

From: Alan Macfarlane, **The Making of the Modern World: Visions from the West and East** (Palgrave, London, 2002)

### **LIFE, WORK AND METHODS**

F.W.Maitland was born on 28th May 1850 at 53 Guilford Street, London. He was educated at Eton and Trinity College, Cambridge. There was no Law or History Tripos at that time so he started by reading Mathematics. He did badly in his first year exams in and then, as Maitland tells us, 'the idle whim of an idle undergraduate' took him into Henry Sidgwick's lecture room in his second year at Trinity.<sup>1</sup> He changed to the new Moral and Mental Sciences Tripos and the result was that eighteen months later he was placed at the equal head of the First Class in his final exams. He was President of the Cambridge Union, a running Blue, a 'Sunday Tramp' and, like Sir Henry Maine before him, an 'Apostle'.

The major influence on his thought at that time was Henry Sidgwick, a disciple of John Stuart Mill. From Sidgwick he imbibed the agnosticism and love of liberty and equality which Mill had shared with Tocqueville. As we have seen, Maitland's dissertation considered the same themes as Montesquieu and Tocqueville and devoted several pages to considering Adam Smith's arguments for economic **laissez faire**. Thus by the time he left Cambridge it was clear that Maitland's interest was in philosophy, and in particular the Enlightenment tradition of political philosophy. As Plucknett notes, 'His ambition was to lead an academic life as a political scientist' and it was only as a 'disappointed philosopher' that he left for London.<sup>2</sup> This is important not only because he 'brought to the law a mind exercised in the wide open spaces of philosophy', but because it helps us to recognize that his last ten years were really a return to philosophy in another guise. His translation of Gierke and writing on corporations and trusts which we shall examine later 'recall his early interest in political philosophy'.<sup>3</sup>

Maitland's failure to obtain a Trinity Fellowship forced him sideways and he moved to London. He lived with his sisters in Kensington and worked for seven years at the Bar. His legal training was thus a later specialization, though he was reputedly a good lawyer. As a pupil in chambers, his master wrote long after that 'He had not been with me for a week before I found that I had in my chambers such a lawyer as I had never met before. I have forgotten, if I ever knew, where and how he acquired his mastery of law; he certainly did not acquire it in my chambers; he was a consummate lawyer when he entered them.'<sup>4</sup> He became close friends with Leslie Stephen, father of Virginia Woolf, and later wrote the **Life of Leslie Stephen**. He married Stephen's sister-in-law, Florence.

It is clear that he wanted to return to academic life and he still hankered after philosophy. His first

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<sup>1</sup> McFarlane, 'Mount Maitland'.

<sup>2</sup> Plucknett, 'Maitland', 184-5

<sup>3</sup> Plucknett, 'Maitland', 191

<sup>4</sup> Quoted in McFarlane, 'Mount Maitland'

published work after leaving Cambridge was a review of A.J.Balfour's **A Defence of Philosophic Doubt** for the philosophical journal **Mind** in 1879 and in 1883 he published two further reviews of Herbert Spencer's work on 'The Ideal State' and 'The law of equal liberty' in the same journal.<sup>5</sup> This interest may have been one of the reasons why the philosopher Henry Sidgwick helped to set up a Readership for him at Cambridge in 1884. It was a momentous year, for it was also when he discovered for himself the vast wealth of original materials for English history in the Public Record Office.<sup>6</sup> These documents would help him to pursue those questions concerning the origins of liberty and equality which he had first surveyed in his Trinity dissertation and which his predecessors had been unable to pursue in detail for lack of information. Thus his first substantial publication was the **Pleas of the Crown for the County of Gloucester**, which was dedicated to Paul Vinogradoff. He described the documents as 'a picture, or rather, since little imaginative art went into its making, a photograph of English life as it was early in the thirteenth century...We have here, as it were, a section of the body politic which shows just those most vital parts, of which, because they were deep-seated, the soul politic was hardly conscious, the system of local government and police...'<sup>7</sup> These were just those areas which Tocqueville had suggested were most distinctive, important and unusual in the English political structure.

Three years later Maitland published an edition of the manuscript collection of cases which the great thirteenth century lawyer Bracton had collected and used when writing his treatise **On the Laws and Customs of England**. These had been discovered by Vinogradoff and were published in three volumes as **Bracton's Note Books** (1887). In the following year Maitland was elected Downing Professor of the Laws of England at Cambridge. In his inaugural lecture on 'Why the History of English Law is Not Written'<sup>8</sup> he explained the enormous importance of editing the medieval yearbooks and other law sources to the highest standard before the history of law could properly be written. Here was a man who had taught himself palaeography, had the training in law, and saw the opportunity. He had discovered a vast repository of records, all of them bearing on exactly those unresolved problems to which his predecessors had pointed. Believing that 'hoarded wealth yields no interest', he founded the Selden Society for the publication of medieval documents.

A decade of publication of detailed legal records followed, including his **Select Pleas of the Crown**

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<sup>5</sup> Hudson (ed.), **History**, 262-3

<sup>6</sup> For a correction of the myth that it was Vinogradoff who introduced him to these records, see Plucknett, 'Maitland', 186

<sup>7</sup> Maitland, **Pleas of Crown**, vii

<sup>8</sup>Maitland, **Collected Papers**, I, 480-97

(1888) and **Select Pleas in Manorial and Other Seignorial Courts**, vol.i.(1889). He also edited with Baildon, **The Court Baron** (1891) for the Selden Society and the **Memoranda de Parlamento** (1893) for the Rolls Society, as well as overseeing the editorial works of others. This immersion in the world of early law, plus an extensive knowledge of continental scholarship, put him in an ideal position to look at English law and politics from a wider perspective. He read and understood French, Latin and Greek and, thanks to early tutoring, was particularly fluent in German. This is important since much of the major progress in comparative and historical law during his lifetime was taking place in Germany. Maitland started on a translation of the major work of Savigny on Roman law, though he never completed it, and translated and published parts of Gierke's treatise on **Political Theories of the Middle Ages** from the German. In 1895 Maitland published his great masterpiece, more than 1300 pages on **The History of English Law before the Time of Edward I**. Although known as 'Pollock and Maitland' after its two editors, in fact Maitland wrote all but the first chapter of the work. In this volume he synthesized the results of the detailed studies he and others were making, as he was also to do in **Domesday Book and Beyond** (1897), **Roman Canon Law in the Church of England** (1898), **Township and Borough** (1898) and **English Law and the Renaissance** (1901).

He also wrote numerous articles and reviews, many of which were published in **The Collected Papers of Frederic William Maitland** (1911) edited by H.A.L. Fisher in three volumes, comprising another 1500 pages. Others which were omitted in this collection were published in **Selected Historical Essays of F.W. Maitland** (1957), edited by Helen Cam. His lectures were so polished that three sets of them could be published more or less verbatim. The first on **The Constitutional History of England** (1908) were delivered in Michaelmas 1887 and Lent 1888, when he was thirty-seven and just before he became Downing Professor. They contain, in raw form, some of the seminal ideas that were to go into the **History of English Law**, and also contain 'several new and original ideas, which Maitland had no opportunity of expressing in his later work...'<sup>9</sup> Maitland lectured on **Equity** at Cambridge from 1892 until 1906, and these were also published, as were his seven lectures on **Forms of Action at Common Law**.

Thus Maitland's published work comprises well over five thousand printed pages, much of it extremely detailed. This is all the more miraculous in that he only started the flow in 1888 and combined it with the usual administrative and teaching duties. In order to understand his achievement properly, we need to take this teaching context, the Fellowship at Downing College and University Professorship, into account.

From his letters we get a few glimpses of his work methods. He describes the other pressures on him from his full involvement as a teaching Professor. On Feb. 16 1890 he wrote 'I am now in the middle of our busiest term and lecturing daily; but the middle is past and I am beginning to look forward to Easter and pleasanter occupations.'<sup>10</sup> On 22nd October 1905 he was still 'teaching six hours per week', but

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<sup>9</sup>Fisher in Maitland, **Constitutional**, vi

<sup>10</sup>Maitland, **Letters**, 80

was 'hopeful of staying here through November - whereat I rejoice', rather than having to leave for the Canaries.<sup>11</sup> The following year he died. As well as the pressures of teaching and illness, there was the actual time spent searching for and copying out original documents at the Public Record Office. In June 1889 he wrote concerning the possible editing of Petitions to Parliament. He outlined the difficulty of finding them and thought that he could only transcribe 'five or six petitions per diem' and he himself 'cannot hope to give more than two months a year to work in the Record Office.' It would therefore take him five or six years to produce the quantity needed for an edited volume.<sup>12</sup>

The overwhelming nature, fascination and difficulty of the materials he was dealing with is well illustrated in several lectures as well as his letters. He was offered the Regius Professorship of History by Balfour in 1902 and turned it down. His official reason to Balfour was that 'For some time I have been compelled to do very little work and to absent myself from England for some months every winter. Twice I have offered to resign the professorship that I hold...'<sup>13</sup> But there were other reasons, explained after attending the inaugural of J.B. Bury who was appointed. 'The Regius Professor of Modern History is expected to speak to the world at large and even if I had anything to say to the W. at L. I don't think that I should like full houses and the limelight.' This again shows his reticence, but in the next sentence he showed where his real passion lay. 'So I go back to the Year Books. Really they are astonishing. I copy and translate for some hours every day and shall only have scratched the surface if I live to the age of Methusalem - but if I last a year or two longer I shall be a 'dab' at real actions. It was a wonderful game as intricate as chess and not like chess cosmopolitan. Unravelling it is an amusement not unlike that of turning the insides out of ancient comedies I guess.'<sup>14</sup>

He was also increasingly ill. We are told that in the summer of 1887, aged 37, he was already seriously unwell. 'This was the first recorded attack of the tuberculosis which, together with diabetes, was to make the rest of his life precarious ...' Thus in 1889 he wrote to Vinogradoff 'I very much want to see you again and I don't know that I can wait for another year: this I say rather seriously and **only to you**. Many things are telling me that I have not got unlimited time at my command and I have to take things very easily.'<sup>15</sup> From 1898 he had to winter in the Canaries, carrying any books or copies of manuscripts

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<sup>11</sup>Maitland, **Letters**, 449

<sup>12</sup>Maitland, **Letters**, 70

<sup>13</sup> Maitland, **Letters**, 343

<sup>14</sup>Maitland, **Letters**, 349

<sup>15</sup>Quoted in McFarlane, **Mount Maitland**

with him to work on. He died prematurely of pneumonia on 20th December 1906, aged 56. During the twenty-two years of full production he transformed our understanding of the early history of England and solved many of the puzzles which his great predecessors had left only partially resolved.

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So Maitland set out to probe deeply into the previous thousand years of English history. Yet the task seemed overwhelming. Glimpses of his working methods are shown in relation to the great **History of English Law**. On 24 Nov. 1889 he wrote to Bigelow, 'Yes, Pollock and I have mapped out a big work, too big I fear for the residue of our joint lives and the life of the survivor. Vol.I. is to bring things down to the end of Henry III. I am already struggling with a chapter on tenure but cannot make progress for the ground is full of unsuspected pitfalls.'<sup>16</sup> A few months later, on 23rd March 1890 he had already realized that Pollock was not going to be much help and he felt even more overwhelmed. 'I have been plunged for some months past in a big job. Pollock and I had a hope of turning out a historical book, but I am not sure now that he will be able to give his time, and if that be so I shall hardly get very much done in my lifetime. However, I have set to work on the more public side on the law of cent. XII and XIII, and am struggling with tenures and scutages and such like...Some day I hope to get free of tenures and villeinage and so on, and to tackle the pure private law of ownership, possession etc...I hope that this time may come; but have my doubts - for the topic of "Jurisdiction" stares me in the face and looks even more threatening than "Land Tenure".'<sup>17</sup>

On 18 Oct. 1890 he wrote to Pollock 'And now I will write about the size of our book. I go on writing and writing, for I have so arranged my lectures that I have little else to do. Thus matter accumulates at a great rate. I know that some of it deals with rather minute points; but the more I see of cents. XII and XIII the more convinced am I that their legal history must be written afresh with full proof of every point.'<sup>18</sup> At this stage he envisaged two volumes, one on public, one on private law. Among the subjects in the former would be 'our say about the genesis of feudalism. This means a great pile of stuff. For example, for six weeks past I have had "juristic persons" on my mind, have been grubbing for the English evidence and reading the Germans, in particular Gierke's great book (it is a splendid thing though G. is too metaphysical).'<sup>19</sup> He concluded that 'Tenure is practically finished. A large part of Jurisdiction is written but requires re-arrangement. In Status I have done the baron, the knight, the

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<sup>16</sup>Maitland, **Letters**, 78

<sup>17</sup>Maitland, **Letters**, 83

<sup>18</sup>Maitland, **Letters**, 87

<sup>19</sup>Maitland, **Letters**, 87

unfree. I am prepared to deal with monks and the clergy, and have opinions about corporations. Aliens will not take me long but Jews I have hardly yet thought.<sup>20</sup> Thus within a year of starting he had written about 200 pages of the most difficult part of volume one.

On 29 May 1892 he wrote to Vinogradoff, 'with me the matter stands thus - F.P., who is now in the West Indies and may go to India in the winter, has written an Anglo-Saxon chapter. **Between ourselves** I do not like it very much, partly because it will make it very difficult for me to say anything about A-S law in any later part of the book. My effort now is to shove on with the general sketch of the Norman and Angevin periods so that my collaborator may have little to do before we reach the Year Book period - if we ever reach it. So I am half inclined to throw aside all that I have written - it is a pretty heavy mass - about Domesday and the A-S books.'<sup>21</sup>

In July 1894 Maitland explained in detail how he had gradually taken over the writing of the whole work. 'The original scheme would have divided the work into approximately equal shares - but I soon discovered - that I wanted one thing while my yoke-fellow wanted another...the discrepancy was but slowly borne in upon me and, when it was becoming apparent, I pushed on my work in order that as much as possible might be done in the way which - rightly or wrongly - I like...you see therefore that I cannot accuse him [F. Pollock] of not doing his fair share, for I did not want him to do it. What I have always been fearing was not that he would get any credit that would belong to me but that he would take chapters out of my hand.'<sup>22</sup> The contract with the University Press was made with Maitland alone.

The two great volumes seem to have been written by the end of 1894, despite his work as editor of many other works alongside them, and in the preface of 21st Feb. 1895 it was stated that 'The present work has filled much of our time and thoughts for some years. We send it forth, however, well knowing that in many parts of our field we have accomplished, at most, a preliminary exploration. Oftentimes our business has been rather to quarry and hew for some builder of the future than to leave a finished building. But we have endeavoured to make sure, so far as our will and power can go, that when this day comes he shall have facts and not fictions to build with.' A separate note by Pollock stated that 'It is proper for me to add for myself that, although the book was planned in common and has been revised by both of us, by far the greatest share of the execution belongs to Mr. Maitland, both as to the actual writing and as to the detailed research which was constantly required.'<sup>23</sup>

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<sup>20</sup>Maitland, **Letters**, 87

<sup>21</sup>Maitland, **Letters**, 109

<sup>22</sup>Maitland, **Letters**, 138

<sup>23</sup>Maitland, **History**, I, vi

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Maitland developed a particular way of writing through which he might explore and explain the immensely complex interconnections of English history through the centuries. The style is one of our clues to the man, so it is worth pausing for a moment on this. G.O.Sayles tried to summarize it thus. 'As an artist in words, Maitland followed no conventions and is himself inimitable... He seems to take the reader into his confidence and to converse with him, charming him with his exquisite sense of the perfect word and phrase, the happy epigrams; his gay humour.'<sup>24</sup> In a section on Maitland's way of writing and style, Zutshi provides some important clues. He writes that 'Maitland's style is so individual, compelling, seductive and, at times, beautiful that many of those who have written about him have drawn attention to it.' The 'conversational quality' is partly explained by the fact that 'As he composed sentence and paragraph for book or lecture, he said the words aloud so that he might hear as well as see them.' He wrote 'as if he were speaking'.<sup>25</sup> He is said to have invariably written standing at the lectern which is still preserved at Downing College, Cambridge.

This last point is particularly interesting. All of his writing has the quality of directness, simplicity and elegance, as if the author were talking in his ordinary voice. The fact that Maitland wrote as if he were trying to explain complex matters to an audience of undergraduates, and the fact that a lectern is confined so that one has to put the mass of data in one's notes to one side and concentrate on the central issues, is significant. Maitland himself explained his method to Lord Acton. 'According to my habit I made a rush at it, writing chiefly from memory, in order that I might see the general outlines of my chapter.'<sup>26</sup> Thus he wrote 'fast, and with relish, in a sinewy style that has engaged generations of readers' producing 're-creations of medieval life that convinced by their range, coherence and imaginative zest.'<sup>27</sup> His style and genius in writing is well captured by one of his foremost disciples, K.B. McFarlane. 'Here was a writer who could be highly technical and a delight to read, a fine artist with a powerful analytical mind and a remarkable flair for the concrete instance that made the past live.' In his later writings 'There was the same learning, weighty but winged, the sparkle, the lucidity, the same sureness of finger in disentangling historical knots.' Thus in his twenty years of writing there are few pages which 'do not bear the stamp of Maitland's highly individual and, it would seem, effortless genius. He wrote like a brilliant talker; we are told that his talk was brilliant and that his public speeches were long remembered and

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<sup>24</sup> Sayles, 'Maitland'.

<sup>25</sup> **Letters**, ii, ed. Zutshi, p.20

<sup>26</sup> **Letters**, ii, ed. Zutshi, no.174.

<sup>27</sup> **Selected Essays**, 15

quoted.<sup>28</sup>

A little of the quality of his lectures is captured by one of those who attended them. 'Maitland lectured on English law ... as though he were some saintly medieval monk reciting the miracles of his order. His tall gaunt figure was restless with animation; his voice would ... pass into a sort of liturgic rhythm as he completed his outline of some large cycle of legal development ... Yet even at a moment of what seemed genuine enthusiasm, ... a sudden shaft of humour would flash into the lecture and, though the tense face hardly relaxed, the eyes in an instant were all play...' <sup>29</sup> The editors of a set of his lectures on 'Equity' described how 'Those who heard them delivered - amongst whom we are - with all Maitland's gaiety, and with all his charm of manner and his power of making dry bones live, will not easily forget either the lectures or the lecturer.'<sup>30</sup>

The freshness of the lecturing and writing also undoubtedly lay in the fact that Maitland was always exploring new subjects, explaining them as much to himself as to his audience, thinking aloud in another's presence. History particularly interested him since he knew so little about it until quite late in his life. In another letter to Lord Acton who had asked him to write a chapter on sixteenth century religion for the **Cambridge Modern History** he explained his innocence and ignorance, the basis of his curiosity and wonder. Maitland wrote that he would try to do so, 'though you may guess a good deal, you can not know the depth of my ignorance - I have hardly so much as heard that there was a Queen Elizabeth. Until I was thirty years old and upwards I rarely looked at a history - except histories of philosophy, which don't count - and since then I have only 'mugged up', as the undergraduates say, one subject after another which happened to interest me.'<sup>31</sup>

Maitland's work has often been likened to a piece of music. It is difficult to describe this, but one example of the tribute to his mind and style by his greatest legal historian contemporary and friend, Paul Vinogradoff, captures something of the effect. 'In every special case, in the treatment of any great doctrine, or institution, or epoch, Maitland has a manner of starting with disconcerting critical observations and of noticing at the outset contradictions and confusion, but then he feels his way, as it were, like a musician running his fingers over the keys in an improvised prelude, towards leading ideas and harmonious combinations.' Hence numerous apparently dry and difficult subjects become 'curiously attractive through the reflection of a kind of organic process in the mind of the scholar creating order

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<sup>28</sup>McFarlane, **Mount Maitland**

<sup>29</sup> Quoted in Schuyler, **Maitland**, p.17

<sup>30</sup> Maitland, **Equity**, v

<sup>31</sup> **Letters**, ii, no.122



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and sense in the midst of confusion.<sup>32</sup> It is not difficult to think of Bach, Handel, or even Maitland's beloved Wagner after whom he named his daughters Ermengard and Fredegond.

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<sup>32</sup> Vinogradoff, 'Maitland', 287; the connection between Maitland's style and music is explicitly or implicitly made by a number of recent writers, see Hudson (ed.), **The History of English Law**, ix and note 3.

Maitland was a very private person. Although a number of biographical studies have been written about him, and though two volumes of his letters have been published, it is not easy to obtain a picture of Maitland the man. We know of his 'gaiety' in lecturing. From the lives and letters he appears to be an upright, moral, man. He was Liberal in politics; an early advocate of degrees for women at Cambridge, agnostic in religion; committed above all to his family, friends and students. He was clearly deeply loved by his family. He was a workaholic and may have suffered a mental break-down and contemplated suicide.<sup>33</sup> Thin and increasingly emaciated, he was frugal and energetic. To learn more about him we have to examine his voluminous writings.

### **Theoretical methodology**

We have seen that one of Maitland's deepest interests was in the development of liberty. In pursuing this topic his training as a lawyer was obviously central and links him to his illustrious ancestors, Montesquieu, Adam Smith and Tocqueville. 'He had an unerring instinct for seeing the pattern behind a mass of details and the skill to weave the facts once linked into a persuasive case.' Furthermore, as S.F.C. Milsom writes, 'I am also pretty sure that the extraordinary immediacy of Maitland's writing has to do with his background as a lawyer and law teacher...A main ingredient is the habit of bringing situations to life in terms of the dialogues of real people.'<sup>34</sup> It seems likely that there was more to the legal training than this, for as in the other cases, it gave him that ability to see into the very essence or structure of things, to approach them in a **relational** way, seeing the balance of forces, to be able to measure the facts against an ideal-type model. Like Montesquieu, Smith and Tocqueville, he combined induction and deduction. Few had so many new 'facts' at their disposal and he clearly had an immensely good memory. Yet he shaped the facts into new imaginative patterns through inspiration. He took nothing for granted and questioned everything. Thus with his brilliance, energy and insight he created a new paradigm, or rather completed the one which had begun with Montesquieu.

His approach was both holistic and relational, treating all the different aspects of the past within one framework. By 'envisaging the history of English law as an aspect of the whole stream of English life he brought legal history into close relationship to political, constitutional, social, economic and religious history.'<sup>35</sup> In fact what he did was to see that by taking law, the central English institution, as the thread he could show the **relations** between all the different features of English society. He concentrated on the medieval period, but lectured and taught on the whole period from the Anglo-Saxons to the nineteenth century. He was thus able to provide the first great, document-based, analysis of the patterns or spirit of English culture over the thousand years leading up to the industrial revolution.

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<sup>33</sup> See Maitland, **Letters**, II, 4

<sup>34</sup> Milsom, 'Review of Elton', 225

<sup>35</sup> Hazeltine, 'Maitland'

Maitland's aim was to understand the development of later Victorian wealth and liberty. He was convinced that the answer lay buried in the mounds of hitherto unused legal records. 'Think for a moment what lies concealed within the hard rind of legal history. Legal documents, documents of the most technical kind, are the best, often the only evidence that we have for social and economic history, for the history of morality, for the history of practical religion. Take a broad subject - the condition of the great mass of Englishmen in the later middle ages, the condition of the villagers. That might be pictured for us in all truthful detail; its political, social, economic, moral aspects might all be brought out; every tendency of progress or degradation might be traced; our supply of evidence is inexhaustible...'<sup>36</sup> Or again he wrote more briefly, '...speaking broadly we may say that only in legal documents and under legal forms are the social and economic arrangement of remote times made visible to us.'<sup>37</sup>

Yet the difficulties were immense. There was the obvious fact that the hand-writing, the dog latin and law-french, the abstruse forms of procedure and technical terms all had to be mastered, requiring immense dedication and energy. He had not only to read the documents, but re-construct a largely vanished world view in order to understand them. This was particularly the case in certain branches of law which had faded out. For instance, in relation to the ecclesiastical court records, as he described. 'A detailed history of our ecclesiastical courts is at present impossible. Very few attempts have been made to put into print the records out of which that history must be wrung. They are voluminous... Those who achieved the task would have to learn much that has not been taught in England during the past three centuries and, it may be, to unlearn a good deal that has been taught too often.'<sup>38</sup>

Related to this was the problem of anachronism. Here Maitland introduced one of his key concepts, the idea that one should write history both backwards and forwards. It is worth quoting the passage fully both as an example of his style and also his realization of the aims and the dangers of historical reconstruction. He pointed out that 'The history of law must be a history of ideas. It must represent, not merely what men have done and said, but what men have thought in bygone ages. The task of reconstructing ancient ideas is hazardous and can only be accomplished little by little. If we are in a hurry to get to the beginning we shall miss the path.' In particular one had to beware of intellectual anachronism. 'Against many kinds of anachronism we now guard ourselves. We are careful of costume, of armour and architecture, of words and forms of speech. But it is far easier to be careful of these things than to prevent the intrusion of untimely ideas. In particular there lies a besetting danger for us in the barbarian's use of a language which is too good for his thought. Mistakes then are easy, and when committed they will be fatal and fundamental mistakes. If, for example, we introduce the **persona ficta**

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<sup>36</sup>Maitland, **Collected Papers**, I, 485-6

<sup>37</sup>Maitland, **Collected Works**, II, 3

<sup>38</sup>Maitland, **Roman Canon Law**, 131

too soon, we shall be doing worse than if we armed Hengest and Horsa with machine guns or pictured the Venerable Bede correcting proofs for the press; we shall have built upon a crumbling foundation.' How could one avoid this danger? 'The most efficient method of protecting ourselves against such errors is that of reading our history backwards as well as forwards, of making sure of our middle ages before we talk about the "archaic", of accustoming our eyes to the twilight before we go out into the night.'<sup>39</sup>

If one were successful, one might achieve the ultimate goal of imaginative re-construction, that is to say the revealing of other worlds and other times, not just a distorted reflection of our own. Not only, for example, will the 'villages and hundreds which the Norman clerks tore into shreds' be 'reconstituted and pictured in maps', but 'Above all, by slow degrees the thoughts of our forefathers, their common thoughts about common things, will have become thinkable once more.'<sup>40</sup>

Another aspect of this anachronism or bias was caused by the historian's own convictions and often unexamined political orientation. Maitland recognized this when he wrote, for example, that 'the English believer in "free communities" would very probably be a conservative, I don't mean a Tory or an aristocrat, but a conservative.' 'On the other hand with us the man who has the most splendid hopes for the masses is very likely to see in the past nothing but the domination of the classes. Of course this is no universal truth - but it comes in as a disturbing element.'<sup>41</sup> Since Maitland became deeply immersed, as we shall see, in questions of 'free village communities', as well as liberty and equality, it is important that he recognized the problem and that we remember his pedigree and inspiration from Tocqueville by way of Mill and Sidgwick.

Another key was to start in the right place, to find the essence of the structure. This was Maitland's equivalent to Tocqueville's comprehension of the American pattern when he realized that equality was the starting point from which everything else flows. For Maitland, it was the understanding of the medieval concept of tenure which unlocked the rest. 'In any body of law we are likely to find certain ideas and rules that may be described as elementary. Their elementary character consists in this, that we must master them if we are to make further progress in our study; if we begin elsewhere, we are likely to find that we have begun at the wrong place...as regards the law of the feudal times we can hardly do wrong in turning to the law of land tenure as being its most elementary part.'<sup>42</sup> Not elementary in the sense of simple, for it was immensely complex, but elementary in the sense of basic. For Maitland was

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<sup>39</sup>Maitland, **Domesday Book**, 356

<sup>40</sup>Maitland, **Domesday Book**, 520

<sup>41</sup>Maitland, **Letters**, 60

<sup>42</sup>Maitland, **History**, I, 231

also well aware that there was no correlation between 'elementary' or early forms and simplicity. Too often we allow ourselves to suppose that, could we get back to the beginning, we should find that all was intelligible and should then be able to watch the process whereby simple ideas were smothered under subtleties and technicalities. But it is not so. Simplicity is the outcome of technical subtlety; it is the goal, not the starting point. As we go backwards the familiar outlines become blurred; the ideas become fluid, and instead of the simple we find the indefinite.<sup>43</sup>

A further key lay in placing England in a comparative perspective. As Maitland wrote 'History involves comparison, and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of the idea of legal history.'<sup>44</sup> Maitland's knowledge of German and French law was very extensive and he was deeply knowledgeable about Roman law.<sup>45</sup> Thus, like his great predecessors, he was able to see clearly what was unusual and what was in common in the English case. He was certainly no 'Little Englander', and, as Patrick Wormald notes 'would bend over backwards to disabuse Englishmen of misplaced faith in the uniqueness of their Island Story'.<sup>46</sup> On the other hand, as we shall see, if he felt that England was different, he did not shrink from saying so.

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One of the most difficult tasks for a historian is to balance change and continuity and it is in this theoretical area that we can learn most from Maitland. From Montesquieu to Tocqueville there had been a feeling that England had witnessed a peculiarly continuous and increasingly unusual history by the standards of the rest of Europe. To what extent did Maitland also find a continuity in the structure, and to what extent was there some kind of dramatic revolution in the early modern period? In Maitland's many works we look in vain for any sign of a belief that a vast and revolutionary change had occurred at some specific point in English history, dividing off 'medieval' from 'modern' England. Instead, his view that the legal and social structure of England, in its basic principles, was already laid down by the thirteenth century is shown in many passages.

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<sup>43</sup>Maitland, **Domesday Book**, 9

<sup>44</sup>Maitland, **Collected Papers**, I, 488

<sup>45</sup> Among others Plucknett, 'Maitland', 185, Vinogradoff, 'Maitland', 288 and Paul Hyams in Hudson (ed.), **History of English Law**, 217 comment on the width of his learning and command of continental sources.

<sup>46</sup> In Hudson (ed.), **History of English Law**, 13

By the death of Henry II (1271), 'English law is modern in its uniformity, its simplicity, its certainty.'<sup>47</sup> Lawyers from the fourteenth century onwards believed that 'the great outlines of criminal law and private law seem to have been regarded as fixed for all time. In the twentieth century students of law will still for practical purposes be compelled to know a good deal about the statutes of Edward I.'<sup>48</sup> This continuity, he believed, had been of great advantage to English historians, setting them off from those of continental nations where it had not occurred. '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. It has never passed utterly outside the cognizance of our courts and our practising lawyers. We have never had to disinter and reconstruct it in that laborious and tentative manner in which German historians of the present day have disinterred and reconstructed the law of medieval Germany.'<sup>49</sup>

This continuity is shown in the treatment of particular subjects. For instance, when analysing the forms of action at common law, Maitland took the period 1307-1833 as one period. He admitted that this was 'enormously long', yet wrote that 'I do not know that for our present purpose it could be well broken up into sub-periods.'<sup>50</sup> The most important area was property law. Here were the deepest continuities. This 'most salient trait', the 'calculus of estates which, even in our own day, is perhaps the most distinctive feature of English private law', Maitland thought very old. It had been a characteristic for six centuries, having taken a 'definite shape' in the second half of the thirteenth century, drawing on much older customs. This continuity was not merely to be found in the Common Law, which was 'one of the toughest things ever made'. In his **Constitutional History of England**, which covered the period from Anglo-Saxon England up to the 1880s, Maitland made no substantial modifications to Stubbs's general vision of continuity. For instance, he wrote 'take any institution that exists at the end of the Middle Ages, any that exists in 1800 - be it parliament, or privy council, or any of the courts of law - we can trace it back through a series of definite changes as far as Edward's reign.'<sup>51</sup> It was because English constitutional and legal principles had been laid down so early that in the **History of English Law** he did not take the story beyond the thirteenth century.

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<sup>47</sup> Maitland, **History**, I, 225

<sup>48</sup> Maitland, **Selected Essays**, 123

<sup>49</sup> Maitland, **History**, I, xxxiv

<sup>50</sup> Maitland, **History**, II, 210; I, 225; Maitland, **History**, I, civ; Maitland, **Forms**, 43

<sup>51</sup> Maitland, **History**, II, 10-11; Maitland, **Constitutional**, 20

Maitland's research did not just go back to the twelfth century. He was deeply knowledgeable about the Anglo-Saxon period. In his lectures on the **Constitutional History of England** he stressed the continuity between Anglo-Saxon and late eleventh century England. He explains that though the Norman Conquest was of great importance, we 'must not suppose that English law was swept away or superseded by Norman law. We must not suppose that the Normans had any compact body of laws to bring with them. They can have had but very little if any written law of their own; in this respect they were far behind the English.'<sup>52</sup> After all, 'They were an aristocracy of Scandinavian conquerors ruling over a body of Romance-speaking Celts.' Thus we 'must not therefore think of William as bringing with him a novel system of jurisprudence.'<sup>53</sup> Maitland then shows in detail how little changed in the legal framework until the mid twelfth century. After all, William merely came to England, as he claimed, as the rightful heir to Edward the Confessor, 'William succeeded to Edward's position.'<sup>54</sup> Thus the 'valuable thing that the Norman Conquest gives us is a strong kingship which makes for national unity.'<sup>55</sup>

This view of the continuity of English law over the Norman invasion was not undermined by the next ten years of Maitland's research and was repeated in the **History of English Law**. He describes how it is only very slowly that the consequences of the Norman invasion came to be felt. 'Indeed if we read our history year by year onwards from 1066, it will for a long time seem doubtful whether in the sphere of law the Conquest is going to produce any large changes. The Normans in England are not numerous. King William shows no desire to impose upon his new subjects any foreign code. There is no Norman code.'<sup>56</sup> Thus 'we may safely say that William did not intend to sweep away English law and put Norman law in its stead. On the contrary, he decreed that all men were to have and hold the law of King Edward - that is to say, the old English law...So far as we know, he expressly legislated about very few matters.'<sup>57</sup> Undoubtedly the 'conquest, the forfeiture, the redistribution of the land gave to the idea of holding land from others a dominance that it could not obtain elsewhere', but this was an unintended consequence, as was that of the germ of the idea of the jury system which Maitland thought came from France.<sup>58</sup> But in general, as he shows in detail, the Normans and Angevins built on and then

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<sup>52</sup>Maitland, **Constitutional**, 6-7

<sup>53</sup>Maitland, **Constitutional**, 7

<sup>54</sup>Maitland, **Constitutional**, 154

<sup>55</sup>Maitland, **Constitutional**, 9

<sup>56</sup>Maitland, **History**, I, 79

<sup>57</sup>Maitland, **History**, I, 88

adapted, simplified, strengthened an earlier tradition of Anglo-Saxon laws.<sup>59</sup>

Maitland, in fact, managed to capture the mixture of continuity with change over the seven hundred years up to the time in which he was writing. 'Hardly a rule remains unaltered, and yet the body of law that now lives among us is the same body that Blackstone described in the eighteenth century, Coke in the seventeenth, Littleton in the fifteenth, Bracton in the thirteenth, Glanvill in the twelfth. This continuity, this identity, is very real to us if we know that for the last seven hundred years all the judgments of the courts at Westminster have been recorded, and that for the most part they can still be read...eventful though its life may have been, it has had but a single life.'<sup>1</sup>

Maitland follows the trail back to the edge of the 'German woods'. 'Beyond these seven centuries there lie six other centuries that are but partially and fitfully lit, and in one of them a great catastrophe, the Norman Conquest, befell England and the law of England. However, we never quite lose the thread of the story. Along one path or another we can trace back the footprints, which have their starting-place in some settlement of wild Germans who are invading the soil of Roman provinces, and coming in contact with the civilization of the old world. Here the trail stops, the dim twilight becomes darkness; we pass from an age in which men seldom write their laws to one in which they cannot write at all. Beyond lies the realm of guesswork.'<sup>2</sup> It is this which 'gives to English legal history a singular continuity from Alfred's day to our own.'<sup>3</sup>

In lectures which constituted the **Constitutional History of England** Maitland described the early Anglo-Saxon law codes in England. Those of Ethelbert in about 600 'seem to be the earliest laws ever written in any Teutonic tongue.' It was already far from 'primitive', being influenced by Christianity. The later law codes of Ine in 690 and Alfred in about 890 'show us that during the last two centuries there had been no great change in the character of law or the legal structure of society.'<sup>60</sup> From then there was a continuous set of laws up to the Norman conquest. If we look at these, one thing is very clear, 'namely that the influence of Roman jurisprudence was hardly felt', even though the influence of Christianity was present, for example in the introduction of the written will.<sup>61</sup> Then came the Normans, 'a race whose distinguishing characteristic seems to have been a wonderful power of adapting itself to circumstances, of absorbing into its own life the best and strongest institutions of whichever race it conquered...'<sup>62</sup>

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<sup>58</sup>Maitland, **History**, I, 93-4

<sup>59</sup>See Maitland, **History**, I, 104-7

<sup>60</sup>Maitland, **Constitutional**, 1-2

<sup>61</sup>Maitland, **Constitutional**, 5

<sup>62</sup>Maitland, **Constitutional**, 122



Thus the earlier Germanic invaders probably introduced the important division into 'hundreds'<sup>63</sup> and the central concept of feudalism, namely the loyalty to a chief. Maitland argues that the 'personal relation between land and man which is one ingredient of feudalism, is indeed old; we may see it in the first pages of the history of our race. It can be traced to the relation between the German **princeps** [prince] and his **comites** [counts] described by Tacitus.<sup>64</sup> This developed into the territorial Anglo-Saxon thegn, and the principle expands so that 'This relation of man and lord we find in all parts of the social structure.'<sup>65</sup> Furthermore, while 'Nothing, I believe is more of the essence of all that we mean when we talk of feudalism than the private court - a court which can be inherited and sold along with land', 'jurisdiction, the right to hold courts, had been passing into private hands' for 'some time before the Norman Conquest'.<sup>66</sup> He suggested that 'in the eighth or even in the seventh century' there were in England people who had jurisdiction within their territories' and that 'a royal grant of land in the ninth and tenth centuries generally included, and this as a matter of "common form", a grant of jurisdiction.'<sup>67</sup> Thus in conclusion, 'The facts of feudalism seem to be there - what is wanting is a theory which shall express those facts. That came to us from Normandy.'<sup>68</sup>

Ten years later, in the **History of English Law**, Maitland had not changed his views on the basically Germanic origins of English law. The law that prevailed in England before the Norman Conquest was 'in our opinion...in the main pure Germanic law.'<sup>69</sup> Thus 'Coming to the solid ground of known history, we find that our laws have been formed in the main from a stock of Teutonic customs, with some additions of matter, and considerable additions or modifications of form received directly or indirectly from the

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<sup>63</sup>Maitland, **Constitutional**, 44

<sup>64</sup>Maitland, **Constitutional**, 148

<sup>65</sup>Maitland, **Constitutional**, 148

<sup>66</sup>Maitland, **Constitutional**, 151

<sup>67</sup>Maitland, **Domesday Book**, 282

<sup>68</sup>Maitland, **Constitutional**, 151

<sup>69</sup>Maitland, **History**, I, xxix

Roman system.<sup>70</sup> The original Anglo-Saxon impetus was increased by later waves of other Teutonic sources. 'Now each of these Germanic strains, the purely Anglo-Saxon, the Scandinavian, the Frankish' was important, and it is difficult to measure their relative influence.<sup>71</sup> Thus the picture that is painted fits very well with that of Maitland's predecessors. There are Montesquieu's early Germanic roots. There is Tocqueville's 'prodigious similarity', earlier than Tocqueville argues, namely in the eleventh century between England and northern France. Maitland's vision is balanced, providing both a picture of continuity and change, similarity and difference. The early Germanic origins are particularly important, as we shall see, for Maitland was able to show that Germanic law and social structure contained unusual attitudes towards property and family relations.

In this vision of a mixture of continuity and change, Maitland explicitly attacked the increasingly dominant evolutionary paradigm of the post Darwinian era, which, perverting Darwin's central ideas, suggested a set of necessary 'stages' through which all societies had to move. The rejection of this framework helps to explain how he followed the undogmatic and open-minded tradition of Montesquieu, Smith and Tocqueville. In his **History of English Law** he writes that 'To suppose that the family law of every nation must needs traverse the same route, this is an unwarrantable hypothesis. To construct some fated scheme of successive stages which shall comprise every arrangement that may yet be discovered among backward peoples, this is a hopeless task. A not unnatural inference from their backwardness would be that somehow or another they have wandered away from the road along which the more successful races have made their journey.'<sup>72</sup> He explicitly rejected a unilineal, or single set of stages, of progress, the late nineteenth century gospel, writing for instance in relation to the question of women's status in society that he could not start the investigation 'until we have protested against the common assumption that in this region a great generalization must needs be possible, and that from the age of savagery until the present age every change in marital law has been favourable to the wife.'<sup>73</sup>

Maitland's central attack on the doctrine of evolutionary stages, comes in **Domesday Book**. He points out that the anthropologists of the time are divided on the question, but 'Even had our anthropologists at their command materials that would justify them in prescribing a normal programme for the human race and in decreeing that every independent portion of mankind must, if it is to move at all, move through one fated series of stages which may be designated as Stage A, Stage B, Stage C and so forth, we still should have to face the fact that the rapidly progressive groups have been just those

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<sup>70</sup>Maitland, **History**, I, xxx

<sup>71</sup>Maitland, **History**, I, xxxi

<sup>72</sup>Maitland, **History**, II, 255

<sup>73</sup>Maitland, **History**, II, 403

which have not been independent, which have not worked out their own salvation, but have appropriated alien ideas and have thus been enabled, for anything that we can tell, to leap from Stage A to Stage X without passing through any intermediate stages. Our Anglo-Saxon ancestors did not arrive at the alphabet, or at the Nicene Creed, by traversing a long series of "stages"; they leapt to the one and to the other.<sup>74</sup> He continued that 'in truth we are learning that the attempt to construct a normal programme for all portions of mankind is idle and unscientific. For one thing, the number of portions that we can with any plausibility treat as independent is very small. For another, such is the complexity of human affairs and such their interdependence that we can not hope for scientific laws which will formulate a sequence of stages in any one province of man's activity. We can not, for instance, find a law which deals only with political and neglects proprietary arrangements, or a law which deals only with property and neglects religion. So soon as we penetrate below the surface, each of the cases whence we would induce our law begins to look extremely unique, and we shall hesitate long before we fill up the blanks that occur in the history of one nation by institutions and processes that have been observed in some other quarter. If we are in haste to drive the men of every race past all the known "stages", if we force our reluctant forefathers through agnatic **gentes** [groups based on the male line] and house-communities and the rest of it, our normal programme for the human race is like to become a grotesque assortment of odds and ends.'<sup>75</sup>

What alternative model of change, then, can Maitland offer? He does not usually address the problem directly, but often indicates obliquely how one might use an organic growth model, yet without any **necessity** for things to have occurred in a certain way. An illustration of this approach is shown in his treatment of one of the central and enduring features of English history, the system of local government. Maitland writes that 'Certainly, to any one who has an eye for historic greatness it is a very marvellous institution, this Commission of the Peace, growing so steadily, elaborating itself into ever new forms, providing for ever new wants, expressing ever new ideas, and yet never losing its identity...we shall hardly find any other political entity which has had so eventful and yet so perfectly continuous a life.'<sup>76</sup> Maitland describes here, in a delicate balance, both 'newness' and 'identity' over time, an institution whose history is both 'eventful' and yet 'continuous'. Such an approach allows us the flexibility to admit that by a strange paradox things can both remain the same and also change.

The effect of this approach was to make it possible to examine both continuity and change without being forced to project back a necessary course of 'stages'. For example, this dissolved the 'great break' theory of the change between the thirteenth and nineteenth centuries. In Maitland's hands the

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<sup>74</sup> Maitland, **Domesday Book**, 345

<sup>75</sup>Maitland, **Domesday Book**, 345-6; for another similar long attack, see Maitland, **Collected Papers**, III, 294-9.

<sup>76</sup>Maitland, **Collected Papers**, I, 470

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supposed structural transformation between a 'feudal/peasant' 'stage' of English history, which then was replaced by a 'modern/capitalist' stage through the 'revolution' of the sixteenth and seventeenth century evaporated. He pushed back the deeper structural continuity to the thirteenth century and earlier. He thus documented and expanded Tocqueville's insight that England was a quite 'modern' society by the seventeenth century by showing how it was similarly 'modern' back to the thirteenth century and before.

1. Maitland, **Collected Papers**, II, 418

2. Maitland, **Collected Papers**, II, 418

3. Maitland, **Selected Essays**, 98