



Problems of the Roman Criminal Law by J. L. Strachan Davidson

Review by: J. S. Reid

The Journal of Roman Studies, Vol. 2 (1912), pp. 270-273

Published by: [Society for the Promotion of Roman Studies](#)

Stable URL: <http://www.jstor.org/stable/295963>

Accessed: 09/05/2014 01:04

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at
<http://www.jstor.org/page/info/about/policies/terms.jsp>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.



Society for the Promotion of Roman Studies is collaborating with JSTOR to digitize, preserve and extend access to *The Journal of Roman Studies*.

<http://www.jstor.org>

strong for him." Here we plainly have the old Italian *templum* of augury, the rectangular space marked out by the *lituus* within which birds might be observed; and here too we find the rule which held good of some birds at least, that the left was the auspicious side. Then again we have *oscines* as well as *alites*: e.g. the woodpecker has two notes, one of which is of good, the other of bad omen. If they have secured good omens from other birds, they will avoid hearing the woodpecker by singing and rattling their paddles on the sides of the boat: which seems to savour of Roman ways, even if it cannot be precisely paralleled in Italy.

(2) The sacrifice of a pig, the most usual victim, is always accompanied by an examination of its liver; and opposite to p. 80 we have a photograph of two Kayans in the act of doing this. As with the Romans (after they had learnt the art from the Etruscans), the liver was marked out in certain divisions. "The rule generally followed is to identify the under surface of the right lobe with the territory of the party that kills the pig and makes the enquiry; the adjacent part of the left lobe with the territory of any party involved in the question which adjoins that of the first party; and the under surface of the caudal extremity with that of any remoter third party" (p. 62, of vol. ii, where also many other details are given of the method of interpretation). It is interesting to note that the omens thus obtained are held to be the answer of the god to the prayers carried to him by the spirit of the pig.

We do not find here the highly elaborated system, illustrated, for instance, by the now famous liver of Piacenza;¹ but the method of dividing the surface of the liver is the same in both systems, though the Etruscans divided their livers into seats of deities instead of territories of themselves and their neighbours; and the Borneans seem to be in a fair way to develop their methods with something like Etruscan extravagance.

These extracts will give some idea of the evidence on which the authors rest their suggestion that the two systems of divination may have had a common root. The question is assuredly one of great interest, whichever way it be answered. But I must point out that it would probably be found to bear as much on the origin of the Etruscan people as on that of the Roman. The divination by the liver is almost certainly Etruscan; the Romans had not got further than an examination of that organ to see whether the victim was acceptable to the god.² It may be, too, that the *templum* used in augury was in origin Etruscan; but I feel that I had better stop at this point, and leave these mysterious problems to the specialist, who of late has been inclined to trace the Etruscan divination to the East. The articles on divination in Hastings' *Dictionary of religion and ethics* will be found useful here, as well as Körte's *Etrusker* in Pauly-Wissowa.

I will just add one word to a notice of which the only object is to draw the attention of Roman scholars to this work. On p. 170 of vol. i they will find an estimate of the social gain of this strange system, which again reminds us of Rome: "there can be no doubt that the strong faith of the people in the omen-birds, and the awe inspired by them, is very favourable to the maintenance of discipline and obedience to the chiefs, and that this fact is appreciated by the chiefs." Compare Dr. Frazer's *Psyche's Task*, ch. ii.

W. WARDE FOWLER.

PROBLEMS OF THE ROMAN CRIMINAL LAW. Two vols. By J. L. STRACHAN DAVIDSON. 9 $\frac{1}{4}$ × 6 $\frac{1}{2}$, xxii + 246 + iv + 288 pp. Oxford: University Press, 1912. 18s. n.

These discussions on moot points in Roman criminal law deserve and will receive a warm welcome from scholars. Their combination of thoroughness with lucidity and candour distinguish them among debates of their class. Criminal administration,

¹ Thulin, *Martianus Capella und das Leber von Piacenza*, p. 7.

² Wissowa, *Religion und Kultus der Römer*, ed. 2, p. 419.

particularly in the age of the republic, is notoriously one of the darkest portions of the Roman polity. It is so, in part; because the procedure relating to crimes was never developed and systematised as was the civil law by the continuous action of its executants. On the civil side the *mos maiorum*, ever professing to be changeless, and ever changing, was expounded by authoritative voices, whose judgments were accessible to the citizens at large. If the *mos maiorum* and statute law were at variance, they were cunningly reconciled by generally accepted fictions. But until the emperor came on the scene the criminal law was never subjected to any process of regularisation. The interaction of custom and statute left a wide field for irregularities. The processes attaching to the *imperium* and to the *intercessio*, in their relation to criminal law, were not formulated by legal intellects and made precise. The statutes that limited the *imperium* and those on which the *intercessio* was based were so vague as to leave large room for capricious and contradictory actions, dependent for their practical validity, during the republican period, more on the condition of public opinion at the moment, than on principles or precedents recognised and recorded. Even under the empire the evolution of the criminal law cannot be placed in comparison with that of law in its civil applications.

Mr. Strachan Davidson's work, in consequence of its plan, consists largely of criticisms upon the work of writers on the subject, and especially of the two great treatises of Mommsen, the *Staatsrecht* and the *Strafrecht*. Mommsen continually strives to find some clear underlying principle to explain vagaries which are the natural outcome of Roman republican institutions. In his quest he is frequently driven to special pleading and sometimes even crosses the border between that and sophistry. Mr. Strachan Davidson offers clear and cogent refutations of many of his positions. The examples are so numerous that it is hardly worth while to specify; but I may mention the examination of Mommsen's views on the oath taken by Brutus, the founder of the republic, to treat royalists as outlaws (i, p. 18); on *iudicatio* and *coercitio* (i, 97), and on the "Bacchanalian conspiracy" (i, 234). The opinion of Danz on the *actio sacramenti* (should it not rather be *actio sacramento*?) is pertinently tested and rejected. The discussions are, however, not merely negative. Construction is handled as well as destruction. Here Mr. Strachan Davidson will doubtless suffer to some extent the fate of others who have dealt with the same material. Valid objections may often be urged against his conclusions. It seems unlikely in regard to some of the "problems," that solutions generally acceptable will ever be found.

The parts of the work which are most open to criticism, in my opinion, are those which relate to the punishment in the republican age of citizens without trial. It is curious, for instance, that (i, p. 132) the case of Clodius, arraigned for sacrilege, is treated as an apparent violation of the veto on *privilegia* in the Twelve Tables, without any mention being made of the expulsion of Cicero. Surely the "poena in cives nominatim sine iudicio constituta," as Cicero called it (*Pro Dom.* § 4), was to all intents and purposes a "bill of pains and penalties." The very interesting discussion of the case of the Catilinarians in vol. I contains not a little that is useful and to the point, but also some things to which exception may be taken. It is really not possible to vindicate Caesar's action from inconsistency, on the ground that imprisonment was "not a punishment but only a rough method of detention." The confiscation of the prisoners' property, proposed by Caesar, cuts away the ground from this defence. I do not regard the explanation given of the law of C. Gracchus "ne de capite civium Romanorum iniussu vestro iudicaretur" (*Cic. Rab. perd.* 12) as satisfactory. Can it be that these words exhaust the contents of the statute? Did C. Gracchus really disregard the lawless slaughter of his brother and his brother's adherents, not authorised in any way, and condemn merely the inquisition afterwards held, which had behind it an order of the senate? This would indeed have been to strain at a gnat and swallow a camel. The case of Rabirius, tried in 63 B.C. for his share in the murder of Saturninus, of course absolutely bristles with difficulty, and it seems to pass the wit of man to devise an explanation of it which will stand fire. Mr. Strachan Davidson sharply distinguishes the charges contained in the *multae irrogatio* from the harangues of the tribune before

the populace (i, p. 200). There seems to be an assumption that the indictment was an elaborate document. But the evidence points to the formal arraignment by which a criminal case was introduced to the *comitia* as having been quite laconic. "Perduellionem tibi iudico" is a specimen. The charge against Rabirius was probably no further formulated than by the words "quod civem indemnatum necasset" or something of the sort. Is it certain that Caesar presided at the trial of Rabirius for *perduellio* (i, p. 203)? It seems far more likely that a magistrate *cum imperio* was in the chair. The action of Metellus, the praetor who ordered the red flag at the Janiculum to be hauled down, and so saved Rabirius, is intelligible if he were the president. He thus converted (theoretically) the meeting of the centuries, the *exercitus togatus*, into a gathering of the *exercitus armatus*. The idea that the tribune ever presided at a meeting of the centuries with auspices "borrowed" from the praetor is one for which I believe no real evidence exists. It seems more consistent with Roman constitutional practice generally to suppose that the praetor summoned the meeting and sat in the chair.

A few scattered remarks on matters of interest may perhaps be added.

Can it really be that all scoundrels who were citizens were permitted to escape from justice at Rome (i, p. 145)? The same question may be asked with regard to the local tribunals of Italy before jurisdiction in serious matters was concentrated at the capital. Was the career of the criminal merely a game of general post, so that if he failed in one town he could start again in another? This is of course an intensely difficult problem. I touched on the subject in a recent article in this Journal and hope to be able to deal with it at length before long. The testimony of Polybius in his famous chapter (vi, 14), that the "δῆμος κρίνει θανάτον καὶ μόνος" certainly does not prove that no one was put to death without trial. It merely states that all who were tried were arraigned before a popular assembly.

"In hostium numero habere" is the Latin euphemism for a general massacre" (i, p. 104). Reference is made to Caes. *B.G.* i, 28, 2, where the expression is applied to 6000 Helvetii. The common inference that these prisoners were killed is not a necessary one. If they were sold as slaves the phrase would be quite appropriate. Caesar made much money in Gaul by his sale of prisoners, and bestowed thousands upon his friends.

The case of Licinia, the widow of C. Gracchus (i, pp. 78, 184), is curious, but the information about it does not prove that the property of C. Gracchus was not confiscated after his death. The jurist Iavolenus tells that P. Mucius Scaevola, the consul of 133 B.C. (who vetoed a proposal in the senate to sanction the massacre of Tiberius Gracchus and his followers) gave an opinion "quod res dotales in ea seditione qua Gracchus occisus est perissent," that the loss should be made good to her, on the ground that the turmoil was caused by her husband's fault. The notion that Licinia's property was destroyed in the uproar is singular, and contradicts Plut. *C. Gr.* c. 17. And that P. Mucius Scaevola should have been judge in a suit brought by Licinia (his niece) against her husband's estate, is difficult to believe. Even if he were only consulted as a lawyer (one would imagine on his niece's side) he would not have outraged her feelings by basing an opinion on her husband's guilt. A more reasonable view would be that a debate took place in the senate on the question whether Licinia's dowry should be exempted from confiscation; that some were ready to make her suffer for what they deemed the sin of her husband, and that Scaevola turned the argument against them by an appeal to the general principle that the law protected the dowry against wrongdoing by the husband.

The passage in Cic. *Cluent.* § 151, seems to me to make rather against than for the supposition that C. Gracchus established a *quaestio* to try cases of judicial corruption (ii, p. 20). "When Clodius invaded the mysteries of the Bona Dea in 62 B.C. it was found that none of the standing *quaestiones* were competent to deal with the matter" (ii, p. 41). This statement may have been prompted by a remark of Mommsen (*Strafr.* p. 198) "Entweiheung der Festfeier der Bona Dea, wofür ein positives Strafgesetz nicht vorlag," which is not the same thing. Cicero classified the offence as *incestum* (*Part. Or.*

§ 118 and *Mil.* § 59) and stated that in such cases the usual maxim that an offender's slaves may not be examined by torture against him, did not hold good. In another place (p. 682) Mommsen seems to adopt Cicero's view. The only things certain about the *lex Fufia* under which Clodius was tried are (1) that a special praetor was assigned for the case, so that it was taken *extra ordinem* (*Sen. Ep.* 97, 7); (2) that a *iudicum genus* (*Cic. Att.* i, 16, 2) favourable to Clodius was adopted. Only the procedure was new. The offence concerned one of the *stata sacrificia capite sancta* of which Cato the censor spoke. If Cicero's client Rabirius could be hauled before a *quaestio* for violating sacred places (*Rab. perd.* § 7), there surely must have been room in some *quaestio* for the trial of an outrage like that of Clodius.

J. S. REID.

L'ARMÉE ROMAINE D'AFRIQUE ET L'OCCUPATION MILITAIRE DE L'AFRIQUE SOUS LES EMPEREURS. Par RENÉ CAGNAT. Première partie. 11 × 9, xxiii + 423 pp. 4 plans and illustrations. Paris: Imprimerie nationale. E. Leroux. 1912. 14 fr.

Ever since its first appearance in 1892 M. Cagnat's detailed and scholarly monograph on the Roman army in Africa has claimed an honoured place on the shelves of all those who interest themselves in the military system of the Roman empire. It is true that study of the frontier lines of the province and the troops which defended them had not then yielded such impressive results as those obtained soon afterwards by the Limes-Commission in Germany, nor were the African inscriptions relating to this subject so numerous as those of Dacia, Pannonia or Britain. On the other hand, the fortress of the Legio III Augusta at Lambesis furnished a group of epigraphical texts which were and remain unequalled for the light they throw on the character and organisation of this branch of the service, and M. Cagnat made the most of these and other opportunities. It is, however, no disparagement of his work to welcome a new and revised edition. Excavations at Lambesis itself, more detailed exploration of the frontier than was possible when the first edition was written, the discovery of new inscriptions, to say nothing of the fresh sources of information opened by the work of fellow-scholars in other parts of the Roman empire, have made both amplification and revision inevitable.

The first part of the second edition, now before us, includes the military operations in the African provinces under the empire and the organisation of the army in the ante-Diocletianic period. It is shorter than the corresponding sections of the original edition, but this is merely due to the omission of the lists of governors and officers which M. Cagnat has not thought it necessary to reprint, and we imagine that the space thus saved will be more than required for the fresh archaeological and topographical information which will be included in the second part. In comparing the new edition with the old, one is struck in every chapter by the number of new texts utilised, and the readiness with which they slip into place and fill up gaps in our knowledge. One inscription, for example, solves a topographical problem connected with the campaign of Theodosius in 372 (p. 84); another adds a corps of Pannonian cavalry to the list of troops sent from other provinces to the Mauretanian war waged in the reign of Pius (p. 48), and a group of "bulletins de victoire" set up by the governors of Mauretania illustrates the campaigns of Maximian in 296-298 (p. 68). Each instance is comparatively unimportant by itself, but the sum of new information is extensive and impressive. More striking changes appear in the sections devoted to the internal economy of the legion, and of the social problems which naturally followed the creation of a standing army, particularly in view of the tendency, which developed strongly during the second century, for the various regiments composing this army to remain for generations at the same stations.

In the first place, M. Cagnat accepts the well-known Egyptian evidence as proof