

Thus in feudalism landownership and sovereignty coincided, so that the Crown's sovereignty over Scotland and its *dominium eminens*, its ultimate tenurial superiority, were the same thing, were identical concepts⁴. Since sovereignty involved jurisdiction, landownership implied jurisdiction, so that the royal courts could dispense justice because the Crown was the ultimate superior, and every subordinate owner of land likewise had the right to hold courts, and in fact did so⁵. Taxation was likewise raised by the Crown as superior rather than as sovereign, though more accurately it should be said that to the feudal mind no such distinction could be conceived. Land tenure penetrated every institution; land was not so much an asset, to be bought and sold, as today, but rather a focus of social relations. Even religion was feudalised. The Crown held Scotland as the vassal of God, and in prayer the act of holding the hands together was adopted from the feudal ceremony of homage, the *immixtio manuum*, so that the worshipper was binding himself as the vassal of God.

Two themes of feudalism require particular notice. The first is that the distinction between public law and private law, a distinction intrinsic to the law of the Roman Empire and to modern legal systems, was absent in feudalism. Feudalism involves a systematic denial of the distinction, as will be apparent from what has already been said. The other point is that ownership of land, something taken for granted by the Romans as by the moderns, did not exist under feudalism. Feudalism involves the absolute denial that land can be owned. Indeed, the very concept of a real right can hardly be said to exist under feudalism. Land rights are personal, not real. Land is not owned, but held in tenure, and tenure means a personal relationship with other people, the superior and the oversuperior, with the vassals and tenants. For the same reason land cannot, in the pure feudal conception, be sold or bequeathed.⁶ The power of sale and bequest go close to the heart of ownership, but no one can sell or bequeath what he does not own, and no one could own land. It is true that today we speak of *dominium utile* and *dominium directum*, and of course *dominium* means ownership. But these terms are not feudal, but result from the attempt made in the later middle ages, when feudalism was declining, to reconstruct it in accordance with civilian concepts. More will be said of this later.

¹ Historiography is subject to passing fashions, of which this tendency may be one. One of the problems is how to distinguish western European feudalism from other systems with which it shares common features, such as ancient Japan. See *Les Liens de Vassalité* (Société Jean Bodin, 2nd edn, Brussels, 1958).

² F W Maitland *Constitutional Law of England* (1st edn, 1900) pp 23, 24.

³ F L Ganshof *Qu'est-ce que la Féodalité?* (1944, in English as *Feudalism*), Introduction. This is a classic study of the subject, and more legal in its approach than the other classic study, M Bloch *La Société Féodale* (1939/40, in English as *Feudal Society*). Ganshof includes an extensive bibliography. See also D Herlihy *History of Feudalism* (1970). English feudalism was a major influence in Scotland. The literature on it is very large. See in particular S F C Milsom *Legal Framework of English Feudalism* (1976). Scots literature will be mentioned later.

⁴ We still have a relic of this in the rule that the Crown cannot dispone but only feu, for to dispone would, in the feudal scheme of things, be to alienate not only land but also sovereignty.

⁵ There were certain exceptions.

43. Origin of feudalism. The traditional opinion was that feudalism emerged in the fifth century, on the fall of the Roman Empire in the west, but this is now known to be inaccurate. Thus we have a conveyancing styles book by one Marculfus, written at Paris about 660, which does not indicate the existence of feudalism¹. There is no real trace of feudalism in the *Edicta* of the Lombard kings such as Rothair (issued in 643) or Liutprand (issued 713–735). It seems that it emerged in the eighth century, in the Kingdom of the Franks². Its social and economic causes cannot be traced here, and are perhaps not fully