

## BOOK REVIEWS

*History of Roman Legal Science.* By Fritz Schulz. Oxford: Oxford University Press, 1946. Pp. xvi, 358. \$7.50.

The late Hermann Kantorowicz and Professor de Zulueta of Oxford had planned to edit a comprehensive history of legal science. Two books have now been published which had their inception in that project. One is the all too brief *Introduction to Greek Legal Science*, by Professor George Calhoun, which Professor de Zulueta published as an encyclopedia article after Calhoun's untimely death; the other is the work here reviewed, originally intended as a somewhat similar article but, happily, expanded by Professor Schulz into a substantial and independent volume.<sup>1</sup>

The Oxford Press has given us a beautifully and correctly printed book. That there are practically no misprints is a great achievement, and the extremely few lapses—"rain-wonder"<sup>2</sup> instead of "miracle," "rhetorics,"<sup>3</sup> "strikes us into surprise"<sup>4</sup>—indicate careful editing.

Professor Schulz tells us on his first page that this is to be neither a history of Roman law nor a history of the systematic thinking of Romans about the law, nor yet a history of the sources of Roman law. It becomes a little difficult to see just how these various subjects are to be distinguished from what Professor Schulz has in mind but by an application of the Platonic dialectic of differentiation<sup>5</sup> he manages it, and is apparently not disturbed by the fact that to Aristotle the method of *διαίρεσις* is merely a "feeble kind of syllogism," *ἀσθενὴς συλλογισμὸς*, Anal. Pr. I, 31, 46<sup>a</sup> 31. Professor Schulz's "legal science" is the account of how people concerned in any way with the law, whether as judges, practitioners, publicists, philosophers or merely dilettanti, have understood their business. It is a new way of taking "legal science" and all new approaches are to be warmly welcomed.

<sup>1</sup> Professor Schulz forestalls criticism of omissions in his references (p. iv). What is here noted, therefore, is intended as a supplement and not as a criticism. To the general works on Roman law mentioned on p. 3, n. 4, I should like to add R. v. Mayr's *Römische Rechtsgeschichte* (Samml. Goeschen, 1912-1913), and my own *Handbook of Roman Law* (St. Paul, 1927). For a concise and accurate account of the sources, it would be hard to find anything better than Kipp's *Geschichte der Quellen des röm. Rechts* (4th ed. 1919). On Greek law, instead of the quite unsatisfactory volume of Vinogradoff on *The Jurisprudence of the Greek City*, which was written when that great scholar, because of his failing eyesight, was compelled to rely almost wholly on amanuenses, a reader will be better guided by Egon Weiss's *Griechisches Recht* (1923) and Bonner and Smith's two volumes on *The Administration of Justice from Homer to Aristotle* (1930).

It is also important to add two collections of *leges* to that of Rotondi (p. 88). One is in the Pauly-Wissowa *Realenzyklopädie* under *lex*; the other is in the Daremberg-Saglio, *Dict. des Antiquités*, s.v. *leges*. Both give the laws alphabetically and not chronologically as Rotondi does. It might be noted in general that Professor Schulz frequently cites the great German classical cyclopedia but almost never mentions the French one although it contains a number of excellent articles on both Roman and Greek law.

<sup>2</sup> P. 6, n. 8.

<sup>4</sup> P. 125.

<sup>3</sup> P. 56, n. 5.

<sup>5</sup> P. 68.

Professor Schulz proceeds to divide his history into four periods: the first, the archaic period, goes from the earliest times till about 200 B.C., when Hellenistic influences became dominant; the second, the Hellenistic period, runs to the time of Augustus; the third, the classical period, from Augustus to Diocletian, and the last, the bureaucratic period, ends quite sharply with 534 A.D., the "decisive turning point," the year in which the "codification" of Justinian was completed.<sup>6</sup> These divisions are at least as good as any other. The famous 44th chapter of Gibbon has three periods; the Twelve Tables to Mucius; Mucius to Alexander Severus; Alexander to Justinian.<sup>7</sup> The only comment I should care to make is on the sharp line at 534 A.D. In the following six years, no less than one hundred Novels were issued. Of these, some are quite lengthy and have been of great influence, especially the 118th. To say that 534 is the "exact end" and that after this the "legal science of the East is properly called Byzantine, and that of the West, Romanistic," is somewhat hardy.<sup>8</sup> Gregory the Great in 603 A.D. quotes Nov. 90 and 123, without any suspicion that the law after the constitutio *Cordi* is anything else than continuing Roman law binding on Romans east or west.<sup>9</sup> For each period Professor Schulz discusses, in successive chapters, the jurists, the legal profession, the character and tendencies of the jurisprudence of the period, and, for all the periods but the last, the forms and transmission of the literature. There is a certain amount of overlapping and repetition but the full Table of Contents and the Index enable us to discover the author's views on anything which we could reasonably be seeking in a book of this sort.

What sort of a book is it? The differentiations already mentioned give us some idea and the Preface tells us more. "I have written," Professor Schulz tells us, "not only, and not in the first place, for the narrow circle of specialist scholars in Roman law, but with the hope of being read by advanced law-students and of assisting them in their study of the sources. I have written no less for students of classical philology and ancient history."<sup>10</sup> We shall all readily admit that no one of these groups could read the book without profiting by it. But unless the reader is after all a professed Romanist, for whom the book is not intended "in the first place," he will do well to fortify himself by reference to one or another of the general introductions to Roman law mentioned on p. 3, n. 4. He is otherwise likely to be confused and he certainly will get a highly colored—one is tempted to say a kaleidoscopic—view of the entire subject as it presents itself to an able and brilliant, but a little too self-confident, scholar.

Professor Schulz writes *con amore*. The subject of his book is "the purest and most original expression of the Roman genius."<sup>11</sup> But he does not burst into ecstatic admira-

<sup>6</sup> P. 332.

<sup>7</sup> Differences of opinion on what was the "classical age" are referred to on p. 99, n. 2. We may add R. v. Mayr's four divisions: the first ends with the establishment of the praetorship; the second with Hadrian; the third with Diocletian; and the last is that of the orientalization of the law. This oriental element I should regard as of prime importance. In Professor Schulz's presentation of the same period (pp. 262-329), it seems to be taken as a new form of Hellenization (p. 297).

<sup>8</sup> P. 2. Compare also the strange finality he gives this exact year on p. 265.

<sup>9</sup> Epist. 13, 50; Mon. Germ. Hist. II, 2, 417. In the same epistle he quotes the Pandects and the Code under these names.

<sup>10</sup> P. iv.

<sup>11</sup> P. 4.

tion at every stage of its development, as the seventeenth and eighteenth century Romanists did, with a declaration that the Roman law was the quintessence of human reason or synonymous with justice itself. He finds the most productive period to be the second, that in which the Promethean fire of Greek (chiefly Platonic) dialectic was brought to the law.<sup>12</sup> He discovers an intellectual fatigue in the brilliant achievements of the classical period,<sup>13</sup> and while he shares the general judgment of scholars that the last period was devoid of originality, he is far more appreciative of its achievements than other historians are.

The special merit of the book, besides the wide range of learning which brings almost every field of ancient life into relation with the law, consists in the strikingly novel and adventurous characterizations of men and epochs in Roman legal history. It does not seriously derogate from this merit that most of his colleagues in the field will partly or wholly challenge the validity of his judgments. So vitally important an element in human history as the Roman law must be valued and revalued from all points of view and a man who like Professor Schulz has lived with the subject all his life and thought its problems through has earned the right to a hearing on anything he cares to say about them, whether his views do or do not commend themselves to his fellow-workers.

Professor Schulz makes so many acute and original observations that these alone would give this book importance. He is very properly skeptical of the older traditions and is sometimes even derisive of them. It is a little unfortunate that he does not direct his skepticism against the cult of interpolations, which he stoutly defends, and to the still more difficult task of examining with caution the often brilliant and always entertaining flashes of imagination that occur to him.

He refers constantly, and nearly always disparagingly, to "modern Romanists" who in most cases might protest that they have not fallen into the pit from which he seeks to rescue them. For example, the word "hero" used as a translation of the term *ἥρωες* is, one should say from his own example,<sup>14</sup> taken by modern Romanists much as he takes it. It means a distinguished legal scholar now dead. But it was a technical term for such a person and the modern use is practically a transliteration not wholly void of facetiousness. Almost the same thing can be said of the many other references in this book to the ineptitude of "modern Romanists."

That he deals a harsher measure than he wishes to receive is indicated by his plea, already noted, that failure to mention a book or article is no proof that he does not know it. But he assumes that Seckel and Kübler in their second edition of the *Jurisprudentiae antejustinianae Rel.* (1911) were unaware of Conrat's *Der Westgotische Paulus*, published in 1907.<sup>15</sup> There might have been other reasons for omitting to mention that book in Seckel's Preface. Again, he is surprised that one jurist should consider another's opinion "ridiculous." But he quotes with approval Beseler's characterization of Johannes Stroux's fine study of *summum ius*, as a "*Wahnvorstellung*,"<sup>16</sup> a word I should be inclined to apply to much more than half of all Beseler's work. He is more than a little supercilious about the merely "bio-bibliographical" details which interested the humanist civilians.<sup>17</sup> But his book contains a great deal of "bio-bibliographi-

<sup>12</sup> P. 68.

<sup>13</sup> P. 178.

<sup>13</sup> P. 129.

<sup>16</sup> P. 76, n. 6.

<sup>14</sup> P. 274, n. 12.

<sup>17</sup> P. 3.

cal" matter, as indeed it could not help doing. Nor were the pre-Savigny civilians any more engrossed in them than their successors.

A more general criticism, however, must direct itself to the astounding dogmatism which is exhibited throughout the book. He is sure of questions about which there can be no certainty. Thus when he has Iavolenus (D. 40, 12, 42) say "*haec vera sunt*" of a statement of Labeo, he is consciously uttering an opinion.<sup>18</sup> But Professor Schulz makes these statements about matters of past history even though evidence is either extremely defective or wholly lacking and he does so generally when he rejects other versions which might seem to others at least as well founded. So his view of the "encroachment" of the priestly colleges on the law is the "true explanation."<sup>19</sup> And he appends in note 4, "All other more or less fantastic views (e.g., Jhering, *Geist*, I, 300 ff. Kunkel p. 13) are erroneous."<sup>20</sup> At the risk of entertaining a fantastically erroneous view, I would hazard a wholly different explanation than his of the relation of the priests to early law. He knows that pontiffs before Coruncanus "must" have given *responsa* in public<sup>21</sup> although Pomponius says the opposite, and there is nothing to indicate that he is wrong. The *responsa* of Brutus "must have been in the last four books which Q. Mucius, the augur, pronounced to be *non veri Bruti libri*."<sup>22</sup> This makes nonsense of Cicero's reference to them. A passage of Gaius "cannot be genuine,"<sup>23</sup> a judgment which is part of the entire interpolationist technique. The *prooemium* of the Gnomon shows "beyond question" that it is a literary work.<sup>24</sup> One may retort that no opinion in such things is beyond question.

Nor has Professor Schulz's great learning saved him from statements that seem to me to be "unquestionably" errors. He says twice that no one who was not a member of a sacred college could so much as study sacral law, and cites Cato, as quoted by Gellius (I, 12, 17).<sup>25</sup> Cato, however, seems to say distinctly that anybody could learn it but would not thereby become a pontiff or an augur. Just so, Lord Stowell or Sir Stafford Cripps might acknowledge that their great skill in ecclesiastical law did not qualify them to perform the duties of ordained priests. It was not teaching that was beneath the dignity of a Roman gentleman<sup>26</sup> but merely professional teaching for compensation.<sup>27</sup> Nor was it a "clause" in the *coemptio* that prevented the wife from being *servae loco*, but the wholly different words used (Gaius, I, 123). When Critias speaks of the omniscience of God,<sup>28</sup> he speaks as an avowed atheist, and declares this omniscient God to be a pure invention of magistrates in order to check secret crimes. The example cited by Gaius in 4, 11, is scarcely a "liberal" interpretation, but on the contrary it is expressly advanced as an illustration of strict pleading. It is hard to see what he means by stating that "no one thought of extending the *lex Aquilia* . . . beyond the literal meaning of the words *occidere, urere, frangere, rumpere*"<sup>29</sup> and that this was true at all times.<sup>30</sup> Gaius (III, 217) seems to contradict this assertion. The Temple of Saturn contained the treasure, not the State-archives, and how the "God-fearing Celts," when they burnt the city, could have prevented a conflagration which destroyed the Regia

<sup>18</sup> P. 124.

<sup>19</sup> P. 8.

<sup>20</sup> *Ibid.*

<sup>21</sup> P. 10.

<sup>22</sup> P. 92.

<sup>23</sup> P. 115.

<sup>24</sup> P. 155, n. 1.

<sup>25</sup> Pp. 18 and 40.

<sup>26</sup> Pp. 23 and 57.

<sup>27</sup> Compare Seneca, *Contr.* II, pr. 5.

<sup>28</sup> P. 28, n. 6.

<sup>29</sup> P. 30.

<sup>30</sup> P. 30, n. 8.

from spreading to the temples, is difficult to see.<sup>31</sup> Besides, the Regia contained an important shrine, that of Mars, where the sacred shields were kept. The passage quoted from Thucydides is a speech put in the mouth of the Spartan King Archidamas, and has no relevance to the point discussed.<sup>32</sup> Surely, Professor Schulz does not think that *ius commune* is used in our sources as the equivalent of *consuetudo*.<sup>33</sup> Can one say that "speculation on the ideal state and ideal law there was none" in the Republic, in view of Cicero's *De Republica* and *De Legibus*?<sup>34</sup> The former made a considerable impression and the *De Legibus* directly referred to idealized Roman practice. If they are excluded because Professor Schulz does not think Cicero was a lawyer at all, he has forgotten the *Pro Quinctio* and the *Pro Caecina*. Is it indeed "sheer fantasy" to believe that the Romans consciously applied the *ius gentium* in cases of sales?<sup>35</sup> Gaius III, 93, says this is exactly what they did. Moreover, that it can be alleged that *ius gentium* is merely the Greek *κοινὸν δίκαιον* is next to incredible. When the Greeks met the term in Latin, they reduced it to paraphrases like *διατάξεις περὶ τῶν ἐν ἔθνεσιν οἰκούντων* (Mitteis-Wilcken II, 2, p. 425, from a Strasburg papyrus) or the *ἔθνικὸν νόμιμον* of Theophilus [Ferr. p. 6]. Cicero does not say that Brutus' book reproduced his responsa "word for word"<sup>36</sup> but merely (De Or. 2, 32, 142) that he referred to the litigants *nominalim* and did not generalize the situations. To say "No Greek word *ἐϋρηματικός* exists,"<sup>37</sup> is only to say that the word is a *hapax legomenon*. And even that is not quite the case since it occurs in all the manuscripts of Pseudo-Aristeas, 137, and is found in all the older texts, as well as in the newest.<sup>38</sup>

I have omitted any references to matters in which I find Professor Schulz's presentation wholly unsatisfactory, as in the treatment of the *ius gentium* and of equity, and in his analysis of Roman case law.<sup>39</sup> On these matters most Romanists will retain their own, doubtless prejudiced, views.

I am afraid that the book as a whole, despite its aggressively stimulating character and despite the valuable supplement it affords to Krueger's and to Kipp's source-histories, will have the "unpleasantly ephemeral appearance" which Professor Schulz ascribes to the Krueger revisions of Mommsen's "smaller" edition of the Digest, i.e., the 11th, 12th and 13th, the last being issued in 1920.<sup>40</sup> This resulted from Krueger's insertion of references to interpolations in the notes. "This information," says Professor Schulz, "belongs in the Palingenesia and the Index Interp., not to the edition." Quite so. And the constant reference in this book both in the text and notes to interpolations will reduce its value when scholars have returned to a reasonably scientific attitude toward the text of the Digest.

The search for interpolations began afresh in Germany in the nineteenth century under the stimulation of Eisele and Gradenwitz. It was in no sense new. Those humanists who took a critical attitude in their study of ancient institutions, notably François Baudouin, had referred to the difficulties presented by sources which have come down to us through the hands of an imperial commission composed of men who

<sup>31</sup> P. 33.

<sup>32</sup> P. 56, n. 1.

<sup>34</sup> P. 70.

<sup>36</sup> P. 92.

<sup>33</sup> P. 61.

<sup>35</sup> P. 73.

<sup>37</sup> P. 242.

<sup>38</sup> Thackeray in Swete's *Introd. to O.T.* (1914), Tramontano (1931). Wendland writes *εὔρε τικώτεροι* after Eusebius. Nor would it mean "discoverer" but "inventive" or "pertaining to inventions" (*ibid.* n. 2). A Greek at any stage of the language would have taken it as an alternative to *εὔρητικός*.

<sup>39</sup> Pp. 130-31.

<sup>40</sup> P. 355, n. NN.

were primarily administrators and legislators and only in a minor degree scholars and historians. In the following generations, such men as François Hotman, Antoine Favre and Johann Jakob Wissenbach sought to disentangle Papinian and Ulpian from the "Tribonianisms" by which they believed the original texts were distorted.

Their fundamental approach, as we may see from the analyses of Favre (Antonius Faber) by de Media (*Boll. del Ist. di dir. rom.* xiii, 208-42) and Baviera (*Archiv. Giur.* 69, 398-404), was not really different from the modern attitude except that no one maintained the theory, which really was peculiarly Hotman's, that Tribonian had been guilty of wilful fraud in palming off on his contemporaries his own corrupt versions as those of the "classical" jurists. But as to method, I am inclined to believe that they were substantially the superiors of the revivers of their doctrine. They used as their criteria history and logic and not merely words.

Their chief weakness lay in the fact that they were necessarily ignorant of the vast additional documentary material which modern archeology has put at our disposal, and in the fact that methods of critically studying texts of any kind had not yet been developed. For Roman law, such methods begin with Hugo and Savigny. And so far as logic is concerned, they had not rid themselves of the medieval doctrine that the legislation of Justinian was only slightly less entitled to the quality of perfection than the Scriptures themselves, and that apparent contradictions were likely to be due to deliberate heresy.

The weakness of the modern school, on the other hand, is the astounding reliance it puts on verbal criteria—which is not philology, since philology, humanly understood, has taught us nothing if not the uncertain and the shifting character of verbal usage. Armed with "tests" like "*hodie*,"<sup>41</sup> the more advanced of interpolationists have turned the Digest into a series of colored patches, much like the polychrome Pentateuch of Paul Haupt, which for scholars should be an *exemplum in terrorem*.

Not only has there been no real evidence in most instances of the validity of these tests, but a number of newly discovered texts have disproved it in some passages and rendered it doubtful in all. These discoveries, however, have in no way abated the zeal of the doctrinaires. Beseler, who has carried fantasy in these matters almost to the point of irresponsibility, is credited with having stated when the new fragments of Gaius made nonsense of much of Knip's views and his own, "I am still of the same opinion." The story may be apocryphal, but the attitude is demonstrable.

Unfortunately, it is Beseler who is quoted hundreds of times by Professor Schulz in this book and on page after page troublesome texts are brushed aside as interpolations. Anything can be proved in this fashion and astounding things have been proved.

That there are interpolations in our texts of Digest and Code is undoubted. What they are and where they are can be determined only by a complete volte-face, by an admission that the method inaugurated by Eisele has led us into a blind alley and that the next generation of Romanists—if there is a next generation—must begin over again without an index of interpolations and with a willingness to refuse a verdict where evidence is lacking. The axiom of Wittgenstein still holds, *Wovon man nicht sprechen kann, darüber muss man schweigen*. To which I would propose the corollary: "When a dozen things can be said with equal plausibility one must not say that only one thing can be said."

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<sup>41</sup> Even *sed* (*Credite posterit!*) has been used as a sign of interpolation.

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