

THE INSTITUTES

A TEXTBOOK OF THE HISTORY
AND SYSTEM OF ROMAN
PRIVATE LAW

BY

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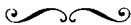
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(German Private Law' (*Deutsches Privatrecht*)—as the new branch of legal study came to be called—definitely took its place in the legal curriculum side by side with the Pandect law. As distinguished from the books on the Pandects, which were concerned with the 'received' private law of foreign origin, the books on German Private Law were concerned with the private law of Germany so far as it was of native origin. The subject-matter of German Private Law accordingly comprised both the indigenous portions of the *common* private law of Germany—that is, besides the institutions already mentioned (family trusts, charges on land, and 'Erbverträge', supra, p. 3), the feudal law of the Lombards which had likewise been received--and further those portions of the native law which had survived the reception in the shape of 'particular' laws. Inasmuch, however, as the native German law found its principal stay and refuge in these particular laws, German Private Law became pre-eminently the general science of the various particular laws of Germany, as opposed to the law of the Pandects, which was the science of the common law of Germany.

Thus the private law of Germany was dealt with in two distinct branches of study corresponding to its twofold origin : first, in the law of the Pandects and secondly, in German Private Law, the former having for its subject the common private law of Roman origin, the latter the indigenous private law, existing for the most part only in the shape of 'particular' laws. Of the two branches the law of the Pandects was the older, the larger, and the more powerful. But the younger branch grew steadily in importance : inwardly it became less and less dependent on its older rival, and consequently increased in outward power, so that it gradually became the stronghold of national legal ideas as against the claims of the foreign ideas imported from Roman law.

§ 3. *The Law of the Pandects and Codified Law.*

The law of the Pandects had established itself in Germany as being the common private law of the so-called Holy Roman Empire of the German Nation. The decline of the ancient Empire necessarily involved a decline of the authority attaching to the law of the Pandects.

From the eighteenth century onwards the initiative in regard to

legislation was taken by the governments of the separate German States. Some of the legislatures, more especially those of the smaller States, contented themselves with legislating on single topics; that is, they confined themselves to working out the particular laws of their respective States, leaving the subsidiary force of the common Pandect law within their territories untouched. In the larger States, however, the idea of a codification struck root, the idea, in other words, of recasting afresh the law as a whole: private law, criminal law, and the law of procedure. The formal effect of a codification is to set aside the existing law in its entirety, as far as the territory affected is concerned, and to substitute for all the laws transmitted from the past a single new code. The condition of the private law of Germany called for a remedy of this kind. The dualism of the private law, the antithesis between the common Roman law and the particular German law—which latter was of the most heterogeneous character—could only be removed by means of a new code which should fuse Roman and German law into a complete whole. But as long as no strong German Empire was forthcoming, the necessary momentum for such an achievement was lacking', and the task of codification therefore devolved on the separate legislatures of the larger German States. Thus it came about that the law was codified for considerable parts of Germany—the private law, as well as the criminal law and the law of procedure—and within these parts the law of the Pandects ceased henceforth to have the force of law.

The whole of Germany was accordingly divided into two great territories corresponding' to the form in which its private law presented itself. This division continued till January 1, 1900.

The 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 Schleswig¹, the Hanse towns, Lauenburg, Mecklenburg,

¹ In the greater part of Schleswig, the so-called Jütisch Low of King Valdemar II of Denmark (A.D. 1240) was in force in the form of a Low German translation dating from the end of the sixteenth century. Roman law had never been received in the territory governed by the Jütisch Low. Apart from isolated institutions to which it applied, it operated, for the

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 Rhenish Hesse), Hohenzollern, Wurttemberg and Bavaria (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. In all these countries many laws had been enacted setting aside the rules of Roman private law, in some parts but sparingly, in others on a larger scale. But the force of Roman private law as a subsidiary common law remained unaffected throughout the whole of this territory, in other words, it continued to be valid in all cases where not directly overridden by the contrary provisions of particular laws.

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. All these codes, however, had, in substance, adopted a large number of the principles of Roman law. This territory comprised those portions of Germany which were governed by the Prussian Landrecht of 1794, the French Civil Code of 1804 (which was in force on the left bank of the Rhine, as well as in Baden in the shape of the Baden Landrecht of 1809), and the Royal Saxon Civil Code of 1863. In the western territories of the Austro-Hungarian Empire (on this side of the *Leytha*) the law of the Pandects prevailed till 1811, in which year it was superseded by the Austrian Civil Code. Almost the entire eastern half of Germany to the right of the Elbe, and the extreme west to the left of the Rhine, were already governed by civil codes.

The time for definitely putting an end to the legal authority of the Pandect law had now arrived.

rest, merely as a 'ratio scripta', i.e. so far only as it gave expression to such requirements as sprang from equity and the general nature of the circumstances in question. The same is true to this day of Roman law in the Swiss cantons, except where the law has been codified. It was expressly received, in the sense of obtaining formal subsidiary force of law, only in those portions of Switzerland which were formerly under the influence of the jurisdiction exercised by the Court of the Imperial Chamber (*Reichskammergericht*) which Emperor Maximilian I established in 1495 A.D.