

## THE KING'S PARTNERS IN BRACTON \*

Some years ago it was noted that Bractonian studies might remind readers of the fifteenth century complaint that scholars were glossing at third hand<sup>1</sup>. However, a trail of glosses can lead to the discovery of what otherwise might remain hidden. Nor should the need to apply such a methodology to Bracton's *De legibus et consuetudinibus Angliae* come as a surprise. Quite some time ago Schultz suggested this approach. He believed that a re-reading of the legal literature of the fourteenth and fifteenth centuries might reveal references which would help contemporary scholars discover Bracton's intent<sup>2</sup>. In addition, until recently, many important passages of the manuscript have been thought to be later additions or glosses incorporated into the text. Though this position is now largely untenable, the original text, which was begun perhaps as early as the 1220s, invited continuing explanation, clarification and adaptation. In fact, the evolution of the text which we possess today as well as its authorship, even though Bracton is spoken of as its author and will be here, has only recently been established by Samuel Thorne. Indeed, he has shown that many passages which were once thought to have been later textual additions or glosses were actually part of the original

\* I should like to express my thanks to Stephan Kuttner of the Institute of Medieval Canon Law at the University of California, Berkeley, and to Peter Pazzaglioni of the Graduate Theological Union, Berkeley, for their assistance in facilitating this study and for their helpful suggestions, and to the Hill Monastic Manuscript Library at St. John's University in Minnesota.

<sup>1</sup> B. TIERNEY, *Bracton on Government*, in « Speculum », XXXVIII (1963), p. 295.

<sup>2</sup> F. SCHULTZ, *Bracton on Kingship*, in « English Historical Review » (EHR), LX (1945), p. 176. All references to *De legibus et consuetudinibus Angliae* are to the edition of S.E. THORNE, *Bracton on the Laws and Customs of England*, vols. I-IV, Cambridge 1968-1977.

manuscript, which had been abridged by the editor of our archetype but restored by later copyists into their text<sup>3</sup>.

One of the most famous parts of *De legibus*, previously considered a later addition or gloss, is the subject of this study. This *addicio*, referred to as the *addicio de cartis*, appearing in a passage concerning the king's charters, is among the texts most commented on in *De legibus*. From the nineteenth century on, scholars have disagreed as to whether this *addicio* was Bracton's and whether it is consistent with what the author wrote elsewhere in *De legibus*. Thorne has definitively answered the former question about the authenticity of the *addicio de cartis*<sup>4</sup>. It is a part of the original manuscript. However, what the *addicio* means and what Bracton intended by it are still considered by scholars to be very uncertain, as a review of the literature will shortly suggest. This study hopes to suggest a possible interpretation of the *addicio*, particularly its most enigmatic phrase: « Qui socium habet, habet magistrum ». The discovery of a commentary by Albericus de Rosate on the maxim « qui socium habet, habet dominum » is the basis for this new interpretation. Before proceeding to it, a review of earlier interpretations of the *addicio* will be useful. The full text of the *addicio* to which all the literature refers is presented here for convenient reference:

No one may pass upon the king's act or his charter so as to nullify it, but one may say that the king has committed an *iniuria*, and thus charge him with amending it, lest he and the justices fall

<sup>3</sup> For Thorne's discussion of the authorship of *De legibus*, see III, xiii-xliii. He calls Raleigh, who became bishop of Winchester in 1239, « the prime mover behind *De legibus* » (p. xxxvi), and identifies at least tentatively Henry de Bratton, clerk, as the person who was supplementing and revising *De legibus* at least by the 1240s (p. xxxf). See also P. Hyams' review of Thorne's vols. III and IV in EHR, XCIII (1978), pp. 864-66 for a summary of Thorne's position on the authorship of *De legibus*, where Hyams concludes that « no careful reader can doubt the essential correctness of his picture » (p. 866).

<sup>4</sup> Thorne's position on the authenticity of the *addicio* can be found in I, xiv-xv, and III, xlvi, n. 9, where he states that « this *addicio* is as Bractonian as any other and was certainly in his manuscript. It was in the margin, a gloss on the statement made a bit earlier, that no one may judge the charter or act of the king ».

into the judgment of the living God because of it. The king has a superior, namely, God. Also the law by which he is made king. Also his *curia*, namely the earls and barons, because if he is without bridle, that is without law, they ought to put the bridle on him. That is why the earls are called the partners, so to speak, of the king; he who has a partner has a master. When even they like the king, are without bridle, then will the subjects cry out and say 'Lord Jesus, bind fast their jaws in rein and bridle'. To whom the Lord will answer, 'I shall call down upon them a fierce nation and unknown, strangers from afar, whose tongue they shall not understand, who shall destroy them and pluck out their roots from the earth'. By such they shall be judged because they will not judge their subjects justly, and in the end, bound hand and foot, He shall send them into the fiery furnace and into outer darkness, where there will be wailing and gnashing of teeth<sup>5</sup>.

Although this text has been scrutinized for almost a century, what the *addicio* intended when it stated that the « earls are called the partners, so to speak, of the king » and « he who has a partner has a master » is still judged to be at best obscure. The trail of glosses that will be followed here suggest an interpretation of this *addicio* that is consistent with what is said elsewhere in *De legibus*. In short, the *addicio* does not propound a revolutionary doctrine or one that would in some way hold the king's authority was lesser than his barons'.

<sup>5</sup> THORNE, II, p. 110. « Item factum regis nec cartam potest quis iudicare, ita quod factum regis irritetur. Sed dicere poterit quis quod rex iustitiam fecerit, et bene, et si hoc eadem ratione quod male, et ita imponere ei quod iniuriam emendet, ne incidat rex et iustitiam in iudicium viventis dei propter iniuriam. Rex habet superiorem, deum scilicet. Item legem per quam factus est rex. Item curiam suam, videlicet comites et barones, quia comites dicuntur quasi socii regis, et qui socium habet, habet magistrum. Et ideo si rex fuerit sine fraeno, id est sine lege, debent ei fraenum apponere nisi ipsimet fuerint cum rege sine fraeno. Et tunc clamabunt subditi et dicent, 'Domine Ihesus in chamo et fraeno maxillas eorum constringe'. Ad quos dominus, 'Vocabo super eos gentem rubustam et longinquam et ignotam, cuius linguam ignorabunt, quae destruet eos et evellet radices eorum de terra, et a talibus iudicabuntur, quia subditos noluerunt iuste iudicare'. Et in fine ligatis pedibus eorum et manibus, mittet eos in caminum ignis et tenebras exteriores, ubi erit fletus et stridor dentium ».

A brief review of the literature, however, suggests the temerity of this thesis. Maitland spoke of this *addicio* as « perhaps the most remarkable passage in the whole book » and noted that « seldom have more momentous words been written in a lawyer's text » — or, he added, been so often quoted in seventeenth-century political trials and repeated by others as Bracton's opinion. In discussing this passage, Maitland presented it as an obvious intrusion, being « flatly contrary to several other passages ». His conclusions were that the passage was an addition and that it was unlikely that Bracton had himself later added this gloss. It is to be noted that Maitland challenged the authenticity of the *addicio* primarily because he thought this gloss expressed a doctrinaire position contrary to what Bracton wrote elsewhere<sup>6</sup>. Indeed the problem with which this gloss confronts us appears obvious. Its assertion that the king has a superior in his *curia*, « rex habet superiorem... curiam suam, videlicet comites et barones, quia comites dicuntur quasi socii regis, et qui socium habet habet magistrum... » appears to be quite opposite to what is written elsewhere in *De legibus*<sup>7</sup>.

Maitland's puzzlement has been shared by most who have commented on this *addicio* after him. Its assertion that the king is under his *curia*, according to Schultz, comes as a surprise and the reason which the gloss gives for this position he considered to be unintelligible<sup>8</sup>. Lapsley described the argument of the *addicio* as « trying to square a

<sup>6</sup> F.W. MAITLAND, *Bracton's Note Book. A Collection of Cases*, I, London 1887, pp. 29-33. Güterbock had referred to the *addicio* as a « striking passage » in which Bracton had modified what he had written at fo. 171b (III, 43), in *Bracton and His Relation to Roman Law*, trans. by B. Coxe, Philadelphia 1866, p. 29. Maitland later wrote: « The contradiction is flagrant, and if the same man wrote both passages he must have modified the first principles of his political theory ». See his *Select Passages from the Works of Bracton and Azo*, London 1895 (Selden Society, VIII), p. 65. Woodbine, on the basis of his understanding of the manuscript history of the *addicio*, concluded that « the authority on which it rests is far too insufficient to allow us to regard Bracton as the author of it ». See THORNE, I, p. 333.

<sup>7</sup> THORNE, II, p. 110. Maitland quotes five statements from *De legibus* in contradiction to what the *addicio* alleges, *Note Book*, I, pp. 31-2.

<sup>8</sup> *Bracton on Kingship*, p. 174. He suggests that the reason which the *addicio* gives, « qui socium habet, habet magistrum », was possibly a medieval proverb which he, however, had not been able to find.

circle » and « inherently frivolous »<sup>9</sup>. Tierney, arguing against Lapsley's position, asserted that there was a reasonable explanation for « the most puzzling words in the *addicio*, « qui socium habet, habet magistrum! »<sup>10</sup>. According to Tierney the gloss's meaning is consistent with Bracton's view of kingship expressed elsewhere if the *addicio* is interpreted in light of a relevant canonical parallel. Just as the bishop or pope with his *curia* formed a tribunal which was superior to the bishop or pope acting alone, so the king acting in his *curia* was superior to the king acting without it<sup>11</sup>. An interpretation of the *addicio* similar to Tierney's was offered shortly afterwards by Richardson. He claimed that two cases in *Bracton's Note Book* concerning the outlawry of Hubert de Burgh clearly illustrated the doctrine of the *addicio* that « though the king has no human superior, he yet has a superior in the law or that his court wherein his earls and barons sit is also at least in a sense his superior »<sup>12</sup>.

The consensus of scholarly opinion still holds with Maitland, however, that the doctrine of the *addicio* contradicts what Bracton wrote elsewhere. Thorne, representing that consensus, gently disagrees with Tierney's effort to harmonize the *addicio* with other passages in *De legibus* but nevertheless firmly supports the authenticity of the *addicio*<sup>13</sup>. Even H. Kantorowicz, who had stood by the

<sup>9</sup> G. LAPSLEY, *Bracton and the Authorship of the 'addicio de cartis'*, in EHR, LXII (1947), pp. 15, 17.

<sup>10</sup> TIERNEY, *Bracton on Government*, p. 311. His criticism of Lapsley is witty and effective.

<sup>11</sup> *Ibid.*, pp. 314-16.

<sup>12</sup> H.G. RICHARDSON, *Bracton: The Problem of his Text*, London 1965 (Selden Society, Supplementary Series, II), p. 33. His reference is to *Note Book*, II, pp. 664-67, no. 857; III, pp. 126-28, no. 1108. Richardson had apparently not seen Tierney's article when his book went to press as there appears to be no reference to it.

<sup>13</sup> THORNE, III, xlvi, n. 9: « [Bracton] frequently begins his supplementary remarks by repeating the passage he is commenting upon... [;] if it is put in quotation marks Tierney's difficulty... disappears ». Tierney's « difficulty », however, is really one of his arguments for an interpretation of the *addicio* which would see less than radical or revolutionary doctrines in it. Tierney had written: « There is one point that seems to me of decisive importance. The first words of the *addicio* itself are, 'No one can judge the charter or act of the king so as to invalidate the king's act'. The radical

authenticity of the *addicio*, did not allege its argument to be consistent with what Bracton had written elsewhere. He saw it as a « revolutionary » gloss, apparently an inevitable change of opinion on a matter more political than legal in the ever shifting circumstances of Henry III's « anarchic 'rule' »<sup>14</sup>. He saw this change of positions and the intent of the *addicio* as praiseworthy and prophetic « which if rightly read and understood, contain the clue to centuries of English constitutional life, legal, moral and political »<sup>15</sup>.

H. Kantorowicz's remark points out another problem in seeking to interpret the gloss. Although setting a text into context and elucidating the body of thought to which they belong are both necessary, the results of the attempts will hardly gain general support when the meaning of the crucial phrases of the text continues to elude readers. Unfortunately while its meaning was still obscure the *addicio* became a part of a much larger web of argumentation: to support or not support armed rebellion; to place the king 'above' or 'below' the law<sup>16</sup>.

Over ten years ago an effort was made to unravel the meaning of the maxim. Radding proposed that the *socius* of whom the maxim speaks is to be understood literally as a partner<sup>17</sup>. He discovered that the maxim, *qui socium habet habet magistrum* (hereafter referred to as q.s.h.), is similar to an Italian proverb, *chi ha compagno, ha padrone*, which

interpretations not only make the *addicio* disagree with Bracton, they make it disagree with itself ». *Bracton on Government*, p. 316.

<sup>14</sup> H. KANTOROWICZ, *Bractonian Problems*, Glasgow 1941, p. 50.

<sup>15</sup> *Ibid.*, p. 52.

<sup>16</sup> For an annotated bibliography of earlier works, see C.H. McILWAIN, *The Present Status of the Problem of the Bracton Text*, in « *Harvard Law Review* », LVII (1943), pp. 237-40. For more recent studies, see SCHULTZ, *Bracton on Kingship*, p. 136; TIERNEY, *Bracton on Government*, p. 295, n. 1; E. LEWIS, *King above Law? 'Quod Principi Placuit' in Bracton*, in « *Speculum* », XXXIX (1964), pp. 240-48; and J.W. MCKENNA, *The Myth of Parliamentary Sovereignty in Late Medieval England*, in *EHR*, XCIV (1979), pp. 481-506. See also M. DAVID, *La souveraineté et les limites juridiques du pouvoir monarchique du IX<sup>e</sup> au XV<sup>e</sup> siècle*, Paris 1954, p. 250; and E. CORTESE, *La Norma Giuridica*, Milano 1962 (*Ius Nostrum. Studi e Testi*, 6.1), pp. 152-54, and vol. II (1964), pp. 225, 232, n. 170.

<sup>17</sup> C.M. RADDING, *The Origins of Bracton's 'Addicio de Cartis'*, in « *Speculum* », XLIV (1969), pp. 239-46.

he found in Alexander Dumas's *The Count of Monte Cristo*, where a shipowner quotes it as a necessary qualification of his wish to appoint the ship's captain. Radding held that the maxim as Dumas quoted it was probably derived from Roman law on partnership<sup>18</sup>. He noted that Roman law subjects the partner, *socius*, to the very restrictions implied in Dumas's use of the proverb. Further, the actions of a *socius* could be scrutinized by partners and an action *pro socio* could force a partner to make restitution for fraud or negligence. Radding infers that the argument of the *addicio* is that:

The king and barons formed what was in effect a partnership, a *societas*. Thus, the king's actions were subject to baronial scrutiny as a partner's actions were. If the king judged wrongly then the common interest suffered and his partners, the barons, could demand that the error be corrected<sup>19</sup>.

If the assumption that the king and barons form a *societas* is accepted, Radding concludes, then « the difficulties of the *addicio* disappear »<sup>20</sup>. Further, from the 1230s on, baronial claims to be the *homines naturales* of the king and to be associated with the king in deciding all important matters accorded with the position given them in the *addicio*. Thus, whoever the author was, he supported the baronial position and provided it with a new unifying element, « the concept of a *societas* between the king and barons »<sup>21</sup>. Unfortunately, Radding leaves his argument that Bracton might have understood England to be a *societas* hanging on the slender thread of the maxim's similarity to the one which Dumas had used.

Radding's suggestion that the maxim concerns the law of partnership appears confirmed by a fourteenth-century commentary of Albericus de Rosate (d. 1360)<sup>22</sup>.

<sup>18</sup> *Ibid.*, p. 242.

<sup>19</sup> *Ibid.*, p. 243.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*, p. 246. Radding's conclusion, however, is that the meaning of the gloss « conflicts with much of the rest of the book ».

<sup>22</sup> For a biography see L. PROSDOCIMI, in *Dizionario Biografico degli*

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His discussions of the maxim occur, however, in his commentary on the title *De publicanis et vectigalibus et commissis*, Book 39 of the Digest, rather than where one might have expected it in his commentary on D.17.2 (*Pro Socio*), which deals with partnership law. *De publicanis* treats of the special obligations of publicans in farming taxes and of the recourse which claimants who suffered unfairly from their exactions had against them and their agents. Since the farming of taxes was regularly undertaken in partnership, it provided Albericus with an opportunity to introduce the maxim<sup>23</sup>. Whether there is more than an accidental relationship, however, between Roman partnership law and the maxim's appearance in his gloss to D.39.4.3, and its use in Bracton is the question to which we must turn. What did Albericus understand the maxim *q.s.h.* to mean?

Albericus' first reference to the maxim occurs in his rubric to the title, where he summarizes the issues and questions he will deal with:

And note the common saying; 'who has a partner has an owner'. Owner's said only by reason of pre-eminence (D. 39.4.3.1. par *Quod ait*). This happens when a husband constitutes his wife as the mistress, stewardess and usufructuary. That, procurators may be punished if they transact more than what has been granted them to do for the benefit of their owners (D. 39.4.)<sup>24</sup>.

*Italiani*, I (Roma 1960), pp. 656-7, v. Alberico de Rosate; also D. MAFFEI, *La Donazione di Costantino nei giuristi medievali*, Milano 1964, p. 178, n. 1.

<sup>23</sup> W.W. BUCKLAND, *A Text-Book of Roman Law from Augustus to Justinian*, 2nd ed., Cambridge 1932, pp. 513-14.

<sup>24</sup> *Prima Alberici super Digesto novo. Commentaria argutissima iuris utriusque doctorum, super Prima parte Digesti novi* (1534), fo. 45: « Et nota vulgare: qui habet socium habet dominum. Quod dominus dicatur ratione preeminentie tantum. eodem legem par. quod ait. Quod facit ad questionem quando maritus constituit uxorem dominam et massariam et usufructuariam. Quod procuratores eorum quibus conceditur quod possint conducere gratia usus dominorum si plus conducant puniantur infra eodem legem Si publicanus par. de rebus ». « *Vulgare* » as used above can be understood to mean an Italian proverb. For Bracton's substitution of *magister* see below p. 116, notes 141-43. *Dominus* has been translated as 'owner' since property rights not lordship appear at issue. Note also that Albericus's word order differs from that of Bracton who quotes the proverb as « qui socium habet, habet magistrum ».



What Albericus summarizes in the rubric is his commentary on the words «licet domini non sint» of the law *Cum si exhibuissent* (D.39.4.3.). The «common saying» or maxim, *q.s.h.*, which he quotes, is part of his comment on the words «licet domini non sint». Before turning to his commentary, a review of the citations in the rubric can provide a framework in which to follow his detailed discussion.

The first reference in the rubric is to the paragraph *Quod ait* (D.39.4.3.1.). Here Ulpian, noting that the edict provides an action against the owners, states that this judgment against the owners «must be understood to be against the partners in tax farming even if they are not owners»<sup>25</sup>. Whether each of the partners was an owner of the servant or the agent through whom the harm was done made no difference. Should the owner not provide an opportunity to the injured party for identifying the person who had caused the harm, all the partners would be held liable. The phrase in Ulpian's commentary, «even if they are not owners», «licet domini non sint», had caught the attention of others before Albericus, but they had been content simply to underscore the possibility that judgment might be given against all the partners, even if not all were owners of the servants who had done the harm<sup>26</sup>. Only Albericus, present evidence suggests, tried to connect Ulpian's statement with the Italian maxim *q.s.h.*<sup>27</sup>.

At least two connections between what Ulpian had written and the maxim may plausibly have occurred to Albericus. Albericus had noted the harshness of the law

<sup>25</sup> D. 39.4.3.1: «Quod ait 'in dominos', sic accipiendum est 'in socios vectigalis', licet domini non sint». Quotations of the *Corpus iuris civilis* are from the edition of P. KRUEGER and TH. MOMMSEN, 3 vols., Berlin 1954.

<sup>26</sup> Accursius merely refers to an earlier law, D. 39.4.1 (*Praetor ait*), par., *Familie nomen* as explanation and to Azo. *Accursii Glossa in Digestum Novum*, *Glossatorum Juris Civilis*, IX (repr. 1968), fo. 22v.

<sup>27</sup> The sixteenth-century editors of the *Glossa ordinaria* of Accursius in *Digestum Novum* (Lyons 1550), p. 126, in a marginal note at D. 39.4.3 (*Quod ait*), state that «Albericus allegat istum textum ad hoc quod qui habet socium, habet dominum». When reference is made to the *Glossa ordinaria* it is to the volumes of the Lyons edition of 1549 and 1550.

toward publicans. In his gloss on *Cum si exhibuissent* he immediately followed another reference to the maxim with a statement referring to the words of the law: « There [it states] 'so harsh', for instance, because they are held *insolidum* if they do not present them even though they might not be able to do so without fault »<sup>28</sup>. More important than the seeming harshness of the law was its treatment of publicans as if they were owners though it conceded that they might not be. If Albericus understood the maxim *q.s.h.* to suggest a certain harshness, exaggerating the rights of one partner over those of another, and to refer to something less than real ownership, the connection would have been easy to make.

In his gloss to *Quod ait* Albericus explains the limited way in which the partners could be understood to be owners when they obviously were not. They are « owners », *domini*, only because they possessed a certain preeminent authority :

[The law states] « even if they are not owners » they are therefore called owners by reason of a certain preeminence and authority, as above, *Rerum amo. lex 1* (D. 25.2.1); *De pecul. lex Si servus ordinarius* (D. 15.1.17); and *Mand. lex Creditor, par. fin.* (D. 17.1.60.4), and the argument is that if the husband leaves his wife behind as mistress, steward and usufructuary, it is to be understood that he did not appoint her as owner, *domina*, but left her a certain power or authority to be steward. The argument can be found below, *De solu. lex Titia* (D. 24.3.34), and *De ver. sig. pronuntiatio par. 1* (D. 50.16.195.1), and this can be found in *De non eligen. secundo nuben. par. aliud vero quiddam* (Nov. II, 4) where [it is] in the use obviously of the owners. About this see also

<sup>28</sup> *Super Digesto novo*, fo. 46: « Et nota ex verbo quod ait vulgare: qui habet socium habet dominum. Dy [nus de muxello]. Ibi tam dura sicut ut teneantur insolidum si no exhibeant licet sine culpa exhibere non possint. Oldradus ». « Tam dura » are words in the law he is glossing, D. 39.4.3: « Cum si exhibuissent, noxali iudicio convenirentur. Id circo autem tam dura condicio eorum effecta est quia debent bonos servos ad hoc ministerium eligere ». The siglum; « Dy. », I have assumed refers to Dynus de Muxello, but I have found nothing in his glosses that appears to refer to this maxim. For Dynus, see *Dictionnaire de Droit Canonique*, IV (Paris 1949), pp. 1250-57.

what is noted in the gloss and what is said fully at C. *Si secun. nupse. mulier lex 1* (C. 5.10.1)<sup>29</sup>.

Albericus suggests that in these instances persons were owners only in the sense that they had a certain preeminent authority or right, not that they had in fact real ownership. The illustrations he chose were varied but consistent with his interpretation. The first reference is to *Rerum amotarum* (D.25.2.1) in which an action is given against a wife for theft. In his comment on this law, Albericus acknowledges that a wife might be charged with theft from her husband in special cases but does not admit that a wife can generally be charged in this matter<sup>30</sup>. His citation of this law is probably due to the fact that it demonstrates the peculiar position of a wife in respect to her husband's ownership of her dowry<sup>31</sup>. His second reference, D.15.1.17, appears more helpful than the first and even refers back to *Si cum exhibuissent. Si servus meus ordinarius* (D.15.1.17) allowed an owner to deduct from his slave overseer's *peculium* the money which the servants of the slave overseer owed the owner. The slave overseer obviously could not own his *peculium* although he had specific rights and obligations regarding it, such as freedom to buy or sell with it and to administer it<sup>32</sup>. The overseer's special authority and not his ownership of his *peculium* is the point of Albericus's comparison. In his commentary on this text he notes that the slave overseer is the *dominus* of his *peculium* only in

<sup>29</sup> *Super Digesto novo*, fo. 46: « Ibi licet domini non sint dicuntur ergo domini ratione cuiusdam preeminentie et auctoritatis ».

<sup>30</sup> ALBERICUS, *Commentarii in primam infortiati partem*, Venice 1585, repr. 1978 (Opera Iuridica Rariora, XXIII), fos. 32v, 33.

<sup>31</sup> For dowry see M. BELLOMO's article on *Dote* (*Diritto Intermedio*), in « Enciclopedia del Diritto », XIV (Milano 1964), pp. 8-32; see also M.M. SHEEHAN, *The Influence of Canon Law on the Property Rights of Married Women in England*, in « Mediaeval Studies », XXV (1963), pp. 109-24; and J. KIRSHNER and J. PLUSS, *Two fourteenth-century Opinions on Dowries, paraphernalia and non-dotal goods*, in « Bulletin of Medieval Canon Law », 9 (1979), pp. 65-77; also see note 44 below.

<sup>32</sup> For the Roman *peculium* see BUCKLAND, *A Text-Book*, pp. 533-36; and for a medieval application of the concept to monies in the possession of monks, see M. BLECKER, *The Civil Rights of the Monk in Roman and Canon Law: the Monk as 'Servus'*, in « American Benedictine Review », XVII (1966), pp. 186-88.

a preeminent fashion<sup>33</sup>. The overseer could not prevent his owner, therefore, from taking what was owed the owner by the overseer's servants from the overseer's *peculium*.

In this commentary, as he does later in commenting on *Quod ait*, Albericus refers to the example of the husband who, in his will, constitutes his wife as stewardess and usufructuary<sup>34</sup>. Albericus gives almost the same citations in both places. His discussion of the husband's will in *Quod ait*, however, is preceded by yet another example of ownership by reason of preeminence. This, his third citation, is to the paragraph *Lucius* in D.17.1.60.4<sup>35</sup>. In commenting on this law he discusses delegation of free and general administration. His commentary on *Lucius* begins with the statement that « a general concession even of free administration does not include [license for] fraudulent administration »<sup>36</sup>. Albericus apparently wished to compare the administrative authority of a procurator to an exercise of the powers of ownership based on preeminent authority. His rubric to title four — where, it should be recalled, his first reference to *q.s.h.* occurs — included a citation which refers to a procurator's liability for exceeding his authority<sup>37</sup>. That a procurator's mandate was in some sense analogous to a partner's authority had already been suggested by Azo, but not that the *socius* was an owner in the manner of a

<sup>33</sup> *Secunda Alberici super Digesto Veteri*, Lyon 1534, fo. 110: « Ultimo allegatur hec lex in ver. et id quidem quod mihi dominus. Quod quis dicitur dominus solum ratione preeminentie sicut his est dominus ordinarius vicarii solum ratione preeminentie . . . ».

<sup>34</sup> *Ibid.*: « Quod facit ad questionem quando maritus constituit uxorem in testamento dominam massariam et usufructuariam quod valeat relictum. pro hoc infra de publica. lex si cum exhibuissent, rerum amota. lex I; in aut. de non eligendo secundo nubentes par. illud vero quidam. Ibi usu existentibus dominis ».

<sup>35</sup> For a discussion of procuratorial delegation, see B. TIERNEY, *Foundations of the Conciliar Theory*, Cambridge 1955, pp. 117-27, and G. POST, *Studies in Medieval Legal Thought: Public Law and the State, 1100-1322*, Princeton 1964, pp. 92-6.

<sup>36</sup> *Super Digesto veteri*, fo. 129v. In the gloss to paragraph three of D. 17.1.60 (Si inter maritum) Albericus notes: « Aut maritus obligatur ut procurator et eo casu quicquid superest habet reddere aut elegit ut proprium negotium gerens quod superest potest retinere. h.d. ». In this instance the husband could be compared to a procurator with regard to his wife's dowry.

<sup>37</sup> For the text see n. 24 above.

procurator<sup>38</sup>. Nor does that latter possibility occur to Albericus. The point of comparison for Albericus is the procurator's « preeminent » authority and the character of the ownership exercised by the *dominus* of *q.s.h.*

The comparison to a proctorial mandate is followed by the example of the husband whose will « leaves his wife as mistress, stewardess and usufructuary ». « It is argued », Albericus notes, « that he has left her, it seems, not as the owner [*domina*] but with a certain kind of power or authority to acts as stewardess »<sup>39</sup>. The first text he cites, D.24.3.34, does not appear helpful. It deals with the father's rights vis-a-vis his daughter's dowry. His comments shed no light on the specific issue for which he apparently cited it, except to affirm implicitly the limited character of the daughter's ownership<sup>40</sup>. In fact, only in the last reference that Albericus cites is his argument concerning the question likely to have been fully discussed. Although I have been unable to locate the text, an extended discussion of the law cited, which concerns a wife's ownership of her dowry, can be found in the *Glossa ordinaria*. The case is discussed there in almost the same words Albericus was later to use: « the husband having left her as mistress and usufructuary... » and is settled analogously; « she does not have ownership but usufruct »<sup>41</sup>. It would appear from his refer-

<sup>38</sup> *Summa Aurea*, Lyons 1557, repr. 1968, fo. 103v: « Quoniam socius quasi procurator est pro parte, post tractatum mandati ponit de societate ».

<sup>39</sup> *Super Digesto novo*, fo. 46: « Et est argumentum quod si maritus relinquat uxorem dominam massariam et usufructariam ut non dominam sed quandam potestatem vel auctoritatem massariandi legasse videatur ». « Legasse » and « reliquat » refer to the husband's intent as expressed in a will. In a parallel gloss Albericus explicitly refers to the husband's will; for the text of that gloss see n. 34 above.

<sup>40</sup> *Commentarii in primam infortiati partem*, fo. 21v: « dic ergo Titia, scilicet in quasi possessione sui iuris existens quia stabat tamquam materfamilia ».

<sup>41</sup> *Glossa ordinaria* (C. 5.10.1), col. 839, at v. derogari: « Sed quid si dicat vir, relinquo cara dominam et usariam vel dominam et usufructuariam quid habebit mulier per talia legata? Quod nil: ut ff. de re iudi. lex ubi repugnantia. Econtra quod sic, ut sint duo legata scilicet plenae proprietatis et usufructus. ut ff. de usufruc. lega. lex si Titio fundus. Unde cum proprietatem non habent quia testator alium instituit, habebit usufructum per legem illam. Sicut et alias dicitur, lego usumfructum habitationis nam usum habitationis videtur legare ut supra de usufruc. cum antiquitas. Alii dicunt eo plus, quod heredes iure fideicommissi teneantur restituere haereditatem.

ence in *Quod ait* to his extended commentary that Albericus had not added much there to what he could already have found in the *Glossa ordinaria*.

In summary, Albericus has argued in his comment on *Quod ait* that, although all the publicans in partnership are not necessarily the owners of the slaves who collected the tax revenues, « *licet domini non sint* », they are treated as such because of their preeminent authority or responsibility as partners. This authority is similar to that of a procurator or of a wife with respect to her dowry. By implication, his understanding of the maxim *q.s.h.* is that a partner did not literally have an owner or master, but that a person who has a partner has someone who has a preeminent authority or right over something in which they shared.

What Albericus did not say may also be helpful in understanding what he believed *q.s.h.* meant. Curiously, in none of his references is there mention either of the limitations that Roman law imposed on the actions of partners or of the character of their joint ownership. Such limitations, according to Radding, were the point of the comparison that he believed Bracton was trying to make when he used *q.s.h.* to reason about the king's relationship with his barons. Maitland's assumption that knowledge of partnership law was above Bracton's head cannot be made about Albericus, who commented extensively on partnership law elsewhere<sup>42</sup>. His failure to mention the limitations which partnership law placed on partners in giving examples of the meaning of preeminence does not appear to be due either to accident or ignorance.

If partnership law had been on Albericus's mind in commenting on *q.s.h.*, he had occasion to refer to it when he cited *Rerum amotarum*. The law itself speaks of the

Sed secundum consuetudinem sic, et hic cum dicitur dominam et usufructuriam debet habere alimenta ». The dispute as to whether the husband is the owner of the dowry or not can also be found in Azo, *Brocarda*, repr. Turin 1967 (Corpus Glossatorum Juris Civilis, IV, 3), fo. 92.

<sup>42</sup> MAITLAND, *Select Passages*, p. 158. Albericus' glosses to the title *Pro Socio* require 6 folio pages in the edition cited above.

« partnership of life » between the husband and wife and the *Glossa ordinaria* had called attention to these words by specifying that this partnership was both « divine and human »<sup>43</sup>. Marriage was commonly considered a conjugal partnership and Raymond of Penafort had explained its nature as such by the story of woman's lateral origin from Adam's rib. She was his associate, not head or handmaid, because she came from his side not his head or foot<sup>44</sup>. Although marriage was indeed called a partnership, that concept was not applied to the property relations between spouses. Even the wife's dowry was not legally hers while her husband lived. He was the owner<sup>45</sup>. It is to this that Albericus appears to refer in citing *Rerum amotarum*. That the wife was called the husband's *socia* seemed to be of no interest to him. In fact, if Roman partnership law concerning joint property of partners had been applied between husbands and wives, it would likely have caused a revolution. Albericus appears to have been far from making such an association of ideas when he referred to *Rerum amotarum* in his discussion of *q.s.h.*

There is yet another reason to believe his silence is significant. The ownership of each partner in a *societas* of what was held in common was not absolute, rather each owned his share of the whole. It could be said, albeit by some stretch of the imagination, that the ownership of a partner had something about it of the character of « preeminent » authority as Albericus describes such authority. Since Albericus does not cite Roman partnership law in discussing *q.s.h.*, the conclusion seems unavoidable that he

<sup>43</sup> *Glossa ordinaria* (D. 25.2.1), col. 66, at v. *societas vitae*: « Scilicet divinae et humanae », which phrase is taken from C. 9.32.4: « Adversus uxorem (quae socia rei humanae atque divinae domus suscipitur) . . . ».

<sup>44</sup> RAYMUNDUS DE PENAFORT, *Summa de Poenitentia et Matrimonio*, Rome 1603, repr. 1967, Lib. IV, De matrimonio, par. 3, p. 512: « intelligitur ergo de consensu matrimoniale seu conjugalis societatis; quod patet ex primae mulieris formatione, quam dominus non formavit de capite viri, ne domina videretur; non de pede, ne ancilla reputaretur, sed de latere, ut collateralis; et socia haberetur et hoc consensu, seu conjugali societate oportet eos cohabitare, et individuum vitae consuetudinem observare ».

<sup>45</sup> See *Glossa ordinaria* (C. 5.12.30), cols. 857-58, at v. *naturali iure* for an extended discussion of the question; also notes 31 and 41 above.

did not associate the Roman *societas* with the kind of partnership involved in *q.s.h.* But he obviously believed that the maxim explained how one could speak of a *dominus*, in « *licet domini non sint* », who was not legally an owner. The usefulness of *q.s.h.* for such an explanation is clear if Albericus understood the maxim to provide a commonly understood example of the exercise of a proprietary right by a person who was not really the owner. The very least that can be said is that if he had believed *q.s.h.* concerned partnership relations in a Roman *societas*, he probably would have cited Roman law regarding such partnerships. He did not.

Albericus's reference to the maxim as a popular one would suggest the possibility that *q.s.h.* drew its meaning more immediately from common practice or belief than from Roman law or the glosses of the legists. In the *Count of Monte Cristo*, where Radding discovered the maxim paralleling *q.s.h.*, Dumas has a ship owner quote it regarding the appointment of the captain of a merchant ship. It would seem useful, therefore, to explore the law of mercantile partnerships as an alternative source from which *q.s.h.* might have taken its significance.

There is ample evidence that mercantile partnerships of diverse kinds were widespread during the thirteenth century<sup>46</sup>. The medieval *commenda*, like the Roman *societas*, allowed two or more to share their resources in labor, capital or talent for the pursuit of profit. The importance of partnership in the accumulation of capital and the pursuit of trade is generally acknowledged. However, as Lopez notes, although profits and risks are shared, the other relations between parties of a *commenda* are more like those between a borrower and lender than between partners<sup>47</sup>. There is no joint liability to third parties and, as the *commenda* is a real contract, it takes effect only when the lender, the com-

<sup>46</sup> R.L. REYNOLDS, *Europe Emerges: Transition Toward an Industrial World-Wide Society 600-1750*, Madison 1961, p. 222.

<sup>47</sup> R.S. LOPEZ and I.W. RAYMOND, *Medieval Trade in the Mediterranean World*, New York 1955, p. 174.



*commendator*, turns the capital over to the borrower, the *tractator*. Nevertheless, the similarity of the *commenda* to the Roman *societas* has recently, led one scholar to conclude « that ultimately the origins of the *commenda* stretched back to the Roman contract... »<sup>48</sup>. The argument over the origins of the *commenda* need not detain us.

The similarities and differences between the *commenda* and the Roman *societas*, however, have a bearing on the interpretation of *q.s.h.* They are similar because both allow the partners to invest and to share in any profit in the same ratio as they contributed to the common resources or capital<sup>49</sup>. As already noted, there is a major difference between the two agreements. The *commenda* was a real contract whereas the *societas* was merely consensual. A *tractator* of a *commenda* was not obligated, therefore, to undertake what he had agreed to do until he had actually taken possession of the capital which had been agreed upon<sup>50</sup>. The ownership of the capital never changed hands, however. Though the *tractator* had possession of the capital, the *commendator* was still the owner of it. In fact, some municipal statutes referred to the *commendator* as the *dominus* or *sire* of the *commenda* capital<sup>51</sup>. Finally, unlike the partners of a Roman *societas*, the *tractator* was independent of the *commendator* in carrying out the business of the *commenda* unless restrictions had been stipulated in the original agreement. In a Roman *societas* the partners shared in the conduct of the enterprise and any one of them might veto what the other partners wished to do<sup>52</sup>.

<sup>48</sup> J.H. PRYOR, *The Origins of the 'Commenda' Contract*, in « *Speculum* », LII (1977), p. 37. This article is the best survey of the material. For a brief summary of the basic economic features of the *commenda* see *Ibid.*, p. 6.

<sup>49</sup> *Ibid.*, p. 19. Pryor notes that the two forms which the *commenda* took, the bilateral and unilateral contracts, were closely identified even though in the former both partners invested whereas in the latter only the *commendator* did. In either case, Pryor points out that the *tractator* alone declared his obligation (*Ibid.*, p. 12).

<sup>50</sup> *Ibid.*, p. 20.

<sup>51</sup> *Ibid.*, pp. 33-4.

<sup>52</sup> Frequently the partners also shared in the ownership of the capital of the partnership, although common ownership of the capital was not essential to the classical *societas*. BUCKLAND, *A Text-Book*, pp. 507-9.

The most remarkable contrast between the two is, then the former's insistence both on the *commendator's* ownership of the capital and on the *tractator's* independence in doing with it as he saw fit. In contrast, the Roman *societas* encouraged the commingling of the partners' capital, that is to say its common ownership, and required their mutual assent to the administration of the partnership's affairs.

On the face of it, the maxim *q.s.h.*, apart from Albericus' use of it, can summarize either set of partnership relationships, but it seems particularly appropriate to the *commenda* in which, although one partner remained literally *dominus* of the capital, the other had possession of it and freedom to act with it as he chose. The *tractator* was master of the capital in one sense, as Albericus seems to describe it, by «preeminence». The *commendator*, with only the proverbial one-tenth of the law, had ownership nevertheless in the literal sense. In a *commenda* partnership each partner was a *dominus* but each in a different way. This use of *dominus* in two senses is like a pun, about which a proverb can be made, especially if the subject is as commonplace as were mercantile partnerships in the thirteenth century. On the other hand, the Roman *societas*, because it gave each partner a virtual veto over the administration of the partnership and admission of new partners, could be said to allow one partner to be the master, *dominus*, of the other. But since Albericus refers to the maxim as a common saying, probably as an Italian saying, and because no other legist has been found to this date to have used *q.s.h.*, it seems likely that it was understood in the context of the *commenda* contract more than that of the Roman *societas*. The only troublesome feature of this supposition is that Albericus's explanation of the «preeminent» authority of the *dominus* is accurate only if it applies to the partner who is the *tractator*. However, he may have thought that it would be perfectly obvious to his contemporaries why the *commendator* was a *dominus* and that only the part of the maxim's meaning which he found useful needed comment.

Besides the differences already mentioned between the *commenda* and *societas*, Pryor infers from the glosses of Azo, Accursius and Odofredo that they took a position at odds with their predecessors and successors regarding the proportionality of shares in a *societas*. According to him, their position would have made a *societas* incompatible with the *commenda*. If this was the case, it would have been even less likely that Bracton's contemporaries interpreted *q.s.h.* in terms of a Roman *societas*. As convenient as this conclusion might be for my argument, it seems unwarranted by the texts. The issue is whether Azo and, following him, Accursius and Odofredus, allowed for an unequal division of shares and profits of a *societas*, which was precisely what a unilateral *commenda* did. Pryor, citing one of Azo's glosses, concluded that he did not allow an unequal division and that Accursius and Odofredus stood by Azo's opinion. The text of the gloss in question reads:

Potest enim id agi ut quis duas partes vel tres habeat, alius unam? Si modo aliquis plus tulerit societati, vel pecuniae, vel operae, vel cuiusque alterius rei causa. Et forte aliter non tenet praedicta conventio, ea ratione quia societas est quoddam ius fraternitatis<sup>53</sup>.

Azo's question whether one partner can have two or three shares and the other only one is answered straightforwardly: yes, « if one brings more money, labor or whatever to the partnership than the other ». His response up to this should not be surprising since he has merely restated the law he is glossing<sup>54</sup>. But the question he is leading up to is whether such a division of shares will stand

<sup>53</sup> Azo, *Summa Aurea*, fos. 103v-104. In Pryor's citation of the gloss, *art. cit.*, p. 17, n. 43, part of Azo's text appears to have been transposed. His conclusion that Azo did not support an unequal division of profits does not seem dependent, however, on the transposition.

<sup>54</sup> D. 17.2.29: « Si non fuerint partes societati adiectae, aequas eas esse constat, si vero placuerit, ut quis duas partes vel tres habeat, alius unam; an valeat? Placet valere, si modo aliquid plus contulit societati vel pecuniae vel operae vel cuiuscumque alterius rei causa ». Pryor also cites this law at another point in his article, p. 19, without, however, associating it with Azo's gloss.

up in court even if one of the partners has not contributed more to the partnership than the other. Azo's answer to this question is not an unequivocal 'no' since his own teacher had held it possible, as had others for different reasons. But Azo holds the position that such an agreement would not be valid since he believes that the law, because it asserts the fraternal character of the *societas*, prefers it that way. A greater contribution by one of the partners than by the other is, for Azo, therefore, the *sine qua non* for unequal shares in a partnership<sup>55</sup>.

Odofredus did follow Azo's position but interpreted it rightly to allow unequal division of shares if the partners' contributions were unequal. In his gloss to *Si non fuerint* he stated that such an unequal division is valid, « but only if one [partner] contributes more to the partnership either in money, work or skill »<sup>56</sup>. Odofredus returned to this issue later in the same gloss when he asked, « What if both partners invest money, work and skill equally and contract that one will receive two shares of the profit and the other a third, is this agreement valid? Certainly not according to Azo »<sup>57</sup>. After presenting almost the same opposing positions which Azo had, he accepted Azo's position here as the « truer one ». Accursius saw the issue similarly, that the division of shares has to be in proportion to the contributions of

<sup>55</sup> Azo, *Summa Aurea*, fo. 104: « Et forte aliter non tenet praedicta conventio, ea ratione, quia societas est quoddam ius fraternitatis. Et licet aliter pacta tollantur inter contrahentes, hic tamen reprobantur: ut ff. depositi, lex l. par. si conveyerit, et ff. eod. l. si non fuerint. infra responso. et lex verum infra respons et instit. eo. par. l. vel forte (ut ait Guill.) non valet conventio societatis iure, sed valet iure pactionis. Domino autem meo videbatur subaudiendum esse maxime sicut et alibi ff. de contrahen. emp. fundi. Ergo primae sententiae adhaereo quia lex hoc videtur aperte velle ». The crucial phrase is at the beginning « Et forte aliter non tenet ». It appears as if Pryor did not give *aliter* the weight it deserves; that is, the unequal division would « otherwise » not hold, if one partner did not contribute more to the partnership than the other.

<sup>56</sup> ODOFREDUS, *Lectura Super Digesto Veteri*, Lyon 1552, repr. 1968, fo. 90v: « Sed si convenit ut unus ferat duas vel tres partes valet hec conventio? Sed si unus tantum plus contulit in societate vel pecunie vel opere vel industrie ».

<sup>57</sup> *Ibid.*: « Sed quid si ambo socii pariter ponunt pecuniam et operam et industriam et fit pactum quod unus ferat duas partes lucri alter tertiam numquid valet hec conventio? Certe non secundum Azo ».

each partner, and for the same reason, that partnerships are analogous to fraternal relationships<sup>58</sup>.

The division of shares that is legally required is not an equal one but one which is proportional to the partners' contributions to the partnership, and this proportionality holds for both profit and loss<sup>59</sup>. The principle of proportionality is reflected in an example Azo gave to illustrate how a partnership is ended by the disappearance of its purpose:

If we enter a partnership, you with three horses and I with one so that you can sell all four after you have mine, and you will give me a fourth of the sale price and before the sale my horse dies, the partnership does not continue...<sup>60</sup>.

Azo obviously believed that nothing was wrong with unequal shares. The reason for the dissolution of the partnership was that its purpose was to sell four horses and not just to have four horses<sup>61</sup>. The *societas* as seen by Azo and Accursius, it may be inferred, differed from the *commenda* not primarily because the division of shares and of profit and loss were radically different. Rather it appears that these glossators stressed the fraternal character which they believed a *societas* should have.

Accursius returned to the idea that the relations between partners should be similar to those between brothers when he explained that the word *fraternitatis* is used in *Verum est* (D.17.2.63) «because the partners love each other as brothers and because by the nature of partnership

<sup>58</sup> *Accursii Glossa in Digestum Vetus*, Venice 1488, repr. 1969, fo. 263, at v. *societati*: «Si autem non contulit plus nunquid hoc pactum valet? Quidam ut Azo quod non... et est ratio quia societatis habet ius fraternitatis. Unde licet alias huiusmodi pacta servantur... hoc tamen non valet...».

<sup>59</sup> Azo also specified that whatever is expressed about sharing profit in a partnership is to be understood to be tacitly said about sharing losses and vice-versa: «Si autem in societate contrahenda exprimatur aliquid de lucro, idem videtur tacite dictum in damno et e converso idem est». *Summa Aurea*, fo. 104.

<sup>60</sup> *Ibid.*: «Si ergo cum tu tres equos haberes et ego unum, societatem coivimus, ut accepto equo meo quadrigam vendere, et ex pretio mihi quartam partem redderes...».

<sup>61</sup> *Ibid.*: «nec enim habendae quadrigae, sed vendendi societatem coivimus».

the property [of the partnership] becomes common [to the partners] just as it is [among brothers] because of their fraternal descent »<sup>62</sup>. Perhaps Accursius believed that exploitive relationships between partners are inappropriate. He did not consider that differing levels of contributions *per se* were inappropriate or exploitive; they became so only if the principle of proportionality was not observed. He acknowledged, however, that others thought differently. Some legists, he seems to imply, held that exploitive relationships between partners were acceptable because the very nature of a partnership is to make it possible for a partner to profit from his partner<sup>63</sup>. The usual definition of partnership as « an agreement between two or more for the more favorable use of skills and a more productive use of money » implied, Azo had said, that « in a partnership the more profitable use of the skill of one party and the money of the other is due in each case to the other partner »<sup>64</sup>. But Azo apparently intended not that this should be understood to mean one partner could exploit the other rather, that together they made more profitable use of their common resources than either could alone employing his own resources. Elsewhere Azo noted that partners cannot contract that a gift to the partnership will benefit only one partner because this would imply a mercenary relationship between them<sup>65</sup>. Accursius in accepting Azo's opinion that partnerships should be characterized by fraternal relations rejected what appears to have been a

<sup>62</sup> *Accursii Glossa in Digestum Vetus*, fo. 265v at v. fraternitatis: « quia socii invicem ut fratres se diligunt et quia ratione societatis fiunt res communes sicut ratione fraternitatis ».

<sup>63</sup> *Ibid.*, fo. 263 at v. societati: « alii dicunt ut Iohannes quod valet et subaudiunt hic maxime nam hoc ipso quod socius sit dicunt alii afferri commodi aliquid ».

<sup>64</sup> *Summa Aurea*, fo. 103v: « Est autem societas duorum vel plurium conventio contracta ob commodiorem usum et uberiores questum ». He attributes this definition to Cicero, not to the laws.

<sup>65</sup> *Ibid.*: « In societate autem contrahenda non potest illi adijci modus ut quaecunque ex societate obvenerint donationis causa pertineant ad socium meum et ego nihil habeam... Nec enim ego socius suus esse sed potius mercenarius videor ». In ordinary speech *socius* frequently referred to a friend or companion as in the proverbs quoted in H. WALTHER, *Proverbia Sententiaeque Latinitatis Medii Aevi*, Göttingen 1963-67 (Carmina Medii Aevi Posterioris Latina, II, vols. I-V), IV, pp. 278, 985.

substantial consensus that they could be exploitive. Possibly he and Azo believed that the relationships constituted by a *commenda* contract and an agreement to form a *societas* differed in principle. In a *societas* the *socius* was held accountable to observe the principle of *fraternitas*, but not necessarily so in a *commenda*. As Lopez noted, the relation between the *commendator* and *tractator* was more like one between a lender and borrower than between partners.

There are other differences between the two contracts of which both seemed to be conscious, but only their apparent belief that there was a difference in the spirit of the relationship between the partners in each of the two contracts has a special bearing on the interpretation of *q.s.h.*<sup>66</sup>. Though Pryor erred in believing that Azo and those who followed him differed substantially from the consensus regarding the division of profit and loss in a *societas*, he was correct in believing that their comments imply a recognition of a

<sup>66</sup> Azo, for instance, emphasizes the purely consensual character of a *societas*; in *Summa Aurea*, fo. 103v: «*contrahitur societas solo consensu . . .*», which was not the case in a *commenda* contract where the capital had to be handed over to the *tractator*, who at the completion of the journey had to return the capital or its equivalent and all the profit to the *commendator*. Accursius, in a gloss to *Si non fuerint*, may have had two aspects of the *commenda* contract, would not have to be shared by the other partner concerning the risks that the partners took: «*Sed quod si perdatur pecunia talis an sit periculum commune? Respondeo non nisi hoc actum est sicut nec si alter qui operas praestat moretur esset commune*». *Accursii Glossa in Digestum Vetus*, fo. 263 at v. Solus. The loss of capital, as in a unilateral *commenda* contract, would not have to be shared by the other partner unless it had been specified, just as only the partner who contributed the labor accepted the risk of death while journeying. The *societas*, Accursius appears to be saying, was like the *commenda* with respect to the risks each partner was undertaking. However, continuing the same gloss, he seems to be pointing out an important difference between the two forms of agreement: «*sed an posset unus alium compellere operari vel tantundem pecuniae reportet vel reponat. Respondeo non quia finita est societas in emptione rerum*». A partner of a *societas* could not compel his partner to return with the money because the partnership ended with the completion of its purpose, the sale of the goods. Clearly Accursius could not have meant that an action *pro socio*, by which means partners could legally enforce a distribution of the profits and losses of a partnership, was unavailable. Rather, what he appears to be excluding is the usual requirement in a *commenda* contract that the *tractator* return with the original capital or its equivalent and all the profit and deliver them into the possession of the *commendator*. For this aspect of the *commenda* contract, see PRYOR, *art. cit.*, pp. 7, 33; for the action *pro socio*, see BUCKLAND, *A Text-Book*, pp. 509-11.

difference between the two forms of partnership agreements. In a *societas* the partners were bound by the principle of *fraternitas*, in a *commenda* they were not.

The differences between *societas* and *commenda*, of which Bracton's contemporaries were aware, suggest caution in interpreting *q.s.h.* from the perspective only of Roman partnership law. Indeed the potentially exploitive character of the *commenda* contract strengthens the supposition that *q.s.h.* refers primarily to the relations between the *commendator* and the *tractator*. Their relationship need not necessarily have been brotherly. The *dominus* of *q.s.h.* could suggest a master, a potentially exploitive relationship with a partner. In summary, Albericus's reference to *q.s.h.* as a popular saying, his interpretation of *dominus* as meaning a person with preeminent authority not ownership, and the exploitive character suggested by the maxim, all argue that its meaning should be explored in terms of the relationship between a *commendator*, the real *dominus* of the capital, and a *tractator*, who, once he had possession of the money, could do pretty much with it as he wished.

Bracton's « *qui socium habet, habet magistrum* » appears to be the first recorded reference to the maxim Albericus later quoted as *qui habet socium, habet dominum*. That he was perhaps the first to cite it does not lead confidently to the conclusion that Bracton knew what it meant. Maitland asserted that partnership law was above Bracton's head<sup>67</sup>. On the other hand Radding believed that Bracton knew enough about Roman partnership law to compare the governance of England to that of a Roman *societas*. Even if Bracton did make the comparison, it could still be doubted that he knew fully what it meant. Radding does not, however, prove his case that Bracton did seek to make such a comparison when he quoted the maxim *q.s.h.* Radding, it will be recalled, argued that the troublesome assertions of the *addicio*, that of « the 'barons' control of the king, and their damnation should they allow

<sup>67</sup> MAITLAND, *Select Passages*, p. 158.



him to go 'unbridled' », are explained by features of Roman partnership law<sup>68</sup>. He even suggests that Bracton had to rely on partnership law rather than on corporate theory to reason as he did about the collective guilt of the barons if they left the king unbridled. « Contemporary doctrine », Radding stated, « held that sins committed by corporations damned only those who actually committed them »<sup>69</sup>. England, it would seem, had to be conceived of as a *societas* if Bracton was to hold the barons collectively responsible for an unbridled king.

There is a twofold difficulty in the way of accepting his argument. Radding's supposition about the date of the *addicio* is in error, as it was likely written before 1246<sup>70</sup>. Until the decretal *Romana ecclesia* of 1246 (VI, 5.11.5.) it was possible to argue that all the members of a corporation could be punished for a crime. Thus, before 1246 Bracton would not have had to abandon corporate theory to affix guilt on all the members of a corporation. Radding's implicit confidence in Bracton's knowledge of corporate law, however, is not misplaced. In E. Kantorowicz's judgment, Bracton contributed to the developing concept of the corporation as a fictitious person<sup>71</sup>. But is the *addicio*

<sup>68</sup> RADDING, *art. cit.*, p. 243. Güterbock's less judgmental observation concerning one of Bracton's references to *societas* (for Bracton's reference see THORNE, II, p. 287) is: « These contracts seem, however, to be referred to in this connection rather for theoretical completeness of the system of obligations than for practical reasons ». *Bracton and His Relation to Roman Law*, p. 144.

<sup>69</sup> RADDING, *art. cit.*, p. 243.

<sup>70</sup> It seems useless to seek to date the *addicio* beyond what Thorne has already sketched as the possible chronology of the writing and redaction of *De legibus* (THORNE, III, pp. xxx-xlii), which would make a date no later than the 1240s likely. In this instance, as I will argue, the assertion of the *addicio* is not dependent on then current corporate theory about the delicts of corporations or the rules governing a Roman *societas*. Therefore the issuance of *Romana ecclesia* cannot be assumed to provide a date before which Bracton probably would not have written what he did. For the development of thirteenth-century thought concerning juristic persons, see M.J. RODRIGUEZ, *Innocent IV and the Element of Fiction in Juristic Personalities*, in « *The Jurist* », XXII (1962), pp. 287-318, and p. 297 for the current practice of excommunicating corporations; see also I. TH. ESCHMANN, O.P., *Studies on the Notion of Society in St. Thomas Aquinas; I, St. Thomas and the Decretal of Innocent IV Romana ecclesia; ceterum*, in « *Mediaeval Studies* », VIII (1946), pp. 1-42.

<sup>71</sup> For Bracton's understanding of corporate law see E. KANTOROWICZ,

the place to discover whether or what Bracton thought about corporations and partnerships? The real problem with Radding's argument is its implied interpretation of the *addicio* to mean that *all* persons are held responsible if the king is left unbridled, that he was really talking about a *corpus* or *societas*. The text does not imply this; in fact it scarcely allows such an inference to be drawn. If such collective guilt involving every earl and baron is not Bracton's point, he had no need to search for a legal collectivity in which every member was punishable for its delict regardless of whether there had been personal complicity in the deed or not. It seems far-fetched to presume that Bracton would have had to depend on legal theories about corporations or the concept of a Roman *societas* merely to argue that the barons, some or all, would be accountable to God in the commission or omission of their duties. Raymond de Penafort, for instance, held without assuming, it would appear, the existence of a particular kind of legal relationship, that those who induced a tyrant to misdeeds through advice, flattery, detraction, etc., should be held *in solidum* for the resulting damages<sup>72</sup>. The issue in the *addicio* is not whether someone who cooperates in the king's misdeeds by commission or the omission of duty is held morally responsible, but rather the nature of the duty which obligates the barons. Neither the concepts of a *universitas* nor a *societas* were necessary to convince persons of the

*The King's Two Bodies: A Study in Medieval Political Theology*, Princeton 1957, p. 316, n. 7, and P. MICHAUD-QUANTIN, *Universitas, expressions du mouvement communautaire dans le moyen-âge latin*, in *L'Église et L'état au moyen-âge*, XII, Paris 1970, p. 64. Maitland's criticism of Bracton's understanding of corporate property, *res universitas* (*Select Passages*, p. 95), has been answered by H. KANTOROWICZ, *Bractonian Problems*, p. 90, and more recently by J.L. BARTON, *Roman Law in England*, Milan 1971 (*Ius Romanum Medii Aevi*, V, 13a), p. 15, n. 28. Barton also points out that Bracton's position on the distinction between *res publicae* and *res communes* is not a blunder but in accord with Placentinus's position. Gaines Post has demonstrated the importance of Bracton's use of the maxim *quod omnes tangit* in the development of corporate representation in *A Romano-canonical Maxim 'Quod omnes tangit' in Bracton*, in «*Traditio*», IV (1946), pp. 197-251. See also Y.M.J. CONGAR, *Quod omnes tangit, ab omnibus tractari et approbari debet*, in «*Revue historique de droit français et étranger*», XXXVI (1958), pp. 210-59.

<sup>72</sup> RAYMUNDUS DE PENAFORT, *Summa*, Lib. II, par. 20, p. 189.

barons' moral responsibility to fulfill their obligations. However, either concept could have been used to help define what their duties were to an unbridled king.

The consideration of the latter point leads, it seems, to the conclusion that Bracton could not have had a Roman *societas* in mind as literally defining the relationships between the king and barons. If he had, then it would have been the very odd situation that Radding tried to suggest it was not<sup>73</sup>. A Roman *societas* involved the requirement of mutual consent for the transaction of the affairs of the partnership and allowed any *socius* to initiate a proceeding to scrutinize the actions of his partner, as Radding pointed out. What he failed to note, however, is that the *societas* is a consensual contract, a nude pact, with no enforceable standing in the king's court. Further, although the admission of a new partner required the assent of all the partners, any partner could terminate the partnership at any time. Finally, the action *pro socio*, which terminated a partnership, was required to gain the scrutiny of a partner's deed<sup>74</sup>. For Bracton to have considered that the barons and king formed a partnership according to Roman law would have meant that he believed the governance of society could be left to the discretion and pleasure not just of the king, but of any individual baron. No wonder « the example of the *societas* », as Radding noted, « is [apparently] unused by other mediaeval political theorists »<sup>75</sup>. It is not likely to have been what Bracton had in mind either.

Perhaps the surest approach to interpreting the meaning of the *addicio* is by comparing its argument with that

<sup>73</sup> RADDING, *art. cit.*, p. 243.

<sup>74</sup> BUCKLAND, *A Text-Book*, p. 511.

<sup>75</sup> RADDING, *art. cit.*, p. 243. Bracton's acceptance of such a view would have placed him in opposition to what F.M. Powicke, for instance, interprets to be the direction political and social life were taking in early thirteenth century England. In his interpretation of the reissuance of the Great Charter in 1225 he notes: « The form of what historians term a feudal contract was given richer content, the idea namely that society was the expression of mutual obligation ». See his *King Henry III and the Lord Edward: The Community of the Realm in the Thirteenth Century*, I, Oxford 1947, p. 37, and also p. 390, for his suggestion that Bracton, instead, may have envisioned the kingdom as a disciplined body.

of a parallel text in *De legibus*. Attention has already been called to this passage which occurs in Bracton's discussion of novel disseisin:

If it is the prince or king or another who has no superior except God, the remedy by assise will not lie against him; there will only be opportunity for a petition that he correct and amend his act. If he fails so to do, let it suffice him for punishment that he await God the Avenger, who says, « Vengeance is mine and I will repay », unless one says that the *universitas regni* and his baronage may and ought to do this in the king's own court<sup>76</sup>.

The penultimate phrase « may and ought to do this [*hoc facere possit et debeat*] » is without an obvious antecedent. What is it that some allege the *universitas regni* can and ought to do in the king's court? Immediately preceding this phrase Bracton had noted that if the king fails to amend his act his punishment will await God the Avenger<sup>77</sup>. He may have meant that some believe the *universitas regni* can and should punish the king. Though possible, the context argues against the interpretation that Bracton is concerned here principally with the punishment of the king for his misdeeds. Just previously Bracton had made much of his belief that no remedy lies against the king. One can only petition « that he correct and amend his act ». Further, immediately following his presentation of this opinion about what the *universitas regni* can and ought to do he suggests and espouses a procedure through which the king can be « compelled, so to speak, by the law » to amend his act<sup>78</sup>. The issue which he appears to

<sup>76</sup> THORNE, III, p. 43. This passage will henceforth be referred to as *nisi sit qui dicat*. For bibliography see TIERNEY, *Bracton on Government*, p. 314, n. 52. Richardson wrongly suggests that Schultz overlooked this passage in his *Bracton: The Problem of His Text*, p. 31. Schultz, however, does not explicitly compare the two passages in « Bracton on Kingship », p. 173f. Güterbock had discussed this passage before Maitland, although he did not compare it to the *addicio*; see his *Bracton and His Relation to Roman Law*, p. 29.

<sup>77</sup> For Bracton's use of *Deus ultor*, see G. Post, *Bracton on Kingship*, in « *Tulane Law Review* », XLII (1968), pp. 524-34.

<sup>78</sup> THORNE, III, p. 43: « ex tunc erit factum et iniuria in manu domini

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address in this passage, therefore, is whether or not the king can be compelled to amend his act. If *hoc facere* means that the *universitas regni* and barons can and ought to make the king amend his act, this opinion would be, as we are led to expect, contrary to what Bracton had just said — that one might proceed only by petition — and also to what he wrote elsewhere — that «no requirement may be imposed on [the king]»<sup>79</sup>. In another place, while repeating the same position, that «there is no one who can impose the necessity of correcting or amending [his act]», Bracton added, however, «unless he himself wishes»<sup>80</sup>. Finally the parallel phrase in the *addicio* is: «charge him with amending [the *iniura*] [*et ita imponere ei quod iniuriam emendet*]»<sup>81</sup>. Since the verb *imponere* is used in all these three cases, it would seem that the issue was whether the necessity of amending his wrongful act could or could not be imposed on the king.

Before exploring why such an «imposition» troubled Bracton, it may be useful to consider another course of action to which *hoc facere* might refer. Since both the *addicio* and the parallel passage *nisi sit qui dicat* speak of doing whatever is to be done in the king's *curia*, it has been held that the doctrine of the *addicio* is «that a king could be judged by his own court»<sup>82</sup>. Though a court judgment against the king is implicit in both the *addicio* and *nisi sit qui dicat*, the issue which they address and on

regis, qui dici debet in hoc facto quasi warrantus, et ex tunc poterit si voluerit factum suum emendare quasi a lege compulsus, et quam in persona sua cum sit ei submissus debet firmiter observare». Bracton's proposal here for indirect access to the king through suit of a third party is seen as the solution which was generally adopted; see R.V. TURNER, *The King and His Courts: The Roles of John and Henry III in the Administration of Justice, 1199-1240*, Ithaca 1968, pp. 263-65.

<sup>79</sup> THORNE, III, p. 27: «Sed semper erit sua voluntas expectanda, cum non possit ei necessitas imponi».

<sup>80</sup> THORNE, IV, p. 159: «nec poterit ei aliquis necessitatem imponere quod illam corrigat vel emendet nisi velit...».

<sup>81</sup> THORNE, II, p. 110.

<sup>82</sup> TIERNEY, *Bracton on Government*, p. 313, states this doctrine to be «generally accepted as that of the *addicio*» and one with which thirteenth century political writers were not unfamiliar and to which Lapsley foolishly takes exception.

which Bracton cites differing opinions is not simply whether the king can be judged. Elsewhere Bracton makes it clear that although, as he often states, the deed of the king cannot be questioned<sup>83</sup>, « if [the deed] is wrongful it will not then be the deed of the king. And since it is not his deed, because wrongful, it may be questioned and judged, but it cannot be amended or revoked without him »<sup>84</sup>. Here Bracton distinguished clearly between questioning and even judging the king's wrongful act and amending or revoking it. Only the king can do the latter.

His opinion here that the king can commit a wrongful deed, an act which can be judged, is not an exception to his principles. His position follows from a basic distinction he and his contemporaries made. The power of the king is from God to do justice and not *iniuria*, and « he is a king as long as he rules well but a tyrant when he oppresses... »<sup>85</sup>. If Bracton was presenting an exceptional position in the *addicio* and *nisi sit qui dicat*, it would not be that the king's *curia* can judge his misdeeds, but rather that the *curia* can and should coerce the king to amend his act. Certainly some coercion must be implied in getting the king to submit to the judgment of the *curia*. That coercion obviously could not be judicial as no writ can run against the king. The case of Hubert de Burgh illustrates how circumstances, however, might compel the king to submit to the judgment of his *curia* while explicitly declaring that no writ ran against him<sup>86</sup>. It would appear that some form of extra-legal coercion is implied by *hoc facere* and this coercion is what troubles Bracton most about this opinion.

It should be noted that here as elsewhere Bracton

<sup>83</sup> THORNE, II, pp. 109, 169, IV, 78.

<sup>84</sup> THORNE, IV, p. 159.

<sup>85</sup> THORNE, II, p. 305.

<sup>86</sup> For the proceedings in Hubert de Burgh's case see MAITLAND, *Bracton's Note Book*, II, pp. 664-67, no. 857; III, pp. 126-28, no. 1108. The case has been variously interpreted: L. EHRLICH, *Proceedings Against the Crown, 1216-1377*, Oxford 1921 (Oxford Studies in Social and Legal History, VI), pp. 15-6; G.B. ADAMS, *Council and Courts in Anglo-Norman England*, repr. New York 1965, p. 270; B.C. KEENEY, *Judgment by Peers*, Cambridge 1949 (Harvard Historical Monographs, XX), pp. 75-79; and TURNER, *The King and His Courts*, pp. 177-78.

saw little if any difficulty in discerning when and if the king committed an *iniuria*. His hesitations are not about the discovery of facts or the judgment about the law in matters concerning the king's misdeed. Apparently in such instances, as in others, honest and competent justices would not err in knowing what judgment to make. This view seems unchallenged even when Bracton discusses what might happen if the king and his council were initially deceived by false suggestions:

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For the king may be deceived since he is a man, but God can never be since he is God. [If], when the lord king has been apprised of this, he persists in his intention to protect the tenant, though the *iniuria* from then on it will be the *iniuria* of the king himself, since he is bound to dispense justice to all men...<sup>87</sup>.

The justices in this instance know what is right, and perhaps so does the king, but he may still refuse to amend his act even when properly informed. This judicial infallibility, so to speak, helps explain what Bracton then went on to recommend:

If [the king] imposes the necessity of rendering judgment upon his justices in this case or others like it, let them render it in this way, that it is not by judgment but because the lord king so wishes, whence it follows that the judgment is a matter of will rather than *ius*, if it can be called a judgment »<sup>88</sup>.

Though the king was error prone, justices apparently were not, although they might have to give the appearance of judging falsely by declaring the king's will. Bracton did not even try to rationalize such conduct by suggesting it was a judgment in doubtful matters and therefore the king's opinion could be followed or that it was in the public interest for the judges to go along with the king.

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<sup>87</sup> THORNE, IV, p. 159.

<sup>88</sup> *Ibid.*

Bracton only alleged that in such instances the king «imposes the necessity of rendering judgment [*Et si iustitiariis suis necessitatem imponat*]»<sup>89</sup>.

This passage brings us back to what is at the heart of the issue for Bracton; whether the necessity to amend his act can or cannot be imposed on the king. The idea of something «imposed» arises here in connection with the necessity felt by the judges to judge falsely or simply to declare the king's will in a matter before them. To do what the king wills in such cases is something Bracton as a judge could hardly have relished and perhaps himself never did. Bracton offers this advice because he understood that a king had the means, obviously not legal, to coerce a judge to do what he did not want to do: to judge falsely. If forced, therefore, to hear a case where such might occur, Bracton suggested that the judge avoid the other horn of the dilemma by declaring what is the king's will, not what he judges to be the merits of the case. By inference it seems plausible to argue that Bracton understood *imponere*, when he used it to describe what the *universitas regni* was to do if the king did not amend a wrongful act, to mean some form of extrajudicial coercion.

Bracton's refusal to accept the possibility of such coercion, except, as usually alleged, in the *addicio*, has been shown to be based on his theory of kingship<sup>90</sup>. Although the conclusions of the studies of his theory need not be recapitulated here, it is important to underscore the role which his belief that the king had no superior played in his thinking, and to suggest, that implicit in Bracton's thinking is a distinction between *potestas*, royal authority, and *potentia*, actual power to coerce. There is no doubt that Bracton relates the belief that no one can force the king

<sup>89</sup> Elsewhere (THORNE, II, p. 306), Bracton states that a king may lack wisdom and if so «he will destroy them, for from a corrupt head corruption descends to the members, and if understanding and virtue do not flourish in the head it follows that the other members cannot perform their functions». Ehrlich appears to stress overly Bracton's belief in the king's presumed inerrancy in *Proceedings Against the Crown*, p. 9.

<sup>90</sup> See note 16 above.



to amend his act or impose the necessity on him to do so to the characterization of the king as a superior: « There is no one who can impose the necessity of correcting or amending it upon him unless he himself so wishes since he has no superior except God... »<sup>91</sup>; or, « The king has no equal within his realm... nor *a fortiori* a superior, because he would then be subject to those subjected to him »<sup>92</sup>. As scholars have pointed out, Bracton intended to exclude the authority of any other prince or king over the English king and within England the possibility that a writ could run against him<sup>93</sup>. Tierney has shown that *superior* in this sense did not mean that the king was *legibus solutis*, not subject to law but rather that the king was the supreme enforcer of law. Therefore without him there could be no judicial enforcement of the law. Nor would it make sense to say that the king could enforce the law against himself<sup>94</sup>. This is Bracton's position. If the king is to fulfill his coronation oath to do justice to all men, the king « must surpass in power all those subjected to him »<sup>95</sup>. Added to these words is the gloss: « He ought to have no peer, much less a superior, especially in the doing of justice... »<sup>96</sup>.

The word *superior*, therefore, suggests two ideas, that a person has *auctoritas* over subjects and also actual *potentia*<sup>97</sup>. Bracton apparently is conscious of both these senses

<sup>91</sup> THORNE, IV, p. 159.

<sup>92</sup> THORNE, II, p. 33.

<sup>93</sup> Schultz discusses both these ideas in *Bracton on Kingship*, pp. 149-51.

<sup>94</sup> B. TIERNEY, 'The Prince is Not Bound by the Laws'. *Accursius and the Origins of the Modern State*, in « Comparative Studies in Society and History », V (1962-63), pp. 378-400. For *q.p.p.*, see E. LEWIS, *King Above Law?*, pp. 240-69, which deals extensively with E. Kantorowicz's thesis of a king 'above and below' the law. I agree with Lewis's conclusion that Bracton's use of *q.p.p.* is in reference to the king making a judgment as he pleases and that Bracton considered *q.p.p.* irrelevant in this instance because even in making law, what 'pleases the king' is what has been rightly defined by counsel and what the king gives his authority to.

<sup>95</sup> THORNE, II, p. 305: « Potentia vero omnes sibi subditos debet praecellere ».

<sup>96</sup> *Ibid.*: « Pareni autem habere non debet nec multo fortius superiorem maxime in iustitia exhibenda... ».

<sup>97</sup> See also LEWIS, *King Above Law?*, pp. 256-58, for a distinction similar to the one made here.

when he discusses the king's coronation oath and the royal duty to do justice. The king not only has authority but he also ought (*debet*) to have the power (*potentia*) to enforce justice, for «it would be to no purpose to establish laws (and do justice) were there no one to enforce them»<sup>98</sup>. Bracton's concern about possible excesses or misuse of royal *potestas* stems from his belief that the king's *potentia* ought to surpass all over whom the king ruled. Bracton is led naturally in this discussion to make clear that the king's *potestas*, however, is limited to doing justice, for this *potestas* alone is from God. The *potestas* on the other hand to do injury is from the devil<sup>99</sup>. But whatever the source of the king's authority, it might be argued that the king's power, *potentia*, could be exercised oppressively, even violently against his subjects: «He is a king as long as he rules well but a tyrant when he oppresses by violent domination the people entrusted to his care»<sup>100</sup>. Therefore Bracton urges the king to «temper his power by law, which is the bridle of power». Though one might speak of law as a bridle of authority, *potestas*, it seems more likely that Bracton believed the law was in some sense a bridle to be put on the exercise of power, which his use here of *potentia* suggests: «Temperet igitur potentiam per legem quae frenum est potentia...»<sup>101</sup>.

In his discussion of the status of persons, he had added, after stating the king had no superior, «nor one more powerful [*nec multo fortius superiorem, neque potentioiorem*]»<sup>102</sup>. In glossing the next sentence, which states that the king should be under the law, he noted that the

<sup>98</sup> THORNE, II, p. 305: «et supervacuum esset leges condere et iustitiam facere nisi esset qui leges tueretur».

<sup>99</sup> *Ibid.*: «Potestas itaque sua iuris est et non iniuriæ...», and, «quia illa potestas solius dei, potestas autem iniuriæ diaboli et non dei...».

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.* H. Kantorowicz called this comparison of the law with a bridle of power rather than with an instrument of power «Bractonian» (*Bractonian Problems*, p. 61).

<sup>102</sup> THORNE, II, p. 33. His translation simply renders both «*superiorem*» and «*potentioiorem*» of Bracton's text by the one word «superior», which is appropriate, but it does require one to keep in mind the distinction between *de iure* and *de facto* implicit in the use of the word «power» and apparently intended by Bracton.

king ought to « bestow upon the law what the law bestows upon him, namely rule and power [*videlicet dominationem et potestatem*] »<sup>103</sup>. The law gives the king authority (*potestas*) and he should therefore give authority to it in return. Bracton does not appear to be talking here about the power to coerce but about the authority to enforce the law. His argument is that the king should voluntarily submit his power to be bound or bridled by the authority of the law. The same distinction between the authority to coerce and the actual use of coercion is implicit in an extended gloss in which Bracton compares what Jesus Christ did — submitting Himself to the law — and what the king ought to do: « God chose this most powerful way to destroy the devil's work, he would use not the power of force but the reason of justice [*non virtute uteretur potentiae sed iustitiae ratione*] »<sup>104</sup>. Almighty God chose not to use coercive force but rather the observance of the *ratio* of justice to save the human race. It seems very likely, then, that Bracton understood *superior* to include the concepts both of *auctoritas* and *potentia*, that is both the authority and the force necessary to enjoin compliance with law<sup>105</sup>.

Accordingly, Bracton affirms in *nisi sit qui dicat* that against one who has no superior other than God there is no remedy through writ or judicial coercion; for remedy, one must wait the vengeance of God<sup>106</sup>. The latter implies, as the former clearly states, that there is no way on earth through a judicial process to enforce a judgment against the king. The opinion, however, which Bracton presented in *nisi sit qui dicat* as that of some others, held that there was a way by which the king could be coerced to accept a judgment against him. Since Bracton understood that the king is the ultimate enforcer of law, and that his power, not just his *auctoritas* but also his *potentia*, should surpass that of his subjects, it is clear why he would not

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.* For a discussion of Bracton's thought here, see note 111 below.

<sup>105</sup> In the same text (THORNE, II, p. 33), however, he later uses *potestas* rather than *potentia*: « Sic ergo rex, ne potestas sua maneat infrenata ».

<sup>106</sup> THORNE, II, p. 43.

adopt this apparently contrary opinion. If the *universitas regni* and the baronage had a sufficiency of coercive power to impose amendment of his deeds on an unwilling king, the supremacy of royal coercive power was at best challenged and at worst rendered ineffective.

The *addicio de cartis* addressed the same issue which *nisi sit qui dicat* took up but with a new insight. In using *q.s.h.* to argue how the *curia* was a *superior* of the king, Bracton is in fact limiting and circumscribing the meaning of *superior*, in this instance, to the exercise of a form of coercive power which he thought was admissible. The argument of the *addicio* begins straightforwardly. It speaks of amending an *iniura* of the king: «but one may say that the king has committed an *iniuria*, and thus charge him with amending it...»<sup>107</sup>. The first part of this statement goes no further than what Bracton had written elsewhere: «And since it is not his deed, because wrongful, it may be questioned and judged...» Bracton, however, had continued on in this passage to say «but it cannot be amended or revoked without him»<sup>108</sup>. Amending the king's act or revoking it in some sense against his will is what the *addicio* appeared to intend by the words «and thus charge [*imponere*] him with amending it», and *nisi sit qui dicat* by «*hoc facere*». In the *addicio*, imposing the necessity of amending his deed, *imponere*, is parallel to and linked by alliteration to the notion that the king should be bridled by the barons: «if he is without bridle, that is without law, they ought to put the bridle on him [*fraenum apponere*]»<sup>109</sup>.

Elsewhere, however, Bracton urged, if not presumed, that the king will bridle his own power through the exercise of temperance and moderation and will therefore be in compliance with the law. Self-restraint should regularly lead the king to put on the bridle of power. But perhaps Bracton went even further in a particularly disputed pas-

<sup>107</sup> THORNE, II, p. 110.

<sup>108</sup> THORNE, IV, p. 159.

<sup>109</sup> THORNE, II, p. 33. For *fraenum* see note 101 above.

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sage to urge the king not only to submit voluntarily to the law but by implication also to accept a judgment against himself by the *curia*:

And that he ought to be under the law appears clearly in the analogy of Jesus Christ, whose vicergerent on earth he is, for though many ways were open to Him for his ineffable redemption of the human race, the true mercy of God chose this most powerful way to destroy the devil's work, he would use not the power of force but the reason of justice. Thus he willed himself to be under the law that he might redeem those who live under it. For He did not wish to use force but judgment. And in that same way the Blessed Mother of God, the Virgin Mary, Mother of our Lord, who by an extraordinary privilege was above the law, nevertheless, in order to show an example of humility, did not refuse to be subjected to established law. Let the king, therefore, do the same, lest his power remain unbridled<sup>110</sup>.

God Himself, who lived and died under the law, submitted to judgment, and it would seem by implication, to the enforcement of a judgment that led to His death. He could instead have won salvation by the force of His almighty power and escaped judgment or death, but he chose to observe the course of justice. Therefore, Bracton appears to be arguing, the king *a fortiori* ought to submit voluntarily to lawful judgment and to the enforcement of that judgment. But Bracton nevertheless concluded this discussion, as has already been pointed out, with the statement that if the king is unwilling to amend his act, justice can only be done eventually through God's vengeance. The analogy, in emphasizing the voluntary character of the king's submission, dramatizes the issue of what kind of coercion is intended by «*hoc facere*» in *nisi sit qui dicat* or «*imponere*» in the *addicio*. Bracton could not have intended that the force used against Jesus Christ in His arrest, pas-

<sup>110</sup> *Ibid.*

sion and death was legitimate or defensible even if it were used against an errant king<sup>111</sup>.

The nature of the coercion which the *addicio* allowed to be used against the king is dependent upon whom the *addicio* assumed will exercise it and under what circum-

<sup>111</sup> THORNE (II, p. 33, n. 9-10) notes that Bracton is quoting Pope Leo the Great here. For a discussion of this passage see LEWIS, *King Above Law?*, pp. 263-65, who found the passage's purpose « at most, to adorn, to confuse, and, as Schultz notices, to interrupt an exposition that is otherwise sharply stated, consistent and also adequately developed in legal and logical terms. Needless to say, Lewis rejects the passage as the « particularly telling and clarifying instance » (that E. Kantorowicz claims it to be) of Bracton's conception of a king 'above and below' the law (*The King's Two Bodies*, pp. 156-57). Gaines Post has shown that the passage illustrates Bracton's point that the king should voluntarily submit to the law, *Bracton on Kingship*, especially pp. 546-48. I would go further than Post to suggest that Bracton asks the king to submit voluntarily to a judgment of positive law against him and, accordingly, even to the acceptance, therefore, of amending his act which would be the equivalent of a self-enforcement of the judgment. For the background of Bracton's phrase about the *singulari privilegio* of the Virgin see *Ibid.*, pp. 546-51. As Post has shown, Bracton is logically following his comparison of the king's voluntary subjection to the law with Mary's acceptance of a *singulare privilegium* that would require her still to be subject to human laws and, I might add, suffer as Simeon foretold (Lk. 2:34).

It does not appear remarkable, therefore, that Bracton was drawn into this theological excursion, or that he was not put off by the implication that Christ's suffering, in some form or other, might befall the king. The Christian doctrine of suffering like Christ was common enough in the thirteenth century to explain why Bracton did not hesitate at least by implication to suggest suffering might befall a king as well as Christ. In fact his quotation of Pope Leo the Great suggests that Bracton had a particularly ancient doctrine about mankind's salvation in mind that provided an *a fortiori* argument for the king's submission not only to law but through voluntary action to the amendment of his misdeeds. His quotation of Leo the Great refers to a belief that held that God undid the devil's just claim to dominate mankind, and therefore freed mankind from the necessary prospect of hell, through Jesus Christ's submission to a false judgment that condemned Him to death. For a brief statement of this belief and bibliography, and for the development by St. Anselm of an alternative view, see R.W. SOUTHERN, *St. Anselm and his Biographer*, Cambridge 1966, pp. 93-7. On p. 94, Southern writes: « If God seized Man by force from the Devil's rule, this would be a breach of the order and justice of the universe. Similarly, if the Devil extended his kingdom beyond the range of his voluntary subjects [mankind], this too would destroy the order and justice of his empire, breaking down his claim to a just and universal rule over mankind. In subjecting the sinless Man Christ to his empire of Death, the Devil overstepped the bounds of the rule and forfeited his claim to justice ». It is obvious why Bracton may have considered this an *a fortiori* argument for the king's voluntary submission to just judgment, because Christ had submitted Himself even to an unjust judgment to save His people. If this is Bracton's argument, it is hardly irrelevant adornment that he intended by drawing this analogy between the king and Christ.

stances. The persons whom the *addicio* and *nisi sit qui dicat* call upon to coerce the king to amend his act are the earls and barons (*comites et barones*), in the former case, and, in the latter, the « association » of the realm and the baronage (*universitas regni et baronagium*). In both instances Bracton seems to have in mind the same two classes of persons whom he refers to as earls and barons in the *addicio*. What Bracton understood by *universitas regni* is of special interest because it appears to parallel the *societas* which the *addicio* alleged that the king and barons form. His use in the *addicio* of the idea that the king and earls form a *societas* parallels an earlier passage. In the title « Of Persons » Bracton treated of earls separately from barons and derived the name of the former, *comites*, from their role as partners of the king:

Various powerful persons are established under the king, namely, earls, who take the name *comites* from *comitatus*, or from *societas*, a partnership... for kings associate such persons with themselves in governing the people of God...<sup>112</sup>.

Then after a digression about the significance of sword belts and swords he states, « There are other powerful persons under the king who are called barons... ». There can be no doubt that he distinguishes, in these passages between the earls and barons. Only the former, apparently, are the *socii* of the king.

But what weight did Bracton give the words *socius* and *societas*? Did he think the king and earls actually formed a Roman *societas*? Bracton used similar language, *socius*<sup>113</sup> and *associari*<sup>114</sup>, when he wrote about the relations of judges to each other and to the king. In these instances he did not imply that a Roman *societas* existed. In the case of the *addicio* Bracton carefully qualified what he had said earlier about the earls and *socii* of the king in the title « Of Per-

<sup>112</sup> THORNE, II, p. 32.

<sup>113</sup> THORNE, II, p. 309; III, pp. 257, 346; IV, p. 313.

<sup>114</sup> THORNE, II, p. 337.

sons ». The *addicio* states: « That is why the earls are called the partners, so to speak, of the king [*quia comites dicuntur quasi socii regis*] »<sup>115</sup>. The *addicio* alleges that the earls are only *quasi socii* of the king. *Quasi* can of course be understood either as part of a technical term, as when Bracton wrote of « quasi contracts » — or as indicating that something approximated something else. The latter seems more probable as his meaning in the *addicio*, since legists used the phrase *quasi societas* in that sense rather than to suggest a special status or distinct entity. Thorne in his translation of the *addicio* also understands its meaning in this comparative sense. Azo's brief discussion of *quasi societas* in his introduction to the title *Pro socio* speaks of it in this manner and makes references with which the reader may now be familiar:

A quasi-partnership is contracted by consent alone among cohabitants as in D.9.3.4, and between a lord and serf as in D.19.2.25.6<sup>116</sup>.

In the first two instances the citations are to the language of the Digest itself: « ...a wife, who is received into the home as a partner [*socia*] in human and divine affairs (C.9.32.4) »; and « ...otherwise a sharecropper by the law of partnership, so to speak (D.19.2.25.6) »<sup>117</sup>. Clearly the character of the partnership in these cases was limited by differing personal statuses or by other features of the dominant relationship in which these parties were involved. Thus, for instance, although the wife may be a partner of her husband, it is essentially as a sexual partner that she has equality<sup>118</sup>. In the case of the *colonus*, not only is his status unequal to that of his lord but his legal condition may be different, too. The applicability of the analogy of

<sup>115</sup> THORNE, II, p. 110.

<sup>116</sup> AZO, *Summa Aurea*, fo. 103v: « Quasi societas solo consensu contrahitur inter cohabitantes, ut ff. de iis qui deiec. lex perceptione. Item inter virum et uxorem ob debitum carnis ut infra de crim. epil. haere. adversus. Item inter dominum et colonum ut ff. locati, si merces par. vis ».

<sup>117</sup> D. 19.2.25.6: « ... alioquin partiarius colonus quasi societatis iure et damnum et lucrum cum domino fundi partitur ».

<sup>118</sup> Raymond de Penafort explains what Azo had summarized as *debitum carnis* in his *Summa*; see note 44 above.



a *societas* in these instances was quite limited and based primarily on the similarity between the relationship involved and the broad definition of partnership as a cooperative effort by two or more to share varying resources for mutual profit or benefit.

If Bracton only meant that the relationship between the king and the earls was like a partnership, a *quasi societas*, it would not appear exceptional or surprising. Albericus witnesses to a similar use. In glossing D.19.2.25.6, which Azo had cited in connection with his explanation of *quasi societas*, Albericus raised the question of whether a lord should bear with a minor or slight injury at the hands of his vassal. Since Albericus had just interpreted this law to provide that modest damages or gains in quasi partnership could be ignored, he probably understood that a lord and his vassal could be considered to form a *quasi societas*<sup>119</sup>. When Bracton applied the term *societas* to the relationship between the king and earls he only did so in the limited sense in which legists similarly applied the term. Nor does his omission of « *quasi* » in his description of the *societas* that the king and earls formed in the title « Of Persons » suggest he had something else in mind there. Since the argument of the *addicio* rests on the claim that the earls are *socii* of the king, Bracton had to be careful there about what he actually asserted their relationship was. In the former

<sup>119</sup> *Super Digesto Veteri*, fo. 161v: « Modicum damnum vel lucrum non attenditur ut per hoc augeatur vel diminuatur merces... ». Since this states his interpretation of the paragraph *Vis maior* (D. 19.2.25.6), it may possibly be his thought here that smallness in principle allows one to discount the matter rather than that the relationship of the lord and his vassal is like that of partners and, therefore, that a minor injury should be sustained without complaint by a lord: « et quod dominus debet sustinere levem et modicam offensam vassali ». Albericus elsewhere provides interesting evidence for what Bracton may have intended when he stated that « rex parem non habet, nec vicinum, nec superiorem » (THORNE, II, p. 157). The first and last exclusions of *De legibus* have received comment, but not the middle one that the king has no « neighbor ». In discussing the likeness of *societas* to brotherhood in a gloss to D. 17.2.63, Albericus states that neighbors, *vicini*, are called *quasi socii* (*Super Digesto Veteri*, fo. 133v). Bracton probably intended, therefore, that the king cannot be bound as a private person might be to his neighbors as *quasi socii* (see THORNE, III, p. 127, for whatever this may have implied). If this is the case, Bracton may well have been familiar with other relationships which were interpreted as being similar to a partnership, *quasi societas*.

place he did not need to exercise such care. He only asserted in the title « Of Persons » that kings associated earls with themselves in governing and, therefore, their name could be derived either from *comitatus* or *societas*.

If Bracton intended to use *societas* in such a loose way, what sense did it make to exclude the barons from this relationship? In fact, it is not likely that Bracton made such an exclusion, although he accepted the constraints which he believed etymology imposed on his use of *socius*. In the *addicio* he included the barons along with the earls in the king's *curia*, which is his *superior*. *In nisi sit qui dicat* the barons may be said to be included under a double title, the *universitas regni*, which was usually inclusive of them, and the redundant *baronagium*<sup>120</sup>. In fact his choice both of *societas* and *universitas regni* may show more concern about the relationship between persons than about who they were. Even though his use of these collective terms need not be construed to mean he believed that the kingdom was literally a corporation or partnership<sup>121</sup>, it is difficult to avoid the conclusion that he intended to mean that the barons and earls were to act collectively as representatives,

<sup>120</sup> F.M. POWICKE, *King Henry III*, I, p. 357, and by the same author, *The Thirteenth Century, 1216-1307*, 2nd ed., Oxford 1962, pp. 132, 142. For the parallel *communitas regni*, see J.R. STRAYER, *Statute of York and the Community of the Realm*, in « American History Review », XLVII (1941), pp. 1-22; and W.A. MORRIS, *Magnates and Community of the Realm in Parliament 1264-1327*, in « Medievalia et Humanistica », I (1943), pp. 58-94, who differs with Strayer mainly in the interpretation of its meaning after 1300.

<sup>121</sup> P. MICHAUD-QUANTIN, *Universitas*, p. 66. Michaud-Quantin states that usage allowed *societas* to designate almost any association or gathering, and quotes a thirteenth century gloss as giving as equivalents of *socius*, « consors, conscius, particeps, adiutor, minister, comes, amicus ». Nor was *universitas* strictly applied (see *Ibid.*, pp. 33-63). For Bracton's expertise in corporate terminology see note 71 above. The controversy concerning the University of Paris illustrates the point. When the masters became a corporation has been a matter of debate, and until the mid-thirteenth century the masters themselves emphasized their characteristics as an association, a partnership, rather than as a corporation. See G. POST, *Parisian Masters as a Corporation, 1200-1246*, in « Speculum », IX (1934), pp. 421-45, for an analysis of the evidence for the date of the emergence of the masters as a corporation, and P. MICHAUD-QUANTIN, *Le droit universitaire dans le conflit parisien de 1252-57*, in *Studia Gratiana*, VIII (1962), pp. 580-99, for the conflict over the legal status of the corporation and the right of the masters to exclude persons from membership.

in some fashion, of the kingdom<sup>122</sup>. Minimally it would seem both passages affirm that acknowledged leaders of the earls and barons and not just a motley crew were to act together to coerce the king. Obviously, nothing short of this would make much political sense.

Unexplained still is what must appear now especially contrived: the argument of the *addicio* that the *curia* is a *superior* of the king because the earls are his quasi partners. If the argument of the *addicio* is that a special form of coercion may be used to make the king amend his act, there is an answer for the curious turn the argument takes. Implicit in both the *addicio* and *nisi sit qui dicat* is the belief that coercion is to take place in the king's *curia*. In the former it is explicitly stated that the *universitas regni* and baronage are «to do this» in the king's court. The *addicio* only implies that the king is to be bridled in his court. Since it asserts that the king may be charged — that is, coerced to amend his act — Bracton would have understood the king to have had a *superior*, an authority and a coercive force to compel him to amend his act. The *addicio* continues logically, therefore, to affirm that the king indeed has a *superior* in God and the law. But in the former case, though God's vengeance is real enough, it cannot be depended upon for immediate results however certain it will ultimately be. The law, too, is a *superior*, but not in the sense that it can coerce the king to amend his act. At best, as Bracton noted elsewhere, when the law is against the king and that fact or that judgment is made public, the law can, in a manner of speaking, compel the king through shame or perhaps even fear to amend his act<sup>123</sup>. Thus if the *addicio* is to assert that there is another *superior*, it must assert a source not only for that authority but for the form

<sup>122</sup> The phrase *communitas regni* was in fact associated with the leading earls and barons acting in concert on behalf of the *regnum* even against the king. See, STRAYER, *art. cit.*, pp. 10-12; he notes that at the end of Henry III's reign the king had accepted the language of the magnates. POST, *Public Law and the State*, p. 325, notes that «the magnates had considered themselves to be the essential corporation or *universitas regni*».

<sup>123</sup> THORNE, II, p. 43.

of coercion it would propose. Even though Tierney argued that the king judging together with his *curia* may have been considered superior to the king judging alone<sup>124</sup>, the *addicio* must address a different question. The authority of the *curia* acting with or without the king is not as much at issue as is its power to compel the king to amend his act. Further, in acting contrary to justice the king would actually be acting in Bracton's eyes without authority. Clearly, then, what the argument has to affirm is that his *curia* has sufficient power as well as authority to impose amendment of an injury on the king, and the kind of power that could not blunt the king's ability to coerce.

If the opinion Bracton cited in *nisi sit qui dicat* and implied in the *addicio* is that the *curia* should impose the amendment of an *iniuria* on the king, the possibility that this coercion would be applied by members of the *curia* in the *curia* ought not to be excluded. If one limits what is understood by amending the king's act to mean simply judging his misdeed but not compelling the king to amend it, one might easily be persuaded that this could be done in the *curia*. However, even for the *curia* to judge his act would require the king to have been compelled if not persuaded to be present, and *a fortiori* if present to accept a judgment against himself and to remedy his misdeed<sup>125</sup>. In his study of Henry III's use of his *curia*, Turner noted that cases begun by petition to amend the king's act, like that of Hubert de Burgh, «left unanswered the question of coercion: with what weapons were the barons to put a bridle on the king if not with warfare?»<sup>126</sup>. Some believe

<sup>124</sup> TIERNEY, *Bracton on Government*, pp. 314-17.

<sup>125</sup> Though in the case of Hubert de Burgh the king stated he participated in the judgment of his own gracious will, the baronial crisis which his policies created had required him to come to terms with the political forces that were unleashed. POWICKE, *King Henry III*, pp. 131-40, 143-44.

<sup>126</sup> TURNER, *The King and His Courts*, p. 251. Matthew Paris speaks of the king as relying, *fretus*, on the advice of his council. His use of *fretus* suggests that he saw or hoped, as the case might be, that the king was 'held back' in his *curia* from undertaking what would be ill-advised schemes (M. PARIS, *Chronica Majora*, ed. by H.R. Luard [Rolls Series, VLII, vols. I-VII], V, pp. 130, 159). Matthew, though not making it explicit, apparently believes that the *curia* or even individual counsellors should rein

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the *addicio* answered this question unequivocally in favor of a *ius rebellionis*<sup>127</sup>. If, however, the argument of the *addicio* is understood to parallel that of *nisi sit qui dicat*, it may very well have intended to limit the form of the coercive action as well as its authority to the *curia*, that is, to what could be done in the *curia* short of using force of arms to make the king amend his act. Contemporary baronial politics, which put so much energy into seeking to control appointments to the king's council, also suggest the barons believed that leverage could be applied in the *curia* to move the king in matters of concern to them<sup>128</sup>.

How the king was to be compelled in his *curia* to amend his act remains the final piece of the puzzle to be found. The maxim *q.s.h.* may prove to be that piece: when put in place it suggests how Bracton came to believe that the earls and barons could act in the *curia* as a *superior*, in a limited sense, to be sure, of the king. Powicke's narrative and interpretation of the events of 1258 are helpful in suggesting the kind of events which Bracton perhaps had witnessed earlier in Henry III's reign and which he may have considered were aptly described by the maxim *q.s.h.* :

Leaving their swords at the door, they entered the king's hall. Hugh Bigod, with reassuring words, gave their ultimatum to the perturbed king. Henry and his reluctant heir swore on the gospels to submit themselves entirely to their counsel

the king in from some of his willful actions (*Ibid.*, pp. 6-7, 91, 128). For Paris's aristocratic bias and interpretation of political events, see H. PLEHN, *Der Politische Charakter von Matheus Parisiensis. Ein Beitrag 13. Jahrhundert*, 1897 (Staats- und Socialwissenschaftliche Forschungen, XIV), especially pp. 42-93; also R. VAUGHAN, *Matthew Paris*, Cambridge 1958, pp. 137-42, 137.

<sup>127</sup> H. KANTOROWICZ, *Bractonian Problems*, p. 50, merely implies this to be the intent of the *addicio*. The characterization of the *addicio*'s position as giving a *ius rebellionis* is LAPSLEY's, *art. cit.*, pp. 15, 17.

<sup>128</sup> POWICKE, *King Henry III*, I, pp. 290-342. TURNER, *The King and His Courts*, p. 168, notes that in the twelfth and thirteenth centuries the *curia* was «more often a deliberative body for debate on matters of war and peace, taxation and custom than it was a trial court». This same point is made and its importance for understanding Bracton underscored by TIERNEY, *Bracton on Government*, p. 308: «Administrative business was commonly transacted under judicial forms and before courts that were also courts of judicature. Bracton's work is soaked in the preconceptions of such a system».

and to consent to all that they wished to have done. The letters patent which record the king's undertaking were drawn up 2 May. One document announced the agreement. It stated that at the parliament now ending the king had discussed with his barons the prosecution of the Sicilian business. The barons had replied that they would do their best to get an aid from the community of the realm if the pope would moderate his conditions and the king would reform the state of the realm<sup>129</sup>.

Though the threat of force or armed rebellion may not have been excluded from these proceedings, clearly in Henry III's case it was the prosecution of his Sicilian scheme and accordingly his need of both money and the barons' cooperation that may have been the compelling factor in his acceptance of the baronial demands. Although these demands may not have required the specific amendment of one of the king's acts, they clearly did involve a change in how he was to make appointments to his *curia* and all that this implied<sup>130</sup>. On this occasion, representatives of the earls and barons had persuaded the king or coerced him, against his oft-repeated policy, to change his « acts » in order to gain political and financial support. This « compromise » had probably been reached in his *curia* and appears to be typical of the « compromises » in which the king normally took part in the *curia*<sup>131</sup>.

Although this is a possible interpretation of certain crucial political events, is it what the *addicio* intended? Another peculiarity of the *addicio*'s argument supports the supposition that it is. In explaining why the *curia* is the king's *superior*, the *addicio* alleges « That is why the earls are called the partners, so to speak, of the king... ». But

<sup>129</sup> Powicke, *King Henry III*, I, pp. 377-78. Nor is this a singular instance. Powicke describes the settlement at Westminster, 13 May 1253, when the barons granted an aid and the prelates the tenth, « on condition that its proceeds were spent during the crusade under the oversight of the magnates who were with the King ». *Ibid.*, p. 368.

<sup>130</sup> *Ibid.*, p. 379.

<sup>131</sup> See TURNER, *The King and His Courts*, pp. 121-24, for the king's involvement in the *curia* in reaching settlements.

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the *curia*, as the *addicio* notes, is composed of earls and barons<sup>132</sup>. To show that the earls strictly speaking alone are partners fails to prove or explain how the *curia* itself was the king's *superior*. But as already discussed, Bracton did not consider earls to be literally partners, anyway. His argument did not depend on a *non sequitur*. If his intent was to show that the *curia* could responsibly compel the king to amend his act and thus, in some sense, act as his *superior*, a reference to *q.s.h.* could make the point. Common usage which called earls *socii* of the king gave him the opportunity to suggest, by using the maxim *q.s.h.*, that the *curia* could use political persuasion to compel the king to amend his act, as it had in the past.

But was *q.s.h.* widely enough known to have come to Bracton's attention and to be useful to illustrate his point? The lack of evidence of *q.s.h.*'s use earlier than Bracton or after him until Albericus referred to it, hardly encourages belief in the maxim's ubiquity. Nevertheless, my argument supposes it was known to those for whom Bracton wrote. Since Albericus, too, is the only witness to *q.s.h.* in his century, and speaks of it as a maxim, the supposition that it was known in the early thirteenth century is no more implausible, though Bracton, too, is the only witness to it in his time, than it is to assume it was a maxim in the fourteenth century. The caution offered so many years ago that much of what Bracton drew on may have come « from a tradition so general that it was in the mouths of all the learned of the time »<sup>133</sup> may be true in this instance, if what had been on their lips was an Italian maxim. The maxim *q.s.h.* may have easily traveled with commerce from Italy. Mercantile partnerships, even Italian, were becoming important in banking in the England of Bracton's time<sup>134</sup>. As early as the reign of Richard I, English-

<sup>132</sup> LAPSLEY, *art. cit.*, p. 15, asserted that the argument of the *addicio* is a *non sequitur* since only the earls are *socii* and therefore the barons could not be the king's masters.

<sup>133</sup> C.H. McILWAIN, *art. cit.*, p. 224.

<sup>134</sup> N. DENHOLM-YOUNG, *The Merchants of Cahors*, in « *Medievalia et Humanistica* », IV (1946), pp. 37-44; also Y. RENOARD, *Les Cahorsins*,

men had gone to Genoa to establish business partnerships<sup>135</sup>. Accordingly it is not necessary to suppose that familiarity with Italian business practices came to England only through Italians living there<sup>136</sup>. Turner discovered a number of cases heard surprisingly *coram regem* during Henry III's reign in which one of the parties was a merchant partner<sup>137</sup>. It is hard to believe that as a clerk and practicing lawyer Bracton would not have had some familiarity with Italian business partnerships and not come to know, then, of a maxim, *q.s.h.*, which he might have believed would make his meaning clear to his readers, rather than obscure it.

The relationships between the partners of which the maxim spoke were of a different kind than between partners in a Roman *societas* and probably more widely known — those between a *commendator* and a *tractator* — but still spoken of in terms of *socius* and *societas*<sup>138</sup>. The *com-*

*hommes d'affaires français du xiii<sup>e</sup> siècle*, in « Transactions of the Royal Historical Society », 5th series, XI (1961), pp. 43-67, especially pp. 49-54. For Italians in England, see W.E. LUNT, *Financial Relations of the Papacy with England to 1327*, Cambridge 1936, p. 599f.; also G. OLSON, *Italian Merchants and the Performance of Papal Banking Functions in the Early Thirteenth Century*, in *Economy, Society, and Government in Medieval Italy: Essays in Memory of Robert L. Reynolds*, ed. D. Herlihy, R.S. Lopez and V. Slessarev, Kent 1969, pp. 45, 52-53; and A. SAPORI, *Le compagnie italiane in Inghilterra (sec. XIII-XIV-XV)*, 3rd ed., Florence 1956, pp. 1059-70.

<sup>135</sup> In fact Robert L. Reynolds concluded from the evidence that very close contacts were maintained between the English partners in Genoa and London; see *Some English Settlers in Genoa in the Late Twelfth Century*, in « The Economic History Review », IV (1933), pp. 317-23.

<sup>136</sup> Matthew Paris finds Italians almost omnipresent and most avaricious (*Chronica majora*, V, pp. 245, 558, 581, 680). The financial relations of Canterbury Cathedral Priory, for instance, with Italian partnerships have been detailed by Mavis Mate in *The Indebtedness of Canterbury Cathedral Priory 1215-95*, in « The Economic History Review », XXVI (1973), pp. 183-97. Mate argues that the expulsion of the merchants in 1240 was due in part to condemnations of usury and led to a modification of practices connected with lending for interest; see especially, *Ibid.*, pp. 185f., 190, 193f.

<sup>137</sup> TURNER, *The King and His Courts*, pp. 52, n. 166; 54, n. 177; 178. Long ago Güterbock noted in *Bracton and His Relation to Roman Law*, p. 50, that Bracton refers explicitly to D. 39.4 (*De publicanis*, etc.). See THORNE, II, p. 323, where Bracton's reference to D. 39.4.16.13, is shown to be in an *addicio*. How familiar the author of this *addicio* was with the title *de publicanis et vectigalibus et commissis* can hardly be inferred from such a casual reference, but it is tantalizing to speculate that he might have found an earlier reference to *q.s.h.* in a gloss to the Digest where Albericus was later to make reference to it.

<sup>138</sup> Bracton's use of « *quasi socii regis* » suggests not only that he did



*mendator*, the *dominus* of the capital, could set certain conditions for its use and if a *tractator* wanted the money badly enough he would have to accept those conditions. Bracton is asserting in the *addicio* that the king as a *tractator* has a *superior* of sorts in his *commendator*: the barons, whose money he wants. The barons are his «master»; that is, they are able to set their terms and if the king wants their money badly enough he may be compelled to do their bidding — in this instance, to amend his act. In this sense the king has a *superior* in his *curia*.

If Bracton intended this comparison in using *q.s.h.*, it is not without irony. The king's constant demands for money for his largely unpopular ventures abroad may well have made him appear to be like a feckless or reckless *tractator*<sup>139</sup>. If Bracton had used *q.s.h.* in this sense, it would help to explain why, as Richardson pointed out, the royalist author of *Fleta* took no exception to the *addicio*<sup>140</sup>. As a maxim, it spoke equally of the mastery a *tractator* had of the *commendator's* money once it was in his possession, and it was this half of the maxim's meaning that Albericus had relied on to explain «*licet domini non sint*». Further, the maxim dealt only with contractual relation-

not believe the earls were literally partners in the governance of England, but also that he understood the *socii* of the maxim were not partners in a Roman *societas*. The relationship between *commendator* and *tractator* could in Bracton's mind have been like other relationships that were analagous to a Roman partnership and were thus called *quasi societas*, as, for instance, the example in note 119. Also it is interesting to note an order issued by King John in 1203 to the justices of Westminster that they were not to entertain pleas against anyone «while their money [denarii] is in the lord king's service beyond the sea». The order is quoted in TURNER, *The King and His Courts*, p. 76. I have found no case, however, in which a legist has referred to a *commenda* as a *quasi societas*. My explanation of his use of the maxim does not assume that Bracton believed the king was literally a *tractator* when such grants were made. The comparison was useful only in describing how the *curia* was politically *superior* to the king in a way that Bracton thought would be readily understood by others.

<sup>139</sup> For his foreign ventures see POWICKE, *King Henry III*, I, pp. 208-58; 343-409.

<sup>140</sup> RICHARDSON, *Bracton: The Problem of His Text*, pp. 31-32. He also believed (*Ibid.*, p. 34) that Lapsley's interpretation of the *addicio* would make it contradict what Bracton wrote about lese-majesty (THORNE, II, pp. 334-37), in pleas of which Bracton provides that the *curia* itself, without the king, will judge (*Ibid.*, p. 337).

ships and could hardly have been understood to imply something about what today might be called the constitutional position of the monarchy. The relationship entered into in a *commenda* contract was short-lived, usually for a specific journey. The parties of such contracts thus came and went sometimes never to see each other again.

Bracton's use of *q.s.h.* did not, then, have revolutionary implications. The argument of the *addicio* could clarify the role of the *curia* as a kind of political superior of the king when he had acted wrongfully, that is, contrary to his authority as king and therefore without royal authority. In such instances, it is the argument of the *addicio*, the king may be compelled to amend his act in the *curia* not through violence against his person or property but only through the persuasion that the power to grant money and assistance could have. Bracton could have believed it possible to compel the king to amend his act in this way, because ultimately it meant that the king himself would be willing to amend it. If understood in this sense, the position of the *addicio* is much more circumspect than the opinion Bracton cited in *nisi sit qui dicat* but did not espouse. During the time between the writing of the latter and the *addicio*, the author may have come to understand the practical implications of the idea of superior. Superior did not imply *de iure* absolute power, and certainly *de facto* the notion of coercive force, which it required, could be relative, subject to changing circumstances. In seeing that the earls and barons could use the granting or refusal of financial and political aid in the *curia* as a form of coercion to force the king to amend a wrongful act, one does not have to believe that Bracton was a revolutionary lawyer or whig historian. The one discrepancy between his usage of the maxim *q.s.h.* and Albericus's may even be due to Bracton's effort to domesticate the letter of the word in his source, the Italian maxim. In Bracton's wording of the maxim there is no *dominus*. The *socius* has a master, *magister*. Even though thirteenth-century

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usage would allow one as a substitute for the other<sup>141</sup> and in Italian at a later date the proverb is quoted using *signoria* or *padrone*<sup>142</sup>, and less frequently *maestro*<sup>143</sup>, it may be that Bracton in quoting the maxim winced at using *dominus* in a context in which he usually referred to the king as *dominus rex*. Since *magister* could do as well and was a common title of persons who served the king in and out of his *curia*, he may have deliberately chosen the word *magister* instead of *dominus*.

The *addicio* is therefore not the « dogmatic statement » that Maitland would have had us believe it is, nor the « shallow » and « slipshod » argument Lapsley called it, nor, as Lewis caricatured it, the « concoction of an untidy mind »<sup>144</sup>. If anything, the *addicio* gives evidence that its author moved carefully from the position expressed elsewhere in *De legibus* that supreme authority could never be coerced even if it did wrong, to a belief that subjects could use certain means to require kings to amend their wrongful acts. What the *addicio* sanctioned was not coercive force against the king's person or property, but the use of political and financial pressure in his *curia* to compel him to amend his wrongful act. In short, the *addicio de cartis* did not endorse the position rejected in *nisi sit qui dicat*, and its author did not have to throw out his first principles<sup>145</sup>. Experience and reflection, not an ideological revolution, can explain the change in position<sup>146</sup>. The occasion for the change of mind could

<sup>141</sup> « Magister » in classical usage could refer to kings and princes from whom power or authority emanate, as well as to colleagues in an association. See *Thesaurus Linguae Latinae*, VIII, fac. 1, Leipzig 1976, col. 771. Du CANGE, *Glossarum Mediae et Infimae Latinitatis*, vols. I-VII, repr. 1954 (1883-87), V, pp. 168-173, provides a list of offices of *magistri* many of whose holders could also have been called *domini* (*Ibid.*, III, pp. 172-75).

<sup>142</sup> For example see G. NARDI, *Proverbi: Frasi e modi proverbiali del Ravennate*, Imola 1922, p. 28.

<sup>143</sup> A. PIANO RUGGERI, *Enciclopedia dei proverbi e dei detti celebri*, Milan 1969, p. 83.

<sup>144</sup> MAITLAND, *Bracton's Note Book*, I, 32; LAPSLEY, *art. cit.*, p. 15; LEWIS, *art. cit.*, p. 264, n. 86.

<sup>145</sup> MAITLAND, *Select Passages*, p. 65.

<sup>146</sup> Earlier in *Bracton's Note Book*, p. 33, Maitland had left the possibility open that Bracton had added the gloss *g.s.h.* « having learned and unlearned many things since he wrote the body of the treatise ».

have been the events of the early 1240s when the king and Bracton's patron, Raleigh, then bishop-elect of Winchester, were at odds. These events may have led him to reflect on the precedent established in the case of Hubert de Burgh. Bracton may have become convinced of the need to accommodate the absolutist implications of the position of *De legibus* — against the use of any coercion to force the king to amend his acts — with the constant needs of the *communitas regni* for reform<sup>147</sup>. He had only to acknowledge that the meaning of the doctrine that the king had no *superior* did not exclude the use by the *curia* of a form of compulsion (the grant of monies or their denial) to which it was entitled, to persuade the king to change his mind and to amend his act. Persuasion through the power of the purse, even if it is not stated in such words, is what the *addicio* accepted<sup>148</sup>.

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<sup>147</sup> THORNE, III, p. xl.

<sup>148</sup> If this is Bracton's intent in using *q.s.h.*, *Fleta*, which omits *q.s.h.* in its summary of the *addicio* may already have missed Bracton's point: « Verumtamen in populo regendo superiores habet ut legem per quam factus est rex, et curiam suam, videlicet comites et barones. Comites enim a comitiva dicantur, qui, cum viderint regem sine freno, frenum sibi apponere tenentur ne clament subditi 'Domine Iesu Christe, in chamo et freno maxillas eorum constringe' ». Ed. H.G. Richardson and G.O. Sayles, London 1955 (Selden Society, vol. LIII), II, pp. 36-7. Yet Richardson would understand the royalist author of *Fleta* to have held this to be innocuous; *Bracton: The Problem of His Text*, p. 31. Similarly, the interpretation put on it by John Bradshaw, Lord President of the High Court of Justice which tried Charles I, is far different from Bracton's intent: « This we know to be law, *Rex habet superiorem, Deum et legem, etiam et curiam*; so says the same author. And truly, Sir, he makes bold to go a little further, *Debent ei ponere fraenum*: they ought to bridle him. And, Sir, we know very well the stories of old: those wars that were called the Barons' War, when the nobility of the land did stand out for the Liberty and Property of the Subject, and would not suffer the kings, that did invade, to play the tyrants freer, but called them to account for it; we know that truth that they did *fraenum ponere* »; From *Cobbett's Complete Collection of State Trials*, IV, London 1809, col. 1009f. Bradshaw believed that the *addicio* justified armed rebellion, but interestingly he does not quote the maxim *q.s.h.* Perhaps he saw no reason to, but I suspect it had already become a puzzle to those who read it. One of the earliest English collections of proverbs omits *q.s.h.* (See C. SPERONI, ed., *Charles Merbury «Proverbi Vulgari»*, Berkeley 1946 [University of California Publications in Modern Philology, vol. XXVIII]). How-

ever, the issue which the *addicio* addresses should have been of interest to Merbury, for his collection of proverbs is appended to his *A Briefe Discourse of Royall Monarchie as of the Best Commonweale*, London 1581, and at p. 43f., he states: « Our Prince therefore is not to receive his power from any... But our Prince, who is the image of God on Earth... is not to acknowledge any greater then himselfe; nor any authoritie greater than his owne. Wherefore as he is not to receive his power from any: so is he neither to be subject unto any higher Power, either at home, or abroad: though some doe maintaine that a Prince ought to be subject unto the states and Peares of his Realme: as the kinges of Lacedemon were to the Ephori. An opinion (if it be not well tempered and conveniently limited) most prejudiciall unto th' estate of a Monarchie: perverting, and converting the same into a meere Aristocratie; Much lesse is he subiecte in any thing unto the Multitude... ». (This *Discourse* is not reprinted in Speroni's edition and was made available to me by the Huntington Library). *Q.s.h.* is not to be found in perhaps the largest sixteenth century English collection of Italian proverbs, some 6500; see G. FLORIO, *Giardino di recreatione: Second frutes*, London 1591. However, *q.s.h.* does appear in GIO. TORRIANO's, *Piazza universale di proverbi Italiani: or A Common Place of Italian Proverbs and Proverbial Phrases* (London 1666), p. 49, no. 21: « chi ha compagnia, ha signoria », which he translates as « who hath company, hath lordship ». One may conclude that whatever meaning Bracton had given it had been forgotten by the seventeenth century.