

THE HISTORY  
OF  
ENGLISH LAW

BEFORE THE TIME OF EDWARD I

BY  
SIR FREDERICK POLLOCK  
AND  
FREDERIC WILLIAM MAITLAND

SECOND EDITION

S. F. C. MILSON

VOLUME I

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*

CAMBRIDGE UNIVERSITY PRESS

CAMBRIDGE

LONDON • NEW YORK • MELBOURNE.

Published by the Syndics of the Cambridge University Press  
The Pitt Building, Trumpington Street, Cambridge CB2 1RP  
Bentley House, 200 Euston Road, London NW1 2DB  
32 East 57th Street, New York, NY 10022, USA  
296 Beaconsfield Parade, Middle Park, Melbourne 3206, Australia

© Cambridge University Press 1968

Library of Congress catalogue card number: 69-21197

ISBN 0 521 07061 9 hard covers

ISBN 0 521 09515 8 paperback

First published 1895

Second edition 1898

Reprinted 1911 1923 1952

Reissued with a new introduction  
and bibliography by

S.F.C Milsom 1968

Reprinted 1978

Printed in Great Britain at the  
University Press, Cambridge

## PREFACE TO THE SECOND EDITION.

**I**N 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.

## 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.

## 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 <sup>1</sup> .
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 Germaniæ.
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.

<sup>1</sup> The second edition of Schröder's D. R. G. is referred to.



LIST OF TEXTS USED<sup>1</sup>.

[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, Svo. 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.).

---

<sup>1</sup> 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.

---

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. Abbatum. Gesta Abbatum Monasterii S. Albani (R).  
 Abingdon, Chronicon Monasterii de (R).  
 Anglo-Saxon Chronicle (R).  
 Annales Monastici (R).



- 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).  
 Trivet, 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.

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.

Cartu-  
laries.

Bath, Two Chartularies (Somerset Record Soc. 1893).  
 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, Landbooc, vol. i., ed. D. Royce, Exeter, 1892.  
 Worcester, Register (Camd.).

Round, Ancient Charters (Pipe Roll Soc.).  
 Madox, Formulæ Anglicanæ, London, 1702.  
 Monasticon Anglicanum, ed. 1817 etc.

## ADDITIONS AND CORRECTIONS.

- p. 33, last lines. As to the *burh-geat* (not *burh-geat-sell*) 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*.

## 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.

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

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

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



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

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

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.