REVIEWS

MAITLAND: A CRITICAL EXAMINATION AND ASSESSMENT. By *H. E. Bell.* Cambridge, Mass.: Harvard University Press, 1965. Pp. 150, $4.00.

Far better to read Maitland than books about him, Bell, Late Fellow of New College, would have been the first to say. Yet there comes a time when an appraisal of every great historian and his work is in order. The account that Bell has rendered is critical and creative, and he has written with grace and felicity a book that is useful, sensitive, and original. His purpose was not just to bring Maitland up-to-date, nor to brush him up for students, nor to run him down for scholars by computing mistakes and errors. What Bell set out to do, and has done with skill, was to analyze the central theses in Maitland's writings, to assess their validity today, and to point out the qualities in his work that have "made it permanently influential on English historical scholarship."[1] One justification for doing this is the surprising number of books and articles that deal with the subjects upon which Maitland wrote and that have appeared since his death in 1906. Their range and variety are truly startling, and Bell has told just what scholars such as Plucknett, Powicke, and Postan, Cam, Galbraith and Sayles, and Hazeltine, Hollond, and Milsom have done to carry forward, to confirm, or to alter, Maitland's conclusions and hypotheses.

A sensibility of his own enabled Bell to set forth in a fine first chapter the nature of Maitland's genius and the characteristics of his work. Among them he divined as the very essence of Maitland's talent an ability "to penetrate to the inner meaning of the words used in his sources."[2] Another outstanding trait that marks Maitland's writings was "his eye for the great central concepts of the common law in different phases of its development."[3] One of these great concepts that particularly and constantly fascinated Maitland was that of " 'juristic persons', the trust and the corporation."[4] A concern for jurisprudence, Bell pointed out, runs through many of his writings—notably those

1. H. E. BELL, MAITLAND: A CRITICAL EXAMINATION AND ASSESSMENT 6 (1965) [hereinafter cited as BELL].
2. *Id.* at 8.
3. *Ibid.*
4. *Id.* at 9.

on the borough, the crown, trusts, and the body politic. Bell also has traced many a "recurrent theme" through several of Maitland's works; and one that he considered basic in the *History of English Law to 1272* was "the tendency of the law for the great men to become, too, the law for the small."[5] A second was what Maitland himself "termed the 'beautiful simplicity' of the law of the twelfth and thirteenth centuries."[6] This chapter on the *History* is, quite properly, the longest; it distinguishes the "most influential theses" of this "Definitive Work" and their subsequent modification and it describes Maitland's techniques. Bell has placed *History* itself "along with Bracton and Blackstone as a great classic of English law."[7]

Bell was more critical of Maitland's excursions into sixteenth-century history into which friends had impelled him. At Acton's request, he had produced that brilliant *tour de force*, "The Anglican Settlement and the Scottish Reformation," the only chapter in thirteen volumes of the *Cambridge Modern History* to sparkle. Bell apologized for this chapter as "uncharacteristic," but here Maitland met, and surely matched, the masters of literary history at their own game, the flowing narrative. Maitland may have been unfamiliar with writing narrative history, and yet his product was, Bell himself has shown, so "readable and memorable" that honest scholars unintentionally have plagiarized phrases and clauses as sharply cut and highly polished as any by Clio's finest lapidaries.[8] A delicious wit and a subtle sense of humor enrich this chapter, and these qualities also appear in Maitland's *Collected Papers* containing several little classics on law in Tudor England.

Why this wit and humor did not accompany Maitland to the classroom and the lecture hall has puzzled his biographers. His posthumously printed course lectures seem to lack "what his friend Buckland called 'the play of fancy and the humour which ornament his other work.' "[9] True perhaps, but then the best classroom humor comes, for many teachers, with spontaneous remarks, and seldom do "notes to lecture from," as Maitland's wife called them, convey the full meaning of the spoken word.[10] Only "eyes that saw and ears that heard" that infinitesimal pause or slight inflection, the quick glance or the quarter smile, can catch the quiet ironies of many a speaker.[11] For one not present to

5. *Id.* at 85.
6. *Ibid.*
7. *Id.* at 64.
8. *Id.* at 127.
9. *Id.* at 142.
10. *Ibid.*
11. CAM, SELECTED HISTORICAL ESSAYS OF F. W. MAITLAND xxix (1957), quoting MAITLAND, THE LIFE AND LETTERS OF LESLIE STEPHEN 312 (1906).

write about the teacher is, of course, quite impossible, and Bell wisely limited his remarks about "Maitland as Teacher" to a brief Appendix. Here he includes Oscar Browning's testimony that "his lectures were never numerously attended," and that "more than half of the scanty audience were women; there was perhaps one undergraduate law student, then a few B.A.s and four or five historians from King's."[12] But was Browning himself always there? And just how many students at Cambridge in the '90s and '00s did attend lectures? Anyway, Bell makes the point that Maitland did not shirk his teaching, even in his illness; he offered a variety of the standard courses that law professors give; and he faithfully fulfilled "the peripheral duties of the university teacher," those of examiner and of secretary, for over eight years, of the University Law Board.[13]

For the University, Maitland gave the Rede Lecture in 1901 on *English Law and the Renaissance.* About this, perhaps the most criticized of Maitland's publications, Bell was uneasy, and he remained unconvinced of its validity. He found the genesis of the Lecture in an 1898 Review of *The Records of the Honourable Society of Lincoln's Inn* where Maitland put the question: "Why was there in England no 'reception' of Roman Law?"[14] In Germany there had been a formal Reception, and in the Review Maitland had said that for England "the danger was very great."[15] In the Rede Lecture, however, he did not say so much, and he restrained his "main theme" to the propositions that "the continuity of English legal history was seriously threatened," that "the pathway for a Reception was prepared," and that medieval England's "schools of national law," the Inns of Court with their "scheme of legal education," were what "saved English law in the age of the Renaissance."[16] Nevertheless, Bell rejected what he called Maitland's "thesis that in Henry VIII's reign the common law was seriously endangered and a Reception of Roman Law at that time well within the bounds of possibility."[17] Bell also concluded that the "work done on Tudor legal history since his death [1906] makes it impossible to uphold the lecture's central thesis."[18] However, recent Roman Law studies in America by Kuttner, Lear, Ewart Lewis, Post, and Tierney have shown that it had affected medieval English law, and they make a

12. BELL at 143.
13. *Id.* at 144.
14. *Id.* at 130.
15. *Ibid.*
16. MAITLAND, ENGLISH LAW AND THE RENAISSANCE 16, 17, 19, 23, 26, 27 (1901).
17. BELL at 131.
18. *Id.* at 136.

Tudor Reception seem less impossible and the Rede Lecture look less like an historical fantasy.

Maitland's guilt—if guilt it was—lay in having "concocted a Rede Lecture" that deftly depicted, with a great delicacy in choice of words and play of fancy, a mood.[19] An attitude, a state of mind did exist among English men-of-law and statesmen, between 1525 and 1550, one that was sympathetic towards the continent's "second new birth of Roman Law."[20] Perhaps Maitland should not have teased his audience with so many implications; and perhaps Bell should not have deduced so much, for his analytical exposition of what he called "the four main bases of Maitland's argument" seems a heavy-handed way to assess this intuitive kind of history.[21] Maitland did not actually say in the Rede Lecture that "the common law was seriously endangered" or that a Reception was possible.[22] What he did was to paint a Romanic backdrop against which to play up the heroics of the Inns of Court; and his artistry, later reinforced with 62 pages of thorough annotation, still seems both seductive and convincing.

He told how academic brain trusters who had read civil law alongside the Isis or the Cam were advancing at this very time, 1525-1550, upon Westminster. Several of them joined Henry VIII's administrative entourage; they took up bishoprics or deaneries; and they sat in the prerogative courts or councils. The King's own cousin, Reginald Pole, a cardinal-to-be, had returned to England in 1527 from study at Padua and was at the time said to have urged upon Henry a Reception of Roman Law. Later on, in 1539, Henry VIII and Thomas Cromwell put into parliament a bill for royal proclamations, and members felt it necessary to amend it in order to secure the subject's property, his liberty, and the common law and statute from excessive use of the regal power. Soon King Henry created Regius Professorships in civil law, and in 1544 he appointed to the Cambridge chair "the Rev. Prof. Dr. Sir Thomas Smith, Knt., M.P., Dean of Carlisle, Provost of Eton, Ambassador to the Court of France and Secretary of State to Queen Elizabeth," and, it may be added, Master of Edward VI's Court of Requests.[23] "With praiseworthy zeal," Maitland remarked, Sir Thomas went off to Padua "for his Roman Law and his legal degree."[24] So the symptoms

19. THE LETTERS OF FREDERIC WILLIAM MAITLAND 226 (Fifoot ed. 1965).
20. MAITLAND, *op. cit. supra* note 16, at 5.
21. BELL at 131.
22. *Ibid.* (Bell's words).
23. MAITLAND, *op. cit. supra* note 16, at 10.
24. *Id.* at 9.

went, and the Rede Lecture contains many more such indications of a Tudor ardor for Roman law with which Maitland completed his *mise en scène.* Then he went "back" to his "main theme":

> A Reception there was not to be, nor dare I say that a Reception was what our Regius Professor or his royal patron desired. As to Smith himself, . . . he was well content to contrast the public law of England with that of "France, Italy, Spain, Germany and all other countries which" to use his words "do follow the civil law of the Romans" . . . . I think that a well-equipped lecturer might persuade a leisurely audience to perceive that [between 1525 and 1550] the continuity of English legal history was seriously threatened.[25]

Maitland's words, "the public law of England," are a clue to his meaning and, perhaps, to Bell's and others' misunderstanding.

Men-of-law, parliament-men, and royal ministers in the sixteenth century recognized private law and public as two distinct concepts. An early appearance of the English words, "public laws," was in a statute of 1554-55 that concerned royal dispensations "given by such order as the public laws of the realm then approved."[26] Here was a recognition of the concept, public law, as the law that pertained to the constitution—what the Prof. Dr. Sir Thomas Smith called "the forme and manner of the governement of Englande, and the policie thereof."[27] More than once Maitland warned not to ask questions of medieval history about the "constitution," "sovereignty," or "public law"—at least not until the fifteenth century when Sir John Fortescue could write, "regal power is restrained by political law (*lege politica*)."[28] Political law, England's public law, was what a Reception of Roman Law, or of Justinian principles, would have threatened most and what Maitland, it is submitted, had in mind in the Rede Lecture. By directing, perhaps by limiting, Maitland's remarks to the public law, they seem reasonable and valid. The Renaissance interpretation, for example, of the Roman Law maxim, *Quod principi placet legis habet vigorem* (what the prince wills or wishes has the force of law) was supplanting its medieval rendering—what the prince approves (with the counsel and consent of his councilors) has the force of law.[29] Such a change of meaning further supports Maitland's assumption that there

25. *Id.* at 16-17.

26. Dispensation Act, 1554, 1 & 2 Phil. & M., c. 8, § 33.

27. SIR THOMAS SMITH, DE REPUBLICA ANGLORUM 142 (L. Alston ed. 1906).

28. SIR JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE 26-27 (Chrimes ed. 1942).

29. Cf. Ewart Lewis, *King Above Law? "Quod Principi Placuit" in Bracton,* 30 SPECULUM 240 (1964); B. Tierney, *Bracton on Government,* 38 SPECULUM 295 (1963).

might have been a Reception, though how clear and present a danger there actually was can only be conjectured. Had a ninth Henry succeeded the eighth in 1547, instead of a boy and his two sisters, then those saviors of England's public law and constitutional government—the Inns of Court, the common lawyers, and the parliament-men—might have found themselves too late to cope with a prince's arbitrary will.

Doubt may remain about what the Inns of Court saved English law from; but there was none in Maitland's mind about what they saved it for. The Rede Lecture concluded with a dashing five-page finale that ranged from Coke's "first charter of Virginia" to John Marshall and "straight to the Pacific," from Baltimore and Australia to those "detached members of the manor of East Greenwich in the county of Kent," Bombay and Prince Rupert's land, and so to "a country village" in Connecticut where James Kent, the future chancellor, retired in 1779 and at the age of fifteen read "the four volumes" of Blackstone upon the breaking up by the war of Yale College.[30]

WILLIAM HUSE DUNHAM, JR.*

STUDIES IN MEDIEVAL LEGAL THOUGHT: PUBLIC LAW AND THE STATE, 1100-1322. By *Gaines Post.* Princeton: Princeton University Press, 1964. Pp. 633.

The revival of jurisprudence enjoys a notable position in the "Renaissance of the Twelfth Century" envisioned by Charles Homer Haskins a generation ago.[1] At the center of the new legal learning was the study of Roman Law, in particular the *Corpus Iuris Civilis.* The greatest body of law ever compiled in the West, which had once governed the most powerful state that had ever ruled in the West, was presented virtually *de novo* in a complete and codified form for the edification of educated men in a congeries of European countries just beginning to assume statehood. Each country had its customary law already, of course, but as a means of defining the public authority of a strong central government and of regulating the private legal relations of an urbanized society, the *coutumiers* were as toys compared

30. MAITLAND, *op. cit. supra* note 16, at 31-32, 94-95.

* George Burton Adams Professor of History and Former Master of Jonathan Edwards College in Yale University.

1. HASKINS, THE RENAISSANCE OF THE TWELFTH CENTURY (1927).