

## A PLEA FOR THE STUDY OF BRITTON

The interest of the writer in Britton came about in an unusual way. About five years ago he was offered a MS. which had been purchased by the seller at one of the sales of the Sir Thomas Phillipps' Collection of MSS., conducted by Messrs. Sotheby, Wilkinson & Hodge, in London. The MS. was described in the catalogue as follows: "Britton (Joh) *De Legibus Angliae, Libri IV. Tractatus de Breviis*, manuscript of the Thirteenth Century, written in double columns, on vellum, with ornamental and colored capitals, titles in red Russia — folio XIII Cent. \* \* \* This fine manuscript written throughout in Norman French is the work of John Britton, Bacton, or Becton, Bishop of Hereford, who died in 1275. Very early MSS. of this work are exceedingly rare."

The MS. itself consisted of 127 sheets of vellum written in double columns on both sides, making 254 pages, each page having broad margins surrounding the text, preceded by a table of the headings or subjects, in double column, occupying two pages, and preceding this table were two pages of introduction, the whole being encased between four sheets of worm-eaten vellum, much discolored. The body of the MS. was in excellent condition, and free from blemish, until folio 107 was reached, when there were marked signs of damage, probably from moisture, without destroying, however, the legibility of the text.

The whole was bound in leather and was lettered on the back, "*Bracton de Legibus Angliae*". On the binder's fly leaf appeared in ink the marking "23913 MSS. Ph", written over a penciled "3097", and beneath in pencil, not obliterated, "Ex Bibl. Sir G. P. Turner". In the centre of the same page a repetition of the number "3097" in ink was stricken out by three lines drawn through the figures without making them illegible. At the foot of folio 4, in the margin, the words appear "Phillipps MSS. 23913", evidently in the same handwriting as the markings on the fly leaf. The text began on Folio 4, and was divided on that single page into five paragraphs, each introduced by beautifully illuminated letters in red and blue, with scrolled central designs. The page was headed, by the illuminator, in bold red block letters, "Bractvn", undoubtedly written at the same time with the text. No special thought was given at the time to the difference in

the numbering attributed to it in the Phillipps Collection, but there was such a manifest discrepancy between the catalogue attribution to "Britton" and the heading "Bractvn" followed by the lettering of the book on the binding, that the matter was referred to the British Museum for a report where it was ascribed to the early 14th Century, and declared to be "not the abridged work of Britton, but the full text of Bracton,—it is correctly lettered in the binding."

Relying on this report the purchase was made; some months later, the writer, in turning over the pages of the Eighth Volume of the publications of the Selden Society entitled "Bracton and Azo", found that Maitland, the editor of the series, in verifying Bracton's text, declared that he had looked at the MSS. in the Phillipps Collection to see whether they would be of service in restoring Bracton's marginalia to their proper place, and that he had given a list of the Bracton MSS. in that famous collection, among which appeared "P. B.—Phillipps 3097".

Here then seemed to be confirmation, although unexpected, from a most distinguished source, and for some time the writer remained happy in the conviction that he had a thoroughly well-attested copy of Bracton, but with the query in the back-ground why was the number "3097" stricken out, and the number "23913" substituted? Later, the writer became the owner of the *first printed* edition of Bracton (Folio—Londini Apud Richardum Tottellum An. do. 1569) with the original autograph signature upon the title page of Bulstrode Whitelocke, one of the four commissioners of the Great Seal just prior to the ascendancy of Cromwell. On placing the printed volume beside the MS. it was at once perceived that it was three inches taller than the latter, and almost three times as thick. A single glance showed that the folios were 444 in number, making 888 pages as against 254 of the MS. Further examination was interrupted at the time, but the thought grew that the MS. could not have furnished sufficient copy to make the printed book, and that either the MS. was incomplete, or that it was not Bracton, *non obstante* the report of the British Museum. Still later, the writer acquired the *first printed edition* of Britton, without date, but printed by Redman as appearing by the colophon and attributed by experts to "probably the year 1530", and this was followed by the acquisition of the second edition (Wingate's-1640). Both of these were

in Octavo, about the size of a modern 12 Mo. and although the folios were not numbered, the thickness was sufficient, but no more than sufficient, to carry the text of the MS. On collating the MS. with the printed text of Britton it was found to correspond substantially word for word and paragraph for paragraph from beginning to end, with some variations in readings. The conclusion was that the MS. was complete, but it was of Britton and not of Bracton; the attribution in the catalogue was correct, and the report of the British Museum was incorrect. One feature of the two works had been overlooked by the expert. The text of Bracton was in Latin; the text of Britton was in Norman French, and if this had been noticed, no doubt could have arisen.

There remained the inquiry how could the illuminator of the Britton MS. have written Bracton at its head?—a mistake which was followed by the binder in lettering. The answer was found when the writer examined the edition of Britton by Francis Morgan Nichols, published at Oxford in 1865. Mr. Nichols in his introduction gives an account of 26 MSS. copies which he had seen. No. 23 is in the Harleian Library. "Title in rubric: *Bracton* (qu. Bratton). Early Fourteenth Century". This is an almost exact description of the writer's copy. Mr. Nichols adds: "the name of the treatise, which in modern times has been generally known as Britton, is variously spelt in the MSS., Bratton, Brattom, Bretton, Breton." In a foot-note he says: "In MSS. of the Thirteenth and Fourteenth Centuries the double t was frequently written like ct. the upper part of the first letter being kept below, and the second letter being carried up above the cross line. This is the case throughout the Cambridge MSS. of Britton, Gg. v. 12, cited in the various readings as MS. C. where in the colophon the title of the book is so written as to read at first sight 'le liure de Brectoun'. Selden mentions another MS. of Britton in the colophon of which the book is called le Brecton. Possibly this may have been merely another example of the double T." In our case we venture to assert that here is a third example of the double letter t, which explains at last how the doubt arose and how the doubt has been solved.

Owing to the foregoing circumstances, which gave to the subject much personal interest, the writer was led to undertake a particular examination of Britton, and to make comparisons between it and the earlier treatises of Glanville, Bracton, the Dia-

logus de Scaccario, and the contemporaneous treatises of Fleta, Hengham, Magna, and Hengham Parva, with the resulting belief that the work of Britton is worthy of more specific attention than it has hitherto received from students of legal history. Hence the title to this paper.

The first noticeable feature, which distinguishes it from all the books named, is that it is written in Norman French, while the others are in Latin, the language of an earlier day. Further research shows that Britton was the *first great treatise upon law written in the vernacular of the Courts of the period*, a series to which the later works, The Year Books, the Abridgements of Statham, Fitzherbert, and Brooke, Les Ples Del Coron Per Staunforde, Le Liver des Assizes, Littleton, Plowden, and Perkins' Profitable Booke belong. This is of importance because it marks an epoch, just as Coke's Institutes was the first important work upon our law composed in the English language.

The second feature of distinction is unique and is apparent upon a glance at the opening words. *It is the only treatise which on its face purports to have been promulgated by royal authority.* The Prologue consists of a salutation by the King, "Edward, by the grace of God, King of England, Lord of Ireland, and Duke of Aquitaine, to all his faithful people and subjects of England and Ireland, peace and grace of salvation". The second paragraph is still more striking: "Desiring peace among the people who by God's permission are under our protection, which peace cannot well be without law, we have caused such laws as have been heretofore used in our realm to be reduced into writing according to that which is here ordained". In fact the royal authority throbs through every page of Britton—: "We will", or "We command" is the common opening of hundreds of sentences. There is no such assertion of authority, personal to the office of the King, in any other work. In Glanville, Bracton, Fleta, and the Regiam Majestatem there are prefaces more or less in imitation of Justinian's Institutes, but it is evident that no author save Britton so boldly claimed the royal backing.

The third feature of distinction is that *Britton was written in the reign of Edward I.* It is unnecessary to emphasize the importance of this, or to illustrate it in detail. The reign of "Our English Justinian", who was "The Greatest of the Plantagenets", marked "the turning point of English history", according to one writer,—"the beginning of English history", in the view of an-

other. Sir Mathew Hale in his History of the Common Law did not scruple to affirm that more was done in the first thirteen years of Edward's reign to settle and establish the distributive justice of the Kingdom, than in all the ages since that time put together. Of course this praise must be limited to Hale's day, and involves no later comparison. Blackstone, in his celebrated closing chapter Of the Rise, Progress and Gradual Improvements of the Laws of England, which is one of the best in the Commentaries, emphasizes this view. Pollock and Maitland in their monumental History of the Common Law definitely close their work upon the door-sill of that reign, which they recognize as the entrance to the modern period. Finally, Jenks, in his recent work upon The Making of the Common Law, devotes a large volume to the Age of Edward. Britton is an eye witness of the legal acts of the King.

With the foregoing points in its favor we now turn to the work itself. *It fairly represents the period to which it belongs.* The value and importance of Britton's descriptions of the system as promulgated by Edward have not been sufficiently attended to by students. This we think has been due to two causes: First, because there is a widely prevalent impression that Britton is but an abridgment or digest of Bracton, and Fleta, traceable to the high authority of Selden with scholars, who in his *Dissertatio ad Fletam* described Britton as a royal abridgment of Bracton increased by the addition of some subsequent statutes. The second cause is because Pollock and Maitland give but three meagre references to the book, while separate and elaborate chapters are given to Glanville and Bracton. This, we take it, is not because these learned scholars—one of them truly profound—were unconscious of the value of Britton's book, but because it did not come within the scope of their work which was definitely limited to an examination of the law and its gradual formation prior to the days of Edward I. These circumstances have operated to the disadvantage of Britton.

So far as the writer's knowledge goes, Mr. Nichols was the first to combat the assertion of Selden, but there is no satisfactory method of determining such a matter for one's self except that of an actual comparison of the books. The writer has performed that task and is satisfied that it needs but a comparison to convince any candid mind of the injustice done to Britton. Much of the matter contained in Bracton and Fleta, both earlier

treatises, appear in Britton, but not more so than can be expected of a later author traversing the same ground as his predecessors, just as Hale followed Coke, and Blackstone followed Hale, particularly in his *Analysis*. But the forms, the arrangement of heads of subjects, and the subdivisions are totally different, and the proofs of independent authorship on the part of Britton are abundant and conclusive. The art of condensed statement, embodying the results and in part incorporating the language of previous writers, involving as it does the use of the mind in fusing the material, and compressing it, as in this case, into one-fourth the space, is in itself an act of independent authorship, but when this is followed by a totally different arrangement of the subject and of subdivisions, and the proper classification of new matter, and the more thorough treatment of common topics, there can be but little left to hypercriticism. Architects can scarcely be charged with copying each others' plans because all buildings consist of foundations, walls, and roofs. It is in the combination and disposition of the parts that originality is displayed. No one can read the opening paragraph of Bracton's first chapter, and follow it by turning to the opening words of Glanville without perceiving that Bracton had Glanville either in mind or in hand at the time of writing, yet no one would venture to charge Bracton with misappropriation of ideas, or even of language. But the matter goes deeper than this. Bracton's work, the noblest product of five hundred years, and incomparably greater than Britton in its dignity of style, its loftiness of sentiment, its copious drafts upon the Civil Law, and its scientific arrangement, devotes the first Book to the Division of Things: The second book to the methods of acquiring title to Things; the third, fourth, and fifth to Actions, and in their discussion Bracton states the substantive principles of law. Britton makes no attempt at philosophical arrangement or statement: his work is essentially practical, and designed for the information of practitioners. His first book treats of the Authority of Justices and of other officers and of personal pleas, including pleas of the Crown. His second, treats of Disseisins and their remedies; his third, of Intrusions and their remedies; his fourth, of Pleas relating to Advowsons and the Property of Churches; and of Attaints; his fifth, of pleas of Dower and Entry; and his sixth of Proprietary actions. But the point lies here. If we read Britton "with our wits as well as with our eyes" we can visualize the legal con-

ditions of the reign of Edward I. The value and importance of the work consists of its descriptions of the system of the Common Law as arranged and ordained by the greatest of the English Kings, from a lawyer's point of view, considering the effects upon all that was subsequently illustrated by the labors of Littleton, St. Germain, Fortescue, Perkins, Plowden, Coke, Hale and Blackstone. This is particularly true of the judicial establishments and the partition of jurisdiction between tribunals, and the reservation of Appellate authority to the King or to the judges who especially represented his personal authority. As Dugdale in his *Origines Juridiciales* says: "Consonant whereunto is that expression of King Edward the first in the beginning of his Booke of Laws, called Breton, where, having declared, that he is God's Vicegerent, and that he hath distributed his Chardge into several portions as being not able alone to hear and determine all the complaints of his subjects; he thus goeth on—'*Nos voulons que nostre jurisdiction*', etc.—We will, that our jurisdiction be superior to all the jurisdictions of our Realm; so that in all Felonies, Trespasses, Contracts, and in all other actions personal or real, we have power to give, or cause to be given, such judgments as do appertain (without any other Process) wheresoever we know the direct truth, as Judges."

It would have been impossible for any one to have said this at an earlier date, for it was not until the reign of Edward that this concentration of authority occurred. Henry II, had taken the first decided steps towards a consolidation of the judicial authority of the Kingdom, but the steps were few and halting in comparison with the stride of the mighty Longshanks. In studying the origin of the present judicial establishments, it is clear that Edward I, played a Founder's part. Professor Baldwin, in his Introduction to Britton as one of the Legal Classic Series, declares: "the Courts of England, if we are to measure them by their relation, on the one hand, to the people, and on the other to the law, had first come into existence under the legislation of his reign."

Then, too, it is one of the features of Britton that he gives form and color and detail to various methods of trial supplying what others had omitted, and furnishing material for later writers to work into picturesque passages of their text. Thus it is with proceedings by trial by Battle in civil actions for land. Glanville is the first to mention the matter, but he simply states

it as a well-established remedy. Bracton has either omitted to treat of battle in civil actions, or the treatise has not come down to us. It is true that in his description of appeals, involving charges of crime, he enters into many particulars, including the oath of the parties, and the manner of the combat, but Britton adds details concerning the armor and weapons of the combatants in an appeal which are not to be found in Glanville, Bracton or Fleta. Other notices of this curious subject are to be found in Dugdale, and they re-appear in Coke, and finally in Blackstone's incomparably graphic chapter in his Third Book, but it is in the pages of Britton that what artists would term "atmosphere" is to be found. Another instance may be found in Britton's treatment of the peculiar force given to a written instrument by the presence of a seal.

On the whole, the great value of Britton to the student of legal history is that he is an author who lived in the midst of the acts that he described, and these acts concern the most important formative period of the English law; an author who was a trained lawyer, familiar with technicalities, and not simply an annalist or historian. It is an original work dropped by the side of an original spring. We commend it to the attention of students in the words of William Fynde in his Abridgement of the Records in the Tower: "Let all Professors of the Law and other studies beware lest through sloathfulness, ease or negligence, they nowe study and make use of Abridgement in their professions, rather than of the original Law Books, Statutes and Authors, lest they divert them to close and shallow Cisterns, whose leisure might serve (as they should principally endeavor) to be well acquainted with the deep and open original springs."

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