2013

Between England and France: A Cross-Channel Legal Culture in the Late Thirteenth Century

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Repository Citation

McSweeney, Thomas J., "Between England and France: A Cross-Channel Legal Culture in the Late Thirteenth Century" (2013).
Faculty Publications. 1855.
<https://scholarship.law.wm.edu/facpubs/1855>

Law, Governance, and Justice

New Views on Medieval Constitutionalism

Edited by

Richard W. Kaeuper

With the assistance of

Paul Dingman and Peter Sposato

BRILL

LEIDEN • BOSTON
2013

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Library of Congress Cataloging-in-Publication Data

Law, governance, and justice : new views on medieval constitutionalism / edited by Richard W. Kaeuper with the assistance of Paul Dingman and Peter Sposato.

pages cm. — (Medieval law and its practice ; volume 14)

Includes index.

ISBN 978-90-04-23590-8 (hardback) — ISBN (invalid) 978-90-04-23642-4 (e-book)

1. Constitutional history—England—History—To 1500—Congresses. 2. Constitutional history, Medieval—Congresses. I. Kaeuper, Richard W., editor of compilation. II. Dingman, Paul, editor of compilation. III. Sposato, Peter, editor of compilation.

KD3941.L39 2013

342.4202'90902—dc23

2012043177

This publication has been typeset in the multilingual “Brill” typeface. With over 5,100 characters covering Latin, IPA, Greek, and Cyrillic, this typeface is especially suitable for use in the humanities. For more information, please see www.brill.com/brill-typeface.

ISSN 1873-8176

ISBN 978-90-04-23590-8 (hardback)

ISBN 978-90-04-23642-4 (e-book)

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BETWEEN ENGLAND AND FRANCE: A CROSS-CHANNEL LEGAL CULTURE IN THE LATE THIRTEENTH CENTURY

Thomas J. McSweeney¹

The relationship between England and Normandy underwent several dramatic changes in the century and a half between 1066, the Norman conquest of England, and 1204, the Capetian conquest of Normandy. While the Norman constitution of Henry I's reign saw England and Normandy as a single *regnum* with a single administration, the Angevin constitution saw them become two component parts of a much larger Angevin Empire. After 1204, England and Normandy were separated and a new Capetian constitution was put in place in Normandy, one in which old institutions were respected, but which replaced the personnel at higher levels of government with men from the French king's domains. In this paper I will explore one thing that remained the same through all of these changes. I will look at the culture of legal treatise-writing as evidence that England and Normandy shared a common way of talking and writing about law, which they did not share with the rest of France, across the divide of 1204. Indeed, while the structures of government diverged in England and Normandy after 1204, legal writing actually converged. The developments in legal writing that we see in English treatises decades after the Capetian conquest are mirrored in their Norman counterparts, suggesting that England and Normandy maintained contacts in the legal sphere for most of the thirteenth century. These legal treatises show us that, although separated politically, England and Normandy were part of a cross-Channel legal culture.

Let us start, as lawyers often do, with a case: William brought a writ of novel disseisin against Henry, claiming that Henry had physically ejected him from William's Devonshire estate. This writ followed the standard form of the writ of novel disseisin as it had developed in the royal chancery of the twelfth century. It said that Robert had, "unjustly and without

¹ I would like to thank Paul Hyams, Ada-Maria Kuskowski, Sarah Harlan-Haughey, Eliza Buhner, Melissa Winders, and the participants in the conference "Law, Justice, and Governance" for their comments on earlier versions of this paper.

judgment, disseised William of his free tenement."² This case arose in the fourth decade of the thirteenth century, when judges, and even a fledgling legal profession, were beginning to pay more attention to the precise wording of writs. Pleaders in this period thus had the option of parsing the writ: taking an exception to a specific word and claiming that this word did not accurately describe what happened in this case. This is precisely what Henry did. On the appointed day, Henry appeared in court and took exception to the word "disseised," claiming that he could not have disseised William, since William never had seisin of the land.³ Henry then made the very technical and sophisticated argument that while William could be said to be *in seisin* of the land, he could not be said to be *seised* of the land because he held the parcel in the name of another, namely Robert. William did indeed hold the land for a set term in exchange for rent paid to Robert.

Henry was a savvy pleader, and probably had the aid of a lawyer with some university training, because he was making a subtle distinction based on Roman law. Justinian's *Digest* quotes the jurist Ulpian as saying that "there is a great difference" between a person who *possesses* and a person who is merely *in possession*.⁴ The former actually has the rights of a possessor and can use the courts to regain his possession. The latter is denied the remedies open to a true possessor. When Henry distinguished between a person who is seised and a person who is in seisin he was equating the Anglo-French word *seisin* with the Roman legal term *possession* and applying the substance of the Roman law of possession to his English case. This was not a new thing in the 1230s. The author of the late twelfth-century treatise known as *Glanvill* had referred to the petty assizes—the writs of mort d'ancestor, novel disseisin, *utrum*, and darrein presentment—both as writs of seisin and as writs of possession at different points in his treatise.⁵ But where the *Glanvill* author only made a

² Elsa de Haas and G.D.G. Hall, eds., *Early Registers of Writs* (London: Bernard Quaritch, 1970), 83.

³ Henry de Bratton, attr., *Bracton on the Laws and Customs of England*, trans. and ed. Samuel E. Thorne (Cambridge, MA: Belknap Press, 1977), 3: 124.

⁴ "*Est autem longe diversum: aliud est enim possidere, longe aliud in possessione esse.*" D.41.2.10.1, Translation based on S.P. Scott, ed., *The Civil Law* (Cincinnati: Central Trust Company, 1932).

⁵ "Those pleas in which the claim is based on possession, and which are determined by recognitions, will be discussed later in their proper place." (*De illis autem que super possessione loquuntur et per recognitiones terminantur inferius suo loco dicetur*). Ranulph de Glanvill, attr., *The Treatise on the Laws and Customs of England Commonly Called Glanvill*, ed. G.D.G. Hall (London: Nelson, 1965), 4, book I: 4. "There remains for discussion those

brief suggestion that seisin and possession were equivalent terms, Henry actually imported Roman law substance to the law of seisin. Henry essentially claimed that William could not have been disseised because he had no seisin that the law was bound to protect, just as a Roman possessor in William's shoes would not have the protection of a Roman-law interdict.

There is only one problem with this case: it is entirely fictional. There was no William, no Henry, no Robert and no claim in any English court that a person who is seised is different from a person who is in seisin. Indeed, to my knowledge, no case exists either in the plea rolls or the law reports in which one party makes such a distinction.⁶ But the hypothetical case of William, Henry, and Robert is not entirely without precedent in the legal writing of the thirteenth century. Indeed, I did little more than give narrative form to a legal argument developed by an author writing in the 1220s and 1230s. This argument about the nature of seisin, that being seised and being in seisin are two very different things, comes from the treatise *On the Laws and Customs of England*—commonly called *Bracton*—the work of several authors writing between about 1220 and 1260.⁷ *Bracton* tells us that an alleged disseisor may take exception to the words

[pleas] which concern seisin only. By virtue of a constitution of the realm called an assize, these questions are for the most part settled by recognition . . ." (*Nunc vero ea que super saisinis solummodo usitata sunt restant prosequenda. Que quia ex beneficio constitutionis regni que assisa nominator in maiore parte transigi solent per recognitionem . . .*) Ibid. 148, book XIII: 1.

⁶ A few cases exist on the plea rolls of the 1220s and 1230s that use the terms *possessio* and *proprietas*. Frederick Pollock and Frederick William Maitland, *The History of English Law Before the time of Edward I*, 2nd ed. (Cambridge: Cambridge University Press, 1899), 2: 31–2, 110, n. 2. In a case of 1224, the writ of right was said to be "*super proprietate*" and the writ of mort d'ancestor "*super possessione*." Frederick William Maitland, *Bracton's Note Book* (London: C.J. Clay, 1887), 2: 193. In a 1231 case, the writ of mort d'ancestor is said to be a writ of possession. Ibid. 437; Cyril Flower, ed., *Curia Regis Rolls of the Reign of Henry III*, vol. 14, 14 to 17 Henry III (1230–1232) (London: Her Majesty's Stationary Office, 1961), 314, no. 1474. These cases come from the rolls of Martin of Pateshull and William of Raleigh, who are the two justices most cited in the *Bracton* treatise. They were probably part of the Roman-inspired circle of justices who wrote the treatise. In fact, William of Raleigh is the most likely candidate for the first author of the treatise.

⁷ The royal justice Henry de Bratton, to whom the treatise was being attributed as early as the 1270s, almost certainly worked on the treatise but, as Samuel Thorne has shown, could not have written the majority of the text, much of which must have been written in the 1220s and 1230s, before Bratton had begun his career as a clerk in the king's courts. It is more likely that William of Raleigh, clerk to Martin of Pateshull, C.J., and later chief justice himself, was the author. Bratton had close connections to Raleigh, and was probably his clerk. Although Bratton was just one of the authors who worked on the treatise, I will, for the purposes of this article, refer to the text as *Bracton* for clarity's sake; *Bracton's* title in most of the manuscripts is *De Legibus et Consuetudinibus Anglicanis*, while *Glanvill* is often titled the *Tractatus de Legibus et Consuetudinibus Regni Anglie* and the Norman text I will

"he disseised him" in the writ of novel disseisin on the ground that the plaintiff was merely *in seisin*, because, "to be in seisin is very different from being seised, just as it is very different to be in possession and to possess," borrowing Ulpian's words from the *Digest* and replacing *possessio* with *saisina*.⁸

The constitutional implications of *Bracton* have been explored extensively, not least in a series of articles and chapters discussing the treatise's potentially conflicting statements about the king's relationship to the law. The *Bracton* authors' view that the king is both beholden to the law and unrestrained by the law (*legibus solutus*) has puzzled historians looking for English constitutional principle in these Roman-inspired passages.⁹ These passages are the most studied parts of the treatise because they are the most obviously concerned with constitutional questions. They fill only a few pages, though, out of the 1188 in the modern printed edition of *Bracton*. This article will treat another constitutional implication of *Bracton*, one that pervades the whole of the treatise. While the *Bracton* authors' writing on kingship may or may not be evidence of a developed constitutional theory, the fact that the treatise was written at all, and that it was written in the same style as a text which was being written in Normandy at the same time, tells us something about the relationship between England and Normandy. Many decades after the Capetian conquest of Normandy, England and Normandy shared in a cross-Channel legal culture. We can catch a glimpse of this legal culture in the middle decades of the thirteenth century through the legal treatises being written on both sides of the Channel: England and Normandy shared a legal genre, the Latin

be discussing is titled the *Summa de Legibus in Curia Laicali*. The similarity between their contemporary titles would only serve to confuse the reader.

The project of analyzing Bracton is complicated by the fact that the text had at least two authors, and possibly more, whose work is difficult to separate. I will therefore refer to the Bracton authors, rather than the Bracton author, throughout.

⁸ Bracton, *Laws and Customs of England*, 3: 124.

⁹ See, e.g., Hermann Kantorowicz, *Bractonian Problems* (Glasgow: Jackson, Son & Co., 1941), 49; Gaillard Lapsley, "Bracton and the Authorship of the 'Addicio de Cartis,'" *English Historical Review* 62, no. 242 (1947): 1-19; Charles M. Radding, "the Origins of Bracton's Addicio de Cartis," *Speculum* 44, No. 2 (Apr., 1969), pp. 239-246; Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton, Princeton University Press, 1957), 143-192; S.J.T. Miller, "The Position of the King on Bracton and Beaumanoir," *Speculum* 31, No. 2 (Apr., 1956): 263-296; Fritz Schulz, "Bracton on Kingship," *English Historical Review* 60, No. 237 (1945): 136-176; Brian Tierney, "Bracton on Government," *Speculum* 38, No. 2 (1963): 295-317; Ewart Lewis, "King Above Law? 'Quod Principi Placuit' in Bracton," *Speculum* 39, No. 2 (1964): 240-269.

summa, as a way of writing about law. Although legal texts, which later generations of lawyers termed *coutumiers*, were being written in Capetian France at around the same time, they are very different in form from *Bracton* or its Norman counterparts. They were written in French and make no claims to be *summae* equivalent to the texts of Roman and Canon law. The authors of the Norman and English *summae*, on the other hand, shared many concerns in common. On both sides of the Channel, legal writers were engaging in a shared discourse about how the Roman law of property related to the Anglo-Norman writs that concerned land, and they were reaching some of the same conclusions, conclusions that their counterparts in Paris, Anjou, and Orleans were not reaching. Thus, despite Normandy's incorporation into the Capetian kingdom, England and Normandy shared in a unique, cross-Channel legal culture long into the thirteenth century.

Property before Property

Over the course of the thirteenth century, a transformation took place in the way English and Norman jurists thought and wrote about the relationship between people and things. We call this relationship "the law of property" today because of the shift in the thirteenth century towards using the Roman law term *proprietas* (which can be rendered in English as *property* or *ownership*) to describe it. In the hypothetical case of William and Henry, we saw one aspect of this transformation, the equation of the Anglo-French term *seisin* with the Roman term *possessio*. Between the middle of the twelfth and the middle of the thirteenth centuries, legal writers in England Romanized their language. In 1100, English and Norman landholders would have spoken of being "seised" of land or of having an ancestor who was "seised as of right." By the end of the twelfth century, we see treatise authors on both sides of the Channel using the terms *possessio* and *proprietas*, two types of interests a person can have in a piece of land at Roman law, as synonyms for the Anglo-French *seisin* (Fr. *seisine*, *saisine* Lat. *saisina*) and right (Fr. *dreit*, Lat. *ius*, *rectum*). Finally, by the middle of the thirteenth century, well after England and Normandy had been separated by the Capetian conquest of 1204, we see authors on both sides of the Channel trying very hard to turn *seisin* and right into possession and property by importing Roman law substance into discussion of the Anglo-French terms, even when the vernacular and Roman concepts proved impossible to reconcile. That English and Norman authors were

invested in reconciling Roman and local law—in a way that authors in other parts of the French king's domain were not—across the divide of 1204 is strong evidence that there was still contact between Angevin England and Capetian Normandy.

This progression from seisin and right to possession and property was certainly not a natural progression; treatise-writers had a difficult time making seisin and right into possession and property. In order to understand why the Anglo-French and Roman terms were so difficult to reconcile with each other, and why it took a committed jurist to attempt to reconcile them, we must first understand what Anglo-French terms like *seisin* and *right* meant to the English and Normans before they were transformed into Roman *possession* and *property*. But it is difficult for us to imagine the range of meanings the words *seisin* and *right* could bear in the minds of Anglo-French landholders, judges, and lawyers, or even to explain them in modern terms, because our own language has been so thoroughly Romanized. If Roman property language “provide[s] a kind of DNA of legal ownership, the intellectual structure within which most later legal thought has developed,” it was the jurists of thirteenth-century England and Normandy, the people who wrote *Bracton* and the Norman *Summa de Legibus*, who were the genetic engineers.¹⁰ It is thus no great surprise that historians and legal scholars still read *Bracton* for knowledge of law in the thirteenth century. The *Bracton* authors and their Norman counterparts essentially invented the Romanized language of English law that we speak today. The ways we express, through language, how people relate to things have been structured by these authors. We can understand their writings because we speak the language they invented for us.

It is much more difficult to describe what people thought before Roman property law came to structure thinking about the relationship between people and things. How does one describe seisin and right without using the word *property*? This word is so fundamental to the way we think about our relationship to things that we tend to imagine that it is a natural part of human existence. But property—in the sense that we use it today—is a very particular and artificial way of thinking about how people relate to things, and might have been as difficult for a twelfth-century English or French lord to understand as seisin and right are for us to understand today.

¹⁰ Joshua Getzler, “Roman Ideas of Landownership,” in *Land Law: Themes and Perspectives*, ed. Susan Bright and John Dewar (Oxford: Oxford University Press, 1998), 81.

That said, there are a few things we can say about the meanings that the words *seised*, *disseised*, *seisin*, and *right*, might have had in the years leading up to 1204. First, while Roman law *possessio* was an abstract right, *seisin* was not.¹¹ In fact, it rarely appeared as a noun before the end of the twelfth century.¹² The assize of novel disseisin speaks of being “disseised” and the assize of mort d’ancestor speaks of being “seised on the day he died,” but neither mentions *seisin*.¹³ *Seisin*, therefore, was not originally a thing; it was an act. *Right*, however, has been a noun since its first appearances. Writs and plea roll entries spoke of being “seised as of right” and of having the “greater right.”¹⁴ Since one was an act and one was a thing, there is no reason why the words *seisin* and *right* need to be regarded as describing two separate ideas. Writs that spoke of disseisin and writs that determined who had the greater right were simply different procedures for recovering the same thing. To put it another way, disseisin was the act of depriving one of his right.¹⁵ Even when *seisin* did begin appear as a noun, though, as it did in the late twelfth-century treatises called *Glanvill* and in the *Très Ancien Coutumier de Normandie*, it did not seem to be wholly distinct from *right*. The main difference between the writs that protected *seisin* and those that protected *right* was that writs of *seisin* were based on “recent and notorious facts” and writs of *right* were based

¹¹ Possession was often discussed in Roman legal texts as if it was a matter of fact; the relevant question in deciding whether a person was in possession of a thing was whether the person was in physical control. For all practical purposes, it was treated as an abstract right, though. For instance, a possessor only relinquished possession when he relinquished it both *corpore* (by body) and *animo* (by mind), meaning that he had to give up physical control and intend to give up physical control. If the possessor was ejected forcefully from his land, he remained the possessor even though he was not in control by fact, because he had never intended to relinquish possession. In this case, possession cannot be anything but an abstract right, because the possessor has no physical control of the land. This doctrine appears in the early thirteenth-century *summa* of Azo of Bologna, a work upon which the authors of *Bracton* relied for their knowledge of Roman law. Azo, *Summa Azonis sive Locuples Iuris Civilis Thesaurus* (Venice 1581), 746.

¹² R.C. Van Caenegem, *Royal Writs in England from the Conquest to Glanvill* (London: Bernard Quaritch, 1959), 313; S.F.C. Milsom, *The Legal Framework of English Feudalism* (Cambridge: Cambridge University Press, 1976), 24.

¹³ *Glanvill*, *Laws and Customs of England*, 150, book XIII: 3; 167, book XIII: 33. The *Glanvill* author does provide writs executing judgments that speak of delivering *seisin*, in the nominal form, to a disseised party. *Ibid.* 153, book XIII: 8.

¹⁴ Pollock and Maitland, *History of English Law*, 2: 75–76, 141; *Glanvill*, *Laws and Customs of England*, 35, book II: 18.

¹⁵ Van Caenegem formulates the similarity between *seisin* and *right* in a slightly different way. He argues that “right” means the right to be seised. The point is essentially the same, though: that novel disseisin and the writ of right were designed to defend the same interest. Van Caenegem, *Royal Writs*, 310.

on "older and more obscure facts."¹⁶ Thus, a person recently deprived of his land could bring an assize of novel disseisin to regain it and would only have to prove that he himself had held the land. A person whose ancestor had been deprived of his land several generations before would have to rely on the writ of right and would have to prove his ancestor's right. By the time the two terms had been established as two separate nouns, right had been defined essentially as a well-established seisin that went back many years.¹⁷

Roman Law before Bracton

Why, then, did the treatise-writers of the thirteenth century think it important to equate these two French terms with the Roman legal terms *possessio* and *proprietas*, which were so different in substance? It is possible that Roman influence was present from the time of Henry II's reforms, when he created the writs that would be used in both England and Normandy. The debate over the influence that Roman law did or did not have on the development of the early English writs is long-standing.¹⁸ Frederick William Maitland's writings were influential in setting the tone for the later literature. Maitland saw the genesis of Henry II's petty assizes in Roman law thinking.¹⁹ He believed that, in the late twelfth century, the writ of right was not working; it was cumbersome and slow.²⁰ Henry II and his councilors saw that the same was true of the Roman *vindicatio*, the action for *proprietas*, which settled the matter of who owned the thing against the entire world once and for all. It made perfect sense that the *vindicatio* be designed as a slow procedure; if the court is to determine something as absolute as the *proprietas* of the thing, it should go about it in a deliberate manner and make sure that everyone who might be able to claim the *proprietas* is heard. In most cases, though, one does not need to settle his rights against the world once and for all. By way of example, imagine two

¹⁶ Donald W. Sutherland, *The Assize of Novel Disseisin* (Oxford: Clarendon Press, 1973), 40.

¹⁷ *Ibid.*

¹⁸ For two recent surveys of the literature see Anne Duggan, "Roman, Canon, and Common Law in Twelfth-Century England: The Council of Northampton Re-Examined," *Historical Research* 83, no. 221 (2010): 379; Joshua C. Tate, "Ownership and Possession in the Early Common Law," *American Journal of Legal History*, XLVIII (2006): 281–313.

¹⁹ Frederic William Maitland, *Equity: also, The Forms of Action at Common Law: Two Courses of Lectures* (Cambridge: Cambridge University Press, 1913), 318–323.

²⁰ *Ibid.*, 318.

neighbors, Titus and Lucius. When Titus has been holding a piece of land peacefully for as long as anyone can remember, and Lucius then comes to that land with some thugs, kicks Titus off of it, and sets up residence in Titus' house, Titus does not need to prove that he has a better right to the land than anyone else in the world, only that he has a better right to the land than Lucius. Thus, the Romans created the possessory interdicts, which protected the last person in possession of the land, which did not determine anything with respect to who owned the land, and which were much simpler, faster, and easier to use than the *vindicatio*. Titus can thus bring an interdict—in this case an interdict *unde vi*—against Lucius to be put back in possession of the land.²¹

Of course, Titus may have been in possession of the land unlawfully, and Lucius may have kicked him off of the land because Lucius actually owned it. If that was the case, Lucius, after losing in the *unde vi* action that Titus brought, could always bring his own *vindicatio* to prove his ownership. Maitland thought that Henry II's advisors had looked to the Roman example and used it to fix the problems with royal justice in post-anarchy England.²² Thus, in the same way that a Roman litigant could bring an action on the possession and then on the property, a late twelfth-century Englishman, let's call him Alan, ejected from a piece of land could bring an assize of novel disseisin against his disseisor, Ranulph. If Alan lost at the novel disseisin, he could always bring a writ of right, a more cumbersome procedure, but one that could trump the novel disseisin and put him back on the land. Frederic Joüon des Longrais called this type of procedure the "double action," where there is a simple action for easy, recent cases and a more complicated action for hard ones.²³

This narrative does explain Henry II's law reforms very neatly, but it has several weaknesses. First, as several scholars have demonstrated, seisin and right tracked possession and property very poorly.²⁴ Where seisin and right, as we have seen, existed on a continuum, where right was an ancient seisin, the *Digest* famously says that "property has nothing in common with possession."²⁵ In other words, possession and property are two

²¹ Barry Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1962), 108–109.

²² Maitland, *Forms of Action*, 318–323.

²³ Frederic Joüon des Longrais, "La portée politiques des réformes d'Henry II en matière de saisine," *Revue historique de droit français et étranger*, 4th series, xv (1936): 540–571.

²⁴ See Van Caenegem, *Royal Writs*, 314–316; Joüon des Longrais, "Réformes d'Henry II," 57.

²⁵ D.41.2.12.1.

separate, abstract rights, often, but not always, held by the same person. Indeed, in certain circumstances, the possessor of a piece of land could sue the owner if the owner tried to dispossess him, something that is not possible if right is seisin that one has had for a very long time and is therefore not qualitatively different from seisin. Moreover, *proprietas* was not just a discreet, abstract right. It was also an absolute right, good against the world. Only one person could have it at a time. And yet, the grand assize asks a jury to decide who has "the greater right."²⁶ One could not similarly ask who has the greater *proprietas*, because one either has it or does not.²⁷

A greater weakness in the argument that Henry II's reforms of land law were inspired by Roman law from the beginning is that it relies on a very few references from the end of the twelfth century. A charter of Archbishop Theobald uses the word *possessio* interchangeably with *saisina*.²⁸ Richard FitzNeal, in his *Dialogue of the Exchequer*, written in the 1170s or 1180s, uses the term *propriarios* to mean *owners*, suggesting that he knew something about Roman law, but then turns immediately to refer to the things they own as *possessiones*, indicating that he knew these terms but was not overly troubled by their technical meanings.²⁹ Historians mostly rely, though, upon a few words in *Glanvill*, a treatise written ten to twenty years after the possessory assizes were created, for their evidence. The evidence that the *Glanvill* author was thinking very deeply about Roman law is sparse: he uses the word *proprietas* three times and the word *possessio* only once.³⁰ Moreover, for the *Glanvill* author, the words seem little more than tags for types of writs. He does not import any of the Roman law substance of possession or property into his treatise, and discusses none of the implications that might follow from a writ being designated either possessory or proprietary. While he drew "much inspiration from learned law," the author of *Glanvill* "remained faithful . . . to the *esprit coutumier*," according to one scholar from the civil law side.³¹ By itself *Glanvill*'s use of

²⁶ *Glanvill, Laws and Customs of England*, 35, book II: 18.

²⁷ Getzler, "Roman Ideas of Landownership," 82.

²⁸ Avrom Saltman, *Theobald, Archbishop of Canterbury* (London: Athlone Press, 1956), 390, no. 167.

²⁹ Ralph FitzNeal, *Dialogue de Scaccario*, ed. Emilie Amt and S.D. Church (Oxford: Clarendon Press, 2007), 160–161, book II, c. xiii; Van Caenegem, *Royal Writs*, 311.

³⁰ *Glanvill, Laws and Customs of England*, 4, book I: 3; 6, book I: 7; 132, book XI: 1. When the author turns to the assizes, though, he does not call them writs of possession, but writs of seisin. *Ibid.*, 148, book XIII: 1.

³¹ Jean Yver, "Le Bref Anglo-Normand," 29 *Tijdschrift voor Rechtsgeschiedenis* 29, no. 2 (1961): 324.

possession and property is hardly enough to prove that the king's servants had lifted the idea for the petty assizes from Roman law. Anne Duggan has argued in a recent article that the jurists of Henry II's reign were familiar with Roman law and even deployed Roman law terms and procedures in the king's fight with Thomas Becket, but that they did not need more than a smattering of Roman law for the type of borrowings they made.³² This is the type of Roman law investment we see in references to the petty assizes and to the writ of right, a borrowing of terminology without a borrowing of substantive law.

If the suggestion that Henry II's reforms came out of Roman law is based on scanty circumstantial evidence, why, then, do historians look to Roman law to find the origins of Henry II's program? The answer is that the authors of the later *Bracton* treatise wanted us to see English law through a Roman lens, and made a great investment of time, parchment, and ink in convincing us that English law could be reconciled with Roman law. Where the *Glanvill* author does little more than use Roman terms as synonyms for their English counterparts, the *Bracton* author imports the substance of the Roman law of possession and property into his discussion of seisin and right. It was only reading backwards from *Bracton*, who tries very hard to show that seisin and right are indeed possession and property, that Maitland could say that "seisin simply meant possession" in the thirteenth century.³³ Reading back from *Bracton*, it is easy to see *Glanvill* as the mere tip of an iceberg; the one small piece of evidence for a lost late twelfth-century Roman law program, rather than as the work of someone who had a bit of Roman law training borrowing terminology.

It is thus the *Bracton* author's Romanizing program, not Henry II's, that makes us want to find Roman origins for Henry II's law reforms. The group of royal clerks and justices who were responsible for *Bracton* were deeply invested in the idea that the *Glanvill* author first voiced, that "it will not be absurd to call English laws *leges*, though they are unwritten."³⁴ They set out to prove that English law deserved to stand beside the written laws and consequently took a great deal of their organizational principles and substantive law from Roman and Canon law. Their deep investment in

³² Duggan, *Roman, Canon, and Common Law*, 405.

³³ Pollock and Maitland, *History of English Law*, 2: 31.

³⁴ "Sed non erit absurdum leges Anglicanas licet non scriptas leges appellare." *Bracton, Laws and Customs of England*, 2: 19; "Leges autem Anglicanas licet non scriptas leges appellari non videatur absurdum." *Glanvill, Laws and Customs of England*, 2, prologue.

showing that English law could be reconciled with the *ius commune* was something altogether new.

Two Summae in a World of Coutumiers

The move from a surface-level use of Roman law to a deep investment in Roman law styles and substance that occurred in England also appeared across the Channel, in Normandy, at precisely the same time. Normandy produced three legal treatises in the twelfth and thirteenth centuries. The work that would later be called the *Très Ancien Coutumier de Normandie* was originally written as two works. The first was written sometime around 1200, probably before the Capetian conquest.³⁵ The second was written around 1220.³⁶ The third text, conventionally titled the *Summa de Legibus in Curia Laicali*, was probably written in the 1250s, well after the conquest.³⁷ Despite the political division between England and Normandy after 1204, these Norman treatises are very similar to their English cousins. Beyond that, we even see similar *changes* in the treatise culture as it developed over the course of the thirteenth century. The most obvious point of similarity between the two traditions is language. Like *Glanvill* and *Bracton*, but unlike contemporary *coutumiers* from other parts of the French-speaking world, such as the *Livre au Roi*, *The Établissements de Saint Louis*, the *Coutûmes de Beauvaisis*, and Pierre de Fontaines' *Avis à un Ami*, all three of the Norman treatises were originally written in Latin.³⁸ A more subtle similarity is the treatises' use of Roman law. The authors of the two parts of the *Très Ancien Coutumier* were writing in the same tradition as the *Glanvill* author. Both parts of the *Très Ancien Coutumier* use *possessio* and *proprietas*, as the *Glanvill* author does, as labels for types of writs. In fact, the author of the second half of the *Très Ancien Coutumier* closely follows the *Glanvill* author's use of this Roman legal language: "First possession will be treated and then ownership."³⁹ He goes on to

³⁵ Ernest-Joseph Tardif, ed., *Coutumiers de Normandie*, (Rouen: A. Lestringat, 1896), 1: lxv.

³⁶ *Ibid.*

³⁷ *Ibid.*, 2: cxv.

³⁸ Myriam Greilsammer, ed., *Le Livre au Roi* (Paris: Académie des inscriptions et belles-lettres, 1995); Paul Viollet, ed., *Établissements de Saint Louis*, 4 vols. (Paris: Renouard, 1881–86); Philippe de Beaumanoir, *Coutûmes de Beauvaisis*, 2 vols., ed. A. Salmon (Paris: A. Picard and sons, 1889–90); Pierre de Fontaines, *Le Conseil de Pierre de Fontaines*, ed. M.A.J. Marnier (Durand: Paris, 1846).

³⁹ Tardif, *Coutumiers de Normandie*, 1: 69, c. LXXIII.

treat the Norman equivalents of novel disseisin, mort d'ancestor, and darrein presentment under the heading of possession, and then treats the various writs of right under the heading of ownership, the same division we find in *Glanvill*. But, as in *Glanvill*, we do not see any attempt to make Norman law conform to the Roman law of possession and ownership. In the decades approaching and immediately after 1204 Roman law thinking remained on the surface level in both England and Normandy.

When the treatise-writing tradition evolved, it evolved in the same way on both sides of the Channel, in spite of a political division that cleaved the Norman courts from their English counterparts. The authors of *Bracton* and the *Summa de Legibus* were invested much more deeply in Roman law than their predecessors were. They wrote their treatises not just in Latin, but in the *summa* format of the schools. The *Summa de Legibus* goes under many titles, but the one that E.-J. Tardif found to be most common was the *Summa de Legibus in Curia Laicali*. The treatise we call *Bracton* today was most often called *De Legibus et Consuetudinibus Anglicanis* or *Angliae*, and explained in its introduction that it was a *summa*.⁴⁰ We could easily call either of these texts the *Summa de Legibus*.

Both texts borrowed their frameworks from Roman law. After a short section on the king, the courts, and justice, the *Bracton* authors divided their text explicitly into the same sections as Justinian's elementary law textbook, the *Institutes*: those on persons, things, and actions.⁴¹ They did this even though it did not fit their subject matter very well; the section on actions, which discusses the writs that are used in the king's courts, comprises nearly four-fifths of the treatise, while the sections on persons and things are given short shrift.⁴² On its face, the Norman *Summa* does not seem to be organized in a Roman manner, but in reality, its organization shows that its author was affected by Roman law on a deep level. The author tells us that he has divided his treatise into two parts, the first "in which are treated laws and other things necessary in law to deduce the preambles of complaints," and the second, "in which are treated the uses and institutes or laws, through which complaints are terminated."⁴³ These headings sound very practical, concerning themselves not with

⁴⁰ Bracton, *Laws and Customs of England*, 2: 19.

⁴¹ *Ibid.*, 2: 29.

⁴² *Ibid.*, 2: 282–4: 378.

⁴³ "Presens itaque opus in duas partes dividitur, in quarum prima jura tractantur et alia in jure necessaria ad deductionem preambula querelarum; in secunda vero parte tractantur usus et institute sive leges, per que querele terminator." Tardif, *Coutumiers de Normandie*, 2: 1.

high questions of what the law is, but with practice-based questions of what the court does, and they sound distinctly un-Roman, more like the *Glanvill* author's remarks that his treatise will describe "certain general things which are frequently used in court," than the *Institutes'* promise to treat all of private law.⁴⁴ As Tardif observed, however, the *Summa* is arranged to move from general considerations of justice and the judiciary to things, and finally to actions, missing only the *Institutes'* section on persons.⁴⁵ The author tells us that he is delivering the custom of the court, but he delivers it in Roman wrapping.

The Law of Property

The mid-thirteenth century's deeper investment in Roman law becomes most apparent in the treatises' discussion of the substantive law of property. The authors of *Bracton* tried very hard to make seisin and right fit into the Roman framework of possession and property, even when it meant fitting a square peg into a round hole. At times, the authors used *Glanvill's* two-tiered system, equating seisin with possession and right with property. At the beginning of the tractate on the writ of entry, for instance, the treatise says that possession is determined by assizes and recognitions, while property is determined by a jury.⁴⁶ The authors here place the petty assizes, which, for the most part, use the word *seisin*, on the possessory side, and the writs of entry and right on the proprietary side. With the exception of the writs of entry, which had not yet been invented in *Glanvill's* time, this is the same distinction that *Glanvill* makes.⁴⁷ The authors of the treatise were either not in agreement on this neat division or not set on it, however, because elsewhere the writ of mort d'ancestor appears on the property side of the equation.⁴⁸ Indeed, the authors were not even

⁴⁴ "Sunt quedam in curia generalia et frequentius usitata." *Glanvill, Laws and Customs of England*, 3, prologue; Inst. 1.1.4, Peter Birks and Grant McLeod, trans. and eds., *Justinian's Institutes* (Ithaca, NY: Cornell University Press, 1987), 36–37.

⁴⁵ Tardif *Coutumiers de Normandie*, 2: cliii–clv.

⁴⁶ *Bracton, Laws and Customs of England*, 4: 21.

⁴⁷ *Bracton, Laws and Customs of England*, 4: 21. See also *Ibid.*, 2: 319.

⁴⁸ *Ibid.*, 3: 39. From the late thirteenth century, the law reports show lawyers distinguishing "writs of possession" from "writs of right," using the Roman term for one and the Anglo-French term for the other. David Seipp has shown that these terms were not used in any consistent way, and they were simply one way of articulating a hierarchy of writs. Thus if a litigant sued on a writ of right and lost, he could not later sue on a writ of novel disseisin because the writ of right was a higher writ. However, if he sued on a writ of novel disseisin, he could later sue on a writ of entry or a writ of right. To reflect this hierarchy,

set on the two-tiered system, because they often used a three-tiered division into possessory seisin, possessory right, and proprietary right.⁴⁹ This is not the end of it, either: the authors employed as many as six tiers in their attempt to describe seisin and right in a way that will mesh with possession and property.⁵⁰ Fitting the law the authors had learned in the universities together with the law they knew from the courts was obviously not an easy task, and it troubled the authors of *Bracton* much more than it did the author of *Glanvill*.

Bracton thus repeats *Glanvill*'s division into possessory and proprietary actions and takes it a step further. The authors of *Bracton* had become deeply invested in the idea that the law of seisin and right was, in essence, the same as the Roman law of property and possession. They worked hard to reconcile, in true scholastic fashion, the Anglo-French terms with their Roman counterparts even though, at times, they were forced to do verbal gymnastics to make the argument for the terms' equivalence. The author of the *Summa* shared the *Bracton* authors' penchant for distinctions and tried to make his distinctions fit the categories of seisin and right, as well, although he broke his categories down along slightly different lines. At times the author speaks of seisin and possession as if they are equivalents,

the reporters used the terms in a relative way: a writ of entry might be called a writ of possession to distinguish it from *the* writ of right, but it might be called a writ of right to distinguish it from a writ of novel disseisin. The *Bracton* author seems to be somewhere in between the Roman theory that possession and property are distinct interests that have nothing in common with each other and the view expressed in the courtrooms of the late thirteenth century that they are terms that can be used to mean "lower" and "higher" for procedures that lie on a continuous hierarchy. 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, Cardiff, 1987*, ed. Thomas G. Watkin (London: Hambledon Press, 1989), 9–36. See, e.g., Bracton, *Laws and Customs of England*, 3: 325, where cosinage is described as a writ of possessory right, below the writ of right, which is a writ of proprietary right, but above the assize of mort d'ancestor.

⁴⁹ Bracton, *Laws and Customs of England*, 3: 271.

⁵⁰ "There is another kind of possession, having little of possession and nothing of right, as that which is by license, or clandestine or forcible; such never acquires a vestment through the passage of time. There is a [third] kind, having something of possession but nothing of right, as that granted for a term of years, where nothing may be taken except the use and the fruits. A [fourth] kind has a good deal of possession though nothing of right, as that which one has for life only, by the *causa* of dower or gift or some other. There is also a [fifth kind] of possession which has more of possession and much of right, as where one has the free tenement and the fee to himself and his heirs. Lastly, there is a [sixth] kind, having a maximum of possession and of right, as where one has the free tenement the fee and the *proprietas*. But though he has a maximum of possession and of right, nevertheless another may have a greater right in the same thing." Bracton, *Laws and Customs of England*, 3: 13. See also 2: 122–3, where he divides possession into five categories, depending on how much possession, right, and property one has in the land.

as when, in two successive chapters, he speaks of seisin taken by force and then of possession taken by force.⁵¹ Sometimes he speaks of possessing seisin as if they are two separate levels of abstraction between the person and the land, an abstract seisin in the land, a seisin which can itself be possessed.⁵² He also uses a distinction, which seems to be of his own invention, between "possessional" and "personal" actions.⁵³ It is a modification of the Roman distinction between actions *in rem* and actions *in personam*. Actions *in rem* settle a person's rights in a thing as good against the world. Actions *in personam* settle matters only between the parties to the case. Actions *in rem* can be further subdivided into actions on the possession and actions on the property, at least according to some of the jurists of Roman law.⁵⁴ The author of the *Summa*, though, allows actions on the possession to stand in for all actions *in rem*. He includes the writ *de stabilia*—which is in the form of a writ of right—as a possessional action, despite the fact that he later describes it as a proprietary action, suggesting that he sees possessional actions as a broader category and proprietary actions as a subset of it.⁵⁵ This is a very confusing and un-Roman solu-

⁵¹ Tardif, *Coutumiers de Normandie*, 2: 234, c. XCV: 11–12.

⁵² Ibid., 2: 88, c. XXV: 3.

⁵³ Ibid., 2: 134, c. I: 1–4.

⁵⁴ Strictly speaking, according to classical Roman law, possession is not determined by actions *in rem*. In fact, it is not determined by actions at all. The procedures for recovering possession were called interdicts and were not considered to be actions in the proper sense. Ernest Metzger, "Actions," in *A Companion to Justinian's Institutes*, ed. Ernest Metzger (Ithaca, NY: Cornell University Press, 1998), 210. The *Institutes* could give the reader the impression that procedures on possession are *in rem*. When it introduces actions *in rem*, the example it gives begins "suppose someone is in possession of a corporeal thing." In the example, it is the defendant who is in possession, and the plaintiff is actually claiming a property right, but the text does not make this clear. I. 4.6.1–2; Peter Birks, *Justinian's Institutes*, 129. The thirteenth-century jurist Azo of Bologna defined actions *in rem* as actions "which are given against anyone by reason of possession" (*quae dantur contra aliquem ratione possessionis*) Azo, *Summa Azonis Sive Locuples Iuris Civilis Thesaurus* (Venice 1581), 1119.

⁵⁵ At the beginning of the fifth distinction, the author tells us that all actions arise either out of an injury done to one's person or in one's possession. Tardif, *Coutumiers de Normandie*, 2: 134, c. I: 2. Later he tells us that possessional actions can be protected by oath, by duel, or by an inquest called a recognition. He uses the term "inquest" elsewhere to describe the petty assizes, and indicates that the duel is the proper mode of proof in the writ of right. Ibid., 2: 209, c. LXXXVII: 3. For a writ of right called *de stabilia* as an action on the property, Ibid., 2: 287, c. CXIII: 1–2.

The author actually makes the distinction between actions on the possession and actions on the property in the section of his treatise on the view, and it makes a difference there. The author tells us that the view must be made and the facts sworn to by four knights and eight law-worthy men if it is on the property, but can be made by twelve law-worthy men, no knights being necessary, if it is a case of disseisin. Ibid., 2: 261, c. CVII: 1.

tion to the problem of reconciling the law of seisin and right to the law of possession and property, since property is not a subset of possession under any reading of the Roman texts.⁵⁶ The author seems to be following the lead of earlier authors, like the jurists who wrote *Glanvill* and the *Très Ancien Coutumier*, in equating seisin and right with possession and property, but he is grappling with the fact that he cannot quite make that easy equation work.

The doctrine of prescription is where the authors of the *Summa* and of *Bracton* come closest to each other in their solutions to the problem of reconciling Roman and Anglo-Norman law. From the Roman law texts available in the thirteenth century, the authors of the English and Norman *summae* would have been able to glean the terms *longi temporis praescriptio* and *usucapio*, which, by Justinian's time, had become near synonyms.⁵⁷ Both gave the person who possessed a thing for a long time the *proprietas* in that thing and, at the same time, extinguished the previous owner's property interest, much like the modern Common law doctrine of adverse possession.⁵⁸ One can see why this doctrine might appeal to someone accustomed to thinking that one's seisin becomes stronger the longer one is in seisin, until it is so strong that it becomes something different called right. The *Bracton* authors use these Roman terms in several places, sometimes discussing prescription, sometimes discussing possession for a "long time" without expressly using the word prescription, and sometimes using usucapion, without making any noticeable distinction between the terms. They occasionally combine several of the terms together, as when one author says, "Now we must explain how [property] is transferred without title and livery, by usucapion, that is, by long, continuous and peaceful possession: by time and without livery."⁵⁹

The author makes the same distinction between possession and property at 2: 317, where he explicitly calls the writ *de stabilitia* a writ on the property in the fee and the writ of novel disseisin a writ on the possession of the fee.

⁵⁶ The author's confusion may have come from his reading of contemporary Roman law texts. The passage from Azo's *Summa Codicis* cited above, says that actions *in rem* arise "by reason of possession." Azo, *Summa Azonis*, 1119. A passage like this could have led the author of the *Summa de Legibus* to conclude that actions *in rem* were all possessional.

⁵⁷ *Usucapio* was the term used for moveables and *longi temporis praescriptio* was the term used for land. Joshua Getzler, "Roman and English Prescription for Incorporeal Property," in *Rationalizing Property, Equity, and Trusts: Essays in Honour of Edward Burn*, ed. Joshua Getzler (London: LexisNexis U, 2003), 290.

⁵⁸ *Ibid.*, 288–290.

⁵⁹ Bracton, *Laws and Customs of England*, 2: 156.

The authors of *Bracton* use the Roman terminology of prescription to explain how seisin can turn into right, and occasionally make a mess of it. For instance, one of the authors tells us that

If livery is not made, long and peaceful seisin and long use, though of another's property, suffices for livery, to the extent of seisin and a free tenement, as where one enters into a vacant thing possessed by no one, as into an inheritance not yet taken up, for long possession suffices for livery and generates right.⁶⁰

The author of this passage is doing several things. First, he is directly equating seisin and possession and right with property. The "long and peaceful seisin" at the beginning of the sentence becomes "long possession," by which the author almost certainly means the doctrine of *longi temporis possessio*, by the end. Under the law of Justinian, *longi temporis possessio* would give the possessor a property interest in the land. In *Bracton*, though, the attempt to line up seisin and right with possession and property makes the discussion much more complicated. If one is in seisin of a piece of land for a long time, that seisin can substitute for livery of seisin. Livery of seisin is a ceremony required to put someone in seisin, as the author explains here. So, paradoxically, one must be in seisin already to receive seisin without livery. The last clause of the sentence tells us that long seisin will also generate right. Roman and English doctrines collide here. The first phrase, in which the author says that long seisin will substitute for livery, even if the property belongs to someone else, takes the first half of the Roman doctrine: long possession will extinguish the previous owner's proprietary interest. According to this author, though, it only gives the person in seisin of the land "seisin and a free tenement," not the right/property he would receive at Roman law.⁶¹ The second phrase, which says that long possession generates right, has Roman resonances, since long possession can turn into property through prescription, but it also has resonances of English thinking about seisin and right as two things that exist in some nebulous relationship to each other along a continuum, in which right is essentially a very old seisin. Once again we see the *Bracton* author using a Roman language for something he could express in Anglo-

⁶⁰ "Sufficit pro traditione quoad seisinam et liberum tenementum longa seisinam et pacificam et longus usus, quamvis in re aliena. Ut si quis ingressum habuerit in rem vacuum et a nullo possessam, sicut in hereditatem non aditam, longa enim possessio sufficit pro traditione, et parit ius." Bracton, *Laws and Customs of England*, 2: 126.

⁶¹ Ibid.

French terms, going to great pains to do it, and ending up with something muddled and confusing.

The author of the Norman *Summa* imports the Roman law of prescription in some of the same, pained ways that the authors of *Bracton* do. He tells us that a court can acquire jurisdiction over actions that normally belong to the Duke by "long possession which makes prescription."⁶² He uses prescription to refer to holding land and to holding churches in free alms, as well. When he discusses the writ *de feodo et vadio*, he associates the Roman law of prescription with the writ's limitation period. The limitation date in a writ acted like a modern statute of limitations, preventing people from bringing claims that were too old. Thus, someone claiming land by a writ of right in the early thirteenth century was barred if none of his ancestors had held the land since the death of Henry I.⁶³ Of course, the implication of a limitation date is that after a certain date, you can no longer recover your right. Thus, if Saer committed a disseisin against William and William failed to bring a complaint to the royal court before time ran out, he would never be able to sue on an assize of novel disseisin. Saer would be safe, at least from that particular action, and might keep the land. This is a far cry from giving Saer the property in the land, though, and is therefore different from the Roman law of prescription, which would actually extinguish William's property right and create one for Saer.⁶⁴ And yet the author of the *Summa de Legibus* tells us that the limitation date is based on the Roman law of prescription:

Let it be known, however, that, through this writ, it should be inquired whether gage was made after the coronation of King Richard; for if it shall have been understood that gage was made before the coronation of King Richard, it can no longer be revoked. And let it be known that prescription is accustomed to run for thirty years; for land which has been abandoned without gage beyond the space of thirty years will not be called back by writ.⁶⁵

⁶² "Per longevam possessionem que facit prescriptionem." Tardif, *Coutumiers de Normandie*, 2: 139, c. LII: 7.

⁶³ Pollock and Maitland, *History of English Law*, 2: 81.

⁶⁴ Although the Romans did originally have limitations periods, they did not grant any kind of positive right. Getzler, "Roman and English Prescription," 284–285.

⁶⁵ "Sciendum autem est quod inquiri debet per hoc breve utrum post coronamentum regis Ricardi factum fuerit vadium; si enim ante coronamentum regis Ricardi vadium factum fuisse constiterit, non potest ulterius revocari. Et sciendum est quod hujusmodi prescriptio solebat currere de xxx. annis; terra enim, que ultra xxx. annorum spacium dimittebatur invadiata, non erat per breve revocanda." Ibid., 2: 279–280, c. CXI: 13.

In the first part of this section the author sets the limitation date for the writ at the coronation of King Richard. Thus, if the gage was made before King Richard's coronation, the case has already lapsed. In the second part, he speaks about the limits of the writ using the Roman law of prescription. He even uses the prescriptive term of thirty years, adopted into Roman law in the reign of the Emperor Theodosius, a term which lines up neither with the limitation dates in writs nor with the nebulous notion that seisin will eventually ferment into right given some undefined amount of time to do so.⁶⁶ He uses a parallel format to connect his discussion of limitation dates with his discussion of prescription. He begins the sentence on the limitation date with "let it be known," and continues into the law of prescription with the parallel "and let it be known," as if this sentence is a continuation of the discussion about limitation dates.⁶⁷ Further down on the page, the author makes the equation of prescription with Roman limitation dates even more explicit by telling us that, since it was difficult for people to remember back thirty years, the duke—he does not tell us which one—allowed the people of Normandy to use the coronation of King Henry as the measure for prescription because it was an easy date to remember and was longer than thirty years ago.⁶⁸ The limitation date was thus put in place to give effect to the law of Theodosius. He goes on to say that the switch to the coronation of King Richard was made in the reign of Philip Augustus, at some point that was at least thirty years after Richard's coronation, to maintain the thirty-year prescription period.⁶⁹ It is highly unlikely that the Norman Dukes were concerned with the Roman prescriptive term of thirty years when they set their limitation dates. For some reason, though, the author of this treatise wants there to be a Roman origin for the limitation date. The limitation date thus serves to approximate the prescriptive term.

The authors of both *Bracton* and the *Summa de Legibus* were thus invested in analogizing the law of prescription—an ancillary to the law of possession and property—to elements of their own law, even when

⁶⁶ See, e.g., "The court, however, holds all pleas... except those in which the prince of Normandy has conceded his court... or through long possession which makes prescription." Ibid., 2: 139, c. LII: 7; Nicholas, *Introduction to Roman Law*, 128. The thirty year period was also used by the Merovingians and Carolingians. The author's language suggests that he was taking his theory from Roman law. Mark Hagger, "Secular Law and Custom in Ducal Normandy, c. 1000–1144," *Speculum* 55, no. 4 (2010): 847.

⁶⁷ Tardif, *Coutumiers de Normandie*, 2: 279–80, c. CXI: 13.

⁶⁸ Tardif, *Coutumiers de Normandie*, 2: 280, c. CXI: 13.

⁶⁹ Ibid.

the comparison was not obvious. And yet prescription is an area of the law that the authors of *Glanvill* and the *Très Ancien Coutumier* showed no interest in at all. This development occurred after 1204 on both sides of the Channel. This runs counter to Jean Yver's characterization of Norman law as a conservative law, a law that was "primarily a legacy of the ducal era."⁷⁰ Norman law was developing rapidly in the thirteenth century. It appears that English and Norman treatise writers of the mid-thirteenth century were engaged in a cross-Channel discourse about the proper relationship between Roman law and the law administered by the local courts. But how could a cross-Channel legal culture have survived the conquest of 1204?

The Administration of Normandy

Between the reign of Henry I and the Capetian Conquest of 1204, the relationship between England and Normandy underwent some significant changes. In Henry I's reign, England and Normandy were administered as a single cross-Channel polity. Under the Norman kings, there was essentially one administration for both England and Normandy. The royal justices followed the peripatetic court, so at the level of royal and ducal justice the Norman tenant and his English counterpart would have found themselves before the same king or duke and the same justices.⁷¹ Under the Angevins, the constitutions of England and Normandy changed as the kingdom and the duchy were incorporated into the wider holdings of the counts of Anjou. The Angevin king-dukes shifted away from a single, cross-channel administration and towards multiple, local hierarchies in each of their domains. The court was still often on the move, but with larger holdings to survey, which meant that the king and his court would be able to give less time to each region. The Angevin dynasty had to rely on local viceroys, called seneschals or justiciars, who headed up more or less permanent administrations in each of their territories.

⁷⁰ Daniel Power, *The Norman Frontier in the Twelfth and Early Thirteenth Centuries* (Cambridge: Cambridge University Press, 2004), 143; Jean Yver, "Les caractères originaux de la Coutume de Normandie," *Mémoires de l'Académie Nationale des Sciences, Arts, et Belles-Lettres de Caen*, new series, 12 (1952): 311–330.

⁷¹ John Le Patourel, "The Norman Conquest, 1066, 1106, 1154?" in *Anglo-Norman Studies I*, ed. R. Allen Brown and Marjorie Chibnall (Ipswich, UK: Boydell Press, 1979), 108–109.

Geoffrey of Anjou had warned his son Henry II not to "exchange the customs of Normandy or England" with those of Anjou.⁷² Henry and his successors seem to have taken this to heart: Anjou received no assize of novel disseisin. He was less concerned about mixing the customs of England and Normandy, however, than he was about mixing the customs of his other realms: Henry II's English law reforms were introduced to Normandy in a way that they were not introduced to other parts of the Angevin Empire. So Normandy, as a result, had writs equivalent to the writs of right, novel disseisin, mort d'ancestor, and others familiar to historians of England. Indeed, of all the parts of the Angevin Empire, Normandy and England had the closest legal and administrative ties. John Le Patourel was undoubtedly correct when he said that the administration of Normandy changed as a result of the Angevin takeover, but England's ties with Normandy remained strong and were of a different type than its ties with other parts of the Angevin domain.⁷³

We still see royal justices serving on both sides of the Channel under the Angevins. Richard of Ilchester, an English-born official who served in the English exchequer and on English eyres, was sent to Normandy from 1176 to 1178 to reform the Norman exchequer along English lines.⁷⁴ Richard FitzNeal, the author of the *Dialogue of the Exchequer*, who also served occasionally as a royal justice in England, accompanied him.⁷⁵ So did Gilbert Pipard and Richard Giffard, both of whom had a great deal of experience serving as eyre justices in England. Both would serve again as eyre justices in England and end their careers as royal officials in Normandy, crossing the Channel frequently over the course of their careers.⁷⁶ William FitzRalph, who replaced Richard of Ilchester as seneschal in 1178, seems to have used his experience as an eyre justice in England as

⁷² L. Halphen and R. Poupardin, eds., *Chroniques des Comtes d'Anjou et des Seigneurs d'Amboise* (Paris, 1913), 224.

⁷³ Le Patourel, "Norman Conquest," 108.

⁷⁴ Ralph V. Turner, *The English Judiciary in the Age of Glanvill and Bracton* (Cambridge: Cambridge University Press, 1985), 47; *Oxford Dictionary of National Biography*, s.v. "Richard of Ilchester."

⁷⁵ Turner, *English Judiciary*, 50.

⁷⁶ Both Giffard and Pipard were appointed eyre justices by the assize of Northampton of 1176. Pipard already had at least eight years of experience as an eyre justice at this point in his career, and would continue to sit on English eyres until 1185, even while serving as a viscount and royal castellan in Normandy, positions he was appointed to in 1180. Giffard is known to have served on eyres from 1176 to 1180, when he was appointed a bailli and castellan in Normandy. Charles Homer Haskins, *Norman Institutions* (Cambridge, MA: Harvard University Press, 1918), 180; Edward Foss, *The Judges of England* (London: Longman, 1848), 1: 253, 292.

a model for his frequent and energetic travels around the duchy to hear cases.⁷⁷ The author of the *Très Ancien Coutumier* recorded several of his judicial decisions as precedents.⁷⁸ William served an astonishing twenty-two years in the office of seneschal, and so from 1176 to 1200, the Norman administration was headed up by men who had received their training in the English administration and who had sat in judgment in England's royal courts.

Going in the other direction, Richard Barre, who was probably a Norman with family on both sides of the Channel and who spent much of his career crossing from side to side, was one of the most active members of the bench at Westminster from 1194.⁷⁹ William de Sainte-Mère-Eglise, who was certainly a Norman and who spent much of his early career in the ducal administration in Normandy, joined Barre as a justice around the same time.⁸⁰ In John's reign, we see Henry de Pont-Audemar, a Norman whose family held lands in England, and who had served in several capacities as a ducal administrator in Normandy, serving as a justice in England.⁸¹ Even though the Anglo-Norman *regnum* of Henry I had been augmented by the holdings of the counts of Anjou and the dukes of Aquitaine and Brittany, the relationship between England and Normandy remained a special one. While we see Normans serving as justices in the English courts and vice-versa, we find no Breton, Gascon, Angevin, or Poitevin justices in England. The new Angevin constitution, therefore, does not seem to have changed the fact that England and Normandy shared a legal culture. More of their judicial work was being done by royal officials who were sited locally than had been the case under Henry I, but they were officials whose careers might take them across the Channel several times.

⁷⁷ Haskins, *Norman Institutions*, 184; Turner, *English Judiciary*, 20.

⁷⁸ Tardif, *Coutumiers de Normandie*, 1: 47, 51.

⁷⁹ Turner, *English Judiciary*, 73–4, 90; *Oxford Dictionary of National Biography*, s.v. "Richard Barre."

⁸⁰ Turner, *English Judiciary*, 74.

⁸¹ *Ibid.*, 138, 155. This is admittedly a rather small group of people. Turner points out that the ratio of Poitevins and Normans to English is lower in the judicial administration of England than in other parts of the royal administration. If we take only those justices who Turner identifies as the core of the judiciary—those who spent most of their time judging, as opposed to those people who were appointed to just one or two eyres—we end up with a very small sample size. In Richard I's reign there were only about half a dozen justices in the core, two of whom were Norman. The Norman element thus was not very large, but was significant.

It is thus not entirely surprising that *Glanvill* and the author of the *Très Ancien Coutumier* both use Roman language in their limited way. When *Glanvill* and the first part of the *Très Ancien Coutumier* were written, Normandy was still part of an Angevin domain in which England and Normandy shared a special relationship. If the similarities between these early texts show us that the cross-Channel legal culture established at least by the time of Henry I was alive and well under the Angevins, the similarities between *Bracton* and the *Summa de Legibus* show us that it survived the Capetian conquest. This is despite the fact that the Capetians replaced the Angevin barons of the exchequer with men from the court in Paris and replaced local or English *baillis* and viscounts with men from Île-de-France who were moved from region to region within the Capetian realm every few years.⁸² Much of the higher Norman nobility and clergy were replaced with Capetian loyalists from France as well. In short, many of the people whose business it was to know something about Normandy's custom went out of favor and power after 1204, to be replaced by people whose experience was in other parts of the Capetian kingdom.

One would think that a treatise written in Normandy in the 1250s, almost three generations after the Capetian administration opened for business in Normandy, would bear more in common with the *coutumiers* of Northern France than with the legal treatises of England. While later generations of jurists would translate the *Très Ancien Coutumier* and the *Summa de Legibus* into French and call them *coutumiers*, in their original form the Norman treatises looked very different from those of other Capetian domains. The authors of the thirteenth-century *coutumiers* do use Roman law at times, but there is no sign that it pervades their thinking as it does in the *Summa de Legibus* and *Bracton*.⁸³ Beaumanoir's famous *Coutûmes de Beauvaisis*, an ambitious text, draws on schools learning at times, but does not aspire to be a *summa* or to justify the law contained within it to a schools-educated audience as *Bracton* does. The *Coutûmes* is a book on procedure that claims to be a book on procedure; *Bracton* and the *Summa de Legibus* are books on procedure that claim to be *summae* on the whole of law: persons, things, and actions.

⁸² Joseph Strayer, *The Administration of Normandy Under Saint Louis* (Cambridge, MA: Medieval Academy of America Press, 1932) 6–9, 92–93.

⁸³ The *Summa de Legibus* was later placed firmly within the *coutumier* genre and was called the *Grand Coutumier de Normandie* in its later French translation.

A Cross-Channel Legal Culture

The *Bracton* author's Norman kindred spirit, coming from a very similar culture of legal practice but from a very different political culture, was expressing law in precisely the same ways as the *Bracton* author and he was doing so when there must have been enormous cultural pressure from neighboring regions of France to do otherwise. The similarity between their projects is suggestive of a common culture that crossed the channel long after Phillip Augustus took Normandy away from the Angevins. I am not suggesting that these authors copied each others' work. In fact, there is little chance that they could have copied each other.⁸⁴ The similarity between the two treatises must come from a shared set of values about law rather than from direct influence from one text to another.

Treatise-writing is not the only evidence of this shared legal culture. There are other indications that legal thinking was crossing from England to Normandy and even affecting legal practice in the thirteenth century. The writ which is called "*de possessione antecessoris*" in the *Très Ancien Coutumier* and "*de saisina antecessoris*" in the *Summa de Legibus*, the equivalent of the English writ of mort d'ancestor, underwent a change between the two Norman treatises. In the second half of the *Très Ancien Coutumier*, which was written close to 1220, it follows an archaic form, which would have already been out of date in England at the time of the Capetian conquest.⁸⁵ In the *Summa*, it follows a form that is in line with English practice of the middle of the thirteenth century.⁸⁶ If the *Très Ancien Coutumier* accurately represents Norman practice in the 1220s, it would seem that either the Norman courts were using more than one form of the writ before the Capetian conquest, or that Norman courts began to follow English developments after the Conquest that they had not followed before it.⁸⁷

⁸⁴ The *Summa de Legibus* was probably written in the 1250s, while the work on *Bracton* was begun in the 1220s and 1230s and was completed in the 1250s, but, as far as we know, did not circulate before Henry de Bratton's death in 1268. Thus, *Bracton* was finished, but was probably not generally available, for most of the range of years in which the *Summa* could have been written. Tardif, *Coutumiers de Normandie*, 2: clxxxvii–cxciv; Samuel E. Thorne, Introduction to *Bracton on the Laws and Customs of England*, ed. and trans. Samuel E. Thorne (Cambridge, MA: Belknap Press, 1977), 3: xiii–lii.

⁸⁵ Tardif, *Coutumiers de Normandie*, 1: 72, c. LXXIV: 2–3.

⁸⁶ Ibid., 3: 239, c. XCVIII: 1; Yver, "Le Bref Anglo-Normand," 327.

⁸⁷ Another genre of legal writing which England and Normandy shared with each other, but which I will not have time to go into here, was the plea roll entry. The English and Norman administrations both recorded what happened in the royal and ducal courts

But how would the very particular combinations of Roman law with regional custom that we see in the English and Norman texts called *De Legibus* have made it across the Channel? If the judges of Capetian Normandy were trained in parts of the Capetian kingdom that produced legal literature that looks very different from the *Summa de Legibus*, and are therefore unlikely candidates for the authors, who produced these very sophisticated and technical texts, which drew both from practice and from the law being taught in the universities? The problem is not so much whether there were people who operated in a cross-channel sphere—since we know there were—but whether they were the types of people who could produce such a text. Who would have had the technical knowledge, the access to the other side of the Channel, and the curiosity about what was becoming a highly technical area of study to transfer ideas across the Channel? I would like to make a few suggestions. First, although the viscounts, the *baillis*, and the barons of the exchequer of Capetian Normandy were French and moved from appointment to appointment every few years, they had clerks who stayed put and provided continuity to the courts. The senior clerk of a *bailliage* was an important person. He would often sit in the assizes in place of the *bailli*. Usually a Norman, the clerk might serve in his office for several decades, under as many as half a dozen *baillis*, and much of the court's knowledge of local law must have come from the clerk. Most of the clerks we know about bear the title of "master," indicating that they had substantial university training, perhaps in Roman or Canon law.⁸⁸ In short, they sound like their counterparts in England, the clerks of the royal courts, who we know more about because many of them—such as Martin of Patishall, William of Ralegh, and Henry of Bratton—eventually became royal justices themselves. In England, it was these clerks-turned-judges who wrote the *Bracton* treatise, and their Norman equivalents certainly would have had the combination of experience in the courts and university training required to write a treatise like the *Summa de Legibus*. Although we know very little about these Norman

in documents known as plea rolls from the late twelfth century onwards. From both England and Normandy we have surviving collections of entries that have been excerpted from the plea rolls, seemingly to use as didactic texts for teaching law. *Bracton* contains over 500 cases excerpted from the plea rolls and there are several surviving stand-alone collections from England. Manuscripts of the Norman *Summa de Legibus* often contain collections of cases or, in the case of Huntington Library MS 1343, are glossed with cases from the Norman exchequer in the same hand as the main text of the treatise. I hope to treat the shared case law culture of England and Normandy in a later work.

⁸⁸ Strayer, *Administration of Normandy*, 98.

clerks, it is entirely possible that some of them were in their offices before the Capetian conquest of Normandy, and that they maintained links with their English counterparts across the divide of 1204.

A few families were able to maintain estates in both Angevin England and Capetian Normandy up to the middle of the thirteenth century. Some individuals were allowed to hold on to their cross-Channel domains for life, with the proviso that their English and Norman lands would have to go to different heirs at death.⁸⁹ William Marshal and his heirs succeeded not only in holding onto their Norman lands until 1234, but also in creating a patronage network that allowed their clients and tenants to hold land on both sides of the Channel. At least one family had lands in both England and Normandy as late as 1244.⁹⁰ These landholders would have provided a link between the legal culture of England and the legal culture of Normandy as they developed in the thirteenth century. Richard Marshal brought the seneschal of his Welsh lands, Master William of Christchurch, to manage his estate at Orbec in Normandy.⁹¹ Master William may very well have heard pleas on behalf of his master in both Wales and Normandy. Henry of Trumbleville, who held lands in England and served Henry III in Gascony in the 1220s and 1230s, sat as a justice at Westminster in 1221.⁹² In 1227, he sat at the assizes in Normandy, where his brother was a cathedral canon.⁹³

Although we have no evidence that the texts themselves crossed the Channel, it is not outside of the realm of possibility.⁹⁴ Romances and histories still crossed the channel in this period. One avenue for this might have been religious houses. The lay lords who held land on both sides of the Channel had been forced to choose between their lands in England or their lands in Normandy by the mid thirteenth century, but religious houses had not.⁹⁵ Monasteries with priories and fiefs on the opposite side of the Channel continued to administer those priories. If monasteries were not responsible for the authorship of these treatises, they certainly

⁸⁹ J.A. Everard and J.C. Holt, *Jersey 1204* (London: Thames & Hudson, 2004), 127.

⁹⁰ Daniel Power, "The French Interests of the Marshal Earls of Striguil and Pembroke, 1189–1234," in *Anglo-Norman Studies XXV: Proceedings of the Battle Conference, 2002*, ed. John Gillingham (Woodbridge, Suffolk: Boydell Press, 2003): 219.

⁹¹ Daniel Power, "French Interests of the Marshal Earls," 222.

⁹² *Oxford Dictionary of National Biography*, s.v. "Trumbleville [Turbeville], Sir Henry de."

⁹³ *Ibid.*; Power, "French Interests of the Marshal Earls," 218.

⁹⁴ We are fairly sure a copy of the *Summa de Legibus* made it to the Channel Islands and is the text referenced in the *quo warranto* proceedings of 1331. Tardif, *Coutumiers de Normandie*, 2: ccxxi.

⁹⁵ Le Patourel, "Norman conquest," 107.

patronized them. Many of the copies of *Bracton* and of the *Summa de Legibus* for which we can assign a provenance belonged to monasteries or other religious establishments.⁹⁶ The treatises, then, may not just be evidence of a cross-Channel culture; they may have been one of the vehicles for transmitting legal ideas across the Channel. Texts and ideas could traverse the boundary between the Capetian and Angevin domains.

The Roman doctrines we find in *Bracton* and the *Summa de Legibus* are there because their authors wanted them to be there, not because they were present in the Anglo-Norman writs from their beginnings. This should lead us to question the treatises' usefulness as guides to the law practiced in thirteenth-century courts, but it should also raise questions about why their authors were so committed to Roman law and why they were so committed to it on both sides of the Channel. The similarities in treatise-writing styles on both sides of the Channel have implications for both the history of England and the history of Normandy. English Common law was perhaps not as insular as the country itself was. Normandy's incorporation into the French kingdom may not have changed its contacts with England as significantly as it may at first seem. Perhaps we should not think of the narratives of English and Norman law as national narratives and instead look to a cross-Channel Anglo-Norman legal culture up to the latter half of the thirteenth century, a culture in which my fictional Henry could have gotten his Roman law from a customary law treatise on either side of the Channel, even if he would not have gotten anywhere with his argument in a court.

⁹⁶ Copies of the *Summa de Legibus* which belonged to monasteries include Bibliothèque Nationale MS Latin 4650 and 4653. MS Latin 4652 might have belonged to the Archbishop of Rouen. Tardif, *Coutumiers de Normandie*, 2: xvii, xxiii, xxvi. *Bracton* manuscripts were popular with religious establishments as well. British Library MS Add. 24,067 belonged to Chertsey. MS Add. 21,614 belonged to Glastonbury. MS Royal 9. XV belonged to John of Derlington, a Dominican friar who became archbishop of Dublin.