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ARTICLES

WHY THE HISTORY OF ENGLISH LAW HAS NOT BEEN FINISHED

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WHEN I was appointed to another chair in 1988, I managed to avoid giving an inaugural lecture; but this time neither you nor I have been so fortunate, and the precedents must be followed. And the first precedent is the pleasant one of acknowledging the honour and delight of succeeding my friend Gareth Jones, whose footsteps I traced in the more remote past from the big college in Gower Street to the little college in Trumpington Street which has now furnished five professors on Sir George Downing's foundation.[1]

Last year Professor Beatson asked in his inaugural lecture whether the common law had a future, and not long before that the Regius Professor considered whether Roman Law had a future, as an influence on legal thought. Perhaps a new Downing Professor ought to follow suit, and address the future of the laws of England in the next millennium, as they jostle with those of Europe and the Orient, or as nation states lose their autonomy, or as all law collides with the forces of ignorance and anarchy. But it will not surprise most of you if this one looks backwards as well as forwards, to ask questions about the future of their past. The history of the laws of England may turn out to be more secure than their living future; but the study of history is not exempt from change, and how the legal past will be treated is a very real question for the future of legal studies in the widest sense. I have even heard it suggested that, with so many changes taking place in

* Downing Professor of the Laws of England, Fellow of St Catharine's College, Cambridge. Inaugural lecture delivered in the Law School on 14 October 1998. This version has been lightly amended.

[1] Due note has been taken that the first of them, Thomas Starkie K.C., was accused by one of his audience of beginning every subject "too near the creation of the world": *The Memoirs of Sir John Rolt* (1939), p. 54, referring to his lectures in the Inner Temple ("Starkie was not happy as a lecturer. His learning was great, and he began the history of any subject he touched upon too near the creation of the world. But he was replete with sound legal principle."). Since Rolt considered John Austin "practical and business-like" by comparison, this must have been meant as quite a severe criticism.

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the law and the legal world, legal history is becoming a less important branch of legal scholarship and less relevant to a student's needs. This could hardly be more wrong, since legal history is the study of legal change. Unless we regard law as no more than a body of randomly changing rules, its history must be an essential dimension in its study. What is more—and I am mindful at this point of Plucknett's rather forceful censure of Maitland for treating legal history solely as a branch of legal study[2]—the history of English law must also be an essential dimension in the social and intellectual history of this country, as well as being a key to understanding much of the available evidence of the past; but that is beyond my immediate jurisdiction.[3]

Most of you will know that my title is shamelessly—some might say sacriligiously—adapted from that of Maitland's inaugural lecture as Downing Professor on 13 October 1888: "Why the History of English Law has not been Written".[4] The temptation was irresistible. And perhaps it is permissible, now that a century has passed, to begin by putting Maitland himself in a historical context.[5] He was elected to the chair at a time when there were few academic lawyers of any kind, when the only legal history taught at Oxford or Cambridge was Roman, and when the only expertise in ancient legal records was to be found among practising barristers in the inns of court. Legal history had not yet been separated from the study and practice of law, and lawyers were by training prone to anachronism. However, although a barrister might still be asked in late Victorian times to advise on the effect of a thirteenth-century statute, he was not required to have "a knowledge of medieval law as it was in the middle ages, but rather a knowledge of medieval law as interpreted by modern courts to suit modern facts". Maitland knew this at first hand, after seven years in Chancery chambers; but he had become enthused by the German school of document-based history, which had begun to influence historians in England,[6] and he was being drawn into what soon

[2] T.F.T. Plucknett, "Maitland's View of Law and History" (1951) 67 L.Q.R. 179–194, reprinted in *Early English Legal Literature* (Cambridge, 1958), at pp. 13–14, 17. But a Downing Professor, at least in his inaugural lecture, is obliged to address his own Faculty.

[3] Cf. G.R. Elton, *Maitland* (1985), pp. 22–24, on the importance of legal history for historians. Yet in practice legal history is seldom taught in History departments; and, as Professor Milsom has remarked, "few historians deal with the law on its own terms": S.F.C. Milsom, introduction to Pollock and Maitland, *History of English Law before the Reign of Edward 1* (Cambridge, 1968), vol. 1, p. xxiv.

[4] Reprinted in H.A.L. Fisher (ed.), *Collected Papers of Frederic William Maitland, Downing Professor of the Laws of England* (Cambridge, 1911), Vol. 1, pp. 480–497.

[5] Cf. Plucknett, "Maitland's View of Law and History", *Early English Legal Literature*, pp. 1–18; S.F.C. Milsom, "F. W. Maitland" (1980) 66 *Proceedings of the British Academy* 265–281 (reprinted in *Studies in the History of the Common Law* (1985), pp. 261–277).

[6] See C.H.S. Fifoot, *Frederic William Maitland: a life* (Cambridge, Mass., 1971), pp. 92–93. Fifoot attributed the English reception to Bishop Stubbs, who had opened the matter in his

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became an incurable addiction to English legal manuscripts.[7] He saw that law had an intellectually fascinating history which had to be distinguished from law as law, and urged the separation of what he called two logics: the logic of authority (as used by the practising lawyer) and the logic of evidence (as used by the historian). Thus was inaugurated the scholarly study of English legal history.[8] Maitland's approach to legal history, which we all now take for granted, was to uncover as far as possible the original records and writings that constitute the body of contemporary evidence, and then to interpret them according to the social and intellectual setting in which they were produced.

Since 1888 we have benefited from Maitland's own inspiring work, from Holdsworth's laborious sixteen volumes, from hundreds of monographs and thousands of articles, some of them written by friends present, and above all from the revolution wrought by Professor Milsom, in whose presence I tremble to speak let alone to pontificate. Of course my title is not meant as a dismissal of these books, which have been the guide and inspiration of my own career, or as an insult to members of this audience. How, then, dare I reopen Maitland's theme after such a fruitful century? The glib answer is that history will go on changing as people change. History is what we choose to make of the past, and as "we" change, so interpretations and topics of interest change. But that, however true, has become a commonplace observation since Maitland's time, and it is only incidental to what I intend to talk about today.

I am concerned with the more basic truth that history cannot be written in any reliable way until the best evidence has been harvested. That was indeed Maitland's underlying theme. He concluded that it was futile trying to write the early history of the common law without new editions of the medieval law reports—"the hopeless mass of corruption that passes as a text of the year books"—and some progress in studying "the tons of unprinted plea rolls". That is why he stopped his own *History of English Law* in 1307, and spent his last years editing the year books from 1307 to 1310 for the Selden Society. It was a small but significant start, and he called for a team of followers to carry on the work: "think", he

inaugural lecture at Oxford in 1867 and published his *Select Charters* in 1870. The institution of the Rolls Series in the 1860s had an important impact on medieval scholarship; and the years immediately before Maitland's lecture saw the foundation of the Pipe Roll Society (1884) and the Selden Society (1887), and the Domesday Commemoration (1886).

[7] Fifoot, *Life of Maitland*, pp. 58–62. Maitland attributed this addiction to Vinogradoff, whom he met in 1884; but Plucknett pointed out that he was already at that date "puzzling out manuscripts": *Early English Legal Literature*, pp. 8–10.

[8] And, some would say, of English history in general: see G.R. Elton, *F. W. Maitland* (1985).

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said, "what ten men might do in ten years by selecting, copying, indexing, digesting . . . ".[9]

We now know that the ten men did not step forward. There was no money to pay them, no glory to be won, no glittering prizes comparable with those dangled before the Bar. Maitland discussed with a note of despair the problem of recruitment, pinning his best hopes on failed barristers.[10] Only one accepted the invitation,[11] William Craddock Bolland, who in return for a modest stipend edited a goodly number of year books, pushing forward all the way to 1316, but left no successor.[12] After his death, there was a plan to recruit surplus linguists—ten *women*, perhaps—from Oxford, where experts in medieval French were being produced at a rate which exceeded demand. A few were indeed lured into the year books, only to scuttle back into safer territory after the customary savage review by H.G. Richardson.[13] The problem remains unsolved to this day. Editorship, though one of the most rigorous of disciplines, is not well rewarded in departments of Law or History. Of monetary reward alone there is none, and career prospects seem to be less well advanced by painstaking editorial work, which uses a wide range of skills to illuminate the unknown, than by flamboyant essays stating either the obvious or the absurd in fashionable jargon. (This is not to be wondered at when we live in a world where more bibliometric points are to be gained in the citation indexes for work which is deservedly attacked than for work which is silently approved.) Potential editors are drawn into the wrong academic departments, where they are either out of touch with legal thinking or too timid to tackle texts of forbidding technicality.

I do not mean today to preach defeatism—armed though I am with a weighty precedent for gloominess of tone.[14] England has in fact managed to do more than most countries in unearthing its earlier legal materials and cleaning them for inspection. The Selden

[9] Cf. his letter to Ames, 6 May 1888, printed in C.H.S. Fifoot (ed.), *The Letters of F. W. Maitland* (Selden Soc. Suppl. Series, 1965), no. 39, at p. 41 ("I very much wish I could train up a few Cambridge men to use the Record Office; but they all believe that they are going to succeed at the Bar."). He was at this time Reader in English Law.

[10] As Plucknett commented, the lecture was partly about "Why the Selden Society cannot find editors", and Plucknett emphatically rejected the supposition that trained lawyers were the best potential legal historians: *Early English Legal Literature*, pp. 11, 13–14.

[11] Maitland was himself assisted by a briefless barrister, G.J. Turner, who went on to edit several volumes but was rather more dilatory than Bolland.

[12] Bolland was recruited by Pollock on L.W.V. Harcourt's death in 1909, and from 1920 until his death in 1927 he received a stipend of £200 a year: *Centenary Guide to the Publications of the Selden Society* (1987), pp. 24–25.

[13] *Centenary Guide*, p. 28; and for earlier women editors, mostly from the United States, see pp. 25–26.

[14] Plucknett went so far as to deduce that Maitland was suffering from "acute depression" as a result of illness: *Early English Legal Literature*, p. 13. But *cf.* Milsom, introduction to Pollock and Maitland, *History of English Law*, vol. 1, p. xxiii ("Each generation has produced its handful of scholars . . . And yet . . . our own great stores of evidence are largely neglected").

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Society (founded in 1887, with Maitland as its first Literary Director) has reached the 114th volume in its main series. This is a positive achievement of immense value. But have we succeeded in disinterring enough of the evidence to write the history of English law? Of course we have not. By "enough", I am not thinking merely of bulk. I do not suppose that every material piece of surviving legal material could ever be made available in edited form, or that it should. By that standard, we would be compelled to embrace defeatism. But in truth it would be counter-productive. The better question is whether we are concentrating enough on the right kind of evidence in the right kind of way.

What is Law for the Purposes of Legal History?

Before attempting an assessment, there is a preliminary question of a fundamental kind which I raise, not in order to answer it, but because it affects what I will be saying. Maitland reminded us that legal history is history rather than law. But what is law, for the purposes of legal history? Those who established the Downing chair thought that England was governed by "laws", in the plural, rather than just English law. Perhaps the draftsman had read Coke, who announced that there were fifteen species of law in England.[15] On the other hand, Charles Viner in providing for a similar chair at Oxford opted for the singular. I do not wish to make anything turn on that distinction today, though it incidentally reminds us—those of us who profess to explore and expound the law—that we ought from time to time to reflect upon the various dimensions of the law we work with.

Is the law what courts do; or what they say, or think, they do? Or is it what lawyers predict that courts would, or might, do if a question were pressed upon them tomorrow, preferably with the benefit of their own arguments? Or is it what courts ought to do, in the opinion of the best legal minds of the day, when (as I do not mean to imply is often the case) those are not the minds controlling the decisions? Is the law as found in written legal authorities different from professional practices and understandings which are not written down? These are questions not merely for abstract philosophers, because they affect what we study and teach in law schools, and what we write about in law books. For the moment, however, I am concerned with the importance of such questions for the legal historian. And the further dimension of time adds to the problem. Maybe no lawyer in England would nowadays suggest that the law is what courts ought to do, if in a particular case it

[15] Co. Litt. 11b. His distinctions, needless to say, are not akin to those drawn in this lecture.

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can be certainly predicted that they will not. But can we assume that it was always thus? It was not always so elsewhere: the older civilian tradition paid little attention to courts and their doings, and indeed continental legal historians have only recently begun to take any interest at all in court records and reports.[16] Is it, then, conceivable that English law was once—if I may borrow the convenient French terms—*doctrine* as much as *jurisprudence*? Any answer to such questions as these must depend upon the point of view of the questioner.

The problem has to be faced when we find conflicts between different kinds of historical evidence. For example, the year books and early-modern reports sometimes seem to be at odds with the formal records, in the sense that we find reported assertions of principle which do not square with the practice as reflected in uncontested cases in the plea rolls. Nowadays this should never happen; but things have changed almost beyond comparison in the last 150 years. I am not altogether sure whether our courts of record keep records—in the traditional sense—any more. If they do, I doubt whether anyone looks at them once a case is over. Law reporting has become largely a matter of selecting, and adding apparatus to, verbatim texts of authoritative pronouncements; for all I know, reports may come directly from the judges' word-processors. In an age when we have come to treat law reports as the primary source of common-law authority, and are even beginning to log on to instant electronic transcripts, it is easy to forget how selective and idiosyncratic were the manuscript law reports used until the nineteenth century. Can we really suppose that earlier reporters based their jottings on the same principles as *The Law Reports*? In reading their French hieroglyphs can we confidently tell which of the jotted remarks were intended or thought to lay down the law, which merely to provoke a response, or even, perhaps, calculated to make things sufficiently unclear to alarm the parties into a compromise? The plea rolls at least show us that the majority of cases pleaded on a point of law remained without formal judgment. A definitive judgment was not the goal; and I would hazard a guess that even today most lawsuits have compromise rather than judgment, or legal clarification, as the hoped-for end.

We have a good example of an apparent evidential clash in the history of contract, where the reported cases on *assumpsit* for nonfeasance are seemingly belied by the court records. The reports

[16] See *Judicial Records, Law Reports, and the Growth of Case Law* (5 Comparative Studies in Continental and Anglo-American Legal History [CSC], Berlin, 1989); A. Wijffels (ed.), *Case Law in the Making* (17 CSC, Berlin, 1997).

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(beginning in 1400) show the courts denying that trespass on the case lay for passively failing to perform a promise—not doing something is not a tort—while the records show that the Chancery clerks were perfectly happy from the 1360s onwards to issue writs on the case to plaintiffs claiming damages for nonfeasance.[17] But is this really a conflict of evidence, as some have supposed, or do the two kinds of evidence show us different perceptions of the same process? Could it be, for example, that the Chancery clerks thought they earned their fees merely by issuing a writ, not by guaranteeing its legal validity? By legal validity I mean acceptability to the courts which would have to provide and enforce any remedy. Validation in that sense would only have been required in the unlikely event of a legal challenge. The vast majority of writs, then as now, performed their task by bringing the defendant to the point of settlement or to a judgment by default. There may, therefore, have been a difference in the real world between law as perceived by the officers who issued the writs, by the lawyers who advised clients, and by the judges who were asked to sanction new remedies. The first two kinds of law may over time give way to the third, but often they may have a long independent life of their own.

Another instance is well enough known to all English legal historians. The complexity of the court system could lead to a conflict of laws within the same country of domicile. At times, indeed, different branches of the legal system have taken embarrassingly different views of the same questions. An extreme example occurred in 1598 when the Court of Common Pleas held the Court of Requests—sitting a few yards away—to be a legal nonentity, so that all its decisions were *coram non iudice*.[18] So far as we know, this stunning decision did not greatly discourage the Requests, which continued to operate as before. Similar examples could be drawn from the pre-Reformation ecclesiastical courts, which treated the canon law as having an autonomous authority and did not always buckle under when faced with prohibitions from the secular courts. Then there was the long and unseemly dispute in Tudor times between the King's Bench and the Common Pleas over the use of actions on the case in place of prior remedies.[19] Now what, in cases such as these, was "the law"? As an

[17] A.K.R. Kiralfy, *The Action on the Case* (1949), p. 147; J.H. Baker, introduction to *The Reports of Sir John Spelman*, vol. 2 (94 Selden Soc., 1978), pp. 262, 265, 266, 269; R.C. Palmer, *English Law in the Age of the Black Death 1348–1381* (Chapel Hill and London, 1993), pp. 142, 177, 182–183, 299. Nevertheless, only one *judgment* has been found in the rolls: *Athelingflet* v. *Maydeston* (1362) K.B. 27/408, m. 3d; Palmer, *op. cit.*, p. 329.

[18] *Stepneth* v. *Lloyd* (1598) Cro. Eliz. 647, 4 Co. Inst. 97, 12 Selden Soc. xxxix; A.K.R. Kiralfy, *A Source Book of English Law* (1957), p. 301.

[19] S.F.C. Milsom, *Historical Foundations of the Common Law*, 2nd ed. (1981), pp. 69–70, 333, 350–352; J.H. Baker, "New Light on Slade's Case" [1971] C.L.J. 51–67 (reprinted in *The Legal*

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absolute question it is meaningless because, as in private international law, the answer depends upon the forum in which the question is raised. All these courts were right, by their own lights.

And this is where the practising lawyer knows more than can be read in books, because it is his task to assess the likelihood of success in alternative situations. Practising lawyers know that success in litigation is not always, or even often, dependent upon a matter of pure law. It is more a matter of how a tribunal can be persuaded of the facts as the party sees them, and how it can be persuaded to see those facts in a warm light which does not relegate the party's best point of law to the shadows. It must also happen that counsel will sometimes advise a client contrary to the current state of case-law, if the client is willing and able to press the case on appeal to a tribunal where there is a strong chance that the previous case-law will be modified.[20] Then again, there are large areas of law wholly uncontaminated by decided cases.[21] This may be because questions have not been raised before, or because they have been settled in a way which does not register in law reports, or because not enough has turned on them to justify pressing disputes as far as a judicial decision. A striking modern example was the Law Reform (Frustrated Contracts) Act 1943, which despite its many obscurities, much beloved by law teachers, received no judicial gloss in the printed law reports for forty years, and then only because—thanks to Colonel Gaddafi—millions of barrels of oil came to turn upon every nuance of phrase.[22]

Unfortunately for lawyers concerned with the remoter past, it is only the books and records that remain. There were no medieval or Tudor law journals commenting upon the living understanding of the time, no royal commissions, no standing law commission, no newspapers, no books of reminiscences or diaries, and virtually no legal correspondence. Our main recourse has therefore been to the cases which went to court, and these have been preserved for us in almost overwhelming abundance.

Profession and the Common Law (1986), pp. 393–432); *Introduction to English Legal History*, 3rd ed. (1990), pp. 53–56, 391–393, 450, 482–483.

[20] Now that the House of Lords considers itself free to depart from its own previous decisions, there is official sanction for the notion that there can be principles of the common law which run counter even to the highest judicial pronouncements.

[21] Soon after the delivery of the lecture, this phenomenon was considered by Lord Browne-Wilkinson in *Kleinwort Benson Ltd.* v. *Lincoln City Council* (1998) Times, 30 Oct., p. 38 ("Much commercial and property activity [occurs] on the basis of law not laid down by judicial decision").

[22] *B.P. Exploration Co. (Libya) Ltd.* v. *Hunt (No. 2)* [1983] 2 A.C. 352. The academic treatment began with G.L. Williams, *The Law Reform (Frustrated Contracts) Act 1943* (1944).

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Case Law

The recording of decisions in the central courts occurred at an early stage in English legal history, and contributed a great deal to its distinctive character.[23] Over a million sheep, during six centuries, gave their skins to make the "record"—the continuous parchment memorial of the proceedings and judgments in the king's courts. Indeed, the common law owes a large debt to sheep-farming. The skins were called rolls, probably because they were kept individually rolled up until the end of each term, when they were numbered with a brush (Japanese-style) and bound up with cords in flat bundles, to be stored in a cellar under Westminster Hall known in later medieval times as Hell. It is a long and remarkably good memory, with few losses and little damage between the 1190s and the discontinuation of parchment rolls in Maitland's own lifetime. However, it is an exacting task to draw legal history from these thousands of miles of abbreviated Latin. Not only is their extent daunting; their enormous bulk is counterbalanced by severe verbal economy. The rolls were designed to record all the steps in proceedings, and the final outcome; but, like well-kept minutes of Faculty meetings, they studiously bypassed the debates, the compromises and the intellectual processes which governed the moves or the decisions. The prothonotaries had enough to think about without consulting the needs of legal historians in future centuries; and it would not have occurred to them that anyone would try to use their rolls without a shared understanding of the realities which they concealed. That is why lawyers became so dependent on law reports, which must have had a primarily intellectual purpose, but are far less methodically kept and come fraught with other difficulties. Nevertheless, the legal historian needs both roll and report, since the two kinds of source supplement each other.

Plea Rolls

Of the two sources of precedent, the most extensive by far is the official record. The rolls are the only authentic record of the business of the courts, of the kinds of cases dealt with, and of the kinds of people involved; and they are the only authentic source of precedents of judicial decisions—precedents in the narrowest sense of showing the precise question raised, and when and how judgment was given upon particular forms of pleading or findings of fact. Maitland did not suppose they could ever all be printed.

[23] See J.H. Baker, "Records, Reports, and the Origins of Case-law in England", in *Judicial Records, Law Reports, and the Growth of Case Law*, 5 C.S.C. 15–46.

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They cannot practicably be indexed or calendared. They have not even all been read by historians. So what can be done with them?

They cannot simply be ignored. Although a great deal could be done in the pioneering days of legal history without recourse to the Public Record Office—the sixteen volumes of Holdsworth's *History of English Law* were compiled without using unpublished rolls—few legal historians nowadays could justify avoiding the labour of record work. Whatever the topic under investigation, there is little option but to rummage through the mountains of parchment preserved at Kew looking for evidence. Research of this kind has achieved a great deal since Holdsworth's time; but those involved in it would agree that no individual can ever hope to trace all the evidence relevant to any chosen subject. Sampling is one way forward. It can tell us what kinds of procedure were typical; and of course we need to know what was typical before we can begin to assess special cases such as those found in the law reports. But sampling does not guarantee that we will find those rare cases which provide greater insights than routine business.

Sometimes we can search for a single case which we know to be of interest, because we have been prompted by a surviving report. But finding a single case—unless one is fortunate enough to have a correct roll-reference—is like looking for a needle in a haystack. Indeed it is worse, because there may be a hundred haystacks, and a nagging uncertainty whether the needle is really there at all. Nevertheless, from Maitland's time to the present, editors of manuscript law reports have undertaken to trace as many as possible of the cases in the rolls. It is perhaps the hardest part of an editor's task, more time-consuming and demanding than the decipherment and translation of the text itself. The modern editions of year books and Tudor law reports now contain a wide selection of examples of different kinds of pleading and procedure in the central courts; but their main use is to supplement and explain the reports to which they relate.

The Selden Society has also been engaged, since its beginning, in publishing edited selections from the records. In the early days, when so little was known about the various kinds of record and what they might reveal, a valuable enterprise was to select a specimen roll and print it in full, to show the kind of thing it contained; and it naturally began at the beginning. The Society published specimen rolls of the early Curia Regis, of forest eyres, of the Exchequer of Pleas, and of justices in general eyre.[24] The publication of Curia Regis Rolls was not continued by the Society,

[24] *Centenary Guide*, pp. 33–41.

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and, although it has been taken over by the government publishers, it is clear that no more than a small fraction of the plea rolls can ever be put into print. After nearly eighty years, the series of thirteenth-century Curia Regis Rolls has only reached 1245.[25] As yet no later plea rolls have been printed in their entirety—not one term. It is difficult even to estimate the number of volumes which would be required for a comparable edition of a single large Tudor plea roll; much space could be saved by means of abbreviations, but it is doubtful whether it would be worth the expense. Perhaps something can be done by modern science; instant access to the rolls by the flash of a laser beam, or whatever new devices the next century has to offer, could revolutionise research. But it will not happen without a large investment of money, and that will be a more difficult obstacle to overcome than the technology.

As for traditional methods, the Selden Society has always made it a priority to open up new areas of research, and once specimens of particular kinds of roll are in print a more profitable policy may be to commission topical selections. It began with select cases concerning criminal law,[26] followed by cases on mercantile law and public works. In the 1980s two valuable additions have been made which illuminate the development of the law of wrongs: Judge Arnold's fourteenth-century trespass cases from the King's Bench and Common Pleas and Professor Helmholz's defamation cases.[27] These show not only how interesting the factual content of the rolls can be, but also how much substantive law can be culled from superficially uninviting sources. The records of local courts have so far received less attention from lawyers—as opposed to local historians[28]—and more exploratory work needs to be done there.

A significant outcome of all this achievement has been to prove that the records are ignored at our peril. They can affect what we know in fundamental ways. Yet there still remains far more to be learned from the complete corpus of records than we know at present; and, ironically, our existing knowledge grows weaker in the post-medieval centuries. The plea rolls after 1550 have barely been touched by legal historians. They are, of course, quite repulsive to the touch, for all but the most dedicated enthusiasts, but the joy of discovery can be enhanced by the physical challenges. Our plea-roll scholar needs a strong arm, a flexible neck and back, an immunity

[25] *Curia Regis Rolls* (H.M.S.O., 1922–1991), 17 volumes; P. Brand (ed.), *Curia Regis Rolls 27–30 Hen. III* (Woodbridge, 1998). In the lecture it was asserted that the series had been discontinued, but it is pleasing to correct this by noting the recent continuation by a private publisher; and another volume is believed to be nearing publication.
[26] Vol. 1.
[27] Vols. 100, 103; Vol. 101.
[28] But see Vol. 114.

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to dust and soot, a working knowledge of Victorian knots, an ability to speed-read abbreviated Latin (if possible, upside down), and above all a due sense that not every word of a record is true or factually meaningful. This may be an unappetising job description, but the repellent outward features of the rolls disguise an almost inexhaustibly rich factual and intellectual content. Much of our legal history is still locked up in our more comfortable modern equivalent of Hell down in the Surrey marshes. The next generation must not lose the keys.

Law Reports

In comparison with the plea rolls, the law reports are far less voluminous; and yet they are at least equally valuable, because every case tells, and because the report often shows some of the mental workings behind the results. There is no equivalent of routine common form in the law reports: we may suppose that every case was reported because someone thought it worth the paper and ink. It is true that the older law reports can be exasperating. So often they open an important question and then leave it in the air, with a sudden adjournment or change of tack. We might be tempted to blame lazy or stupid reporters—men who, as legend relates of Espinasse, only understood half of what passed in court and reported the other half[29]—but we would do better to try to understand the legal system in which they worked, a system under which judges expressed most of their opinions before trial, and would go to great lengths to avoid committing themselves on controversial legal questions lest parties be discouraged from compromise. So often, also, the reports seem to miss major new developments, or to report dicta which (as I noted earlier) clash with practical experience, or even to mangle the facts of the case in hand. Here again we may be guilty of anachronism if we condemn these as obvious faults, assuming the reports to have been intended as a coherently edited chronicle of English jurisprudence. We still do not know quite how the medieval reports came about, but coherently edited and systematically published they were not. They may at first have grown out of the case-method of teaching; and those of us who are law teachers know that it is legitimate in the classroom to twist, change or simplify the facts of a real case in order to test to destruction the principles which it is thought to illustrate. It is all too alarmingly possible that some of our awkward medieval cases were jotted down precisely because they surprised everyone in court, and therefore provided good material

[29] T. Mathew, 54 L.Q.R. 368, quoting Pollock C.B. Cf. *Small* v. *Nairne* (1849) 13 Q.B. 840, 844, *per* Lord Denman C.J.

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for a future moot. Another difficulty—one which we professional legal historians do not like to admit in public—is that most of us find a few of the old reports unintelligible, and a still higher proportion uninteresting. Here again we should be cautious in our judgments. No doubt some cases in all ages are of passing technical interest only; and it would be absurd to try to write legal history so as to accommodate and explain every single procedural jot and tittle. But in some measure our disregard for the bulk of the law reports is a result of our own narrowness, and of the tendency to approach sources with premeditated questions, perhaps anachronistic questions, in mind. That may be unavoidable; but real history, Maitland's kind of history, requires us to understand the past in its own terms.

The root problem, again, is that we still do not have the bulk of the material in print—at least, not in an acceptable and usable form. Law reporting began in the 1260s and has continued down to the present day; but it is only in the last two centuries that reports have been commissioned for the press and published within a year or two of the event.[30] For five hundred years reports were written in manuscript with the intention that they should remain in manuscript, and if they came to be printed later that was more or less a matter of chance and usually beyond the supervision of the reporter.[31] The first two centuries of reporting were over before printing even became a possibility. But the historian does well to remember that for another two or three centuries thereafter lawyers were accustomed to using manuscript as well as printed books, that the vagaries of publication left some of the best reports unprinted, and that in consequence some of our principal sources of case-law remain unprinted to this day. In any case, printing (when it came) was not organised to provide the legal profession with recent cases, but rather to make available otherwise uncirculated texts of non-standard reports from earlier periods.

The medieval law reports are called "year books" not because they were produced according to some coherent scheme lasting for 250 years but simply because (being anonymous) they have to be cited by year. Our "vulgate" text, printed in the seventeenth century, is the one Maitland described as "a hopeless mass of corruption", not only full of misprints and corruptions but divided by chasms of many years which were not printed at all—including

[30] The first such venture seems to have been the King's Bench *Term Reports* (1785–1800). Although Plowden and Coke put out some very recent reports, their published volumes were essentially selections from notebooks kept over many years.

[31] From this should be excepted Plowden and Coke, who edited their own reports for the press; but very few other reporters did so.

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the entire reign of Richard II.[32] But deficient editing was not the worst feature of law printing. Printing the year books created a positively misleading illusion of a single series of reports stretching over two or three centuries,[33] when the printers had in truth welded into an artificial unity a tangled mass of notes by different people, some of whom worked alongside each other and summarised the same case in different words. The modern editing of year books began in the 1860s, when the government-funded Rolls Series started to publish the previously unprinted year books of Edward I and Edward III.[34] The twenty-one volumes produced between 1863 and 1911—by only two editors—were a remarkable achievement in the dark days before Maitland, and raised in some minds the prospect of a complete new edition of all the year books. Several schemes were debated, but none of them ever came to anything. Once it became clear that the Rolls Series would not be carried further, the Selden Society decided to make a start on the reign of Edward II,[35] and then (in 1912) the new Ames Foundation in America took up Richard II. Maitland was the first Selden editor, and produced the earliest years of Edward II himself, setting new and higher standards for his successors, especially in relation to the treatment of variant texts and the publication of parallel plea rolls. But the going has not been easy. Maitland originally estimated that Edward II could be done in seven volumes.[36] Today, twenty-eight volumes later, there are still seven years—perhaps twenty volumes—left, and no new editors coming forward to help. The very few experiments which have been conducted with later year books[37] suggest that the later years could mostly be fitted into one volume each, since there are fewer variants; but even on this basis it would require perhaps 150 volumes to contain the still unedited year books. Some time before I became Assistant Literary Director of the Selden Society, I calculated that, given a production-rate of

[32] For the printing of the year books, see J.H. Baker, "English Law Books and Legal Publishing, 1557–1695" in *History of the Book in Britain*, Vol. 4 (forthcoming).

[33] Even the Selden Society editors have been guilty of this, since they silently edited out the criminal cases found in the Edward II reports, presumably as not fitting into their concept of a year book: see J.H. Baker, "Some Early Newgate Reports (1315–28)" in C. Stebbings (ed.), *Law Reporting in England* (1995), pp. 35–53.

[34] For a fuller account of these projects and their prehistory, see "Editing the Sources of English Legal History 1800–1996" (1996) 37 *Bulletin de la Commission Royale pour la publication des Anciennes Lois et Ordonnances de Belgique* 71–85.

[35] See *Centenary Guide*, pp. 19–22.

[36] *Ibid.*, p. 20 (1896).

[37] Namely, one volume of Hen. VI (1422) and one of Edw. IV (1470) (Vols. 50, 47). See also M. Hemmant (ed.), *Select Cases in the Exchequer Chamber before all the Justices of England*, taken from the year books of Hen. VI to Hen. VII (Vols. 51, 64). The writer has ventured into the 16th century with an as yet unpublished edition of 12–14 Henry VIII. An experiment in producing a shorter interim edition of a year book is R.V. Rogers (ed.), *Year Books 9–10 Henry V (1421–22)* (privately printed, Würzburg, 1948), a slim volume with no translation or records.

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nine year books in the previous forty years, we could expect to see Edward II completed in about the year 2750.[38] Alas, that has proved wildly optimistic. All our Edward II editors are now dead. Yet Maitland himself warned us: "The first and indispensable preliminary to a better legal history than we have of the later middle ages is a new, a complete, a tolerable edition of the year books. They should be our glory, for no other country has anything like them; they are our disgrace, for no other country would have so neglected them."[39] Despite overseas aid—five of the nine volumes just mentioned were edited by scholars from abroad—there is no obvious way in which the situation can be remedied in our time, unless some great benefactor steps forward to encourage the ten women and men to volunteer.

The position with respect to the early-modern law reports is even worse. Only in very recent times has editorial attention been given to the reports of the sixteenth and seventeenth centuries,[40] and the bulk of unprinted material is vast. Moreover, for the period 1590–1660, many of the best reports are still unprinted.[41] By some perverse conspiracy, not only did the economics of contemporary law printing keep the fullest reports off the booksellers' shelves, but now the economics of academical scholarship continues to keep them out of sight. Yet the newly uncovered reports have proved to contain vital missing links. It is enough to recall how Professor Simpson's rediscovery of Spelman's reports solved the problem of how the Statute of Uses came to be passed: without Spelman's inside information about *Lord Dacre's Case* we should never have known.[42] It is appalling that so many series of reports kept by judges should still be unpublished, when so much reliance is still placed on inaccurate notes pushed through the press in the 1650s. They can, of course, be consulted in manuscript, but only with great difficulty. Collation, emendation and apparatus, including reference to the record, are needed to

[38] "Unprinted Sources of English Legal History" (1971) 74 *Law Library Jnl* 302, 309. It is embarrassing to read, on the same page, the estimate that Edw. II might be finished by the year 2010; the Society no longer has any editors working on the year books of that reign.

[39] F. Pollock and F.W. Maitland, *History of English Law before the Time of Edward I* (1895), Vol. 1, p. xxxv.

[40] The Selden Society began in 1954 with Mr. Yale's edition of Lord Nottingham's reports of Chancery cases, 1673–82 (Vols. 73, 79). More recently the society has published editions of Sir John Spelman's reports (Vols. 93–94), Sir John Port's autograph notebook (Vol. 102), *Reports from the Lost Notebooks of Sir James Dyer* (Vols. 109–110); and *Reports of Cases by John Caryll*, Part 1, 1485–1499 (Vol. 115). These reports were previously unpublished, apart from the later cases in Caryll (which are in Keil.).

[41] See J.H. Baker, "The Dark Age of English Legal History, 1500–1700" in D. Jenkins (ed.), *Legal History Studies 1972* (Cardiff, 1975), pp. 1–27, 11–20 (reprinted in *The Legal Profession and the Common Law*, pp. 446–457); D. Ibbetson, "Coventry's Reports" (1996) 16 J.L.H. 281–303.

[42] A.W.B. Simpson, "The Reports of John Spelman" (1957) 72 L.Q.R. 334–338; J.H. Baker, "Uses and Wills" in 94 Selden Soc. *192–203*.

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make them fully usable. There are still many series completely unpublished, and in addition there remain unpublished some important reports by judges whose work was partially printed: for instance, William Dalison and Sir Edward Coke.[43]

For the period after 1700, there is a far wider range of case-related material. Judges began regularly to keep notes of the evidence given on circuit, and we begin to see in sharper focus what was happening at civil trials.[44] The notebooks are mere notes of the evidence, without the legal submissions and directions which we really need, but their potential usefulness has been demonstrated by Professor Oldham's published selections from Lord Mansfield's notebooks.[45] There are also collections of cause papers,[46] solicitors' archives, and the papers of government departments, organisations and individuals involved in litigation, not to mention printed pamphlets,[47] newspapers and (as we reach modern times) oral evidence. Little has yet been done with this kind of material, though the pioneering work of Professor Simpson has shown how it can shatter traditional illusions.[48] For the centuries nearest our own we ought to have the most complete picture of all; but it has only been sketched in outline.

There is also a further complication. While observing Maitland's best-evidence rule, the legal historian must nevertheless grapple with the knowledge that cases have two histories. The first is the story of the decision itself, as a single event; and the other is the story of its legal effect, of its transmission and reception. If we want to know what was really in issue and decided in a particular case, we

[43] For Coke's notebooks, see J.H. Baker, "Coke's Notebooks and the Sources of his Reports" [1972A] C.L.J. 59–86. For Dalison's reports, which are difficult to disentangle from Harpur's, see idem, "The Dark Age of English Legal History" (in *The Legal Profession and the Common Law*), pp. 449–450; L.W. Abbott, *Law Reporting in England 1485–1585* (1973), pp. 104–141.

[44] There are a few earlier circuit notebooks of a different kind. See J.H. Baker, *Reports from the lost Notebooks of Sir James Dyer*, Vol. 1 (109 Selden Soc., 1993), pp. xcii-xcvi; Vol. 2 (110 Selden Soc., 1994), pp. 400–469.

[45] J. Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (Chapel Hill and London, 1992). Note also the more revealing circuit diary of Ryder C.J. (1754–56): J.H. Langbein, "Shaping the 18th Century Criminal Trial: a view from the Ryder sources" (1983) 50 Univ. Chi. Law Rev. 1–136. Ward C.B.'s earlier but considerably thinner circuit diary (1695–1714) is in Lincoln's Inn, MS. Misc. 582.

[46] Examples of cause papers, including "paper books" (draft pleadings) and notes for judgments, are Lincoln's Inn, MS. Misc. 510–530 (Ward C.B., 1674–1714); Yale University Library, Osborn shelves, Lee boxes (Lee C.J., 1730–54); Lincoln's Inn, Dampier MS. 1 (Ashhurst J., 1769–85); MS. 2 (Buller J., 1778–96); MS. 3 (Lawrence J., 1794–1801); MS. 4 (Dampier J., 1803–06).

[47] For the large quantity of reports of trials after 1660, in pamphlet form, see J. Beattie, *Crime and the Courts in England* (1986), pp. 23–25, 649–651; T.P. Gallanis, "Review Article" (1998) 19 J.L.H. 84–87. For the Old Bailey Sessions Papers, see J.H. Langbein, "The Criminal Trial before the Lawyers" (1978) 45 Univ. Chi. Law Rev. 263, 264–267. For earlier evidence in the form of chapbooks, see J.H. Langbein, *Prosecuting Crime in the Renaissance* (1974), pp. 45–55.

[48] See A.W.B. Simpson, *Leading Cases in the Common Law* (Oxford, 1995); and also his *Cannibalism and the Common Law* (Chicago, 1984).

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need the record, the best manuscript reports, and where possible background documents and correspondence. But in tracing the linear development of the law, we must remember that practising lawyers rarely did that kind of research. For lawyers of the next and succeeding generations, the same case is not a historical event but a text frozen in the pages of a printed law report, with all its flaws and ambiguities, and perhaps with an accumulating gloss of judicial explanations and distinctions which bear little or no relation to what originally happened. The legal historian must therefore approach his cases in two dimensions, and be alive to the textual corruption and doctrinal flexibility inherent in the modes of transmitting case-law from one generation to the next.

Common Opinion

It is now high time to reach the main item in my audit, which will bring us back to some of the unanswered questions which I posed near the beginning. For I would submit that, important as case-law is, we have made an error if we have treated the history of the common law solely as a history of decided cases. There is a whole world of law which never sees a courtroom. Law can exist, in the sense that people are aware of it and conform to it, even when it is neither written down in legislation nor the subject of accessible declarations by the judiciary. We all know that only a small proportion of the matters taken to legal advisers result in litigation, and only a small proportion of those which do reach the courts are pursued to judgment. That must have been as true of 1398 or 1698 as it is of 1998. And, even in the context of court proceedings, there is a world of practice and discretion which is understood by experienced practitioners but is not to be found in books.[49] This is not confined to matters of procedure. It may, for instance, be especially true of public law, which has received little attention from legal historians since Maitland; and at least part of the reason is that, even when constitutional issues were presented to the judges, the outcome was frequently withheld from public view on grounds of secrecy or delicacy.[50]

The extrajudicial legal world of the past is, inevitably, to some extent beyond recall. Yet there are various forms of evidence in writing, increasing in their range after 1500, such as arbitration

[49] See *R.* v. *Wilkes* (1770) 4 Burr. 2527, 2566, *per* Lord Mansfield C.J. ("Matters of practice are not to be known from books. What passes at a judge's chambers is matter of tradition: it rests in memory").

[50] In uncovering the secrets, we are heavily reliant on the private notebooks of prominent judges: see Baker, "Coke's Notebooks" (in *The Legal Profession and the Common Law*), pp. 201–203; *Reports from the lost Notebooks of Sir James Dyer*, vol. 1, introduction, pp. xliv-lxxxv.

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awards, legal opinions, conveyancing practice, teaching, tracts and articles in journals, and even personal letters. These kinds of material have been largely overlooked by legal historians. There has been no scholarly study of counsel's opinions, and of the purpose and effect of their circulation in copybooks. Precious little has been written on the history of conveyaning. Admittedly a history of property law written solely from conveyancing documents, without reference to the law reports, would be dull and lifeless, and a history written solely from the opinions of counsel would be impossible as well as dull; but we have so far been content with a history of property law written almost exclusively from the controverted cases, and that cannot be quite right.[51] How often did the unusual facts of *Shelley's Case* recur in the real world? Perhaps never. In any case, Professor Simpson has now shown us that the case was really about religion.[52]

For medieval times, even though the kind of collateral evidence I have mentioned is largely absent, my doubts take on a larger significance. I am not sure that the medieval lawyer even thought of the common law as primarily case-law.[53] If he did, then it is remarkable that his cases were not preserved for posterity in a way more amenable to their purpose.[54] True, a Chaucerian serjeant was expected to possess "cases and domes all" reaching back to the dawn of legal memory, and they were the mainstay of a decent medieval law library.[55] But these books contained very few judicial decisions, in the modern sense; even demurrers were not usually decided; and most of our leading cases, such as *Doige's Case* and *Lord Dacre's Case*, are reported in the year books without the final result.[56] Only blind faith could persuade anyone who has tried to read the year books that the medieval common law was somehow derived from their contents. Trying to glean law from the year books is like trying to learn the rules of chess or cricket merely by watching video-recorded highlights of matches. The reader soon

[51] An obvious example is the origin of the trust, in its post-1535 form. This cannot be traced from the law reports; but Dr N.G. Jones has shown how it can be reconstructed from the Chancery records and surviving deeds.

[52] Simpson, *Leading Cases in the Common Law*, pp. 13–44.

[53] For what follows, see J.H. Baker, "English Law and the Renaissance" [1985] C.L.J. 46–61 (reprinted in *The Legal Profession and the Common Law*, pp. 461–476).

[54] Professor Milsom has referred to "the difficulty of getting answers from the Year Books, and the extraordinarily hesitant and oblique way in which fundamental questions are treated in them": S.F.C. Milsom, "Law and Fact in Legal Development" (1967), reprinted in *Studies in the History of the Common Law*, at p. 189.

[55] For the ownership and circulation of year-book manuscripts, see A.W.B. Simpson, "The Circulation of Yearbooks in the Fifteenth Century" (1957) 73 L.Q.R. 492–505; J.H. Baker, "Books of the Common Law, 1400–1557" in *History of the Book in Britain*, Vol. 3 (Cambridge, 1999).

[56] For *Doige's Case* (1442) and *Lord Dacre's Case* (1535) see J.H. Baker and S.F.C. Milsom, *Sources of English Legal History: private law to 1750* (1986), pp. 391, 105.

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senses that contemporaries must have known something he does not, some common understanding to enable them to appreciate the moves. There must have been a body of presuppositions and ground rules which do not appear in the books themselves, except in oblique glimpses.

Without for a moment denying the enormous evidential importance of the year books, which a fifteenth-century chief justice tells us were written *ad futurorum eruditionem*,[57] perhaps it might be better to think of the medieval common law as a body of received wisdom—wisdom both about the practice and procedure of the courts and also about substantive principles—which transcended single instances, and is therefore not all set out in the law reports. It was not for the most part judge-made law, since the authoritative declaratory role now assigned to English courts was much weaker before the Tudor period, and most judgments followed automatically from jury verdicts on the facts. The role of the courts, like that of a chess referee or cricket umpire, was not to make or develop the rules but merely to see that they were followed. Nor, despite the existence of important pieces of legislation, was medieval English law in any sense written law; the nearest it came to a *corpus iuris communis* was the alphabetical abridgment of snippets. I do not mean that lawyers looked to something higher like "natural law", except in their most rhetorical moments. Their law, I suggest, approximated to what the Romans called *communis opinio iurisprudentium*, the collective wisdom of the learned. It might be regarded as a scholastic version of what Professor Milsom has referred to as "unofficial law".[58] The late-medieval English name for it was "common learning" (*comen erudition* in law French).

The Inns of Court

If this learning was not all to be found secreted in the law reports, where was it acquired? Some of it, no doubt, was just the common understanding of intelligent Englishmen of the time. I suppose most basic legal ideas rest ultimately on the assumptions of lay society. This kind of unofficial law could be administered by juries as well as judges,[59] and in the hands of the former it could operate as local law, or even—at any rate when special juries came to be used in commercial cases[60]—specialist law. The point at which mere

[57] J. Fortescue, *De Laudibus Legum Anglie*, ed. S.B. Chrimes (Cambridge, 1942), p. 114, line 27.
[58] "Law and Fact in Legal Development", in *Studies in the History of the Common Law*, pp. 176–179, 188–189, where there is an illuminating discussion of the legal consequences of lawyers thinking "off the record" and of legal thought outstripping the legal forms.
[59] See, *e.g.*, T.A. Green, *Verdict according to Conscience* (Chicago, 1985).
[60] See J.C. Oldham, "The Origins of the Special Jury" (1983) 50 Univ. Chi. Law Rev. 137–221.

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working assumptions harden into positive law, or notionally immemorial local custom,[61] is another difficult question which I must avoid for the present. However, it is evident from the year books that much of the unwritten law of the medieval period was not the man-in-the-street law of the common juror but technical lawyer's law; and, in so far as *comen erudition* was professional learning, the answer to the question now seems clear. It was what Serjeant Kebell in 1493 called "the old learning of court",[62] meaning the inns of court. From the 1340s onwards the law school for apprentices of the Bench—a school previously centred on the court itself—was a collegiate system, with four major colleges (the inns of court) supported by a larger number of lesser societies (the inns of chancery).[63] For the three centuries prior to the outbreak of the Civil War in 1642, they constituted a flourishing common-law university located between the city of London and Westminster.[64] The four inns of court still survive, and since Tudor times they alone have controlled admission to the bar; but so completely did their life change after the Civil War that it became difficult even for historians to see that they were once a large, influential and intellectually rigorous school of law which fully deserved comparison with a university, a law school which had been teaching and arguing about English law since the time of Edward III, apparently taking over from a non-collegiate *studium* which had flourished in the time of Henry III and Edward I.[65]

We now know something about the system of education, the readings on statutes (which corresponded to the university *lecturae*) and the moots (which corresponded to the *quaestiones disputatae*). It seems likely that many of our early law tracts grew out of an educational routine; and I have hinted that perhaps the year books themselves did so.[66] The readings, though framed as glosses upon

[61] In some instances, the immediate source of a common-law idea was a local custom, especially a custom of London. Many apparent legal inventions were "just early appearances in royal courts of claims familiar elsewhere": S.F.C. Milsom, "Reason in the Development of the Common Law", in *Studies in the History of the Common Law*, p. 164.

[62] *Hulcote* v. *Ingleton* (1493) Caryll's reports, 115 Selden Soc. 138, 139.

[63] By 1500 the number of inns of chancery had settled at nine; but there were earlier inns which came and went.

[64] For the educational system in its heyday, see J.H. Baker, intro. to *Readings and Moots at the Inns of Court in the Fifteenth Century*, Vol. 2 (105 Selden Soc., 1989); *The Third University of England: the inns of court and the common law tradition* (Selden Soc. lecture, 1990); intro. to *Spelman's Reading on Quo Warranto* (114 Selden Soc., 1997).

[65] Maitland, of course, did see it, though he did not have time to pursue it: see, *e.g.*, "Why the History of English Law has not been Written", *Collected Papers*, Vol. 1, at p. 488; *English Law and the Renaissance* (Cambridge, 1901), p. 25. Until recently, however, the received view was that the inns began merely as lodgings and did not assume academic functions until the 15th century: S.E. Thorne, "The Early History of the Inns of Court" (1959) 50 Graya 79–96 (reprinted in *Essays in English Legal History*, pp. 137–154).

[66] See P. Brand, "Courtroom and Schoolroom: The Education of Lawyers in England prior to 1400" (1987) 60 *Historical Research* 147–165; "The Beginnings of English Law Reporting" in C. Stebbings (ed.), *Law Reporting in Britain* (1995), pp. 1–14.

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the words and phrases of the statutory texts, dealt in passing with many aspects of the common law.[67] For instance, the development of a coherent body of criminal law seems largely attributable to these exercises, there being no centralised judicial machinery for the purpose.[68] And, in addition to the readings (which were delivered in vacation, to allow students to attend the courts), there were daily exercises in hall of a rigorous nature. These learning-exercises could be just as convoluted as the discussions of pleading in Westminster Hall, and yet our "common learning" may have owed more to these regular academic exercises than it did to the more haphazard forensic interchanges in open court. Since all the judges had taught in the inns of court,[69] and returned in the learning-vacations to attend the readings, this was no ivory tower. The inns of court were centrally involved in making English law into a coherent science, in developing the kind of systematic thought which is evident in Littleton's *Tenures* if largely absent from the year books.

The learning exercises came to an abrupt end with the clash of arms in 1642, and attempts to revive the old system in the 1660s were ultimately unsuccessful. The doleful truth is that the inns of court found the monetary fines for not reading far more useful than the lectures themselves. That situation could only have arisen because the centre of authority in the common law had already shifted irrevocably from the law schools to the courts. The law was no longer amorphous common learning, but was what the judges said it was. This change was to be so permanent and deep-seated that even legal historians all but forgot the earlier heritage of *comen erudition*. We forgot that (if we may again borrow the French terms) English law once had a body of *doctrine*, created by the readers and benchers and their precursors, complementing and systematising (perhaps even sometimes prompting and directing) the *jurisprudence* of the courts. Fortunately, however, the lecture-notes were not all thrown away. In fact, they survive in some profusion, not far below the bulk of the year books, though the quality varies between full texts and rough student notes.[70] The oblivion of this abundant material is another aspect of the tyranny of the press over our intellectual horizons. The law printers did not

[67] An extreme example is provided by James Hales' reading in Gray's Inn (1537) on costs (23 Hen. VIII, c. 15), which includes a substantive account of the various personal actions mentioned in the statute, including actions on the case: Brit. Lib. MS. Hargrave 92, fo. 37v; translated in Baker & Milsom, *Sources of English Legal History*, pp. 345–351.

[68] 94 Selden Soc. *299–346*; "The Refinement of English Criminal Jurisprudence, 1500–1848" in *The Legal Profession and the Common Law*, pp. 303–324.

[69] To become a serjeant it was necessary in practice to have been a reader. On taking the coif, serjeants were required to leave their inns of court; but they retained close links with them.

[70] The bibliography of readings which is being prepared for the Selden Society contains just over 2,000 items. Many of the later items are not texts of lectures as such, but notes of the readers' cases—the examples used to illustrate the lectures and to provide a basis for disputation.

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condescend to deal in lectures, and no readings before Tudor times were printed in black letter.[71] Modern scholarship has meekly followed suit.[72] Only a few fifteenth-century readings have been printed in scholarly editions, mostly by Professor Thorne before he turned to *Bracton* in the 1950s.[73] And if the medieval lectures need far more attention than they have received, the later readings have been still more shamefully neglected, for they cover a wider range of subjects, some of which do not feature prominently in the reports. So far only two have found their way into a modern edition, one within the last twelve months.[74]

Conclusion

This lecture has, I suppose, kept veering towards a certain pessimism of tone which you might well have predicted from the title. Perhaps there is less reason for natural optimism than in 1888, when the future was sufficiently uncertain to admit of more hope for great publishing enterprises. There have of course been impressive advances, especially in the interpretation of legal change, and it has even become possible to detect weaknesses in some of Maitland's own pioneering essays. But it is doubtful whether in the task of uncovering the raw material we have (for all but the earliest period) advanced very far beyond what Maitland expected his ten men to do in ten years. That is not because scholars have been idle, but because even the few who have followed the call to edit texts cannot work full-time at the task. Moreover, it does not now seem that legal history is ever going to attract many brilliant failures from the Bar. Not that scholars of the necessary calibre, attainments and inclinations have disappeared from the face of the

[71] Note, however, that an anonymous Elizabethan writer urged that the readings be published, "to th'end that studentes might be resolved in doubtfull pointes of the lawe": Brit. Lib., MS. Harley 4317, fo. 4.

[72] As long ago as 1928, Holdsworth called for the publication of more readings, if they could be discovered; but he regarded them merely as "the best of commentaries on the Year Books and the early Reports": *Some Lessons from our Legal History* (1928), p. 167, n. 4. He assumed the common law had always been case—law, augmented by "books of authority" and statutes: "The Importance of our Legal History" (a lecture delivered at Northwestern University), *ibid.*, pp. 3–54.

[73] S.E. Thorne (ed.), *Prerogativa Regis: tertia lectura Roberti Constable de Lyncolnis Inne anno 11 H. 7* (New Haven, 1949); *Readings and Moots at the Inns of Court in the Fifteenth Century*, Vol. 1 (71 Selden Soc., 1952). There are also some extracts from readings, and some readers' cases, from the 15th century in J.H. Baker (ed.), *Spelman's Reports* (93 Selden Soc.), *Port's Notebook* (102 Selden Soc.), *Readings and Moots*, Vol. 2 (105 Selden Soc.), and *Spelman's Reading* (113 Selden Soc., appendix to the introduction).

[74] Both are from the early 16th century: B.H. Putnam (ed.), "Prima Lectura Magistri Thome Marowe", in *Early Treatises on the Practice of the Justices of the Peace* (Oxford, 1924), pp. 286–414 (Inner Temple, 1505); J.H. Baker (ed.), *John Spelman's Reading on Quo Warranto delivered in Gray's Inn (Lent 1519)* (113 Selden Soc., 1997). For use of a 17th-century reading (Francis Moore's 1607 reading on charitable uses), see G.H. Jones, *History of the Modern Law of Charity 1532–1827* (Cambridge, 1969).

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earth. If only a tiny percentage of students could be diverted from those other branches of history, or literary studies, where staple topics seem to be revisited with dreary frequency, the gains might yet be substantial. Once the fear of technicality can be overcome, few other fields apart from archaeology can offer as much opportunity to delve into unbroken ground and recover lost worlds. At any rate, there is no need for historians of English law to fear redundancy. There is more than enough to keep them in the forefront of legal scholarship for the next hundred years. And they have a more vital role to play than ever in keeping alive an understanding of the laws of England in a rapidly changing world. The new information technology may soon provide us with instant access to every piece of legal information throughout the globe; but it will not equip us with the wisdom to understand it. And surely, if civilisation is cut away from its roots, it will wither for want of sustenance.

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