

**PROBLEMS OF THE
ROMAN CRIMINAL
LAW, VOL. I**

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Problems of the Roman criminal law, Vol. I by James Leigh Strachan-Davidson

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JAMES LEIGH STRACHAN-DAVIDSON

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PROBLEMS OF THE ROMAN CRIMINAL LAW

BY

JAMES LEIGH STRACHAN-DAVIDSON

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IN TWO VOLUMES

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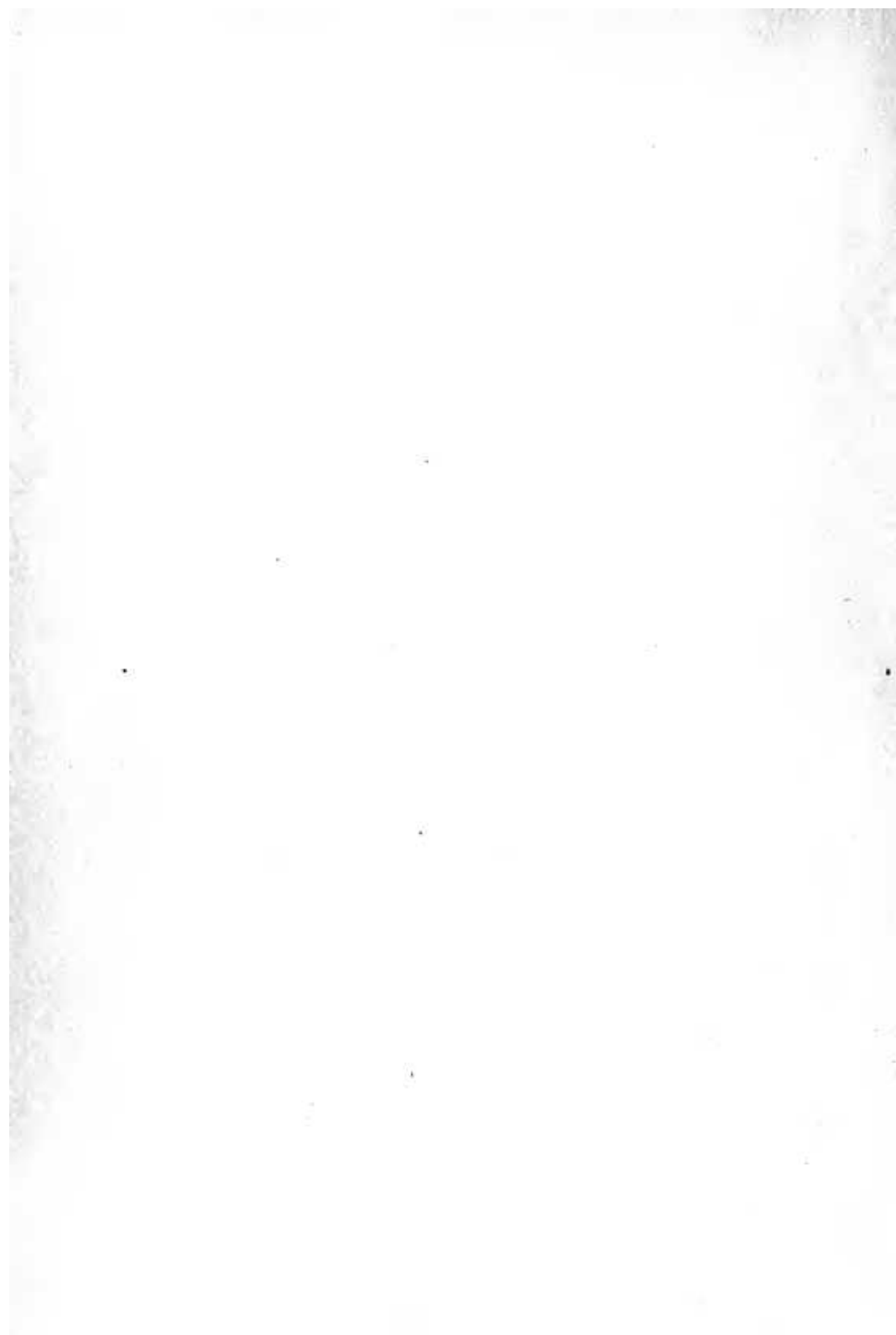
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MORTE PRAEMATVRA ABREPTI



PREFACE

THIS book has developed out of a criticism of Mommsen's *Römisches Strafrecht*, published in the *English Historical Review* for April 1902. Paragraphs from that article are by the kind permission of the Editor embedded in these pages.

I ventured at the time to prophesy that future workers in the field would necessarily take Mommsen's great treatise as the foundation of their labours. As my work progressed, I have found this more and more true in my own case, and I should wish my book to be regarded as, in the main, a supplement to Mommsen. In the first place the presence of Mommsen's *Strafrecht* absolves me from the task of attempting a complete and systematic account of the Roman Criminal Law; and I am thus enabled to concentrate attention on certain definite problems and difficulties, lying thickly along the main lines of the subject, which seem to call urgently for solution; in dealing with these, however, I have endeavoured to indicate something of a continuous thread of principle and development. In the second place, the narrowing of the field enables me to attempt that which Mommsen declared impossible for himself in the span of life allotted to him, namely, to discuss the arguments and opinions of modern scholars on the various questions in dispute. Besides criticizing the doctrines of Mommsen himself, I have passed in review some of those of Danz, Geib, Girard, Greenidge, Ihering, Madvig, Maine, Rein, Wlassak, and Zumpt, and frequent quotations from these writers find

their place in my book. The names of many others will be mentioned in due course. The critical method may seem to be contentious, but it is difficult in any other way fairly to present the questions at issue. It must be remembered likewise that the matters in which I have ventured to differ from these eminent scholars are necessarily brought into prominence, and that they show out before a background of general agreement. This is notably the case whenever I find myself disputing with Mommsen. His authority is so great that his pronouncements can hardly ever be passed over in silence, and I have felt bound to express in each case either concurrence or dissent. I have something of the same feeling towards Girard and Greenidge.

Two excellent criticisms of Mommsen's *Strafrecht* have been published, one by Esmein in the *Nouvelle Revue Historique* (1902), the other by Hitzig in the *Schweizerische Zeitschrift für Strafrecht, Revue Pénale Suisse* (1900); from these I have gathered many valuable hints. I must, however, confess a certain disappointment at the small amount of interest which seems to have been taken in Mommsen's great work by jurists and historians. The learned periodicals cordially greeted the appearance of the book and in some cases published good summaries of its contents, but so far as I am aware they have not, except in the two instances named above, attempted any detailed criticism. In one instance, however, Mommsen has been treated with the respect of which he is worthy, that is to say by Girard in his *Organisations Judiciaires*, which, so far as it has yet gone, supplies an admirable commentary on the *Strafrecht*. I consider myself unfortunate in the circumstance that Girard's first volume appeared simultaneously with my own review of Mommsen, and that I thus committed myself in print to some opinions on the earlier period which I have seen reason

to modify in the present book after studying Girard's work. The same would very likely be the case in my discussion of the more numerous and interesting problems of the next age of the Roman Criminal Law, if I could see how they are to be treated by Girard ; but my book goes to press without my having the advantage of consulting the second volume of the *Organisations Judiciaires*, for which scholars are still waiting.

For another opportunity missed I have myself to blame. Until the publication in the present year of Girard's *Mélanges de Droit Romain* I was ignorant of the long and instructive controversy between himself, Wlassak, and Lenel respecting the Lex Acbutia, which ought to have been noticed in my fourth and fifth chapters.

The first number of the *Journal of Roman Studies* contains an article on 'Some questions of Roman Public Law', by Professor J. S. Reid, of Cambridge. This paper, likewise, has come into my hands too late for me to make use of it in the text. I am glad to find myself in agreement with Professor Reid on several points discussed in the following pages.

Finally, I would record my thanks for the valuable assistance supplied me by friends who have read portions of my book in proof, or have given information and criticism on individual difficulties. I must mention more especially A. C. Clark, Fellow of Queen's College, Oxford, Professor A. V. Dicey, Fellow of All Souls College, E. N. A. Finlay, Scholar of Balliol, W. Warde Fowler, Fellow of Lincoln College, W. M. Geldart, Professor of English Law, and H. Goudy, Professor of Civil Law, both Fellows of All Souls, Professor Haverfield, Fellow of Brasenose, E. Hilliard, Fellow of Balliol, Andrew Lang, late Fellow of Merton, J. B. Moyle, Fellow of New College, H. J. Roby, late Fellow