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BRACTON AND HIS TIME

FRED H. BLUME*

Henry de Bracton, or Bracton was par excellence one of the founding fathers of the common law. Glanville had written a treatise on that law some fifty to seventy years previously. It was insignificant as compared with that of Bracton, whose aim was to write a complete treatise on all the various topics arising in law. That he was successful in his undertaking is attested by all who have examined his work. He lived in the 13th century. His life was probably nearly coextensive with that of Henry III who was born in 1207 and reigned, after the death of King John, from 1216 to 1272 A. D. The date of Bracton's birth is unknown; he probably died in 1268. He finished his treatise on the law about 1260. He was an ecclesiastic. He was one of the judges of the King for twenty-three years, was one of the signers of a number of royal charters, and is thought by some to have been the chief justice (Justiciar) of the realm from 1265 to the time of his death. The law since Glanville's time had a rapid and permanent growth. At the end of Bracton's life most of the main outlines of our medieval law had been drawn and the subsequent centuries in the main but filled in some details.¹ It had to some extent become an artistically and over-refined system so that only a regular study was able to master it. Hence a work like that of Bracton had become necessary.² Reeves in his *History of English Law*, Vol. 2, p. 357 says: "The great ornament of his reign (Henry III) is the treatise of Henry Bracton. * * * Bracton's book compared with that of Glanville's is a voluminous work, the latter is little more than a sketch so far as the plan of it goes, and that is confined to proceedings in the King's Court, but the former is a finished and systematic performance, giving a complete view of the law in all its titles as it stood at the time it was written." Pollock & Maitland say:³ "Bracton's book is the crown and flower of English Medieval Jurisprudence." Holdsworth⁴ speaking of the time of Henry III states: "English law takes a long step towards becoming such a coherent and definite body of rules that it can be compared with the civil and canon law. English law as we see it summed up in the work of Bracton is an achievement of which any nation may well be proud." Campbell in Vol. I of his *Lives of the Chief Justices*, P. 63, states that Bracton was rivaled by no English juridical writer until Blackstone arose five centuries afterwards. We study human activities and human civilization to dissipate some of the mists and mysteries surrounding human life, so a paper about

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1. 1 Pollock & Maitland (hereafter referred to as P. & M.) 174.

2. Gueterbock translated by Coxe, p. 32 to 33.

3. 1 P. & M. 206.

4. 2 *History of the Law of England* (hereafter referred to as Holdsworth) 217.

Bracton and his time may not be altogether without interest for lawyers. In fact it seems clear that one who wants to understand the development of our common law must at least go back to Bracton's treatise and the law of Bracton's time. It is not the purpose of this paper, however, to consider the treatise of Bracton at length. The intention is merely to give some of the highlights of his time, of his work, and of the legal institutions of his time, not hesitating, however, to mention some incidental facts before or after his time.

The population of England in the 13th century was probably approximately two or three million. The population of London was probably little more than that of Cheyenne today; that of York about 11,000; that of Bristol about 9,500; that of Coventry about 7,000; that of Norwich about 6,000; that of Lincoln about 5,000;⁵ so that the population was mostly rural. England in the 13th century in fact was mainly a country of villages or manors, each containing some 60 to 80 inhabitants. Generally, but not always the village was coterminous with a manor. However, a manor might contain several villages. The Bishop of Durham held 67 villages distributed in 10 manors. Again there might be two or more manors in the same village. In some villages the holders of land were small people who were the immediate tenants of the king or of some magnate who had no other land in the neighborhood. The greater portion of the people were serfs or villeins, the latter of somewhat higher status than serfs. They held land under some lord and had theoretically no rights against the latter, but who generally were secure in their possessions, of say about 12 acres, so long as they performed the services for and paid the dues to their lord, transmitting their holdings to their heirs the same as free-holders and transferring their holdings ordinarily freely, at least when transferred with the consent of the lord.⁶ In 1215 King John had been compelled to grant the Great Charter. The reign of Henry III was turbulent; he was in continuous quarrels with the earls and the barons. The Mad Parliament met in 1258. The succeeding years saw a civil war, the Baron's war, and King Henry for a time was held captive. The year 1265 A. D. saw the first real parliament of England, consisting of prelates and nobles and commons. The standard of verbal and social refinement was extremely low. The villages had to depend mainly on nomadic traders and artisans for supplying some of the necessities of life. There were buffoons traveling about, and minstrels and singers, outlaws and thieves of all kinds. The strong arm generally prevailed. Redress for grievances, real or imaginary, was promptly taken, sometimes bordering on the Lynch Law of today.

5. See Sharon Turner, *History of the Anglo-Saxons*; Ogg *Economical Development of Modern Europe* (1917) p. 11; Thorold Rogers, *Work & Wages*, p. 119; Ogg thinks that London might have had a population of 100,000.

6. Rogers, *supra*, 44, 46; 1 P. & M. 414, 432, 608, 609, 610, 629; 2 Selden Society 161, 164.

Fights, riots, plunder and incendiarism occurred continually so that it cannot be surprising that an ordinance of 1233 A. D., repeated in 1252, provided that in every village watch should be kept throughout the night by four men.⁷ It was under these conditions that Bracton wrote his treatise, but of which he took no notice therein.

The common law was established and developed by the courts of the King after the Norman Invasion. Other courts existed at that time; but to furnish revenue to the King and to keep the greater and lesser barons in check, as well as to curb the turbulent and contentious people, seemed to make the establishment of the royal courts a necessity. These courts did not at once displace the local courts. It was only by a gradual process extending over several centuries that these courts, along with the court of equity, finally assumed jurisdiction in practically all matters except those delegated to inferior and later-established courts. In Bracton's time they exercised exclusive jurisdiction in all serious criminal cases, in most cases relating to real property, but a limited jurisdiction in other matters. Originally the King's Court was one court. By the 13th century it had branched off into the King's Bench—originally a court held in the presence of the King—the common pleas court and the court of exchequer, the common pleas always, the exchequer generally, sitting at Westminster. Since it was burdensome to require all litigants and juries to come to Westminster or to other places where the King might happen to be, the custom arose as early as the reign of Henry I (1110 to 1135) to send judges into the various counties to try cases. One court held by these judges was called the Grand Eyre—the Grand Court—held about once in seven years in each county. Its business was to overhaul the work of the local officials and courts of the county since the time that a like court had been held. While some judicial business was done, the main purpose seems to have been to extort fines for every misdeed that had been done. So unpopular was the court that in 1233 the Cornishmen betook themselves to the woods rather than to face the justices. These courts ceased to be held in the first half of the 14th century.⁸ More important from the standpoint of permanency were other itinerant judges to try criminal or civil actions.⁹ In 1176 A. D. 18 justices were assigned to six circuits and from that year onwards some part of the country was regularly visited by itinerant judges. They were sometimes appointed for special purposes and for a limited time, but in Bracton's time general commissions began to be issued to try cases, and criminal as well as civil jurisdiction became vested in the same men. In 1272 A. D., the first year of the reign of Edward I, who is called the Justinian of the Common Law, a new ordinance originated

7. 1 P. & M. 565; see also 1 Aubrey Rise and Growth of the English Nation, 305 to 333; 60 Selden Society Introduction 169.

8. See 1 Holdsworth 265-272.

9. 1 Holdsworth 50.

the regular circuits of these justices. The country was divided into a group of counties and to each group two justices were assigned to hold the courts in the various counties three times a year. This was the beginning of the *Nisi Prius* system, the judges of which ultimately became part of the judges of the common law.¹⁰

Some factors in connection with the common law were distinctive to that system. Important ones were (a) the jury system; (b) the fact that it had been developed mainly through the judges of the royal courts; (c) the fact that courts of law and courts of equity became separated, although that was not yet true in Bracton's time; (d) the fact that actions were usually commenced by a writ issued out of the office of the Chancellor, although that was not yet entirely true in Bracton's time, as hereafter mentioned; (e) the fact that from early times and much earlier than in other countries, a parliamentary system was developed, and that he who held the crown held it subject to the will of the people. But it is a mistake to think that the common law was wholly indigenous in England and was developed solely out of the customs of the country. "We must not" says James Bryce¹¹ "exaggerate the originality of our law." * * * "It is not original in the sense of owing little or nothing to foreign sources." In fact it is doubtful that we exaggerate when we say that originally at least most of the common law administered in the royal courts was not indigenous, but was taken from or influenced by outside law, although, of course, legal doctrines like those of a foreign law would at times originate in England uninfluenced by the latter, but would be like it merely because they arose out of like conditions. Max Radin¹² appears to be right when he states that "The common law in all its formative periods grew up in close relation with the whole background of the European culture. It is not too much to say that English law was more isolated in the first half of the 19th century than it had been at any stage of its previous history or has been since." The foregoing will become clearer as we proceed.

Justices of the Peace were not created until the 14th century. But there were, as already stated, in the thirteenth century other courts aside from the royal courts. The extent of their jurisdiction is not entirely clear, mainly perhaps by reason of the fact that that extent was not uniform. There were county courts, originally held twice a year, but in Bracton's time generally once a month. Before the Norman Invasion these courts were courts of plenary jurisdiction, but in Bracton's time their jurisdiction was, in the main, confined to minor matters in civil as well as in criminal case. They frequently met two days at a time.¹³ They were presided over by the sheriff. Its judges

10. 1 Holdsworth, 273 to 284.

11. 3 Evolution of Law Series 376.

12. Anglo-American Legal History, 531.

13. 62 Selden Society 65.

were part of the freemen of the county. There were also courts of subdivisions of the counties, called the hundreds, meeting, in Bracton's time, every three weeks, presided over by the sheriff or his bailiff, unless it had passed into the power of some baron, and whose jurisdiction had been curtailed by the royal courts in like manner as that of the county courts. Till 1268, but not thereafter, its judgments could be reviewed by the county court.¹⁴ Holdsworth¹⁵ tells us that the extent of the jurisdiction of the hundred courts and the county courts was originally equal, but that the county courts were courts for the greater men, and the hundred courts were courts for the smaller men. The latter came more and more to be combined with the manorial courts, hereinafter mentioned, and were administered by the lords or their bailiffs and who had acquired the jurisdiction either through usurpation or through the gift of franchise. In such case the business of the hundred court was usually carried on at the same time as, though not confused with, the business of the manorial court.¹⁶ The foregoing courts administered justice according to the customs of the county, which originally were Teutonic, and which were probably not particularly influenced by the Norman Invasion, except in connection with the feudal law, for the Normans were Northmen, of the same race as the English, who, as stated by E. A. Freeman¹⁷ "stayed a little time in Gaul to put on a French varnish and who came to England to be washed clean again." It should be mentioned in this connection that there existed in Bracton's time, and before, the system of frank-pledge. That was a system under which men were grouped in groups of ten, called tithings, each one of the group being responsible for the conduct of the others. Twice a year the sheriff of the county went to the hundreds, called the sheriff's tourn, to see that the system of frank-pledge was in order, to learn of grave crimes that were committed, and to assess fines for smaller offenses. The power of the sheriff, however, frequently came to be exercised by the lords of manors, as well as by some boroughs.¹⁸

The Normans brought with them a feudal system somewhat more developed than that in England. They seemingly extended the institution of manorial courts—courts of the nobles—to some extent by reason of royal grants previously existing in England.^{18a} In the feudal system the king theoretically was the owner of all the land. He might make grants of part of it to others who would be his tenants in chief in return for certain services—military service being most honorable. The greater tenants in chief usually would in turn grant lands to what

14. 1 Holdsworth 12, 75.

15. *Id.* at 75; See also 62 Selden Society 84-91; 1 P. & M. states that the hundred courts had no jurisdiction in land or criminal cases.

16. Woodbine in 33 Yale L.J. 800; see 1 Holdsworth 184; 2 Selden Society 176-177.

17. English People in Their Three Homes, p. 155.

18. 1 Holdsworth 76, 134-135, 142.

18a. Maitland, Domesday Book and Beyond, 80-94; 1 Holdsworth, 19-30.

are called mesne tenants, who in turn might grant some of their rights to others. The lowest grade of land holders held their land by servile tenure, that is to say, they performed certain services, such as plowing, sowing and the like,¹⁹ and whose superior was a lord, who might be a layman or an ecclesiastic. These lords, either personally or through their steward, held a manorial court about once in three weeks. Rogers in his *Work and Wages*, p. 98, graphically describes some of the doings in these courts as follows: "There they presented scolds for wrangling; there the miller who took advantage of his monopoly was indicted and punished; the widow was allotted her charge on the land; the baker or brewer, who had broken the assize or outraged the discipline of the manor, was fined; ambitious fathers bargained for permission to send their sons to school; and mothers got leave to marry their daughters. The labourer who is defrauded of his wages is permitted to distrain on his employer's goods and even household chattels; and poachers are mulcted for their offences. Sometimes the whole parish strives to emancipate itself from the obligation of grinding its corn at the lord's mill, and is amerced for so heinous a breach of manor law. The common carrier is summoned for failing to deliver goods trusted to him, and is constrained to make compensation. A woman is fined for harbouring a stranger in her house. A son comes into court, and, on succeeding to his father's tenement, * * * acknowledges that he is bound to pay an annuity to his mother for her whole life—of a quarter of wheat, another of barley, another of peas, and forty pence; proffering, as sureties for the due performance of his obligation, two other residents. The parish priest is generally the peacemaker."

In Volume 4 of the *Selden Society*, dealing with manorial courts of the 13th century, are set forth numerous cases involving, among others, the following matters: Assault and battery, defamation, debt, killing and striking beasts, cutting trees in the lord's wood, pasturing beasts in the lord's meadow, taking grass from the lord's meadow, taking fruit from the lord's garden, taking fish from the lord's pond, selling fish that had become rotten and caused sickness, failure to pay toll at the lord's mill. In one instance, speaking of two women it is stated: "and the said crones took to their fists and each other's hair and raised a hue and cry, and their husbands hearing this ran up and made a great rout (disturbance?). Therefore, by award of the court the said women * * * are in mercy."²⁰ Freehold tenants as well as the serfs and villeins were subject to the criminal law and police regulations administered in these courts²¹ although some of the manorial courts did not have such plenary jurisdiction.

19. See Ransome, *History of England*, 100.

20. See also 1 Holdsworth 184.

21. 2 Holdsworth 376.

Then there were ecclesiastical courts, generally speaking with jurisdiction in matters of probate. These courts frequently sought to usurp jurisdiction in various other matters. It was only by writs of prohibition from the royal courts that its jurisdiction in lay matters was kept within bounds. It is not unlikely that had it been permitted to continually encroach on the royal courts, we would have had the Roman law instead of the common law. Nor must we overlook the courts of the boroughs. The jurisdiction of these courts was not uniform. It depended somewhat upon the charter powers. It was the rule of those days, as the rule is now, that a borough, or municipality, had only those powers which were expressly or impliedly granted them. Their charters were all special. There was no general law, under which municipalities were organized. The charters were generally granted by the king, sometimes by some lord.²² Boroughs ordinarily had power to enact ordinances, for instance, building ordinances.²³ Their civic and criminal jurisdiction extended generally to the same class of cases as in manorial and other local courts,²⁴ somewhat more varied by reason of the denser population and by reason of the enactment of various ordinances. They had a full or great court twice or three times a year, but lesser courts often sat once a week.²⁵ They had their merchant guilds and craft guilds, which frequently had courts of their own.²⁶ They, too, might have fair courts. Similar courts were the court of the Staples, organized soon after the time of Bracton,²⁷ a commercial court for foreign merchants—and the maritime courts. These courts administered the law merchant. The fair court was commonly known as the piepowder court because frequented by men with dusty feet who wandered from mart to mart.²⁸ The grant of the right to hold fairs was a royal prerogative. The right was granted to boroughs or to an individual, and the grant impliedly included the right to hold court. In boroughs the piepowder court was sometimes combined with the ordinary borough court, sometimes was kept separate. The law administered in these courts was not the law indigenous in England. Fairs were held all over Europe during the middle ages. Merchants traveled from city to city where fairs were held, and a commercial law—the law merchant—was developed which was very nearly uniform in all countries, and which ultimately became part of the common law. For the most part the law was laid down by the merchants themselves. It was essentially cosmopolitan in character. It was important in these courts that cases should be decided

22. 1 P. & M. 640.

23. *Id.* at 660.

24. 2 Holdsworth 386-395; see 1 P. & M. 644.

25. 1 P. & M. 658; 21 Selden Society, Introduction 145 ff.

26. 1 P. & M. 667.

27. 1 Holdsworth 542.

28. 23 Selden Society xiii-xiv.

29. 1 Holdsworth 536-538.

swiftly. Hence the procedure was summary, and the sessions of the court during the fair were continuous.²⁹ Volume 23 of the Selden Society, relating to the Law Merchant gives us numerous illustrations of the kind of cases tried in these courts. Among them were cases of trespass; of non-payment for goods or services; selling wine for more than allowed; brewing beer contrary to prohibition; unlawful detention of goods; defamation; fraud in connection with sales. Writings payable to bearer were known as early as the thirteenth century, and these writings were the origin of the negotiable instruments of the modern days.³⁰ Bracton held³¹ that the so-called God's penny, given as earnest money to bind a sale, was not effective to that end, but that the seller might refuse to carry out his contract by paying to the buyer double the amount of the earnest money given. That was not the view of the merchants, and their view prevailed when in 1303, the king provided that "every contract between the said merchants and any persons whencesoever they may come touching any kind of merchandise shall be firm and stable so that neither of the said merchants shall be able to retract or recede from the said contract when once the God's penny shall have been given and received between the parties to the contract."³² In fact it seems to have been common to bind a bargain "by a drink in advance."³³

The royal courts could and to a certain extent did exercise supervisory control over the local courts, creating, as time went on, a uniformity in administering the law.³⁴ On the other hand there can scarcely be any doubt that the local customs in turn exerted an influence on the royal courts, and hence upon the common law. There are but few records of the county and the hundred courts, but many records have been found of the manorial and the borough courts. Throughout the middle ages practically all lands belonged to some manor and almost the whole population was manorial.³⁵ Some manors seem to have been small and the number of tenants few so that no manorial court was held,³⁶ but that probably was the exception and not the rule. Now nearly all important land and criminal cases were triable in the royal courts. The borough and the manorial courts would ordinarily have occupied a large field of cases of minor importance, especially when combined with the courts of the hundred which sat every three weeks. Then, too, the sheriff or his bailiff went through the hundred twice a year, mainly in connection with criminal matter, or the lords or boroughs exercised that power instead of the sheriff. So that theoretically only a very limited number of mat-

30. 1 Holdsworth 543, 544.

31. Bracton f. 61b, 62.

32. 2 Selden Society, p. 133.

33. 3 Select Essays in Anglo-American Legal History (hereafter referred to as "Essays") 10.

34. 2 Holdsworth 397.

35. Ogg, *supra*, 19, 2 Holdsworth 199, 200.

36. 1 P. & M. 531, 603, and also Britton F. 275.

ters would have been left to the county courts. But that was not so, at least in the first half of the 13th century. We learn that when a county court was held in Lincolnshire and it had disposed of a number of cases during one day, 140 cases were left undecided.³⁷ That seems a surprisingly large number in view of what has been said, and in view of the fact that the county court in that county met every forty days.³⁸ The theory of Holdsworth that the county court was the court of the greater men, and that the hundred court was the court of the smaller men appears to be an unsatisfactory explanation unless intended to refer, as it doubtless did, to the parties who were the judges in the case. A survey of the country contained in the so-called Domesday Book was made in 1085. Lincolnshire was said to have a population of 25,817, of which 68 were what the writer takes to be chief landholders (tenentes), about 11,000 freehold tenants, an almost equal number of unfree tenants, and some inhabitants of boroughs and various miscellaneous persons.³⁹ It is probable that the population during these centuries was comparatively stable, and it is not probable, in view of what has been stated, that the number of chief holders of land increased from 1085 A. D. to the 13th century. If, as they probably were, the greater men were the chief land holders and the county court was for them, then the number of cases above mentioned would be wholly disproportionate to the number of men involved, even though as we are told⁴⁰ fines were imposed for every small infraction of the law in order to enrich the treasury of the king, so that every man expected to be fined for something or other at least once a year. A partial explanation of the situation here discussed is probably this: the hundred courts dealt only with controversies involving men of the same hundred; similarly the manorial courts; the county courts dealt with controversies involving men from different hundreds and different manors, and an unusual number of cases may have accumulated at the particular time involved. Probably freeholders and free tenants were enabled to resort to the county court without resorting to any other local court. Nothing definite, however, seems to be known on that point.

It is agreed by all the authorities that the common law has been influenced by the Roman law, or indirectly through the Canon law. The extent of the influence is disputed. An absolute measure is, of course, impossible. The weight of opinion appears to be that the influence was considerable. Vinodagraff in his *Roman Law in Medieval Europe*, page 104, thinks that in the development of juridical ideas "the initial influence of Roman teaching on English doctrines will be found to be considerable." That opinion also is held by the author

37. 1 P. & M. 549; 60 Selden Society 12.

38. 1 P. & M. 538.

39. 2 Sharon Turner, *supra*, 332.

40. 2 P. & M. 513.

of the introduction to Vol. 60 of the Selden Society. Holdsworth⁴¹ speaking of the indirect influence of the Roman Law on the common law states "Men who knew something of the civil and the common law so transfigured the old English customary law that they made it a system of law fit to govern a modern state." Bracton copied a great deal in his discussion of the general rules of law from Azo, of Bologna, Italy, a man noted for his work on the Roman Law all over Europe. He, Bracton, quotes directly in a number of instances from the digest of Justinian and from the code of Justinian. A much greater number of passages of the Roman Law are incorporated in the text itself without any statement of the source. One gains the impression in considering his citations from the Roman Law that he considered that law as authority in all cases not inconsistent with specific customs and statutes of England; in other words that the Roman Law was a sort of supplementary law from which could be gathered the rules of law not found in the local laws and customs. That was the view taken of the Roman Law both in Lombardy as well as in northern France.⁴² Maine in his *Ancient Law*⁴³ calls Bracton a plagiarist and states, "that an English writer of the time of Henry III should have been able to put off on his countrymen as a compendium of pure English law a treatise of which the entire form and a third of the contents were directly borrowed from *corpus juris*, and that he should have ventured on this experiment in a country where the systematic study of the Roman Law was formerly prescribed, will always be amongst the most hopeless enigmas in the history of jurisprudence." That statement, however, is generally considered to be an exaggeration. Maitland, who on the whole considers Bracton's treatise to be excellent, originally thought that Bracton was well versed in the Roman Law. He changed his mind and came to the conclusion that the author was comparatively ignorant of that law. It is hardly possible to over-estimate Maitland's learning in his own field. His detailed examinations of Bracton's references to the Roman Law⁴⁴ shows clearly that many of his criticisms are justified. Take, for instance, Bracton's reference to the Roman "stipulation". He knew that it might be evidenced in writing yet he treats of the oral stipulation. (Q.) Do you, Frances, promise to pay me \$10.00 in gold in London on January 1, 1948? (A.) I do. This was an oral stipulation and one of the most solemn contracts in early Roman Law. However, it had practically ceased to exist in Justinian's time, a writing taking its place. It never was a contract in vogue in England. It was never in vogue in Italy during Bracton's time, although the Italian commentators discussed it as though it was of practical use. The oral stipulation was not the only Roman Law rule not in practical use in Bracton's

41. *Id.* at 125.

42. Vinodagraff, *supra*, 42, 72; Bracton and Azo, 8 Selden Society Introduction 29.

43. P. 59, ed. 1864.

44. Bracton and Azo, *supra*.

time but treated fully by the learned Italian commentators. It is not surprising, therefore, that Bracton followed in their footsteps for he attempted to write a complete scientific treatise of the law. He must have known that some of the matters which he mentioned had no practical application in his day, but he may have thought that the contrary would be true in a more advanced state of society. In some instances Bracton omitted passages of Azo as inconsistent with English Law, in others he modified passages, in others he illustrated Roman principles by English examples.⁴⁵ This shows that Bracton did not blindly copy from the Roman Law, but he knew in what cases a discrimination should be made. Bracton's latin, in which he wrote his treatise, is generally recognized to be fairly good. He had a note book which he used containing some two thousand decided cases. In his treatise he cites some five hundred decided cases. All this shows that he must have had a good education, and that he gave considerable thought and study to the rules and the principles of law. It may not, therefore, have been his misunderstanding or ignorance of the Roman Law so much that lead him to treat the Roman Law as he did as it was his ambition to make the rules of law as complete as possible, adapting it as nearly as he could to what he conceived should ultimately at least be applicable in his country.

In early law there was no definite demarcation between contract and tort, and there are traces of this confusion many years after the time of Bracton. If for instance a loan to a person was not repaid as it should be, it was considered that the borrower withheld it tortiously.⁴⁶ It is clear, however, that Bracton knew the difference between contract and tort, though he would not have drawn the line of distinction where it was subsequently drawn. The law had not yet been fully developed in that connection. He wrote that obligations arise out of contract, quasi contract, delict and quasi delict.⁴⁷ Contracts might be conditional or unconditional, possible or impossible. In fact the law on contract and the extinction thereof was treated in detail and at considerable length. The pleas of fraud, duress, *res judicata* were available to defeat an action on a contract.⁴⁸ He took the law on the subject from the Roman law—much of it from Azo. He did not, however, succeed in fastening his system upon the common law. Part of it did not fit in at all. Oral stipulations have already been mentioned. The consensual contracts of the Roman law—contracts by mutual promises—did not fit into the common law system of that time. In fact Bracton was somewhat inconsistent; for he stated that a contract formed by simple parol promises was not enforced in the King's courts except at times as a favor,⁴⁹ though it may be that in some cases such

45. 1 L. Q. R. 431-432.

46. 2 Holdsworth 368.

47. Bracton f. 99.

48. See Gueterbock, *supra*, 138-149.

49. Bracton f. 100a.

contracts were enforced in the local courts.⁵⁰ The only actions on contract or quasi contract entertained in the King's courts were covenant, (contract in writing) account, detinue and debt.⁵¹ The action of account was used mainly against the bailiffs of the lords, the action of detinue mainly against bailees. The action of debt usually arose out of sales, barter, loan of money or other property, leases, and upon work and labor performed. Such contracts as well as bailment were what are called real contracts, that is to say contracts where something was done or given on one side in return for something to be given or done on the other side. These contracts were subsequently generalized and gave rise to the well known doctrine of *quid pro quo*.⁵² It may be noted in this connection that the beginning of the law of agency may be seen, for instance, in the representation of bailiffs for the various lords and the representation of attorneys in litigation, for the legal profession had made its appearance during the period in question. Young attorneys were frequently appointed as bailiffs of the lords, and were glad to obtain the position, for it gave them experience in presiding in the lord's court and learning the law by the actual practice thereof.⁵³ In some of the municipalities administering the law merchant it was held, that if a servant was openly trading with the goods of his master, the master was answerable for his acts.⁵⁴ It may be further noted that the germs of the law of trusts, so largely applied to real estate in subsequent years, were present in the action for account, for the person who held the money held it in trust for the man entitled thereto.⁵⁵

Actions in tort in the royal courts were rather limited in Bracton's time. Replevin was originally confined to cases of a wrongful levy upon property.⁵⁶ Negligence, so fruitful a source of modern actions, played little part in the law of Bracton, partly doubtless by reason of absolute liability for one's actions at that time, whether done intentionally, unintentionally or carefully or negligently.⁵⁷ Bracton undertook to modify that rule in the case of bailees, and his theory was confirmed by *Coggs vs. Bernard* 2 Ld. Raym. 909. It may be that negligence was considered in actions in the local courts, however.⁵⁸ An act for defamation was not entertained in the royal courts for many years after Bracton's time, though it was frequently brought in the local courts.⁵⁹ The main action in tort in the royal courts, particularly in the latter half of the thirteenth century, was the action of

50. 2 P. & M. 197.

51. 3 Essays 304.

52. 3 Essays 311-312, 323; 2 Holdsworth 367.

53. 1 P. & M. 592.

54. 21 Selden Society, Introd. 85.

55. See 3 Essays 311.

56. 3 Essays 551.

57. Wigmore; 3 Essays 475.

58. 2 P. & M. 527.

59. 2 P. & M. 536.

trespass, which included a great variety of wrong—assault and battery, wounding, false imprisonment and other outrages committed on a person; forcible taking of any chattel, theft, breaking a ditch, and other injuries to property. The action lay only against the trespasser himself, and was not an action for the recovery of property itself, though stolen, but an action for damages only. It was possible to recover property taken by theft or force, but the subject is somewhat involved and technical, so that it has been deemed best not to attempt to elucidate it in this paper.⁶⁰

In this connection we should consider the rule mentioned and discussed in *Tuttle vs. Short*, 42 Wyo. 1, that a personal action dies with the person. In early law it meant just what it says. Bracton recognized the rule, but limited it to a personal action founded upon tort, holding that such action dies with the death of the tortfeasor, and apparently with the death of the person injured.⁶¹ And that was the rule until modified by statute. Sec. 3-402, Wyo. Comp. St. 1945, modifying the rule, provides that actions for mesne profits, injury to real and personal property, for fraud and deceit shall survive notwithstanding the death of the tortfeasor. Section 3-403 provides for actions for causing death. So personal was the action considered that the right to bring it could not be assigned. And digressing for a moment, that was true also in connection with an ouster from real estate. No assignment or alienation of such right could be made. It was not until 1845 that by statute the interest of a person ousted from real estate became transferable in England.⁶² So, too, our statute section 66-107 states that "no grant or conveyance of lands or interest therein shall be void for the reason that at the time of execution thereof such lands shall be in the actual possession of another claiming adversely." That statute can be understood only in the light of the non-assignability above mentioned. In fact the rule that a right or chose in action was not transferrable was a rule of the widest application.⁶³

The subject of acquisition of ownership was treated by Bracton at great length. Such ownership might be acquired by prescription, that is to say long possession and neglect of the owner to bring an action to recover it.⁶⁴ All actions, says Bracton,⁶⁵ have a limitation of time. Ownership could also be acquired by gift or sale. Alienation of land held by anyone as tenant in chief could not be made without the king's consent. But otherwise the right was favored, as it was by Bracton.⁶⁶ A quite usual method of transfer was by a fictitious suit, the prosecutive purchaser bringing an action to recover the land, the

336; 2 P. & M. 157-168.

61. Bracton f. 101b.

62. 3 Essay 543, 544.

63. 3 Essays 580.

64. 3 Essays 368, Pollock & Maitland call it limitation of actions.

65. f. 52.

66. 1 P. & M. 332, 336.

vendor asking the court to compromise the suit. In the compromise he acknowledged the purchaser to be the owner, and the written compromise was spread upon the records of the court. That was the method of conveyance by a woman, and the judges carefully examined her to determine whether or not she consented freely, a method similar to that adopted in this state, when a conveyance of homestead is made.⁶⁷ Transfer could also be made by deed.⁶⁸ So, too, land could be mortgaged. But in all cases title did not pass unless the property, both real as well as personal, was delivered. That rule was in effect in the time of Glanville.⁶⁹ Since land that was mortgaged was required to be delivered, the theory prevailed until comparatively recent times that the mortgagee had the legal title, or at least acquired it at default, although the mortgagor had the right to redeem before default. Transfers might, and often were made jointly to husband and wife.⁷⁰ Thus arose the estate by the entirety, considered in *Peters vs. Dona*, 49 Wyoming 306, a decision which created much discussion among the legal fraternity of the state, though such estate was already recognized as early as Bracton's time, if not before.

Land might be acquired by descent. If a man had only daughters they inherited equally. If he had sons and daughters, the latter were excluded. And in Bracton's time, the rule of primogeniture was generally, though not entirely, the rule. But the rule of primogeniture could be defeated during this time—though not previously—by an alienation made during the life-time of the owner, without the consent of the heir.⁷¹ The rule of primogeniture did not apply in municipalities.⁷² A man could not will away all of his personal property as he pleased, except when he left no wife or children. If he left a wife but no children, or no wife but a child or children, he could will away one half as he pleased. If he left both wife and child or children, he could will away as he pleased only one third thereof.⁷³ Property might also be acquired by a widow under the law relating to dower, but that was not yet definitely fixed during Bracton's time. So, too, the estate of curtesy of a surviving husband was recognized.

It may be worth while to mention in this connection that for many years death by intestacy was regarded with horror. That indicated that a man had not made a last confession, for if he had, the ecclesiastic would have induced him to leave at least part of his worldly goods to the church to administered for the good of his soul. As a result, the king or the lords asserted the right to confiscate the goods of the intestate. Generally speaking, the right was denied in Bracton's

67. 3 Holdsworth 245.

68. See Radin, *supra*, 399-401.

69. Glanville book 10 c. 14, 7 c. 1; 3 Holdsworth 354.

70. 2 P. & M. 434.

71. 2 P. & M. 260-313, 328, 329.

72. 2 P. & M. 330.

73. *Id.* at 348-350.

time. The distribution of the goods among the heirs was recognized in Magna Charta. Bracton himself stated that "If a free man dies intestate and suddenly, his lord should in no wise intermeddle with his goods, save in so far as is necessary in order that he may get what is his, but the administration of the dead man's goods belong to the church and his friends, for a man does not deserve punishment although he died intestate."⁷⁴

Bracton did not deal with the court of equity, for the reason that it was many years before that court, the chancellor's court, became a separate court, and the development of that court deserves a separate paper. The author dealt at length, however, with actions relating to the possession and ownership of real property, the most important civil actions in those days, and the proceedings relating thereto. But the particular actions mentioned by him in that connection have long passed out of use. There was, for instance, an action called novel disseisin, that is to say an action against one who had recently dispossessed the plaintiff, an action very much like one in the Roman law. The action of ejectment subsequently took its place. The author also treated at length of the various tenures of land and feudal rights connected therewith, such as homage, wardship and escheats of lands to the lords. But we shall not enter into these subjects here. The law of servitude was mentioned. Writs of habeas corpus, quo warranto and prohibition were known. The rule of today that the king cannot be sued was fully established in Bracton's time,⁷⁵ and the author recognized that the law is and should be developed by going from precedent to precedent—in other words by analogy.⁷⁶ And in view of his citation of many previously decided cases, Bracton may well be considered the author of the doctrine of stare decisis. Little need be said in this paper of the criminal law of Bracton's time. It was cruel. A conviction of a felony generally meant death and the confiscation of the felon's property. It was a great producer of revenue for the king and the lords. Aubrey⁷⁷ speaking of the criminal law of the thirteenth century states: "The ghastly recurrence of capital punishment tended to make people callous. Hanging went on at a pace and to an extent that are now inconceivable. The criminal law was an awful and tremendous piece of mechanism for the condemnation and execution of all who were held dangerous to persons, and, still more, to property. Thieving was deemed worse than a bodily assault; as is yet the case. Such treatment led to human life being held in low estimation. This lasted down to recent times, for there were incessant additions to the Statutes by which numerous petty crimes were made felonies, until, at length, more than two hundred offences were pun-

74. See Gross, *Medieval Intestacy*; 3 Essays 728.

75. Bracton f. 382b; 1 P. & M. 516.

76. Bracton f. 1b.

77. 1 Aubrey, *supra* at 333.

ishable with death. The pillory was the punishment for fraud, false measures, adulteration, cheating, slander, scolding, selling putrid fish, and numerous other offences; the rough pelting by the mob often proving fatal."

Actions in the royal courts in civil cases were ordinarily commenced by what is called a writ, issued out of the office of the chancellor, each writ adapted to the particular cause of action which the plaintiff might have. These writs were comparatively simple. A writ in a case of debt, for instance, was as follows: "The king to the sheriff, Health. Command N. that justly and without delay, he render to R. one hundred marks which he owes him, as he says, and of which he complains that he has unjustly deforced him. And unless he does so, summon him, by good summons, that he be before me or my justices at Westminster in fifteen days from the Pentecost, to show wherefor he he has not done it. And have there, summons and this writ, Witness etc."⁷⁸ The writ accordingly sounds somewhat like the common alternative writ of mandamus. Nothing like it was known in the Roman law. It was similar to other orders sent out by the king's office and was designed to force parties to come to the royal courts for the purpose of having the rights of a plaintiff determined therein. Some of the writs, in the beginning, were expensive, others came to be issued as of course. Bracton states that no one can litigate without a writ.⁷⁹ That was not entirely true in the thirteenth century. We have learned quite a little about the commencement of actions in the royal courts in that century since volume 60 of the Selden Society was issued in 1941, from which it appears that a great many cases were then commenced by complaint, frequently written, without a writ, generally in cases in which a writ fitting the particular facts had not yet been devised. In other words, it may well be said that actions by complaint, without a writ, were in the nature of actions in equity, and if such actions had continuously been permitted, there would have been no necessity for the development of a separate court of equity. But there were signs in the reign of Henry III that such actions became more and more restricted.⁸⁰ Summons followed the issuance of the writ or the filing of the complaint. In some civil cases the defendant could be arrested. The subsequent pleadings of the parties, when they appeared in court, were required to follow closely the statement of the cause of action in the writ. It might, in some cases, however, take considerable time before the defendant appeared in court. The mode of travel, and the distance from the court necessitated many delays, and the law of the time deals at length with excuses (essoins) which the defendant could make before he actually appeared.

Bracton's time saw the jury system, previously used to some

78. Glanville book 10 c. 1.

79. Bracton f. 413 b.

80. 60 Selden Society.

extent, further developed. The ecclesiastical (Lateran) council assembled at Rome in 1216 forbade ecclesiastics to take part in the ordeals by fire and water, and the use thereof was forbidden in England in 1219.⁸¹ Trial by battle became practically obsolete in the royal courts by the end of the thirteenth century.⁸² Compurgation, that is to say a defense by the oath of the defendant, assisted by a certain number of oath-helpers, was still permissible in some cases, particularly in the local courts. It was no longer permissible in criminal proceedings in the royal courts, and became limited in actions of trespass, deceit and forcible injury.⁸³ The jury system was compulsory in possessory actions in these courts, and the use thereof was permitted to the defendant in cases involving ownership of real property.⁸⁴ The jury, however, in those days was not like the jury of today. It was composed of men of the neighborhood, who supposedly had knowledge of the facts involved in the cases, and it was not until the sixteenth century that the separation of jury and witnesses became general.⁸⁵

In closing this paper, it may not be without interest to mention the advice, half humorous, half serious, given to lawyers in a treatise by one Durand, mentioned by Aubrey⁸⁶ in speaking of the thirteenth century, as follow: "When before the judge, you are to take off your cap and make an obeisance, graduated according to his rank. Do not be loquacious. Address him in a manner that may be pleasing to him. If he be angry do not rejoin. Do not laugh causelessly before the judge. When he speaks, listen respectfully, and then laud his wisdom and eloquence; * * * Some counsel rise with arrogance, rub the face, push the hair behind the ears, blow the nose loudly, clear the throat, or examine their hands and their dress. Some alternately lift their eyes to heaven and bow their head, or they wrinkle the forehead, compress the lips, frown, and fix their hands on their hips. Some begin eloquently and end badly. Some think that plenty of words atone for want of sense and give a good return for the fee. You should be concise; pretend to be simple; abound in generalities; using ambiguous and equivocal words. Obtain as many delays as possible, but cautiously, lest the Judge presume against you. You should not habitually take a low fee for pleading, lest you lose your reputation. Undertake those causes only which you can conscientiously advocate. If a cause be desperate, give it up."

81. 1 Holdsworth 311.

82. Id. at 310.

83. Id. at 307; See 60 Selden Society, Introduction 134.

84. 1 Holdsworth 328-329.

85. Id. at 334.

86. 1 Aubrey, *supra* at 273.