

RALEIGH LECTURE ON HISTORY

Maitland and Anglo-Saxon Law: Beyond Domesday Book

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WE ARE OF COURSE HERE to praise famous men; and certainly not to bury them under the rubble of the learning that has accumulated over the century since the first publication of the *History of English Law*.¹ At the same time, my idea of what makes a worthy tribute comes from two remarks of Maitland's own. 'I try', he wrote (of his anxiety about the shortcomings of *Domesday Book and Beyond*), 'to cheer myself up by saying that I have given others a lot to contradict'; and (from his illuminating inaugural, 'Why the History of English Law is not written'), 'the lawyer must be orthodox, otherwise he is no lawyer; an orthodox history seems to me a contradiction in terms.'² We owe this first and greatest of professional medievalists the compliment of arguing with him as one would with a contemporary colleague. Yet the *History of English Law* is also a monument. It deserves something of the attention that we give to works whose greatness we readily admit, yet do not regard as being in quite the idiom of modern histories: Gibbon, Macaulay, even Stubbs. It demands, that is to say, to be explained. To put it another way, I am a 'heretic', like the eminent scholar who concludes these proceedings. I take it for granted that Maitland (and Pollock) made mistakes, even laboured under serious misconceptions. But it is not enough to say that they were wrong; we

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¹ Read at Cambridge 7 July 1995. A fuller and somewhat differently balanced version of this Raleigh Lecture was read at Birmingham on 28 November 1995, under the title 'Frederic William Maitland and the Earliest English Law'. For many of the more substantial points of legal history (e.g. nn. 26, 43–5, 56–61, 69–70, 76), recourse must regrettably be had to my *The Making of English Law* (Oxford, forthcoming), where there is scope to discuss them at greater length.

² *Letters*, i no. 200; *Collected Papers*, i 491.

must know why. Historians of this class are not wrong without good reason; we must find those reasons. I shall not, then, spend much of this lecture celebrating Maitland's virtues. That would be preaching to the converted. Nor shall I dwell for long on where, whether in my view or that of others, he was in error. That would be a pygmy's dance on a titan's shoulders. What I wish to try to do is to understand how, for better for worse, he took the lines that he did.

I start at something of a disadvantage compared to the other contributors to this series. As we all know (as one of us should have known before he first presumed to comment on Maitland and Anglo-Saxon law), the *History of English Law's* chapter on the Anglo-Saxons was not written by Maitland. Chapter 1 (as it was in the first edition) was Pollock's work, and Maitland's reaction was never to let him write another. The evidence on this seems unambiguous. Letters are extant from both men which say as much.³ But this may not justify us in transferring responsibility for all flaws in the Anglo-Saxon chapter from the hero of our proceedings to their other walk-on character.⁴ This chapter may not be unadulterated Pollock. Pollock could write with flair and insight, but not of course with Maitland's inimitable effervescence. The Anglo-Saxon law chapter is lifeless by comparison with the preceding one on the 'Dark Ages', which Maitland introduced to the second edition, or almost all the fourteen that follow. There are few if any arresting images. There is little or no wit. This chapter also bears a marked similarity in wording and content to a later essay of Pollock's on the subject; whereas Maitland's own short surveys for *Social England* and for *Encyclopaedia Britannica*, dated two years before and nine years after the *History of English Law*, are in the palpable idiom of the rest of the book.⁵ It may be possible to detect

³ Letters, i no. 109, p. 103 (1892), and cf. no. 138 (1894); M. deW. Howe, ed., *The Pollock-Holmes Letters* (2 vols, Cambridge, 1942), i 60-1. Dr Zutshi tells me that the whole of the original MS (CUL Add MS 6987) is in Maitland's hand, but the first (Anglo-Saxon) chapter is not included.

⁴ Heinrich Brunner, whose review found the Anglo-Saxon chapter, 'not on a level with the other chapters of this excellent work', politely declined to develop the point that he detected, 'with some degree of precision the authorship of portions of this work': *Political Science Quarterly*, xi (1896), 535-6, (cf. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, germanistische Abtheilung*, xvii (1896), 126-7).

⁵ Sir F. Pollock, 'English Law before the Norman Conquest', *LQR*, 14 (1898), 291-306, repr. in *Essays in Anglo-American Legal History* (3 vols, Boston/Cambridge), pp. 88-107; F. W. Maitland, 'Outlines of English legal history', in H. D. Traill, ed., *Social England* (London, 1893), repr. in *Collected Papers*, ii esp. 418-35; and 'History of English Law', in *Encyclopaedia Britannica* (10th edn, XXVIII supplement, 1902), repr. in H. M. Cam, ed., *Selected Historical Essays of F. W. Maitland* (Cambridge, 1957), esp. pp. 97-102. To give two potentially revealing examples: Pollock is fond of the word 'archaic' and its derivatives ('English Law', 88, 92, 103, 105, and cf. Pollock and Maitland, i 38, 43-4, 47, 55, 57, etc.), but it is notably rarer

traces of differences of opinion between the two.⁶ Yet some passages seem to bear the Maitland touch. A final sentence, new to the second edition ('the king's lordship and the hands that gather the king's dues are everywhere; and where they have come the king's law will soon follow'), recalls Round's dry observation that 'the hand of Esau was less distinctive than the pen of the Downing Professor'.⁷ If Maitland intervened at this stage, he could presumably have done so in the first edition; and the relative rarity of changes between the two editions suggests that Pollock's views generally had his endorsement.⁸

It is no surprise that they should. Maitland's summaries of 1893 and 1902 may be livelier than Pollock's chapter, but they are similar enough in content to leave an impression that Pollock wrote with a draft of the first of them at his elbow. Here too is the formalism generated by 'doomsmen's' law (though with a sympathetic *aperçu* of its rationale); here are feud and 'pecuniary mulct' slowly — all too slowly — making way for punishment.⁹ Given his vision, already crystallised in his inaugural lecture, of the social history that 'lies concealed within the hard rind of legal history', we can well believe that Maitland regretted Pollock's relegation of sundry topics to the realm of 'social

in Pollock and Maitland's introductory chapter or wherever else it might have been expected, as also in the *Social England* and *Britannica* essays; preferred terms are 'ancient', 'old', even 'rude' or 'barbarous', and there may here be a further reaction against Maine's schematic thought (below, p. 16). Again, Pollock and Maitland's introductory chapter (2nd edn) strikingly (and justly) refers to the legislation of Alfred's successors as 'capitularies', 19; the same idea recurs in *Collected Papers*, ii 422, and *Selected Historical Essays*, p. 98; but it is absent from the Pollock and Maitland chapter on 'Anglo-Saxon law', or from Pollock's acknowledged works.

⁶ Thus, outlawry is said to have 'developed in the Danish period as a definite part of English legal process' (i 43), and, in the first edition (i 26-7) to have been 'used in or very soon after Alfred's time — as a substantive penalty'; but the italicized phrase is absent from the second edition, and there seems to be little evidence of the idea in Maitland's later discussion (ii 449-53, etc.), or in his other writings. See also below, n. 23, on private jurisdiction.

⁷ Quoted by H. E. Bell, *Maitland* (London, 1965), p. 62.

⁸ The sentences added to the chapter's opening paragraph in the second edition express the philosophy of *Domesday Book and Beyond* which is now cited. Other changes are: on the relationship between royal and other forms of lordship (i 30/6); kindred is 'not yielding precedence to', rather than 'prior to' the State (i 31/7); the critique of Kemble is modified (i 33/9, 62/39-40), giving pause as to the remarks on i 28/4; Brunner's criticism (p. 536) of the first edition's point about the 'fore-oath' (i 16) is taken on board (i 40 and n. 1), as also his schoolmasterly reproof (*ibid.*) about penal slavery (i 56/33); secular and ecclesiastical courts are no longer 'sharply' separated (i 40/16); above all, the double-edged discussion of private justice is dropped (i 43/20-1) in favour of the much more categorical *Domesday Book and Beyond* account (see below). In this light, and without wishing to deny Pollock all claims to humour, one ponders such phrases, already in the first edition, as 'worshipful company of the Statutes of the Realm', and 'Clovesho that "famous place" whose situation is now a matter of mere conjecture' (i 27/3, 42/18). See also below, Hudson, n. 43.

⁹ 'Outlines of English legal history', pp. 424-8.

antiquities'.¹⁰ But part at least of what he said that he disliked about this chapter was that 'it will make it very difficult for me to say anything about Anglo-Saxon law in any later part of the book'.¹¹ This was a defect he was in a position to remedy, and so are we. He contrived to return to the pre-Conquest period in later sections of the *History of English Law*, as well as in part II of *Domesday Book and Beyond*, the self-confessed repository for much of what he had felt precluded from incorporating in 1895. Then, on top of the brief 'encyclopedic' accounts already mentioned, there are three notable early papers, one early Selden Society introduction, his review of Liebermann, and a variety of *obiter dicta* in his letters.¹² We can hardly plead ignorance of Maitland's views on Anglo-Saxon law.

Nor are we left in much doubt that for him, as for Pollock, its role in the story of English law was merely marginal. The first words of the second edition's new introduction speak of history's 'seamless web' (displaying Maitland's Johnsonian capacity to launch clichés). But this 'historian of situations, [not] development' saw the primary need as 'a fairly full statement of the English law of the Angevin time'.¹³ As will be obvious by the time I finish — as will scarcely be news to some — it is here that I think his cardinal error lay. It is therefore appropriate to begin by stressing that Maitland had three perfectly good reasons for it. In the first place, he could not get out of his mind the glaring contrast between the *Leges Henrici Primi* at one end of the twelfth century and *Glanvill* at the other.¹⁴ He was entirely aware of the reasons why the *Leges* might not be taken at face value.¹⁵ What never seems to have occurred to him is that it might have misrepresented the nature of pre-Conquest English justice. We shall return to this point more than once. Meanwhile, a second factor was that Pollock and Maitland wrote, as we shall see, in the Salad Days of the Germanic

¹⁰ Pollock and Maitland, i 56, 62, and cf. i 34, 49; *Collected Papers* i 485–6.

¹¹ See n. 3; and below, Hudson, p. 29.

¹² See especially Pollock and Maitland, i 296–305, 568–82; ii 240–60, 314–23, 449–58, 503–4, 514–15, 598–603; *Domesday Book and Beyond*, pp. 220–356; *Collected Papers*, i 202–46, 304–28, iii 447–73; *Selected Historical Essays*, pp. 41–51; and *Letters*, i nos 87, 96, 238, 271, 305; *Letters*, ii nos 37, 175, 311, etc.

¹³ Pollock and Maitland, i p. ci; cf. pp. 225, ii 672–3, and 'Outlines of English legal history', p. 418; but note *Letters*, i no. 285 (to Poole, referring to Stubbs's introduction to the final edition of his *Select Charters*): 'Are not all men continuationers?' For Maitland 'as historian of situation', see R. W. Southern, review of *Letters*, i, *History and Theory*, 6 (1967), 111.

¹⁴ E.g. Pollock and Maitland, i 165, ii 448; *Collected Papers*, i 332 (1885), ii 28–30, 36 (1889), 443–4 (1893), iii 451 (1904); *Selected Historical Essays*, p. 102 (1902).

¹⁵ Pollock and Maitland, i 32 (Pollock?), 100–1; *Domesday Book and Beyond*, pp. 80–7; *Collected Papers*, ii 433 (1893); *Letters*, ii no. 37, p. 53 (to Rashdall, 1892); cf. Hudson, pp. 44–5.

Historische Rechtsschule, whose birth Maitland admiringly recalled when introducing his translation of part of Gierke's *Genossenschaft*. For this school, the value of the Anglo-Saxon codes, couched as they uniquely were in the vernacular, was that they axiomatically represented 'an especially pure type of Germanic archaism' (as Pollock put it).¹⁶ Not only did this rule out *a priori* any important link with the dynamic force of the emergent Common Law; it is also meant that there was little point in repeating a story that the *Rechtsschule* itself had already told.¹⁷

Thirdly, and in any case, Maitland clearly felt out of his depth in Anglo-Saxon materials, as well he might. Though the 'satisfactory edition of the land-books' that he thought 'a long way off' in 1897 is still advancing at glacial speed, we have an infinitely better idea than he could ever have of what constitutes an acceptable document.¹⁸ He lacked the benefit of Liebermann's *Gesetze* until three years before he died, and then only had the texts volume, whose interest (as he noted when declining to review it a second time) 'lies quite as much within the linguistic as within the legal department'. Another letter of the next year to W. H. Stevenson about the young H. M. Chadwick's *Studies on Anglo-Saxon Institutions* says that 'it is full five years since I had a look at Anglo-Saxondom', and continues, with habitually ludicrous modesty, that his 'knowledge of it was always superficial', and he 'could hardly tell "wer" from "wite"'.¹⁹ A. L. Smith shrewdly observed that the scope of the *History of English Law* was fixed by the extent to which it related (in its own words) to 'a luminous age . . . an age of good books . . .'.²⁰ To either side lay the Anglo-Saxon evi-

¹⁶ Gierke, pp. xv-xvii; Pollock and Maitland, i 44, echoing 'Outlines of English legal history', p. 429, 'purest specimens of pure Germanic law'.

¹⁷ *Collected Papers*, ii 12-13 ('Materials for English legal history', 1889): if beginning before the late-eleventh century, 'we shall have to eke out our scanty knowledge with inferences drawn from foreign documents . . . in that case the outcome will be much rather an account of German law in general than an account of that slip of German law which was planted in England: a very desirable introduction to a history of English law it may be, *but hardly part of that history*' (my emphasis).

¹⁸ Above all from P. H. Sawyer, *Anglo-Saxon Charters: An Annotated List and Bibliography* (London, Royal Historical Society Handbooks, 1968), now being revised by Dr Susan Kelly.

¹⁹ *Letters*, i no. 395 (1904); *Letters*, ii no. 311 (1905).

²⁰ A. L. Smith, *Frederic William Maitland: Two Lectures and a Bibliography* (Oxford, 1908), pp. 39-40; Pollock and Maitland, ii 672-3. Note that Maitland looked to be overridden by Liebermann's eventual publication of the Anglo-Saxon and Anglo-Norman laws, Pollock and Maitland, i 97 n. 3; while controversies about the origin of proprietary right 'are better left to those who have more copious materials for the history of very remote ages than England can produce', Pollock and Maitland, ii 77 (with reference in n. 2 to Brunner's review of the first edition). Cf. too the remark about the Anglo-Saxon dooms in *Domesday Book and Beyond*, p. 226; and the pessimism about Anglo-Saxon law preceding the passage quoted in n. 17 above.

dence and the Year Books; and in devoting what turned out to be his last years to elucidating the latter, he effectively forsook the former. His verdict on Stubbs's (as he thought) relatively tentative coverage of the period before 1066 could very well express his own hesitation: 'many an investigator will leave his bones to bleach in that desert before it is accurately mapped.'²¹ As a 1901 forecast of Anglo-Saxon studies in the century to come, it was not wholly off beam.

In these lights, the marvel of Maitland is that he was so seldom wrong. But wrong he could be, sometimes by what now amounts to common consent. Merely to catalogue the post-Maitland heresies of modern Anglo-Saxonists would be distasteful in this (or any) setting.²² I shall thus say little, and then only towards the end, of Maitland's misconceptions about bloodfeud. I shall spare you 'bookland' with all its appurtenances. I shall (of course) give 'feudalism' a wide berth. Instead, I wish to highlight three issues, which boil down in the end to one; so far as law was concerned, Maitland, in common with nearly all commentators until now, drastically underestimated the power and the aggression of the Old English state.

My first issue is one where heresy is now unanimous, if espoused (as heresies should be) to varying extremes, from wildly sectarian to *via media*. The case argued by Part II of *Domesday Book and Beyond*, that, in Maitland's own irresistibly quotable words, 'the well-endowed immunist of St Edward's day has jurisdiction as high as that which any palatinate earl of after ages enjoyed': that case has, in effect, collapsed.²³ Julius Goebel powerfully restated Henry Adams's thesis, attacked by Maitland, that Anglo-Saxon grants of judicial privilege conceded only the fines and forfeitures that came of doing justice; why, otherwise, should the lord's court appear in Henry I's short writ on shire and hundred courts, but not in the entire corpus of pre-Conquest legislation?²⁴ Naomi Hurnard demonstrated with measureless erudition

²¹ *Collected Papers*, iii 506. This was doubtless one reason why, 'of all that I have written, [*Domesday Book and Beyond*] makes me most uncomfortable': *Letters*, i no. 271.

²² For a critique of some specifics in Pollock's chapter, especially its allegations of 'archaism', and of the king's non-intervention, see P. Wormald, 'Charters, Law and the settlement of disputes in Anglo-Saxon England', in W. Davies and P. Fouracre, eds, *The Settlement of Disputes in Early Medieval Europe* (Cambridge, 1986), pp. 149–68.

²³ *Domesday Book and Beyond*, pp. 258–92, quoted at p. 283; cf. *ibid.*, pp. 80–107; Pollock and Maitland, i 43 (the more hesitant formulation of the first edition's pp. 20–1, omitted from the second in favour of *Domesday Book and Beyond*, perhaps hinting that Pollock and Maitland did not see eye to eye); also *ibid.*, i 73, 576–80, ii 453–5.

²⁴ Hn com 3, *Gesetze*, i 524; H. Adams, 'The Anglo-Saxon courts of law', in *Essays in Anglo-Saxon Law* (Boston, 1876), pp. 27–54; J. Goebel, *Felony and Misdemeanor* (repr., Philadelphia, 1976), pp. 339–78.

that the 'pleas of the Crown', which Cnut professed to reserve but actually anticipated the Confessor in his readiness to alienate, were not the major pleas that Maitland had thought them, but redeemable, hence minor; it was just because they were petty enough for lords to think that they could take their profits for granted that Cnut found it necessary to remind them that they could not.²⁵ It is thus unnecessary to go as far as my own (positively Mugglestonian) position, which holds that lords' courts are as evanescent in the not inconsiderable body of recorded lawsuits before 1066 as they are in legislation (but thereafter as evident in case-law as in prescriptive texts); and that even our one apparently solid instance of Oswaldslow resulted from 'bent' evidence laid before the 1086 commissioners by the sainted Wulfstan.²⁶ Even Helen Cam, playing Wiglaf to Maitland's Beowulf, fell back on the redoubt that lords' jurisdiction was limited to the hundred level, with those possessing whole hundreds privatising their courts *de facto*; she thought government was anyway so much less active before 1066 that immunity from its intrusions was redundant.²⁷

How can Maitland have got it so wrong? In part, he was victim of his priceless common sense. 'No one in the middle ages does justice for nothing'; in other words, kings and their officials would lose interest in administering justice once they no longer harvested its fruits. Yet Maitland himself knew from Domesday Book of instances where courts whose revenues had been alienated were still run by royal officials, and he can have found few where the logic of his position was visibly worked out.²⁸ Of other considerations playing on his mind, some have been met already. Here above all, he was vulnerable to bogus charters. Even his safety-net, that 'the traditions . . . legends current in later times, cannot be altogether neglected', is lost once we appreciate that the manufacture of so many fraudulently ancient franchises implies that something in the

²⁵ II Cn 12, *Gesetze*, i 316-17; N. Hurnard, 'The Anglo-Norman Franchises', *EHR*, 64 (1949), 289-323, 433-60.

²⁶ P. Wormald, 'A handlist of Anglo-Saxon Lawsuits', *ASE*, 17 (1988), 247-81; 'Charters, Law', 163; 'Lordship and justice in the early English kingdom: Oswaldslow revisited', in W. Davies and P. Fouracre, eds, *Property and Power in The Early Middle Ages* (Cambridge, 1995), pp. 114-36.

²⁷ H. M. Cam, 'The "Private" Hundred in England before the Norman Conquest', and 'The Evolution of the medieval English franchise', both repr. in id., *Law-Finders and Law-Makers in Medieval England* (London, 1962), pp. 59-70, 22-43.

²⁸ *Domesday Book and Beyond*, pp. 277; and pp. 87, 92, 95-6; this point is argued in detail by D. Roffe in chapter 5 of his unpublished 1987 Leicester Ph.D. thesis, 'Nottinghamshire and the North: a Domesday Study', and in 'Brought to Book: lordship and land in Anglo-Saxon England', another unpublished paper that he has kindly shown me.

post-Conquest climate was creating a new demand for them.²⁹ The *Leges Henrici* was probably again a decisively malign influence. 'If that book has any plan at all', wrote Maitland, 'it is a treatise on the law of jurisdiction, a treatise on "soke" ' and it has plenty to say about the jurisdiction of lord's courts.³⁰ Maitland was hindered from seeing that private justice might be a function of lordship that reached England only with its conquerors, by the suggestive if hardly conclusive fact that its vocabulary, unlike that of so much of the law, remained English.³¹ In any case, his jurisdictional analysis was only part of the case that Anglo-Saxon law had escaped the 'archaic' straitjacket in which Pollock enfolded it, to the extent that 'tribalism was giving place to feudalism'; a case which, depending how one defines that much-defined word (and no one, of course, ever defined it more wittily or wisely), he went far towards making.³² He had long come to see 'jurisdiction in private hands' as 'that most essential element of feudalism'.³³

This point re-introduces the question of Maitland's sense of his place in European scholarship. To a degree unmatched by any English medievalist before Powicke and his disciples, Maitland was intensely cosmopolitan. Kemble and Stubbs were *au fait* with the main currents of continental thought. But so far as I know, neither they nor anyone else (nor many before quite recent times) paid such close attention to what foreign historians were saying about subjects which interested them.³⁴ One of the most striking features of his correspondence and papers is the constantly sounded note of fury at the failure of his fellow-countrymen to measure up to the standards of scholars overseas, even as regards texts or topics which were an Englishman's birthright.

²⁹ *Domesday Book and Beyond*, p. 267; two of the earlier charters that mattered most to his argument, S 183, 278, are deeply problematic; while few of the writs he cited on pp. 260-1 have withstood later scrutiny: Wormald, 'Oswaldslow', pp. 128-9.

³⁰ *Domesday Book and Beyond*, p. 80; *LHP*, 20-23, 25-33, Downer, pp. 122-37, etc.

³¹ Pollock and Maitland, i 73, 576; cf. the justly famous passage on the Frenchification of English legal terminology, Pollock and Maitland, i 80-7.

³² 'Outlines', *Collected Papers*, ii 423; *Domesday Book and Beyond*, pp. 295-6; to judge from *Letters*, i no. 96 (to Pollock, 1891), the work which became *Domesday Book and Beyond*'s 'England before the Conquest' first germinated as 'Origins of Feudalism'; cf. Hudson, below, p. 31. For Maitland's definitions, see Pollock and Maitland, i 66-7, 'an unfortunate word', etc.; *Collected Papers*, i 175 (1879), 'a good word [which] will cover a multitude of ignorances'; above all the immortal 'squib' in *Constitutional History*, p. 142, echoed in the 1889 inaugural lecture, *Collected Papers*, i 489.

³³ Pollock and Maitland, i 68 and (e.g.) 527.

³⁴ It would be interesting to know how many other twentieth-century English medievalists sent copies of their latest work to counterparts of Meyer, Petit-Dutaillis, Brunner, Gierke and Liebermann: *Letters*, ii no. 306 (cf. no. 295, 'debts of a very personal kind' to Gierke, Brunner, Stutz, Hübner and Liebermann); and how often has the death of a scholar from these islands been marked by the sort of international accolade published in *LQR*, 23 (1907), 137-50?

His Liebermann review is an astonishing extended metaphor of the race for colonies, which concludes starkly, 'we have lost the Anglo-Saxon laws'. To use that image for a German's work at a time of escalating Anglo-German African rivalry, must have been meant to hurt — to hurt not the revered 'little man' of course, but Englishmen who had left him the field.³⁵ The primary clue to Maitland's theory of Anglo-Saxon jurisdiction is thus contained in a letter to Pollock of 1891, when the *History of English Law* was under way: 'As to the A-S "immunities" . . . I don't think we can dissociate the English from the Frankish question. Adams's essay represents the school of Roth. Against this there has been a marked reaction both in France and Germany'. It is quite true that Adams had followed Roth's line, and that this had been largely discredited by the 1890s.³⁶ The last thing Maitland was prepared to be was insular or out-of-date. The discussion in *Domesday Book and Beyond* features repeated analogies between the experience of the late Old English polity and the dying Carolingian empire.³⁷ Which brings us to the last and surely decisive point. Maitland evidently had half an eye on the apparently lethal results of the lavish outlay of Frankish immunities, and was drawing appropriate conclusions about the events of 1066. It is hard enough for today's historians to think away the implications of its overwhelming defeat for the health of the pre-Conquest state. In the 1890s, the decade of 'the battle', as Maitland characterized it with waning amusement to J. H. Round, one of its two protagonists, it must have been utterly impossible.³⁸ And Maitland in fact makes the lineage in his mind perfectly clear, when summing up his survey of Domesday 'Sake and Soke': seignorial control of courts would not have been a matter of indiffer-

³⁵ *Collected Papers*, iii 447–73, at p. 472. Examples are easily multiplied: Pollock and Maitland, i cv; *Letters*, i no. 14 (to Bigelow, 1885 'constant fear that some German or Russian or Turk will edit Bracton and shame the nation which has produced six volumes of rubbish'; — targeting the wretched Sir Travers Twiss); *Collected Papers*, i 485 (1889, 'who else [than Liebermann] should publish the stupid things?'); iii 424 (1901, 'terror lest the Savigny Stift or the École des Chartes should undertake an edition' of the Year Books); cf. too the introduction to *Bracton's Note Book* of 1887, quoted by H. A. L. Fisher, *Frederick William Maitland* (Cambridge, 1910), p. 34 (with the personal comment of this brother-in-law of Maitland, p. 53); and another diatribe from the first of his Selden Society Year Book series (vol. 17, 1903, pp. xxxii–xxxiii), climaxing on the characteristically Biblical note, 'Lo! they turn unto the Gentiles'.

³⁶ *Letters*, i no. 95. See the discussion by Fustel de Coulanges, *L'Origine de la système féodale* (Paris, 1890), pp. 336–425, to which Maitland refers. It is appropriate to add that the long-established reaction against Maitland's views for England is now being matched by a marked minimalization of the consequences of Frankish immunities, for which it is enough to refer to the discussion and bibliography of Paul Fouracre, in Davies and Fouracre, eds, *Property and Power*, pp. 53–81.

³⁷ *Domesday Book and Beyond*, pp. 263–5, 278–9, 280, 282–4.

³⁸ *Letters*, i no. 134.

ence to 'far-sighted men . . . but it has not been proved to our satisfaction that the men who ruled England in the age before the Conquest were far-sighted. Their work ended in stupendous failure'.³⁹

My second heresy has had adherents at times but has on the whole been banished to windswept hillsides by Maitlandian orthodoxy. There were few things of which he felt more sure than that the introduction of the jury of presentment by the Assize of Clarendon in 1166 was a watershed in English law. Nor did he seriously hesitate to accept Brunner's famous thesis that its origins lay in the Frankish royal inquest, and that it was brought to England by Norman and then Angevin kings.⁴⁰ He admitted an element of doubt, and never really accounted (any more than had Brunner) for the phenomenon's apparent presence in Ethelred's third code. More to my point, he accepted, indeed did much to establish, that there was some connection between presentments by juries and the obligations of Frankpledges.⁴¹ He still remained fairly certain that the denunciatory functions of the frankpledge were introduced by Henry II's edict.

This is hardly the place for a detailed analysis of the issue. I shall keep it as simple and close to Maitland as I can by focusing on the frankpledge question. Did neighbourhood sureties, tithings, already have the duty of exposing their erring members to the king's justice as well as indemnifying their misdeeds before 1166, or indeed 1066? If so, the 'Angevin breakthrough' might be a change of tactics but scarcely a new strategy. I believe that Anglo-Saxon evidence does allow us to say this. Maitland thought that it did not. The villain of the piece (from my angle) is again the *Leges Henrici Primi*. 'In the days of (the "Leges" of) Henry I . . . there is no talk of presentment of offences'.⁴² Yet the *Leges* is perceptibly referring in the relevant passage to Cnut's law obliging all aged twelve and over to be in 'hundred and tithing'. It

³⁹ *Domesday Book and Beyond*, pp. 102-3.

⁴⁰ Pollock and Maitland, i 138-44; 'Outlines', *Collected Papers*, ii 454; 'History', *Selected Historical Essays*, p. 101; but cf. also Pollock and Maitland, i 151-2 ('puzzling'), ii 642-3 ('a matter of doubt'). The literature on this subject is of course vast: enough to say that one of the most recent and authoritative treatments, R. C. van Caenegem, 'Public prosecution of crime in twelfth-century England', in C. N. L. Brooke, et al., eds, *Church and Government in the Middle Ages. Essays presented to C. R. Cheney on his 70th Birthday* (Cambridge, 1976), pp. 41-76, is a vindication of Maitlandian first principles.

⁴¹ Pollock and Maitland, i 568-71, 580. There is an even clearer account of the linkage in 'Leet and Tourn', part of Maitland's introduction to *Select Pleas in Manorial Courts* (Selden Soc., 2, 1888), pp. xxvii-xxxviii, excerpted in *Selected Historical Essays*, pp. 41-51; and not to be ignored is his remarkable 1881 paper, 'The criminal liability of the Hundred', *Collected Papers*, i 230-46, which left regrettably little trace in either Pollock and Maitland or any of Maitland's later writings.

⁴² *Selected Historical Essays*, pp. 49, 46.

goes on at once to echo Cnut's clauses about lords' responsibility to go surety for their men. These clauses are based in turn on Ethelred's Woodstock code, whose closely related equivalent for the Five Boroughs area was the Wantage code; and this Wantage code has the notorious reference to the duty of the wapentake's 'twelve leading thegns' under oath to accuse and to arrest the *'tithbysig'* (i.e. 'charge-laden'): the provision of its Woodstock counterpart is that the king's reeve is to place in surety those seen as 'untrustworthy to all people', or else to execute them.⁴³ In that light, the Wantage twelve are neither isolated nor necessarily Scandinavian. They are one cog in machinery designed to develop local liability for the persistently deviant. So was the 1166 jury. To take this mode of argument further: Cnut goes on to demand in almost the same breath that twelve-year-olds swear an oath to eschew robbery. Frankpledge recruits swore such an oath in *Bracton's* time. The oath of loyalty previously specified by Edmund had imposed a duty not to conceal its breach by neighbours; and his next law had ordered steps to be taken against thieves. Alfred had already decreed an 'oath and pledge', which, according to his son, was 'taken by the whole people', and meant non-compliance with crime.⁴⁴ To take an oath not to cover up for criminals is not a lot different from swearing to denounce them. To clinch the point, the measure adduced by Brunner in tracing the criminal inquest to Carolingian roots was a stipulation by Charles the Bald of a general oath binding on *all* subjects, and applying to theft as well as loyalty itself.⁴⁵

One can readily grant that this is not a discourse of empanelled twelve and itinerant justice such as Henry II laid down; but we can now more easily see how the Wantage Code comes so close. It is clear that we already have an idea of communal responsibility to take action about behaviour that harms all, not merely of injury redressed between parties concerned; and if justice is not done yet by specialist journeymen, we still have officials who act in the name of established authority. If you will allow me a Maitland parody (as Maitland's shade surely will): Ælfric is an inveterate rustler; Wulfric and the other nine members of his tithing have made good his depredations once too often. To them he is now *tithbysig*; they surrender him to Ælfstan, king's reeve, who

⁴³ *LHP*, 8: 1-3, Downer, pp. 102-3, II Cn 20-20a, 31-31:1, *Gesetze*, i 322-3, 334-5; I Atr 1:10-11, pp. 218-19; III Atr 3:1-2, pp. 228-9; I Atr 4-4:1, pp. 220-1.

⁴⁴ II Cn 21, *Gesetze*, pp. 324-5; *Bracton*, f. 124, Thorne, ii 350-2; III Em 1, *Gesetze*, i 190; Af 1, pp. 46-7; II Ew 5, pp. 142-3.

⁴⁵ A. Boretius, ed., *Capitularia Regum Francorum* (MGH, Legum Sectio II, 2 vols, 1883) 260: 4, + Addit. 1, II, pp. 272, 274; H. Brunner, *Die Entstehung der Schwurgerichte* (Berlin, 1872), pp. 458-63 (the Italian capitularies cited by Brunner (*Capitularia* 91:8, 213:3, I, pp. 192-3, II, pp. 86-7) do not materially strengthen his case).

has a short way with such miscreants. A perfunctory effort to find him new sureties is of no avail. Ælfric is soon at the end of a rope. But there is a taint in this blood. Ælfric's great-grandson, William, has the ancestral light fingers with others' stock. Earl Robert of Leicester is in the vicinity; William is duly denounced as '*rettatus vel publicatus*' by Giles and eleven of the hundred's other heads of frankpledges. As William dangles on his gibbet, we beg leave to doubt that he is much consoled to contemplate the enhanced dignity of the men and the process that put him there.

Some of these things Maitland could well have seen. Some he very nearly did. But readiness to take Brunner's word for it (and, we must add, reluctance to go beyond German experts to continental sources) is now compounded by another trait in Maitland's intellectual psychology. Sir Richard Southern insists that 'anyone who wishes to understand his historical starting-point... must read his essay on Real Property'.⁴⁶ This greatest of legal historians bursts into view with a dazzling display of verbal pyrotechnics at the expense of the legal profession. A decade later, his Inaugural suspected (in what must be more disguised autobiography) that legal history's future can only lie with failed lawyers. In the last year of his life, he lauds the emergence of a rational code of German law, with more sidelong glances at the English approach, crediting this in part to the labours of the German scholars he so admired.⁴⁷ His extraordinary sense of the need to 'liberate' both past and present from their intellectually constricting embrace was a mainspring of his enduring modernity.⁴⁸ It was born of disgust

⁴⁶ Southern, review of *Letters*, i, 107; *Collected Papers*, i 162–201 (1879). Plucknett also spotted its relevance, 'Maitland's view of Law and History', *LQR*, 67 (1951), 184–5; as indeed had Pollock himself, *Quarterly Review*, 206 (1907), 406.

⁴⁷ *Collected Papers*, i 493–6; iii 474–88. For the autobiographical side of the inaugural, see S. F. C. Milsom, 'F. W. Maitland', *PBA*, 66 (1980), 273. Plucknett's dismay, 187–91, might have been tempered by considering the likely impact on Maitland of the employment of most German legal historians as '*Juristen*', then as now — the requirement of 'failure' in England presumably arising from the far lower academic salaries west of the North Sea (then as now): cf. *Letters*, ii no. 135.

⁴⁸ *Collected Papers*, i 493: 'it is to the interest of the Middle Ages that they be not brought into court any more'; *Collected Papers*, iii 486: 'anyone who really possesses what has been called the historic sense must, so it seems to me, dislike to see a rule or an idea unfitly surviving in a changed environment'; while (p. 487) the Germans are 'pioneers — masters' of legal history, which 'encouraged them to believe that every age should be mistress of its own law'. Compare *Letters*, ii no. 116, pp. 104–5, an important letter to (significantly, perhaps) Dicey: 'The only direct utility of legal history (I say nothing of its thrilling interest) lies in the lesson that each generation has an enormous power of shaping its own law... I am sure that [its study] would free [men] from superstitions... the only justification that I ever urge *in foro conscientiae* is that if history is to do its liberating work it must be as true to fact as it can possibly make itself, and true to fact it will not be if it begins to think what lessons it can teach'; cf. too the observation that 'there is nothing strange in the coincidence' that 'the great years of the Record Commission, 1830 to 1840' were those of "radical reform":

at the entrapment of his fellow-lawyers in history blended of illusion and anachronism. He loved to catch Coke or Blackstone in the toils of a historical *trompe-l'œil*.⁴⁹ Such is the voice of the *History of English Law* on the jury: 'the prevailing opinion . . . has triumphed over the natural disinclination of Englishmen to admit that this "palladium of our liberties" is in its origin not English but Frankish, not popular but royal'.⁵⁰ Maitland would bend over backwards to disabuse Englishmen of misplaced faith in the uniqueness of their Island Story. But Anglo-Saxon frankpledge carried an extra handicap: William of Malmesbury had attributed it to King Alfred. He may have known what he was talking about: he was the only twelfth-century historian who certainly read Anglo-Saxon law-codes; his Old English was better than Maitland's or ours; and he could have worked out the correct meaning of texts so elliptical as to elude us. But Maitland went right along with Stubbs's and Morris's contempt for the idea.⁵¹ He had a special reason to do so. All through the time that the *History of English Law* was being written, he was wrestling with *The Mirror of Justices*, whose mischiefs included high regard for Alfred's legal ways.⁵² Whatever left the taste of legal legend could not be objective legal history.

In my third and (for now) last heresy, I stand alone, though of course in hope of converts. Like most commentators on early law to date, Pollock included, Maitland believed that its dominant notion was one of tort rather than crime.⁵³ Each was ready to admit that the concept of punishment was making 'progress' before 1066.⁵⁴ Not, however, enough: 'on the eve of the conquest many bad crimes could still be paid for with money'; 'the great need of the time was that the ancient system of money compositions . . . should give way before . . .

'the desire to reform the law went hand in hand with the desire to know its history', *Collected Papers*, ii 9-10; and *Collected Papers*, iii 438-9: 'strenuous endeavours to improve the law were not impeded, but forwarded by a zealous study of legal history . . . Now-a-days we may see the office of historical research as that of *explaining, and therefore lightening*, the pressure that the past must exercise upon the present, and the present on the future. To-day we study the day before yesterday, in order that *yesterday may not paralyse to-day, and to-day may not paralyse tomorrow*' [my emphasis].

⁴⁹ Thus, his demolition of the 'Common Law tradition' that the Year Books had originated as an 'official' record: (Selden Soc., 17, 1903), pp. xi-xiv; and see below, n. 52, on *The Mirror of Justices*.

⁵⁰ Pollock and Maitland, i 141-2; cf. 'Outlines', *Collected Papers*, ii 445.

⁵¹ *Gesta Regum*, ed. W. Stubbs (2 vols, London, 1887-9), ii 122, i 129-30; Introduction, ii, p. li; W. A. Morris, *The Frankpledge System* (Harvard Historical Monographs XIV, 1910), p. 6; Pollock and Maitland, i pp. xcvi, 65; *Collected Papers*, ii 422.

⁵² W. J. Whittaker and F. W. Maitland, eds, *The Mirror of Justices* (Selden Soc., 7, 1895), pp. ix-x, xxvi-xxvii, 8, 54, 166-71; and cf. *Letters*, i nos. 112, 171.

⁵³ Pollock and Maitland, i 46, ii 449.

⁵⁴ Pollock and Maitland, i 48, ii 451-2; *Collected Papers*, i 225-6, ii 428.

true punishments'; if Henry I's charter promised a 'return to the old English system of pre-appointed wites', 'we may be glad that he did not keep it'; 'a scheme of *wer* and bloodfeud, of *bót* and *wite*' 'disappears with marvellous suddenness'.⁵⁵ Maitland thus missed the pronounced switch in later Anglo-Saxon law from amendment to penalty. The best summary indication of this is the very sense of the word '*bót*'. From Edward the Elder's time, with few and explicable exceptions, it means compensation to God, Church, king or community at large. In other words, it in effect meant the same as '*wite*'. It was the price of mercy, which was high. Many offences were penalized by the 'king's disobedience' of 120 shillings (£2 or £2.50); several of the more serious by the royal '*mund*' of £5; some of the worst of all, defiance of written law among them, by *wergeld* itself, the cost of life.⁵⁶ In short, *mund* that had once been the value of the king's protection was now the premium on his commands; *bót*, once redress of a tort to an injured kin, was now a fine for harming the whole people.

Nor was Maitland alert to all implications of the scope of later Anglo-Saxon punishment. Abingdon's chronicle called the death penalty '*more iudicii Angliae*'; and it has recently been shown that this was an Anglo-Saxon, not a Norman, inheritance.⁵⁷ The point may even be upheld by archaeological evidence from 'execution cemeteries', which had opened for business before, but not much more than a century and a half before, 1066.⁵⁸ The large number of forfeitures to the king recorded throughout the southumbrian area from Alfred's reign to the Confessor's are unlike equivalent sanctions under the Ottonians and Salians in often relating to lesser crimes than treason.⁵⁹ All this bears on the crucial question of the origins of the concept of felony. Maitland was in good company in deciding that the conversion of a word whose basic meaning is 'broken faith' into a term for 'crime of any considerable gravity', was a process whose 'details are

⁵⁵ Pollock and Maitland, ii 451-2, i 74, ii 514, 448, 458; cf. i 106, ii 522-3.

⁵⁶ E.g. II Cn 83-83:1, *Gesetze*, i pp. 366-7 (cf. 63, pp. 352-3, 73:1, pp. 360-1(!)). Note that the £5 and £2 fines that are much more widespread in the 'shire customs' of Domesday Book than any local variations correspond respectively to the king's 'protection money' and to the 120 shillings (480 Mercian pence) 'disobedience money'.

⁵⁷ CMA, ii 104 (the crime was theft); J. Gillingham, '1066 and the introduction of chivalry into England', in Garnett and Hudson, eds, *Law and Government*, pp. 31-56, especially pp. 38-46.

⁵⁸ E.g. N. Gray Hill, 'Excavations on Stockbridge Down, 1935-6', *Papers and Proceedings of the Hampshire Field Club and Archaeological Society*, 13 (1937), 246-59.

⁵⁹ E.g. Wormald, 'Handlist', nos 23, 25, 31, 37-9, 41, 45, 56, 60, 100, 102, 124, 127, 129, 132, (theft); 40, 50, 54, 58, 61, 71, 145, 148 (homicide and mayhem); 29, 53, 68, 78 (sexual offences); compare K. Leyser, *Rule and Conflict in an Early Medieval Society. Ottonian Saxony* (London, 1979), pp. 36-8, 153 (n. 33).

obscure'.⁶⁰ He hesitantly thought that the link lay 'in the rule that the felon's fee should escheat to his lord'. But we are still left with the question why larceny should be treated as severely as treason itself or nearly so. An explanation is to hand in a feature of later Anglo-Saxon jurisprudence that we have already observed: the 'oath and pledge' taken by twelve-year-olds extended fidelity to disavowal of theft, just like its close Carolingian counterpart.⁶¹ An elasticated conception of the 'king's enemy' was stretched to cover serious but conventional crimes against the community as a whole. In these terms, conventional crime was indeed a breach of faith, one that imperilled a whole people in so far as it unleashed the anger of God. Such a theory could come — gradually of course — to colour the mind-set and vocabulary of the post-Conquest ruling establishment.

Now, we must again recognize that Maitland was not unconscious of these possibilities: he had in full measure the great scholar's maddening tendency to have noticed what one thought one had been first to notice oneself. Never mind the number of times he (and Pollock) commended the law-making of kings from Alfred to Cnut; a remarkable footnote in his chapter on 'Crime and Tort' observes the 'increasing frequency' of late Saxon forfeitures for 'grave crimes', the spread of amercements for 'king's disobedience', and the relevance of Frankish 'forfeiture of goods for the elastic offence of *infidelitas*'.⁶² His work for *Domesday Book and Beyond* must have increased his respect for the capacities of the Old English state, whose ability to tax at a 'monstrous' level he set the fashion for crediting.⁶³ But this merely resurrects the question

⁶⁰ Pollock and Maitland, i 303-4, cf. ii 464-70, 478-502. Compare S. F. C. Milsom, *Historical Foundations of the Common Law* (London, 1969), p. 355: 'a mystery'.

⁶¹ See W. Kienast, *Unternaneneid und Treuvorbehalt in Frankreich und England* (Weimar, 1952), pp. 15-27; Kienast mostly missed the evidence from pre-Conquest England, pp. 173-4, but made a strong case that such an oath was unknown in Normandy before 1066 — a point which may well be thought to carry more weight than the question whether Carolingian inquests are better attested in Normandy than England, as Brunner made Maitland think, Pollock and Maitland, i 141-4.

⁶² Pollock and Maitland, i 515 (n. 4) (already in the first edition, p. 514): endorsements of later Anglo-Saxon royal legislation often extend to a scouting of possible Frankish influence: Pollock and Maitland, i pp. c-ci, 19-20, 44, 51, 94, 142, ii 451-2; *Collected Papers*, i 204, 225-6, ii 14, 20, 423; *Selected Historical Essays*, p. 98. At *Collected Papers*, i 316-17 is an alternative suggestion about the origins of felony which is notably closer to the one adopted above; and also to be noted are the implications of *Collected Papers*, i 230-46, on 'The criminal liability of the Hundred'.

⁶³ *Domesday Book and Beyond*, pp. 3-8, 446-75; see the debate between John Gillingham and Ken Lawson, *EHR*, 104-5 (1989-90), with J. Campbell, 'The Anglo-Saxon State: a maximum view', *PBA*, 87 (1994), 39-65. There may even be hints of a change in Maitland's view of Anglo-Saxon law itself, in 'History', *Selected Essays*, pp. 99, 102: this is notably less inclined to make so much of the 'three laws', as opposed to the pre-eminent king's law, than Pollock and Maitland i 106-7 (or *Collected Papers*, ii 20-1 (1889)), and the gulf between the

why he went no further. He often said that kings of England made law at a time when there was elsewhere silence (or worse); even more often that they were strong enough to build up their own law in the age first exposed to the stimulus of the Learned Laws. He knew that it was in England rather than their overseas lands that Angevin initiative bore fruit.⁶⁴ It is not *prima facie* audacious to see a connection between these facts. Maitland did not. Why not?

A first point relates to 'bót' rather than punishment. Maitland naturally lacked an ear for the rhythms of blood-feud. As ever, it is remarkable how much he did understand. His very first paper after his 'Real Property' polemic latched on to the possible significance of female kin for compensation and feud in Welsh law.⁶⁵ 'The traveller who has studied the uncorrupted savage can often tell the historian of medieval Europe what to look for, never what to find'. The drift of this quotation shows Maitland battling with the insidious temptations of Maine's evolutionary schemes of human law.⁶⁶ But he might well have responded to the insights of modern anthropology as warmly as today's historians of early medieval society, few of whom would dissent from his *caveat*. Even if he was preoccupied by 'the many bad features of the system of pecuniary mulcts', the word 'marvellous' can as well mean 'remarkable' as 'admirable'; there may be a hint of Maitlandian irony in the 'marvellous revolution' that 'the kinsfolk of the slain lose their right to a *wer* [with] A modern statute . . . required to give the *parentes occisi* a claim for damages in any English court'. All of that said, there is no denying that he had the traditional lawyer's preference

Leges Henrici Primi and *Glanvill* is (only) 'at first sight very wide' — though that point is not developed. Note too the implications of the final sentence added in the *second edition* to the chapter on Anglo-Saxon law, above, p. 3.

⁶⁴ Pollock and Maitland i 19, 105; *Collected Papers*, ii 20, 316, 422–3; *Selected Historical Essays*, pp. 97–8; Pollock and Maitland, i 167–8, 302–3 (n. 3), and see below, n. 77; cf. M. T. Clanchy, *England and its Rulers (1066–1272)* (London, 1983), p. 145; also Holt, below, pp. 47–64, and Helmholz, below, pp. 145–69.

⁶⁵ *Collected Papers*, i 226: 'nice questions might arise from the mutual interference of family obligations'; cf. Pollock and Maitland, ii 240–5; and also *Letters*, ii nos 54, 84. For modern appreciation of this aspect of Welsh law, see now T. M. Charles-Edwards, *Early Irish and Welsh Kinship* (Oxford, 1993), pp. 181–200; and for the anthropological dimension (of course) M. Gluckman, 'The peace in the feud', *Custom and Conflict in Africa* (Oxford, 1956), pp. 1–26.

⁶⁶ *Collected Papers*, iii 300: part of a notable essay on 'The Body Politic' which represents Maitland's most considered (albeit otherwise unpublished?) critique of the school of Maine. To be set against the warmth of his inaugural's remarks about Maine, *Collected Papers*, i 486–7, see (e.g.) *Collected Papers*, iii 460 (from his review of Liebermann), *Letters*, ii nos 97, 146 (extending even to Sidgwick), 279, 370, together with the comments of Fisher, *Maitland*, p. 27; also Pollock and Maitland, i pp. xciii–xcv, ii 240, and *Domesday Book and Beyond*, pp. 344–6; see also White, below, pp. 91–113.

for punishing the crime over compensating its victim.⁶⁷ To that extent, he was himself trapped in the lawyerly time-warp from which he had sought to escape through historical study.

As we might by now have guessed, Maitland was led to accept the ongoing relevance of 'bót' down to and after the Conquest by his usual incubus, the *Leges Henrici Primi*.⁶⁸ He perceived some of the problems that the *Leges* author faced. But he failed to see the effect of its dependence on Anglo-Saxon codes, which the same man had Latinized (not without difficulty) in his 'Quadripartitus'; nor did he realize that this author's knowledge of the realities of Anglo-Saxon law could have been as limited as his command of Old English language.⁶⁹ He was apt to see the *Leges* muddle as the mirror of a confused mind, itself the product of a confused situation. So it was, in each respect; yet not quite as Maitland meant. In an age that was coming to expect fuller and more systematic statements of law, the *Leges* writer was trying to reconstruct English law from memorials that misled him inasmuch as they were inspired by other priorities; from a background in French 'feudal' lordship, he struggled to understand the system of a state whose old ruling class had been displaced by conquest.⁷⁰ It was not that the Old English kingdom was hidebound by 'bót and wite', any more than it was crippled by private jurisdiction. Rather, a regime with a well developed sense of 'royal rights', but with an abiding regard for its ancestral codes for no other reason than that they were ancestral, was now overrun by a political culture which put a premium on lordship and had a tendency to codify everything in sight.

Maitland's forensic intuition here dovetailed with his historical professionalism.⁷¹ His inaugural claims that, though 'our patience of centennial celebrations has been somewhat severely tasked this year' (another modern note), the ensuing 3 September would 'see the seven-

⁶⁷ Pollock and Maitland, ii 459. For ways in which bewigged perspectives blinkered understanding of feud in a different, but not necessarily dissimilar, context, see J. Wormald, 'Bloodfeud, kindred and government in early modern Scotland', *PP*, 87 (1980), 90-7.

⁶⁸ Pollock and Maitland, i 106, ii 448, 458; 'Outlines', *Collected Papers*, ii 428.

⁶⁹ Pollock and Maitland, i 100-1; *Collected Papers*, iii 470-1 (reviewing Liebermann); and the letter above, n. 15. On the *Leges*, see Hudson below, p. 44-5; and P. Wormald, 'Quadripartitus', in Garnett and Hudson, *Law and Government*, pp. 133-47.

⁷⁰ As to the sort of priorities that would encourage King Alfred and his heirs to preserve a minutely detailed tariff of compensations for bodily injuries, while leaving everyone bar William of Malmesbury in ignorance of all that they envisaged by 'oath and pledge', see P. Wormald, 'Lex Scripta and Verbum Regis: legislation and Germanic kingship from Euric to Cnut', in P. H. Sawyer and I. N. Wood, eds, *Early Medieval Kingship* (Leeds, 1977), pp. 105-38.

⁷¹ For Maitland's professionalism, see above all G. R. Elton, *F. W. Maitland* (London, 1985), pp. 19-34, 98-102, with the review by S. F. C. Milsom, *Times Literary Supplement* 28 February 1986, 225-6; but Elton's case was in part anticipated as early as A. L. Smith's tribute, *Maitland*, pp. 5-6.

hundredth birthday of English legal memory'; *Glanvill's* completion is the moment when 'English law becomes articulate [and] we become the nation whose law may be intimately known'. 'I would not for one moment speak slightly of the memorials of an earlier time'; but those of the twelfth century were more audible and must be heard first. Much of this lecture is a hymn to the matchless resources of the Public Record Office; one of its most 'modern' themes is its harping on all there remains to do.⁷² The materials to which he gave most of the rest of his life were dauntingly intractable but they were recognisably legal records. Whether from his grandfather, whose histories he praises for that quality in a letter to his sister, from his life at the Bar, or from the model of his German peers, he had acquired an overpowering feeling for the primacy of 'hard' evidence.⁷³ It was not a spirit calculated to develop empathy towards evidence which was 'soft' precisely because it was spawned by an age that knew not professional law. Whatever else they were, the *Leges Henrici Primi*, and the Anglo-Saxon codes beyond, were not law such as could be 'intimately known'.

The problem that neither Maitland nor any later legal historians have been able to solve is how we are to conceive of law or law-making under a vigorous regime, with an as yet rudimentary bureaucracy, and nothing easily recognisable as a legal profession. Maitland took it for granted that the alternative to written law was '*Alleinherrschaft des Gewohnheitsrechtes*'.⁷⁴ But if custom is not a constant; if it can be moulded by social pressures or manipulated to political ends, as we now know that it can, then presumably it can also be shaped by legislative design, in a process that is largely shielded from the historian's gaze. Law can be dynamic without lawyers or systematic law-giving. Maitland was predisposed by both historical skills and legal training to equate the beginnings of state intervention with the birth of legal professionalism.⁷⁵ His commitment to PRO-style records made him see the same gulf in England as his German counterparts saw on the continent, between the 'learned' laws and the 'folk' law which the *Leges Henrici* had artificially respirationed. It was as though the legislation

⁷² *Collected Papers*, i 480–6; cf. *Collected Papers*, ii 8–12. Though Maitland appears to have garbled his memory of Vinogradoff's introducing him to the PRO (*Letters*, i no. 374; Fisher, *Maitland*, pp. 24–5; Plucknett, 'Maitland's place', 186–7; Fifoot, *Life*, p. 60), it is significant that he thought back to this moment in the spirit of the typical Victorian 'conversion'.

⁷³ *Letters*, i no. 98; the importance of Maitland's opinion of his grandfather as a guide to his own values is noted by Fisher, pp. 2–3, by his sister herself, *CLJ*, 11 (1951–3), 67–8, and by Fifoot, *Life*, pp. 10–11; cf. also Southern, review of *Letters*, i, 108.

⁷⁴ Pollock and Maitland, i 19 27.

⁷⁵ Cf. *Collected Papers*, ii 37; 'towards the end of the [Angevin] period the history of law begins to be . . . a history of professional learning'.

of kings from Alfred to Cnut had never been. If, instead of contrasting the worlds of *Glanvill* and the *Leges*, Maitland had dwelt on what Rannulf de Glanville *filis*, chief justiciar, could have learned from Hervey de Glanville *père*, knight of the shire, he might have seen how the Angevin legal establishment could inherit structures erected by the first kings of the English on a customary base.⁷⁶

I hope it is clear from what I have said that the weaknesses of Maitland's account of Anglo-Saxon law were in a real sense the effects of his strengths: his lack of insularity, his scorn for unsupported tradition, his respect for raw evidence. It is thus appropriate that I should conclude by stressing that one outcome of what I am arguing would be to buttress a central plank in Maitland's case. Time and again, he returned to the point that the history of law in England and in other European countries differed because the king of England was in command of his courts, whereas the lack of such control abroad splintered law into provincial customs to which the ultimate response of frustrated rulers was resort to the law of Rome.⁷⁷ To me that seems an essential truth, however much nuanced by criticism of some of its more vigorous expressions. I would add that this need not be as incompatible as it at first looks with the major modern heresies. If, in the first place, 'state' power was an inheritance from pre-Conquest kings, initially only partly glimpsed and grasped by their successors, then the contradictions and hesitations of twelfth-century kings in face of 'feudal' priorities become readily intelligible, without our having to reckon that they somehow blundered into americing every disseisin, every failed pleas.⁷⁸ To agree, secondly, that the justice of the 'state' was the most powerful force in play is not to deny that it might be as greedy, cruel and inept as the justice of any lord — if more so, perhaps, than a Victorian instinct could easily accept.⁷⁹

⁷⁶ Cf. R. Mortimer, 'The family of Rannulf de Glanville', *BIHR*, 54 (1981), 1-16; H. M. Cam, 'An East Anglian Shirt Moot of Stephen's reign', *EHR*, 39 (1924), 568-71. Cf. Hudson, below, p. 39-46.

⁷⁷ Pollock and Maitland, i 24, 84, 111, 131-4, ii 5, 36, 313, 558-9, 632, 673; *Collected Papers*, i 482, ii 64, 434-45; *Selected Historical Essays*, p. 104; also *Justice and Police* (1885), p. 32; *Select Pleas*, pp. lxxii-lxxiii; and *Gierke*, p. xiii; cf. too *Letters*, i nos. 50 (to Vinogradoff, 1888), 202 (1897?), 449 (1905). For part of the trouble that this view got Maitland into, see Fifoot, *Life*, pp. 227-31; and Elton, *Maitland*, pp. 79-88.

⁷⁸ See Elton's very pertinent version of the Milsom critique, in his *Maitland*, pp. 44-8, especially pp. 47-8: Maitland 'does overlook the likelihood that it took more than one king, even a Conqueror, to triumph over the social structure and world of ideas within which had been able to conquer England in the first place'. On punishment of disseisin or false claims, see Pollock and Maitland, ii 41-5, 519, 539, 572-3.

⁷⁹ Cf., e.g., M. T. Clanchy, 'Law and love in the Middle Ages', in J. Bossy, ed., *Disputes and Settlements. Law and Human Relations in the West* (Cambridge, 1983), pp. 47-67; also his 'A medieval realist: interpreting the rules at Barnwell Priory Cambridge', in E. Attwooll, ed.,

The difficulty of critically assessing a historiographical giant, even one who would have welcomed it as much as Maitland, is the risk of lapsing into absurd and impertinent patronisation. I therefore end by claiming that Maitland was in one respect totally wrong. I am quite unable to understand how this near-exact contemporary of W. G. Grace, whose last 'Golden Summer' was also in 1895, could have had no more to say of cricket than that there was 'too much sitting about'.⁸⁰

Perspectives in Jurisprudence (Glasgow, 1977), pp. 176–94, where he points out (p. 179) that the introduction to the edition by J. Willis Clark, *Liber Memorandum Ecclesie de Bernewelle* (Cambridge, 1907), pp. xliii–lxiii, with all its potential for a revisionist view, was ironically the last thing Maitland ever wrote. See also Hudson, below, pp. 34–9.

⁸⁰ W. W. Buckland, 'F. W. Maitland', *CLJ*, 1 (1923), 282. I am grateful to the other participants in this symposium for their criticism and advice, notably to the editor, to Professor van Caenegem, to Dr Magnus Ryan and above all to Dr Jenny Wormald.

Abbreviations

- ANS — *Proceedings of the Battle Conference on Anglo-Norman Studies*.
ASC — *Anglo-Saxon Chronicle*.
ASE — *Anglo-Saxon England*.
(BI)HR — (*Bulletin of the Institute of Historical Research*).
BL — British Library
BN — Bibliothèque Nationale.
Bracton, Thorne — *Bracton De Legibus et Consuetudinibus Angliae*, ed. & trans S. E. Thorne (4 vols, Cambridge, Mass., 1968–77).
BNB — *Bracton's Note Book*, ed. F. W. Maitland (3 vols, London, 1887).
CLJ — *Cambridge Law Journal*
CMA — *Chronicon Monasterii de Abingdon*, ed. J. Stevenson (2 vols, London, 1858).
Collected Papers — H. A. L. Fisher, ed., *The Collected Papers of Frederic William Maitland* (3 vols, Cambridge, 1911).
CRR — *Curia Regis Rolls* (HMSO, 1922–).
DB — *Domesday Book seu Liber Censualis Wilhelmi Primi Regis Angliae*, ed. A. Farley and H. Ellis (4 vols, London, 1783, 1816).
Dialogus — Richard FitzNigel, *Dialogus de Scaccario*, ed. & trans C. Johnson, rev. F. E. L. Carter & D. E. Greenway (Oxford, 1983).
Domesday Book and Beyond — F. W. Maitland, *Domesday Book and Beyond* (repr. with Foreword by J. C. Holt, Cambridge, 1987).
EHR — *English Historical Review*
Elton, Maitland — G. R. Elton, *F. W. Maitland* (London, 1985)
English Lawsuits — *English Lawsuits from William I to Richard I*, ed. R. C. van Caenegem (2 vols, Selden Soc., 106, 107, 1990–1).
EYC — *Early Yorkshire Charters*, vols. I–III, ed. W. Farrer (Edinburgh, 1914–16); index to vols. I–III, ed. C. T. & E. M. Clay; vols. IV–XII, ed. C. T. Clay (Yorks. Arch. Soc. Rec. Ser. Extra Ser., 1935–65).
Fauroux, *Recueil* — *Recueil des actes des ducs de Normandie*, ed. M. Fauroux (Mémoires de la société des antiquaires de Normandie, 26, Caen, 1961).
Fifoot, *Life* — C. H. S. Fifoot, *Frederic William Maitland: a Life* (Cambridge, Mass., 1971).
Garnett and Hudson, *Law and Government* — G. S. Garnett and J. G. H. Hudson, eds, *Law and Government in Medieval England and Normandy: Essays in Honour of Sir James Holt* (Cambridge, 1994).
Gervase — Gervase of Canterbury, *The Historical Works of Gervase of Canterbury*, ed. W. Stubbs (2 vols, London, 1879–80).
Gesetze — *Die Gesetze der Angelsachsen*, ed. F. Liebermann, (3 vols, Halle, 1903–16).

- Gierke* — F. W. Maitland, trans, *Political Theories of the Middle Age*, by Otto Gierke (Cambridge, 1900).
- Glanvill*, Hall — *Tractatus de Legibus et Consuetudinibus Regni Anglie qui Glanvilla vocatur*, ed. and trans G. D. G. Hall (Edinburgh, 1965).
- Holt, *Magna Carta* — J. C. Holt, *Magna Carta* (2nd edn, Cambridge, 1992).
- JMH* — *Journal of Medieval History*.
- Letters*, i — C. H. S. Fifoot, ed., *The Letters of Frederic William Maitland*, vol. i (Selden Soc., Supplementary Ser., 1, 1965).
- Letters*, ii — P. N. R. Zutshi, ed., *The Letters of Frederic William Maitland*, vol. ii (Selden Soc., Supplementary Ser., 11, 1995).
- Letters to George Neilson* — F. W. Maitland. *Letters to George Neilson*, ed. E. L. G. Stones (Glasgow, 1976).
- LHP*, Downer — *Leges Henrici Primi*, ed. & trans L. J. Downer (Oxford, 1972).
- LQR* — *Law Quarterly Review*
- Maitland, *Constitutional History* — F. W. Maitland, *The Constitutional History of England* (Cambridge, 1908).
- MGH* — *Monumenta Germaniae Historica*.
- Milsom, *Legal Framework* — S. F. C. Milsom, *The Legal Framework of English Feudalism* (Cambridge, 1976).
- ns — New Series
- PBA* — *Proceedings of the British Academy*.
- PKJ* — *Pleas before the King or his Justices, 1198–1202*, ed. D. M. Stenton (4 vols, Selden Soc., 67, 68, 83, 84, 1952–67).
- Pollock and Maitland — Sir Frederick Pollock and F. W. Maitland, *The History of English Law before the Time of Edward I* (2 vols, 2nd edn reissued with a new introduction and select bibliography by S. F. C. Milsom, Cambridge, 1968).
- PP* — *Past and Present*.
- PR* — *Pipe Rolls*
- PRO* — Public Record Office
- PRS* — Pipe Roll Society
- RCR* — *Rotuli Curiae Regis. Rolls and Records of the Court held before the King's Justiciars or Justices*, ed. F. Palgrave (2 vols, Record Commission, 1835).
- Reading Cartularies* — *Reading Abbey Cartularies*, ed. B. R. Kemp, (2 vols, Camden Soc., 4th Ser. 31, 33, 1986, 1987).
- Reg. Ant. Linc.* — *The Registrum Antiquissimum of the Cathedral Church of Lincoln*, ed. C. W. Foster and K. Major (10 vols, Lincoln Rec. Soc., 1931–73).
- RRAN* — *Regesta Regum Anglo-Normannorum, 1066–1154*, ed. H. W. C. Davis et al. (4 vols, Oxford, 1913–69).
- S* — P. H. Sawyer, *Anglo-Saxon Charters: an Annotated List and Bibliography* (London, 1968).
- Stenton, *English Feudalism* — F. M. Stenton, *The First Century of English Feudalism 1066–1166* (2nd edn, Oxford, 1961).
- Stubbs, *Charters* — *Select Charters and other Illustrations of English Constitutional History*, ed. W. Stubbs (9th edn, Oxford, 1913).
- TRHS* — *Transactions of the Royal Historical Society*
- VCH* — *Victoria County History*