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Reception of the Roman Law in Germany

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THE RECEPTION OF THE ROMAN LAW IN GERMANY.

AS in other countries it was the universities which prepared the way for the Reception of Roman Law in Germany. Many of those great institutions which still lead the world in learning date from about the middle of the thirteenth century, and instruction in foreign law was offered from the beginning. At first the emphasis was placed on the Canon law but chairs of Roman law were established at Heidelberg in 1387, at Basel in 1460, at Ingolstadt in 1472, at Tübingen in 1477, at Freiburg in 1479, at Vienna in 1493 and at Greifswald in 1498, and were filled by Italian, French and Spanish doctors.[1] Where the latter were replaced[2] by professors of German nationality the incumbent was usually required to be one who had taken a degree at an Italian University. Thus a strong connection was established with Roman jurisprudence and the leaders of thought were imbued therewith.

The influence of this began soon to manifest itself among the bar. For, even at that early period "a university degree came to be considered a necessary qualification for the practice of the law."[3] And the study of Roman law in preparation for such degree opened a new era for the legal profession. In the words of an eminent authority:

> "A lay bar appeared and took from the clergy the leadership. Just as the study of theology and the taking of holy orders had formerly been the only basis for an assured career, so now the study of law opened manifold positions. The theory, developed in Italy, that the doctors in law enjoyed a status of nobility, had found early entry into Germany. Nobody denied that as 'milites legalis militiae' they stood on a level with the most distinguished and privileged class of knightly descent. We find them in the entourage of emperors and princes as chancellors and councillors; they appear as plenipotentiaries in the imperial Diet; they are employed in political missions for negotiations of all kinds. They were courted by the grandees of the Empire. Well-to-do cities eagerly sought the service of the doctors, and great lords and cities, in order to make sure of such, readily furnished talented young men with ample means for study, if

[1] Continental Legal History Series, I, 338, 352, 354.

[2] The foreign doctors were, in some instances, retained until a late period. Id. 354.

[3] Holdsworth, Reception of Roman Law in the Sixteenth Century, Law Quarterly Rev., XXVIII, 39, 49.

> they would obligate themselves to enter their service on completion of their education. And in the same way the banking house of Fugger recruited legal counsellors out of the Geizkofler family."[4]

It is not strange that with such an influential body trained in and devoted to it the Roman law in Germany continued to advance at the expense of the Canon law. One manifestation of the advance was the appearance in the fourteenth century of what has been called "the first and most influential law book on procedure."[5] It came to be known ultimately as *"Der richterliche Klagspiegel"* ("Mirror[6] of Judicial Plaints") and its author, said to have been an unknown Swabian "thoroughly conversant with civil affairs and a learned practitioner" announced that his purpose was "to give useful instructions how a party must conduct himself in court, so necessary in the practice of the day, to the end that the darkness of uncertainty may be dissipated, and the common law become clear."[7] The second part of the work treats of criminal law and procedure from the Roman viewpoint, interpreting them, however, in German terms, with accompanying comment drawn in part from Justinian's Institutes. Yet the work is not predominantly procedural, for the first "tractate" is devoted to civil law, and through its popularization of Roman law principles among the lay public for whom the book was intended it is believed to have aided materially in the general "Reception" of that system.[8]

On October 16, 1495, the *Reichskammergericht* (Imperial Chamber of Justice), which had been established by the Diet of Worms, was opened at Frankfort on the Main and this event is regarded as a decisive one[9] for the extension of Roman law.

The tribunal—which was one of second instance or appeal for subjects of territories and imperial cities, though of first instance for immediate imperial vassals—was composed of a president-judge and sixteen associates or assessors ("judgment-finders"). Of these latter, one-half were required to be doctors "worthy for their learning in the law" and all took an oath to judge according to the

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[4] Stintzing, *Geschichte der deutschen Rechtswissenschaft*, translated in Continental Legal History Series, I, 370.

[5] Id. 360.

[6] Cf. the English "Mirror of Justices" and the Spanish *"Espejo de todos los derechos"* (Mirror of all Rights) of the thirteenth century.

[7] Continental Legal History Series, I, 360.

[8] Id.

[9] Holdsworth, The Reception of Roman Law in the Sixteenth Century, Law Quarterly Rev., XXVIII, 39, 49. Cf. Stintzing, *Geschichte der deutschen Rechtswissenschaft* Ch. 2, translated in Continental Legal History Series, I, 366.

"common laws of the empire" which phrase was understood to include the Roman law.[10] "The whole position of this court," says STINTZING, "to which an acquaintance with the various local laws could not be easily accessible, resulted in the Roman-Canon law's predominance in marked degree in its decisions."[11] And HOLDSWORTH[12] adds:

> "The men by whom it was staffed, and the law which it administered, were Roman; and with every change in its constitution Roman influences were strengthened. It helped to forward the Reception not by precept only, but also by example. Its forms and procedure were copied by the princes, by the cities, and at length even in the inferior courts."

For "after the highest court of the Empire had thus led the way, the territorial and the city courts were bound, as courts of lower instance, to follow."[13]

Still another factor in the Reception was the rise of a school of native German juridical writers of whom the most eminent was ZASIUS, who lived until 1535. He is said to have been the first in Germany "to treat seriously the connection between Humanism[14] and legal science."[15] He was of the school of Renaissance jurists and is ranked with the Italian ALCIAT and French BUDÉ "as one of the founders of modern legal science."[16] ZASIUS was devoted to the Roman law, or, as he expresses it, such parts thereof "as were useful, salutary and in accord with the customs of Germany,"[17] and he drafted the Baden regulation of 1511 which embodied little more than the Roman law of inheritance and guardianship.[18] His attachment to Roman law led him to oppose the Reformation "though without finding contentment within the other party," and to stand for tradition and authority while "others and in particular the younger generation (of jurists) followed the

[10] Stintzing, *ubi supra; Brunner, Grundzuege der deutschen Rechtsgeschichte,* (4th Ed. 1910), translation in Continental Legal History Series, I, 337.

[11] Brunner, *ubi supra.*

[12] The Reception of the Roman Law in the Sixteenth Century, Law Quarterly Review, XXVIII, 39, 49.

[13] Brunner, *ubi supra.*

[14] See *ante.*

[15] Stintzing, *Geschichte der deutschen Rechtswissenschaft,* translated in Continental Legal History Series, I, 381.

[16] Id. Cf. Holdsworth. The Reception of Roman Law in the Sixteenth Century, Law Quar. Rev. XXVII, 387, 395.

[17] Stintzing, *ubi supra,* translated in Continental Legal History Series, I, 427.

[18] Stobbe, *Rechtsquellen,* II, 390 *et seq.*

movement notwithstanding."[19] As regards the general effect of the latter it has been said:

> "The Reception of the civil law, as thus restated by the lawyers of the sixteenth century, was assisted by the decline in the importance of the canon law. Partly owing to the Reformation, partly owing to the rise of the self-contained independent state, the importance of the civil law tended to increase at the expense of the rival system. It would not indeed be true to say that the canon law at once lost all its authority even in Protestant states. It was far from being wholly consumed in the fire to which Luther had consigned its books. Many of its doctrines had been worked by the Bartolists into the fabric of the civil law which the sixteenth century received. It was, therefore, still appealed to even in Protestant states; and, in the seventeenth century, Arthur Duck tells us that no one who aspired to be a really learned civilian could afford to neglect the canon law. But when all allowances are made it is clear that the new political and religious conditions will gradually degrade the canon law from the position of a rival of the civil law to the position of a supplement."[20]

LEGISLATION.

It was natural that this general advance of Roman law should manifest itself sooner or later in legislation. We have seen how Roman criminal procedure of the Italian type found its way into German legal literature in the form of the *"Klagspiegel."* In the same century its general theory was embodied into some new collections of laws. These were the Revised Ordinances of Worms and the Criminal Code of MAXIMILIAN I for the Tyrol. Both came into force in 1499 and were followed in 1506 by a similar code of the same monarch for Radolfzell, and in 1507 by the *"Bambergensis"*, drafted by Johan VON SCHWARZENBERG for the Bishop of Bamberg, and declared to have "possessed the character at once of a legislative code and an officially prepared text-book of the Italian criminal law" and to have been "soon received in different courts outside the jurisdiction of Bamberg."[21]

This work became the basis of the Brandenburg-Franconian

[19] Stintzing, *ubi supra,* translation in Continental History Series, I, 382.

[20] Holdsworth, The Reception of Roman Law in the Sixteenth Century, Law Quarterly Review, XXVIII, 39, 42-43.

[21] Schröder, *Lehrbuch der deutschen Rechtsgeschichte,* (5th Ed. Leipzig, 1907) § § 83, 84, translation in Continental Legal History Series, I, 402, 403.

criminal code of 1516 and, after much improvement and revision, of the *"Constitutio Carolina Criminalis"* or *"Halsgerichtsordnung"* of the Emperor CHARLES V. (CARLOS I of Spain). The latter has been called "by far the most important statute of the empire" and "the first true code, in criminal law and procedure, by which the dualism of the native and the foreign law was reconciled."[22] Drafts of it were prepared in 1521 (pursuant to a resolution of the Diet of Worms) 1523, 1529 and 1530, but it was not until 1532 that the Diet of Regensburg finally adopted it. Thereafter "it dominated in German law through two centuries."[23] It came into force *de facto* in different parts of Switzerland, in some being declared an official law book—in Freiburg as late as 1803,—as well as in the Swiss regiments of the French Army.[24] So in the Netherlands the *"Carolina"* seems to have been applied by the courts though the question of its actual adoption there is still open.[25]

THE CODES.

"We may regard the Reception as accomplished," says STINTZING,[26] "by the first half of the sixteenth century;" but the legislative confirmation of the Roman law in Germany has continued to find renewed expression almost until the present hour. Instances[27] of this, not already mentioned, were the "Landrechts" of Würtemberg (1555), Julich-Berg (1555-65), and Bavaria (*"Codex Maximillianus Bavaricus Civilis*), 1756, which "retained the principle of the subsidiary force of the Pandect law"[28] and "was no more than a summary of the decisions, a sort of table of contents to the Roman law as then practised."[29]

PRUSSIA.

FREDERICK the Great, who reigned from 1740 to 1786, outlined a general plan for codification as early as 1749. The draft of a *"Corpus Juris Fredricianum"*, prepared by VON COCCEJI, the High Chancellor, appeared in three volumes a couple of years later; but only the first book, relating to civil procedure, came into force and that not until 1781. The work proceeded, however, under the

[22] Id.

[23] Id. 403.

[24] Eugen Huber in Continental Legal History Series, I, 501.

[25] Professor Van Hamel in Continental Legal History Series, I, 463, 464.

[26] *Geschichte der deutschen Rechtswissenschaft,* Ch. 2, § 1.

[27] Schröder, *Lehrbuch der deutschen Rechtgeschichte,* (5th Ed., Leipzig, 1907), § § 83, 84, 91.

[28] Id.

[29] Planiol, *Traite elementaire de droit civil,* (5th Ed. 1908) I, 23 et seq. translation in Continental Legal History Series, 303.

leadership of the minister VON CARMER and later of the Councillor SUAREZ, and in 1784 the draft of a new code was published and submitted for comment. Seven years later this was proclaimed a *"Gesetzbuch"* for the Prussian States, but before taking effect it was further revised slightly, and in 1794 it was finally published and went into force on June 1 of that year under the title of *"Allgemeines Landrecht für die preussischen Staaten."* A great German authority has analyzed it as follows:

> "The Code is divided into two parts, the parts into titles, the titles into paragraphs. Its most important parts are those of private law (part 1, and titles 1-6 of part 2), the law of the Church (pt. 2, tit. 11), and criminal law (pt. 2, tit. 20). Titles 7-10 of part 2 treat of class law: peasants (tit. 7), the middle class (tit. 8), nobility (tit. 9), and civil servants (tit. 10). Under the peasant class the village communities are treated; under the middle class the cities (secs. 86-178), gilds and trades (secs. 179-474), commercial law (secs. 475-712, 1250-1388, 2452-2464), the law of bills of exchange (secs. 713-1249), admiralty (secs. 1389-1933, 2359-2451), and insurance (secs. 1934-2358). Part 2, titles 12-19 contain provisions on public and administrative law, including the regalia and the law of guardianship, the conception of the last being wholly bureaucratic."[30]

A French critic[31] has declared that this code "was too long, its topics poorly distributed, and its text overburdened with details; the principles in it are smothered under rules for concrete cases."

Nevertheless it contained some highly advanced provisions; as *e. g.*, the following from the Introduction:

> "Every citizen is obliged to promote the welfare and security of the community in accordance with his position and means. If the rights and duties of the individual should come into collision with the promotion of the general welfare, the rights and advantages of the individual citizen must range after the interests of the community. On the other hand, the State is obliged to make good the damage which individuals may suffer by sacrificing their rights and interests to the general welfare."

Or these from the body of the Code:

> "Every citizen must be allowed complete freedom of religion and of conscience.

[30] Schröder, *ubi supra.*
[31] Planiol, *ubi supra.*

"On the other hand, every religious body is obliged to teach its members fear of God, obedience to the laws, loyalty towards the State, and moral behaviour towards the citizens * * * *

"It is the duty of the State to provide for the maintenance of those citizens who cannot provide for themselves, and who cannot obtain maintenance from those private persons who, according to the law, are obliged to provide for them."

AUSTRIA.

Meanwhile codification was likewise in progress in the neighboring Austrian empire, which was then, even more than subsequently, under German influence. The *"Constitutio Criminalis Theresiana"*, embodying substantive as well as remedial criminal law, was proclaimed in 1769, but the Empress MARIA THERESA, for whom it was named, failed to approve the draft of a corresponding *"Codex Theresianus"* for private law prepared by Professor AZZONI. In the succeeding reign, however, that portion of it which related to family law was published under the title of *"Josephanisches Gesetzbuch"* and in 1781 a general code of judicature was published, in 1787 a criminal code and in 1788 a code of civil procedure.

The *"Allgemeines bürgerliches Gesetzbuch,"* the work successsively of KEES, MARTINI and ZEILER, who profited, no doubt, by the recently enacted Code Napoleon, was finished in 1810 and came into force not only for the Austrian crown lands, Croatia and Siebenbürgen, where it still obtains, but was extended to parts of Bavaria as well as to Hungary, where, however, it was displaced a half century later. The same authority quoted above characterizes this Austrian Code as follows:

"It is composed of three parts, which in turn are divided into sections, and (in all) 1502 consecutive paragraphs. Its system is similar to the portions of the Prussian Code that deal with private law. In form and expression the Austrian code is more satisfactory; for its authors were instructed to restrict themselves to principles and resist all temptations to deal with detailed cases, whereas Frederick the Great desired, if possible, a separate provision for every case. This excessive particularity is the greatest fault of the Prussian Code, which is otherwise favorably distinguished from all others by clarity of expression, sound views, and exhaustiveness. Both Codes contain, in addition to the native law directly adopted (at best, forming a much smaller part than

the Roman law), much that was unconsciously embodied in them. For their authors unconsciously *thought* within Germanic legal conceptions,—although in the main they *consciously* departed from the Roman law only when holding (under the influence of the school of natural law) a different notion of a 'rule of reason' or of 'the nature of things.' "[32]

As a result of this long and extensive process the German states were now divided into two regions, one of common (Roman) law and the other of codes. As described by a distinguished commentator:

"Territory of the law of the Pandects, or (as it was also called) the territory of the common law, was that portion of Germany in which Roman private law—in the form in which it had obtained recognition as the common law of Germany—maintained its formal validity and continued to be enforced, except where expressly altered by special local laws. This territory embraced Holstein with some parts of Schleswig, the Hanse towns, Lauenburg, Mecklenburg, part of Hither Pomerania (Neuvorpommern) and Rügen, the greater part of Hanover, Oldenburg (except the Principality of Birkenfeld), Brunswick, the Thuringian Duchies, Lippe-Detmold, Schaumburg-Lippe, Waldeck, the district of the former Appellate Court of Ehrenbreitstein, Hesse-Nassau, Hesse-Darmstadt (except the Palatinate and the Franconian principalities). It constituted one large and continuous stretch of land, extending from Schleswig-Holstein in the north to Bavaria in the south. * * *

"The territory of the codified private law was the territory where the formal validity of Roman private law had been set aside in favour of exhaustive local codes governing the entire private law of the land."[33]

But whatever its form the Reception of the Roman law was now practically complete. For in the first of the regions described above "the force of Roman private law as a subsidiary common law remained unaffected throughout;"[34] and in the second region the codes largely embodied the principles of the Roman law.[35]

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[32] Schröder, *ubi supra.*
[33] Sohm, Roman Law (3d. Ed. 1907) 5, 6.
[34] Id. 6.
[35] Id.