



THE CHARTERED INSTITUTE OF ARBITRATORS

The Prehistory of Dispute Resolution in England

By

Derek Roebuck

Reprinted from
(2006) 72 Arbitration 93–103

Sweet & Maxwell Limited
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)

THOMSON
—★—™
SWEET & MAXWELL

Articles

The Prehistory of Dispute Resolution in England

by DEREK ROEBUCK

“My understanding and experience of British prehistory lead me to the view that the Ancient Britons were a resourceful bunch. Their insular society worked well: they seem to have kept their feuding to manageable proportions.”

Frances Pryor, *Britain BC*, p.438¹

1. INTRODUCTION

I am convinced that the present practice of mediation and arbitration cannot be understood without a knowledge of how it has come to be what it is now. Discussions of what should happen in the future, for example the arguments about whether mediation should be controlled by the state, or whether the same third party can act as both mediator and arbitrator, seem dangerously ill-informed when mediation is assumed to be an ancient Chinese or a late 20th-century American invention.

There are those who believe that recognisable processes of formal arbitration in England began with the birth of the common law or even with what they unhelpfully call the first Arbitration Act 1697.² Yet even a cursory glance at the ways in which earlier societies dealt with disputes—long before there were courts, or judges, or lawyers, or even written law—not only shows that they have always used mediation and arbitration. There is early evidence of assemblies where they met to deal with a wide range of business, including disputes between individuals and groups. There is no evidence, and no reason to believe, that they behaved irrationally. Mediation no doubt led to settlements and arbitration to awards, which in early society the group would normally enforce. When the sources become richer, they reveal techniques and procedures which may possibly lead to better practice today.

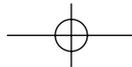
My work on the early history of mediation and arbitration has already produced volumes on Ancient Greece and Rome.³ Now I am working on early English arbitration and have found that there is no justifiable starting point later than prehistory.⁴ But can anything at

¹ This article has been sparked off and informed by his two recent, comprehensive, accessible and lively books: Francis Pryor, *Britain BC: Life in Britain and Ireland Before the Romans* (Harper Perennial, London, 2004) and *Britain AD: a Quest for Arthur, England and the Anglo-Saxons* (Harper Collins, London, 2004). No one who has not read them can rely on their old general knowledge of England's early history, however much they may want to argue with his conclusions.

² For example, “the very inefficiency of the Courts had inspired, by 1680, the first experiments in arbitration ever held outside the trade guilds”, D.R. Coquillette, *The Civilian Writers of Doctors' Commons, London* (Duncker and Humblot, Berlin, 1988), p.139.

³ Derek Roebuck, *Ancient Greek Arbitration* (Holo Books, Oxford, 2000); Derek Roebuck and Bruno de Loynes de Fumichon, *Roman Arbitration* (Holo Books, Oxford, 2004); “‘Best to Reconcile’: Mediation and Arbitration in the Ancient Greek World” (2000) 66 *Arbitration* 275–287.

⁴ I hope to publish *Early English Arbitration* next year. It may go up to the 12th century. This article is based on the present draft of Ch.2, Ch.1 being concerned with such technicalities as definition and language. Chs 3 on Roman Britannia and 4–8 on the Anglo-Saxon periods up to Cnut are done. I followed a digression and produced a lecture “Customary Law before the



THE PREHISTORY OF DISPUTE RESOLUTION IN ENGLAND

all be known about what happened before history, that is written sources, began? I believe so. Because the different parts of the British Isles have different histories, and practically because I cannot read Celtic languages, all my present work is restricted to England: not Ireland, nor Scotland, nor Wales.

For more than 700,000 years there have been humans in what is now England. They have been living in communities, co-operating in hunting, making and possibly trading in tools, and carefully burying their dead for half a million years.⁵ They have probably been talking to one another since no later than 250,000BC.⁶ Perhaps some of them were our hominid ancestors, like us in many basic ways, social as well as genetic. We know nothing of how they resolved the disputes they must have had. The recent discovery of a jawbone suggests that *homo sapiens*, our own kind, has lived here for more than 37,000 years.⁷ New finds keep pushing these dates back but that seems to be the earliest realistic starting point for a study of dispute resolution in England.

Until about 8,000 years ago, England was part of the land mass of North-western Europe. Then the strip by which travellers could walk to and from the peninsula was finally inundated and the islands took their separate form. Now we think of England, Ireland, Scotland and Wales, but those nation states are comparatively very recent.

The written record starts only 2,000 years ago and most of it is unreliable. Not all historians are as scholarly as Tacitus, in one passage at least, where he writes⁸: “However, who the people were who first lived in Britain, whether indigenous or immigrants, is not sufficiently proved, as usual among foreigners.”

Long before the Roman occupation, however, there is the better evidence of archaeology, which, though it says nothing directly about how disputes were resolved, tells us much about what was going on in the evolving communities.⁹ Thanks to archaeological scholarship, we know much more than Tacitus could. It may take imagination to produce pictures from the faint hints which lie scattered in the astonishing scholarship of the archaeological reports, but they should not be ignored.

Archaeological evidence does not usually provide what we are looking for directly; as Jacquetta Hawkes wrote¹⁰:

“The evidence for historical events during those centuries is tenuous and as easily broken as a cobweb. Archaeology catches so much of general life, so little of particular events.”

For example, though there is no direct evidence for how they resolved disputes, there is ample evidence of highly-developed societies at a much earlier date than we are used to believing. Their social and technological development makes it inconceivable that the people, who 4,000 years ago devised Stonehenge or over 3,000 years ago used the exquisite gold cups found at Rillaton in Cornwall or recently in Woodnesborough in Kent (both now in the British

Conquest”, delivered at the Institute of Advanced Legal Studies on February 27, 2006 but not yet published, which covers much of the same ground as this article and includes some of the same text.

⁵ S.A. Parfitt and 17 others, “The Earliest Record of Human Activity in Northern Europe” (2005) 483 *Nature* 1008–1012.

⁶ Based on studies of the development of the human throat, tongue and ears, e.g. *New Scientist*, June 22, 2004, but a much earlier date, c.500,000BC is suggested by Sverker Johansson, *Origins of Language: Constraints on Hypotheses* (Benjamins, Amsterdam, 2005).

⁷ Tom Higham, Oxford Radiocarbon Accelerator Unit, *BBC News* April 27, 2005.

⁸ R.M. Ogilvie and I.A. Richmond (eds), *Tacitus: Agricola* (Clarendon Press, Oxford, 1967) 11, p.99; the best new translation is A.R. Birley (tr.), *Tacitus: Agricola and Germany* (Oxford University Press, Oxford, 1999).

⁹ Neil Faulkner, *Decline and Fall of Roman Britain* (Tempus, Stroud, 2004), pp.259–262.

¹⁰ Jacquetta Hawkes, *Dawn of the Gods* (Random House, New York, 1968), p.66.



Museum), had not worked out a system for coping with at least some of their differences in a peaceful way, with replicable routines and the expectations of fairness they arouse.

2. SOCIETY

Ancient Greek Arbitration and Roman Arbitration were about dispute resolution in societies dominated by cities, civilised at least in that sense. Athens was a city and Greece a land of city-states. Rome, too, was a city and the centre of a great empire with many cities. England was not a land of cities. Nor did it begin to have effective central government or comprehensive administration until 1,000 years ago. Even when it was one or more Roman colonies, the colonial government did not control the whole of the country. Greece and Rome made much use of writing and produced fine literature. England had none at all before the Romans came.

Throughout the Palaeolithic or Old Stone Age, roughly 500,000BC to 8,000BC, there is evidence that the population grew, if slowly, and larger groups formed. There appears to have been enough room for all. For the first 36,000 years or so of habitation by *homo sapiens*, until about 7500BC, England was lightly populated, with many communities little larger than an extended family. Larger groupings were based on extended kin. There is plenty of evidence that they gathered together for social purposes. The larger social group, whether called kin or clan or tribe, provided insurance against some of the risks of life, including the ill-effects of disputes, which arise naturally in every society. If families do not attend such gatherings, they live in backwardness, says Homer of the Cyclopes in a precocious flash of anthropological insight: "they have no assemblies where counsel is taken nor customary laws."¹¹ Pryor suggests that even in the Mesolithic, from say 8,000 to 5,000BC, when the population grew more rapidly: "people didn't live in such close proximity that disputes and rivalry for scarce resources could give rise to social competition."¹² I wonder. That can only be true for competition between groups; there must have been normal competition as well as co-operation within the group of the extended family, at least.

Up to this time, Stone Age people had fed themselves by gathering food in the wild or by hunting. Now they gradually added farming, which allowed them to cluster more densely but required the exchange of stock for breeding, if not the trading of surplus¹³:

"Farming is a vastly more efficient means of producing food calories than hunting or gathering. It allows many more people to live in the landscape, and that in turn means that communities have to live alongside each other. So they must find ways of settling disputes ..."

The first hunter-gatherer-farmers were still nomadic too, to some degree, but eventually, probably after c.3,000BC, they foraged abroad less often and came to settle on a piece of land they called their own. Not in individual ownership, of course, but a part of the clan, inalienable, belonging as much to all its members, dead and living and still to be born, in the temporary stewardship of those alive who represented the clan for the time being. That is hard enough for us to comprehend but it is even harder to realise that there was land ownership before there were linear boundaries. Most of us now can only think of boundaries as lines drawn round plots. It was possible for earlier communities to grade the authority

¹¹ *Odyssey*, 9.112; *Ancient Greek Arbitration*, p.70.

¹² Pryor, *Britain BC*, p.104.

¹³ Pryor, *Britain BC*, p.111. It used to be accepted that farming was introduced by an "invading wave" from abroad but archaeological scholarship (particularly the results of mitochondrial DNA tests) has cast doubt on that. Indeed, modern archaeological research finds little evidence of "invading waves" at any time, though this, as so many matters, is hotly disputed. For the controversy about the Anglo-Saxon invasions see now Don Henson, *The Origins of the Anglo-Saxons* (Anglo-Saxon Books, Hockwold-cum-Wilton, 2006).



THE PREHISTORY OF DISPUTE RESOLUTION IN ENGLAND

they had over land according to its nearness to their ancestral sites, often the burial places of ancestors. Boundaries were then circumferences from central ancestral burial places, so that the community (clan members alive or dead) might have exclusive rights to occupy land near the nodal points, but diminishing rights of use the further away they went, perhaps to grow things and keep animals nearby, to hunt and gather further away, where they might share those rights with other groups. That is still the way land ownership is thought of in some communal societies in the islands in the north of Papua New Guinea today. There is no direct evidence that it was ever so in England but¹⁴:

“One clue may be provided by a series of large Bronze Age burial mounds, often with multiple circular ditches surrounding them, which appear to be evenly spaced at roughly half-kilometre intervals along the southern part of this landscape. It’s as if some time around 2500BC people decided that the fertile pastures of the southern Welland Valley had to be parcelled up in an equitable fashion, and enlisted the help of their dead ancestors to ensure that the arrangement was not abused.”

My suggestion that prehistoric societies may have had more sophisticated concepts of space and boundaries and “ownership” played no part in that insight of Pryor. Is the evidence, from England in the Bronze Age and Papua New Guinea today, all the more convincing for being quite unconnected? Which is more elaborate, the linear boundary or the measurement from nodes? This provides an insight into the nature of customary law which should never be ignored. The development of our legal system as, dare I say it, of our popular theology, has been a process of simplification, not elaboration, until modern times.¹⁵

3. TRADE

There cannot be trade without disputes. There is evidence of trade even in the Old Stone Age, including half-finished flint tools and Baltic amber in the form of beads. Regular patterns of reiterated trade would be unlikely if disputes could only be resolved by violence when the parties could not settle them for themselves. The definition of “trade” at that time is debatable but not during the period covered by this article, the following eight millennia. For our purposes it does not matter whether goods have become commodities or are exchanged within a market economy. There was widespread distribution all over England of stone axes in the New Stone Age.¹⁶ Some could be used to chop down trees but others would have shattered and must have been prized by their recipients for their appearance. They were exchanged for something, goods or services or privileges. Though we do not know what those were, they must have been of value to those who received them. Neither side need have put much value in what they gave in return. The anthropologists who have studied the Kula ring and other forms of reciprocity have shown how such systems may work.¹⁷

There was cross-Channel trade for 3,000 years before the Romans interfered with it. The main exports were slaves, corn and raw materials. The discovery on the seabed off Dover of a cargo of 352 bronze implements, exported from France, is only one bit of evidence for cross-Channel trade about 1500BC, perhaps two centuries before the first wheel discovered in England was made.¹⁸ There is some evidence that the Veneti of Brittany had their own permanent trading posts in England about then.¹⁹ Recent finds from wrecks off Salcombe in

¹⁴ Francis Pryor, *Britain AD*, pp.79–82 and 226: “barrow burial is about territoriality”.

¹⁵ See, e.g. Peter Lawrence, *The Garia: an Ethnography of a Traditional Cosmic System in Papua New Guinea* (Melbourne University Press, Melbourne, 1984).

¹⁶ *Britain BC*, pp.150–151.

¹⁷ Bronislaw Malinowski, *Argonauts of the Western Pacific* (Routledge & Kegan Paul, London, 1922), essential reading for an understanding of England in the Stone Age.

¹⁸ *Britain BC*, pp.297, 300.

¹⁹ Barry Cunliffe, “Britain, the Veneti and Beyond” (1982) 1 *Oxford Journal of Archaeology* 39–68.



Devon and Dover in Kent, dating from c.1200–1000BC, show cross-Channel trade flourished between South-west England and Brittany until Caesar's attacks on Brittany in 57BC, after which most trade switched to Kent and the Thames estuary, except for wines, figs, glass and other luxuries to supply the requirements of the sophisticated pre-Roman Iron Age British.

There is archaeological support for the stories preserved by Pliny and Herodotus of exports of tin from Cornwall c.600BC. Strabo, writing c.AD20, said the Phoenicians took care to monopolise the trade and kept the route a secret, until Publius Crassus, governor of Hispania Ulterior, managed the voyage to Cornwall (c.95BC) and saw how tin was mined and found the people peaceable.²⁰ The Phoenician merchants knew not only the sea routes; they used their knowledge of the markets to sell tin throughout the Mediterranean. Nothing is known of how they settled their disputes with their suppliers in England, though there is no reason to suppose they forwent the techniques and procedures they were used to elsewhere. It is possible to speculate that they had regular meetings of some kind, with rules for mediation and arbitration, especially if you can accept that the root of all the "arbit-" words, in all languages, is to be found in Phoenician traders' pidgin.²¹ The wrecks off Salcombe in Devon and Langdon Bay in Kent show that scrap metal was being traded across the Channel by the Middle Bronze Age (c.1200–1100BC).²² If there is trade in scrap metal, can you imagine there being no disputes which required some systematic process for their resolution?

4. CUSTOM AND LAW²³

Wherever humans are found, at whatever time in history, they are social animals. If circumstances force them to be alone, they seek to rejoin the group when they can. It may well be that a permanent grouping is necessary for the survival of human young. The smallest group, the family, is in communal societies (as I prefer to call pre-state societies) not just a mother, father and their children. These extended families have relations with other neighbouring groups and wider kin with whom they congregate at certain times for agreed purposes, which can include the resolution of inter-kin disputes. This seems to be a universal phenomenon.

Any group of humans living together as a community needs common rules to govern the behaviour of the individuals within it. Even within a group seeking to function as a family there must be some system, however rudimentary and implicit. The rules of a kin group have more effective sanctions than those of a state. Life in such communal societies has been observed in recent times by anthropologists. It is fair to accept, if great care is taken, that some fundamental characteristics of modern communal societies are similar to those in earlier societies which archaeology shows had similar ways of life.

Communal life is public. There is little privacy and opportunities for eccentricity are limited. There is little chance of conduct deemed antisocial passing unnoticed or being attributed to the wrong person. Moreover, the sanctions are often immediate and applied until they work, that is until the culprits give up their antisocial behaviour and admit their faults, or have their capacity to misbehave removed.

The rules are, of course, unwritten, but they are better known in their entirety than the laws are to citizens of states. The greatest technological advance in the law is the use of writing, which reduces individual and communal memory as it provides the techniques of recording and reminding, provided the rules can be expressed simply enough. But an even

²⁰ Strabo, *Geographica*, 3, 5, 10–11; T.W. Potter and Catherine Johns, *Roman Britain* (British Museum, London, new edn, 2002), pp.14–15.

²¹ *Roman Arbitration*, p.19.

²² Potter and Johns, *Roman Britain*, p.13.

²³ Much of what follows is taken from my *Background of the Common Law* (2nd edn, Oxford University Press, Hong Kong, 1990), Ch.2, "Communal Societies and Customary Law". See now Adam Kuper, *The Reinvention of Primitive Society: Transformations of a Myth* (Routledge, London, 2005).



THE PREHISTORY OF DISPUTE RESOLUTION IN ENGLAND

more basic difference is economic. Economic relations are far more complex in more modern societies and much of the complexity of their laws is the result. On the other hand, a great deal of the complexity of communal law stems from the group's concern to control much more of what would now be considered the private lives of its members. For example, communal groups have comparatively few members so that selection of spouses from within them is limited. The health of the group requires a wider definition of incest. In our society, anonymous adoption has made possible the unwitting marriage of siblings, which would be unthinkable in a communal society. All the members of any communal group know the rules of their customary law in detail and expect hard punishment for their breach and the facts are not likely to be in dispute. Everywhere in modern communal societies there are legal rules of a complexity, sophistication and abundance that modern legal scholars find hard to comprehend. There is no reason to doubt that the rules of customary law were just as complex in prehistoric England.

It is also fair to assume that the customary laws of the various groups shared certain characteristics. Modern law has categories, used for the purposes of exposition and application: public and private; civil and criminal; property and obligations. Customary law does not, all law being one, consecrated by long use, general acceptance and the group's religion, superstitions, magic, whatever we choose to call what they believed. Customary law cannot be openly questioned by anyone on the grounds of utility or fairness. It is an essential attribute of the group. Yet it is always assumed, for that very reason, that to find it you must look for whatever rules produce a result in the best interests of the group (or those with power within it). Expediency is all, whatever formula is needed to produce it. That does not mean that there are no legal principles; just that, after the decision-makers have clarified them and applied them to the problem, you can be sure that there is no danger of the heavens falling.

The group ideology assumes that customary law is unchanging and unchangeable and is now what it has been since time began, yet it constantly responds to new stimuli, particularly technological innovation. It has probably been doing so for ever, with no consciousness of progress, let alone discussion of reform. It is changed to meet the needs of those with power. They are the ones who in the assemblies declare what the customary law is, and those who in applying it fix the details of its rules not just for that dispute but in the memories of everybody for the future.



5. ASSEMBLIES AND DISPUTE RESOLUTION

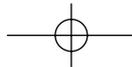
From about 4000BC the Stone Age inhabitants of England started to build a variety of spectacular communal edifices, which we now call monuments. Any of them may have relevance to dispute resolution. To take causewayed enclosures first, found all over southern England.²⁴ Most of them were probably not dwellings, as first thought, nor tombs, but many were provided with a front courtyard admirably suited for assemblies "for the transaction of the necessary business of tribal life."²⁵ A common feature is a line of posts, often of impressive size.²⁶ Beasts could have been tied to them, though they are usually bigger than necessary for that purpose. It is common to find animal bones there, with evidence of some eaten there and others slaughtered to be eaten elsewhere.²⁷ They could also mark the places

²⁴ *Britain BC*, pp.162–173.

²⁵ Isobel Smith, *Windmill Hill and Avebury: Excavations by Alexander Keiller 1925-1939* (Oxford University Press, Oxford, 1965), p.19. This is not the place to speculate about their religious uses.

²⁶ There is a splendid drawing in *Britain BC*, p.203, fig.36.

²⁷ Once an animal was killed, it had to be eaten within a few days. Surplus fresh meat could not be stored. When herds outgrew the food to feed them or the labour to tend them, there had to be a feast. When labour greatly exceeded the need for it, did communities join in



(2006) 72 ARBITRATION 2

where the elders stood or sat in the assembly, like the polished stones in the *Iliad*, discussed below.²⁸

There may well have been what historians, anthropologists and archaeologists all call “ritual” elements, as there is in most things we do publicly now, from umpires walking out together to start a cricket match to many aspects of the most modern arbitral hearing, with electronic chess clocks now unconsciously but exactly replicating the water clocks of their forebears in Ancient Greece. In prehistoric times we can call it ritual or magic if we like. I prefer to think of it as early science, particularly when it is a part of technology, such as the mines at Great Orme in north Wales, “thought to have yielded a rather extraordinary 175 to 238 tons” of copper in the Bronze Age.²⁹ Better to stick with what we can be confident about: the processes in the assemblies were clearly accompanied by solemn acts which were customary and replicated and intended to have some consequence.

The assemblies could well have been seasonal, which would have avoided the need to give notice, but they could also have been called whenever necessary. The location of causewayed enclosures beside rivers may be significant if they were used for dispute resolution. The river was often not just a border between the territories of different kin groups; it was a safer way of getting there than crossing alien land.

Another kind of Stone Age edifice is the barrow. It may, like the long barrow at West Kennet near Avebury, greet you with impressive stones standing at the entrance. When barrows were filled with earth, that seems to have signified some kind of completion, some sealing-off, including—who knows?—perhaps the settlement of a dispute. The artefacts buried in a round barrow at Lockington, south of Derby, may have been intended to recognise such a settlement, around 2100–1900BC. They include two decorated gold armlets, not a pair, and a long copper dagger made in Brittany and found in its scabbard. It is usually assumed that these were intended to accompany some dead man to another world.

I suggest a simpler explanation, which—though of course still the merest speculation—accounts for the armlets not being a pair, as one would expect if they were to be worn in the next world, where no doubt fashion would matter. The parties to a dispute brought it before some kind of tribunal in a public traditional assembly, which we can assume existed at that time. A settlement was mediated or arbitrated. After “ritual” preparation (nearly as awe-inspiring as a visit to a solicitor’s office, followed by a conference with a Q.C. in an inn of court) the award was “sealed” and its terms remembered by solemn repetition accompanied by “ritual” depositing of the tokens of settlement, exchanged armlets and the customary sheathing and burying of the hatchet, or rather an expensive imported dagger. We might be well advised to remove the word “ritual” in this paragraph and replace it with “rational”.

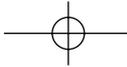
Assemblies in the Bronze Age were clearly more than religious ceremonies. Farmers needed to meet to exchange livestock to renew the bloodline, even if they did not have to sell their surplus stock. There is evidence of conspicuous consumption at feasts. Is there any

building monuments? Richard Bradley, *The Social Foundations of Prehistoric Britain: Themes and Variations in the Archaeology of Power* (Longmans, London, 1984) is a scholarly treatment of these and allied problems, especially at pp.64 and 166.

²⁸ There are also striking similarities in overall shape and interior disposition of space between the reconstructions of the long barrow at West Kennet, *Britain BC*, p.201, fig.35, and of the tomb at Apesokari in Crete, Nanno Marinatos, *Minoan Religion: Ritual, Image and Symbol* (University of South Carolina Press, Columbia, 1944), p.12, fig.14 and p.19, fig.19. Both have a space in front of the entrance suitable for public gatherings. Marinatos writes (p.14, her italics): “Cult implements and offerings were found *outside* the tombs, thus suggesting periodic visitation . . . by *sizable groups of people*. . . The area outside the tombs is spacious, capable of serving communal gatherings.”

²⁹ *Britain BC*, pp.264–275. It is scarcely possible that in 5km of passages, some 70m deep, and some so tiny that only children could have worked them, mining could have been carried out without disputes arising.





THE PREHISTORY OF DISPUTE RESOLUTION IN ENGLAND

evidence that disputes were settled there? Pryor asks the question³⁰: “Why had many of the Bronze Age implements dredged from the River Thames . . . been partially melted down?” His answer is that they were “votive offerings”:

“Now I think I’m beginning to understand what might have been in people’s minds as they partially melted down their spearheads, then dropped them into the river—doubtless with a spectacular hissing explosion of steam. It would be hard to imagine a stronger symbolic statement.”

Symbolic of what if not of the ending of hostilities, of settlement of a dispute? Is any other explanation more likely? In his later work, *Britain AD*, Pryor writes³¹: “In most cases, those offerings reflect rank, status or the avoidance of conflict . . . conflict that has been avoided through some symbolic act.” Avoided or resolved?

The most compelling object of all, however, is also perhaps the most beautiful. It was made of polished flint about 3200BC and, though found not in England but in Ireland at Knowth in County Meath, is of direct relevance.³² It is usually called a “macehead”. That term seems as misleading as it is anachronistic, if mace has its common modern meaning of a staff symbolising authority, usually royal. Just looking at it, though, is enough to proclaim its association with public speaking. It is a stylised human head, only about 80mm tall and 60mm wide, not much bigger than a knob on a walking stick, of polished brown and white flint, with a great gaping mouth. It has a slot which shows it was meant to be fitted on to the top of a staff. Do we know anything about such “speaking-staffs” in other times and places? We do indeed! Homer’s *Iliad* and *Odyssey* are full of descriptions of assemblies. The fullest account of an arbitration is in the description of the assembly portrayed on the shield of Achilles.³³



“Men were crowded together in an assembly. A dispute had been stirred up there, and two men were disputing about the reconciliation-payment for a man who had been killed. One was pleading ‘all to be yielded’, pointing it out to the citizens, but the other refused to accept anything. Both men had put it to a knowing-one to reach an end. And men, supporters of each side, were cheering on both of them, so marshals were restraining the crowd. The elders sat on polished stones in a sacred circle and one after another took the speaking-staff (*skēptron*) of the shouting marshals in their hand and adjudicated.”



The elders are given seats on polished stones in the sacred circle.³⁴ Each elder takes the speaking-staff from one of the marshals, whose function is to keep the crowd in order, and speaks out in turn. No speaking-staff has so far been found by archaeologists in Greece, to my knowledge, but it would not be surprising if the imagery were similar. It does not signify royal power or the equivalent of the Roman *imperium*, as the lictors’ *festuca* did.³⁵ The wide-open mouth has double significance. First, it proclaims the authority of the president of the assembly to conduct proceedings. He or his marshal calls for order and he decides who shall

³⁰ *Britain BC*, pp.275–276.

³¹ *Britain AD*, p.217.

³² I know Knowth is in Ireland and this article is restricted to England but this specimen is irresistible. Maceheads both of antler and stone have been found in England, Bradley, *Social Foundations*, pp.46, 48–49, 55. A few of sandstone and of quartzite are described and illustrated in W.F. Rankine, “Stone Maceheads with Mesolithic Associations from South-Eastern England” (1949) 15 *Proceedings of the Prehistoric Society* 70–76.

³³ *Iliad*, 18.497–508. The references to other passages in the *Iliad* and *Odyssey* and in later literature are in *Ancient Greek Arbitration*, where the speaking-staff is more fully discussed.

³⁴ Until recently they still did sit on polished stones in a half circle in Rarotonga in the Cook Islands to deliberate in the assembly. I have taken photographs of the stones.

³⁵ Gaius, *Institutes*, 4.16.

speak. Similar formality survives even now in the body language of a French meeting, when the *président* decides to *donner la parole*, rather like a modern conductor without a baton. Secondly, it shows that only one person may speak at a time and that is the one holding the staff. That is a convention which all must honour at the risk of being shunned as a lout. That is the dramatic point of the earlier passage in the *Iliad*, when Achilles, the celebrity superstar athlete, behaves so petulantly, turning on his commander-in-chief Agamemnon, who has taken his slave girl³⁶:

“You drunk with the face of a dog and the heart of a doe, you never have the guts to fight . . . you just take the booty of anyone who stands up to you . . . You listen to me—I swear a great oath by this staff which the Greeks hold in their hands when they turn over their judgments in their minds—they who (for Zeus) guard customary law, *themis*,—I swear you this great oath—you’ll be sorry!”

And he does the unthinkable—he throws the staff down. I’m sure no Irish speaker would have treated the beautiful Lowth “macehead” with such disrespect. But is it too far-fetched to see the many “maceheads” found in England being used similarly as speaking-staffs in English assemblies? No other more convincing explanation has been offered for their use.

6. WHAT THE ROMANS FOUND

By the Iron Age, there were large tribes, some led by chiefs who would be kings, both peoples and rulers known by name from later sources. Pryor suggests that there were places on their borders where they met in assemblies, before Roman occupation curtailed a trend towards conglomeration in larger kingdoms.³⁷ He finds “little trace of feuds”, by which he means violent vendettas rather than the regular kin-based systems for the resolution of disputes in Anglo-Saxon times. This was a land of socially highly developed and economically prosperous communities.³⁸

“From a technological point of view, the native inhabitants of Britain had been fashioning iron tools and weapons for some seven hundred years. They grew most of the common crops that we see in the modern countryside, and they had possessed sophisticated wheeled vehicles for well over a thousand years. Their clothes were made from brightly dyed woven cloth, and their artists and craftsmen were capable of producing works of art that could hold their own alongside the finest creations offered by the ancient world.”

That is not what the Roman sources say. What mattered to Tacitus was that the Britons were ready to fight. They had not yet been unmanned by Roman ways, as Tacitus said they were to become as a matter of colonial policy and as the Gauls already had. But in many ways they resembled the Gauls, to whom Tacitus said they were related³⁹:

“Those nearest to the Gauls are like them, either because of the continuing strength of their common origin or because the two countries run close together from opposite directions, so that the weather gives them their physical appearance. But taking everything into account it is likely that the Gauls invaded the neighbouring island. You can detect their religion there, and their superstitious persuasions. The language is quite similar.”

Could the customary law and practices of dispute resolution, too, have been similar? Julius Caesar tells a likely story about how the Celts in Gaul settled their disputes⁴⁰:

³⁶ *Iliad*, 1.224–245.

³⁷ Bradley, *Social Foundations*, p.167.

³⁸ *Britain BC*, pp.405–406, 409, 431.

³⁹ Tacitus, *Agricola*, 11.

⁴⁰ Caesar, *Gallic War*, 6.13–14.



THE PREHISTORY OF DISPUTE RESOLUTION IN ENGLAND

“[The druids] are the ones who lay down the law for almost all disputes, public and private, and whether something is considered a crime, and whether there has been a killing, and if there is a dispute about inheritance or boundaries they settle it. They lay down remedies and penalties. If any individual or group does not abide by their decision, they ban them from sacrifices; for them this is the gravest punishment. Those that they ban are held to be impious and accursed and everyone keeps clear of them, cutting them and refusing to talk to them, lest they suffer some harm from contact with them. If they try to exert their rights they will not be given them and they are granted no honour.

Caesar says that the community relied on the druids to lay down the law, which of course was customary law then. He also stresses that they had no written laws but the druids kept them in their memory.⁴¹ Though there is no reason to rely on this as evidence even of how the Gauls resolved their disputes, their British kin had similar druids, and it is likely that they too had a hand in resolving disputes. Though the Romans had no objection to communities resolving their own disputes by customary law, they did not find druids an acceptable alternative authority. Tacitus says that the Romans massacred the last of them on Anglesey, on the pretext that their human sacrifices were abhorrent.⁴² Druids or no, those well-developed British communities had systems for resolving disputes which continued after the Romans set up their colonial government with its own laws for some people in some parts of England. And there is evidence that those systems continued to function long after the Romans had gone.

7. WHAT CAN WE KNOW?



What can we learn from all these scraps of evidence and the application of disciplined imagination to them? There are some fundamental things which we can with confidence say we know. Before there are any surviving written sources, the archaeological evidence shows that communities in what is now England met in assemblies. So much is clear from the barrows and roundhouses and standing stones and most strikingly from the “maceheads”. We may infer replicated procedures, and probably rules, for the resolution of disputes from the relics of trade. There must have been customary law of some kind because there always is, even in what we know of the Stone Age elsewhere, and always at the stage of development which societies in England had reached by the Iron Age. We know nothing of its content.

We may speculate that dispute resolution followed the procedures we may observe in contemporary or recent communities with similar technological, economic and social cultures. Disputes within the family were dealt with privately, as they usually are now. Families were more extended then and so the need for resort to neutrals arose only when the dispute was between two larger groups or individuals from those groups. Then arbitration became a formal matter. As far as we know, it always took place in an assembly, though not necessarily one called for that purpose. Assemblies may well have had more general functions. Not surprisingly, there is no evidence of private ad hoc dispute settlement.

There is no evidence, and no reason to believe, that the deliberations of the assemblies was formalistic, ritualistic, or in any way less rational than ours. It is hardly likely that they would have been bound by modern formalistic rules of evidence. They would no doubt include rather more of what was known or reputed to be the parties’ characters and reputations. Perhaps also, at some stages, their place in society. They may have relied on oaths, as we still pretend we do in litigation, though not in mediation and arbitration. From evidence of later periods—which, of course, it is folly to rely on, or to ignore—it seems likely that the aim of the assembly was usually settlement. Mediation would be tried first (and throughout)

⁴¹ There were “law-speakers” who remembered customary law and others who remembered royal decrees in Anglo-Saxon times, G.P. Krapp and E. van Kirk Dobbie (eds), *The Exeter Book* (Columbia University Press, New York, 1936), “The Gifts of Men”, lines 41–43 and 72–73.

⁴² Tacitus, *Annals*, 14.30.



(2006) 72 ARBITRATION 2

and adjudication was a last resort and even then likely to concentrate on what was expedient, even if there was talk about rights. Enforcement would depend on social pressures, backed up by communal force where that was available. If all this failed, no doubt there was the kind of tribal warfare which still goes on in the Highlands of Papua New Guinea. That, too, might well be formal rather than full-blooded. And, in some cases, negotiation probably continued after the award, as sometimes it does today.

8. CONCLUSION

This article does not try to draw conclusions for use in present practice or in proposals for reform. That is for others to do. Its only ambition is to provide those who make decisions about the future of dispute resolution with sufficient knowledge of how and when it all started, in England at least, so that whatever programmes they decide on for the future will not be based on false prehistorical premises.

