

# REVIEWS

THE ECONOMICS OF PUBLIC UTILITY REGULATION. By Irston R. Barnes. New York: F. S. Crofts & Co., 1942. Pp. xxiv, 952. \$5.00.

THE distinctive character of this new textbook on public utility regulation lies neither in its organization of material, which follows a fairly standardized outline, nor in its statement of principles and of public policy, which accords generally with "the best liberal thought" of current writers. Instead, the author's real contribution is his skillful combination of a broad survey with a wealth of detail and of concrete illustration. The detail is carefully selected, accurately presented, and of sufficient importance to interest the specialist if not the casual reader. To a far greater extent than do the shorter texts, Barnes's treatise portrays the true complexities of modern utility regulation as well as the significant variations among the different jurisdictions of the nation.

Following a well established precedent of textbook writers, Barnes begins with a chapter on The Public Utility Concept, devoted largely to a review of the legal cases on businesses "affected with a public interest" and noting recent decisions which reduce the force of the traditional distinction between a public and a private calling. In presenting the "theories" by which various writers have rationalized the power of the government to regulate the prices and services of particular businesses, Barnes gives qualified approval to the "social disadvantage theory," which "finds the ultimate sanction for regulation in the welfare of society rather than in the protection of individuals."<sup>1</sup> Unfortunately, the author fails to make clear just what distinction he has in mind between the welfare of society and the welfare of the individuals within that society. In default of such an explicit distinction, I am at a loss to attach any definite meaning to the "social disadvantage theory" of regulation.

Chapters II to IV review the history and the economic characteristics of public utilities, including an excellent chapter on corporate structures under the domination of the holding company. The subject of regulation is then introduced by three chapters: on state and federal jurisdiction; on the instruments of regulation (the legislature, the judiciary, and the commission); and on franchises. As a layman, after reading Barnes's discussion of the case law on state versus federal jurisdiction, I remain confused on the nicer aspects of the dispute. Perhaps, however, the confusion lies in the case law itself.

The treatment of rate regulation is preceded by a chapter on the control of accounting, with special reference to accounting for depreciation. The recent trend away from the use of mere, arbitrarily determined, retirement reserves to systematic accounting for accrued depreciation is supported by the author, whose views on wise regulatory policy with respect to depreciation as a factor in rate making seem fair and sensible. On the theoretical side, however, the author's discussion, like that of all other writers in the field (including the present reviewer), is inadequate. Barnes, for example, appears to accept, as

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1. P. 18.

valid for rate making as well as for accounting purposes, the Federal Power Commission's definition of depreciation as "the loss in service value not restored by current maintenance, incurred in connection with the consumption or prospective retirement of electric plant in the course of service from causes which are known to be in current operation and against which the utility is not protected by insurance."<sup>2</sup> But neither he nor the Federal Power Commission has succeeded in defining that "service value," the loss of which is said to constitute "depreciation."

When the term "depreciation" refers to something which must be deducted from cost new in arriving at a rate base, the objection to identifying it with loss in *value*, however "value" be construed, is that the rate base itself is essentially a cost category and not a value category in the minds of those who, like Barnes, reject the standard of *Smyth v. Ames*.<sup>3</sup> If, then, the rate base does not purport to measure the *value* of the property, why should one arrive at it by deducting from cost new an allowance for a *decline* in value? Moreover, if "value" is outlawed as a rate base because of the familiar vicious-circle objection (namely, that value depends on earning power, which in turn depends on prospective rates), why should not depreciation likewise be outlawed when used as a value concept?

In a later chapter, Barnes recognizes this fundamental difficulty of definition, by stating that "in utility regulation, depreciation is not simply a value concept."<sup>4</sup> In this chapter he properly treats depreciation in terms of amortizable cost rather than in terms of value decrement. Yet he does not completely abandon the value conception, for he now refers to depreciation in terms of "lessening in cost value"<sup>5</sup>—a phrase which is self-contradictory on its face.

One other point in Barnes's discussion of depreciation may fairly be challenged, namely, his statement that the same considerations which underlie the deduction of accrued depreciation from reproduction cost new, as a measure of the rate base, apply also to its deduction from original cost.<sup>6</sup> While Barnes is almost certainly right in insisting that depreciation is properly deductible in both instances, the *reason why* it is deductible from reproduction cost would seem to be different from the reason why it is deductible from original cost. Furthermore, the logic of a reproduction-cost rate base calls for a definition of depreciation different from the definition appropriate under an original-cost rate base. The space limits of this review, however, preclude an exposition of this point, which I have discussed elsewhere at some length.<sup>7</sup>

Chapters IX to XVIII are devoted directly to rate regulation, including an extensive review and critique of the Supreme Court opinions on "fair value" and on "reasonable rate of return." Well done as this survey of the legal precedents is, I question whether so much space should be given to it in a treatise written primarily from the standpoint of an economist. Much of what the

2. P. 256.

3. 169 U. S. 466 (1898).

4. P. 477.

5. Pp. 478, 490.

6. P. 408.

7. 2 BONBRIGHT, VALUATION OF PROPERTY (1937) 1137-40.

courts have said about the principles of rate regulation is now so clearly beyond the pale of scientific thought and reasonable controversy that it is hardly worth reading unless it still reflects authoritative law. The attempt to master the intricacies of these judicial pronouncements is likely to leave both the author and the reader with inadequate time to analyze the many, complex problems in the economics of rate making that are still the proper subject of dispute among experts. Barnes's treatise suffers in this respect, for it treats only summarily the more difficult and more important economic aspects of rate theory, such as the proposed principle of charges made equal only to *marginal* cost,<sup>8</sup> or the relative merits of alternative measures of the demand charge.<sup>9</sup> Each one of these problems of "applied economic theory," along with a number of others, deserves a long, separate chapter in an advanced study of the economics of rate regulation.

On the nature of the rate base, Barnes agrees with other economists that "present value," in the businessman's sense of the word "value," must be rejected on logical grounds. Indeed, recent cases suggest the likelihood that the Supreme Court itself will soon expressly take a similar position. One point, however, deserves more consideration than it has received from critics of the "fair value" doctrine. That is whether "value" rather than mere "cost" might qualify as a rate base if it were to be identified, not with the commercial value of the property to its owners, but rather with the potential value of the assets to the community. So construed, the acceptance of "value" as a rate base would not run afoul of the vicious-circle objection to market value, although it would be subject to other objections that might well be fatal from a practical standpoint. I raise this point, not with the idea that "value to the community" demands acceptance as a rate base alternative to that of the *Smyth v. Ames* doctrine, but rather by way of accounting for the refusal of many intelligent people, including many judges, to accept the frequent assertion of appraisers that the *value* of a public utility property is a mere reflection of its earning power. In refusing to accept a capitalized-earnings conception of value, may they not be thinking in terms of the potential value of an electric plant or of a railroad system to the people of the community who benefit, directly or indirectly, from its services? Such a value is indeed no mere expression of anticipated corporate income.

The relative merits of original cost and of reproduction cost as the chief determinant of the rate base—a subject of long-standing debate among lawyers and economists—are discussed at length in Chapters XII, XIII, and XIV. Although the author himself gives the honors to original cost, he presents well and fairly the defense of a rate base which rises and falls with changing construction costs. However, he has failed to mention one serious fallacy in the *theoretical* case for reproduction cost. The fallacy lies in a failure to recognize that the economic advantage which is claimed for a reproduction-cost rate base (namely, that it would result in rates high enough, but not too high, to induce consumers to make the optimum use of public services) is an advantage which could be fully secured only if rates were set at mere *incremental* cost—at the

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8. Pp. 586-88.

9. Pp. 325-31.

additional unit cost of supplying more service, without reference to overhead costs. Indeed, Hotelling and other economists to whom Barnes refers,<sup>10</sup> accept the full logic of this position by proposing that utility rates be set at marginal cost and that any resulting deficits be paid for by governmental subsidies. But the reproduction-cost rate base, while it avoids the need for a subsidy, also misses the very objective that is supposed to constitute its great charm from the standpoint of orthodox economic theory.

The chapter on The Rate of Return makes good use of the two excellent studies of the subject prepared by Carl I. Wheat and published in 1938 by the Federal Communications Commission. Barnes rightly notes the lack of clarity in the judicial pronouncements as to a "reasonable" rate of return; and he also notes that some of these pronouncements, such as that of the Supreme Court in the *Bluefield* case,<sup>11</sup> seem more germane to a commission's search for an *economically sound* rate of return than to a court's inquiry as to whether the rate which a commission has already allowed is "confiscatory." He also calls attention to the marked incongruity between the criteria discussed by the courts in connection with valuation and the criteria discussed by the same courts in connection with rates of return.

Believing that a fairly sharp distinction should be drawn between the idea of a *reasonable* rate of return and the idea of a *non-confiscatory* rate, Barnes would measure the former at whatever rate is required to attract the necessary *additional* capital to the enterprise, while he would measure the latter at whatever rate is high enough to avoid a "withdrawal" of *existing* capital. But he has difficulty in giving definite meaning to his phrase "withdrawal of capital," since the capital outlays for most public-utility assets are irretrievable costs save for mere salvage value. With various qualifications, he concludes that a proposed rate of return may be adjudged "reasonable" if it permits the company's stock to sell at some 10 points above par (or above legitimate book value); whereas it must be adjudged not only unreasonable but positively "confiscatory" if its niggardliness brings the market price of common stock persistently to 5 or 10 points below par value (or legitimate book value), and if the resulting yield at which this stock will sell on the market is materially higher than that characteristic of other similar securities.

These are ingenious suggestions. Yet I suspect that the distinctions which they would draw between reasonable and confiscatory rates of return are too subtle for practical application by the courts. If some distinction is called for, as well it may be, there is much to be said for a simple rule that a rate of return to be adjudged "confiscatory" must be found to be not only "unreasonable," but *outrageously* unreasonable, or at least, "unreasonable beyond reasonable doubt!"

Among the "alternatives to the present-value rate base" presented in Chapter XVII, Barnes presents his own promising modification of the "prudent investment" basis of rate regulation. A part of this program he adapts from the Washington plan as applied to the electric company serving that city,

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10. Pp. 586-88.

11. *Bluefield Water Works & Improvement Co. v. Public Service Comm.*, 262 U. S. 679, 692 (1923).

and another part from a proposed utility bill drafted by Dr. John Bauer with my assistance and presented in the Minority Report of the New York State Commission on the Revision of the Public Service Commissions Laws.<sup>12</sup> But Barnes would modify the provisions of the Washington plan by reserving for consumers, to be applied to amortization of capital investment, half of any excess earnings yielded by rates in effect in any given year. More important, unlike other schemes of rate control which follow the "prudent investment" principle, the rate of earnings on common stock equity would be left flexible so that it could be made sufficient, in ordinary times, to permit the company to attract new capital by the issuance of more common stock of the same class. This provision, Barnes thinks, would go a long way toward removing what he deems the most serious defect of the prudent-investment plan—the difficulty of selling common stock if the dividends on that stock are limited to a fixed maximum rate.

After leaving the subject of rate control, the author first devotes a long chapter to the regulation of holding companies before and after the passage of the Federal Public Utility Act of 1935. The topic is well treated in such a short space. But I am somewhat surprised to find no discussion of what is perhaps the most critical economic problem in the entire realm of holding-company regulation—namely, the case for or against a plan of integration which will divorce the business of local distribution from the business of large-scale generation and transmission. Apparently the draftsmen of the Holding Company Act did not have in mind this type of reintegration. But in the light of the experience of the British Grid System, the Ontario Hydro-Electric System, and the Tennessee Valley Authority, the proposal to separate the wholesale from the retail business of our private utility systems deserves careful study.

On security regulation, to which all the standard textbooks devote a special chapter, Barnes presents much fresh material originating largely with the newer federal commissions—especially the Securities & Exchange Commission. The major new development in this aspect of regulation, I take it, has been the recent refusal of some of the more aggressive commissions to "let bygones be bygones" so far as concerns an improper *existing* capital structure. Of course, there is a review of the recent controversy about competitive bidding. Barnes also presents a first-rate discussion of the requirements of a "balanced" capital structure.

A chapter on regulation of service standards is followed by one on the Federal Power Commission, which could have been materially enriched if the author had been able to consult the subsequently published monograph on that Commission by Robert D. Baum.<sup>13</sup> What Barnes presents is merely such a picture of activities and rulings as can be secured from the official reports of the Commission itself. The more intimate facts about the Commission and the extent and nature of its influence on the national power policies is missed because of lack of data. Barnes notes that until the Commission was reorgan-

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12. N. Y. Leg. Doc. No. 75 (1930) 241-422.

13. BAUM, *THE FEDERAL POWER COMMISSION AND STATE UTILITY REGULATION* (1942).

ized in 1930 it lacked the membership and the staff that could have enabled it to perform its assigned functions adequately. But he might also have noted that the whole social philosophy of the commissioners was changed as a result of the change from the old-line Republican administrations of the post-war period to the New Deal administration under Roosevelt. The recent clashes of this federal commission with several state commissions, such as that of New York, together with its successful cooperation with other state commissions, would also be worth treating. Finally, I miss a discussion of the still pending Niagara Falls Power Company license case, in the hearings on which the Commission's early licenses were challenged as failing utterly to protect the public interest.

From the standpoint of the political significance of private utility enterprise, the most enlightening chapter is that which summarizes the Federal Trade Commission's special report on propaganda of the utility corporations. This is followed by the final chapter, a seventy-one page discussion of public ownership, including not only municipal ownership but also the federal hydro-electric projects and the cooperatives sponsored by the Rural Electrification Administration.

Very wisely, the author gives relatively little space to the familiar, abstract debate on the merits of private versus public ownership. Both of these forms of organization have their distinct advantages and disadvantages. Moreover, both have so many possible variations that they cannot be discussed intelligently as if they presented merely two, definite alternatives. Largely under the stimulus of the New Deal political philosophy, the 1930's marked the rise of a period of experimentation with a number of variations in the field of public ownership, and even of several variations in the field of regulated private ownership. Down to date, as Barnes's discussion indicates, some of these experiments, such as those of the federal multiple-purpose dams, the public electricity districts and the rural cooperatives, have had results so promising that the program deserves vigorous continuance.

One theoretical aspect of the problem of public development of multiple-purpose dams seems to me to merit a more fundamental treatment in an economic treatise than Barnes gives it; that is, the problem of joint-cost allocation, which is mentioned briefly in connection with the work of the Tennessee Valley Authority.<sup>14</sup> The three alternative theories of allocation noted by Barnes<sup>15</sup> are by no means the only ones, and even their *rationale* is not adequately discussed. There are two major schools of thought as to joint-cost allocations. According to the first point of view, it is possible (at least in theory) to find some formula for allocating joint costs which is logically valid in the sense that only this one formula results in the "true" or "proper" allocation. According to the second point of view, the very "jointness" of a joint cost makes it indivisible except by an arbitrary *tour de force*. Hence, save under very unusual circumstances, there can be no such thing as any single, rational allocation as against which all other possible allocations are irrational. The extreme position along this line is taken by those who insist that all

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14. Pp. 867-70.

15. P. 868.

allocations are utterly arbitrary in the worst sense of the word and hence that they should never be attempted.

Reading between the lines, I surmise that Barnes would go a long way, at least, toward conceding the arbitrary nature of any joint-cost allocation. But the soundness of such a viewpoint is not obvious on its face; and a detailed discussion in the light of modern economic analysis would be a welcome addition to an advanced treatise on public utility economics.

In concluding this review, let me note that the very excellence of the book is what warrants the detailed criticisms that I have attempted here. The treatise is likely to have such deserved influence on the future literature, that a reviewer is justified in searching for limitations as well as in calling attention to its many virtues.

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THE IMPACT OF FEDERAL TAXES. By Roswell Magill. New York: Columbia University Press, 1943. Pp. ix, 218. \$3.00.

IN *Fortune* magazine for January, 1938, there appeared an article entitled "The Federal Tax System." The article was not really about the federal tax system at all although it did include a little-finger-nail sketch of that system; it was a modulated howl against the substantial taxation of American business. "How heavy a tax burden can U. S. business bear? And for how long? . . . there is a limit beyond which free business enterprise cannot pay taxes and be free; beyond which the capitalist economy must fail." It happens that this article, although unsigned, was the work of two men. The voice was Archibald MacLeish's voice, but the hands were the hands of MacLeish's friend who was then, briefly, Under Secretary of the United States Treasury. The hands were the hands of Roswell Magill.

Five years have passed, and a book has just been published entitled *The Impact of Federal Taxes*. This time both the voice and the hands are those of one who is billed on the book's jacket, not as Professor of Law at Columbia University, not as practising tax attorney in New York City, but as Former Under Secretary of the Treasury. "A badly designed tax system . . . can be a serious brake on incentive. Ours . . . is beginning to function as a brake today," says page viii; "our corporation taxes are exceptionally heavy," says page 18; "the method of taxing corporate income is grossly unfair," says page 19; "will there still be venture capital available for our enterprise system?" asks page 120; "American corporations seem to be caught in the greatest financial pincer-movement in their history," says page 121. Etc. Mr. Magill's melody lingers on.

It lingers on despite the fact that there is more to Mr. Magill's little book than his old theme song. What the book amounts to is a roughly revised

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reprint of half a dozen of the author's old articles and speeches, larded out with enough new stuff to stretch the whole to a little more than 200 small pages. As a result, the book is a book in form only. There is no cohesion, no continuity from chapter to chapter except the annoying continuity of frequent repetition. Thus, the *Horst* case, the *Hallock* case and the *Clifford* case, although all important cases, are scarcely so important as to warrant detailed and almost identical discussion two times apiece—discussion so identical that, for example, a relevant quotation from an earlier opinion appears both on page 104 and on page 181. And although Mr. Justice Stone's quoted "philosophy" in the *Horst* decision makes good reading on page 53, "the kernel of Mr. Justice Stone's philosophy" as quoted on page 185 has a too familiar ring. In fact, the only possible excuse for Mr. Magill's sixth chapter, a slightly warmed-over second serving of what has come before, is to add thirty pages to his book. It adds nothing else.

Nor should the unwary layman be taken in by Mr. Magill's protestation in his preface that his book is going to deal with "federal taxation in its broader and more fundamental aspects"; that it "is not designed to compete with treatises which interpret the law"; and again, in his first chapter, that "it will be a pleasure to leave the exposition of these matters [technical legal stuff] to the encyclopedic textbooks and tax services." Chapter II has 89 footnotes, all strictly legal; Chapter III has 150. Chapter VII is a tacked-on procedural discussion of federal tax administration, of no conceivable interest to anyone but a tax attorney. On page 87 appears the not atypical sentence: "In general, a payment by a corporation to its officers or employees has been treated as compensation, not as a gift, but payments by a successor corporation to employees of the predecessor or by stockholders, who had just sold their stock, to the corporate administrative staff have been regarded as gifts,"—with three footnotes. Here indeed are the broader and more fundamental aspects of federal taxation.

Actually Mr. Magill would have done better to stick to his legal knitting throughout, instead of branching off, as he does for about one-half the book, on broader and more fundamental excursions. Far and away the best of his work is embodied in the two chapters—one called *The Income Tax on the Family* and the other *Gift and Death Taxes*—which, as the author frankly concedes, are rehashes of old law review articles. In these Mr. Magill is competent, thoroughly informed, and sound if not imaginative in his suggestion of minor reforms. Yet even here he betrays a slant which is something less than objective—which savors more of *Fortune* magazine than of a Former Under Secretary of the Treasury. Thus, having earlier dismissed the results of taxing state and municipal bond interest (which he approves) as "inconsiderable"—not only from the standpoint of extra revenue but of "increased tax equity"—he devotes page after page to the problems of the poor millionaire who is anxious to leave his fortune to his family instead of to the government. Again, after earlier pointing out that, by taking full advantage of the gift and estate tax exemptions, a man can easily turn over \$100,000 to his family completely free of federal taxes—and commenting that these two federal taxes along with the income tax make it almost impossible today to build

up and transfer more than "a moderate estate"—Mr. Magill makes his point crystal clear on page 91 by labeling as "moderate" a *net* estate of half a million dollars.

It is in the field of corporate taxation, however, that Mr. Magill really lets go. "The two major corporation taxes—the normal tax and surtax on corporate net income and the excess-profits tax—are fundamentally defective, and the defects are emphasized by high rates." Here, on page 143, is the old familiar tune, and Mr. Magill rings all the changes. He repeats, not once but three times, the Union League refrain about stocks being owned by the poor as well as the rich so that big corporate taxes really soak the poor. "A recent study of dividend distributions in 1940 indicates that 47 per cent of the total payment was received by nonprofit institutions like hospitals, schools, and churches, by persons with small incomes who did not file returns, or by persons with net incomes of less than \$5,000," says Mr. Magill on page 149—without bothering to indicate that 53 per cent of the dividends, then, must have gone to profit institutions and persons with incomes over \$5,000. Those persons, according to Mr. Magill's own figures on page 198, add up to less than 1 per cent of the population, as contrasted to the more than 99 per cent who receive a part of 47 per cent of corporate dividends. More significantly, Mr. Magill nowhere states that about 20,000 persons, one-seventieth of 1 per cent of the population, regularly collect more than one-third of all corporate dividends which are *paid to individuals*; that ownership of corporate stock, when it spreads wide, spreads paper-thin; and that, in consequence, a corporate tax is essentially, although by no means exclusively, a tax on the rich.

Mr. Magill's chief indignation about the corporate income tax boils up from the fact that the same income is taxed again, without credits or deductions, when it is paid out to individuals as dividends. "The result," he says on page 27, "is a tremendous double-tax burden on corporate income, greatly in excess of the taxes on any other form of income. This discrimination against corporate income is perhaps the most serious offense against fairness in the present tax law." Mr. Magill's point, not a new one, is a valid one. But it is not nearly so valid as he would have it appear. And therein lies the essence of my major quarrel with Mr. Magill.

Now Mr. Magill is a tax attorney, and he is no fool. He must know that corporate income is not always taxed twice. He must know that it is not taxed twice when it is retained and reinvested by the corporation instead of being distributed as dividends. He must know, further, that this very fact creates what is probably the biggest loophole in the income tax law—whereby wealthy men who control large corporations, but not so closely as to come under the penalty provisions of the "personal holding company" tax, escape the high brackets of the individual income tax by simply reinvesting and reinvesting their earnings without declaring dividends. He must know that this practice holds a double advantage in that the tremendous increase in the value of such investments, if they are held until death, is never taxed as capital gain to anyone. He must know that the sole purpose of the undistributed-profit tax of a few years ago was to put an end to this little game by forcing the declaration of dividends—and that the undistributed-profit tax was wil-

fully misrepresented to death, largely at the instigation of the wealthy men whose game it had spoiled. He must know that, in the absence of an undistributed-profit tax, almost the only way to hit these hoarded profits is with a high corporate income tax, *per se*. He says none of these things, and, although they are by no means a complete answer to what he does say, I am afraid that, in omitting them, Mr. Magill is himself guilty of a "serious offense against fairness."

Similarly, his diatribes against the "confiscatory" excess-profits tax bear all the earmarks of special pleading. Meticulous to pounce on every minor defect of the law which in any way works hardships on corporations, Mr. Magill has not a single harsh, or even mildly critical, word to say about the law's most glaring flaw. This flaw happens to operate in favor of corporations—and it has already cost the federal treasury literally billions of dollars. It is the alternative base, whereby every corporation, of its own sweet will, is permitted to choose whether to compute its normal profits (and hence its taxable excess profits) from past earnings or from its invested capital. Mr. Magill may—and obviously does—approve, in all honesty, of this boon to corporate wealth. But in the light of his references to the British income tax law when he likes the way it works, I do not see how he can, with any honesty, keep from his readers the fact that Great Britain's excess-profits tax contains no alternative base whatever. Nor do I see how he can say, on page 190, that our 90 per cent excess-profit tax rates "have already reached a peak" without at least a passing mention of the British rate of 100 per cent.

Although it is the striking omission of relevant material tending to counter his own conclusions which will most deeply disturb any informed reader who does not share Mr. Magill's prejudices, perhaps the best comment on his persistent and tender solicitude for corporate wealth lies in a little table of facts published by the *New York Herald Tribune* some weeks ago. The table shows that total corporate profits for 1942, *after payment of all taxes*, were 23 per cent higher than in the boom year of 1940, and 300 per cent higher than in 1938—the year when Mr. Magill expressed indirectly in *Fortune* magazine his concern about the impact of federal taxes on the future of American business. And if—in the face of facts like these—the same man is still concerned about the same thing today, it is not too surprising. For it seems to me that the author of *The Impact of Federal Taxes* was not really Former Under Secretary Magill of the United States Treasury and was not really Professor Magill of Columbia University. It was Roswell Magill, Esq., of the New York Bar.

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BRACTONIAN PROBLEMS. By H. Kantorowicz. Glasgow: Jackson, Son and Co., 1941. Pp. 133.

THIS is a posthumous publication, under the editorship of Mrs. F. M. Stenton, of the first draft of a lecture which the author, at the time of his death, was preparing for delivery in the University of Glasgow. The main portion of the work is given over to a consideration of the Roman law element in those small portions of Bracton's lengthy treatise drawn more or less verbatim from Roman and Romanesque sources. The primary object of the writer is to show that Bracton was not the uninstructed Romanist that some of his critics have called him.

The first chapter after the introduction restates the none too numerous known facts of Bracton's life. Following this is a chapter which is devoted to a discussion of the date of the treatise. Maitland believed that Bracton wrote his book, or the larger part of it at least, in the decade 1250-60. Although this opinion has been generally accepted, Dr. Kantorowicz contends that Bracton began to write at least as early as 1239. The preface to the *De Legibus* and the *materia* in the *Summa Aurea* of William of Drogheda are, in parts, much alike. Hitherto it has been supposed that Bracton borrowed from the *Summa*, but Dr. Kantorowicz maintains that William borrowed from Bracton. Then, he argues, as William had begun to write by 1239, and would probably have written his preface on beginning the *Summa*, Bracton must have written his introduction at least as early as that same year. This leads to a still further conclusion. At the very beginning of his work Bracton informs us that he is going to draw on old judgments, *vetera iudicia*, for his material. At one place or another in his text he cites a large number of cases from the years 1217-40. These, and the laws of their time which they represent, have always been regarded as the *vetera iudicia* to which Bracton refers in his preface. Dr. Kantorowicz can not believe that if Bracton had begun to write as early as 1239, he would have regarded such recent cases as *vetera iudicia*. He then concludes that "the ancients to whom he looks up in reverence must therefore be those to whom we still do the same: the Romans."<sup>1</sup> It is most difficult to accept such a conclusion in view of the context in which Bracton speaks of the *vetera iudicia*. He emphasizes the difference between the written *leges* of the civil law and the unwritten laws and customs of England. He points out that in England the legal customs vary from place to place, so that in different counties, cities, boroughs and towns, it will always be necessary to ascertain what the custom of the place is and how it is applied. Since laws and customs of this sort are often misapplied by unlearned men who sit in judgment, Bracton says he has diligently examined the *vetera iudicia* of upright men, and whatever he has found worthy of note he has gathered together in one book for the instruction of at least the younger generation. Throughout this section of his text Bracton clearly seems to be thinking of the unwritten laws and customs of England, rather than of the written *leges* of the civil law.

In his fourth chapter Dr. Kantorowicz develops what he rightly calls his central thesis. It has long been recognized that part of the text in some of

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1. P. 26.

the early *De Legibus* folios, where Bracton is quoting verbatim from Roman sources or is depending largely upon them, is far from acceptable. This is not because of any failure on the part of the manuscripts to agree as to what the text should be. They do agree and they stand solidly behind the troublesome passages, indicating that the common ancestor of all the extant manuscripts must have contained these same readings. Dr. Kantorowicz will not believe, as scholars hitherto have, that the textual defects are Bracton's own. He defends Bracton as being thoroughly versed in Roman law, cites an instance of what he terms "his surpassing skill in the use of Roman terminology," and even goes to such an extreme length as to say that the definition of *mutuum*, as given by Bracton, "is more meticulously correct than that given by the Romans themselves and the most learned modern Romanists."<sup>2</sup> Convinced that Bracton was too learned a civilian to have written the Roman law passages just referred to, he believes that the common ancestor of the Bracton manuscripts could not have been Bracton's own copy of his work, because that copy, in his opinion, would have been free from textual mistakes. As a result of this conclusion he is faced with the problem of finding some answer to the question of who did write the text if Bracton did not. He therefore adopts the hypothesis that the common ancestor of the manuscripts was a copy of Bracton's copy, made by a clerk after Bracton's death. This redactor theory is not advanced by him as a result of any study of the manuscripts or their characteristics; he frankly admits that his opinion is based on a study of the printed texts only. Actually, this theory of the archetype rests primarily on his belief that Bracton was too good a civilian to have been responsible for the passages credited to him by the manuscripts. Starting with this belief he develops his theory of the redactor, and then uses this, not as an hypothesis but as an established fact, to prove the proposition on which it is itself founded.

The existence of this archetype, which is a necessary basis for most of Dr. Kantorowicz's emendations, is also the foundation on which he builds his criticism of Maitland and Maitland's estimate of Bracton, and on which he challenges and denies the authority of the manuscripts. The redactor is made the scapegoat for all the textual difficulties in those few folios of the *De Legibus* which come under consideration. This copyist is said to have made occasional mistakes of many kinds, but chiefly, and most importantly, he was afflicted with a decided and uncontrollable tendency to perpetrate haplographic errors. He had a penchant for mistaking a word in one place for a similar or somewhat similar word in another place, with the result that the intervening part of the text was omitted. So certain is Dr. Kantorowicz of this outstanding characteristic of the alleged redactor, that he does not hesitate to make any change in the text that he deems desirable, provided that it can be based on the possibility of a haplographic error on the part of this scribe.

Perhaps for the purpose of making this person seem more real, we are told that he "must have been more than a mere professional scribe, and less than an accomplished scholar."<sup>3</sup> The basis on which this estimate of the supposed copyist is made is not explained, and just how such an evaluation could be

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2. P. 97, n. 1.

3. P. 38.

arrived at is hard to understand. No claim is anywhere made that the clerk was writing anything of his own into the text; he is said merely to have attempted to copy, without the addition of any new matter, the original text before him. Such a purely manual piece of work could show nothing except his competence as a copyist, and most certainly it could give no indication of the caliber of his scholarship. If Dr. Kantorowicz is correct as to the errors which he says were perpetrated by this man, the latter would seem to have been, as far as his ability to copy was concerned, even less than a professional scribe. For the professional scribe, like the modern compositor, could ordinarily be counted on to reproduce satisfactorily what was put before him. He did far better work than the redactor is alleged to have done. If the existence of the latter could be established, we might be willing to agree—as possibly explaining how he came by Bracton's own copy of his work—that he may have been “a friend, a relative, a colleague of Bracton's, his official clerk or his private secretary.”<sup>4</sup> But until it is proved that there was such a copyist, it seems hardly profitable to speculate on the identity of what is an as yet unknown and purely hypothetical person.

The cause of his redactor's shortcomings is put by Dr. Kantorowicz squarely on the ground of his having been, psychologically, an unusually poor copyist. An ingrained habit of this sort in any copyist would inevitably affect all portions of his work, no matter what he happened to be copying, for one who is constitutionally unable to copy correctly, as it is insisted that the redactor was unable, would make mistakes whatever the text before him might be. If the hypothesis of the redactor and his ineradicable failing is a correct one, the same faults which are attributed to him in his copying of a small Roman law portion of the treatise, should appear also in the many times larger part devoted to English law. Dr. Kantorowicz's conclusions are based on a study of what is, at most, a mere fragment of a very long text, and as far as any evidence that he has brought forward is concerned, those conclusions are applicable, if at all, to only a few places where Bracton was copying from Roman law sources. These parts of Bracton's text are peculiar, or unique, in both character and provenience. In them he is not writing straightforwardly out of the fullness of his own knowledge about a law which he himself helps to administer—or even, apparently, out of any fullness of knowledge of Roman law—but he is largely plagiarizing from the writings of others. He is composing with his eyes on civil law books, especially Azo, which are open before him—a fact which Dr. Kantorowicz tacitly admits by attempting to emend what he considers corruptions in these places by reference to the printed editions of the works from which Bracton was copying. A theory which is based on material drawn from so small and so abnormal a part of the *De Legibus* has little to recommend it as applying to the whole treatise, all the more so because the textual irregularities at the places where it has been made to apply are susceptible of other possible explanations which have already been suggested by earlier scholars, such as poor Roman law texts in Bracton's possession, deliberate alteration by him of the texts of his exemplars, lack of accurate or deep knowledge of Roman law on his part. To prove his thesis that

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4. *Ibid.*

the entire text of Bracton, as we have it, is the work of a copyist with an inveterate tendency to lose his place, Dr. Kantorowicz would have at least to demonstrate that what he calls "nonsense," allegedly resulting from the clerk's haplography, is to be found throughout the *De Legibus*, and to approximately the same degree in all portions. He can not do this because, as is well known, the characteristic defects which he finds in some of the Roman law parts of the treatise do not appear in that far larger portion on English law.

Dr. Kantorowicz admits this difference between the two sections of text, and tries to explain it by saying that the copyist "must have been trained in English law."<sup>5</sup> This again is mere assertion unsupported by proof. It takes for granted that there was a redactor, but it proves nothing as to the actual existence of such a person. Clearly that existence must be proved before one can be permitted to cite the fact that the English portion is textually of a far higher quality than the Roman, to prove that the mythical clerk knew English law better than he did civil law. Otherwise the "must have been trained" is made to account for the difference between the two portions of text and, in a circle, the fact of that difference is used to prove the "must." In all the censure which Dr. Kantorowicz has heaped upon the redactor for his copying of Bracton's text where Bracton himself is drawing on Azo or the Institutes, not a word has been said about the copyist's knowledge or ignorance of what he has been copying or of its effect upon his work. He has not been criticized for the lack of any intellectual competence—as for having copied incorrectly individual words which were technical or difficult to understand—but only for having been careless and inattentive, and for having lost his place. As far as the Roman law parts of the text are concerned, the matter of his knowledge or ignorance does not at all enter into the argument in favor of a redactor. Inasmuch as the alleged haplography in one portion of the treatise has been explained on grounds which do not require any consideration of the scribe's understanding of what he was copying, a supposed knowledge of English law on his part can hardly be advanced as a reason for the lack of this same haplography in another portion. The psychological weaknesses and defects which are said to have been responsible for the faulty first part, and are there rightly considered as having had no connection with the scribe's comprehension of the text before him, would have continued to operate until the end of his task. One who is merely copying the work of another with no intention of making alterations or additions of his own, is primarily concerned, and necessarily so, with the task of reproducing with a mechanical fidelity the exact words of his exemplar rather than with the meaning of what he is copying. This being so, it is inconceivable that a copyist who was unable to do any better, on this purely mechanical side, than the redactor is supposed to have done in the civil law parts of the treatise, should ever have reached, in the course of producing a single book, the high standard of copying he must necessarily have attained to have also been responsible for the English law portion.

Even for those parts of the text of the *De Legibus* which Dr. Kantorowicz considers, plausibility, which he is fond of stressing, does not in any way constitute proof of his assertion. That to him such emendations as "quasi [Et

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5. *Ibid.*

competunt ex contractu vel quasi], cum . . .," or "actiones [rei persequendae causa comparatae sunt, si quidem actiones] sunt . . .,"<sup>6</sup> make sense, or better sense, or are desirable on other grounds, does not in itself prove the soundness of his belief in a clerk addicted to haplography. At best they are possible explanations of what might have happened, but by no means necessarily a proof of what actually did occur. As Dr. Kantorowicz at one place admits, conjectural emendations, from their very nature, can not be considered as equivalent to proof; yet all that he brings forward to support his thesis of a redactor is one conjectural emendation after another. Not a shred of actual evidence, either internal or external, is produced.

The emendations above, and many others of the same type, have been made, we are told, with regard to "transcriptional probability." But probability, transcriptional or otherwise, is not an exact notion. The idea of probability is controlled too largely by the personal equation to be a reliable guide, since what may seem probable to one person may seem far from probable to another. Moreover, the writer's idea of transcriptional probability in the case of his own emendations, is controlled very largely by the printed texts of Azo and the Krueger and Mommsen edition of the *Corpus Juris Civilis*. Just what Bracton's manuscript text was, of either Azo or the *Corpus*, we do not know. It may have been very good or very bad or anything in between. But we may be certain that, to a greater or less extent, it differed from that in the printed editions. Consequently, only if we had Bracton's own Roman law exemplars would we be able to speak of transcriptional probability with any convincing assurance as far as any particular emendation is concerned. For aught we know, many of the readings in the Roman law part of Bracton's text which fail to agree with the editions may have been in the manuscripts from which he copied. Even the alleged haplographic passages might be explained on the same basis. For as the author has gone to some pains to point out, haplography is a more or less common result of scribal copying and is not limited to copyists of any one time or tongue. It is found not only in all types of manuscripts on every conceivable subject, but, to some extent, in every individual manuscript. So even if Dr. Kantorowicz is correct in the matter of the haplography which he claims to discover in those special sections of the treatise where Bracton, as all scholars agree, was plagiarizing from Azo, that haplography may have existed originally in the Azo manuscript which Bracton was using, and from it have been reproduced in his own text. Dr. Kantorowicz's argument in favor of transcriptional probability is based throughout on two principal assumptions: first, that the texts of Bracton's Roman exemplars were in agreement with our modern printed texts of the same works, and second, that Bracton in using them at all verbatim intended to copy, and did so copy, just what was in those manuscripts—and this despite the well known fact that Bracton frequently altered, or even omitted, portions of the Roman text at places where he was for the most part copying verbatim. Because we know nothing as to the textual condition of his manuscript Roman law books, or of his intended, or actual, manipulation of their contents at any particular place, it would seem anything but wise deliberately to change Bracton's text

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6. P. 100.

from that which is authorized by the manuscripts, to one which corresponds to the printed Azo or Institutes.

An additional reason for proceeding cautiously in these matters is presented by Dr. Kantorowicz himself. He admits, as an indisputable fact, that Bracton, in copying from the "unreliable compilations" of Azo, would be inclined "reverently" to reproduce "grammatical and legal mistakes which he obviously found in his manuscript."<sup>7</sup> Yet when he comes to make his emendations, he altogether loses sight of the implications of this admission, and the blame for the discrepancies is laid wholly upon the redactor rather than upon the just as possible faulty manuscripts from which Bracton may have copied.

Inasmuch as we can not be certain that Bracton's exemplars were not defective, there is little point in Dr. Kantorowicz's statement that he is going to prove the certainty of a redactor, by confining himself to corruptions which "we have not the right to attribute to Bracton in person . . . because only an extremely drowsy or careless man could have written them without at least afterwards correcting them himself."<sup>8</sup> For by his own admission, these corruptions may have been in the text which Bracton would reproduce, without correction, in a spirit of unquestioning reverence. In his choice of passages to prove the actuality of his hypothetical redactor, Dr. Kantorowicz further says that he is going to "use great caution and circumspection."<sup>9</sup> Therefore the nine passages which he finally selects may be regarded as the best he can find to prove his point. Six of them fall within that part of Bracton's text which is contained in Maitland's *Bracton and Azo*. Any profitable discussion of all the conjectural emendations made in these six passages would involve a full discussion of the questions—passed over by the author, though weighed by Maitland and others—as to just how and to what extent and for what purposes Bracton intended to use the material he extracted from Azo, and would consequently, because of its length, be impossible within the limits of a review. We may, however, be granted the space necessary to discuss, with reasonable detail, the other three passages numbered 2, 7, and 9, which having been selected on the same basis as the other six, are representative of the group as a whole.

The first is on fol. 92, where Bracton, after saying that a man must endow his future wife at the church door, continues, "Non enim valet constitutio facta in lecto mortali." Dr. Kantorowicz's comments: "The last editor made the conjecture *maritali* only tentatively and buried it in the apparatus, but it is quite obvious. The scribe was misled to speak of the death bed instead of the marriage bed because the wife can claim dower only after the death of her husband, and because the same passage speaks of heirs and succession. The two words are of course very similar."<sup>10</sup> This is typical of Dr. Kantorowicz's treatment of the selected passages in general, and characteristic of his facility for easy explanation. As in his discussion of so many other passages, one editor or another is criticized, the authority of the manuscripts is considered of no value at all, and the emendation and its accompanying remarks—includ-

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7. P. 77.

8. P. 39.

9. P. 38.

10. P. 43.

ing as usual the reason for the redactor's mistake—are made with an assurance and air of finality which, backed by the author's reputation as a scholar, are most persuasively convincing. The great difference between this and most of the other attempts at explanation made by Dr. Kantorowicz, is that here we have the opportunity to test the validity of the explanation by actual facts. The result is not such as to inspire us with confidence in the certainty of the many other assertions of the same type which it would be impossible for one either to prove or disprove. Actually, the last editor gave the reading *mortali* in the text, indicated by "Sic, MSS." in the apparatus that such was the reading of the manuscripts, and then queried the reading *maritali*, which had already been insisted on by others who had commented on the passage. Just why Dr. Kantorowicz should regard this emendation, as so many of his others, as obvious does not appear. He may have been influenced by the *vel in camera* which follows the *mortali*, but the fact of association with a chamber is no more a characteristic of the marriage bed than of the death bed. *Maritali* as a permissible reading is excluded by the very definition of *dos* as given earlier in this same folio, for *dos* is said to be something bestowed by the man on the woman *propter nuptias futuras* and *ante desponsationem in initio contractus*. That is, the man must endow the woman he is going to wed before the marriage takes place. But *maritali* could mean only that the marriage had already occurred. There would have been no point at all in Bracton saying that the woman could not be endowed on the marriage bed, when only two lines previously he had said that she must be endowed before marriage. But, on the other hand, there would be no repetition of statement in saying that she could not be endowed *in lecto mortali*. What Bracton clearly had in mind was the situation where a man on his death bed, and according to the regular practice, attempts to endow the woman *before* the espousal. The *mortali* of the manuscripts is most surely correct, and we can be certain, notwithstanding Dr. Kantorowicz's strong insistence to the contrary, that his redactor did not make a mistake at this point because of the similarity of two words. We cannot recall having seen the expression *in lecto maritali* employed in connection with the subject of common law dower. The phrases *in lecto suo mortali* and the equivalent *in suo lecto aegritudinis* are met with frequently. *In suo lecto mortali*, again with reference to the place where a woman has been endowed, will be found in Bracton at fol. 304, this time in a writ. Two cases in the Note Book, nos. 1875 and 1895, convey the information *desponsavit Matillidem uxorem suam in lecto suo mortali*, and *non desponsavit . . . sed tantum fidem dedit in lecto suo mortali*. Case 1718 in the same book has the defending party in an action for dower say that the woman ought not to have dower, because *non fuit desponsata nisi in lecto suo in egritudine sua unde obiit*. In the margin, directly opposite this, is a note in almost the very same words that Dr. Kantorowicz would emend on fol. 92—*Nota quod non valet dotis constitutio in lecto mortali . . .* The practical point of law involved in the *in lecto mortali*, a point which Dr. Kantorowicz in his comment misses altogether, is a most important one; namely, that a woman who marries a man on his death bed cannot claim the common law right of dower after his death. Her *constitutio dotis*, though made before her marriage, will be of no avail because the formalities have not taken place publicly at the church door.

The second passage is found on fol. 147. As given in the manuscripts it reads, "Olim quidem corruptores virginitatis et castitatis et eorum fautores, cum nec. . . ." The first edition has *suspendebantur* after *castitatis*. Dr. Kantorowicz states that the first editor "added" *suspendebantur*, and that the other editors "accepted this emendation without questioning it."<sup>11</sup> Now it would be quite impossible for one to say with knowledge that the word was "added" by the first editor, for there is nothing in the way that it is printed that marks it as an emendation, or that distinguishes it from the words that precede or follow it. As far as can be determined, the sixteenth century editor seems to have made no emendations in his text, or to have inserted anything without some manuscript authority. At one place Dr. Kantorowicz refers to "the" manuscript used by the first editor, but the complete collation of many manuscripts now makes it certain that that editor made, as stated in his preface, a comparison of several manuscript texts. That was nearly four hundred years ago, and in some manuscript, which could easily have disappeared in the interval since then, he may well have found the *suspendebantur*. It is the type of insertion which the early users of the *De Legibus* often made in their manuscript copies. That the word itself is historically incorrect, does not do away with the probability of its manuscript origin, for the medieval lawyer was often woefully weak on his legal history. On this very matter of rape and its penalty, *suspendebantur* as an error is matched, or even surpassed, by the inaccuracy of as great a lawyer as Thorpe—later a C. J.—who in 1342 could be so far wrong as to say that rape "was only a trespass at common law." All things considered, it seems more likely than not that the *suspendebantur* came from some manuscript source. Certainly there is no evidence to support the assertion that it was added by the first editor.

Nor did the last editor, as Dr. Kantorowicz claims, accept the word without questioning it. On the possibility that the editor of the first edition may have had some manuscript authority for it, the word was put in square brackets in the text, and in the footnotes the information was given that the word was not found in the manuscripts but came only from the 1569 edition. Although Dr. Kantorowicz maintains that *suspendebantur* as a predicate is out of place, and that the verb should come, and in Bracton's copy did come, after *fautores*, it is submitted that a verb would be grammatically correct at either place. It is the emendation rather than grammar that demands a verb after *fautores*. The sentence is not a very close recasting of the one in Justinian's Code 9. 13. 1., beginning *Raptores virginum*. Dr. Kantorowicz admits, as of course he must, that "what Bracton precisely had written we have no means of knowing,"<sup>12</sup> yet in spite of this, and on the basis of an alleged omission due to haplography, he makes the text read, "*fautores [capite puniebantur ut raptores]*". These words are wholly fanciful on his part; they do not occur in Code 9. 13. 1 or involve the usual question of transcriptional probability. They are only one of many combinations of words, all with haplographic possibilities, which could be used at this same place to bring out the same idea. The lack of a predicate in this passage justifies a comment, but it does not justify a tampering with the text, especially when such tampering is founded on guesswork alone.

11. P. 46.

12. P. 47.

From the fact that the manuscripts give no verb at all, the intrinsic probability would seem to be that Bracton never wrote one, either through inadvertence or because he left a space to be filled in after he had assured himself as to the ancient penalty for rape. This latter possibility, strange though it may seem, would be quite in keeping with what has happened at other points in the text. There are places at which, for reasons not clear, other verbs have been omitted, and there are still other places where it is plain that Bracton deliberately left blank spaces in his manuscript for matters he intended to look up before committing himself in writing. The largest spaces are those which have been left for certain writs which he promises to give, but the forms of which he seems to have been for the moment unable to remember. That these empty places were not later filled in would seem to indicate that he did little work towards rectifying omissions in his text, once he had written it. In the process of copying and recopying, most of these gaps in the great majority of the manuscripts have been filled up, but in one or another of the earlier copies, at one place or another, though not always in the same places, spaces up to twenty-five lines in extent have been left for the promised insertions. Because Bracton had this habit of leaving what were meant to be temporary gaps at points where he was momentarily uncertain as to actual facts or forms, there is always present, in such a case as that before us which involves a matter of historical fact, at least the possibility that the omission may be due to an original hiatus which was never filled in and which disappeared in the process of successive copyings. The alteration of the text at this point has little to commend it, both because it is far from certain that this particular passage ever had a predicate—either at the place where the author puts it or anywhere else—and because the suggested emendation has no basis that is substantial and positive enough to make its acceptance imperative.

The third passage occurs on fol. 162b. Dr. Kantorowicz says that the text as handed down by the manuscripts "hardly makes sense." We are compelled to disagree most emphatically with this statement. Bracton reads, "Item cum procurator generalis armatus venerit, et ipse dominus videtur armis deiecisse, sive hoc mandaverit sive ratum habuerit. Et hoc quidem erit dicendum in familia, cum familia armata venerit. Ego non videor venisse armatus sed familia, nisi iussi vel ratum habui." The *hoc* in the second sentence refers, of course, to what has just been stated in the first—the same thing that has been said relative to the *procurator* when he shall have come armed, must be said in regard to the *familia* when the latter shall have come armed. It is altogether clear from the context that the *dominus* has had no active participation in the act, all he does is to order it or ratify it; he does not accompany either the *procurator* in the one case or the *familia* in the other. Moreover, there was no need for Bracton's inserting anything more in the text to bring out this point, especially since the "I shall not be deemed to have come armed" still further necessarily implies my non-participation in the coming of the *familia*, inasmuch as the statement would not be true if I had taken part in their act. Therefore the emendation suggested by Dr. Kantorowicz, "venerit, ego non, [ego non] videor" is not only unnecessary, but actually superfluous in adding nothing to the meaning which the text already has without it. If the text "hardly makes sense" without the added *ego non*, it continues to make the same sense with it inserted.

It may be added, parenthetically, that this is the second time in the nine selected passages that Bracton's text has been deliberately changed to make it conform more closely to the text of the printed Digest. In neither case has the alteration changed the sense of the passage. In both cases there can be no valid objection, on the score of either language or sense, to the text as given in the manuscripts. In number five of the passages *facinoribus* has been urged as an emendation for *factionibus*, because the former is the reading found in the Digest. As a matter of fact, in this particular context the words are synonymous. *Factionibus* in a medieval work is entitled to its medieval meaning. In medieval Latin *factio*, as *facinus* in classical Latin, may mean either deed or, in a more special sense, misdeed. One of the many definitions of *factio* found in Du Cange is given in terms of *facinus*: "Facinus pravum, delictum." Such altogether unnecessary alteration of a text which is perfectly sound as it stands, is unwarranted from any point of view.

The [*ego non*] is found in the emendation because Dr. Kantorowicz has come to suspect any passage in Bracton from Roman law exemplars which does not agree with the printed text of those exemplars, and because of his conviction that these "corruptions" in Bracton's text must be laid to the haplographic errors of the redactor. Bracton was copying from Digest 43. 16. 3. 11 which, after the sentence about the procurator, reads, "Hoc et in familia dicendum est: nam cum familia sine me armata venit, ego non videor venisse, sed familia, nisi iussi vel ratum habui." It will be seen that Bracton, although he keeps closely to the rest of the Roman text, has omitted the *sine me*. It is this omission which leads our emendator to insert the wholly uncalled for *ego non*, although Bracton, by using two sentences for the Digest's one, has made a slight variation in the exact wording of the Roman law text sufficient to bring out the very idea of the latter without using the *sine me*. The only fault which has been found with this sentence in Bracton is that it does not make sense, but the only actual difference between it and the corresponding sentence in the Digest is that it omits the *sine me*. This being so, the logical thing would be for Dr. Kantorowicz to follow the procedure which he has adopted at so many other places, and insert a *sine me* in Bracton's text. The principle of transcriptional probability, which he says governs all his emendations, would hardly allow him to do otherwise. He will not do so, however, because "to insert simply *sine me* would not explain the corruption."<sup>13</sup> This statement is not true unless the words "as a haplographic error" are added. It is to explain the alleged corruption as haplographic that the emendator goes contrary to all that he has preached and practiced before, and, instead of adding the obvious *sine me* at the point where it occurs in the Digest, inserts the equivalent *ego non* at the place it must occupy if the redactor is to be charged with having made one of his usual mistakes.

There is no "corruption" at this point in Bracton's book. His text as it stands not only makes sense, but the meaning is perfectly clear and plain, namely, when my *familia* shall have come armed, their act shall not be imputed to me unless I have ordered it in the first place or have ratified it later. This is certainly the sense in which one of Bracton's contemporaries took it.

13. P. 48.

To Fleta, who copied it into his treatise, it meant plainly enough, "Hoc idem dicendum erit in familia, cum ipsa venerit armata. Et quo casu non videor esse armatus, sed ipsa familia, nisi hoc iussi vel ratum habui." Here again the manuscripts, rather than their calumniator, unquestionably give the correct reading.

Dr. Kantorowicz is likewise hardly correct when he says, "It does not seem to have been noticed that the whole section has been compiled from the title of the Digest 'De vi et de vi armata,' 43, 16."<sup>14</sup> This fact has been well known since at least as early as 1862, when Güterbock commented on the connection in his *Henricus de Bracton und sein Verhältniss zum römischen Rechts*.

As far as the passages we have just considered are concerned, Dr. Kantorowicz has been anything but successful in fulfilling his promise to prove his thesis of a redactor by selecting, "only corruptions we have *positive* [sic] reasons to ascribe to the clerk because they can be explained as misreadings of the correct text."<sup>15</sup> He has, however, been fully successful in demonstrating the truth of a fact which all of us at times have difficulty in keeping clearly in mind—the fact that *an* explanation, however plausible it may seem or however strongly it may be asserted, is not necessarily also *the* explanation.

The discussion of Bracton as a civilian begins with a statement of the well known fact that "everything that regards the romanist and romanesque portions of the *De Legibus* has been a matter of dispute among the greatest authorities."<sup>16</sup> More particularly at issue have been the questions of the extent of Bracton's civil law learning, and his understanding, or misunderstanding, of his Roman law texts and Azo. As a matter of fact, all the Roman law parts of Bracton's book are neither consistently good nor consistently poor, yet most scholars have accepted both good and bad as having come from Bracton. Dr. Kantorowicz, on the other hand, is willing to accept the authority of the manuscripts only for those passages which tend to support his belief that Bracton was a learned civilian, and repudiates the manuscripts' authority when they insist on readings which other scholars have accepted as evidence that Bracton was not deeply learned in Roman law. He exculpates Bracton in the matter of these readings at the expense of the supposed redactor; he attributes to the English judge a wide knowledge of Roman law, and great ability in using it and adapting it to his purpose. He does not, however, wish "to declare Bracton a learned civilian by the high standards and on the model of the Italians."<sup>17</sup>

The section on Maitland *versus* Bracton is quite the longest single portion of the whole book. In 1895 Maitland edited for the Selden Society his *Bracton and Azo*. This is a detailed study of the first ten folios of Bracton's text—much of which was taken largely verbatim from Azo or the Institutes—and of the text of parts of Bracton's *De Actionibus* (fols. 98b-106b, 112-115), some portions of which were borrowed from the same Roman sources. Dr. Kantorowicz discusses and combats the opinions expressed and the conjectures made

14. *Ibid.*

15. P. 39.

16. P. 58.

17. P. 77.

by Maitland in this book. In contrast to the estimate of Bracton held by this critic, Maitland regarded Bracton as having been "a poor and uninstructed Romanist," who did not thoroughly understand Roman law. As a result Dr. Kantorowicz condemns Maitland for not understanding Bracton, along much the same lines that Maitland condemned Bracton for not understanding Azo. Maitland's vast knowledge in regard to things Bractonian is admitted and acknowledged. He is said to have committed only one mistake, "but a fundamental one, from which all his others, without exception, are derived. He did not see that Bracton's text has come down to us from one archetype."<sup>18</sup> To just what extent Maitland should be blamed for not recognizing the existence of a conjectural and hypothetical redactor is a rather nice question. Maitland believed, as have all other scholars who have considered the matter except Dr. Kantorowicz, that the text of the *De Legibus* in the extant manuscripts came from Bracton's own copy of his work and that the fundamental mistakes in the Roman law parts were perpetuations of mistakes made in that copy. He started with the premise that the text as we have it is Bracton's; Dr. Kantorowicz with the premise that Bracton was a learned civilian. Both agree that the text of some parts of the Roman portions of the work was not that which a learned civilian would have written. Maitland's conclusion is that Bracton was not a learned civilian; Dr. Kantorowicz's, that the text was not Bracton's. Maitland's position would seem to be the stronger, for prima facie the text in the manuscripts is Bracton's. This inference may be rebutted, but only by actual evidence to the contrary. Dr. Kantorowicz has brought forward no such evidence to prove that the manuscripts do not contain Bracton's own text; he merely asserts that they do not. Maitland's conjectures are based not upon another and unproven conjecture, but upon the very substantial and proven fact that the text readings which are under fire are firmly supported by the manuscripts. With the manuscripts solidly against him, Dr. Kantorowicz certainly has no more ground for insisting that the original text was without errors, than Maitland had for maintaining the contrary.

Moreover, and this point can not be overemphasized, it is only in a few places, where Bracton was copying directly from exemplars which themselves may well have been corrupt, that Dr. Kantorowicz has found anything to make it seem plausible to him that a redactor may have "jumped as usual from *constituit . . . to constituit*" or have made other similar mistakes. Nor does the attempt to exonerate Bracton by using the theory of the redactor answer satisfactorily many of the criticisms raised by Maitland in *Bracton and Azo*. Until the faultlessness of Bracton's original text is established, Dr. Kantorowicz can hardly hope to refute Maitland by asserting, without proof, that that text was perfect, and then using a series of conjectural emendations, based on the assumption of that undemonstrated perfectness, to prove the actuality of the redactor. All things considered, the theory of the archetype is too tenuous to make a copyist, habitually given to haplography, seem a more probable explanation of Bracton's poor showing in this part of his text, than that of poor Roman law exemplars or Bracton's own manipulation of their texts, as suggested by Maitland and others. In one place Maitland's opinion

18. P. 80.

as to the reason for a certain reading is said to have been "the unfortunate effect of a prejudice which by now must have become inveterate."<sup>19</sup> It may well be doubted, however, if any reader of the two books will consider Maitland, in any of his conclusions, more obsessed with the idea of Bracton as an uninstructed Romanist, than Dr. Kantorowicz is with his theory of a redactor and archetype. Although he has warned others that "in textual criticism nothing is certain except the inevitability of error,"<sup>20</sup> Dr. Kantorowicz insists on the correctness of his emendations and the soundness of his own opinions, as opposed to those of Maitland. Since most, if not all, of the matters on which he differs from Maitland are not susceptible of either proof or disproof, it is difficult to share Dr. Kantorowicz's enthusiastic certainty as to the impregnability of his own conclusions, which has led him dogmatically to override those of Maitland.

In his last section Dr. Kantorowicz asks for a new edition of Bracton. Without reserve he condemns as altogether unsatisfactory the plan used in editing the last edition—of which he had seen only the first two volumes. That plan deliberately excluded extraneous matter of any kind from the volumes which contained the text. The aim of the editor, as fully expressed in the preface to the second volume, was to produce not necessarily the "best" text from the point of view of law or language, but "to present, as nearly as may be, the text of the *De Legibus* as it finally left Bracton's hands."<sup>21</sup> That text was to be based on the weight of manuscript authority as represented by the three main text traditions found in the extant manuscripts. The reader was warned that "the readings which on the authority of the MSS. must be accepted as Bracton's own, are not always what, from the context, we might expect or desire."<sup>22</sup> Because of the widely divergent views of scholars as to the reason for the poor state of some parts of the Roman portion of the text, it was deemed inadvisable to meddle deliberately with that text as given by the manuscripts. It was expressly pointed out that "it has seemed preferable to discuss troublesome readings in the commentary, rather than on insufficient manuscript authority to alter them in the text."<sup>23</sup> The historical apparatus was also to appear in this volume of commentary, along with such other matter as would normally be included at such a place. But Dr. Kantorowicz is not willing to accept this arrangement of the material, contending that the plan was fundamentally wrong. He blames the editor for having reproduced the exact text of the manuscripts, and insists that the readings which were not acceptable should have been emended in passing and that the historical and all critical apparatus should have accompanied the text. He complains that the necessity of consulting another volume, apart from that of the text, to get this additional information makes the work too unwieldy and cumbersome—by implication decrying the plan of a commentary, which would still have to

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19. P. 92.

20. P. 132.

21. 2 BRACTON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE vii.

22. *Ibid.*

23. *Ibid.*

be consulted by a reader even though the apparatuses were given with the text.

There are other criticisms of a lesser sort, some of which can be explained on the basis of personal preference, but some of which are not easy to understand. Thus the editor is taken to task for not following the exact notation used by Maitland in the case of some manuscripts, and in another place he is censured for using the identical system of notation which Maitland employed for these manuscripts. At another place it is said that the use of this system in the critical apparatus conveys little to the reader, as the manuscripts "are not arranged by groups or any other rational criterion." Actually, as again carefully explained in the preface to the second volume, the manuscripts from which the text was derived were selected as representing the three text traditions and are grouped according to those traditions. This procedure, which does not appear rational to Dr. Kantorowicz, allows the reader not only to see the basis on which the text is constructed, but also, if he so desires, to reconstruct the text of each or any of the traditions. The criticism that the graphs, employed to represent relationship as regards the pedigree of the manuscripts, are "bewildering" because no explanation of them is given anywhere, seems strange in view of the fifty pages in the first volume, where the diagrams occur, devoted to explaining in detail the relationships of the manuscripts with which each graphic illustration is concerned.

It is difficult to see either the cause or the value of the censure that the edition contains a "certainly unauthentic calendar of rubrics." The editor in his preface was careful to forestall the necessity of just that criticism by pointing out that as far as Bracton was concerned, the rubrics might not be authentic: "A word of explanation is demanded by the rubrics. Whether or not Bracton himself wrote the rubrics, and whatever may have been their position and importance in the original MS., all the MSS. now extant have them. Therefore in reproducing this feature we are making the text appear as it must practically always have appeared to users of Bracton MSS. from the beginning."<sup>24</sup> The very practical reason for not giving variant readings with the rubrics—another cause of complaint—was also made clear in the same place.

Most difficult of all to understand is the criticism that the last edition is based on "the utterly corrupt text of the extant MSS."<sup>25</sup> Obviously the text of Bracton, or of any other medieval writer, must be founded on such manuscripts of that text as are now in existence, notwithstanding such defects as the manuscripts themselves may have. Incidentally, we would take issue with the "utterly." It is a very strong word; too strong, we venture to say, to be applied without reservations to even that small part of the text which comes within the limits of Dr. Kantorowicz's study, even though it is the least commendable part of the treatise textually. For the other portions of the text, the state of the manuscripts compares favorably with that of other medieval manuscripts which have been many times copied and recopied.

In a paragraph, which from its position and change of style reminds one curiously enough of an *addicio* in Bracton, it is said to be "intolerable that the

24. *Id.* at ix.

25. P. 128.

most important literary source of English legal history should further be obstructed and defiled."<sup>26</sup> To have any point, this charge of obstruction and defilement can rightly be levelled only at the extant manuscripts, for all three editions of the *De Legibus* have contained only the text as found in those manuscripts, without the addition of anything new or extraneous. Such defilement as may be found in the printed texts has come from the manuscripts themselves. This implies that the new edition which is advocated should not follow the manuscripts as the other editions have done, but should take such liberties with their texts as the future editors deem desirable. And this is just what Dr. Kantorowicz advises the editors to do.

Because some material from Roman and Romanesque sources, and even less from canonical and theological sources, is to be found in the treatise, which is mainly pure English law, he contends that no single person is competent to produce a suitable edition. Two or three editors, each familiar with a different field, would be required. The text would be based not on the authority of the various traditions as established by a pedigree of the manuscripts—which now universally recognized practice Dr. Kantorowicz explicitly repudiates—but on the "best" manuscript, "that is, the one least disfigured by what are obviously mere scribal errors."<sup>27</sup> Just how this best manuscript is to be selected from the half a hundred extant manuscripts, or how the scribal errors of successive scribes and generations are to be distinguished from each other and from the true text—without the aid of a pedigree and a knowledge of text traditions—we are not told. This "best" text is to be collated with other texts whose number or method of selection is not explained. From the resulting variant readings, those which seem "most probably correct" to the person who happens to be the editor, would be selected, and when none of the texts contain a "probable" reading, the text would be emended. In other words, probability, as gauged by the individual fancy of the editor, would be substituted for the authority of the manuscripts.

In the matter of emendations, the editors should be "courageous enough to make many, and if necessary, daring conjectures."<sup>28</sup> The general principle of the type of conjectural emendation recommended, and the extent to which it might be used, is illustrated by Dr. Kantorowicz's handling of a passage on fol. 102. In a short space of ten lines of text as originally printed, he gives us five emendations,<sup>29</sup> four of them lengthy ones based on the supposed haplography of the hypothetical redactor, who here shows himself incapable of copying more than two and one-half lines without skipping, on an average, a block of six words. The first emendation is said to be "desirable on stylistic grounds"; the second is "indispensable," and is "justified like the three next ones on the ground of haplography"; the third is based on Institutes 4. 6. 17; the fourth, "not precisely necessary, but plausible for symmetry's sake," is based on a corresponding passage on fol. 102b; the fifth, "which is not very satisfactory stylistically, is unavoidable if Bracton is not to divide personal

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26. P. 131.

27. P. 132.

28. *Ibid.*

29. P. 100-01.

actions into real and personal actions." The character of a text constructed on these principles, instead of on the textual authority of the manuscripts would depend largely upon the scholastic idiosyncrasies of the particular editors. In any case it would differ greatly from the text of the former editions, and also differ greatly from the text to be found in any of the manuscripts. To what extent it would even approximately approach the text as Bracton wrote it can only be surmised. Whatever else may be said for the procedure advocated, there would seem to be no surer way of causing Bracton's text to be "further obstructed and defiled."

There are a number of misleading or incorrect statements in this book, two of which seem to be of importance enough to merit comment. One is in a passage devoted to a discussion of emendations where it is said that, "in Bracton's case the necessary conjectures are much safer than usual, as he in great part only copied or paraphrased known texts of Roman or English law and legal literature."<sup>30</sup> This statement is so far from exact that it is difficult to account for it, except on the supposition that the writer was assuming that the few folios of Roman or Romanesque material which he had examined and was discussing, were representative of the whole treatise. Civil law influence shows itself in Bracton in various ways and in many different parts of the treatise. But the places at which Bracton can be said "only to have copied or paraphrased" Roman law texts, do not amount, even on the most generous estimate, to over a tenth of the *De Legibus*. Bracton's predecessor as a text writer in the field of English law had been Glanvill. Although some of the material in Glanvill finds its way into the later work, Bracton's manipulation of this material results less in a direct copy, or even a paraphrase, than an amplification of the points in Glanvill with additional matter of his own—as any one who has tried to collate the same passage in the two texts will testify. Glanvill's treatise is so small when compared with Bracton's bulky book, that even if the latter had used more of Glanvill than he did, it would not have affected the originality of his work as a whole.

As part of the profuse praise bestowed upon everything pertaining to Bracton, we are at one place informed that his handwriting "was just what was to be expected: lucid, harmonious, and powerful."<sup>31</sup> As proof of this, in a footnote, reference is made to a published photograph in which the word *volo*, "his" *volo* it is called, is to be seen in the margin of a plea roll, Curia Regis Roll no. 72. In Bracton's Note Book, cases nos. 80-124 have been copied from the Hilary and Easter cases on this roll. Of these Note Book cases, 21 in Hilary term and 11 in Easter term have been marked on the roll with the word *volo*. It has been assumed that *volo* was written by Bracton as a direction to some clerk to copy into the Note Book the cases so marked. How slight the ground for this assumption is may be seen by consulting the entire text of Curia Regis Roll no. 72, as published in the eighth volume of the Curia Regis Rolls. For Hilary term, 42 of the cases on the roll are marked with a *volo*, of which a scattered one-half of these are to be found in the Note Book; and for Easter term, 32 of the cases are marked, only 11 of which

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30. P. 40.

31. P. 36-37.

are in the Note Book. This means that considerably less than half of all the *volo* marked cases on the roll appear in the Note Book, though we should expect all of them to be there if they had been thus marked for inclusion by the man for whom the Note Book was made. Again, if *volo* had been Bracton's direction to his clerk to copy a case, how shall we explain not only why that clerk failed to copy more than half of these cases, but also how he came to insert from the same roll 13 other cases which had no directing *volo*? Moreover, even if it could be proved that this particular *volo* had been written by Bracton, it could hardly be used as an illustration of the normal writing which he would regularly employ. For *volo* is written in unusually large letters with smooth-running lead crayon or pencil, and not with the far differently operated quill and ink which would be used in writing a book or document. Unless some of the many marginal notes, in different hands and by different persons, which are to be found in the Note Book are in Bracton's writing—a matter on which the editor of the Note Book wisely refused actually to commit himself—there is, as far as is known, no specimen of Bracton's normal handwriting in ink in existence.

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