1977

Book Review. De Legibus et Consuetudinibus Angliae

Morris S. Arnold
Indiana University School of Law - Bloomington

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub

Part of the Legal History Commons

Recommended Citation
http://www.repository.law.indiana.edu/facpub/1135

This Book Review is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
BOOK REVIEW


Reviewed by Morris S. Arnold

Although this thirteenth-century law book, long attributed to the royal judge Henry de Bracton, first appeared in print in 1569 (the "Vulgate"), serious Bractonian scholarship is now just over one hundred years old. An abortive attempt to translate the text appeared in 1878–1883, but it was not until this century that Professor George E. Woodbine of Yale produced what was supposed to be a definitive edition of the text by comparing, over a thirty-five-year period, nearly fifty very lengthy manuscripts. This edition was not accompanied by a translation, and it was that deficiency which Professor Thorne set out to remedy some twenty years ago. With the appearance of the present two volumes, the translation is almost complete. A final volume, with apparatus, notes, and other matter, is promised in the near future (p. vi).

During the period of serious Bractonian scholarship, legal historians have espoused widely different views regarding the date of the work, the status of the text, and the learning of its author. Professor Thorne’s patient devotion to answering these and other questions has now provided us with very nearly definitive answers to most of them and, as with all good scholarship, has uncovered other questions for future students of Bracton to ponder.

1 Charles Stebbins Fairchild Professor of Legal History, Harvard University.
2 Professor of Law, University of Pennsylvania.
3 An early contribution was C. Gütberock, Bracton and His Relation to the Roman Law (B. Coxe trans. 1866).
6 H. Bracton, De Legibus et Consuetudinis Angliae (S. Thorne trans. 1968–1977). (Unless otherwise noted, page references are to volume III.)
7 Woodbine’s text is reproduced in facsimile, and the translation supplied on the facing pages. Revisions in the translation of volume II, made necessary by Professor Thorne’s new textual theory, see p. 518 infra, will appear in a later volume (see pp. v–vi).

The Bractonian literature is enormous. Most of the major contributions before 1956 are collected in the notes to T. Plucknett, A Concise History of the Common Law 258–65 (5th ed. 1956), especially at 262 n.1.
I.

Professor Thorne's interpretation of redundant, disjunctive, and contradictory textual material provides a new explanation for the puzzlingly flawed character of the treatise. Woodbine's first volume was denounced as unemendably defective almost immediately after it appeared, and indeed, the text was unintelligible in many places. In the ensuing scholarly furor, many differing explanations for those defects were posited. For some, they proved Bracton's incompetence; for others, they proved the existence of an editor (the mysterious "Redactor" of the literature) who made a mess of the text after Bracton's death; and for still others, the faults were attributable to a dim and drowsy copyist too stupid to understand a learned work. Professor Thorne's view, more complicated than will allow for easy compression, has some features of all of these theories. But more important, the exhaustive detective work necessary to establish his textual theory has led to the shattering of two widely believed propositions of medieval English legal history. First, Professor Thorne demonstrates that Bracton's Note Book (it has been called this for almost one hundred years now) has no connection with the treatise. Even more startling, it appears that Bracton did not write the major part of the De Legibus, the book that has borne his name for seven hundred years.

In rejecting the previously unquestioned assumption of Bracton's authorship, Thorne first shows that much of the unintelligibility exhibited by the text is attributable to a reviser who was at work in the 1230's attempting to modernize an already existing treatise to reflect recent legal changes. Thorne demonstrates that revisions were made to accommodate changes in the law of bastardy wrought by the Statute of Merton (1236) and transformations in the law of advowsons, prohibitions, and the procedure surrounding the writ of entry sur disseisin (pp. xv–xxviii). The revision was never complete, and much of it appeared in the margins of the reviser's book. Later, these marginalia were incorporated into the text, sometimes in the middle of a sentence, thus rendering the treatise incomprehensible (p. xix). Similar ill treatment of the reviser's work also explains how, in a relatively short space, the book can give contradictory answers to the same

---

8 H. Kantorowicz, Bractonian Problems (1941).
9 It received its name from Maitland, see F. Maitland, Bracton's Note Book (1887) [hereinafter cited as B.N.B.], but had been connected with Bracton and thought to be his three years earlier. See id. at xvii–xxii (Prof. Paul Vinogradoff's letter in The Athenaeum, July 19, 1884).
10 The first manuscript which clearly credits Bracton with authorship comes from 1277, nine years after his death (p. li).
legal question (pp. xv–xvi). Often new rules were brought into the text, but because of careless editing, the old rules were not expunged.

Thorne's most fundamental point, however, is that the bulk of the treatise as we now have it, the book on which the reviser was at work, seems to come from the 1220's. Thus, it is unlikely that Bracton wrote the treatise, since he probably was not born before 1200. The author's identity is not known, but Thorne maintains that William of Ralegh, Bracton's patron and an important judge of the period, was "the prime mover behind the De Legibus" (p. xxxvi).¹¹

But if the honor of authorship is denied Bracton, he is not altogether an interloper, since Thorne believes that Bracton was the ill-treated reviser of the 1230's (p. xliii). Certainly after 1245 the treatise was in his care; all the latest cases cited by it (the last is from 1258) were decided while he was on the bench and most of them were heard by his court (p. xliii). He also seems to have been the sole author of the small tractate on cosinage (p. xxxi).¹² Still, his contribution to English law — if indeed he was the reviser — is now reduced to a small fraction of that previously accorded him; and this is one of those times when it is hard to rejoice in the spectacle of the mighty brought low. Bracton stood as the sole identifiable representative of serious common law scholarship in his era. His countrymen once doubted his Romanesque learning, and Thorne himself rehabilitated him in a previous volume (vol. I, pp. xxxii–xl). But all that remains of his Civilian reputation are a few desultory citations from Raymond de Penafort's Summa de Matrimonio (p. xxxi).

The conclusion that Bracton did not author the treatise is not Thorne's only fundamental break with traditional Bractonian scholarship. Thorne has also sought to sever the connection between Bracton's Note Book and the treatise itself. Most legal historians, under the influence of Frederic Maitland, have believed that a note book containing cases from the plea rolls of the first half of Henry III's reign was prepared for Bracton, who then used it to write his treatise.¹³ But this note book contains 2000 cases, and only 150 of those are among the treatise's 500 case citations (p. xxxiv). Further, the treatise sometimes ignores relevant cases from the note book, leaving assertions unsupported or citing only weaker authorities not discussed there (p. xxxv & n.10). Mait-

¹¹ Thorne says that a letter written by Ralegh "uses language reminiscent of the De Legibus" (p. xlii n.25).
¹² Thorne believes that an earlier reviser was at work in the late 1220's (pp. xxxii–xxxiii).
¹³ See 1 B.N.B., supra note 9, at 72–117 for Maitland's very elaborate argument.
land's argument that the uniqueness of the treatise and the note book implies a connection between them was uncharacteristically ill considered. Indeed, Thorne plausibly supposes that there were many persons working in the rolls during this period (p. xxxv), some of them, at least, compiling books very similar to what a later age would call Books of Entries. Moreover, if Bracton was working on the treatise in the 1250's, or even the 1240's, it is difficult to understand why old, often outdated cases like the ones in the note book would have been of interest (pp. xvii–xxvii). Maitland rendered only a possessory judgment in Bracton's favor; Thorne seems to have overturned it by pleading and proved facts higher in the right.

II.

Professor Thorne's conclusions, though iconoclastic, are not likely to be seriously challenged. It does seem curious, however, if the main body of the treatise was produced, say, by 1230, that no copy of it in its unrevised form has ever come to light. The treatise may have been closely guarded by Ralegh and Bracton, although it is difficult to imagine a motive for their protectiveness except, perhaps, a desire that no one see the book until it was finished. This was a misbegotten hope, as it turned out. Once it escaped, the treatise enjoyed an enormous circulation. Over fifty manuscripts have survived, and while it is not easy to determine what the survival ratio of medieval manuscripts is, some have estimated it at one in ten. Some of the extant versions of the treatise are abridgements, but, even so, can it be that manuscripts of "Bracton" (what shall we call it now?) once numbered in the hundreds? The existence of such a large number of manuscripts makes it even harder to guess why versions of the core book have not been discovered.

Still, most questions about the text and meaning of the treatise are now answered for the foreseeable future. Perhaps the next task for medievalists should be to concentrate on the surviving plea roll evidence — the official records of litigation — in order to discover whether the treatise accurately stated the prevailing law. All treatise writers indulge in some wishful thinking, and finding consensus in a chaotic case law sometimes involves authors in something very much like dissembling. The author of the treatise may well have engaged in one or both of these activi-

14 Id. at 80.
15 Id. at 117 ("Must we not say then that, until evidence be produced on the other side, Bracton is entitled to a judgment, a possessory judgment? Idea consideratum est quod Henricus recuperavit seisinam suam, salvo jure cuiolibet.").
ties rather more than most text writers. But not enough detailed work has been done in the rolls from the Bractonian period to substantiate this hypothesis, despite the manageable volume of these records. Indeed, failure to exploit this primary material properly is the chief deficiency of Frederic Maitland's seminal *The History of English Law,* long regarded as the preeminent and unquestioned authority on medieval English legal history.

It is improbable that any academic figure has so dominated his subject as has Maitland. Recently, however, historians have made progress rearranging the larger picture that he provided us in his astonishing array of books, instead of simply chipping away at his detail. Thorne's painstaking and patient work has shattered most of Maitland's conclusions about the *De Legibus* — its date, its authorship, and its connection with the note book. More importantly, Maitland relied heavily on the *De Legibus* for the substance of *The History of English Law,* and this reliance has been shaken by Thorne's heterodox conclusions. What is surprising is not so much that Maitland turned out to be human, but that it has taken so long to prove it.

---

17 S. Milson, *The Legal Framework of English Feudalism* (1976), has completely undone Maitland's view of the feudal foundation of English law.