Roman Canon Law in the Church of England. Six Essays by FREDERIC WILLIAM MAITLAND, LL.D., Downing Professor of the Laws of England in the University of Cambridge. London, Methuen & Co., 1898. — vi, 184 pp.

Successful revolutions, which establish new law, are usually accompanied or followed by an effort to show that the new law is really old. Where the discovery of legal precedents is impossible, the revolutionists sometimes satisfy themselves with the mere name of law and base their innovations upon "the law of nature." More often, however, they consciously or unconsciously falsify the old law. The extension of papal authority in the middle ages, for example, was attended, at a critical period, by the appearance of forged decretals, running back into the first centuries of the Christian era; and after the triumph of the papal policy these decretals found a place in the official body of the canon law. The triumph of Parliament over the crown in England carried with it the triumph of the Whig theory of English constitutional law, in which the powers exercised by the Tudors were ignored or obscured. The successful revolt of the American colonies from Great Britain legitimized a theory of colonial rights which our historians accepted for a hundred years, and which will not cease to be orthodox until we have thoroughly adjusted ourselves to our new position as a power in possession of colonies. In like manner, the withdrawal of England, under Henry VIII, from the Roman ecclesiastical communion — a withdrawal which made the ecclesiastical court a part of the machinery of the English state — produced the theories: (1) that the law of the church, as established by "the Word of God," had been corrupted by the Roman Church; (2) that papal legislation had never been binding upon English ecclesiastical courts, except by virtue of its "reception"; and (3) that English

canon law had never been identical with that of Rome, but was, in part at least, the product of insular custom and legislation. The first theory served as a basis for much of the ecclesiastical legislation of Henry VIII's time; the two other theories have been accepted by the English courts and have received, in our own time, the support of the Ecclesiastical Courts Commission. This commission included among its members Dr. Stubbs and other historians "whose every word," says Professor Maitland, "deserves attention."

In the essays of which this book is made up, and which were originally printed in the *English Historical Review* and the *Law Quarterly Review*, Professor Maitland has taken issue on the second and third of these revolutionary theories. He maintains that the decrees of the Roman Church councils and the decretals of the popes were recognized, during the three centuries before the Reformation, as absolutely binding upon English ecclesiastical courts. This view he finds clearly expressed in the writings of the English canonists. He shows, without much difficulty, that Dr. Stubbs's views, if expressed in the fifteenth century, would properly have led to his degradation from his bishopric and his committal to the secular authorities to be burned as a heretic. He finds that the English ecclesiastical courts applied papal decretals promptly and without question of their authority, and he can find no evidence of "an ecclesiastical judge . . . rejecting a decretal because it infringes the law of the English Church or because that church has not 'received' it" (p. 84). He shows that all the cases in which it is alleged that England had a special canon law of its own, divergent from the general canon law of Christendom, are cases in which secular law applied by the secular courts had taken the place of ecclesiastical law applied by the ecclesiastical courts. Such a substitution of secular for ecclesiastical law was in no wise peculiar to England. All over the Continent, during the later middle ages, state and church were contending for jurisdiction, and the authority of the secular courts was being extended over more or less of the ground which the church claimed as its own. The ouster of the English ecclesiastical courts from any particular field of the law, and the application, by English secular courts, of rules differing from those of the canon law, no more created a special English canon law than similar occurrences in Germany and in France created a German or a French canon law. To prove that the national law became English canon law, it would be necessary to show that the English ecclesiastical courts accepted and applied it. Professor Maitland, however, shows the contrary. The church not only left to

the state the enforcement of the secular rules of law, but it refused even to assist the state in applying them. When, for example, the bishops were asked by the justices (in inheritance cases) whether a child had been born before or after the marriage of his parents, they refused to answer the question, because by answering it they would have aided the justices in applying a rule of legitimacy different from that of the canon law. This is the antecedent history of the famous declaration of Merton. The result was, of course, that the church lost its jurisdiction over the question of legitimacy in inheritance cases. Questions of legitimacy, however, continued to come before the ecclesiastical courts, in another class of cases over which their jurisdiction was complete; and, in determining the legitimacy of a candidate for orders, it appears that they continued to recognize the Roman *legitimatio per subsequens matrimonium* (pp.53–56).

The only point, it seems to me, in which Professor Maitland's book leaves room for further discussion is to be found in his treatment of the doctrine of "acceptance" (pp. 31, 32). The *Decretum Gratiani* asserts: Sicut enim moribus utentium in contrarium nonnullae leges hodie abrogatae sunt, ita moribus utentium ipsae leges confirmantur. Following out this thought, the canonists speak of constitutions that are not binding because they have not been "accepted." Now it may be admitted, as Professor Maitland says, that the cases in which non-use or contrary use was invoked against papal legislation were very trivial, but it can hardly be conceded that the dicta in question are to be taken to mean only that written laws may fall into desuetude. The doctrine of desuetude logically carries with it the doctrine of acceptance, or at least non-acceptance; for if laws can cease to be binding through discontinuance of application, it is only consistent to say that a law never applied has never become binding.

The doctrine of desuetude, however, was borrowed by the canonists from the civil law; and in the civil law it is subjected to a limitation which Professor Maitland does not notice, but which, if it constituted part of the canon law also, would be most important for his purposes. Local laws may be abrogated by non-use or contrary use in the locality, and general laws may fall into general desuetude; but general laws cannot be affected by a purely local failure of application. Were not the canonists bound to take the same position? The mediæval Teutonic state, of course, took the opposite view: "*Stadtrecht bricht Landrecht und Landrecht bricht gemeines Recht*," was true whether the laws in question were written or customary. But this Teutonic theory, however accordant with the Teutonic idea of the

state, was wholly inconsistent with the ideas of the church; and the canonists, it seems to me, should have taken the Roman view. Yet Professor Maitland cites at least two cases in which John of Ayton and Lyndwood apparently accept the Teutonic theory (p. 32, n. 1; *cf.* p. 10, n. 4). This whole question deserves a thorough reëxamination.

There is, again, a rule of mediæval pleading which the civil courts seem to have taken from the ecclesiastical courts, and which, if I am right in supposing it to have been an ecclesiastical rule, would go far to make the doctrine of "non-acceptance" one of little practical value. I refer to the rule that he who pleads a rule of the general Roman law "*fundatam habet intentionem*," and need not plead or prove the absence of a contrary local law or custom. The burden of proving contrary local usage was by this rule thrown upon the other party.

Professor Maitland not only shows that, in the English theory and practice of the thirteenth, fourteenth and fifteenth centuries, papal legislation was recognized as binding the English ecclesiastical judges; but shows also, in his third essay, how the papal power of legislation grew out of the papal jurisdiction, and how much Englishmen did to promote the development of that jurisdiction. The position of the pope, however, as "universal ordinary," — with power of receiving complaints, not merely on appeal but also in first instance, and of delegating the trial and decision of cases, with instructions as to the law to be applied, to any persons whom he chose to appoint, — would seem less extraordinary to the reader, if Professor Maitland had mentioned the fact that it rested on imperial precedents, and that the pope acted in ecclesiastical cases precisely as the Roman emperor had acted in civil cases.

At the close of his fourth paper, in which he discusses the legal issue between Henry and Becket, Professor Maitland remarks:

> I believe that a little research among foreign books would strengthen us in our conviction, by showing that the scheme which I have attributed to [Henry], the scheme which sends the clerk to and fro between the royal judge and the bishop, had for a long time past been a well-known arrangement, and was one that Henry was likely to regard as ancient and legitimate [p. 146].

This is undoubtedly true; and it is to be regretted that the author, who has made such extensive researches for these essays, did not undertake this little additional investigation. He would, I think, have been able to show us that Henry's scheme was the scheme that had been worked out in the Frankish Empire; and he might have found it possible to connect the false Isidore's forged decretals (cited on

page 141) with Carolingian capitularies, instead of seeking their prototype in a constitution of Arcadius and Honorius.

Professor Maitland has, however, done so much for us in these essays, and has done it so well, that it is hardly fair to quarrel with him for stopping wherever he sees fit. His main theses, it seems to me, are fully established; and he helps the reader in a hundred lesser points to a better understanding of English history in the later middle ages. A book like this — touching, as it does, upon matters with which every English historian of the period has to deal — makes us realize how flabby history is without the backbone of law; and if the "pure" historian has not time to undertake such researches for himself, he should at least appropriate the results which the legal historians are working out for him.

The late Professor Seeley, as is well known, had a deep-rooted prejudice against history that tried to be literature; and it may be conceded that when the literary instinct is not under strict control, it is a dangerous gift to the historian, or indeed to any writer whose business it is to tell the truth. When, however, as in Professor Maitland's case, facts are neither twisted to perfect an epigram nor whittled away to point a climax, we can enjoy the historian's felicity of phrase and power of dramatizing a situation without even a vicarious twinge of conscience; and we can wish, without any mental reservation, that other scholars, whose material is equally solid, were able to present it with the same polish.

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