

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second
Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)

THE HISTORY
OF
ENGLISH LAW.

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second
Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)

THE HISTORY
OF
ENGLISH LAW
BEFORE THE TIME OF EDWARD I

BY
SIR FREDERICK POLLOCK
AND
FREDERIC WILLIAM MAITLAND

SECOND EDITION

*Reissued
with a new introduction and select bibliography by
S. F. C. MILSOM*

VOLUME I

CAMBRIDGE
AT THE UNIVERSITY PRESS

1968

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press

The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org

Information on this title: www.cambridge.org/9780521070614

First published 1895

Second edition 1898

Reprinted 1952

Reissued with a new introduction and select bibliography by S. F. C. Milsom 1968

Re-issued in this digitally printed version 2008

A catalogue record for this publication is available from the British Library

Library of Congress Catalogue Card Number: 68-21197

ISBN 978-0-521-07061-4 hardback

ISBN 978-0-521-09515-0 paperback

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)

v

PREFACE TO THE SECOND EDITION.

IN this edition the first chapter, by Prof. Maitland, is new. In Book II., c. ii. § 12, on ‘Corporations and Churches’ (formerly ‘Fictitious Persons’), and c. iii. § 8, on ‘The Borough,’ have been recast. There are no other important alterations: but we have to thank our learned critics, and especially Dr Brunner of Berlin, for various observations by which we have endeavoured to profit. We have thought it convenient to note the paging of the first edition in the margin.

F. P.

F. W. M.

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)

PREFACE TO FIRST EDITION.

THE present work has filled much of our time and thoughts for some years. We send it forth, however, well knowing that in many parts of our field we have accomplished, at most, a preliminary exploration. Oftentimes our business has been rather to quarry and hew for some builder of the future than to leave a finished building. But we have endeavoured to make sure, so far as our will and power can go, that when his day comes he shall have facts and not fictions to build with. How near we may have come to fulfilling our purpose is not for us to judge. The only merit we claim is that we have given scholars the means of verifying our work throughout.

We are indebted to many learned friends for more or less frequent help, and must specially mention the unfailing care and attention of Mr R. T. Wright, the Secretary of the University Press.

Portions of the book have appeared, in the same words or in substance, in the *Contemporary Review*, the *English Historical Review* and the *Harvard Law Review*, to whose editors and proprietors we offer our acknowledgments and thanks.

F. P.

F. W. M.

Note. It is proper for me to add for myself that, although the book was planned in common and has been revised by both of us, by far the greater share of the execution belongs to Mr Maitland, both as to the actual writing and as to the detailed research which was constantly required.

F. P.

21 Feb. 1895.

CONTENTS.

	PAGE
PREFACE TO THE SECOND EDITION	v
PREFACE TO THE FIRST EDITION	vi
TABLE OF CONTENTS	vii
LIST OF ABBREVIATIONS	xviii
LIST OF TEXTS	xix
ADDENDA	xxii
INTRODUCTION by Professor S. F. C. Milsom	xxiii
I. The Place of <i>Pollock and Maitland</i> Today, xxiii; II. The Real Actions, xxvii; III. The Personal Actions, xlix; IV. Procedure, lxiv; V. A General View, lxxi.	
SELECT BIBLIOGRAPHY AND NOTES by Professor S. F. C. Milsom	lxxv
I. (1) Original Sources: Ancient Laws and Law Books, lxxv; Records of Royal Courts to the late Thirteenth Century, lxxvi; Records of Local Courts to the early Fourteenth Century, lxxvii; Early Year Books, lxxviii. (2) Institutional Studies: General Accounts, lxxviii; Local and Private Courts and Officials, lxxix; Eyres, lxxx; Benches and Judicial Aspects of Exchequer, lxxx; Profession and Literature, lxxxi; Criminal Administration and Law, lxxxi; Jury Proceedings, lxxxii; Legislation, lxxxii; Ecclesiastical Jurisdiction, lxxxiii.	
II. (1) The Real Actions: General and Background Discussions, lxxxiv; Background to the Actions, lxxxiv; Writ of Right, lxxxv; Mort D'Ancestor, lxxxvi; Seisin and Novel Disseisin, lxxxvi; Writs of Entry, lxxxviii; Other Actions, lxxxviii. (2) The Personal Actions: General Accounts, lxxxviii; Personal Actions in Local Courts, lxxxix; Contract in Royal Courts, lxxxix; Trespass, xc. (3) Procedure: General Accounts, xc; Writ and Plaint, xci; Procedure and Pleading, xci.	
INTRODUCTION	xciii

BOOK I.

SKETCH OF EARLY ENGLISH LEGAL HISTORY.

CHAPTER I.

THE DARK AGE IN LEGAL HISTORY, pp. 1—24.

The difficulty of beginning, 1. Proposed retrospect, 1. The classical age of Roman law, 2. The beginnings of ecclesiastical law, 2. **Century III.** Decline of Roman law, 3. **Century IV.** Church and State, 3. **Century V.** The Theodosian Code, 5. Laws of Euric, 5. **Century VI.** The century of Justinian, 6. The *Lex Salica*, 6. The *Lex Ribuaria*, and *Lex Burgundionum*, 7. The *Lex Romana Burgundionum*, 7. The *Lex Romana Visigothorum*, 8. The Edict of Theoderic, 9. The Dionysian collection of canons, 9. Justinian's books, 9. Justinian and Italy, 10. Laws of Æthelbert, 11. **Centuries VII and VIII.** Germanic laws, 12. System of personal laws, 13. The vulgar Roman law, 14. The latent Digest, 15. The capitularies, 16. Growth of canon law, 16. **Centuries IX and X.** The false Isidore, 17. The forged capitularies, 17. Church and State, 18. The darkest age, 18. Legislation in England, 19. England and the Continent, 20. **Century XI.** The Pavian law-school, 21. The new birth of Roman law, 22. The recovered Digest, 23. The influence of Bolognese jurisprudence, 24.

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)

viii

Contents.

CHAPTER II.

ANGLO-SAXON LAW, pp. 25—63.

Imperfection of written records of early Germanic law, 25. Anglo-Saxon dooms and custumals, 27. Anglo-Saxon land-books, 28. Survey of Anglo-Saxon institutions, 29. Personal conditions : lordship, 29. The family, 31. Ranks : *ceorl*, *eorl*, *gesif*, 32. Thegn, 33. Other distinctions, 34. Privileges of the clergy, 34. Slavery and slave trade, 35. Manumission, 36. Courts and justice, 37. Procedure, 38. Temporal and spiritual jurisdiction, 40. The king's jurisdiction, 40. The Witan, 41. County and hundred courts, 42. Private jurisdiction, 43. Subject-matter of Anglo-Saxon justice, 43. The king's peace, 44. Feud and atonement, 46. *Wer*, *wite* and *bót*, 48. Difficulties in compelling submission to the courts, 49. Maintenance of offenders by great men, 50. Why no trial by battle, 50. Treason, 51. Homicide, 52. Personal injuries : misadventure, 53. Archaic responsibility, 55. Theft, 55. Property, 56. Sale and other contracts, 57. Claims for stolen goods : warrant, 58. Land tenure, 60. Book-land, 60. *Lán*-land, 61. Folk-land, 61. Transition to feudalism, 62.

CHAPTER III.

NORMAN LAW, pp. 64—78.

Obscurity of early Norman legal history, 64. Norman law was French, 66. Norman law was feudal, 66. Feudalism in Normandy, 67. Dependent land tenure, 69. Seigneurial justice, 72. Limits of ducal power, 73. Legal procedure, 74. Criminal law, 74. Ecclesiastical law, 74. The truce of God, 75. Condition of the peasantry, 76. Jurisprudence, 77. Lanfranc of Pavia, 77.

CHAPTER IV.

ENGLAND UNDER THE NORMAN KINGS, pp. 79—110.

Effects of the Norman Conquest, 79. No mere mixture of national laws, 79. History of our legal language, 80. Struggle between Latin, French and English, 82. The place of Latin, 82. Struggle between French and English, 83. Victory of French, 84. French documents, 85. French law-books, 87. Language and law, 87.

Preservation of old English law, 88. The Conqueror's legislation, 88. Character of William's laws, 89. Personal or territorial laws, 90. Maintenance of English land-law, 92. The English in court, 93. Norman ideas and institutions, 93. Legislation : Rufus and Henry I., 94. Stephen, 96. The law-books or *Leges*, 97. Genuine laws of William I., 97. The *Quadripartitus*, 98. *Leges Henrici*, 99. *Consiliatio Cnuti*, 101. *Instituta Cnuti*, 101. French *Leis* of William I., 101. *Leges Edwardi Confessoris*, 103. Character of the law disclosed by the *Leges*, 104. Practical problems in the *Leges*, 105. Practice of the king's court, 107. Royal justice, 108.

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)*Contents.*

ix

CHAPTER V.

ROMAN AND CANON LAW, pp. 111—135.

Contact of English with Roman and Canon law, 111. Cosmopolitan claims of Roman law, 112. Growth of Canon law, 112. Gratian, 113. *Decretales Gregorij*, 113. The Canonical system, 114. Relation of Canon to Roman law, 116. Roman and Canon law in England, 117. Vacarius, 118. English legists and canonists, 120. Scientific work in England, 120. The civilian in England, 122.

Province of ecclesiastical law, 124. Matters of ecclesiastical economy, 125. Church property, 126. Ecclesiastical dues, 127. Matrimonial causes, 127. Testamentary causes, 128. *Fidei laesio*, 128. Correction of sinners, 129. Jurisdiction over clerks, 130. *Miserabiles personae*, 131. The sphere of Canon law, 131. Influence of Canon upon English law, 131. English law administered by ecclesiastics, 133. Nature of canonical influence, 134.

CHAPTER VI.

THE AGE OF GLANVILL, pp. 136—173.

The work of Henry II., 136. Constitutions of Clarendon, 137. Assize of Clarendon, 137. Inquest of Sheriffs, 137. Assize of Northampton, 137. Henry's innovations. The jury and the original writ, 138. Essence of the jury, 138. The jury a royal institution, 140. Origin of the jury: The Frankish inquest, 140. The jury in England, 141. The jury and *fama publica*, 142. The inquest in the Norman age, 143. Henry's use of the inquest, 144. The assize *utrum*, 144. The assize of novel disseisin, 145. Import of the novel disseisin, 146. The grand assize, 147. The assize of mort d'ancestor, 147. The assize of darrein presentment, 148. Assize and jury, 149. The system of original writs, 150. The accusing jury, 151.

Structure of the king's courts, 153. The central court, 154. Itinerant justices, 155. Cases in the king's court, 156. Law and letters, 160. Richard Fitz Neal, 161. Dialogue on the Exchequer, 161. Ranulf Glanvill: his life, 162. *Tractatus de Legibus*, 163. Roman and Canon law in Glanvill, 165. English and continental law-books, 167.

The limit of legal memory, 168. Reigns of Richard and John, 169. The central court, 169. Itinerant justices, 170. Legislation, 170. The Great Charter, 171. Character of the Charter, 172.

CHAPTER VII.

THE AGE OF BRACTON, pp. 174—225.

Law under Henry III., 174. General idea of law, 174. Common law, 176. Statute law. The Charters, 178. Provisions of Merton, Westminster and Marlborough, 179. Ordinance and Statute, 181. The king and the law, 181. Unenacted law and custom, 183. Local customs, 184. Kentish customs, 186. Englishry of English law, 188. Equity, 189.

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)

x

Contents.

The king's courts, 190. The exchequer, 191. Work of the exchequer, 191. The chancery, 193. The original writs, 195. The chancery not a tribunal, 197. The two benches and the council, 198. Council and parliament, 199. Itinerant justices, 200. Triumph of royal justice, 202. The judges, 203. Clerical justices, 205.

Bracton, 206. His book, 207. Character of his work: Italian form, 207. English substance, 208. Later law books, 209. Legal literature, 210.

The legal profession, 211. Pleadings, 211. Attorneys, 212. Non-professional attorneys, 213. Professional pleadings, 214. Regulation of pleadings and attorneys, 215. Professional opinion, 217. Decline of Romanism, 217. Notaries and conveyancers, 218. Knowledge of the law, 220.

English law in Wales, 220. English law in Ireland, 221. English and Scottish law, 222. Characteristics of English law, 224.

BOOK II.

THE DOCTRINES OF ENGLISH LAW IN THE
EARLY MIDDLE AGES.

CHAPTER I.

TENURE, pp. 229—406.

Arrangement of this book, 229. The mediæval scheme of law, 229. The modern scheme, 230. Our own course, 231.

§ 1. *Tenure in General*, pp. 232—240.

Derivative and dependent tenure, 232. Universality of dependent tenure, 234. Feudal tenure, 234. Analysis of dependent tenure, 236. Obligations of tenant and tenement, 237. Intrinsic and forinsec service, 238. Classification of tenures, 239.

§ 2. *Frankalmoin*, pp. 240—251.

Free alms, 240. Meaning of 'alms,' 241. Spiritual service, 242. Gifts to God and the saints, 243. Free alms and forinsec service, 244. Pure alms, 245. Frankalmoin and ecclesiastical jurisdiction, 246. The assize *Utrum*, 247. Defeat of ecclesiastical claims, 248. Frankalmoin in cent. xiii., 250.

§ 3. *Knight's Service*, pp. 252—282.

Military tenure, 252. Growth and decay of military tenure, 252. Units of military service, 254. The forty days, 254. Knight's fees, 256. Size of knight's fees, 256. Apportionment of service, 257. Apportion-

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)*Contents.*

xi

ment between king and tenant in chief, 258. Honours and baronies, 259. The barony and the knight's fee, 260. Relativity of the knight's fee, 261. Duty of the military tenant in chief, 262. Position of military sub-tenants, 263. Knight's service due to lords who owe none, 264. Scutage, 266. Scutage between king and tenant in chief, 267. Scutage and fines for default of service, 269. Scutage and the military sub-tenants, 271. Tenure by escuage, 272. The lord's right to scutage, 274. Reduction in the number of knight's fees, 275. Meaning of this reduction, 276. Military combined with other services, 277. Castle-guard, 278. Thegnage and drengage, 279. Tenure by barony, 279. The baronage, 280. Escheated honours, 281.

§ 4. *Serjeanty*, pp. 282—290.

Definition of serjeanty, 282. Serjeanty and service, 283. Types of serjeanty owed by the king's tenants in chief, 283. Serjeanties due to mesne lords, 285. Military serjeanties due to mesne lords, 286. Essence of serjeanty, 287. The serjeants in the army, 288. Serjeanty in Domesday Book, 288. Serjeanty and other tenures, 290.

§ 5. *Socage*, pp. 291—296.

Socage, 291. Types of socage, 291. Extension of socage, 293. Fee farm, 293. Meaning of 'socage,' 293. Socage in contrast to military tenure, 294. Socage as the residuary tenure, 294. Burgage, 295. Burgage and borough customs, 295. One man and many tenures, 296.

§ 6. *Homage and Fealty*, pp. 296—307.

Homage and fealty, 296. Legal and extra-legal effects of homage, 297. The ceremony of homage, 297. The oath of fealty, 298. Liegeance, 298. Vassalism in the Norman age, 300. Bracton on homage, 301. Homage and private war, 301. Sanctity of homage, 303. Homage and felony, 303. Feudal felony, 305. Homage, by whom done and received, 306. The lord's obligation, 306.

§ 7. *Relief and Primer Seisin*, pp. 307—318.

The incidents of tenure, 307. Heritable rights in land, 307. Reliefs, 308. Rights of the lord on the tenant's death, 310. Prerogative rights of the king, 311. Earlier history of reliefs, 312. Relief and heriot, 312. Heritability of fees in the Norman age, 314. Mesne lords and heritable fees, 315. History of the heriot, 316. Relief on the lord's death, 317.

§ 8. *Wardship and Marriage*, pp. 318—329.

Bracton's rules, 319. Wardship of female heirs, 320. Priority among lords, 320. What tenures give wardship, 321. Prerogative wardship, 321. The lord's rights vendible, 322. Wardship and the serjeanties, 323. The law in Glanvill, 323. Earlier law, 325. Norman law, 326. The Norman apology, 326. Origin of wardship and marriage, 327.

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)

§ 9. *Restraints on Alienation*, pp. 329—349.

Historical theories, 329. Modes of alienation, 330. Preliminary distinctions, 331. Glanvill, 332. The Great Charter, 332. Bracton, 332. Legislation as to mortmain, 333. Alienation of serjeanties, 334. Special law for the king's tenants in chief, 335. Growth of the prerogative right, 336. *Quia emptores*, 337. Disputed origin of the prerogative right, 338. Summary of law after the Charter, 339. Older law, 340. Anglo-Norman charters, 340. Discussion of the charters, 341. Conclusions as to law of the Norman age, 343. Usual form of alienation, 345. General summary, 345. Gifts by the lord with his court's consent, 346. Alienation of seignories, 346. Law of attornment, 347. Practice of alienating seignories, 348.

§ 10. *Aids*, pp. 349—351.

Duty of aiding the lord, 349.

§ 11. *Escheat and Forfeiture*, pp. 351—356.

Escheat, 351. The lord's remedies against a defaulting tenant, 352. Action in the king's court, 352. Distress, 353. Proceedings in the lord's court, 354. Survey of the various free tenures, 355.

§ 12. *Unfree Tenure*, pp. 356—383.

Freehold tenure, 356. Technical meaning of 'freehold,' 357. Villeinage as tenure and as status, 358. Villein tenure: unprotected by the king's court, 359. Want of right and want of remedy, 360. Protection by manorial courts, 361. Evidence of the 'extents,' 362. Attempt to define villein tenure, 362. The manorial arrangement, 362. The field system, 364. The virgates, 364. Villein services, 365. A typical case of villein services, 366. Week work and boon days, 367. Merchet and tallage, 368. Essence of villein tenure, 368. The will of the lord, 370. Villeinage and labour, 370. Uncertainty of villein services, 372. Tests of villeinage, 372. Binding force of manorial custom, 376. Treatment of villein tenure in practice, 377. Heritable rights in villein tenements, 379. Unity of the tenement, 381. Alienation of villein tenements, 382. Villein tenure and villein status, 382.

§ 13. *The Ancient Demesne*, pp. 383—406.

The ancient demesne and other royal estates, 383. Immunities of the ancient demesne, 384. Once ancient demesne, always ancient demesne, 385. Peculiar tenures on the ancient demesne, 385. The little writ of right, 385. The *Monstraverunt*, 388. The classes of tenants, 389. Bracton's theory, 389. Theory and practice, 391. Difficulties of classification, 393. Sokemanry and socage, 394. Later theory and practice, 396. Why is a special treatment of the ancient demesne necessary? 397. The king and the conquest settlement, 398. Royal protection of royal tenants, 400. Customary freehold, 401. No place for a tenure between freehold and villeinage, 404. The conventioners, 405. Conclusion, 406.

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)*Contents.*

xiii

CHAPTER II.

THE SORTS AND CONDITIONS OF MEN, pp. 407—511.

Law of personal condition, 407. Status and estate, 408.

§ 1. *The Earls and Barons*, pp. 408—411.

The baronage, 408. Privileges of the barons, 409.

§ 2. *The Knights*, pp. 411—412.

Knighthood, 412.

§ 3. *The Unfree*, pp. 412—432.

The unfree, 412. General idea of serfage, 413. Relativity of serfage, 415. The serf in relation to his lord, 415. Rightlessness of the serf, 416. Serfdom *de iure* and serfdom *de facto*, 417. Covenant between lord and serf, 418. The serf in relation to third persons, 419. The serf's property, 419. Difficulties of relative serfdom, 420. The serf in relation to the state, 421. How men become serfs, 422. Servile birth, 422. Mixed marriages, 423. Influence of the place of birth, 424. Villeins by confession, 424. Serfdom by prescription, 425. How serfdom ceases, 427. Manumission, 427. The freedman, 428. Modes of enfranchisement, 429. Summary, 429. Retrospect. Fusion of villeins and serfs, 430. The leveling process, 431. The number of serfs, 431. Rise of villeins, 432.

§ 4. *The Religious*, pp. 433—438.

Civil death, 433. Growth of the idea of civil death, 433. Difficulties arising from civil death, 435. The monk as agent, 436. The abbatial monarchy, 437. Return to civil life, 437. Civil death as a development of the abbot's *mund*, 438.

§ 5. *The Clergy*, pp. 439—457.

Legal position of the ordained clerk, 439. The clerk under temporal law, 439. Exceptional rules applied to the clerk, 440. Benefit of clergy, 441. Trial in the courts of the church, 443. Punishment of felonious clerks, 444. What persons entitled to the privilege, 445. What offences within the privilege, 446. The Constitutions of Clarendon, 447. Henry II.'s scheme, 448. Henry's scheme and past history, 449. Henry's allegations, 449. Earlier law: the Conqueror's ordinance, 449. The *Leges Henrici*, 450. Precedents for the trial of clerks, 450. Summary, 452. Henry's scheme and the Canon law, 454. The murderers of clerks, 456.

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)

§ 6. *Aliens*, pp. 458—467.

The classical common law, 458. Who are aliens? 458. Disabilities of the alien, 459. Naturalization, 460. Law of earlier times, 460. Growth of the law disabling aliens, 461. The king and the alien, 462. The kinds of aliens, 464. The alien merchants, 464. The alien and the common law, 465. Has the merchant a peculiar status? 466. The law merchant, 467.

§ 7. *The Jews*, pp. 468—475.

General idea of the Jew's position, 468. The Exchequer of the Jews, 469. Relation of the Jew to the king, 471. Relation of the Jew to the world at large, 473. Law between Jew and Jew, 474. Influence of the Jew upon English law, 475.

§ 8. *Outlaws and Convicted Felons*, pp. 476—478.

Outlawry, 476. Condition of the outlaw, 477.

§ 9. *Excommunicates*, pp. 478—480.

Excommunication, 478. Spiritual leprosy, 478. Excommunication and civil rights, 480.

§ 10. *Lepers, Lunatics and Idiots*, pp. 480—481.

The leper, 480. The idiot, 481. The lunatic, 481.

§ 11. *Women*, pp. 482—485.

Legal position of women, 482. Women in private law, 482. Women in public law, 483. Married women, 485.

§ 12. *Corporations and Churches*, pp. 486—511.

The corporation, 486. Beginnings of corporateness, 487. Personality of the corporation, 488. The anthropomorphic picture of a corporation, 489. Is the personality fictitious? 489. The corporation at the end of the middle ages, 489. The corporation and its head, 491. The corporation in earlier times, 492. Gradual appearance of the group-person, 493. The law of Bracton's time, 494. The *universitas* and the *communitas*, 494. Bracton and the *universitas*, 495. No law as to corporations in general, 497.

Church lands, 497. The owned church, 497. The saints as persons, 499. The saint's administrators, 500. Saints and churches in Domesday Book, 500. The church as person, 501. The church as *universitas* and *persona ficta*, 502. The temporal courts and the churches, 503. The parish church, 503. The abbatial church, 504. The episcopal church, 505. Disintegration of the ecclesiastical groups, 506. Communal groups of secular clerks, 507. Internal affairs of clerical groups, 508. The power of majorities, 509. The ecclesiastical and the temporal communities, 509. The boroughs and other land communities, 510.

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)*Contents.*

xv

§ 13. *The King and the Crown*, pp. 511—526.

Is there a crown? 511. Theories as to the king's two bodies, 511. Personification of the kingship not necessary, 512. The king's rights as intensified private rights, 512. The king and other lords, 513. The kingship as property, 513. The king's rights can be exercised by him, 514. The king can do wrong but no action lies against him, 515. King's land and crown land, 518. Slow growth of a law of 'capacities,' 518. No lay corporations sole, 520. Is the kingdom alienable? 521. The king can die, 521. The king can be under age, 522. Germs of a doctrine of 'capacities,' 523. Personification of the crown, 524. Retrospect, 526.

CHAPTER III.

JURISDICTION AND THE COMMUNITIES OF THE LAND, pp. 527—532.

Place of the law of jurisdiction in the medieval scheme, 527. All temporal jurisdiction proceeds from the king, 528. The scheme of courts, 529. Division of the land, 529. The county court, 529. The hundred court, 530. The sheriff's turn, 530. Seigniorial courts, 530. Feudal courts, 531. Franchise courts, 531. Leets, 532. Borough courts, 532. The king's courts, 532.

§ 1. *The County*, pp. 532—556.

The county, 532. The county officers, 533. The county community, 534. The county court, 535. Identity of county and county court, 536. Constitution of the county court, 537. Suit of court no right, but a burden, 537. Suit of court is laborious, 538. Sessions of the court, 538. Full courts and intermediate courts, 539. The suitors, 540. Suit is a 'real' burden, 541. 'Reality' of suit, 542. The vill as a suit-owing unit, 542. Inconsistent theories of suit, 543. The court in its fullest form, 544. The communal courts in earlier times, 545. Struggle between various principles, 546. Suit by attorney, 547. Representative character of the county court, 547. The suitors as doomsman, 548. A session of the county court, 549. The suitors and the dooms, 550. Powers of a majority, 552. The *buzones*, 553. Business of the court, 553. Outlawry in the county court, 554. Governmental functions, 554. Place of session, 555.

§ 2. *The Hundred*, pp. 556—560.

The hundred as a district, 556. The hundred court, 557. Hundreds in the king's hands, 557. Hundreds in private hands, 558. Duties of the hundred, 558. The sheriff's turn, 559.

§ 3. *The Vill and the Township*, pp. 560—567.

England mapped out into vills, 560. Vill and parish, 560. Discrete vills, 561. Hamlets, 562. Vill and village, 562. Vill and township, 563. Ancient duties of the township, 564. Statutory duties, 565.

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)

xvi

Contents.

Contribution of township to general fines, 566. Exactions from townships, 566. Miscellaneous offences of the township, 566. Organization of the township, 567.

§ 4. *The Tithing*, pp. 568—571.

Frankpledge, 568. The system in cent. xiii., 568. Township and tithing, 568. The view of frankpledge, 570. Attendance at the view, 570. Constitution of tithings, 571.

§ 5. *Seignorial Jurisdiction*, pp. 571—594.

Regalities and feudal rights, 571. Acquisition of regalities, 572. Theories of royal lawyers, 573. Various kinds of franchises, 574. Fiscal immunities, 574. Immunities from personal service, 574. Immunities from forest law, 575. Fiscal powers, 575. Jurisdictional powers, 576. Contrast between powers and immunities, 577. Sake, soke, toll and team, 578. Sake and soke in cent. xiii., 579. View of frankpledge, 580. The leet, 580. The vill and the view, 581. The assize of bread and beer, 581. High justice, 582. High franchises claimed by prescription, 584. The properly feudal jurisdiction, 584. The feudal court is usually a manorial court, 585. Jurisdiction of the feudal court, 586. Civil litigation: personal actions, 587. Actions for freehold land, 587. Actions for villein land, 588. Litigation between lord and man, 588. Presentments, 589. Governmental powers and by-laws, 590. Appellate jurisdiction, 590. Constitution of the feudal court, 592. The president, 592. The suitors, 592.

§ 6. *The Manor*, pp. 594—605.

The manor, 594. 'Manor' not a technical term, 595. Indefiniteness of the term, 596. A typical manor, 596. The manor house, 597. Occupation of the manor house, 598. Demesne land, 599. The freehold tenants, 600. The tenants in villeinage, 601. The manorial court, 602. Size of the manor, 603. Administrative unity of the manor, 604. Summary, 604.

§ 7. *The Manor and the Township*, pp. 605—634.

Coincidence of manor and vill, 605. Coincidence assumed as normal, 606. Coincidence not always found, 607. Non-manorial vills, 608. Manors and sub-manors, 609. The affairs of the non-manorial vill, 610. Permanent apportionment of the township's duties, 610. Allotment of financial burdens, 611. The church rate, 612. Apportionment of taxes on movables, 615. Actions against the hundred, 616. Economic affairs of the non-manorial vill, 617. Intercommoning vills, 618. Return to the manorial vill, 620. Rights of common, 620. Rights of common and communal rights, 620. The freeholder's right of common, 621. The freeholder and the community, 622. Freedom of the freeholder, 623. Communalism among villeins, 624. The villein community, 624. Communalism and collective liability, 627. The community as farmer, 628. Absence of communal rights, 629. Communal rights disappear upon

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)*Contents.*

xvii

examination, 629. Co-ownership and corporate property, 630. The township rarely has rights, 632. The township in litigation, 632. Transition to the boroughs, 633.

§ 8. *The Borough*, pp. 634—688.

Cities and boroughs, 634. The vill and the borough, 634. The borough and its community, 635. Sketch of early history, 636. Borough and shire, 636. The borough as vill, 637. The borough's heterogeneity, 637. The borough and the king, 638. The borough and the gilds, 639. Transition to cent. xiii., 639.

Inferior limit of burgality, 640. Representation in parliament, 641. The typical boroughs and their franchises, 642. Jurisdictional privileges, 643. Civil jurisdiction, 644. Criminal jurisdiction, 644. Return of writs, 644. Privileged tenure, 645. Mesne tenure in the boroughs, 645. Seignorial rights in the boroughs, 646. Customary private law, 647. Emancipation of serfs, 648. Freedom from toll, 649. The *firma burgi*, 650. What was farmed, 650. The farm of the vill and the soil of the vill, 652. Lands of the borough, 652. Waste land, 653. The borough's revenue, 655. Chattels of the borough, 656. Elective officers, 656. Borough courts and councils, 657. By-laws and self-government, 660. Limits to legislative powers, 661. Enforcement of by-laws, 661. Rates and taxes, 662. The borough's income, 663. Tolls, 664. The gild merchant, 664. The formation of a gild, 664. The gild and the government of the borough, 665. Objects of the gild, 666. The gild and the burgesses, 667. The gild courts, 667. The borough as a franchise holder, 668.

Corporate character of the borough community, 669. Corporateness not bestowed by the king, 669. Gild-like structure of the community, 670. Admission of burgesses, 671. The title to burgherhood, 671. The 'subject' in the borough charters, 672. Discussion of the charters, 673. Charters for the borough, the county and the whole land, 674. Charters and laws, 674. The burgesses as co-proprietors, 676. The community as bearer of rights, 676. Inheritance, succession and organization, 677. Criminal liability of the borough, 678. Civil liability, 679. The communities in litigation, 680. Debts owed to the community, 682. The common seal, 683. The borough's property, 685. The borough's property in its tolls, 685. The ideal will of the borough, 686. The borough corporation, 686. The communities and the nation, 687.

Cambridge University Press
 978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second
 Edition - Volume I
 Frederick Pollock and Frederick William Maitland
 Frontmatter
[More information](#)

LIST OF ABBREVIATIONS.

A.-S.	= Anglo-Saxon.
Bl. Com.	= Blackstone's Commentaries.
Co.	= Coke.
Co. Lit.	= Coke upon Littleton.
D. B.	= Domesday Book.
D. G. R.	= Deutsches Genossenschaftsrecht
D. R. G.	= Deutsche Rechtsgeschichte ¹ .
E. H. R.	= English Historical Review.
Fitz. Abr.	= Fitzherbert's Abridgement.
Fitz. Nat. Brev.	= Fitzherbert's Natura Brevium.
Harv. L. R.	= Harvard Law Review.
Lit.	= Littleton's Tenures.
L. Q. R.	= Law Quarterly Review.
Mon. Germ.	= Monumenta Germaniae.
P. C.	= Pleas of the Crown.
P. Q. W.	= Placita de Quo Warranto.
Reg. Brev.	= Registrum Brevium.
Rep.	= Coke's Reports.
R. H.	= Hundred Rolls.
Rot. Cart.	= Charter Rolls.
Rot. Cl.	= Close Rolls.
Rot. Parl.	= Parliament Rolls.
Rot. Pat.	= Patent Rolls.
Sec. Inst.	= Coke's Second Institute.
Sel. Chart.	= Stubbs's Select Charters.
X.	= Decretales Gregorii IX.
Y. B.	= Year Book.

¹ The second edition of Schröder's D. R. G. is referred to.

LIST OF TEXTS USED¹.

[R=Rolls Series. Rec. Com.=Record Commission. Seld.=Selden Society.
 Camd.=Camden Society. Surt.=Surtees Society.]

Die Gesetze der Angelsachsen, ed. F. Liebermann, in progress. Collections
 Die Gesetze der Angelsachsen, ed. Reinhold Schmid, 2nd ed., Leipzig, 1858. of ancient
 Ancient Laws and Institutes of England, 8vo. ed. (Rec. Com.). laws and
 Councils and Ecclesiastical Documents, ed. Haddan and Stubbs, vol. iii. documents.
 Oxford, 1871.

Quadripartitus, ed. F. Liebermann, Halle, 1892.
 Consiliatio Cnuti, ed. F. Liebermann, Halle, 1893.
 Leges Edwardi Confessoris, ed. F. Liebermann, Halle, 1894.
 Instituta Cnuti, ed. F. Liebermann, Transactions of Royal Hist. Soc.
 N.S. vol. vii. p. 77.

Codex Diplomaticus Ævi Saxonici, ed. J. M. Kemble (Eng. Hist. Soc.).
 Diplomatarium Anglicum Ævi Saxonici, ed. B. Thorpe, London, 1865.
 Cartularium Saxonicum, ed. W. de G. Birch, 1885 ff.

Placita Anglo-Normannica, ed. M. M. Bigelow, London, 1879.

Select Charters, ed. W. Stubbs, Oxford, 1881.
 Chartes des Libertés Anglaises, ed. Ch. Bémont, Paris, 1892.

Statutes of the Realm, vol. i. (Rec. Com.), 1800.

Rolls of the King's Court, Ric. I. (Pipe Roll Soc.).
 Rotuli Curiae Regis temp. Ric. I. et Joh., ed. Palgrave (Rec. Com.). Judicial
 Placitorum Abbreviatio (Rec. Com.). Records.
 Select Pleas of the Crown, 1200–1225 (Seld.).
 Select Civil Pleas, 1200–1203 (Seld.).
 Pleas of the Crown for the County of Gloucester, 1221, ed. Maitland,
 London, 1884.
 Bracton's Note Book, ed. Maitland, Cambridge, 1887.
 Three Assize Rolls for the County of Northumberland (Surt.).
 Placita de Quo Warranto (Rec. Com.).
 Somersetshire Assize Rolls (Somers. Record Soc.).

¹ For texts relating to Normandy see below, vol. i. pp. 64–5; and for texts
 relating to the English boroughs, see below, vol. i. pp. 642–3.

xx *List of Texts.*

	Select Cases from Coroners' Rolls (Seld.). Rotuli Parliamentorum, vol. i. (official edition). Memoranda de Parlamento, 1305 (R).
	Select Pleas in Manorial Courts (Seld.). The Court Baron (Seld.). Durham Halmote Rolls (Surt.). The Leet Jurisdiction in Norwich (Seld.).
Miscellaneous Records.	Domesday Book (official edition).
	Pipe Roll of 31 Henry I. (Rec. Com.). Pipe Rolls of Henry II. (Pipe Roll Soc.). Red Book of the Exchequer (R). Liber Niger Scaccarii, ed. Hearne, Oxford, 1728. Rotuli Literarum Clausarum, 1204-1227 (Rec. Com.). Rotuli Literarum Patentium, 1201-1216 (Rec. Com.). Rotuli Chartarum, 1199-1216 (Rec. Com.). Rotuli de Oblatis et Finibus, temp. Joh. (Rec. Com.). Excerpta e Rotulis Finium, 1216-1272 (Rec. Com.). Fines, sive Pedes Finium, 1195-1215, ed. Hunter (Rec. Com.). Feet of Fines, 1182-1196 (Pipe Roll Soc.). Rotuli Hundredorum, Hen. III. et Edw. I. (Rec. Com.). Parliamentary Writs (Rec. Com.). Testa de Neville (Rec. Com.). Documents illustrative of English History, ed. Cole (Rec. Com.). Calendarium Genealogicum (Rec. Com.).
	Foedera, Conventiones etc., ed. 1816 (Rec. Com.). Prynne, Records, i.e. An exact Chronological Vindication...of the King's Supreme Ecclesiastical Jurisdiction, etc., London, 1655.
	Munimenta Gildhallae (R), containing Liber Albus and Liber Custumarum.
Law- books.	Bracton, Tractatus de Legibus, ed. 1569. Bracton and Azo (Seld.). Britton, ed. F. M. Nichols, Oxford, 1865. Fleta, seu Commentarius Iuris Anglicani, ed. 1685. Glanvill, Tractatus de Legibus, ed. 1604. Hengham, Summae, printed at the end of Selden's ed. of Fortescue, De Laudibus. The Mirror of Justices (Seld.).
Law reports.	Year Books of 20-1, 21-2, 30-1, 32-3, 33-5 Edward I. (R).
Chronicles, Annals etc.	Chronicles, Abbatum. Gesta Abbatum Monasterii S. Albani (R). Annals etc. Abingdon, Chronicon Monasterii de (R). Anglo-Saxon Chronicle (R). Annales Monastici (R).

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)*List of Texts.*

xxi

-
- Antiquis Legibus, Liber de (Camd.).
 Becket. Materials for the Life of Thomas Becket (R).
 Benedictus Abbas. See Gesta Henrici.
 Brakelonda, Chronica Jocelini de (Camd.).
 Burton, Annales de, in Annales Monastici, vol. i. (R).
 Cambrensis. See Giraldus.
 Canterbury. See Gervase.
 Coggeshall, Radulphi de, Chronicon Anglicanum (R).
 Cotton, Bartholomaei de, Historia Anglicana (R).
 Diceto, Radulfi de, Opera Historica (R).
 Dunstaplia, Annales Prioratus de, in Annales Monastici, vol. iii. (R).
 Durham, Symeon of, The Historical Works of (R).
 Eadmeri, Historia Novorum (R).
 Edward I. and Edward II., Chronicles of (R).
 Eveshamensis, Chronicon Abbatiae (R).
 Flores Historiarum (R).
 Franciscana, Monumenta (R).
 Gervase of Canterbury, Works of (R).
 Gesta Henrici Secundi (Benedict of Peterborough) (R).
 Giraldus Cambrensis, The Works of (R).
 Gloucester, Metrical Chronicle of Robert of (R).
 Hemingburgh, Walteri de, Chronicon (Eng. Hist. Soc.).
 Hovedene, Rogeri de, Chronica (R).
 Hugonis, Magna Vita S. (R).
 Huntendunensis, Henrici, Historia (R).
 Liber de Antiquis Legibus (Camd.).
 Malmesbiriensis, Willelmi, Gesta Regum (R).
 Mapes, Gualterus, de Nugis Curialium (Camd.).
 Melsa, Chronicon Monasterii de (R).
 Monte, Roberti de, Chronica, in Chronicles of Stephen etc. vol. iv. (R).
 Newborough, William of, in Chronicles of Stephen etc. vol. i. (R).
 Parisiensis, Matthaei, Chronica Majora (R).
 " " Historia Anglorum (R).
 Ramsey, Chronicle of the Abbey of (R).
 Rishanger, Willelmi, Chronica et Annales (R).
 Tewkesbury, Annals of, in Annales Monastici, vol. i. (R).
 Torigneio, Roberti de, Chronica, in Chronicles of Stephen etc. vol. iv. (R).
 Trivetii, Nicholai, Annales (Eng. Hist. Soc.).
 Waverleia, Annales de, in Annales Monastici, vol. ii. (R).
 Wigorniensis, Florentii, Chronicon (Eng. Hist. Soc.).
 Wykes, Thomae, Chronicon, in Annales Monastici, vol. iv. (R).
 York, Historians of the Church of (R).
-
- Academica, Munimenta (R).
 Cantuarienses, Epistolae, in Chronicles etc. of Richard I., vol. ii. (R).
 Cantuarienses, Literae (R).
 Dunelmense, Registrum Palatinum (R).
 Grosseteste, Letters of Bishop (R).

Letters,
etc.

xxii *List of Texts.*

	Lanfranci Opera, ed. Giles, Oxford, 1844.
	Northern Registers, Historical Papers and Letters from (R).
	Osmund, Register of St (R).
	Peckham, Registrum Johannis (R).
	Royal and other Historical Letters, Henry III. (R).
	Saresberiensis, Joannis, Opera, ed. Giles, Oxford, 1848.
<hr/>	
Cartu-	Bath, Two Chartularies (Somerset Record Soc. 1893).
laries.	Battle, Cartulary (Camd.).
	Brinkburn, Cartulary (Surt.).
	Burton, Cartulary (Salt Society, 1884).
	Gloucester, History and Cartulary (R).
	Guisborough, Cartulary (Surt.).
	Malmesbury, Register (R).
	Newminster, Cartulary (Surt.).
	Paul's, Domesday of St (Camd.).
	Peterborough, Black Book of, at the end of Chronicon Petroburgense (Camd.).
	Ramsey, Cartulary (R).
	Rievaulx, Cartulary (Surt.).
	Sarum, Charters and Documents of (R).
	Selby, Coucher Book (Yorkshire Archaeological Soc. 1891-3).
	Whalley, Coucher Book (Chetham Soc. 1847).
	Whitby, Cartulary (Surt.).
	Winchcombe, Landboc, vol. i., ed. D. Royce, Exeter, 1892.
	Worcester, Register (Camd.).
<hr/>	
	Round, Ancient Charters (Pipe Roll Soc.).
	Madox, Formulæ Anglicanum, London, 1702.
	Monasticon Anglicanum, ed. 1817 etc.

ADDITIONS AND CORRECTIONS.

- p. 33, last lines. As to the *burh-geat* (not *burh-geat-setl*) see W. H. Stevenson, E. H. R. xii. 489 ; Maitland, Township and Borough, 209.
- p. 118. Dr Liebermann has withdrawn the suggestion that Vacarius was the author of the tract on Lombard law. See E. H. R. vol. xiii. p. 297. The Summa de Matrimonio has been printed in L. Q. R. xiii. 133, 270.
- p. 556, note 1. Add a reference to J. H. Round, The Hundred and the Geld, E. H. R. x. 732.
- p. 663. As causes of municipal expenditure we ought to have mentioned the many presents, of a more or less voluntary kind, made by the burgesses to kings, magnates, sheriffs and their underlings. For these see the Records of Leicester, ed. Bateson, *passim*.

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)

xxiii

INTRODUCTION.

BY S. F. C. MILSOM.

I. The Place of 'Pollock and Maitland' Today.

MAITLAND, I think, would have been saddened by this re-issue of his book, and not only by the inadequacy of an introductory essay that is the sole addition to what last left his hands just seventy years ago. He felt sorry for those whose work became classical: it meant that vitality had been lost from the enterprise they had loved. Of course much has been done. Each generation has produced its handful of scholars from either side of the Atlantic, and from either shore of that other ocean dividing law and history. His own Selden Society has proved over and over again the richness of the surviving materials. It has become clearer than ever that we can hope to understand the growth of the common law, almost from its beginning as an intellectual system, in a detail unimaginable for its great rival in the western world. And yet, while every syllable of the Roman texts has attracted prolonged scrutiny, our own great stores of evidence are largely neglected. Workers are still few; the subscriptions of a private association are still a principal support of the work; and more than sixty years after Maitland died his book is reprinted, not as a dead masterpiece but as a still living authority.

Nor is it just that his book is still useful to scholars. In large part, the part that most interested him, it is still their starting-point. For the law itself, as opposed to legal institutions, they still rely upon his vision of the subject as a whole.

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)

Their questions still take the form: was Maitland right? This is not true of institutions. What he had to say about these, mostly contained within the first volume, has indeed worn well. The general reader will get a picture which has been corrected and amplified in many details, but of which the broad outlines remain; and he will find it a livelier and more compelling picture than any produced since. But for the scholar it is superseded. Serious inquiry about our early courts or lawyers or their literature, though it cannot neglect *Pollock and Maitland*, does not begin there. These matters have all been the subject of more recent and more intensive study; and some of the work is listed in the first section of the bibliography which follows this essay.

The essay itself, however, will be devoted to what has not been done rather than to what has, to the area in which *Pollock and Maitland* remains the starting-point. Why is it that so much less progress has been made with the law than with its institutions? Largely it is because less has been attempted. Few lawyers venture into history, and few historians deal with the law on its own terms. To the beginner seeking a subject, the very bulk of the sources is discouraging. There is so much technicality to be mastered. This is true; but the calculation probably underestimates both what we can learn from technicalities and what force they can exert in their own day. To one who started as a lawyer and who stands uneasily between the two disciplines, there is visible a similarity between a traditional belief of historians and a newer belief among some lawyers: the law serves its day, and its reasoning, which can always be manipulated to produce a sensible, practical solution, does not matter. 'A sensible, practical solution it may be', wrote Maitland elsewhere, 'but legal principle avenges itself.'

The reality of this intellectual force may provide a different kind of explanation for the smaller progress made with the law itself than with its institutions. It is not only that less has been attempted: less success has been achieved in what has been done, and this may partly be due to the scale of the attempts. Maitland was of a generation which believed in great historical undertakings; and since his time scholarship has narrowed its vision, seeking to learn in greater detail

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)*Introduction.*

xxv

about smaller areas. That this has been beneficial to institutional studies is proved by the results. But it may not suit legal studies. A fact found in a plea roll about a court, for example, can be picked up and handled as a thing in itself. But legal facts do not come away like that. They are parts of a pattern, and if we cut snippets away for examination we may not see even the detail of the design, because we look from the wrong angles.

But of course, when we rely upon Maitland's vision of the subject as a whole, we look from his angles; and when we ask whether Maitland was right, we ask his questions. I believe—and I do not know how to introduce one of the greatest works of English history otherwise than by a *credo*—that the very splendour of his achievement may have beguiled us into a too easy dependence. If he himself could have any wish for this reissue, I believe it would be that some reader would be stimulated to follow his example, to come to the sources without assumptions, and to make them indicate their own vantage-points and suggest their own questions.

This then will be an essay in heresy, pious heresy, intended to suggest the kind of doubt which it seems possible to have about Maitland's picture. To use a phrase familiar in thirteenth-century plea rolls, he wrote 'as one who saw and heard'. He seems to have seen a society and its law whole and to have heard its disputes singly. The voices arguing he heard indeed in his sources; and all the materials made available since his death have confirmed that he heard aright. What is difficult to realize is the extent to which the picture as a whole must have been his own creation, the extent to which any picture of early legal development must remain uncertain.

It is a property of legal sources, especially from the middle ages, that they will tell the investigator nearly everything except what he wants to know. Business documents are made for those who know the business; and the records of litigation, whether plea rolls which were the courts' minutes, or Year Books which were reports made for the professional or educational purposes of lawyers, are brusque in their unhelpfulness to outsiders. Charters and the like use words which we may not even recognize as terms of art, let alone guess at the volumes of meaning which it is the function of

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)

terms of art to import. Even legislative acts, even legal treatises, were addressed to an audience which knew something about the law and which lived in the society which the law regulated. We have to conjure up both. It is what was assumed that we need to know, not what was said.

One example of this inscrutability may serve to make the point. The earliest action of which we know for the recovery of land is called the writ of right, and it worked in this way. The demandant claiming the land made a formal declaration to the court asserting that a named ancestor had been seised in the reign of a named king, and then setting out the pedigree from that ancestor to himself. No other facts were alleged. The tenant, the man in possession against whom the action was brought, denied this declaration at large; and the court's business was to arrange a test which would indicate whether it was true or rather, in case truth seems too precise a concept, whether it was just. At first this test was always a battle, and what was directly tested was the oath of the demandant's champion, who made himself out to be a sort of hereditary witness. Later the tenant was allowed instead to choose the grand assize, a kind of jury; but even then, with exceptions that do not now matter, the plea roll recorded only an answer saying blankly that the one side or the other had the greater right.

About this legal process we know in great detail. It is described in the book known as *Glanvill*, written between 1187 and 1189; and there are countless examples in the plea rolls, the great series of which begins only a few years later. We know, for example, just what excuses the parties might make for not coming, and how often; we know that, if several parcels of land were at stake, arable had to be claimed before meadow, and meadow before marsh; we know what ceremonies the champions went through before fighting, and what oaths they swore; and we know what a demandant should do who wrongly guessed that his opponent would choose the grand assize and had not provided himself with a champion—when he saw the tenant returning to court with an armed man, he should instantly make off, lose by default and not by judgment, and so be free to start again. All this we know so well that with some rehearsal we could manage

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)*Introduction.*

xxvii

the law-suit ourselves. But we do not know what it was about, what 'the right' was. We do not even know what had happened: if the demandant's claim was just, how had the tenant come to the land? The law court is miraculously clear in our spotlight. The world around it, largely the world of fact and wholly the world of ideas, is in the dark.

II. The Real Actions.

HERESIES are not easily formulated. The suggestion underlying this and the following section is that Maitland did not sufficiently reckon with the law of courts other than the king's courts; and on the face of it this seems deeply unjust. There is much about other courts in this book; and elsewhere, especially in Selden Society editions, he did more than anybody to bring home their importance. But they are important in various ways. They are important to any picture of the life of ordinary people until long after the period covered by this book. They are important as the sources of custom from which the common law came. But they are also important to the interpretation of what we see in the king's courts themselves; and this is the point now in question. As is often the case with Maitland, attentive reading can sometimes detect suspicions. But he did not have time to follow them up. They did not much affect what he said, or at all affect what others have built upon his work. In the result, our picture of the early common law assumes that we can read its archives in isolation, and that although we shall get an incomplete picture of society we shall not thereby misunderstand the law itself. But we may misunderstand it by mistaking the original sense of its simplest words. To the extent that the king's courts were not inventing law but adopting customs enforced by other courts, their elementary concepts and categories must have been formed in those other courts; and the names by which they were known must have acquired their first meanings there. If we look only at materials from the king's courts, we may attribute to those names anachronistic meanings, narrowed or widened by later developments within the common law from an

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)

original and more elementary sense. The clearest example of this will be discussed in the next section: our picture of the personal actions has been distorted by paying insufficient attention to local jurisdictions. The present section will suggest that something similar may have happened with the real actions and feudal jurisdictions.

‘Now were an examiner to ask who introduced the feudal system into England? one very good answer, if properly explained, would be Henry Spelman . . . If my examiner went on with his questions and asked me, when did the feudal system attain its most perfect development? I should answer, about the middle of the [eighteenth] century.’ Maitland’s joke ousted a great deal of legalistic history: perhaps too much. His account of the real actions and of seisin has been discussed more than any other part of his book: and the discussion has assumed Maitland’s general picture and questioned details. Largely it has assumed his account of what happened and wondered about why. But if we stand back and look at the picture as a whole, the striking thing is the insignificant position occupied by the feudal relationship. Feudal jurisdiction is jurisdiction in our sense and no more: should a dispute go to this court or to that? And apart from jurisdiction, the system of actions is one that could have existed in ancient Rome, one that could have existed—and in some ghostly sense did exist—in nineteenth-century England.

The system is described in terms of possessory and proprietary remedies; and the Roman language, for which of course there is plenty of warrant in Bracton and some in Glanvill, was for Maitland and has ever since been a cause for doubt. But the chief doubt has been about the source of the idea of protection that can be called possessory, and there may be a prior doubt: in what sense was that the idea? There can be little question that it was the idea at the end of the period covered by this book. A tolerant Roman lawyer would then have allowed the real actions to be described in those terms, subject to two reservations. He might have felt that the principle behind the possessory remedies had manifested itself in a peculiarly English and *ad hoc* way. And he might have felt that the adjective ‘proprietary’ was being used in a peculiarly English and relative sense. But there was

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)*Introduction.*

xxix

a range of remedies from the most obviously possessory, that for the ejected against his ejector, up to the most nearly proprietary, that which decided title as between the parties for ever. In the possessory remedies the question of right could not in general be raised. The ejected could not be met by an assertion of title in his ejector. The claimant seeking to retrieve land given to the present tenant's father by his own father, whom he alleges to have been mad when he gave it, could not be met by an assertion that his father's father had got the land in the first place only by ejecting some ancestor of the tenant. In a possessory remedy discussion could not go behind the facts alleged by the claimant, behind the possession from which his story started. And since by this time there was a possessory remedy for virtually every constellation of facts, and since they were all quicker, more convenient and more acceptable than the proprietary, the proprietary was becoming otiose, a little-used reserve.

In this scheme the actions are ranged up and down a single scale. A claimant can nearly always choose between the high point on that scale, the troublesome but conclusive proprietary remedy, or something lower down, based upon easily established facts, but inconclusive in that the loser can always begin a new action going higher into the right. This was the scheme which existed in the late thirteenth century, and which gave the common law its distinctive and sensible notion of relative title. But the question is, how it came into existence. For Maitland, the proprietary remedy, the writ of right, was primeval. The top of the scale came first. Then it was built up from the bottom, first the possessory assizes, and then the writs of entry which eventually reached up to the writ of right. Each stage offered the claimant a new alternative to the writ of right, and, since the possessory remedies were all royal, a new escape from feudal jurisdiction. From the point of view of the king, therefore, the desire to extend his jurisdiction may have been a motive. From the point of view of the claimant, however, and this is the proposition to be doubted, the whole development is seen as conducted in the same terms throughout: the writ of right, once the only remedy, would always cover his case, and he is offered an increasing range of more convenient possessory alternatives.

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)

xxx

Introduction.

Taking first the writ of right, such work as has been done since Maitland's time has added only to our knowledge of its mechanics. In particular we know that the jurisdictional position was more complicated than he could see, and that the provision in Magna Carta about the writ *praecipe* was concerned with a genuine difficulty of legal administration and not with a straightforward attempt by the crown to steal jurisdiction. But it remains the case that early in the thirteenth century lords minded about their jurisdictional rights, though late in the century, when removal to the king's courts was regular, nobody much minded except litigants, to whom the matter was a nuisance.

But this decline of jurisdictional interest, which treats jurisdiction as the right to determine a case by applying to it the fixed rules of the common law and to take the profits of justice, looks like the last stage of a greater decline. Feudal jurisdiction had started as the power to decide, not just to declare a result reached by applying external criteria. And however much force we attribute to the customs of a lordship, there is a great difference between a lord and his court applying rules within their own control if within anybody's, and the same body applying royal rules. Seen from above the difference is that a lord's jurisdiction becomes a matter of dignity and cash, perhaps more trouble than it is worth. Real control is lost, the decisive step being one which later ideas would not even associate with jurisdiction: a tenant's dispositions become effective of their own force, and need no validation from above. Seen from below the same difference can be expressed only in the language of private law. The tenant's right has not only become larger and more secure; it has changed its nature. It now exists, not in the closed legal world of the lordship, but under an open Roman sky. The tenant has become an owner.

It was this abstract ownership that the demandant in a writ of right was in the thirteenth century claiming. But the logic of the action was inappropriate. What happened in court has already been described for the purpose of showing how reticent our voluble sources can be. There was the count based upon hereditary descent, the blank denial, and the test of battle or grand assize from which emerged a blank result.

Cambridge University Press

978-0-521-09515-0 - The History of English Law: Before the Time of Edward I, Second Edition - Volume I

Frederick Pollock and Frederick William Maitland

Frontmatter

[More information](#)

Introduction.

xxxi

It is easy, but wrong, to dismiss the whole process as archaic and therefore senseless. If we accept the premise of a divine test—and it seems to be the premise of all early law—even the battle answered a specific question. What was tested was an oath, in this case an oath by the demandant's champion that his own ancestor had seen the seisin upon which the claim rested, the seisin of the ancestor from whom the demandant traced his descent. The toss of the coin, if we choose to think in those terms, did not indicate just which party was to win: it indicated whether or not the demandant's count was true.

But the facts in the count, the ancestor's seisin and the hereditary descent, were in the thirteenth century irrelevant to any real question between the parties. The point can best be made by considering two cases which would in fact have been redressed by possessory actions; but on the received view it would be open to the demandant to bring a writ of right, and we shall suppose him to do so. First comes the claimant already postulated, who wishes to retrieve land granted away by his father when insane. In his count he will begin from the seisin of the most remote ancestor of whom he knows, and trace the descent to himself. His mad father is a name in the pedigree; and the fact mainly attested by the champion's oath, the ancestral seisin, is not even in dispute. That count went back beyond the true issue, and passed by without heeding it. In our second example, it does not reach it. Suppose that the demandant's father bought the land from one whose family had held it for generations, and suppose that the demandant has been ousted by one whose true claim is to have a better right than that family had. If he brings a writ of right, the demandant must count on the seisin of his father, and he cannot even mention the vendor's ancestral holding. It is about the seisin of the father that his champion must swear; and upon that the case somehow pointlessly turns.

Nor are these examples special. If land is considered as an object of ownership, capable of passing from hand to hand rightfully and wrongfully, then the range of possessory remedies in the later thirteenth century covers almost every imaginable dispute, every situation in which its passage from