

*Obscuritas legum: Traditional Law,
Learned Jurisprudence, and Territorial Legislation
(The Example of *Sachsenspiegel*
and *Ius Municipale Maideburgense*)*

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Jurisprudence deals intrinsically with authoritative texts. Like theology, it is entangled with script and its understanding, which is why both disciplines are usually considered hermeneutic. It is then no wonder that both share a common problem as well: the authoritative texts to which both are bound may be quite old. And this is why legal hermeneutics sometimes faces challenges—or even fails.¹ Like any other text, a law-book that has been preserved for a long time with only a few or even no adaptations, may certainly become obscure. The consequences of that obscurity will be the focus of this paper.

The argument will be unfolded in three steps. First, I will introduce both the Saxon Mirror and the Magdeburg Law as parts of a common Saxon Law (*ius Saxoniae*), as an insoluble amalgam, and as incredible successes in medieval and early modern Europe over a period of at least five hundred years.² I will then, secondly, go on to discuss briefly the problems that arose through the continuing use of outdated legal texts

¹ The body of literature on this problem is already vast. To name but one title, *Obscurity and Clarity in the Law: Prospects and Challenges*, ed. Anne Wagner and Sophie Cacciaguidi-Fahy (Aldershot: Ashgate, 2008), provides multiple challenging perspectives.

² I have tried to trace this enormous influence in my doctoral thesis: *Sachsenrecht: Studien zur Geschichte des sächsischen Landrechts in Mittelalter und früher Neuzeit* (Berlin: Duncker & Humblot, 2007). There are quite a number of works published in English on the Saxon Mirror, including a translation: Maria Dobozy, ed., *The Saxon Mirror: A Sachsenspiegel of the Fourteenth-Century* (Philadelphia: University of Pennsylvania Press, 1999), but only a few on the Magdeburg Law. For readers who are unfamiliar with German the bi-lingual popular book *Saxon Mirror and Magdeburger Law: The Groundwork for Europe* (Potsdam: Handel und Wandel, 2005), is a good starting point.

that had become linguistically obscure, and present contemporary voices that called for a reaction to their use. As we will see, however, none of those contemporaries was interested in ceasing to use these texts or replacing them with some more modern or more efficient code. Rather, people were astonishingly keen to keep their legal tradition. In a third step, I will review a number of very different attempts to adapt this traditional Saxon law to the interests and needs of a changing juridical culture from medieval to early modern times.

Ius Saxoniae: The Saxon Mirror and Magdeburg Law as a Legal Amalgam

The *Saxon Mirror* (*Sachsenspiegel*) is the earliest in a series of vernacular law-books that gave German legal culture its character throughout the later Middle Ages.³ It was written in the first quarter of the thirteenth century by one Eike from the small village of Reggow near Magdeburg and Halberstadt in the then comparatively newly colonized areas east of the river Elbe. Six charters dated between 1209 and 1233 prove that von Reggow was a historical person.⁴ Apart from that, everything we know or presume about him rests upon the little he says about himself in the rhymed preamble to his law-book. According to these few verses, he had first written his book in Latin and was then encouraged to translate it into German by Earl Hoyer von Falkenstein. The Latin original is lost, but the German version had tremendous success and is preserved in some 450 manuscripts, including fragments.

The *Saxon Mirror* comprises a collection of customary laws, mostly dealing with the rural culture from which Eike came and thus with the rights and laws of both peasants and rural nobility. His *Mirror* is divided into two major parts: a part dealing with land-law (*Iantrecht*), which is subdivided into three books, and a part dealing with feudal law (*Ienrecht*). However, Eike also included a number of laws dealing with impe-

³ The so-called *Mühlhäuser Rechtsbuch* is generally considered to have been written at approximately the same time; cf. Hans Patze, "Zum ältesten Rechtsbuch der Reichsstadt Mühlhausen in Thüringen aus dem Anfang des 13. Jahrhunderts," *Jahrbuch für die Geschichte Mittel- und Ostdeutschlands* 9/10 (1961): 59–126. Helmut Coing, *Epochen deutscher Rechtsgeschichte* (Munich: Beck, 1967), 26, has termed Germany's later Middle Ages "the era of law-books" ("Rechtsbücherzeit").

⁴ These can be easily accessed in a reprint in Alexander Ignor, *Über das allgemeine Rechtsdenken Eikes von Reggow* (Paderborn: Schöningh, 1984), 325–30.

rial law and with what we would nowadays probably call "public law," some of which turned out to be excitingly influential. For instance, the seven electoral princes, who for centuries elected the German king, and thus the Emperor of the Holy Roman Empire, appear in the *Saxon Mirror* for the first time.⁵

The *Magdeburg Law*, or *ius Maideburgense*, as contemporaries often called it, was, like Eike's *Saxon Mirror*, compiled privately by one or more anonymous people at roughly the same time, probably only a little after Eike translated his *Mirror* into German. The text's development is even more complex than that of the *Saxon Mirror*, although it has not been as well-researched, and it did not achieve its most widely-disseminated form, the *Vulgata*, until the end of the thirteenth century.⁶ We still lack a modern edition of the text today.⁷ The activities of the Magdeburg Panel of Judges (*Schöppenstuhl*), a council of lay jurists that became the central authority for interpreting the law in the towns that claimed to follow the "Saxon Law," have been markedly more prominent in legal historical research. Some of these cities were explicitly given the privilege to follow Magdeburg Law by their town lords; others had produced their own law-books, either privately or at the demand of a city's council, to make sure their local laws were compatible with Saxon Law. Whenever these towns were uncertain about the application of a particular rule of the law, they asked for help in its interpretation from the Magdeburg Panel of Judges,

⁵ This is not the place to discuss the still heavily debated origins of the electoral princes' *collegium*. The last contribution to this debate is Frank-Reiner Erkens, "Anmerkungen zu einer neuen Theorie über die Entstehung des Kurfürstenkollegs," *Mitteilungen des Instituts für Österreichische Geschichtsforschung* 119 (2011): 376–81; and the last survey of the conflicting positions was carried out by Thomas Ertl, "Alte Thesen und neue Theorien zur Entstehung des Kurfürstenkollegiums," *Zeitschrift für historische Forschung* 30 (2003): 619–42.

⁶ The *Magdeburg Law* has probably not been as well researched as the *Saxon Mirror* because legal historians of the nineteenth century judged it unsuccessful in its attempt to harmonize Saxon and learned legal tradition; cf., for instance, Otto Stobbe, *Geschichte der deutschen Rechtsquellen*, vol. 1 (Braunschweig: Duncker & Humblot, 1860), 379, 387.

⁷ There are five different editions from the eighteenth and nineteenth centuries, none of which meets modern standards. The division and sequence of the chapters and paragraphs differs from one manuscript, and one edition, to another, and consequently none of the editions may be said to be the "standard" one. In this essay, I will refer to Alexander von Daniels, ed., *Das buke wichebde Recht: Das saechsische Weichbildrecht nach einer Hs. der Kgl. Bibliothek zu Berlin von 1363* (Berlin: Dümmler, 1853). The manuscript behind this edition is the same that Homeyer used for his edition of the *Saxon Mirror* (see footnote 14).

or another one of the similar panels (*Oberhöfe*) that quickly developed in the "lands of Saxon Law" in towns like Kraków, Wrocław, Olomouc, and Opava.⁸

The Magdeburg Panel, however, remained the most authoritative and famous of these panels until far into the sixteenth century, even after it was officially abolished by Emperor Charles V in 1547. Responses sent out by the Magdeburg Panel were collected in manuscripts and later in print from the fifteenth century onwards, and served as model cases for those judging by Magdeburg Law. The archive of the Magdeburg Panel, unfortunately, burned during the sack of Magdeburg by Tilly's troops in 1631; so attempts have been made over the last century to collect as many of these charters as possible in order to reconstruct from them the basic ideas of Magdeburg Law.⁹

The combined influence of the *Saxon Mirror* and the Magdeburg Law, as materialized in both the actual town-law (*Weichbildrecht*) and the letters of the Magdeburg Panel of Judges, was enormous. "Common Saxon Law" (*ius commune Saxonum*) became a catchword during the rise of literacy in German legal culture, especially in the Eastern parts of the Empire and the neighbouring kingdoms, as early as the thirteenth century, but most intensively during the fourteenth and fifteenth. Law-books were composed in cities in Poland, Moravia, Belarus, Hungary, and the Baltic. Manuscripts of both the *Saxon Mirror* and the *Ius Maideburgense*, both often compiled in one manuscript, circulated throughout Central and Eastern Europe, and towns in Silesia, Prussia, or Bohemia asked the Magdeburg Panel of Judges for juridical advice.¹⁰

The inseparability of the two law-books is also illustrated by the fact that even the Magdeburg Panel frequently referred to the *Saxon Mirror*

⁸ The German term *Oberhof* is usually applied to a panel comparable to a Superior Court, which had a codified procedure for giving juridical advice and whose judgments could not be appealed. The Magdeburg Panel of Judges was more informal, but—perhaps for this reason?—the most influential of these panels.

⁹ These few sentences must suffice to sum up the complex history and influence of the Magdeburg Panel of Judges. For a more detailed account cf. Heiner Lück, "Der Magdeburger Schöffenstuhl als Teil der Magdeburger Stadtverfassung," in *Hanse – Städte – Bünde: Die sächsischen Städte zwischen Elbe und Weser um 1500*, vol. 1, ed. Matthias Puhle (Magdeburg: Stadtmuseum Magdeburg, 1996), 138–51.

¹⁰ An on-going transnational research project at the Sächsische Akademie der Wissenschaften Leipzig (Germany) will certainly shed more light on this highly complex process of legal transmission within in the next few years. For more details and a list of publications cf. <http://www.magdeburger-recht.eu> (last accessed January 11, 2013).

rather than their own town law (*wichbild*) when they gave juridical advice on Common Saxon Law, or even when Magdeburg itself was a party to a legal conflict.¹¹ In 1387, for instance, four prominent mediators ("gekorn schidelude"), amongst them the bishops of Halberstadt and Brandenburg, issued a charter concerning a legal dispute between Magdeburg and its archbishop Albrecht over a salt spring in Groß-Salze (nowadays Schönbek in Saxony).¹² In their charter they paraphrased the Magdeburg aldermen's complaint: the archbishop's men

had taken possession of the brine and dispersed our burghers and other people, both clerics and laymen, [and therefore acted] against this chapter of the common land-law which states: "One shall not expel anyone from his property holding . . ."¹³

This refers to II 24 § 1 of Eike's Saxon Mirror.¹⁴ From the fourteenth century onwards compilers of law-books and the Magdeburg Panel of Judges distinguished increasingly between the Saxon land-law (*landrecht*) and town-law (*wichbild*) but they still tried to compile global depictions of the Saxon Law for use in both rural and urban contexts.

Saxon Law and Legal Traditionalism

The success of Saxon Law, however, was not without its draw-backs and caveats, especially in the fifteenth and sixteenth centuries. On the one hand, a growing number of contemporaries noted the differences between customary Saxon law and the learned tradition of the *ius commune*, that from the fourteenth century onwards increasingly gained

¹¹ A number of examples are provided in Kümpfer, *Sachsenrecht*, 231–40.

¹² Gustav Hertel, ed., *Urkundenbuch der Stadt Magdeburg* (Halle: Otto Hendel, 1896), 399–403 (No. 629).

¹³ "sek des bornen heft undirwunden und unse borgen mit den andirn papen und leyen entweret wedder dat capittel des gemeynen lantrechtis, dare steyt: 'men schal nymande ute sinen weren wissen . . .'" (Hertel, *Urkundenbuch*, p. 402). The English translation, as elsewhere in this article where not explicitly stated otherwise, is mine.

¹⁴ "No one may expel a person from his property holding by court order, even if he came into it unlawfully, unless the claimant can dispossess him with a legitimate claim when he is present . . ." (Dobozy, *Saxon Mirror*, 100); "Man ne sal niemanne ut sinen geweren wisen von gerichtes halven, al si he dar mit unrechte an komen, man ne breke sie eme mit rechter klage, dar he selve to gegenwarde si . . ." (Carl Gustav Homeyer, ed., *Des Sachsenspiegels erster Theil oder das sächsische Landrecht*, 3rd ed. [Berlin: Dümmler, 1861], 214).

recognition north of the Alps, as well as other legal customs, such as French, Polish, or Flemish ones. On the other hand, legal practitioners were more and more concerned about the inner structure of both the *Saxon Mirror* and the *Ius Maideburgense*; to them both seemed to have been compiled without any system—a lack that pained the growing number of German jurists who had been trained in the learned laws at Europe's universities.

The encounter with other legal traditions was not completely problematic; it had its positive aspects as well. Indeed, for many German jurists, Saxon Law must have seemed more attractive than other traditions—as its broad reception suggests. When Emperor Charles V. proposed his plans for a new penal code—the later *Constitutio Criminalis Carolina*, issued in 1532—at the Augsburg Reichstag in 1530, the Electors of Saxony and Brandenburg

refused to give up their Saxon Law that has been in use by their ancestors as long as man can remember, and therefore they would stick to their laws and would not accept the new penal code.¹⁵

The lack of systematization of both the *Saxon Mirror* and the *Ius Maideburgense* was more problematic because it was harder to find any reason for it. Indeed, there is no apparent reason for this lack of order in both the *Mirror* and the town law-book.¹⁶ Some chapters do clearly belong together, but others give the impression of having been inserted randomly in the collections. Here, for example, are the opening chapters of book III of the *Saxon Mirror*:¹⁷

- III 1 Concerning the rape of a girl or a woman, and all those who follow the hue and cry for a red-handed deed.
- III 2 Concerning priests and Jews who carry arms.
- III 3 No woman bearing a child and no feebleminded person may be sentenced.
- III 4 When a person demands back what he transferred or sold.
- III 5 Whatever a person lends or transfers for safe keeping.

¹⁵ "... das se von oeren seczichen rechten, welge uber menschengedencken by oene gehalten, nicht abstehen wolln, soltn by denselbigen verharren und deysse nuwe haltsgerichts ordenungh nicht annemen noch in deyselbige bewilligen haben" (Herbert Grundmann, ed., *Valentin von Teteleben: Protokoll des Augsburger Reichstages 1530* [Göttingen: Vandenhoeck & Ruprecht, 1958], 89).

¹⁶ A number of studies have tried to find one. Instead of naming them all I refer the reader only to Ignor, *Über das Allgemeines Rechtsdenken*, who discusses them all and gives his own interpretation.

¹⁷ Translations are taken from Dobozý, *Saxon Mirror*, 56–57.

- III 6 If a servant loses his master's property at dice.
- III 7 A Jew need not be a Christian man's guarantor. If one accepts belongings as collateral.

Some of the chapters seem to be linked thematically, but others do not. The *Mirror* jumps back and forth between matters of procedure, of penal law, of the law of obligations, etc. The same is true for its civic equivalent, the *Ius Maideburgense*. Here is a more or less random snippet from the chapters of one fourteenth-century manuscript of the *Ius*:¹⁸

- LXVII If someone claims moveable goods from someone else.
- LXVIII No adult judge may entitle a guardian for his court. What happens if a man is asked for a judgment and is unwilling to respond.
- LXIX On minor wounds. If a suit is barred. On major wounds.
- LXX If someone sells a horse to someone else.
- LXXI On theft.
- LXXII On theft during day light.

Like the Saxon Mirror, the *Ius Maideburgense* looks sloppy to the modern reader—and it seems that it did so already to rather close contemporaries. From at least the fifteenth century, there were efforts to revise the *Saxon Mirror* both to bring it up to date and (even more importantly) to give it a clear order. Early traces of these efforts can only be guessed at. In a letter written in early 1411, Johannes Stalberg, an *abbreviator* from Northern Germany working at the papal court, praised his friend Dietrich von Niem for the positive effects of his engagement with the Saxon law ("sentencias Saxonicas"), and also referred to Dietrich's corrective work on the *Mirror*—sadly without providing details.¹⁹

In 1493, the Common Superior Court of Altenburg and Leipzig proposed, in the course of a discussion about new procedures, "that the Saxon Mirror be reformed so that one may continue to judge by common Saxon Law."²⁰ It might well be that this proposal was a reaction to the rule Prince Albrecht had imposed on the Superior Court just a few years

¹⁸ Von Daniels, *Das buke wichebelde Recht*, col. 74.

¹⁹ Hermann Heimpel, *Dietrich von Niem (c. 1340–1418)* (Münster: Aschendorff, 1932), 317: "O quam laudabilis et felix vestre huius sapientie et studii litterarum infinitorumque laborum vestrorum finis, qui correctione des Spigels."

²⁰ "Item dass der Sachsenspiegel gereformiret werde also das man noch land-leufiges Sechsisches Recht spreche" (Theodor Muther, "Kleiner Beitrag zur Geschichte der sächsischen Konstitutionen und des Sachsenspiegels," *Zeitschrift für Rechtsgeschichte* 4 [1864]: 169).

before, in 1488:

At this court, everything shall be judged by Saxon Laws, as far as they are lawful, still in use, and clearly expressed. But everything that is not regulated, is obscure or is incomprehensible shall be judged and explained according to the common laws [scil. the *ius commune*].²¹

The Saxon jurists in Altenburg and Leipzig in 1493 probably feared the implementation of the learned laws, the *ius commune*, by virtue of the prince's ruling. Only few decades later, when Prince Johann Friedrich outlined new procedures in 1534, the Court refused to follow them because they did not go far enough in terms of legal reformation: "Especially the obscure book of the Saxon Mirror with its many double meanings has caused many unlawful judgements and quarrel in our lands."²² The passage that I quote here goes on for some time and gives a very graphic impression of how annoyed the panel was with the situation.

Prince Johann Friedrich did not, however, reform the *Saxon Mirror*. He replied that such an endeavour was impossible at that moment and the longed-for reform had to wait a number of years. In the meantime, a number of aids had been developed to address the problems the voiced by the Common Superior Court of Altenburg and Leipzig in 1493.

Explaining and Systematizing Saxon Law: Early Glosses, Commentaries, and other Exegetic Aids—from Manuscript to Print

We might well start with one outstanding example of the ways in which efforts were made to render the *Saxon Mirror* more useful. Four manuscripts of the text, all beautifully illuminated, have caught scholarly interest since at least the middle of the eighteenth century. All stem from one and the same lost ancestor and therefore share many visual aspects.

²¹ "Es sullen auch alle Sachenn vor dem gerichte nach Sechßigischenn Rechtenn, wu das rechtlich vnd bestendigk, ausgedruckt, vorsprochenn werddenn wu es aber vnaußgedrucket tunkel adder vnvornemlich ist, Sal es erfüllunge vnd dewtunge nach gemeynen Rechtenn nehmen" (Christian Gottfried Kretschmann, *Geschichte des Churfürstlich Sächsischen Oberhofgerichts zu Leipzig von seiner Entstehung 1483 an bis zum Ausgange des 18. Jahrhunderts: nebst einer kurzen Darstellung seiner gegenwärtigen Verfassung* [Leipzig: Crusius, 1804], 36).

²² "Sunderlich das vnvorstentlich Buch des Sachssenspiegels des zwespoldigen vorstandt vilerley vnбилliche vrtail gefallen vnd im lande vil Zcang vnnd hadder" (Muther, "Kleiner Beitrag," 170–71).

I will not discuss the famous illustrations here at any length since their function is still uncertain despite the multitude of plausible interpretations that have already been proposed.²³ Most researchers now agree that these illustrations are far more than mere decorations, but hardly anyone would still propose that the scenes served as a way of transmitting the legal ideas of the *Mirror* to the illiterate, as some sort of *consuetudines pauperum*, so to speak. They might indeed have helped readers understand the text, but they are by no means a substitute for it. Rather, these illustrations might be seen as a sort of explanatory commentary, as well as a mnemonic device to help find articles quickly.

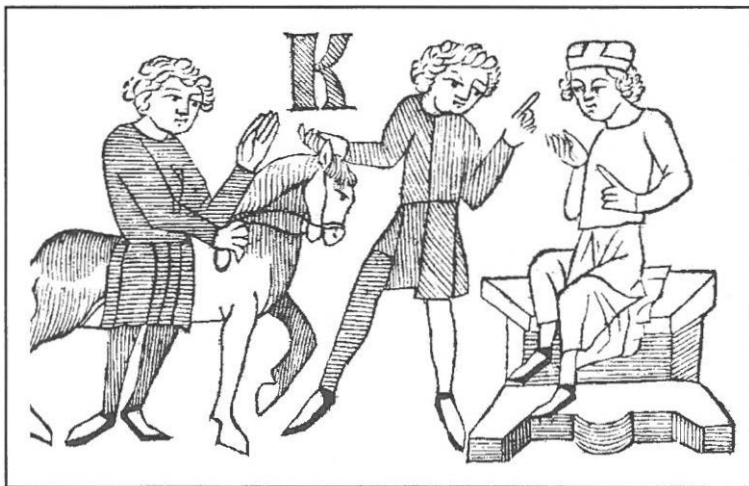


Fig. 1: Scene from one of the *Saxon Mirror's* *codices picturati* (Wolfenbüttel, Herzog-August-Bibliothek, Cod. Guelf. 3.1. Aug. 2°, fol. 34r).²⁴

²³ They are discussed in Dagmar Hüpper, "Funktionstypen der Bilder in den *Codices picturati* des Sachsenspiegels," in *Pragmatische Schriftlichkeit im Mittelalter: Erscheinungsformen und Entwicklungsstufen*, ed. Hagen Keller, Klaus Grubmüller, and Nikolaus Staubach (Munich: Fink, 1992), 231–49. A comprehensive discussion in English of the most important aspects of the quest may be found in Madeline H. Caviness and Charles H. Nelson, "Silent Witnesses, Absent Women, and the Law Courts in Medieval Germany," in *Fama: The Politics of Talk and Reputation in Medieval Europe*, ed. Thelma Fenster and Daniel Lord Smail (Ithaca: Cornell University Press, 2003), 47–72.

²⁴ Drawing taken from Christian Ulrich Gruppen, *Teutsche Alterthümer zur Erleuterung des Sächsischen und Schwäbischen Land- und Lehn-Rechts* (Hannover: J.W.

In another small group of manuscripts, all dating from the fifteenth century and seemingly from the diocese of Hildesheim, not too far from the *Saxon Mirror*'s place of origin, the sequence of the articles is rearranged into what was apparently a clearer order for the compiler of their archetype, although this new order is no clearer than the old one in many places, at least for a modern reader.²⁵ Indices likewise appear slowly in manuscripts of the *Saxon Mirror* from the fifteenth century onwards. These indices usually have little in common with modern ones, but they do combine alphabetical groupings with thematic ones.

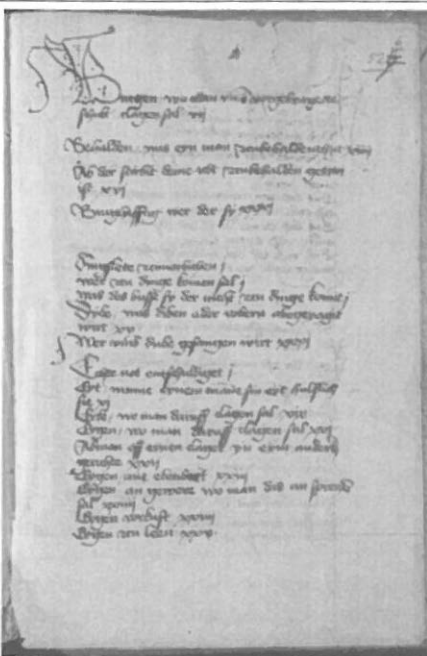


Fig. 2: Index for a manuscript of the *Richtsteig Landrecht* (Göttweig, Stiftsbibliothek, Cod. 364rot, fol. 526r).

Burgen / wu man umbe
vorgeburgette schult
clagen sol vij
Behalden / waseyn man
zcu behalden thut xliij
ab der stirbit, demicht zcu
behalden getan ist xvj
Burghafftig / wer der sy
xxxij

Dingslete zcu vorbithen j
wer zcu dinge komen sal j
Dybe / was diben ader ro-
bern abegeyagt wirt xv
Wer umbe dube gefangen
wirt xxxj

Schmidt, 1746), 104.

²⁵ Cf. Kümper, *Sachsenrecht*, 160–61.

Glosses were yet another means of adapting the *Saxon Mirror* to new circumstances and making it more useful—and one of these new circumstances definitely was the spreading of the learned laws, the *ius commune*, in northern Europe. We have already mentioned some of the Saxon jurists' distrust of, and even resistance to this movement. Others, however, thought rather of harmonizing the two legal spheres.

Already sometime in the 1330s, Johann von Buch (c. 1290–c. 1356), a learned jurist who had been trained in Bologna, annotated the land-law of the *Saxon Mirror* with corresponding passages from the *ius commune*. This widely recognized gloss (*glossa*) was particularly influential for the development of Saxon Law in two ways: first, Johann came up with the idea that the *Saxon Mirror* was modelled upon a privilege that Charlemagne had given the Saxons after their defeat and Christianization, and that Eike had merely translated this privilege and added a few chapters of his own—which, consequently, Johann did not gloss. Second, his gloss succeeded in harmonizing and explaining the contradictory and obscure passages of the *Mirror*. Johann even went so far as to quietly reconfigure the Saxon Law in a number of ways.²⁶ The gloss soon spread in a vast number of manuscripts along with the *Saxon Mirror* and was even frequently quoted as an authoritative source along with the *Mirror* and the Magdeburg Law. The latter also was glossed during the fifteenth century.

Johann's gloss was followed by a number of others, and also further adapted, so that the history of the text has grown very complex, but almost any edition suffices to give us an impression of the effect of the gloss on the presentation of the *Saxon Mirror* and its practical use. Fig. 3 is an example of the way the text is presented in a number of similar editions from the sixteenth century. Three phrases from an article of the *Saxon Mirror*, printed in bold, are glossed, with their first words figuring as indices: *Es mag auch kein weib/etc.*, *Zueignn/etc.* and *Spreche sie aber das es ihr/etc.* The gloss explains or specifies certain details and adds parallels or evidence from other legal sources—notably the Magdeburg Law, abbreviated with *Weich*. Moreover, in this specific edition, a number of Latin *allegationes* have been inserted between the text of the *Saxon Mirror* and the gloss. The redundancies between these allegations and the gloss remind us that three texts—the *Saxon Mirror*, the gloss, and the allegations—have been compiled here.

²⁶ Details are provided by Bernd Kannowski, *Die Umgestaltung des Sachsenspiegels durch die Buch'sche Glosse* (Hannover: Hahn'sche Buchhandlung, 2008).

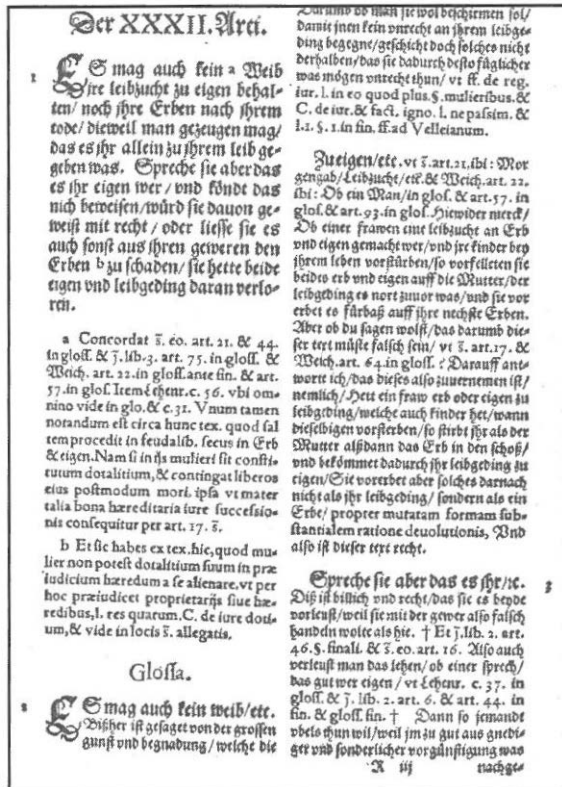


Fig. 3: Printed text of a Saxon Mirror with Gloss (Christian Zobel, Leipzig, 1569)

Article III 78 provides a good example of the way in which Johann glossed the *Saxon Mirror*. This article reads:

[§ 1.] The king and every judge preside over capital crimes and serious felonies, the property of each of his men and kin, and does not act disloyally thereby.

[§ 2.] In turn, the man may on behalf of his king and judge certainly oppose any injustice and help resist it in all ways possible. Even where his kin or lord is concerned, he does not act disloyally.²⁷

²⁷ Dobozy, *Saxon Mirror*, 136; "[§ 1.] Die koning unde iewelk richtere mut wol richter over hals unde over hant unde over erve iewelkes sines mannes unde mages,

Maria Dobozy, whose translation is quoted here, understands the second paragraph as an imperative for judicial assistance. This is in line with the currently accepted interpretation of the paragraph,²⁸ but some scholars read § 2 in another way. They—including me—would translate it rather as:

[§ 2.] A man must also resist injustice perpetrated by his king or judge, and help in resisting it all the time, and also his kin or lord, and does not act disloyally.

Both translations are justified linguistically, but Johann von Buch must have understood III 78 § 2 in the second way. Still, he could not imagine anyone actively resisting the Roman king and so he comments:

Note with care that he writes: *his king*, and not: *the king*. For by saying *his king* he means just any king, such as the king of Bohemia or of Denmark. One may lawfully resist these kings and their judges. Had he said *the king*, he would have meant the Roman king. And this would have been unjust, for nobody may lawfully resist him. . . .²⁹

Johann von Buch was doubtlessly the most influential glossator of the *Saxon Mirror*, but he was not the only one. Numerous less known legal writings blossomed from the fifteenth century onwards to explain certain passages of the *Mirror* and Magdeburg Law, written not only by practitioners from the Panels of Judges (*Schöffenstühle*) but now also by legal professors of the emerging German universities, especially from Leipzig. One of the more famous examples might be Dietrich von Bocksdorf, who composed a number of small pieces to adapt the *Saxon Mirror* to contemporary situations.³⁰ As time went on, the printed editions of

unde ne dut dar an weder sine trüwe nicht. [§ 2.] De man mut ok wol sime koninge unde sime richtere unrechtes wederstand, und san helpen wesen to aller wis, al si he sin mach oder sin herre, unde ne dut dar an weder sine trüwe nicht" (Homeyer, *Des Sachsenspiegels Erster Theil*, 374).

²⁸ I discuss this problem in more detail in Kümpfer, *Sachsenrecht*, 555–62.

²⁹ "Vnde sineme koninge et cetera. Dit nym behendeliken, dat hir steyt: *Sineme koninge*, vnde nicht: *Deme koninge*. Wente dar mede, dat he secht: *Sime koninge*, dar mede menet he sunderlike koninge, alseden koningh van Bemen edder dene van Denemarken. Dessen koningen mot men wol alle des wedderstan, des men eneme richtere wedderstan mod. Hedde he auer gesecht: *Deme koninge*, so hedde he de Romeschen koningh ghemenet. So were dat vnrecht ghewesen, we deme en man nemand wedderstan . . ." (Franz-Michael Kaufmann, ed., *Glossen zum Sachsenspiegel-Landrecht. Buch'sche Glosse*, vol. 3 [Hannover: Hahn'sche Buchhandlung, 2002], 1459; italics are all taken from the original).

³⁰ Cf. Christoph H. F. Mayer, "Dietrich von Bocksdorf († 1466) – Kleriker, Jurist, Professor. Zugleich zur ‚Unvernunft‘ heimischer Gewohnheit im Zeitalter der Rezeption," in *Tangermünde, die Altmark und das Reichsrecht: Impulse aus dem*

the *Mirror* and the Magdeburg Law became more academic in their editorial design to suit the new needs of legal culture. The most successful editions of both law-books were published in Leipzig, beginning in 1535. They were edited by the law professor Christoph Zobel (1499–1560) who added to them material drawn from both juridical writings and legal practice.³¹ After his death, his son-in-law continued to publish editions of the *Mirror*, the last being printed in Heidelberg in 1614.³²

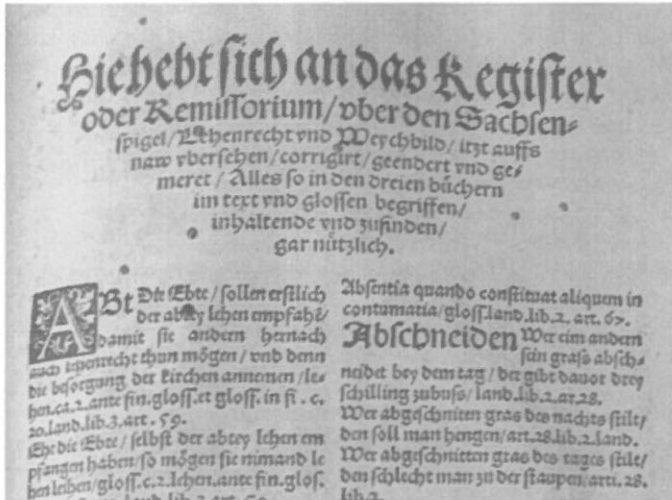


Fig. 4: A remissorium from a Saxon Mirror edited in 1536 by Chistoph Zobel (Leipzig)

One of the most characteristic innovations of the early printed editions is the inclusion of a *remissorium* or *repetitorium* (Fig. 4) to make the *Mirror* more accessible.³³ This new type of indexing had emerged already within

Norden des Reiches für eine europäische Rechtskultur, ed. Heiner Luck (Stuttgart: S. Hirzel, 2008), 92–141. A detailed study on this fascinating jurist will soon be published by Marek Wejwoda (Leipzig).

³¹ On Zobel cf. Konrad Krause, *Alma mater Lipsiensis: Geschichte der Universität Leipzig von 1409 bis zur Gegenwart* (Leipzig: Leipziger Universitätsverlag, 2003), 49–50.

³² A handlist of all these editions and their content is provided in Hiram Kümper, ed., *Secundum Iura Saxonica: Sechs prozessrechtliche Traktate der Frühen Neuzeit* (Nordhausen: Bautz, 2005), 106–11.

³³ More examples than the ones mentioned here are discussed in Kümper, *Sachsen-*

manuscript culture and replaced the thematic indices (like the one shown in Fig. 2) in many manuscripts. The afore named Dietrich von Bocksdorf, for instance, compiled a huge but as yet unedited *repertorium* that included references to the *Saxon Mirror*, the Magdeburg Law, and the law-book of Meissen, a close relative of both the law-books.³⁴

In view of the popularity of the Saxon Law in the sixteenth century, on the one hand, and the number of different editions available on the book market, on the other, an edition's comprehensiveness and ease of use must have been major selling points. Figure 5, for instance, shows a table from a 1545 edition of the *Saxon Mirror* in which its editor, Nikolas Wolrab, lists all the advantages of his new edition.

- the text *and* a gloss in both German *and* Latin
- the subdivision of the *capitula* into paragraphs
- *additiones* to each article
- a revision of all *allegationes* to the learned laws
- an alphabetical *repertorium*

The *allegationes* that Wolrab mentions have already been shown above in Fig. 3. Some were attributed to Dietrich of Bocksdorf, others were added by unnamed jurists, and still others probably by the editors, like Christoph Zobel, themselves.

The growing concern about the divergences between traditional Saxon Law and the learned laws ultimately generated another type of literature, the *differentiae juris*, which can also be considered an effort to interpret the obscurities of the Saxon Law. These were thematic compilations that sought to resolve apparent contradictions between the two traditions with respect to specific points. Sebastian Stelbagius's *Epitome* (Fig. 6) offer one example of this genre.

recht, 180–87.

³⁴ There is no edition. A manuscript probably written in 1464 by one of Bocksdorf's pupils is preserved in Zwickau, Ratsschulbibliothek, Ms. II, VIII, 28.

Fluss was weise oder form die

ganze Edition des Sächsenspiegels angestellet/
vund durchaus vollföret / auch was besonderer nutz.
licher verbesserung daran gewandt worden / nitwenig
vnd etwelchen vermerck.

- I.  **N**ie vnd jede Text / beneben ihren vorigen vnd alten Glossen / Lateinische vund Deutsche / seind aus etlichen alten Exemplaren in ziemlicher anzahl / welche man darab hat conferirt / zum fleißigsten restaurirt worden.
- II. Ein jeder Artikel / zusampt seiner Deutschen Glossen / ist mit numeris geteilt / damit ein jeder in nachsuchunge allerhand Rechtspuncten / von welchen darinn gemeldet wird / sich desto daß ind / geberichten können.
- III. Vor einem jeden Artikel seind schließliche vnd kurze Summarien gesetzt / welche auch mit den numeris / so neben dem Text / vnd Glossen stehen / vnderscheiden / vnd dasjenige so im Text / Glossen / neben Additionibus / insertis vnd marginalibus zu befinden / vnd deren runden verstaund thun / anzeigen.
- IV. Nach einem jeden Deutschen Artikel folgen etliche neue Additiones / welche mit Buchstaben gezeichnet / darmit zu sehen / auff was wort ein Text ein jede zu referieren.
- V. In den Glossen / beydes Deutschen vnd Lateinischen / seind albereit auch etliche viel neue Additiones gesetzt welche / damit unterschiedlich zu sehen / vnd den Leser in verfolgung dieses sententzes nicht irren machen mögen / seind sie also (ADD: TIO.) eingeschlossen vnd notirt.
- VI. Weil auch an vielen enden in den alten Glossen vormals die Allegata ganz falsch vnd unvollkommen gesetzt / Ja an viel enden oft ganz ausgelassen vnd übergangen gewesen / als ist solches alles in gegenwertiger Edition mit besondern fleiß vnd gutem bedacht ersiaret worden / welches / damit es einem jeden desto bequemer möcht vor augen sein / ist es albereit mit zweyen ?? bezeichnet.
- VII. Vnd zum letzten / damit ein jeder solches ganzen buchs desto fleißlicher / seiner vorfallenden gelegenheit nach / sich habe zugebrauchen / ist zuende ein ganz neues vnd nutzbares Repertorium hinan gesetzt / welches / auff welchem Blat vnd Columnen / auch wie oft von einem jeden ding in diesem ganzen Sächsenpiegel Meldung geschieht / dem Alphabet nach / richtig vnd ordentlich hat weisen.

Fig. 5: Editorial report for a Saxon Mirror printed in 1545 by Nikolaus Wolrab (Leipzig)

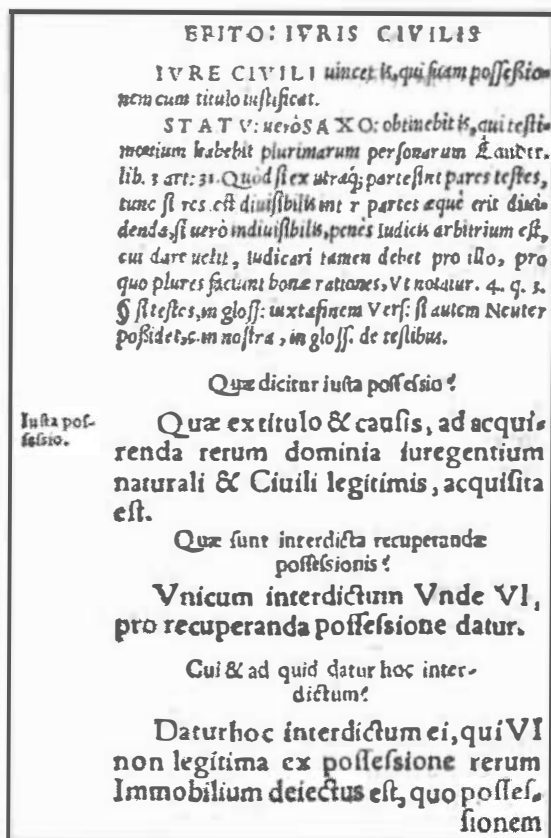


Fig. 6: Sebastian Stelbagius, *Epitome sive summa universae doctrinae iustitiae legalis* (Bautzen, 1564)

The *Compendium juris civilis et Saxonici*, which was written sometime around 1537 by Konrad Lagus, but not printed until 1597, provides another example of an effort to address the obscurities of the Saxon Law.³⁵

³⁵ Cf. Theodor Muther, *Zur Geschichte der Rechtswissenschaft und der Universitäten in Deutschland. Gesammelte Aufsätze* (Jena: H. Dufft, 1876), 319–23. On Lagus cf. Hans Erich Troje, "Konrad Lagus (um 1500–1546) und die europäische

The *Saxon Mirror*, Lagus complained, was "written in such a disorderly manner that not one single piece is in the right place, but it switches back and forth between this and that."³⁶ Stelbagius and Lagus, however, were already headed down the path to the *usum modernus pandectarum*, the specific form of academic German jurisprudence that struggled with the discrepancies between traditional and learned laws until virtually the end of the Old Empire in 1806.

The *Constitutiones electorales Saxonicae Divi Augusti* and Melchior Kling's Revised *Saxon Mirror*—a Postscript?

We have now seen a number of different attempts to keep a law-book that had become obscure in terms of both its meaning and its structure accessible within a changing juridical culture. Some, especially editors, who wanted their books to be sold, were more optimistic about this possibility than others. Pessimists, on the other hand, emphasised the obscurity—especially in terms of structure—of the old-fashioned law-book.

Among them was Melchior Kling (1504–1571), a professor of Canon Law at Leipzig University.³⁷ The *Saxon Mirror*, Kling asserted in a letter to the Elector August of Saxony, was written without any systematic order ("gantz ane ordnung") so that no-one could actually follow its rules ("das sich schir Niemandts darein Richten kan")—and still it was used in every-day juridical practice ("Vnd ist doch in teglicher vbung"). This is why he, Kling, had planned "to systematize" the Saxon law "so that everyone could easily understand it and find his way through it."³⁸ His idea

Rechtswissenschaft," in *Wittenberg: Ein Zentrum europäischer Rechtsgeschichte und Rechtskultur*, ed. Heiner Lück and Heinrich de Wall (Cologne: Böhlau, 2006), 150–73; and Gerhard Theuerkauf, *Lex, Speculum, Compendium iuris: Rechtsaufzeichnung und Rechtsbewußtsein in Norddeutschland vom 8. bis zum 16. Jahrhundert* (Cologne: Böhlau, 1968), 183–216.

³⁶ "... so unordentlich geschrieben, das darinnen kein stücke schier ist, wie es sol, in sonderheit vorgenommen, sondern hin und herwider von diesen und von jenen rechtsfällen" (Konrad Lagus, *Compendium juris civilis et Saxonici* [Magdeburg: Francken, 1597], 4).

³⁷ On his life and writings cf. Rolf Lieberwirth, "Melchior Kling (1504–1571), Reformations- und Reformjurist," in *Wittenberg: ein Zentrum europäischer Rechtsgeschichte und Rechtskultur*, ed. Heiner Lück (Cologne: Böhlau, 2006), 35–62.

³⁸ "in eine solche ordnung zu bringen das es ein Jeder leichtlich verstehen vnd sich drein richten solt" (Melchior Kling, *Das Gantze Sechsisch Landrecht mit Text und Gloß in eine richtige Ordnung gebracht* [Leipzig, 1572], introduction [no pagina-

was actually fairly simple and in perfect keeping with the legal thinking of contemporary jurists trained in the learned laws. Instead of the traditional three books of the *Saxon Mirror*, he divided the material into four books: one on the legal *personae* (the king, dukes, suitors, testators, etc.), a second on procedures (citation, sentences, appellation, etc.), a third on various kinds of suits brought for civil matters, such as the law of obligations, inheritance, etc., and a fourth on penal law. According to this plan, Kling hoped to

write it in easily understandable German words, with the grace of God, so that not one single line in the whole *Saxon Mirror* would remain that was not placed in the proper chapter.³⁹

How did Kling realize this plan? First, as proposed in his letter, he arranged the articles of the *Saxon Mirror* in a completely new sequence inspired by the dogmatic structures of the learned laws. He maintained a reference to each article's place in the existing editions of the *Mirror*, however, in order to facilitate comparison with those editions and on account of the huge existing literature. He also provided cautious comments on the articles and paragraphs he had newly combined. Here are two examples of his work.

The first example (Fig. 7) explains the meaning of article III 58 to the contemporary reader, for whom it might well have been problematic:

The imperial princes of the realm shall have as lord no layperson other than the king. A bannerfief that makes a man a crown vassal is valid only when it is conferred by the king. Whatever a second man receives before the king does not make him first holder of the estate because another had already been invested with it before. Therefore, the estate cannot elevate him to a crown vassal.⁴⁰

This rule had been obsolete for a long time because of the growing complexity of the Empire's feudal landscape. Kling updates the article by explaining that nobody can become an imperial prince of the realm by

tion or foliation)).

³⁹ "wolte es mit gueten verstendigen deutschenn wortern, vermittelt gottlicher hülffe dermassen schreiben das In gantzen Sachssenspiegel nicht ein einige Zeil sein solte, die nicht vnter Iren ordentlich titl gebrach were" (Kling, *Das Gantze Sechsisch Landrecht*, introduction).

⁴⁰ Dobozy, *Saxon Mirror*, 131; "Des rikes vorsten ne solen nenen leien to herren hebben, wen den koning. It n'is nen vanlen, dar die man af moge des rikes vorste wesen, he ne untva't von deme koninge. Svat so en ander man vor ime untveit, dar n'is jene die vorderste an'me lene nicht, went it en ander vor ime untfeng, unde ne mach des rikes vorste dar af nicht sin" (Homeyer, *Des Sachsenspiegels Erster Theil*, 354).

other means than by royal investiture. He does not, however, forbid these princes from forming feudal bonds with their equals. In the second example (Fig. 8), Kling first shortens the article. In full the *Saxon Mirror* III 55 states:

None but the king may judge the imperial princes at the level of life and health. As for the Schöffen[-barfreien] class, if they are convicted and sentenced to capital punishment, then only the bailiff may execute them.⁴¹

Des Reichs Fürsten sollen keinen andern leihen Fürsten haben zum Herrn/ den den König/ Es ist ein Zanlehen/ da ein Man des Reichs Fürst von indge gesein / er empfahe es denn von dem Könige. Was ein Man voremern andern zu Lehen empfehet / da ist der ander / so es fürbaß auch empfehet / der sorder sie nicht an dem Lehen (dennes jemer der zu empfangen hat) Vnd dieser mag auch des Reichs Fürste darnach mit gesein/ Da von Lib. 3. Art. 58.

K L I N G.] Des Reichs Fürsten / etc. Das ist / es kan keiner ein Fürst des Reichs sein / er habedann sein Lehn erst mittel vom Könige empfangen / vnd kan also kein leihen Fürst / einen andern leihen Fürsten beleihen / das er traesse derselben beziehung ein Fürst des Reichs were.

Des Reichs Fürsten / etc. Sind Art. Zum dritten mal / so sollen sie solche er hievor gesprochen hat/ Wie man von die er land haben / die da Fürstenthumb sind. Du

SDer die Schöffenbarenfreien leute (wenn sie iren leib verurwercken / vnd vertheilet sein) mag niemand richten / denn der rechte Fronher. Lib. 3. Art. 55.

K L I N G.] Dis ist auch nicht also im brauch.

Der die Schöffenbaren / etc. non nouam in h. S. primi. & in athen. de

Fig. 7 and 8: Melchior Kling, *Das Gantze Sechsisch Landrecht mit Text und Gloß in eine richtige Ordnung gebracht* (Leipzig 1572)

Kling quotes only the second sentence, leaving aside the king's high jurisdiction over the imperial princes. The *Schöffen*—or rather *Schöffenbarfreie*—who are the subject of the second sentence, were a peculiar class of men in legal history for there is no proof of their existence before

⁴¹ Dobozy, *Saxon Mirror*, 130; "Over de vorsten lif unde ire gesunt ne mut neman richtere sin, wan die koning. Over scepenbare vrie lude, svenne se iren lif verwerken unde verdelet sin, ne mut neman richten wenne die echte vronde bode" (Homeyer, *Des Sachsenspiegels Erster Theil*, 351).

the *Saxon Mirror* and some scholars have supposed that Eike might have invented them.⁴² Consequently, Kling notes: "This is no longer valid."⁴³

Kling, however, had not been the only one complaining to the dukes of Saxony—in 1556, for example, Melchior Osse (1506–1557) also wrote his famous political testament (*Politisches Testament an Augustum Churfürsten zu Sachssen*) to the Elector August of Saxony⁴⁴—and the success of Kling's revised edition of the *Saxon Mirror*, which was published posthumously in 1572, was doubtlessly much reduced by August of Saxony's issuing the *Constitutiones electorales Saxonicae* just a few months earlier, even though the *Constitutiones* dealt only with certain controversial issues that had arisen from the diversity of norms and legal practices in the ducal lands and left a good deal of other matters untouched.⁴⁵ The *Constitutiones* thus never replaced either the *Saxon Mirror* or the Magdeburg Law in juridical practice. Their influence in broad regions of Central and Eastern Europe was unaffected by the Saxon legislation, and both law-books continued to be consulted by practitioners and cited in juridical writings. The innovative approach and conception that lay at the origin of these works was a milestone in the history of an astonishing legal traditionalism within the lands of Saxon Law that perpetually invented new strategies and formats to guarantee the continued accessibility of its central authoritative texts—a history that does certainly not end in the sixteenth century.⁴⁶

⁴² The discussion is quite complex and is summarized in Karl Kroeschell, "Von der Gewohnheit zum Recht: Der Sachsenspiegel im späten Mittelalter," in *Recht und Verfassung im Übergang vom Mittelalter zur Neuzeit*, vol. 1, ed. Hartmut Boockmann, Bernd Moeller, et al. (Göttingen: Vandenhoeck & Ruprecht, 1998), 68–92.

⁴³ "Diß ist auch nicht also in brauch" (Kling, *Das Gantze Sechsisch Landrecht*, f. 101r).

⁴⁴ Cf. Oswald Artur Hecker, ed., *Schriften Dr. Melchiors von Osse: mit einem Lebensabriss und einem Anhang von Briefen und Akten* (Leipzig: Teubner, 1922), 280 and 287.

⁴⁵ Details on the drafting of the *Constitutiones* are provided by Hermann Theodor Schietter, *Die Constitutionen Kurfürst August's von Sachsen vom Jahre 1572. Geschichte, Quellenkunde und dogmengeschichtliche Charakteristik derselben* (Leipzig: F. A. Brockhaus, 1857).

⁴⁶ For a continuation until the early twentieth century cf. Kümpfer, *Sachsenrecht*, 285–334.



Obscurity in Medieval Texts

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Obscurity in Medieval Texts

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Lucie Doležalová, Jeff Rider,
and Alessandro Zironi

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