

Ownership and Possession in the Early Common Law

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Of the two great legal systems produced by Western civilization, the English common law is by far the younger. Nearly a thousand years passed between the classical period of Roman law and the birth of English law as a national institution. Many scholars have viewed the reign of Henry II (d. 1189), the medieval English king most associated with legal reform, as pivotal in the development of the common law.¹ The English common law came into its own in the twelfth century, long after the

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The following abbreviations and abbreviated citations are used in this article:

- BNB BRACTON'S NOTE BOOK (F.W. Maitland ed.) (1887)
Bracton BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND (George E. Woodbine ed. and Samuel E. Thorne trans., 1968-77, repr. Buffalo, New York, 1997)
CRR CURIA REGIS ROLLS, 18 vols., London: 1922-
D. *Digest of Justinian*, in CORPUS IURIS CIVILIS (Theodor Mommsen & Paul Krueger eds., 1880-95)
Inst. JUSTINIAN'S INSTITUTES (Paul Krueger ed., Peter Birks & Grant McLeod trans., 1987)
Glanvill THE TREATISE ON THE LAWS OF CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL (G.D.G. Hall ed. and trans., 1965)
Lectura Medieval English commentary to *Justinian's Institutes*, in FRANCIS DE ZULETA & PETER STEIN, THE TEACHING OF ROMAN LAW IN ENGLAND AROUND 1200 (1990), 8 SS Supp. Series
LP F. DE ZULETA ED., THE LIBER PAUPERUM OF VACARIUS (1927), 44 SS
PKJ PLEAS BEFORE THE KING OR HIS JUSTICES, 1198-1212 (D.M. Stenton ed. 1948-67), 67, 68, 83, 84 SS
PL *Patrologia Latina* (Jacques-Paul Migne ed., 1844-55)
RCR ROTULI CURIAE REGIS (F. Palgrave ed., 1835)
SS Selden Society
X. *Liber Extra* (*Gregorian Decretals*), in CORPUS IURIS CANONICI (Emil Friedberg ed., 1879-81)

1. On the significance of Henry's reign see PAUL BRAND, "*Multis Vigilis Excogitatum et Inventam*": Henry II and the Creation of the English Common Law," in THE MAKING OF THE COMMON LAW 77 (1992). *But see* JOHN HUDSON, LAND, LAW AND LORDSHIP IN ANGLO-NORMAN ENGLAND 281 (1994) (arguing that the reforms of Henry II were "an acceleration of administrative change, not an unprecedented leap forward").

compilation of Justinian's *Digest*.

While Henry II was responsible for many specific innovations, the most significant change of his reign was an expansion in the role of the king's court.² English kings had long been involved in rectifying failures of seigniorial or local justice, but royal involvement in individual disputes became routinized in the reign of Henry II. Ordinary disputes between freeholders of all sorts were heard in the royal courts and were subject to the same rules. By making royal justice widely available, Henry created a national common law. Most historians agree that the English common law is not a continuum stretching back into time immemorial; it is an institution that was born at a particular moment in time.

When the English common law came into existence, what we today would call the civil law was experiencing a renaissance. Roman law had been revived in the universities, and was being integrated with canon law into the *ius commune*, the "common law" of Europe. The first recension of Gratian's *Decretum* was completed in the mid-twelfth century,⁴ providing a conceptual framework for canon law that would serve as a basis for future commentary. Papal decretals were being issued to ecclesiastical officials all over Europe, and an increasing number of legal cases were being brought to the pope's court.⁵ Henry II and his advisors could scarcely have been unaware of this, as it was happening right under their noses. Many papal decretals from the twelfth century are addressed to English bishops, who were expected to apply the *ius commune* in local disputes.

Because the *ius commune* already had a long history when the English common law came into being, historians have debated the extent to which the English legal pioneers borrowed from the older system. Some remedies, doctrines, and rules of the early English common law bear a resemblance to certain features of Roman or canon law, which prompts the question of whether the resemblance reflects conscious or unconscious borrowing or simply coincidence. While it is rarely possible to answer this question definitively, that has not stopped historians from trying.

One of the characteristic features of classical Roman law is the sharp distinction it draws between ownership and possession.⁶ In rough terms, ownership is title and possession is actual enjoyment.⁷ The classical Roman jurists were careful to distinguish between the two; Ulpian wrote that "ownership has nothing in common with possession (*nihil commune*

2. See Joseph Biancalana, *For Want of Justice: Legal Reforms of Henry II*, 88 COLUM. L. REV. 433 (1988).

3. See *id.* at 434.

4. See ANDERS WINROTH, *THE MAKING OF GRATIAN'S DECRETUM* 138-44 (2000).

5. See JANE E. SAYERS, *PAPAL JUDGES DELEGATE IN THE PROVINCE OF CANTERBURY* 1198-1254, at 1-5; WINROTH, *supra* note 4, at 145.

6. H.F. JOLOWICZ & BARRY NICHOLAS, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 259 (3d. ed. 1972).

7. W.W. BUCKLAND & ARNOLD D. McNAIR, *ROMAN LAW & COMMON LAW: A COMPARISON IN OUTLINE* 62 (2d. ed. 1952, rev. F.H. Lawson).

habet proprietatem cum possessione).”⁸ If the distinction between ownership and possession can be found in the early common law, that might be a sign that Roman ideas had some bearing on the development of the English system.

The Latin word for possession, used by the Roman jurists, is *possessio*; ownership could be denoted by the words *proprietas* or *dominium*. Early English writers did make use of these terms, especially the author of the treatise called *Bracton* written in the early thirteenth century.⁹ But two other terms are more common in the early records of the English royal courts: *ius*, or right, and *seisina*, or seisin. The great English legal historian Frederic William Maitland thought that *ius* and *seisina* were roughly equivalent to *proprietas* and *possessio* respectively.¹⁰ Maitland distinguished between two important royal remedies for the recovery of real property based on whether they protected ownership or possession. Right was protected by “the proprietary action,” the writ of right.¹¹ By the late twelfth century, seisin of land was protected by the assize of novel disseisin, which Maitland called “a distinctly possessory action.”¹² Thus, Maitland denoted the early actions of the common law by words derived from the Latin *proprietas* and *possessio*, suggesting that English law, like Roman law, clearly distinguished between these two concepts.

Maitland’s assumption that seisin and right were merely the English equivalents of possession and ownership has been forcefully challenged by S.F.C. Milsom. Milsom does not view seisin and right as synonyms for Roman possession and ownership. For Milsom, seisin and right must be understood in the context of the lord-vassal relationship. A lord “seised” his tenant of his land; thus “seisin” originally denoted the condition of having been seised by a lord.¹³ Right, on the other hand, “was not a sort of ownership, but just the right to hold of the lord.”¹⁴ According to this view, seisin and right were not mutually exclusive concepts, for both reflected the feudal bond between lord and tenant. In Milsom’s view, the notion that Roman law had some influence on the early English law of property, other than supplying it with Latin words, is implausible.¹⁵

Milsom’s view of English law and its relationship with the *ius commune* is controversial. Other modern scholars have seen avenues for influence between the two systems. Mary Cheney, for example, has suggested that the assize of novel disseisin emerged in the context of an effort by the church (specifically Archbishop Thomas Becket) to recover property that

8. D 41.2.12.1.

9. 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 33 (2d. ed. 1968).

10. 2 *id.*

11. 2 *id.* at 62.

12. 2 *id.* at 47.

13. S.F.C. MILSOM, *THE LEGAL FRAMEWORK OF ENGLISH FEUDALISM* 39-40 (1976).

14. *Id.* at 71.

15. S.F.C. MILSOM, *A NATURAL HISTORY OF THE COMMON LAW* 1 (2003).

had been illegally alienated according to canon law.¹⁶

Donald Sutherland, writing before Milsom's main work but after the initial explication of Milsom's ideas,¹⁷ argued that the assize may have been partly inspired by the Roman interdict *unde vi*, which protected the possessor of property from being put out by force.¹⁸

While Sutherland acknowledged differences between *unde vi* and novel disseisin, he would not have quarreled with Maitland's characterization of the latter as a distinctly possessory action. Sutherland was sufficiently confident in the similarity between the Roman and English actions to state that the "influence of Roman law thus seems to be clear."¹⁹ However, Sutherland also acknowledged that the parallel between Roman *proprietas* and *possessio* and English *ius* and *seisina* was not complete; the latter concepts were more like points along a spectrum, whereas the former were completely distinct.²⁰

Before one can ask whether the early common law was influenced by concepts of ownership and possession in the *ius commune*, it is first necessary to establish that these ideas were important not only to classical Roman law, but to Roman law as it was understood in the twelfth century, and to canon law. In a persuasive essay, Cheney has shown that the concepts of *proprietas* and *possessio* were invoked in ecclesiastical courts in twelfth-century England.²¹ No one, however, has yet examined the academic development of these ideas in England, chiefly in the *Liber pauperum* of Vacarius, or in the early *ordines* devoted to matters of procedure. These works are an important piece of the puzzle, and must be considered as part of the *ius commune* of the late twelfth century.

Discussion to date about ownership and possession in the early common law has also been limited in another respect. Most of what has been written on the subject has focused on what today we would call corporeal interests in land. Scholars have not yet considered whether there was any Roman or canon law influence on the advowson writs, or whether the early common law of advowsons distinguished between ownership and possession. As defined by Maitland, an advowson is "the right to present a clerk to the bishop for institution as parson of some vacant church; the bishop is bound to institute this presented clerk or else must show one of some few good causes for a refusal."²² Advowsons were property, and,

16. Mary Cheney, *The Litigation Between John Marshal and Archbishop Thomas Becket in 1164: A Pointer to the Origin of Novel Disseisin?* in J.A. GUY & H.G. BEALE EDS., *LAW AND SOCIAL CHANGE IN BRITISH HISTORY* (1984) at 9, 25-26.

17. Sutherland cited Milsom's introduction to the revised edition of Pollock and Maitland's *History of English Law*, published in 1968.

18. DONALD W. SUTHERLAND, *THE ASSIZE OF NOVEL DISSEISIN* 22-23 (1973).

19. *Id.* at 23.

20. *Id.* at 41-42.

21. Mary Cheney, *Possessio/proprietas in ecclesiastical courts in mid-twelfth century England*, in *LAW AND GOVERNMENT IN MEDIEVAL ENGLAND AND NORMANDY: ESSAY IN HONOUR OF SIR JAMES HOLT* (George Garnett & John Hudson eds., 1994), at 245.

22. 2 POLLOCK & MAITLAND, *supra* note 9, at 136.

like land, they could be inherited or transferred from one person to another. Unlike land, however, advowsons were incorporeal,²³ and had the special characteristic that they could be exercised only when the church in question became vacant, such as by the death or resignation of the parson. The fact that an advowson could lay dormant for many years engendered a great deal of litigation, much of it in the royal courts. Nevertheless, the advowson writs have generally been ignored by those interested in the relationship between the *ius commune* and the early common law.

This article attempts to fill in these gaps in the current literature in order to arrive at a better understanding of whether, or to what extent, the early common law distinguished between ownership and possession. The article will argue that the basic distinction between ownership and possession was a part of the *ius commune*, both in theory and in practice, as it was known in England in the latter half of the twelfth century. This distinction can arguably be seen in the advowson writs, and it cannot be explained there, as it has in the land context, by reference to the feudal relationship between lord and tenant. English right and seisin were not the same as Roman ownership and possession, but those who created the English common law might have been inspired in part by Roman and canon law ideas.

The article is divided into four parts. Part I examines the role that the concepts of ownership and possession played in the *ius commune* as it would have been known in England in the second half of the twelfth century, taking into account Roman law texts and procedural *ordines* as well as litigation in the ecclesiastical courts. Part II then enters the current debate as to how English notions of right and seisin match up to Roman or canon-law ideas of ownership and possession, focusing, as previous scholarship has, on the assize of novel disseisin and the writ of right for land. Moving beyond the current literature, Part III considers how these ideas might have played out in the advowson writs. Part IV concludes.

OWNERSHIP AND POSSESSION IN THE IUS COMMUNE

In order to see how ownership and possession were distinguished in the *ius commune* around the time of Henry II, it is best to start with the texts of Roman law that were known in England during that period. This article will focus on two introductory texts that are known to have been studied in England in the late twelfth century: Justinian's *Institutes*, which were the subject of an English commentary circa 1200,²⁴ and the *Liber Pauperum* of Vacarius, a twelfth-century English collection of extracts from the *Digest* and *Code*.²⁵ The *Liber Pauperum* probably originated in

23 An advowson would eventually be classified as an "incorporeal hereditament," or "a right issuing out of a thing corporate." 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1979, facsimile of 1st. ed., 1765-69), vol. 2, 20-21.

24. FRANCIS DE ZULETA & PETER STEIN, THE TEACHING OF ROMAN LAW IN ENGLAND AROUND 1200 (1990), 8 SS Supp. Series at 1 ff.

25. LP.

Oxford, Northampton or Lincoln in the 1170s or somewhat later,²⁶ and the *Institutes* were most likely used as a companion to the *Liber Pauperum*.²⁷ Although the English commentary on the *Institutes* probably dates somewhat later than Henry II's reforms, it will also be discussed.

Although southern Britain was a part of the Roman Empire, little trace of Roman law survived the Saxon invasions.²⁸ The Norman invasion in 1066 did not bring about a revival of Roman law in England.²⁹ In the mid-twelfth century, however, interest in Roman law among Englishmen began to revive. Thomas Becket, the future Archbishop of Canterbury, spent a year in Bologna in the 1140s.³⁰ Vacarius, who had studied in Bologna at the time of the Four Doctors, arrived in England sometime in the mid-1140s, and began teaching Roman law soon thereafter, although his teaching career was cut short when King Stephen banned the study of Roman law in 1152.³¹ Stephen's prohibition did not last long, and by the time of Henry II an increasing number of Englishmen were studying law both in Bologna and in English schools.³² Before the end of the twelfth century, the Abbey of Peterborough owned a two-volume set of the entire *Corpus Iuris Civilis* as well as a copy of the *Institutes* and copy of the *Summa* of Placentinus.³³ While most of the royal justices in the twelfth century may not have had Roman law training,³⁴ there were men in England with such experience to whom they could have turned, had they cared to learn how Roman law dealt with issues of property.³⁵

If King Henry's advisors did consult men learned in Roman law, they would have learned about the difference between ownership and possession. An English student of Roman law in the late twelfth century would almost certainly have been taught that there was a distinction between *proprietas* and *possessio*. Ulpian's statement that "ownership has nothing in common with possession" was included in the *Liber*

26. DE ZULETA & STEIN, *supra* note 24, at xxxiii, xxxvii.

27. Because the *Liber Pauperum* does not excerpt passages from the *Institutes*, one may surmise that the former was meant to complement the latter. The purpose of the *Liber Pauperum* was to allow students to advance from the *Institutes* to writings contained in the *Digest* and *Code*. De Zuleta, 44 SS at li.

28. See W. Senior, *Roman Law in England Before Vacarius*, 46 LAW Q. REV. 191, 191-92 (1930); Ralph V. Turner, *Roman Law in England Before the Time of Bracton*, 15 J. BRIT. STUD. 1, 1 (1975).

29. See Turner, *supra* note 28, at 2.

30. DE ZULETA & STEIN, *supra* note 24, at xxii.

31. JOHN OF SALISBURY, *Policraticus*, viii, 22, in THE STATEMAN'S BOOK OF JOHN OF SALISBURY (John Dickinson ed. and trans. 1963); Turner, *supra* note 28, at 6.

32. Turner, *supra* note 28, at 7.

33. W. Senior, *Roman Law Mss. in England*, 47 LAW Q. REV. 337, 337 (1931).

34. Turner, *supra* note 28, at 23.

35. See Eleanor Rathbone, *Roman Law in the Anglo-Norman Realm*, 11 STUDIA GRATIANA 255, 263 (1967) (finding "evidence of some degree of familiarity with the principles and doctrines of Roman law in a fairly wide stratum of the educated class in England about 1180 and of a marked infiltration in court and council by men with specialist knowledge").

Pauperum.³⁶ Ownership and possession were acquired and retained in different ways, and were protected by different remedies.

The course books of Roman law used in twelfth-century England do not give a formal definition of ownership, but they give considerable attention to how it was acquired. The *Institutes* list several different “natural” modes of acquiring ownership, including the taking of wild animals (*occupatio*),³⁷ the finding of gem-stones (*inventio*),³⁸ and the making of a new thing from someone else’s materials (*specificatio*).³⁹ Delivery (*traditio*) was also listed as a “natural” mode of acquiring ownership.⁴⁰ In order for ownership to be transferred by delivery, however, there had to be a sufficient *causa*, such as gift, dowry, or sale.⁴¹ In the case of sale, the buyer had to pay the price or otherwise satisfy the seller in order for ownership to pass, unless the sale was made on credit.⁴² Inheritance was not treated as a means of acquiring ownership, but was a separate category, treated in a different book of the *Institutes*.⁴³

In addition to these “natural” modes of acquiring ownership, the sources also describe the “civil” modes of usucapion (*usucapio*) and long-term possession (*longi temporis possessio*). Property could be acquired by these modes when it was possessed in good faith for a fixed period of time, three years for movables under *usucapio* and ten or twenty years for immovables under *longi temporis possessio* (ten years *inter praesentes*, twenty years *inter absentes*).⁴⁴ According to the English commentary on the *Institutes*, the possession had to be just at the outset and for an acceptable cause, “one as a result of which ownership is normally transferred, such as sale, barter and the like.”⁴⁵ However, the commentary also suggests that things possessed in bad faith could be acquired in “not less than thirty years.”⁴⁶

Ownership was protected by the ancient action of *rei vindicatio*, an action that applied to all movable property as well as land.⁴⁷ The *rei vin-*

36. D. 41.2.12.1 (LP 7.17). See also D. 41.2.17.1 (LP 7.17) (explaining that one can lose possession by intent alone, but ownership can only be lost by an act such as delivery).

37. Inst. 2.1.12 and *Lectura* gloss to 2.1.17.

38. Inst. 2.1.18 and *Lectura* gloss.

39. Inst. 2.1.25 and *Lectura* gloss to 2.1.27.

40. Inst. 2.1.40.

41. *Id.* 2.1.41.

42. *Id.*

43. *Id.* 3.1.ff.

44. *Id.* 2.6.pr. The three-year period for movables was a reform of Justinian; classical law had provided a one-year usucapion period for movables and two years for immovables. See *id.*

45. *distinguitur causa ex qua solet dominium transferri, Puta ex emptione, permutatione etc. similibus. Distinguitur etiam initium, ut sit iustum.* *Lectura* gloss to 2.6.pr. (trans. Francis de Zuleta & Peter Stein). This allowed property to be acquired in good faith and by normal means from a nonowner, which was not possible under the “natural” means of acquiring ownership.

46. *Mala fide uero possessa non minus xxx. annorum spatio adquiruntur.* *Id.*

47. D. 6.1.1 (LP 3.27).

dicatio was an *in rem* action, which meant that the defendant did not need to be obliged to the plaintiff as in an *in personam* action.⁴⁸ The focus of the action was on the plaintiff's right rather than the defendant's wrong, and the plaintiff did not have to show that the defendant was bound under the law of contract or delict to hand over the property. The action could be brought against a defendant who possessed the thing or had fraudulently ceased to possess it.⁴⁹ There was no requirement that the defendant have some relationship with the plaintiff, so long as he had a relationship with the thing. As the English commentary on the *Institutes* put it, "in an action *in rem* we seek what is ours, and one's own thing is owed to no one."⁵⁰

Like ownership, possession is left undefined in the sources of Roman law considered in this chapter, but the jurist Paul does offer an etymology: he says that the origin is from *sedibus* (seat) and *positio* (position) because there is a natural holding by the one who stands on a thing.⁵¹ This etymology suggests that physical control was understood to be an essential type of possession. Possession was acquired *corpore et animo*, both physically and mentally.⁵² Physically controlling a thing could certainly involve the possession of it, even if physical control was not always necessary.

Only corporeal things could be possessed in the full sense.⁵³ The Roman sources do, however, acknowledge a kind of possession of incorporeal rights. Hence the concept of *quasi possessio*, a state that could be achieved by the exercise of a right such as a servitude.⁵⁴ Two key texts on quasi-possession appear in the *Liber Pauperum*,⁵⁵ and the term *quasi possessiones* appears in the English commentary on the *Institutes* in a passage on possessory remedies.⁵⁶

Possession was protected by interdicts, which were originally forms or sets of words used by the praetor to order or prohibit.⁵⁷ Gaius, in a passage included in the *Liber Pauperum*, wrote that one who contemplated suing for a thing would be better off suing first by some interdict rather than bringing the *rei vindicatio*, because it is far better to be in possession

48. *Id.*; Inst. 4.6.1.

49. D. 6.1.36.pr. (LP 3.27).

50. *nota enim actione in rem persequimur quod nostrum est. Nemini enim sua res debetur.* *Lectura* gloss to Inst. 4.6 (trans. Francis de Zuleta & Peter Stein).

51. D. 41.2.1.pr. (LP 7.17).

52. D. 41.2.3.1 (LP 7.17). A gloss on this rubric in the *Liber Pauperum* distinguishes between civil and corporeal possession: the former can only be lost when someone strong and powerful takes possession and I cannot repel him, while the latter can be lost simply when another takes possession in his own name. LP gloss *ad rubricam* 7.17.

53. *Id.*

54. See GIUSEPPE BRINI, *POSSESSO DELLE COSE E POSSESSO DEI DIRITTI NEL DIRITTO ROMANO* (1978 reprint of 1906 edition), 28-38; see also ENRICO FINZI, *IL POSSESSO DEI DIRITTI* (1968 reprint of 1915 edition).

55. D. 8.2.20 (LP 3.39); 8.5.10 (LP 3.42).

56. *Lectura* gloss to Inst. 4.15.

57. Inst. 4.15.pr.

oneself and put the burden of being plaintiff on one's opponent.⁵⁸ For this reason, the *Institutes* note, "there is often, in fact almost always, a hot dispute as to possession itself."⁵⁹

The *Institutes* divide the possessory interdicts into three categories: those for obtaining (*adipiscendae*), retaining (*retinendae*), and recovering (*recuperandae*) possession.⁶⁰ The first category involved the situation where someone else was in possession of property that belonged to someone with a right of inheritance; it awarded possession to someone who never had it.⁶¹ The latter two categories, on the other hand, protected the possessor of property against disturbance or dispossession, and were of critical importance in the Roman law of property as presented in the *Institutes* and *Liber Pauperum*. The two interdicts for retaining possession were the interdict *uti possidetis* and the interdict *utrubi*. These interdicts, the former applicable to land and the latter to movables, served to decide which of two parties possessed the property in dispute and thereby determined which would be the plaintiff and which the defendant in a *rei vindicatio*, for, "[w]ithout first identifying the possessor, it is impossible to begin the vindication."⁶² In the classical period, the *Institutes* explain, the winner in *uti possidetis* was

the party in possession at the date of the interdict itself, as long as his possession had not been obtained from his opponent by force, stealth or license. It was irrelevant that the possessor had forcibly driven out a third party, had secretly usurped a third party's possession, or had obtained a third party's license to possess. With *utrubi* the winner was the one who had possessed for the greater part of the year, not counting possession obtained from the opponent by force, stealth, or license.⁶³

Justinian harmonized the working of the two interdicts, so that the winner, for both land and movables, was the party who possessed when issue was joined, "still discounting possession obtained from the opponent by force, stealth, or license."⁶⁴ It was irrelevant whether the possession was just or unjust, for

58. D. 6.1.24 (LP 3.27) (*Is qui destinavit rem petere animadvertere debet, an aliquo interdicto posit nancisci possessionem, quia longe commodius est ipsum possidere et adversarium ad onera petitoris compellere quam alio possidente petere.*)

59. Inst. 4.15.4 (*plerumque et fere semper ingens existit contentio de ipsa possessione*) (trans. Peter Birks & Grant McLeod).

60. Inst. 4.15.2.

61. Inst. 4.15.3.

62. . . . *namque nisi ante exploratum fuerit, utrius eorum possessio sit, non potest petitoria actio institui, quia et civilis et naturalis ratio facit, ut alius possideat, alius a possidente petat.* Inst. 4.15.4 (trans. Birks & McLeod).

63. . . . *uti possidetis interdicto is vincebat, qui interdicti tempore possidebat, si modo nec vi nec clam nec precario nactus fuerat ab adversario possessionem, etiamsi alium vi expulerit aut clam abripuerit alienam possessionem aut precario rogaverat aliquem, ut sibi possidere liceret: utrubi vero interdicto is vincebat, qui maiore parte eius anni nec vi nec clam nec precario ab adversario possidebat.* Inst. 4.15.4a. (trans. Birks & McLeod).

64. *hodie tamen aliter observatur: nam utriusque interdicti potestas quantum ad possessionem pertinet exaequata est, ut ille vincat et in re soli et in re mobile, qui possessionem nec vi nec clam nec precario ab adversario litis contestationis tempore detinet. Id.* (trans. Birks & McLeod).

every possessor had a greater right than one who did not possess.⁶⁵

Both *utrubi* and *uti possidetis* were formulated as actions preventing the use of force.⁶⁶ In *uti possidetis*, the more important of the two actions, the praetor issued the following order to the parties: "I forbid force to be used to prevent him of you two who is at present in faultless possession of the disputed building from possessing it as he present does."⁶⁷ The purpose of the interdict was to protect the possession of the one whom the praetor decided was the preferred possessor of the land.⁶⁸ The formulation of the interdict, however, allowed for two possibilities: it could be a double action in which both parties claimed possession, or it could be a simple action brought against a disturber who did not claim to possess.⁶⁹ In the writings of the early Continental glossators, the interdict was understood primarily as a double action, but they allowed that the dispute over possession could be only implicit and follow from the behavior of the disturber. At the beginning of the thirteenth century, Azo envisaged two kinds of interdict *uti possidetis*: one intended to settle a dispute over possession, and the other to sanction a simple disturbance.⁷⁰

An examination of the English Roman law texts from the late twelfth and early thirteenth centuries shows that, while *uti possidetis* was understood as a double action, it was also seen as a means of preventing the use of force. The English commentary on the *Institutes* gives an explanation very similar to that contained in the *Institutes* itself:

In [the interdict *uti possidetis*] the winner is the one who was in possession at the time of the interdict, and it applies to the land.... Since the question of the legal right of possession is of the utmost importance, it is necessary, in proceedings of this kind, for it to be clear which party should be called plaintiff and which defendant. But since usually the party in possession is in the better position, in interdicts of this kind there is usually the greatest dispute between the parties. For each of them claims that he is in possession, and since each of them appears to be both plaintiff and defendant, interdicts of this kind are, as described later, called double, since the parties seem to litigate in two ways.⁷¹

A gloss on the relevant rubric in the *Liber Pauperum*, on the other hand,

65. D. 43.17.2 (LP 8.14).

66. *Id.*; D.43.31.1 (LP 8.28).

67. *Ait praetor: 'Uti eas aedes, quibus de agitur, nec vi nec clam nec precario alter ab altero possidetis, quo minus ita possideatis, vim fieri veto.'* D. 43.17.1.pr. (LP 8.14) (trans. Fritz Schulz). See FRITZ SCHULZ, CLASSICAL ROMAN LAW § 781 (1951).

68. D. 43.17.1.1 (LP 8.14).

69. LUCIEN MASMEJAN, LA PROTECTION POSSESSOIRE EN DROIT ROMANO-CANONIQUE MIEVIAL (XIIIe-XVe SIECLES) 261 (1990).

70. *Id.* at 261-62.

71. *hoc interdicto uincit ille qui tempore interdicti possidebat, et competit pro rebus soli. . . . Sed quia maxima oritur questio de iure possessionis, ideo necessarium est huiusmodi ordinari ut expressum sit uter agens et uter reus dici debeat. Sed quia frequenter melior solet esse pars possidentis, circa huiusmodi interdicta maxima inter partes solet esse de possessione contentio; uterque namque se possidere defendit. unde uterque actor et uterque defensor esse uidetur. unde etiam, ut in sequenti habetur, duplicia dicuntur huiusmodi interdicta, quia duplicia uidentur partes agere.* *Lectura* gloss to Inst. 4.15.4 (trans. Francis de Zuleta & Peter Stein).

states that the interdict was “for retaining possession lost secretly,” but was also “a prohibition by which the possessor prevented his adversary from using force to possess.”⁷² The interdict was “offered on account of force,” but it was on account of “force of repulsion,” whereas the interdict *unde vi* (discussed below) was on account of “force of revenge.”⁷³ Thus, both the idea of *uti possidetis* as a double action and the notion of the interdict as a remedy against force were part of the English understanding of Roman law in the late twelfth century.

The remedy for recovering possession was the interdict *unde vi*, by which the person who was forcibly ejected could recover possession from the ejector.⁷⁴ The *Institutes* make clear that the ejector was compelled to restore possession to the dispossessed plaintiff “even if he himself acquired possession from the violent ejector by force, stealth, or license.”⁷⁵ The interdict applied only to eviction by force from land and buildings, and not to the loss of movables.⁷⁶ A plaintiff who had not acquired possession *corpore* or *animo* could not bring the interdict, for the interdict protected only one who had possession and lost it, not one who was simply not admitted to possession.⁷⁷ The *Liber Pauperum* contains several extracts relating to *unde vi*, and the action would have been known to Englishmen who studied Roman law in the late twelfth century.

The Roman possessory interdicts all share a common assumption: that a plaintiff seeking to recover property should claim possession first before any further proceedings take place.⁷⁸ A plaintiff who lost a suit under one of the interdicts could subsequently bring a *rei vindicatio*. The possessory action was meant to be heard first, but it was not necessarily the final word.

The Roman possessory interdicts would eventually find counterparts in canon law. By the end of the twelfth century, the canonists would evolve an action similar to the Roman interdict *unde vi* that could be brought by a clerk who was violently ejected from his benefice.⁷⁹ In time, this canon-law action would be generalized into the *actio spoli*, which was eventually available to laymen as well as clerks.⁸⁰ Maitland believed that the *actio spoli* was the inspiration for the English assize of novel

72. *Est autem retinende possessionis clam perditae, est etiam prohibitorium quo possessor aduersarium ne sibi possidendi uis fiat proh(ibet)*. LP gloss *ad rubricam* 8.14 (*Uti possidetis*.)

73. *Sed hoc interdictum propter uim proditum est; sed illud supra ad uim ulciscendam, hoc autem ad propulsandam pertinet*.

74. D. 43.16.1 (LP 8.12).

75. “. . . per quod is qui deiecit cogitur ei restituere possessionem, licet is ab eo qui vi deiecit vi vel clam vel precario possidebat.” Inst. 4.15.6.

76. D. 43.16.1.3 (LP 8.12).

77. D. 43.16.1.26 (LP 8.12).

78. D. 6.1.24 (LP 3.27).

79. FRANCESCO RUFFINI, *L'ACTIO SPOLII: STUDIO STORICO-GIURIDICO* 329, 337 (photo-reprint 1972 (1889)).

80. MASMEJAN, *supra* note 69, at 187-91.

disseisin, because both actions protected the possessor of property against despoliation regardless of whether he had a claim to ownership.⁸¹ Maitland also attached some significance to the phrase “*iniuste et sine iudicio*” in the assize of *novel disseisin*, which he claimed pointed to canon law origins.⁸² Maitland’s view was adopted by Holdsworth in his multivolume history of English law.⁸³ Maitland was careful to point out that, although the assize of *novel disseisin* was influenced by the canon law, it was not identical to the canon law action.⁸⁴ The link he drew between the two institutions, however, was strong.

Maitland’s theory remained unchallenged for decades, until H.G. Richardson and G.O. Sayles argued that the assize of novel disseisin cannot have based directly on the *actio spoli*. The canon law *actio spoli* had not evolved by 1166 in time to influence the assize: in fact, the term *actio spoli* was not even known in the Middle Ages.⁸⁵ The medieval term was *condictio ex canone Redintegranda*, referring to the first word of two canons in Gratian’s *Decretum*.⁸⁶ As far as has been determined, the canonists’ *condictio ex canone Redintegranda* was first mentioned by Sicard of Cremona in his *Summa* written around 1179-82,⁸⁷ several years after the development of the assize of novel disseisin. Even at this stage, it is not clear exactly what the *condictio* protected, or who could avail themselves of it.⁸⁸ The canonists only began to elaborate on the significance of the *condictio ex canone Redintegranda* after 1215, when a decree of Innocent III forced the commentators to explain the difference between *redintegranda* and the action apparently created by the pope.⁸⁹

To say that the *actio spoli* was not in existence in the mid-twelfth century, however, does not mean that the basic idea behind it was unknown to canon law at that time. Since the days of the False Decretals, which were composed in the ninth century by an unknown author or authors, the canon law had recognized two principles regarding bishops: whoever has been despoiled must be restored, and a bishop who has been despoiled must have his property restored before answering charges.⁹⁰

81. 1 POLLOCK & MAITLAND, *supra* note 9, at 135; 2 *id.* at 48 n. 1.

82. *Id.* at 48 n. 1.

83. 2 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 204 (3d. ed. 1923).

84. 1 POLLOCK & MAITLAND, *supra* note 9, at 135.

85. H.G. RICHARDSON AND G.O. SAYLES, SELECT CASES OF PROCEDURE WITHOUT WRIT UNDER HENRY III, AT CXXVIII-CXXIX (1941).

86. C.2 q.1 c.1-6 and C.3 q.1 c.1-6.

87. RUFFINI, *supra* note 79, at 329, 337.

88. Not until the end of the fourteenth century would it be finally settled that laymen as well as churchmen could avail themselves of the *condictio ex canone Redintegranda*, see MASMEJAN, *supra* note 69, at 198 (1990), and canonists would argue for centuries over whether the action could be successfully brought against a third party who had received the property in good faith.

89. *Id.* at 188-94.

90. R.C. VAN CAENEGEM, ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL, at 388 (SS No. 77, 1959) (quoting RUFFINI, *supra* note 79, at 288).

The forged papal letters stating these principles were collected in Gratian's *Decretum*,⁹¹ copies of which would have been available in England by 1166.⁹² Baron van Caenegem links these principles of the canon law with the old Germanic idea of *gewere*, or "peaceful and actual enjoyment of any right," and argues that the *condictio ex canone Redintegranda* drew upon this older concept, expanding it to cover all persons.⁹³ Yet the notion that possession must be protected against despoliation also has an obvious Roman law parallel.

By the 1180s, a distinction between proprietary and possessory actions appears in some of the canonistic *ordines* devoted to matters of procedure. The *Summa Quicumque vult* of Johannes Bassianus, which dates to around 1185, describes separate forms for actions in rem and possessory actions.⁹⁴ The *in rem* formula is explicitly compared to the Roman *rei vindicatio*, and, as in Roman law, separate forms are given for actions for recovering and retaining possession. The same is true of the *Summa* of Ricardus Anglicus, and, according to Wahrmund's edition, the passage in question appears in a version of the text that scholars now believe to have been composed in England prior to 1190.⁹⁵ In the late twelfth-century, an Anglo-Norman school of canonists was producing a number of works devoted to Roman and canonical procedure,⁹⁶ and Ricardus' work should be assigned to this category. Canonists were beginning to internalize property concepts from Roman law, and the existence of the distinction between ownership and possession in the original *ordo* of Ricardus Anglicus shows that the idea had made its way to England.

The distinction between ownership and possession is not only evident in Roman and canon-law academic writings from the second half of the twelfth century: it can also be seen in court cases from the same period. The evidence

91. C.2 q. 2; C.3 q. 1.

92. VAN CAENEGEM, *supra* note 90, at 368 (listing Gratian's *Decretum* among books acquired by Lincoln Cathedral circa 1150-58). The principles were also well-known through the False Decretals themselves, which circulated in England as part of "Lanfranc's Collection." *Id.* at 389 n. 1.

93. *Id.* at 388-89.

94. 4 LUDWIG WAHRMUND ED., QUELLEN ZUR GESCHICHTE DER RÖMISCH-KANONISCHEN PROCESSES IM MITTELALTER 4-5 (1925). On the date see LINDA FOWLER-MAGERL, *ORDINES IUDICIARII AND LIBELLI DE ORDINE IUDICIORUM* (FROM THE MIDDLE OF THE TWELFTH TO THE END OF THE FIFTEENTH CENTURY) 63 (1994).

95. Wahrmund used Vat. lat. 2691, fol. 49r-58v, as one of the manuscripts for his edition. This manuscript is taken to represent the English version of Ricardus' *ordo*. See <http://faculty.cua.edu/pennington/1140q-r.htm>. Wahrmund gives several alternate readings from this manuscript in the passage devoted to ownership and possession. 2:3 LUDWIG WAHRMUND ED., QUELLEN ZUR GESCHICHTE DER RÖMISCH-KANONISCHEN PROCESSES IM MITTELALTER, 4-6 (1915). The alternate readings do not affect the gist of the passage, which describes separate remedies for ownership and possession, compares the *in rem* remedy to the Roman *vindicatio*, and distinguishes between actions for recovering and retaining possession.

96. See Stephan Kuttner & Eleanor Rathbone, *Anglo-Norman Canonists of the Twelfth Century: An Introductory Study*, 7 *TRADITIO* 279, 290 (1949-51).

has been discussed by Mary Cheney and others,⁹⁷ but it is worth reviewing here. Court cases and papal decretals show that ideas being discussed among scholars were also playing out in practice, in particular the notion that a possessory suit should be brought first before claiming ownership.

A priest claiming a benefice before an ecclesiastical tribunal was likely to sue first for possession before claiming ownership. In a lawsuit held in the court of Theobald, archbishop of Canterbury, who died in 1161, Alan of N. sought a benefice of which he had allegedly been despoiled. A letter to the pope written by John of Salisbury on behalf of Archbishop Theobald says that Alan initially sued by a possessory (*possessorio*) action, but when this claim appeared to be barred by prior judgment, he dropped his possessory suit and brought a proprietary claim (*petitorium*), arguing that he had been the rector in the time of an earlier bishop and had proven this in court.⁹⁸ The discussion of the case distinguishes clearly between possessory and proprietary claims, and shows that a plaintiff was likely to start with a possessory claim.

Another case heard during Theobald's reign shows that the disposition of a possessory action was understood not to preclude a subsequent proprietary action. A certain Peter claimed possession of lands that pertained to the archbishop's manor of Wimbledon and Barns. The King ordered that the dispute was to be heard in the archbishop's court. Peter claimed seisin on the basis that his father possessed the land on the day Henry I died, but without mentioning inheritance. Since Peter could offer no proof that the land was held heritably, he was denied seisin, but the question of right was reserved.⁹⁹ The fact that Peter was told that he could bring a subsequent action concerning the right suggests that the possessory suit was considered to be preliminary in nature.

The canon-law rule that an individual who was despoiled of a benefice had to be restored to possession before further proceedings took place, which would become the basis for the *condictio ex canone Redintegranda*, was known in England in the second half of the twelfth century. For example, a decretal of Pope Eugenius dated Feb. 5, 1152 orders the bishop of Hereford to restore certain property to a certain Henry, reserving the cause concerning the ownership (*causa proprietatis*) for the monks.¹⁰⁰ Likewise, a decretal of Alexander III dating to the period 1164 to 1179 and addressed to the bishop of Worcester orders the

97. See Cheney, *supra* note 21; see also HUDSON, *supra* note 1, at 104, 267 (discussing a case recorded in a charter of Archbishop Theobald); Biancalana, *supra* note 2, at 500-01 (discussing this case and another from the same period).

98. "[O]misso iudicio possessorio, petitorium instituit asserens ecclesiam suam esse et se personam eius a tempore Mauriti bonae memoriae Lond(oniensis) episcopi extitisse. . . ." W.J. MILLOR, S.J. & H.E. BUTLER EDS., *THE LETTERS OF JOHN OF SALISBURY* (1986 ed., rev. by C.N.L. Brooke) [hereafter *LETTERS OF JOHN OF SALISBURY*], No. 72. For a discussion of this case see Biancalana, *supra* note 2, at 501.

99. MARION GIBBS ED., *EARLY CHARTERS OF THE CATHEDRAL CHURCH OF ST. PAUL*, LONDON No. 163 (1939).

100. E.O. BLAKE ED., *LIBER ELIENSIS* 352-53 (1962).

restoration of a certain clerk to the possession of benefice from which he had been despoiled; once possession has been restored, the rival clerk may institute an action concerning the ownership.¹⁰¹

The idea that the question of possession should be decided first had been a working assumption of the papal court since the 1140s, if not earlier. For example, a decretal of Pope Eugenius III dated January 16, 1146 orders the bishop of Angoulême and Limoges to put certain clerks back into possession (*in possessione*) of a church, allowing them to bring an action concerning the ownership (*causam de proprietate*).¹⁰² A similar order was given to the bishop of Perigord in September of 1146.¹⁰³ These decretals use the technical terms of Roman law, now part of the *ius commune*.

Notions of *proprietas* and *possessio* did not only affect churchmen: they also affected powerful laymen who became involved in ecclesiastical litigation. In the mid twelfth-century, Reginald earl of Cornwall became involved in a dispute over the church of Hinton, of which the earl claimed the advowson. In the case, recorded in a letter of Theobald to the pope drafted by John of Salisbury, a clerk named Ernald claimed the church by presentation of a certain knight. The earl, who had apparently dispossessed the clerk, was persuaded to grant restitution on condition that he might be able to bring a proprietary claim (*petitorium*).¹⁰⁴ Laymen who sued in the church courts would have understood that a restoration of possession had to precede any dispute concerning ownership. If they did not understand this in the beginning, the lesson would be taught to them by the ecclesiastical court.

Reginald was the uncle of King Henry II, and, as Cheney explains, the king was expected to understand the distinction between proprietary and possessory suits.¹⁰⁵ In a dispute between the abbot of St. Vincent and the bishop of Llandaff, the ecclesiastical judges decided to receive the abbot's proof notwithstanding pending appeals to the pope and the king, "both because it was only concerned with possession (*super sola possessione fiebat*) and because it was produced for the third time at great expense and trouble."¹⁰⁶ The reference to *sola possessione* indicates that possessory actions were considered to be distinct and preliminary; they could be followed by a proprietary action. The king, to whom the report was addressed, was expected to understand this.

The references in cases and papal decretals to proprietary and pos-

101. Hans-Eberhard Lobmarm ed., *Collectio Wigorniensis* 7.72, in 22 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE, KANONISTISCHE ABTEILUNG 143-44 (1933).

102. 180 PL, col. 1095 no. 72.

103. *Id.* col. 1153 no. 127 ("*Facta autem restitutione, si clerici . . . de proprietate agere voluerint . . . causa audiat. . .*").

104. LETTERS OF JOHN OF SALISBURY, *supra* note 98, no. 102.

105. Cheney, *supra* note 21, at 253.

106. A. CHÉDEVILLE ED., *LIBER CONTROVERSARIUM SANCTI VINCENTII CENOMANNENSIS* No. 251 (1968) (translation by Mary Cheney, *supra* note 21, at 250) ("*tum quia super sola possessione fiebat, tum quia jam tertio multis laboribus et sumptibus ipsius abbatis producta fuerat*").

sessory actions suggests that Richardson and Sayles were too quick to dismiss the possibility of canon law influence on the assize of novel disseisin. Even if the *condictio ex canone Redintegranda* was not created until the 1180s, it is clear that canon-law possessory actions were available in England to restore dispossessed persons to their property by the 1150s if not earlier. Whether these actions were the inspiration for the assize of novel disseisin is another question, but the fact that the *condictio* was created after the assize should not be taken to rule out the possibility of influence.

In her article on possessory and proprietary concepts in twelfth-century English ecclesiastical litigation, Cheney draws the conclusion that it was the “example and pressure of the papal court” that spread notions of *proprietas* and *possessio* among the English prelates.¹⁰⁷ But this prompts the question of how the distinction became part of the parlance of the papal court. One suspects that the writings of the academic jurists had some effect on the development of this distinction in practice. Some of the pope’s advisors might have had a background in Roman law. At the very least, the development of possessory and proprietary ideas in practice was consistent with the contemporary theoretical development of the same ideas. As Cheney notes, “[t]here seems to be no doubt that the concept of possession was revived as a result of the academic study of Roman Law in the early twelfth century in Italy.”¹⁰⁸

The revived study of the *Corpus Iuris Civilis* had an impact on what was happening in ecclesiastical courts. This leads us back to the question of whether the revival of Roman law also had an impact on the formation of the English common law, either directly or (more likely) indirectly through the example of the ecclesiastical actions. To this question we will now turn.

THE WRIT OF RIGHT FOR LAND AND THE ASSIZE OF NOVEL DISSEISIN

In his seminal work on the early history of the common law, Maitland identified the writ of right for land and the assize of novel disseisin as, respectively, the proprietary action and the possessory action.¹⁰⁹ Subsequent scholarship has focused on these two writs as possible evidence for—or against—a Roman or canon law influence on the early English law of property. In order to evaluate whether the early common law distinguished between ownership and possession, therefore, it is best to start with these two writs.

The writ of right was one of the earliest writs developed during Henry II’s reign, and it had antecedents going back to the reign of

107. Cheney, *supra* note 21, at 252.

108. *Id.* at 247.

109. 2 POLLOCK & MAITLAND, *supra* note 9, at 47, 62.

William the Conqueror.¹¹⁰ The wording of the writ as it stood in the latter part of Henry's reign is preserved in the treatise known as *Glanvill*, which was written circa 1187-89.¹¹¹ The writ commanded a particular lord to "do full right without delay" with respect to a certain parcel of land which A claimed to hold of the lord and of which B was deforcing A.¹¹² If the lord did not do this, the writ warned, the sheriff would, "that I may hear no further complaint for default of right."¹¹³ The writ had to be directed against the lord of whom the plaintiff claimed to hold, "not to anyone else, not even to the chief lord."¹¹⁴ If the lord failed to do right to the plaintiff, the plaintiff could have the case removed to the county court by a procedure known as *tolt*.¹¹⁵ From there the plaintiff could have the case transferred to the royal court by a writ of *pone*.¹¹⁶ The basic idea behind the writ was that, when a lord failed to do justice to one of his tenants, the king had the right to intervene.¹¹⁷

The writ of right could involve a slow, cumbersome procedure. Once the matter was removed into the king's court, the defendant had to be summoned. If he failed to appear at the first summons, up to two additional summonses would be issued.¹¹⁸ The defendant could also avail himself of up to three *essoins*, alleging (by a representative) that he was sick, overseas, in the king's service, or on a pilgrimage.¹¹⁹ When the defendant did appear, the plaintiff would state his claim and offer to prove it by his champion.¹²⁰ The defendant could then vouch a warrantor, who had to be summoned and who could also *essoin* three times.¹²¹ The defendant or his warrantor would then choose between battle and the grand assize.¹²²

This last element of the procedure accompanying the writ of right—the election between battle and the grand assize—was a fairly recent innovation at the time *Glanvill* was written, the grand assize having been introduced by the assize of Windsor in 1179.¹²³ Prior to that date, all writs

110. See VAN CAENEGEM, *supra* note 90, at 206-21, 413-24 (giving examples); Biancalana, *supra* note 2, at 442-48.

111. The date and authorship of the treatise are uncertain. It is unlikely to have been written by the royal justiciar Rannulf Glanvill, as was once thought. Internal evidence suggests that it was written between 29 November 1187 and 6 July 1189. See G.D.G. HALL, *Introduction to Glanvill*.

112. *Glanvill* XII, 3 [trans. Hall].

113. *Id.* [trans. Hall].

114. *Id.* XII, 8 [trans. Hall].

115. *Id.* XII, 6-7; Biancalana, *supra* note 2, at 443.

116. *Glanvill* VI, 7.

117. Biancalana, *supra* note 2, at 466.

118. *Glanvill* I, 7.

119. *Id.* 111-29.

120. *Id.* IV, 6, p. 46. *Glanvill* refers to "*probos homines*," but the champion is usually a single individual in the early plea rolls.

121. *Id.* III 1-6.

122. *Id.*

123. J.H. Round, *The Date of the Grand Assize*, 31 ENG. HIST. REV. 268, 268-69 (1916).

of right were decided by battle, which, as *Glanvill* describes it, involved six possible essoins, three for the defendant and three for his champion.¹²⁴ The grand assize involved fewer essoins, but its procedure was scarcely expeditious: four knights were summoned to elect twelve knights, who were then summoned to decide the matter.¹²⁵ At any stage, one or more of the knights might fail to show up, which would slow things down further.

The cumbersome nature of the writ of right, together with the unseemliness of trial by battle, probably prompted the invention of the assize of novel disseisin, the most important legal innovation of Henry II's reign.¹²⁶ Unlike the writ of right, the writ of novel disseisin was addressed to the sheriff, not the plaintiff's lord. The earliest evidence for the form of the writ comes from *Glanvill*. In the writ, the king informs the sheriff of A's complaint that B "unjustly and without a judgment has disseised him of his free tenement in such-and-such a vill since my last voyage to Normandy." The king then orders the sheriff to restore the chattels seized from the land and hold the tenement and the chattels in peace for a specified period of time. The tenement would then be viewed by "twelve free and lawful men of the neighbourhood," called the recognitors, who would then be summoned to appear before the king or his justices at the appointed time. B, or his bailiff, would also be attached to hear the recognition.¹²⁷ There were no essoins allowed and the assize could proceed even if the defendant failed to appear.¹²⁸

Maitland believed that the assize was created around 1166 by a royal ordinance, possibly at the council held in Clarendon early that year.¹²⁹ Beginning in 1166, the Pipe Rolls record amercements "for disseisin" against "the king's assize" or "the king's writ."¹³⁰ It is possible, however, that the ordinance was made before 1166, possibly as early as 1155.¹³¹ It has been suggested that the initial ordinance established only a "criminal" offense, and the regular "civil" remedy developed later, perhaps soon before the writ appears in *Glanvill*.¹³² Even the basic notion that the assize was created by a formal act of legislation has been challenged.¹³³ But the assize as it appears in *Glanvill* looks like a "deliberately co-ordinated design," and, since there is no evidence of a later enactment, the

124. *Glanvill* II, 3, p. 23.

125. *Id.* II, 11-12, pp. 30-32.

126. See SUTHERLAND, *supra* note 18, at 35-36.

127. *Glanvill* XIII, 33.

128. *Id.* XIII, 38.

129. 1 POLLOCK & MAITLAND, *supra* note 9, at 145.

130. *Pipe Roll 12 Henry II*, 4, 7, 10, 14, 65.

131. See SUTHERLAND, *supra* note 18, at 7-8; see also DORIS M. STENTON, *ENGLISH JUSTICE BETWEEN THE NORMAN CONQUEST AND THE GREAT CHARTER 1066-1215*, at 39 (1964).

132. S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 138-39 (2d. ed. 1981).

133. J.E.A. JOLLIFFE, *ANGEVIN KINGSHIP* 46-47 (1955).

most likely inference is that *Glanvill* preserves the original form of the assize from 1155-66.¹³⁴

In his study of the history of English writs from the Norman conquest to *Glanvill*, Baron van Caenegem stressed the continuity between early writs issued by all the Norman kings before 1166 and the eventual development of the assize of novel disseisin.¹³⁵ In these writs, the Norman kings ordered individuals to restore disseised property to other individuals or religious houses who had complained to the king about the disseisin. Lady Stenton has pointed out, however, that none of the writs reprinted by van Caenegem was returnable: the king did not appoint a day for the hearing of the action, indicate how it should be dealt with, or instruct the recipient to "send men to view the land at issue and appear when the case is heard with the summoners and the writ."¹³⁶ These points were all key features of the fully developed writ of novel disseisin.

Whether the assize of novel disseisin was the result of brilliant thinking throughout "many night watches," as the author of *Bracton* believed,¹³⁷ or simply a logical extension of a century-old royal tradition of interfering in disputes over seisin, the dispute resolution mechanism that it created was to have a powerful effect on subsequent English legal history. The development of the assize of novel disseisin in the mid-twelfth century was truly an eventful step forward for English law.

As discussed above, Maitland believed that the assize of novel disseisin was inspired by canon law and thus indirectly by the Roman interdict *unde vi*.¹³⁸ Maitland suggested that the assize originated as a preliminary action to decide who would be the defendant in a subsequent action of right. Maitland envisioned a contest between independent claimants of a particular tenement, one of whom "turns out" the other in order to secure the advantages of being the defendant in the proprietary suit.¹³⁹ The claimants, in Maitland's account, need not have anything in common other than a desire to occupy the same property. Maitland did not suggest that the assize had any tenurial dimension.

Milsom's work in the latter half of the twentieth century, particularly his *Legal Framework of English Feudalism*, has offered a very different view of the origins of the assize of novel disseisin. Acknowledging that the assize later came to be used to protect landowners against ordinary wrongdoers, Milsom argues that its original purpose was to safeguard against abuses of seigniorial power.¹⁴⁰ Rather than view the plaintiff and

134. SUTHERLAND, *supra* note 18, at 17-18; but see Robert C. Palmer, *The Origins of Property in England*, 3 LAW & HIST. REV. 1, 22 (1985) (suggesting that the assize was "formalized into a standardized writ shortly before 1188").

135. VAN CAENEGEM, *supra* note 90, at 267-303, 444-464.

136. STENTON, *supra* note 131, at 33-34.

137. *Bracton*, f. 164b (trans. Samuel E. Thorne).

138. See *supra* text accompanying notes 81-82.

139. 2 POLLOCK & MAITLAND, *supra* note 9, at 46-47.

140. MILSOM, *supra* note 13, at 14.

the defendant as random parties or neighbors involved in a dispute as social equals, Milsom thinks that the defendant was likely to be the plaintiff's lord, called to task for disseising him without following the proper procedures.¹⁴¹ The assize, according to Milsom, must be viewed within a feudal framework.

Milsom also has a novel explanation for the writ of right. In Milsom's view, the writ of right grew out of the settlement in 1153 between King Stephen and the future Henry II. According to Milsom, chronicle evidence suggests that this settlement contained a general provision that those who were disinherited during the Anarchy should be restored to the rights that they held under Henry I.¹⁴² Milsom does not think that the writ reflected a general royal policy of enforcing the customs of inheritance.¹⁴³ As an accidental consequence of the writ, however, issues that were formerly the sole province of the seigniorial courts were taken to a new, abstract level. Before the writ of right was created, Milsom explains, a decision by the lord to accept A's homage rather than B's was final; there was no appeal. But the writ of right changed this, and gave the descendants of B the power to undo the original decision by invoking the authority of the king's court.¹⁴⁴

Robert Palmer has offered a somewhat different account of the writ of right, which also connects the writ to the 1153 settlement. In Palmer's view, the compromise protected each person who took land away from a tenant during the anarchy, but when that person died the tenant who had been dispossessed during the anarchy had the right to be accepted by the lord. The writ of right was needed to allow the dispossessed tenant to make his claim.¹⁴⁵ Palmer, who thinks that the assize of novel disseisin did not become a private right of action until shortly before *Glanvill*, concurs with Milsom that the early common-law remedies cannot be characterized as proprietary or possessory in nature.¹⁴⁶

In his *Legal Framework of English Feudalism*, Milsom drew a useful distinction between upward-looking claims—claims by a tenant against his lord—and downward-looking claims, claims by a lord against his tenant.¹⁴⁷ Biancalana has shown that the writ of right could initially be used to make either upward-looking claims or downward-looking claims. Under Henry II, however, the writ of right came to include a clause that the plaintiff claimed to hold the land in question from the addressee.¹⁴⁸ The writ could no longer be brought by a lord against his tenant to force the tenant

141. *Id.* at 11.

142. *Id.* at 178.

143. MILSOM, *supra* note 132, at 128-29.

144. *Id.* at 129.

145. Robert C. Palmer, *The Feudal Framework of English Law*, 79 MICH. L. REV. 1143-45 (1981).

146. See Palmer, *supra* note 134, at 13, 22.

147. MILSOM, *supra* note 13, at 80-102.

148. Biancalana, *supra* note 2, at 445-49.

to plead in the lord's court. Instead, it was a writ to be brought by a tenant when someone else had got into the land under the lord's authority. The writ was addressed to the lord, but the defendant was the rival tenant.

Under Milsom's explanation, the assize of novel disseisin also had an upward-looking aspect, insofar as it was brought by the tenant against the lord. But the tenant would only bring the assize after the lord had already taken action against him by disseising him. Thus, the dispute as a whole would have a downward-looking dimension: the lord wants to get rid of the tenant and has taken action to dislodge him. Here the dispute is between the tenant and his lord, not between the tenant and a third party. It is possible, therefore, to explain the difference between the writ of right and the assize of novel disseisin in terms of upward-looking and downward-looking claims: the former is an upward-looking claim by a tenant, the latter is the tenant's reaction to a downward-looking claim by his lord.

Before the reforms of Henry II had their corrosive effect on the old system of seigniorial justice, ordinary disputes over freehold land were generally decided in the lord's court, not in the court of the king. Henry II's reforms gradually shifted much litigation into the royal courts, which eventually became the sole venue for disputes regarding freehold land. Milsom argues, however, that in order to understand the original purpose of the assize of novel disseisin, it must be seen not through the prism of later developments, but as it would have fit into a world where the lord's court was still the dominant venue for land litigation. Created by men who lived in this world, Milsom reasons, the assize of novel disseisin must have been designed not to destroy the seigniorial court system, but to provide a remedy for tenants in cases where its guidelines were being disregarded.

Milsom derives support for his understanding of the assize of novel disseisin partly from the wording of the assize and partly from the early plea rolls. First, Milsom contends that the phrasing of the assize betrays its tenurial context. Under English law and custom, the lord could legally distrain a tenant for failure to do the services due to his tenement, provided he obtained a judgment against him in the seigniorial court: hence the requirement that the disseisin be done without a judgment was not mere surplusage when applied to the lord.¹⁴⁹ In Milsom's view, the reference to chattels also makes perfect sense: since the lord would have taken them away in distraining the plaintiff, the sheriff could reasonably be told to have them put back.¹⁵⁰

As Milsom shows, the earliest plea rolls provide some examples of cases where an assize of novel disseisin was brought by a tenant against his lord. In some cases we find a defendant pleading that the assize ought not to proceed because he lawfully distrained the plaintiffs by judgment in his court for failure to render services.¹⁵¹ In other cases, we find A bring-

149. MILSOM, *supra* note 13, at 11.

150. *Id.* at 12.

151. See 2 RCR 22-23 (Mich. 1199); 3 CRR 133 (Trin. 1204). In order for this plea to work, the defendant had to produce his court; if he did not, judgment would be given for the plaintiff. 3 CRR 161-62 (Trin. 1204); 3 PKJ No. 932 (York 1204); MILSOM, *supra* note 13, at 13.

ing a writ of novel disseisin against B concerning certain land and a writ *de homagio capiendo* (“for taking homage”) against B concerning land in the same place. In Hilary term 1199, for example, Absalom son of Absalom brought a writ *de homagio capiendo* against Bernard Grim concerning land in Cambridge.¹⁵² Later that year Absalom can be seen suing the same defendant by an assize of novel disseisin concerning land in the same county.¹⁵³ We find Robert, son of Osbert, bringing an assize of novel disseisin against Walter of Hereford concerning a free tenement in Kingswood in 1198; five years later Robert de Kingswood, probably the same Robert, is bringing a writ *de homagio capiendo* against the same Walter concerning land in the same vill.¹⁵⁴ In Michaelmas term 1201, Robert de Heriet is bringing both the assize and a writ *de homagio capiendo* against Henry de Braibof.¹⁵⁵ In all of these cases, the defendant is likely to have been the plaintiff’s lord.

Despite these entries, Milsom concedes that the assize of novel disseisin was not brought exclusively by tenants against their lords, at least by the time of *Glanvill*.¹⁵⁶ In his discussion of purprestures, or encroachments, *Glanvill* discusses the possibility that the assize could be brought against one’s lord or one’s neighbor.¹⁵⁷ The existence of a few cases in which the defendant is clearly the plaintiff’s lord does not necessarily prove that the lord was the usual defendant.

Milsom’s arguments from the wording of the assize have been challenged. Paul Brand notes that, under Milsom’s reading, the word “unjustly” in the phrase “unjustly and without a judgment” would be superfluous, as any disseisin by a lord without a judgment would necessarily be unjust.¹⁵⁸ Brand believes that the phrase was “intended simply to ensure that the assize was not used to remedy supposedly unjust judgments.”¹⁵⁹ As for the reference to putting back the chattels, Brand explains, a neighbor, as well as a lord, might take the chattels off of the land for purposes of storage.¹⁶⁰ Most importantly, nothing in the writ of novel disseisin states that the plaintiff claims to hold the land of the defendant, as was the case in the writ of right.¹⁶¹ Brand considers it more likely that the assize was concerned from the beginning with public order, and the limitation to

152. 1 CRR 86 (Hil. 1199).

153. 1 RCR 422 (Pas./Trin. 1199). This entry says Trim instead of Grim, but it is probably the same defendant. MILSOM, *supra* note 13, at 18 n. 1.

154. 1 RCR 177 (Herts. 1198) (the assize); 2 CRR 259-60 (Trin. 1203) (the writ *de homagio capiendo*).

155. 2 CRR 55, 60 (Mich. 1201). The second entry does not mention the land, but both entries are from Hampshire.

156. MILSOM, *supra* note 13, at 13.

157. *Glanvill* IX, 11 (tenant against lord); *id.* IX, 13 (neighbor against neighbor).

158. PAUL BRAND, *The Origins of English Land Law: Milsom and After*, in *THE MAKING OF THE COMMON LAW*, *supra* note 1, at 223.

159. *Id.*

160. *Id.*

161. *Id.* at 222.

free tenements marked the sphere of the king's competence.¹⁶² Brand also takes issue with Milsom's contention that the writ of right was meant only to put back those dispossessed during the Anarchy, as there is no evidence of this in the wording of the writ.¹⁶³

Brand is not the only scholar to have taken issue with Milsom's view of the early common law. Before Milsom published his book, his theory was evaluated by Sutherland, who concluded that, although feudal lords might often have been defendants in actions brought under the assize of novel disseisin, we cannot assume that they were the only defendants that Henry II and his advisors had in mind when they created it. "If feudal lords were . . . the usual disseisors against whom tenants needed new protection, the designers of the assize made their work not one whit different on that account, but cast it in the form of an action good against all the world."¹⁶⁴

While some scholars since Milsom have treated the assize of novel disseisin in the general context of Henry II's reforms, others have discussed the relationship of the assize in particular to concerns of the church. In an essay published in the mid 1980s, Cheney argued that litigation between the royal courtier John Marshal and Archbishop Thomas Becket in 1164 may help to explain the development of the assize of novel disseisin.¹⁶⁵ Under canon law, bishops and abbots had a duty to recover lost possessions of their churches, and Archbishops Theobald and Thomas Becket acted vigorously in the mid-twelfth century to recover properties that allegedly belonged to the see of Canterbury, many of which had been lost during the civil war of Stephen's reign. Around 1164, Becket put John Marshal out of possession of one such estate, and litigation ensued to determine whether Marshal held of Archbishop Thomas or the archbishop held the estate in demesne. Becket was victorious, for, as

162. *Id.* at 224.

163. *Id.* at 221.

164. SUTHERLAND, *supra* note 18, at 31. Even if the assize of novel disseisin and other inventions of Henry II's reign were intended to be a check on seigniorial courts, the imposition of such a check was itself a manifestation of central state authority and an attempt to aggrandize the king's power vis-à-vis that of the intermediate lords. See HUDSON, *supra* note 1, at 254, 262-71; Biancalana, *supra* note 2, at 435-36. The phrasing of the writ of novel disseisin laid open the possibility for deciding all land disputes in the king's court, and it is difficult to believe that the dramatic consequences that eventually ensued came as a complete surprise to those who developed the assize. About ten years after the assize of novel disseisin was created, Henry II and his advisers created the assize of mort d'ancestor. This writ was designed for situations where a lord prevented an heir from inheriting land of which his ancestor had been seised. Biancalana, *supra* note 2, at 484-85. Like the assize of novel disseisin, the assize of mort d'ancestor used a jury of twelve men as its dispute resolution mechanism. Guaranteeing the inheritability of freehold land, the resulting writ was frequently invoked by plaintiffs in the years to come. Another important innovation of the reign of Henry II was the precipe writ of dower, which gave widows who had none of their dower a remedy in the royal courts. *Id.* at 514. In several different contexts, Henry II and his advisers intervened in matters that had previously been the province of the seigniorial courts, increasing the authority of the king and the royal courts while simultaneously strengthening the hand of freeholders against intermediate lords.

165. Cheney, *supra* note 16.

one of Becket's biographers pointed out, Marshal "had no right as the law then stood (*nullo iure munitus, quod tunc lex erat*)."¹⁶⁶ The phrasing of this comment is telling: "as the law then stood" implies that the law had changed by the time Becket's biographer was writing.

The essence of Cheney's argument is that this 1164 litigation may have been the immediate impetus behind the creation of the assize of novel disseisin. It has always been puzzling why the magnates of England passively accepted the infringement on their seigniorial jurisdiction that the assize represented. The puzzle is solved, however, if we can assume that some of the magnates were tenants in John Marshal's position who wanted a procedure to prevent churchmen from evicting them from their lands without a judgment.¹⁶⁷ Cheney notes that papal privileges granted during the 1140s often contained a novel clause specifically authorizing English bishops to recover lost church lands, many of which had fallen into lay hands during the chaos of King Stephen's reign.¹⁶⁸ If the church was more likely to recover its lands during the years leading up to the assize of novel disseisin by disseising lay tenants than vice versa, that might explain why the assize did not meet with resistance from the great English barons.

Mike Macnair has offered a somewhat different explanation than Cheney for the development of the assize of novel disseisin, but one which also depends upon conflicts between churchmen and laymen over property.¹⁶⁹ Macnair points out that, prior to the development of the assize, the main tool for deciding property disputes was the writ of right. Trial by battle was unacceptable to the church as a means of dispute resolution. The church preferred proof by documents and witnesses in a church court, but this was unacceptable to the king and the laymen involved in the disputes. Perhaps, then, the assize of novel disseisin, with its trial by a jury of recognitors, emerged as a compromise between the procedural needs of the church and the desire of laymen such as John Marshal for an effective remedy.¹⁷⁰

166. *Id.* at 16-17 (trans. Cheney).

167. *Id.* at 24.

168. Cheney, *supra* note 16, at 19 (citing 2 PASTURKUNDEN IN ENGLAND (Walther Holtzmann ed. 1935), nos. 54 (Salisbury), 57 (Chichester), 78 (Exeter, misdated 1153 for 1146)). The special emphasis on recovering lost property in these letters is probably related to the chaos caused by King Stephen's reign, but the duty to recover lost possessions was an ancient canonical duty "impressed upon each prelate at the time of his blessing or consecration." *Id.* At any time during the twelfth or thirteenth centuries, prelates would have sought to recover land they had once possessed that had fallen into lay hands.

169. Mike Macnair, *Vicinage and the Antecedents of the Jury*, 17 LAW & HIST. REV. 537, 581-82 (1999).

170. If the assize rolls from the early thirteenth century are any indication, churchmen were more likely to appear in novel disseisin cases as defendants than as plaintiffs. A survey of assize records from six counties (Lincolnshire, Worcestershire, Yorkshire, Gloucestershire, Warwickshire, Staffordshire) from the early years of Henry III's reign, edited by the Selden Society, revealed a total of 598 actions of novel disseisin. Of these, 98, or 16.39%, involved a member of the clergy either as a plaintiff or as a defendant, and 70, or 11.71%, involved a high-ranking clergyman such as an abbot, prior or bishop. Of the total number of novel disseisin cases involving members of the clergy, 61, or 62.24%, were cases

If the theories of Cheney and Macnair are correct, then there is a real possibility of Roman or canon law influence on the assize of novel disseisin. If church prelates put pressure on the king and his advisers to create a new action, they might have drawn on ideas from the *ius commune*, which they were applying in their courts. In particular, they might have asked for something similar to the interdict *unde vi*, or another possessory remedy being used in the church courts at the time.

Sutherland saw several similarities between the assize of novel disseisin and the interdict *unde vi*.¹⁷¹ Both taught that it was a violation of law to put out the possessor of property by force, it being a breach of the peace. Both applied to land and property fixed to land, like buildings, but not to movables. Both proscribed all force, not merely violence. To prevail at either the assize or the interdict, the plaintiff had to have been in actual possession. A slave could not bring the interdict, nor could a villein bring the assize. But the slave's master could bring the interdict if a third party evicted the slave, just as the villein's lord could bring the assize if a third party disseised the villein. Under either Roman law or English law, the party who failed could bring a countersuit in which he might get the land back. Finally, and most significantly, both the interdict and the assize provided that the winner would get not only the land but the movable property on it and the income the land had produced during the wrongful occupancy, and both provided that the one dispossessed or disseised could recover possession by suing the original ejector as sole defendant regardless of who currently possessed the land.

There were also differences between the assize and the interdict, which Sutherland noted.¹⁷² The assize provided that the disseisin had to have occurred since some fixed event such as the king's last crossing to Normandy, whereas the interdict had no such limitation. The assize applied to certain incorporeal property such as rights of common pasture, and protected against nuisances, which the interdict did not. The interdict did not incorporate a jury of twelve recognitors like the assize. Most crucial of all, the assize did not borrow any of the technical language of Roman law.

Despite these dissimilarities, Sutherland reached the conclusion that the interdict "guided the development of the assize."¹⁷³ Milsom could not disagree more. In Milsom's view, the only way in which Roman law had any "influence" on the early common law was in supplying it with the

in which a member of the clergy was being sued by a layman or laymen, 29, or 29.59%, were cases in which a member of the clergy was suing a layman or laymen, and 8, or 8.16%, were cases with members of the clergy on both sides. The figures are similar if one considers only cases involving high-ranking clergymen: 45, or 64.29%, involved a high-ranking clergyman being sued by a layman or laymen, 29, or 27.14%, involved a high-ranking clergyman suing a layman or laymen, and the remaining 6, or 8.57%, were interclergy disputes. Interestingly, of the actions brought against higher-ranking clergy, the clergy were successful in 30 actions and unsuccessful in only 7.

171. SUTHERLAND, *supra* note 18, at 22-23.

172. *Id.* at 23-24.

173. *Id.* at 22.

Latin language.¹⁷⁴ If the assize really was directed initially against lords who disseised their tenants without a judgment, then it is hard to draw a parallel with the Roman interdict *unde vi*. The feudal relationship between lord and tenant was uniquely medieval; there was no counterpart in Roman law. Milsom's understanding of the assize does not admit the possibility of Roman influence.

So long as scholars focus their attention exclusively on the assize of novel disseisin and the writ of right, it is unlikely that we will make much headway toward understanding whether or how the early common law incorporated concepts of ownership and possession from the *ius commune*. If the distinction between these two writs can be explained in terms of the tenorial direction of the dispute, as Milsom has, then it is hard to call one possessory and the other proprietary. It is clear, however, that ideas of ownership and possession derived from the *ius commune* were being put into practice in the ecclesiastical courts in England. The question is whether the common-law property scheme as a whole, as opposed to two writs concerning land, bears a similarity to the scheme of the *ius commune*. To answer that question it is necessary to look at the advowson writs.

THE ADVOWSON WRITS

Because no plea rolls or registers of writs survive from before 1194, it is impossible to say precisely how many royal advowson writs were available in the decades prior to *Glanvill* and what purposes they might have served. Referring to an event that probably occurred around 1156-57, the cartulary of Darley Abbey records that twenty-four recognitors swore that the church of St. Peter of Derby was in the donation of Hugh, dean of Derby.¹⁷⁶ What sort of writ resulted in this inquest is not specified; the fact that there were twenty-four recognitors suggests that it was an *ad hoc* commission and not a regular writ. A record of litigation between Battle Abbey and Hamo Peche concerning the church of Thurlow raises the possibility that there might have been a writ that referred to the aggressive action of the defendant in seizing the advowson. According to the chronicler, the abbey commenced suit in both the royal and the ecclesiastical court, the royal action based on "the violence of the knight" (*militis violentia*), the ecclesiastical on "the intrusion of the clerk" (*clerici intrusione*).¹⁷⁷ The reference to *violentia* might be read as suggesting that the royal writ was somehow delictual in nature, but the chronicler may not have been thinking in a technical legal sense. Only from the

174. MILSOM, *supra* note 15, 1.

175. The discussion that follows focuses on the advowson writs created during the reign of Henry II. It does not consider the writ of *quare impedit*, which was developed slightly later. On the writ of *quare impedit* see Joshua C. Tate, *The Origins of Quare Impedit*, 25 J. LEGAL HIST. 203 (2004).

176. R.C. VAN CAENEGEM ED., *ENGLISH LAWSUITS FROM WILLIAM I TO RICHARD I* (1991), 107 SS no. 365, p. 328.

177. *Id.* no. 445, p. 477.

time of *Glanvill* do we have a clear picture of what advowson remedies were available in the royal courts.

Of the advowson writs described by *Glanvill*, the *precipe* writ of right of advowson was no doubt the earliest to emerge, and the procedure associated with the writ was rather cumbersome. Like the writ of right for land, it involved a number of possible summonses and essoins, followed by the waging of battle (or, after the assize of Windsor, by an election between battle and the grand assize).¹⁷⁸ A plaintiff who brought a writ of right could hope to recover his advowson eventually, but not without considerable delay, unless the defendant defaulted.

In 1179, the same year that Henry II introduced the grand assize, the Third Lateran Council added an additional complication for plaintiffs seeking to recover advowsons by writ of right during a vacancy. This Council was interpreted to give the bishop the authority to fill a benefice when a dispute over the patronage lasted longer than six months.¹⁷⁹ A procedure was needed that could quickly decide an advowson dispute before the passage of time triggered the Council and gave the bishop the prerogative to choose his preferred candidate. This may have been the impetus for the assize of darrein presentment.

The assize of darrein presentment, like the assize of novel disseisin, was one of several "recognitions" devised during the reign of Henry II, all of which summoned a jury-like body called an "assize" of twelve free and lawful men from a particular location to resolve a question or questions specified in the writ. In this assize, the question was which patron present-

178. *Glanvill* I, 7, 10; IV; 3-6. One unique element in the procedure for the writ of right of advowson was the taking of the advowson into the king's hand in the event the defendant exhausted all his essoins and still failed to appear. In such a case the sheriff would go to the church and "in the presence of trustworthy men, announce that he has seized the presentation of that church into the hand of the lord king." *Id.* IV, 5 (trans. Hall).

179. 3 Conc. Lat. c. 17 (1179) = X 3.38.3. Canon 17 of the Third Lateran Council originally provided that, when a legal controversy arose concerning the patronage and no decision was arrived at in two months, the bishop would automatically choose the parson himself. Although two months was the time limit expressed by the Council, later canonists referred to three or four months, and four months was the limit referred to when the canon was included in the *Compilatio 1* and the *Liber Extra*. See PETER LANDAU, *JUS PATRONATUS: STUDIEN ZUR ENTWICKLUNG DES PATRONATS IM DEKRETALENRECHT UND DER KANONISTIK DES 12. UND 13. JAHRHUNDERTS* 171-72 (1975). More significantly, however, a decretal of Alexander III directed to the bishops and archbishops of England specified that, in a controversy over the patronage, the bishop, six months after the vacancy occurred could himself fill the church. X 3.3 8.22. Canonists offered different explanations for the contradiction between the four-month period of the Council and the six-month period of the decretal. See LANDAU, *supra*, at 172-73. However, the records of the English royal courts do not refer to two different time limits. The plea rolls do sometimes report that a benefice was filled by the bishop "by authority of the Council (*auctoritate concilii*)" because of a lapse of time. If the time in question is specified, however, it is always said to be six months. See, e.g., 12 CRR no. 379, p. 72 (Hil. 1225) (*episcopus . . . quia ecclesia vacavit ultra sex menses, ipse auctoritate concilii illam contulit . . . clerico suo*); 14 CRR no. 81, p. 13 (Trin. 1230) (*dominus Cantuariensis per lapsum sex mensium contulit ei ecclesiam illam auctoritate concilii*); 14 CRR no. 1227, p. 260 (. . . *contulit ecclesiam illam . . . ratione concilii post lapsum vi. mensium*). The plea rolls leave the impression that the English church interpreted the Third Lateran Council as establishing a six-month time limit for all patronage disputes.

ed the last parson who was now dead to the church in a stated village, which church was alleged to be vacant and of which church the plaintiff claimed the advowson (*quis advocatus presentavit ultimam personam que obit ad ecclesiam de illa villa, que vacans est ut dicitur et unde N. clamat advocacionem*).¹⁸⁰ Thus the assize concerned the last presentation (*ultima presentatio*), and has acquired the French-derived name of darrein presentment. The person or persons found to have presented the last parson recovered seisin of the advowson and were entitled to present the next parson.¹⁸¹

Because the earliest surviving reference to the assize of darrein presentment dates to 1180,¹⁸² some scholars have assumed that the assize was created in response to the Third Lateran Council.¹⁸³ Peter Landau, however, has argued that the assize must have been created before 1176.¹⁸⁴ A decretal of Alexander III, dating to the years 1173-76, ruled that a clerk instituted in a church at the presentation of one who believed himself patron ought not to lose his benefice when another recovers the advowson in court, provided that the one who presented him “possessed the right of patronage of the church” and did not merely “believe himself to be patron without possessing the right.”¹⁸⁵ This rule is attributed to an “English custom.”¹⁸⁶ In Landau’s view, the distinction drawn by the decretal makes sense only if there was an action available in English law to recover “possession” of an advowson.¹⁸⁷ Landau thinks that the assize of darrein presentment was that action.

It is possible, therefore, that the assize was created before the Third Lateran Council. The procedure of the assize, however, seems tailored to solve the problem the Council created, and one may doubt whether the earlier decretal of Alexander was in fact referring to the assize. While the decision as to whether the patron possessed the right of patronage might well have turned on who presented the last parson, this determination could have been made independently by the ecclesiastical court when the benefice was claimed, without reference to a secular judgment. In other words, the English custom in question might have been a custom of the English ecclesiastical courts in cases where a layman had recovered the advowson by writ of right.

The assize of darrein presentment offered plaintiffs in advowson

180. *Glanvill* XIII, pp. 148-70; XIII, 19, p. 161.

181. *Id.* XIII, 20, p. 161.

182. VAN CAENEGEM, *supra* note 90, at 332-33; *English Lawsuits*, 107 SS no. 518. An 1182 entry in the pipe rolls may also refer to the assize of darrein presentment, though it could also refer to the grand assize. *Pipe Roll 28 Henry the Second*, 83 (1182) (*‘Radulfus Ferrari is reddit compositum de 10 marcis pro respectu de recognitione cujusdam ecclesie’*).

183. See, e.g., VAN CAENEGEM, *supra* note 90, at 332.

184. LANDAU, *supra* note 179, 195-98.

185. *Si vero tunc non possidebat ius patronatus, sed tantum credebatur esse patronus, cum tamen non esset, nec possessionem patronatus haberet secundum consuetudinem Anglicanam poterit ab eadem ecclesia removeri*. 1 Comp. 3.33.23 (emphasis added).

186. *Id.*

187. LANDAU, *supra* note 179, 196-98 n. 696.

cases the possibility of a swifter judgment in comparison with the writ of right. It also provided a fixed mode of dispute resolution in the form of a jury drawn from the community, which undoubtedly attracted plaintiffs who were disinclined to fight a battle and who thought that representatives drawn from the community would decide in their favor. In light of these advantages, it is perhaps unsurprising that the assize of darrein presentment is the most common type of advowson action in the early plea rolls. The assize, however, did not provide a final answer as to who had the superior claim in the advowson; only the writ of right could offer the successful plaintiff some assurance that the matter would not be taken up again in the king's court.

If judgment was given against the defendant in the assize, the defendant could subsequently bring a writ of right.¹⁸⁸ Whether a party who lost by writ of right could subsequently bring the assize was a closer question, or at least the author of *Glanvill* pretended that it was for the sake of argument. The treatise writer suggested that, in principle, a plaintiff should be able to bring the assize on the basis of his ancestor's seisin "notwithstanding anything that may have been decided about the right to present" (*non obstante aliquo quod factum sit super iure ipso presentandi*).¹⁸⁹ At the same time, however, allowing the assize to be brought by the party who lost the advowson by writ of right would mean that "it does not seem that disputes which have once been ended by judgment in the court of the lord king are firmly settled forever,"¹⁹⁰ and judgment in the action on the right ought to conclude the matter. *Glanvill* therefore concludes that a plaintiff could prevail by the assize only if the defendant failed to object on the basis of the earlier judgment; if the defendant argued, as he surely would, that the plaintiff lost by judgment in the king's court whatever right he or his ancestors may have had, the plaintiff would lose his case and be liable for amercement.¹⁹¹ In other words, a party who lost by the assize could subsequently bring the writ of right, but not vice versa. The assize, if it was brought, had to come first.

Cases from the plea rolls show that an action of darrein presentment, once concluded, could be followed by a writ of right. In Trinity term 1200, for example, John Chapel brought an assize of darrein presentment against the abbot of Saint Augustine and the prior of Leeds concerning the church of Preston, in Kent. Although the entry is fragmentary, it appears that John prevailed.¹⁹² Three years later we find John bringing a writ of right against the abbot concerning the advowson of the same church; the abbot elected the grand assize.¹⁹³ It seems that John was not satisfied with the judgment awarding him the next presentation, and wanted to settle the

188. *Glanvill*, XIII, 20, p. 161.

189. *Id.* IV, 11 (trans. Hall).

190. *Id.* (trans. Hall).

191. *Id.*

192. 1 CRR 175 (Trin. 1200).

193. 2 CRR 157 (Hil. 1203).

matter once and for all by writ of right.

Although the same person might be plaintiff in both the assize and the subsequent writ of right, it was more common for the parties to be reversed, since the party who prevailed at the assize had more to lose by bringing a subsequent suit. In Michaelmas term 1200, for example, John of Langdon brought an assize of darrein presentment against Robert of Sutton and Alberic de Ver. The jurors reported that Payn de Schenefeld presented the last parson, and Robert responded that the church was in that land which he held of John, son of Payn. Seisin was awarded to Robert.¹⁹⁴ Two years later we find John back in court, suing Robert by writ of right.¹⁹⁵ The assize only settled the question of the last presentation, and John could pursue the matter further by claiming his right. Other examples can be cited where the parties are reversed in the subsequent action of right.¹⁹⁶ Being the loser in a darrein presentment action did not necessarily end the story, but in most cases the issue of the last presentation was decided first.

The double process afforded by the assize of darrein presentment and the writ of right calls to mind the Roman law double process by possessory interdicts and *rei vindicatio*. Just as the party who had possession at the time of the lawsuit prevailed at *utrubi* or *uti possidetis*, so did the party who had presented the most recent parson prevail at the assize of darrein presentment. If the defendant conceded that the plaintiff presented the last parson, it was irrelevant whether the presentation was unjust,¹⁹⁷ as with the interdicts. Once the issue of seisin was decided, the losing party had recourse to the writ of right, but in the meantime the party who prevailed in the darrein presentment action could have a suitable candidate instituted as parson. It was better to be in seisin than to be the plaintiff in an action of right.

Unlike land, advowsons were not held “of” a lord. The patron held the advowson in his own right and did not owe any feudal service with respect to it. Lawsuits over advowsons were not “upward-looking” or “downward-looking”—they had a horizontal dimension. Double process in the advowson context, therefore, cannot be explained as reflecting a feudal framework.

Despite the basic similarity between the interaction of the English

194. 1 CRR 332 (Mich. 1200).

195. 2 CRR 113 (Mich. 1202), 223, 236 (Pas. 1203).

196. See, e.g., (a) 12 CRR 289 #1423 (Mich. 1225) = 3 BNB 531 #1685 (the assize), and 13 CRR 6 #26 (Pas. 1227) = 2 BNB 201 #248 (the writ of right, with the parties reversed); (b) 13 CRR 377 #1799 (Pas. 1229) (defendant in action of right refers to earlier, successful darrein presentment action brought by his father).

197. When the defendant argued that a church was not vacant, it was a permissible response for the plaintiff to say that the current parson was admitted unjustly and over his appeal. See 3 BNB #1352, p. 328 (Mich. 1217); 3 BNB #1354, p. 330 (Mich. 1217). If the defendant conceded the plaintiff's presentation, however, it was immaterial whether the presentation was unjust. See 11 CRR #1662, p. 331 (Trin. 1224) (defendant concedes that the plaintiff presented the last parson, but says the presentation was unjust; summary judgment for plaintiff).

advowson writs and Roman double process, one can also point to ways in which the advowson writs were different. One possible counterargument derives from the fact that a donee, who did not have seisin, was able to block the assize of darrein presentment by asserting his gift.¹⁹⁸ This might suggest that darrein presentment was not a wholly possessory action. Yet the defense applied only when there was some connection between the plaintiff and the donor, and it seems to have been designed primarily to remedy the injustice that would result if the plaintiff was allowed to repudiate an ancestor's charter yet at the same time recover the advowson on the basis of that ancestor's presentation. Granting the donee a defense when the plaintiff was the heir of the donor simply allowed the donee to compel the completion of the gift. Such a defense did not mean that the donee had a claim to ownership or that there was a proprietary component to the assize.

The limited nature of the defense of gift is reinforced by what might be termed the rule of subsequent presentation. By the operation of this rule, when a person gives an advowson away, but afterward (before the donee has a chance to present) presents another clerk to the bishop who is instituted as parson, the gift of the advowson is null and void by virtue of the donor's subsequent presentation.

One of the earliest examples of a subsequent presentation argument in the rolls dates to Trinity Term 1200 and involves an assize of darrein presentment. In the case, Robert de Curci sued Roger de Scures concerning the advowson of Farlington, in Hampshire. Roger responded that Robert de Curci, Robert's uncle, gave a moiety of the vill of Farlington with appurtenances to his father William fitz Walter and a moiety to his uncle Roger fitz Walter, and that Roger was the heir of both. Roger conceded that the plaintiff's uncle presented the last parson, but asserted that the gift followed that presentation. Robert's attorney initially responded that he was not summoned concerning the charters and should not have to respond to them. When the court directed Robert's attorney to respond, he said that after Robert's charters were made, William de Curci father of Robert presented the last parson, Andrew, and put himself on the jury concerning that presentation. The court decided to call a jury to determine whether William de Curci presented the last parson. The jury's verdict is not recorded.¹⁹⁹

The case between Robert and Roger is distinctive in that the parties disagreed not only on whether the last presentation occurred before or after the gift, but on who made the last presentation, Robert's uncle or Robert's father. In the paradigmatic subsequent presentation dispute, both parties agree on who presented the last parson, and the sole issue is when

198. *Queri autem potest ab initio utrum aliquid dici possit quare assisa illa remanere debeat. Et potest quidem ad hoc dici, scilicet tenentem ipsum concedere antecessorem petentis ultimam inde fecisse presentationem sicut uerum dominum et primogenitum heredem, sed postea feodum illud ex quo pendet aduocatio ei uel antecessoribus suis contulisse aliquo uero titulo; et ita eo ipso remanet assisa, et placitum super exceptione ipso inter ipsos litigantes deinde esse potent.* Glanvill XIII, 20, pp. 161-62.

199. 1 CRR 239 (Trin. 1200).

that presentation occurred. A 1212 dispute between Agnes de Roche and the abbot of Beaulieu is typical. Agnes brought an assize of darrein presentment against the abbot concerning the church of Fenstanton, Huntingdonshire. The abbot's attorney responded that Roland de Dinan presented the last parson, a certain Richard. Agnes acknowledged this and said that the land and advowson descended from him to Derian her late husband. The abbot's attorney then alleged that, after Roland made that presentation, he gave the church to the abbey; a charter was offered. Agnes replied that, after Roland made that charter, if he ever did, he presented a parson who was admitted at Roland's presentation. The abbot said that Richard was parson for days and years before the charter was made. Both parties put themselves on the jury, and the jurors said that Roland gave the church (i.e., presented a parson) after the charter was made. Agnes was awarded her seisin and the abbot was amerced.²⁰⁰

The rule of subsequent presentation was invoked most frequently in assizes of darrein presentment, and it is quite possible that the rule was first developed in that context. The rule is understandable if one assumes that the donee originally had neither ownership nor possession, but something like an *in personam* claim, which could be invoked against the donor or his heir provided that there had been no revocation of the gift. This does not mean that the assize of darrein presentment was really meant to decide right rather than seisin.

The defense of gift, therefore, does not meaningfully distinguish the assize of darrein presentment from the Roman interdicts. But there are other important differences. First, while the primary purpose of the interdict *uti possidetis* was to set the stage for a subsequent *rei vindicatio*, the assize of darrein presentment settled an urgent question about the next presentation, and was not necessarily followed by a dispute about the right. The cases cited above,²⁰¹ in which a darrein presentment action was followed by a writ of right, may be the exception rather than the rule.²⁰² A similar argument has been made with regard to the assize of novel disseisin, which was not usually followed by an action of right,²⁰³ and it may apply equally well here. If one accepts the theory that the assize of darrein presentment was invented in response to the Third Lateran Council, then the assize might have been intended primarily as a substitute for, and not a complement to, the writ of right. Even if litigants disappointed in darrein presentment actions did not always avail themselves of the writ of right, however, the fact remains that they could if they wished.

One can point to other ways in which the assize of darrein presentment differed from the interdict *uti possidetis*. The assize, unlike the interdict, did not prevent the use of force, and one party in the assize was clearly plaintiff and the other clearly defendant, in contradistinction to the

200. 6 CRR 190-91 (Hil. 1212).

201. See *supra* text accompanying notes 192-195.

202. Although I have not done a formal count, my estimation is that most cases of darrein presentment were not followed by an action of right.

203. RICHARDSON & SAYLES, *supra* note 85, at cxxix.

interdict. Nor did the assize include the interdict's requirement that possession be *nec vi nec clam nec precario*, although there was a requirement that the presentation have been made in time of peace, and that might be seen as analogous.²⁰⁴ But perhaps the most telling difference is that the text of the assize does not refer to either seisin or possession, and does not borrow the vocabulary from or follow the phrasing of the interdict, which uses the verb "to possess" twice.²⁰⁵ One would expect a remedy modeled on Roman law to be framed in a similar way as the Roman remedy that inspired it, at least as regards the basic concept of possession. If the king's advisers were attempting to replicate the Roman interdict, they knew how to cover their tracks.

The writ of right of advowson also departs significantly from Roman proprietary ideas. In cases brought by this writ, the justices frequently held that it was not possible to acquire right by transfer without presenting a candidate. Only a presentation in the past would entitle a plaintiff to bring the writ of right, for one could not sue on the basis of "another's right given to one by charter and not one's own right."²⁰⁶ Roman law acknowledged the acquisition of ownership by delivery, provided that there was a sufficient causa, such as gift, dowry, or sale.²⁰⁷ One might expect that, if the writ of right of advowson had been modeled on the Roman *rei vindicatio*, the justices would have treated delivery of the charter of gift as a transfer of ownership and allowed the donees to bring the writ. In any event, because the writ of right predates the assize of darrein presentment, it was clearly not originally conceived as part of a double process.

Having the right to an advowson meant that one or one's ancestors had presented a candidate at a specified point in the past, possibly many years ago. Having seisin, by contrast, meant having made the last presentation. The distinction was not absolute: it was a matter of degree. Thus, the English concepts of right and seisin cannot be treated as literal equivalents of Roman ownership and possession. Sutherland aptly summarized the difference between English right and seisin and Roman ownership and possession when he noted that the Roman terms "were distinct juridical concepts with no middle ground between them, while seisin and right . . . were reference points in a continuum: the more recent and notorious facts, the relatively older and less well-known facts."²⁰⁸

204. The *tempore pacis* requirement appears in *Glanvill* IV, 1, p. 44, but not XIII, 19, p. 161, which suggests either that XIII was completed before IV or that there was a clerical error in XIII.

205. *Ait praetor: 'Ut i eas aedes, quibus de agitur, nec vi nec clam nec precario alter ab altero possidetis, quo minus ita possideatis, vim fieri veto.'* D. 43.17.1.pr. (LP 8.14).

206. This rule is stated plainly in 2 CRR 173 (Hil. 1203) ("*alterius jus per cartam sibi datam et non suum jus proprium.*"); see also 11 CRR no. 121, p. 21 = 3 BNB no. 1578, p. 457 (Hil. 1223) (plaintiff amerced because "*loquitur de alieno iure et alterius seisina quam antecessorum suorum*"). The rule was not always applied in practice, however. See 1 CRR 471 (Pas. 1201) (plaintiff allowed to bring writ of right on basis of gift); 4 CRR 126 (Pas. 1206) (same); 2 BNB no. 39, pp. 33-35 (Pas.-Trin. 1219) (same).

207. Inst. 2.1.41.

208. SUTHERLAND, *supra* note 18, at 41-42.

The fact remains, however, that the assize of darrein presentment introduced the possibility of something close to double process in the advowson context, and the scheme in *Glanvill* would not have struck a contemporary canonist or Romanist as peculiar. The two basic features of Roman and canon law mentioned in Part II—separate remedies for ownership and possession and the idea that possession should be determined first—can arguably be seen in the English common law of advowsons, although the form they took there is different from the form they took in the *ius commune*. While it would be a stretch to assume that the royal advisers consulted books or teachers of Roman law in designing the English legal system, it is likely that at least some of the men responsible for the advowson writs knew about the sort of actions that were being heard in ecclesiastical courts at the time. The basic distinction between *proprietas* and *possessio* can arguably be seen in the advowson writs, translated into terms that Englishmen understood and brought into harmony with English ideas.

CONCLUSION

Looking only at the writs concerning land, it is difficult to say with any sort of definitiveness that the early common law distinguished between ownership and possession. If Milsom is right about the tenurial dimension of the writ of right for land and the assize of novel disseisin, then these two actions cannot be said to reflect Roman or canon law influence. Any resemblance to Roman law must be accidental. But the fact that concepts of ownership and possession can arguably be seen in the advowson writs cannot be explained away so easily. The advowson writs do not involve upward-looking or downward-looking claims: they do not follow any tenurial direction. Once the scheme as a whole is considered, the possibility of influence becomes more real.

Taken as a whole, the early common law of property seems to incorporate ideas of ownership and possession. The resemblances between the assizes of novel disseisin and darrein presentment and the Roman interdicts are too strong to be ignored. Even so, the common law did not “receive” Roman ideas in the same the way its sister legal systems did on the Continent. English right and seisin were not interchangeable with Roman ownership and possession.

In the end, the question of whether Roman and canon law influenced the early common law of property depends on how one defines influence. If influence means borrowing the specific tools of another legal system and transplanting them into a different context, then it is unlikely that sort of influence occurred here. On the other hand, if influence can mean drawing on a concept from one system and building a new framework that departed in significant ways from the original system, then it is entirely possible that some such influence occurred in this context. The royal advisers may not have borrowed Roman answers for English questions,²⁰⁹ but it is unlikely that they answered those questions in an intellectual vacuum.

209. MILSOM, *supra* note 15, at 2.