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## SOCIAL RELATIONS

### The community and the individual

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

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

His full attack on the evolution from community to individual ownership occurs in later works. In the **History of English Law** he carefully defines the meaning of 'community' and concludes that while the county and the township constitute legal **communities** by the twelfth century<sup>3</sup>, the idea of the 'community' is more complex than this. 'The student of the middle ages will at first sight see communalism everywhere. It seems to be an all pervading principle. Communities rather than individual

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<sup>1</sup>Maitland, **Constitutional**, 51

<sup>2</sup>Maitland, **Collected Papers**, II, 313

<sup>3</sup>Maitland, **History**, I, 534, 564

men appear as the chief units in the governmental system.' But this is deceptive. 'A little experience will make him distrust this communalism; he will begin to regard it as the thin cloak of a rough and rude individualism.<sup>4</sup> Certainly the township is a 'communitas', but that does not mean that there is communalism.

For example, it looks on the surface as if there are rights 'in common' in the waste land and 'common' pasture. Yet are these rights 'of common' in any sense 'communal rights'? Of course there is an element of 'community' in it. 'A right of common is a right to enjoy something along with someone else, to turn out one's beasts on a pasture where the beasts of the lord and of one's fellow-tenants feed, to take sticks from a wood, turf from a moor, fish from a pond in which others are entitled to do similar acts.' Yet this does not imply communal ownership. 'But, for all this, the right may be an individual's several right, a right that he has acquired by a several title, a right that he can enforce against his fellow-commoners, a right that he without aid from his fellow-commoners, can enforce against strangers, a right over which his fellow-commoners have little or no control.'<sup>5</sup> Thus, having explained the matter further and in detail, Maitland concludes that 'This is not communalism; it is individualism **in excelsis**.'<sup>6</sup> Likewise, as a marginal note to further explanation put it succinctly 'The manorial custom gives several rights not communal rights.' 'Rights of the township disappear when examined.'<sup>7</sup> He concludes that 'anything that even by a stretch of language could be called a communal ownership of land, if it had ever existed, had become rare and anomalous before the stream of accurate documents began to flow.'<sup>8</sup> There is no evidence back to the Conquest of 'common property'. Thus 'in this chapter we may have seen enough to give us pause before we assent to any grand dogma which would make "communalism" older than "individualism"'. The apparent communalism of old laws covers an individualism which has deep and ancient roots.<sup>9</sup>

Another line of argument put forward by the defenders of the 'village community' theory was that open-field agriculture with its mingled strips necessitated communal management. If people had to act

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<sup>4</sup>Maitland, **History**, I, 616

<sup>5</sup>Maitland, **History**, I, 620-1

<sup>6</sup>Maitland, **History**, I, 623

<sup>7</sup>Maitland, **History**, I, 629

<sup>8</sup> Maitland, **History**, I, 630

<sup>9</sup>Maitland, **History**, I, 688

together to plant, let animals in to graze and so on, surely there must have been some 'community organization'. Maitland answered this suggestion in several places. For instance, in an article on 'The Survival of Archaic Communities' he wrote as follows. 'It seems to me that some of our guides in these matters are in danger of exaggerating the amount of communalism that is necessarily implied in the open field system of husbandry. We have of course the clearest proof that the system can go on subsisting in days when manorial control has become hardly better than a name, that it can subsist even in the eighteenth and nineteenth centuries. We have also, so I think, fairly clear proof that it can subsist from century to century in many a village that has no court, no communal assembly. No communal bye-laws and indeed no legal recognition of the communal custom are absolutely necessary for the maintenance of the wonted course of agriculture; the common law of trespass maintains it.'<sup>10</sup> The effect is achieved 'not by the rights or the bye-laws of a community' but 'by the rights of other individuals'.<sup>11</sup> In other words a person must behave like his co-cultivators and if he mis-behaves he will either lose his crops or be disciplined by an ordinary common law writ of trespass. The 'community' does not come into it.<sup>12</sup>

In his **Domesday Book and Beyond** Maitland provided an analysis of the problem in a section on 'The Village Community' in 'England before the Conquest'. He started wistfully. 'A popular theory teaches us that land belonged to communities before it belonged to individuals. This theory has the great merit of being vague and elastic...' The theory 'seems to hint, and yet to be afraid to say, that land was owned by corporations before it was owned by men.' Maitland continues 'The hesitation we can understand. No one who has paid any attention to the history of law is likely to maintain with a grave face that the ownership of land was attributed to fictitious persons before it was attributed to men.'<sup>13</sup> It is here that he attacks the 'normal sequence of stages' theory of 'the anthropologists'. He argues that 'To say the least, we have no proof that among the Germans the land was continuously tilled before it was owned by individuals or by those small groups that constituted the households. This seems to be so whether we have regard to the country in which the Germans had once lived as nomads or to those Celtic and Roman lands which they subdued. To Gaul and to Britain they seem to have brought with them the idea that the cultivable land should be allotted in severalty. In some cases they fitted themselves into the agrarian framework that they found; in other cases they formed villages closely resembling those that they had left behind them in their older home. But to all appearance, even in that older home, so soon as the village was formed and had ploughed lands around it, the strips into which those fields were

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<sup>10</sup> Maitland, **Collected Papers**, II, 360

<sup>11</sup> Maitland, **Collected Papers**, II, 360

<sup>12</sup> For another documented discussion along the same lines, see Maitland, **Township**, 25

<sup>13</sup> Maitland, **Domesday Book**, 340-1

divided were owned in severalty by the householders of the village.<sup>14</sup> Thus from the very start, land was owned by individuals or households, not by some larger entity. Thus 'our evidence, though it may point to some co-operation in agriculture, does not point to a communistic division of the fruits.' In a footnote Maitland rejects Seebohm's ideas and explains how the Anglo-Saxon tithing system 'is compatible with the most absolute individualism.'<sup>15</sup>

Maitland continues 'Thus, so far back as we can see, the German village had a solid core of individualism.'<sup>16</sup> He considers the 'commons' and again finds that the rights were attached to particular ownership of houses and arable strips so that 'such "rights of common" may take that acutely individualistic form which they seem to have taken in the England of the thirteenth century.'<sup>17</sup> Thus, repeating the material from the 1893 article, he puts as the side-heading 'Feebleness of the village community', for the 'village community' had 'no court, no jurisdiction.'<sup>18</sup> Nor was this system basically changed after 1066 with the elaboration of the manorial system. The evidence Maitland cites from the manor of Orwell 'brings to our notice the core of individualism that lies in the centre of the village. The houses and the arable strips are owned in severalty, and annexed to these houses and arable strips are pasture rights which are the rights of individuals...'<sup>19</sup> No more than the family, the 'village community' cannot provide a political, legal or economic foundation in the development of English society. In conclusion, therefore, he rejected the great hypothesis of the movement from Community to Individual, or even the reverse. 'In fine, is it not very possible that the formula of development should be neither "from communalism to individualism," nor yet "from individualism to communalism," but "from the vague to the definite"?'<sup>20</sup>

Maitland had thus shown some of the ways in which the individual was freed from the overwhelming

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<sup>14</sup>Maitland, **Domesday Book**, 346

<sup>15</sup>Maitland, **Domesday Book**, 346, and **ibid**, note 1

<sup>16</sup>Maitland, **Domesday Book**, 348

<sup>17</sup>Maitland, **Domesday Book**, 348

<sup>18</sup>Maitland, **Domesday Book**, 349

<sup>19</sup>Maitland, **Domesday Book**, 353

<sup>20</sup> Maitland, **Collected Papers**, II, 362

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

## Social ranks

In relation to the higher ranks, Maitland's general case is put in the **Constitutional History of England**. In assessing the nature of the baronage, Maitland concludes that 'tenure is the quarter in which we must look: the idea of nobility of blood is not the foundation.'<sup>21</sup> He concedes that the idea of nobility of blood 'does occur all Europe over among the peoples of our own race if we go back far enough.' Thus 'The distinction between eorl and ceorl is a distinction between men who by birth are noble, and those who by birth are perfectly free but still not noble...' Yet, 'for a long time before the Conquest', i.e. presumably back into later Anglo-Saxon England, 'the nobility of birth had been supplanted by a nobility of tenure and of office.' Thus the 'thane is noble because of his relation to the king, a relation intimately connected with the holding of land...' Out of this one might have expected a 'nobility of tenants in chief, crown vassals.' But the Norman Conquest 'put difficulties in the way of the formation of such a nobility.' For the 'aggregate body of tenants in chief was a very miscellaneous mass, including very great men, and men who might relatively be called very small...' Hence the 'grades were many and small; there was no one place at which a hard line could be drawn; and probably it suited the king very well that none should be drawn, that he should not be hemmed in by a close aristocracy; against the greater feudatories he relies on the smaller tenants in chief.'<sup>22</sup>

Maitland is arguing that out of the power of the crown and special circumstances, a separate nobility of birth failed to emerge in England. Comparing the situation with France, he wrote 'Whatever social pre-eminence the families of peers may have, has no basis in our law: we have never had a **noblesse**.'<sup>23</sup>

One symbol and key to this was the equality of all free men before the law, a central tenet of English law from at least the thirteenth century. As Milsom nicely summarizes Maitland's vision, 'The world into which Maitland's real actions fit is essentially a flat legal world, inhabited by equal neighbours. Lordship is little more than a servitude over the land of another, and its content is fixed and economic. The services and incidents are important, but the law relating to them is self-contained, unrelated to other questions...' Now this 'flat world' is the opposite of that hierarchical world, based on the premise of inequality, which was to develop over the rest of the continent. But when had such a flat world

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<sup>21</sup>Maitland, **Constitutional**, 79

<sup>22</sup>Maitland, **Constitutional**, 79-80

<sup>23</sup> Maitland, **Constitutional**, 171

developed? Milsom is clear that 'There can be no doubt that by the end of the period covered by his book, the world was as Maitland saw it.'<sup>24</sup> Maitland's 'Book' ends in 1307; so Milsom is talking about the second half of the thirteenth century. Thus he agrees with Maitland that by the second half of the thirteenth century we are in a flat legal world.

As Maitland himself put it, 'if we could look at western Europe in the year 1272, perhaps the characteristic of English law which would seem the most prominent would be its precocity.' It was uniform over the country. It was also uniform over all the social statuses; 'in England the law for the great men has become the law for all men, because the law of the king's court has become the common law.'<sup>25</sup> Thus 'English law is modern in its uniformity, its simplicity, its certainty...'<sup>26</sup>

Law, ultimately, is based on contractual relationships, and not on status. This is the essence of feudalism - as Maine had realized. This can be found in all aspects of English life, for instance, as Maitland notes, 'In our English law bastardy can not be called a status or condition', a bastard 'is a free and lawful man...In all other respects he is the equal of any other free and lawful man' - a situation very different from that on the Continent.<sup>27</sup> The same is true of children - whom, as we shall see, are not under 'patriarchal' power because of their age and status in the family, and women, who are not inferior because of their gender.

Two areas where status, birth, ascription usually operate - are in relation to those above the normal law, with special privileges, namely the nobility, and those below it, the serfs. In each, Maitland notes some curious features. In his chapter on 'The Sorts and Conditions of Men', he starts by stating that in the thirteenth century, 'The lay Englishman, free but not noble, who is of full age and who has forfeited none of his rights by crime or sin, is the law's typical man, typical person.'<sup>28</sup> There are, of course, other special types - the 'noble men and unfree men', the clergy, Jews, aliens etc. Yet, in relation to the lay order, 'it may seem to us that, when compared with the contemporary law of France or at any rate of Germany, our law of **status** is poor: in other words, it has little to say about estates or ranks of men. Men are either free men or serfs; there is not much more to be said. When compared with tenure, status

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<sup>24</sup>In Maitland, **History**, I, xlvii

<sup>25</sup>Maitland, **History**, I, 224; and **ibid**, II, 402

<sup>26</sup>Maitland, **History**, I, 225

<sup>27</sup>Maitland, **History**, II, 396-7

<sup>28</sup>Maitland, **History**, I, 407

is unimportant.<sup>29</sup> Thus 'our land law has been vastly more important than our law of ranks.'<sup>30</sup> He notes that English writers find it very difficult to translate the Latin word 'status'.

Turning specifically to the top, 'Our law hardly knows anything of a noble or of a gentle class; all free men are in the main equal before the law.'<sup>31</sup> As Maitland says, considering England had been conquered by the Normans, this is very strange: 'A conquered country is hardly the place in which we should look for an equality, which, having regard to other lands, we must call exceptional.'<sup>32</sup> Yet this equality is what there is. Under the powerful English kings, a small group emerged, 'an estate of temporal lords, of earls and barons.' But the 'principles which hold it together are far rather land tenure and the king's will than the transmission of noble blood.' The only privilege they have is political - they are consulted by the king. 'They have hardly any other privileges. During the baron's life his children have no privileges; on his death only the new baron becomes noble.' Among the 'extremely few' privileges was that of all free men to be judged by their peers - in this case other peers. Even this, as Maitland explains, was no great privilege and rather vague. Apart from this 'There are a few little rules of procedure which distinguish the noble from the non-noble.'<sup>33</sup> Thus 'English **gentix hons** have no legal privileges, English counts and barons very few.'<sup>34</sup>

Turning to the knights, 'kighthood can hardly be accounted a legal **status**.'<sup>35</sup> There is a good deal of work which only they can do. 'In administrative law therefore the knight is liable to some special burdens; in no other respect does he differ from the mere free man. Even military service and scutage [tax paid in lieu of military service] have become matters of tenure rather than matters of rank...'<sup>36</sup>

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<sup>29</sup>Maitland, **History**, I, 407

<sup>30</sup>Maitland, **History**, I, 408

<sup>31</sup>Maitland, **History**, I, 408

<sup>32</sup>Maitland, **History**, I, 408

<sup>33</sup>Maitland, **History**, I, 409, 411

<sup>34</sup>Maitland, **History**, II, 446

<sup>35</sup>Maitland, **History**, I, 411

<sup>36</sup>Maitland, **History**, I, 412

At the other extreme of the social hierarchy, we may wonder about the serfs. 'In the main, then, all free men are equal before the law.' And, as Maitland continues, 'Just because this is so the line between the free and the unfree seems very sharp.' So what does Maitland make of the English serf? In a letter written in 1890, Maitland noted his difficulty in describing English serfdom. 'I have been writing about villeinage and have been puzzled by our law's way of treating the villein as "free against all men but his lord".'<sup>37</sup> His central conclusion, though he does not quite put it in these words, is that just as nobility is a contractual relationship between king - lord - land (tenure), and not a status, so serfdom is a contractual relationship between two individuals. In this it contrasts with 'slavery' which is in most civilizations a 'status'. The conception of serfdom in medieval England according to contemporary texts 'at many points comes into conflict with our notion of slavery.' Thus Maitland says of the great English lawyer Bracton, 'In his treatment of the subject Bracton frequently insists on the relativity of serfdom. Serfdom with him is hardly a status; it is but a relation between two persons, serf and lord.' It is true that 'As regards his lord the serf has, at least as a rule, no rights; but as regards other persons he has all or nearly all the rights of a free man; it is nothing to them that he is a serf.' As Maitland says, 'Now this relative serfdom we cannot call slavery. As regards mankind at large the serf so far from being a mere thing is a free man.'<sup>38</sup>

Even in relation to the lord, the situation is not so clear cut. 'As against his lord the serf can have no proprietary rights.'<sup>39</sup> Yet, in practice, 'the lord in his court habitually treats them as owners of chattels, he even permits them to make wills...'<sup>40</sup> Maitland comments, 'So here again, when we look at the facts, the serf's condition seems better described as unprotectedness than as rightlessness...'<sup>41</sup> Or again, 'Yet another qualification of rightlessness is suggested. More than once Bracton comes to the question whether the lord may not be bound by an agreement, or covenant, made with his serf. He is inclined to say Yes.' Bracton argues that 'the serf may be made a free man for a single purpose, namely that of exacting some covenanted benefit...'<sup>42</sup>

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<sup>37</sup>Maitland, **Letters**, no.86

<sup>38</sup>Maitland, **History**, I, 415

<sup>39</sup>Maitland, **History**, I, 416

<sup>40</sup>Maitland, **History**, I, 416-7

<sup>41</sup>Maitland, **History**, I, 417

<sup>42</sup>Maitland, **History**, I, 418



As for other people, 'The serf's position in relation to all men other than his lord is simple: - he is to be treated as a free man. When the lord is not concerned, criminal law makes no difference between bond and free...'<sup>43</sup> This freedom is most graphically shown in relation to property: 'in relation to men in general, the serf may have lands and goods, property and possession, and all appropriate remedies.'<sup>44</sup> As for the manumission of the serf, for Bracton, it is simple. Since Bracton 'habitually regards serfdom as a mere relationship' he 'sees no difficulty; the lord by destroying the relationship destroys serfdom.'<sup>45</sup>

All this leaves us with a very curious half-way position; a strange mixture of status and contract. As Maitland notes, 'Its central idea, that of the relativity of serfage, is strange. It looks artificial: that is to say, it seems to betray the handiwork of lawyers who have forced ancient facts into a modern theory.'<sup>46</sup> They were faced with the 'juristic curiosity' of 'a merely relative serfdom.' Even the relative serfdom is complex. 'When a lord allows it to be recorded that on the death of his servile tenant he is entitled to the best beast, he goes very far towards admitting that he is not entitled to seize the chattels of his serf without good cause.' Thus Maitland writes, 'We hesitate before we describe the serf as rightless even as against his lord...'<sup>47</sup>

As to the number of serfs, it is very difficult to estimate since 'tenure is so much more important than status', so that the contemporary surveys 'are not very careful to separate the personally free from the personally unfree'<sup>48</sup>, an interesting admission. Furthermore, Maitland writes, 'it is highly probable that large numbers of men did not know on which side of the legal gulf they stood...'<sup>49</sup> A gulf of such hazy outlines is hardly a great gulf. Nevertheless, it would seem probable that 'the greater half of the rural

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<sup>43</sup>Maitland, **History**, I, 419

<sup>44</sup>Maitland, **History**, I, 419

<sup>45</sup>Maitland, **History**, I, 428

<sup>46</sup>Maitland, **History**, I, 429

<sup>47</sup>Maitland, **History**, I, 430

<sup>48</sup>Maitland, **History**, I, 431

<sup>49</sup>Maitland, **History**, I, 432

population is unfree<sup>50</sup> - whatever that means.

All this requires further investigation - for instance, though serfs could in theory be sold as chattels by their lord, how often did this happen? The economic historian Thorold Rogers wrote, 'In the many thousands of bailiffs and manor rolls which I have read, I have never met with the single instance of the sale of a serf.'<sup>51</sup> He also states that serfdom was a secure position and not at all rightless, even against the lord.<sup>52</sup> All this may help to explain one of the most curious silences in English history - the way in which, without any formal emancipation, without any noticeable activity of any kind, serfdom and villeinage faded away - they just seem to have sloughed off a skin and transformed themselves.

In conclusion, Maitland fully endorses the picture of English peculiarity which had been elaborated by Tocqueville and gives it historical precision. In that crucial period between the twelfth and fourteenth centuries when France and Germany moved from contract (feudalism) to status - or 'caste' in Tocqueville's language - England did not take this 'normal' path. This unusual divergence is crucial to the understanding of later class society. For example, Sugarman has recently noted, 'the English gentry were in this vital way institutionally different from the lesser nobilities of other nations. The fact that only the titular peers were a distinct sub-species, to be tried only by members of their own order, was surely a very important legal difference from countries where the whole of the second estate was privileged at law.'<sup>53</sup>

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

### **Family relations**

It is a characteristic of the majority of agrarian societies that, just as property is not owned by an individual, so the individual does not have distinct legal rights. Put crudely, the family is a single legal and political entity and the oldest male, the 'father', has fairly absolute rights over the others: men over women, parents over children, and the father over all. This is the patriarchal form, the **patria potestas** which we do not merely find in simple societies studied by anthropologists, but enshrined in Roman law

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<sup>50</sup>Maitland, **History**, I, 432

<sup>51</sup>Rogers, **Six Centuries**, 34

<sup>52</sup>Rogers, **Six Centuries**, 44

<sup>53</sup>Sugarman, 'Law', 40

and widespread in much of western Europe in the **ancien regime**. How does Maitland's analysis of English history compare with this simplified model?

In relation to the Saxon period, Maitland felt that 'It is by no means certain...that we ought to endow the English father with an enduring **patria potestas** over his full-grown sons, even when we are speaking of the days before the Conquest.'<sup>54</sup> As for the later period, the position is much clearer. 'If our English law at any time knew an enduring **patria potestas** which could be likened to the Roman, that time had passed away long before the days of Bracton. The law of the thirteenth century knew, as the law of the nineteenth knows, infancy or non-age as a condition which has many legal consequences; the infant is subject to special disabilities and enjoys special privileges; but the legal capacity of the infant is hardly, if at all, affected by the life or death of his father, and the man or woman who is of full age is in no sort subject to paternal power... Our law knows no such thing as "emancipation", it merely knows an attainment of full age.'<sup>55</sup>

Equally significantly, an 'infant may well have proprietary rights even though his father is still alive.' This it explained as follows. 'Boys and girls often inherit land from their mothers or maternal kinsfolk. In such case the father will usually be holding the land for his life as "tenant by the law of England", but the fee will belong to the child. If an adverse claimant appears, the father ought not to represent the land in the consequent litigation; he will "pray aid" of his child, or vouch his child to warranty, and the child will come before the court as an independent person. What is more, there are cases in which the father will have no right at all in the land that his infant son has inherited; the wardship of that land will belong to some lord.'<sup>56</sup> Furthermore, 'An infant can sue; he sues in his own proper person, for he can not appoint an attorney. He is not in any strict sense of the word "represented" before the court by his guardian, even if he has one.'<sup>57</sup> Some "'friend" of the infant sues out the writ and brings the child into court' but the 'action will be the infant's action, not the friend's action, and the court will see that the infant's case is properly pleaded.' When the procedure was regularized in the thirteenth century 'How weak the family tie had become we see when we learn that this next friend need not be a kinsman of the infant.'<sup>58</sup> All of this is an extremely long way from the **patria potestas** model. The idea that infants could inherit separate property, could sue separately, that they were not responsible for their parent's crimes, or their parents for theirs after childhood is extraordinary by the standards of most civilizations.

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<sup>54</sup>Maitland, **History**, II, 437

<sup>55</sup>Maitland, **History**, II, 438

<sup>56</sup>Maitland, **History**, II, 439

<sup>57</sup>Maitland, **History**, II, 440

<sup>58</sup>Maitland, **History**, II, 441

Even more extraordinary is the relation between man and woman. Maitland treats their position in a number of key passages and throughout his account rejects the theory that female status had once been low and had 'evolved' upwards to his own time.<sup>59</sup> He showed that English law from very early on treated even husband and wife as separate persons, so that in England 'Long ago we chose our individualistic path.'<sup>60</sup> He shows that almost immediately after the Norman Conquest women were able to inherit even property which required the holder to provide military service for the crown.<sup>61</sup> He recognizes that within marriage from the thirteenth century, a married woman loses some rights: her husband by the common law is the wife's guardian which 'we believe to be the fundamental principle', but he constantly needs her consent also.<sup>62</sup> Let us examine in a little more detail three sections where he describes the status of men and women.

In relation to female children's status in England before the Conquest Maitland writes, 'That women were subject to anything that ought to be called a perpetual tutelage we do not know. Young girls might be given in marriage - or even in a case of necessity sold as slaves - against their will; but for the female as well as for the male child there came a period of majority, and the Anglo-Saxon land-books show us women receiving and making gifts, making wills, bearing witness, and coming before the courts without the intervention of any guardians.'<sup>63</sup> 'After the Norman Conquest, the woman of full age who has no husband is in England a fully competent person for all the purposes of private law; she sues and is sued, makes feoffments, seals bonds, and all this without any guardian.' All this is very different from 'the "perpetual tutelage of women"', relics of which 'were to be found on the continent in times near to our own.'<sup>64</sup>

In relation to the complex relation of husband and wife, he found that a much more equal relationship had been partially undermined from the fourteenth to nineteenth centuries. Thus 'throughout the twelfth century and into the thirteenth we habitually find married women professing to do what according to the

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<sup>59</sup>Maitland, **History**, II, 403

<sup>60</sup>Maitland, **History**, II, 432

<sup>61</sup>Maitland, **History**, I, 262

<sup>62</sup>Maitland, **History**, II, 406

<sup>63</sup>Maitland, **History**, II, 437

<sup>64</sup>Maitland, **History**, II, 437

law of a later time they could not have done effectually.<sup>65</sup> Yet through the system of the marriage settlement and the courts of equity 'the English wife, if she belonged to the richer class, became singularly free from marital control. Modern statutes have extended this freedom to all wives.'<sup>66</sup> Again we see a divergence between England's common law and equity system and what happened from the fourteenth century on the continent where an apparently egalitarian system, where husband and wife pooled or completely shared their property, actually led women into a trapped position with no separable rights. Maitland explains how not only did the modern freedom of English women arise out of a reaction to harsh or unjust laws, but 'we ought also to say that if our modern law was to be produced, it was necessary that our medieval lawyers should reject that idea of community which came very naturally to the men of their race and of their age. We may affirm with some certainty that, had they set themselves to develop that idea, the resulting system would have taken a deep root and would have been a far stronger impediment to the "emancipation of the married woman" than our own common law has been. Elsewhere we may see the community between husband and wife growing and thriving, resisting all the assaults of Romanism and triumphing in the modern codes.'<sup>67</sup>

In relation to private law in the thirteenth century 'Women are now "in" all private law, and are the equals of men. The law of inheritance, it is true, shows a preference for males over females; but not a very strong preference, for a daughter will exclude a brother of the dead man, and the law of wardship and marriage, though it makes some difference between the male and the female ward, is almost equally severe for both. But the woman can hold land, even by military tenure, can own chattels, make a will, make a contract, can sue and be sued. She sues and is sued in person without the interposition of a guardian; she can plead with her own voice if she pleases; indeed - and this is a strong case - a married woman will sometimes appear as her husband's attorney. A widow will often be the guardian of her own children; a lady will often be the guardian of the children of her tenants.'<sup>68</sup>

In relation to public functions, however, women were excluded from almost all public roles. Thus Maitland again summarizes the position. 'As regards private rights women are on the same level as men, though postponed in the canons of inheritance; but public functions they have none. In the camp, at the council board, on the bench, in the jury box there is no place for them.'<sup>69</sup>

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<sup>65</sup>Maitland, **History**, II, 411

<sup>66</sup>Maitland, **History**, II, 433

<sup>67</sup>Maitland, **History**, II, 433

<sup>68</sup>Maitland, **History**, I, 482

<sup>69</sup>Maitland, **History**, I, 485

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

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

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