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Book Review. The Assize of Novel Disseisin by Donald W. Sutherland

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politics in the 1860s involved more than war-related matters, Hyman permits a more realistic appreciation of the accomplishments of the Republican party. In all, *A More Perfect Union* is a notable achievement which, as we move beyond the second Reconstruction a century later, may have the effect of illuminating public policy questions of our own time.

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With the possible exception of trespass, the assize of novel disseisin, which did so much to popularize royal justice in medieval England, has attracted the attention of more investigators than any other common-law action. It has not, however, previously been graced with anything like a comprehensive and credible history. Born in the obscurity of the twelfth century where records are wanting or vague, it was not obsolete until the middle of the seventeenth; and even thereafter it would occasionally make an appearance in one of those "kingless commonwealths on the other shore of the Atlantic Ocean" of which Maitland wrote. Professor Sutherland's illuminating book, therefore, fills an obvious need, but it does more than that: It sets a standard which future historians of the law will do well to imitate.

Sutherland wrote his book to convince and it is convincing. There is no more controversial subject in the history of the common law than the extent to which, if any, English law owes a debt to the Continental Roman law revival. Most Englishmen have stoutly maintained the insularity of their law, while the occasional Continental historian who has trespassed into the field of English legal history has generally found something there at least vaguely Romanesque. Sutherland takes up the question of the effect of the Roman interdict *unde vi* on the inventors of novel disseisin; the question has been much debated previously, but Sutherland approached it, as no one had previously, in a systematic and workmanlike fashion. By delving into the *Corpus Juris Civilis*, he is able to produce from the *Code* and the *Digest* similarities between *unde vi* and the assize which, as he says, "strain the bounds of coincidence" (pp. 22-23). Of course, similar problems give rise to similar solutions, and Sutherland will not have convinced every reader; but he has at the very least shifted the burden of coming forward to the other side. Furthermore, his contribution goes beyond the
immediate question of the correctness of his conclusion: he has avoided the vague and repetitious assertions of previous historians and has concentrated on hard, analytical methods to produce his thesis.

One key purpose of *unde vi*, however, could not have been in the minds of the assize's inventors: *unde vi* consciously shifted the burden of proof by making the defendant the plaintiff in a later action, thus putting him at a procedural disadvantage at trial. In England, with its jury of the countryside, there was no notion which corresponded exactly to the idea of burden of proof.

Did the assize protect seisin or right? The question is peculiarly elusive. Sutherland answers it by saying that the assize would deal with only those matters of right which could be determined with "dispatch and entirely by rational proofs" (p. 40); the remedy was summary and so vouchers to warranty, essoins, and the other cumbersome features of the real actions were excluded. But a defendant's right could, subject to more or less arbitrary needs of speed and expediency, be raised by him, provided only that he had entered within a reasonable time after his right of entry accrued. Bracton's four-day rule, which he never really advanced with much certainty, was not law; instead, a disseised owner had a somewhat indefinite period within which to enter, a period which varied with the circumstances of his case (pp. 97-104). In most instances, defendants seemed to act quickly enough to satisfy the judges; Bracton himself in one instance held a six months' hiatus permissible (p. 99). So the assize was "possessory" in the sense that it excluded matters of right if the right was not triable with dispatch or if the defendant had not acted within a reasonable time. (The latter requirement was never precisely defined; it was as elastic as the equitable defense of laches.) But the assize was not possessory in the sense that it automatically protected the possession of a mere trespasser against an owner asserting his right by self help. And in any case a resort to some appropriate action was often available to a loser in novel disseisin, at least if the facts raised by that more *droiturel* writ were not already found against him in a special verdict of the assize. If they were, he was estopped by these facts and no other action on them was allowed even though such an action might theoretically be "higher in the right" (p. 143-144). This doctrine, established early in the reign of Edward II, does much to explain the popularity of the special verdict in the assize.

To transform novel disseisin into a general device for trying title for an owner out of possession, the exercise of a right of entry by such a person was equated with actual control. By the reign of Edward I such an owner could simply enter, "declare his intention and make a show of control, and charge any adverse occupier to
withdraw" (p. 143). Anyone who did not retreat in the face of this ritual was adjudged a disseisor. The exercise of a right of entry was allowed almost any owner out of possession, unless some arcane happening had occurred to toll the entry: if the disseisor had made a feoffment over or had died, the action would not lie. The first tolling event, the feoffment over, was abandoned in Richard II's reign (p. 162); the second, death of the disseisor, remained in effect until the end but its force was much attenuated by the doctrine of continual claim. In the meantime, sometime in the reign of Edward III, it had become firmly established that lapse of time could never bar an entry. Thus self help had triumphed completely. But in Richard II's reign, perhaps in response to that victory, a statute was enacted forbidding the use of force or large numbers of supporters in effecting entries. The entry still belonged to the owner; but the force required to overcome a recalcitrant occupier was the state's to wield. The state had not created the right, it simply came along to effect the remedy. So the fourteenth century gave birth to "the whiggish doctrine that property belonged to private persons apart from government while to the state pertained a monopoly of the use of force" (p. 168).

Although by the late thirteenth or early fourteenth century the assize had become the chief mechanism for trying title between competing claimants to land, it had a few competitors, the chief among which was trespass. In the thirteenth century, the judges had sometimes refused to allow matters of freehold to be determined in actions of trespass (p. 172); but by Edward I's reign the action was commonly employed for such purposes. Sometimes this use of trespass is obvious, as when issue is taken on the right to the freehold; sometimes it is implicit, as where the writ alleges the cutting of trees or mowing of grass. But many other cases, even assault and battery cases, may have behind them an essentially proprietary claim—defense of property is never specially pleaded in the middle ages. An interesting and recurring question is raised by this use of trespass, for by allowing it the distinction between "real" and "personal" actions was somewhat blurred. It is true that the recovery of the land itself was not allowed a freeholder suing in trespass (or even a termor until very late), and the action was thus not "real" in the sense that the res was recoverable. Still, to allow the determination of freehold rights in trespass was a theoretical departure of sorts, and it may partially explain the rarity of special verdicts in trespass cases: if juries were allowed to give them, then their collateral estoppel effect would allow trespass to do the work of all the real actions. Perhaps the judges were not willing to allow such a theoretical encroachment; thus the development of the law of torts was retarded, remaining amateur-
ish and somewhat unsophisticated for many centuries. This seems one plausible explanation for the general refusal to allow trespass juries the advantage given assize juries by Westminster II, c. 30—the right "to show the truth of the deed, and ask the help of the justices."

Had Sutherland's book merely fulfilled the promise of its title it would have been remarkable enough; but it does that and much more. One example will have to suffice here. In the course of unearthing the development of rights of entry, Sutherland turned to an examination of the thirteenth-century rolls of the central courts; and there he discovered that beginning in the middle of the thirteenth century lords reasserted a right to prohibit the alienations of their tenants. Allowing feudal lords to frustrate the gifts of their tenants by giving them rights of entry is surprising because it is in the teeth of the general development toward free alienability which had prevailed as a clear trend from the late twelfth century onward. This, then, is a remarkable discovery and will no doubt provide essential information for future economic historians. Sutherland's book is full of new discoveries like this, which serves partly to explain why it is the best book on the history of real property to appear in recent years.

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