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POWER AND PROPERTY

The unusual nature of English feudalism

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

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

Maitland believed that 'the most remarkable characteristic of feudalism' was the fact that 'several different persons, in somewhat different senses, may be said to have and to hold the same piece of

[1] Maitland, **History**, I, 67

[2] Maitland, **Constitutional**, 152, 153

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

It is worth quoting one of his definitions in full. Feudalism is 'A state of society in which the main bond is the relation between lord and man, a relation implying on the lord's part protection and defence; on the man's part protection, service and reverence, the service including service in arms. This personal relation is inseparably involved in a proprietary relation, the tenure of land - the man holds lands of the lord, the man's service is a burden on the land, the lord has important rights in the land, and (we may say) the full ownership of the land is split up between man and lord. The lord has jurisdiction over his men, holds courts for them, to which they owe suit. Jurisdiction is regarded as property, as a private right which the lord has over his land. The national organization is a system of these relationships: at the head there stands the king as lord of all, below him are his immediate vassals, or tenants in chief, who again are lords of tenants, who again may be lords of tenants, and so on, down to the lowest possessor of land. Lastly, as every other court consists of the lord's tenants, so the king's court consists of his tenants in chief, and so far as there is any constitutional control over the king it is exercised by the body of these tenants.'[7]

Maitland stressed that English 'feudalism', though originating from a common ancestor, had developed into something peculiar and different by at least the twelfth century. He commented that 'we have learnt to see vast differences as well as striking resemblances, to distinguish countries and to distinguish times' when we discuss feudalism. Thus 'if we now speak of the feudal system, it should be with a full understanding that the feudalism of France differs radically from the feudalism of England, that the feudalism of the thirteenth is very different from that of the eleventh century.' For England 'it is quite possible to maintain that of all countries England was the most, or for the matter of that the least,

[3] Maitland, **History**, I, 237

[4] Maitland, **Domesday Book**, 258

[5] Maitland, **History**, I, 68

[6] Maitland, **History**, I, 230

[7] Maitland, **Constitutional**, 143-4

feudalized.'[8] The paradox is resolved when we remember that there are two central criteria whereby we measure feudalism. In terms of land law, England was the most perfectly feudalized of societies. All tenures were feudal. Maitland wrote, 'in so far as feudalism is mere property law, England is of all countries the most perfectly feudalized.'[9] Thus 'Owing to the Norman Conquest one part of the theory was carried out in this country with consistent and unexampled rigour; every square inch of land was brought within the theory of tenure: English real property law becomes a law of feudal tenures. In France, in Germany, allodial owners might be found: not one in England.'[10] For instance, the 'absolute and uncompromising form of primogeniture which prevails in England belongs, not to feudalism in general, but to a highly centralized feudalism, in which the king has not much to fear from the power of his mightiest vassals...'[11] Thus, in terms of tenure, England was the most feudal of societies.

On the other hand, in the even more important sphere of public and private law and political power, that is, in terms of government, England went in a peculiar direction, towards some centralization of power, rather than the dissolution of the state. Maitland points out that 'our public law does not become feudal; in every direction the force of feudalism is limited and checked by other ideas; the public rights, the public duties of the Englishman are not conceived and cannot be conceived as the mere outcome of feudal compacts between man and lord.'[12] Maitland outlines the major features of this limitation of public feudalism. 'First and foremost, it never becomes law that there is no political bond between men save the bond of tenure...whenever homage or fealty was done to any mesne lord, the tenant expressly saved the faith that he owed to his lord the king.'[13] Thus a man who fights for his lord against the king is not doing his feudal duty; he is committing treason. Over-mighty subjects could not draw on justification from this system. This point is so important that Maitland elaborates it in various ways.

'English law never recognizes that any man is bound to fight **for** his lord. The sub-tenant who holds by military service is bound by his tenure to fight for the king; he is bound to follow his lord's banner, but

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[8] Maitland, **Constitutional**, 143

[9] Maitland, **History**, I, 235

[10] Maitland, **Constitutional**, 163-4; allodial property is held in absolute ownership.

[11] Maitland, **History**, II, 265

[12] Maitland, **Constitutional**, 164

[13] Maitland, **Constitutional**, 161

only in the national army: - he is in nowise bound to espouse his lord's quarrels, least of all his quarrels with the king. Private war never becomes legal - it is a crime and a breach of the peace.'[14] A 'man can hardly "go against" anyone at his lord's command... without being guilty of "felony"'. As Maitland wrote, 'Common law, royal and national law, has, as it were, occupied the very citadel of feudalism'.[15] To bring out the full peculiarity of this, Maitland tells us, 'you should look at the history of France; there it was definitely regarded as law that in a just quarrel the vassal must follow his immediate lord, even against the king'.[16] In England, 'military service is due to none but the king; this it is which makes English feudalism a very different thing from French feudalism.'[17]

There are a number of other differences which make this central feature possible and flow from it. In England there is an alternative army for the king, which helps to protect him against an over-dependence on his feudal tenants. 'Though the military tenures supply the king with an army, it never becomes law that those who are not bound by tenure need not fight. The old national force, officered by the sheriffs, does not cease to exist...In this organization of the common folk under royal officers, there is all along a counterpoise to the military system of feudalism, and it serves the king well.'[18] Another source of strength for the centre is the fact that 'Taxation is not feudalized.' Maitland tells us that the 'king for a while is strong enough to tax the nation, to tax the sub-tenants, to get straight at the mass of the people, their lands and their goods, without the intervention of their lords.'[19] Thus he is not entirely dependent on powerful lords for soldiers or money.

Nor is he entirely dependent on them for advice. We are told that the King's Court (**Curia Regis**) 'never takes very definitely a feudal shape...It is much in the king's power to summon whom he will.'[20] Finally, the king is not forced to delegate judicial powers to the barons. 'The administration of justice is

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[14] Maitland, **Constitutional**, 161

[15] Maitland, **History**, I, 303

[16] Maitland, **Constitutional**, 162

[17] Maitland, **Constitutional**, 32

[18] Maitland, **Constitutional**, 162

[19] Maitland, **Constitutional**, 162

[20] Maitland, **Constitutional**, 163

never completely feudalized. The old local courts are kept alive, and are not feudal assemblies.'[21] As a result of this the 'jurisdiction of the feudal courts is strictly limited; criminal jurisdiction they have none save by express royal grant, and the kings are on the whole chary of making such grants. Seldom, indeed, can any lord exercise more than what on the continent would have been considered justice of a very low degree.'[22] Starting with considerable power, the king 'rapidly extends the sphere of his own justice: before the middle of the thirteenth century his courts have practically become courts of first instance for the whole realm - from Henry II's day his itinerant justices have been carrying a common law through the land.'[23]

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

What Maitland argued was as follows. Most of the important elements of feudalism were present in England before the Norman Conquest, in particular the superiority of the contractual relationship with a lord over the birth relationship with kin. Then for about a century after the Norman Conquest there was a real system of military tenures. 'Speaking roughly we may say that there is one century (1066-1166) in which the military tenures are really military...'[24] In this same period there are powerful local courts. This is the period when, though much more centralized, English and French 'feudalism' looked most alike. But after that the system moves away to that which is described above. By about 1266 at the latest 'the military organization which we call feudal has already broken down and will no longer provide either soldiers or money...' for the Crown.[25] Likewise, various devices are used to circumvent the feudal principle of separate courts for lords.[26] 'Slowly but surely justice done in the king's name by men who

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[21] Maitland, **Constitutional**, 162

[22] Maitland, **Constitutional**, 162-3

[23] Maitland, **Constitutional**, 163

[24] Maitland, **History**, I, 252-3

[25] Maitland, **History**, I, 253

[26] Maitland, **History**, I, 172; for instance, the centralized

are the king's servants becomes the most important kind of justice, reaches into the remotest corners of the land.'[27] Everything became permeated by centralized law, and a law which was in its turn permeated by the unusual concept of tenure, that is to say a contractual relationship of holding something or another by a non-blood relationship. Thus 'In the Middle Ages land law is the basis of all public law...the judicial system is influenced by tenure, the parliamentary system is influenced by tenure.'[28]

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

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

Kinship and property in England

Marc Bloch suggested that the development of feudalism in western Europe after the fall of Rome was linked to a peculiarly flexible and 'weak' kinship system. He wrote that kinship ties were 'by their very nature foreign to the human relations characteristic of feudalism.'[29] The 'relative weakness' of kinship in western Europe 'explains why there was feudalism at all.'[30] Or 'More precisely feudal ties proper were developed when those of kinship proved inadequate.'[31] His hypothesis is amply anticipated by Maitland's earlier account.

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justice of **novel disseisin** and the assize of **mort d'ancestor** in the twelfth century, Maitland, **History**, I, 146-8

[27]Maitland, **History**, I, 84

[28]Maitland, **Constitutional**, 38

[29]Bloch, **Feudal** , I, 138

[30]Maitland, **Feudalism**, i, 142

[31]Bloch, **Feudal**, II, 443

Maitland was well aware that the current anthropological orthodoxy, for instance in the work of Sir Henry Maine, was that all societies, including the Teutonic peoples, had gone through a period of agnatic kinship, that is, descent flowing through the male gender, leading to the formation of powerful clans or, as anthropologists call them, unilineal descent groups.[32] Yet detailed study of Tacitus and the codes of the Anglo-Saxons and other materials did not bear out this evolutionary sequence. Maitland first worked back to the thirteenth century text of Bracton, which showed a system of tracing descent through both males and females which is identical to that which is used in England today.[33] He then took the analysis back to the Anglo-Saxon period. In a section on 'Antiquities' he showed that Anglo-Saxon kinship was bilateral or cognatic, tracing descent through both genders, and hence the formation of exclusive groups or clans which could have been the basis for political and legal action, was impossible.

He pointed out that from the very earliest rules, we find that the blood-feud payments show that those who share the payment 'consist in part of persons related to him through his father, and in part of persons related to him through his mother.' Such a concept 'ties the child both to his father's brother and to his mother's brother' and hence 'a system of mutually exclusive clans is impossible, unless each clan is strictly endogamous.' As he puts it in a marginal note, 'No clans in England.'[34] Thus 'we ought not to talk of clans at all' for 'our English law does not contemplate the existence of a number of mutually exclusive units which can be enumerated and named; there were as many "blood-feud groups" as there were living persons.'[35] Such groups could not act as the bedrock of the politico-legal system. Whatever the earliest unrecorded history, 'What seems plain is that the exclusive domination of either "father-right" or "mother-right"...should be placed for our race beyond the extreme limit of history.'[36] The absence of the patriarchal or patrilineal family, he argued had nothing to do with Christianity - its emergence 'we certainly cannot ascribe to the influence of Christianity.'[37] The Germanic method of calculating descent through both male and female lines, preserved in England, was very different from the method of calculating through the male line alone, characteristic of the later Roman Empire even after the spread of

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[32]Maitland, **History**, II, 240-1

[33]Maitland, **History**, II, 269ff, 296-7

[34]Maitland, **History**, II, 241

[35]Maitland, **History**, II, 242

[36]Maitland, **History**, II, 243

[37]Maitland, **History**, II, 243

Christianity.[38]

Two years later Maitland re-iterated his central conclusion, namely that Anglo-Saxon kinship being cognatic could not provide the basis for political allegiances. Those who settled down in England at the fall of the Roman Empire may have been kinsmen, 'But (explain this how we will) the German system of kinship, which binds men together by the sacred tie of blood-feud, traces blood both through father and through mother, and therefore will not suffer a "blood-feud-kin" to have either a local habitation or a name.' Thus the 'village community was not a **gens** [group based on the male line]. The bond of blood was sacred, but it did not tie the Germans into mutually exclusive clans.'[39]

As a number of subsequent anthropologists have confirmed, it is abundantly clear that as soon as the Anglo-Saxons appear in documented history, that is, from Tacitus' and Caesar's accounts of the first century A.D., they appear to be tracing their descent simultaneously through the male and female line.[40] This made kinship, as Bloch had argued, too weak and fragmented to act as the basis for their legal and political system. Hence their development of elaborate alternatives through proto-feudalism, travelling judges, and other devices.

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

The essence of the property law in the majority of agrarian systems which we label 'peasant' is the link between the family and landed property. The 'domestic mode of production' is based on co-ownership by parents and children. All those born into a family have birth rights. They cannot be 'disinherited' for they are co-owners, members of a corporate group. The rise of individual ownership whereby parents or children have separate rights, is, as Marx and Weber rightly argued, the basis of modern capitalist property relations. It has often been thought that the destruction of familistic property rights occurred in England during a great transformation to capitalism from the later fifteenth century. For instance Marx had argued that 'the legal view...that the landowner can do with the land what every owner of commodities can do with his commodities...arises...in the modern world only with the development of capitalist production.' Capitalism as a system 'transforms feudal landed property, clan property,

[38]Maitland, **History**, II, 386-7

[39]Maitland, **Domesday Book**, 349

[40] For example, see Radcliffe-Brown, **Kinship**, 15 and more generally Fox, **Kinship**, ch. 6.

small-peasant property' into modern, individualistic ownership.[41]

Maitland's work shows a striking absence of familistic ownership. In relation to freehold property, Maitland stated that 'In the thirteenth century the tenant in fee simple has a perfect right to disappoint his expectant heirs by conveying away the whole of his land by act **inter vivos** [between the living]. Our law is grasping the maxim **Nemo est heres viventis** [no-one is the heir of a living person].'[42] Indeed, he believes 'that men were within an ace of obtaining such a power [i.e. of leaving real estate by will] in the middle of the thirteenth century.'[43] Although Glanvill produced some rather vague safeguards for the heir, Bracton in the thirteenth century omitted these and the King's Courts did not support a child's claim to any part of his parent's estates. The only major change between the thirteenth and sixteenth centuries was that by the Statute of Wills in 1540 a parent could totally disinherit his heirs not only by sale or gift during his lifetime, but also by leaving a will devising the two-thirds of his freehold estate which did not go to his widow. The situation had in fact been formalized in the Statute **Quia Emptores** of 1290, which stated that 'from henceforth it shall be lawful for every freeman to sell at his own pleasure his land and tenements, or part of them...', with the exception of sales to the church or other perpetual foundations.[44] In this crucial respect, English common law took a totally different direction from Continental law. As Maitland put it, 'Free alienation without the heir's consent will come in the wake of primogeniture. These two characteristics which distinguish our English law from her nearest of kin, the French customs, are closely connected...Abroad, as a general rule, the right of the expectant heir gradually assumed the shape of the **restrait lignager** [restraint of the line]. A landowner must not alienate his land without the consent of his expectant heirs unless it be a case of necessity, and even in a case of necessity, the heirs must have an opportunity of purchasing.[45]

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

[41]Marx, **Capital**, III, 616

[42]Maitland, **History**, II, 308

[43]Maitland, **History**, II, 27

[44]Simpson, **Land Law**, 51

[45]Maitland, **History**, II, 309,313

had been formally specified by the artificial device of an entail. Even such entails could be broken quite easily in the sixteenth and seventeenth centuries.[46] As a result, as Chamberlayne put it in the seventeenth century, 'Fathers may give all their Estates un-intailed from their own children, and to any one child.'[47]

It would appear that 'Children had no stronger rights in the non-freehold property of their parents.'[48] This is particularly shown, as Maitland argues, in the absence of any **restrait lignager** in England, that is any custom that children could prevent their parents disposing of their property during their lifetime. The absence of this restraint is shown in numerous passages by Maitland.[49] He was puzzled by this unique feature, but in no doubt that it was present.[50] Even those restraints that there were, were probably not to keep land in the family.[51]

Another aspect of the oddity was the way in which inheritance worked. As Maitland explained 'At the end of Henry III's reign [i.e. the 1270s] our common law of inheritance was rapidly assuming its final form. Its main outlines were those which are still familiar to us, and the more elementary of them may be thus stated:- The first class of persons called to the inheritance comprises the dead persons's descendants; in other words, if he leaves an "heir of his body", no other person will inherit.'[52] This may seem precocious, but not unexpected. But what Maitland realized was that it ruled out wider kin claims. For example, 'even though I leave no other kinsfolk, neither my father, nor my mother, nor any remoter ancestor can be my heir...'[53] We have 'the curious doctrine that the ascendants are incapable of inherit-

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[46]Blackstone, **Commentaries**, II, 116-8, described some of the devices for doing so.

[47]Chamberlayne, **Present State**, 337

[48]Macfarlane, **Individualism**, 83

[49]Maitland, **History**, II, 12-13, 446; I, 647

[50]Maitland, **History**, I, 344

[51]Maitland, **History**, II, 312

[52]Maitland, **History**, II, 260

[53]Maitland, **History**, II, 286

ing'; inheritances must, acting by a law of social gravity, flow downwards.[54] Brothers, for example, were not each other's heirs. All that a child can claim is what has not been disposed of by his direct ancestor. 'An heir is one who claims by descent what has been left undisposed of by his ancestor; what his ancestor has alienated [disposed of] he cannot claim.'[55]

Thus Maitland had found no strong links between family and land. Nor did he find any restraint placed by the lord of the manor. In his earlier lectures he had argued that 'We can produce no text of English law which says that the leave of the lord is necessary to an alienation by the tenant...the royal judges, like all lawyers, seem to have favoured free alienation...'[56] In the **History** he confirms this view and shows how in this respect, as in relation to the crucial question of family ownership, what happened was that England retained the individualistic property system, while on the Continent it was abandoned and property and seigneurial rights grew. He concludes that in relation to lordly constraints, 'the tenant may lawfully do anything that does not seriously damage the interests of his lord. He may make reasonable gifts, but not unreasonable. The reasonableness of the gift would be a matter for the lord's court; the tenant would be entitled to the judgment of his peers.' Maitland is surprised that the system 'should have been so favourable to the tenants...if we have regard to other countries' but suggests that 'the Norman Conquest must for a while have favoured "free trade in land"'.[57] The crux of the matter is that England in the first half of the thirteenth century began to diverge from the Continent. 'If the English lawyers are shutting their ears to the claims of the lords, they are shutting their ears to the claims of the kindred also, and this just at a time when in Normandy and other countries the claims of the lord and the claims of the expectant heir are finding a formal recognition in the new jurisprudence. Whether we ascribe this result to the precocious maturity of our system of royal justice, or to some cause deep-seated in our national character, we must look at these two facts together:- if the English law knows no **retrait feodal** [feudal restraint], it knows no **retrait lignager**.'[58] This crucial passage summarizes the great divide. Whatever the caveats of certain critics, there is no way round Maitland's argument.[59]

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[54]Maitland, **History**, II, 286

[55]Maitland, **History**, II, 19

[56]Maitland, **Constitutional**, 29

[57]Maitland, **History**, I, 343-4

[58]Maitland, **History**, I, 344

[59]For criticism and my replies, see Macfarlane,**Culture**, 192-7

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

As Maitland explains, 'Seemingly what we mean when we speak of "family ownership", is that a child acquires rights in the ancestral land, at birth or, it may be, at adolescence; at any rate he acquires rights in the ancestral land, and this not by gift, bequest, inheritance or any title known to our modern law.'[60] He admits that there is some likelihood that some such rights may have existed in England and elsewhere in western Europe. Yet he argues that the earliest record we have of the peoples who conquered western Europe at the fall of the Roman Empire, suggests that property was already treated as belonging to an individual. 'Tacitus told his Roman readers that the Germans knew nothing of the testament, but added that they had rules of intestate succession. These rules were individualistic: that is to say, they did not treat a man's death as simply reducing the number of those persons who formed a co-owning group. Again, they did not give the wealth that had been set free to a body consisting of persons who stood in different degrees of relationship to the dead man. The kinsmen were called to the inheritance class by class, first the children, then the brothers, then the uncles. The **Lex Salica** has a law of intestate succession; it calls the children, then the mother, then the brothers and sisters, then the mother's sister. These rules, it may be said, apply only to movable goods and do not apply to land; but an admission that there is an individualistic law of succession for movable goods when as yet anything that can be called an ownership of land, if it exists at all, is new, will be quite sufficient to give us pause before we speak of "family ownership" as a phenomenon that must necessarily appear in the history of every race. Our family when it obtains a permanent possession of land will be familiar with rules of intestate succession which imply that within the group that dwells together there is mine and thine.'[61] This comes from the very early period.

The evidence for the Anglo-Saxon period in England is equally interesting and is summarized by Maitland as follows. 'Now as regards the Anglo-Saxons we can find no proof of the theory that among them there prevailed anything that ought to be called "family ownership." No law, no charter, no record of litigation has been discovered which speaks of land as being owned by a ... family, a household, or any similar group of kinsmen. This is the more noticeable because we often read of **familiae** which have rights in land; these **familiae**, however, are not groups of kinsmen but convents of monks or clerks.'[62]

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[60] Maitland, **History**, II, 248

[61] Maitland, **History**, II, 250-1

[62] Maitland, **History**, II, 251

But, further, 'the dooms and the land-books are markedly free from those traits which are commonly regarded as the relics of family ownership. If we take up a charter of feoffment [document investing an individual with a fief or fee] sealed in the Norman period we shall probably find it saying that the donor's expectant heirs consent to the gift. If we take up an Anglo-Saxon land-book we shall not find this; nothing will be said of the heir's consent. The denunciatory clause will perhaps mention the heirs, and will curse them if they dispute the gift; but it will usually curse all and singular who attack the donee's title, and in any system of law a donee will have more to fear from the donor's heirs than from other persons, since they will be able to reclaim the land if for any cause the conveyance is defective. Occasionally several co-proprietors join to make a gift; but when we consider that in all probability all the sons of a dead man were equally entitled to the land that their father left behind him, we shall say that such cases are marvellously rare. Co-ownership, co-parcenary, there will always be. We see it in the thirteenth century, we see it in the nineteenth; the wonder is that we do not see more of it in the ninth and tenth than our Anglo-Saxon land-books display.'[63]

Of course, expectant heirs may try to recover land which they feel they should have. But even here, Maitland found no greater power to do so in the Anglo-Saxon period than in the nineteenth century. 'In the days before the Conquest a dead man's heirs sometimes attempted to recover land which he had given away, or which some not impartial person said that he had given away. They often did so in the thirteenth century; they sometimes do so at the present day. At the present day a man's expectant heirs do not attempt to interfere with his gifts so long as he is alive; this was not done in the thirteenth century; we have no proof that it was done before the Conquest.'[64] In his 'Last words on family ownership', he concluded modestly that 'We have not been arguing for any conclusion save this, that in the present state of our knowledge we should be rash were we to accept "family ownership," or in other words a strong form of "birth-right", as an institution which once prevailed among the English in England. That we shall ever be compelled to do this by the stress of English documents is improbable.'[65] As far as I know, his view has not been controverted.

Maitland provides an over-all scheme. From the earliest descriptions by Tacitus, individual ownership was the rule. Of course there were rules of heirship, but these did not restrict the power of a living man who 'owned' the property to dispose of it. This very unusual, non-domestic mode of production may have prevailed over much of north-western Europe from the fifth to twelfth centuries. Then, under pressure from kin and lords it was transformed into seigneurial and family property over the Continent. In England alone it remained much as it had been - the basis for that capitalist, individualistic, system of property which was to lie behind much of later English development. The difference was largely due to

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[63]Maitland, **History**, II, 251-2

[64]Maitland, **History**, II, 252

[65]Maitland, **History**, II, 255

the different balance of powers which existed in war-torn Europe and the relatively peaceful and nationally bounded island of Britain. Thus, once again, Maitland challenged the widespread view of a necessary set of stages which all societies had to go through, in this case from family to individual property.