

OCCASIONAL SERIES

Conversations with Emeritus Professor Stroud Francis Charles (Toby) Milsom: A Journey from Heretic to Giant in English Legal History

Abstract: Lesley Dingle, founder of the Eminent Scholars Archive at Cambridge, gives a further contribution in this occasional series concerning the lives of notable legal academics. On this occasion, the focus of her attention is Stroud Francis Charles (Toby) Milsom QC BA who retired from his chair of Professor of Law at the University of Cambridge in 2000 after a distinguished career as a legal historian at the universities of Oxford, London School of Economics and St John's College Cambridge. His academic life and contentious theories on the development of the Common Law at the end of the feudal system in England were discussed in a series of interviews at his home in 2009. At the core are aspects of his criticism of the conclusions of the nineteenth century historian Frederick William Maitland, upon which the teaching of the early legal history of England was largely based during much of the 20th century. Also included are insights into his research methods in deciphering the parchment Plea Rolls in the Public Records Office, and anecdotes relating to his tenure as Dean at New College Oxford (1956–64) as well as associations with the Selden Society: he was its Literary Director, and later President during its centenary in 1987. Professor Milsom also briefly talked of his memories of childhood during WWII and his inspirational studies as a student at the University of Pennsylvania (1947–48).

Keywords: legal history; academic lawyers; biography

Of the eminent scholars I have had the pleasure of interviewing, none have spent their entire careers questioning and probing the very foundations of their chosen speciality so closely as Emeritus Professor of Law Toby Milsom.¹ In this respect, his researches have been a single-minded pursuit of not just “facts” hidden in the mediaeval records he painstakingly interpreted, but of the social system that generated them, and what the legal process, to which they related, was trying to achieve. As a consequence, he had to explore the territories of both legal and social historians, and inevitably crossed swords with the occupants of each. Milsom was a self-proclaimed “heretic and lonely dwarf”, but posterity is certain to look upon his legacy as the creation of a giant.

During the course of four lengthy interviews with Professor Milsom at his home in Newnham, Cambridge in late 2009, certain traits stood out that illustrate aspects of his effective, forensic style of legal research and which I shall emphasise from time to time:

pragmatism, propensity to work alone, depth of interest in F. W. Maitland, single-mindedness, self-deprecation, and a pervading sense of humour and fun.

ACADEMIC ROOTS

Stroud Francis Charles (Toby) Milsom was born on 2nd May 1923 in Merton, Surrey. From a relatively early age he decided to follow a career in the natural sciences, being good at both chemistry and physics at school. Also, since his father² had studied chemistry (later becoming Secretary at the London Hospital in Whitechapel), and his maternal grandfather had been a doctor, there was a legacy of scientific learning in the family. Sadly, this was cruelly dashed when Toby arrived at Trinity College in the autumn of 1941 to start his studies and found himself barred from the Science Tripos because his mathematics mark was not sufficiently high. Ultimately, he settled on

law as only his third choice. Even sixty-two years later, after his revelations had sent seismic shocks through the fabric of English legal history, he still dreamt of his lost ambitions. “[As] one who turned reluctantly from natural sciences to the law and who never quite suppressed a hankering for test tubes”.³

Understandably, Toby Milsom’s abrupt change of academic course on arrival at Cambridge was a seminal moment for his career and expectations. For legal history, it was a contingent event of great importance whose resultant legacy re-shaped our understanding of the evolution of the common law, and more generally how to interpret legal developments in social mileaux that are poorly-understood. To have reached this point, however, Toby explained that his very presence at Trinity College had itself been dependent upon an earlier contingency that had prevented his being called up for active service at the beginning of the war. He talked about this at length, and was very matter-of-fact about a brush with death in which he sustained a serious head wound in his boyhood, leaving him with brain damage from which he was lucky to survive.

During this critical incident, Toby was fortunate to have been treated by the pioneering Radcliffe neurosurgeon Professor Cairns⁴ who rushed down to Plymouth to examine his injury.

“I could hear what he was saying, which wasn’t a great comfort to me....Yes well we have torn away a bit of brain, and I heard this, but I rationalised brain into membrane. I was sent home and a dressing was done on my forehead every day for a year, and it wouldn’t heal. My nose dripped, and eventually somebody had the wit to put a test tube under and find out what it was. It was cerebral spinal fluid, so I had a puncture as it were. So from the London Hospital I was taken to the Radcliffe Infirmary in Oxford where he [Cairns] opened me up and mended it with a sort of puncture repair kit....I still didn’t realise how serious it was, how lucky I was actually. I was in and out of hospital for about a year....I then went back to school.”

Cairns eventually ensured Toby’s complete recovery – much against the odds in 1939 when nearly all his patients survived the operation, but hardly any survived much longer. The condition made Toby unfit for active military service – “I had call-up papers but of course they couldn’t call me up” – so perhaps he was spared the fate that befell his brother⁵. Thus diverted, he arrived at a war-time university shorn of most of its staff and students, where he received his second nasty shock.

The final orientation of Toby Milsom in the direction of mediaeval English law took place under the influence of his final year Director of Studies, Harry Hollond⁶ (during 1943–44), who had just been appointed Rouse Ball Professor of English Law, and “who said that he was a legal historian. He never wrote anything about anything as far as I know. Among the Fellows of Trinity in those days writing was somehow deemed a bit *infra dig*.”

Once graduated, there followed an hiatus of three years, while Toby served the last year of the Second



Photo 1: Professor Toby Milsom with Professor Sam Thorne, Cambridge Massachusetts, 1968

World War in a Naval Intelligence unit housed in Nissan huts on the Balliol cricket pitch on Jowett Walk in Oxford. Immediately following the war, he studied and qualified for the Bar, but decided not to practise, choosing to sally forth into the esoteric byways of legal history by studying under Professor George Haskins at the University of Pennsylvania (Penn Law, 1947–48). Toby had won a Harkness Commonwealth Scholarship, and on his first visit to the USA his eyes were opened both to the financial largesse of American universities, and their more expansive attitude to the way law is practised: “the American legal system still has I suppose....the spirit of free enterprise or something, which English lawyers have rather lost. We’re all a bit hidebound and they go for it, which is fun.” He had “a lovely time at Penn Law School.”

Toby took maximum advantage of his visit to the USA, and over the next nearly four decades returned across the Atlantic on no less than twenty occasions to teach and give lectures: New York University (5), Yale (9), and Harvard, Indiana, Colorado, Columbia and Chicago, mainly on English legal history. It was during these that he finally met and became friends with Professor Sam E. Thorne⁷ of Harvard with whom he had originally hoped to work on his first visit in 1948, but who had somewhat perversely been in England at the time. He thoroughly enjoyed these visits, summed up by some remarks he made about the students he encountered at Yale. “It’s always fun, because the students have no idea at all about legal history, and don’t

really want to know. But theyask very difficult questions, and that's good, makes one think."

Toby Milsom came back to Cambridge in 1948 from his visit to Penn Law with an award winning dissertation that, by the time he landed in England, had scooped him a Trinity Prize Fellowship ("to my astonishment.....Harry Hollond's doing I think"), followed quickly by the Cambridge Law Faculty Yorke Prize. A teaching post at Trinity materialised ("I think it was old Winfield⁸ who persuadedTrinity to take me on as a Staff Fellow"), putting his academic career on a firm foundation. He could now pursue English legal history, shielded from the necessity of focussing on more practical or popular topics.

After hugely successful stints at Oxford (New College: Toby left Cambridge in 1955 for a short stint at the LSE in 1955–6), and the chair of Legal History at the London School of Economics (1964–76, where he succeeded the famous Professor T. F. T. Plucknett⁹), he returned to Cambridge (St Johns College) as Professor of Law in 1976. Here he cemented his reputation as a scholar and thinker on the early development of the Common Law, retiring in 1990.

Throughout his career he was also heavily involved with both administrative and research matters relating to legal history, being a Member of the Royal Commission on Historical Manuscripts (1975–98), and holding two influential posts in the Selden Society¹⁰ – Literary Director (1964–80), and President (1985–88).

The Selden Society was the venue for the publication of Toby Milsom's first book (with the late Elsie Shanks, 1963¹¹), and with its strong support from the English establishment, including royal patronage, the society enjoys much interest in the USA. Consequently, when the centenary year coincided with his presidency, Toby Milsom had a grand occasion on his hands: "an awful lot of jollification which somebody had to manage....we had an enormous party and, because it was known that the Duke of Edinburgh was going to be there, hundreds of our American members crossed the Atlantic to be present at this party, and I'd never seen them [before], I had no idea who they were...I said to the Equerry, look, I'm not going to be able to introduce these people. "Don't you worry", he said "just let him [the Duke] loose", which I did and he was wonderful. He spent a happy evening talking to all kinds of peopleNot just "hello, how are you?" but actually little comments, he was really wonderful."

Professor Milsom's verdict on his time as President of the Selden Society, of which the centenary was the highlight – "it was quite fun." One interesting aside to Toby's presidency was his portrait in the 1987 Selden Society centenary volume, a striking photograph for which he sat in 1956, the year he left Trinity and joined the LSE.

"There was a studio photograph of me done...in the early 1950s, and if I've got a copy of that I'll dig that out. It was extraordinary. When we were in London I used to get my hair cut in a place in Bond Street, and the entrance to the barber's had in it a display window of a professional photographer. She was a very famous photographer called Lotte Meitner-Graf.¹² I was terrified because she didn't have great

studio cameras - she used a Rolleiflex and to get her angles she would stand on packing cases and that sort of thing - this old lady swaying to and fro. I think probably I was still in Trinity at that time, and told her this. She told me all about her nephew-in-law, a physicist called Otto Frisch¹³ who was a Fellow of Trinity and a very famous man. She was very well connected....had all kinds of famous relatives, and she was a lovely lady actually. My wife took me on my first visit, and the old lady said "Well that's you done; now I want to do your wife" and she took some beautiful photographs of Irène, who was of rather striking appearance."

DWARVES, GIANTS AND HERESIES: COMING TO TERMS WITH HISTORY

During the course of his career, Professor Milsom published eight books (including two editions of his seminal *Historical Foundations of the Common Law*) and all were primarily anchored in his own meticulous research on the mediaeval records that he spent so many years deciphering in, *inter alia*, the Public Record Office in Chancery Lane. One only has to look at the detail in his footnotes to the slim, but dense *The Legal Framework of English Feudalism*, for example, to grasp the depth of his immersion in the subject and the scholarship that he devoted to his cause. His was a finely honed intellect, driven by vision, which was to divine and rectify the misconceptions, as he saw them, in the then-current interpretations of the roots of the English Common Law.

It is not possible to read any of Professor Milsom's scholarly presentations without immediately coming face to face with both the works and the personality of the legal historian Professor F. W. Maitland¹⁴. Maitland was the prime author of the magisterial *Pollock & Maitland*¹⁵ text from which all students in the latter half of the 20th century (in England at least) were taught English legal history, and which held the place in law schools that the Bible might hold in churches. It was the accepted wisdom and last word, because it had been, effectively, the first word – as Milsom put it "[before Maitland] there was no legal history worth the name¹⁶". Maitland strode the stage like a giant, and Toby had, like all his peers, been brought up on the iconic work. It is ironic, therefore, that he expended so much of his energies endeavouring to identify, and then flush out, its myths. So deeply embedded in the fabric of perception of lawyers and historians of late feudal England had they become¹⁷, that when he first challenged its tenets, Toby Milsom was the first to admit to his becoming a heretic, albeit a pious one. In his introduction to *Pollock & Maitland* Toby gives the key to his realisation of where Maitland's misunderstanding lay – "It is what was assumed that we need to know, not what was said",¹⁸ and he spent much of his life sifting through the records of mediaeval law to find clues as to what had been assumed.

I mentioned earlier that Toby Milsom was self-deprecating, and this was most evident in his dealings with the

legacy of Maitland. To Milsom, Maitland was a giant and “his work on the history of English law...largely untouched, untouchable¹⁹”. He said to me that “F. W. Maitland invented English Legal History and wrote the book from which we’ve all copied ever since,” considering himself merely a dwarf on the giant’s shoulder.²⁰ Consequently, his task, in undermining some of the foundations of the grand Maitlandian historiographic edifice, was a solitary (perhaps unpopular) one and Toby clearly saw himself in others’ eyes as an unfashionable eccentric, almost someone to be pitied, and drew a parallel with a “lonely figure in some Bateman drawing – the man who thinks that Maitland was wrong”.²¹

That was Milsom’s dilemma, and he summed up what became an ongoing theme permeating the fabric of his research: “For me the question [was] how [an] historical reconstruction can be so convincing, even so beautiful, and yet, as I [had] no doubt that it is, fundamentally wrong?”²² At the heart of the problem was the belief that Maitland had misconstrued the meaning of the feudal concept of “seisin”, as used in the Plea Rolls and Yearbooks of the late twelfth century. Essentially, Toby recognised that the notion embodied a relationship between a lord and his man that entailed tenure (he used the analogy of a university professor having tenure of his chair), while Maitland had fallen into the trap of assuming that seisin implied an “abstract idea of the same nature as our [i.e. modern] “possession”.²³ From this flowed so much of the controversy around which Toby wrote his books and articles. When I asked him to paraphrase to one not trained in English land law the implications of the crucial Assize of Novel Disseisin of Henry II²⁴, critically, dealing with the concept of being disseised and around which so much of the heat and light in this epic notional struggle revolved, he did so in a way which immediately reminded us that lawyering has changed little over eight hundred years: “the Assize of Novel Disseisin has an extraordinary history - from starting as a kind of grandiose peace keeping device, it ended up as the forum of the way in which most land disputes were settled. It’s not that chaps went and threw each out and then had a fight, as it were. Very often a disseisin would be dreamed up in the lawyer’s office in order to start a law suit.”

It is a salutary thought that from such a legal manoeuvre, if Toby Milsom is to be believed, the English feudal society unravelled, even if the assize had been designed to shore it up. In contrast, the giant, as the dwarf points out, had already discounted the feudal system as a crumbling institution and had determined that the Assize of Novel Disseisin was designed to counter the deteriorating situation. Toby summed its destabilising effect as “What had been done must now be undone in favour of what ought to have been done”²⁵ This difference lies at the core of his one-sided dispute with Maitland over feudalism²⁶, and forty years on from formulation, it still splits opinion and raises issues that go beyond legal into social history (for example, in 2004 Ibbetson suspected, of what he called Toby’s most

heinous heresy, that it was a possessory remedy²⁷, as Maitland had assumed).

In addition to this intense commensal relationship with Maitland’s legal work, there was a second element that caused Professor Milsom concern: Maitland’s memory. An example of this was the unease expressed when he was preparing for his 1980 British Academy Lecture On a Mastermind.²⁸ Toby felt that Maitland would have resented “anybody poking about in his past”, even “if only by way of explaining his admiration for the man as well as his mind”.²⁹ “It was quite a challenge composing that lecture, because I had a pretty clear picture of Maitland as a very private person but I had to do it, so I poked.” It also shows in his account of the occasion (in 2001) when he was asked to unveil the F. W. Maitland Memorial plaque in Westminster Abbey.

“There were a lot of people, as you can imagine, and the Dean³⁰ ...conducted a little service. The plaque is set into the floor, so what I had to do was to tear away a sort of green baize cover, a bit *infra dig* actually. But I’m sure Maitland would be pleased to be there, as it were. He’s actually buried in the Canary Islands where he died and I had to do a bit of propaganda – there was a school of thought wanting to dig him up and bring him back, and I was terribly against that; I thought he ought to be left where his daughter had put him...Yes it was a funny do, that.”

These strands to Toby Milsom’s interest in things Maitlandian, come to a head in his assessment of Maitland’s later years. As early as 1968, Toby had hinted that “attentive reading [of Maitland’s work] can sometimes detect suspicions...[of his vision of the feudal world]...but that he did not have time to follow them up”.³¹ This refers to the time Maitland spent in his self-imposed exile on Grand Canaria (for health reasons), where he utilised his last years writing a book³² on the life and correspondence of his friend, and his wife’s uncle-in-law, the author Leslie Stephen.³³

I asked Toby if he thought Maitland could have solved more of the legal dilemmas that he left for posterity had he spent his time otherwise (Maitland died only two years after Stephen’s death in 1904).

“I think all that’s pure speculation. We do know that he was occasionally frustrated that he was in the Canaries and had to be there to stay alive, and all the stuff was in London,in his day there was photocopying of a sort, but it was very primitive and rather expensive, and I don’t think he managed to take much with him to work on.....The [material] on Stephen did take a great deal of time, but then of course he was deeply devoted to Stephen, partly because of his marriage. I wish he’d spent less time on Stephen and more time on the materials in London. But there you are. I mean people do what they think they ought to do, and he thought he owed it to Stephen and to his wife to get that job done....he corresponded with heaven knows how many people over Stephen. Everybody Stephen was known to have been in contact with or written to I think, he wrote and got material that way. So that it was for him a huge research effort.”

Maitland's wife Florence³⁴ had realised this, and implied that it hastened his end "Oh, I never realised what a strain of anxiety that book had been on him".³⁵ Also critically, Maitland's best student, who might have followed up his work on the plea rolls after his death (Mary Bateson)³⁶ herself died in 1906, so the line of investigation suddenly stopped and legal historians had to await Toby Milsom's genius half a century later for the subject to be re-invigorated.

MODUS OPERANDI

The single mindedness with which Professor Milsom approached his research is apparent with a moment's thought – the documents from which he gleaned his information had been written in scribes' shorthand in Latin or the Anglo-Norman dialect of mediaeval French. Given his scientific school background, I was intrigued to learn how he had acquired the necessary linguistic expertise from his arriving at Trinity College in 1941, to undertaking research for his first scholarly paper, which appeared in 1954.³⁷

His reply was remarkable. "I never set out to learn anything. If I had something that I had to make out then I had to make it out, it's as simple as that. So to that extent I just learned as I went along. There was a consolation, however: the law had the one great advantage over, for example, history or English or most other subjects, in that one thing follows from another. Or more or less...that was comforting to one who would have liked to have been a scientist. Actually I enjoyed it." It was typically self-effacing, but at least Toby was prepared to admit there were some obstacles to be overcome in deciphering the old records: "They're hard work and the writing is tiresome. Once one's learned it, it's not as tiresome as one might think, but it is highly abbreviated, so you get the first two letters of a word and then a squiggle meaning there's more."

The physical materials with which he toiled were also unusual. "I did a lot of work on plea rolls, and those are on parchment. You take a sheepskin and write on both sides of it and when you fill it up you put another on top. If you're me, it all ends up with your going into the Public Record Office and asking ...for the roll for whatever term and year it is, and two brown coated men stagger in carrying on a stretcher between them a sort of coffin like object, which is the roll for one term. [This] may be up to 1000 membranes and weighs a ton.... Parchment was expensive so they used both sides. So that when you've finished one side you get the strong men to turn the damn thing over and start on the backs."

For most of his career, Toby translated plea rolls in search of clues to divine the fundamental relationships between lord and man and the true mediaeval meaning of tenure, which lay at the heart of the heresies he was proffering.³⁸ This entailed constantly visiting the repository of the plea rolls, which were, "in the Public Record Office, now in Kew. In my day it was all in Chancery Lane³⁹ which was much more convenient than Kew. And it's all there. I doubt whether any society... oh, the Chinese probably, have



Photo 2: Professor Milsom with Prince Philip, HRH Duke of Edinburgh, at the Selden Society Centenary Celebrations, 1987

kept their records better than us,...otherwise we're the best in the world.... Chancery Lane [had] an enormous round room with a big round table in the middle, and I suppose nearly 20 people could sit at this table and work. My plea rolls were never popular because when you've read a bit you flick it over to get the next bit, and the dust of ages is shot into the face of the person opposite. There's nothing you can do about that except avoid sitting opposite me."

Such detective work was not without its pitfalls. One of the reviewers of Toby's last book *A Natural History of the Common Law*⁴⁰, (Elliot Gardner⁴¹), compared his *modus operandi* in Darwinian terms to a natural historian analysing a somewhat patchy fossil record. When I asked him if could remember moments of making any significant discoveries he said, "I do remember once in the round Reading Room of the old Public Record Office, reading something and suddenly an awful lot of things fell into place. I was so excited I got up to walk around in the corridors, [but] I turned into the corridor before I was actually through the door with the result I got the most colossal bang on the head. That brought me to my senses."

On the possibility of future research adding to his own work, I reminded Professor Milsom that when he gave his eulogy to Maitland in Westminster Abbey in

2001⁴², he had drawn attention to Maitland being spurred to action by a visiting Russian academic who said that a wealth of data lay in England that no one had bothered to analyse properly. I asked him if he thought additional records waited to be unearthed. *"I think they've probably mostly been discovered. [However], there's probably a fair number of local records of either Manor Courts or County and Hundred Courts that people know about, that haven't [been] used properly yet. They tend to be in provincial record offices, not very comfortable to work on. So I guess people probably just leave them alone, as I did."*

HAVING FUN AND OTHER REMINISCENCES

A feature of our conversations, as listeners to the original audio records will soon discover, is the humorous, almost jocular manner in which Professor Milsom told his story. He was also honest and forthright, giving some of his reminiscences a quality that indicated a scholar who was used to speaking his mind, but fairly. It is his delightful laugh however, that will immediately strike listeners to the audio records, and it reflects a side of his character that can be epitomised by his description of his first visit to the USA at Penn Law – *"...which [was] fun."*

Trawling through his interviews there were sixteen occasions on which Toby Milsom referred to various aspects of his career as having been *fun*, and one can only conclude that he found most aspects of his research rewarding and entertaining. He used the word to describe lectures he received from Professor Bailey⁴³ as an undergraduate, his work in Naval Intelligence during the war, aspects of his teaching inquisitive students, committee work on the Manuscript Commission, his presidential duties in the Selden Society, naturally, his various overseas trips, and even the laborious examination of plea rolls in the Public Record Office in Chancery Lane. Toby Milsom seems to have found "fun" in all these things: he liked his work. Perhaps that is why he was so successful and dedicated, even though by his own admission, he worked mostly alone – *"I was never a very gregarious person.... I never did much legal history in my office or room in College or whatever, it all went on at home,"* and of his colleagues at LSE *"I don't think I had any, if you know what I mean. I was pretty much left to my own devices."*

Toby Milsom's sense of "fun" resulted in several very amusing anecdotes, and one is a particular favourite. It was told apropos his memory of Professor Emlyn Wade⁴⁴, in Toby's early years at Cambridge.

"I got to know him quite well because the Foreign Office allowed itself to get into a cockeyed dispute with the French Government over some miserable rocks in the English Channel. They're near Jersey and Guernsey but they're separate. There was a dispute over the ownership of these rocks which... did carry very valuable fishing rights. Instead of doing a nice treaty and just dividing up the fishing rights, the Foreign Office foolishly decided to take it to the International Court. The legal adviser to the Foreign Office at the time, a

man called Sir Eric Beckett⁴⁵ had been a pupil of Emlyn Wade's. He yelled to Emlyn for help and Emlyn yelled to me. So Emlyn Wade and I spent months and months over these wretched rocks. We were taken to see them. We went in the States of Jersey's state barge, which wasn't a very stately vehicle, and we had with us a couple of marines because you never know about what those damn Frenchies might not get up to. We landed on the one of these rocks that had a flagpole, and one of the marines was sent to raise the flag. It was a boiling hot day and the poor chap was struggling with this damn thing and it wouldn't go up. The rest of us decided to go in for a swim. I was swimming next to the Bailiff of Jersey who was a real Jersey grandee, Sir Alexander Coutanche⁴⁶, VC twice over I think. Heaven knows how many other decorations – wonderful, good old fashioned gent. He and I were swimming in the sea when quite suddenly he vanished, and I've always been proud of guessing what had happened. That the marine had won, the flag was fluttering at the flagpole, and the Bailiff had come to attention in the water and gone down. He bobbed up again all right. The whole thing was tremendous fun."

Another amusing incident came from his time at New College Oxford (1956–64), when he was College Dean. He recounted *"the night porter ringing me up at two in the morning and saying – he was a man of few words and his one word on that occasion was – "Explosions!". So, I thought this sounded serious enough for me to go. It transpired that somebody had spent a fruitful evening with those bird scarer things, which are strung out along a fuse and, if you were skillful, you could easily throw them up to hang over a gargoyle. And there were these blasted bangs going off the whole time, and I told the night porter to lurk in a dark corner while I walked round. But the dark corner he had to lurk in was one where they'd left a string of these damn things. He wasn't best pleased. Needless to say, all this was enemies from Magdalen College and I don't like to think what happened to Magdalen the next night!"*

One of the hallmarks of Professor Milsom's interviews was his frank, dry reminiscences of some of the personalities who crossed his path. One that warrants re-telling here relates to a highly-regarded legal historian with whom he was partially contemporaneous, and who himself had studied Maitland's writings closely. By the time Toby met Professor Plucknett he was near the end of his career, but he was well-acquainted with him from his time at the LSE.

By 1963, Plucknett had, *"became senile, to put it brutally, and LSE eventually forged his signature on a letter of resignation. But it didn't occur to him that he ought to resign from the Selden Society, and so I and two friends – Derek Hall⁴⁷, now dead, who was in Oxford, and David Yale⁴⁸ ... become, as it were, coadjutors to the failing Bishop. When he died each of us pointed the finger, but the two of them ganged up on me and pointed at me, so I got stuck with being Literary Director [of the Selden Society]."*

Further reminiscences by Toby of Plucknett's later years were both poignant and tender. Recalling an address he gave to the British Academy: *"They invited old*



Photo 3: With Sir John Baker at the occasion of Sir John's daughter's wedding, Cambridge, 2003

Plucknett to speak at one of their dinners. I have this dreadful memory of him droning on interminably and I think we found out afterwards that he'd been reading his PhD dissertation. He was a very nice man, totally removed from the world.

His wife managed his life, I think, and had no idea what he did. So far as she was concerned he went off to business every morning. ... In his study, when a Selden Society volume got into proof, it would first come in galley proofs and he would string them at the top, like plea rolls these things were festooned all round his study. I think she dusted them."⁴⁹

Finally, Toby Milsom's verdict on his being appointed QC was nothing if not honest. When I asked him about the occasion in 1985 he replied: "Well of course it's totally meaningless. For real QCs it makes a big difference to their life in practice because, at any rate when I knew about these things, you couldn't have a QC unless you had a junior, and you had to pay the junior at least two-thirds of what you were paying the QC. So that taking silk was quite a gamble, you might find your practice more or less vanish. But for me this was just an honorary thing. Oh, there was a ceremony and a big dinner...and it was the then Tory Lord Chancellor Hailsham⁵⁰, and I was made to go and show myself in various Courts. I didn't have to do anything – just had to go in wig and gown and bow to the Judge and go out again. This

is apparently part of the routine. So it really meant nothing in my life. It was a nice gesture."

REFLECTIONS

During my interviews with Professor Milsom I sensed both pent-up scholarship and an intangible detachment. He had undertaken decades of diligent research and produced some profound analyses, but had now handed these over to his fellow scholars to make of them what they will. I could never lose the image of a thwarted scientist who had lent his analytical skills to the legal fraternity in exchange for a suitably challenging career that had also proved to be fun.

His almost indifference to popular approval was summed up nicely in his answer to a question I put about the audience for what he considered his most important work, *Historical Foundations of the Common Law*.⁵¹ "Well, Butterworth's commissioned it as a student book, so I suppose it was, but I was just writing for myself I'm afraid. And I think time has shown that students find it a very difficult book."

Similarly his attitude to teaching legal history. "It's always been a very optional subject and most people who are planning to make their livelihood at the law don't give a damn.....I quite enjoyed it....so, self-indulgence, really, but Trinity had given me a job so I didn't have to worry.....it didn't much matter whether I did something that people wanted or not. Nobody wanted legal history and they still don't." And while at LSE he taught legal history "for anybody who wanted it [but] there weren't many fools in the LSE who did want it."

Given this single-mindedness, one might be tempted to ask what relevance such studies might have for the workings of modern legal systems, and I asked Professor Milsom to elaborate. He was ready with an answer: "English Land Law is sort of deep frozen feudalism, to a large extent. There are all kinds of features of it that can only be explained in terms of its remoter history. If one was starting afresh, one wouldn't dream of doing that, but of course you



Photo 4: Professor Milsom photographed by the author at his home in Granchester March 2010

can't start afresh because far too much of the wealth of far too many people depends upon it, so... I shudder to think what a rational Frenchmen would make of a nice new, modern, shiny English land law."

He also offered the suggestion that we are currently regressing to a more feudal system than, for example, that with which Maitland would have been familiar in 1895⁵², and singled out the interference of local bureaucrats: "blasted planning officer...sort of latter day lord," and reflected that it might be an irreversible trend "since we seem to be persuaded that we have to regulate so much. Our great grandparents would be absolutely horrified. Really would be horrified I think – my old grandfather [used to say] It's my land me boy, it's my land."

This was a theme upon which he had already elaborated in relation to his main Maitlandian heresy, and the statement shows that his heretic, anti-establishment views can be projected into the very heart of the probable future development of the Common Law. It is worth quoting in full: "it comes down to the familiar difficulty of telling cause from effect...the heresy sees these [the

king's courts] as, in origin, external controls working upon the jurisdiction of lords, and generating abstract rights of property in the same kind of way as today the external control of the European Court is beginning to produce abstract "human rights". When a government unit ceases to be sovereign, whether feudal lordship or modern state, its practices cease to be conclusive".⁵³

My visits to Grantchester Meadows were always a delight, and the interviews with Professor Milsom invariably humorous, witty and he unfailingly charming, kind and self-deprecating. After a lifetime of forensic combat which entailed so much nuanced data, I asked Toby Milsom if he thought he had "converted" many of his fellow legal historians to his heretical views on the early development of the Common Law: "I've honestly no idea. I don't talk to anybody. I'm sure I haven't altered John Baker's⁵⁴ views on many things." A humble response from a scholar called recently "the most significant historian of English Law since Maitland".⁵⁵ It seems safe to say that the self-proclaimed dwarf, with his heresies, has taken his place with the giants of legal history.

Footnotes

¹ St John's College, specialising in mediaeval legal history. This account should be read in conjunction with further biographical details of Professor Milsom's life on the Eminent Scholars Archive website at: http://www.squire.law.cam.ac.uk/eminent_scholars/professor_toby_milsom.php Direct quotations from Milsom in the interviews are in italics.

² (1889–1970). Captain Harry Lincoln Milsom, 5th Battalion, Prince Albert's (Somerset Light Infantry) 1914–18 War.

³ In the Introduction to his book "A Natural History of the Common Law", Columbia University Press, (2003), p. xiii.

⁴ Hugh William Bell Cairns (1896–1952). He also attended Lieutenant-Colonel Thomas Edward Lawrence (1888–1935) - Lawrence of Arabia, who died in a motorbike accident, suffering serious brain damage, and Unity Valkyrie Mitford (1914–48). She was a prominent supporter of fascism and friend of Adolf Hitler and had tried to commit suicide in Germany in 1939.

⁵ Darrell Edward David Milsom (1919–40), RAF, killed on active service in the first months of the War.

⁶ Henry Arthur Hollond (1888–1974). Rouse Ball Professor of English Law 1943–50.

⁷ Samuel E. Thorne (1907–94), Professor of Legal History Harvard University (1956–78), Librarian of Yale University Law School (1945–56).

⁸ Sir Percy Henry Winfield (1878–1953), Inaugural Rouse Ball Professor of English Law (1928–43).

⁹ Theodore Frank Thomas Plucknett (1897–1965), Professor of Legal History, LSE (1931–63).

¹⁰ Founded by F. W. Maitland in 1887 and devoted to English legal history. It was established with the support of the judges, the Inns of Court, the universities and the legal profession in England, the United States and other countries. Queen Victoria was its first Patron and it continues to enjoy royal patronage.

¹¹ Shanks, E. & Milsom, S. F. C. "Novae Narrationes (Introduction, translation and notes)", Selden Society, volume 80 (1963).

¹² Lotte Meitner-Graf, (1898–1973), born in Vienna. Emigrated to England when the Germans invaded Austria in 1938. She photographed many celebrities, including politicians, authors, classical musicians, actors and scientists (including many Nobel Prize laureates) both in Vienna, and at her studio at 23 Old Bond Street, W1 London.

¹³ Otto Frisch (1904–1979), born in Vienna. Nephew of Lise Meitner (Lotte's sister-in-law), and the Jackson Professor of Physics, Cambridge (1947–72). Worked on the Manhattan Project (developing the atom bomb).

¹⁴ Frederic William Maitland (1850–1906), Downing Professor of the Laws of England, University of Cambridge 1888–1906.

¹⁵ "History of English Law, Before the Time of Edward I", 1st edition 1895, 2nd edition 1898, 2nd edition reissued with a new Introduction by S. F. C. Milsom, CUP, (1968).

Sir Frederick Pollock (1845–1937), Professor of Jurisprudence at Oxford (1883–1903), was a noted friend of U.S. Supreme Court justice Oliver Wendell Holmes, Jr., which boosted sales in the USA. (See below note 16, p. 261).

¹⁶ Milsom, S. F. C. "F. W. Maitland, British Academy Lecture on a master-mind" (1982) Proceedings of the British Academy, (for 1980) 56, 265–281 p. 281.

¹⁷ For instance in the works of Theodore Frank Thomas Plucknett (1897–1965).

Professor of Legal History, LSE, 1931–63, and Cecil Herbert Stuart Fifoot (1899–1975), Fellow of Hertford College, Oxford, who wrote "Frederic William Maitland: a Life", (1971).

- ¹⁸ See above note 15, p. xxvi.
- ¹⁹ See above note 16, p. 267.
- ²⁰ See above note 16, p. 281.
- ²¹ See above note 16, p. 267. H. M. Bateman (1887–1970) was a cartoonist and artist famous for his “the man who....” pictures featuring a genteel buffoon perpetrating some social gaff.
- ²² See above note 16, p. 274.
- ²³ See above note 16, p. 279.
- ²⁴ 1166.
- ²⁵ Milsom, S. F. C. *The Legal Framework of English Feudalism: The Maitland Lectures given in 1972* CUP 201pp see p. 66 (1976).
- ²⁶ See pages 245–246 of Milsom, “Pollock and Maitland”: a lawyer’s retrospect”. In: Hudson, J (ed), “The History of English Law: Centenary Essays on “Pollock and Maitland” (1996) *Proceeding of the British Academy* 89 243–259. Also mentioned in Milsom, “Maitland” (2001) *Cambridge Law Journal* 60(2) 265–270 p. 269. (Westminster eulogy to Maitland).
- ²⁷ Ibbetson, D. *Publication Review: “A Natural History of the Common Law”* 2nd Ed, S. F. C. Milsom. (2004) *Law Quarterly Review* 120 696–700 see p. 699.
- ²⁸ See above note 16.
- ²⁹ See above note 16, p. 267.
- ³⁰ The Very Reverend Arthur Wesley Carr, Dean of Westminster 1997–2006.
- ³¹ See above note 15, p. xxvii.
- ³² Maitland, F. W. “The Life and Letters of Leslie Stephen”, London: Duckworth & Co, (1906).
- ³³ Sir Leslie Stephen, KCB (1832–1904), author, critic and mountaineer; father of Virginia Woolf and Vanessa Bell
- ³⁴ Florence Henrietta, née Fisher (1863–1920).
- ³⁵ Spoken on the day Maitland died, and quoted in Fifoot, see note 17, p. 279.
- ³⁶ Mary Bateson (1865–1906), historical writer, published “Mediaeval England, 1066–1350” (1903).
- ³⁷ “Not doing is no trespass: a view of boundaries of case” (1954) *Cambridge Law Journal* 105.
- ³⁸ See above note 26, Milsom 1996, p. 246 and 256.
- ³⁹ The Public Record Office (PRO) was established in 1838. All records were transferred to Kew in 1997. The Chancery Lane building where Milsom worked is now the Maughan Library of King’s College London.
- ⁴⁰ See above note 3.
- ⁴¹ Lawyer at GaleX Wolf LLC, North Brunswick, New Jersey, ex. Columbia University. Gardner, E. “Reading the fossil record: a new look at old law” (2004) *Cardoza Law Review* February 1245–1249.
- ⁴² See above note 26.
- ⁴³ Stanley John Bailey (1901–80), Rouse Ball Professor of English Law (1950–68).
- ⁴⁴ Emlyn Capel Stewart Wade (1895–1978), Downing Professor of the Laws of England (1945–62).
- ⁴⁵ Sir (William) Eric Beckett (1896–1966), QC. Chief Legal Adviser to the Foreign Office. Led UK legal team before ICJ in the Corfu Channel case, (*UK vs. Albania*) 1949.
- ⁴⁶ Sir Alexander Moncrieff Coutanche, Baron Coutanche (1892–1973). Attorney-General and Bailiff of Jersey (1935–61). Knighted 1946 after liberation of Jersey from German occupation.
- ⁴⁷ Then President of Corpus Christi College, Oxford
- ⁴⁸ D. E. C. Yale, former President of the Selden Society. Reader in English Legal History, Fellow of Christ’s College, Cambridge.
- ⁴⁹ See also Milsom, S. F. C. “Theodore Frank Thomas Plucknett, 1897–1965” (1966) *Proceedings of the British Academy* 51 (for 1965) 505–519.
- ⁵⁰ Lord Hailsham of St Marylebone, (1907–2001), born Quentin Hogg. Lord Chancellor, 1970–74 and 1979–87.
- ⁵¹ First Edition 1969, Second Edition 1981.
- ⁵² See above note 16, p. 279.
- ⁵³ See above note 16, p. 278.
- ⁵⁴ Sir John Hamilton Baker, Professor of English Legal History (1988–98), Downing Professor of the Laws of England (1998–2011). Milsom’s co-author of “Sources of English Legal History” London Butterworths (1986).
- ⁵⁵ See above note 27, p. 696.

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Biography

Lesley Dingle is the Foreign and International Law Librarian and Founder of the Eminent Scholars Archive at the Squire Law Library, University of Cambridge. She is a Senior Member of Wolfson College.

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CURRENT ISSUES

The Future of Legal Research

Abstract: This article is based on a presentation given by John Bell at the annual conference of The Society of Legal Scholars (SLS)¹ held in Bristol in September 2012. His talk reflects the immediate challenges facing law schools, academic lawyers and the legal publishing industry in the light of the recent Finch Report² and the subsequent response by the Government³ whereby it has adopted an open access policy to publicly funded research.

Keywords: higher education; funding; open access; legal publishing; academic

INTRODUCTION

On 16 July 2012, the UK Government announced that, in response to the Finch Report, it had decided to adopt an Open Access policy to publicly funded research. This means that research which is publicly funded (by research grant from a research council or government department, or by public funds, such as QR (Quality Research) research grant from the Funding Councils) will have to be available for free electronically, after a short period for the publisher to gain money from it. This is known as “Gold Access”. Basically, instead of journals being funded by subscriptions from libraries, people and firms, they will be funded by payments from the author of the article. The UK Research



John Bell

Councils (RCUK) announced on the same day that all articles funded from their research grants which are submitted to journals after 1 April 2013 (seven months time from now!) will have to be open access. That means the publishers can only embargo the publication for 1 year before everyone will have access. The Funding Council will be consulting in the autumn on how this applies to research funded by its QR research grant. This policy applies only to journal articles. But it is quite clear that ‘Chapters in Books’ will follow suit and possibly academic monographs. This paper picks out some issues.

Academic lawyers come as both consumers and producers of open access works. Open Access is fundamentally a system which is in our interests, and it needs to work properly. The main concern is to ensure that the