

FREDERIC WILLIAM MAITLAND

**ENGLISH LAW AND
THE RENAISSANCE**

(THE REDE LECTURE FOR 1901)

TO
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AT
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ENGLISH LAW AND THE RENAISSANCE.

Mr Vice-Chancellor and Fellow-Students :

WERE we to recall to life the good Sir Robert Rede who endowed lecturers in this university, we might reasonably hope that he would approve and admire the fruit that in these last years has been borne by his liberality. And then, as in private duty or private interest bound, I would have him speak thus: 'Yes, it is marvellous and more than marvellous this triumph of the sciences that my modest rent-charge stimulates you annually to record; nor do I wonder less at what my lecturers have said of humane letters and the fine arts, of the history of all times and of my time, of Erasmus whom

I remember, and that age of the Renaissance (as you call it) in which (so you say) I lived. But there is one matter, one science (for such we accounted it) of which they seem to have said little or nothing ; and it happens to be a matter, a science, in which I used to take some interest and which I endeavoured to teach. You have not, I hope, forgotten that I was not only an English judge, but, what is more, a reader in English law¹.

Six years ago a great master of history, whose untimely death we are deploring, worked the establishment of the Rede lectures into the picture that he drew for us of The Early Renaissance in England². He brought Rede's name into contact with the names of Fisher and More. That, no doubt, is the right environment, and this pious founder's care for the humanities, for logic and for philosophy natural and moral was a memorable sign of the times. Nevertheless the fact remains that, had it not been for his last will and testament, we should hardly

have known Sir Robert except as an English lawyer who throve so well in his profession that he became Chief Justice of the Common Bench. And the rest of the acts of Robert Rede—we might say—and the arguments that he urged and the judgments that he pronounced, are they not written in queer old French in the Year Books of Henry VII and Henry VIII? Those ancient law reports are not a place in which we look for humanism or the spirit of the Renaissance: rather we look there for an amazingly continuous persistence and development of medieval doctrine.

Perhaps we should hardly believe if we were told for the first time that in the reign of James I a man who was the contemporary of Shakespeare and Bacon, a very able man too and a learned, who left his mark deep in English history, said, not by way of paradox but in sober earnest, said repeatedly and advisedly, that a certain thoroughly medieval book written in decadent colonial French was 'the most perfect

and absolute work that ever was written in any human science³. Yet this was what Sir Edward Coke said of a small treatise written by Sir Thomas Littleton, who, though he did not die until 1481, was assuredly no child of the Renaissance.

I know that the names of Coke and Littleton when in conjunction are fearsome names or tiresome, and in common honesty I am bound to say that if you stay here you will be wearied. Still I feel that what is at fault is not my theme. A lecturer worthy of that theme would—I am sure of it—be able to convince you that there is some human interest, and especially an interest for English-speaking mankind, in a question which Coke's words suggest:—How was it and why was it that in an age when old creeds of many kinds were crumbling and all knowledge was being transfigured, in an age which had revolted against its predecessor and was fully conscious of the revolt, one body of doctrine and a body that concerns us all remained so

intact that Coke could promulgate this prodigious sentence and challenge the whole world to contradict it⁴? I have not the power to tell and you to-day have not the time to hear that story as it should be told. A brief outline of what might be said is all that will be possible and more than will be tolerable.

Robert Rede died in January, 1519. Let us remember for a moment where we stand at that date. The Emperor Maximilian also was dying. Henry VIII was reigning in England, Francis I in France, Charles I in Spain, Leo X at Rome. But come we to jurisprudence. Is it beneath the historic muse to notice that young Mr More, the judge's son, had lately lectured at Lincoln's Inn⁵? Perhaps so. At all events for a while we will speak of more resonant exploits. We could hardly (so I learn at second-hand) fix a better date than that of Rede's death for the second new birth of Roman law. More's friend Erasmus had turned his back on England and was by this time in correspondence with two

accomplished jurists, the Italian Andrea Alciato and the German Ulrich Zasius. They and the French scholar Guillaume Budé were publishing books which mark the beginning of a new era⁶. Humanism was renovating Roman law. The medieval commentators, the Balduses and Bartoluses, the people whom Hutten and Rabelais⁷ could deride, were in like case with Peter Lombard, Duns Scotus and other men of the night. Back to the texts! was the cry, and let the light of literature and history play upon them⁸. The great Frenchmen who were to do the main part of the work and to make the school of Bourges illustrious were still young or unborn; Cujas was born in 1522; but already the advanced guard was on the march and the flourish of trumpets might be heard⁹. And then in 1520—well, we know what happened in 1520 at Wittenberg, but perhaps we do not often remember that when the German friar ceremoniously and contumeliously committed to the flames some venerated lawbooks—this,

if an event in the history of religion, was also an event in the history of jurisprudence. A current of new life was thrilling through one *Corpus Juris*¹⁰; the other had been sore stricken, and, if it escaped from violent death, might perish yet more miserably of a disease that becomes dangerous at the moment when it is discovered.

A few years afterwards an enlightened young humanist, of high rank and marked ability, a man who might live to be pope of Rome or might live to be king of England, was saying much evil of the sort of law that Rede had administered and taught; was saying that a wise prince would banish this barbaric stuff and receive in its stead the civil law of the Romans. Such, so we learn from one of his friends, was the talk of Reginald Pole, and a little knowledge of what was happening in foreign countries is enough to teach us that such talk deserves attention¹¹.

This was the time when Roman law was

driving German law out of Germany or forcing it to conceal itself in humble forms and obscure corners¹². If this was the age of the Renaissance and the age of the Reformation, it was also the age of the 'Reception.' I need not say that this Reception—the reception of Roman law—plays a large part in modern versions of German history, and by no means only in such as are written by lawyers. I need not say that it has been judged from many different points of view, that it has been connected by some with political, by others with religious and by yet others with economic changes. Nor need I say that of late years few writers have had a hearty good word for the Reception. We have all of us been nationalists of late. Cosmopolitanism can afford to await its turn¹³.

Then we observe that not long after Pole had been advocating a Reception, his cousin King Henry, whose word was law supreme in church and state, prohibited the academic study of one great and ancient body of law—the canon

law¹⁴—and encouraged the study of another—the civil law—by the foundation of professorships at Oxford and Cambridge. We observe also that his choice of a man to fill the chair at Cambridge fell on one who was eminently qualified to represent in his own person that triad of the three R's—Renaissance, Reformation and Reception. We know Professor Thomas Smith as a humanist, an elegant scholar with advanced opinions about the pronunciation of Greek. We know the Reverend Thomas Smith as a decided, if cautious, protestant whose doings are of some interest to those who study the changeful history of ecclesiastical affairs. Then we know Dr Thomas Smith as a doctor in law of the university of Padua, for with praiseworthy zeal when he was appointed professor at Cambridge he journeyed to the fountain-head for his Roman law and his legal degree¹⁵. Also he visited those French universities whence a new jurisprudence was beginning to spread. He returned to speak to us in two inaugural

lectures of this new jurisprudence: to speak with enthusiasm of Alciatus and Zasius¹⁶: to speak hopefully of the future that lay before this conquering science—the future that lay before it in an England fortunately ruled by a pious, wise, learned and munificent Prince. Then in Edward VI's day Thomas Smith as a Master of Requests was doing justice in a court whose procedure was described as being 'altogether according to the process of summary causes in the civil law' and at that moment this Court of Requests and other courts with a like procedure seemed to have time, reason and popularity upon their side¹⁷. Altogether, 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 was a man of mark in an age of great events. Had some of those events been other than they were, we might now be saying of him that he played a prominent part in Renaissance, Reformation and Reception,

and a part characteristic of that liberal and rational university of which he was professor, public orator and vice-chancellor¹⁸.

Some German historians, as you are aware, have tried to find or to fashion links that will in some direct and obvious manner connect the Reformation and the Reception. In one popular version of the tale protestantism finds a congenial ally in the individualism and capitalism of the pagan Digest¹⁹. In truth I take it that the story is complex. Many currents and cross-currents were flowing in that turbid age. It so happens that in this country we can connect with the heresiarchal name of Wyclif a proposal for the introduction of English law, as a substitute for Roman law, into the schools of Oxford and Cambridge²⁰. On the other hand, the desire for a practical Reception of the civil law is ascribed to the future cardinal, who in his last days reconciled England for a moment, not with the Rome of the Digest, but with the Rome of the Decretals. And by the way we may notice

that when the cardinal was here upon his reconciliatory errand he had for a while as his legal adviser one of the most learned lawyers of that age, the Spaniard Antonio Agustin. But we in England take little notice of this famous man, who, so foreigners assure us now-a-days, began the historical study of the canon law and knew more about the false Isidore than it was comfortable for him to know²¹. Our Dr Smith was protestant enough; but his Oxford colleague Dr John Story showed zeal in the cremation of protestants, helped Alva (so it is said) to establish the Inquisition in the Netherlands, was hanged as a traitor at Tyburn in 1571 and beatified as a martyr at Rome in 1886. Blessed John Story was zealous; but his permanent contribution to the jurisprudence of his native land was (so far as I am aware) an early precedent for the imprisonment of a disorderly member by the House of Commons, and a man may be disorderly without being a jurist²². Ulrich Zäsi went part of the way with

Luther; but then stayed behind with Erasmus²³. He had once compared the work that he was doing for the Corpus Juris with the work that Luther was doing for the Bible²⁴. The great Frenchmen answered the religious question in different ways. One said 'That has nothing to do with the praetor's edict.' His rivals charged him with a triple apostasy²⁵. Three or four of them were stout huguenots, and we must not forget that Calvin and Beza had both been at Bourges and had both studied the civil law. Melancthon also was a warm admirer of Roman jurisprudence²⁶. It is reported that Elizabeth invited Francis Hotman to Oxford²⁷. He was protestant enough, and fierce enough to exchange letters with a tiger²⁸. He is best known to English law-students as the man who spoke light words of Littleton and thus attracted Coke's thunderbolt²⁹; but if he thought badly of Littleton, he thought badly of Tribonian also, and would have been the last man to preach a Reception. Professor Alberigo Gentili

of Oxford, he too was protestant enough and could rail at the canonists by the hour; but then he as an Italian had a bitter feud with the French humanizers, and stood up for the medieval gloss³⁰.

Plainly the story is not simple and we must hurry past it. Still the perplexity of detail should not obscure the broad truth that there was pleasant reading in the Byzantine Code for a king who wished to be monarch in church as well as state: pleasanter reading than could be found in our ancient English law-books. Surely Erastianism is a bad name for the theory that King Henry approved: Marsilianism seems better, but Byzantinism seems best³¹. A time had come when, medieval spectacles being discarded, men could see with the naked eye what stood in the Code and Novels of Constantinople. In 1558 on the eve of an explosive Reformation 'the Protestants of Scotland,' craving 'remedy against the tyranny of the estate ecclesiastical,' demanded that the controversy should be judged

by the New Testament, the ancient fathers 'and the godly approved laws of Justinian the emperor³².' University-bred jurists, even such as came from an oldish school, were very serviceable to King Henry in the days of the great divorce case and the subsequent quarrel with the papacy. Tunstall, Gardiner, Bonner, Sampson and Clerk, to say nothing of the Leghs and Laytons, were doctors of law and took their fees in bishoprics and deaneries³³. Certainly they were more conspicuous and probably they were much abler men than those who were sitting in the courts of the common law. With the one exception of Anthony Fitzherbert, the judges of Henry's reign are not prominent in our legal history, and we have little reason for attributing deep knowledge of any sort of law to such chancellors as Audley, Wriothesley and Rich. I doubt our common lawyers easily accommodated themselves to ecclesiastical changes. Some years after Elizabeth's accession the number of barristers who were known to the