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MAITLAND REISSUED

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THE FIRST of these books[1] contains seven of Maitland's papers — the most essential parts of his introduction to the "Memoranda de Parliamento 1305," "The Corporation Sole," "The Crown as Corporation," "The Unincorporate Body," "Trust and Corporation," "Moral Personality and Legal Personality," "The Body Politic." Mr. Lapsley has edited the first of these papers, Professor Hazeltine the fourth and fifth, and Professor Winfield the rest. The papers fall into four groups. The first deals with constitutional history, the second and third with English legal history, the third and fourth with the problem of group and corporate personality, and the last with political science.

Since Maitland wrote the first of these papers, much has been written on the early history of Parliament, and many unpublished Rolls of Parliament and other documents relating to Parliament have been printed. To this large literature Mr. Lapsley's preface is an invaluable guide. From it, I think, emerges the fact that Maitland's paper began a new epoch in the study of the early history of Parliament. In this paper, as in all his other historical work, Maitland tells his story from the original documents and from the point of view of the men who wrote those documents; and here, as elsewhere, he portrays the ideas of these men with amazing clarity. This method of writing the early history of Parliament, when applied by a man of unique historical and literary genius, produced results which were perhaps more revolutionary than those produced by any of his other works. The reason why it produced these revolutionary results is as follows: The protagonists in the constitutional conflicts of the seventeenth century had used the events of Parliamentary history to prove their political creeds. The victory of Parliament in 1688 was thought to have established not only the legal but also the historical correctness of the views held by those who supported the Parliament. Thus there was established a traditional view of Parliamentary history; and that traditional view had, during the eighteenth and nineteenth centuries, coloured the interpretation of the sources, and

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1. SELECTED ESSAYS. By F. W. Maitland. Edited by H. D. Hazeltine, G. Lapsley and P. H. Winfield. Cambridge: at the University Press; New York: The Macmillan Co. 1936. Pp. ix, 264. $3.65. EQUITY: A COURSE OF LECTURES. By F. W. Maitland. Edited by A. H. Chaytor and W. J. Whittaker. Revised by John Brunyate. Cambridge: at the University Press; New York: The Macmillan Co. 1936. Pp. xxiv, 343. $4.00. THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES. By F. W. Maitland. Edited by A. H. Chaytor and W. J. Whittaker. Cambridge: at the University Press; New York: The Macmillan Co. 1936. Pp. xi, 92. $1.25.

given rise to a set of doctrines as to the constitution of Edward I's Parliaments which suffered from the fatal defect of looking at medieval facts from the point of view of the modern theory of the constitution. Maitland's account of what a Parliament of Edward I's reign really was and what it really did presented so great a contrast to the received view on these matters that, as Mr. Lapsley says, it was some time "before scholars grasped completely the bearings and implications of his essay or realized how strong a solvent of orthodoxy it was destined to be." It was pioneer work — as were many other of Maitland's works; and though very much has been published on these lines since, it is wonderful how well his work has stood the test of comparison with the results of later researches in this field. This fact will be apparent if we look at some of the conclusions of Messrs. Richardson and Sayles in their Introduction to the *Unedited Rolls of Parliament 1279–1373.*[2]

Maitland insisted that "a session of the king's council is the core and essence of every *parliamentum.*" This is accepted as obviously true by Messrs. Richardson and Sayles when they say: "The king had always a council round him, a comparatively small body which was largely ministerial. On special occasions this small body would be afforced according to the needs of the moment, and parliament was a specially solemn occasion. Under Edward I the council summoned to parliament probably varied a great deal in composition; but when really important business had to be despatched every effort would be made to include all magnates of influence in church and state, and certainly every highly placed minister." Maitland pointed out that the records of the audience of, and the answers to, petitions take the largest space in the roll of 1305; and precisely the same point is made by Messrs. Richardson and Sayles. They say also that "the decisions of the council in parliament were apt to be directions as to the means of obtaining justice or of reaching a settlement rather than final judgments." Exactly the same thing is said by Maitland, and, indeed, as Maitland points out, by Hale. Similarly Maitland's observation that "by no sharp line can the petitions of the assembled lords and commons be marked off from the general mass of petitions" is said by Messrs. Richardson and Sayles to be generally true; but they think that some of this class of petitions did not pass through the hands of the receivers and triers, but went straight to the council. These few illustrations show the soundness of Maitland's conclusions. They show that the soundness of those conclusions was due to his capacity for seeing into the minds of those who composed the documents which he was interpreting—a capacity which has never been equalled by any other historian.

2. ROTULI PARLIAMENTORUM ANGLIE HACTENUS INEDITI MCCLXXIX–MCCCLXXIII, Camden Soc., 3d series, vol. li (1935).

The fourth and fifth of these papers on "Trust and Corporation" and "Moral Personality and Legal Personality," are two of the most important papers in this collection. They have been very well edited by Professor Hazeltine. He has translated the German phrases, he has added notes which give references to books in which Maitland's theories have been discussed, and at the end he has given us a comprehensive bibliography of the continental and English literature on these subjects. These papers are important because in them Maitland introduced English lawyers to a new body of thought, and explained why it was a new body of thought to Englishmen. Both his account of the continental controversies to which it had given rise, and his explanation why these controversies had had no English counterpart, shed a new light on English institutions and English law.

The accepted continental theory of corporations had unduly restricted liberty of association. It was generally held that the only persons whom the State would recognize were either natural persons or fictitious persons. Fictitious persons were corporations; and it was only the sovereign who could create a fictitious person. The logical consequence of this view was what is known as the "Concession Theory"—"the corporation is, and must be, the creature of the State. Into its nostrils the State must breathe the breath of a fictitious life, for otherwise it would be no associated body but individualistic dust."[3] Thus the existence of all groups and communities were subordinated to the will of a sovereign State. Under the influence of this theory the old communities of the Middle Ages were dissolved, and therefore the liberty to associate was strictly limited. It was not till the beginning of the twentieth century that French law relaxed these limitations. In these circumstances those who desired to obtain a greater liberty of association attacked the theory upon which these limitations were based. Associations, it was said, were not fictitious. They were real things, as real as the human beings who composed them. They did not depend for their existence on the authorization of the State. The State therefore should recognize them in the same way and for the same reasons as it recognizes natural men. Thus the question whether group personality was fictitious or real became an important practical question because upon it depended the extent of the liberty of association and the powers of these associations.

Maitland pointed out that this had never been so important a practical question in England, partly because English law had never ceased to recognize some of the medieval communities such as counties and hundreds and Inns of Court, and partly because it had in the Trust a medium whereby many different associations could live and flourish

3. GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE (1900) xxx.

without any authorization by the State. For the first time he pointed out the importance in this connection of that medieval element in English law, the survival of which had been secured by the victory of the Parliament and the common law in the seventeenth century; and for the first time he pointed out the significance of the Trust Concept in our public and semi-public law. What theories English lawyers had had upon corporate personality were of a superficial kind; for, like other branches of the common law, the law as to corporations had grown up gradually and depended very little upon philosophical theory. Maitland's papers set lawyers thinking, and made them realize the need to acquire some clearer ideas as to the theoretical foundations upon which their law rested. I think that the result of that investigation has been to show that in the main the common law view of corporate personality is a sensible theory; but that the somewhat hand-to-mouth manner in which it has grown up has had its dangers, more especially in these latter years when the liberty to associate allowed by the common law, and the ease with which statutes allow corporate form to be assumed, have multiplied both the number and power of these various associations. The following conclusions have, I think, emerged:

In the first place, the question whether corporate personality is real or fictitious, though practically important in continental speculation because it was bound up with the question of liberty of association, is not fundamentally important for lawyers. The law recognizes persons, not from the biological point of view, but as the subjects of rights and duties. That being so, a group of persons, corporate or otherwise, which is the subject of rights and duties, is a person no less and no more than a natural person. No doubt it is a different sort of person because it is artificial, and no doubt its artificial quality gives it a different legal status. But it is just as real a person as a natural person. As Professor H. A. Smith has said,[4] "a confusion is sometimes created by not distinguishing clearly between the legal and the philosophical, or the legal and the historical aspects of the matter. Thus, for example, if we ask the familiar question 'Has the corporation a real group will as distinct from that of its individual members?' the answer will usually be for the philosopher. The lawyer is under no obligation to answer such a question, and the law does not generally provide him with an answer unless litigation has proved or legislation has anticipated its necessity. Now it is almost impossible to imagine any law suit in which the judge must find himself driven to pronounce upon the existence or non-existence of a group-will. The semi-philosophical expressions we find here and there in the Reports are invariably *obiter dicta,* and the true method of handling, or rather refusing to handle, such questions is well illus-

4. SMITH, THE LAW OF ASSOCIATIONS (1914) 128–129.

trated by the Privy Council in *Citizens Life Assurance Company v. Brown*[5] where Lord Lindley says: 'If it is once granted that corporations are for civil purposes to be regarded as persons, *i. e.*, as principals acting by agents and servants, it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals'."

Secondly and consequently, the common law, without indulging in much speculation as to the nature of a corporation's personality, has evolved the common sense view that a corporation has, so far as is consistent with its artificial nature and with the purpose with which it is created, the capacities and liabilities of a natural man.

Thirdly, the common law has always adhered to the rule that corporate form can be conferred only by the State. Those continental speculators who wished to get a larger liberty of association thought that, when they had disproved the fictitious nature of corporate personality and proved its reality, they had also proved the falsity of the Concession Theory. They thought that from the proof of its reality it followed that no authorization of the State was needed for its recognition as a legal *persona*. But this conclusion really rests upon a confusion of thought which is due to the circumstances in which the continental controversies had arisen. It is perhaps arguable that it is a weak spot in Maitland's brilliant exposition of these continental theories that he does not clearly point out that proof that unincorporate groups have a real life of their own, though it disproves the Fiction Theory, has no logical bearing on the Concession Theory. Therefore the common law, while admitting to the reality of corporate and, to some extent, of group personality, has always adhered to the Concession Theory. I think that it may be maintained that it was because the law recognized the reality of the life of a group that it insisted that, for a legal life, it must have the authority of the State. The State is thus able to impose conditions which will prevent these corporate groups from menacing the peace of the State and the liberty of the individual.

But fourthly, the gradual and untheoretic way in which the English law as to groups and associations has grown up was dangerous in an age which demanded this liberty to associate in groups which tended to increase in size and power. The absence of any clear theory as to the basis of the law caused lawyers and legislators to ignore this danger. It caused them to ignore the implications of Burke's aphorism that "liberty when men act in bodies is power." The excessive liberty given to Trade Unions, and the absence of all power in the Company Acts to provide any machinery for disincorporating a company which is guilty of wrong-doing, are illustrations.

5. [1904] A. C. 423, 426.

For all these reasons I think that it may be maintained that these papers of Maitland, though dealing largely with speculations evoked by causes which are not operative in England, are of great importance to English lawyers and statesmen. They are important, first because they have elucidated the theories adopted by English law upon the topic of corporate and unincorporate personality; secondly because they point to certain defects in that law; and thirdly because they elucidate the historical importance of certain aspects of English public law, and in particular the large part which the Trust Concept has played in different branches of public and semi-public law. They are of great importance to students of jurisprudence because they contain clear reasoning upon fundamental principles and problems which helps students to think for themselves. They are of great importance to students of comparative law because they show in the clearest way the divergent manner in which, under the stress of different conditions, similar problems are discussed and solved.

The two papers on "The Corporation Sole" and "The Crown as Corporation" are studies in two topics of English legal history which had been very little explored till Maitland wrote about them. They are interesting histories of the failure to adapt the new law, which was beginning to grow up round the corporation, to old bodies of legal doctrine, which had been elaborated in the days when this new law had not been heard of. But I think that the failure of the attempt to apply the conception of a corporation sole to the Crown was due, not so much, as Maitland would seem to suggest, to the conception itself, as to the course of English constitutional history. Parliament won its victory over the Crown with the help of medieval precedents which regarded the King as a natural man. Those precedents assorted badly with the doctrines of the Tudor lawyers which made the King a corporation sole, the head and representative of the State, and the possessor of many mystical qualities. If the Stuart Kings and the prerogative lawyers had had their way King and State would have been identified, and the conception of a corporation sole might have been valuable. But the result of the victory of the Parliament was that the Crown, though it remained a corporation sole with many extraordinary qualities, did not become coextensive with the State. The ambiguous position which the Crown thus occupied between the old theories and the new accounts for the failure of the concept of the Crown as a corporation sole. The two papers on "The Unincorporate Body" and "The Body Politic" are less important. The first deals mainly with the relation of the Trust Concept to corporation law, and explains why it has "given us a liberal substitute for a meagre law of corporations." The second enters a protest against the view that "we are within measurable distance of a

sociology or an inductive political science which shall take no shame when set beside the older sciences."

In Mr. Brunyate's new edition of Maitland's *Lectures on Equity*[6] the text has very wisely been left unchanged, except for the omission of two passages dealing with topics which have been rendered obsolete by the Property Legislation of 1925. In fact Mr. Brunyate tells us that, because the book deals mainly with the basic principles of equity, "surprisingly little revision has been found necessary." But the footnotes, which were not Maitland's work, have been added to and altered. In addition Mr. Brunyate has added six notes which deal with the cases of *Oliver v. Hinton*[7] and *Walker v. Linom*,[8] Restrictive Covenants, Trusts, the Law of Property since 1925, the Administration of Assets, and Election. Mr. Brunyate has done his editorial work very skilfully, and his notes are just what is wanted—not too long, and at the same time clear and accurate. The book will be more valuable than ever as an introductory book for students, and it will still be valued by all lawyers, because it continues to describe in Maitland's clear and effective style the root principles of equity, the relation of equity to law, and its place in the English legal system.[9]

I regret that Mr. Brunyate has not given us his opinion as to Maitland's thesis that equitable rights are essentially *jura in personam*; for, as he says, Maitland's views on this point "pervade the book and are of the essence of it." Mr. Brunyate thinks that the discussion and criticism of Maitland's views on this point are not the function of a reviser. I think that he might easily have given us another note on this topic. In fact the excellence of the notes which he has given us will cause his readers to regret the omission.

My own opinion on this controverted topic is that it is the one case in which Maitland's views upon equity have been materially modified by subsequent discussion. I think that this modification is justified by two reasons. In the first place, there is weighty authority against Maitland's views; and, in the second place, his insistence on the predominately personal character of equitable rights obscures the true nature of equitable ownership:

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6. MAITLAND, *op. cit. supra* note 1.

7. [1899] 2 Ch. 264.

8. [1907] 2 Ch. 104.

9. There is only one remark that I should like to make about the text. It is curious that at page 45, where the relation of debtor and creditor is contrasted with the relation of trustee and *cestui que trust*, neither Maitland nor Mr. Brunyate cites the case of Lister v. Stubbs, 45 Ch. Div. 1 (1890), which turns on this very difference.

First, authority is against Maitland. Lindley, L. J., in the case of *Lister v. Stubbs*,[10] and Lord Parker in the case of *Sinclair v. Brougham*,[11] emphasized the proprietary character of equitable rights. In the former case Lindley, L. J., said that the fallacy of the plaintiff's argument was in failing to distinguish between the debtor-creditor and the trustee-*cestui que trust* relation "in confounding *ownership* with obligation."[12] In the latter case Lord Parker said that equity, "starting from a personal equity, based on the consideration that it would be unconscionable for anyone who could not plead purchase for value without notice to retain an advantage derived from the misapplication of trust money, it ended, as was so often the case, *in creating what were in effect rights of property,* though not recognized as such by the common law."[13]

Secondly, I think the insistence of the predominately personal character of equitable rights obscures the true nature of equitable ownership. No doubt a *cestui que trust* has rights *in personam* against his trustee; but he has many other rights both against his trustee and against third persons. It is these other rights which give him equitable ownership. What then is this equitable ownership? The answer is that its main characteristic is the fact that it is a right as against all the world except as against a bona fide purchaser for value without notice of the legal estate. This characteristic is due to the relation in which equity has always stood to the law. Equity has always followed the law, and, when the equities are equal, has always allowed the law to prevail. It seems to me impossible to say that ownership of this character has not got predominately proprietary characteristics merely because there is one possible person as against whom it cannot be asserted. Indeed it is impossible to maintain this thesis without denying the existence of equitable ownership—which seems to me to be absurd. At any rate the doctrine of following trust property shows that, whatever the law might say, equity always regarded these equitable rights as something very different from merely personal obligations; for the essence of that doctrine is this — even if the property has got into the hands of a bona fide purchaser for value, so that the equitable ownership of it has ceased to exist, the former owner is given a proprietary right to or in any property which can be identified as its proceeds, and is thus enabled to take it in preference to creditors whose rights are merely personal.

In the first edition of the *Lectures on Equity* there was included a set of "Lectures on the Forms of Action." The latter set of lectures

10. 45 Ch. Div. 1 (1890).
11. [1914] A. C. 398.
12. Lister v. Stubbs, 45 Ch. Div. 1, 15 (1890). The italics are mine.
13. Sinclair v. Brougham, [1914] A. C. 398, 441–442. The italics are mine.

have been detached from the *Lectures on Equity,* and are printed in their original form and without annotation in a separate volume.[14] Of that volume it is only necessary to say that it is still an indispensable introductory volume to the study of English legal history. There has, it is true, been some controversy as to the connection of Chapter 24 of the Statute of Westminster II[15] with action on the case.[16] It is possible that it may be necessary to revise somewhat the traditional view which Maitland states.[17] With that exception these lectures hold the field as the best account for the beginner, and, like all Maitland's work, however elementary, they have much that is of value to the mature student.

Sir Frederick Pollock has said of Maine's writings that "they are classics in their kind, and accordingly their standard and worth are little or not at all affected by the changes which the learning of posterity may bring to specific propositions contained or assumed in them;"[18] and of his genius he has said that it "was not only touched with art, but eminently artistic; and art is immortal."[19] This and more than this can be said of Maitland's writings. He was more alive than Maine to the human aspects of the history of law. It is easy, as I have said elsewhere, when dealing with theories, and doctrines, and institutions, to forget that they were made and used and developed and abused by men of like passions with ourselves. Maitland never forgot this. He can extract human traits from a plea roll and a Year Book. And this characteristic of his genius was developed by his sense of humour and his gaiety of manner which conceal the learning and research underlying the brilliant argument which flows so easily. Moreover, to this sense of humour and this gaiety there must be added a talent for epigram, which clinches the argument, and sums up in some memorable phrase the conclusion of the whole matter. And I think that it can be maintained also that Maitland was a greater lawyer and legal historian than Maine. He was one of the great lawyers of his age, and one of the greatest historians, legal or otherwise, that this country has ever produced. This may seem to be an extravagant claim. But I am not alone in this opinion. Mr. G. M. Young in his brilliant picture of Victorian England has said: "I dwell on the name of Maitland partly because, outside his own profession, England has

14. MAITLAND, *op. cit. supra* note 1.

15. Statute of Westminster 2d, 1285, 13 EDW. I, c. 24.

16. Plucknett, *Case and the Statute of Westminster II* (1931) 31 COL. L. REV. 778; Landon, *The Action on the Case and the Statute of Westminster II* (1936) 52 L. Q. REV. 68; Plucknett, *Case and Westminster* II (1936) 52 L. Q. REV. 220.

17. (1931) 47 L. Q. REV. 334.

18. POLLOCK, OXFORD LECTURES (1890) 151.

19. *Id.* at 154.

never done justice to that royal intellect, at once as penetrating and comprehensive as any historian has ever possessed: but more because no other English writer has so perfectly apprehended the final and dominant object of historical study: which is, the origin, content, and articulation of that objective mind which controls the thinking and doing of an age or race, as our mother tongue controls our speaking; or possessed, in so full a measure, the power of entering into that mind, thinking with its equipment, judging by its canons, and observing with its perceptions."[20]

To us who are lawyers he is one of those fixed stars who takes his place with such men as Bracton, Littleton, Coke, Hale, and Blackstone. And because he takes this rank students will always wish to study his *ipsissima verba,* to know what his views were, even though it has been proved by later research that they must be modified. It seems to me that in these circumstances what is wanted is not so much selected fragments of his works with annotations, as the works themselves. What is wanted is two or three omnibus volumes printed on thin paper in legible type which contain all he wrote. I should exclude the *History of English Law,* but nothing else. All else, beginning with his introduction to *The Select Pleas of the Crown for the County of Gloucester,* and including his introductions to *Bracton's Note Book* and to the volumes of the Selden Society, which he edited, ought to be printed exactly as he wrote them. No introduction would be needed—merely a list of important dates in his life; and of course the dates of publication would be affixed to each work. I am sure that these volumes would satisfy a want which has long been felt by lawyers and historians. I am sure that they would have a rapid sale, and that the demand for them would continue, even as the demand for the works of the other classics of our legal and historical literature continues. Many of these books were published by the Cambridge University Press, and that Press ought to publish these omnibus volumes. Let us hope that the Syndics of that Press will see that it is to their interest not to refuse thus to recognize the needs of students, and the outstanding qualities of Maitland's work—prophet though he is from their own country.

20. YOUNG, VICTORIAN ENGLAND, THE PORTRAIT OF AN AGE (1934) 185–186.