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Transfers of Property in Eleventh-Century Norman Law

William John Gallagher
University of Michigan Law School

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TRANSFERS OF PROPERTY IN ELEVENTH-CENTURY NORMAN LAW.
By *Emily Zack Tabuteau*. Chapel Hill: The University of North Carolina Press. 1988. Pp. x, 445. \$49.95.

Transfers of Property in Eleventh-Century Norman Law is a comprehensive survey of property transfer law in Normandy at the time of its introduction into England by William the Conqueror. Unfortunately, Emily Zack Tabuteau¹ never ventures far beyond the literal scope of the title. Much of the book exists in a vacuum, with the author doing little to make clear the "obvious" relevance of her findings to post-Conquest England (p. 2), or, for that matter, to eleventh-century Norman society. For the reader who is not well versed in the early developments of English property law or Norman society, the description of property transfer in this era may be of little value in understanding the dynamics of social and legal development in either setting. The book, however, does provide a well-researched and well-digested review of Norman property law for the legal historian seeking to understand property transfers of the period in Normandy.

In the book, apparently the first thorough analysis of Norman property law during the period,² Professor Tabuteau relies primarily on approximately nine hundred extant charters written for the benefit of bishoprics and monastic communities.³ The first of these charters appeared in the late tenth century, which the author sets as the starting point for her study (p. 7). The need for a large number of sources was balanced against the desire to analyze purely eleventh-century law, leading Ms. Tabuteau to choose 1106 as the terminal year for her research (p. 3). There is no surviving evidence that these documents, although widely used by the Church at the end of the eleventh century, were ever popularly employed for the recording of transfers.⁴

1. Associate professor of history, Michigan State University. *Transfers of Property in Eleventh-Century Norman Law* is the author's first book. Her prior publications include Tabuteau, *Definitions of Feudal Military Obligations in Eleventh-Century Normandy*, in *ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE* 18 (1981); Tabuteau, *Book Review*, 28 *AM. J.L. HIST.* 285-86 (1984) (reviewing *THE ROLL OF THE SHROPSHIRE EYRE OF 1256* (A. Harding ed. 1981)); Tabuteau, *Book Review*, 59 *SPECULUM* 610-15 (1984) (reviewing *D. BATES, NORMANDY BEFORE 1066* (1982)).

2. The author claims this as the first modern scholarship on the topic. P. 1.

3. In chapter 2, the author states that the only sources available for a study of the eleventh-century Norman law are the charters. P. 7. Most contemporary chroniclers are dismissed as being of little use. P. 12. Other works occasionally cited include an accounting record from a community of nuns, a list of ducal rights, and the writings of Orderic Vitalis, an English-born monk who lived in Normandy in the early twelfth century. P. 13.

The author provides a list of the charters referred to and includes several appendixes which analyze the language, time, and persons described in the charters. Pp. 231-68.

4. The author suggests that this absence of lay charters, and the relative abundance of ecclesiastical charters, may be due to the survival of the Church and the Church's financial interest in protecting its claims to property. P. 9.

Consequently, these documents, the heart of the book, are concerned more with the Church's role in transactions than the laws of the layman. Tabuteau tries to construct a general picture of property transfer through analogy and descriptive information found in the charters.⁵

In her chapters on types of property transfer,⁶ Tabuteau divides property alienations into three categories: permanent, conditional, and temporary. Under each heading, she further subdivides according to the consideration involved.⁷ These charters do not clearly express the precise division between, and the contemporary meaning of, these categories; therefore, the author readily admits, it is "sometimes difficult to tell in a particular instance what form of alienation is involved" (p. 44). Although they provide a convenient and familiar structure for her study, the divisions may be more after-the-fact impositions than a reflection of the contemporary view of property transfer. Nonetheless, they do aid the reader in connecting eleventh-century Norman property transfer laws with the Common Law that followed.

The lack of clear definition arises most noticeably in the section on gifts. Here, Tabuteau never clearly explains the legal meaning of what is a gift — facially the most common of her categories.⁸ She states only that what made a gift a gift was "apparently well-understood" in the eleventh century (pp. 28), relating that consideration for gifts included counter-gifts (money, horses, jewelry, military equipment, and the like), a place for a relative or the donor in the religious community, or, not surprisingly, salvation. These bargains seem to border on sales. Sales, however, were often disguised as gifts, since parties believed donations to the Church were methods of gaining heavenly merit (pp. 28-29). Although she tries to give the reader reason to

5. The documents, beyond describing the transaction of concern in each charter, contain material that reveals what the general pattern of property transfers might have been in this period. P. 10. Tabuteau classifies this material as "elaborations" on a basic structure (the sample structure given is "so-and-so gives such-and-such property to this-or-that church"). P. 10. She places these elaborations into three categories. The first is a description of the consideration involved in the transfers. The second provides a history of the land concerned. These earlier transfers not only helped the parties involved identify the property being transferred, but also, for Tabuteau's purposes, provide her with information about arrangements solely between lay persons. The third departure from the skeletal charter scheme is a description of the methods of verification used.

As the author notes, these embellishments provide her research into Norman property transfers with a "staggering" amount of information — at least relative to other legal topics on the same period. P. 11.

6. Chapter 3, "Permanent Alienations," pp. 14-43, and chapter 4, "Conditional and Temporary Alienations," pp. 44-94.

7. Under permanent alienations, Tabuteau places gifts, post-obit and deferred gifts, sales, exchanges, and tenure in alms. Categories in temporary alienations are fiefs, rentals, and grants for limited term life estates, mortgages, and movables. Her conditional gifts group has no further subcategorization.

8. The author states that most of the transfers of property recorded in the eleventh-century charters were gifts. P. 14.

think that the concepts of sale and gift were viewed as conceptually distinct in the eleventh century, the author writes that it is "impossible" from her perspective always to know if what is portrayed in a charter is a sale or a gift (p. 30). The importance of her division is thus diminished, and the inability to distinguish "gifts" from "sales" suggests that the reality may have been far different and far more complex than the scheme presented.

Also left unanswered are issues as to the earthly effects of contemporary categorization upon the legal validity of the exchange⁹ and a discussion of the institutions of enforcement.¹⁰ While the book resigns itself to not providing the reader with a keen sense of the divisions of the law (p. 41), it fails to compensate with explanations of the forces and trends that caused the confused state of the law. Although she briefly mentions the law's apparent state of flux (pp. 42-43), Tabuteau fails to develop this observation into a thesis.

In the midst of her writings on property transfer, Tabuteau inserts a chapter on ownership and tenure in eleventh-century Normandy.¹¹ Essentially the same work that appeared more than a decade ago,¹² the chapter serves as her entry into the historical debate over whether Norman society was predominantly feudal by the time of the Conquest.¹³ However, the chapter is not a major contribution to the debate. The center of the author's argument is her showing that words denoting ownership in the early eleventh century came to indicate tenure by the end. She then asserts that we can infer from this a shift away from ownership toward tenure during the eleventh century. Her argument is at times overly subtle, and will leave most readers unable to comprehend the significance of the shift she perceives. Tabuteau

9. Tabuteau does explore this topic in her section on permanent alienation by sale. Pp. 27-34. She argues that one indication of the precarious status of money-based exchanges is that they were often accompanied by security devices such as pledges and warranties. P. 31. The persuasiveness of this argument is lessened by the fact that her division between sales and gifts is not sharp. Pp. 27-28. Countergifts, which frequently consisted of money, blurred the distinction and make any analysis resting solely on the category of sales questionable.

10. Although the author later describes the modes of assurance that parties employed to enforce the charters, she fails to devote much space to the issue of whether parties to a transfer were aided by institutions outside their agreement in enforcing the terms of their transaction.

11. This material appears in chapter 5, "Ownership and Tenure." Pp. 95-112.

12. Her earlier contribution to what she depicts as a "well-worked topic" p. 297 n.53, is Tabuteau, *Ownership and Tenure in Eleventh-Century Normandy*, 21 AM. J.L. HIST. 97 (1977). The material in that article constitutes, verbatim, most of this chapter. For the version here, the author has substituted a truncated introduction and has added material on the relation between feudal service and the transfer of property.

13. To highlight the features of this dispute, the author cites Charles Homer Haskins and Henri Navel as the leading proponents of the view that "all or almost all land in Normandy was held rather than owned by the mid-eleventh century." P. 95. For the opposing side, a "much smaller group," only Donald Matthew is mentioned. P. 95.

Among other adherents to the point of view Tabuteau hopes to rebut is R. Allen Brown, who states that "we need not doubt the reality of Norman feudalism in 1066 . . ." R.A. BROWN, *THE NORMANS AND THE NORMAN CONQUEST* 39 (1969).

provides a sea of distinctions and synonyms, but provides little aid as to which side has the better of the argument. The sole convincing statement of the section is that “[c]ertainty in this matter may be forever beyond reach” (p. 95).

Of greater relevance to the rest of the book is a small section discussing the consequences of property transfer on feudal service obligations.¹⁴ This issue could have been given greater attention, but, as the author notes, the charters are “silent” about what happens to service obligations upon the transfer of real property (p. 111). By going beyond the confines of the charters, which are the basis of her book, Tabuteau could have better explored an area she describes as “perhaps the most perplexing problem raised by transfers of property” (p. 110).

In the final third of the book, Tabuteau concentrates on the devices and ceremonies used by eleventh-century Normans to insure that their transfers would last. The author’s organization is clearer in this section, imposing a natural structure upon the methods used to guarantee transfer. The importance to the parties of the different types of assurances is evident. For example, if the Church lost possession of property, the donor might lose the expected spiritual benefits (p. 113). These problems encouraged the use of assurances to secure the transfer against challenges by others and by the parties themselves, (pp. 116-17).

Transfers were secured through several means, many of which reveal how tenuous title must have been during the period.¹⁵ For example, the author recounts that fears of challenges by third-party claimants to the donor’s right to transfer the property caused the parties to bring together many people, including potential claimants, to view the ceremonial acts of transfer. These people were gathered not only to witness the ceremonies, which confirmed the parties’ agreement, but also to renounce any claims they might have had to the same land (pp. 142-46).

Publicly, many possible claimants would participate in the receipt of counter gifts or be called upon as witnesses. These persons were also responsible — at risk of penalty¹⁶ — for assuring the transferee that

14. The three pages on the relation of feudal services and property transfer comprise some of the newer material in chapter 5. Pp. 110-12.

15. Tabuteau subdivides the types of assurances into several broad categories, each of which constitutes a chapter. Public acts are covered in chapter 6, pp. 113-41; the role of third parties as confirmers, witnesses, signers and pledges is covered in chapter 7, pp. 142-69; consent by those with possible claims in chapter 8, pp. 170-95; warranty in chapter 9, pp. 196-204; and penalties in chapter 10, pp. 205-10.

16. The most common penalty, according to the author, is anathematization. P. 205. It is interesting to note that “[s]ome charters make a clear distinction between excommunication in the present world and condemnation to Hell in the afterlife, whereas others allude only to one or the other or simply express a hope that persons who trouble the church may never go to Heaven.” P. 380, n.1. This split, as Tabuteau writes, may have had little functional difference. P. 380, n.1.

the transferor would not later challenge (pp. 146-69). In addition, many other public ceremonies, including oaths, the placement of symbolic objects on an altar, or a walk around the property, were used to impress upon the parties the solemn nature of the occasion. These acts also provided additional witnesses if the validity of the transfer was later challenged (pp. 119-41).

Tabuteau writes that the recording of the transfer in a charter was of secondary importance. The charter was written to describe the ceremonies of transfer, not to serve as an official paper with evidentiary functions (p. 219). Those who attended the public ceremonies, or who had possible claims, would be listed in the document as having recognized the transfer. The charter would relate the activities and memorable details of the ceremonies so that each participant could recall the event (p. 212). Unfortunately, Tabuteau never clearly explains the relationship of these practices to later developments in English law. Although she presents this final material clearly and accurately, the absence of meaningful context means her investigation will not be open to an uninitiated legal or historical audience.

While it allows scholars a chance to survey documents from the era in digested form, *Transfers of Property in Eleventh-Century Norman Law* does not succeed in opening this era to the lay reader. The book offers its own vision of what property transfer law may have been in the period, but does little to suggest why Norman law had developed to this point, and what would drive its development in the future. As a dissertation on the elements of a specific area of Norman law, Tabuteau's book functions well. But, for the reader who hopes to gain insight into the interaction between Norman society and its laws, one should take the book's title seriously. *Transfers of Property* doesn't wander far beyond the narrow scope its title suggests.

— William John Gallagher