

1893

A History of the Evolution of the Modern Law of Real Property

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Thesis

A History of the Evolution of the
Modern Law of Real Property

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Francis Stanton Root

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I n t r o d u c t i o n .

The Civil Law was the well spring from which early English legal thought mainly drew its inspiration. But from Bracton to Blackstone the pedantry of the Common Law writers was so potent an influence, that to go outside the narrow groove set by immemorial usage for legal conceptions was well nigh professional treason, so that few dared brave the spirit of their times.¹ For centuries the origin, nature and history of primitive society, from which have been evolved our modern institutions, were shrouded in uncertainty. Lay minds, trained in history and theology, speculated and theorized (often twisting known facts to meet preconceived theories)

1. Outlines of the Science of Jurisprudence, xiv.

as to the sources of the complex mechanism of modern society, with its varied and well determined systems of government and jurisprudence, and the legal profession were, for the most part, content to drift along without a murmur, acquiescing in the results but eschewing the path of historical research as beyond the pale of jurisprudence.

But with the advent of the Analytical School, which ~~has~~ swayed English legal thought for the past half century, jurisprudence received a genuine scientific impulse and the legal conceptions of the day, a broader and more comprehensive outlook.¹

Even this, however, seemed inadequate as a method of obtaining a correct juridical conception of modern society, and it was left for a new school to complete the transformation so ably begun by Jeremy Bentham and his disciples.²

1. Outlines of the Science of Jurisprudence, xiv-xv.
 2. "But the unhistorical and unphilosophical char-

So now the Historical School, as modified by the Comparative Method, has been firmly established as a legitimate branch of legal investigation.¹

And this investigation is chiefly valuable, not for its antiquarian interest, but because of its influence of the Analytical School, and the limitation and relativity of its positions, have been always coming more and more clearly into view. . . . The wilful and untenable narrowness of the Austinian system has been glaringly demonstrated by the progress of historical research. The solid and brilliant expositions of Ancient Law and Custom by Sir Henry Sumner Maine have shown how little Austin really caught of the broad spirit of the Historical School, and they convincingly prove the utter inadequacy of the analytical Theory of Sovereignty to explain the nature and range of positive law". Mr. W. Hastie, in the preface to his translation of the *Outlines of the Science of Jurisprudence*, x-xii, citing Sir Henry Maine, Mr. Frederic Harrison, Mr. W. Galbraith Miller, Mr. Herbert Spencer and Professors Holland, Clark and Pollock.

1. Thorpe, *Ancient Laws and Institutes of England*, xvi-xvii ; Maine's *Village Communities*.

"The supreme importance of the application of the

ence and bearing on the present.¹ Indeed, an exact knowledge of legal history is indispensable to the jurist, because of the strictly historical development of modern law and institutions.²

Thus studying the early Aryan institutions they are seen to have contained all the germs of modern institutions, whether democratic, aristocratic or monarchical,³ and a marked similarity

Comparative Method to jurisprudence is now universally recognized, and much progress has recently been made in this direction. It is the culminating characteristic and distinction of the Historical School of Law. Austin advocates and professes to apply the principles of the Comparative Method to jurisprudence, but his standpoint was too insular and his range of vision too limited to lead to any important results. A much more fruitful application of the method is made by Sir H. S. Maine, whose works are full of historical comparisons and elucidations of an original, instructive and often surprising kind. These works have done much to raise the conception of law in England out of the narrow grooves of Bentham and Austin's modes of thought, and to give breadth and universality to the science of law." *Outlines of Jurisprudence*, 216, note.

appears in the evolutionary processes of the several groups of the Aryan and Semitic races. Some eminent writers now go so far as to claim that all primitive peoples have passed through practically the same course of development in the attainment of any given degree of civilization.⁴

Be this as it may, in ancient society it is always difficult to distinguish law and custom⁵, but custom slowly crystallizes into positive law, until finally they are clearly distinguishable. Under early customary law the relation of man to society in general was a status. Men were held together by the tie of consanguinity, and every man who was not a relative or a slave was an enemy.⁶ But the acquisition of individual wealth, the settlement of definite areas of land and its gradual individ-

1. Maine's Village Communities, 6 ; The Saxons in England, viii. 2. Outlines of Jurisprudence 202-7 ; Reeves' History of the English Law clvi.
 3. History of the Norman Conquest, I, 75.
 4. Gomme's The Village Community, Ch. 1.

ual appropriation, the many inventions which have made the production of wealth constantly easier, and the discovery of the reciprocal advantages of trade, have tended to make men's modern relations essentially contractual. In fact the entire movement of society from the earliest times to the present, from the infancy of man to civilization, has been from status to contract---from a social organization founded on kinship to a political organization founded on territory and property, and with men's relations governed by contract rather than status.⁷

It is my purpose in the brief time and space at my command, to trace this movement with special reference to the origin and development of the idea of property in land. In other words, I shall sketch the History of the Evolution of the Modern Law of Real Property.

5. Digby, History of the Law of Real Property, 63.

6. Fiske, The Destiny of Man, 78-79.

Sir Henry Sumner Maine very aptly says :- "Until quite recently the theories accepted concerning the early history of property would scarcely bear a moments examination. The popular account of it, that it had its origin in a state of nature, is merely a way of giving expression to our own ignorance, and the most of the theories which till lately had currency on the subject are in reality nothing more than restatements of this view, more or less ingenious."⁸ It is in this field especially that the most lamentable ignorance has prevailed, and here it is that the brilliant efforts of the new school have been most pregnant with results, and have made available a vast storehouse of materials, hitherto inaccessible.

7. Maine's Village Communities, 110 ; Maine's Ancient Law, 125-32, 170 ; Morgan's Ancient Society, 62.

8. Maine's Village Communities, 221.

The discovery and translation of the Brehon law tracts of Ireland, the abundant opportunity of the English rulers of India, to study the ancient literature and existing primitive types of Hindu institutions, the recent observations of Professor Bogišić among the Slavonian races of Eastern Europe, the researches of Mr. Lewis Morgan and others amongst the Aboriginal Americans, the efforts of the eminent jurists of the German School in tracing out the ancient mark system and in recognizing the true relation of law and history, Mr. Seebohm's investigation of the English Willage Community and Mr. Skene's of the Scotch village community, all combined with a reviving interest in the Roman system of jurisprudence, have made possible the formulation of a definite theory of the origin and evolution of institutions, based on well established

facts, and one which goes a long way towards explaining and simplifying our institutions as they exist to-day.¹

1. "It would seem that light is pouring from many quarters at once on some of the darkest pages of the history of the law^{and} of society. To those who knew how strong a presumption already existed that individual property came into existence after a slow process of change by which it disengaged itself from collective holdings by families or larger assemblies, the evidence of the primitive village system in the Teutonic and Scandinavian countries, had a very great interest; this interest largely increased when England, long supposed to have had since the Norman Conquest an exceptional system of property in land, was shown to exhibit almost as many traces of joint-ownership and common cultivation as the countries of the North of the Continent; but the interest culminates, I think, when we find that these primitive European tenures and this primitive European tillage constitutes the actual working system of the Indian Village Community, and that they determine the whole course of Anglo-Indian administration." Maine's Village Communities, 61-2.

"A real flash of light was struck when German stu-

Contrary to the orthodox view, property in land as we understand it, viz. absolute individual ownership, under this new light has been shown to be a comparatively modern institution, and is, for the most part, the result of the disintegration of the feudal system. It is, indeed, distinctively Western even at the present time, and is essentially different from the allodial holdings that preceded feudalism.

dents perceived the connection between the widely prevalent common or open-field system of husbandry and the village community, which for centuries had used it as a shell. . . . A great step was taken as regards the English problem when Mr. Kemble, followed by Mr. Freeman and others, attempted to trace in English constitutional history the development of the ancient German free institutions, and to solve the English problem on the lines of the German mark. . . . Another step was gained on somewhat new lines when Professor Nasse, of Bonn, pointed out to English students (who hitherto had not realized the fact) that the English and German land systems were the same, and that in England also the open-field system of husbandry was the shell of the me-

alism.¹ Since the feudal system went to pieces, land has gradually come to be considered as individual property. Hence superficial observers at once assume that it must have been so considered before. Sir William Blackstone in his Commentaries on the Laws of England, takes the position that property in land first grew up through long continued occupation. Thus far he is probably correct, but when he goes on to contend that this occupation and consequent ownership was by individuals, his position clearly is scientifically and historically untenable. As a matter of fact no such thing as absolute individual ownership of land was ever known among primitive ~~diaeval~~ village community. . . . A new flash of light at once lit up the subject and greatly widened its interest when Sir Henry S. Maine, carrying with him to India his profound insight into Ancient Law, recognized the fundamental analogies between the village communities of the East and the West, and sought to use actually surviving Indian institu-

peoples, and is unknown to-day among many branches of the Aryan family.² The statement that the early occupation of land by groups of men gave the group a property in it, might be correct, but it has taken a long course of changes to bring about the Western idea of absolute, individual, transferable property in land.³

 tions as typical representatives of ancient stages of similar Western institutions." Seebohm, The English Village Community. x-xii.

1. Maine's Village Communities, 227-8.

2. In speaking of private property, it should be noted that the word "property" may be used in the sense of transferability as a commodity, or it may mean the right to cultivate merely. In the latter sense there is property in land in India, and there was in Europe before the feudal system, but in the popular sense of to-day there is no such thing in the East as private property in land. Tenure of Land in India, Sir George Campbell, 151-2. Published by the Cobden Club in Systems of Land Tenure in Various Countries.

3. "For many years past there has been evidence sufficient to warrant the assertion that the old-

Take, for example, the archaic Eastern ideas of property in land or moveables, rents, profits, exchange etc. and compare them with those of the Western world. There is a striking similarity, except that the former conceptions are based on a collective unit as the basis of society, while the latter are based on an individual unit.¹ The existing Hindu unit is not, however, the most ancient but is one of the intermediate stages in the transformation of society from collectivism to individualism—from status to contract.

The general outline of the various stages in the development of civilized peoples, and which I shall endeavor to sustain by the facts, is as follows: the Patriarchal Family, the Joint Undivided

est discoverable forms of property in land were forms of collective property, and to justify the conjecture that separate property had grown through a series

Family, the House Community, the Village Community, the Feudal System, disintegration of the Feudal System and the growth of individual property in land.

It will be observed that the investigation has been principally confined to Arvan communities, and not all even of the different branches of that family have followed exactly the same course of development, but in the main the outline is substantially correct for all.² So it will often appear that the more archaic types are perpetuated by peculiar circumstances, far beyond their time. Thus side by side in India are found the joint undivided family and the village community, and in England you see the village community's shell, the open-field system of husbandry, outlasting the feudal ----- (though not always an identical series) of changes, out of collective property or ownership in common." Maine's Village Communities, 76-7.

1. Id. 222-3.

2. Id. 76-7.

system. Side by side, they tend each to modify the other.

Moreover, during a great part of the evolutionary processes, appears the tribal organization more or less prominent. From the patriarchal family to the village community, the tribal organization predominates. In hilly countries, where the purity of kinship is more easily preserved, the tribe or clan is perpetuated much longer than in the lowlands, where by conquest and the easy mixture of races the tradition of kinship and a common ancestry becomes weakened and lost, and the basis of union is transferred to the land¹

1. Gomme, The Village Community, Ch. 6.

T h e P a t r i a r c h a l F a m i l y .

The patriarchal family is an institution of immense antiquity, probably the oldest of the human race. With it society began the slow process of transformation from the lowest stages of barbarism to the highest civilization.¹

This epoch in the history of mankind marks the beginning of a distinct train of legal ideas. It contained the germ of the modern idea of sovereign-

1. The horde theory, which conceives an earlier indiscriminate mixture of the sexes, does not seem to be supported by the weight of authority, either historically or scientifically. At any rate there is definite evidence to support the patriarchal group, which can not be said of the other theory. Maine's Early Law and Custom. Ch. VII.

ty.¹ Here is political power in embryo, the chief growing out of the head of the household, the state taking its first beginning from the family.²

The group consists of kinsmen, real or fictitious, men, women children and slaves, cattle and other moveables, all held in subjection to the eldest living ascendant. Their habits are nomadic, their property consists entirely of moveables, and they claim no title to the land other than tempora-

1. "There are in the history of law certain epochs which appear to us with such knowledge as we possess, to mark the beginning of distinct trains of thought and distinct courses of practice. One of these is the patriarchal family, a group of men and women, slaves and children, animate and inanimate property, all connected together by a common subjection to the ~~eldest-living-ascendant~~ paternal power of the chief of the household." Maine's Village Communities, 15 : Ancient Law, Ch. V.

2. Maine's Early Law and Custom, 242.

ry occupancy while they feed their flocks. On the death of the head of the family, or patriarch, the group divides into its component parts, each son taking his share of the ancestral estate and, in turn, becoming the patriarch of his own family, slaves and moveable property.

Of this ancient type of the family probably the best account extant is found in the Hebrew Scriptures. Thus on the death of Abraham's father, the estate was divided between Abraham, his brother Nahar and his nephew Lot. Abraham and Lot joined fortunes for a time, but strife between their servants led to their separation, Lot going down into the valley of the Jordan, while Abraham went West into the land of Canaan.¹

According to the patriarchal model of Genesis the father had absolute and supreme power over the

1. Genesis, Chs. XII, XIII.

members of his household, even to life and death.

Thus Abraham's attempt to offer up Isaac as a sacrifice¹, and Jacob, while he served for his wives,

seemes to have been the slave of Laban.² So the

Roman law shows from the very earliest times, the

family ruled by the pater familias and vestiges of

a common related family life, similar to the joint-

undivided family of the Hindus or the house commun-

ity of the South Slavonians.³ Now by applying this

historic family organization back to the Aryan

tribes that overran the Italian penninsula, we have

effectually established the early Roman patriarchal

family very much on the basis of Genesis. The Ho-

meric literature shows a similar state of society.

The Odyssee, speaking of the Cyclops, says: "They

1. Genesis, Ch. XXII.

2. Genesis, Ch. XXIX. Maine's Ancient Law, 123-4.

3. Maine's Early Law and Custom, 238-9.

have neither assemblies for consultation nor thesmistes, but every one exercises jurisdiction over his wives and children, and they pay no regard to one another."¹

It is, perhaps, mere speculation to presume the once universal existence of the patriarchal family, but wherever found or wherever traces of it are found it exhibits the same leading characteristics. And often when the patriarchate has entirely disappeared as regards the family, its previous existence is shown in the organization and government of the larger groups.² The union of sacerdotal and royal functions amongst the German tribes, as described by Tacitus, indicates their patriarchal origin.³

So it seems safe to assume that when the Ary-

1. Maine's Ancient Law, 124-5.

2. Stubbs' Constitutional History, 32. Maine's Early History of Institutions, 310-12.

3. Stubbs' Constitutional History, 32.

ans spread out over Europe the unit of their tribal organization was the patriarchal family. Certain it is that very decided remnants survived in Greece and Rome, and amongst the Teutonic and Celtic races, even long after the nomadic life had been entirely abandoned, and the people had settled down to the quiet pursuits of agriculture

But there comes a time when the increase in population and the scarcity of pastures, and especially of new pastures, makes necessary a thickening of the population, and the pastures and yield of the flocks must be eked out by spasmodic attempts at agriculture. The further division of the family will not best subserve these interests. Hence follows the enlarging of the family into a more comprehensive unit, which will form the theme of the next topic.

T h e J o i n t - U n d i v i d e d F a m i l y

This group arises after the death of the patriarch, when the family instead of dividing up into separate families, continues its organization under the leadership of an elected chief. Their habits may yet be nomadic or they may engage in agriculture. They have a common household, a common table, common flocks, and incidentally common lands on which they may be temporarily settled. This organization was continued throughout several generations.¹ When settled on definite areas, the land

was held, tilled and pastured in common. The different members of the family were not necessarily

1. Maine's Early History of Institutions, 7.

confined to the same calling, but whatever was produced must be turned into the common treasury.¹ Originally there could be no alienation of any property of the family, except, perhaps, spoils of adventure, which may be considered the first recognized private property.²

In short, here was a system of perfect communism, subject only to the exactions of the chief. But the sense of patriarchal right did not die out. Each father or grandfather had absolute power over his own wife, children and descendants. The headship or managership was elective, usually with a strong preference for the eldest male line. The chief was not the owner of the property but was merely managing director. Occasionally when the family became so large as to be unwieldy, it again sub-

1. Maine's Early History of Institutions, 78.

2. Maine's Early Law and Custom, 241.

divided and true patriarchal authority revived in the smaller groups.¹

The group was held together by the tie of consanguinity rather than territory, but the kinship was often diluted by the fiction of adoption. However, the fact that they were settled on definite areas of land, did tend to make land the basis of union. At any rate it was a step in the scale of transition from the one theory to the other.²

Sir Henry Maine finds the joint-undivided family extant in India, and in the Brehon law tracts, records of an almost identical arrangement in ancient Ireland, which was continued through many generations. It grew first into the Sept, then into the Clan, all the time becoming more and more artificial by the infusion of new blood.³ The chief point of

1. Maine's Early History of Institutions, 116-18.

2. Id., 78.

3. Id., 199-200.

difference between the Irish sept, as portrayed in the Brehon laws, and the joint-undivided family of the Hindus, is that in the latter the distribution of the share of a deceased member in the property of the community is per capita. Every member is the peer of every other member and all share alike. They are still brothers and in early times the distribution was not even postponed until the death of the member, but took place immediately on acquisition. But the sept had passed beyond this stage, and on the death of the head of a family, the property was distributed per stirpes amongst his descendants. And right here, when the idea of brotherhood and a common ancestor begins to wane, begins the modern idea of property.¹

The arduous delving of Mr. Lewis Morgan into the antiquities of aboriginal America, has brought forth

1. Maine's Early History of Institutions, 187-95.

important results. He finds that in the Aztec Confederacy the unit of society was the joint-undivided family. They held their lands in common, constructed joint tenement houses of adobe-brick and of stone, and lived in large households composed of a number of related families. They not only held their lands in common but they also practiced communism in living, which places them almost on an identical plane with the house communities of the South Slavonians, which will be treated in the next topic.¹

1. Morgan's Ancient Society, 187.

T h e H o u s e C o m m u n i t y .

This should hardly be treated as a separate and distinct epoch in the evolution of institutions, but rather it represents the joint-undivided family after it has become firmly attached to the land for generations. It is an expanded joint family, still with a common home and table, collective enjoyment of all property, both land and moveables, a common occupation, and it is under an elective headship. The long occupation of a definite area of land has tended to weaken the bond of kinship and to transfer it to the land. There are, as yet, no private rights in the land, but moveables are recognized as priv-

ate property and are freely exchangeable as a general thing.¹

Considering the house community merely as an expansion of the joint-undivided family, it is, next to the patriarchal family, the oldest institution of the human race.² It still exists in full vigor only amongst the South Slavonians, which includes the Croats, Dalmatians, Montenegrins, Servians and Slavonized Bulgarians.³ Here it is made up often of many natural families, each internally governed by its own eldest living ancestor, who has much of the patriarchal power. But for the whole community there is a common manager for the common interests.⁴

The total number of males is seldom more than sixty

1. Maine's Early History of Institutions, Ch. 1.

Early Law and Custom, 241.

2. Early Law and Custom, 237.

3. Id., 241.

4. Id. 242-3.

all told.¹

Every member of the community has an absolute right to maintenance by the community, and every male has a voice in the government.² The capital stock, or productive forces, of the community are inalienable, and in this respect similar to the *res mancipi* of the Roman law. In Montenegro a son may be emancipated as in Rome, but he can not take with him any of the common property, or *peculium*.³ The group corresponds very closely to the Roman gens, except that the latter within historic times had been weakened and lost in many instances, while the former has been preserved in its pristine vigor and purity. The house community also closely resembles the Irish sept and the Teutonic kin.⁴ But for the

1. Maine's Early Law and Custom, 261.

2. Id. 244-7.

3. Id. 247-53.

4. Id. 239 ; Early History of Institutions, Lect. 7.

fact that the natural families comprising the group continue together for many more generations, the house community of the South Slavonians is point for point like the joint-undivided family of the Hindus.¹ There are still groups of peasants in France which are really modified house communities, and before the Revolution ~~the~~ French cultivating groups were almost universally such.²

By natural growth and development the house community tends to become a village community, the land tending to division among the natural families. The lots shift periodically, but all the time tending to vest, subject only to the power of the collective body to veto alienation. Occasional failure to divide estates so vested at the death of the tenant tends to become habitual, the tie of brother-

1. Maine's Early Law and Custom, 240.

2. Early History of Institutions, 7.

hood is greatly weakened, and the tradition of a common ancestry fades away into antiquity and is lost. The common house tends to become a group of houses, each held by its own family and ruled internally by its own head. The transformation is complete, and we have all the elements of a village community. The house community is a thing of the past.¹ This leads to a consideration of the next step in the evolution of institutions.

1. Maine's Early Law and Custom, 261-3.

The Village Community.

When the Teutonic nations ceased to be purely nomadic, a family or tribe would settle down on a definite area of land, on a basis of real or supposed kinship, developing in time into a village community.¹ This epoch marks the completion of that change which made land the basis of political union rather than consanguinity. The common dwelling and table have been succeeded by separate houses, each jealously guarded by its occupant. The homestead and curtilage are the first approach to the modern idea of property in land. But here was no absolute

1. Digby's History of the Law of Real Property, 4.

property. The homestead could be alienated only by consent of the whole community, and it was always subject to well defined rights in favor of the family of the tenant. The arable lands are divided and allotted to the different households, the pasture lands are only partly divided, while the waste lands remain common.¹

A comparative study of this institution and its remnants as found throughout the world, both past and present, shows clearly the mode of transition from the early communism in lands, with which it began its career, to the absolute property of modern times. Thus in Russia survives the periodical redistribution of the land, and here you find the tie of kinship, which is the basis of the communism,

1. Maine's Early History of Institutions, 75 . . .

relatively strong. While in India the redistribution has gradually ceased, and the tie of kinship likewise, is nearly lost in oblivion, though here is still submission to common rules of tillage. However, in some provinces of India pure clanship exists to-day. The social system of Rajputana is based exclusively on the tie of blood. This tribe is of pure Aryan stock, and though the kinship is not always real, it is always assumed.¹

Theoretically, if a member of a village community dies or attempts to sell out, his share goes back to the commune, and almost universally the community has reserved the right to veto alienation.² This was the case with the Hebrews, though theirs was not strictly a village community system.³ This right of pre-emption and escheat may be traced di-

1. Maine's Early Law and Custom, 267-82.

2. John Fenton, The Antiquary, IV, 89-91.

3. Levitticus, XXV, 33.

rectly to the theoretical^{common} ancestry.¹ As the sense of private ownership grows stronger, the kindred tie grows weaker, and the village community finally disappears in modern proprietorship.²

In the Highland clans everything, both land and moveables, was held in common, and the chief doled out the individual allotments at short intervals. In the Slavonian villages there is an annual re-distribution of the products, while in Russia there is no distribution of products at all, but periodical re-distributions of the land. And in India even the land has come to be held indefinitely without re-distribution, and the only checks^{on private property} are the servitudes

1. C. J. Connell, The Antiquary, IV, 226.

2. "As the common ancestry fades away into indistinctness, and the community gets to consider itself less an assemblage of blood relations than a body of co-villagers, each household clings with increasing tenacity to the allotment which it has once obtained, and re-divisions of the land among the^{whole} community whether at fixed periods or at death, become rarer and rarer, and at last cease altogether, or survive

in favor of the public usages in cultivation, and the reservation by the community of the right to veto alienation.¹ This, however, is not universal in India, for in the Jaghire district of Madras the lands change annually. The Afghans change every ten years, the Vaccæans every year, and divide the produce as well, and the Illyrian Dalmatians every seven years. The Arabs of Oran claim property only in the seeds they have sown.² The re-distribution in Israel was once in fifty years, or every year of Jubilee.³ Periodical re-distribution is also found in Scotland and Mexico.⁴

One stage in the transition from collectivism

only as a tradition." Maine's Early History of Institutions, 188-9.

1. Maine's Ancient Law, 268-71.

2. Kemble, The Saxons in England, 39.

3. Leviticus, Ch. 25.

4. John Fenton, The Antiquary, IV, 89-91.

to individual property in land was reached when the arable land was allotted to the several families of the township. Another was gained when the 'shifting severalties' came to an end, and the final step was taken when all restraints as to use and alienation were removed.¹

The typical village community is not the accidental product of a particular time or race. It is found in all Aryan communities, in the Fiji Islands, amongst the Berbers of North Africa, the North American Indians, the Zulus and Eskimos, in Java and many other countries.² It is still common in many parts of the world, and distinct traces of it are left in England, Germany and many of the most highly civilized countries of Europe. England's open-field

1. Maine's Village Communities, 81-2.

2. John Fenton, The Antiquary, IV, 89-91

3. Maine's Early History of Institutions, 1-6 ;
Maine's Village Communities, 83.

system of a generation ago was the shell of the medieval village community.¹

Turning now to examine in detail the village community of India, we find it existing side by side with the joint-undivided family, or perhaps it would be more correct to say that in many instances the Indian village community is made up of a number of joint families as units.² At any rate it is an assemblage of co-proprietors, organized into a patriarchal society of immense antiquity.³ Every member of every generation is entitled to an undivided share of the whole. There is an elective headship, which tends to descend to the eldest agnatic kin. The manager has control of the common funds and of internal police affairs.⁴ Common parentage, whether real or

1. Seebohm, *The English Village Community*, XIII.

2. Maine's *Early Law and Custom*, 241. 3.

3. *Ancient Law*, 260-61. 4. 260-62.

not, is assumed.¹ The theoretical, periodical redistribution of land is generally extinct, though the tradition remains.² When the allotments become unequal, extra burdens may be imposed to adjust the inequalities.³ When allotments are made they are governed by custom and chance rather than contract.⁴ The arable land is merely divided equally between the different members of the community, each man or family cultivating his own allotment. The climate being tropical, it will not allow the three-field system of the Teutonic mark, but the rules governing cultivation are very minute.⁵ The waste and pasture lands are common and under municipal control.⁶

The Anglo-Indian administration has finally

1. Maine's Ancient Law, 262-3.
2. Maine's Village Communities, 112, 13.
3. Systems of Land Tenure in Various Countries, 160.
4. Id. 110-11.
5. Id. 108-10.
6. Id. 160.

adopted the village as the unit of revenue.¹ The attempt formerly was to lay taxes on each individual, but the natives, it is said, did ^{not} appreciate the justice of the innovation, but at once clubbed together and paid the tax as a village, thus showing their firm attachment to the communism of their fathers.²

The village is governed by a Council of Elders very similar to the Teutonic Assembly of Males.³ Sometimes a headman or chief takes the place of this council, but the causes which operated to transform the mark into the manor have held sway but feebly here.⁴ Each village is self supporting, having players of every necessary trade and profession, even to the village accountant.⁵

The mark is a cultivating group of families

1. Systems of Land Tenure in Various Countries, 159.

2. Id. 197, note.

3. Maine's Village Communities, 122, 161.

4. Id. 123, 12.

5. Id. 125-6.

settled on the land, and is the original basis of Teutonic society.¹ The most plausible hypothesis is that it arose, as did the village community (and of which it is merely a species) from the natural growth and expansion of the family.² It was a voluntary association of freemen, self governing, with a real or feigned kinship, with a common name, religion and customs.³

Look for a moment at its social and economic scheme.⁴ Each family possessed a homestead and curtilage. The pasture and waste lands were owned in common and occupied in common, while the arable lands were allotted to the markmen individually. Caesar saw the German tribes in a state of transition from

1. The Saxons in England, 53.

2. Id. 58.

3. 54-7.

4. "The township was an organized, self supporting, self acting group of Teutonic families, exercising a common proprietorship over a definite area of land, its mark, cultivating its domain on a common system

nomadic to settled life. There were no estates in land at that time, but annual allotments were made, and the people seemed to be bound together principally by the tie of kinship.¹ The Germania of Tacitus shows still the annual allotments of the arable lands while each man owned his own house.²

These accounts do not exactly tally with the full fledged mark system. The Germans at this time were not wholly agricultural. There was not the mark system but the principle of common tenure was there. There was the village, with its administration of justice, but it was not the village system. Noblemen were there but no manors. All lands held in severalty were held allodially, although there was no allodial system. There was no feudality, be-

and sustaining itself with the produce." Maine's Village Communities, 10.

1. Stubbs' Constitutional History, 15-16.

2. Id. 19.

cause land was not the basis of the tie between lord and man. But the germs of all these were present.¹

Von Maurer, in describing the German mark, says that the land belongs to the community in partnership. In the center of the clearing are the buildings, and each markman has his homestead, house, courtyard and farm buildings. This entitles him to share in the common land. He has a right to the enjoyment of the woods, pasture, meadow and arable lands, but this right is to possession and is not ownership. His absolute right to the fee of the property is merged with that of the whole community. The woods and pastures are unappropriated by individuals. The meadow lands are definitely apportioned, but from the hay harvest until the following spring they lie open as

1. Stubbs' Constitutional History, 34-5.

common pasture. After each man has housed his own hay according to well settled usages as to time and manner, the fences are thrown down and the meadow becomes pasture until the next season. The arable land is divided into several fields, usually three, for rotation of crops, and each householder receives an allotment in each field.

This system has prevailed at different times over the whole of Germany. Every markman has a place in the assembly, the assembly is the unit of the nation. Hence nationality is personal rather than territorial.¹ But he only was a member of the state who held arable lands.² This was the village community in full vigor.

As better methods of agriculture succeeded, the annual allotments became permanent, but the

1. Stubbs' Constitutional History, 49-51.

2. The Saxons in England, 90-91.

woods and pasture long remained common. Thus we have here the homestead and arable lands beginning to be recognized as private property, but still subject to common rules of tillage, and inalienable, except by consent of the whole community.¹

The Salian law shows the Franks of the fifth century with quite a strong centralized government, with the mark in decay. They were passing rapidly towards feudalism. The local assemblies still retained their functions, but common cultivation had largely passed away. However, no one could enter the community without its permission.²

The permanent impressions left by the mark system are the local assemblies (afterwards the manorial courts), local self-government and the inseparable connection between land ownership and the pos-

1. Stubbs' Constitutional History, 51-2.

2. Id. 53-4.

session of public rights.¹

The mark system which has just been described as the village community in full vigor, was that of the Saxons when they conquered England. They took it with them and started on the soil of Britain where they left off on the continent. But the tribal identity was bound down to no territorial area ; the magistrate ruled the tribe, not the soil ; the political divisions were of the folk and host, not of the land ; the laws were the usages of the nation not of the territory.² They still had the association of the township and the mark system of election to public functions, and were bound together by the tie of kindred rather than land.³ Large tracts of territory were set off to the Hundreds of the conquering host. These hundreds, dividing on the basis of kinship, settled down into village communi-

1. Stubbs' Constitutional History, 52.

2. Id. 65.

3. Id. 65.

ties ; the hundreds developing into the counties, the village communities into the townships. The unoccupied or waste lands were left open to the kings, who probably granted them to their personal followers on a sort of feudal tenure.¹

So the historic English township is undoubtedly a direct descendant of the Teutonic mark, although political rights do not, as in the mark, depend entirely upon a partnership in the land of the community. But even here there is common cultivation down almost to the present time, as well as holdings of usufruct.² These latter are merely appendices of private ownership, but are sufficiently important to distinguish the holdings from the fee-simple of to-day.

Common lands still exist in some manors and

1. Stubbs' Constitutional History, 71-4.

2. Id. 82-4.

townships of England, and until very recently common cultivation was seen on every hand. The local courts of the town and manor can be traced directly to the mark. The functions of the village assembly in determining who shall enter the community, and local arrangements as to fencing, common husbandry, the proportion of cattle to be turned into the common pasture etc., still exist in the manorial courts and town meetings. The customs of relief and surrender are merely survivals of the old method of admitting new members to the mark.¹ In short the township is a body of allodial owners, descended from a community of interests.² The township still elects its own officers and makes its own by-laws, but the jurisdiction of the old manorial courts has been taken away, leaving but the shell.³ The *hams and tuns* of England are taken from

1. Stubbs' Constitutional History, 84-5.

2. Id. 85.

3. Id. 90-91.

the ancient clan or village communities in bondage.¹




The distinctive marks of the open-field system of agriculture, which, as has been remarked before, is but the shell of the village community once prevalent throughout England, may perhaps best be studied in the light of a living example.

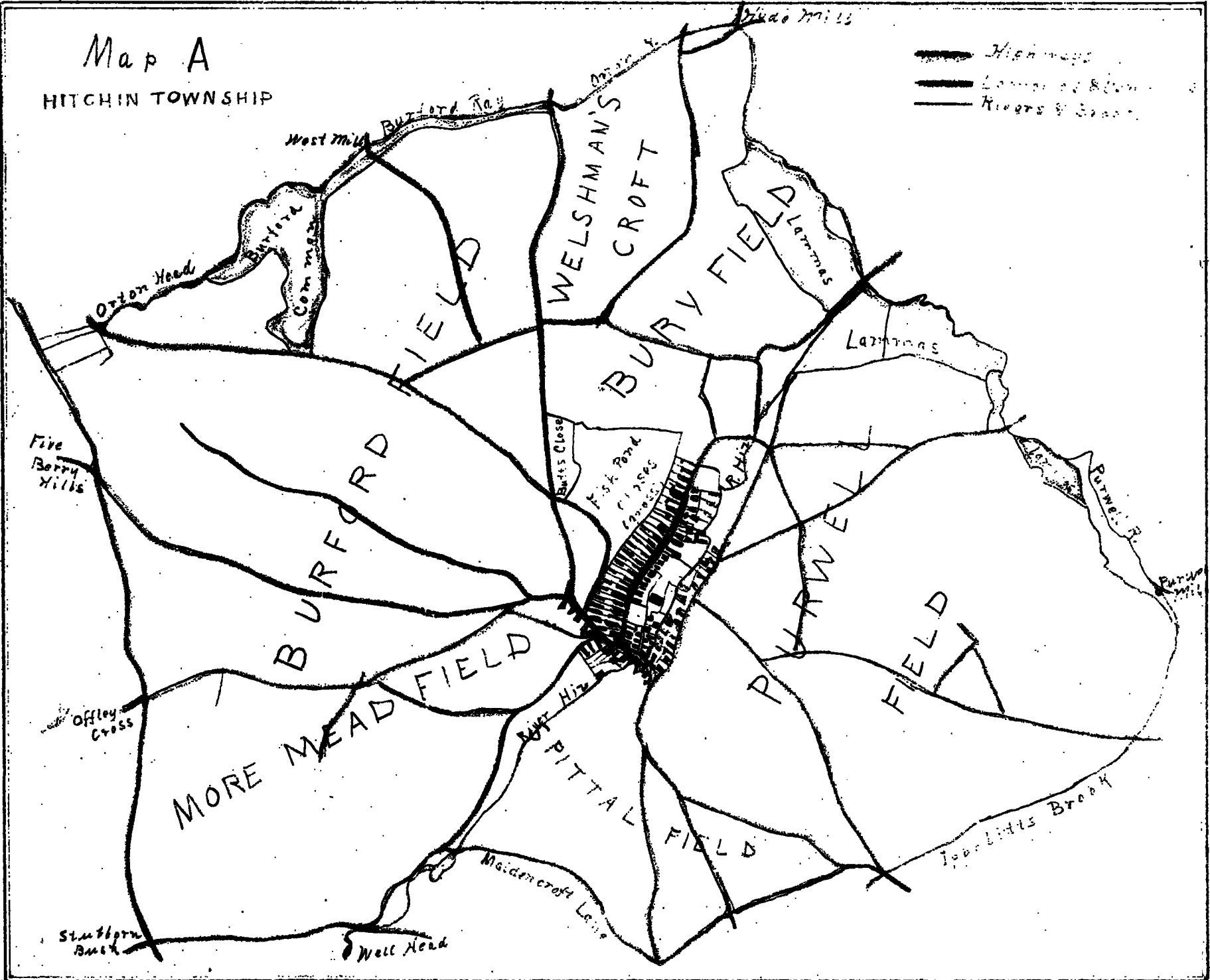
Mr. Frederic Seebohm writing in 1883, states that in Hitchin, Hertfordshire where he resided, owing to the fact that from the time of Edward the Confessor to the present it has been a royal manor (with strong evidence that it dates back to before the Roman Conquest), and the "Queen still being the lady of the manor, the remains of its open fields have never been swept away by the ruthless broom of an enclosure act." The description of the manor which he annexes was taken from the report of the Court Leet, and View of Frankpledge, held con-

1. Early History of Landholding among the Germans, 43; The English Village Community, 181.

Map A

HITCHIN TOWNSHIP

-  High ways
-  Lanes & Byways
-  Rivers & Streams

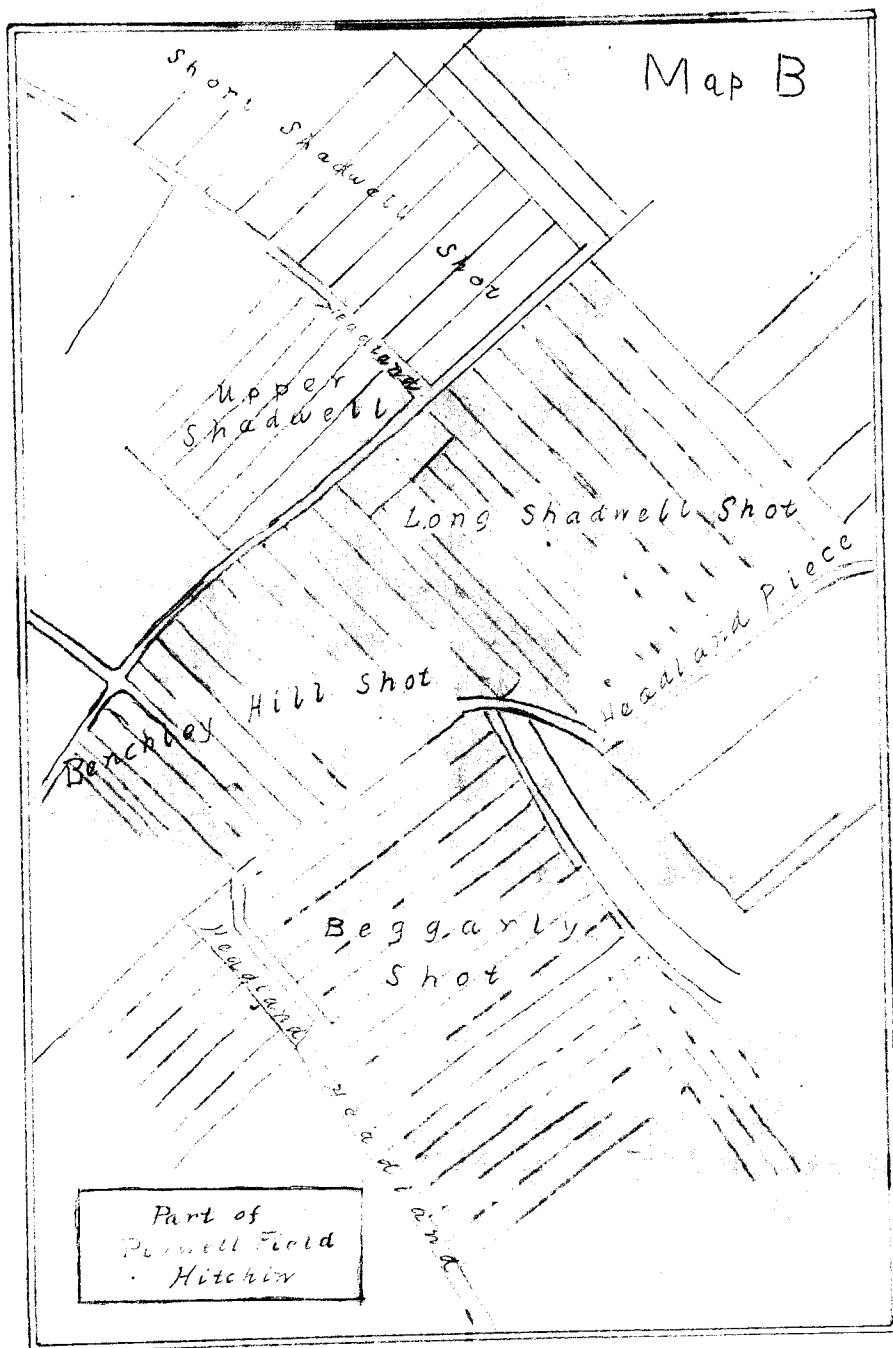


currently with the Court Baron of the manor, the report being made on the presentment of the jurors, October 21. 1819.¹

It will be seen by reference to map A that the divisions and arrangement of the township correspond very closely to that of the village community already explained. The collection of houses in the center, surrounded by the arable fields, and beyond these the pasture and meadow lands, is the normal type of the village community. It will be noticed that Hitchin is almost purely an agricultural community, there being an entire lack of wastelands and very little pasture.

The map^B_A presents very much the appearance of a spiders web. The strips approximate an acre each, and are separated by green balks of unplowed turf. They are four rods or furlongs wide, and forty long,

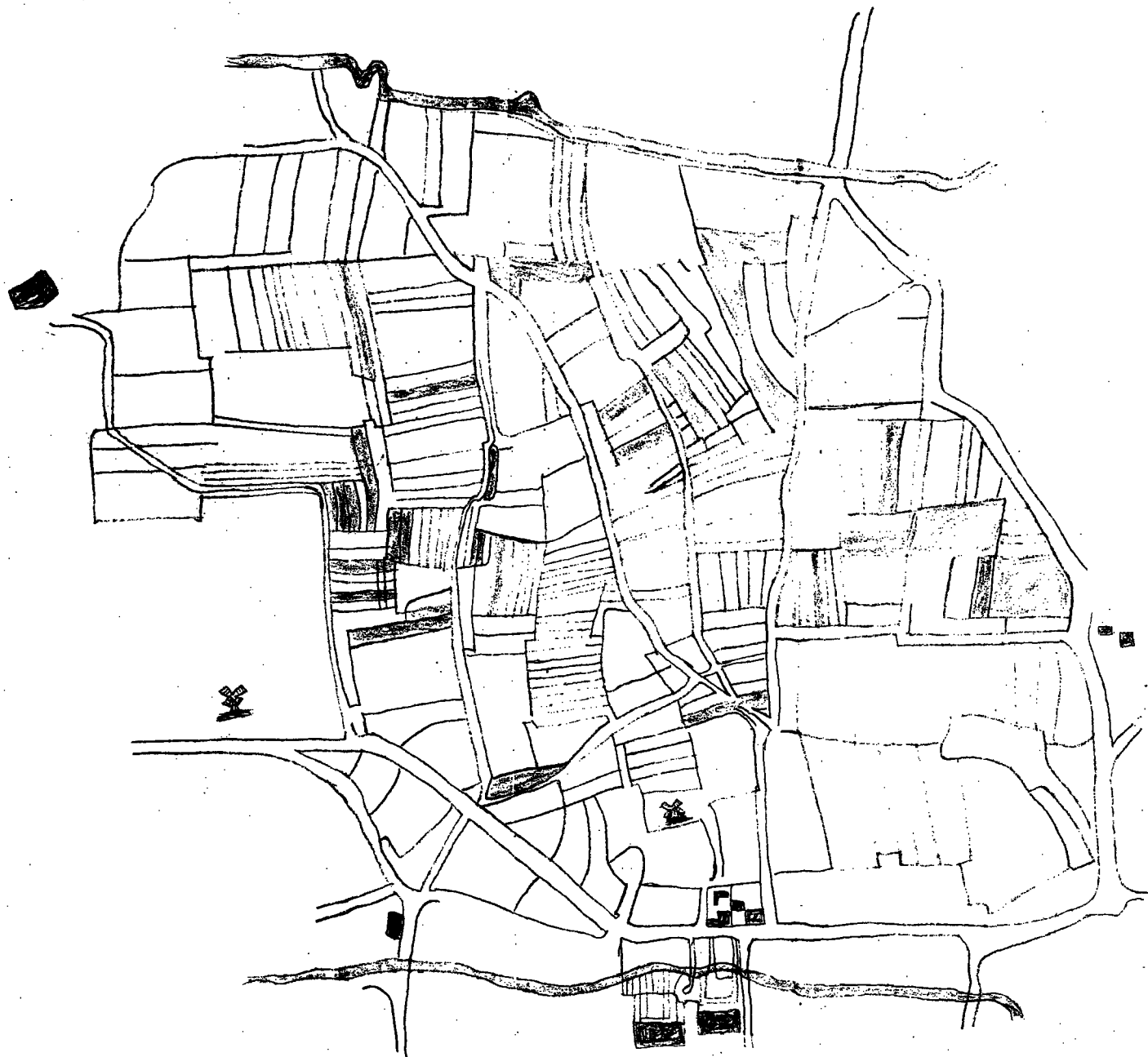
1. The English Village Community, Ch. 1 and App. A.



or there are half acres of the same length and half as wide. But for centuries the process of combining the strips by descent, trading etc, has been going on, so that now they vary greatly in size.

These strips lying side by side and running in the same direction, form larger divisions of the field called "shots". When the common field ways or roads will not give access to the shots from alongside the strips, there is left at one end a wide unplowed strip called a "headland". All the owners of the strips have the right to turn the plow upon the headland. The "lynch" is the terraced strip formed by always turning the furrow down hill, and is universally found on the hillsides wherever the open-field system has prevailed. Its indestructability has preserved it long after the reason for its being has disappeared. Corners

Map C
Purwell Field.



that could not be cut up into strips of the regulation size, were measured off into "gored acres", and little odds and ends remaining vacant were known as "no man's land" or "Jacks land".

Thus much for the outward marks of the system. Now let us look at the peculiarities of ownership. As a rule, the holdings of each man are scattered here and there all over the township. Reference to ~~the~~ annexed map of Purwell field shows the extent to which this practice was carried, even well into the present century. The various strips of two of the proprietors of the field are colored for easy identification. A summary of the ^{individual} holdings of all the proprietors in the whole township, shows a variation from one to thirty-eight parcels, and the quantities vary yet more.

The great antiquity of the manor is shown in the form used in setting out the boundaries, which is identical with that used by the Romans in Britain two thousand years ago, and is as follows :

"From Orton Head to Burford Ray,

and from thence to a Watermill Called Hide Mill,

" " " " Willberrv Hills,

" " " " a place called Bossendale,

" " " " a WaterMill called Burwell Mill,

" " " " a Brook or River called Ippollitt's
Brook,

" " " " Maydencroft Lane,

" " " " a place called Wellhead,

" " " " a place called Stubborn Bush,

" " " " a place called Offley Cross,

" " " " Five Borough Hills(Five Barrows),

" " " " back to Orton Head, where the boun-

daries commenced."

The presentments further describe the reliefs of freeholders, and the fines etc. of the copyholders under the manor; also the various particulars as to powers of leasing, forfeiture, cutting timber, heriots, etc.; the freedom of grain from toll in the market, the provision of the lord of the common pond and the stocks for the use of the tenants of the manor, and the right of the lord, with the consent of the homage, to grant out portions of the waste by copy of the court roll at a rent and customary services. This shows conclusively the ancient community of interests.

Then follows a description of the commons, and the rights of every occupier of an ancient messuage in the Green Commons and the Lammes Lands are clearly defined. The lammes meadows are divided into strips like the common fields, for the purpose of the hay

crop. The common fields are Purwell field, Welshman's Croft, Burford field, Spital field, Moremead field, and Bury field. It is said that these fields have immemorially been and ought to be kept and cultivated in three successive seasons of tilth grain, etch grain and fallow. Purwell field and Welshman's Croft are to be fallow one year, Burford and Spital the next, and so on in rotation. Every occupier of unenclosed lands in the common fields, may pasture his sheep over the whole field after the harvest, and when it is fallow. But if one encloses his parcel, he loses forever his rights of pasture over the rest. This system controlled the freeholders and copyholders without distinction.

Hitchin is but a fair example of the open-field system as it has, at one time or another, prevailed

throughout England.¹ An examination of the Enclosure Acts, whose object was the annihilation of this system and the substitution of absolute individual property for the previously existing ascertained rights, will convince anyone of the accuracy of the last statement. Thus from 1766 to 1832, twenty-two parishes within a radius of ten miles of Hitchin were enclosed in this way. There are about ten thousand parishes in England, and from 1760 to 1840, nearly four thousand enclosure acts were passed, all having the same general characteristics.²

The full description already given of Hitchin will make unnecessary further reference to English survivals of the village community. However, a case reported in 15 East shows the surviving custom of the court leet meeting at certain specified times to set out the boundaries of the several al-

1. The English Village Community, 436. 2. Id. 14.

lotments.¹

When the Puritans settled New England, according to the traditions of their ancestors, they organized themselves into village communities. But the spirit of liberty and equality so pervaded, that on the dissolution of the principal features of the communal system, none of the manorial or feudal tendencies appeared on this side of the water. However the community of interests was never entirely dissolved, as is proved by the existence to-day of the historic New England townmeeting, where all the members of the community come together once a year to exercise some of the functions of the old village council in the management of town affairs.

The highways, the schools and the religious interests are still common, and by-laws are passed at

town meeting with reference to these, and officers

1. Maine's Village Communities, 201 ; Palfrey's History of New England, II, 13.

are elected to enforce them. A community of interest in some things, and local self-government in all things is the legacy of the village community to New England.

Turning now to classic history we find in the gens or house of the Romans, a village community very much on the type of the Indian village community of to-day¹. Rome was founded and made possible only by the coalescence of several village communities. They had the government by the council of elders, the public allotment of land and many of

1. "The gens was also a group on the model of the family : it was the family extended by a variety of fictions, of which the exact nature was lost in antiquity. In historical times, its leading characteristics were the very two of which Elphinstone remarks in the village communities. There was always the assumption of a common origin, an assumption sometimes notoriously at variance with the facts ; and to repeat the historians words : 'If a family became extinct, its share returned to the common stock.'"
Maine's Ancient Law, 264.

the characteristics of other early Aryan communities.¹

The Russian village community is so similar to those already described that it scarcely needs mention. As already stated in another connection, it is the natural development of the house community of the South Slavonians. But it is much more extensive, and is managed on a somewhat different basis. The land is divided between the families, the lots shifting periodically and vesting in the occupant, subject only to the veto power of the community on attempted alienation. It is a curious fact that here the size of the allotment is regulated by the size of a man's family, the one with the largest family getting the largest allotment. This practice is known as "Mir".²

1. Maine's Early History of INstitutions, 84.

2. Systems of Land Tenures in Various Countries, 385-93.

The sense of property in land is not fully developed, but the tie of brotherhood is greatly weakened, and the tradition of a common ancestor dim and almost forgotten.¹ The government is similar to that of the Teutonic mark.²

The reason for the preservation of this primitive institution in all its pristine purity, while in other countries its decline began centuries since, lies in the fact of the immense wastes of Russia. When a village became too large and cumbersome for its necessarily restricted territory, it would throw off a colony into the neighboring waste. The colony, settling down on the plan of its mother village, would in turn throw off other colonies. This process has gone on for ages and the end is not yet.³

1. Systems of Land Tenures in Various Countries, 362.

2. Maine's Early Law and Custom, 261-3.

3. Early History of Institutions, 83.

In Russia proper, the re-distribution takes place regularly, but in Servia, Croatia and Austrian Slavonia the produce alone is distributed, the land being still held and worked in common.¹

Running through Celtic antiquities, we find the same phenomena of evolution. The Scotch village community has been a living reality for centuries, as have also been the tribal communities of Ireland and Wales. For the last four or five hundred years the Scotch village communities have been composed mostly of proprietors rather than tenants, but the same usages prevail whether the tenant be owner or not.² As tenants, each was jointly and severally liable for rent, but at the present time each tenant is liable only for his own rent.³

Like the mark, there was the village itself,

1. Maine's Ancient Law, 267-8.

2. The Scotch Village Community, 657.

3. Id. 657-8.

the arable land and the common grazing ground. The houses are personal property, being made of bone-wood and sod and moveable from place to place. They are arranged in an irregular group near the center.¹

The arable lands were divided into "in-field" and "out-field", the former being tilled according to the English open field system of rotation of crops, the latter according to the Irish system of shifting arable lands.² This same dual system was known in Norway also. The out-field was divided into three parts, one being cropped with oats until exhausted, the others in the meantime recuperating in grass. The in-field was smaller and received all the manure. Hence it naturally varied in size according to the amount of manure available. The rotation of crops was barley, oats and peas.

1. The Scotch Village Community, 658.

2. Id. 658-9.

The allotments varied in size, according to the ability of the tenant to work a large or a small area, and were made before cropping. The ancient practice was to cultivate in common and divide the produce, but it was found that the lazy man stood an equal chance with the industrious, so the system of tri-ennial allotments was adopted. Each field was divided into as many acre strips as there were members, and then one third of the arable land was chosen by lot every year.¹ Lots were also cast for fishing ground.

Seed time and harvest were uniform, being carefully regulated by the community, and the stubbles were used for pasture from season to season. The grazing lands were entirely undivided, but the amount of stock each could pasture was carefully lim-

1. The Scotch Village Community, 659-61.

ited, a horse being equivalent to two cows or eight sheep. One tenant might keep an over stock, provided another had an under stock, and on paying the latter for the privilege. Temporary overstock could be kept on payment of pasturage to the community, which fund went for the purchase of bulls, rams etc. The horses, work cattle and farm implements were used in common, and indeed it was the scarcity and value of these articles that made possible the long continuance of the system.

The Scotch Birley Court was composed of tenants, and presided over by an over-man elected by them and confirmed by the landlord. This officer, now called the constable, the tenants were sworn to obey and to compensate for his services. He was the farm manager, arbiter and appraiser, and petty magistrate. Later his functions degenerated into a

valuator.

When the tenants by purchase or otherwise, became proprietors of the soil, they almost invariably continued the community system, the Birley Court becoming a sort of Burgh Council. Thus in Prestwick of Ayrshire, the land was owned by the freemen, but was periodically apportioned as before, and the consent of the community being necessary to alienate. This system prevailed throughout Scotland even down to the present century. Though for the most part extinct or declining, it to-day exists vigorous and undecayed, among four thousand citizens of Long Island.¹

But in the Highlands of Scotland, and in Ireland and Wales, the communities were tribal rather than manorial in their origin and composition. Situate in a hilly country, the nomadic life held sway

1. See generally, The Scotch Village Community.

for centuries, and even down to our own times, pastoral life was in the ascendency. The produce of their flocks was sufficient to supply the simple wants of the people.

Under the tribal system of Wales of the twelfth century, each tribe occupied a particular district, and was composed of households of free Welshmen, all blood relations, whose homesteads were grouped about on the countryside. The hangers-on of the tribe or of the chief were not members, and were put off by themselves in groups of households, which would correspond somewhat to the Saxon village community. Aside from these servile holdings the homesteads were scattered, but grouped arbitrarily for the purpose of payment of rents to the tribal chief.

The same was true in Ireland in the fifteenth century, and the system of shifting homesteads ob-

tained, in accordance with the ancient ideas of kinship. Wherever Agriculture was in vogue, it was conducted on the open-field system. But instead of the three-field system with its rotation of crops, which we have noticed in England and Scotland and which seemed to be necessary in countries where agriculture was the main stay of the people, the arable land was divided into several fields, one of which was cropped year after year until exhausted, when it was allowed to recouperate in grass while the next field was likewise being exhausted.

Instead of the "yard-land" (a constant number of strips to the holding) we find the "run-rig" or "rundale" system, whereby the land is shared in rough equality by dividing it up into a large number of small pieces of irregular size. There is the same scattered ownership of the open-field systems

of England and Germany, but the strips are irregular and the aggregate holdings approximately equivalent. This system is applied to-day in parts of Ireland and among the Crofters on the West of Scotland.

Ireland of the seventeenth century is where Germany was at the beginning of the Christian era. It has theoretical tribal ownership of the land, its re-distributions among the tribesmen being still frequent, and agriculture subordinate to pasture. The re-distribution of the lands is made through shifting of homesteads, and "run-rig" agriculture was the open-field system in vogue.

"The main distinctive mark of the tribal system is the absence of towns and villages, and the preponderance of cattle over corn. But when corn becomes the ruling item in economic arrangements, there grows up the settled homestead and village,

with its open fields around it."¹ Thus in Ireland, Wales and the Highlands of Scotland, the nature of the country determined the economic arrangements, and perpetuated the old tribal system for centuries after it had been entirely supplanted in England by the more modern village system.²

The American Indians illustrate the village community in stages of development more or less perfect. The village Indians of New Mexico, Mexico and Central America are the most advanced. They exhibit nearly all the peculiar phenomena of the Aryan village communities.³ Then there are the semi-village Indians, including the Iroquois, New England, Virginias and Creeks.⁴ Take, for instance, the gens of the Iroquois. It is a body of blood relations

1. The English Village Community, 246.

2. Id. Chs. 6 and 7, for a general description of the Irish and Welsh tribal systems.

3. Morgan's Ancient Society, 151.

3. "Their land is held in common as the property

having a common name, religion and language. Though they are not a cultivating group, their land is held in common. There is a general inheritance of property by the gens, and the council manages common interests.¹

A cultivating village in the Fiji Islands is surrounded by a moat, mound and war fence. It is divided into two sections separated by a ditch, and these in turn are subdivided into quarters. Each family group has its own town lot, and each separate family a distinct plot for a house. Each quarter belongs to a family group. The town lot after its subdivision and appropriation by the separate families is, in a sense, private property. The arable land lies beyond the village, and is sometimes held ----- of the community, but after a person cultivates a lot he has a personal claim to it, which he may sell to anyone of the same community". Ancient Society, 180. Rev. S. Gorman, Historical Society New Mexico, 1860.

1. Morgan's Ancient Society, 66-71.

and tilled in common, and sometimes divided between the members of the group. All have equal rights in the forest, which lies beyond the arable lands.¹

The villages of the Dyaks of Borneo are generally built along rivers. The houses are large and are raised fifteen or twenty feet above the ground, and are occupied by a joint undivided family or house community. Every Dyak cultivates his own field.²

The tribes of the Basutos are subdivided into groups under the leadership of a sub-chief. The village huts are placed around the circumference of a vast circle, in the center of which are corraled their flocks. The land belongs to the whole community, and no one can dispose of the land from which he derives his support. Every father is assigned a parcel of land, which is insured to him so long as

1. Gomme, The Village Community, 10

2. Id. 10-12.

he does not change his locality. The bounds of the fields are carefully laid out, and the possession of pasture is subject to clearly defined rules. Every man must keep his flocks from the grazing ground of the others.¹

This completes my review of the village communities of various countries. It is necessarily limited, incomplete and in many respects unsatisfactory. Yet the results point towards a uniform primitive communism, and a fuller investigation would undoubtedly strengthen that view. It remains only to discuss the feudal system, its rise and fall, and its results on the modern ideas and institutions of the Western world, for it must be remembered that the larger part of the world has never taken that step in progress, which has played so important a part in western civilization.

1. Gomme, The Village Community, 12.

T h e F e u d a l S y s t e m .

The rise, progress and decline of the manor and the feudal system forms a chapter in the evolution of human institutions, interesting and important as it is intricate and unique. The early Teutonic cultivating group contained in itself all the elements of feudalism, and everywhere we see them transforming themselves into the manor. Feudalism is an indigenous Teutonic institution.

There were causes at work leading to the inequalities of land, ^{and} to the establishment of suzerainty's of one village over another, and tending to place the benefits of an unequal proprietary system

and the enjoyment of these suzerainty's in the hands of particular families, and consequently in the hands of their chiefs for the time being. With the chieftancy of the tribe the modern history of aristocracy begins. At first elective, it tends to become hereditary, through the seeming universal reverence for family and blood. The decay of tribal leadership ends in primogeniture.¹ The power of the chief grows by gathering around him a body of "men", ever in increasing numbers. As a member of the community he receives his regular allotment of arable land and enjoys his share of the pasture, but as chief administrative officer he has also control of the wastes. Here he plants his "men" in servile colonies, or the village itself may send out its hangers-on in servile colonies. In either case

1. Maine's Early History of Institutions, 202.

the chief tends more and more to exercise as his own, rights which formerly belonged to the community. As this process goes on and the number of the chief's personal followers is augmented, his power and sense of proprietorship become correspondingly great. The chief has been transformed into the lord, and the village waste has become the lord's waste.¹

We now see a cultivating group differing from the ancient village community in that it is held together by a variety of subordinate relations to a feudal chief, the lord, rather than by kinship. The holdings of the freemen of the village are now held by free tenures, while the servile tenures become the copyholds of the lord's domain. The Ascertained rights of both free and servile tenants in the lord's waste are respected, but the sense of

1. Maine's Early History of Institutions, 130.

propriatorship grows in the chief. And where individual rights are not clearly ascertained, the lord encroaches on the meadow lands as well as on the wastes.¹ The explanation for these constant encroachments is found in the fact that the lord has succeeded to many of the legislative functions of the old assembly, and hence he appropriates to himself such rights of the community as are not immediately valuable, and such as would require legislative adjustment to settle the mode of enjoyment. Thus it appears that the relation of landlord and tenant arose from custom rather than contract. The tenant has not received his estate from the landlord but the landlord has wrested his estate from the tenant. The village assembly has been transformed into the manorial court to meet the exigencies of

1. Digby, History of the Law of Real Property, 28.

the changed situation. But it still retains many of its old functions.¹

The growth of the power of one community or chief over other communities, may come about in two ways. By sending out colonies to her waste lands, the mother community would naturally exercise a sort of suzerainty over her off-spring. But more generally the little inter-tribal wars were a most fruitful source of establishing such relations. The conquerors would either appropriate the waste as spoil of war and thereon plant servile colonies, leaving the the conquered community her independence, or they would take the whole domain and restore it to be held in dependence. Precisely the change from one of these systems to the other also took place in the history of Roman conquest and growth. First they appropriated only the unoccupied land of their enemies, but afterward the conquered were in-

corporated into the empire.

These were the inherant elements that were pointing primitive Teutonic society towards Feudalism. But the system in its ultimate development, was the result of another set of influences, or perhaps of a similar set of influences on a magnified scale. When the great Teutonic monarchies began to be formed, large grants of the national waste of the conquered provinces were made to the powerful chiefs of the conquering hosts. Often the benefices would be of whole settled districts, in which case the vanquished provincials would continue their village life , but subject to a new lord.¹

But aside from these, there was another great element at work in the production of that great structure, known in its entirety as the feudal system.

1. Maine's Village Communities, 130-47.

The practice of commendation was a powerful influence, and the great disorder produced by the relaxation of power at the fall of the ~~Carlovingian~~ ^{Carolingian} Empire, greatly augmented it. In short it is an arrangement whereby the weak put themselves under the protection of the strong. The freeman became a vassal and did homage to the lord. In return he received protection in those troublous times.¹

But the prime moving and largely controlling cause of the rise of feudalism, is found in the gradual encroachments of the chief or lord upon the domain of the community, rather than the benefices and commendations of later times. In the disentanglement of individual from collective rights, the chief, from his more advantageous position, managed as already shown to get more than his just and proportionate share. The feudalized text writ-

1. Maine's Early Law and Custom, 341-52 ; Early History of Institutions, 154-5 ; Digby, History of the Law of Real Property, 32.

ers speak of the lord "granting" to his tenants certain rights, and "reserving" to himself certain other rights, when the fact is that the lord had exacted from the tenants rents and dues for the exercise of rights already theirs, out which he had wrested from their true position.

The tenure of the landholders under the feudal system was considered in the light of a feudal loan. They were not the absolute owners of the soil, nor was the lord, or landlord, as he came to be known later. Yet both were owners in a sense, having clearly defined and well ascertained rights therein. Theirs was not a contract relation entirely, but the holding of the tenant was by a tenure, established by immemorial custom.

The freeholders always had a secure tenure as regards the time of enjoyment. Their right to the possession of the land was absolute, and not condi-

tioned upon the whims or will of the lord. Then by the Magna Charta the tenants were secured as to the amount of dues or payments of rent which the landlord could exact, thus practically annihilating rack rent..¹ This legislation marks the beginning of the passage from feudal to commercial tenures.

But the chief factors of the change were economic rather than legislative. Commencing with the twelfth century silver, which was used exclusively as the circulating medium of exchange, began steadily to appreciate in value. Hence the amount of rent payments in money correspondingly decreased, for it was an immemorial custom having the sanction of unwritten law, that a feudal lord could not take advantage of natural causes to disadvantage his tenants. So by the beginning of the sixteenth century

1. F. Seebohm, The Land Question. Fortnightly Review, XIII, 89 . . .

the money payments of rent had dwindled to a minimum.

About the year fifteen hundred the amount of silver available for money was enormously increased, and continued steadily to increase. Again the tenant received the benefit. As the volume of currency increased prices correspondingly rose. But as the rents were fixed at a certain number of fixed payments in current coin, when the value of the coin depreciated, it follows that the ratio of rent values paid to the value of the land, correspondingly decreased. The fall in the value of silver from 1500 to 1870 was in the ratio of six to one, thus removing five-sixths of the burdens of feudalism.

But other economic causes of equal importance were at work. The large increase in population, and the steady drift of the people toward the cities, combined with the increase in the volume of currency, caused a steady rise in the price of land. This

has been eighteen fold since the sixteenth century, thus removing seventeen-eighteenths of the remaining burdens. Both causes combined reduced the feudal burdens in 1870 to one per centum of what they were in 1500. Thus the enormous rents of mediaeval times have been reduced by natural causes to so low a figure as to amount merely to a nominal quit-rent-- a simple recognition of the manorial character of the tenure and the suzerainty of the lord.

But what have become of these nominal quit-rents, the only remaining tie between landlord and tenant? They survived the abolition of military tenures¹, but by two statutes of Charles II,² all royal rents were sold. The buyers were often the parties from whom the rents were due. This affected a large number of holdings, for the proportion of

1. 12 Car. II, c. 2.

2. 2 Car. II, c. 6 ; 22 & 23 Car. II, c. 24.

lands paying royal rents at that time was large, owing to the many forfeitures of the civil wars. The enclosure acts, beginning about 1760 have so far as they have operated, not only put an end to quit-rents, but also disentangled the collective rights of the tenants, and substituted therefor individual rights. These causes have operated upon freeholders and copyholders alike, but the latter received absolute ownership only by the Enfranchisement Acts.

We now see that the feudal land law of England tended directly toward peasant proprietary rights. But the commercial spirit of the age and the necessity for combination of capital and concentration of energies, has again taken the land from the hands of the peasantry, and the present tendency is toward larger aggregations of land just as surely as it is toward greater loans and combinations of capital.¹

Before we conclude let us look for a moment at the Irish land question.¹ When England undertook the government of Ireland, the people were in a state of transition between a pastoral and agricultural life. Indeed the nomadic life had scarcely ceased, for shifting severalties were still in vogue. The internal disorders had so far unsettled society, that to a very great extent the Irish tenants held by precarious tenures at the will of the chieftan who happened to be in the ascendancy.

To remedy these evils and to "civilize" Ireland the English started out to introduce the English manorial system. But instead of introducing feudalism in toto, they succeeded in doing very little besides placing English barons over Irish tribes, leaving untouched the precarious condition of tenures and

1. The Land Question, English Tenures in Ireland, Fortnightly Review, XII.

rents. Thus the economic causes which operated in England through fixity of tenures and rents, failed utterly to affect Ireland. In England the landlords have never been absolute owners of the soil, or even considered themselves as such, but under the English administration of Ireland, the landlords have come to consider themselves absolute proprietors of the soil. The result has been that from James I to the present time, full mental value, or rack-rent, has been exacted, regardless of the fact that the tenants from long association with the soil, and from the fact that their ancestors for generations have occupied the same farms, have come to consider the soil as peculiarly their own, and to regard the extortion of the landlords as robbery and spoliation.

Fixity of tenure and indestructibility were the genius of feudalism, yet England has suffered Ireland

to be peopled with commercial tenants at will, while her own citizens have enjoyed secure tenures. Had not this state of affairs been fostered by two centuries of British rule, there is no doubt but that Irish land tenures would to-day be as secure as those of England. But in spite of the law, custom in Ulster does give fixity of tenure, and in the same way the rent is kept below the commercial value of the land.¹

The ultimate simplicity of commercial tenures is not yet reached even in this country, which, however, is considerably in advance of the mother country. This advance is marked by the passage of various laws to facilitate the disposal of land and its conversion into cash, thus making it freely exchangeable like any other commodity. This is , per-

1. The Land Question, English Tenures in Ireland, Fortnightly Review, XII.

haps, best illustrated in the recording laws, unknown in England, but which make it easy and safe to deal in real estate. In England if a man wishes to purchase a piece of land, he must go to the owner, or his attorney, and search a long chain of title.

The muniments of title are always in the hands of the party desiring to sell, and he may charge what he pleases for examination or refuse altogether.

It costs enormously to make a search there. Moreover it is often mere chance that enables the purchaser to stumble on to prior liens or conveyances. If the vendor's chain of title is not perfectly clear, or if there have been deeds or encumbrances which are purposely or accidentally absent from that chain, and of which the vendee has no notice or means of getting notice save through the vendor, the vendee must necessarily rely implicitly upon the word of

the vendor, and must be content with the possession of such knowledge as the vendor choose to impart.

in America
But here, the vendee is bound only by the records on file in the office of the clerk or register of deeds, which may be searched at a merely nominal cost.

It is very easy to see that the result of all this is to stimulate and encourage the free exchange of land in the general market of commodities. And this object is yet further promoted by the compulsory notice lis pendens, which is necessary to protect the parties to a suit with reference to real property, from dealings with innocent third parties before the final determination of the suit.¹

So the restraints on the holding and alienation of land are being gradually abolished. In New York aliens may, by taking certain steps prescribed by

1. N. Y. Code Civ. Pro. Sec. 1670 . . .

statute, take, hold and dispose of real property.¹

With one exception, the power of alienation can not now be suspended for a longer period than two lives in being,² and agricultural lands can not be leased for more than fourteen years. Married women may now hold and convey real estate as though they were sole. Lands belonging to an infant may be easily sold by applying to the court, and a late session of the legislature has extended the right and made it much easier.³ In this state a woman's inchoate right of dower may be released to any one, the last Legislature having extended her previous right to release to her husband only. Tenants by curtesy and dower may take gross sums in lieu thereof, and mortgages have almost universally come to be considered

1. N.Y. Rev. St., 8th. Ed. 2420 . . .

2. N.Y. Rev. St., 8th. Ed. 2432, Secs. 15, 16.

3. N.Y. Rev. St., 8th. Ed. 2431, Sec. 3.

as mere liens.

The people of this state in their sovereign capacity have declared: "All lands within this state are declared to be allodial, so that, subject to the liability of escheat, the entire and absolute property is vested in the owners, according to the nature of their respective estates ; and all feudal tenures of every description, with all their incidents, are abolished".¹

All this shows still a tendency to make land more effectually a commercial commodity in every possible way. But it is difficult to see how much more advance can henceforth be made along these lines, for it seems as if the ultimate simplicity of commercial tenures has been practically reached. If further progress is to take place, and ^{since} a cessation

1. N.Y. Rev. St. 8th. Ed., Sec. 3, p. 2418.

of human progress is scarcely conceivable, it must be along lines not now clearly distinguishable.

S u m m a r y a n d C o n c l u s i o n .

The result of this inquiry shows that the whole movement of society, from the earliest times to the present, has been from status to contract, a gradual disentanglement of individual from collective rights, a transfer of the bond of union that holds men together in civil society from consanguinity, to land; and only in the modern Western world, which has passed through feudalism, has there been erected a territorial society or state, where land is considered as a commercial commodity, to be bartered and sold by the individual as other commodities. Modern ownership in severalty has grown, not alone from the precarious possession of the servile classes, but

from the indestructible association of the status of a freeman with a share in the land of the community to which he belonged.

The constant tendency has been to convert the free cultivating community into the manor, and thus through feudalism to reach the goal of private property in land. But the way was long and tortuous, and if a thorough understanding of the situation shall lead civilized nations, in their dealings with nations which have not yet reached our plane, to so bring about the inevitable transformation as not to lead them through all the mazes of the feudal system, but to bring them directly to the desired goal, this laborious investigation will not have been in vain. The ultimate settlement of the Irish land question, and of the many questions arising out of the relations of the European nations with

the East, as well as the question of the relation of our own government to the the American Indian, all depend directly upon the principles here involved. Moreover in order to thoroughly understand existing laws and institutions to-day, it is necessary to know their origin, nature and history.¹

On the other hand, with reference to our own future progress, if the signs of the times, indicating a growing sense of the universal brotherhood of man, really point, as many able men affirm, to a return to the early communism of our fathers, at least so far as regards land and productive forces, then a thorough understanding of this whole subject is absolutely necessary, in order that we may escape the pitfalls and failures of the old system, and that we may build deep and strong the foundations of the new, which are laid for posterity.

1. An interesting case showing the necessity
(over)

Then finally, as a matter of true culture and scholarly attainment, investigations such as these should rather be encouraged than discouraged. It involves, both on the part of the patient investigator and the general reader, a sharpening of the intellect and a broadening of the sympathies, otherwise unattainable.

*Ithaca, N.Y.
May 15, 1893.*

Francis S. Rook.

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