

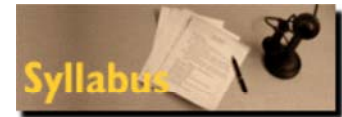
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Spring 2015

LEGAL HISTORY: ENGLISH LEGAL HISTORY

Tentative Syllabus



Professor Donahue

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Introduction

This is a survey course on the legal history of England from the time of the Anglo-Saxon invasions to the 18th century. We begin with a barely literate, largely pagan, people, whose laws and institutions are best studied with the techniques of anthropology and historical linguistics, and we end with a world power, whose laws and institutions, though different from our own, are recognizably the ancestors of those of Great Britain and the United States today. Our chronological span covers roughly 1100 years, from Aethelberht (r. ?584–616) to Queen Anne (r. 1702–1714), and we have 25 lectures (Mon. and Wed. 11:10 to 12:00, when we will meet in the Yard with the students in Medieval Studies 117) and 12 “section meetings” (Tue. 10:40 to 12:00, when we will meet in the School by ourselves) in which to do it.

Obviously we cannot cover in depth all aspects of English legal history in this long period. One way to handle the problem would be to deal with a few topics in depth and ignore the rest. Such an approach is tempting particularly for an historian who believes that legal history can only properly be understood in its social, economic and political context and who also believes that no one should study history after high school without looking at primary source material. On the other hand, there is something about that great sweep of development from the early Middle Ages to the early modern period that I find irresistible. Some place in the university someone ought to try to “put it all together.”

Indeed, the need for such a course as part of general liberal education has led the Faculty of Arts and Sciences to ask that this course be made available to the undergraduates. Hence, this course is also being offered as Medieval Studies 117. There will be a separate section for the undergraduates, so that we can devote our Tuesday “section meetings” to more sophisticated analysis of legal topics. On Mondays and Wednesdays, we will meet with the undergraduates for general lectures, devoted both to “constitutional” and legal developments. I have tried to make the lectures and the sections fit together, but occasionally we will be a bit ahead in the sections. This characteristic is particularly prevalent at the end of the course, because we are going to consider some developments in the 17th and 18th centuries, while the undergraduates will stop, pretty much, at the end of the 16th century.

While I believe that an overall survey is called for, I do not want to sacrifice my belief in the relationship between legal history and other kinds of history and my belief in primary materials. John Baker’s *An Introduction to English Legal History* (4th ed., Butterworth, 2002), which will serve as our text, seems to me to be deficient in these regards. (Otherwise, the book is first-class.) Baker is writing for English students. He can assume that they know who Edward I was, just as we know who George Washington was. Since he is writing for undergraduate law students, however, he cannot assume that they know much about the modern law of contracts, torts, etc. The book, therefore, is organized in two parts. The first traces the history of English legal institutions against an assumed background knowledge of the broader history. The second part of the book deals with the principal headings of

substantive law, property, contract, tort, family and criminal law, each with its chronological development. Except for some sample writs and pleadings, Baker offers no primary materials.

We are going to proceed somewhat differently. I have divided our 1100 years into four major periods: Anglo-Saxon, High Middle Ages, Later Middle Ages, Early Modern. In each period we will consider first the major historical developments, particularly the “constitutional” developments, in the period, then the legal institutions (courts, procedure, legal profession, legal literature) and finally, documents illustrating one or more of the central themes of the substantive law in the period. (For scheduling reasons, the order is reversed in the third topic.) Thus, the first part is devoted to the emergence of a concept of legal wrong in the Anglo-Saxon period, the second to how notions of private property developed in feudal England, the third to how the notion of wrong split into what today we call contract and tort, and the fourth to how ideas of equity shaped property, contract and tort in the early modern period.

The focus on particular substantive topics in each period involves a judgment that these topics best illustrate our overall theme of how the relationship between “law,” on the one hand, and politics, society, and economics, on the other, changed over 1100 years. It also involves distortions. The first of these has to do with the topics themselves. Our story of how the ideas of tort and contract came to separate does not come to a head until *Slade’s Case* in 1602, considerably after our “age of trespass” has formally come to an end. In order to see how equity shaped the law of property in the early modern period, we are going to have to go back and pick up a story that we will have left at the Statute *De Donis* in 1285. These discontinuities, however, are not as troubling as what we will have to omit: Criminal law is the principal first-year topic that we will barely cover. The older views on this topic have been largely upset, but the modern research is too disparate and inchoate to summarize in a survey course. Nor will we deal with any other “public law” topic in depth. A diachronic study of any of the modern public law topics, with the possible exception of tax law, is fraught with difficulties, while a synchronic study of public law in any given period leaves us, at least in the present state of research, without much that we can carry over to the next period. We will, however, consider a number of public law topics in our surveys of constitutional developments.

In the course of covering our topics we will read all of Baker, but in a very different order from that in which he wrote it. We will also examine in class a number of documents and read a few supplementary articles that are contained in the multilithed materials. (A book of documents J. H. Baker & S. F. C. Milsom [ed.], *Sources of English Legal History: Private Law to 1750*, 2d ed. [Oxford, 2010] [the first edition, Butterworths, 1986, is equally good], gives us some more documents to play with and is good for finding primary materials from which to write papers. The book is on reserve in Langdell.) Baker himself teaches his own textbook somewhat out of order, and the sections of the book are designed to be read pretty much independently of each other; so the order should not be too much of a problem. You might, however, want to read Baker through, either at the beginning or at the end of the course, to see how he puts it all together. The advantage of proceeding out of topic order will, I hope, be that we will be able to see more clearly how it really was in any given period, how it changed, and maybe even why it changed.

The undergraduates will be reading same set of books and will have the same assignments in the multilithed materials. They have a tendency, however, to approach this material from different angles. If that fact leads you to want to sit next to an undergraduate during lectures so that you can share insights, that’s fine. One of the things that I hope comes out of this experiment is a notion that people on one side of Cambridge Street have something to say to those on the other.

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Background

There are no prerequisites for the course. Probably everyone in the course has some pieces of the necessary background knowledge—a course in Chaucer, for example, is a marvelous introduction to much of what we will be doing, as is, in a somewhat different way, a course in Shakespeare—and no one, including myself, has all the necessary background knowledge. I will assume that you have never taken a course in English history and that you know no Latin and no French. We will explain what you

need to know of these topics in class. If you have taken a medieval and/or early modern English *legal* history course someplace else or if you have had an English constitutional history course that devoted some time to legal development in the same periods, you probably should not take this course. You should instead consider the seminar in English legal history that is being offered this semester.

At the beginning of each section of the syllabus there is a list of “general readings.” These are not required readings for the course, but are designed to allow you to explore some of the topics. If you feel that the “straight history” part of the course is going too fast for your knowledge, you might want to look at some of the books suggested in these lists. In particular, Bryce Lyon’s *A Constitutional and Legal History of Medieval England* (2d ed., Norton, 1980) is recommended as a solid, if somewhat uninspiring, introduction to the constitutional history of medieval England. I have included some page references to Lyon and a number of other books in the general readings. I have also put a few extracts from Lyon in the materials to help us through the narrative history of our periods. (Lyon, together with the other books that the undergraduates will be reading, are on reserve in Langdell.)

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Requirements

The reading load is fairly heavy. (I tell the undergraduates just the opposite, because for a history course, the reading load is fairly light.) Give priority to the documentary materials. Not all classes have documentary assignments, but those which do will devote a considerable amount of time to the documents, and you’ll be lost if haven’t read them in advance.

When this course was expanded from a two-hour course to a three-hour course, I deliberately did not expand the coverage, because previous students suggested that I had too much material for two hours. Rather, I used the extra hour to devote more time to the documents and to class discussion. I do think that in a three-hour course we can do some writing. I am asking you to write a five-page paper, exclusive of footnotes that analyses some document in the materials or in Baker and Milsom. It may be a case or a statute or a piece of writing about the law. The paper should present an *idea* supported by *evidence* (primary materials please). The paper should illustrate some broad theme about the relationship of law and society. The first draft of the paper is due at the end of the week in which we take up your topic in class. (I will relax that requirement for those dealing with early topics, but I want to spread the drafts out over the semester). I will return the draft with comments. You should turn in the final draft to my assistant, Ms. Reader, in Hauser 506 not later than 4:30 p.m. on Fri., 8 May. (I will have a more elaborate description of the paper requirement at our first “section meeting.”)

There will be a take-home exam during the exam period, distributed on the last day of class, Mon., 27 Apr., and to be returned to my assistant (Ms. Reader again, Hauser 506) (not the Registrar’s Office) no later than 4:30 p.m. on Fri., 8 May. The exam will probably have two questions, one of which will focus on a document, like those contained in the class materials and Baker and Milsom, and the other of which will allow you to range quite broadly. (A copy of some of the recent exams will be posted on the website.)

You may write a term paper in lieu of taking the exam. The paper must cover at least two of our four periods, and it must use primary materials. Students who have chosen the paper option in previous years enjoyed it but agreed that it involved a lot more work than just taking the exam. If you want to take the paper option, please let me know no later than the beginning of spring vacation (Mon., 16 Mar.). I will need to approve your topic.

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Office Hours

My office is in Hauser 512 in the Law School. My assistant is Ms. Reader in Hauser 506, and my office hours are from 12:45–2:45 on Mondays, or by appointment. There is a sign-up sheet for office hours on the door. Signing up for the office hours is usually not necessary at the beginning of the term, but it will be by the end.

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The following syllabus is arranged by topics and assignment numbers as well as by date. Each assignment will take roughly one class period, but I want to leave some flexibility. The calendar that follows the syllabus gives my current estimate of when we will deal with each assignment. Note: *Baker* = J.H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworth, 2002); *Brown* = A.L. Brown, *The Governance of Late Medieval England* (Stanford: Stanford U. Press, 1989); *Elton* = G.R. Elton, *The Tudor Constitution: Documents and Commentary*, 2d ed. (Cambridge [Eng.]; Cambridge U. Press, 1982); *Jolliffe* = J.E.A. Jolliffe, *The Constitutional History of Medieval England*, 4th ed. (New York: W.W. Norton, 1961); *Loyn* = H.R. Loyn, *Governance of Anglo-Saxon England* (Stanford: Stanford U. Press, 1984); *Lyon* = Bryce Lyon, *A Constitutional and Legal History of Medieval England*, 2d ed. (New York: W.W. Norton, 1980); *Materials* = C. Donahue, ed., *Materials on English Constitutional and Legal History* (available in Hauser 518); S&M = Carl Stephenson & F.G. Marcham, eds., *Sources of English Constitutional History*, vol. 1, rev. ed. (New York: Harper & Row, 1971) (all the cited S&M documents are in the *Materials*; there's a table at the beginning that shows you where to find them); *Warren* = W.L. Warren, *The Governance of Norman and Angevin England* (Stanford: Stanford U. Press, 1987).

Syllabus

Topic I. *General Readings: Baker*, 1–10, 27–34, 212–19. *Loyn* (the whole book); or *Jolliffe* 1–138; or *Lyon The Age of Tort* 3–103; or *Warren* 1–22 (this last only recommended for those who are already familiar with Anglo-Saxon England).

Assignment

- [Tue., 27 Jan.](#) 1. Introduction; the legacy of the ancient world (herewith some brief remarks on Roman law and Christianity); the “reception” question — *Materials* § 1 (CD bk. rev., Letter to the Romans, outlines, Justinian extracts).
- [Wed., 28 Jan.](#) 2. Constitutional history of England from the Anglo-Saxon invasions to the Norman invasion — *Materials* § 2A–2C (Anglo-Saxon documents and narrative).
- [Mon., 2 Feb.](#) 3. Aethelberht’s ‘Code’ and Anglo-Saxon law — *Materials* § 2D–2F (Aethelberht’s ‘code’, Simpson article, Notes).
- [Tue., 3 Feb.](#) 4. Kings, lords and families in Anglo-Saxon England; Aethelberht’s Code — Review
[Return to index](#) *Materials* § 2.

Topic II. *General Readings: Baker*, pp. 12–34, 37–39, 53–76, 175–78, 223–47, 259–74, 479–97, 538–61
The Age of Property (sample documents) (pay particular attention to *Baker*, pp. 538–41 (A.i, B.i and B.ii) and pp. 542–5 (C.i and C.ii.)). *Warren*, pp. 24–229 and *Brown*, pp. 100–237; or *Jolliffe*, pp. 139–362; or *Lyon*, pp. 109–115, 127–99, 217–27, 244–99, 310–36, 351–407, 408–68, 496–561, 586–612.

Assignment

- [Wed., 4 Feb.](#) 5. The conquest of England and the feudalism debate — *Materials* §§ 3A–3B, 3D–3E (narrative, White bk. rev., Domesday Book extracts). [Try to get a sense for what the debate is all about and how one might use a document like Domesday Book to come to some conclusions about the debate.]
- [Mon., 9 Feb.](#) 6. *Regnum and sacerdotium*: learned law and politics, 1066–1215 — *Materials* §§ 3F–3G (outlines and documents, narrative).
- [Tue., 10 Feb.](#) 7. Norman and Angevin institutions: the Exchequer and the courts — *Materials* § 3C, 3E (narrative, Pipe Roll of 31 Henry I). The assizes of Henry II as seen at his death: *Glanvill* — *Materials* § 4A–4B (Assizes of Northampton and Clarendon, *Glanvill* extracts) (Section).

Wed., 11 Feb.	8. The assizes of Henry II as seen at his death: Glanvill — Review Materials § 4A–4B (Assizes of Northampton and Clarendon, Glanvill extracts).
Mon., 16 Feb.	9. The criminal law, an overview— <i>Materials</i> § 9E (Hay-Langebein debate); <i>Baker</i> 570–608 (Section).
Tue., 17 Feb.	10. The Polstead saga — <i>Materials</i> § 4C (Section).
Wed., 18 Feb.	11. The assizes of Henry II as seen by the barons: <i>Magna Carta</i> — <i>Materials</i> § 5A (<i>Magna Carta</i> and the Treaty of Winchester).
Mon., 23 Feb.	12. The assizes of Henry II revisited — <i>Materials</i> § 4D (Palmer bk. rev.).
Tue., 24 Feb.	13. Property and the family — <i>Materials</i> § 5B (Statutes <i>De Donis</i> and <i>Quia Emptores</i>) (Section).
Wed., 25 Feb.	14. The king and the barons — <i>Materials</i> §§ 5C–5D.
Mon., 2 Mar.	15. Parliament — Review <i>Materials</i> §§ 5C–5D (pp. 275–6, A Record of Parliament; pp. 247–75, S&M Nos. 48–9, 51–2); read <i>Materials</i> § 5H (S&M No. 54G, pp. 307–8).
Tue., 3 Mar.	16. The “old” personal actions: Debt, detinue, covenant and account— <i>Materials</i> § 7B (statutes, writs, and cases); <i>Baker</i> 360–71, 409–13, 440–45 (Section).
Wed., 4 Mar.	17. Court structure and social structure c.1300 — Review <i>Materials</i> §§ 5H, 7D.
Mon., 9 Mar.	18. The theory of kingship and the English and French constitutions c.1300 — <i>Materials</i>
Return to index	§ 5F, G (Bracton on kingship; French outline).

Topic III. *The Age of Trespass* *General Readings: Baker*, pp. 76–81, 155–62, 165–7, 178–82, 186–8, 204–12, 317–50, 365–77, 379–90, 394–97, 401–9. *Brown*, pp. 1–99, review pp. 100–55; or *Jolliffe*, pp. 362–95; or *Lyon*, pp. 475–82, review pp. 496–561, 586–612.

Assignment

Tue., 10 Mar.	19. Personal actions in courts other than Common Bench — <i>Materials</i> § 7D (cases); <i>Baker</i> 371–73 (Section).
Wed., 11 Mar.	20. Introduction to the 14th century; household, council, parliament — <i>Materials</i> §§ 6A–6B (Articles against Gavaston; S&M Nos. 57–8, 60–2, 63A–63E, 64; narrative).
Mon., 23 Mar.	21. Origin and development of trespass (Edward I to Edward III) — <i>Materials</i> § 7C (trespass writ, <i>Brainton v. Pinn</i> , <i>Ferrers v. Dodford</i> , <i>Rattlesdene v. Grunston</i> , <i>The Humber Ferry Case</i> , <i>The Miller’s Case</i> , <i>The Innkeeper’s Case</i> , <i>Waldon</i> , <i>The Farrier’s Case</i> , <i>The Surgeon’s Case</i> , <i>Anon.</i>).
Tue., 24 Mar.	22. Pleading and the legal profession — <i>Materials</i> § 7A (a Y.B. case). (Section will meet in the Root Room of the Harvard Law School Library).
Wed., 25 Mar.	23. <i>Assumpsit</i> — <i>Materials</i> §§ 7C, 7E (<i>Watton v. Brinth</i> , <i>Anon.</i> , <i>Watkin’s Case</i> , <i>Somerton’s Case</i> , <i>Anon.</i> , <i>Doige’s Case</i> , <i>Dictum</i> , <i>Orwell</i> , <i>Pykering</i> , <i>Slade’s Case</i>).
Mon., 30 Mar.	24. King making and unmaking — <i>Materials</i> § 6G (documents concerning the depositions of Edward II, Richard II, and Edward V); review <i>Materials</i> § 6A (Articles against Gavaston).
Tue., 31 Mar.	25. Personal actions revisited — Review <i>Materials</i> §§ 6A–6B, §§ 7C, 7E. Late medieval constitution— Review <i>Materials</i> §§ 6C–6E (chronology, documents [S&M nos. 66B–F, 67–70, 73–76, 79A–B] and narrative). (Section).
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Topic IV. *The Age of Equity* *General Readings: Baker*, pp. 97–124, 126–32, 162–65, 167–72, 248–57, 269–76, 280–96, 347–61, 409–21. *Elton*, pp. 1–4, 12–14, 17–18, 20–23, 30–33, 39–45, 59–61, 80–82, 88–94, 102–5, 117–20, 129–34, 148–56, 163–6, 170–4, 187–90, 199–203, 218–26, 233–40, 245–54, 260–8, 290–6, 307–12,

327–30, 338–45, 378–83, 395–99, 419–23, 442–8, 462–8, 483–99 (this is basically his introductions to the documents); and one of the following: *Brown*, pp. 238–43, review pp. 1–99; or *Jolliffe*, 409–95; or *Lyon*, 567–74, review pp. 586–612, read pp. 613–49.

Assignment

- [Wed., 1 Apr.](#) 26. Order, social structure and the law, 1348 – 1500 — *Materials* § 6F (Statute of Labourers; wage rates; S&M Nos. 62D, 64C, Statute 1 Henry IV; Statute, 8 Edward IV; Sumptuary Statute; S&M Nos. 73F, 74I, 81C).
- [Mon., 6 Apr.](#) 27. Littleton, Fortescue, St. German: Idea of law, c. 1500 — *Materials* §§ 8A, 9A (S&M no. 73, 74A, S&M 74B–N; Littleton, Fortescue, St. German extracts).
- [Tue., 7 Apr.](#) 28. Survey of constitutional history from the Reformation through the Restoration— *Materials* §§8A–8C (chronology, documents, narrative) (Section).
- [Wed., 8 Apr.](#) 29. The origins and development of equity; the search for a forum — *Materials* § 9C (S&M no. 71; petitions; cases; St. German).
- [Mon., 13 Apr.](#) 30. Ecclesiastical Jurisdiction, 1250–1600 — *Materials* § 9B (Donahue article; *Circumspecte Agatis*; *Articuli Cleri*; S&M Nos. 62E, G, 64F, 69B, 74B–C; *Dolling c. Smith*).
- [Tue., 14 Apr.](#) 31. Judges, lions and thrones; the reform movement — *Baker* 47–61, 97–110, 155–75, 208–14, 216–21, 223–33; *Materials* §§8D, 9D (Harding extracts); *Baker* 243–52 (again) (Section).
- [Wed., 15 Apr.](#) 32. The English Reformation — Review *Materials* § 8A (S&M nos. 74B–E, G, L–M; 81A–B, E–G).
- [Mon., 20 Apr.](#) 33. Uses and the Statute — *Materials* § 9C, 9E (S&M no. 71C; S&M nos. 64E, 74H).
- [Tue., 21 Apr.](#) 34. *The Duke of Norfolk's Case* — Review *Materials* § 9E (the case); *Baker* 318–35 (Section).
- [Wed., 22 Apr.](#) 35. *Slade's Case* — Review *Materials* § 7E (*Orwell*, *Pickering*, *Holygrave*, *Slade's Case*).
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CALENDAR

Mon., 26 Jan.	=	Introduction	
Tue., 27 Jan.	=	Assignment 1	Introduction; The legacy of the ancient world (Section)
Wed., 28 Jan.	=	Assignment 2	Anglo-Saxon constitution
Mon., 2 Feb.	=	Assignment 3	Aethelberht's 'Code' and Anglo-Saxon law
Tue., 3 Feb.	=	Assignment 4	Anglo-Saxons (overview); Aethelberht (Section)
Wed., 4 Feb.	=	Assignment 5	The conquest and feudalism
Mon., 9 Feb.	=	Assignment 6	<i>Regnum</i> and <i>sacerdotium</i> , 1066–1215
Tue., 10 Feb.	=	Assignment 7	Norman and Angevin institutions; <i>Glanvill</i> (Section)
Wed., 11 Feb.	=	Assignment 8	<i>Glanvill</i> (cont'd)
Mon., 16 Feb.	=	Assignment 9	Special Lecture: The criminal law (law and grad students only)
Tue., 17 Feb.	=	Assignment 10	The Polstead saga (Section)
Wed., 18 Feb.	=	Assignment 11	Magna carta
Mon., 23 Feb.	=	Assignment 12	The assizes of Henry II revisited
Tue., 24 Feb.	=	Assignment 13	Property and the family: The statutes <i>De Donis</i> and <i>Quia emptores</i> (Section)
Wed., 25 Feb.	=	Assignment 14	The king and the barons
Mon., 2 Mar.	=	Assignment 15	Parliament
Tue., 3 Mar.	=	Assignment 16	The problem of proof and the “old” personal actions (Section)

Wed., 4 Mar.	=	Assignment 17	Court structure and social structure c1300
Mon., 9 Mar.	=	Assignment 18	Theory of kingship and the English and French constitutions c1300
Tue., 10 Mar.	=	Assignment 19	Personal actions in courts other than Common Bench (Section)
Wed., 11 Mar.	=	Assignment 20	The 14th century—household, council, parliament
Mon., 16 Mar.	—	Fri., 20 Mar.	Spring Vacation
Mon., 23 Mar.	=	Assignment 21	Trespass
Tue., 24 Mar.	=	Assignment 22	Pleading and the legal profession (Section will meet in the Root Room of the HLS Library; final date for selecting topic for short paper topic)
Wed., 25 Mar.	=	Assignment 23	<i>Assumpsit</i>
Mon., 30 Mar.	=	Assignment 24	King making and unmaking
Tue., 31 Mar.	=	Assignment 25	Personal actions revisited. Late medieval constitution (Section)
Wed., 1 Apr.	=	Assignment 26	Order, social structure and the law, 1350 – 1600
Mon., 6 Apr.	=	Assignment 27	Littleton, Fortescue, St. German: The idea of law c1500
Tue., 7 Apr.	=	Assignment 28	Constitutional history Reformation through Restoration (Section)
Wed., 8 Apr.	=	Assignment 29	Equity
Mon., 13 Apr.	=	Assignment 30	Ecclesiastical Jurisdiction, 1250 – 1600
Tue., 14 Apr.	=	Assignment 31	Judges, lions and thrones; the reform movement (Section; last date for turning in short paper drafts; statement of term papers due)
Wed., 15 Apr.	=	Assignment 32	The English Reformation
Mon., 20 Apr.	=	Assignment 33	Uses and the Statute
Tue., 21 Apr.	=	Assignment 34	<i>The Duke of Norfolk's Case</i> (Section)
Wed., 22 Apr.	=	Assignment 35	<i>Slade's Case</i>
Mon., 27 Apr.	=	Final Lecture	Take-home exam distributed
Fri., 8 May	=	Due date	Final draft of short paper and take-home exam due in Hauser 506