The Concept of Property in the Early Common Law

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"There is nothing," wrote William Blackstone, "which so generally strikes the imagination and engages the affections of mankind, as the right of property." Property continues to occupy a place of enormous importance in American legal thought. More than just a staple of the first-year law school curriculum, the concept of property guides the application of constitutional doctrines of due process and eminent domain. A grand division between "property rules" and "liability rules" classifies our common law entitlements. Property is a concept of such longstanding importance in our law, of such great inertial momentum, that it has expanded to include nonphysical property in goodwill, inventions, designs, artistic expression, symbols, secrets, privacy, and ce-

1. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (Oxford 1766). For Blackstone, this right of property was "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." Id.

Throughout this article, spelling, punctuation, and capitalization of quotations have been modernized. Dates are calculated by "historical year" commencing January 1.

2. See, e.g., BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977); RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 1-3 (1990); Laura S. Underkuffler, On Property: An Essay, 100 YALE L.J. 127, 128-33 (1990).

3. See Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089, 1105-10 (1972).

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lebrity, as well as "new" property in social security benefits, government contracts, job security, and occupational licenses. Recent scholars have identified property with autonomy, personality, political participation, and reliance interests. Thus expanded, the concept of property threatens to disintegrate. If it includes everything, does it mean anything?

Important as the concept of property was and is for lawyers, Blackstone observed that "there are very few that will give themselves the trouble to consider the origin and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title." Legal scholars addressing the foundation of property rights typically begin with the writings of John Locke, an English Whig philosopher of the late seventeenth century. They give little consideration to the meaning, scope, or importance of property in the centuries of common law development prior to Locke's time. Legal historians have typically chosen the modern lawyer's property concept as an organizing category for doctrines that lawyers in past centuries would not have recognized by that label.

This article summarizes a long and important development of property ideas in English common law discourse prior to the seventeenth century. I focus attention on the use of property language and property

4. See, e.g., Charles Reich, The New Property, 73 YALE L.J. 733, 778-87 (1964); Kenneth J. Vandevelde, The New Property of the Nineteenth Century: The Development of the Modern Concept of Property, 29 BUFF. L. REV. 325, 334-54, 358-59 (1980).
5. See, e.g., Richard Powell, The Relationship Between Property Rights and Civil Rights, 15 HASTINGS L.J. 135 (1963); Frank Michelman, Property as a Constitutional Right, 38 WASH. & LEE L. REV. 1097, 1109-14 (1981); Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 957 (1982); Joseph William Singer, The Reliance Interest in Property, 40 STAN. L. REV. 614, 652-701 (1988); Underkuffler, supra note 2, at 142-47.
6. E.g., Felix S. Cohen, Dialogue on Private Property, 9 RUTGERS L. REV. 357, 359-82 (1954); Thomas C. Grey, The Disintegration of Property, in PROPERTY: NOMOS XXII 69, 74-78 (Roland Pennock & John Chapman eds., 1980); John W. Van Doren, Private Property: A Study in Incoherence, 63 U. DET. L. REV. 683, 684-86, 700-701 (1986). See Nedelsky, supra note 2, at 223; Vandevelde, supra note 4, at 362-63.
7. 2 Blackstone, supra note 1, at 2.
8. See, e.g., Epstein, supra note 2, at 9-16 ; Carol M. Rose, Possession as the Origin of Property, 52 U. CHI. L. REV. 73, 73-74 (1985); Richard Epstein, Possession as the Root of Title, 13 GA. L. REV. 1221, 1227-30 (1979). A welcome exception is Charles Donahue, Jr., The Future of the Concept of Property Predicted from Its Past, in PROPERTY: NOMOS XXII, supra note 6, at 35-40.
9. See, e.g., THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 504-623 (5th ed., 1956) ("Part III. Real Property"); S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 99-239 (2d ed., 1981) ("Part II. Property in Land").
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concepts in English legal literature. This focus challenges, in particular, the contemporary assumption that land is the paradigm of property analysis. For more than two centuries, the steady development of property doctrines in medieval English common law was completely divorced from disputes concerning the possession of land. It focused instead on controversies about goods and animals. Later, English lawyers in the Tudor era formulated an abstract concept of property and assimilated land to their treatment of goods and animals. At the same time, they wove into their doctrines the strands of a contemporary theological debate about the origins of individual ownership and the role of the state. English lawyers developed and elevated their concept of property to a position of central importance in their thinking.

A Gap in Legal Terminology

I start with the notion that you can't talk about something if you haven't got a word for it. Close study of the words lawyers used and did not use in the past can help recover some of the mental abstractions they employed. Because the lawyers who argued in the common law courts of England kept a running record of important snippets of courtroom argument from the 1290s onward, I have been able to eavesdrop on them, noticing in particular the things I would expect to hear, but find they did not say. For most of that period, lawyers were not using some of the fundamental abstractions we take for granted as original, seemingly inevitable building blocks of their (and our) substantive legal knowledge.

Lawyers in England got along for about two centuries, from 1290 to 1490 or so, without using any single term that had the scope, application, and explanatory power that later lawyers found in the words “property” and “ownership.” That is to say, they lacked a word for legally protected interests in both land and goods, one that would assimilate these interests to some degree, and separate them from other legally protected relations. This article is an attempt to account for the changing application of the term “property” before, during, and after this crucial period.

10. See any modern American casebook or treatise on “property law.”
11. Meant as a working hypothesis, this proposition has attracted more objections from readers of prior drafts than I had expected. I do not say that all concepts need words or that you can't think about something if you don't have a unitary label to attach to it. My point is about communicating a concept to others sharing the same language. For that, I am supposing, a word or phrase is necessary. Lack of any word or phrase suggests that no unitary concept is being communicated.
English people then had no more trouble in articulating what were their "own" lands or money or personal belongings than we do now in identifying what is ours. Indeed it was a truism of the entire period that law was necessary chiefly for this purpose. University study of Roman law began with the basic definition of justice: rendering to each person what was his own (suum). The Bible enjoined you not to steal and not to covet your neighbor's goods, but the Bible did not tell you what was yours and what your neighbor's. Human law aided obedience to God's law by identifying what was mine and what was yours, meum et tuum.

This does not get us very far. True, the terminology of "mine" and "yours" was then, as it is now, applied indifferently to land, animals, and inanimate objects. It was also appropriate, however, to use such terminology for one's name, spouse, children, parents, servants, friends, country, king, lord, body, soul, sins, debts, thoughts, death, and a lot of other possessive uses that stretch far beyond the legal pigeonhole that lawyers later labeled "property." What turns out to be "missing" in the common law literature from 1290 to 1490 is a term narrower than the overinclusive possessive "mine" and the verb "have," but broad enough to encompass what earlier and later conceptions of "property" took as paradigms: land, goods, and animals.

This might fairly be described as a "gap" in the development of the medieval English lawyers' vocabulary. In the century before 1280, the fledgling profession of English common law judges did have such a term, the Latin proprietas.5 Proprietas played an important structural role in the handful of legal treatises that survive from that period. These works, especially the mid-thirteenth century treatise attributed to Henry

12. J. Inst. 1.1.pr; Dig. 1.1.10.pr (Ulpian, Regularum 1).
13. See infra, text accompanying note 211. The standard gloss of Accursius on Justinian's Digest (c. 1250) reasoned that divine law enjoined "thou shalt not steal" but that human law (ius gentium) instituted individual property. 2 R.W. CARLYLE & A.T. CARLYLE, A HISTORY OF MEDIAEVAL POLITICAL THOUGHT IN THE WEST 48 & n.2 (1970).
14. John Locke and a few other seventeenth-century political writers combined attributes commonly said to be "mine" (self, life, limbs, liberty, labor) with things commonly said to be "my property" (land, goods, animals). THOMAS HOBBES, LEVIATHAN 382–83 (1968) (pt. 2, ch. 30, p. 179 in 1651 ed.); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287–88, 350, 383 (Peter Laslett ed., 1960); RICHARD OVERTON, AN ARROW AGAINST ALL TYRANTS 3–4 (London 1646), reprinted in G.E. AYLMER, THE LEVELLERS IN THE ENGLISH REVOLUTION 68, 68–69 (1975). They may also have been combining the two senses of "property" as ownership and "property" as attribute. See also infra, text accompanying notes 267–68.
15. On the derivation of our word "property," see Donahue, supra note 8, at 31–32.
de Bracton, clearly differentiated "property" relations from two other categories: first, "personal" status relations among free persons in various positions of power and subordination, and second, "obligations," contractual and tortious. In application to land, goods, and slaves, the property abstraction traced back to classical Roman law through the medium of canon law and medieval civil law texts. Jurists in continental Europe continued to use and elaborate this concept in succeeding centuries.

Between 1290 and 1490, however, when the written language of the professional advocates in England was Anglo-Norman French, lawyers made practically no use at all of the cognate term *propreté* in reference to land. What made sense in the early treatises no longer made sense in the context of Year Book dialogue. The slippery relationship between language and conceptual structure turns out to be more complex, therefore, than my initial, simple premise would suggest. If you are not using a word for something, but it was used by earlier generations whose learning you profess to share, and is currently used by others (canonists and civilians) whose learning you regard as analogous to your own, you may or may not be thinking about that something.

When lawyers did speak of "property" in the Year Books—and in the first hundred years of these reports the term was genuinely scarce—"property" referred to interests in domestic animals and goods and on a few occasions to interests in less tangible entities assimilated to those paradigm categories. One did not say "this is my property," as we use the term now. Rather, one said "I have property in it" or "the property of it is to (or with) me." Property was thus a characteristic or attribute (or "property") of a cow or a jewel or a sum of money, not a shorthand referent to the thing itself. Lawyers typically talked about the "property" in a thing when the person with that "property" was not the person who actually had the thing in hand. It is curious that in the most common procedural setting, when two or more persons made inconsistent claims of "property" in the same animal, lawyers throughout most of the Year Book period showed very little interest in how the actual judicial determination of property would be made.

As the fifteenth century progressed, English lawyers made increasingly frequent use of "property" terminology, still in reference to goods and animals, but not land. I notice increasingly the familiar conceptual
“pull” that the Roman-based notion of absolute, individual *proprietas* could still exert. Lawyers’ arguments began to suggest common assumptions that there must in every instance be someone who had the property in a thing, who had that property without regard to where the thing might be taken, and who had that property as against everyone else in the world. Lawyers began to speculate about precisely when, in the course of a transaction or by operation of law, the property in a thing was changed or transmuted from one person to another. Toward the end of the Year Book period, around 1500, lawyers began to argue about old questions in new, property-based terms: disputes about hunting wild animals on other people’s land, making new goods from other people’s materials, and harvesting crops in other people’s fields.

The discussion of “property” in wild animals in a series of cases at the turn of the sixteenth century showed most clearly the influence of civil law terminology and ideas. In this context, English lawyers began to offer accounts of the natural origin of individual property. The Year Books from 1490 onward gave the first indications in English common law discourse—the first since the earlier treatise tradition died out in the thirteenth century—of a universal, abstract notion of “property rights” or a “law of property.” Here was a conceptual category with enough content of its own to begin reorienting English legal thinking toward assimilation of landholding, consumption of goods, and use of animals. The English lawyers’ most coherent, connected accounts of the origin of property rights and property were found in newer, more reflective forms of legal literature that began to appear in the sixteenth century, in particular the popular dialogue *Doctor and Student* by Christopher St. German.

By the start of the seventeenth century, treatises and handbooks for students of the common law, the forerunners of Blackstone’s *Commentaries*, brought land and goods under the general rubric of “property.” In the fierce political debates and civil war that followed, lawyers and laymen alike identified the crucial function of law to be to protect “property” in this broader, more abstract, and more fundamental sense. Out of the legal and political rhetoric of this period came Thomas Hobbes’s and John Locke’s philosophical accounts of property and the settled discourse of the later seventeenth-century lawyers, who regarded a unitary, abstract, more or less absolute property right as a bedrock element of their conceptual structure of law. This article examines the absence of this broad “property” concept from common law discourse for several centuries and its revival by late fifteenth- and sixteenth-century lawyers.
Property in the Early Common Law Treatises

"Property" was a fundamental and expansive notion in the earliest manuscript accounts of common law courts in England. The treatise known by the name of Glanvill, composed between 1187 and 1189, is our first description of regular proceedings of the king’s central law courts conducted by professional judges and their clerks.20 A classification of the types of pleas the king’s courts would hear formed the organization of the treatise. All pleas, the reader first learned, were either “criminal” or “civil.” At the next level, Glanvill divided civil pleas into two categories, “proprietary” and “possessor.”21 Both sets of distinctions were drawn from the terminology of Roman and canon law. After the initial juxtaposition, the Roman terms for “proprietary” and “possessor” pleas were used sparingly in the remainder of the Glanvill text.22 More often, Glanvill’s explanatory categories were terms that a reader might have understood as “native” equivalents of property and possession, the words “right” (recto or iure) and “seisin.”23 Terms such as “criminal,” “civil,” “proprietary,” and “possessor” look familiar to modern eyes, but in dividing royal pleas among those terms the author made some curious choices. Debt was classified as property, and the early “torts”—breach of the king’s peace (trespas) and iniuria—came under the heading of criminal pleas.24

The next great treatise on English common law, composed in the second quarter of the thirteenth century and attributed to Henry de Bracton, borrowed much more heavily from the conceptual framework

20. GLANVILL, DE LEGIBUS ET CONSUETUDINIBUS REGNI ANGLIAE (George 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). Subsequent citations are to the Hall edition.

21. GLANVILL, supra note 20, at bk. 1, ch. 3, classified civil pleas for land in the king’s court as claims on the property (super proprietate) and claims on the possession (super possessione).

22. E.g., GLANVILL, supra note 20, at 6 (bk. 1, ch. 7, fol. 2v) (recto); id. at 132 (bk. 11, ch. 1, fol. 41) (recto); id. at 157 (bk. 13, ch. 13, fol. 48); id. at 158 (bk. 13, ch. 15, fol. 48v); 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, vol. 5, pt. 13a, 1971).

23. GLANVILL, supra note 20, at 6 (bk. 1, ch. 7, fol. 2v) (de recto); id. at 43 (bk. 4, ch. 1, fol. 13v) (iure); id. at 136 (bk. 12, ch. 1, fol. 42v); id. at 148 (bk. 13, ch. 1, fol. 45v). The word “seisin” was itself new in the last third of the twelfth century; earlier documents used the verb forms “to seise” and “to be seised.” Id. at 192.

24. GLANVILL, supra note 20, at 4 (bk. 1, ch. 3, fol. 2); id. at 3 (bk. 1, ch. 2, fol. 1v); id. at 25 (bk. 2, ch. 3, fol. 8). See J.L. Barton, BRACHTON AS A CIVILIAN, 42 TUL. L. REV. 555, 566 n.51 (1968).
of Roman law, and thereby added distinctions that might have seemed “missing” to sophisticated readers of Glanvill. Like Justinian’s Institutes, Bracton’s treatise divided the subject-matter of law into persons, things, and actions. The long and unfinished treatment of actions, which accounted for the bulk of the treatise, repeated the juxtaposition of the first two sections by distinguishing “real” and “personal” actions. Actions for property or for possession were real (in rem) actions. Personal (in personam) actions arose ex contractu, ex maleficio, or ex delicto.

The crucial distinction, the one that formed the dominant vocabulary of exposition for most sections of the treatise, was the division Bracton made between real actions founded on property (super proprietate) and those founded on possession (super possessione). In Bracton’s extensive commentary on the principal writs for the recovery of land, their scope, and the procedures particular to each, the terms “property” and “possession” recurred so frequently that readers of the treatise must have acquired an understanding of the distinction between them. In Bracton’s terms, what a rightful heir inherited was a “property right” (ius proprietatis) to land. In the 1280s, the treatise known as Britton, an abridged update of Bracton, rendered this Roman-based terminology in French, contrasting proprete of land with possessioun, and invoking a dreit de proprete.

25. 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 294 (fol. 103) (G.E. Woodbine ed., S.E. Thorne trans., 1968–77).
26. Compare J. INST. 1.2.12 with 2 BRACTON, supra note 25, at 29 (fol. 4b).
27. Cf. 2 BRACTON, supra note 25, at 318 (fol. 112b).
28. Id. at 290–95 (fols. 101b–103).
29. Id. at 294, 296–97 (fols. 103, 104). See also 3 id. at 13 (fols. 159b–160). On the classification of individual writs, see, e.g., 2 id. at 320–21 (fols. 113–113b); 3 id. at 18, 291, 325–26 (fols. 161, 270b, 283b–284); 4 id. at 21, 47 (fols. 317b, 327b).
30. 1 id. at 115–16; 2 id. at 24–25 (fol. 3); 4 id. at 350–51 (fols. 434b–435). In other passages, Bracton equated possessory and proprietary right with the interests of the life tenant and reversioner. 2 id. at 106 (fol. 32b); 3 id. at 13 (fol. 160). On the conceptual separation between property and possession, see, e.g., 2 id. at 321 (fol. 113); see D. 41.2.12.1; WILLIAM OF DROGHEDA, SUMMA AUREA 357 (L. Wahrmund ed., 1914); BRACTON AND AZO 208–9 (Selden Society Vol. 8). See also 3 BRACTON, supra note 25, at 325 (fol. 267) (paraphrase); id. at 283 (fol. 267).
31. BRITTON bk. 2, ch. 3, fols. 87, 89b (Francis Morgan Nichols ed. & trans., Oxford 1865); id. at bk. 2, ch. 8, fol. 101; id. at bk. 2, ch. 11, fol. 106b; id. at bk. 2, ch. 16, fol. 121b; id. at bk. 4, ch. 13, fol. 204; id. at bk. 3, ch. 22, fol. 217; id. at bk. 3, ch. 26, fol. 221b; id. at bk. 4, ch. 3, fol. 226; id. at bk. 4, ch. 6, fol. 233b; id. at bk. 4, ch. 8, fols. 235b–236; id. at bk. 6, intro., fol. 268 (1:221, 227, 257, 271–72, 311; 2:120, 153–54, 166–67, 178, 203, 209–10, 309). See also the problematic MIRROR OF JUSTICES 57, 65, 67 (Selden Society Vol. 7) (chs. 16, 24, 25, droit de proprieté).
How is it that "property" in land, so well established in the century-long treatise tradition, disappeared almost entirely in the Year Book literature that succeeded the treatises? In the relatively few passages that focused on interests in goods and animals—the only context in which the later Year Book lawyers admitted of propreté—Bracton favored the Roman term dominium, not proprietas. The overwhelming impression left by Bracton's treatment of the "law of things," however, was that most rules of ownership, its acquisition, and its transfer could be phrased without reference to any distinction between land and other "things," corporeal or incorporeal, that were capable of individual appropriation. Under either Roman term, property was property.

The Year Books: Land and Chattels

The Break from the Treatises

Manuscripts of Bracton and Britton were still being copied—by someone—when the new profession of advocates began to keep Year Books, records of their dialogues with the justices of the king's central law courts. Despite Bracton's incessant use of the Latin proprietas in reference to land and Britton's equivalent propreté, I have found almost no mention of property in land in the manuscript Year Books that have so far made their way into printed editions, a more or less continuous series from the 1290s to the end of the fifteenth century. Instead of pairing "property" and "possession" of land, as the treatises had done, Year Book lawyers spoke simply of "right" and "possession." This was part of a larger pattern. From the entire Roman conceptual structure borrowed by Bracton to classify English common law, the first Year Book lawyers regularly used only three terms as categories for sorting out their learning: "real" and "personal" actions and "possessor" writs. The disappearance of the term "property" in reference to land is all the more curious because, to any contemporary canonist or civilian (Roman) lawyer, the English common lawyers' use of "possession" and "possessor actions" must have seemed to call out for its

32. 2 BRACTON, supra note 25, at 40-47, 127-29, 156, 158-59, 181, 184 (fols. 8-10b, 40b-41b, 51b, 52b, 61b, 62b).
33. For a few apparent exceptions in printed editions, not found in the original Year Book manuscripts, see infra text accompanying notes 149-50.
34. See David J. Seipp, BRACTON, the Year Books, and the "Transformation of Elementary Legal Ideas" in the Early Common Law, 7 LAW & HIST. REV. 175, 183-95, 200-201 (1989).
natural counterpart, the opposite end of the stick: "property" in land. Much later, in the sixteenth century, English common lawyers restored most of the familiar terminology of the Romans, making basic conceptual building blocks of "public" and "private," "civil" and "criminal," "property" and "contract" law.

An obvious question, one that has been around for a long time and remains far from resolution, is this: What use, if any, did Year Book lawyers make of the earlier treatises? Glanvill was a century out of date, Bracton nearly fifty years old, but Britton was current and, from the number of manuscripts that survive, fairly popular among some readers when the series of Year Books began. Monastic houses and cathedral chapters, frequent litigants of the age, are the most likely source of the bulk of treatise manuscripts that survive. Wouldn't there also have been copies in the hands of the common lawyers? It is difficult to believe that this new, secular profession of pleaders in the common law courts lacked either the intelligence or the linguistic skills to exploit any learning from the treatises that might have been useful to them.\(^35\)

The linguistic retreat from the full Roman terminology of Bracton to the largely homegrown vocabulary of the Year Books strongly suggests that the treatises formed no part of the basic education of new lawyers joining the fledgling profession. If any of them encountered the learning of Bracton or Britton as trained professional pleaders thereafter, they would have found that these old authors emphatically associated the term "property" with interests in land—a usage they did not share. Year Book lawyers need not have concluded that this learning was "inaccurate," however, nor changed their own terminology to conform to it.

Here is one possible explanation. The older treatises, from Glanvill onward, took the form of descriptions and interpretations, meant for outsiders, of proceedings in the king's law courts. As such, the authors deliberately used an "external" source of terminology, the only one appropriate to the intended readership. Readers of the Glanvill and Bracton treatises would have understood that they were seeing English common law proceedings "translated" into what was for them a familiar technical Roman vocabulary shared by civil and canon lawyers. Some Year Book lawyers could perhaps have used the same vocabulary as well, out of court and hence out of our earshot, to explain their strategies.

\(^{35}\) For evidence of the common lawyers' acquaintance with the Bracton treatise through 1300, see Paul Brand, The Origins of the English Legal Profession 112–13 (1992); Paul Brand, Courtroom and Schoolroom: The Education of Lawyers in England Prior to 1400, 60 Hist. Res. 147, 163 (1987).
to clients, particularly the ever-litigious bishops and abbots, who had some elementary training in Roman law.36 But in the fourteenth and fifteenth centuries, these lawyers seem to have felt little need to explain their learning to outsiders and less need to borrow prestige from the learned (civil and canon) laws.

Yet this explanation does not go as far as it must. When "property" dropped out of the Year Books for all references to land, no single term denoting an interest in "things"—land and goods and animals—appeared to replace it. This was more than a matter of translating from an external to an internal vocabulary. It was an important conceptual change.

The English lawyers who contended against each other in the Year Book reports would have used any promising argument to advance their causes. If the broad and blunt proprietas of Bracton's treatise were of any practical value to one side or another in any of the thousands of reported contests over landholding entitlements, the lawyers would have invoked it. In contests over entitlement to goods and domestic animals, Year Book lawyers came to invest proprete with much of the abstract, conceptual force of the earlier proprietas and our later "property." These quarrelsome Year Book pleaders of the later Middle Ages seem to have agreed among themselves, however, that land and goods could not be equated for such purposes under the "property" label or any other.

For goods and animals there was "property," and for land the comparable term in the Year Books was "right" (dreit). Lawyers classified their writs regarding land into two sorts: writs "of possession" and writs "of right." In this scheme, "right" was "greater" or "higher" than possession. The word itself carried with it an absolute connotation: one right, straight, true answer.37 The social context of landholding, however, supplied the lawyers with a variety of questions about a variety of persons who might have "right" of varying scope and nature in the same parcel of land. The Year Book lawyers later elaborated this nesting set of "rights" into the twin hierarchies of tenures and estates.38 Determining this "right" to land and punishing breaches of the peace made up the lion's share of business in the king's common law courts.

Goods, animals, and other interests collectively characterized as "chattels" got far less attention than land in the early Year Books.

36. RALPH V. TURNER, THE ENGLISH JUDICIARY IN THE AGE OF GLANVILL AND BRACTON, C. 1176-1239, at 150-51 (1985).
37. See Seipp, supra note 34, at 190-91.
38. The scheme was fully worked out in THOMAS LITTLETON, TENURES (1st publ. 1481).
Lawyers applied the terminology of "property" to these things from the outset, however, and retained it when cases involving chattels became, over the next two centuries, a much larger part of the jurisdiction of the common law courts. The differing terminology suggests differences in the lawyers' perceptions of land and chattels. I will examine three possible explanations: a "good feudal lawyer" thesis, a "devisability" thesis, and an "interference" thesis. Only the last of these has broad explanatory power for the sharp divergence in legal language.

**The "Good Feudal Lawyer" Thesis**

The "good feudal lawyer" explanation argues, in simplest terms, that the Year Book lawyers got it right. As good feudal lawyers, they knew that no English lord, tenant, or villein had any "property" interest in land. Only the king, at the top of the feudal pyramid, had the absolute property right to all the land in the realm, and everyone else merely "held" land on condition of performance of services or payment of rent. Thus Bracton was wrong, and any mention of "property"—if understood to mean the highest and most complete interest in a thing—was as inappropriate for English land as it was appropriate for the goods and animals the English owned outright. This point was made most prominently in the first decade of the seventeenth century, and it was made not by a common lawyer but by an eminent English civilian, John Cowell. Cowell had the wit or luck to put this explanation in one of the first examples of a new and useful sort of legal literature, the law dictionary, from which it quickly entered the mainstream of legal authorities.

There are significant problems with this "good feudal lawyer" explanation. First of all, those who knew Roman law in the Middle Ages had
no difficulty accommodating their inherited terms for absolute ownership, *dominium* and *proprietas*, to a feudal world of relative rights. They made distinctions, for example, between the lord’s *dominium* (*dominium directum* or *ratione iurisdictionis et gubernationis*) and the tenant’s *dominium* (*dominium utile* or *ratione proprietas*). English lawyers might as easily split the two terms, reserving “dominion” for the lord’s interest (ultimately the king’s) and *proprieté* for that of the tenant in possession (or vice versa). In the mid-fourteenth century, an English theologian, Richard Fitzralph, made just such a distinction between *dominium* and *proprietas.* For the civilians, this sort of terminology did not resolve the longstanding debate whether the emperor (or prince or king) had a *dominium eminens* (our “eminent domain”), an ultimate ability to dispose of a subject’s “property,” but it left in place the abstract notion of “property in things”—land as well as other goods—held by the person in immediate, rightful, and permanent possession.

In several respects, moreover, the English people had no more absolute an interest in their goods and animals than they had in their land. English lawyers explained in the *Year Books* how a person’s “property” in goods and animals was subject to, and quite capable of appropriation by, feudal lords and the king. Forfeiture, outlawry, heriot, deodand, waif, and estray all named situations in which such rights could be asserted.

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42. Also in Normandy on the eve of the Conquest, when charters referred to *dominium* and *proprietas* in laypersons’ land, the terms applied to feudal holdings. EMILY ZACK TABUTEAU, TRANSFERS OF PROPERTY IN ELEVENTH-CENTURY NORMAN LAW 95–99, 107–9 (1988).

43. OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES 79, 178 n.271 (Frederic William Maitland trans., 1900); 5 CARLYLE & CARLYLE, supra note 13, at 102; Janet Coleman, Property and Poverty, in THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT 607, 614 (J.H. Burns ed., 1988); John W. Cairns, Craig, Cujas, and the Definition of Feudum: Is a Feu a Usufruct?, in NEW PERSPECTIVES ON THE ROMAN LAW OF PROPERTY 75–84 (Peter Birks ed., 1989); Francis S. Philbrick, Changing Conceptions of Property in Law, 86 U. PA. L. REV. 691, 700–703 & n.31, 706 (1938). Later English lawyers employed the distinction, in, e.g., 2 BLACKSTONE, supra note 1, at 105; 2 ROBERT CHAMBERS, A COURSE OF LECTURES ON THE ENGLISH LAW 85, 158 (Thomas M. Curley ed., 1986).

44. Richard Fitzralph, *De Pauperie Salvatoris*, bk. 1, ch. 2; bk. 4, chs. 1–2, in JOHN WYCLIFFE, DE DOMINO DIVINO 279–81, 435–40, Wyclif Society no. 10 (Reginald Lane Poole ed., London 1890) (c. 1350) (excerpts translated in 1 EWART LEWIS, MEDIEVAL POLITICAL IDEAS 121–24 [1954]).

45. See GIERKE, supra note 43, at 179 n.271; J.W. GOUGH, JOHN LOCKE’S POLITICAL PHILOSOPHY 74 n.4 (1950).

46. See, e.g., Mich. 7 Edw. 4, pl. 16, fol. 18 (1467) (heriot custom entitled the lord to take the villein’s best beast at his death, even if the villein had sold it while alive). Citations in this form are to the “Maynard” or “Vulgate” edition of 1679–80.
In the words of Francis Bacon, a contemporary of John Cowell and a better common lawyer, "no man is so absolute owner of his possessions"—goods and land alike—"but that the wisdom of the law does reserve certain titles unto others."

Finally, John Cowell, Francis Bacon, and other lawyers first articulated this contrast between feudal arrangements and property at the same time many lawyers (among them Cowell and Bacon) were applying the term "property" to land and goods indiscriminately. Lawyers began to refer to property in land when Tudor kings were reasserting their rights to feudal revenues from land held in knight service, rights that remained in force until 1660. Though it is thus both anachronistic and overly formalistic to presume that medieval English lawyers shared the "good feudal lawyer's" technical explanation of the distinction between land and goods, the social dimensions of feudal landholding probably did have a role to play in the conceptual split made by the Year Book lawyers, as part of what I will call the "interference" thesis.

The "Devisability" Thesis

Land can be said to have differed from "chattels" in a number of respects. The restriction of "property" terminology to the latter category helped reinforce and maintain those differences. The distinction that loomed largest in the arguments of the Year Book lawyers was the one found in the rules for descent of an interest at the death of the holder.

Everything that would be inherited, that would vest automatically in the heir, was assimilated to land. Except in a few localities, land in England could not be devised by will until a statute permitted this in 1540. Landholders circumvented this rule by granting their land to groups of friends on trust that they would regrant it after the grantor's death to whomever the grantor named. What could be devised by will were goods, domestic animals, and "chattels real" (leases of land for years and some wardships)—in short, everything in which a person could have "property." These passed to executors by testament or to

47. FRANCIS BACON, THE LEARNED READING ... UPON THE STATUTE OF USES (delivered 1600, first publ. London 1642), in 14 THE WORKS OF FRANCIS BACON 283, 319 (James Spedding et al. eds., Boston 1861).

48. Statute of Tenures, 12 Car. 2, ch. 24 (1660); A.R. Buck, THE POLITICS OF LAND LAW IN TUDOR ENGLAND, 1529-1540, 11 J. LEG. HIST. 200, 201 (1990).

49. A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 62, 139 (2d ed., 1986). See infra text accompanying note 282. In the Anglo-Saxon period, it was possible to pass land by will, but this was a late development and a rare practice, probably introduced by the Church. MICHAEL M. SHEEHAN, THE WILL IN MEDIEVAL ENGLAND 83-99 (1963).
administrators in cases of intestacy, all under the supervision of the church courts.

There was much less of a contrast in disposition during one’s lifetime. Both land and chattels were generally alienable.50 There is evidence of active markets both for agricultural produce and for land, at least in small holdings, in the late twelfth and thirteenth centuries.51 One’s ability to buy and sell freehold land without the consent of one’s lord was recognized in the statute Quia emptores terrarum in 1290,52 just when the term “property,” so closely linked with alienability in later legal contexts, disappeared from the common lawyers’ vocabulary for land transfers.

On its face, the important distinction between heritable land and devisable chattels suggests that Year Book lawyers, either from the outset or gradually over the decades, might have linked “property” most closely to the ability to devise an interest at death, rather than the ability to alienate during life or the certitude that an interest would form part of the inheritance passing to the legally designated heir.53

A source for this link, if the link is there, could have been the common lawyers’ contact with canon law as it was administered by the church courts of England in matters of succession to goods. Roman legal terminology suffused the writings of the medieval canonists in England, as elsewhere in Europe. From the Year Book lawyers’ point of view, the church courts had everything to do with testaments of goods and nothing to do with inheritance of land. Thus “property,” so named, could have come into the hands of executors, through a terminology shared by canonists and common lawyers, while no such shared jurisdiction would have extended “property” language to the heir of lands. A link to canonist usage would help to explain why the term was applied only to devisable chattels in the Year Books without positing any necessary conceptual tie between the idea of devisability and the ascription of “property.”

50. For both categories of holdings, however, individuals could sometimes place restrictions on the terms of gifts in order to limit future alienation by the recipients.
51. See Christopher Dyer, Lords and Peasants in a Changing Society 51, 110-11 (1980); Alan Macfarlane, The Origins of English Individualism 124-30 (1978); R.H. Tawney, The Agrarian Problem in the Sixteenth Century 59-61, 78-80, 90-93 (1912).
52. Quia Emptores Terrarum, 18 Edw. 1 (1290); see Simpson, supra note 49, at 54–55.
53. R. Howard Bloch suggests that in late medieval France the link went entirely in the opposite direction. Property (proprietas, propre) was equated with patrimony and land, while goods, allied with money, did not connote property. R. Howard Bloch, Etymologies and Genealogies: A Literary Anthropology of the French Middle Ages 73–74, 171–73 (1983).
The chronology casts some doubt on this thesis. Lawyers found effective ways to get land to an intended beneficiary by means of the "use," ancestor of the "trust," from the fourteenth century onward. Lawyers began to ascribe property to land in the 1490s, long after the practical evasion became common, and yet some half a century before Parliament made lands devisable in 1540.54 After 1540, mentions of property in land became common in the case reports, but again this change in terminology cannot be simply a matter of church courts taking jurisdiction over the transmission of land at death. In fact, church courts did not extend their jurisdiction to land left by wills.55 The context of sixteenth-century common lawyers' references to property in land extended beyond the power to dispose of land by will. It encompassed an assimilation of land to goods and animals on several fronts at once.

The "Interference" Thesis

The third explanation bears on the more direct and more obvious ways in which land and chattels differed. Goods and animals were "moveables," land "immovable" in the classification of Justinian, Bracton, and (very occasionally) the common lawyers.56 A principal reason Year Book lawyers found themselves talking about "property" was that domestic animals (sometimes on their own account) and goods (usually with help) strayed far from their rightful possessors, and were taken up by others in distant places. A person's "property" in goods or animals could continue despite lack of possession, control, or knowledge of their whereabouts.57 Land, by contrast, remained where one left it. The identity of the rightful holder of land was common knowledge to the surrounding population. Goods and animals required notional nametags—ascriptions of "property" to some person, who might be unknown in the county where the goods or animals were found.

Goods could be made and then consumed or destroyed, animals were born and would perish, but the land remained indefinitely. The temporal dimension posed problems for the ascription of "property" to goods and animals. The common law frequently, and without too much discomfort, left the holder of a "property" interest without a remedy to recover specific goods or animals after they were wrongfully taken, even when

54. Statute of Wills, 32 Hen. 8, ch. 1 (1540).
55. R.H. HELMHOLZ, ROMAN CANON LAW IN REFORMATION ENGLAND 1, 81–82 (1990).
56. See, e.g., J. INST. 2.6.pr; 2 BRACTON, supra note 25, at 39 (fol. 7b); Hil. 9 Hen. 6, pl. 16, fol. 63 (1432); see infra text accompanying note 173.
57. See infra text accompanying notes 75–82.
they still existed and could be located.\textsuperscript{58} When, by the absence of an appropriate legal remedy or by the plaintiff’s election of remedies, the goods taken could not be recovered, Year Book lawyers stated without hesitation that “property” had vested in the thief or the trespasser.\textsuperscript{59} Later, notions that wrongdoers ought not acquire “property” in things by reason of their wrongdoing helped push the common lawyers toward new remedies. Land, perhaps because it could always be recovered, because all its remedies were, in this sense, “proprietary”—as earlier and later lawyers would say—did not pose such puzzles.

Chattels could be consumed, destroyed, lost, or hidden. They could be entirely appropriated, rightfully or wrongfully, by a single individual. Land, in an important sense, could not. The conceptual distance between interests in land and interests in chattels, as they were treated in Year Book arguments, might well have stemmed from differences those lawyers perceived in the level of insecurity posed by interferences with chattels, on the one hand, and interferences with land, on the other. The Year Book cases that used the language of “property” painted a portrait of fourteenth- and fifteenth-century England in which people resorted to litigation only in those rare circumstances when forcible self-help was not satisfying.\textsuperscript{60} Goods and animals were taken and re-taken, for all sorts of reasons and on all sorts of pretexts, quite often to apply pressure to or exact recompense from a person who possessed them. Complicating matters was the fact that possessors often found themselves with goods and animals entrusted to them for safekeeping, or sold by them and retained for later delivery, or assigned to them as executors of a testamentary gift. Adversaries resorting to self-help seemed to care as little about who had the “property” in things they took as did ordinary thieves and trespassers.

Land was no less subject to self-help remedies and depredations, but the effect of interference was much less drastic. Goods and chattels could be lost forever in the course of private wars and disturbances. Land could be taken and retaken countless times, it could be diminished considerably in agricultural yield and in the rent it would produce for a given year, but land could not perish completely. More importantly, even in the best and most peaceful of times, many persons other than

\textsuperscript{58} Thus Maitland concluded that “the ownership of land was a much more intense and completely protected right than was the ownership of a chattel.” \textit{2 Frederick Pollock & Frederick William Maitland, The History of English Law Before the Time of Edward I} 153 (2d ed., Cambridge 1898).

\textsuperscript{59} See infra text accompanying notes 92-104.

\textsuperscript{60} This is a theme throughout J.G. Bellamy, \textit{Bastard Feudalism and the Law} (1989).
the “tenant in possession” would work and live on a given parcel of land, and derive benefit from it. Many others would take some of its produce, or simply make their way across it on the way to somewhere else. Some had what were then legally cognizable rights of common, profit, way, or tithe. Others had customary entitlements. Others had social expectations of hospitality, charity, or neighborliness. The “tenant in possession” could often be a character who never set foot on the piece of land and received a fixed rent bearing only a tenuous relationship to the land’s productive value. The image of one individual owner, or even one family, excluding all others and taking all increase from a parcel of land would have been a vast oversimplification, and probably an unrecognizable image for holders of large or small parcels.

Land had significance greater than the sum of its economic production and use value. It is conventional to say that land was power in medieval England. Land was also an important component of identity. Only a certain limited set of interferences with land, only some “entries,” actually threatened the position, income, or security of a tenant in possession. Many of the comings and goings upon and “takings” from land were of little or no consequence to the freehold tenant or to the bailiff in day-to-day supervision of the land. In contrast, every “taking” of goods or animals threatened permanent loss of the entire value. Every “possession” of goods and animals was potentially exclusive in a way that “possession” of land would not ordinarily be. There was, in this sense, a unitary interest in a horse or a book or a bolt of cloth. The on-off, all-or-nothing character that “property” took on in Roman legal texts and in Year Book debates was appropriate for the things that were vulnerable to all interferences in a way that land was not.

There is one further respect in which scholars have hypothesized that the treatment of land and chattels might have differed. Some have taken the terminology of “property” to be an index of the development of “individualism” in a society. On this scale, “property” would be found

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61. Lords frequently converted service obligations to fixed money rents. Dyer, supra note 51, at 98–100.

62. Before the sixteenth century, the advantage of landholding lay not in the ability to exclude everyone, but in the ability to raise a force of fighting men from among the tenants sharing occupation of one’s land. Tawney, supra note 51, at 188–90. Greater prestige lay in lavish, conspicuous expenditures than in hoarding one’s wealth. A. Gurevich, Representations of Property During the High Middle Ages, 6 Econ. & Soc’y 1, 16–17, 21–22 (1977).

63. See, e.g., Macfarlane, supra note 51, at 57–59. For earlier continental parallels, see Paulo Grossi, La proprietà nel sistema privatistico della seconda scolastica, in La seconda scolastica nella formazione del diritto privato moderno 117 (Paolo
in goods and animals to the extent that they were treated as wholly within the control of single individuals. Land would not be termed "property," insofar as it was treated as within the control of several members of a family or of a wider community. This distinction is difficult to test. Lawyers and others typically contrasted what was "property" with what was held in "common," but the "right" that lawyers found in land was also a right the lawyers attributed to a single individual. English lawyers' usage focused on single individuals as the locus of nearly all rights and duties, perhaps far more than nonlawyers would have acknowledged.64

If lawyers' and litigants' perceptions of interests in and interferences with land differed from their perceptions of interests in and interferences with goods and animals, the difference would not only help explain the narrowed context for "property" terminology in the lawyers' discourse, but it would also help explain how that "property" terminology developed in the fifteenth and sixteenth centuries. The statements that Year Book lawyers framed in terms of "property," all in relation to goods and animals, reached a level of abstract, theoretical consistency that transcended the framework of the writs or "forms of action" in which their arguments were set. By taking goods and animals, not land, as their two paradigms of the "property" interest, the common lawyers found it easier to borrow, use, and incorporate notions of "property" as an absolute, individualistic, and "natural" (pre-legal or fundamental) interest. When, over the course of the sixteenth and seventeenth centuries, the common lawyers expanded their "property" terminology to include land, they reached once more for a higher set of abstractions and followed once again the classical Roman model. In so doing, they carried over the conceptual trappings of absolute property in goods and animals into the context of land disputes, and changed the way future generations of common lawyers would talk and think about this new form of "property."

The Year Books: Property in Chattels

I have found just over 280 Year Book reports in which lawyers, justices, or reporters used the term "property" in one French spelling

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64. See infra text accompanying notes 104, 105, 115–18.
or another. At first, the term appeared very rarely: just two dozen such reports turned up in the thirty-five volumes of Rolls Series and Selden Society editions covering the first three decades of regular Year Book reporting, 1290 to 1320. In all, the period from 1290 to 1370 accounted for one-quarter of the cases, 1370 to 1440 roughly another quarter, and the remaining half in steadily increasing frequency through the latter part of Henry VI’s reign, the reigns of Edward IV, Richard III, Henry VII, and the few years of Henry VIII’s reign found in printed editions of the Year Books. Talk of "property" then continued unabated in some seventy cases found in the published sixteenth-century reports of John Caryll, Robert Brooke, James Dyer, Edmund Plowden, and others, and in the recently published editions of reports of John Spelman and John Port.

Much could be written about the detailed doctrinal development of this property interest in chattels—indeed, much has been written. My purpose instead is to sketch some of the broader assumptions and conceptions evidenced by this increasing use of "property" terminology. What follows is a synthesis of usage and context, of arguments and assertions recorded by and for professional lawyers, not of official holdings of the courts.

Certain aspects of property terminology persisted throughout the Year Book period: in particular, the abstract level of the lawyers' arguments about "property," the sharp distinction between "property" in goods and actual physical possession, the ease with which the lawyers ascribed "property" to thieves and trespassers, and the difficulty the lawyers had in locating the "property" of church goods and goods of deceased testators. After 1400 new notions began to appear in the Year Books, notions of absolute and relative property, of the acquisition of property

65. See, e.g., F.W. Maitland, The Seisin of Chattels, 1 LAW Q. REV. 324 (1885); James Barr Ames, The Dissesisin of Chattels, 3 HARV. L. REV. 23, 313, 337 (1890); Percy Bordwell, Property in Chattels, 20 HARV. L. REV. 374, 501, 731 (1916); Maurice Finkelstein, The Plea of Property in a Stranger in Replevin, 23 COLUM. L. REV. 652 (1923); H.D. Hazeltine, Gossip About Legal History: Unpublished Letters of Maitland and Ames, 2 CAMBRIDGE L.J. 1, 10-17 (1924); S.E.C Milsom, Sale of Goods in the Fifteenth Century, 77 LAW Q. REV. 257 (1961); J.H. Baker, Introduction, in 2 THE REPORTS OF SIR JOHN SPELMAN 209-20 (Selden Society Vol. 94, 1977).

66. The Year Books are a better source for studying conventional legal usage than for pinning down authoritative legal doctrine. Reporters recorded successful and unsuccessful pleading strategies, but often omitted the results of the cases. See David J. Seipp, Roman Legal Categories in the Early Common Law, in LEGAL RECORD AND HISTORICAL REALITY 9, 17 (Thomas G. Watkin ed., 1989). For a study of late twentieth-century "property" discourse in American state supreme court decisions, see Donahue, supra note 8, at 48-55.
in things taken from land and in wild animals captured, tamed, or killed. Finally, we catch the first few glimpses of property in land.

Property in the Abstract

Year Book lawyers phrased their pronouncements about “property” in terms broad and abstract enough to fit all goods and domestic animals whatsoever. Readers of a Year Book report would often learn nothing at all about the specific material objects or animals in dispute: reporters merely noted down that the lawyers made their arguments about unspecified “goods” (biens), animals (avers or bestes), or chattels. In this respect, the treatment of goods and animals as objects of litigation resembled the treatment of persons as subjects of litigation. Abstract, anonymous ciphers populate the Year Books: a faceless “plaintiff,” “defendant,” “John at Style,” “one Alice,” and so forth. Whatever influence the actual identity of these persons carried in the pleading and trial of their own lawsuits, for readers of the Year Books they could be anyone from the Archbishop of Canterbury to the poorest cottager’s widow.

The lawyers’ use of abstractions in describing persons who might hold property is a more telling aspect of the Year Book discussions than their habit of speaking abstractly about the “things” that could be held as property. Notions of formal equality in law were thereby communicated to future generations of lawyers who took the Year Books as their model for lawyerly argument. In relation to “things,” the abstract level of argument tended to assimilate a broad range of tangible objects and intangible interests to the twin paradigms of the typical goods and the typical domestic animals. “Suppose I sell you my horse” was the usual opening gambit in any number of Year Book arguments about “property” in any number of objects. Land, in this respect, resisted the relentless abstracting tendencies of the Year Book reporters a bit more. The lawyers recognized important differences in the legal treatment of individual parcels of land by location (ancient demesne, particular boroughs, Kentish gavelkind land) and, to a lesser extent, by use (grants of forest, wood, manor).

Two paradigms—specific goods and domestic animals—set the terms of Year Book debate about what “property” meant. Lawyers analogized from these instances to the other sorts of “chattels” that appeared, infrequently, in Year Book cases mentioning the term. Throughout the Year Book period, English common lawyers had no difficulty finding “property” in money and undifferentiated goods (such as grain and wine), and in creditors’ rights to payment of debts—though some balked
at the notion of “property” in a fire or in wild animals. They ascribed “property” with equal facility to the interests they categorized as “chattels real,” including leases of land for terms of years and certain wardships of minors, and to the right to hold markets or fairs. From the mid-fourteenth century and increasingly in the fifteenth century, they recognized “property” in houses, trees, grain, grass, and minerals affixed to land but capable of sale and of removal from the land, as chattels, by a purchaser or a trespasser. Lawyers in all these contexts made the same types of “property” arguments that served them in over 250 cases where goods and animals were in dispute.

I did not find any instance in the Year Books of lawyers talking about an individual’s “property” in that person’s own self, body, life, liberty, or labor, though this language began to appear in the late seventeenth century. Nor did I find any report in which a lawyer referred to “property” in a spouse or child, though again seventeenth-century lawyers could frame such a question. A single case of 1406 did report a

67. Pasch. 6 Edw. 2, pl. 16, 43 Selden Society 114 (1313) (Russell); Kent Eyre, 6–7 Edw. 2, 27 Selden Society 28 (1313–14) (Ingham); Mich. 17 Edw. 3, pl. 78, R.S. 357 (1343); Pasch. 1 Hen. 7, pl. 2, fol. 14, 15 (1486); Mich. 20 Hen. 7, pl. 1, fol. 1 (1504); Woodward v. Darcy, 1 Plowden 184, 185, 75 Eng. Rep. 285 (1558). But see Pasch. 7 Hen. 4, pl. 3, fol. 39 (1406) (no property in unpaid debt obligation); Mich. 21 Hen. 7, pl. 2, Keilway 69, 72 Eng. Rep. 229 (1506) (no property in undesignated barley). On fires, Pasch. 2 Hen. 4, pl. 6, fol. 18 (1401). But see Paramour v. Yardley, 2 Plowden 542, 75 Eng. Rep. 799 (1579). See infra text accompanying notes 139–44.

68. 2 Edw. 2, pl. 50, 17 Selden Society 105 (1308–09); 4 Edw. 2, pl. 3, 42 Selden Society 173 (1310–11); Pasch. 17 Edw. 2, fol. 543 (1324); Trin. 14 Edw. 3, pl. 37, R.S. 277, 279 (1340); Hil. 15 Edw. 3, pl. 26, R.S. 313 (1341); Pasch. 12 Edw. 4, pl. 25, fol. 10 (1472); Pasch. 10 Edw. 4, pl. 1, fol. 1 (1470); Hales v. Pettit, 1 Plowden 253, 259, 75 Eng. Rep. 396 (1562).

69. Hil. 18 Edw. 3, pl. 47, RS 629 (1344); Hil. 19 Edw. 3, pl. 23, R.S. 465, 467 (1345); Mich. 11 Hen. 4, pl. 59, fol. 32 (1409); Mich. 6 Edw. 4, pl. 18, fol. 7 (1466); Trin. 7 Edw. 4, pl. 5, fol. 13, 14 (1467); Hil. 18 Edw. 4, pl. 1, fol. 21, 1 (1479); Trin. 21 Hen. 7, pl. 5, fols. 27, 28 (1506); 1 THE REPORTS OF SIR JOHN SPELMAN, supra note 65, at 3 (Accion sur le Case pl. 3) (1522).

70. Thomas v. Sorrell, Vaughan 330, 337, 124 Eng. Rep. 1098, 1102 (1673). See supra note 14 and infra text accompanying notes 267–68. See also, e.g., C.B. Macpherson, PROPERTY: CRITICAL AND MAINSTREAM POSITIONS 7 (1978). Cf. Richard Tuck, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 3, 16 (1979) (suggesting this was a pervasive notion before the seventeenth century). Although proprete did not refer to one’s person, the related term propre, meaning one’s “own,” appeared most frequently in the Year Books in two contexts: appearing “personally” in court (en propre person) and holding goods for one’s own use (come propre biens). We retain this sense of one’s “proper” identity in our distinction between proper nouns and common nouns.

71. See, e.g., Barham v. Dennis, Cro. Eliz. 770, 78 Eng. Rep. 1001 (C.P. 1601); Thomas v. Sorrell, Vaughan 330, 339, 124 Eng. Rep. 1098, 1103 (1673). See infra text accompanying notes 264–65.
lawyer phrasing the issue of free or unfree status of a claimed villein as “trying the property,” in analogy to a similarly worded writ regarding claims to recover animals. Notes of arguments on hypothetical cases mooted in the Inner Temple in the 1490s record law students or lawyers speaking of lords having property in the bodies of their villeins and of guardians having property in the bodies of their wards. Nonetheless, it is fair to say that persons themselves and their personal capacities (except in the sense of the debtor’s repayment of a sum of money) did not form a paradigm or even a noticeable instance of the language of “property” in the courtroom.

Property to Non-Possessors

However abstract their discussions, Year Book lawyers did not speak in a way that equated “property” with its object, as modern usage does. Lawyers did not say that “the horse was your property” but rather that “the property of the horse was to (or at, or with, or of) you.” “Property” was uniformly an attribute of the goods or chattels in question, not another way of talking about the objects themselves. If a thief took my goods, that was one thing, but if a thief acquired the property in them, that was quite another. I do not join with the philosopher C. B. Macpherson in reading this “property” attribute in the Year Books simply as a “right” in the limited sense of “an enforceable claim to some use

72. Mich. 8 Hen. 4, Retourne pl. 31, in [Nicholas Statham], Epitome Annalium Librorum tempore Henrici Sexti fol. 157b (1406) (1st publ. London, c. 1490). In 1346, in a replevin action for return of distrained animals, the defendant claimed himself to be a monk and the plaintiff to be the abbot’s villein. The plaintiff responded that a monk could not have proprete de villein. Mich. 20 Edw. 3, pl. 32, 2 R.S. 305 (1346). This may have meant either “property in a villein” or “property in a villein’s goods.” Other cases describe lords “seised” of their villeins. Mich. 3 Edw. 3, pl. 14, fol. 38 (1329).

73. Arguments in the Inner Temple, MS. Harley 1691, Case 22 (fol. 26v), 105 Selden Society 136 (propety en lour corps); Case 33 (fol. 32), 105 Selden Society 147 (property de corps). Cf. Case 28, 105 Selden Society 141 (lord’s loyall interest en le corps of villein).

74. Bracton did not consider villeins the “chattels” of their lords, or as “slaves” in relation to anyone else but their lords. Bracton preferred to write that villeins were in the power (potestas) of their lords. See Paul R. Hyams, King, Lords and Peasants in Medieval England: The Common Law of Villeinage in the Twelfth and Thirteenth Centuries 90-96 (1980). Earlier sources indicate that villeins could be bought and sold like domestic animals. See id. at 3–5. See also 2 Chambers, supra note 43, at 106.

75. The common Year Book usage is proprete a someone. I have rendered the law French phraseology in this form: “the property in the goods was to or with a certain person.”
or benefit of something.”76 Attribution of “property” brought with it a
great many advantages but some disadvantages as well—a full com-
plement of rights, powers, duties, and liabilities. To have the property
of goods and animals meant, in many instances, to lose the beneficial
use of them in circumstances of attaint, forfeiture, attachment, exe-
cution, heriot, mortuary, and the like.77

In many of the common contexts of property discussion in the Year
Books, the property of goods or animals was with one person at a time
when another person had them actually in hand. In the typical bailment,
an extremely common arrangement, a bailor retained the property in
goods that he or she had entrusted to the safekeeping of a bailee.78 In
the typical distraint, an extremely common form of self-help, a lord
seized a tenant’s domestic animals in order to compel the tenant to
perform services or pay rent in arrears, but the tenant retained property
in the animals held by the lord.79 In a sale of goods or animals, the
property passed to a buyer as soon as a definite contract was made,
and a seller retained the bare custody until delivery took place.80 When
one person leased a domestic animal to another for a period of time,
the property remained with the lessor.81 When a landholder impounded
a stray animal, the property remained with the original possessor.82

76. MACPHERSON, supra note 70, at 3.
77. See, e.g., Trin. 18 Edw. 3, pl. 4, R.S. 231 (1344) (heriot); Trin. 12 Ric. 2, pl. 2,
Ames 3, 4; STATHAM, supra note 72, Distresse pl. 3 (1388) (attaint); Mich. 13 Ric. 2,
pl. 3, Ames 35; pl. 4, Ames 37 (1389) (mortuary); Mich. 13 Hen. 4, pl. 5, fol. 2 (1411)
(execution); Mich. 7 Edw. 4, pl. 16, fol. 18 (1467) (heriot); Trin. 20 Hen. 7, pl. 2, Keilway
61, 63, 72 Eng. Rep. 223 (1505) (forfeiture); Woodland v. Mantel, 1 Plowden 94, 95,
75 Eng. Rep. 152 (1553) (heriot). Cf. Fair Court of St. Ives, 23 Selden Society 83 (1311)
(attachment).
78. Mich. 47 Edw. 3, pl. 55, fol. 23 (1373); Mich. 48 Edw. 3, pl. 8, fol. 20 (1374);
Hil. 14 Hen. 4, pl. 37, fol. 27 (1413); Pasch. 7 Hen. 6, pl. 24, fol. 31 (1429); Mich. 2
Edw. 4, pl. 26, fol. 25 (1465); Hil. 18 Edw. 4, pl. 5, fol. 23 (1479); Mich. 22 Edw. 4, pl.
10, fol. 29, 30 (1482).
79. E.g., Trin. 2 Hen. 5, pl. 9, fol. 10 (1414); see infra text accompanying notes 110–
17.
80. Trin. 21 Hen. 6, pl. 12, fol. 55 (1443); Mich. 22 Hen. 6, pl. 50, fol. 33 (1443);
Hil. 49 Hen. 6, pl. 4, 47 Selden Society 163 (1471); Pasch. 17 Edw. 4, pl. 2, fol. 1 (1477);
Hil. 18 Edw. 4, pl. 1, fols. 21, 1 (1479); Hil. 21 Hen. 7, pl. 4, fol. 6 (1506); Hil. 21 Hen.
7, pl. 30, fol. 18 (1506); Port’s Notebook, 102 Selden Society 109 (1523).
81. Mich. 1 Edw. 4, pl. 18, fol. 9 (1461) (Yelverton).
82. Estray (property passed to the taker after a year and a day): Hil. 31 Edw. 3,
STATHAM, supra note 72, Estray pl. 1, fol. 79a (1357); Hil. 39 Edw. 3, pl. [14], fol. 4
(1365); Pasch. 7 Hen. 6, pl. 21, fol. 27, 28 (1429); Mich. 20 Hen. 7, pl. 1, fol. 1 (1504).
Damage feasant: 27 Lib. Ass. pl. 64, fol. 143 (1353); Pasch. 12 Edw. 4, pl. 25, fol. 10
(1472); Mich. 7 Hen. 7, pl. 1, fol. 16 (1491); Mich. 13 Hen. 7, pl. 11, fol. 10 (1497).
Property to Husbands

Another instance of the separation of “property” from actual possession, effective control, and beneficial use arose within the marriage relationship. As far as the common law courts were concerned, husbands had the “property” of all goods and animals their wives brought into the marriage or acquired while married.83 Wives could not, without their husbands’ continuing assent, direct the disposition of goods or animals at death.84 In contrast, married women’s interests in lands, though limited, were not denied altogether.85 In matters of “property,” England’s “unfree persons” were in a better position than married women: villeins held property in goods and animals until the lord decided to seize them.86

Most of the cases in which lawyers tried (vainly) to assert a “property” interest for married women came in the first three decades of Year Book reporting. This suggests that the simple, uniform, abstract rule of “property” to husbands did not at first reflect every litigant’s expectations. In the later Year Books, the point was rarely made, probably because lawyers knew not to frame pleadings in the name of married women.87 I do not know when the English Chancellors began enforcing “uses” or “trusts” of goods and money for the benefit of married women.
or how widely such devices were used before the seventeenth century. 88 Other evidence, however, particularly in collections of medieval wills, suggests that women had more control over disposition of goods and animals than the common law admitted. 89

English canonists had long differed with the common lawyers, upholding the right of married women to make valid bequests of goods in a series of ecclesiastical statutes from 1240 to 1342. In 1430, William Lyndwood summed up the canonists' case for wives to dispose of their "own" (propriae) clothing and other personal effects, their "paraphernalia," by testament. 90 On the Continent, medieval civilians ascribed property in other goods to the husband, but unlike the common lawyers they had a term for the wife's "lesser" interest in goods. A leading fourteenth-century civilian distinguished the dominium proprietatis of the husband from the dominium utile or dominium directum of the wife. 91 The common lawyers' rule was more absolute and unaccommodating than the formulations of the learned lawyers in the universities.

Property to Thieves

When one person wrongfully took goods or animals from another, did the "property" remain with the original possessor or pass to the one who took? Perhaps the most puzzling usage of "property" terminology in the Year Books—puzzling for modern readers—arose in the contexts of takings of goods by felony and by trespass. An early report suggested that a felon acquired the "property" in stolen goods, an odd notion now but one that accorded with the determination in that case that after indictment and conviction the felon's goods (including those proved to have been stolen) were forfeit to the king or lord. 92 By the 1470s, however, lawyers were of the opinion that property in goods did

88. See Susan Staves, Married Women's Separate Property in England, 1660-1833, at 29, 35 (1990).
89. See M.M. Sheehan, The Influence of Canon Law on the Property Rights of Married Women in England, 25 Medieval Stud. 109, 121-22 (1963); Ann J. Kettle, 'My Wife Shall Have It': Marriage and Property in the Wills and Testaments of Later Medieval England, in Marriage and Property 89, 94-96 (Elizabeth M. Craik ed., 1984).
90. William Lyndwood, Provinciale seu constitutiones Angliae 173 (Oxford 1679) (gloss on propriarum uxorum); Sheehan, supra note 89, at 119-20.
91. See Jacques Pluss, Baldus de Ubaldis of Perugia on Dominium over Dotal Property, 52 Tijdschrift voor Rechtsgeschiedenis 399, 409 (1984).
92. Hil. 8 Edw. 3, pl. 30, fol. 10, 11 (1334).
not pass to the felon, but remained with the original possessor. The victim's continuing property in the stolen goods made theft a continuing offense. One result was that an indictment could be brought in any county to which the thief had carried the goods. On the other hand, if the thief sold the stolen goods in "market overt" to an innocent buyer, property passed from the original possessor to the buyer "by operation of law." Forfeiture of stolen goods could be reasoned the same way.

Property to Trespassers

The common lawyers persisted much longer in stating that a person sued in trespass for taking another's goods acquired property in the goods by the wrongful taking. The trespass remedy was limited to damages. Thus, by suing in trespass, the plaintiff could not recover the specific goods taken. If the plaintiff no longer had the property, the defendant must. In a singular Year Book report of 1490, the lawyers disputed whether the original possessor retained the property of taken goods or acquired a mere "right of property." With a bare "right of property," the victim of a trespass could not, for example, make a valid

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93. Mich. 13 Edw. 4, pl. 7, fol. 3 (1473); Pasch. 4 Hen. 7, pl. 1, fol. 5 (1489); Mich. 2 Hen. 8, Keiway 160, 72 Eng. Rep. 335 (1511). Cf. Pasch. 13 Edw. 4, fol. 9, 10 (1474); Argument in the Inner Temple, Case 33, 105 Selden Society 147 (c. 1490s). For a lawyers' conundrum, see Trin. 7 Hen. 7, pl. 18, fol. 43 (1492) (a bailor could be hanged for stealing his own property from his bailee).

94. Pasch. 4 Hen. 7, pl. 1, fol. 5 (1489).

95. Hil. 33 Hen. 6, pl. 15, fol. 5 (1455); Mich. 35 Hen. 6, pl. 33, fol. 25, 29 (1456); Pasch. 5 Hen. 7, pl. 11, fol. 18 (1490); Mich. 20 Hen. 7, pl. 21, fol. 11, 12 (1504); Port's Notebook, 102 Selden Society 106 (n.d.); Willion v. Berkley, 1 Plowden 223, 244, 75 Eng. Rep. 372 (1562); JOHN PERKINS, A PROFITABLE BOKE sec. 93 at 20D (London 1528; 15th ed., London 1827).

96. Port's Notebook, 102 Selden Society 109 (n.d.).

97. Mich. 6 Edw. 2, pl. 38, 34 Selden Society 142 (1312) (trespass & replevin suppose plaintiff out of property); London Eyre, 14 Edw. 2, 86 Selden Society 133 (1321) (plaintiff asserts defendant claims property, defendant appropriated the property); Pasch. 19 Hen. 6, pl. 5, fol. 65 (1441) (property in taker); Mich. 2 Edw. 4, pl. 8, fol. 16 (1462) (Littleton); Hil. 21 Edw. 4, [pl. 6, fol. 74.] Brooke's Abridgement, Trespass pl. 358 (1483) (Brooke's note only); Mich. 6 Hen. 7, pl. 4, fol. 7, 8, 9 (1490); Argument in the Inner Temple, Case 33, 105 Selden Society 147 (c. 1490s).

98. Although trespass was limited to damages, plaintiffs saw considerable advantages in this type of writ. In an action of trespass, the defendant was subject to arrest, and if the plaintiff prevailed, the defendant was subject to imprisonment until he satisfied the judgment.

99. See, e.g., Hil. 1 Hen. 5, pl. 4, fol. 3 (1414).
Two years later, another lawyer took the position that the "owner" had the property, not the wrongdoer. (The English term "owner," itself an important measure of developing "property" notions, was slowly making its appearance in the Year Books at this time.)

It is tempting to say that the lawyers who ascribed "property" to the trespasser were simply tailoring their property concept to fit whichever of the writs or "forms of action" they happened to be using. What was "property" to one person in a trespass suit might be "property" to another person in a different type of proceeding on the same facts. Indeed, many passages in the Year Books explained that the writ of trespass differed from the writs of replevin, detinue, debt, and the appeal of robbery in that plaintiffs bringing writs of trespass "supposed" or "affirmed" that they no longer had the property in the goods or animals taken. Even in this respect, however, fifteenth-century common lawyers did not fragment their talk of "property" to fit it into tight procedural compartments.

In trespass, as in other actions, Year Book lawyers employed an expansive scope of analogy for their arguments, reasoning freely from "property" in one type of action to "property" in another. True, pleading rules and the limits of available remedies occasionally bedeviled the Year Book lawyers' efforts to make consistent use of their ascriptions of "property" in goods and animals. In actions of trespass, however, lawyers resisted the implication that plaintiffs could lose the "property" in goods, long after a taking, at the moment they chose to proceed with

100. Mich. 6 Hen. 7, pl. 4, fol. 7, 8, 9 (1490) (droit del propriete).
101. Trin. 10 Hen. 7, pl. 13, fol. 27 (1492) (on dating, see 102 Selden Society 151 n.2). Cf. Pasch. 12 Edw. 4, pl. 25, fol. 10 (1472) (property was always to plaintiff).
102. Mich. 11 Hen. 4, pl. 46, fol. 23 (1409) (sheep); Pasch. 12 Edw. 4, pl. 22, fol. 8, 9 (1472) (market); Pasch. 4 Hen. 7, pl. 9, fol. 8 (1489); Hil. 16 Hen. 7, pl. 3, fol. 4, 5 (1501); Mich. 18 Hen. 7, pl. 2, Keilway 46, 72 Eng. Rep. 204 (1502) (land); Colthirst v. Bejushin, 1 Plowden 23, 35, 75 Eng. Rep. 56 (1550); Mich. 15 & 16 Eliz., pl. 2, 3 Dyer 326b, 73 Eng. Rep. 738 (1573). These uses coincide with mentions of "owners" in statutes and parliamentary records. See infra text accompanying notes 153–55.
103. Hil. 8 Hen. 6, pl. 17, fol. 27 (1430); Mich. 22 Hen. 6, pl. 26, fol. 15 (1443); Mich. 22 Edw. 4, pl. 10, fol. 29, 30 (1482); Mich. 2 Ric. 3, pl. 39, fol. 14 (1484); Pasch. 4 Hen. 7, pl. 1, fol. 5 (1489); Mich. 14 Hen. 7, pl. 22, fol. 12, 13 (1498); Port's Notebook, 102 Selden Society 151 (n.d.). Conversely, defendants who did not wish to deny the entirety of their plaintiffs' claims for trespass to goods had to give "color" to the plaintiffs' claims by confessing (in what came to be a legal fiction) that the plaintiffs once had property in the goods or animals taken. See Donald W. Sutherland, Legal Reasoning in the Fourteenth Century: The Invention of "Color" in Pleading, in On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne 182, 183–84 (Morris S. Arnold et al. eds., 1981) (color originated in novel disseisin).
trespass rather than another remedy. Instead, the lawyers reached the conclusion that the “property” must have passed to the trespasser at the time of the taking. What emerges from the body of Year Book cases on “property” is an assumption that the common law could give consistent, substantive descriptions of “who had the property” in the world outside of the courtroom. Later lawyers and political writers would take for granted that property existed independently of the particular forms of action that might be used in an English court. They would dispute whether this property in things of the world predated all government and all human laws.104

Property to Churches

Throughout the Year Book period, the common lawyers found it difficult to adapt their “property” terminology to two situations that straddled their jurisdictional boundary with the church courts of England: church goods and goods of deceased persons in the hands of executors. The lawyers’ puzzlement in these situations suggests that if canon law was a source of “property” terminology in the Year Books, it was a problematic one. Canonists themselves had difficulty in applying an absolute, individual “property” notion to the goods and lands of a church.105 When the common law courts saw writs that ascribed property in goods to a parish church or chapel, a monastery, or a priory, some lawyers objected that such entities could not have “property” in anything.106 Others pointed out the difficulty of ascribing property to the churchwardens, parsons, vicars, abbots, and priors personally.107 Any of these positions could be vacant for long periods of time. Faced with the impossibility of finding property with anyone when the position of abbot or prior was vacant, the lawyers were driven to conclude that

104. See infra text accompanying notes 204–13 (St. German), 222–26 (Fortescue), 234 (Coke). This was also a theme in seventeenth-century political writing.
105. Brian Tierney, Medieval Poor Law: A Sketch of Canonical Theory and Its Application in England 39–43 (1959). Before the twelfth century, some considered the patron saint of the church, or the church building itself, as the holder of the property interest. Later views ascribed the property to Christ, to the whole community of the clergy, or to the entire body of the Christian faithful.
106. Trin. 4 Edw. 2, pl. 32, 42 Selden Society 134 (1311); Trin. 18 Edw. 3, pl. 4, R.S. 231 (1344); Mich. 47 Edw. 3, pl. 55, fol. 23 (1373); Argument in the Inner Temple, Moot Case 21, 105 Selden Society 135 (c. 1490s).
107. Hil. 32 Edw. 1, R.S. 357 (1305); Mich. 11 Hen. 4, pl. 25, fol. 12 (1409); Trin. 9 Hen. 6, pl. 21, fol. 25 (1431); Pasch. 19 Hen. 6, pl. 10, fol. 66 (1441).
property could reside with an ecclesiastical institution. One working assumption—that "property" ought to belong to an individual living human being—had come into conflict with another—that at any given time the "property" had to be somewhere.

**Property to Executors**

Year Book lawyers faced another persistent puzzle when they attempted to determine whether executors had the "property" in goods of a deceased testator. If executors had the "property" in goods, there were suddenly many circumstances that could frustrate the testator's directions when, for example, the unmarried executrix took a husband, or the felonious executor forfeited everything. If the executors did not have the "property," there were suddenly many suits they could not bring to recover the goods or their value. Moreover, if the executors did not have the "property," the alternative was to ascribe it to the dead testator. Lawyers long disagreed on this point, some quite willing to contend that property remained with the dead. Their running dispute illustrated how the term "property" left little room for maneuver. One person or another had to have it; a great deal followed from the determination.

**Property in Replevin**

Defendants "claiming property" in the action of replevin provided the single most frequent use of the term in the Year Books from the 1290s through the late sixteenth century. Replevin, as originally conceived, was an action to recover domestic animals wrongfully "dis-

108. Mich. 7 Edw. 4, pl. 1, fol. 14 (1467); Mich. 9 Edw. 4, pl. 9, fol. 33, 34 (1469). The common lawyers had less trouble finding property in guilds and other bodies corporate. Pasch. 19 Hen. 6, pl. 10, fol. 66 (1441).

109. Property in executors: Hil. 32 Edw. 1, R.S. 357 (1305); Hil. 17 Edw. 3, STATHAM, *supra* note 72, Replegiare pl. 6, fol. 161a (1343); Hil. 39 Edw. 3, pl. [24], fol. 6 (1365); Mich. 13 Hen. 4, pl. 1, fol. 26 (1411); Trin. 15 Hen. 6, STATHAM, *supra* note 72, Executours pl. 15, fol. 87b (1437); Mich. 21 Hen. 6, pl. 1, fol. 1 (1442); Mich. 28 Hen. 6, pl. 19, fol. 4 (1449); Trin. 2 Edw. 4, pl. 1, fol. 13, 14 (1462); Pasch. 10 Edw. 4, pl. 1, fol. 1 (1470). Property in testator: 4 Edw. 2, pl. 3, 42 Selden Society 173 (1310-11); Mich. 17 Edw. 3, pl. 78, R.S. 355, 357 (1343); Mich. 24 Edw. 3, pl. 38, fol. 35 (1350); Mich. 48 Edw. 3, pl. 8, fol. 20 (1374); Pasch. 3 Hen. 4, pl. 8, fol. 15, 16 (1402); Pasch. 18 Hen. 6, pl. 3, fol. 3, 4 (1439); Trin. 37 Hen. 6, pl. 11, fol. 30 (1459); Pasch. 21 Edw. 4, pl. 2, fol. 21, 22 (1481); Trin. 20 Hen. 7, pl. 2, Keilway 61, 63, 72 Eng. Rep. 223 (1505). *Cf.* Pasch. 10 Edw. 4, pl. 1, 47 Selden Society 1, 3 (1470) (testator was no longer in being); Hales v. Petit, 1 Plowden 253, 259, 75 Eng. Rep. 396 (1562) (dead men could have no property).
trained" by a defendant who claimed to be owed services or rent by the plaintiff. When the plaintiff brought the action, the sheriff returned the animals to the plaintiff and the parties could then proceed to determine if services or rent payments were due. An answer the defendant might make at the outset to stop the sheriff from returning the claimed animal was that the plaintiff did not have "property" in the animal in question.

Several sorts of property arguments could work here. The defendant could claim that he or she had the property in the animal, or that some third party had the property, or that the plaintiff and a third party both had the property in common, or that some but not all of a group of co-plaintiffs had the property, or that the co-plaintiffs had separate and not common property in a group of animals taken. The plaintiff who did not concede at once could pursue the matter, but a new writ was necessary. It seems that property, like the right to land, should not be tried without a writ. By the time of Edward Coke, this was a rule of law. The writ of proprietate probanda ordered the sheriff to convene a jury of twelve who would hear the evidence of the parties and determine who had the

110. See 2 Pollock & Maitland, supra note 58, at 576–78. Paul Brand has gathered transcripts of plea rolls and manuscript reports from the 1270s onward in replevin cases where property in the chattels came into issue. I thank Dr. Brand for providing me with copies of these sources.

111. To defendant: 21 Edw. 1, R.S. 107 (1293); Hil. 32 Edw. 1, R.S. 55 (1304); 2 Edw. 2, pl. 16A, 17 Selden Society 65 (1308–09); Mich. 31 Edw. 3, Statham, supra note 72, Gager de Deliverans pl. 6, fol. 107a (1357); 1 The Reports of Sir John Speelman, supra note 65, at 142 (1533). To third party: Trin. 33 Edw. 3, Statham, supra note 72, Replegiare pl. 5, fol. 161a (1359); Hil. 6 Hen. 4, pl. 17, fol. 2 (1405); Trin. 2 Hen. 6, pl. 10, fol. 14 (1424); Mich. 9 Hen. 6, pl. 14, fol. 39 (1430); Hil. 19 Hen. 6, Statham, supra note 72, Barre pl. 75, fol. 35b (1441); Hil. 20 Hen. 6, pl. 6, fol. 18 (1442); Trin. 5 Edw. 4, pl. 19, fol. 5 (1465); 1 The Reports of Sir John Speelman, supra note 65, at 81 (1527); but see Mich. 21 Edw. 4, pl. 24, fol. 54 (1481) (plaintiff in replevin need not have property). To plaintiff and third party: Trin. 33 Edw. 3, Statham, supra note 72, Replegiare pl. 5, fol. 161a (1359). To fewer than all co-plaintiffs: 2 Edw. 2, pl. 62, 17 Selden Society 128 (1308–09); 1 The Reports of Sir John Speelman, supra note 65, at 202 (1522); Constable, supra note 83, at 229 (1489). To co-plaintiffs severally and not in common: Pasch. 11 Hen. 6, pl. 17, fol. 31 (1433); Pasch. 34 Hen. 6, pl. 8, fol. 37 (1456); Pasch. 10 Edw. 4, pl. 8, 47 Selden Society 36 (1470); Mich. 12 Hen. 7, pl. 3, fol. 4, 5 (1496); 1 The Reports of Sir John Speelman, supra note 65, at 202 (1522).

112. Mich. 30 Edw. 3, pl. [40], fol. 22 (1456). Paul Brand has found plea rolls and manuscript reports of writs of proprietate probanda from 1290 onward. I thank Dr. Brand for providing me with copies of these sources.

113. Edward Coke, The First Part of the Institutes Or, A Commentary Upon Littleton 145b (London 1628); On the original logic of the proposition that no one need answer for his or her freehold except by the king's writ, see S.F.C. Milsom, The Legal Foundations of English Feudalism (1976).
property in the animals. A defendant who falsely claimed property in the animals not only saw them returned to the plaintiff, but paid a fine to the king and damages to the plaintiff for the taking.

By the 1470s, when lawyers were compiling the earliest alphabetical “abridgements” of the Year Books, the cases on “claiming property” in replevin formed a recognized category under the title Proprietate probanda.114 Even so, the writ of proprietate probanda seemed to be one that the lawyers did not encounter very often. Several Year Book cases explained the writ’s operation in very basic terms, as did later legal sources.115 What is most notable about the general run of replevin cases is the lawyers’ apparent lack of interest in how the sheriff and jury would go about determining who had the property in the animals.116 Some parties’ assertions of property might have been groundless, like that of the hypothetical plaintiff put forward by Justice Fortescue in 1452, who sought to “buy” a horse from an unwilling seller by bringing a replevin action for it, getting the sheriff to deliver it, and then paying damages in trespass.117 One can imagine many other instances, however, in which the parties honestly disputed the “property” of an animal, and the jury had to find it out as well as they could.

*Absolute and Relative Property*

Lawyers’ use of “property” terminology increased steadily in the late fifteenth-century Year Books. Pleadings grew more complex, and the Year Book lawyers found themselves more and more often concerned

114. STATHAM, *supra* note 72; FITZHERBERT, *supra* note 39; Lincoln’s Inn MS Hale 181, fol. 236r. A later work, ROBERT BROOKE, *LA GRAUNDE ABRIDGEMENT* (London 1573) had an alphabetical entry for “Propertie.” No finding aid or index in any early or modern edition of Year Book material identified the whole range of “property” uses. Most indices omitted the term altogether.

115. Mich. 30 Edw. 3, pl. 64, fol. 30 (1356); Mich. 7 Hen. 4, pl. 5, fol. 27, 28 (1405); Trin. 7 Hen. 4, pl. 3, fol. 47 (1406); Hil. 14 Hen. 4, pl. 32, fol. 24 (1413); Mich. 31 Hen. 6, in STATHAM, *supra* note 72, Proprietate Probanda pl. 5, fol. 138a (1452); Hil 31 Hen. 6, pl. 1, fol. 12 (1453); Mich. 39 Hen. 6, pl. 47, fol. 35 (1460); Mich. 21 Edw. 4, pl. 35, fol. 64 (1481); Constable, *supra* note 83, at 228–232 (1489); 1 THE REPORTS OF SIR JOHN SPELMAN, *supra* note 65, at 189, 204 (n.d); COKE, *supra* note 113, at 145b. One reporter reproduced the writ, Mich. 1 Edw. 4, pl. 18, fol. 9 (1461); and another noted that the writ was read aloud in court, but that he did not hear it, Mich. 11 Hen. 4, pl. 10, fol. 4 (1409).

116. The determination of property in the country was not a matter of record, and plaintiffs tried occasionally to relitigate the issue. Mich. 30 Edw. 3, pl. [40], fol. 22 (1356).

117. Mich. 31 Hen. 6, STATHAM, *supra* note 72, Proprietate Probanda pl. 5, fol. 138a (1452); 3 FITZHERBERT, *supra* note 39, Proprietate Probanda pl. 4 [5], fol. 26v (1452).
to find out which of the persons involved in a complex web of bailments, rentals, gifts, deaths, devises, and trespasses had the "property" in goods at a particular time. This "property" took on a more and more absolute cast. In 1483, for example, one lawyer tried to force the opposing party to plead specifically where a third party had had property in a chest. The plea was rejected by the court on the argument that if one had property in a thing in some certain place, one had it everywhere in the world—one could not have property in a certain place, but had to have it in every place. 118

Underlying the whole course of the common lawyers' arguments about property in the Year Books were assumptions that the "property" of goods had to belong to someone, and would ordinarily belong to only one individual at any given time. 119 All goods in the kingdom in which no one had property were adjudged to the king by his prerogative, according to Chief Justice Gascoigne in 1406. 120 In the exceptional circumstance, two or more individuals might have property "in common," but only if they shared in acquiring the goods or animals by a joint purchase or gift. 121 Two persons occupying different roles in a transaction would not both have the same "property." 122 The ascription of "property" carried with it a great many consequences, not least the pleading advantages summed up in the catch-phrase "he who has the property has the action." 123

The lawyers' general acceptance of "absolute" property did not preclude them from finding instances of "relative" property. In one of the rare cases of replevin in which the lawyers went one step beyond the blank claim and blank finding of property, the defendant who had taken some animals was able to prove in 1409 that the property belonged to a third party at the time of the taking, but the plaintiff seeking replevin was able to prove that this same third party had leased the animals to the plaintiff. The Chief Justice concluded that "as against" the defen-
dant, the plaintiff as lessee had property in the animals. In 1489, a lawyer explained in one of the formal learning exercises at Lincoln's Inn that the lessee of domestic animals had property "for a term" while the lessor had the "whole" or "entire property." More instances of "relative" property followed in the first decade of the sixteenth century. Lawyers found that one who held animals under a lease had "good property for a time," as did one who held goods as a pledge. One who held goods as bailee for their safekeeping had a "special property," property "against all strangers" but not against the bailor. These references to "special property" or "property for a time" held by lessees and bailees demonstrated the growing influence of notions of an absolute and unitary "whole property" against all the world, held by the original possessors of goods and animals.

New Property for Old Problems

The Year Book lawyers had long debated whether one who wrongfully occupied another's land for long enough to plant, raise, and harvest an agricultural crop could then keep the harvested grain. Another long-standing question was whether those who hunted wild animals on the lands of others were entitled to the killed or captured animals, as against the claims of the landholders. After 1450, lawyers began to use the language of "property" to address these and similar topics. Their disputes led them to speculate how "property" could first be acquired in things that had not previously existed and in animals that had not previously belonged to anyone. For arguments on these subjects, the common lawyers drew upon Roman law and theological debates on the origins of property.

Property in Crops. The Year Book lawyers agreed that standing crops, like standing trees, were part of the land; only when severed from the

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124. Mich. 11 Hen. 4, pl. 39, fol. 17 (1409) (Thirning C.J.). Cf. Mich. 1 Edw. 4, pl. 18, fol. 9 (1461) (defendant was lessor).
125. Constable, supra note 83, at 231 (1489).
126. Hil. 21 Hen. 7, pl. 23, fol. 14, 15 (1506).
127. Mich. 20 Hen. 7, pl. 1, fol. 1 (1504).
128. Hil. 21 Hen. 7, pl. 23, fol. 14, 15 (1506); Mich. 21 Hen. 7, pl. 7, Keilway 71, 72 Eng. Rep. 231 (1506).
129. I use "absolute" here in the modern sense, rather than its weaker sixteenth-century sense. See S.B. Chrimes, The Constitutional Ideas of Dr. John Cowell, 64 Eng. Hist. Rev. 461, 481 n.1 (1949).
130. For a full discussion extending to manuscript sources, see Baker, supra note 65, at 210-15.
land could they be "property." They disagreed whether the property went to the landholder or to the person who severed the timber or grew and harvested grain from the land. In 1456, one lawyer argued that after timber was cut, it became the property of the taker, because when no longer annexed to the freehold land the "nature" of the wood was altered. In 1458, another lawyer contended that seeds, when put in the land, became the property of the person whose soil it was, and when harvested remained the property of the landholder. By the 1470s, a new generation of common lawyers discovered a distinction between the two situations. Trees and hay grew on the land by "act of God" and would be there whether a wrongful occupier held it or not, so they should go to the rightful possessor of the land. On the other hand, crops that were sown by the wrongful occupier would not have come into being but for this act of human labor, so they should go to the wrongful occupier.

Later common lawyers continued to elaborate these points, stressing that while both harvested grain and cut timber changed their nature and became "property" for the first time by the acts of the wrongful occupier, the occupier would only have "property" in crops grown by the occupier's own "manual labor." In 1490, some tried to analogize from this situation to a question that would have been familiar to every student of Roman law: who should prevail when one person had made shoes from another person's leather. English common lawyers had probably not conceived of this puzzle as a "property" issue since the time of Bracton. The lawyers argued in 1490, with appropriate citation to Bracton's treatise, that the property was altered if the nature of the thing itself was altered or mixed with another thing, as when grain was

131. Mich. 37 Hen. 6, pl. 12, fol. 6 (1458). Thus it was argued that those with "rights of common" to graze animals on land had no "property" in the grass. 1 THE REPORTS OF SIR JOHN SPELMAN, supra note 65, at 91 (1522).

132. In an early case, one who leased a field from a life tenant could reap the grain he sowed after the life tenant's death. Hil. 19 Edw. 3, pl. 23, R.S. 465, 467 (1345). But one who bought trees from the holder of a limited interest in land acquired "property" in the timber "conditionally" and had to cut them down before the landholder's interest ended. Hil. 18 Edw. 4, pl. 1, fol. 21, 1 (1479).

133. Mich. 35 Hen. 6, pl. 3, fol. 2 (1456).

134. Mich. 37 Hen. 6, pl. 20, fol. 10 (1458).

135. Pasch. 12 Edw. 4, pl. 10, fol. 4, 5 (1472); Trin. 15 Edw. 4, pl. 11, fol. 31 (1475).

136. Mich. 2 Hen. 7, pl. 4, fol. 1, 2 (1486); 1 THE REPORTS OF SIR JOHN SPELMAN, supra note 65, at 215 (1534).

137. See 2 BRACTON, supra note 25, at 45–47 (fols. 9b–10b).
made into malt, or silver melted with gold, or trees cut down and made into a house, or, as in this case, leather mixed with thread.\textsuperscript{138}

Property in Wild Animals. The introduction of “property” terminology in cases of capturing or killing wild animals can be traced back to the 1420s, when lawyers stated that a landholder had property in wild animals only for the time they remained on his or her land.\textsuperscript{139} By 1444, common lawyers had begun to take a position that was repeated in many cases throughout the 1490s and into the 1520s: no one could have property in wild animals, but landholders might have something less, an “interest” in the beasts, that permitted them to grant rights to hunt and to hold bailiffs to account for depredations.\textsuperscript{140} Many invoked the Roman tag that \textit{ferae naturae} were \textit{nullius in bonis} or \textit{nullius in rebus}, sometimes citing Bracton’s treatise.\textsuperscript{141} Common lawyers probably recognized the classical source of their terminology in this regard.\textsuperscript{142}

Where Roman jurists and medieval civilians had stressed the element of “capture” in the acquisition of property, the common lawyers reasoned, however, from the “labor” or “industry” expended in the chase or the domestication, as they had in other cases.\textsuperscript{143}

It is in this context that Year Book lawyers began to explain the origin of human “property” in things of this world. In the course of legal argument in 1520, for example, a lawyer stated that at the beginning of the world all animals were obedient to Adam, but when Adam sinned

\textsuperscript{138} Mich. 6 Hen. 7, pl. 4, fol. 7, 8, 9 (1490). See also Anon., Popham 38, 79 Eng. Rep. 1157 (K.B. 1594) (you mix your hay with mine, embroider my garment, cast your gold into my melting pot).

\textsuperscript{139} Trin. 3 Hen. 6, pl. 34, fol. 55 (1425); Pasch. 7 Hen. 6, pl. 41, fol. 36 (1429).

\textsuperscript{140} Trin. 22 Hen. 6, pl. 11, fol. 59 (1444); Mich. 18 Edw. 4, pl. 12, fol. 14 (1478); Mich. 7 Hen. 7, pl. 1, fol. 16 (1491); Mich. 10 Hen. 7, pl. 12, fol. 6, 7 (1494); Trin. 10 Hen. 7, pl. 28, fol. 30 (1495); Mich. 12 Hen. 7, pl. 5, fol. 25 (1496); Mich. 12 Hen. 7, pl. 2, Keilway 30, 72 Eng. Rep. 187 (1498); Argument in the Inner Temple, Moot Case 57, 105 Selden Society 168 (c. 1490s); 1 THE REPORTS OF SIR JOHN SPELMAN, supra note 65, at 64 (c. 1511–13); Trin. 12 Hen. 8, pl. 3, fol. 3, 4, 5 (1520); Mich. 12 Hen. 8, pl. 2, fol. 9, 10, 11 (1520); Mich. 14 Hen. 8, pl. 1, fol. 1 (1523). Cf. Mich. 49 Hen. 6, pl. 10, 47 Selden Society 124 (1470) (possessor of nests had property in fledgling sparrowhawks).

\textsuperscript{141} 2 BRACTON, supra note 25, at 41–42 (fols. 8, 8b). Cf. \textit{id.} at 166–67 (fot. 55b).

\textsuperscript{142} Note, for example, the classical motif in Mich. 12 Hen. 8, pl. 2, fol. 9, 10, 11 (1520) (\textit{bos mortuus non est bos; cervus mortuus non est cervus, homo mortuus non est homo}).

\textsuperscript{143} On the Roman and civilian doctrine, see Charles Donahue, Jr., Animalia ferae naturae: \textit{Rome, Bologna, Leyden, Oxford and Queen's County, N.Y., in STUDIES IN ROMAN LAW IN MEMORY OF A. ARTHUR SCHILLER 41–55} (Roger S. Bagnall & William V. Harris eds., 1986).
they had rebelled, and now were in common, so that a person who took a wild animal or bird, and by industry, labor, and diligence made it tame by restraining its liberty, acquired property in it.\textsuperscript{144} Such appeals to an original and "natural" acquisition of property, a "creation story" for property, became more frequent after 1550 in the reports of Edmund Plowden. God committed all worldly things to the order and disposal of men,\textsuperscript{145} and so while God made men lords of the earth and possessors of all things in it, just how much of the earth and of the things therein one man should have, and how much another, God left to be ascertained and settled by mankind, by laws to be made by them for that purpose.\textsuperscript{146} Filling out their creation story, lawyers could be heard to argue that "ever since property has been among men," they have been able to leave it by will.\textsuperscript{147} Not all property, however, was equally available for all persons. God made gold and silver so people could trade, for the good of the whole nation, and thus the king must have the property in any gold and silver mines, not the proprietors of the soil.\textsuperscript{148}

\textit{Property in Land}

The lone exception I have found to the linguistic split between "property" in goods and "right" in land in the first two centuries of Year Book reporting is a King's Bench case of 1405. Chief Justice Gascoigne was reported to have said that if a writ of trespass were brought for cutting down the plaintiff's trees, a defendant could "claim property in the freehold" and thereby get a decision on who should hold the land.\textsuperscript{149} Gascoigne's words also appear, without citation or attribution, and in slightly altered form as "property in the soil," in the earliest printed edition of the \textit{Old Natura Brevium}, an elementary legal text much in use in the fifteenth century.\textsuperscript{150} The nature of the defendant's plea was irrelevant to Gascoigne's point, which was about review in the

\textsuperscript{144} Trin. 12 Hen. 8, pl. 3, fol. 4 (1520) (Brooke).
\textsuperscript{145} Colthirst v. Bejushin, 1 Plowden 21, 31, 75 Eng. Rep. 50 (1550).
\textsuperscript{146} Sharington v. Strotton, 1 Plowden 298, 308, 75 Eng. Rep. 469 (1565).
\textsuperscript{147} Graysbrook v. Fox, 1 Plowden 275, 280, 75 Eng. Rep. 427 (1565).
\textsuperscript{148} The Case of Mines, 1 Plowden 310, 315–316, 75 Eng. Rep. 480 (1567).
\textsuperscript{149} Hil. 6 Hen. 4, pl. 6, fol. 1 (K.B. 1405). The same language is found in the earliest printed report of this case, Richard Tottel's edition of 1553, 6 Hen. 4, pl. [6], fol. [62r, 62v]. A reference to \textit{severall propriet\ae} in land in Mich. 12 Ric. 2, pl. 17, Ames 67, 68 (1388), is a misreading of Lincoln's Inn Hale MS 77, fol. 251, l. 6 (\textit{severall tenaunce}). A genuine, though specialized, usage in Mich. 11 Hen. 4, pl. 12, fol. 5 (1409), described the right to cross one's own land, by analogy to a right of way across another's land, as "the property (propriete) that he had in the soil."
\textsuperscript{150} \textit{Old Natura Brevium} fol. 20v (London c. 1518).
King's Bench of actions commenced with and without writ. "Claiming property" was the common terminology in actions for replevin of, or trespass to, goods; "property" was the appropriate term for leases of land for terms of years. Gascoigne's stray remark shows that there were contexts in which an English lawyer could think and speak of "property" in freehold land, particularly in the King's Bench, where relatively few actions about landholding were heard. In occasional cases before and after, lawyers used analogies from sales of land to make arguments about "property" in sales of goods, in contexts that came very close to acknowledging something called "property" in land.151

"Property of land" reappeared in an action for replevin in 1493, and the phrase is found again in a report of James Dyer in 1549 on the king's right to a debtor's goods and land.152 "Owners" of land appear in statutes dating from 1491, and in case reports from 1502.153 The language of statutes changed along with that of the lawyers' case reports. The preamble of an important Reformation statute in 1532 asserted that "laws temporal [make] trial of property of land and goods."154 Only with Plowden's reports in the later sixteenth century, however, did references to property and *jus proprietatis* in land, and to "proprietors" and "owners" of land, begin to appear with any frequency.155 The references to "property" in goods and animals still far outnumbered those to land, and common lawyers probably understood that the term ordinarily did not encompass land. It was possible to say in 1546, for example, that in England aliens might "have property," and buy and sell, while clearly meaning that aliens could hold goods but not land.156

When sixteenth-century common lawyers raised their sights from the

151. Mich. 37 Hen. 6, pl. 18, fol. 8 (1458); Pasch. 17 Edw. 4, pl. 2, fol. 1, 2 (1478). For an early example of analogy to property in a case about land, see Pasch. 17 Edw. 2, fol. 543 (1324).
152. Hil. 8 Hen. 7, pl. 3, fol. 10 (1493); Stringefellow v. Brownesoppe, 1 Dyer 67b, 73 Eng. Rep. 143 (1549).
153. 7 Hen. 7, ch. 2, sec. 5 (1491); 11 Hen. 7, ch. 17 (1494); Mich. 18 Hen. 7, pl. 2, Keilway 46, 72 Eng. Rep. 204 (1502). See also 1 Hen. 8, ch. 5, sec. 4 (1509) (owner or proprietary); 21 Hen. 8, ch. 11 (1530) (owners and occupiers of ground); 32 Hen. 8, ch. 7, sec. 1 (1540) (owners and proprietaries). For earlier mentions of owners of goods, see 4 Rotuli Parliamentorum 390, col. 1 (1432); 6 id. 65, col. 2 (1473); 4 Hen. 7, ch. 10, sec. 3 (1487).
154. 24 Hen. 8, ch. 12, sec. 1(6) (1532).
155. Sharington v. Strotton, 1 Plowden 298, 308, 75 Eng. Rep. 469 (1563); The Case of Mines, 1 Plowden 310, 315-16, 75 Eng. Rep. 480 (1567); Davy v. Pepys, 2 Plowden 438, 440-41, 75 Eng. Rep. 662 (1573); Paramour v. Yardley, 2 Plowden 539, 543, 75 Eng. Rep. 800 (1579).
156. 38 Hen. 8, Brooke's New Cases 13, 73 Eng. Rep. 852 (1546).
framework of individual cases to the loftier views of their common law “as a whole,” a more general notion of “property” emerged. By joining land and goods under a single term, the parliamentary drafters of 1532 could say that the king’s common law had as its chief purpose the determination of property in both these important classes of things. The new language of property, beginning in the legal writings of the sixteenth century, was pitched at a higher plane of generalization. Lawyers more often referred to property without specifying the particular object in dispute. By the early seventeenth century, lawyers and political writers began to say that property was at least as important and fundamental as the common law itself.157

Property Beyond the Common Law Literature

The justices and serjeants of the king’s courts of common law were a tiny group, numbering just a few dozen at any one time. Their technical discourse was quite specialized, but they were all speakers of the English language in constant communication with lay persons about matters legal and nonlegal. The lawyers understood that their legal language was a specialized jargon. They may have deliberately tried to make it so. The usage of English common lawyers is of little help, then, in fixing the meaning or context of the word “property” shared among all English speakers at the time. Historical dictionaries, concordances, and glossaries of pre-seventeenth-century nonlegal texts, on the other hand, provide some information on the contemporary vernacular use of the terms “property” and “owner” in England.158

Before the sixteenth century, laymen writing in English applied the term “property” very rarely to land, if at all. Anglo-Saxon texts, legal and nonlegal, had a term for owning (ågenung), owner (ågend, ågend-freá), and what was owned (ågen, ågan).159 This was a single term that served to translate what Latin authors distinguished as property (proprietas), possession (possessio), and the lordship (dominium) both of

157. See infra text accompanying notes 228–30, 267–69.
158. I started with ANGLO-NORMAN DICTIONARY 560, 561 (William Rothwell ed., 1977–); MIDDLE ENGLISH DICTIONARY 1399–1408 (Robert E. Lewis ed., 1956–). For reasons to prefer the study of usage in surviving vernacular texts to usage in Latin sources, see Gurevich, supra note 62, at 2.
159. JOSEPH BOSWORTH, AN ANGLO-SAXON DICTIONARY 28–29 (T. Northcote Toller ed., London 1882–98); ALISTAIR CAMPBELL, ENLARGED ADDENDA AND CORRIGENDA TO AN ANGLO-SAXON DICTIONARY 3 (1972).
temporal lords and of Our Lord in heaven.\textsuperscript{160} Writers of the Anglo-Saxon law codes used the terms \textit{ágend} and \textit{ágend-freá} indifferently for the "lord" of a servant or slave and for the rightful possessor of stolen goods or animals.\textsuperscript{161} They used the same terms whether addressing the responsibilities of the lord/owner for injury done by servants, slaves, or animals, or describing the right to obtain recovery or compensation for loss.\textsuperscript{162} One late (circa 1020s) Anglo-Saxon source, a charter by a Yorkshire cleric, described \textit{ágendland}, land that was adjacent to a lord's demesne land (\textit{inland}) and was neither under lease (\textit{laer}) nor under service obligation (\textit{weorcland}).\textsuperscript{163} This is the only recorded reference I could find to "own-land" or "owned-land" in Anglo-Saxon or Old English.

"Property" is found in Anglo-Norman texts from the early 1180s and in Middle English texts from the 1380s. The most common meaning, from the age of Geoffrey Chaucer and John Gower down to the time of William Shakespeare, was that of an "attribute" or "characteristic" of a person, thing, or abstraction.\textsuperscript{164} When "property" had to do with a person's interest in a thing—the sense in which lawyers applied the

\textsuperscript{160} E.g., Caedmon, \textit{Genesis}, l. 2141, \textit{in The Junius Manuscript} 64 (George Philip Knapp ed., 1931) (Genesis 14:22); Cynewulf, \textit{Crist and Satan}, l. 1198, \textit{in Codex Exoniensis: A Collection of Anglo-Saxon Poetry} 73, l. 32 (Benjamin Thorpe ed., London 1842).

\textsuperscript{161} E.g., II Canute, ch. 24, sec. 1, \textit{in The Laws of the Kings of England from Edmund to Henry I}, at 186 (A.J. Robertson ed. & trans., 1925); Hlothhere & Eadric, chs. 1, 3, \textit{in The Laws of the Earliest English Kings} 18 (F.L. Attenborough ed., 1963).

\textsuperscript{162} E.g., Hlothhere & Eadric, chs. 1, 3, \textit{in Laws of the Earliest English Kings}, \textit{supra} note 161, at 18; Inc, ch. 42, sec. 1; ch. 53, \textit{in id.} at 52–54; III Aethelred, ch. 4, sec. 1, \textit{in id.} at 66.

\textsuperscript{163} MS verso of The York Gospels in the Dean and Chapter Library, York, ff. 156b, 157, \textit{in Anglo-Saxon Charters} 166, ll. 11, 16, 26 (A.J. Robertson ed., 1939). The term \textit{ágendland} is not recorded elsewhere. \textit{Id.} at 415.

\textsuperscript{164} See, e.g., \textit{Geoffrey Chaucer, The Tale of Melibeus}, l. 2364; \textit{The Nun's Priest's Tale}, l. 4142, \textit{in Canterbury Tales} 210, 274 (Walter S. Skeat ed., Oxford 1894); \textit{Boethius, De Consolatione Philosophiae} 54, 100, 173–74 (Richard Morris ed., London 1886) (Geoffrey Chaucer trans.) (bk. 3, prose 6, l. 1435; bk. 3, met. 11, l. 2847; bk. 5, prose 6, ll. 5028, 5083); \textit{John Gower, Confessio Amantis}, bk. 7, ll. 63, 157, 369, 432, 601, 896, 976, 1001, 1159, 1177, 1237, 1492, \textit{in The Complete Works of John Gower: The English Works} 235–66 (G.C. Macaulay ed., 1901); \textit{William Shakespeare, A Midsummer Night's Dream}, 3:2:368; \textit{The Life and Death of King Richard II}, 3:2:131; \textit{The Second Part of King Henry IV}, 4:2:99; \textit{Hamlet}, 2:1:104, 3:2:247; \textit{As You Like It}, 3:2:26; \textit{Measure for Measure}, 1:1:3; \textit{All's Well That Ends Well}, 2:3:131; \textit{Antony and Cleopatra}, 1:1:60 [all citations to 1–3 \textit{The Complete Oxford Shakespeare} (1987)].
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term\textsuperscript{165}—the context in nonlegal texts is usually religious, and the connotation is overwhelmingly negative. Dozens of surviving manuscripts from the fourteenth and fifteenth centuries praised monastic establishments for holding all goods in common and shunning “property,” or condemned them for doing the opposite.\textsuperscript{166} To have “property” of goods (or goods “in proper”) was a sin, and monks guilty of this vice were denounced as “proprietaries” or “owners.”\textsuperscript{167}

What violated the monastic vow of poverty was no more virtuous for the laity, according to devotional tracts from the mid-fifteenth century onward.\textsuperscript{168} As one allegorical verse of the 1420s put it, property

\begin{itemize}
\item \textsuperscript{165} A rare mention of “properties” as attributes or characteristics in the Year Books is Mich. 39 Hen. 6, pl. 18, fol. 15 (K.B. 1460) (the two properties that rejoinders must have).
\item \textsuperscript{166} E.g., \textit{Raymond du Puy, The Hospitallers’ Riwle} 5, l. 141, Anglo-Norman Texts no. 42 (K.V. Sinclair ed., 1984) (c. 1185); \textit{Jack Upland, in Chaucerian and Other Pieces} 196, sec. 41, ll. 190, 194 (Walter W. Skeat ed., Oxford 1897) (1402); \textit{A Stanzaic Life of Christ} 345, l. 10157, Early English Text Society no. 166 (Frances A. Foster ed., 1926) (c. 1400); \textit{John Capgrave, Life of St. Augustine} 44, l. 4, Early English Text Society no. 140 (J.J. Munro ed., 1910) (c. 1450).
\item \textsuperscript{167} \textit{The French Text of the Ancrene Riwle} 111, ll. 30–31, Early English Text Society no. 240 (W.H. Trethewey ed., 1958) (c. 1325); \textit{The Book of Vices and Virtues} 33, ll. 23, 24, Early English Text Society no. 217 (W. Nelson Francis ed., 1942) (trans. of Lorens d’Orléans, Somme Le Roi, c. 1375); 6 \textit{Ranulph Higden, Polychronicon... Monachi Cestrensis} 345, Rolls Series no. 41 (Joseph Rawson Lumby ed., London 1876) (John Trevisa trans., ante 1387); \textit{A Pistle of Preier, in Deonise Hid Duiunite and Other Treatises} 58, l. 9, Early English Text Society no. 231 (Phyllis Hodgson ed., 1955) (c. 1390); \textit{The Declaring of Religion, in Twenty-Six Political and Other Poems} 81, stanza 8, l. 59, Early English Text Society no. 124 (J. Kail ed., 1904) (c. 1421); \textit{id.} at 83, stanza 18, l. 141; \textit{Comment on the Testament of St. Francis, in The English Works of John Wyclif} 49, Early English Text Society no. 74 (F.D. Matthew ed., London 1880) (c. 1420); \textit{Optional Expansion to Sermon 11, First Sunday in Lent, in Lollard Sermons} 142, l. 406, Early English Text Society no. 294 (Gloria Cigman ed., 1989) (c. 1425); \textit{Nicholas Love, The Miroour of the Blessed Lyf of Jesu Christ} 318 (Lawrence F. Powell ed., 1908) (trans. of Bonaventura, Meditationes Vitae Christi, 1430); \textit{Additions to the Rules of St. Saviour and St. Bridge, in The History and Antiquities of Syon Monastery} 261 (George James Aungier ed., London 1840) (c. 1450); \textit{Life of St. Cuthbert in English Verse} 60, l. 2054, Surtees Society no. 87 (James Thomas Fowler ed., Durham 1891) (c. 1450); \textit{The boke of the Craft of Dying, in 2 Yorkshire Writers: Richard Rolle of Hampole and His Followers} 417 (C. Horstman ed., London 1896) (c. 1500). \textit{See also John Wycliffe, Tractatus de Apostasia} 30, l. 28, Wyclif Society no. 9 (Michael Henry Dzwiecki ed., London 1889) (1383) (Latin).
\item \textsuperscript{168} \textit{Jan van Ruysbroeck, Treatise of Perfection of the Sons of God, in The Chastising of God’s Children} 238, l. 7 (Joyce Bazire & Eric Colledge eds., 1957) (c. 1450); \textit{Guillaume de Deguleville, The Pilgrimage of the Life of Man} 658, ll. 24591, 24593, Early English Text Society Extra Series no. 83 (F.J. Furnivall ed., 1901) (John Lydgate trans., ante 1475); \textit{Reginald Pecock, The Donet} 52, l. 8, Early English Text
was the huge boil, pimple, or hump on the rich man's back that would prevent him from passing through the eye of the needle into heaven. 169 In contemporary translations, Thomas à Kempis's *De Imitatio Christi* enjoined laypersons to stand "without all manner of property." 170 So did Desiderius Erasmus's *Enchiridion Militis Christiani, 171* while Thomas More's *Utopia* made the argument that "this property be exiled and banished." 172 There were stages: one virtuous person might give up all claim to worldly riches "in his own property" and yet hold these same riches "in common" with others; another might renounce all "civil lordship," individual or in common, upon "unmoveable riches" only; another might renounce this "civil lordship" upon "worldly riches moveable and unmoveable." 173

In a few of these medieval condemnations of property, virtuous "poverty" was the opposite term. 174 Much more frequently, however, the opposite of having "property" in goods was sharing goods in "common." For the religious writers, property in a thing meant selfish individual appropriation, storing up more than was needful, and refusing to share. Consistent with this sense of the term, references to "those who have no property" in these texts do not denote the destitute, but the "monk, nun, or espoused wife" (here lawyers would agree) and those who "get their food in laboring." 175 Yet holding goods in "common" did not mean sharing with everyone. 176 A good Franciscan could receive things

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Society no. 156 (Elsie Vaughan Hitchcock ed., 1921); *Thomas à Kempis, The Earliest English Translations of the First Three Books of the De Imitatione Christi* 112, l. 28, Early English Text Society Extra Series no. 63 (John K. Ingram ed., London 1893) (ante 1500).

169. *De Gueuleville, supra* note 168, at 490, ll. 18353–69.

170. *Kempis, supra* note 168, at 112, l. 28 (*sine . . . omni proprietate in orig.*).

171. *Desiderius Erasmus, Enchiridion Militis Christiani: An English Version* 152, l. 10, Early English Text Society no. 282 (Anne M. O'Donnell ed., 1981) (English trans. 1533–34); *id.* at 158, l. 31.

172. *Thomas More, Utopia* [44] (Raphe Robinson trans., London 1551); *Thomas More, Utopia, in 4 The Complete Works of St. Thomas More* 104, l. 17 (Edward Surtz & J.H. Hexter eds., 1965) (*sublata prorsus proprietate in orig.*). Thomas More did not use the term elsewhere in *Utopia*, though he recurred several times to the evils of private ownership.

173. *Pecock, supra* note 168, at 52, l. 8.

174. *De Gueuleville, supra* note 168, at 490, ll. 18353–64; *id.* at 658, ll. 24593–94; *Erasmus, supra* note 171, at 158, l. 31.

175. *5 Cursor Mundi* 1556, l. 28389, Early English Text Society no. 68 (Richard Morris ed., London 1878) (ante 1400); *The Romaunt of the Rose* 86, l. 6594 (Frederick J. Furnivall ed., 1911) (ante 1425).

176. "In the earlier period the word common implied common exclusiveness quite as much as common enjoyment." *Tawney, supra* note 51, at 238.
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"for the use" and yet not receive them "for property." Thomas Cranmer condemned the "subtle sophistical term, proprium in communi" by which the monastic houses amassed riches while their members professed to observe a vow of poverty. Literate, sophisticated English speakers would probably have understood the term "property" against this contested religious backdrop of monastic virtues and circumventions. These texts serve as a warning that we may not simply rely on loose etymology to conclude that property was always "proper," that wealth was always "well," or that goods were always "good."

A few of the medieval English sources mention property in a more neutral, secular context. Though having property in goods was bad, taking another's goods as one's own property was worse. Reaping where another had sown, John Gower wrote, was to "make common of property." The same author wrote that wars began when a rich king or lord would "ask and claim property in a thing to which he had no right, but only his great might," and that the Jews, "dispersed in all lands," lived "without property of place." A churchman, Reginald Pecock, was the only nonlawyer I found describing the relation of property to law in medieval England. In two works from the 1440s, Pecock wrote that the virtuous ruler should "make and ordain to be

177. The Testament of St. Francis, in 1 Monumenta Franciscana 568, Rolls Series no. 4 (J.S. Brewer ed., London 1858) (note on The Pouerte of the Freers Minor, c. 1525); see Gregory IX, Quo elongati (1230) in Bullarii Franciscani Epitome 230a (C. Eubel ed., 1908) ("We say therefore that [the friars] ought not to have proprietas, either individual or common, but may have the usus alone of the utensils and books and moveable goods which they are permitted to have... leaving the dominion of their settlements and houses to those to whom it is known to pertain."); Nicholas III, Exiit qui seminal (1279), in id. at 293a–293b; Decretal VI 5.12.3 in 2 Corpus Iuris Canonici cols. 1109, 1113–14 (Emil Friedberg ed., Leipzig 1879); M.D. Lambert, Franciscan Poverty 86–89, 141–45 (1961). Cf. id. at 50–51 (no mention of proprietas or dominium in St. Francis's own writings).

178. Thomas Cranmer, Of Good Works, in Miscellaneous Writings and Letters 147 (John Edmund Cox ed., Cambridge 1846) (1560 & 1562 editions add "that is to say, proper in common").

179. For such arguments, see Gottfried Dietze, In Defense of Property 9–11 (1971); V.G. Kiernan, Private Property in History, in Family and Inheritance: Rural Society in Western Europe, 1200–1800, at 361, 364–65 (Jack Goody et al. eds., 1976).

180. Gower, Confessio Amantis, bk. 5, l. 6098, in 3 Complete Works, supra note 164, at 113; The Tale of Beryn 101, l. 3375, Early English Text Society Extra Series no. 105 (W.A. Clouston ed., 1909) (c. 1460). See also Jacob's Well 138, l. 27, Early English Text Society no. 115 (Arthur Brandeis ed., 1900) (c. 1450) (the rich sinner should make restitution to the "owners" of his goods).

181. Gower, supra note 164, at 194 (bk. 2, l. 2377).

182. Id. at 289 (bk. 3, l. 2326).

183. Id. at 449 (bk. 5, l. 1727).
made, with common assent of the people, laws to rule all his liegemen in contracts and covenants about property of temporal goods and about translation and the change of them from one person to another," as well as laws setting punishments for wrongs.184 Pecock also wrote that the people had a duty to pay to their ruler "bodily service and tribute" by just laws ordained, "unless he [the ruler] have by any just title property sufficient upon all the land or upon some" to provide for his needs without taxation.185 The first of these passages generalizes quite aptly the "property" of the Year Book lawyers: an interest in worldly goods that was the subject of contracts and covenants, always liable to transfers and takings. The second passage is not part of the discourse I find in contemporary legal sources. It denotes a king's property, presumably in his own demesne lands and in feudal services upon all or part of the land in the kingdom.

One more important term must be traced. "Owners" appear to have been scarcer in surviving medieval English sources than were "property" and "proprietaries." The early appearances of "owner" that I have found are ones describing monks guilty of covetousness.186 Writing in the 1440s, Reginald Pecock reminded his readers that their "goods" of nature, grace, world, and state belonged to God as the truest "owner," while they themselves were merely "secondary owners or occupiers."187 Surviving enrollments, petitions, and wills from 1442 onward refer to "owners" of tenements, ships, and goods in neutral terms.188 In similar fashion, "proprietaries" appear after 1440 in a neutral setting, no longer

184. REGINALD PECOCK, THE REULE OF CRYSTEIN RELIGIOUN 335, Early English Text Society no. 171 (William Cabell Greet ed., 1927) (c. 1443); PECOCK, supra note 168, at 75, l. 23 (make laws "in contracts and covenants about property and thereto appurtenant, [and] in keeping peace"). Pecock's writings about law are discussed extensively in NORMAN DOE, FUNDAMENTAL AUTHORITY IN LATE MEDIEVAL ENGLISH LAW (1990).

185. PECOCK, supra note 168, at 78, l. 22.

186. DAN MICHEL, AYENBITE OF INWYT, OR REMORS OF CONSCIENCE 37, Early English Text Society no. 23 (Richard Morris ed., London 1866) (1340); 6 HIGDEN, supra note 184, at 345.

187. PECOCK, supra note 184, at 293.

188. York Enrolment Book B.Y. 87, entry for Jan. 3, 1442, in A VOLUME OF ENGLISH MISCELLANIES 18, Surtees Society no. 85 (James Raine, Jr. ed., Durham 1890); Petition of Newcastle Merchants, December 15, 1451, from Public Record Office, Misc. Roll 468, in 3 ARCHAEOLOGIA AELIANA (n.s) 183, 186 (1860); Will of John Baret of Bury, 1463, in WILLS AND INVENTORIES FROM THE REGISTERS OF THE COMMISSARY OF BURY ST. EDMUND'S 22, Camden Society no. 49 (Samuel Tymms ed., London 1850); JOHN CAPGRAVE, THE CHRONICLE OF ENGLAND 170, Rolls Series no. 1 (Francis Charles Hingeston ed., London 1858) (ante 1464).
the sinning monks they once were. The dictionary-makers have not traced the word "ownership" earlier than the sixteenth century, though one fifteenth-century writer came up with "proprietary." In both religious and secular contexts, the term "property" usually appeared in the abstract, applying to no specific item but to "goods" in general or to anything at all. "Owners" specifically of land can be found after 1440, but "property" related to undifferentiated "goods" or money, and neither to animals nor to the possession of land. The things that monks and nuns could secretly and sinfully possess were not landed estates, but clothing, jewels, rich foods, and money. Nonlegal usage in the Middle Ages establishes that "property" connoted what was appropriated to an individual person beyond that person's immediate needs, in strong and frequent contrast with what was common to others. Nonlegal and legal discourses appear to have been at cross purposes. The standard devotional manuals of the fourteenth and fifteenth centuries enjoined all to live (and live well) without property in goods, while the lawyers supposed that all goods were at all times the property of some individual person or other. Nothing in the lawyers' usage of the term hints at the heavy condemnations heaped on property by the religious writers. In this respect, the usage of clerics and lay religious figures appears to have had a stronger influence on secular English texts of nonlawyers than lawyers' usage had.

Christopher St. German and John Fortescue

In the early sixteenth century, the Year Books remained the principal source and storehouse of the common lawyers' accumulated learning. Students of the common law could draw much learning about "property" from the disorderly heaps of Year Book manuscripts, but it was not easy. By this time, however, the common lawyers were introducing new forms of legal literature in which they devoted more of their attention to problems they saw affecting the common law as a whole:

189. The English Register of Oseney Abbey 161, l. 21, Early English Text Society no. 133 (Andrew Clark ed., 1907); id. at 162, ll. 2, 29 (entries for January 27, 1443). Agreement dated 1509 from Bishop John Longland's Register of Memoranda at Lincoln, leaf 240, in Lincoln Diocese Documents 132, l. 1, Early English Text Society no. 149 (Andrew Clark ed., 1914).

190. Van Ruysbroeck, supra note 168, at 242, l. 15; id. at 243, ll. 22, 24. See 2 Pollock & Maitland, supra note 58, at 153 n.1.

191. Neither abridgements, indexes, nor marginal notes would direct readers to every case discussing property in the Year Books.
problems of defining the common law, of setting it apart from other bodies of law, of describing the legitimate sources of the common law, of explaining the foundations of its authority, of articulating the general principles that underlay its specific applications, and of discerning an orderly classification of the subject matter of law. In one of the earliest and most popular of these new works, readers could glimpse an extensive, abstract, universal "law of property" that was embodied, so the author said, in English common law.

In the late 1520s, Christopher St. German was in his sixties, no longer actively practicing as a common lawyer but active in the religious controversies at the court of Henry VIII. That is when he wrote *Doctor and Student*, two dialogues between a doctor of divinity and a student of the common law. He intended this work to be his contribution to a genre of religious writing popular on the Continent: books on how to resolve conflicts between conscience and law. St. German's originality lay in his use of English common law rather than civil law for his examples of conflicts with the commands of conscience. He also intended the work, it seems, to acquaint clerics, especially ecclesiastical court judges, with the rudiments of the law of England.

To carry out his intentions, St. German had to explain a good deal of English common law, and he did so in English, expressly to reach those not already learned in the law. Students at the Inns of Chancery and Inns of Court soon seized upon his dialogues as an easy route to legal knowledge. *Doctor and Student* was said to be more popular than Thomas Littleton's *Tenures* in the sixteenth century.
In the early pages of St. German's work, his doctor of divinity explained how English common law fit into the grand scheme of things, the descending scale of universally binding legal orders: law eternal, law of reason (or law of nature), law of God (or revelation), and law of man (or positive law). To all this, St. German's student of the laws of England responded that those "learned in the law," presumably common lawyers like himself, split the law of reason into three parts. In the first place, the "law of reason primary" by its own force forbade murder, perjury, deceit, and breaches of the peace. Second, the "law of reason secondary general" applied reason to human customs that were not mandated by God or reason but were nevertheless observed by all nations. By this law, one could begin with the "general law or general custom of property" and deduce through innate reason that disseisins, trespasses on land, and theft of goods were unlawful. Third, according to the student of law, was the "law of reason secondary particular." By that law, reason operated on the particular laws or customs observed by one realm alone, England in this case, to reach deductions about what could and could not be done.

Both the doctor's and the student's classifications placed English common law within the broader realms of law named and described in the opening sentences of Justinian's *Institutes*, Gratian's *Decretum*, and Bracton's treatise. Students of common law had no doubt heard of divine law and natural law, and perhaps of the law of nations, in sermons and religious tracts. These were familiar terms of analysis and debate in England, as they were on the Continent, but they were ordinarily the tools of theologians and canonists, not of the lawyers at Westminster Hall. As St. German's student said, "It is not used among
them that be learned in the laws of England to reason what thing is commanded or prohibited by the law of nature and what not."203 *Doctor and Student* brought some longstanding debates out of the theology schools, into direct contact with common law principles, and, more important, down to the level of elementary common law instruction.

In particular, St. German introduced generations of beginning law students to an abstract and universal "law of property" (*lex proprietatis*)—its origin, nature, and legitimacy. According to *Doctor and Student*, at the creation of the world and of humankind, all things were held in common; private property was not necessary.204 But after the Fall, as both population and covetousness increased, the first kings introduced a law of property.205 Thus, individual property ownership was founded on human law and public expediency, consonant with innate reason and divine revelation but not required by either.206 Once people had property, human law next instituted contracts so that things could be exchanged.207 St. German repeated over and over again this "creation story" of property: the early innocent age when all things were shared in common, the later introduction of private property as a human invention justified by its utility, and the consequent introduction of laws of contract, another contingent human creation, to facilitate the exchange of property.208

All this was traditional theological teaching.209 There was nothing unjust about individual property, according to the conventional view, but natural law had originally left all things common to all people.210 Human law by custom or statute dictated, as it must in our present

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203. 91 Selden Society 30-31 (not in Latin editions).
204. 91 Selden Society 18-19 (Latin editions only).
205. 91 Selden Society 18-19 (Latin editions only).
206. 91 Selden Society 28-29, 56-57.
207. 91 Selden Society 132-35.
208. 91 Selden Society 38-39, 183, 228. The same account is found in the *proemium* to another popular elementary legal text of the time, *John Perkins, A Profitable Book, Treating of the Laws of England* xiv (1st ed., London 1528, 15th ed., London 1827).
209. 91 Selden Society xxiv-xxv; *Thomas Aquinas, Summa Theologiae* 2a 2ae, q. 66, art. 2; Tierney, *supra* note 105, at 27–33; L.W.B. Brockliss, *French Higher Education in the Seventeenth and Eighteenth Centuries: A Cultural History* 303-4 (1987); Brian Tierney, *Public Expediency and Natural Law, in Authority and Power: Studies on Medieval Law and Government Presented to Walter Ullmann* 167, 176 (Brian Tierney & Peter Linehan eds., 1980).
210. See Gratian, *Decretum* D.8, c. 1, in 1 Corpus Iuris Canonici cols. 12–13; 2 Carlyle & Carlyle, *supra* note 13, at 136–42; 5 id. at 14–20.
Concept of Property

fallen state, what belonged to me and what to my neighbor. The conclusions to be drawn from this orthodox position varied widely. Must property be shared in times of necessity? May those in need take away the property of one who misuses it? May the king, with good cause, take property from an individual? May the king do so without good cause? Varying answers for all these questions could be found in late medieval civilian, canonist, and theological writings. St. German himself stressed the contingent nature of property law and its origin in human custom in order to point out how the common law and the king’s prerogative could legitimately limit, condition, and divest individual property in goods and animals.

St. German’s Doctor and Student was the first work on English common law in wide circulation (that is, the first since Bracton’s treatise) to delineate a general law of property, one applicable to land as well as goods. In the 1520s, common lawyers still very rarely applied the word “property” to land, and St. German, when writing the student’s speeches about specific common law doctrines, remained reluctant to go beyond the mention of “possession” of, or “right” to, land. Nevertheless, St. German spelled out the background assumptions that made land the prime example for a general law of property: that the law in effect “enclosed” one person’s land from another’s though they both occupied an open field, that it was not lawful for anyone to enter into the freehold of another without consent or other authority, and that the nature of a fee simple required that the holder be able to alienate it as he wished. He challenged conventional assumptions by asking readers to imagine a

211. See, e.g., John Colet, Epistolae B. Pauli ad Romanos Expositio, in Opuscula Quaedam Theologica 134, 259 (J.H. Lupton ed., London 1876) (“This law of a corrupter nature is the same as that Law of Nations, resorted to by nations all over the world; a law which brought in ideas of meum and tuum—of property [proprietas], that is to say, and deprivation [privatio]; ideas clean contrary to a good and unsophisticated nature: for that would have a community in all things.”) It was elementary learning among civilians that property originated by the “law of nations” or “law of peoples.” J. Inst. 2.1.11.

212. See Joseph Canning, The Political Thought of Baldus de Ubaldis 79-82 (1987); J.P. Canning, Law: Sovereignty and Corporation Theory, 1300-1450, in Cambridge History, supra note 43, at 454, 457-59; Janet Coleman, Property and Poverty, in id. at 607, 617-25, 637-48; 1 Lewis, supra note 44, at 94-97; Gierke, supra note 43, at 79-81, 178-81 nn.271-280.

213. 91 Selden Society 38-39, 146-47, 183, 291; see 91 Selden Society xxx.

214. E.g., 91 Selden Society 158 (Doctor).

215. 91 Selden Society 4-5 (terrarum possessione and dominio rerum), 222.

216. 91 Selden Society 62-63, 98-99, 140-41, 253, also 222.
common law that barred all alienation of land or all wills of goods. St. German also used the term “contract” as he used the term “property,” to characterize a universal, abstract legal entity, not the sum of the Roman “species” of contracts nor that of their common law equivalents, but the abstract relation within a unified “law of contract” centered on a single paradigm, the assent to exchange money for goods.

St. German gave common lawyers an entire superstructure of universal laws in which these abstract notions of “property” and “contract” could play a part, but he was not the first common lawyer to treat “property” at such an abstract and universal level. In the early 1460s, John Fortescue, the former Chief Justice of the King’s Bench, composed work in Latin with the title De Natura Legis Naturae. The work never achieved anything like the popularity of Doctor and Student, and may have been entirely unknown to common lawyers in the sixteenth century. In it, Fortescue argued the losing cause in the battle between the Houses of Lancaster and York and ridiculed the notion of a female monarch. He constructed his case for Henry VI entirely from natural law, which he linked to divine law and distinguished from such human laws as imperial (or civil) law, the law of nations, and English law.

Like St. German, Fortescue examined the fundamental and universal categories of property and contract, but he reached different conclusions. According to Fortescue, property in things (proprietas rerum) and contract (contractus) arose after original sin changed man’s status, but owed

\[217. 91  Selden Society 134–35, 197.
218. 91  Selden Society 228, 231; cf. 91 Selden Society 269, 296; Helmut Coing, Common Law and Civil Law in the Development of European Civilization—Possibilities of Comparison, in ENGLISCHE UND KONTINENTALE RECHTSGESCHICHTE: EIN FORSCHUNGSPROJEKT 31, 36 (Helmut Coing & Knut Wolfgang Norr eds., 1985); J.L. Barton, Towards a General Law of Contract, in id. at 45, 45–46 (summarizing a paper by Richard Helmholz).
219. JOHN FORTESCUE, De Natura Legis Naturae, in THE WORKS OF SIR JOHN FORTESCUE (Thomas Fortescue, Lord Clermont ed., London 1869). Chrimes dates the composition of De Natura to 1461–63, in JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIE IXVI, IXXIII (S.B. Chrimes ed. & trans., 1949).
220. The few known MSS. date no later than the early sixteenth century. FORTESCUE, DE LAUDIBUS, supra note 219, at 214–15; Charles Plummer, notes to JOHN FORTESCUE, THE GOVERNANCE OF ENGLAND 75–76 (Charles Plummer ed., Oxford 1885). It was first published in 1714.
221. FORTESCUE, De Natura, supra note 219, at 66–68, 106–8, 164. See STEPHAN KUTTNER, HARMONY FROM DISSONANCE: AN INTERPRETATION OF MEDIEVAL CANON LAW 46 (1960); CANNING, supra note 212, at 69, 76, 78; Alan Harding, The Reflection of Thirteenth-Century Legal Growth in Saint Thomas’s Writings, in AQUINAS AND PROBLEMS OF HIS TIME 18, 30 (G. Verbeke & D. Verhelst eds., 1976).]
their origin to the same law of nature that had governed paradise.222 His explanation echoed that of contemporary lawyers in Year Book reports on wild animals and growing crops, and presaged John Locke’s “labor theory”: people first acquired property in things by the “sweat of the brow” (sudore) under the law of nature.223 Property in land and goods descended to heirs, and contract transferred that property from seller to buyer, all according to a divinely ordained, perpetual, and immutable law of nature.224 No one, not even the king, could transfer more right to another person than he held himself.225

Fortescue adopted what was a minority view among canonists and theologians: that private property antedated government and that natural law imposed limits on the legitimate power of the king to appropriate the property of individuals.226 His writings anticipated the work of St. German, who brought these longstanding pan-European controversies into the mainstream of common law discourse: controversies not only about the fundamental nature of property, but also about the relation between natural law and positive law. Such thinking was still, in the sixteenth century, more theology than law,227 but common lawyers from the seventeenth century onward made these debates their own and shaped them in new ways, with enormous consequences for their country and the world. One of the necessary tools for this debate, one provided in part by St. German and Fortescue, was a structure of legal ideas that could juxtapose the common law with divine, natural, and

222. FORTESCUE, De Natura, supra note 219, at 82, 149–50 (property in immovable and praeidial things, moveable and personal things); id. at 168. See Winifred Gleeson Keaney, Sir John Fortescue and the Politics of the Chain of Being, in JACOB’S LADDER AND THE TREE OF LIFE: CONCEPTS OF HIERARCHY AND THE GREAT CHAIN OF BEING 221, 230 (Marion Leathers Kuntz & Paul Grimley Kuntz eds., 1987); Edgar W. Lacy, The Relation of Property and Dominion to the Law of Nature, 24 SPECULUM 407, 407–9 (1949); SCHLATTER, PRIVATE PROPERTY: THE HISTORY OF AN IDEA 72–75 (1951).

223. FORTESCUE, De Natura, supra note 219, at 218 (invoking God’s words to Adam, Genesis 3:19, “In the sweat of thy face shalt thou eat [thy] bread.”). See SCHLATTER, supra note 222, at 73. John Locke’s version is set forth in chapter 2, section 6 of his Second Treatise of Government. LOCKE, supra note 14, at 271.

224. FORTESCUE, De Natura, supra note 219, at 91, 102, 106–8, 145. But kings could take land away from one person to give to another, id. at 83–84.

225. Id. at 125, 147; cf. FORTESCUE, De titulo Edwardi Comitis Marchiae, in WORKS OF SIR JOHN FORTESCUE, supra note 219, at 66*; Defensio Juris Domus Lancastriae, in id. at 506.

226. DOE, supra note 184, at 26–27; Coleman, supra note 43, at 614–25, 638–40; Tierney, supra note 209, at 177–82.

227. See, e.g., De Haeresibus, ch. 14, in REFORMATIO LEGUM ECCLESIASTICARUM (1549); cf. The Forty-Two Articles of Religion of 1552, no. 37, and the well-known Thirty-Nine Articles, no. 38.
rational norms, and could treat abstractions like property and contract as basic and necessary elements of any complete body of law.

Seventeenth-Century Voices

By the early seventeenth century, “property” had been installed, at least in elementary works on the common law, as a fundamental concept applying to land as well as to other things. “The end and effect of the law,” according to a popular tract for law students written in 1599, “is to settle the property and right of things in them to whom they belong, and to judge those things common which continuance of time and the intercourse of parties have distributed and warranted to many.”228 Another work, falsely attributed to Francis Bacon, opened with the words: “the use of the law consists principally in these three things: 1. To secure men’s persons from death and violence. 2. To dispose the property of their goods and land. 3. For preservation of their good names from shame and infamy.”229 The real Francis Bacon, in a manuscript presented to James I, made a “true and received division” of the common law between ius privatum, “the sinews of property” and ius publicum, the sinews “of government.”230 John Cowell’s law dictionary of 1607 supplied an influential definition of property: “the highest right that a man hath or can have to any thing,” a term that was used “for that right in lands and tenements, that common persons have,” despite Cowell’s royalist objections.231

The legal writings of Edward Coke, extremely influential for generations of common lawyers, are a good indicator of the use of property language in the early seventeenth century. Coke was Attorney General in 1600 when he published the first volume of his Reports and Chief Justice of the King’s Bench when he published his eleventh volume in 1615. In Coke’s Reports, the word “property” usually appears in the

228. WILLIAM FULBECK, DIRECTION, OR PREPARATIVE TO THE STUDY OF THE LAW 144 (repr. 1987).

229. The Use of the Law, fol. 1, publ. with Francis Bacon’s maxims in THE ELEMENTS OF THE COMMON LAWES OF ENGLAND (London 1630) (spelling and punctuation modernized). The anonymous author then went on to discuss “property in lands” by entry, descent, escheat, and conveyance, fols. 26–72, and “property in goods,” fols. 72–84. See also JOHN DODDERIDGE, THE LAWYERS’ LIGHT 16–42, 65–66 (London 1629).

230. FRANCIS BACON, A Preparation toward the Union of Laws (1st ed., London 1641) in 7 THE WORKS OF FRANCIS BACON 731, 733 (James Spedding et al. eds., London 1872).

231. COWELL, supra note 40, s.v. Propertie, sig. [Fff 4]–[Fff 4v] (Cambridge 1607). See supra, text accompanying notes 40, 48.
context of goods or animals, while the words “owners” and “ownership” usually appear in the context of lands. Coke had recently retired from his seat in Parliament when he published the first volume of his Institutes, his famous Commentary on Littleton, in 1628. In his Institutes, Coke made a few more references to “property” in land and many more to “owners” of goods and animals. The terms were gradually converging. Coke’s most striking use of “property” was his figurative use of the term at the end of his Commentary on Littleton, where he advised law students that by knowing the reason of the law they could acquire “property” and ownership” of law.

Coke’s Reports distinguished those who had the “absolute,” “general,” “whole,” or “very” property in goods from those who merely had a “qualified,” “possessory,” or “special” property. Most mentions of “property” in Coke’s works follow the familiar patterns of Year Book usage: husbands and wives, testators and executors, churches, bailments, forfeitures, replevins, sales of stolen goods, wild animals, growing crops, and trees. Coke repeated a version of the “creation story” of property in his Commentary on Littleton: “after the Flood, all things were common to all,” but “under the law natural, and by multiplication of people, and making proper and private those things that were common, arose battles.”

What were new in Coke’s legal works were the grand generalizations that “laws temporal [make] trial of property of land and goods” and that “in our law there is jus proprietatis [right of property], possessionis and possibilitas,” the “rule of law” that one needed a writ to try property, the “rule of the common law” that “when no man can claim property in any goods, the King shall have them by his prerogative,” and the “maxim” that “property of all goods must be in some person.”

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232. For example, an interest in standing trees, when divided from interest in land, is “property”; when reunited, it is “ownership.” Herlakenden’s Case (Ivy v. Herlakenden), 4 Co. Rep. 62a, 62b-63b, 76 Eng. Rep. 1027-1030 (K.B. 1589).

233. COKE, supra note 113, at 394b.

234. Lampet’s Case (Lampet v. Starkey), 10 Co. Rep. 46b, 50b, 77 Eng. Rep. 1002 (C.P. 1612); see COKE, supra note 113, at 266a, 369a; EDWARD COKE, THE THIRD PART OF THE INSTITUTES 110 (London 1643).

235. De Jure Regis Ecclesiastico, 5 Co. Rep. 1a*, 29b*, 77 Eng. Rep. 34 (quoting 24 Hen. 8, ch. 12, sec. 1[6] [1532]); EDWARD COKE, THE FOURTH PART OF THE INSTITUTES 321 (London 1644).

236. Lampet’s Case (Lampet v. Starkey), 10 Co. Rep. 46b, 50b, 77 Eng. Rep. 1002 (C.P. 1612); see COKE, supra note 113, at 266a, 369a; EDWARD COKE, THE THIRD PART OF THE INSTITUTES 110 (London 1643).

237. COKE, supra note 113, at 145b.

238. Constable’s Case (Constable v. Gamble), 5 Co. Rep. 106a, 108b, 77 Eng. Rep. 223 (K.B. 1601).

239. EDWARD COKE, THE SECOND PART OF THE INSTITUTES 167 (London 1642); see COKE, supra note 236, at 110.
according to Coke, meant that owners could declare and dispose the use of land, could devise all or at least two-thirds of their land, could charge two-thirds of their land, could lease and sell, and could build houses for the poor without the king’s license, but could not exclude commoners (those with rights of common on the land).

Other case reports from the late sixteenth and seventeenth centuries similarly continued the medieval learning about property in goods and animals, generalized more readily about property, and introduced “owners” of “property” in land. Lawyers stated in several contexts that only the courts of common law, not the church courts nor the king’s courts of Admiralty or of High Commission, could decide questions of property. The bulk of common law cases mentioning “property” did so in reference to goods or animals. Most of these cases involved questions of whether and when the property was “altered” from one person to another in a purchase and sale or other covenant or grant, in a judicial execution, forfeiture, condemnation, or bankruptcy, in a conversion,
trespass, theft, piracy, or capture by the enemy, in a marriage, or in a cast of dice.

The common lawyers continued to argue the claims of property in growing trees and growing crops. With much greater frequency, the lawyers sorted a whole menagerie of wild animals (ferae naturae) into the property of the landowner, of the tamer, of the hunter, of the king, and of no one. In these and other contexts, lawyers were puzzling out the relation between the right to property and the right to possession. One argument gave the owner of land the property in wild

Eng. Rep. 175 (Exch. 1678); Brook v. Smith, 1 Salkeld 280, 91 Eng. Rep. 245 (Nisi Prius 1693); Martin v. Wilsford, Carthew 323, 325, 90 Eng. Rep. 791 (Exch. 1694); R. v. Broom, Carthew 398, 399, 90 Eng. Rep. 831 (K.B. 1696); Roberts qui tam v. Wetherhead, Comberbach 361, 90 Eng. Rep. 528; 1 Salkeld 223, 91 Eng. Rep. 198 (K.B. 1696).

250. Rooke v. Denny, 2 Leon. 192, 193, 74 Eng. Rep. 470 (C.P. 1586); Anon., Cro. Eliz. 685, 78 Eng. Rep. 921 (C.P. 1599); Gumbleton v. Grafton, Cro. Eliz. 781, 78 Eng. Rep. 1012 (K.B. 1600); Bishop v. Montague, Cro. Eliz. 824, 78 Eng. Rep. 1051 (C.P. 1600); Brown v. Wootton, Cro. Jac. 73, 74, 79 Eng. Rep. 63 (K.B. 1605); Greenway v. Baker, Godbolt 193, 78 Eng. Rep. 117 (C.P. 1612); Serviento v. Jolliff, Hobart 78, 79, 80 Eng. Rep. 228 (C.P. c. 1615); Radly v. Eglesfield, 1 Ventr. 174, 86 Eng. Rep. 118 (K.B. 1671).

251. Hastings v. Douglas, Cro. Car. 343, 344, 345, 79 Eng. Rep. 902, 903 (K.B. 1634).

252. West v. Stowell, 2 Leon. 154, 74 Eng. Rep. 438 (C.P. 1578); Walker v. Walker, 5 Mod. 13, 87 Eng. Rep. 490; Comberbach 303, 90 Eng. Rep. 492; Holt K.B. 328, 90 Eng. Rep. 1081 (K.B. 1694).

253. , E.g., Hare v. Okelie, 1 Leon. 315, 74 Eng. Rep. 286 (C.P. 1578); Tisdale v. Essex, Hobart 34, 35, 80 Eng. Rep. 793 (K.B. 1616); Anon., 1 Leon. 275, 74 Eng. Rep. 250-51 (K.B. 1584); Lewknor v. Ford, 1 Leon. 48, 49, 74 Eng. Rep. 45-46; 4 Leon. 162, 163-65, 225, 227-29, 74 Eng. Rep. 796-97, 838-39; Godbolt 114, 116-18, 78 Eng. Rep. 71-72 (C.P. 1586); Anon., Godbolt 98, 99, 78 Eng. Rep. 61 (C.P. 1586); Chalk v. Peter, Godbolt 167, 168, 78 Eng. Rep. 102 (C.P. 1610); Heydon v. Smith, Godbolt 172, 173, 78 Eng. Rep. 105-6 (C.P. 1610).

254. Dewell v. Sanders, 2 Rolle 30, 31, 81 Eng. Rep. 639 (K.B. 1618) (salmon, sturgeon, doves); Vincent v. Lesney, Cro. Car. 18, 19, 79 Eng. Rep. 621 (C.P. 1625) (hawk); Child v. Greenhill, Cro. Car. 553, 554, 79 Eng. Rep. 1077; March N.R. 48, 49, 82 Eng. Rep. 406 (K.B. 1639) (deer, rabbits, doves, fish); Lister v. Hone, March N.R. 12, 82 Eng. Rep. 389 (K.B. 1639) (hawk); Usher v. Bushnel, T. Raym. 16, 83 Eng. Rep. 9 (K.B. 1661) (pheasant); Mallocco v. Eastly, 3 Lev. 227, 83 Eng. Rep. 663 (C.P. 1685) (deer); Polyxphen v. Crispin, 2 Keble 765, 766, 84 Eng. Rep. 484; 1 Ventr. 22, 23, 83 Eng. Rep. 85 (K.B. 1671) (fish, pheasant); Sutton v. Moody, Comberbach 458, 90 Eng. Rep. 590; 2 Salk. 556, 91 Eng. Rep. 471 (K.B. 1697) (rabbits).

255. E.g., Foster v. Spooner, Cro. Eliz. 17, 17-18, 78 Eng. Rep. 284 (C.P. 1583); Brent's Case, 2 Leon. 14, 16, 74 Eng. Rep. 320 (C.P. 1575); Finch's Case, 2 Leon. 134, 141, 74 Eng. Rep. 426 (Exch. 1591); Hill v. Haukes, 1 Roll. 44, 45, 81 Eng. Rep. 316 (K.B. 1614); Bowles v. Berrie, 1 Rolle 177, 180, 81 Eng. Rep. 415 (K.B. 1615); Lister v. Hone, March N.R. 12, 82 Eng. Rep. 389 (K.B. 1639); Polyxphen v. Crispin, 2 Keble 765, 766, 84 Eng. Rep. 484 (K.B. 1671); Smith v. Kemp, Carthew 285, 286, 90 Eng. Rep. 769.
animals “by reason of possession” so long as they remained on the soil, while the response was that the hunter who chased an animal onto the owner’s land had possession and property “by the pursuit.” Lawyers were thus equating two very different kinds of possession, one exercised simply by ownership of land and another by effort or industry.

The lawyers also continued to distinguish kinds or degrees of property. Most often, they found “general” property in one person (a bailor, lessor, reversioner, buyer, etc.) and “special” property in another (a bailee, lessee, termor, seller, etc.). “General” property was also “absolute,” “principal,” “greater,” “grand,” “whole,” “true,” or “very” property; the corresponding “special” property was “qualified,” “conditional,” “present,” “possessory,” “mere,” and “a kind of” property. “And therefore quære,” asked a pair of common lawyers in 1586, “what shall be meant by this word ‘property’?” A grand rule was emerging: whoever had the “general” or “absolute” property in a thing could assert the interest against everyone in the world, and whoever had the “special” property could assert it against everyone but the “general” or “absolute” owner.

(K.B. 1693); Coombes v. Hundred of Bradley, 4 Mod. 303, 305, 87 Eng. Rep. 410 (K.B. 1694).

256. E.g., Anon., 2 Leon. 201, 74 Eng. Rep. 478 (K.B. 1586); Coney’s Case, Godbolt 122, 123, 78 Eng. Rep. 75 (K.B. 1587).

257. E.g., Luddington v. Amner, Godbolt 26, 27, 78 Eng. Rep. 17 (K.B. 1583); Wood v. Ash, Owen 139, 74 Eng. Rep. 958 (C.P. 1586); Bloss v. Holman, Owen 53, 74 Eng. Rep. 893 (C.P. 1587); Bind v. Plain, Cro. Eliz. 218, 219, 78 Eng. Rep. 474, 475; 1 Leon. 220, 221, 74 Eng. Rep. 203 (K.B. 1591); Price v. Simpson, Cro. Eliz. 718, 719, 78 Eng. Rep. 953 (C.P. 1599); Heydon v. Smith, Godbolt 172, 173, 78 Eng. Rep. 105 (C.P. 1610); Ratcliff v. Davis, Yelv. 178, 80 Eng. Rep. 118; 1 Bulst. 29, 30, 80 Eng. Rep. 735 (K.B. 1610); Bowles v. Berrie, 1 Rolle 177, 180–82, 81 Eng. Rep. 415–16 (K.B. 1615).

258. E.g., Luddington v. Amner, Godbolt 26, 27, 78 Eng. Rep. 17 (K.B. 1583); Anon., 1 Leon. 275, 74 Eng. Rep. 250–51 (K.B. 1584); Anon., 2 Leon. 201, 74 Eng. Rep. 477 (K.B. 1586); Lewknor v. Ford, Godbolt 114, 116, 117, 78 Eng. Rep. 71; 1 Leon. 48, 49, 162, 163–64, 225, 227–29, 74 Eng. Rep. 45, 796–97, 838–39 (C.P. 1586); Wood v. Ash, Godbolt 112, 113, 78 Eng. Rep. 69 (C.P. 1586); Coney’s Case, Godbolt 122, 123, 78 Eng. Rep. 75 (K.B. 1587); Shelbury v. Scotsford, Yelv. 23, 24, 80 Eng. Rep. 17 (K.B. 1602); Dowglas v. Kendall, 1 Bulstr. 93, 94–95, 80 Eng Rep. 793–94 (K.B. 1610); Dewell v. Sanders, 2 Rolle 30, 32, 81 Eng. Rep. 640 (K.B. 1618); Hastings v. Douglas, Cro. Car. 343, 345, 79 Eng. Rep. 903 (K.B. 1634); Lister v. Hone, March N.R. 12, 82 Eng. Rep. 389 (K.B. 1639); Wilbraham v. Snow, 1 Lev. 282, 83 Eng. Rep. 408; 1 Mod. 30, 86 Eng. Rep. 708 (K.B. 1670); Sutton v. Moody, Comberbach 458, 90 Eng. Rep. 590; 3 Salk. 290, 91 Eng. Rep. 831; 1 Ld. Raym. 250, 251, 91 Eng. Rep. 1064 (K.B. 1697).

259. Lewknor’s Case, 4 Leon. 225, 228, 74 Eng. Rep. 838 (C.P. 1586) (Serjeants Fenner and Walmsley).

260. E.g., Rockwood v. Feasar, Cro. Eliz. 262, 78 Eng. Rep. 517 (K.B. 1591); Smith v. Oxenden, 1 Chan. Cas. 25, 22 Eng. Rep. 676 (Ch. 1663).
Two or more persons could thus have different sorts or degrees of property in the same goods or land, but the lawyers' vocabulary did not have room for more than one sort of "owner." The owner of land was free to till the ground or stock it with game, and to part with the land as he pleased, all of it by grant or use, or two-thirds by devise, "if it be according to law." With the proliferation of references to "owners," old debates were phrased in new ways. Conflicts were no longer between holders of rights of common and "the lord of the manor" or "he who has the freehold." Now the protagonists were the commoner and the "owner of the soil" or "owner of the land."

Having extended the scope of "property" to one's land, lawyers at the start of the seventeenth century considered extending it still further, to one's children. Asking whether an action of trespass lay for taking a parrot, a thrush, or a spaniel, and finding no examples in the Register of Writs, lawyers made the issue whether the law imputed "property" in such an animal to the plaintiff. Asking whether a father could sue in trespass for the abduction of his daughter (not the heir apparent), and finding nothing in the Register, a majority of Justices in the Court of Common Pleas held that "[h]ere the father has not any property or interest in the daughter, which the law accounts may be taken from him." The justices conceived the possibility of ascribing property in a child to the parent, but rejected it. A century later, justices on the same court would affirm that the owner had a property in a villein and the guardian had a property in a ward, though English law took no

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261. Brent's Case, 2 Leon. 14, 16, 74 Eng. Rep. 320 (C.P. 1575) ("as clay is in the hands of the potter"); Inchley v. Robinson, 2 Leon. 41, 42, 74 Eng. Rep. 342 (C.P. 1587); Ward v. Lambart, Cro. Eliz. 394, 78 Eng. Rep. 639 (C.P. 1593); Soulle v. Gerrard, Cro. Eliz. 525, 78 Eng. Rep. 773–74 (C.P. 1595); Sharpe v. Sharpe, Noy 148, 74 Eng. Rep. 1110 (C.P. 1609). Cf. R. v. Boreston, Noy 158, 160, 74 Eng. Rep. 1120 (Exch. Ch. 1600) (owner cannot make an heir).

262. Hawks v. Mollineux, 1 Leon. 73, 74 Eng. Rep. 69 (C.P. 1587); Fowler v. Dale, Cro. Eliz. 362, 363, 78 Eng. Rep. 612 (C.P. 1594); Gresham v. Ragge, Owen 114, 74 Eng. Rep. 940 (K.B. 1601); Crosse v. Abbot, Noy 14, 74 Eng. Rep. 985 (K.B. 1605); Kendridge v. Pargett, Noy 130, 74 Eng. Rep. 1093 (K.B. 1608). Cf. Chalk v. Peter, Godbolt 167, 168, 78 Eng. Rep. 102 (C.P. 1610) (owner of the profits may not be the same as owner of the soil).

263. On whether one could have property in a dog, see Trin. 12 Hen. 8, pl. 3, fols. 3–5 (1520); Fines v. Spencer, Dyer 306b, 307a, 73 Eng. Rep. 692 (K.B. 1572); Ireland v. Higgins, Cro. Eliz. 125, 126, 78 Eng. Rep. 383; Hetley 50, 124 Eng. Rep. 334 (K.B. 1588); Chambers v. Workhouse, 3 Salk. 140, 91 Eng. Rep. 739 (C.P. 1692).

264. Barham v. Dennis, Cro. Eliz. 770, 78 Eng. Rep. 1001 (C.P. 1601). Cf. Jenks v. Holford, 1 Vern. 61, 62, 23 Eng. Rep. 312 (Ch. 1682) (a patent providing that no other shall use a new invention may vest a property).
notice of negro slavery within England.265 The lawyers yearned toward a rule that no one could have property in the person of another, but could not say it without qualification.266

A new extension of property language is found in a singular argument of John Vaughan, Chief Justice of the Court of Common Pleas, in the Exchequer Chamber in 1673. The learned Chief Justice Vaughan, at home in canon, civil, and biblical law, could also speak in the voice of contemporary political theorists. Explaining the distinction between malum prohibitum, which the law could permit, and malum in se, which the law could not permit, Vaughan said that “in life, liberty, and estate, every man who has not forfeited them, has a property and right which the law allows him to defend, and if it be violated, [the law] gives an action to redress the wrong, and to punish the wrongdoer.”267 His point was that “a law can alter, change, or transfer a man’s property in life, liberty, estate, or any interest [to another man], as it will” and so “to alter or transfer men’s properties to others is no malum in se, it is daily done by the owner’s express consent, and by a law without their express consent.”268 But “to violate men’s properties is never lawful,” that was “a malum in se.”269 This was a view Thomas Hobbes condemned and John Locke embraced.

Conclusion

Common lawyers before 1490 did not apply the word “property” to land because land was different. In the fourteenth and fifteenth centuries, land was different not merely because (in theory) one “held” land for services due to a feudal lord, and not merely because (in theory) land could not be devised by will, but more important because land was far

265. Smith v. Brown, 2 Salk. 666, 91 Eng. Rep. 566; 2 Ld. Raym. 1275, 92 Eng. Rep. 338; Holt K.B. 495, 90 Eng. Rep. 1173 (K.B. 1706); Smith v. Gould, 2 Salk. 666, 667, 91 Eng. Rep. 567 (K.B. 1705).

266. Butts v. Penny, 2 Lev. 201, 83 Eng. Rep. 518; 3 Keble 785, 84 Eng. Rep. 1011 (K.B. 1677) (“there could be no property in the person of a man sufficient to maintain trover,” “no property could be in a villein but by compact or conquest,” “no property in the plaintiff more than in villeins”); Smith v. Brown, 2 Salk. 666, 91 Eng. Rep. 566; 2 Ld. Raym. 1275, 92 Eng. Rep. 338; Holt K.B. 495, 90 Eng. Rep. 1173 (K.B. 1706) (“By the common law, no man can have a property in another, but in special cases”).

267. Thomas v. Sorrell, Vaughan 330, 337, 124 Eng. Rep. 1102 (Exch. Ch. 1673).

268. Thomas v. Sorrell, Vaughan 330, 338, 124 Eng. Rep. 1102 (Exch. Ch. 1673).

269. Thomas v. Sorrell, Vaughan 330, 337–38, 124 Eng. Rep. 1102-03 (Exch. Ch. 1673), citing Mich. 11 Hen. 7, pl. 35, fol. 11–12 (1495), and 2 Bracton, supra note 25, at 373 (fol. 132b).
less vulnerable to interference by others than were goods, animals, or sums of money. Land could sustain multiple overlapping claims by many individuals and casual or regular uses by many others. The primary relation of an individual to a parcel of land, what lawyers called the "right," could be maintained without physically excluding others. Indeed, land had little value to the rightful holder if others were entirely excluded.

While common lawyers lavished their attention on the multiplicity of estates, tenures, and customary arrangements that could concern an imperishable and endurably productive tract of land, the relation to goods and animals that the lawyers called "property" was simpler. Ascribing property to one person excluded all relations with other persons except those of safeguarding or leasing, and even these had to be called "property" of a qualified or special sort. One who had the property in a thing preserved this bond with the object wherever it was carried and wherever it strayed. The property relation pointed to the person who had capacity to bring actions in court and to initiate transactions out of court. In the practical arrangements of life in late medieval England, it was goods and animals, not land, that came closest to what Blackstone would later call "that sole and despotic dominion...in total exclusion of the rights of any other individual in the universe." 270

After 1490, practitioners of English common law began to assimilate their terminology for landholding to their terminology for ownership of goods and animals. There could now be "property" in land and "owners" of land. One explanation for this shift in legal vocabulary is a desire for simplification. It was simpler to have one term and one set of concepts for the relations of people to land, goods, and animals all together than to continue the bifurcated terminology of the previous two centuries. Property in goods and animals was a much simpler concept than right, estate, and tenure in land, so in this sense the simpler and more abstract concept took over and subordinated the more complex set of landholding interests. By writing about property in land and ownership of land, lawyers from the sixteenth century onward invoked a stark mental image of one solitary person alone in complete and exclusive possession of one tract of land. It became possible now for lawyers in England to speak and write about "property in general" with reference at once to land, goods, and animals alike. This was a powerful generalization, destined for enormous impact on law and government, but was one that could not have been uttered while the lawyers' language about goods and language about land remained separate.

270. BLACKSTONE, supra note 1, at 2.
From the beginning of the seventeenth century onward, we can begin to speak of a general law of property without doing violence to the words and conceptions of the lawyers whose doctrines we describe. From one perspective, this widespread understanding that the common law protected a fundamental interest called “property” was barely a century old in 1600. From another perspective, it was an idea about law rooted in the oldest and most widely used legal texts, one that had always been available to common lawyers to accept or reject as they wished. In many of the results the late-fifteenth-century common lawyers reached using “property” terminology, I find echoes of Roman and canon law, the common heritage of “sophisticated” law as it was taught in universities in England and throughout Europe.

English common lawyers, though they did not accept the Roman and canon texts as “works of authority” or official “sources” of law, never entirely cut themselves off from the influence of Roman and canonist ideas, particularly in substantive matters. Common law discourse rapidly re-incorporated much of the basic Roman legal terminology in the sixteenth and seventeenth centuries, not least this broader and more abstract notion of “property.” The English lawyers’ accounts of a “natural” origin of property came straight out of a rich stream of theological and canonist debates on the moral status of individual property ownership.

I conclude, then, with a question. Abstract conceptions of absolute and individual property in all “things,” along with accounts of property’s ultimate origin and justification, were available to English common lawyers throughout the entire period under study. Why did the English lawyers begin to reintroduce these conceptions and creation stories only in the late fifteenth and early sixteenth centuries? Why did they start then to use a unitary, foundational category of “property” to account for their dealings concerning land, goods, and animals? Many contemporary social, economic, political, and doctrinal developments might contribute to an explanation.

For example, social historians of the period suggest that, in early Tudor times, “new families” who had made their money as merchants (or lawyers) were moving up into the landowning class in much greater numbers than before. It may be that persons accustomed to dealing with “property” in the sense of commodities and sums of money carried over their expectations and their terminology to the landed status they enjoyed. However, the most direct explanations come from doctrinal and institutional sources.

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271. Tawney, supra note 51, at 186–89, 192–93; R.B. Smith, Land and Politics in the England of Henry VII 242–44, 256 (1970).
rapidly acquired. Those who viewed their landholdings more as a source of rental income than as an inherited entitlement to social and political position would perhaps more readily assimilate land to the character of goods. As land became more “property-like,” the newly named “owner” acquired more freedom to alienate, to extract value in new ways, and to exclude others, while the long-recognized rights of other persons over the same land were diminished.

Economic historians have found an active market in land throughout the entire period of this study, from the twelfth century to the seventeenth. The volume of sales and mortgages of land appears to have picked up greatly in the 1530s, even before Henry VIII began selling off the enormous landholdings confiscated from the Church. At lower rungs of society, land apparently changed hands at a brisk pace for centuries. Collective cultivation of manor lands had already begun to give way to individual holdings. New in the sixteenth century was the “enclosure” of large estates, often to replace customary manorial tenants with more profitable sheep-raising. In the process, tenants fought to retain their traditional rights of “common,” rights to pasture their own field animals. As in the theologians’ and philosophers’ creation stories, “property” was replacing “community.” New holdings for English “proprietors” in America called for new formulations of the origin and justification for property in land, as other European imperial powers were finding.

The rapid political changes beginning with the accession of Henry VII and continuing through the Civil War provide another source of explanation for this change in legal terminology and conceptions. The

272. Justice Fitzherbert, in a manuscript report of 1527 uncovered by John Baker, stated: “common law and common reason consider goods, chattels, and money, as highly as land, for many people who do not have lands have goods and money of as great value as land.” 2 THE REPORTS OF SIR JOHN SPELMAN, supra note 65, at 209. See SMITH, supra note 270, at 255.

273. See, e.g., 2 THE REPORTS OF SIR JOHN SPELMAN, supra note 65, at 178–80, and sources cited therein.

274. See DYER, supra note 51, at 51, 110–11; MACFARLANE, supra note 51, at 124–30; TAWNEY, supra note 51, at 59–61, 78–80, 90–93.

275. SMITH, supra note 270, at 216, 218–19, 221, 253; Buck, supra note 48, at 210.

276. TAWNEY, supra note 51, at 172, 405.

277. Id. at 180–85, 216–17.

278. Id. at 240–53.

279. WILLIAM B. SCOTT, IN PURSUIT OF HAPPINESS: AMERICAN CONCEPTIONS OF PROPERTY FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY 6–7, 14–16 (1977); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 138–42. 201–5 (1990).
king had always been an active litigant in his own courts, and carved out exceptions to countless common law rules for his special prerogative. The increased pretensions, intrusions, and revenue needs of the Tudor kings and queens led, however, to a great deal of new law about king and subject. From the standpoint of the common law, the social distinctions between persons diminished significantly in this period, while the gulf between the sovereign and everybody else widened. Despite the truism that all land was held of the king, many of the references to a more generalized "property" in land and goods that began to appear in legal literature after 1485 were in the context of conflicting claims of king and subject. As such, they tapped the wealth of continental political thinking, most of it embodied in civilian terminology, about the right of the "prince" to take property from persons. The religious upheavals that England underwent in the sixteenth and seventeenth centuries brought theological issues, including the debates on the nature and origin of property, into parliamentary discourse and public controversy to a much greater extent than ever before. Property "in the abstract," for purposes of theological and political debate, grew to include land as well as goods. The pull away from Rome also brought the church courts and common law courts closer together, and helped to "domesticate" and "secularize" the ecclesiastical jurisdiction over transmission of goods at death. The two previously separate categories of land and chattels were brought closer together in this way as well. Running in tandem with these changes were "internal" factors that may have helped pull English common law doctrines on land, goods, and animals together under an overarching rubric of "property." The legal treatment of land changed in important ways in the sixteenth century to resemble more closely the legal treatment of chattels. Recalling that leases of land for terms of years were chattels real within the scope of "property" in the lawyer's usage, an assimilation may have come when ejectment, originally a remedy for termors, largely replaced the older remedies for freeholders. In particular, Parliament in 1540 permitted wills of land. Though the "use," forerunner of the trust, had long permitted testators to make effective disposition of the beneficial occupation of their land, the common lawyers formally abandoned the regime of compulsory primogeniture when, under the Statute of Wills,
testators could direct the descent of "right" to their land with the same freedom that they had always enjoyed to devise the "property" in their goods.\footnote{Statute of Wills, 32 Hen. 8, ch. 1 (1540); see Buck, supra note 48, passim, esp. 212-15.}

Lastly, some causation must have run in the opposite direction. Changes in the way lawyers talked and thought about their clients' relationships with others and with the material world helped contribute to some or all these social, economic, political, religious, and doctrinal changes. Throughout the period under study, one of the principal attributes of legal thought was its internal compulsion toward increasing simplification and abstraction. When speaking of "property," English common lawyers pursued this tendency in the direction of increasing convergence with their continental counterparts and toward increasing use of civilian and canonist models for both legal terminology and substantive legal conceptions. In a place or a time in which those aspiring to profound learning were less enamored of classical and cosmopolitan sources, a very different law of property might have emerged, or no law of property at all.

\footnote{Statute of Wills, 32 Hen. 8, ch. 1 (1540); see Buck, supra note 48, passim, esp. 212-15.}