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THE ROMAN ELEMENTS IN BRACTON'S TREATISE

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All students of English legal history must have felt gratified to know that Dr. Woodbine had succeeded in mastering the difficulties attending a critical edition of Bracton's text, and the recently published second volume of his work¹ gives them a substantial instalment of the results of his scholarly selection and revision of readings. In an article of the *YALE LAW JOURNAL*,² Dr. Woodbine has commented with much acumen and ripe judgment on the vexed problem of the use made by the famous patriarch of Common Law of his Roman materials, especially of Azo's *Summa in Institutiones* and *Summa in Codicem*, but also of the original texts of the *Corpus Juris*. I am glad to find that Professor Woodbine sides with me in his general appreciation of Bracton's Romanesque learning. Instead of marking Bracton down on account of his real or supposed blunders and misunderstandings,³ he points out that in most cases Bracton's peculiarities of rendering and interpretation of Roman doctrines are traceable to the definite plan of using, as it were, Roman bricks for the construction of an English edifice. Like all other leading exponents of customary law in the XII and XIII centuries, he was dominated by a profound reverence for the wisdom of Roman jurisprudence, and endeavoured to utilise its distinctions and principles for the purpose of arranging and rationalising the incoherent mass of barbaric and feudal custom. The application of such a method could not fail to produce strange combinations which it is easy to ridicule as anachronisms. But instead of indulging in somewhat pedantic criticism

¹ Bracton, *De Legibus et Consuetudinibus Angliæ*, edited by G. E. Woodbine, Vol. II (1922).

² (1922) Vol. 31, p. 827.

³ See Maitland, *Bracton and Azo* (1895) xix and *passim*. Goudy in *Essays in Legal History* (ed. by P. Vinogradoff, 1913) 223.

it is more interesting, as it seems to me, to discover the motives which produced the curiously hybrid formations assumed by Roman doctrines at the hand of mediaeval legists.⁴

As, however, the severe condemnation of our writer is formulated by Maitland as the result of a painstaking and minute study, it is not enough to enter a general protest against the treatment of the examinee by his examiners. It seems necessary to go again through the papers with care and to discover, if possible, why so many passages of the Institutes or of Azo have been twisted by Bracton into shapes that do not correspond to their plain and direct meaning. We might not merely exonerate a famous Judge in respect of irreverent censures, but also, perhaps, observe some characteristic indications of the peculiarities of mediaeval juridical thought. Professor Woodbine has given a good example of such a rehabilitation by his analysis of Bracton's chapters *De Adquirendo Rerum Dominio*, more or less set aside in Maitland's book. I propose to put before the readers of the YALE LAW JOURNAL a few remarks on some other points condemned by Maitland and Goudy. Before doing so, however, I should like to make one observation bearing on the general use of Roman sources in the treatise *De Legibus*. Most of the commentators—and Professor Woodbine among them—hold that Bracton had recourse to original texts of the Institutes, of the Code and of the Digest in addition to the statements of Azo in his two *Summae*.⁵ This assumption seems open to considerable doubt. The references to the originals are so rare and so accidental that Bracton can hardly have had complete texts before him or, if the books were available, can scarcely have used them to any appreciable extent. It is to be noticed that he usually omits from Azo's treatises the direct quotations which abound in them. What is to be found in the extant text is often traceable to marginal notes of students⁶ and, even apart from that, may be accounted for by the existence of collections of extracts made by men who had a wide knowledge of the subject and served as intermediaries between the learned circle of Italian glossators and the lawyers of less civilised countries—France, England—when the latter turned to Roman jurisprudence for the purpose of setting in order their own laws. One compilation of this kind is especially indicated for detailed study as a possible source of Bracton's Romanesque learning, namely the *Liber Pauperum* of Vacarius.⁷ Even on the strength of Wenck's well known monograph⁸ one may come to the conclusion that Bracton's references to the various parts of the *Corpus Juris* do not range outside the fragments collected in the *Liber Pauperum*. When Professor de Zulueta's edition of Vacarius, on which he has been at work for many years, is

⁴ See Vinogradoff, *Roman Law in Mediaeval Europe* (1909) 88 *et seq.*

⁵ (1922) 31 YALE LAW JOURNAL, at p. 845.

⁶ E.g. the reference to C. II. 3. 13 on f. 16d. of the Vulgate.

⁷ *Circ.* 1150.

⁸ Wenck, *Magister Vacarius* (1820).

published we shall be better able to identify the extracts that have passed to Bracton through Vacarius' mediation. It may be noticed even now, however, that Bracton, in opposition to the glossators, does not, as a rule, refer to the controversies between doctors (*Dissensiones Dominorum*); and even when he does so by way of exception, his reference is introduced in obscure terms, e.g., by *secundum quosdam*. The *Liber Pauperum* is also very reticent on the subject. Direct references to M(artinus) or B(ulgarus) or even V(acarius) are exceedingly rare and the glosses appear rather disappointing in this respect. But this feature is easily explained by the aim of the compilation; it was made for the use of poor English students and not of learned Italian doctors. The same is the case with Bracton; the contrast between his persistence in following the substance of Azo's exposition and the casual way in which certain references to the texts themselves are inserted testifies in itself that we have to deal with a student of secondhand books and not of the original sources. This is confirmed by the appearance of school tags like the enumeration of the six modes of contracting.⁹ The stock example of the exchange of a copy of the Code for a copy of the Digest does not fit at all in the English school surroundings of the age, while it would be quite appropriate in Italian university intercourse. I do not go further, therefore, than to claim for Bracton an acquaintance with Roman law at second hand by means of *Summae* and collections of extracts. Even with this qualification Bracton's use of civilian jurisprudence remains a remarkable monument of the scholarly interest and of the ingenuity of an English lawyer bent on rationalising the laws and customs of his time and country.

I should like to examine from this point of view some of the charges of ignorance levelled against Bracton. Let us begin with a point to which the late Professor Goudy has dedicated the greater part of a paper read at the London Congress of Historical Sciences in 1913.¹⁰ It deals with the statement on f. 101 of the Vulgate¹¹: "Item tollitur obligatio morte alterius contrahentium vel utriusque, maxime si est poenalis, vel simplex—si autem duplex, scilicet poenalis et rei persecutoria, in hoc quod poenalis est tollitur, et non extenditur contra heredes, nec datur heredibus, quia poena tenet suos auctores et extinguitur cum persona." "An obligation is also got rid of by the death of either of the contracting parties or of both, especially if it is a penal obligation or a simple one; but if it be a double one, namely penal and for recovery, it is got rid of as far as it is penal and it does not extend to the heirs, nor is it allowed to the heirs because a penalty binds the original parties and is extinguished with the person." Professor Goudy

⁹ Maitland, *op. cit. supra* note 3, 143. The book of extracts may have been compiled in the school of Thomas of Marlborough instead of being derived from Vacarius' *Liber Pauperum*.

¹⁰ Goudy, *op. cit. supra* note 3, 222 *et seq.*

¹¹ 2 Woodbine's ed. 288.

thought that this "is wholly confused. It is evident that in seeking to apply the Roman doctrine on this point to English law (and he is plainly not stating existing English rules) Bracton failed to distinguish between *obligatio* and *actio*."¹² One may feel inclined to question the justice of this rigorous verdict when one notices that the doctrine as stated by Bracton turns out to be an expression of a widely diffused principle of mediaeval customary law. The *Sachsenspiegel*, which summarizes the customary law of XIII century Saxony, declares:¹³ "He who takes the inheritance shall acquit debts to the extent of the goods transferred to him by the inheritance. He is not bound to pay for theft or brigandage or gambling losses nor any debt the equivalent of which he has not received in the inheritance or for which he did not stand surety." The distinction between obligations arising from delict and from contract is clearly stated: it involved important practical consequences in those days, because the most important action arising out of obligations—debt and detinue—had a delictual character. The rule was eventually generalized in customary Saxon law in the sense that the heirs came to be bound by any obligation contracted by their ancestor in case they had derived profit from the transaction.¹⁴ In this form we find the rule mentioned in the *Summa de legibus Normanniae*, a compilation almost coeval with Bracton's treatise.¹⁵ Altogether there can be no doubt that the restrictions on the transmission of personal actions did not originate in an erroneous use of Roman texts by Bracton, but in an attempt to state a customary principle that finds its application in other countries as well as in England. The case is a conspicuous instance of the blending of Roman and customary doctrine in XIII century juristic thought.

Several of the cases mentioned by Maitland on page xix have to be traced to the same process. One does not need to make complicated hypotheses in order to explain why Bracton claimed the half-free, half-servile tenantry of ancient demesnes as *adscripticii*,¹⁶ or why he availed himself of the term *Statuliberi*¹⁷ to designate the very common group of villeins temporarily enjoying rights of freemen. The remodelling of the doctrine of occupation of things which did not belong to anyone before¹⁸ is hardly to be reckoned as a blunder: it is rather an extreme statement of the view that beasts of the chase ought to belong to the King unless the privilege of hunting them had been conceded to subjects by a Royal grant. The law of the Forest was derived from such a

¹² Goudy, *op. cit. supra* note 3, 223.

¹³ I. 6. sec. 2.

¹⁴ *Der Richtsteig Landrechts*, herausg. von C. G. Homeyer (1857) cap. 10, Sec. 3, quoted by Hensler, 2 *Institutionen des Deutschen Privatrechts* (1885-86) 547, note 11.

¹⁵ *Ancienne Coutume de Normandie* (de Gruchy ed. 1881) ch. 88.

¹⁶ Maitland, *op. cit. supra* note 3, 49.

¹⁷ *Ibid.* 83.

¹⁸ *Ibid.* 103.

view¹⁹ and although it ran counter to old usage it found strong support among the partizans of Royal power.

On page 63 again we find a significant "interpretation" by Bracton concerning ranks of men: the civilians followed the example of the *Corpus Juris* in assigning the highest authority in the secular world to the Emperor. The English writer could not follow their teaching in this respect without discarding the fundamental concept of the complete independence of the Crown of England. The natural outcome was a re-statement of the doctrine similar to that which French lawyers²⁰ adopted in the XIV century: Emperors and Kings were placed on the same level as wielding the sovereign authority.

A conspicuous case of intelligent adaptation is presented by the substitution of "forisfamiliatio" for emancipation.²¹ The absolute power of the *paterfamilias* was unknown to mediaeval society and, consequently, the practice of emancipating sons had no meaning for a writer on English customary law. Azo expounded the teaching of the *Corpus Juris* in accordance with the strict method of the glossators, but Bracton was not copying without reflection, and therefore he very properly set aside the passage on emancipation. The nearest approach to that institution he found in a usage described by Glanville²² by which a father might start a son as an independent householder outside the family community. The custom was an interesting manifestation of joint family life under the management of the father, and a certain recognition of the claims of sons not succeeding to their father's main holding. It would become especially important in places with Borough English succession, as the elder brothers of the junior heir appeared as natural candidates for such an endowment. Bracton evidently had Glanville's passage in view when he referred to "forisfamiliatio" as an ancient custom. It may be remarked that similar practices have played an important part in the development of succession in the French *coutumes*.²³

There are frequent cases when Bracton effected a simplification of Romanesque learning by selecting some one characteristic pronouncement instead of copying them all. Why should, for instance, his treatment of the distinction between *res publicae* and *res communes* that gave rise to a conflict of opinion between Placentinus, on one side, Johannes Bassianus and Azo on the other, be attributed to "little care for the controversy?"²⁴ Was it quite unreasonable for Bracton to adopt the view of Placentinus and not that of Azo in this case?

¹⁹ Cf. the statement of the *Dialogus de Scaccario* (circ. 1178) on the derivation of the law of the forest from the personal discretion of the King. *Lib. I, c. 11, sub fine.*

²⁰ See C. N. Sidney Woolf, *Bartolus of Sassaferrato* (1913) 340, 380 note 2.

²¹ Maitland, *op. cit. supra* note 3, 77.

²² *Lib. VII, c. 3.*

²³ See Paul Viollet, *Histoire du Droit Civil Français* (3d ed. 1905) [522] *et seq.*

²⁴ Maitland, *op. cit. supra* note 3, 95.

Bracton gave a positive meaning to Azo's sarcastic observation concerning any attempt to vary the species of law in accordance with the innumerable differences of persons and things. He dropped the "essent" which imparted to Azo's sentence its ironical meaning and spoke gravely of the diversity of *jura*, because he had in view not varieties of law, but varieties of *rights*—the right to a house, to an ass, to a vineyard, to a field, as well as the right of Peter or of John.²⁵ This is not very good Latin, but the general meaning of the passage can hardly be in doubt.

There are, of course, instances in which Bracton's text, as we have it, contains obscure or badly worded statements, and this is hardly to be wondered at, as the author seems to have carried out his great enterprise in troubled times and without final revision. As an example, one might refer to the passage about the foreshore.²⁶ After stating the rule as to common access to the sea by the shore, the Institutes and Azo's Commentary on them mention the exceptional right connected with the buildings situated on the shore "quia non sunt juris gentium communia sicut et mare;" Bracton's text introduces *litora* as the subject of the sentence giving a different turn to the sentence. One may well ask what meaning did the writer attach to the assertion that the shore is not *juris gentium* like the sea after having spoken of the shore as common to all because it gives access to the sea? Two explanations appear possible: *litora* may have been a marginal note for reference which has slipped into the text. If so, the misunderstanding must have occurred very early in the genealogical development of the MSS.; it appears in the principal copies. If this explanation should be deemed hazardous, there remains the possibility of an assumed contrast between *jus naturale* and *jus gentium* in this respect. The shore would be *res communis* by the law of nature, but liable to appropriation by the *jus gentium*, in consequence of the erection of buildings or monuments. Some support for such an explanation may be derived from the fact that Bracton accepts Azo's observation that in this case *solum cedit aedificio*, but omits the remark that it would be "aliud secundum regulam."

Altogether there is certainly a great difference between noticing the blemishes of Bracton's treatise and ascribing them to ignorance and lack of understanding on the part of the author. Bracton's use of Roman law has to be estimated according to standards drawn from the literary activity not of Azo, but of Pierre de Fontaine or of Beaumanoir.

²⁵ *Ibid.* 33. Bracton, f. 3b. 2 Woodbine's ed. 25.

²⁶ F. 7d. 2 Woodbine's ed. 40; Maitland, *op. cit. supra* note 3, 93.