

‘Pollock and Maitland’: a Lawyer’s Retrospect

S. F. C. MILSOM

MANY YEARS AGO, mailing the typescript of a tentative and theoretical paper, I tempted providence by congratulating myself on not having to say exactly what it was about. When the thing had been published there came a demand from a journal of social science abstracts for a 200-word summary. I should have remembered the episode when backed into a corner by Professor Holt and handed my present assignment. Even if I were sure I had rightly digested the papers we have enjoyed, they are too diverse in aim and character for summary or synthesis.

Any such attempt would also court the special irritation felt by insiders when an outsider reinterprets their work. The initiative for this occasion came from the medieval history section of the British Academy; and although the legal section gave its enthusiastic blessing, it is essentially a conference of historians. Professor Helmholz and I are the only speakers to be or have been law teachers rather than history teachers; and it will be one of my themes that the regular medievalist and the lawyer kind of legal historian are often looking for different things in different ways, and that some of the things both would like to find are lost between them. I believe the very fact of the present gathering must be a symptom of that loss. For a work of history to retain any authority after a hundred years, and not just be read as one might read Gibbon or Macaulay,¹ testifies to some extraordinary quality in its author: also to some failure in those who have come after, including ourselves.

So instead of risking attempts at summary or synthesis, this retrospect will first pick out observations about Maitland’s book which have been common to more than one of the papers, and will then take the

greater risk of expressing some lawyerly discontent with the present state of the subject. The first common feature is the proportion of their topics in which our contributors have found that Maitland was not really interested. Neither the Anglo-Saxon nor the Anglo-Norman period was central to his concerns, nor were the learned laws, nor was the family as such, nor for the most part were Professor Hyams's underdogs. The top dog was another matter: Maitland was certainly interested in kingship and would I think have specially appreciated Dr Garnett's analysis, not least for the only sustained piece of legal argumentation which the subjects have elicited.

This catalogue of our topics in which Maitland was not really interested has an obvious corollary. His central concern in 'Pollock and Maitland' is clearly stated: 'We shall speak for the more part of the law as it stood in the period that lies between 1154 and 1272'.² Two points need making. The first is about Maitland: the connotations of 'the law is as it stood' are both unitary and static. The second is about us: our period papers on the ages of *Glanvill* and *Bracton* have dealt with matters of great interest and importance, but not with the law of those periods as such. For the Anglo-Saxon and Anglo-Norman periods, for which 'Pollock and Maitland' clearly cannot now be regarded as definitive, Mr Wormald and Dr Hudson have indeed concerned themselves with the law and told us much about it: in the hands of historians, the legal history of those periods is on the move. For periods after Edward I, the density of legal technicality has mostly persuaded historians to leave the subject to lawyers. But it is not only in our centenary studies that the subject central to Maitland's interest has become something of a no-go area; and so he lives on.

Why did Maitland write about things not central to his concerns? For the Anglo-Saxon period of course one answer is that he did not write about it because Pollock got in first. But Mr Wormald has given us reasons for thinking that he did not substantially dissent from what Pollock had written,³ and perhaps this is the place to make a quite different point. Both Mr Wormald and Dr Hudson have examined the chronological relationship between Maitland's work on *Domesday Book and Beyond* and on the *History of English Law*;⁴ and I am left marvelling even more than before at the speed with which the *History* was written: five years from conception to delivery to the press, and much of *Domesday Book* as well as the infant Selden Society thrown in. It is a fact to bear in mind when swearing on the book.

² Pollock and Maitland, i 232.

³ See above, Wormald, p. 3.

⁴ See above, Wormald, p. 4 and Hudson, pp. 27 *et seq.*

If Maitland underestimated the Anglo-Saxon legacy, and saw the Anglo-Norman period as mainly important for leaving enough royal power for Henry II to work with, and if neither period offered sufficient materials with which he felt at home, still he could hardly alter the agreed plan and leave them out; and perhaps that is all there is to it. But Mr Wormald's discussion of presenting juries introduces another feature of Maitland's work which I at least had not fully taken in, and which these papers have brought out in a striking way. He was *against* things, in Mr Wormald's case anything that 'left the taste of legal legend';⁵ and perhaps he relished the chance to say so. Similarly his concern for individualism as against communalism, and therefore his hostility to theories which had seen the family rather than the individual as the original legal unit, is a principal theme of Professor White's paper.⁶ In both cases his antipathy seems to have led Maitland astray.

Among our topics the most striking example of this characteristic is Maitland's treatment of the learned laws. That the Common Law had become strong enough to rule out any reception of Roman Law must be the most important single outcome of the period covered by his book. But during that period (or any other) was anybody thinking in those terms?⁷ Dr Hudson and Professor Hyams both draw attention to Maitland's use of the word 'foreign'; and Professor Hyams sees patriotic pride at work.⁸ The emotional charge seems to affect the question as well as the answer. Professor Helmholz sees both Maitland and the common lawyers about whom he wrote as not very interested in the learned laws and as attaching no great importance to them for their own sakes;⁹ but there was an important reaction in Maitland's mind. Here he was not fighting just other scholars. He saw the Common Law as under threat, and joined up for a war which never happened. Of the treatment in 'Pollock and Maitland' Professor Helmholz says 'The smell of something very like a battle rises from the pages'.¹⁰

His daughter Ermengard believed that Maitland rarely wrote in

⁵ See above, Wormald, p. 13.

⁶ See above, White, pp. 92 *et seq.* Cf. below, p. 256, n. 57. For another aspect, see above, Summerson pp. 120-1.

⁷ On Maitland's Rede Lecture, see e.g. J. H. Baker, 'English Law and the Renaissance', reprinted in *The Legal Profession and the Common Law* (London, 1986), p. 461. See also G. R. Elton, *F. W. Maitland* (London 1985), pp. 79 *et seq.*

⁸ See above, Hudson, p. 25 and Hyams, p. 217, n. 6.

⁹ Even when Maitland saw Roman influence in a point of detail, he thought it malign, e.g. (of a curious theory about why the tennor was not seized): 'English law for six centuries and more will rue this youthful flirtation with Romanism'; Pollock and Maitland, ii 115.

¹⁰ See above, Helmholz, p. 156.

silence: he spoke aloud the words flowing from his pen.¹¹ If she were still here, one might ask her how often the voice coming under the study door sounded as though her father was arguing rather than just speaking. The sense of involvement must sharpen a historian's vision: I shall never forget Helen Cam pointing indignantly to a case in her typescript of the *Eyre of London* with the words 'Just look at the scoundrel. And he is going to get away with it.'¹² But, as these papers have suggested, a vision so sharpened may turn out on closer examination of the evidence to be just more sharply wrong.

Another of Maitland's enemies was feudalism. I have referred before to his jibe about its being introduced into England in the seventeenth century and reaching its most perfect development in the eighteenth;¹³ and there is an obvious likeness to the reaction seen by Mr Wormald against what Maitland thought another 'legal legend'.¹⁴ The language is sometimes that of contempt. '“Feudalism” is a good word, and will cover a multitude of ignorances'.¹⁵ '[W]e are tempted to pronounce [certain rules] quite unintelligible, and therefore presumably “feudal”'.¹⁶ But for Maitland the enemy is not just sloppy language: it is the idea that tenure had any importance in the development of the law about property in land. For him the personal relationship between lord and man was never more than an add-on extra to a system turning on abstract relationships between man and land. To say that the man owns or possesses the land is to make a statement to which no lord can be relevant; and 'Ownership and Possession' is the title of his chapter and the essence of his vision.¹⁷

It would be ironical if Maitland's reaction against his feudal enemy was stealthily abetted by his Roman enemy. Dr Brand, who has concentrated on the dating and authorship of *Bracton*, points out that the book itself cannot have affected the law in the period covered by Maitland's book; and for what it is worth I share his doubt about the extent to which it is reliable evidence for any thirteenth-century law.¹⁸ Things often look different in the plea rolls. But the *Bracton* kind of man may have been a carrier who in his own day passed on Roman infections with his Roman terms. And more importantly, to use Plucknett's words, 'Maitland's

¹¹ Ermengard Maitland, *F. W. Maitland, A Child's-Eye View* (Selden Soc. pamphlet, 1957), p. 8.

¹² Recollected in *Eyre of London*, ii (Selden Soc., 86, 1969), p. ix.

¹³ *Constitutional History*, pp. 142–3. Cf. *Collected Papers*, i 489.

¹⁴ See above, Wormald, p. 13.

¹⁵ *Collected Papers*, i 175.

¹⁶ *Collected Papers*, i 410.

¹⁷ Pollock and Maitland, ii 1 *et seq.*

¹⁸ See above, Brand, p. 86.

great work is essentially Bractonian'.¹⁹ For legal historians the important influence of *Bracton* was on Maitland himself. And the important influence of Maitland on the history of property law (a puny name for the social and economic core of things) is the assumption of abstract ideas of ownership and possession — both untidy by Roman standards, but abstract still. It was some unitary system of law rather than a controlling person or authority that said 'this is yours'.

The implications of this touch several of the foregoing papers. If somebody is an owner, but faces some difficulty in transferring his ownership, you are driven to the assumptions behind another of Maitland's headings, 'Restraints on Alienation'.²⁰ Maitland assumes once-for-all transfers of 'ownership' for which some once-for-all consent may be required, especially of heirs. Professor White, if I have understood him rightly, sees a sale of land as indeed a once-for-all alienation, but a gift in alms as a continuing exchange of land for prayers in which a kinship group may have a continuing non-legal interest; and their assent is recorded largely to register that interest.²¹

The difference may be more in emphasis than in substance but my own vision is more 'legal' than Professor White's, though closer to Thorne's than to Maitland's. Any grant creating a tenure was a continuing arrangement and not a once-for-all alienation. The prototype of the sale for money was an exchange of the land for the service attributable to it. The grantor took homage, and this bound his heir to continue the arrangement; but since it provided for the proper proportion of his own obligation of service the heir was in principle not harmed. For grants which did not reserve compensating service, *Glanvill* describes arrangements in which the donor should not bind his heirs by taking homage. But custom still obliged the heirs to continue certain of those arrangements, particularly gifts in *maritagium* and free alms, provided they were limited to an appropriate proportion of the whole inheritance. Other gratuitous allocations within the inheritance would be continued, or not, at the unfettered discretion of the heirs.²²

For the younger son there is no customary equivalent of the daughter's *maritagium* which the heir must honour, presumably because fathers were easily persuaded by later wives to divert resources from heirs by earlier marriages. But of course the father can make such an

¹⁹ T. F. T. Plucknett, *Early English Legal Literature* (Cambridge 1958), p. 105.

²⁰ Pollock and Maitland, i 329.

²¹ See above, White, p. 106.

²² *Glanvill*, vii 1, Hall, pp. 69 *et seq.*; S. E. Thorne, 'English feudalism and estates in land', reprinted in his *Essays in English Legal History* (London, 1985), at pp. 24 *et seq.*, especially, for the difference from Maitland's view, p. 25 n. 42.

allocation and hope that his heir will choose to continue it. *Glanvill* does not say that a father cannot or must not benefit a younger son, only that he cannot easily do so 'beyond' the consent of the heir;²³ and the word *preter* does not seem to be just an elegant variation of *sine*.

When the father died the heir would often elect not to continue an arrangement now at his will, with dismal consequences. A determined father could lock his heir out by taking the younger son's homage. Since this would carry service it would not have been seen as a gratuitous benefit in the older framework reflected in *Glanvill's* account, and the father's seemingly new expedient must mark a change in economic perception: what matters is increasingly absence of money price rather than freedom from service. But homage within the family attracted the subversive consequences associated with 'lord and heir': if the younger son died childless the homage would require the eldest to admit such other heirs of the younger as other brothers. All would have been well if only the younger son had been a bastard, who could have no heirs except his own legitimate issue.²⁴ So the father took to making him an honorary bastard, confining the grant to heirs of his body; and the end of that was to be the fee tail.

So there was no rule against the younger son: there was just no customary provision like the daughter's *maritagium* or the church's alms which would stop the heir resuming this part of his inheritance. And even those customary provisions were not so secure as those guarded by the bar of homage. Even when royal jurisdiction is established, heirs can often be seen trying to undo such gifts; and all such grants had been even more precarious so long as their continuation depended upon decisions made by the heir in his own court. It is all still the heir's inheritance. So, with the emphasis of a lawyer rather than a family historian, I would be more inclined that Professor White to see kin joining in or confirming English grants primarily as potential heirs binding themselves not to discontinue the gift rather than as family recording their stake in the spiritual benefit. And if different kin seem to be recruited for different gifts by the same donor,²⁵ I would remember that for different inheritances, perhaps mother's rather than father's, the potential heirs might be entirely different.

What is in issue in all this, of course, is how far people were thinking in terms of some ownership as against a genuinely dependent tenure. Dr Hudson sees a truly tenurial structure in Anglo-Norman England.

²³ *Glanvill*, vii 1, Hall, p. 70.

²⁴ *Glanvill*, vii 1, Hall, pp. 70-1 juxtaposes the bastard and the legitimate younger son.

²⁵ See above, White, p. 112, n. 127. If it was donee rather than donor who instigated the recruiting, the legal element would be even clearer.

His tenant in fee 'had considerable security of tenure within his lifetime, provided he fulfilled the services which he owed his lord. His heir, particularly if a close relative, would normally succeed him'.²⁶ The reader who manages to put *Bracton* (and Maitland) out of his mind will recognize the same terms of thought in *Glanvill*, although the lord's discretions are now much confined by royal power: tenure is still conditional on the fulfilment of obligations; and inheritance still involves the lord's acceptance.²⁷ What is more, those words of Dr Hudson's would equally describe the situation of the unfree tenant until centuries later, when he too will get a different royal protection and become another kind of owner.

By contrast, Dr Garnett's paper does at one point envisage an early idea of ownership. Comparing an ecclesiastical vacancy with the death of a lay tenant-in-chief, he sees the heir of the latter as somehow owner even before he (or in the case of a woman, her husband) has been seised by the king. This pushes to its logical conclusion a common reading of the possessive adjectives in Henry I's Coronation Charter. Two linguistic points may be made. First, Maitland was wary of possessives, pointing to a frequent misunderstanding of 'my money in the bank'.²⁸ He saw the *praecipe* writ of debt as making a proprietary claim; but one can more easily see the writ of right as about an obligation on the lord to deliver the land to the heir, which suggests a different possible sense for the Charter's possessives.

Secondly, ordinary grammar may be overruled by the obvious, so that a possessive may refer to the person under discussion in the main sentence.²⁹ The Charter purports to address tenants-in-chief; and when c. 2 says that on the death of one of them *haeres suus non redimet terram suam* it may have seemed obvious that the *suam* like the *suus* referred to the dead man (though you would still have to allow for ellipsis in the closing sentence). And on the death of one of them leaving only a daughter, is the promise of c. 3 to give her to a suitable man with 'her' (the daughter's) inheritance, or with 'his' inheritance, that of the tenant-in-chief who will die and to whom the promise is made? To give full weight to 'her' is hard to reconcile with the much later attitude of the *Dialogus* to even the male heir of a tenant-in-

²⁶ See above, Hudson, p. 43.

²⁷ Cf. below, p. 256, at n. 56; p. 258, at n. 66.

²⁸ Pollock and Maitland, ii 205. If you are in the red you owe the bank, if in the black the bank owes you. Both are personal obligations dependent on the solvency of the debtor; and in neither case is the money owned.

²⁹ One of the difficulties of legal history is that legal writers were addressing persons who knew what they meant. *Glanvill* sometimes goes for the obvious, once to the editor's puzzlement: vii 3, Hall, p. 76 n. 2.

chief.³⁰ And to treat the male or female heir as 'owner' immediately does not make sense in the law of *Glanvill's* time or later. Suppose the dead man's widow is with child. Or suppose the heir having this 'ownership' dies before seisin is delivered: whoever succeeds will do so not as his or her heir but as heir of the original dead man.

Related doubts arise over any view of a grant in alms as a transfer of everlasting ownership. Of course there will be no inheritance on the side of the donee. But unless it is waived the donor's heir will still have to do the service owed in respect of the land; and *Glanvill's* limitation of such gifts to an appropriate proportion of the inheritance is reflected when the mortmain problem seems suddenly to spring from nowhere. The earliest concern is not with the lord's incidents, but with his services when the tenant gives away too much.³¹ The problem has arisen with the disappearance of *Glanvill's* sanction, namely that the heir might discontinue a precarious tenure he could not in that sense afford. It is probably the assize of novel disseisin that now prevents the heir resuming land so given; and so a tenure in principle precarious has become a kind of ownership.³²

To a small extent this line of thought might affect one of Professor Holt's quantitative conclusions. He attributes the disparity between the proportions of lay to ecclesiastical beneficiaries in his *acta* on the one hand, and in the Chancery rolls on the other, entirely to the preservative qualities of ecclesiastical institutions; and that must be the principal explanation.³³ But if *Glanvill's* account is taken seriously, the beneficiaries of any such gifts, even those guarded by the heavy artillery of the Church, would feel a measure of insecurity: they might suffer if their benefactor's heir, perhaps through later acts of generosity, might default on his obligations to king or intervening lords; and this might lead them to seek any assurance they could get. By the time of the Chancery rolls, though they might worry about their chattels being distrained for service owed by their donor's heir, they were safe from their tenure being discontinued by the heir himself.

The main thrust of Professor Holt's paper is the exciting promise of more evidence for the 'Age of *Glanvill*'. But there will still be a need to attend more closely than Maitland did to the 'larger building-

³⁰ *Dialogus*, p. 94.

³¹ *Magna Carta* 1217, c. 39.

³² A mark of dependence had been the need to join the donor or his heir in litigation. There may be traces in the earliest rolls of warrantors suing on behalf of grantees in alms. For *Glanvill* (vii 18, Hall, p. 94) the warrantor of *maritagium* might have to be joined like the warrantor of dower. See Milsom, *Legal Framework*, pp. 50-1, 144-5.

³³ See above, Holt, pp. 60-1.

blocks' available to him.³⁴ He could not have described the development of property law as he did if he had immersed himself in *Glanvill* as he had in *Bracton*, or even if he had discussed c. 4 of the Assize of Northampton in his text, alongside his characterization of mort d'ancestor as a general possessory remedy against equals, instead of remarking in a footnote that it was first aimed to protect heirs against their lords.³⁵

And here the lawyer feels uncomfortably bound to note another reservation. Whether or not so intended, Professor Holt's insistent images of supply and demand and of justice as a commodity may be understood as endorsing the hypothesis that novel disseisin and mort d'ancestor were the beginnings of an essentially competitive scheme of supply, which would draw litigation from lords' courts into the king's. Professor Thorne, even though he was thinking in Maitland's terms of the assizes as possessory remedies, judged that incredible; and he saw 'possessory' sources of demand generated by endemic disorder.³⁶ I believe the assizes arose out of order rather than disorder, being conceived as direct protection for tenants against abuses of power by their lords; and it is worth remarking that the abuses were in precisely the matters picked out by Dr Hudson in the sentence quoted above: security of tenure for the living tenant and succession of his heir on death.³⁷ But the evidence suggests that they were happening at a very different level of society. Professor Hyams's villeins were excluded, but the main beneficiaries seem to have been small free peasants; and the earliest plea rolls sometimes show them bringing great lords to book. If so, and whatever the immediate political motive, justice was something more than a commodity in which King Henry II saw profit.

Professor Holt's contrast between a vertical view of history, following something through in time (whether backwards or forwards) and a 'lateral or panoramic view of all the evidence at a particular point in time', prompts other lawyerly observations.³⁸ The first is that legal history is by definition largely vertical, concerned with change through time rather than the still snapshot of one moment. And since it is almost a function of law to hide change, few developments other than those made by explicit legislation can be pinned down and dated. The same rule works differently. The same word changes its meaning. The same action is put to a fresh purpose. The same situation is

³⁴ See above, Holt, p. 47.

³⁵ Pollock and Maitland, ii 57 and n. 1. Cf. i 147: 'the practice of the courts soon left those words behind it'. But it is the words and not the later practice that show the original intention.

³⁶ S. E. Thorne, 'Livery of seisin', in his *Essays in English Legal History*, p. 44.

³⁷ See above, Hudson, p. 43, quoted above p. 248-9.

³⁸ See above, Holt, p. 49.

analysed in a new way. It follows that there will be few conclusions that are securely established as one can establish a regular historical fact. One can go badly wrong, and perhaps Maitland sometimes did. But that is the nature of the subject.

At least to a lawyer, it seems to follow that understanding how law works is relevant to legal history. There has been misunderstanding of Maitland's well-known remark about a lawyer having to be orthodox and orthodox history being a contradiction in terms.³⁹ He was adamant that history should play as small a part as possible in modern legal affairs, and that a good lawyer might have no interest in history. 'But . . . a thorough training in modern law is almost indispensable for any one who wishes to do good work on legal history'.⁴⁰ He went further: 'There are large and fertile tracts of history which the historian as a rule has to avoid because they are too legal'.⁴¹ Maitland was himself a lawyer, a practising barrister turned law teacher. He was of course offered a chair of history and declined, not I think out of modesty. He had no great opinion of the history faculty of the time, and was comfortable with his lawyer colleagues. But historians are a persistent lot and they got him in the end. Geoffrey Elton made him their patron saint.⁴² And when, in hard times from which Professor Holt's 'March windfall' seems sadly remote,⁴³ it was necessary to make a case for filling the chair of medieval history, the case made was based on Maitland as having given Cambridge a special place in medieval studies. That he had been in the law faculty, was hardly relevant. He was 'really' a historian.

Even on that basis, Mr Wormald notes that he did not write 'in quite the idiom of modern histories'.⁴⁴ Indeed. For one thing, of course, he was of an age in which historians generally believed in narrative or 'vertical' history. Not until long after his death did they restrict themselves to panoramic views of specific topics in short periods, or concentrate on the doings of individuals whose names would take over their indexes. There are not all that many personal names in the index of 'Pollock and Maitland', nor do many of its basic propositions rest on

³⁹ See *Collected Papers*, i 491. The misunderstanding may stem largely from Plucknett, *Early English Legal Literature*, pp. 13–14. Plucknett was a pure historian who spent his working life in law faculties but never felt at home with his lawyer colleagues; and as a legal historian he was not at his best with legal reasoning.

⁴⁰ *Collected Papers*, i 493.

⁴¹ *Collected Papers*, i 486.

⁴² Elton, *F. W. Maitland*, p. 97.

⁴³ See above, Holt, p. 51.

⁴⁴ See above, Wormald, p. 1.

the kind of evidence with which today's historians work. They rest on the authority of Maitland himself.

Maitland was also 'really' a lawyer; and the longevity of 'Pollock and Maitland' has a paler legal counterpart. Some law teachers still try to persuade students to start their study of trusts by reading Maitland's *Equity*. The subject has since been transformed, but his lectures magically elucidate a conceptual basis that was hard to come to terms with in his own day, and is even harder to make out behind later incrustations of detail. In the same spirit Maitland tried to persuade his law students to start their study of property law by reading Blackstone before they turned to the standard work. That was the text-book by Joshua Williams which was first published a few years before Maitland's birth and held sway until the property legislation of 1925; and Maitland told his students he himself had found it hard going at first (hence the recommendation to start with Blackstone) but had always seen further into the subject with each successive reading.⁴⁵

The most obvious thing that historians miss if they disregard the fact that Maitland was a lawyer is the contents of his mind. Dr Hudson refers to one of Maitland's papers as linking 'at least rhetorically' property law in the nineteenth century to that of the middle ages.⁴⁶ But there seems nothing rhetorical about the linkage in 'Pollock and Maitland': 'English law both medieval and modern seems to accept to the full this theory: — Every title to land has its root in seisin; the title which has its root in the oldest seisin is the best title'.⁴⁷ So the basic principle of the Common Law of property, a principle still alive and most clearly visible today in connection with the finding of chattels, is carried back from Joshua Williams to *Glanvill* and beyond; and there of course it links up with Maitland's vision of proprietary and possessory remedies.

This was one of two great 'vertical' leaps which for Maitland conjured up a phantom continuity in English legal history.⁴⁸ The other is less important in the sense that it does not carry the same implications of social and economic continuity. He saw the 'forms of action' as 'the core of English law'.⁴⁹ This vision, which long dominated the subject

⁴⁵ 'Two Lectures delivered by F. W. Maitland . . . in 1889', [1966] *CLJ*, 54-74, at 59, 65-8.

⁴⁶ See above, Hudson, p. 33, n.53.

⁴⁷ Pollock and Maitland, ii 46. Cf. *Collected Papers*, i 174-5.

⁴⁸ Cf. authors' introduction to Pollock and Maitland, i, p. xxxiv (p. civ in 1968 reissue): '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'.

⁴⁹ *Collected Papers*, i 484.

and which seems from some of our papers to be staging yet another resurrection, saw the original writs as the basis of the law. A particular factual mischief was remedied by a particular writ which dictated everything about the lawsuit including the mode of proof. This vision is more or less consonant with the law of the eighteenth and early nineteenth centuries; and Maitland carried it back into much earlier times. For some actions his lecture audience was provided with a phylogeny indeed, a diagram as of the evolution of living things.⁵⁰ The framework he thus imposed governed the subject until facts began to emerge which did not fit, one of the smaller of them coincidentally mentioned by Dr Brand in connection with the dating of *Bracton*. A sub-tenant's chattels are taken in distraint by the superior lord for a failure of service by the intervening lord. For a time the sub-tenant suing the intervening lord uses one writ if he has a charter, another if not.⁵¹ Proof here determined the choice of writ rather than being determined by it.

So if, as Professor Holt says, Maitland largely avoided the dangers of working vertically backward on the small scale, he may have gone wrong on a scale too large to be visible to historians working within limited time periods. Legal history is about how people were thinking and can rarely reach a secure 'panoramic' conclusion: mostly it must proceed by hypothesis. In a sense, law itself proceeds by hypothesis. Historians worry about single facts — true or not. A practising lawyer may of course worry about facts like whether his client did it. But a lawyer concerned with the law is dealing with combinations of facts that are given, assumed to be so; and he postulates an analysis which will bring them within this rather than that legal principle. For example, different legal consequences follow if the same words are taken as a statement rather than a promise. The lawyer chooses between alternative perceptions of the same facts. Similarly the lawyer legal historian is not so often concerned with single facts which can be proved or disproved as with the way in which combinations of facts were perceived and rationalized; and here Maitland the lawyer was supremely convincing.

Let me vary the 'panoramic' analogy of a still snapshot at a particular moment. Imagine that some kink in time throws up video recordings of successive heirs of the same tenurial unit doing homage to successive lords through the centuries after the Conquest. You can be sure that

⁵⁰ *The Forms of Action at Common Law* (with Equity, Cambridge, 1909), p. 348; (separate publication, Cambridge, 1936), p. 54.

⁵¹ See above, Brand, p. 72. Cf. Milsom, *Legal Framework*, pp. 63, 128: there are 'overlaps' between *warrantia carte*, *de fine facto*, *ne vexes*, and *mesne*.

actual observers saw the earliest as dispositive acts: custom indicated the disposition and was by definition nearly always followed, but here was this inheritance happening. The latest were seen as mere ceremonies, required by unimportant custom to follow upon an inheritance which had already happened by operation of a disembodied law. But your videos would not show you when the change of perception came about, and there was surely a period during which actual observers could not have given a clear answer. The change was not in facts which people at the time could see, or which historians now can pin down and date: it was in assumptions and perceptions. It happened in the same hiding-place as that in which Dr Hudson sees the Normans as smuggling their customs into England: peoples' heads.⁵²

Although he did not discuss the matter in those terms, this was the essence of Thorne's published lecture about Feudalism and Estates in Land. I heard him read it to a group of historians in Oxford. Whoever was presiding said at the end that it had been very interesting and they looked forward to the footnotes. But the footnotes that came were not of a kind to satisfy historians who want to see things actually happening: they assumed that the end position had always been so, and thought it wicked of Thorne to suggest otherwise without giving actual examples of heirs not inheriting. But he was not supposing a change in what happened, only in perceptions.⁵³

The same point can be made in terms which may seem whimsical. Both Dr Hudson and Mr Wormald remark on Maitland's use of fictitious characters as though it was strange (and Mr Wormald generously shows fellow-feeling by himself hanging an Anglo-Saxon Doe and a 12th-century Roe).⁵⁴ But lawyers and law teachers do it all the time. They have to. Even if life were so simple that you always started with a paradigm case establishing a principle which would be refined from precedent to precedent, and even if the paradigm would not have been too obvious to litigate, it would have been cluttered with distractions which you would have to tell your listeners to ignore. Tom, Dick and Harry are more amenable (and safer than my own rash habit of naming colleagues or members of my audience). But for the historian there is more to swallow than that: a fictitious case has no date. The paradigm may never have happened, being no more than a lawyer's backward rationalization from some later tangle: often you cannot say exactly when your principle was consciously recognized. But you can still be sure that it mattered for a time.

⁵² See above, Hudson, p. 39.

⁵³ Thorne 'English feudalism', in his *Essays in English Legal History*, p. 13.

⁵⁴ See above, Wormald, pp. 11-12, and Hudson, p. 34.

The lawyer legal historian's version must be panoramic in another sense. It must be consistent in itself and with all the known facts: but it does not normally depend on a single fact. Arguments focused on particulars do not necessarily work with generalisations, and the law is always a generalisation. Again I will make the points in my own terms. One of the things in *Glanvill* that Maitland did not mention (and so, to borrow an observation from Professor Hyams,⁵⁵ nobody else did either) is the power of a lord in various circumstances to deprive a defaulting tenant by process of his own court without the king's writ.⁵⁶ This is dependence: the tenant has tenure, but he is not an owner. Early plea rolls have some entries, which also Maitland did not mention,⁵⁷ in which a deprived tenant brings novel disseisin against his lord, who admits the taking and relies on the due process of his own court. The correlation between that process and the words of the writ is compelling: for example, the writ uniquely orders the replacement of chattels,⁵⁸ and this fits a due process which distrained on chattels before any taking of the tenement itself. So I suggested that this specific protection of tenants against their lords, and not Maitland's abstract possessory remedy, was the original purpose of the assize.⁵⁹

As with Thorne when he questioned Maitland on inheritance, outrage ensued; and single-fact objections were made to the points of correlation between writ and process. The most revealing (of the difference between the disciplines) concerns the writ's order to summon the defendant's bailiff. Two separate historians pointed out that any lord has a bailiff. Of course: and the appearance of the defendant's bailiff in a single case would not show (though it might still suggest) that the defendant was the plaintiff's lord. But we are concerned with what in effect was a piece of general legislation: a carefully thought-out writ assumes that its defendant will always have a bailiff and so always be a lord. Can it have been aimed at irrelevant lords? The usual plaintiff in the early rolls is a free peasant: so was the common mischief that the lord of one manor, as it were, sought out and annexed the scattered strips of a tenant in another manor? What would he do with them?

⁵⁵ See above, Hyams, p. 230.

⁵⁶ *Glanvill*, ix 1, Hall, esp. pp. 104–5; ix 8, esp. p. 112. Cf. vii 12, esp. pp. 85, 86; vii 17, pp. 90–1.

⁵⁷ The only use of novel disseisin by tenant against lord discussed by Maitland concerned pasture, forced upon his attention by the 'statute' of Merton; Pollock and Maitland, i 622–3. The pre-Merton situation is dramatised in ten lines of imaginary speech by an imaginary tenant, which serves as another outlet for the antipathy to communalism noted by Professor White. Maitland does not consider what would have been the situation before the assize was introduced.

⁵⁸ The uniqueness of this order is noted in *Glanvill*, xiii 38, Hall, p. 170.

⁵⁹ Milsom, *Legal Framework*, pp. 8–35.

And who would tender the service and suit of court due to the victim's lord from the tenement so taken?⁶⁰

A similar objection was that if the assize were directed against the lord it might have said so. Perhaps: and perhaps it did. The lawyers' equivalent of reckoning with all the facts at a particular time is that all the assumptions at a particular time must have been consistent. My heresy about novel disseisin goes with another about seisin: by definition it had been a lord who seised and might disseise a tenant.⁶¹ Only as lord was marginalized by king did seisin become a kind of abstract possession connoting just one person, not two.

In fact Maitland's carrying back of ideas of ownership and possession is irreconcilable with many things in the early sources which he either ignored or swept aside. Some have been mentioned in this paper. These and others were discussed in a paper read in November 1994 to the Haskins Society, and to be published in its Journal. The title of that paper refers to what is perhaps the most striking. The nature of the writ of right was assumed by Maitland rather than discussed;⁶² and in the grand assize, an alternative to trial by battle, he saw the knights as declaring which of the two parties had the greater right in the Joshua Williams sense of title derived from the earlier seisin. But in more than forty per cent of all grand assizes on the early rolls, the question for the knights is not abstract but tenurial: whether one of the parties has greater right to hold the land of the other or the other to have it in demesne. In *Bracton's Note Book*, which Maitland himself edited, the proportion is nearer fifty per cent. But he never mentions them. A possible explanation looks to his speed of working and his dependence on *Bracton* itself, from which the part treating such issues is missing. The extraordinary concentration of his mind produced a compelling picture. But the facts which lay outside the field of that concentrated vision remain; and there is no way of adjusting his account so as to accommodate them. Either you accept Maitland's authority and ignore that other evidence; or you work on a different picture.

Who cares about lawyers' concepts? Maitland did, but ironically his vision of basic concepts which did not change between King Henry II and Queen Victoria has suppressed questions. He provides historians with an all-purpose set of answers, including a glossary of legal terms

⁶⁰ And would the victim's lord accept service from a stranger, when that acceptance would bind him to warranty? See *Glanvill*, iii 7, Hall, p. 42.

⁶¹ As usual (cf. Wormald, above p. 15, and Elton, *Maitland*, p. 54), Maitland had himself thought of this; *Collected Papers*, i 365. But he did not at that time consider the effect on the concept itself of the shift from seignorial to royal jurisdiction. That thought came to him later, but was not pursued; Pollock and Maitland, ii 38.

⁶² There is just one paragraph: Pollock and Maitland, ii 62-3.

apparently valid for all periods: sources are read as though words such as 'wardship', 'seisin' and (for a long time) 'trespass' had always meant the same. And it seems to follow that historians need not worry too much about the law. A small symptom is a tendency to emphasise non-legal elements in a legal situation. In these papers, for example, Professor White sees a strictly legal understanding of the participation of kin in grants in alms as trivialising the matter;⁶³ and Dr Hudson reminds us of the trend toward consideration of disputing outside the legal process.⁶⁴ But the latter always goes on, and always largely in the shadow of what is likely to happen if the dispute does come to court. As long as many lawsuits ended in oaths, jeopardising your soul and earthly reputation (or indeed your opponent's) would often have seemed an unacceptable non-pecuniary cost.

But one's understanding of the legal concepts in peoples' heads must affect one's understanding of the world in which they lived. If you see King Henry II as providing new possessory protection for people you think of as landowners, you necessarily see land as already just property like a villa in the Roman world or in Victorian England: property without strings that you can just take, perhaps hoping that your taking will give you a Joshua Williams title. A tenement owing service and suit would not come away like that. At the very least the strings have to be dealt with; and Maitland overlooked the considerable ancillary apparatus which royal intervention necessitated. Except in a table showing the relative frequency of 'forms of action',⁶⁵ for example, he never mentions the action *de homagio capiendo*. But it is an important ingredient in *Glanvill's* account of inheritance, to which the lord's acceptance of the heir is still essential;⁶⁶ and without it mort d'ancestor (on any view of that remedy) could have produced mere deadlock.

Nor is it just 'legal' matters that are affected, like lawsuits, inheritance, alienation. To carry back later proprietary ideas seems to a lawyer to risk anachronism in matters which are certainly not a lawyer's business, such as governmental and social structure and economic motivation.⁶⁷ So long as land was not property without strings, for example, you cannot think of a sale of land as a simple exchange of this area for money, or therefore rest too much weight on the idea of a land market. But the lawyer has done enough to lose friends without

⁶³ See above, White, p. 106.

⁶⁴ See above, Hudson, pp. 34 *et seq.*

⁶⁵ Pollock and Maitland, ii 565-7.

⁶⁶ *Glanvill*, ix 4-7. Hall, pp. 107-11; cf. i 3, Hall, p. 4.

⁶⁷ Cf. T. F. T. Plucknett, *The Mediaeval Bailiff* (London 1954, Creighton Lecture 1953), p. 2: 'It is only in text-books that constitutional, economic and legal history are set apart from one another. In real life they are simultaneous, and one man lives all his histories concurrently'.

trespassing further. I have tried to make my point in terms of matters which I think I understand. But for legal history the proposition is general and serious; and I hope I shall not be thought disrespectful either to the memory of Maitland or to my historian friends if I put the matter plainly. The methods of today's historians work with the institutional hedgerows of the law: but they do not work well in the legal field itself, where one is looking not so much for hard datable facts as for shifting assumptions, analyses, perceptions. There indeed Maitland's compelling vision has become an orthodoxy, almost beyond question.⁶⁸ And if we go on as we are, we can look forward to our successors celebrating the bicentenary of 'Pollock and Maitland' as still the last word on the history of English law in its most crucial period. I wonder whether he would be pleased.

⁶⁸ See above, Wormald, p. 10. Cf. Elton, *Maitland*, pp. 32-3: 'The history he wrote concerned itself with highly technical issues and used materials and terms of art that are not accessible to the general reader; indeed too few historians have bothered to master them since. In Maitland's hands they created lasting orthodoxies... A hundred years of teaching have anchored them in concrete so well set that every effort of doubt or modification calls for dynamite'.

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*