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The language of the common law has a life and a logic of its own, resilient through eight centuries of unceasing talk. Basic terms of the lawyer's specialized vocabulary, elementary conceptual distinctions, and modes of argument, which all go to make "thinking like a lawyer" possible, have proved remarkably durable in the literature of the common law. Two fundamental distinctions—between "real" and "personal" actions and between "possessory" and "proprietary" remedies—can be traced back to their early use in treatises of the first generations of professional common law judges and in reports of courtroom dialogue from the first generations of professional advocates in common law courts. Together these distinctions give the clearest indications that the early common law professions borrowed the vocabulary and techniques of Roman and canon law. Moreover, they play an important role in the ongoing historical debate over English legal concepts of property ownership.

Frederic William Maitland based his account of the origin and working of the early common law writs on a vision of royal and feudal courts competing in the late twelfth century for jurisdiction over property owners and their suits about rights to land. He found in the early royal writs some of the familiar conceptual distinctions shared by ancient Roman and contemporary European legal systems: "real" actions differentiated from "personal" actions, and, among the "real" actions, interests in "property" protected by one group of writs beginning with the writ of right, and interests in "possession" protected by

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another group of writs first manifested in the assizes of novel disseisin and mort d'ancestor.[1] In conceiving of feudal tenants as "owners" of land and in making use of the Latin term *proprietas* to describe that ownership,[2] Maitland followed the terminology of one of his principal sources, a treatise from the second quarter of the thirteenth century identified as the work of Justice Henry de Bracton.[3]

More recently, Professor S. F. C. Milsom has given us a new understanding of the early land law writs introduced by Henry II half a century before Bracton's time. Milsom saw the writs as attempts to restore and regulate the seignorial relationship between lords and tenants after the chaos of the previous reign. Neither pro-Roman nor antifeudal, "the only intention behind writ of right, mort d'ancestor, and novel disseisin was to make the seignorial structure work according to its own assumptions."[4] In Milsom's account, Henry II's writs eventually destroyed the very lord-tenant relationship they were intended to restore. The unintended result is manifest half a century later in Bracton's vision of "seisin and right as abstract concepts, untidy versions of possession and ownership." Bracton's rights were "good against the world," and this can only have meant that Bracton's was "a Roman or a modern world," not the seignorial world Henry II sought to restore. This was, in Milsom's words, no less than a "transformation of elementary legal ideas."[5]

Professor Milsom has illuminated not only the original seignorial logic of the twelfth century but also the transformed legal world from the thirteenth century onward. Much work remains to be done to gain a better understanding of the new set of ideas shared by common law practitioners in this succeeding age. In the late thirteenth century and the first decades of the fourteenth century, a profession of advocates, or "pleaders," made its appearance in the king's courts at Westminster.[6] This new legal profession prospered and passed down its learning to succeeding generations of apprentices in a new form of legal literature that culminated in the Year Books, a series of reports of dialogue in court between pleaders and the king's justices.[7] In the discourse of the Year Book pleaders, some elements of the Roman vocabulary of Bracton and Maitland remain, while others drop out of sight. Milsom's alternative descriptions of Bracton's abstract concepts raise questions: How "Roman" was the post-transformation world of 1300? How "modern"?

One can begin to answer some of these questions by focusing on four words found in Roman texts and in the Year Book sources (and in modern legal discourse). Surviving manuscripts of the Year Books and predecessor works made very frequent use of the term "possession" to differentiate their writs, gave a specialized and limited scope to the

term "property," and occasionally distinguished "real" from "personal" actions.[8] The distinctions are fundamental ones; the categories have long been thought obvious. Their presence has been read to mark the emergence of a common law notion of ownership of property.[9] Their use in English legal literature is one measure of the extent to which the community of English lawyers turned to Roman law for elementary substantive distinctions, for patterns of legal reasoning, and for a structure of legal concepts.

In legal historiography the long-standing debate about Roman influences on the English common law has borne more than its share of hidden agendas and overt prejudices.[10] Many historians saw Roman law as an illiberal, subversive, "foreign" element, ever threatening to invade and corrupt the indigenous purity of England's common law. The Roman concepts demonstrably present in twelfth- and thirteenth-century English legal materials represent (to mix two familiar metaphors of the anti-Roman historians) a "youthful flirtation" that "operated as a sort of prophylactic inoculation, and . . . rendered the national law immune against destructive infection."[11] For another school of legal historians, however, the adoption of Roman legal concepts represented the victory of clear thinking over confusion, the embrace of universally valid principles.[12]

To its detractors Roman law embodied "absolutist" political ideas and the centralization of power.[13] Alongside a handful of passages on the lawmaking power of the prince, the great bulk of Roman legal writings portrayed a system of "private" legal rules that put theoretically unlimited power over land, goods, and subordinate persons in the hands of a sole adult male, the *paterfamilias.*[14] This emphasis on individual absolute ownership pervades the fundamental organizing principles of the Roman law texts. All actions were either real or personal. A "real" action was a claim to ownership of a physical thing or slave, a *res,* asserting that the individual claimant's relationship to the thing was superior to that of all other claimants. A personal action, by contrast, was a claim to enforce a pre-existing obligation owed by a specific person.[15] "Property," *proprietas* or *dominium,* expressed the relationship of absolute ownership enforced by the real actions. "Possession" was its counterpart, a lesser interest that could be split off from ownership and protected separately.[16]

English lawyers in the thirteenth and fourteenth centuries spoke of "real" actions and "personal" actions, and distinguished actions for "possession" from actions asserting another, more inclusive interest in land and goods. If they meant what the Roman lawyers meant by such terms, their usage would suggest that English lawyers in that age had

a substantive concept of absolute property rights in land, of an individual interest that negated all claims of other persons. It would have been quite possible for such a concept of absolute ownership to have coexisted with the system of common law writs these lawyers administered, even though their writs, formulated in an earlier century, did not provide a means to litigate directly that ultimate issue of ownership against all the world.

Did the "transformation" of which Milsom has written give English common lawyers a new idea of property ownership to shape the future direction of land law development? Was their conception of the interests they were protecting based on Roman models, or was it closer to the seignorial relationship Milsom has posited for the twelfth century, or was it a fresh development tied to neither set of ideas?

I seek here to answer such questions of "transformation of elementary legal ideas" by examining the usage and context of shared legal terminology in the Year Books and other texts of the common lawyers from the 1270s to 1320, in the Bracton treatise composed in the 1230s to 1250s, and in some of the Roman and canon law texts studied in the medieval universities throughout the period. The English lawyers whose words are recorded in the Year Books found it useful to generalize about the writs they could employ in the royal courts and to apply labels to their categories of writs. The chief example before them was the developing system of canon law, for which a separate profession of legal practitioners integrated their new learning much more closely with Roman models. The common law pleaders, to a lesser extent than their canonist counterparts, grouped their writs in ways that mimicked those of the elementary Roman categories of actions.

This study of the Year Book evidence finds that the early common lawyers did not reproduce specific Roman or canon law doctrine along with the borrowed Roman vocabulary. It is not that they consciously rejected Roman notions of absolute ownership and actions to establish rights against the whole world; these first professional lawyers may simply not have known or understood how the Roman legal texts defined the terms they borrowed.

For all that, however, the common lawyers of 1300 did have use for Roman vocabulary and Roman legal method. They borrowed "half," so to speak, of the Roman distinction between possessory and proprietary actions and found a comfortable classification of remedies upon which to hang the labels "real" and "personal." They further exploited the Roman and canon law "sound" of their technical vocabulary by occasionally embroidering an argument with a Roman legal maxim, stripped of its original context. In so doing, the English legal

profession may have been seeking an extra measure of legitimacy in an age that venerated the ancients, or may simply have been imitating their contemporaries practicing in the church courts. On my reading of their surviving literature, however, the English legal profession in the half century after Bracton found no need to push the common law writs to Roman extremes of bare possession and absolute ownership.

Bracton and the English Institutional Tradition

The present study is set within a broader temporal context. Lawyers, judges, and legal academics have tried many times over the centuries to portray in a single work the whole of the common law. Beginning with Glanvill[17] and Bracton[18] in the twelfth and thirteenth centuries; beginning again after 1600 with John Cowell,[19] Henry Finch,[20] Matthew Hale,[21] and Thomas Wood,[22] and culminating in William Blackstone's famous *Commentaries*;[23] then beginning once more with John Austin,[24] T. E. Holland,[25] and their American and Commonwealth counterparts[26]— these authors all borrowed their terminology and structure wholly or partly, directly or indirectly, from a Roman scheme of classification found in Gaius's and Justinian's Institutes. The telltale traces of distinctions between "public" and "private"; "persons," "things," and "actions"; "civil" and "criminal"; "real" and "personal"; "contractual" and "delictual"; and "possessory" and "proprietary" pervade these treatise writers' attempts to divine the inherent "structure" of the common law. When viewed in terms of structure and vocabulary, each of these successive formulations bears such striking similarity to the last, across such a vast stretch of time, that the entire enterprise appears to establish a remarkable degree of intellectual continuity.

But the influences of these "institutional" treatises and commentaries upon each other is just one part of the story. The larger question is how representative or influential these vast efforts of synthesis were in framing the ordinary discourse of lawyers and in training the minds of new generations of lawyers, particularly on the level of categorization and organization of legal knowledge.

The surviving legal literature of the twelfth and thirteenth centuries provides evidence of such influences. We know that near the end of Henry II's reign, the treatise known as Glanvill opened by distinguishing "criminal" from "civil" pleas and set forth a single introductory juxtaposition of possessory and proprietary actions, but then applied Roman terms only sparingly in the remainder of the text.[27] In the

extant Plea Rolls of Richard I, John, and Henry III, references to anything like Roman "possession" of land are extremely rare.[28]

By contrast, Bracton's treatise on the laws and customs of the English royal court, dating from the second quarter of the thirteenth century, followed closely the terminology and organizing principles of Justinian's Institutes—much more closely, it is often said, than the subject matter warranted.[29] English royal judges and their clerks were probably more familiar with Roman and canon law in Bracton's time than ever before or since. Before 1190, in the time of Glanvill, English students would have had to go abroad to Paris, Bologna, or other continental universities to receive any instruction in Roman or canon law; by the 1230s, however, both civil and canon law instruction were well established at Oxford, and those who embarked on legal study began with lectures on the Institutes.[30] Clerics with this background served as royal administrators and judges throughout the thirteenth century. By the end of Edward I's reign, however, common law judges were chosen instead from among the new profession of pleaders, whose careers typically did not begin with university training in civil law.[31]

Bracton's treatise circulated widely in the late thirteenth century, just when an organized profession of common lawyers was taking shape.[32] The treatise had its imitators in the 1280s,[33] including Britton, an updated epitome in French, the language then replacing Latin as the written medium for transmitting the profession's learning. Beyond these, however, for three centuries we find no trace of fresh attempts to put the whole of English common law into Bracton's or any other analytical framework. The question remains whether Bracton's avowedly Roman structure became, in any respect, the conscious or unconscious mental structure for the succeeding generations of common lawyers whose arguments are reported in the Year Books from the 1290s onward.

From beginning to end, readers of Bracton were continually required to make sense of his distinctions between civil and criminal, real and personal, contractual and delictual, and, especially, possessory and proprietary actions.[34] The treatise placed overwhelming reliance on this Roman terminology. After some introductory definitions, Bracton announced that the whole of the law with which the treatise proposed to deal related either to persons or to things or to actions (*pertinet vel ad personas, vel ad res, vel ad actiones*).[35] Like much of the first third of Bracton's treatise, this grand division was drawn from a contemporary *summa* of Justinian's Institutes.[36]

The law of persons, though it had pride of place, took up a mere 4 manuscript folios, followed by 90 folios on "things." The remaining

350 folios covered only part of the projected treatment of actions, which Bracton classified in well-known Roman terms. His "first" classification was of actions *in rem, in personam,* and "mixed."[37] The effect, as in Justinian's Institutes, was to repeat within the category of actions the dichotomy already set forth between persons and things in the first two sections of the treatise—procedure, as it were, mirroring substance.

One seeking to define real and personal actions from the text of Bracton's treatise would learn more about the subcategories within these two categories of actions than about any theoretical or functional differences between them. Personal or *in personam* actions included criminal and civil actions and arose *ex contractu, ex maleficio,* or *ex delicto* (or *quasi* any of these three).[38] Real or *in rem* actions included those founded on possession and those founded on property; those for corporeal things and those for incorporeal rights; and those to recover possession, to acquire possession, and to retain possession.[39]

A single crucial passage sets forth Bracton's version of the conceptual difference between real and personal actions found in the Institutes. Actions *in rem* were brought by one who claimed to be the owner of a thing against the possessor, and sought the thing itself, not its price, its value, or an equivalent thing of the same kind. The demandant in a real action did not base the claim on any personal obligation of the possessor to return the thing. Rather, the demandant asserted ownership of the thing and instituted the action against whoever happened to be in possession.[40] Actions of this sort could be brought for immovable things, said Bracton, but in an action for a movable thing—an ox or an ass, a garment, money, or grain—the possessor was always permitted to pay its value instead of returning the specific thing; hence, such actions were *in personam.* Real actions recovered specific (immovable) things; personal actions recovered damages or a penalty.[41] Novel disseisin, in Bracton's scheme, was both personal, because it could be brought against the disseisor for his act, and restitutory, hence real, because it restored the land to the disseisee.[42]

The more crucial distinction, the one that formed the dominant vocabulary of exposition for most sections of the treatise, is the division Bracton made within the category of real actions. It was the same distinction found in Glanvill's opening passages: between actions founded on possession (*super possessione*) and on property (*super proprietate*).[43] Of the writs that form the major subject matter of Bracton's treatise, novel disseisin, mort d'ancestor, and cosinage were called possessory actions; the writ of right and writs of entry were proprietary.[44] In the extensive commentary on these actions, their scope, and the procedures

particular to each, the terms "possession" and "property" recur so frequently that it is doubtful a reader could make much of Bracton's treatise without a firm grasp of the difference between these terms, gained either from other Latin texts or from the treatise itself.

In the opening passages of his treatise, Bracton interjected an attempt to distinguish possessory and proprietary "right" (*ius*), something he tried to do again at greater length in the last pages of the unfinished work.[45] In both passages, Bracton sought to explain how the proprietary right could become separated from possession: when, for example, the *proprietas* descended to the nearest heir (who might be absent or a minor or an idiot) but, before the inheritance was taken up, a more distant relative or a stranger put him- or herself in seisin. From such seisin, the possessory right descended to the intruder's heirs, Bracton wrote, as a kind of proprietary right. There were then two proprietary rights descending through different persons, but the descendants of the nearer heir had the "greater" proprietary right.

As Maitland said, it was "a radically un-Roman gloss" employing a Roman vocabulary to approximate an English notion of "relative" ownership.[46] Elsewhere, Bracton scrupulously followed Roman law as it was then understood, for example, to delineate the physical and mental requirements for possession;[47] to distinguish between actions for recovering, obtaining, and retaining possession;[48] and to maintain, where possible, a strict separation between the notion of possession and that of ownership.[49]

The world and the law Bracton described had undoubtedly changed from the seignorial relationships of Henry II's reign. Even so, Bracton's Roman learning did not well suit the practice of his contemporaries on the bench.[50] Within a generation after Bracton's treatise, the new profession of common lawyers was producing a literature of its own, using a handful of the Roman terms Bracton had applied to English law (though much more sparingly) and using the others not at all. Historians have occasionally taken the Year Book lawyers to task for perpetuating Bracton's terminological difficulties, for not "talk[ing] of English law in English terms."[51] "[I]t is unfortunate," wrote Van Caenegem, "that the terminology of 'possessory assizes' was introduced"; the early lawyers "used it improperly" in an attempt "to apply categories and terms and concepts to legal realities for which they were never intended."[52]

This study begins at this uneasy boundary line between the language of the law and law's "reality." I searched through the Year Books of 1292 to 1294 and 1302 to 1319[53]—and many earlier legal tracts, including *Brevia Placitata, Casus Placitorum,* and *Novae Narrationes*—

for all French or Latin variants of the terms Bracton borrowed from the organizational scheme of the Institutes. I focus here on those "institutional" terms that appear with sufficient frequency to be considered part of the early Year Book lawyers' regular vocabulary: "real," "personal," "property," and "possession."[54] The endeavor is to proceed from the language of the post-Bracton sources, insofar as possible without presuming modern or ancient definitions for the terms that pleaders in royal court employed, and to draw meaning from the contexts and relationships of the categories. The goal is to compare the way Year Book pleaders used their distinctions between "real" and "personal" pleas, and between writs "of possession" and writs "of right," with the Bractonian and Roman dichotomies.[55]

The Year Books reveal two sorts of classifications bearing Roman vocabulary. One is a conceptual distinction between what might be called "possessory right" and a more inclusive "greater right." The other distinguished between "real" pleas for a plaintiff's specific recovery of land and "personal" pleas for monetary compensation for a defendant's acts or defaults. Neither distinction resembles the strict conceptual separation of actions *in rem* and *in personam* and of possession and ownership found in Roman law. Indeed, my study concludes that the legal profession in the early thirteenth century did not start with or settle on any agreed system of classification. Rather, judges and pleaders developed a form of argument using assertions about correct classification as one way of analogizing from prior experience with one writ to new questions posed by another writ. The rhetorical practice of placing writs in a set of mutually exclusive "categories" may have drawn upon Roman models, but it was subordinate to a different vision of hierarchical relationships between the writs.

Categorizing the Writs

Writs of right, novel disseisin, mort d'ancestor, debt, covenant, trespass, and the rest—these original writs were the foundation of the pleaders' learning[56] and the lowest level of lawyerly abstraction and categorization. The king's court had long ceased deciding these sorts of disputes in *ad hoc* fashion. The first step in the typical proceeding was now the choice of a generalized blank form writ from among those the Chancery made available. Pleaders and justices argued not merely about the particular litigant's writ of mort d'ancestor in the case before them but also about that writ in the abstract, everyman's hypothetical

writ of mort d'ancestor—the wording that set all writs of mort d'ancestor apart from all other writs.[57]

The repertoire of writs that the Court of Common Pleas would accept, and the names for them, were fairly well settled in the period of the early Year Books.[58] The generalized forms of these writs provided a set of elements for the Year Book lawyers to distinguish and classify in a number of ways. There were new writs and old writs, original writs from the Chancery and judicial writs from the court, writs given by "common law" and writs given by statute. There were writs of a "higher" or more "solemn" character and writs of a "lower" or more "tender" nature; along this continuum the courts fashioned a hierarchy that determined, when a claimant had a choice of writs, which of the writs could still be brought after the claimant had lost on another writ.[59] And in some 260 instances in the first three decades of Year Book reports, writs "of right" and "of possession" were contrasted with each other and with a third category, writs "of trespass." An additional 30 or more cases put these same writs within the categories "personal" or "real."

Pleaders and justices applied the label "of possession" most frequently and most consistently to the writs based on descent from an ancestor who died seised of land. The typical writs "of possession" were mort d'ancestor, ael, besael, and cosinage.[60] Once a rule or procedure came to be applied to one of these writs, it could readily be applied to the rest of them, since they were all writs "of possession."[61] Some arguments, such as the tenant's answer that the demandant had not named the ancestor who had actually been "last seised" of the land, became so stereotyped by reference to the category label that some reporters would record only "we say that this is a writ of possession and so etc." and the opponent would respond to the standard argument.[62] If an opponent pleaded to mort d'ancestor as he would to a writ "of right," it was sufficient to deflect his argument to respond that this was a writ "of possession."[63] Oddly, the writ most clearly "possessory" to legal historians, novel disseisin, was rarely denoted a writ "of possession."[64] The point may have been too obvious, or the learning surrounding this writ too specialized for application to the others. Pleaders also did not belabor the point that the original writ of right was to be listed in the "of right" category.

The writs that posed recurring problems of classification were the several writs of entry and formedon. Tenants' counsel would assert that the demandants' writs were "of possession" in order to attack them on some grounds, such as that a demandant was born before the marriage of his or her parents.[65] Counsel would argue just as surely

that the same writs were "of right" to challenge them on other grounds, such as the nonage of one of the parties or the omission of an ancestor in the demandant's chain of descent.[66] Demandants' counsel would assert the contrary label in either instance.[67]

The reports of such arguments do not proceed to explain a rational basis for preferring one classification or another on the basis of the wording of writs or of particular factual circumstances of the parties. Most such disputes ended short of clarification, with one party or the other backing down to try another response. Some pleaders took the middle ground and contended that the writs were "mixed" in possession and right.[68] Despite occasional reports that Chief Justice Bereford had declared, "I wish you to understand that no writ of entry is a writ of right,"[69] and "all writs of formedon are writs of possession,"[70] pleaders continued to insist on the labels most favorable to their clients, with mixed results, and reached no consensus by 1319.

The Year Book pleaders sorted some thirty other writs among the categories "of possession," "of right," and "of trespass."[71] They applied the terms most frequently to writs pertaining to parsons of churches.[72] Of these, the writ of right of advowson and the writ of utrum were "of right," darrein presentment was "of possession," and quare impedit straddled the two categories very much like the writs of entry did before it likewise settled down as a writ "of possession."[73] Writs relating to dower, on the other hand, played no part in the classification scheme. Still other writs, such as the writ of customs and services, had variations in wording that could land them in either category or leave them "mixed."[74] Finally, there were writs in the category "of trespass" that could dispense with many of the technical rules applied to the other groups. The termor's remedy of quare ejecit, for example, was not "of possession" but "of trespass," and pleaders succeeded in fitting such writs as ravishment of ward, forfeiture of marriage, waste, conspiracy, and account into this category as well.[75] Attempts to label others, like the writ of right of ward and quare impedit, as writs "of trespass" met with less success.[76]

A smaller number of Year Book reports apply the classifications "real" and "personal" to the common law writs. There is not enough evidence to show consensus among the pleaders, but the label "real" is used, as one might expect, for such writs as novel disseisin, cosinage, and cessavit,[77] while among "personal" actions are counted debt, covenant, and trespass.[78] These labels accord with the classifications legal historians have long imposed on the thirteenth-century writs. The same cannot be said for the Year Book lawyers' description of a writ of annuity as a "real" plea[79] or their repeated labeling of quare impedit,

the writ so often disputed between the labels "of possession" and "of right," as a "personal" action.[80]

Once again, the pleaders disagreed on some writs: writs of waste and warranty of charters are called "personal" by some pleaders and "real" by others.[81] They disagreed, too, on the reasons they occasionally recorded for categorizing a writ as real or personal. The label "personal" could apply because only damages were recoverable and land could not be restored,[82] or because the suit involved a "chattel" that could not descend from ancestor to heir,[83] or, as most often seems to be the case, because the plaintiff alleged a wrongful act "personally" carried out by the defendant.[84]

Taking the Year Books of 1292 to 1319 as a whole, it is striking how often the pleaders and justices disagreed on how to classify their writs.[85] The arguments certainly suggest that important consequences flowed from these groupings, but the pleaders neither began with nor arrived at any consensus, even for such very common writs as entry and formedon. New or unusual writs would occasionally stump the lawyers; they confessed they had no notion which label should attach.[86] In some contexts, argument proceeded on the basis that the labels were mutually exclusive; every action was either real or personal, every writ should be purely of right or of possession or of trespass.[87] At other times, the pleaders and justices spoke of writs "mixed" in possession and right,[88] or in right and trespass,[89] or personal and real.[90] A pleader might argue that his writ would change from one label to another, depending on the opponent's answer.[91] He might argue that a particular writ could be "of right" as to his opponent and "of possession" as to his own side.[92] A few bits of dialogue, whether the result of corrupt texts or of exasperated counsel or reporters, end up describing writs "of right of possession"[93] and "of possession of right."[94]

All of this could mean that the classification of writs was still in its initial, creative phase; or, alternatively, that it was already a bygone practice degenerating into incoherence and disuse; or that such labels never made any real difference to the outcome of pleading. Of these explanations, the first is most persuasive, given the pleaders' undiminished persistence in offering arguments based on classification over the course of three decades.[95] Little was settled during thirty years of labeling,[96] as might be expected under a pleading system so well calculated to avoid judicial rulings.[97] The purpose of this study is not to reconcile these confusing attempts at taxonomy in order to divine some "correct" classification. Rather, it is to understand the common lawyers' intent and purpose in using these particular category terms. Despite the evident confusion and conflict, pleaders in the Year Books

worked to practical and explicable ends when they argued for one classification or another.

The Use and Sense of the Categories

The rhetorical strategies of the Year Book pleaders and the justices in basing arguments on legal classifications should be familiar to the modern common lawyer. If one's opponent sought to rely on a rule from one of the "real" pleas, one could answer that the present plea was "personal" and, therefore, a different rule must be followed because some other "personal" action applies it.[98] If one's opponent cited a recent judgment favorable to his client's side, it was enough to say that the judgment mentioned was in a writ "of right" and that here the parties were in a writ "of possession."[99] If one's opponent advanced an argument that had succeeded before only in a writ "of right," the difference in classification alone invited the conclusion that the opposite result should be reached in a writ "of possession."[100]

Such arguments were premised on the mutual exclusivity of the categories. If a writ was "of possession," then it was not "of right." All writs "of possession" would bear greater similarity to one another than any of them would bear to a writ "of right." In a system premised on treating like cases alike without explaining the relevance of their similarity to the question at hand, the argument ended there.[101] The labels "real," "personal," "possession," "right," and "trespass" gave Year Book lawyers a vocabulary that permitted them to manipulate the writs more easily in larger groups. The pleaders could phrase rules, take positions, and pose hypothetical situations in terms of "all writs of possession."[102]

Some of the labels these pleaders used were not, however, ideally adapted to this purpose. The words "writ of right" could refer either to a whole category or to an individual writ within that category, as could the words "writ of trespass." Beyond this ambiguity, the Year Books' pairing of the terms "real" and "personal," and of "possession" and "right" as category labels raises important questions of linguistic preferences. Looking forward from the surviving legal literature of 1190 or 1260, it was neither necessary nor obvious that the words *real, personel, possessioun,* and *dreit* (to take the most common of many spellings) would be chosen over all other contenders as the fundamental categories for common law disputes over land.

Glanvill had juxtaposed "possession" with *proprietas* and elsewhere had contrasted "seisin" with "right," matching Roman term to Roman

and native to native.[103] Bracton made much more extensive use of the Roman vocabulary, contrasting "possession" almost exclusively with *proprietas,* and confounding a distinction between "possession" and "right" by making frequent references to "possessory right" (*ius possessionis*).[104] In the 1280s Britton rendered these words in French, contrasting *propreté* of land with *possessioun* and speaking of *le dreit possessorie.*[105] The Year Book reporters, however, appear to have confined the word *propreté* exclusively to chattels;[106] "property" dropped out of the lawyers' language completely as a term to be applied to landholding and contrasted with "possession."

Bracton's vocabulary of "real" and "personal" actions was also not the obvious or only choice for lawyers in the late thirteenth century. Glanvill had no comparable terms of classification. Bracton's imitators, Britton and Fleta, both commenced with the division of actions into real and personal,[107] but one of the short French tracts that appeared in the decades after the Bracton treatise, *Fet Asaver,* opened with what was to become a popular alternative to the real/personal vocabulary, characterizing pleas in the royal court as either "pleas of land" or "of trespass," or both.[108] *Modus Componendi Brevia,* a companion tract composed in Latin, included both this and the division of real and personal actions in its opening discourse.[109] The Year Books before 1320 in fact contain many more references to "pleas of land" as a category label than to "real" pleas.[110]

In the Year Books of the late thirteenth and early fourteenth centuries, a newly emerging legal profession was in the process of developing its own specialized, technical language, gradually and imperceptibly departing from laymen's usage.[111] Future editions of the legal manuscripts surviving from the reign of Edward I will no doubt shed more light on the pleaders' preference for pairing the words "real" with "personal" and "possession" with "right" to compare writs.[112] Given the increased attention to the received texts of statutes,[113] Year Book pleaders would have had to attach some meaning to "writs of possession," if only to reckon with the first and second Statutes of Westminster of Edward I, both of which employed the term.[114] The words "possession" and "person" had a multitude of everyday uses in the Year Books apart from the increasingly technical terms "writ of possession"[115] and "personal action," but cataloguing their diverse uses in other applications offers less insight into the terminology of classification than does close attention to the relationships that pleaders envisioned between the writs when they classified them.

On the relationships between "real" and "personal" pleas, the Year Books offer fewer examples but more explanation than is found for

writs "of possession" and "of right." A writ could be categorized as "personal" because it ended in damages, because it disputed rights to a chattel, or, most commonly, because it accused the defendant of committing a personal act of wrongdoing.[116] The first explanation focused, as did Bracton, on the nature of the remedy available; the second represented a further step toward the developing distinction between movable, devisable "personalty" and immovable, heritable "realty"; and the third rooted "personal" actions in a notion like the original Roman one, that the defendant's act gave rise to an obligation to the plaintiff. Writs might be "real" on one basis and "personal" on another.[117]

On whichever basis the Year Book pleaders constructed their "real" and "personal" categories, they used them to conform the procedures of all "personal" actions to one standard and all "real" actions to another. In general, pleaders argued that a writ was "real" to take advantage of old procedural safeguards and to allow a defendant to put off answering until other potential parties were brought into the proceeding. They argued that a writ was "personal" in order to require the defendant to answer to his or her own act at once without delays, excuses, quibbles, or the assistance of other potential parties.[118]

Running counter to this tendency, and counter to the whole idea of mutually exclusive real and personal actions, was the willingness of pleaders to bend writs to new purposes. They would commonly use writs about "personal" actions of particular defendants—about taking of beasts, acts of waste to land, wardship of heirs and heiresses—in order to litigate issues of entitlement to land. Clever pleaders could gain the procedural advantages of "personal" actions for their plaintiffs, then raise the stakes and force the defendants to justify their acts by establishing their entitlement to disputed land.[119] Such stratagems, which were to become familiar in the development of the common law, helped break down any sharp conceptual separation between "real" and "personal" actions.

Writs "of possession" and "of right" show a similar tension between sharp categorization and strategic flexibility. While the pleaders reached no consensus and offered little explanation of the basis for classifying some writs "of possession" and others "of right," there does emerge most clearly from the Year Books a common understanding that each writ occupied a position relative to the others on a continuum from "lowest" to "highest." Pleaders and justices employed this hierarchy of writs with practical effect, determining in the many instances in which demandants had a choice of writs whether a loss with one writ precluded the demandant from bringing a new action with another.[120] Judgment

on a "lower" writ had no *res judicata* effect in a writ of a "higher" nature, which proceeded on a more formal basis and could raise factual issues reaching back further into the past.[121]

It is possible to translate much of the dialogue about writs of possession and writs of right in the Year Books into statements about the relative position of writs on this continuum. A particular writ might be said to be "of right" when compared with a writ lower on the *res judicata* ladder,[122] but would be called "of possession" if the speaker had in mind its relation to a writ higher on the same scale.[123] Writs of trespass were the lowest on the scale.[124]

The mental image or "structure" that best fits the context of Year Book references to writs "of possession," "of right," and "of trespass" is a smooth vertical continuum indicating which writs decided or foreclosed relatively less for *res judicata* purposes and which foreclosed more.[125] If a demandant sought to support a writ by raising an issue (such as the tenant's legitimacy) that would give the demandant judgment in any writ that could be brought, the tenant could reply that the demandant ought not be heard to plead "in the right" when the writ was only one "of possession."[126] The demandant tried, in essence, to raise the stakes and might, if successful, bar the tenant from countersuit not only on this writ and "lower" writs but on all "higher" writs as well. On the other hand, if a tenant raised an issue that would defeat a claim "on the possession," the demandant could argue that in his situation he could have no other writ and, thus, that the one he had must be his highest—therefore, a writ "of right."[127]

But the labels were clumsy proxies for talk about "higher" and "lower" writs.[128] Two very different structures were in competition: one a continuum of higher and lower writs, and the other a sharp separation of all "writs of possession" from all "writs of right." There was some appeal to the notion that each writ could be classified, once and for all, as one thing or the other, so that writs within each category could share more or less the same rules.[129] Pleaders' "arguments from categories" tended to produce greater similarity among all writs within a category and greater differences between categories.[130] Throughout the Year Books I studied, this subsidiary notion of disjunctive, coordinate categories of writs remained in tension with the more usual and more effective notion of a hierarchy of writs.

The terms the pleaders attached to their categories tended to move the paradigms to the extremes and to exacerbate this tension with the dominant hierarchy. The "right," in a Christian world, suggested a single correct and universally valid result.[131] To "settle the right" was not just to decide a claim that was relatively "higher" than another

claim—it gave the impression that a judgment was rendered for always and for everyone.[132] In embracing the word "possession" for another of their categories, pleaders used a label to which Bracton, with an eye to the Roman law and its contemporary exponents, had already attached a great deal of learning. The hierarchical structure of relationships between the writs remained the more useful one, but when the Year Book lawyers spoke of writs "of possession" or of "real" and "personal actions," this usage squarely poses the question of deliberate and conscious borrowing from Roman concepts of the division of actions.

Roman Legal Categories in the Year Books

Roman Substance in the Year Books

The elementary Roman distinction between actions *in rem* and *in personam* opened the treatment of actions in the fourth book of Justinian's Institutes.[133] In an action *in rem,* the plaintiff asserted a claim to take control of a physical thing, no matter who currently possessed it. The claim was not conceived as enforcing an obligation owed by the current possessor to the plaintiff. The defendant in a real action was mentioned only incidentally in the plaintiff's formula and could withdraw entirely by abandoning the thing in dispute. In an action *in personam,* by contrast, the plaintiff asserted a claim against the defendant's "person" and conceived it as an obligation the defendant must perform, arising from a debt or the commission of a wrong.[134]

This distinction among actions, elaborated by the Roman jurists of the early third century A.D., was not based on a difference in the remedies afforded by the actions. A second classification that followed this one in Justinian's Institutes focused on remedies: some actions were "restorative," seeking recovery of a specific thing; others were "penal," seeking damages that might be one, two, three, or four times the plaintiff's loss.[135] In the Roman scheme, all real actions and some personal actions were restorative; other personal actions were penal or were "mixed," both restorative and penal.[136]

Already by the fourth and fifth centuries A.D., legal texts from the Western Roman Empire had lost sight of the classical jurists' formulation of the real/personal distinction and had begun substituting this second distinction for it. Actions for money damages were called "personal," and actions for recovery of a thing "real."[137] In 533 the compilers of Justinian's *Corpus Iuris* revived the classical jurists' terminology of real and personal actions distinguished by their cause—ownership or ob-

ligation—rather than their remedy—specific land and chattels or money compensation.[138] Civil lawyers trained in the medieval universities took Justinian's statement of the classical distinction between actions *in rem* and *in personam,* and began to transform it into the modern civilian distinction between substantive "rights": absolute rights *in rem* against the entire world and rights *in personam* arising out of relationships with specific individuals.[139]

Surviving manuscripts of Bracton's treatise omitted the words of the Institutes that explained how the classification of real and personal actions differed from the classification of penal and restitutive actions.[140] Elsewhere, Bracton ran the two distinctions together, as late Roman and Germanic legal texts had done, ending with "real" actions for restoring specific things and "personal" actions for seeking monetary damages and penalties.[141] The Year Book lawyers likewise made the easy equation of personal actions with money damages and real actions with recovery of land or rights in land.[142] Their categorization of writs in these terms cannot be said to reproduce the content of the Roman distinction. The Roman idea of a real action as a claim "against a thing" that establishes the plaintiff's superior right to the thing over all other persons, that presumes no obligation of the possessor to convey the thing to the plaintiff, and that may indeed proceed without the possessor, is absent from the Year Book dialogues. The "real" pleas contrasted with "personal" pleas in the Year Books do not exhibit the absolute character of the Roman actions *in rem.*

The proposition that classical Roman law also distinguished between possession and ownership, and between possessory and proprietary actions, is elementary and undisputed,[143] but is not so easily drawn from the Institutes. The problem of determining what "possession" and "ownership" might have meant in preclassical, classical, and more recent times has produced an enormous literature.[144] This study ventures nowhere near the complexities of that subject. Suffice to say, for purposes of discussing the language of the early common law of England, that the Roman distinction had emerged by the end of the Republican era,[145] receded from view in the West during the fourth and fifth centuries,[146] and then was revived in somewhat altered form in Justinian's *Corpus Iuris Civilis.*[147]

In simplest terms, a medieval student could learn from Justinian's Institutes that litigants could use the interdict *uti possidetis* to retain or recover possession of land from someone with a relatively weaker claim, or the real action *vindicatio* to prove ownership not only against a possessor but against all third parties.[148] The student might then gather from Justinian's Digest or one of the summaries then in

circulation that the interdict remedy was provided because possession must be kept separate from ownership;[149] that bringing an unsuccessful interdict did not foreclose the claimant from later bringing a *vindicatio* action, because in the interdict it is possession that is in issue, whereas in the action it is ownership;[150] and, conversely, that instituting a *vindicatio* for land would not preclude resort to the interdict *uti possidetis,* for again the Digest stated that ownership has nothing in common with possession.[151] The Roman law exemplified not a many-layered hierarchy but a disjunction of actions, premised on complete separation of these concepts of possession and proprietary right.

The schools of Roman law that flourished at Bologna and spread throughout Europe in the twelfth and thirteenth centuries based their reconstruction of Roman legal science on distinctions such as this one.[152] Pithy, epigrammatic passages from the Digest on the strict separation between *possessio* and *proprietas* were just the sort the medieval glossators cherished. Once separated, the two could be contrasted: *proprietas* to be sought in a claim to ownership maintained against anyone who happened to be in possession; *possessio* to be sought in a relative claim to restoration brought by one recently dispossessed against the intruder.

The Church embraced the possessory/proprietary distinction in devising canon law actions for restoration of church property and revenue, and of marital rights.[153] Beginning in the late twelfth century, canon lawyers extended the Roman idea of possessory actions in several respects.[154] Whereas the Roman interdict was brought by one dispossessed against the dispossessor, the canonists' "possessory" action could be based on the possession of the plaintiff's predecessor in right and brought against one who took from the dispossessor.[155]

Like the canonists, Bracton applied the possessory/proprietary vocabulary to the English writs and repeated many of the Roman definitions and refinements.[156] Bracton twice penned the Digest's *nihil commune habet possessio cum proprietate,* though with qualifications of his own.[157] In transplanting this distinction to the law of the English royal courts, Bracton had to take labels devised for the strict separation of the *vindicatio* and *uti possidetis* and apply them to a continuum of relatively lower and higher actions.[158] Like the canonists, Bracton extended his notion of possession to cover descendants of a prior possessor claiming against takers from and descendants of the person who dispossessed the prior possessor. Bracton's solution, expressed many times over in the treatise, was the separation of possessory and proprietary right (*ius*). Possessory right was possession, or descent from an ancestor who had died seised; proprietary right was the "mere," or

pure, right of inheritance through an ancestor who had not died seised.[159] Writs such as mort d'ancestor decided only the question of possession or possessory right; the writ of right decided *both* rights, or, as Bracton added in French, *dreit dreit*.[160]

The Year Books for the most part drop any mention of Bracton's separate "proprietary right."[161] The term *propreté* is missing altogether from discussions of land and appears only infrequently in regard to chattels, despite Bracton's incessant use of the Latin equivalent and the frequent references to a *dreit de propreté* in Britton's French abridgment of the treatise.[162] Instead, the pleaders spoke simply of "right," the right decided by the writ of right, the interest that Bracton and Britton had called the double *dreit dreit* of possessory and proprietary right. None of the writs decided solely this question of the "pure" proprietary right, and no doubt it was simpler to conceive of the writ of right deciding one thing rather than two. "Possession" and "right" were ways of saying "less" and "more," or "part" and "all." When viewed in relation to Bracton's and Britton's more complex terminology, the Year Books can be seen to depart from the full Roman distinction and to break the connection with much of the Roman baggage Bracton attached to the labels, including the insistence on a strict separation between *possessio* and *proprietas*. In the English writs possession, ownership, and right could not be kept separate.[163]

By borrowing "half" of the Roman possessory/proprietary distinction, the common lawyers came to share another legal term of art with the scholars of Roman law, but their application of the word "possession" in the Year Books, like their use of "real" and "personal," departed substantially from the dictates of the Roman texts. For example, Bracton and the Romans carefully distinguished corporeal and incorporeal things; incorporeal things, such as obligations, servitudes, advowsons, and the like, could not be possessed (they could only be "quasi-possessed").[164] The Year Book pleaders, if anything, went further than the civilians and canonists not only in reifying intangible "things" but in objectifying their "possession." Though one passage in an early Year Book report seems to have echoed Bracton's idea that the incorporeal could not be possessed,[165] the Year Books elsewhere abound with references to "possession" of advowsons, services, homage, and debts, as well as of wards and villeins.[166] If there was a writ determining the "right" to some incorporeal thing, then what a "lower" writ determined was its "possession."

The structure of legal remedies and the underlying structure of human relations that emerge from the words and arguments of the Year Books show fundamental departures from the model of Roman

law. Possession and right were abstract concepts that the common lawyers could manipulate at a fairly high level of generalization, yet the relationship between writs "of possession" and writs "of right" was not the same as the civilians' distinction between *possessio* and *proprietas.* It was a relationship of a very different kind, a pairing of comparative terms for writs, viewed either along a continuum of "lower" and "higher" writs or in two boxes labeled "less" and "more." In similar fashion, the Year Book lawyers lacked any counterpart to a Roman "real" action, and so made the easy equation of "real" with the remedy of specific recovery and "personal" with remedies of monetary compensation or penalties.

The Year Book pleaders' categorization of their writs as writs of possession, right, and trespass, and as real and personal actions, thus did not reproduce the Roman classification of actions nor transplant the substance of Roman legal concepts. Their substantive distinctions bear closer resemblance to those the canon lawyers applied under the same terms.[167] But this did not foreclose later generations of lawyers from reading the Year Book classifications in senses closer to what a Roman lawyer would have understood.

Roman Style in the Year Books

English common lawyers speaking, writing, and reading the words of the Year Books did not use these terms from Roman law to reflect or adapt Roman legal doctrine. Yet, their usage was more than an unintentional blunder or coincidence of shared vocabulary. Terms such as "possession," "action," "real," and "personal" helped link pleaders and justices in the English royal courts to a well-stocked arsenal of sophisticated argumentation and of disembodied fragments for authoritative pronouncement. To take one example, the Year Books make almost no mention of real or personal "writs" (*brefs*). What they called "personal" or "sounding in the realty" were sometimes "pleas," but more often "actions." The word "action" was often used, in context, to refer to what later English lawyers called a "cause of action," considered independently of the written document that commenced a particular court proceeding. For a defendant to take exception to the "writ" might delay the suit while the plaintiff purchased a better worded writ, but if the defendant's exception went to the "action," the argument was that the plaintiff should be foreclosed from suing further on that ground by any writ.[168] When using their legal vocabulary in this way, the Year Book lawyers appeared to share with the Roman jurists a

term by which they distinguished the basis or nature of the plaintiff's legal claim from the verbal formula that initiated a court proceeding.

At a more superficial level, by calling their actions "real" and "personal," English common lawyers might have evoked in their audience—who may have comprised apprentices, attorneys, clients, and bystanders—an impression that the mysteries practiced in the Common Bench shared a common grounding with the legal acumen of the revered ancients. If men of affairs in the early fourteenth century had any acquaintance at all with the *Corpus Iuris Civilis,* perhaps from a season of university study, it is reasonable to suppose that they might have known that the Institutes, the first and most elementary of the texts and the most widely circulated in summary form, was organized on the principle that all law *vel ad personas pertinet vel ad res vel ad actiones.*[169]

A number of passages in the Year Books suggest that pleaders were aware that in writs concerning "possession," the legal lore of Bracton and the Romans could be deployed to advantage. In half a dozen reports in the course of two decades, the reporters (and, it is tempting to think, the speakers) switched from French to Latin in midsentence to voice one or another "maxim" relating to possession. In four instances, the Year Books report that Chief Justice Bereford or one of the pleaders argued *melior est condicio possidentis quam petentis.*[170] That the condition of a possessor should be preferred over that of a claimant (under one set of circumstances or another) was a formula familiar to medieval civilians and canonists alike. Similar language could be found in the Digest's final and most popular title, *de diuersis regulae iuris,*[171] elsewhere in the *Corpus Iuris Civilis,*[172] and among the maxims collected in the *Liber Sextus* of Pope Boniface VIII.[173] Glanvill used identical language to evade an open question of inheritance between the uncle and the grandchild, and Bracton used it to favor the bastard in possession over the bastard who was out.[174] The contexts of the Year Book discussions were two vexed and peculiarly English questions: inheritance by one born before the marriage of one's parents,[175] and inheritance by a stepsister from her stepbrother.[176] To these particular issues the Roman texts had no application, but the Latin words were ones that must have seemed, even in 1302, to have rung down through the ages.[177]

Invocations of Roman authority could be more explicit than this. In 1307, on a writ of cosinage, Justice Hervey de Staunton is reported to have rebuked the demandant's pleader with the words "you are a lawyer (*legister*), and there is a 'written law' which speaks of this matter, *cogi possessorem re.*"[178] *Legister* connoted familiarity with civil or

canon law, and "written law" had long meant the law of the Romans.[179] Staunton's citation (the editor does not identify it) is presumably to a passage in Justinian's Code, one that Bracton also cited as "C. *de heredibus* l. *cogi possessorem.*"[180] The Roman text pronounced it unjust to compel a possessor to disclose his title to anyone who demands it, except to make him say whether he holds the property as possessor or as heir. Staunton applied the rule in a similar fashion to place the burden on the demandant to show her title, and not force the tenant in possession to produce his own.

The next glimpse of this maxim comes in 1312, when Walter de Friskeney, apparently speaking for a demandant in novel disseisin, claimed that the "law demands" *coge possessorem dicere suum titulum.*[181] It was a rather drastic abridgment of the Roman text, or perhaps merely an expansion of the Roman citation, seemingly intended to make precisely the opposite point and force the tenant in possession to disclose his title. After these Latin words appear in the Year Book account, Friskeney's opponent is reported to have abandoned his point and shifted to another defense. In the end, "they went out to imparl and did not come back."[182]

Another exchange in 1313 suggests again the rhetorical power of appeals to "Roman" learning. Justice William Inge invoked the "imperial law (*lei imperiale*) upon which the law of the land was founded" for another "maxim," *possessio fratris facit sororem heredem,* a wholly English rule of succession here applied to favor the claim of a stepsister to inherit the father's estate from her stepbrother over the claim of an uncle "of the whole blood."[183] The words provoked two responses. John Denham replied for the uncle that while this "imperial law" spoke wholly of the right, he was pleading wholly on the possession of the brother and, therefore, the rule did not apply.[184] Chief Justice Bereford, however, swore (*Nom de Dieu!*) that there was no such rule at common law and that the common law would not be changed.[185] No outcome was recorded.

Roman law did permit succession by the half blood, but on an entirely different basis[186] and without, so far as I could trace, any mention of *possessio fratris.* Bracton's treatise contradicted itself on the preference for stepbrothers over sisters of the whole blood, and did not address the precise point contested by Inge and Bereford.[187] Of the widely available sources, only Britton made Inge's point—and he did not use the Latin tag.[188] As a maxim, *possessio fratris* appears to have been a new invention when Inge lent it the venerable status of "imperial law."

Pleaders and justices of the early Year Books thus showed their

awareness of Roman law; they drew upon it as a source for their own professional lore. These few instances of Roman legal maxims on "possession," wrenched from their original context and stripped of their original content, or misquoted, or made up out of whole cloth, are but the most direct evidence of efforts by the common lawyers to "sound Roman."[189] Civilians and canonists of the same period made much more extensive use of Roman legal texts, of course, but with the same free disregard of context. The Year Book lawyers—by classifying writs into a few broad, mutually exclusive categories; by arguing on the basis of such categories to apply rules from one writ to another; and by using the terms "personal action," "real action," and "writ of possession" to label these categories—consciously or unconsciously assimilated their fledgling legal expertise to ancient Roman models and the techniques of the civilians and canonists who made formal study of them. It would have been difficult, as Professor Plucknett pointed out, for Glanvill and Bracton to write about law in Latin without using the ready-made technical vocabulary of the Roman jurists.[190] When French replaced Latin as the medium of professional communication, the pleaders' language continued to echo some of the Roman terms applied by Bracton, and continued to mimic styles of argument and thought that Roman jurists and their medieval interpreters had made synonymous with law.

Turning from the close quarters of Westminster Hall, it is well to recall the place of Roman law in the medieval university. To scholars embarking on the study of Roman law in the twelfth century and after, the *Corpus Iuris* embodied the perfect conception of law. It was complete, seemingly capable of answering every conceivable question; it was elegant, written with a sophistication of reasoning and expression that could no longer be attained; and it was authoritative, bearing the stamp of the good Christian emperor Justinian.[191] The "institutional" scheme of categories provided medieval lawyers with a perfect structure for this perfect body of legal materials. The civilians had only the text; they could not know Roman law as it was practiced, nor discern its historical development, nor share the unspoken assumptions that the classical jurists held.[192] Law was a text of unquestioned legitimacy, but people had lost the ability to comprehend it. Their daunting intellectual task in the university was to range through the vast bulk of Justinian's text and to rediscover what they believed to be the inherent consistency and logic of those disparate materials. In the popular phrase of the twelfth and thirteenth centuries, learned men saw themselves as dwarves perched on the shoulders of giants.[193]

The typical pleaders in the English royal court were not university-

trained civilians;[194] they were practitioners, not teachers, engaged in the very different enterprise of developing pleading strategies to advance their clients' interests, to enhance their individual reputations, and to ensure their profession's survival. Even so, their Year Books acknowledged the existence of Roman law, its intellectual merits, and its usefulness in argument. They thus owed some part of their success as a profession to their ability and willingness to imitate civil and canon law practitioners by constructing abstract distinctions and quoting the occasional maxim. While the Year Book classifications of "writs of possession," "writs of right," "real actions," and "personal actions" did not carry over the substantive content of the Roman legal distinction, they did draw upon the methods of civilians and their Roman sources.

The Roman influence did not merely act "as a cathartic on men's minds, sweeping away much confused and archaic thinking;"[195] it substituted a particular type of rationality, a method of legal reasoning that is traceable in the Year Books.[196] Like the civilians, the common lawyers showed they could classify their actions on the basis of substantive distinctions, use their classification to analogize from one action to another, and, more fundamentally, administer a system in which disputes could be resolved by appeal to "rules" formulated in terms as broad and abstract as the categories they devised. It is beyond the scope of this study to judge how far the early common lawyers resembled the civilians in treating their own "law" as an authoritative body of logical and consistent rules that existed in some ideal sense beyond present human understanding and that could be "discovered" piecemeal through intellectual effort by trained experts.

Some Concluding Notes

The Year Books began more than a century after the court of Henry II standardized the writ of right and the assizes of novel disseisin and mort d'ancestor in the late twelfth century. It is doubtful they can reflect forward to the present day any new light from that earlier period—or illuminate further the mid-thirteenth-century "transformation of elementary legal ideas" that, in Professor Milsom's account, drew it to a close. Too little is known about the common law in the age of Glanvill and Bracton. But as long as legal historians continue to apply the terminology of real and personal actions to the writs, as long as they continue to debate whether the Roman distinction between possessory and proprietary actions lay at the origin of the fundamental land law writs (and there is no sign the debate is stopping), the

unparalleled source material of 1290 and afterward will provide a useful reflection of that later age and of the sense professional lawyers made of the writs in practice.

The language of the Year Books offers a glimpse of the structure of legal ideas shared by those who made their living from contesting the common law writs. If, as this study assumes, fundamental relationships among the oldest and most important common law writs formed a set of mental conceptions of deep and lasting significance, the absence of Roman substance in the pleaders' categories of "real actions," "personal actions," "writs of possession," and "writ of right" in the early Year Books adds indirect support to Milsom's explanation that Roman legal notions of absolute ownership and possession did not dwell at the heart of the English writ system from the time of Henry II. Certainly such notions did not survive unscathed among the lawyers of Edward II's time. More likely, Bracton's Roman framework for the English writs and the interests those writs protected was, half a century after their introduction, overlaid on the writs by the treatise author and a generation of Roman-trained clerks and justices.

The pleaders and justices of 1300 made of their writs a simpler system than the one Bracton assembled from Justinian's Institutes. What use they made of Roman law was superficial and imitated far more of the vocabulary and style of the civilians than of substantive Roman law principles. For a system of oral pleading in which fundamental points could long remain unresolved, this connection may have given reassurance, in the face of such uncertainty, that resort could ultimately be made to the fixed rules of the Romans. For a new profession of pleaders who were making up a good bit of their substantive expertise as they went along, hearkening back to Roman models of lawyerly sophistication may also have enhanced the legitimacy of their role.

The Year Book pleaders did inherit a world in which elementary ideas of law had been transformed. The remedies they routinely administered had become "actions," abstract and generalized, brought by "one Adam" against an equally faceless and placeless defendant, neither lord nor tenant nor stranger. This way of speaking about the writs took them out of the social context that had made sense of them when they were extraordinary royal interventions in seignorial landholding arrangements a century before. But the "right" of which English pleaders spoke in the early 1300s was far from both the Roman *proprietas* and "that sole and despotic dominion" Blackstone proclaimed "over the external things of the world, in total exclusion of the rights of any other individual in the universe."[197]

The structure that emerges from the Year Book categories is one that dispensed with any need for a word or a concept for "property" in land separate from "possession" and the all-inclusive "right." The Year Book pleaders had available to them the term *proprietas* or *propreté,* which Bracton and Britton so often paired with "possession," but they settled upon a quite different pairing of "possession" and "right" to distinguish their land law actions. Even so, by using one term from the Roman pairing, the Year Book pleaders left an invitation for future lawyers to "understand" that the Roman *possessio,* and its obvious counterpart *proprietas,* gave meaning to the common law actions.[198]

In the same way, talk about "real" and "personal" actions in the Year Books departed from the Roman concepts of actions and rights "against the world" contrasted with rights against a specific person. From a Roman standpoint, all the English actions were "personal," relative actions, just as all the protected interests in land were "possessory" to one degree or another. English common lawyers, however, kept both the term "real" and the term "personal" in their professional jargon and filled the pair of labels with new meanings as time went on.

Future generations, looking for substance where the early common lawyers had sought only style and a bit of enhanced legitimacy, could thereby restore the missing terms of these classical dichotomies more easily and "find" notions of absolute property implicit in the language of the common law. Words and ways of thought, originally borrowed for an immediate advantage in pleading, persisted, became entrenched, and ultimately worked to set limits on the future discourse of the profession. But the law is a living language, and it is no criticism of the Year Book pleaders that they unintentionally created the potential for confusion when they borrowed a few Roman terms for reasoning about English law.

I have examined two aspects of the Roman structure that Bracton and Glanvill adapted for the common law, those for which the same terms were commonly used in the Year Books of the succeeding age. The Year Book categories of "possession" and "right" represented a substantial departure from Bracton's "possessory" and "proprietary" actions and from his Roman model. The pleaders did not apply the Roman distinction, perhaps because the relationship between the writ of right and the assizes of mort d'ancestor and novel disseisin was too close to the heart of the pleaders' practical enterprise to be recast.

At a higher level of classification, where the pleaders might have felt less was at stake in immediate practical terms, the opportunity was there to set up tight categories of real and personal actions along the

lines of the Roman dichotomy. But again, the pleaders kept crossing their own category lines and managing to make "personal" actions, however defined, reach results that by their lights were "real." They refused to be blinkered by rigid systems of classification, and instead treated the writs that made up their intellectual system as manipulable, protean tools for achieving quite diverse private ends. The intellectual scheme of the early common lawyers certainly operated within restraints, but its restraints were not those of the Roman legal categories.

The legal profession set the terms of its discourse, and among its unspoken premises were many shared preconceptions about law, right, and fairness. The process of reconstructing that shared world of ideas is problematic, but it can shed light on the most fundamental and enduring elements of our legal tradition. What is missing from the basic grammar of early common law discourse is as important as what is found there. The first English common lawyers did not hark back to the world of intimate, individual seignorial relationships, nor did they accept the ready-made world of Roman property owners, formally equal, with absolute claims against the world. Theirs was a world of abstract but not absolute rights, of comparative advantage rather than exclusive entitlement. Property, as we now understand it, was not an idea that the lawyers required to make sense of their common law.

NOTES

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1. 2 F. POLLOCK & F.W. MAITLAND, THE HISTORY OF ENGLISH LAW 31–80 (esp. 72–73) (2d ed. 1898); F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 19–25, 34–35 (A.H. Chaytor & W.J. Whittaker eds. 1936). Writs of right sought land based on the claimant's right and inheritance. Novel disseisin sought land because the claimant had been "disseised" unjustly and without judgment. Mort d'ancestor asserted that the father of the claimant had died seised of the disputed land and the claimant was his heir.

2. 2 F. POLLOCK & F.W. MAITLAND, *supra* note 1, at 2–6, 33. *See also* R.C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 44 (1973).

3. H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND (G.E. Woodbine ed., S.E. Thorne trans. 1968–1977) [hereinafter cited as BRACTON, folio (volume:page)]. The treatise appears to have been begun in the 1220s or 1230s by one or more clerks or justices of the king's court; Henry de Bracton, a royal clerk and later justice, probably

took it up in the late 1230s, continued and revised the work, and left it unfinished in 1256 or 1257. Thorne, *Translator's Introduction,* in BRACTON, 3:v, xxvii, xxxvi–xxxviii, li. This article will denominate all claimants to authorship impartially as "Bracton."

4. S.F.C. MILSOM, THE LEGAL FRAMEWORK OF ENGLISH FEUDALISM 186 & *passim* (esp. 65–66) (1976).

5. *Id.* at 37.

6. *See* Brand, *The Origins of the English Legal Profession,* 5 LAW & HIST. REV. 31, 36–38 (1987); J.H. BAKER, THE ORDER OF SERJEANTS AT LAW 9–10 (1984). On the attribution of the early Year Books to students or apprentices of law, see, e.g., Maitland, *Introduction,* in THE YEAR BOOKS OF 1 AND 2 EDWARD II xi–xvi (17 Selden Soc'y [hereinafter S.S.] 1903); Dunham, *Introduction,* in CASUS PLACITORUM, 69 S.S. xxx–xli (1952); T.F.T. PLUCKNETT, EARLY ENGLISH LEGAL LITERATURE 109–11 (1958).

7. Brand, *Courtroom and Schoolroom: The Education of Lawyers in England Prior to 1400,* 60 HIST. RES. 147, 150–65 (1987).

8. For early examples, see CASUS PLACITORUM, 69 S.S. 79, 97, 114 (cases of naifty, replevin, and mort d'ancestor, c. 1272 — c. 1278); NOVAE NARRATIONES, 80 S.S. 137 (para. B 278), 234 (para. C 159), 305 (para. C 285A) (E. Shanks & S.F.C. Milsom eds. 1963); *Exceptiones ad Cassandum Brevia,* in FOUR THIRTEENTH CENTURY LAW TRACTS 170 (G.E. Woodbine ed. 1910); Anon., Hereford Eyre, Y.B. 20 Edw. 1, Rolls Series [hereinafter R.S.] at 27 (1292) (entry); Daniel v. de Bere, Hereford Eyre, Y.B. 20 Edw. 1, R.S. 59 (1292) (formedon); Anon., Y.B. Pasch. 21 Edw. 1, R.S. 135 (1293) (mort d'ancestor).

9. 2 F. POLLOCK & F.W. MAITLAND, *supra* note 1, at 2–6.

10. *See* Moccia, *English Law Attitudes to the 'Civil Law,'* 2 J. LEG. HIST. 157, 158–60 (1981).

11. 2 F. POLLOCK & F.W. MAITLAND, *supra* note 1, at 115; Brunner, *The Sources of English Law,* in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 7, 42 (1908). *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 27 (2d ed. 1979).

12. *See, e.g.,* Lawson, *Roman Law as an Organizing Instrument,* 46 B.U. L. REV. 181, 194–95 (1967). *Cf.* H.G. RICHARDSON & G.O. SAYLES, LAW AND LEGISLATION FROM AETHELBERT TO MAGNA CARTA 84–85 (1966).

13. *See, e.g.,* P. ANDERSON, LINEAGES OF THE ABSOLUTIST STATE 25–27 (1974); Jolowicz, *Political Implications of Roman Law,* 27 TUL. L. REV. 62, 63 (1947).

14. *See, e.g.,* W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 101–4 (P. Stein 3d ed. 1975); H.F. JOLOWICZ, ROMAN FOUNDATIONS OF MODERN LAW 181–83 (1957); Saller, *Patria Potestas and the Stereotype of the Roman Family,* 1 CONTINUITY & CHANGE 7, 8 (1986).

15. *See infra* at nn.133–39.

16. *See infra* at nn.143–51.

17. GLANVILL, DE LEGIBUS ET CONSUETUDINIBUS REGNI ANGLIAE (G.E. Woodbine ed. 1932); THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL (G.D.G. Hall ed. & trans. 1965) [hereinafter cited as GLANVILL]. Authorship of the treatise is disputed; the work itself is conventionally denominated "Glanvill."

18. BRACTON, *supra* note 3.

19. J. COWELL, INSTITUTIONES IURIS ANGLICANI (1605).

20. H. FINCH, NOMOTECHNIA (1613); H. FINCH, LAW, OR A DISCOURSE THEREOF (1627).

21. M. HALE, AN ANALYSIS OF THE CIVIL PART OF THE LAW (1713); M. HALE, HISTORY OF THE PLEAS OF THE CROWN (1736).

22. T. WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND (1720).

23. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765–1769).

24. J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832).

25. T.E. HOLLAND, THE ELEMENTS OF JURISPRUDENCE (1880).

26. *E.g.*, Z. SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT (1795–1796); J. KENT, COMMENTARIES ON AMERICAN LAW (1826–1830); W. MARKBY, ELEMENTS OF LAW (1871); H.T. TERRY, LEADING PRINCIPLES OF ANGLO-AMERICAN LAW (1884); J.W. SALMOND, JURISPRUDENCE (1902).

27. At the outset, Glanvill distinguished criminal and civil pleas (GLANVILL, bk. 1, ch. 1), and further classified civil pleas for land in the king's court as claims on the property (*super proprietate*) and claims on the possession (*super possessione*) (bk. 1, ch. 3). In later exposition, however, the treatise distinguished civil pleas in indigenous terms: pleas of right (*placita de recto*) (bk. 12, ch. 1) and those that concern seisin alone (*super saisinis solummodo*) (bk. 13, ch. 1). Cf. other references to *possessio* (of chattels) in bk. 10, ch. 8; and to *proprietas* in bk. 1, ch. 7; bk. 11, ch. 1; bk. 13, chs. 13, 15; notes in Woodbine ed. at 262, 281–83. On some problems with the classification, see J.L. BARTON, ROMAN LAW IN ENGLAND 9 & n.20 (IUS ROMANUM MEDII AEVI, v. 5, pt. 13a, 1971).

28. On the striking absence of the term "possession" beyond the ecclesiastical context, see 2 F. POLLOCK & F.W. MAITLAND, *supra* note 1, at 31–32, 110 n.2; F. JOÜON DES LONGRAIS, LA CONCEPTION ANGLAISE DE LA SAISINE *passim* & esp. 151 (1925). Two exceptions are in BRACTON'S NOTE BOOK (F.W. Maitland ed. 1887): Case no. 240, Hil. 8 Hen. 3, 2 *id.* at 193 (1224) (writ of right *super proprietate* and mort d'ancestor *super possessione*); Case no. 564, Pasch. 15 Hen. 3, 2 *id.* at 435, 437, 14 CURIA REGIS ROLLS 1474 (1231) (mort d'ancestor; lord and heir rule pertains to *ius* and not to *possessionem*).

29. Bracton has launched an enormous literature. See, e.g., the bibliographies in H.G. RICHARDSON, BRACTON: THE PROBLEM OF HIS TEXT 155–57 (1965); Thorne, *Translator's Introduction*, BRACTON, 3:vii–xi. On the parallels to the Institutes, see, e.g., H.G. RICHARDSON, *supra*, at 57–58; Barton, *Bracton as a Civilian*, 42 TUL. L. REV. 555, 564–66 (1968); *infra* note 36. For particular criticisms of Bracton's arrangement, see, e.g., F.W. MAITLAND, SELECT PASSAGES FROM THE WORKS OF BRACTON AND AZO, 8 S.S. 169–70, 184 (1895) [hereinafter cited as BRACTON & AZO]; F.W. MAITLAND, *supra* note 1, at 59; Plucknett, *The Relations Between Roman Law and English Common Law Down to the Sixteenth Century*, 3 U. TORONTO L.J. 24, 41 (1939); T.F.T. PLUCKNETT, *supra* note 6, at 95 & n.2; J.L. BARTON, *supra* note 27, at 16–17.

30. 1 THE HISTORY OF THE UNIVERSITY OF OXFORD 3, 526–27, 538–39 (J.I. Catto, ed. 1984) (chapters by R.W. Southern, J.L. Barton, and L.E. Boyle).

31. J.L. BARTON, *supra* note 27, at 27–28; 1 THE HISTORY OF THE UNIVERSITY OF OXFORD, *supra* note 30, at 521–22, 582 (chapters by J.L. Barton and Jean Dunbabin).

32. Some fifty surviving manuscripts of Bracton testify to a wide though short-lived popularity prior to 1300. *See, e.g.*, J.P. DAWSON, THE ORACLES OF THE LAW 54 (1968); J.L. BARTON, *supra* note 27, at 17; Brand, *supra* note 7, at 163. On the nascent legal profession, see Brand, *supra* note 6, at 36–38.

33. BRITTON (F.M. Nichols ed. & trans. 1865) [hereinafter cited as BRITTON]; FLETA, 72, 89, & 99 S.S. (H.G. Richardson & G.O. Sayles ed. & trans. 1953–1983) [hereinafter cited as FLETA]. Britton and Fleta did not use Roman categories as their main organizing structure, and they employed them in textual exposition more sparingly than Bracton did. On possessory and proprietary actions, see, e.g., BRITTON, bk. 2, ch. 11, fol. 106b

(1:271–72); FLETA, bk. 4, ch. 1, fol. 82, 89 S.S. 46. *See also Summa Parva,* in RADULPHI DE HENGHAM SUMMAE 60–61, 68–69 (W.H. Dunham ed. 1932).

34. Though many Bracton manuscripts left out the passages that most closely followed the Roman sources, this terminology appeared throughout the discussion of the writs.

35. BRACTON, fol. 4b (2:29).

36. Maitland collated passages from Bracton with a *summa* of the Institutes by Azo of Bologna, including those setting forth the main structure. BRACTON & AZO, 8 S.S. 42–43, 165–70.

37. BRACTON, fol. 101b (2:290). Other passages distinguished civil and criminal, contractual and delictual actions. *Id.* at fols. 99, 101 (2:283, 289).

38. *Id.* at fols. 101b–103 (2:290–95).

39. *Id.* at fol. 103 (2:294). *Cf. id.* at fol. 112b (2:318).

40. *Id.* at fol. 102 (2:292).

41. *Id.* at fol. 102b (2:292). This foreshadows the English lawyers' later distinction between real and personal property. F.W. MAITLAND, *supra* note 1, at 60; Williams, *The Terms Real and Personal in English Law,* 4 LAW Q. REV. 394, 405–8 (1888).

42. BRACTON, fols. 114b, 161b, 164b, 218b (2:324; 3:18, 26, 157). Bracton recurred to the distinction between real and personal actions perhaps a dozen times more in the remainder of the treatise.

43. *Id.* at fols. 103, 104 (2:294, 296–97). *See also id.* at fols. 159b–60 (3:13).

44. *E.g., id.* at fols. 113–113b, 161, 270b, 283b–284, 317b, 327b (2:320–21; 3:18, 291, 325–26; 4:21, 47). Cosinage claimed land of which a relative (other than a direct ancestor) died seised, asserting that the claimant was that relative's heir. Writs of entry claimed that the current holder of land should render it to the claimant because of a particular flaw in the current holder's title to the land. *See also supra* note 1.

45. BRACTON, fol. 3 (1:115–16, 2:24–25), fols. 434b–435 (4:350–51). In other passages, Bracton equated possessory and proprietary right with the interests of the life tenant and reversioner. *Id.* at fols. 32b, 160 (2:106, 3:13).

46. BRACTON & AZO, 8 S.S. 31, 33. See further BRACTON, fols. 30b–31 (2:101–3).

47. BRACTON, fol. 38b (2:121–22) (defining possession as the physical and intentional detention of a corporeal thing, with the concurrent support of right); *see* AZO, SUMMA CODICIS 7.32, nos. 1–2 (Venice ed. 1610); DIG. 41.2.3.1 (Paul, Ad Edictum 54) (citations are to THE DIGEST OF JUSTINIAN (T. Mommsen & P. Krueger eds., A. Watson ed. and trans. 1985)).

48. BRACTON, fol. 103 (2:294); J. INST. 4.15.2 (citations are to JUSTINIAN'S INSTITUTES (P. Krueger ed., P. Birks & G. McLeod trans. 1987)).

49. BRACTON, fol. 113 (2:321); *see* DIG. 41.2.12.1 (Ulpian, Ad Edictum 70); WILLIAM OF DROGHEDA, SUMMA AUREA 357 (L. Wahrmund ed. 1914); BRACTON & AZO, 8 S.S. 208–9. Also BRACTON, fol. 284 (3:325) (paraphrase); *id.* at fol. 267 (3:283).

50. *See supra* note 29.

51. A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 37 (2d ed. 1986). *See also* D.W. SUTHERLAND, THE ASSIZE OF NOVEL DISSEISIN 41–42 (1973); H.G. RICHARDSON & G.O. SAYLES, *supra* note 12, at 81–82. Other historians have taken the Year Book lawyers to task for not adopting Bracton's scholarship. T.F.T. PLUCKNETT, *supra* note 6, at 93–94 ("no one who reads the Year Books would ever suspect that Bracton had lived and written").

52. R.C. VAN CAENEGEM, ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL, 77 S.S. 315 & n.3, 390 (1959).

53. The Year Books do not purport to be accurate verbatim transcripts of courtroom

dialogue, and wording varies greatly from one version to another for the same case. *See* W.C. BOLLAND, A MANUAL OF YEAR BOOK STUDIES 43–44 (1925); Bolland, *Introduction,* in THE YEAR BOOKS OF 6 EDWARD II, 43 S.S. xxv–xxvi (1926). Whether the terminology recorded is that of the named speaker or of a reporter or copyist at some later stage, it formed some part of the vocabulary of the profession. What follows will, for the most part, treat the eight or so justices and twenty or thirty pleaders as a collective group, rather than speculate on the verbal proclivities of the named individuals.

54. In the Year Books studied, some 260 reports made reference to writs "of possession" and related categories; 110 more made notable uses of the term *possessioun* (various spellings), and 16 used the term *propreté* (all in relation to chattels). Ten reports employed the term *real* or *realte* alone or in conjunction with the term *personel,* and 25 used the term *personel* or *personalte* alone. Sources for the reign of Edward I that remain, as yet, in manuscript were not consulted for this study.

55. On the difficulties of interpreting Year Book language, see Collas & Plucknett, *Introduction,* in THE YEAR BOOKS OF 12 EDWARD II, 70 S.S. xiii (1951).

56. *See, e.g.,* Hothwait v. Courtenay, Y.B. Mich. 9 Edw. 2, pl. 2, 45 S.S. 2, 5 (1315) (*bref original est fondement de ley*).

57. On the importance of this move to standardization, see R.C. PALMER, THE WHILTON DISPUTE, 1264–1380 at 14–16 (1984); Biancalana, *For Want of Justice: Legal Reforms of Henry II,* 88 COLUM. L. REV. 433, 442 (1988).

58. Clerks and lawyers kept registers of writ forms in what gradually moved toward a traditional ordering, though there was no apparent logic to the order. Maitland, *History of the Register of Original Writs,* 3 HARV. L. REV. 97, 98–101 (1889); T.F.T. PLUCKNETT, *supra* note 6, at 32–33. An unusual manuscript attempted to impose an analytical framework on these writs by distinguishing real, personal, mixed, and statutory writs. *See* Hall, *Commentary,* in EARLY REGISTERS OF WRITS, 87 S.S. civ–cvii (E. de Haas & G.D.G. Hall eds. 1970).

59. *See infra* at nn. 120–27.

60. These writs claimed that a parent, sibling, uncle, or aunt (in mort d'ancestor); a grandparent (in ael); a great-grandparent (in besael); or collateral relative (in cosinage) had died seised of land, and that the claimant was the heir. Some 60 such cases apply the labels to these writs. Of reports mentioning more than one such writ as "of possession," see, e.g., Nota, Middlesex Eyre, Y.B. 22 Edw. 1, R.S. 365 (1294) (ael, cosinage); Attecrouch v. Frost, Y.B. Trin. 3 Edw. 2, pl. 9A, 20 S.S. 159 (1310) (ael, besael); Higham v. Bartelot, Kent Eyre, Y.B. 6–7 Edw. 2, 29 S.S. 35 (1313–1314) (mort d'ancestor, ael); Warthill v. Selby, Y.B. Pasch. 7 Edw. 2, pl. 8, 39 S.S. 110 (1314) (ael, besael); Whittlesey v. Laurence, Y.B. Mich. 8 Edw. 2, pl. 24, 37 S.S. 135 (1314) (ael, besael, cosinage).

61. *E.g.,* Anon., Middlesex Eyre, Y.B. 22 Edw. 1, R.S. 301 (1294) (ael); Latimer v. Thwing, Kent Eyre, Y.B. 6–7 Edw. 2, 29 S.S. 50 (1313–1314) (mort d'ancestor); Anon., Kent Eyre, Y.B. 6–7 Edw. 2, 29 S.S. 58 (1313–1314) (same).

62. Anon., Y.B. 21 Edw. 1, R.S. 135 (1293) (mort d'ancestor); Anon., Cornwall Eyre, Y.B. 30 Edw. 1, R.S. 245 (1302) (ael); Hammil v. Chalon, Kent Eyre, Y.B. 6–7 Edw. 2, 27 S.S. 4 (1313–1314) (cosinage).

63. *See* Anon. v. Berkeley, Kent Eyre, Y.B. 6–7 Edw. 2, 29 S.S. 56 (1313–1314) (mort d'ancestor); Samuel v. Hopsal, Y.B. Pasch. 8 Edw. 2, pl. 9, 41 S.S. 112 (1315) (besael).

64. Exceptions are Berners v. Berners, Y.B. Pasch. 10 Edw. 2, pl. 13, 54 S.S. 106; *re-argued,* Y.B. Trin. 10 Edw. 2, pl. 6, 54 S.S. 159 (1317); Turk v. Ardinguelli, London Eyre, Y.B. 14 Edw. 2, 86 S.S. 152 (1321).

65. Bucketon v. Kynelingworth, Y.B. Mich. 5 Edw. 2, pl. 22, 63 S.S. 76 (1311) (formedon in the remainder); Spernel v. Welton, Y.B. Mich. 7 Edw. 2, pl. 3, 36 S.S. 95 (1313) (formedon in the descender); Ennock v. Ennock, Y.B. Mich. 7 Edw. 2, pl. 4, 36 S.S. 105 (1313) (entry dum non fuit compos mentis); Le Fraunceys v. De La Hay, Y.B. Trin. 12 Edw. 2, pl. 20, 81 S.S. 99 (1319) (formedon in the descender).

66. *E.g.*, Daniel v. de Bere, Hereford Eyre, Y.B. 20 Edw. 1, R.S. 59 (1292) (plea of nonage in formedon in the descender); Anon., Y.B. Mich. 12 Edw. 2, pl. 66, 65 S.S. 151 (1318) (same in entry cui in vita); Leycestre v. Leycestre, Northamptonshire Eyre, Y.B. 3–4 Edw. 3, 98 S.S. 563 (1329–1330) (same in entry de quibus); Le Bret v. Tolthorpe, Y.B. Mich. 4 Edw. 2, 22 S.S. 27 (1310) (plea of omission in formedon in the descender); Paramore v. Gedding, Y.B. Mich. 7 Edw. 2, pl. 2, 36 S.S. 92 (1313) (same in entry cui in vita); Russell v. Garlekmonger, Northamptonshire Eyre, Y.B. 3–4 Edw. 3, 97 S.S. 478 (1329–1330) (same in formedon in the reverter).

67. Lydford v. Giffard, Y.B. Trin. 5 Edw. 2, pl. 14, 33 S.S. 186 (1312) (entry dum fuit infra aetatem); Anon., Y.B. Trin. 5 Edw. 2, pl. 35, 33 S.S. 235 (1312) (entry dum non fuit compos mentis); Spernel v. Welton, Y.B. Mich. 7 Edw. 2, pl. 3, 36 S.S. 95 (1313) (formedon in the descender); Anon., Y.B. Trin. 7 Edw. 2, pl. 22, 39 S.S. 218 (1314) (entry cui in vita).

68. Of more than a dozen such reports, see, e.g., Anon. v. Dean of Hereford, Hereford Eyre, Y.B. 20 Edw. 1, R.S. 27 (1292) (entry cui in vita); Anon. v. Sculle, Y.B. Pasch. 10 Edw. 2, pl. 14, 54 S.S. 108 (1317) (same); Normanby v. Normanby, Y.B. Mich. 12 Edw. 2, pl. 52, 65 S.S. 97 (1318) (formedon in the descender); Twyford v. Pyrie, Northamptonshire Eyre, Y.B. 3–4 Edw. 3, 97 S.S. 429 (1329–1330) (same).

69. Attecrouch v. Frost, Y.B. Trin. 3 Edw. 2, pl. 9A, 20 S.S. 159 (1310) (entry dum fuit infra aetatem). The pleader so rebuked blithely switched labels and launched his next argument. *See also* Scaldeford v. Vaudey, Y.B. Mich. 4 Edw. 2, pl. 3, 22 S.S. 30 (1310) (entry ad terminum qui praeteriit).

70. Haselholt v. Haselholt, Y.B. Pasch. 4 Edw. 2, pl. 19, 26 S.S. 171 (1311) (formedon in the reverter); also Anon., Y.B. 2 Edw. 2, pl. 81, 17 S.S. 159 (1308–1309) (same); *but see* Anon., Y.B. 2 Edw. 2, pl. 25, 17 S.S. 79 (1308–1309) (formedon in the descender "of right" per Bereford C.J.); Langeton v. Workeslegh, Y.B. Trin. 12 Edw. 2, pl. 21, 81 S.S. 101 (1319) (same).

71. Many of these characterizations are discussed in Milsom, *Commentary on the Actions*, in NOVAE NARRATIONES, 80 S.S. xxxi–ccxiv.

72. It it possible that these were the first writs to be juxtaposed in terms of "right" and "possession." *See infra* note 120. The rare appearances of the word "possession" in legal records of the late twelfth and early thirteenth centuries are nearly all in the context of ecclesiastical matters. *See supra* note 28. Writs of right of advowson claimed the right to present a parson. Darrein presentment asserted that the claimant or his ancestor presented the last parson and that the church was now vacant. Quare impedit sought to require a bishop or other person to permit the claimant to present a parson to a church that had come within the claimant's gift. Utrum was a writ by which parsons asserted that land was held by their church for spiritual services and was not a lay fee.

73. Of the 35 such reports in the Year Books, see, e.g., Hothwait v. Courtenay, Y.B. Mich. 9 Edw. 2, pl. 2, 45 S.S. 2 (1315) (writ of right of advowson); Parson of Meppershall v. Prior of Chicksands, Y.B. Mich. 6 Edw. 2, pl. 19, 34 S.S. 70 (1312–1313) (utrum); Prior of Dudley v. Bishop of Worcester, Hereford Eyre, Y.B. 20 Edw. 1, R.S. 205 (1292) (darrein presentment); Adeleye v. Prior of St. John, Shropshire Eyre, Y.B. 20 Edw. 1, R.S. 281 (1292) (quare impedit); Bernake v. Montalt, Y.B. Pasch. 3 Edw. 2, pl. 1A, 20

S.S. 58 (1310) (same); R. v. Prior of Worksop, Y.B. Hil. 10 Edw. 2, pl. 26, 54 S.S. 74 (1317) (same); Monthermer v. Prior of St. John, Y.B. Trin. 12 Edw. 2, pl. 12, 81 S.S. 78 (1319) (same). The muddled *Mirror of Justices,* which may date from this period, listed utrum among the possessory pleas; THE MIRROR OF JUSTICES ch. 25, 7 S.S. 65 (W.J. Whittaker ed. 1895).

74. Bardolf v. Prioress of B., Y.B. 2 Edw. 2, pl. 57, 17 S.S. 115 (1308–1309) (customs & services); Villeins of Ewell v. Prior of Merton, Y.B. Pasch. 8 Edw. 2, pl. 17, 41 S.S. 144 (1315) (monstraverunt); Burnhill v. Ringtherose, Y.B. Trin. 3 Edw. 2, pl. 30A, 20 S.S. 200 (1310) (suit of mill); Alwarthorpe v. Abbot of Fountains, Y.B. Mich. 12 Edw. 2, pl. 79, 65 S.S. 167 (1318) (quod permittat of pasture).

75. Hertford v. Percy, Y.B. Mich. 6 Edw. 2, pl. 64, 34 S.S. 222 (1312–1313) (quare ejecit); Anon., Middlesex Eyre, Y.B. 22 Edw. 1, R.S. 555 (1294) (ravishment of ward); Anon., Y.B. Pasch. 34 Edw. 1, R.S. 175 (1306) (same); Peverel v. Holbrook, Y.B. Hil. 7 Edw. 2, pl. 7, 39 S.S. 43 (1313) (forfeiture of marriage); Anon., Y.B. Mich. 11 Edw. 2, pl. 54, 61 S.S. 148 (1317) (same); Anon., Y.B. Pasch. 3 Edw. 2, pl. 19, 20 S.S. 100 (1310) (waste); Goldington v. Bassingburn, Y.B. Trin. 3 Edw. 2, pl. 27A, 20 S.S. 193 (1310) (conspiracy); Scottow v. Birkeleghe, Y.B. Trin. 5 Edw. 2, pl. 19, 33 S.S. 205 (1312) (account).

76. Anon., Y.B. Trin. 32 Edw. 1, R.S. 243 (1304) (writ of right of ward); Champion v. Havering, Y.B. Hil. 5 Edw. 2, pl. 7, 31 S.S. 27, 173 (1311) (quare impedit).

77. Lavington v. Seymark, Y.B. Hil. 11 Edw. 2, pl. 1, 61 S.S. 152 (1317); Lymesy v. Abbot of Westminster, Y.B. Trin. 6 Edw. 2, pl. 11, 36 S.S. 31 (1313); Anon., Y.B. 2 Edw. 2, pl. 75, 17 S.S. 150 (1308–1309). Cessavit was a lord's claim for land held by a tenant who had ceased doing services for two years.

78. Somery v. Burmingeham, Y.B. Mich. 4 Edw. 2, pl. 87, 22 S.S. 198 (1310); Anon. v. Ersedekene, Cornwall Eyre, Y.B. 30 Edw. 1, R.S. 143, 145 (1302); Anon., 4 Edw. 2, 42 S.S. 165 (1310–1311) (from 2 A. FITZHERBERT, LA GRAUNDE ABRIDGEMENT fol. 34, Garraunt des Chartres pl. 29 (1514)); Gentylcors v. Brown, Y.B. Pasch. 3 Edw. 2, pl. 31, 20 S.S. 113 (1310); Fitzanable v. Haket, Y.B. Mich. 5 Edw. 2, pl. 46, 63 S.S. 230 (1311); Taumbes v. Skegness, Y.B. Pasch. 5 Edw. 2, pl. 11, 31 S.S. 215 (1312). Debt commanded the defendant to render a sum of money or fungible goods owed to the plaintiff and unjustly detained, or come to court to explain why not. Covenant commanded the defendant to keep an agreement with the plaintiff to perform services or convey specific goods. Trespass ordered the defendant to come to court to explain why he or she committed a wrong against the plaintiff.

79. Daman v. Abbot of Gloucester, Y.B. Trin. 6 Edw. 2, pl. 23, 36 S.S. 80 (1313). *Cf.* Maitland, *supra* note 58, at 217. Annuity commanded the defendant to render a sum of money or fungible goods in arrears from the annual rent or payment owed to the plaintiff. On the disappearance of the original connection of annuities to land, see Milsom, *Commentary on the Actions,* in NOVAE NARRATIONES, 80 S.S. clxix–clxxii.

80. Anon., Y.B. Pasch. 3 Edw. 2, pl. 40, 20 S.S. 125 (1310); R. v. Prior of Merton, Y.B. Mich. 11 Edw. 2, pl. 24, 61 S.S. 84 (1317).

81. Burnel v. Beauchamp, Y.B. Pasch. 3 Edw. 2, pl. 13A, 20 S.S. 89 (1310); Mareschal v. Foliot, Y.B. Trin. 3 Edw. 2, pl. 3A, 20 S.S. 150 (1310); Lavington v. Seymark, Y.B. Hil. 11 Edw. 2, pl. 1, 61 S.S. 152 (1317) (waste); Somery v. Burmingeham, Y.B. Mich. 4 Edw. 2, pl. 87, 22 S.S. 198 (1310); Anon., 4 Edw. 2, 42 S.S. 165 (1310–1311) (from 2 A. FITZHERBERT, LA GRAUNDE ABRIDGEMENT fol. 34, Garraunt des Chartres pl. 29 (1514)) (warranty of charters). *See also* Anon., CASUS PLACITORUM, 69 S.S. 78 (c. 1272 — c. 1278) (naifty "personal" or "of right"). Waste claimed damages (and, by statute, forfeiture of land) from a temporary holder of land who had altered the land

to the damage of a future possessor. Warranty of charter commanded a lord to warrant that the plaintiff held land of the lord according to the terms of the lord's (or his ancestor's) charter.

82. Anon., CASUS PLACITORUM, 69 S.S. 78 (c. 1272 — c. 1278); Wygketone v. Bishop of Carlisle, Y.B. Mich. 31 Edw. 1, R.S. 343 (1303); Anon., 4 Edw. 2, 42 S.S. 165 (1310–1311) (from 2 A. FITZHERBERT, LA GRAUNDE ABRIDGEMENT fol. 34, Garraunt des Chartres pl. 29 (1514)); Comyn v. Monpynson, Y.B. Mich. 5 Edw. 2, pl. 52, 63 S.S. 247 (1311); Noreis v. Northcott, Y.B. Pasch. 5 Edw. 2, pl. 34, 33 S.S. 76 (1312); Hutton v. Ludlow, Y.B. Mich. 7 Edw. 2, pl. 41, 39 S.S. 15 (1313). *Cf.* Lavington v. Seymark, Y.B. Hil. 11 Edw. 2, pl. 1, 61 S.S. 152 (1317) (in waste, the plea is not real, though the judgment is, by Statute of Gloucester, 1278, 6 Edw. 1, ch. 5).

83. R. v. Prior of Merton, Y.B. Mich. 11 Edw. 2, pl. 24, 61 S.S. 84 (1317).

84. *E.g.*, Anon., CASUS PLACITORUM, 69 S.S. 79 (c. 1268 — c. 1272); Anon. v. Erskedene, Cornwall Eyre, Y.B. 30 Edw. 1, R.S. 143, 145 (1302); Burnel v. Beauchamp, Y.B. Pasch. 3 Edw. 2, pl. 13, 20 S.S. 89 (1310); Midhope v. Prior of Kirkham, Y.B. Mich. 7 Edw. 2, pl. 17, 36 S.S. 172 (1313). *But see* Anon., Y.B. 2 Edw. 2, pl. 75, 17 S.S. 150 (1308–1309) (cessavit real, though the action accrued by the defendant's own act).

85. For different reports contradicting each other on the same writ, see, e.g., *supra* at nn.65–73. For disputes surfacing in an individual report, see, e.g., Rasen v. Furnival, Y.B. Pasch. 3 Edw. 2, pl. 49A, 20 S.S. 140 (1310) (formedon in the descender); Twyford v. Pyrie, Northamptonshire Eyre, Y.B. 3–4 Edw. 3, 97 S.S. 429 (1329–1330) (same); Villeins of Ewell v. Prior of Merton, Pasch. 8 Edw. 2, pl. 17, 41 S.S. 144 (1315) (monstraverunt).

86. Bevercote v. Abbot of Rugford, Y.B. Mich. 31 Edw. 1, R.S. 413, 415 (1303) (parson's quod permittat for common of pasture); Anon. v. Hoyland, Y.B. Mich. 33 Edw. 1, R.S. 63 (1305) (partition).

87. Abbot of C. v. Earl of Warren, Middlesex Eyre, Y.B. 22 Edw. 1, R.S. 527, 529 (1294).

88. *See supra* note 69.

89. R. v. Anon., Stafford Eyre, Y.B. 21 Edw. 1, R.S. 423 (1293) (quo warranto).

90. Anon., Y.B. 2 Edw. 2, pl. 75, 17 S.S. 150 (1308–1309) (cessavit).

91. Anon., Cornwall Eyre, Y.B. 30 Edw. 1, R.S. 279 (1302) (quo jure); Maltalent v. Romyley, Y.B. Trin. 32 Edw. 1, R.S. 227, 239 (1304) (admeasurement of pasture); Devereux v. Tuchet, Y.B. Hil. 3 Edw. 2, pl. 18A, 20 S.S. 16 (1310) (entry ad terminum qui praeteriit); Anon., Y.B. 2 Edw. 2, pl. 62, 17 S.S. 128 (1308–1309) (replevin); Anon., Y.B. Hil. 32 Edw. 1, R.S. 59 (1304) (trespass); Wygketone v. Carlisle, Y.B. Mich. 31 Edw. 1, R.S. 343 (1303) (quo jure).

92. Fressingfeld v. Cookley, Y.B. Hil. 3 Edw. 2, pl. 17B, 20 S.S. 13, 15 (1310) (quare impedit).

93. Bucketon v. Kynelingworth, Y.B. Mich. 5 Edw. 2, pl. 22, 63 S.S. 76, 77 (1311) (formedon in the descender).

94. Bernake v. Montalt, Y.B. Pasch. 3 Edw. 2, pl. 1B, 20 S.S. 60, 61 (1310) (quare impedit).

95. The terminology can be found, still hotly disputed, later in the fourteenth century. *See, e.g.*, Reskemmer v. Abbot of Beaulieu, Y.B. Mich. 16 Edw. 3, pl. 87, R.S. 571 (1342) (quare impedit); Pole v. Archbishop of York, Y.B. Mich. 8 Rich. 2, Ames Foundation ed. [hereinafter cited as Ames] 102, 103 (1384) (same); Anon., Y.B. Hil. 12 Rich. 2, pl. 26, Ames 136, 137 (1388) (de curia claudendo).

96. Quare impedit did appear to settle into the category of writs "of possession" after 1310, but the other writs remained unsettled.

97. Pleading rules pressured the pleaders to present their single best argument on behalf of the party employing them and to abandon the rest. Bolland, *Introduction,* 43 S.S. xi–xiii. Sparring between opposing pleaders on these terms could proceed to issue without the intervention of the justices. Often the modern reader can know only that an argument was advanced in particular language (or was recorded as having been advanced that way), that it drove the opponent to adopt a different line of argument, or that its proponent was himself driven to abandon it and try another course, with rarely a definitive pronouncement from the justices. Given the reluctance of the justices to make definitive rulings, the "law of the case" emerging from pleaders' bluffing and strategic concessions in individual reports cannot be taken for generally applicable rules or professional consensus. Sutherland, *The Brotherhood and the Rivalry of English Lawyers in the General Eyres,* 31 AM. J. LEG. HIST. 1, 6–8 (1987).

98. When, however, one's interlocutor was Justice Bereford, such an answer was not quite enough. Lavington v. Seymark, Y.B. Hil. 11 Edw. 2, pl. 1, 61 S.S. 152, 156 (1317).

99. Molin v. Abbot of Westminster, Middlesex Eyre, Y.B. 22 Edw. 1, R.S. 339 (1294) (cosinage).

100. Samuel v. Hopsal, Y.B. Pasch. 8 Edw. 2, pl. 9, 41 S.S. 112 (1315) (besael).

101. Thus, it was enough to say that ael and cosinage were writs of possession and "savored" of mort d'ancestor. Anon., Middlesex Eyre, Y.B. 22 Edw. 1, R.S. 301 (1294); Anon., Y.B. Mich. 31 Edw. 1, R.S. 461 (1303).

102. *E.g.,* Anon., Y.B. 2 Edw. 2, pl. 63, 17 S.S. 130 (1308–1309); Paramore v. Gedding, Y.B. Mich. 7 Edw. 2, pl. 2, 36 S.S. 92 (1313); Etchingham v. Sandwich, Kent Eyre, Y.B. 6–7 Edw. 2, 29 S.S. 26 (1313–1314); Welton v. Messager, Northamptonshire Eyre, Y.B. 3–4 Edw. 3, 98 S.S. 537 (1329–1330). Pleaders tried unsuccessfully to make the category label a substantive limit on liability by arguing that there were writs of ael (on grandfather's seisin) and besael (on great-grandfather's), but not of tresael (on great-great-grandfather's), in order to bar a writ of cosinage (on a collateral relative's seisin) in which the demandant traced descent through a great-great-grandfather. *E.g.,* Kirkeby v. Everyngham, Y.B. Pasch. 32 Edw. 1, R.S. 145 (1304); Tremur v. Giffard, Y.B. Mich. 6 Edw. 2, pl. 62, 34 S.S. 211 (1312–1313); *cf.* Reskemmer v. Abbot of Beaulieu, Y.B. Mich. 16 Edw. 3, pl. 87, R.S. 571 (1342) (quare impedit).

103. *See supra* note 27. In Year Book dialogue, "writ of seisin" was a conceivable label, though rarely applied. *See* Sagor v. Atte Welle, Y.B. Trin. 4 Edw. 2, pl. 1, 42 S.S. 13, 14 (1311) (ael).

104. *See supra* at nn.45–46. For Bracton, possession and *proprietas* could both be elements of "right" (*ius*). In the few instances where he did contrast possession with "right," *e.g.,* fol. 285b (3:329), Bracton's term is again *ius,* not the *recto* of the writ of right. *See also Summa Magna,* in RADULPHI DE HENGHAM SUMMAE, *supra* note 33, at 40 (*proprietate recti*); *id.* at 47 (*proprietatem iuris*); *Judicium Essoniorum,* in FOUR THIRTEENTH CENTURY LAW TRACTS, *supra* note 8, at 134 (*iure et proprietate*).

105. BRITTON, bk. 2, ch. 3, fols. 87, 89b; bk. 2, ch. 8, fol. 101; bk. 2, ch. 11, fol. 106b; bk. 2, ch. 16, fol. 121b; bk. 3, ch. 13, fol. 204; bk. 3, ch. 22, fol. 217; bk. 3, ch. 26, fol. 221b; bk. 4, ch. 3, fol. 226; bk. 4, ch. 6, fol. 233b; bk. 4, ch. 8, fols. 235b–236; bk. 6, intro., fol. 268 (1:221, 227, 257, 271–72, 311; 2:120, 153–54, 166–67, 178, 203, 209–10, 309); *but see* bk. 3, ch. 9, fol. 189b; bk. 4, ch. 15, fol. 267 (2:81, 305–306) (contrasting writs of possession and of right). See also the problematic MIRROR OF JUSTICES, *supra* note 73, at chs. 24, 25, 7 S.S. 65, 67 (*droit de propriete*).

106. *See, e.g.,* Anon., Y.B. 21 Edw. 1, R.S. 107 (1293); Rudde v. Hagham, Y.B. Mich. 30 Edw. 1, R.S. 31 (1302); Codeston v. Tunbridge, Y.B. 2 Edw. 2, pl. 16A, 17 S.S. 65 (1308–1309); Thyke v. Fraunceys, Y.B. Mich. 5 Edw. 2, pl. 48, 63 S.S. 240 (1311); Saunderville v. Driby, Y.B. Mich. 7 Edw. 2, pl. 32, 39 S.S. 1 (1313); Hermewelle v. Cambernoun, Y.B. Mich. 12 Edw. 2, pl. 31, 65 S.S. 42 (1318). *Cf.* Fressingfelde v. Jonesman, Y.B. 2 Edw. 2, pl. 50, 17 S.S. 105 (1308–1309) (*propretê de la garde*).

107. BRITTON, bk. 1, ch. 1, fol. 1b (1:3) and *passim;* FLETA, bk. 1, ch. 1, fol. 4, 72 S.S. 13; bk. 4, ch. 1, fol. 82, 89 S.S. 46, and *passim.* The untrustworthy MIRROR OF JUSTICES opened its treatment of actions with the same classification, *supra* note 73, at bk. 2, ch. 1, 7 S.S. 43, though when it later divided the writs, they had become real and personal "sins" (*pecchiez*), *id.* at bk. 2, ch. 6, 7 S.S. 49.

108. *Fet Asaver,* in FOUR THIRTEENTH CENTURY LAW TRACTS, *supra* note 8, at 53; T.F.T. PLUCKNETT, *supra* note 6, at 95.

109. *Modus Componendi Brevia,* in FOUR THIRTEENTH CENTURY LAW TRACTS, *supra* note 8, at 53; T.F.T. PLUCKNETT, *supra* note 6, at 143.

110. *See, e.g.,* Goldington v. Bassingbourne, Y.B. Hil. 5 Edw. 2, pl. 10, 31 S.S. 42 (1311). In one case, the reported words of Justice Hervey de Stanton imply that "plea touching the realty" could be a broader category than "plea of land." Porteseye v. Haustede, Y.B. Mich. 4 Edw. 2, pl. 59, 22 S.S. 173 (1310). In another case that term (found in a different manuscript), the same Justice is quoted contrasting pleas of land with personal actions. Somery v. Burmingeham, Y.B. Mich. 4 Edw. 2, pl. 87, 22 S.S. 198 (1310).

111. Collas & Plucknett, *Introduction,* 70 S.S. xix–xxi. For an argument that *l'entendement de ley* required that "reversion" in a deed be read as "remainder," see Saltmarsh v. Redeness, Y.B. Hil. 10 Edw. 2, pl. 13, 54 S.S. 35, 38 (1317). In 1314 Chief Justice Bereford opened an address to the jury on a writ of utrum (perhaps in French, perhaps in English) with the words "This is a writ of right where the mise is joined on a certain point" and so forth, provoking the response "Sire, we are not lawyers (*gentz de ley*)" and a request for further explanation. Abbot of Tewkesbury v. Calewe, Y.B. Trin. 7 Edw. 2, pl. 1, 39 S.S. 158, 160–61 (1314).

112. On the latter pairing, an exceptionally useful manuscript source is the short elementary tract *Divisiones Brevium,* described in Brand, *supra* note 7, at 163–64. The tract, represented in several manuscripts in the British Library, appears intended to explain the common law writs to readers already familiar with some Roman legal terminology. It begins by introducing the writ "called right" (*breve expressum recti*), and contrasts it with writs "of entry" and "of seisin." The predominant category, however, is that of writs "of possession." Mort d'ancestor, utrum, novel disseisin, darrein presentment, ael, besael, and cosinage are said to be writs *de possessione et non de proprietate.* The newer terminology is also present: Quare impedit is "mixed" *de recto et de possessione.* This suggests that the late thirteenth-century learning surrounding the writ of quare impedit may hold the clue to the Year Books' opposition of possession and right. *See* British Library Additional MS. 22708, fols. 30v–31v; Harley MS. 1120, fols. 146–49; Harley MS. 1208, fols. 137–39; Lansdowne MS. 467, fols. 172v–173v; Royal MS. 10.A.v, fols. 147v–149v.

113. T.F.T. PLUCKNETT, LEGISLATION OF EDWARD I at 14 (1949).

114. Statute of Westminster I, 1275, 3 Edw. 1, ch. 40 (voucher to warranty in writs of possession, of entry, and of right); Statute of Westminster II, 1285, 13 Edw. 1, ch. 5 (1285) (writs of advowson of right and of possession). As writs "of possession," Westminster I listed mort d'ancestor, cosinage, ael, nuper obiit, intrusion, and other like writs; Westminster II listed darrein presentment and quare impedit. For applications,

see Rust v. Banyard, Y.B. Trin. 32 Edw. 1, R.S. 249, 251 (1304); Dodingtone v. Anon., Y.B. Trin. 32 Edw. 1, R.S. 265, 269 (1304); Marmion v. Scoter, Y.B. Pasch. 10 Edw. 2, pl. 27, 54 S.S. 124, 125 (1317). In contrast, chapter 3 of the Statute of Gloucester, 1278, 6 Edw. 1, applied by its terms to cosinage, ael, and besael, and was not extended to other writs of possession. Cauville v. Drax, Kent Eyre, Y.B. 6–7 Edw. 2, 29 S.S. 159, 160 (1313–1314) (nuper obiit) (query by reporter); Whittlesey v. Laurence, Y.B. Mich. 8 Edw. 2, pl. 24, 37 S.S. 135, 136 (1314) (entry).

115. The formula *bref de possessioun* was not entirely uniform; more variants appeared after 1310. *See* Bernake v. Montalt, Y.B. Pasch. 3 Edw. 2, pl. 1B, 20 S.S. 60 (1310) (*accioun . . . en la possessioun*); Walsham v. Walsham, Y.B. Mich. 8 Edw. 2, pl. 10, 37 S.S. 52, 53 (1314) (*accioun possessorie*); Colchester v. Abbot of Colchester, Y.B. Mich. 8 Edw. 2, pl. 11, 37 S.S. 71, 73 (1314) (*precipe de possessioun*); Peverel v. Braose, Y.B. Trin. 8 Edw. 2, pl. 4, 41 S.S. 188, 192 (1315) (*accioun en la possessioun*); Anon., Y.B. Pasch. 10 Edw. 2, pl. 17, 54 S.S. 111 (1317) (*play de possessioun*).

116. *See* cases cited *supra* notes 83 to 85.

117. *E.g.,* Anon., Y.B. 2 Edw. 2, pl. 75, 17 S.S. 150 (1308–1309) (cessavit); Lavington v. Seymark, Y.B. Hil. 11 Edw. 2, pl. 1, 61 S.S. 152 (1317) (novel disseisin, waste).

118. *E.g.,* Nota, Shropshire Eyre, Y.B. 20 Edw. 1, R.S. 245 (1292) (default is peremptory in personal action); Anon., Y.B. 2 Edw. 2, pl. 75, 17 S.S. 150 (1308–1309) (no plea of age); Burnel v. Beauchamp, Y.B. Pasch. 3 Edw. 2, pl. 13, 20 S.S. 89 (1310) (no impleader of codefendant); Anon., Y.B. Pasch. 3 Edw. 2, pl. 40, 20 S.S. 125 (1310) (no exception to variance); Somery v. Burmingeham, Y.B. Mich. 4 Edw. 2, pl. 87, 22 S.S. 198 (1310) (same); Fitzanable v. Haket, Y.B. Mich. 5 Edw. 2, pl. 46, 63 S.S. 230 (1311) (no aid of lord); Noreis v. Northcott, Y.B. Pasch. 5 Edw. 2, pl. 34, 33 S.S. 76 (1312) (no exception of ancient demesne). Contrary arguments appear in Anon., Y.B. 2 Edw. 2, pl. 62, 17 S.S. 128 (1308–1309) (personal plea abates, surplus co-plaintiff); Daman v. Abbot of Gloucester, Y.B. Trin. 6 Edw. 2, pl. 23, 36 S.S. 80 (1313) (wager of law only for personal actions).

119. *E.g.,* Anon., Y.B. Hil. 32 Edw. 1, R.S. 59 (1304) (trespass); Burton v. Lancaster, Y.B. 2 Edw. 2, pl. 133, 19 S.S. 59 (1308–1309) (replevin); Comyn v. Monpynson, Y.B. Mich. 5 Edw. 2, pl. 52, 63 S.S. 247 (1311) (wardship); Lavington v. Seymark, Y.B. Hil. 11 Edw. 2, pl. 1, 61 S.S. 152 (1317) (waste).

120. Robert Palmer suggests that darrein presentment and the writ of right of advowson may have been the first writs to be employed successively on a regular basis. Palmer, *The Origins of Property in England,* 3 LAW & HIST. REV. 1, 24 (1985).

121. The basic principle can be found variously formulated in, e.g., BRACTON, fols. 103b, 112b, 328 (2:297, 319; 4:47); CASUS PLACITORUM, no. 19, 69 S.S. 4; Warde v. Le Venur, Y.B. Mich. 5 Edw. 2, pl. 17, 63 S.S. 56, 59–60 (1311); Oseville v. Keu, Northamptonshire Eyre, Y.B. 3–4 Edw. 3, 97 S.S. 406, 407–8 (1329–1330) (argument to jury). For applications, see, e.g., Anon., Stafford Eyre, Y.B. 21 Edw. 1, R.S. 439 (1293) (ne vexes and contra formam feoffmenti); Anon., Middlesex Eyre, Y.B. 22 Edw. 1, R.S. 455, 457 (1294) (utrum and writ of right).

122. Latimer v. Thwing, Kent Eyre, Y.B. 6–7 Edw. 2, 29 S.S. 50, 53 (1313–1314) (mort d'ancestor touched the right higher than novel disseisin); Bule v. Baker, Y.B. Trin. 4 Edw. 2, pl. 24, 42 S.S. 85, 86 (1311) (nuper obiit and de rationabili parte).

123. Anon., Y.B. Mich. 4 Edw. 2, pl. 12, 22 S.S. 71, 72 (1310) (replevin); Fen v. Somercotes, Y.B. Mich. 3 Edw. 2, pl. 3, 19 S.S. 90, 91 (1309) (formedon); Anon., Y.B. Trin. 32 Edw. 1, R.S. 243 (1304) (cosinage).

124. Anon., Y.B. Pasch. 32 Edw. 1, R.S. 181, 183 (1304) (waste).

125. The defendant's exception that the plaintiff was foreclosed from relitigating an

issue on which judgment had already been rendered against the plaintiff was then, as now, called *res judicata.*

126. *See, e.g.,* Wartone v. Anon., Y.B. Hil. 32 Edw. 1, R.S. 61 (1304); Anon. v. Berkeley, Kent Eyre, Y.B. 6–7 Edw. 2, 29 S.S. 56 (1313–1314). *Cf.* Adeleye v. Prior of St. John, Shropshire Eyre, Y.B. 20 Edw. 1, R.S. 281 (1292).

127. *See, e.g.,* Scoland v. Grandison, Kent Eyre, Y.B. 6–7 Edw. 2, 27 S.S. 186 (1313–1314); Parson of Meppershall v. Prior of Chicksands, Y.B. Mich. 6 Edw. 2, pl. 19, 34 S.S. 70 (1312–1313).

128. In certain circumstances, judgment on a writ of possession could bar a higher writ. Anon. v. Prior of Plumtone, Y.B. Trin. 32 Edw. 1, R.S. 257 (1304) (ael and entry). This was something a lower writ should not be capable of doing.

129. Abbot of C. v. Earl of Warren, Middlesex Eyre, Y.B. 22 Edw. 1, R.S. 527, 529 (1294); Marmion v. Saddler, Y.B. Hil. 8 Edw. 2, pl. 16, 41 S.S. 42 (1315).

130. *See supra* at nn.98–102.

131. "Christianity probably inspired the idea of something objectively right and just, that is, following the right direction," as expressed in the term *directum* in use from the seventh century. Kiralfy, *Law and Right in English Legal History,* 6 J. LEG. HIST. 49, 56 (1985).

132. Anon., Middlesex Eyre, Y.B. 22 Edw. 1, R.S. 617 (1294) (*a tou le jours de munde*).

133. J. INST. 4.6.1 ff.

134. W.W. BUCKLAND, *supra* note 14, at 607, 674–78; M. KASER, ROMAN PRIVATE LAW 37–39, 405 (R. Dannenbring trans. 4th ed. 1984); J.A.C. THOMAS, TEXTBOOK OF ROMAN LAW 74, 89 (1976).

135. J. INST. 4.6.16 ff.

136. *Id. See* Ankum, *Gaius, Theophilus and Tribonian and the Actiones Mixtae,* in STUDIES IN JUSTINIAN'S INSTITUTES IN MEMORY OF J.A.C. THOMAS 4–12, 14–15 (1983).

137. E. LEVY, WEST ROMAN VULGAR LAW: THE LAW OF PROPERTY 219–28 (1951).

138. *Id.* at 238–41.

139. *See, e.g.,* H. KANTOROWICZ, STUDIES IN THE GLOSSATORS OF THE ROMAN LAW 199 (1938); Jolowicz, *Obligatio and Actio,* 68 LAW Q. REV. 469, 478–79 (1952).

140. BRACTON, fol. 102 (2:291 at n.10); J. INST. 4.6.17; AZO, SUMMA INSTITUTIONUM 4.6, nos. 35–36 (Venice ed. 1610). See the additions in H. KANTOROWICZ, BRACTONIAN PROBLEMS 100–101 (1941).

141. BRACTON, fols. 102–102b (2:292–93).

142. *See supra* at n.82.

143. *See, e.g.,* E. LEVY, *supra* note 137, at 19–20 & n.2; J.A.C. THOMAS, *supra* note 134, at 138; M. KASER, *supra* note 134, at 104, 115.

144. See the references at J.A.C. THOMAS, *supra* note 134, at 138 n.41, and discussion, *id.* at 139–41.

145. A. WATSON, THE LAW OF PROPERTY IN THE LATER ROMAN REPUBLIC 91–96 (1968), dates the conceptual development to an earlier point than does M. KASER, *supra* note 134, at 116–17.

146. E. LEVY, *supra* note 137, at 19–34, 61–62; M. KASER, *supra* note 134, at 108.

147. M. KASER, *supra* note 134, at 108, 119.

148. J. INST. 4.6.1–2, 4.6.15, 4.15.4 & 6.

149. DIG. 43.17.1.2 (Ulpian, Ad Edictum 69) (*separata esse debet possessio a proprietate*).

150. DIG. 44.2.14.3 (Paul, Ad Edictum 70) (*in interdicto possessio, in actione* [*scil. in rem*] *proprietas vertitur*).

151. DIG. 41.2.12.1 (Ulpian, Ad Edictum 70) (*nihil commune habet proprietas cum possessione*).

152. On the glossators' predilection for "distinctions," particularly those among actions, see H. KANTOROWICZ, *supra* note 139, at 214–16, 223.

153. Adams & Donahue, *Introduction*, in SELECT CANTERBURY CASES, 95 S.S. 73–75 (1981); M.G. CHENEY, ROGER, BISHOP OF WORCESTER 1164–1179, at 162–64 (1980); R.H. HELMHOLZ, MARRIAGE LITIGATION IN MEDIEVAL ENGLAND 67, 69 (1974).

154. M. KASER, *supra* note 134, at 114–15; Le Bras, *Canon Law*, in LEGACY OF THE MIDDLE AGES 350–51 (C.G. Crump & E.F. Jacobs eds. 1926).

155. F. RUFFINI, L'ACTIO SPOLII: STUDIO STORICO-GIURIDICO 395–96, 412–24 (1889).

156. *See supra* at nn.43–44, 47–49. In passages added to the discussion of novel disseisin, Bracton echoed the relative character of the Roman interdict. BRACTON, fol. 210b (3:136); *cf.* DIG. 43.16.1.30 (Ulpian, Ad Edictum 69); and referenced the absolute character of the Roman *vindicatio*, BRACTON, fol. 183b (3:68), *see* TANCRED, ORDO JUDICIARIUS, bk. 2, tit. 10 (F. Bergmann ed. 1842); H.G. RICHARDSON, *supra* note 29, at 138–39.

157. BRACTON, fol. 113b (2:321), quoting DIG. 41.2.12.1 (Ulpian, Ad Edictum 70); *see* WILLIAM OF DROGHEDA, *supra* note 49, at 357; BRACTON & AZO, 8 S.S. 208–209. Also BRACTON, fol. 284 (3:325).

158. Professor Biancalana has recently revived the thesis that novel disseisin was introduced in Henry II's time in imitation of the canon law distinction between possessory and proprietary claims. Biancalana, *supra* note 57, at 475–76, 501. Even on this account, Bracton would have had to sort the rest of the writs between the two labels.

159. BRACTON, fols. 434b–435 (4:351). For "mere right," see, e.g., *id.* at fols. 209, 266, 267, 278b, 347 (3:132, 280, 283, 312; 4:98). A different view is presented in Turner & Plucknett, *Introduction*, in BREVIA PLACITATA, 66 S.S. lxix–lxxix (1951).

160. For *dreit dreit*, see, e.g., BRACTON, fols. 206b, 283b, 372b, 434b (3:125, 325; 4:170, 350).

161. Some hints of the language of double right remained, e.g., Student Work-Book item 15, in CASUS PLACITORUM, 69 S.S. lxxxvi (*bref de dreit dreit*); BREVIA PLACITATA, 66 S.S. 214 (*dreit dreit*); Maulay v. Driby, Y.B. Mich. 1 Edw. 2, pl. 1, 17 S.S. 1, 2 (1307) (*in mero iure*); Bucketon v. Kynelingworth, Y.B. Mich. 5 Edw. 2, pl. 22, 63 S.S. 76, 77, 90 (1311) (*dreit de possession, dreit dreit*); Langeton v. Workeslegh, Y.B. Trin. 12 Edw. 2, pl. 21, 81 S.S. 101, 102 (1319) (*dreit simple*).

162. *See supra* at nn.104–6.

163. *See, e.g.*, Ingelisthorp v. Nottesham, Y.B. Pasch. 32 Edw. 1, R.S. 512, 513 (1304) (*possessio et rectum separari non possunt*).

164. BRACTON, fols. 10b, 38b, 52b–53, 222, 223 (2:48, 121, 159; 3:166, 168); *but see id.* at fols. 52–52b, 244 (2:158, 3:222); *cf.* DIG. 41.3.4.26(27) (Paul, Ad Edictum 54); 43.3.1.8 (Ulpian, Ad Edictum 54). The tenant for years was sometimes allowed possession by Bracton, e.g., BRACTON, fols. 27, 44b, 160, 220b (2:92, 138; 3:13, 162), and sometimes denied it, e.g., *id.* at fols. 167b–168 (3:33).

165. Normanvyle v. Parson of Steytone, Middlesex Eyre, Y.B. 22 Edw. 1, R.S. 605, 609 (1294) (*chose nun-corporale, la ou ne put estre mutacion de possession*).

166. *E.g.*, R. v. Anon., Y.B. Pasch. 34 Edw. 1, R.S. 191 (1306) (advowson); Birmingham v. Dean of Wolverhampton, Y.B. Mich. 10 Edw. 2, pl. 43, 52 S.S. 125, 126 (1316) (same); Merton v. Merton, Y.B. 2 Edw. 2, pl. 128B, 19 S.S. 44, 47, 48 (1308–1309) (services); Prior of Bridlington v. Grimston, Y.B. Pasch. 5 Edw. 2, pl. 3, 31 S.S. 177, 179 (1312) (homage); Anon., Y.B. Mich. 10 Edw. 2, pl. 24, 52 S.S. 74

(1316) (debt); Frowyk v. Leuekenore, Y.B. Hil. 3 Edw. 2, pl. 4, 19 S.S. 157, 162 (1310) (ward); Ingelisthorp v. Nottesham, Y.B. Pasch. 32 Edw. 1, R.S. 512, 513 (1304) (villein).

167. *See* F. RUFFINI, *supra* note 155, at 399–406, 412–24.

168. *E.g.*, Lacey v. Blaby, Y.B. Mich. 3 Edw. 2, pl. 14, 19 S.S. 108, 109 (1309); Anon., Y.B. Pasch. 3 Edw. 2, pl. 34, 20 S.S. 118, 119 (1310). *Cf.* BRACTON, fols. 369b, 372, 413b (4:160, 168, 285–86).

169. J. INST. 1.2.12; DIG. 1.5.1 (G. Inst. 1.8).

170. Hay v. Anon., Y.B. Mich. 30 Edw. 1, R.S. 53, 57 (1302) (voucher to warranty in dower) (Bereford, C.J.); Lilleburn v. Draper, Y.B. Hil. 4 Edw. 2, pl. 36, 26 S.S. 66, 68 (1310–1311) (formedon in the descender) (Bereford, C.J., or Laufer); Chamber v. Chamber, Y.B. Trin. 5 Edw. 2, pl. 10, 33 S.S. 161, 165 (1312) (writ of right) (John de Ingham), *re-argued,* Y.B. Mich. 7 Edw. 2, pl. 24, 36 S.S. 210, 213 (1313) (William Herle); Audley v. Deyncourt, Y.B. Trin. 6 Edw. 2, pl. 20, 36 S.S. 68, 70 (1313) (cosinage) (Bereford, C.J.). For a later example, see Anon., Y.B. Trin. 12 Edw. 3, R.S. 621, 623 (1338) (novel disseisin).

171. DIG. 50.17.126.2 (Ulpian, Ad Edictum 15) (*melior est causa possidentis*); 50.17.128.1 (Paul, Ad Edictum 19); 50.17.154 (Ulpian, Ad Edictum 70).

172. DIG. 20.1.10 (Ulpian, Ad Edictum 73) (*possidentis meliorem esse condicionem*); 43.33.1.1 (Julian, Digestorum 49) (*possidentis condicio melior erit*).

173. VI 5.12.65, in 2 CORPUS IURIS CANONICI col. 1124 (E. Friedberg ed. 1879–1881) (*in pari delicto vel causa potior est conditio possidentis*); *see* P. STEIN, REGULAE IURIS: FROM JURISTIC RULES TO LEGAL MAXIMS 149, 155 (1966).

174. GLANVILL, bk. 7, ch. 3, fol. 24v (between uncle and grandson, *melior est conditio possidentis*); BRACTON, fols. 253b, 418–418b (3:248, 4:300–301) (between two bastards *melior sit in hoc casu condicio possidentis*). *Cf. id.* at fol. 161 (3:16).

175. The possessor of land received the benefit of the canon law rule legitimating offspring when their parents subsequently married, while the claimant seeking possession was subject to the common law rule forbidding inheritance by those born out of wedlock. *See generally* Barton, *Nullity of Marriage and Illegitimacy in the England of the Middle Ages,* in LEGAL HISTORY STUDIES 1972 at 28–49 (D. Jenkins ed. 1975).

176. *See infra* at n.183–85.

177. Another favorite text of the civilians was CODE J. 7.32 (on acquiring and retaining possession) (citations to CODEX IUSTINIANUS (P. Krueger ed. 1915)); H. KANTOROWICZ, *supra* note 139, at 158–59. There are hints of borrowing from CODE J. 7.32.8 (Diocletian & Maximian 294) in Ingelisthorp v. Nottesham, Y.B. Pasch. 32 Edw. 1, R.S. 512, 513 (1304) (*possessio et rectum separari non possunt*), and of CODE J. 7.32.5 (Diocletian & Maximian 290/293) (*nemo causam sibi possessionis mutare possit*) in Anon., Y.B. Hil. 35 Edw. 1, R.S. 435, 437 (1307).

178. Anon. v. Corbet, Y.B. Pasch. 35 Edw. 1, R.S. 467, 469 (1307).

179. J.A. ALFORD, PIERS PLOWMAN: A GLOSSARY OF LEGAL DICTION 85, s.v. Legistre (1988); M.T. CLANCHY, FROM MEMORY TO WRITTEN RECORD 11, 252 (1979).

180. CODE J. 3.31.11 (Arcadius & Honorius 396); BRACTON, fol. 114 (2:323). Maitland credits this passage as "the most learned piece of Romanism in the whole of Bracton's treatise." BRACTON & AZO, 8 S.S. 211–13. *See also* BRACTON, fols. 196, 372b (3:98, 4:169). On the Roman source, see E. LEVY, *supra* note 137, at 235.

181. Anon., Y.B. Pasch. 5 Edw. 2, pl. 41, 33 S.S. 97 (1312). Four or five other counsel also argued in this report, and it is possible (though I find it less plausible given the placement and substance) to read Friskeney's two brief statements as contentions for the tenant instead of the demandant.

182. *Id.* Another Latin tag, *pedis posicio* (or *possessio*) *sufficit vero heredi,* is attributed

to Justice Henry le Spigurnel in Lewis v. Monner, Kent Eyre, Y.B. 6–7 Edw. 2, 29 S.S. 90, 92, 94 (1313–1314). The thought was that the rightful heir would be seised if he entered upon a single foot of the disputed parcel. The recollection may be of Bracton's reference to the barest minimum of possession without right, an intrusion or *pedem positio,* BRACTON, fol. 159b (3:13), or may draw more directly upon the Digest's etymology of *possessio* from *sedibus quasi positio,* "seat" or "position," or, as some manuscripts had it, *pedibus quasi pedum positio.* DIG. 41.2.1.pr (Paul, Ad Edictum 54) and variants in 4 THE DIGEST OF JUSTINIAN, *supra* note 47, at 502 & nn.1–2.

183. Audley v. Deyncourt, Y.B. Trin. 6 Edw. 2, pl. 20, 36 S.S. 68, 70 (1313). I interpret "imperial law" to refer to the Latin passage *possessio fratris facit sororem heredem* rather than to the bland passage in French that precedes it: *qe veot qe leritage deit descendre a plus digne* ("which says that the inheritance ought to descend to the most worthy").

184. *Id.* at 70. In a writ of possession (this was cosinage), the claimant had to show descent from the "last seised," the brother in this case, whereas in a writ of right the demandant could show descent from another ancestor (such as the father), and it was conceivable that different results could be reached.

185. *Id.* at 70, 76. The same point was debated in Anon., Y.B. Pasch. 33 Edw. 1, R.S. 445 (1305); Russel v. Le Lung, Y.B. Mich. 5 Edw. 2, pl. 14, 63 S.S. 41, 43 (1311) (*non facit sororem heredem fratris nisi possessio prehabita*); Sonde v. Chaunterel, Y.B. Pasch. 12 Edw. 2, pl. 19, 70 S.S. 150 (1319); Anon., Y.B. Mich. 19 Edw. 2, 1678 Vulgate ed. at 628 (1325). Bereford, whose position ultimately prevailed, took the maxim to mean that once the brother had entered and become seised, a sister of the whole blood would prevail over a stepbrother, and indeed the half blood would be excluded entirely. *See* T.F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 721–22 (5th ed. 1956); A.W.B. SIMPSON, *supra* note 51, at 60–61.

186. NOV. 84 (539), 118 (543) (citations to NOVELLAE (R. Schoell & G. Kroll eds. 1912)). The *Libri Feudorum,* likewise regarded as "imperial law" in this period, contain no such rule either.

187. BRACTON, fols. 65–65b, 279b–280 (2:190–91, 3:314–15).

188. BRITTON, bk. 6, ch. 2, fols. 270b–271 (2:316–17).

189. No "maxims" on real or personal actions came to light in this research. The troublesome tag *actio personalis moritur cum persona,* not found in Roman law, has been traced no further back than Anon., Y.B. Mich. 12 Hen. 8, pl. 3, 1679 Vulgate ed. at fol. 11 (1520) (Latin); Anon., Y.B. Mich. 18 Edw. 4, pl. 17, 1680 Vulgate ed. at fols. 15, 16 (1478) (Latin); Anon., Y.B. Pasch. 19 Hen. 6, pl. 10, 1679 Vulgate ed. at fol. 66 (1440) (French); Arches v. Anon., Y.B. Hil. 11 Hen. 4, pl. 20, 1679 Vulgate ed. at fols. 45, 46 (1410) (French); *see* A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 562–65 (1975); Mackintosh, *Actio Personalis Moritur Cum Persona,* 5 JURID. REV. 375, 376–78 (1893); Goudy, *Two Ancient Brocards,* in ESSAYS IN LEGAL HISTORY 215, 222–26 (P. Vinogradoff ed. 1913).

190. Plucknett, *supra* note 29, at 33; *see also* H.G. RICHARDSON & G.O. SAYLES, *supra* note 29, at 84–85.

191. Van Caenegem, *Law in the Medieval World,* 49 LEG. HIST. REV. 13, 27 (1981); A. WATSON, THE MAKING OF THE CIVIL LAW 24–27 (1981).

192. *See* J.P. DAWSON, *supra* note 32, at 127.

193. Bernard of Chartres was the first of many, among them John of Salisbury, Alexander Neckam, Peter of Blois, and Henricus Brito, who recorded this sentiment. *See* R.K. MERTON, ON THE SHOULDERS OF GIANTS 177–219 (1965).

194. *See* J.L. BARTON, *supra* note 27, at 27–28. For possible exceptions, see Brand, *supra* note 7, at 162–63.

195. H.G. RICHARDSON & G.O. SAYLES, *supra* note 12, at 84.

196. On Roman legal method and its legacy, see generally F. SCHULZ, HISTORY OF ROMAN LEGAL SCIENCE esp. 278–99 (1946); Lawson, *supra* note 12, at 189–96; Honoré, *Legal Reasoning in Rome and Today,* 4 CAMBRIAN L. REV. 58 (1973); B.W. FRIER, THE RISE OF THE ROMAN JURISTS esp. 184–96 (1985); Goodrich, *Historical Aspects of Legal Interpretation,* 61 IND. L.J. 331, 333–46 (1986).

197. 2 W. BLACKSTONE, *supra* note 23, at 2.

198. That, as I hope to show in a later article, was a development largely accomplished by the end of the seventeenth century, after an additional period of continental civilian influence on the common law.