

# The Learned Laws in 'Pollock and Maitland'

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THIS ESSAY IS MEANT TO DESCRIBE the place of the Roman and Canon Laws in Pollock and Maitland's *History of English Law*. The assignment given to me also calls for some discussion of the several ways the subject of the role of the European *ius commune* in the development of English law looks different (and the same) one hundred years later. The essay's purpose is thus to examine the role which the book's authors themselves regarded the learned laws as having played in the development of English law and also to review briefly the progress in scholarship, the changes in attitude, and the stability in viewpoint that have occurred during the intervening years. It will also say a word, or perhaps two words, about Maitland's overall approach to the *ius commune*. At the end of the paper, there is a hesitant comment about the future of this subject. But my principal goal has not been prediction. Still less has it been providing direction for others. It has been description — and I hope accurate description — of what has already happened. No speaker should imagine that his hearers have their pencils at the ready in hopes of being assigned a research topic. To approach the task of description, it seems appropriate first to set out the assumptions and definitions upon which the description will be based.

## Definitions

The term 'learned laws' refers to the Roman and Canon Laws, known together as the *ius commune*, and more specifically it means these two laws as they existed from the revival of legal science in the twelfth

century to the end of the nineteenth century.<sup>1</sup> The definition encompasses the contents of the *Corpus iuris civilis* and the *Corpus iuris canonici*, together with the medieval glosses and the other early commentaries written upon them. One might also include the *Libri feudorum*, because this compilation was regularly printed in medieval and early modern copies of the *Corpus iuris civilis* and because it played a larger role in the development of Western law than is allowed in most of our textbooks.<sup>2</sup> But this is a small matter, particularly since 'Pollock and Maitland' refers to it only exceptionally.

This definition excludes several sources of law that could be called 'learned' without doing violence to the term. It excludes what Continental scholars call the *ius proprium*, that is the laws of particular regions or cities. It excludes maritime and urban law and the so-called *lex mercatoria*. And of course it excludes the English common law, although I would not wish to be thought to hold the view that the adjective 'learned' would be wholly inappropriate in describing it. But the Roman and Canon Laws were what was taught in the Universities, in England as on the Continent, and this fact must fix the definition of 'learned' for purposes of this contribution, as it did for Pollock and Maitland themselves.

The temporal limitations imposed on this definition should also be stated at the outset. By 'Roman Law' is not meant the law of antiquity, the law of classical Rome. The term refers to the Roman Law as understood and interpreted by the medieval jurists. Maitland was quick to point out the significance of the gap on this score between the ancient and the medieval. Sparked by the rediscovery of the *Digest* during the eleventh century, the revival of the scientific study and exposition of the civil law led to very different conclusions and assumptions from those that had governed the world in which the texts of the *Digest* were formulated. The discussion of the Italian developments in the fifth chapter of Volume One is particularly worth reading on this score. The medieval law of civil and criminal procedure, for example, turned out to be very different from that which prevailed during the

<sup>1</sup> Fuller treatments of the subject are: James A. Brundage, *Medieval Canon Law* (London, 1995); Péter Erdő, *Introductio in historiam scientiae canonicae* (Rome, 1990); Jean Gaudemet, *Les sources du droit canonique VIIIe-XXe siècle* (Paris, 1993); id., *Église et Cité: histoire du droit canonique* (Paris, 1994); E. J. H. Schrage & H. Dondrop, *Utrumque ius, eine Einführung in das Studium der Quellen des mittelalterlichen gelehrten Rechts* (Berlin, 1992). All contain abundant references to prior and more specialized scholarly work. For treatments putting the canon law into contemporary context, see Manlio Bellomo, *The Common Legal Past of Europe 1000-1800* (Washington, D.C., 1995); Ennio Cortese, *Il Rinascimento giuridico medievale* (Rome, 1992), pp. 48-61; Harold J. Berman, *Law and Revolution* (Cambridge, Mass., 1983, pp. 199-254.

<sup>2</sup> See Walter Ullmann, *Law and Politics in the Middle Ages* (Ithaca, N.Y.), 1975, p. 217.

Roman Republic or Empire.<sup>3</sup> Equally, the *litis contestatio* turned out to be something different in the thirteenth century than it had been in the second.<sup>4</sup> The term was retained in the *ius commune*; its significance in practice changed. Thus, the 'learned laws' of this contribution's title were themselves in the flux, even of formulation, during the period covered by the *History of English Law*. And it was this living law upon which one must focus in studying the question of its impact in England during the twelfth and thirteenth centuries.<sup>5</sup>

The quality of 'coming into being' was particularly true for the Canon Law. Beginning with Gratian's *Concordance of Discordant Canons*, the *Decretum* compiled in 1140, the Canon Law had itself entered a new era of development that would separate it decisively from the Church's law of the previous thousand years. What had gone before would come to look incomplete, incoherent, and unworthy of citation, when it was set beside the Canon Law in the form it assumed in the thirteenth century and thereafter. The first volume of 'Pollock and Maitland' sketches this feature admirably. Indeed its pages on the subject read better and contain more information than many such descriptions written more recently.<sup>6</sup> They contain some gems, as for example a wonderful and (to me) quite unexpected comparison of Gratian's *Decretum* to Coke upon Littleton.<sup>7</sup> It is a comparison that illumines with a deft stroke the regard in which the work of the Father of the Canon Law was held by the medieval canonists.

Temporal limitations exist at the other end as well. In dealing with the Common Law, Maitland trespassed with some frequency on the limit set by the reign of Edward I, but even so his primary focus remained fixed on the period before the fourteenth century. That limit excludes much development in the learned laws as well, principally what used to be called the era of the 'post-glossators'. Bartolus and Panormitanus, the most complete expositors of the medieval Roman and Canon Laws, lie on the other side of the line. So does much, though not quite all, of the encyclopedic literature of the *ius commune*. The *glossa ordinaria* to the texts of the laws, together with the works of some of the first commentators, Hostiensis and Azo for example,

<sup>3</sup> Knut Wolfgang Nörr, 'Päpstliche Dekretalen und römisch-kanonischer Zivilprozeß', in Walter Wilhelm, ed., *Studien zur europäischen Rechtsgeschichte* (Frankfurt, 1972), pp. 53-65.

<sup>4</sup> See Alessandro Giuliani, 'Dalla "litis contestatio" al "Pleading system"', *Riflessioni sui fondamenti del processo comune europeo*, *Index: Quaderni camerti di studi romanistici*, 22 (1994), 433-45.

<sup>5</sup> See for instance the example of this found at Pollock and Maitland, ii 89, dealing with the importance of *traditio* in Roman law.

<sup>6</sup> Pollock and Maitland, i 111-35.

<sup>7</sup> Pollock and Maitland, i 113.

must therefore hold the attention of the student of Maitland's approach to the learned laws.

### The Importance of the Learned Laws

Turning now to an assessment of the place of the Roman and Canon Laws in 'Pollock and Maitland', I may say that my first review inclined me to an affirmative answer. The two laws seemed to have played an important role in the account of English law's growth. However, more fully considered, my conclusion turned out to be the opposite. They turned out to have exerted no more than a superficial influence on the content of the Common Law, although they did exert a strong impulse in forcing English lawyers to formulate their own law. I have followed my own experience in what follows, and I hope that this is something more than a modern parody of Abelard's *Sic et Non*. In fact, I believe both views are contained in 'Pollock and Maitland', and that they are not in the end mutually contradictory.

The argument for the importance of the Roman and Canon Laws in 'Pollock and Maitland' rests ultimately on three things: first, the relative frequency with which they are mentioned in the work; second, the authors' acknowledgement of the significance in English history of the jurisdiction of the courts (principally those of the Church) where the two laws held sway; and third, the serious consideration they give to the possibility that the Canon and Roman Laws exerted more than a fleeting influence on the contents and development of the English Common Law.

#### *The Frequency of Mention*

Both Pollock and Maitland were conscious of the existence of the learned laws and of the foundational place they have occupied in the Western legal tradition. Pollock was perhaps the more learned of the two in the Roman Law, but Maitland was certainly no amateur. It must have been natural, second nature one might almost say, for them to have had recourse to the Roman and Canon Laws in thinking about English developments. So one finds. Discussion of the early years of the English law of contract in 'Pollock and Maitland', for instance, is filled with citation to Roman Law and civilian terminology. The *stipulatio*, the *commodatum*, the *nudum pactum* all figure in its pages.<sup>8</sup>

<sup>8</sup> Pollock and Maitland, ii 194-5.

Nor did Pollock ignore the Canon Law in his account of the subject. The canonists' affirmation of the principle that actions could arise from promises and the central place of the pledge of faith in the canonists' scheme of obligations are both brought to the fore.<sup>9</sup>

It might be said that this was inevitable, given the rudimentary state of the early common law of contract. This would be the truth, but it would not be the whole truth. Maitland often referred to the institutions of Roman and Canon Law even where there was no such obvious stimulation. The parallel between the formulary system of the Romans and the development of the writ system in the Common Law is given full play. It is a parallel 'so patent that it has naturally aroused the suggestion that the one must have been the model for the other.'<sup>10</sup> Maitland is prompt to discredit this opinion, but the habit of comparison remains strong in his subsequent treatment. And it is easy to find other instances, some of them quite surprising. Roman Law's *lex talionis* and the English practice of amercing an unsuccessful plaintiff *pro falso clamore suo* is one.<sup>11</sup> The canonical institution of synodal witnesses, recorded in the *Libri duo de synodalibus causis* of Regino of Prüm (d. 915), and the early English presentment juries is another.<sup>12</sup> Roman criminal law and the English treatment of the 'crime against nature' is a third.<sup>13</sup> None of these subjects cried out for mention of the Roman and Canon Laws. But mention there is all the same.

The explanation for this habit must be, in part, that it grew from the assumptions we associate with comparative law. The idea is that the comparative method will illuminate what is special, and what is common, about almost any legal system. Certainly this was second-nature to Pollock, and Maitland seems to have shared the impulse. One sees its impact not only with respect to Romanist institutions. When he discussed the institution of marital property, Maitland looked naturally enough at the customs of France and Germany for illumination of the English situation.<sup>14</sup> For him, the contrast revealed something useful, and also otherwise in danger of being overlooked, even if there was no direct tie. But there is more than this. Not all references to Roman and Canon Laws in the work can be explained this way. References to the learned laws crop up so regularly in 'Pollock and Maitland' that one is bound to ascribe a special character to them.

<sup>9</sup> Pollock and Maitland, ii 197-9.

<sup>10</sup> Pollock and Maitland, ii 559.

<sup>11</sup> Pollock and Maitland, ii 539. See also ii 560, on the chancellor and the praetor, ii 597, on the development of the law of costs: ii 636, on the use of 'decisory oaths'.

<sup>12</sup> Pollock and Maitland, i 152.

<sup>13</sup> Pollock and Maitland, ii 556.

<sup>14</sup> Pollock and Maitland, ii 402.

This was not the habit of simple 'comparativism'. It was comparative law with an aim.

### *The Role of the Spiritual Courts*

It bears repeating that 'Pollock and Maitland' was not meant to be simply the history of English Common Law. It is the history of English law, and English law embraced courts where the *ius commune* was regularly applied. The tribunals of the king were courts of limited jurisdiction, and the regulation of much of human life occurred outside them. Foremost among these other institutions were the courts of the Church, although there were others where the learned laws came to be applied in some measure. The courts of the ancient universities are of course a prominent example. At least from what we know so far, it appears that they were governed by the *ius commune*, although it is hard to speak with assurance about these courts since their records, though not untouched, still await their historian.

Maitland certainly appreciated the role played by the spiritual tribunals in the development of English law. He devoted a not inconsiderable number of his pages to the law of marriage and divorce, to probate jurisdiction, to the 'criminal' jurisdiction of the ecclesiastical courts, and even to the Church's contentious claim to enforce contractual obligations under the rubric of breach of faith. Not only does 'Pollock and Maitland' contain explicit treatment of the sources and nature of both the civil and Canon Laws, it carries them into English legal practice, looking with care at the courts where they were put into effect.

This did not mean that these courts, or the law they enforced, earned uniformly high marks from Maitland. It would be more accurate to say the reverse. They earned low marks. If it is a common failing among historians to admire the things about which they write, or else to write about things they admire, it is a temptation Maitland successfully resisted. The Church's marriage law Maitland described as 'no masterpiece of human wisdom',<sup>15</sup> going on to speak with apparent feeling about the 'incalculable harm done by a marriage law which was a maze of flighty fancies and misapplied logic.'<sup>16</sup> Maitland regarded the separation of chattels from realty that provided the basis for the English Church's jurisdiction over testaments as the product of an 'evil

<sup>15</sup> Pollock and Maitland, ii 368.

<sup>16</sup> Pollock and Maitland, ii 389. See also i 447, speaking of the 'enormous harm' done by the exercise of matrimonial jurisdiction by the Church.

hour'.<sup>17</sup> 'The consequences', he wrote, 'have been evil. We rue them at the present day'.<sup>18</sup> He regarded canonical compurgation, the principal means of proof used within the criminal jurisdiction of the Church as 'little better than a farce' already in the thirteenth century,<sup>19</sup> and he treated the Church's pious request for mercy in the cases of men and women found guilty of heresy and handed over to the secular power for burning with the contempt it so fully deserves.<sup>20</sup> Maitland had little instinctive sympathy towards modern apologies for medieval religion, at least in its legal side. Admiration for the law of the Church did not come easily to him.

Still, if there was little in the way of sympathy or admiration, Maitland had an appreciation of the historical importance of the ecclesiastical courts and the *ius commune* administered within them. He did not ignore the significance of the Church as an influential twelfth-century landholder. Nor should it be forgotten that it was the authority and significance of the Roman Canon Law in England that he vindicated in the celebrated dispute with Bishop Stubbs. The conclusions he drew from that controversy found their way into 'Pollock and Maitland', and as he himself put it, they 'compelled [him] to make some inquiry about the rules that were enforced by the ecclesiastical tribunals in this country.'<sup>21</sup>

### *The Influence of Roman and Canon Laws on the Common Law*

I have now reached the question of the extent to which the Roman and Canon Laws exerted any significant influence upon the course of the English Common Law. It was a contentious question one hundred years ago, and it remains so today. Every serious student admits that there was *some* influence. Maitland wrote, for example, 'The history of law in England, and even the history of English law, could not but be influenced by them.'<sup>22</sup> He ascribed the very name of the English Common Law to the inspiration of the canonists.<sup>23</sup> But that tepid acknowledgement cannot be the end of the matter. The question is

<sup>17</sup> Pollock and Maitland, ii 114-15.

<sup>18</sup> Pollock and Maitland, ii 363. See also i 480, speaking of the inconveniences caused by the ability 'to postpone to an indefinite date' the sentence, this by means of the system of canonical appeals.

<sup>19</sup> Pollock and Maitland, i 443. See also i 447, speaking of the 'invidious and mischievous immunity' of the clerical order.

<sup>20</sup> Pollock and Maitland, ii 545.

<sup>21</sup> *Roman Canon Law in the Church of England* (London, 1898), p. 1.

<sup>22</sup> Pollock and Maitland, i 117.,

<sup>23</sup> Pollock and Maitland, i 176-7.

when and in what areas influence occurred, and how pervasive it proved to be.<sup>24</sup> Particularly troublesome is the need to arrive at a satisfactory evaluation of the use of civilian terminology by English lawyers. This sort of usage is not infrequent in the historical record. But did making use of the words and phrases of the learned laws mean that there was real influence, or simply that the common lawyers were placing a pretty civilian window dressing on law that was *au fond* purely English?

One finds this question oft raised in the literature, and a confident answer one way or the other sometimes given. Going further with what is a difficult problem remains one of the tasks for legal historians of our generation and the future. I myself think it would be well if we were to admit frankly the difficulty of the inquiry, perhaps even of giving up the search for a general conclusion for the moment. Here I speak as one more likely to exaggerate than to ignore the influence of the learned laws. This admission will not resolve the ultimate question; indeed it could retard attempts to answer it. However, it may help us get further into the heads of the lawyers whose habits we are describing and it will help us to understand the various possibilities inherent in the process of transmission of legal ideas from one legal culture to another if we do not reach for an all-or-nothing conclusion. We may better understand the lawyers, better understand the meaning of borrowing vocabulary without necessarily taking over underlying principles of substantive law, if we do not jump quickly for a satisfying conclusion one way or the other.

When one turns back to 'Pollock and Maitland' itself, there are more than a few examples where borrowing from the learned laws is said to have occurred. These instances are noted, perhaps not infrequently, but certainly with regularity. The idea that law could be a true science Maitland attributed to the attractive force of Roman and Canon Laws.<sup>25</sup> The importance of the *exceptio spoli* in the formulation of the assize of novel disseisin is acknowledged, if it is not given great prominence.<sup>26</sup> The influence of Roman legal theory on the English

<sup>24</sup> See Andrew Lewis, 'What Marcellus says is against you: Roman Law and Common Law', in A. D. E. Lewis and D. J. Ibbetson, eds, *The Roman Legal Tradition* (Cambridge, 1994), pp. 199–208.

<sup>25</sup> Pollock and Maitland, i 131–5.

<sup>26</sup> Pollock and Maitland, i 146, ii 48. This connection now seems established; see Mary Cheney, 'Possessio/proprietas in ecclesiastical courts in mid-twelfth-century England', in Garnett and Hudson, *Law and Government*, pp. 245–54; Paul Brand, '“Multis vigiliis excogitatam et inventam”'; Henry II and the creation of the English Common Law', *Haskins Society Journal*, 2 (1990), 196–222; Donald W. Sutherland, *The Assize of Novel Disseisin* (Oxford, 1973), pp. 20–1.



law's grant of rights to the holder of land for a term of years is stated.<sup>27</sup> And the notion that theories drawn from the learned laws or from the Franciscan experience with the Canon Law were influential in the development of the English feoffment to uses is described as 'very possible'.<sup>28</sup> These are but examples, and when one totes them up, it might well be concluded that 'Pollock and Maitland' takes the position that the Roman and Canon Laws had more than a marginal force in the history of English law. All in all, it starts out by looking as though the Roman and Canon Laws must have played a creative part in the law of England.

### The Unimportance of the Learned Laws

A more leisurely consideration of the contents of 'Pollock and Maitland', however, shows that this view requires considerable modification. The role of the Roman and Canon Laws in shaping English law turns out to have been less than the accumulation of the evidence so far presented suggests, and what substantial influence there was turns out also to have been as much by repulsion as by attraction.<sup>29</sup> In other words, as often as not, the Roman and Canon Laws stimulated the English lawyers to develop their own law, but it happened as if from fear or revulsion against the *ius commune*. They wished to ensure that there would be an alternative. It is a little like Maitland's own view of the law administered in the ecclesiastical courts described above. He admitted the possibility of following it, but in the end he found the effect of doing so to have been either repellent or unfortunate. More often than not, he lamented the consequences of following the *ius commune*, where it had been followed. He stressed the necessity felt by the English lawyers for quick reaction to ward off its possible influence, where room for manoeuvre had remained.

<sup>27</sup> Pollock and Maitland, ii 114. See also i 353: borrowing of the action *cessavit per biennium*. He adds, however, 'It is one of the very few English actions that we can trace directly to a foreign model.'

<sup>28</sup> Pollock and Maitland, ii 238. See also ii 171, dealing with the law of bailments.

<sup>29</sup> E.g. Pollock and Maitland, ii 355, where the establishment of freedom of testation is ascribed in part to the attitude that if the opposite rule were upheld in the ecclesiastical courts, this 'was sufficient to convince royal justices and lay lords that something wrong was being done'.

*The Limited Interest in Roman and Canon Laws*

The attitude that Maitland brought to the task of coming to grips with medieval *ius commune* is stated with disarming frankness in the Preface to his *Roman Canon Law in the Church of England*. Speaking about the *History of English Law*, he wrote, 'On pain of leaving the book shamefully incomplete, I was compelled to make an incursion into a region that was unfamiliar to me, namely, that of ecclesiastical jurisprudence.'<sup>30</sup> In my opinion, this statement is becomingly modest and not entirely inaccurate. Maitland was certainly capable of looking at and making use of the texts, the glosses, and the distinctions characteristic of the *ius commune*. He made the incursion. 'Pollock and Maitland' shows this, for example, in its extensive and sophisticated coverage of the Becket controversy, and of course it is what underlay the controversy between Maitland and Bishop Stubbs over the place of the Canon Law in the medieval English Church. At the same time, when Maitland undertook these incursions, he did so not by inclination. He entered most of them either by force of necessity, or else by way of applying the methods of comparative law, which need ascribe no particular importance to the system to which one's own is being compared, other than revealing more about the 'home legal system' than would otherwise be possible.

Maitland himself cannot have been particularly *interested* by the intricacies of the medieval *ius commune*. He took it up, as he said himself, by compulsion, often looking no further than the decretal or *lex* that stated the basic rule. But it was not his favorite reading. He preferred *Bracton* or the Yearbooks. And where overlap in coverage gave him a choice — as in dealing with the legal capacity of monks, the effects of excommunication, or the character of an ecclesiastical pension — he very often eschewed any exploration of the Canon Law in favour of the English Common Law on the subject.<sup>31</sup>

Moreover, when he was obliged to deal with areas outside the purview of the Common Law, Maitland customarily referred to a secondary source wherever there was an adequate treatment in existence. He used these almost (but not quite) to the exclusion of working through the learned laws themselves. Thus the general treatment of Roman and Canon Law in Volume I is drawn almost entirely from J. F. von Schulte's *Die Geschichte der Quellen und Literatur des canonischen Rechts* and some of the English chronicles.<sup>32</sup> The treatment of 'Cor-

<sup>30</sup> *Roman Canon Law in the Church of England*, p. v.

<sup>31</sup> Pollock and Maitland, i 437, 480-1; ii 134-5.

<sup>32</sup> See Pollock and Maitland, i 112 n.3 and pages immediately following.

porations and Churches' relies heavily — perhaps a little too heavily — on Otto von Gierke's *Das deutsche Genossenschaftsrecht*.<sup>33</sup> Except for special situations, 'Pollock and Maitland' rarely takes its readers into the pages of Hostiensis, William Durantis, or even the *glossa ordinaria*.<sup>34</sup>

For the most part, reliance on secondary sources caused no harm. Von Schulte's work is reliable. And who could write anything if he did not make use of the work of others? But there are places in 'Pollock and Maitland' where a more first-hand exploration of the *ius commune* would have been useful. Maitland's treatment of the law of last wills and testaments relied very heavily on what he termed 'an intense and holy horror of intestacy'.<sup>35</sup> The evidence adduced to show that horror comes from a few monastic chronicles, rather than from the Canon or Roman Law on the point, and this limitation gives a one-sidedness to the book's presentation of the jurisdictional boundaries reached in England. A more balanced view of the subject of intestacy, one that comes easily from examining the learned laws themselves, would, I think, have improved the pages in 'Pollock and Maitland' on the subject. The same can be said of the treatment of ecclesiastical offenses. Little is said in it about any offense save heresy. No reference at all is made to the abundant literature of the *ius commune* that deals with crime and criminal procedure.<sup>36</sup>

### *The Absence of Significant Influence*

I noted a minute ago that 'Pollock and Maitland' makes room for the possibility of influence running from the learned laws to the English Common Law. This was but half of an adequate description, and perhaps it was the lesser half. When one examines the characterization of that influence most often found in 'Pollock and Maitland', one quickly sees that it did not amount to much at bottom. Thus the influence of the *ius commune* on the English law of contract is described as 'but superficial and transient'.<sup>37</sup> Importation of law from

<sup>33</sup> Pollock and Maitland, i 486 n. 1 and pages immediately following. I say too heavily because some of the legal principles of the learned laws were actually less mysterious than an English speaking reader gathers from reading Gierke's text. See also i 124, on the law of jurisdiction, citing Paul Hinschius, *Die Kirchenrecht der Katholiken und Protestanten in Deutschland* (1896-97); ii 67, 137, on the canon law of possession, citing Carl Bruns, *Das Recht des Besitzes im Mittelalter und in der Gegenwart* (1848); the work was reprinted in 1965.

<sup>34</sup> Special situations: Pollock and Maitland, ii 195 n. 2 (Hostiensis on contract); ii 336 n. 2 (Durantis on executors).

<sup>35</sup> Pollock and Maitland, ii 356, 326.

<sup>36</sup> Pollock and Maitland, ii 543-57.

<sup>37</sup> Pollock and Maitland, ii 193.

without is described as 'rare'.<sup>38</sup> Already in the time of *Bracton*, any Romanist influence there may once have been in England was already 'on the wane',<sup>39</sup> and where (as in the case of the possessory assizes) there is acknowledged influence, English law has acted on the remedy 'very speedily [to make] it her own'.<sup>40</sup> Between the English and the Continental laws, there had come to be what Maitland called 'an unfathomable gulf' by the time that *Bracton's* treatise had assumed its final form.<sup>41</sup>

Above all, except as a stimulus to formulation of the Common Law, there was an abiding lack of interest in Roman and Canon Laws among English lawyers. Their habitual lack of training in University law faculties is crucial. Their education in the Inns of Courts marks them off irretrievably from their Continental brethren. Even when the English common lawyer quoted a canonical maxim, in Maitland's view, more likely than not the English lawyer was 'profoundly ignorant' of its source.<sup>42</sup> What is added to this statement by the word 'profoundly', I cannot say. But I am sure that the lawyer who emerges from the pages of 'Pollock and Maitland' is a man not much interested in legal theory, and particularly uninterested in any theory drawn from the learned laws. By the reign of Edward I, it could be said that the common lawyers — at least most of them — 'know nothing of any system but their own'.<sup>43</sup>

### *The Language of Contest*

A striking impression in re-reading the pages of 'Pollock and Maitland', at least for me, has been the prevalence of images of conflict in the descriptions of the relationship between the learned laws and the English Common Law. The smell of something very like a battle rises from the pages. Or perhaps it is a quasi-Darwinian struggle for survival. It is at any rate a contest for mastery within the law of England, and it was being fought between the English law and the massed forces of the *ius commune*. The conflict was all the sharper for the attractiveness

<sup>38</sup> Pollock and Maitland, i 134.

<sup>39</sup> Pollock and Maitland, i 218.

<sup>40</sup> Pollock and Maitland, ii 48. See also ii 571: 'After a brief attempt to be Roman our law falls back into old Germanic habits'.

<sup>41</sup> Pollock and Maitland, ii 561, speaking of procedure and the forms of action. See also ii 6 n. 1: Roman terminology related to land 'quite alien to the spirit of English law'; ii 197: 'But, before the thirteenth century was out, both Roman and canon law had lost their power to control the development of English temporal law'.

<sup>42</sup> Pollock and Maitland, i 218. See also ii 297.

<sup>43</sup> Pollock and Maitland, i 225.

of the Roman Law half of the *ius commune*. Like the Lorelei, Romanism had the power to enchant. But its siren song led in the end to the rocks.<sup>44</sup>

The example of Germany stood behind this view of the relationship between the law of England and that of Rome. The possibility of a wholesale 'Reception' of Roman Law, displacing native law with something more sophisticated and worse, was a very real one for Maitland. It had happened elsewhere. He had it very much in his mind in the Rede Lectures of 1901,<sup>45</sup> and it served as something like a leitmotiv in the *History of English Law* itself. The same thing could have happened in England. In the twelfth and thirteenth centuries, the *ius commune* was at the gate. There was a real possibility that it would be allowed to win its way inside.

The picture is that of a continuing struggle. The relationship between the courts where the *ius commune* held sway, the courts of the Church, is customarily put in terms of a contest between two rival powers.<sup>46</sup> After the dispute between Becket and Henry II over the treatment of criminous clerks, the king is said to be still 'in possession of the greater part of the field of battle'.<sup>47</sup> Where there is agreement, it is the result of 'a concordat' between rival combatants.<sup>48</sup> Where there is no agreement, there always remains a 'border-land that might be more or less plausibly fought for'.<sup>49</sup> The Romano-canonical procedure is the 'one great rival' to that of trial by jury,<sup>50</sup> and engagement with it had led to 'a perilous moment' for English forces.<sup>51</sup>

At the end of the day, the 'peril' was averted and the enemy kept outside the gates. Although, as Maitland put it, 'the escape was narrow',

<sup>44</sup> Maitland was not alone in this view; see James Q. Whitman, 'The disease of Roman Law: a century later', in *Syracuse Journal of International Law and Commerce*, 20 (1994), 227-34. See also the description in Kenneth Pennington, 'Learned Law, Droit Savant, Gelehrtes Recht: the tyranny of a concept', *Rivista internazionale di diritto commune*, 5 (1995), 199-200.

<sup>45</sup> 'English Law and the Renaissance', reprinted in *Select Essays in Anglo-American Legal History* (Boston, 1907), i 168-207, and also, without most of the footnotes, in Helen M. Cam, ed., *Selected Historical Essays of F. W. Maitland* (Cambridge, 1957), 135-51.

<sup>46</sup> E.g. Pollock and Maitland, i 132: 'opposition' between the two systems; i 241: 'severe struggle' over land held by spiritual tenure; ii 198: 'Struggle between ecclesiastical and temporal justice' in law of contracts; ii 333: 'Victory of the Church courts' in questions of testamentary succession; ii 429: 'struggle' between temporal and spiritual courts over married women's power of testation.

<sup>47</sup> Pollock and Maitland, i 125. See also ii 200, speaking of ecclesiastical 'retaliation' for use of writs of prohibition.

<sup>48</sup> Pollock and Maitland, ii 333. See also ii 201: 'Both parties were in their turn aggressors.'

<sup>49</sup> Pollock and Maitland, ii 198. See also i 127: 'border warfare' over tithes; i 479: 'always a brisk border warfare simmering'.

<sup>50</sup> Pollock and Maitland, ii 656. See also ii 639, where it is said that the *ius commune* 'for the moment . . . gains a foothold'.

<sup>51</sup> Pollock and Maitland, ii 673.

escape there was.<sup>52</sup> And it had happened by the reign of Edward I. This was one reason Maitland felt secure in covering only the history of English law up to that date. He regarded the period between *Glanvill* and *Bracton* as the critical moment in English legal history. It was during this time that the common lawyers developed the law of their country sufficiently so that it could withstand, both then and afterwards, any threat of a reception of the *ius commune*. The presence of the Canon and Roman Laws, menacing and seductive in turn, and the struggle for mastery over English legal institutions, had led the English lawyers to formulate their own law. They did so well enough that their law would withstand all assaults from without. 'It is,' Maitland wrote, 'in opposition to "the canons and Roman laws" that English law "becomes conscious of its own existence"'.<sup>53</sup>

Repulsion is (or at least may be) as fruitful as adulation, and the contest between systems, the younger taking only enough from the elder to make its own position impregnable, decided the fate of English law. This is the reason that, when the question is fully considered, there is no real contradiction between the importance and the unimportance of the *ius commune* in 'Pollock and Maitland'. The learned laws played a significant role, but there was more stimulation than imitation in it. With English law, there was not to be 'dictation from without'.<sup>54</sup>

### Maitland and the *ius commune*

This has been a summary of the role of the *ius commune* found in 'Pollock and Maitland'. I turn now to the subject of how it all looks in hindsight, and in particular to the question of how Maitland's understanding of the *ius commune* stands up in light of what has been learned in the one hundred years since he wrote. In most of its particulars, my conclusion is that it stands up very well. As a guide to the nature of the *ius commune* itself, however, I think it has proved less trustworthy.

### *Advances and Alterations in Scholarship*

It would be surprising, indeed it would be astounding, if there had been no advances in our knowledge about the subjects covered in 'Pollock and Maitland' and if these advances had not overthrown some of the conclusions in it. After reviewing them, however, one must be

<sup>52</sup> Pollock and Maitland, ii 658.

<sup>53</sup> Pollock and Maitland, i 131.

<sup>54</sup> Pollock and Maitland, i 135.

struck by how few there turn out to have been. One is surprised, moreover, by how often it has happened that what can have been no more than guesses on Maitland's part have turned out to be right, now that we know more.

For example, thanks to the labours of Professor Stein, Sir Richard Southern and others, we are now better informed about Vacarius and the *Liber pauperum* than Maitland was.<sup>55</sup> It seems that Vacarius did not actually teach in Oxford, for no law school existed there at the time, and that he was as concerned with the jurisdiction exercised in the ecclesiastical courts as with the academic side of Roman Law. When one looks at the treatment in 'Pollock and Maitland', however, it is notable how cautious Maitland was on these points.<sup>56</sup> There is very little to fault in his words. We now also know, thanks to the efforts of Dr Duggan, Professor Kuttner and others, that the high percentage of English decretals found in the *Decretales Gregorii IX* had nothing to do with papal policy or the need to bring England into obedience to the papacy, but rather with the prominence of English canonists among those who did the work of collecting papal decretals.<sup>57</sup> Again, however, Maitland expressed his conclusions on this score with caution, and in neither case was he relying on his own research.

In at least one instance where Maitland had himself looked into the details of the *ius commune*, that of Henry II's position under the Canon Law in his dispute with Thomas Becket over the trial of criminous clerks, the conclusions to which Maitland was drawn looked a few years ago to have been entirely overthrown.<sup>58</sup> Today, however, in light of further research, it appears that Maitland was pretty much correct after all.<sup>59</sup> Henry II seems to have

<sup>55</sup> See R. W. Southern, 'Master Vacarius and the beginning of an English academic tradition', in J. Alexander and M. Gibson, eds, *Medieval Learning and Literature: Essays for R. W. Hunt*, (Oxford, 1976), pp. 257–86; Francis de Zulueta and Peter Stein, *The Teaching of Roman Law in England around 1200* (Selden Soc. Supplementary Series, 8, 1990).

<sup>56</sup> Pollock and Maitland, i 118–19.

<sup>57</sup> Pollock and Maitland, i 115. Compare Charles Duggan, *Twelfth-century Decretal Collections and their Importance in English History* (London, 1963); and see also Stephan Kuttner and Eleanor Rathbone, 'Anglo-Norman Canonists of the twelfth century', *Traditio*, 7 (1951), 279–358; Peter Landau, 'Die Entstehung der systematischen Dekretalensammlungen und die europäische Kanonistik des 12. Jahrhunderts', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, kan. Abt. 65 (1979), 127–32; Mary G. Cheney, *Roger, Bishop of Worcester 1164–1179: an English Bishop in the Age of Becket* (Oxford, 1980), pp. 197–208.

<sup>58</sup> Charles Duggan, 'The Becket dispute and the criminous clerks', *BIHR*, 35 (1962), 1–28, reprinted in *Canon Law in Medieval England* (London, 1982), No. X.

<sup>59</sup> Richard Fraher, 'The Becket dispute and two decretist traditions', *JMH*, 4 (1978), 347–68; Dr Duggan's rejoinder (*Canon Law*, cited in previous note, Addenda, p. 6), to the effect that 'Fraher attaches insufficient importance to the Church's discretionary rights in applying or denying permissible procedures', unfortunately does nothing to restore his side of the argument.

had the better of the canonical argument, just as Maitland had originally concluded.<sup>60</sup>

Probably the greatest advances that have taken place since 1895 in the study of the place of the learned laws in England have come from the exploration of the records of the ecclesiastical courts. Maitland knew of the existence of these records. He urged that they be explored.<sup>61</sup> He made surmises about what they might contain. He expressed conclusions with the express proviso that they might be proved wrong by such future exploration. As it turned out, most of his surmises have not in fact been proved wrong by examination of the records. They have been proved right. He supposed, for example, that uses might first have been enforced in the ecclesiastical courts. The records show that they were so enforced,<sup>62</sup> at least in some dioceses, though for reasons that seem quite incoherent to me the most recent book that deals with the subject has seen fit to treat that enforcement as inconsequential.<sup>63</sup> Similarly, Maitland guessed that 'probably the ecclesiastical courts did something' to provide guardianship protection for children,<sup>64</sup> and indeed that guess proves to have been the fact.<sup>65</sup> His surmise about the absence of causes involving *miserables personae* from the English ecclesiastical court records has also proved correct.<sup>66</sup> It is true that Maitland underestimated the staying power of ecclesiasti-

<sup>60</sup>The argument is found in 'Henry II and the criminous clerks', in his *Roman Canon Law in the Church of England*, pp. 132-47.

<sup>61</sup>E.g. Pollock and Maitland, ii 352, relating to the children's right to legitim.

<sup>62</sup>See my 'The early enforcement of uses', in *Canon Law and the Law of England* (London, 1987), 341-53.

<sup>63</sup>Robert C. Palmer, *English Law in the Age of the Black Death: a Transformation of Governance and Law* (Chapel Hill, N. C., 1993), pp. 111-16. The enforcement of uses is found only in the ecclesiastical records for the dioceses of Canterbury and Rochester. The question of what this means is raised because no regular runs of act books survive from other dioceses during the fourteenth century. Palmer maintains that 'uses were not usually frequent in Kent', and that it follows that the article's conclusion that ecclesiastical courts enforced feoffments to uses before the Chancery began to do so must be rejected. It is difficult to follow the argument. As a matter of logic, the exact opposite conclusion seems to follow from his premise. If uses were infrequent in one area and if records mentioning them survived in that area but not elsewhere, this would suggest that there were probably more cases of enforcement where uses were more frequent, but that we cannot discover them because of the failure of records to survive from those areas. I would not myself put great faith in deductive reasoning in an area like this, but the logic of the argument that the appearance of uses in ecclesiastical records from dioceses in counties where uses were not frequent means that we can disregard the evidence of their enforcement in the ecclesiastical forum altogether eludes me.

<sup>64</sup>Pollock and Maitland, ii 444.

<sup>65</sup>I have tried to present this evidence in 'The Roman Law of guardianship in England, 1300-1600', in my *Canon Law and the Law of England*, pp. 211-45.

<sup>66</sup>Pollock and Maitland, i 131.



cal jurisdiction in dealing with sworn contracts and testamentary debts.<sup>67</sup> In fact, the records show that these sources of ecclesiastical jurisdiction flourished well into the fifteenth century.<sup>68</sup> Overall, however, it is remarkable how few such factual corrections there are to be made in the account found in 'Pollock and Maitland'. Most of his surmises have been confirmed by the records.

It should also be said that there has since been scholarly opinion opposed to some of Maitland's conclusions, particularly about the law of the Church. Maitland saved some of his harshest judgments for the laws of marriage, testamentary succession, and criminal procedure administered by the Church. In each case, the medieval Church has found its modern defenders. Some of this seems a little extreme, even to one of those defenders. It is being asserted today, for instance, that in developing legal protection of the rights of criminal defendants, the courts of the Roman Inquisition were in the van.<sup>69</sup> Most of the disagreements, however, seem to me to come down to questions of personal opinion rather than provable facts, or even reasonably clear inference. My own views do differ from those of Maitland in some particulars, but I could not with any confidence charge him with error on that account. Why should anyone prefer my prejudices to his? Besides, his opinions have stimulated work on many occasions, and not for me alone. They make for good reading, and they are a spur to research. I shall omit discussion of my own opinions.

### *The Question of Influence from the ius commune*

It is difficult to say a great deal about developments related to the question of the extent to which Roman and Canon Laws influenced the English Common Law. In some ways the question stands today only slightly removed from where it stood one hundred years ago. On the one side, some scholars treat the notion that English law developed largely in isolation from Continental law as 'a myth'.<sup>70</sup> Others see structural differences so fundamental that it remains right to speak of a fundamental and continuing division of European law into two camps,

<sup>67</sup> Pollock and Maitland, ii 343, 346.

<sup>68</sup> Brian Woodcock, *Medieval Ecclesiastical Courts in the Diocese of Canterbury* (Oxford, 1952), p. 84.

<sup>69</sup> See e.g. John Tedeschi, 'Introduction', *The Prosecution of Heresy: Collected Studies of the Inquisition in Early Modern Italy* (Binghamton, N. Y., 1991).

<sup>70</sup> E.g. Reinhard Zimmermann, 'Civil Code or Civil Law? — Towards a new European private law', in *Syracuse Journal of International Law and Commerce*, 20 (1994), 220.

and that the English camp was isolated from the Continental.<sup>71</sup> Now, as at the time Maitland wrote, all serious scholars admit that influence occurred, but they are not agreed about how extensive it was, at what periods it was at its strongest, and at what levels it operated. About recent developments, two observations having to do with changes in the scholarly position over the past hundred years seem worth making. They work in opposite directions.

First, as pointed out by a perceptive young Spaniard, the view that there were continuing connections between English and European laws is more likely to be held by Continental scholars and by North Americans than by English historians.<sup>72</sup> There are exceptions to this statement, as he himself admits, but it seems to be as sound as most such generalizations. The result is that today there is more scholarship devoted to showing the connections, simply because more European scholars are interesting themselves in the law of England. To this extent there has been movement towards ascribing a greater fundamental importance to the *ius commune* than was true for Pollock and Maitland.

However, there is also a 'counter-trend'. Seeing legal development as a product of small, and often unintended, changes resulting from choices made by lawyers in the immediate interests of their clients, a view most persuasively expressed by Professor Milsom, has pushed historiography on this subject in the opposite direction. If legal change is driven chiefly by practitioners, not by treatise writers or large thinkers, and if Bracton's treatise is the learned exception rather than the faithful depiction of English medieval law, then it must seem less likely that the Roman and Canon Laws have influenced the course of the Common Law. It is hard to envision the humble drafter of pleadings with Accursius at his elbow. To this extent, there is less room in the historiography of English law today for the *ius commune* than there was at the time of 'Pollock and Maitland' itself.

### *Maitland's View of the ius commune*

If these questions have not reached a satisfactory conclusion and can only be mentioned on that account, there is nonetheless good reason to dwell upon developments relating to Maitland's more general depiction

<sup>71</sup> See e.g. R. C. van Caenegem, *The Birth of the English Common Law* (Cambridge, 1973), p. 105, arguing that: 'England became an island in the Romanist sea', and that its law was 'a freak in the history of western civilization'.

<sup>72</sup> Javier Martínez-Torrón, *Derecho Angloamericano y derecho canónico. Las raíces canónicas de la 'common law'* (Madrid, 1991), p. 37. See e.g. Michele Graziadei, 'Il patto e il dolo', in *Scritti in onore de Rodolfo Sacco*, Paolo Cendon ed. vol. 1 (Milan, 1994), pp. 589-612.

of the nature of the Canon Law. It is here that his work on the learned laws is commonly cited today. The fullest expression of his views on this subject is found in *Roman Canon Law in the Church of England*, rather than in *The History of English Law* itself, but the subject is taken up in both. It calls for remark and somewhat more detailed exploration.

It has just been noted that Maitland's personal excursions into the learned laws were occasional and not prolonged. He was capable of working through the *ius commune*, but he himself claimed no more than to having put his toe into the vast ocean of Continental legal learning. This is true, but coming from a self-professed wader, some of his comments seem remarkably shrewd a hundred years on. For instance, the seemingly off-hand remark that 'to the canonist there was nothing so sacred that it might not be expressed in definite rules', pithily describes one of the Canon Law's most salient features.<sup>73</sup> The canonists did enter into the most detailed, and private areas of human life, attempting to guide the users of the law if they could not coerce them. Similar is Maitland's remark about the canonical impediments to marriage — that they were the work of men who were 'reckless of mundane consequences'.<sup>74</sup> This captures an important truth about the canonists. They began not with practical consequence, but with divine law and established texts. They did not adopt a utilitarian, still less a 'person-centred' view of the law. It was men's responsibility to adjust their behaviour to fit legal norms, not the legislator's responsibility to adjust the law to promote human happiness.<sup>75</sup>

Having said this, however, one must also say that his overall view of the subject suffers from his not having gone deeper and that this omission affected his side in the famous, and sometimes exaggerated, dispute with Bishop Stubbs about the nature of legal relations between England and the Papacy during the period. The question was whether the English Church enforced papal decretals as 'binding statute law' during the middle ages. Stubbs had written that although the decretals were regarded 'as of great authority in England', they were 'not held to be binding on the courts'.<sup>76</sup>

In Maitland's opinion this was flat wrong. The papal law books were treated as 'binding statute law' by the spiritual courts in medieval England. He made appropriate reservations for simple ignorance at the lowest levels of ecclesiastical administration, but otherwise he held

<sup>73</sup> Pollock and Maitland, ii 436.

<sup>74</sup> Pollock and Maitland, ii 385.

<sup>75</sup> Georg May and Anna Egler, *Einführung in die kirchenrechtliche Methode* (Regensburg, 1986), pp. 14–15.

<sup>76</sup> *Report of the Ecclesiastical Courts Commission* (London, 1883), p. xviii.

that the only situations in which the spiritual tribunals in England ignored the papal law-books were cases where the 'strong hand of the king' prevented them from doing so. The law of advowsons, the canonical *ius patronatus*, and the rules about bastardy after the Council of Merton were typical examples where this had happened, but apart from these instances, the ecclesiastical courts followed the law of the papal decretals as a modern court follows a statute enacted by king and Parliament.

In my view, Maitland's treatment gives a misleading impression of the nature of the *ius commune*. The papal decretals were not then treated as 'binding statutes' — not by the popes who promulgated them, not by the medieval canonists, and even less so in the working world of the spiritual courts.<sup>77</sup> *The stylus curiae* had a place in canonical practice that must be reckoned with in any full description of the law. And familiarity with the work of the canonists dispels the clarity of Maitland's depiction of an ordered statutory regime.

To take only the clearest example from England, a papal decretal required the presence of two witnesses and the parish priest to sustain the validity of a last will and testament.<sup>78</sup> English practice, however, routinely sanctioned wills proved by two witnesses, and often even less.<sup>79</sup> Similarly, papal decretals relating to minor excommunication,<sup>80</sup> the specific enforcement of espousals by *verba de futuro*,<sup>81</sup> and the availability of a canonical *restitutio in integrum*,<sup>82</sup> seem not to have

<sup>77</sup> See Charles Donahue, Jr., 'Roman Canon Law in the medieval English Church: Stubbs vs. Maitland re-examined after 75 years in the light of some records from the Church courts', *Michigan L. Rev.*, 72 (1972), 647–716.

<sup>78</sup> X 3.26.10, 11.

<sup>79</sup> Probate 'in common form' required no witnesses at all, and if this be regarded as resting simply on the absence of contest, the movement was clearly away from requiring the presence of a priest. See also in my 'The origin of holographic wills in English law', *Journal of Legal History*, 15 (1994), 97–108.

<sup>80</sup> Only major excommunication and suspension *ab ingressu ecclesie*, a form of personal interdict, seem to have been applied in medieval practice. It is not yet clear whether this was an English peculiarity; see also the comment to this effect by Panormitanus, *Commentaria in Decretalium libros* (Venice, 1617), ad X 5.39. pr. no. 3.

<sup>81</sup> X 4.1.10; contrast X 4.1.17. Practice in the ecclesiastical courts seems also to have varied. See Rudolf Weigand, 'Die Rechtsprechung des Regensburger Gerichts in Ehesachen', in *Leibe und Ehe im Mittelalter* (Goldbach, 1993), p. 286; such sentences cannot be found in the English records.

<sup>82</sup> X 1.41.1, allowing a church to invoke the privilege of restitution. The remedy was apparently restricted to English practice to permitting the introduction of evidence or legal argument after the proper term of introduction has passed. E.g. Snow c. Wood (Lichfield, 1465), Jt. Rec. Office, Lichfield, Act book B/C/1/1, f.9, in which the judge 'restituit dictum Thomam ad terminum tercii productionis'. See also a fifteenth-century English formulary, British Library MS. Harl. 3378, fols. 92v–94, the only relevant form included being a 'Petitio in integrum restitutionis per quam pars possit producere testes postquam conclusum fuerit in causa'.

been put into use in medieval England. In these matters, there was no impediment placed in the way of the ecclesiastical courts by the 'strong hand' of the king. No writ of prohibition lay. But the records of the ecclesiastical courts show that these decretals were not applied in practice.

It is unfortunate in this regard that Maitland devoted such a large portion of his investigation to William Lyndwood's *Provinciale*.<sup>83</sup> It must have seemed a reasonable enough choice — Lyndwood's subject was the law of the English provincial constitutions. However, in fact, it turns out that it was not the best choice. As a remarkable article by Brian Ferme has recently shown in dealing with the law of testaments and probate administration, Lyndwood's *thèse de prédilection* was the harmonization of English practice with the *ius commune*.<sup>84</sup> To have laid any weight upon the places where there was divergence between papal law and local custom would have subverted this theme, and Lyndwood did not do it.

I do not mean to suggest that there was anything anti-papal in the habits of the medieval English Church. There was not. Canonists were able to assert in one breath that the pope's legal opinion was superior to that of all bishops together, then in the next, that papal decretals might give way to contrary, legitimate usages.<sup>85</sup> Nor was there anything unique about the English position. Churches in other parts of Europe stood in a similar position. A recent study of the church of Toulouse, for instance, speaks similarly of 'une certaine originalité' in its legal practice when compared with the texts of the Canon Law.<sup>86</sup> The reality is that the medieval *ius commune* admitted a greater latitude of interpretation by the jurists and a greater role for customary practice by the courts than is compatible with the regime of papal legislative sovereignty that Maitland carried into his famous dispute with Stubbs.

Further examples from the Canon Law itself are not hard to find. A papal decretal specifically reserved to the Roman church all interpretations of papal privileges. However, by the time the canonists were finished glossing this decretal, the rule it stated had been so limited as

<sup>83</sup> See *Letters*, i nos. 168, 179.

<sup>84</sup> 'The testamentary executor in Lyndwood's *Provinciale*', *The Jurist*, 49 (1989), 677.

<sup>85</sup> See *gl. ord. ad Decretum Gratiani*, Dist. 4, c. 3 and d.p. id.

<sup>86</sup> E.g. Jean-Louis Gazzaniga, 'Droit et pratique: notes sur les décisions de la Chapelle toulousaine', in *L'Église et le droit dans le Midi (XIIIe-XIVe siècle)* (Cahiers de Fanjeaux 29) (Fanjeaux 1994), p. 332; and p. 325, where the author discusses and gives further examples of 'le particularisme toulousain'. See also Anne Lefebvre-Teillard, *Les officialités à la veille du Concile de Trente* (Paris, 1973), pp. 87-9.

to make its application in practice an extraordinary situation.<sup>87</sup> To have read the decretal as a 'binding statute' would have hindered the doing of justice in hundreds of quite ordinary disputes, and the canonists recognized the possibility. They also met it, exercising a freedom in treating the decretal which allowed them to avoid this unfortunate, though apparently statutorily required, result. It is thus not startling to find the frank comment of a canonist beside a papal decretal: 'Sed hoc non servatur'.<sup>88</sup>

This feature is observable with particular clarity in the Canon Law relating to custom. The validity of a custom contrary to the *ius commune* of the Church was measured not by whether it contradicted a statute or a papal decretal.<sup>89</sup> It was measured instead by two tests: first, by whether or not it conformed to reason and natural law; and second, by whether it met the tests of valid prescription, principally long usage and acceptance by the people affected by it. Thus the Canon Law left room for a *consuetudo praeter ius* and even for a *consuetudo contra ius*. Panormitanus commented, for example, 'Note that the constitution of a Pope does not extend to those who have a contrary custom.'<sup>90</sup> He meant, of course, a valid custom, and one not specifically condemned by the papal constitution. The Canon Law was concerned principally with ensuring that customs did not sanction wrongful conduct, interfere with the Church's system of government, or induce *periculum animae* among those subject to the law. In other words, the test of validity was not whether or not the custom was consistent with an existing statute or papal decretal, but whether it conformed to tests of reason and legitimacy that had little to do with the tenets of legislative sovereignty.<sup>91</sup>

There were seeds of a more rigorous and hierarchical attitude towards custom contained in some of the texts of the classical Canon

<sup>87</sup> This was true from an early date: see e.g. Hostiensis, *Lectura in libros Decretalium* ad X 2.1.12, nos. 4-7. See also Kenneth Pennington, *Pope and Bishops: the Papal Monarchy in the Twelfth and Thirteenth Centuries* (Philadelphia, Pa., 1984), pp. 154-89.

<sup>88</sup> *Gl. ord.* ad X 2.7.1., s.v. *inconsulto*. The decretal required a bishop to have recourse to the supreme pontiff before swearing the oath *de calumnia*.

<sup>89</sup> See DD ad X 1.4.11; see Alain Sériaux, 'Réflexions sur le pouvoir normatif de la coutume en droit canonique', *Droits: Revue française de théorie juridique*, 3 (1986), 63-7; Udo Wolter, 'Die "consuetudo" im kanonischen Recht bis zum Ende des 13. Jahrhunderts', in Gerhard Dilcher et al., eds, *Gewohnheitsrecht und Rechtsgewohnheiten im Mittelalter* (Berlin, 1992), pp. 104-14.

<sup>90</sup> *Commentaria ad libros Decretalium* (Venice, 1617), ad X 3.42.1, no. 7: 'Et sic bene et singulariter nota quod constitutio papae non extenditur ad alios habentes consuetudinem contrariam'. The text involved had to do with baptismal customs.

<sup>91</sup> See Peter Leisching, 'Prolegomena zum Begriff der ratio in der Kanonistik', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (kan. Abt.)*, 72 (1986), 329-37.

Law.<sup>92</sup> In the sixteenth century, attempts were made to bring the wide scope that had long been afforded to customary practices within such a regime of legislative supremacy, by asserting that the custom obtained its *vis legis* by virtue of the consent, or at least the acquiescence, of the legislator. In these terms the formal *causa* of the custom's force could be said to be the will of the papal legislator. But the fit was never perfect, opinion was never unanimous, and it reads the medieval evidence anachronistically to suppose that this way of looking at things had been the point of departure for the medieval law.<sup>93</sup>

The situation in later canonistic thought was in fact something like the mirror image of the argument that the Canon Law was received in England only because it had the sanction of the king. The argument may be said to contain a good deal of truth in the climate of the late sixteenth century, but it is not an accurate portrayal of the medieval law. The disagreement between Stubbs and Maitland, as it seems to me, was carried on without recognizing this characteristic of the medieval Canon Law. It was conducted with the anachronistic assumption that the medieval *ius commune* fit the juristic tenets of legal positivism, or at any rate those of the Council of Trent. On this account it continues to mislead, and Maitland's clear victory in the dispute with Stubbs has hindered us from seeing the *ius commune* as it actually was.

To repeat, it is widely assumed today that Maitland had much the better of the argument, and that his refutation of the claims of the Church of England showed him at his best as an historian.<sup>94</sup> The first half of this statement is correct, although it is wrong to dismiss Stubbs' views as harshly as is sometimes done.<sup>95</sup> However, the second half is not. The relations between the papal lawgiver and his subjects, clerical or lay, did not fit the system of legislative sovereignty that

<sup>92</sup> E.g. *gl. ord.* ad Dist. 4 c. 3: 'Dicas quod sententia Papae praevalet ut [C. 35 q. 9 c. 5], nam etiam error principis legem facit.' And see *gl. ord.* ad. d. p. c. 3 s.v. *abrogatae*: 'Sed credo quod consuetudo rationabilis et praescripta tollat leges, ut [X 1.4.11] etiam sine scientia principis; difficile enim esset eum omnes consuetudines quae servantur scire.' See also *gl. ord.* ad Dist. 12 d. a. c. 1 s.v. *et minores*.

<sup>93</sup> Perhaps the best example would be in the law of tithes, where in order to fit ecclesiastical court practice to the strict model of the Canon Law, it would have to be said that the popes had tacitly approved a great many customs contrary to the law, when in fact the medieval popes had condemned most of them. See e.g. Gene A. Brucker, 'Ecclesiastical courts in fifteenth-century Florence and Fiesole', *Mediaeval Studies*, 53 (1991), 248-9; A. G. Little, 'Personal tithes', *EHR*, 60 (1945), 67-88.

<sup>94</sup> Elton, *Maitland*, pp. 69-79.

<sup>95</sup> For recognition of the merits of his side, see Dorothy M. Owen, *The Medieval Canon Law: Teaching, Literature and Transmission* (Cambridge, 1990), p. 64; E. W. Kemp, *An Introduction to Canon Law in the Church of England*, (London, 1957), pp. 30-2; J. W. Gray, 'Canon Law in England: some reflections on the Stubbs-Maitland controversy', *Studies in Church History*, 3 (1966), 48-68.

Maitland assumed.<sup>96</sup> Some decretals were treated that way. Some were not. The *ius commune* permitted a degree of uncertainty, of 'flexibility' if you like, about the law that ill accords with a regime of 'binding statute law'.<sup>97</sup> In a real sense the question put at issue in the Stubbs-Maitland dispute seems to me to have been a *question mal posée*.

In this assertion I am very conscious of being out of step with a strong and learned tradition in English historiography. It is revealing, for example, that the Festschrift published by the Cambridge University Press in honour of the teacher who has done most to interest English scholars in the canon law was called *Authority and Power*.<sup>98</sup> The title was well chosen. The law of the Church is described in Walter Ullmann's work as the exercise of sovereign power. That was his theme. And it certainly is part of the story. But it is not the whole story. And overall, it seems to me misleading to treat the law and literature of the *ius commune* in terms primarily of the exercise of power. The 'descending theory of government' is incompatible with a system of law that allowed so much authority to the opinions of jurists and such a large role to customary rights of jurisdiction. The exercise of authority there was, but laying single-minded stress upon it may easily obscure the character of the learned laws.

## The Future

It is time to conclude. I do so with a word about the future, and it will be brief. The question is whether 'Pollock and Maitland' after one hundred years has retained the ability to inspire, and by now it must be clear that I believe it does. Although amended in details, augmented in parts, and replaced in spots, and although deficient (at least by my lights) in its understanding of the inner nature of the *ius commune*, 'Pollock and Maitland' remains the best overall treatment of the place of the learned laws in medieval England. It is the volume scholars still turn to for guidance and inspiration. My prediction is that it will continue to do so for the immediate future, and that research will continue along present lines — that is, by beginning with 'Pollock and

<sup>96</sup>The canonistic developments are well summarized in Peter Landau, 'Neuere Forschungen zu Quellen und Institutionem des klassischen kanonischen Rechts bis zum Liber Sextus: Ergebnisse und Zukunftsperspektiven', *Proceedings of the Seventh International Congress of Medieval Canon Law*, (1988), 36–47.

<sup>97</sup>See the pertinent remarks, with supporting references, by Laurent Mayali, in *Rechtshistorisches Journal*, 10 (1991), 81–3.

<sup>98</sup>Brian Tierney and Peter Linehan, eds., *Authority and Power: Studies on Medieval Law and Government presented to Walter Ullmann on his Seventieth Birthday* (Cambridge, 1980).



Maitland' and seeking to assess its conclusions in light of further exploration of court records and the learned laws.

In my own view, the second of these is actually more urgent than the first. We have made good progress in the archives. However, on the ecclesiastical side of the fence at least, legal and administrative history is very often being written from the records alone. I do not mean to disparage the fruits of that research. I have presented some of it myself. However, treatment of many subjects — benefit of clergy for example — would be improved by examination of the formal Canon Law of these subjects.<sup>99</sup>

A German writer has said that, in comparison with the study of the academic law, in Continental scholarship, investigation of ecclesiastical court records is something of a 'step-child'.<sup>100</sup> Legal doctrine absorbs the bulk of the Germans' attention. In the field of English history, something like the reverse has been true. The history of the Church's institutions is often described without any reference to the Canon and Roman Laws. The balance needs to be redressed, in my view, and for this the example of Maitland's work provides a spur. Maitland made the excursion into the law of the Church, even if it was one he made grudgingly. He regarded it as alien territory for an English lawyer, and perhaps it was. But he surveyed it in a way that still impresses. Over the years, 'Pollock and Maitland' has proved to have a great power — both a staying power and an inspiring power. On this view of things, it still has some inspiration left to impart.

<sup>99</sup> Several of J. H. Baker's additions and improvements to Laura Gabel's classic account of the institution, *Benefit of Clergy in England*, (Northampton, Mass., 1928), come from taking a look at the Canon Law on the subject. See his 'Some early Newgate reports (1315-28)', in Chantal Stebbings, ed., *Law Reporting in England* (London, 1995), pp. 46-53.

<sup>100</sup> Rudolf Weigand, 'Zur mittelalterlichen kirchlichen Ehegerichtsbarkeit', in *Liebe und Ehe im Mittelalter*, (Goldbach, 1993), p. 307: 'ein Stiefkind der historischen Forschung'.

# Abbreviations

- ANS — *Proceedings of the Battle Conference on Anglo-Norman Studies*.  
 ASC — *Anglo-Saxon Chronicle*.  
 ASE — *Anglo-Saxon England*.  
 (BI)HR — (*Bulletin of the Institute of Historical Research*).  
 BL — British Library  
 BN — Bibliothèque Nationale.  
 Bracton, Thorne — *Bracton De Legibus et Consuetudinibus Angliae*, ed. & trans S. E. Thorne (4 vols, Cambridge, Mass., 1968–77).  
 BNB — *Bracton's Note Book*, ed. F. W. Maitland (3 vols, London, 1887).  
 CLJ — *Cambridge Law Journal*  
 CMA — *Chronicon Monasterii de Abingdon*, ed. J. Stevenson (2 vols, London, 1858).  
 Collected Papers — H. A. L. Fisher, ed., *The Collected Papers of Frederic William Maitland* (3 vols, Cambridge, 1911).  
 CRR — *Curia Regis Rolls* (HMSO, 1922–).  
 DB — *Domesday Book seu Liber Censualis Wilhelmi Primi Regis Angliae*, ed. A. Farley and H. Ellis (4 vols, London, 1783, 1816).  
 Dialogus — Richard FitzNigel, *Dialogus de Scaccario*, ed. & trans C. Johnson, rev. F. E. L. Carter & D. E. Greenway (Oxford, 1983).  
 Domesday Book and Beyond — F. W. Maitland, *Domesday Book and Beyond* (repr. with Foreword by J. C. Holt, Cambridge, 1987).  
 EHR — *English Historical Review*  
 Elton, Maitland — G. R. Elton, *F. W. Maitland* (London, 1985)  
 English Lawsuits — *English Lawsuits from William I to Richard I*, ed. R. C. van Caenegem (2 vols, Selden Soc., 106, 107, 1990–1).  
 EYC — *Early Yorkshire Charters*, vols. I–III, ed. W. Farrer (Edinburgh, 1914–16); index to vols. I–III, ed. C. T. & E. M. Clay; vols. IV–XII, ed. C. T. Clay (Yorks. Arch. Soc. Rec. Ser. Extra Ser., 1935–65).  
 Fauroux, Recueil — *Recueil des actes des ducs de Normandie*, ed. M. Fauroux (Mémoires de la société des antiquaires de Normandie, 26, Caen, 1961).  
 Fifoot, Life — C. H. S. Fifoot, *Frederic William Maitland: a Life* (Cambridge, Mass., 1971).  
 Garnett and Hudson, Law and Government — G. S. Garnett and J. G. H. Hudson, eds, *Law and Government in Medieval England and Normandy: Essays in Honour of Sir James Holt* (Cambridge, 1994).  
 Gervase — Gervase of Canterbury, *The Historical Works of Gervase of Canterbury*, ed. W. Stubbs (2 vols, London, 1879–80).  
 Gesetze — *Die Gesetze der Angelsachsen*, ed. F. Liebermann, (3 vols, Halle, 1903–16).

- Gierke — F. W. Maitland, trans, *Political Theories of the Middle Age*, by Otto Gierke (Cambridge, 1900).
- Glanvill, Hall — *Tractatus de Legibus et Consuetudinibus Regni Anglie qui Glanvilla vocatur*, ed. and trans G. D. G. Hall (Edinburgh, 1965).
- Holt, *Magna Carta* — J. C. Holt, *Magna Carta* (2nd edn, Cambridge, 1992).
- JMH — *Journal of Medieval History*.
- Letters, i — C. H. S. Fifoot, ed., *The Letters of Frederic William Maitland*, vol. i (Selden Soc., Supplementary Ser., 1, 1965).
- Letters, ii — P. N. R. Zutshi, ed., *The Letters of Frederic William Maitland*, vol. ii (Selden Soc., Supplementary Ser., 11, 1995).
- Letters to George Neilson — F. W. Maitland. *Letters to George Neilson*, ed. E. L. G. Stones (Glasgow, 1976).
- LHP, Downer — *Leges Henrici Primi*, ed. & trans L. J. Downer (Oxford, 1972).
- LQR — *Law Quarterly Review*
- Maitland, *Constitutional History* — F. W. Maitland, *The Constitutional History of England* (Cambridge, 1908).
- MGH — *Monumenta Germaniae Historica*.
- Milsom, *Legal Framework* — S. F. C. Milsom, *The Legal Framework of English Feudalism* (Cambridge, 1976).
- ns — New Series
- PBA — *Proceedings of the British Academy*.
- PKJ — *Pleas before the King or his Justices, 1198–1202*, ed. D. M. Stenton (4 vols, Selden Soc., 67, 68, 83, 84, 1952–67).
- Pollock and Maitland — Sir Frederick Pollock and F. W. Maitland, *The History of English Law before the Time of Edward I* (2 vols, 2nd edn reissued with a new introduction and select bibliography by S. F. C. Milsom, Cambridge, 1968).
- PP — *Past and Present*.
- PR — *Pipe Rolls*
- PRO — Public Record Office
- PRS — Pipe Roll Society
- RCR — *Rotuli Curiae Regis. Rolls and Records of the Court held before the King's Justiciars or Justices*, ed. F. Palgrave (2 vols, Record Commission, 1835).
- Reading Cartularies — *Reading Abbey Cartularies*, ed. B. R. Kemp, (2 vols, Camden Soc., 4th Ser. 31, 33, 1986, 1987).
- Reg. Ant. Linc. — *The Registrum Antiquissimum of the Cathedral Church of Lincoln*, ed. C. W. Foster and K. Major (10 vols, Lincoln Rec. Soc., 1931–73).
- RRAN — *Regesta Regum Anglo-Normannorum, 1066–1154*, ed. H. W. C. Davis *et al.* (4 vols, Oxford, 1913–69).
- S — P. H. Sawyer, *Anglo-Saxon Charters: an Annotated List and Bibliography* (London, 1968).
- Stenton, *English Feudalism* — F. M. Stenton, *The First Century of English Feudalism 1066–1166* (2nd edn, Oxford, 1961).
- Stubbs, *Charters* — *Select Charters and other Illustrations of English Constitutional History*, ed. W. Stubbs (9th edn, Oxford, 1913).
- TRHS — *Transactions of the Royal Historical Society*
- VCH — *Victoria County History*