HISTORY OF ROMAN PRIVATE LAW; PART I. SOURCES

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HISTORY

OF

ROMAN PRIVATE LAW

PART I

SOURCES

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HISTORY OF ROMAN PRIVATE LAW.

INTRODUCTION.

WHETHER I shall be doing what is worth while—to quote the opening words of **Livy**—in writing a new History of Roman Law at this time of day, I scarcely know. The following were the *desiderata*, as they seemed to me, which determined me to the task a good many years ago (see Clark's *Practical Jurisprudence*, p. 6).

The ultimate results of the so-called "Classical Jurisprudence," coupled with the Imperial Legislation which ends with Justinian, had been duly estimated and fairly well expounded, in one form or another, for some time past. But the treatment of Roman Private Law in its process of historical development, which surely is at least as remarkable and instructive as those results, did not appear to me to have been distinctly dealt with in an equally satisfactory manner.

This deficiency was not of course imputed by me to any failure in insight or power of treatment on the part of predecessors and contemporaries whom it would have been presumption to criticise, but to differences in object. I can best explain my meaning by reference to one of the most renowned of such predecessors. In the Introduction to his Spirit of the Roman Law, **Ihering** speaks of the inner relation and mutual belonging (*Zusammengehörigkeit*) of

facts, as more important for his purpose, than their outer connexion (*Verbindung*) through time (Geist, i. 59, 60 and Anm. 27). If this dictum merely indicates the selection or greater prominence of certain facts as compared with other contemporary facts, there can be no question of its truth and applicability for all historical purposes. In Ihering's actual treatment of his subject I think it means a good deal more. That subject is a generalisation—avowedly, it is true, "at different stages of development"—but still a generalisation of the Spirit of Roman Law, or of the Roman people in their law-making capacity, *as a whole*. It is a subject most interesting and suggestive for philosophical or ethnological study: in the course, moreover, of its treatment, it involves propositions and conclusions, on this or that individual question of Roman legal history, for which the gratitude of all modern writers on Roman Law is due to its author in no ordinary degree. On the other hand, such a treatment does frequently and unavoidably coordinate views and principles separated by lapses of time inconsistent with any traceable sequence. Yet this sequence, or in other words this relation of cause and effect, is of the essence of the enquiry—so at least it seems to me—where Roman Law is studied, either simply as a matter of History or, in connexion with Jurisprudence, as an example and a lesson of experience for practical politics and actual life. And this last is the point of view from which I am endeavouring to trace the development of that part of Roman Law which has more particularly survived to modern thoughts and times.

In the course of this enquiry I have found myself unavoidably obliged to go sometimes beyond the strict province of Private Law, at least in the opening stages—to enter, in fact, into the early Constitutional History of Rome and the authorities for that history—a much debated subject,