English Law and the Renaissance

Eighty Years On:
In Defence of Maitland

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Eighty years have passed since, on 5 June 1901, Frederic William Maitland delivered his Rede Lecture, English Law and the Renaissance, at Cambridge, and for perhaps forty years the lecture was famous; more recent criticism has made it notorious. In 1931, Plucknett said that the discoveries of thirty years had done nothing to impugn Maitland’s estimate of the crisis in which the legal profession struggled with the Doctors of Civil Law under Henry VIII but had added weight to it. By 1971, however, Maitland’s biographer, Fife, was saying that the lecture had given general delight and provoked general dissent and adopting the judgement of H. E. Bell:

...it is doubtful whether any legal historian familiar with the period would today accept its thesis.

Since then there has perhaps been some reaction in favour of the lecture, and in a recent discussion Dr J. H. Baker speaks of Maitland’s conclusion as ‘completely vindicated’. Yet much of the earlier comment seems to be accepted as valid, so that the prevailing atmosphere is still one of unfavourable criticism.

Indeed, the critics have sometimes expressed themselves in such terms that we almost seem to be listening to so many counsel prosecuting Maitland for obtaining credit by false pretences—or perhaps for criminal libel on Henry VIII; and the octogenary of the alleged offence is an appropriate occasion for putting forward a defence. The chief prosecutors have of course been Professor G. R. Elton and Professor S. E. Thorne; others seem to have followed these prosecutors (perhaps a little unwarily), while Holdsworth has been called as a witness, though

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the use made of him may well be liable to attack as presented in the form of hearsay.

Of the two prosecutors, Thorne has been the more concentrated, in a lecture under the same title as Maitland's, specially devoted to the charge of false pretences. Elton has been the more persistent, in a series of asides from 1952 on; his interest is in the libel on Henry VIII, and his arguments imply that Maitland's statements carry the innuendo that Henry was a despot. Fortunately for the defence, the arguments of prosecuting counsel tend to contradict each other, and the evidence does not support those arguments, so far as they bear on the true thesis of Maitland's lecture.

For the defence's first argument must be that on the charge of false pretences there is no case to answer. According to Thorne, Maitland's thesis was a simple one: that in the second quarter of the 16th century the continuity of English law was seriously endangered by a threatened reception of Roman law.

That was not Maitland's thesis: his discussion of the possible threat to continuity was only incidental to his main purpose, which was to answer his own question:

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 ['that a certain thoroughly medieval book written in decadent colonial French'—namely Littleton's Tenures—'was "the most perfect and absolute work that ever was written in any human science"'] and challenge the whole world to contradict it?

He put his answer into a sentence. 'Medieval England had schools of national law.' His thesis then was not that there was a particular threat to the common law, but that any danger of a Reception of learned Roman law was averted by the existence of the most unlearned sort of learned men, the English common lawyers. For him English Law and the Renaissance was a study of a problem in English legal history, in the history of the English legal system. Thorne indeed treated it as that, and went on to deny its true thesis as well as its alleged thesis; and to this denial we must return later.

The charge of libel on Henry VIII is the one Elton is most concerned to press, and as we have seen it involves an innuendo, it requires us to read statements as implying criticism or interpretation. In the present case, this means that when Maitland speaks of Henry as doing something or as having been likely to have considered doing something, we are to take this as implying that Henry was a despot. Now it certainly seems clear that Maitland thought Henry was a despot: a phrase like 'at the moment when the Henrician Terror is at its height' surely suggests that. But that does not mean that the statement about Henry's action or thought is false, or that a conclusion drawn from the statement about the possible consequences for the English legal system is necessarily unsound. We need not here enter into the argument (largely an argument about definition rather than substance) whether Henry was a despot, but we must say that Elton is rather too ready to understand Maitland's words as implying a charge of despotism, and so to undervalue them.

This appears most clearly in Elton's reference to the tag 'the English lex regia'

applied to the Act of Proclamations of 1539. He thought Maitland was perhaps inspired by Froude's evocation of the Roman dictator.

Maitland evidently assumed in his readers too great a knowledge of Roman law: the parallel is of course much more direct, and to pursue the point is not mere pedantry, for this particular point is the centre of the Roman-law doctrine of the prince's authority to legislate. That doctrine was certainly interpreted in very various ways, most surprisingly of all by Trevelyan, who wrote that Kings

James and Charles held, with the students of Roman law, that the will of the Prince was the source of law.

Professor Hurstfield goes much of the way with Trevelyan when he speaks of the central doctrine of Roman civil law—*quod principi placuit legis habet vigorem*.

Elton offers a correction: historians do not seem to tire of quoting the dictum 'quod principi placuit, legis habet vigorem' ('what the prince has approved has the force of law') as though it identified legislation with the monarch's will, whereas it only signifies that the law of a country requires endorsement by its head.

There were political theorists who would accept the positive as well as the negative part of the correction, but there is no support for such a view in the original statement of the rule. This comes from the passage in the
Digest which explains the ground on which imperial constitutions have statutory force:  

quod principi placuit legis habet vigorem: utpote cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat.

The parallel with the Act of Proclamations is very close, especially when we remember on the one hand that lex was a technical term for a particular type of Roman legislation (so that the rule is best translated ‘what has pleased the prince has the force of a statute’) and on the other that Elton has himself said that though the authority to make proclama-

tions, given to the king by the Act was limited by the required consent of his Council, . . . this meant nothing in 1539.

It is even more important to realise that the interpretation of this passage from the Digest was the subject of a conflict of opinion among the Glossators, as Maitland had known for some time before the Rede Lecture, since Gierke has an account of the conflict:

Some of them declared that there had been a definitive alienation, whereby the People renounced its power for good and all, and that therefore the People, when once subjected to the Emperor, had no legislative power and could never resume what it had alienated. Others saw the translatio as a mere concessio, whereby an office and a usus (right of user) were conveyed, while the substance of the Imperium still remained in the Roman People. Thence they argued that the People is above the Emperor (populus maior imperatore), can at the present day make laws, and is entitled to resume the imperial power.

So the precedent of the Roman Lex Regia was not necessarily favourable to sixteenth-century absolutism, and the parallel with the Act of Proclamations is not weakened by the fact that the Act left undisturbed the legislative competence of Parliament. This surely means that Elton is not justified in citing Maitland’s reference as an example of the old view that the Act marked the high-water mark of Tudor despotism.

Nor need we concern ourselves with the background of the Act of Proclamations, and in particular we need not consider what its promotion implies for the character of Thomas Cromwell, which naturally exercised Elton. It suffices to note that the Act confirms the king’s admitted pre-existing authority to make proclamations and provides for their enforcement. We shall see reason to believe that the King could have used his power to make proclamations to effect a practical Reception through the Chancery and the conciliar courts: he did not do so, and we cannot say whether that was because he did not want to effect a Reception or because he believed that to effect it would cause him more trouble than it would be worth. For Elton, and for Holdsworth (who seems to have believed that Henry was a constitui-

tionalist by conviction), the answer would be that he did not want a Reception; Maitland, who did not dare to say that a Reception was what Henry desired, would not have been certain.

We can indeed assume that Maitland regarded Henry VIII as a despot, at least in the sense that he ‘wished to be monarch’. If Maitland had read Elton’s reference to his suggestion that in the 1530’s the common law was nearly displaced by the civil law, and liberty therefore by despotism, he might have proposed the correction:

the common law was nearly displaced by civil law because liberty had been displaced by despotism—though he would have insisted that the King’s despotic inclinations were not the only stimulus towards Reception. If Henry had indeed procured a Reception, he would no doubt have favoured an absolutist interpretation of the civil law, but he might well have found reason to realise that the sixteenth century rightly did not regard the civil law as necessarily any more despotic than any other, as one may discover by reading the praise which Thomas Starkey (The Dialogue between Reginald Pole and Thomas Lupset, written c.1535) bestowed on it in the course of a general defence of constitutionalism.

And if indeed Henry did not want a Reception, that may well have been because he recognised with Elton that no king could have used the civil law more brilliantly to help himself than Henry VII . . . used the common law to restore his finances or Thomas Cromwell used it to subjugate the Church, in both cases without ever infringing its principles or details.

It is probably significant, moreover, that when Maitland spoke of pleasant reading in the Byzantine Code he called Henry a king who wished to be monarch in church as well as state.
For, as Elton points out, the civil law could have been used to strengthen the King’s position against the Pope:22

In the fourteenth century some exponents of the Roman law concluded that any state which did not acknowledge a superior was an empire (imperium); Cromwell, who has been falsely accused of wishing to introduce the Roman law in England, nevertheless may possibly have encountered the notion during his travels. He seems also to have been familiar with the parallel thought, on the subject, of Marsiglio of Padua who in the same century defended the authority of the medieval empire against the papal claim to ‘fullness of power’ (plenitudo potestatis). Since England was engaged in shedding papal power, the assertions of anti-papal authority made in previous centuries obviously came in useful. The English attack on Rome therefore rested on the ancient claim that imperium—lay authority—derives as much from God as does the Pope’s authority, elaborated into an important theory of the state by the addition of Marsiglio’s and the civilians’ conclusion that imperium exists wherever a body politic governs itself without superior on earth.

Maitland was of course familiar with all this, and it provides a conclusive answer to Thorne’s argument that when Henry was casting off the usurped authority of the bishop of Rome23

it would indeed be very curious . . . that a movement should be under way to substitute an alien system of law for the native variety.

This no doubt wearisome introduction has been necessary because Elton’s concern for the good name of Henry VIII and Thomas Cromwell seems to have led him to misinterpret Maitland by reading so many of his statements as reflecting unfavourably on Henry. It is unfortunate that though Elton so often speaks of this or that idea about Henry’s despotism as being common among historians, he does not give references to the writers he has in mind, or refers only to this one lecture of Maitland’s. We have seen one example of this weakness already, in a specific citation; elsewhere a criticism of Maitland may not be intended, but is likely to be deduced. Thus after a reference to24

Maitland’s thesis . . . that England nearly had a ‘Reception’ of Roman law

Elton continues:

It is, however, still supposed that it [the common law] triumphed despite the intentions of the government

but does not name any supposer. He can hardly have meant that Maitland still supposed it, fifty years after his death, but there is nothing to suggest that he supposed anything of the kind in 1901.

We turn then to see what he really did suppose in 1901, so far as that can be deduced from what he said in the Rede Lecture and in other published work of about the same period. Did he in fact propound the thesis that the common law nearly succumbed to the civil law

(Bland),25 the

suggestion that in the 1530’s the common law was nearly displaced by the civil law

(Elton),26 the

unhappily very misleading argument that . . . the common law was seriously threatened by a possible ‘reception’ of the law civil

(Elton),27 or even the

thesis . . . that . . . the continuity of English law was seriously endangered by a threatened reception of Roman law

(Thorne)?28 Let us try to bring out clearly the argument of the Rede Lecture and examine the specific criticisms made of specific points. Maitland began by pointing out that the founder of the Lecture, a contemporary of More and Fisher, was Chief Justice of the Common Bench and had been a reader at his Inn, and went on:29

the rest of the acts of Robert Rede . . ., 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.

This led to the great question already quoted: how did the common law survive so that Coke could challenge the whole world to contradict his praise of Littleton?

Rede had died in 1519, and30
We could hardly (so I learn at second-hand) fix a better date... for the second new birth of Roman law... Humanism was renovating Roman law... Back to the texts! was the cry, and let the light of literature and history play upon them.

A few years later Reginald Pole, according to one of his friends, 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.

The reference is to Thomas Starkey's 'Dialogue between Pole and Lupset', which Maitland thought had been laid before Henry VIII, so that if Pole's views were not correctly presented, at any rate Starkey thought that in King Henry's eyes he was befriending Pole by making him speak thus.

As this comment shows, it was not important for Maitland whether Pole had ever spoken the words put in his mouth, or whether the use of Pole and Lupset was a literary device, no more (as Elton put it), and it is hardly more important that the Dialogue never reached the King. The passage from the Dialogue was cited by Maitland as an effective expression of a popular view in humanist circles, a view which was the legal division in a violent attack on the Middle Ages in general, carried on with exuberance on many fronts and taking many forms, from the Epistoloe Obscurorum Virorum and The Praise of Folly to the Reformation itself.

In a word, the idea of reforming law by a return to the purer sources was in the humanist air, and it seems improbable that Henry VIII was unconscious of it or quite indifferent to it.

A little more needs to be said about Starkey's Dialogue, because of the attention given to it by Thorne. On the one hand he emphasises that the proposal attributed to Pole was no reasoned plan, no practical project, but an idea thrown out in conversation by a Renaissance humanist, more at home in university circles in Padua than in the Italian or English courts and points out that the new Roman law of the humanists, whose aim it was to restore the clear light of classical jurisprudence was not adequate for the needs of the sixteenth century. This is of course true, but not exactly new. A year before the Rede Lecture Maitland had said of Germany:

In theory what was received was the law of Justinian's books. In practice what was received was the system which the Italian commentators had long been elaborating.

When it came to applying the law in the courts, life soon stained the white radiance of juristic eternity, and we can be thankful that practical considerations made the humanist lawyers moderate their enthusiasm for their classical models. If the men of letters and the men of religion had been equally practical, Latin could have survived the Renaissance as a living international language, and the fundamentalist excesses of Protestantism (which include, in the legal field, the Reception of Mosaic criminal law in Scandinavia) could have been avoided. But all this does not mean that humanist impulses did not encourage the Reception on the Continent, or that an English Renaissance prince would not favour Reception on humanist grounds, even though he would soon come to see that the classical jurisprudence must be modified in contemporary practice.

On the other hand Thorne regards the words attributed to Pole as the one definite statement in support of Maitland's remarkable tour de force.

In a sense, this again is true: we can agree that the idea of a reception seems never to have appeared in official circles nor to have had the slightest government support even if we think Thorne rather naive in assuming that the government which continually justified its acts by references to English legal history cannot possibly have thought of introducing a different system which might have been used to justify those acts even more effectively. Starkey's Dialogue is to be read as expressing a general humanist attitude rather than advice actually given by a particular humanist to the King; in a similar way we should think of government support for a Reception as a possibility of the political climate of the time, rather than a fact for which there is evidence. Maitland would accept the evidence and non-evidence which is now available as confirming his doubt whether Henry wanted a Reception, and he might well adopt as a statement of his position a sentence of Thorne's:
The Pole of the *Dialogue* thought [a Reception] could be brought to pass quickly, and in view of all that Henry did bring about, it seems likely that this too could have been accomplished.

Holdsworth seems to have been unable to see this: he thought it quite inconceivable that Parliament would have assented to a project to subvert the common law —but as has already been hinted, a practical Reception need not have required the collaboration of Parliament. We shall come to this point when we return to England after an excursion to Germany.

We turn to Germany because Maitland said of the views attributed to Pole that a little knowledge of what was happening in foreign countries is enough to teach us that such talk deserves attention, and the developments in Germany bulked large in his exposition. Indeed, for Thorne, Maitland’s interest in the Reception sprang from his reading of German legal history, and especially of the work of Stintzing and Schröder: it was essentially their outline, constructed abroad out of foreign materials, into which he fitted, with masterly skill, what little English evidence he could muster.

Thorne is content to hint that the English evidence was insufficient to fill the German outline, but we need to look rather more closely at the outline itself, for it is too simple for the facts as present-day German scholarship understands them.

Maitland’s view of the Reception in Germany can be summed up in a sentence from the Rede Lecture:

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 corners.

—but this is not his only reference to the subject. In the Introduction to his translation of Gierke’s *Political Theories of the Middle Age* (published in 1900) he wrote:

Italian doctrine swept like a deluge over Germany. The learned doctors from the new universities whom the Princes called to their councils could explain everything in a Roman or would-be Roman sense. . . . the Fürst appeared as ‘the Prince’ of political theory and the Princes of the Corpus Iuris. The doctors could teach such a prince much that was to his advantage.

*In the Encyclopaedia Britannica* article ‘History of English Law’, drafted during the winter (1899–1900) in which he translated and introduced Gierke but published after the Rede Lecture, he indicated the contemporary German attitude: This [the Tudor age] was the time when Roman law swept like a flood over Germany. The modern historian of Germany will speak of ‘the Reception’ . . . as no less important than the Renaissance and Reformation with which it is intimately associated. Very probably he will bestow hard words on a movement which disintegrated the nation and consolidated the tyranny of the princes.

This is the background against which to read a footnote to the Rede Lecture, not included in the *Historical Essays* reprint:

Within some of these states or ‘territories’ there was in the sixteenth century a good deal of comprehensive legislation . . . A *Landrecht* . . . was issued by the prince. His legislative action was not always hampered by any assembly of Estates; he desired uniformity within his territory; and the jurists who fashioned his law-book were free to romanize as much as they pleased. The Württemberg *Landrecht* of 1555 issued by Duke Christopher . . . is one of the chief instances.

For this passage Stintzing and Schröder are vouched; part of Schröder’s statement runs in translation thus:

In the drafting of the Württemberg Landrecht (1555) the outstanding Germanic material, collected by inquiry from the courts, was pushed to one side as unsuitable rubbish and vouchsafed no consideration.

The *Landrecht* was mainly the work of Sichard, professor at Tübingen, and became the model for many other codifications; in the passage just quoted we have the Germanist interpretation of the nineteenth century. The emphasis is very differently laid by German scholars today. In codification, we are told, an important impulse came from the interest of the Lords (*Landesperren*) and usually also of the Estates, in the unification of legal practice and the removal of defects, above all the lack of uniformity in the administration of law in the lower courts, which offended the sense of justice of the laity and the academic conscience of the lawyers . . . . As a basis for a common *Landrecht* the local tradition in the territories was most often not usable, because it was multiform, often unwritten and
therefore also uncertain in content ... So in 1553 the Commission of the Estates of Württemberg for the preparation of the *Landrecht* found it not to be possible ‘to make a reasonable, useful, and proportionable *Landrecht* from the usages and statutes laid before them in great heaps’.

Moreover, no generalisation about the course of the Reception could now be offered as appropriate for all Germany, for the foreign law did not pour over Germany in broad streams, but (to maintain the metaphor) divided into numberless channels. The course of the Reception varied from one to another of the innumerable jurisdictions of Germany, but everywhere the formal adoption of Roman-law principles can be seen as the culmination rather than the start of a process, and it is civil lawyers who bring Roman law into the courts, not Roman law which brings the lawyers.

We must not think of the process in any one jurisdiction as typical, and Frankfurt-am-Main was certainly not typical of Germany at large, if only because the *Reichskammergericht* had its seat there in the first years after its establishment in 1495; the course of Reception there cannot nevertheless be taken as an illustration. The formal Reception in Frankfurt was effected by a codification in 1509 and completed by a revised codification in 1578, but these formal recognitions of the change followed a development in the City's chief tribunal. This was the *Schöffengericht*, in which the verdict given by the *Schöffen* allotted the benefit of proof among the parties in accordance with medieval practice, without any clear separation of fact and law. Roman-law ideas appear in the court records from 1482, and from about 1490 exhaustive pleadings, setting out the juristic implications of the facts from all possible standpoints of Roman law, are increasingly found. These written pleadings, presented in all significant cases after about 1500, were introduced by the new race of graduate advocates, whose activity much embarrassed the *Schöffen*, who were lay patricians of the City; the basis for thoroughgoing romanisation was laid when the *Schöffen* in their turn sought advice from law graduates.

Other factors will also have contributed to the mental climate in which Dr Adam Schönwetter, City Advocate from 1493, was able to influence the court in its practice and the Council in its decision (taken in 1498) to take in hand, with the advice of the learned, a reform and ordering in relation to the law; the Code of 1509 was of his drafting. That Schönwetter was also an advocate of the *Reichskammergericht* will remind us that the presence of that court in Frankfurt attracted practitioners who would also be available to advise litigants in the City Court, while members of the Faculty of Law at the University of Mainz were also very ready to supplement their income by advising private and public clients. The young University and the young Imperial Court certainly contributed to make the progress of romanisation exceptionally rapid in Frankfurt, but a similar development is found in many different kinds of circumstance: the strongest element in bringing about the change to Roman law will usually be seen to be the attraction for litigants and for the courts of a clearly stated system to which reference can be made for a solution to any problem. Romanisation was much slower in jurisdictions which had a written statement of the indigenous Germanic law, as in the *Sachsen-spiegel* and the books derived from it.

When we now return to England, with today's concept of sixteenth-century Germany in our minds, we shall be very conscious of the political contrast. There is in England no great problem of the diversity of law in different jurisdictions, and the Estates are certainly not interested in law so that they gladly leave reform to the Prince. As Holdsworth implied, the Parliament of England was likely enough to have resisted with success any attempt to introduce a general Reception by legislation: at the very least it would have so delayed and modified any bill for the purpose that the resulting Act must have been of doubtful value. This probable intransigence of a lawyer-infested Parliament of course supports Maitland's explanation of the survival of the common law: the influence of the common lawyers was so great because they were members of a well-organised learned profession.

The attitude of Parliament has another importance, for it reminds us that we ought not to think of Reception as necessarily introduced by Act of Parliament. Just as we have seen that in Germany the way for a formal codified Reception could be prepared by the practice of the courts, so we might have found a Reception capturing England by a postern gate. After all, when Henry VIII forbade the academic study of canon law, he encouraged that of Roman law by founding the Regius chairs at Oxford and Cambridge, and just after his day commissions appointed for the two universities were specially directed to make adequate provision for the study of the civil law by the foundation of colleges which should be devoted entirely to this subject.

Again, when a commission was appointed in the late 1530s to report on the Inns of Court and later to recommend improvements in the system of
legal education, though it is true that the commissioners were all members of the Inns, it must also be remembered that they were all young men who would not necessarily feel committed to maintenance of the old system. Those who appointed them may not have realised how strong loyalty to the system could be; they may on the other hand have recognised the dilemma which still faces the would-be law reformer, in that those who understand the system do not want to reform it, while those who want to reform it do not understand it well enough to criticise it practically. So (for all we know) the commission’s report may have been expected to provide a case for introducing Roman law, or at least to provide a description of the system which would support such a case. But whatever intentions or expectations or hopes lay behind the appointment of the commission, its results support Maitland because they show the resilient strength of the common-law profession.

For whatever reason A Reception there was not to be, nor dare I say that a Reception was what our Regius Professor or his royal patron desired . . . . Nevertheless I think that a well-equipped lecturer might persuade a leisurely audience to perceive that in the second quarter of the sixteenth century the continuity of English legal history was seriously threatened.

Maitland’s language shows his characteristic caution: the threat of which he speaks is not to the existence of the common law, but to the continuity of English legal history. So when we are told that Maitland’s thesis has been laboriously and successfully overthrown by Holdsworth and his suggestion long ago severely modified by Holdsworth: the supremacy of the common law itself was never threatened by the conciliar courts we ought to remember Holdsworth’s own words: But though I am inclined to think that the existence of the common law was not endangered in the first half of the sixteenth century, I am of opinion that its supremacy was in very serious danger.

If the common law’s supremacy was in danger, the continuity of English legal history was certainly threatened. In the reign of Henry II the existence of the local courts was not endangered, but their supremacy was undermined by the royal courts—and the continuity of English legal history was so broken that English legal historians are almost entirely uninterested in earlier English law.

So, after saying that our medieval law was open to humanistic attacks. It was couched partly in bad Latin, partly in worse French, Maitland went on to suggest that the pathway for a Reception was prepared . . . . we may think of the subjected church and the humbled baronage, of the parliament which exists to register the royal edicts, of the English Lex Regia which gives the force of statute to the king’s proclamations, of the undeniable faults of the common law, of its dilatory methods, of bribed and perjured juries, of the new courts which grow out of the King’s Council and adopt a summary procedure devised by legists and decreetists. Might not the Council and the Star Chamber and the Court of Requests—courts not tied and bound by ancient formalism—do the romanising work that was done in Germany by the Imperial Chamber court, the Reichskammergericht?

In this eloquent passage Maitland was certainly assuming an almost infinite capacity for getting his own way in Henry, and we today shall not dare to endorse his view of the function of Parliament. But in assessing the possibility (rather than the likelihood) of a Reception in England we ought perhaps to look for a moment at the position with the eyes of Henry’s contemporaries—say with those of a continental humanist lawyer. We know what Erasmus thought of English common lawyers: would not his friend Zasius have thought that the king who could change the allegiance of the English church could also change the allegiance of the English courts, and would he not have thought that a humanist king would want to change it? The Duke of Württemberg too might have thought that the King of England could secure a reform by legislation rather faster than had been possible in Württemberg, where the codification of 1555 was the end-result of a process begun in 1514.

For the twentieth-century reader, however, two items in the catalogue of Henry’s achievements will attract attention: the ‘English Lex Regia’ and the conciliar courts. The former has already been dealt with and we need only add that the legislative authority given to the Emperor by the Roman Lex Regia was not in theory exclusive and that in practice he used the nominal legislature to register his edicts. As for the conciliar courts, Bell commented on Maitland’s question whether they might not do the same romanising work as the Reichskammergericht: The answer, I suppose, is that they might have done, but that in practice they did not.

Fifoot thought the answer ‘pertinent’; Maitland might have thought it
rather obvious, for what he really wanted to know was why they did not. We must ask how they might have done what they did not do, but the answer can be postponed until we have considered the probability that if there had been any pressure from authority in favour of a Reception, the common law was in a poor case to withstand it.

Maitland was persuaded that in the middle years of the sixteenth century and of the Tudor age the life of our ancient law was by no means lusty.

This conclusion follows references to the end of the Year Books in 1535 and to some indications of a falling-off in the business of the common-law courts. The critics have done only rough justice to Maitland over the Year Books, attacking not so much what he said as what they have thought his hints must mean: this appears most clearly in Dr J. H. Baker’s unusually rash allegation that Maitland went so far as to suggest that this event was another ominous indication of the king’s antagonism towards the common law while Bell said that it is not convincing to represent their end as being due to Machiavellian government action.

Now Maitland’s actual words were (in the text of the Lecture)

And then we see that in 1535, the year in which More was done to death, the Year Books come to an end: in other words, the great stream of law reports that has been flowing for near two centuries and a half . . . becomes discontinuous and then runs dry. The exact significance of this ominous event has never yet been duly explored: but ominous it surely is. Some words that once fell from Edmund Burke occur to us: ‘To put an end to reports is to put an end to the law of England’,

and (in a note to this passage)

The cessation of the Year Books in 1535 at the moment when the Henrician Terror is at its height is dramatically appropriate.

There is no suggestion at all that the cessation was caused by official action, and the expression ‘dramatically appropriate’ seems apt for coincidence rather than causation. This makes peculiarly unfortunate Holdsworth’s comment:

if, as is now generally admitted, they [the Year Books] owed their origin merely to the private enterprise of the legal profession, their cessation loses much of its significance.

Maitland knew that the Year Books of 1535 were not the work of official reporters and he doubted whether there had ever been official reporters. Burke was certainly right, when we remember that by his day Equity like Common Law was committed to a doctrine of precedent for which reports were indispensable. In the sixteenth century only the common-law courts relied on reports, and the cessation of reports produced by the private enterprise of the profession might well mean that the profession no longer felt that reports were worth producing, because the litigation which involved legal argument no longer went to the common-law courts. Today, when much more work has been done on the history of reporting — and we remember that Maitland said — we recognise that the end of the Year Books is significant in a different way.

A great deal, however, has yet to be done before the relevant facts will be fully known.

With the introduction of written pleadings, these guides for serjeants pleading orally in court became obsolete.

There was no break in continuity between the Year Books and the nominate reports, and the Year Books had already begun to change because of the change in the form of pleading. But this change was a change in the direction of civilian procedure, and to that extent a preparation of the pathway for a Reception.

For the decline of business in the common-law courts, Maitland admittedly confined himself to citing contemporary reactions — the complaint of the common lawyers of 1547 against the Lord Chancellor and the account given by Stow of the idleness of the courts in 1557. This account was of course impressionistic, but Holdsworth made it the starting-point of a solemn sampling of court rolls. He easily succeeded in showing that the common-law courts were not entirely idle: even the roll of the Court of Exchequer had two entries for 1525 and ten for 1557. But his sample was small and his measure of the courts’ business was not very satisfactory; in her fuller analysis the late Marjorie Blatcher used the fluctuating profits on the seals of the two benches as a measure of business, and detected a trend which may be stated, without over-simplification, thus. The benches had been losing business from the 1430s; they could rally but could not reverse a tendency which persisted until its nadir in 1524–5; they picked up again, but with great difficulty, and then began to soar into prosperity in the 1550s.
We remember that Maitland said: 74

When the middle of the century is past the signs that English law has a new lease of life become many

—and Blatcher’s analysis shows that the common assumption that 75

the danger to the Common Law disappeared with Wolsey

is wrong: the business of the common-law courts did not recover in absolute terms for several years, and it was declining sharply in relation to that of other courts.

The common lawyers themselves still believed in the danger in 1547, when they complained that the Chancellor, Thomas Wriothesley, Earl of Southampton, had delegated his judicial functions 76

unto certaine persone, the more parte whereof be Civilians nat learned in the saide Lawes of this realme . . .

Holdsworth brushed the complaint aside: 77

We may suspect the petition of the students of the common law of an aggravated form of exaggeration, for the petition probably had a political purpose. At any rate it was used by the political opponents of Wriothesley . . . as an excuse for getting rid of him.

It is indeed likely enough that the petition had a political purpose, as Maitland surely recognised when he wrote: 78

With Somerset’s motives for thrusting Southampton aside we are not concerned . . . . That he had any desire to protect the common lawyers we must not assume: but the petition itself deserves attention.

Even if one has personal or political motives for attacking somebody, one does not base a case against him on grounds which have no colour of truth. No-one who wanted to discredit Holdsworth would accuse him of being pro-German. 79

The students’ case seems clear enough. 80

The commissioners to whom Southampton had delegated judicial powers were Robert Southwell (master of the rolls), John Tregonwell, John Oliver, and Anthony Bellasye (masters of chancery). Tregonwell, Oliver and Bellasye were all doctors of the civil law.

It is arguable that these men, long familiar with the practice of Chancery, were better suited to exercise the Chancellor’s jurisdiction than the common-law judges who had deputised for earlier Chancellors, for the judicial experience of those judges was all in the common-law courts

where they could avoid responsibility by relying on the jury. 81 There had been in the second half of the fifteenth century a complete change from Chancery clerks and masters trained on the job to graduates in civil law or jurisprudence. 82 If these men exercised the Chancellor’s jurisdiction they must inevitably romanise it: when (as must sometimes happen) they were faced with a problem for which their own experience offered no solution, they would look for guidance to the experience of others, as lawyers always do; and since there was at that time little or no recorded Chancery experience, they would look for guidance in the Roman sources on which their training had been based. We may admit that the students of common law had a more mercenary motive for criticism, since the use of the Chancery staff as deputies reduced the demand for the services of the common-law judges and therefore indirectly the prospects of ultimate promotion to the bench for the students; this admission does not weaken the argument that civil lawyers in judicial office would of necessity romanise the law they administered. This is, as we have seen, the lesson to be learnt from the German scholarship of the present century: absolutist tendencies in the German princes were far less important as agents of the Reception than the availability of trained civilians as advocates for litigants and advisers for courts staffed by laymen.

This account of the tendency of Chancery will suggest how Henry VIII could have brought about a Reception without reference to Parliament, by using his prerogative and his powers of appointment to office, to encourage the tendency. He was already using the prerogative to establish new courts—and Coke would denounce those courts as unconstitutional; but they were essential in Henry’s day. They owed their existence to an increase in litigation, but it is not enough to say with Elton: 83

The really striking thing about the courts of the early Tudors is not the determination of government to provide justice, but the determination of litigants to seek it, or rather to seek that success at law which among the victorious passes for justice. The pressure of suitors was enormous and quite sufficiently accounts for the proliferation of courts.

The pressure of suitors certainly accounts for an increase in the total business of all the courts, just as the pressure of suitors accounts for the increase in the total business of all the courts after the Second World War, and so for the increased prosperity of an enlarged practising bar. But insofar as the post-War increase of business has been an increase in the old kind of business, it has been dealt with by a proliferation of judges, not of courts, so that even the Chancery Division has now
thirteen judges where in 1939 it had six. But there has also been a
proliferation of tribunals to deal with new kinds of litigation—industrial
tribunals, the Restrictive Practices Court, and so on; and these tribunals
have been established just because the traditional courts (‘tied and bound
by ancient formalism’) could not be expected to do justice in the new
kinds of case. If the Tudors had needed only to deal with more suitors,
they could have appointed more judges to the common-law courts; they
created new courts because the particular formalism of the common law
prevented it from doing justice in the new kinds of case which were now
becoming more important. In Elton’s own words:84

Court-making was an industry in the early sixteenth century, and
Cromwell ... believed in adding in this way to the effectiveness of
law and justice in the realm ... I will record my conviction that
one of Cromwell’s reforming purposes touched the need to provide
better and swifter justice for those who came seeking it.

The contemporary comparison must not be pressed too far, but it is
hardly too fanciful to see in the comments of some twentieth-century
judges on the operation of the newer judicial and quasi-judicial bodies a
parallel to the resentment of the Tudor common lawyers, and in the
influence of the judges who sit on our special tribunals a parallel to43

the strong common-law influences to which all the prerogative
courts were subject. The most notable of these was perhaps the
matter of personnel.

Maitland concentrated his attention on the signs of civilian influence in
these courts, but if he had commented on the common-law influences he
could have said that their existence reinforced his main thesis. The
common lawyers owed to their learned character both their position as
members of these courts and their influence on their fellow-members.
The truth is that both civilian and common-law influences operated in
the conciliar courts as they did in Chancery; if the King had wanted to
make either influence decisive, he had the power to do so, and we shall
see that one particular move at the end of his reign can be regarded as
decisively favouring the common law in Chancery and almost all the
other courts.

There was thus a balancing of common-law and civilian interests in the
conciliar courts and in Chancery, and the growth of business in those
courts had affected the common-law courts. Elton argues that the
common law itself was not in danger.86

At most we can speak of danger to the old courts of the common
law, which were being rivalled by new courts where the common
law, augmented by statutes, was enforced more efficiently. The law
itself never budged before the civil law, confined from the first to
those spheres which the common law did not touch.

The second of these sentences may be literally true, but it loses most of its
force when we remember how many were the spheres which the common
law did not touch: quite apart from the cases within the Admiralty
jurisdiction, there were such matters as wills, slander, informal
contracts, and the whole range of cases for which only Chancery offered
relief. Moreover the common law was surely budging a little when it
adopted written pleadings, and it is no answer to this to say that pleading
is only a matter of procedure, which leaves substantive law unaffected.
Least of all can one say that of the medieval common law, whose
learning was primarily concerned with pleading and whose greatest pride
was the jury, one of the three procedural devices by which Henry II
ensured the victory of the royal common law over local custom.87

Indeed, for the lawyer, the contrast between different systems of law is
more often a matter of differences in procedure than in substance. This is
true even within the English legal system of today, over a century after
the fusion of Law and Equity: a barrister who practises in the Queen’s
Bench Division feels lost in a Chancery Division court,88 and when
lawyers are suspicious of the new tribunals, it is largely because they
distrust their innovations in procedure. It becomes clearer when the
contrast is with a foreign system, and it was clearer still in earlier periods
when procedure was more formal and rigid. When Edward I sent a
commission into Wales in 1281 to collect evidence about certain legal
practices, many witnesses spoke of a choice between ‘the law of Hywel’
(i.e. Welsh Law) and other possibilities; by the law of Hywel they did not
mean substantive rules about the rights of the parties, but procedural
rules about the proof of facts.89

Hence the lawyer cannot feel at ease with Elton’s comment on the
court of Chancery:90

in its procedure, as Sir Thomas Smith points out, the Chancery
leant heavily on the civil law, and it was here that, from the
plaintiff’s point of view, it most remedied the defects of the
common law . . . . But the law administered in the court was more
like that of England than that of Rome.

Since the whole point of the Chancery jurisdiction, as the common
lawyers saw it in the sixteenth century, was that it operated where the
common law did not, it is hard to see how the law administered there
could resemble the common law, even though we admit that it did not
resemble Roman law. The use, which by 1500 was the staple of Chancery
practice, was an institution sui generis: the common law did not recognise it, and there was no parallel to it in Roman law. What is more, the use could not have developed at common law because the common law procedure could not extract the information which would establish the continuing existence of the use, once the original link between feoffor and feoffee to uses had been broken. The common law would normally award damages to the feoffor or his heir-at-law against the feoffees who broke their contract with the feoffor: the Chancellor with his coercive measures directed to the defendant's conscience through his body, gave the cestui que use the land itself, even where he was not the feoffor or his heir, and he soon extended the remedy so that it became available against any holder of the land except a bona fide purchaser for value without notice of the use.  

This new kind of property, unknown to civil law and common law alike, could not have been born without the procedural machinery which begat it. Here is a particularly striking example of the secretion of substantive law in the interstices of procedure: we can find another instance of the importance of procedure, on the other side of the account between civil and common law, in the change in the Admiralty procedure for the trial of certain crimes, made by statute in 1536 at a time when if ever a Reception was likely.

According to the preambles of the two statutes, traitors, pirates, thieves, robbers, murderers, and confederators who committed their offences at sea often escaped unpunished, because their offences were triable in the Admiralty court after the course of the cyvelle Lawes, the nature wherof is that before judgement of the same can be given agaynst the offenders either they must plaignly confess their offencis (which they will never do without torture or paynes) or elles their offencis be so plaignlye and dyrectely provyd by Wytinesses idyfferent suche as sawe theyr offencis comytyd,

and possible witnesses, if not killed at the time of the offence, were likely to be seamen who would often have left on new voyages so as not to be available at the trial. The remedy was that these offences should be tried by the othes of twelve good and lawfull men inhabited in the Shyre named in a commission to be issued by the King. The trial is to be in the same form as if the offences had been done on land: the procedure is to be the common-law procedure. But the King's commission is to be dyrectid to the Lorde Admyrrall or Admyrals or to his or theyr

Lieutenant Deputie or Deputies and to three or foure such other substancial persone as shalbe namyd by the Lorde Chauncellor for the tyme being, as often as nede shalbe requyre.

The jurisdiction is not transferred to the ordinary common-law courts, nor is there any suggestion that the substantive law of piracy was changed.  

The foregoing paragraphs are not intended to prove that a Reception of Roman law was imminent in England in the 1530s, but to indicate that 'the pathway for a Reception was prepared' in the sense that if anyone in authority had wanted a Reception, he would have found the necessary machinery ready to hand. The 'piracy' statutes of 1536 are a clear warning that no indiscriminate adoption of civilian practices was on the way, but the existence of these statutes must not blind us to the fact that romanisation need not require recourse to Parliament. In a non-parliamentary romanisation the first step of authority (which could have been a popular one) would be to condone and even encourage the extension of their jurisdiction by Chancery and the conciliar courts. This extension it was which under Wolsey made those courts more popular than the common-law courts; their popularity waned when it led to such accumulation of business that delay became as serious as in the common-law courts. To remedy that weakness it would be necessary only to appoint more men to sit in judgement; in particular it would be necessary to ensure that Chancery had in addition to the Chancellor judges who would act by authority directly committed to them, rather than as deputies exercising authority delegated by the Chancellor.  

The additional judges whose appointment should maintain the popularity of the courts would then be civilians. It may be argued that there were not enough civilians to meet the need, but if there had been a strong positive move to favour the civilians in the early sixteenth century, it would have been easy to swell the numbers of qualified civilians — far easier than to swell the numbers of qualified common lawyers. For though there is reason to think (with Maitland) that the training of common-law practitioners was effective, it cannot be regarded as efficient: a great deal of time and labour, for both trainer and trained, went into the production of a single practitioner. Recent research has shown how small was the number of common-law practitioners, and since the training of the common lawyer was so slow, any attempt to increase numbers could take effect only after a long interval. The training of civil lawyers, by contrast, depended on the universities. It is true that the process was long-drawn-out: at Cambridge
the candidate for the Doctor's degree in civil law must, if a regent in arts, have heard lectures on the civil law for eight years, and, if not, for ten years

but a reforming humanism could have shortened the process. There would be little difficulty in increasing the supply of teachers by imports from the continent, and no difficulty at all in increasing the supply of learners—though perhaps too many of them might have been Welshmen. A generation later, the Denbighshire author Humphrey Llywd would be saying that in Wales:

there is no man so poore, but for some space he setteth forth his children to Schole, and such as profite in studie: sendeth them vnto the Universities, where, for the most part, they enforce them to studie the Ciuite law. Wherby it chaunceth, that the greater sort of those which profess the Ciuite, or Canon lawes in this Realme are VWelshmen.

Scholarships and sizarships could ease the path through the universities to civilian practice; there were no comparable subsidies for the training of common lawyers—a fact which is reflected to this day in the social origins of the judges. Courts staffed by civilians and attracting business away from the common-law courts would have quietly romanised the law which was of practical importance, while leaving the common law to wither in the courts to which no ordinary litigant would turn. If this gradual process had been begun under Henry VIII and continued through the rest of the century, it is not too fanciful to suppose that James I would have wanted to proceed to the logical conclusion which was reached in so many parts of Germany, a codification of the law, in a Code which would necessarily be on Romanist lines. In particular, we might expect such a Code to state categorically that in any case for which the Code provided no solution the court should turn to the Corpus Iuris. And if we are told that Coke and the Parliament would have had something to say about all this, we must ask what Coke would have been, and what the composition of Parliament would have been in the 1620s, if in the 1530s Henry VIII had given that small push which could bring about a Reception.

Henry did not give that push:

A Reception there was not to be, nor dare I say that a Reception was what our Regius Professor or his royal patron desired.

But the common-law judges of the 1530s might well feel fearful, for they could not know whether Henry desired a Reception. It is argued that the danger of a civilian take-over in Chancery was removed when a common

lawyer was appointed to succeed Wolsey (who was not a civilian) as Chancellor, but we cannot be sure that that was quite what Henry had in mind. He could of course have appointed a legally-qualified cleric, and he may well have decided that to do so would be provocative; but when he chose More we can hardly say whether he was thinking of him first as a common lawyer and the son of a judge, or as a humanist and a man of conciliatory temper who could persuade the common-law judges that the Chancellor must be free to fill the gaps in the common law's provision of justice—as in fact he did.

More's appointment, whatever the motive for it, eased the tension between Chancery and the common-law courts, but it left the problem of relations between them unsolved, to rise again at the end of the century. It is of course wrong to think of a political conflict of laws and courts in the sixteenth century but it is also misleading to say that when the common lawyers, from Sir Thomas More onwards (1529) established virtual monopoly over the chancellor's own office, equity came to be adapted to the common law. It always remained a separate body of law, but instead of resting on a hostile set of rules it became an ally: the two understood each other.

For in a sense Equity had always been adapted to the common law in that it recognised the common-law rules when it found ways of doing justice in spite of those rules, and it had always been an ally of the common law because the common-law judges usually recognised that their formal rules sometimes prevented them from doing justice. The appointment of a common lawyer as Chancellor was no guarantee that Chancery and the common-law courts would not quarrel: the most aggressive Chancellor was the common lawyer Thomas Egerton, Earl of Ellesmere.

The battle between Coke and Ellesmere needs a fuller examination than would be appropriate here, but the fact that that battle could be fought shows that the problem was not solved in 1529. If equity rested on rules in 1529, those rules were as hostile to the common law after that as they had been before; but the common lawyers' great complaint was: Equity is a roguish thing: for Law we have a measure, know what to trust to: Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity.

It was only when Lord Nottingham had declared that the conscience by which the Chancellor was to proceed was merely civilis et politica, and tied to certain measures
that the relation between Chancery and the common-law courts became stable and the possibility of conflict was removed. For a century and a half after the appointment of More it depended on personalities whether the two understood each other, and a modern parallel may make the point a little clearer. From 1907, when the Court of Criminal Appeal was created, until 1966, when it was replaced by the Criminal Division of the Court of Appeal, it was always possible that the Court of Criminal Appeal would apply the law differently from the Court of Appeal. Perhaps because both courts knew that the House of Lords stood above them, they seem to have shown an enforced respect for each other's decisions, but over one matter a conflict between them remained unresolved for nine years. In *R. v. Denyer*, the Court of Criminal Appeal under Lord Hewart C.J. upheld the conviction for demanding money with menaces of an official of the Motor Trade Association who had invited a trader to pay a fine as an alternative to being put on the Association's 'stop list'; this decision was disapproved by the Court of Appeal in *Hardie and Lane Ltd v. Chilton*, and Lord Hewart took an early opportunity to make it clear, for the purposes of the administration of criminal law, that unless and until the decision in *Rex v. Denyer* in this Court is reversed by the only competent tribunal, it is binding upon and will be enforced by this Court against any person or persons offending in like manner.

The resolution of the conflict came in 1937, when the House of Lords, in *Thorne v. Motor Trade Association*, followed *Hardie and Lane v. Chilton* and overruled *R. v. Denyer*.

The possibility of conflict between Chancery and the conciliatory courts on the one hand, and the old common-law courts on the other, remained even in the later sixteenth century. In the early part of the century, if the authorities had wanted to effect a Reception, they could have used the possibility for their purpose, by appropriate appointments to the courts. That they did not do so may mean that they did not want a Reception, but might equally mean that though they wanted one they recognised that the attempt to effect one would cause them unacceptable trouble. There is, however, one piece of evidence which suggests more strongly that they did not want a Reception. As we have seen, romanisation of German courts was greatly helped by the litigants' use of trained civilians, and civilian advocates could likewise have helped to romanise English courts. A reference to university-trained civil lawyers, confined largely to practice in the Chancery, the Admiralty Court, the Court of Requests and the ecclesiastical courts suggests that civilians appeared as advocates in Chancery, but cites no authority. The list of practitioners in Chancery in Wolsey's time, published by Dr Franz Metzger, shows that the most important practitioners were members of the Inns of Court, and there seem to be very few civilians among them: perhaps indeed only the Chancery officials (such as John Clerk, Master of the Rolls, who was LL.D. of Bologna) had university degrees in law. Be that as it may, the doors of Chancery were closed to civilian advocates by the Proclamation of 1546, by which it is ordered and agreed by the commandment of . . . the King's highness, with the advice of the Lord Chancellor of England and all the justices of both benches, that no person except that he hath read in court shall be admitted nor suffered to be a pleader in any of his highness' honorable courts at Westminster; that is to say, in the Courts of Chancery, King's Bench, Common Pleas, Exchequer, Star Chamber, Duchy Chamber, Augmentations, Sewers, Tents and First Fruits, and Wards and Liveries, unless he be thereunto admitted and appointed by the said Lord Chancellor and the two Chief Justices with the advice of two of the benchers and ancients of either of the four houses of court.

It was this proclamation (which did not apply to the Court of Requests) which more than anything else ensured that romanisation would not go forward unnoticed. Or, if that language seems too strong, we can say that the proclamation is the clearest proof of the strength, not of the common law but of the common lawyers. There would be no Reception of Roman law in England because the common lawyers were a profession, learned enough to provide the sophistication which in so many German jurisdictions could come only from the civil lawyers, and having enough cohesion to enable them to obstruct any serious attempt at radical innovation.

Every piece of evidence which strengthens the argument that a Reception was unlikely strengthens also Maitland's argument that it was because English law was taught law that a Reception did not occur. In the Rede Lecture, Maitland concentrated on the teaching system of the Inns of Court; elsewhere he had given credit to the attitude of English lawyers in the age of Glanvill and Bracton:

> It was the critical moment in English legal history . . . . It was the moment when old custom was brought into contact with new science. Much . . . depended on the result of that contact. It was a perilous moment. There was the danger of an unintelligent 'reception' of misunderstood and alien institutions. There was the danger of a premature and formless equity. On the other hand, there was
the danger of a stubborn Nolusmus, a refusal to learn from foreigners and from the classical past. If that had not been avoided, the crash would have come in the sixteenth century and Englishmen would have been forced to receive without criticism what they had once despised.

The criticisms of the alleged thesis of Maitland’s Lecture have strengthened the case for its true thesis. Thorne, however, will have none of this. For him, not only was there no danger of a Reception, but if there was no reception, as we know there was none, it was not because of the four Inns of Court and a medieval system of moots and readings, but because English law found solutions within itself for the very serious and threatening problems raised by

a series of movements

that might have made a reception possible.

For our present purpose, it is not necessary to discuss whether Thorne is right in regarding law (like medicine) as an intellectual structure which differs from a creed, or a body of doctrine like the comprehensive system of scholastic philosophy

because

it finds its justification independently in its success in dealing with the problems life presents to it.

But he goes on to say:

Only when [the law] is unsuccessful in the practical sphere, when its rules lead to results contrary to, or different from, what is required or expected, does the way open for reform or reception. These follow upon failure, or what is the same thing, new needs with which the law does not, or can not cope.

This is neither theoretically necessary nor in practice by any means always true, but even to the extent to which it is true it does not invalidate the true thesis of the Rede Lecture.

Let us for the moment accept that sixteenth-century English law found its own solutions for the problems of its age: we still have to ask why it did so when sixteenth-century German law (on the whole) did not. And to that question the answer must be Maitland’s answer, that

Medieval England had schools of national law
— with all that is implied in the words school and national. The transmission of the traditional law did not depend in England on the bare memory for custom of lay courts, as it did in so many German jurisdictions, nor even on the possession of a written text of the tradition like the Sachsenspiegel. English law was tough for being taught, and it was perhaps the tougher for being taught in a particular way and under particular auspices. Traditional law transmitted by lay memory can give satisfactory solutions only for cases of a type familiar to memory; the existence of a written record of the tradition lengthens memory and makes it permanent—and may also petrify it; the greatest value of an academic training in law is that it gives some of those trained a vision of the mechanics of possible development for the law—though it inevitably gives the duller pupils a dead and deadening contentment with routine application of their learning.

Training at the Inns of Court was through the ordinary medieval instruments of lecture and disputration: in the technical language of the Inns, reading and moot; and of these the moot is by far the more significant. Disputation in philosophy or theology may well have exhausted its possibility of value before the end of the Middle Ages, though a layman in those disciplines will be slow to express any opinion; but for the training of the lawyer the moot is particularly appropriate because of the function he will often have to fulfill as a practitioner, whether advocate or judge. It may be fanciful to think of counsel for the plaintiff as presenting a thesis, which is countered by counsel for the defence in an antithesis, leaving the judge to produce a synthesis; perhaps we should use more pictorial language. The practitioner is concerned to put the instant case into the proper legal compartment: most often, the compartment already exists, and the disagreement between the parties is one over facts. Rather less often, their disagreement is over the choice between two possible compartments. And, far less often, there is no ready-made compartment, so that a new one must be constructed. It is in meeting the need for this construction that the academically-trained lawyer comes into his own.

When the lay Schöffen met a wholly new problem, their customary law could not provide a solution, for there can be no custom in relation to something that has never yet happened. So if they failed to persuade the parties to compromise (and we must remember that British judges today still try to persuade litigants to relieve the pressure for innovating), they were forced to turn to academically-trained lawyers for solutions. In Germany the only academically-trained lawyers were university graduates in civil or canon law or in both laws.

The schools of law in Germany were not schools of national law. They may have been thought of as schools of universal law, of a higher law transcending any national system, for we must not forget that such
authority as Roman law had in Germany owed little to the alleged continuity of the Empire and much to the alleged rationality of the law. A German university faculty of law would have told a premature Germanist that there could be no German schools of national law because there was no German national law. But in England there had been royal, national, law since the twelfth century, and that national law was academically taught. Now Maitland had pointed out that the law which was the main subject of study in the Pavia of the eleventh century was not Roman law but Lombard law; ... this body of Lombard law, having once become the subject of systematic study, showed a remarkable vitality in its struggle with Roman jurisprudence. ... it was not utterly driven from the kingdom of Naples until Joseph Bonaparte published the French code. Law schools make tough law.

In England the law schools made very tough law indeed, too tough as we must say, because the schools were under the auspices of the profession. This connection with the profession is doubly significant. On the one hand, it contributed to building up the unity of the profession, whose strength and cohesion seem (as we have seen) to have meant so much for the defence of the common law against possible governmental attack. On the other hand it will have meant that disputes were related to more practical problems than might have been thought up by university academics who were not concerned with practice. At any rate, the practising common lawyer was a man who had learnt to wrestle with problems for which there was no ready-made solution. The solutions which the common lawyer, tied and bound as he was by ancient formalism, found for his problems were all too often unacceptably harsh; but a kind-hearted man of the fifteenth century would not need to worry unduly about their harshness, because he knew of other courts to which the victim could turn; and it is significant that Thorne does not claim that the common law found solutions within itself, for the solutions came from outside. We have seen that even before the sixteenth century the common-law courts were adopting the written pleadings which on the Continent came from the civilians, and in the sixteenth century innovations were being made in those other courts which would gradually be adopted by the common-law courts. The result is that

The medieval law lived on in an organic sense, but the rate of development, distortion and innovation was so accelerated that the gulf between Littleton and Coke became greater than Littleton could have dreamed or than Coke would admit.

Coke indeed did all he could to resist any innovation that was not of his own making, and if he had had his way Chancery would have been prevented from granting the injunctions which the common-law judges had admitted to More were indispensable. Nor was he alone, as the anonymous Serjeant's Replication to Doctor and Student shows: the Serjeant, like Coke after him, showed such indifference to injustice as to come very near to fulfilling Thorne's precondition for reform or reception.

Adaptation to the new conditions did not come easily to the common lawyers, and it is here that a comparison with developments in France will be apposite. Baker rightly points out that the circumstances of France and Germany were very different (he might have murmured the magic words mos gallicus and mos italicus); but he seems to go too far when he speaks of France as having a 'gothic revival' like that which Maitland saw in England. He concludes that at the same time as Maitland's solution is completely vindicated, his question dissolves away. Here was nothing remarkable in the survival of English law. England was not sailing against the stream of the Renaissance in Europe.

It is part of the reasoning which leads to this conclusion that

The legal humanists of Europe had no more impact on living law than had the now almost forgotten Civilians of Oxford and Cambridge. But the methods which they pioneered could be applied as well to French law as to Roman law, so that, while the legal historians strove to discover (for its own sake) the pristine purity of classical Roman law, professors of contemporary law (such as Charles Dumoulin) were beginning to free national customary law from its encrustations of medieval Romanism.

The contrast thus implied between France and Germany can be summed up in the words of a French legal historian:

Nous avons pris du droit romain, mais nous ne l'avons pas reçu.

But if there is in this matter a contrast between France and Germany, there is an equally sharp contrast between France and England. In France, Roman law became a source of solutions for legal problems imperio rationis, in a way quite alien to the sixteenth- and seventeenth-century common lawyers: no-one ever suggested that there was a mos anglicus.

Seventeenth-century French law may not have been classical Roman: perhaps it was baroque, but it was hardly Gothic; and insofar as seventeenth-century English law was Gothic, it was so by way of survival rather than revival. When the Gothic common lawyers came to grapple
with the commercial cases which they were trying to win from the Admiralty court, they floundered clumsily for a long time, and the solution which the common-law courts at last found for the problem of enforcing the everyday contracts of business life left an aftermath of problems which are still troublesome after nearly four centuries.19 Those problems will serve as evidence that the common law’s own resources were not adequate to meet the challenges of new conditions, though the profession was strong enough to maintain it in its position while it took over the functions which had been performed by other courts. When the ‘Dark Age of English Legal History’ has been thoroughly illuminated, we shall perhaps see clearly just how the additional courts of that age provided the innovations which would in time be adopted by the older courts, but we are hardly likely to be convinced that the common law could have solved the new problems of the age without the help of those other courts. Maitland had seen this seven years before the Rede Lecture, and he shall have the last word, in the last paragraph of his ‘English Law, 1307–1600’:20

Somehow or another, England, after a fashion all her own, had stumbled into a scheme for the reconciliation of permanence with progress. The old medieval criminal law could be preserved because a Court of Star Chamber would supply its deficiencies; the old private law could be preserved because the Court of Chancery was composing an appendix to it; trial by jury could be preserved, developed, transfigured because other modes of trial were limiting it to an appropriate sphere. And so our old law maintained its continuity. . . . it passed scathless through the critical sixteenth century, and was ready to stand up against tyranny in the seventeenth. The Star Chamber and the Chancery were dangerous to our political liberties. Bacon could tell King James that the Chancery was the court of his absolute power. But if we look abroad we shall find good reason for thinking that but for these institutions our old-fashioned national law, unable out of its own resources to meet the requirements of a new age, would have utterly broken down, and the ‘ungodly jumble’ would have made way for Roman jurisprudence and for despotism. Were we to say that equity saved the common law, and that the Court of Star Chamber saved the constitution, even in this paradox there would be some truth.

5. ‘English Law and the Renaissance’, La storia del diritto nel quadro delle scienze storiche (Florence, 1966) [hereafter referred to as Storia], 437–45.
7. English Law and the Renaissance [hereafter ELR] (Cambridge, 1901), 3–5; Selected Historical Essays of F. W. Maitland [hereafter HE] (ed. Helen M. Cain; Cambridge, 1957), 136. As no copy of the original edition has been conveniently available, quotations follow HE, whose spelling and punctuation differ somewhat from the original. Most of the original notes are omitted from HE; quotations from these follow the original. The Lecture was also reprinted, with the original notes, in Select Essays in Anglo-American Legal History (ed. Association of American Law Schools), i (Boston, Mass., and Cambridge, 1907), 168–207.
8. ELR 23, HE 144.
9. ELR 77 n.49.
16. Otto Gierke, Political Theories of the Middle Ages (tr. F. W. Maitland; Cambridge, 1900), 43.
17. TC 21.
20. ibid.
21. ELR 14, HE 140.
23. Storia 438; for Maitland’s knowledge of the subject, see his Introduction to Gierke, Political Theories, xii, xiv, and cf. the reference to Marzialism as a name for ‘the theory that King Henry approved’, ELR 14 and n.31, HE 140.
24. (1956) 5 Tr. R.H.S., 5th series, 78; HSEP ii.202; Studies ii.223. Elton may well have been thinking of Pollard (Henry VIII) and Trevelyan (History of England), both of whom speak without Maitland’s caution of the advance of Roman law.
26. (1952) 25 Bull.I.H.R. 128; HSEP ii.188; Studies ii.74.
29. ELR 3, HE 135–6.
30. ELR 5–6, HE 137.
31. ELR 7, HE 137.
32. ELR 41 n.11, HE 149 n.5.
96. HEL iv.229 n.7.
97. Humfrey Lluyd, The Breuiary of Britayne (tr. Thomas Twyne, London, 1573), fo. 60v. The original Latin text was published at Cologne in 1572; Llwyd had died in 1568.
100. Elton, TC 151. The citation of HEL iv.277f: in support of this view is hardly justified.
102. (1676) Cook v. Fountain, 73 S.S. 371.
103. [1926] 2 K.B. 258.
105. (1929) 20 Cr.App.R. 186. This was an announcement ad hoc at a sitting of the Court of Criminal Appeal. As Chief Justice, Lord Hewart was himself a member of the Court of Appeal, but the temptation to add further comment shall be resisted.
107. Prest, Inns of Court 22.
111. Storia 445.
112. Storia 444.
113. ELR 24–5, HE 144.
116. 94 S.S. 28.
117. Ibid., 27.
120. HE 134: the material was first published in 1894. This summary brings out clearly the fact that England escaped a Reception because the common law adopted innovations brought in various ways from outside. In a comment on C. H. McIlwain’s suggestion that there was a danger of a Reception in James I’s time, Professor Brian P. Levine has recently emphasized the importance of ‘the alleged fear that some sort of reception would occur, ... even if that fear was groundless’: Law-making and Law-makers in British History (ed. Alan Harding; Royal Historical Society Studies in History, no.22; 1980), p.115. The same importance attaches to a similar fear in the sixteenth century, even though the strength of the common-law profession meant that that fear was groundless. It was that fear which led to the condemnation of Southampton for delegating his judicial functions to civilians (above, p.124), and to the legal profession’s opposition to the decisions of Dr John Stokesley, who ‘sat alone either in the white hall or in St Stephen’s chapel at Westminster from 1521’ until he was removed in January 1523 after an examination of his judgements by a committee of common lawyers: J. A. Guy, The Cardinal’s Court (Hassocks, Sussex, 1977), pp.44–5.