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The judicial interpretation of legislation in later thirteenth- and early fourteenth-century England

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The early history, or perhaps it is better called the pre-history, of the judicial interpretation of legislation goes back to at least the first quarter of the thirteenth century. We can certainly see the courts at work, for example, in the years after 1215 in giving a specific meaning to that clause of Magna Carta which had required that 'common pleas' should not 'follow our court' but be held 'in some certain place' (*in aliquo certo loco*).[1] A specific meaning needed to be attached by the courts to the term 'common plea',[2] and perhaps also to the requirement that such pleas be held 'in some certain place'.[3] It must also have been the courts and their justices who were responsible for, or at the very least responsible for accepting, the somewhat counter-intuitive interpretation of the 1237 legislation advancing limitation dates which is found within a few years of its enactment.[4] The legislation required (among other things) that counts of claimants in the writ of right should in future not go back as far as 1135 and the day of the death of Henry I (*tempore regis Henrici senis anni et diei*) but no further than the reign of Henry II (*a tempore regis Henrici avi domini regis*). This was to come into force as from Whitsun in the twenty-first regnal year (7 June 1237), but the legislation also said that writs which had been previously acquired might proceed (*et brevia prius*

Unless otherwise stated, manuscript sources are in the National Archives, London.

[1] c. 17 in the 1215 original charter; c. 12 in the 1216 and 1217 reissues; c. 11 in the 1225 reissue.

[2] For argument on this point see *Curia Regis Rolls*, xv, no. 1958 (1236) and for a ruling on this point see *CRR*, xvi, no. 8.

[3] For a 1260 enrolment of the king's claim to a manor against the prior of Wenlock in King's Bench where the prior sought the view and requested that he be given 'a certain day in a certain place' (*quod dies certus ei prefigatur et in loco certo*) and because the writ touched the right he was adjourned to a return day the following term before the justices at Westminster see KB 26/167, m. 4.

[4] *Close Rolls, 1234–7*, pp. 520–21. It soon became wrongly associated with the Provisions of Merton of 1236 and is c. 8 of the classic text of those Provisions.

inpetrata procedant). The obvious meaning would seem to be that the old limitation date would continue to be applicable in the case of writs then pending or which were acquired between the enactment of the legislation (probably in early February) and Whitsun 1237. The courts, however, allowed the continuation of any claim which had been brought prior to 1237 which had gone without a day for whatever reason (and however far in the past that had been)[5] provided there had been no permanent determination of that claim. As early as 1241 a claimant who had made a count based on the seisin of an ancestor in 1135 answered the tenant's objections that such a claim was statute-barred by showing that there had been litigation prior to the legislation which had gone without a day on the death of the claimant's father, and then further litigation brought by the claimant which had gone without a day on the death of the tenant's late husband. This was evidently accepted by the court as justifying the pre-1154 claim.[6] There was then a continuing trickle of such cases down to 1279, and this continued for a while even after the further change in limitation dates made in 1275 by the Statute of Westminster I, c. 39.[7]

It is, however, only in the reign of Edward I that it begins to be possible to see the engagement of individual named justices or groups of justices with the interpretation of statutes and their language in the context of the hearing of individual cases. This is mainly, but not exclusively, through surviving reports of those cases. The earliest known evidence, however, comes from the plea roll enrolment of a Common Bench case of Michaelmas term 1277.[8] In an action of attaint brought to reverse the verdict of a jury given in an action of cosinage in the 1274 Middlesex eyre, the defendants sought judgment of the writ on the grounds that the original verdict had been given before the enactment of c. 38 of the Statute of Westminster I in 1275, which had provided the statutory authority for the extension of

[5] A litigant in the 1268 Yorkshire eyre cited litigation brought by his ancestor Ivo against the tenant's grandfather supposedly before Rannulph de Glanville in 8 Richard I (1196–7) (though he had died in 1190). His opponent cited the 1237 legislation as though made at Runnymede before King John. For the case see *Henry of Carleton* v. *William de Arderne*: JUST 1/1050, m. 66d.

[6] *Matthew de Columbers* v. *Mabel de la Ryvere*: JUST 1/37, m. 7 (1241 Berks hire eyre).

[7] *Thomas of Rodborough* v. *Alan de Chartres and his wife Joan*: CP 40/30, m. 71d. For a discussion of these cases see Paul Brand, '"Time out of Mind": The Knowledge and Use of the Eleventh- and Twelfth-Century Past in Thirteenth-Century Litigation', in *Anglo-Norman Studies XVI* (Woodbridge, 1994), pp. 37–54, at p. 40; Paul Brand, 'Lawyers' Time in England in the Later Middle Ages', in Chris Humphrey and W M Ormrod, eds., *Time in the Medieval World* (York and Woodbridge, 2001), pp. 73–104, at pp. 99–100.

[8] CP 40/21, m. 63d. For the original case see JUST 1/538, m. 3d (Anglo-American Legal Tradition database image 3221).

the action of attaint beyond the limited range of actions (assizes only) in which it had hitherto been available.[9] The statute had not itself made clear whether or not it was to be retroactive, that is, whether it was to apply to jury verdicts which had been given prior to 1275. The point was settled in what may seem a curious way. A junior justice of the court (John de Lovetot) who had only been appointed to the court in Easter term 1275 (the very term during which the legislation was enacted) 'recorded' (*recordatur*) that it was 'not the king's intention' (*non est intencionis domini regis*) nor had it been at the time of the making of the statute (*nec exististit tempore confectionis statuti predicti*) that attaint juries be taken on inquisitions held before the statute was made. On that basis the action was dismissed. Whether this can properly be called 'judicial' interpretation of the statute is less clear, since what Lovetot seems to be doing here is acting as a channel for the king's authoritative ruling on the point at issue, based on his intention at the time of the making of the statute.

Clearer evidence of what may properly be called 'judicial' interpretation comes from law reports of the mid-1280s. In one of the earliest in the 1285 Northamptonshire eyre, Master Thomas of Siddington, the rector of the church of Passenham and, prior to this eyre, himself one of the justices of the same 'northern' eyre circuit, brought an action of annual rent to assert his title to certain annual rents owed to his church by the abbot of Grestein and two defendants and to claim fourteen years of arrears of those same rents. His only title to these rents was the seisin of his church and of his predecessors prior to his succession to the living. The defendants argued that he was not entitled to claim any arrears. In an intervention that did not itself quite amount to a judgment, Saham J. invoked c. 28 of the Statute of Marlborough of 1267 in favour of his erstwhile colleague's action and his right to claim arrears, saying that it was 'quite clear . . . that if a rector dies seised as of the right of his church, his successor (if someone withholds it from him) has his recovery and in this case damages will be adjudged to him . . . '[10] He seems to be referring to that part of c. 28 which referred to the possibility of an action and the recovery of damages but only in the case of intrusion into lands (not the withdrawal of annuities) during the time of a vacancy, and only for lands and tenements of which abbots and other ecclesiastical prelates, but not

[9] *Statutes of the Realm*, I, p. 38.

[10] *Earliest English Law Reports, vol. III, Eyre Reports to 1285*, 122 Selden Society, 2005, p. 233 (85 Northants. 9). For this chapter see Paul Brand, *Kings, Barons and Justices: The Making and Enforcement of Legislation in Thirteenth-Century England* (Cambridge, 2003), pp. 481–3.

parish priests, had died seised as of the right of their church.[11] It is difficult to know whether Saham's memory was at fault here or whether he was deliberately trying to extend a narrowly drawn clause to cover what he saw as an analogous situation. Saham also appears, but mainly through the possibly distorting effects of a complaint made against him for misconduct in 1290, as both significantly extending and significantly restricting c. 4 of the 1278 Statute of Gloucester, which had created the action of *cessavit per biennium*, through rulings made in a very briefly reported case in the 1286 Cambridgeshire eyre.[12] The statute clearly envisaged that the remedy be available only where the initial grant had created a tenurial relationship between grantor and grantee under which rent or the provision of estovers to a quarter of the value of the land was owed; where this rent or payment in kind had ceased; and where the land granted had lain fresh (so that no distress could be found on it) for two or three years.[13] Saham J. allowed the action to proceed even though the grant had been made merely in the hope (*sub spe*) that someone else (and not the grantee) would provide the grantor with food and clothing to a quarter of the annual value of the land in return for his service in a manor as a serjeant or hayward (and thus not as a rent or render payable by the defendant) and, according to the complainant, overruled an exception that the agreement had not created a rent and that the grantor had forfeited the food and clothing by his own wrongdoing when he had left the service of the lord concerned because he was in arrears on his account. Saham also refused to allow the exception that the land had not lain fresh but had been open to distraint. The legislation also specifically provided that if the defendant came before judgment, ready to pay arrears and damages and to find a suitable surety for the future observance of the terms contained in the writing, he was to keep his land. The report, however, indicates that, even though the defendant offered to fulfil the covenant and offered surety after a jury verdict passed against him it was Saham's view that this was too late, and this is also what the defendant later alleged had happened. The plea roll, however, tells a different, and possibly misleading, story: that the defendant had nothing in court when the verdict passed against him from which to satisfy the arrears (though it adds that he ought in any case to

[11] But note that the plea roll enrolment specifically refers to the other part of this chapter, supporting a right of action for withdrawals made in the time of a predecessor when the predecessor had not obtained justice.

[12] For the complaint see JUST 1/541B, m. 9d and the report and the enrolment of the original case *EELR*, vol. IV, pp. 381–2.

[13] *Statutes of the Realm*, I, p. 48.

have done this before the jury gave its verdict) and that he had no surety to offer for future performance.

Another case from the following year shows judicial interpretation of legislation at the hands of Thomas Weyland, then the chief justice of the Common Bench but soon after this himself a fugitive from justice. It is also concerned with the interpretation of the same legislation (c. 4 of the Statute of Gloucester).[14] In this 1287 case the grantor of land at fee farm sought to recover that land from the alienee of the person to whom he had granted it on the grounds that the original grantee had ceased performing the services owed for two years. The grantee had alienated the land to the tenant before the first term at which the rent was payable. The grantor thought that this meant that he was not able to distrain on the grantee because he had never been seised of this rent. Weyland, C.J. took a narrow view of the statute. The statute was intended to supply a remedy where the common law failed. Where the common law was adequate there was no need of the statutory remedy.[15] There was a common law remedy where a tenant failed to pay his rent. It was to distrain in his fee. The statute (as it itself made clear) only supplied a remedy if he was unable to find distresses in his fee, not where he thought he was unable to distrain for other reasons. Since that was not the case here the statutory remedy was not available. But there seems to have been no final judgment in the case.

Law reports become much more plentiful after 1290 and more particularly as from the summer of 1291, and this provides much more evidence about the nitty-gritty of the business of interpreting statutes. One thing they certainly show is that (from at least 1295 onwards) arguments about the meaning of statutory enactments and rulings on their meaning were being made with reference to the specific words of the statutory enactment. This is easier to see where the published text of the statute was in Latin and it is this Latin text which was being quoted in the French language report. In three reports of a 1295 formedon in the descender case (*William son of William de Ferrers* v. *Henry le Porter and his wife Ismania*) the tenant objected to a claim being made by the son and heir of the original donee in tail in which he was seeking to recover land alienated by

[14] *Early English Law Reports, vol. II, Common Bench Reports 1285–1289 and Undated Reports 1279*–1289, 112 Selden Society, 1996, pp. 265–8 (1287.1).

[15] In one report Weyland said this was the same principle as that which applied to writs of entry: no one could bring a writ of entry in the *post* (as created by the 1263 reissue of the Provisions of Westminster and by c. 29 of the Statute of Marlborough) where the writ of entry within the degrees was available. This is the principle affirmed by c. 40 of the Statute of Westminster I (1275): *Statutes of the Realm*, I, pp. 36–7.

the initial donee (his father). This was on the grounds that the claimant had counted that his father (the initial donee) had been seised under the grant in the reign of Henry III but that the statute of *de Donis* (chapter 1 of the Statute of Westminster II of 1285) applied only to entails created after 1285 since it specified that *ad dona prius facta non extenditur* ('it did not extend to gifts made before').[16] All three reports show that this was rejected by the court. One notes simply that 'it was supposed by the court that these words related solely to the (time of the) alienation and not to the time of the gift' (*E la fuist suppose de court qe cele parole ad solement regard al alienacion et nyent al tens del doun*). In the other two it was more specifically chief justice Mettingham who rejected it and who said (in the fuller of the two versions), 'If you understand that what the statute says of *ad dona prius facta etc.* relates to the initial gift you understand wrongly, but it relates to the alienation made by the one to whom the gift was made' (*Si vous entendez qe ceo qe le statut dyt . . . deyt aver relacion au primer doun vous entendez malement mes yl ad relacion a la alienacion fete par celi a qi le doun se tailla*). None of the reports shows the justices making what might seem to the modern reader the obvious point that the piece of the statute being quoted has been torn from its original context in which it is preceded by 'And it is to be known that this statute is to apply in respect of the alienation of the tenement contrary to the form of the gift made in future and . . . ' (*Et sciendum quod hoc statutum quoad alienacionem tenementi contra formam doni imposterum faciendum locum habet . . .*).

In 1298 there is the first reference in a report to a justice, or perhaps the justices, looking at a statute, doing more than just relying on their memory and examining the written text of the legislation being cited. It is a report of a replevin case (*Nicholas of Stillingfleet* v. *Parnel de Coygners*) in which the defendant had refused to gage the release of animals in the court because she had previously been adjudged the irreplevisable return of the animals taken in distraint by the Yorkshire county court after the plaintiff had twice been non-suited in replevin pleas brought there.[17] The defendant's serjeant (Sutton) said that the statute which had authorised irreplevisable returns only applied before the justices (*Le statut*

[16] BL MS. Additional 37657, f. 107r; LI MS. Miscellaneous 738, f. 106v; LI MS. Misc. 87, f. 18r. The plea roll enrolment is CP 40/110, m. 118d. For the legislation see *Statutes of the Realm*, I, pp. 71–2.

[17] There are two collatable reports of this case in BL MS. Additional 5925, f. 42r and LI MS. Hale 188, f. 38r. The enrolment is on CP 40/122, m. 114d.

ne sert fors qe devant justices). This is a reference to that part of the Statute of Westminster II, c. 2 which had first introduced the possibility of a judgment for return irreplevisable and whose words do indeed only talk in terms of litigation already removed into the king's court.[18] A little later it is Howard, J. who (in one version) is reported as looking at the statute (*How' regarda le statut*) and who in the other version spoke of himself and perhaps others as having done so (*Haward. Nous avoms regard le statut* . . .). He duly confirmed that it only applied before justices and not in the county court. He held that this meant that the county court could not adjudge an irreplevisable return and that the defendant must therefore gage the return of the distress.

The justices did not rely on the wording of legislation alone. In a suit brought by the judicial writ of *scire facias* (invented by the Statute of Westminster II, c. 45)[19] in King's Bench in Trinity term 1307 to enforce the terms of an earlier fine (of 1278) the question arose whether a life tenant who had sought the aid of a reversioner who was actually present in court was entitled to additional delay to have the reversioner summoned specifically for that purpose. The chief justice of the court, Roger Brabazon, was uncertain how to interpret the rather vague words of the chapter about the elimination of procedural delays. He decided that what was needed was consultation 'with our companions who were present at the making of the statute' (*voloms de ceste chose conseiller ove nos compaignons qe furent al statut fere*). The case was certainly adjourned to a later day, probably the same term, and it must be supposed that what he was intending to do was to consult with the justices not only of his own court but also of other courts who had been present at the making of the Statute of Westminster II.[20] What exactly that meant is less clear: was it those who were present when it was initially drafted? Or those who were present when it was discussed and approved in parliament?

Justices were certainly present in parliament when legislation was being discussed and probably took part in the discussion. The best evidence of this comes from a report of an assize of mort d'ancestor brought by Adam of Redlingfield against the chancellor and university of Cambridge for four messuages and twenty-six acres of arable in Cambridge heard

[18] *Statutes of the Realm*, I, p. 73. [19] *Statutes of the Realm*, I, pp. 93–4.
[20] *YB 33–35 Edward I*, pp. 577–87, at p. 585. The passage does not appear in other reports of the same case. For the record see KB 27/188, m. 45 [partially printed in *Select Cases of the Court of King's Bench vol. 3*, 58 Selden Society, 1939, pp. 165–8].

in the summer session of the 1299 Cambridgeshire eyre.[21] Counsel for the chancellor and university pleaded in bar a fine made in the previous Cambridgeshire eyre of 1286. Counsel for the claimant attempted to make the old and long accepted objection that the fine was not a bar since the claimant's brother and not the university had been seised before the making of the fine and when it was made. But c. 1 of the Statute of Fines published early in April 1299 had stated that this kind of objection was no longer to be accepted by the court and allowed to deprive fines of their effect.[22] The chief justice of the eyre, John of Berwick, had evidently been present at the Lent parliament of 1299 where this legislation had been enacted and he duly reported something of what had been said there less than six months earlier about the basic principle being enacted: 'when this statute was being made this argument was made: how can someone acknowledge tenements of which he was never seised to be the right of another who was never seised nor any of his ancestors? To this it was answered that since he acknowledged [it] one ought to understand that it was so, since who could better make estate than one who has the right in it.'[23]

The justices also interpreted legislation in the light of what they said, or what they deduced from the statute itself, to be its primary purpose. In a dower case brought in Trinity term 1291 Margery, widow of Philip of Bredicot, sued John of Bredicot in the Common Bench for one third of a messuage and a virgate in Bredicot near Worcester which she claimed as her dower. John said she was not entitled to dower as the land had been given to Philip and the heirs of his body and he had died without such an heir and had thus not been so seised that he was able to endow her.[24] The widow's counsel (Harle) cited Magna Carta as providing that the widow was to be entitled to have one-third of the land of which her husband had been seised. The heir's counsel (Warwick) argued that if she gained her dower that would be contrary to the will of the donor and

[21] BL MS. Additional 35116, ff. 56v–57v. The enrolment is JUST 1/96, m. 26d. It is not to be found in the other report of the same case in BL MS. Add. 5925, ff. 31r–v.

[22] *Statutes of the Realm*, I, pp. 128–9.

[23] *Berewyk. Quant ceo statut fust a fere home fist ceste reson: coment purra home conustre les tenemenz dount il ne fust unke seisi estre le droit autri qe unqes ne fust seisi ne nul de ses auncestres? A ceo fut respondu qe depus qil conust e home deit entendre qe auzi soit qar qi purra melz faire estate fors qe celui qe droit en ad.*

[24] CP 40/90, m. 87. There are reports of the case in multiple manuscripts: BL MSS. Harley 25, ff. 86v and 90v, Harley 572, ff. 142r–v, Harley 2183, f. 64r, Harley 2183, f. 65v, Stowe 386, f. 174v, Additional 31826, f. 148r, Additional 37657, f. 7r, Egerton 2811, ff. 107v–108r and Bodleian Library MS. Holkham Misc. 30, f. 60r.

'statute [meaning Westminster II, c. 1] provided that his wishes should be expressly kept in all matters' (*e lestatut veut qe sa volunte seyt en touz poynz expressment garde*). Harle argued that any issue of the husband would have inherited and since the wife was only a 'vessel to conceive' no failure could be ascribed to her. Warwick argued that since the husband had never had more than 'free tenement' (a life estate) she was not entitled to dower from this free tenement. Mettingham, C.J. then gave judgment. He said that the statute (he means Westminster II, c. 1) was made to prevent disinheritance since before the statute those who to whom land was given in tail could alienate the tenements so given once they had issue and exclude their issue and also exclude the donor's issue from the reversion. Its purpose was not to deprive widows of their dower contrary to Magna Carta (*pur eschuir celis durescis fut purveu statut e noun pas a toler damis lur douer encontir la Grant Chartre*). Since it was agreed by both sides that if there had been a child it would have inherited the tenement 'as of fee and right' even if the 'fee' concerned was only a 'fee tail' (*le fiz ust este enherite des tenement cum de fee e de dreit, coment qe le fee seit taille*) and any failure was not on her part, he gave the judgment of the court that she should recover her dower.

A related form of argument was that which identified those for whose benefit legislation had been made and said that they were the only group or groups who could benefit from it. Such an argument was, for example, made in the report of an assize of novel disseisin at an assize session of 1307 where the defendant had been distrained for arrears of a rent and had then replevied the distress. His counsel argued that the plaintiff's mother had given him the tenements concerned after the Statute of *Quia Emptores* of 1290 and thus the plaintiff (her heir) could not claim the rent as rent service. Higham, J. said that even if a tenant had been enfeoffed after the statute to hold of his feoffor and he had become seised of his services the tenant could not take advantage of the statute 'because if you wish to be aided by the statute it is necessary that you be the one for whose advantage the statute was made. But you know well that *Quia Emptores* was made wholly for the advantage of chief lords so that they do not lose wardships, reliefs and escheats. You are a tenant whom the statute does not aid'. And if one looks at the preamble to the statute that is exactly what this would lead you to conclude.[25] In modern terms, however, this was an *obiter dictum* since the matter then went to a jury verdict. This found that

[25] *Statutes of the Realm*, I, p. 106.

the enfeoffment had in fact preceded the statute of 1290 and the plaintiff's mother and the plaintiff had been seised until he was disseised.[26]

A second reported case (*Roger of Mersea and his wife Isabel* v. *Joan the wife of Robert Cope*) from Hilary 1305 unites both these approaches. A woman and her second husband brought a writ of entry *cui in vita* to recover fifteen acres of land granted to the woman and her first husband and allegedly alienated by that first husband.[27] In bar the tenant pleaded a final concord levied both by the wife and by the first husband with the alleged alienee in the 1287 Suffolk eyre, acknowledging the alienee's right to the land. In only one of the three reports is there an argument about the effects of that final concord. Counsel for the claimants said that the tenements had in fact originally been granted in fee tail to the wife and her first husband and the heirs of their bodies and that the alienation by fine had been made after the enactment of c. 1 of the Statute of Westminster II which had said that any final concord levied on land held in fee tail was in future to be held null and void (more pithily in the French *estatut veut qe la ou tenemenz sunt donez en fee tayle etc. e pus aliene en fee e sur ceo fyn se leve la fyn sait tenu pur nule*). That is indeed pretty much what the final sentence of c. 1 says but a little bit more fully.[28] It was counsel for the other side who rebutted this: 'the statute had been made to assist those to whom the reversion belongs and the heirs of the donee, and so he was not in the case of the statute' (*B dit qe statute est fet en ayde a ceus a qy la reversion apent e a les heyrs le done, dount il ne fut mye en cas de statut*). According to the same report it was Hengham, C.J. who in essence adopted this reasoning: 'You are not aided by statute and so the court adjudges that you take nothing by your writ' (*Vus nestes mye ayde par estatut par quai agard la cort qe vus ne prengnez ren par vostre bref*).

One other revealing, but anonymous, judgment of this period is known only from the plea roll enrolment. For once it is a criminal plea. It comes from the 1284 Leicestershire eyre and it takes us back to the interpretation of Magna Carta. Magna Carta (in clause 54 of the 1215 version and c. 34 of the 1225 version) had laid down as a rule that no one was to be arrested or imprisoned on the appeal (private criminal prosecution) of a woman for any death other than that of her husband. Annabel, the

[26] The case is reported in BL MSS. Harley 572, f. 160v and Hargrave 375, f. 185r.

[27] CP 40/154, m. 52d. The case is reported in BL MSS. Hargrave 375, f. 29v, Additional 31826, f. 375v and Stowe 386, f. 199r.

[28] 'Et si finis super hujusmodi tenementa imposterum levetur ipso jure sit nullus nec habeant heredes aut illi ad quos spectat reversio, licet plene sint etatis, in Anglia et extra prisonam, necesse apponere clamium suum'.