

Cornell Law Review

Volume 18
Issue 2 February 1933

Article 2

13_18CornellLQ192%5b1932-1933%5d.pdf

Charles Sumner Lobingier

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

Recommended Citation

Charles Sumner Lobingier, *13_18CornellLQ192%5b1932-1933%5d.pdf*, 18 Cornell L. Rev. (1933)
Available at: <http://scholarship.law.cornell.edu/clr/vol18/iss2/2>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

THE RISE AND FALL OF FEUDAL LAW

CHARLES SUMNER LOBINGIER*

I. INTRODUCTORY. Among the various legal systems which flourished during the Middle Ages, contributed to the formation of the Modern Civil Law and left their impress upon all Western law, was that which grew out, and formed part, of what we call feudalism.¹ This was a cross current of European social and legal evolution. While other factors and forces—Roman law, Canon law, early International law—were working toward the unification and rationalization of law in Europe, feudalism raised barriers, interrupted progress and often frustrated the most important results of the former. Like the great glaciers which crept down from the polar regions at the close of the Pliocene epoch, undoing the work of untold geological ages, feudalism swept over Europe, stayed for a time the progress of mankind^{1a} on that continent and left consequences which are even yet perceptible.

1. *Character.* Fully developed feudalism has been described² as

“a complete organisation of society through the medium of land tenure, in which, from the king down to the lowest land-owner, all are bound together by obligation of service and defence: the lord to protect his vassal, the vassal to do service to his lord; the defence and service being based on and regulated by the nature and extent of the land held by the one of the other.”

*Professor of Law, National University School of Law; former U. S. Judge in the Philippines and in China.

¹Pollock & Maitland consider this “an unfortunate word”, primarily because “it draws our attention to but one element in a complex state of society and that not the most distinctive” and because it makes “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.”

^{1a}“The church itself seems at length to have been overwhelmed in the resistless tide of Feudalism, sharing to the very depth its secularity, its violence and its moral depravation”. CANON LAW AS A FACTOR IN CHRISTIAN CIVILIZATION, 18 UNITARIAN REVIEW 302.

²STUBBS. CONSTITUTIONAL HISTORY OF ENGLAND (Oxford, 1896). I, 274.

Munroe Smith, regarded it as “a system by which all the land of the realm was drawn into the service of the realm, or as a system by which those who render service to the community receive, in the form of the yield or produce of land, payment or salary for their services.” DEVELOPMENT OF EUROPEAN LAW 165. HALLAM, MIDDLE AGES (1893), I, 309 characterizes the feudal system as “the general establishment of a peculiar relation between the sovereign (not as king, but as lord) and his immediate vassals; between these again and others standing to them in the same relation of vassalage, and thus frequently through several links in the chain of tenancy.”

Three elements³ were here included, viz. (1) property (2) personal (mainly military) and (3), eventually, jurisdictional. The first was represented by the benefice⁴ which originally meant a favor of any kind but came to signify a grant of land with a feudal purpose. Lands not so granted came to be known as allodial. The second element, in the form of vassalage,⁵ characterizes the relation between grantor and grantee; the third, flowering in the manor, is found in "the grants of immunity by which in the Frank empire, as in England, the possession of land was united with the right of judicature."⁶ The original purpose of the system was mainly military.

"The employment of cavalry as the chief force in war and the development of definite feudal tenures go hand in hand. They appeared first in the southwestern part of the empire, in Aquitania. In Gaul or West Francia in the middle of the ninth century the armies were almost wholly composed of cavalry and consisted partly of free vassals and partly of *ministeriales*—that is, *knechte* equipped as knights."⁷

Hence the earliest form of tenure was that afterward known in England as "knight service". Its development was followed by that of another which came to be called "frankalmoign" in which the

³CALISSE, *STORIA DI DIRITTO ITALIANO* (trans. Cont. Leg. Hist. Ser.) VIII, 51; GUIZOT, *HIST. OF CIVILIZATION* (Hazlitt's trans. 1901) III, 19, 20.

⁴"The beneficiary system originated partly in gifts of land made by the kings out of their own estates to their own kinsmen and servants, with a special undertaking to be faithful; partly in the surrender by the landowners of their estates to churches or powerful men, to be received back again and held by them as tenants for rent or service." Stubbs, *ubi supra* note 2, 275.

⁵"The word vassal, used by the Franks, meant a person in a state of dependence upon a seignior and bound to serve him personally according to a pact entered into between them, in return for protection and a living." Calisse, *ubi supra* note 3, 48.

"The acts constituting the feudal contract were called *homagium* and *investitura*. The tenant had to appear in person before the lord surrounded by his court, to kneel before him and to put his folded hands into the hand of the lord, saying: 'I swear to be faithful and attached to you as a man should be to his lord.'** To this act of homage corresponded the 'investiture' by the lord, who delivered to his vassal a flag, a staff, a charter or some other symbol of the property conceded. There were many variations according to localities and, of course, the ceremony differed in the case of a person of base status." VINOGRADOFF, *CAMBRIDGE MEDIEVAL HISTORY*, III, 458. Cf. PARTIDAS III (XVIII [LXVIII]) where the form is given in full; also II, (XIII [XXIV]); BRACTON, *DE LEGIBUS ANGLIÆ* fol. 80; WOODBINE, II, 232.

⁶STUBBS, *ubi supra* note 2, I, 276.

⁷SMITH, *DEVELOPMENT OF EUROPEAN LAW*, (1928), 163.

"It was the law of France, so late at least as the commencement of the third race of kings, that no man could take a part in private wars, except in defence of his own lord." HALLAM, *MIDDLE AGES* (1893) I, 166.

service rendered was of a religious or charitable kind and the subject matter, ecclesiastical lands. Other forms of tenure will appear as we proceed.

2. *Origin and Sources.* Montesquieu (1689-1755)⁸ speaks of the feudal laws as those "which suddenly appeared all over Europe, not being connected with any of the former institutions." He found feudalism in early accounts of the Germanic tribes, especially the Franks, and, apparently, deemed it unnecessary to go farther back. But the explanation was not quite so simple. Feudalism was a product of many forces and elements⁹ and it was not until the late 19th century that all were identified and assembled. Sir Henry Maine (1822-1888)¹⁰ found that the *emphyteusis*¹¹

"not probably as yet known by its Greek designation, marks one stage in a current of ideas which led ultimately to feudalism.**In the course of that long period during which our records of the Roman Empire are most incomplete, the slave-gangs of the great Roman families became transformed into the *coloni*,

⁸ESPRIT DU LOIS (Pritchard's ed.) XXX, 1 sq.

⁹"Montesquieu, and many others: each forms a different idea of it. Whence arises this diversity? It is that they have almost all proposed to find the feudal system entire even in its very cradle, to find it such as they see it is at the epoch of its full development. Feudalism has, as it were, entered at once into their mind; and it is in this condition, at this stage of its history, that they have everywhere sought it. And as, notwithstanding, each of them has applied himself more particularly to such and such a characteristic of the feudal system, and has made it to consist in one particular element rather than another, they have been led into immensely different ideas of the epoch and mode of its formation; ideas which may be easily rectified and reconciled as soon as people will consent not to forget that feudalism took five centuries in forming, and that its numerous elements during this long epoch, belong to very different elements and origins." GUIZOT, HISTORY OF CIVILIZATION 19.

¹⁰ANCIENT LAW (Pollock's ed.) 299-303.

See also BEGUELIN, LES FONDEMENTS DU REGIME FEODAL DANS LA LEX ROMANA (1893), relating to an epitome of Alaric's Breviary.

Cf. SMITH, DEVELOPMENT OF EUROPEAN LAW, 154: "Some of the roots of the feudal system, in particular serfdom and local immunity, ran back into the late Roman Empire."

HALLAM (*ubi supra* note 2, I, 186) found "sufficient to warrant us in tracing the real theory of féuds no higher than the Merovingian history in France; their full establishment, as has been seen, is considerably later."

¹¹"The legal emphyteusis is 'a perpetual right in a piece of land that is the property of another.' This word occurs first in the Digest of Justinian, and the emphyteutic possessor seems generally to be a mere lessee: it appears in the Lombard Capitulary of A. D. 819." Cf. my MODERN CIVIL LAW, CORPUS JURIS, XL, 1455 sq. For a comparison between the classical *emphyteusis* and the *fief* (*few*) as developed in Scotland, see DUNDAS, A SUMMARY VIEW OF THE FEUDAL LAW (1710) 5.

whose origin and situation constitute one of the obscurest questions in all history. We may suspect that they were formed partly by the elevation of the slaves, and partly by the degradation of the free farmers; and that they prove the richer classes of the Roman Empire to have become aware of the increased value which landed property obtains when the cultivator has an interest in the produce of the land. We know that their servitude was predial; that it wanted many of the characteristics of absolute slavery, and that they acquitted their service to the landlord in rendering to him a fixed portion of the annual crop. We know further that they survived all the mutations of society in the ancient and modern worlds. Though included in the lower courses of the feudal structure, they continued in many countries to render to the landlord precisely the same dues which they had paid to the Roman *dominus*, and from a particular class among them, the *coloni medietarii*, who reserved half the produce for the owner, are descended the *metayer* tenantry, who still conduct the cultivation of the soil in almost all the South of Europe.**We have clear evidence that between the great fortresses which, disposed along the line of the Rhine and Danube, long secured the frontier of the Empire against its barbarian neighbors, there extended a succession of strips of land, the *agri limitrophi*, which were occupied by veteran soldiers of the Roman army on the terms of an Emphyteusis.**It seems impossible to doubt that this was the precedent copied by the barbarian monarchs who founded feudalism. It had been within their view for some hundred years, and many of the veterans who guarded the border were, it is to be remembered, themselves of barbarian extraction, who probably spoke the Germanic tongues. Not only does the proximity of so easily followed a model explain whence the Frankish and Lombard Sovereigns got the idea of securing the military service of their followers by granting away portions of their public domain; but it perhaps explains the tendency which immediately showed itself in the Benefices to become hereditary, for an Emphyteusis, though capable of being moulded to the terms of the original contract, nevertheless descended as a general rule to the heirs of the grantee."

So much for the origin of the property element. As to the personal side

"the holder of a benefice, and more recently the lord of one of those fiefs into which the benefices were transformed, appears to have owed certain services which were not likely to have been rendered by the military colonist, and were certainly not rendered by the Emphyteuta. The duty of respect and gratitude to the feudal superior, the obligation to assist in endowing his daughter and equipping his son, the liability to his guardianship in minority, and many other similar incidents of tenure, must have been literally borrowed from the relations of Patron and

Freedman under Roman law, that is, of quondam-master and quondam-slave."¹²

But if these basic sources of feudalism were Roman, another element was not.

"When the feudal world has at last been constituted, it wears superficially a variety and irregularity of outline very unlike the apparent uniformity of the Roman Empire. But, on close inspection, all feudal society is seen to be a reproduction of a single typical form. This *unit* consists of a group of men settled on a definite space of land, and forming what we Englishmen call a Manor, and what in France was called a Fief.*¹³ We can trace the Manorial group backwards to an earlier social form, a body of men democratically or rather aristocratically governed, in which the free tenants had as yet no lord, the village community."¹³

Here was one instance of the autocratic influence of feudalism. *The Final Process*. "Frequent in the fifth century", we are told,¹⁴ was the practice known as "commendation", by which

"the inferior put himself under the personal care of a lord, but without altering his title or divesting himself of his right to his estate; he became a vassal and did homage."¹⁵

It seems to be agreed¹⁶ that it was the combination of this practice with the benefice which produced the fief.¹⁷

¹²MAINE, ANCIENT LAW 303.

¹³MAINE, EARLY LAW AND CUSTOM (1886) 302, 306. Cf. VINOGRADOFF, CAMBRIDGE MODERN HISTORY III, 473.

¹⁴HALLAM, *op. cit. supra* note 2, I, 185. Cf. 165, sq.

¹⁵STUBBS, CONSTITUTIONAL HISTORY I, 275. "The duke (of Normandy) himself was by commendation a vassal of the king, not so much as king, for the gift to Rollo had left him free, but as duke of the French: Richard of Normandy had commended himself to Hugh the Great, whose descendants had since become kings." *Ibid.* 272. "Military service was sometimes the condition of this engagement". HALLAM, *op. cit. supra* note 2, I, 185.

Church livings were held *in commendam* in England. BLACKSTONE, COMM. I, 393. Cf. IV, 107, indicating that the system had crept into canon law.

HALLAM (*op. cit. supra* note 2, I, 187n) was not certain that the vassalage described in *Las Siete Partidas* "meant anything more than voluntary commendation *from which the vassal might depart at pleasure". But the vassal could "depart" only when he had suffered certain great wrongs. (Part. IV (XXV [VII])). It was in fact one of the universal feudal rules that the vassal was bound only so long as the lord observed his obligations. The doctrine of the *Partidas* appears to be no different. Again the relation might involve a change in property status which would be inconsistent with commendation as defined in the text.

¹⁶HUEBNER, HISTORY OF GERMANIC PRIVATE LAW (trans. Cont. Leg. Hist. Ser. VII, 335) where he mentions feudalism as "originating in a union of vassalage and the *beneficium*." Cf. STUBBS, CONSTITUTIONAL HISTORY, I, 275.

¹⁷"Tenure conditioned by service was called the *feudum, fief, Lehn*." VINOGRADOFF, CAMBRIDGE MEDIEVAL HISTORY, III, 459.

"Benefice, vassalage and immunity had now met and united; to the fief, the new institution which had grown out of them, each contributed an element."¹⁸

Holdsworth,^{18a} however, dates feudalism in Europe from the century following Charlemagne's death, "because, in default of any central government, it was thru feudalism alone that any semblance of order could be kept."

3. *Diffusion*. "Originating in the Frankish empire," says Huebner,¹⁹ "the feudal system spread from the Frankish law into most countries of Christendom"; but "the center of radiation was the French monarchy and the empire".²⁰ We may trace its gradual development in the France of the 9th century,²¹ but its diffusion therefrom was largely due to an element of its population which had only recently become French. For it was not until 911 that

"the Frankish king, Charles the Simple, granted Rollo as a fief a considerable part, the eastern part, of later Normandy. Apparently Rollo did homage for his fief in feudal fashion by placing his hands between the hands of the king, something, we are told, which 'neither his father, nor his grandfather, nor his great-grandfather before him had even done for any man.'"²²

This Rollo, or Hrolf,²³ was the leader of a band of Northmen—Scandinavian freebooters—whose countrymen had harried France

"At the end of the 10th century, when feudalism was definitively constituted its territorial element, bore the name of fief (*feodum*) * * According to some (and this is the opinion of most of the French jurists, of Cujas among others), the word *feodum* is of Latin origin; it comes from the word *fidēs* * According to others, and especially according to German writers, *feodum* is of German origin. * The Germanic origin seems to me far more probable than the Latin origin." GUIZOT, HISTORY OF CIVILIZATION, III, 20, 21.

"The most important tenurial relation ("*Leiheverhältnis*") of the medieval law was tenure ("*Lehn*") in the technical sense. Hardly another institute of the law equalled in importance the tenancy ("*Leihe*") of the feudal law." HUEBNER, *op. cit.* *supra* note 16, 334-5.

¹⁸CALISSE, *op. cit.* *supra* note 3, 50.

^{18a}HISTORY OF ENGLISH LAW (3d ed.) 210.

¹⁹*Op. cit.* *supra* note 16, 335.

²⁰CALISSE, *op. cit.* *supra* note 3, 51.

²¹The Edict of Mersen (847) provided: "Each freeman may choose a lord, either the king or one of his vassals; and no vassal of the king shall be obliged to follow him to war, except against a foreign enemy." The Edict of Kiersy (877) declared that sons of counts who should follow the king, Charles the Bald, to Italy should succeed their fathers in office. "These Edicts", observes Duruy, "set the seal upon a revolution begun long before, and out of which arose a new social order." HISTORY OF FRANCE (4th English ed., 1929) III.

²²HASKINS, THE NORMANS IN EUROPEAN HISTORY (1915) 27.

²³See POLLOCK & MAITLAND I, 70.

for two generations. Once established in the land, however, they quickly absorbed its culture²⁴ and, among other features, the feudal institution. It is a French historian²⁵ who declares Normandy the cradle of the feudal state in France. And having absorbed feudalism they soon began to extend it. Their inherited, roving instincts found vent in pilgrimages and then in expeditions, and early in the 11th century they appear in Southern Italy, fighting the Saracens, and setting up a principality near Naples about 1030. After subjugating the mainland by 1071 under Robert Guiscard they invaded Sicily, reconquered it from the Moslems in 1091, after 30 years of warfare, and founded, under the feudal lordship of the Pope, a kingdom with Roger I as ruler and Palermo as the capital. It lasted nearly two centuries, and was noted for its policy of toleration and its patronage of learning; but, more pertinent to our present theme, is its introduction into, at least southern, Italy, of the feudal system.²⁶

"There the feudal law was first organized by Robert Guiscard, and afterwards confirmed by Roger. When William (the Bad) refused to follow it, the barons' insurrection occurred; their ancient customs being denied them, they rose against their oppressor. In the ensuing disorders, the text of the Assizes (preserved in the royal palace) disappeared, and no more is now known of it than that it was called '*Defatari*,' a word (of Arabic origin) which signifies 'Manuscript' or 'record,' *i. e.* in which the feudal usages were recorded."²⁷

On the other hand

"The north with its powerful Frankish counts and equally powerful bishops was a favorable territory after weak national kings had supplanted the Carolingian dynasty. In central Italy a stronger government, the Church and the communes, gave less opportunity of development to the fief and made it more purely a right of property and less a politico-military institution."²⁸

England. Meanwhile, as Robert and Roger were extending feudalism in the south of Europe, William, Duke of Normandy, was carrying it into England. How far it had existed there previously, is a point which has occasioned much discussion among the historians;²⁹ but

²⁴HASKINS, *ubi supra* note 22, 48 sq.

²⁵FLACH, *LES ORIGINES DE L'ANCIENNE, FRANCE* (1886) III, 88.

²⁶See HASKINS, *THE NORMANS IN EUROPEAN HISTORY* VII, VIII, to the latter of which an ample bibliography is appended.

²⁷CALISSE, (trans. *Cont. Leg. Hist. Ser.*) I, 76.

²⁸*Ibid.*, VIII, 51.

²⁹See STUBBS, *CONST. HIST.*, I, 281 *et seq.*; HALLAM, *MIDDLE AGES* II, 85 sq.

the master, Maitland,³⁰ characterizes the English state on the eve of the Norman Conquest as

“a society of lords and men. At its base are the cultivators of the soil, at its apex is the king. This cone is as yet but low.”

But with the coming of the Norman

“a great change took place in the substance of the cone, or if that substance is made up of lords and men and acres, then in the nature of, or rather the relation between, the forces which held the atoms together. Every change makes for symmetry, simplicity, consolidation.**This change, if it makes at first for a more definite feudalism, or (to use words more strictly) if it substitutes feudalism for vassalism, makes also for the stability of the state, for the increase of the state’s power over the individual, and in the end for the disappearance of feudalism.”

The new importance of feudalism in England is indicated by the fact that during the first century (the 13th) of England’s great legislative activity, little was enacted which did not in some way affect feudalism. The first Magna Carta (1215, XXXIX) forbade the issuance of writs of *Praecipe*³¹ “to anyone concerning any tenement whereby a freeman may lose his court” (*i. e.* manorial jurisdiction). That was in aid of the feudal relation; we shall find later that legislation to curb the feudal system began soon. Nevertheless feudalism has had in England a long vogue which has not yet terminated, and from England the system spread to Scotland³² and even to some of the English colonies in North America.³³

Other Norman Extensions. But the expanding energy of the Normans was not wholly spent in Italy and England. They took a not inconsiderable part in the crusades and one result thereof is probably seen in the Assize of Jerusalem.³⁴ Its characteristic features resemble

³⁰DOMESDAY BOOK AND BEYOND, (1897), 170-172.

³¹By means of which “the king ignored the feudal court of the lord, and brought these cases before his court.” HOLDSWORTH, HISTORY OF ENGLISH LAW (3rd ed.) I, 58.

³²HALLAM, MIDDLE AGES I, 187; DUNDAS, A SUMMARY VIEW OF THE FEUDAL LAW (1710).

But not to the Orkneys and Shetland. See DOBIE, UDAL AND FEUDAL, 43 JURID. REV. 115.

³³See note 43C and note *e. g.*, the lord proprietorship of Penn in Pennsylvania and of Calvert in Maryland. See Penn v. Lord Baltimore, 1 Vesey 444 (1750) per Lord Chancellor Hardwicke, and Cf. Bassett, *Landholding in Colonial North Carolina*, 11 LAW QUART. REV. 154; Barnes, *The Proprietary Government of Carolina* 12 GREEN BAG, 644.

³⁴See *infra* note 69. Hallam, (MIDDLE AGES I, 180) speaks of it as “a monument of French usages in the 11th century.”

French feudalism so strongly that an observer would draw that inference even without the knowledge that the best restoration of the work was by Frenchmen, among them Jean of Ghibelin, a descendant "from the family of one of the courts of Chartres"³⁵ which, by the way, is near the border of Normandy. Nor was that the last instance of Norman feudal extension. When New France was founded in the 17th century, most of the settlers were from Normandy,³⁶ feudalism went with them and remained long after its disappearance in Europe.³⁷

Spain. Hallam³⁸ thought "that feudal tenure was as ancient in the north of Spain as in the contiguous provinces of France". It was, indeed, "so general in the kingdom of Aragon" that he reckoned it "among the monarchies which were founded on that basis".³⁹ He was further of the opinion that feudal tenures in Castile were "very rare"; but he cites authorities to the contrary and his conjecture that the vassalage of the *Partidas* was merely commendation, is clearly wrong.⁴⁰ In both Catalonia and Valencia feudalism of the French type seems to have been established at an early period.⁴¹ In the *Partidas*^{41a} it appears fully developed, and we should expect to find it transplanted to Spain's vast colonial possessions. The *Leyes de Burgos*, promulgated about a score of years after the discovery of America, confirmed the *encomienda* system there with at least the property and personal features of the feudal regime.⁴² They provided for bringing the Indians as *encomendados* (villeins) under

³⁵CALISSE, *op. cit. supra* note 3, Cont. Leg. Hist. Ser., I, 75; SMITH, THE ASSIZE OF JERUSALEM (Leicester, 1842) 8. See *infra* note 71.

³⁶BRACQ, EVOLUTION OF FRENCH CANADA (1924) 3.

³⁷MUNRO, THE SEIGNIORIAL SYSTEM IN CANADA (1907) 9, 10; Titles and Documents Relative to Seigniorial Tenure (Quebec, 1852).

³⁸MIDDLE AGES I, 187 and note. "In a very few years after the first institution of the Knights Templars, they were endowed with great estates, or rather districts, won from the Moors, on condition of defending their own and the national territory. These lay chiefly in the parts of Aragon beyond the Ebro, the conquest of which was then recent and insecure." *Ibid. cit.* MARIANA, HIST. HISPAN. L. X. C. 10.

³⁹Feudalism in Sardinia was developed "under the Aragonese dynasty", according to Calisse, *op. cit. supra* note 3, Cont. Leg. Hist. Ser., VIII, 51.

⁴⁰See *ante*, note 15.

⁴¹DONIOL, LA REVOLUTION FRANCAIS ET LA FEODALITE (2nd ed. 1876), 176; FLACH, LES ORIGINES DE ANCIENNE FRANCE, III, 88.

^{41a}See new English edition (Scott, Lobingier, Vance) 1931.

⁴²HELPS, CONQUERORS OF THE NEW WORLD (London, 1848), II, 253 sq.: MOSES, SPAIN OVERSEAS (New York, 1929), 40 sq. The first ships following Legaspi to the Philippines carried instructions to establish the *encomienda* system there RELACION DE LA CONQUISTA DE LUZON (1572). 15.

the Spaniards as *encomendaros* or vassals of the crown. The process of creating vassalage had the regular feudal accompaniments of homage, oath of fealty and obligations of service; which in the case of the Indians was to be industrial rather than military. Provision was also made for their religious instruction and the modifications of peninsular feudalism seemed to have consisted largely in adapting it to New World conditions with the special design of providing labor and promoting missionary effort.⁴³

Netherlands. Feudalism was evidently in full vogue in the Netherlands when they were under the Holy Roman Empire; for, as early as 1346, we find the Empress Margaret granting a "handvest" (privilege) which relieved feudal tenants from military service beyond the border, unless the war had been undertaken upon the advice of the "knights, nobles and good towns."^{43a} And so late as 1631 feudalism was of sufficient importance in the Netherlands that the celebrated Grotius devoted thereto (under the title of *leen-recht*) no less than three chapters (XLI-XLIII) of the second book of his famous commentary^{43b} on the country's law. In 1629 the States General granted a charter^{43c} of "Freedoms and Exemptions for Patroons" and others "who would plant colonies in New Netherland". It was provided that the former should "forever own, possess and hold from the (General West India) Company as a perpetual fief of inheritance, all the lands lying within in the aforesaid limits, together with high, middle and low jurisdiction." (VI) They were required to "satisfy the Indians of that place for the land" (XXVI) and "find means to support a minister and schoolmaster as soon as possible" (XXVII); but the company was "to supply them with as many blacks as possible" (XXX). Among those who availed themselves of this opportunity was Kiliaen van Rensselaer (1580-1644?) a Company director, who, in the year following the grant, founded a Manor known as Rensselaerwyck, at the confluence of the Hudson and the Mohawk, and on both sides of the former, with an area of 48 by 24 miles, having, "at one period several thousand tenants".^{43d} In 1632 this patroon established a manorial court whose proceedings for certain years have been published^{43e} and which lasted longer, it

⁴³See DOUGLAS-IRVINE, *THE LANDHOLDING SYSTEM OF COLONIAL CHILE*, 8 Hispanic-American Hist. Rev. 470 sq.

^{43a}See Grotius, *Inleiding tot de Hollandsche Rechtsgeleerheyd*; translated by Prof. R. W. Lee under the title, "The Jurisprudence of Holland" (Oxford, 1926) 259.

^{43b}*Ubi supra*.

^{43c}Reprinted, Van Rensselaer Bowier. MSS (Albany, 1908) 137 sq.

^{43d}See VAN RENSSELAER, *THE VAN RENSSELAER MANOR* (Baltimore, 1917), 18.

^{43e}VAN LAER, *MINUTES OF THE COURT OF RENSSELAERWYCK, 1648-1652* (Albany, 1922).

is believed, than any other feudal court within the present limits of the United States. Feudal tenures were not actually abolished in New York until nearly the mid 19th century^{43f} nor until after what amounted to a local civilization to prevent the collection of rents.^{43g}

Germany. "The German feudal law", said Sohm,⁴⁴ "is the richest part of the rich field of German property law". According to Sherman^{44a} "six centuries of German legal history, following Charlemagne," constitute the feudal period. An edict of the Emperor Conrad II, in 1037, marks, it has been said,⁴⁵ "the full maturity of the system and the last stage of its progress". The edict affected directly Lombardy alone; but the feudal law book of that region⁴⁶ acquired a great vogue in Germany and was translated into the vernacular. Feudal law, under the name of *lehnrecht*⁴⁷ appears in German compilations of the 13th century which will be discussed later and "the Lombard law was received as a common and subsidiary law in feudal relations beginning with the second half of the 1400s, notwithstanding that the German feudal law had itself reached a mature and rich development."⁴⁸ Legislation supplementing this "common feudal law" continued down to the 19th century.⁴⁹

Other Countries. Feudalism obtained something of a foothold in the Byzantine empire,⁵⁰ in certain Slavic regions⁵¹ and in those portions of the Near East where the Assize of Jerusalem was introduced, as well as in Scandinavia.⁵² Something like it existed in ancient Babylonia⁵³ and in Japan where it flourished until late in the 19th century.⁵⁴ In Ethiopia (Abyssinia) the first steps to curtail it have just been taken.^{54a}

^{43f}Const., 1846, I, 11-15. Certain "rents and services" were excepted.

^{43g}See ANDERSON, LANDMARKS OF RENSSELAER COUNTY (Syracuse, 1897) ch. VIII.

⁴⁴Z. Priv. Off. R., I (1874), 247.

^{44a}SHERMAN, ROMAN LAW IN THE MODERN WORLD, I, 304.

⁴⁵I HALLAM, MIDDLE AGES, 167.

⁴⁶See *post*, p. 208.

⁴⁷"Lehen is, comparatively a modern form, and signifying also one who leans on another, and in so far connected with the word to lend, *leihen*, and thus the latter has certainly some affinity with the derivation of the word Feodal." I COLQUHOUN, ROMAN LAW (London, 1849), 131.

⁴⁸Huebner, *op. cit.* note 16, *supra*, at 341-2, (trans. Cont. Leg. Hist. Ser., VII). Cf. Brissaud, *ibid.* I, 75.

⁴⁹Huebner, *Ibid.*, 342.

⁵⁰4 CAMBRIDGE MEDIEVAL HISTORY 75.

⁵¹*Ibid.*, 547.

⁵²But see, DOBIE, UDAL AND FEUDAL, 43 JURID. REV. 117.

⁵³See 41 Law Quart. Rev. 449.

⁵⁴LEE, HISTORICAL JURISPRUDENCE (New York, 1900), 456.

^{54a}See N. Y. Times, Jan. 2, 1932.

II. NATURE. "Of all the phenomena of feudalism", said Maitland,⁵⁵ "none seems more essential than seignorial justice. In times gone by English lawyers and historians have been apt to treat it lightly and to concentrate their attention on military tenure. For them 'the introduction of the military tenures' has been 'the establishment of the feudal system.' But when compared with seignorial justice, military tenure is a superficial matter, one out of many effects rather than a deep-seated cause. Seignorial justice is a deep-seated cause of many effects, a principle which when once introduced is capable of transfiguring a nation."

Suarez⁵⁶ called the feudal legislation of the Prussian *landrecht* a *jus feudale universale*; but he seems to have referred to Germany alone. Feudal law never became *jus commune* as did Roman and Canon law. It is true that the law of the multifarious feudal jurisdictions had similar features and showed striking resemblances; but that was partly because they arose under analogous conditions and were, as we have seen, largely diffused from a single center; and partly because of the prestige of certain feudal law books presently to be discussed.⁵⁷ The underlying theory of feudal law on this point has been stated as follows by a recognized authority:⁵⁸

"The relationship of service in public law and the obligation of military service which preceded it was later (perhaps beginning with the tenth century) applied to private law. Thus it was concluded that all persons and things within the boundaries of a certain territory were subject to *its* law exclusively."

There was, accordingly, no room in feudal law for a *jus commune*. Nor was there, as in Canon law, a central authority, judicial or legislative, to resist diversifying tendencies and keep feudal law uniform. It was therefore inherently local and became one of the principal forces in producing the present day conflict of laws. As Jenks^{58a} expresses it, "feudal law is essentially a law of courts. **Each court has its own law."

Necessarily these isolated feudal jurisdictions could not remain wholly uninfluenced by surrounding systems. Compilations of feudal law will be found to contain not a little material obviously borrowed from Roman and Canon law.

⁵⁵DOMESDAY BOOK AND BEYOND, 258.

⁵⁶Quoted by HUEBNER *op. cit.* note 16, at 342.

⁵⁷*Post*, p. 208. Cf. SMITH, 21 DEVELOPMENT OF EUROPEAN LAW 173; JENKS, LAW AND POLITICS IN THE MIDDLE AGES (London, 1913), 25.

⁵⁸MEILL, INTERNATIONAL CIVIL AND COMMERCIAL LAW (Kuhn's ed., 1905), 61.

^{58a}JENKS, *ubi supra*.

"There was also", according to Smith,⁵⁹ "a great deal of borrowing of law, each jurisdiction being more or less influenced by the development in neighboring jurisdictions".

But all these were resorted to mainly for the purpose of filling the gap in local feudal law and not because the other systems enjoyed any authority *per se* in local feudal courts.

Feudal law was notable, too, for its contradictions and inconsistencies. Feudalism itself was the very antithesis of democracy; indeed the latter's main task has been to combat and overthrow feudal institutions. Yet, paradoxically, some of democracy's most cherished maxims and notions are of feudal origin. The doctrines of equality before the law, that laws must receive the assent of those whom they govern, that taxes may not be levied without consent of the taxed, that every man's house is his castle and that everyone is entitled to a trial by his peers were feudal doctrines; but they meant something very different to those who formed and administered feudal law, from what they are now understood to mean. Most of them appear in certain famous instruments, like Magna Carta, which have come to be considered the palladiums of democracy, but which were really framed by autocrats, combining to oppose another autocrat, one step higher in the feudal scale. And so of these doctrines; they were formulated by vassals for their own protection against the feudal lord; but they were never intended to have, and never in the full feudal age had, any application to villeins. Thus between the ostensible theory and the actual working of feudal law there was a wide gulf. Modern democracy has crossed it by taking the doctrines at their face value and giving them an application and interpretation of which their authors never dreamed. Modern constitutions may owe a debt to feudal law; but it is one which the supposed creditor would hardly recognize.

III. FORM AND REPOSITORY.

1. *Custom.* The earliest feudal, like other native, law of the time was consuetudinary.⁶⁰ From Glanvill⁶¹ we learn that suits were conducted in the lord's court,

⁵⁹ DEVELOPMENT OF EUROPEAN LAW XXI (this is the page number).

⁶⁰"The whole jurisprudence of these (manorial) courts rests on custom and is rarely touched by statute." 2 STRUBBS, CONST. HIST. 287.

"The society of the middle ages scarcely knew any other rule than custom. It had little idea of law established by a legislative power. On the very rare occasions when a prince felt the need of modifying the custom, he did it only after having convoked and consulted all the notables of the country." CHARLES SEIGNOBOS, THE FEUDAL REGIME (New York, 1902), 63.

⁶¹DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE (Woodbine's ed.) XII, (VI).

“according to the reasonable Customs prevailing in their Courts; which are so numerous and various, that it is scarcely possible to reduce them into writing.”

Moreover, in a small way, each feudal court might develop a “jurisprudence” or case law of its own.

“Just as the communal courts declared the custom of those who were subject to them, so we find that the newer feudal courts develop and declare the custom which governs the feudal relationship.”⁶²

2. *Legislation.* We have seen⁶³ how feudalism was aided by French royal edicts as early as the 9th century. These entered into and became a part of feudal law in France and something of the sort was happening elsewhere. The Emperor Conrad’s Edict of 1037, already mentioned,⁶⁴ was a landmark of feudal law forbidding anyone to be deprived of his fee, but in accordance with law and by the judgment of his peers; forbidding alienation by the lord without the tenant’s consent; and guaranteeing to the lesser vassals the right of appeal to the imperial commissioners. These are but a few typical instances of important legislation affecting feudalism in its earlier period.

“*In Leges Henrici* [1108–1118]”,⁶⁵ say Pollock & Maitland,⁶⁶ “we may find the high water mark of English vassalism”.

Magna Carta inaugurated a long period of English legislation

⁶²PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW (New York, 1929), 263.

“A dispute as to the possession of a *villenagium* followed on the same lines as a trial in which a free tenement was the object in dispute, although the latter was naturally much more complex. From the technical point of view, in the first case the trial took place before the peers of the contending parties, who as suitors of the court were its judges, while in the second case the lord or his steward was the only judge and such assessors as were called up had only advisory powers. But as a matter of fact the verdicts of the court were regarded as the expression of legal custom in the second case, and the reservation that the lord might override the customary rules was due to his exceptional position, and not to the ordinary working of manorial courts. A body of legal tradition and of conceptions of equity grew up in the lower social stratum as well as in the upper.” VINOGRADOFF, 3 CAMBRIDGE MEDIEVAL HISTORY 469.

The seigneur “administered the law of the fief, not the law of the land, or the king, or the people. If there is a dispute as to what this law is, we must go, as Boutillier tells us, to the *greffe*, or register of the court of the fief. If this is silent on the point, we must call the men of the fief together, and hold an *enquête par tourbe*, an enquiry by the multitude.” JENKS, LAW AND POLITICS IN THE MIDDLE AGES 23.

⁶³Ante, note 21.

⁶⁴Ante, text for note 45.

⁶⁵See STUBBS, SELECT CHARTERS (8th ed., 1900), 104 sq.

⁶⁶1 POLLOCK & MAITLAND 300.

affecting feudalism and in fact that famous instrument cannot be correctly interpreted except in the light of feudal law. There were also humbler efforts at law making in the same field both in England and elsewhere. Thus the feudal manorial court

"could make by laws both for the good government of the community, and for the regulation of the common field system of agriculture—a system which was common in the 17th and earlier part of the 18th centuries, and survived till the 19th."⁶⁷

So in New France the Seigneur had power

"to publish all such regulations for the governance of the habitants as were not inconsistent with the Custom of Paris and the laws of the colony."⁶⁸

A Feudal Code. The most complete, and probably the most interesting, feudal compilation which had the force of law was that known as the Assize of Jerusalem.⁶⁹ It was originally composed for the Latin kingdom founded in 1099 by Godfrey de Bouillon who

"aimed to establish a system of law for the diverse Christian population which had followed in the Crusades from all parts of Europe and had remained in Palestine under the new kingdom; and he caused their customs to be compiled for this purpose. Skilled persons were selected; questions as to their home customs were submitted (in the manner already noticed under Charlemagne) to the people's assemblies, and especially at their judicial sessions; whence the term 'Assizes'. On approval of the feudal chiefs, royal sanction was then given. Naturally, the result was essentially a system of feudal law, the newly born kingdom being founded on that basis."⁷⁰

The compilation included two parts, each devoted to a tribunal—*La Haute Cour* (for vassals) and *La Basse Cour (des Bourgeois, commoners)*. The section pertaining to the former consists of 273 chapters treating of public officers, the court's organization and procedure therein, seigneur and vassal, the church, tenures, inheritance and crimes as related to the feudal nobility. The other section contains 304 chapters affecting the commonalty and including law and justice

⁶⁷I. HOLDSWORTH, HISTORY OF ENGLISH LAW (3rd ed., 1926) 185. But "the freeholder sometimes refused to be bound by bye-laws made by the court". *Ibid.* 181.

⁶⁸MUNRO, THE SEIGNORIAL SYSTEM IN CANADA (New York, 1907), 148.

⁶⁹See its text by Beugnot (Paris, 1841-3). The two enormous volumes are a monument to the author's industry and learning. There is also an edition by Foucher (1839).

⁷⁰BRISSAUD, MANUEL D'HISTOIRE DU DROIT FRANCAIS (trans. Cont. Leg. Hist. Ser., 1, 75).

(I), the courts (II–XII), the church (XIII, XIV), foral capacity (XV–XXI), actions (XXII–XXVI), obligations (following Roman models, XXVII–XXIX, LXXXV–CVI), proof and trial (CXVI–CLIV, CCLVIII–CCLX), marriage (CLV–CLXXV), succession (CLXXVI–CCII), gifts (CCX), serfs (CCIV sq.) and penalties (CCLII, CCLXVIII, CCLXXXIII). It does not appear that the original text of the Assize survived the recapture of Jerusalem by the Saracens in 1187; but its provisions continued as the law in that part of Palestine which remained as the Latin kingdom; and versions of it appeared there,⁷¹ in Armenia⁷² and in Cyprus,⁷³ moving “finally to Euboea (Negropont) where it came to an end when the Turks acquired sway.”⁷⁴

While Smith⁷⁵ states that “here we have a full and minute digest of feudal law based upon the decisions rendered in the feudal court”, a perusal of it, especially the second part, discloses that not a little of its material was drawn from Roman books—Gaius, the *Codex Theodosianus*, and the *Corpus Juris*, including, of course, the Digest.⁷⁶ Yet “the Assizes of Jerusalem will always remain a mine of feudal principles and a treasure to scientific jurists”.⁷⁷ An important com-

⁷¹“The new kingdom was singularly rich in lawyers, and the extant Assizes of Jerusalem were the result of their studies. The names of the great legists are Philip of Navarre, Jolin and James of Ibelin, and Guy le Tort. John of Iberlin, who died in 1266, and bore the title of count of Jaffa, Ramleh (Rames), and Ascalon, drew up the existing Assize of the High Court.” STUBBS, LECTURES ON MEDIEVAL AND MODERN HISTORY (Oxford, 1887), 192.

⁷²As the Assizes of Antioch. See their text (Venice, 1876).

⁷³“It is in exact symmetry with Western usage, that this great compilation was not received as a code until the year 1369; like the ‘Siete Partidas’ of Alfonso the Wise, it was but a body of jurisprudence, the use of which depended on its own reasonableness, or a collection of customs which were recorded because they were used, not merely used because they were recorded. They reflect infinite lustre on the Cypriot lawyers who, in an age of turmoil and exertion, continuous and overwhelming, found time and labour for recording them.” STUBBS, *ubi supra*, 192, 195.

“However, before the Turkish conquest, the Venetians had held control, and in 1336 they had recognized the Assizes as the law of the land. A new arrangement of them was translated into Italian in 1531. And so, in the end, Italy’s protection preserved the life of that law which had originally set out from Italy itself.” BRISSAUD, *ubi supra*, I, 76.

⁷⁴BRISSAUD, *Ibid.*, adding (note) “The Assizes as used in Euboea were sanctioned as its law by the Doge Foscari, in 1421, and were in force (until the Turkish Conquest) under the name of ‘Assizes of Romania’.”

⁷⁵DEVELOPMENT OF EUROPEAN LAW, 175.

⁷⁶SMITH, ASSIZE OF JERUSALEM 10.

⁷⁷STUBBS, *ubi supra*, 195.

pilation of German feudal law was the *Corpus Juris Feudalis Germanici*.^{77a}

3. *Treatises*. The Bologna revival, and the scientific legal instruction which accompanied it, included feudal law⁷⁸ and this called for information in accessible, written form. Such appears to have been the origin of the *Libri Feudorum*⁷⁹ ("Books of the Fiefs") or *Consuetudines Feudales*, compiled in northern Italy, doubtless mostly at Milan. The work included not merely the customary law just discussed but also

"legislative measures adopted by north Italian diets held under the authority of the German rulers of the Holy Roman Empire and decisions rendered by the feudal courts of Milan, Pavia, Piacenza, and Cremona. This material is accompanied by interpretations or glosses."⁸⁰

As eventually published along with the *Corpus Juris*, the *Libri Feudorum* consisted of two books (the first with 28 and the second with 58 titles)⁸¹ and four appendices; and these appear to cover every phase of the relationship between the feudal lord and his vassal.

"Thus it came to be regarded as a repertoire of general feudal jurisprudence, to be appealed to, just as Roman law was appealed to, when a specific rule was wanted."⁸²

Books containing feudal law appear in Spain from at least as early as the 12th century.^{83a} Such were the "Usages of the County of Barcelona",⁸³ that political unit being one of the earliest feudal states.⁸⁴ The *Fuero Viejo*, begun toward the end of the 10th century, and augmented at the Cortes of Najera in 1176, contained numerous provisions regarding vassalage. The *Fuero* of Tudela, whose source

^{77a}See Senkenberg's ed. 1740.

⁷⁸BRISSAUD, *ubi supra*, I, 74; SMITH, DEVELOPMENT OF EUROPEAN LAW 174.

⁷⁹See its text by Lehmann (1896) "About the year 1770, Girard and Obertus, two Milanese lawyers, published two books of the law of fiefs, which obtained a great authority, and have been regarded as the groundwork of that jurisprudence." I HALLAM, MIDDLE AGES 182. "Both their authors and the precise period of their first composition are unknown. This is due to the diversity of their materials: for statutes, judgments, and customs of various epochs were heaped together by successive hands, and all of this was done by private zeal and initiative, without official sanction." BRISSAUD, *ubi supra*, I, 74.

⁸⁰SMITH, DEVELOPMENT OF EUROPEAN LAW 174.

⁸¹The subject matter of each title is set forth by I COLQUHOUN, ROMAN CIVIL LAW 139-141.

⁸²HOLDSWORTH, HISTORY OF ENGLISH LAW 142.

^{83a}See SMITH, DEVELOPMENT OF EUROPEAN LAW 174.

⁸³See SEIGNOBOS, THE FEUDAL REGIME 61.

⁸⁴3 FLACH, LES ORIGINES DE L'ANCIENNE FRANCE 88.

has been ascribed in part to the *Fuero de Sobrarbe* which Altamira⁸⁵ considers "purely fabulous", was approved by the Cortes of Aragon in 1122 and the *Fueros de los fijos-dalgo*⁸⁶ by that of Castile at Najera in 1138. The proximity of both regions to France may explain the earlier appearance there.⁸⁷ The last named work was doubtless a source for the considerable material of *La Siete Partidas* (IV [XXIV, XXV]),⁸⁸ relating to feudal law.

The earliest legal literature of England, into which as we have seen,⁸⁹ the system had been brought in the preceding century, contains much feudal law. The treatise⁹⁰ ascribed to Glanvill (1181) purports to deal with procedure in the king's court; but it takes up feudal subjects in chapter III of book I and there are few subsequent chapters where feudal law is not referred to. Pollock & Maitland⁹¹ seem doubtful whether to call Bracton "the greatest of English feudists"; and Littleton's "Tenures" (1480), "the first great book upon English law not written in Latin and wholly uninfluenced by Roman law"⁹² was a treatise on property law, essentially feudal, and became the basis of Coke's First Institutes (1628). Blackstone⁹³ (1765), has much to say (not always accurately) of "the Feodal System" and of the tenures which were still recognized as feudal in his day. About the same time Sullivan, Professor of Common Law in the University of Dublin, published a work^{93a} on the subject.

⁸⁵Continental Legal History Ser., I, 610.

⁸⁶Known also as the *Fuero* (ordinance) *de Najera*, and as the Book of Decisions and Arbitrations.

⁸⁷"Attention should be called, lastly, to the indubitable, but nevertheless vague influence—at one time very greatly exaggerated—of the *French law*, not only in the Pyrenean region, but also in other parts of the Peninsula. That in the former the French influence persisted after the independence of the Spanish Mark, might be affirmed a priori, considering the multiplicity and continuity of the bonds between Aragon, Catalonia, and the South of France (Rousillon, the county of Toulouse, etc.), not only in the political order, but also in religious, literary, and other relations; but it is also concretely blazoned in the recurrent identity of feudal, municipal, civil, and other institutions that is observable between one and the other region." Altamira. *Continental Leg. Hist. Ser.*, I, 606.

⁸⁸See Scott's translation, Index, for other material.

⁸⁹*Ante*, text for n. 30. p. 199.

⁹⁰TRACTATUS DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE (Woodbine's ed.)

⁹¹I, 67.

⁹²2 HOLDSWORTH, HISTORY OF ENGLISH LAW 573.

⁹³2 COMMENTARIES, ch. IV. sq., a work which "summed up and passed on the common law, as developed mainly by the work of the legal profession, before it was remodelled by the direct legislation inspired by the teaching of Bentham." 2 Holdsworth, *ubi supra*, 575.

^{93a}AN HISTORICAL TREATISE ON THE FEUDAL LAW (London, 1772); Chs. VI-XXVII treats Feudalism in general.

Among the earliest books containing *lehnrecht*⁹⁴ was the *Sachsenspiegel*,⁹⁵ published in Latin and later translated into German by Eike von Repkow, a knight and *schöffe* (manorial court lay judge) from the Hartz mountain region. It is only the second part which treats of *lehnrecht*, the first part being devoted to *landrecht* or general customary law. "The *Sachsenspiegel* quickly acquired great prestige", observes Brunner,⁹⁶ especially in northern, central and eastern Germany. Imitations of it (the *Deutschenspiegel*) (*Spiegel der deutschen Leute*) ca. 1250, and (the *Kaiserliches Land und Lehnrecht*)⁹⁷ appeared within the next score of years, specializing in Swabian custom. A work known as the "Oldest Livonian Feudal Law" was also combined with material taken from the *Sachsenspiegel*.⁹⁸

In France, which as we have seen,⁹⁹ was the center from which feudal law extended, it first appeared in written form in the compilations of customary law which date from the 13th century. "The feudal law of the Ile de France is set forth in some detail"¹⁰⁰ in the *Grand Coutumier de France* published about the end of the 14th century. *Li Livres de Coutumes et de Usages de Biauvoisins* (ca. 1280) composed by Philippe de Remi, Sire de Beaumanoir, while primarily a work on the customs, is frequently resorted to for the feudal law of that period. But it was not until feudal institutions were under fire that special treatises on the legal phase thereof began to appear and their appearance coincided with feudalism's decline.¹⁰¹

⁹⁴See *ante*, note 47.

⁹⁵See HOMEYER, *DES SACHSENSPIEGEL* (3rd ed. 1861), i. e. "SAXON MIRROR". Cf. the Spanish *ESPEJO DE TODOS LOS DERECHOS* and the English Horne's "MIRROR OF JUSTICES", both later in the same century. Sohm (*Z. Priv. Off. R.*, I (1874), 247), says that Repkow's work "may well challenge, in the fullness and clearness of its content and in the beauty of the presentation, every other legal record."

⁹⁶GRUNDAZÜGE DER DEUTSCHEN RECHTSGESCHICHTE (4th ed. Leipzig, 1910; trans. *Cont. Leg. Hist. Ser.*, I, 311, sq.), adding "With the conservative spirit of a low-Saxon, Eike (as he tells us in his rhymed preface) pursues the end of presenting the law handed down from his forefathers.** On the other hand, in his strongly marked legal sense and juristic logic he appears as an epoch-making reformer, formulating with bold originality legal principles which only subsequently, and on the strength of his authority, became an actual part of the law."

⁹⁷"Wrongly known since in the 1600's as the *Schwabenspiegel*", *Cont. Leg. Hist. Ser.*, I, 320. See GENGLER, *SCHWABENSPIEGEL* (2nd ed. 1875); LASSBERG, *SCHWABENSPIEGEL* (1840).

⁹⁸BRUNNER, *op. cit.*, *Cont. Leg. Hist. Ser.*, I, 321.

⁹⁹*Ante*, text for note 20, p. 197.

¹⁰⁰BRISSAUD, *op. cit.*, *Cont. Leg. Hist. Ser.*, I, 230.

¹⁰¹See *post*, p. 224.

IV. SCOPE AND SUBJECTS

1. *Persons*.^{101a} The feudal system was essentially one of ranks and classes. From the sovereign down, each individual had a definite status from which it was difficult to rise.¹⁰² Feudalism, toward the end, was approaching the condition of a caste system. Below the sovereign were his vassals, the nobility,¹⁰³ and below them, theirs,¹⁰⁴ who were obliged to do homage to the lord.¹⁰⁵ We have seen¹⁰⁶ that the oldest form of tenure was that eventually known as "knight service", originally enjoyed by a special branch of the cavalry.

"Thus", observes Calisse,¹⁰⁷ "arose the ideal of a class dedicated to arms and by birth and ability worthy of the profession. Its members formed the highly honored rank of cavaliers,¹⁰⁸ that is the cavalry force. Around them grew up the romantic ideals of knighthood."

In France which "was, indeed, its home, and the region wherein it attained to its fullest perfection",¹⁰⁹

"No one was born a knight; he was made a knight by a solemn ceremony; the king himself had to be made a knight."¹¹⁰

But in Italy "it became an order closed to all save nobles",¹¹¹ and in Germany,

^{101a}See Brissaud, 9 Cont. Leg. Ser. 295 sq.

¹⁰²However, "occasionally a man who was born a villein might find a grand career open to him." 1 POLLOCK & MAITLAND 432.

¹⁰³"In the nobility itself there were sharp gradations of rank." SMITH, DEVELOPMENT OF EUROPEAN LAW 167. In Spain the nobles were known as *ricos hombres*. Ecclesiastical dignitaries like bishops and abbots were included.

¹⁰⁴England, GLANVILL, DE LEGIBUS ET CONSUEUDINIBUS, IX, 1: BLACKSTONE, COMM. II, 53.

Italy, LIBRI FEUDORUM, I, 5 sq.

Spain, PARTIDAS, IV (XXIV).

¹⁰⁶GLANVILL, *ubi supra*.

¹⁰⁶Ante, p. 193.

¹⁰⁷STORIA DI DIRITTO ITALIANO (trans. Cont. Leg. Hist. Ser. VIII, 113).

¹⁰⁸Lat. *Caballarii* (from *caballus* low Lat. for horse) whence Spanish *caballero* and French *chevalier*. In Germany they became *knechte* and in England, knights. "The horse became the emblem of chivalry; it prolonged the legs of the knight and gave him an immeasurable superiority over the lightly armed foot-soldier." PASTOR, CHIVALRY IN SPAIN (In Prestage's CHIVALRY) (London, 1928), 117.

GREEN, SHORT HISTORY OF THE ENGLISH PEOPLE (London, 1892), 227, considered that feudalism itself "depended on the superiority of the mounted noble over the churl."

¹⁰⁹HEARNshaw, CHIVALRY AND ITS PLACE IN HISTORY (In Prestage's CHIVALRY) 2.

¹¹⁰SEIGNOBOS, THE FEUDAL REGIME 32; but see Brissaud, 9 Cont. Leg. Hist. Ser., 297 sq.

¹¹¹CALISSE, *ubi supra*, 113.

"as mounted service in war was as dear as it was distinguished, a knightly lineage was very soon added to the requirement of a knightly mode of life, and thereby transformed a professional into a blood estate. The feudal law included in one legal unit all persons of knightly birth and calling, and graded them within this unity in estates, according to their military rank."¹¹²

In England

"the law honours them [the knights] by subjecting them to special burdens; but still knighthood can hardly be accounted a legal status"¹¹³

According to the *Partidas* (II [XXII (I)]) "in ancient times, one man out of a thousand was selected to be made a knight."

Admitted to knighthood only after passing through the preceding grades of page and esquire,¹¹⁴ an elaborate ceremonial,¹¹⁵ not unlike that of vassalage, accompanied the investiture, toward the close of which, the candidate grasped with his right hand and took an oath

"that he will not avoid death on account of his religion, if it is necessary; second, that he will risk it on defence of his natural lord; third, that he will risk it in behalf of his country."¹¹⁶

Thereupon he received the accolade,¹¹⁷ a blow on the neck or shoulder and thus there "was grafted upon feudalism in the 11th and succeeding centuries**that peculiar and often fantastic code of etiquette and morals"¹¹⁸ which has come to be known as chivalry.

From France where "it attained to its fullest perfection",¹¹⁹ chivalry spread to Germany¹²⁰ and the Normans carried it into England and elsewhere.^{120a} We find it evidenced in Spain by the epic literature

¹¹²HUEBNER, *ubi supra*, (trans. Cont. Leg. Hist. Ser., VII, 90).

¹¹³I POLLOCK & MAITLAND 411.

¹¹⁴"In England, where knighthood was useless, almost all gentlemen ceased to have themselves received into knighthood and were content to remain squires." SEIGNOBOS, *ubi supra*, 34.

¹¹⁵See HEARNSHAW, (in Prestage's CHIVALRY), 22, 23; DAVIS, LIFE ON A MEDIEVAL BARONY (1922), 200 sq.; BOOK OF THE ORDRE OF CHIVALRY (Paxton's trans. 1926), 66 sq.

¹¹⁶LAS SIETE PARTIDAS, II, (XXI [XIV]).

¹¹⁷"Derived from the old Roman form of manumission of slaves by the *alapa*, or blow on the face, indicating figuratively that this was the last punishment he should receive." I COLQUHOUN, ROMAN CIVIL LAW 134.

¹¹⁸DAVIS, MEDIEVAL EUROPE 106.

¹¹⁹HEARNSHAW (in Prestage's CHIVALRY), 2.

¹²⁰ATKINS, CHIVALRY OF GERMANY (*Ibid.*) 84 sq.

^{120a}"The great orders of chivalry were international institutions." BRYCE, HOLY ROMAN EMPIRE (1904) 266.

which grew up around the adventures of *El Cid Campeador*,¹²¹ and the regulations in the *Partidas* (II [XXI]) became also the law of chivalry in Portugal.¹²² Intimately connected with the crusades, the course of that movement saw a combination of chivalry with monasticism, producing three great orders: the Knights (Hospitallers) of St. John, formed about 1118 for the relief of pilgrims to the Holy Land; the Templars, founded the same year for the protection of pilgrims and the defense of the holy places; and the Teutonic Knights, instituted about 1128 by Walpot of Bassenheim and caring for the poor and sick. All of these had rules and ceremonials like those of chivalry in general; but their members were monks as well as soldiers. The first survives in the orders, both Catholic¹²³ and Protestant, known as the Knights of Malta; the second was suppressed in the 14th century by the joint efforts of Pope Clement V and King Philip V of France; while the third became a Protestant order at the Reformation. All this might seem to constitute a digression; but its bearing on our general theme of feudal law is apparent when we recall that for over four centuries a court of chivalry flourished in England, having general jurisdiction of military causes "as well out of the realm as within", and summary cognizance of knights charged with offences. Established by Edward III, it was presided over jointly by the Lord High Constable and the Earl Marshal, though the latter also sat alone as a court of honor passing upon questions of precedence, coats of arms, and other heraldic subjects.¹²⁴ This court of chivalry was the predecessor of modern military and naval courts martial.

There were other freemen besides knights¹²⁵ and below the latter the *bas chevaliers*.¹²⁶ Then came the burghers (bourgeoisie). At the base of the feudal pyramid stood the villeins or serfs,¹²⁷ who

"owe to the lord all sorts of dues and services, personal labour, among others, on the lands which form his domain; they may

¹²¹PASTOR, CHIVALRY OF SPAIN (*Ibid.*) 113. CANTAR DE MIO CID (TEXTO GRAMATICA Y VOCABULARIO, por R. Menendez Pidal) "the most Homeric in spirit of all poems after the Iliad (Southey, 15 Quar. Rev. 654); surpasses all until Dante. Hallam."

¹²²PRESTAGE, CHIVALRY 142.

¹²³The present Grand Master is Prince Chigi Albano, with headquarters in Rome.

¹²⁴BLACKSTONE, COMMENTARIES 68; 4 *ibid.* 264. Cf. 5 ENCYC. BRIT. (14th ed), 693.

¹²⁵*E. g.*, the English "yeomen".

¹²⁶See 2 HALLAM, MIDDLE AGES 594 n. But cf. 1 COLQUHOUN, ROMAN CIVIL LAW 134: the *fijs dalgo* (*Partidas* IV (XXI), (III, IV)); and see SMITH, DEVELOPMENT OF EUROPEAN LAW 174.

¹²⁷SMITH, DEVELOPMENT OF EUROPEAN LAW 166.

not leave the Manor without his permission; no one of them can succeed to the land of another without his assent; and the legal theory even is that the movable property of the villein belongs to the lord. Yet it may confidently be laid down that, in the light of modern research, none of these disadvantages prove an absolutely servile status, and that all may be explained without reference to it."¹²⁸

But the *Partidas* (IV [XXV] II) recognize no other servile class than slaves though Smith¹²⁹ tells us that "slavery was practically extinct in Spain." Villeinage is usually acquired by birth, even if one parent is free,¹³⁰ but there are various modes of acquiring freedom,¹³¹ and they seem to be modeled mostly on Roman forms of manumission.¹³² Such was the structure of feudal society; and closely connected therewith are any peculiarities which are more commonly discussed under the law of persons. Thus the lord or sovereign was the "guardian in chivalry" of his vassal's minor heir and not only was the former's consent required¹³³ for the heir's marriage, but

"the guardian had the power of tendering him or her a suitable match, without disparagement or inequality; which if the infants refused they forfeited the value of the marriage (*valorem maritagii*) to their guardian".¹³⁴

¹²⁸MAINE, EARLY LAW AND CUSTOM 305.

"The villein may not give his daughter in marriage (at least, not to a villein on another manor), nor may he have his son ordained a priest, nor may he sell a horse or an ox without the lord's permission. For leave to marry, the villein has to pay." SMITH, DEVELOPMENT OF EUROPEAN LAW 1671.

"The serf is his lord's chattel but is free against all save his lord," say POLLOCK & MAITLAND (I, 431); but they quote a maxim of English lawyers which "will forbid us to speak of the English 'serf' as a slave". (*Ibid.* 415).

"If any serf struck or wounded a free Christian, the sufferer was to be cured at the expense of the Lord of the serf, and the serf himself was to be drawn and hanged whenever the court could lay hold of him." SMITH, ASSIZE OF JERUSALEM 38.

¹²⁹DEVELOPMENT OF EUROPEAN LAW, 277.

¹³⁰GLANVILL, DE LEGIBUS ET CONSUEUDINIBUS, V (VI); HORNE, MIRROR OF THE JUSTICES (Maitland's ed.), II, 28. The English writ *de nativis* was available to one claiming another as his villein and trial by combat might not be invoked. GLANVILL, V (I sq.).

¹³¹*Ibid.*; *Partidas*, IV (XXII).

¹³²See Justinian's DIGEST, *lib.* XL.

¹³³In Bracton's NOTE BOOK (pl. 965), "it is suggested that a woman, who has married a ward without his lord's consent, ought not to have dower." I POLLOCK & MAITLAND 319 n. 7.

"If the infants married themselves without the guardian's consent, they forfeited double the value (*duplicem valorem maritagii*)." 2 BLACKSTONE, COMM. 70.

¹³⁴*Ibid.*

There was no breach of promise action but

“A man affianced to a woman might change his mind before actual espousal on payment of repentance fees, ‘repentailles.’”¹³⁵

In Italy, at least, feudal law seems to have recognized the morganatic marriage.¹³⁶

2. *Obligations.* Feudalism seems to have effected little change in the law of obligations. As referred to in the Assize of Jerusalem (II [XXXVII–XXXIX, LXXXV–CVI]), they are substantially those of the Roman law. Horne,¹³⁷ wrote in the late 13th century:

“Contract is a discourse between persons to the effect that something that is not done shall be done. And of this there are divers kinds, some of which are perpetual, such as gift, sale, matrimony, and others are temporary, such as bailments and leases. And there is a mixed kind, such as exchange, which may be for a time or may be for ever. And one kind of contract is an obligation”.

On the other hand there were, in Germany at least, obligations arising by law (*debita feudalia legalia*), e. g.

“debts* contracted to maintain the feudal estate in its original extent or condition or for the redemption of the rights of co-heirs; hypothecs imposed upon the land with the consent of the lord and the agnates; certain statutory obligations of the successors in the fief; debts declared liabilities of the fief with the consent of all living agnates and successors.”¹³⁸

Finally there was the *lehnsstamm* (*constitutum feudale*).¹³⁹ On the delictual side

“a blow given to a serf is a wrong to the serf. It may also give his lord a cause of action against the striker; but here also the law makes no difference between bond and free.”¹⁴⁰

3. *Property.* The principal subject matter of feudal law was property and one form of that, viz. land.

“The grand and fundamental maxim of all feudal tenure”, wrote Blackstone,¹⁴¹ is* “that all lands were originally granted

¹³⁵SMITH, ASSIZE OF JERUSALEM 35.

¹³⁶LIBRI FEUDORUM, II (XXIX). Cf. I COLQUHOUN, ROMAN CIVIL LAW 141.

¹³⁷MIRROR OF THE JUSTICES, II, 27.

¹³⁸HUEBNER, *ubi supra*. (Cont. Leg. Hist. Ser., VII, 345).

¹³⁹*Ibid.* ¹⁴⁰I POLLOCK & MAITLAND 419.

¹⁴²COMMENTARIES 53. Cf. I POLLOCK & MAITLAND 232 sq.

“The leading characteristic of the feudal conception is its recognition of a double proprietorship, the superior ownership of the lord of the fief co-existing with the inferior property or estate of the tenant.” MAINE, ANCIENT LAW 295.

out by the sovereign, and are therefore holden, either mediately or immediately of the crown. The grantor was called the proprietor, or lord, being he who retained the dominion of ultimate property of the feudal or fee: and the grantee, who had only the use and possession, according to the terms of the grant, was styled the feudatory or vassal."

Those who held immediately from the crown were known as tenants *in capite* or in chief; and all tenures were either free (frank-tenement francs tenaciers, frei hintersassen)^{141a} or servile (villeinage). Of the former the principal tenures were, as we have seen, (1) chivalric or knight service,¹⁴² granted, supposedly, for the performance of military duty; (2) frankalmoign, acquired by indefinite spiritual and charitable services and applicable to lands held by ecclesiastics; in England (3) serjeanty, which might be acquired by other than military service, and (4) socage "the great residuary tenure",¹⁴³ granted for service other than those mentioned above. The servile tenure was villeinage which, in the age of Bracton,¹⁴⁴ did not yet describe a status. It is from these tenures that the modern Anglo-American law of real property derives.^{144a} "Probably is it upon some such scheme as this that feudalism has played," say Pollock and Maitland,¹⁴⁵ referring to the estates of dower and curtesy. "Here in England it destroys the equality between husband and wife."

There has been much discussion in England,¹⁴⁶ of the rights and restraints of the feudal tenant as regards alienation of his interest.

In Germany, according to Huebner,¹⁴⁷

"the common feudal law required, for conveyance, not only the consent of the lord but also the consent of the agnates and of co-feoffees and feoffees of reversions (*eventualbelehnten*). These also possessed a revocatory action in case of an improper alienation; not, however, one unlimited as to time, such as the lord originally possessed, but one available within a prescriptive period of thirty years. If the lord reclaimed the fief by means of a revocatory action it remained in his hands only so long as the alienor and his descendants capable of feudal service might live. After their death the rights of the agnates and of co-feoffees and feoffees in the reversion became effective. In addition to a right

^{141a}See BEGUELIN, LES FONDAMENTS DU REGIME FEODAL (Paris, 1893) 51.

¹⁴²The Norman fief or tenure de haubert. MIRROR OF THE JUSTICES, II, 27.

¹⁴³I POLLOCK & MAITLAND 294.

¹⁴⁴Folio 26, 208b; WOODBINE, II, 89. Cf. MAINE, EARLY LAW AND CUSTOM 305.

^{144a}"The feudal system remained the foundation of the land law of England". LEE, HISTORICAL JURISPRUDENCE 463.

¹⁴⁵II, 419.

¹⁴⁶See I POLLOCK & MAITLAND 329 sq.

¹⁴⁷HUEBNER, *ubi supra* (Cont. Leg. Hist. Ser., VII, 344).

of revocation the feoffor and his successors possessed the feudal preferential right of purchase (*lehnsretrakt, retractus feudalis*).”
For

“under the influence of the Lombard law”, he continues,¹⁴⁸ “there were developed from the forms of feoffment by contract (*Gedinge*) recognized in the German law,—either of definite lands or of undetermined reversions,—the two institutes of feudal rights in expectancy^{148a} (*lehnsanwartschaft*) and feoffments in reversions (*eventualbelehrung*).”¹⁴⁹

Among several of these rights, the earliest had preference.

“As for feoffments of several persons, in many regions the principles of the Lombard institute of co-feoffment (*coinvestitura*) were adopted.**Unlike the German law, the Lombard feudal law recognized tenorial relations originating in extinctive prescription (*verjährung*) in those cases where one had possessed a fief for thirty years with good faith in both parties, and had rendered feudal services from it (so-called *feudum informe*). This principle passed over into the common feudal law and into many of the modern regional systems, the period being reduced in the practice of the common law to ten or to twenty years.”¹⁵⁰

In other countries

“when feudal tenures were swept away by the great revolutions of the eighteenth and nineteenth centuries, real property, previously governed by feudal law, came to be governed by Roman rules. Almost the only important principle recognized today in the continental law of real property, which was not recognized at Roman law, is that permanent rent charges may be imposed on land.”¹⁵¹

Nevertheless “immemorial prescription,” according to Brissaud^{151a} “has played a large part in the formation of feudal society” and given “the latter its laws and rights.”

¹⁴⁸*Ibid.* 342, 343.

^{148a}“Granted either in a particular fief (*expectativa feudalis specialis*) or in the first fief which should escheat (*expectativa feudalis generalis*) or in any fief whatever (*expectativa feudalis indeterminata*). They secured to the holder of such future estate, without any investiture, a contractual right against the lord to investigate upon fulfillment of a condition.” *Ibid.* 343.

¹⁴⁹“Like the old ‘*donatio post obitum*’, involved an immediate investiture, either of a definite fief when it should escheat or of the first one that should fall vacant: it therefore conveyed immediately to the grantee a real,—albeit a qualified—right in expectancy (*wartrecht*). The instant the condition was fulfilled the right of the feoffee became unqualified; he did not need to seek a new feoffment.” *Ibid.*

¹⁵⁰*Ibid.* 343.

¹⁵¹SMITH, DEVELOPMENT OF EUROPEAN LAW 173.

^{151a}*Ubi supra*, 361.

As to other property in England "movables are not made the subjects of 'feudal tenure' " because

"the dogma of retrospective feudalism which denies that there is any absolute ownership of land (save in the person of the king) derives all such truth as it contains from a conception of ownership as a right that must be more complete and better protected than was that ownership of chattels which the thirteenth century and earlier ages knew. On the land *dominium* rises above *dominium*; a long series of lords who are tenants and of tenants who are lords have rights over the land and remedies against all the world. This is possible because the rights of every one of them can be and is realized in a seisin; *duae possessiones sese compatiuntur in una re*. It is otherwise with the owner of a chattel. If he bails it to another, at all events if he bails it on terms that deprive him of the power to reclaim it at will, he abandons every sort and kind of seisin; this makes it difficult for us to treat him as an owner."¹⁵²

On the other hand in Germany

"movables, provided their substance or their value was assured of permanence and money (the profits of an assured capital) were recognized as objects of feudal tenure."¹⁵³

4. *Succession*. With property so largely confined to land, and that held subject always to another's interest, the application of ordinary Roman and canonical rules of succession was necessarily impeded. Moreover

"with the feudal system the right of primogeniture¹⁵⁴ finally appears. **The fief is granted to the eldest because he has that natural superiority over his brothers which is given him by age and experience, because he has been associated with his father, in the carrying out of feudal duties longer than his brothers."

¹⁵²11 POLLOCK & MAITLAND 182.

So, likewise, in the Netherlands. GROTIUS, INLEIDING, II (XII, 35).

¹⁵³HUEBNER, *ubi supra*, 342.

¹⁵⁴"The right of primogeniture, frequently found in the old legislations, where it is connected with religious ideas and the worship of ancestors." (Genesis XXV).

It "preceded the heritability of fiefs, for the grantor at the death of the vassal frequently renewed the grant for the benefit of the elder son of the latter. Once fiefs became hereditary a period of uncertainty and hesitation was reached, which was escaped from more or less quickly according to locality. The Breton Assize of 1185 is one of the first legislative acts upon this matter, and it must have been preceded by an Anglo-Norman law of Henry II, which has not come down to us, but which must have prohibited the partition of baronies and fiefs of the hauberk, at least among males." BRISSAUD, MANUEL D'HISTOIRE DU DROIT FRANCAIS (trans. Cont. Leg. Hist. Ser. III, 634-5.) In the *Partidas* II (XV [II]) primogeniture obtains only among the sons of the sovereign. In Scotland it seems not to have prevailed. See DUNDAS, *ubi supra*, Ch. IX.

Again, "the feudal system was opposed to the succession of women because they were incapable of rendering the military and court services connected with the possession of a fief."¹⁵⁵

Charles the Bald's edict of 877, making offices inheritable by sons, applied also to fiefs; and the Emperor Conrad II extended the principle to grandchildren and brothers.¹⁵⁶ But ascendants, wives, illegitimate and adopted children were excluded.¹⁵⁷ Degrees of relationship were reckoned according to the Roman, and not the Canon law.¹⁵⁸

5. *Public Law.* "The feudal regime", according to Seignobos,¹⁵⁹ "did not establish between inhabitants of the same country any of the relations which seem to us indispensable for the constitution of a state. There was at that time neither public tax, nor public military service, nor public tribunals: nothing but private dues, private tribunals (landlords' courts, seigneurs' courts), and service in private wars."

Yet, as Holdsworth¹⁶⁰ points out, feudal law has "its two sides* property and jurisdictional. To use modern terms, it has affinity both with the law of real property and with constitutional law".

On its jurisdictional side it developed a fairly complete judicial system.

"The Signorial Court, the Court Baron", says Maine,¹⁶¹ "is the ancient village assembly, in which the administration of justice has now taken precedence of other public concerns, but in which those public concerns continue to be discussed, the lord

¹⁵⁵Ultimately it is continued "in the interest of the family". *Id.*, 636. BRISSAUD, *ubi supra*, III, 632. Cf. *Partidas*, IV (XXVI [VI]); DUNDAS, A SUMMARY VIEW OF THE FEUDAL LAW (Scotland), 34. Brissaud adds that in France the customs were divided, sometimes admitting and sometimes rejecting, female succession; and in the former case occurring only "if there were no males of the same degree".

¹⁵⁶2 MONTESQUIEU, *ESPRIT DES LOIS* 369, 370. "The Lombard law conceded a right of inheritance in the fief not only to the issue of the last possessor, but also to his 'agnates', his collaterals of the male line; although this was accorded them only so far as they were descendants of the first acquirer,—i. e., only to persons to whom the fief was 'feudum paternum'." HUEBNER, *ubi supra*, VII, 345.

Under the *Partidas* (IV [XXVI (VI)]), "the inheritance of the fief does not pass beyond grandsons but reverts afterwards to the lords and their heirs".

¹⁵⁷DUNDAS, *ubi supra*, Ch. X. Cf. *Partidas*, IV (XXVI (VII)).

But under the Dutch feudal law ascendants and wives inherited. GROTIUS, *INLEIDING*, II (XLI, 12, 21, 23). (Genesis XXV)."

¹⁵⁸For the distinction, see my *Lex Christiana*, 20 GEORGETOWN L. J. 168.

¹⁵⁹THE FEUDAL REGIME, 65.

¹⁶⁰I HISTORY OF ENGLISH LAW 179.

¹⁶¹EARLY LAW AND CUSTOM, 303.

presiding,¹⁶² the free tenants advising,¹⁶³ the villeins attending without definite share or voice in the deliberations, like the crowd in the Homeric Agora."

Haskins¹⁶⁴ gives the following in examples in Normandy alone:

"Robert of Belleme has an important court of his barons. The monks of Saint-Évroul have their court, in which they may declare the forfeiture of a fief. The honor of Ralph Taisson has its barons, who can be summoned to record against encroachment the title of the abbey of their lord's foundation. The honor which William Painel holds of the abbot of Mont-Saint-Michel has a court of seven peers,¹⁶⁵ who owe service according to the custom of their ancestors, and there are also separate courts for his manors."

Under the Assize of Jerusalem, *La Haute Cour*, according to Smith,¹⁶⁶

"was an assembly composed of the King and the nobles holding directly of him for the regulation of the general affairs of the Kingdom and the particular concerns of the Baronage. *Every Terrier or feudal Lord had his burges court, in which he was represented by his Viscount or Bailly."¹⁶⁷

In England, a practitioner¹⁶⁸ of the time tells us that "the court Baron, in the genuine sense, is the court of lord's jurisdiction in his manor, and holds plea of all land held of the manor, and in debt under 40s." Moreover,

"these humble courts seem to have recognized certain causes of action for which the king's courts offered no remedy; they gave damages in cases of slander and libel and possibly they en-

¹⁶²"It cannot be said that the intendant, in the tribunals for tenants, always limited himself to this role, at least in France." SEIGNOBOS, *ubi supra*, 60n.

¹⁶³"In the feudal courts it was the peers, the equals of the parties, who were the judges. Judgment by the tenants appears to have been the custom in Germany in the thirteenth century." SEIGNOBOS, *ubi supra*, 60.

¹⁶⁴NORMAN INSTITUTIONS (Cambridge, 1918), 24.

¹⁶⁵"The number seven suggests the usual number of the Frankish *scabini* from whom the peers of feudal courts seem to have been derived; probably it is these same seven who owed the military service due from the honor." *Ibid.* n.

¹⁶⁶ASSIZE OF JERUSALEM, 9, 10.

¹⁶⁷"The *Coutume de Normandie* makes the Vicomte subordinate to the Bailli. The Bailli of Normandy represented the Duke in his Courts of Justice, while the Vicomte was a 'Bas Justicier', and had no criminal jurisdiction. The office of Bailli was somewhat analogous to that of the English Sheriff." *Ibid.* iin.

¹⁶⁸ROGER NORTH, LIVES OF THE NORTHS (1826). The author's brother Francis began as a steward in such a court and ultimately became Chief Justice of the Common Pleas.

forced some agreements to which the king's courts would have paid no heed."¹⁶⁹

Seignories with judicial rights were established in New France (Canada) as early as 1627 although it is not until a later generation that we find a record of their exercise.¹⁷⁰

Jurisdiction. Seignobos¹⁷¹ observes that

"in almost all the documents of the middle ages, justice means the right of levying fines or the product of those fines. Very often this right was shared with other persons, and mention is made of the half or quarter of the justice of such and such a village. They even came to distinguish between high and low justice (later also middle), according to the value of the profits."

As worked out in New France, reproducing, doubtless, conditions in the mother country,

"the seignior whose jurisdiction was limited to a grant of *moyenne justice* had authority to take cognizance of all civil actions in which the amount in dispute did not exceed sixty *sols paris*, and of all criminal causes in which the awardable penalty did not exceed the same sum;* to order the arrest of an offender;* to appoint tutors or curators for minors or persons *non compos mentis*, to determine the compensation to be paid them, and, in general, to supervise the property of all dependents in guardianship;* to decide disputed questions of measurement and acreage (*faire mesurer et arpenter*), and to determine the boundaries (*bornage*) of lands within his seignory. The few seigniors who possessed the rights of low jurisdiction only could take cognizance of disputed matters in which the amount at issue did not exceed sixty *sols*, and in criminal cases could award a penalty not exceeding ten *sols*. The possession of this degree of jurisdiction merely gave the seignior power to settle trivial disputes between the inhabitants, or between himself and his dependents, regarding the amount of seigniorial dues."¹⁷²

La Basse Cour of the Jerusalem kingdom seems to have been invested with an extensive criminal jurisdiction;¹⁷³ probably because there was no other court to exercise it. But in medieval England such jurisdiction belonged primarily to the royal courts and, in theory, the feudal lord

"would have, at least over the freehold tenants, but a purely civil, that is, non-criminal, non-penal, jurisdiction; it would be

¹⁶⁹I POLLOCK & MAITLAND 587.

¹⁷⁰MUNRO, THE SEIGNORIAL SYSTEM IN CANADA (New York, 1907), 146 *seq.*

¹⁷¹THE FEUDAL REGIME, 18.

¹⁷²MUNRO, THE SEIGNORIAL SYSTEM IN CANADA 150, 151.

¹⁷³ASSIZE OF JERUSALEM, II (CCLXXIII sq.).

competent for personal actions and also for real actions in which freehold lands were demanded; but the latter could only be begun by a royal writ.** Over unfree persons and unfree tenements its authority would be more ample; about the title to lands held in villeinage it would be able to say the last word, it could enforce the manorial custom and inflict minor punishments upon the villeins."¹⁷⁴

Finally

"besides this feudal justice, there is the jurisdiction which is franchisal, arising from the grant of public rights by the sovereign, the justice which men will one day say has nothing in common with the fief. We cannot in the 11th century draw the line separating these two sorts of jurisdiction with the sharpness which later feudal law permits."¹⁷⁵

Procedure. Of the feudal courts in France, a noted historian¹⁷⁶ of that country says,

"justice was formalistic, like a strictly regulated game; the judges had only to maintain the rules, judge the throws, and proclaim the winner. Every trial consisted of several sacramental acts accompanied by consecrated phrases, which followed each other like the scenes of a drama. The petitioner (or accuser) asked for a day for the trial. When the day came the petitioner set forth his complaint and swore to it. The defendant immediately replied, word by word, and took oath. The witnesses swore in their turn. Then came the call, that is to say, the provocation; next the duel; and finally, the sentence. A word or a movement that was contrary to the rules sufficed to condemn a suitor. At Lille, whoever during the oath moved his hand, which rested upon the Bible, lost his case."

Pollock & Maitland¹⁷⁷ make out a somewhat better case for the English manorial court where "there are formal pleadings" and

"the justice which the customary tenants got was strict justice; it was not 'equity' on the one hand, but on the other it was not 'the will of the lord'."

¹⁷⁴I POLLOCK & MAITLAND 531. There was also a group of offences which was "distinctively feudal", to which the term "felony" was applied and which included breaches of the feudal nexus* which would work forfeiture or escheat of the fief. For these were among the severest penalties known to feudal law. *Ibid.*, 351 sq.

¹⁷⁵HASEKINS, NORMAN INSTITUTIONS 24. The court leet "was a police court for the presentment of offences and for the punishment of minor offences; it was co-ordinate with the sheriff's turn. Sometimes the lord had yet higher justice in his hands and might hang thieves taken in the act of theft". I POLLOCK & MAITLAND 532.

¹⁷⁶SEIGNOBOS, *ibid supra*, 60.

¹⁷⁷I, 588.

When Roger North practiced in the court Baron (17th century) "the process is after the model of the ancient common law and the knowledge how to conduct such a court fits a man to be a practiser even at the Common Pleas Bar."¹⁷⁸ But

"ordinarily the disputants or offenders [in New France] were called by the seignior to the manor-house, where, after a proceeding which partook more of the nature of a conference than a trial, some satisfactory settlement was usually effected."¹⁷⁹

Torture was not regularly permitted in England¹⁸⁰ and in only one instance (II [CCLIX]) by the Assize of Jerusalem. Under the *Partidas*¹⁸¹ it is authorized to a limited extent and with evident reluctance. The modes of trial are generally those of the royal courts—battle, or other ordeal, oath and upon evidence. The first was in full vogue in France,¹⁸² England,¹⁸³ the countries subject to the Assize of Jerusalem (I [CCLX]) and Germany.¹⁸⁴ The *Partidas*¹⁸⁵ reveal it as passing out of use in Spain and do not recognize other forms of these ordeals though the latter were used in various countries at the time. In the English manorial court "jurors are sworn in, sometimes twelve, but often less than twelve, to present offences."¹⁸⁶ But this was an accusing jury only. The Assize of Jerusalem (II [VII sq.]) has likewise much to say of *jurés*; but these appear to have been "a body of permanent judges".¹⁸⁷ At any rate they must not be of lower rank than him whom they tried.¹⁸⁸ Such was the original meaning of the historic phrase which promised *judicium parium*¹⁸⁹—a judgment of one's peers; it had no reference to trial by jury in the modern sense.¹⁹⁰ Indeed, so late as the 16th century "in the county, court baron, hundred, and such other like, they shall be tried by the oath of the

¹⁷⁸3 LIVES OF THE NORTHS 107 sq.

¹⁷⁹MUNRO, THE SEIGNORIAL SYSTEM IN CANADA 152.

¹⁸⁰2 POLLOCK & MAITLAND 658 sq.

¹⁸¹Edition of 1931, Int. lxxii.

¹⁸²SEIGNOBOS, *ubi supra*, 62.

¹⁸³2 POLLOCK & MAITLAND 632 sq.

¹⁸⁴"In the 10th century Otto I, in Germany, had two champions fight to decide whether the son should exclude grandsons who were his nephews from the succession." SEIGNOBOS, *ubi supra*, 62.

¹⁸⁵Edition of 1931, Int. lxxii.

¹⁸⁶1 POLLOCK & MAITLAND 589.

¹⁸⁷SMITH, ASSIZE OF JERUSALEM 21; FORSYTH, HORTENSIVS THE ADVOCATE (3d ed.) 195.

¹⁸⁸SEIGNOBOS, *ubi supra*, 64; 1 POLLOCK & MAITLAND 409.

¹⁸⁹LIBRI FEUDORUM, I, (XVIII, XXII); LEGES HENRICI PRIMI, (XXXI); Magna Carta, XXIX.

¹⁹⁰1 HOLDSWORTH 59; 1 POLLOCK & MAITLAND 594.

parties and not otherwise, unless the parties assent that it shall be tried by the homage."¹⁹¹

A controversy between lord and vassal concerning a fief was arbitrated by other vassals¹⁹² or it was tried in the lord's court with the vassals as judges.¹⁹³

Appeals. Maine¹⁹⁴ says of the French *parlements* which were "originally creations of the king",

"Not only did they employ against the signorial courts the same weapons which were used by the English judges, but they borrowed a special instrument of attack from the Roman law, by insisting on their right to hear appeals from all subordinate jurisdictions."

In Glanvill's time¹⁹⁵ a dissatisfied lord's court suitor might obtain a royal writ and upon proof that the lord "had failed to do him justice", remove the cause to the county court. A somewhat similar practice prevailed under the Assize of Jerusalem¹⁹⁶ and Blackstone¹⁹⁷ speaks of

"the peers of the king's court still reserving to themselves (in almost every feudal government) the right of appeal from those subordinate courts in the last resort."

A French edict¹⁹⁸ of 1667 recites:

"It is our will that an appeal shall lie from the seigniorial jurisdictions which are within the limits of our Prévôté¹⁹⁹ at Quebec, to the said Prévôté and from the said Prévôté to our said council at Quebec, which we prohibit from receiving any immediate appeal from the said seigniorial jurisdictions. . . and with respect to the other seigniorial jurisdictions which are not within the limits of the said Prévôté of Quebec, the appeals from them shall be brought immediately before the said council until such time as we shall have established other royal jurisdiction."

V. DECLINE AND ABOLITION. "In nearly all the states of Europe", says Adams²⁰⁰ "the end of the feudal age was reached about the close of the 13th century". Green²⁰¹ considers military feudalism to have

¹⁹¹ST. GERMAIN, DOCTOR AND STUDENT, fol. 14.

¹⁹²LAS SIETE PARTIDAS IV (XXVI [XI]).

¹⁹³DUNDAS, A SUMMARY VIEW OF THE FEUDAL LAW 81.

¹⁹⁴EARLY LAW AND CUSTOM, 316.

¹⁹⁵DE LEGIBUS ET CONSUEUDINIBUS, XII.

¹⁹⁶SMITH, ASSIZE OF JERUSALEM 9.

¹⁹⁷2 COMM. 54.

¹⁹⁸I EDITS ET ORDONNANCES (Quebec, 1854 sq.) 237 (VIII).

¹⁹⁹Established by Champlain.

²⁰⁰9 ENCYC. BRIT. (14th ed.) 207.

²⁰¹SHORT HISTORY OF THE ENGLISH PEOPLE, 227.

ended with the Battle of Crecy (1346) which demonstrated the equality with (if not superiority to) the mounted chevalier, of the villein foot soldier. Meanwhile, English legislation had been changing feudal tenures. The third Magna Carta (1217, XXXIX) forbade a freeman to "give or sell so much of his land that the residue shall be insufficient to support the service due in respect thereof to the lord of the fee";²⁰² or "to give his land to any religious house in order to resume it again to hold of the house";²⁰³ with a penalty of forfeiture. But the Petition²⁰⁴ of the Barons at Oxford in 1258 called for measures to strengthen the king's courts at the expense of the feudal tribunals. By the Provisions of Westminster (1259),²⁰⁵ afterward incorporated into the Statute of Marlborough (1267)²⁰⁶, feudal court jurisdiction could not be claimed over one not specially bound thereto unless his ancestors had "done suit" within 39 years. The Statute of Gloucester (1278)²⁰⁷ made it a condition to issuing the writ of trespass in the king's court that the applicant declare the value of the goods of whose taking he complained to be not less than 40s; thus limiting, in effect, the feudal court's civil jurisdiction to that sum. In the following year the statute *De Viris Religiosis* (1279)²⁰⁸ provided another in the long series of "mortmain" acts. The Second Statute of Westminster (*De donis conditionalibus*, 1285)²⁰⁹ converted the conditional fee into a fee tail thus enabling the grantor to create interests in remainder or reversion "distinct from the purely tenurial right which the lord has to succeed by escheat if his tenant in fee simple dies without heirs."²¹⁰ The celebrated statute *Quia Emptores* (1290)²¹¹ abolished the practice of "subinfeudation" and made a freeholder's alienee the tenant of the former's lord, to whom, instead of to the alienor, all feudal services and other incidents accrued. Thus, by the end of the 13th century, not only was feudal jurisdiction con-

²⁰²"This," says Plucknett, "is the first express limitation of a feudal character upon alienation in English legal history." CONCISE HISTORY OF THE COMMON LAW, 340.

²⁰³The first prohibition of "mortmain". "If a man gave land to a religious corporation, i. e., made an alienation in mortmain, the lord got a tenant who never died, who was never under age, who could never marry, who could never commit felony. The religious corporation suffered none of those incidents in the life of the natural man which were profitable to the lord." 2 HOLDSWORTH, HISTORY OF ENGLISH LAW 348-9.

²⁰⁴STUBBS, SELECT CHARTERS 386-7.

²⁰⁵*Ibid.*, 400 sq.

²⁰⁶"For 20 years past there has not come to England so good a law for poor people". Bearford, C. J., in the Y. B. 3, 4 Ed. II (S. S.) 162 (1310).

²⁰⁷6 Ed. I, c. 8; ENG. STATS. AT LARGE.

²⁰⁸7 Edw. I.; ENG. STATS. AT LARGE, 2, c. 3.

²⁰⁹13 Edw. I, c. I; ENG. STATS. AT LARGE.

²¹⁰2 HOLDSWORTH 350.

²¹¹18 Edw. I, c. 1.

siderably curtailed in England, but feudal tenures were materially modified and, as a result, "the feudal courts had become unprofitable".²¹²

But it was not until the Commonwealth arose, and the ideas engendered by the Puritan revolution had floated to the surface, that the most vital blow was struck at feudal incidents and tenures. In the very year of the Restoration, Parliament enacted²¹³

"that the court of wards and liveries, and all wardships, liveries, primer seisins, and ousterlemains, values and forfeitures of marriages, by reason of any tenure of the king or others, be totally taken away. And that all fines for alienations, tenures by homage, knights-service, and escutage, and also aids for marrying the daughter or knighting the son, and all tenures of the king *in capita*, be likewise taken away. And that all sorts of tenures, held of the king or others, be turned into free and common socage; save only tenures in frankalmoign, copyholds, and the honorary services (without the slavish part) of grand serjeanty."

Nevertheless,

"the common law** has created manorial jurisdiction. It has tied down feudal jurisdiction to the tract of land called a manor".²¹⁴

And still in Blackstone's day "this court is an inseparable ingredient of every manor".²¹⁵

The Law of Property Act, (14 *Geo. V, c. 20* (1925)) "freeing it [property] from useless feudal survivals," repeals the Rule in Shelley's case.

Schemes for abolishing feudal tenures and jurisdictions in Scotland, though conceived under James VI, failed to bear fruit until 1748,²¹⁶ and such tenures continued unimpaired in Ireland until Gladstone's Land Purchase act of 1881 initiated the process which has now

²¹²1 HOLDSWORTH 178.

²¹³2 Car. II, c. 24. "A statute, which was a greater acquisition to the civil property of this kingdom than even magna carta itself." BLACKSTONE, 2 *Comm.* 77. Cf. Robinson, *Anticipations under the Commonwealth of Changes in the Law*, 1 *Select Essays in Anglo-American Legal History* (Boston, 1907) 489.

²¹⁴1 HOLDSWORTH 184.

²¹⁵2 *COMM.* 91. "Even after the courts of common law and the court of Chancery, and, in the sixteenth and early seventeenth centuries the courts of Requests and Star Chamber, had begun to protect the copyholder, the court still continued to do a certain amount of litigious business connected with copyhold." 1 HOLDSWORTH 185.

²¹⁶20 GEORGE II, cc. 43, 50; Eng. Stats. at Large.

"The feudal tenures were abolished" for Scotland after Culloden. (Apr. 16, 1746) GREEN, *SHORT HISTORY OF THE ENGLISH PEOPLE* (1902), 744.

practically resulted in bringing Irish land to the people. Today in the Channel Isles, the last remnant of England's once extensive Norman realm, not only the *coutume* of Normandy, but the feudal incidents²¹⁷ remain in force; and these are French in origin.

France. Sir Henry Maine,²¹⁸ in one of his later works, propounds the question

"Why did the Manor in its decay produce such different results in England and France? Why did its transformation end in one country in a revolution which is an epoch of history? Why, in another, in a somewhat inconvenient form of landed property?"

He begins his answer as follows:

"If I were to say that the first French Revolution took place because a great part of the soil of France was held on Copyhold Tenure, the statement would doubtless sound like a paradox."

For, he proceeds to explain, the copyhold in England was considered a mild even if "inconvenient" form of tenure.

"But the French peasant holding by servile tenure, never compared himself with the farmers of the domain land of the nobles, who were a very special class, the *metayers*, not only hiring their land from the lord, but having it stocked by him. The peasant compared his lot with that of the nobles themselves, and bitterly chafed at the contrast."

And so the late 18th century *cahiers*²¹⁹ or "statements of grievances which, according to the ancient practice of the French States-General, were sent up from every administrative subdivision of France," reveal "unqualified bitterness of feeling", and "the hostility of the cultivating peasantry to the territorial nobility in all provinces of France except Brittany and Anjou not merely as one of the causes of the Revolution, but as the chief cause of the rapidity with which it gathered head and of the comparative stability which it manifested." But long before this the intellectuals had been agitating against feudal institutions. As the agitation spread, opposition crystallized and "the Parliament of Paris, just before the Revolution, ordered the work of Boncerf, 'On the Inconveniences of Feudal Rights', to be publicly burnt."²²⁰ But such gestures were futile. As Maine²²¹ points out

²¹⁷See, e. g., PARKER, THE BATTLE OF THE STRONG, describing how the ordinary resident is required to share even a catch of fish with the seigneur.

²¹⁸EARLY LAW AND CUSTOM, 291, 294, 295, 307, 322, 323. Cf. DONIOL, LA REVOLUTION FRANCAISE ET LA FEODALITE (2d ed., Paris 1876), Ch. XII sq.

²¹⁹See also TAINÉ, L'ANCIEN REGIME (Durand's trans. New York, 1931), 37 sq.

²²⁰MAINE, *ubi supra*, 317.

²²¹*Ibid.*, 298. See DONIOL, *ubi supra*, I (XVII) seq.

"the legislation of the Constituent Assembly²²² swept away the greatest part of the feudal dues, and provided compensation for only a part of them. The Legislative or Second Assembly abolished the residue and withdrew the compensation.²²³ The Convention, or Third, found almost nothing to destroy, though it was passionately eager to fasten on a hated institution, and though the Revolutionary lawyers, who abounded in it, were the real authors of the legislative provisions, afterwards engrafted on the Code Napoleon,²²⁴ which for ever prevented the revival of feudal ownership in France."

But there was one country which had been, and for most purposes continued to be, French, where feudal institutions lingered on long after the Revolution. The Articles of Capitulation signed by Britain and France at Montreal in 1760, bound the former to maintain the feudal tenures; and this was confirmed some three years later by the Treaty of Paris. Meanwhile, the British Commandant, General Murray, granted two seigneuries (one at Murray Bay) to Englishmen.²²⁵ The policy was criticised, both by British settlers and by natives, who found the administration of French feudal law by English judges, anything but satisfactory; and about 1790 a movement began to abolish the seigniorial tenure.²²⁶ The Canada Trade Act²²⁷ of 1822, designed to facilitate voluntary commutation of seigniorial lands, proved futile, as did its revision²²⁸ of 1825; and dissatisfaction increased, contributing to the uprising of 1837. Following Lord Durham's report in 1839 and that of a commission appointed in 1840, the legislature of lower Canada enacted statutes²²⁹ in 1845 and 1849 with a view further to facilitate commutations, but public sentiment was now moving strongly toward abolition and a ministry

²²²Decree of August 4, 1789, which also abolished feudal tenures.

²²³"In the end, the nobles received no compensation for the loss of these rights: as the flame of revolution gathered head, it was as much as they could do if they saved their lives. But this was not at all intended by the First or Constituent Assembly. It abolished without compensation those rights only which it supposed to have sprung from the ancient helplessness of the vassal; but wherever any class of rights seemed to it to have originated in a contract between the lord and his vassal, it abolished them indeed but provided for the lord's receiving their money-value. The distinction did some honour to the spirit of justice prevailing in the First Assembly, but no doubt it was founded on historical error." MAINE, *ubi supra*, 324.

²²⁴E. g. art. 638, reading "an easement does not imply any feudal superiority of one tenement over the other."

²²⁵MUNRO, *THE SEIGNIORIAL SYSTEM IN CANADA* 192 sq.

²²⁶*Ibid.*, Ch. VII.

²²⁷3 Geo. IV, c. 119; *ENG. STATS. AT LARGE*, secs. XXXI-XXXII.

²²⁸6 Geo. IV, c. 59, 42; *ENG. STATS. AT LARGE*. 289 sq.

²²⁹Canada Statutes, *Ibid.* Vict. c. 42; 12 *Ibid.* c. 49.

pledged to that result entered office following the election of 1854. On December 8th of that year its measure²³⁰ became law.

"The twilight of European feudalism was more prolonged in French Canada than in any other land. Its prolongation was unfortunate. For several decades preceding 1854 it had failed to adjust itself to the new environment, and its continuance was an obstacle to the economic progress of Canada."²³¹

Germany. As in other countries, feudalism began to decline in Germany before the close of the Middle Ages. In 1717 King Frederick William I provided for the redemption in Prussia of *Bauerlehn* (villein) as well as noble, tenures,²³² and *Schulzenlehn* jurisdiction. Frederick the Great's edict of December 30, 1764, attached villeins to the land²³³ and gradually the way was prepared for the sweeping reforms of the French Revolution.

"The only exceptions were crown-fiefs and heritable feudal offices (*Erbämterlehn*); '*feuda extra curtem*' (fiefs situated outside the kingdom) and reversionary (*beanwartschaftete*) tenures."²³⁴

Other parts awaited the revolution of 1848; following which came the Prussian constitution of 1850 declaring

"The creation of feudal holdings...is forbidden. Existing fiefs...shall be converted into free ownership under statutory provisions."²³⁵

This was supplemented by legislation which effected "the extinction of the rights of holders of future interests in the fiefs (*Lehn-sanwärter*), subject to money compensation, in so far as existing fiefs were not converted into family fideicommissa." The latter result was accomplished in other German states; but still, at the adoption of *Das Gesetzbuch* (Civil Code) it was found necessary to provide in the introductory act (art. 59) that "the provisions of state laws relative to family fideicommissa and fiefs, including allodial,** remain unaffected". These, however, were eliminated by the Weimar constitution of 1919.

Italy. "At the opening of the 18th century", says Calisse,²³⁶ "feudal holdings were still counted by thousands and the popu-

²³⁰*Ibid.*, 18 Vict., c. 3. A special court was provided for the settlement of seignorial claims.

²³¹MUNRO, *THE SEIGNEURS OF OLD CANADA* (Toronto, 1914), 149-50.

²³²HUEBNER, *op. cit.* (Cont. Leg. Hist. Ser., VII, 347).

²³³DONIOL, *ubi supra*, 202.

²³⁴HUEBNER, *op. cit.*, 347.

²³⁵Art. 40. The subsequent article excepted temporary "crown fiefs, i. e., those granted directly by the king and *feuda extra curtem*".

²³⁶STORIA DI DIRITTO ITALIANO (trans. Cont. Leg. Hist. Ser. VIII, 187).

lation subject to them by millions. But the government, moved by political reasons and the tendency of the times, brought aid. Personal servitudes and in great part the patrimonial rights of the feudal barons were abolished."

Here the results of the French Revolution were brought home in a direct way by the establishment in 1806 of Joseph Bonaparte as king of Naples. Thereupon

"Feudalism was abolished. The struggle to this end had been long and the results were notable, because of the strength that feudalism had acquired and of the evils it had produced in the southern provinces."²²⁷

Thus the extension of the Napoleonic Empire had not a little to do with the decline of feudalism; and when, two years later, King Joseph granted his subjects a new constitution, he was crossing the Pyrenees to rule in the peninsula.

Spain. The Cortes of 1811, which marks the beginning of liberalism in Spain, naturally tackled feudalism and thereby, thought Doniol,²²⁸ began an undertaking which lasted nearly 30 years. In truth it has lasted at least four times that long. The law of Aug. 6, 1811 recovered to the state all seignories with jurisdiction and abolished vassalage, feudal dues and privileges, indemnifying the seigneurs where these had been acquired by contract.²²⁹ Fernando VII, on returning to power in 1814, restored all except the jurisdiction. A more radical measure, passed by the Cortes in 1821, failed for two years to receive the royal assent. In 1837 another law was passed which practically extinguished seignorial privileges. There remained, however, the church tithes, which, in 1839, were replaced by a special tax for ecclesiastical expenses. The great landed estates, royal, clerical, and lay, were still mostly intact at the revolution of 1931 and their disposition afforded one of the major problems of the new Cortes. Meanwhile in the Spanish colonies, the feudal *encomiendas* fell with or before the revolutions and Roman property doctrines displaced those of feudalism in all Spanish-American codes.

Yet it would be incorrect to say that feudalism and all its consequences have been obliterated. Continental Europe offers many traces of it; e. g., the titled nobility still found in countries like Italy and Hungary, not to mention their courtesy titled kinsmen of the newly formed republics. In the English speaking countries, out-

²²⁷*Ibid.*, 203.

²²⁸*Ubi supra*, 180 sq. Cf. ALTAMIRA, *Cont. Leg. Hist. Ser.*, I, 691.

²²⁹*Cf. ante*, n. 223.

side of Great Britain, such traces have mostly disappeared; but even there the non-statutory law still abounds in rules of feudal origin which only the civil law codes have succeeded in removing. For "The human mind awakened from the sleep of feudalism and the dark ages, fastened on all the problems that are inherent in human society—problems which, even at the present day, are not half solved".²⁴⁰

²⁴⁰EDWARD ABNER, *PILGRIM FATHERS, Preface*. (Quoted in GLENN, *SOME COLONIAL MANSIONS*, I, 295.