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The Settlement of Disputes in Early Medieval Europe

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THE SETTLEMENT OF DISPUTES IN EARLY MEDIEVAL EUROPE. Edited by *Wendy Davies* and *Paul Fouracre*. New York: Cambridge University Press. 1986. Pp. xii, 304. $49.50.

The structure of *The Settlement of Disputes in Early Medieval Europe*[1] is particularly interesting. On the one hand, the work is a straightforward miscellany: There are ten individually authored essays, each a self-contained, independent endeavor focusing on a discrete geographic region of Europe.[2] On the other hand, the work's contributors assert that *The Settlement of Disputes in Early Medieval Europe* "is meant to be read as a book and not as a collection of separate essays" (p. ix). Read "as a book", the heart of the work is its Conclusion, which presents a "common view" and "stand[s] as an expression of the group approach" (p. ix).

As a miscellany, all ten of the work's essays make for enjoyable reading. The lawyer interested in the history of the common law, however, will be primarily interested in the work's sole essay on English law, Patrick Wormald's *Charters, Law and the Settlement of Disputes in Anglo-Saxon England* (pp. 149-68). In his essay, Mr. Wormald infers — from extant examples of "one broad type of charter, the formal record of the settlement of disputes"[3] — how parties in pre-Conquest England litigated their claims. He concentrates on two disputes; one (judgment made in 824) "between Bishop Heahberht (of Worcester) and the community of Berkeley, concerning the inheritance of Æthelric, son of Æthelmund" (p. 152), and another (resolved in 998) over the rights of St. Andrew's Cathedral (of Rochester) to an estate at Snodland, Kent.

Mr. Wormald draws two conclusions from the record of these dis-

1. Wendy Davies is a Professor of History at University College, London; Paul Fouracre is a Lecturer in History at the University of London Goldsmiths' College.

2. The first four essays discuss regions within France, canvassing fifth- and sixth-century Gaul, eighth-century Francia, early ninth-century West Francia, and ninth-century Brittany. The remaining six essays cover Spain, Italy, the Byzantine Empire, England, Ireland, and Scotland.

3. P. 2. The passage continues: "(often, then and since, called *placitum**)." The asterisk signals that the work's *Glossary* contains an entry for this word. The *Glossary* defines *placitum* as follows:

> *Placitum*, pl. *placita* A word generally used by historians to refer to a specific type of document recording the final composition [sic] at the end of a law suit; for example, a mutual agreement or a formal royal permission. This usage is attested in early medieval sources, but the word has a very much wider range of meanings in classical and late Latin. The document now called a *placitum* appears to have developed only in the sixth century. By the eighth century in Francia and Italy, the meaning was extended to that of a public court hearing ('an agreement to appear in court' or a 'royal license for a public hearing') and later to the whole of a public court-case, across many hearings; and to the document recording the case.

P. 273; *Cf.* BLACK'S LAW DICTIONARY 1035 (5th ed. 1979).

putes.[4] The first is that "the 'oral-formulaic' approach to Anglo-Saxon litigation is not borne out by the records of actual pleas" (p. 167). In other words, courts did *not* enter judgment against a party merely because he sneezed during pleading. The second conclusion is that "[t]he Anglo-Saxon state came to play an aggressive and interventionist part in proceedings" (p. 167). That is to say, the Crown was willing to institute and utilize a judiciary to protect its interests.

There is nothing controversial about these conclusions: They are, in fact, so *un*controversial that Mr. Wormald must generate his own controversy. He claims that an "orthodoxy" (p. 149) exists — a "substantially entrenched" one at that (p. 149) — which actually holds that, in the early Middle Ages, a stutter while pleading skewed a case, and that the King was unconcerned with using the courts to maintain his hold on the scepter. This "orthodoxy" is chimerical,[5] and Mr. Wormald's fixation on the refutation of such a straw man is a sharp wound to the integrity of his essay. Over time, it will sap from this well-executed piece the lasting merit it otherwise might have enjoyed.

The contributors to *The Settlement of Disputes in Early Medieval Europe* divide their joint *Conclusion* into three parts. Part 1, *The Rôle of Writing in the Resolution and Recording of Disputes,* briefly explains

4. Mr. Wormald makes three other observations about these records. Two are mere variations on his second conclusion, which is discussed in the text. The other is a rather hopeful assertion that even though "the case-law evidence is confined to the social and intellectual élite, it may be wrong to regard what it implies as remote and unfamiliar for a wider swathe of society." P. 167.

5. On the history of English law, Frederic William Maitland wrote often and well. Mr. Wormald's mistaken belief in a stultified "orthodoxy" is, strangely enough, a tribute to Maitland's continued hold on the minds of legal historians.

To prove the existence of this orthodoxy, Mr. Wormald produces a long string of quotations "from Maitland himself." P. 149 (citing 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW (2d ed. 1898)). Mr. Wormald concludes that *simply because these quotations bear Maitland's name,* they "have commanded near universal acceptance," (p. 150), and therefore *must* constitute an "orthodoxy."

The flaw in Mr. Wormald's conclusion is that *Pollock* (whose views are far less respected than Maitland's) wrote the cited series of quotations. Mr. Wormald himself, in footnote 91 (the *last* footnote to the essay), grudgingly admits his misascription, and further admits it came to his attention only after "this paper went into proof." P. 168 n. 91. Mr. Wormald tries to justify his error on the grounds that "the generally accepted custom . . . is to attribute the opinions of the *History of English Law* to Maitland." *Id.* Yet Maitland's *disavowal* of the cited passages is a matter of public record. THE LETTERS OF FREDERIC WILLIAM MAITLAND 102, 103 (C. Fifoot ed., Selden Society Supplementary Series, Vol. 1, 1965) ("F.P. . . . has written an Anglo-Saxon chapter. Between ourselves I do not like it very much.") (letter 109; emphasis omitted). Perhaps one can base an entire orthodoxy on the words "of Maitland himself"; Mr. Wormald, however, should have first made sure it was Maitland's words that he was citing.

In the same vein, Mr. Wormald asserts that Anglo-Saxon charters "received the most cursory acknowledgement from Maitland." P. 149. Yet Maitland's essay, *England Before the Conquest,* examines, *inter alia,* charters involving "the church of Worcester" and "the church of Rochester," *the same two churches Mr. Wormald discusses in his article!* Maitland, *England Before the Conquest,* in DOMESDAY BOOK AND BEYOND 220, 227-28, 235 (1897). Why doesn't Mr. Wormald cite this essay? Mr. Wormald takes an unaccountably belligerent attitude towards Maitland. He should have at least *distinguished* Maitland's essay, if only to dispel the otherwise attendant odor of less-than-fair play.

the "direct relationship" between "the generic diversity and formal sophistication of documentary records" and "a society's ability to preserve them" (p. 208). Part 2, *Procedure and Practice in the Settlement of Disputes,* induces — from the inferences reached in the separate essays — a general picture of the daily workings of the various legal systems instituted by the successor states to the Roman empire. Part 3, *Dispute Processes and Social Structures,* explores the relationship between early medieval legal systems and their contemporaneous alternatives (such as feuding).

Part 2 depicts "how the courts actually operated" (p. 217) in the following manner:

> Generally we can characterize their procedure as pragmatic — it followed logical sequences. If a litigant claimed to have a charter, he was told to produce it; if someone reckoned to be able to find supporting witnesses, the court would defer the hearing until they appeared; if a boundary was in dispute, members of the tribunal would accompany both parties to visit the area in questions, and so on. [pp. 217-18]

Part 3 describes the relationship between legal and "alternative" dispute resolution systems in the early Middle Ages as follows: "Going to court . . . often fitted into a set of wider social strategies for each party; at the least, the court case was only one part of the dispute and its settlement, which could have a far longer time-scale" (p. 233).

The sketch part 2 gives of medieval legal systems is solidly supported. Moreover, part 3's description of the integration of medieval law and society is a genuine contribution to our understanding of medieval dispute resolution. Yet here too, the straw man lurks,[6] a presence which in the long run detracts from the *Conclusion*'s overall worth. In addition, part 3 indulges in truisms — "courts must have been of some use for disputants; we should not assume that people went to court out of a disinterested love for the law" (p. 234) — and spends far too long discovering what Stewart Macaulay uncovered twenty-five years ago: that "one uses or threatens to use legal sanctions to settle disputes when other devices will not work and when the gains are thought to outweigh the costs."[7]

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6. The *Conclusion* describes its straw man thus:

> A major aim of this book has been to show that the traditional picture of early medieval law, as presented in the early twentieth-century legal histories, *and indeed still accepted by many modern experts* on the legal changes of the twelfth and thirteenth centuries, cannot be maintained. *That picture derived largely from an over-simple reading of Germanic law codes, which were too often accepted simply as a straightforward description of what happened in courts.*

P. 228 (emphasis added). This reformulation of the "orthodoxy" requires the reader to believe that an entire class of experts (in both law and history), confuses codes of civil procedure with trial transcripts.

7. Macaulay, *Non-Contractual Relations in Business,* 28 AM. SOC. REV. 55, 65 (1963). Part 3 contends that "[t]he key advantage of going to court was the width of support potentially available to a party there." P. 234. The cost of going to court was that in court, "the rules of law themselves begin to matter. Such rules expressed above all the values of the state . . . ." P. 235. In other words, the cost involved was the risk that the state would subordinate the parties' inter-

Read either as a miscellany or as a unified work, this book is a work of minor merit with minor flaws. In the special case of the historian of comparative law, the overall quality of the other nine essays admittedly saves the work. For the common law historian, however, this unhappy combination moves *The Settlement of Disputes in Early Medieval Europe* from *treatise* to *divertissement,* from a book worth reading to one worth reading only in the absence of anything better.

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ests to its own. The general thrust of part 3 is that a party assumed this risk when, and only when, it was advantageous for him to do so.