F.W. MAITLAND

AND THE MAKING OF THE MODERN WORLD

by Alan Macfarlane

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Acknowledgements and Alterations

I would like to thank a number of people who have helped. The Maitland Society of Downing College, Cambridge, invited me to give a Bicentenary Celebration lecture on Maitland. Among those who attended and offered comments I am particularly grateful to Professor John Baker, whose work on English law has long inspired me.

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I am grateful to those at Palgrave who helped to produce the first edition of this book as part of *The Making of the Modern World; Visions from the West and East* (2002). Perhaps partly because the book contained a great deal else, a chapter on Maine, another on Durkheim, and seven chapters on the Japanese philosophical reformer Yukichi Fukuzawa, it was not only expensive, but the Maitland sections were somewhat overlaid. It was never published in paper covers. This book is now made available for those who are more specifically interested in Maitland's contribution to solving the mystery of how our modern world emerged. I have not updated the ideas or references, although a number of books have come out since I wrote it. I have merely re-arranged the first and

last chapters, and omitted the chapters on Maine and Durkheim. I have also made some minor alterations to grammar and tried to make several ideas a little clearer.

Conventions and Measures

Normally, much of the materials in a monograph would be one's own. This book, however, is a work in which I try to let Maitland in his own words. Consequently it contains many quotations from his own work. This has an effect on the style of the book, but I hope that the authenticity of the many thoughts of the chosen authors will enrich the argument.

Spelling has not been modernized. American spelling (e.g. labor for labour) has usually been changed to the English variant. Italics in quotations are in the original, unless otherwise indicated. Variant spellings in quotations have not been corrected. Round brackets in quotations are those of the original author; my interpolations are in square brackets.

The footnote references give an abbreviated title and page number. The usual form is author, short title, volume number if there is one (in upper case Roman numerals), page number(s). The full title of the work referred to is given in the bibliography at the end of the book, where there is also a list of common abbreviations used in the footnotes. Works by Maitland and Fukuzawa are listed at the front of the book in the section on 'Abbreviated Titles'.

Measures

A number of the quotations refer to English systems of measurement, some of which are now no longer in use.

Value: four farthings to a penny, twelve pennies (d) to a shilling (s), twenty shillings to a pound (£). One pound in the seventeenth century was worth about 40 times its present value (in 1997).

Weight: sixteen ounces to a pound, fourteen pounds to a stone, eight stone to hundred-weight (cwt) and twenty hundred-weight to a ton. (approximately one pound (lb) equals 0.454 kg.)

Liquid volume: two pints to a quart, four quarts to a gallon. (approximately one and three quarter pints to one litre)

Distance: twelve inches to a foot, three feet to a yard, 1760 yards to a mile. (approxroximately 39.4 inches to 1 metre).

Area: an acre. (approximately 2.47 acres to a hectare).

Abbreviated Titles of F.W.Maitland's works (in date order)

Pleas of the Crown: **Pleas of the Crown for the County of Gloucester**, 1884

History: **History of English Law before the Time of Edward I**, with Sir F.Pollock, originally published in 1895, 2nd edn. Cambridge, 1923; preface by S.F.C.Milsom to the reprint of 2nd edn., Cambridge, 1968

Township: **Township and Borough**, Cambridge, 1898

Roman Canon Law: Roman Canon Law in the Church of England. Six Essays, 1898

Political: **Political Theories of the Middle Ages**, by Otto Gierke, tr. and introduction by F.W.Maitland, Cambridge, 1900

Equity: **Equity also The Forms of Action at Common Law; Two Courses of Lectures**, Cambridge, 1909

Collected Papers: **The Collected Papers of Frederic William Maitland**, ed. H.A.L.Fisher, Cambridge, 1911, 3 volumes

Constitutional: **The Constitutional History of England**, Cambridge, 1919

Domesday: **Domesday Book and Beyond**, Cambridge, 1924

Selected Essays: **Selected Historical Essays**, ed. Helen Cam, Boston, 1962

Letters: **The Letters of F.W.Maitland**, ed. C.H.S.Fifoot, Cambridge, 1965

Letters, ii: **The Letters of Frederic William Maitland**, vol.II, ed. for Selden Society by P.N.R.Zutshi, 1995

Forms of Action: **The Forms of Action at Common Law**, eds. A.H.Chaytor & W.J.Whittaker, Cambridge, 1968

1. The Mystery of the Modern World

Looked at from the perspective of all of human history and all other human civilizations, what has happened on earth during the last three hundred years is extraordinary. A new kind of civilization has emerged which has an unprecedented set of organizational principles. All other civilizations have been based on the principles of an ordering of institutional parts in two ways. There was a strict vertical hierarchy, some form of stratification where orders were integrated through a set of levels, whether castes or otherwise. These were based on birth and indicated to people where they were placed, how to behave, how to live. Yet the overturning of these premises is precisely what has happened in the last three hundred years and anarchy, on the whole, has not ensued. This is part of the tendency towards equality, which Tocqueville analysed. That this happened raises two great questions. How did such a strange thing as the break-down of hierarchy occur, and how could a civilization not based on it work? What could hold equal people together and prevent them either from falling apart into atomistic confusion or, equally dangerously, from surrendering their liberty to some form of absolutist government?

Put in another way, the problem could be seen in terms of the loss of the sovereignty of groups. In the long history of mankind, people had always existed as subordinate to groups, but now, for the first time, a world arose where the individual came before the group. This is often seen as the quintessence of modern liberty. Again this poses the double question of how such a strange situation could have emerged, and, once present, how it could possibly work. Too much atomization would surely lead to the collapse of the social system. This was one of the great quandaries for the anthropology and sociology of the nineteenth century and lay behind many of its best-known theories.

Yet not only did this unprecedented social order work, it worked so well, at least at the material level, that the area where it first developed, Holland, England and then America and western Europe, rapidly became the richest and most powerful area of the world and hence dominated and spread its system. Now this system, or local attempts at imitating it, envelopes almost the whole world.

One might put the same story in a slightly different way. Human life can for convenience be divided into four major spheres, the pursuit of power (politics), the pursuit of wealth (economics), the pursuit of salvation and meaning (religion), the pursuit of social and sexual warmth (kinship). In the normal state of affairs these are fused into one totality, a holistic merging based on the dominance of one sphere to which everything else is secondary. Tribal societies provide this dominance or infrastructure through kinship, India and Islam through religion, traditional China through kinship and ethics (Confucianism), **ancien regime** Europe increasingly through kin-based politics. What is peculiar about modernity is that there is no institutional infrastructure, or, if it exists, is provided by the impersonal, contextual, contractual pressures of the 'free' market economy. The competitive and individualistic elements of this type of economy are well known. But it is less well appreciated that this economy is based upon an ethic of trust, without which it cannot operate.

Again one has to ask how such a state of affairs, where the spheres have become separated and balanced came about and, once dominant, how it can possibly work. People only kept together by the 'invisible hand' would surely soon realize that the sphere of work and trade did not provide a sufficient basis to keep society together. Anyway, how could the predatory tendency of each sphere to dominate the others be restrained and, furthermore, how were the different areas integrated when each was supposedly autonomous and proud of its liberties? For example, how was religion largely kept out of family relations, or kinship out of economics? These are themes discussed by Maitland and the earlier Enlightenment thinkers.

To achieve and sustain such a balance over a long period is very difficult. Always in human history the tendency for one, or two spheres in collusion, to dominate has quickly emerged and some form of **ancien regime** has established itself. Even in the twentieth century, those who worked in the name of the two massive ideologies of right (fascism) and left (communism) have been united in their attempts to bundle things together with one superior master, the State or Party. That they only very narrowly failed to return mankind to an undivided world where liberty and real equality of all men would have vanished is well known. The political institutions of modernity are extremely precarious and may well be transient.

If this stark and rough characterization of modernity is correct, it suggests two mysteries already referred to. The state of affairs which first became strongly evident in Holland and England, where liberty, equality (of a sort), and wealth were joined in new ways, is extraordinary. Firstly, it is historically and comparatively unique; no large-scale civilization has ever run for a period of several centuries on these principles. Secondly, it is extremely difficult to see how such a civilization could have emerged. Normally the balance tips one way or the other as wealth increases. One sphere, perhaps in collusion with another, comes to dominate and almost necessarily the group comes to dominate the individual. This had always happened in the past, yet, for the first time, it did not happen again. How did this astounding exception occur; what made it not only possible, but happen? Linked to this is the question that has vexed many of the greatest thinkers from Montesquieu to Durkheim; what could possibly hold such a system together?[1] If kinship was restrained, God was kept out of the market, the State inhibited, how or why should people work effectively together? These were the two great unanswered questions by the middle of the nineteenth century.

We can call the two questions about modernity the historical and functional ones. The historical one is basically, when, how and why did the peculiarities of modernity - equality, liberty, individualism, the absence of infrastructural determination, first happen? Once such a civilization had occurred and once it had been shown that it produced wealth and power, it was soon emulated and its spread is less of a problem, though how it happened is very revealing. The first instance is particularly baffling and has attracted the thoughts of many great

[1] I have analyzed the views of Montesquieu and other great thinkers on this issue in *The Riddle of the Modern World*.

minds from the Enlightenment onwards. Yet the functional question is equally difficult to solve, that is the question of how such a system works. How is it possible to provide a balance, which will give people an ability to work effectively together and yet not crush their liberty and individuality? 'Status' had been extremely effective in bringing civilizations up to a high level, but then proved too cramping for 'modernity' to emerge. Yet the conventional wisdom, which was that 'contract' or the division of labour provides the answer, was patently unsatisfactory. Humans only tied together by functional interdependence, as on a conveyor belt, do not have enough incentive for co-operative action outside the specific situation. 'Contract', at least in its pure or theoretical form, is immediate, rational, and impersonal, and in many instances is temporary and dyadic. Hence 'contract' by itself is an insufficient foundation for effective group action. Thus the conventional wisdom of nineteenth century sociology, of the movement from status to contract, from mechanical to organic solidarity, of community to individual, is not fully satisfactory.

The mystery deepens if we re-phrase the puzzle in slightly different words as follows. In order for humans to achieve their ends, they need to enter into a social contract with others. This is Thomas Hobbes' main point. To overcome narrow individualistic competition and the war of all against all, it was necessary to forgo some power and allocate it to the governor, Leviathan. More normally, rather than erecting a State, early societies were formed into kinship-based groups, which we term the tribal stage. As State-based systems emerge, they usually build themselves upon these kinship groupings and re-order them through religious (caste) or State hierarchies (Confucian China), which can integrate wider groupings but still, maintain their kinship base. What is central to all of this is that these are systems founded upon status, blood birth. What Hobbes envisaged was different, entirely contractual, not based on religion or kinship, but secular and individualistic. Yet Hobbes' system was tied together by one system of loyalties alone, those to the State. The only subordinate groups were corporations licensed by the State.

Thus the large-scale civilizations which first emerged tended to re-enforce the birth-status groupings, caste and kinship, while integrating them into a powerful State. Much of Indian and Chinese history fits broadly within this pattern. A second variant, which we often describe as the **ancien regime**, was somewhat different. There were functionally defined birth statuses - peasants, nobility, bourgeois, and clergy - but alongside these there were also many groupings with some contractual mobility. Yet while these groupings were not based on birth, they were explicitly recognized and licensed, as it were, by the State. Thus all meaningful groupings either derived from birth or from delegated power from the State.

In such a social structure, as wealth increases it automatically strengthens the organizing institutions of the system. Part of the wealth will flow towards birth-based institutional groupings, whether of kinship or religion, re-enforcing kinship and caste. Part of the wealth will go to strengthen occupational and hierarchical blood divisions, between workers, priests and warriors for example. Part of the wealth will go towards increasing the power of the State. Each of these institutional orders will cast a jealous eye on the wealth producers,

whether peasants, merchants or craftsmen, and try to siphon off as much as possible of any new surpluses they make.

In such a normal course of events a productive system tends to become over-rigid. All attempts to set up groups other than those based on birth are seen as threats to the kin or the State. Religion often provides the one achievement-based alternative, but by definition is not meant to engage too much in wealth production. Thus the general tendency is for hierarchy, whether based on ritual, class, kinship or political forces, to increase over time. So, in such a system, wealth and new technology tend to inflate or feed into the pre-existing structures.

How, then, did something different emerge, which neither fell into the trap of too-powerful birth-based or centralized political systems, nor a too fragmented and individualistic, Hobbesian, world? How could civilizations avoid the Scylla of Status and also the Charybidis of Contract? The way, obviously, lay through some combination of the best of both; the affective, emotional ties of status, the flexibility and efficiency of contract, forged into something new. This new arrangement must allow a new kind of grouping to emerge, which had certain unusual properties.

So by the 1870s the problems had become quite focused. The West was decidedly peculiar in its lack of infrastructure and in its deep contradictions arising out of the separation of spheres. Outsiders noted this as well. No other civilization in world history had been like this and it was somehow tied to the wealth, productivity and power of the West, which now confronted the world. So how had this happened and how did it work? The answer seems to lie in the history of England, which, well before 1870, was the dominant imperial power. And within England the answer to the question of how it worked seems to lie in some alternative to the primordial institutions, that is in the various imagined rather than actual communities, not the nation alone, but all the imagined and invented communities of civil society.

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It was in the 1870s that, in his attempt to win a Trinity College Fellowship at Cambridge, a young scholar called Frederic William (F.W.) Maitland submitted a dissertation entitled 'A Historical Sketch of Liberty and Equality as Ideals of English Political Philosophy from the Time of Hobbes to the Time of Coleridge'. He published it at his own expense when he was twenty-five.[1] In this long and brilliant work Maitland summarized and analyzed much of the greatest thought on 'liberty' in the two hundred years before his own work, including the work of Hobbes, Locke, Hume, Adam Smith, Rousseau, Kant, Coleridge, Mill and others. The central theme is the way in which the individual is embedded in wider groupings. Having sketched out the philosophical problems in this early work, I believe that his later life's work on English historical records allowed him to re-examine how the modern liberty had emerged. He examined the relations of

[1] It is re-published as the first work in Maitland, **Collected Papers**. The Online Library of Liberty has all three volumes available:
http://oll.libertyfund.org/Home3/BookToCPage.php?recordID=0242.03

the state and the citizen from the feudal period onwards, the relations of community and individual from Anglo-Saxon origins, and of the family and the individual.

Maitland tried to show that from very early on there had been a peculiar liberty of the individual in England, particularly in relation to property and power. In opposition to most of his contemporaries, including Sir Henry Maine, he disliked the idea of the movement of all societies from Community (Status) to Association (Contract). He saw a basic liberty and individualism in England from Anglo-Saxon times onwards. Thus freedom and liberty of action, he argued, are indeed key features of the curious English structure which, in his day, was spreading all over the world. Yet if the individual is not embedded in the wider group in the usual ways, what about the second great unifying force, hierarchy?

Basically Maitland takes up Tocqueville's central theme, namely the nature and implications of equality and inequality. What he shows is that the nature of English law and social structure is such, and has always been such, that there are few, if any, inherited differences based on birth. All differences, whether of social rank, of parental power or of gender are the result of contract, or as modern sociologists might say, of achievement rather than ascription. Thus he presents a picture of a competitive and fluid social structure as far back as the records take us. All this, he is aware, is very unusual and very important.

Yet, having spent much of his life analysing in detail how the development of liberty and equality had worked, and having shown that most of the famous theories of the movement from status to contract were seriously over-simplified descriptions of what had happened, Maitland was faced in his last years with a serious difficulty. If, as Tocqueville realized, people are not held together by birth status (in a community, social rank or family), what will make them cohere? How can they act together to effect things and to protect themselves against the State? This was also the problem for Montesquieu and Adam Smith, but none of the three thinkers were able to devise a solution. Yet I believe that Maitland did find an answer in his arguments, up to now practically ignored, concerning corporations and trusts.[1]

Another problem which he addresses concerns the reasons why England became different from most of its continental neighbours. Here he amplifies, expands and documents the insights of Tocqueville and his predecessors, namely that being an island was the crucial fact. Islandhood had many consequences, some of which Maitland explores in relation to the tension within the balance of power, as with the unusual form of feudalism and the development of the parliamentary system. One manifestation that particularly interests him is the divergent development of law, English Common Law and Equity, as opposed to the restoration of Roman Law over the continent. Another major feature which intrigues him is the way in which there can be a 'changing

[1] The one exception, which I discovered after this book was completed, is the excellent work by David Runciman on **Pluralism and the Personality of the State** (Cambridge, 1997), chapter 5 and pp.66-70 which provides a detailed account of the legal background to parts of Maitland's work and a discussion of trusts and corporations.

same', that is to say both continuities and change at the same time. His delicate account of change with continuity, avoiding most of the usual pitfalls, provides the possibility of a non-evolutionary and non-revolutionary approach to history.

So, by the time of his untimely death at the age of fifty six, Maitland had made a lightning sketch of what the essence of English (and hence American) civilization was and how it could balance liberty, equality and fraternity. What is curious is that his findings and vision, though preserved among technical legal historians, have become almost forgotten among wider historians and the general public. I myself do not remember ever encountering him in six years of historical training at Oxford University between 1960-6. This amnesia is a good example of what is not usually considered by those who discuss paradigm shifts, namely the way in which earlier knowledge of a high quality is too often quietly forgotten.[1]

[1] Though he is not quite forgotten. On 4th January 2001 F.W. Maitlaind became the first professional historian to have a memorial placed in Poet's Corner in Westminster Abbey and thus become immortal.

2. The Man and his Methods

Who, then, was this Maitland and what chance did he have of solving the mystery of the modern world? F.W. Maitland was born on 28th May 1850 at 53 Guilford Street, London. He was educated at Eton and Trinity College, Cambridge. There was no Law or History Tripos at that time so he started by reading Mathematics. He did badly in his first year exams and then, as Maitland tells us, 'the idle whim of an idle undergraduate' took him into Henry Sidgwick's lecture room in his second year at Trinity.[1] He changed to the new Moral and Mental Sciences Tripos and the result was that eighteen months later he was placed at the equal head of the First Class in his final exams. He was President of the Cambridge Union, a running Blue, a 'Sunday Tramp' and, like Sir Henry Maine before him, an 'Apostle'.

The major influence on his thought at that time was Henry Sidgwick, a disciple of John Stuart Mill. From Sidgwick he imbibed the agnosticism and love of liberty and equality which Mill had shared with Tocqueville. As we have seen, Maitland's dissertation considered the same themes as Montesquieu and Tocqueville and devoted several pages to considering Adam Smith's arguments for economic **laissez faire**. Thus by the time he left Cambridge it was clear that Maitland's interest was in philosophy, and in particular the Enlightenment tradition of political philosophy. As Plucknett notes, 'His ambition was to lead an academic life as a political scientist' and it was only as a 'disappointed philosopher' that he left for London.[2] This is important not only because he 'brought to the law a mind exercised in the wide open spaces of philosophy', but because it helps us to recognize that his last ten years were really a return to philosophy in another guise. His translation of Gierke and writing on corporations and trusts, which we shall examine later 'recall his early interest in political philosophy'.[3]

Maitland's failure to obtain a Trinity Fellowship forced him sideways and he moved to London. He lived with his sisters in Kensington and worked for seven years at the Bar. His legal training was thus a later specialization, though he was reputedly a good lawyer. As a pupil in chambers, his master wrote long after that 'He had not been with me for a week before I found that I had in my chambers such a lawyer as I had never met before. I have forgotten, if I ever knew, where and how he acquired his mastery of law; he certainly did not acquire it in my chambers; he was a consummate lawyer when he entered them.'[4] He became close friends with Leslie Stephen, father of Virginia Woolf, and later wrote the **Life of Leslie Stephen**. He married Stephen's sister-in-law, Florence.

It is clear that Maitland wanted to return to academic life and he still hankered after philosophy. His first published work after leaving Cambridge was a review of A.J.Balfour's **A Defence of Philosophic Doubt** for the philosophical journal **Mind** in 1879 and in 1883 he published two further reviews of Herbert Spencer's work on 'The Ideal State' and 'The law of equal liberty' in the same

[1] McFarlane, 'Mount Maitland'.
[2] Plucknett, 'Maitland', 184-5.
[3] Plucknett, 'Maitland', 191.
[4] Quoted in McFarlane, 'Mount Maitland'.

journal.[1] This interest may have been one of the reasons why the philosopher Henry Sidgwick helped to set up a Readership for him at Cambridge in 1884. It was a momentous year, for it was also when Maitland discovered for himself the vast wealth of original materials for English history in the Public Record Office.[2] These documents would help him to pursue those questions concerning the origins of liberty and equality which he had first surveyed in his Trinity dissertation and which his predecessors had been unable to pursue in detail for lack of information. Thus his first substantial publication was the **Pleas of the Crown for the County of Gloucester**, which was dedicated to Paul Vinogradoff. He described the documents as 'a picture, or rather, since little imaginative art went into its making, a photograph of English life as it was early in the thirteenth century...We have here, as it were, a section of the body politic which shows just those most vital parts, of which, because they were deep-seated, the soul politic was hardly conscious, the system of local government and police...'[3] These were just those areas which Tocqueville had suggested were most distinctive, important and unusual in the English political structure.

Three years later Maitland published an edition of the manuscript collection of cases which the great thirteenth century lawyer Bracton had collected and used when writing his treatise **On the Laws and Customs of England**. These had been discovered by Vinogradoff and were published in three volumes as **Bracton's Note Books** (1887). In the following year Maitland was elected Downing Professor of the Laws of England at Cambridge. In his inaugural lecture on 'Why the History of English Law is Not Written'[4] he explained the enormous importance of editing the medieval yearbooks and other law sources to the highest standard before the history of law could properly be written. Here was a man who had taught himself palaeography, had the training in law, and saw the opportunity. He had discovered a vast repository of records, all of them bearing on exactly those unresolved problems to which his predecessors had pointed. Believing that 'hoarded wealth yields no interest', he founded the Selden Society for the publication of medieval documents.

A decade of publication of detailed legal records followed, including his **Select Pleas of the Crown** (1888) and **Select Pleas in Manorial and Other Seignorial Courts**, vol.i. (1889). He also edited with Baildon, **The Court Baron** (1891) for the Selden Society and the **Memoranda de Parliamento** (1893) for the Rolls Society, as well as overseeing the editorial works of others. This immersion in the world of early law, plus an extensive knowledge of continental scholarship, put him in an ideal position to look at English law and politics from a wider perspective. He read and understood French, Latin and Greek and, thanks to early tutoring, was particularly fluent in German. This is important since much of the major progress in comparative and historical law during his lifetime was taking place in Germany. Maitland started on a translation of the major work of Savigny on Roman law, though he never

[1] Hudson (ed.), **History**, 262-3.
[2] For a correction of the myth that it was Vinogradoff who introduced him to these records, see Plucknett, 'Maitland', 186.
[3] Maitland, **Pleas of Crown**, vii.
[4] Maitland, **Collected Papers**, I, 480-97.

completed it, and translated and published parts of Gierke's treatise on **Political Theories of the Middle Ages** from the German. In 1895 Maitland published his great masterpiece, more than 1300 pages on **The History of English Law before the Time of Edward I**. Although known as 'Pollock and Maitland' after its two editors, in fact Maitland wrote all but the first chapter of the work. In this volume he synthesized the results of the detailed studies he and others were making, as he was also to do in **Domesday Book and Beyond** (1897), **Roman Canon Law in the Church of England** (1898), **Township and Borough** (1898) and **English Law and the Renaissance** (1901).

He also wrote numerous articles and reviews, many of which were published in **The Collected Papers of Frederic William Maitland** (1911) edited by H.A.L. Fisher in three volumes, comprising another 1500 pages. Others, which were omitted in this collection, were published in **Selected Historical Essays of F.W. Maitland** (1957), edited by Helen Cam. His lectures were so polished that three sets of them could be published more or less verbatim. The first on **The Constitutional History of England** (1908) were delivered in Michaelmas 1887 and Lent 1888, when he was thirty-seven and just before he became Downing Professor. They contain, in raw form, some of the seminal ideas that were to go into the **History of English Law**, and also contain 'several new and original ideas, which Maitland had no opportunity of expressing in his later work...'[1] Maitland lectured on **Equity** at Cambridge from 1892 until 1906, and these were also published, as were his seven lectures on **Forms of Action at Common Law.**

Thus Maitland's published work comprises well over five thousand printed pages, much of it extremely detailed. This is all the more miraculous in that he only started the flow in 1888 and combined it with the usual administrative and teaching duties. In order to understand his achievement properly, we need to take this teaching context, the Fellowship at Downing College and University Professorship, into account.

From his letters we get a few glimpses of his work methods. He describes the other pressures on him from his full involvement as a teaching Professor. On Feb. 16 1890 he wrote 'I am now in the middle of our busiest term and lecturing daily; but the middle is past and I am beginning to look forward to Easter and pleasanter occupations.'[2] On 22nd October 1905 he was still 'teaching six hours per week', but was 'hopeful of staying here through November - whereat I rejoice', rather than having to leave for the Canaries.[3] The following year he died. As well as the pressures of teaching and administration, there was the actual time spent searching for and copying out original documents at the Public Record Office. In June 1889 he wrote concerning the possible editing of Petitions to Parliament. He outlined the difficulty of finding them and thought that he could only transcribe 'five or six petitions per diem' and he himself 'cannot hope to give more than two months a year to work in the Record Office.'

[1] Fisher in Maitland, **Constitutional**, vi.
[2] Maitland, **Letters**, 80.
[3] Maitland, **Letters**, 449.

It would therefore take him five or six years to produce the quantity needed for an edited volume.[1]

The overwhelming nature, fascination and difficulty of the materials he was dealing with are well illustrated in several lectures as well as his letters. He was offered the Regius Professorship of History by Balfour in 1902 and turned it down. His official reason to Balfour was that 'For some time I have been compelled to do very little work and to absent myself from England for some months every winter. Twice I have offered to resign the professorship that I hold...'[2] But there were other reasons, explained after attending the inaugural of J.B. Bury who was appointed. 'The Regius Professor of Modern History is expected to speak to the world at large and even if I had anything to say to the W. at L. I don't think that I should like full houses and the limelight.' This again shows his reticence, but in the next sentence he showed where his real passion lay. 'So I go back to the Year Books. Really they are astonishing. I copy and translate for some hours every day and shall only have scratched the surface if I live to the age of Methusalem - but if I last a year or two longer I shall be a 'dab' at real actions. It was a wonderful game as intricate as chess and not like chess cosmopolitan. Unravelling it is an amusement not unlike that of turning the insides out of ancient comedies I guess.'[3]

He was also increasingly ill. We are told that in the summer of 1887, aged 37, he was already seriously unwell. 'This was the first recorded attack of the tuberculosis which, together with diabetes, was to make the rest of his life precarious ...' Thus in 1889 he wrote to Vinogradoff 'I very much want to see you again and I don't know that I can wait for another year: this I say rather seriously and **only to you**. Many things are telling me that I have not got unlimited time at my command and I have to take things very easily.'[4] From 1898 he had to winter in the Canaries, carrying any books or copies of manuscripts with him to work on. He died prematurely of pneumonia on 20th December 1906, aged 56. During the twenty-two years of full production he transformed our understanding of the early history of England and solved many of the puzzles which his great predecessors had left only partially resolved.

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Maitland set out to probe deeply into the previous thousand years of English history. Yet the task seemed overwhelming. Glimpses of his working methods are shown in relation to the great **History of English Law**. On 24 Nov. 1889 he wrote to Bigelow, 'Yes, Pollock and I have mapped out a big work, too big I fear for the residue of our joint lives and the life of the survivor. Vol.I. is to bring things down to the end of Henry III. I am already struggling with a chapter on tenure but cannot make progress for the ground is full of unsuspected pitfalls.'[5] A few months later, on 23rd March 1890 he had already realized that Pollock was not going to be much help and he felt even more overwhelmed. 'I have been

[1] Maitland, **Letters**, 70.
[2] Maitland, **Letters**, 343.
[3] Maitland, **Letters**, 349.
[4] Quoted in McFarlane, **Mount Maitland.**
[5] Maitland, **Letters**, 78.

plunged for some months past in a big job. Pollock and I had a hope of turning out a historical book, but I am not sure now that he will be able to give his time, and if that be so I shall hardly get very much done in my lifetime. However, I have set to work on the more public side on the law of cent. XII and XIII, and am struggling with tenures and scutages and such like...Some day I hope to get free of tenures and villeinage and so on, and to tackle the pure private law of ownership, possession etc...I hope that this time may come; but have my doubts - for the topic of "Jurisdiction" stares me in the face and looks even more threatening than "Land Tenure".'[1]

On 18 Oct. 1890 he wrote to Pollock 'And now I will write about the size of our book. I go on writing and writing, for I have so arranged my lectures that I have little else to do. Thus matter accumulates at a great rate. I know that some of it deals with rather minute points; but the more I see of cents. XII and XIII the more convinced am I that their legal history must be written afresh with full proof of every point.'[2] At this stage he envisaged two volumes, one on public, one on private law. Among the subjects in the former would be 'our say about the genesis of feudalism. This means a great pile of stuff. For example, for six weeks past I have had "juristic persons" on my mind, have been grubbing for the English evidence and reading the Germans, in particular Gierke's great book (it is a splendid thing though G. is too metaphysical).'[3] He concluded that 'Tenure is practically finished. A large part of Jurisdiction is written but requires re-arrangement. In Status I have done the baron, the knight, the unfree. I am prepared to deal with monks and the clergy, and have opinions about corporations. Aliens will not take me long but Jews I have hardly yet thought.'[4] Thus within a year of starting he had written about 200 pages of the must difficult part of volume one.

On 29 May 1892 he wrote to Vinogradoff, 'with me the matter stands thus - F.P., who is now in the West Indies and may go to India in the winter, has written an Anglo-Saxon chapter. **Between ourselves** I do not like it very much, partly because it will make it very difficult for me to say anything about A-S law in any later part of the book. My effort now is to shove on with the general sketch of the Norman and Angevin periods so that my collaborator may have little to do before we reach the Year Book period - if we ever reach it. So I am half inclined to throw aside all that I have written - it is a pretty heavy mass - about Domesday and the A-S books.'[5]

In July 1894 Maitland explained in detail how he had gradually taken over the writing of the whole work. 'The original scheme would have divided the work into approximately equal shares - but I soon discovered - that I wanted one thing while my yoke-fellow wanted another...the discrepancy was but slowly borne in upon me and, when it was becoming apparent, I pushed on my work in order that as much as possible might be done in the way which - rightly or wrongly - I like...you see therefore that I cannot accuse him [F. Pollock] of not doing his fair

[1] Maitland, **Letters**, 83.
[2] Maitland, **Letters**, 87.
[3] Maitland, **Letters**, 87.
[4] Maitland, **Letters**, 87.
[5] Maitland, **Letters**, 109.

share, for I did not want him to do it. What I have always been fearing was not that he would get any credit that would belong to me but that he would take chapters out of my hand.'[1] The contract with the University Press was made with Maitland alone.

The two great volumes seem to have been written by the end of 1894, despite his work as editor of many other works alongside them, and in the preface of 21st Feb. 1895 it was stated that 'The present work has filled much of our time and thoughts for some years. We send it forth, however, well knowing that in many parts of our field we have accomplished, at most, a preliminary exploration. Oftentimes our business has been rather to quarry and hew for some builder of the future than to leave a finished building. But we have endeavoured to make sure, so far as our will and power can go, that when this day comes he shall have facts and not fictions to build with.' A separate note by Pollock stated that 'It is proper for me to add for myself that, although the book was planned in common and has been revised by both of us, by far the greatest share of the execution belongs to Mr. Maitland, both as to the actual writing and as to the detailed research which was constantly required.'[2]

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Maitland developed a particular way of writing through which he might explore and explain the immensely complex interconnections of English history through the centuries. The style is one of our clues to the man, so it is worth pausing for a moment on this. G.O.Sayles tried to summarize it thus. 'As an artist in words, Maitland followed no conventions and is himself inimitable... He seems to take the reader into his confidence and to converse with him, charming him with his exquisite sense of the perfect word and phrase, the happy epigrams; his gay humour.'[3] In a section on Maitland's way of writing and style, Zutshi provides some important clues. He writes that 'Maitland's style is so individual, compelling, seductive and, at times, beautiful that many of those who have written about him have drawn attention to it.' The 'conversational quality' is partly explained by the fact that 'As he composed sentence and paragraph for book or lecture, he said the words aloud so that he might hear as well as see them.' He wrote 'as if he were speaking'.[4] He is said to have invariably written standing at the lectern which is still preserved at Downing College, Cambridge.

This last point is particularly interesting. All of his writing has the quality of directness, simplicity and elegance, as if the author were talking in his ordinary voice. The fact that Maitland wrote as if he were trying to explain complex matters to an audience of undergraduates, and the fact that a lectern is confined so that one has to put the mass of data in one's notes to one side and concentrate on the central issues, is significant. Maitland himself explained his method to Lord Acton. 'According to my habit I made a rush at it, writing chiefly from memory, in order that I might see the general outlines of my chapter.'[5] Thus he

[1] Maitland, **Letters**, 138.
[2] Maitland, **History**, I, vi.
[3] Sayles, 'Maitland'.
[4] **Letters**, ii, ed. Zutshi, p.20.
[5] **Letters**, ii, ed. Zutshi, no.174.

wrote 'fast, and with relish, in a sinewy style that has engaged generations of readers' producing 're-creations of medieval life that convinced by their range, coherence and imaginative zest.'[1] His style and genius in writing is well captured by one of his foremost disciples, K.B. McFarlane. 'Here was a writer who could be highly technical and a delight to read, a fine artist with a powerful analytical mind and a remarkable flair for the concrete instance that made the past live.' In his later writings 'There was the same learning, weighty but winged, the sparkle, the lucidity, the same sureness of finger in disentangling historical knots.' Thus in his twenty years of writing there are few pages which 'do not bear the stamp of Maitland's highly individual and, it would seem, effortless genius. He wrote like a brilliant talker; we are told that his talk was brilliant and that his public speeches were long remembered and quoted.'[2]

A little of the quality of his lectures is captured by one of those who attended them. 'Maitland lectured on English law ... as though he were some saintly medieval monk reciting the miracles of his order. His tall gaunt figure was restless with animation; his voice would ... pass into a sort of liturgic rhythm as he completed his outline of some large cycle of legal development ... Yet even at a moment of what seemed genuine enthusiasm, ... a sudden shaft of humour would flash into the lecture and, though the tense face hardly relaxed, the eyes in an instant were all play...' [3] The editors of a set of his lectures on 'Equity' described how 'Those who heard them delivered - amongst whom we are - with all Maitland's gaiety, and with all his charm of manner and his power of making dry bones live, will not easily forget either the lectures or the lecturer.'[4]

The freshness of the lecturing and writing also undoubtedly lay in the fact that Maitland was always exploring new subjects, explaining them as much to himself as to his audience, thinking aloud in another's presence. History particularly interested him since he knew so little about it until quite late in his life. In another letter to Lord Acton who had asked him to write a chapter on sixteenth century religion for the **Cambridge Modern History** he explained his innocence and ignorance, the basis of his curiosity and wonder. Maitland wrote that he would try to do so, 'though you may guess a good deal, you can not know the depth of my ignorance - I have hardly so much as heard that there was a Queen Elizabeth. Until I was thirty years old and upwards I rarely looked at a history - except histories of philosophy, which don't count - and since then I have only 'mugged up', as the undergraduates say, one subject after another which happened to interest me.'[5]

Maitland's work has often been likened to a piece of music. It is difficult to describe this, but one example of the tribute to his mind and style by his greatest legal historian contemporary and friend, Paul Vinogradoff, captures something of the effect. 'In every special case, in the treatment of any great doctrine, or institution, or epoch, Maitland has a manner of starting with disconcerting critical observations and of noticing at the outset contradictions and confusion,

[1] **Selected Essays**, 15.
[2] McFarlane, **Mount Maitland.**
[3] Quoted in Schuyler, **Maitland**, p.17.
[4] Maitland, **Equity**, v.
[5] **Letters**, ii, no. 122.

but then he feels his way, as it were, like a musician running his fingers over the keys in an improvised prelude, towards leading ideas and harmonious combinations.' Hence numerous apparently dry and difficult subjects become 'curiously attractive through the reflection of a kind of organic process in the mind of the scholar creating order and sense in the midst of confusion.'[1] It is not difficult to think of Bach, Handel, or even Maitland's beloved Wagner after whom he named his daughters Ermengard and Fredegond.

Maitland was a very private person. Although a number of biographical studies have been written about him, and though two volumes of his letters have been published, it is not easy to obtain a picture of Maitland the man. We know of his 'gaiety' in lecturing. From the lives and letters he appears to be an upright, moral, man. He was Liberal in politics; an early advocate of degrees for women at Cambridge, agnostic in religion; committed above all to his family, friends and students. He was clearly deeply loved by his family. He was a workaholic and may have suffered a mental break-down and contemplated suicide.[2] Thin and increasingly emaciated, he was frugal and energetic. To learn more about him we have to examine his voluminous writings.

[1] Vinogradoff, 'Maitland', 287; the connection between Maitland's style and music is explicitly or implicitly made by a number of recent writers, see Hudson (ed.), **The History of English Law**, ix and note 3.
[2] See Maitland, **Letters**, II, 4.

3. The Theoretical Framework

We have seen that one of Maitland's deepest interests was in the development of liberty. In pursuing this topic his training as a lawyer was obviously central and links him to his illustrious ancestors, Montesquieu, Adam Smith and Tocqueville. 'He had an unerring instinct for seeing the pattern behind a mass of details and the skill to weave the facts once linked into a persuasive case.' Furthermore, as S.F.C. Milsom writes, 'I am also pretty sure that the extraordinary immediacy of Maitland's writing has to do with his background as a lawyer and law teacher...A main ingredient is the habit of bringing situations to life in terms of the dialogues of real people.'[1] It seems likely that there was more to the legal training than this, for as in the other cases, it gave him that ability to see into the very essence or structure of things, to approach them in a **relational** way, seeing the balance of forces, be able to measure the facts against an ideal-type model. Like Montesquieu, Smith and Tocqueville, he combined induction and deduction. Few had so many new 'facts' at their disposal and he clearly had an immensely good memory. Yet he shaped the facts into new imaginative patterns through inspiration. He took nothing for granted and questioned everything. Thus with his brilliance, energy and insight he created a new paradigm, or rather completed the one which had begun with Montesquieu.

His approach was both holistic and relational, treating all the different aspects of the past within one framework. By 'envisaging the history of English law as an aspect of the whole stream of English life he brought legal history into close relationship to political, constitutional, social, economic and religious history.'[2] In fact what he did was to see that by taking law, the central English institution, as the thread he could show the **relations** between all the different features of English society. He concentrated on the medieval period, but lectured and taught on the whole period from the Anglo-Saxons to the nineteenth century. He was thus able to provide the first great, document-based, analysis of the patterns or spirit of English culture over the thousand years leading up to the industrial revolution.

Maitland's aim was to understand the development of later Victorian wealth and liberty. He was convinced that the answer lay buried in the mounds of hitherto unused legal records. 'Think for a moment what lies concealed within the hard rind of legal history. Legal documents, documents of the most technical kind, are the best, often the only evidence that we have for social and economic history, for the history of morality, for the history of practical religion. Take a broad subject - the condition of the great mass of Englishmen in the later middle ages, the condition of the villagers. That might be pictured for us in all truthful detail; its political, social, economic, moral aspects might all be brought out; every tendency of progress or degradation might be traced; our supply of evidence is inexhaustible...'[3] Or again he wrote more briefly, '...speaking broadly

[1] Milsom, 'Review of Elton', 225.
[2] Hazeltine, 'Maitland'.
[3] Maitland, **Collected Papers**, I, 485-6.

we may say that only in legal documents and under legal forms are the social and economic arrangement of remote times made visible to us.'[1]

Yet the difficulties were immense. There was the obvious fact that the hand-writing, the dog Latin and law-French, the abstruse forms of procedure and technical terms all had to be mastered, requiring immense dedication and energy. He had not only to read the documents, but re-construct a largely vanished worldview in order to understand them. This was particularly the case in certain branches of law which had faded out. For instance, in relation to the ecclesiastical court records, as he described. 'A detailed history of our ecclesiastical courts is at present impossible. Very few attempts have been made to put into print the records out of which that history must be wrung. They are voluminous... Those who achieved the task would have to learn much that has not been taught in England during the past three centuries and, it may be, to unlearn a good deal that has been taught too often.'[2]

Related to this was the problem of anachronism. Here Maitland introduced one of his key concepts, the idea that one should write history both backwards and forwards. It is worth quoting the passage fully both as an example of his style and also his realization of the aims and the dangers of historical reconstruction. He pointed out that 'The history of law must be a history of ideas. It must represent, not merely what men have done and said, but what men have thought in bygone ages. The task of reconstructing ancient ideas is hazardous and can only be accomplished little by little. If we are in a hurry to get to the beginning we shall miss the path.' In particular one had to beware of intellectual anachronism. 'Against many kinds of anachronism we now guard ourselves. We are careful of costume, of armour and architecture, of words and forms of speech. But it is far easier to be careful of these things than to prevent the intrusion of untimely ideas. In particular there lies a besetting danger for us in the barbarian's use of a language which is too good for his thought. Mistakes then are easy, and when committed they will be fatal and fundamental mistakes. If, for example, we introduce the **persona ficta** too soon, we shall be doing worse than if we armed Hengest and Horsa with machine guns or pictured the Venerable Bede correcting proofs for the press; we shall have built upon a crumbling foundation.' How could one avoid this danger? 'The most efficient method of protecting ourselves against such errors is that of reading our history backwards as well as forwards, of making sure of our middle ages before we talk about the "archaic", of accustoming our eyes to the twilight before we go out into the night.'[3]

If one were successful, one might achieve the ultimate goal of imaginative re-construction, that is to say the revealing of other worlds and other times, not just a distorted reflection of our own. Not only, for example, will the 'villages and hundreds which the Norman clerks tore into shreds' be 'reconstituted and pictured in maps', but 'Above all, by slow degrees the thoughts of our

[1] Maitland, **Collected Works**, II, 3.
[2] Maitland, **Roman Canon Law**, 131.
[3] Maitland, **Domesday Book**, 356.

forefathers, their common thoughts about common things, will have become thinkable once more.'[1]

Another aspect of this anachronism or bias was caused by the historian's own convictions and often unexamined political orientation. Maitland recognized this when he wrote, for example, that 'the English believer in "free communities" would very probably be a conservative, I don't mean a Tory or an aristocrat, but a conservative.' 'On the other hand with us the man who has the most splendid hopes for the masses is very likely to see in the past nothing but the domination of the classes. Of course this is no universal truth - but it comes in as a disturbing element.'[2] Since Maitland became deeply immersed, as we shall see, in questions of 'free village communities', as well as liberty and equality, it is important that he recognized the problem and that we remember his pedigree and inspiration from Tocqueville by way of Mill and Sidgwick.

Another key was to start in the right place, to find the essence of the structure. This was Maitland's equivalent to Tocqueville's comprehension of the American pattern when he realized that equality was the starting point from which everything else flows. For Maitland, it was the understanding of the medieval concept of tenure which unlocked the rest. 'In any body of law we are likely to find certain ideas and rules that may be described as elementary. Their elementary character consists in this, that we must master them if we are to make further progress in our study; if we begin elsewhere, we are likely to find that we have begun at the wrong place...as regards the law of the feudal times we can hardly do wrong in turning to the law of land tenure as being its most elementary part.'[3] Not elementary in the sense of simple, for it was immensely complex, but elementary in the sense of basic. For Maitland was also well aware that there was no correlation between 'elementary' or early forms and simplicity. 'Too often we allow ourselves to suppose that, could we get back to the beginning, we should find that all was intelligible and should then be able to watch the process whereby simple ideas were smothered under subtleties and technicalities. But it is not so. Simplicity is the outcome of technical subtlety; it is the goal, not the starting point. As we go backwards the familiar outlines become blurred; the ideas become fluid, and instead of the simple we find the indefinite.'[4]

A further key lay in placing England in a comparative perspective. As Maitland wrote 'History involves comparison, and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of the idea of legal history.'[5] Maitland's knowledge of German and French law was very extensive and he was deeply knowledgeable about Roman law.[6] Thus, like his great predecessors, he was able to see clearly what was unusual and what was in common in the English case. He was certainly no 'Little Englander', and, as

[1] Maitland, **Domesday Book**, 520.
[2] Maitland, **Letters**, 60.
[3] Maitland, **History**, I, 231.
[4] Maitland, **Domesday Book**, 9.
[5] Maitland, **Collected Papers**, I, 488.
[6] Among others Plucknett, 'Maitland', 185, Vinogradoff, 'Maitland', 288 and Paul Hyams in Hudson (ed.,), **History of English Law**, 217 comment on the width of his learning and command of continental sources.

Patrick Wormald notes 'would bend over backwards to disabuse Englishmen of misplaced faith in the uniqueness of their Island Story'.[1] On the other hand, as we shall see, if he felt that England was different, he did not shrink from saying so.

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One of the most difficult tasks for a historian is to balance change and continuity and it is in this theoretical area that we can learn most from Maitland. From Montesquieu to Tocqueville there had been a feeling that England had witnessed a peculiarly continuous and increasingly unusual history by the standards of the rest of Europe. To what extent did Maitland also find continuity in the structure, and to what extent was there some kind of dramatic revolution in the early modern period? In Maitland's many works we look in vain for any sign of a belief that a vast and revolutionary change had occurred at some specific point in English history, dividing off 'medieval' from 'modern' England. Instead, his view that the legal and social structure of England, in its basic principles, was already laid down by the thirteenth century is shown in many passages.

By the death of Henry II (1271), 'English law is modern in its uniformity, its simplicity, its certainty.'[2] Lawyers from the fourteenth century onwards believed that 'the great outlines of criminal law and private law seem to have been regarded as fixed for all time. In the twentieth century students of law will still for practical purposes be compelled to know a good deal about the statutes of Edward I.'[3] This continuity, he believed, had been of great advantage to English historians, setting them off from those of continental nations where it had not existed. 'So continuous has been our English legal life during the last six centuries, that the law of the later middle ages has never been forgotten among us. It has never passed utterly outside the cognizance of our courts and our practising lawyers. We have never had to disinter and reconstruct it in that laborious and tentative manner in which German historians of the present day have disinterred and reconstructed the law of medieval Germany.'[4]

This continuity is shown in the treatment of particular subjects. For instance, when analysing the forms of action at common law, Maitland took the period 1307-1833 as one period. He admitted that this was 'enormously long', yet wrote that 'I do not know that for our present purpose it could be well broken up into sub-periods.'[5] The most important area was property law. Here were the deepest continuities. This 'most salient trait', the 'calculus of estates which, even in our own day, is perhaps the most distinctive feature of English private law', Maitland thought very old. It had been a characteristic for six centuries, having taken a 'definite shape' in the second half of the thirteenth century, drawing on much older customs. This continuity was not merely to be found in the Common Law, which was 'one of the toughest things ever made'. In his **Constitutional**

[1] In Hudson (ed.), **History of English Law**, 13.
[2] Maitland, **History**, I, 225.
[3] Maitland, **Selected Essays**, 123.
[4] Maitland, **History**, I, xxxiv.
[5] Maitland, **History**, II, 210; I, 225; Maitland, **History**, I, civ; Maitland, **Forms**, 43.

History of England, which covered the period from Anglo-Saxon England up to the 1880s, Maitland made no substantial modifications to Stubbs's general vision of continuity. For instance, he wrote 'take any institution that exists at the end of the Middle Ages, any that exists in 1800 - be it parliament, or privy council, or any of the courts of law - we can trace it back through a series of definite changes as far as Edward's reign.'[1] It was because English constitutional and legal principles had been laid down so early that in the **History of English Law** he did not take the story beyond the thirteenth century.

Maitland's research did not just go back to the twelfth century. He was deeply knowledgeable about the Anglo-Saxon period. In his lectures on the **Constitutional History of England** he stressed the continuity between Anglo-Saxon and late eleventh century England. He explains that though the Norman Conquest was of great importance, we 'must not suppose that English law was swept away or superseded by Norman law. We must not suppose that the Normans had any compact body of laws to bring with them. They can have had but very little if any written law of their own; in this respect they were far behind the English.'[2] After all, 'They were an aristocracy of Scandinavian conquerors ruling over a body of Romance-speaking Celts.' Thus we 'must not therefore think of William as bringing with him a novel system of jurisprudence.'[3] Maitland then shows in detail how little changed in the legal framework until the mid twelfth century. William merely came to England, as he claimed, as the rightful heir to Edward the Confessor 'William succeeded to Edward's position.'[4] Thus the 'valuable thing that the Norman Conquest gives us is a strong kingship which makes for national unity.'[5]

This view of the continuity of English law through the Norman invasion was not undermined by the next ten years of Maitland's research and was repeated in the **History of English Law**. He describes how it is only very slowly that the consequences of the Norman invasion came to be felt. 'Indeed if we read our history year by year onwards from 1066, it will for a long time seem doubtful whether in the sphere of law the Conquest is going to produce any large changes. The Normans in England are not numerous. King William shows no desire to impose upon his new subjects any foreign code. There is no Norman code.'[6] Thus 'we may safely say that William did not intend to sweep away English law and put Norman law in its stead. On the contrary, he decreed that all men were to have and hold the law of King Edward - that is to say, the old English law...So far as we know, he expressly legislated about very few matters.'[7] Undoubtedly the 'conquest, the forfeiture, the redistribution of the land gave to the idea of holding land from others a dominance that it could not obtain elsewhere', but this was an unintended consequence, as was that of the germ of the idea of the jury system which Maitland thought came from France.[8] But in general, as he

[1] Maitland, **History**, II, 10-11; Maitland, **Constitutional**, 20.
[2] Maitland, **Constitutional**, 6-7.
[3] Maitland, **Constitutional**, 7.
[4] Maitland, **Constitutional**, 154.
[5] Maitland, **Constitutional**, 9.
[6] Maitland, **History**, I, 79.
[7] Maitland, **History**, I, 88.
[8] Maitland, **History**, I, 93-4.

shows in detail, the Normans and Angevins built on and then adapted, simplified, strengthened an earlier tradition of Anglo-Saxon laws.[1]

Maitland, in fact, managed to capture the mixture of continuity with change over the seven hundred years up to the time in which he was writing. 'Hardly a rule remains unaltered, and yet the body of law that now lives among us is the same body that Blackstone described in the eighteenth century, Coke in the seventeenth, Littleton in the fifteenth, Bracton in the thirteenth, Glanvill in the twelfth. This continuity, this identity, is very real to us if we know that for the last seven hundred years all the judgments of the courts at Westminster have been recorded, and that for the most part they can still be read...eventful though its life may have been, it has had but a single life.'[2]

Maitland follows the trail back to the edge of the 'German woods'. 'Beyond these seven centuries there lie six other centuries that are but partially and fitfully lit, and in one of them a great catastrophe, the Norman Conquest, befell England and the law of England. However, we never quite lose the thread of the story. Along one path or another we can trace back the footprints, which have their starting-place in some settlement of wild Germans who are invading the soil of Roman provinces, and coming in contact with the civilization of the old world. Here the trail stops, the dim twilight becomes darkness; we pass from an age in which men seldom write their laws to one in which they cannot write at all. Beyond lies the realm of guesswork.'[3] It is this which 'gives to English legal history a singular continuity from Alfred's day to our own.'[4]

In lectures which constituted the **Constitutional History of England** Maitland described the early Anglo-Saxon law codes in England. Those of Ethelbert in about 600 'seem to be the earliest laws ever written in any Teutonic tongue.' It was already far from 'primitive', being influenced by Christianity. The later law codes of Ine in 690 and Alfred in about 890 'show us that during the last two centuries there had been no great change in the character of law or the legal structure of society.'[5] From then there was a continuous set of laws up to the Norman Conquest. If we look at these, one thing is very clear, 'namely that the influence of Roman jurisprudence was hardly felt', even though the influence of Christianity was present, for example in the introduction of the written will.[6] Then came the Normans, 'a race whose distinguishing characteristic seems to have been a wonderful power of adapting itself to circumstances, of absorbing into its own life the best and strongest institutions of whichever race it conquered...'[7]

Thus the earlier Germanic invaders probably introduced the important division into 'hundreds'[8] and the central concept of feudalism, namely the loyalty to a chief. Maitland argues that the 'personal relation between land and

[1] See Maitland, **History**, I, 104-7.
2 Maitland, **Collected Papers**, II, 418.
3 Maitland, **Collected Papers**, II, 418.
4 Maitland, **Selected Essays**, 98.
[5] Maitland, **Constitutional**, 1-2.
[6] Maitland, **Constitutional**, 5.
[7] Maitland, **Constitutional**, 122.
[8] Maitland, **Constitutional**, 44.

man which is one ingredient of feudalism, is indeed old; we may see it in the first pages of the history of our race. It can be traced to the relation between the German **princeps** [prince] and his **comites** [counts] described by Tacitus.'[1] This developed into the territorial Anglo-Saxon thegn, and the principle expands so that 'This relation of man and lord we find in all parts of the social structure.'[2] Furthermore, while 'Nothing, I believe is more of the essence of all that we mean when we talk of feudalism than the private court - a court which can be inherited and sold along with land', 'jurisdiction, the right to hold courts, had been passing into private hands' for 'some time before the Norman Conquest'.[3] He suggested that 'in the eighth or even in the seventh century' there were in England people who had jurisdiction within their territories' and that 'a royal grant of land in the ninth and tenth centuries generally included, and this as a matter of "common form", a grant of jurisdiction.'[4] Thus in conclusion, 'The facts of feudalism seem to be there - what is wanting is a theory which shall express those facts. That came to us from Normandy.'[5]

Ten years later, in the **History of English Law**, Maitland had not changed his views on the basically Germanic origins of English law. The law that prevailed in England before the Norman Conquest was 'in our opinion...in the main pure Germanic law.'[6] Thus 'Coming to the solid ground of known history, we find that our laws have been formed in the main from a stock of Teutonic customs, with some additions of matter, and considerable additions or modifications of form received directly or indirectly from the Roman system.'[7] The original Anglo-Saxon impetus was increased by later waves of other Teutonic sources. 'Now each of these Germanic strains, the purely Anglo-Saxon, the Scandinavian, the Frankish' was important, and it is difficult to measure their relative influence.[8] Thus the picture that is painted fits very well with that of Maitland's predecessors. There are Montesquieu's early Germanic roots. There is Tocqueville's 'prodigious similarity', earlier than Tocqueville argues, namely in the eleventh century, between England and northern France. Maitland's vision is balanced, providing both a picture of continuity and change, similarity and difference. The early Germanic origins are particularly important, as we shall see, for Maitland was able to show that Germanic law and social structure contained unusual attitudes towards property and family relations.

In this vision of a mixture of continuity and change, Maitland explicitly attacked the increasingly dominant evolutionary paradigm of the post Darwinian era, which, perverting Darwin's central ideas, suggested a set of necessary 'stages' through which all societies had to move. The rejection of this framework helps to explain how he followed the undogmatic and open-minded tradition of Montesquieu, Smith and Tocqueville. In his **History of English Law** he writes that 'To suppose that the family law of every nation must needs traverse the same route, this is an unwarrantable hypothesis. To construct some

[1] Maitland, **Constitutional**, 148.
[2] Maitland, **Constitutional**, 148.
[3] Maitland, **Constitutional**, 151.
[4] Maitland, **Domesday Book**, 282.
[5] Maitland, **Constitutional**, 151.
[6] Maitland, **History**, I, xxix.
[7] Maitland, **History**, I, xxx.
[8] Maitland, **History**, I, xxxi.

fated scheme of successive stages which shall comprise every arrangement that may yet be discovered among backward peoples, this is a hopeless task. A not unnatural inference from their backwardness would be that somehow or another they have wandered away from the road along which the more successful races have made their journey.'[1] He explicitly rejected a unilineal, or single, set of stages, of progress, the late nineteenth century gospel, writing for instance in relation to the question of women's status in society that he could not start the investigation 'until we have protested against the common assumption that in this region a great generalization must needs be possible, and that from the age of savagery until the present age every change in marital law has been favourable to the wife.'[2]

Maitland's central attack on the doctrine of evolutionary stages comes in **Domesday Book**. He points out that the anthropologists of the time are divided on the question, but 'Even had our anthropologists at their command materials that would justify them in prescribing a normal programme for the human race and in decreeing that every independent portion of mankind must, if it is to move at all, move through one fated series of stages which may be designated as Stage A, Stage B, Stage C and so forth, we still should have to face the fact that the rapidly progressive groups have been just those which have not been independent, which have not worked out their own salvation, but have appropriated alien ideas and have thus been enabled, for anything that we can tell, to leap from Stage A to Stage X without passing through any intermediate stages. Our Anglo-Saxon ancestors did not arrive at the alphabet, or at the Nicene Creed, by traversing a long series of "stages"; they leapt to the one and to the other.'[3] He continued that 'in truth we are learning that the attempt to construct a normal programme for all portions of mankind is idle and unscientific. For one thing, the number of portions that we can with any plausibility treat as independent is very small. For another, such is the complexity of human affairs and such their interdependence that we can not hope for scientific laws which will formulate a sequence of stages in any one province of man's activity. We can not, for instance, find a law which deals only with political and neglects proprietary arrangements, or a law which deals only with property and neglects religion. So soon as we penetrate below the surface, each of the cases whence we would induce our law begins to look extremely unique, and we shall hesitate long before we fill up the blanks that occur in the history of one nation by institutions and processes that have been observed in some other quarter. If we are in haste to drive the men of every race past all the known "stages", if we force our reluctant forefathers through agnatic **gentes** [groups based on the male line] and house-communities and the rest of it, our normal programme for the human race is like to become a grotesque assortment of odds and ends.'[4]

What alternative model of change, then, can Maitland offer? He does not usually address the problem directly, but often indicates obliquely how one

[1] Maitland, **History**, II, 255.
[2] Maitland, **History**, II, 403.
[3] Maitland, **Domesday Book**, 345.
[4] Maitland, **Domesday Book**, 345-6; for another similar long attack, see Maitland, **Collected Papers**, III, 294-9.

might use an organic growth model, yet without any **necessity** for things to have occurred in a certain way. An illustration of this approach is shown in his treatment of one of the central and enduring features of English history, the system of local government. Maitland writes that 'Certainly, to any one who has an eye for historic greatness it is a very marvellous institution, this Commission of the Peace, growing so steadily, elaborating itself into ever new forms, providing for ever new wants, expressing ever new ideas, and yet never losing its identity...we shall hardly find any other political entity which has had so eventful and yet so perfectly continuous a life.'[1] Maitland describes here, in a delicate balance, both 'newness' and 'identity' over time, an institution whose history is both 'eventful' and yet 'continuous'. Such an approach allows us the flexibility to admit that by a strange paradox things can both remain the same and also change.

The effect of this approach was to make it possible to examine both continuity and change without being forced to project back a necessary course of 'stages'. For example, this dissolved the 'great break' theory of the change between the thirteenth and nineteenth centuries. In Maitland's hands the supposed structural transformation between a 'feudal/peasant' 'stage' of English history, which then was replaced by a 'modern/capitalist' stage through the 'revolution' of the sixteenth and seventeenth century evaporated. He pushed back the deeper structural continuity to the thirteenth century and earlier. He thus documented and expanded Tocqueville's insight that England was a quite 'modern' society by the seventeenth century by showing how it was similarly 'modern' back to the thirteenth century and before.

[1] Maitland, **Collected Papers**, I, 470.

4. Power and Property

The crucial period for the Enlightenment theories concerning the divergence of England from much of continental Europe was between the tenth and fifteenth centuries. This is the classic period when European feudalism gradually turned into something else. Thus if we are to understand Maitland's solution to the question of how modern English society emerged, we have to follow him into a fairly technical discussion of the nature and peculiarity of English feudalism and how it differed from that of its continental neighbours. Although this is complex, it is at the heart of his analysis. He shows the peculiar nature of the arrangement, which emerged on this island, both, centralized and de-centralized, and he explains how this happened. By taking part of the feudal tie to its logical extreme, England benefited from great cohesion; by devolving power to the locality the country enjoyed flexibility and a certain amount of proto-democracy. Thus Maitland explains in detail what Tocqueville, Maine and others had only guessed and sketched out.

Maitland first lamented the difficulty of defining feudalism: 'the impossible task that has been set before the word **feudalism** is that of making a single idea represent a very large piece of the world's history, represent the France, Italy, Germany, England, of every century from the eighth or ninth to the fourteenth or fifteenth.'[1] The result is confusion. Maitland attempted to clarify the situation. The central feature of feudalism was the strange mixture of ownership, the relationship between the economic and political. The **fee** or **beneficium** was 'a gift of land made by the king out of his own estate, the grantee coming under a special obligation to be faithful...To express the rights thus created, a set of technical terms was developed:- the beneficiary or feudatory holds the land of his lord, the grantor - **A tenet terram de B**. The full ownership (**dominium**) of the land is as it were broken up between A and B; or again, for the feudatory may grant out part of the land to be held of him, it may be broken up between A, B, and C, C holding of B and B of A, and so on, **ad infinitum**.'[2]

Maitland believed that 'the most remarkable characteristic of feudalism' was the fact that 'several different persons, in somewhat different senses, may be said to have and to hold the same piece of land'.[3] But there are other equally characteristic and essential features. In some mysterious way power and property have been merged. Feudalism is not just a landholding system, but also a system of government. While many have seen 'the introduction of military tenures' as the 'establishment of the feudal system', in fact, when 'compared with seignorial justice, military tenure is a superficial matter, one out of many effects rather than a deep seated cause.'[4] He describes as 'that most essential element of feudalism, jurisdiction in private hands, the lord's court.'[5] The merging of power and property, of public and private, is well shown elsewhere in Maitland's work.[6]

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[1] Maitland, **History**, I, 67.
[2] Maitland, **Constitutional**, 152, 153.
[3] Maitland, **History**, I, 237.
[4] Maitland, **Domesday Book**, 258.
[5] Maitland, **History**, I, 68.
[6] Maitland, **History**, I, 230.

It is worth quoting one of his definitions in full. Feudalism is 'A state of society in which the main bond is the relation between lord and man, a relation implying on the lord's part protection and defence; on the man's part protection, service and reverence, the service including service in arms. This personal relation is inseparably involved in a proprietary relation, the tenure of land - the man holds lands of the lord, the man's service is a burden on the land, the lord has important rights in the land, and (we may say) the full ownership of the land is split up between man and lord. The lord has jurisdiction over his men, holds courts for them, to which they owe suit. Jurisdiction is regarded as property, as a private right which the lord has over his land. The national organization is a system of these relationships: at the head there stands the king as lord of all, below him are his immediate vassals, or tenants in chief, who again are lords of tenants, who again may be lords of tenants, and so on, down to the lowest possessor of land. Lastly, as every other court consists of the lord's tenants, so the king's court consists of his tenants in chief, and so far as there is any constitutional control over the king it is exercised by the body of these tenants.'[1]

Maitland stressed that English 'feudalism', though originating from a common ancestor, had developed into something peculiar and different by at least the twelfth century. He commented that 'we have learnt to see vast differences as well as striking resemblances, to distinguish countries and to distinguish times' when we discuss feudalism. Thus 'if we now speak of the feudal system, it should be with a full understanding that the feudalism of France differs radically from the feudalism of England, that the feudalism of the thirteenth is very different from that of the eleventh century.' For England 'it is quite possible to maintain that of all countries England was the most, or for the matter of that the least, feudalized.'[2] The paradox is resolved when we remember that there are two central criteria whereby we measure feudalism. In terms of land law, England was the most perfectly feudalized of societies. All tenures were feudal. Maitland wrote, 'in so far as feudalism is mere property law, England is of all countries the most perfectly feudalized.'[3] Thus 'Owing to the Norman Conquest one part of the theory was carried out in this country with consistent and unexampled rigour; every square inch of land was brought within the theory of tenure: English real property law becomes a law of feudal tenures. In France, in Germany, allodial owners might be found: not one in England.'[4] For instance, the 'absolute and uncompromising form of primogeniture which prevails in England belongs, not to feudalism in general, but to a highly centralized feudalism, in which the king has not much to fear from the power of his mightiest vassals...'[5] Thus, in terms of tenure, England was the most feudal of societies.

On the other hand, in the even more important sphere of public and private law and political power, that is, in terms of government, England went in a peculiar direction, towards some centralization of power, rather than the dissolution of the state. Maitland points out that 'our public law does not become feudal; in every direction the force of feudalism is limited and checked by other ideas; the

[1] Maitland, **Constitutional**, 143-4.
[2] Maitland, **Constitutional**, 143.
[3] Maitland, **History**, I, 235.
[4] Maitland, **Constitutional**, 163-4; allodial property is held in absolute ownership.
[5] Maitland, **History**, II, 265.

public rights, the public duties of the Englishman are not conceived and cannot be conceived as the mere outcome of feudal compacts between man and lord.'[1] Maitland outlines the major features of this limitation of public feudalism. 'First and foremost, it never becomes law that there is no political bond between men save the bond of tenure...whenever homage or fealty was done to any mesne lord, the tenant expressly saved the faith that he owed to his lord the king.'[2] Thus a man who fights for his lord against the king is not doing his feudal duty; he is committing treason. Over-mighty subjects could not draw on justification from this system. This point is so important that Maitland elaborates it in various ways.

'English law never recognizes that any man is bound to fight **for** his lord. The sub-tenant who holds by military service is bound by his tenure to fight for the king; he is bound to follow his lord's banner, but only in the national army: - he is in nowise bound to espouse his lord's quarrels, least of all his quarrels with the king. Private war never becomes legal - it is a crime and a breach of the peace.'[3] A 'man can hardly "go against" anyone at his lord's command... without being guilty of "felony"'. As Maitland wrote, 'Common law, royal and national law, has, as it were, occupied the very citadel of feudalism'.[4] To bring out the full peculiarity of this, Maitland tells us, 'you should look at the history of France; there it was definitely regarded as law that in a just quarrel the vassal must follow his immediate lord, even against the king'.[5] In England, 'military service is due to none but the king; this it is which makes English feudalism a very different thing from French feudalism.'[6]

There are a number of other differences which make this central feature possible and flow from it. In England there is an alternative army for the king, which helps to protect him against an over-dependence on his feudal tenants. 'Though the military tenures supply the king with an army, it never becomes law that those who are not bound by tenure need not fight. The old national force, officered by the sheriffs, does not cease to exist...In this organization of the common folk under royal officers, there is all along a counterpoise to the military system of feudalism, and it serves the king well.'[7] Another source of strength for the centre is the fact that 'Taxation is not feudalized.' Maitland tells us that the 'king for a while is strong enough to tax the nation, to tax the sub-tenants, to get straight at the mass of the people, their lands and their goods, without the intervention of their lords.'[8] Thus he is not entirely dependent on powerful lords for soldiers or money.

Nor is he entirely dependent on them for advice. We are told that the King's Court (**Curia Regis**) 'never takes very definitely a feudal shape...It is much in the king's power to summon whom he will.'[9] Finally, the king is not forced to

[1] Maitland, **Constitutional**, 164.
[2] Maitland, **Constitutional**, 161.
[3] Maitland, **Constitutional**, 161.
[4] Maitland, **History**, I, 303.
[5] Maitland, **Constitutional**, 162.
[6] Maitland, **Constitutional**, 32.
[7] Maitland, **Constitutional**, 162.
[8] Maitland, **Constitutional**, 162.
[9] Maitland, **Constitutional**, 163.

delegate judicial powers to the barons. 'The administration of justice is never completely feudalized. The old local courts are kept alive, and are not feudal assemblies.'[1] As a result of this the 'jurisdiction of the feudal courts is strictly limited; criminal jurisdiction they have none save by express royal grant, and the kings are on the whole chary of making such grants. Seldom, indeed, can any lord exercise more than what on the continent would have been considered justice of a very low degree.'[2] Starting with considerable power, the king 'rapidly extends the sphere of his own justice: before the middle of the thirteenth century his courts have practically become courts of first instance for the whole realm - from Henry II's day his itinerant justices have been carrying a common law through the land.'[3]

The contradiction is thus resolved. By taking one aspect of the feudal tie, the idea that each person is linked to the person above him, both in terms of tenure and power, to its logical limits, the English system developed into something peculiar. By the standards of Marc Bloch's French model of feudalism, England was the least feudal of countries. Looked at in another way, England was the ideal-typical feudal society, with an apex of both landholding and justice and power in the chief lord, and it was other feudal systems which, through the devolution of too much power, were defective. Both are tenable views.

What Maitland argued was as follows. Most of the important elements of feudalism were present in England before the Norman Conquest, in particular the superiority of the contractual relationship with a lord over the birth relationship with kin. Then for about a century after the Norman Conquest there was a real system of military tenures. 'Speaking roughly we may say that there is one century (1066-1166) in which the military tenures are really military...'[4] In this same period there are powerful local courts. This is the period when, though much more centralized, English and French 'feudalism' looked most alike. But after that the system moves away to that which is described above. By about 1266 at the latest 'the military organization which we call feudal has already broken down and will no longer provide either soldiers or money...' for the Crown.[5] Likewise, various devices are used to circumvent the feudal principle of separate courts for lords.[6] 'Slowly but surely justice done in the king's name by men who are the king's servants becomes the most important kind of justice, reaches into the remotest corners of the land.'[7] Everything became permeated by centralized law, and a law which was in its turn permeated by the unusual concept of tenure, that is to say a contractual relationship of holding something or another by a non-blood relationship. Thus 'In the Middle Ages land law is the basis of all public law...the judicial system is influenced by tenure, the parliamentary system is influenced by tenure.'[8]

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[1] Maitland, **Constitutional**, 162.
[2] Maitland, **Constitutional**, 162-3.
[3] Maitland, **Constitutional**, 163.
[4] Maitland, **History**, I, 252-3.
[5] Maitland, **History**, I, 253.
[6] Maitland, **History**, I, 172; for instance, the centralized justice of **novel disseisin** and the assize of **mort d'ancestor** in the twelfth century, Maitland, **History**, I, 146-8.
[7] Maitland, **History**, I, 84.
[8] Maitland, **Constitutional**, 38.

Many great thinkers have concluded that the politico-economic relations are central to our puzzle. If Maitland is right that England developed an unusual form of centralized feudalism, building something unique on top of roots which were in themselves unusual and confined to western Europe, we would have found the key to some of the problems facing many of his intellectual predecessors.

Yet, like all mysteries, Maitland's answer just pushes the puzzle back further. If English feudalism was different, both in its nature and in how it evolved, why was this the case? Here we need to follow him into another fairly technical discussion, this time concerning the relationship between kinship and politics. The relations of institutions are the key to the mystery and one of the most powerful of these is the blending of kinship, power and property.

Kinship and property in England

Marc Bloch suggested that the development of feudalism in Western Europe after the fall of Rome was linked to a peculiarly flexible and 'weak' kinship system. He wrote that kinship ties were 'by their very nature foreign to the human relations characteristic of feudalism.'[1] The 'relative weakness' of kinship in Western Europe 'explains why there was feudalism at all.'[2] Or 'More precisely feudal ties proper were developed when those of kinship proved inadequate.'[3] His hypothesis is amply anticipated by Maitland's earlier account.

Maitland was well aware that the current anthropological orthodoxy, for instance in the work of Sir Henry Maine, was that all societies, including the Teutonic peoples, had gone through a period of agnatic kinship, that is, descent flowing through the male gender, leading to the formation of powerful clans or, as anthropologists call them, unilineal descent groups.[4] Yet detailed study of Tacitus and the codes of the Anglo-Saxons and other materials did not bear out this evolutionary sequence. Maitland first worked back to the thirteenth century text of Bracton, which showed a system of tracing descent through both males and females which is identical to that which is used in England today.[5] He then took the analysis back to the Anglo-Saxon period. In a section on 'Antiquities' he showed that Anglo-Saxon kinship was bilateral or cognatic, tracing descent through both genders, and hence the formation of exclusive groups or clans which could have been the basis for political and legal action, was impossible.

He pointed out that from the very earliest rules, we find that the blood-feud payments show that those who share the payment 'consist in part of persons related to him through his father, and in part of persons related to him through his mother.' Such a concept 'ties the child both to his father's brother and to his mother's brother' and hence 'a system of mutually exclusive clans is impossible, unless each clan is strictly endogamous.' As he puts it in a marginal note, 'No clans in England.'[6] Thus 'we ought not to talk of clans at all' for 'our English law

[1] Bloch, **Feudal** , I, 138.
[2] Maitland, **Feudalism**, I, 142.
[3] Bloch, **Feudal**, II, 443.
[4] Maitland, **History**, II, 240-1.
[5] Maitland, **History**, II, 269ff, 296-7.
[6] Maitland, **History**, II, 241.

does not contemplate the existence of a number of mutually exclusive units which can be enumerated and named; there were as many "blood-feud groups" as there were living persons.'[1] Such groups could not act as the bedrock of the politico-legal system. Whatever the earliest unrecorded history, 'What seems plain is that the exclusive domination of either "father-right" or "mother-right"...should be placed for our race beyond the extreme limit of history.'[2] The absence of the patriarchal or patrilineal family, he argued had nothing to do with Christianity - its emergence 'we certainly cannot ascribe to the influence of Christianity.'[3] The Germanic method of calculating descent through both male and female lines, preserved in England, was very different from the method of calculating through the male line alone, characteristic of the later Roman Empire even after the spread of Christianity.[4]

Two years later Maitland re-iterated his central conclusion, namely that Anglo-Saxon kinship being cognatic could not provide the basis for political allegiances. Those who settled down in England at the fall of the Roman Empire may have been kinsmen, 'But (explain this how we will) the German system of kinship, which binds men together by the sacred tie of blood-feud, traces blood both through father and through mother, and therefore will not suffer a "blood-feud-kin" to have either a local habitation or a name.' Thus the 'village community was not a **gens** [group based on the male line]. The bond of blood was sacred, but it did not tie the Germans into mutually exclusive clans.'[5]

As a number of subsequent anthropologists have confirmed, it is abundantly clear that as soon as the Anglo-Saxons appear in documented history, that is, from Tacitus' and Caesar's accounts of the first century A.D., they appear to be tracing their descent simultaneously through the male and female line.[6] This made kinship, as Bloch had argued, too weak and fragmented to act as the basis for their legal and political system. Hence their development of elaborate alternatives through proto-feudalism, travelling judges, and other devices.

Thus kinship did not provide the political infrastructure and hence, as both Maitland and Bloch argued, its weakness helped to create an environment in which the courts and the modern, territorial, state could emerge out of 'feudalism'. Furthermore, its curiously fragmented nature had another important effect in relation to the economy and the subsequent development of an equally unusual system, to which we give the rough label of 'commercial capitalism'.

The essence of the property law in the majority of agrarian systems which we label 'peasant' is the link between the family and landed property. The 'domestic mode of production' is based on co-ownership by parents and children. All those born into a family have birth rights. They cannot be 'disinherited' for they are co-owners, members of a corporate group. The rise of individual ownership whereby parents or children have separate rights, is, as Marx and Weber rightly

[1] Maitland, **History**, II, 242.
[2] Maitland, **History**, II, 243.
[3] Maitland, **History**, II, 243.
[4] Maitland, **History**, II, 386-7.
[5] Maitland, **Domesday Book**, 349.
[6] For example, see Radcliffe-Brown, **Kinship**, 15 and more generally Fox, **Kinship**, ch. 6.

argued, the basis of modern capitalist property relations. It has often been thought that the destruction of familistic property rights occurred in England during a great transformation to capitalism from the later fifteenth century. For instance Marx had argued that 'the legal view...that the landowner can do with the land what every owner of commodities can do with his commodities...arises...in the modern world only with the development of capitalist production.' Capitalism as a system 'transforms feudal landed property, clan property, small-peasant property' into modern, individualistic ownership.[1]

Maitland's work shows a striking absence of familistic ownership. In relation to freehold property, Maitland stated that 'In the thirteenth century the tenant in fee simple has a perfect right to disappoint his expectant heirs by conveying away the whole of his land by act **inter vivos** [between the living]. Our law is grasping the maxim **Nemo est heres viventis** [no-one is the heir of a living person].'[2] Indeed, he believes 'that men were within an ace of obtaining such a power [i.e. of leaving real estate by will] in the middle of the thirteenth century.'[3] Although Glanvill produced some rather vague safeguards for the heir, Bracton in the thirteenth century omitted these and the King's Courts did not support a child's claim to any part of his parent's estates. The only major change between the thirteenth and sixteenth centuries was that by the Statute of Wills in 1540 a parent could totally disinherit his heirs not only by sale or gift during his lifetime, but also by leaving a will devising the two-thirds of his freehold estate which did not go to his widow. The situation had in fact been formalized in the Statute **Quia Emptores** of 1290, which stated that 'from henceforth it shall be lawful for every freeman to sell at his own pleasure his land and tenements, or part of them...', with the exception of sales to the church or other perpetual foundations.[4] In this crucial respect, English common law took a totally different direction from Continental law. As Maitland put it, 'Free alienation without the heir's consent will come in the wake of primogeniture. These two characteristics which distinguish our English law from her nearest of kin, the French customs, are closely connected...Abroad, as a general rule, the right of the expectant heir gradually assumed the shape of the **restrait lignager** [restraint of the line]. A landowner must not alienate his land without the consent of his expectant heirs unless it be a case of necessity, and even in a case of necessity, the heirs must have an opportunity of purchasing.[5]

Thus by English Common Law children had no birth-right and could be left penniless. Strictly speaking it is not even a matter of 'disinheritance'; a living man in the sixteenth century has no heirs, he has complete seisin or property. The only restriction is the right of his widow to one third of the real estate for life. A son, in effect, has no rights while his father lives and they are not co-owners in any sense. In the case of freehold real estate in the sixteenth century the children had no automatic rights. The custom of primogeniture might give the eldest child greater rights than other children; but ultimately even the eldest son had nothing except at the wish of his father or mother, except

[1] Marx, **Capital**, III, 616.
[2] Maitland, **History**, II, 308.
[3] Maitland, **History**, II, 27.
[4] Simpson, **Land Law**, 51.
[5] Maitland, **History**, II, 309, 313.

where the inheritance had been formally specified by the artificial device of an entail. Even such entails could be broken quite easily in the sixteenth and seventeenth centuries.[1] As a result, as Chamberlayne put it in the seventeenth century, 'Fathers may give all their Estates un-intailed from their own children, and to any one child.'[2]

It would appear that 'Children had no stronger rights in the non-freehold property of their parents.'[3] This is particularly shown, as Maitland argues, in the absence of any **restrait lignager** in England, that is any custom that children could prevent their parents disposing of their property during their lifetime. The absence of this restraint is shown in numerous passages by Maitland.[4] He was puzzled by this unique feature, but in no doubt that it was present.[5] Even those restraints that there were, were probably not to keep land in the family.[6]

Another aspect of the oddity was the way in which inheritance worked. As Maitland explained 'At the end of Henry III's reign [i.e. the 1270s] our common law of inheritance was rapidly assuming its final form. Its main outlines were those which are still familiar to us, and the more elementary of them may be thus stated: The first class of persons called to the inheritance comprises the dead persons's descendants; in other words, if he leaves an "heir of his body", no other person will inherit.'[7] This may seem precocious, but not unexpected. But what Maitland realized was that it ruled out wider kin claims. For example, 'even though I leave no other kinsfolk, neither my father, nor my mother, nor any remoter ancestor can be my heir...'[8] We have 'the curious doctrine that the ascendants are incapable of inheriting'; inheritances must, acting by a law of social gravity, flow downwards.[9] Brothers, for example, were not each other's heirs. All that a child can claim is what has not been disposed of by his direct ancestor. 'An heir is one who claims by descent what has been left undisposed of by his ancestor; what his ancestor has alienated [disposed of] he cannot claim.'[10]

Thus Maitland had found no strong links between family and land. Nor did he find any restraint placed by the lord of the manor. In his earlier lectures he had argued that 'We can produce no text of English law which says that the leave of the lord is necessary to an alienation by the tenant...the royal judges, like all lawyers, seem to have favoured free alienation...'[11] In the **History** he confirms this view and shows how in this respect, as in relation to the crucial question of family ownership, what happened was that England retained the individualistic property system, while on the Continent it was abandoned and property and seigneurial rights grew. He concludes that in relation to lordly constraints, 'the tenant may lawfully do anything that does not seriously damage the interests of his lord. He may make reasonable gifts, but not unreasonable. The

[1] Blackstone, **Commentaries**, II, 116-8, described some of the devices for doing so.
[2] Chamberlayne, **Present State**, 337.
[3] Macfarlane, **Individualism**, 83.
[4] Maitland, **History**, II, 12-13, 446; I, 647.
[5] Maitland, **History**, I, 344.
[6] Maitland, **History**, II, 312.
[7] Maitland, **History**, II, 260.
[8] Maitland, **History**, II, 286.
[9] Maitland, **History**, II, 286.
[10] Maitland, **History**, II, 19.
[11] Maitland, **Constitutional**, 29.

reasonableness of the gift would be a matter for the lord's court; the tenant would be entitled to the judgment of his peers.' Maitland is surprised that the system 'should have been so favourable to the tenants...if we have regard to other countries' but suggests that 'the Norman Conquest must for a while have favoured "free trade in land"'.[1] The crux of the matter is that England in the first half of the thirteenth century began to diverge from the Continent. 'If the English lawyers are shutting their ears to the claims of the lords, they are shutting their ears to the claims of the kindred also, and this just at a time when in Normandy and other countries the claims of the lord and the claims of the expectant heir are finding a formal recognition in the new jurisprudence. Whether we ascribe this result to the precocious maturity of our system of royal justice, or to some cause deep-seated in our national character, we must look at these two facts together:- if the English law knows no **retrait feodal** [feudal restraint], it knows no **retrait lignager**.'[2] This crucial passage summarizes the great divide. Whatever the caveats of certain critics, there is no way round Maitland's argument.[3]

In the passages above the argument is pushed back by Maitland to the time of the Norman invasions. In the period between about 1066 and 1200 England and much of the Continent had split the land from the lord and the family's control: they were later united on the Continent but not in England. One central question is then where had this very unusual system originated? Was it something new in the eleventh century, or does it have earlier roots?

As Maitland explains, 'Seemingly what we mean when we speak of "family ownership", is that a child acquires rights in the ancestral land, at birth or, it may be, at adolescence; at any rate he acquires rights in the ancestral land, and this not by gift, bequest, inheritance or any title known to our modern law.'[4] He admits that there is some likelihood that some such rights may have existed in England and elsewhere in western Europe. Yet he argues that the earliest record we have of the peoples who conquered western Europe at the fall of the Roman Empire, suggests that property was already treated as belonging to an individual. 'Tacitus told his Roman readers that the Germans knew nothing of the testament, but added that they had rules of intestate succession. These rules were individualistic: that is to say, they did not treat a man's death as simply reducing the number of those persons who formed a co-owning group. Again, they did not give the wealth that had been set free to a body consisting of persons who stood in different degrees of relationship to the dead man. The kinsmen were called to the inheritance class by class, first the children, then the brothers, then the uncles. The **Lex Salica** has a law of intestate succession; it calls the children, then the mother, then the brothers and sisters, then the mother's sister. These rules, it may be said, apply only to movable goods and do not apply to land; but an admission that there is an individualistic law of succession for movable goods when as yet anything that can be called an ownership of land, if it exists at all, is new, will be quite sufficient to give us pause before we speak of "family ownership" as a phenomenon that must

[1] Maitland, **History**, I, 343-4.
[2] Maitland, **History**, I, 344.
[3] For criticism and my replies, see Macfarlane, **Culture**, 192-7.
[4] Maitland, **History**, II, 248.

necessarily appear in the history of every race. Our family when it obtains a permanent possession of land will be familiar with rules of intestate succession which imply that within the group that dwells together there is mine and thine.'[1] This comes from the very early period.

The evidence for the Anglo-Saxon period in England is equally interesting and is summarized by Maitland as follows. 'Now as regards the Anglo-Saxons we can find no proof of the theory that among them there prevailed anything that ought to be called "family ownership." No law, no charter, no record of litigation has been discovered which speaks of land as being owned by a ... family, a household, or any similar group of kinsmen. This is the more noticeable because we often read of **familiae** which have rights in land; these **familiae**, however, are not groups of kinsmen but convents of monks or clerks.'[2] But, further, 'the dooms and the land-books are markedly free from those traits which are commonly regarded as the relics of family ownership. If we take up a charter of feoffment [document investing an individual with a fief or fee] sealed in the Norman period we shall probably find it saying that the donor's expectant heirs consent to the gift. If we take up an Anglo-Saxon land-book we shall not find this; nothing will be said of the heir's consent. The denunciatory clause will perhaps mention the heirs, and will curse them if they dispute the gift; but it will usually curse all and singular who attack the donee's title, and in any system of law a donee will have more to fear from the donor's heirs than from other persons, since they will be able to reclaim the land if for any cause the conveyance is defective. Occasionally several co-proprietors join to make a gift; but when we consider that in all probability all the sons of a dead man were equally entitled to the land that their father left behind him, we shall say that such cases are marvellously rare. Co-ownership, co-parcenary, there will always be. We see it in the thirteenth century, we see it in the nineteenth; the wonder is that we do not see more of it in the ninth and tenth than our Anglo-Saxon land-books display.'[3]

Of course, expectant heirs may try to recover land which they feel they should have. But even here, Maitland found no greater power to do so in the Anglo-Saxon period than in the nineteenth century. 'In the days before the Conquest a dead man's heirs sometimes attempted to recover land which he had given away, or which some not impartial person said that he had given away. They often did so in the thirteenth century; they sometimes do so at the present day. At the present day a man's expectant heirs do not attempt to interfere with his gifts so long as he is alive; this was not done in the thirteenth century; we have no proof that it was done before the Conquest.'[4] In his 'Last words on family ownership', he concluded modestly that 'We have not been arguing for any conclusion save this, that in the present state of our knowledge we should be rash were we to accept "family ownership," or in other words a strong form of "birth-right", as an institution which once prevailed among the English in England. That we shall ever be compelled to do this by the stress of English documents is improbable.'[5] As far as I know, his view has not been controverted.

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[1] Maitland, **History**, II, 250-1.
[2] Maitland, **History**, II, 251.
[3] Maitland, **History**, II, 251-2.
[4] Maitland, **History**, II, 252.
[5] Maitland, **History**, II, 255.

Maitland provides an over-all scheme. From the earliest descriptions by Tacitus, individual ownership was the rule. Of course there were rules of heirship, but these did not restrict the power of a living man who 'owned' the property to dispose of it. This very unusual, non-domestic mode of production may have prevailed over much of north-western Europe from the fifth to twelfth centuries. Then, under pressure from kin and lords it was transformed into seigneurial and family property over the Continent. In England alone it remained much as it had been - the basis for that capitalist, individualistic, system of property which was to lie behind much of later English development. The difference was related to the different balance of powers which existed in war-torn Europe and the relatively peaceful and nationally bounded island of Britain. Thus, once again, Maitland challenged the widespread view of a necessary set of stages which all societies had to go through, in this case from family to individual property.

5. Social Relations

One of the great organizing ideas of social theorists of the later nineteenth century was the movement from Community to Association, as Tonnies put it. Much of the work of Marx, Morgan, Maine and others was centred on this supposed uniform movement. Again, if we examine Maitland's work, we shall see that by challenging this assumption he managed to resolve a number of the problems, which had faced his predecessors.

As early as his lectures in 1883, published in the **Constitutional History**, he pointed to the 'very great difficulties which at the present moment cannot be explained' in relation to the theory of 'Recent historians' about the origins of the township. They argued that the township was 'a community which is far more ancient than the manor; a community which, so far as English history is concerned, we may call primitive; a group of men or of families bound together, very possibly by kinship, which cultivates land by a system of collective agriculture, which is or has been the owner of the land' but which, in course of time has 'fallen under the dominion of a lord.'[1] In an article in 1893 he showed even greater scepticism about the theory that 'land was owned by communities before it was owned by individuals'. Although he is not ready to attack the argument directly, he believes that 'this doctrine is as little proved and as little probable as would be an assertion that the first four rules of arithmetic are modern when compared with the differential calculus.'[2]

His full attack on the evolution from community to individual ownership occurs in later works. In the **History of English Law** he carefully defines the meaning of 'community' and concludes that while the county and the township constitute legal **communities** by the twelfth century[3], the idea of the 'community' is more complex than this. 'The student of the middle ages will at first sight see communalism everywhere. It seems to be an all pervading principle. Communities rather than individual men appear as the chief units in the governmental system.' But this is deceptive. 'A little experience will make him distrust this communalism; he will begin to regard it as the thin cloak of a rough and rude individualism.'[4] Certainly the township is a 'communitas', but that does not mean that there is communalism.

For example, it looks on the surface as if there are rights 'in common' in the waste land and 'common' pasture. Yet are these rights 'of common' in any sense 'communal rights'? Of course there is an element of 'community' in it. 'A right of common is a right to enjoy something along with someone else, to turn out one's beasts on a pasture where the beasts of the lord and of one's fellow-tenants feed, to take sticks from a wood, turf from a moor, fish from a pond in which others are entitled to do similar acts.' Yet this does not imply communal ownership. 'But, for all this, the right may be an individual's several right, a right that he has acquired by a several title, a right that he can enforce against his

[1] Maitland, **Constitutional**, 51.
[2] Maitland, **Collected Papers**, II, 313.
[3] Maitland, **History**, I, 534, 564.
[4] Maitland, **History**, I, 616.

fellow-commoners, a right that he without aid from his fellow-commoners, can enforce against strangers, a right over which his fellow-commoners have little or no control.'[1] Thus, having explained the matter further and in detail, Maitland concludes that 'This is not communalism; it is individualism **in excelsis**.'[2] Likewise, as a marginal note to further explanation put it succinctly 'The manorial custom gives several rights not communal rights.' 'Rights of the township disappear when examined.'[3] He concludes that 'anything that even by a stretch of language could be called a communal ownership of land, if it had ever existed, had become rare and anomalous before the stream of accurate documents began to flow.'[4] There is no evidence back to the Conquest of 'common property'. Thus 'in this chapter we may have seen enough to give us pause before we assent to any grand dogma which would make "communalism" older than "individualism". The apparent communalism of old laws covers an individualism which has deep and ancient roots.'[5]

Another line of argument put forward by the defenders of the 'village community' theory was that open-field agriculture with its mingled strips necessitated communal management. If people had to act together to plant, let animals in to graze and so on, surely there must have been some 'community organization'. Maitland answered this suggestion in several places. For instance, in an article on 'The Survival of Archaic Communities' he wrote as follows. 'It seems to me that some of our guides in these matters are in danger of exaggerating the amount of communalism that is necessarily implied in the open field system of husbandry. We have of course the clearest proof that the system can go on subsisting in days when manorial control has become hardly better than a name, that it can subsist even in the eighteenth and nineteenth centuries. We have also, so I think, fairly clear proof that it can subsist from century to century in many a village that has no court, no communal assembly. No communal bye-laws and indeed no legal recognition of the communal custom are absolutely necessary for the maintenance of the wonted course of agriculture; the common law of trespass maintains it.' [6] The effect is achieved 'not by the rights or the bye-laws of a community' but 'by the rights of other individuals'. [7] In other words a person must behave like his co-cultivators and if he mis-behaves he will either lose his crops or be disciplined by an ordinary common law writ of trespass. The 'community' does not come into it.[8]

In his Domesday **Book and Beyond** Maitland provided an analysis of the problem in a section on 'The Village Community' in 'England before the Conquest'. He started witheringly. 'A popular theory teaches us that land belonged to communities before it belonged to individuals. This theory has the great merit of being vague and elastic...' The theory 'seems to hint, and yet to be afraid to say, that land was owned by corporations before it was owned by men.' Maitland continues 'The hesitation we can understand. No one who has paid any

[1] Maitland, **History**, I, 620-1.
[2] Maitland, **History**, I, 623.
[3] Maitland, **History**, I, 629.
[4] Maitland, **History**, I, 630.
[5] Maitland, **History**, I, 688.
[6] Maitland, **Collected Papers**, II, 360.
[7] Maitland, **Collected Papers**, II, 360.
[8] For another documented discussion along the same lines, see Maitland, **Township**, 25.

attention to the history of law is likely to maintain with a grave face that the ownership of land was attributed to fictitious persons before it was attributed to men.'[1] It is here that he attacks the 'normal sequence of stages' theory of 'the anthropologists'. He argues that 'To say the least, we have no proof that among the Germans the land was continuously tilled before it was owned by individuals or by those small groups that constituted the households. This seems to be so whether we have regard to the country in which the Germans had once lived as nomads or to those Celtic and Roman lands which they subdued. To Gaul and to Britain they seem to have brought with them the idea that the cultivable land should be allotted in severalty. In some cases they fitted themselves into the agrarian framework that they found; in other cases they formed villages closely resembling those that they had left behind them in their older home. But to all appearance, even in that older home, so soon as the village was formed and had ploughed lands around it, the strips into which those fields were divided were owned in severalty by the householders of the village.'[2] Thus from the very start, land was owned by individuals or households, not by some larger entity. Thus 'our evidence, though it may point to some co-operation in agriculture, does not point to a communistic division of the fruits.' In a footnote Maitland rejects Seebohm's ideas and explains how the Anglo-Saxon tithing system 'is compatible with the most absolute individualism.'[3]

Maitland continues 'Thus, so far back as we can see, the German village had a solid core of individualism.'[4] He considers the 'commons' and again finds that the rights were attached to particular ownership of houses and arable strips so that 'such "rights of common" may take that acutely individualistic form which they seem to have taken in the England of the thirteenth century.'[5] Thus, repeating the material from the 1893 article, he puts as the side-heading 'Feebleness of the village community', for the 'village community' had 'no court, no jurisdiction.'[6] Nor was this system basically changed after 1066 with the elaboration of the manorial system. The evidence Maitland cites from the manor of Orwell 'brings to our notice the core of individualism that lies in the centre of the village. The houses and the arable strips are owned in severalty, and annexed to these houses and arable strips are pasture rights which are the rights of individuals...'[7] No more than the family, the 'village community' cannot provide a political, legal or economic foundation in the development of English society. In conclusion, therefore, he rejected the great hypothesis of the movement from Community to Individual, or even the reverse. 'In fine, is it not very possible that the formula of development should be neither "from communalism to individualism," nor yet "from individualism to communalism," but "from the vague to the definite"?'[8]

Maitland had thus shown some of the ways in which the individual was freed from the overwhelming power of kin or community. But he was well aware of

[1] Maitland, **Domesday Book**, 340-1.
[2] Maitland, **Domesday Book**, 346.
[3] Maitland, **Domesday Book**, 346, and **ibid**, note 1.
[4] Maitland, **Domesday Book**, 348.
[5] Maitland, **Domesday Book**, 348.
[6] Maitland, **Domesday Book**, 349.
[7] Maitland, **Domesday Book**, 353.
[8] Maitland, **Collected Papers**, II, 362.

other constraints that normally operated to tie the individual. One of these was the strength of structural inequality of status and power, which gave people a superior or inferior position at birth which could not be challenged. Having considered liberty of the individual at some length, he also paid attention to the closely related question of equality and inequality.

Social ranks

In relation to the higher ranks, Maitland's general case is put in the **Constitutional History of England**. In assessing the nature of the baronage, Maitland concludes that 'tenure is the quarter in which we must look: the idea of nobility of blood is not the foundation.'[1] He concedes that the idea of nobility of blood 'does occur all Europe over among the peoples of our own race if we go back far enough.' Thus 'The distinction between eorl and ceorl is a distinction between men who by birth are noble, and those who by birth are perfectly free but still not noble...' Yet, 'for a long time before the Conquest', i.e. presumably back into later Anglo-Saxon England, 'the nobility of birth had been supplanted by a nobility of tenure and of office.' Thus the 'thane is noble because of his relation to the king, a relation intimately connected with the holding of land...' Out of this one might have expected a 'nobility of tenants in chief, crown vassals.' But the Norman Conquest 'put difficulties in the way of the formation of such a nobility.' For the 'aggregate body of tenants in chief was a very miscellaneous mass, including very great men, and men who might relatively be called very small...' Hence the 'grades were many and small; there was no one place at which a hard line could be drawn; and probably it suited the king very well that none should be drawn, that he should not be hemmed in by a close aristocracy; against the greater feudatories he relies on the smaller tenants in chief.'[2]

Maitland is arguing that out of the power of the crown and special circumstances, a separate nobility of birth failed to emerge in England. Comparing the situation with France, he wrote 'Whatever social pre-eminence the families of peers may have, has no basis in our law: we have never had a **noblesse**.'[3] One symbol and key to this was the equality of all free men before the law, a central tenet of English law from at least the thirteenth century. As Milsom nicely summarizes Maitland's vision, 'The world into which Maitland's real actions fit is essentially a flat legal world, inhabited by equal neighbours. Lordship is little more than servitude over the land of another, and its content is fixed and economic. The services and incidents are important, but the law relating to them is self-contained, unrelated to other questions...' Now this 'flat world' is the opposite of that hierarchical world, based on the premise of inequality, which was to develop over the rest of the continent. But when had such a flat world developed? Milsom is clear that 'There can be no doubt that by the end of the period covered by his book, the world was as Maitland saw it.'[4] Maitland's 'Book' ends in 1307; so Milsom is talking about the second half of the

[1] Maitland, **Constitutional**, 79.
[2] Maitland, **Constitutional**, 79-80.
[3] Maitland, **Constitutional**, 171.
[4] In Maitland, **History**, I, xlvii.

thirteenth century. Thus he agrees with Maitland that by the second half of the thirteenth century we are in a flat legal world.

As Maitland himself put it, 'if we could look at western Europe in the year 1272, perhaps the characteristic of English law which would seem the most prominent would be its precocity.' It was uniform over the country. It was also uniform over all the social statuses; 'in England the law for the great men has become the law for all men, because the law of the king's court has become the common law.'[1] Thus 'English law is modern in its uniformity, its simplicity, its certainty...'[2]

Law, ultimately, is based on contractual relationships, and not on status. This is the essence of feudalism - as Maine had realized. This can be found in all aspects of English life, for instance, as Maitland notes, 'In our English law bastardy can not be called a status or condition', a bastard 'is a free and lawful man...In all other respects he is the equal of any other free and lawful man' - a situation very different from that on the Continent.[3] The same is true of children - whom, as we shall see, are not under 'patriarchal' power because of their age and status in the family, and women, who are not inferior because of their gender.

Two areas where status, birth, ascription usually operate are in relation to those above the normal law, with special privileges, namely the nobility, and those below it, the serfs. In each, Maitland notes some curious features. In his chapter on 'The Sorts and Conditions of Men', he starts by stating that in the thirteenth century, 'The lay Englishman, free but not noble, who is of full age and who has forfeited none of his rights by crime or sin, is the law's typical man, typical person.'[4] There are, of course, other special types - the 'noble men and unfree men', the clergy, Jews, aliens etc. Yet, in relation to the lay order, 'it may seem to us that, when compared with the contemporary law of France or at any rate of Germany, our law of **status** is poor: in other words, it has little to say about estates or ranks of men. Men are either free men or serfs; there is not much more to be said. When compared with tenure, status is unimportant.'[5] Thus 'our land law has been vastly more important than our law of ranks.'[6] He notes that English writers find it very difficult to translate the Latin word 'status'.

Turning specifically to the top, 'Our law hardly knows anything of a noble or of a gentle class; all free men are in the main equal before the law.'[7] As Maitland says, considering England had been conquered by the Normans, this is very strange: 'A conquered country is hardly the place in which we should look for an equality, which, having regard to other lands, we must call exceptional.'[8] Yet this equality is what there is. Under the powerful English kings, a small group emerged, 'an estate of temporal lords, of earls and barons.' But the 'principles

[1] Maitland, **History**, I, 224; and **ibid**, II, 402.
[2] Maitland, **History**, I, 225.
[3] Maitland, **History**, II, 396-7.
[4] Maitland, **History**, I, 407.
[5] Maitland, **History**, I, 407.
[6] Maitland, **History**, I, 408.
[7] Maitland, **History**, I, 408.
[8] Maitland, **History**, I, 408.

which hold it together are far more land tenure and the king's will than the transmission of noble blood.' The only privilege they have is political - they are consulted by the king. 'They have hardly any other privileges. During the baron's life his children have no privileges; on his death only the new baron becomes noble.' Among the 'extremely few' privileges was that of all free men to be judged by their peers - in this case other peers. Even this, as Maitland explains, was no great privilege and rather vague. Apart from this 'There are a few little rules of procedure which distinguish the noble from the non-noble.'[1] Thus 'English **gentix hons** have no legal privileges, English counts and barons very few.'[2]

Turning to the knights, 'knighthood can hardly be accounted a legal **status**.'[3] There is a good deal of work which only they can do. 'In administrative law therefore the knight is liable to some special burdens; in no other respect does he differ from the mere free man. Even military service and scutage [tax paid in lieu of military service] have become matters of tenure rather than matters of rank...'[4]

At the other extreme of the social hierarchy, we may wonder about the serfs. 'In the main, then, all free men are equal before the law.' And, as Maitland continues, 'Just because this is so the line between the free and the unfree seems very sharp.' So what does Maitland make of the English serf? In a letter written in 1890, Maitland noted his difficulty in describing English serfdom. 'I have been writing about villeinage and have been puzzled by our law's way of treating the villein as "free against all men but his lord".'[5] His central conclusion, though he does not quite put it in these words, is that just as nobility is a contractual relationship between king - lord - land (tenure), and not a status, so serfdom is a contractual relationship between two individuals. In this it contrasts with 'slavery' which is in most civilizations a 'status'. The conception of serfdom in medieval England according to contemporary texts 'at many points comes into conflict with our notion of slavery.' Thus Maitland says of the great English lawyer Bracton, 'In his treatment of the subject Bracton frequently insists on the relativity of serfdom. Serfdom with him is hardly a status; it is but a relation between two persons, serf and lord.' It is true that 'As regards his lord the serf has, at least as a rule, no rights; but as regards other persons he has all or nearly all the rights of a free man; it is nothing to them that he is a serf.' As Maitland says, 'Now this relative serfdom we cannot call slavery. As regards mankind at large the serf so far from being a mere thing is a free man.'[6]

Even in relation to the lord, the situation is not so clear cut. 'As against his lord the serf can have no proprietary rights.'[7] Yet, in practice, 'the lord in his court habitually treats them as owners of chattels, he even permits them to make wills...'[8] Maitland comments, 'So here again, when we look at the facts, the serf's

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[1] Maitland, **History,** I, 409, 411.
[2] Maitland, **History**, II, 446.
[3] Maitland, **History**, I, 411.
[4] Maitland, **History**, I, 412.
[5] Maitland, **Letters**, no. 86.
[6] Maitland, **History**, I, 415.
[7] Maitland, **History**, I, 416.
[8] Maitland, **History**, I, 416-7.

condition seems better described as unprotectedness than as rightlessness...'[1] Or again, 'Yet another qualification of rightlessness is suggested. More than once Bracton comes to the question whether the lord may not be bound by an agreement, or covenant, made with his serf. He is inclined to say Yes.' Bracton argues that 'the serf may be made a free man for a single purpose, namely that of exacting some covenanted benefit...'[2]

As for other people, 'The serf's position in relation to all men other than his lord is simple: - he is to be treated as a free man. When the lord is not concerned, criminal law makes no difference between bond and free...'[3] This freedom is most graphically shown in relation to property: 'in relation to men in general, the serf may have lands and goods, property and possession, and all appropriate remedies.'[4] As for the manumission of the serf, for Bracton, it is simple. Since Bracton 'habitually regards serfdom as a mere relationship' he 'sees no difficulty; the lord by destroying the relationship destroys serfdom.'[5]

All this leaves us with a very curious half-way position; a strange mixture of status and contract. As Maitland notes, 'Its central idea, that of the relativity of serfage, is strange. It looks artificial: that is to say, it seems to betray the handiwork of lawyers who have forced ancient facts into a modern theory.'[6] They were faced with the 'juristic curiosity' of 'a merely relative serfdom.' Even the relative serfdom is complex. 'When a lord allows it to be recorded that on the death of his servile tenant he is entitled to the best beast, he goes very far towards admitting that he is not entitled to seize the chattels of his serf without good cause.' Thus Maitland writes, 'We hesitate before we describe the serf as rightless even as against his lord...'[7]

As to the number of serfs, it is very difficult to estimate since 'tenure is so much more important than status', so that the contemporary surveys 'are not very careful to separate the personally free from the personally unfree'[8], an interesting admission. Furthermore, Maitland writes, 'it is highly probable that large numbers of men did not know on which side of the legal gulf they stood...'[9] A gulf of such hazy outlines is hardly a great gulf. Nevertheless, it would seem probable that 'the greater half of the rural population is unfree'[10] - whatever that means.

All this requires further investigation - for instance, though serfs could in theory be sold as chattels by their lord, how often did this happen? The economic historian Thorold Rogers wrote, 'In the many thousands of bailiffs and manor rolls which I have read, I have never met with the single instance of the sale of a serf.'[11] He also states that serfdom was a secure position and not at all

[1] Maitland, **History**, I, 417.
[2] Maitland, **History**, I, 418.
[3] Maitland, **History**, I, 419.
[4] Maitland, **History**, I, 419.
[5] Maitland, **History**, I, 428.
[6] Maitland, **History**, I, 429.
[7] Maitland, **History**, I, 430.
[8] Maitland, **History,** I, 431.
[9] Maitland, **History**, I, 432.
[10] Maitland, **History**, I, 432.
[11] Rogers, **Six Centuries**, 34.

rightless, even against the lord.[1] All this may help to explain one of the most curious silences in English history - the way in which, without any formal emancipation, without any noticeable activity of any kind, serfdom and villeinage faded away - they just seem to have sloughed off a skin and transformed themselves.

In conclusion, Maitland fully endorses the picture of English peculiarity which had been elaborated by Tocqueville and gives it historical precision. In that crucial period between the twelfth and fourteenth centuries when France and Germany moved from contract (feudalism) to status - or 'caste' in Tocqueville's language - England did not take this 'normal' path. This unusual divergence is crucial to the understanding of later class society. For example, Sugarman has noted, 'the English gentry were in this vital way institutionally different from the lesser nobilities of other nations. The fact that only the titular peers were a distinct sub-species, to be tried only by members of their own order, was surely a very important legal difference from countries where the whole of the second estate was privileged at law.'[2]

The inequalities of wealth and blood status are but two of the 'natural' inequalities which people often use to organize life in agrarian societies. Two others, age and gender, both finding their strongest expression within the family, are others. Maitland devoted considerable attention to family relations and again we may wonder how his picture fits with that of the earlier theorists.

Family relations

It is a characteristic of the majority of agrarian societies that, just as property is not owned by an individual, so the individual does not have distinct legal rights. Put crudely, the family is a single legal and political entity and the oldest male, the 'father', has fairly absolute rights over the others: men over women, parents over children, and the father over all. This is the patriarchal form, the **patria potestas** that we do not merely find in simple societies studied by anthropologists, but enshrined in Roman law and widespread in much of Western Europe in the **ancien regime**. How does Maitland's analysis of English history compare with this simplified model?

In relation to the Saxon period, Maitland felt that 'It is by no means certain...that we ought to endow the English father with an enduring **patria potestas** over his full-grown sons, even when we are speaking of the days before the Conquest.'[3] As for the later period, the position is much clearer. 'If our English law at any time knew an enduring **patria potestas** which could be likened to the Roman, that time had passed away long before the days of Bracton. The law of the thirteenth century knew, as the law of the nineteenth knows, infancy or non-age as a condition which has many legal consequences; the infant is subject to special disabilities and enjoys special privileges; but the legal capacity of the infant is hardly, if at all, affected by the life or death of his father, and the man or woman who is of full age is in no sort subject to paternal

[1] Rogers, **Six Centuries**, 44.
[2] Sugarman, 'Law', 40.
[3] Maitland, **History**, II, 437.

power... Our law knows no such thing as "emancipation", it merely knows an attainment of full age.'[1]

Equally significantly, an 'infant may well have proprietary rights even though his father is still alive.' This it explained as follows. 'Boys and girls often inherit land from their mothers or maternal kinsfolk. In such case the father will usually be holding the land for his life as "tenant by the law of England", but the fee will belong to the child. If an adverse claimant appears, the father ought not to represent the land in the consequent litigation; he will "pray aid" of his child, or vouch his child to warranty, and the child will come before the court as an independent person. What is more, there are cases in which the father will have no right at all in the land that his infant son has inherited; the wardship of that land will belong to some lord.'[2] Furthermore, 'An infant can sue; he sues in his own proper person, for he can not appoint an attorney. He is not in any strict sense of the word "represented" before the court by his guardian, even if he has one.'[3] Some '"friend" of the infant sues out the writ and brings the child into court' but the 'action will be the infant's action, not the friend's action, and the court will see that the infant's case is properly pleaded.' When the procedure was regularized in the thirteenth century 'How weak the family tie had become we see when we learn that this next friend need not be a kinsman of the infant.'[4] All of this is an extremely long way from the **patria potestas** model. The idea that infants could inherit separate property, could sue separately, that they were not responsible for their parent's crimes, or their parents for theirs after childhood is extraordinary by the standards of most civilizations.

Even more extraordinary is the relation between man and woman. Maitland treats their position in a number of key passages and throughout his account rejects the theory that female status had once been low and had 'evolved' upwards to his own time.[5] He showed that English law from very early on treated even husband and wife as separate persons, so that in England 'Long ago we chose our individualistic path.'[6] He shows that almost immediately after the Norman Conquest women were able to inherit even property which required the holder to provide military service for the crown.[7] He recognizes that within marriage from the thirteenth century, a married woman loses some rights: her husband by the common law is the wife's guardian which 'we believe to be the fundamental principle', but he constantly needs her consent also.[8] Let us examine in a little more detail three sections where he describes the status of men and women.

In relation to female children's status in England before the Conquest Maitland writes, 'That women were subject to anything that ought to be called a perpetual tutelage we do not know. Young girls might be given in marriage - or even in a case of necessity sold as slaves - against their will; but for the female as well as

[1] Maitland, **History**, II, 438.
[2] Maitland, **History**, II, 439.
[3] Maitland, **History**, II, 440.
[4] Maitland, **History**, II, 441.
[5] Maitland, **History**, II, 403.
[6] Maitland, **History**, II, 432.
[7] Maitland, **History**, I, 262.
[8] Maitland, **History**, II, 406.

for the male child there came a period of majority, and the Anglo-Saxon land-books show us women receiving and making gifts, making wills, bearing witness, and coming before the courts without the intervention of any guardians.'[1] 'After the Norman Conquest, the woman of full age who has no husband is in England a fully competent person for all the purposes of private law; she sues and is sued, makes feoffments, seals bonds, and all this without any guardian.' All this is very different from 'the "perpetual tutelage of women"', relics of which 'were to be found on the continent in times near to our own.'[2]

In relation to the complex relation of husband and wife, he found that a much more equal relationship had been partially undermined from the fourteenth to nineteenth centuries. Thus 'throughout the twelfth century and into the thirteenth we habitually find married women professing to do what according to the law of a later time they could not have done effectually.'[3] Yet through the system of the marriage settlement and the courts of equity 'the English wife, if she belonged to the richer class, became singularly free from marital control. Modern statutes have extended this freedom to all wives.'[4] Again we see a divergence between England's common law and equity system and what happened from the fourteenth century on the continent where an apparently egalitarian system, where husband and wife pooled or completely shared their property, actually led women into a trapped position with no separable rights. Maitland explains how not only did the modern freedom of English women arise out of a reaction to harsh or unjust laws, but 'we ought also to say that if our modern law was to be produced, it was necessary that our medieval lawyers should reject that idea of community which came very naturally to the men of their race and of their age. We may affirm with some certainty that, had they set themselves to develop that idea, the resulting system would have taken a deep root and would have been a far stronger impediment to the "emancipation of the married woman" than our own common law has been. Elsewhere we may see the community between husband and wife growing and thriving, resisting all the assaults of Romanism and triumphing in the modern codes.'[5]

In relation to private law in the thirteenth century 'Women are now "in" all private law, and are the equals of men. The law of inheritance, it is true, shows a preference for males over females; but not a very strong preference, for a daughter will exclude a brother of the dead man, and the law of wardship and marriage, though it makes some difference between the male and the female ward, is almost equally severe for both. But the woman can hold land, even by military tenure, can own chattels, make a will, make a contract, can sue and be sued. She sues and is sued in person without the interposition of a guardian; she can plead with her own voice if she pleases; indeed - and this is a strong case - a married woman will sometimes appear as her husband's attorney. A widow will often be the guardian of her own children; a lady will often be the guardian of the children of her tenants.'[6]

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[1] Maitland, **History**, II, 437.
[2] Maitland, **History**, II, 437.
[3] Maitland, **History**, II, 411.
[4] Maitland, **History**, II, 433.
[5] Maitland, **History**, II, 433.
[6] Maitland, **History**, I, 482.

In relation to public functions, however, women were excluded from almost all public roles. Maitland again summarizes the position. 'As regards private rights women are on the same level as men, though postponed in the canons of inheritance; but public functions they have none. In the camp, at the council board, on the bench, in the jury box there is no place for them.'[1]

We thus have an intermediary status. In terms of the position of spinsters and widows, their private position was as it is today. In relation to married women, they were under the 'guardianship' of their husband. In relation to public affairs, they were largely excluded. There are no grounds for thinking that their status had improved since Anglo-Saxon times, and it probably deteriorated between the thirteenth and nineteenth centuries, but much less so than of many women in continental Europe. The relatively high status of women which Tocqueville saw in America is a direct descendant of this - even down to his analysis of the extreme separation between the private and public role of women which exactly mirrors Maitland's account.

From a consideration of Maitland's treatment of feudal, family and community relations we can see that he elaborated a picture that enriches and substantiates the guesses of Montesquieu, Smith and Tocqueville. He showed some structural peculiarities in England. The individual was freer; the social structure was more flexible. Above all, the vital separations between economy, kinship and polity, which Maitland thought had been present in Anglo-Saxon England, had survived into a peculiar form of feudalism, which had then evolved in a different direction from that in most of the 'feudal' societies in continental Europe. Thus Maitland had outlined a narrative which filled in the earlier guesses, showing how the widespread tendency towards rigidity had not happened in England.

Maitland's solutions here lead us on to further questions and in particular make us wonder why it was that in the important period after about 1200, England retained its flexibility, its separation of powers, whereas much of continental Europe moved towards centralized power, the re-linking of politics and economics, politics and religion, a growth of a status-based society. Maitland had shown that England was peculiar. He needed to explain why it had become different and, even more importantly, why it remained so.

[1] Maitland, **History**, I, 485.

6. The Divergence of Legal Systems

If we gather together all his discussions, Maitland's picture of what happened is, in essence, as follows. The legal, political and social systems of much of north-western Europe were alike in the long period between the collapse of the Roman Empire and about the twelfth century. There was nothing special about England except that, having been over-run by three waves of Teutonic peoples (Anglo-Saxons, Vikings, Normans) and having been less deeply Romanized than much of continental Europe, it was an extreme example, with northern Germany and Scandinavia, of the Germanic system. It was only in the twelfth century that the divergence between England and the Continent became clear, consisting largely in the fact that in England the relations between king, lords and people remained balanced, property was held by contract and the rights of kin were not re-established. In other words, while much of the continent began to move towards a 'peasant' and 'caste', that is highly stratified, system, England developed towards an individualized and open social structure. The similarity to Tocquevil-le's account is striking.

The question, of course, is why England did not follow the course of most continental countries. Ultimately, Maitland's answer seems to lie in the field of politics and law. At the heart of this was the issue of royal power. On the one hand it was the powerful, highly centralized, legal system focusing on the Crown which began to differentiate England. Yet Maitland also documents in great detail the numerous 'intermediary bodies' and checks and balances, which prevented the judicial centralization from turning into the administrative centralization and political absolutism which Montesquieu and Tocqueville, had seen emerge on the Continent. The Crown in England was both immensely powerful, yet not absolutist. Following Stubbs, Maitland characterized its position on a number of occasions, in a series of paradoxical remarks which capture the essence of the fact that the Crown is both the font of power and law, yet not absolute. 'The king can do wrong; he can break the law; he is below the law, though he is below no man and below no court of law.'[1] Thus the 'rights of the king are conceived as differing from the rights of other men rather in degree than in kind.'[2] Magna Carta merely confirmed what was long the case, that 'the king is ... below God and the law ... the king is bound to obey the law', a view which Fortescue excellently elaborated in the fifteenth century, but had earlier been exemplified by Bracton.[3]

Thus there is a contradiction. England is the most centralized, rule bound and highly governed country in Europe, with royal power penetrating right down to the level of every citizen, just as every citizen holds his property of the Crown. On the other hand, there is no large bureaucracy, no standing army, an enormous amount of delegated power and delight in powerful intermediary liberties. Maitland filled in the picture which Montesquieu and Tocqueville had sketched out, showing how it worked and evolved. Although he occasionally alludes to 'some cause deep-seated in our national character'[4], he pays little attention to

[1] Maitland, **History**, I, 515-6.
[2] Maitland, **History**, I, 512.
[3] Maitland, **Constitutional**, 100, 198-9.
[4] Maitland, **History**, I, 344.

such nebulous concepts. Instead he focuses on a set of historical 'accidents'. The accident of islandhood, of the Norman Conquest, of the genius of the Angevin rulers and so on. Nothing was to do with 'race'; nothing was determined by Germanic origins. Yet origins and customs, and language and many other things were parts of that unusual chemistry which produced an increasingly odd situation on this small island.

In a sense, to understand why and how the peculiarity emerged through a mixture of structural and accidental causes, one would have to write a detailed history of England. Briefly, however, we can approach part of Maitland's answer to this question by looking at two themes that he pursued with increasing interest, that is the relations between English and Roman law, and the development of corporations and trusts. Both provide keys to his solution.

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Maitland's remarks on the growing divergence between English and Roman law are scattered through his works. Although he had read deeply on continental law, carried on a correspondence with a number of leading Roman law scholars and even edited part of the work of one of the greatest comparative philosophers of law, Otto Gierke, Maitland's references are usually allusive and brief. It would have grossly inflated his work to have undertaken as detailed a survey of the legal traditions of each country as he did of England. His comparative remarks therefore have to be set in the context of the numerous other studies of the comparison of continental and English law which were available at the time and have been published since.[1] He looked at the English side of the differences, and took the continental side as given. Some may wonder whether he has thereby exaggerated or distorted the differences and it is for this reason that I later provide an assessment from the French side by the greatest of the later comparative historians, Marc Bloch. Maitland's work should also, obviously, be read in the context of the previous detailed comparative accounts by Montesquieu, Adam Smith and Tocqueville with whom his analysis is essentially in agreement.

Maitland noted that during the twelfth to sixteenth centuries much of northern Europe received a renovated Roman law. As he put it, 'Englishmen should abandon their traditional belief that from all time the continental nations have been ruled by the "civil [i.e. Roman] law", they should learn how slowly the renovated Roman doctrine worked its way into the jurisprudence of the parliament of Paris, how long deferred was the "practical reception" of Roman law in Germany, how exceedingly like our common law once was to a French **coutume**.[2]'

By the thirteenth century, England was beginning to look distinctly different from the rest of Europe, not because England had changed, but because Roman law had not established itself there: 'English law was by this time recognized as distinctly English.' This feeling of contrast was heightened because, although 'Roman jurisprudence was but slowly penetrating into northern France and had

[1] For example, Vinogradoff, Roman **Law**, Stein and Shand et al.
[2] Maitland, **History**, I, xxxvi.

hardly touched Germany' by the thirteenth century, many Englishmen thought that the whole of Europe now had written Roman law, which 'served to make a great contrast more emphatic.'[1] Certainly, by the sixteenth century England was an island carrying an old Germanic legal system, and lying off a land mass dominated by Roman law.

Examples of the growing divergence abound. For instance, in relation to the law of contract 'it is plain that at latest in the thirteenth century our English law was taking a course of its own.'[2] In relation to inheritance, over much of Europe there was a partial 'reception' of Roman ideas, but 'during the middle ages the Roman system was not observed in England.'[3] The claims of wider kindred to family land, were 'finding a formal recognition in the new jurisprudence' over much of Europe, but not in England.[4] When Normans and Angevins came to England, they re-enforced, modified and developed a system which was different from that which grew up in their homeland. 'Not upon the Normans as Normans can we throw the burden of our amazing law of inheritance, nor can we accuse the Angevin as an Angevin.'[5] Thus 'In dealing with any century later than the thirteenth, the historian of English law could afford to be silent about Roman and Canon law, for...these laws appear in a strictly subordinate position, are administered by special courts, and exercise very little, if any, influence on the common law of England.'[6]

The effects of this difference were immense and among them, Maitland believed, was the reason why political absolutism did not develop in England. 'The English common law was tough, one of the toughest things ever made. And well for England was it in the days of Tudors and Stuarts that this was so. A simpler, a more rational, a more elegant system would have been an apt instrument of despotic rule. At times the judges were subservient enough: the king could dismiss them from their offices at a moment's notice; but the clumsy, cumbrous system, though it might bend, would never break. It was ever awkwardly rebounding and confounding the statecraft which had tried to control it. The strongest king, the ablest minister, the rudest Lord-Protector could make little of this "ungodly jumble".'[7] Or again, Maitland writes 'our old law maintained its continuity...it passed scathless through the critical sixteenth century, and was ready to stand up against tyranny in the seventeenth...if we look abroad we shall find good reason for thinking that but for these institutions our old-fashioned national law...would have utterly broken down, and the "ungodly jumble" would have made way for Roman jurisprudence and for despotism.'[8] Instead, the common law with its vague but strong assumption that the king was under no man, but **was** under the law, was maintained.

Clearly the maintenance and development of an alternative legal system to Roman law was a key to England's peculiarity. How did this happen? Here we

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[1] Maitland, **History**, I, 188.
[2] Maitland, **History**, II, 185.
[3] Maitland, **History**, II, 361.
[4] Maitland, **History**, I, 344.
[5] Maitland, **History**, I, 266.
[6] Maitland, **Collected Papers**, II, 30-1.
[7] Maitland, **Collected Papers**, II, 484-5.
[8] Maitland, **Collected Papers**, II, 495-6.

can only summarize a few of Maitland's widely spread hints. The first thing to look at, as Tocqueville would have said, was the 'point of origin'. Before the Norman invasion the differences were already marked. This was partly due to the fact that the effects of the Germanic invasions were different. In England the Roman civilization was swept away. But 'in the kingdoms founded by Goths and Burgundians the intruding Germans were only a small part of a population, the bulk of which was Gallo-Roman, and the barbarians...had made their entry as subjects or allies of the emperor...'[1] This partly helps to explain why Roman civilization, in the shape of law and religion and language, came back into France, Spain and Italy, whereas it did not do so in England. In England 'there was no mass of Romani, of people who all along had been living Roman law of a degenerate and vulgar sort and who would in course of time be taught to look for their law to Code and Digest.'[2]

The difference becomes clear if we contrast the continental and English situations. 'On the continent of Europe Roman law had never perished. After the barbarian invasions it was still the "personal law" of the conquered provincials. The Franks, Lombards, and other victorious tribes lived under their old Germanic customs, while the vanquished lived under the Roman law. In course of time the personal law of the bulk of the inhabitants became the territorial law of the country where they lived. The Roman law became once more the general law of Italy and of Southern France; but in so doing it lost its purity, it became a debased and vulgarised Roman law, to be found rather in traditional custom than in the classical texts, of which very little was known. Then, at the beginning of the twelfth century, came a great change. A law-school at Bologna began to study and to teach that Digest in which Justinian had preserved the wisdom of the great jurists of the golden age. A new science spread outwards from Bologna.'[3]

In England the situation was different during the Anglo-Saxon period. 'Eyes, carefully trained, have minutely scrutinised the Anglo-Saxon legal texts without finding the least trace of a Roman rule outside the ecclesiastical sphere. Even within that sphere modern research is showing that the church-property-law of the Middle Ages, the law of the ecclesiastical "benefice", is permeated by Germanic ideas. This is true of Gaul and Italy, and yet truer of an England in which Christianity was for a while extinguished. Moreover, the laws that were written in England were, from the first, written in the English tongue; and this gives them a unique value in the eyes of students of Germanic folk-law, for even the very ancient and barbarous **Lex Salica** is a Latin document, though many old Frankish words are enshrined in it. Also we notice - and this is of grave importance - that in England there are no vestiges of any "Romani" who are being suffered to live under their own law by their Teutonic rulers.'[4]

Thus, by the time of the Norman invasion there was a significant difference, already, between say France and England. This difference was made the greater by the fact of the size and geography of England. Thus Maitland writes that in

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[1] Maitland, **History**, I, 13-14.
[2] Maitland, **History**, I, 24.
[3] Maitland, **Collected Papers**, II, 439-40.
[4] Maitland, **Selected Essays**, 100; for a similar description, see also Maitland, **Collected Papers**, II, 428-9.

accounting for the unusually coherent legal and political system in England, 'we should have to remember the small size, the plain surface, the definite boundary of our country.' This continues as a very powerful background factor: 'This thought indeed must often recur to us in the course of our work: England is small: it can be governed by uniform law: it seems to invite general legislation.' Again, we should note that 'the kingship of England, when once it exists, preserves its unity: it is not partitioned among brothers and cousins.' Furthermore, 'a close and confused union between church and state prevented the development of a body of distinctively ecclesiastical law which would stand in contrast with, if not in opposition to, the law of the land.'[1]

The fact of geography meant that England became one nation and one state. Referring to the twelfth and thirteenth century, Maitland wrote that 'there was no need in England for that **reconstitution de l'unite nationale** which fills a large space in schemes of French history, and in which, for good and ill, the Roman texts give their powerful aid to the centripetal and monarchical forces. In England the new learning found a small, homogeneous, well conquered, much governed kingdom, a strong, a legislating kingship. It came to us soon; it taught us much; and then there was healthy resistance to foreign dogma.'[2]

The reference to the 'much governed kingdom' takes us onto his last two major theories. The effects of the Norman Conquest and subsequent development of Angevin kingship were to make England even more homogeneous and united. For instance, in terms of law, 'The custom of the king's court is the custom of England and becomes the common law.'[3] Or even more graphically, 'our system is a single system and revolves around Westminster Hall.'[4] In England the 'nation is not a system of federated communities; the king is above all and has a direct hold on every individual.'[5] Yet this direct hold is also a protection, for instance against the oppressions of the lords. By the statute of novel disseisin [new dispossession] of 1166, for example, the 'seisin of a free tenement, no matter of what lord it be holden, is protected by the king.'[6]

Thus part of the answer is that the Crown was so powerful that it 'protected' the individual, not only against his superiors, but against the strong claims of the Church, or of his family. 'Here in England old family arrangements have been shattered by seignorial claims.'[7] There is no overlap of family and law, just as the absence of defined kin groups broke any possible link between family and religion. This is reinforced by the religious system for 'the Christianity which the Germans have adopted...is not a religion which finds its centre at the family hearth...the heir could not offer the expiatory sacrifice, nor would it be offered in his house; no priesthood had descended upon him.'[8]

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[1] Maitland, **History**, I, 20-1.
[2] Maitland, **History**, I, 24.
[3] Maitland, **History**, I, 184.
[4] Maitland, **Collected Papers**, I, 483.
[5] Maitland, **History**, I, 688.
[6] Maitland, **History**, I, 146.
[7] Maitland, **History**, II, 445.
[8] Maitland, **History**, II, 257-8.

What then of the growing interest in Roman law that was spreading all over Europe in the twelfth century onwards? Here Maitland develops a very subtle argument which we might term the 'vaccination' theory. England did absorb some elements of Roman law, that it to say some systematization and clarity, enough to make its own law better. Yet it was enough to prevent the full version of Roman law being accepted at a later date

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Maitland was well aware that Roman Law had a considerable influence on English law in the twelfth and particularly the thirteenth centuries. All over Europe in the thirteenth century onwards Roman Law swept all before it. 'In the thirteenth century the Parliament of Paris began the work of harmonising and rationalising the provincial customs of Northern France, and this it did by Romanising them. In the sixteenth century, after "the revival of letters," the Italian jurisprudence took hold of Germany, and swept large portions of the old national law before it. Wherever it finds a weak, because an uncentralised, system of justice, it wins an easy triumph.'[1]

To England 'it came early' so that 'very few are the universities which can boast of a school of Roman Law so old as that of Oxford.'[2] Thus 'for a short while, from the middle of the twelfth to the middle of the thirteenth century' the influence of Roman Law 'was powerful'. 'Some great maxims and a few more concrete rules were appropriated, but on the whole what was taken was logic, method, spirit rather than matter.'[3] The extent and limits of the influence can be seen in the work of the greatest of medieval English lawyers, Bracton. 'He was an ecclesiastic, an archdeacon, but for many years he was one of the king's justices. He had read a great deal of the Italian jurisprudence, chiefly in the works of that famous doctor, Azo of Bologna. Thence he had obtained his idea of what a law-book should be, of how law should be arranged and stated; thence also he borrowed maxims and some concrete rules; with these he can fill up the gaps in our English system. But he lets us see that not much more can now be done in the way of Romanisation.'[4]

Bracton mainly drew on English common law, for he found that the numerous writs and precedents there showed a system where 'the king's court of professional justices - the like of which was hardly to be found in any foreign land, in any unconquered land - had been rapidly evolving a common law for England, establishing a strict and formal routine of procedure, and tying the hands of all subsequent judges.'[5] Consequently his work, rather than ushering in Roman Law, had the opposite effect. 'From Bracton's day onwards Roman law exercises but the slightest influence on the English common law, and such influence as it exercises is rather by way of repulsion than by way of attraction. English law at this early period had absorbed so much Romanism that it could withstand all future attacks, and pass scathless even through the critical

[1] Maitland, **Collected Papers**, II, 441.
[2] Maitland, **Collected Papers**, II, 441.
[3] Maitland, **Collected Papers**, II, 443.
[4] Maitland, **Collected Papers**, II, 444.
[5] Maitland, **Collected Papers**, II, 444.

sixteenth century.'[1] It was shortly after he wrote his treatise that Edward I's (1272-1307) reign saw 'English institutions finally take the forms that they are to keep through coming centuries.'[2]

Bracton's work and the unusual failure of Roman Law to gain more than a small foothold in England were due to many other factors. One of them was the legislative ability of the Angevin kings and the expansion of royal justice. In his characteristically graphic way Maitland describes what happened. If the Anglo-Saxon laws had been maintained unaltered, the English legal system might have 'split into a myriad local customs, and then at some future time Englishmen must have found relief from intolerable confusion in the eternal law of Rome.' This did not happen because, among other things, 'under Henry II the king's own court flung open its doors to all manner of people, ceased to be for judicial purposes an occasional assembly of warlike barons, became a bench of professional justices, appeared periodically in all the counties of England under the guise of the Justices in Eyre. Then begins the process which makes the custom of the king's court the common law of England.'[3] Thus 'in the middle of the twelfth' Henry II 'concentrated the whole system of English justice round a court of judges professionally expert in the law. He could thus win money - in the Middle Ages no one did justice for nothing - and he could thus win power; he could control, and he could starve, the courts of the feudatories. In offering the nation his royal justice, he offered a strong and sound commodity. Very soon we find very small people - yeomen, peasants - giving the go-by to the old local courts and making their way to Westminster Hall, to plead there about their petty affairs.'[4] Maitland believed that 'King Henry and his able ministers came just in time - a little later would have been too late: English law would have been unified, but it would have been Romanised.'[5] There were disadvantages to the English system, 'But to say nothing of the political side of the matter, of the absolute monarchy which Roman law has been apt to bring in its train, it is probably well for us and for the world at large that we have stumbled forwards in our empirical fashion, blundering into wisdom.'[6]

For Maitland the story did not quite finish here. Impressed by the resurgence and spread of Roman Law in the sixteenth century, particularly in Germany, he suggested that England narrowly avoided becoming Romanized again in that century.[7] It appears that his anxiety was exaggerated since numerous subsequent historians have examined the matter and have suggested that, short of actual conquest by Philip II, there was no real likelihood of such a reception taking place.[8] Thus by the end of the thirteenth century, he argued, the trajectories of England and much of continental Europe were decisively diverging.

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[1] Maitland, **Collected Papers**, II, 444-5.
[2] Maitland, **Selected Essays**, 105.
[3] Maitland, **Collected Papers**, II, 434.
[4] Maitland, **Collected Papers**, II, 438.
[5] Maitland, **Collected Papers**, II, 438.
[6] Maitland, **Collected Papers**, II, 439.
[7] Maitland, **Selected Essays**, ch.vii.
[8] Elton, **Maitland**, 79-88 summarizes some of the arguments.

The absence of the reception of Roman law had many implications in every sphere of life; it altered political relations, social relations, religion. In a late essay on 'The Body Politic' Maitland mused on some of the reasons for the divergence between England and the continent. He made a few further suggestions. Speaking of Italy, Spain, Germany, the Low Countries, France and England he wrote that 'Of all these countries at the critical time, say between 1150 and 1300, Britain was the only one in which there was no persecution of heretics, in which there were no heretics to persecute.' This influenced the law deeply. 'Everywhere else the inquisitory process fashioned by Innocent III for the trial of heretics becomes a model for the temporal courts.' He admitted that this was not the only reason for divergence. 'If I were to say more I should have to speak of the causes which made the England of the twelfth century the most governable and the most governed of all European countries, for if a Tocqueville had visited us in 1200 he would have gone home to talk to his fellow-countrymen of English civilization and English bureaucracy.' Nevertheless, he continued that 'there can I think be no doubt that we have laid our finger on one extremely important cause of divergence when we have mentioned the Catharan heresy.' He notes that the Cathar or Albigensian heresies became 'endemic in the south of France' and in particular in Languedoc. Yet he decides to turn away from this and ends by asserting that the English history, though diverging, is as 'normal' as any other.

Nevertheless in considering the wider causes of the growing divergence, Maitland's mind did not rest with Roman law and religion or even islandhood. Rather, he began to see that it was possible to investigate a largely overlooked but enormously significant reason for the divergence.

7. Fellowship and Trust

In his consideration of the balance of liberty, equality and wealth through time, Maitland had effectively demolished one side of the famous nineteenth century dichotomy which was the basis of most thought on the evolution of societies. He had shown that not all civilizations had started in a world where individuals were embedded within the community, where contract was entirely subordinate to status, and where hierarchy and patriarchy were universal. Yet his magnificent achievement would be incomplete if he were to be unable to re-construct the other end of the famous supposed transformation. He needed to re-think the nature of the modern world as supposedly constituted by contract, individualism and equality.

In the last few years of his life, Maitland sketched out a plan for how this re-thinking might be done. He died without implementing the scheme in detail. But we can see in his hints the way in which he finally reconciled those great contradictions which he had wrestled with in his youthful fellowship dissertation on liberty and equality, namely how Adam Smith's 'self love' and 'social love' could be harmonized, and how Tocqueville's problem of how to reconcile equality with liberty could be achieved. Maitland did this through an exploration of what he came to believe was the greatest of all English legal contributions to the world, the Trust. This was an institution born by accident, not from Roman law, but which became the third great principle of social organization in the world, standing on the same level as Status and Contract. It was the Trust and the trust which it engendered which provided the foundations for modern liberty, wealth and equality.

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Maitland asked himself what the link between political liberty, economic prosperity and the legal framework might be. Tocqueville had isolated parts of the solution. He had noted that there was a developing tendency in much of Europe for the central power to abolish all the intermediary bodies, that is to withdraw any franchises previously given to towns, local assemblies and parliaments. Any corporate group which derived its power from the State became a threat and was undermined. In the end one had the State and the Individual - with very little in between. There were very few ways in which individuals could associate without incurring the jealousy of the State. Since, among other things, religious and economic differentiation and development required the formation of sub-units - to worship, trade, manufacture - this tendency to eliminate the smaller grouping would finally abolish political, religious and economic liberty and also abolish progress towards wealth.[1]

Tocqueville also saw that one country seemed to have developed along a different path. He laid a great stress in his work on America on the free associations which the Americans constantly set up. These associations were the essence of their religious, social and economic dynamism. Without them, wealth and liberty would again vanish. Thus Tocqueville had isolated the structural mechanism which linked social and legal forms through to religious and

[1] Fukuyama, **Trust**, has recently endorsed this general view.

economic liberty. What he lacked was the training and deep knowledge of medieval European law to see what the 'point of departure' of this development was. He traced it back to England, as with other features, but was unable to pursue the matter further. It is from Maitland that we receive an answer.[1]

Maitland started his account of the development of the corporation based on Roman law with the universal need for some kind of group above the level of the individual. 'Every system of law that has attained a certain degree of maturity seems compelled by the ever-increasing complexity of human affairs to create persons who are not men, or rather (for this may be a truer statement) to recognize that such persons have come and are coming into existence, and to regulate their rights and duties.'[2] The essence of what has to be set up, the corporation or 'embodiment', he describes as follows. 'The core of the matter seems to be that for more or less numerous purposes some organized group of men is treated as an unit which has rights and duties other than the rights and duties of all or any of its members. What is true of this whole need not be true of the sum of its parts, and what is true of the sum of the parts need not be true of the whole. The corporation, for example, can own land and its land will not be owned by the sum of the corporators; and, on the other hand, if all the corporators are co-owners of a thing, then that thing is not owned by the corporation. This being so, lawyers from the thirteenth century onwards have been wont to attribute to the corporation a "personality" that is "fictitious" or "artificial".'[3] We are told that 'Sinibald Fieschi, who in 1243 became Pope Innocent IV was, it is said, the first to proclaim in so many words that the **universitas** is **persona ficta**.' [the association is a fictive person] [4]

The corporation thus has considerable power. The crucial question is where it derives this power from. In relation to English boroughs Maitland argued that 'Incorporation must be the outcome of royal charter...The king makes something. He constitutes and erects a body corporate and politic in deed, fact and name (in **re, facto et nomine**).'[5] Maitland gave a fuller account of the development of corporation theory on the Italian model. 'Its sacred texts were the law of an unassociative people. Roman jurisprudence, starting with a strict severance of **ius publicum** from **ius privatum**, had found its highest development in "an absolutist public law and an individualistic private law." ... The theory of corporations which derives from this source may run (and this is perhaps its straightest course) into princely absolutism, or it may take a turn towards mere collectivism (which in this context is another name for individualism); but for the thought of the living group it can find no place; it is condemned to be "atomistic" and "mechanical".'[6] He believed that 'If it be our task legally to construct and maintain comfortable homes wherein organic groups can live and enjoy whatever "liberty of association" the Prince will concede to them, a little, but only a little, can be done by means of the Romanist's co-ownership (**condominium, Miteigentum**) and the Romanist's

[1] For some of the background to his work, and particularly the relations with German jurisprudence and the work of Gierke, see Runciman, **Pluralism**, in particular chapters 3-5.
[2] Maitland, **History**, I, 486.
[3] Maitland, **History**, I, 488.
[4] Maitland, **Township**, 18.
[5] Maitland, **Township**, 18.
[6] Maitland, **Political Thought**, xxviii.

partnership (**societas, Gesellschaft**). They are, so we are taught, intensely individualistic categories: even more individualistic than are the parallel categories of English law, for there is no "jointness" (**Gesammthandtschaft**) in them.'[1] This leads to what is known as the 'Concession Theory'. That is to say 'The corporation is, and must be, the creature of the State. Into its nostrils the State must breathe the breath of a fictitious life, for otherwise it would be no animated body but individualistic dust.'[2] Thus 'the corporation does not grow by nature; it must be made, by the act of parliament, or of the king, or of the pope...'[3] Basically, 'If the personality of the corporation is a legal fiction, it is the gift of the prince.'[4] He quoted a classic definition that 'a Corporation is a Franchise' and commented that 'a franchise is a portion of the State's powers in the hands of a subject.'[5]

The absolutist element in this State derivation is spelt out by Maitland with clarity, for 'what was understood to be the Roman doctrine of corporations was an apt lever for those forces which were transforming the medieval nation into the modern State. The federalistic structure of medieval society is threatened. No longer can we see the body politic as **communitas communitatum**, a system of groups, each of which in its turn is a system of groups. All that stands between the State and the individual has but a derivative and precarious existence.'[6] Thus, paradoxically, rather than strengthening the individual in relation to the State, the corporation became an indirect way of weakening the subject. France provided a very good example, as Montesquieu and Tocqueville had earlier realized. In France, 'I take it, we may see the pulverising, macadamising tendency in all its glory, working from century to century, reducing to impotence, and then to nullity, all that intervenes between Man and State...In this, as in some other instances, the work of the monarchy issues in the work of the revolutionary assemblies. It issues in the famous declaration of August 18, 1792: "A State that is truly free ought not to suffer within its bosom any corporation, not even such as, being dedicated to public instruction, have merited well of the country." That was one of the mottoes of modern absolutism: the absolute State faced the absolute individual.'[7] It is this view of the tendency to absolutism, and the way a Roman concept of corporations aided it, that explains remarks Maitland made in a letter to Henry Jackson in 1900. 'The subject of my meditation is the damnability of corporations. I rather think that they must be damned...' He ends the letter by looking forward to a great work. 'Then for the great treatise **De Damnabilitate Universitas**.'[8]

If, then, it was not the Roman Law corporation that led towards the vibrant world of American associationalism, where did the key lie? Here, in the last ten years of his life, Maitland started to see the answer, and it was an accidental, unexpected and chance one. It lay in the development of a device that had no roots in Roman law, but was a bi-product of many forces, in particular the

[1] Maitland, **Political Thought**, xxx.
[2] Maitland, **Political Thought**, xxx.
[3] Maitland, **History**, I, 490.
[4] Maitland, **Collected Papers**, III, 310.
[5] Maitland, **Political Theories**, xxxi.
[6] Maitland, **Collected Papers**, III, 310.
[7] Maitland, **Collected Papers**, III, 311.
[8] Quoted in Fisher, **Life**, 124-5.

inadequacies of Roman law and the structural tensions in English society in the thirteenth century. He had considered the theory that the origin of the Trust was in Roman law, but by 1894 could write that 'I have long been persuaded that every attempt to discover the genesis of our **use** [the device that led into the Trust] in Roman law breaks down...'[1] In his lectures on Equity, given up to the year of his death, he told his audience that 'I don't myself believe that the use came to us as a foreign thing. I don't believe that there is anything Roman about it. I believe that it was a natural outcome of ancient English elements.'[2] He expanded this remark later in the lectures, starting his assessment of the evidence as follows: 'Some have thought that this new jurisprudence of uses was borrowed from the Roman law; that the English use or trust is historically connected with the **fidei commissum**. I do not myself believe in the connexion. One reason for this disbelief I will at once state because it leads on to an important point. From the first the Chancellors seem to have treated the rights of the **cestui que use** [the person or persons on whose behalf the trust is undertaken] as very analogous to an estate in land. They brought to bear upon it the rules of the English land law as regards such matters as descent and the like.'[3]

Maitland believed he might discover something special and powerful. He had, among other things, thrown light on the question of how it was possible to move from status based societies to something other than pure, atomistic and individualistic contract. His excitement on discovering this key to the riddle of the peculiar nature of the modern world is palpable. In a letter to John Gray in 1902 he wrote of 'a matter of great historical importance - namely the extreme liberality of our law about charitable trusts...I think that continental law shows that this was a step that would not and could not be taken by men whose heads were full of Roman Law.'[4] The individual was acting like a king. '**Practically** the private man who creates a charitable trust does something that is very like the creation of an artificial person, and does it without asking leave of the State.'[5] The following year he also wrote to Gray that 'I am endeavouring to explain in a German journal how our law (or equity) of trusts enabled us to keep alive "unincorporated bodies" which elsewhere must have perished.'[6]

In the few years before his premature death he came to believe that the Trust was probably the most important of all English legal contributions. He wrote 'The idea of a trust is so familiar to us all that we never wonder at it. And yet surely we ought to wonder. If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely, the development from century to century of the trust idea.'[7] These words were echoed in a letter to John Gray in November 1903, 'Some one ought to explain our trust to the world at large, for I am inclined to think that the construction thereof is the greatest feat that men of our race have performed in the field of

[1] Maitland, **Collected Papers**, II, 403.
[2] Maitland, **Equity**, 6.
[3] Maitland, **Equity**, 32.
[4] Fisher, **Life**, 134.
[5] Fisher, **Life**, 134.
[6] **Letters**, ed. Fifoot, no.364; see also the letter of 15th November to the same.
[7] Maitland, **Collected Papers**, III, 272.

jurisprudence. Whether I shall be able to do this remains to be seen - but it ought to be done.'[1] Increasingly ill, Maitland was unable to perform the task and died within three years. But he has given us glimpses of how he would have approached the subject and why he thought it so very important.[2]

Through a series of reported conversations with his German lawyer friends, Maitland brought home the fact that the trust was something unique to England and very important. The Trust, Maitland explained to his students in a series of lectures given up to the year of his death, 'perhaps forms the most distinctive achievement of English lawyers. It seems to us almost essential to civilization, and yet there is nothing quite like it in foreign law. Take up for instance the ... Civil Code of Germany; where is trust? Nowhere. This in the eyes of an English practitioner is a big hole. Foreigners don't see that there is any hole. "I can't understand your trust," said Gierke to me.'[3] The enormity of the gap in Continental law is shown by another remark. Much of modern society, as many have argued, is based on Contract. Yet Maitland chides a German friend for not having anything equivalent to the Trust in their legal system and tells him that 'I have looked for the Trust, but I cannot find it; to omit the Trust is, I should have thought, almost as bad as to omit Contract.'[4] The German friend was obviously nettled by such remarks and others such as 'Foreigners manage to live without trusts. They must.'[5] He replied '"Well, before you blame us, you might tell us what sort of thing is this wonderful Trust of yours.'[6] Maitland is more than happy to attempt this, and indeed published one of his longest analyses of trusts and corporations in German. He was keen to do so because he believed that 'Of all the exploits of Equity the largest and the most important is the invention and development of Trust.'[7] Consequently 'Anyone who wishes to know England, even though he has no care for the detail of Private Law, should know a little of our Trust.'[8] Nor was it just the concept of the Trust in itself that was so striking; many of the ideas which sprang out of it were equally remarkable. For example 'That idea of the trust-fund which is dressed up (invested) now as land and now as current coin, now as shares and now as debentures seems to me one of the most remarkable ideas developed by modern English jurisprudence.' [9]

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The idea of holding something in trust for someone else is a very old one and may have been found in a number of Germanic societies after the collapse of the Roman Empire. Certainly Maitland found that the idea of the use, **opus**, was widespread in Anglo-Saxon England, for example 'long before the Norman

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[1] Fisher, **Life**, 147.

[2] Maitland's hints were largely concealed. Thus even the normally perceptive John Burrow in his treatment of Maitland's work on 'the spirit of association' and the nature of the Trust can suggest that Maitland treated the subject as roughly equivalent to 'clubbability', the 'ethics of returning library books' (Burrow, 'Village Community', 280).

[3] Maitland, **Equity**, 23; Otto Gierke, part of whose work Maitland translated (in **Political Theories**) was one of the very greatest of modern legal theorists.

[4] Maitland, **Collected Papers**, III, 323.

[5] Maitland, **Collected Papers**, III, 273.

[6] Maitland, **Collected papers,** III, 323.

[7] Maitland, **Equity**, 23.

[8] Maitland, **Collected Papers**,III, 322.

[9] Maitland, **Collected Papers**, III, 277.

Conquest we may find a man saying that he conveys land to a bishop to the use of a church...'[1] Well before the revival of Roman law with its idea of a corporation created by a higher power, there was a widespread idea of an unincorporated body of people who held some asset on behalf of themselves or others. 'Probably as far back as we can trace in England any distinct theory of the corporation's personality or any assertion that this personality must needs have its origin in some act of sovereign power, we might trace also the existence of an unincorporated group to whose use land is held by feoffees.'[2] The germ of the idea, holding to the use of another in trust and the creation of a non-governmental body, was thus already present. Its formal institutionalization on a large scale which was to change the world began, however, in the thirteenth century.

One minor contribution to this development may have been religious. Several times Maitland draws attention to the effect of the peculiar vows of poverty undertaken by the new Franciscan orders who came to England in the early thirteenth century. 'The law of their being forbade them to own anything... A remarkable plan was adopted.' This was that the benefactor would convey the property which they needed in order to survive 'to the borough community "to the use of" or "as an habitation for" the friars.'[3] The major contribution, however, came from another source.

Maitland pointed out that the institutionalized trust emerged out of a dilemma. 'The Englishman cannot leave his land by will. In the case of land every germ of testamentary power has been ruthlessly stamped out in the twelfth century. But the Englishman would like to leave his land by will. He would like to provide for the weal of his sinful soul, and he would like to provide for his daughters and younger sons. That is the root of the matter. But further, it is to be observed that the law is hard upon him at the hour of death, more especially if he is one of the great. If he leaves an heir of full age, there is a **relevium** to be paid to the lord. If he leaves an heir under age, the lord may take the profits of the land, perhaps for twenty years, and may sell the marriage of the heir. And then if there is no heir, the land falls back ("escheats") to the lord for good and all.'[4] To get round the problem, the 'landowner conveys his land to some friends...' 'They are to hold it "to his use (**a son oes**)". They will let him enjoy it while he lives, and he can tell them what they are to do with it after his death. I say that he conveys his land, not to a friend, but to some friends. This is a point of some importance. If there were a single owner, a single **feoffatus**, he might die, and then the lord would claim the ordinary rights of a lord...Enfeoff five or perhaps ten friends...("as joint tenants"). When one of them dies there is no inheritance; there is merely accrescence. The lord can claim nothing.'[5] This idea came out of Anglo-French law, 'it is not in Roman books that Englishmen of the fourteenth century have discovered this device.'[6]

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[1] Maitland, **Collected Papers**, II, 404.
[2] Maitland, **Collected Papers**, III, 283.
[3] Maitland, **Collected Papers**, II, 407-8.
[4] Maitland, **Collected Papers**, III, 335.
[5] Maitland, **Collected Papers**, III, 335-6.
[6] Maitland, **Collected Papers**, III, 337; for another version of this story, see Maitland, **Equity**, 26-7.

The desire of the landowners to avoid the strict implications of primogeniture and royal power would have failed if they had not coincided with the developing interest of one of the very strongest of royal officials, the Chancellor, to provide a new legal flexibility to supplement the Common Law, through the system of equity. 'The Chancellor began to hold himself out as willing to enforce these honourable understandings, these "uses, trusts or confidences" as they were called, to send to prison the trustee who would not keep faith. It is an exceedingly curious episode. The whole nation seems to enter into one large conspiracy to evade its own laws, to evade laws which it has not the courage to reform. The Chancellor, the judges, and the Parliament seem all to be in the conspiracy. And yet there is really no conspiracy: men are but living from hand to mouth, arguing from one case to the next case, and they do not see what is going to happen.'[1] These trustees were not a perpetual corporation. They were not set up or "incorporated" by the State. Yet they had 'a jointness about them so that they could act as one body.' They were a 'fictitious person', recognized by the law, but nothing to do with the State.

The growth of this device proceeded apace, both nourishing and being protected by the growth of 'equity'.[2] The royal power as well as the lawyers turned a blind eye to this development, which seemed at first so innocuous. Like the custom of primogeniture, what had started as an upper class device spread through the large middling ranks of the population and began to widen its purposes in so doing. 'And then, if I may so speak, the "settlement" descended from above: descended from the landed aristocracy to the rising monied class, until at last it was quite uncommon for any man or woman of any considerable wealth to marry without a "marriage settlement."'[3] In due course 'the trust became one of the commonest institutes of English law. Almost every well-to-do man was a trustee...'[4]

When it became clear that the trust was developing into a major threat to royal power and finances, Henry VIII tried to crush it in the Statute of Uses (1535). But the horse had already bolted. Maitland summarizes a complex story in a few lines. 'Too late the king, the one person who had steadily been losing by the process, saw what had happened. Henry VIII put into the mouth of a reluctant Parliament a statute which did its best - a clumsy best it was - to undo the work. But past history was too strong even for that high and mighty prince. The statute was a miserable failure. A little trickery with words would circumvent it. The Chancellor, with the active connivance of the judges, was enabled to do what he had been doing in the past, to enforce the obligations known as trusts.'[5] The trust continued on its way. By the late sixteenth century an alternative set of methods to form meaningful, enduring, associations of citizens in pursuit of a common goal had been developed, for it was widening out from just passing property across the generations. It was becoming particularly important for the setting up of charities and good works.

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[1] Maitland, **Collected Papers**, II, 492.
[2] The story is well told in Maitland, **Equity**, 1-6.
[3] Maitland, **Collected Papers**, III, 354.
[4] Maitland, **Collected Papers**, III, 354.
[5] Maitland, **Collected Papers**, II, 493.

Maitland drew attention to some of the structural benefits of this development, in particular as a supplement to the idea of corporations or **universitas**. 'The trust has given us a liberal substitute for a law about personified institutions.'[1] More generally he outlined the situation thus, describing the period roughly from 1500 to 1900. 'For the last four centuries Englishmen have been able to say, "Allow us our Trusts, and the law and theory of corporations may indeed be important, but it will not prevent us from forming and maintaining permanent groups of the most various kinds: groups that, behind a screen of trustees, will live happily enough, even from century to century, glorying in their unincorporatedness. If Pope Innocent and Roman forces guard the front stairs, we shall walk up the back."'[2] Whereas under Roman Law all could be threatened by the State, in England it was different: what for Roman lawyers was a 'question of life and death was often in England a question of mere convenience and expense, so wide was that blessed back stair. The trust deed might be long; the lawyer's bill might be longer; new trustees would be wanted from time to time; and now and again an awkward obstacle would require ingenious evasion; but the organized group could live and prosper, and be all the more autonomous because it fell under no solemn legal rubric.'[3] The diversity and vagueness of what a trust could be helped it in its flourishing diversity. 'In dealing with charitable trusts one by one, our Courts have not been compelled to make any severe classification.'[4] Whatever was useful and broadly 'charitable', in the words of mutual benefit to those involved (other than the trustees) and not illegal, could be pursued.

Thus the trust enabled the development of unincorporated bodies, protected from the prying eyes of the State or others. The **Genossenschaft** [Fellowship] 'has to live in a wicked world: a world full of thieves and rogues and other bad people. And apart from wickedness, there will be unfounded claims to be resisted: claims made by neighbours, claims made by the State. This sensitive being must have a hard, exterior shell. Now our Trust provides this hard, exterior shell for whatever lies within.'[5] Thus '...we come upon what has to my mind been the chief merit of the Trust. It has served to protect the unincorporated **Genossenschaft** against the theories of inadequate and individualistic theories.'[6] Yet there was something mysterious to foreigners about 'the most specifically English of all our legal institutes... the trust'. There was a kind of paradox; here was a non-body, or nobody, that was yet embodied. Maitland tried to explain the contradiction to his continental friends as follows. In the trust there is 'the device of building a wall of trustees' which 'enabled us to construct bodies which were not technically corporations and which yet would be sufficiently protected from the assaults of individualistic theory. The personality of such bodies - so I should put it - though explicitly denied by lawyers, was on the whole pretty well recognised in practice. That something of

[1] Maitland, **Collected Papers**, III, 279.
[2] Maitland, **Political**, xxix.
[3] Maitland, **Political**, xxxi.
[4] Maitland, **Collected Papers**, III, 365.
[5] Maitland, **Collected Papers**, III, 368.
[6] Maitland, **Collected Papers**, III, 367.

this sort happened you might learn from one simple fact. For some time past we have had upon our statute book the term "unincorporate body."[1]

Maitland readily admitted that this was mysterious, even illogical, yet it worked. 'Some day the historian may have to tell you that the really fictitious fiction of English law was, not that its corporation was a person, but that its unincorporate body was no person, or (as you so suggestively say) was nobody.'[2] Yet this 'nobody' was much more than a mere partnership in pursuit of short-term profit. It was something different from what looked like equivalent devices under the revived Roman law: 'we may notice that an Englishman will miss a point in the history of political theory unless he knows that in a strictly legal context the Roman **societas**, the French **societe**, and the German **Gesellschaft** should be rendered by the English **partnership** and by no other word.'[3] A partnership for practical, money-making, ends did not create much mutual confidence, trust or commitment, but a trust did. 'It has often struck me that morally there is most personality where legally there is none. A man thinks of his club as a living being, honourable as well as honest, while the joint-stock company is only a sort of machine into which he puts money and out of which he draws dividends.'[4]

The Trust was, as Maitland realized, something very peculiar, somehow bridging the gap between status and contract, between people and things. Although it forms people into powerful groups, 'It has all the generality, all the elasticity of Contract.'[5] 'It is an "institute" of great elasticity and generality; as elastic, as general as contract.'[6] In order to blend two contradictory principles, a sleight of hand had to be performed which puzzled continental lawyers and is difficult to explain. Probably once again referring to Gierke, Maitland wrote "'I do not understand your trust," these words have been seen in a letter written by a very learned German historian familiar with law of all sorts and kinds. Where lies the difficulty? In the terms of a so-called "general jurisprudence" it seems to lie here:- A right which in ultimate analysis appears to be **ius in personam** (the benefit of an obligation) has been so treated that for practical purposes it has become equivalent to **ius in rem** and is habitually thought of as a kind of ownership, "equitable ownership." Or put it thus: If we are to arrange English law as German law is arranged in the new code we must present to our law of trust a dilemma: it must place itself under one of two rubrics; it must belong to the Law of Obligations or to the Law of Things.... It was made by men who had no Roman law as explained by medieval commentators in the innermost fibres of their minds.'[7] Maitland explains roughly how the Chancellor somehow managed to muddle the two. 'We know what happened. No sooner had the Chancellor got to work than he seems bent on making these "equitable" rights as unlike mere **iura in personam** and as like **iura in rem** as he can possibly make them. The ideas that he employs for this purpose are not many; they are English; certainly they are not derived from any knowledge of Roman law with

[1] Maitland, **Collected Papers**, III, 317.
[2] Maitland, **Political**, xxxiv.
[3] Maitland, **Political Theories**, xxiii.
[4] Maitland, **Collected Papers**, III, 383.
[5] Maitland, **Collected Papers**, III, 322.
[6] Maitland, **Equity**, 23.
[7] Maitland, **Collected Papers**, III, 272-3.

which we may think fit to equip him. On the one hand as regards what we might call the internal character of these rights, the analogies of the common law are to be strictly pursued.'[1]

Maitland seems to have conceived the Trust as combining two principles. On the one hand, the way it was held, protected, entered into and enforced was according to voluntaristic, not contractual methods. 'No, there is no "obligatory" language: all is done under cover of "use"; a little later of "confidence" and "trust"'.[2] Or again he writes 'Let me repeat once more ... that use, trust or confidence originates in an agreement. As to the want of valuable consideration for the trustee's promise, it might, I think, fairly be said that even if there is no benefit to the promisor, the trustee, there is at all events detriment to the promisee, the trustor, since he parts with legal rights, with property and with possession.'[3] From this voluntaristic external viewpoint all that is created is a set of personal rights, between the trustor, trustee and person for whom the trust is made. It is quite clear that 'the trustee is the owner, the full owner of the thing, while the **cestui que trust** has no rights in the thing.' Yet this is not quite the whole story, for a personal relationship not of contract but of trust or obligation has been set up, not enforceable by law but by equity. 'The specific mark of the trust is I think that the trustee has rights, which rights he is bound to exercise for the benefit of the **cestui que trust** or for the accomplishment of some definite purpose.'[4] Thus, considered from one viewpoint we are talking about those interpersonal relations which belong to rights in persons. This is the essence of the trust. 'Men ought to fulfil their promises, their agreements; and they ought to be compelled to do so. That is the principle and surely it is a very simple one. You will say then that the Chancellor begins to enforce a personal right, a **jus in personam,** not a real right, a **jus in rem** - he begins to enforce a right which in truth is a contractual right, a right created by a promise. Yes, that is so, and I think that much depends upon your seeing that it is so. The right of **cestui que use** or cestui **que trust** begins by being a right **in personam**. Gradually it begins to look somewhat like a right **in rem**. But it never has become this; no, not even in the present day.'[5]

Yet while the frame is, so to speak, an enforcement of personal rights, the content is modelled on and filled with the highly sophisticated system of contractual land law which Maitland in his earlier works had shown to have developed in England by the thirteenth century and which spelt out rights against the whole world in 'things'. Thus Maitland explains that 'as regards estates and interests the common law of land is to be the model... The new class of rights is made to look as much like rights **in rem** (estates in land) as the Chancellor can make them look - that is in harmony with the real wish of the parties who are using the device... Thus we get a conversion of the use into an incorporeal thing - in which estates and interests exist - a sort of immaterialized piece of land. This is a perfectly legitimate process of "thing making" and one that is always going on.'[6] Thus the content of the trust, the 'use', came to have all

[1] Maitland, **Collected Papers**, III,275.
[2] Maitland, **Equity**, 31.
[3] Maitland, **Equity**, 29.
[4] Maitland, **Equity**, 47-8.
[5] Maitland, **Equity**, 29-30.
[6] Maitland, **Equity**, 31.

that strange flexibility and multiplicity which was the great contribution to a new kind of property system developed under common law. In Maitland's words 'the use came to be conceived as a sort of metaphysical entity in which there might be estates very similar to those which could be created in land, estates in possession, remainder, reversion, estates descendible in this way or in that.'[1]

The result is a hybrid, which is neither straight status nor contract, neither pure rights in a person, nor rights in a thing. Such a system, Maitland believed, would not have emerged in Roman law, where the distinction between these two was very firm; 'the Trust could hardly have been evolved among a people who had clearly formulated the distinction between a right **in personam** and a right **in rem**, and had made that distinction one of the main outlines of their legal system.'[2] This is what mystified Maitland's continental colleagues, heirs of many centuries of Roman law. 'Jurists have long tried to make a dichotomy of Private Rights: they are either **in rem** or **in personam**. The types of these two classes are, of the former, **dominium**, ownership; of the latter the benefit of contract - a debt. Now under which head does trust - the right of **cestui que trust** - fall? Not easily under either. It seems to be a little of both. The foreigner asks - where do we place it in our code - under Sachnrech or under Obligationenrecht?'[3] In fact it straddles both, bridging those great divides between Community and Association, Status and Contract, Mechanical and Organic solidarity which were supposed to divide the 'modern' world from the 'ancient'. If asked whether it is a system based on status or contract, one has to give a mixed answer. 'The best answer may be that in history, and probably in ultimate analysis, it is **jus in personam**; but that it is so treated (and this for many important purposes) that it is very like **jus in rem**. A right primarily good against **certa persona**, viz. the trustee, but so treated as to be almost equivalent to a right good against all - a **dominium**, ownership, which however exists only in equity. And this is so from a remote time.'[4]

By bridging this gap, by uniting the great dichotomy, Maitland had implicitly refuted his predecessor Maine and subverted much of the classic sociology of the later nineteenth century. He had suggested that there was not just a binary opposition between two forms of civilization, and a movement from one to another. He showed that much of modern dynamism came through mixing the two principles, thereby creating a tolerable balance of inter-personal warmth and trust and commitment, with a reasonable amount of flexibility and voluntary association. Alluding to Maine's famous thesis, he was able to argue that the trust was indeed as important as that other great legal institution, the contract, and that modernity was based on it. 'The march of the progressive societies was, as we all know, from status to contract. And now? And now... there are many to tell us that the line of advance is no longer from status to contract, but through contract to something that contract cannot explain, and for which our best, if an inadequate, name is the personality of the organised group.'[5] What was set up through the device of the trust was an entity which has been created by ordinary citizens and not by the State. In other words, a personal

[1] Maitland, **Equity**, 33.
[2] Maitland, **Collected Papers**, III, 325.
[3] Maitland, **Equity**, 23.
[4] Maitland, **Equity**, 23-4.
[5] Maitland, **Collected Papers**, III, 315.

right had been turned into a property right. This was totally against the spirit of Roman Law. 'In truth and in deed we made corporations without troubling king or parliament though perhaps we said that we were doing nothing of the kind.'[1]

[1] Maitland, **Collected Papers**, III,283.

8. The Effect of Trust Upon The World

The effects of this revolutionary innovation of a new legal device, the Trust, were diverse. One was in contributing to political freedom. Here Maitland assumes the voice of a continental lawyer, who speaks as follows. "'There is much in your history that we can envy, much in your free and easy formation of groups that we can admire. That great 'trust concept' of yours stood you in good stead when the days were evil: when your Hobbes, for example, was instituting an unsavoury comparison between corporations and ascarides [intestinal worms, thread worms], when your Archbishop Laud (an absolutist if ever there was one) brought Corporation Theory to smash a Puritan Trust, and two years afterwards his friend Bishop Montague was bold enough to call the king's attention to the shamelessly unincorporate character of Lincoln's Inn. And your thoroughly un-Roman "trust concept" is interesting to us."

Since much of Maitland's work was concerned with the relations between the individual and the State it is worth examining his various hints in a little more depth. One benefit of the trust was to help keep the judiciary independent. Lawyers were trained, and found their social and moral life sustained, by the Inns of Court.[1] If these had been appropriated by the Crown through incorporation, for example, the great struggle between Sir Edward Coke and the common lawyers and the Crown in the seventeenth century might have turned out differently. More generally, the constraints which the law put on the tendency for power to grow were dependent on the independence of the judiciary as Montesquieu and Tocqueville had noted. The fact that among the 'great and ancient, flourishing and wealthy groups' which were based on the Trust were the Inns of Court was significant.[2] This was by choice. 'Our lawyers were rich and influential people. They could easily have obtained incorporation had they desired it. They did not desire it.' [3]They retained their independence.

Another important area was in the right to political associations. There were the various political clubs, essential to the balance of British politics. There were also numerous other political associations set up for particular purposes. Maitland only mentioned in passing 'those political societies which spring up in England whenever there is agitation: a "Tariff Reform Association" or a "Free Food League" or the like'.[4] But on several occasions he mentions Trade Unions as one of the fruits of the right of free association arising from the idea of the trust.[5] He brought out their importance by way of contrast with the Continent. He noted that many of his examples were taken from the eighteenth century, when Montesquieu and others were making a similar contrast. This was 'a time when, if I am not mistaken, corporation theory sat heavy upon mankind in other countries. And we had a theory in England too, and it was of a very orthodox pattern; but it did not crush the spirit of association. So much could be done

[1] For an excellent and detailed account of how the Inns acted without incorporation and the various advantages of not being incorporated, see Baker, 'Inns of Court'. A number of the more general arguments in this chapter are also given depth by Professor Baker's analysis.
[2] Maitland, **Collected Papers**, III, 317.
[3] Maitland, **Collected Papers**, III, 370-1.
[4] Maitland, **Collected Papers**, III, 387.
[5] For example, Maitland, **Collected Papers**, III, 400.

behind a trust, and the beginnings might be so very humble.' [1] But the contrast did not end then. Maitland noted that during the French Revolution, despite all the talk of freedom, although business partnerships were maintained 'Recent writers have noticed it as a paradox that the State saw no harm in the selfish people who wanted dividends, while it had an intense dread of the comparatively unselfish people who would combine with some religious, charitable, literary, scientific, artistic purpose in view.' In France, even 'at the beginning of this twentieth century it was still a misdemeanour to belong to any unauthorised **association** having more than twenty members." The idea of a legal, unincorporated, association of free people pursuing political ends was essential to democracy.

Another effect Maitland noted was on one of Tocqueville's main themes, the de-centralization of power and the autonomy of local and regional bodies. Maitland believed that the 'English county' was one example of an unincorporated, yet existing, body.[2] It was this which prevented it becoming merely a servant of the central government. So that 'if the English county never descended to the level of a governmental district, and if there was always a certain element of "self-government" in the strange system that Gneist described under that name, that was due in a large measure (so it seems to me) to the work of the Trust.' [3]

Perhaps deepest of all was an effect that spread outwards through all of political life. All power tends to corrupt, but it does so far less if the power is not looked on as the personal property of the powerful, but rather as a temporary force held 'in trust' for others. This, Maitland, suggests, is what the idea of the Trust and the trust it entailed performed. He explains that 'In the course of the eighteenth century it became a parliamentary commonplace that "all political power is a trust"; and this is now so common a commonplace that we seldom think over it. But it was useful." Above all it permeated the delicate relationship between the king and the people, enabling a new kind of constitutional monarchy to emerge. 'Possibly the Crown and the Public are reciprocally trustees for each other; possibly there is not much difference now-a-days between the Public, the State, and the Crown, for we have not appraised the full work of the Trust until we are quitting the province of jurisprudence to enter that of political or constitutional theory.' [4] This was an established fact by the later nineteenth century and Maitland briefly suggests how the application of the concept of trust had spread and influenced events in a somewhat disguised way in the aftermath to the confrontations between king and people of the seventeenth century. 'Applied to the kingly power it gently relaxed that royal chord in our polity which had been racked to the snapping point by Divine right and State religion. Much easier and much more English was it to make the king a trustee for his people than to call him officer, official, functionary, or even first magistrate. The suggestion of a duty, enforceable indeed, but rather as a matter of "good conscience" than as a matter of "strict law" was still possible; the supposition that God was the author of the trust was not excluded, and the idea

[1] Maitland, **Collected Papers**, III, 376.
[2] Maitland, **Collected Papers**, III, 400.
[3] Maitland, **Collected Papers**, III, 397.
[4] Maitland, **Political Theories**, xxxvi.

of trust was extremely elastic."

Having established a concept of trust between monarchy and people by the eighteenth century, the idea found a further extension and application as a metaphor to hold together the largest Empire the world has ever known. Maitland explained that 'when new organs of local government are being developed, at first sporadically and afterwards by general laws, it is natural not only that any property they acquire, lands or money, should be thought of as "trust property," but that their governmental powers should be regarded as being held in trust. Those powers are, we say, "intrusted to them," or they are "intrusted with" those powers." A political example of how this worked was in relation to India. Maitland alludes to the way in which the delicate matter of the absorption of the East India Company was handled. 'When a Statute declared that the **Herrschaft** which the East India Company had acquired in India was held "in trust" for the Crown of Great Britain, that was no idle proposition but the settlement of a great dispute." He expands on this as follows: 'the English Trust...has played a famous part on the public, the world-wide, and world-historic stage. When by one title and another a ruler-ship over millions of men in the Indies had come to the hands of an English Fellowship, this corporation aggregate was (somewhat unwillingly) compelled by Acts of Parliament to hold this precious thing, this 'object of rights,' this rulership, upon trust for a so-called corporation sole, namely, the British Crown."

This was just part of that wider concept that all power was held in trust. The whole of the British Empire came to be seen as held 'in trust' for the peoples themselves, until they were ready to take over. ' Open an English newspaper, and you will be unlucky if you do not see the word "trustee" applied to "the Crown" or to some high and mighty body. I have just made the experiment, and my lesson for today is, that as the Transvaal has not yet received a representative constitution, the Imperial parliament is "a trustee for the colony." There is metaphor here." Maitland noted government ministers of his and earlier times saying that Victoria's government 'is a trustee for "the whole empire"'.[1] Perhaps this is part of the explanation for Tocqueville's question as to how such a small country as England could hold such a large Empire with such apparent lack of strain. The mechanism of the trust both gave the metropolitan government confidence and an easy conscience and allowed elastic forms of delegation of power without posing a direct clash between the centre and the periphery.

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Equally important, as Maitland realized, were the effects of the possibility of having non-incorporated bodies in the field of religion. Maitland shows how the trust became a key defence of religious nonconformity and the sects. Any religious organization needs to form itself into some kind of permanent group. For instance, it needs a place of worship. Since such buildings had to be funded and maintained, how was this to happen? The State, associated with a Catholic or Anglican settlement was hardly likely to give them corporate status. What the Methodists, Baptists, Quakers and others did was to set up trusts. Groups of trustees ran their affairs and were recognized by the law. As Maitland pointed

[1] Maitland, **Political Theories**, xxxvi, note 3.

out, it is likely that without this legal loop-hole, the whole of nonconformity would have been crushed. Religious liberty and the trust were closely linked.

This is how Maitland himself puts the case. 'All that we English people mean by "religious liberty" has been intimately connected with the making of trusts. When the time for a little toleration had come, there was the Trust ready to provide all that was needed by the barely tolerated sects. All that they had to ask from the State was that the open preaching of their doctrines should not be unlawful." All that was required by the State was minimal. For 'if the State could be persuaded to do the very minimum, to repeal a few persecuting laws, to say "You shall not be punished for not going to the parish church, and you shall not be punished for going to your meeting-house," that was all that was requisite. Trust would do the rest, and the State and **das Staatskirchenthum** [the Established Church] could not be accused of any active participation in heresy and schism. Trust soon did the rest. I have been told that some of the earliest trust deeds of Nonconformist "meeting-houses" say what is to be done with the buildings if the Toleration Act be repealed. After a little hesitation, the courts enforced these trusts, and even held that they were "charitable". And now we have in England Jewish synagogues and Catholic cathedrals and the churches and chapels of countless sects. They are owned by natural persons. They are owned by trustees." Maitland illustrated this with the case of the Wesleyans, whose chapels were set up as trusts. 'Now-a-days we see Wesleyan chapels in all our towns and in many of our villages. Generally every chapel has its separate set of trustees..." Even large religious organizations could be tolerated in the form of trusts. 'Behind the screen of trustees and concealed from the direct scrutiny of legal theories, all manner of groups can flourish: ... a whole presbyterian system, or even the Church of Rome with the Pope at its head."

That England and later America were lands of toleration and sectarianism, exhibiting that mysterious relation between private and public which puzzled Tocqueville but which he saw as a central feature of America, is partly explained by the device of the Trust. The presence of the Trust explained why, if one searched through the voluminous records of Common Law, 'in the hope of discovering the organization of our churches and sects (other than the established church) you will find only a few widely scattered hints." It was equity and the trust that provided the infrastructure for the distinctive Protestant sectarianism of England and America. Maitland sums up the finding thus: 'If we speak the speech of daily life, we shall say that in this country for some time past a large amount of wealth has "belonged" to religious "bodies" other than the established church, and we should have thought our religious liberty shamefully imperfect had our law prevented this arrangement. But until very lately our "corporation concept" has not stood at the disposal of Nonconformity, and even now little use is made of it in this quarter: for our "trust concept" has been so serviceable."

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Linked to religious freedom was economic liberty. In terms of economic development, a device was needed which would allow people to come together to co-operate in some venture of a new kind. This was the era when new insurance facilities were needed. It was a time when traders and manufacturers needed to

form themselves into joint-stock arrangements and to issue shares. The law of trusts made all this possible, providing a 'wedge' which allowed in joint-stock arrangements and limited liability.[1] In all these cases the entity was recognized by the law, yet did not draw its strength directly from the Crown. It was a free association of individuals who had bound themselves together.

Again, let us look at Maitland's account of some of the effects. Two examples Maitland describes in some detail may be given. He traces the history of the development of a late seventeenth century coffee house owned by Edward Lloyd, embodied in the mid-eighteenth century in a small trust fund and later, in 1811, a trust deed with eleven hundred signatures. Thus was developed the great insurance firm of Lloyds.[2] Maitland could easily have added numerous other examples of banks or mutual (or building) societies. But his second example was the London Stock Exchange. He describes how it grew from people meeting in an eighteenth-century coffee house into a group of trustees. By the later nineteenth century it was vast and wealthy. In 1877 some people recommended that after all these years as a trust it should be incorporated. 'And so the Stock Exchange was incorporated? Certainly not. In England you cannot incorporate people who do not want incorporation, and the members of the Stock Exchange did not want it." As for insurance companies, Maitland noted that a number of insurance companies, including the 'Sun' had been set up as unincorporated bodies by the early eighteenth century and had continued so until the time of Maitland's writing.[3]

One of the advantages of the fact that many of the pivotal economic institutions in England from the sixteenth century developed as trusts would have been appreciated by Adam Smith. New economic enterprises, for example long distance trade, or marine insurance, or making a new product, are risky. The individual needs protection, some limitation of liability, mutual assurance. Yet if the protection is given by the government, it very often takes the form of a monopoly. As Smith pointed out, this could easily turn out over time into something that would inhibit creative development. But it was of the essence of trusts that they were not state monopolies. If someone else wanted to set up a marine insurance company or a building society the trustees could not prevent them. It provided a protection for the members without inhibiting newcomers. It was thus the ideal situation for competition with protection, for uniting individuals in a way that did not inhibit other individuals. It is difficult to see how the wealth of industrial England could have been created without the trust concept.

The later development of trusts, from the second half of the nineteenth century, is more complex. On the one hand, some have argued that, particularly in America, they later became an impediment to economic growth by creating **de facto** monopolies.[4] On the other hand, Maitland was right to draw attention to the way in which the Trust also formed the foundation for dynamic growth in America. 'It is a big affair our Trust. This must be evident to anyone who knows -

[1] Maitland, **Collected Papers**, III, 389-92.
[2] Maitland, **Collected Papers**, III, 372.
[3] Maitland, **Collected Papers**, III, 390.
[4] For example Mancur Olson in various works, including in Wilson and Skinner (eds.), **Market and State**, 109-12.

and who does not know? - that out in America the mightiest trading corporations that the world has ever seen are known by the name of "Trusts."" He was not sure why the Americans should have used the trust form, rather than the corporation, 'when they were engaged in constructing the greatest aggregations of capital that the world had yet seen', but he believed that it was because 'the American corporation has lived in greater fear of the State than the English corporation has felt for a long time past."

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A third equally important area, which Maitland touched on, was in relation to social and intellectual liberties. He noted that a foreigner thinking of England would have noted 'you have been great makers of clubs." Many were of pivotal importance in political, legal and social life. For instance, 'every judge on the bench is a member of at least one club'.[1] Maitland took as an example the Jockey Club. 'I believe that in the eyes of a large number of my fellow-countrymen the most important and august tribunal in England is not the House of Lords but the Jockey Club; and in this case we might see "jurisdiction" - they would use that word - exercised by the **Verein** [club] over those who stand outside it. I must not aspire to tell this story. But the beginning of it seems to be that some gentlemen form a club, buy a race-course, the famous Newmarket Heath, which is conveyed to trustees for them, and then they can say who shall and who shall not be admitted to it." Newmarket Heath had been purchased by the Jockey Club 'without asking the King's or the State's permission.[2] He also referred to 'your clubs and those luxurious club-houses which we see in Pall Mall." But there were numerous others. Clubs were also closely related to intellectual activities, for example the Royal Society, British Academy and numerous working men's clubs were of enormous importance in furthering science and learning. He noted that 'many learned societies', including the one he had founded, the Selden Society, were run by trustees, as were key institutions such as the London Library.[3] While it struck Tocqueville that America was notable for its associations, it has struck many that one of the great peculiarities of England is its creativity in the field of inventing quasi-groups: its charitable, social, scientific and literary, 'clubs' and associations.

A final area which Maitland sees as important is what he calls 'social experimentation' and which we might roughly term innovation. He writes as follows: 'First and last the trust has been a most powerful instrument of social experimentation. To name some well-known instances:- It (in effect) enabled the landowner to devise [leave] his land by will until at length the legislature had to give way, though not until a rebellion had been caused and crushed. It (in effect) enabled a married woman to have property that was all her own until at length the legislature had to give way. It (in effect) enabled men to form joint-stock companies with limited liability, until at length the legislature had to give way. The case of the married woman is especially instructive. We see a prolonged experiment. It is deemed a great success. And at last it becomes impossible to maintain (in effect) one law for the poor and another for the rich,

[1] Maitland, **Collected Papers**,III, 378.
[2] Maitland, **Collected Papers**, III, 385.
[3] Maitland, **Collected Papers**, III, 388.

since, at least in general estimation, the tried and well-known "separate use" has been working well. Then on the other hand let us observe how impossible it would have been for the most courageous Court of Common Law to make or to suffer any experimentation in this quarter." Thus the device of the trust affected not only individuals, but categories - married women, the poor (through boards of guardians, Poor Law funds and charity), the young and so on. The way it raised the status of married women by protecting their property particularly impressed Maitland.[1] In general it allowed a flexibility and vagueness which allowed change: 'let us observe that Englishmen in one generation after another have had open to them a field of social experimentation such as could not possibly have been theirs, had not the trustee met the law's imperious demand for a definite owner.' [2]

Of course this is not to say that continental style corporations were completely neglected. They were available as well. But as Maitland points out, the fact that an alternative mechanism also existed took the strain off the corporation route. If a group of people could get a better deal out of being incorporated, they might at a later point seek one - as Oxford and Cambridge did in the seventeenth century. But they had a choice and thus were not wholly dependent on royal whim. This was tremendously important. He singled out as one of the great achievements of the trust idea that it 'has given us a liberal supplement for a necessarily meagre law of corporations'.[3] In Germany, where Roman law had conquered in the sixteenth century, there had lingered on various earlier forms of associations which were different. Much of Maitland's interest in German historical law was in the academic attempts to revise these alternatives, in particular the research on **genossenschaft** which he thought was best translated as 'Fellowship', which 'with its slight flavour of an old England may be our least inadequate word'.[4] But while the Germans had to try to revive or re-invent such associations, they had become a rich and multifarious species in England by the seventeenth century.

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Summarizing Maitland's illuminating insight into the solution to Tocqueville's puzzle concerning the origins of associations, we can say that in England from about the thirteenth century there began to develop a society which had various essential constituents. It had a powerful Crown and a ruling group in parliament. The centre was strong - but it was limited in its power by two other levels. In the middle was a crowd of unincorporated bodies, to a certain extent 'nobodies', in Maitland's phrase, but nobodies which are the essence of what would now be called 'Civil Society'. The secret, anti-State, organizations (mafia, triads) which have been the bane of most governments were not necessary. The rights of association, so important later for the trades union and the labour movement, allowed people to associate. They were encouraged to put their energies into open activity.

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[1] Maitland, **Collected Papers**, III,356.
[2] Maitland, **Collected Papers**, III, 283.
[3] Maitland, **Collected Papers**, III, 279.
[4] Maitland, **Political Theories**, xxv.

Thus through the widening development of the concept of the Trust, there also, indirectly, developed a world of trust and openness, which is the basis not only of capitalism but also for modern science.[1] Maitland points out that this is such a large feature of the development of English civilization that it has become invisible. 'Now we in England have lived for a long while in an atmosphere of "trust," and the effects that it has had upon us have become so much part of ourselves that we ourselves are not likely to detect them. The trustee...is well known to all of us, and he becomes a centre from which analogies radiate." The whole system is based on trust, both presuming a widespread level of trustability and, by that assumption, creating it. 'If I convey land to you as a trustee for me, or as a trustee for my wife and children, there is not merely what our law calls a trust, there really is trust placed by me in you; I do trust you, I do place confidence, faith, reliance in you." In many civilizations such trust in unrelated individuals would not be easy. Nor would it be easy to find people who were prepared, for no obvious reward, to carry out such duties, for 'a very high degree not only of honesty but of diligence has been required of trustees'.[2] The whole wide concept of public and disinterested service for others and for the community is related to the development of the trust. It is indeed a peculiar development and, if we combine Tocqueville with Maitland, one of the keys to the making of the modern world.

[1] For the necessity of trust in economic development, see Fukuyama, **Trust**; for science, Shapin, **Social History.**

[2] Maitland, **Collected Papers,** III, 352.

9. Was Maitland Right?

Maitland died a hundred years ago and a huge amount of research has been undertaken along the lines he sketched out. Before we accept his account of the making of the modern world it is worth briefly summarizing the modifications and corrections to his work since his death.

There have been a number of detailed assessments which summarize the modifications. James Cameron's **Frederick William Maitland and the History of English Common Law** (1961), points out that Maitland's theory of the origin of English boroughs is no longer accepted and that in relation to Roman law, Bracton was probably a better Romanist than Maitland believed. He also notes that as Holdsworth and others have shown, Maitland exaggerated the danger of a 'Reception' of Roman Law in England in the sixteenth century. Yet, in relation to ninety-five percent of Maitland's work, Cameron suggests that the interpretations he put forward are still trustworthy. H.E.Bell's **Maitland, a Critical Examination and Assessment** (1965) echoes the above three criticisms and adds minor modifications in relation to three particular topics.[1] Otherwise, again, he leaves almost all of the findings intact, for instance pointing out that in the debate about the pre-Norman roots of feudal relations, scholarship has swung back in favour of Maitland's interpretation.[2] Bell generally endorses the vision of a man he describes as 'the greatest English historian'.[3] In relation to Maitland's **History of English Law**, Bell places it as the third of the great syntheses of English law, alongside Bracton and Blackstone, and notes 'how very much later scholars have depended on Maitland's groundwork, and, second, how rarely, in matters of great importance, they have found serious fault with it.'[4]

More recently, G.R.Elton's **F.W.Maitland** (1985) summarizes the same set of minor criticisms. To these he adds three other technical criticisms.[5] Elton also draws attention to one other area of challenge. This was a view put forward by F.C.Milsom in his introduction to the re-print of **The History of English Law** (1968). Milsom suggested quite tentatively that while Maitland's picture of a flat, two-dimensional world in law was correct by the later thirteenth century, possibly Maitland underestimated the strength of feudal power relations between about 1160 and 1260.

It is worth pointing out that even if Milsom turns out to be right, this only makes a small difference to one sub-aspect of Maitland's work. Milsom himself recognizes this when he writes 'if all this is right, and if the modifications required now seem important, they are not important when compared with the original picture.'[6] When he returned to the same allegations fourteen years later, Milsom remained diffident about whether his 'heresy' was right at all and

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[1] That is scutage, **Quia Emptores** and the writ of trespass, all technical matters.

[2] Bell, **Maitland**, 30.

[3] Bell, **Maitland**, 2.

[4] Bell, **Maitland**, 68.

[5] He argues that Maitland's disparaging view of the law book **Fleta** is too strong, that his theory that Domesday Book was a 'geld' book is wrong, and that Maitland has ignored the plaint by bill.

[6] Milsom, in Maitland, **History**, I, lxxiii.

concluded with the words, 'And now the dwarf must stop grumbling about his vantage-point on the giant's shoulder...'[1] Elton considers Milsom's claim that 'Maitland failed to give proper weight to the social structure of a feudal or seigneurial world'.[2] He summarizes Milsom's view that 'Maitland antedated the settled and sophisticated state of the law by a hundred years at least, whereas in his view the feudal relationship predominated down to the end of the twelfth century over the King's rule...'[3] As Elton writes, 'In the end, the two pictures differ in emphasis rather than essentials...'[4] In any case, even this minor heresy may be wrong: 'No attempt has yet been made to assess this new interpretation, and for all I know Milsom may not in the end prevail.'[5] That the heresy has gained so little ground either from its original proponent or others in the eighteen years of its life leads one to wonder as to its importance and plausibility.

When we consider that some five thousand pages of detailed findings, written about a hundred years ago, have been modified in only a few minor emphases and one or two facts, and that the bulk of Maitland's edifice still stands, we can begin to understand why he has an almost god-like status among historians who know the problems he faced and the elegance of his solutions.

The great legal historian Vinogradoff disagreed with Maitland on some specific points, but shortly after Maitland's death wrote of him as 'the greatest legal historian of the law of England' and as a man to whom lawyers, historians and sociologists were equally indebted: 'lawyers because of his subject, historians because of his methods, sociologists because of his results.'[6]

J.H.Hexter referred to Maitland as 'the greatest of English historians' in his book on modern historians.[7] R.G.Collingwood referred to the 'best historians, like Mommsen and Maitland'.[8] Denys Hay in his overview of western historiography describes him as a 'giant' who, with Marc Bloch, is one of the 'two greatest historians of recent times'.[9]Bloch himself referred to 'the great English jurist Maitland.'[10] The medievalist Helen Cam ends her preface to his **Selected Essays** by concluding fifty years after his death. 'Let us say with Powicke, "Maitland is one of the immortals" and leave it at that.'[11] G.O.Sayles wrote that 'In the range of his interests, the fineness of his intellect, and the considerable bulk of what he wrote in barely twenty-five years, Maitland has no match among English historians.'[12] Part of the reason he has not been more generally appreciated is explained by John Burrow. Comparing him to the great William Stubbs, Burrow writes that 'Maitland's was a comparable mind, sharper, finer,

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[1] Milsom, 'F.W.Maitland', 281.
[2] Elton, **Maitland**, 45.
[3] Elton, **Maitland**, 47.
[4] Elton, **Maitland**, 46.
[5] Elton, **Maitland**, 48.
[6] Vinogradoff, 'Maitland', 288-9.
[7] Hexter, **Historians**, 156.
[8] Collingwood, **Idea**, 127.
[9] Hay, **Annalists**, 169.
[10] Bloch, **Feudal Society**, I, xxi.
[11] Maitland, **Selected Essays**, xxix.
[12] Sayles, 'Maitland'.

more theoretical and impressionable, but in Maitland's case ... there is no single work which is so obviously the summation of his talents and learning.'[1]

K.B. McFarlane wrote in 1965 that if when Seccombe talked in his obituary of Maitland of 'the shallowness of the ripple caused by the passing of England's greatest historian since Gibbon and Macaulay', he 'means to suggest that Maitland's greatness as a historian fell short of the heights attained by Gibbon and Macaulay, he did his friend an injustice. Probably he wished only to indicate how select was the company to which Maitland belonged. Few with any right to an opinion would find fault with that estimate for claiming too much. As we look back over the whole range from a distance, we can see that the summit of Mount Maitland overtops them all. What other English historian has combined such exact scholarship with so much imaginative insight, intellectual grasp, and brilliance in exposition. Outside Britain his only rival is Mommsen.'[2] Even his most learned critic, Milsom, writes of him as 'a still living authority'. Maitland, he wrote, 'would probably wish his work to be superseded. There is little sign that this will happen soon.'[3]

In a recent symposium, a number of distinguished medieval historians and two lawyers have combed through his great work on the **History of English Law** a hundred years after its publication. They have found very little to quibble with, making only minor technical adjustments to his account.[4] Often where they do differ in interpretation, this merely lends weight to Maitland's more general argument. For example, Patrick Wormald suggests three 'heresies' but concludes that 'one outcome of what I am arguing would be to buttress a central plank in Maitland's case', namely that 'the history of law in England and in other European countries differed because the king of England was in command of his courts... To me that seems an essential truth...'[5] Likewise, in a foreword to a new edition of **Domesday Book and Beyond**, J.C.Holt has pointed to some technical errors in the book, yet still recommends it as 'the greatest single book on English medieval history'.[6]

Subsequently Wormald, before his untimely death, produced the first volume of his magisterial two-volume work on **The Making of English Law**. He pays tribute to Maitland as 'the greatest legal historian of all time', an 'Immortal'.[7] He suggests that Maitland believed that the Common Law had sprung with 'marvellous suddenness' from the head of King Henry II (1154-89) and that this indicates that Maitland under-estimated the importance of its roots in the Anglo-Saxon period.[8] Since, as I have argued above, I do not interpret Maitland in this way, but rather as stressing the Anglo-Saxon origins of English civilization at a wider level, I do not find it necessary to correct Maitland. Everything which Wormald argues merely reinforces what I think Maitland was more generally arguing. For example, Wormald writes that 'Henry II made law

[1] Burrow, **Liberal Descent**, 131.
[2] McFarlane, **Mount Maitland.**
[3] Maitland, **History**, I, lxxiii.
[4] See the essays in Hudson (ed.), **History of English Law.**
[5] In Hudson (ed.), **History of English Law**, 19.
[6] Holt, 'Foreword', v.
[7] Wormald, **Making**, xi, 17.
[8] Wormald, **Making**, x.

like no other twelfth-century king, because he inherited a system of royal justice that was already uniquely old and active'.[1] Or again he writes that 'the kingdom where something singular happened to law in the twelfth century was also one where something without European parallel was happening in the tenth and eleventh. Henry II legislated as Alfred, Aethelstan, Edgar and Cnut had, but as the last Carolinginans, Ottonians and Capetians had not.'[2]

Thus it may well be true that Wormald has spotted an inconsistency in Maitland's presentation of his argument, but the general thrust of Wormald's enterprise serves only to re-inforce the story which Maitland told about the peculiar nature of English history. The theme of the projected second volume is announced on the back cover of the first and again fits extremely well with what I take to be Maitland's more general argument. We are told that the book will show 'how a formidable system of formal and informal control was established by England's first kings in the fields of Church law, crime and punishment, law-courts and property.' The achievements of Henry II and his successors would have been impossible without this. I believe that Maitland would have been delighted with Wormald's conclusion that 'England has a unique legal history because it is the oldest continuously-functioning state in the world.'

Another recent work which basically endorses much of the argument for continuity and Anglo-Saxon origins which Maitland advanced is James Campbell's **The Anglo-Saxon State**. In a number of reprinted essays he argues, for example, that the 'individual' characteristics, which I had detected in medieval and early modern England, on the basis of reading Maitland and other sources, 'existed earlier'. He relates this to other phenomena in Anglo-Saxon England: 'a high proportion of land transfers were by sale; women had very considerable rights; legal procedures rather than being, as used to be argued, archaic and irrational by our standards, have been powerfully argued to be perfectly sensible and rational in a modern sense, with much stress on written evidence: there was a lot of literacy in that society.'[3]

James Campbell stressed again and again the commercial sophistication, the strong sense of national unity, the powerful state apparatus, the relative weakness of kinship, the seeds of democratic politics and other factors, which fit perfectly with Maitland's account. Maitland's work is very frequently cited and almost always endorsed. That arguably the most learned Anglo-Saxon and early medieval scholar of his generation should continue to support the Stubbs-Maitland vision in a publication nearly a hundred years after Maitland's death is worth noting.

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We have seen that Maitland took the argument on a stage by documenting the theories suggested by Tocqueville and others.[4] They put forward a hypothesis of what had happened based on some historical research, but were unable to go

[1] Wormald, **Making**, xi.
[2] Wormald, **Making**, 19.
[3] Campbell, **Anglo-Saxons**, 27-8.
[4] The argument of Maitland's predecessors is summarized in Macfarlane, **Riddle of the Modern World**.

deeply into the most important case, England, for lack of sources and training. Maitland had the training and sources and was one of the leaders of the great movement of the last quarter of the nineteenth century which opened up the public records and printed selections for the first time. He was a great editor and student of original documents, from Anglo-Saxon times onwards. His intuitions were checked against, and also arose from, a deep understanding of historical documents. Yet he only had a few years of healthy life in which to do this, and there were some tasks he bequeathed to his successors. We earlier saw the fruits of this labour in various publications and the founding of the Selden Society.

Maitland was well aware that he was only just scratching the surface. In the introduction to **Select Pleas in Manorial and Other Seignorial Courts** he wrote that 'A few sets of rolls completely printed beginning in the thirteenth and ending in, let us say, the sixteenth century, would be of inestimable value, especially if they began with surveys or 'extents' and ended with maps.'[1] He was well aware that vast treasures awaited the social and legal historian in areas of local records which he could only touch on.

His own work was mainly on early manorial records and those of the central courts of the Common Law. He was unable to explore thoroughly whole ranges of other documents, the rich records of equity jurisdiction, local ecclesiastical records and so on. And although he did make a more detailed study of part of the Cambridgeshire area, he never really undertook a detailed study of one village or set of manors which would bring together the records.

Maitland was the leading figure in the first archival revolution, when the central records became usable and used for the first time. The second archival revolution took place roughly in the quarter of a century after 1950 when local history and the re-organization of the local record offices suddenly revealed an immense new set of materials. [2] These materials allow us to see how far Maitland's still somewhat intuitive conclusions were substantiated by microscopic work on how the system he postulated actually worked at the local level. This forms a fascinating case rather similar to a biologist predicting certain things would be found when the microscope becomes strong enough. The work I briefly summarize below allows us to test his conclusions.

Large quantities of historical materials at the local level have been published since Maitland died, particularly by record societies. There have also been a number of well-known studies of villages and manors. The study I have been engaged on since 1970 with my colleagues, and particularly Sarah Harrison, is somewhat different from these. Firstly we have endeavoured to track down all the records for a particular parish, Earls Colne in Essex, over the period from the earliest records through to 1854, some five hundred years. Secondly all these records have been typed into a computer, published on microfiche and are now available on the World Wide Web.[3] We thus have available, for the first time, very long runs of manor court rolls, which can be combined with other excellent manorial records including a detailed map of 1598, to reconstruct landholding

[1] **Select Pleas**, xi-xii.
[2] For one overview, see Macfarlane, **Guide.**
[3] See the Earls Colne website off www.alanmacfarlane.com.

over half a millenium. This material is complemented by the extensive records generated by the ecclesiastical authorities, including parish registers and wills, and by the central courts, in particular the rich and hitherto largely unused records of the equity courts (for example Chancery). At one period we are also taken down to the personal level through the diary of Ralph Josselin, the vicar of Earls Colne, through the middle part of the seventeenth century. [1]

All this material has been indexed and family histories and land patterns have been re-constructed. This has taken a team effort involving several computer programmers and many person-years of work. It is unlikely that it will ever be repeated, but it does give us a chance to see how well Maitland's vision works.

It is not possible to do more than summarize some impressions from this dense mass of material. In relation to some of Maitland's major arguments, it would seem that his preliminary hunches fit the data very well. The Earls Colne documents show that English law and society had a continuous evolution from 1200 onwards and that there was no great break, no 'transformation' from one kind of civilization ('feudal', 'peasant') to another ('capitalist', 'individualist'). Anyone who reads through the documents for Earls Colne, and who investigates how the system worked which generated them, will endorse Maitland's vision. There is change, but the deeper structures have great force and evolve without any revolutionary break. Even if we go behind the documents as much as we can, we can see no shadow of the Marxist or other transformations.

Maitland had argued that the English system feels very different from what one reads about in relation to France or much of 'peasant' Europe during the period between the fourteenth to eighteenth centuries. For example, that the attachment to the land in England is far weaker than in France and the strength of the family-land bond is never the same. The conclusion of Maitland concerning the English case again seems fully borne out by the Earls Colne documents.

Maitland had argued that the system in England was never based on the idea of a 'village community', with 'community' ownership of land or other assets and a deeply immobile society where blood and neighbourly relations formed people into a '**gemeinschaft**'. Maitland's description of the mixture of individualism and association appears to capture how the system worked in Earls Colne very well indeed, and there is no sign between 1350-1850 of the movement from community to individualism.

Maitland had suggested that the English system consisted of a complex web of rights and duties which was both centralized and de-centralized, and which nested people in levels and layers. A study of the land and other records of Earls Colne is beautifully illuminated by Maitland's account of how feudalism worked, and in particular the detailed descriptions in some of the lengthy court cases in Earls Colne, involving such notables as the Earl of Oxford and Lord Treasurer Burleigh, illustrate the immensely sophisticated links between power and property which Maitland analysed so well.

[1] See Macfarlane, **Family Life** and **Diary**.

Maitland presented a picture of an unstable, meritocratic and mobile, social structure in which people were constantly jockeying for wealth. In other words, there were no castes, no hereditary blood ranks, but rather wealth could buy status. This is illustrated throughout the history of Earls Colne, with property changing hands, with new rich London merchants entering the village, with children of the same parents rising and dropping in wealth and rank.

Maitland suggested that the family system was based on negotiation and a basic premise of equality, for instance that there was an absence of patriarchal male power over children and women. There is abundant evidence in Earls Colne, again especially in the equity records, but also in wills and other records, of the relative autonomy and power of women and children. There is, as Maitland argued, no evidence of a gradual improvement in women's status over the centuries and, if anything, the women of the fourteenth to sixteenth century appear more autonomous than those of the nineteenth.

Maitland documented the power and ubiquity of law and due process. This is everywhere apparent; the heart of the system in Earls Colne was the multiplicity of courts, the respect for law, the widespread knowledge of and involvement of people down to almost the bottom of the society in the legal system. It was, as Maitland realized, a society soaked in law, but law of a curiously confrontational, customary and rights-based kind.

Maitland suggested that what held the system together was the ability of non-related persons to work together in small associations and units based on the concept of the Trust. Even at the local level of Earls Colne we can see his ideas reflected, often indirectly, in a thousand ways. We can see it in the organization of the school, the church, the manor, the county administration; the way in which the clergy, the teachers, the jurors in the manorial courts, the small nonconformist sects worked. All this and many other signs show us a world where people collaborated to run their own activities with their neighbours, friends, co-religionists or whatever in numerous informal associations. Many of these were based on trust and honesty, on time freely given to benefit not the community as a whole, but either the association or something at a higher level, though it was not yet called the State. Thus the individualism was curbed by the proliferation of associations and by the obligations to work with others.

In a short book all this can only really be asserted. I can only affirm that in studying Earls Colne over the last thirty years, in comparing it to another English parish in the north of England, Kirkby Lonsdale, and by comparing both of these to what I have read about as an anthropologist, and a long study of a Himalayan village and the history of Japan, I have found that Maitland's vision fits and illuminates the English case beautifully.[1] I did not undertake the village study to test Maitland, but after the event, when we compare his hypothetical model against the superb documentation for one English parish for five hundred years, it is impossible to find anything that he seems to have seriously misjudged. This is more than can be said for many of those who have come after

[1] Macfarlane **Resources**; Macfarlane 'Law and custom in Japan'; Macfarlane, '"Japan" in an English Mirror'.

him and it is another hint that we can have some confidence in his conclusions. Inspired by Maitland's heritage, we have made available many thousands of pages of original documents against which his vision can be tested.[1]

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Since Maitland's account, if correct, would be such an elegant demonstration of the accuracy of the guesses of Montesquieu, Smith and Tocqueville, it is worth assessing his authority by one further test. Although he was deeply knowledgeable about continental law and far from being a 'little Englander' we may wonder whether England was really so odd, and whether the divergence during the twelfth to fifteenth centuries is as real as Maitland argued. In order to pursue this, we can look at the problem from another angle, through the eyes of arguably the only other medievalist who can vie with Maitland in width and depth, namely Marc Bloch. What did Bloch think of that comparison between continental and English development which was at the centre of the theories of all these thinkers?

In relation to England, Bloch seems to have developed a three-period model which is in many respects parallel to Maitland's. The Anglo-Saxon period constituted the first phase. In his great work on **Feudal Society**, Bloch noted that from Anglo-Saxon times there was something independent and different about England, it was 'a society of a Germanic structure which, till the end of the eleventh century, pursued an almost completely spontaneous course of evolution.' [2] Part of the reason for its oddness, as Maitland had argued, was that 'Britain lacked that substratum of Gallo-Roman society which in Gaul...seems clearly to have contributed to the development of class distinctions.'[3]

Then, as Maitland had argued, there was about a century and a half of considerable overlap, namely between about 1100 and 1250. 'Despite its distinctive features, the course of development in England presented some obvious analogies with that in the Frankish state.'[4] Thus the 'evolution of the **de facto** nobility at first followed almost the same lines as on the continent - only to take a very different direction in the thirteenth century.'[5]

The divergence began pretty soon for, again echoing Maitland, Bloch argued that from about the end of the twelfth century the relations between the power of the Crown and the lords developed in a different direction in England. 'It is here that the two paths noticeably diverge. In England from the twelfth century onward royal justice made itself felt with exceptional force.' In France, on the other hand, 'the evolution of royal justice lagged a good century behind that of England and followed a totally different course.'[6]

There were several areas where the growing divergence from the later twelfth century showed itself. Among these were the following. The 'distinction between

[1] See www.alanmacfarlane.com.
[2] Bloch, **Feudal**, I, 181.
[3] Bloch, **Feudal**, I, 184.
[4] Bloch, **Feudal**, II, 370.
[5] Bloch, **Feudal**, I, 184.
[6] Bloch, **French**, 127, 128.

high and low justice always remained foreign to the English system.'[1] The allodial estates common on the continent, which prevented the final penetration of feudal tenures to the bottom of society, were totally extinguished in England, where all land was ultimately held of the king and not held in full ownership by any subject. England was exceptional in not having private feuding sanctioned after the Conquest; it therefore avoided that disintegrated anarchy which was characteristic of France.[2] Indeed, English feudalism, we are told 'has something of the value of an object-lesson in social organization', not because it was typical of feudal society but because it shows 'how in the midst of what was in many respects a homogeneous civilization certain creative ideas, taking shape under the influence of a given environment, could result in the creation of a completely original legal system..'[3] It is this 'completely original legal system' which provides the key to the problems which we have been discussing.

At a deeper level, Bloch was saying that, as Maitland had argued, England had moved a long way away from that feudalism through which much of the continent had passed. Bloch noted the centralization and uniformity of the English political and social system. This was different from his major feature of feudalism, devolution, disintegration and the dissolution of the state. The contrasts come out when he compares England and France. 'In England there was the Great Charter; in France, in 1314-15, the Charters granted to the Normans, to the people of Languedoc, to the Bretons, to the Burgundians, to the Picards, to the people of Champagne, to Auvergne, of the **Basses Marches** of the West, of Berry, and of Nevers. In England there was Parliament; in France, the provincial Estates, always much more frequently convoked and on the whole more active than the States-General. In England there was the common law, almost untouched by regional exceptions; in France the vast medley of regional "customs".'[4] Thus England was uniform and centralized, France varied and regionalized. Because 'the public office was not completely identified with the fief', Bloch argued, 'England was a truly unified state much earlier than any continental kingdom.' Furthermore, the English parliamentary system had a 'peculiar quality which distinguished it so sharply from the continental system of "Estates"' linked to 'that collaboration of the well-to-do classes in power, so characteristic of the English political structure...'[5]

Related to these differences was a peculiar status system. England had no formal blood nobility, while such a nobility did develop in France. It was true that 'England had an aristocracy as powerful as any in Europe - more powerful perhaps...' At the top was a narrow group of earls and 'barons', who were in the thirteenth century being endowed with privileges. Yet somehow these privileges took a different shape from those on the Continent. They were 'of an almost exclusively political and honorific nature; and above all, being attached to the **fief de dignite**, to the "honour", they were transmissible only to the eldest son. In short, the class of noblemen in England remained, as a whole, more a "social" than a "legal" class.' Although, of course, power and prestige lay with this group, it was 'too ill-defined not to remain largely open.' Thus 'In the thirteenth

[1] Bloch, **Feudal**, II, 370.
[2] Bloch, **Feudal**, I, 128.
[3] Bloch, **Feudal**, I, 274.
[4] Bloch, **Feudal**, II, 425-6.
[5] Bloch, **Feudal**, II, 430, 371.

century, the possession of landed wealth had been sufficient to authorize the assumption of knighthood, in fact to make it obligatory.'[1] Therefore 'in practice, any family of solid wealth and social distinction' never 'encountered much difficulty' in obtaining permission to use hereditary armorial bearings.[2]

Bloch's story is that there was a confusion of ranks up to the Norman invasion, and during the crucial twelfth and thirteenth century England did not move in the continental direction. No nobility based on law and blood, no incipient 'caste' in Tocqueville's sense, emerged. This, as his predecessors had argued, gave the English aristocracy their enduring flexibility and power. 'It was mainly by keeping close to the practical things which give real power over men and avoiding the paralysis that overtakes social classes which are too sharply defined and too dependent on birth that the English aristocracy acquired the dominant position it retained for centuries.'[3] It is not surprising that Bloch should head the section, 'The Exceptional Case of England.' At the level of European feudalism, Bloch had demonstrated that indeed, England, as Tocqueville had much earlier guessed, had not moved from contract (feudalism) to status (caste ranks). It had not reversed Maine's famous dictum that 'the movement of the progressive societies is from status to contract'.

Likewise in the lowest rank, there developed something strikingly unlike the situation in France. It is in the same period, namely the second half of the twelfth century, that another structural difference became visible, the peculiar position of the English villein. Bloch points out 'How often has English villeinage been treated as the equivalent of the French **servage** in the 13th, 14th and 15th centuries...But this is a superficial analogy... Villeinage is in fact a specifically English institution.' This was a result of 'the very special political circumstances in which it was born', namely that 'As early as the second half of the 12th century...the kings of England succeeded in getting the authority of their courts of justice recognized over the whole country.'[4] The differences grew wider and wider so that 'The French serf of the 14th century and the English serf or villein of the same period belonged to two totally dissimilar classes'.[5] Elsewhere he elaborates on how, 'in this remarkably centralized country' the royal authority could re-capture runaway serfs.[6] This was because under the influence of the Normans and Angevins, 'the judicial powers of the crown had developed to an extraordinary degree.'[7] He confirms Maitland's view that in the 'England of the Norman Kings there were no peasant allods' while these were present in France.[8]

All of these structural differences set England along a very different path to much of continental Europe. Bloch even linked these differences to a growing divergence in relation to liberty and property. In his essay 'A Contribution Towards a Comparative History of European Societies', originally published in

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[1] Bloch, **Feudal**, II, 331.
[2] Bloch, **Feudal**, II, 331.
[3] Bloch, **Feudal**, II, 331.
[4] Bloch, **Land**, 58-9.
[5] Bloch, **Land**, 61-2.
[6] Bloch, **Feudal**, I, 271.
[7] Bloch, **Feudal**, I, 272.
[8] Bloch, **Feudal** I, 248.

1928, Bloch elaborated the effects of some of these differences. English agriculture became 'individualistic' while French agriculture remained 'communal', A 'new notion of liberty' was born in England where 'no man, not even the King, may come between him [the serf] and his lord. But there was nothing like this in France. There, royal justice was much slower in developing, and its progress took a quite different course. There were no great legislative enactments like those of Henry II of England.'[1] Thus although England and France were 'neighbouring and contemporary societies' the 'progress and results' of their individual development 'reveal such profound differences of degree that they are almost equivalent to a difference of kind...'[2]

Thus we see in Bloch, as in Maitland, a narrative which basically fills out the guesses of earlier theorists. Some of the roots of our peculiar modern world lie in the Anglo-Saxon period. For a century or a little more England and the continent converged. Then, from the twelfth century, law and social and political structures diverged. Much of the continent moved towards Tocqueville's caste and absolutism. For particular reasons one island retains a balance of forces and a dynamic tension between parts of the institutional structure. This would provide shelter for the inventions and ideas of its larger European neighbours.

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F.W. Maitland's work has tended to be set within too small a frame. Most of those who write about him are historians of England or English lawyers, specialists who are technically equipped to follow parts of his argument. They do not often set him within a European frame or a great tradition of intellectual endeavour. They do not see his real interest in the questions of political economy stemming from his early training and fellowship dissertation; they do not consider his extended temporal frame, a metahistory of England from the seventh to nineteenth centuries. They are too close to him.

When we step back, as we now can do since he is quite distant from us, we can see, as K.B.McFarlane put it in his metaphor, that he is indeed a mountain rising far above the technical history of medieval English law, and far more than merely a great editor of English documents, though he is both of those things as well. His central problems concerning the origins of liberty and equality are the same as those of Montesquieu and Tocqueville. And his answers, though limited to one country, make up for geographical width by their time-depth and their deep erudition.

Maitland was not a believer in inevitable progress. He was not a 'Whig' historian. Yet he believed in growth, change with continuity, the deep roots of English liberty. He was not an English chauvinist, yet he was proud of English law and saw its virtues despite, or perhaps partly because of, its muddle and empiricism. He was not a vulgar positivist; he realized that historical work depended critically on intuition, hunches, guesswork. Yet he equally realized that careful research into contemporary documents was necessary to prove and correct the intuitions. He moved with ease between theory and data, between

[1] Bloch, **Land**, 60-1.
[2] Bloch, **Land**, 66.

minute and accurate detail and grand overviews. He was both one of the best of local historians and also a thinker on an international scale. As Schuyler wrote, the 'combination of broad views and minute investigations, of what Macaulay called landscape painting and map making in the writing of history, is one of his marked characteristics.'[1]

Driven on by the sense of an impending early death Maitland tried to solve within a period of some twenty years the same riddle as earlier thinkers. How had the strange modern world, with its glimpses of liberty, equality and wealth, been made? Why had it found its expression in a certain part of the world and in its earliest and definitive form in England? What precisely were the constituents of this peculiar civilization? His solutions, much more deeply based on documents, were in substance the same as those put forward by Montesquieu, Adam Smith and Tocqueville. The essence of modernity lay in the separation of spheres, the tensions between religion, politics, kinship and economy. Out of these contradictions emerged certain liberties and a dynamic energy. Maintaining the balance between them was extraordinarily difficulty. What the others had guessed was that the origins must lie somewhere in the period of the Germanic invasions. What Maitland showed was that while the trail did indeed run into darkness there, it was possible to move back and forth along the trail since that time.

If one did so, one could see that maintaining the balance was a gigantic accident. A whole set of factors, from the general (the nature of islandhood, the accident of the Norman Conquest, the absence of Cathar heresies and the inquisition), to the individual (the personality of Henry II or Edward I) played their part. What happened on one small island both reflected what happened on its neighbouring continent, but also transformed it. Like some new species of finch on the Galapagos, there developed a new kind of civilization. This would then be magnified and taken to its extreme through other accidents, the development of America, the expansion of the British Empire and the first industrial revolution and so to the modern world. With Maitland we have a developed theory which puts forward a believable answer to one part of the question of how the modern world has been made.

[1] Schuyler, **Maitland**, p.20.

10. Maitland's Solution to the Mystery

The solution or heart of the mystery concerning the origins or our strange world lay in the hybrid nature of what has emerged. The overcoming of the contradictions between status and contract must lie in a new form of association. This new entity must be 'incorporate', that is have an enduring body, yet it must not be set up by blood (kinship) or by religion, or by the State. It must be answerable to itself. Yet it must be recognized and tolerated by these jealous institutions. Secondly, it must be recruited and selected on the basis of choice, both of those within the group and those outside. It must be based on achievement rather than ascription, with a right to recruit and expel and a tendency towards recruiting on the grounds of merit and efficiency. Thirdly, it must be able to pursue goals and protect itself from the encroachments of jealous rivals, goals which are rather specific and which are not thrown off course by wider considerations. In other words, it needs to encase a set of individuals and give them a co-operative and protected space where they can pursue the goals of the group.

All civilizations develop temporary, if often weak, versions of this; flower arranging circles, mutual credit associations, coffee-house cliques. But as soon as any of these gain conspicuous success or begin to accumulate wealth, they tend to be crushed by their rivals. The family resents the time and emotional attraction of groups of this kind; the Church bans Masonic-type institutions; the State crushes any large-scale organization or meeting of potential subversives. Thus nothing much can develop in the interstices between the dominating institutions of kinship, religion and the State.

What is extraordinary, and so beautifully described by Maitland, is just that development of the myriad sets of such institutions over time in the rather odd civilization of England. The Trust provided just these features, an enduring or embodied entity larger than the individual, recruitment on choice and merit, toleration by the State, religion and kin, providing a sense of mutual sharing and co-operation in pursuit of some goal. Its fruits, as Maitland showed, are to be seen in many fields, in religion, politics, economy, and social clubs. One possible side-effect or connection he only touched on is between these new entities and the world of sport and games. He did note their immense importance in sport, as in the Jockey Club or the M.C.C., but this was only the shell. The extraordinary fact that almost all team games were invented or developed in England from the later middle ages on, rugby, football, cricket, hockey and so on, is surely not a coincidence.

Firstly these games need the organization within which they could occur, the bounded areas of space, time and attention that permits a group of people taking time away from the calls of economy, kinship, State and religion, to kick a ball about or whatever the activity is. This is provided by the 'club' with its rules, pitch, clubhouse and so on. And then that extraordinary blend of competition and co-operation, self-love and social obligation, which is the quintessence of team games, is encouraged. It is the template for all other kinds of collaborative behaviour. The goal is to win, in sport, war, wealth production, pursuit of merit. The rules are known and involve mutual responsibilities as well as personal gratification. The boundaries of the activities are strictly policed. In theory,

during the game itself, the demands of kinship, faith, social status, political power should be excluded, if possible. The game is the thing. The same spirit of those who pool their talents and assets to form a trading company, bank, operatic society or a legion of 'Quangos', quasi-autonomous non-governmental organizations, or what is often referred to as 'civil society'.

Once these middling groupings have gained a foothold and been allowed to develop, they soon reach a stage where the inflow of increasing wealth is fed into them. They are like middle-sized plants, filling in densely the space between the high vegetation, the tree-tops of the State and Church, and the single individuals or family on the forest floor. In most civilizations, this middle level has been increasingly cut away, leaving a huge space between the State and the Established Religion on the one hand, and the clinging bed of short, flattened, lateral links that is the extended family. But once the peculiar associations start to flourish, as Tocqueville noted in America, they crowd into this middle area, weakening the despotic power of the two extremes, the roof canopy of State and God, the amoral familistic demands of the kinship groupings. Loyalties are multifarious, activities are protected, and there are huge advantages to be gained from associating for numerous purposes. A world of clubs, companies, fellowships, sects and so on emerge.

This is the safeguard of liberty and equality, as Montesquieu, Tocqueville and Maitland all realized, protecting the individual from the tendencies towards political centralization or over powerful demands of a familistic or religious kind which stress uniformity. Emerging diversity, co-operation with competition, flexibility, constant new forms of organization and innovation are encouraged. This is the secret of the strength and vigour of England, then America, then Japan and now much of the world. It has swept over the world along with English language, law and games, all of which are linked to each other.

For the first time, increasing wealth fed into the middle parts of the system, rather than top and bottom. A prosperous, bourgeois, middle-class world emerged, full of competing small-scale groupings, 'teams' one might say, which tried to outdo each other whether at football, in interpretation of the Christian bible, trade with the Indies, political power. Parties, clubs, associations, these are the organizational secret of modernity. Only they could effectively overcome the two extremes of anomie/contract or holism/status. They made tolerable the separation between different parts of a society and indeed help to maintain it. They constitute the increasing division of the world into small, meaningful, social spaces which cross the boundaries of primordial loyalties. The grounds of recruitment are not status, but contract, but once formed they have some of the warmth of kinship, without the open-ended claims. And because there are many of them, and none has a monopoly, none can become absolutist. Whether competing political parties ever jostling for power, or religious sects, jostling for salvation, or scientific and artistic associations, competing for truth or beauty, or social clubs, competing for leisure and jollity, or economic associations, competing for wealth, they provide the individual numerous places to develop her or his creativity and energy. The Japanese developed this through a peculiarly flexible sort of kinship system, the English through the Trust. And on these developing institutions were laid the foundations of the first escape into modernity in East and West.

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One of the characteristics of this world of associations is, of course, that if you are brought up in it and it surrounds you, it becomes invisible. Associationalism is now so 'natural' to the British and Americans that it seems to need no explanation, and it would hardly be such peoples who discovered the power of associations. It tends to be those who have lost or have weakly developed associationalism who first notice its importance. Nowadays it tends to be those, for example, from an East European background who are interested in what will replace communism who praise civil society in the West and stress its centrality.[1] In earlier times it was those outside Europe. Even earlier, it was the French and Scots, living in recently **ancien regime** or clan societies, dominated by status, who were astonished by this peculiar phenomenon.

The new dimension added through Maitland's rejection of Sir Henry Maine's theory of the movement of all progressive societies from status to contract was the historical documenting of the accidental and artificial development of civil society, which for the first time became dominant in a world civilization. Democracy, liberty, equality and wealth all have their roots in this common, largely invisible, bed of associations. Its emergence was an accident, its survival precarious. The infant could easily have been strangled and if Henry VIII or Hobbes had had their way, the intestinal worms that fed within the body politic would have been poisoned and evacuated. If they had been, the desire to unite in the pursuit of wealth, power, knowledge, would no doubt have been expressed in the multitude of secret societies, Masons, Rosicrucians, Mafia, Triads, Yaku-za and so on which infest other bodies politic.

In the majority of historical cases there are the fully accepted, status-based, structures and against them the prohibited secret organizations at war with the State. The constant tension saps both parties; the costs of secrecy and the costs of policing are equally great. What is extraordinary in the Anglo-American tradition is that the associations were relatively open. There was little prohibition or interference. The sects, parties, clubs, companies, fellowships, were not driven underground into a world of an 'informal' or 'black' economy, polity or society. They worked with the State and the Established Church. They paid their taxes, observed the rules of the State, and were composed of the most upright citizens who were proud to declare their membership. Hence wealth, power, sociability, knowledge could all be pursued openly. There was little of the friction of surveillance, of intrigue and secrecy. Nor was it difficult to spread successful solutions to practical problems.

As soon as a sect or company or club was set up which appealed to others, the open market in associations encouraged competitors. And the rewards of belonging to such units, whether material or symbolic, did not have to be laundered in any way. The encouragement to honesty, trust and mutual respect, rather than fear, deceit and mutual suspicion is enormous and the advantages of such an open society, whether in the pursuit of truth or wealth or social worth, were decisive. The 'black' alternative systems and double standards which are

[1] See for example the work of E. Gellner, particularly **Conditions of Liberty** and, for a more critical assessment, from an East European perspective, Hann and Dunn **Civil Society**.

increasingly the bane of the former Soviet Union, India and many parts of the world, were, on the whole, absent.

Thus at the level of the nation, that same favourable mix of diversity within a common uniformity occurred at a localized level. This encouraged the splitting up of the sources of power, wealth, sociability so that centralization and rigidification became more difficult. As soon as some monopoly began to build up, it was automatically outflanked by smaller, but nimbler, rivals. Even the State itself found itself deprived of many of its lucrative functions by sets of individuals combining in associations which had 'privatized' policing, money making, entertainment, knowledge generation.

As Tocqueville had pointed out, this meant that the almost powerless individual could become strong through associating with other like-minded individuals. Whether through a trades union, a women's institute, a suffragette organization, a slavery abolition society, a disability action group, a minority religion or whatever, a plurality of voices were heard and hitherto disadvantaged groups started to improve their position. Normally, in other countries, protest from such groups, or even a recognition of their common interests, was crushed. Yet the associations gave them power. And this power was at a meaningful level. Marx glumly encouraged the workers of the world to unite, well aware that class solidarity was too nebulous, too factionalized, to be strongly felt. But like-minded individuals could join in communities which could be strongly imagined because they were small enough, directed enough, to make people feel part of a rule-bound local organization. People could play for and identify with a football club or religious sect. It is more difficult for them to imagine themselves deeply devoted to 'football' or a world religion in the abstract.

In order for the modern world to emerge it was necessary not only to set up a new economic organization, a new political order, or even a set of oppositions and separations between the basic ties and demands of religion, politics, economics and kinship. Somehow the old dichotomies, community and individual, status and contract, rulers and ruled, had to be overcome. Or if one were to put it in Darwinian terms, the selfish gene is not enough. Free competition leads to Hobbes' nasty, brutish and short life. But the other extreme, the complete fusing of the individual in the organic whole is not satisfactory either, leading in extreme cases to the worlds of Stalin, Hitler, Mao and Pol Pot. A tension between competition and co-operation, self-love and social, has both to be maintained and, at the same time, resolved.

When Bernard Mandeville in the early eighteenth century began to speculate on these problems, it was clear that somehow a resolution of the conflict between 'private vice' or self-love, and 'public benefit' or social good, was possible and the 'grumbling hive' worked.[1] Yet neither he, nor, to a large extent, even the Enlightenment philosophers could work out how the trick was performed. In the second half of the nineteenth century, Maine, Tonnies, Marx all applied their minds to the same problem, but none really came up with a satisfactory answer, for they either thought in terms of binary oppositions (Maine and Tonnies) or tried to return mankind to some primitive,

[1] Mandeville, **Fable.**

pre-oppositional, situation (Marx). Maitland accepted the disassociations and the disenchantments, the contradictions and the separations. Yet he saw beyond them to new forms of mixture of status and contract, of community and individual, which had until relatively recently never underpinned a civilization. Developing insights of Tocqueville on associations, anticipating recent work on civil society, he saw how humans had invented a system which encouraged the development of numberless small, imagined, communities which still preserved individuality.

These little groupings had bodies, they were emotionally and organisationally more than the sum of the parts, yet they were also artificial bodies. They were not based on birth or inheritance, nor were they merely chartered off-shoots of the State. They were autonomous, yet regulated lightly, recognized yet largely ignored, 'nobodies' in Maitland's phrase, yet they filled the teeming middle space of open, democratic societies. This multitude of associations were the bane of all authoritarians, they needed to be 'bundled up' into the State according to those from Hobbes, through Rousseau, to Hitler and Mussolini. If they could not be incorporated into the body politic, they must be exterminated if possible. All alternative groupings to the State, whether these are artificial entities or ethnic ones, must be broken down, destroyed. As the French Revolutionaries quoted by Maitland had declared, there must be no other loyalties than to the State. A world of State and citizen alone, with no cross-binding ties between citizens not mediated through the State, was proclaimed.

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If, as Tonnies put it, the opposition is between societies based on contract, reason, the mind, in other words **gesellschaft** (or what Maitland translated accurately not as 'association', but 'partnership'), as opposed to societies based on emotion, status, blood and place, or **gemeinschaft** (community) then modern civilizations, in order to work and be tolerable places to live in, have somehow to find a way to fuse the two. This is what 'fellowship' or trust does. It is vaguely related to clubism, to 'matiness' in the Australian sense, but is not gendered. It makes it possible to set up meaningful, enduring, sub-communities within a basically contractual society. These 'communities' are not based on blood and place, but communities of sentiment as well as purely instrumental and practical goals, which make life worth living and complex co-operation possible. Whether a music club, a rowing club, a ballroom dancing club, a gardening club, a political club, a religious fraternity, a business organization, a charity, or a thousand other organizations, the blend of heart and mind, of emotion and reason, of the short-term instrumental and the long-term affections, of self-love and social, can be achieved. It is this invention of associational institutions which explains why most of the major charitable, social, political as well as economic, political and sporting associations were invented in England. The list would include the RSPCA, Salvation Army, Lions clubs, Boy Scouts and Girl Guides, Oxfam, Women's Institutes, Rambler's Associations and so on almost endlessly. [1] And as Tocqueville had noticed,

[1] See Veliz, 'A World Invented in England' in **New World**.

participation in such self-governing associations is the main bulwark against dictatorship. The rights of associations are the protection for liberty and all totalitarian aspirants try to curtail them, usually on the pretext of war or the threat of war.

The real mystery is how such anomalous and mixed entities could arise; with too much sentiment to have been achieved by contract alone, with too much choice and reason to be ascribed purely by status. They are logical contradictions, hybrid forms, as Maitland so elegantly described. They are corporate, having bodies, yet not incorporated by the State. They are formally constituted, artificial entities, yet evoking the passionate adherence of their members. Do they have any parallels in the high animals, one wonders, that is associations based on mutual interest and proven capacities independent of birth? Some have lasted up to seven hundred years in the West, the Universities, Inns of Court, religious brotherhoods, guilds and fraternities. Yet the great time of their proliferation was probably the seventeenth to nineteenth centuries when Britain became the richest and most powerful nation in the world. And the whole art of setting up these quasi-groups was exported to America.

This is not to argue that such an associational world had never occurred before or outside the Anglo-American region. This situation of numerous non-kinship, non-state associations is what was characteristic of the small-scale communities of Western Europe in the early medieval period. Thousands of semi-contractual, semi-permanent institutions, religious fraternities, guilds, craft mysteries, liberties, vills and manors, feudal associations, universities were present. It was a community of communities. This was, to a certain extent, also the situation in medieval Japan after the collapse of the Chinese-based civilization in the eleventh and twelfth centuries. Numerous semi-contractual associations of a religious and secular kind flourished. Such periods, as in the free cities of southern Germany or Renaissance Italy, are periods of enormous innovation and energy. Yet they usually do not last for long. The parts are knitted up together, the loose confederations and liberties crushed, a few powerful institutions, Leviathan and the Papacy, grow and absorb smaller entities until there is a new hierarchical and holistic world. This happened in different ways in **ancien regime** Europe and Tokugawa Japan. They were alike in seeing a move away from contract to status. In only one or two exceptional cases, for example Holland, parts of Scandinavia, England, does one see a move from contract and status to something beyond both of them, namely trust and association.

In continental Europe, with its revived Roman Law from the fourteenth century, the new institutions found it difficult to survive and have several times almost been snuffed out in the twentieth century. Likewise it has been difficult for them to take hold in the communist states, which consider all alternatives to the Party with deadly hostility. Nor have they always found great favour in caste-based India or, until recently, in much of Latin America. Only in Japan, where the legacy of medieval feudalism was a society already curiously modern in its separations, even if overlaid with the rigidities imposed after the Tokugawa gained dominance in the early seventeenth century, could the Anglo-American system very rapidly take root, even if it was again temporarily repressed in the period up to the Second World War.

These associations fit with a modern world in various ways. Firstly, they tend to fit within a separated sphere. Whereas the traditional spheres tried to be hegemonic, for example kinship dominated religion and the economy, or politics tried to organize the rest, the associations were located within a particular sphere. A religious sect should not interfere much in politics or the market, a gardening club would not pronounce on religion, a sporting club should not tamper with the market. So these associations did not demand a total, but rather a partial, goal-directed, loyalty. On the other hand, they tended to be more than purely utilitarian. They had rules, demanded commitment, excluded as well as included, had a feeling of community, that is to say of belonging. The call to efficiency in pursuit of certain ends, sport, thought, politics, worship, could be heeded. Yet the individual could also have a sense of mutual friendship, fellowship, meaning, and social appreciation in Smith's terms. So the whole was more than the sum of the parts.

As far as the relations between these associational groups go, this was flexible, fluid and quite relaxed. There was sometimes games-like competition, as in a college or university boat race. There was sometimes ranking. But on the whole the structure was maintained, as in other acephalous (headless) systems by the tension between the groups. In the same way, the system as a whole worked through structural tensions and contradictions and oppositions, rather than through a merging of top-downwards authority.

Thus, in theory, through the mysterious contradictions of these new mixed forms of association, the individual can expand beyond the isolation of the lonely crowd, to become part of numerous quasi-groups, the fellowship stretching from transitory ones (the pub or communal hot spring) to an enduring group making or doing things together over the years. Even if each woman and man is not part of a continent, in theory each person can visit islands of fellowship in a sea of atomistic, contractual, market society. This possibility, and the resolution of the logical contradiction of self-love and social, is the mysterious essence of modernity.

In a trick which is so difficult to understand, a civilization has emerged which has separated off different parts of life, the institutions of power (politics), wealth (economics), knowledge and belief (religion), warmth and procreation (kinship). But the intolerable burden of living in such a world, the enormous inefficiency of a world of isolated, non-trusting, individuals who would be the only locus of contact between the separated spheres, is overcome by a new flexible institution, whose proto-type was the trust. This is something akin to the reciprocal altruism of the biologists, but with humans is much more than that, and develops into an extraordinary mixture of flexibility and commitment, of individual and community, of calculation (reason) and loyalty (emotion). This is what gave Maitland hope that a new world, which combined liberty, equality and wealth, was both possible and might continue.

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ed. edited or editor
edn edition
eds. editors
Jnl. Journal
n.d. no date
tr. translated by
Univ. University

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