THE CONTINENTAL LEGAL HISTORY SERIES
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A HISTORY
OF
GERMANIC PRIVATE LAW

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I might instance in other professions the obligation men lie under of applying themselves to certain parts of History; and I can hardly forbear doing it in that of the Law, — in its nature the noblest and most beneficial to mankind, in its abuse and debasement the most sordid and the most pernicious. A lawyer now is nothing more (I speak of ninety-nine in a hundred at least), to use some of Tully's words, "nisi leguleius quidem cautus, et acutus praeco actionum, cantor formularum, auceps syllabarum." But there have been lawyers that were orators, philosophers, historians: there have been Bacons and Clarendons. There will be none such any more, till in some better age true ambition, or the love of fame, prevails over avarice; and till men find leisure and encouragement to prepare themselves for the exercise of this profession, by climbing up to the vantage ground (so my Lord Bacon calls it) of Science, instead of grovelling all their lives below, in a mean but gainful application of all the little arts of chicane. Till this happen, the profession of the law will scarce deserve to be ranked among the learned professions. And whenever it happens, one of the vantage grounds to which men must climb, is Metaphysical, and the other, Historical Knowledge. HENRY ST. JOHN, Viscount BOLINGBROKE, *Letters on the Study of History* (1739).

Whoever brings a fruitful idea to any branch of knowledge, or rends the veil that seems to sever one portion from another, his name is written in the Book among the builders of the Temple. For an English lawyer it is hardly too much to say that the methods which Oxford invited Sir Henry Maine to demonstrate, in this chair of Historical and Comparative Jurisprudence, have revolutionised our legal history and largely transformed our current text-books. — Sir FREDERICK POLLOCK, Bart., *The History of Comparative Jurisprudence* (Farewell Lecture at the University of Oxford, 1903).

No piece of History is true when set apart to itself, divorced and isolated. It is part of an intricately pieced whole, and must needs be put in its place in the netted scheme of events, to receive its true color and estimation. We are all partners in a common undertaking, — the illumination of the thoughts and actions of men as associated in society, the life of the human spirit in this familiar theatre of coöperative effort in which we play, so changed from age to age, and yet so much the same throughout the hurrying centuries. The day for synthesis has come. No one of us can safely go forward without it. — WOODROW WILSON, *The Variety and Unity of History* (Address at the World's Congress of Arts and Science, St. Louis, 1904).

A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect. — Sir WALTER SCOTT, *"Guy Mannering,"* c. XXXVII.

CONTINENTAL LEGAL HISTORY SERIES

GENERAL INTRODUCTION TO THE SERIES

"ALL history," said the lamented master Maitland, in a memorable epigram, "is but a seamless web; and he who endeavors to tell but a piece of it must feel that his first sentence tears the fabric."

This seamless web of our own legal history unites us inseparably to the history of Western and Southern Europe. Our main interest must naturally center on deciphering the pattern which lies directly before us, — that of the Anglo-American law. But in tracing the warp and woof of its structure we are brought inevitably into a larger field of vision. The story of Western Continental Law is made up, in the last analysis, of two great movements, racial and intellectual. One is the Germanic migrations, planting a solid growth of Germanic custom everywhere, from Danzig to Sicily, from London to Vienna. The other is the posthumous power of Roman law, forever resisting, struggling, and coalescing with the other. A thousand detailed combinations, of varied types, are developed, and a dozen distinct systems now survive in independence. But the result is that no one of them can be fully understood without surveying and tracing the whole.

Even insular England cannot escape from the web. For, in the first place, all its racial threads — Saxons, Danes, Normans — were but extensions of the same Germanic warp and woof that was making the law in France, Germany, Scandinavia, Netherlands, Austria, Switzerland, Northern Italy, and Spain. And, in the next place, its legal culture was never without some of the same intellectual influence of Roman law which was so thoroughly overspreading the Continental peoples. There is thus, on the one hand, scarcely a doctrine or rule in our own system which cannot be definitely and profitably traced back, in comparison, till we come to the point of divergence, where we once shared it in common with them. And, on the other hand, there is, during all the intervening centuries, a more or less constant juristic sociability (if it may be so called) between Anglo-American and Con-

tinental Law; and its reciprocal influences make the story one and inseparable. In short, there is a tangled common ancestry, racial or intellectual, for the law of all Western Europe and ourselves.

For the sake of legal science, this story should now become a familiar one to all who are studious to know the history of our own law. The time is ripe. During the last thirty years European scholars have placed the history of their law on the footing of modern critical and philosophical research. And to-day, among ourselves, we find a marked widening of view and a vigorous interest in the comparison of other peoples' legal institutions. To the satisfying of that interest in the present field, the only obstacle is the lack of adequate materials in the English language.

That the spirit of the times encourages and demands the study of Continental Legal History and all useful aids to it was pointed out in a memorial presented at the annual meeting of the Association of American Law Schools in August, 1909:

"The recent spread of interest in Comparative Law in general is notable. The Comparative Law Bureau of the American Bar Association; the Pan-American Scientific Congress; the American Institute of Criminal Law and Criminology; the Civic Federation Conference on Uniform Legislation; the International Congress of History; the libraries' accessions in foreign law, — the work of these and other movements touches at various points the bodies of Continental law. Such activities serve to remind us constantly that we have in English no histories of Continental law. To pay any attention at all to Continental law means that its history must be more or less considered. Each of these countries has its own legal system and its own legal history. Yet the law of the Continent was never so foreign to English as the English law was foreign to Continental jurisprudence. It is merely maintaining the best traditions of our own legal literature if we plead for a continued study of Continental legal history.

"We believe that a better acquaintance with the results of modern scholarship in that field will bring out new points of contact and throw new light upon the development of our own law. Moreover, the present-day movements for codification, and for the reconstruction of many departments of the law, make it highly desirable that our profession should be well informed as to the history of the nineteenth century on the Continent in its great measures of law reform and codification.

"For these reasons we believe that the thoughtful American lawyers and students should have at their disposal translations of some of the best works in Continental legal history."

And the following resolution was then adopted unanimously by the Association:

"That a committee of five be appointed, on Translations of Continental Legal History, with authority to arrange for the translation and publication of suitable works."

The Editorial Committee, then appointed, spent two years in studying the field, making selections, and arranging for translations. It resolved to treat the undertaking as a whole; and to co-ordinate the series as to (1) periods, (2) countries, and (3) topics, so as to give the most adequate survey within the space-limits available.

(1) As to *periods*, the Committee resolved to include modern times, as well as early and mediæval periods; for in usefulness and importance they were not less imperative in their claim upon our attention. Each volume, then, was not to be merely a valuable torso, lacking important epochs of development; but was to exhibit the history from early to modern times.

(2) As to *countries*, the Committee fixed upon France, Germany, and Italy as the central fields, leaving the history in other countries to be touched so far as might be incidentally possible. Spain would have been included as a fourth; but no suitable book was in existence; the unanimous opinion of competent scholars is that a suitable history of Spanish law has not yet been written.

(3) As to *topics*, the Committee accepted the usual Continental divisions of Civil (or Private), Commercial, Criminal, Procedural, and Public Law, and endeavored to include all five. But to represent these five fields under each principal country would not only exceed the inevitable space-limits, but would also duplicate much common ground. Hence, the grouping of the individual volumes was arranged partly by topics and partly by countries, as follows:

Commercial Law, Criminal Law, Civil Procedure, and Criminal Procedure, were allotted each a volume; in this volume the basis was to be the general European history of early and mediæval times, with special reference to one chief country (France or Germany) for the later periods, and with an excursus on another chief country. Then the Civil (or Private) Law of France and of Germany was given a volume each. To Italy was then given a volume covering all five parts of the field. For Public Law (the subject least related in history to our own), a volume was given to France, where the common starting point with England, and the later divergences, have unusual importance for the history of our courts and legal methods. Finally, two volumes were allotted to general surveys indispensable for viewing the connec-

tion of parts. Of these, an introductory volume deals with Sources, Literature, and General Movements, — in short, the external history of the law, as the Continentals call it (corresponding to the aspects covered by Book I of Sir F. Pollock and Professor F. W. Maitland's "History of the English Law before Edward I"); and a final volume analyzes the specific features, in the evolution of doctrine, common to all the modern systems.

Needless to say, a Series thus co-ordinated, and precisely suited for our own needs, was not easy to construct out of materials written by Continental scholars for Continental needs. The Committee hopes that due allowance will be made for the difficulties here encountered. But it is convinced that the ideal of a co-ordinated Series, which should collate and fairly cover the various fields as a connected whole, is a correct one; and the endeavor to achieve it will sufficiently explain the choice of the particular materials that have been used.

It remains to acknowledge the Committee's indebtedness to all those who have made this Series possible.

To numerous scholarly advisers in many European universities the Committee is indebted for valuable suggestions towards choice of the works to be translated. Fortified by this advice, the Committee is confident that the authors of these volumes represent the highest scholarship, the latest research, and the widest repute, among European legal historians. And here the Committee desires also to express its indebtedness to Elbert H. Gary, Esq., of New York City, for his ample provision of materials for legal science in the Gary Library of Continental Law (in Northwestern University). In the researches of preparation for this Series, those materials were found indispensable.

To the authors the Committee is grateful for their willing co-operation in allowing this use of their works. Without exception, their consent has been cheerfully accorded in the interest of legal science.

To the publishers the Committee expresses its appreciation for the cordial interest shown in a class of literature so important to the higher interests of the profession.

To the translators, the Committee acknowledges a particular gratitude. The accomplishments, legal and linguistic, needed for a task of this sort are indeed exacting; and suitable translators are here no less needful and no more numerous than suitable authors. The Committee, on behalf of our profession, acknowl-

edges to them a special debt for their cordial services on behalf of legal science, and commends them to the readers of these volumes with the reminder that without their labors this Series would have been a fruitless dream.

So the Committee, satisfied with the privilege of having introduced these authors and their translators to the public, retires from the scene, bespeaking for the Series the interest of lawyers and historians alike.

THE EDITORIAL COMMITTEE.

A HISTORY OF GERMANIC PRIVATE LAW

EDITORIAL PREFACE TO THIS VOLUME

By Ernest G. Lorenzen[1]

The importance of Huebner's History of Germanic Private Law to the student of legal history, philosophy of law, and comparative law is set forth in such eloquent language in the introductions to this volume by Professors Vinogradoff and Walz as to make any further observations on this point both unnecessary and unfitting. For a general description of the work the following brief quotation from a review in one of the leading German periodicals, "Zeitschrift für Bundesstaatsrecht und Völkerrecht", may suffice: "Huebner's History of Germanic Private Law is a treatise on the private law of Germanic countries the several institutions of which are traced in their development from their origin to the present time. . . . An extraordinary command of the vast literature of the subject and a style, perfect in form and possessing great lucidity, characterize the treatise, which is the only one incorporating the latest investigations in this field." (Vol. IV, p. 519.)

A few data concerning the life and work of the author of this volume will be of interest. Rudolph Huebner was born in Berlin on September 19, 1864. He took a doctor's degree in law at the University of Berlin and was Privatdozent at that institution for several years. He has been professor of law at the universities of Bonn and Rostock and at the present moment occupies the chair of Legal History, German Civil Law, and Public Law at the University of Giessen. Huebner's literary activities have been along the line of Germanic law. His most important contributions in this field before the publication of the present treatise have been: "Die donationes post obitum und die Schenkungen mit Vorbehalt des Niessbrauchs im älteren deutschen Recht"; "Gerichtsurkunden der fränkischen Zeit"; "Immobiliarprozess der fränkischen Zeit"; "J. Grimm und das deutsche Recht." In all of these works Huebner has shown himself to be a follower of Otto v. Gierke and Heinrich Brunner.

The translation of Huebner's History of Germanic Private Law into English was a task beset with the greatest difficulties, which

[1] Of the Editorial Committee; Professor of Law in Yale University.

only a person of great linguistic ability and of the broadest legal training could successfully meet. Fortunately Professor Philbrick possessed all of these qualifications in an eminent degree. He took his Ph. D. at Harvard University, where he specialized in history and political science. Having been granted an honorary John Harvard Travelling Fellowship, he continued his studies in Berlin, Paris, and London. Subsequently he pursued archive researches in Cuba and in Spain. He took his LL. B. degree at Columbia University, and was admitted to the New York Bar. Since 1915 he has been professor of law at the University of California, where he is in charge of the courses in foreign and comparative law and legal theory. Professor Philbrick has addressed himself to his task with great enthusiasm and success, and has spared no effort to make the translation both accurate and readable.

The first edition of the present work was published in 1908. The translation is of the second edition, which appeared in 1913 and brought the history of Germanic Private Law down to date by tracing its development into the Swiss Civil Code, of December 10, 1907.

INTRODUCTION TO THIS VOLUME

By Sir Paul Vinogradoff [1]

The title of Professor Huebner's book is "Principles of Germanic Private Law", and yet it has been rightly included into a collection of works on Legal History. This is in itself characteristic; the fact is that contemporary German law is not only essentially a product of historical development, as indeed all varieties of Law are, but that it was reconstructed and formulated in opposition to another great jurisprudential system — the Roman one — as the outcome of a peculiar national process of legal thought. In this way its positive rules and institutions are liable to be traced to leading ideas which have manifested themselves in a more or less distinct manner in previous history. The learned and talented author himself belongs to a moderate section of the so-called Germanistic school, and may be said to follow O. Gierke in a general way, although he is very careful to notice authoritative opposition, and tries on every occasion to state his conclusions with as much academic impartiality as possible. From the above mentioned point of view the subject commands indeed the greatest interest. It raises questions of the highest importance not only for the practical lawyer and the legal historian, but for the student of jurisprudence. It presents a concrete test for the application of various theories as to the national trend of legal thought, as to the leading distinctions between periods, as to the possibility of a "reception" of foreign law, as to the value of comparative and of analytical study, etc.

I

Let us rehearse briefly the course of the development which culminated in the formation of the system of law laid down in the "Bürgerliches Gesetzbuch", the Civil Code of the German Empire. The threads of the literary controversy need not be followed into more remote antiquity than the beginning of the nineteenth century, when, at the close of the Emancipation War

[1 D. C. L., F. B. A.; Corpus Professor of Jurisprudence in the University of Oxford; Fellow of the Academy of Sciences of Petrograd. — Ed.]

against Napoleon, the famous conflict of opinion between Thibaut and Savigny led to the formation of the so-called "Historical School of Law." The subject of dispute was the formulation of a general and modern code of law for the emancipated German States which should take the place of that strange figment — "the Common Law of Rome as practised in Germany." Savigny protested against such an undertaking as expressing the conception that law comprised a set of arbitrary rules contrived with more or less skill to meet the requirements of actual life, without any reference to national traditions and to the peculiarities of social psychology of the people who were to be operated upon.

In formulating his own views Savigny, Eichhorn, and the other leaders of the new school came to consider the growth of law as essentially an organic process, akin to the evolution of language, of folklore, of religion, unconscious and half conscious in its most profound currents, but directing the whole of the ostensible life of juridical rules and corresponding rights. From this psychological point of view, sharply opposed to the rationalistic logic of the "Aufklärung" or "age of enlightenment", the Historical School of Law joined hands with the mythological and linguistic researches of a Jacob Grimm, who himself contributed to the work of the lawyers by writing his remarkable "German Legal Antiquities" ("Deutsche Rechtsalterthümer"). What is more, it may be considered as one of the principal varieties of the Romantic movement with its determined opposition to pure intellectualism, to the cosmopolitan violence of the Revolution and of Napoleon's régime. Burke and Wordsworth have given strong expression to the organic, historical teaching of that period as far as Great Britain was concerned. But the application to jurisprudence was mainly the work of German students. English writers were not much affected by the crisis, because in their case there was no danger whatever of a subversion of traditional development: they had rather to face the other extreme; and the rationalistic individualism of Bentham [1] was hailed as a deliverance from the stubborn passivity of an Eldon or an Ellenborough. Thus it was reserved for a late comer like Sir H. Maine to popularize the doctrines of Savigny in England; and, by the time he appeared on the scene, new ideas had supervened which gave the whole problem an entirely different aspect.[2]

[1] As to Bentham's characteristic aversion for historical authority, see *e.g.* Works, VIII, 392, 442.

[2] *Cf. P. Vinogradoff*, "Teaching of Sir Henry Maine" (Oxford, 1904), p. 9.

Let us turn back, however, to the main line of our inquiry. Savigny devoted himself almost entirely to the study of Roman Law. His principal contribution to German legal history consisted in the indirect influence of his History of Roman Law in the Middle Ages, which was intended to show that the reception of Roman doctrines by medieval Europe was by no means the result of mechanical submission and copying, but rather a gradual absorption of rules and examples by the less civilised tribes of Teutonic invaders. The work of the first period of the "Historical School of Law" which has still to be taken into account in the study of German private law is represented broadly in Eichhorn's monumental "History of German State and Law" ("Deutsche Staats- und Rechtsgeschichte") and in his text-book on German Private Law. Eichhorn had to deal with the fragmentary utterances of Germanic legal thought embodied in the legislation and jurisprudence of the numerous German States before their re-union. He was struck by the many points of similarity in these disconnected laws and explained them by common origin — they were for him the various branches of the same tree, which produce the same kind of leaves and fruit because the same sap runs through them all from the common roots and common stem.

Albrecht's monograph on the "*Gewere*" (the Germanic conception of possession) is perhaps the most characteristic book concerning another side of the Germanistic theory. It was written to prove that the treatment of possession in the ancient and medieval law of the Germanic people was fundamentally different from the development of the corresponding doctrine in Roman law. In this way the two systems were contrasted one with the other, not in vague generalities, but in regard to the specific applications of a leading principle of juridical thought. A further link was added to the chain by Beseler in his famous book on "Popular Law and Lawyers' Law", in which the practical common sense of Germanic legal lore was contrasted with the narrow and pedantic treatment of juridical questions by lawyers trained on Roman doctrine. The spirit of popular revolt in which the task was conceived and carried out by Beseler reminds one of the popular hostility against the Doctors of foreign law entertained by the people at large in the sixteenth century. In a sense, though with much greater learning and a wider view of the field, Gierke may be said to follow on the same lines. He is animated by patriotic zeal when he tries to present side by side

the three great currents of legal development which, according to his view, dominate the legal thought of Western Europe — the Roman, the Canonistic, and the Germanistic one. He has chosen the law of "Association" ("Genossenschaft") to prove to what extent their leading ideas are different, and how great an importance must be assigned to the Germanic view, with its realistic treatment of the corporate body, thoroughly opposed as well to the Romanesque theory of fiction as to the Canonistic line starting from the idea of a "foundation" ("Anstalt").

In this way we can undoubtedly observe a continuous stream of research and reflection running in the channel of national self-consciousness ever since Savigny imparted the first impulse by his revolt against cosmopolitan rationalism, and, in spite of many modifications of the doctrine, the main object — interpreting details from this view-point of national psychology — is still well to the fore. We must not omit to notice, however, that in German jurisprudence itself strong tendencies of a different kind have found powerful expression and have proved in many respects to be more scientific and more progressive.

I do not mean in this case the criticism of details and the struggle for supremacy on the part of representatives of the Romanistic school, like Windscheid, Bekker, Dernburg. They were bound to take up a more cosmopolitan point of view and they did so; but apart from some success as regards particular points, their opposition has not prevailed against the onslaught of the Germanists, and they barely succeeded in keeping some of their positions on the debatable ground of practical codification. But there is another set of thinkers who deserve greater attention. Their point of departure may be traced to the work of Ihering and Gerber. Ihering holds a great place in the history of nineteenth-century juridical thought, and the evolution of his ideas has been significant of the gradual working out of leading principles which have shaped juridical opinion in Europe. Already in the first stage of his career, culminating in the work on the "Spirit of Roman Law", he took up an attitude that clashed with the views of the Historical School of Law as represented by Savigny, Eichhorn, and Puchta. He laid stress on the technical side of legal method, and contended that the popular notions of justice and equity constituted merely a background for the formation of legal doctrine effected by the activity of legal experts — legislators, judges, pleaders, interpreters of law.

Altogether the historical side of jurisprudence, though of the

utmost importance for explaining the present and observing the peculiarities of juridical thought, was declared to be an introduction to another and more important side, facing the problems of the future. Ihering had the right to paraphrase for the use of his theory the famous reflections of Goethe's Faust on the meaning of the Gospel of St. John, ch. I: "In the beginning there was the Word." Surely the true sense requires a different version — "In the beginning there was the Deed." Inasmuch as legal rules are acts conceived as directions for men's conduct, the creative character of law has to be recognised quite as much as its historical origins.

In further elaboration of this idea Ihering came to consider law chiefly as a factor of social evolution. All legal rules are in the last instance attempts to master social problems by means of State compulsion. Regarded from the point of view of the relations between individuals and the coördinating Commonwealth, their object is the recognition and protection of certain interests, and thereby they create rights, — "subjective rights", as they say in Germany. Taking up his stand on the social functions of law, Ihering was necessarily led to formulate three consequential positions of the utmost importance. (1) He entered an emphatic protest against the purely analytical method of dealing with questions of law. He subjected to ridicule and to scornful criticism those of his colleagues who put all their faith in dialectical exercises of subsumption and constructions, reproaching them with living in a fool's paradise of juridical abstraction ("Der juristische Begriffshimmel").[1] As against the barren pedantry of these scholastic exercises, he set the duty of the lawyer never to lose sight of the practical needs involved. As one illustration of the far-reaching significance of this line of thought, I may be allowed to call attention to Gēny's more recent book on the interpretation of law, conceived in the entirely different surroundings of French practice and yet insisting on that very necessity of breaking with purely dialectical methods of interpretation for the sake of the requirements of actual life. (2) A sociological standard had to be set up for the proper direction of juridical activity, and Ihering found such a standard in the conception of social utility. His "Aim of Law" (Zweck im Recht) is to a great extent devoted to investigating the grounds of social coöperation, and the author has spared no effort to make it clear that in fashion, customs, ordinary morality, and

[1] From "Scherz und Ernst in der Jurisprudenz".