

"Mittermaier", in MacDonell, John, Sir, 1846-1921, and Edward Manson, eds., *Great Jurists of the World*, Boston: Little, Brown and company, 1914, xxxii, 607 p., at pp. 543-560 (series; The Continental legal history series; vol. 2)

MITTERMAIER¹

CARL JOSEPH ANTON MITTERMAIER was born at Munich on August 5, 1787. His father was an apothecary, a man of excellent training in natural science, with a quick intelligence and a disposition benevolent almost to eccentricity. His mother is depicted to us as a busy woman, with a clear, calm, and shrewd understanding. His father's brother-in-law, Zimmermann, was a seafaring man, and had been helmsman to Captain Cook, the celebrated circumnavigator of the world. The sailor's stirring description of distant lands found the boy a receptive hearer, and served to awaken that yearning for foreign travel which Mittermaier kept to his last days.

Mittermaier's Life.—His father died at an early age; and upon the second marriage of his mother the youth was sent to a school kept by a clergyman, a man of stern and narrow mind, whose wide acquaintance, however, with ancient and modern tongues served to instil into his pupil the liking and knowledge of foreign languages. His later linguistic accomplishments, the product of the seed thus sown, were unusual in a German scholar, and secured for him the friendship and admiration of many foreigners whose acquaintance he made on his numerous journeys and in his varied correspondence.

On entering the Munich Lyceum, he applied himself with zest to natural science; this he never forsook in later years, endeavour-

¹ The author of this biographical sketch was a colleague of Mittermaier at Heidelberg. Dr. Goldschmidt himself became the most famous German jurist of his day in commercial law, and at his death, twenty years ago, was one of Europe's greatest legal scientists. The article here translated was published first in the *Archiv für civilistische Praxis*, 1867, vol. vii., p. 417, and afterwards in the author's *Vermischte Schriften*, 1901, vol. i., p. 653.

A few lines have been inserted from the Notice of Mittermaier's life given in the Preface to the French translation (1868) of Mittermaier's *Criminal Procedure in England, Scotland, and the United States*; that translation was made by A. Chauffard, Judge at Albi.

The present translation is by Dr. Victor von Borosini, of Hull House, Chicago.



C. J. Mittermaier

CARL JOSEPH ANTON MITTERMAIER

ing always to turn it to account in his legal studies. His plan then was to become a mining engineer, and he took the preliminary examination for this when he was thirteen. But on account of his apparently weak constitution his stepfather refused him permission to follow either this occupation or that of a physician, which he next preferred. At sixteen he entered the law course of the University of Landshut, but he attended the lectures on anatomy and medicine as well as those on law and philosophy. His scanty resources obliged him to earn money by giving private lessons; but amidst all these tasks he showed even at this stage the indefatigable nature of his industry by producing while yet a student a treatise (never printed) on Natural Law. As a private tutor he came into close relations with Von Zentner (then minister of State, formerly professor at Heidelberg) who took a kindly interest in his welfare. On completing his course at the University he practised at Munich, mostly in criminal cases, before the provincial court of the Au suburb. His thorough knowledge of foreign tongues attracted the attention of the great criminalist of the time, Anselm von Feuerbach, who had come from the University of Landshut to draft the criminal code for the Bavarian government. Feuerbach made him his secretary, with the special work of making excerpts from the French and Italian codes and draft-codes.

Mittermaier had in view an academic career, and planned therefore to train himself thoroughly by pursuing studies at some other university. The government allotted him a travelling scholarship of 600 florins; not so much indeed with a view to seeing any productive results, as merely to recognize his merits, and to gladden his brief remaining span of life; for at this time the fragile youth of twenty-one (as he himself, grey with years, afterwards recounted with much zest on the occasion of the fiftieth anniversary of his doctorate) was regarded by all, himself included, as doomed by an incurable tuberculosis; and a year longer at the most was allotted to him on earth.

At Zentner's suggestion, he went to Heidelberg, and there studied under such masters as Martin, Heise, Thibaut, Zachariae, and Klüber. To enlarge his income, he continued to do private tutoring; and the consequence of this overwork was a dangerous attack of fever. While still convalescent, he received an appointment from the Bavarian government as professor of the newly-founded University of Innsbruck. He accordingly applied

for his doctorate at Heidelberg, which was awarded on March 29, 1809. His thesis was entitled *Void Judgments in Criminal Cases*.¹ His first large treatise, likewise in the field of criminal procedure, dates in the same year—*Theory of Proof in Criminal Procedure*.² But through the publishers' bankruptcy it did not appear until 1821, when Heyer of Darmstadt published it under the same title.

Before Mittermaier entered on his duties at Innsbruck, the Tyrol had been freed from Bavarian rule by a popular uprising; so that the young jurist was left without an appointment. After practising for a while with a barrister at Munich, he became *privat-docent* at Landshut. After refusing a call to Kiel, he received the Landshut professorate, which had been promised him. In the ensuing year he made his choice of a life companion by marrying the sister of a friend and colleague, the famous surgeon, Ph. F. von Walther; and the union proved to be one of unbroken happiness. The marriage was blessed with seven children.

For ten years he pursued at Landshut an academic career of the most productive activity. Young as he was, the University honoured him by electing him rector three times in succession. Moreover, the administration of the large properties of the University, hitherto managed by the government, was through his earnest efforts restored to the University and confided to his care. The scope of his courses was extensive. The course on Roman Legal History, which he had begun at the instigation of Savigny (his colleague at Landshut) he soon gave up, for he realized that it interfered with the necessary concentration of his efforts. But he gave courses in Criminal Procedure, in German Private Law and Legal History (one of the earliest courses on this subject), and also (after von Gocner had been appointed in 1810 on the Legislative Committee in Munich) in Civil Procedure. His already numerous writings of this period dealt with these three subjects.

In the first group fall: *Handbook of Criminal Procedure*,³

¹ *De nullitatibus in causis criminalibus observat. spec.*, Heidelberg, 1809.

² *Theorie des Beweises im peinlichen Prozess, nach den gemeinen positiven Gesetzen und den Bestimmungen der Französischen, Oesterreichischen, Bayrischen und Preussischen Kriminalgesetzgebung*, 2 parts, Mannheim, 1809.

³ *Handbuch des peinlichen Processes, mit vergleichender Darstellung des gemeinen deutschen Rechts und der Bestimmungen der Französischen, Oesterreichischen, Bayrischen und Preussischen Kriminalgesetzgebung*, Bd. I., Abth. i. and ii., Heidelberg, 1810; Bd. ii., Heidelberg, 1812.

Introduction to the Art of Defensive Advocacy in Criminal Cases,¹ and *Public and Oral Procedure and the Jury System*.² Here belongs also his editorship of the *Archiv für Kriminalrecht*, which in 1816 he took over with Konopak and Kleinschrod; this journal, founded in 1798, was now called *Neues Archiv für Kriminalrecht* (16 vols., 1816-1833), and afterwards *Archiv des Kriminalrechts, Neue Folge* (24 vols., 1834-1857). Mittermaier remained throughout at its head. In the second group belong his *Introduction to the Study of German Legal History*³ and *Sketch of a Scientific Treatment of German Private Law*.⁴ In the third group, Civil Procedure, no elaborate book was published in this period, but in 1818 he founded with Gensler and Schweitzer the *Archiv für Civilistische Praxis*, whose chief editor he was, after his removal to Heidelberg, until his death. The first volumes contain from his pen numerous abstracts of trials, reviews of the literature on procedure, and of codes and draft codes on procedure and on mortgages.

He accepted in 1819 a chair in the newly established University of Bonn, after he had refused a call to Halle; thus finishing his career in Landshut. He was the first dean of the faculty of law in Bonn. During his two years in the Rhenish city, he began to work on two of his most important books: *Textbook of German Private Law*⁵ and *German Common Civil Procedure*.⁶

At Bonn he lectured on German Private and Criminal Law and Procedure, laying stress on practical exercises, including legal rhetoric; and as the Code Napoléon was there in force, he thoroughly studied the French law and its procedure. As provisional proctor of the university, he was forced to take an official part in the lamentable prosecutions for sedition, which during those years were very actively carried on in Bonn; and he disliked his position for this reason. He refused a call to the Supreme Court

¹ *Anleitung zur Vertheidigungskunst im Kriminalprozess*, Landshut, 1814; 2 Auflage, 1820.

² *Ueber die öffentliche und mündliche Rechtspflege und das Geschworenengericht in Vergleichung mit dem Deutschen Strafverfahren*, Landshut, 1819.

³ *Einleitung in das Studium der Geschichte des germanischen Rechts*, Landshut, 1812.

⁴ *Versuch einer wissenschaftlichen Behandlung des Deutschen Privatrechts, mit einem Grundriss zu Vorlesungen*, Landshut, 1815.

⁵ *Lehrbuch des Deutschen Privatrechts*, Landshut, 1821.

⁶ *Der gemeine deutsche bürgerliche Prozess in Vergleichung mit dem französischen Civilverfahren und mit den neuesten Fortschritten der Prozessgesetzgebung*, 1 Beitrag, Bonn, 1820; 2 Beitrag, 1821.

of the four Free Cities in Lübeck; but accepted in 1821 a call to the University of Heidelberg.

Here he taught for forty-six years, interrupted only by a short parliamentary activity. In the winter of 1847 he lectured only for a few months, on account of the initial sessions of the Diet of Baden; in the following summer, and in the winter of 1848-49, he did not teach at all, on account of his attendance at the German Parliament. In spite of the distance, and the poor communications between Karlsruhe and Heidelberg, he lectured regularly while a member of the Diet of Baden. His yearly course of lectures covered German Private Law, Criminal Law and Procedure, Civil Law; he also held seminars in Civil and Criminal Procedure. On arriving at the age of sixty-four he gradually restricted this immense activity. German Private Law was lectured upon for a last time in the summer of 1850, Civil Procedure in the winter of 1855-56, the Methods of a Trial Judge in the summer of 1854. His seminar of Criminal Procedure met for the last time during the winter of 1854-55. From 1856 until his death he lectured during the summer on Criminal Procedure; during the winter on Criminal Law, besides giving public courses on the Jury System, English Procedure, Curious Criminal Cases, and some important doctrines of Criminal Law (murder, political and property crimes). He was from 1821 until his death at the head of the formerly much consulted *Spruchkollegium*.

His literary activity was prodigious. The following works begun in Landshut and in Bonn, were either continued, or brought out in enlarged and thoroughly revised editions: *Principles of German Common Private Law, including Commercial Law, Bills of Exchange, and Maritime Law*; ¹ *The German Common Law of Civil Procedure*; ² *German Criminal Procedure*; ³ *Doctrine of Proof in German Criminal Procedure*; ⁴ *An Introduction of the*

¹ *Grundsätze des gemeinen deutschen Privatrechts mit Einschluss des Handels-, Wechsel-, und Secrechts*, Landshut, 1824, 7th ed., 1847.

² *Der gemeine deutsche bürgerliche Prozess*, Erster Beitrag, 2 Auflage, 1822; 3 Auflage, 1838; Zweiter Beitrag, 2 Aufl., 1827; 3 Aufl., 1838; Dritter Beitrag, Bonn, 1823; 2 Aufl., 1832; Vierter Beitrag, Bonn, 1826; 2 Aufl., 1840.

³ *Das Deutsche Strafverfahren in seiner Fortbildung durch Gerichtsgebrauch und Partikulargesetzbücher und in genauer Vergleichung mit dem englischen und französischen Strafverfahren*, 2 Abth., Heidelberg, 1827; 2 Aufl., 1832-33; 3 Aufl., 1839-40; 4 Aufl., 1845-46.

⁴ *Die Lehre vom Beweise in deutschen Strafprozess nach dessen Fortbildung durch Gerichtsgebrauch und deutsche Gesetzbücher in Vergleich mit den Ansichten*

Art of Defensive Advocacy.¹ Besides numerous contributions to periodicals, we must note the following publications, of varying size, all of which, with one exception, pertain to Criminal Law, and mostly to Criminal Procedure: *Mental Alienation*,² *The present Condition of Criminal Legislation in Germany*,³ *The Principle of Mental Alienation in Criminal Law*,⁴ *The Progress of Criminal Legislation*,⁵ *Conditions in Italy*,⁶ *Oral Procedure, the Theory of Accusation, Publicity, and the Jury System*,⁷ *Essays on Criminal Law*,⁸ *The Present System of Prisons in England*,⁹ *Legislation and Practice in Criminal Cases*,¹⁰ *Improvement of Prisons*,¹¹ *The Present State of the Prison Question*,¹² *Capital*

des englischen und französischen Strafverfahrens, Darmstadt, 1834. Among the numerous translations of this are: *Traité de la preuve en matière criminelle*, by Alexandre, Paris, 1848; *Teoria della prova nel processo penale*, by F. Ambrosoli, Milano, 1858; *Tratado de la prueba materia criminal*, Madrid, 1851.

¹ *Anleitung zur Verteidigungskunst*, 3 Aufl., 1828; 4 Aufl., 1845. Italian translation: *Guida all'arte della difesa criminale*, by C. F. Gabba, Milano 1858.

² *Disquisitio de alienationibus mentis quatenus ad jus criminale spectant*, Heidelberg, 1825. (Rectoral address.)

³ *Ueber den neuesten Stand der Kriminalgesetzgebung in Deutschland*.

⁴ *De principio imputationis alienationum mentis in jure criminali recte constituendo*, Heidelberg, 1837. (Rectoral address.)

⁵ *Die Strafgesetzgebung in ihrer Fortbildung geprüft, nach den Forderungen der Wissenschaft und nach den Erfahrungen ueber den Werth neuer Gesetzgebungen, und über die Schwierigkeiten der Kodifikation mit vorzüglicher Rücksicht auf den Gang der Beratungen von Entwürfen der Strafgesetzgebung in konstitutionellen Staaten*, Erster Beitrag, Heidelberg, 1841; Zweiter Beitrag, 1843.

⁶ *Italienische Zustände*, Heidelberg, 1844. Italian translation: *Delle condizioni d'Italia*, by P. Mugna, Milano, 1845.

⁷ *Die Mündlichkeit, das Anklageprinzip, die Oeffentlichkeit und das Geschworenengericht, in ihrer Durchführbarkeit in den verschiedenen Gesetzgebungen dargestellt und nach den Forderungen des Rechts und der Zweckmässigkeit mit Rücksicht auf die Erfahrungen der verschiedenen Länder geprüft*, Stuttgart, 1845. Italian translation: *Il processo orale, accusatorio pubblico e per giurati*, Modena, 1848.

⁸ *Vier Abhandlungen aus dem Strafrecht. Als Einleitung zur neuesten Ausgabe von Feuerbach's Strafrechtsfälle*, Frankfurt a/M., 1849.

⁹ *Der neueste Zustand der Gefängniseinrichtungen in England und Englische Erfahrungen über Einzelhaft*, Heidelberg, 1850.

¹⁰ *Die Gesetzgebung und Rechtsübung über Strafverfahren, nach ihrer neuesten Fortbildung dargestellt und geprüft*, Erlangen, 1856.

¹¹ *Die Gefängnisverbesserung, insbesondere die Bedeutung und Durchführung der Einzelhaft im Zusammenhang mit dem Besserungsprinzip, nach den Erfahrungen der verschiedenen Strafanstalten*, Erlangen, 1858.

¹² *Der gegenwärtige Zustand der Gefängnisfrage, mit Rücksicht auf die neuesten Leistungen der Gesetzgebung und Erfahrungen ueber Gefängniseinrichtung mit besonderer Beziehung auf Einzelhaft*, Erlangen, 1860. Italian translation: *Stato attuale della questione sulle carceri*, by F. Benelli, Florence, 1861.

Punishment,¹ Experience Relating to the Efficiency of Juries in Europe and in America,² English, Scotch, and American Criminal Procedure.³

Mittermaier attached great importance to this last-named book, which is full of personal observations made during his sojourn in England, and embodies the results of his correspondence with jurists in the United States. Besides giving a vivid and true picture of English judicial customs and of the administration of law, he analyzes in an exceedingly lucid way the origin, development, and actual state of the English legal system, especially with regard to the jury. Every chapter of the book proves that it was written after a thorough personal examination of the most important institutions.

Systems of Procedure.—Mittermaier's remarkable preface gives us in concise form his extremely comprehensive statement of the fundamental principles of English, Scotch, and American Criminal Procedure, combined with a discussion as to the possible adoption of some of the principles by France and the German States. As an example of his lucid style, judicial attitude of mind, and shrewd penetration in practical affairs, we subjoin a translation of this Preface (from the French edition):

"In order to carry out efficiently the administration of criminal justice, criminal procedure should be based on the principles of responsible accusation, oral trial, and publicity. A judicial organization in accord with these principles is needed; by which speediness of trials, independence of judges, a carefully worked out system of jurisdiction, and uniformity of procedure and decisions are guaranteed. These problems may be solved in different ways. Legal history shows us two entirely different solutions.

"In the first system we find a judicial organization in which the administration of justice in a given territory is subjected to the jurisdiction of a superior court as a centre, on which all other courts depend. It presupposes the most active co-operation of the people at large in following up criminals, and necessitates in the preliminary proceedings the principles of responsible accusation and of publicity.

¹ *Die Todesstrafe, nach dem Ergebniss der wissenschaftlichen Forschung, der Fortschritte der Gesetzgebung und der Erfahrungen*, Heidelberg, 1862. Many translations, including: *De doodstraf*, by J. B. Vos, Leiden, 1863; *La pena di morte*, by Carrara, Lucca, 1864; *Capital Punishment*, by T. M. Moir, London, 1865; *La peine de mort*, by Leven, Paris, 1865.

² *Erfahrungen über die Wirksamkeit der Schwurgerichte in Europa und in Amerika, über ihre Vorzüge, Mängel und Abhülfe*, 3 Hefte, Erlangen, 1864-65. Russian translation by Nestor Lamansky, St. Petersburg, 1866.

³ *Das Englische, Schottische und Amerikanische Strafverfahren im Zusammenhang mit den politischen, sittlichen und sozialen Zuständen und die in den Einzelheiten der Rechtsübung dargestellt*, Erlangen, 1851.

It regards as indispensable a formal trial, oral examination, and responsible accusation. The presiding judge, who questions neither the accused nor the witnesses, directs the trial; the jury's findings are not confined to answers to specific interrogatories, but after receiving from the presiding judge an instruction upon all the important legal points in the case, they give a general verdict on the guilt of the accused, after an examination of the facts according to the rules of evidence.

"The second system is based on a logical division of jurisdiction between different courts, organically linked together, and on the assistance of a large staff of court officers, including a representative of the State, with sufficient powers for the discovery of crimes. It requires a secret preparatory investigation, which therefore is more of an inquisitorial character, and furnishes reports to be used for what they are worth at the trial. The oral and public trial is based on a charge emanating from a magistrate, and is directed by the presiding Judge of the trial court, who gives the final instruction to the jury. The latter's jurisdiction is limited to the most serious criminal offences. Not restricted by legal proofs, they render their verdict freely upon what is generally called 'intimate conviction,' and in the form of replies to the president's interrogatories.

"The first system, corresponding to Roman law principles, is adopted in England, Scotland, and the United States. The second is the basis of French and German codes.

"The first mentioned system appears in three different varieties.

"The first of those (adopted in England) is a product of ancient institutions, which in course of time have been improved; it is based on the principle of responsible accusation by private individuals, and the logical consequences of the latter's application. It gives much discretionary power to the judge in applying the law. It guarantees the justice of verdicts by submitting the charge to the approval of a grand jury, and by requiring that the verdict of guilt be only binding in case the petty jury is unanimous.

"The second variety (adopted in Scotland) requires the action of a superior court officer, who first determines whether the information gained through a secret preparatory investigation warrants an accusation or not. The prosecution depends therefore not upon a grand jury, but upon this officer alone. At the trial itself, counsel for the defence and public prosecutor enjoy the same privileges; the interests of the defence are protected in the most adequate way. A majority of the jury renders a valid verdict.

"The third system (as found in the United States) is on the lines of the English law; it is marked, however, by a different and simpler system of judicial organization, by the use of public prosecutors, and by great solicitude for the rights of the defence. It regulates by law what is left in England to judicial discretion, and rejects several antiquated distinctions preserved in English procedure.

"Every one interested in the progress of criminal legislation must study the English procedure. German lawgivers are accustomed to take French laws as models. Satisfied with imitating

these, they never study English law, whose importance was not appreciated in France. French lawgivers failed to grasp the national spirit of the law in England and its intimate relation with the moral development and the political and social customs of the country. If we study the provisions of French criminal procedure, we find undoubtedly many of the improvements which the English law presents; for instance, a very good judicial organization, with a wise co-ordination of jurisdiction. But, when we look at the spirit of French and English criminal procedure, and then compare its application in the two countries, we notice many discrepancies. Frequently rules of the French code are in flagrant contradiction with principles which underlie the corresponding rules in England and guarantee their efficiency. In France, many of these rules have not a natural basis; in other words, institutions are lacking which are the necessary correlative to the same rules in England; the efficiency of the French rules is often handicapped by the lack of those principles which alone would justify them. Nowhere has criminal procedure such deep roots in the moral and social customs as in England; nowhere has its evolution more closely corresponded to the development of the nation and its destinies. In no other country can it look back on as many centuries of existence and experience; and an enlightened lawgiver cannot overlook such an advantage. Nowhere is criminal procedure better protected by sane guarantees, nor contributes as efficiently and generally in maintaining public order; while, by its method of guaranteeing absolute personal liberty, it is in great favour with the whole nation.

"The study of English, Scotch, and American law presents, however, some difficulties. Both theoretical and practical textbooks leave much to be desired in the way of stating fundamental principles and details. The authors, writing practical handbooks for their compatriots, in referring to the national law, assume that the reader is thoroughly acquainted with social and legal customs of which a foreigner is most likely totally ignorant. In order to get a thorough insight into English procedure, one must examine specific cases in their details, and see how fundamental principles are applied in their decision. It is imperative to know the course of judicial decision, and the historical development of institutions from time immemorial. The legal views of judges, as shown in the final instructions to the jury or in the introductory part of the judgments, must be analyzed, and the reasons ascertained on which rest the legal decision in each case. It is necessary, finally, to study public opinion and national feeling, as is expressed and interpreted by judges and lawyers, by citizens on jury duty, and by lawgivers.

"The present work aims at meeting the demand for an historical examination of each institution from its origin until the present day. It attempts to show how these institutions are connected with social and political customs and the stage of civilization of the people. The fundamental principles of the English system, and their application in numerous criminal cases, will be discussed, with

citations from particular cases and instructions by judges. To succeed in such an undertaking is only possible by personal investigation, by consultations with jurists and other citizens, and by perusal of statistics and parliamentary reports. By such a method an exact picture can be secured of the judicial system, of its operation, and of reform measures proposed in different details. More than fifteen hundred criminal cases tried during the last three years were studied by the author, either by personally taking notes during the proceedings, or by perusing the shorthand reports and the journals, as well as the reports in the extremely valuable collection of Arkley (for Scotland). For the description of the actual conditions of criminal practice in the United States, the assistance of several leading legal scientists was secured.

"No impartial student of English criminal procedure could commend its complete imitation by other nations. This would do injustice to the improvements that have been introduced into French criminal procedure, and particularly to the many reforms made in German States since 1848, which were received with such favour by the public. It is undoubtedly true that whoever has watched trials of criminal cases in England is very strongly impressed with the efficiency of that system. While thoroughly recognizing the rights of the accused, and allowing him every liberty of defence, it insures the innocent person's acquittal and the guilty one's condemnation. And a system of criminal procedure, which shall conform to ideas of justice, and while inspiring the fullest confidence in each citizen, shall guarantee public order and security, must in the opinion of all intelligent men be of the greatest importance. They must consider how far it is feasible to establish a system of criminal procedure which will satisfy every requirement while avoiding the shortcomings observable in France, England, Scotland, the United States, and Germany. After a thorough study one will concede that English law can contribute a great deal to a theoretically and practically perfect system, and will yet be able to maintain that certain methods, whose efficient application in England, Scotland, and the United States is made possible by institutions peculiar to these countries and certain characteristics of their social life, would be impracticable in Germany.

"The present work is intended to prepare the reader for a more elaborate one, in which the shortcomings and defects of criminal procedure of different countries will be discussed more thoroughly, by analyzing the fundamental principles and their logical consequences. It is hoped to show in this work how a system of criminal procedure may be established, which shall safeguard in equal degree the interests of society and the liberty of the individual citizen, inspiring confidence in all worthy citizens and wholesome terror in all enemies of public order."

Mittermaier never wrote a handbook of Criminal Law, though he repeatedly declared that it was to be his life's work. Instead, he brought out the 12th (1836), the 13th (1840), and the 14th

(1847) edition of Feuerbach's *Handbook*; to this he added numerous footnotes, in which he expressed his own ideas and embodied also the views of other authors, which were frequently opposed to Feuerbach's.

Besides all this, he wrote countless reviews and reports, covering the whole field of legal science, which were published partly in German and foreign journals, partly in the periodicals which he edited himself. Two of the latter, the oldest and most influential publications of German legal science, have been mentioned above—the *Archiv für civilistische Praxis* and the *Archiv für Kriminalrecht*. For fifty years, from its foundation, he was chief editor of the first-named journal. Every number contains contributions by Mittermaier, either under the form of discussions of specific questions or of reviews of codes, draft-codes, and the literature of the Law of Procedure. It is like a running commentary for fifty years on all publications on this subject. Some of his most frequent topics were: the legal profession, relations between justice and administration, statistics of civil cases, marital property rights; we also find essays on the law of guardianship, railroad law, and other subjects. For forty-two years, until its publication ceased, he was chief editor of the *Archiv für Kriminalrecht*. He contributed to it regularly articles on criminal law and procedure, and reviewed codes, draft-codes, and literature.

Mittermaier would discuss the theoretical side of a question only so far as it served an immediately attainable end. He always avoided sacrificing practical advantages to an excessive aspiration for ideal perfection. Wise circumspection and broad experience always guided his deeply philosophical mind towards the real goal—the final application of principles to practice. With this object constantly in view, while advising German legal scientists to take up the study of foreign legislation and works of foreign authors, Mittermaier insisted on their keeping up the thorough method and scientific synthesis peculiar to German science. Though he was heart and soul in this great work of progress on universal lines (made possible by his industry and his linguistic knowledge), he took extreme care not to fall into the error (too common in our own days) of failing to appreciate enough the laws and institutions of one's own country, while praising to the skies those of foreign lands. He carefully avoided advocating dangerous innovations—an advocacy often due to an exaggerated admiration of foreign institutions insufficiently

known. A clear-cut, judicial instinct protected him against consenting to sacrifice time-honoured institutions of his own country to those of foreign lands, the introduction and adoption of which would frequently be impracticable.

A third publication, founded by Mittermaier and C. S. Zachariae (later edited in co-operation with R. v. Möhl and for a time with Warnkoenig), attained great influence; this was the *Critical Review of Legal Science in Foreign Countries*.¹ Here Mittermaier published also many articles on foreign legal institutions, codes, and literature. Most of the more prominent jurists of foreign countries became its contributors, and thus the comparative study of law assumed international importance. After the *Archiv für Kriminalrecht* ceased to be published in 1857, Mittermaier (beginning with vol. x., 1858) joined the staff of the *Gerichtssaal* (first number in 1849), which was primarily devoted to Criminal Law. Many of his criminalistic essays appeared in this journal, as well as in Goldammer's *Archiv für preussisches Strafrecht*, and in *Der Allgemeinen Deutschen Strafrechtszeitung* (v. Holtzendorff), to which he was a contributor.²

Mittermaier's active part in public life began in 1827, when he was elected a member of the legislative body of Baden, to which he belonged until its dissolution. The city of Bruchsal was represented by him in the Lower House of Baden from 1831 to 1840. In that year he resigned, crushed with grief by the death of his eldest son, Dr. Martin Mittermaier (whose graduating treatise, *Ueber die Gründe der Verpflichtung zur Edition von Urkunden*, (Heidelberg, 1835), is still considered a valuable contribution to science). He accepted a seat again from 1845 to 1849. With the exception of the first two years of his parliamentary activity, he was the presiding officer of the Lower House during the sessions of 1833, 1835, 1837, 1839, and 1845. Many legal and administrative reforms of far-reaching importance were secured by Mittermaier's active co-operation: a law regulating municipal self-government, relief for the peasantry, codes of civil and criminal procedure and of criminal law, laws introducing the jury system, and many others. He strongly favoured oral procedure, publicity, a public prosecuting attorney in civil procedure,

¹ *Kritische Zeitschrift für Rechtswissenschaft des Auslandes*, 28 vols., Heidelberg, 1828-1856.

² Many of the above contributions were translated into English and French, in books or periodicals.

and later the jury system. In criminal procedure he advocated thorough investigation of facts, humane penalties, and prison reform. The question of the jury system required an especially tactful treatment. At a time when it was of the utmost importance to convince the authorities and the lawyers of the advantages of oral and public procedure, in order to enlist their sympathy for this reform measure, Mittermaier refrained from publicly discussing the question of the jury. But as soon as both measures had been adopted by the legislature, he took up the question of the jury, which he had carefully investigated in France and other countries, and advocated its introduction. His numerous essays and articles on prison reform, life sentences, deportation, and capital punishment, had a decisive influence in making criminal law more humane. One who compares the principles advocated by Feuerbach and Grolmann at the beginning of the nineteenth century with the present state of criminal science and law in Germany will realize what invaluable services Mittermaier rendered.

Mittermaier's admirable services as president of the Lower House of Baden led to his election, on March 31, 1848, at Frankfurt, president of the first German parliament. After the failure of this German struggle for a constitution, he retired from politics, refusing for years the invitation from many districts to become their representative in the Lower House of Baden. In the civic life of Heidelberg, whose honorary freedom was conferred upon him in 1838, he was vitally interested. He was a member of the city council, the school board, and numerous benevolent societies, being one of the founders and directors of the relief society and the orphanage. In a memorial address, State Councillor Lamey has drawn us a picture of Mittermaier in the following appreciative terms: "Mittermaier was absolutely free from selfishness and prejudice. He undertook as his life's task to promote the welfare of the State and all its citizens. The misery of the poor, the appeal of the oppressed, and the affliction of prisoners touched his heart. All could rely upon his help, without being questioned as to their responsibility for the misfortune. Schools, orphan asylums, and other charitable institutions always secured his active co-operation. He tried unceasingly to lessen all forms of unnecessary distress and suffering, caused by human selfishness, superstition, and unkindness." By his teaching and writing, and by his varied social activity

he did more than his share for the improvement of laws and for the raising of the standard of civilization.

His desire for knowledge induced him to spend his vacations travelling about in search of additional information on foreign countries, their inhabitants and institutions, instead of seeking a rest from his fatiguing professional activity. Besides collecting literature during these trips, he met the best-known German and foreign legal scientists, lawyers, and statesmen. His first Italian trip, for instance, yielded a rich harvest of rare books of medieval legal literature, which he carried home in his knapsack. Italy, suffering in her political and spiritual development from foreign oppression, attracted his special interest. Eight times he crossed the Alps, and in his *Conditions in Italy* he expressed his deep sympathy with that country. France and Belgium were frequently visited; he there came in contact not only with native, but also with Spanish and Portuguese statesmen and legal scientists. In 1850, when already sixty-three years old, he went to England and Scotland, thoroughly prepared by careful studies of their institutions and language. By personal contact with statesmen, lawyers, and prison officials, he was able to fill in the gaps in his knowledge of English legal and penal institutions. A much cherished project to visit the United States was never realized, but he gathered an unusually vast fund of information on legal conditions in that country by personal correspondence with statesmen and legal scientists in many States of the Union. In later years his vacations were specially devoted to visits to prisons and insane asylums. He attended the two international congresses of charities and correction in Brussels and Frankfurt; at the latter he was made temporary presiding officer. In 1846 and 1847 he went to the Congresses in Lübeck and Frankfurt. In Lübeck he was asked to prepare a report on the jury system for the next meeting in Frankfurt; and this report was there adopted. This led to the general introduction of the jury system after 1848.

His professional success and the honours bestowed on him in steadily increasing numbers as his age advanced never affected in the least his simple and modest character. Neither university titles, nor the tributes of thousands of scholars from every corner of the globe, nor the many German and foreign orders of merit nor his membership in the most important academics and scientific societies of the world, produced the slightest change

in his character or manners. A helping hand was always extended to the most humble, as well as to the most prominent. He enjoyed the dedication of a work by an unknown author quite as much as one by a writer of repute. He lent freely the books which stocked his extensive library. He would answer any question from any part of the world. Mittermaier had become so famous an authority, not only on civil procedure, but also on general foreign law and its literature, that courts of law and legal scientists often saved themselves the trouble of investigating on their own account by simply referring the question to him.

His fiftieth jubilee as a doctor, in 1859, brought visits from deputations of the Universities of Heidelberg, Freiburg, and Basel, of primary and secondary schools, of representatives of the government, the municipality, and the clergy, and of many societies. The president of the Supreme Court offered congratulations in the name of the courts of law of Baden, eulogizing especially his merits as a legislator and legal scientist. The legal and philosophical faculties of nearly all German Universities commemorated the event by sending letters of congratulation. His doctor's diploma was renewed (according to custom) by the faculty of law, and the philosophical faculty of the University of Heidelberg conferred upon him the honorary title of doctor of philosophy. Numerous scientific works were dedicated to him on this occasion.

After 1859 Mittermaier began to restrict his academic, though not his literary, activity. We have mentioned before that he became greatly interested, during the later years of his life, in prison reform, the jury system, and the abolition of capital punishment. Most of the works written after 1858 related to these topics. His book on Capital Punishment,¹ published in 1862, the embodiment of fifty years of work and experience, astonished German and foreign legal scientists with its exhibition of indefatigable energy on the part of a man of seventy-six, and forced many to reconsider their ideas on this grave problem.

When repeated attacks of sickness began to undermine his seemingly robust health, he spoke often to his intimate friends of his intention of giving up his academic work. He suspended his lecture course in May, 1867, under an attack of pleurisy.

On his eightieth birthday he gave to the University of Heidel-

berg his library of 15,000 volumes, a royal gift, which will immortalize his name in the University.

He died of heart disease on August 28, 1867, a painless and beautiful death.

Characteristics.—The most appropriate epithet for Mittermaier is humanitarian; for this describes most adequately both the strength and the weakness of his talents. His chief aim throughout his life was to turn to practical use the abundant material which had been contributed to legal science. He was enabled by his astonishing receptivity and his learning to use these resources to the utmost. Legal science in his opinion embodied the principles which rule human society. As they continually change, he favoured a constant re-examination of the law and of social phenomena and social needs. He put on record even the minutest details of progress. The Historical School of Law had had proclaimed as its chief purpose the critical study of the existing laws and their historical evolution. But Mittermaier, aiming far beyond this, set as the task of his life the rational examination and improvement of existing laws. He advocated at the outset of his career improvements in procedure, especially in the antiquated criminal procedure, though the necessity of the introduction of the jury system dawned only slowly upon him. In his teaching and writing he tried to familiarize the people thoroughly with a subject, showing its evolution and the practical working out of fundamental principles. He was never content to advance only one argument for the support of a theory, but generally discussed it from many points of view. He relied, for instance, upon psychiatry and legal medicine to support his views on the needed changes of criminal law and procedure. Taking the point of view of comparative legal history, he showed how the almost hitherto unknown Italian law had influenced the evolution of Roman-German civil and criminal law and procedure; he likewise drew attention to the part played by Germanic and later sources of law. He was the first author to become thoroughly acquainted with the foreign literature on German legal science and on the evolution of German law. Until Mittermaier's indefatigable industry increased the scope of German knowledge in such astonishing degree, only the few most important foreign codes were considered by German jurists.

He was one of the founders and most influential representatives

of the science of comparative law, which aims to collect all available material on the law of every people in all periods, and thus to prepare a basis for more uniform legislation in all civilized countries. Though much here remains still to be accomplished, Mittermaier has pointed out, in his more important works, the general legal principles and their relation and efficiency in the whole domain of social institutions of many countries. His method was to ascertain how far they differed or were identical in theory and in practice, and how expedient would be the adoption of foreign principles in German law. Thus Mittermaier must be deemed the most important mediator between German and foreign legal science. Of all German legal scientists, even Savigny not excepted, his name is internationally best known and most esteemed.

Though his activity covered so much ground that even a detailed survey is difficult enough, he used to tell his friends that only by force of circumstances had he taken up so many different subjects ; and he strongly advised younger men to concentrate their efforts and to specialize ; for this alone guarantees progress in science. Mittermaier, as a jurist, was of prodigious fertility ; he never allowed his political and public activities to interfere with his indefatigable industry along scientific lines. He was one of the most influential popularizers of legal science, of which he thoroughly knew every branch.

In the history of penal law his name is immortal ; and he has here earned the title of the foremost legal scientist of his century. Posterity will for ever hold in memory how much progress was achieved through Mittermaier's efforts, and how many projects of reform still awaiting fruition were proposed and made possible by his enlightened toil.