

**A HISTORICAL SKETCH
OF CIVIL PROCEDURE
AMONG THE ROMANS**

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A Historical Sketch of Civil Procedure Among the Romans by J. T. Abdy

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BY
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TO
HIS ROYAL HIGHNESS

PRINCE ALBERT,

CHANCELLOR OF THE UNIVERSITY OF CAMBRIDGE,

Et. &c.

This Work is

(BY PERMISSION)

DEDICATED

BY HIS ROYAL HIGHNESS'S MOST

OBEDIENT HUMBLE SERVANT,

THE AUTHOR.

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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 purposedly 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