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Review of Frederic William Maitland, *Historian: Selections from his Writings*, edited by Robert Livingston Schuyler

Sanford N. Katz

Boston College Law School, katzs@bc.edu

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nounces this type of person, the woman he knew who went about telling everybody how wrong the trial was but could give no reasons; in fact she had not even taken the trouble to read Frankfurter's book.⁷⁵ The written critiques of the trial are mostly hypercritical analyses—a nick here and a nick there, followed by sweeping conclusions.

Montgomery's book has lasting clinical value in its elaborate citation and analysis of the multitudinous assaults on the trial. It shows that fault can be found in all human testimony, particularly if there is incentive enough and money enough to stage the campaign. The case was really tried three times, once by the jury, next by the Governor and Joseph Wiggin, his eminent legal adviser, and lastly by a committee composed of the President of Harvard, the President of M.I.T. and a judge. We agree with Professor Samuel Williston that rarely, if ever, have defendants in a criminal case been so repeatedly and unanimously convicted by such competent tribunals.⁷⁶

The book, in the end, leaves us with an abiding confidence that no miscarriage of justice occurred and that the judicial processes of democracy are still respectable and secure.

WILLIAM J. HUGHES, JR.*

FREDERIC WILLIAM MAITLAND HISTORIAN: SELECTIONS FROM HIS WRITINGS. Edited by Robert Livingston Schuyler. University of California Press, Berkeley and Los Angeles, 1960. Pp. 261. \$1.50.

In the last few years there has been a rebirth of intense interest in the life and writings of Frederic William Maitland. In 1957 Maitland's daughter Ermengard wrote her personal tribute to her father in a short but moving portrait published by the Selden Society.¹ In the same year Professor Warren O. Ault of Boston University published "The Maitland-Bigelow Letters."² Although mostly personal in nature, the letters afford deep insight into Maitland's scholarly habits as well as presenting his own views on his works. *Frederic William Maitland Reader* by Professor V. T. H. Delany of Queen's University of Belfast published in

⁷⁵ Phillips, *op. cit.* supra note 72, at 204.

⁷⁶ Professor Williston's view was set forth in a biography in the late 1940's. Yeomans, Abbott Lawrence Lowell 491 (1948).

* Professor of Law, Georgetown University Law Center.

¹ E. Maitland, F. W. Maitland, *A Child's-Eye View* (1957).

² Ault, *The Maitland-Bigelow Letters*, 37 B.U.L. Rev. 285 (1957).

1957 is a collection of selected writings by and about Maitland.³ Professor Helen M. Cam's *Historical Essays* (1957)⁴ is perhaps the first real attempt, by means of a brilliant Introduction, to place some choice essays by Maitland in their historical perspective. In this respect, Professor Cam's work differs substantially from both the Delany book and Robert Livingston Schuyler's *Frederic William Maitland Historian—Selections from His Writings* published last year.

In his presidential address before the American Historical Association in 1951, Robert Livingston Schuyler spoke of Frederic William Maitland as the one historian who "has meant more to me than any other . . . not primarily for the subjects he dealt with, but for his methods, his insights, and his superb historical sense."⁵ Nine years have passed since his address was given, yet the publication of *Frederic William Maitland Historian* is testimony to the continued reverence in which Maitland is held by the contemporary historian.

In his Introduction the author has relied heavily on his 1951 address. Rather than adopting Professor Cam's technique of using the Introduction as an explanation of the writings selected by the editor (or indicating why certain selections were chosen over others), Schuyler presents a biographical sketch followed by an excellent general essay on Maitland as an historian. Even though the Introduction may not be fully integrated with the selections, when compared with the Cam book this paperback edition is a gem.

Maitland's writings total about 140 items including reviews, articles in learned journals, his Selden Society publications and his major volumes.⁶ Professor Schuyler has chosen passages from those works of Maitland that have received the widest acclaim, using chapter headings for classification purposes.⁷

³ The Delany book follows the pattern of the other Readers (e.g., The Holmes Reader, The Marshall Reader, The Brandeis Reader and the Alexander Hamilton Reader) published by Oceana Publications.

⁴ Cam, *Selected Historical Essays of F. W. Maitland* (1957).

⁵ Schuyler, *The Historical Spirit Incarnate: Frederic William Maitland*, 57 *Am. Hist. Rev.* 303 (1952).

⁶ For a bibliography of Maitland's writings see Delany, *Frederic William Maitland Reader* 235-42 (1957).

⁷ Schuyler has included selections from: *Introduction to Memoranda de Parlamento* (1893), *The History of English Law before the Time of Edward I* (1895), *Domesday Book and Beyond* (1897), *English Law and the Renaissance* (1901), *Pleas of the Crown for the County of Gloucester* (1884), *Praerogativa Regis* (1891), *Why the History of English Law Is Not Written* (1888), *Township and Borough* (1898), *The Suitors of the*

If one were to ask what Maitland's chief impact on scholarship has been, we should, I suppose, say that Maitland brought law to bear on history and history to bear on law.⁸ To Maitland, "the history of law was not a specialised subsection of the history of England; it was an integral part of it; it was the key to the whole story."⁹ "Whether we like it or not," Maitland wrote, "the fact remains that, before we can get at the social or economic kernel of ancient times, we must often peel off a legal husk that requires careful manipulation."¹⁰

Maitland felt that law was *in* history. He emphasized the danger of imposing legal concepts of a later date on facts of an earlier time.¹¹ He protested against reading either law or history backwards. Conversely Maitland abhorred selecting a legal concept from the past and applying it to a present situation without regard to the setting in which it was originally born. In this he found the major difference between the historian and the lawyer. Maitland wrote:

[W]hat is really required of the practising lawyer is not, save in the rarest cases, a knowledge of medieval law as it was in the middle ages, but rather a knowledge of medieval law as interpreted by modern courts to suit modern facts. A lawyer finds on his table a case about rights of common which sends him to the Statute of Merton. But is it really the law of 1236 that he wants to know? No, it is the ultimate result of the interpretations set on the statute by the judges of twenty generations. The more modern the decision the more valuable for his purpose. That process by which old principles and old phrases are charged with a new content, is from the lawyer's point of view an evolution of the true intent and meaning of the old law; from the historian's point of view it is almost of necessity a process of perversion and misunderstanding. Thus we are tempted to mix up two different logics, the logic of authority, and the logic of evidence. What the lawyer wants is authority and the newer the better; what the historian wants is evidence and the older the better. This when stated is obvious; but often we conceal it from ourselves under some phrase about "the common law."¹²

An eminent contemporary history professor, George O. Sayles of Aberdeen (Scotland), has said much the same thing:

County Court (1888), Introduction to Select Passages from the Works of Bracton and Azo (1895), Introduction to The Mirror of Justices (1894), Introduction to Year Books of Edward II, Vol. I (1905), Introduction to Year Books of Edward II, Vol. III (1906), and Elizabethan Gleanings (1900).

⁸ Cam, *op. cit.* supra note 4, at xi.

⁹ *Id.* at x.

¹⁰ 3 Maitland, *Collected Papers* 459 (1911).

¹¹ "[A]ny one who really possesses what has been called the historic sense must, so it seems to me, dislike to see a rule or an idea unfitly surviving in a changed environment. An anachronism should offend not only his reason, but his taste." *Id.* at 486.

¹² Schuyler, *Frederic William Maitland Historian* 137 (1960).

The lawyer is not in *consimili casu*: for the most part he does not need to know what the law used to be or even how it came to be what it is. The truth he seeks is contemporary to himself, the law as it is today, and if only he can ascertain that, then he may rest content.¹³

Perhaps lawyers deserve Professor Sayles' gentle rebuke that they are interested in some venerable doctrine only to the extent that they feel compelled to find the last case that interpreted it. The fact of the matter is, for example, that the history of procedural reform in the Anglo-American legal system gives ample evidence of, if anything, an excessive attachment to the past.¹⁴ However, should we as lawyers subscribe to a view which in essence asserts that lawyers can function independently of a sense of history?

A knowledge of legal history *is* important to the practitioner. The lawyer can use legal history to illustrate that a current legal concept was established in response to necessities which have now disappeared or been greatly modified and should therefore no longer be applied.¹⁵ Legal history can indicate that a contemporary legal rule now regarded as "established" is not of ancient lineage but originated in fairly recent times by way of judicial aberration; or that a general rule has evolved not by common-law principles but by a process of "legal metamorphosis."¹⁶

For those of us who wish to see the tradition of Maitland, Pollock and Holdsworth transplanted here, wide use in the law schools of Schuyler's paperback collection of Maitland's essays is—in view of the bleak spectre of contemporary indifference by the American law schools to legal history—encouraging and welcome.

It was Maitland's dream that law students study legal history.¹⁷ At Cambridge University, Maitland's alma mater, his vision has in some degree been realized. Unfortunately in this country law schools primarily teach current practice and doctrine. As Judge Wyzanski has

¹³ Sayles, *The Court of King's Bench in Law and History* 3 (1959).

¹⁴ See generally, Bodenheimer, *The Inherent Conservatism of the Legal Profession*, 23 *Ind. L.J.* 221 (1948).

¹⁵ See, e.g., the history of the rule limiting the admissibility of a confession of a crime in 3 *Wigmore, Evidence* §§ 817-20, 865 (3d ed. 1940).

¹⁶ See Professor Steffen's discussion of the general rule which requires "a servant or other agent to indemnify his master or principal who has paid damages to a third person injured by the unauthorized tort of the servant or agent," *Restatement, Restitution* § 96, comment a (1937), in Steffen, *The Employer's "Indemnity" Action*, 25 *U. Chi. L. Rev.* 465, 471-72 (1958).

¹⁷ Schuyler, *op. cit.* supra note 12, at 141-42.

pointed out, "[H]istory is a negligible part of the required reading. . . . We no longer believe either that the forms of action do, or that they should, rule us from the grave."¹⁸ And the bald and unhappy truth is that perhaps we no longer care.

SANFORD N. KATZ*

GOVERNMENT LITIGATION: CASES AND NOTES. By David Schwartz and Sidney B. Jacoby. The Law Schools of Georgetown University and New York University, Washington and New York, 1960. Pp. xxviii, 456. \$7.50.

An invitation to review a book gives one an interesting choice: he may use the opportunity to vent some pet ideas more or less pertinent to the subject of the book, or he may resist the temptation and tell what the book is about. I shall describe the book.

Although it has been estimated that in one-fourth of the cases on the civil dockets of the federal courts the United States is a party, lawyers tend to regard government litigation as a mysterious specialty hardly resembling the ordinary grist of the judicial mill. This case book, assembled by two whose qualifications as specialists are beyond dispute, illuminates the unique features of actions by or against the Government. At the same time, however, it gives the generalist a new perspective and a measure of assurance by pointing out the many similarities between Government and private litigation.

The authors modestly disclaim any purpose to elucidate procedure, for the stated reason that books already exist which do this; but *en passant* they teach important lessons in federal procedure, and particularly furnish useful hints of practical wisdom pertaining to out of court negotiations with government officials. Materials along this line are not readily found in textbooks on federal procedure. In fact, I regard as extremely valuable the opening chapter which explains the organization of the Department of Justice and other agencies, the functions of United States Attorneys and others in various types of cases, limitations on attorneys' fees arrangements and illustrations of the "square corners" a person must turn when he deals with the Government.

When may a plaintiff sue in the district court, when must he go to the Court of Claims, and when should he resort to the Comptroller General for relief? And when, in litigating with the United States, is he

¹⁸ Wyzanski, *History and Law*, 26 U. Chi. L. Rev. 237, 239-40 (1959).

* Assistant Professor of Law, The Law School, Catholic University of America.