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LEGAL STUDIES ON THE CONTINENT.

ESCHBACH. *Introduction à l'étude du droit, contenant outre l'Encyclopédie juridique 1° un traité de droit international, 2° des institutions littéraires de droit ancien et moderne et 3° un résumé des législations Égyptienne, Hébraïque, Hellenique et Indoue. Troisième édition. Paris : 1856. pp. 615.*¹

The higher scientific study of the law in France is especially due to the influence of German jurisprudence ; it entered on three sides, from Belgium, from Strasburg, and from Geneva, but it soon found a centre in Paris, itself, which is of still greater importance. The first coalition of German and French jurists started in 1819, when the writer, then in Liege, at the suggestion of his friend, Blondeau, (who died in 1853,) a Belgian by birth, in connection with Jourdan,

¹ A work upon the study of the law in Europe, has long been wanted here. The difficulty in the way of our young jurists has always been twofold : the best of these volumes are written in German, and very few of us ever find our way beyond the pages of a light French author ; there have been, it is true, translations from the former into the latter, but, almost without exception, such works have been useless for our purpose. It was long a wish of the translator of the following pages, to be able to present some of the results of German scholarship in the pleasant form so characteristic of French acuteness, but this purpose is in great part fulfilled by an elaborate review from the pen of Mr. Warnkönig, one of the most voluminous elementary writers in Germany, of the work of Mr. Eschbach, an Alsacian, Profes-

du Cauveroy, Demante, and others, began to edit the journal "Themis;" it opened with a general sketch of the history of German jurisprudence, from the year 1789. In 1820 Rossé joined in the movement in the *Annales de Législation*. In Paris, Jourdan, who died in 1826, was the active leader of the new school; he was followed in 1828, by Lerminier, an elegant scholar, educated in Strasburg, who first appeared in *The Globe*, but afterwards wrote more important works; then came Klimrath, a thorough German in feeling, and when "Themis" ended in 1830, with its tenth volume, the *Revue*, edited by Fœlix and Wolowski, became the organs of German jurisprudence, which by degrees followed in France close on the footsteps of Germany itself, and found in Laboulaye, the most active friend, and a leader who soon outrivaled all the others. He now edits, supported powerfully by Königswarter, Ginoulhac, de Roziere, Dareste, and many others, the *Revue historique du Droit*. Long since, the direction of jurisprudence has been entrusted to a second generation, and one of these is the author of the work now under discussion, Prof. Eschbach, of Strasburg. It belongs to a class of works known in Germany for a century, under the name of Legal Encyclopædia, but of new birth in France. The earlier works of this kind in our century, are by Dupin, Le Page, and L'herbette, of which only the first are remembered, and that because they are used by the law students in preparing for their examination. In 1828 appeared the *Principes Généraux du Droit*, by Rey, now quite forgotten; in 1829, Lerminier's classic *Introduction à l'histoire générale du droit*, which has outlived many new editions. In 1840, under the Minister Cousin, the Law Schools

of the Code Napoleon in the Faculty of Strasburg. This article was printed in one of the best German law journals, the *Kritische Zeitschrift für die gesammte Rechtswissenschaft*, edited by Dr. Marquardsen, one of the most promising German jurists of the day, so that there is on every side, guaranty of the value of the original work, of the Review, a translation of which is here submitted, and of the journal in which it originally appeared. If it shall, to any extent, assist our fellow-students in the vast and mazy region of continental jurisprudence; if it prove of interest, as a means of acquaintance with the labors of foreign jurists, their methods of research, and their means of improvement, the purpose of the translator will be fully accomplished.

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were directed to begin the study of the law by an encyclopædia; Dr. Eschbach, then professor suppléant of the Law Faculty of Strasburg, received instructions to deliver this lecture; the volume—a third edition of it is now before us—entitled *Introduction à l'étude du droit*, is the fruit of his cultivation of this branch of jurisprudence.

The newest edition of Eschbach's work, is very different from the two earlier, and, as its title suggests, more than a mere legal encyclopedia; it is a work of such plentiful contents, as to be of peculiar value in enabling us, in an easy way, to become acquainted with the authors who have written on the different branches of the law, both of modern and ancient France, by means of a cursory history of its literature. The volume has three parts: the 1st, an introduction to the study of the law generally, (pp. 1–139); the 2d, the divisions, the history, and the sources of French law, (pp. 140–419); the 3d, the subordinate legal sciences, (pp. 420–616). The book is arranged in the following order: the first section begins with the most important foundations of the law, as, distinction du droit et de la morale; rapports entre le droit et la morale, notion de la justice, acceptions diverses du mot droit, science du droit ou jurisprudence, division du droit en général, (pp. 1–19); then follows chap. 1st, droit naturel, (pp. 16–25); chap. 2d, du droit positif, in three sections: 1, sources du droit positif, (pp. 26–40); 2, branches du droit positif, (pp. 41–53); 3, droit des gens international, (more than a general sketch of international law, pp. 53–139). In his analysis of the principles of the law, the author starts with the empirical fact, that man is gifted with freedom of will, and that of a twofold sort, an inner liberty of conscience in his purposes, and an outer, sole control of his own actions, in both, however, regulated by duties; in the first, those moral duties that control his conscience: in the second, those legal duties born of reason and protected by government, limiting his conduct towards other men. The author thus wins a basis for his whole theory, repudiates Kant's antinomy between law and morals, by saying that morals persuade us always to do what the law commands, and to abandon what it forbids; on the other hand, the law never sanctions anything opposed to

morals. This he follows up with the explanation of the idea of justice, which he makes twofold, (justice *extérieure et intérieure*), first, to give to each man the legal responsibility prescribed by the law of the land; second, to ascribe to each man the moral compulsion which his conscience binds on him. In the latter, the author does not go beyond the comparison of legal and purely natural duties, *devoirs de justice et de charité*, as it is so well distinguished by Cousin; but in § 4 he turns at once to the real legal discussion, explains the different meanings of the word law; gives in § 5 the character of jurisprudence, and, after some general remarks on legal hermeneutics, closes with the reasons for dividing law into natural and positive. By the former, he understands the principle of the restraints of our native freedom, necessarily imposed upon us by the relations of mankind as a great community, which government must, although it does not always sanction, and may modify out of regard for the general welfare of all. Whatever agrees with this necessary law, whether it is found in the statutes of the law-maker or not, is, according to our author, Natural Law; whatever varies from it, is simply Positive Law, which includes the natural law sanctioned by the government; he continues, (p. 15): *il résulte de ce que précède, que la division du droit en naturel et positif, n'est pas une invention scolastique et de doctrine . . . et les devoirs réglés par le droit naturel sont tous aussi parfaits que ceux imposés par le droit positif.*

As the author proceeds to give in detail the contents of the different divisions of the law, he discusses first natural law, next the main branches of positive law; and in treating of the former, as well as of the international law which belongs to the latter, gives the most famous authors on the subject; a method which he adheres to in the discussion of the encyclopedia of the modern, as well as of the older French law.

In treating, very cursorily too, in his first chapter, of natural law, the author gives in § 10 only a general explanation, without any exact scientific analysis on the basis of any system of philosophical jurisprudence. He takes for granted, the reality of legal truths received for their own sake, which are implanted in the feeling of

right that is common to all mankind, and lead us to the discovery of those rules of justice which exist in the nature of things; he proceeds on the supposition that the Code Napoleon recognizes the existence and binding power of such natural rules of law, (and quotes, to that end, an expression of the jurist Troplong, p. 17,) and applies to it § 11, on the use of natural law; he cites art. 565, 1135, 1854 of the code, while he disregards art. 1268, where it says: *la répétition n'est pas admise à l'égard des obligations naturelles, qui ont été volontairement acquittées*; a legal principle which does not help us to determine what the authors of the code really did mean by *obligation naturelle*.

The brief history of the literature of natural law in § 12, is only bibliographic. The historical development of the science which would have been in place here, is passed by; although the modern writers on this branch are cited, and among them fourteen Frenchmen. (pp. 25, 26.)

The first division of the section devoted to positive law, treats of its sources; it is not purely abstract nor strongly dialectic, but confused by the mixture of Roman and French principles. Thus, in § 15, the division into *jus scriptum* and *non scriptum*, is made up partly from French, partly from Roman law. The explanation of statute law does not present its elements in a logical shape, but says, only generally, that the laws must proceed from the sovereign power, and those of the constitution from its constituents; they must contain general principles, and not rules for particular individuals or conditions; they should have no retroactive force—are either directory or prohibitory—permissive laws do not really exist. In § 29 we are told that the principle of the Roman law, *juris ignorantia nocet*, does not exist according to the code, in civil processes in France; and in § 31, *la loi est personnelle ou réelle*, which is applied by the author to the doubtful doctrine of *droit international privé*.

The reason for the binding force of the *jus non scriptum*, given by our author, is not only (v. § 21) the usual one, that it is law silently sanctioned by the people, but, further, that it is allowed by the law maker, which is true enough for France, because the code civil permits it to be used only exceptionally as prescribed in fifteen arti-

cles (cited p. 35). The author here takes occasion to discuss the question of codification, in criticisms on the works of Thibaut, v. Savigny and Ch. P. Cooper, and rejects the views of the last named. The *jus non scriptum* is in his view (p. 32) that of the infancy of nations, and can as little serve an advanced people, as the clothes of children fit grown up men. As a branch of the *jus non scriptum*, he discusses, in § 22, the doctrine des auteurs, in § 123, the learning so important in France, on jurisprudence des arrêts, and gives, on p. 40, the interpretation of a law of April 1, 1837, in regard to the final decrees of the Cour de Cassation on appeals, which have a really binding power only in exactly similar, not however in analogous cases.

The second division of the chapter on positive law, is occupied by a register of the contents of its different branches, according to the needs of French students, and in his system the main distinction is, like that of Montesquieu, into private law, public law, and international law. The first is:

1. Theoretical or common law, and that again general and special.

2. Practice or *procédure civile*.

The second is:

1. Constitutional law, (*droit constitutionnel ou politique*);

2. Administrative law, (*droit administratif*); and

3. Criminal law, theoretical, (*droit pénal*) and practical (*instruction criminelle*, §§ 26-37.)

The Third is international law, (*droit des gens*, pp. 38-91.)

Under general private law, the author distinguishes *jus personarum*, *rerum*, *actionum vel obligationum*; nor does he claim for France any peculiar private law, not even mentioning its commercial code as such. In § 33 of constitutional law, the author endeavors to give an exact meaning to the idea of State, and gives as its requisites, that it should exist in one territory, and that there must be a sovereign power.

The national government he divides into *pouvoir inspectif*, *législatif*, and *exécutif*; the contents of the sections devoted to public law, are brief, and expressed in popular language. The German

readers of Prof. Eschbach's work will be surprised to learn that international law is discussed with a minuteness which bears no proportion to the space given the other branches of the law, and is nothing less than a complete system in itself. The author did this wittingly, and intimates it on his title-page, in the phrase "traité élémentaire de droit international." This intentional addition is to be attributed to the fact that in the French law schools (except Paris and Strasburg) no special lectures are reserved for international law, and no examinations include it. Since, however, an acquaintance with it is certainly of great service to the future lawyer, an opportunity must be found to introduce it to the French student. What could be fitter than the cours d'introduction à l'étude du droit, and when better than in the general introduction; for international law is the common law of all civilized nations of the world, and this may well justify our author. His method of discussion is indeed a satisfactory one, and belongs to the most successful parts of his work. Very useful is the § 1, Développement historique du droit international, with its references to the newest literature of the subject; we do not feel called upon to examine it more attentively here, but it is a most important addition to the literature of international law.

The second part of the Encyclopedia of our author is, as we have said, dedicated to an examination of French law; first dogmatic, in ch. 1, Principales branches du droit Français, §§ 92-108, and then, with great detail, historically, in ch. 2—Services du droit Français, §§ 109-212.

At first blush this division looks unadvisable as an ante-historic one. The effects of the development of law in France are discussed in advance of the causes; but the author must have had reasons for this method; most likely these are to be found in the fact that he thinks the first demand of the nascent jurist is knowledge of the real existing condition of the law. His interest in learning how it became thus and so, will then be on the increase, while, perhaps, a long historical introduction might have fatigued him so much, that he would not have turned with necessary freshness of mind to the study of practical law.

The author begins, in § 92, with an historical sketch of French legal history, followed by an account of the contents of each of its branches, so that in each, and often in subdivisions, the jurists who have written on these subjects are cited in alphabetical order; accompanied by short notices of their origin, where and when born, what they have written, and when they died. At the end of this section we find the authors of general works on the whole subject of French law, including Dalloz and A. Dupin, Guizot, Favart de Langlade, Merlin, &c.; in § 94, a short account of the code civil; § 95, treats, in detail, of its numerous commentators, and their works and monographs, so as to give a particular value to foreign jurists; in the same way, §§ 98, 99, discuss the Code de Commerce and its scientific treatment; in §§ 100, 101, the Code de Procédure; in §§ 102, 103, Constitutional Law as late as the year 1852; §§ 104, 105, du droit administratif; §§ 106, 107, du droit criminal; and § 108, du droit international Français.

In regard to the scientific treatment of the different branches of French law, it is to be wished that the author had not confined himself to bibliographical notices, but had given a brief account of the method of each author, to show how it first appeared in France, and how it gradually transformed itself into what it now is. It would, for example, be highly useful to know whether the first interpréters of the code civil, like Merlin, were thoroughly learned in old French law, and understood the spirit of its more modern additions. How was it with many newer authors, who confine themselves to a bare rational interpretation of the text? What influence did the translation of Zachariaï's Text-Book of French Law exercise in France, and how far the new historic school has found merit in the eyes of the law students?

The history of the sources of French law is divided by the author into three periods: The ancient comes down to 1789; the modern to 1852, and the contemporaneous from the establishment of the present empire. It deals first with the Roman law, next with canonical law, the so-called legislation des barbares, the feudal law, and lastly, with the droit coutumier and droit des ordonnances.

The contents of the sections devoted to Roman law, are—

(a) A history of the sources of the Roman law, down to the completion of the laws of Justinian.

(b) A history of the literature of the civil law, from Justinian to our own day.

The author says that the Roman law is, in France, foreign, exotic, and not of original growth, which is true only of the Justinian law, but not of that which preceded it, for that was as much domesticated in Gaul, as in the other parts of the Roman Empire, and as Savigny has clearly proven, in the one half of France was so long accepted, that it was called the *pays du droit écrit*. Our author's examination of the history of the sources of Roman law, is not purely historical, nor arranged in periods, nor very pragmatic; but a description of the different sources, one after the other, very much as in Berryat St. Prix's *Histoire du droit Romain*, a work which seems to have served as our author's model in his literary history, too, but without any slavish imitation. The sections are numbered as follows:

- (a) *Jus civile Papirianum.*
- (b) *Lex duodecim tabularum.*
- (c) *Jus Flavianum et Aelianum.*
- (d) *Leges, Senatus consulta, Plebiscita.*
- (e) *Mores majorum.*
- (f) *Jus honorarium.*
- (g) *Jus gentium.*
- (h) *Auctoritas prudentium.*
- (i) *Constitutiones principum, (§§ 111–124.)*

This is preceded by an estimate of the present importance of the Roman law, which is no longer valid *ratione imperii sed rationis imperio*, it is therefore become *raison écrite du droit*, and hence the value of its study.

The author recognizes the value of the critical study of the fragments of Roman law, as it has developed itself in Germany, and gives it its place in §§ 114, 122, 124; he recognizes and adopts, too, the prevailing German views in regard to the sources of law. The history of the creation of the *corpus juris civilis* in §§ 125–131,

is likewise formed on German authority. In § 132 the collections of Roman law made by the "barbarians," are examined; and in §§ 133-138, there is a more complete history of Byzantian law than is to be found in any other text books, except those of Montreuil and Zachariä.

An account of the most important editions of the *corpus juris civilis* in § 139, leads to a history of the study of the Roman law in the west. In the order of this history—it might be objected to on that score—the author has first disposed of the Spanish, Portuguese, and Belgian civilians, and then discusses the Italian, French, Dutch and German schools in succession; it is not a good reason, the fact that the number of civilians in those countries were small; the Belgian school, flourishing in the sixteenth century, was only an offshoot of the French, and the older of the first two, was partly Italian, partly French and Dutch. If he wished to classify the civilians according to nationality, he might at least have spoken of the Germans in advance of the three other nations. As for the Italian schools, the author follows Berryat Saint Prix in distinguishing the *Irneriens* (*Glossatores*) from the *Bartolistes* (*Scribentes*), but always in subordination to Savigny's *History of the Roman Law in the Middle Ages*, which is accessible in Quenoux's translation into French. The most distinguished glossists and interpreters of the fourteenth and fifteenth century, are cited in alphabetical order, followed by the Italian civilians of the sixteenth, seventeenth, and eighteenth centuries. In the history of the study of the Roman law *de l'école Française*, the author begins with the eleventh century, but comes down to our own day, (§§ 146-150.) The number of French Romanists of our century, here cited, is not small, and the following are given with references to their works:—Alban de Hauthuille, Benech, Berryat Saint Prix, Blondeau, Bonjean, Demanget, Du Courroy, Etienne, Ferreol Rivière, De Fresquet, Genty, Ginouilhac, Giraud, Guérard, Laboulaye, Lafertière, Le Bastard de Lisle, Ortolan, Pellot, Poncelet; some of them have, indeed, only translated German works on Roman law into French, (such are Bonjean, Etienne, Poncelet,) and on that account Quenoux deserves to be mentioned. Only a few of them have furthered the

study of the Roman law by their original criticisms and researches, such as the works of Laboulaye and Pellat; in §§ 152–157, is an account of the German authors, the mere list of the names of famous German civilians of our own century, is by no means complete, and very faulty; the author acknowledges, (p. 323,) that France is second to Germany in the scientific study of the Roman law, and ascribes this fact to the great social event of the codification of the law in France; but he consoles his countrymen with the following burst: “Mais pour le bonheur et la grandeur de la France, mieux vaut mille fois l’uniformité de législation que l’amas indigeste des législations allemandes, dût la codification nous avoir fait perdre la couronne de Droit Romain que fut décernée sans conteste à nos jurisconsultes du 16ième siècle!” (p. 324.) To all this it might be said, that since the French jurists first made acquaintance with German jurisprudence in 1819, their Romanists might have pursued with equal zeal and like spirit, the study of classical law, and might rival us, just as has been done by French naturalists, philologists, and historians, and as some of their jurists are now doing.

The author remarks with great truth, the number of rules adopted in the most modern French law, that take root in the oldest German; he quotes, p. 345: la garde ou mainbournie, la reserve testamentaire, the rules: l’institution d’heritiér n’a point lieu: puissance paternelle ne vaut, and en fait de meubles la possession vaut titre; all these belong to the Législation de Barbares, and under this same head are discussed l’institution contractuelle, le douaire, le régime de la communauté conjugale, la garantie, l’émancipation par mariage; the rules, le mort saisit le vif, and many others. On this account, the author considers the study of German law and its history, as equaling, in importance to the French jurist, the feudal law, the droit coutumier, the ordonnances des rois, and the arrêts réglementaires. For the representation of the history of these sources of law, as well as for their scientific analysis, the author merits all the praise of having succeeded perfectly, and especially in his history of the droit coutumier. The oldest sources, and those highly interesting ones, only lately published, are given (pp. 366–387) more fully than in any other new work,

although in the briefest space. Not less successful is the progressive review (pp. 355-419) of the history of French legislation since 1789, especially that of the authorship of the code civil; but there was no need to begin a new period in 1852, for the fact of the restoration of the empire is only a further, and, perhaps, not the last act of the development of France's political organization, and has not in the least altered the civil or criminal laws of the land. At page 410, begins the third part of the book, which contains useful or necessary aids to the future jurist, arranged compactly in nine divisions, of which the most important are, the study of belles lettres, history, philosophy, the literature and the history of the literature of jurisprudence, mathematics, natural sciences, paleography, and diplomacy, medical jurisprudence, and the practice of the law, (*pratique des affaires*,) statistics, and political economy. Then follows under the title of *Études comparatives des législations étrangères*, an account of the laws of the Medes and Persians, Egyptians, Jews, Greeks, and Indians.

Our author puts on these studies only a purely scientific value; as such they have, for over a century, been cultivated in France with great partiality, under the name of comparative legal history (*histoire du droit comparée*); why he has not continued to give, as he did in earlier editions, historical review of the law and legislation of the most important nations of Europe, is as inexplicable as his silence in regard to the Moslem law of Algiers, although it has been discussed by several French writers. In fine there can be no hesitation in declaring that this *Introduction à l'étude du droit*, by Prof. Eschbach, is a valuable addition to our own, as well as to French legal literature. It is the most important work of the kind which has appeared since the publication, in 1772, of the *Lettres sur la profession d'Avocat*, by Camus, even though improved by Dupin, and should be particularly esteemed by our jurists.