Michigan Law Review

Volume 27 | Issue 6

1929

THE FIFTEENTH CENTURY-THE DARK AGE IN LEGAL HISTORY

Joseph F. Francis
Professor of Law, University of Oklahoma

THE FIFTEENTH CENTURY—THE DARK AGE IN LEGAL HISTORY

By Joseph F. Francis*

EVERYWHERE during the last few decades there has been a revolution in the thinking of educated men. I refer to the revolution in logical method[2] and thought that had its impetus first in the non-Euclidian mathematicians. was then carried on by the logicians and philosphers and finally culminated in the startling conclusions announced by Einstein.[3] This revolution has been an attack on absolutism and on the metaphysical nonentities that pervade all man's learning. The attack is not new, it is only new in vigor, in scope, and in promise.

Scientists have definitely given up looking for laws in nature and are now satisfied to treat all so-called "natural laws" as postulates, or tentative general statements used as convenient tools for present description of events, and as hypotheses for further investigation. Every word in the scientist's vocabulary is being critically re-examined and meaningless or metaphysical terms are being rapidly cast aside. Taking their cue from the physical sciences, the social sciences[4] have, especially during the last three decades, made a tre-

*Professor of Law, University of Oklahoma.

[2]Morris R. Cohen, "The Subject Matter of Formal Logic" (1918) 15 Jr. of Philosophy, Psychology, and Scientific Method, ib., Mechanism and Causality in Physics; Edington, A. S., Time, Space, and Gravitation (1920); Karl Pearson, Grammar of Science (1900). *Cf.* Mr. Justice Holmes, Collected Papers (1920) 307, "To have doubted one's first principles is the mark of civilized man."

[3]Charles Nordman, Einstein and the Universe (1922).

[4]Karl Pearson, *op. cit.* supra note 2 and other citations in that note. L. L. Bernard, "Scientific Method and Social Progress," 31 Am. Jr. of Sociology 1-9. "The law is not in nature. It is in the mind of the person who has formulated it as a method of seeing nature and in the minds of those who have copied it from him as a view point. This is a fact which the metaphysician has not yet realized, and the realization of it will transform his attitude toward science, progress, human relationships, all things" * * * "The formulation of social laws is subject to the same general principles as is the formulation of physical and chemical laws." *Cf.* J. P. Hall, the "Task of the Law School," 24 Mich. L. Rev. 42, 47.

mendous drive toward objectivity.[5] Sonorous abstractions and magnificent generalizations about how man had or ought to have behaved are giving way to facts and figures. Laborious researches in statistics, social psychology, and history are being made to find out something of the origin, direction, and goal of man's activity. True, only a bare beginning has been made here. Furthermore, the terminology of the social scientists is hopeless and they are still groping for a methodology.[6] But if the social scientist can again take his cue from the physical scientist of 1929, there is some hope for a science of man in society.[7]

I. Recent Tendencies in the Law

How has the law reacted to what is going on all about us? True to form, the legal profession is lagging almost beyond shouting distance behind the spirit of the time. Some notable improvements have, however, recently been made. It is significant that these have been improvements in theory. Mr. Justice Holmes seems to have anticipated the physical scientists of today when he said a generation ago: "The prophesies of what the courts will do in fact and nothing more pretentious, are what I mean by law."[8] "For legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it."[9]

What is any law, physical or social, more than a dogma of prediction? Still it can hardly be said that this view of our laws as formulas of prediction is the current view.[10] We are just arriving.

[5]T. Veblen, The Place of Science in Modern Civilization (1919) chs. I and II; John Dewey, Human Nature and Conduct (1922); A. W. Small, Some Contributions to the History of Sociology (1923); 28 Am. Jr. of Soc. 385. F. R. Moulton "M. Henri Poincaire" 20 Popular Astronomy, 11-12; A. N. Whitehead, An Introduction to Mathematics (1911); B. Russell, The A B C of Atoms; John Dewey, Experience in Nature (1925); Pound, Philosophy of Law. F. C. S. Schiller, Formal Logic (1912); H. E. Cunningham, Text Book of Logic (1924).

[6]Nicholas J. Spykman, Preface to Social Theory of George Simmel, (1925).

[7]I do not, of course, refer to the mathematical positivism of Comte.

[8]Collected Papers (1925) 173.

[9]*Ib.*, 313.

[10]W. W. Cook, "The Logical and Legal Basis of the Conflict of Laws," 33

Although very much of our terminology is still crammed with metaphysics or is entirely meaningless, we have made some noteworthy progress in accurate definition of some of our more fundamental terms. While our opinions are cast in the form of deductive logic, we are slowly coming to realize that these opinions do not represent the *method* of thinking, but only the *product* of thought.[11] Although we still talk as though we decided doubtful cases deductively, in our more thoughtful moments we know better than that. This helps us to see more clearly the law-making element in our decisions. Once it become fully recognized that the judges are making law and not merely finding it, it becomes necessary for them to give quite different reasons for these decisions.[12]

Just as the law of gravitation is not a conclusive argument against aviation, so the legal profession is sharing the common belief in man's ability to somewhat better his condition, in spite of the social and physical forces about him. (Here I am conscious of the metaphysical quality of the word "forces.") Judges are not only frankly admitting but are actually basing and stating the social policies upon which their decisions rest. This is a far cry from the recent time when all talk about "public policy" in the court room and even in the leading law schools of this country, was tabooed. This is a marked triumph over the metaphysical historical school of the nineteenth century or the law of nature school of the eighteenth, both of which thought of law as something found and not made. We seem now to be entering a new age of creative activity[13] in law as well as

---

YALE L. JR. 457-458. *Cf.* the popular belief that an ostrich buries its head in the sand when frightened. A story started by Herodotus. See J. P. Hall, *op. cit.*, note.

[11]John Dewey, "Logical Method and the Law," 10 CORN. L. QUART. (Dec. 1924). Mr. Dewey makes this remarkably clear. *Cf.* John M. Zane, "German Legal Philosophy", 16 MICH. L. REV. 287, 338 for a case of a brilliant writer still following Aristotle's conception of deductive logic. Zane probably is not supported today by any of the better writers on formal logic. *Cf.* H. E. Cunningham, *op. cit.* ch. 23. LEGAL METHOD 329; F. C. S. Schiller *op. cit.*, note 5. See also L. L. Bernard *op cit.* note 4.

[12]Roscoe Pound, SPIRIT OF THE COMMON LAW (1921) ch. 7; Holmes COLLECTED PAPERS (1920) 179-184. See also note 12. H. A. Overstreet, "Philosophy and our Legal Situation," 10 JR. OF PHILOSOPHY, PSYCHOLOGY AND SCIENTIFIC METHOD 113.

[13]Roscoe Pound, SPIRIT OF THE COMMON LAW, (1921) ch. 8; INTERPRETATIONS OF LEGAL HISTORY, (1923) ch. 7. Cardozo, NATURE OF THE JUDICIAL

in the sciences. Yet as is the case in the other social sciences, our opinions are filled with high sounding phrases that are worse than useless. There is a tremendous amount of dead timber and metaphysic in our legal language. May we, too, take our cue from the modern physicist and chemist and purge our technical vocabulary of all senseless terminology and base our decisions, in so far as they are new at least, on matters of fact, objectively obtained?

It would seem then that the next logical step in the improvement of the law is the abandonment of its aloofness from the other social sciences and a sacrifice of its splendid isolation for the greater common good that will come from a correlation and integration of all the social sciences, including history, the great laboratory of them all. A methodology along this line is yet for the future but there are already some hopeful signs.[14] If considerations of social convenience and policy are to be the basis of all the decisions in all really doubtful cases then it can hardly be denied that jurisprudence will have to borrow freely from the other social sciences. The new economics, the new political sciences, the new sociology, the new history, the new social psychology, all contain the stuff out of which the new jurisprudence is to be made.

What has history, and more especially, legal history to offer to the new era in jurisprudence?

II. The Contributions of History to Law

Modern history writing, in the scientific sense, began with the German historians late in the first half of the nineteenth century.[15]

Process, (1921); Growth of the Law, (1923). Walter W. Cook, "Scientific Method and Law" 13 Am. Bar Assn. Jr. 303. Herman Oliphant, "A Return to Store Decisis" 14 Am. Bar. Assn. Jr. 71 and 159. This launching of the new school of jurisprudence at Johns Hopkins is significant.

[14]K. N. Llewellyn, "The Effect of Legal Institutions on Economics," Am. Economic Rev. 665. Professor Llewellyn is now preparing a book based on a graduate course given at Yale University Law School during the summer of 1925 and is now being given at Columbia University which he will probably entitle Law in Society wherein he breaks ground for just such a methodology. See John R. Commons, "Law and Economics," 34 Yale L. Jr. 371; Oliphant, *op. cit.* note 13.

[15]Albion W. Small, "Ranke and Documentation," 29 Am. Jr. of Sociology 69.

History writing has ever since been steadily becoming more objective and less metaphysical.[16] Sometimes we see history perverted as by Savigny and his metaphysical but inappropriately named "historical" school of jurisprudence. Savigny was extremely unhistorical when he postulated the Hegelian idea of "right" working out its course in history and further postulated man's helplessness in getting out of the way of these forces.[17] We see Savigny was claiming too much for history. History can not displace reason and science.[18] It must be their ally. The famous attacks of the Austrian social scientists,[19] and the more recent criticisms of Morris R. Cohen[20] on history are directed to the excesses of historians, to the unhistorical in history writing, and not to the new history as a reasonably objective description of events. The new history designates, as near as may be, objective descriptions of all the activities of man since he first appeared upon the earth, all past human experience. When Cohen appears to go so far as to argue that, however valuable history might be otherwise, it can afford no criterion for the evaluation of present social problems, he is simply saying it seems that man can not learn from experience, and that is the end of the matter.

Dean Pound's attack upon the historical school is, as I see it,[21] not an attack on history at all, but rather a plea *for* history; says

---

[16]Karl G. Lampercht, "The Science of History," CONGRESS OF ARTS AND SCIENCES II. (St. Louis, 1904) III *et. seq.;* F. J. E. Woodridge, THE PURPOSE OF HISTORY, (1916) J. H. Robinson, THE NEW HISTORY, ch. I.

[17]Roscoe Pound, INTERPRETATIONS OF LEGAL HISTORY, (1923) 12-20.

[18]Morris R. Cohen, "The Insurgence Against Reason," 32 JR. OF PHILOSOPHY 120.

[19]Albion W. Small, "Later Phases of the Conflict Between the Historical and the Austrian Schools," 29 AM. JR. OF SOCIOLOGY 517.

[20]"History versus Value," JR. OF PHILOSOPHY, PSYCHOLOGY AND SCIENTIFIC METHOD, vol. 11, p. 701. Is not this what chiefly distinguishes man from the lower animals—his ability to use his past? See W. N. Polokov (1925) MAN AND HIS AFFAIRS, ch. II.

[21]He has been misunderstood by Sir Frederick Pollock in "A Plea for Historical Interpretation," 39 LAW QUART. REV. 163, and by Max Radin in a review of Pound's SPIRIT OF THE COMMON LAW and his INTRODUCTION TO JURISPRUDENCE, (1923) 11 CAL. L. REV. 455, 456. Pound is talking about the metaphysical in history writing of the historical school; these gentlemen are talking about the historical method. Even as far back as the Thibaut-Savigny controversy the opposite parties were mis-stating each other's positions. See A. W. Small, "Thibaut-Savigny Controversy," 28 AM. JR. OF SOCIOLOGY 711.

Pound: "After a century of historical jurisprudence along these lines we come to think that it is not a historical school at all."[22]

Very recently Dean Pound has made this very clear when he said: "Today after the ordering and the systematizing era of the latter part of the nineteenth century, we are called to a new era of creative activity. In such a time legal history must be one of our chief instruments. It must show us what our traditional legal materials really are and how they came to be what they are. It must show how far they grew out of or were given shape by the needs of the civilization of the time of their beginnings, how or how far they were reshaped by the civilization of later times, and how far they responded or failed to respond to the change in the social, political, or economic order. Thus when we set out to frame juristic and legislative programs we must look to history to tell us both what we may seek to do with some assurance of success and what we must avoid. .... We have long been in the habit of looking to legal history to warn us. But rightly used it will do much more. It will enable us to walk with some assurance in the new paths which are opening before us."[23]

A good word can be so long associated with something obnoxious that the word itself prejudices all its connotations.

Now let us turn to the positive side of our story and see what history holds in store for the legal profession.[25]

One great contribution of history to the science of man is the law of continuity,[26] or the law of steady growth. Things do not just happen. This law has recently been demonstrated by the social psychologists in their dogma of "habit," "custom," and "mores." This "law" if I may call it that, is based upon a more fundamental postulate, namely, the postulate of causality in the affairs of men. This postulate, as all postulates, is a great act of faith but there is

[22]INTERPRETATIONS OF LEGAL HISTORY (1923) 19. See *ib.* p. 67-8, 115, and 141 *et seq.* "Jurisprudence is historical and must be historical in so far as it takes stock of the social conditions which call forth legal principles" says Pound in reviewing Vinogradoff OUTLINES OF HISTORICAL JURISPRUDENCE, 35 HARV. L. REV. at 782. SPIRIT OF THE COMMON LAW (1921) 213.

[23]Roscoe Pound, Introduction to P. H. Winfield's THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY, (1925) p. xv.

[25]J. O. Hertzler, "The Sociological Uses of History," 31 AM. JR. OF SOCIOLOGY 173.

[26]J. H. Robinson, HISTORY OF WESTERN EUROPE, ch. I.

but one other alternative, and that is animism or abstract chance. This alternative has been tried for some thousands of years with little success. It gets us nowhere.

As a corollary to the above law we may add that history, so far as we are now aware, shows that there is no power that guides the destinies of man save himself; that there is no beneficent purpose in history; that social degeneration, and misery are just as liable to overtake man as progress and social well-being. We see that man's greatest enemy has been man himself. We see men cutting each other down and setting civilization back ages, not so much because of a difference of ideals or opinions but because of a misunderstanding of each others' language.[27]

Mr. Justice Holmes states the case for legal history so vigorously and so beautifully that I make no apology for quoting from him at length,—

"The life of the law has not been logic; it has been experience... In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation ....its form and machinery and the degree to which it is able to work out desired results, depend very much upon its past."[28]

"The past gives us our vocabulary and fixes the limit of our imagination. We can not get away from it .... it always ought to be remembered that historic continuity with the past is not a duty, it is only a necessity."[29]

"To get to the bottom of any system, therefore, a good deal of history has to be studied, and this is true of the law under which we live now."[30]

"The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race."[31]

"The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we

[27]Other suggested "laws" of history will be found in an able address by Edward P. Cheyney before the American Historical Association at Columbus in 1923; W. N. Polokov, MAN AND HIS AFFAIRS, ch. V.

[28]O. W. Holmes, COMMON LAW, 1.

[29]*Ib.*, COLLECTED PAPERS, 139.

[30]*Ib.*, 156.

[31]*Ib.*, 170.

can not know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, towards a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal."[32]

"History sets us free and enables us to make up our minds dispassionately."[33]

"Any man who is interested in ideas needs only the suggestions that I have made to realize that the history of the law is the embryology of a most important set of ideas, and perhaps more than any other history tells the story of a race."[34]

"It is worth while, even with the most mundane ideals, to get as big a grasp of one's subject as one can. And therefore it is worth while to do what we can to enlighten our notions of the desirable and to understand the precedents by which we are constrained. The history of the law stands along side of sociology and economics as a necessary tool if one is to practice law in a large way."[35]

Thus we have the opinion of a very busy lawyer who has done much to make the law what it is, and in doing so has drawn freely from legal history. It is difficult to see how a lawyer who is really historically minded can fairly ever be classed as a radical or as a conservative. He has a healthy but tempered faith in all reform. He has an enlightened scepticism for all the verities.

III. Is the Legal Profession Historically Minded?

I have been uttering truisms, I know, but is the legal profession historically minded?[36] Has the legal profession, as a profession,

---

[32] *Ib.*, 1867.

[33] *Ib.*, 225.

[34] *Ib.*, 299.

[35] *Ib.*, 301; see also *ib.*, 229, 212, 187, 289.

[36] "You are speaking Sir of Records, but who are they among this crowd. (and even of the Coifs) who ever study or vouchsafe to defile their fingers with any dust save that which is yellow? Or know anything of the records, save what upon occasion they lap out of Sir Robert Cooke's basin and some few others?" The diarist Evelyn to the Bishop of Carlisle 1699 (Dr. Nicholson) noticed by A. L. Cross, the New Holdsworth (1925) 22, 23.

ever been historically minded? I see very little evidence of it in the opinion of the courts. Take down at random, any reporter. How infrequently in the opinions will one find that the judge is conscious of the origin and the development of the doctrines he is propounding. Often he seems to have nothing better than a blind guess that the reasons he is confidently repeating for his decision have been obsolete for two centuries.[37] In the long shelves of treatises on our law, with a very few notable exceptions, you seldom find the writer treating his subject in the light of its evolution but rather as if it has no beginning, no growth and no direction.[38] Suppose some benefactor chose to endow a chair of legal history in one of our better universities, where would he look to find a man to fill the chair? I doubt if there are more than the merest handful of men in this country who claim to have more than a speaking acquaintance with legal history. Certainly very few could qualify for such a position. It is getting to be almost a discovery to find in our legal periodicals the historical treatment of a subject which takes it back through its various phases to its origin in earlier law. Yet we all know that seldom does a new case arise but analogies centuries old are competing for recognition. Over thirty-five years ago the great Maitland prayed that American scholars might come from across the Atlantic and help explore the vast mines of legal history.[39] To that prayer all too little response has as yet been made.

The reasons for this apparent lack of interest in the history of our law are many and complex. Our lack of the records on this side of the Atlantic no doubt is one important reason for our not search-

[37]E.g.: "An agister has no lien because he does not improve an article by labor and skill;" "One can not be guilty of larceny of apples on a tree for the trespass merges with the trespass to the land;" "One can not be guilty of larceny of a dollar bill for this is a chose in action and the paper is merged in the chose;" "An ultra vires contract is void because it is illegal." "Money paid under a mistake of law is not recoverable for policy demands the presumption that every one is presumed to know the law;" "Fresh complaint, is an exception to the hearsay rule because it is made so soon after the outrage that it is likely to be true;" "The state is not liable in tort for the king can do no wrong;" "Delegated powers can not be delegated;" "Corporations cannot migrate;" "A crime is not committed here for the force did not take effect here" etc., etc. * * *

[38]Wigmore and Williston are notable exceptions.

[39]2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1889) 53, 95.

ing them. Our reliance upon the earlier English treatises has too often proved disappointing. The authors seem to be interested more in the empty formal rules than in the purposes they serve. I wonder if readers have not often noticed in historical monographs as well as treatises on both sides of the Atlantic that our authors often give us a remarkably clear picture of their problem or problems in the 12th and 13th centuries, but then in the 14th century, especially in the latter half, a mysterious darkness seems to pervade the discussion of the problem which is totally lost in the 15th century. When the problem emerges again in the 16th century, it has usually undergone a remarkable and unexplained transformation, or more often it is completely lost in the dark period and new rules emerge in the 16th century full grown.[40] The fifteenth century has been a barrier to all earnest research in legal history. This is submitted as one of the important reasons why the legal profession, on this side of the Atlantic at least, has appeared to have little or no interest in the law's past.[40a] We shall see presently why the fifteenth century is so much of a blank in our law and how this may be temporarily remedied in part at least in the near future. The fact that this condition exists and has existed for five centuries is a reproach to the profession.

If the legal profession has not been historically minded in the past, it must become so now in this approaching age of creative activity in the law.[41] In the time of our break with the eighteenth century notions of law, there arose a tremendous interest in the law's past. Parliament issued roll after roll of its old records in those days of "radical reform"— quoting Maitland,—"The desire to reform the law went hand in hand with the desire to know its his-

[40]This is especially true in property, criminal law and procedure. What happened to all our writs and assizes in real property that we know so well in the thirteenth and fourteenth centuries? In the thirteenth century, we see the criminal law change from the private appeal into the pleas of the crown but we know very little as to how the strict rules of absolute liability were softened by the many defences appearing in the sixteenth century. The rise of the "Use" is still very obscure. Still more so is the action of assumpsit and our whole doctrine of contract.

[40a]Another important reason is the barrenness of traditional legal history of its connection with the life of its time.

[41]Roscoe Pound's introduction to P. H. Winfield's CHIEF SOURCES OF ENGLISH LEGAL HISTORY. *Ib.*, SPIRIT OF COMMON LAW.

tory; and so it has always been and always will be."[42] Today there is great promise for the reform of our law as evidenced by the changing notions of the functions of the law schools. The notion is brewing that law schools must become centers of scientific social research,[43] as evidenced by the recent renewed interest in legal history, as evidenced in the recent interest in legal philosophies and legal theories, and as demonstrated by the fact of the American Law Institute. The law is showing faint but certain reactions to thought of the last decade, that is such a powerful influence in the other social sciences. Historical mindedness is the logical result of scientific mindedness. There can be no scientific law making that disregards history.

The ways and means of insuring historical mindedness in our young lawyers are beyond the scope of this paper.[44] When the need is clearly recognized, ways and means will take care of themselves. It only remains, as I have already hinted, to suggest a point where some legal history research is urgently needed.

IV. Survey

Before we shall ever be able to teach or know much about our legal institutions their history must be written. No adequate history of the English law will ever be written before a great deal more use is made of the first hand authoritative sources, and much more attention is paid to the social and economic background of formal rules. Before we shall ever be able to trace a single rule or doctrine to a time when it did or did not serve a useful purpose we shall have painstakingly to work over the stacks and stacks of old records that the English guard so carefully but use so little.[45]

---

[42]E. W. Maitland, "Materials for History" 2 Select Essays in Anglo-American Legal History 59. "Now it is idle to talk of effectively reforming the law, and still idler to talk of reforming its administration until we have prepared for the reform in the consciousness of the profession; and the way for the law schools to enlighten and reform lawyers is to enlighten and reform students." F. S. Philbrick, "A Casebook on Legal History," 31 Yale L. Jr. 720, 732.

[43]J. P. Hall, *op. cit.*

[44]A. L. Cross, "English History and the Study of English Law," 2 Mich. L. Rev. 649; Francis S. Philbrick, "A Case Book on Legal History," 31 Yale L. Jr. 720.

[45]There are some notable exceptions. Selden, Cotton, Prynne and Hale in

It is far beyond the scope of this paper to give a critical survey of what has been done in the writing of the history of our law. But in order to show a place where something more urgently needs to be done it will be necessary to notice a few of the more important achievements along this line. For this purpose I shall roughly divide the history of our law into four periods: (I) The Anglo-Saxon Period; (II) The Period Between the Conquest and the Beginning of the Fifteenth Century; (III) The Fifteenth Century; and (IV) The Period Beyond the Fifteenth Century to date. Of the first and the last of these four periods we need here say but just a word.

We shall probably seldom have occasion to go beyond the Norman Conquest to find the origin of a modern rule of law or an existing legal institution; but if need arise we have the great work of Liebermann on the Anglo-Saxon laws that will forever remain definitive. For the period from the fifteenth century onward our only embarrassment, for the most part, is not the lack of but the wealth of materials. We must center our attention on the second and third periods in our classification. Although there are other important materials to be taken in consideration, we shall confine our attention to the treatises, the Year Books, and the Plea Rolls.

A. *Treatises.*

Strange as it may seem we probably know more about the early period of our law than we know of any other period until almost our own times. I refer to the age of Glanvil and Bracton. Here we have two great contemporary judges writing their splendid treatises from first hand information of our law such as it then was. Then we have the borrowers from Bracton in Britton and Fleta, which when properly used, contain much valuable information that appears neither in Glanvil nor Bracton. It is to our great gain that Bracton borrowed freely records of the court and collected them into what Maitland has made famous under the style of "Bracton's Note Book." As further contributing something to our knowledge of this period we have the writings of Littleton, Coke, Hale, Hawkins, Bigelow, Holmes, Blackstone, Maitland, Vinogradoff, Stephens,

the seventeenth century and Pollock, Maitland, Pike, Bolland, Vinogradoff, and others in the nineteenth century, and Holdsworth in the twentieth century.

Pike, Brunner, Taylor, Jenks, Stubb, Digby, and others.[46] English legal history writing began in earnest with Reeves. Then after the materials had increased twenty-fold we get the monumental work of Pollock and Maitland describing at least the main structures of our legal institutions up to the time of Edward I. The New Holdsworth also covers this period and on some subjects supplements Pollock and Maitland. When Woodbine's Bracton is finally completed and translated there will be little to be wished for in this period. The latter part of this period, that is from Edward I to the fifteenth century, is not so well treated but the projections of Pollock and Maitland together with Reeves and Holdsworth give us a fairly coherent story of bare legal history. It is to be noted that no truly functional legal history writing has ever yet been attempted.

What is the situation as regards the fifteenth century? When Reeves wrote he stood, so far as available sources are concerned, where Blackstone, and Coke, and Littleton stood when they were writing their treatises. The same was true when Pollock and Maitland wrote their history and the same situation practically prevails while Holdsworth writes today. In Littleton we have only the highly technical subject of Tenures treated. Fortescue gives us a rather sketchy popular account of the law in his day. Valuable as these two accounts are they practically leave the great body of our law untouched. How much Littleton relied upon the Year Books or upon his memory we do not know and as to just how accurate is Littleton we shall never certainly know until the Plea Rolls have been thoroughly consulted. Coke has been abused enough. Suffice it here to say that he was imposed upon by the Mirrors, and Y. B. B. It is now well known that Blackstone's popularity was due to his ability to make the law "speak like a scholar and a gentleman" rather than to his ability as a careful legal historian. He copied Coke industriously and indiscriminately mixed opinion and fact.[47] His civil law was superficially learned and his philosophy of law shows crude borrowings from Puffendorf, Locke, and Montesquieu.[48] On the fifteenth century he is practically valueless to the person who

[46]See appendix. There is real need for a series of combined tables describing sources for each decade of our history.

[47]A. L. Cross, "A Recent History of English Law," 19 MICH. L. REV. 1, 5.

[48]F. H. Winfield, THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY 339.

is interested in tracing a particular problem through that century. Reeves did the best he could with the materials he had at his disposal. As with Reeves so with Holdsworth, he has had to reluctantly, as he admits, depend upon the black letter Year Books and their abridgments for the outlines of the law for this period. Holdsworth has of course,[49] not been able to examine the unedited Plea Rolls. Since practically all the treatises we have on our law during the fifteenth century are based primarily on the black letter Year Books it becomes necessary to consider the nature and value of these documents.

B. *The Black Letter Year Books*

The story of the Year Books is now of such common knowledge that I will only point out those characteristics that serve to make my point.

It is now settled beyond reasonable doubt that, contrary to the opinion entertained for centuries, the Year Books are private, unauthoritative selected cases chiefly of procedural interest to the apprentices at law.[50] There are still many unanswered puzzles as to the mechanics of the note-taking, the manuscript making, etc., but the following facts are quite clear:—There are no records of appointments or payments of reporters during the Year Book period. Most of the Year Books have at least two and sometime as many as sixteen parent MSS. which generally vary from each other widely. No official stamp was ever put up on them as by reserving them for the use of the court or by making them a permanent record of the cases. In fact only those cases were reported that were thought to be of value to the lawyer in his practice. They do not purport to be a complete record of all the cases. Furthermore it is also fairly clear that neither the reporters nor the judges during this period thought of these reports in any way as authoritative. Even during the time of Coke we find many cases where the judges pass over the Year Books to the same cases in the Plea Rolls, which shows that they did not regard them as authoritative.[51] They often con-

[49]Because of their inaccessability.

[50]W. S. Holdsworth, II HISTORY OF ENGLISH LAW, 3d ed. (1923) 525-556. We have here a splendid account of the Y. B. B.

[51]*Ib.*, 538 note 5: "Maitland (Y. B. 3Edw. II (S. S.) xxi) says that one of the MSS of Edward II's Y. B. B. contains many records with a precise reference to the roll." Pike has found many such references in the Y. B. B.

tain long drawn out discourses on points of pleading or on hypothetical cases so that the reader is generally left at sea as to what disposition was made of the case that was before the court. Imagine a modern lawyer trying to find the law today in his jurisdiction with such a system of reporting. Or imagine some legal historian trying to restate the modern law five centuries hence from these reports exclusively.

We have no evidence that when it came to the printing of the Year Books in 1581 or 1582 the best MSS. was selected. I quote from Holdsworth which represents the opinion of all the scholars who have worked with the black letter Year Books: "Neither the older editions nor the later show any signs of careful editing. In some cases where two reports of the same case were found in different MSS. the 2nd. report is dislocated from the first, and either made to appear as a report of a different case or, else labeled as a residum or continuation. It is true that Tottle takes credit to himself for having done something in the way of correction; but there are few signs that in some cases more than one MSS. has been consulted. The edition of 1679 also claims to be corrected and amended; but in the opinion of those most competent to judge, this claim is not justified. Maitland has collected crushing evidence of the carelessness with which it has been printed. He shows that the MSS. which Maynard lent, and the table of matters which he furnished, have been so carelessly printed that it is almost impossible to make sense of the greater part of the cases. 'Of sheer nonsense those old black letter books are too full.' And at the present day the books which served lawyers 'steeped in the learning of real actions' will not serve us, because 'we have not earned the right to guess what a mediaeval law report ought to say'.... "He (Pike) was the first to begin the practice of collating the Year Books with the Plea Rolls, and he has thereby shown us, 'who have not earned the right to guess' the way to verify."[52]

There are other serious defects in the black letter Year Books[53]

[52] *Op. cit.* II, 530-531. C. C. Soule, "Year Book Bibliography," 14 HARV. L. REV. 557, 572; P. H. Winfield, CHIEF SOURCES OF ENGLISH LEGAL HISTORY 177.

[53] C. C. Soule *op. cit.*, W. S. Holdsworth, *op. cit.*, 525 *et. seq.*; P. H. Winfield, *op cit.* 173 *et. seq.*

such as gross blunders in spelling, in Latin, in French, in wrong insertions, in misleading cross references, in binding and in paging, it not being uncommon to find pages upside down. Add to this the difficulty of reading this black letter printing, much more difficult than the MSS., and you will readily see why they are not only hopelessly inadequate as a description of the law of the fifteenth century but why they are practically worthless to modern students of legal history who are untutored in reading the black letter printing.

The printing of the Year Books began in 1581 or 1582. Pynson was their first systematic publisher. By the end of the first quarter of the sixteenth century he had published from fifty to sixty five editions. After Pynson there were some dozen occasional printers of the Year Book all of which were driven from the field by Tottle in the latter half of the sixteenth century with his 225 editions. The first nearly complete edition we have of the reports is the "Quarto Edition" finished in 1638. For some yet unexplained reason many gaps occur in this edition, leaving a total of about one-third of all the years unpublished. The final edition is the "Standard Edition" published in 1679. The edition is practically a reprint of the "Quarto Edition" arranged chronologically with a few minor additions. Then after a period of nearly two hundred years of inaction modern editing begins with the Rolls Series (1863-83) by the Record Commission under the editorship of Horwood and Pike. Horwood edited the Y.B.B. of 20-22 and 30-35 Edward I and 11 Edward III, Pike edited the Y.B.B. of 12-20 Edward III. Pike's edition which takes us near the middle of the fourteenth century is very valuable for he collates the Y.B.B. with the Plea Rolls. The Selden Society under the editorship of Maitland, Turner, Vinogradoff, and Bolland countinued the practice of verification initiated by Pike and have since 1903 edited eight years (1-8 Edw. II) from Edward II. If the Selden Society should decide to go on beyond Edward II in editing Y.B.B., at the present rate of speed it would take them over one thousand years to complete the fifteenth century. Between 1292 when the Y.B.B. began until 1535 when they end, a period of 243 years, we have now 25 Y.B.B. edited (this includes the Y.B. 12 Richard II, edited by George F. Deiser for the Ames Foundation in 1914). Although we have been at it over a half century we have barely made a beginning in editing the Y.B.B. It is to be noted, how-

ever, that we have some valuable work done in the fourteenth century but absolutely nothing in the fifteenth.

Do we, then, have any authoritative first hand records of what went on in the courts during the fifteenth century, that century that is in many ways the most important of all? Yes, we have the Plea Rolls that are inaccessible except in their original MS. form.

C. *Plea Rolls*

What are these Plea Rolls that we have heard so much about? Physically, they are sheets of parchment fastened together at the top. When they first begin to appear in 1194 they are often untidy and sketchy: "The jurors say John son of L. and Alice daughter of S. were drowned in the mill pond of Estwell, and Englishery was not presented. Murder."

Thus we get the story of the murder fine and the presumption against Englishery told in a cryptic sentence or two. By the middle of the thirteenth century these records are almost as full and neat as we could desire. These records served many important purposes so it was highly important that they be accurate and complete in every detail. Bolland vividly pictures to us how the great load of bulky court records were piled up in front of the court room where sat the itinerant justices. With these records the coroner's records must agree in the minutest detail or he was "in mercy," a very convenient way of collecting taxes. Furthermore, the justices must account to the king in this lucrative business of dispensing justice and these records were the account books. Then again, compromises and conveyances by cyrographs were recorded in these records and were the final and best evidence of these transactions. This is the reason that the records were so carefully guarded against forgeries long before the crime of forgery is a crime generally. These facts make these records extremely valuable as authentic first hand authoritative records of the law.

Due to the fact that these records were so jealously guarded they were practically inaccessible to the profession. Even as our law reports today, they were issued in such masses that the law became lost in them. They were stacked in the Tower of London but the old Tower was not large enough, so they were stored in the Chapter House at Westminster and in the Exchequer building; but even

these have a limited capacity, so finally the overflow was taken to the basements of the Temple Church, White Tower, Wakefield Tower, in the stables of the Carlton House, and in the sheds of the King's mews and The Rolls garden. Half forgotten and practically inaccessible they remained in this condition until the beginning of the nineteenth century when the Record Commission was appointed and did nothing until 1838 when the Records Office was established and the records gathered there. The Plea Rolls are now fairly well roughly catalogued, although we do not yet know when they end. We know that they completely parallel the Y.B.B. and run into the Tudor and Stuart periods. In the Common Bench alone during the reign of Henry VIII there are an average of about 2,700 skins of parchment per year or a total of over 100,000 skins for his period of thirty-eight years reign. Although their volume is baffling we can now easily find just the Plea Rolls we wish. We have now at our finger tips nearly the complete record from 1194 on.

Let us now see what has been the almost unanimous opinion of all the scholars who have worked on them of the relative value of the Y.B.B. and the Plea Rolls.

What Scholars have Thought of the Value of the Plea Rolls. All the Scholars who have worked in this period are practically unanimous as to the value of Plea Rolls.[53a]

[53a] Summary of the Plea Rolls (Edited) by Centuries. 11th. & 12th. C: Bigelow's Placita Anglo-Normannica, 1066-1189. Placitorum Abbreviato, (Rec. Com.), 1189-1272. 13th. C.: Placitorum Abbreviato, (Rec. Com., 1189-1272.

1. Palgrave's Rotuli Curiae Regis (R. C.) 1205-17.
2. Government 1922-25, (Rec. Com.), 1201-03.
3. Maitland's Bracton's Note Book, 1216-72.
4. Selden Society: Select Civil Pleas (Baildon), 1200-03. Select Pleas of the Crown (Maitland), 1200-25. Select Civil Pleas (Glouchester, Maitland), 1221. Select Civil Pleas (Somerset, Healy), 1200-67. Select Pleas of the Forest (Turner) 13th. Cen. Select Cases from Coroner's R. (Gross) 1265-1413.
5. Surtees Society: Select Pleas from the County of Northumberland, 1256, 1260, 1276.
6. Pipe Roll Society: Three Rolls of the King's Court (Maitland) 12th. Cen., 1194-95.

14th. C.; Pike's YBB. collated with the Plea Rolls which covers the period from 1338 to 1346.

15th. C.: Nothing but a few scattered cases edited for some local county or from some special court.

Says Brunner: "The development of the law at this time (14th and first one third of 15th century) must be traced almost exclusively through the judicial sources."[54]

"The records belonging to this period are as yet unprinted. Even the Abbreviato closes with Edw. II. The printing of the older records would be especially desirable in order to facilitate the understanding of the Y.B.B."[55]

Quoting Maitland: "One of the many excellent features of the newly published Y.B.B. of Edw. III's reign consists of the further information of the cases there reported, which information has been obtained from the Plea Rolls. Often the report of a case in the Y.B.B. is but partly intelligible to modern readers until we are told what are the pleadings and the judgment formally recorded on the office roll of the court. . . . . But this is not the only use that should be made of the Rolls. The Y.B.B. invaluable though they be, (or would be, were they made legible) are far from giving us a complete view of the litigation of the period, to say nothing of a complete view of the law. They are essentially books made by lawyers for lawyers and consequently they put prominently before us only those parts of the law which were of immediate interest to practitioners of the time; and exaggerated emphasis is laid on minute points of pleading and practice, while some of the weightiest matters of law are treated as obvious and therefore fall in the background. If anything like a thorough history of "the forms of action" is to be written, the Plea Rolls as well as the Y.B.B. must be examined. The work of turning over roll after roll will be long and tedious but greater feats of industry have been performed with far less gain in prospect. To give an example of the use of the Plea Rolls, let us recall Darnell's case, the famous case of Chas. I's day, about the power of the king and the lord of council to commit to prison. The question what were the courts to do with a man so committed could not be answered out of the Y.B.B., it had to be answered out of the Plea Rolls, the Rolls contain an exhaustive history of *habeas corpus,* the Y.B.B. have little to say about it, for cases about "misnomer" and the like had been far more interesting to the lawyers than "the liberty of the subject." And

[54]W. S. Holdsworth, *op. cit.,* 599.

[55]SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 43-3.

so it is suspected that the new principles of private law which appear in the Y.B.B. of Edward IV (First decade of fifteenth century) the rise of the action of assumsit, the doctrine of consideration, the protection of copy holders, the conversion of the actions of ejectment into a means of trying title to lands, the destruction of estates tail by fictitious recoveries,—that all these and many other matters of elementary importance might be fully illustrated from the Plea Rolls, whereas the Y.B.B. give us but dark hints and unsolved riddles."[56]

"The enormous value of these documents (Plea Rolls) to the historian is obvious; they give him a very complete view of all the proceeding of the royal tribunals. We are still behind hand in the work of exploiting the Plea Rolls."[57]

"The spirit of the Y.B.B. will hardly be caught unless we perceive that instruction for pleaders rather than authoritative fixation of points of substantive law was the primary object of the reporters."[58]

Pike says: "The report and the record were drawn up for two wholly different purposes. The report was intended for the use of the legal profession, including the judges. It was designed to show general principles of law, pleading and practice. It was of course always a report of a particular case but of one reported solely because it contained, or was supposed to contain, matter of general use. (Notice the reports do not pretend to cover all the cases. They are a sort of selected case practice books). The records, on the other hand, were drawn for the purpose of preserving the exact account of the proceedings in the particular case, *in perpetuan rei memoriam,* but only in the form allowed by the court. These contain no arguments, no pleadings but those actually allowed..... For these reasons, it frequently happens that the record in Latin differs widely from the report in French, each serving to illustrate the other, and for historical purposes, neither being complete without the other.... The record .... brings to light, in a calmer fashion, innumerable details without which a perfect picture of the social conditions of the country can not be drawn. It sometimes happens that there are widely different reports of the same case .... one even absolutely

[56]*Ib.,* 91-2.
[57]*Ib.* 81-2.
[58]Quoted in Holdsworth *op. cit.* 558.

at variance with the other in relation to what was said, done, and decided. The record of the case is then invaluable as the only authoritative statement of the pleadings accepted and of the judgment." (Here Pike takes several Y.B. cases and compares them with the records and shows how incomplete and misleading are the Y.B.B. alone and states that it is an "undoubted fact that the Y.B.B. are not very intelligible without the records.")[59]

What has been done in the way of editing and printing the Plea Rolls, these valuable first hand sources of our law?[60]

---

[59]2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 597.

[60]The following are some of the more important works: (C. Gross SOURCES OF ENG. HIST, 2d ed.)

Bractons Note Book, F. W. Maitland, 3 Vols. 1887. A collection of nearly 2000 cases made by Bracton from reign of Henry III.

Placita Anglo-Normanica. M. M. Bigelow, 1879, Valuable in that it collects cases in historical documents that appear there only, covering the period from William I to Richard I.

Placita dequo warranto, Wm. Illingsworth Rec. Com. 1818. Inquiries into alleged franchiscs during the years from Edw. I to Edw. III.

Placitorum abbreviato. Arthur Argarde. In time of Eliz. Rec. Com. in 1811 published these covering the years from Rich. I to Edw. II. Although many interesting cases have been omitted, this collection is considered very valuable, but insufficient.

Rotuli curiae regis. Francis Palgrave, 1835. Rec. Com. 2 vols. Records of the curiae regis and of the years from 6-10 Richard and I John. Considered very valuable.

In the Selden Society series, the following are especially valuable:

Select Pleas of the Crown, F. W. Maitland, 1887, 1200-25. Criminal Cases.

Select Civil Pleas, W. P. Baildon, 1889, 1200-03. Civil Cases.

Select Cases from the Coroners Rolls. C. Gross, 1265-1413. Development of jury, coroners office, and jurisdiction of hundred and county courts and the beginnings of elective representations.

Select Cases in Chancery, W. P. Baildon, 1896, 1364-1471. Development of the principles of equity and the court of Chancery.

Select Pleas of the Forest, G. J. Turner, 1899, Forest Laws of the thirteenth century.

There are many valuable collections of pleas collected from the manorial and county courts by the Selden and other learned societies of England. The following are especially valuable:

Select Pleas in Manorial and other Seniorial Courts, F. W. Maitland 1889.

Pleas of the County of Glouchester before the Justices Itinerant, F. W. Maitland, 1884 for year 1221.

Somersetshire Pleas, Civil and Criminal, from the Rolls of the Intinerant

V. Conclusion

Thus we see that the only authoritative, first hand evidence of our law in the fifteenth century that we have has not been touched. If our legal as well as our general history is ever to be adequately written these Plea Rolls must be thoroughly explored. If detailed rules or doctrines of law are to be traced into or through this cen-

---

Justices; Close of the Twelfth to 41 *Henry III,* C. E. Healey, 1897. Good translation.

Extracts from the Plea Rolls from Rich. I to Rich. III (Staffordshire) George Wrottesley (1903):

Three Early Assizes Rolls for Nurthumberland, Wm. Page, 1891 for the Surtec Society covering the rolls of the 1256, 1269, and 1279.

The British Government started in 1922 to continue the editing of the Plea Rolls beginning where Palgrove left off 1201 and are now through 1203 Rec. Com. 2 volumes (1922 and 1925).

Perhaps the following are of sufficient importance to be listed here:

Blacita Coram Domino Rege: Pleas of the court of king's bench, 25 Edw. I. W. P. W. Phillimore. British Re. Soc. 1889.

Three Rolls of the King's Court, 1194-95, ed. F. W. Maitland. Pipe Roll Soc. London, 1891.

Oxford City Documents, 1268-1665, ed. J. E. T. Rogers, Oxford Hist. Soc. Oxford, 1891.

Honor and Forest of Pickering, ed. R. B. Turton. North Riding Record Soc., Records, new series, London, 1894-97.

(See C. Gross, Sources of English Hist. 2nd ed. 1915 Nos. 2032-86).

Appendix

Treatises

Some important treatises covering the period between the conquest and the fifteenth century:

Bigelow, M. M. History of Procedure in England, 1066-1204-1880.

Hale, Mathew, History of the Pleas of the Crown—2 volumes 1736. (Valuable. One of the best historical textbooks of the law.)

Maitland, F. W., Collected Papers, 1911.

Madox, Thomas, The History and Antiquities of the Exchequer of England. 2 volumes 1769. Best authority on this subject.

Holmes, O. W., Common Law 1881.

Select Essays in Anglo-American Legal History.

Spencer, George. The Equitable Jurisdiction of the Court of Chancery. 2 volumes. 1846-9.

Brunner, Hemrich. Das Anglonormannische Erbfolge System, 1869. (Valuable).

Vinegradoff, Paul. Villainage in England. (especially in the twelfth and thirteenth centuries) 1892.

Scholarly introductions in the Selden Society publications.

Ames, J. B. Essays in Legal History. 1913.

tury these records must be printed. If we ever hope to quit guessing as to the origin of our doctrines of the corporation, contract, agency, uses, future interests, negligence, mens rea, and other numerous doctrines of our law that had their origin or decisive formation in this period we must consult these huge stacks of the best evidence. It would be a tremendous task to edit even a small portion of all

---

Taylor, Hannis. Origin and Growth of the English Constitution 1889-98.

Jenks, Edw. Law and Politics in the Middle Ages. 1898.

Pollock and Maitland. The History of the English Law before Edw. I. 2nd. Ed. 1898.

Brunner, Heinrich. Die Entstehung der Schurgerechte. 1871. (Demonstrates the frankish origin of the jury).

Neilson, Geo. Trail by Combat, 1890.

Pike, L. O. A History of Crime in England. 2 vols. 1873-76. Valuable.

Stephens, J. F. A. History of the Criminal Law of England.

Thayer, J. B. A Preliminary Treatise on Evidence at the Common Law.

Blackstone, Wm. Commentaries on the Laws of England. 4 volumes 1765-69.

Bracton, Henry D. (1250-1256) (No good edition until Woodbine completes his.)

Britton, Translated from the French by F. M. Nichols 1865. (Able translation).

Pound, Roscoe. Interpretations of Legal History (1923).

Fleta (Anon.) About 1290. Sir Thos. Clark. 1735 in Part.

Glanvill, Runulf De about 1187-89. Translated by John Beans 1812 (but hardly satisfactory. A new edition is being prepared by Geo. E. Woodbine).

Mirror of the Justices (anon.). Between 1285 and 1290. Ably edited by W. J. Whitaker for the Selden Society.

Four Thirteenth Century Tracts. G. E. Woodbine 1910.

The Court Baron by F. W. Maitland and W. P. Baildon 1891. Editing tracts on procedure in local courts.

Other valuable treatises will be found in Gross C. Sources and Literature of English History 2nd ed. 1915; Winfield, P. H. Chief Sources of English Legal History 1925. Brunner H. "The Sources of English Law" 1908 2 Select Essays in Anglo American Legal History 7; Maitland, F. W. Material for the History of England 1889 (Ib). Pollock and Maitland, History of the English Law before Edw. I. 2nd. ed. 1889; Holdsworth W. S. A History of English Law, 3rd ed. 1923.

Valuable monographs will be found in the English Historical Review, Law Quarterly Review and other legal periodicals.

The following topics also touch the fifteenth century:

Stubbs, Wm. The Constitutional History of England. 3 vols. 1874-78 (By far the best on the subject for this period).

Coke, Edw. Institutes of the laws of England. 4 parts. 1628-44. Many references to year books but often incorrect. Chas. Butler ably edits first part. Coke or Littleton in 1817-18th edition.

the rolls of this century. A little handful of English scholars are accomplishing great things but the task is so tremendous in scope that there is little hope that anything will be done here for centuries if they do not get some help from overseas. Most general historians or research scholars in the social sciences who recognize the value

---

Reeves, Jno. A History of English Law. 3rd. ed. 4 vols. 1814. (Except Holdsworth this is the best general account of period between Edw. I and Elizabeth).

Littleton, Thos. Tenures About 1481. Edited by Eugene Wambough 1903. (Able).

Fortescue, Sir John. De landibus legum Angliae. About 1468-70 Lord Clermont in 1869 adopted the edition of Andrew Amos who annotated Gregors edition in 1825. (See Gross No. 1873) (A better edition is needed).

Blackstone, Wm. Commentaries on the Laws of England. 1765-69.

Stephens, J. F. History of Criminal Law. 1883.

Pike, L. O., History of Crime. 1873.

Digby, K. E. Introduction to the History of the Law of Real Property 1875.

Holdsworth, W. S. A History of English Law 3rd. ed. 1923.

In Constitutional History the following are also valuable:

Adams, G. B. The Origin of the English Constitution. New York, etc. 1912.

Gneist, Rudolph. Englische Verfassungsgeschichte. Berlin 1882.

Maitland, F. W. The Constitutional History of England. Cambridge 1908.

Medley, D. J. A Student's Manual of English Constitutional History Oxford, 1894; 4th ed. 1907.

Taswell-Langmead, T. P. English Constitutional History. London 1875; 6th ed. 1905.

White, A. B. The Making of the English Constitution, 449-1485. New York, 1908.

These vary in value:

Carter, A. T. Outlines of English Legal History, 4th ed. 1910. (Influenced by the Historical School).

Crabb, George, A History of English. London 1829. (Little value).

Glasson, Ernest. Histoire du droit et des institutions de L'Angleterre, compares au droit, de la France. 1882-83. (Little value).

Gundermann, J. I. Englisches Privatrecht. 1864.

Maine, H. S. Ancient Law. 1861 (New ed.). by Frederick Pollock, 1906. (Influenced by Sovigny).

Salmond, J. W. Essays in Jurisprudence and Legal History. London, 1891. (Scholarly).

Scrutton, T. E. The Influence of the Roman Law on the Law of England. 1885. (Valuable).

Select Essays in Anglo-American Legal History. By various authors. Ed. by a committee of the Association of American Law Schools. 1907-09.

of these records generally do not have enough technical training in the law to handle this material. The so called "practical" lawyer is too prone to make light of this "impractical" occupation, as even today stupid goat herds look smilingly on as archeologists are digging at the troad among the tombs of an earlier civilization.

Here is the supreme place for immediate research for making further research possible. Yet there is no movement on foot to do

---

Maywood, John. A Treatise and Discourse of the Laws of the Forest. 1598. 5th ed. 1744.

Du Boys, Albert. Histoire Du Droit Criminel Des Peuples Modernes. 1854-60 (Brief).

Forsyth, William. History of Trial by Jury. 1852 New ed. by J. A. Morgan, 1875. (Standard until Brunner, Thayer, et al.)

Inderwick, F. A. The King's Peace: 1895 (Unreliable).

Lea, H. C. Superstition and Force: 4th edition, 1892. (Very able).

Lee, W. L. M. A History of Police in England, 1901; (Too brief).

Morris, W. A. The Frankpledge System 1910 (Standard).

Patetta, Frederico. Le Ordalie. 1890. (Best account of ordeals).

Easterby, William. The History of the Law of Tythes in England. 1888.

Nicholls, George. A History of the English Poor Law. 1854.

Traill, H. D. Social England. 1894-97. Revised 1901-04 (Useful).

Court Baron. F. W. Maitland and W. F. Baildon, Selden Soc. 1891.

Four Thirteenth Century Law Tracts, G E. Woodbine, 1910.

Hengham, Ralph de, Radulphi de Hengham Summae, Magna Hengham et parva vulgo nuncupatae, 1616. Reprint, 1660, 1672, 1737, 1741, 1775. (See Holdsworth account).

(Novae Narrationes), 1561. (Method of Pleading.)

Old Tenures Newly Corrected, 1525. (Influenced Littleton but much inferior to Littleton's Tenures.)

Maitland, F. W. Domesday Book and Beyond. 1897. Reprint 1907. (Best Analysis).

Pollock, Frederick. A Brief Survey of Domesday. English History. Review., 1895. (Good Article).

Round, J. H. Feudal England. 1895; reprinted 1909. (Very Useful).

Dialogus De Scaccario. Edited by Thomas Madox, in the appendix to his History of the Exchequer. 1711; 9th edition 1913.

Liber Niger Scaccario, ed. Thomas Hearne. 1728; 2nd edition, 1771; reprinted, 1774.

Liber Rubeus De Scaccario; Hubert Hall. Rolls Series. 1896.

Great Roll of the Pipe for the Fifth (to the thirty-first) year of Henry II., 1158-85. Pipe Roll Soc. 1894-1913.

Records of the Parliament at Westminister in 1305. Ed. F. W. Maitland Rolls Series. 1893.

Rotuli Parliamentorum; ut et petitiones et placita in parliamento 1832.

Price, George. Treatise on the Law of the Exchequer. 1830.

Foss, Edward. Tabulae curiales, 1066-1864. London, 1865.

anything like this here. This great gulf in the continuity of our legal history should be at least temporarily bridged until a firm structure can later be made. This could be done by the editing and printing of a few Plea Rolls from the beginning, the middle and the end of the fifteenth century. If English societies do not have the funds nor the editors to do this, it should be done by American scholars and American funds. I am authoritatively assured that the task is not nearly as difficult as it sounds. Maitland also assures

---

APPENDIX II

What Has Been Done on the Year Books.

I. Early Printing.

1. Machlina (1481 or 1482) 30-7 Hen.6-20Hen.6 (1422-61).

2. Pynson (1493-1528)—Earliest systematic publisher who published from 50 to 65 editions.

a. 1510-20. 40-50 Edw. 3 (1326-77).

b. Hen. 6 (1422-61) most all of.

c. Edw. 4 (1461-83) most all of.

d. 9 and 12 Hen. 7 and 14 Hen. 8 almost contemporary.

3. Ten other occasional publishers.

4. Richard Tottle (1553 to 1591) drove out all other publishers with 225 editions.

a. (1553-63) in groups of one book each.

(1) (1553) 1-14 Hen. 4 (1399-1413).

(2) (1555) 1-21 Hen. 7 (1485-1509).

(3) (1556) 40-50 Edw. 3 (1326-77).

(4) (1562) 1-10 Edw. 3.

(5) (1563) All of Hen. 5 (1413-22).

5. Quarto edition (1587-1638) in parts.

a. 1587, 5 Edw. 4 (1461-83) "Longo Quinto."

b. 1596, 1-10 Edw. 3 (1326-77).

c. 1597, 1 Edw. 5 (1413-22).
1 and 2 Rich. 3 (1483-1485).
1-21 Hen. 7 (1885-1509).
12, 13, 14, 18, 19, 26, 27, Hen. 8 (1509-1547).

d. 1599, 1-22 Edw. 4 (1461-83).

e. 1600, 40-50 Edw. 3 (1326-77).

f. 1601, 21-39 Hen. 6 (1422-61) (Omitting 23-26 and 29).

g. 1605, 1-14 Hen. 4 (1399-1413).

h. 1606, The Liber Assisarum Sel. Cases from Edw. 3.

i. 1609, 1-20 Hen. 6 Omitting 5, 6, 13, 15, 16, 17, (1422-61).

j. 1619, 17-30 Edw. 3. Omitting 19, 20, 31, 37, (1326-77).

It will be noted that about one third of all the years between 1292 and 1535 are omitted. We have none of Edw. 1 (1272-1307), Edw. 3 (1307-26), Rich. 2 (1377-99), Hen. 5 (1413-22) or Hen. 8 (1509-47). There is also a big gap in Edw. 3.

us that with "a little Latin and a little law" these records soon begin to yield up their secrets. This much at least we owe to the cause of legal education and research. We owe nothing less to our kindred across the sea in view of our great debt for the wealth of material that has been put at our disposal by the Selden and other learned societies. May thte prayer of Maitland be more fully answered and may we be ready for the approaching period of creative activity in our law.

---

6. Standard edition of 1679. No. Y. B.B. were published between 1638 and 1679. This edition is practically a reprint of the quarto edition arranged chronologically. The first part adds the Y. B.B. of Edw. 1-2. The work is in eleven parts as follows:

a. Memoranda in Scaccaro 1-29 Edw. 1 (1272-1307) and Y B.B.-1-29 Edw. 1.
b. 1-10 Edw. 3 (1326-77).
c. 17-39 Edw. 3 (omitting 19, 20 and 31-37).
d. 40-50 Edw. 3 (called "Quardragesms").
e. Liber Assisarum, 1-50 Edw. 3.
f. 1-14 Hen. 4 (1399-1413), and 1, 5, 7, 8, 9 Hen. 5 (1413-22).
g. 1-20 Hen. 6 (1422-61) (omitting 5, 6, 13, 15, 16, 17).
h. 21-39 Hen. 6 (1422-61) (omitting 23-26 and 29).
i. 1-22 Edw. 4 (1461-83).
j. "Long Quinto" or the Long Report of 5 Edw. 4.
k. 1 Edw. 5 (1413-22), 1 and 2 Rich. 3 (1483-1485), 1-21 Hen. 7 (1485-1509 (omitting 17-19) and 12, 13, 14, 18, 19, 26, 27 Hen. 8 (1509-47).