Cambridge Law Journal, **60(2)**, July 2001, pp. 265–270
Printed in Great Britain

MAITLAND

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THIS is an honour I should have declined, and I must ask indulgence for a stumbling performance. It is 50 years since I tried to read a lecture or other address; but for this I need to get the words right. My tribute must be to the extraordinary man with whom I have argued for much of my life, not to the superhuman myth engulfing him.

Maitland died in 1906 in Grand Canary, where a neglected grave contrasts with veneration induced in scholars throughout the common-law world by a long lifetime's worth of seemingly miraculous writing. But the life was not long, and the writing began late. He started real work at 34 and died at 56. For most of those 22 years he knew his life would be cut short, and the last eight winters sent him to places with sunshine but no libraries. This second life was one of extreme concentration, a tribute to the man and also a caution about the work.

The first life was that of Squire Maitland.[1] The land came to him at 16 when his grandfather died. His father had died when he was 13 and his mother when he was one, and he grew up independent of means and very independent of mind. A bad undergraduate start became excellence when independence allowed

* The text of an address given at the unveiling on 4 January 2001 of a memorial tablet for F.W. Maitland in Westminster Abbey. The tablet, by Richard Kindersley, is set in the floor of the South Transept. The initiative with the Dean and Chapter had been taken by two Oxford historians, Patrick Wormald of Christ Church and George Garnett of St Hugh's College; and at the ceremony the speaker was introduced by Sir James Holt. It seemed appropriate for publication to be in the Journal which has printed other occasional pieces about Maitland. There were two memoirs: W.W. Buckland, "F.W. Maitland", Vol. 1 (1923), 279–301; and S.C. Reynell, "Frederic William Maitland", Vol. 11 (1953), 67–73 (this was written by Maitland's elder sister in the months after his death, but had circulated only privately and in mimeograph). There were also two pieces by Maitland himself: "From the Old Law Courts to the New", Vol. 8 (1942), 2–14 (this was first published in 1883 in The English Illustrated Magazine, Vol. 1, 3–15); and "Two Lectures delivered by F.W. Maitland" [1966] 54–74 (these lectures were given in 1889 to advise candidates for Part II of the Law Tripos on their course of study in the light of new regulations then coming into force; Downing College gave the manuscript in 1959 to the Law School of Northwestern University).

[1] See the memoir by Mrs. Reynell (reference in asterisked note above) at p. 67. The landed status was of course not paraded: *cf.* "I did not realise that you were landowners", C.H.S. Fifoot, *Frederic William Maitland: A Life* (Cambridge, Mass., 1971), at p. 174.

https://doi.org/10.1017/S0008197301000113 Published online by Cambridge University Press

change to an unconventional subject.[2] Then convention took him to the bar like his grandfather and father. Unlike them Maitland meant to practise and did distinguished work for others, but his own practice never grew. After seven years family events broke up the London household,[3] agricultural depression made the landed income falter, and it was finally clear the practice had failed. He decided to start again as law teacher, and in 1883 applied unsuccessfully for a post in Oxford.

Cambridge appointed him a year later. But during that year the second life had been fired in a way which makes it specially right that he should be commemorated in this national place, and near the Hall in which (until just months before he left his practice) the common law had been made.[4] A deeply English Englishman felt shame on learning (and partly from a visiting Russian) how much original material survived for the history of English law and how little had been done. He would see to that, and would not fail again.[5] His first serious books were editions publishable only because Squire Maitland paid, and hence his part in launching the Selden Society which still bears the publishing burden.[6] In 1888 those books and his first Selden volume secured his election as Downing Professor of the Laws of England.

For the rest of his life a house in Downing College was Maitland's tranquil base; and only lately have we realised how often he was at war.[7] Wars about public matters, fought with breath-taking imagery,[8] were openly declared. There was no

[2] The poor start was in mathematics, lasting dislike of Greek having ruled out classics. These were the only subjects in which success might lead to a college fellowship; and the move to moral sciences under the influence of Henry Sidgwick (who later provided the money for Maitland's readership) might have dismayed Maitland's father, whose success in both classics and mathematics had gained him a Trinity fellowship.

[3] His mother's sister died in 1880, having looked after Maitland and his sisters ever since the death of their mother. The elder sister (who was to write the memoir mentioned in the asterisked note above) married in 1883.

[4] For Maitland's own account of the removal of the courts from Westminster Hall, see the asterisked note above.

[5] "I should never have succeeded if I had not failed once": S.C. Reynell, "Frederic William Maitland" (asterisked note above) at p. 70. Mrs. Reynell took this to refer to the undergraduate failure in mathematics (n. 2 above), but at p. 72 she referred also to the surely more relevant passage in his Inaugural Lecture (*Collected Papers*, vol. 1, 480 at pp. 495–496) about failure at the bar.

[6] The serious books were *Pleas of the Crown for the County of Gloucester, 1221* (London 1884) and *Bracton's Note Book,* 3 vols (London 1887). The adjective is needed because there was also a relatively slight volume in a citizenship series, *Justice and Police* (London 1885). Maitland's precise part among those responsible for founding the Selden Society is not known.

[7] This was one of the things to come out of a symposium organised in 1995 by the British Academy. The papers, edited by John Hudson, were published as *The History of English Law: Centenary Essays on "Pollock and Maitland"* (Proceedings of the British Academy, vol. 89, Oxford 1996).

[8] Outstanding examples are his onslaught on the law of real property in 1879, necessarily anonymous while he was at the bar (reprinted in *Collected Papers,* vol. 1, 162–201); and one of his contributions in the Cambridge University Senate in 1897 on the question of degrees for women, *Cambridge University Reporter*, vol. 27 (1896–97), 748 esp. at p. 751.

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declaration of academic wars, though the imagery can be a signal; and battles might be long ago. In a set-piece lecture on *English Law and the Renaissance*[9] he enlisted beside St. George to repel an invader, seeing the 16th-century English law as dying, ripe for replacement by Roman law, and surviving only because stiffened by law teaching in the Inns. The unreality of the Roman threat has long been known, but it was left to the present holder of his chair to show that our law was much alive and staging its own home-made renaissance.

Even in sanctuary it seemed wise to introduce with an agreed example the thought that Maitland could be seriously wrong—and such people cannot be slightly wrong: they can misconceive a situation but hardly mistake a detail. He called orthodox history a contradiction in terms,[10] but his own work became a creed it is impious to question and he might have relished today's special anomaly: the tablet was promoted by one of his unbelievers and will be unveiled by an outright heretic.

A larger anomaly will be unveiled with it. The tablet makes him just "historian". He taught all branches of private law, and his printed lectures on *Equity* are still sometimes recommended to students.[11] He respected his lawyer colleagues,[12] thought little of the individual Cambridge historians of his time,[13] collectively thought them a quarrelsome lot,[14] and when offered the Regius chair of history near the end of his life he unhesitatingly declined.[15]

But historians have long sought to expunge the lawyer; and one episode shows how Maitland's subject came to fall between two chairs. A pure historian spent his life teaching legal history in law schools, the only forum in which it is regularly taught and thought about. But he never talked with his lawyer colleagues or got beyond the layman's view of law as just a lot of rules. Today's rules cannot matter to yesterday's, so he felt entitled to dismiss as an aberration of illness Maitland's stated belief that only a lawyer

[9] Cambridge, 1901.
[10] "Why the History of English Law is not written" (Inaugural Lecture), *Collected Papers*, vol. 1, 480 at p. 491.
[11] For his lecture subjects see Fifoot's *Life* (n. 1 above), 66, 96–97. The recommendation by some teachers that beginners in trusts should start with his *Equity* (published posthumously in 1909 and lightly edited in 1936) may be compared with Maitland's recommendation in 1889 that beginners in land law might profitably begin with Blackstone ("Two Lectures" in asterisked note above at pp. 65–70). It is not the changing details but the elementary bearings that give difficulty. Maitland's rejection of Blackstone's history (Inaugural Lecture, n. 10 above, at p. 489) makes his recommendation more striking.
[12] *Letters of F.W. Maitland*, vol. 1, ed. C.H.S. Fifoot, Selden Soc. (London 1965), nos. 323, 348.
[13] *Ibid.*, no. 323.
[14] *Ibid.*, no. 175.
[15] *Ibid.*, nos. 343, 348.

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could do good work on legal history.[16] And he proved Maitland's point, being good on institutions but saying things about the law which seem sensible until you ask how they could come up. It is not knowledge of modern rules a legal historian needs but a sense of how law works.

Maitland has even been nominated patron saint of historians;[17] but he did not play by the rules of today's history game, which has increasingly focussed on narrow topics in short periods, mostly on individuals whose names take up most or all of any index.[18] Maitland was concerned with individuals too, but they were not indexed because not real people. They were the conflicting interests in a kind of situation, which is what law is about. Like all law teachers he sometimes gains immediacy and saves words by naming imaginary characters. Sometimes they speak in inverted commas: one emotional tirade runs to ten printed lines (its real target being not the supposed 13th-century audience but a 19th-century theory).[19] But usually only vivid prose betrays the dialogue he was hearing and his magic is that readers hear it too.[20]

Provided he could keep his amateur status, neither conscripted into the faculty of his day nor required to conform to the rules of ours, Maitland might not have minded being just "historian". His was still an age of truly original scholarship, before a craft system locking apprentices into the assumptions of their masters, when have-a-go scholars of independent means and independent mind did it their way. His grandfather wrote independently on church history.[21] An independent have-a-go figure in natural history is a larger example and also more directly relevant.

Maitland saw England as a legal Galapagos insulating native evolution from Roman contamination. We now know that he pressed the Darwinian analogy too far, seeing the whole development of English law in terms of monstrous species, the "forms of action": "they are—we say it without scruple—living things ... The struggle for life is keen among them and only the fittest survive".[22] It is one way of picturing what was going on

[16] T.F.T. Plucknett, *Early English Legal Literature* (Cambridge 1958: this chapter of the book had appeared in the Law Quarterly Review in 1951), 13. The reference is to Maitland's Inaugural Lecture (n. 10 above) *Collected Papers*, vol. 1, at pp. 493–494.

[17] G.R. Elton, *F.W. Maitland* (London 1985), Chapter 4.

[18] The legal historian is primarily interested in kinds of situation or relationship or transaction or legal proceeding. An index of names is no help in finding these in the first place, though it may amplify information gained elsewhere.

[19] F. Pollock and F.W. Maitland, *History of English Law* (2nd ed. 1898), vol. 1, 623.

[20] *Cf.* the enchanting recollections of his elder daughter Ermengard, *F.W. Maitland, A Child's-Eye View* (London 1957, format of Selden Society Lectures) at p. 8: "In his dealing with words I believe he said them as he wrote, or at any rate heard them very clearly...."

[21] For Maitland's opinion of his grandfather's work, see *Letters*, vol. 1 (n. 12 above), no. 98.

[22] *History of English Law* (n. 19 above), vol. 2, 561.

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from the 16th century to the 19th, when lawyers (in their own ruthless renaissance) were choosing remedies for procedural advantage however inappropriate to their claims. But Maitland extended the vision into earlier times, and so hid what had really been rational argument about legal categories.[23] His account of early property law also saw remedies competing for custom: but this was another fight, not against Roman law (which ironically inspired the key element in his scheme) but against feudalism.[24] This did wider damage: he carried back into the 12th century basic ideas of property at home in the 19th, and therefore assumptions of a 19th-century social and economic order.

There are no scholarly miracles; and if writing so old still has authority that is because people do not look behind it to the evidence. Reliance is natural when the writing set the assumptions upon which generations have worked, when history is so fragmented that nobody looks at the wood in which their particular trees were growing, and when the evidence is intractably legal. And Maitland's magic is not confined to the immediacy with which his readers hear disputes. There is also the lawyer's power to impose a simple and convincing pattern upon complex matters. It became a creed because it *had* to be right.

The pattern is the thing, not details but the way they are fitted together. And if the pattern is wrong, that will show not in details mistaken but in details missed. Incongruities have been emerging since the time of the second war, mostly in legal publications and disregarded by historians.[25] By now many details can be seen not to fit Maitland's pattern. Of some he could not have known: others were missed by the spot-light of that concentrated vision. But there they are; and I believe another irony of this occasion is that historians of medieval England will have to let Maitland die and begin again with less static assumptions. They will mind, but he would not. He meant to open a subject up, not also close it down.

[23] This vision gained wider currency from the posthumous publication of his lectures on *The Forms of Action at Common Law* (first published together with *Equity* in 1909; published separately but unedited in 1936).

[24] *Cf.* the published papers of the British Academy's centenary symposium on "Pollock and Maitland" (n. 7 above), at p. 246.

[25] Early publications raising incongruities (though not always spelling them out) were as follows. On the forms of action: H.G. Richardson and G.O. Sayles, *Select Cases of Procedure without Writ under Henry III* (1941, Selden Soc. vol. 60); S.F.C. Milsom, "Not Doing is No Trespass" (1954 Cambridge Law Journal) *Studies in the History of the Common Law* (London & Ronceverte 1985), 91–103; Milsom, "Reason in the Development of the Common Law" (1965 Law Quarterly Review) *ibid.*, 149–170. On property law: S.E. Thorne, "Livery of Seisin" (1936 Law Quarterly Review) *Essays in English Legal History* (London & Ronceverte 1985), 31–50; Thorne, "English Feudalism and Estates in Land" (1959 Cambridge Law Journal) *ibid.*, 13–29; S.F.C. Milsom, new introduction to reissue of "Pollock and Maitland" (1968). For a recent survey of the incongruities about property (a certain exasperation itself tribute to the continuing power of Maitland's analysis) see S.F.C. Milsom, "Maitland and the Grand Assize" (1995) Haskins Society Journal, vol. 7 (Woodbridge & Rochester NY 1997), 151–177.

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He will not die for lawyers. He founded the history of their subject, and it is not just part of social and economic history. To use uncomfortably large words it is the intellectual history of society. As well as protecting native development our Galapagos preserved evidence from an early stage—how early dawned upon Maitland only near the end of his life. Photographs of manuscripts could be worked on in winter exile, and he began editing year books, courtroom discussions later than the terminal date of the book in which he had portrayed an almost modern system. The modernity came from later ideas carried back and also from a Roman infection of his main 13th-century source.[26] Maitland took his source to represent regular legal thinking in 13th-century England, and was startled to find in the 14th-century year books a "stage in the history of jurisprudence" so early that the equivalent stage in Roman law could only be guessed at.[27] That Roman stage would have been centuries before the Christian era.

We cannot know whether he ever set this late insight against the picture he had painted so definitively. Little time was left, and (his only digression in 22 years) he gave much of it to writing the life of a dead friend.[28] But we can see that what he had started was the history of the one Western system for which evidence survives from a beginning, when men first had to work out right and wrong with their own reason instead of settling single disputes with blank answers from ordeals and the like. In a passage engraved on the tablet Maitland aspired to recover "common thoughts about common things";[29] and those thoughts and things went deeper than the routines of medieval life.

[26] "Maitland's great work is essentially Bractonian": T.F.T. Plucknett, *Early English Legal Literature* (n. 16 above) at p. 105.

[27] *Year Books of 1 & 2 Edward II* (1903, Selden Soc. vol. 17), Introduction at p. xvii.

[28] *The Life and Letters of Leslie Stephen* (London 1906). Letters between Maitland and Stephen after the death of Stephen's second wife in 1895 show Stephen believing that if there was to be any memoir of himself it should be short and hoping that Maitland would write it; *Letters*, vol. 1 (n. 12 above), no. 157; Fifoot's *Life* (n. 1 above), 268; *Letters of F.W. Maitland,* vol. 2, ed. P.N.R. Zutshi, Selden Soc. (London 1995), no. 63. Stephen died early in 1904; and instead of a short memoir Maitland collected letters and impressions from both sides of the Atlantic and wrote a book running to 500 pages. It appeared early in November 1906 and Maitland knew it had been well received: but the cost in time and worry appears from many of his own letters and from a letter written after his death by his wife to her mother: Fifoot's *Life*, 279.

[29] From the closing paragraph of *Domesday Book and Beyond* (Cambridge 1897).

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