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DOMESTIC TRIALS, AND *THE STRUGGLE*
FOR LAW: JHERING’S LEGAL DISPUTE
WITH HIS MAIDSERVANT AS A FORMATIVE INFLUENCE
ON HIS CONCEPT OF LAW

1. VIENNA 1872

Rudolf von Jhering’s international hit *Der Kampf um’s Recht*¹, first published in 1872 and translated into English in 1879², bore the motto “Im Kampfe sollst du dein Recht finden”³. In the preface to the first German edition, the author announced a “piece of psychology of law”⁴ which made it necessary for the legal subject, be it an individual or a nation, to fight for its right with the aim of finding “[its] own personality, [its] feeling of legal right, [its] self-respect”⁵. In the midst of this struggle, law was “not mere theory, but living force”⁶, a process of “research, struggle, fight, in short toilsome, wearying endeavour”⁷. Through unconditional involvement in the struggle, the combatant created his own right, but also law as such. Only by struggling, on the other hand, could he succeed in establishing himself as a person.

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¹ R. von Jhering: *Der Kampf um’s Recht*, Vienna 1872.

² R. von Jhering: *The Struggle for Law*, Chicago 1879.

³ *Ibidem*, p. I. The words “In battle you shall find your right” are curiously absent from the English translation. Unless otherwise indicated, translations are provided by the authors.

⁴ *Ibidem*, p. V.

⁵ R. von Jhering: *The Struggle for Law*, Chicago 1879, p. 26.

⁶ *Ibidem*, p. 1.

⁷ *Ibidem*, p. 13.

As it was previously stated⁸, Jhering's theory of law had its starting point in a very personal fight: a court case. Whilst hardly any traces of this can be found in the published version of *The Struggle for Law*⁹, Jhering's farewell lecture which had been delivered in Vienna in February 1872 and which had formed the basis of the book, had apparently contained a vivid account of the episode. It has been handed down to us in two slightly different versions, one of which was published in the Viennese journal *Gerichtshalle*. Here, the account of the event was given as follows:

"I myself have had occasion to feel that bitterness [i.e. a violation of Rechtsgefühl]. It was a case that involved my maidservant. She suddenly wanted to leave, asserted that she had terminated her employment, but she had not given notice. There was nothing I could do. I sought help from the police; the girl was interrogated and confessed that she had not given notice, but insisted that she did not wish to continue her service; the police tell me: sue for compensation (continuing hilarity). And in court? The girl denies all and the police are but a *singularis testis* [i.e. a single witness, and therefore inadmissible in court] whose quality [...] (increased hilarity). At that moment, I say, I felt the sting of injustice, when one has a proper right, and the institutions of the state are such that one cannot enforce this right, not with all the will in the world. And this is what I accuse the modern laws of, that they force a man with a strong sense of justice (Rechtsgefühl) to undertake the act of cowardice of which I spoke earlier, to forsake his proper right"¹⁰.

Another journal, the *Juristische Blätter*, published the following account:

"I myself have once had occasion to feel bitterly injustice done to me. It was a case that involved one of my maidservants. Her lover went to America; she wanted to leave too, said she had terminated her employment, but had not done so. In court, they told me with a shrug: sue for compensation. It was then that I felt it first, felt the thorn of the injured right, and what it means when the institutions of the state are such that the injured man cannot assert his right!"¹¹.

The "maidservant" referred to in these accounts was a young woman named Caroline Kuhl. She was born in Biedenkopf, a village about fifty kilometres north of Gießen, on 29 January 1839, as the seventh (and youngest) child of Emmanuel, a cobbler, and his wife, Anna Elisabeth¹². She was employed in Jhering's household in Gießen from 7 October 1862 to 6 October 1863. Soon thereafter, she sued her

⁸ O. Behrends: *Rudolf von Jhering. Beiträge und Zeugnisse aus Anlaß der einhundertsten Wiederkehr seines Todestages am 17.9.1992*, 2nd ed., Göttingen 1992, p. 69.

⁹ However, cf. *ibidem*, pp. 69, 120 et seq.

¹⁰ *Gerichtshalle* 16 (1872) no. 22, *Jhering in "Juristischen Gesellschaft"*, 14 March 1872, pp. 95–99, 99, printed in: R. von Jhering: *Der Kampf ums Recht*, H. Klenner (ed.), Freiburg (Breisgau) etc. 1992, pp. 107–131, 128 et seq.

¹¹ *Juristische Blätter* 1 no. 3, *Jhering's Vortrag in der Juristischen Gesellschaft*, 17 March 1872, pp. 29–34, 33, printed in: R. von Jhering: *Der Kampf ums Recht*, F. Ermacora (ed.), Frankfurt am Main [etc.], 1992, pp. 12–54, 45.

¹² Hessisches Staatsarchiv Marburg (HStAM), Bestand Protokolle, no. II Biedenkopf 15 Mappe 3 and Heiratsprotokoll 1825, Bestand Protokolle, no. II Biedenkopf 16 Mappe 1.

former employer for payment of her working wage (*Liedlohn*) amounting to 12 guilders — and won.

Despite the universal fame of *Der Kampf um's Recht* and the significance of *Kuhl v. Jhering* with regard to its inception, no reconstruction of the case appears to have been attempted so far. In the middle section of this paper, we will present such a reconstruction, based on the court papers from the Jhering estate preserved at the *Staats- und Universitätsbibliothek* (SUB) Göttingen. It will be followed by a short discussion of certain oddities which may or may not have led to Jhering's defeat. The final chapter is devoted to the impact of the trial on the book. Why struggle? And who struggles for his or her law?

First, however, we would like to provide some context.

2. GIESSEN 1863

Gießen, where Jhering had served as a full-time university professor since 1852, was the capital of the province of Upper Hesse, “a hilly country, rather lacking in beautiful scenery”, as the 1872 Baedeker put it¹³, the northernmost of the three provinces of the Grand Duchy of Hesse-Darmstadt¹⁴. With about 850,000 inhabitants and an area of 8,345 km², it was one of the smaller states of the *Deutscher Bund* or German Confederation, of which it had been part since the foundation in 1815.

The Grand Duchy was governed by the descendants of the House of Hesse. Upon his accession to the throne in 1806, the first Grand-Duke, Louis I, had dissolved the Provincial Diets. In 1820, a constitution was enacted and the Grand Duchy was transformed into a constitutional monarchy with a bicameral system, which lasted until 1918.

The territory of the Grand Duchy was severely fragmented, which was not conducive to political unity or economic development. The convergence to a single state was also hampered by the different legal traditions of the three provinces. French law was still in force in Rheinhessen, Starkenburg had a strong particularist tradition and Oberhessen was largely a country of pure *ius commune*, i.e. the Roman law. In the nineteenth century, the Grand Duchy was renowned throughout Germany for its legal situation, second in its complexity only to the Kingdom of Bavaria¹⁵.

¹³ K. Baedeker: *Die Bahn durchschneidet die hessische Provinz Oberhessen, ein hügeliges Land ohne besondere landschaftliche Schönheit* (in:) K. Baedeker: *Deutschland und Österreich. Handbuch für Reisende*, 15th ed., Koblenz 1872, p. 367.

¹⁴ The other provinces were Starkenburg (capital: Darmstadt) and Rheinhessen (capital: Mainz).

¹⁵ G. Jung: *Die zivilrechtliche Stellung der Frau im Großherzogtum Hessen. Über die Geschlechtervormundschaft im 19. Jahrhundert*, Diss. Darmstadt/Marburg 1997, p. 55. Cf. also W. Schubert: *Der Code civil und die Personenrechtsentwürfe des Großherzogtums Hessen-Darmstadt von 1842 bis 1847*, ZRG Germ. Abt. 88 (1971), pp. 110–171.

With about 10,000 inhabitants, Gießen was the most populous city in Upper Hesse¹⁶. As the capital, it not only housed the administrative authorities of the province and the county, but was also the seat of a *Hofgericht* (court of appeals). At the municipal level, there was a *Stadtgericht* (town court) and a *Landgericht* (regional court)¹⁷. Economically and culturally rather inconspicuous, Gießen was mainly known for its university, which had been founded in 1607. In the 1860s, its 400 students were mainly taught by brilliant young professors, who, at the beginning of their careers, were not yet in a position to demand very high salaries. One of these professors was Jhering, 33 years of age at the time of his appointment¹⁸. He quickly gained fame as a successful author (volume 1 of *Der Geist des römischen Rechts* was just published), as an innovative teacher and a sought-after legal expert, and he became one of the most important members of the university with first-rate contacts throughout the city and province¹⁹.

According to Jhering's son, Friedrich, their household in Gießen was rather large. Rudolf and his wife Ida had five children, all but one of whom were born there²⁰. In 1862, the family lived in a rented flat at today's 13 Liebigstraße. On 6 October that year, the claimant-to-be, Caroline Kuhl, applied for a job as a maid-servant. She was 23 and unmarried. Having signed the customary one-year tenancy agreement (*Miethvertrag*), she started working in the Jhering household the following day and remained there until the end of the agreed term. On 7 October 1863, she left. On this occasion, Jhering allegedly refused to "pay the outstanding wage of twelve guilders" and "hand over her *Dienstbücher* (service books) and *Heimathschein* (certificate of nationality) which were still in his possession"²¹. The disagreement was preceded by a quarrel between Ida Jhering and Caroline Kuhl on the subject of "a box and a bedsheet"²². Shortly before Ms Kuhl's departure in early October, Jhering forced her to accompany him to the police station. There, he appealed to the highest-ranking police officer in the province, *Großherzoglicher Polizeirat*, Lorenz Nover, of the rank of a *Polizeicommissär erster Classe*²³, for "assistance"²⁴ in his

¹⁶ Cf. A. Spiess: *Das Lahntal von seinem Ursprung bis zur Ausmündung nebst seiner nächsten Umgebung*, Ems 1866, pp. 41 et seq.

¹⁷ J.G.K.E. Kuchler: *Die Gesetzgebung des Großherzogthums Hessen*, Darmstadt 1848, pp. 194–196.

¹⁸ On the appointment procedures, cf. D. Klippel: *Rudolf von Jhering an der Juristischen Fakultät der Ludwigs-Universität Gießen (1852–1868)* (in:) O. Behrends: *Rudolf von Jhering. Beiträge und Zeugnisse aus Anlaß der einhundertsten Wiederkehr seines Todestages am 17.9.1992*, Göttingen 1992, pp. 31–37, 32.

¹⁹ *Ibidem*, pp. 33 et seq.

²⁰ M. Kunze: *Rudolf von Jhering — ein Lebensbild* (in:) *Rudolf von Jhering. Beiträge und Zeugnisse aus Anlaß der einhundertsten Wiederkehr seines Todestages am 17.9.1992*, Okko Behrends, Göttingen 1992, pp. 11–28, 14.

²¹ C. von Biedenkopf Prof. Dr. Jhering zu Gießen "[...] Auszahlung des rückständigen Lohnes mit 12 Gulden" and "die Aushändigung ihrer in seinem Besitze befindlichen resp. ihm übergebenen Dienstbücher (und ihres Heimathscheines)", 2 February 1864, SUB Göttingen Cod. Ms. Jhering.

²² "[...] eine Schachtel und Bettuch". *Replik i.S. Officialanwalts der Karoline Kuhl von Biedenkopf gegen Den Hr. Professor Jhering zu Gießen, Beklagten, Liedlohn betreffend*, SUB Göttingen Cod. Ms. Jhering 10:2 (11).

²³ *Hof- und Staatshandbuch des Großherzogthums Hessen 1863*, Darmstadt 1863, p. 256.

²⁴ *Ibidem*.

dispute with the unruly maidservant. The legal assessment of this conversation and the exchange between Ida Jhering and Caroline Kuhl would become the main points of debate in the subsequent legal dispute.

It was preceded by the following letter which reached Jhering at the end of October 1863:

“Dearest Herr Professor!

Before taking the most difficult step of turning to the courts for legal assistance in reclaiming my remaining credit of 12 guilders, I implore you to spare me and cease refusing payment of my salary, as I terminated my contract with your wife in a timely manner and endured the year I had offered my services to you until the very last hour.

Every worker, as soon as he has done the work which is his duty, is indeed worthy of his salary, and I believe that I have fulfilled all my duties with you in time and consequently I deserve my hard-won wages.

By finally repeating my request addressed to you above, I commend myself to you with respect²⁵.

The letter was signed by Caroline Kuhl. Shortly thereafter, she took legal action by filing a suit with the *Stadtgericht*²⁶. Since there was no gender tutelage in Gießen, she could do so without the aid of a legal guardian²⁷.

3. THE TRIAL

A) PRIMARY PROCEEDINGS²⁸

By appointment of the court, attorney Wilhelm Curtman was assigned to the claimant as her *Official-Anwalt* (official representative), according to the province’s poor laws²⁹. Curtman, a son of the director of the teachers’ seminary at Friedberg,

²⁵ “Geehrtester Herr Professor!

Bevor ich den mir sehr schweren Schritt gerichtliche Hülfe zur Erlangung meines Restguthabens im Betrage von 12 Gulden von Ihnen zu erhalten in Anspruch nehme, erlaube ich mir vorerst in diesen Zeilen die Bitte an Sie, mich davon zu verschonen und mir die Auszahlung meines Lohnes nicht länger zu verweigern, indem ich Ihrer Frau gegenüber ja zeitig genug meinen Austritt aus Ihren Diensten ankündigte und ich auch das Jahr auf welches ich mich bei Sie vermietete bis zur letzten Stunde ausgehalten habe.

Es ist doch wohl ein jeder Arbeiter, sobald er die ihm obliegende Arbeit völlig verrichtet, seines Lohnes werth und ich glaube, daß ich allen meinen Obliegenheiten bei Ihnen pünktlich nachgekommen bin und demzufolge meinen Lohn sauer verdient habe.

Indem ich schließlich meine oben an Sie gerichtete Bitte wiederhole, empfehle ich mich Ihnen unter Hochachtung²⁷. Kuhl to Jhering, 28 October 1863, SUB Göttingen Cod. Ms. Jhering 10:2.

²⁶ By 26 November 1863, the suit was already pending, cf. SUB Göttingen Cod. Ms. Jhering 10:2 (36).

²⁷ G. Jung: *Die zivilrechtliche Stellung der Frau im Großherzogtum Hessen. Über die Geschlechtersvormundschaft im 19. Jahrhundert*, Diss. Darmstadt/Marburg 1997, p. 131.

²⁸ Terminology according to O. Bülow: *Gemeines deutsches Zivilprozessrecht. Vorlesungsnachschrift von L. Fechter aus dem Wintersemester 1868/69*, Tübingen 2003, pp. 180 et seq.

²⁹ Resolutum, 27 December 1863, SUB Göttingen Cod. Ms. Jhering 10:2 (38). Jhering was notified on 31 December. The legal basis was a law dated 29 March 1836, “das Armenrecht in den Provinzen Starkenburg und

was 31 at the time³⁰. He had studied in Gießen and Heidelberg³¹ and was one of the youngest lawyers accredited to the *Hofgericht*³². In his statement of claim, he demanded “payment of a *Liedlohn* of twelve guilders, together with the interest due from the initiation of the proceedings, the documents currently in his [Jhering’s] possession *sine causa*, and payment of the legal costs”³³. He based his demands on the fact that the one-year term of service, to which his client had consented, expired. Jhering’s statement of defence is missing from the files. It can, however, be reconstructed from Curtman’s reply. Jhering claimed that his wife had negotiated “continuation of the tenancy (i.e. service) agreement”³⁴ with Caroline Kuhl before Pentecost, and the latter had agreed to extend the tenancy beyond the termination date. In a note written at the time, Jhering stated:

“Before the Feast of St. John (June 24, termination date, moving date) my wife said to the girl that if she wished to leave by Michaelmas [29 September], she should say so by St. John’s day, that my wife was willing to abide by her will, whereupon she stated: I have no intention to leave, there is nothing to gain from changing positions”³⁵.

It was only in the dispute with her mistress on Pentecost (May 24) that the claimant changed her mind. Once again Jhering:

“It was at least four or five weeks later, if not more, that my wife chided her for a gross misbehaviour, and she [Caroline] expressed her wish to leave saying, according to my wife: If you are not satisfied, feel free to look for another girl [...]”³⁶.

Oberhessen betreffend” (in:) *Nachträge zur Hessen-Darmstädtischen Civil-Processordnung vom Jaher 1724 und Peinlichen Gerichts-Ordnung vom Jahr 1726 mit Supplementen v. Darmstadt. 130*, Philipp Bopp, Darmstadt 1839, pp. 88–122.

³⁰ *Academische Monats-Hefte* 10 (1893), no. 112, pp. 188–189. (Christian Ludwig Karl) Wilhelm Curtman was born in Worms on 24 February 1833. His parents were Wilhelm Jakob Georg, a well-known educator, and Sophie Louise, née Gebhard. On 1 November 1864, he got married in Friedberg near Gießen where he lived and worked. His wife was Maria Anna Rosine Schaeffer, the daughter of Georg Karl Friedrich and Anna Maria, née Sebastiani. Curtman died on 21 July 1893 in Gießen, where he lived since his retirement.

³¹ W. Hoffmann: *Cubiculum Latinum*, Einst und Jetzt 25, 1980, pp. 169–179, 169. Curtman, “a highly educated man, whose Latin was as good as his German”, first registered in Gießen on 14 May 1850, cf. the register of enrolments and inscriptions at the University of Gießen, WS 1807/08 — WS 1850, compiled by Franz Kössler, pp. 29. There he became an active member of the *Corps Teutonia* student fraternity (rec. 1851), and also of the *Corps Rhenania* in Heidelberg (rec. 1852). In his old age, he was awarded great honours in respect of both, for instance as a founder of the so-called *Cubiculum latinum* in Gießen.

³² *Hof- und Staatshandbuch des Großherzogthums Hessen 1863*, Darmstadt, Verlag der Invalidenanstalt 1863, p. 386. “In der Theorie des Rechts und in seiner practischen Anwendung war er gleich bewandert”, Obituary, *Academische Monats-Hefte* 10 (1893), no. 112, pp. 188 et seq.

³³ Complaint dated 2 February 1864, SUB Göttingen Cod. Ms Jhering 10:2 (12) “[...] Zahlung des Liedlohnes mit 12 Gulden nebst Proceßzinsen von der Klagemittheilung an und die sine causa in seinen Händen befindlichen Urkunden schuldig zu erkennen unter dessen gleichzeitiger Verurtheilung in die Prozeßkosten”.

³⁴ “[...] Fortsetzung des Mietvertrags verhandelt”, SUB Göttingen Cod. Ms. Jhering 10:2 (11).

³⁵ “Vor Johannis (24 Juni: Kündigungs-, Zugtermin) sagte meine Frau dem Mädchen: sie solle, wenn sie Michaelis fort wolle, zu Johannis kündigen, meine Frau sei dies bei Willen ihren Wünschen, worauf sie äußerte: ich habe nicht die Absicht fortzugehen, mit dem Wechseln kommt Nichts heraus”. Note in Jhering’s hand, undated, SUB Göttingen Cod. Ms. Jhering 10:2 (18).

³⁶ “Vier bis fünf Wochen oder noch länger, als meine Frau ihr Vorstellungen gemacht hatte wegen einer groben Ungehörigkeit äußerte sie ihren Willen zu gehen, u zwar, wie meine Frau meint, in der Weise: Wenn Sie nicht zufrieden sind, können Sie sich ja nach einem andern Mädchen umsehen [...]”. *Ibidem*.

In Jhering's view, the notice therefore came too late, because after 24 June. Accordingly, the contractual relationship was automatically extended to the next regular termination date at the end of the year. Because of the claimant's breach of contract, he maintained, he incurred a loss of four guilders for the employment of a substitute, which he in turn demanded from the claimant.

In his reply, attorney Curtman denied the existence of such an agreement and the allegation that his client "had left her employment contrary to the terms of the contract, that she was still employed and that she had terminated too late"³⁷. Even police commissioner Nover, he maintained, had not succeeded in persuading her to stay on until the end of the year³⁸. For the same reasons, he also denied the claim for compensation.

Some time later, as the summer months passed, the *Stadtgericht* issued an interlocutory decision whereby the defendant, in view of the "closed procedure and rejected settlement [...] within an expiry period of 14 days"³⁹ was ordered to prove his allegations, namely:

"— that the continuation of the tenancy agreement after 6 October 1863 had been agreed between his wife and the claimant on Pentecost last year and that it could be terminated but quarterly on 1 January, 1 April, 1 July and 1 October and that this should have occurred three months earlier, and also, as regards the compensation claim, that the defendant, after the applicant's leaving the service, had been forced to employ another servant, and thus had been forced to pay four guilders more — after which further decision is to be made with regard to the merits and the costs"⁴⁰.

This was the judgement of evidence (*Beweisurteil*) which ended the first part of a *ius commune* civil action with the official closing of the files (*Aktenschluss*)⁴¹. The *Stadtgericht* had been presented with the relevant facts, had subjected them to an initial legal examination, had found them somewhat deficient and was, therefore, unable to reach a *Definitivkenntnis*, a final verdict. According to the general principles of evidence, the court thus imposed the burden of proof on the party for which the modification of the contract was favourable, in this case Jhering. The two-week

³⁷ "[...] daß sie contractwidrig weggehe, daß sie weiter gemiethet und zu spät gekündigt habe". Reply, 21 May 1864, SUB Göttingen Cod. Ms. Jhering 10:2 (11).

³⁸ *Ibidem*, 10:2 (11).

³⁹ "[...] binnen rechtszerstörlicher Frist von 14 Tagen", Ruling dated 7 July 1864, SUB Göttingen Cod. Ms Jhering 10:2 (33).

⁴⁰ "[...] daß bezüglich der Fortsetzung des Miethvertrags nach dem 6. October 1863 etwa um Pfingsten v[origen] J[ahres] zwischen seiner Ehefrau und der Klägerin verabredet sei, daß diese nur quartaliter zum 1. Januar, 1. April, 1. July und 1. October den Dienst verlassen könne und zu diesem Zweck ¼ Jahr vorher deshalb zu kündigen habe — ferner bezüglich der Entschädigungsforderung daß Beklagter nach dem Dienstaustritt der Klägerin bis zu Ende des Jahres durch Miethung eines anderen Dienstboten an Lohn für diesen 4 Gulden mehr als Klägerin erhielt, aufgewendet habe — wonach weitere Entscheidung in der Hauptsache und über Kosten erfolgen soll". *Ibidem*, 10:2 (33).

⁴¹ O. Bülow: *Gemeines deutsches Zivilprozessrecht* (in:) *Vorlesungszeitschrift von L. Fechner aus dem Wintersemester 1868/69*, Tübingen 2003, pp. 200 et seq.

period prescribed by the Hesse-Darmstadt Code of Civil Procedure of 1724 was a *Präklusionsfrist*, a limitation period⁴², a fact which was about to prove much to the detriment of Jhering.

B) PROCEEDINGS FOR THE TAKING OF EVIDENCE

The next stage of the civil action was the so-called *Beweisverfahren*, the proceedings for the taking of evidence, during which the party charged with the burden of proof had to provide the required evidence. The proceedings were governed by a strict set of rules: if the burdened party's evidence succeeded completely in convincing the court, conviction would immediately follow; if it failed to do so, there would be an acquittal. However, if the court found the evidence "only more than half convincing", the party with the burden of proof had to swear an *Erfüllungseid* (oath of completion) in order to win the case. If the court thought the proof "less than half" convincing, a *Reinigungseid* (oath of purification) was required. It was sworn by the opposing party and sealed its victory. In other words, conviction and acquittal were always subject to the swearing of an oath, following the final verdict, the *Endurteil*⁴³.

In this case the complex set of rules played out as follows: in order to deliver the first statement of proof, i.e. the existence of a contractual agreement between his wife and the claimant, Jhering called the police commissioner Nover to give evidence. Nover's hearing took place on 29 September 1864:

"On this day, the Grand-Ducal police commissioner Nover appears and declares, as properly instructed: My name is Lorenz Nover, Roman Catholic, police officer here, 52 years old, ad rem. It was in October last year, around the beginning of the month, that the defendant came to my office with the claimant, because, as I was informed by them, they were in dispute over the duration of the tenancy agreement of the claimant. It is customary here that in the case of an employment contract of unlimited duration the service can be terminated only on Michaelmas, Christmas, although there is no express agreement. I only remember that at that time the plaintiff declared, etc."⁴⁴.

⁴² P. Bopp: *Hessen-Darmstädtische Civil-Prozessordnung vom Jahr 1724 und Peinliche Gerichts-Ordnung vom Jahr 1726 mit Supplementen*, Darmstadt 1830, p. 50.

⁴³ O. Bülow: *Gemeines deutsches Zivilprozessrecht* (in:) *Vorlesungszeitschrift von L. Fechner aus dem Wintersemester 1868/69*, Tübingen 2003, pp. 234 et seq.

⁴⁴ "Im heutigen Termin findet sich der Großherzogl. Polizeirath Nover ein und erklärt, sachgemäß instruiert: Ich heiße Lorenz Nover, katholisch, Polizeirath dahier, 52 Jahre alt, ad rem. Es wird im October v[origen] J[ahres], etwa zu Anfang dieses Monats gewesen sein, als der Beklagte mit der Klägerin zu mir auf mein Geschäftsbüreau kam, weil sie Beide, wie ich von ihnen mitgetheilt erhielt, über die Dauer des Miethvertrags der Klägerin in Streit sich befanden. Ueblich ist es hier, daß bei einem Dienstvertrag auf unbestimmte Zeit, doch der Dienstaustritt nur auf Michaeli, Weihnachten, obwohl hierüber gerade keine ausdrückliche Anordnung besteht. Ich erinnere mich nur, daß damals der Kläger erklärte etc.". SUB Göttingen Cod. Ms. Jhering 10:2 (16).

Nover, it became clear, could not give direct evidence, but moved, as attorney Curtman slyly remarked, “from the field of actual perception to that of conclusion or even conjecture”⁴⁵. In the alleged exchange between the two parties, he went on, there had apparently been “not the slightest indication that the claimant had actually been questioned” about the matters at hand. After that, the witness appeared once more in court, but to no avail⁴⁶. The court’s final verdict duly stated that Jhering’s witness:

“failed to confirm that the claimant had actually declared that the tenancy agreement with the defendant had been concluded, but merely stated his private opinion that he had taken as much from her behaviour. This argumentation, therefore, cannot be considered consistent with the *Erfüllungseid* [...]”⁴⁷.

At this point of the proceedings, Jhering was in deep trouble. What saved him from immediate conviction was the court’s findings concerning the second statement of proof, the compensation claim. Here, Jhering named Kuhl’s successor, one Elisabeth Müller, as a witness. The court considered her testimony as sufficient, stating:

“that the argument of the defendant so far as the same was attempted by a witness is to be regarded as unsuccessful for the first proof of evidence, but that the second proof was to be accepted [...]”⁴⁸.

In avoiding Jhering’s immediate conviction, the court caused some confusion. There could only have been a claim for compensation under the second statement of proof if there had been a breach of contract in the sense of the first, whose demonstration just failed. Nevertheless, the court’s verdict entered into legal force, as Jhering did not lodge an appeal or demand re-entry into the proceedings.

C) THE FINAL STAGES OF THE PROCEEDINGS

Still, the argument by oath had to be made. The verdict being clear with regard to the first statement, the court had not yet decided which party should be called up to take an oath: would the claimant take a *Reinigungseid* or her adversary an *Erfüllungseid*? Thus, at the end of the period of appeal, attorney Curtman demanded that:

⁴⁵ “[...] vom Felde der thatsächlichen Wahrnehmungen auf das der Schlußfolgerungen oder gar der Vermuthungen”, Impugnationshandlung, 22 November 1854; SUB Göttingen Cod. Ms. Jhering 10:2 (14).

⁴⁶ Resolutum, 9 January 1865, SUB Göttingen Cod. Ms. Jhering 10:2 (19).

⁴⁷ “[...] nicht zu bestätigen, daß Klägerin den von der Beklagten Seite behaupteten Miethvertrag als wirklich abgeschlossen zugestanden habe, vielmehr nur seine individuelle Ansicht dahin äußert, daß er aus ihrem Benehmen eine solche Folgerung gezogen, hiernach aber die Beweisführung auch nicht bis zum Erfüllungseid erbracht angenommen werden kann [...]”, Entscheidung, 11 February 1865, SUB Göttingen Cod. Ms. Jhering 10:2 (21).

⁴⁸ “[...] daß der Beweis des Beklagten zum ersten Beweissatz, soweit derselbe durch einen Zeugen versucht wurde, für mißlungen zu erachten, der zweite Beweissatz aber als bis zum Erfüllungseid erbracht anzunehmen sei, unter Aussetzung der Entscheidung über die Prozeßkosten”. *Ibidem*.

“the defendant be forced to swear the oath with regard to the first statement within the prescribed period of time, otherwise he should be precluded”⁴⁹.

As an alternative, Curtman proposed that his client would take a *Reinigungseid*, thus making any *Erfüllungseid* on Jhering’s part redundant⁵⁰. And so it happened: a court hearing was arranged for Caroline Kuhl to “take the deferred *Reinigungseid sub praesentibus legibus* [...] on the morning of 10 April 1865, at 11 o’clock”⁵¹. Her adversary’s defeat was now imminent, which makes the ensuing powerplay on his part at least partially understandable.

Jhering, in an increasingly frantic effort to prevail, now brought to bear all his social prestige and standing as a Grand-Ducal professor and renowned jurist. With the generous support from the competent judge, *Assessor* Carl Bott, Caroline Kuhl’s court appointment to take the *Reinigungseid* was deferred and yet another round of settlement negotiations commenced. Jhering, his wife and judge Bott took turns in once again urging the claimant to acknowledge her guilt and abandon her claim. The relevant minutes are missing from the file in Jhering’s estate; attorney Curtman’s angry reply, however, has survived. It deserves to be quoted in full:

“With regard to the events of 10 April this year, strange news has come to my ears, so strange that one might doubt its truth.

First of all, I would like to call attention to the fact that, according to our legislation, a poor maidservant and a Privy Councillor of Justice, together with his wife, are perfectly equal before the law; accordingly, a maidservant must be allowed to take her oath even if this means that a professor of jurisprudence loses his court case and a police commissioner has given evidence. The hearing on the tenth of this month was intended precisely for the taking of the oath, because, according to Your Honour, the defendant did not succeed in delivering proof. My client, according to the reports I have been given, was quite willing to take the oath, but she could not get to it because of all the talk about settlement and dire warnings against perjury. However, she has not given her consent to the settlement. The claimant herewith declines any solicitation of settlement and wishes to be spared further requests for conciliation, while the defendant’s right to lodge a plea for perjury remains unaffected. If it should be true that even the reporting judge urged my client to admit her guilt, since she would not be burdened with any costs, I would like to state that I am prepared to forgo half of my attorney’s fee in favour of Privy Councillor Jhering, as long as my client receives her money in full.

Apart from that, I am seriously concerned that a further delay in the proceedings and the taking of the oath would necessitate a complaint of the sharpest criticism

⁴⁹ “[...] dem Herrn Beklagten aufzugeben nunmehr innerhalb bestimmter Frist bezüglich des ersten Beweisesatzes von dem vorbehaltenen Eide Gebrauch zu machen, gegenfalls er damit ausgeschlossen würde”. Vortrag, March 13, 1865, SUB Göttingen Cod. Ms. Jhering 10:2 (24).

⁵⁰ *Ibidem*.

⁵¹ “[...] den ihr über den Vorbeweis deferirten Eid sub praesentibus legibus auszuschwören”. *Ibidem*.

with the Hofgericht of the province of Upper Hesse, to which the case, together with witness statements concerning the events that occurred on the tenth day of this month, will be presently referred if I am not immediately provided with a satisfactory decision”⁵².

He resubmitted his request on 22 April⁵³. However, the court, following a request made by Jhering, ordered the temporary suspension of the oath proceedings in order “to give the claimant time to examine her conscience”⁵⁴. In the same ruling, attorney Curtman’s remarks were considered “highly superfluous and ineffective, [...] highly unsuitable and tactless”⁵⁵. It was not until 9 May that a new date was set. Before taking her oath, Caroline Kuhl was then ordered to see a clergyman who would explain to her in more detail the concept of taking an oath and the spiritual dangers involved in committing perjury⁵⁶. This specific measure was imposed on the basis of an obscure ministerial decree of 1813; in practice, however, “the oath taker was only required to let a clergyman explain the importance of the oath if the opponent expressly demanded it”, as a contemporary commentary on the pertinent article (§ 8) of the *Hessen-Darmstädtische Civil-Process-Ordnung* (Code of Civil Procedure) put it⁵⁷. Now Jhering pulled out all the stops.

He even took up the pen himself. In a lengthy writ dated 24 May 1865, he expatiated on the legal significance of Caroline Kuhl’s silence in answer to his wife’s notice. His ample remarks on the topic of tacit approval according to Roman law were supported by examples concerning the role of *facta concludentia* with *pro*

⁵² “Ueber die Vorgänge im Termin des 10[.] April dieses Jahres sind mir sonderbare Dinge berichtet worden, so sonderbar, daß sie mich fast an deren Wahrheit zweifeln lassen möchten.

Zunächst möchte ich darauf aufmerksam machen, daß nach unserer Gesetzgebung eine arme Magd und ein Geheimer Justizrath sowie dessen Frau Gemahlin vor dem Gesetze ganz gleich sind, daß demnach auch eine Magd zum Eide zugelassen werden muss, selbst wenn ein Professor der Jurisprudenz dadurch den Prozess verliert und ein Polizeirath Zeugniß abgelegt hat. Der Termin am 10. diesen Monats war aber, weil der Herr Beklagte seinen Beweis nach Ansicht verehrlichster Stelle nicht erbracht hatte, zur Eidesleistung bestimmt. Meine Mandantin war ferner nach dem mir gegebenen Berichte durchaus bereit, den Eid zu leisten, konnte aber vor ihr aufgedrungener Vergleichsprojecten und Meineidsverwarnung nicht dazu kommen, obwohl sie trotzdem ihre Einwilligung zum Vergleich nicht ertheilt hat. Die Klägerin lehnt hiermit jeden Vergleich ab und ich bitte, sie mit weiteren Vergleichsansuchen zu verschonen. Eine Anklage wegen Meineids bleibt dem Herrn Beklagten dann immerhin unbenommen. Wenn es wahr sein sollte, daß sogar von Seiten des Herrn Resipienten Assessor Carl Bott bemerkt worden ist, die Klägerin möge bei einem Vergleiche nur ihre Kosten übernehmen, sie brauche ja doch nicht zu bezahlen, so will ich mir erlauben, beizufügen, daß ich im Falle eines Vergleichs, wobei die Klägerin ihr alles Geld erhält, bereit bin, dem Herrn Geheimen Justizrath Jhering die Hälfte meiner Kosten nachzulaßen.

Im Uebrigen aber mache ich ernstlich darauf aufmerksam, daß eine weitere Verzögerung des Verfahrens und der Eidesleistung durch die schärfste Kritik beim Großherzoglichen Hofgerichte der Provinz Oberhessen gerügt werden müßte, an das die Sache augenblicklich mit Benennung der Zeugen über das Verfahren vom 10. diesen Monats abgegeben werden wird, wenn nicht sofort zufriedenstellende Verfügung an mich als den Officialanwalt der Klägerin ergeht [...]”. Vortrag, 15 April 1865, SUB Göttingen Cod. Ms. Jhering 10:2 (4).

⁵³ Auferlegte Erklärung, 22 April 1865, SUB Göttingen Cod. Ms. Jhering 10:2 (5).

⁵⁴ Resolutum, 22 April 1865, SUB Göttingen Cod. Ms. Jhering 10:2 (4).

⁵⁵ *Ibidem*.

⁵⁶ Resolutum, 9 May 1865, SUB Göttingen Cod. Ms. Jhering 10:2 (s.n.).

⁵⁷ P. Bopp: *Hessen-Darmstädtische Civil-Prozessordnung vom Jahr 1724 und Peinliche Gerichts-Ordnung vom Jahr 1726 mit Supplementen*, Darmstadt 1830, p. 59.

herede gestio. Finally, he expressed the hope that the court would regard his scientific proof “as given”, dismiss his opponent’s oath as “redundant” and rule in “the sense which I have outlined”⁵⁸. He also demanded restitution and, in an increasingly erratic hand, offered further factual evidence on the conduct of the claimant at the hearing of 10 April, calling none other than judge Bott to give evidence⁵⁹. All this was highly inconsistent with the fact that the *Beweisverfahren* had long been closed, preclusion had occurred and the period of restitution had expired. Lastly, Jhering angrily rejected attorney Curtman’s mock offer regarding his legal fee:

“I do not know what gave him [i.e. Curtman] the confidence to dare make me such an offer. I can therefore only see this as an expression of his own judgment as to the value of his own pleadings delivered in this case. In any case, it pleases me that I will not be forced to accept the offer of half (the poor salary) from a lawyer for the poor”⁶⁰.

The trial subsequently came to an abrupt end. On 3 July 1865, Caroline Kuhl, in the presence of her lawyer, was allowed to take a *Reinigungseid*. Four days later, the court ruled:

“that the defendant’s argument has been considered to be unsuccessful, and that he is ordered to pay the sum of twelve guilders in wages with 5% interest from 23 February 1864, onwards, to return the claimant’s service book and certificate of nationality and to bear the costs of the proceedings”⁶¹.

The last document in the file is a receipt:

“In the case of Karoline Kuhl from Biedenkopf, claimant, against the Grand Ducal Professor, Privy Councillor of Justice, Dr. Jhering, of Gießen, defendant, concerning a claim of 17 guilders, 54 kreuzer in taxes and 1 guilder, 52 kreuzer in insinuation fees, 19 guilders, 46 kreuzer in total, which the defendant has paid in full. Gießen on 15 September 1865. Grand Ducal Stadtgericht Gießen. Muhl”⁶².

⁵⁸ “Ich gebe mich der Hoffnung hin, dass diese in dem von mir entwickelten Sinn ausfallen u. demgemäß mein Beweis als erbracht, der Eid der Clägerin aber für überflüssig erklärt werde”. Erklärung und Antragstellung, 24 May 1865, SUB Göttingen Cod. Ms. Jhering 10:2 (1).

⁵⁹ *Ibidem*.

⁶⁰ “Ich weiß nicht, wodurch ich ihm d.h. Curtman den Muth gemacht habe, meinerseits es verschuldet habe, daß er es wagt, mir ein solches Anerbieten zu machen und kann daher darin nur den Ausdruck ... seines eigenen Urtheils über den Werth seiner in dieser Sache gelieferten Proceßschriften erblicken, jedenfalls freue ich mich, in der Lage zu sein, das Anerbieten des halben Armenrechts von Seiten eines Armenadvokaten nicht annehmen zu brauchen”. *Ibidem*.

⁶¹ “[...] daß die Beweisführung des Beklagten für mißlungen zu erachten und derselbe zur Zahlung der libelirten zwölf Gulden Lohn mit 5% Zinsen vom 23. February 1864 an schuldig sei, auch das Dienstbuch der Klägerin und deren Heimathschein an diese herauszugeben und die Prozeßkosten zu tragen habe”. Urtheil, 7 July 1865, SUB Göttingen Cod. Ms. Jhering 10:2 (41).

⁶² “In Sachen der Karoline Kuhl von Biedenkopf, Klägerin, gegen [den] Großherzoglichen Professor, Geheimen-Justizrath Dr. Jhering zu Gießen, Beklagten, wegen Forderung über 17 Gulden 54 Kreuzer fiskalische Taxen und 1 Gulden 52 Kreuzer Insinuationsgebühren — Summe 19 Gulden 46 Kreuzer, welche Beklagter anhier bezahlt hat. Gießen den 15. September 1865. Großherzogliches Stadtgericht Gießen. [signed by Stadtrichter Carl Theodor] Muhl”. Quittung, 25 September 1865, SUB Göttingen Cod. Ms. Jhering 10:2 (43).

In addition, there were the attorneys' fees. It is not known whether Jhering accepted the discount so brazenly offered by Curtman.

4. JHERING'S DEFEAT

Jhering's crushing defeat merits some explanation. How did it happen that one of the greatest lawyers of the nineteenth century was apparently not capable of assessing his own chances in court? How was it that a legendary legal expert seemed to know so little about law procedures and their internal dynamics? How could Jhering emphasize the importance of court practice and still so intensely despise his adversary and her legal representative? Answers to these questions may be found in some of Jhering's less likeable character traits and perhaps also in his conduct during the trial, which must be viewed against the background of his professional self-image and his notions about *Rechtswissenschaft* as a science. What is striking is not just the fact that he lost the case, but the nature and seriousness of his failure.

To begin with, Jhering's apparent hesitation and delay in intervening in the procedure is quite noteworthy. Judging by the documents available, he only introduced substantiated claims of his own at a very advanced stage when certain irrevocable steps had already been taken. This may have been due to his relative lack of practical experience; it also suggests that, to Jhering's mind, court pleadings as such were not of primary importance. According to the beliefs of the Historical School, law, by virtue of its immanent spirit, was bound to emerge, regardless of deadlines or preclusions. The notion that the dispute could be decided not by applying the scientific methods of carving out legal truths from normative texts but by court proceedings within a specific timeframe and a fixed set of procedural rules seemed quite alien to him. Taken to its extreme, this epistemology of law would actually render trials obsolete. In reality, however, Jhering's expectations would be played out not in the spirit world of the Historians, but in a simple courtroom. Here, the great jurist was woefully out of his depth. The reasons for Jhering's unshakeable belief that he was in the right against his former maidservant and his profound mortification at the defeat, which was still palpable in 1872, lie precisely in this peculiar displacement in his actions and expectations, in the failed transition from his accustomed social role of civil law professor to the role of defendant in a civil action.

Besides the confusion in his own situation between two different frameworks of law, i.e. "law in books" and "law in action"⁶³, Jhering fell victim to yet another displacement, resulting in a grave error in substantive law. His main argument during the trial was the contractual duty to terminate on the part of his opponent. But

⁶³ This famous distinction was introduced as late as 1910 by the chief propagator of Jhering's ideas in America, Roscoe Pound (*Law in books and law in action*, 44 Am. L. Rev. 12 1910).

why would someone in Caroline Kuhl's situation feel the need to submit such a document, knowing that her fixed-term contractual relationship was bound to end anyway once her year of service had ended? Moreover, why did Jhering, of all things, turn to the police for help when the contractual dispute arose between him and his maidservant, a reaction which seems odd if not downright excessive? The answers to these questions lie in Jhering's particular notion of his relationship with Caroline Kuhl as an employee. In his opinion, it was not governed by private law, as might be expected, but by *Gesinderecht* (manorial law), a curious mixture of civil, administrative and criminal law, applicable to menial and farm workers throughout large parts of Germany⁶⁴. Among the various laws codifying *Gesinderecht*, the Prussian *Gesindeordnung* of 1810 stands out. Together with its ancillary laws, it "was of substantive validity [...] far beyond its territorial scope"⁶⁵. In the Rhine Province west of the Grand Duchy, it had even been formally enacted. Jhering's apparent belief in the applicability of the Prussian *Gesindeordnung* in the city of Gießen is expressed, albeit indirectly, in statements he made during the trial and in the Vienna lecture. His simultaneous assumptions, all contrary to *ius commune*, of a duty of termination on behalf of his former maidservant, fixed periods of notice and the existence of special police prerogatives in the matter very clearly point to a flawed instance of *Rechtsgefühl* on his part. In reality, however, relationships between servants and masters in Gießen were not subject to *Gesinderecht*, but only to the rules of contract according to *ius commune*. This was admitted, albeit reluctantly, by Jhering's own witness, police commissioner Nover. He maintained that periods of notice were "customary" in open-ended contracts⁶⁶, but not a matter of positive law; in fixed-term contracts, on the other hand, they were virtually unknown. Quite ironically, Jhering, a great expert in Roman law, had supplanted them in his mind with a fantasy of a common *Gesinderecht* and continued to do so even in 1872⁶⁷.

Jhering's preference for the universal over the particular can also be observed in other cases. In 1862, he gave two expert opinions on behalf of the Swiss city of Basel in its litigation against its neighbouring canton regarding the ownership rights of the city's former fortifications (*Basler Schanzenstreit*)⁶⁸. The Swiss Federal Tribunal ultimately decided in favour of Basel. Its verdict, however, was not based on the belligerent opinions delivered by Jhering and his colleagues on the intricacies of public property law according to *ius commune*, but on the interpretation of an

⁶⁴ Wilhelm Kähler counted no fewer than 59 manorial legislations, 16 of which in Prussia, see W. Kähler: *Gesindewesen und Gesinderecht in Deutschland*, Jena 1896, p. 107.

⁶⁵ Th. Vormbaum: *Politik und Gesinderecht im 19. Jahrhundert, vornehmlich in Preußen, 1810–1918*, Berlin: Duncker & Humblot 1980, p. 169, with reference to W. Kähler: *Gesindewesen und Gesinderecht in Deutschland*, Jena 1896, p. 219.

⁶⁶ *Protokollabschrift der Zeugenaussage Lorenz Novers*, 29 September 1864, SUB Göttingen Cod. Ms. Jhering 10:2 (16).

⁶⁷ R. von Jhering: *Der Kampf um's Recht*, Vienna 1872, p. 55.

⁶⁸ W. Kundert: *Der Basler Schanzenstreit von 1859/62*, BZGA 73 (1973), pp. 157–194.

earlier arbitration judgement between the parties. “The extensive expert opinions of the German jurists” to one of the Swiss judges:

“made it very difficult for the judge to perform his duty due to the manner of dissection and disintegration of the topics of the original judgement, the application of certain theories and the consequences derived from these theories, involving rather strange ideas in the process [...]”⁶⁹.

Eventually, he decided to “put aside all these opinions and focus on the wording of the original judgement in order to grasp its meaning”⁷⁰.

In the dispute over the Basel fortifications, the marginal role played by the Pandectist school’s *Rechtswissenschaft* could still be downplayed. After all, it was eventually on the winning side — if one accepted Jhering’s side to be the only truly scientific one, which he himself certainly did⁷¹. Yet the fact that the arcane debates between Jhering and his colleagues Dernburg, Keller and Rüttimann, concerning Roman law “did not interest the Swiss Federal Tribunal in the least”⁷², as Marie Theres Fögen put it, was obvious to those who read the court’s reasoning.

In this respect, the case of *Kuhl v. Jhering*, which, quite contrary to the Swiss case, was tried before a *ius commune* court, was rather similar; this time, however, the great Mandarin was defeated. In Gießen, his deliberations were not on property law but on contract law, and they were disregarded by the court not because they were deemed inapplicable, but because he did not succeed in proving his claims and had not complied with the timeframes in place. Obviously, Jhering did not manage to cope with the transition from the big picture of international arbitration to the much smaller sphere in the provincial capital of Gießen, nor was he able to switch from being a legal expert to being a defendant in a civil action. Because he did not even recognize that such manoeuvres were required, he eventually lost the goodwill of the court which had, throughout the proceedings, been quite sympathetic to his cause. This experience clearly formed the background to his scathing criticism of the traditional epistemology of law, put forward in 1872, which, in his opinion, contained:

“an error pregnant with the most ominous consequences imaginable, because it feeds man with hope where he should act, and act with a full and clear consciousness of the object aimed at, and with all his strength. It feeds him with the hope, that

⁶⁹ “...dem Richter seine Aufgabe sehr erschwert durch die Art und Weise der Behandlung des Gegenstandes, durch die Zergliederung und Zersetzung der Orte des Urtheils, durch Unterstellung desselben unter gewisse Theorien, und durch die Folgerungen welche man aus diesen Theorien wieder ableitete, und wobei man ganz fremdartige Anschauungen hineingezogen hat” (in:) *Der Rechtsstreit über die Basler Festungswerke. Bericht der Delegirten der h. Regierung von Baselstadt, Vorträge der Parteien, Referat des Instructionsrichters, Verhandlungen und Urtheil des h. Bundesgerichtes über die Ansprüche des Kantons Baselland an den Basler Festungswerken, vom 28. und 29. October 1862, nebst zwei Beilagen*, Basel 1862, p. 105.

⁷⁰ *Ibidem*.

⁷¹ M.Th. Fögen: *Lob der Pandektistik* (in:) R.M. Kiesow, R. Ogorek, S. Simitis (eds.): *Summa. Dieter Simon zum 70. Geburtstag*, Frankfurt am Main 2005, pp. 179–205, 187.

⁷² *Ibidem*, p. 194.

things will take care of themselves and that the best he can do, is to fold his arms and confidently wait for what may gradually spring to light from that primitive source of all law called the natural conviction of legal right”⁷³.

Apart from his blind confidence in the workings of *Volksgeist*, rejected so vividly in subsequent years, Jhering’s disregard for particularity is the most striking finding in *Kuhl v. Jhering*. For Jhering, small-scale law, controlled without exception from the macro level, could have absolutely no significance of its own; learned law always prevailed. It is highly ironic that Jhering argued with *Gesinderecht* when he should have done so on the grounds of *ius commune*, thus implying that the manorial law for servants was on the same epistemological level with the Roman sources. In *The Struggle for Law*, he maintained this astonishing position, as seen in the famous sentence: “When the master can no longer insist that the servant shall do his duty — in other words: enforce the *Gesindeordnung*, — when the creditor cannot enforce payment on his debtor, when the public attach no great importance to the correctness of weights and measures, can it be said that nothing is imperilled but the authority of the law?”⁷⁴.

5. WHOSE STRUGGLE?

A sudden change in the environment of an individual, calling into question one’s accustomed views of oneself and one’s ways of dealing with things in one’s immediate surroundings and in the world at large, is known as “breaking frame”, a concept introduced by the sociologist Erving Goffman in 1974⁷⁵. When a person, “for whatever reason, [...] breaks frame and perceives he has done so”, he maintains:

“the nature of his engrossment and belief suddenly changes. Such reservations as he had about the ongoing activity are suddenly disrupted, and, momentarily at least, he is likely to become intensively involved with his predicament; [...] He loses command over the formulation of viable response. He flounders”⁷⁶.

Jhering’s hapless actions may well be understood against the backdrop of his surprising and disturbing experiences during the trial, again according to Goffman, as a form of “involvement”, a situation “of being carried away into something — in a word, engrossment” without any “means of distinguishing strips of untransformed activity from transformed ones”⁷⁷, established patterns of action and expectation in an accustomed life as a professor as distinct from the drama of the courtroom.

⁷³ R. von Jhering: *The Struggle for Law*, Chicago 1879, p. 13.

⁷⁴ R. von Jhering: *The Struggle...*, *op. cit.* (transl. from the fifth German edition by John J. Lalor), p. 69, following R. von Jhering: *Der Kampf um’s Recht*, Vienna 1872, p. 55. Unchanged in later editions.

⁷⁵ E. Goffman: *Frame Analysis*, New York 1977, pp. 345 et seq.

⁷⁶ *Ibidem*, pp. 378 et seq.

⁷⁷ *Ibidem*, p. 347.

Jhering experienced the failure of the historicist paradigm of law in a very personal and painful way. Instead of confirming people's "real life" experience with their established notions of top and bottom of society, the legal process yielded a completely unexpected result. In a trial of civil law, a person of the lowest social order, and a woman at that, prevailed against a police commissioner, a ruling judge, a priest — and even more importantly — against science itself, embodied in Jhering's own person. The verdict, which mocked all certainties regarding power relations and gender roles and which empirically proved that law was not subject to historical inevitability, but was first and foremost a matter for the courts, seems to have genuinely horrified Jhering. This may seem strange, as the second edition of *Geist des römischen Rechts*, whose completely revised introductory chapter dealt with the very same problems, was near completion at the time of the trial. The verdict with its sudden and very public confirmation of the theoretical findings on the role of "life" in law, however, seems to have made a lasting impression on him.

Now, in conclusion, let us return to the question posed at the beginning: whose struggle was it? Who fought the original *struggle for law*? As we have seen, Jhering's remarks in the Vienna lecture on his former opponent are far from flattering; in the final version, published in 1872, she is not even mentioned. And yet there are good reasons why Caroline Kuhl can be identified as the hidden leading character in *The Struggle for Law*. It was her who fought for her rights against the perceived wisdom of the popular spirit and the logic of organicist development. It was her who fought for her "hard-earned wages" committing her entire personality, courage and determination. Her fight, if we follow Jhering's reasoning, was instrumental not only in her achieving her personal right, and thus in becoming a true personality, but also in attaining objective law. Finally, her fight and her victory against all odds comprised the core and starting point for Jhering's theoretical work on *Kampf um's Recht* and, even more importantly, on *Der Zweck im Recht* (Law as a means to an end). Thus, Caroline Kuhl, represented by the formidable Wilhelm Curtman, may be rightly seen as the true heroine of Jhering's literary bestseller, one of only a few law books from the nineteenth century with real global significance. Unsung until today, 145 years after the publication of *The Struggle for Law*, she deserves to be remembered as such.

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INGE KROPPEMBERG, NIKOLAUS LINDER

DOMESTIC TRIALS, AND *THE STRUGGLE*
FOR LAW: JHERING'S LEGAL DISPUTE
W HIS MAIDSERVANT AS A FORMATIVE INFLUENCE
ON HIS CONCEPT OF LAW

S u m m a r y

In 1864 and 1865, during close to a year and a half, the famous German law professor and renowned legal expert, Rudolf von Jhering, was caught up in a civil action in his then hometown of Gießen. It had been brought against him by his former maidservant, a certain Caroline Kuhl, who sued him for three months' wages. Years later, towards the end of his tenure in Vienna, Jhering vividly recalled this trial as a prime example of some of the deficiencies and absurdities of modern law which he so scathingly criticised. In the published version of *Der Kampf um's Recht*, which appeared in 1872, however, there is not the slightest mention either of Kuhl or the lawsuit she dared to bring — and win — against one of the greatest lawyers of the century.

This paper presents a historical reconstruction of *Kuhl v. Jhering* based on the court papers from Jhering's estate preserved at the *Staats- und Universitätsbibliothek* (SUB) Göttingen, followed by an assessment of Jhering's actions and behaviour before and during the trial. It finishes with a discussion of the lawsuit's significance as a provider of ideas and, indeed, a prequel to Jhering's single most successful work *Der Kampf um's Recht*, one of the few 19th century law books with a real global reach, which is still popular today.