

HISTORY 3851 – CAPITALISM AND THE LAW

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KEY LEGAL HISTORY TERMS

*There is no attempt to be comprehensive here; this is merely a glossary of terms that are significant for reading J.H. Baker's *Introduction to English Legal History*.

Baker, Chapters 13, 14, and 15

Feudalism is the word we use to describe a social order based on vassalage and land tenure. It was established in England under the Anglo-Saxon Kings (prior to the 11C), and continued to develop when the Normans established manorialism (11C-15C). The transition from feudalism to capitalism is one of the most contested and ambiguous areas of historical debate, but we can say several things about it in England. The transformation 'happened' prior to industrialization of production, between the 13C and the 17C. The decline in feudalism was related to the establishment of a merchant class in towns that were under Royal protection, and the rise of the Atlantic world enriched by African slavery and new world colonies. The rise of capitalism was institutionally framed by changes in the law of real property, contracts, patents/monopoly, torts and negligence, trusts and corporations, and labour.

Manorialism (or Seigniorialism) was a feudal form under which a manor (a large house or castle) extended its dominion over a nearly self-sufficient village and surrounding lands. You might see it as an arrangement that stood in tension with both Germanic tribalism (think Vikings) and Imperial Rome. In Europe it stems from the late Roman Empire, survived Roman collapse, and was well-established on the Continent by the 8C. Manorialism was not Anglo-Saxon; it was brought to England by the Normans in the 11C, but they also brought a stronger sense of Kingship that interfered with manorial independence. It declined in England from the 13C to the 15C with the rise of the common law and royal justice.

Vassalage is an unequal relationship of reciprocal obligation or fidelity (feudalism) between the vassal and his lord. The typical exchange is for the vassal to be granted possession (not ownership) of land in return for an obligation of military service. This mutual promise was called *homage*, and was ritualized in various ways. Service could also be rendered in other forms (labor on the lord's lands, road construction, or shares of produce). The lord-vassal relationship extended like a great chain of being from God to the king to nobles to knights to landed peasants. The Anglo-Saxons developed lord-vassal relationships, but the Normans extended these to cover all forms of real property (land). After the Normans all land was held of the King and no land could be held - *allodial* – in absolute ownership free of obligation (eminent domain, statutory regulation, and taxation).

Tenure is the the part of vassalage that refers directly to the fact that real property ties the tenant (who could have a status ranging from a villein/serf to a knight to a cleric) to the lord (who held dominium or ownership and could be a noble of various rank up to the King). Land tenure offers a way to refer to this relationship when service is replaced by rents in the 13-14C, which is typically understood to reduce the significance of fidelity (vassalage) and commodified the relationships around real property. It was formally abolished by statute in 1660.

Focland/Bocland is an Anglo-Saxon (7C-11C) distinction between land whose possession cannot be removed from the folk or kin group because they own it *allodial*, and land that can be placed into a tenurial relationship and recorded as such in books (boceland). *Lænland* (loan land) referred to focland that could be booked for a period of time before returning to the kin group. The terms help us understand the coexistence of tribal (kinship) and tenurial (lord-vassal) forms of real property in England prior to the Normans.

Fee (*feodum*) is the Norman word that replaces *boceland* (book land) to name land granted by the lord in return for the loyalty of the vassal, and with this word also comes the destruction of *focland* and *allodial* ownership by the kin group (tribal groups).

When the Normans introduced the fee, they also displaced the whole Anglo-Saxon nobility (following the conquest of 1066). A Norman noble family in England became defined by a fee where possession of land (tenure) was secured from the King (or other lord) through military (knights) service or by non-military offices such as Grand Serjeanty. These are also called “free chivalrous” tenures. Nobles (and clerics) might have made up 5% of the population in the Middle Ages.

For clerics, the initial Norman terms of the fee involved performance of sacramental rituals, study, and keeping books. These forms of spiritual tenures could either require specific ritual performances for ancestors, or require more general ministry - *frankalmoin*.

Most people worked the land (95%). Peasant fees required servile (base) labour such as digging, plowing, cutting, harvesting, animal husbandry, or perhaps some lower forms craft production.

Free peasants held (typically larger) fees with explicit obligations for service. These were transformed into moneyed rents between the L12C to the L14C, and when this happens we call it *socage*. So, socage is a form of free holding (the others were the tenancy of knights and clerics) by rent, and it was achieved by perhaps 15% of English families working about 20% of the land before the 14C.

Unfree tenants were called villeins, and the terms of their fees were in *copyhold* in the L11C – meaning they were defined by the custom of the manor, held at the will of their lord. Villeins could seek justice only at their lord’s court, and so the lord also determined what “custom” meant – that is why it was ‘unfree’ tenure.

Between the L12C and the 14C, royal courts amended these manorial prerogatives for villeins (about 40% of the population working about 45% of the land) and gave a legal recourse to freemen, craftsmen, and merchants outside of manorial courts. However Baker says little about another 40% percent of English peasants were unfree borders or cottars who lacked sustainable tenures (or were completely landless bondsmen who lived on the *demense* – the domain – of a noble Lord or Abbott). These people were invisible in terms of property law.

Subinfeudation happens when tenure, or the terms of the fee (whether granted to knights or freemen or villeins), was divided by the tenant to sub-tenants. The practice increased in the L12-L13 centuries, and as subinfeudation proceeded labour service was gradually replaced by money. This process quickly made military service as a fee unpractical (what was a partial knights-service?). As a result knights-service became *scutage* – money due for armed protection. When peasant service becomes money rent we call it *socage*. Increased use of *scutage* and *socage* signalled a decline in the personal nature of feudal service, and made the way for feudal service to become taxes and rents by the L14. This process took centuries of gradual change, and even as it did - the tie between property and marriage and inheritance maintained the importance of loyalty and kinship in realty.

Statute of Quia Emptores (1290) – trans. ‘Because of the buyers,’ prohibited subinfeudation.

Seisin was being in possession of land as a feudal tenant. The tenant was seised in the land under the dominium of the lord; the lord was seised of the tenants services or moneyed payments. Neither owned the land as moderns mean it. Earlier in the feudal period (before the L12C), the tenant had no freedom to use the land for whatever he chose (nor could they leave it untended), could not enforce a family’s right of inheritance, nor will it to another, and could not sell it. Tenants often obtained permission to do these things, but not as a right that adhered to them as persons.

Custom protected tenants best in the area of inheritance of tenancy, but this remained entirely subject to the will of the manorial court (the lord himself) until manors began to be constrained by assize courts and common law forms of action in the L12C.

Incidents of Tenure are payments due to the lord by the tenant at key points of life’s transitions. They include the lord’s right to exact payment for his children’s marriage, to alienate the fee by substitution, at the death of the tenant, or if the tenant’s heir was a minor.

Use was a medieval device of property law. A would convey to B on a condition that B would use it for the benefit of C. But, C could also be A. A land holder could create a use for their own benefit, and by doing this avoid paying debts, feudal incidents, or royal taxes. The legitimate purpose of a use was for the benefit of ones children or for a religious group. Between the 11-14C, uses could not be addressed via common law and they were likely to view B as the land lord, but courts of equity began acting upon them in the 14C and treating A as the land lord.

Canons of Descent are the rules that determine inheritance.