

THE ROMAN ELEMENT IN BRACTON'S DE ADQUIRENDO RERUM DOMINIO

GEORGE E. WOODBINE

Assistant Professor of Law, Yale University

Beginning at least as early as the seventeenth century, reaching a climax sometime after the middle of the nineteenth, and continuing down to our own time, there has been a very considerable discussion among law writers and legal historians as to the effect of Roman law upon English law.¹ That some twenty-five years ago the Selden Society should have brought out as its eighth volume Maitland's *Bracton and Azo* was at least a tacit acknowledgment that even in regard to some of its more detailed aspects the discussion was still open. It is a subject which necessarily takes us back into the rather remote past. In the sixteenth century the "Reception" to the Roman law took place upon the Continent; but in England, in spite of the friendliness of Henry VIII and of university professors to the civil law, there was no such reception.² This has been explained on the basis of English dislike to the strong centralizing tendencies of the Roman system, which apparently amounted to active hostility on the part of English lawyers. Yet even before the time of the reception, English law had encased itself in an armor of self-sufficiency which was well-nigh impervious to the attacks of the civilians. Consequently it is to an earlier period of English law to which we have to look for an answer to the question as to what extent the Roman legal system influenced the English. A period of especial importance is that extending from the middle of the twelfth century to the end of the thirteenth, that is, from Vacarius to Edward I.³ It has been said that during this century and a half the influence of Roman upon English law was so great as rightly to merit its being called the Roman epoch of English law.⁴

Even for this limited earlier period a study of the subject involves the use of a vast amount of material. Among all this material Bracton's *De Legibus* is of fundamental importance. Written shortly after the

¹ For the general subject, and a list of works bearing on it, see Scrutton, *The Influence of the Roman Law on the Law of England* (1885).

² "English law schools saved, but isolated, England in the days of the Reception." Maitland, *English Law and the Renaissance* (1901) 35, *Select Essays in Anglo-American Legal History* (1907) 168, 207.

³ For Vacarius see *Dictionary of National Biography*; Liebermann in (1896) 11 *ENG. HIST. REV.* 305-314; Maitland, *Magistri Vacarii Summa De Matrimonio* (1897) 13 *L. QUART. REV.*, 133-143, 270-287; Wenck, *Magister Vacarius* (1820).

⁴ Güterbock, *Henricus de Bracton* (Coxe's tr. 1886) 17. Cf. 2 Holdsworth, *History of English Law* (1909) 117: "After the end of the thirteenth century the study of the civil and the canon law ceased to influence directly the development of English law. But up to that period their influence was direct." See also Pollock and Maitland, *History of English Law* (1905) ch. V, *Roman and Canon Law*.

middle of the thirteenth century, systematic in the treatment of its subject matter, purporting to take in the entire body of English law, it is, because of both its method and its scope, indisputably the greatest legal work of the whole middle ages. If at this period Roman law had affected or was affecting English law, one might reasonably expect to find evidences of it here. The importance of Bracton from this standpoint has not been overlooked by the writers; many have discussed the subject of Bracton's Romanism, some at considerable length; two books have been devoted entirely to it.⁵

Among the questions most debated in connection with the Roman element in Bracton, three stand out: What is the amount of Roman law in Bracton? For what purpose did Bracton make use of Roman law? What was the extent of Bracton's knowledge of Roman law? On the correct answers to these three questions depends in no small degree the ultimate answer to the principal question as to the influence of the civil law upon the law of England. The widely divergent answers which have been given to all three of these questions can not be reconciled, but they may perhaps be explained by keeping in mind a point already brought out by Holdsworth—that as Bracton admittedly contains both Roman and English elements, it is natural that a Roman and a common-law lawyer should each see in the *De Legibus* much that is hidden from the other, and emphasize the importance of that which he sees most clearly.⁶

The amount of Roman law in Bracton has been variously estimated. Hoüard regarded the treatise as so largely made up of Roman law that he did not include it in his *Traité sur les Coutumes Anglo-Normandes*, though he found a place there for both Glanvill and Fleta. Maine accused Bracton of plagiarism and said that the whole of the form and

⁵ Scrutton, *op. cit.* 78, *et seq.*, and Scrutton, *Roman Law in Bracton* (1885) 1 L. QUART. REV. 425, *et seq.*; 2 Holdsworth, *op. cit.* 212, *et seq.*; Vinogradoff, *Roman Law in Medieval Europe* (1919) 87, *et seq.* In 1862 Güterbock published *Henricus de Bracton und sein Verhältniss zum Römischen Recht*. Four years later this was translated into English by Brinton Coxe. A general survey of the whole field, and taking in the entire treatise of Bracton, it could not, because of its breadth, go into great detail. It was well done, so well done in fact, that any later work upon the same subject can hardly hope to start except upon the basis there laid down—as later printed books have shown. Among other things, Güterbock made it plain that certain portions of Bracton's text were taken verbatim from Azo, several pages of parallel passages being given to illustrate that copying. In 1894 Maitland, acting on Güterbock's suggestion, edited for the Selden Society his well known *Bracton and Azo*, in which were included, with a commentary, most of the passages in which Bracton was copying more or less verbatim from Azo, together with many passages which Bracton had taken more directly from the *Corpus Juris Civilis*. This resulted in the re-editing of some twenty-two folios of the *De Legibus* (fs. 1-10b, 98b-106b, 112-115). That part of Bracton's text under consideration in the present article (fs. 11-98) was passed over, except for a passage on putative marriages (f. 63), which seems to show the influence of the canonist Tancred.

⁶ 2 Holdsworth, *op. cit.* 213.

one-third of the content was pure Roman law.⁷ On the other hand, Reeves thought that all the Roman law in Bracton would not fill three pages.⁸ Between these extreme, and manifestly incorrect, estimates have been made many others. It might well be expected that different, and contradictory, answers would be given to the question as to what extent the Roman law to be found in Bracton was actually and actively a part of the then law of England, for that is a question which demands a study of other sources in addition to Bracton, and one that is difficult of solution. But it is not easy to understand how the amount of Roman law in Bracton as a whole, or in any particular portion of the treatise—a matter which can be determined by a study of the text itself—should have been so differently computed. Opinions differ just as widely as to the significance of Bracton's use of Roman law and his object in using it. We are told that it was used only for illustration or ornament; that it was used only for an academic discussion of speculative questions; that Bracton incorporated it into his treatise because it was a part of the every-day law of England, and in actual use as such.⁹ For the third question—as to Bracton's knowledge of Roman law—we find the same range of answers as for the other two, with diametrically opposed extremes. To Grueber, Bracton is thoroughly trained in Roman law.¹⁰ Scrutton considers him well acquainted with Roman law, which he made use of in dealing with his own English law that up till that time lacked form and precision.¹¹ Vinogradoff says that this thirteenth-century English judge did anything but a poor piece of work with his Roman materials, which he used consistently and intelligently to built up a set of English Institutes.¹² Maitland, on the contrary, calls Bracton "a poor, an uninstructed Romanist." He tells us definitely that the apparently learned pages which Bracton tries to fill with Roman law are his worst pages; that unless we use superlatives to express the good quality of the English portions of his treatise, only "bad" will fit the Romanesque parts; that Bracton is not only an uninstructed legist, but a mere beginner who is tentatively groping his way among uncouth terms and alien ideas.¹³

It is only natural that the third question should have brought forth such different answers. Each writer must necessarily judge the quality of Bracton's Romanism on the basis of his own opinion as to

⁷ Maine, *Ancient Law* (1864) ch. iv.

⁸ ² Reeves, *History of the English Law* (1787) ch. viii, at p. 89.

⁹ ² Reeves, *loc. cit.*; Maitland, *Bracton and Azo*, xxi; Güterbock, *op. cit.* 56, 57.

¹⁰ Sohm, *Institutes of Roman Law* (Ledlie's tr. 1892) xxx-xxxi.

¹¹ Scrutton, *op. cit.* 82; Scrutton, *Roman Law in Bracton* (1885) I L. QUART. REV. 425, 430.

¹² Vinogradoff, *op. cit.* 88-90.

¹³ Maitland, *Bracton and Azo*, xviii-xx. H. Goudy agrees with Maitland: "Great as were Bracton's merits in other respects, his knowledge of Roman law was utterly defective." *Two Ancient Brocards* (1913), included in *Essays in Legal History read before the International Congress of Historical Studies in London*.

Bracton's purpose and intention in making use of Roman law. And there has been no unanimity of opinion in regard to Bracton's object in drawing upon the civil law as he did. Maitland's conclusions in *Bracton and Azo* are based on the assumption that Bracton was trying to reproduce more or less closely his Roman sources, and that he intended to give technical meanings to his Roman terms.¹⁴ Quite otherwise was Güterbock's belief.¹⁵

"When Bracton occasionally uses such expressions as *ususfructus*, *fructus*, *usus*, *habitatio*, he does not at all connect them with the legal notions which the Corpus Juris has made current with us. On the contrary these words are used by him in a general meaning and not in a technical sense, and without reference to any particular institution of the Roman law."

Scrutton's idea is that when there was no English law on a certain point, Bracton took Azo almost or quite verbatim merely to give completeness to his own exposition.¹⁶

"We can thus explain the constant appearance in the extracts from Azo of Roman terms having no English counterpart, which Bracton has not apparently thought it worth while to alter."

Vinogradoff says that while Azo stands very near our own expositors of Roman law, explaining and illustrating, but not remodeling, the texts from the Corpus, and not taking into consideration modern practice, "such a standard (of judgment) would be entirely out of place in regard to Bracton," whose aim "was as different from that of his model, the Bolognese doctor, as the means at his disposal were peculiar." Bracton "does not want to state Justinian's teachings more or less exactly, but compiles Institutes for the English law of his time."¹⁷

¹⁴ Though Maitland, disagreeing with other writers, goes to an extreme length in denying Bracton's ability to understand and intelligently to use his Roman sources, it must be confessed that on its face at least *Bracton and Azo* is very persuasive. This is due partly to the editor's inimitable style and boundless enthusiasm, and partly to the fact that, consciously or unconsciously, the treatment of this medieval subject is developed in true medieval fashion in the syllogistic form. For the results of that work, in so far as they crystallize into definite conclusions in the editor's mind, can most succinctly be stated thus: All, or nearly all, the Roman element of any importance in Bracton is found on folios 1-10b, 98b-106b, 112-115; for these folios Bracton's manipulation of the Roman element can be called only "bad"; therefore the manipulation of the Roman element in Bracton can be called only "bad." The first statement is the assertion of an alleged fact and as such is susceptible of proof or disproof. The second statement is not, as it on first sight seems to be, the statement of a fact, but the interpretation of a set of facts which have been interpreted by different writers in different ways. In other words, the conclusion which constitutes the minor premise of the syllogism is not the inevitable result of a set of facts from which it is derived, but it is the result of a certain interpretation of those facts, which interpretation is open to question.

¹⁵ Güterbock, *op. cit.* 88.

¹⁶ Scrutton, *Roman Law in Bracton* (1885) 1 L. QUART. REV. at p. 431; Scrutton, *op. cit.* 82.

¹⁷ Vinogradoff, *op. cit.* 89.

From the standpoint of the larger questions involved, so much depends upon a correct understanding of Bracton's motive in using his Roman sources, that it is to be regretted that the writers are not agreed on that point. Yet disagreement is practically inevitable. The matter of motive resolves itself into a question of interpretation rather than one of fact; it is something difficult of proof or disproof. Moreover, Bracton may well have had one object in view in using Roman law in one part of his treatise, and quite another object in view in another part. The object may have varied with his method. At times he quotes page after page of the Roman material with little or no variation from the original; at times there is a mixture of Roman and English law, in varying proportions of each; sometimes a whole set of ideas are developed through the medium of English illustrations resting on Roman principles; for a large part of the treatise the Roman element is lacking altogether. What lies behind this difference of method we may not be able to discover. But it goes without saying, that any explanation of Bracton's purpose in his use of Roman law which will fit all the facts, and all his differences of method, must be based upon a study of the whole *De Legibus*.

We are not here prepared to examine the whole of that treatise from the standpoint of its Roman element. We would, however, in so far as the limitations of space permit, consider that portion of the work which in the printed editions is set off by itself under the heading of *De Adquirendo Rerum Dominio*, or rather that portion of it which is omitted from the excerpts in *Bracton and Azo*, namely folios 11-98.¹⁸

¹⁸ There can be no doubt that Bracton, following the title of D. 41.1, meant that *De Adquirendo Rerum Dominio* should constitute a unit in itself. It begins on folio 8b at ch. 1 of the old printed text, which treats of the acquisition of ownership *de iure naturali*. In ch. 4 (f. 10) the methods of acquiring ownership *ex iure civili* are discussed. It may be noted that the first section of this chapter, which is not, as the rest of the chapter taken from Azo, outlines topically, though briefly, more of *De Adquirendo Rerum Dominio* which is to come. Ch. 5 (f. 11) takes up merely the first topic suggested in the first section of ch. 4, i. e., how ownership may be acquired *ex causa donationis*. In *Bracton and Azo* the end of the first block of text is put not at f. 8b but at f. 11. This is due partly to the fact that with the end of ch. 4 Bracton ceases, for a short interval, to copy verbatim from Azo, and partly because a very noticeable break occurs in the Digby MS. at this point. This led Maitland to believe that a break may have occurred in Bracton's own MS. at ch. 5, at which place he thought Bracton turned from the copying of Roman material to the exposition of practical English law. Maitland's wonderful ability to put life into a dead subject is nowhere better exemplified than in the place where he so vividly describes Bracton's feelings as he finished with ch. 4 and prepared to take up ch. 5. As a portrayal of the particular emotions there depicted they cannot be surpassed: "We can almost hear the *Laus Deo!* that he uttered as he turned from alien matter that he did not understand to the practical English law of feoffments that he administered. This is how he dashes into a new and more congenial part of his work:—'Quoniam inter alias causas acquisitionis magna, celebris et famosa est causa donationis.' Here at length speaks the English justice." Maitland, *Bracton and Azo*, 134. We are deeply and most sincerely sorry to have to question in any way the historical accuracy of this truly remark-

In regard to the amount of Roman law in these nearly ninety folios of text we again have a diversity of opinion. Scrutton sees here a large section of text in which Roman principles appear to be the framework, though masses of English matter are moulded on them.¹⁹ Güterbock found so much Roman law in *De Adquirendo Rerum Dominio* that he drew heavily on this particular part of the *De Legibus* in his discussion of the general subject, as a mere glance at his book will show. Holdsworth believes that here, "the Roman law is not only used to define and illustrate the outlines of the English law of property; it is used also to solve many problems which may result from the working of its rules."²⁰ Maitland, on the contrary, thought that in this portion of his treatise Bracton had practically ceased to have recourse to the Roman law books, and was devoting his attention to pure English law.²¹ We have therefore, at the very start, a clear cut issue: is there in this part of Bracton's text a Roman element of such extent or consequence as to render it important, or is it merely negligible?

Now, speaking generally, it is more difficult to show the relation between Bracton and the Roman sources for folios 11-98 than for the folios immediately preceding. He does comparatively little copying verbatim in comparison with what he has done on folios 1-10b. The connection between his text and the civil-law books is less obvious. Maitland's estimate of the Roman element in folios 11-98, which is certainly too small, is easily explained on this basis. It was only natural that, fresh from a portion of the *De Legibus* where almost every word had been taken more or less verbatim from Azo, he should, by the very contrast, have regarded folios 11-98 as being only slightly touched by the Roman influence. There are some portions of *De Adquirendo*

able word picture. We would be content to forget facts in our enjoyment of it. But the facts intrude and come between us and the picture. For in reality the break in the Digby MS. is the accidental result of a peculiar method of copying. There is no break in Bracton's plan, and little, if any, change in his method. He is still using his Roman sources, still copying verbatim, though not to the same extent. When at ch. 5 he dashes into a new and more congenial part of his work to speak at length as the English justice, his very first word, *Quoniam*, would seem to be a memory echo of Azo's opening word (in C. 8.54). And is it mere coincidence that the sectional headings which Bracton runs over for us at the very start—*Quid sit donatio, Quis donare possit, Cui donari possit*—are exactly those used, among others, by Azo? See 1 Woodbine, *Bracton* (1915) 52, 53 for a discussion of the limits of *De Adquirendo Rerum Dominio*. Notice also in Bracton's text the beginnings of ch. 23 (f. 52), ch. 27 (f. 61), ch. 29 (f. 62). On the peculiar method used for dividing the work of the scribes who copied the Digby MS., see 1 Woodbine, *Bracton* (1915) 70-76.

¹⁹ Scrutton, *Roman Law In Bracton* (1885) 1 L. QUART. REV. at p. 429.

²⁰ 2 Holdsworth, *op. cit.* 227.

²¹ Maitland, *Bracton and Azo*, xv, xvi: "He has pushed Azo's Summa aside; he has Glanvill's treatise and the Note Book under his eye; he is no longer stumbling and blundering as he is in those first ten folios; he is writing about matters that he understands, about law that he administers. Occasionally he turns to Azo: for example, when he wants a theory of possession. . . . Now and then he may look at the Institutes or the Digest, but this happens rarely."

Rerum Dominio on which the Roman law could be expected to have little or no effect. *De homagiis faciendis et capiendis* and *De releviis dandis* are subjects having no counterpart in Roman law; they are too late for the *Corpus Juris*—or for Azo, who does not attempt to bring the *Corpus* up to date. In some portions the Roman law would be directly at variance with the English law, because of fundamental differences, as on the subject of heirs. But taken in many of its parts, this portion of Bracton's treatise is a good illustration of the truth of a statement already made by another, that frequently English writers did not simply copy their Roman models, but borrowed suggestions from them in order to develop them in their own way.²² In these parts there is a constant exercise of a knowledge of Roman law by Bracton. It has been noted that in one place he has woven into his treatise almost every word of a parallel passage of Glanvill.²³ In many places in folios 11-98 he has done the same sort of thing with passages from Roman sources, though the interweaving has left little of the Roman element in its original form. What we actually find is this: that in both *De Donationibus* and other parts of *De Acquirendo Rerum Dominio*, Bracton uses his Roman law texts, sometimes copying them verbatim, but more often picking and choosing his material; that in many places he makes use of the ideas, principles, and vocabulary of the Roman system, at times with, and again without, the admixture of English matter.

Going more into detail we may see, in the first place, that Bracton did not, as Maitland contended, make a break at folio 11 in the sense that he here ceased to borrow from his Roman exemplars. The following comparison of texts will show that.

Azo:—Quoniam donatio stipulatione demum interveniente, . . . Videamus ergo quid sit donatio. Et quidem donatio est quaedam mera liberalitas, quae nullo cogente conceditur, . . . id est neque civili neque naturali. . . . Quae sit donationum divisio? Et quidem alia simplex, alia ob causam. Simplex est cum nullo casu velit ad se reverti quod dedit, vel quod se daturum promisit: sive fiat pure, sive in diem, sive sub condicione. Ob causam est, quae interponitur ut aliquid fiat vel non fiat: in quam speciem dico cadere donationem propter nuptias et causa mortis, et dotis. (*De Donationibus*. C. 8.54.).

Bracton (f. 11):—Quoniam inter alias causas acquisitionis. . . . Est autem donatio quaedam institutio quae ex mera liberalitate nullo iure cogente procedit. . . . Videndum qualiter donatio dividatur. Dividitur autem sic, quod donationum alia inter vivos, alia mortis causa, . . . Item donationum alia simplex et pura, scilicet quae nullo iure civili vel naturali cogente, nullo pretio, metu vel vi interveniente, ex mera et gratuita liberalitate donantis procedit, et ubi in nullo casu velit donator ad se reverti quod dedit, vel quod se daturum promisit, sive fiat donatio pure sive in diem, nisi fiat sub condicione vel sub modo. Item alia fit ob causam, ubi scilicet causa interponitur ut aliquid fiat vel

²² Vinogradoff, *op. cit.* 105.

²³ Maitland, *Bracton and Azo*, xxiv, note 4.

Digest:—Donationes complures sunt. dat aliquis ea mente, ut statim velit accipientis fieri nec ullo casu ad se reverti, et propter nullam aliam causam facit, quam ut liberalitatem et munificentiam exercent: haec proprie donatio appellatur. dat aliquis, ut tunc demum accipientis fiat, cum aliquid secutum fuerit: non proprie donatio appellabitur, sed totum hoc donatio sub conditione est. Item cum quis ea mente dat, ut statim quidem faciat accipientis, si tamen aliquid factum fuerit aut non fuerit, velit ad se reverti, non proprie donatio dicitur, sed totum hoc donatio est, quae sub conditione solvatur. qualis est mortis causa donatio. (D. 39.5.1 *De Donationibus*).

non fiat, in quam speciem cadit donatio causa dotis vel causa mortis vel huiusmodi. Ut si quis ea mente dederit, ut tunc demum fiat accipientis cum aliquid fuerit subsecutum, id est si aliquid factum fuerit vel non factum. Et hoc genus donationis improprie dicitur donatio, cum tota omnino fiat sub conditione. Et si quid detur ea mente ut statim fiat accipientis, si tamen aliquid factum sit vel non factum, id ad se reverti, nec hoc proprie dicitur donatio, sed talis videlicet quae resolvitur sub conditione, secundum quod inferius dicitur plenius de donationibus conditionalibus.

It is evident that here Bracton started in with Azo, borrowed his idea of *mera liberalitas*, looked up his reference to D. 39.5.29.1 and D. 50.17.82 for the *iure* omitted by Azo, omitted his *id est civili neque naturali* to bring it in later under a slightly changed form, then added an extended and explanatory arrangement of Azo's simple *mera liberalitas*, and to the Italian's qualifications of *dies* and *condicio* added that of *modus*. This is a copying verbatim from Azo, but it is something more besides. Bracton may have gotten his idea of the division *inter vivos* and *mortis causa* from a reference made by Azo (it is omitted in our excerpt) to D. 39.6.35, but it seems more reasonable to accept this division as one made by Bracton himself for the general treatment of this subject, especially as it is on such a division that his scheme of developing the subject is based.²⁴ Even though Bracton's *nullo pretio, metu vel vi interveniente, ex mera et gratuita liberalitate donantis* may have been suggested by Azo's *mera autem ideo dicitur: quia si fiat ex necessitate, non est donatio*, still the explanation is Bracton's own, while the mention of *metus* and *vis*, with the development of these subjects later on in this same chapter (which development is carried on, by direct reference, to the very heart of the treatise and the Assize of Novel Disseisin), indicates the way in which Azo's text was made subordinate to something which Bracton regarded as larger and more important. Having finished with Azo for the time being, Bracton turns to the Digest, which he uses in much the same way, again reserving a fuller discussion of some matters for a place much further along. That is, within the limits of the first page on which Bracton is said to have pushed aside his Roman sources, we see him using not only Azo, but the Corpus as well.

For the rest of this fifth chapter we shall find him making further use

²⁴ For the probable plan on which the *De Legibus* was developed, see 1 Woodbine, Bracton (1915) 60-62.

of his Roman material, sometimes copying verbatim, sometimes borrowing only expressions, at other times taking merely the bare idea. English writs will be given and English cases will be cited. But not these, nor the mention of Ipswich or Saint Albans, not even Judge Martin de Pateshull in the county of Hereford, will make Bracton forget his Roman law. Its words and phrases, the general atmosphere of it, is ever with him, even when he is not quoting directly from it, and the English law does not cause him to put it out of his memory. His text itself is the proof of this statement. We can not take it up in detail here, but he who seeks shall find.²⁵

Not that chapter five is representative of all of *De Adquirendo Rerum Dominio* in this respect. There is one large block of text in which we seek almost in vain for any indication of a Roman element. For something more than the last third of this particular part of his treatise there is little conscious or deliberate use of the civil law by Bracton; the Roman influence is practically lacking. There are some much smaller blocks of text to which these same statements would, in general, apply.²⁶

²⁵ Before leaving ch. 5 we should notice briefly Bracton's skillful way of treating the subjects of *vis* and *metus*, to a discussion of which the last portion of this chapter is devoted. By a clever device he makes a single treatment of each subject meet the demands of two passages nearly one hundred and fifty folios apart. A gift, says Bracton, should be given freely and not under compulsion, and if made under restraint it may be revoked. Therefore he must take up *vis* and *metus*. But he prefers to discuss *vis* in detail somewhere else than here. That subject, he tells us, will be considered further on in the treatise of novel disseisin. Here he will write about *metus*. This is one proof among many others that Bracton was writing with a well defined plan in mind. He has not finished the first part of *De Donationibus*, yet he knows already that the subject of *vis* will fit into his scheme of things better in the later place. One of the opening sections of the assise of novel disseisin is devoted to the promised discussion of *vis*. But even on folio 162 Bracton goes back to his Roman sources. Azo has taken up both *vis* and *metus* in his *Summa of the Code* (C. 2.19); the two subjects are treated together in the *Digest* (D. 4.2). The definition of *vis* in the *Digest* is slightly different from that in Azo; Bracton accepts Azo's definition. Going a little further into Bracton's treatment of *vis* we find him distinguishing the different kinds: *vis simplex, armata, expulsiva, clandestina, perturbativa, inquietativa, ablativa, compulsiva* (quae aliquando metum inducit, he says twice), *iniuriosa et illicita*. These are not the terms of the *Digest*, but of the commentators nearer to Bracton's own time. Azo uses many of them. That is, well towards the middle of his long book Bracton is yet drawing on Azo. At the end of his discussion of *vis* he refers us back to *De Donationibus* for a treatment of *metus*. Now if we go back to our starting point for this latter subject (f. 16b), we find the *Digest*, Azo, and Bracton giving practically the same definition. After the definition Azo has only four short lines of text which Bracton does not follow; he goes instead to the *Digest*, reversing the order of passages in the latter book in his use of them.

²⁶ With the end of ch. 6 (f. 20b) Bracton finishes with the subject of "donatio condicionalis vel sub modo." For the next eighteen folios we have a text that is English law almost entirely. Yet even here there can be seen in places no slight trace of the Roman element. Notice, for instance, ch. 12 (f. 29) which discusses the question whether or not a *donatio* can be made between husband and wife

But even after all these deductions have been made, there yet remains a very considerable portion of *De Adquirendo Rerum Dominio* that shows, in one way or another, to a greater or less degree, the result of Bracton's knowledge of Roman law.

To proceed—chapter six takes up the *donatio condicionalis*.²⁷ It is full of ideas which Bracton has gotten from the Roman law. For the most part it shows a true Roman law vocabulary, though there are in it many words of English law which the juriconsults would not have understood.²⁸ Even admitting that Bracton does not always display the acumen of an Azo when it comes to an explanation and use of the term *sub modo* (if we remember correctly, even the juriconsults themselves are not always in agreement on the matter of *condicio, modus, dies* as qualifications of a juristic act), yet on the whole he has done well with this portion of his text. Moreover he has done what Azo could not have done, he has made obvious the application of Roman principles to English law, with its free tenements, its assises, and even its right of presentation—"Item si quis ita dederit sub modo vel sub condicione. . . . Verbi gratia si quis dederit alicui advocacionem alicuius ecclesie, ut ibi faciat prioratum. . . ."

To go into anything like detail for the whole chapter would require many pages of space. Bracton has most certainly made use of the Code, Digest, and Institutes. He may also have been looking into Azo. It must suffice to notice briefly a few passages to illustrate his methods of using the Roman texts to bring out his own points. We may observe him taking texts which are sometimes far apart in the original and bringing them into all but juxtaposition:

during matrimony. Though Bracton cites several English cases in this chapter, the connection of his text with D. 24.1 (*De Donationibus inter Virum et Uxorem*) is evident. On folio 29b he cites and quotes from C. 5.3.20, and on folio 30b he makes a direct reference to D. 39.5.15, comparing the Roman *lex* with the English *consuetudo*.

²⁷ Bracton shows himself quite as competent to pick and choose his order of subjects in the larger sense as well as in the smaller. For many of his broader divisional titles and subjects he has suggestions ready at hand in his Roman law books. Of these he makes use. On folio 11 we found him accepting Azo's division of *donationes* (*donatio simplex, donatio ob causam*). On folio 17 he makes another division from another standpoint (*donatio simplex et pura, donatio condicionalis vel sub modo*). Here he is following the order of subjects in Azo, where *De Donationibus* (C. 8.54) is followed by *De Donationibus quae sub modo vel Condicione vel certo Tempore Conficiuntur* (C. 8.55). In the Digest *De Donationibus* is followed by *De Mortis Causa Donationibus*, which subject Bracton does not introduce for another forty folios. But though Bracton follows Azo's order of subjects at this place he does not follow the latter's text, which is only some twenty lines in length. Bracton devotes three folios to this subject of conditional gifts. The Roman element in these folios is evident to the most casual observer; it is so much in evidence that even Twiss's edition of Bracton notices it with eleven marginal references to the *Corpus*.

²⁸ Such as *maritagium, re data ad feodi firman, pro homagio et servitio, ad warrantiam, liberum tenementum, ad feoffatum, breve*, and the like.

D. 41.1.9.3: nihil enim tam conveniens est naturali aequitati quam voluntatem domini volentis rem suam in alium transferre ratam haberi (also in Inst. II. 1.40).

D. 50.17.195: Expressa nocent, non expressa non nocent (also in D. 35.1.52).

Bracton (f. 18): Et sufficit quia hoc semel voluit, quia nihil tam conveniens est naturali aequitati quam voluntatem domini volentis rem suam in alium transferre ratam haberi. Et expresso eo ad quod tenetur donatarius in carta donationis, alia omnia videntur esse remissa quae non sunt specialiter expressa. Et sic expressa nocent, non expressa non nocent, et sic liberat carta ab onere quae expresse non onerat.

This method amounts almost to a habit. Perhaps the best example of the way in which Bracton thus manipulates his Roman material to fit his own scheme is found more than forty folios on, where he is considering *donationes mortis causa*.²⁹ In the space of something less than a page he uses five passages from the Corpus, thus:

D. 39.6.2: tres esse species mortis causa donationum ait, unam, cum quis nullo praesentis periculi metu conterritus, sed sola cogitatione mortalitatis donat, aliam esse speciem mortis causa donationum ait, cum quis imminente periculo commotus ita donat, ut statim fiat accipientis. tertium genus esse donationis ait, si quis periculo motus non sic det, ut statim faciat accipientis, sed tunc demum, cum mors fuerit insecuta.

Inst. II. 7.1: Mortis causa donatio est, quae propter mortis fit suspicionem, cum quis ita donat, ut, si quid humanitus ei contigisset, haberet is qui accepit: sin autem supervixisset qui donavit, reciperet, vel si eum donationis poenituisset aut prior decesserit is cui donatum sit.

D. 39.6.26: Si qui invicem sibi mortis causa donaverunt pariter decesserunt, neutrius heres repetet, quia neuter alteri supervixit. idem iuris est, si pariter maritus et uxor sibi donaverunt.

Bracton (f. 60): tres sunt species. Una, cum quis nullo praesentis periculi metu conterritus, sed sola cogitatione mortalitatis donat. Alia, cum quis imminente periculo mortis commotus ita donat ut statim fiat accipientis. Tertia, si quis commotus periculo non dat sic ut statim fiat accipientis, sed tunc demum cum mors fuerit insecuta. Et mortis causa donatio. . . .

Et donationes quae sic fiunt propter mortis suspicionem, mortem testatoris confirmantur: et sic fiunt, ut si quid humanitus contigerit de testatore, habeat is cui legatum est. Si autem convalescat, retineat vel rehabeat legatum, vel si prior moriatur ille cui legatum est.

Et si duo qui sibi invicem mortis causa donaverint pariter decesserint, neutrius heres repetet quia neuter alteri supervixit.

²⁹ The English law on this subject was developed on the basis of the Roman law, with which even yet it is in substantial accord.

D. 39.6.1: Mortis causa donatio est, cum quis habere se vult quam eum cui donat magisque eum cui donat quam heredem suum. (cf. Inst. II. 7.1.)

D. 39.6.3-6: Mortis causa donare licet non tantum infirmæ valetudinis causa, sed periculi etiam propinque mortis vel ab hoste vel a prædonibus vel ab hominis potentis crudelitate aut odio aut navigationis ineundæ: aut per insidiosa loca iturus aut aetate fessus: hæc enim omnia instans periculum demonstrant.

Et est re vera talis donatio mortis causa cum testator rem legatam se ipsum magis habere voluerit quam eum cui legata fuerit, et eum cui legata est magis quam heredem suum. Si autem sic. . . . Mortis causa donare licet non tantum infirmæ valetudinis causa, sed periculi et propinque mortis ab hoste vel a prædonibus, vel ob hominis potentis crudelitatem vel odium, aut causa navigationis vel peregrinationis imminente, aut si quis fuerit per insidiosa loca iturus: hæc enim omnia instans periculum demonstrant.

Toward the end of the first section of the sixth chapter, folio 19, Bracton comes to give examples of the innominate contracts which he has already mentioned.³⁰ Here his illustrations, instead of being English, are distinctly Roman, and of such a character as to be worthy of notice:

"Do ut des, ut si dicatur, Do tibi digestum ut des mihi codicem, ut si digestum tradidero, teneris mihi ad codicem tradendum. Vel si dicam, Do tibi ut facias, id est, do tibi codicem ut facias mihi scribi digestum."

This shows that to Bracton the Digest and Code were literally two books. Usually his illustrations, even for Roman principles, are English, and they are apt and practical enough for the most part. No passage in the whole book is more dependent upon a Roman terminology than that on *res incorporales* (folio 52b); we have been told that Bracton's whole treatment of this subject is expressed in Roman terms.³¹ But notice his illustration here; he chooses an advowson as the *res incorporales*: the church built of wood or stone is a corporeal thing, but the right of presentation is incorporeal; so it is one thing to give the church, and quite another thing to give the advowson. But by common usage, laymen, because of their ignorance of this distinction, give the church when they mean to give the advowson. All of Bracton's readers would understand his distinction between the church and the right of presenting to it. Would they understand as well his reference to the Code and the Digest in the earlier passage? May we not at least infer that he thought they would? On this basis can be explained his use of other typical Roman illustrations in the second section of this same sixth chapter, which is thoroughly saturated with Roman material,

³⁰ In the care with which he goes into an explanation of the four innominate contracts there is the suggestion that Bracton still had in mind his earlier expressed intention to write "ad instructionem saltem minorum" (f. 1). He is apparently giving to these *minores* a rule which he found useful in his own earlier study of some of the basic principles—"Facit enim modum ut, si condicionem, quia causam. Unde versus, 'Scito quod ut modus est, si condicio, quia causa.'"

³¹ I Maitland, *Collected Papers* (Fisher's ed. 1911) 379.

as a mere glance at it will show. His use of "si coelum digito tetigeris" to illustrate the impossible condition we can well understand; it is not possible to improve upon the example furnished by the Corpus. Bracton's explanation of a *condicio casualis* is also noteworthy, not only because of the stock Roman illustrations which it contains, but because it gives a distinctly Roman setting to his favorite set of words to express a contingent future event. He says:

"Item si condicio casualis fuerit, ut si dicam, 'Do tibi talem rem si navis venerit ex Asia, vel si Titius consul factus fuerit, erit donatio in pendentem quia huiusmodi donationes dependent ex insidiis fortunae.'"

More than once again in his pages yet to be written he will have the ship coming out of Asia and Titius posing as a consular possibility.³² Their origin is plain. But where did Bracton get the "dependent ex insidiis fortunae"? He is fond of using the phrase. It occurs at least five times more in *De Adquirendo Rerum Dominio*.³³ It is permissible to refer to C. 6.27.6, "Sin autem casualis condicio est et ex fortunae insidiis defecerit," and to C. 6.51.1.7, "Sin autem aliquid sub condicione relinquatur vel casuali, vel potestativa, vel mixta, quarum eventus ex fortuna . . . pendeat." Azo in his treatment of these passages leaves out the "ex insidiis fortunae." Apparently Bracton has gone straight to the Code for one of his favorite phrases.

Another passage in this same chapter raises and half answers the question as to the origin of another of Bracton's much used expressions, one that has become a common-law maxim. On folio 20 we have: "Poterit enim quis renuntiare pro se et suis iuri quod pro se introductum est . . . quia scienti et volenti non fit iniuria." With this and the lines immediately following it, which we need not reproduce here, should be compared the passage on folios 48b-49:

"Et ita poterit quis ex conventionem speciali renuntiare his quae pro se introducta sunt et suis. . . Scienti enim et volenti non fit iniuria, et ideo dicit (not dicitur) scienti et volenti, quia qui errat non consentit."

There are words of the Code in these two similar passages (C. 2.3.29) — "cum alia regula est iuris antiqui, omnes licentiam habere his quae pro se introducta sunt renuntiare"; but of particular interest is Bracton's oft-repeated words that "scienti et volenti non fit iniuria."³⁴ The words last quoted, "quia qui errat non consentit," are used again by Bracton on folios 44, 58b. They come near to D. 2.1.15, "non consentiant qui errent."³⁵ But for "volenti et scienti non fit iniuria" we have found no such close parallel. D. 42.8.6.9 offers a suggestion: "Nemo enim videtur fraudere eos qui sciunt et consentiunt";³⁶ so also does

³² On folio 47 we get this variation: "Si navis venerit ex Asia vel comes Ricardus effectus fuerit rex Alemanniae."

³³ On folio 47 (twice), f. 92b, f. 94b, f. 98.

³⁴ It occurs first in an *addicio* on folio 18 in the form "volenti non fit iniuria"; the longer form is found on folios 20, 49, 51b.

³⁵ The same general idea is found in D. 39.3.20 and D. 50.17.116.

³⁶ Also in D. 50.17.145. Cf. "Scienti et consentienti non fit iniuria neque dolus,"

D. 47.10.1.5: "quia nulla iniuria est, quae in volentem fiat." But the exact words used by Bracton we have not been able to find in either the Corpus or Azo, though in a similar situation on folio 38b Bracton has made Azo the subject of the same word *dicit*.³⁷ Here Bracton may be referring to some commentator other than Azo, but it seems more reasonable to suppose that he is reproducing only the Roman idea, using his own words: "scienti et volenti non fit iniuria."³⁸

More than in any other part of *De Adequirendo Rerum Dominio*, that portion of text which has to do with *possessio* shows the influence of Roman law.³⁹ One need read only what Güterbock has already written (chapter xi) to realize that in his treatment of this subject Bracton is permeated with the language and ideas of the civilians. His definition of *possessio* he takes directly from Azo (C. 7.32), and follows it up with several lines copied practically verbatim from the same source. We can not here take the space for parallel passages, but if one will compare folios 38b-39 of Bracton, noting his reference to the treatise of Novel Disseisin and matter which will be found there, with folios 159b-161 (Assise of Novel Disseisin), and with Azo in C. 7.32.4-9, he will see both how Bracton was using his Roman materials and how he was developing his own scheme of treatment.

With the subject of *traditio* Bracton deals at considerable length. It is a matter of great importance in the English conveyance. Here also

in VI to lib. v. t. xii. c.v. 27. But Boniface VIII did not become pope till nearly thirty years after Bracton's death.

³⁷ "De hoc autem quod dicit, corporis et animi cum iuris adminiculo concurrente" (Azo in C. 7.32.3), Bracton's *dicit* taking the place of Azo's own *dixi*, though just before this Bracton has changed another *dixi* of Azo into *dicitur*. After giving his definition of *traditio* (f. 39b) Bracton has, as explanatory of the terms used in the definition, "De re corporali ideo dicit (not "dicitur" as in the printed text) quia" and a little lower down, "De re propria vel aliena dicit quia" (cf. Azo in C. 4.49.9). Later yet (f. 42) we find, "De hoc autem quod dicit quod vacua debet esse possessio" (cf. Azo in Inst. ii. 1.56).

³⁸ On this general subject see Williams, *Latin Maxims in English Law* (1895) 20 L. MAG. & REV. 283.

³⁹ Although Bracton is indebted to Azo for much that he has to say about *possessio*, he more than once follows the Digest rather than Azo as to the order of subjects under the general heading. Thus the change which comes at ch. 19 (f. 45b) follows the Digest for order. Ch. 21 (f. 51), on how possession once acquired may be lost, is followed by a discussion of how possession may be acquired by usucapion. This too is the order of subjects in the Digest. In Azo the subject of usucapion is taken up in C. 7. 25-31 and *De Adquirenda et Retinenda Possessione* in C. 7.32, with *De Longi Temporis Praescriptione* the subject of C. 7.33. In the Institutes the two subjects of usucapion and prescription are united under one title which precedes *De Donationibus*. Yet Bracton follows the order of subjects in the Institutes at times. At least when it comes to developing an order of subjects, Bracton is not stumbling and groping among his Roman books. He is willing to take what they furnish him; yet not they, but his own scheme of treatment determines at what point and in what order this or that subject shall find a place in his treatise. There is nothing in the choice that suggests patchwork or imitation. He shows the independence and dexterity of a workman who knows his material and how to use it for his own purpose.

he draws on the Roman law, going to both Azo and the Corpus. To illustrate:

D. 41.1.9.3-4: Hae quoque res, quae traditione nostrae fiunt, iure gentium nobis adquiruntur: nihil enim tam conveniens est naturali aequitati quam voluntatem domini volentis rem suam in alium transferre ratam haberi. Nihil autem interest, utrum ipse dominus per se tradat alicui rem an voluntate eius aliquis. . . .

D. 41.1.9.5: Interdum etiam sine traditione nuda voluntas domini sufficit ad rem transferendam, veluti si rem, quam commodavi aut locavi tibi aut apud te deposui, vendidero tibi: licet enim ex ea causa tibi eam non tradiderim, eo tamen, quod patior eam ex causa emptionis apud te esse, tuam efficio.

Bracton (f. 39b-40): quia res quae traditione nostrae fiunt iure gentium nobis adquiruntur. Nihil enim tam conveniens est naturali aequitati quam desiderium domini volentis in alium rem suam transferre ratam haberi. Et nihil interest an ipse dominus per se tradat alicui rem datam, an alius voluntate ipsius, sicut per procuratorem si ipse praesens non fuerit, Et in quo casu ostendantur litterae et carta ut dici poterit talis habuit breve et cartam, secundum quod Anglice dicitur, *He hadde bothe writ and chartre*. . . . Item sufficit pro traditione corporali nuda voluntas domini ad alium, quasi mutata causa possessionis, dum tamen fiat cum solemnitate, quod probatio non deficiat, ut si quis rem alicui locaverit vel concesserit ad terminum vitae vel annorum, postea eidem vendiderit vel donaverit, licet eam ex tali causa primo non habuerit, eo tamen quod ipse dominus petitur eam ex tali causa vel alia quacumque apud eum esse sua efficitur.

Immediately preceding the excerpt here given, Bracton, after a passing mention of *possessio vacua* (cf. Azo in Inst. II. 1.56, and Azo in C. 4.49.4), has defined *traditio* and explained his definition.⁴⁰ Then he goes straight to the *Digest* and that same passage on *naturalis aequitas* which we have already seen him using in a different connection on folio 18. This is one of Bracton's characteristics. He uses over and over again not only his concise maxims, but also whole passages that seem to have imbedded themselves in his memory and are not too long for repetition. And be it noted that this applies to passages that are typically English as well as to passages that are typically Roman. After this brief incursion into the *Digest* he comes back to the English significance of the *traditio*; his reference to the writ and charter at this place is one of the very few English expressions in his whole book; he tells us that under certain circumstances *traditio* should be made by the door, the hasp, or the ring (per ostium et per haspam vel per anulum); if there is no building on the place, seisin is to be given the donee by

⁴⁰ For Bracton's emphasis upon *possessio vacua* as necessary for *traditio*, see Güterbock, *op. cit.* 94. This idea was not based upon the *Corpus*, but was in harmony with the teachings of the contemporary civilians.

means of the staff and the wand (*per fustum et per baculum*). This is all English enough. But the Roman element shows up too. After livery of seisin, the donee has merely to place his foot upon the land with the intent to possess; it is not necessary that he walk all around or everywhere upon it,⁴¹ or that he at once make use of it and take profits (*expletia*) from it. It would seem that the mere mention of *expletia* brought at once to Bracton's mind the *fructus perceptio* of Roman law, with its attendant vocabulary and phraseology. Thus he says that one may not be able to take *expletia* because the time for harvest has not yet come (*quia nondum advenit tempus messium neque vindemiarum*); if he gathers unripe fruits (*fructus non maturos perceperit*) or cuts down trees, these ought not to be called profits because they result in damage rather than advantage. We are told that *traditio* is not necessary where there has been long and peaceable seisin and long use, as where one has entered upon a vacant *res* which is possessed by no one, and the example of such a *res* is an inheritance upon which no one has yet entered (*hereditatem non aditam*). Do we need better proof of the fact that even in the midst of things thoroughly English, Bracton could hardly express some of his ideas except through the medium of the strict terminology of Roman law? Then, in the last passage quoted, Bracton says that the so called "brevi manu traditio" will suffice for delivery without more. He does not give it this name, but he goes straight to the Digest for his illustration, though he makes the important addition that the will of the former owner should be made manifest by some ceremony sufficient to prove the intent.⁴² In this place, at least, Bracton is not stumbling helplessly through his Roman material.

Continuing with this same subject of *traditio* into the next section (§3, f. 41), we come to an *additio*. We can not be absolutely sure that it was written by Bracton.⁴³ If written by someone else, it would be additional proof of a general knowledge of Roman law in England among Bracton's contemporaries, for the *additio* is an old one. Whoever the writer of it may be, he is using Azo in exactly the same way that Bracton uses Azo.⁴⁴ Moreover the passage starts out with a direct quotation from Code 2.3.20: "Traditionibus et usucapionibus dominia rerum, non nudis pactis transferuntur," which Bracton makes one of his stock maxims in *De Adquirendo Rerum Dominio*, using it on folios 16, 38b, 41, 43, 62, with a reference on folio 61b to a previous use of it. These facts all but prove that Bracton was the writer and justify a comparison of the passage with the passage in Azo on which it is based (Inst. II.1.56-64), more especially because it furnishes an excellent example of the writer's manipulation of the Italian's text, and because

⁴¹ Cf. D. 41.2.3.1.

⁴² "... dum tamen fiat cum solemnitate, quod probatio non deficiat. . ."

⁴³ Many of the *addiciones* were written by Bracton. In some of the Bracton MSS. there are contemporary marginal references to, or citations of, the *Corpus*.

⁴⁴ He has just used Azo on folios 38b-39 (Azo in C. 7.32.4-9). Here he turns to Azo in Inst. II. 1. 56-64.

it comes some thirty folios beyond the point at which Bracton is supposed to have laid aside Azo's *Summa*. In this comparison much must here be omitted, for in both writers the passage is a long one.

Azo: Quod autem dictum est, traditione acquiri possessionem, plerique intellexerunt ita, si emptor inducatur in vacuam possessionem. . . . Dicimus ergo regulare esse, ut ex his, quae aguntur inter vivos, non acquiratur dominium sine inductione in possessionem: sed tamen bene acquiritur sine possessione. Illa enim verba, *in vacuam possessionem*, ponuntur demonstrative, non causative. . . . Regulare autem ideo dixi: quia quandoque sine traditione transit dominium, et sufficit patientia: ut si tibi vendo, quod tibi commodavi, vel apud te deposui. Hoc enim ipso, quod patior tuum esse, vel apud te esse, videor tibi tradere. Item si quis merces in horreo depositas vendiderit, simul atque claves horrei apud horrea tradiderit emptori, transferet dominium et possessionem in emptorem, etiam si emptor non aperuerit horrea: et si venditoris non fuerint merces, Idem etiam potest assignari quando res vendita vel donata est in conspectu, quam venditor vel donator dicit se tradere. . . . Item retentio ususfructus et traditio instrumenti rei pro traditione reputantur. . . .

Et idem potest assignari, cum rem illam, quam tibi donavi et non tradidi, a te conduco: videor enim tradere. . . . Item si rei petitaee acceperim pretium, transfero proprietatem in reum, si res petita sit in praesentia, vel reus postea nanciscatur possessionem voluntate actoris. . . . Porro quod dictum est de traditione, est intelligendum de ea quae non sit nuda, sed vestita, id est quam praecesserit causa vera, vel putativa, qua transeat dominium. . . . Illud non refert an tradat dominus, an eius volun-

Bracton: Et quod dicitur traditione acquiri possessionem, regulare quidem verum est quod inter vivos non acquiritur dominium sine inductione in possessionem, sed tamen aliquando bene acquiritur sine possessione vacua. Illa enim verba *in vacuam possessionem* dicuntur demonstrative et non causative.

Regulare autem dixi ideo, quia quandoque sine traditione transit dominium et sufficit patientia, ut si tibi vendo quod tibi accommodavi, aut apud te deposui vel ad firmam vel ad vitam. Et si quod ad vitam vendam tibi in feodo, et sic mutaverim causam possessionis, hoc fieri poterit sine mutatione possessionis. Ex hoc enim quod patior rem meam esse tuam ex alia causa, vel apud te esse, videor tradere. Idem de mercibus in horreis.

Idem etiam dici poterit et assignari quando res donata est vel vendita in conspectu, quam venditor vel donator dicit se tradere ut si ducatur in aream vel campum. Item retentio ususfructus et traditio instrumenti rei de firma et termino pro traditione accipitur.

Item illud idem poterit assignari cum rem illam quam tibi donavi et non tradidi conducam a te, sic videor tradere. Item si rei petitaee acceperim pretium, ut si petam a te rem meam et res sit in praesenti, transfero proprietatem in emptorem, si emptor postea nanciscatur possessionem mea voluntate. . . . Item oportet quod vestita sit traditio et non nuda, scilicet quod traditionem praecedat vera causa vel putativa qua transeat dominium. Et illud non refert utrum tradat dominus an alius eius tamen voluntate. Et non refert multum utrum

tate alius. Nam et si liberam universorum negotiorum alicui permiserit administrationem, isque ex his negotiis rem vendiderit et tradiderit, facit rem accipientis. . . . Secus in procuratore generali, qui non habet liberam, Sed et per non dominum quandoque transfertur dominium, et etiam contra domini voluntatem: ut per tutorem, vel curatorem, et per iudicem. . . .

Et non solum fit hoc inter vivos, sed etiam in ultima voluntate: qua transfertur dominium ab aditione hereditatis, sicut solet transferri per traditionem inter vivos. Nam et quaedam cum universitate transeunt, quae specialiter alienari non possunt: ut fundus dotalis, et purpura. . . . Illud etiam in voluntate domini videtur notandum, quod in incertam personam transfert proprietatem rei: ut ecce, praetores vel consules, qui missilia iactant in vulgus, ignorant quid eorum quisque excepturus sit: . . . Et eadem ratione si rem pro derelicto habitam quis occupaverit, statim fit eius dominus. Habetur autem pro derelicto res mobilis, si ita abiciat quis eam, ut nolit suam esse: vel immobilis, si eadem intentione exeat de ea: ideoque statim desinit dominus eius esse. . . . Alia est causa earum rerum, quae in tempestate maris, causa levandae navis eiciuntur. Hae enim permanent domini: quia non eicit ea mente, quod nolit esse dominus, sed quo magis cum ea navi periculum maris effugiat.

praecedat vel sequatur voluntas ut si procurator liberam habens administrationem negotiorum universorum, si talis vendiderit et tradiderit rem facit accipientis voluntate domini subsecuta. Item contra voluntatem domini quandoque transfertur dominium, scilicet per iudicem, quia indicium ruit in invitum.

Et non fit hoc tantum inter vivos, sed etiam in ultima voluntate, dum tamen donator bonam habeat memoriam, sicut fieri solet inter vivos. Item quaedam transeunt cum universitate licet de eis specialiter non fiat mentio, sicut sunt pertinentiae et iura. Item in incertam personam, sicut sunt missilia. Item sine traditione, res habita pro derelicta ubi dominus statim esse desinit dominus: si autem causa levandae navis non sit, quia non ea voluntate eicit quis ut desinat esse dominus vel nolit. Si autem ea mente ut nolit esse dominus, aliud erit. Item sine traditione si velit quis id quod est apud te disseisina vel intrusione tuum sit et tibi remaneat, tamquam venditum vel datum.

Even by itself the above passage is significant. It is something which must by all means be taken into account when we are considering Bracton's use of Azo. Both the omissions and the additions made by Bracton speak most eloquently to the effect that there is here no simple re-copying; they show plainly enough that Bracton was concerned with something quite different from a mere restatement of Azo's text, even though he felt it necessary, or expedient, to go to the latter for assistance in expounding some of the more subtle points of legal learning which were not to be found in the law writers of his native England. But

the passage does not stand alone or isolated. The very next section (sec. 4), except for the word *seisinam* which occurs twice, might well have been written by a civilian as far as its vocabulary and most of its subject matter are concerned. It has in it something of D. 41.2., and of Azo in C. 7.32, even though it contains, as does the following section also, a reference to the assise of novel disseisin farther on. Section 5, with its *possessio vacua*, *possessio naturalis*, *possessio iusta et iniusta*, *donatio imaginaria*, *traditio imaginaria et fictitia*, *actio negotiorum gestorum*, savors of the same Roman influence. Section 6 will also require a commentary from this standpoint some day. The Rolls Series edition of Bracton has attempted to do something by giving ten marginal references to the Corpus for this short section. We may offer this warning in passing—that Twiss's references, even when correctly given, are not always found opposite the passages to which they apply. It is not putting it too strongly to say that this particular portion of Bracton's treatise could hardly have been written except for the knowledge, influence, and vocabulary of the Roman law.⁴⁵

Over the next fifteen folios, with their admixture of Roman and English material, we may not now linger—not even to wait for the ship

⁴⁵ It may not unreasonably be asked whether Bracton would ever have undertaken to write the *De Legibus* if it had not been for the general effect of the Roman law upon him. Whatever Bracton has done with Roman law, the latter has done much for him, giving him a scheme, an incentive, and a vocabulary. Often when he owes nothing else to the Roman system he is yet indebted to it for terminology. Intangible as the subject is for discussion, Bracton's knowledge and handling of his Roman law enables him often so skillfully to weld together Roman and English elements that the welding is evident only on close examination. The influence of the Roman sources upon Bracton is to be seen not only in the actual passages or phrases or doctrines which he incorporates boldly into his text, but in the more subtle influence of their vocabulary. He writes throughout in Latin, but he has, as it were, two vocabularies, the legal Latin of Roman law and the legal Latin of English law. This is doubtless one reason why the quality of his Latinity has been so variously estimated. For there is a vast difference between the Latin of Paul or Ulpian and that of the Note Book or a Register of Writs. For subjects that are truly and strictly English he uses the terms of English law, albeit he writes in Latin; but when he comes to speak of *possessio*, *traditio*, *donatio*, *res incorporales*, and the like, he falls naturally into a legal Latin that is Romanesque, and not—till he has naturalized it, so to speak—English. Compare for instance such a passage as that on folio 56b, "Item nec mutare poterit idem rex de iure libertatem prius concessam, ut si dominus rex tenenti suo concesserit talem libertatem quod nullus vicecomes vel ballivus ingressum habeat in terram suam vel feodum suum, ad aliquam summonitionem vel attachiamentum vel districtionem pro servitio faciendam, si servitium tenentis sui alicui attornaverit et concesserit, talis retorna brevium non habebit" and so on, with the passage on folios 52b-53 which begins, "Tura siquidem cum sint incorporalia." In the latter mentioned place the matter of servitudes is being considered. In Roman law *quasi possessio* was used as referring to servitudes (*iura in re aliena*); in English law it has never been customary to apply it to our praedial servitudes. Bracton uses this term in his general discussion of these incorporeal rights: "sic quasi possidentur ex fictione iuris," "rei incorporalis quasi possessio," "sint quasi in possessione." He was forced to use these terms; English law had not yet developed a vocabulary of its own on this subject, at least not one sufficient for his purpose; but it is

that is again coming out of Asia. But Bracton's short treatment of *emptio venditio* and *locatio conductio* reveals so much of his method and his purpose that it deserves at least a brief mention. The beginning of chapter 27 (f. 61b) indicates that he brought in the subject of purchase and sale to round out the scheme developed under his main title of *De Adquirendo Rerum Dominio*.⁴⁶ Though his text on its face shows that he had Inst. III. 23 and 24 before him, he refused to follow the civil law in putting the risk on the buyer, and deliberately altered its text to put the risk on the seller in accordance with the English rule. Notice what the alteration is: the first portion of Bracton's sentence is copied directly from the Institutes, the latter part is copied just as directly from Glanvill.⁴⁷ Yet just before this Bracton has answered a question raised by Glanvill in regard to the forfeiture of an earnest, and the answer is in agreement with the civil-law rule in Inst. III. 23.⁴⁸ All this is only one of numerous instances that his Roman sources and his Glanvill are at his beck and command, not he at theirs.

From this point on for the rest of *De Adquirendo Rerum Dominio* we find comparatively little conscious or deliberate use of the civil law by Bracton. Yet it remains in his memory; from time to time he throws out suggestions of it; to some extent he makes use of the canon law.⁴⁹ But into these exceptional incursions we can not now follow him.

not his fault if after his time English lawyers failed to understand the technical difference between *possessio* and *quasi possessio*, *possidere* and *esse in possessione*.

⁴⁶ "Est etiam quaedam causa acquirendi rerum dominia quae dicitur causa emptionis et venditionis."

⁴⁷ Bracton: "Cum emptio et venditio contracta fuerit ut praedictum est ante traditionem et post, periculum rei emptae et venditae illum generaliter respicit qui eam tenet, nisi aliter ab initio convenerit." Institutes: "Cum autem emptio et venditio contracta sit (quod effici diximus, simulatque de pretio convenerit, cum sine scriptura res agitur), periculum rei venditae statim ad emptorem pertinet." Glanvill (X. 14): "Periculum autem rei venditae et emptae illum generaliter respicit qui eam tenet, nisi aliter convenerit."

⁴⁸ In this same section Bracton reads, "Ut si homo (not bos as in the printed text) venditus mortuus fuerit ante traditionem, vel aedes incendio consumptae, vel fundus vi fluminis in toto vel in parte consumptus vel ablati, et huiusmodi, quibus rationibus videtur quod totum periculum pertineat ad venditorem." With this should be compared the corresponding passage in the Institutes (III. 23.3). It is clear beyond any doubt that Bracton is not trying to restate the Roman principle, but is giving the English rule. He is willing to keep by way of example the illustration given in the Institutes of the "homo venditus" (*venditus* is Bracton's addition to the original *homo*), but when it comes to the matter of risk he again completely reverses the Roman rule to give the English law.

⁴⁹ Folios 62b-77b have to do with the general subject of inheritance. Between the English heir and the Roman heir there was a broad gulf. Bracton did not try to bridge it. Even though at the beginning he defines an inheritance as "successio in universum ius quod defunctus habuit" in the words of D. 50.16.24, he does not try to apply this definition to English law. His whole treatment of the subject shows that he knows the ground on which he treads; whatever may have been his reason for giving the Roman definition, he discusses the subject from the

In the foregoing brief survey of one portion of Bracton's treatise we have been able to do no more than broadly to indicate its content of Roman law. To show it fully even a complete array of parallel passages would not suffice. It would require a commentary that should take up in detail passage after passage and page after page. What has been given is sufficient to show that though for some portions, for some large portions, of these ninety folios the Roman element is negligible, yet for other portions, for other large portions, it is very much in evidence, and for some portions of fundamental importance. This part of the *De Legibus* must therefore be taken into account when the question of Bracton's Romanism is under consideration. For a discussion of that subject it is just as important as the folios which precede it or immediately follow it—folios to which much attention has already been directed. We are inclined to think it even more important. Not only does Bracton not feel the same necessity of using Roman sources in these folios that he felt in the first ten folios or those immediately after f. 98b—he has a greater abundance of English material for this middle portion of text—but we have here a larger variety of subject matter, many different methods of treatment, and a noticeable mixture of Roman and English elements. We find, therefore, a broader field for comparison. Not that one on the basis of this part of the *De Legibus* alone should attempt to answer the question of Bracton's object in using Roman law, or that other question as to his knowledge of it. That attempt must await a detailed examination of the whole treatise.⁵⁰ But we may at least say this: that believing that Bracton was trying to do something other than merely to reproduce the Roman doctrines and technical terms, believing that he was trying to write a systematic and complete exposition of English law (without in any way attempting to change that law), we can not but regard his use of Roman material in *De Adquirendo Rerum Dominio* as both intelligent and skillful.

standpoint of English law. On folio 63 he describes the legitimate heir as one "quem nuptiae demonstrant." This is one use to make of D. 2.4.5—"pater vero is est quem nuptiae demonstrant." His rubric to ch. 33, *De Heredibus Instituendis*, is the title of Inst. II. 14. Güterbock believed that Bracton's partition proceedings between co-heirs "was copied without doubt from the Roman *iudicium familiae herciscundae*" (D. 10.2). On folios 77b-91b homage and relief and the custody of (medieval) heirs are discussed. These are not Roman law subjects; they are not known to the *Corpus*; yet even in his definition of homage Bracton seemingly can not get away from the language of Roman law—"homagium est *iuris vinculum*" (cf. Inst. III. 13). With folio 92 he enters upon the subject of dower. The English dower is not the Roman *dos*; Bracton does not confuse them. But in his early general treatment of the subject he can not forego the pleasure of bringing in material from Azo in C. 5.12 (*De Iure Dotium*) and from D. 23.3.5, though he reverses Azo's order of subjects. But though he uses Roman terms, Bracton makes a distinction between what they represent and what he knows as dower: "Et hoc proprie dicitur dos mulieris secundum consuetudinem Anglicanam." It is on this line that he continues his discussion of dower.

⁵⁰This applies especially to some portions of *De Corona* and to parts of the Assise of Novel Disseisin, neither of which have as yet received much attention from the standpoint of the Roman element.