Yale Law School
Yale Law School Legal Scholarship Repository

Faculty Scholarship Series | Yale Law School Faculty Scholarship

1-1-1920

Book Review: History of Germanic Private Law

Edwin Borchard
Yale Law School

Follow this and additional works at: http://digitalcommons.law.yale.edu/fss_papers

Part of the Law Commons

Recommended Citation
Borchard, Edwin, "Book Review: History of Germanic Private Law" (1920). *Faculty Scholarship Series.* Paper 3671.
http://digitalcommons.law.yale.edu/fss_papers/3671

This Book Review is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

A HISTORY OF GERMANIC PRIVATE LAW, by RUDOLF HUEBNER. Translated by Francis S. Philbrick. Continental Legal History Series, v. IV. Boston: LITTLE, BROWN & Co. 1918. pp. 785.

The opinion expressed some years ago on the appearance of the first volume of this notable series, namely, that the horizon of the lawyer trained in the common law would be vastly broadened by these English translations of fundamental works on continental legal history, is amply fortified by the volume under review.

Huebner's original work, *Grundzüge des deutschen Privatrechts,* of which the second edition is here translated, has since appeared in Germany in a third edition (Leipzig, 1919) and the author has since transferred his professional activities from Giessen to Halle. The English title more correctly pictures the contents of the book than the original German, for it deals less with the "principles" of "German" law than with the "history" of "Germanic" law.

A detailed study of "Germanic", as contrasted with "Roman" law is essential to a correct appreciation of the historical development of private law in northern, central and western Europe, for both threads have been woven into the fabric of modern private law. A study of Germanic law naturally adopts the historical method, for the sources of that law must be found in the period before 1495, when Roman law was "received" in central Europe; and its later development is to be traced in its struggle for existence with the more scientific and better developed Roman system. That it was a hardy plant is attested by the survival of many of its doctrines in the present German, French, Swiss and related civil codes and in the Scandinavian law. Its revival as a special field for study is identifiable with the regeneration of Germany after the Napoleonic wars; and with the growth of modern Germany patriotic zeal stimulated scientific research in the effort to establish that positive law and modern theory owed to indigenous legal institutions as much as they did to the alien Roman law, and that the law in force cannot be understood without an intensive study of both systems. The polemics of the "Germanic" and the "Roman" schools of jurists became most acute in the period between 1875 and 1895 when the present German civil code was in process of formation. The success attending the appearance of Gierke's *Entwurf* or Draft in 1890, following the publication for criticism of the first draft of the code, marks the high point of Germanic influence. The Germanists have enlisted in their ranks some of the most eminent scholars of modern times, including Eichhorn, Beseler, Stobbe, and Maitland's hero, Gierke, names worthy of association with the Romanists, Savigny, Windscheid, Dernburg and Jhering. The student of law in central Europe must acquire (1) a familiarity with the institutional history of Roman law more profound than that required of the student in the Bologna law school described by Fitting, and (2) a knowledge of Germanic institutions sufficient to enable him to understand the sources and history of the various provisions of modern codes and legal doctrines. The treatise under review is designed to meet the second need.

That it is a scholarly work of the first rank may be taken for granted. It does not, like Gierke's notable *Deutsches Privatrecht* (3v. Leipzig, 1895-1917) undertake to present the existing law of Germany so far as derived from Germanic origins, but discusses systematically in its separate divisions the institutions of Germanic law, from their earliest known origin and where possible, up to their present survival. The work, therefore, embodies the results of some centuries of legal

HeinOnline -- 20 Colum. L. Rev. 631 1920

and historical research. Its value to the student of legal history is enhanced by its parallel, though subsidiary, discussion of Roman institutions, and its indication of the influence of the one system upon the other and the extent of the survival of each in modern positive law and theory.

In its principal divisions, namely, the law of I. Persons, II. Things, III. Obligations, IV. Family Law and V. Succession and Descent, the work covers topically the material of the usual continental civil codes, although it does not follow systematically the German or any other civil code. An opening Introduction discusses the "general traits" of Germanic private law and the external history of the system, particularly the circumstances attending and the reasons for the "reception" of the learned Roman system. These are found in the disunity of the local customary law and its unresponsiveness to the economic and social needs of growing trading communities, which required the administration of a rounded system of law by learned judges. The remainder of the book consists of an institutional discussion of the Germanic law as an independent science usually presenting, however, the relation and interoperation of Germanic doctrines to and with their rival Roman counterparts in the various stages of their mutual development in Germany and their comparative survival in the composite modern law.

Notable among the Germanic contributions may be mentioned the association or corporation theory. Probably no other system has been so rich in the development of forms of collective and group activity and ownership of property; and Maitland's authority supports the conclusion that few legal institutions have had in their service such scholars as Beseler and Gierke, the latter of whom has spent a life of research in the study of the corporation. The first volume of his *Genossenschaftsrecht* appeared in 1868, the fourth in 1913, not to mention his *Genossenschaftstheorie* (1887). And although Gierke finally convinced the German codifiers and the courts that the corporation was a juristic person and a "reality" and not a fiction, it is a mistake to assume, as Saleilles has pointed out, that the "realists" overlook the fact that a business corporation is an association of individuals who are the beneficial owners of the corporate property. The student of contemporary events may find valuable material in the Germanic craft guilds and industrial and co-operative associations, with their political aspects, and the co-existence of highly developed forms of group organization with an extremely individualistic basis of society. If, as the sociological school of jurists maintain, law is but the registration of the social solution of social problems, it will be a matter of no little interest to observe how far continental civil codes will now be amended.

Not less interesting than the history of the corporation is the development of the various forms of seisin of land, which in theory was identical with the seisin of chattels. The "mystery of seisin" will be, if not solved, at least illuminated by a study of the Germanic *Gewere*. The distinction between the law of property in land and in movables, so much emphasized in Germanic and in English law, almost came to an end with the "reception" of the Roman law, one of its few survivals being the system of land registry in the establishment of title. The land system has remained Germanic in form and Roman in substance; whereas in English law it may be said that while the forms of transfer became Romanized, in substance ownership and estates in land represent a blending of Germanic and feudal institutions with certain aspects, occasionally called misconception, of the Roman *jura in re aliena*.

The doctrine of possession presents another fruitful field for com-

HeinOnline -- 20 Colum. L. Rev. 632 1920

parative study. The *animus possidendi,* so necessary to the Roman conception, was absent from the Germanic law; so, the means of protecting possession, so highly developed both in France and England, and at least well known to the Roman law in the interdicts *uti possidetis* and *unde vi* were practically unknown to the Germanic law. Perhaps this was because possession created a presumption of title, and the trial of possession became submerged in a trial of title. The disseisor had to show his title. The differences between the Roman and Germanic systems naturally gave rise to a voluminous literature on the theories of possession. In contrast with the single noteworthy common-law production of Pollock and Wright, it is conservative to say that twenty to thirty important monographs on possession may be noted in continental legal literature. Many eminent jurists have considered it incumbent upon them to present at length their views on possession.

With the vast theoretical and historical background of the continental jurist, it is surprising to observe his aversion for analytical jurisprudence. Even Jhering scorns it; and Bierling and Binding have found few adherents in defending it. Yet, when it is observed that the word *Rechte* (rights) is used in several different senses, that "power" is confused with "capacity", and that *Schuld* (duty) is distinguished from *Haftung* (liability) by the fact that the former concept is free from the element of compulsion or "must" (involving merely *sollen,* "ought" or "shall"), whereas the latter, liability, does include compulsion or "must", distinctions which lie at the foundation of the Germanic law of obligations, we may be pardoned for finding a certain confusion in some aspects of German legal thought. Nor is it remarkable that these uncertain concepts were overpowered in the civil code by the Roman *obligatio* which comprised the element of duty to perform, and that legal enforceability is now made the test of "duty". Possibly the distinction between a moral and a legal duty might explain the modern survivals of *Schuld* and *Haftung.* Tort liability is in all continental countries less technically developed than in the common law.

To the continental student a legal doctrine presents a vista of historical data and theoretical hypotheses and opinions rather than a digest of recent cases. It is, thereferoe, inevitable that the continental lawyer and law writer must be a scholar. Whether the civil law more efficiently serves those who live under it than does the common law, the test for utilitarian comparison, is a matter still among the unexplored fields of legal research. At all events, lawyers of the common law cannot but profit by having uncovered for their information the sources and history of legal institutions in the lands whence their forbears emigrated or in which a contemporary civilization worked out its social institutions. That is the significance of the Continental Legal History Series.

The work under review cannot be left without tribute to the excellent introduction of Professor Vinogradoff or without adequate expression of appreciation of the scholarly performance of a most difficult task by the translator, Professor Philbrick.

Edwin M. Borchard.

FORMATIVE INFLUENCES OF LEGAL DEVELOPMENT. Evolution of Law: Select Readings on the Origin and Development of Legal Institutions, Vol. III. Compiled by ALBERT KOCOUREK and JOHN H. WIGMORE. Boston: LITTLE, BROWN AND COMPANY. 1918. pp. 705.

"Formative Influences of Legal Development" is the third volume in a series on the evolution of law, compiled by Professor Kocourek and Dean Wigmore of Northwestern University. As are the preceding

HeinOnline -- 20 Colum. L. Rev. 633 1920