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BRITTON

AN ENGLISH TRANSLATION
AND NOTES

BY

FRANCIS MORGAN NICHOLS, M.A.

OF LINCOLN'S INN, BARRISTER AT LAW

FORMERLY FELLOW OF WADHAM COLLEGE

WITH AN INTRODUCTION

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INTRODUCTION.

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YALE UNIVERSITY.

THE founders of nations or of national institutions have a place by themselves. They are judged, not like other men, by their own talents or character, or immediate achievements, but rather by the ultimate consequences of the movements in which they shared.

Edward I is one of the few English sovereigns who has played a founder's part. Parliamentary history really dates from his convocation of the assemblage of the different estates of the realm at Westminster in 1275. The courts of England also, if we are to measure them by their relation, on the one hand, to the people, and, on the other, to the law, had first come into existence under the legislation of his reign, beginning, at its outset, with the Statute of Westminster, the First.

A few years before his accession English law had been put in form by Bracton. That great work, however, was written in Latin, and addressed to the scholar. It was too long to be a ready source of information to anybody. Bulk and want of indexes made such treat-

tises, before the invention of the art of printing, of little use in the practical administration of judicial business. An abridgment of Bracton, also in Latin, was prepared by the Chief Justice of the King's Bench, under Edward I, Gilbert de Thornton; but, like most abridgments, it was read by few. The treatise styled "Fleta" was published at about the same time; but this, again, was in Latin, and, so far as it has any pretensions to originality, contains little of value except its account of the constitution of the royal household.

Edward I had brought his courts, and wished to bring his law, into close touch with the English people. This could only be done by making the way in which it affected them known in a language commonly understood by those who were the natural leaders in the community. Such was then the form of French used in court circles. It is more intelligible to a Frenchman of our day than the English of the time of Edward I is to the Englishman of the time of Edward VII.

The treatise, of which a translation is given in this volume, was written in this "Law French," as it is often called, but what may be better styled the French of the thirteenth century. Law books have preserved it for us, but they took it from the common speech of the date. No English king wrote in English before Henry V. If the contents of a Latin document were to be communicated to the courtiers at the royal palace, in the time of Edward I, it was done in French.*

Who "Britton" was is uncertain. The authorship

* Nichols Ed. of Britton, I, xlvi, note.

of the book was attributed by Sir Edward Coke to John Britton (or de Breton), bishop of Hereford. The bishop, however, died in 1275, and if he wrote it, great additions must have been made by a later hand, for statutes are mentioned which were enacted long after that date. It is more probable that the author was one of the justices of the inquisitorial tribunal instituted by Edward I, towards the close of his reign, and popularly called "Trailbaston." In a commission issued in 1300 to those who were to hold it in the counties of Norfolk and Suffolk we find the name of John le Breton,* and that of 1304, for the county of York, includes "Johannes de Barton de Riton." † It is suggested by Nichols, in his edition of Britton, that this John le Breton was the same person who is variously described in other annals of this reign as "Sir John le Breton," "Sir John de Breton," and "Johannes le Breton, dominus de Sporle." ‡ We find also that in 1305 "Sir John de Bretaign" is assigned by the king to serve on a parliamentary commission to receive and answer petitions that concerned the people of Gascony.§ The title of Edward I was "King of England, Lord of Ireland, and Duke of Aquitaine." Aqu-

* *Ibid.*, xxi.

† Spellman's Glossary, *Trailbaston*. Dict. of Nat. Biography, *Barton, John de*. Possibly B. RITON may be the fanciful name assumed by the unknown author.

‡ Nichols' Britton, I, xxi.

§ Parliamentary History of England, I, * 127.

taine was the Roman name for Gascony and, two years before, the English had regained possession of it by a treaty with France. In selecting the members of such a commission regard would naturally be paid to their familiarity with the French language as it was written, and Sir John de Bretaign was therefore presumably well acquainted with it, and so qualified, as far as scholarship was concerned, to compose such a treatise as Britton. Spelling in those days, when men knew their mother tongue mainly from oral conversation, often varied, and "Bretaign," which was certainly the same name as "Bretaigne" or "Britain,"* may not improbably have been identical with "Briton," "Britton," "Breton," "Bretoun" or "Barton." The *Britanni* of the Romans passed both into *Britones* in monkish Latin and *Bretons* in French.

The Baron of Sporle † can hardly have been the author of Britton, for he inherited his lands and title in the reign of Henry III, and the book, if his, would

* Two years later (1307) we find "John de Britain, Earl of Richmond," as one of those summoned to the Parliament of Carlisle. *Parl. Hist. of Engl.*, I, *133. The first Earl, Alain Le Roux, came with William the Conqueror, and being from Brittany, was known as Count Alain the Red, of Brittany. His descendants made "de Bretagne," and later "de Britain," a part of their names.—Plauché, *The Conqueror and his Companions*, I, 8265.

† He is one of the barons who signed the famous protest to the Pope in 1301, and died a few months before Edward I, his name not occurring in the writ summoning the last parliament of that reign.—1 *Parl. Hist.*, *123, *133.

have been likely to go by the name of his barony rather than by that of his family. Probably it was the work of his son, Sir John le Breton, of Blatherwyk, in Northamptonshire, who died at a mature age in 1306 or 1307 (34, Edward I),* and who may also have been known as "Sir John de Bretaign."

But from whatever pen Britton may have come, its main authority is due to the stamp which it bears of royal approval. Like the Institutes of Justinian and many of the later barbarian codes, it speaks in the name of the sovereign. The Roman Emperor gives the names of those to whom he entrusted the work of revising his laws. The barbarian codes often refer in general terms to the aid given by the bishops and judges.† Edward I, in his prologue to Britton, simply speaks of it as a compilation of the existing laws which he has had put in writing for the information of his subjects, and which he reserves the right to repeal or alter by the assent of his council.

Britton was, no doubt, prepared with the special view of familiarizing the people with the idea that the administration of justice belonged only to the crown and to those to whom the crown had committed it. It was the policy of Edward I to curtail or sweep away, so far as possible, the jurisdiction of the local

* Burke's *Commoners*, IV, 230; Nichols' *Britton*, I, xxii.

† See, for instance, the captions to the *Laws of Liutfrand*, King of the Lombards, and to those of Peppinus, King of Italy, in the *Corpus Juris Germanici*, 1027, 1282.

courts of a manorial or feudal character.* He had been at pains first to reform his own. Shortly before the publication of Britton, of the sixteen judges of England, fourteen had been convicted of extortion and corruption in office.† The bench was then reconstituted, and a favorable opportunity thus given to make the king's courts more acceptable to the community at large. The two judges who were allowed to remain seem to have fully reflected his views as to the royal prerogative. One of them, John de Metingham, when in 1296 Edward undertook to frighten the clergy into submission by a decree of general confiscation, we find announcing from his seat in the King's Bench that "for the future no manner of justice shall be done them in any of the King's courts on any cause whatsoever, but justice shall be had against them to every one that will complain and request it of us." ‡

The statutes of Gloucester and Westminster the Second, which were the expression of Edward's policy of concentrating all judicial business of importance in the hands of his own judges, had been passed early in his reign, but the corruption of those to whom the people had then been invited to entrust their concerns must have militated strongly in favor of the old order of things. The new judges, armed with Britton as a

* See *Select Pleas in Manorial and other Seignorial Courts*, Vol. I, in *Selden Soc. Publ.* in the introduction to which this subject is well and extensively discussed.

† In 1290. *Parl. Hist.*, I, * 89; *Spellman, Glossary, Justitiarius*.

‡ *Parl. Hist.*, I, * 104.

guide of procedure, entered upon their field of service under the most favorable circumstances. Most of Edward's legal reforms, so far as Acts of Parliament could go, had been accomplished. "The laws," says Sir Matthew Hale, "did never in any one Age receive so great and sudden an Advancement, nay, I think I may safely say, all the Ages since his Time have not done so much in Reference to the orderly settling and establishing of the distributive Justice of this Kingdom as he did within a short Compass of the thirty-five Years of his Reign, especially about the first thirteen Years thereof."* But Acts of Parliament could not execute themselves. It was through his new-made bench that Edward expected to incorporate them into the life of the people. It was by their aid also that he proposed to re-shape the common law in the interest of a strong and centralized government. So it was that, to quote again from Hale, "gradually the Common Justice of the Kingdom came to be administered by Men knowing in the Laws, and conversant in the great courts of B.R. and C.B. and before Justices Itinerant;" and "partly by the Learning and Experience of his Judges, and partly by his own wise Interposition, he silently and without Noise abrogated many ill and inconvenient Usages, both in his Courts of Justice and in the Country." †

Britton, like Glanville, is primarily a book for

* History of the Common Law, * 158.

† *Ibid.*, 160, 162.

judges and lawyers. It looks at rights through remedies.

First (Book I, Chapters 1 to 4) comes a description of the various officers of justice and the general method of holding and conducting the King's courts. Then public rights and wrongs are discussed (Chapters 5 to 26). Next follows a statement of the remedies for certain private wrongs (Chapters 27 to 29). One chapter (30) is given to a description of the Sheriff's courts or "Tourns," a matter passed over by Bracton. The next provides for the universal use of standard weights and measures, and for the regulation of prices of bread and beer. Villenage is the subject with which the first book closes.

Book II is devoted to remedies for wrongs affecting the possession of real estate, and mainly to disseisin.

Book III treats of inheritances and actions by heirs and coparceners.

Book IV takes up actions concerning the Church establishment and matters of religion, including ad-
rowsons and false oaths.

Book V first sets forth the procedure to obtain dower, and then (Chapters 14 to 16) explains pleas or writs of entry.

Thus far possessory rights to property have been expounded. The last Book (VI) begins by taking up property actions, and (Chapters 1 to 3) the rules of intestate succession. Then comes an explanation of "Essoins" or excuses for non-attendance at court (Chapters 5 to 9), and the work closes abruptly with a

statement (Chapter 10) of the nature and office of attorneys.

Throughout the whole of the treatise there is a steady endeavor to guard and magnify the royal prerogatives. The laws as they are set forth are to be obeyed because the king wills and commands it (Prologue I, 1). He may take jurisdiction over all manner of actions (I, 2). Holy Church shall "retain her liberties unimpaired" because the king so wills (I, 12). If a royal charter is set up, whether it be allowable or false or doubtful can be judged by none but the king. "*car a celi est respoudre et de juger qi en fu autour*" (I, 99). If a law is to be abrogated or altered, the power to do this is saved to the king by the assent of his earls and barons and others of his "conseyl," who these others might be being left to the royal pleasure from time to time.

"Council" was of course the name for what we now call Parliament, and the Judges were often invited to it, and took an active part in drafting the statutes which they were afterwards to enforce.*

Trial by jury, in the time of Britton, was in a state of transition.

The jurors were tellers of the facts in issue rather than judges of these facts. They were to decide on what they knew before they entered the court room, more than on what they learned at the trial. If at its

* See Pollock & Maitland, *History of English Law*, 2d Ed., I, 198, 200.

conclusion they reported a disagreement, and declared upon their oaths that they knew nothing about the fact in dispute (I, 126), a new jury was to be impanelled.

The system also lacked one of what we have come to consider its essential features, the requirement of unanimity.

In trials for felony, if the jury failed to agree, the Judge could examine them one by one, and if he found that the majority knew the truth (I, 12b), judgment was to be rendered according to their opinion. A failure to agree, however, was only to be reported as a last resort. If they (that is, apparently, if a majority) were not certain where the truth lay, the defendant was to be discharged (I, 13).

In civil cases, after a disagreement had been reported, and the Judge, on examination of each, had found how the majority stood, the parties were asked if they would consent to adding enough more to the majority to make twelve. If both consented, a verdict could thus be obtained. If either refused his assent, judgment went against him (I, 136).

Felons, as now, were not to be brought to the bar in irons, nor in any manner of bonds (I, 14), but apparently this provision was not always observed, for in a MSS. copy of Britton in the library of Cambridge University, made early in the fourteenth century, there is substituted for it the words "*hors de trop gros fers et hors de trop gros liens*.*

* Nichols' Ed. of Britton, I, 35, note, lix. Occasionally felons

A humane saving in favor of burglars is worth notice. Infants under age, and poor persons who from famine made an entry for any victuals of less value than twelve pence, could not be convicted of this crime (I, 17). As three half-pence a day was then considered sufficient to support a man (I, 12), this exception in favor of the poor meant a good deal.

Britton is not without value to the modern lawyer for his definitions.

An obligation, for instance, it is said is a bond of law through which any one is bound to give or do any thing, and so is a mother of a plea, and takes its birth from some preceding trespass or contract (I, 61). Here is clearly brought out the notion which was the subject of discussion in *Ogden v. Saunders*, 12 Wheaton, 213, that a contractual obligation is the consequence of a contract, and not a part of it.

An oath is "an affirmation or denial of anything whereby a man is charged on peril of his soul to say the truth" (II, 237).

The foundation of the still surviving doctrine as to the peculiar force which a seal gives to a written document is nowhere more plainly traceable than in the pages of Britton.

If suit is brought on a writing, and the defendant denies its execution, he cannot enter the plea of *non*

were arraigned in fetters as late as the time of Chief Justice Holt. —Campbell, *Lives of the Chief Justices of England*, III, 24.

est factum if it bears his seal (I, 64b).^{*} That makes it his deed; but he may plead in avoidance that it was made after he had lost his seal and had had the loss cried and published by the churches and by the markets. A plea that the plaintiff was once his seneschal or chamberlain or in other service with him, and that, for the great confidence he had in him, he gave him his seal to keep, and while he so had it in his keeping he made the writing without his knowledge, was bad; for he should have provided himself with a more trusty keeper. In such case his remedy was by an action of treason against the plaintiff by appeal of felony, or, if he preferred, by a civil action in trespass.

Attorneys-at-law Britton styles "general attorneys." They were to be admitted by royal letters patent, which could be issued by the Chancellor (II, 286). The Justices on the circuit could only admit attorneys for a particular cause, upon the appointment of the parties to it (II, 285b). All general attorneys could levy fines and make the record of them (*cirographe*), the fee for this record being limited to four shillings (I, 37b). The class of sergeants-at-law was already recognized (I, 37b), and if any appeal of felony were abated by reason of the mispleading or other default of a sergeant, since he ought to know the way to plead, he was to be fined a hundred shillings (I, 40b), and if the error were malicious, punished criminally and deprived of his office.

^{*} Cf. Fleta, 132, *et seq.*

As we compare Britton with his predecessors in English law, we find no such prominence given to mere form as marks the pages of Glanville; nor is there much of the scientific arrangement and civil law learning of Bracton. When put by the side of Fleta, Britton appears to write with a freer pen and to cover a wider field. He has also a better understanding of the sources of English law.* Torts receive more attention, for they are now more fully remediable in the king's courts (I, 23, 141, 157).

The main causes, however, why Britton supplanted the earlier treatises, so far as real use was concerned, were, first, that he wrote in a language commonly understood by those taking part in court proceedings, and, second, that he spoke in the king's name.

His general view of the royal prerogative was less favorable to the liberties of the people than that taken by Bracton. The latter, in speaking of the laws and customs of England, says that "*Quae quidem cum fuerint approbatae consensu utentium et sacramento regum confirmatae, mutari non poterunt nec destrui sine communi consensu et consilio eorum omnium quorum consilio et consensu fuerunt promulgatae.*" †

This has a more manly ring than the opening words of Britton's first book, in which the law of the realm is spoken of as "here ordained" (*ceo qe cy est ordeyné*)

Britton was widely read while it lay in manuscript.

* See Holmes, *Hist. of the Common Law*, 266.

† I, 1, 7.

and more than twenty-five copies made in the fourteenth century are still preserved in English libraries. The translation which follows was made from one of these (collated, however, with others), which was found at Lambeth palace. It may be one of the original publications furnished by the Crown for the use of the Church, and so date back to the last decade of the thirteenth century. This is the more probable because it bears no name or title.

Britton was first printed about the year 1530, but that edition is an imperfect one.

Mr. Nichols was obliged to choose between different manuscripts in respect to the apportionment of some of the chapters between the different books. Villenage, for instance, he assigns to the first, when others place it in the second book.

The plan of throwing the work into sections separately numbered is his, and was not adopted in any previous publication.

This translation was published by Mr. Nichols in connection with the original in the French text, to which the upper half of each page was devoted. His book was issued from the Clarendon Press at Oxford in 1865, with a scholarly introduction, and the valuable notes to the translation which are reproduced in this volume. It was in two volumes, each paged separately, but a marginal paging was also given which follows the paging of the earliest printed edition, above described.

In the present volume, the paging used is that which

Mr. Nichols placed upon the margin of his volumes ; but in order to facilitate the use of his very excellent index, his paging is reproduced on the margin. Thus, page 30 corresponds to page 75 of his first volume (I, 75). The references in this introduction are to the pages as numbered in the Oxford edition.

SIMEON E. BALDWIN.

YALE UNIVERSITY,
April, 1901.

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