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Maintenance in Medieval England. By JONATHAN ROSE [Cambridge University Press, 2017. xvii + 409 pp. Hardback £85.00. ISBN 978-1-107-35832-4.]

This work is the product of a close examination of hundreds of references to maintenance from the primary sources of English law in the period 1275-1485. The topic remains of interest in the twenty-first century, driven by concerns relating to litigation funding and access to justice, despite the modern abolition of the tort and crime of maintenance and champerty considered in *Giles v Thompson* [1994] 1 A.C. 142. The early legislation commenced with the Statute of Westminster I, 1275 c. 25: "No officer of the king by himself nor through others, shall maintain pleas, suits or matters hanging in the king's courts ...", and many statutes followed. The author, a distinguished United States law professor, propounds two broad themes. One concerns the ways in which judges, faced with an undefined subject matter, came to recognise justifications for involvement in the litigation of another. This is an example of the classic technique of the common law. The second, which is closely linked to an analysis of the individual cases, is a conclusion that the statutes were ineffective. So far as the record discloses, little criminal or civil litigation was directed at the rich and powerful, and indeed the sources suggest that maintenance actions were brought by the rich and powerful in order to harass and burden their adversaries. This theme obviously resonates with the practical effect of legislation on a range of topics eight centuries or so later.

The work commences with a useful orientation. The basic tension arose between traditional, well-sanctioned notions of good lordship, which were understood as requiring assistance to the lord's household and retainers, but which led to difficulty in the early legal system when that assistance was extended to litigation. Chapters 2-6 and 8 deal, clearly and highly readably, with the progression of statutes, petitions and litigation which ensued at the beginning of the period once described by Maitland as the "seven lucid centuries" which followed the darker period shortly after the Norman conquest. These chapters describe the civil and criminal litigation over the next two centuries.

The account is vivid and particular. If there is one thing about this work which is especially effective, it is the comprehensive footnoting which provides not merely standard references to the various plea rolls and other records, mostly kept in the National Archives at Kew, but

also image numbers of the free online Anglo-American Legal Tradition archive assembled and being augmented by Robert C Palmer and Elspeth K Palmer, and made available (with an endowment and an intention that it be a permanent resource) by the University of Houston (www.aalt.law.uh.edu). The image number cross-referencing vastly enhances the accessibility of the work.

Many examples could be given. One, taken from pp. 71-73, concerns the 1313-14 Kent Eyre, chosen by me because of the 18 year books of that Eyre collated (originally by Maitland) in volume 24 of the Selden Society's annual series, although this particular example is not found in that volume. A presentment charged that a group of clergy, led by John of Hucking, vicar of Chart, made an oath that "each of them would maintain the pleas and actions which anyone of them began or undertook, whether justly or falsely". The presentment continued (in Rose's translation) "And that for long time they were bound as conspirators and united by oath and they were and are maintainers of unjust pleas and actions and so that by their conspiracy through the greatest part of the whole county of Kent, truth and justice are suffocated". The footnote gives not only the PRO reference (PRO JUST 1/383 m. 109) but also the AALT image number (it is image 1686 in the relevant directory). And the reader with access to the internet who wishes in an instant to be taken to an image of the roll may do so, and even one with no mediaeval language may see the clear hand which has written (something like) "manutenendes placitas querelas injustas" (translated as "maintainers of unjust pleas and actions") and the concluding "justitia suffocavit". (Rather than providing the URL in this review, readers are encouraged to visit the AALT website and see for themselves, if they are unfamiliar with it, how easily any particular image can be found.)

Maitland sat down at the beginning of his career, without paleographical knowledge, and puzzled out the Gloucester roll of 1221. He told others to do the same. He maintained that "anyone who knows some law and some Latin will find that the difficulty [in reading legal manuscripts] disappears in a few weeks": see Bell, *Maitland: A Critical Examination and Assessment* (1965), p. 15. Few have his aptitude, yet those who choose to follow his advice no longer need to travel to the reading room of an English archive. I cannot help but think that the man who did so much to publish the primary documents recording the beginnings of the English legal system would be delighted at works such as this which deploy modern technology to illuminate legal history.

The work adopts a modern, law-in-context approach, which many would associate with Brian Simpson's work. Rose recognises that non-legal sources may illuminate medieval practice and perceptions of maintenance, and chapter 7 is a stimulating chapter on medieval literature, understandably focusing on the works of Gower and, especially, Langland's *Piers Plowman*, dwelling on the aptly named Lady Meed ("mede" in Middle English connoted reward or payment, and was associated with bribery and venality), who was charged by Conscience that she corrupted the king's justices with "Rynges wip Rubies and richesses manye" and told lies against the law. But Rose also introduces political songs, and theatrical and religious works of the fifteenth century, as well as letters from the Paston collection.

Chapter 11 moves to the law regarding livery. Livery became a concern in the late fourteenth century: retainers associated by badge, collar or robes became associated with maintenance, and provoked a legislative response. Once again, there is a contemporary ring to this, at least in Australia, in the controversial legislation prohibiting the wearing of the insignia of outlawed motorcycle gangs (also known as "patch clubs"): the history is conveniently found in the New South Wales Ombudsman's recent report *Review of police use of powers under the Crimes (Criminal Organisations Control) Act 2012* [2017] NSWOmbSRP 1. A more traditional example of aspects of livery being litigated in modern times is the fascinating litigation, not mentioned by Rose, arising from the advice given by Sotheby's to Lord Coleridge to sell a judicial collar: *Coleridge v Sotheby's* [2012] EWHC 370 (Ch). I also regret the absence of commentary on the enigmatic but quite famous "caps of maintenance", such as that given by the Pope (Leo X) to Henry VIII on 19 May 1513, of which the hereditary right to bear it was vested in the family of the Marquess of Winchester, according to *The Manual of Rank and Nobility or Key to the Peerage* (1828) pp. 528-530, citing contemporary sources which also suggested the title Christianissimus was conferred on him at that time, years before receiving Fidei Defensor. There are other such garments (see for example Devitt, "'To cap it all': The Waterford Cap of Maintenance" (2007) 41 *Costume* 11). The true mediaeval notion of maintenance as a mark of fealty or lordship is difficult to appreciate today.

I confess to finding some of Rose's statistical reasoning in the concluding chapters of the book less than convincing. Two instances concern the conclusions drawn from his

analysis of relative proportions. First, Rose compares the civil and criminal litigation from 1272-1327, finding that criminal cases greatly outnumbered civil (230 as opposed to 87 actions). It is far from clear that a conclusion that "criminal prosecution as the predominant method of dealing (73%) with this conduct underscored the significance of this abuse" (p. 91). To my mind, more information is needed to sustain a conclusion drawn from the prevalence of criminal as opposed to civil proceedings. To take an example from several centuries later, the enforcement of the obligation upon a parish to maintain a highway was left *exclusively* to the criminal law. That was the gravamen of the leading case, *Russell v Men of Devon* (1788) 2 T.R. 667, in which proceedings were brought against "the men dwelling in the county of Devon", and an attempt to rely by analogy on Edward I's Statutes of Hue and Cry (13 Edw. I c. 3), which gave remedies against the inhabitants who failed to apprehend a felon, was rejected. The fact that parishes (and later, surveyors and local authorities) were prosecuted on account of the notoriously treacherous condition of English roads says much about the perceived role of the criminal law centuries ago, but little about the importance of the issue.

A second example turns on Rose's analysis made possible by a provision in Richard II's Statute of Additions which required parties to state their status and occupation. Rose collates statistics for 349 plaintiffs and 1915 defendants in civil actions. Some 32% of plaintiffs (110) were knights, esquires or gentlemen, while only 12% of defendants (224) were of the same status. Rose concludes that since such plaintiffs and defendants were far outnumbered by the "middling sort of people", involved in trade, rather than more powerful and higher status people, it is "reasonable to conclude that the maintenance statutes were not used to curb legal corruption and abuse by powerful individuals and officials and, therefore, did not achieve their statutory objective" (pp. 326-7). I am inclined to think that Rose's thesis is correct; I do not doubt that there were some men who were perceived to be too powerful ever to be convicted. But it is also reasonable to assume that the class of "middling sort of people" very substantially outnumbered the nobility, such that the absolute numerical comparison upon which he relies is not especially probative.

Rose concludes with the ironic observation that the twentieth century has seen the end of almost a millennium of statutes directed to maintenance and other abuses of curial process. Now that access to justice is denied not so much by systemic corruption as by the cost of lawyers, the introduction of litigation funding and contingency-based charging

has occurred concurrently with the abolition of maintenance and champerty.

Lord Mustill commenced his leading speech in *Giles v Thompson* with the words “My Lords, the crimes of maintenance and champerty are so old that their origins can no longer be traced, but their importance in medieval times is quite clear”. This work goes far to falsify the first of those propositions, and convincingly demonstrates the second. Lord Mustill also said that the law of maintenance and champerty could best “be kept in forward motion” by looking to its origins. This book is to be praised for enabling those interested to do precisely that.

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