

PLEASE NOTE

This is a draft paper only. Please do not cite without the express permission of the author.

The Law of Maintenance: The Judicial Development of the Law

Presented at the British Legal History Conference, University of Oxford, July 1-5, 2007

Jonathan Rose

Willard H. Pedrick Distinguished Research Scholar and Professor of Law,
Sandra Day O'Connor College of Law

Arizona State University
Tempe, Arizona 85287-7906
(480) 965-6513 (office phone)
(480) 965-2427 (fax)
jonathan.rose@asu.edu

B.A. 1960, University of Pennsylvania; LL.B. 1963, University of Minnesota. The author wishes to express appreciation to John Baker, Michael Berch, Paul Brand, Gerald Harriss, David Ibbetson, Neil Jones, James Oldham, Wendy Rose, George Schatzki, and David Seipp for their comments and assistance. I also want to express my appreciation to the officers and fellows of Magdalen College for their support and hospitality in giving me access to the College Archives and, in particular, to Robin Darwall-Smith, College Archivist and Christine Ferdinand, Fellow Librarian. As usual, the author bears full responsibility for the Article's analysis and conclusions as well as all its errors.

The Law of Maintenance: The Judicial Development of the Law

Maintenance is, where any Man gives or deliver[s] to another, that is Plaintiff or Defendant in any Action, any Sum of Money or other Thing, to maintain his plea, or takes great Pains for him when hath Nothing therewith to do;¹

I. Introduction

In medieval England, complaints about maintenance were common and it was considered a longstanding social and legal problem. Contemporaries complained that maintenance, like felonies and trespasses, interfered with ‘the peace and the quiet’ of the realm, ‘troubled and disturbed’ the realm, caused ‘misfortune, hardship, and burden,’ and ‘riots, excesses, and misgovernance’² These concerns produced numerous official responses.³ Starting in 1275 and continuing through the sixteenth century, numerous statutes prohibiting maintenance and related offenses such as conspiracy and champerty were enacted.⁴ In addition, indictments and private

1. William Rastell, *Les Termes del Ley* 433 (1721). This work, likely the first law dictionary, was initially published in 1523 as *Exposicioniones Terminorum Legum Anglorum*. The next law dictionary, initially published in 1607, defined maintenance as ‘an upholding of a cause or person. . . . him that secondeth a cause depending in suite between others, either by lending money, or making friends for either partie, toward his help.’ John Cowell, *The Interpreter* (1637). Cowell said that the word was ‘metaphorically drawn from the succoring of a young child, that learned to goe, by ones hand. In our lawe, is used in the euill part’

2. *Rotuli Parliamentorum*, vol. 2, 136-37, nos. 10 & 11 (1343); *ibid.*, 165, no. 6 (1348); *ibid.*, 237, no. 7 (1352); *Rotuli Parliamentorum*, vol. 3, 109-10, no. 61(1381); *ibid.*, 228, no. 1 (1388); *Rotuli Parliamentorum*, vol. 4, 344, no. xvi (1429). Coke said that the ‘common right is delaied, or disturbed’ by maintenance. Edward Coke, *The Second Part of the Institutes of the Laws of England* (London, 1797)(1986 reprint) 212.

3. The preamble to a 1346 ordinance noted the complaints about maintenance and that the ‘law of the land [was] . . . disturbed many times’ by it’ with a negative impact on ‘the ease and quietness of our subjects.’ 20 Edw III (1346), *Statutes of the Realm*, vol. I, 303. Holdsworth said that maintenance caused a ‘perversion of justice.’ William Holdsworth, *A History of English Law* (London, 1966), vol. III, 394-96. He said further that it ‘endangered the peace of the state.’ *Ibid.*, vol. 5, 201. Winfield characterized maintenance, like conspiracy and champerty, as an ‘abuse of legal procedure.’ P.H. Winfield, *The History of Conspiracy and Abuse of Legal Procedure* (Cambridge, 1921), 131.

4. There were over fifteen enactments between 1275 and 1542. The primary enactments were Statute of Westminster I, cc. 25, 28, 33, 3 Edw. 1 (1275), *Statutes of the Realm*, vol. I, 33-34; Statute of Westminster II, 13 Edw I, c. 49 (1285), *Statutes of the Realm*, vol. I, 95; *Articuli Super Cartas*, 28 Edw I, st. 3, c. 11 (1300), *Statutes of the Realm*, vol. I, 139; Statute of Conspirators, 33 Edw I, I *Statutes of the Realm*, vol. I, 216 (Statutes of Uncertain Date); 4 Edw. III, c. 11 (1330), *Statutes of the Realm*, vol. I, 264; 20 Edw III, cc. 4, 5 & 6 (1346), *Statutes of the*

actions seeking redress for maintenance were not uncommon.⁵ According to the Year Book evidence, maintenance cases were particularly common in the fifteenth century.⁶ However, despite these numerous statutes and legal actions, complaints to authorities persisted,⁷ suggesting that the remedies were ineffective.⁸ Contemporary authorities recognized this. In 1485, the Huse (Hussey), C.J. told an after dinner gathering of justices that maintenance statutes would

never be well executed until the Lords spiritual & temporal are of one mind, for love and dread that they have of God, or of the King, or of both, to execute them effectively. . . . For he said that, when he was the king's attorney, all the Lords swore to keep the Statutes which they with others had then compiled together, by order of the same King, and diligently to execute them, and he saw that within an hour, while they were in the Star Chamber, several of the Lords made retainers by oath and swearing, and did other things that were directly contrary to their said sureties and oaths. . . . And he told this to the king.⁹

Realm, vol. I, 304-05; I Rich II, c. 4 (1377), *Statutes of the Realm*, vol. II, 2-3.

5. The oyer and terminer commissions at Beccles and Norwich, December 2-7, 1450 and at the Norwich Guildhall, November 26, 1450 returned numerous indictments for maintenance. TNA:PRO KB 9/267, m. 19, 24-25; TNA:PRO KB 9/272, m. 2-5.

6. The Year Books contain fifty-five writs of maintenance in the fifteenth century, forty of which were brought by 1460, and which does not include the writs of champerty that alleged maintenance.

7. *Rotuli Parliamentorum*, vol. 2, 225-26, no. 4 (1351); *ibid.*, vol. 3, 16, no. 49 (1377); *ibid.*, 21, no. 83 (1377); *ibid.*, 23, no. 92 (1377); *ibid.*, 42, no. 43 (1378); *ibid.*, 446, no. 161 (1399); *ibid.*, vol. 4, 348-49, no. 35 (1429); *Paston Letters-Davis* (Oxford, 2004), part II, 528, no. 881; note 2, above.

8. J.H. Baker, *The Oxford History of the Laws of England* (Oxford, 2003), vol. VI, 69-73; R.L. Storey, *The End of the House of Lancaster*, 27; Winfield, *Conspiracy and Abuse*, 154-57. Contemporary literature also reflected the complaints.. 'The Regement of Princes,' *Hoccleve's Works*, ed. Frederick Furnivall (London, 1897), ll. 2787-2814. Hoccleve decried that 'And al such mayntenance, as men wel knowe, sustened is nught by persones lowe, But Cobbes [great men] grete this ryot sustene.' *ibid.*, ll. 2804-06.

9. *Et le Chief Justice disoit, que le ley ne sera onques bien execute tanque tous les Seigniors espirituels & temporels sont d'un confirment pur l'amour que ils ad de Dieu, or de Roy, ou d'ambideux effectuellement de eux executer . . . Car il dit que il veist en temps E .4 quand il fuit son attorney, tous les Seigniors jures a garder les Statuts, queux ils ove autres avoit adonq compile ensemble par commandement de mesme le Roy, & eux diligentment executent : et il veiait deins un heure tanque ils furent en le Star Chambre divers de les Seigniors faire retainments par oath & serement, & autres choses, que furent directement contraries a lour dits suretes, & oathes . . . et disoit que il disoit ceo au Roy mesme'. Mich 1 Hen VII, f. 3, pl. 3 (1485). William Hussey was Attorney General from June 16, 1471 to July 7, 1478. John Sainty, *A List of English Law Officers, King's Counsel and Holders of Patents of Precedence* (London, 1987) 44. The general pardon covering many crimes, including champerty, maintenance,*

As this background shows, maintenance, like most aspects of legal history, had both legal and social dimensions. The purpose of this paper is to trace its legal development.

II. The Law of Maintenance

A. An Overview

Maintenance was one several offenses directed at conduct that interfered with the administration of justice. Initially, it was not clearly distinguished from the related offenses of conspiracy and champerty.¹⁰ As maintenance became more distinct from these other offenses, it was understood as involvement in another person's litigation. But the statutes simply prohibited maintenance, and did not define the illegal conduct.¹¹ Most declarations only alleged that the defendant had 'maintained and upheld' (*manutenuit et sustenavit*) a particular plea, similar to the standard writ.¹² Seventeenth and eighteenth commentators as well as current scholars have defined maintenance quite similarly to the early law dictionaries.¹³ Coke said it was 'an upholding of the demandant or plaintiff, tenant, or defendant in a cause depending in a suit, by

and embracery, also reflects this ambivalence. *Rotuli Parliamentorum*, vol. 5, 283, no. 29 (1455).

10. Winfield, *Conspiracy and Abuse*, 142-50; Holdsworth, *The History of English Law*, vol. III, 396-97. Winfield documented the history of maintenance. Winfield, *Conspiracy and Abuse*, 131-60. Holdsworth has summarized its history. Holdsworth, *The History of English Law*, vol. III, 394-400.

11. Most the statutes simply used the word, 'maintain' (*mainteingne*) and made it illegal to maintain another's 'quarrel.' Statute of Westminster I, cc. 25, 28, 33, 3 Edw. 1 (1275), *Statutes of the Realm*, vol. I, 33-34; 20 Edw III, cc. 4, 5 & 6 (1346), *Statutes of the Realm*, vol. I, 304-05. One statute said 'sustain any quarrel by maintenance. I Rich II, c. 4 (1377), *Statutes of the Realm*, vol. II, 2-3.

12. *Clement v. Mader*, TNA:PRO CP 40/756, m. 104 (1450); *Mitchell v. Coutesham*, TNA:PRO CP 40/771, m. 114 (1453); *Registrum Omnium Brevium*, vol. II, ff. 182 ('maintained and supported'), 189 ('undertook to maintain and maintained'). The declarations and writs state that the statute prohibits maintaining and upholding, referring like to the 1377 statute. I Rich II, c. 4 (1377), *Statutes of the Realm*, vol. II, 2-3. The complaint might, however, supply more detail as to alleged illegal behavior. Paul Brand, 'Ethical Standards for Royal Justices in England, c. 1175-1307,' 8 *Univ. Chi. Roundtable* 239, 244-45, 254-55 (2001).

13. Note 1 above.

word, action, writing, countenance, or deed.’¹⁴ In Hawkins’ view, a ‘maintainer’ was anyone who gave ‘any Kind of Assistance to either of the Parties in the Management of the Suit depending between them’, whether or not it involved giving money or saving the party expense.¹⁵ Modern scholars have defined it as ‘giving any kind of support to’ matters in the royal courts and ‘meddling in someone else’s litigation.’¹⁶

The initial maintenance statutes were penal in nature and did not, like the conspiracy and champerty statutes, create civil remedies for victims until the end of the fourteenth century.¹⁷ As private actions increased, particularly in the fifteenth century, medieval judges developed the law. Although the Year Book cases confirm the breadth of the statutes and illustrate that any involvement or meddling in another person’s lawsuit could be illegal maintenance, they also show how the judges limited the offense. But the judges did not attempt to interpret the statutory language by identifying what kind of meddling in another’s legal action was maintenance. In fact, many actions were based on what seems, at least to a modern observer, to be fairly minor and inoffensive conduct, helping a litigant find a lawyer. Instead, the judges circumscribed the

14. Edward Coke, *The Second Part of the Institutes of the Laws of England* (London, 1797)(1986 reprint) 212.

15. William Hawkins, *A Treatise of the Pleas of the Crown* (5th ed., London, 1771), Book I, chap. 83, pp. 249-50.

16. Brand, ‘Ethical Standards for Royal Justices in England’, 8 Univ. Chi. Roundtable 239 244 (2001); J.H. Baker, *Introduction to English Legal History* (4th ed., London, 2002), 162 n.26.

17. Winfield, *History of Conspiracy*, 150-54; Holdsworth, *History of English Law*, vol. III, 397-98. Civil remedies were probably first created in 1331 by 4 Edw. III, c. 11. The Register of Writs contains several writs of maintenance. *Registrum Omnium Brevium*, vol. II, ff. 182, 189. Winfield believed that these writs were based on the 1377 statute, 1 Rich II, c. 4 (Winfield, *History of Conspiracy*, 153) although that statute does not explicitly authorize a civil remedy and the penalty is imprisonment and ransom to the King, which is the statutory penalty described in the writ. Civil actions seeking damages clearly used writs based on this statute. W. Rastell, *A Collection of Entries*, (London 1596), f. 427, pl. 1 & 2. The first writ of maintenance seeking damages in the Year Books appeared in 1405. YB Mich. 7 Hen. IV, f. 30b, pl. 5. A 1332 action suggested that a writ of champerty might be used against maintenance, reflecting perhaps early mingling of these two offenses as well as their relation to each other. YB Trin. 6 Edw. III, f. 33a, pl. 9.

offense in other ways. One limitation that applied in all cases was that it was only maintenance if a plea was already pending in court.¹⁸ But the more important limitations that determined the legality of the defendant's conduct arose from the justifications asserted by the defendant..

These justifications, which were not enumerated in the statutes but developed by the judges, provide the most important basis for understanding the law of maintenance.¹⁹ The defendant would assert some relationship with the party maintained or some basis for a legitimate interest in the litigation that precluded finding the conduct illegal. As a justice said in a 1431 case, 'When a man has cause or sufficient color concerning the maintenance, he can maintain well enough'.²⁰ But, not all cases turned on the veracity of the plea's justification. In some cases, the plaintiff would reply that the defendant had engaged in 'special maintenance', conduct that exceeded the scope of activities permitted by the justification,²¹ for example, that the defendant gave money to a juror.²²

B. The Judicial Development of the Law. Whether conduct was illegal maintenance depended on whether justifications for lawful involvement in another's litigation existed and, if so, whether the conduct exceeded the scope of what was permissible.

18. YB Trin. 3 Hen. VI, f. 53, pl. 24 (1425) (Martin, JCP). This requirement was explicit in the early statutes. Statute of Westminster I, cc. 25, 28, 3 Edw. 1 (1275), *Statutes of the Realm*, vol. I, 33-34; Statute of Westminster II, 13 Edw I, c. 49 (1285), *Statutes of the Realm*, vol. I, 95; *Articuli Super Cartas*, 28 Edw I, st. 3, c. 11 (1300), *Statutes of the Realm*, vol. I, 139. Although not explicit in the later statutes, perhaps their use of the word, 'quarrel,' incorporated this notion. In any event as the early law dictionaries (note 1 above) and Year Book cases show, it was commonly understood to be a requirement in action for maintenance.

19. Later abridgements structured their discussion of maintenance according to the justifications and their nature. Charles Viner, *Abridgement*, 2d ed. (London, 1793), vol. 15, 160-65.

20. YB Hil. 9 Hen. VI, f. 64, pl. 17 (1431).

21. *Quand un home ad cause ou sufficient colour de maintenir, il peut maintenir assez bien*. YB Mich. 8 Hen. IV, f. 6, pl. 8 (1406).

22. YB Hil., 9 Hen. IV, f. 64, pl. 17 (1431).

1. Justifications. Many of the justifications successfully asserted in maintenance actions raise considerable doubt as to notion many instances of supporting another's litigation was unlawful. Common justifications included kinship or having a legal interest in the land in dispute. Thus, a relative helping his kin find a lawyer²³ or a lord doing so for a tenant²⁴ would justify the maintenance, but not so if done by a 'stranger.'²⁵ A person who had been retained as a lawyer could also justify maintenance on that basis.²⁶ One important justification was supporting a servant's litigation. In a number of maintenance actions, both the justices and the lawyers frequently asserted that a master could lawfully maintain his servant's actions.²⁷ In the leading case, *Pomeroy v. Abbott of Bukfast* (1442), the defendant sought several men to be counsel to a man retained as his carver and justified the maintenance on that basis.²⁸ The Common Bench justices had no doubt that the plea was a good justification. Newton, C.J. and Paston, J. said:

23. YB Mich. 19 Hen. VI, f. 14, pl. 34 (1460); YB Mich. 9 Edw. IV, f. 31, pl. 4 (1469).

24. YB Hil. 9 Hen. VI, f. 64, pl. 17 (1431); YB Pasch. 11 Hen. VI, f. 41, pl. 36 (1433).

25. Some thought that maintenance might also be justified as an act of charity, such as helping a poor man or someone who did not speak English. YB Hil. 9 Hen. VI f. 64, pl. 17 (1431); YB 21 Hen. VI, f. 15, pl. 30 (1442); YB 22 Hen. VI, f. 35, pl. 54 (1443); YB Hil. 34 Hen. VI, f. 25, pl. 3 (1456); YB Hil. 15 Hen. VII, f. 2, pl. 3 (1500).

26. YB Mich. 11 Hen. VI, f. 10, pl. 24 (1432); YB Mich. 22 Hen. VI f. 5, pl. 7 (1443); *Mitchell v. Cloutesham* (1453) TNA:PRO CP 40/771, m. 114; *Forster v. Alfray* (1454), TNA:PRO CP 40/774, m. 313, YB Mich. 9 Hen. VII, f. 7, pl. 4 (1493); Rastell, *A Collection of Entrees* f. 431v, pl. 16 & 17; J.H. Baker, 'Counsellors and Barristers' in *The Legal Profession and the Common Law* (London, 1986), 112-14 (numerous cases cited); J.H. Baker, 'Solicitors and the Law of Maintenance 1590-1640' in *The Legal Profession and the Common Law* (London, 1986), 125-50 (numerous cases cited).

27. YB Hil. 9 Hen. VI, f. 64, pl. 17 (1431); Mich. 22 Hen. VI, f. 35, pl. 54 (1443); *Wm. Clement v. Jo. Mader et al.*, CP 40/756, m. 104, YB Trin. 28 Hen. VI, f. 7, pl. 1 (1450); YB Hil. 32 Hen. VI, f. 24, pl. 11(1454); YB Hil. 34 Hen. VI, f. 25, pl. 3 (1456); W. Rastell, *A Collection of Entrees*, f. 428, pls. 8 & 9; Case LXXVIII, *Jenkins*, vol. 1, 92; Case XCVIII, 1 *Jenkins* 101; *Thursby v. Warren*, Mich. 3 Car. I, *Croke Car.* 159 (1628).

28. *Pomeroy v. Abbot of Bukfast*, Mich. 21 Hen. VI, f. 15, pl. 30 (1442), 40 CP 729, m. 301 (1443). The plaintiff did not traverse that plea, but, as was common, alleged special maintenance in his replication. Special maintenance will be discussed subsequently.

And so in a stranger it is maintenance, in the Abbot who is his master, it is not: and so it seems the bar is good. . . . For it is lawful for a master to maintain his servant, as to be with him at the bar, stand there with him give him counsel; and bring his own counsel with him to give counsel to his servant²⁹

Importantly, the rationale for this justification did not focus on the servant's interest, but on that of the master. In a 1456 case, a defendant in a maintenance action justified on the ground that he was the master of a man, who requested him to speak to a man of law to be the servant's counsel.³⁰ The defendant's lawyer explained that 'the master can meddle for his servant: for he is to have the loss of his service, for that it is expedient that he speak to counsel learned in the Law to aid his servant'.³¹ He stated that the meddling was for the master's 'ease', 'profit', and 'advantage' and 'not the advantage of the servant'.³² Another of the defendant's lawyers went further, stating that 'the Master is obliged by true right to find his servant his necessaries , or otherwise he will do a wrong to him: and so he can have the writ of Covenant against him, if he has indentures of covenants'.³³ In a 1479 case, Bryan, C.J. said 'I understand this case has been adjudged in our books, that a neighbor can go with another neighbor to seek out a man

29. *Purque en estranger it est un maintenance, & en l'Abbe que est son Master, nemy: purque semble le barre bon. . . . Car il est loial Master de maintenir le servant, come estre ove luy al'barre, & la estoir ove luy, & doner a luy counsel; & port son counsel demense ove luy a doner counsel a son servant. Ibid., f. 16a & b.*

30. Robert Horne's Case, YB Hil. 34 Hen. VI, f. 25, pl. 3 (1456). The court did not dispute the validity of the justification, but the critical issue, which will be discussed subsequently, was whether the master could spend his own money for the servant.

31. *le Maister poit mester pur le servant: car il est de aver perdue son service & pur ceo it est expedient que il parler al' counsele appris de Ley pur aider le servant'. Ibid., f. 25b.*

32. *'mon ease & profit auxi . . . que ceo est pur mon ease & avantage, & nemy pur avantage de mon servant'. Ibid., f. 26a.*

33. *Mes le Maistre est oblige pur vray droit de trouver son servant ses necessaries, ou autrement il fait tort a luy: purque il poit aver breffe de Covenant envers luy, s'il avoit endentures de covenants'. Ibid. f. 26a*

knowledgeable of the law, etc. And also that a Master can maintain his servant's suit, etc.'³⁴

The actions make clear that the justification is not limited to household servants, but depends on some formalized relation such as by indenture, charter, or contract. In one action, the justification was upheld as to a chaplain because he was retained.³⁵ But in another action, because of the absence of a retainer, the plaintiff traversed the justification for a priest, who said divine service and who asked the defendant to be his counselor.³⁶ The defendant gave the priest advice although he was not a man learned in the law, but the court said it was not maintenance, 'for it would follow that no friend could counsel another'.³⁷ While this view goes further than many other actions, it is not the only one suggesting friendship as a justification.³⁸

In a number of actions, the justification was based on having a legal interest in the land in dispute. In 1431, Babington, C.J. said 'a lord can maintain his tenant,'³⁹ a view expressed in other actions.⁴⁰ In addition, a feoffee could support the litigation of the feoffors for whose use he

34. '*jeo entend cest case ad estre judge en nostre livres, que un neighbor poit aler ove un autre neighbor a enquerer pur un home sachant del ley, etc. Et auxi que le Miaister poit maintenir le querele son servant, etc*'. Mich. 19 Edw. IV, f. 3, pl. 9 (1479). In accepting the right of master to maintain for his servant, the report of the action, like several others, referred to *Pomeroy v. Abbot of Bukfast*.

35. YB Mich. 19 Hen. VI f. 30, pl. 56 (1440). The plaintiff alleged that the defendant had discharged him.

36. YB Mich. 22 Hen. VI, f. 35, pl. 54 (1443).

37. *A que il fuit dit par le Court que ceo ne poet estre ajuge asacun maintenance: car adonques ensuere qu nul amy Counsellere autre*'. *Ibid.*, f. 35a. There was a *capias* against the priest and the defendant advised him to go to London and purchase a *supersedeas*.

38. *Coram Rege* Roll, no. 140, m. 42 (Easter 1294), III *Select Cases in the Court of the King's Bench*, 58 *Selden Society* (London, 1939), 22 ('since lawful for everyone of the realm to help his friends in their rights'); YB Mich. 12 Edw. IV f. 14, pl. 15 (1472).

39. '*car un Seignior peut maintenir son tenant*'. YB Hil. 9 Hen. VI, f. 64, pl. 17 (1431).

40. YB 11 Hen. VI, f. 41, pl. 36 (1433); YB Trin. 11 Hen. VI, f. 39, pl. 33 (1433); Mich. 27 Hen. VI, A. Fitzherbert, *Le Graunde Abridgement*, Mayntenance 25, f. 65.

held and a feoffor likewise if the feoffee was sued,⁴¹ and a feoffee could assist a party if the dispute would affect the former's rights in the land.⁴² Further, a lessor could maintain his termor⁴³ as could a person who had interest as an heir apparent⁴⁴ or by remainder, reversion, descent, or some other legal interest in the property affected by the litigation.⁴⁵

2. The Scope of Permitted Conduct

The final resolution of whether conduct was illegal maintenance depended on whether it exceeded the permissible scope of the justification

a. Payment of the Defendant's Own Money for Counsel. A common issue that arose, especially in the master-servant cases, was whether the master could pay his own money to assist the servant.⁴⁶ The resolution of this issue was not clear and at least three different views appeared in the Year Book cases. One view was that it was permissible as an aspect of the broad right of a master to support his servant. A variant on this view limited it to payment in those cases where the servant was sued in an action that could result in imprisonment. A second view was that it was illegal maintenance for the defendant to pay his own money as it exceeded the bounds of legitimate support. The third view was that payment of money by the master was

41. YB Trin. 14 Hen. VI, f. 7, pl. 32 (1436); YB Hil. 34 Hen. VI, f. 30, pl. 15 (1456); YB Mich. 35 Hen. VI, f. 15, pl. 25; YB Pasche, 2 Edw. IV, f. 2, pl. 6 (1462).

42. YB Mich. 6 Edw. IV, f. 5, pl. 15 (1466).

43. YB Mich. 39 Hen. VI, f. 19, pl. 29 (1460).

44. Mich. 14 Hen. VII, f. 2, pl. 5 (1498).

45. YB Hil. 9 Hen. VI, f. 64, pl. 17 (1431); YB 11 Hen. VI, f. 41, pl. 36 (1433); YB Trin. 11 Hen. VI, f. 39, pl. 33 (1433); YB Mich. 19 Edw. IV, f. 3, pl. 9 (1479). In one action, the defendant justified as the party's mainpernor. YB Hil. 32 Hen. VI, f. 24, pl. 11 (1454).

46. This issue arose occasionally in the kinship cases as well. In 1469, Choke, J. said one could meddle for his brother or kin, but giving money would be special maintenance. YB Mich. 9 Edw. IV, f. 31, pl. 4 (1469).

lawful only if it was from the wages that the master owed the servant.

In *Pomeroy v. Abbot of Bukfast*, Newton, C.J. and Paston, J. expressed the first view.

They said:

For it is lawful for a master to maintain his servant, as by being with him at the bar and standing there with him and giving him counsel, and by bringing his own counsel with him to give counsel to his servant and, just as it is lawful for him to counsel his servant and bring his own counsel to counsel his servant, so too he can give his own money to an apprentice to give him counsel. For it is lawful for the apprentice to take [money] for his counsel. It is otherwise where the master give any money on behalf of his servant to a juror to give his verdict because it is not lawful in that case for the juror to accept it. And even though his counsel and he himself pays on behalf of the servant his fees to the court in discharge of the servant for his counsel and he himself pay it for the servant to the advantage of his servant or otherwise give or loan his servant money to maintain and aid him in the suit in all these cases it will not be said to be any maintenance in his person.⁴⁷

Fineux, C.J. provided a more limited rationale for this view, saying 'I may maintain my servant, & expend my own money to aid him, & this is for the loss of his services'.⁴⁸ In doing so, he distinguished between a debt action against the servant, where paying money was permissible as services would be lost and *praecipue quod reddat* for land, where payment was not lawful as they would not be lost; and other actions drew this same distinction.⁴⁹

47. '*Car il est loial Mastre de maintenir le servant, come d'estre ove luy al barre, et la estoit ove luy, et doner a luy counsel; and port son counsel demense ove luy a doner counsel a son servant; et si bien come il est loial a luy pur counseller son servant et porter son counsel demense, ou counseller son servant, si bien poit il doner son propre argent a un apprentice pur doner a luy son counsel. Auter est ou le Mastre dona ascun argent pur son servant a un juror a dire son verdict, car en cela n'est loial al juror a prendre. Et tout soit que son counsel, et eux luy mesme paier pur le servant les fees al Court, ou discharge le servant de son counsel, & eux luy mesme paier pur le servant en l'avantage de son servant, ou autrement doner ou apprestre son servant argent pur luy maintenir & aid en le suit; en toutes ceux cases il ne sera dit en son person ascun maiintenance*'. YB Mich. 21 Hen. VI, f. 16a & b, pl. 30 (1442). The meaning of this passage seems clear although it is somewhat confusing as there seem to be some words missing and it is repetitive. Lawyers in later cases referred to this case in support of this view. YB Trin. 28 Hen. VI, fo. 12, pl. 28 (1450).

48. '*jeo puis maintaine mon servant, & expend de mes propres deniers pur luy aider, & cest pur le perde de ses services*'. YB Mich. 21 Hen. VII, f. 40, pl. 62 (1505).

49. Case XCVIII, Jenkins 101; *Stone v. Walters et al*, Moore 813 (1610).

Those who supported the second view said this type of support was excessive and, therefore, illegal.⁵⁰ One lawyer explained that although a master could meddle for his servant, he could not pay his own money as the servant's loss was not his loss.⁵¹ In a 1452 action, Fortescue, C.J. concluded it was maintenance as it strengthened the servant's action to the disadvantage of his opponent. He said:

It is to be seen whether a Master can give his money to the counsel of his servant be lawful or not: and Sir, I say that not: for a man cannot do more for his servant in such a case than ask such a Justice that the matter of his servant can hastily be speeded as the Law wills, for the deliverance of his servant, and likewise he can ask a man of Law to be of counsel with his servant as the Law wills, for the deliverance of his servant: for if he loses the service of his servant, he has his remedy against the servant, also he need not pay his salary if he withdraws his service, thus the Master can keep him without damage. And to prove the deliverance of the money is maintenance, I will prove it: for by the money the matter for the servant can be strengthened on his side, so that he can ensure that the other party is delayed longer in his suit or barred where there is a recovery had against him by this, therefore it is maintenance which is not permissible, etc⁵²

But Fortescue's rationale, strengthening one party to the disadvantage of the other, is not only puzzling, but both different from and inconsistent with the justifications asserted by other justices. Moreover, an ambiguity in his statement may suggest that he did not view the

50. Fitzherbert, *Le Graunde Abridgement*, fo. 40, Issue Case 83, & fo. 64 Maintenance Case 12, (1451); YB Pasche 28 Hen. VI, f. 7, pl. 1 (1450); YB Hil. 32 Hen. VI, f. 24, pl. 11 (1454); YB 19 Mich. Edw. IV f. 5, pl. 16 (1479).

51. 'issint il dit que le Maister poit mster pur le servan. & via versa, le servant pur son Maister. Mes nul de eux poit doner argent, ne auter doner pur l'auter de ses biens: car le perte le Maister n'est le perte le servant; nec converso, etc'. Hil. 32 Hen. VI, f. 24, pl. 11 (1454).

52. 'Il est a voit le quel le Maister purroit doner deniers al' conseil son servant, soit loyal ou nemy: et Sir jeo di que non: car home ne point plus faire pur son servant en tiel cas que prier tiel Justice, que le matter son servant poit hastivement estre spede come la Ley veut. Et issint poit prier un home de Ley estre a consell ove son servant come le Ley veut, pur le deliverance de son servant: car s'il perd le service de son servant., il ad son remedy vers le servant, & auxi il ne covient de paier son salary, s'il sustreit son service, & issint le Maister luy poit garder sans damage. Et de prover que le deliverance des deniers est maintenance, jeo proveray: car per les deniers le matter pur le servant poit estre enforce de sa party; issint que il poit entendre l'autre party est per le plus long temps delay in sa suit, or barre., ou recovery ew envers luy pere ceo, adonques il est maintenance, nient congeable, etc'. YB Mich. 31 Hen. VI, f. 9b, pl. 1 (1452). F

prohibition as absolute. His discussion of the availability of a remedy for the master who lost the service of his servant by withholding his salary may indicate that Fortescue was actually espousing the third view, that the payment of money was not illegal if it were made from the servant's wages in the hands of the master.⁵³ Several actions reflected this view,⁵⁴ sometimes tying it to the loss of services.⁵⁵

These actions support at least a limited right for masters, and perhaps others who assert permissible justifications, to spend their own money in assisting another's litigation. The leading case, *Pomeroy v. Abbot of Bukfast* supported an unlimited right to do so. Several cases viewed the expenditure as lawful when the nature of the action would cause the loss of the servant's services or when the payment was from wages owed the servant. No justice clearly supported a total prohibition of such expenditures although plaintiffs' lawyers voiced that view.

C. Illegal Maintenance. There were clearly some forms of conduct that were illegal maintenance. A leading example, perhaps the most common special maintenance, was bribing jurors. Plaintiffs often replied to the justification by alleging that the defendant had given money to a juror to say his verdict for one side. All agreed that such conduct was illegal.⁵⁶ In a 1412

53. Hawkins cited this speech for that proposition. Hawkins, *A Treatise of the Pleas of the Crown*, Book I, c. 83, sec. 23, p. 253.

54. YB Hil. 34 Hen. VI, f. 25 pl. 3, (1456); YB Mich. 19 Edw. IV, f. 3, pl. 9 (1479); *Petson v. Penygton & Hagas* Trin. 15 Hen. VIII (1523), I Spelman's Reports, ed. J.H. Baker, 93 Selden Society (London, 1976) 163; *Roos v. Hurleston, Salford & Bowman*, TNA: PRO CP 40/1042, m. 446 (1524); Anon., Moore 6 (1549); *Saukell's Case*, Hetley 78 (1628).

55. YB Hil. 34 Hen. VI, f. 25, pl. 3 (1456).

56. YB Hil. 13 Hen. IV, f. 16, pl. 12 (1412); YB Mich. 21 Hen. VI, f. 15, pl. 30 (1442); YB, Mich. 22 Hen. VI, f. 5, pl. 7 (1443); YB Hil. 34 Hen. VI, f. 25, pl. 3 (1456); *W.H. v. W.C.*, Rastell, *A Collection of Entrees*, f. 431, pl. 17 (1457); YB Pasche 18 Edw. IV, f. 4, pl. 23 (1478); YB Mich. 19 Edw. IV, f. 3, pl. 9 (1479); W. Rastell, *A Collection of Entrees*, f. 428, pl. 9; *ibid.*, f. 429, pl. 10. David Seipp, 'Jurors, Evidences and the Tempest of 1499', in John W. Cairns & Grant McLeod eds., *"The Dearest Birth Right of the People of England" The Jury in the History of the Common Law* (Oxford, 2002) 83.

action, 'all the justices were clearly of the opinion that an attorney cannot give anything to any man of the inquest & if he does, he is punishable for it as a stranger would be'.⁵⁷ In *Pomeroy v. Abbot of Bukfast*, Newton, C.J. & Paston, J. said that it was unlawful maintenance 'when a Master gives any money on behalf of his servant to a juror to say his verdict; for in this it is not lawful for the juror to take'.⁵⁸ Such payments may have also constituted embracery, penalized by a writ of *decies tantum*.⁵⁹ Similarly, payments to sheriffs, coroners, and other officials were also illegal maintenance.⁶⁰ In a 1412 action, all the justices said it was illegal for anyone 'to give a reward to . . . a sheriff and bailiff of the liberty and other officials in this case and similar ones' as it was for an attorney to promise one to the jurors.⁶¹

Nor was bribery the only type of conduct influencing jurors that was considered illegal maintenance. Threatening a juror was also illegal.⁶² Laboring a jury by someone not a litigation

57. *Et tous les Justices fuerent clerement d'opinion que ne est list a un attorney a promitter ne doner regard as Jurours, & s'il face, il est punishable pur icel, come ascun estraunge person sera'*. Hil. 13 Hen. IV, f. 16b & 17a, pl. 12 (1412). It was also maintenance for a juror to give money to a fellow juror. YB Mich. 17 Edw. IV, f. 5, pl. 2 (1477).

58. *Car il est loial al' apprentice de prendre pur son conseil. Autre est ou le Master dona ascun argent pur son servant a un Juror a dire son verdict: car en cele n'est loial al' Juror a prendre, etc'*. Mich. 21 Hen. VI, f. 16b, pl. 30 (1442).

59. 38 Edw. III, st. 1, c. 12, *Statutes of the Realm*, vol. I, 384. A. Fitzherbert, *The New Natura Brevium* (Dublin, 1793), pp. 396-98. One action distinguished maintenance and embracery, saying that the person who gave the money committed maintenance and the one who took it was an embraceror. YB Hil. 13 Hen. IV, f. 16, pl. 12 (1412). Another action said that if the third party gave his own money to the juror it was maintenance, and otherwise embracery. YB Mich. 11 Hen. VI, f. 10, pl. 24 (1432). Coke treated embracery as a form of maintenance. Edward Coke, *The First Part of the Institutes of the Laws of England or a Commentary on Littleton* (London, 1832), f. 369a.

60. YB Hil. 13 Hen. IV, f. 16, pl. 12 (1412); YB Mich. 12 Edw. IV, f. 14, pl. 15 (1472); YB Pasch. 18 Edw. IV, f. 2, pl. 8 (1478); YB Pasche 18 Edw. IV, f. 4, pl. 23 (1478); Rastell, *A Collection of Entrees*, f. 428, pl. 9.

61. *Et tous les Justices fuerent clerement d'opinion que ne est list a un attorney a promitter ne doner regard as Jurours . . . & simile est de Visconte & baillie de liberte et autres officials in hoc casu & similibus'*. YB Hil. 13 Hen. IV, f. 17a, pl. 12 (1412).

62. YB Mich. 19 Hen. VI, f. 31, pl. 60; YB Hil. 32 Hen. VI, f. 24, pl. 11 (1454); YB Mich. 22 Hen. VI, f. 5, pl. 7 (1443); Seipp, 'Jurors, Evidences and the Tempest of 1499', 83.

party was in the same category.⁶³ Fitzherbert and Coke both treated such laboring a jury as illegal.⁶⁴ Giving money to a third party to labor the jury was viewed similarly. In *Pomeroy v.*

Abbot of Bukfast, the justices spelled out the limits of permissible conduct regarding jurors.

They said that

And then the opinion of Paston, Newton & all the others was that it was a maintenance: for the record is, that he gave WE 40s. of his own goods to labor the jury to say their verdict on the side of the said M & it was not lawful to do so for the Abbot, nor for any other: for although it is lawful for one who has to meddle with the matter to show evidence to the Inquest, to inquire of them to say their verdict; yet it is not lawful to labor the Inquest to say their verdict for one party specially, although the truth is on that side.⁶⁵

But not all the justices agreed with these views.⁶⁶

Some maintenance actions also suggested that abuse of legal processes could be illegal.

In *Pomeroy v. Abbot of Bukfast*, Newton, C.J. said that 'if one makes a labor for my indictment, by reason of which I am indicted, I will have a writ of Maintenance against him, and yet that is

63. YB Pasch. 11 Hen. VI, f. 41, pl. 36 (1433); YB Mich. 22 Hen. VI, f. 5, pl. 7 (1443); YB Pasch. 28 Hen. VI f. 6, pl. 1 (1450); YB 20 Hen. VII, f. 11, pl. 21 (1504). Laboring a jury probably involved advocating for a particular result although its precise definition is unclear. But the line between lawfully informing the jury and illegal laboring, especially by the parties to the litigation, is unclear, meriting a full discussion, which is beyond the scope of article. For the purposes of this article, it is sufficient to know that advocating to a jury by a third party in another's litigation was illegal maintenance. See Seipp, 'Jurors, Evidences and the Tempest of 1499', 80-85.

64. Fitzherbert, *New Natura Brevium*, p. 396; *Coke on Littleton*, f. 369a.

65. *Et puis l'opinion de Paston & Newton, & Touts les autres fuit que ceo fuit un maintenance: car le record est, quod dedit W.E. xl s. de bonis suis propriis ad laborandum juratoribus pro verdicto suo dicendo pro parte dicti M & ceo ne fuit loial affaire par le dit Abbe, ne par nul autre: car tout soit que il est loial a celuy que ad a mesler ove le matter par monstre evidence al' Enquest, & eux enquere a dire lour verdict; uncore il n'est loial a luy de laborer l'Enquest a dire lour verdict pur l'un party specialment, tout soit le veritie de cele party'. YB Mich. 22 Hen. VI, f. 5b, pl. 7 (1443)(motion in arrest of judgment).*

66. YB Mich. 20 Hen. VII, f. 11, pl. 21 (1504 (maintenance to labor jury to say the truth); YB Hil. 34 Hen. VI, f. 25, pl. 3 (1456)(lawful for attorney or other learned in law & of counsel to ask the jurors to appear on the day to say the truth).

not a quarrel, but the reason is in my opinion, it is the King's action, between him & the party'.⁶⁷ Initiating other kinds of legal proceedings such as inquisitions may raise similar issues. To the extent that the inquisitions resulted from third party pressure, they might also be illegal maintenance on reasoning analogous to Newton's arguments regarding procuring an indictment. However, the findings of fact in such an inquisition were not binding in other proceedings and were more easily reversed, suggesting a contrary conclusion.⁶⁸ Nevertheless, the return of these types of inquisitions likely violated a 1429 statute enacted to guard against abusive escheators.⁶⁹

Many instances of the conduct supporting litigation illustrated the abusive pressure that the powerful could exert.⁷⁰ Contemporaries were well aware of this as indicated by common complaint that 'law goeth as lordship biddeth' and Sir John Fastolf's statement to his lawyer, John Paston that 'for now adays ye know well that law goeth as it is favored.'⁷¹ Some maintenance statutes specifically mentioned 'great men'⁷² and a later court thought that the law was directed primarily at 'person[s] of superior rank'.⁷³ Moreover, the justices in the Year Book

67. He continued that 'the Statute is general, that it does not lie to anyone to maintain in any quarrel or action betw him & the party'. Paston, J. apparently did not agree. *Nota, que Newton tient par opinion; si un fait un labour a moy endite, par force de quel jeo suis endite, jeo averay brefe de Maintenance envers luy, & uncore ceo n'est nul queerele, mes le case est a ma entent, c'est l'accion le Roy perenter luy et le party, & le Statut est general, qu ne list a ascun de maintenir en ascun quarel ou accion perenter luy et le party.* ¶ Paston tient le contrary. YB Mich. 22 Hen. VI, f. 6b, pl. 7 (1443)(motion in arrest of judgment). Writs of conspiracy were also used against those who procured indictments. YB Mich. 8 Hen. IV, f. 6, pl. 8 (1406).

68. I am grateful to Paul Brand for pointing this out to me.

69. 8 Hen. VI, c. 16, *Statutes of the Realm*, vol. II, 252-53.

70. Powell, 'Law and Justice,' 35-36.

71. *Paston Letters-Davis*, vol. II, no. 520.

72. Statute of Westminster I, c. 33, 3 Edw. I., *Statutes of the Realm*, vol. I, 35; 1 Edw III, st. 2, c. 14, *Statutes of the Realm*, vol. I, 256; 1 Rich II, cc. 4, 7, 9, *Statutes of the Realm*, vol. II, 2-3.

73. *Thursby v. Warren*, Cro. Car. 159, 160 (1628).

actions exhibited a special concern about conduct undertaken by powerful persons. In *Pomeroy v. Abbot v. Bukfast*, Newton, C.J. said that it was maintenance for a person ‘who has great rule or great power in the county’ to come to the bar with the party, even though he said nothing or did nothing, because it ‘will perhaps cause those who will be the jurors to favor the party and find for him’ as the person would be ‘understood to wish well to that party’.⁷⁴ Similarly, Prysot, C. J. said that support from a ‘lord or powerful man’ was maintenance ‘because the party is comforted in the suit and this is grave maintenance from a worthy man’.⁷⁵ Although the actions of ‘great men’ may have heightened the concern about maintenance, several statutes made clear that the prohibition extended to everyone, ‘great or small’ or of ‘whatsoever estate or condition.’⁷⁶ Moreover, the many of the cases involve persons who are not ‘great’ and the developing law did not make such status relevant.

V. Conclusion

This examination of the maintenance actions in the Year Books and other sources reveals that the generally articulated contemporary and modern definitions of maintenance are overbroad. Medieval judges believed that some instances of nonparty support of litigation were appropriate and that broadly prohibiting all such conduct was unfair and inconsistent with

74. ‘*Car mettomus que un que rien n’ad affaire ove le matter vient al’barre ove le pleintif ou defendant & estoit ove luy, & ryen dit, ne rien fait; uncore ceo n’est [sic] serra adjuge un maintenance, & un continuel maintenance tout temps pend le ple; & le case est, par ceo que paraventure il est tiel persone que ad grand rule ou grand poiar en le County & eux que vient al’barre ove l’un party entend que il veut bien a cele party, & que il est plus favorable a cele party que a l’autre, que paraventure causera ceux que serront Jurours favoure le party, & passent ove luy*’. Mich. 22 Hen. VI, f. 6b, pl. 7 (1443)(motion in arrest of judgment).

75. ‘*Mes seignour ou authre puissant home estre maintenance, pur ceo que le party est conforted en le suit & cest graund maintenance dun proude home*’. Fitzherbert, *Le Graunde Abridgement*, Maintenance 22, fo. 65 ((1458).

76. 20 Edw III, cc. 4 (1346), *Statutes of the Realm*, vol. I, 304; I Rich II, c. 4 (1377), *Statutes of the Realm*, vol. II, 2-3.

legitimate interests of nonparties and recognized legal notions. As it has been shown, they developed the law of maintenance accordingly through individual cases.⁷⁷

More generally, one must be cautious in assessing complaints and legal actions involving maintenance. Charges of maintenance were easily made, especially against one's opponents. Moreover, it was used as a litigation tactic against adversaries.⁷⁸ Those who complained about maintenance frequently were its practitioners and beneficiaries.⁷⁹ Thus, sorting out the legal treatment and social attitudes toward maintenance is a complex undertaking.

May 22, 2007

77. The author examined about 150 Year Book cases as well as a number of others in the nominative reports from the fourteenth through the sixteenth century that involved writs of maintenance, champerty, and conspiracy as well as other actions that discussed maintenance.

78. Sir John Fastolf's servant, Thomas Howes, brought maintenance actions in response to John Andrew's conspiracy actions against him. TNA: PRO KB 27/782, m. 97d (rex), Mich. 35 Hen. VI (1456); TNA: PRO KB 27/784, m. 60, East. 35 Hen. VI (1457); TNA: PRO KB 27/790, m. 79, Mich. 37 Hen. VI (1458).

79. Harriss, 'Introduction,' in McFarlane, *England in Fifteenth Century*, xxii; Carpenter, 'Law, Justice, and Landowners in Late Medieval England,' 1 *Law & Hist. Rev.* 205, 226-31 (1983).