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## Property before Property: Romanizing the English Law of Land

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# Property Before Property: Romanizing the English Law of Land

THOMAS J. MCSWEENEY†

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## INTRODUCTION

The language of property underlies the way we talk about the relationship between people and things in both common law and civil law systems. Property, along with contract and tort, is one of the fundamental divisions of private law in the common law. Because property is so

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fundamental to the way lawyers think, we tend to treat property as if it is a natural way to view the world. But the language of property has a history. The earliest common law writs, all of which had something to do with rights in land, make no mention of property.<sup>1</sup> The earliest surviving sources that associate the early common law writs of right, novel disseisin, mort d'ancestor, utrum, and darrein presentment with a law of property date to the late 1180s, twenty to forty years after the writs were first developed.<sup>2</sup> It is, therefore, anachronistic to refer to these writs as the English law of property, but it is also difficult to avoid.

The language of property actually comes out of a very specific cultural and historical context. It comes from Roman law and canon law, which together formed the medieval *ius commune*, or common law of Christendom.<sup>3</sup> It was the *ius commune*, the ancestor of the civil law systems that dominate continental Europe today, that gave English its words *possession* and *property*.

In this Article, I will look at two legal treatises that span the period between 1187 and 1258. Both were likely written by people who worked in the English royal courts. The first of these two treatises, *De Legibus et Consuetudinibus Regni Angliae*, known today as *Glanvill*, was written about a generation after Henry II's famous reforms and shows some signs of Roman law influence.<sup>4</sup> The focus of the article will be on the later of the two treatises. In the 1220s, a justice or clerk in the royal courts began work on a new treatise and seems to have given it a title almost identical to that of *Glanvill*. It is called *De Legibus et Consuetudinibus Angliae* (*On the Laws and Customs of England*) or *De Legibus et Consuetudinibus Anglicanis* (*On*

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1. David Seipp has observed that English lawyers got along until about 1490 without any single concept that had the scope of the word "property." David J. Seipp, *The Concept of Property in the Early Common Law*, 12 LAW & HIST. REV. 29, 31 (1994).

2. See discussion *infra* Parts I.B, II.

3. R.H. HELMHOLZ, *THE SPIRIT OF CLASSICAL CANON LAW* 20 (1996) ("The *ius commune* . . . stood above the rules of the different courts, the particular lands, and even the individual legislative bodies among which European jurisdictions were divided.")

4. G.D.G. Hall, *Introduction to THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL*, at xxxvi-xl (G.D.G. Hall ed. & trans., Oxford: Clarendon Press 2002) (1965) [hereinafter GLANVILL].

*English Laws and Customs*) in most manuscripts.<sup>5</sup> Much of the treatise had been written by 1236, although it went through at least one, and probably two, rounds of writing and revision between 1236 and 1258.<sup>6</sup> The hands of several royal justices touched this treatise. Martin of Pattishall, who was the senior justice of the common bench (later the Court of Common Pleas) from 1217 to 1229, may have been involved in the earliest stages.<sup>7</sup> William of Raleigh, Pattishall's clerk and the future chief justice of the court *coram rege* (the court "before the king," which would later be known as the King's Bench), almost certainly wrote the bulk of the treatise.<sup>8</sup> Henry of Bratton, Raleigh's clerk, added some material in the 1250s, and may have been working on it much earlier.<sup>9</sup> It is from a misspelling of Bratton's name that we get the treatise's common title, *Bracton*.<sup>10</sup>

I will show that it was the authors of *Bracton* who first tried to work the practices of the royal courts and the norms of the Anglo-Norman landed elite into a law of property on

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5. BRACON ON THE LAWS AND CUSTOMS OF ENGLAND (Samuel E. Thorne trans. 1968–1977) [hereinafter BRACON].

6. See Thomas Joseph McSweeney, *Priests of Justice: Creating Law out of Administration in Thirteenth-Century England* 114-17 (2011) (unpublished Ph.D. dissertation, Cornell University) (on file with Cornell University Library).

7. RALPH V. TURNER, *THE ENGLISH JUDICIARY IN THE AGE OF GLANVILL AND BRACON*, c. 1176–1239, at 194 (1985).

8. Paul Brand, *The Age of Bracton*, in *THE HISTORY OF ENGLISH LAW: CENTENARY ESSAYS ON "POLLOCK AND MAITLAND"* 78 (John Hudson ed., 1996) [hereinafter Brand, *The Age of Bracton*]; Samuel E. Thorne, *Translator's Introduction*, in 3 BRACON ON THE LAWS AND CUSTOMS OF ENGLAND xxxvi (1977). For a contrary view, that the treatise was written in the 1250s and Henry de Bratton was the primary author, see J.L. Barton, *The Mystery of Bracton*, 14 J. LEGAL HIST. 1, 8-9 (1993); J.L. Barton, *The Authorship of Bracton: Again*, 30 J. OF LEGAL HIST. 117, 117-19, 150-51 (2009). For Brand's response to Barton, see Paul Brand, *The Date and Authorship of Bracton: A Response*, 31 J. LEGAL HIST. 217, 217 (2010).

9. 3 Thorne, *supra* note 8, at xliii.

10. Bratton came from the village of Bratton Fleming in Devonshire. Several of the early manuscripts of the treatise name the author as Henry de Bratton, which probably became Henry de Bracton by way of a scribal error. In Gothic script, c's and t's look very similar, and it would be easy to mistake one for the other. Paul Brand, *Bratton, Henry of (d. 1268)*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, <http://www.oxforddnb.com.gate.lib.buffalo.edu/view/article/3163> (last visited June 16, 2012).

the Roman model.<sup>11</sup> The authors attempted to create a legal system using Roman law as their framework. They were heavily invested in showing that the practices of the English royal courts, practices which they themselves administered as royal justices, could be understood through the lens of Roman law. They wanted to prove that the work that they performed in the royal courts was part of an international system of *ius commune*. This made them, in a sense, the common law's first comparativists.

In trying to reconcile English practice with Roman law, however, the authors of *Bracton* discovered that it was difficult to make the Roman language of property fit with what they knew about the relationship between people and land. The *Bracton* authors twist Roman law to fit with their own perceptions of landholding. We have texts that provide us with more conventional readings of Roman law from the thirteenth century, among them Azo of Bologna's *Summae* on the *Institutes* and the *Codex*, which the authors of *Bracton* relied upon heavily, and a series of Roman law lectures that were written in England around the year 1200.<sup>12</sup> Treating these texts as a baseline for contemporary understandings of Roman law and then turning to the ways the authors of *Bracton* twist those understandings, we can get a sense of how the royal justices' conceptions of the relationship between people and land differed from those of the jurists in the universities.

In Part I of this article, I will describe the three languages that provided the vocabulary for the authors of treatises: the Anglo-French vernacular of landholding, the writs of the royal courts, and Roman law. In Part II, I will look at the ways the *Glanvill* author began to mix all three

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11. Bracton's relationship to Roman law has long been noted by historians. Henry Sumner Maine thought that Bracton had "put off on his countrymen as a compendium of pure English law a treatise of which the entire form and a third of the contents were directly borrowed from the Corpus Juris . . ." HENRY SUMNER MAINE, ANCIENT LAW 82 (16th ed. 1897). Although Maine's assertion that one-third of the treatise is borrowed from the Roman *Corpus Iuris Civilis* is certainly an exaggeration, the authors of Bracton did take their organization from Roman law and borrowed extensively from both ancient and contemporary Roman law texts. See discussion *infra*, Part III.

12. AZO, SUMMA AZONIS SIVE LOCUPLES IURIS CIVILIS THESAURUS (1581); THE TEACHING OF ROMAN LAW IN ENGLAND AROUND 1200, at xx, liv (Francis De Zulueta & Peter Stein eds., 1990).

languages together. In Part III, I will discuss the *Bracton* treatise. I will look in particular at three different, contradictory schemes for reconciling the Roman law of property to the practices of the English courts that appear at different points in the treatise. The authors showed their deep commitment to placing English practice within the ambit of Roman law by the extreme measures they took to reconcile the systems even when it must have become clear to them that reconciliation was impossible. In Part IV, I will discuss why their attempts at reconciliation did not work. The authors were committed to the notions that all titles were relative and that one's right to the land strengthened gradually over time. These notions were common to the Francophone Anglo-Norman landed elite of their time, but fit poorly with Roman law. The *Bracton* authors were thus required to perform some complicated verbal gymnastics to show that English practice could be described using the language of Roman law. In the conclusion, I will discuss what this historical example can teach us about using property as a category in comparative legal scholarship.

### I. THREE LANGUAGES OF LAND

The authors of the treatises we will examine were essentially speaking three different, but related, languages, each of which had its own vocabulary and grammar to describe the relationship between people and land.<sup>13</sup> When the last of these treatises was written, the idea of dividing land into "estates" as we do in the modern common law was still several decades in the future. In fact, the English would not regularly use the moniker *common law* to refer to the practices of the English courts for several decades.<sup>14</sup>

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13. I do not use the term *law* to describe these three systems, because it tends to be misleading. Anglo-French elites in England were not accustomed to speak about their landholding in terms of *law*. In fact, the word *lei* (cognate with the modern French *loi*), was more often used in epics and romances to mean "religion." LA CHANSON DE ROLAND 30, 32, 58, 66 (Ian Short ed. & trans., 2d ed. 1990). The writ system was only described as a legal system after Roman law influence had entered into the equation. See discussion *infra* Part II.

14. There are a handful of examples from the twelfth and thirteenth centuries of the phrase *ius commune* or *commune regni ius* being used to refer to the practices of the royal courts. JOHN HUDSON, THE FORMATION OF THE ENGLISH COMMON LAW 18-19 (1996). The phrase *commune ley* or *lex communis*, from which we get our modern *common law*, first began to appear in the last decades

These three languages of landholding will therefore seem rather foreign.

A. *The French Vernacular*

Although we do not know the identities of all of the authors who worked on *Glanvill* and *Bracton*, it is a safe bet that they had all grown up as members of the Anglo-Norman landed elite or, at the very least, had become acclimated to the landed elite's patterns of thought as they gained the patronage necessary to go to school and to work in the royal and ducal courts.<sup>15</sup> The Francophone elites of England in the twelfth and thirteenth centuries shared a vernacular language of landholding with their counterparts in Northern France. English elites, who were learning to speak English in larger numbers by 1200, but who still spoke French among themselves, moved in a Northern French cultural world.<sup>16</sup> They read epics and romances in Old French that told of wars and adventures in the Frankish Empire of Charlemagne and the Britain of King Arthur.<sup>17</sup> These literary works often involved legal disputes and would have both reflected and informed the legal norms of this class.<sup>18</sup> They are thus one site where we can see the vernacular language of landholding at work.

The twelfth-century epic *Raoul de Cambrai*, which we know was read at the court of Henry II, describes a dispute over an inheritance in tenth-century France.<sup>19</sup> The epic

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of the thirteenth century. See Paul Brand, *Law and Custom in the English Thirteenth Century Common Law*, in *CUSTOM: THE DEVELOPMENT AND USE OF A LEGAL CONCEPT IN THE MIDDLE AGES* 17, 21 (Per Andersen & Mia Münster-Swendsen eds., 2009).

15. See TURNER, *supra* note 7, at 205-06.

16. See Ian Short, *Language and Literature*, in *A COMPANION TO THE ANGLO-NORMAN WORLD* 191, 204 (Christopher Harper-Bill & Elizabeth van Houts eds., 2002).

17. The oldest extant manuscript of the oldest surviving French epic, the *Song of Roland*, is written in the Anglo-Norman dialect of French. See Ian Short, *Introduction*, in *LA CHANSON DE ROLAND* 9 (Ian Short ed., 2d ed. 1990).

18. Paul Hyams, *Henry II and Ganelon*, 4 *SYRACUSE SCHOLAR* 23, 25-26 (1983).

19. Gerald of Wales references a conversation he had with none other than Ranulph de Glanvill, the king's justiciar, head of the royal court system, about the poem. Glanvill was not, unfortunately, the author of the treatise that is

provides us with some of the vocabulary of landholding in the Northern French world, and the principal metaphor for the relationship between people and land was indeed *holding*. The verb *tenir* was used to describe a person's control over land, as the noun *tenement* could be used to describe the land he held.<sup>20</sup> Indeed, the word *tenant* was used far more often than *vassal* in both England and Northern France to describe a person who held land of a lord.<sup>21</sup> Before he held land, the tenant needed to be placed in control of it, and for this a different metaphor was used. The Old French verb *saisir*, etymologically related to a word meaning "to sit," meant "to invest" or "to put in physical control."<sup>22</sup> It began to appear as a noun, *saisine*, the state of having been invested, in the twelfth century.<sup>23</sup> England's French-speaking elites thus spoke of being seated on their land and afterwards of holding it.

The conflict in *Raoul de Cambrai* centers on the fief of Cambrai, which Raoul's father had held during his lifetime. Upon his death, however, the Frankish emperor passes over Raoul, a minor at the time, in favor of a loyal, but landless, supporter.<sup>24</sup> Raoul spends the early part of the poem trying to recover his inheritance. In the arguments of Raoul and his supporters before the emperor, we can see some of the normative arguments that one might make to claim land. The emperor is said to have done wrong to have deprived Raoul of his *heritage* by giving Cambrai to another man in *fieaige* or in *fee*.<sup>25</sup> Raoul speaks as if the *heritage* is normative; a person who inherited his land has a stronger claim to it than someone who acquired it in some other way. The landed elite of northern France and post-Conquest England did indeed make a distinction between inherited land, which they tended not to alienate in order to preserve

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attributed to him. Paul Hyams, *The Common Law and the French Connection*, in PROCEEDINGS OF THE BATTLE CONFERENCE ON ANGLO-NORMAN STUDIES IV, 1981 at 78, 80 (R. Allen Brown ed., 1982).

20. RAOUL DE CAMBRAI 40 (William Kibler ed., Sarah Kay trans., 1996).

21. See SUSAN REYNOLDS, FIEFS AND VASSALS 347, 388 (1994).

22. See ALGIRDAS JULIEN GREIMAS, DICTIONNAIRE DE L'ANCIEN FRANÇAIS 42-43, 539-40 (3d ed. 2004); RAOUL DE CAMBRAI, *supra* note 20, at 44.

23. GREIMAS, *supra* note 22, at 540.

24. RAOUL DE CAMBRAI, *supra* note 20, at 40.

25. *Id.*

it for the eldest son at the holder's death, and acquired land, which the holder could alienate with relative freedom.<sup>26</sup> The most famous example of this restraint on the ability to alienate the *heritage* from the head of the *lignage* actually comes from the post-Conquest context: William the Conqueror's eldest son, Robert Curthose, received the family patrimony of the duchy of Normandy when his father died, but William felt free to will the kingdom of England, as an acquisition that was not part of the family's ancient inheritance, to his second son, William Rufus.<sup>27</sup> The lineage thus had a claim on the *heritage* that restricted the powers even of the current tenant to alienate it. Raoul is not just concerned that the emperor has given away his *heritage*, however; he is also concerned that he has given it in *fieaige*. In twelfth-century English charters, the word *fee* usually meant that the land was held in such a manner that it was heritable, although this was not always the case.<sup>28</sup> Stephen White has demonstrated that words like *fee* were contestable. To a lord, the word *fee* might imply a grant only for life; to a tenant, it might mean a heritable grant.<sup>29</sup> Raoul himself uses the term in both senses. When he is being deprived of his own land, Raoul invokes his right to inherit the fee.<sup>30</sup> When he later asks the emperor to grant him the fee of another deceased baron, he treats it as a mere life estate that that baron's children have no right to inherit.<sup>31</sup>

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26. JOHN HUDSON, *LAND, LAW, AND LORDSHIP IN ANGLO-NORMAN ENGLAND* 204-06 (1994) (noting that land that had been acquired during the tenant's life or the tenant's father's life was more freely alienable without the family's permission than the family's ancient inheritance was).

27. FRANK BARLOW, *WILLIAM RUFUS* 47-48 (1983) (discussing Orderic Vitalis's account of William the Conqueror's death, and his bequest of England, as an acquisition, to William Rufus).

28. HUDSON, *supra* note 26, at 94-97. Paul Hyams has argued, however, that the fee was not always associated with heritability. Paul R. Hyams, *Notes on the Transformation of the Common Law Fief into the Common Law Tenure in Fee*, in *LAWS, LAWYERS, AND TEXTS: STUDIES IN MEDIEVAL LEGAL HISTORY IN HONOUR OF PAUL BRAND* (Susanne Jenks et al. eds.) (forthcoming 2011).

29. Stephen D. White, *The Discourse of Inheritance in Twelfth-Century France: Alternative Models of the Fief in Raoul de Cambrai*, in *LAW AND GOVERNMENT IN MEDIEVAL ENGLAND AND NORMANDY: ESSAYS IN HONOUR OF SIR JAMES HOLT* 173, 179-80 (George Garnett & John Hudson eds., 1994).

30. *See id.* at 179.

31. *See id.* at 180.

Even if the word is contestable, a grant of Raoul's inheritance to someone else in (potentially heritable) *fieaige* threatens Raoul's claim and the claim his descendants would have after him.<sup>32</sup>

Raoul's supporters also use the language of right (*droit*), a term that often appears in English land disputes in the twelfth century.<sup>33</sup> Raoul's mother, Alais, goads Raoul into fighting for Cambrai as "your right" (*ton droit*).<sup>34</sup> The term was difficult to define, even for contemporaries, because it was thought to be quasi-mystical.<sup>35</sup> Questions of right were submitted to trial by battle or ordeal, which elicited God's judgment, in England and Northern France.<sup>36</sup> It seems that there were doubts about the efficacy even of God's judgment, because the process by which it was obtained was riddled with various human interventions that had the potential to throw off the proceedings.<sup>37</sup> When Henry II allowed certain cases brought by writ of right to be decided by juries, and thus by purely human means, the human jurors were asked only who had the *greater* right.<sup>38</sup> They could not know who had absolute right, since this was known to God alone.<sup>39</sup>

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32. RAOUL DE CAMBRAI, *supra* note 20, at 40.

33. *Id.* at 74, 78, 92.

34. *Id.* at 92. Several other characters say that Raoul "has right." *Id.* at 74, 78.

35. Paul R. Hyams, *Trial by Ordeal: The Key to Proof in the Early Common Law*, in ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE 106 (Morris S. Arnold et al. eds., 1981) ("[T]he mystery of seisin and right, for example, or the question of who *ought* to hold land under dispute in Domesday *invasiones*, was much less easily abstracted from the divine judgment.").

36. *Id.*

37. See Paul Hyams, *The Legal Revolution and the Discourse of Dispute in the Twelfth Century*, in THE CAMBRIDGE COMPANION TO MEDIEVAL ENGLISH CULTURE 63-64 (Andrew Galloway ed., 2011) (arguing that, while the late twelfth century showed no crisis of faith about the ordeal, the literature of the time does provide numerous examples of ordeals that are misinterpreted by their human observers).

38. See EARLY REGISTERS OF WRITS 6 (Elsa de Haas & G.D.G. Hall eds., 1970); GLANVILL, *supra* note 4, at 30.

39. Donald Sutherland thought that the assize of novel disseisin was originally designed as a lesser writ than the writ of right, which was decided by trial by battle, in order to assuage the elites' fears that their landholding would

The most important aspects of this vernacular language to keep in mind are that heritability had a strong normative force; the rights of lineages were as much at stake in property disputes as the rights of individuals. People felt that the heir of the last person who held the land, Raoul, for example, had a strong claim to the right, the emperor's grant notwithstanding. But no human being could know who had the right in an absolute sense, so the Anglo-Norman landed elite concerned themselves primarily with questions of who, between two claimants, had a better right to the land, and imagined an absolute right, good against all the world, as something that was beyond practical reach.

### B. *The Language of Writs*

The Anglo-French vernacular influenced and intertwined with the second language that the early treatise authors spoke: the language of writs. All of our authors worked in the courts of twelfth- and thirteenth-century

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be subject to juries rather than to God. The fact that a loser in an assize of novel disseisin might still bring a writ of right and obtain God's judgment through trial by battle "guaranteed that a man might hold his lands freely in reliance on himself under God and not subject to the king's will or to the word of such of his neighbors as might happen to be sworn on a jury." DONALD W. SUTHERLAND, *THE ASSIZE OF NOVEL DISSEISIN* 37 (1973). Paul Hyams thinks that the jury may have originally have been justified as a form of divine judgment in order to sell it to landholders who were used to having their land disputes settled by duels. Hyams, *supra* note 35, at 118.

The idea that right was knowable to God alone was also familiar to Roman jurists. The author of the second introduction to the *Bracton* treatise, probably William of Raleigh, quotes the *Institutes'* definition of justice: "the constant and unailing will to give to each his right." 2 BRACTON, *supra* note 5, at 23; *see also* J.INST.1.1. He then goes on to reproduce Azo of Bologna's commentary on the passage, in which Azo explains how we can refer to human acts as just even though perfect justice belongs to God alone. *See* 2 BRACTON, *supra* note 5, at 23. Azo points out that God "gives to each man in accordance with his deserts" and "is neither variable nor inconstant in his dispositions and wills." AZO, *supra* note 12, at 1047. For justice to be perfect, it must be perfectly constant. According to Azo and Raleigh, human beings can also be said to be just even though they are variable and inconstant in their actions, because humans can have a constant and unailing *will* to give to each his right, even if they will inevitably fail in the execution of that will. Thus, human beings are incapable of *being* perfectly just and giving to each his right, but they can *intend to be* perfectly just. Only God can be perfectly just in the execution. *Id.* at 1047; 2 BRACTON, *supra* note 5, at 23.

England, which ran on these short, Latin-language documents. A writ was simply an order from the king.<sup>40</sup> Henry II (r. 1154–1189) and his councilors had revolutionized their use in the royal administration in England and the ducal administration in Normandy, although the Angevin king did not introduce them in the other parts of his vast continental domain.<sup>41</sup> Henry introduced a series of writs *de cursu*, which anyone could acquire from the royal chancery by paying a small fee.<sup>42</sup> These new writs could be used to start proceedings in the royal courts.<sup>43</sup> The most important for our purposes will be the writs that were used to settle disputes over land held in lay fee, i.e., not by the church in free alms. The procedures these writs set into motion were called assizes or recognitions.<sup>44</sup> Assize, like *seisin*, was etymologically related to the verb “to sit,” and probably originally referred to the sittings of the king’s council where these procedures were created.<sup>45</sup> Assize also became the usual term for the royal orders, somewhat like early statutes, that came out of these sittings.<sup>46</sup> It was eventually attached to the writs themselves and to the juries of twelve men who decided cases under those writs.<sup>47</sup> The word *recognition* was used to refer to the panel of jurors who came to recognize (*recognoscere*) whether certain events had happened.<sup>48</sup> The assize of novel disseisin could be sought by a person who had been recently ejected from his land (the word *novel* in the name of the writ means *recent*; the word *disseisin* refers to the ejection or dispossession). The assize of mort d’ancestor aided a person who was the nearest heir of the

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40. M.T. CLANCHY, FROM MEMORY TO WRITTEN RECORD: ENGLAND 1066–1307, at 90-91 (2d ed. 1993).

41. Daniel Power, *Henry, Duke of the Normans (1149/50-1189)*, in HENRY II, NEW INTERPRETATIONS 95, 102 (Christopher Harper-Bill & Nicholas Vincent eds., 2007).

42. 1 THE 1235 SURREY EYRE 27 (C.A.F. Meekings ed., 1979).

43. See HUDSON, *supra* note 14, at 143.

44. See GLANVILL, *supra* note 4, at 149.

45. GREIMAS, *supra* note 22, at 42-43.

46. H.G. RICHARDSON & G.O. SAYLES, LAW AND LEGISLATION FROM ÆTHELBERHT TO MAGNA CARTA 102-03 (1966).

47. *Id.* at 108-09.

48. GLANVILL, *supra* note 4, at 150.

last person to die seised of a piece of land.<sup>49</sup> Both of these writs ordered the sheriff to summon a jury to appear before the king's justices and thus brought the case directly to the king's courts.<sup>50</sup> The writ of right was somewhat different. The writ of right patent, available to all freemen who did not hold land directly of the king, was addressed to the plaintiff's lord and commanded him to do right to the plaintiff with a warning that if he did not, the sheriff would take the case into his hands.<sup>51</sup> Once someone sued on this writ, the case could easily be transferred to the king's court.<sup>52</sup> The writ of right could be decided by a trial by battle or put to a jury by way of a procedure called the grand assize, which was introduced later in Henry II's reign as an alternative to trial by battle.<sup>53</sup>

The language that the writs used would eventually become a technical vocabulary of its own, but the royal councilors who drafted these writs drew on the languages that they already knew. There has been debate about whether Roman law played any part in the drafting of Henry II's writs.<sup>54</sup> If it did, and I think it doubtful that it played much of a role, it has left no mark on the language of the writs themselves. Despite the fact that the writs were written in Latin, the drafters took their inspiration from the Anglo-French vernacular. *Mort d'ancestor* speaks of being seised (Latinized as *seisitus* or *saisitus*) of the land and *novel disseisin* speaks of being disseised (*disseisivit*).<sup>55</sup> The

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49. *Mort d'ancestor* only aided the nearest heir if that heir was a child, brother, sister, nephew, or niece of the deceased landholder. In the thirteenth century, the royal courts developed other writs for parents (the writ of *aiel*), grandparents (*besaiel*), and all other relatives (*cosinage*). Contemporaries viewed these writs as part of a family of writs. See EARLY REGISTERS, *supra* note 38, at 280.

50. 3 BRACTON, *supra* note 5, at 57, 249.

51. 4 *Id.* at 47.

52. 4 *Id.* at 47-48.

53. EARLY REGISTERS, *supra* note 38, at 6.

54. For two recent summaries of this debate, see Anne J. Duggan, *Roman, Canon and Common law in Twelfth-Century England: The council of Northampton (1164) Re-Examined*, 83 HIST. RES. 379, 397-99 (2010) and Joshua C. Tate, *Ownership and Possession in the Early Common Law*, 48 AM. J. LEGAL HIST. 280, 281 (2006).

55. 3 BRACTON, *supra* note 5, at 57, 249.

writs of right used the Latin terms *ius* and *rectum*.<sup>56</sup> Both of these terms could be translated into English as *right*, and it would seem that the drafters were using them as Latin translations of the Old French *droit* or, in its Anglo-French form, *dreit*. So when a plaintiff in the English king's courts of the thirteenth century claimed land as "his right" (*ius suum*), he was making essentially the same claim that Raoul de Cambrai's mother wanted her son to make when she told him to go fight for Cambrai as "your right" (*ton droit*).<sup>57</sup>

It was up to the justices and litigants of the late twelfth and early thirteenth centuries to transform the words in writs into terms of art. The writ procedures began to delimit the range of meanings a particular word might have. The assize of novel disseisin begins, "The king to the sheriff, greeting. Such a one has complained to us that such a one disseised him wrongfully and without judgment of his *free tenement* in such a vill . . . ."<sup>58</sup> The words *free tenement* literally imply only that the land is held (*tenement* comes from the Latin *tenere* or the French *tenir*, "to hold") and is held freely, i.e., not as a villein, or serf, would hold land.<sup>59</sup> As litigants purchased writs of novel disseisin to bring their cases to the royal courts, the justices had to decide what types of landholding the assize would cover. They decided that it would not cover a person holding land for a term.<sup>60</sup> As

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56. 4 *Id.* at 47. The writ itself was called a *breve de recto* and ordered the plaintiff's lord to do full right (*plenum rectum*), but when the question was put to a jury by way of the grand assize, the question was who had the greater right (*maius ius*) in the land. *Id.* at 47, 56. The *praecipe in capite* used the term *ius* in the writ itself. *Id.*

57. RAOUL DE CAMBRAI, *supra* note 20, at 92.

58. 3 BRACTON, *supra* note 5, at 57 (emphasis added).

59. The author of GLANVILL appears to use *free tenement* in this general sense at times. GLANVILL, *supra* note 4, at 28 ("[The grand assize] takes account so effectively of both human life and civil condition that all men may preserve the rights which they have in any free tenement . . . .").

60. See SUTHERLAND, *supra* note 39, at 32. This was possibly because when a landholder transferred his land to a termor, the parties traditionally did not undertake a ceremony known as livery of seisin. This ceremony symbolically transferred seisin of the land from one party to the other. Since seisin was not transferred to the termor, the termor had no seisin and could not be disseised. Since the assize gave the action to a person who was disseised, the termor could not have an assize of novel disseisin. *See id.* at 32-33.

a result, the lease for a term was not considered a free tenement even though, according to the literal meaning of the words, it should have been. A free tenement came to be defined as a piece of land that was covered by the assize. American common law preserves the technical language of the assize; it still labels leaseholds as nonfreehold estates, even though this makes little sense given the literal meaning of the words.<sup>61</sup> To rent an apartment is not to hold land as a villein would. The justices and litigants of the early common law thus transformed the vernacular terms that had made their way into writs into a technical language of writ practice.

### C. Roman Law

Finally, the authors of all three of these treatises had become familiar with the language of Roman and canon law. Roman law had been undergoing a revival in the twelfth century.<sup>62</sup> Although the sequence of events is murky, by the middle of the twelfth century at the latest there were people systematically teaching Roman law in the Italian city of Bologna.<sup>63</sup> Canon law developed into an academic discipline around this time, too, with the publication of Gratian's *Concordance of Discordant Canons*, a collection of authoritative Church texts used as a textbook in the Bologna schools from the middle of the century.<sup>64</sup> Which of the two disciplines led the developments in Bologna is not clear.<sup>65</sup> What is clear is that by the end of the twelfth century, Roman and canon law had become intertwined. While they were distinct academic disciplines with separate faculties in the universities, students in each were required to learn quite a bit of the other.<sup>66</sup> They operated according to

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61. JESSE DUKEMINIER ET AL., PROPERTY 419 (7th ed. 2010).

62. PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 43 (1999).

63. See Harry Dondorp & Eltjo J.H. Schrage, *The Sources of Medieval Learned Law*, in THE CREATION OF THE IUS COMMUNE: FROM CASUS TO REGULA 7, 31 (John W. Cairns & Paul J. du Plessis eds., 2010).

64. See ANDERS WINROTH, THE MAKING OF GRATIAN'S DECRETUM 1-2 (2000).

65. *Id.* at 2-4.

66. JAMES A. BRUNDAGE, THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION: CANONISTS, CIVILIANS, AND COURTS 237-38 (2008).

very similar principles and contemporaries spoke of them as forming a single *ius commune* (common law).<sup>67</sup>

The Roman law that concerns us here is not the classical Roman law of the Augustan period, or even necessarily the law as it was taught in Bologna. Rather, we will be concerned with Roman law as it would have been understood by an English justice with a few years of Roman law training living in the late twelfth or early thirteenth century. Canon law was the law of the ecclesiastical courts in England and our authors may have encountered *ius commune* principles there, but in the treatises themselves the Roman and canon law we encounter is presented in the style of the schools, as a textualized, academic law. We know that our English authors had training in Roman and canon law by the references they make to the two laws in their texts. The author of *Glanvill* used Justinian's *Institutes*, a sixth-century legal textbook.<sup>68</sup> The authors of *Bracton* used Justinian's *Digest* and *Codex* as well.<sup>69</sup> More importantly, they borrowed extensively from Azo of Bologna's *Summa Institutorum* and *Summa Codicis*, two commentaries on the sixth-century sources by an early thirteenth-century Roman law glossator, which show us the ways that people in the medieval schools were reading the ancient texts.<sup>70</sup> The authors of *Bracton* also had several thirteenth-century procedural manuals of Roman and canon law in their collection and had access to Gratian's *Concordance of Discordant Canons* and the *Decretals of Gregory IX*, both collections of Church law.<sup>71</sup>

The authors probably did not learn about the two laws that composed the *ius commune* entirely from books. The texts were meant to be used as part of a scholastic training

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67. HELMHOLZ, *supra* note 3, at 20.

68. See Hall, *Introduction* to GLANVILL, *supra* note 4, at xxxvi.

69. For examples, see 2 BRACTON, *supra* note 5, at 19, 299, 306.

70. See generally SELECT PASSAGES FROM THE WORKS OF BRACTON AND AZO (Frederic William Maitland ed., 1895) (comparing the Romanesque portions of Bracton's treatise with Azo of Bologna's writings).

71. 2 BRACTON, *supra* note 5, at 22 (citing the *Decretals of Gregory IX*); *id.* at 27 (citing Gratian's *Decretum*); see generally H.G. Richardson, *Azo, Drogheda, and Bracton*, 59 ENG. HIST. REV. 22 (1944) (discussing the influence of Azo, a teacher and a famous *Summa* writer in Bologna, and William of Drogheda, a thirteenth-century Oxford canonist, on *Bracton*).

program. This training would have been available to them in several different places. Every cathedral had a school, and depending on the schoolmaster and his background, the cathedral might offer some training in law as part of a general course that could also cover theology, medicine, and the arts.<sup>72</sup> The first universities were appearing in Europe by the second half of the twelfth century, as well. A few Englishmen and Normans traveled to Bologna, but from at least the early decades of the thirteenth century, Oxford was also an option for legal studies.<sup>73</sup> We are fortunate that a set of lectures on the *Institutes*, written in England around the year 1200, have survived.<sup>74</sup> Our authors may have heard these very lectures. At the very least, they are evidence of the interpretations of Roman law current in England's schools at that time, the kinds of interpretations that the authors would have been familiar with.

That education taught the authors of these treatises to think about law in particular ways. Law was not a collection of court procedures; law was an internally coherent system. Justinian's *Digest* made a point of saying in one of its introductions that it contained no contradictions.<sup>75</sup> Gratian's *Concordance of Discordant Canons* was built around the idea of bringing order to a disorderly collection of authorities. Gratian placed authoritative texts that appeared to conflict with each other side-by-side and demonstrated that, if read properly, they did not conflict at all.<sup>76</sup> This scholastic method of law was characterized by a

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72. NICHOLAS ORME, *ENGLISH SCHOOLS IN THE MIDDLE AGES* 79 (1973). The Third Lateran Council of 1179 required that every cathedral maintain at least one master to teach the clerics and "poor scholars." R.W. SOUTHERN, *THE MAKING OF THE MIDDLE AGES* 194 (1953).

73. Thomas Becket was sent to Bologna to study law for one year while he was a cleric in Archbishop Theobald's household. FRANK BARLOW, *THOMAS BECKET* 36-37 (1986). By 1174, the community of English students in Bologna was substantial enough to endow an altar dedicated to the newly canonized St. Thomas Becket in one of the city's churches. BRUNDAGE, *supra* note 66, at 224. Oxford was already an important center of learning in the 1190s, but Cambridge would not get off the ground as a center of studies until the 1220s or 1230s. *See id.* at 238-40.

74. These lectures have been edited in *TEACHING OF ROMAN LAW*, *supra* note 12.

75. DIG. (Justinian, *Constitutio Tanta* 15).

76. *See* JAMES A. BRUNDAGE, *MEDIEVAL CANON LAW* 47 (1995).

love of distinction, categorization, and taxonomy. Law was divided into public and private; civil and criminal; persons, things, and actions.<sup>77</sup>

These authors would have had little opportunity to see Roman law in action, however. Their one opportunity might have been the ecclesiastical courts. Those courts used canon law and all three of the possible contributors to the *Bracton* treatise held ecclesiastical benefices, which might have led them to be involved with the church courts.<sup>78</sup> Canon law had adopted the language of property and possession from Roman law and, although few records survive from the English ecclesiastical courts in this period, the *Bracton* authors could have had some experience with possessory and proprietary actions in that setting.<sup>79</sup> Otherwise, Roman law was something to be learned through books and in classrooms. Although the works of the ancient and medieval jurists are extremely detailed and subtle—Azo's *summae* together run more than 1200 pages in their earliest printed editions—Roman law's flexibility in practice might have been lost on the twelfth- and thirteenth-century justices.<sup>80</sup> The process of bringing Roman law into court practice was a work of legal translation; the justices were trying to learn to speak a foreign language when they learned Roman law, and they were working to learn the strict rules of grammar

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77. See J. INST. 1.2.12, 4.18.pr-1.

78. Brand, *supra* note 10; David Crook, *Raleigh, William of (d. 1250)*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, <http://www.oxforddnb.com.gate.lib.buffalo.edu/view/article/23042> (last visited June 16, 2012); Alan Harding, *Pattishall, Martin of (d. 1229)*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, <http://www.oxforddnb.com.gate.lib.buffalo.edu/view/article/21542> (last visited June 16, 2012).

79. Mary Cheney has placed the key developments in the adoption of the language of possession and property in England's church courts in the period between 1140 and 1160. The distinction between possessory and proprietary actions was certainly well-established in the ecclesiastical courts by the 1220s. Mary Cheney, *Possessio/Proprietas in Ecclesiastical Courts in mid-twelfth-century England*, in LAW AND GOVERNMENT IN MEDIEVAL ENGLAND AND NORMANDY: ESSAYS IN HONOUR OF SIR JAMES HOLT 245, 253 (George Garnett & John Hudson eds., 1994).

80. AZO, *supra* note 12; PETER GARNSEY & CAROLINE HUMFRESS, THE EVOLUTION OF THE LATE ANTIQUE WORLD 60-61 (2001) (arguing that the codes promulgated by late Roman emperors tend to make the law appear rigid and obscure the work of local jurists and parties in working out the law on the ground).

rather than the flexible colloquialisms of practice. Additionally, their knowledge of Roman law may not have been very deep. None of these three justices is ever described in the rolls as *magister*, the title usually accorded in the records to justices who had taken degrees in the schools.<sup>81</sup> Their periods of training in Roman and canon law may have been short, just long enough for major distinctions and general principles to imprint on their minds. Thus, as we will see, the idea of property as an absolute right, good against the world, which the *Bracton* authors took from Roman law, was adopted into the treatise without recognition of its exceptions and qualifications at Roman law. Their first experience applying this law would have been when they tried to reconcile it to the workings of the English courts, and this is when they would have begun to work through situations where the general rules and principles did not work very well.

The distinctions that Roman law scholars made in the realm of property law concern us most here. In the Roman law of the sixth century, the law of the Justinianic period, property was not a major division of the law as it is in modern common law. There would have been no first-year course on property. The *Institutes* is divided into sections on persons, things, and actions. The discussions of property and possession appear primarily in the sections on things and actions. The word *thing* (*res*) could have a broad range of meanings at Roman law. Although it is never defined in the *Institutes*, in the section on things it appears to mean anything with which a human being can have a property relationship, whether it be something corporeal, like a house, or incorporeal, like a servitude or an obligation.<sup>82</sup>

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81. TURNER, *supra* note 7, at 150, 226.

82. See generally J. INST. 2.3 (discussing servitudes); J. INST. 2.2.2 (defining obligations and inheritances). There are some things that can be owned by no one, but which are nevertheless things. The sea shore is the prime example. The authors of the *Institutes* raise this example, however, because it is surprising that there is a thing that can be owned by no one. In fact, as the authors of the *Institutes* point out, there was a difference of opinion on the matter. While some jurists imagined the sea shore to be owned by no one, others imagined it to be owned by all people in common. J. INST. 2.1.5. The statement that the sea shore is incapable of ownership is thus a legal conclusion rather than a statement about the sea shore's reification. It is presumably a thing and a human being could presumably have a property relationship with it if not for the law's prohibition.

It is significant that the law of things appears before the law of actions in the text, because the law of things is not just physically prior to the law of actions; it is also conceptually prior to the law of actions.<sup>83</sup> Abstract concepts come before the concrete actions that put them into practice. When the author of the lectures on the *Institutes* written in England around the turn of the thirteenth century turns from the law of things, which ends with a subsection on obligations, to the law of actions, he tells us that actions are treated after obligations because “actions . . . arise from obligations.”<sup>84</sup> The reader of the *Institutes* and the hearer of the lectures is led to think of law not as a set of court practices, but as an abstract system that is put into practice through those court practices.

The medieval jurists constructed a systematic law of property—systematized well beyond what the classical jurists or Justinian had done—out of Justinian’s texts. In the writings of the medieval jurists, property was ceasing to be a concept within the law of things and was becoming a major division of the law in its own right. The author of our lectures on the *Institutes* began his commentary on the section on things by telling us it is about property: “And so [the section] on things concerns showing which things (*res*) are subjected to our ownership (*dominium*, a synonym for *proprietas*) and which are not.”<sup>85</sup>

The twelfth- and thirteenth-century jurists conceived of landholding primarily through the concepts of *property* (*proprietas*, *dominium*) and *possession* (*possessio*). Our modern word *property* is derived from the Latin *proprietas*, which is related to the Latin word *propria*, an adjective

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83. J. INST. 2.1 (beginning of section on things); J. INST. 4.6 (beginning of section on actions).

84. TEACHING OF ROMAN LAW, *supra* note 12, at 116. It is less clear whether Roman law of the classical period—i.e., the early empire—placed concepts or rights conceptually prior to actions. Hans Peter has argued that the classical jurists thought primarily in terms of actions rather than rights or abstract concepts. HANS PETER, ACTIO UND WRIT 56-57 (1957). Peter Garnsey has argued that the jurists of the classical period were concerned with abstract rights and had a concept of an individual, subjective right to property. PETER GARNSEY, THINKING ABOUT PROPERTY 180-81 (2007).

85. TEACHING OF ROMAN LAW, *supra* note 12, at 29 (I have modified de Zulueta and Stein’s translation) (“De Rebus itaque agit, ostendens que res dominio nostro subiciuntur et que non.”).

meaning “[my] own.” *Proprietas* is thus something that is one’s own, and can be literally rendered into English as *ownership*.<sup>86</sup> *Dominium*, which is related to *domus* (house) and *dominus* (lord), was used interchangeably with *proprietas* in the Roman law texts.<sup>87</sup>

Property was a right *in rem*, good against all the world.<sup>88</sup> That is to say that the action by which one recovered one’s property, called a *vindicatio*, mentioned only the plaintiff and the thing claimed, not the defendant.<sup>89</sup> The question at issue was whether A was the owner of the thing, absolutely and against all comers, not whether A had better title in the thing than B as we would ask in modern common law systems.<sup>90</sup> Roman law scholars imagined property as absolute in another way as well. Property was the sum total of three rights that, together, gave one absolute control of the thing, at least as the jurists imagined absolute control. These three rights were called *usus* (the right to use the thing), *fructus* (the right to take its fruits), and *abusus* (the right to dispose of the thing).<sup>91</sup> Jurists thought of property as the conjunction of the three, subject to servitudes, which might temporarily alienate the owner’s control of the *usus* or *fructus*.<sup>92</sup> The jurists carefully limited the servitude to preserve the fiction that the owner was supreme. The typical example of a servitude was the

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86. See OXFORD ENGLISH DICTIONARY, s.v. “ownership” (2d. ed. 1991) (“The fact or state of being an owner; legal right of possession; property, proprietorship, dominion.”).

87. ADOLF BERGER, ENCYCLOPEDIA OF ROMAN LAW 441 (1953).

88. See J. INST.4.6.1; AZO, *supra* note 12, at 1118; TEACHING OF ROMAN LAW, *supra* note 12, at 111; D.L. Carey Miller, *Property*, in A COMPANION TO JUSTINIAN’S INSTITUTES 42-43 (Ernest Metzger ed., 1998).

89. See J. INST.4.6.1; AZO, *supra* note 12, at 1118; TEACHING OF ROMAN LAW, *supra* note 12, at 111; see also Miller, *supra* note 88, at 47 (“The right of ownership is protected by a vindicatory action . . . . The applicable form of procedure involved the assertion of a claim to the actual thing.”).

90. Ernest Metzger, *Actions*, in A COMPANION TO JUSTINIAN’S INSTITUTES 218 (Ernest Metzger ed., 1998); Miller, *supra* note 88, at 45 (“[O]wnership is a distinct paramount right rather than a mere label attaching to the most compelling of two or more competing claims to a thing.”).

91. TEACHING OF ROMAN LAW, *supra* note 12, at 35 (discussing the right to use and the right to take the fruits as part of the usufruct); Miller, *supra* note 88, at 45.

92. See J. INST. 2.4.pr-1.

usufruct, which combined *usus* and *fructus*.<sup>93</sup> The usufruct left the owner with only the *abusus*, but the *usus* and the *fructus* could only be alienated for short periods of time<sup>94</sup>. The owner could specify that the usufruct would last for a specific amount of time or for the usufructuary's life. In either event, the usufruct returned to the owner no later than the usufructuary's death; it could not be passed to anyone else by sale, gift, or inheritance.<sup>95</sup> These restrictions on alienation preserved property's status as the absolute right in the minds of jurists.<sup>96</sup> Thus, the simple, take-home message of most Roman law texts was that property was an absolute, indivisible right good against the world. The English justices seem to have picked up this message.

Property was contrasted with possession: according to the *Digest*, "property has nothing in common with possession."<sup>97</sup> Property was an abstract legal right. Possession was the actual control of the land. Property was protected by an action. Possession was protected by an interdict, a type of procedure that was not properly considered an action by the jurists.<sup>98</sup> Where property was absolute, possession was relative. If A was put out of possession of his land by B, he could sue B on a possessory interdict. The interdict would decide only who, between A and B, had possession. It did not decide A's rights against C or anyone else.<sup>99</sup> We know that the *Bracton* authors were familiar with the bright line between possession and property because they quote the *Digest's* insistence that the two have nothing in common twice.<sup>100</sup> Other Roman legal texts did not distinguish quite so clearly. Azo, for instance,

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93. See J. INST. 2.3-4; AZO, *supra* note, 12 at 1072.

94. See Miller, *supra* note 88, at 67.

95. See J. INST. 2.4.4; Miller, *supra* note 88, at 67.

96. See ALAN RODGER, OWNERS AND NEIGHBOURS IN ROMAN LAW 2 (1972) ("For the Pandectists ownership is in essence unrestricted and any limitations which may be placed on it are somehow alien to it and detract from its purity . . .").

97. DIG. 41.2.12 (my translation) ("Nihil commune habet proprietatis cum possessione . . .").

98. See Metzger, *supra* note 90, at 210.

99. See TEACHING OF ROMAN LAW, *supra* note 12, at 111.

100. See 2 BRACTON, *supra* note 5, at 321; 3 *id.* at 325.

defines actions *in rem* as actions based on possession.<sup>101</sup> Despite the jurists' insistence that possession was a matter of fact rather than of law it was a fact with important legal significance. Possession had the potential, just as it does in modern law, to become an abstract legal construct. The classic American property case, *Pierson v. Post*, raised the question of whether a person obtained possession of a fox when he began to pursue it, when he had a reasonable chance of killing it, when he killed it, or when he held it in his hands.<sup>102</sup> Only in the last of these cases can we unequivocally say that the fox-hunter has the fox in his physical control, but any of the others could, potentially, be labeled possession. Roman law, which is the source of the common law doctrine of possession, could similarly treat someone who is not in control as a matter of fact as the possessor. For transfer of possession, Roman law required that the possessor give up his possession *corpore et animo*, by body and by mind, meaning that he physically give up possession and intend to give up possession.<sup>103</sup> Say, however, the possessor, A, is physically ejected from his land by B. A no longer has possession *corpore*; he has no physical control of the land at all. He is still legally the possessor, however, because he never surrendered possession *animo*.<sup>104</sup> Possession in this case can hardly be said to be a mere fact. It is a legal right, and, according to Justinian's texts, A could sue B using the interdict *unde vi* to recover his land.<sup>105</sup> The doctrine that one had to possess both *animo* and *corpore* was appealing to the *Bracton* authors, who used it throughout the treatise.

The authors of *Glanvill* and *Bracton* were writing within a tradition that saw the *ius commune* as a universal law and saw English court practices as part of that larger

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101. AZO, *supra* note 12, at 1119 ("There are however those [actions] *in rem*, which are given against anyone by reason of possession, i.e., because he has the thing, or possesses it.") (my translation) ("Sunt autem illae in rem, quae dantur contra aliquem ratione possessionis, id est, quia habet rem, vel possidet.").

102. *Pierson v. Post*, 3 Cai. R. 175 (N.Y. 1805).

103. AZO, *supra* note 12, at 740. The *corpore et animo* requirement has been incorporated into the common law of gifts, which require both delivery and intent to make a gift.

104. *Id.* at 740.

105. See 2 BRACTON, *supra* note 5, at 296.

*ius commune*.<sup>106</sup> *Ius commune* was the system of which English custom was a local instantiation. We are not accustomed to think about the early common law this way because civil law is generally seen, and sees itself, as common law's opposite. On the common law side, scholars have worked hard to explain why England was so unique in its legal development.<sup>107</sup> Somehow the English royal courts resisted the reception of Romano-canonical procedure that occurred in places like France and Italy in the thirteenth century and the more widespread reception of Roman

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106. Manlio Bellomo has made similar arguments for other parts of Europe. Bellomo has argued that historians who see the *ius commune* as merely a subsidiary law, to be cited only when no appropriate local law could be found on point, do so because they inappropriately treat the *ius commune* as a positive law. Bellomo demonstrates that, rather than providing specific rules and laws, *ius commune* provided a set of unchanging structures and principles through which jurists could interpret the *ius proprium*, the local law of the place. The *ius commune* was the unchanging form of law and the *ius proprium* was the instantiation of that form. MANLIO BELLOMO, *THE COMMON LEGAL PAST OF EUROPE 1000-1800*, at 152-53 (Lydia G. Cochrane trans., 1995). Bellomo specifically treats the Sicilian *Liber Augustalis* of 1231, which created a hierarchy among laws. A judge deciding a case was to turn to the law of the kingdom first. If there was no royal law on point, he could then turn to the customs of the locality. If neither of those provided the answer, only then could he turn to *ius commune*. The *ius commune* thus comes last, as a subsidiary law to be used only when all local law has run out. Bellomo points out that it is only the specific provisions of Roman and canon law that the *Liber Augustalis* places in an inferior position to *ius proprium*. The structures, principles, and terminology of the *ius commune* infused all of the laws of the kingdom of Sicily, including the *Liber Augustalis* itself, which is heavily influenced by Roman law. *Id.* at 89-94.

107. See J. H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 28 (4th ed. 2002) (arguing that Roman law found a highly developed legal system that was difficult to supplant when it arrived in England in the twelfth and sixteenth centuries); R. C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 90-92 (2d ed. 1988) (arguing that England's period of legal development pre-dated the continent's by half a century and produced a workable court system before Roman influence could reach England); see also 1 FREDERICK POLLOCK AND FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 135 (2d ed. 1898) [hereinafter POLLOCK & MAITLAND] ("Our English law shows itself strong enough to assimilate foreign ideas and convert them to its own use. Of any wholesale 'reception' of Roman law there is no danger. From the day at Clarendon onwards it is plain that we have many *consuetudines* which must be maintained in the teeth of *leges* and *canones*.").

substantive law in later centuries.<sup>108</sup> An oft-quoted explanation was offered by the German scholar Heinrich Brunner around the turn of the twentieth century. Brunner thought that England had received a bit of Roman law early on, in Henry II's reforms and in texts like the *Bracton* treatise, and that this small reception of Roman law had "operated as a sort of prophylactic inoculation, and had rendered the national law immune against destructive infection."<sup>109</sup> "Prophylactic" generally has a more specific meaning today than it did in Brunner's time, making it an unfortunate choice of words for reasons that Brunner probably could not have foreseen. This metaphor, which gives us an inherently negative view of civil law, has been repeated in much more recent common law histories.<sup>110</sup> When historians of the common law repeat the prophylactic metaphor in a world where we associate common law with England and civil law with the continent it conjures up images of the seductive civil law threatening to infect the common law with the wicked French disease.

It is not only its highly negative attitude towards civil law that makes this metaphor inapt. The metaphor assumes that the common law was a healthy body that could be invaded by civil law in the thirteenth century. It is essentially a backward-looking view of history, coming at the problem from the situation in the modern world, where common law and civil law are two competing systems that could potentially infect (or influence, to paint it in a less negative light) each other. This was not the case in twelfth- and thirteenth-century England. The royal justices did not yet think of the procedures followed in the royal courts as a unified common law; the expression *ley commune* would not make its first appearances until the end of the thirteenth century.<sup>111</sup> Rather, like their civilian counterparts, they thought of their law as part of an international *ius commune*. We can see this clearly in the *Bracton* treatise. In the introduction to that text, one of the text's authors, this

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108. See EDWARD PETERS, *INQUISITION* 52-53 (1988); see generally GERALD STRAUSS, *LAW, RESISTANCE, AND THE STATE: THE OPPOSITION TO ROMAN LAW IN REFORMATION GERMANY* (1986).

109. See Heinrich Brunner, *The Sources of English Law*, in *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 42 (1908).

110. See, e.g., BAKER, *supra* note 107, at 28.

111. See Brand, *supra* note 14, at 21.

one probably Henry de Bratton himself, says that “though in almost all lands use is made of the *leges* and the *jus scriptum*, England alone uses unwritten law and custom. There law derives from nothing written [but] from what usage has approved.”<sup>112</sup> Bratton presents England as a lone holdout in a world that he imagines to be populated by textualized law. Of course, this is manifestly untrue. Very little of Western Christendom used *ius scriptum*.<sup>113</sup> Yet, the author chooses to present England as unique in not using written law.

In this passage, Bratton is actually using the language of the *ius commune* to highlight England’s difference from it. He uses the terms *leges* (laws) and *ius scriptum* (written law) in the same way they are used in texts like the *Institutes* and Gratian’s *Decretum*. The word *lex* is used throughout the *Bracton* treatise to refer specifically to Roman law.<sup>114</sup> The clearest case appears in the tractate on acquiring dominion over things, a portion of the text which was probably written by the royal justice William of Raleigh during one of the early phases of writing on the treatise.<sup>115</sup> In one passage from this tractate, Raleigh tells us that “until the felony is proved, the land of a felon can never be the

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112. 2 BRATTON, *supra* note 5, at 19 (“Cum autem fere in omnibus regionibus utatur legibus et iure scripto, sola Anglia usa est in suis finibus iure non scripto et consuetudine.”). For the argument that Henry de Bratton wrote the *introductio* to the text, see Brand, *The Age of Bracton*, *supra* note 8, at 77.

113. Bratton may have known of a few recent attempts to create royal statutory compilations comparable, at least in the minds of their authors, with Justinian’s collection of imperial legislation, the *Codex*. Frederick II of Sicily had issued his *Liber Augustalis* in 1231. Alfonso X of Castile and León issued the *Fuero Real* between 1252 and 1255, a failed attempt to create a law for his whole kingdom. The kings of France issued *ordonnances* at various points in the thirteenth century, but no more often than the kings of England issued *assizes* or *statuta*. In Northern France, the area of the world with which the English had the most contact, law remained largely unwritten in the 1250s. BELLOMO, *supra* note 106, at 93, 100, 104.

114. 2 BRATTON, *supra* note 5, at 19.

115. This tractate contains *addiciones*, or accretions to the text, that contradict the main text. This leads me to believe that it was written in the earlier stages of writing, when Raleigh was working on the treatise, and revised by one of the later authors, perhaps Henry de Bratton. At one point in the tractate, for instance, the main text says “the services must be certain and expressed in writing.” *Id.* at 62. To which someone has added, “or without a writing,” changing the meaning of the passage substantially. *Id.*

escheat of the chief lord” and that, in this rule, “law (*lex*) agrees with English custom (*consuetudo Anglicana*): ff. de donationibus l. post contractum [this is a citation to Justinian’s *Digest*, D. 39.5.15], where it is said that gifts made after the commission of a capital crime are valid unless condemnation follows.”<sup>116</sup> Raleigh is familiar with the distinction made in Roman and canon law texts between *lex*, which is written, and *mos* or *consuetudo* (custom), which is unwritten.<sup>117</sup> He is clearly distinguishing between the written *lex* and the unwritten *consuetudo* in this passage, but he sees the two as being in accord with each other. Raleigh makes another important distinction in this passage: he feels the need to modify the word *custom* with the adjective *English*. The word *lex*, however, requires no modifier. He does not need to specify that the *lex* he refers to is Roman law, even though he makes it clear immediately afterwards that he is referring to the *Digest*. Roman law is just *lex*; it is *the* one, universal written law. This passage is not an outlier. Many other portions of the treatise use the term *lex* to refer to provisions of the *Digest* and the *Codex*, and both Raleigh and Bratton speak about Roman law as if it was binding authority in England.<sup>118</sup>

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116. *Id.* at 101. (I have modified Thorne’s translation) (“[C]onvenit lex cum consuetudine Anglicana, ff. de donationibus l. post contractum, ubi dicitur quod post contractum capitale crimen donationes factae valent nisi condemnatio subsequuta sit.”).

117. See J.INST.1.2.3 (“Written law (*ius scriptum*) is *lex* [followed by several other categories of written law]. . . .”); J.INST.1.2.9 (“Law (*ius*) comes into being without a writing (*ex non scripto*) when a rule is approved by use.”) (Translation by Peter Birks and Grant McLeod); D.1 c.5 (“Custom, however, is a kind of *ius* instituted by usage.”). Isidore of Seville, an author with whom the *Bracton* authors were certainly familiar, and who they quote, 3 BRACTON, *supra* note 5, at 151, and *id.* at 360, may have actually been Raleigh and Bratton’s source for the distinction. See ISIDORE OF SEVILLE, ETYMOLOGIAE 5.3.2-3 (“*Lex* is a written constitution. *Mos* is custom proved by age, or unwritten *lex*. For *lex* is called from *legendo*, because it is written. *Mos* however is long custom (*longa consuetudo*) . . . . *Consuetudo*, however is *ius* instituted by customs (*moribus*), which is received for *lex*, when *lex* is lacking.”) (my translation) (“*Lex* est constitutio scripta. *Mos* est vetustate probata consuetudo, sive *lex* non scripta. Nam *lex* a *legendo* vocata, quia scripta est. *Mos* autem longa consuetudo est . . . . *Consuetudo* autem est *ius* quoddam *moribus* institutum, quod pro lege suscipitur, cum deficit *lex*.”).

118. See, e.g., 2 BRACTON, *supra* note 5, at 305. (using *lex* to mean a Roman statute); *id.* at 323 (several direct citations to the *Digest* referred to by the term *lex* as part of an addition to the text that was probably made by Henry de

The fact that *lex* has a specific meaning in the treatise makes Bratton's choice of it in the introduction all the more significant. He presents England and its law as exceptional. England was the lone holdout in a world that used written, Roman law. But then Bratton turns to defending English law's place within the international legal order that was defined by the *ius commune*. Quoting *Glanvill*, he explains that:

Nevertheless, it will not be absurd to call English laws *leges*, though they are unwritten, since whatever has been rightly decided and approved with the counsel and consent of the magnates and the general agreement of the *res publica*, the authority of the king or prince having first been added thereto, has the force of a [*lex*].<sup>119</sup>

Bratton places himself on the edge of a Roman and canon law culture of written law and tries to convince the reader that England is a part of it, albeit in an unconventional way. English law can be described as *lex*, the universal law of the *ius commune*, even though it is unwritten. The language that makes common law and civil law into two competing systems belongs to a later era.

The treatise writers of the late twelfth and early thirteenth centuries were administrators, landholding elites, and legal scholars and, as such, had to be conversant in all three languages. But these three languages contained some inherent contradictions, and, as we shall see, the authors of treatises worked hard, but unsuccessfully, to reduce the dissonance between the languages they were required to speak.

## II. MIXING THE LANGUAGES: THE *GLANVILL* TREATISE

The treatise we generally call *Glanvill* is titled, in many of its manuscripts, *De Legibus et Consuetudinibus Regni Angliae* (*On the Laws and Customs of the Realm of*

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Bratton); *id.* at 367 (using *lex* to refer to an excerpt from an ancient Roman jurist found in the *Digest*).

119. 2 BRATTON, *supra* note 5, at 19 ("Sed non erit absurdum leges Anglicanas licet non scriptas leges appellare, cum legis vigorem habeat quidquid de consilio et consensu magnatum et rei publicæ communi sponsione, auctoritate regis sive principis præcedente, iuste fuerit definitum et approbatum.").

England).<sup>120</sup> It was written ca. 1187–1189.<sup>121</sup> The name *Glanvill* comes from the royal justiciar at the time of its writing, who is mentioned in some of the manuscripts as its author, although the attribution is dubious.<sup>122</sup> *Glanvill* is a Latin text which describes the procedures of the king's court. Written a decade after the end of Henry II's busiest period of reform, it is the earliest source we have for many of the writs that became so important to the common law. *Glanvill* also makes an early effort to translate English practice into the language of Roman law. The author takes the words *seisin* and *right*, words that appeared in the Anglo-French vernacular and in the language of writs, and equate them, in a direct one-to-one fashion, with the Roman law terms *possession* and *property*. Early in the treatise, he distinguishes between pleas that "concern solely claims to the property in the disputed subject-matter" and pleas where "the claim is based on possession."<sup>123</sup> On the possession side of the line, he places all those pleas "which are determined by recognitions," meaning primarily those assizes that historians of English law know so well—novel disseisin, mort d'ancestor, utrum, and darrein presentment—and tells us that these "will be discussed later in their proper place."<sup>124</sup> When he gets to the proper place, book XIII on recognitions, he does not use the division between possession and property that he used in the introduction to his work. Instead, he says that he has dealt with "pleas about right" (*placita de recto*) and is now turning to recognitions, which are concerned "with seisins only."<sup>125</sup> The Romanist language of possession (*possessio*) and property (*proprietas*) that the author began with has morphed into the language of *seisin* (*saisina*) and right

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120. GLANVILL, *supra* note 4, at 1.

121. Hall, *Introduction* to GLANVILL, *supra* note 4, at xi.

122. *Id.* at xxx-xxxiii.

123. GLANVILL, *supra* note 4, at 4.

124. *Id.*

125. *Id.* at 148 (I have modified Hall's translation). Hall translates this phrase as "with *seisin* only," but the Latin word he translates as "*seisin*," *saisinis*, is plural. I would like to thank John Hudson for pointing this out to me.

(*rectum*), terms that would have made sense in the vernacular.<sup>126</sup>

The *Glanvill* author understood Roman law well enough to see the similarities between the words *seisin* and *right* of their writs and Roman law's *possession* and *property*. The comparison may have made sense to him for several reasons. First of all, in the way the words were used by the Anglo-Norman landed elite, being seised was something that happened in an instant, when the donor of the land invested the donee. Right was generally tied to a generational claim, that the land had belonged to the family for a long time.<sup>127</sup> This mirrored the Roman law of prescription, as described by Azo and our English lecturer on Roman law, by which one's possession could mature into a property right.<sup>128</sup> Likewise, writs that dealt with *seisin* generally had quicker, simpler procedures associated with them than writs that dealt with *right*.<sup>129</sup> In the same way, Roman actions on the possession were much quicker and simpler than actions on property.<sup>130</sup> This made perfect sense in both cases. The action on the right or property decided more than the action on the *seisin* or the possession and generally precluded the parties from bringing any future action. So the losing party in a writ of right could not bring

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126. This is not the only place in the treatise that the author makes it clear that he equates the Roman *possession* with the Anglo-French *seisin* and the Roman *property* with the Anglo-French *right*. He also speaks of pleas brought "on the question of property by means of a writ of right (*breve de recto*)" which he parallels later with the phrase "except on the question of right (*recto*) by . . . a writ of right." *Id.* at 6, 10.

127. Hudson makes the point, for instance, that landholders felt more free to alienate land, without the lord's permission, that had been inherited than land that had been acquired during one's lifetime, since, with acquired land, the landholder's relationship with the lord who had given him the land was still strong. As the land was inherited over several generations, though, the connection between land and lord became more attenuated and the connection between land and family became stronger. Contemporaries might have put this in terms of an increase in right. See HUDSON, *supra* note 26, at 209.

128. See AZO, *supra* note 12, at 731-39; TEACHING OF ROMAN LAW, *supra* note 12, at 37.

129. See SUTHERLAND, *supra* note 39, at 35.

130. Frederic Joüon des Longrais, *La portée politiques des réformes d'Henry II en matière de saisine*, *Quatrième série*, xv REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 565-67 (1936).

another writ of right but also could not bring a novel disseisin.<sup>131</sup> The reverse was not true. The loser in a novel disseisin case could bring a writ of right. So the procedure on the right or property had to be more rigorous than that on the seisin or possession. Frederic Joüon des Longrais called this type of procedure the “double action” (*double procès*) where there is a simple action for easy cases and a more complicated action for hard ones.<sup>132</sup> He was among a group of historians who thought this was evidence that Henry II and his councilors had copied Roman models when they created the petty assizes and the writs of right, although he thought their borrowing did not go beyond the idea of having a double action.<sup>133</sup> There is no real reason, apart from this similarity, to believe that copying was involved.<sup>134</sup> The fact that the English writs and Roman actions had this double action in common, though, certainly encouraged the authors of texts like *Glanvill*, authors who were inclined to make comparisons between English and Roman law, to treat their writs as if they were Roman

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131. See David J. Seipp, *Roman Legal Categories in the Early Common Law*, in *LEGAL RECORD AND HISTORICAL REALITY: PROCEEDINGS OF THE EIGHTH BRITISH LEGAL HISTORY CONFERENCE* 9, 25 (Thomas G. Watkin ed., 1989).

132. Joüon des Longrais, *supra* note 130, at 567.

133. See *id.* at 555. (“If Roman influence appears undeniable in the appearance of the double action, it seems not to have guided the reforms of seisin in their details.”) (my translation).

134. Mary Cheney has demonstrated that the ecclesiastical courts in England were making use of the distinction between possessory and proprietary actions by 1160. Since royal servants in clerical orders might sit in judgment in ecclesiastical courts and great magnates might have their disputes heard in those courts, there were opportunities for Henry II’s councilors to become aware of the distinction. See Cheney, *supra* note 79, at 252-53. It is important to note, however, that none of the early writs use any language borrowed from Roman or canon law and our first evidence that anyone was thinking of them as parallels to Roman actions comes from the *Glanvill* treatise, written a decade to a generation after most of the writs had been created. Joshua Tate has argued that, by looking at the assize of darrein presentment, we can see Roman and canon law influence more clearly than we can in assizes that concern lay fees. The problems of lordship that are present in the assizes of novel disseisin and mort d’ancestor are absent from darrein presentment, which concerns the right to present to a church. See Tate, *supra* note 54, at 307-09. The problem with this argument is that darrein presentment probably post-dated novel disseisin and mort d’ancestor, and may simply have been based on those writs, not on Roman or canon law. See *id.* at 307.

actions and to treat seisin and right as if they were possession and property.

Even if the *Glanvill* author could see parallels between English writs and the Roman law of possession and property, he did not try to work the writs into anything like a systematic law of property in the style of medieval Roman law. The *Glanvill* author does divide his treatise into sections on pleas on the property and pleas on the possession, but his discussion centers not on substantive law doctrines like property and possession, but on the writs that were administered by the royal courts.<sup>135</sup> He follows what Maitland called a “dilemmatic” method;<sup>136</sup> he starts with a fact pattern that might come before the royal courts and then subdivides that fact pattern, creating a sort of decision tree for the justice sitting in court:

If the tenant chooses to defend himself by battle against the demandant, then the procedure is as stated above. But if the tenant prefers to put himself upon the lord king’s Grand Assize, then the demandant will either do the same, or he will not. . . . But if he is unwilling to put himself upon the assize he must show some cause why there should be no assize between them. . . . If the demandant makes this objection, the tenant will either admit it or not.<sup>137</sup>

The author’s concern is not with a systematic set of laws, but with what the royal justice must do depending on the decisions of the parties before him. It is a very practical exposition of the workings of the king’s courts, not a systematic exposition of a field of law. If we were to use the categorizations of Roman law, we would say he was thinking in terms of procedural, not substantive, law. I do not think that these categorizations are appropriate for *Glanvill*, though, because he almost certainly *was not* thinking about it that way. His is an administrator’s mentality. The text itself is not all that different from the *Dialogue of the Exchequer*, a text on financial administration written around the same time.<sup>138</sup>

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135. Hall, *Introduction to GLANVILL*, *supra* note 4, at xxii.

136. See 1 POLLOCK & MAITLAND, *supra* note 107, at 166.

137. GLANVILL, *supra* note 4, at 26.

138. See MICHAEL CLANCHY, FROM MEMORY TO WRITTEN RECORD: ENGLAND 1066-1307, at 18-19 (2d ed. 1993) (comparing *Glanvill* to the *Dialogue* as two manuals that attempted to describe administrative procedures in general ways).

III. TOWARD A SYSTEM OF PROPERTY: THE *BRACTON* TREATISE

The *Glanvill* author seems to have had some sense that his law was part of the larger system of *ius commune*. The authors of *Bracton* show a much deeper commitment to this idea. *Bracton*, like Justinian's *Institutes*, is divided into sections on persons, things, and actions.<sup>139</sup> The author of the treatise's first introduction, probably Henry de Bratton, calls it a *summa*, which was a genre of writing current in the Roman and canon law faculties in the universities.<sup>140</sup> As I have argued elsewhere, the *Bracton* authors were much more heavily invested in Roman law because the ideology of medieval Roman law served their professional interests.<sup>141</sup> The author of *Glanvill* was writing in a period when the royal administration was not specialized, and when the people who worked in the royal courts might also be great magnates, work in the exchequer, or serve as clerks in the royal household.<sup>142</sup> They were jacks of all trades who sat as justices part-time, as one among many roles they filled.<sup>143</sup> The *Bracton* authors were a new type of justice. They had served long apprenticeships as clerks to justices before being elevated to the bench themselves.<sup>144</sup> William of Raleigh was Martin of Pattishall's clerk for at least fifteen years when he became a justice of the common bench in 1229.<sup>145</sup> Henry de Bratton was William of Raleigh's clerk before he

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139. The authors divided the treatise this way even though the section on actions, which is the shortest of Justinian's sections, fills almost the whole of the treatise. 2 BRACTON, *supra* note 5, at 29 ("[T]he whole of the law with which we propose to deal relates either to persons or to things or to actions, according to English laws and customs."); *id.* (beginning of section on persons); *id.* at 39 (beginning of section on things); *id.* at 282 (beginning of section on actions, which runs for more than two volumes in the modern edition); J. INST.1.2.12 ("All the law that we use, however, pertains either to persons, or to things, or to actions.") (my translation) ("Omne autem ius, quo utimur, vel ad personas pertinent vel ad res vel ad actiones.").

140. See 2 BRACTON, *supra* note 5, at 19.

141. Thomas J. McSweeney, *English Justices and Roman Jurists: The Civilian Learning Behind England's First Case Law*, 84 TEMPLE L. REV. (forthcoming); McSweeney, *supra* note 6, at 4-5.

142. *Id.*

143. See TURNER, *supra* note 7, at 39.

144. *Id.*

145. See *id.* at 237.

became a justice.<sup>146</sup> A great deal of a man like Henry de Bratton's identity must have been bound up in the fact that he was a royal justice. Roman law was essentially a new technology that spoke to that identity. It provided the justices with a language for talking about the work they were doing as something superior to the other parts of the royal administration. They were jurists, servants of an impersonal law, priests of justice, as one of the *Bracton* authors put it, not the king's accountants.<sup>147</sup> For the author of *Glanvill*, Roman law was useful to the extent that it could provide him with a few technical terms; for the authors of *Bracton*, it provided them with an identity.

The treatise is, as mentioned, divided on the model of Justinian's sixth-century legal textbook, the *Institutes*, into sections on persons, things, and actions. Within these broad sections it is divided into tractates on specific subjects. The law of property is found in the same places in *Bracton* as it is in the *Institutes*, in the sections on things and actions. Within the law of things, *Bracton* contains a tractate on acquiring dominion over things, which mirrors a section of the *Institutes*.<sup>148</sup> This contains many of the doctrines of occupation, capture, and gift that have become staples of the common law of property.<sup>149</sup> Property also finds a prominent place in *Bracton*'s section on actions, which is divided into tractates on individual writs and procedural topics that cut across writs.<sup>150</sup> The *Institutes*'s section on actions contains quite a bit of that text's systematic discussion of property. It is even more prominent in *Bracton*'s section on actions, however, because all of the writs it discusses deal with landed wealth in one way or another.

These tractates show us that the authors of *Bracton* clearly knew of the tradition of equating *right* with *property* and *seisin* with *possession*, but they show a discomfort with the straight equation between the Roman and Anglo-French

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146. *Id.* at 216.

147. See 2 BRACTON, *supra* note 5, at 24. This passage is an allusion to a passage from Azo of Bologna's *Summa Codicis*. AZO, *supra* note 12, at 1047.

148. See 2 BRACTON, *supra* note 5, at 42-281; J. INST. 2.7-.25.

149. See 2 BRACTON, *supra* note 5, at 42, 44, 47-48.

150. See *id.* at 282.

terms that the *Glanvill* author had used.<sup>151</sup> The Bracton authors knew enough about Roman law and the practice of the English royal courts to see that this one-to-one equation would not work. Although writs that used the word *seisin* and writs that used the word *right* might be equivalent to Roman actions on the possession and the property to the limited extent that both systems used a double action, once the *Bracton* authors explored the substantive law of Roman possession and property more deeply, they found that reconciling the two systems would require a much more complex scheme. The Roman law the justices had learned dealt in absolute rights and abstract concepts. The procedures they administered in the courts dealt in concrete disputes between real people. In some cases the abstract theories of Roman law and the concrete practices of the English courts came to different conclusions. Both, however, had to be correct as far as the justices were concerned. They could not stray too far from the practices of the English courts, but Roman law was a universal law. The dilemma resembles the problems modern physicists have reconciling classical physics with quantum mechanics. The former works very well on the macro level; the latter works very well on the micro level. It has proved difficult to develop a unified theory that reconciles the two, however. The justices who wrote *Bracton* were trying to develop a unified theory of law. They maintained their investment in demonstrating equivalence between English and Roman law even as it must have become apparent to them that this would not work. In the process, they created several schemes for understanding landholding that fit possession and property together with *seisin* and *right* in increasingly contradictory and absurdly complex ways. We will now turn to three of those schemes.

#### A. *The Causae of Possession*

In the tractate on acquiring dominion over things, a section of the treatise that was probably written primarily by William of Raleigh sometime before 1236, Raleigh discusses a gift made by someone who has no right in the thing he is giving (i.e., what happens when William gives

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151. They refer to the assize of novel disseisin as a possessory interdict and distinguish it from a *vindicatio*, or writ of right, for instance. *Id.* at 294.

away land that actually belongs to Ranulf?).<sup>152</sup> As part of this discussion, he presents us with our first scheme for thinking about the relationship between the Roman law of property and English court practice. Raleigh tells us that, “A thing may be entirely and in every way another’s, with respect to the right and the property, the fee and the free tenement, the usufruct and the bare use.”<sup>153</sup> These six interests—right, property, fee, free tenement, usufruct, and bare use—add up to the greatest power one can have over a piece of land, since they make the land “entirely and in every way” (*omnino et ex toto*) the other person’s land.<sup>154</sup> It is a curious list, drawn from all three languages of landholding. *Right* (*ius* in this instance) was a term in use in all three languages. It could have come to the author through the writ of right, through Roman law, or through the vernacular, as a translation of *dreit*. *Property* is clearly a Roman law term. *Fee* and *free tenement* were in use in the Anglo-Norman vocabulary of landholding; they often appear in charters. The fact that Raleigh places them side-by-side and makes such a clear distinction between the two indicates that he was probably thinking more specifically of their use in two different writs, the assize of mort d’ancestor and the assize of novel disseisin. *Usufruct* and *bare use* (*nudum usus*) are again terms drawn from Roman law texts. Raleigh is combining three different ways of speaking about the relationship between human beings and land into one set of interests.<sup>155</sup> Somehow these six things connect a person to a piece of land, and when all are present, make it

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152. There are several references to the statute of Merton of 1236 in this tractate, but they appear to be later additions to bring the text up to date. One is placed in the middle of a long excerpt from *Glanvill* and another between two sentences that appear to have been consecutive at one point, indicating that the main text was written before 1236 and needed to be updated. See *id.* at 179, 276; 3 Thorne, *supra* note 8, at xiii.

153. 2 BRACTON, *supra* note 5, at 101.

154. *Id.* at 101.

155. This is not the only version of the list the authors give. See *id.* at 123 (“the right and the property, the fee and the free tenement and seisin”); *id.* at 127 (“[T]he [pure] right and the property, the fee and the free tenement and the usufruct.”). I have modified Thorne’s translation of “*merum ius*” from “mere right” to “pure right” because the meaning of the word *mere* has shifted since the thirteenth century from “pure” to “nothing more than.”

his “entirely and in every way.”<sup>156</sup> But how do they connect the person to the land? What are these interests?

Elsewhere in the tractate on acquiring dominion, Raleigh names them *causae possidendi*, “causes of (or reasons for) possession.” The terminology comes from the *Digest*.<sup>157</sup> He tells us that if A makes a gift of a piece of land to B, A may change B’s *causa possidendi* without making a new grant

as where, having first granted a usufruct for a term he may grant his tenant a free tenement, without livery [a ritual by which one person transferred seisin to another], by force of a new *causa*. If at first [it was] for a term of life and as a free tenement, he may change the *causa* to one in fee.<sup>158</sup>

Raleigh imagines the landholder to have possession or seisin of the land itself. The *causa* is the interest that legitimates his possession of the land for a particular purpose. Once the donor has been put in physical possession, the *causa* of that possession can be changed without the ritual formalities that usually accompanied land transfers because the possession itself has not changed hands.<sup>159</sup> The author does not treat the *causae* as abstract property rights that can themselves be possessed. He speaks of possession of the land under a *causa*, not possession of a *causa*.<sup>160</sup>

The *causae* are separable from each other and, in fact, different people may hold the land by each of the *causae* at the same time, as

one may have the right and the property and the fee in a free tenement and another the free tenement. One may have the fee and free tenement and another the [pure] right. One may have all these and another the usufruct. One may have all these and the use and another the fruits.<sup>161</sup>

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156. *Id.* at 101.

157. DIG. 41.2.3.19 (Paulus, Ad Edictum 54) (“*Illud quoque a veteribus praeceptum est neminem sibi ipsum causam possessionis mutare posse.*”).

158. 2 BRACTON, *supra* note 5, at 140 (modification in the original).

159. *See id.* at 138.

160. *See id.* (“Two possessions of the same thing are not repugnant to one another provided they arise from different *causae*.”).

161. 3 *Id.* at 132; *see also* 2 *id.* at 102 (“A thing may be in small part one’s own and in greater part another’s, as where one has a free tenement in a thing and

They are, therefore, not just greater or lesser versions of the same right to the land. Each one must have distinguishing features so that the holder of a free tenement in a piece of land, for example, holds something different from the person who holds the fee in that same land. The authors of the *Bracton* treatise give us hints as to what each of these *causae* mean, and they define them largely in terms of duration.<sup>162</sup> The bare use is difficult to untangle in the context of the treatise. The author of the lectures on the *Institutes* written in England around 1200 distinguished clearly between the bare use and the usufruct in terms of the rights to use and enjoy the land, but the authors of *Bracton* do not seem to have thought very deeply about the distinction between these two *causae*, often associating the two and even more often leaving the bare use off of the list altogether.<sup>163</sup> One passage divides the usufruct from uses which are “called bare” in that the person who holds a usufruct holds it for a certain term, such as a term of years, while the holder of a bare use can be ejected at any time.<sup>164</sup> The distinguishing feature of the bare use is thus that it has no fixed duration.<sup>165</sup> The owner can end it at any time. The distinguishing feature of the usufruct is the right to hold the land for a set term, a form of landholding that was common in England.<sup>166</sup> Terms were used for land pledged to creditors. Likewise, holding land in wardship could be described as a term of years by thirteenth-century authors;

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another the property and the fee, as where a doweress is in possession, or another holding for life by gift, or by the law of England, or until provision be made for him and the like.”).

162. This division according to duration bears similarity to the later system of Common law estates, which also divide up the bundle of rights in land according to their duration, a similarity that I will develop further in Part IV.

163. See TEACHING OF ROMAN LAW, *supra* note 12, at 35.

164. 2 BRACTON, *supra* note 5, at 102, 123.

165. The bare use seems to be similar to the modern tenancy at will or license.

166. See 2 BRACTON, *supra* note 5, at 101, 106, 140; 3 *id.* at 97, 161, 268, 273-75. The authors sometimes follow Roman jurists in defining the usufruct as the right to use (*usus*) and enjoy the fruits (*fructus*) of the land, as the Roman law texts do. *Id.* at 138; see also *id.* at 92 (“Indeed the farmer can vindicate nothing except the usufruct, namely that which he can use freely and take the fruits from without impediment from the feoffor.”) (I have modified Thorne’s translation) (“[F]irmarius vero nihil sibi vindicare poterit nisi usumfructum, scilicet quod libere uti posset et sine impedimento feoffati percipere fructum.”).

when a tenant died with a minor heir, his lord was entitled to hold the land, as guardian, until the heir attained majority.<sup>167</sup>

The authors define the free tenement as a longer *causa* than the usufruct: the free tenement is for life.<sup>168</sup> There were several ways in which a person might hold for life. A widow was entitled to one-third of the lands her husband had held in demesne for the remainder of her life. A widower was entitled to hold any land his wife had during the marriage “for life . . . by the law of England” if a child had been born to the couple, an arrangement that was later called curtesy.<sup>169</sup> Life holdings could also be used to manage the way land passed at a person’s death. We see many cases from the thirteenth century, often contested, where a landholder put someone else in seisin of his land, but reserved the land to himself for the rest of his life.<sup>170</sup>

The word *fee* could have two meanings, both of which appear in *Bracton*. In a general sense, a fee could simply be a piece of land, and the authors of the treatise use it in this way at times.<sup>171</sup> In a more specific sense, it was a piece of land that was heritable.<sup>172</sup> In the lists of *causae* it is used in this more specific sense: the fee was greater than the free tenement because, like the later fee simple, it did not end

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167. REYNOLDS, *supra* note 21, at 368-69.

168. The authors do define it, as one might expect, in terms of freedom: we are told that it is called *free* to distinguish it from villein, or unfree, tenure, which is not protected by the king’s courts. See 3 BRACTON, *supra* note 5, at 171.

169. 4 BRACTON, *supra* note 5, at 360; BAKER, *supra* note 107, at 271.

170. See, e.g., British National Archives MS JUST 1/1182, m. 4, THE ANGLO-AMERICAN LEGAL TRADITION, available at [http://aalt.law.uh.edu/AALT3/JUST1/JUST1no1182/aJUST1no1182fronts/IMG\\_0652.htm](http://aalt.law.uh.edu/AALT3/JUST1/JUST1no1182/aJUST1no1182fronts/IMG_0652.htm) (last visited June 21, 2012) (recording the case of the manor of Dulverton, heard by Henry de Bratton, where Richard of Turbervill attempted to disinherit his brother by putting someone else in seisin while remaining in control of the land for life); see also 2 BRACTON, *supra* note 5, at 107 (“If one [who] has both rights, property and possession, grants both to another, attaching this modus to his gift, that after a time the possession revert to him to be held for life . . .”).

171. Hyams, *supra* note 28; see also 3 BRACTON, *supra* note 5, at 275 (“Fee is also used in another sense, from the point of view of one who enfeoffs another, what one holds of another, as where one says ‘such a one holds so many fees of me by knight service.’”).

172. *Id.* at 274 (a fee is “what one holds . . . to his heirs”).

with the death of the holder.<sup>173</sup> The writs bear this out. The assize of mort d'ancestor gave an action to the nearest heir of the last person who had been "seised in . . . demesne as of fee."<sup>174</sup> Where the assize of novel disseisin, which was not concerned with heritability of land, used the words *free tenement* to describe the land, the assize of mort d'ancestor used the word *fee*. The authors draw the distinction between the heritable fee and the non-heritable free tenement throughout the treatise. For instance, the tractate on the assize of mort d'ancestor, which may bear the mark of both Raleigh and Bratton, tells us in another version of the *causae* that:

one may be seised of land or a rent in his demesne as of fee and as of free tenement, or only as of fee and not in demesne, or only as of a free tenement, in demesne but not in fee, as may be said of those who hold only for life in whatever way.<sup>175</sup>

In the first situation, where the landholder has both the fee and the free tenement, modern lawyers would say he has an estate that is presently possessory—i.e., he is presently in physical control—and also has the right to pass that estate to his heirs. In the second situation, where he has the fee, but not the free tenement, he has the right to pass his interest in the land to his heirs, but he does not have a presently possessory estate. Someone else has physical control of the estate for life. In the third, where he has the free tenement, but not the fee, he has present control of the land, but not the right to pass it to his heirs. Thus, the free tenement represents the presently possessory life estate, and the fee represents the heritable interest.

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173. The authors never say, however, that the fee is unlimited in time, as modern property scholarship describes the fee simple.

174. 3 BRACTON, *supra* note 5, at 249. Again, it only applied to the nearest heir if that heir was a child, brother, sister, nephew, or niece. *Id.*

175. *Id.* at 275. There are a few cues that point to authorship after 1236 for this tractate. There is a limitation date that did not come into effect until 1237 and a reference to the writ of cosinage, which William of Raleigh invented in the 1230s. *Id.* at 249-50. This does not necessarily mean that Henry de Bratton wrote the tractate; William of Raleigh spent some time in exile between 1243 and 1244, during a fight with the king over his election to an episcopal see, and this might have been an opportunity for him to work on the treatise. See 4 MATTHEW PARIS, CHRONICA MAJORA 263-64, 285 (Henry Richards Luard ed., 1872-1883). Generally speaking, though, the later a tractate was written, the more likely it is that the treatise had already been handed over to Bratton.

Raleigh is doing something rather extraordinary in the *causae* scheme. Where the *Glanvill* treatise used writs to create its organizational framework—sections of the treatise tend to focus on the procedures surrounding a particular writ—Raleigh is using *words*. Where the *Glanvill* author would focus on the assize of novel disseisin and the assize of mort d'ancestor, Raleigh is focusing his discussion on the meanings of the words *fee* and *free tenement*. So, for instance, where he could have said that the assize of novel disseisin was available to a doweress or a widower holding by curtesy, but not to a guardian or termor, Raleigh instead gives us the phrase *free tenement*, which is contained in the writ, and defines it as a life estate, which is what a doweress or widower holding by curtesy would have.<sup>176</sup> To say that the free tenement is held for life is equivalent to saying that the assize applies only to estates held for life or longer. It is the fact that the author discusses these matters using abstract concepts rather than concrete writs that is really interesting. In place of a discussion about whether a particular type of plaintiff might bring a particular writ, the author presents us with a system of different *causae* of possession, based on duration. He is thinking like the authors of the *Institutes*, who place things prior to actions, concepts prior to the procedures that put them into practice.

There is a real danger of oversystematizing the *Bracton* authors' writing on the *causae possidendi*. The authors are inconsistent in the content of the list of *causae* itself, sometimes leaving out terms and sometimes replacing them with others. Many of the lists we find in the treatise leave out the bare use.<sup>177</sup> Once we see the usufruct and the bare use replaced with *seisin*.<sup>178</sup> In addition to the inconsistency we see in the terms themselves, there is a great deal of inconsistency in the ways the authors use them. The usufruct seems to have caused them no end of trouble, for instance, as they tried to make this Roman term fit their experience from English practice.<sup>179</sup> And the authors are

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176. SUTHERLAND, *supra* note 39, at 13.

177. *See, e.g.*, 2 BRACTON, *supra* note 5, at 127.

178. *See id.* at 123.

179. In parts of the treatise, the authors say that the usufruct is for life. *See id.* at 101. This would, of course, gut the concept of the free tenement, making it indistinguishable from a usufruct. The authors are inconsistent in their treatment of the usufruct and the free tenement because Roman law conflicts

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with the writ system of the English courts. At Roman law a usufruct could be for a term of years or for life. See Miller, *supra* note 88, at 66. English court practice distinguished between the termor, who could not bring an assize of novel disseisin, and a life tenant, who could.

A passage in the tractate on exceptions, near the end of the treatise, presents the usufruct in a way that not only conflicts with Roman law, but also with the view of the usufruct presented in the *causae* scheme. The usufruct at Roman law was a right *in rem* that, as we have seen, included the rights to use the land and its fruits. See BERGER, *supra* note 87, at 755; Miller, *supra* note 88, at 42, 65-66. It differed from full *dominium*, however, in that it was a personal servitude; the grant was personal to the grantee and he had no right to transfer (*abusus*) it to another during his life or at death. See Miller, *supra* note 88, at 66-67. The *Bracton* authors were aware of the Roman doctrine that the usufruct was a servitude. They list it among servitudes in the beginning of the tractate on things, which borrows heavily from Justinian's *Institutes*. See 2 BRACTON, *supra* note 5, at 39. In this passage in the tractate on exceptions, however, one of the *Bracton* authors takes an approach to the usufruct that in some ways accords with and in some ways conflicts with that of the Roman jurists. To this author, the usufruct is a chattel, which leaves the "tenement...unchanged in character as a lay fee." 4 *Id.* at 268. The author was following the practice of the English courts, which treated a term of years as a chattel. In thirteenth-century England, the ecclesiastical courts had jurisdiction over wills. This meant that the Church had a great deal of power over how one's possessions passed at death. This power was not complete, however, because most land could not be passed by will and remained within the jurisdiction of the royal courts. The royal courts classed terms of years as chattels, subjecting them to the jurisdiction of the Church courts. This solution to an English problem accords with the Roman jurists' conception of the usufruct in part. The *Digest* says that the usufruct is "not a part of ownership" (*non domini pars*), a phrase which the *Bracton* authors actually quote in part of the treatise. This fits together well with the idea that the usufruct is a chattel and does not change the nature of the tenement. See 3 *Id.* at 162; DIG.50.16.25 (Paulus, Edict 21). But the author's purpose in calling the usufruct a chattel—allowing the holder of the usufruct to pass it by will at death—runs precisely counter to the Roman conception of what a usufruct is. The usufructuary at Roman law had no right to alienate the usufruct, which was extinguished at his death and therefore could not pass by will. See Miller, *supra* note 88, at 67.

In addition to conflicting with the Roman law of the usufruct, this passage conflicts with the *causae* of possession scheme. How could the usufruct be a chattel and a *causa* at the same time? The authors treat the *causae* as if they are reasons for possessing a thing, not things in and of themselves. This is a clear case where the authors' attempt to systematize the practice of the English courts into an internally consistent law using Roman law as their model falls down. In order to make the usufruct accord with court practice, the authors needed to live with a certain degree of dissonance. The treatise was probably never fully edited by the original authors, though, and it is possible that they never noticed the dissonance.

least consistent when they discuss the right and the property. Where the terms *usufruct*, *free tenement*, and *fee* are fairly stable, appearing in most of the versions of the list we find in the treatise, the terms at the top of the list change regularly. In one version of the list, they become the “pure right and the *proprietas*.”<sup>180</sup> In another, they are called the “*dominium* and *proprietas*,” two Roman law terms that were synonyms, not separate interests, in mainstream interpretations of Roman law.<sup>181</sup> Even stranger is the fact that *dominium* plays a different role immediately before this passage. On what would be the same folio in most manuscripts, the author, probably Raleigh here, tells us that the *dominium* of an estate is composed of “the pure right and the property, the fee and the free tenement and the usufruct.”<sup>182</sup> In this list, property is a part of *dominium*. In the other, they are separate *causae*. In Roman law, they were synonyms.<sup>183</sup>

Why did these higher interests cause so much trouble? The authors of the treatise seem to have been unsure what was left over when the term of years (usufruct), the life estate (free tenement), and the heritability (fee) were taken out and granted to another person. What can be longer than a heritable estate that lasts forever? Perhaps the lord's right to take the estate by escheat when the landholder's heirs run out. This should just be another fee, however, according to the authors' classification. The authors define the *causae* in terms of time rather than enjoyment of the land. So when the fee and the free tenement are separated, as when a widow holds the land in dower for life, as a free

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180. 2 BRACTON, *supra* note 5, at 127 (my translation) (“merum ius et proprietatem”).

181. *Id.* at 128.

182. *Id.* at 127 (I have modified Thorne's translation) (“merum ius et proprietatem, feodum et liberum tenementum, et usumfructum”).

183. *Dominium* could mean two things to an English justice with Roman law training. On the one hand, it could be a synonym for *proprietas*. On the other hand, it was the Latin translation for *demesne*, the land which the person at issue held and worked personally (or by unfree tenants, who did not count in the eyes of the law), rather than holding through a free tenant. Perhaps it means *demesne* here, since one who had held by all of these *causae* would, by definition, be working the land himself. One could hold in demesne without having the fee, the property, or the right, however. A woman holding in dower would hold only a free tenement, but could be said to hold in demesne.

tenement, and the previous holder's heir holds the heritable estate, as a fee, the fee is not a possessory estate, but merely what modern property law would call a reversion. How do we differentiate the *causae* greater than the fee: the right, property, pure right, or dominium? The authors do not provide us with an answer.

### B. *The Two Rights*

Where the *Glanvill* author had treated *right* and *property* as synonyms, the authors of the *causae* of possession scheme in *Bracton* imagined them to be separate, if ill-defined, *causae*. Other parts of the treatise present us with a view of the relationship between *right*, *property*, and *possession* that contradicts both of these views, however. Near the beginning of the treatise, an author, probably Raleigh, presents us with two kinds of right:

For there is a right of possession (*ius possessionis*) and a right of property (*ius proprietatis*): the right of possession, as of fee, where the assise of mort d'ancestor is applicable; and as of free tenement, as where one holds only for life, no matter in what way. The right of property is termed the pure right. Thus one may well have both. The right of property may sometimes be separated from the right of possession, for immediately after the death of his ancestor the property descends to the nearer heir, whether he is a minor or of full age, a male or a female, a madman or a fool, as an idiot, one who is deaf and dumb, present or absent, ignorant of the matter or apprised of it. Possession, however, is not at once acquired by such persons, though possession and the right of possession ought always to follow the property.<sup>184</sup>

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184. *Id.* at 24 (I have modified Thorne's translation) ("Quia est ius proprietatis et ius possessionis. Item ius possessionis sicut feodum, et unde locum habet assisa mortis antecessoris. Item ius possessionis sicut liberum tenementum, si quis tenuerit tantum ad vitam quacumque ratione. Item ius proprietatis quod dicitur ius merum. Et unde poterit quis habere utrumque. Et dividi poterit quandoque ius proprietatis a iure possessionis. Quia proprietas statim post mortem antecessoris descendit heredi propinquiori, minori et maiori, masculo et feminae, furioso et stulto sicut fatuo, surdo et muto, praesenti et absenti, et ignorantia sicut scienti. Sed tamen non statim adquiritur talibus possessio, licet possessio et ius possessionis semper sequi debeat proprietatem."). Thorne calls these two rights *possessory right* and *proprietary right*, but in the Latin, *possessionis* and *proprietatis* are genitive nouns, not adjectives. This passage is found in a section of the treatise most likely written by Raleigh. It appears in an

In this passage, Raleigh bifurcates the concept of *right* into a right of possession and a right of property. In doing so, he follows the earlier treatises to an extent. Like *Glanvill*, he uses the binary of pleas of possession and pleas of property, and places the assizes of novel disseisin and mort d'ancestor on the side of possession. Unlike *Glanvill*, he does not equate *possession* with *seisin* and *property* with *right*. In this scheme, both writs of possession and writs of property implicate right.<sup>185</sup> Raleigh may not follow *Glanvill*, but he follows the Roman law of possession and property very closely. The right of property descends automatically to the heir at death because taking property requires no act or intention. The right of possession, however, does not pass automatically because, at Roman law, one had to take possession both *corpore* and *animo*, by body and by mind. Raleigh lists several classes of people who would be unable to take possession *animo* because they lacked the mental capacity to do so. Raleigh is making another valiant effort to work the writs he administered in the courts into the frame of Roman property law.

This scheme of the two rights conflicts with the *causae* scheme in some significant respects, however. If we look at the list that gives the *causae* as “the right and the property,

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*addicio*, one of the later additions to the text, which could indicate that Bratton, not Raleigh, wrote it. Even if these words were written by Bratton, however, the idea of separating right into a right of possession and a right of property must have come from Raleigh originally, since it appears throughout the treatise, and in parts that Raleigh is almost certain to have written. A notable example occurs in the tractate on acquiring dominion over things, very close to two passages that are updated to reflect the statute of Merton of 1236, indicating that the primary text was written before that date. *See id.* at 189.

185. It is, of course, possible that Raleigh is using the word *right* (*ius*) in a different sense here than the the *Glanvill* author does. *Ius* was a word that could have many meanings. The *Glanvill* author imported the term from the grand assize, which asked who had the “greater right” (*maius ius*). *Glanvill* used the word to mean that which is decided by the writ of right, a concept which could also be expressed by the word *rectum*. But *ius* was also used in a general way in Roman law texts to mean any right. In the *causae* of possession scheme and in the “quantum of right” scheme, which we will examine next, Bratton and Raleigh appear to use the word *ius* in the same way the writ of right and the *Glanvill* author used it. Shortly after the section quoted above, Raleigh tells us that when the right of property is split, one person will have the “greater right” (*maius ius*), language drawn directly from the grand assize, indicating that he was thinking about the grand assize when he wrote the text that contains the two rights scheme. *See id.* at 25.

the fee and the free tenement, the usufruct and the bare use” we can see that it does not sit neatly with a bifurcated scheme that separates right into a right of possession and a right of property.<sup>186</sup> In the *causae*, right and property are often listed as two separate *causae*, two separate reasons for possessing the land. Possession is what the landholder has, and right or property is his reason for having it, a reason which also determines the temporal scope of the landholding (whether it is hereditary, for life, for a term, etc.). In the *causae* scheme, right and property are comparable terms, both *causae*. Possession is not a *causa* and is not comparable to these two other terms. In the scheme of the two rights, it is possession and property that are the comparable terms. They are two attributes a right may have. So the words *right*, *possession*, and *property* play very different roles in these two schemes.

The *Causae* of Possession

<b>RIGHT</b>	<b>POSSESSION</b>
<b>PROPERTY</b>	
Fee	
Free Tenement	
Usufruct	
Bare Use	

## The Two Rights

Writ of Right	<b>PROPERTY</b>	<b>RIGHT</b>
Fee/ Mort d’an.	<b>POSSESSION</b>	
Free ten/ Nov. dis.		

The two schemes also differ greatly in their treatment of the substantive law of possession. In the *causae possidendi*, possession is a fact. The list of *causae* is a list of underlying interests that make that possession legitimate. They are abstract rights in the land that allow that land to be possessed in a certain way. In the bifurcated right scheme, the word *possession* is doing very different work. I discussed earlier possession’s tendency to become an

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186. *Id.* at 101.

abstract right.<sup>187</sup> That is what has happened here. It has become a *right of possession*, a lesser right than the right of property. Gone is the *Digest's* insistence, repeated elsewhere in the *Bracton* treatise, that possession and property have nothing in common.<sup>188</sup> Here they exist on the same continuum.

### C. *A Quantum of Right*

In the two-rights scheme, Raleigh associated the writ of right, the assize of mort d'ancestor, and the assize of novel disseisin with the concept of right, despite the fact that *Glanvill* associated only the writ of right with right and associated the two lower writs, mort d'ancestor and novel disseisin, with seisin.<sup>189</sup> The idea that right exists even in some of the writs at the lower end of the scale is central to the third scheme we will examine, the "quantum of right" scheme. In the tractate on acquiring dominion over things, very close to several of the accounts of the *causae possidendi* we have already seen, one of the authors, probably Raleigh again, presents us with the following scheme:

[1] There is possession which has nothing of right but something of possession, as where one is in possession by intrusion. [2] There is another kind that has something of possession but nothing of right, as where one is in possession as guardian or creditor and the like. [3] There is another that has much of possession [but] little of right, as the possession of an ancestor, [recovered] in a possessory action, where another has the pure right and the ancestor the fee and free tenement. [4] And another that has a great deal of possession and something of right, where it is changed into a proprietary *causa*, as where one holds for a term of life or years. [5] There is also possession that has much of possession and much of right, as where in some thing one has the pure right and the property, the fee and the free tenement with seisin.<sup>190</sup>

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187. See *supra* Part I.C.

188. See, e.g., 2 BRACTON, *supra* note 5, at 321; 3 *id.* at 325.

189. See *supra* Part II.

190. 2 BRACTON, *supra* note 5, at 122-23. I have modified the translation slightly from Thorne's. For situation 3, Thorne has a "good deal of possession" but the Latin is "*multum . . . possessionis*," the same phrase he translates as "much of possession" for situation 5. There is a second version

Raleigh places various types of land arrangements on a continuum based on how much possession and how much right each one contains. Right increases fairly steadily from 1 to 5. Possession generally increases as right increases, but this is not universally so. Situations 1 and 2 have something of possession, 3 has much of possession, 4 has a great deal of possession, and 5 reverts to much of possession. So, possession and right appear to be independent of each other.

In one way, this list fits with the *causae* of possession very well. Apart from number 5, these are marginal cases, where the holder of the land holds by one *causa*, but not by another. In number 3, for instance, Raleigh has imagined a case where the possessor holds by fee, but not by right. Raleigh is thus finding ways to separate and distinguish categories of landholding. In other ways, however, the quantum of right conflicts directly with the *causae* and the two-rights schemes. In the *causae* of possession, right and property were comparable terms, of the same order. In the two-rights scheme, possession and property were comparable. In the quantum of right scheme, possession and right are the comparable terms. The author is taking the Roman binary between possession and property, which the author of *Glanvill* applied to the Anglo-French terms *seisin* and *right*, and hybridizing it into a binary between possession and right. This was not altogether new. The author of the *Très Ancien Coutumier de Normandie*, written in parts over the course of the thirteenth century, had used the same distinction, as had William of Raleigh in a 1231 case recorded on his roll.<sup>191</sup> David Seipp has shown that the possession-right dichotomy was also used in the law reports of the late thirteenth century to describe writs.<sup>192</sup>

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of the quantum of right scheme in the treatise, in the introduction to the section of the treatise on civil actions. This version has six tiers. 3 *Id.* at 13.

191. See 1 COUTUMIERS DE NORMANDIE 23, 279-80 (Ernest-Joseph Tardif ed., 1881-1896); 2 BRACON'S NOTE BOOK 437 (F.W. Maitland ed., 1887) ("[T]o be lord and heir pertains to right and not to possession . . .") (my translation) ("*[E]sse dominum et heredem spectat ad ius et non ad possessionem . . .*").

192. Seipp has shown that in the year books, the possession-right dichotomy was used in two, inconsistent, ways. See Seipp, *supra* note 131, at 9-26. First, it was used to create two, entirely separate categories of writs. *Id.* All writs of possession had something in common with each other, and all writs of right had something in common with each other, but never the twain shall meet. *Id.* at 22.

The author's patterns of thought about this binary are primarily Anglo-French. Possession and property, in conventional interpretations of Roman law circulating in Northern Europe, did not come in amounts. One could not have greater property than another.<sup>193</sup> One could have greater right, however: the jurors in a grand assize were asked precisely who has the "greater right" in a piece of land.<sup>194</sup> Although it would describe Roman law actions poorly, the quantum of right scheme actually describes English writs rather well because it does not require a binary classification. A writ like *mort d'ancestor*, which is higher in the hierarchy of writs than the *novel disseisin*, but lower than the writ of right, can be both a writ of possession and a writ of right. Situation three describes an assize of *mort d'ancestor*, or another writ of the *mort d'ancestor* family, which has "much of possession" and also a "little of right."<sup>195</sup> So the assize of *mort d'ancestor* is primarily possessory, but also has some of the aspects of an action on right or property.

The quantum of right scheme causes at least as many problems as it solves, however. Situation 4, where the possessory *causa* turns into a proprietary one, shows some

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Second, it was used to describe writs in a relational way. *Id.* at 25. By *Glanvill's* time, the courts had established a rule that there was a hierarchy of writs and, if one sued on a higher writ, he was barred from bring the same case on any writ beneath it in the hierarchy. *Id.* One could, however, bring his suit on a lower writ, lose, and bring the case again on a higher writ. *Id.* When faced with issues of whether the plaintiff was precluded from bringing his case, the lawyers of the late thirteenth century would use the possession-right binary, but in a relative way. *Id.* Thus, the lower writ was always denominated a writ of possession and the higher a writ of right. *Id.* Thus, when a person had sued on a writ of entry and later sued on a writ of right, the writ of right would be unsurprisingly, denominated a writ on the right and the writ of entry a writ on the possession, because it is lower. *Id.* at 25-26. But if the plaintiff had sued on a writ of *mort d'ancestor* and later wanted to sue on a writ of entry, the writ of entry would be denominated a writ on the right, because, of the two writs, it is the higher in the hierarchy. *Id.* Whether a writ was on the possession or the right was thus situational, based on the writ it was being compared to. *Id.* at 26.

193. Miller, *supra* note 88, at 45 ("[O]wnership is a distinct paramount right rather than a mere label attaching to the most compelling of two or more competing claims to a thing.").

194. See EARLY REGISTERS, *supra* note 38, at 6.

195. See 2 BRACON, *supra* note 5, at 122 (I have modified Thorne's translation) ("Est et alia quæ multum habet possessionis et parum iuris . . .").

of the contradictions inherent in Raleigh's thinking.<sup>196</sup> Raleigh is thinking about *possession* in two different ways: he uses the possession/right distinction of the quantum of right scheme, but also the possession/property distinction of the two rights scheme. So, in this situation, the plaintiff's *causa*, here probably meaning a cause of action, "is changed to a proprietary *causa*."<sup>197</sup> This appears to be the two-rights scheme. The plaintiff's cause of action, or his writ, has crossed the line from a possessory writ to a proprietary writ. He clearly thinks that one may have more or less of possession and right when thinking in terms of the quantum of right scheme, since he says this person has a great deal of possession and something of right. In the two-rights scheme, there are no amounts of possession and property. An action is *either* possessory *or* proprietary. And yet an action that has crossed the line from possession to property still has "a great deal of possession" and, strangely, only "something of right."<sup>198</sup>

Indeed, in this passage, Raleigh combines all three of the schemes. In situation 5, which is greatest of the five in right and property, he combines the quantum of right scheme with the *causae possidendi* scheme.<sup>199</sup> A person in this situation holds the land under all of the *causae possidendi* except, perhaps, the usufruct and bare use: "the [pure] right and the property, the fee and the free tenement with seisin."<sup>200</sup> This sounds like absolute ownership, since the person has pure right and property in the land, but even this is only said to have "much of" right and "much of" possession.<sup>201</sup> The author, in combining these schemes, uses the word *right* in two different ways. It is part of his hybrid binary of possession and right, but it is also a *causa possidendi*. One who has the purest right one can have has "much right" in the land. In the *causae possidendi* scheme, right is something one has or does not and, in this case, represents the highest and purest type of interest one can have in land. In the two-rights scheme, right is bifurcated,

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196. *Id.* at 123.

197. *Id.* (I have modified Thorne's translation) ("vertitur causa proprietatis").

198. *Id.*

199. *Id.* at 122-23.

200. *Id.*

201. *Id.*

but it is still something one has or does not. In the quantum of right scheme, it is something one can have more or less of.

#### IV. UNTANGLING THE THREE LANGUAGES

##### A. *An Absolute Right?*

The problem the authors had in all three schemes with *right*, *pure right*, *property*, and *dominium* stems from a fundamental difference between English and Roman ways of thinking about the relationship between people and land. The authors clearly knew that Roman property was an absolute concept, an *in rem* right good against the world. In theory, they could imagine something like that. There was an absolute right to land that only God could judge. They use terms in the treatise that suggest that they wanted their law to have such a pure and absolute right to land. The language of pure right and the idea that all of the *causae* together add up to *dominium* both suggest an absolute right, as does the concept of the “true owner” or “true lord” (*verus dominus*), which appears in practically every tractate of the treatise.<sup>202</sup> We even see a double right, when the right of possession and the right of property are combined, which the authors call *dreit dreit* (literally, “right right”), which appears to be a Bractonian invention, absent from the English court lexicon before the treatise.<sup>203</sup>

Even if they could imagine a pure, absolute right *in rem* in their vernacular discussions of right and in the Roman law of property, the theory that no human could judge this absolute right admitted no such possibility. In human courts, all rights were relative. The grand assize could only ever decide who had the “greater right.” Thus, we end up with a confused set of schemes that try to speak to both right’s relative nature and property’s absolute and final nature.<sup>204</sup> They all seem to contain some sort of vague notion that property and right are equivalent. The result is that

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202. *See id.* at 84, 86, 123, 127, 155, 157, 174, 230, 240-41; 3 *id.* at 23, 24, 27, 33, 51, 70, 84, 89, 91, 97, 128, 133-36.

203. 3 *Id.* at 325.

204. As Seipp observed, the two rights theory used “a Roman vocabulary to approximate an English notion of ‘relative’ ownership.” Seipp, *supra* note 131, at 13.

each takes on the attributes of the other. Property becomes relative and right becomes absolute. Immediately following the discussion of the two rights scheme we have examined, for instance, Raleigh tells us that “[t]he right of property can sometimes be separated from the right of possession.”<sup>205</sup> This leads Raleigh to give an example where the two rights are held by different people and actually descend to different people. A father dies leaving two sons.<sup>206</sup> The younger son puts himself in seisin upon his father’s death, in violation of his elder brother’s right, and then dies seised of the land.<sup>207</sup> Upon his death, the possessory right will actually descend to the son of this younger son, as his nearest heir.<sup>208</sup> Oddly enough, according to Raleigh, the younger son’s son also inherits “a certain right of property which should follow the principal property.”<sup>209</sup>

Two people have the same right of property in the same land. This was impossible in Roman law.<sup>210</sup> How could Raleigh resolve this? Echoing the words of the writ of right, Raleigh answers this question for the case of the two brothers: “The heirs of the first brother have a greater right than those of the second.”<sup>211</sup> One right of property is a better right of property than the other. It would seem that Henry de Bratton seconded this relative view of right and property.<sup>212</sup> Just as Raleigh imagines the two-rights scheme

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205. 2 BRACTON, *supra* note 5, at 24 (I have modified Thorne’s translation) (“Et dividi poterit quandoque ius proprietatis a iure possessionis.”).

206. *Id.* at 24-25.

207. *Id.*

208. *Id.*

209. *Id.* at 25 (I have modified Thorne’s translation) (“quoddam ius proprietatis . . . quod sequi deberet primam proprietatem”).

210. See DIG. 13.6.5.15 (Ulpian, Ad Edictum 28) (stating that two people cannot have *dominium* in the same thing *in solidum*); Thomas R fner, *The Roman Concept of Ownership and the Medieval Concept of Dominium Utile*, in THE CREATION OF THE IUS COMMUNE: FROM CASUS TO REGULA 131, 136 (John W. Cairns & Paul J. Du Plessis eds., 2010) (demonstrating that the rule against multiple ownership was adopted from Roman law into medieval canon law and caused some difficulty for medieval jurists trying to explain how it could fit with notions of lordship).

211. 2 BRACTON, *supra* note 5, at 25.

212. The following discussion appears in the introduction to the section on civil actions. 3 *Id.* at 13. I suspect Bratton wrote this introduction rather than Raleigh because it contains a reference to William of Drogheda’s *Summa Aurea*, which

as relative, Bratton imagines the quantum of possession scheme as relative. He runs through a list of six different types of interests one may have, according to the amount of possession and the amount of right that each one contains, and then tells us, "But though he has a maximum of possession and of right, nevertheless another may have a greater right in the same thing."<sup>213</sup> Finally, Raleigh imagines the *causae possidendi* scheme, the most absolute of all the schemes, as relative. According to a passage in the tractate on acquiring dominion, "[o]ne may have the [pure] right and the property, the fee and the free tenement [acquired] through some *justa causa* of acquisition and rightful title, and another have all these and the greater right, because of priority in time."<sup>214</sup> Once again, the writ of right's "greater right" makes it impossible for anyone to have a right that is good against all comers. In none of the three schemes is there a point where someone has an absolute right good against the world.

Roman law could simply not be made to fit with the language the authors found in their writs. Roman law had actions on the possession and actions on the property. It had an *in rem* property right, which decided ownership against all the world. The writ of right only decided who, among two people, had the greater right. Writs, documents that set procedures into motion, could not be easily reduced to the abstract concepts that characterized Roman law. The processes of the royal courts, defined by writs, were thus not susceptible to an easy systematization on the Roman model.

## B. *Time*

The idea of relativity of right came to the authors both from the vernacular and from the writs that followed the

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was probably not in circulation until 1239. See Richardson, *supra* note 71, at 23-26. This does not mean that this passage was not written by Raleigh, who might have still been working on the treatise in the 1240s, but it makes it more likely that the treatise had passed into Bratton's hands by the time this passage was written.

213. 3 BRACTON, *supra* note 5, at 13.

214. 2 *Id.* at 103 (I have modified Thorne's translation) ("Item poterit quis habere ius merum et proprietatem, feodum et liberum tenementum, ex aliqua iusta causa adquisicionis et ex iusto titulo, et alius haec omnia, sed maius ius propter temporis prioritatem.").

vernacular understanding of right. The second un-Roman aspect that we see in the treatise appears to have come from outside of the writ system altogether and thus to represent one way that the authors' vernacular understandings of landholding influenced the ways they thought about writs and Roman law. The authors of *Bracton* were obsessed with time. They took easily to the Roman law of prescription and usucapion and molded it to fit their own sense that right became stronger with time.

Maitland famously said in his chapter on ownership and possession in *The History of English Law Before the Time of Edward I* that the "most salient trait of our English land law" is that "[p]roprietary rights in land are . . . projected upon the plane of time. The category of quantity, of duration, is applied to them."<sup>215</sup> Maitland's pithy formulation of the estates in land has become a staple of the American first-year property curriculum.<sup>216</sup> Maitland's heavy reliance on *Bracton* for the legal doctrine of the thirteenth century is well known. Indeed, it might be more accurate to call the book *The History of English Law Before the Time of Edward I According to Bracton*. Even though he recognizes that there was, as yet, no doctrine of estates in land, he treats *Bracton's* obsession with time and duration as a sort of system of estates in the making, and also assumes that *Bracton* is representative of thirteenth-century law.<sup>217</sup>

The *Bracton* authors' obsession with time should have raised red flags for Maitland, however. *Bracton's* discussions of time diverge from and go far beyond those found in Roman law, to the extent that it seems unlikely that Roman influence was the driving force behind them. They also fit very poorly with the dominant historical model of English landholding at Maitland's time: feudalism. The history of landholding before the introduction of Henry II's procedural reforms has largely been written as a story of feudal relations. Under the feudal model, lordship is considered to be the nexus between people and land and landholding is defined by the relationship between lord and vassal. The lord was the true landowner and bought service

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215. 2 POLLOCK & MAITLAND, *supra* note 107, at 10.

216. See JESSE DUKEMINIER ET AL., PROPERTY 192 (7th ed. 2010).

217. 2 POLLOCK & MAITLAND, *supra* note 107, at 10-12.

with that land through the ceremonies of homage and fealty, after which the vassal became the lord's man (*homme*, hence *homage*), received land, and, in exchange, owed the lord service, often as a knight. The relationship through which people acquired access to land was thus a personal bond between two people and, according to this model, the vassal's access to land lasted exactly as long as that personal bond. Most scholars have seen the vassal in the pre-legalized, feudal world as, at most, a holder for life.<sup>218</sup> He might expect that his eldest son would succeed to his lands at his death, but his son had nothing like a legally enforceable inheritance right. In fact, S.F.C. Milsom has argued that the vassal had no right in the land at all, only an affective relationship with his lord, one result of which was temporary access to a piece of land.<sup>219</sup>

Since the 1970s, many scholars have broken away from this feudal model of landholding.<sup>220</sup> Susan Reynolds and John Hudson have argued persuasively that a person's right to hold his land in the early middle ages had very little to do with his lord.<sup>221</sup> Hudson analyzes charters recording land transfers by vassals. He concludes that, in cases of perpetual transfers by subinfeudation, even when the lord's permission was sought and included in the charter, there is no evidence that "the lord was seen at the time as the real or even the co-donor."<sup>222</sup> The vassal did not imagine himself as having a life estate or a mere affective relationship with his lord. He imagined that his land belonged to his family in perpetuity and could be alienated without the lord's permission, subject to "a norm, the strength of which varied

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218. See, e.g., S.F.C. MILSOM, *THE LEGAL FRAMEWORK OF ENGLISH FEUDALISM* 120-21 (1976); Samuel E. Thorne, *English Feudalism and Estates in Land*, 17 *CAMBRIDGE L.J.* 193, 205, 208-29 (1959).

219. See MILSOM, *supra* note 218, at 120-21.

220. See, e.g., HUDSON, *supra* note 26 at 205-07; REYNOLDS, *supra* note 21, at 388; STEPHEN D. WHITE, *CUSTOM, KINSHIP, AND GIFTS TO SAINTS: THE LAUDATIO PARENTUM IN WESTERN FRANCE, 1050-1150*, at 1-7 (1988); Elizabeth A.R. Brown, *The Tyranny of a Construct: Feudalism and Historians of Medieval Europe*, 79 *AM. HIST. REV.* 1063, 1063-67 (1974); Paul Hyams, *Homage and Feudalism: A Judicious Separation*, in *DIE GEGENWART DES FEUDALISMUS* 14, 14-48 (Natalie Fryde et al. eds., 2002).

221. HUDSON, *supra* note 26, at 205-07; REYNOLDS, *supra* note 21, at 388.

222. HUDSON, *supra* note 26, at 213.

with circumstances,” that the lord should be consulted.<sup>223</sup> The most important of those circumstances was the length of time the vassal’s family had been seised of the land. Vassals felt freer to alienate, without the lord’s permission, land they had inherited than land that had come as a direct grant from that lord.<sup>224</sup> *Bracton* bears this out. While the treatise does mention lordship in other contexts, it plays almost no role at all in the treatise’s discussions of one’s right to hold land.<sup>225</sup> The language of lordship does not impinge on the discussions of Roman property law or force the authors to twist Roman law to accord with it.

*Bracton* suggests, as Hudson’s charters do, that the actual nexus between people and land was not lordship, but time. Time was what allowed a person, or more often a lineage, to place its stamp of right upon the land. According to one author, “[s]ome possessions are short and tenuous, others long and fortified by time.”<sup>226</sup> Roman law did have a doctrine, or several doctrines, of time. Under the law of prescription and usucapion, a person who had no property right in a thing could establish one through long possession. This is another area where the authors of the treatise twisted the Roman law they found in their sources to suit their needs. The authors of the treatise, both Raleigh and Bracton, quote the sections of Azo’s *Summa Codicis* that discuss usucapion and prescription, so we know that they drew some of their Roman doctrine from that source.<sup>227</sup> But where Azo discusses usucapion, prescription after ten to twenty years, and prescription after thirty to forty years as three different categories of prescription, all of which require different legal analyses, the *Bracton* authors elide the three and use prescription, usucapion, and possession

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223. *Id.* at 215.

224. Vassals were more likely to record their heirs’ permission in charters alienating inherited land and their lord’s permission in charters alienating land acquired by direct grant from the lord. *See id.* at 209.

225. When the *Bracton* authors discuss the *dominus*, they almost always use the word in the Roman sense of *owner* rather than the medieval sense of *lord*. *See, e.g.*, 2 BRACTON, *supra* note 5, at 174 (using the phrase *dominus verus* to mean the *true owner*, who has the capacity to make a gift).

226. *Id.* at 123 (“Item possessionum quaedam brevis et tenera, et quaedam longa et tempore firmata.”).

227. *See id.* at 121.

for a long time as synonyms.<sup>228</sup> The authors' emphasis on the Roman law of prescription and usucapion goes far beyond the treatment it receives in the authors' Roman law sources.<sup>229</sup> It permeates every tractate. The authors of *Bracton* speak of acquiring right, property, or a free tenement through "long and peaceful possession" or "long and peaceful seisin," phrases undoubtedly modified from Justinian's "long and unchallenged possession," no less than fourteen times in the treatise.<sup>230</sup> As time passes, the fact that someone is holding land matures and strengthens into a right to hold that land; an "is" becomes an "ought." "Long and peaceful" landholding will mature into a right to remain on the land, no matter how it was acquired.<sup>231</sup>

The issues of relativity that we saw in the *causae possidendi* scheme also implicate time. Even the highest of the *causae*, those ones that the *Bracton* authors try to imagine as absolute in the Roman sense, are subject to the rule of priority in time. As we saw in one list of the *causae*, "One may have the [pure] right and the property, the fee and the free tenement [acquired] through some *justa causa* of acquisition and rightful title, and another have all these and the greater right, because of priority in time."<sup>232</sup> The one who is prior in time, who has held longest or whose family has held longest, wins.

Time is also the way the authors divide the various interests people may have in the same land. The *causae possidendi* describe not different ways of cutting up the use rights to a piece of land, but different ways of dividing it temporally: the usufruct is for a term, the free tenement is for life, and the fee continues beyond the life of the current holder. The authors have to twist Roman law here. The usufruct was not defined in terms of time in Roman law. It

228. AZO, *supra* note 12, at 731-51; 2 BRACTON, *supra* note 5 at 126, 156.

229. See AZO, *supra* note 12, at 731-39; J. INST. 2.6; TEACHING OF ROMAN LAW, *supra* note 12, at 37.

230. 2 BRACTON, *supra* note 5, at 102, 123, 126, 127, 142, 150; 3 *id.* at 247, 248, 320; J. INST. 2.6.7.

231. 2 BRACTON, *supra* note 5 at 123, 126, 127, 142, 150; 3 *id.* at 247, 248, 320.

232. 2 *id.* at 103 (second alteration in original) (I have substituted "pure right" for Thorne's "mere right") ("Item poterit quis habere ius merum et proprietatem, feodum et liberum tenementum, ex aliqua iusta causa acquisitionis et ex iusto titulo, et alius haec omnia, sed maius ius propter temporis prioritatem.").

was defined principally as the combination of two use rights, the right to use the thing and the right to enjoy its fruits.<sup>233</sup> At Roman law, its duration was a matter for its creator. He could create a usufruct to last either for a term or for the usufructuary's life.<sup>234</sup> For *Bracton*, the fact that it is for life is what defines the usufruct; use rights are not a natural way to divide up the land for the authors. The highest of the *causae*, the *right, property, pure right, or dominium* depending on the list, are, oddly enough, the most attenuated from any right to actually use the land. If each of the *causae* in a piece of land is really possessed by a different person, it is the lowest on the list who has present control and the right to use it, the people above him having what we would think of as future interests that take effect when his *causa* ends. The person with the highest interests, the interests called "pure" and "proprietary," have some sort of interest that is beyond the fee, beyond the right to inherit. These *causae*, which the author speaks of in the most absolute terms available to him, are defined as possessions fortified by the greatest amount of time and continuing for the greatest time in the future. They entail no present use rights, however.

This focus on time could potentially be explained by the writs that the *Bracton* authors, themselves judges, worked with in the royal courts. Writs contained limitation dates that precluded litigants from bringing cases that were too old. A writ of novel disseisin began, "[t]he king to the sheriff, greeting. A. de N. has complained to us that B., unjustly and without judgment, has disseised him of his free tenement in N. *after our last crossing from Ireland to England.*"<sup>235</sup> The king changed the limitation dates from time to time. The return of King John from Ireland to which the writ refers took place in 1210, and this limitation date came into force in 1218, meaning that, at the time, disseisins committed eight years ago or longer were no longer actionable by an assize of novel disseisin.<sup>236</sup> A justice could think of this in terms of A's free tenement being extinguished and B's very weak claim maturing into a free

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233. Miller, *supra* note 88, at 64-65.

234. *Id.* at 66-67.

235. EARLY REGISTERS, *supra* note 38, at 1.

236. *Id.* at xxxv-xxxvi.

tenement, although A still had the right in the land and could bring a writ of right. One contemporary Norman author did in fact read limitation dates this way.<sup>237</sup> The fact that the limitation periods were longer for the assize of mort d'ancestor and even longer for the writ of right could lead one to the conclusion that those interests, the fee and the right, required more time to mature.<sup>238</sup> But this reading of the limitation dates, where A's right is extinguished and B's matures, is not the *Bracton* authors' reading. The authors of *Bracton* never present limitation dates as if they extinguish A's right. One author, possibly Bratton, tells us that the writ of right "is limited in time" and "does not go back of the time of King Henry the grandfather of the lord king [i.e., before 1154]," but this most emphatically does not mean that a person who lost his land before 1154 has no right.<sup>239</sup>

The reason is because beyond that time one cannot prove anything, *though he has a right in the thing*, since no one can prove anything back of that time, since he cannot speak of his own sight, or of the sight of a father who enjoined his son to be a witness if he should hear it disputed. Hence if one should speak of the time of King Henry the elder *he could lose because of lack of proof*.<sup>240</sup>

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237. The author of the Norman text called the *Summa de Legibus in Curia Laicali*, which was written sometime in the middle of the thirteenth century, argues that the limitation date on the writ of right was meant to approximate the Roman prescriptive period of thirty years and that the date had been moved by Philip Augustus from the coronation of Henry I to the coronation of Richard I to better approximate the thirty-year period. Never mind that the limitation date was never moved again, and that, at the time of writing, as many as seventy years had passed since Richard I's coronation. 2 COUTUMIERS DE NORMANDIE, *supra* note 191, at 279-80.

238. EARLY REGISTERS, *supra* note 38, at xxxvi.

239. 4 BRACTON, *supra* note 5, at 170. This tractate, the tractate on defaults, contains a reference to "Ralph, bishop of Chichester and then chancellor." Ralph Neville, bishop of Chichester, was chancellor until 1238 and then again from 1242-1244. For this passage to have been written at a time when Neville had been, but was no longer, chancellor, it must have been written either between 1238 and 1242 or after 1244. *Id.* at 161. In either case, it was written in one of the later stages of work on the treatise, increasing the odds that it was written by Bratton. It also contains references to William of Drogheda's *Summa Aurea*, which was probably only available after 1239. *Id.* at 159; Richardson, *supra* note 71, at 23-26.

240. 4 BRACTON, *supra* note 5, at 170-71 (emphasis added).

Right is never extinguished. One may lose the means to recover it because he cannot prove his right to the satisfaction of the court, but the person whose family was ejected from the land before the limitation date still has the greater right than the person whose family ejected him. Likewise, while B can no longer be sued by A by a writ of right once the limitation date has changed, he does not actually acquire anything new. If C, who had no claim to the land against A or B, had ejected B at any point while B held the land, B could have sued him on a writ of right and won because B still had the greater right. B had a right that was protected by the writ of right the moment he ejected A from the land.

The fact that the *Bracton* authors read time into so many aspects of landholding in so many different ways leads me to believe that they were not extrapolating the element of time from the writs, but were rather reading the writs through the lens of a landholding culture that already saw time as the most important element in establishing right. We can see this in one passage on the writ of right, which comes immediately before the discussion of limitation dates above; the writ itself does not implicate time, but Bratton reads it as if it does. To Bratton, the reason why the plaintiff in a writ of right must produce a witness who can testify that the plaintiff's ancestor took esplees from the land—essentially meaning that he took some part of its produce—is that it shows that the ancestor was on the land for at least the minimal amount of time needed to take the esplees, and therefore had more than a momentary seisin.<sup>241</sup> It is highly unlikely that this was the actual reason for the rule that esplees must be mentioned in a writ of right. Rather, taking esplees is a way of making one's claim to the land visible. It shows that the claimant's ancestor was on the land as the landholder and not merely as a visitor or intruder.<sup>242</sup> But the author of this passage reads it as a requirement about time.

Thus, there is no sense in the treatise that limitation dates were the impetus for the authors to think about right becoming stronger over time. Nor could the Roman law of prescription be the impetus, because the authors had no

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241. *Id.* at 170.

242. See 2 POLLOCK & MAITLAND, *supra* note 107, at 34.

sense that titles could be extinguished as the Roman jurists did. This, rather, seems to be the authors' own background coming into their writing. They are reading their texts in light of an Anglo-French land culture that focused on time.

#### CONCLUSION

Property talk is so ingrained in both legal and lay discourse that it is easy to imagine that property is a neutral language that can be used to describe any relationship between people and things. The fact that *property* and *possession* are common to both common law and civil law probably does not hurt this assessment. We have seen, however, that the *Bracton* authors, part of the first generation of English justices to learn to speak the language of property, had a very difficult time conforming it to their own languages of the relationship between people and land. They had to twist contemporary understandings of Roman law in the attempt to reconcile it to the practices of the English courts and the understandings of the Francophone Anglo-Norman landed elite, which existed alongside each other as related and competing notions of the way people related to land. The result was not pretty. *Bracton's* discussion of property law is muddled and contradictory. It is the first time, however, that someone thought to try to work the procedures associated with royal writs into a system of property law.

The medieval English experience of trying to fit a non-property system of landholding into the mold of property has the potential to open up further lines of inquiry in property theory, lines of inquiry that I will follow in further research. After all, if the English, the progenitors of the common law, had so much trouble translating their landholding practices into the discourse of property, how useful is property talk for describing relations between people and things in non-Western cultures? Of course, words like *property* and *possession* mean something different to modern legal scholars than they did to Roman law-trained justices in the thirteenth century. To American lawyers, property does not imply an absolute right good against the world. To a lawyer trained in an American law school, property implies concepts like subjective rights and relative title and brings to mind metaphors like the famous bundle of sticks. But this modern conception of property is no more neutral than the Roman conception. In comparative law literature, we often assume that we can describe the

relations between people and things using the terms that are familiar to us from first-year property. We assure ourselves that, even if the locals would not talk about it quite in that way, their relation to the land can be imagined in terms of rights to exclude and rights to alienate. We can talk about Maori “property rights” before the British colonization as if the discourse of property is culturally neutral and can be applied across cultures.<sup>243</sup> Even when we recognize that property talk might be problematic—that it might be something of a cheat—it is difficult to escape. Richard Overstall has to place it in quotes in his *Encountering the Spirit of the Land: “Property” in a Kinship-Based Legal Order*.<sup>244</sup> In doing so, he recognizes that property might not be the most useful way to categorize the ways the First Nations of British Columbia spoke about their relationship to the land, but that he is unable to completely escape the category of property.<sup>245</sup>

The authors of the *Glanvill* and *Bracton* treatises were, in a sense, the common law’s first comparativists. They did not think of themselves in this way. Rather, they were working hard to show that there was nothing to compare; English court practice *was* Roman law. Their failure to demonstrate this in a consistent way shows us just how peculiar the language of property can be. The ways we talk about the relationship between people and things are not neutral and we should be careful not to mislead ourselves by applying them to situations where they are inappropriate, or we risk writing ourselves into the same complicated mess the *Bracton* authors found themselves in.

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243. STUART BANNER, *POSSESSING THE PACIFIC: LAND, SETTLERS, AND INDIGENOUS PEOPLE FROM AUSTRALIA TO ALASKA* 49 (2007).

244. Richard Overstall, *Encountering the Spirit in the Land: “Property” in a Kinship-Based Legal Order*, in *DESPOTIC DOMINION: PROPERTY RIGHTS IN BRITISH SETTLER SOCIETIES* 22 (John McLaren et al. eds., 2005).

245. *Id.* at 23.