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Roman Law in Medieval Europe

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I

THE DECAY OF ROMAN LAW

WITHIN the whole range of history there is no more momentous and puzzling problem than that connected with the fate of Roman Law after the downfall of the Roman State. How is it that a system shaped to meet certain historical conditions not only survived those conditions, but has retained its vitality even to the present day, when political and social surroundings are entirely altered? Why is it still deemed necessary for the beginner in jurisprudence to read manuals compiled for Roman students who lived more than 1500 years ago? How are we to account for the existence of such hybrid beings as Roman Dutch Law or the recently superseded modern Roman Law of Germany? How did it come about that the Germans, instead of working out their legal system in accordance with national precedents, and with the requirements of their own country, broke away from their historical jurisprudence to submit to the yoke of bygone doctrines of a foreign empire? Surely these and kindred questions are well worthy of the attention of lawyers, historians, and students of social science. I cannot attempt

to cover the whole ground in the discussion of such a problem, but it may be of some value to sketch the chief lines of the subject in regard to the principal countries of Western Europe during the Middle Ages. It was mainly at that time that there took place the momentous process, not inappropriately called by German scholars 'the Reception of Roman Law'.

We shall have to deal with laws and law books, with doctrine and casuistry—all topics devoid of romantic charm. But there is a peculiar interest, as I conceive it, in watching the play of social forces and human conceptions. I should like here to recall the words of one of the masters of modern historical study: 'The History of Institutions cannot be mastered—can scarcely be approached—without an effort. It affords little of the romantic incident or of the picturesque grouping which constitute the charm of History in general, and holds out small temptation to the mind that requires to be tempted to the study of Truth. But it has a deep value and an abiding interest to those who have courage to work upon it.'[1]

We may call this interest a scientific one, because, although the methods of social science and of natural science are necessarily different, their aims are identical. Both strive to ascertain the

[1] Stubbs, *Constitutional History*, Introduction.

causes of events in order to pave the way for the formulation of laws of development.

1. The story I am about to tell is, in a sense, a ghost story. It treats of a second life of Roman Law after the demise of the body in which it first saw the light. I must assume a general acquaintance with the circumstances in which that wonderful doctrinal system arose and grew. My tale begins at the epoch of decay during which the Western Empire was engaged in its last struggles with overwhelming hordes of barbarians. It was the time when the new languages and nations of Western Europe were born; when the races gathered within the boundaries fixed by Augustus, Trajan, and Septimius Severus were permeated by Latin culture; when the elements of Romance and Teutonic Europe were gradually beginning to assume some shape. The period may be studied from two opposite points of view: it was characterized by the Romanization of the provinces and by the barbarization of Rome. As it is forcibly put by Lampridius in his Biography of Alexander Severus, the Roman world was crowded with undesirable aliens. No wonder that the standard of culture rapidly fell while the range of Roman influence was extended. We seem to watch a great stream emerging into the expanse of a delta; its waters become shallow, sluggish, and discoloured

by the quantities of sand it carries with it. The gradual transformation of racial elements is especially manifest in military organization. Sturdy Illyrians, Thracians, Goths, and Franks were substituted for the national legions of Italy or Gaul, and it was only through the influx of these recruits that the emperors of the fourth and fifth centuries were able to stave off temporarily the threatening catastrophe. The transformation of the army went so far that the expression 'barbarian' (*barbarus*) came to be commonly used in the sense of soldier. As pagan became an equivalent of heathen, instead of indicating the country folk, so barbarian was used in the sense of military man. Nor were the foreign soldiers merely individual recruits. They were settled in whole troops in the provinces, and their settlements were organized as separate administrative districts. The official Calendar of the Empire, the *Notitia Dignitatum*, mentions *læti* in Gaul; we hear of Sarmatians and *Suevi* as *Gentiles* in Italy. Whole nations, such as the Burgundians, the Visigoths, the Ostrogoths, the Franks, were admitted as allies (*fœderati*) within the limits of the Empire, and quartered in the provinces in a way that made them practically masters of a third, sometimes even of two-thirds, of the land. This influx of alien immigrants in the provinces of the West was bound to make itself felt in the legal

domain. The Empire was forced to recognize to some extent the legal customs of the various tribes, and the idea of wiping out these customs in favour of the civilized law of Rome was never entertained. As evidence of this invasion of barbarian customs, we may quote the words of Bishop Theodoretos (middle of the fifth century). After having spoken of the unity of government and law achieved by the Empire, he qualifies the statement by the remark that the Ethiopians, Caucasian tribes, and barbarians in general were left to follow their own legal customs with regard to transactions among themselves. This raises a question which came to be of vital importance somewhat later, namely, how were members of different tribes to transact business when they met? The supreme authority of the Imperial Courts and of Roman Law did not allow these divergences to assume a sharp and uncompromising aspect, but as alien customs were allowed within its boundaries, the principle that a man must be made answerable primarily to his own personal law existed already in germ in the closing centuries of the Western Empire.

2. A second result of great moment was the fact that Roman Law, even so far as it was recognized and practised by the barbarians in the provinces, began to take the shape of a body of debased rules. Though many of the characteristic institutions of

Roman legal antiquity were still in vigour, they had ceased to represent a high level of juridical culture. Three principal statements of barbarized Roman Law arose at the close of the fifth and at the beginning of the sixth century: the Edicts of the Ostrogothic kings, the *Lex Romana Burgundionum*, and the Roman Law of the Visigoths (*Breviarium Alaricianum*) compiled in 506 by order of King Alaric II. Of these three, the last exerted the greatest influence. While the Edicts of the Ostrogothic kings lost their significance after the destruction of their kingdom by the Byzantines, while the law of the Romans in Burgundy remained local, the Visigothic compilation became the standard source of Roman Law throughout Western Europe during the first half of the Middle Ages. The *Breviarium Alaricianum* purposed to be, and indeed was, a more or less complete Code for the usage of the Roman populations of France and Spain. And it deserves attention as evidence of the state to which Roman Law had been reduced by the beginning of the sixth century.

It still testifies to considerable knowledge and experience. Its Latin is sufficiently pure; it presents a reasoned attempt to compress the enactments of the later Empire into a compendium of moderate size. The texts are accompanied by an interpretation composed either just before Alaric's

code, or in connexion with it, and intended to make the sense of the laws as simple and clear as possible. It is not to be wondered at that the *Breviarium* obtained a dominant position in European Western countries. The *Corpus Juris* of Justinian, which contains the main body of Roman Law for later ages, including our own, was accepted and even known only in the East and in those parts of Italy which had been reconquered by Justinian's generals. The rest of the Western provinces still clung to the tradition of the preceding period culminating in the official Code of Theodosius II (A. D. 438). In the fifth century, lawyers had to take account of the legislative acts of Constantine and his successors up to 438, of fragments of earlier legislation gathered together in the private compilations of Gregorius and Hermogenes, of the *Novellae* of fifth-century emperors, and of a vast unwieldy body of jurisprudence as laid down in legal opinions and treatises of the first three centuries A.D. Even after the achievement of the commissioners of Theodosius, the despairing remarks of Theodosius II on the state of the law in his time remained to a great extent true. One of the principal reasons of the 'pallid hue of night studies of Roman Law', as he expresses it, was undoubtedly connected with the 'immense quantity of learned treatises, the variety

of actionable remedies, the difficulties of case law, and the huge bulk of imperial enactments which raised up a dense wall of fog against all attempts of the human mind to master it'. It was a rather fine performance of the 'barbarian' Visigothic king to attempt, in 506, with the help of his nobles, his clergy, and the representatives of provinces, to do for the Roman population under his sway what Justinian did some thirty years later with infinitely greater resources at his disposal for the Eastern Empire.

3. The comparison with Justinian's Code is also instructive in other respects. Both Codes fall into the same three fundamental subdivisions—that of the Institutes, of Common Law (*jus*), and of the Statutes (*leges*). The first consists of an introductory survey for beginners, the second of jurisprudential doctrines as laid down by legal authorities, and the third of the enactments of recent emperors. Each division is represented in the *Breviarium*. As a parallel to Justinian's Institutes, the *Breviarium* introduces an abstract from Gaius. The choice of this authority was very appropriate, but it was necessary to revise Gaius. And in the hands of Alaric's commissioners the introductory treatise served a purely utilitarian, not a scholarly, purpose. Accordingly, we find eliminated from the text all antiquarian notices such, for instance,

as the distinctions between various kinds of free-born citizens, the *Quirites*, the *Latini*, the *dediticii*, although corresponding distinctions were maintained as regards freedmen. Controversial matter was also omitted, and the text revised with a view to greater simplicity and clearness. Some important parts of the Institutes were surrendered in the course of this process of simplification; for example, the teaching on sources of law, on the contrasting systems of the *jus civile* and the *jus gentium*, and the whole of Gaius's treatment of actions. In all these respects the Visigothic version of Gaius presents a complete contrast with the handling of Gaius's text in the schools of grammar of the fifth-century Empire, as exemplified by the Autun MS. of Gaius.

This shrinking of the intellectual horizon is even more striking in the second subdivision, the part devoted to *jus*—the legal doctrine and jurisprudence of common law, as we should term it nowadays. It consists, in Justinian's *Corpus*, of the stupendous collection of extracts from the great jurists of the first, second, and third centuries, known as the Digest. The barbarians were even more unfit to bear the weight of such a 'mass of wisdom' (*ad portandam tantae sapientiae molem*) than the Roman citizens of the sixth century. The corresponding element in the *Breviarium* is

represented mainly by an abstract from the Sentences of one of the great third-century jurists—Paul, and by a stray text from Papinian. The Sentences of Paul were treated from the same point of view of practical usefulness as the Institutes of Gaius, although, as we are not in possession of a complete edition of the original work, we are unable to judge so well of the amount of text omitted by the Visigothic editors. Still, the general directions of the changes in the text can be ascertained, and these leave no doubt that discussions of too learned a character as well as antiquarian notices were excluded. Thus the output of the older jurisconsults, Labeo, Scaevola, Sabinus, and their compeers, and nearly the whole of the admirable doctrinal work of Papinian, Ulpian, Modestinus, Gaius, and Paul, with the exception of the educational manuals of the two latter, went overboard at the time of the Visigothic codification, as too learned and too complicated for the age. This renouncement of the best inheritance of Roman Law by men who were themselves neither ignorant nor incompetent, speaks volumes for the great decline in the level of culture, and is especially remarkable in the provinces of Spain and Gaul, where there still existed a compact Roman population.

A similar decay may be observed in the third

part of the *Breviarium*, the part devoted to the *leges*, i.e. the enactments of emperors. The *Breviarium* makes its selection from a practical point of view. Omissions are again more characteristic than changes. The substitutions of *Curia* for the provincial governor and of municipal justices (*judices civitatium*) for the praetor are not especially noteworthy. But, although all the sixteen books of the *Theodosianus* appear in some form or other in the *Breviarium*, it is important to notice that the sixth, for example, treating of civil officers and their attributions, is represented by two enactments instead of thirty-eight, and the next one, the seventh, bearing on military organization, by one law instead of twenty-seven. Such shrinkage is noticeable throughout; in this case it arises not so much from a change of intellectual culture as from a difference in administrative arrangements and the decay of governmental institutions.

4. The *Breviarium Alaricianum* consists of laws and rules that are in any case reasonable and tolerably well expressed. A later document of legal tradition, the *Lex Romana Curiensis* of the end of the eighth century, testifies to a further and deeper decay. This is a statement of legal custom, drawn up for the Romance population of Eastern Switzerland, and used in the Tyrol and

Northern Italy as well. Its language and contents are most barbarous. Though the influence of Rome is manifest in the borrowing of legal institutions, the juridical treatment is in no way better, and often worse, than that of contemporary Frankish or Lombard legal customs.

The law in question is based on a very imperfect abstract of the *Lex Romana Visigothorum*, in which the Institutes of Gaius and the greater part of Paul's *Sententiae* are dropped, while the enactments of emperors are generally taken from the text of the 'Interpretation'. To what extent some of these enactments were misunderstood by the Grisons ecclesiastics and judges, may be gathered from one or two examples. The latter actually had the courage to quote the constitution of Valentinian III on the use of the works of ancient jurisconsults.[1] There is not much harm in the fact that Gaius appears in their text as Gagius and Scaevola as Scifola. But the emperor's direction that if opinions conflict, authorities should be counted, and a casting-vote allowed to Papinian as the greatest, is interpreted by the Raetians to mean that every party to a suit ought to produce witnesses and oath-helpers, and if the number of these prove equal, the case must be decided in favour of the side whose contention is counte-

[1] See App. I.

nanced by Papianus. Even apart from the fact that Papianus is a corruption of Papinianus, originating in the *Lex Romana Burgundionum*, this reference to a legal authority, which was not even in use in the region in question, completes the muddle. And it is clear that the paragraph as it stands neither corresponds to the original nor could be put into practice.

There are many scattered traces of barbaric usage making its way into the debased Roman Law of the Raetian country. *Fredum*, the price for peace obtained through the intervention of public authorities, appears here under the same conditions as in Frankish districts. The *Dos*, the possession of which was guaranteed to the wife of a criminal whose property had been confiscated, is the German dower, settled on the wife by the husband, not the Roman *dos*, brought by the wife to the common household. One of the enactments of the Theodosian Code and of Alaric's *Breviarium* on lawful marriage, emphasizing the importance of the consent of both bride and bridegroom, is stated in such a way that it is possible to catch a glimpse of a wedding ceremony performed before a *judex*, a ruler of some kind, and an assembly of neighbours (III, vii, 3). It is evident that we are in the presence of a rather debased and Germanized form of legal custom, engrafted on

fragments of what had been once a system of Imperial law.

5. We must next inquire in what way, and how far, the degenerated legal customs of Rome were applied in the early Middle Ages. It must be noticed firstly, that no State of this period was strong enough to enforce a compact legal order of its own, excluding all other laws, or treating them as enactments confined to aliens. Even the most powerful of the barbarian governments raised on the ruins of the Empire, such as the Lombard or Frankish, dealt with a state of affairs based on a mixture of legal arrangements. The Carolingian rulers, and especially Charlemagne, introduced some unity in matters of vital importance to the government or to public safety, but, even in their time, racial differences were allowed to crop up everywhere. Law became necessarily personal and local in its application. Both facts must be considered in connexion with the survival of Roman legal rules.

The forcible entry of the Goths, Lombards, and Franks into the provinces did not in any sense involve the disappearance or denationalization of the Roman inhabitants. The legal status of the latter was allowed to continue. The personality of a Roman was valued in a peculiar way, differing from the barbarians that surrounded him. If it

cost 200 *solidi* to atone for the homicide of a Frank, it cost 100 *solidi* to kill a Roman in Frankish Gaul. All intercourse between Romans was ruled by the law of their race. When a Roman of Toulouse married a girl of the same race, she brought him a *dos* in accordance with Paul's *Sententiae*, II, 22, 1; he exercised a father's authority over his children, on the strength of the ancient custom of *patria potestas*, as modified by the laws of Constantine. If a landowner wanted to sell his property, he would do it of his own free will, according to the rules of *emptio venditio*. If he wished to dispose of his property after his decease, he would be able to draw up a will making provision for bequests to be paid out by his heir, but carefully avoiding to bequeath more than three-fourths of his property, in conformity with the *Lex Falcidia*. In all these and in many other respects the legal rights of the Roman would be at variance with those of his German neighbours. These, again, would act differently, each according to his peculiar nationality, as Salian Franks or Ripuarians, Bavarians or Burgundians, &c. The position became very intricate when members of different nationalities, living under different laws, were brought together to transact business with each other. As Bishop Agobard of Lyons tells us about 850, it happened constantly that of five people

meeting in one room, each followed a law of his own. We find, in fact, in these cross-relationships very striking examples of so-called conflicts of law. Before proceeding to examine the material questions at issue, it was necessary for the judges to discover to what particular body or bodies of law the case belonged. The report of a trial between the monasteries of Fleury on the Loire and St. Denis provides a good illustration of the points raised on such occasions. The case was brought before the tribunal of the Frankish Court. It was found necessary to adjourn it, because both plaintiff and defendant were ecclesiastical corporations, and as such entitled to a judgement according to Roman Law, of which none of the judges was cognisant. Experts in Roman Law are summoned as assessors, and the trial proceeds at the second meeting of the tribunal. The parties would like to prove their right by single combat between their witnesses, but one of the assessors of the court protests against the waging of battle, on the ground that such a mode of proof would be contrary to Roman Law. The point at issue is therefore examined and decided according to Roman rules of procedure, that is, by production of witnesses and documents. St. Benet, however, the patron of the Abbey of Fleury, was seemingly prejudiced in favour of the Frankish mode of

proof-by-battle, as he revenged himself on the too forward assessor by striking him dumb.[1]

The rules as to allowing or disallowing recourse to one or the other personal law were necessarily rather complicated. For instance, the payment of fines for crimes was apportioned according to the law of the criminal, and not of the offended person. As regards contracts, each party was held bound by the rule of its own law; but if the contract was accompanied by a wager, it was interpreted according to the law of the party making the wager. In the case of a contract corroborated by a deed (*carta*), the legal form and interpretation depended on the status of the person executing the deed. Some cases were rendered more complex by the fact that the courts found it necessary to consider not only the legal status of the grantor, but also the quality of the disposable property. For example, in an Italian charter of 780, we find that a certain Felix makes a donation to his daughter, and receives from her a *launegild*, a compensation, according to Lombard Law, although, as a clerk, he is himself subject to Roman Law. The reason is that, while still a layman, he received the property in question from his wife according to Lombard Law.

[1] *Miracula S. Benedicti*: Mon. Germ. Hist., XV, 1, p. 490, quoted by Brunner, *Deutsche Rechtsgeschichte*, I², p. 394.

6. The confusion resulting from such cross-relations of personal legal status was not lessened by the fact that in almost every jurisdictional district, local customs arose to regulate the ordinary dealings of its population. In districts with a clearly preponderating racial majority these customs assumed a specific national colouring—Lombard, Frankish, Roman, as the case might be. Local customs become in course of time a very marked characteristic of the Middle Ages. They tend to restrict the application of the purely personal principle, although the latter was not entirely abolished for a long time. The way in which the light of Roman legal lore was transformed while breaking through the many-coloured panes of local custom was most varied. It is sufficient for our present purpose to note the geographical boundaries of the regions where legal customs were built up on the basis of Roman Law. The area was a wide one. It covered, firstly, Southern Italy, where the Byzantine Empire upheld its authority, until the advent of the Saracens and of the Normans. Here the courts administered not only Roman Law as laid down in the *Corpus Juris*, but also the legislation of Justinian's successors. In the centre, the district forming the so-called Romagna was characterized by the application of Justinian's Code. Thirdly, in Southern France and Northern

Spain, the *Breviarium Alaricianum* reigned supreme.

Now, by laying stress on these geographical limits, I do not mean that Roman legal customs did not assert themselves outside the mentioned regions. On the contrary, throughout the proper domain of barbaric laws, in Northern France, in Germany, and even in England, the influence of certain Roman institutions was manifest in many ways. Even where there was no numerous Roman population to represent the Roman racial element, the clergy, at least, followed Roman Law, and many rules of the latter were adopted for their practical utility.

Let us notice some of these borrowings of the barbarians during the early Middle Ages.

Roman influence was strongest in the case of the Goths. They had been in contact with the Empire at the time of its comparative strength—in the third and fourth centuries. Their two chief branches were settled for a considerable time on Imperial soil as confederates, very unruly and dangerous confederates indeed, as Rome came to feel at the hands of Alaric I, but still as confederates who learned constantly from their civilized neighbours. In consequence of this long permeation of Roman customs and legal ideas, we find firstly, that the Ostrogoths founded their legislation

directly on Roman patterns, and secondly that the Visigoths of Spain and France adopted Roman enactments wholesale, apart from the fact that, as we have seen, they codified Imperial law for the use of their Roman fellow-citizens. Already in the fragments of the laws of Euric, the most ancient part of Visigothic legislation (about 466), we find a number of paragraphs drawn from Roman sources, for example, the clause forbidding actions concerning events which had occurred more than thirty years previously (*c.* 277); the declaration, that donations extorted by force or intimidation (*vi aut metu*) are to be null and void (*c.* 309), a rule which breaks through the purely formalistic treatment of obligations natural to barbaric law; the admission of equality between men and women as to inheritance (*c.* 320), &c. Later on, during the sixth century, the influence of Roman rules becomes stronger and stronger. Entire sections are adopted by the *Lex Visigothorum*, from the *Breviarium*, the *Novellae*, and from customary laws of Roman origin which still lingered in the courts, in spite of the official codification of Alaric II. About one-third of the so-called *Antiqua* goes back to Roman sources. As to the legislation of the great kings of the seventh century, Chindaswind and Recceswind, who made an attempt to replace personal laws by territorial codes, the greater part

of it is based on Roman patterns. It must, however, be said of this overwhelming Romanization that it is to some extent exaggerated in official laws. Ficker's remarkable investigations have shown that there was a continuous stream of Germanic legal customs running counter to the Romanizing tendencies of royal enactments, and maintaining rules and institutions which remind us strongly of Scandinavian custom, and evidently go back to a Teutonic origin. These Germanic elements emerge again in the later statements of provincial customs, the so-called *Fueros*. But, even if we allow for the existence of such an undercurrent of Germanic custom, the general inference is not destroyed that Roman legal lore had a most powerful influence on the Visigoths of Spain and France.

The history of the Lombards discloses a different state of affairs. The very large Roman population of Northern and Central Italy was neither destroyed nor entirely bereft of its legal inheritance. But the practice of its law was confined to voluntary transactions and to forms of arbitration, resembling those which were in use among Christians before the Church was recognized by the Empire. It is known that votaries of the Christian faith tried to avoid interference from heathen magistrates by settling their disputes through arbitra-

tion. Something of the same kind preserved the tradition of Roman Law in Lombard districts in the course of the sixth and seventh centuries, until it was laid down expressly by an enactment of Liutprand (c. 90) that instruments made before Roman notaries should conform to the rules of Roman Law in the same way as Lombard deeds should be drawn up according to Lombard Law. Although the existence of a body of Roman Law was indirectly recognized in this fashion, no provision was made, even after the above enactment, for the creation of Roman tribunals or the appointment of judges versed in this particular law. We are left to surmise that, when cases necessitating the application of Roman rules came before the Lombard courts, the Germanic judges obtained help from assessors acquainted with Roman Law, and probably chosen from among those very notaries mentioned in Liutprand's enactment.

Now it is remarkable that, although Lombard legislation thus remains true to its Teutonic origin as regards the contents of legal rules, it nevertheless lay open to the powerful influence of Roman Law from two different sides. Firstly, the rapid growth of economic intercourse in Italy with its complicated relations, requiring nice adjustment, rendered a recourse to civilized law highly desirable, more especially as many parties to business

affairs were people of Roman birth, and as transactions with citizens of the Exarchate and of Southern Italy living directly under Roman rule were of every day occurrence. This particular means of permeation is represented by the growth of Lombardic *formulae* for the framing of contracts, which are evidently influenced by Roman patterns. A second path was laid open to the invasion of Roman ideas by the appearance of juridical reflection. In the legislation of the purely Lombard epoch at the beginning of the eighth century, we find already traces of jurisprudential analysis. There is, for instance, an enactment of Liutprand (c. 133),[1] treating of the ejectment of a landed proprietor by his neighbours. If, in the course of these violent proceedings, he suffers bodily harm, the offenders must, of course, pay the fine for the homicide or wounding, but the legislator declares in addition that they are guilty of conspiracy, and must be fined 20 *solidi* on that account. In analysing the case, Liutprand, or his legal advisers, explain why they decree such a fine and not another. They state their reasons for not considering the transgression to be one of '*arscild*', that is, of forming an armed band (cf. Roth. 19, Liutpr. 34, 140), not a case of unlawful organization of country folk (*consilium rusticanorum*, Roth. 279),

[1] See App. II.

nor of riot (*rusticanorum seditio*). It seems to the legislator that the material point in the case lies in the preparation to commit murderous assault. It is this intention which constitutes the criminal element in the conspiracy, and which may lead to the perpetration of the crime. In spite of the barbarous language, the mode of reasoning testifies to a rising level of juridical thought; and, though a direct connexion with Roman rules is not traceable, yet this and similar cases of legal analysis in Lombard legislation suggest that Lombard justice was progressing from a naïve application of barbarian rules to a reflective jurisprudence, and this undoubtedly opened the way for a consideration of Roman doctrine.

In the Frankish Empire we have before us a third example of the process of permeation of barbaric law by Roman notions. The resistance to foreign law is stronger in this case than even in that of the Lombards. The Salic and Ripuarian Codes are based almost exclusively on Teutonic principles. And yet there are many channels by which Roman legal ideas assert themselves. Firstly, there is the influence of the Church, which has left its mark more especially on Bavarian law and on the capitularies of the kings and emperors of Carolingian race. Secondly, there is the influence of Roman rules on private transactions. In this field

the barbarians left a wide margin for the settlement of legal difficulties by private agreements between parties, provided such agreements did not infringe some established or formulated rule of law. Large gaps in the barbaric enactments concerning the settlement of business matters had to be filled up, and this was achieved by extensive borrowing from Roman legal materials. Abundant evidence is afforded in this respect by the Frankish collections of *formulae*, that is, ready-made models of legal instruments. Such ancient collections as those of Marculf, of Anjou, of Tours, are full of instruments framed on the pattern of Roman deeds; and a history of barbaric legal instruments must start in every case from beginnings laid down by Roman precedents. To mention just one or two cases: a *formula* of Marculf shows clearly the breach made into Germanic customs of succession by the theory of the equality of sexes in regard to inheritance admitted by Roman Law: a father bequeaths land to his daughter, in spite of the Salic Law reserving land to the male sex (II, 12). The emancipation from slavery is mostly carried out according to Roman rules constituting a relation of clientship between the freedman and his former master or to the Church, &c.

Even England, the country least affected by Roman influence, does not form an exception in

this respect. The Old English Books, which constitute grants of private property exempted from the application of Folkright, are, to a great extent, a Romanesque importation effected by the Church in conjunction with the kings. Their chief aim was to substitute a form of property, similar to that known to Roman Law, for the landownership restricted by tribal custom, which represented the barbaric mode of land tenure in England.

7. The life of Roman Law in the barbaric states, as far as we have considered it hitherto, was upheld by the continuance of fragmentary and garbled rules derived more or less directly from the system formed during the prosperous periods of Roman civilization. Can it be said that the barbaric successors of Papinian and Ulpian, of Marcus Aurelius and Constantine, kept also up, to some extent, the threads of theoretical reflection and intelligent teaching, which in former days had served to combine separate details into a reasoned whole? Is there a distinct stream of *jurisprudence* winding its way through the dark ages from the fifth century, when western jurists took part in the codification and interpretation of Imperial Law, to the twelfth century, when a body of learned doctrine sprang up again in Italy and France? These problems have given rise to much controversy among modern scholars. We find such

names as those of Stintzing, Fitting, Chiapelli, on one side, and those of Conrat and Flach on the other. It is necessary to take up a position in regard to this discussion, even though there can be no talk of any detailed examination of the arguments adduced on both sides.

To begin with, it seems clear that even legal learning, as distinguished from legal practice, did not entirely disappear with the downfall of the Empire. It survived to some extent together with other remnants of ancient culture, more especially through the agency of the learned classes of those days—the clerical and monastic orders. The survivals in question, however, are not only slight and incoherent, but, as a rule, hopelessly mixed up with the attempt of the early Middle Ages to effect a kind of salvage of the general learning of antiquity. There are no definite traces of organized schools of law. What legal learning there is remains connected with exercises in grammar, rhetoric, and dialectics. A striking example of the kind of work carried on in the course of the seventh and eighth centuries is presented by the Etymologies or Origins of the Spanish Bishop Isidor of Seville. It is an *Encyclopaedia* embracing all sorts of information collected from classical sources—on arts, medicine, Old and New Testament topics, ecclesiastical history, philology, and law. The

legal sections comprise, firstly, generalizations on subdivisions of jurisprudence, on the aims and methods of law, on legislators and jurisconsults; and, secondly, notices as to substantive law—on witnesses, on deeds, on the law of things, on crime and punishment, &c. All these matters are treated by excerpts from classical literature, from writings of jurisconsults, and from legal enactments. As is shown by the title, the author lays great stress on supposed etymologies for the explanation of institutions and rules. It is needless to say that the philological derivations compiled by him are sometimes fanciful in the extreme. In dealing with legal instruments, for example,[1] Isidor explains that *donatio* is the same as *doni actio* (the action of a gift), while *dos* (the marriage portion of the bride) comes from *do item* (I give likewise). And this quibble is referred to the fact that in effecting a marriage settlement the gift (of the bridegroom) comes first, while the portion of the bride follows second. In a similar way *conditio* is derived from *condictio* (joint declaration), because the testimony of not less than two witnesses can be accepted as evidence (V, 24, 25, and 29). There are also many direct misunderstandings, as, for example, when he declares that edicts are enactments of kings or emperors, that *peculium* belongs to minors

[1] See App. III.

only, &c. It is characteristic of the state of legal knowledge in the early Middle Ages that these fragments were greatly appreciated and constantly copied and excerpted.

The study of legal books was mainly limited to two narrow grooves. The leisure of clerical life was employed in this particular, as in other fields, in making abstracts from the voluminous productions of the Roman age, and in trying laboriously to discover the literal meaning of expressions. The abstract (*Epitome*) and the gloss are the two channels for the tradition of learning in the course of this barren epoch. To illustrate the results achieved by abstracts, one may refer, for example, to the so-called *Lex Romana Canonice Compta*, a compilation of Roman laws dating from the ninth century, in which the selection of materials was primarily affected by the wish to provide members of the Church with rules of Roman laws that might be of use to them.

The work of supplying glosses goes on uninterruptedly from classical times right through the Middle Ages. They were the medieval substitutes for translations and commentaries. Short renderings, etymologies, and explanations were inserted over the line to facilitate the interpretation of single terms or words, while longer summaries and notices were jotted down on the margin. The

gloss to a Turin MS. of the Institutes and the gloss to the *Epitome* of the *Codex* in a MS. belonging to the Dean and Chapter of Pistoia (Tuscany), may serve as examples of this type of work. The first was compiled some time before the tenth century, and was based on translations of Byzantine notes to all parts of the *Corpus Juris*. The Pistoia gloss is more original. Its principal elements date also from the ninth century, but it was in use all through the tenth, eleventh, and twelfth centuries, and grew considerably by later additions. Most of the notes have been provided by a person of by no means contemptible intelligence. Though his direct borrowings from the *Corpus Juris* cannot always be traced, he shows in his summaries and in his explanatory remarks an understanding of juridical questions, and is quite able to give the gist of a rule in his own words. For instance, the *Epitome* II, 12, 10, gives the words of an enactment to the effect that, if the representative of a person (*procurator*) had full powers to act in the latter's behalf, a decision given against him in a trial ought to stand; for, in the case of a fraud, the *procurator* might be sued by his principal (*Si quid fraude vel dolo egit, convenire eum more judiciorum non prohiberis*). The gloss notes shortly: 'He who has full power to act can carry a matter to a conclusion unless he commits a fraud' (*nota qui habet plenam potestatem agendi posse rem sine dolo firmiter finire*). The idea is the same as in the original, but is formulated from a different point of view. On the strength of these and similar observations we are able to maintain that there was a constant, though thin, stream of legal learning running through the darkest centuries of the Middle Ages, that is, from the fifth to the tenth. The existence of organized law schools is not proved, nor can there be any talk of a very active development of individual thought. But transcripts and abstracts from the fragmentary materials bequeathed by antiquity were made and studied in the *scriptoria* of monasteries or chapters and in the classrooms of teachers of Arts.

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