THESIS

RELATION OF ROMAN LAW TO ROMAN CIVILIZATION.

FOR THE DEGREE OF

B.A.

SCHOOL OF ANCIENT LANGUAGES.

T. J. HOWORTH.

1891.
RELATION OF ROMAN LAW TO ROMAN CIVILIZATION.

In studying the history of man, his wars, his institutions, his customs, it is the history of his mind that is studied. The character of its thought has ever determined the position which any people or nation has held among its contemporaries. The literature and law of a people are the depositories of its thought; so that a study of either of these must reveal the true character of the people by whom they were produced. Laws are but established customs, whether they proceed from motives of justice, religion, or expediency; but justice develops, as the social relation, civilization, if you please, progresses. The theory of the "survival of the fittest" has ceased to apply when the individual is restrained by law from requiting evils done him. Then has the true idea of civilization been conceived, and society as distinct from the individual is the object of advancement.

We have said that laws are but the customs of the people who frame them; and yet, such customs have been influenced. All nations have had their antecedents and their consequents, of which their customs are but modifications, and to which they are but germs for cultivation. The early customs of the Romans were the product of Grecian culture, which in turn developed the germs of Egyptian and Eastern civilization. As a consequent of Rome, the
West glorifies and testifies to the magnitude of her thought, the grandeur of her institutions. She was the reservoir into which primitive art and industry flowed, where they were renewed, and from which they flowed in various channels to feed the nations by which they were to be perpetuated. All honor to Rome for her gift! She it was who first combined thought and action, enunciated the law of progress, made civilization a reality and left us a heritage by which is assured the consummation of our highest ambition.

It is our object to point out where in the thought and reason of the Roman people are embodied in their laws; to trace Roman thought from its infancy to the time of Christ, when all ancient Roman thought was turned into modern channels. The overthrow of their former religion had the effect of loosing the bonds which held an opulent people to the duties of state and home. Thus we see the empire overrun by luxury and wanton lasciviousness. The effect of such a condition of affairs, was an utter disregard for law; so that, although eminent jurists flourished, the laws have ceased to be an index of the condition of the Roman people.

In treating this subject, it has been thought well to do so under three heads:— (1) Roman law and civilization before time of XII tables. (2) The XII tables and their evidences of civilization. (3) Roman law and civilization as they grew after XII tables to time of Christ.
1. Although the founding of Rome and the first few centuries of her existence is the subject of myth, yet we are in a position to whence came her earlier customs. On all sides were nations more or less civilized and from which Rome gleaned the first principles upon which the state was founded. The Etruscans furnished the pomp and ceremony for which Roman kings and consuls were noted. The famous purple robe, the golden crown, the curule chair, the fasces - all were the gifts of the Etruscans to the Romans. The Sabines, the complete Antipodes of the Etruscans, furnished the germ of Roman austerity and simplicity of taste. The Latins bequeathed to the Romans, ideas of government. It is supposed that the Roman idea of dictatorship was derived from these. Dean says: - "When Rome started on her career of conquering a world and holding in subjection, she borrowed from the Etruscans much of their elder civilization; from the Sabines, their men and manly virtues; and from the Latins their political institutions." Rome borrowed the germs, but it was Romans that developed them.

The early history of Rome is a history of her religion. Primitive as were the Roman practices and customs under this religion, they were destined to develop, and years afterwards Justinian beheld in those religious practices the foundation of his great works. We can scarcely believe that Rome ever approached so near barbarism as to allow the father the right of life and
death over his wife and children. But this right was sanctioned by religion, and religion was the state. Crimes against the state were punished by outlawry, the criminal being abused or killed by any person who chose to do so. Such practices could be allowed, only in an inferior civilization. The unit of the ancient Roman state was the family, of which the father was the head and termed pater familias. The whole family engaged in the worship of the family gods to which no stranger was admitted. The sacred fires tended alone by the pater familias were never allowed to die out. The Roman believed that if the holy fires were extinguished, the shades of their ancestors would be doomed to flit about in endless misery. This, in short, is the religion of the ancient Romans and upon this belief is founded those customs, which appear to us to cast a gloom over Rome's future greatness. It was this religion that held the plebeian so long servile to the patrician. The Roman gods would hear and protect alone a Roman citizen; and he for whom the gods had no protection, whose supplications the gods deemed an insult, could be but the inferiors of those whom the gods favored. The ancient laws and customs of marriage are but in obedience to religious belief, no stranger being allowed to participate in the family worship, there must be some ceremony of marriage by which the new wife may become a member of the family of her husband. The ceremony was termed in the jus civile,
confarreatio and consisted in the breaking together of a loaf of wheaten bread (panis - farreus) before the ancestral gods. Other forms of marriage occur later which mark an onward progress toward the secularization of law. The coemptio was a form of marriage in which the woman was regarded as scarcely more than chattel property, being sold (probably only in form) by the father to the husband.) Here also is evidence of the inferior position which woman held among the earliest Romans.

In the earlier days of Rome, property was undoubtedly held in common. Possession was ownership. But in the gradual development which was taking place, the theory of private ownership sprung up and this also through religious belief. The placing of the family hearth was a sacred act; and, once established, it could be removed only under extreme circumstances. Thus the placing of the hearth established the home. The difficulty of moving the hearth bound property in the hands of the family. At time of XII tables, however, all lands but that upon which the tomb was immediately placed could be aliened.

The son alone could inherit property in the early Roman Law and upon him involved the duty of keeping alive the sacred fires. If there were no son, the father might supply the deficiency by adoption.

Thus did religion shape Rome’s actions, degrading or enlight-
ening as it chanced to contain or not contain elements of truth and morality. But we can not censure the Romans for the support they gave to this religion. In all times, religion has been to man an intuition. That he is an inferior being has always been his belief. It is not in this belief, however, that religion has always been held an index of civilization; but in the character which is ascribed to that superior being or beings, as the case maybe. The religion of a people has always embodied the ideals of right of that people. A striving for an ideal together with a natural development of mind, has made religion not only a help, but an indispensable agent in man's progress.

So the religion of the early Romans was a common source of many customs; rivulets at first, they soon became the broader streams of later law.

In the law regarding debtor and creditor, probably more than in any other early law, is apparent the crude ideas of Roman justice. Here the debtor pledged his body for the payment of the debt; and in default of payment, the debtor became the property of the creditor who might sell him into slavery or kill him as he chose. If there were several creditors, the body of the unfortunate debtor was cut in pieces and distributed among them. Such was right among the ancient Romans. Then society was an incoherent mass, not a unit. The individuals had not yet coalesced suf-
efficiently to sanction a central power which should assume the
differences between individuals, but the primitive spirit of self-
requital still predominated.

As the little Roman city grows in size and age, we find the
religious belief growing weaker and weaker. The conquest of the
surrounding states has placed Rome in a different position. She
has acquired new aspirations and already the spirit of world con-
quest has begun to grow in her. The contact with other peoples
has already begun to awaken thought and reason in Roman mind.
Once it was asked "Does religion demand it?" ; now occasionally is
heard, "Is it good for the people?" Bound down for centuries by
an oppressive religion, the Roman people now undergo a reformation
which brings to light a world of ideas to be turned for their ad-
vancement, a world of people to be conquered by their arms. In
such a condition so favorable for growth, the authority of the
state in civil matters must soon be recognized in a marked degree.
The beginning of state authority may be traced to the custom of
appealing to an arbitrator for the settlement of difficulties.
This is a custom practiced in the earliest times and among the
most uncivilized.

The next step is taken when the priest or public magistrate
is appealed to. Then, the state gives the plaintiff power to com-
pel the defendant to appear before the magistrate.
But, yet, although arbitration was made compulsory, the execution was left entirely to the plaintiff. There remained yet one step to be taken to place the state in complete control of civil disputes. This was the power to regulate private remedies and enforce its judgements. When this stage was reached in the progress of the Roman government, Rome was far on her way toward the realization of what then could be but a dream to her. As this authority grew, each step leading up to the next; so, when once obtained, it was but a stepping stone to the assumption of other rights. Thus it was that so vast a body of law grew, taking from the individual barbarian rights and replacing them by the rights belonging to a member of a civilized community.

But there yet remains one obstacle to Roman progress. The same appeared to the Greeks in earlier times and was never overcome; to the English people in later times and was overcome. I speak of the plebeian. Gaining rapidly in numbers, they became the mass of Roman residents. Yet they had no rights which a Roman was bound to respect, but still subject to the laws which the haughty patrician chose to enact. The defense of Rome, and the body of her army, they soon came to recognize their power and to believe in the principle of the equality of man.

At first the pratricians were the superiors of the plebeians, from a religious standpoint; but when this ceased to be a suffi-
cient position from which to degrade the plebeian, custom arose to continue him in patrician servitude. Plebeian revolts became common and patrician concessions always followed. The arbitrary infliction of punishments by the patricians upon the plebeians for breach of laws which none but patricians could know, caused a clamor on the part of the afflicted. Another demand, another concession and the first written Roman law appears in the form of the XII tables.

The framing of the XII tables clearly indicates a stride in the advancement of Roman civilization. The belief that laws were the dictates of the gods was now overthrown, and law became a human institution. The auguries became an object of skepticism and their replies were made to be less ambiguous, more in accordance with reason, in order still to retain the support of the masses who were moving onward, casting aside all obstacles to their progress. Written laws have ever been the refuge of the oppressed. In them there can be no discrimination as to their application. The patrician and the plebeian alike must pay the penalty of their disregard. Wherever written law is demanded and obtained, we behold a triumph of civil equality; and until such equality is obtained, no nation can expect to rise high in the scale of civilization. Slavery is obnoxious to republican institutions and where it exists, it is an evidence of disorder, an index pointing to a
violation of the first principles upon which an ideal society is formed. But the securing of a law common to all the members of a community precedes but a short time the common participation in legislation, and this we find to be the case at Rome. The creating of a common law was but the first step, the first intimation of the closing of the breach between patrician and plebeian, the herald of a more perfect relation between man and man - the members of Roman society.

The X11 tables \textit{per se} embraced no grand principle of law by which they have become so famous in Roman history; but they represented a principle whereby the barriers to Roman progress were thrown down. They were the beginning of the codification of Roman law, a beginning which terminated so grandly.

The origin of the X11 tables is yet a matter of dispute. On the one hand, it is contended that they were copied from Grecian laws: on the other, is asserted that none of the laws of the X11 tables were exclusively Greek laws at the time of their adoption. The supporters of the former opinion quote Livy (Bk 111 Ch. 31) and Tacitus (Bk 111 C 27) in support of their belief; while those who believe the latter to be true, appeal to human reason for the support of their belief. There seems to be no doubt that a commission was appointed to examine the law of Greece and several oriental countries with a view to codification, but the object here
seems to have been to examine the effect of universally enforced laws which the Romans possessed but in the less dignified form of custom. It is not in accord with the facts derived from the rise of law of other nations that new customs should be introduced in the form of law. We can therefore but infer that all the laws of the XII tables were but the previously existing customs codified, and slightly, if at all, modified.

The law of the XII tables, in many respects, resembles that which had existed as custom before their formulation. But, yet, there contains some facts of law not yet touched upon, and several of the tables a marked improvement upon the preexisting law is noticed. Considering them as a whole, we are struck by the number of crimes which are capitaly punishable. The 2nd table punishes with loss of life any slave who may have been guilty of theft. The 3rd table prescribes the death penalty for any one caught trespassing by night upon cultivated fields. The 1V table gives the creditor the right to kill the debtor upon default of payment. The VII table punishes capitaly the crime of arson, the offender being burned. It also provides for the destruction of slanderers by hurling them from the Tarpeian rock. Further, the tables provide for the infliction of the death penalty upon murderers, rioters, false witnesses and corrupt judices.

Thus we see a host of the most common crimes known to our
criminal code punishable by death at Rome at the time of the XII tables. Morey says, "The XII tables show very clearly that the Romans had made very little advance upon the regulations in respect to injuries that prevail in all rude and barbarous peoples". Indeed in no other respect do they so clearly show this barbarous nature as in such wholesale employment of capital punishment. The Roman may have had a certain degree of culture, but, still, that desire for revenge which is seen permeating all their criminal law, is indeed but the cropping out of an uncontrolled barbaric nature. The varieties of the manner of punishment, also satisfies us as to its object. To-day punishment serves a threefold purpose. It may be (1) purely exemplary; (2) reformatory; (3) retributive or vindictive, intended to show the necessary and righteous connection between wrong doing and suffering. It is doubtful if any of these motives were factors in the Roman punishment of criminals at this early time. Revenge, and revenge alone was the power which inspired the offended to hurl his victim from the Tarpeian rock, flog him to death, stone or burn him. Yet justice was beginning to make its appearance when there was an attempt to graduate the penalty to the intent of the offender, an accidental offence was then punished but slightly. Until, however, punishment was inflicted in accordance with the degree of the crime, and some other motive than revenge prompted it, true civilization never came to
Rome.

The XII tables relieved the debtor by fixing the rate of interest at 1%, but left the other relations between debtor and creditor as they were before.

The fourth table prescribes the rights of fathers and families. But it is here more particularly of the relation of father and child that we wish to speak. This relation was one which had its foundation in the early religion. Not only did the ancient family include those who are now considered as children, but, indeed all were children until the death of the father. Even though a son occupy a high position in the state, even though he be fifty years of age; yet, if his father be not dead, he is but a child. In every such case the father and father alone must inflict the punishment for any crime of the son whether it be public or private. The father alone is responsible to the state for any crime or misdemeanor. The son might be placed by the father in temporary bondage called mancipium. This mancipium might continue until the death of the father when the son became a Roman citizen. The XII tables tended to abridge the power of the father over the son by declaring that the son became free after three successive mancipations. This is the first tendency we notice in Roman law to abridge the power of the father by placing more power in the hands of the state. Once begun, the power of the father was stead-
ily decreased, until, before the end of the Roman republic, his relation with the family and state in this respect were much more in accord with the principles of civilization.

This law also did away with the injustice of primogeniture and divided the patrimony among all the sons. The advancement brought about by this action, may be better appreciated when we recognize the fact, the English law to-day recognizes this right of primogeniture. There is no question as to the injustice it involves. It is indeed to be wondered at that, even custom, however strong, could cause its continuance in a country so high in the scale of civilization.

The sixth table concerns property and possession, and incidentally of succession. The Roman scheme of succession was unlike any that has existed since their time. Property and status always followed the male line. There were three classes of heirs. (1) *sui heredes*. (2) *Agnati*. (3) *Gentiles*. The *sui heredes* were the direct heirs, the sons either natural or adopted. In default of these, the *Agnati* were the successors. The *Agnati* were all those males who could trace their descent in a male line to a common ancestor. In no case were females or the descendants through the female line to inherit. In default of *Agnatès*, the patrimony descended to the *gentiles*, which were composed of all the males bearing the family name of the deceased. This law of succession
was the outgrowth of the early religion. The ones upon whom the worship devolved were the ones to whom the right of succession would naturally fall. This incentive to keep alive the worship was also the principle in which wills found their origin. In case there were no heirs of any kind, the person desiring the perpetuation of his family worship and a peacable entry into the world beyond, would appoint some one, observing strict formality, to perform this duty and incidentally to enter into the possession of his estates. It is evident that when this religion had ceased to be the worship, this appointment would be alone to the succession of the property.

The sixth table avers that the presumption of law was always on the side of the possessor and in case of a dispute as to liberty, liberty was presumed. Here are two principles of law which have been preserved to the present time; and of such high grade are they, founded upon the most firm ethical basis, that we should hardly expect to find them intermingled with such unjust laws as some of those we have noted above.

The comparison, however, serves to show the true character of the Romans. Their sense of justice was struggling to overcome their barbaric nature. The existence of such a law in a code where others are so vastly inferior would lead us to believe that it is not the product of Roman thought. If there is anything in
the XII tables to indicate that they in whole or in part were taken from the Greek law, this must surely be such indication. The presumption of liberty until slavery is proved, finds its counterpart in our presumption of innocence until guilt is proved and this we hold to be one of the bulwarks of liberty. It is this principle upon which the famous Habeas Corpus law is founded. In no law can there be found a principle more conducive to justice and the proper regulation of society.

There yet remains for our consideration one other of the laws laid down in the XII tables. It is that all crimes involving a punishment of death or cases where liberty was involved should be tried before the Comitia Curiata. Here is a law which seems to contradict the impressions we have received from other laws. Notwithstanding the fact that so many crimes were punishable by death, that human life seemed to be regarded with so little reverence, ample opportunity was given the defendant to prove his innocence.

We have now noted the main features of the XII tables as separate principles, it remains to consider the code as a whole. We may say with impunity, that the XII tables give us a meagre indication of what the Roman law shall become.

In the language of Morey "This brief review of the ancient civil law, as embodied in the XII tables show that it continued to bear traces of the primitive customs from which it had descended;
and that, while it contains evidences of improvement upon those early customs, it is yet extremely technical, illiberal and conservative." Technicalities were employed to place the laws above the understanding of the plebeian; they were illiberal and conservative in favor of the patricians whose sole ambition it was to keep the plebeians subservient to their will. The XII tables being the product of religion, they employed many formalities which were the source of their technical nature. Exceedingly exclusive, the laws being made by the patrician and for the patricians they conferred upon the different classes at Rome different degrees of legal capacity. The patricians being still in possession of the legislative and executive departments of the government were in a position to treat with contempt the half gotten victory of the plebeians.

The XII tables did not comprehend laws applicable to all cases, which might arise in the affairs of a fast progressing people, yet the final embodiment of the law in a codified form, the ultimate authority of which was unquestioned, tended to prevent its further progress and made all such progress to be of a revolutionary character - a means of development not contemplated in the law itself.

The next period, that included between the codification of the XII tables and the beginning of the Empire includes the per-
ection of the Roman Law.

III. We have now reached a period in which the true genius of the Roman people as law makers is made apparent. It is this period in which Roman civilization, unpolluted by the extravagances of after years, reaches its height; and the laws framed testify to the nobility and justice of Roman character.

The rise of the plebeian to a civil equality with the patricians is more the evidence of awakening and awakened reason than of force on the part of the plebeian. Rome desires the world as her dominions and perceives the necessity of right ruling in making herself the mistress of the world.

The XII tables, as has been said, contained at one time the whole body of Roman law, were the ultimate authority of law, and thus tended to restrict the law making spirit of the Romans. The manner in which this difficulty was overcome is characteristic of the Romans of this period. Nothing was allowed to be a barrier to their progress. Legal fictions were used in order that broader, more rational, less formal principles might be employed in Roman jurisprudence. These fictions, while seemingly in strict accord with the law of the XII tables, were, in reality, introducing new principles. In this way the ignorant were made to believe that the XII tables which they prized so highly were still the technical rules by which they were governed. In this manner new principles were introduced without the revolutionary tendencies which
would otherwise accompany such changes. England long years afterward employed the same means to avoid laws technical and exclusive in character.

The sources of Roman law were: (1) the XII tables, (2) the leges, (3) plebiscita, (4) Senatorial consultas, (5) Praetorian edicts. Of the first we have spoken, concluding that they were the germ from which sprang later Roman law. The leges were the enactments of the Comitia Curiata, but they fell into disuse early in the republic.

The Sex. Publilia, passed B.C. 472 enacted that the Comitia Tributa might deliberate and pass resolutions (plebiscita) on all matters affecting the welfare of the nation and these laws were binding on the Quirites. By this law, the plebeians were placed upon an equality, civil and political, with the patricians. The effect of such a law can be readily estimated and was no doubt understood by the Romans before its passage. It added thousands to the Roman world - not a barbarian horde, but Romans in the truest sense of the word. When such a law is passed, we can not but perceive a stride in advancement.

The Senatorial consultas were those laws passed by the senate, but were very few in number and formed but a minor part of the Roman law.

It is the Praetorian edicts of which we desire to speak more
fully. It was by the praetors mainly that the law was made so extensive and the sanction of such edicts by the people is evidence of growth. There were two praetors, the praetor Urbanus and the praetor peregrinus. The latter however, was not created until the expansion of the Republic brought with it a foreign relation.

The praetor was the highest officer in the Republic and had power to issue edicts from time to time. These were of two kinds, perpetua and repentina. The former were made at the beginning of the term of office and remained in force during the whole term. The latter were those issued as circumstances might require. It can be readily perceived how the edicta perpetua of the first praetor would be sanctioned with but little change by succeeding praetors. Thus it was that the praetorian edicts came to be permanent. The edicts of the praetor Urbanus interpreted and modified the XII tables until from a technical law, there sprang justice and a finished jurisprudence. But it was the praetor peregrinus who did more for Roman law, and in whose disposition to introduce any more just and equitable law of the surrounding peoples, we may see mirrored that of all Rome. It was the duty of the praetor peregrinus to decide upon all cases which might arise outside of the Roman city. In many of the cases, the laws of the people where the dispute arose was administered, and in such administration-
tion the praetor found laws that were an improvement on some existing Roman law. Such laws were recommended for the Roman city. That disposition to see, without prejudice, the true welfare of the state is the characteristic of a progressive people. The recognition of parts of barbarian law as preferable to their own is evidence of the unselfish, candid spirit of the Romans, a condition to which is, in a great measure, due their great success in law and arms.

The creation of a legal magistrate common to all Rome's territories was the first movement toward a free intercourse with other peoples. Such an officer bound together all of Rome's Italian provinces, so that free intercourse sprang up among them and with Rome. Such being the case, a law common to all was established. This was the *jus gentium*. Laws from all the provinces contributed to its formation and a law was formed, based entirely upon equity principles.

There is no greater evidence of Rome's civilization than her manner of dealing with conquered territory. It is an easy matter to conquer, but only statesmanship can hold together conquered territory. Alexander conquered a vast domain, but at his death, it was rent asunder. For over five centuries did Rome control nearly all the known world, showing that not only did one man among them possess ability, but that it was the common possession
of the Roman people. Harsh measures were used, it is true, in the coercion of conquered people. But this was the case only when lenient measure were futile. The granting of citizenship to all Italian peoples during the Republic shows that diplomacy at Rome in these times was of a high order. That such action is evidence of Rome's high legislative ability will be readily admitted when the disastrous action of other nations in similar cases, are considered.

We have spoken of the laws of Contract, of Possession, Succession and Procedure. It was in this period that they reached their height. The ancient contracts which required the most technical and formal proceeding in order to make them valid, were now displaced by the most general, least formal processes. The fixed question and answer, "Spondes? spondeo", is now too formal for a people whose commerce and foreign relations are rapidly extending. Implied contracts are held as valid as the more formal ones.

The law of Possession, also, now undergoes a great transformation. Formerly only the Quirites could possess land. But under the rule of the praetors, aliens, although they could not legally own land, were protected in their right of possession; so that possession came to be all but actual ownership. Then came the right of voluntary transfer and the law was perfected. This possession, however, partook of an equitable rather than of a strictly
legal right. Although the old religious spirit has become extinct, its effects may still be traced in the laws of the later Republic. Religious practice formed a custom and this it is that prevents a universal legal ownership in land.

No less has the law of Succession been modified. Here too, technical processes have been eliminated and a written will, attested by the seals of seven witnesses, is held valid.

From the early barbarous proceeding, the actio sacramenti, arose a system analogous to our jury system, partaking of the essential features of the modern trial.

Morey says, "The reforms of Procedure were thus in harmony with the changes we have noticed as taking place in the substantive portion of the law, and alike illustrate the general progress of Roman jurisprudence during the Republican period."

Thus we see how Roman law is related to Roman Civilization. Step by step Rome rose to power and culture, and little by little, Roman law grew to keep pace with the increasing requirements of a progressing people. The rules by which any society is governed are complex proportionately to the civilization of such society. Such we found to be the case at Rome. From the few general rules of a barbarian city to the complex laws of a high civilization, such was the growth of Roman law.

We have noticed upon what high ethical principles some of the Roman laws were founded. That we have laws closely resembling
some of those of the Romans, that the principles underlying both are the same, cannot be denied. Yet it is denied by some, presumably on account of their fascination for "Saxon Liberty", that the English law is at all connected with Roman law. An authority says, "Speaking generally, it may be said that, with the exception of certain provisions relating chiefly to the law of real property, the most important principles of the English law, not established by direct legislation, may be traced either directly or remotely to the laws of Rome". And such seems to be conclusive. That so powerful an institution as Roman law could ever exist without influencing in some degree the laws of every civilized people with whom it came in contact, directly or indirectly, cannot well be conceived. It is possible that in all the details of positive practical rules identity does not exist; but identity exists in "the essential conditions of the two systems in the earliest period of each, in their gradual working out from that period, in their manner and form of creating new law and of throwing off the old, and in their method of keeping abreast with the progressive civilization, so that the law should be at once the principle motive power and the most accurate index of that progress".

There was no external force which compelled the acceptance of Roman law by modern nations; but the "internal force of scientific conviction."
"Servatur ibique jus Romanum non ratione imperii, sed rationis imperio".