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“From their Graves”: The Theme of Burial and the Work of the Modern Jurist in F. W. Maitland’s *Equity also the Forms of Action at Common Law*

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Abstract: This paper focuses on the “grave” in the scholarship of Frederic William Maitland. It focuses on Maitland’s later life, his relation to biographical writing and to his series of lectures published posthumously in 1909 as *Equity also the Forms of Action at Common Law*. The paper explores the theme of burial in Maitland’s lectures and draws some observations about the life of historical legal scholarship and the vocation of the modern jurist. Faced with the task of recouping a jurisprudence from the shifting sands of a system of positive law subject to constant mechanistic reform, Maitland remains attentive to the burial of law and to the peculiar life of its artifices and innovation.

Keywords: jurisprudence, jurist, grave, Frederic William Maitland, biography, equity

Photograph of the grave of Frederic William Maitland, Las Palmas Gran Canaria, courtesy of Betty Burgess, Holy Trinity Church and British Cemetery, Las Palmas, August 2014.

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1 “When the sky is at its bluest”

The body of one of England’s most celebrated modern jurists, the legal historian Frederic William Maitland, lies in a grave in the English Cemetery in Las Palmas, Gran Canaria. Due to the ill health he suffered in the later years of his life Maitland had sought regular refuge from the English winter in the Canary Islands. It was to that destination that he travelled from Cambridge in December 1906 and where he died and was buried that same month at the age of 56 in what his biographer C. H. S. Fifoot described as that “little English cemetery close to the sea.”¹ In relation to Maitland’s acclaimed body of scholarship – which was itself something of a unique excavation of the body of common law from its English soil – the resting site of the body of the scholar himself seems to serve as no more than a sidenote. In Maitland’s case, it tells us relatively little about his home, his family, his work, or even the object or inspiration of his scholarship. Warmed by the remote Canarian sun over the days to come, Maitland’s grave today enjoys a peaceful distance from the scenes of his scholarly and professional endeavours (whether at Cambridge where he was professor or Lincoln’s Inn as lawyer) no less than from those same sources of illness that afflicted him during his lifetime. The grave – reticent, still, enduring and isolated as it must be in its island setting – reveals no more secrets to a scholar in search of thoughts and truths that we look for normally only in the full published written words of its occupant.

The aim of this paper is neither to pay tribute to Maitland’s life nor to critique his work and its particular legacy for the study of legal history today. In the context of a collection of work contemporarily devoted to the theme “equity and the resources of critique,” the aim is a more modest one. It is to try to describe some of the contours to the peculiar vocation of the modern jurist as it is revealed in the scholarship that bears Maitland’s name and in particular in the two series of lectures published under his name as *Equity also the Forms of Action at Common Law*. Rather than critique this work from the perspective of assessing what it might contribute today to our understanding of particular jurisdictional questions in the law we still give the name “equity,” the aim is to give a more intimate picture of the office of the jurist through one particular individual who, in occupying this office, attempted to describe the history of English common law and equity, perhaps more distinctly than any other, as a

¹ Cecil Herbert Stuart Fifoot, *Frederic William Maitland: A Life* (Cambridge, MA: Harvard University Press, 1971), 280.

procedural and jurisdictional question.² Even if Maitland himself in this way cannot be considered a “critic” either in his own time or in ours, there is nonetheless a useful and sometimes neglected resource for a critique of law, in attending to the life of the jurist: a life that we tend to observe in the distance it has from coinciding with some work of jurisprudence. Legal critique might derive some encouragement in other words from a thought or science that, operating within its own resources, reveals the possibility of resisting the purely dogmatic function of law.

2 “One is almost ashamed to praise a dead master”

There are no other published lecture series delivered to a student audience on the topic of modern juridical procedure in all its technical elements and detail, to my knowledge, that captures the reader’s imagination quite like Maitland’s *Equity*, even over a century after the lectures were last delivered. But in reading this text, and doing so after Maitland’s death as anyone must do with a posthumously published work such as this, one cannot be content with the

² An attention to the concept of “office” and the office of the jurist in particular has gained some currency within critical legal studies in recent times. A large part of this return to the language of office has been to try to claim a way of critiquing ethical, moral and legal duties and subjectivity in a language that is neither restored to a transcendental understanding of the person (such as in the Kantian critique) or to a deterministic historical materialism in the Marxist sense. An office is institutionally arranged to be neither reducible to the individual that occupies or holds it or to the values (however universal) of the system to which it refers. It thus allows one to cast the person and the ethical self in the immanent, detotalised relation to law, morals, values which it tends to acquire more readily in the craft of jurisprudence than in moral philosophical knowledge. Authors interested in the persona of the “jurist” in this way then, have been interested less in the biographical detail of more or less exceptional exponents of legal knowledge, than in the shape of the conduct and form of institutional life that has made it possible to take up a relation to laws as a relation of study or of science. See especially Shaunnagh Dorsett and Shaun McVeigh, “The Persona of the Jurist in Salmond’s *Jurisprudence: On the Exposition of ‘What Law is...’*,” *Victoria University of Wellington Law Review* 38 (2007): 771–796; Anne Genovese and Shaun McVeigh, “Nineteen-Eighty Three: A Jurisgraphic Report on *Commonwealth v Tasmania*,” *Griffith Law Review* 24.1 (2015): 68–88; David Saunders, “The Critical Jurist and the Moment of Theory,” *Postcolonial Studies* 10.1 (2007): 77–92; Piya Haldar, “The Tongue and the Eye: Eloquence and Office in Renaissance Emblems,” in *Genealogies of Legal Vision*, eds. Peter Goodrich and Valérie Hayaert (Abingdon: Routledge, 2015): 152–178; Olivia Barr, “A Jurisprudential Tale of a Road, an Office and a Triangle,” *Law and Literature* 27.2 (2015): 199–216.

mere admiration of intellectual style and rigour displayed by its dead author – remarkable as it may be – nor with the reception and communication of purely technical knowledge that it imparts; nor even with the possibility of certain applications of theoretical insight to present questions and circumstances that it might offer. The scholarly work is itself posthumously only the sign of a life: no longer the life of the scholar who is dead, but the scholarship that was a life, that indeed *is* a life. If one is not quite content in other words just to follow the jurist in the outer signs of his text: the reasons, the style, the methods, the ordering, the meaning behind the words (all of which are of course historically contingent) but also more importantly in something of his calling to scholarship, the vocation and craft that he pursues in his text and through which moreover it reveals a thought no more contingent than the death of its author, one might hazard the hypothesis that Maitland's grave, his resting place, *does* indeed matter. Not in the sense to which I referred to at the outset of this essay, i. e. as context or as evidence of his life and work to which it offers still only a minor fragment, but in the sense of accounting for the series of offices occupied and assumed by an individual in his or her pursuit of law as a form of science: a jurisprudence. In relation to the merely fleeting and floating chains of signification and interpretation that posthumously haunt even his greatest written works, the grave makes a sign that sticks all the more resolutely to any scholar's deepest instinct and clearest sentiment.

To appreciate and appraise the work of a jurist such as Maitland in other words one must look to more than just the stable published body of work he has left us, but also to what is left of the unstable life that supported its scientific endeavours. This life is something that cannot simply be treated biographically. At the unveiling of a memorial tablet honouring Maitland in 2001 at Westminster Abbey, S. F. C. Milsom remarked that he was able to provide a tribute only to the “extraordinary man with whom I have been arguing for 50 years and not to the superhuman myth engulfing him.”³ And even Maitland's contemporary W. W. Buckland remarked that we were consigned to look for his genius only in what he has left in his writings.⁴ But of “a life,” Gilles Deleuze said that it was a sort of plane of immanence that avoided being hung up on any kind of transcendent hook: subject or object. This pure immanence which he called “a life,” he thought, might be better described in the fading moments of a sort of mean, insignificant, disreputable man, than in those of an individual of great standing

3 Stroud Francis Charles Milsom, “Maitland,” *Cambridge Law Journal* 60.2 (2001): 265–270, 265.

4 William Warwick Buckland, “A Personal Memoir,” in *Frederic William Maitland Reader*, ed. Vincent T. H. Delany (New York: Oceana Publications, 1957): 32–39, 39. This text originally formed the subject for an address to the Society of Public Teachers of Law at Cambridge in 1921.

and achievement. “The life of the individual gives way,” Deleuze wrote in the last essay he penned before his own death, “to an impersonal and yet singular life that releases a pure event freed from the accident of internal and external life, that is, from the subjectivity and objectivity of what happens: a ‘Homo tantum’ with whom everyone empathizes and who attains a sort of beatitude.”⁵ The tendency toward memorialisation of the life and achievements of a great man, a great scholar, misses in this sense much of the simple striving in existence that his work and his thought shares with the most irredeemable individual approaching his death: a striving that is beyond praise or blame since, as Deleuze goes on to note, “it was only the subject that incarnated it in the midst of things that made it good or bad.”⁶

About Maitland himself it was observed by Oliver Wendell Holmes, that “One is almost ashamed to praise a dead master for what he did in a field where he was acknowledged to be supreme. When his work is finished it is too late for praise to give the encouragement which all need, and of which the successful get too little.”⁷ Memorialisations of a great man see the deceased noted for having held some high office – Downing Professor of the Laws of England for example⁸ – where one imagines the scholar’s work being completed and hung up like an ornament justifying this place he has received in history. And yet this life of an individual to which one ascribes a great work subsides, as Deleuze suggested, in favour of the beatitude of those thoughts that were born and linger without subject or object and that one can barely ascribe to anything more than just “a life.”

It is only biography that gives us a life that has begun with birth and which has ended with death. It tells us about the life of the scholar, the scientist, but it does not tell us about the science that is only “a life.” As much as the biographical description can provide important contexts to the life and thought of an individual and to the works that, surviving him, would otherwise be read through blank eyes, it also prejudices us in favour of events that, by the scholar’s own standards, are

5 Gilles Deleuze, *Pure Immanence: Essays on A Life*, trans. Anne Boyman (New York: Zone Books, 2001), 28–29. Deleuze’s reference is to the character Roger Riderhood and the scene of his near death in Charles Dickens’s *Our Mutual Friend*.

6 Deleuze, *Pure Immanence*, 29.

7 Oliver Wendell Holmes, “In Memoriam: Frederic William Maitland,” *Law Quarterly Review* 23(1907): 137–138, 137.

8 It is this accolade incidentally which somewhat prosaically adorns Maitland’s Canarian grave. Maitland was elected to the office in 1888 at 38 years of age and held it until his death in 1906. Henry Arthur Hollond, “Frederic William Maitland 1850-1906: A Memorial Address,” in *Frederic William Maitland Reader*, ed. V. T. H. Delaney (New York: Oceania Publications, 1957), 11–19, 11.

given more significance than they deserve: personal controversies, accolades, bourgeois childhood escapades and the like. Would it be possible to describe anything of the scholar underneath all this, in a way that holds to the order of evidence that their scholarship demands? – the life that has begun not with birth and ended with death, but which has begun with a *grave* and only later by extension to the words and thoughts that seem to have congealed around its occupant? At Westminster Abbey, there is a tablet that commemorates Maitland's life by drawing from the conclusion to his *Domesday Book and Beyond*. "By slow degrees," the inscription recites, coiling around his name in stone in the floor, "the thoughts of our forefathers their common thoughts about common things will have become thinkable once more."⁹ These words, being divorced both from the full text just as much as from the resting place of the scholar himself, seem only to create an empty resonance. It is less the Maitland memorialised at the Abbey than the Canarian Maitland – convalescent, adrift, dying, buried, warmed by the sun – that speaks to the immanence that links scholarship inextricably to that which is as accidental as a life.

3 "Buried, but..."

For a jurist, it is the spectre of law that looms larger in the imagination than the death that will eventually steal him away from his work. This is why one can afford to take seriously the rigour of the scholar in holding to this matter of law no less in the responses that issue during his lifetime from his public institutional *persona* than in the intimacy of the more isolated chambers accompanying his even longer silences and times of repose. "[H]e would have much rather devoted his life to the historical study of English law," recounted Maitland's friend and fellow legal historian Paul Vinogradoff of the former's own self-characterising inclination to scholarship, "than watch in his chambers at Lincoln's Inn for the footsteps of the client who never comes."¹⁰ The jurist seems to perceive more acutely than most the path that only a rigorously pursued study of law would be capable of tracing beyond the reach of even the most impending of judgments, including of course the judgment that is the

⁹ See Website of Westminster Abbey, "History, People, Frederick W. Maitland", accessed December 18, 2015, <http://www.westminster-abbey.org/our-history/people/frederick-w.maitland>

¹⁰ Paul Vinogradoff, "Frederic William Maitland," *English Historical Review* 22.86 (1907): 280–289, 280–281.

limit of his life. Where the anxious practitioner sees the dangerous path of a permanent worklessness, the jurist sees the consolation of an unending study.

Equity Also the Forms of Action at Common Law was first published posthumously at the initiation of his students in 1909 as a record of two series of lectures delivered by Maitland at Cambridge in the years before his death. The last of these lectures, we are told, were delivered in the spring and summer of 1906.¹¹ James T. Shotwell gives us a picture of the scene and atmosphere of Maitland's lectures:

At the south end of the row of houses is the somewhat chapel-like building in which Maitland lectured. Architecturally it suggests something between a monastic refectory and a Quaker meeting-house. The ecclesiastical atmosphere of the class-room, however, may have been partly created by the manner of the lecturer. Maitland lectured on English law, at least when I heard him, as though he were some saintly mediaeval monk reciting the miracles of his order. His tall gaunt figure was restless with animation; his voice would throw off the huskiness due to his physical weakness, and 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, when he dominated the little class by a spiritualized sort of energy, which made one forget both his weakness and his liturgic delivery, 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, and sought over the class for an answering intelligence. Few of his students took notes. The lecture was too interesting. The secret of his hold upon the class undoubtedly lay in his imaginative grasp of the subject combined with an intense earnestness.¹²

The text of *Equity* of course retains only a very minor trace of this style of delivery that Shotwell observed, and yet in it we are capable of hearing more than just the echo of the voice of a dead master of English legal history. What remains relevant to the listeners of these lectures in particular today is of course no longer the purely doctrinal lesson which would have had to adjust itself (even if relatively slightly) to the one hundred years or so of modification in the law since its delivery.¹³ Nor is it even the exquisite reconstruction of a history which those at least in common law countries supposedly share but which, on its own, would probably still be of greater interest to an antiquarian. These

11 Alfred Henry Chaytor and William Joseph Whittaker, "Preface," in *Equity; Also the Forms of Action at Common Law: Two Courses of Lectures*, ed. Frederic William Maitland (Cambridge: Cambridge University Press, 1910): v–vii, v.

12 James T. Shotwell, "Frederic William Maitland," *Political Science Quarterly* 22.2 (1907): 284–290, 288.

13 Milsom notes in 2001 that Maitland's lectures on Equity are still sometimes recommended to students. "It is not the changing details but the elementary bearings that give difficulty." Milsom, "Maitland," 267 (n 11).

assumptions would be either to ignore the audience to which these lectures were intended, or to mistake the office and task of the jurist with that of historian. It is not the mere history of law that interests Maitland *per se*. Rather, it is the historical matter of law which – were it not for the work of jurisprudence to which the jurist is devoted – would continue to “hem us in on all sides,”¹⁴ as Friedrich Carl von Savigny had once warned. Despite all of Maitland’s flair then for uncovering the historical origins of English legal institutions, his lectures are not the example of an historian inviting his listeners into the past worlds that he has the ability of recreating in vivid colour before their eyes; he is here the trainer of a generation of lawyers who must at least in some part learn to be masters of this historical matter of law – purveyors and technicians of the machinery of legal history – if they are not in the end to be themselves ruled by it. He is all the more rigorous as an historian by holding solely to what the technical envelope of law contains – and at the same time all the more lively a jurist by searching for the bones of principle in the dead matter of the historical register.

This is sufficient context for what is the most instantly recognizable quote from Maitland’s two series of lectures. Introducing his students to the topic for his second series (The Forms of Action at Common Law), Maitland starts with an impassioned defence of the topic of English civil procedure as a subject of university and not just professional education. But his lectures take as their subject an element of common law procedure that, at the time Maitland was lecturing, had only relatively recently been abolished by statute. “The forms of action,” he announces accordingly, “we have buried, but they still rule us from their graves.”¹⁵ It is hard to think of a more recited quote from a jurist in twentieth century common law literature. The usual interpretation is that, although abolished as procedural instruments, these forms still leave their indelible imprint on the whole of contemporary substantive law: we therefore neglect their history at our peril. But one thing is commonly missed from this reception of Maitland’s thought, and that is that the lecturer was not so much taking the opportunity to defend in this way the relevance only of the *historical* study of law, the history of its technical forms by way of comparison to the present. A study of this history is of course important, but also not new or controversial. On the contrary, what Maitland tries to show is important for legal education and jurisprudence is what is, and what has become, in law technically

¹⁴ See Friedrich Carl von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* [1814] (London: Littlewood & Co., 1831), 144.

¹⁵ Frederic William Maitland, *Equity; Also the Forms of Action at Common Law: Two Courses of Lectures* (Cambridge: Cambridge University Press, 1910), 296.

obsolete. It is not an understanding of the precedent or the past in itself that history offers to the student of law, but an understanding of the strength of what remains *buried*.

It is impossible to remove from Maitland's two series of lectures for example an interest that the speaker displays for laws that are not just found in history, but which have been consigned (more or less recently) to the past – and the curiosity and difficulty that this places on any systematizing attempt at legal study. The contexts for himself and his students in the early 1900s were of course still the modern reforms made to the English court system and juridical procedure that culminated in the 1870s *Judicature Acts* – something still fresh in the mind of the English lawyer and jurist alike and cutting to the very core of what it must have meant for a university professor to teach even the basics of such things as common law and equity to students waiting to enter the legal profession. With these few recent "strokes of the legislator's pen,"¹⁶ as we know, historically separate courts of common law and of equity in England were combined, and a single procedure and single rule of law were supposedly established in the one High Court of Justice exercising both common law and equitable jurisdiction. This situation produced a sort of crisis in the way in which the idea of jurisdiction could be reinscribed in English jurisprudence at the time: a crisis which the historical jurist could tackle with a keen fervour. In the course of lectures on equity for instance, one finds Maitland first of all grappling with how to teach to university students a field of law whose only essential characteristic was its connection to the practice of a particular court which had existed effectively between the fourteenth and the nineteenth centuries in England, *otherwise* than merely historically. Attempting to begin his lecture with a useful contemporary definition of his topic, Maitland notes the obvious difficulty. "In the year 1875," he remarks, "we might have said 'Equity is that body of rules which is administered only by those Courts which are known as Courts of Equity.' The definition of course would not have been very satisfactory, but now-a-days we are cut off even from this unsatisfactory definition. We no longer have any courts which are merely courts of equity."¹⁷

It would be no exaggeration to say that if Maitland appears as an historian in these lectures, it is purely as a coincidence to his primary task as a teacher of law. The particular legislative predicament of the age was no insignificant matter in this regard. And in Maitland's England – in the context of an innovative modernisation of its civil procedure – it laid down the challenge to any legal

16 Julius von Kirchmann quoted by Carl Schmitt, "The Plight of European Jurisprudence," *Telos* 83 (1990): 35–70, 46.

17 Maitland, *Equity*, 1.

scholar attentive to more than just the surface of positive legal order to salvage a meaningful account of law and jurisprudence for his or her pupils from forms that, whether for three hundred or for just thirty years, had no longer had any practical or technical application. The course of lectures on equity sit alongside those on the forms of action at common law as responding to two sides to the same predicament. If the procedural differentiation between the two spheres no longer existed – between the conduct of maintaining a claim in equity and that of an action at common law – what was the meaning in teaching a topic such as equity as a distinct substantive area of legal knowledge? For Maitland this meaning was not one that as time went by could only become progressively antiquated. He saw in equity, and in particular the idea of the trust, a fundamental element of English jurisprudence that couldn't necessarily be subsumed within history nor encapsulated fully within some other juridical rubric like property or contract. But if one were to retain equity as a topic of university study, what was needed was something of a companion course that equally gave to common law what a course on equity necessarily offered to an inquiring historical mind in the wake of the *Judicature Acts*: a treatment of the form of its procedural obsolescence.

4 “Against rather than in favour of much that is intimate”

Before I come to the place of the grave as such in Maitland's lectures, it is necessary to take a short detour, by way of comparison, through one work of biography (or its failure) which was significant to the scholar during his later years. The last work that Maitland saw published in his lifetime was one that could easily be seen as a diversion from his otherwise concerted endeavours in legal history – a 500 page book honouring the life of his friend, and man of letters, Leslie Stephen: a book that James T. Shotwell remarked “bears no trace of the fact that it was written in part in the very face of death.”¹⁸ Before Stephen's passing in 1904, Maitland had written to him often from his winter retreat, at times playfully beckoning him to the islands where he stayed out of the necessity of his health. It is there, as we know, that he remains today, apparently relieved from such labours that the scholar knows are too great for the span of one lifetime. On the 22 January 1900 he observed to his friend that

¹⁸ Shotwell, “Frederic William Maitland,” 286.

"[r]eally and truly the temptation comes to me, when the sky is at its bluest, to resign my professorship, realise my small fortune and become a Canario for the days that remain."¹⁹

Leslie Stephen was a philosopher and a talented biographer. He wrote lives of Henry Fawcett and of his brother James Fitzjames Stephen and was the first editor of the *Dictionary of National Biography* to which he made a number of contributions on figures such as Samuel Johnson and Thomas Hobbes. Whether Stephen – nearing his own death – was also capable of writing his autobiography however is less clear. In his *Mausoleum Book*, a letter to his children memorializing their late mother, he notes: "I wish to write mainly about your mother. But I find that in order to speak intelligibly it will be best to begin by saying something about myself... I have no intention of writing autobiography except in this incidental way. One reason is that my memory for facts is far from a good one, and that I really remember very few incidents that are at all worth telling. Another reason is that I could give you none of those narratives of inward events, conversions, or spiritual crises which give interest to some autobiographies."²⁰ To take care of the biographer's own written life, the facts of which are lost to the writer's own memory or which he will at least take satisfaction in knowing they will travel with him "to the grave," Stephen instead appointed a jurist and historian. "Any sort of 'life' of me is impossible," he admitted to his children, "if only for the want of materials. Nor should I like you to help anybody to say anything except [...] Maitland [...] and if he liked to do so, you should show him my 'letter' to you."²¹

Maitland did indeed view this letter as his friend Stephen had requested, but rather than write a "short article [...] or a notice in a biographical dictionary"²² as envisaged, he instead compiled some first-hand material from Stephen's own letters along with information and accounts he obtained from Stephen's family, children, pupils and friends into a full-length book. Maitland in this way tried to honour a request that he knew was beyond him in terms of the kind of skills he possessed, and at the same time to open the life he so admired up to others who he imagined may be more qualified to put it into words. "If, as I doubt not, he has left worthy successors," Maitland noted about his friend, the writer, faced with the impossible task that had been entrusted to him, "some one will some

¹⁹ Herbert A. L. Fisher, *Frederick William Maitland: A Biographical Sketch* (Cambridge: Cambridge University Press, 1910), 120.

²⁰ Leslie Stephen, quoted in Frederic William Maitland, *The Life and Letters of Leslie Stephen* [1906] (Cambridge: Cambridge University Press, 2012), 3.

²¹ Stephen, quoted in Maitland, *Life and Letters of Leslie Stephen*, 2.

²² Stephen, quoted in Maitland, *Life and Letters of Leslie Stephen*, 2.

day do for him what he to our admiration did for many others: illustrate in a small compass his life by his books, his books by his life, and both by their environment.”²³

In his letter, Stephen had qualified Maitland for the task of writing his biography only by saying that the latter in some way “understood” him. Maitland attributed this ascription not to an ability on his part to recount or construct certain inner features to the life of the man, but rather “a privilege [in having seen] both in joy and sorrow a certain side or aspect of Leslie Stephen that was only visible to a few.”²⁴ However, the biographer himself must also have appreciated something of the “scrupulous sincerity” that belonged to the scholarly craft of the legal historian.²⁵ As a jurist, Maitland would not be easily side-tracked in his work by the call for undertaking a task of mere individual portraiture: even for a portrait of a close and distinguished friend. He completed the tribute to Stephen in the last years of his own life diverted for the time being from his otherwise concerted study of the Year Books. But the difficulty that a jurist faces with the task of writing the biography of an individual runs deeper than just the distraction it may cause to his study of the legal sources. In response to Stephen’s initial request, Maitland had cautioned that “the art of biography is not [...] given to many and it is not given to me. The only good quality of which I could boast would be reticence and this may become a fault. My judgment would lean *a priori* [...] against rather than in favour of much that is intimate.”²⁶

In this, one can observe that the jurist is perhaps first to see the subject of “a life” less in the personal details that make a typical biography than in the impersonal cases, technical arrangements, apparatuses and institutions that hold it singularly under the sign of law.²⁷ It is not the events that surround an individual in other words

²³ Maitland, *Life and Letters of Leslie Stephen*, 6.

²⁴ Maitland, *Life and Letters of Leslie Stephen*, 5.

²⁵ See Maitland, *Life and Letters of Leslie Stephen*, 2–3. “[Stephen] would [...] have been the first to admit that a biographer rarely penetrates far below the surface, and that he yet performs a useful office if he is fairly diligent, moderately intelligent, and scrupulously sincere. Perhaps I am at this moment but too scrupulously sincere; and in order that no false impression may be left by what has just been said, I make haste to add that not only have I nothing to conceal about Leslie Stephen, but that he had nothing to conceal about himself.”

²⁶ Frederic William Maitland letter to Stephen, quoted in *The Letters of Frederic William Maitland, Volume II*, ed. P. N. R. Zutchi (London: Seldon Society, 1995), 16.

²⁷ As Fritz Schulz once said, in the case of jurisprudence, one must leave all biographical attention “in the background” if one is to touch upon something of the impersonal (if not completely anonymous) craft belonging to the true vocation and inheritance of Western legal science. Fritz Schulz, *History of Roman Legal Science* (Oxford: Clarendon Press, 1946), 4.

that provide the jurist with the strongest evidence of a life. “Life-events” as such – even those as definitive as birth and death – are still only “cases for jurisprudence.” They are instructive in what they reveal not about the individuals involved but about the thought of law, the instabilities inherent in juridical doctrine, the rare exceptions and limit-cases one finds set against seemingly entrenched norms: evidence of a life which as Deleuze said goes only “case by case.”²⁸ Indeed, the juristic conception of the person itself – which makes do without any underlying psychological, metaphysical or theological substrate – seems to uniquely preclude any biographical treatment. Its portrait is pursued rigorously on the canvass of law or jurisprudence, where it takes shape under a purely technical guise: fashioned out of the purely juridical need to make some right or obligation attributable which – were it not for invention of some juristic person – would otherwise dissipate in the clouds. In relation to this technicism, even the mystical political theology famously described in the medieval idea of the “king’s two bodies” (“natural” and “politic” cohering in the one “person”) Maitland thought could be seen as a mere clumsy metaphor.²⁹ The jurisprudential “corporation sole” – that quirk in the English law of persons of which he saw this metaphor as a symptom – could only be marvelled at by its spectacular failure to achieve the one task one could think of asking of it in jurisprudence: to prevent the ownership of an ecclesiastical glebe from falling into abeyance upon the death of the parson (the holder of the land).³⁰ This person – this supposed corporation with only one member – was for Maitland no juristic person, it was “either a natural man or juristic abortion.”³¹

The biographical task was approached with great difficulty. Hence: “How to describe anybody!” was his exasperation about an attempt at writing Stephen’s life. “I can only shovel evidence into heaps and chuck it at the public.”³² A few years earlier, in an essay titled “Moral Personality and Legal Personality”

28 Gilles Deleuze, “G comme Gauche,” in *L’Abécédaire de Gilles Deleuze, avec Claire Parnet*, ed. Pierre-André Boutang (Paris: DVD Editions Montparnasse, 2004).

29 Frederic William Maitland, “The Crown as Corporation,” in *The Collected Papers of Frederic William Maitland, Downing Professor of the Laws of England, Vol. 3*, ed. Herbert Albert Laurens Fischer (Cambridge: Cambridge University Press, 1911), 244–270, 251.

30 Leslie Stephen was himself ordained a parson in 1859, although Maitland notes that he later considered himself to hold that office only “against his will.” Maitland, *Life and Letters of Leslie Stephen*, 106.

31 Frederic William Maitland, “The Corporation Sole,” in *The Collected Papers of Frederic William Maitland, Downing Professor of the Laws of England, Vol. 3*, ed. Herbert Albert Laurens Fischer (Cambridge: Cambridge University Press, 1911), 210–243, 243.

32 Fifoot, *Maitland: A Life*, 273–274.

delivered before Stephen's death, the jurist had playfully hinted at an audacious project of portraiture: the possibility of painting the moral philosopher as a *product* of the history of jurisprudence rather than as its guide. "We are proud of a long line of moralists," he notes about England, "which has not ended in Sidgwick and Martineau and Green, in Herbert Spencer and Leslie Stephen, and we conceive that the 'jurist', if such an animal exists, plays, and of right ought to play, a subordinate, if not subservient part [...] I am not sure however," he goes on to note, "that the poor lawyer with antiquarian tastes might not take his revenge by endeavouring to explain the moral philosopher as a legal phenomenon..."³³ But faced with the more solemn request of the moral philosopher himself, an obligation which fell upon Maitland just a year later as the survivor of the two, the playfulness for "too large" and "too insolent a text"³⁴ waned. Recognizing the serious limitation in his own abilities as a biographer compared to that of his friend as well as questioning the legitimacy of his knowledge of the man compared with others, he arranged the empirical evidence of the life of Stephen in which he saw some genius, like Tribonian had perhaps preserved the writing of the classical Roman jurists: that is, not as a synthesis but as mere "provision for the winter."³⁵ In this way, the task which was too great to complete in Maitland's lifetime in relation to the jurisprudence of the Year Books – this attempt to preserve the intellectual wealth of a past age – was at least modestly fulfilled in relation to the life of a single individual who he knew and admired deeply.

One should not see any shortcoming in this kind of scholarly circumspection. Even in the most creative of his written works, a jurist is not so much author than compiler: arranging disordered fragments and unclassifiable evidence.³⁶ The Maitland whose lectures in equity in 1906 had by all accounts lost nothing of their liveliness and vigour, their "power for making dry bones live"³⁷ as the editors of his lectures put it in their preface, was in the throes at that same time of undertaking a personal and private commitment and an

³³ Frederic William Maitland, "Moral Personality and Legal Personality," in *The Collected Papers of Frederic William Maitland, Downing Professor of the Laws of England, Vol. 3*, ed. Herbert Albert Laurens Fischer (Cambridge: Cambridge University Press, 1911), 304–320, 304–305.

³⁴ Maitland, "Moral Personality and Legal Personality," 305.

³⁵ See Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, 43.

³⁶ As Yan Thomas points out in relation to Roman law, the great works of jurisprudence take their name not from the originator of the laws, but from the one who has received and transmitted them. See Yan Thomas, "Idées Romaines sur l'origine et la transmission du droit," *Rechtshistorische Journal* 5 (1986): 253–273.

³⁷ Chaytor and Whittaker, "Preface," v.

intimate work of scholarship. The project, which Stephen had ensured was entrusted to Maitland alone, was not a mere intellectual diversion. He carried it with him into the last hours of his life. “All the day until he died it was by his side,” is his wife Florence’s account according to Fifoot.³⁸ And if Maitland had been adamant that one could not read any trace of “autobiography” in the writing of Stephen for the reason that the author did not have any so-called subjective “reminiscences” that would be of interest to the public: only “ever-present memories which in his last years ... were the core of his being,”³⁹ then one can afford to read Maitland’s own posthumous work in the same spirit. As jurist, Maitland may have cultivated a certain sober but heartfelt sincerity to the novel task of biography he undertook, but as a reluctant biographer he also cultivated a remarkable sensitivity to what the immanence of “a life” is in the office of jurist. Shotwell finishes his short tribute to Maitland by saying that “when one turns to the book now, with its deliberate self-effacement and the high sense of the judicial function of a biographer, one feels that it in a sense forbids any further attempt to state the impressions of a casual visitor to his home.”⁴⁰

5 “An experimental science”

The grave plays a greater role in Maitland’s *Equity* than just through the meaning one can ascribe to it in his oft-cited phrase: “ruling us from their graves.” It functions as a more immediate sign in relation to the life of legal scholarship that underpins the text. One might say that in *Equity* the grave has one primary function and that is to *remove the immortality of the author* from the surviving work of jurisprudence. When one approaches a posthumous text such as this, the philosophical “death of the author,” in the fateful sense that Barthes had made of it, appears confirmed by more than the right of an impersonal language-function that would take his or her throne.⁴¹ It is true that the author is perhaps haunted more than most by the risks of immortality that seemingly attach him or her to the fate of written works that unashamedly go on surviving. But at least in jurisprudence, any such death of the author, or even failure of such, cannot be a merely figurative affair, a mere language game. If one goes to

³⁸ Fifoot, *Maitland: A Life*, 279.

³⁹ Maitland, *Life and Letters of Leslie Stephen*, 5.

⁴⁰ Shotwell, “Frederic William Maitland,” 290.

⁴¹ See Roland Barthes, “The Death of the Author,” in *Image – Music – Text*, trans. Stephen Heath (London: Fontana, 1977), 142–148.

the Canaries today one could find the stone marking Maitland's grave.⁴² And it is only the grave that leaves a sign, at the same level of the literature that the scholar has left behind, capable of evidencing the limit of the life of the one who has lived at the place where he remains.

Neither the grave nor burial are prominently recurring themes *per se* in Maitland's lectures. They appear explicitly only once: in the already-mentioned quote relating to the forms of action at common law. But the sign of burial extends across the whole of the legal historian's engagement with his material and to his own understanding of his office as jurist in this work. It was only, for instance, the fact of the burial of laws that, for Maitland, seemed to open the office door of the jurist. He addresses these lives and deaths and burials of law for his students in this way like that of a close friend: amiable enough to the listeners who were present, but perhaps even closer to the laws themselves for whom he was more of a ghostly companion – the only one capable of giving a proper eulogy for anonymous lives which have been lived out of joint with the closed time of our personal relations. Maitland's gift was to have been attuned to these – the common and often overlooked lives of juridical institutions – and furthermore to have had the humility (in spite of the march of politico-legal "progress") to sit with and care for what was dying and for what remained barely living in these institutions. He may have been in some ways ashamed in this sense to have had such a keen gift of appreciating the intimate historical beauty in law and its impersonal institutions compared to that of individuals, authors, and authors as legislators. It seemed to be something of this inclination at least, as we have already seen, that led him to question his ability to write a biography after the death of one of his closest friends.

Let us take what Maitland saw in his *Equity* as the cornerstone of English equitable jurisdiction as an example: the trust. Part of Maitland's aim in his lectures is to show to his students that common law and equity were not in any strict sense rival jurisdictions. Equity was a domain that operated purely

⁴² The inscription on Maitland's grave reads as follows, all the more appropriately because unremarkable (Correspondence with Betty Burgess, Holy Trinity Church and British Cemetery, Las Palmas 30 November 2014):

FREDERIC WILLIAM MAITLAND
OF
BROOKTHORPE, GLOUCESTERSHIRE
DOWNING PROFESSOR OF THE LAWS OF ENGLAND, CAMBRIDGE

May 28th 1850 – December 19th 1906

to supplement and above all to fulfil the common law rather than to displace it.⁴³ This was in contrast to the technical operation of the forms of action themselves which had the historical procedural effect of centralizing the system of royal justice in England and of drawing matters away from the plural jurisdictions of the local courts; overcoding them under an official seal.⁴⁴ Much that was taught under the modern rubric of equity for this reason Maitland found no trouble fitting within the general common law jurisprudential categories of contract and property etc. simply as necessary doctrinal supplements to these fields.⁴⁵ "For all this however," he notes, "it has seemed to me possible that certain important provinces of equity, in particular the great province of trust, may not be fully dealt with by other lecturers."⁴⁶ If it was still possible to identify and to teach equity as an area of juridical thought in its own right after the procedural modernisation of the *Juridicature Acts*, for Maitland it was the invention and development of the trust that offered the key. It was only the trust in short that, amongst disconnected doctrines and maxims of equity which were secured by nothing more than their historical bond to the Court of Chancery, had had the fortune of being raised to the level of an *institution*. The modern jurist could in other words turn to the jurisprudential dimensions of the trust as a record of the distinct echo in which equity, if it could still be said to exist independently, resounded in the history of juridical institutions.

The institutional structure of the trust itself however could not be adequately approached if limited to the dead weight of its history or to the mapping of an essentially juridico-evolutionary progression. What needed to be appreciated first and foremost was the jurisprudential contour of the trust: that which isolated its distinct juridical form and distinguished it from the mere accidental social formations that any historian could easily be forgiven for confusing it with, as well as from the dominant juridical paradigms from which it departed. Maitland's primary interest was not so much in the social history of the trust, but in the sealing of it within a particular jurisdictional envelope. He looks in two places: firstly to the cases of jurisprudence that describe the form of life instituted under the jurisdiction of the trust, a life that does not stop at the time and subject-bound life of those who have from time to time made use of it; and secondly to the legislative structurations of equitable jurisdiction that arrest

⁴³ Maitland, *Equity*, 17. "Equity had come not to destroy the law, but to fulfil it."

⁴⁴ See e. g. Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction: Critical Approaches to Law* (Abingdon: Routledge, 2012), 38.

⁴⁵ Maitland, *Equity*, 12–22.

⁴⁶ Maitland, *Equity*, 22.

and sediment it in various ways, allowing us to see the juridical nature of the trust only in some ways in the lacuna of the life that has been left missing of it on the page of positive law.

In the first place, Maitland finds the origins of the trust not in any form of state-sanctioned implementation but as a device responding to quite ordinary predicaments and cases facing the lives of people in medieval England. These problems and responses could, in one sense, be seen as tactical. Maitland points to diverse situations. A group of Franciscan friars travelling to the towns as missionaries, because of the rules of their order which strictly prescribe that they should live in perfect poverty i. e. without any individual or collective worldly possession, adopt the device of having the land necessary for their subsistence conveyed to the borough community instead which is then held by them to their use.⁴⁷ The Church adopts the device of having its real estate put into the hands of certain lay individual owners who hold it on trust in order to avoid the effects of the Statutes of Mortmain that would have required it to pay licence fees to the Crown.⁴⁸ An even more ordinary situation: how to make an effective will in relation to land where the rules of inheritance are decidedly inflexible? A landowner for instance who wishes to provide after his death for his daughter or younger son, or to avoid the wardships, marriages, escheats etc that at the time accrued in favour of the Crown in relation to the land upon his death, adopts the measure of conveying the land to another or to a number of others who he trusts, outliving him, will hold it and dispose of it essentially according to his wishes. These individuals are the joint tenants, the owners, in name only. Their actual jurisprudential status is closer to a juristic device. This “wall of trustees” as Maitland terms them – since part of their function implied that they could be installed and replaced interchangeably like bricks protecting the land or fund from ever falling out of the hands of a designated living owner – had the operation of circumventing certain taxes and certain inflexible rules of inheritance that took effect upon death.

All these cases for jurisprudence revealed fairly humble origins. But for Maitland the trust at the same time was something more than a mere tactic: it could be seen as a certain inflection of lawful relations. Maitland explains that historically courts might have been able to treat the trust as a simple case of

⁴⁷ Maitland, *Equity*, 25.

⁴⁸ See also Stroud Francis Charles Milsom, *Historical Foundations of the Common Law*, 2nd edn (Oxford: Oxford University Press, 1981), 204. Milsom notes that the Statute that prohibited such ‘uses’ for church land first also prohibited the unlicensed enlargement of graveyards in neighbouring property.

contract – notwithstanding the slow development of the action of *assumpsit* – were it not for the distinctive and necessary de-centring of the “author” from the legal relation in question. To frame an effective trust, one had to avoid making things look too obligatory, lest the rights be deemed to be essentially too “personal” and hence find themselves buried within their subjective limits. The trust described a different subject of rights. It created rights in an entity that needn’t have any part in the transaction creating obligations. “In the earliest instances,” Maitland explains, “the trustor and the *cestui que trust* (or *use*) [the beneficiary] are the same person – still it is as *destinatory*, not as ‘author of the trust’ that he has the remedy.”⁴⁹ It was in this fact that the trust described a jurisdiction fundamentally (if somewhat subtly) distinct from contract. Even when this individual is the immediate party to and author of the trust itself, any right is held within this jurisdiction only as a kind of third person who strictly need not play any part nor indeed to know anything about the primary agreement. This “beneficiary” could just as easily be “a baby in arms,” Maitland notes, “or perhaps he is in Australia, or even perhaps he is unborn, for you may have a trust for an unborn person or an unascertained person.”⁵⁰ From the perspective of the trust, the subject of right found itself qualified in this sense by a relatively minimal and malleable set of relations. And the jurist was capable of looking for this subject not so much in what the relations meant in the ordinary time of a life that had to pass stringently from birth to death and through an inflexible order of succession, but in the contours of an institution, uniquely indifferent to the “naturalness” of these limits, which was set up only as a kind of provisional, technical expedient.

The second locus of inquiry for Maitland, as mentioned, was with the statutes that had, since the origins of the use or the trust, altered its jurisdiction in direct and significant ways. Maitland knew, like Savigny, the limitation of his age for the vocation of legislation. “Legislation,” Savigny had once written understatedly, as a response to those scholars who were calling at the time for the drafting of a national Code of law in Germany, “not unfrequently exercises an influence upon particular portions of the law.”⁵¹ Almost a century later, Maitland was echoing this in a publication titled “A Plea for the Codification of English Law.” He there agrees cordially that “gradual and partial” codification may do some good, but adds that “[i]n the way of any larger project I see insurmountable difficulties.”⁵² It was with something of this critical eye toward

⁴⁹ Maitland, *Equity*, 31.

⁵⁰ Maitland, *Equity*, 44.

⁵¹ Savigny, *Vocation of Our Age for Legislation and Jurisprudence*, 32.

⁵² Frederic William Maitland, “A Plea for the Codification of English Law IX,” *New Century Review* 2 (1897): 52–53, 52.

the effects of a purely state-centred mode of law-making and intervention, which more often aimed at benefitting a class than the law itself,⁵³ that Maitland approached the jurisdiction of the trust.

No doubt for Maitland as with Savigny, no piece of legislation could be something that the jurist could simply ignore, whether or not the proliferation of this form of law-making was to make his or her task all the more complicated. But regardless of whether it appears as a pure codification of existing law or custom or as a general or relatively tailored means of reform, legislation seems to be defined for Maitland more by what it tends to bury than by what it tends to reveal on the terrain of legal thought. The Statute of Uses for example, which aimed to abolish the fiction of the “use” according to which the individual enjoying the land would be for legal purposes no longer its true owner, from the point of view of jurisprudence achieved something quite different. Maitland describes the way in which – regardless of how effective it was in shoring up the Crown’s tax revenue in the short term – the statute did not have the effect of limiting the institution of the trust in the way imagined but on the contrary succeeded in securing for it an even more definite and stable jurisdiction. In this way, the effect of the Statute was to allow people on the one hand to actually extend “uses,” imparting their flexibility onto the previously stiffened common law estate, and on the other for the modern trust to be able to take on a distinct form, not just out of the embers of a makeshift technical expedient, but now also as a distinct form of law itself confirmed all the more forcefully by becoming a product of statutory interpretation.⁵⁴

In these as in other examples, it is always the grave of law that provides a surer footing to the jurist on a terrain that one acknowledges from the very first moment is composed of nothing but fictions. Maitland seems attuned to an appreciation that positive law is only the sign that something is sealed in its coffin and buried: a thought, a life, an institution, a science. Within it therefore is contained the evidence of such “a life” not as something to which it refers directly, but in what emerges from the lacuna left by its obsolescence. “So much could be done behind a trust,” Maitland notes, “and the beginnings might be so very humble. All this tended to make our English jurisprudence disorderly, but also gave to it something of the character of an experimental science, and that I hope it will never lose.”⁵⁵

⁵³ Maitland, “A Plea for the Codification of English Law,” 53.

⁵⁴ Maitland, *Equity*, 36.

⁵⁵ Frederic William Maitland, “Trust and Corporation,” in *The Collected Papers of Frederic William Maitland, Downing Professor of the Laws of England*, Vol. 3, ed. Herbert Albert Laurens Fischer (Cambridge: Cambridge University Press, 1911), 321–404, 376–377.

6 “Hic jacet persona ficta”

Let me conclude with a problem. What can we make of the suggestion, which Maitland was reported to have made, joking to his friend and colleague Neville Figgis, that his own epitaph should read: “HIC JACET PERSONA FICTA [here lies a fictive person]”?⁵⁶ It is not by accident that a modern jurist who devotes his scholarly attention to the problem of personality, should come to see his own person, even in its tendency toward the grave, as something worth a little less metaphysical aggrandizement than usual. The prevailing theories on both sides of a debate on juridical personality are content to agree over the common ground that, whatever one makes of corporations and the personality of unincorporated bodies, let alone trusts etc., there is never anything fictional about the personality of a “natural person,” a mortal man before the law. But if there were any lesson to be drawn from a history of the juridical concept of personality for Maitland, it would be one that hinted at something of the opposite formulation: that the “natural” person may be, in fact, more fictional than any of those we call “artificial.” In Maitland’s attention to history, there is of course relatively little to be said of what a single individual, a “natural person” is capable of inscribing as an author, and much to be said of the life of an institution and the anonymous technical craft that, through it, invents living concepts in their humble practical resourcefulness. Surveying such a history, Maitland observes that it just might happen that “the most interesting person that you ever knew was *persona ficta*.”⁵⁷ It is hard to reconcile Smith’s appraisal – i. e. that *hic jacet persona ficta* meant that Maitland “wished to be remembered as one who vindicated the historian’s duty as the duty of tracing the growth of ideas, and showing their overwhelming importance for human progress”⁵⁸ – with the portrait of the same jurist who could for example joke at the suggestion of a biographical work on himself: “A Life of Maitland – I don’t think *that* would take up much space.”⁵⁹ These quips are not just the polite expressions of a brilliant but rather self-effacing scholar. They reveal, in a more necessary sense, the extent to which, for Maitland, the fullness of a grave and

⁵⁶ See A. L. Smith, *Frederic William Maitland: Two Lectures and a Bibliography* (Oxford: Clarendon Press, 1908), 54–56; H. E. Bell, *Maitland: A Critical Examination and Assessment* (London: Adam & Charles Black, 1965), 9; Fifoot, *Maitland: A Life*, 239.

⁵⁷ Maitland, “Moral Personality and Legal Personality,” 309.

⁵⁸ Smith, *Maitland: Two Lectures and a Bibliography*, 54.

⁵⁹ Bell, *Maitland: A Critical Examination and Assessment*, 1. The joke was, according to Bell, a response to a slip of the tongue by one his pupils Alston while visiting Maitland when he was engaged in writing the *Life of Leslie Stephen*.

the true anonymity of the institution of the person leaves truly no room for being “remembered,” for achievements and so on. One of the reasons that Maitland was drawn to legal history, jurisprudence and in particular to the peculiarly English and peculiarly “serviceable” concept of the trust, was as Fifoot notes, that it provided the ideal means of evading all the “metaphysical subtleties” which beset the modern theories of legal personality.⁶⁰ And nowhere, perhaps, were these modern theories taken further than to Maitland’s grave.

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⁶⁰ Fifoot, *Maitland: A Life*, 234.