



STROUD FRANCIS CHARLES MILSON

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## 1923–2016

STROUD FRANCIS CHARLES MILSOM, known since childhood as ‘Toby’,<sup>1</sup> was the pre-eminent historian of English law in the twentieth century. The penultimate male descendant of the Georgian Milsoms who gave their name to Milsom Street in Bath, and of the Victorian Milsoms who founded the music company there, he was born on 2 May 1923, the second son of Harry Lincoln Milsom (1889–1970), Secretary of the London Hospital in Whitechapel, and Isobel Vida (‘Babs’), daughter of the Hon. W. E. Collins MC of New Zealand.<sup>2</sup> Harry had met Isobel in Cambridge at a Trinity College May Ball, while she was still a pupil at Wycombe Abbey, and they married in 1915. Toby always spoke fondly of them. They were clearly a happy family, imbued with good humour, and comfortably situated, with a house in Wimbledon and a larger house (‘Carn Du’) in Rock, Cornwall.

Harry had the foresight to enter both his sons as candidates for admission to Trinity College in 1929, when Toby was six. But the path to Cambridge was not smooth. Toby’s schooldays at Charterhouse were, by his own account, unhappy. He was not a sportsman, and he was not exceptionally distinguished academically. But he enjoyed the sciences, and seemed set on a scientific career of some kind. Then calamity befell him. While staying at Rock in April 1938, the inquisitive schoolboy risked an

<sup>1</sup>His first name was registered on birth as George, but changed at baptism. Stroud was the forename of an uncle, Francis that of his paternal grandfather, and Charles that of his paternal great-grandfather.

<sup>2</sup>A. C. Fox-Davies, *Armorial Families: a Directory of Gentlemen of Coat-Armour* (Edinburgh, 1929), pp. ii, 1361.

unwise investigation of something on the beach which exploded and fractured his skull, puncturing the frontal lobe of his brain and bringing him close to death. A risky operation by the eminent neurosurgeon Professor H. W. B. Cairns of Oxford, followed by many others during a seriously unpleasant year in hospital, left him with a permanently cleft forehead but with his formidable mental faculties unimpaired. Indeed, there was a theory—which he sometimes hinted at himself—that his imaginative gifts may have been somehow released by the trauma. It was an encouraging sign when, during his recuperation, he cultivated his hobby of inventing gadgets seemingly inspired by Heath Robinson.<sup>3</sup>

Disaster struck the family again in 1940, when Toby's elder brother Darrell was killed in an aircraft collision, only months after receiving his commission as a Pilot Officer.<sup>4</sup> The hopes of the family were now pinned on Toby. He had been at the bottom of his advanced class on returning to school, a year behind his contemporaries; but he passed the school examinations required for university entrance, and in 1941 duly followed his father to Trinity. Whether or not it was the result of wartime conditions, there was no interview—a reassuring letter from the housemaster was sufficient—and no prior discussion of what he might study. He went up with a trunk full of science books, intending to read Natural Sciences, but his tutor disabused him of that on arrival. His Mathematics were not good enough. The next suggestion, that he might read English, was brushed aside with the observation that he would surely not want to become a schoolmaster. So he was pushed into Law, the last refuge in such cases.

To everyone's surprise, Milsom began to shine in this new line of study, with starred firsts and prizes in both parts of the Tripos,<sup>5</sup> and a brief first

<sup>3</sup> E.g. machines to let him pick things off the floor. This was not a new-found inclination. In 1937 he had invented a fretwork frame for holding crossword puzzles cut from newspapers—this was illustrated in *The Times*, with a letter from his father which shows more than a hint of the humour which Toby inherited.

<sup>4</sup> He was killed on 29 March in a collision between two Gloster Gladiators. Born in 1919, he had gone to the RAF College at Cranwell, rather than Cambridge (as intended), on leaving school. There was a third calamity when Harry Milsom, the father, lost an eye and narrowly escaped death following a Territorial Army explosives demonstration at Padstow.

<sup>5</sup> He was placed in the first class in the Law Qualifying Examination in 1942 and awarded a college prize. The following year, in Part IB of the Law Tripos, his was the only distinction (colloquially known as a starred first) and he was awarded the George Long Prize in Roman Law. In Part II of the Tripos in 1944 he was one of two candidates awarded distinctions, and shared the George Long Prize for Jurisprudence with the other.

publication in the *Cambridge Law Journal* in his second year.<sup>6</sup> A few years later Harry Hollond, a venerable Law fellow of Trinity, reflected on this strange turn of events in a letter to T. F. T. Plucknett:

Milsom is a very odd case. For one thing he had a hole blown in his forehead by an explosion, and [for] another he was just an ordinary average boy at Charterhouse in school subjects, and his housemaster was amazed when at the end of his first year here he achieved an unprecedented performance in the Law Qualifying Examination. He adds to his ability a quite outstanding charm, and his modesty is almost absurd.<sup>7</sup>

After graduating in 1944, Milsom worked until the end of the war as a temporary civil servant in the Naval Intelligence Division of the Admiralty, scrutinising aerial photographs in Oxford. He then returned to Cambridge and read for the Bar, being tutored at the weekends by R. E. Megarry (later Sir Robert Megarry FBA). He was awarded a Cassel Scholarship by Lincoln's Inn,<sup>8</sup> was called to the Bar in 1947, and envisaged a career at the Chancery Bar, perhaps pursuing his scientific inclinations by specialising in patent work. But scholarship was pulling in another direction, and in 1947 he obtained a Commonwealth Fund Fellowship to study for a year in the United States. Since the most eminent legal historian across the Atlantic (S. E. Thorne) was then in England, it was arranged that he should go to the Pennsylvania Law School in Philadelphia to study under George L. Haskins. The original plan was to work on bailment, but Haskins suggested the early history of judicial review instead.<sup>9</sup> Milsom set to work and wrote a dissertation on the subject in under a year.<sup>10</sup>

The dissertation was a remarkable piece of work, revealing Milsom's ability to peel away misconceptions and rethink the past from the original sources. He began work with the writ of error, which had never been a satisfactory procedure, since it was tied rigidly to the formulaic wording of the plea roll. But 'those who laid the foundations of the common law

<sup>6</sup> *Cambridge Law Journal*, 8 (1943), 206, a case-note on *Murray v Parkes* [1942] 2 KB 123. A second followed, *Cambridge Law Journal*, 8 (1944), 331–2, on the more important case of *Glasgow Corporation v Muir* [1943] AC 448.

<sup>7</sup> Letter of 28 September 1948. This letter, found in Milsom's papers, must have come from Plucknett's papers.

<sup>8</sup> This was worth £600. It more than paid for his admission and call fees, and for his pupillage.

<sup>9</sup> Letter from Haskins to Milsom, 12 July 1947.

<sup>10</sup> While there he wrote a review of F. Schulz's *History of Roman Legal Science* (Oxford, 1946), published in *University of Pennsylvania Law Review*, 96 (1947), 299–301, which already displayed something of his characteristic way of thinking. His main criticism was that Schulz assumed everything the Roman jurists wrote must have been the lucid expression of accurate thought.

were intelligent men', and Milsom concluded that 'something at some time must have gone wrong, that there must have been an unperceived degeneration'. He decided that the key to the story lay in the more obscure procedure called 'false judgment', which no one had correctly grasped:

Accounts of the process of false judgment are to be found in many text books; all are in substantial agreement, and all, as it has transpired, are unsatisfactory. For the most part they are based upon a passage in Glanvill, and if the present writer is correct almost every word of that passage has been misunderstood ...

He concluded that false judgment had been the prototype of proceedings in error, and largely responsible for the procedure's defects. Its dominant characteristic, a legacy from the Anglo-Saxons, was the idea that the judge who judged unjustly had committed a fault for which he ought to be punished. False judgment focused not upon the rights of the parties, but upon the wrongs of the court, and therefore upon its record. Various consequential developments altered the role of the record, causing serious long-term difficulties. The dissertation concluded with some modest disclaimers, the last of which was quietly subversive: 'The writer does not believe that the story which he has tried to tell has any significance in modern affairs at all except perhaps this, that it furnishes new illustrations of the great part, both good and ill, played in legal development by the forces of misunderstanding and confusion.'

On Milsom's return, the essay was submitted for a prize fellowship at Trinity College, the examiners being Plucknett and Thorne, the foremost historians of English law at the time. They were bowled over by it, and Milsom was given the fellowship without difficulty.<sup>11</sup> Plucknett reported that it was many years since he had read anything on legal history with such pleasure and admiration: 'It would be most unfair to describe this dissertation as showing "high promise", for in fact it is a work of notable achievement.' He had recognised the distinct qualities which were later to characterise Milsom's published work:

at numerous points I have noted suggestions and speculations which could only have proceeded from the application of a mature and penetrating mind to a rich store of historical knowledge. This fertility in suggestion is balanced by a keen sense of the difference between proof and probability and complete intellectual honesty (as on p. 118). There are several valuable discussions in which the meaning of words is analysed (e.g. *recordum*, *curia*), and a passage on p. 134 which

<sup>11</sup> He was also awarded the Yorke Prize the following year, the examiners being Plucknett and Sir Cecil Carr. There is a copy of the essay in Trinity College library, and Milsom's own copy will be placed in the Centre for English Legal History, Cambridge.

briefly touches upon the psychology of legal decision shows how thoroughly the author has entered into the thought of the thirteenth century lawyer. In short, this is a mature study ... the author keeps steadily on his course, and constructs his argument in English which is careful, correct and unpretentious. It is a pleasure in these days to read an essay so free from clichés and jargon.

Haskins recommended publication, subject to some work on the manuscript records, which of course were not available in Philadelphia. Plucknett, too, was in no doubt that it should be published as a book,<sup>12</sup> and Milsom's Yorke Prize was awarded on condition that the manuscript be prepared for the press. Milsom duly began to delve into medieval plea rolls in the Public Record Office, amassing piles of expensive photographs, but he was diverted by other work and left the revision too long. A proposal for publication was still with Cambridge University Press in the 1960s, and as late as 1971 he wrote to the Press that he would like to 'preserve the intention and possibility of producing it'.<sup>13</sup> But there is no evidence that he ever began the revisions.

Mindful of the impermanence of his prize fellowship, Milsom did not in 1948 dare to abandon all thoughts of the Bar, and in his first year he served a pupillage in Chancery chambers with J. W. Brunyate, himself a former prize fellow of Trinity.<sup>14</sup> The precaution proved unnecessary,<sup>15</sup> because in 1949 he was appointed a University Assistant Lecturer at Cambridge, and in 1952 he was promoted to the tenured position of Lecturer. He immediately started buying books on legal history,<sup>16</sup> and in

<sup>12</sup> Letter to Derek Hall, 19 September 1949: 'A new fellow of Trinity Cambridge has a book in preparation, which I have seen ... he is S. F. C. Milsom, and it is a good book.' Cf. S. E. Thorne to Harry Hollond, 16 June 1963, referring to 'his unfortunately still unpublished but often-quoted paper on judicial review'. There are only a few remarks on the subject in S. F. C. Milsom, *Historical Foundations of the Common Law*, 1st edn. (London, 1969), pp. 47–8; this book is hereafter referred to as *HFCL*.

<sup>13</sup> Letter of 15 March 1971 ('although the fundamental work is there, it needs a good deal done to it. I was actually without a copy of it for many years until recently, because my copy was being used by the late Helen Cam'). He asked for more time, on the grounds that writing the Maitland Lectures (1972) was more important to him.

<sup>14</sup> Brunyate's clarity of legal thought and exposition made a deep impression on Milsom: see S. F. C. Milsom, 'F. W. Maitland', *Proceedings of the British Academy*, 66 (1980), p. 274. He wrote several works, including a posthumous edition of Maitland's *Equity* (based on lecture-notes). The chambers were at No. 4, Stone Buildings, Lincoln's Inn.

<sup>15</sup> He did earn a fee of 50 guineas for a joint opinion written in 1949, with Professor E. C. S. Wade, supporting the Government's claim to sovereignty over the Ecréhos and Minquiers islets, on the strength of records stretching back to the time of King John. The International Court of Justice decided in favour of the United Kingdom: *France v United Kingdom* [1953] ICJ 3.

<sup>16</sup> Among the earliest were *Bracton's Note Book*, bought in January 1949, and the first eight volumes of the *Curia Regis Rolls*, bound in March 1949.

1951 laid out £100 for a set of ‘quarto’ year books. Odd as it seems in retrospect, the subject of Legal History, which had until 1949 been a paper in Part II of the Law Tripos, was dropped from the syllabus at the very moment of his appointment. This was ostensibly the outcome of a Tripos reform, but the true reason was that the subject had previously been taught in an old-fashioned manner which failed to attract students.<sup>17</sup> The result was that Milsom lectured on Legal History only for the postgraduate LLB course,<sup>18</sup> though from 1950 he also gave lectures on Personal Property for the Tripos. He reminisced that his lectures were scheduled at 9am, and he usually began preparation at midnight, so that they were ‘fresh off the cooker, as it were’. Most of his teaching, however, would have taken the form of college supervisions, doubtless in a wider range of subjects.

### Trespass and the forms of action (1949–54)

The original reason for putting aside the prize essay was that Milsom had become concerned, while preparing his first LLB lectures in 1949,<sup>19</sup> about the traditional background account of English legal history as enshrined in Maitland’s *The Forms of Action at Common Law*. The ‘forms of action’ were the procedural formulae, or writs, into which plaintiffs’ facts had to be fitted in order to originate lawsuits in the royal courts, and they had seemed to provide an eternal conceptual framework for the common law. Maitland’s little manual had come to be treated as gospel, and had been the basis of Cambridge teaching, though it was put together posthumously from lecture notes and never intended for publication. It was a concise introduction to the classical system, which had survived almost until Maitland’s own time: still essential learning for a Victorian law student, but not a convincing explanation of how or why the myriad structure of peculiarities had first evolved. ‘To one whose boyhood had been excitedly concentrated upon the natural sciences’, Milsom later recalled, the ‘lack

<sup>17</sup>The Tripos course had been taught in Milsom’s undergraduate days by H. E. Hollond of Trinity, the Rouse Ball Professor of English Law, whose lectures were said to have been far from popular, and seems last to have been taught in 1948–9 by K. Scott.

<sup>18</sup>From 1950 to 1955 jointly with M. J. Prichard, a fellow of Gonville and Caius College, who obtained a starred first in the LLB in 1949 after attending Milsom’s first class. Mr Prichard’s recollection is that Milsom gave most of the lectures.

<sup>19</sup>See ‘Not doing is no trespass’ (n. 26, below), 105 n. 5 (a discussion with Hollond), and 113 n. 33 (a discussion with Prichard).



of any credible connections between phenomena' was unsatisfying.<sup>20</sup> Milsom revealed his uncertainty about the traditional story in 1949, when reviewing a book about thirteenth-century procedure without writ.<sup>21</sup> Procedure by plaint or bill had long been regarded—reading history backwards—as an odd exception to normal common-law procedure, a form of extraordinary justice comparable to equity. But in fact it was the norm before the writ system began, and Milsom saw that an understanding of how such lawsuits worked, and how causes of action were framed independently of writs, ought to be the principal key to understanding how and why the writs came into being.

The same book review alluded briefly to the origins of the writ of trespass, and it was with trespass that the doubts mainly began. Generations of law students had been taught, and indeed it had become the law, that there were two principal torts: trespass, a forcible wrong (committed 'with force and arms against the king's peace'), and 'case',<sup>22</sup> a miscellaneous and ever-expanding category of non-forcible wrongs. It was widely believed that trespass had been recognised first, and that—as the 'fertile mother of actions' (Maitland's immortal phrase)—it had somehow begotten case, though quite how this happened was controversial. Milsom's difficulties with trespass were further explored in 1953 when, in a review of A. K. R. Kiralfy's *Action on the Case*,<sup>23</sup> he criticised the author's confusion over the action's origins. Kiralfy had assumed that there was in the thirteenth and fourteenth centuries 'a definite wrong called trespass', whereas the word probably just meant 'wrong' in a general sense, as in the Lord's Prayer.<sup>24</sup> On Milsom's view, the origin of case ceased to pose any problem if non-forcible wrongs and trespasses *vi et armis* were both seen as species of trespass remediable through two different forms of writ, the special form (actions on the case) and the general. The 'force and arms' found in the general writs had a jurisdictional rather than a juridical

<sup>20</sup> S. F. C. Milsom, *Studies in the History of the Common Law* (London, 1985), p. ix: this book is hereafter referred to as *Studies*. Cf. the opening remarks in his unpublished Harris Lectures at Indiana University (1974): '... My first attempt in life was to be a natural scientist; and I have never lost the scientist's craving for an almost visible simplicity of mechanism.'

<sup>21</sup> *Law Quarterly Review*, 65 (1949), 259–63, belatedly reviewing H. G. Richardson and G. O. Sayles (eds.), *Select Cases of Procedure without Writ under Henry III* (London, 1941). The editors had not understood the significance of their material in the way Milsom did.

<sup>22</sup> This was an abbreviation of 'action on the special case', or 'trespass on the case'.

<sup>23</sup> *Cambridge Law Journal*, 11 (1951), 464. There was a similar criticism in the review of C. H. S. Fifoot's *History and Sources of the Common Law: Tort and Contract* (1949), in *Cambridge Law Journal*, 10 (1950), 482.

<sup>24</sup> A further development of this thinking was that criminal misdemeanours were also trespasses, in the same sense, but divided from 'tort' by jurisdiction and procedure: *HFCL*, p. 43.



explanation; lesser wrongs were at first beneath the notice of the king's judges, though they were trespasses none the less. Trespass had been split in two for purely practical reasons but with big unforeseen consequences.<sup>25</sup> This was the core of Milsom's discovery about the personal actions, an insight which he acknowledged had been prompted by one of Professor Hamson's lectures in 1947.<sup>26</sup>

Milsom expounded the theme more fully in his first major paper, 'Not doing is no trespass' (1954).<sup>27</sup> The theory that trespass simply meant wrong, and that 'trespass on the case' was a constituent species rather than something generically different, not only did away with the problem of its origin but also removed a major difficulty relating to its later expansion into the field of contract. The use of 'case' to remedy passive breaches of promise—'the most spectacular exploit of case'—had been resisted in the fifteenth and sixteenth centuries, supposedly (according to the received theory) because 'nonfeasance', not doing anything, did not remotely resemble forcible trespass and could not easily be accommodated by analogy. In reality, as Milsom pointed out, it had never been wholly true that 'not doing is no trespass'.<sup>28</sup> The innkeeper who did not protect his guest's goods from theft, or the tenant whose failure to repair his stretch of sea-wall led to a flood, had both been made liable by the use of special writs of trespass devised in the time of Edward III. Not doing could be a trespass, if there was a duty to act; but the medieval view was that, if the duty to act was essentially contractual, the plaintiff should use one of the pre-existing contractual remedies (the writs of covenant, debt and detinue). Many plaintiffs, however, could not use covenant, because they did not have the necessary document under seal, and they did not like to use debt or detinue because (unless there was a sealed bond) the debtor could avoid liability simply by swearing an oath. It was arguably wrong to evade these procedural requirements by treating a breach of contract as a tort, but the exploit was brought off by emphasising the economic damage

<sup>25</sup>Cf. *HFCL*, p. 271 ('the common law of torts was permanently disfigured by coming to the king's courts in two instalments'), and p. 345 ('The modern tort of negligence resulted from the confluence of two streams which had been separated in the first instance only by the jurisdictional division that produced "trespass" and "case" ...').

<sup>26</sup>Hamson had drawn attention to a telling case of 1309, in which a special action with no allegation of force and arms was described in the report simply as 'trespass': S. F. C. Milsom, 'Not doing is no trespass: a view of the boundaries of case', *Cambridge Law Journal*, 12 (1954), 106 n. 7 (*Studies*, p. 92); *Baker and Milsom: Sources of English Legal History*, 2nd edn by J. Baker (Oxford, 2010), pp. 669–71.

<sup>27</sup>Milsom, 'Not doing is no trespass', 105–17; *Studies*, 91–103.

<sup>28</sup>The aphorism was well known to lawyers from a case reported by Sir Edward Coke in 1610.

suffered by reliance on the good faith of the promise, which could be presented as a kind of deceit; and this led in turn to the mysterious doctrine of consideration.<sup>29</sup>

Milsom's new way of looking at trespass put paid to Maitland's *Forms of Action*, at any rate for the formative period of the common law. As Milsom wrote half a century later:

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 ... living things ... The struggle for life is keen among them and only the fittest survive'.<sup>30</sup> It is one way of picturing what was going on from the sixteenth century to the nineteenth ... But Maitland extended the vision to earlier times, and so hid what had really been rational argument about legal categories.<sup>31</sup>

Legal history had thus suddenly begun to change. Fifoot's *History and Sources of the Common Law* (London, 1949) would (as Milsom acknowledged) revive students' interest, by allowing them to read the arguments in the old cases at first hand.<sup>32</sup> Then Kiralfy's *Action on the Case* (London, 1951) had pointed to the importance for scholarship of the later plea rolls, which had been completely unexplored, and of the records of local courts in showing how law was thought of away from Westminster. Milsom hailed it as 'a vast and heroic labour', albeit presented as 'aggregations of important facts rather than as narratives'.<sup>33</sup> But both writers had failed to connect the facts convincingly. By misunderstanding 'trespass', they had misunderstood the role of the early forms of action: 'It is not the nature of plaster that determines the shape of the cast.'<sup>34</sup> It was Milsom who had begun to supply a convincing narrative which joined up the facts.

<sup>29</sup> Milsom would later characterise consideration as 'a coherent theory of contract mutilated by its passage through tort': *HFCL*, p. 315.

<sup>30</sup> A quotation from P. & M. (n. 53, below), p. 561.

<sup>31</sup> S. F. C. Milsom, 'Maitland', *Cambridge Law Journal*, 60 (2001), 268–9. Cf. *HFCL*, p. 25: 'since the mechanisms of change within the common law had been to allow one writ to do the work formally [*altered in 1981 to formerly*] done by another, the whole process came to be seen as an irrational interplay between "the forms of action". It was not. It was the product of men thinking.'

<sup>32</sup> Review in *Cambridge Law Journal*, 10 (1950), 481. Milsom here offered some scathing comments about the old way of teaching legal history 'as a mass of assertion and conjecture taken entirely at second hand, learnt by heart, and rarely understood ... To learn the subject like that is almost a waste of time.'

<sup>33</sup> Review in *Cambridge Law Journal*, 11 (1951), 466.

<sup>34</sup> *Ibid.*

## Marriage, and Oxford (1955–64)

Milsom's work was briefly interrupted by a change of personal circumstances and a geographical relocation. During a severe illness which confined him to his rooms in Trinity College, the other Law fellows had asked Irène Radzinowicz to keep an eye on him, and they had become close. Irène (formerly Ira) was the daughter of Witold Szereszewski (1879–1943), a Polish architect, and in 1933 (aged sixteen) she had married a criminologist, Leon Rabinowicz (1906–99—later Sir Leon Radzinowicz FBA), who taught at the Free University of Warsaw. They came to England in 1938 to study the English penal system, thereby escaping the fate which befell both her parents.<sup>35</sup> Irène had helped her then husband with the research for the first volume of his *History of English Criminal Law* (London, 1948), which earned him a fellowship of Trinity, but the marriage had proved painful for Irène and it ended in divorce. With Toby she found a remarkable rapport. They married in 1955, and supported each other unfailingly for forty-three years. Irène was to manage his life, type up his hieroglyphic drafts,<sup>36</sup> read his proofs, compile his indexes and travel the world with him. She was also reputed to chivvy him into finishing things which he was disinclined to release.<sup>37</sup> But in 1955 it was not possible to remain in Cambridge after marrying the wife of another fellow, and so Milsom resigned his fellowship, accepted a temporary lectureship at the London School of Economics, and moved with Irène to a 'miserable flat' in Chiswick. The *Cambridge Law Journal* was now out of bounds, the editor (a fellow of Trinity) having declined to publish any more of his work on the ground that he did not want to offend Radzinowicz.<sup>38</sup>

<sup>35</sup> Milsom wrote to the present writer on 30 April 2005: 'They came for her Jewish father in the small hours, shot him in a street in Warsaw, and would not let his body be taken away for burial. Her good Catholic mother just disappeared, presumably to be killed in a camp.' Her father had been reduced to working as a warehouseman, and was killed in the Umschlagplatz from which Jews were transported to Treblinka.

<sup>36</sup> By his own account, 'She contrived to type almost everything I ever wrote, but used to say my manuscript was just an aid to telepathy ...': letter to Fiona Baker, excusing his handwriting, 15 July 2003.

<sup>37</sup> Hollond wrote to Irène on 5 August 1969, concerning *HFCL*: 'P.S. After finishing this letter, I read it to Marjorie, who commented: "you haven't said anything about Irène's contribution towards the successful appearance of Toby's book" ... So I add this p.s. to assure you how fully aware we are of what the book owes both to your stimulus and to your co-operation.' Milsom once told M. J. Prichard that she would sometimes order him back to work from more relaxing pursuits such as fretwork.

<sup>38</sup> Letter to the present writer, 15 December 1985, adding: 'Irène and I could, as it were, have sunk'. The editor was Professor C. J. Hamson, who nevertheless remained on friendly terms with Milsom.

The difficulties were soon overcome. Through the intervention of a London colleague (Professor L. C. B. Gower), the editor of the *Law Quarterly Review* (A. L. Goodhart) agreed to take anything he wrote. Then, the following year, he was offered a fellowship of New College, Oxford,<sup>39</sup> where he became settled with Irène in a beautiful college house in New College Lane. As was then usual at Oxford, he was teaching around sixteen hours a week, and from 1959 he also served as dean, responsible for discipline. His pupils from that time remember with fondness both his directness in encouraging high standards, where appropriate,<sup>40</sup> and the generous help he gave to those with less appetite for legal scholarship than himself. One of the latter recalled being asked each week whether or not he had done any work, in between rowing, and on giving the usual evasive answer would be told, ‘Never mind, sit down, have a sherry, and I will tell you all about it.’<sup>41</sup> Many acknowledge the lifelong personal influence which he (and Irène) exerted on them.

Meanwhile, in the vacations, Milsom continued with his work on the personal actions. He had searched through the plea rolls for examples of trespass cases, and the result was a trilogy of articles, ‘Trespass from Henry III to Edward III’, which appeared in the *Law Quarterly Review* in 1958.<sup>42</sup> The use of plea rolls had been pioneered by Kiralfy and G. O. Sayles,<sup>43</sup> but Milsom’s approach went beyond the collection of specimens. The articles drew some private criticism for their dense technicality,<sup>44</sup> but they further strengthened the case Milsom had made in 1954 about trespass, and added some general conclusions. Legal historians had been

<sup>39</sup> He succeeded to the Law tutorship which J. B. Butterworth (later Lord Butterworth) vacated on becoming bursar.

<sup>40</sup> C. J. Perrin CBE recalls that Milsom wrote on one of his first essays, ‘Assertion is no substitute for reasoning, and especially when the assertion is wrong.’

<sup>41</sup> C. Russell, ‘My legal life’, *Lawyer Monthly* (June 2014), 30–1.

<sup>42</sup> S. F. C. Milsom, ‘Trespass from Henry III to Edward III’, *Law Quarterly Review*, 74 (1956), 195–224, 407–36, 561–90; *Studies*, pp. 1–90.

<sup>43</sup> Sayles drew attention to the high proportion of trespass cases in the King’s Bench rolls under Edward I: *Select Cases in the Court of King’s Bench under Edward I*, vol. ii (57 London, 1938), pp. xlii–xliii. But he regarded trespass as ‘this “mitigated” felony on the borderland of tort’.

<sup>44</sup> E.g. Hollond to Milsom, 3 November 1958: ‘I venture to suggest that when you publish further articles in the LQR you should look at them for a moment through the eyes of a probable reader and when necessary enlighten by a note ... (e.g. *op. se*)’. Cf. Hamson to Milsom, 23 October 1963: ‘I remember reading your prize dissertation on the Origins of the Writs of Error—a truly astonishing affair which made the story uncannily clear and plausible and exciting, and I missed a comparable effect in the LQR articles. But the cause most probably is that Error was the work of a very young man who did not bear the burden of knowledge which you now have and who was therefore willing and able to tell the story in a manner much more debonnaire, and much less appropriately no doubt. It is I am sure as foolish to regret that as to regret *les neiges d’antan*.’

looking for conceptual developments, a growing body of remediable wrongs starting with forcible trespass, ‘but we come nearer the truth if we suppose a fixed body: what increased was the proportion remediable in royal courts’. The real story was about jurisdictional boundaries, and the strategies for getting round them.

It was in 1958 also that Milsom first became actively involved with the Selden Society.<sup>45</sup> Plucknett asked him if he would take over the editing of *Novae Narrationes*, which had been begun in 1933 by Dr Elsie Shanks in parallel with her proposed glossary of Law French. It was a guide to the French forms of oral pleading in the various forms of action, probably intended for use at moots in the nascent inns of court or of chancery.<sup>46</sup> The French text was Shanks’s, but Milsom revised the translation heavily in order to make legal sense of it, and wrote a long introduction surveying all the actions represented in the text, commenting on the formulae in the light of reported discussions and early treatises on procedure. The massive volume appeared in 1963. It was full of recondite learning, and few have read it from cover to cover; but Milsom later considered it as a kind of starting-point,<sup>47</sup> and was grateful that the unsought task had compelled him to confront many aspects of the actions which he might not otherwise have thought significant. The exercise convinced him that editing texts could be more fruitful than writing monographs:

In a monograph the writer sets the agenda and will dot i’s and cross t’s in the existing learning. In an edition the document sets the agenda, and (if he lets it) it may lead the editor into original thought. In my own case I’m sure it was brooding over the forms in *Novae Narrationes* that was mainly responsible for any idea I ever had.<sup>48</sup>

That was obviously an exaggeration, but Milsom’s appreciation of the importance of editing coincided with the aims of the Selden Society, of which he became Literary Director, in succession to Plucknett, in 1964.<sup>49</sup>

<sup>45</sup> He had discussed with Plucknett as early as 1952 an edition of Holkham Hall MS. 245, discovered by Thorne, a collection of entries from the plea rolls from 1296 to 1317. He obtained photographs of it, probably because it contained numerous error cases. But Thorne advised against an edition, and the idea was dropped.

<sup>46</sup> Shanks disagreed with Milsom on this, but subsequent research on moots in the inns suggests that Milsom was right.

<sup>47</sup> Letter to Biancalana, 22 August 1997: ‘Research [while at Oxford], mostly in vacations, was on the history of the personal actions (on which I also gave lectures), and then (which I have always thought of as my main starting-point) trying to make sense of the forms in *Novae Narrationes*.’

<sup>48</sup> Letter to the present writer, 12 December 2001.

<sup>49</sup> He held the office until 1980, and served as President in the Society’s centenary year (1987).

## London (1964–76)

Milsom also succeeded Plucknett in 1964 as Professor of Legal History at the London School of Economics.<sup>50</sup> Plucknett had been the first holder of the chair, created in 1931,<sup>51</sup> and Milsom was the obvious successor. Freed from college teaching and decanal responsibilities, Milsom was highly productive in the London years, and in 1967 he was elected a Fellow of the British Academy. During the same period he was a regular summer visitor to New York University and Yale, where he taught legal history courses.<sup>52</sup>

The year after he arrived in London he accepted an invitation by Cambridge University Press to produce a new edition of ‘Pollock & Maitland’, then in its seventieth year.<sup>53</sup> Tinkering with Maitland’s hallowed words was unthinkable, and so he decided instead to write a long critical introduction.<sup>54</sup> Published in 1968, it turned out to be one of his major works, and much of his later writing would be concentrated on Maitland—whom he greatly admired as the founder of his subject,<sup>55</sup> but whose writings some historians seemed to treat as unchallengeable. He began the introduction by remarking on the longevity of Maitland’s book; it was being reprinted ‘not as a dead masterpiece but as a still living authority’.

<sup>50</sup> His candidacy was supported by Thorne, who wrote to Hollond on 16 June 1963, ‘In my opinion Toby is the most promising legal historian in England today, and it was in these precise words that I urged his name upon Kahn-Freund when he visited me here ....’.

<sup>51</sup> Plucknett died in 1965, and Milsom’s insightful memoir was published in S. F. C. Milsom, ‘Theodore Frank Thomas Plunknett 1897–1965’, *Proceedings of the British Academy*, 51 (1965), 505–19; *Studies*, 279–93. He was (according to Milsom, in an interview in 2009) ‘a very nice man, totally removed from the world’; but he lost his mind a few years before his death, and it was rumoured that the LSE authorities had to forge his signature to a letter of resignation.

<sup>52</sup> He made nineteen visits to teach legal history in the United States: five to New York University (a relationship initiated by A. L. Goodhart), nine to Yale, three to Indiana, one to Harvard and one to Colorado. He visited China in 1979 as part of a British Academy delegation, and lectured in Japan in 1981 under an exchange scheme between the Academy and the Japan Academy.

<sup>53</sup> F. Pollock and F. W. Maitland, *History of English Law before the Time of Edward I* (Cambridge, 1895; revised edition, 1898), referred to hereafter as *P. & M.* This was mostly written by Maitland, whose name was placed second only in deference to Pollock’s seniority at the Bar.

<sup>54</sup> In 1970, at the invitation of the publishers, he was minded to do the same for Plucknett’s *Concise History of the Common Law*, 5th edn (London, 1958); but this came to nothing.

<sup>55</sup> He wrote five subsequent pieces specifically about Maitland: Milsom, ‘F. W. Maitland’; review of G. R. Elton’s *Maitland*, in *Times Literary Supplement*, 28 Feb. 1986, 225–6; S. F. C. Milsom, ‘“Pollock and Maitland”: a lawyer’s retrospect’, in J. Hudson (ed.), *Centenary Essays on ‘Pollock and Maitland’* (Oxford, 1996), pp. 243–59; ‘Maitland’ (address at the unveiling of Maitland’s tablet in Westminster Abbey), *Cambridge Law Journal*, 60 (2001), 265–70; and S. F. C. Milsom, ‘Maitland, Frederic William (1850–1906)’, *Oxford Dictionary of National Biography*, <http://www.oxforddnb.com/view/article/34837> (accessed 28 February 2017).

Yet the splendour of Maitland's achievement had beguiled historians into unthinking dependence, and it was time to attempt 'an essay in heresy, pious heresy, intended to suggest the kind of doubt which it is possible to have about Maitland's picture'. His own account of its genesis is worth quoting:<sup>56</sup>

CUP agreed to a distant date, then reneged on that and the job had to be done in great haste. The bit on the personal actions came relatively easily; they had been my stamping-ground. Except for Formedon<sup>57</sup> (a casual find when searching plea rolls for trespass etc.) and except for relevant bits in *Novae Narrationes*, I had neither written nor lectured on the real actions. It would hardly do for a relatively young man to express unidentifiable dissatisfaction with the central Maitland gospel (which was as far as I'd got), so what on earth was I to say? Most of it (more or less all at once, but I started with seisin and disseisin) came out of the grey while waiting at Charing Cross for a train home ... Funny how one remembers places ... I could have shown you the bit of wall in the old PRO I walked painfully into when the trespass/case thing came to me.

Milsom's work on the personal actions had indeed already dealt a death-blow to Maitland's view of the forms of action. Maitland had concentrated too much on the procedures developed in the royal courts, and had treated those courts as if they were making law rather than reflecting assumptions already in existence and enforced in other courts. But the same difficulty beset his account of the land law and the real actions, which paid insufficient attention to the feudal jurisdictions which had been the first, if not the only, recourse earlier in the twelfth century. The result was that many features of the land law seemed to have no rational explanation, and had to be accepted as inexplicable archaisms. Even Maitland had admitted puzzlement over 'the mystery of seisin', the concept which lay at its root.

Recovering unexpressed assumptions was the paramount difficulty. There was an almost impenetrable darkness beyond *Glanvill* (c.1187/89), the first coherent account of English law, written just before routine judicial records began to be kept. *Glanvill* was mainly about procedure. So much was known about the procedural mechanics of the writ of right

<sup>56</sup> Letter to Biancalana, 22 August 1997 (copied to the present writer for information); cf. S. F. C. Milsom, *A Natural History of the Common Law* (New York, 2003), p. xxiii—hereafter referred to as *Natural History*. While working on Thorne's obituary, he had become troubled by an unfounded hint that his introduction had in effect taken over Thorne's ideas and deterred him from turning his Maitland lectures of 1959 (mentioned below) into a book. Thorne had in fact been diverted from the idea of such a book by his concentration on *Bracton*.

<sup>57</sup> S. F. C. Milsom, 'Formedon before *De Donis*', *Law Quarterly Review*, 72 (1956), 391–7; *Studies*, 223–9.



‘that with some rehearsal we could manage the law-suit ourselves. But we do not know what it was about, what “the right” was.’ Maitland had been misled not only by the later concept of the forms of action but by the seeming continuity of all legal institutions and terminology. He had relied too often on the ‘the majestic work of Bracton’,<sup>58</sup> a massive academic work of the thirteenth century, the author of which had not witnessed the beginnings of royal justice and had in any case perceived the legal system ‘with eyes not representative of his own time’.<sup>59</sup> Maitland had, moreover, unconsciously carried back into the twelfth century the legal assumptions of the thirteenth—which indeed were still largely those of the Victorian lawyer—and thought of owning land in the same way as one might own a horse. But possessive pronouns are a trap: ‘my land’ could indicate contractual entitlement rather than property, in the same way as ‘my job’, ‘my bank account’, or ‘my seat on the train’.<sup>60</sup> Milsom had suddenly seen, while awaiting *his* train at Charing Cross, that seisin and right did not begin as ‘flat’ or ‘horizontal’ relationships between equal neighbours, or between people and things, like the Roman *possessio* and *dominium*, but as ‘vertical’ relationships between lords and tenants. Seen in this way, they were at first more about managerial control than abstract ownership. Seisin could only be derived from a lord; and ‘right’ could only be a right to hold of a particular lord.

This new vision tied in neatly with the account of inheritance which Thorne had given in a Maitland Lecture in 1959.<sup>61</sup> By the thirteenth century, as in Maitland’s time, inheritance occurred automatically on an ancestor’s death, by operation of law; even if the rightful heir was for some improper reason excluded, he inherited the legal estate and could

<sup>58</sup> *HFCL*, p. 29, adding that ‘it is one of the important facts in the history of western thought that [*Brevia Placitata*, a treatise on pleading in French] was to prove fruitful, the latter [*Bracton*] sterile’.

<sup>59</sup> Milsom thought it too sophisticated and too remote from the way lawyers actually thought: *P. & M.*, pp. lxxii–lxxiii. He reviewed Thorne’s edition of it sympathetically in *Harvard Law Review*, 74 (1971), 1756–62; but after Thorne’s death he wrote that ‘history was surely the loser by the diversion of Thorne’s extraordinary power of perception. From a fruitful understanding of the nature of the world in which the common law began, he turned to difficult but relatively insignificant puzzles in a heavily corrupted text of questionable value for the study of thirteenth-century English law’: footnote to his undelivered Maitland lecture (2007).

<sup>60</sup> This was not spelt out in the 1968 essay but is briefly mentioned in *HFCL*, p. 88 (‘Today we think of the ownership of a suburban garden, or even of a great agricultural estate, as being something like the ownership of a motor-car’), and more fully in later discussions.

<sup>61</sup> S. E. Thorne, ‘English feudalism and estates in land’, *Cambridge Law Journal*, 17 (1959), 193–209. His (much earlier) essay on seisin was in the Maitland tradition: S. E. Thorne, ‘Livery of seisin’, *Law Quarterly Review*, 52 (1936), 345–64.

sue to recover it in the king's court. But this had not been the starting point. Grants to men and their heirs were frequent enough in the twelfth century, but a putative heir, however strong his claim, had not actually become heir until he had been identified and put in seisin by the lord's court; the heir was the person who actually succeeded, in the realm of fact. The decision by the lord's court was by no means arbitrary, since the default criteria governing the choice were usually clear, but in form it was a managerial decision free from external control.<sup>62</sup> The change in the nature of inheritance would not be visible in the charters and estate histories,<sup>63</sup> but it would profoundly affect the legal historian's understanding of the role of the common-law remedies. Milsom's revision of Maitland carried Thorne's insight further. Seeking to understand the forms of action dealing with real property, he postulated that, when people were expelled from land, the usual culprit was not a third-party villain but the lord: 'mere anarchy might envelop the great, but at the level of the local community are we always to think of neighbour ousting neighbour?'. The primary original sense of disseisin may, in fact, have been the withdrawal of the seisin which only the lord could give, an unseating of his own man. The vertical dimension is what gave seisin the quality which had so puzzled Maitland, a kind of possession but somehow imbued with rightful authority. And this new perspective led Milsom to a different understanding of the real actions, beginning with the writ of right.<sup>64</sup> 'Right' in this context was a greater right to be a lord's tenant than the present incumbent, and the claim was made out by inheritance from someone whom the lord (or the lord's ancestor) had previously put in seisin.<sup>65</sup> It was the lord who had to do right, to make good an earlier grant at the expense of someone he had more recently seised. The assizes of novel disseisin ('the greatest enigma in the history of the common law') and mort d'ancestor could both be explained as remedies devised to challenge more recent actions by

<sup>62</sup>This thesis was not universally understood. Milsom wrote to Professor Charles Donahue on 22 June 1997: 'my own belief ... is that the historians misunderstood what Sam was saying: they thought he was claiming there was a change in who actually succeeded to land, not just a change in the perception of an unchanging pattern of succession'. (Cf. similar remarks in Milsom, *P. & M.*, p. 255; *Natural History*, p. xxiv.)

<sup>63</sup>Thorne's lecture perturbed some of the hearers, but he told Milsom in 1968 that 'they won't find charter evidence or the like to disprove it': Milsom to the present writer, 30 June 1997.

<sup>64</sup>A further account was given in *HFCL*, pp. 88–126. This was substantially rewritten in the second edition (1981), pp. 99–151; it was the most heavily reworked part of the book.

<sup>65</sup>Milsom later admitted to not carrying his heresy far enough in 1968. He had originally thought the claimant had to trace title from the earliest of his ancestors known to have been seised, but subsequently realised that it was rather the *latest* of his ancestors to be seised: see *Natural History*, p. 101.

lords or their agents,<sup>66</sup> before determination of the right, whereas the writs of entry were ‘downward’ writs for use by lords against people wrongly claiming to be their tenants.<sup>67</sup> The language of right, seisin and entry, which became embedded in the English law of real property, had thus all begun with ‘vertical’ feudal connotations which later evaporated. The words remained the same but they changed their meaning, perhaps without everyone noticing. An even more profound, if invisible, effect of the jurisdiction given to the king’s courts by means of these writs was the end of the feudal world as a social reality. The end was not foreseen, or imposed, let alone resisted, but was the unintended result of measures originally meant to reinforce the working of feudal custom. The king’s courts, looking downwards, had to make decisions of a different kind. They were not second-guessing managerial decisions but developing inexorable rules of law which created abstract ownership, and, since it was their decisions which counted, the lord’s role became increasingly irrelevant. The earlier practical arrangements of a feudal society then became ‘embalmed in logic’,<sup>68</sup> and all the peculiarities of the common law of real property were left—in Milsom’s chemical metaphor—as the residue after the lord was dissolved out. This new understanding has been much discussed and criticised,<sup>69</sup> but it is generally agreed that medieval English land law can no longer be understood without first coming to terms with Milsom. The test of a changed viewpoint, as he said himself, is ‘whether you can see more from it’.

Around the same time Milsom revealed another insight, that ‘legal development consists in the increasingly detailed consideration of facts’.<sup>70</sup> Obvious when put into words, it never had been before. That, perhaps, is the true mark of genius. (He once told the writer of this memoir that he had spent his life saying things that are either obvious or wrong, ‘but you

<sup>66</sup> The suggestion as to novel disseisin was at first made tentatively: cf. *HFCL*, p. 118 (two instances of ‘perhaps’); in the 1981 edition (pp. 139–43) the case is made more fully but still guardedly. In *The Legal Framework of English Feudalism* (1976), pp. 11–14, it is asserted more firmly, albeit with an acknowledgment that the assize was used for other purposes by the time of *Glanvill*.

<sup>67</sup> Cf. *HFCL*, p. 120 (‘An entry seems to be a coming into land as seen from above, as seen by the lord’). This was pursued further in Milsom’s last article, ‘What was a right of entry?’, *Cambridge Law Journal*, 61 (2002), 561–74.

<sup>68</sup> S. F. C. Milsom, ‘The past and future of judge-made law’, *Monash University Law Review*, 8 (1981), 3; *Studies*, p. 211.

<sup>69</sup> See below, n. 89.

<sup>70</sup> S. F. C. Milsom, ‘Law and fact in legal development’, *University of Toronto Law Journal*, 17 (1969), 1–17; *Studies*, 171–89. Cf. *P. & M.*, p. lvii (‘Substantive law is the product of thinking about facts. What takes a legal system beyond the mere classification of claims is the adoption of a mode of trial which allows the facts to come out ...’); *HFCL*, pp. 31, 65.

cannot tell which'.<sup>71</sup>) This particular insight led to new explanations of later legal developments, in terms of procedural changes which brought out more of the facts of awkward cases than were contained in formulaic writs and equally formulaic denials. The implications were fully worked out in the revolutionary textbook *Historical Foundations of the Common Law*, commissioned in 1965—as an alternative to revising Plucknett's *Concise History of the Common Law*—and published in 1969.<sup>72</sup> It may have begun life as a projected monograph on the personal actions,<sup>73</sup> but its more ambitious nature resulted from the publisher's request for a textbook. Milsom had new ideas about what such a textbook ought to be. He told the publishers that 'the subject must be sold as the efforts of reason to deal with affairs'.<sup>74</sup> As work progressed, Milsom began to see it as more than a mere introduction to basic information: 'I do believe that the book is coming out, not as a compendium of largely unrelated facts, but as a continuous and intelligible story; and also (do please bury this letter deep in your files) that it is rather important.'<sup>75</sup> It was no longer aimed exclusively at students, and as a provisional title Milsom suggested 'The Growth of the Common Law'.

*Historical Foundations* was not the sort of textbook from which to learn basic facts and dates, but rather a wholly new vision of the subject. A remarkable tour de force, crafted with immense care and subtlety, and full of memorable epigrams, it is too profound to be taken in one reading<sup>76</sup>—some readers have been known to give up—but it acquired a biblical status among the initiated. It recast the new learning in different words, and carried the stories forward into the early-modern period, making use of Tudor plea rolls as well as law reports. A recurrent theme in the book was the danger to historical understanding of hindsight:

<sup>71</sup> Cf. his letter to D. E. C. Yale, 17 February 1974: 'As you know I worry endlessly, and particularly over a topic in which everything fits (or not) with everything else (I had an aunt who managed to do a *Times* crossword entirely wrong)'.

<sup>72</sup> There was a second, much revised, edition in 1981. Many passages were rewritten, and a concerted effort was made throughout to delete unnecessary words.

<sup>73</sup> That project is referred to in S. F. C. Milsom, 'Sale of goods in the fifteenth century', *Law Quarterly Review*, 77 (1961), 257; *Studies*, 105. An autographic note, written later, says it was abandoned around 1970. Some drafts remain for the chapter on the action of debt.

<sup>74</sup> Letter to Nicolas Harrison of Messrs Butterworth & Co., 24 September 1965 ('the twin claims of "piety" and "culture", which have largely kept legal history going among lawyers, have lost their grip, and rightly so').

<sup>75</sup> Letter to Simon Partridge of the same firm, 7 October 1967, explaining the delay in completion.

<sup>76</sup> Thorne wrote to Irène Milsom on 11 August 1969: 'I have read Toby's book with great delight; it is a first-class contribution disguised as a book for beginners: unless the beginners have been doing a lot of reading and thinking, they are not going to get very much [on] first reading ...'.

Lawyers have always been preoccupied with today's details, and have worked with their eyes down. The historian, if he is lucky, can see why a rule came into existence, what social or economic change left it working injustice, how it came to be evaded, how the evasion produced a new rule, and sometimes how that new rule in its turn came to be overtaken by change. But he misunderstands it all if he endows the lawyers who took part with vision on any comparable scale, or attributes to them any intention beyond the winning of today's case.<sup>77</sup>

The book also provided an opportunity to apply the new learning to other topics, such as equity and trusts. Here too, the lesson was that much of the history had previously been approached backwards. The extra-ordinary jurisdiction of the Chancery had not begun as 'equity' in its later sense: 'Not only was there no equity, as a nascent body of rules different from those of the common law. There was no common law, no body of substantive rules from which equity could be different.'<sup>78</sup> In exercising its jurisdiction without the formalities of the common law, the Chancery was at first concerned with the mechanisms of justice rather than with jurisprudence. The likely cause of equity in the substantive sense was the trust of land, and the need to be consistent in exercising the burgeoning jurisdiction over trusts in the fifteenth century. No one could have foreseen its later doctrinal elaboration. The complexities of springing and shifting uses and executory devises was to make the law of future interests 'the most elaborate folly ever built by logic'; but it was a logic which Milsom set out to unravel.<sup>79</sup>

The book did not aim at completeness, and the omissions reflected the teaching of legal history in law faculties. For instance, there was no attempt to revise Maitland's *Constitutional History*, which remained in print even longer than his other works. In so far as it was about law at all, it was not the kind of law found in the medieval plea rolls and year books.<sup>80</sup> Criminal law was only grudgingly added in at the end, with a robust warning:

<sup>77</sup> *HFCL*, p. xii. Cf. *ibid.*, p. 16 ('An immediate problem arises: an immediate solution is found. Nobody can know that the solution will later be seen as the origin of something, or the problem as the effective end of something else'), p. 278 ('lawyers at the time ... could not know, as we do, that a new law of contract was in making for new worlds'), and p. 283 ('Historians looking backwards ... have taken this as a conscious step forward on the path leading to a general remedy ... But lawyers at the time could not see the path they were treading ...').

<sup>78</sup> *HFCL*, pp. 76, 80. This involved some rhetorical overstatement. There were, of course, some substantive rules of common law, such as those which governed inheritance; but equity was not concerned with those.

<sup>79</sup> *Ibid.*, p. 197.

<sup>80</sup> The Press did float the idea of a new edition, but no one dared to take it on. The subject was kept up in some History departments, still relying on Maitland as the textbook, but little original research was done by legal historians after Plucknett.

The miserable history of crime may be shortly told. Nothing worth-while was created. There is no achievement to trace ... A book concerned with foundations can have little to say about Stonehenge, and the aim of this chapter will be negative: to suggest what went wrong, what was lost, why the subject was not developed.<sup>81</sup>

There were telling contrasts to be made here with the sophistication of private law, and these proved Milsom's general point about the mechanisms of change: in a sphere where those mechanisms were absent there was no change, no means of incremental refinement. Major crimes like murder and theft ('legal monoliths') remained much the same over the centuries, while the rest of the criminal law was beset by piecemeal legislative tinkering. The result was that criminal law 'had by the eighteenth century reached an incoherence which seemed to defy even the modest order of the alphabet; and at its less serious levels was perhaps dependent for its workability on the ignorance of all concerned'.<sup>82</sup> The chapter—and the book—end with a bang: 'Crime has never been the business of lawyers.'<sup>83</sup> The strong language flowing through the chapter was considerably watered down in the 1981 edition. It is a tempting speculation that it was a reaction to the pretensions of Radzinowicz's five-volume *History of English Criminal Law*, which evidently still rankled with Irène.<sup>84</sup>

*Historical Foundations* earned Milsom the Ames Prize and Medal from Harvard Law School (1972) and the Swiney Prize for Jurisprudence from the Royal Society of Arts (1974). Soon after it was published, he was invited to deliver a series of Maitland Lectures at Cambridge,<sup>85</sup> and decided to pursue further his revisions of Maitland's account of medieval land law, a subject broached in the previous series by Thorne in 1958. Neither lecturer was hostile to Maitland's methodology; they were continuing in the same tradition, and many believe that Maitland would have been readily persuaded by most of what they said. But the revisions went deep, and were unsettling. The lectures were delivered in 1972, during power cuts, and the lecturer (as he recalled) 'peered from a wavering patch of candle-light much as his lectures tried to make out what sort of world

<sup>81</sup> *HFCL*, p. 353. The paragraph was considerably modified in the 1981 edition. Cf. *HFCL*, p. 361: 'In criminal matters [the common law] had done no more than systematise barbarity'; this became, in 1981, 'In criminal matters there had been almost no substantive development'.

<sup>82</sup> *HFCL*, p. 365.

<sup>83</sup> *Ibid.*, p. 374. This disappeared in the 1981 edition.

<sup>84</sup> Her assistance with volume I of this was acknowledged in the preface. But she later felt the need to compile a hefty file setting out the extent of her own contributions.

<sup>85</sup> The formal invitation was issued by the Managers of the Maitland Memorial Fund late in 1970.

lies in the darkness behind our earliest legal records'.<sup>86</sup> The darkness of the subject matter did indeed give difficulty to the hearers, and the version printed in 1976 as *The Legal Framework of English Feudalism* was not for the faint of heart.<sup>87</sup> Milsom regarded it as the principal achievement of his career,<sup>88</sup> but it was undoubtedly his most challenging piece of writing, and it has in return attracted challenge from historians, chiefly for its factual assumptions about feudal England before the reign of Henry II.<sup>89</sup> No one, however, has seriously doubted its importance. Sir James Holt, whom Milsom came to regard as his fiercest critic, immediately wrote to him: 'I spent some time on it on Sunday evening and then found that I couldn't put it down. It is a *marvellous* piece of work which will set all sorts of new ideas going.'<sup>90</sup>

Although his years at the London School of Economics were Milsom's most productive, his experience of the School was not entirely agreeable. Service on the General Purposes Committee from 1968 to 1970 put him in the thick of the student troubles,<sup>91</sup> and he also felt that some of his

<sup>86</sup> S. F. C. Milsom, *The Legal Framework of English Feudalism* (Cambridge, 1976), p. vii. The copy given to the present writer in 1976 is inscribed to 'John Baker, who supplied the candles'. Milsom's own copy, heavily annotated with further references to the *Curia Regis Rolls*, was specifically bequeathed to the present writer.

<sup>87</sup> Professor J. P. Reid, in *New York University Law Review*, 51 (1976), 911–13, wrote with friendly exasperation: 'While Milsom can turn a phrase with the grace of a Frederic William Maitland, he can obscure a concept with the brilliance of a James Willard Hurst ... If any American lawyer understands this book, it will be marvelous; any general historian, astonishing.'

<sup>88</sup> His file on the lectures contains a note dated 1999: 'It was from these lectures that my most important publication grew ...'. But in the interview which he gave on 11 December 2009 he said there were two to choose between, and *Historical Foundations* was 'the one that made me think the most' and probably the more important.

<sup>89</sup> The principal extended commentaries (by no means all hostile) are R. C. Palmer, 'The feudal framework of English law', *Michigan Law Review*, 79 (1981), 1130–64; R. C. Palmer, 'The origins of property in land', *Law & History Review*, 3 (1985), 1–50; P. R. Hyams, 'Warranty and good lordship in twelfth century England', *Law and History Review*, 5 (1987), 437–503; J. Biancalana, 'For want of justice: legal reforms of Henry II', *Columbia Law Review*, 88 (1988), 433–536; J. Hudson, 'Milsom's legal structure: interpreting twelfth century law', *Tijdschrift voor Rechtsgeschiedenis*, 59 (1991), 47–66; J. Hudson, *Land, Law and Lordship in Anglo-Norman England* (Oxford, 1994), ch. 9; J. Hudson, *The Formation of the English Common Law* (London, 1996), ch. 7; P. Brand, 'The origins of English land law: Milsom and after', in P. Brand, *The Making of the Common Law* (London, 1992), pp. 203–25; P. Dalton, 'The first century of English feudalism', in P. Dalton, *Conquest, Anarchy and Lordship: Yorkshire 1066–1154* (Cambridge, 2002), pp. 257–97.

<sup>90</sup> Holt to Milsom, 21 September 1976. He added: 'I want to re-read it and then I will write to you ...'; but the subsequent letter, if there was one, has not survived.

<sup>91</sup> Milsom to George Reid, 21 June 1978 ('It got me into the firing line in the troubles'). Professor George Garnett recalls that he remained 'very, very angry about the student radicals he had encountered at the LSE in 1968. I recall one account of their provoking a heart attack in one of the caretakers, who had died'. The trouble was not confined to the students. Milsom remembered



colleagues in the Law Department were too busy elsewhere to pull their weight. When he was pressed to take on the convenorship in 1973, the discontent boiled over:<sup>92</sup>

In my mind, my life will justify itself or not on what I can do for my subject. Few people think worth while the slice of a lifetime needed to attain a useful familiarity with the medieval materials; and one's effective work starts late. It may also stop early. I have had exceptional luck in catching glimpses of a framework different from that upon which earlier work was based. It is important if true, and either I get it out or not. This luck has depended on two qualities: a literal mind (in all other ways a great nuisance) which I shall keep; and a fluke imagination which, like mathematicians and such, I know I shall lose. My fear is that if I turn aside now, I shall not succeed in getting back to it. If that were to happen, I should blame myself; I believe I should be blamed by others; and on my scale of values, even the narrow interests of the School would not have been served.

He did take on the unrewarding task a year later, but by then he was looking for an escape. Not averse to administrative duties in a more congenial setting, he thought a headship of house at Oxford would be a preferable situation, and he pursued active discussions first with Pembroke College (1974)<sup>93</sup> and then with New College (1975).<sup>94</sup> At the same time, Professor Glanville Williams, one of the electors to the Downing Professorship of the Laws of England (Maitland's chair at Cambridge), wrote to enquire whether Milsom would accept it if offered. Not appreciating that there would be a contest, Milsom replied that he would, though he confided to New College that, if forced to elect, he would prefer to become its warden. As it turned out, he was not chosen for either position; but the following year another vacancy at Cambridge enabled him to be elected to the 'Professorship of Law (1973)'.<sup>95</sup> The chair of Legal History at the London School of Economics, despite an impassioned written plea from Milsom to the Director of the School, was thereupon discontinued.

a paper handed to him by a young revolutionary, 'a really nasty, beautifully written piece of work' which he felt sure had been penned by a colleague.

<sup>92</sup> Milsom to John Griffith, 20 August 1973.

<sup>93</sup> He withdrew because the college could not make up its collective mind. He wrote to Derek Hall on 9 November 1974: 'they have seen me four times and Irène three ... it does not seem right to hang about any more'.

<sup>94</sup> He wrote to Herbert Nicholas, fellow of New College, 28 May 1975: 'Of course it is something I would like to be. It is also, so far as one can tell without having tried, something I would like to do. I am woolly headed enough to be capable of attachment to institutions, and since I was orphaned at my first college, Irène and I have a special affection for New College.'

<sup>95</sup> The innominate chair had been created in 1973, and was occupied by Kurt Lipstein (previously an *ad hominem* professor) until his retirement in 1976.

## Return to Cambridge (1976–90)

In 1976 Milsom returned with Irène to Cambridge. His lawyer friends at Trinity College would have welcomed him back there, but it was reported that other fellows would be reluctant to offend Radzinowicz, and that it would be ‘socially awkward for anyone to have two husbands in the same College’.<sup>96</sup> Milsom therefore accepted a fellowship of St John’s College instead. The possibility of confronting the social awkwardness continued to plague him while in Cambridge, but he found solace in the friendly welcome at St John’s and nearly became its master in 1978.<sup>97</sup> He contributed not only to the governance of the college but resumed the supervision of undergraduates, a voluntary service for which generations of undergraduates had reason to be grateful. One recalled that, in the late 1990s, ‘he was old but ageless ... you were carried on a journey through years of legal history in the company of a guide so knowledgeable that no matter how confusing the topic had seemed before entering his rooms, you left feeling enlightened and privileged to have been taught by such a master’.<sup>98</sup>

In his later years he turned his mind to the implications of his discoveries for historical jurisprudence. The theme was developed in the Addison Harris Lectures at the Indiana Law School, Bloomington, in March 1974, which he intended to become a small book.<sup>99</sup> Fashion, he observed, had replaced historical jurisprudence with semantic and philosophical studies: ‘a confident age does not want any lessons from history, and does not like the lessons that history seems to teach’. But perhaps his new perspectives could do for jurisprudence what they had done for the history of the common law. It was wrong to assume that law just grows, while remaining all the time the same sort of thing as today. That may have been true for centuries, but not for ever. Maitland’s ‘survival of the fittest’ view of the forms of action had proved unsatisfactory; but there

<sup>96</sup> Patrick Duff to Irène Milsom, 9 October 1975 and 5 January 1976.

<sup>97</sup> He was willing to give up his chair for this, though not his research: letter to George Reid, 3 November 1978. He wrote to John Hall, one of the Law fellows, in June 1978: ‘I am vain enough to imagine I have some of the appropriate qualities of heart if not of head, and therefore that the idea is not inherently absurd’, but he thought the circumstances of his marriage might offend religious sensibilities. In fact the main obstacle was that he had only been a fellow for two years.

<sup>98</sup> Recollection of Isobel Hoyle (BA 1998).

<sup>99</sup> This is indicated by a draft preface. The title of the lectures was ‘Legal Development Analyzed’, and there were two sections, ‘Law and Morals’ and ‘Elementary Concepts’. Milsom abandoned the book after Indiana University declined to arrange for its publication.

were other models of legal evolution, the prime example being the shift from seigniorial management to a scheme of abstract rules worked out by lawyers and imposed by superior courts. Between the thirteenth century and the 'golden age' of the nineteenth, the common law had indeed developed in a linear fashion, under the influence of a learned profession, through the increasingly detailed consideration of factual situations. Law became a discipline akin to Mathematics, in which answers could be worked out by reasoning, as in later Roman law. The Roman and the common law, said Milsom, were both about rights between equals, 'because the two societies could afford those terms'. But that development was largely over. The disappearance of the jury in civil cases had weakened the distinction between law and fact, so that clear legal principle was disappearing in a myriad single instances, and 'longer judgments cite more cases to settle smaller cases less clearly'.<sup>100</sup> And, whereas the jury had been 'index-linked' to the standards of the times, trial by judge alone worked differently. The judgments of individual judges made minute accretions to a body of book-learning which could only be changed by legislation. Moreover, increasing legislative control over citizens meant that English law was reverting to the early medieval model in which upward claims against authority were more significant to most people than the enforcement of abstract rights of property and contract. Milsom pursued these themes further in unpublished lectures in 1978 and 1980,<sup>101</sup> and then in the Wilfred Fullagar Lecture delivered at Monash University, Melbourne, in 1981.<sup>102</sup> They achieved a wider readership in *A Natural History of the Common Law* (New York, 2003), based on lectures given in New York in 1995.<sup>103</sup> This elegant little book is by far the most accessible introduction to Milsom's theories about legal history. But his jurisprudential work, though of the first importance, was largely ignored by the professors of

<sup>100</sup> Milsom, 'The past and future of judge-made law', 9; *Studies*, p. 217.

<sup>101</sup> The Cambridge inaugural lecture, 'A Historian's View of English Law Today', 7 February 1978 (the typescript is marked characteristically: 'Not published—and should not be'); 'Changing Role of the Law—A Historian's View' (St John's College Lecture, University of East Anglia, 1980). A brief foretaste had appeared as 'The vitality of the law', *New Law Journal*, 199 (1969), 607–9.

<sup>102</sup> Milsom, 'The past and future of judge-made law', 1–14; *Studies*, pp. 209–22. This is chiefly concerned with the relationship between courts and juries.

<sup>103</sup> The Carpentier Lectures, delivered at Columbia University, were originally entitled 'A New Essay in Historical Jurisprudence'.

jurisprudence.<sup>104</sup> It seemed either that no one was listening or that the historical detail was too esoteric for pure philosophers.

Milsom was less upset by that than by the criticisms of his revision of Maitland, which suggested an unbridgeable gulf between legal historians with a legal education and those without. The sense that no one outside the law school seemed to connect with what he was saying played increasingly on his mind from the 1970s onwards. He was particularly troubled by the remark of one leading historian that he ought to ‘do it all properly, with names’,<sup>105</sup> evidently misunderstanding what Milsom took to be a virtue, shared with Maitland.<sup>106</sup> It was a point which never ceased to irritate him, and it came increasingly to symbolise for him the narrowness of much historical scholarship:

[T]he orthodoxy of the last half-century by which most kinds of historian project essentially still and close-up pictures, assembling all the evidence for narrow subjects in short periods, is inimical to comprehending the largest legal developments ... As in the natural sciences, fundamental propositions stand or fall not with single facts but with their power to explain all the facts.<sup>107</sup>

Historians of both kinds observed the same facts, which were rarely in dispute; the difficulty was to get inside people’s heads and see that the legal records and documents often concealed changes in the meaning of the words, and in contemporary perceptions of what was really happening.<sup>108</sup> Milsom addressed this explicitly in a lecture given to the Anglo-American Conference of Historians in 1978,<sup>109</sup> in which he set out to ‘consider, in the context of medieval rights in land, the relationship

<sup>104</sup>Not, of course, by legal historians. A. W. B. Simpson wrote that Milsom’s papers on the mechanisms of legal change were ‘important contributions not only to history but to legal philosophy’ and deserved a wider readership than they had enjoyed: review of *Studies in Times Literary Supplement*, 5 September 1986, 985.

<sup>105</sup>He wrote to Biancalana on 22 August 1997: ‘even I, blessed with Dr Johnson’s “stark insensibility”, have been shocked by some of the things that have been said to me e.g. that I ought to make public recantation’.

<sup>106</sup>Cf. Milsom’s review of Elton’s *Maitland* (n. 55 above), 225–6: ‘neither the legal historian nor the lecturer on modern law can ever find the case which illustrates the truly elementary point ... It was too simple to happen, or to be identifiable among records in common form. The point to be communicated is central, beyond doubt, reflected in all the real cases; but there is no way to communicate it clearly except to turn dramatist.’ He returned to the point more insistently in Milsom, ‘“Pollock and Maitland”: a lawyer’s retrospect’, pp. 252–6.

<sup>107</sup>Milsom, *Natural History*, pp. 75–6; and cf. *ibid.*, pp. 121–2 n. 1 (on names). Milsom was also critical of historians’ indexes, which too often concentrated on names rather than ideas.

<sup>108</sup>This was also the theme of Milsom, ‘“Pollock and Maitland”: a lawyer’s retrospect’. It was pursued further in the projected Maitland Lecture which he prepared in 2007 but never delivered. He admitted to the present writer that ‘the thought of a guaranteed (if infuriated) audience for my current effort is a real temptation’; but he had second thoughts about giving it as written.

<sup>109</sup>‘Politics and Jurisprudence in Medieval Land-Holding’ (unpublished typescript).

between what people were up to, and what lawyers were thinking about, and what actually happened'. Milsom wrote on his copy of the lecture, 'The audience were all historians, and they listened with the incomprehension to which a lawyer grows accustomed.' He had always portrayed himself as a heretic,<sup>110</sup> the 'lonely figure in some Bateman drawing, the man who thinks that Maitland was wrong'.<sup>111</sup> No doubt this began as the absurd modesty of his youth, a polite way of proclaiming the importance of his discoveries.<sup>112</sup> Later he saw himself as really enduring condemnation, like lawyers Thorne and Hall before him,<sup>113</sup> and the imagined failure of his teaching to penetrate history faculties caused serious disappointment in later life. He seemed unable to believe that he was held in such high esteem, even by those who did not accept everything he had written.

It was with the same troublesome 'divide' in mind that Milsom accepted from the Oxford historians the daunting challenge of delivering the Ford Lectures in 1985–86 on 'Law and Society in the Twelfth and Thirteenth Centuries'. These explored further the transition from the world of feudal management to that of abstract law, dealing in turn with 'The falling value of knight service', 'Perceptions of property', 'Property and pay', 'Capital and income', the 'Inconvenience of change' and the arrival of 'A rule of law'. They made a deep impression on the hearers, and Milsom intended to prepare them for the press; but he never finished the task, and in 2004 wrote despairingly that they 'still cannot be reduced

<sup>110</sup> He did so in 1958, when sending out offprints of his trespass papers, and he described his introduction to *P. & M.* (1968) as an essay in 'pious heresy'. In speaking about Maitland at the British Academy in 1980, on 5 November, he expressed unease about the ready availability of bonfires on that evening.

<sup>111</sup> Milsom, 'F. W. Maitland', 267; *Studies*, p. 263.

<sup>112</sup> This was made explicit in a letter of 18 May 2002 to the present writer (accompanying a draft paper on writs of entry): 'Vanity of course, but I should not have persevered with this whole 3-D saga if I was not vain enough to think it was important. Heresy is serious when it questions assumptions rather than facts.'

<sup>113</sup> In the undelivered Maitland lecture (2007) he reflected that 'damaging to the history of personal actions was historian Plucknett's failure to see the point of lawyer Derek Hall's manuscript readings of two words in the year book report of the *Humber Ferry Case* ... For lawyers they turned what had seemed a woodenly formalistic quibble into an elementary proposition about the legal analysis of the facts; and this played a part in the (overdue) replacement of Maitland's vision of English law as evolving in a Darwinian struggle between "the forms of action".' For the 'failure' see T. F. T. Plucknett, *Concise History of the Common Law*, 5th edn (London, 1956), p. 470.

to a publishable state, and should not be published', a view from which others may choose in the fullness of time to dissent.<sup>114</sup>

One area where his advocacy was unquestionably effective was the plight of the Faculty of Law at Cambridge. His chairmanship of the Faculty Board (1986–8) brought out the latent flair for leadership which had once attracted him to the idea of a college headship. He soon saw beyond the daily detail to the deep-seated problems facing the Faculty, and in 1987 he prepared a long and forceful paper for the University authorities setting out the grievances as he saw them. The Faculty had less than four per cent of the University's academic staff to teach about eight per cent of its students, the worst ratio of any Law Faculty in the country; lectures had to be given on three widely separated sites; the Squire Law Library was congested and due to run out of space in three years; the office facilities ('a cubby-hole') and the level of staffing were quite inadequate. These problems were, no doubt, a result of the ever-growing imbalance of resources between Humanities and Sciences, but Law was demonstrably suffering more than other subjects.<sup>115</sup> Milsom's persuasive presentation of the Faculty's case began a long dialogue, continued by his successors, which led to a new building, finally opened by the Queen ten years later, and a substantial increase in the Faculty's resources.

Milsom's retirement in 1990 more or less coincided with his wife's increasingly serious loss of memory. By the time of her death in 1998 she hardly knew who he was. There were no children. Her death left him desolate, and a spinal stroke in 1991 reduced his confidence in going out. He had always been a lone scholar, who did not care to discuss his nascent ideas or share his drafts with anyone but Irène, and—perhaps as a result of shyness—he conducted himself with a slightly distant courtesy which seemed to come from another age. Yet he was committed to collegiality, and always uplifted those around him with his wit and infectious sense of humour. It was therefore distressing for his many friends and colleagues, who held him in affection as well as esteem, that for the last ten years before his death on 24 February 2016 he became increasingly reclusive. But the great work had already been done. Among his many honours were

<sup>114</sup>He discussed publication with Oxford University Press in 1986, and gave them some hope of a manuscript later in the year. But only three of the lectures were ever written out in full. Notes survive in 'delivery format' for all six, and also the text of a preliminary lecture about 'the divide'.

<sup>115</sup>The draft case was circulated to the Faculty Board on 2 December 1987.

an honorary benchership of Lincoln's Inn (1970), a silk gown (1985) and honorary degrees from Glasgow (1981), Chicago (1985) and Cambridge (2003). His contribution to the way legal historians think—even those who do not agree with him—has been incalculable. While most historians of the law and legal institutions have contented themselves with establishing details, Milsom altered the entire framework of thought. Legal history was not for him simply the jumble of technical facts which he had been taught, or a form of social history obscured by lawyers' jargon, but nothing less than 'the intellectual history of society'.<sup>116</sup>

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*Note.* Unless otherwise stated, the correspondence and unpublished lectures referred to in this memoir were found in Milsom's papers, which were deposited with the writer by his executors. Of great help also were the interviews with Milsom which were conducted between October and December 2009 by Lesley Dingle of the Squire Law Library, Cambridge, and posted on the Library's website (<https://www.squire.law.cam.ac.uk/eminent-scholars-archive/professor-stroud-francis-charles-toby-milsom>—accessed 28 February 2017).

<sup>116</sup>Milsom, 'Maitland', p. 270 ('it is not just part of social and economic history. To use uncomfortably large words it is the intellectual history of society').