MASTER-MIND LECTURE

F. W. MAITLAND

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In my college library the *Proceedings of the Academy* are so shelved that a search through the volumes is least inconveniently conducted on the top of a ladder, and the results may be precarious too. Of those admitted to the pantheon formed by the Master-Mind Lectures, Maitland lived more recently than any except Bertrand Russell, and he is the only one who in his lifetime was an Ordinary Fellow of the Academy. If one does not count the philosophers, indeed, there are few scholars in the humanities. Of historians there are only three: Carlyle, Gibbon, and Bede. And although there are several persons who had to do with the law—Cicero, Bacon, Bentham, even Bagehot—only Grotius is there as a lawyer. All this is partly explained by the terms of the endowment. The benefactress referred to such as philosophers and poets: it did not occur to her, and rightly not, that law or scholarship as such could yield a master mind. So I climbed down from my high place to set Maitland in more accessible company, among his peers as the first Fellows named in the Academy's charter of incorporation in 1902. Of which of the historians would today's average history graduate probably have heard? Of Lecky, I suppose, and perhaps of John Morley and Cunningham; but only just. The lawyers might fare better, with Anson, Pollock, and Dicey. But that would be partly because of the practice by which law books are kept alive artificially. Anson on Contract, for example, is hale and hearty and 101. In a world in which nothing much must be seen to change, the old name is a comfort; and it sells the book. It is an odd twist that Pollock's name is most widely known in 1980 because it is on the title-page of 'Pollock and Maitland', and that a reason for keeping it there in 1895 was to help sales in the United States. But though he contributed little to the *History of English Law*, Pollock was, and perhaps is, a larger figure in his own field than most of those first Fellows. A historian and a lawyer among them

exemplify the usual ends of innovative scholars: Cunningham, Maitland's student friend and rival, was a pioneer of economic as Maitland was of legal history; and his work is all but forgotten, honourably buried under the work of those who followed. Dicey's work is not forgotten; but it is remembered not for the questions he asked but for the reputations which were so long to be made by picking holes in his answers. For a longer after-life you have to climb back up the ladder: Gibbon's work lives, but not as scholarship.

Names have been dropped around that ladder because the oddity of a familiar fact is a hard thing to communicate; and Maitland's standing today must be among the odder facts in the history of history. His work has not been buried or picked to pieces, and does not survive just as literature. Indeed, apart from lectures which he would not himself have published, it has never been much read except by other historians. But by them it has been regarded, and still is, almost as revelation; and Maitland himself has been, and still is, not just revered but loved. He died in 1906, his consequence measured for the world at large by a meagre and inaccurate obituary in *The Times*, for the academic world by the address of condolence which Oxford University sent to Cambridge University. Such addresses were regularly sent to sovereign or family when a royal personage or the University's Chancellor died: but for this, the immediate precedent was an address to Berlin University on the death of Mommsen. In the aftermath of Maitland's death there were published two books about him, one almost incoherent in its admiration, and a three-volume collection of his papers; and these things were not at that time out of the way. But personal reminiscences were sought as long as they were available. Fifteen years after Maitland's death W. W. Buckland wrote of him in terms astonishing to one who remembers the rather mathematical pleasure of Buckland's teaching. Thirty years later, marking the centenary of Maitland's birth, came a more formal tribute from H. A. Hollond, who also secured the publication of a private memoir written long before by Maitland's sister. And in 1957 there appeared the enchanting recollections of Maitland's daughter Ermengard. But Maitland's death, on Miss Ermengard's nineteenth birthday, was then fifty years in the past. Personal affection could surely play no further part. Yet, in that same year, a new collection of his papers was published by Helen Cam, who had been an undergraduate at Royal Holloway College when Maitland died and never knew him: but there is something like devotion in what she wrote. Since then books have

been dedicated to him; his letters have been published; there have been a book about his work (by one who confessed to having fallen under a personal spell), a full-length life (something of which the thought, suggested by accident, seemed grotesque to Maitland himself), and lesser hagiographical writing—and all this for a scholars' scholar dead almost three-quarters of a century. And today, however ill the task is done, the Academy acknowledges that he was more than that, and places him on its own list of immortals.

What was it about Maitland that has made time stand still? He is not even a dead immortal, one whose contribution, however great, is measurable and past. Some of the peripheral writing in that extraordinary range has of course been overtaken, like all other historical work done so long ago. But his work on the history of English law is largely untouched, untouchable. 'Maitland's analysis . . . remains dominant, and it is hardly conceivable that the primacy of his work will ever be displaced': the magisterial tone is that of *The Times Literary Supplement* a year or two ago. 'That's not what Maitland said, is it?' The question was put to Professor Thorne on a recent visit from his Cambridge to ours. 'No', said Thorne. 'Well I don't believe it then', said his questioner. Both remarks were occasioned by the appearance of a book which proposed an altogether different interpretation of matters central to Maitland's subject; and by an irony it is the author of that and other heterodox work who had been set to fathom his unfathomable quality. Your lecturer is the lonely figure in some Bateman drawing, the man who thinks that Maitland was wrong. People have been kind about it, as about any other eccentricity. But that is how Maitland stands.

His life was in the ordinary sense uneventful. The surprising thing in retrospect is that the period of achievement was short and began late and almost casually. It began at about the same time as what seems to have been an unusually happy marriage, and as the recognition of an illness which could only bring the life slowly to its end. Personally reticent, I think he would have resented a stranger poking about, even if only by way of explaining his own admiration for the man as well as his mind; and I shall mention only such details as seem relevant. The family was well-to-do. Maitland's grandfather's grandfather and father had made money in the city of London; and by marriage the latter had acquired land in Gloucestershire. A sufficiency of both was to descend through the next three generations, and to allow their lives to shape themselves as they did. Maitland's grandfather was

first called to the Bar: then he was ordained and took a cure of souls. But that did not last long either; and although he was for a time Librarian of Lambeth, his life was essentially that of an independent scholar, an ecclesiastical historian of some distinction. Maitland's father did well enough at Cambridge to become a Fellow of Trinity College; and he too was called to the Bar. But though his life was long centred on Lincoln's Inn, it was one of leisure and cultivated interests until, only a few years before his early death, he became Secretary to the Civil Service Commissioners.

This was the tradition that Maitland followed. The need was not for a career so much as for an activity in which the talents could be used; and often, of course, as with his undoubtedly talented father, they were not used to great advantage. It is an aspect of Maitland which was naturally apparent to his family: his sister wrote her memoir 'to show how he gradually settled down to work and gradually discovered the work that it was best for him to do'. For me it is symbolized—as is much about the law itself—by a book on my shelves, Maitland's copy of Littleton's *Tenures*. For the subject which he created, this fifteenth-century account of the land law is an important source: but Maitland did not acquire it as a legal historian. The name on the flyleaf is that of his father; and when Miss Ermengard gave it to me, she pointed out that it might well have been first acquired by his grandfather. It was natural for a gentleman to be called to the Bar, and therefore to have a copy of Littleton—and not just out of antiquarian interest.

Other family circumstances made for independence of mind. Maitland was born in 1850. His mother died soon after, and he and his two sisters were devotedly brought up by a sister of hers. Shortly before his thirteenth birthday his father also died; and it was his mother's brother who a few months later took him to Eton. Half-way through his time there his paternal grandfather died, the ecclesiastical historian; and the family property came to Maitland when he was sixteen.

He spent six years at Eton, gaining no identifiable acquirements except a love of testing exercise, especially rowing and running, and a distaste for the Greek language. In 1869 he went up to Trinity College, Cambridge, as a commoner; and such efforts as he made in his first year must have gone to the rowing and the running. They cannot have gone to mathematics, which he was reading, because he did badly in an examination at the end of the year. Why mathematics? He probably never thought of contenting himself with an ordinary degree, as many commoners did then

and much later. And if he was to seek honours, only the classical and mathematical triposes carried prestige or any chance of a fellowship: his father's had been the reward for doing well in both. But Eton had put paid to the classics; so he made the only conventionally respectable choice.

What else was there? Not history. The History Tripos was created the year after Maitland went down, the subject having been ejected first from the Moral Science and then from the Law Tripos. Plucknett in a printed lecture on 'Maitland's view of law and history' was dismayed—even affronted—that Maitland's inaugural lecture should have looked to the Bar to advance legal history. But for once Plucknett's own historical sense had deserted him, and he was placing Maitland in his own world. But Maitland did not read law either. It is ironical that Cambridge had a Law and History Tripos exactly for the time that he was up. Another Maitland of Trinity took it; and the *University Calendar* and *The Times* obituary both confused the two. Our Maitland turned from mathematics to what he must have seen as an almost defiantly unconventional choice, one which he could afford. The Moral Science Tripos carried no prestige, and no college would contemplate electing a Fellow on the basis of success in that alone. 'The standard of a first class is low because the most able and industrious men do not devote themselves to the study; they do not devote themselves to the study because it is not rewarded, and it is not rewarded because the standard of a first class is low.' That was how Henry Sidgwick saw the tripos in 1870, the year that Maitland turned to it. Perhaps his regard for Maitland was partly for the first of a succession of remarkable men who turned to it for something other than the conventional reward, and so gave it standing.

What first attracted them may have been admiration for the stance which Sidgwick had taken in the preceding year, by resigning his Fellowship because he no longer believed the declaration required by the religious tests. Maitland recalled going to listen on 'the idle whim of an idle undergraduate'; but the lectures were one of the important experiences of his life, and near its end he remembered Sidgwick as 'one to whom I owe whatever there is of good in me'. Sidgwick had paid for the readership which brought him back to Cambridge, a debt acknowledged in the dedication of *Bracton's Note Book*, and had given him frequent encouragement, but Maitland's language goes beyond such things: this was his only master. If the influence was ever specified, it may have had to do with the quality that so impressed him

about Sidgwick's lectures, a transitive truthfulness, a determination to communicate his understanding of things. It was not just a habit of scrupulous statement, though in Maitland himself that became automatic. You could almost devise a linguistic metal-detector which, passed over his pages, would tell you where to dig in legal history: a change into the more accommodating passive mood, for example, may be the echo of a doubt. The special thing for Sidgwick was the communication: in our horrid but helpful jargon, he had always to 'get it across'. And Maitland's own most obvious power is the directness with which he speaks to you through the printed page. My language is mixed, but for once not by accident. We know that his lectures were always written and always read; and we have Miss Ermengard's near certainty that he spoke his words as he wrote them 'or at any rate heard them very clearly . . . he never merely wrote or read—he taught by word of mouth'. He lectured with an intense nervousness of delivery and gesture which dissolved for hearers into their own preoccupation with his subject-matter. But the force that drew them in was not generated by the performance. It had already been caught on the page, and you can hear him still.

Success came and went for Maitland with Sidgwick's subject. He became president of the Union and an Apostle. And in 1872 he shared with Cunningham the first place in the first class of the Moral Science Tripos. But he knew that that could not qualify him to follow his father in a fellowship, and was tantalized by another chance. In 1875 Trinity offered a fellowship in philosophy to be awarded by dissertation. Of the four candidates Maitland, Cunningham, and James Ward were all to be among the first Fellows of this Academy; and it was James Ward who won the Trinity fellowship. Maitland had his dissertation printed as for publication, but was later careful to insist that he had not in fact published it; and it shows none of his strength. One could wonder why Sidgwick thought so highly of him if Sidgwick had not explained his own reason for doubt: it was because Maitland understood Sidgwick's mind so well. It is not just that he dealt better with the concrete than with the abstract, would have made more of Wilkes than of liberty. It is that you cannot sympathize with abstractions; and the visions he communicates with such power are of people whose situation he sees so clearly that he feels their feelings.

Perhaps he was seeing them with the eyes that so struck contemporaries. Buckland mentions them in connection with Maitland speaking in the Senate House, and particularly his

speech in 1897 in favour of women's degrees. Maitland was on the losing side, but at least he put paid to a scheme for fobbing the women off with a university of their own. The place for that, he suggested, would be the waiting-room at Bletchley Junction. But 'you could not oblige the women to take the Bletchley degree. You would be waiting, waiting, waiting in the waiting room, and they would be waiting, waiting, waiting outside . . . You wait there; but you do not wait there always. You change for Oxford and Cambridge.' Perhaps just wit. But those two waiting groups are dramatizing a conflict in the same way as three individuals—to take one of dozens of examples from 'Pollock and Maitland'—in a passage discussing how the representation of litigants in court first became permissible. 'John may fairly object that he has been summoned to answer not the circumspect Roger but the blundering Ralph.' An explanation is then offered: 'The captiousness of the old procedure is defeating its own end, and so a man is allowed to put forward some one else to speak for him, not in order that he may be bound by that other person's words, but in order that he may have a chance of correcting formal blunders . . . .'. This is congruous with the only relevant fact, which is that early pleaders might be disavowed by their clients. But there is no other evidence, and Maitland scrupulously put a 'perhaps' before his summarizing sentence: 'Perhaps the main object of having a pleader is that one may have two chances of pleading correctly'. But I am sure that he was convinced as, for what it is worth, am I—convinced by John and Roger and Ralph.

It is not for a lawyer to discuss the place of imagination in historical studies at large. But the legal historian must reckon that his law had no abstract existence, that his subject-matter makes sense only in terms of people involved in some real or imaginary conflict, and that the conflicts that matter to him are the ones that were somehow difficult. 'Persons who can never be in the wrong are useless in a Court of Law', wrote Maitland; and so are persons who are obviously in the wrong. The legal historian has not only to visualize the dispute, but to feel some sympathy for both sides. There is another metal-detector to pass over his pages: if he condescends to the people he is writing about, he has misunderstood the matter. You rarely get a signal from Maitland's work on that machine. Whenever a question is reduced to the scale of a visualized dispute, the litigants and their lawyers take credible attitudes. But you cannot do it always: and it is when questions are not reduced to that scale that even a Maitland can go wrong.

But you have to ask more of your imagination than to serve as a

check on your understanding of the evidence. The evidence tells you what disputes were about in the superficial sense; but it does not tell you in detail what had happened, let alone how each side saw his grievance. And that is the essence of the subject. Legal development comes down to articulations of the nursery cry: 'Not fair'. The immediacy and realism of Maitland's work stem, I think, from the sympathy which induced him to visualize so much in those terms. The quality can only be a gift of fortune. But if the habit owed anything to any other person, a nursery may have had to do with it. All the compelling work was done after his marriage; and his wife peopled their daughters' world with all kinds of creature, animal and human, real and imaginary, all with distinct characters and all articulate. Her Mrs Gravelrat and Maitland's Mrs Josiah Smith (the Ermengard of his fancy was to be the reliable wife of a reliable clergyman) and the waiting groups at Bletchley and Roger and Ralph all lived in the same mind.

We left him after a failure. Another was to come. He had joined Lincoln's Inn as a student in 1872, perhaps meaning to go to the Bar only in the way his father had. The years after he left Cambridge were leisurely. He lived in the house in Kensington to which his sisters and aunt had moved some years before. He travelled, especially for musical occasions in Germany. It could so easily have been an honourable and unfruitful life like his father's. But he went into chambers on his call in 1876 and until 1884 sought practice as a conveyancer. In 1884 he was elected to the Cambridge readership which had been established by Sidgwick's generosity; and since his first book on legal history was published and his second projected all about the same time, it is agreeable to think that he left the Bar because he saw his future as a legal historian. But he had applied for a readership at Oxford in the preceding year, before his first visit to the Public Record Office and before there was any thought of editing the Gloucester plea roll, let alone *Bracton's Note Book*; and although he had published three papers about the early history of the criminal law, they do not show the sense of mission which was to possess him. There may have been negative reasons for the change. The Kensington household broke up with the death of his aunt and the marriage of his elder sister. The agricultural depression left the Gloucestershire lands little more than self-supporting. There was other money of course: he was able to pay for the publication of both the *Gloucestershire Pleas of the Crown* and *Bracton's Note Book*—and it is to his having to do so that his beloved Selden Society probably owes its existence. But he was never again to feel quite so secure as he

had; and unease would be intensified if he already had any suspicion about his health. 'Slowly it is doing for me; but quite slowly. . . .' In 1899 he said that a doctor had diagnosed the condition so described more than ten years earlier. And in 1889 he wrote 'Many things are telling me that I have not got unlimited time at my command' . . . and wondered whether he had even another year to live. The earliest recorded physical break-down was in 1887; but the Bar has always demanded great stamina, and the 'many things' may have begun to raise doubts about that.

The change was more than a change of career: it was almost a change of character. Except for the running and the rowing and the work inspired by Sidgwick, it had so far been an easy-going life. And now at the age of thirty-four he began to work with an intensity that only illness would interrupt and only death would end. Whatever the excitement of those materials that Englishmen had so neglected, he must have made an unrelenting effort of will; and the sense of mortality surely played its part. But there was something else. 'I should never have succeeded if I had not failed once.' He often said that; and his sister took it to refer to his first mathematical failure at Cambridge. But she tells also of his growing disappointment with the Bar, and links it with a passage in his inaugural lecture: 'The day may come when in the bitterness of his soul he will confess that he is not going to succeed, when he is weary of waiting for that solicitor who never comes . . .'. The lecture then makes the suggestion that so offended Plucknett, that perhaps it was failed barristers who would write the history of English law. It is how Maitland saw himself.

What was he like as a barrister? After his death, the master with whom he had read in chambers recorded the opinion that he would never have succeeded because he would not have pushed enough. But of Maitland as a lawyer he wrote in terms which must be quoted:

> he had not been with me a week before I found that I had in my chambers such a lawyer as I had never met before. I have forgotten . . . where and how he acquired his mastery of law; . . . certainly . . . not in my chambers: he was a consummate lawyer when he entered them. Every opinion that he gave was a complete legal essay, starting from first principles . . . and . . . coming to a conclusion with the clearest grasp of legal points and the utmost lucidity of expression . . . [His] opinions, had he suddenly been made a judge, would have been an honour to the Bench.

This has been discounted as undiscriminating eulogy. But to those who have ever had to do with a particular kind of lawyer, it

reads like a simple description. I have had the humbling fortune to encounter two such more than casually, both now dead: one was briefly and in some formal sense my student; the other was my master when I read in chambers—by coincidence the editor of the last version of Maitland's *Equity*. From elementary propositions and in few and simple words a pattern was built up which disposed of the question. Reference to authority seemed superfluous: you could only say 'of course', and wonder how it had seemed difficult, and reflect that this man should go straight to the bench. But rare and impressive as it is, the talent by itself makes little difference in ordinary practice. It is not even particularly satisfying to its possessor: the law is too easy a material for that kind of power, and life keeps spoiling the patterns. The phenomenon must have to do with the mathematical affinities of the law. The pattern that seems to come from the sky is conjured up by the problem; and its conclusive effect is partly that of internal coherence and partly because it fits the fixed points. No doubt the computer had been offering other patterns to the fixed points; and had one of those fitted, an equally definitive opinion would have been based upon different elementary propositions—different in the sense not of contradicting those actually chosen, but of being about something else. That is how the law works, and largely how it changes. The change is in the premises from which a matter is approached.

Would the possibility that Maitland was that kind of lawyer throw light on the historian? It would explain the speed at which his work was done. But in attributing even speed to the pattern-finding ability of this particular kind of lawyer, I am venturing on to contentious ground; and from this point on you must reckon that your lecturer can no longer quite separate his attempt to explain Maitland's talent from his own beliefs about what will always be regarded as Maitland's subject. For me the question is how historical reconstruction can be so convincing, even so beautiful, and yet, as I have no doubt that it is, fundamentally wrong. The conviction is of two kinds. At the level of detail there is that human conviction: abstract propositions are reduced to disputes between people whose attitudes seem entirely natural. Then there is the intellectual conviction of the patterns into which the detail is arranged: they are always coherent and satisfying and they fit the fixed points.

I think back to my master in chambers, and hear echoes. You could only say 'of course'. It was hardly conceivable that the opinion could be wrong. And indeed things that are obvious cannot be slightly wrong: like the movement of the sun, they can

only be fundamentally wrong. In the law the coherence of the pattern itself is hardly ever in question. The question is which of two patterns fits more closely: you look at the facts this way instead of that way, and an equally compelling answer flows from different premises. But what have the shifty workings of the law to do with honest history? The legal historian also is finding patterns which fit the fixed points of his evidence. He has a mass of original documents produced for business purposes; but they do not explain the ideas and assumptions underlying the business. Unless you have some general account, such as an elementary book for students, you have to reconstruct those for yourself, to find a pattern which fits the detail.

But the shiftiness of the law goes deeper than that. It is not just that more than one pattern may fit. It is that wrong patterns are actively pressed upon the historian. Until modern times the law rarely responded to change with overt changes of its own. Change was absorbed so that those affected never quite saw what was happening, and historians cannot easily see it either. To take the simplest example of often complex mechanisms, a word changes its meaning; and there is nothing obvious to warn you against reading back the later sense and seeing the later pattern of elementary ideas. All historians are subject to that kind of anachronism; but I think it is only legal historians who are systematically deceived by the nature of their evidence.

'We must not be wise above what is written or more precise than the lawyers of the age.' Of course Maitland saw the danger. But consider a passage, for once incautious, that he wrote to explain why 'Pollock and Maitland' stopped with the accession of Edward I.

> So continuous has been our English legal life during the last six centuries, that the law of the later middle ages has never been forgotten among us. . . . Therefore a tradition, which is in the main a sound and truthful tradition, has been maintained about so much of English legal history as lies on this side of the reign of Edward I . . . We are beginning to discover that it is not all true . . . Its besetting sin is that of antedating the emergence of modern ideas . . . But in the main it is truthful.

No historian would dare to write that today: yet all the standard works until recently have been based upon that assumption. You look back on centuries of material generated on the premise that nothing much must be seen to have changed, and write a book saying that nothing much changed. What you project back are features of a later world, not just its law but the assumptions of its society.

Accident made mischief. Except for his Rede Lecture on *English Law and the Renaissance*, which has long been questioned and lately stood on its head, Maitland published little about the law of any period later than the early fourteenth century; and his view of tradition should not have mattered. But he acted upon it in writing a series of seven elementary lectures on the development of the common law remedies. And like his lectures on constitutional history, which we know he would not himself have published, these were published after his death under the title *The Forms of Action at Common Law*. A very short text seems to encapsulate everything important about the subject. It has been by far the most widely read of Maitland's books on legal history; and it provided the framework upon which scholarly work was based for half a century after his death.

Even in such lectures I do not think Maitland would have formulated the view they convey but for another accident, this time one of chronology. The last vestiges of the forms of action themselves were not abolished until the judicial system which had grown since the Middle Ages was at last replaced by a single and almost rational structure. The Judicature Acts took effect in 1875, and even then many years were to pass before they worked their way down into professional assumptions. Maitland joined his Inn in 1872, and was called in 1876. The law that he learnt, and to a large extent the law that he practised, were seen within a framework which had had a truly continuous existence from something close to a beginning. He was still within the tradition upon which he relied, and we are not.

The misunderstanding was serious. Legal development was seen in almost ecological terms. Writs and actions were the original entities of the common law, multiplying by a kind of parthenogenesis and competing for survival. In retrospect, one can attribute its long acceptance only to the authority of Maitland's name, but of course it had some of his strength. Coherent patterns were discerned by reading much earlier materials with the nineteenth-century sense of such words as 'trespass' in mind. They made grammatical sense, but it would have been hard to make human sense if Roger and Ralph had been enlisted and set to argue out disputes, and harder still not to feel that tell-tale condescension towards their lawyers. Instead of new formulations of 'Not fair', you hear less reasoned nursery cries of the order of 'Shall' and 'Shan't'. But Maitland, hurrying through seven centuries in as many hours, had no time for Roger and Ralph.

The damage done to his subject by that act of piety after his death was mainly to what may be called the intellectual history of the law, especially the post-medieval law. You cannot make much of people shouting 'Shall' and 'Shan't' at each other: few scholars took up legal history; and other historians decided, by and large, that the subject was not worth attention. But a historian working in the Middle Ages cannot put the law aside so easily. It is more obviously central to the rest of life, and much of the medieval evidence in England is legal evidence. But here Maitland had not been hurrying, or at least not hurrying in the same way—there was just the bizarre need to finish 'Pollock and Maitland' before Pollock could write any more of it. But disputes are visualized so that detail carries human conviction; and the patterns into which the detail is arranged are, as always with Maitland, compelling in their coherence. You can only say 'of course'.

But the patterns now seem wrong, and for the same kind of reason. The idea of the forms of action was itself carried back, so that the logic underlying medieval lawsuits was not so much missed as seen back-to-front. Modes of proof, the true focus of attention, were associated with kinds of action rather than with kinds of assertion; and some contemporary reasoning was hidden behind an assumed formalism. The distortion is not altogether confined to our picture of legal thinking: the early history of the criminal law, for example, has been bedevilled by our mistaking a legislative change in modes of proof for a much grander invention to secure public order. But for the period upon which Maitland truly worked, as well as for the long sweep of those short lectures, these misunderstandings went more to the intellectual history of the law than to our picture of society.

That is not true of another set of patterns, about which I must say something even on Guy Fawkes night when there will be bonfires handy for a heretic. The formal continuity of legal materials proved deceptive in another way. Let us start from Maitland's copy of Littleton. For his father, and perhaps for his grandfather, it was probably one of the books read to learn the land law. By the time Maitland himself went to the Bar, there was a modern textbook. But he had a bad time with it; and when about 1890 he advised Cambridge students on preliminary reading for the subject, Littleton was among the books he mentioned. But his principal recommendation was that they should read the second volume of Blackstone. Many rules had since been altered, he warned them, and some of the history was untrue. But they were not to worry about either the history or the later changes: 'I

recommend it to you as the easiest and pleasantest way of making yourselves familiar with the technical terms and the elementary ideas of our property law'. There was no antiquarian bias in the law teacher's advice. Ten years earlier, while still at the Bar, he had published anonymously a breath-taking attack on the law of real property; and though anger was muted in this talk to students, you can still hear his distress at the continued domination of a system of ideas as unsuited to the time as 'tenure'. But dominant they still were, and students must learn to work with them.

Perhaps it was their unfitness for his own time that suggested to the historian immutability in the ideas themselves. 'Tenure' is the crux. Copyhold tenure in the nineteenth century was visibly the vestige of an order in which the holding of the tenant was truly dependent upon his lord. The eighteenth century had envisaged a similar starting-point for freehold, and this Maitland utterly dismissed. For him there had of course been erosion of the rights and powers of lords: but at their earliest and most ample they were limited, in the nature of servitudes over what was always the property of the tenant. It is now clear, at least to a heretic, that at their beginning they added up indeed to the proposition that as between the two the land was the property of lord rather than tenant, or rather to the more fundamental proposition that this was an arrangement between them to which the language and ideas of property are inappropriate. For our understanding of the society the difference is large, and hence the heretic's unease about bonfires. But so far as the legal evidence goes, and most of the evidence is legal, it comes down to the familiar difficulty of telling cause from effect. A series of remedies was provided by the king's courts. The heresy sees these as, in origin, external controls working upon the jurisdiction of lords, and generating abstract rights of property in the same kind of way as today the external control of the European Court is beginning to produce abstract 'human rights'. When a governmental unit ceases to be sovereign, whether feudal lordship or modern state, its practices cease to be conclusive. But for Maitland the tenant had always had an abstract ownership; and these new royal remedies represent only competition with feudal jurisdiction, not control. Jurisdiction was all the king wanted, and better mechanical protection was all the tenant got.

Maitland was again, of course, writing within the tradition. Tenants were owners, and even the limited economic rights of thirteenth-century lords had finally disappeared with the

abolition of military tenures. There was nothing to suggest a yet earlier time when those rights were not in themselves desired, when, for example, the succession of an infant tenant was not a benefit bringing wardship of the land but an interruption leaving the lord without a man, when a tenure was indeed an arrangement over which the lord exercised a true control. Such control is paradoxically easier for us to envisage as 1984 approaches than it was for Maitland in 1895. We can see the language and ideas of our own property law being rendered inappropriate by governmental powers of the same juristic nature as those once exercised by lords. You are less of an owner when you cannot effectively realize your property without planning permission, for example, in the same way as you had not quite become owner so long as you needed your lord's licence to alienate.

But these changes of our own day teach another relevant lesson. They have been separate responses to separate problems; and there was no moment at which the over-all social change could be resisted for what it was. So it was with the transformation of feudal society. The over-all change was absorbed by the law, concealed again in such simple ways as the changing meaning of a word. For Maitland 'seisin' was a mystery because it had for centuries been an abstract idea of the same nature as our 'possession'. If you think in those terms, 'to be seised' must denote a relationship, however mysterious, between a person and a piece of land; and 'to be disseised' probably denotes an act of disorder. It does not occur to you that the mystery, the disorder, and the uneven syntax may all disappear if you introduce another person, the lord who had first to put the tenant in seisin and who might later put him out. He disappeared from the language as he lost real control. But his going is not signalled in the evidence. It makes grammatical sense when you read back the later meaning, and the only warning you have is a matter of human sense: since disseisins were very common you seem to be shown a remarkable degree of disorder.

This is the routine deception of legal records, of law itself. It was abetted by another and larger accident, of the nature of an archaeological find recorded as having turned up too deep. The kind of development which English law was beginning in the twelfth century had been completed by Roman law something like a millennium earlier; and there was in England book learning and even, in the church courts, practical experience of a sophisticated system. That infection from another world is the salient fact about the thirteenth-century treatise on English law known by the name of Bracton. It is not the actual Roman

learning that matters, right or wrong. It is the familiarity with substantive rules and abstract concepts proper to a fully developed system. English legal historians have this treatise, written indeed in the thirteenth century but informed by a sophistication of ideas that English law itself would not attain until the eighteenth. Maitland, writing within a still-living tradition, seemed to have warrant for the continuity of that blend of abstract ideas and formalism. Nor is it just that the treatise was available together with all the other sources. For him another accident had given it pre-eminence. 'Pollock and Maitland' was conceived in 1889. In 1887 Maitland had completed his first big task in legal history, his edition of the collection of transcripts from plea rolls known as *Bracton's Note Book*; and for that purpose he had immersed himself in the treatise. Its assumptions had become his own.

Another of his early works might have raised questions, as indeed it raised a passing doubt about the view of contractual development which was to be propagated in *The Forms of Action.* This was a formulary of claims and defences which Maitland edited for his Selden Society in 1890, and it shows clearly the primitive pattern of litigation; but he may have discounted it as coming from the humble level of manor courts. The pattern was of a claim made and denied in almost sacramental phrases; and the one or the other would be sworn to, and the oath tested by compurgation or battle or—until the church interfered—by ordeal. In the king's courts departures from that pattern were compelled as the supernatural testing of oaths made by or on behalf of the parties was replaced by a more rational mechanism. Disputes came to be settled by submitting them to the oath, the sworn verdict, of a jury. But on some constellations of fact, there was obvious danger that a jury would go wrong if the dispute was put to them at large on the old unanalysed general denial of liability. In some circumstances a special plea had to be allowed; and the discussions in court generated by this new possibility became exciting enough to be reported in what have come down to us as the Year Books. Only near the end of his life did Maitland turn to editing those, and only then did he pay them the kind of attention that the editorial task compels. 'A stage in the history of jurisprudence is here pictured for us, photographed for us, in minute detail. The parallel stage in the history of Roman law is represented, and can only be represented, by ingenious guess-work: acute and cautious it may be, but it is guess-work still.' The words come from his first Year Book introduction, and sometimes

I encourage myself with the fancy that they show a sudden doubt: perhaps the world on which he had worked was younger than *Bracton* had led him to believe. But it was too late.

And now the dwarf must stop grumbling about his vantage-point on the giant's shoulder and climb back up his library ladder. Maitland had nothing to stand on. There was no legal history worth the name. There were only the documents for the details, and a mendacious professional tradition and an even more mendacious *Bracton* for the patterns. In some branches of history you can study details in isolation and add the results together. In legal history that does not work. The detail makes little sense in isolation: you have to proceed upon some hypothesis about the patterns, about the framework of ideas and the relationships of society. Maitland's framework enabled him to conjure up a richly detailed world. If the framework is indeed wrong, the detail is not; and progress in his subject is likely to be by successive rearrangements. But nobody will need the qualities that were needed to make a start.

A start towards what? Of course not just the history of doctrine and technicalities, or even of society if that means just a structure. In his introduction to *Bracton's Note Book*, Maitland quoted lines from *The Ring and the Book*:

> Justinian's Pandects only make precise
> What simply sparkled in men's eyes before,
> Twitched in their brow or quivered on their lip,
> Waited the speech they called but would not come.

That Bractonian twist in time seems to infect even the verse: long centuries of making things precise lay behind Justinian. But Maitland was writing about people indeed near a beginning, near that second fall of man by which right and wrong, no longer manifested in divine judgements, had to be articulated into a workaday system. He knew what he was after, and looked forward to a time when 'the thoughts of our forefathers, their common thoughts about common things, will have become thinkable once more'. But all the resources of scholarship will not achieve it without some touch of his sense for common feelings as well. It is this Shakespearian quality that exacts devotion even from the unbeliever: 'Others abide our question'.