

## ‘The Age of Bracton’

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### Maitland and *Bracton*

WHEN MAITLAND HAD WRITTEN the chapter in the first book of the *History of English Law* which provided an overall survey of English law and the English legal system during the reign of Henry III, ‘The Age of Bracton’ must have seemed a natural title. *Bracton*, the work which Maitland characterized as the ‘crown and flower of English medieval jurisprudence’, had of course been written during the reign of Henry III. Nor was Maitland, although he was properly sceptical about the supposed connexion of Rannulph de Glanville with the treatise which bore his name,<sup>1</sup> in any doubt that *Bracton* had been the work of the Devonshire clerk and royal justice whose name it bears, Henry of Bratton.<sup>2</sup> Henry III’s reign was also for Maitland the ‘Age of Bracton’ in at least two other senses. Although he believed that the main part of *Bracton* had been ‘written between 1250 and 1258’ and that the author had gone on ‘glossing and annotating it at a later time’ (by implication down to the time of his death, in 1268),<sup>3</sup> its heavy reliance on judicial decisions from the first half of the reign meant that virtually the whole of the reign could be seen in legal terms as having been the ‘Age of Bracton’. The second, and connected, sense lies in what seems for Maitland to have been the relatively unproblematic nature of the relationship between the law stated in the treatise and that followed in the king’s courts. *Bracton* provided an accurate guide to English law in practice during Henry III’s reign. Although Bracton had assumed ‘a much larger liberty of picking and choosing his ‘authorities’ than would be conceded now-a-days to an English text-writer’, ‘whenever we compare his treatise with the

records' the treatise did indeed seem 'to be fairly stating the practice of the king's court'.<sup>4</sup> Maitland did not suppose that Henry of Bracton had been a dominant figure in the judicial administration of the period. It was therefore not 'The Age of Bracton' in the same way as the previous period had been 'The Age of Glanvill'. Bracton had, nonetheless, been one of the major royal justices of the period and also a figure whose background was typical of that of a majority of his fellow justices.<sup>5</sup> He was thus, if not a dominant, yet still a characteristic, judicial figure of his period.

Many of Maitland's views and assumptions about *Bracton* have come in the last twenty years to look much less secure. The most radical challenge to the existing consensus about the treatise was that posed by the late Professor S. E. Thorne in his modestly, but misleadingly, entitled 'Translator's Introduction' to volume III of his translation and revision of Woodbine's text of *Bracton*, published in 1977. Maitland's views have now found an able and eloquent defender in J. L. Barton in what amounts to an extended review of Thorne's 'Translator's Introduction', published in 1993.<sup>6</sup> However, even as he defended Maitland's views on the date and authorship of the treatise, Barton implicitly cast doubt on something which even Thorne had not really challenged: Maitland's view of the relationship between the text of *Bracton* and English law in practice. This paper will re-examine Maitland's views of *Bracton* in the light of the work of Thorne and Barton. It will also question Maitland's picture of the position of Henry of Bracton within the judiciary of his period.

### The Date of *Bracton*

Before we can turn to the question of the authorship of *Bracton* it will be necessary first to establish when the treatise was composed. It was Maitland's belief that most of *Bracton* had been written between 1250 and 1258.<sup>7</sup> Thorne's arguments in favour of an earlier date were of two kinds: general, and external, ones, and much more specific, internal ones. The general arguments are not a major part of the overall thesis and are less than wholly persuasive. They will not be rehearsed in

<sup>4</sup> Pollock and Maitland, i 209.

<sup>5</sup> Pollock and Maitland, i 205.

<sup>6</sup> J. L. Barton, 'The mystery of Bracton', *Journal of Legal History*, 14 (1993), 1-142.

<sup>7</sup> Pollock and Maitland, i 207. Earlier, in *Bracton's Note Book*, he had placed most of its composition within slightly narrower limits, between about 1250 and 1256: *BNB*, i p. 44.

detail here.<sup>8</sup> The internal arguments are much stronger. The strongest of these will be restated here, albeit sometimes in modified form. Some further internal evidence will also be adduced in support of the proposed redating.

Thorne argued that parts of *Bracton* must have been written prior to the 'provisions' of Merton of 1236<sup>9</sup> since a number of passages relating to changes made by that legislation give every appearance of being additions to a text that was originally complete without them.<sup>10</sup> A passage referring to the new rule of Merton, c. 2, allowing a widow to dispose in her will of the unharvested crops on her dower lands, for example, reads like an awkward addition to what had once been a simple argument explaining why neither heir nor executors got any allowance for the value of the unharvested crops on lands assigned to a widow in dower.<sup>11</sup> This was that the widow herself (or rather, her executors) likewise got no allowance for unharvested crops on her dower lands when they reverted to the heir at her death. While the addition correctly states the law as it had now become it removes the whole point of the original argument. The brief section on *redisseisin*, the action created by c. 3 of the provisions of Merton, in the tractate on *novel disseisin*, also looks like an addition.<sup>12</sup> This is not just because of its placing in a miscellaneous section at the end of the tractate but also because of the sparsity of comment and exposition devoted to it. This is in marked contrast with most of the rest of the tractate. Although there is little direct evidence to indicate that the references to the awarding of damages to a doweress under c. 1 of the provisions in the tractate on dower are a later insertion<sup>13</sup> it must surely be significant that the text gives two quite different formulas for the clause instructing the sheriff to levy those damages.<sup>14</sup> It is difficult to believe that both were ever in use and it seems most likely that the two forms represent alternative possibilities under consideration

<sup>8</sup> *Bracton*, ed. Thorne, iii pp. xxxiii, xxxvi. For some criticisms see Barton, 'Mystery of Bracton', 5, 123-4.

<sup>9</sup> Thorne does not say that all of the treatise had necessarily been written prior to 1236: 'When the text itself was written is a question to which there is no simple answer, for the tractates were composed at different times, but since the innovations introduced by the provisions of Merton in 1236 appear as insertions, much of the *De Legibus* must already have been in existence by that date . . .' (*Bracton*, iii p. xiv). Barton is therefore wrong to suggest that he is combatting the view that 'a first version of the whole of the text which we now have was written before 1236': Barton, 'Mystery of Bracton', 9.

<sup>10</sup> *Bracton*, iii pp. xiii-xiv.

<sup>11</sup> *Bracton*, f. 96, Thorne, ii 276.

<sup>12</sup> *Bracton*, f. 236b, Thorne, iii 201-2.

<sup>13</sup> *Bracton*, f. 312b, Thorne, iii 398-9.

<sup>14</sup> This does not seem to have been noticed by Thorne.

shortly before or after the provision's enactment. Further evidence for composition of at least two of what Thorne took to be additional passages relating to the provisions of Merton not long after 1236 is to be found in the way that these passages refer to those provisions as the 'nova . . . gracia et provisione' or 'nova constitucione..'.<sup>15</sup> Neither look plausible ways of referring to legislation which by 1250 was already fourteen years old.<sup>16</sup>

Thorne also mentions as evidently inserted and readily dateable the brief passage included in the replevin section at the end of the tractate on pleas of the crown relating to the writ of recaption,<sup>17</sup> a remedy which he believed could be dated to c. 1237 and to have been closely connected with the invention of the writ of *redisseisin* by the provisions of Merton.<sup>18</sup> While the closeness of that particular connexion may be open to question, there is early authority for ascribing the invention of this remedy to William Raleigh and thus dating it to the period between 1234 and 1239 when Raleigh was senior justice of the court *coram rege* and responsible for various legal innovations.<sup>19</sup> Nor can there be much doubt that it is an insertion, for it interrupts the final section of a discussion of the different kinds of *avowry* which could be made in replevin.<sup>20</sup> The treatise gives two versions of the writ. One envisages the action being heard before the justices in eyre, the other before the county court, though both writs suppose the prior (and still pending) replevin litigation to have been heard in the county court. These are evidently two alternative drafts, of which only one (that authorizing a hearing in the county court) was eventually adopted.<sup>21</sup> It thus seems probable that this material itself dates to the later 1230s, and that it was added precisely because the section on replevin as originally written had no reference to recaption for the good reason that its writing preceded the invention of the remedy.

As Thorne also noted, there were at a number of different places in

<sup>15</sup> *Bracton*, ff. 96, 312b, Thorne, ii 276, iii 398–9.

<sup>16</sup> *Bracton*, iii p. xxxi.

<sup>17</sup> *Bracton*, f. 159, Thorne, ii 447–8.

<sup>18</sup> *Bracton*, iii p. xiv.

<sup>19</sup> Maitland, *Collected Papers*, ii 147 (CB 95).

<sup>20</sup> Either the person who inserted the passage or a subsequent editor seems also to have been responsible for inserting '*secundam*' in the immediately succeeding passage to make it appear as though it was referring to the pleading of recaption. However, the subsequent reference to a decision made by Raleigh in his 1232 Leicestershire eyre makes it clear that it is really about the action of replevin and continues the discussion which precedes the inserted material: *Bracton*, f. 159b, Thorne, ii 448.

<sup>21</sup> It was later possible to bring an action of recaption before royal justices but only if the original action of replevin had itself already been removed before them. This is not the situation presupposed by this writ.

the treatise texts of writs whose limitation dates correspond to those in use before the changes made by legislation of 1237 or at still earlier dates or which could best be understood as crudely and inaccurately altered versions of writs containing such limitation dates.<sup>22</sup> Examples of the former were two writs of attaint (for reversing the verdict of assizes of novel disseisin and mort d'ancestor) of which the first contained a limitation date ('after our first coronation at Westminster') appropriate only between 1229 and 1237; the second a limitation date ('after the first coronation of our uncle Richard') appropriate at any date between 1218/20 and 1237.<sup>23</sup> A third example is the limitation date for the writ of nuisance. This is abbreviated to being 'after the last return etc.'<sup>24</sup> Thorne plausibly suggests that this represents the limitation date in use between 1218 and 1229 ('after the last return of King John from Ireland into England') rather than that used after 1229 ('after our first coronation') or that used after 1237 ('after our first crossing into Brittany'). Examples of crudely altered limitation dates are provided by the two limitation dates given for the writ of novel disseisin ('after the last return of the lord king from Brittany into England' and 'after the last return of King Henry') and a third given for the related writ of nuisance ('after our last return from Brittany into England').<sup>25</sup> As Thorne notes, this is not a limitation date which was ever in use but it does look like a botched attempt by someone working after 1237 to update the limitation date in use between 1218 and 1229 ('after the last return of King John from Ireland') 'by someone who knew that Henry's name should appear, not John's, and that the place should be Brittany, not Ireland'.<sup>26</sup> Barton's suggestion that the author was using an out of date register of writs and may have been intending to return later to correct his errors seems particularly implausible if we are really to believe that the treatise was written during the 1250s by someone currently active as an assize justice.<sup>27</sup>

Thorne also argues convincingly that the treatise originally held that the assize *utrum* could only be brought by clerks (the position established by Pateshull in a 1227 decision) but that it had been supplemented soon after 1236 by a reviser who noted that today (*hodie*) it could be brought by either a clerk or a layman.<sup>28</sup> Since there seems

<sup>22</sup> *Bracton*, iii p. xxviii.

<sup>23</sup> *Bracton*, f. 291, Thorne, iii 343.

<sup>24</sup> *Bracton*, f. 233b, Thorne, iii 194.

<sup>25</sup> *Bracton*, ff. 179, 185b, 233, Thorne, iii 57, 72, 192.

<sup>26</sup> *Bracton*, iii p. xxviii.

<sup>27</sup> Barton, 'Mystery of Bracton', 19-20.

<sup>28</sup> *Bracton*, iii p. xvii; *Bracton*, f. 285b, Thorne, iii 329.

to be no evidence of the assize actually being brought by laymen after c. 1240 this in turn suggests (even if Thorne does not note this fact) that the passage had been added by that date but not revised thereafter for the way in which the statement is phrased indicates that the reviser was talking specifically about current practice (*obtinet hodie*), not about what the law ought to be, but no longer is.<sup>29</sup> Further evidence (again not noted by Thorne) to suggest composition of this part of the treatise not later than the early 1230s comes from the passage restricting the use of the assize to lay rectors of parish churches instituted by the ordinary.<sup>30</sup> Legislation of 1234 specifically extended the use of the assize to religious holding churches to their own use.<sup>31</sup>

Although Barton may well be right to reject Thorne's assertion that the whole section of 'formed' writs of prohibition is a later addition to a discussion of prohibitions written before this kind of prohibition came into use,<sup>32</sup> it must be significant that so many of these 'formed' writs can themselves be dated to the 1230s as such prohibitions certainly went on being drafted at later dates.<sup>33</sup> The most economical explanation is surely that the author was writing this section no later than c. 1240.

There is also other, independent evidence to support Thorne's general hypothesis of an earlier date for the composition of the treatise. Passages concerned with procedure and practice provide particularly good evidence for the date of composition since in general they read as though they are describing procedure and practice current at the time of the writing of the treatise. The forms of judicial commission which the treatise contains include a variant on the writ patent of commission to the justices of the general eyre covering justices appointed with power solely to take assizes of novel disseisin and mort d'ancestor and to deliver gaols.<sup>34</sup> This is a form apparently last used in 1226.<sup>35</sup> It is difficult to believe that anyone compiling such a treatise

<sup>29</sup> A Nicol, 'Changes in the assize utrum between the constitutions of Clarendon and Bracton' in J. B. Post and R. F. Hunnisett, eds, *Medieval Legal Records edited in Memory of C. A. F. Meekings* (London, 1978), pp. 18–24 at p. 21.

<sup>30</sup> *Bracton*, ff. 285b–6, Thorne, iii 330.

<sup>31</sup> *CRR*, xv nos 1173, 1178.

<sup>32</sup> *Bracton*, ff. 402b–5, Thorne, iv 253–61; *Bracton*, iii pp. xix–xx; Barton, 'Mystery of Bracton', 24–5.

<sup>33</sup> *Bracton*, iii p. xx; *Bracton*, f. 403b, Thorne, iv 256–7 (November 1236); f. 404, Thorne, iv 257 (prior to 1240); f. 404b, Thorne, iv 258–9 (1240 or earlier); ff. 404b–5, Thorne, iv 259–60 (after 1236); f. 405, Thorne, iv 261 (case of 1235–6). To these might be added *Bracton*, f. 405, Thorne, iv 260–1 which seems to be related to litigation of 1228.

<sup>34</sup> *Bracton*, f. 109, Thorne, ii 309.

<sup>35</sup> C. A. F. Meekings, 'Introduction', in *Calendar of the General and Special Assize and General Gaol Delivery Commissions on the Dorse of the Patent Rolls, Richard II (1377–1399)* (Nedeln, Liechtenstein, 1977), pp. 1–2.

in the 1250s would have bothered to include it or even necessarily have known of its existence. Nor is it easy to see why someone writing in the 1250s should have wanted, or even been able, to include a writ of summons and list of articles from the 1227 Shipway session of the Kent eyre and a related mandate just after giving a much more up to date version of the same articles plus elsewhere a separate writ of summons.<sup>36</sup> It is much easier to see how a treatise which had originally included the 1227 summons and articles (perhaps as an interesting variant on the standard type) might have been imperfectly updated by incorporating the later set but without discarding the earlier variants. Other evidence pointing to composition in the late 1220s or early 1230s is the author's mention in passing, and without a hint that it was at the time of composition no longer in use, of the *essoin* of the common summons at the general eyre, a type of *essoin* still allowed in 1232 but which had ceased to be allowed by the time of the general eyre visitation of 1234–6.<sup>37</sup>

Other evidence points less specifically only to composition prior to the mid-1240s. The forms of appointment of justices for the hearing of individual assizes and related writs envisage only two possible alternatives: the appointment of four knights of the county and the appointment of a justice of the Common Bench with power to choose his own associates.<sup>38</sup> The first form was in use only up to c. 1242–3.<sup>39</sup> The presence of only these two forms in the treatise also incidentally provides strong negative evidence against composition of this part of the treatise by Henry of Bratton during the 1250s. Had he been composing the treatise then, his own assize commissions (which do not belong to either of these two types) would surely have been much more readily to hand than either of these. The author also appears to be describing the current practice of the courts in the passage about *mesne* process in personal actions in the tractate 'Of exceptions'.<sup>40</sup> For him the next stage in that process after initial summons and two attachments is *habeas corpus*.<sup>41</sup> *Habeas corpus* was indeed commonly part of *mesne* process in such actions as late as Trinity term 1243, though often

<sup>36</sup> *Bracton*, ff. 117b–18, Thorne, ii 333–4.

<sup>37</sup> *Bracton*, f. 110, Thorne, ii 312; *Crown Pleas of the Wiltshire Eyre, 1249*, ed. C. A. F. Meekings (Wiltshire Archaeological and Natural History Society, Records Branch, 16, 1961), p. 45.

<sup>38</sup> *Bracton*, ff. 110b–11b, Thorne, ii 313–16.

<sup>39</sup> Meekings, *Calendar of Assize and Gaol Delivery Commissions*, p. 3.

<sup>40</sup> *Bracton*, ff. 439–44b, Thorne, iv 363–78.

<sup>41</sup> *Bracton*, f. 440, Thorne, iv 367.

bypassed.<sup>42</sup> By Hilary and Easter terms of 1244 it had disappeared.<sup>43</sup> It is difficult to believe that this portion of the text could possibly have been written after 1243, though it might well have been written some years earlier. At first sight, the reference in the treatise to the writ of grand distress provides a contrary indication.<sup>44</sup> The grand distress only became a regular part of the mesne process in personal actions in the late 1240s.<sup>45</sup> There are, however, isolated instances of its use in cases going back as early as 1207 and it was in intermittent use thereafter.<sup>46</sup> It is probably significant that while the author gives the actual formulas of writs up to and including that of the first writ of simple distraint he does not give any formulas for the other writs of distraint which he mentions including the writ of grand distress.<sup>47</sup> This is probably because he knows of these writs only from plea roll references to them and not from the writ formulary from which he took the other writs, which presumably represents the judicial writs in common use at the time this part of the treatise was composed. This suggests that at the time of writing the writ of grand distress was not yet part of the normal mesne process.<sup>48</sup>

A more substantive point concerns the treatise's mention in passing of the use of the action of warranty of charter as a substitute for the action of mesne where the tenant seeking acquittance had a charter from the mesne lord or his ancestor or (though the treatise notes that there is some dispute about this) in place of the action of *ne vexes* where the tenant was seeking to prevent his lord claiming more services than were contained in his charter of feoffment.<sup>49</sup> Plea roll evidence does, indeed, indicate that warranty of charter was used as a substitute for mesne but not after 1236.<sup>50</sup> No legal writer writing in the 1250s

<sup>42</sup> cf. PRO, KB 26/130, mm. 6d, 19d, 20, 20d, 22; cf. KB 26/130, mm. 3(1) d, 17.

<sup>43</sup> KB 26/132, KB 26/133, KB 26/134A *passim*.

<sup>44</sup> Bracton, f. 440b, Thorne, iv 368.

<sup>45</sup> The grand distress was not yet part of mesne process in the Bench in Easter term 1244 (PRO, KB 26/133 and 134A *passim*) but was in use by 1249/50 e.g. KB 26/135, m. 31 (Mich. 1249), KB 26/138 mm. 7, 12d, 16d, 17d (Hil. 1250) etc..

<sup>46</sup> CRR, v p. 7 and cf. CRR, v p. 141. For its use in later cases see CRR, xiv no. 386 (1230); CRR, xv no. 719 (1233); PRO, KB 26/129, m. 8 and KB 26/130, m. 19d (1243).

<sup>47</sup> Bracton, f. 440b, Thorne, iv 367-8.

<sup>48</sup> It may also be this second-hand knowledge of writs which explains why he thinks that the writ of distraint '*quod sis securus habendi corpus ejus*' is distinct from the initial writ of simple distraint. The evidence of the plea rolls suggests that they are simply two variant forms of the first writ of distraint: see Paul Brand, *Contribution of the Period of Baronial Reform (1258-1267) to the Development of the Common Law in England*, D.Phil thesis (Oxford, 1974), p. 311.

<sup>49</sup> Bracton, f. 399, Thorne, iv 243, 244. But note that at Bracton, f. 38, Thorne, ii 119, the treatise specifically says it cannot be used in place of *ne vexes*.

<sup>50</sup> The latest example of its use is CRR, xv no. 1682.



would have referred to it as though it were uncontested current practice. Its use in place of *ne vexes* is likewise attested only between 1220 and 1234.<sup>51</sup> A reference to its use being contested but supportable fits the mid or even early 1230s much better than the 1250s.

A date prior to c. 1240 is also suggested by the author's doctrine that lords are generally only justified in demanding the services specified in their charters of feoffment.<sup>52</sup> The courts seem to have followed the same line down to that date. Thereafter, they came to accept that lords might be entitled to additional services provided they could show seisin of them subsequent to the making of the tenant's charter.<sup>53</sup> While it is plausible that this was a change of which the author of the treatise did not approve he is unlikely to have simply passed it over in silence, without even arguing against it. The most likely explanation is that he was writing before it had occurred. This is also the most likely explanation for a related feature of his discussion, his assertion that three kinds of suit of court (for the hearing of pleas by writ of right, for the judgment of thieves and for the enforcement of the lord's court) could be claimed by lords even without any specific stipulation for them in the tenant's charter of feoffment.<sup>54</sup> Again, this is a doctrine which was followed in a series of cases decided between 1223 and 1241 but which disappeared thereafter.<sup>55</sup> It is impossible to believe that, had the author been writing in the 1250s, he would have written as though this was still current law.

### The Authorship of *Bracton*

Maitland believed that the whole treatise, as originally written, was the work of Henry of Bracton. In Thorne's view, however, Bracton must have played a much smaller part in its composition. The treatise had probably been in Henry of Bracton's possession from some time in the mid-1230s.<sup>56</sup> He had been responsible for adding various passages connected with William of Raleigh's activities in the later 1230s and relating to the provisions of Merton plus a relatively small number of passages reflecting his own judicial career and experience during the

<sup>51</sup> *CRR*, viii p. 193 (1220); *CRR*, xi nos 1018, 1215 (1223); *BNB*, pl. 1000 (1224); *CRR*, xii no. 2524 (1226); *BNB*, pl. 1771 (1227); *CRR*, xiii no. 717 (1228); *BNB*, pl. 531 (1231); *CRR*, xiv no. 1768 (1231); *BNB*, pl. 837 (1234).

<sup>52</sup> *Bracton*, ff. 35, 38, Thorne, ii 112, 119.

<sup>53</sup> Brand, *Contribution of the Period of Baronial Reform*, pp. 70-1.

<sup>54</sup> *Bracton*, f. 35, Thorne, ii 112.

<sup>55</sup> Brand, *Contribution of the Period of Baronial Reform*, p. 73.

<sup>56</sup> *Bracton*, iii p. v.

1240s and 1250s.<sup>57</sup> He could not have written the major part of the treatise since much of it had been written before the earliest probable date for Bracton's entry into clerical service in the courts, the earliest date when he became even a potential author for such a treatise.<sup>58</sup> These parts of the treatise had been written by a clerk sufficiently close to the great justice Martin of Pateshull, who had retired from the Bench in 1229, to refer to him as 'Martin' and to know what the great man used to do and say in court.<sup>59</sup> This pointed to the most distinguished of Pateshull's clerks, William of Raleigh, whom Henry of Bracton had himself served as a clerk. Thorne was, however, surprisingly reluctant to give Raleigh full credit and preferred to characterize him as no more than 'the prime mover behind the *De Legibus*'.<sup>60</sup>

Within a few years of Henry of Bracton's death in 1268 it was clearly believed that he had been the author of the treatise which still bears his name. The first folio of one of the earliest surviving MSS. of Bracton (OA) has an inscription noting that this is '*principium libri domini H. de Bratona*'.<sup>61</sup> There also survives a copy of the letters issued early in 1278 by Robert of Scarborough acknowledging the receipt of '*librum quem dominus Henricus de Breton composuit*' on loan until the following June from master Thomas Bek archdeacon of Dorset, acting as agent for Robert Burnel, bishop of Bath and Wells.<sup>62</sup> This may simply have been because a manuscript, perhaps at this stage the only manuscript, of the treatise was found among Bracton's possessions after his death, possibly among the property he had left at Wells, which might explain how Burnel obtained his copy of the manuscript. It would have been natural under these circumstances to ascribe authorship of the treatise to Bracton without any detailed examination of its contents. Ascription to Bracton may, however, have come from, or been confirmed by, a reading of the treatise. In certain manuscripts the authorial *ego* of a passage at the beginning of the treatise is extended to '*ego Henricus de Brattone*' ('*ego Henricus de Brattone animum erexi ad*

<sup>57</sup> *Bracton*, iii pp. xxx-xxxii, xliii. Thorne thought it just possible that Bracton had entered Raleigh's service earlier than the mid-1230s and was therefore responsible for material relating to William of Raleigh dating from c. 1232 onwards: *Bracton*, iii pp. xxxi, xxxii.

<sup>58</sup> *Bracton*, iii pp. v, xxxi.

<sup>59</sup> *Bracton*, iii pp. xxxii-xxxiii.

<sup>60</sup> *Bracton*, iii p. xxxvi. His formulation is that 'it flourished during his years as clerk and judge, began to falter when he exchanged the Bench for the court *coram rege* and was drawn, as the king's chief legal adviser, into the political events of the reign, and all but ceased when he left the law for a bishopric in 1239'.

<sup>61</sup> *Bracton*, iii p. li.

<sup>62</sup> PRO, E 36/275, f. 175. It is printed in D. Ogg, ed., *Johannis Seldeni ad Fletam Dissertatio* (Cambridge, 1925), p. 11.

*vetera judicia justorum . . .*).<sup>63</sup> A more subtle suggestion of Bracton's authorship is also to be found in that section of the tractate on the assize of novel disseisin which deals with errors in the names included in writs.<sup>64</sup> His is the first name used as an exemplar to demonstrate possible errors in first names (where 'William' is put in error for 'Henry'); his first name and surname are used to illustrate errors in syllable ('*Henricus de Brothtona*' for '*Henricus de Brattona*') and letter ('*Henricus de Brettona*' for '*Henricus de Brattona*'). His too is the name used to illustrate an error in the dignity held by the plaintiff ('Henry de Bratton precentor' for 'Henry de Bratton dean').

Yet there are good reasons for doubting with Thorne whether Henry of Bracton could have been the author of all or even a major part of the treatise. The first, as Barton himself recognizes, is the difficulty in explaining why he should have abandoned work on the treatise in 1256, some twelve years before his own death, at exactly the time when his retirement from the bench meant that he had more leisure and despite the fact that he remained perfectly capable of other kinds of activity.<sup>65</sup> The political circumstances of the mid-1250s were surely not enough to have daunted an author who had already invested much time and effort in his work from completing it. Abandonment of the treatise is much more plausible as the act of a man in despair at ever bringing suitably up to date or even imposing any real order on a treatise which was mainly the work of another author writing several decades earlier.

A second argument depends on the dating of substantial portions of the treatise. Parts of the treatise must have been written during the later 1220s or early 1230s. While there is no real hard evidence to support Richardson's hypothesis that Henry of Bracton was only born as late as c. 1210 and was therefore too young to have become a clerk much before the mid-1230s, the total absence of references to Bracton on the Bench plea rolls or in other contemporary official sources before the mid-1230s indicates that he did not become a court clerk much before then.<sup>66</sup> Nor can he immediately have acquired the degree of legal knowledge and expertise that was required for the composition of a major legal treatise. He must therefore remain an unlikely candidate for authorship of the major part of the treatise which was composed prior to the late 1230s.

<sup>63</sup> It only appears, however, in two of the MSS. collated by Woodbine and both Barton ('Mystery of Bracton', 1) and Thorne (*Bracton*, iii p. li) consider it to be a later addition.

<sup>64</sup> *Bracton*, f. 188b, Thorne, iii 79.

<sup>65</sup> Barton, 'Mystery of Bracton', 125-6.

<sup>66</sup> Barton, 'Mystery of Bracton', 2-3.

There are, in any case, strong arguments for supposing that the treatise as we now have it is the work of more than one author or at the least of an author and an independent reviser. Maitland himself noted some of this evidence, though he attempted to explain it away as the consequence of a single author having second thoughts without undertaking a full revision of his text.<sup>67</sup> Take, for example, the treatise's discussion of the question of the validity of legacies of freehold land made by grantees who have been granted land to hold to themselves, their heirs, assigns and legatees. The view originally taken (and stated at two different points in the treatise) was that such a bequest was valid. A legatee in possession could plead the bequest in his defence. A legatee out of possession could (or at least should be able to) sue for the enforcement of the bequest in the king's court, though such a writ was not currently in use.<sup>68</sup> In a third passage, however, the treatise comes down firmly against validity.<sup>69</sup> It seems clear, however, that this passage too originally agreed with the others for in introducing what now stands as the argument against validity the author says that '*Vide-tur prima facie quod haec dictio "legare" supervacua sit et haberi debeat pro non adjecta . . .*' All that has happened is the striking out of the answering (and originally more convincing) counter-argument. This is surely the work of a reviser in a hurry who disagreed with the original author but could not be bothered to formulate his own arguments. It does not look like the work of a man who had simply changed his own mind but did not find it necessary to refute his own original arguments for holding in favour of devises. An original author who had changed his mind would surely also have remembered to revise the other passages where he discussed the same question.

A second area where it seems clear that a second author with a diametrically opposed view-point has been at work revising what the first author said is in two passages which discuss whether courts christian may exercise jurisdiction over bequests of freehold land in boroughs and towns where local custom allowed such legacies.<sup>70</sup> In the first, the original author gave all the good reasons for allowing court christian jurisdiction over such cases. A reviser then came along and added the comment 'These things are true, according to R. and the others' ('*Hec vera sunt, secundum R. et alios*'), a distancing remark which does not answer the arguments but does ascribe them to the unspecific 'R. and the others' rather than the author himself. He then notes a single

<sup>67</sup> BNB, i pp. 36-7.

<sup>68</sup> Bracton, ff. 18b, 412b, Thorne, ii 70, iv 283.

<sup>69</sup> Bracton, f. 49, Thorne, ii 149.

<sup>70</sup> Bracton, ff. 409b, 412, Thorne, iv 273, 282.

contrary decision from 1218 as authority for the opposite view but without any supporting rationale for that decision. He has made a similar change in a second passage which is illustrating how matters once subject to secular jurisdiction can become subject to ecclesiastical jurisdiction. One example used is that of tenements left by will in boroughs and cities. Again it is surely a clumsy reviser rather than an author who has changed his mind who has distanced himself from the original view-point of the text by adding '*secundum quosdam*' to it and then goes on to give the contrary view. The new view robs the whole passage of its value as illustrating the point it is meant to demonstrate and the distancing phrase '*secundum quosdam*' is surely a very strange one for an author to use about what had once been his own view.

Evidence of a rather different kind for at least two authors having been at work on the treatise is also to be found in the opening pages of the treatise. The first author is to be heard in the *prohemium auctoris*.<sup>71</sup> He describes the work as a whole as a *tractatus*. He tells us that the *intencio . . . auctoris* is to treat of 'the matters and cases which occur and are found each day in the kingdom of England' and to 'instruct and teach all who wish to know how lawsuits and pleas are decided according to the laws and customs of England . . .'. There is nothing here to suggest any criticism of the current judiciary; nothing to suggest that the author's material will not be taken from current cases and procedure. We hear a very different voice in the immediately preceding passage.<sup>72</sup> This author describes the treatise not as a *tractatus* but as a *summa* divided up into *paragrapha* and *tituli*. He also gives as his purpose in writing the rather different one of writing for 'the instruction at least of lesser men' ('*ad instructionem saltem minorum*') and talks of greater men who are 'foolish and insufficiently instructed, who climb the seat of judgment before learning the laws' and of how they pervert laws and customs by deciding cases more by their own will than by the authority of the laws. It is this author who talks of going back to the 'ancient judgments of just men (*vetera judicia iustorum*), searching through . . . their deeds, their *consilia* and *responsa*'. Here again, then, we have two very different authorial voices, or rather the voice of an author and of his reviser. The first author was writing when the cases in the treatise were still current cases; the second at a time when their appearance in the treatise required justification.

There may even be some evidence of the existence of two authors (or an author and a reviser) in the passage already discussed about

<sup>71</sup> *Bracton*, f. 1b, Thorne, ii 20.

<sup>72</sup> *Bracton*, f. 1, Thorne, ii 19.

errors in names.<sup>73</sup> In the very same passage the example of an error in *cognomen* used is that of 'Hubertus Roberti' where 'Hubertus Walteri' was the proper name. The name of the great archbishop of Canterbury and royal justiciar (who had died in 1205) is hardly likely to have been the first name that came to mind to someone of Henry of Bracton's generation. It would have been much more obvious to a legal author of a previous generation. The example of an error in the identification of the dignity held by the plaintiff as 'Henry de Bratton precentor' when the plaintiff is 'Henry de Bratton dean' may be even more revealing. Here, Bracton has indeed again used his own name but he has not given himself any of the dignities he is known ever to have held (prebendary, archdeacon, chancellor). He may, of course, have been dreaming about what his future career might bring him, but it seems more probable that here (as elsewhere) he has simply substituted his own name for that of the individual whose name originally stood there. If so, it is tempting to suggest that this might have been one of the two judges whose judgments are cited so heavily in the treatise: the Martin of Pateshull whom Raleigh served as clerk and who had been dean of St Paul's cathedral in London.

There is no reason for doubting that Henry of Bracton was responsible for the addition to the treatise of material directly connected with his own career as a royal justice. It also seems likely, as Thorne suggested, that he was responsible for adding to the treatise material connected with William of Raleigh's period as senior justice of the court *coram rege* and to which he had access as one of William of Raleigh's clerks. We are almost certainly hearing Henry of Bracton (even if his name was not in the original manuscript) speaking as the *ego* of the '*ego . . . animum erexi ad vetera iudicia justorum . . .*' for it was surely Bracton who was faced with the problem of justifying a book full of references to long-dead and long-retired judges and their judgments and we also know from Bracton's own references in the treatise that he was critical of the judgments of his contemporaries on the bench.

We can also be reasonably certain that William of Raleigh played a major part in the production of the treatise. Another of Martin of Pateshull's clerks could have written the passages recounting what the great justice used to say and do in court and referring to the great man by his first name, but the fact that the treatise subsequently passed into the hands of Henry of Bracton, who was one of Raleigh's clerks, strongly suggests that it was Raleigh who wrote these passages. Raleigh

<sup>73</sup> Above, p. 75.

is, indeed, a plausible author for most, if not all, of the various constituent parts of the treatise, for the writing of those parts of the treatise which can be dated would coincide with his period as a senior clerk in Pateshull's service and as a justice of the Common Bench.

### 'Bracton's Note Book'

Vinogradoff's discovery in 1884 of a manuscript in the British Museum (Additional MS. 12269) containing around 2000 transcripts of entries on the plea rolls of the Common Bench, Eyres and King's Bench from the period between 1217 and 1239/40 when Martin of Pateshull and William of Raleigh were justices of those courts (and only from those courts where they were acting as justices) provided for Maitland essential evidence of how it had been possible for an author writing in the 1250s to make such extensive use of the judicial decisions of that earlier period. It had been known since the time of Madox that Bracton had possessed plea rolls belonging to Pateshull and Raleigh and had been made to surrender them in 1258,<sup>74</sup> but it was in this manuscript (which Maitland, following a hint from Vinogradoff, christened 'Bracton's Note Book') that Maitland thought he had found the evidence of how Bracton had actually set to work to select and copy material from the earlier rolls to be used in the writing of the treatise. 'Even with the aid of a note book, his feat of citing some five hundred cases scattered about in some fifty rolls was a gigantic feat of patience, industry, memory' but, Maitland considered, 'without some such aid the feat would have been impossible' since 'to have transplanted five hundred cases directly out of this disorderly mass into their proper places in a systematic exposition of the law, would have been beyond the power of any man.'<sup>75</sup> It was true, he admitted, that no more than 200 of the cases Bracton cited could actually be found in 'Bracton's Note Book' but he conjectured that the 'Note Book' was the sole and fortunate survivor of the two or more such 'Note Books' compiled and used by Bracton.<sup>76</sup>

Thorne's discussion of 'Bracton's Note Book' is not one of the more lucid parts of his 'Translator's Introduction'.<sup>77</sup> He does not, it seems, deny that the 'Note Book' had been in the possession of Henry of Bracton: indeed, it is difficult to see how he could have done so,

<sup>74</sup> *BNB*, i p. 25.

<sup>75</sup> *BNB*, i p. 79.

<sup>76</sup> *BNB*, i p. 79.

<sup>77</sup> *Bracton*, iii pp. xxxiv-xxxix.

given the strength of the evidence Maitland had adduced to demonstrate precisely this point.<sup>78</sup> Nor does he deny that Bracton was responsible for at least part of the 'Note Book' (the transcripts of *coram rege* cases of the period 1234/5–1239/40 which it contains).<sup>79</sup> It was his belief, however, that these had been added to an original nucleus of transcripts of enrolments from twenty-eight consecutive terms (running from Easter term 1227 to Easter term 1234) for which Bracton had not been responsible.<sup>80</sup> Copies of enrolments from still earlier terms had been derived from existing collections of such enrolments which were 'copied as the maker of the book came upon them...'.<sup>81</sup> Thus the 'Note Book', just like the treatise itself, was, for Thorne, mainly a work of the 1220s and 1230s rather than of the 1250s and was, again like the treatise, mainly produced by someone other than Henry of Bracton.

Thorne also argued that the 'Note Book' had in fact played no significant role in the composition of the treatise. In the absence of an index, he suggests, it would have been difficult to find cases dealing with any particular subject and thus to make use of a 'Note Book' arranged chronologically.<sup>82</sup> Even where cases were transcribed into the 'Note Book' they were sometimes cited in such a way as to show the author was citing them directly from the plea roll or from personal knowledge. Sometimes the author of the treatise mentions the location of a case on the relevant plea roll, or cites a case under the correct year and term where the 'Note Book' misascribes it or shows knowledge of facts or names that are only found in the plea roll entry and not in the 'Note Book' version of that entry.<sup>83</sup> Sometimes the author demonstrates personal knowledge of circumstances connected with a case that cannot have been derived either from the original plea roll entry or from the 'Note Book' version of that entry.<sup>84</sup> A majority of the 500 cases cited in the treatise were not, in any case, to be found in the 'Note Book'.<sup>85</sup> These, Thorne suggested, must have been cited directly from the rolls themselves. He does not consider Maitland's suggestion that they might have been cited from other 'Note Books' now lost. Thorne did not wholly exclude the possibility that the 'Note Book' had been compiled

<sup>78</sup> Bracton, iii p. xxxix: 'Bracton, who, to all appearances, was with Raleigh during those years and into whose possession the Note Book may already have come...' Maitland's evidence for connecting the Note Book specifically with Henry of Bratton and not just with the author of the treatise is given in *BNB*, i pp. 93–104.

<sup>79</sup> Bracton, iii p. xxxix.

<sup>80</sup> Bracton, iii pp. xxxviii–xxxix.

<sup>81</sup> Bracton, iii pp. xxxvi–xxxviii.

<sup>82</sup> Bracton, iii p. xxxiv.

<sup>83</sup> Bracton, iii p. xxxiv.

<sup>84</sup> Bracton, iii pp. xxxi–xxxiii.

<sup>85</sup> Bracton, iii p. xxxiv.



with the writing of the treatise in mind. But if so it was, he suggested, curious that so few of the cases transcribed were then cited in the treatise (no more than 150 out of 2000 entries copied);<sup>86</sup> and if the author had indeed set about creating a law-book from the record of the decisions of the courts all he would really have needed was a summary of the legal rule that the case embodied 'similar to the short annotations in the margins of the Note Book and the paragraphs of the *Casus et Judicia*', not full transcripts of individual enrolments. It would have been much easier and more convenient for him to have noted the relevant point as he read through the rolls than for him to read them and then have his clerks go through and transcribe each relevant entry in full. Thus the 'Note Book' made very little sense as a compositional aid.<sup>87</sup> Indeed, if Thorne's arguments about the date and authorship of the treatise were correct, an aide-memoire such as the 'Note Book' would in any case have been much less essential for the writing of the treatise than Maitland had supposed it to be, for on Thorne's view of the treatise's date and authorship, it would not have been too difficult for the author to cite cases from memory from the rolls (with perhaps some subsequent checking of those citations). It is less clear what Thorne did suppose the purpose of the compilation to have been. The originally independent collections of enrolments of the 1220s he seems to have seen as a by-product of the education of junior clerks of the Bench, giving them practice in copying enrolments and becoming acquainted with their formulae; the collections of the 1230s as by-products intended for the instruction not just of clerks but also of professional lawyers.<sup>88</sup> The general alternative purpose of the whole collection at which he seems to be hinting is an educational one.

It is clear that Maitland must be wrong about the date when the enrolments now found in 'Bracton's Note Book' were first selected and copied from the rolls. Many of the cases might have been selected and copied at any time up to and including the 1250s for they are unannotated or given annotations which are no help in dating when those annotations were made. But some do contain unmistakable clues about when the processes of copying and annotation took place. It is impossible, for example, to believe that someone working in the 1250s would have bothered to have copied cases about rights of common only to mark them as rendered obsolete by the provisions of Merton.<sup>89</sup>

<sup>86</sup> *Bracton*, iii p. xxxiv.

<sup>87</sup> *Bracton*, iii p. xxxviii.

<sup>88</sup> *Bracton*, iii p. xxxviii.

<sup>89</sup> *BNB*, pll. 1883, 1975.

It must also have been a selector and copyist working before the enactment of the provisions and an annotator working not long afterwards who were responsible for copying an entry which raises the question of the dowress's right to the crops on her dower land beside which an annotator (working surely within a few years of the enactment of the provisions) has noted that this has now been altered by the '*nova gracia*'.<sup>90</sup> Probable evidence of a copyist and an annotator both working as early as the 1220s is to be found in the annotation to an enrolment of a case of Trinity term 1222 which notes an opinion of the royal justice William Briwerre holding for an analagous (but even more extensive) limitation on the obligation of warranty in such a way as to suggest that at the time of the annotation Briwerre (who died in 1226) was still alive or only just dead.<sup>91</sup> It is less clear that Thorne has definitively established those portions of the text of the 'Note Book' for which Henry of Bracton is responsible and those for which others were responsible; or indeed those portions which are direct copies from the plea rolls and those portions which were taken at second hand from existing collections, and further work still needs to be done on this.

The absence of an index from the volume as we now have it does not, of course, prove that one never existed. Thorne's evidence that some of the cases which are found in the 'Note Book' are in fact cited in ways that show the 'Note Book' was not being used is hardly conclusive. It only applies to a relatively limited number of citations and goes to show not that the 'Note Book' was of no use but rather that the author(s) of the treatise had more than one source of information for the cases cited in the work: recollection and direct access to the rolls as well as consultation of the 'Note Book'. A much more potent objection to the notion that the 'Note Book' was used in the composition of the treatise is the presence in the 'Note Book' of only a minority of the cases cited in the treatise. Maitland's hypothesis of the existence of lost additional 'Note Books' which would have contained the missing cases requires us to posit that there once existed two or more Note Books covering exactly the same terms as each other, with no obvious division of subject matter allocating what went into one Note Book rather than another. This seems rather unlikely.

<sup>90</sup> *BNB*, pl. 1409.

<sup>91</sup> *BNB*, pl. 196: 'Nota quod si quis terram dederit per cartam et quod warantizabit versus omnes preterquam versus tales, si contra tales vocetur non warantizabit. Idem videtur si capiatur homagium salvo jure cujuslibet vel si expresse ne teneatur ad warantiam, secundum W. Briwerre'. cf. Maitland's discussion (*BNB*, i pp. 85-6) which notes that the treatise puts Briwerre's involvement in a slightly different context, that of the maker of many charters which such specific exclusions of warranty against particular individuals.

Thorne may not, however, be right in concluding that the 'Note Book' as we now have it was never intended to play any part in the composition of the treatise. The fact that so few of its cases are cited does not in itself present an insuperable difficulty. It is possible that in the process of revision and copying other citations which may once have been in the text were lost. It is also possible that the collection was put together after part or all of a first version of the treatise was written and with a view to its future revision, a revision which Henry of Bracton never completed. Thorne's point about the author not needing full transcripts of the cases concerned is certainly a good one. It is, however, possible that they were made with a rather different purpose in mind, that of serving as *pièces justificatives* to go with the revised treatise. If the treatise was intended for a wider audience than those immediately involved with the running of the Westminster courts who had access to the plea rolls (and we cannot assume that even they would have had access to the older rolls of Pateshull and Raleigh which seem to have been in Bracton's own custody) but was intended to be supported with the evidence of decided cases some such companion volume of copies of enrolments would surely have been needed for this purpose.

### *Bracton and English Law in Henry III's reign*

Maitland thought that *Bracton* could for the most part be treated as a reliable guide to the law of the royal courts during Henry III's reign. The general idea of a law book and the way it should be organized Bracton had indeed borrowed from the traditions of the learned law. He had also borrowed some general maxims, a few specific rules on matters of rare occurrence and some technical terms which he used on occasion in place of those normally used by common lawyers. However, 'the main matter of his treatise is genuine English law laboriously collected out of the plea rolls of the king's court' and 'whenever we compare his treatise with the records — and this can now be done at innumerable points — he seems to be fairly stating the practice of the king's courts.'<sup>92</sup> Bracton had, it was true, been highly selective in his choice of authorities, for he cites in the main only the decisions of Martin of Pateshull and William Raleigh. This was, however, simply because his purpose had been 'to state the practice, the best and most

<sup>92</sup> Pollock and Maitland, i 207–9.

approved practice, of the king's court.<sup>93</sup> Maitland's picture of English law in the reign of Henry III seems then to have been a relatively static one. He does indeed note that one of the reasons that the treatise cannot have been substantially revised after 1259 is that it takes no account of the Provisions of Westminster. He also notes that the passage on the *essoine de malo lecti* and the computation of the year and a day allowed to a successful essoinee in leap years has not been revised in the light of the 1256 Leap Year ordinance.<sup>94</sup> Yet he seems to accept at face value the implicit assertion that a treatise full of the legal doctrine of the time of Pateshull and Raleigh and which is buttressed by the citation of the decisions of the courts over which they presided represents what is still 'the best and most approved practice of the king's court' in the 1250s.<sup>95</sup>

Although Thorne believed that most of the treatise had been written as much as two decades earlier than Maitland, he too considered that the treatise presented a reliable picture of the actual practice of the king's court. His picture of that practice is, however, a much more dynamic one and takes full account of the fact that the custom of the king's court changed materially over time. Indeed, Thorne argued that much of the textual confusion of the treatise was to be accounted for by imperfect attempts at revision of the text which were intended to take account of changes in the law resulting both from statutory enactments and from doctrinal changes in the Common Law itself.<sup>96</sup>

Barton, by contrast, is sceptical about the degree to which *Bracton* can be seen as being a straight reflexion of the practice of the royal courts, whether in the 1230s or in the 1250s, as 'one reason for which the doctrine of the treatise is frequently difficult to date is that it is the doctrine of the author rather than of the judges.'<sup>97</sup> He makes a good case for that part of the treatise which deals with the trial of issues of bastardy (and more particularly issues of special bastardy) being seen as a polemic, whose author 'must have been well aware that the practice which he was describing was not followed at the date when he was writing, and had not been followed at any time within the memory of the profession'.<sup>98</sup> He also suggests the need for a similar scepticism on other matters as well: as to whether the Bractonian doctrine that *indicavit* did not lie for tithes amounting to less than one

<sup>93</sup> Pollock and Maitland, i 209, cf. *BNB*, i pp. 45–52.

<sup>94</sup> *BNB*, i pp. 41–3.

<sup>95</sup> *BNB*, i pp. 50–1.

<sup>96</sup> *Bracton*, iii pp. xiii–xxviii.

<sup>97</sup> Barton, 'Mystery of Bracton', 5 (and cf. 104).

<sup>98</sup> Barton, 'Mystery of Bracton', 18–19.

sixth of the value of a church had ever been adopted or applied as a rule by the courts and whether there ever was a writ allowing a devisee of land to sue for that land in the king's court or a rule allowing a devisee to sue for land in a church court.<sup>99</sup>

Certain parts of the treatise clearly purport to describe current practice or currently existing institutions. The author is not attempting to describe the 'best practice' of the king's courts, but actual existing practice and more work on matching the law and practice of the treatise with the changing law of Henry III's reign would produce further evidence of when the different parts of the treatise were composed. But Barton is also clearly right in supposing that several passages in *Bracton* do not describe the legal doctrine or practice of the king's courts at any specific date, whether in the 1220s, the 1230s or 1250s. Another example is provided by the passage in the tractate on novel disseisin in which the author seems to be arguing for treating certain kinds of unjustified distraint (where there is no pretext for the distraint or where the distresses taken are excessive or where the order of distraints is not observed) as disseisins. Here the very language of the passage indicates that the author is arguing a case rather than stating current or past legal practice.<sup>100</sup> A less obvious example is provided by a preceding passage where the author purports to be giving rules about the order in which distresses should be taken.<sup>101</sup> This has been accepted by at least one distinguished modern legal historian as a valid statement of thirteenth-century English legal rules governing the making of distraints.<sup>102</sup> Some of the preferences can indeed be verified as rules observed and enforced, though generally only by much later evidence. The rule requiring the distraint of a tenant's chattels before those of his sub-tenants was clearly no longer applicable by the early 1250s but may conceivably have been the earlier rule. There is, however, no evidence, of any rule requiring the distraint of the chattels of villein sub-tenants before those of the lord. Indeed, we know that in the case of distraints for the king's debts (admittedly a special case) the contrary rule was applied in Henry II's reign and that the same rule was still valid in 1250 when Henry III reminded the assembled

<sup>99</sup> Barton, 'Mystery of Bracton', 24, 45-7.

<sup>100</sup> *Bracton*, f. 217b; Thorne, iii 155: 'Sed cum fieri possit disseisina si cultura per districtionem depereat quare non fit disseisina eodem modo si depereat melioracio? Quia ubi deficit melioracio, perit cultura in parte vel toto. Videtur igitur quod sit disseisina si quis per capcionem averiorum meorum cum non subsit causa distringendi, vel cum sit, modum excedat, vel per excogitatum maliciam ordinem non observaverit. . . . Non video quare non.'

<sup>101</sup> *Bracton*, f. 217, Thorne, iii 154.

<sup>102</sup> D. W. Sutherland, *The Assize of Novel Disseisin* (Oxford, 1973), p. 83.

sheriffs in the Exchequer of its existence.<sup>103</sup> Nor can we see the enforcement of any general rule requiring other *animalia otiosa* to be taken in distraint before sheep prior to legislation of 1275 (*Districciones Scaccarii*) and the fact that certain religious houses obtained royal charters which gave their sheep such a privilege provides strong negative evidence against its existence prior to that date.<sup>104</sup> While it is possible that the author is stating some variety of local customary rule (perhaps the rules which applied in a particular county) he is clearly not stating the regular practice of the king's court.

It also seems clear that the section of the treatise which deals with the action of replevin is not in fact describing the way in which the action was pleaded at any date in the king's court.<sup>105</sup> Here the problem is not that *Bracton* is providing a contentious picture of what English legal custom is or ought to be, but rather that what he is doing (and all, if one reads him carefully, that he is claiming to be doing) is describing the workings of the action in the county court, perhaps even in one particular county court, and the rules and customs described are apparently those of this one particular, albeit unspecified, county court. He also seems to be describing the mechanics of the action at a relatively early period when, even when the plea was initiated by royal writ, jury trial was not available to decide issues of fact arising in pleading, but only the production and examination of suit and wager of law. The few references to replevin litigation in the king's court are clearly all later additions.

*Bracton* does provide us with a valuable insight into the English Common Law of the late 1220s and 1230s, though we need to be wary of using it as a reliable guide even to the law of that period except where we can check what the treatise says against the evidence of the plea rolls. There is no reason to suppose that it is a reliable guide to the law of any later period. The Common Law was constantly developing and the nature and content of English legal custom during the second half of the reign of Henry III needs to be established from the evidence of the surviving plea rolls and the relatively few minor treatises which were written in that period. Henry III's reign might easily have been the 'Age of Bracton' in yet another sense. The 'Bractonian' synthesis and statement of English law might have helped to crystallize and stabilise English legal custom along the lines established

<sup>103</sup> *Dialogus*, pp. 111–12; 'quod nullus rusticus distringatur pro debito domini sui quamdiu dominus suus habuerit per quod poterit distringi . . .' as quoted in M. T. Clanchy, 'Did Henry III have a policy?', *History*, 53 (1968), at p. 216.

<sup>104</sup> *Stat. Realm*, i 197b.

<sup>105</sup> *Bracton*, ff. 156b–59b, Thorne, ii 439–49.

or stated by the treatise. It was not and the reasons are not hard to find. No one apart from Henry of Bracton appears to have had access to the treatise prior to his death. It was therefore impossible during his lifetime for *Bracton* to exercise any influence over the development of English law. By the time Henry of Bracton had died it was perhaps too late for *Bracton* to enjoy the kind of success and influence it might have had if it had gone into circulation at a date closer to the time of its original composition.

### Henry of Bracton as a Royal Justice

Henry of Bracton was, for Maitland, one of the major royal justices of the reign of Henry III. This is perhaps no more than implicit in the *History of English Law* where he brackets his name with those of Martin of Pateshull, William Raleigh, Robert of Lexington, and William of York not just as a clerical justice but also as one of the 'great lawyers [who] seem to have earned the respect of all parties in the state'.<sup>106</sup> The introduction to *Bracton's Note Book* makes it plain how Maitland originally formed that opinion. It was not just because Bracton had been the author of a great legal treatise but also because Maitland believed that, after a brief spell as a justice in eyre (in 1245), Bracton had become a justice of the highest regular royal court, the court of King's Bench (by 1248), and had then probably served as a justice of that court continuously down to the time of his death in 1268.<sup>107</sup> By the time he came to write the *History of English Law* Maitland knew that Henry of Bracton had retired or been dismissed from the court of King's Bench in or shortly after 1257. This does not seem, however, to have altered his picture of Henry of Bracton's place in the English judiciary of his period. Maitland also thought that Bracton's training and clerical status made him a typical figure in the royal judiciary of his day. Henry III's judges 'seem for the most part to have worked their way upwards as clerks in the court, in the exchequer, in the chancery'. Many of the royal justices of the reign of Henry III were, like Bracton, ecclesiastics and 'canonries, deaneries and even bishoprics were still to be earned by good service on the bench'. It had only been towards the end of the reign that 'the lay element among the king's judges is beginning to outweigh the ecclesiastical'.<sup>108</sup>

<sup>106</sup> Pollock and Maitland, i 205.

<sup>107</sup> *BNB*, i pp. 18-22.

<sup>108</sup> Pollock and Maitland, i 205.

It now seems clear that Maitland was wrong in supposing that a majority of royal justices of the reign of Henry III were clerks and that it was only in the final years of the reign that a lay element became prominent in the courts. From the very beginning of regular royal courts in England in the reign of Henry II laymen and clerics had been fairly evenly balanced within the ranks of royal justices and this remained true not just during the reign of Henry III but also in the reign of his son, Edward I.<sup>109</sup> It is certainly possible to trace the background of a number of royal justices of Henry's reign in service as clerks in the courts, though recruitment from clerks with experience solely in other branches of the royal administration was perhaps rather less common than Maitland suggests and prior clerical service does not seem to have been the background of a majority of royal justices of the period.<sup>110</sup> Maitland's picture of Bracton as one of the major judicial figures of the reign of Henry III seems even more dubious. Bracton never served as a justice of the main royal court for the hearing of civil litigation (the Common Bench) and only ever sat as a junior eyre justice in three consecutive eyres all held in a single year (1245). Even his service as a justice of the court of King's Bench ran only from 1247 to 1251 and again from 1253 to 1257, no more than ten years in all.<sup>111</sup> His judicial career thus hardly bears comparison with the over thirty years as a Common Bench and eyre justice of Gilbert of Preston or the twenty and more years of judicial service of three other royal justices (Robert of Lexington, Roger of Thirkleby, and Henry of Bath) or even the judicial service of the eight other justices who had careers of between ten and twenty years.<sup>112</sup> Henry of Bracton was thus a comparatively minor judicial figure in the overall context of the English judiciary during Henry III's reign. This is a matter of some importance because it may have been precisely because Henry of Bracton's judicial experience was so limited that he was forced to give up any attempt to bring the treatise itself up to date. *Bracton* had been written by someone with direct experience of the Common Bench and of the eyre both as a clerk and as a justice and this experience was put to good

<sup>109</sup> R. V. Turner, *The English Judiciary in the Age of Glanvill and Bracton* (Cambridge, 1985), p. 291; Paul Brand, *The Making of the Common Law* (London, 1992), pp. 158–65, 196–9.

<sup>110</sup> Paul Brand, *The Origins of the English Legal Profession* (Oxford, 1992), pp. 28–9. The only example Maitland cites of a chancery clerk is William of York but it is now clear that he had served in a position equivalent to that of the later keeper of rolls and writs of the Common Bench for almost a decade prior to his appointment as a royal justice: *Ibid.*, p. 28. A better example would have been Robert Fulks who had served as a chancery clerk for about twenty years prior to his appointment as a Common Bench justice in 1271 but was without any substantial prior court experience.

<sup>111</sup> *Bracton*, iii p. xxxiii.

<sup>112</sup> Brand, *Origins of the English Legal Profession*, pp. 27–8.



use in the writing of the treatise. It needed someone with similar experience to bring or keep it up to date. Henry of Bracton was not that man. He was therefore reduced to claiming that it was deliberate choice on his part only to cite the 'ancient judgments of just men' in the treatise. In reality, he did so because he had no alternative.

# Abbreviations

- ANS — *Proceedings of the Battle Conference on Anglo-Norman Studies*.  
ASC — *Anglo-Saxon Chronicle*.  
ASE — *Anglo-Saxon England*.  
(BI)HR — (*Bulletin of the Institute of Historical Research*).  
BL — British Library  
BN — Bibliothèque Nationale.  
Bracton, Thorne — *Bracton De Legibus et Consuetudinibus Angliae*, ed. & trans S. E. Thorne (4 vols, Cambridge, Mass., 1968–77).  
BNB — *Bracton's Note Book*, ed. F. W. Maitland (3 vols, London, 1887).  
CLJ — *Cambridge Law Journal*  
CMA — *Chronicon Monasterii de Abingdon*, ed. J. Stevenson (2 vols, London, 1858).  
Collected Papers — H. A. L. Fisher, ed., *The Collected Papers of Frederic William Maitland* (3 vols, Cambridge, 1911).  
CRR — *Curia Regis Rolls* (HMSO, 1922–).  
DB — *Domesday Book seu Liber Censualis Wilhelmi Primi Regis Angliae*, ed. A. Farley and H. Ellis (4 vols, London, 1783, 1816).  
Dialogus — Richard FitzNigel, *Dialogus de Scaccario*, ed. & trans C. Johnson, rev. F. E. L. Carter & D. E. Greenway (Oxford, 1983).  
Domesday Book and Beyond — F. W. Maitland, *Domesday Book and Beyond* (repr. with Foreword by J. C. Holt, Cambridge, 1987).  
EHR — *English Historical Review*  
Elton, Maitland — G. R. Elton, *F. W. Maitland* (London, 1985)  
English Lawsuits — *English Lawsuits from William I to Richard I*, ed. R. C. van Caenegem (2 vols, Selden Soc., 106, 107, 1990–1).  
EYC — *Early Yorkshire Charters*, vols. I–III, ed. W. Farrer (Edinburgh, 1914–16); index to vols. I–III, ed. C. T. & E. M. Clay; vols. IV–XII, ed. C. T. Clay (Yorks. Arch. Soc. Rec. Ser. Extra Ser., 1935–65).  
Fauroux, Recueil — *Recueil des actes des ducs de Normandie*, ed. M. Fauroux (Mémoires de la société des antiquaires de Normandie, 26, Caen, 1961).  
Fifoot, Life — C. H. S. Fifoot, *Frederic William Maitland: a Life* (Cambridge, Mass., 1971).  
Garnett and Hudson, Law and Government — G. S. Garnett and J. G. H. Hudson, eds, *Law and Government in Medieval England and Normandy: Essays in Honour of Sir James Holt* (Cambridge, 1994).  
Gervase — Gervase of Canterbury, *The Historical Works of Gervase of Canterbury*, ed. W. Stubbs (2 vols, London, 1879–80).  
Gesetze — *Die Gesetze der Angelsachsen*, ed. F. Liebermann, (3 vols, Halle, 1903–16).

- Gierke — F. W. Maitland, trans, *Political Theories of the Middle Age*, by Otto Gierke (Cambridge, 1900).
- Glanvill, Hall — *Tractatus de Legibus et Consuetudinibus Regni Anglie qui Glanvilla vocatur*, ed. and trans G. D. G. Hall (Edinburgh, 1965).
- Holt, *Magna Carta* — J. C. Holt, *Magna Carta* (2nd edn, Cambridge, 1992).
- JMH — *Journal of Medieval History*.
- Letters, i — C. H. S. Fifoot, ed., *The Letters of Frederic William Maitland*, vol. i (Selden Soc., Supplementary Ser., 1, 1965).
- Letters, ii — P. N. R. Zutshi, ed., *The Letters of Frederic William Maitland*, vol. ii (Selden Soc., Supplementary Ser., 11, 1995).
- Letters to George Neilson — F. W. Maitland. *Letters to George Neilson*, ed. E. L. G. Stones (Glasgow, 1976).
- LHP, Downer — *Leges Henrici Primi*, ed. & trans L. J. Downer (Oxford, 1972).
- LQR — *Law Quarterly Review*
- Maitland, *Constitutional History* — F. W. Maitland, *The Constitutional History of England* (Cambridge, 1908).
- MGH — *Monumenta Germaniae Historica*.
- Milsom, *Legal Framework* — S. F. C. Milsom, *The Legal Framework of English Feudalism* (Cambridge, 1976).
- ns — New Series
- PBA — *Proceedings of the British Academy*.
- PKJ — *Pleas before the King or his Justices, 1198–1202*, ed. D. M. Stenton (4 vols, Selden Soc., 67, 68, 83, 84, 1952–67).
- Pollock and Maitland — Sir Frederick Pollock and F. W. Maitland, *The History of English Law before the Time of Edward I* (2 vols, 2nd edn reissued with a new introduction and select bibliography by S. F. C. Milsom, Cambridge, 1968).
- PP — *Past and Present*.
- PR — *Pipe Rolls*
- PRO — Public Record Office
- PRS — Pipe Roll Society
- RCR — *Rotuli Curiae Regis. Rolls and Records of the Court held before the King's Justiciars or Justices*, ed. F. Palgrave (2 vols, Record Commission, 1835).
- Reading Cartularies — *Reading Abbey Cartularies*, ed. B. R. Kemp, (2 vols, Camden Soc., 4th Ser. 31, 33, 1986, 1987).
- Reg. Ant. Linc. — *The Registrum Antiquissimum of the Cathedral Church of Lincoln*, ed. C. W. Foster and K. Major (10 vols, Lincoln Rec. Soc., 1931–73).
- RRAN — *Regesta Regum Anglo-Normannorum, 1066–1154*, ed. H. W. C. Davis *et al.* (4 vols, Oxford, 1913–69).
- S — P. H. Sawyer, *Anglo-Saxon Charters: an Annotated List and Bibliography* (London, 1968).
- Stenton, *English Feudalism* — F. M. Stenton, *The First Century of English Feudalism 1066–1166* (2nd edn, Oxford, 1961).
- Stubbs, *Charters* — *Select Charters and other Illustrations of English Constitutional History*, ed. W. Stubbs (9th edn, Oxford, 1913).
- TRHS — *Transactions of the Royal Historical Society*
- VCH — *Victoria County History*