

Address at the Memorial Service for Professor S. F. C. Milsom

St John's College Chapel, 19 November 2016

Toby liked to compare legal history to children's games with a twist – jigsaws with missing pieces and no lid, or the game in which you draw lines between dots whose numbers have disappeared. It is much the same when someone dies. Fortunately, we have the wonderful interviews which Lesley Dingle captured in 2009. I recommend them to everyone who has not listened to them, since they bring Toby back to us immediately.

Today I will try to join up just a few of the dots. One of the earliest is in the middle of the 1929 edition of Fox-Davies's *Armorial Families*, where a six-year old Toby appears as the second son of Harry Milsom, the fifth son of Francis Henry Milsom of Bath. He was to be the last but one of the male descendants of the Milsoms who gave their name to Milsom Street. His father was a military type, who wore a black eye-patch as the result of a munitions explosion. By a bizarre and horrific coincidence, Toby had suffered even more serious head injuries from an exploding mine which attracted his unwise schoolboy curiosity on a beach in Cornwall. It pierced the frontal lobe of his brain, and he was not expected to survive. After some experimental surgery (using what Toby jokingly called 'a puncture repair kit'), and a very unpleasant year in hospital, he miraculously recovered and was able to return to school. He was a year behind, and at the bottom of his class, though some thought – including Toby – that the brain trauma had done something to make him think more imaginatively.

The educational setback did not prevent Toby gaining admission to Trinity, his father's college, where he had been entered for admission at the

aforementioned age of six. No interview was needed, nor any course of study discussed. He came up with a trunk full of science books, intending to read Natural Sciences, though on arrival his Tutor ruled it out because his Maths were not good enough. English, his other love at school, was also ruled out, lest it doom him to become a schoolmaster. So he was consigned to the Law Faculty – the last refuge in such cases. Here his brilliance began to shine, with starred firsts and prizes in both parts of the Tripos. In 1948 Harry Hollond (of Trinity) noted this strange turn of events in a letter to Plucknett: ‘Milsom is a very odd case. For one thing he had a hole blown in his forehead by an explosion, and [for] another he was just an ordinary average boy at Charterhouse in school subjects, and his housemaster was amazed when at the end of his first year here he achieved an unprecedented performance in the Law Qualifying Examination. He adds to his ability a quite outstanding charm, and his modesty is almost absurd.’ So perhaps the explosion did indeed somehow release his special genius, as much to his own surprise as to his housemaster’s.

Denied a scientific career, Toby set his thoughts on the Patent Bar, but immediately after his Call in 1947 he was diverted into spending a year in Philadelphia on a Commonwealth Fund Scholarship. This settled the whole course of his life. Under the guidance of George Haskins, he wrote a dissertation on writs of error, and discovered his gift of sceptical historical insight – he saw that everyone had read the story backwards, with the end in view rather than the beginning, and had in consequence become mired in misunderstanding. The essay was praised by Plucknett as a work of ‘remarkable achievement and maturity’; it won him a fellowship at Trinity, and the Yorke Prize, soon followed by a University Lectureship. If someone

nowadays were to produce a PhD dissertation of such depth after three or four years it would be hailed as a triumph. The prize essay was written in less than a year.

Toby soon noticed that much of legal history as currently perceived wasn't quite right. It had been embalmed by the timeless appeal of Maitland, and entombed in the stolid tomes of Holdsworth. But 'To one whose boyhood had been excitedly concentrated upon the natural sciences', he later recalled, the 'lack of any credible connections between phenomena' was unsatisfying. He had therefore started thinking beyond the litany of unconnected technicalities which he had been taught, convinced that rational men would not have invented procedures and doctrines which made no practical sense. Legal history is especially prone to anachronism because legal language and institutions have long lives, and it is too easy to think of our 'silly old ancestors' as fumbling towards what we now know. He saw round the distorting lens of hindsight, producing explanations which seem obvious once given but which had not occurred to anyone before. That, perhaps, is the true mark of genius. (He once told me he had spent his life saying things that are either obvious or wrong, but you can't tell which.)

Toby's style of communication was unique. His teaching was extempore and very informal, with no more than scribbled headings on a 4 x 6 in. card to guide him, because he preserved a sharp distinction between speech and writing. His classroom evocations were memorable: who could forget the imaginary sheriff whose breakfast boiled egg was left uneaten when, to his consternation, the writs arrived to prepare for an eyre? His writing was equally vivid, but very different – honed with immense care, subtlety and elegance – a striking epigram, or a humorous play on words, on

almost every page. Many have found his literary style difficult, because everything he wrote was crafted with economy, nothing missing but never a word too many, striking a fine balance between statements and hints, between proof and probability, but always assuming (perhaps too confidently) that readers would grasp his allusions and qualifications effortlessly. Few of his writings can be absorbed in one reading; but, unlike most academic books, they deliver more and more with every re-reading. He was perhaps the last writer in legal academia whose works could be regarded as literature.

In his personal dealings, Toby was good company, committed to collegiality, and generous towards everyone he knew, yet with a courtesy, diffidence and slight distance which came from another age. His sensitive letters were closer to those of the nineteenth century than to the electronic mail which has eclipsed letter-writing. Friends and students adored him. Curiously, though, few felt that they really knew him. Perhaps the only person who truly understood him was Irène, to whom he was utterly devoted. The daughter of a distinguished Polish architect, she had married a criminologist in 1933, and they had emigrated to England in 1938 to escape the awful fate which her parents eventually suffered. The first marriage was not a success, but with Toby she had a remarkable rapport and they supported each other unfailingly for 43 years. We should remember Irène too, and all that she meant to Toby, on this occasion.

Toby's diffidence was a mystery to those of us who make do with inferior endowments. In public he called his insights his 'heresies', and he seemed to expect always to be attacked – if not actually burned in flames – or at best condescendingly ignored as the oddball who dared to suggest that

Maitland might be wrong. Probably this was the absurd modesty at work, a polite acknowledgment that his insights were deeply significant. In 1973 he wrote privately of the need for urgency in his work: 'I have had exceptional luck in catching glimpses of a framework different from that upon which earlier work was based. It is important if true, and either I get it out or not. This luck has depended on two qualities: a literal mind (in all other ways a great nuisance) which I shall keep; and a fluke imagination which, like mathematicians and such, I know I shall lose.'

Heretic or not, it bothered him that he thought he had not been fully understood by historians outside the law school. Historians observed the same facts but did not (as he thought) always get inside the mind to explain them. An unpublished conference paper of 1978 is marked in Toby's hand: 'The audience were all *historians*, and they listened with the incomprehension to which a lawyer grows accustomed.' When he presented me with a copy of his *Natural History* in 2004, he wrote that he thought the 'historians' (his word) would be cross and that one of them [*whom I will not name*] 'might actually blow up'. It seems that he never could quite believe that he was actually held in such high esteem, even by those who questioned the details of his heresies.

The creed which Toby felt obliged to abandon was that of the great Maitland, and comparison is inevitable. In a lecture delivered in Japan forty years ago, Toby himself said: 'England is a country where lawyers are forgotten when they die (if not before); and in this they may be luckier than historians, whose names are remembered for the few years it takes their successors to expose all their mistakes. With Maitland it has been different ... There is nothing facile about his writing. You have to put your mind to it.

But if you do, his mind is still there – as it were just behind the page. One is captivated as well as convinced.’ There could hardly be a better description of Toby himself. You have to put your mind to the writing, but if you do the appeal is infectious.

Yesterday some of the historical questions he stirred were given a new airing, but this is not the time to revisit them. It is enough to say that Toby was one of the most remarkable men we have had the privilege of knowing – perhaps as a consequence of that big bang. His intellectual gifts were, to borrow a Cornish phrase which he liked to use, as scarce as hen’s teeth. We remember him for them, of course – and he will be remembered by future generations as long as Maitland has been. But here today we also remember him as a teacher, inspiration and friend. We shall not see his like again.