

A HISTORICAL SKETCH
OF
CIVIL PROCEDURE
AMONG
THE ROMANS

by
J.T. Abdy, LL.D.

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BY

J. T. ABDY, LL.D.

BARRISTER AT LAW, REGIUS PROFESSOR OF CIVIL LAW IN THE
UNIVERSITY OF CAMBRIDGE, AND FORMERLY FELLOW OF TRINITY HALL.

Cambridge :
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1857.

TO
HIS ROYAL HIGHNESS
PRINCE ALBERT,

CHANCELLOR OF THE UNIVERSITY OF CAMBRIDGE,

&c. &c.

This Work is

(BY PERMISSION)

DEDICATED

BY HIS ROYAL HIGHNESS'S MOST

OBEDIENT HUMBLE SERVANT,

THE AUTHOR.

P R E F A C E.

A CONSIDERABLE portion of the matter contained in these pages was delivered in the shape of Lectures, at the University of Cambridge, on the Rise and Progress of Civil Procedure among the Romans.

My original aim was to dwell upon the historical features in this branch of their legal institutions, and to exhibit its steady progress from the ancient rude symbolism of the Twelve Tables, to the more complex technicality of the Imperial Code, rather than to attempt to make a treatise on actions at law.

But as I advanced in my task I found many points requiring special notice ; and though the labours of Heffter, Savigny, Zimmern, Walther, and Ortolan had cleared away the difficulties, and left little or nothing that was new, for a writer on this part of Roman law to speak of, yet the

inaccessibility to many persons of their works, and the quantity of matter contained therein, induced me to seize upon a few salient points, and exhibit them in an English dress.

Of these topics the most noteworthy to my mind were the separation of the legislative and judicial functions of the chief magistrates at Rome, the peculiar position of the *Judex*, the influence of equitable remedies on the *Jus civile*, the history of *Interdicts*, and the change in the character of *Appeals*, and mode of bringing them; most noteworthy because they belong really to the history of the Roman people, and emphatically mark those elements of their character so strenuously insisted on, and so eloquently described by Savigny, viz. the holding fast by the long-established without allowing themselves to be fettered by it; and the quick, lively, political spirit by which the power of their constitution was renovated, so that what was new merely ministered to the development of what was old.

The chapter on Evidence was added in order to bring together from the pages of Gothofred, Pothier, and Huber some few of the leading principles on which this part of the Roman law of procedure was based, that by this means might be exhibited, not only the contrast between the system of that people and our own, but the peculiar advantages which Roman jurisprudence, by reason of its high state of cultivation, affords of serving as a pattern and model for all scientific labours in law.

Perhaps no period of time could be found better adapted than the present for dwelling upon the doctrines of the Roman law, and insisting on its merits in aid of the development of legal principles. The extensive alterations in our process and forms of pleading, the gradual *rapprochement* of equity to common law, the steady progress that is going on in the removal of those feudal notions that have hampered our law of real property, and overlaid it with technical difficulties, expressed in a jargon as barbarous as it is unphilosophical, are some

among other beneficial changes by which we may hope in time to approximate to that point of excellence ascribed by Savigny to the Roman law, when we shall have a system that may be discovered by plain good sense, not overlaid with intolerable formalities and narrow pedantry on the one hand, nor too abstruse and complicated for the apprehension of all but a few on the other; a system not purposely confined to a few high priests and patricians, like the *Actiones legis* of old, but one approved and appreciated by all, on account of its simplicity and clearness, where the "theory and practice may be the same, the one framed for immediate application, the other ennobled by scientific treatment, and where we shall see in every principle a case for application, in every case a rule by which to decide it."

The remarks of an elegant scholar of our own time (whose writings prove his eminent qualities as a jurist) come in aid of the views here maintained, that the Roman law deserves especial attention and

deep study in the present day. "It is not," says Dr. Maine, in his masterly essay on Roman law and legal education¹, "because our jurisprudence and that of Rome were *once* alike that they ought to be studied together, it is because they *will be* alike, it is because we in England are slowly and perhaps unconsciously and unwillingly, but still steadily and certainly, accustoming ourselves to the same modes of legal thought, and to the same conceptions of legal principle to which the Roman jurists had attained after centuries of accumulated experience and unwearied cultivation."

These are admirable words, the truth and value of which become the clearer the closer we scrutinise the tendency of our modern legal reform; but to two, among the many questions of the day, does the importance of the study of the Roman law most apply, viz. the demand for codification, and the demand for legal education. The difficulties that stand in the

¹ See the Cambridge Essays for 1856.

way of the first of these questions are many and powerful, not the least of which is what the writer above quoted so forcibly insists upon, viz. the decay of technical phraseology in the English law, and the want of a proper legal terminology, by which a definite and concise expression of legal conceptions may be given; an evil that presented itself as one of such importance to the mind of Mr. Livingstone, as required at once to be removed, and necessitated the addition to his Code of Louisiana of a book of definitions.

How admirably the Roman Law comes in aid of this defect, and what service may be rendered to our legal phraseology by the writers whose technical language is so skilfully exhibited in the pages of the Digest, Dr. Maine has sufficiently shewn. But it is in its connexion with legal education that the Roman Law stands preeminently forth. If we are to expect a properly devised system of codified, or well arranged law, is it too much to ask for minds trained up to the

task, and capable of providing for the combination of theory and practice, that must present itself therein? And if what Bacon says be true, that the age in which a code should be formed should exceed preceding ages in intelligence, what answer shall be made to the question, "Is this such an age, and have we the means at our disposal for such a task?" Can we say that our general mass of legal intelligence is superior to what is past, or can we avoid seeing the inferiority of our own juridical writers to the jurists of neighbouring countries. And when we search for reasons for such a state of affairs, one above all must strike us, viz. the want of a sound legal training for those who are to become the proposers and exponents of the laws of this country.

For one thing and the other, for legal reform, whatever shape it may assume, and for legal education, the maxims and principles embodied in the Roman Law, and the language in which they are framed, undoubtedly are of inestimable value.

The study of the Roman Law will help to bring out that twofold spirit, which, to use Savigny's words, is indispensable to the jurist—the *historical*, by which the peculiarities of every age and every form of law may be seized and appreciated, the *systematic*, by which every notion and every rule may be placed in lively connexion and cooperation with the whole.

In conclusion, let us hope that the time is not only coming, but is not far off, when the phraseology of the Statute-Book will not be the worse for a rate in aid from its friendly, not rival neighbour, the Corpus Juris, and the champions of Archbold, Tidd and Chitty will have no cause to fear the utter destruction of these eloquent commentators, although our students are brought up to peruse and admire the learning of Ulpian, Gaius and Papinian.

CAMBRIDGE,

June 18, 1857.

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EXPLANATION OF REFERENCES.

I. and Inst. stands for the Institutes of Justinian.

D. for Digest.

C. for Justinian's Code.

N. for the Novellæ Constitutiones.

Cod. Theod. for the Codex Theodosianus.

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