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REVIEWS AND CRITICISMS


The history of German law represents peculiar difficulties, because of the long struggle between the Romanistic and the native elements. Emphasis will be laid by students upon one or the other of these factors as their training and organized thought lead them to follow in the footsteps of Savigny or to enroll under the banner of Gierke, and in consequence no treatise will be wholly free from the bias occasioned by the writer’s sympathies and allegiance.

The present work is written by a follower of Gierke, but one who does not fail to give due recognition to the importance of the Roman and Canonistic elements in the evolution of the modern system. Professor Huebner’s method is admirably adapted to present a brief and clear outline of the development of private law among the Germanic peoples from the folk-laws to the codes. The “vertical” plan, as Mr. Jenks terms it, is followed—that is, each institution is separately treated—though there is an interesting introduction which gives a description in bold outlines of the different stages of evolution and of the general characteristics of German law. With respect to each institution, the author first describes the primitive and early medieval law, next the later medieval law, then the modern development from the time of the Reception down to the latest codes. Institutional history, thus treated, to use the words of Stubbs, “presents a regularly developed series of causes and consequences, and abounds in examples of that continuity of life, the realization of which is necessary to give the reader a personal hold on the past and a right judgment of the present. For the roots of the present lie deep in the past and nothing in the past is dead to the man who would learn how the present comes to be what it is.”

The student of English and American legal institutions, as Maitland’s work has shown us, must perforce acquaint himself to a considerable extent with Germanic origins. Our law of associations, for example, cannot be viewed aright unless we know something of the Genossenschaft and its history; to explain our law of land something must be said of the Gewere; the history of our law of chattels is involved with that of the maxim Hand muss Hand wahren; a thorough study of our law of dower or community property requires some knowledge of the Wittum and Morgive. The brief discussion by Huebner of Schuld and Haftung, involving the almost untranslatable distinction between “sollen” and “mussen,” is of importance to one who would seriously study the doctrine of responsibility. For example, the viewpoint of the early customs that every violation of an
obligation was subject to a penalty still continues to color modern legislation, as in the provisions of the German civil code, in this respect resembling somewhat our own common law, which make a lunatic responsible for his torts.

It is a matter of discredit to English and American scholarship that until the publication of the present series under the auspices of the Association of American Law Schools, there was no apparatus available by which the English reader might gain some familiarity with the history of European law. With the aid of Brissaud's History of French Private Law and the present volume, read in connection with the histories of English law by Pollock and Maitland, Holdsworth and Jenks, one whose learning in foreign tongues is "a younger brother's portion," may now equip himself with a respectable knowledge of the experience of Western Europe in the field of private law. Let such a one read what Huebner says about the privilege (or disability) of "equal birth" among the high nobility of the German Empire—a privilege that never existed in England or in France, even under the old régime—and much that has been and is obscure in the history of the great war and in the present situation of central Europe becomes appreciably clearer.

The student of criminal science will find his greatest interest, aside from the history of the law as to responsibility previously mentioned, in the picture of the primitive German law with its undifferentiated conceptions of wrong. Possibly, too, he may obtain an occasional side-light upon psychological problems, as in the observation of the process by which the husband's absolute right vitæ et necis in the most primitive law becomes reduced in the Flemish custom of Ardenburg to the rule that he may cut open his wife and warm his feet in her blood, provided only, that he sew her up again and she remain alive. The grim and even ghastly humor of this doubtless apocryphal rule, so reminiscent of the Shylock theme, the poetry and the symbolism of the early Germanic law, find numerous illustrations of a similar character in the present volume. The thoughtful student will not be satisfied merely to refer such elements to a supposed national psychology. He will see in the operation of the aesthetic impulses one of the mightiest forces in the evolution of society.

Huebner's text book was the best available for the purpose of translation in this series, where the fields of public law, criminal law and civil and criminal procedure are covered by special treatises. Schroeder's and Brunner's histories do not so elaborately cover the subject of private law in its total development, nor do they so industriously correlate the past with the present. Heusler's book is too long, and moreover presents only a cross-section of the law as it is stated in the Sachenspiegel, the Schwabenspiegel and the other law books of the middle ages. Huebner's book is not an original treatise, but a text book designed for university students; it meets the needs of the beginner. It is admirably clear in expression, written with a full knowledge of the materials, and its interest and value is enhanced by the author's constant employment of the comparative method.
The translator has performed a difficult and extensive task in a most creditable manner. He has wisely preserved untranslatable terms, though he indicates the English expression having the approximate meaning, thus, Gewere, sein, Schuld und Haftung, duty and liability. In spite of the necessity thus imposed of preserving the original technical language, the English of the translation is clear and idiomatic. A complete and analytical index renders the book more usable than the original even to one sufficiently familiar with German.

Sir Paul Vinogradoff’s introduction is a valuable contribution to the scanty literature in English upon the theory of possession.

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LEGAL AND POLITICAL STATUS OF WOMEN IN IOWA. By Ruth A. Gallaher, Iowa City, Iowa. The State Historical Society of Iowa, 1918. Pp. XII, 300.

In this monograph Miss Gallaher has given us a well-written historical sketch of two phases of Iowa State history, namely, the development of the civil rights of women under Iowa law and the progress of the woman suffrage movement; and, incidentally, the acquisition by women of the right to hold certain elective and appointive offices in that state.

The first part of the monograph deals with civil rights, and is necessarily based upon an examination of the Iowa Codes, statutes and judicial decisions; but the treatise is not, and, as the author assures us, is not intended as a contribution to law or jurisprudence. In ten short chapters is traced the development of civil rights from the common law under which married women were denied separate personality and unmarried women did not actually enjoy many of the advantages which the law gave them, down to the present when women, whether married or unmarried, enjoy most of the rights which pertain to men. After an introductory chapter summarizing the status of women at common law, follow chapters which deal with the “personal rights” of women, women in education, industry and the professions, marriage and divorce, and with the property rights of women. Excluding from consideration feminine activities in religious and other similar organizations, the author has confined herself for the most part to pointing out distinctions between men and women established by law or judicial decisions, only incidentally touching upon laws of a general nature applying equally to men and women. Inasmuch as the Iowa criminal law makes little distinction between men and women, either as victims or as perpetrators of crimes, the chapter on “Women and the Criminal Law” is necessarily very brief.

The common law was at first the basis of the punishment of crimes in Iowa, but step by step this has been superseded or modified by statutes more favorable to women, notably in the matter of punishment of sex crimes. The common law fixing the age of consent at ten years, for example, was accepted by the Iowa law of 1838 and remained unchanged for almost fifty years; then, in 1886, the age was raised to