

THE TANNAITIC LAW OF HOMICIDE
IN COMPARISON WITH ROMAN AND ENGLISH LAW

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A P P R O V A L

This dissertation, entitled

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Preface

It is the aim of this treatise to examine the rules of homicide as recorded in the Mishna, the Tosefta, the halakic Midrashim, and the Baraitot cited in both Talmuds; to compare them with their Roman and English counterparts, and to reduce them to system.

Though these rules reflect three different periods in the history of Jewish justice, they must not be regarded as mere historical recordings of various practices at varied times. The fact that most of them were codified in the Mishna, indicates that they were meant to be the Law by which the future generations should live and conduct their affairs.

Yet, this law was not the natural and continuous development out of the past. It was rather a compilation of Phariseeic practices of the Second Commonwealth, of institutions of a remote biblical past, and of legal elements conceived by the Tannaim of the first century after the destruction of the Temple, forming in this way a comprehensive law of homicide.

There is no doubt that the law was indeed humane. But was it in harmony with the internal conviction of the people to whom it was addressed? Were R. Akiba and R. Tarphon expressing the sentiment of the people, when they said: "Had we been in the Sanhedrin, none would ever have suffered a death-penalty." The law in its final form was never alive, then who can tell as to its validity?

In regard to Roman law, this writing will be confined to the following three periods: the period of the early and middle Republic in which criminal law was inquisitorial in character, namely, when the magistrate was accuser, investigator, and judge in one and the same person; the era of the last century of the Republic in which the law became accusatory, namely, when crimes were tried before judge and jury; and the era of the first centuries of the Empire, when the accusatorial

method was under the influence of the emperors gradually giving way to the return of the original magistrial procedure.

As sources for Roman criminal law, the Justinian Digest and Roman authors were employed. But as a guide to the sources ----- and to the interpretation of the various opinions and seeming contradictions, Theodor Mommsen's Romisches Strafrecht was indispensable ----- in my research.

For Common law, I relied mainly on Stephen's Commentaries on the Laws of England, Kenny's Outlines of Criminal Law, and ----- the Corpus Juris. -----

----- The plan and method by which I have sought to accomplish the purpose of my treatise may be concluded from the Table of Contents and the Introduction.

Table of Contents

	Page
Preface.	v
Chapter	
I Introduction.	1
The Nature and Scope of Homicide.	1
1. Homicide Under Common Law Defined.	1
2. Suicide Not Part of Homicide Under Tannaitic Law.	3
3. Suicide Under Roman Law.	10
4. Beast and Fowl Subjected to the Law of Homicide.	11
II Substantive Law	
Classification of the Various Kinds and Degrees of Homicide and the Penal Consequences of Each.	14
A. Justifiable Homicide.	15
B. Excusable Homicide.	24
III Manslaughter.	36
A. Voluntary Manslaughter.	39
B. Involuntary Manslaughter.	42
C. Involuntary Manslaughter in Opposition to the Law as Formulated in the Mishna.	48
IV Murder.	50
The Victim.	56
Persons Not Capable of Committing Crimes.	56
V The Court.	58
1. Organization of the Court.	58
2. Qualifications of the Judges.	59
3. Selection of the Judges.	60
4. The Court Sessions.	61
5. The Territorial Jurisdiction.	65
6. The Death Penalty.	66
VI The Procedure.	69
1. The Indictment.	69
2. The Qualifications of the Witnesses.	73
VII The Trial.	77
1. Opening of the Trial Session.	77
2. Examination of the Witnesses.	79
3. The Deliberations.	84
4. The Verdict.	85
VIII Part I.	89
A. The Execution.	89
B. The Burial.	91
C. The Property of the Offender.	91
Part II.	92
Beast and Fowl Under the Law of Homicide.	92

The Tannaitic Law of Homicide in Comparison with Roman and English Law

Chapter I

Introduction

The Nature and Scope of Homicide

1. Homicide Under Common Law Defined

The law of homicide obviously deals with homicide. The noun "homicide" is the English derivation from the Latin term homicidium signifying the killing of a man. But the killing of a man is not necessarily a crime. Neither in tannaitic, nor in Roman, nor in English law is there a crime for a soldier to kill an enemy on the battle field, or for an executioner to execute a condemned criminal. Homicide is, therefore, a general term embracing lawful as well as unlawful acts.

Now, while the term explicitly denotes that the victim must be a human being, it says nothing about the nature of the killer. Hence, in order to determine the scope of the law of homicide, English jurists have sought to furnish homicide with a legal definition; but not being able to agree on one, they came up with two. Definition one determines homicide as "the killing of a human being by a human being." Two formulates it as "the killing of a human being by another human being."⁽¹⁾ One definition apparently includes suicide in the law of homicide, while the other excludes it.

The first determination is based upon English common law. Though in recent years English court decisions have abolished all penalties for suicide, such as the confiscation of the suicide's goods, as well as his burial in the highway with a stake through the body, common law still regards the intentional suicide of a sane person as an act of homicide; and though it does not punish his body and his heirs, as such a punishment would be revolting to the people, it considers one

who persuades another to kill himself as an accessory to the crime of murder, and punishes him accordingly. (2)

The second definition is a definition by statute, reflecting the tendency of some American states toward self-destruction. These states enacted statutes providing that a suicide and those who furnish him the means to take his own life as well as those who instigate him to do it are free from any criminality. (3)

Now, neither of the two definitions applied to English law would describe the tannaitic law of homicide. The first is not applicable to the latter because of the following consideration. One of the rules of tannaitic criminal law is that there can be no capital crime unless designated as such by a biblical statute. Indeed, there must be two statutes for each crime, one in the form of a warning (נגיד) against a certain act, and the other in the form of a condemnation of its perpetrator (ענין). Furthermore, while the latter may be expressed by a positive, or by a negative commandment, the former must be stated by a negative commandment only. The statute: "Thou shalt not suffer a sorcerer to live," indicates the penalty in a negative way. (4) But the commandment: "And he that curseth his father and his mother shall surely be put to death," (5) postulates the same in a positive way.

Thus, though the Bible declares that "He that smiteth a man so that he dieth, shall surely be put to death," (6) the sages condition this death penalty on the requirement of a negative commandment, for they say: "We have heard the penalty for it, but not the warning against it. But Scripture says: 'Thou shalt not murder.'" (7)

Now, at a first glance the requirement of two statutes for one crime appears as a peccoliar whim of the sages. Since the Bible explicitly states that he who kills a man shall be put to death, it is

understood that the Bible is opposed to the killing of a man, then why do the Tannaim demand a special statute forbidding murder? Yet, it is not as peculiar as that. The sages recognizing the fact that often there are two statutes for one and the same criminal activity in the Bible, and unwilling to regard the Bible as a historical record, decided that it contained two sets of criminal law, one addressed to the individuals not to perform certain acts, and the other directed to the whole community as a responsible body for law and order. As the community is represented by courts of justice, the latter may be identified with the former. Hence, wherever there is a rule of condemnation (ל/ח) addressed to the judicature, there must be also a warning addressed to the individuals (פ' נ/ח). If Scripture says to the community: "Whosoever lieth with a beast shall surely be put to death,"⁽⁸⁾ it also says to the individual: "And thou shalt not lie with any beast to defile thyself therewith."⁽⁹⁾ But Scripture commands to punish one who curses or wounds his parents, yet no respective warnings to individuals are formulated in it. In these and similar cases the biblical consistency is saved with the help of the thirteen rules of expounding the Scriptures.⁽¹⁰⁾

2. Suicide Not Part Of Homicide Under Tannaitic Law

However, we do not find in tannaitic literature the claim that the biblical statutes of homicide embrace the killing of oneself as well as that of another. There is R. Eleazar who interprets the biblical passage: "And surely your blood of your lives will I require," to mean self-murder.⁽¹¹⁾ Still the Tanna does not assert that suicide is included in the biblical commandment: "Do not murder," being consequently a form of homicide. He merely finds a law in the Bible making self-destruction a felony per se. ~~ל/ח~~

The Midrash interprets the passage in the same sense,

but concedes one the right of self-killing as a means of escape from torture and humiliation as in the case of King Saul on the mountains of Gilboa. (12)

R. Judah goes even further. He entertains the opinion that a man of sound mind should and would prefer suicide to torture and humiliation. "For these things I weep." (13) R. Judah said: "For the loss of the senses and for the loss of Shekina. Otherwise, how was it possible that Zedekiah saw that they were going to put out his eyes, and he had no sense to smash his head on the wall until the departure of his soul?" (14)

Similarly, the Epitomist of II Maccabees regards the suicide of Razis as noble and worthy of a man of noble rank. In describing his death, he says: "As he was completely surrounded, he fell upon his sword, preferring to die nobly rather than to fall into the hands of a mob and be outraged in a manner unworthy of his noble rank." (15)

That Josephus too has given some thought to this view is clearly seen from Eleazar's address to the garrison of Masada. "I believe that it is God who has granted us this favor, that we have in our power to die nobly and in freedom—a privilege denied to others who have met with unexpected defeat. Our fate at break of day is certain capture, but there is still the free choice of a noble death with those we hold most dear." (16)

This is also the accepted view in the Talmud. According to the Talmud, God brought famine upon the land of Israel because the Jews had not eulogized King Saul properly. (17) For the same reason, the Talmud exalts the four hundred boys and girls who rather drowned themselves than to be humiliated by their captors. (18)

However, as there is a difference of opinion about

most ethical and religious questions based on human speculation, but not yet enshrined in a strong venerable tradition, so it is about the commission of suicide.

When the disciples seeing the prolonged suffering of R. Hananiah ben Teradion as he was burning on the stake, asked him to open his mouth, so that the fire would hasten his death, he replied: "It is only right that He who has given life should take it away, but let not man destroy himself." (19)

The same thought is expressed by Josephus in the defence of his preference to live under the Romans to a death by his own hands. "It is from Him that we have received our being and it is to Him that we should leave the decision to take it away." (20)

However, while Josephus' right view on this subject can hardly be determined, since his pro-suicide speech put into the mouth of Eleazar is not less forceful than the contra speech spoken in his own defence, Jossippon is in full agreement with the latter. His version of the death of the Masada-garrison deviates from that of Josephus. While according to the latter, they died by their own hands, according to the former, Eleazar and his men died fighting. (21)

For the same reason unlike the Epitomist of II Maccabees, he refrains from exalting the suicide of Razis. He merely reports the fact of the self-murder without further commenting on it. (22)

He even accuses Saul of cowardice in his preference for self-destruction to torture in the hands of the Philistines. In the defence of Josephus' surrender to the Romans, he says in regard to Saul: "I, thus, believe that he did it out of cowardice, for he said: 'Lest these uncircumcised come, thrust me through, and abuse me.'" (23)

Besides this contraversial suicide, the Tannaim agree on one's justification to commit suicide in order to escape certain

cardinal sins. The Midrash excludes from the law of suicide a situation like that of Hananiah, Misha'el, and Azariah where one is forced to worship an image. ⁽²⁴⁾ Another Midrash interprets the mass drowning of the four hundred boys and girls mentioned above as an escape from carnal sin. ⁽²⁵⁾

The same motivation is given in the Talmud for the suicide attempts of R. Zadok and R. Cahana. ⁽²⁶⁾

A third justifiable suicide is that of repentance. It is told in the Midrash about Yokim the nephew of Jose ben Yohezer that he derided his uncle who was taken to be hanged as a martyr for the Law. But the latter persuaded him to do penitence for his sins. He then killed himself; and before Jose expired on the gallows, he announced that his nephew had preceded him into Paradise. ⁽²⁷⁾

Similarly, it is related in the Talmud that R. Hiya ben Ashi attempted suicide to atone for a carnal sin which he erroneously thought to have committed. ⁽²⁸⁾

Now, according to my opinion there is also a fourth suicide sanctioned by some of the sages. A Jew is justified in killing himself when his mental anguish is so overwhelming that life has become unbearable to him, though he is neither threatened by humiliation, nor by physical harm. This will help explaining the differences in the versions of the death of the mother of the seven sons who died as martyrs by the hands of Antiochus. The Epitomist of II Maccabees, and Josippon tell that she died a natural death. ⁽²⁹⁾ The author of IV Maccabees relates that as she was about to be seized and put to death, she flung herself into the fire, so that no one might touch her body. ⁽³⁰⁾

In the Midrash, on the other hand, it is told that she went insane, fell off the roof, and died. ⁽³¹⁾ In the Talmud, it is plainly stated that she went up upon the roof, threw herself down, and died. ⁽³²⁾ In addition to

that, IV Maccabees alone has the version that the youngest brother too has committed suicide. (33)

But since there is no apparent reason for the Epitomist of II Maccabees to conceal the suicide of mother and son, as he himself exalts the self-killing of Razis, it is reasonable to agree with M. Hada^s that the suicide of mother and son are the invention of the author of IV Maccabees who wished to exhibit the young man's ardor, and the mother's modesty that no one should touch her body. (34)

Josippon, on the other hand, who rejects suicide under all circumstances is satisfied with the original story of II Maccabees that they died a natural death.

Again the Tannaim were not cognizant of the books of the Maccabees. Had they been aware of them, they would have placed them among the Sefarim Hizonim, namely, the books outside of the Canon which were not permitted to read. (35) Hence, very likely the Tannaim knew the story of the seven brothers from hearsay. And they knew it in a version that she died by her own hands, since otherwise the midrashic modification of her death would be unnecessary. Besides that while the authors of The Maccabees elaborate with seeming relish on the tortures of the brothers, the Tannaim know of no torments in this case. But as torture was not a factor in our story, the sages recorded in the Midrash see no reason for the mother's suicide. Accordingly she did not commit suicide, but went insane, fell from the roof, and died. On the other hand, the talmudic account of her death indicates greater leniency toward suicide than the midrashic. According to the Talmud, the agony of the soul is sufficient excuse for self-destruction. An unfortunate mother who has seen her son dying by the hands of a tyrant, is justified in not wanting to continue living, and in departing voluntarily from a life full of agony and sorrow.

The same motive will also explain the suicide of the young priests related in a Baraita. Like the mother who is unable to go on living after the death of her beloved children, so the priests can not bear life after the loss of the Holy Temple which has meant everything to them. Thus, it is related: "When the First Temple was destroyed, groups of young priests who had the keys to the Temple went up to the roof and said: 'Lord of the universe, since we were not privileged to be trustworthy keepers of Thy treasure, so we herewith return the keys. They then threw the keys toward heaven, whereupon they threw themselves into the fire.'⁽³⁶⁾"

This consideration may also account for the abstruse self-destruction of the laundryman because of his being absent at the time Rabbi died.⁽³⁷⁾ Nevertheless, R. Jacob Emden remarks to this as follows: It is very much to wonder about this suicide, as it is an act punishable by the forfeiture of the future world.⁽³⁸⁾ The same Rabbi also claims that he has seen in Semahot the statement that he who commits suicide forfeits his share in the world to come.⁽³⁹⁾

Though this statement has not been found in any of our editions, besides the fact that Semahot is a post-talmudic product,⁽⁴⁰⁾ it is quite popular among the Jews of to-day that this was the amoraic tenet. This view is also shared by Solomon Zeitlin.⁽⁴¹⁾ Orally, he suggested to me the following talmudical passage as an indication of the existence of such belief at least among some of the Tannaim: "It happened that four hundred boys and girls were captured for a vile purpose. When they learned the purpose of their capture, they asked: 'If we drown ourselves, shall we share in the life to come?'"⁽⁴²⁾ Now, the question of the children presupposes the belief that a suicide forfeits his share in the future world.

However, while this legend apparently reflects such a view, there is not found a direct tannaitic, or amoraic statement supporting

it. On the contrary, in the Mishna it is explicitly stated that with the exception of the cases recorded in it as excluded from the life to come, all the Jews have a portion in it.⁽⁴³⁾ Similarly, in the Tosefta are counted four more excluded cases; and these in addition to those recorded in the Mishna are regarded as exhaustive. This is clearly seen from the text where it is stated: "They added to them that he who removes the yoke... have no share in the world to come."⁽⁴⁴⁾ But, since there is no connection between this statement and the preceding passage in the Tosefta, it apparently refers to the excluded cases recorded in the Mishna, denotes the additional cases which very likely have been agreed upon by the Tannaim after the conclusion of the Mishna, and considers them as complete, though suicide is not one of them.

Nevertheless, the belief was probably common among the Tannaim and Amoraim that senseless suicide was a sin against God, and it would be punished by Him. One is even forbidden to bruise oneself, though R. Akiba dissents.⁽⁴⁵⁾ Likewise one is not allowed to endanger his life.⁽⁴⁶⁾ Still the only penalty for suicide explicitly expressed in the Talmud is the one cited above: "And surely your blood of your lives will I require."⁽⁴⁷⁾

Josippon And Josephus, on the other hand, are more outspoken on that point. According to the former, the soul of a suicide is condemned to eternal restlessness, and according to the latter, to the "darker regions of the nether world."⁽⁴⁸⁾

Josephus even alleges that a law has existed in his time whereby the body of a suicide was exposed unburied until sunset.⁽⁴⁹⁾ Still since it is not mentioned in rabbinic literature, we may safely assume that either this practice was not favored by the sages and it came into disuse immediately after the destruction of the Temple, or it had been originally nothing but a local custom which

ceased to function together with the termination of the existence of its locality. The latter hypothesis may also be applied to the sanctions recorded in the treatise of Semahot. Even, if the rules forbidding to mourn a self-destroyer, to eulogize him, and to perform rites at his burial not absolutely necessary to uphold the amenities in the face of his relatives recorded there and ascribed to Tannaim of the second century of our era are tannaitic indeed, the talmudic silence about them seems plausible by their having been limited to a locality. The talmudical silence also indicates that while there might have been a few communities practicing some sort of retribution against a suicide, the general tendency during the tannaitic and amoraic times was to leave ^{it} to the judgement of God. We may, thus, conclude that from the time of the earliest Tannaim until the closing of the Talmud, suicide was hardly ever regarded as a felony, and was surely never considered as a part of the law of homicide. ⁽⁵⁰⁾

3. Suicide Under Roman Law

Like the Jews, the early Romans exposed the body of the self-murderer unburied. But while the former merely delayed its burial till sunset without further abusing it, the latter actually left it unburied. In reference to Virgil's description of the suicide of Queen Amata, wife of King Latinus, Servius states: "Cautum fuerat in pontificalibus libris ut qui laqueo vitam finisset insepultus abiceretur." ⁽⁵¹⁾ This practice, however, came into disuse in the early days of the Republic, when a new penalty was introduced. The goods of the suicide were confiscated by the State. ⁽⁵²⁾ And finally under the Empire every penalty for the commission of suicide was removed. Tacitus tells us that at the time of Tiberius, if one was convicted to die, his property was confiscated, and burial was denied to him, whereas if he committed suicide his body was buried, and his will respected. ⁽⁵³⁾

This consideration for the self-murderer was obviously due to the two philosophies, Stoicism and Epicureanism, prevalent in Rome in those days. Stoics as well as Epicureans agreed that it was the right and privilege of a free man to depart from life at his own discretion. Seneca, a noted Stoic, appropriating the words of Epicurus, pointedly expressed the doctrine of both schools on that point. "Malum est in necessitate vivere, sed in necessitate vivere necessitas nulla est." (54)

4. Beast and Fowl Subjected to the Law of Homicide

Finally, the second definition quoted above would not hold true for the tannaitic law. According to this definition and the general practice in English and American courts, man alone is indictable as a principal under the law of homicide, whereas the tannaitic law regards beast and fowl too as legal persons in reference to that rule.

Thus, it is stated in Genesis: "And surely your blood of your lives will I require; at the hand of every beast will I require it ... Whosoever sheddeth man's blood, by man shall his blood be shed." (55)

This very likely reflects the general practice of the Ancient Hebrews. And the Mosaic law of the goring ox was merely the confirmation of an old tradition with the addition of some specifications such as the degree of the guilt of the owner of the gorer.

Hence, though the Mosaic rule was formulated about an ox, the sages well understood its implication that like the pre-Mosaic law it was not confined to the ox. Some of the sages found this implication by comparing the law of the goring ox with the law of Sabbath. (56) Others read it in the wording of the law itself: "And if an ox gore a man. I thus know only about the ox. How do I know about any other cattle, wild animal, and fowl? It is said: If he gore anyway." (57)

It is obvious that the law is artificially interpreted to fit its spirit by ignoring the fact that the verb 'gore' is not appli-

cable to fowl and hornless animals. (58)

This preference of the spirit of the law to its wording is explicitly expressed in the Mishna: "An ox and all other cattle are alike concerning falling into a pit...It applies also to wild animals and fowl. If so, why is it written an ox, or an ass? Because Scripture speaks of what happens in fact." (59)

Consequently, after stating that capital cases are judged before a court of twenty three judges, the sages assert that not only man, but also the ox, the wolf, the lion, the bear, the leopard, and the snake are sentenced to death by that court. (60) And R. Judah ben Baba testified that a cock was stoned in Jerusalem because he had killed a human being. (61)

Again in the Tosefta, the Tannaim offer the general rule that any cattle, wild animal, or fowl, if it has committed homicide, it is put to death by the decree of twenty three. (62)

Now, in tannaitic literature the concept "cattle" (בְּהֵמָה) in its proper sense includes all domestic animals with the possible exception of the dog, (63) and the cat; (64) and the concept "wild animal" (חַיָּה) all animals living in the wild including the dog and the cat. Yet, the three concepts: cattle, wild animals, and fowl do not embrace all living creatures. Indeed, there is a passage in the Mishna which counts the following seven classes of living beings: domestic animals, wild animals, fowl, fish, locusts, reptiles, and insects. (65)

The problem is, therefore, to determine as to whether the law of homicide was confined to the first three classes often mentioned in tannaitic law, or it embraced all life. At first thought the inclusion of the snake in the law would seem to indicate the extension of the rule at least to reptiles. But we have no evidence as to the snake's classification in tannaitic law. In amoraic literature, there is disagree-

ment about it. In the Palestinian Talmud, it is stated that the snake belongs to the class of the wild animals. ⁽⁶⁶⁾ In the Babylonian Talmud, on the other hand, he seems to be a class by himself. ⁽⁶⁷⁾

However, a perusal of tannaitic law shows that while there was no scientific classification of life, most of the amphibians and the insects were considered as abominable and to be exterminated. Likewise, the extremely dangerous kinds and individuals were to be killed on sight ⁽⁶⁸⁾ even on Sabbath. The law of homicide could, therefore, not be applied to the abominable and the extremely dangerous, but it could include certain kinds of fish. Yet, just as Scripture speaks of what happens in fact, so the sages spoke of what happened in their days. ⁽⁶⁹⁾

We may, thus, conclude that all animals not regarded as abominable, or extremely dangerous were subjected to the law of homicide. Hence, homicide in tannaitic law may be defined as the killing of a human being by another, or by any other living being with the exception of the abominable and extremely dangerous genera.

Chapter II

Substantive Law

Classification of the Various Kinds and Degrees of Homicide, and the Penal Consequences of Each

As all law is a matter of historical growth and development, there are certain fundamental principles upon which all men agree, as a common experience has taught them that which has absolutely been necessary for their survival, and that which has served their interest. But there are rules conditioned by the economical, social, cultural, and political histories of a nation; and different histories inevitably result in disparate systems of law.

Hence, the law of homicide in the three systems of our concern will show similarities to and dissimilarities from each other; and for their convenient study we shall proceed with their classifications.

Homicide in English, Roman, and tannaitic law may be divided into ^{two} main heads: lawful and criminal. According to that same principle of the degree of innocence and blameworthiness, under common law, the best systematized of the three, it has been subdivided into the following five headings: justifiable homicide, excusable homicide, involuntary manslaughter, voluntary manslaughter, and murder. (70)

Now, for the sake of a convenient comparison among the three systems of law, this same classification will be maintained for tannaitic law. At the same time, it is to note that there is no difference in the penal consequences between the justifiable and the excusable homicides. In both cases the slayer remains free. The only distinction lies in the degree of their moral blameworthiness. In the former case the killing takes place without any manner of fault on the part of the slayer; in the latter there is some slight fault, or at any rate the absence of any duty to perform the act, though the blame is so

slight as not to render the party punishable.

A. Justifiable Homicide

1. As pointed out before, there is no objection to the killing of an alien enemy in battle in any of the three systems of law. Moreover, the Jews, the Romans, and the English have revered and praised their war heroes highly all through the ages. However, their policies have differed in regard to the status of the vanquished. According to a tannaitic interpretation of Scripture, the lives of all the inhabitants of an assaulted city are to be spared provided they renounce idolatry and are willing to accept the Noachian laws. If they do not accept these conditions, it is the duty of their conquerors to slay all the male adults, though the war be optional (*אפשר להלחם*) "in order that they do not teach the Jews to do after their abominations." (71)

However, history teaches that most of the Jewish wars like those of other nations were waged by temporary policies rather than by fixed laws. The nature of the war and the treatment of the enemy depended upon the cause of the war, or on the character of the enemy, or on the temperament of the war leader, or on all these and many other factors. No statute has ever been discovered in Jewish law commanding that the captives be measured with lines of which two lines should be put to death, and one should be kept alive. Nevertheless, this was David's (72)

policy toward Moab. Nor were the Hasmonean kings in their zeal with the forceful conversion of the Idumeans, the Itureans, and the others concerned with the abolition of the abominations from the countries of their conquest. (73)

Hyrchanus and Alexander used foreign troops in their wars without being appalled by their paganism; and Aristobulus died with the title of Philhellene. (74)

Thus, their zeal for Judaism was very likely the result of a realization that a small Judea would not be able to preserve its independence for the duration,

and that only a big state inhabited by a large population joined by the bond of common basic ideals would survive permanently.

Hence, since Jewish leaders hardly ever went to the Bible, or to any other law book to consult it as to how to treat their enemies, the tannaitic statement based on Scripture cited above may be regarded merely as the attitude of a group of religious teachers towards heathenism. These men indeed hated idolatry and pagan morals as abominable, as the cause of God's anger, and consequently as the source of all evil. According to their teaching, it was the duty of the Jewish fighters to slay all male adults of the heathenish alien enemy as long as the war endured.

While the Tannaim distinguish between pagan and non-pagan, Roman law places the foreign enemy outside the pale of the law. He is regarded as freebooty to be killed by anyone who finds him. This is the obvious conclusion from the following ordinance: "Transfugas licet ubicumque inventi fuerint, quasi hostes interficere." ⁽⁷⁵⁾ Indeed, the phrase "in hostium numero habere" ⁽⁷⁶⁾ is the Roman expression for "putting to the sword."

Hence, the Romans and the Tannaim have it in common in their regard of the foreign enemy as a notorious criminal whom everyone is justified in killing wherever he meets him. Not so does it obtain with the practice of the English of to day. At common law, it is quite ~~la~~ lawful to kill an alien enemy in battle. But to kill him outside of the actual exercise of war, it is as much as to kill the most regularly ⁽⁷⁷⁾ born Englishman.

2. The legal executioners are of course justified in executing the condemned criminals. Except in murder cases the executioners are the witnesses. Based on the biblical commandment: "The hand of the witnesses shall be ^{on him} first, and afterward the hand of all the people," ⁽⁷⁸⁾

tannaitic law allows the bystanders to participate in the execution only if the witnesses are not able to do it by themselves. ⁽⁷⁹⁾

However, in murder cases the Bible commands that "The avenger of blood shall put the murderer to death." ⁽⁸⁰⁾ Hence, the sages regard it as the duty of the victim's nearest relative to take over the office of the executioner. If there is no blood relative, court appoints a blood avenger, or anyone may appoint himself as such. ⁽⁸¹⁾ If for some unforeseen reason the legal death by the legal person can not be inflicted, in murder cases any form of death by the hand of any person becomes legal, provided it is done under supervision of court. ⁽⁸²⁾

Like the Jews, the Romans had many ways of disposing of a convicted criminal. Yet, if one was convicted to die by the sword, it was prohibited to kill him with an ax, though often the form of death was only a formality, since many of the criminals died under torture which usually preceded the coup de grace. ⁽⁸³⁾ The executioners of citizens were the lictors who had to recite a certain formula in receiving the condemned from the magistrates. ⁽⁸⁴⁾ It stands to reason, therefore, that no others were entitled to administer the death penalty. On the other hand, slaves and foreigners died by the hands of the official states' executioner (carnifex) and his assistants, while the hurling from the precipice originally the common way of execution became at the time of the republic the privilege of the people's tribunes to get rid of their personal enemies. ⁽⁸⁵⁾

Under common law, the law is very explicit that while homicide is not only justifiable but even commendable where the law requires it, it must be executed by the proper officer or his duly appointed deputies in accordance with the sentence of the court. If another person including the judge himself puts the criminal to death, or the appointed officer changes the form of death, it is murder. ⁽⁸⁶⁾

the belief that deviators from traditions were the cause of God's wrath upon his people. And as they could not find a basis for a legal condemnation of the wretches, the Tannaim recommended their destruction as a form of self-defence to the people at large.

Likewise, the Romans believed that Roman greatness depended on the favor of their gods. It was engraved on the Twelve Tables: "No one shall have gods by himself, either new gods, or alien gods, unless recognized by the state."⁽¹²⁹⁾ Hence, whenever the welfare of the Roman world was threatened by disaster, or simply by disunity, the Roman emperors called to the people to do homage to the gods of Rome. Though they were not too strict with those who worshipped a few gods besides those accepted by the state, they regarded the denial of the legal gods of Rome, and particularly the refusal of their ceremonies as atheism and treason punishable by torture and death.⁽¹³⁰⁾

8. The following sanctions of homicide are purely theological, and it is doubtful whether they ever were applied to actual cases during the Second Commonwealth. "If a man steals a sacred vessel or curses by kosem, or has sexual relations with a heathen female, the zealots fall upon him. If a priest served at the altar in a state of uncleanness... the young priests... split open his brain with clubs."⁽¹³¹⁾

Though there are two readings in the Mishna: קסם and קסם, the general opinion is that they mean one and the same, namely, a disguised name for God,⁽¹³²⁾ and the meaning of the passage is that whosoever curses God under the designation kosem or kesem, and is consequently not punishable by court, since the law of a blasphemer is only applicable to those who pronounce the tetragrammaton, zealous people for the Law kill him.⁽¹³³⁾

Yet kesem as given in the Mishna of the Palestinian Talmud possibly means magic. It may signify that if one curses another by magic incantations, zealots may kill him. Similarly, the Laws of the

Nevertheless, if the culprit attempts to escape, the executioner, or any man willing to assist the officer is in the right to kill the escaper in any possible way. (87)

3. The blood avenger is absolved of any blame in slaying the killer who has left the place of exile. R. Jose the Galilean teaches that it is the duty (*ש"ב*) of the avenger, and the privilege (*ש"ב*) of any man to slay him. R. Akiba holds the opinion that the former is justified and the latter is merely excused (*ש"ב*) (88)

4. Homicide is lawful in self defence. And not only is it lawful for the assaulted himself to repel a dangerous assailant by all means which might secure his safety, but it is the duty of any man who sees A. persuing B., and recognizes by the circumstances that B's life is in danger, to destroy the persuer's life for the safety of the persued. (89) However, the lawfulness of the killing depends upon the necessity of it. If a less drastic measure than death would have stopped the persuer, the slaying is murder. (90)

Roman and English jurists concur with this rule. Thus, Cicero says: "An unwritten law of Nature exists... that if our life is exposed to treachery, to violence, to the weapons of robbers, or private enemies, all means that we adopt to secure our safety are legitimate." (91)
~~The right of self~~
 The right of self defence applies also to the protection of one's relatives, (92) of the master by his slaves, (93) and of the officer by the soldier. (94) Though Roman law is silent on the status of an interfering stranger, there is evidence that in a case when one makes known his helplessness by attempting to run away, any man is justified in protecting the life of the fleeing as if it were his own. (95)

Under common law, if anyone attempts murder, and is slain in such attempt either by the assaulted, or by any other person interposing to prevent murder, the slayer is not guilty of any crime. For the

warding off of this attempt by force is justifiable, and if by the use of this force the assailant is killed, no crime has been committed. (96)

5. Killing is legal to prevent rape on those persons ~~wh~~ who if submitted willingly would be punished either by death, or by extirpation. (97) However, if she has already been raped, the killing is not lawful. (98)

Now, there are three cardinal differences between tannaitic and Roman law on that subject. One, according to the former, homicide is lawful merely in cases punishable by death or extirpation, according to the latter, in any case of rape. (99) Two, in the former, there is no distinction between relation and stranger, in the latter the killing is the privilege of a member of the family, (100) or of the household. (101) Three, in the former the slaying is limited to the crime of rape, in the latter a father has the right to kill his adulterous daughter with her paramour, if he surprises them in his own house, or in that of his son in law. And the husband may kill the adulterer provided he dismisses his wife without delay. (102)

Common law concurs with tannaitic that the defender may be a stranger, and the killing must occur in the prevention of a crime. On the other hand, it agrees with Roman law that there is no distinction regarding the person to be ravished. It differs with both by legalizing homicide even to prevent adultery, provided the killing is done by the husband. (103) All these cases are of course justifiable only in case where there is no other way of thwarting the felony. (104)

6. It is the preponderant tannaitic view that the moment a burglar trespasses somebody else's premises at night time, he has forfeited his life. The owner of the property, or anyone present has the legal right to kill him, because it is assumed that his being there places the owner's life in jeopardy. (105) Some even hold the opinion that the law is also valid during the day. (106) If, however,

it is certain that the burglar is harmless as far as life is concerned, while it is not certain in regard to the possessions, the general view is that the killing would be punishable by court, since the law of machtereth is that of self defence, and not of the defence of possessions. ⁽¹⁰⁷⁾ Yet Onkelos seems to hold the opinion that it is the law of the defence of possessions, for he says that if there are any witnesses to the theft, he is to be spared, as the return of the theft is assured. ⁽¹⁰⁸⁾ This appears to be also the view of R. Yiah. ⁽¹⁰⁹⁾ Again, R. Simon ben Yohai says explicitly that man is entitled to defend his belongings by all means at any place and any time. ⁽¹¹⁰⁾

Roman law like biblical distinguishes between breaking in at night and between stealing during the day. The Law of the Twelve Tables reads: "If one surprises a thief at night and kills him, he is free. But if one catches a thief during the day, the thief shall be scourged, and given up as a slave to the person against whom the theft was committed." ⁽¹¹¹⁾ This law was later amended that even at night time, the one who surprises him may kill him provided he could not have spared him without placing himself in jeopardy. ⁽¹¹²⁾

At common law, there is in existence the Person Act whereby no punishment is to be incurred by any person who kills another without felony. And since the owner in killing the intruder has no felonious intent, but to ward off the commission of a felony, he is legally free. ⁽¹¹³⁾

7. One is justified in endangering, or killing a min, an apostate, a betrayer, and an Epicurean. This formulation is based upon the Tosefta as cited by R. Abahu and recorded in the writings of R. Hananel, R. Alphasi, and R. Asher ben Yehiel. ⁽¹¹⁴⁾ In the Tosefta based on the Erfurt Manuscript, however, the Epicureans are not mentioned, and in the dephus-Tosefta the minim and the Epicureans are left out. ⁽¹¹⁵⁾

Nevertheless, the Sephardic version seems preferable to the others, since all these four groups stand together in their being condemned to eternal hell, it follows that their earthly fate should also be alike. (116)

But who are these men that one is allowed to slay? An apostate is one who completely disregards a main tradition, be it for the sake of deriving some benefit of it (פסד מן המצוה), or be it for the purpose of offending the Jewish religion (פגועה ביהדות). (117) A betrayer is a professional informer who betrays Jewish lives, or possessions into the hands of hostile heathens, including into those of an unjust government. (118)

The nature of the Epicurean is not specified in tannaitic law. But from the few reliable passages referring to him he is apparently the counterpart of his Greek and Roman namesake. A perusal of De Rerum Natura shows that Epicureanism regards pleasure as the end to which all else is only a means. Yet religion is evil, for the religious man is haunted by two superstitions: the fear of what may be beyond this life and of that of the all seeing eye and the intervening hand of the gods. These terrors are the destroyers of man's happiness.

The Epicureans, consequently, felt that it was their duty to challenge all religious teaching by uncovering their inconsistencies, and by showing the irrationality of the observance of all kinds of tenets for the sake of some reward, or for fear of punishment. This is why they were accused of having destroyed the divine commandments. (119)

And this is why R. Eleazar reminded his disciples to study Torah diligently in order to be able to meet the Epicurean's challenge to it. (120)

Indeed, Josephus, after describing Epicureanism as it is known from the classical literatures, tries to refute it with the help of the Book of Daniel. (121) This description of them is also in line with that of the amoraic which tells that the Epicurean is usually

derisive of the Torah, and insulting to its students. (122)

In regard to the minim, it is impossible to deal here with the great number of talmudic, midrashic, and other statements relating to them. But we feel that the following few accounts of them are basic for our knowledge of them. Jerome who lived at Bethlehem, Judea, in the fourth century of our era described them as follows: "Even to-day there exists among the Jews a sect in all the synagogues of the East which is called the minim, and which is even now condemned by the Pharisees. Generally they are called Nazareans believing in Christ...but while they wish to be both Jews and Christians, they are neither." (123) Now conceding to Jerome that they were neither good Jews, nor good Christians, but who has ever heard of the early Christians to deny the existence of a future world and to reject the doctrine of the resurrection of the soul? Yet we are told that the minim claimed that there was merely one world, (124) and that the end of man was dust and nothing else, (125)

For that reason, it is logical to accept the following as fundamental as it reconciles the contradictory passages: "And ye shall not walk after your heart, this is minuth." (126) Whoever goes after his heart and not after the teachings of the Torah is a min. Hence the Jewish Christians were minim, but a min was not necessarily a Jewish Christian since the term minim was applied to heretics generally. This is in line with R. Johanan's assertion that "Israel did not go into exile until it became twenty four sects of minim." (127)

While in tannaitic literature there is no evidence that the term minim has ever been applied to any others but Jews, in amoraic times it is designated sometimes non-Jews as well. (128)

Now, the tannaitic justification for the killing of heretics and informers was the result of the suffering of a people under the yoke of foreign tyrants to whom Jewish lives were cheap, and of

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the belief that deviators from traditions were the cause of God's wrath upon his people. And as they could not find a basis for a legal condemnation of the wretches, the Tannaim recommended their destruction as a form of self-defence to the people at large.

Likewise, the Romans believed that Roman greatness depended on the favor of their gods. It was engraved on the Twelve Tables: "No one shall have gods by himself, either new gods, or alien gods, unless recognized by the state."⁽¹²⁹⁾ Hence, whenever the welfare of the Roman world was threatened by disaster, or simply by disunity, the Roman emperors called to the people to do homage to the gods of Rome. Though they were not too strict with those who worshipped a few gods besides those accepted by the state, they regarded the denial of the legal gods of Rome, and particularly the refusal of their ceremonies as atheism and treason punishable by torture and death.⁽¹³⁰⁾

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Though there are two readings in the Mishna: *קוסם* and *קסם*, the general opinion is that they mean one and the same, namely, a disguised name for God,⁽¹³²⁾ and the meaning of the passage is that whosoever curses God under the designation kosem or kesem, and is consequently not punishable by court, since the law of a blasphemer is only applicable to those who pronounce the tetragrammaton, zealous people for the Law kill him.⁽¹³³⁾

Yet kesem as given in the Mishna of the Palestinian Talmud possibly means magic. It may signify that if one curses another by magic incantations, zealots may kill him. Similarly, the Laws of the

Twelve Tables imposed the death penalty upon anyone who by means of magic incantations annoyed another and rendered him ill. (134) The Romans also decreed that whosoever stole what was sacred, or anything entrusting to what is sacred, should be regarded as equal in guilt to a parricide. (135)

B. Excusable Homicide

1. In the introduction to justifiable homicide, we have indicated that neither at tannaitic, nor at common law, as it is practised to-day, is there a difference in the penal consequences between justifiable and excusable homicides. English writers, however, have preserved the distinction at common law for historical reasons, and we have adopted it for tannaitic law for the sake of a convenient comparison with the former. All justifiable killings are voluntary but sanctioned by Law. The excusable homicides are either the result of the highest degree of chance, or they are conditioned by the victim's low status in society, or by the nature of the killer. All this will become clear in the subsequent statutes. Thus, accidental homicide is excusable, if it is caused by way of ascent. But it is not excusable, if it is the effect of an activity by way of descent. If a man is rolling the roof with a roller, and while he is pulling it up, it falls from his hand on a man and it kills him, or if he is drawing up a barrel, and the rope breaks, or it slips from his hand and it falls on a man and kills him, or if he is going up a ladder and he falls on a man and kills him, he is free from guilt. (136)

This rule according to Maimonides is based on the following consideration. Most accidents occur by way of descent because it is the nature of bodies to go down rapidly. On the other hand, homicide by way of ascent is an extraordinary event which can hardly be foreseen and prevented. It is, therefore, excusable. (137)

With the help of the distinction between ascending

and descending, Amoraim have reconciled four seemingly contradictory Baraitot. A butcher is chopping meat and kills a man. One Baraita declares him guilty if the killing has happened in front of him, and not guilty if, in the back of him. Another Baraita asserts the contrary. A third one frees him in both cases, and a fourth one finds him guilty at any rate. The Baraitot are reconciled, however, if we apply the rule of ascent and descent. A butcher applies four motions, two in front of him, and occasionally two behind. He lowers the hatchet and raises it in the front; and when he desires to use force he raises the hatchet behind the shoulder lowering it behind his back to lift it again with greater strength. The killing is excusable if it is the effect of one of the motions which lead the hatchet away from the meat, namely, of the lifting up in front, or of the lowering down in the back. (138)

Whereas the Tannaim basing the law of involuntary homicide on Scripture attempted to make a science of it by applying an objective test to distinguish between misadventurous and negligent killings of which the former were excusable and the latter punishable by exile, Roman jurists have never made such an attempt. It is certain that even in the early days of the republic, the Romans had distinguished between voluntary and involuntary killings. Though the former were primarily offences against individuals, they were held to be dangerous to the public, and were consequently treated as public crimes. On the other hand, the latter whether misadventurous or negligent homicides were regarded as religious offences. Thus, the Laws of the Twelve Tables ordained that if one should kill a man unintentionally, (139) he should merely sacrifice a ram to expiate the blood of the victim. And it is noteworthy that even in the classical period of Roman law when religion had ceased being a factor in law no lex was enacted against culpable homicide.

Juristic writers assert that in the last century of the republic, there were nine permanent criminal tribunals in Rome known as *questiones perpetuae* to administer justice under the nine criminal

 leges enacted in the course of time against all kinds of crimes. (140)

But there was no law under which a negligent killer could be brought to justice. If one injured a free man voluntarily or involuntarily, he

 was arraigned under the *Lex Aquilia*. (141) Again, if one killed another voluntarily with *dolus*, he was judged before a special tribunal designated to deal with capital cases under the *Lex Cornelia*. But this law

 did not embrace negligent homicide. (142)

It is, therefore, safe to assume that involuntary killing remained during the Roman republic a private delict left to the magistrates and praetors to deal with each case individually and to assess its fine or penalty on a subjective basis in accordance with the circumstances and the limited power of the judge. Yet some of these magisterial decisions became the Law in the first centuries of the Empire either through precedence or by an imperial edict. Thus, Hadrian confirmed the decision of the Proconsul of Baetica who relegated a free man for a term of five years who through wantonness caused the death of another. (143) Mommsen counts all together six cases of involuntary homicide which became law under the Empire. (144) Yet each case drew a different penalty; and any other negligent killing not enshrined by precedential decisions still remained ~~priv~~ a private delict. At the same time, it is uncertain as to the tribunal where, and as to the law under which the six kinds of negligence mentioned above were tried. (145)

We may, thus, conclude that tannaitic and Roman jurists agree that involuntary homicide does not belong to the category of murder. But while the former attempted to classify it and to deal with it scientifically, the latter began to look upon it as criminal

only under the ~~E~~mpire, but they never ventured to make an exact science of it.

Common law, on the other hand, has introduced a new factor into the law of homicide, namely, that a killing can not be regarded as misadventurous unless it is the effect of a lawful act. ⁽¹⁴⁶⁾

2. If one throws a stone in his own courtyard killing another, if the victim had no right to enter, he is free from blame. ⁽¹⁴⁷⁾

This rule is based upon the biblical formulation of the law of negligence. It is stated in the Bible that if two men go into the forest to hew wood, and one kills the other accidentally, he must escape into one of the cities of refuge. ⁽¹⁴⁸⁾

But the forest is a place where the victim had a right to be, hence if he had no right to be there, his slayer is free. Similarly, if one enters a carpenter's shop without permission, and is struck by a flying splinter and dies, there is no liability. ⁽¹⁴⁹⁾

Since this rule implies that though other people besides the owner had a right to be there, yet if the victim had no right, the owner is free from banishment, it differs with Roman and common law according to which, he is free only if no one else besides the owner was allowed to enter. ⁽¹⁵⁰⁾

3. If one chops wood and the head of the ax flies back from the wood killing another, the sages say, he is free from guilt.

Rabbi, however, dissents. This seems to be the right conclusion from the second case of the subsequent Mishna:

נשטת בברזל יתקן לברזל רבו אליו אונן יתקן מכלל יתקן
מן ברזל המעביר רבו אליו יתקן מכלל אונן יתקן

"If the iron of an ax slipped from the handle and killed a man, Rabbi says that he need not escape into exile, but the sages say that he

must escape. However, if it flies back from the wood that is being ~~chop~~-chopped and kills, Rabbi says that he must escape, but the sages say, he must not. ⁽¹⁵¹⁾

This explanation appears also to be applicable to the following passage in Sifre: *נשטת בברזל מן ברזל המעביר רבו אליו מן ברזל המעביר*

The anonymous Tanna holds the opinion that the biblical ordinance whereby one is to be exiled refers to a case where the iron slips from the handle, but Rabbi interprets it as a case where it flies back (152) the wood which is being chopped.

This distinction between the head of the hatchet slipping off the handle and the ax flying back from the wood does not exist in English law. If the work is lawful, and the precautions good and prudent people take on such occasions have been taken, there is no liability. (153) This is partly in the spirit of Roman law where each case was left to the magistrate to deal with it in accordance with the (154) circumstances.

4. If a man strikes his fellow man with the intention of killing him, and court considers him to live, but he grows worse and dies, he has to pay to his heirs for injury, for pain, for healing, (155) for loss of time, and for indignity, but he is not guilty of murder. Here the principle of mercy is applied. Since court has estimated him to live, it assumes that he has died from natural causes. Nevertheless, if court considers him to die, and he lives for some time and dies, (156) the one who has struck him is liable. On the other hand, if one strikes his fellow man unintentionally, and court considers him to die, still he lives a short time and then dies, according to a Baraita (157) he is not to be banished, as exile presupposes immediate death.

At Roman law, the intention is decisive. For that reason, Hadrian ordained that if one hit a man to kill, and merely (158) wounded him, he should be convicted of the crime of murder. Again, at common law there is a rule that if the victim dies within a year and a day of the assault, he may be guilty of murder. (159)

~~5. Based~~ 5. Based on Scripture, tannaitic law offered the slave concrete protection against severe chastisement by his

master, for it decreed that if he died within twenty four hours since the castigation, it should be construed as murder which must be expiated by the execution of the master. If, however, the slave survived for twenty four hours, the law presumed that the offence of the master was not ^{too} ~~so~~ heinous but a lawful castigation, since the master had certain rights over the slave being his belonging. ⁽¹⁶⁰⁾ Moreover, if the slave was sold after the beating, the master was free even though the slave died within the period of twenty four hours. ⁽¹⁶¹⁾ This the Tannaim based on the Bible where it says: "and he shall hit him that he dieth under his hand" implying that the guilt of the master depended upon his possession of the slave at the time of the beating as well as the dying. ⁽¹⁶²⁾

This law was attacked by A. Geiger as defying all human logic, forasmuch as the master would see the slave in bad condition, he would sell him to a friend for a few cents to save his own neck in case the former dies. ⁽¹⁶³⁾ Likewise, the Gaon of Wilno found fault with this rule, and he corrected the passage in the Mekilta that the selling of the slave removes the owner's privilege of the twenty four hours and makes him responsible for the former's death even after that period. ⁽¹⁶⁴⁾ Since the Gaon does not indicate the reason for correcting the passage in the Mekilta, it ~~is~~ has been asserted that he saw a contradiction ~~be~~ in this law to the tannaitic spirit of the law as evidenced in the following Baraita: "If one sold a slave to another on the condition that he remain in the old service for thirty days, R. Meir said that only his possessor had the privilege of the twenty four hours, R. Judah said, merely his owner, R. Jose asserted that both, and R. Eliezer claimed that neither." ⁽¹⁶⁵⁾ All these Tannaim conditioned the ^{waiting} period of twenty four hours either on ownership, or on possession, or on both, but neither of them asserted that the period could be waived by abandoning ownership. For that reason, A. Geiger claimed that

the law cited in the Mekilta was later abrogated by the Tannaim quoted
(166)
in the Baraita.

Nevertheless, I agree with Pineles that there is no connection between the two laws. The law of our concern refers to a case where during the flogging the slave belonged and was possessed by one man, and during the dying by another. On the other hand, the Tannaim in the Baraita deal with the problem of possession and ownership. Pineles also tries to rationalize the law. A man does not buy a slave to bury him. Hence his condition appeared fair to the buyer. For that same reason the master might not have realized that he was exceeding
(167)
the measure of moderate chastening.

Whereas tannaitic law regards the slave as a human being, ancient Roman law ascribed to Numa considered him as a thing. His
(168)
master could kill him at will, but a stranger had to pay for him. This was later amended that the killing of somebody else's slave could
(169)
be prosecuted by his owner for damage, or for murder. But he still remained a thing in regard to his own master until the time of Antoninus who decreed that whosoever would kill his own slave without good reason should be not less liable than one killing the slave of another. The good reason was a conviction by a family court for the commission
(170)
of some offence against his master, or another member of the family.

6. If a Jew slays a heathen, or a semi-proselyte,
(171)
accidentally, or intentionally, he is not liable.

Much has been written about this law. It was attacked as barbaric, defended, and twisted around. Yet it is the logical outcome of the fundamental tenet of Judaism, namely, of the belief in the oneness of God. As faithful representatives of Judaism, the Tannaim had a positive abhorrence of idolatry. With them any respect paid to idols was a crime, and a defiance of the only true God and Sovereign. For that reason a Jew convicted as idolator was publicly executed.

Even a whole city was not spared-at least theoretically. Equally all non Jewish pagans bound through God's commandments to Noah to abstain from worshipping of idols were obliged to set up courts to judge and condemn all idolators to the edge of the sword, though one Baraita dis- (172)
sents. (173) However, a Jew had no right to kill a pagan not tried and convicted by court, but he also had no obligation of saving him from (174)
peril. In consideration of all this the obvious conclusion must be that a Jew killing him could not very well be charged with the heinous crime of murder.

The semi-proselyte (גר חצי), on the other hand, was a man who made some pledges to Judaism which were not satisfactory for the duration. According to R. Meir he pledged himself in the presence of three good Jews to abstain from worshipping idols, and according to the sages he took upon himself the seven commandments which were given to Noah, Father of all men, and consequently binding upon his descend- (175)
ants. At the same time, it was expected of him to learn to love his new way of life, gradually to increase his obligation toward Judaism, and finally to become a full pledged proselyte (גר מלא). It has been said in the name of R. Johanan that if the semi-proselyte did not circumcise himself within twelve months of his first pledge, he should be regarded as a min, (176) whose status was lower than that of the pagan, for the former's killing was not only excusable but even rightful. (177)
For that reason the slaying of a ger toshab could not be considered as a criminal act.

7. R. Jonathan says that if one kills a condemned criminal on his way to the place of execution, he is free from liability. (178)

8. Homicide is excusable in case of a court officer who kills the felon while administering to him the prescribed number of stripes. (179)

This law has been accepted by one and all forasmuch as the officer administers the flogging under the direct supervision of court under conditions where there is no possibility to exceed the bounds of duty without being observed and forwarned by court. The ensuing death is, therefore, misadventurous, and consequently excusable.

However, if the officer kills the culprit on any other official business not under direct supervision of court, Aba Saul says, he is not liable forasmuch as the homicide is the result of a dutiful act, but the sages say, he must escape into a city of refuge. The point of view of the former has been adopted by the compilers of Sifre, ⁽¹⁸⁰⁾ and the Mishna. ⁽¹⁸¹⁾ On the other hand, the latter's opinion is stated ⁽¹⁸²⁾ without opposition in the Tosefta.

It is obvious that the controversy between Aba Saul and the sages refers to an instance where the officer does not overstep the boundaries of moderate castigation, or caution in handling the culprit in case of resistance, for otherwise the homicide is not the result of an obligation any more. An overstepping of the bounds of duty would place the officer in line with the court's bailiff who adds one lash to the number prescribed by court about whom the law ⁽¹⁸³⁾ is explicit that he must be banished. Furthermore, the distinction between moderate and non-moderate chastisements may be deduced from a comparison of the law of homicide to that of injury which absolutely postulates such a distinction. If the officer maims the criminal while moderately chasening him, he is not liable. If, however, he beats him more than he should, he loses his status as an officer of the law, and like any other man, he must pay to the victim in accordance ⁽¹⁸⁴⁾ with the law of injury.

The facts being so, Roman and common law will agree with the tannaitic law as advocated by Aba Saul. ⁽¹⁸⁵⁾

9. Similarly, a father who chastises his son to make him better, or a teacher his pupil, and happens to cause his death, Aba Saul says, the homicide is excusable, since it has happened in the line of duty. This is the prevalent opinion in the Mishna and Sifre. (186)

At Roman law the father held the power over life and death of all his descendants. In a case where a certain man had, while hunting killed his son who had committed adultery with his stepmother, Emperor Hadrian caused him to be deported to an island on the ground that he had killed him rather in a tricky way like a highway robber than by asserting his right as a father. (187) On the other hand, a teacher was in his right to chastise his pupil only moderately. (188)

Common law is in full agreement with the tannaitic in regard to a father as well as to a teacher. (189)

10. If an authorized and practical physician administers medicine, or performs a surgical operation which instead of curing kills the patient, the killing is excusable.

Though this rule is not explicitly stated in the Mishna, it necessarily follows from Aba Saul's rule which distinguishes between death as a consequence of an optional act and death as a result of a dutiful act; and healing is obviously a duty. (190)

However, there is a clear statement in the Tosefta that the physician is to be exiled. (191) This led some of the great medieval rabbis to distinguish between a physician and a court's officer in regard to the law of accidental homicide, without being able to explain the reason for such a distinction. (192)

Yet a perusal of the Tosefta shows that there is no distinction between a physician and an officer. (193) and neither is there a difference between optional and dutiful acts in reference to the law of homicide. In either case, the killer is to be banished.

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Hence by accepting the decision of the Mishna, which does differentiate between meritorious and optional acts, as the law, we must conclude that the accidental killing of a patient by his physician is excusable.

However, in regard to the law of injury, a distinction is made between moderate and great injury. If a physician while healing a patient injures him moderately, he is not liable. But if he causes him great injury, he must pay. (194) Again, another tannaitic passage makes a distinction between shogeg and mesid. In the former case he is not liable, while in the latter case he must pay "as a precaution for the general good." (195) ✓

It is obvious that the term mesid does not mean here 'intent' to hurt the patient, for in this case the reason given "as a precaution for the general good" would make no sense. Hence, the two passages very likely mean one and the same that if a physician oversteps the bounds of his duty to take chances with the patient's health, he is liable.

Likewise, in reference to homicide, the physician's act is occasionally designated as bemesid. It is stated in the Mekilta that though the physician slays bemesid, he does not slay with guile. (196) ✓

It is my opinion, therefore, that Aba Saul's rule which exonerates the physician can merely be applied in the case where he causes the patient's death by a mistake of judgement, or by a similar act which is liable to happen during an operation. But in the event of criminal carelessness, Aba Saul would hold the ~~sinien~~ opinion that the physician should be banished.

This view is in full agreement with common law which distinguishes between slight mistakes on the physician's part and gross negligence. In the first case, he is not liable, but in the latter case,

he is guilty of manslaughter.

11.If one killed a man through negligence and was ordered to escape into one of the cities of refuge,but just then the high priest died,he was excused from exile.⁽¹⁹⁸⁾ This law may be explained by the supposition that the term of his confinement begins from the time he is convicted to be deported.Therefore,if the high priest dies between the time of conviction and deportation,the culprit is looked upon as having fulfilled the requirements of the law,and he is accordingly set free.

Chapter III

Manslaughter

Manslaughter at tannaitic law may be defined as the unlawful killing of another with the exclusion of homicide committed directly and intentionally. It consists of voluntary and involuntary killings. Voluntary homicide is an intentional but indirect killing as for instance in the case where one incites a dangerous beast against another causing his death. (199) Involuntary homicide consists in the killing of another without intention by doing some act negligently. It seems that the earlier tannaitic law which was codified in the Mishna did not distinguish between negligent and gross-negligent homicides in regard to their punishment. According to the Mishna, there is no difference between one who falls from a ladder killing another and one who throws a stone into a public domain causing death. In both cases the killer must escape into one of the cities of refuge and stay there until the death of the high priest. (200) Though originally these cities might have been established for the protection of the slayer against the blood avenger, at tannaitic law they were also looked upon as a penal institution. This may be concluded from the prohibition to take ransom from a negligent killer to permit him to dwell in any other city than one of refuge, (201) and from the wording in the Mishna that "he that was condemned to be banished was sent back to his place." (202)

But while the early law does not distinguish between negligent (negligent) and gross negligent (gross negligent) homicides, a distinction between them is clearly seen in the later tannaitic literature. According to the later law, while the negligent killer is to be banished, the gross negligent must not be exiled. Thus, if a man did not know that there was a child in the cradle and he sat upon it killing the child, (203) he must be exiled. Is, however, he knew that there was a child in the

the cradle and he sat upon it killing the child, it is gross negligence, and he is not to be exiled. (204)

However, the law does not specify the penalty of the gross negligent killer. According to Maimonides he is left to the discretion of the blood avenger. (205) The reasoning of Maimonides is obvious. There are three involuntary slayers. The misadventurous killer enjoys court's protection everywhere, the negligent, in the cities of refuge, and the gross negligent, nowhere. Yet law is not pure logic. Besides, ^{that} ~~that~~ the fact that such a regulation is neither recorded in tannaitic, nor in amoraic literature leaves open the possibility that (206) burdened with the stigma of a killer, he was left to the punishment of Heaven. Heaven is also relied upon in the instance of the voluntary slayer. (207)

Thus, manslaughter is distinguished from murder by the absence of the combination of directness and intention; and from non-felonious homicide by the lack of circumstances excusing or justifying the killing.

Now, this concept of manslaughter coincides only partly with that of Roman and English law systems. All three codes agree that homicide resulting from a lawful act negligently performed is neither excusable, nor does it amount to the crime of murder. But common law deviates from the two other systems of law by making the degree of the crime dependable upon the lawfulness or unlawfulness of the act occasioning the killing. The same misadventurous slaying may be either excusable, or manslaughter, or murder. If the act lawful by itself was performed in a lawful manner, the killing is excusable; if the act was unlawful but not amounting to felony, it is manslaughter; and if the act was felonious, it is murder. (208)

In contrast with this, Roman law does not condition the penalty for manslaughter upon the legality of the action causing the

killing. (209) Likewise tannaitic law does not distinguish between law-
 ful and unlawful acts though it does so between dutiful and undutiful
 actions. (210)

On the other hand, Roman and English jurists concur that
 no distinction can be made between direct and indirect killings. At
 common law manslaughter is defined as the unlawful killing of another
 without malice, (211) whereby 'malice' is convertible with the Roman
 dolus and defined as 'evil intent'—though there is a slight disparity
 ----- (212)
 between dolus and 'malice'. But the evil intent of an indirect kil-

 ler is not less evil than that of a direct one. Hence, "He who lets loose
 a dangerous animal is responsible for death caused by such animal. If
 the mischief was undesigned by the defendant, the offence is manslaughter,
 if designed, murder." (213) Likewise, Ulpianus says that it makes no dif-
 ference whether one actually kills another, or is merely responsible
 (214)
 for his death.

Again, Roman and English jurists differ with the tan-
 naitic in regard to homicide upon sudden heat of passions. According
 to the former a man being greatly provoked, immediately kills the ag-
 gressor, though he is not excusable, since there is no absolute necessi-
 ty for doing it, he is neither arraigned for murder, as there is no
 previous malice. For that reason, if a man surprises another in the act
 of adultery with his wife and kills him, he is not guilty of murder, by
 reason of provocation. (215) On the other hand, under tannaitic law pro-
 vocation is no excuse for murder. Even in self-defence if one could save
 himself by maiming his opponent and he preferred to kill him, he would
 (216)
 be guilty of murder.

In the same way, there is disagreement regarding
 the retribution for manslaughter. The Tannaim know merely of two hu-
 man penalties for manslaughter, deportation to a city of refuge until
 the death of the high priest, or death by the hand of the blood

(217)
 avenger. Contrary to this, common law regards manslaughter as "the most elastic of crimes, for the degrees of guilt which may accompany it extend from the verge of murder to the verge of excusable homicide. The punishment is from a fine till penal servitude for life." (218) This is in the spirit of Roman law where the measure of retribution was left to the proconsuls, praetors, and magistrates to deal with every case individually, and to assess its penalty according to the degree of negligence and the circumstances. (219)

To sum up, all three systems of law agree that there are certain killings which are neither excusable, nor capital crimes. Nevertheless, they differ with another in reference to the nature of these slayings and to the form and measure of their penalties.

A. Voluntary Manslaughter

1. Voluntary manslaughter is the unlawful intentional but indirect killing of another. Its retribution is left to Heaven; and its underlying principle seems to be that one can not be made responsible for the crime of murder when somebody-, or something else has contributed to that killing independently of his own action. Thus, if a man incites a dog or a serpent against another causing the other man's death, he is not guilty of murder. Moreover, if one actually forces the serpent to bite a human being, it is the decision of the majority that the defendant has not made himself guilty of a capital crime. R. Judah, however, (220) dissents.

In the former case the defendant is obviously the indirect cause of the other's death, and is consequently not punishable by human hands. In the latter case, however, R. Judah regards him as the actual slayer, since by forcing the snake to bite, he at the same time forces it to discharge the venom which kills, so that the reptile is nothing but a deadly weapon in the hands of the man. But the sages predicate that it is in the power of the snake to bite without discharging poison.

The release of the poison is, therefore, an intentional act on the part of the serpent which though incited by the defendant to anger has the free choice to kill or not to kill. (221)

2. If a man pushed the other into water or fire, and he could save himself but he did not and died, the former is not guilty of murder. (222) Nevertheless, Heaven will punish him for causing the other's death. (223)

At common law in a case like this, court must inquire into the mental and physical conditions of the victim. If any person of similar mental and bodily qualities would have saved himself, the victim and not the defendant would be responsible for the death. (224)

3. If a man procures another to commit murder, the former is not guilty. Shamai, however, dissents. (225) The Amoraim interpret the decision of the majority that the defendant is not guilty of the heinous crime of murder, but he is punishable by Heaven. (226)

At Roman law, procurer, inciter, and actual perpetrator of the crime are equally guilty before the law. (227) For a comparison with common law see above pages 1.2.

4. If one was assaulted by ten men, no matter whether by all together, or by one after another, and was killed, they are all not guilty of murder. R. Judah ben Bethera, however, holds that in the latter case the last one is guilty of murder, since he has hastened his death. R. Johanan bases the decision of the majority upon a biblical passage according to which two persons can not be guilty of murder for the killing of one person. (228)

At common law their degree of guilt depends upon their intent. If they assaulted him on a former grudge of settled malice, and with intent to kill, they are all guilty of murder. If, however, some of them assaulted him with intent to kill, and some without intent, the

former are guilty of murder, and the latter of manslaughter.

Likewise, at Roman law though it is explicitly stated
(230)
that they are all equally guilty before the law, we may safely conclude that each's penalty would depend upon his intent, since under Roman law man's intent is all decisive.
(231)

5. If one sees a man drowning, or being attacked by a wild beast, or robbers, and he does not attempt to save him, he trespasses the biblical command: "Thou shalt not stand idly by the blood of thy neighbor," and he is consequently punishable by Heaven.
(232)

While tannaitic law is consistent in its regarding any "omission" which may lead to man's death as a trespass which requires Heavenly retribution, Roman law distinguishes between "omissions" of those who stand in an obligatory relation to the victim and, of those who stand not. If a slave does not attempt to save his master, or a soldier his officer, or one member of the family the other, he is guilty of murder. On the other hand, a stranger has nothing but a moral obligation to save another.
(233)

At common law, there is the following rule. When a responsibility exclusively imposed on the defendant is such that an omission in its performance is followed by the death of another, the offence may be murder, or manslaughter, in accordance with the defendant's intent. But the omission to perform acts of mercy and humanity are not indictable.
(234)

6. R. Nathan says that if one raises a noxious dog in his house, he trespasses the biblical command: "Thou shalt not bring blood upon thy house." This command is also applicable to the maintaining of a defective ladder.
(235)
Similarly, one must not build a house without a battlement for the roof, and he must not dig a well, a pit, a ditch, et cetera without securing it against an accident.
(236)
Moreover, one must not sell weapons to anyone who is liable to shed innocent blood with it.
(237)

B. Involuntary Manslaughter

Involuntary manslaughter consists in the unlawful killing of another without intention by doing some act negligently. Its penalty is banishment. It is stated in Scriptures that the Jews were ordained to designate six cities for refuge from the blood avenger. The negligent killer shall flee or be deported into one of these cities to a
(238)
abide there until the death of the high priest. Though this rule is biblical, the sages pondered as to the why of this ordinance. R. Meir said: "The killer shortened the life of man, and the high priest prolongs it." Rabbi said: "The slayer defiles the land and causes Providence to depart from man, and the high priest causes Providence to dwell among man. It is not right that he who defiles the land should be in the presence of him who causes Providence (*yishe*) to be among man on earth."
(239)
Another explanation is offered in the Palestinian Talmud that the death of the high priest is an atonement for negligent homicide. The killer must, therefore, be confined in a city of refuge until the death
(240)
of the high priest will expiate his guilt.

1. Thus, if a man was rolling (the roof) with a roller and it fell on another killing him, or if he was letting down a casket and it fell on another killing him, or if he was coming down a ladder and he fell on another causing his death, he must escape to one of the designated cities. This is the general rule of the law, any killing caused by way of descent is punishable by banishment.
(241)

2. If a butcher is chopping meat and he kills a man while raising the hatchet behind his shoulder, or while lowering it in front of him, the killing is the result of negligence, and he is to be exiled.
(242)

3. If a man was chopping wood, and the iron of the ax slipped from the handle and killed a man, the sages say that he must

escape to one of the cities of refuge, but Rabbi dissents.

4. If a man threw a stone into his own backyard killing a man who had a right to enter, he must be exiled. (244) Similarly, if a man entered a carpenter's shop with the owner's permission, and a splinter flew and killed him, the carpenter is to be exiled. (245)

5. If a man threw a stone into a public place causing death, he goes into banishment. R. Eliezer ben Jacob says that if after the stone had left his hand another person put out his head (from a window) and was killed by it, the thrower is exempt from punishment. (246)

The latter based his opinion on the Bible where it says that if the iron slipped from the ax and found his (the wood chopper's) neighbor causing his death, he is to be exiled. (247) The expression "and found" implies that when the iron slipped from the ax, the victim was already there. It precludes, therefore, from banishment a case where the victim has placed himself in the way of the missile. (248) The underlying principle of this rule seems to be that one can not be exiled unless the act can be construed as having meant death from the moment it began, for that particular person who actually was killed.

Yet the opinion of the anonymous Tanna, which must be recognized as the accepted opinion of the Mishna, (249) is that there is no difference whether the victim has been there at the beginning of the act, or he has come in the middle of the act. He who hurls a deadly missile into a public domain causing death goes into banishment.

However, the Amoraim were not satisfied with the way this law is phrased in the Mishna, since one who throws a stone into a public place is almost a deliberate offender who according to their opinion was not to be banished. R. Papa, therefore, explained the Mishna by an instance where one during the day throws debris into a dunghill which people make use of at night time but rarely during the day. (250) But the

question and the answer in the Talmud are obviously based on the later law which distinguishes between negligence and gross-negligence. Yet no vestige of such a distinction is found in the Mishna. In any case of negligence, the killer is exiled.

At Roman law, there was no difference whether the place was public or private. If anything was thrown down or poured out from anywhere upon a place where persons were in the habit of passing, and it fell upon a free person killing him, the thrower, or in case the same was ^{not} known, the party living there had to pay to the victim's heirs
(251)
fifty aurei.

----- At common law, the killing might be misadventurous, manslaughter, and possibly murder, according to the amount of precaution he took to ensure that no one should be injured, and the necessity for such precautions. If he gave warning, and it was in a retired place where persons were unlikely to be passing, it would be homicide by misadventure, but in a crowded place, it might amount to manslaughter. But, if it was in a crowded place, and he gave no warning, it might be murder.
(252)

6. If one intended to fell a tree and struck a man killing him, or the tree fell upon the man and killed him, he must be banished.
(253)

Saul Lieberman finds exception with the first instance of this law as it seems to disagree with Rabha's decision that if one intended to kill a child of non-viable birth and killed a child of viable birth, he is not to be exiled.
(254)
This decision has been accepted by one and all in spite of the fact that a premature child is regarded by the law like a piece of meat, or wood.
(255)

However, Rabha's decision has been based on the later tannaitic law which distinguishes between negligence and gross-negligence while in the Mishna and the Tosefta, it is merely stated that if one in-

intended killing a beast and killed a man, or if he intended killing a premature child and killed a mature one, ect., he is exempt from capital punishment. (256) Hence, the law concerning the killing of a man while intending to fell a tree is not in opposition to that about the killing of a mature child while intending to kill a premature one. In either case the killer is to be exiled. The same rule must also be applied to the other involuntary killings which the Mishna exempts from capital punishment.

At Roman law of the early days of the Republic, the killer would have to sacrifice a ram to appease the blood of the victim, while in the later days it was in the power of the magistrate to punish him with a limited fine, or to absolve him from guilt. (257)

Again, according to common law, if the ~~killing~~ felling of the tree was lawful, and done in a way good and prudent people usually do it, the killing would be excusable. (258)

7. If during a ball game, one of the players accidentally hit with the ball another player or a bystander killing him, he is to be exiled. (259)

In Rome during the later days of the Republic and the days of the Empire, if the killer would be accused by a relative of the victim of recklessness during the game, it would be left to judge and jury to decide whether the act was misadventurous, or negligent, or wanton. In the first case, the actor would be exonerated, in the second, he would be fined, and in the third instance, he might be relegated to an island for a limited time. (260)

Under common law, injuries received at a ball game, or any other lawful game resulting in the death of the person injured, do not amount to any felony provided the act itself was lawful. (261)

8. If a court officer while administering lashes to a

culprit adds one lash to the number prescribed by court, and the criminal dies, the officer must be banished. (262)

Now, it is told in a Baraita that besides the officer, three judges participated in the immediate procedure of flagellation. One recited certain scriptural verses, the second counted the strikes, (263) and the third commanded the officer before each stroke to strike.

For that reason it is claimed in the Talmud that a numerical error on the part of the officer was impossible. His only error could consist in his judgement about the victim's ability to survive an additional stroke administered on his own. But such judgement would conflict with the better knowledge of the experts who adjudged him one lash less than the officer struck, and his act would be at least gross-negligent, an act which precludes banishment. Rav Simi, therefore, concludes that the law formulated above is only applicable in case where the judge erred in counting. (264) In this case though the judge is the indirect cause of the killing, the officer is banished in accordance with the rule that if the actor is a responsible person, he is under all circumstances (265) the principal in the crime.

However, besides the fact that the law in the Mishna does not distinguish between negligent and gross-negligent homicides, there are two cases in the Tosefta which suggest the possibility of the officer's error in judgement without being too careless about human life. It is recorded in the Tosefta that if the experts estimated that the convict could bear twenty lashes, he should receive merely eighteen, as the number must be divisible by three. Therefore, if the officer gave him ~~an~~ nineteen, he must be exiled. (266) Again, if the experts estimated him to be able to bear only three lashes, but after receiving them, he is standing on his feet full of health, and the officer adds one on his own, and the culprit dies, he is to be exiled. (267) In both these cases,

there is room for the officer to commit an error of judgement without anticipating the death of the victim.

9. If a blind man kills involuntarily, R. Meir says, he must escape, but R. Judah says, he must not. (268)

Now, whereas in the Mishna the different opinions are quoted in the names of two individuals, in the Tosefta and Sifre, the former opinion is ascribed to the sages, or respectively to an anonymous Tanna, whose view is usually the prevalent law. (269) By accepting, therefore, R. Johanan's rule that R. Judah's point of view is always prevalent against that of R. Meir, (270) one must conclude that the compilers of the Tosefta and Sifre disagree with the Mishna concerning the status of the blind in reference to negligent homicide.

At Roman and common law, there is no distinction between the seeing and the blind concerning the law of homicide.

10. There is no difference between a Jew killing a slave and vice versa in regard to negligent homicide. In any case the killer must be banished. (271)

11. A semi-proselyte (שליח צבור) is banished only if he kills another semi-proselyte. (272)

12. If a manslayer kills again in the city of refuge, he must be transferred from one part of the city to another. He may not be banished to another city, as he is forbidden to leave the city to which he was banished for the former killing. If, however, a Levite who is a regular resident of one of the cities of refuge kills a man, he must be banished to another city of refuge. (273) Nevertheless, it is asserted in the Tosefta that if for some reason court has banished him to the city of his permanent residence, he is protected against the blood avenger. (274) Maimonides, however, interprets this rule as valid only in case he killed outside of the city of his residence. (275)

13.If one was convicted to be banished at a time when there was no high priest,or if one killed the high priest,or if the high priest killed,he must stay in the city of refuge until his own death.
(276)

14.In case a pupil is exiled,his teacher is to be exiled with him.
(277) R.Johanan adds to it that if the head of a college is banished,the whole college is banished with him.
(278) These rules of which there is no hint in the Mishna show on one side how far the law can go when it is merely theory,and on the other side the great love of men like R.Johanan for the study of the Torah.

C.Involuntary Homicide in Opposition to the Law as Formulated in the Mishna

1.If one did not know that there was a child in the cradle and he sat upon it killing the child,or he did not know that there was a man in the well and he threw a stone into ^{it} killing him,he must be exiled.
(279) On the other hand,if he knew that there was a child in the cradle and he sat upon it killing the child,or he knew that there was a man in the well and he threw a stone into it killing him,he is not to be exiled.
(280) R.Isaac explains the law that in the first case he had no reason to surmise that there was a child in the cradle,ect.; the homicide was,therefore,plain negligence.But,the second rule refers to a case where he had reason to assume that there was a child in the cradle,ect.;the homicide was,therefore,gross-negligence,a crime for which the penalty of deportation is not enough.
(281)

2.If the officer of the court hit a man with the permission of court and killed him,he is to be exiled.
(282) But,if he did it without court's permission,he is not to be exiled.
(283) According to the Mishna,in the former case he would not be exiled,
(284) while in the latter instance,he would be exiled.

3.There are a few statements in a Baraita precluding

the killer from banishment. But, it is not clear whether he was exempted, because the killing was regarded as misadventurous, or because the penalty was too lenient for him, as the homicide was considered as gross-negligence. If one holding a deadly weapon collided with another man in a corner killing him, or if one intended to throw a stone two cubits and it flew four cubits, or if one aimed at one direction and the stone turned into another direction causing death, he is not to be exiled. (285)

Maimonides looked upon the first two cases as gross-negligence, and on (286)

the last one as misadventure.

It is obvious that the latter two rules are not in the spirit of the Mishna, for it is asserted there that if one was chopping wood and the iron slipped from the handle killing a man, the sages say (287)

that he must be exiled, though the chopper neither aimed at the (288)

distance, nor at the direction where the iron landed.

(478) Plutarch, Lives, Cicero, 9.

(479) Cicero, The Verrine Orations, I, 11

(480) Quintilian, Institutio Oratoria, V, 7, 9: Duo genera sunt testium, aut

eorum quibus in iudiciis publicis lege denuntiari solet, quorum a
altera pars utroque utimur, alterum accusationibus tantum concessum est.

(481) Strafrecht, p. 328; Strachan-Davidson, Problems of the Roman Criminal Law, Vol. I, 163

(482) Dig. 5, 5, 8: in causa capitali absens nemo damnatur.

(483) Stephen's Com., IV, ~~350~~ p. 350

(484) ibid., p. 322

(485) ibid., p. 328

(486) ibid., p. 327

(487) ibid., pp. 285, 289.

(488) Tos. Sanh., 6, 2

(489) Mak., 1, 9

(490) Tos. Sanh., 6, 3:

הוא אומר שכל הדין

(491) Sanh., 5, 1

(492) ibid., 40b

(493) ibid., Tos., 9, 1:

הוא אומר שכל הדין

Maimonides, however, interprets the passage that he was questioned unsystematically by passing from one subject to the other in disorder. (H. Edut)

(494) Tos., loc.

~~(495) Sanh., 40b~~

(495) Mak., 6b: If two witnesses saw from two windows the commission of the act without seeing each other, their testimony is invalid.

(496) see supra, pp. 50-55

(497) Sanh., 5, 2

(498) Mak., 1, 8: This is the view of R. Akiba and R. Jose. Rabbi, however, says that the rule is valid provided the disqualified witness is one of those witnesses who had warned the culprit before the act. See also the controversy between R. Shoshet and Rabba about it. (Sanh., 41b)

(499) Sanh., 5, 2

(500) This is also the view of Maimonides in H. Edut (2, 3).

(501) Sanh., 5, 3

(502) loc.

(503) see *ענין פון דער* (Commentary), Yer. Sanh., 5, 1

(504) Sanh., 5, 1; 41a

(505) *ibid.*, Tos., 6, 4; Ket. Tos., 2, 1

(506) Sanh., 5, 5

(507) ~~Cic.~~ Cic., Verr., II, 40, 97. 98: Cicero tells how Verres as praetor
 ---- had convicted a certain Sthenius in the absence
 of both, defendant and prosecutor: citat reum (defendant), non respon-
 did; citat accusatorem... non adfuit. -----

(508) See a few of Cicero's orations against Verres: The Verrine Oration. -----

(509) Strafrecht, p. 426

(510) Cic., Verr., II, 33, 80

(511) Strafrecht, p. 432, note 3

(512) Verr., V, 59, 155: Conscientia tua atque auctoritate meorum testium
 ---- testem nullum interrogastis.

(513) Strafrecht, p. 432

(514) Verr., I, 10, 28: apud antiquos et de auditione testimonium dicebatur.

(515) Quintilian, Institutio Oratoria, III, 7, 2: ipsis etiam reis dare lau-

 datures licet.

(516) Strafrecht, p. 430

(517) *ibid.*, p. 422

(518) *ibid.*, p. 433

(519) *ibid.*, p. 443

(520) loc. cit.

(521) Corpus Juris, "courts", sec. 217

(522) Stephen's Com., IV, 335

(523) *ibid.*, p. 355

(524) *ibid.*, pp. 359. 360

(525) *ibid.*, p. 361

(526) *ibid.*, 381

(527) *ibid.*, 369

(528) *ibid.*, p. 365

(529) *ibid.*, p.366

(530) *ibid.*, pp.366.367

(531) *Tos. Sanh.*, 9,1: There are several opinions in the Talmud as to the true meaning of this rule. We have adopted the view of Rav. Ashi (*Sanh.*, 32b), since it is plausible that the deliberations do not begin until the presiding judge suggests to do so. Nevertheless, the first pleading belongs to the one who is in favor of an acquittal, but that one must be one of the junior judges, (*Sanh.*, 4,2)

(532) *Sanh.*, 4,3

(533) *ibid.*, 5,5. Rabbi, however, maintains that he may not change from acquittal to conviction only after the deliberations were concluded. (*yer. Sanh.*, 4,4) Rav., on the other hand, holds the opposite

that he may not change during the deliberation, but he may change after the deliberation before the final voting. (*Sanh.* 34a)

(534) *ibid.*, 4,2; *Tos.*, 7,2)

(535) *ibid.*, 5,5

(536) *loc.* According to Maimonides the young scholars who pleaded for the defence, as well as the defendant participated in the final voting. (*H. Sanh.*, 10,8) In reference to the young scholars, he is supported by R. Jose ben Hanina who says that if one of the disciples favoring acquittal died, he is regarded as though alive and standing by his opinion. (*Sanh.*, 34a) But regarding the defendant, it is stated in the Talmud: *למי שמת בעה"ב לא יתיר ליה* (*Ver. Sanh.*, 5,5). See also *דבן פ"ה* on *H. Sanh.*, 10,8.

(537) *ibid.*, 5,4

~~(538) *Corpus Juris*, "Criminal Law", sec. 2542~~

(538) *supra*, p.83

(539) *Corpus Juris*, "Criminal Law", sec. 2542

(540) *ibid.*, sec. 2552

(541) *ibid.*, sec. 2542

(542) *ibid.*, sec. 2565

(543) *Sanh.*, 4,1; 5,5

(544) *loc.*

(545) *ibid.*, *Tos.*, 9,1

(546) *Sanh.*, 5,5

(547) *ibid.*, 4,1

(548) *ibid.*, 1,6

(549) *ibid.*, 5,5. The adding of two is for the sake of having a greater range for arriving at a decision.

(550) It is obvious that the adding in this case was a mere formality,
since the additional witnesses could not influence the verdict.^{an}

(551) op.cit., 5, 5

(552) ibid., 42a: R. Johanan.

(553) ibid., 6, 1

(554) Ar., 1, 4

(555) Sanh., 4, 1

(556) Cicero pro Cluentio, XX, 55: Cum in consilium iri oporteret, quesivit

ab reo C. Junius quaesitor ex lege illa
Cornelia, que tum erat, clam an palam de se sententiam ferri vell^{et}.

(557) ibid., XXVII, 75: eius modi sortitio, ut in primis Fulbo et Staieno...

---- esset iudicandum.

(558) Strafrecht, p. 445

(559) ibid., p. 446

(560) Dig. 42, 1, 45: de amplianda vel minuenda poena damnatorum post sen-
---- tentiam dictam sine principali auctoritate nihil est statendum.

(561) ibid., ~~42, 1, 45~~ 48, 19, 27: si tamen de se quis mentitus fuerit...
---- poenam adflictus sit... quibus vel poenam eorum minuta est vel
in integrum restitutio concessa. Sed ita dumtaxat a principibus fieri
potest.

(562) Strafrecht, p. 912: vielmehr hangt der Termin von dem Belieben des
---- vollstreckenden Magistrates ab.

(563) Tac. An., III, 51: ductus in carcerem et statim exanimatus.

(564) Dig. 48, 19, 29

(565) Strafrecht, p. 912, note 5.

(566) Dig. 48, 19, 3: Praegnatis mulieris consumendae damnatae poena differ-
---- tur quoad pariat.

(567) Stephen's Com., IV, 397

(568) ibid., p. 399

(569) ibid., p. 403

(570) ibid., p. 406

(571) ibid., p. 483

(572) ibid., p. 487

(573) Corpus Juris, "Courts", sec. 481

(574) ibid., sec. 631

(575) Stephen's Com., IV, 471. 472

(576) Corpus Juris, "Pardons", sections 9.10

(578) loc.

(579)loc..

(580) Tos. Sanh., 9, 5:

(581) Sinh., 6, 2

(582) *ibid.*, 43a

(583) Sifre Num. 35; Sanh., 9, 1; 7, 3

(584) Sanh., 9, 3

(585) Dig. 48, 9, 1: Lege Pompeia de paricidiis cavetur, ut si quis patrem,
--- matrem, avum, aviam, fratrem, sororem, patruelem, matruelem, ... patr-
ronum patronam.

(586) ibid., 48, 9, 9, 1: "ui alias personas occiderunt praeter matrem et
---- patrem et avum et aviam capitis poena plectentur aut ultimo
supplicio mactantur.

(587) Strafrecht, p. 916

(588) Dig. 48, 9, 9: Poena paricidii...ut parricida virgis sanguineis verberatus --- ratur deinde culleo insuatur cum cane, gallo gallinaceo et vipera et simia: deinde in mare profundum culleus iactatur. hoc ita, si mare proximum est: alioquin bestiis obicitur secundum divi Hadriani constitutionem.

(589) see above, note 404

(590) see above, note 406

(591) Stephen's Com., IV, 60

(592) Sanh., 6, 5

(593) *ibid.*, 6, 6

(594)loc.cit.

(595) *ibid.*, 63a

(596)loc.cit.

(597) *ibid.*, 6, 6

(598) see above, p. 90

(599) Stephen's Com., IV, 61

(600) Tos. Sanh., 4, 6; 48b; Ar., 6b

(601) Dig. 48, 8, 3, 5. See also above, note 53.

לא ר' שלמה ממשאנך דנחמא אלא דא בארצא... ב"ה: 6, 4, B.K., (602)

(603) Tos. Sanh., 3, 2.3.

Chapter IV

Murder

Since "murder" is obviously voluntary homicide, it necessarily consists of three elements: an act, ⁽²⁸⁹⁾ an intent, and a result. The act is the physical part performed by the killer, as for instance the throwing of the stone; the result is the death of the person who was hit by the stone; and the intent embraces all the psychological factors involved in the killing, namely, the will to direct the act to a certain end, the desire to achieve that end, and the foresight of the consequences of the act.

At the same time, all jurists agree that the act per se is not punishable, for they all agree that lunatics who do not know what they are doing, are immune against punishment. ⁽²⁹⁰⁾ On the other hand, the term "intent" is not satisfactory in defining one's criminal guilt, since an intent may be good or evil while only an evil intent indicates the mens rea which is responsible for the crime.

Therefore, though the Roman term dolus, the English, "malice aforethought", and the biblical, be'arima might originally have meant to indicate special forms of viciousness of the mind, or the will, the terms later came to mean nothing else but "evil intent", namely, the intention to do what one knows to be criminal.

Nevertheless, in the same way as the act by itself is not punishable, so man's "evil intent per se" is not punitive. ⁽²⁹¹⁾

However, of the two elements, the physical and the mental, the Romans recognized the latter as the decisive one. Thus, Hadrian decreed that anyone who wounded a man for the purpose of killing him, should be convicted of homicide. ⁽²⁹²⁾

In opposition to this, at common law the act is the determining factor in the killing. If a person commits an act which is in-

trinsically likely to kill, and death results, even though he had no intention to cause death, but merely injury or chastisement, it is murder. Again, where a person while committing or attempting to commit a felony, does an act involving danger to life, and in the prosecution of such intent undesignedly kills a man, this is also murder. (293)

-III- Unlike Roman and English jurists, ~~The~~ the Tannaim insisted that the crime of murder depended on the full realization of both elements, the physical and the mental. There can be no capital punishment for homicide unless one intended to kill a person whose death is legally punitive by death, and he actually kills such a person, no matter whether the particular one he has desired to kill, or any other one. This is the view of the anonymous Tanna, (294) though some of the Tannaim teach that no capital crime has been committed unless the person whose death was contemplated was the one who was actually killed. (295) Furthermore, the tannaitic jurists of the Hadrianic period required not only proof that the defendant knew the facts surrounding his actions, but also that he realized that he was committing a legal wrong punishable by death. (296)

From all said, it follows that at tannaitic law in order to convict one of the heinous crime of murder four facts must be ascertained: one, that the death of the assaulted was due to the assault; two, that the defendant intended to kill a person whose killing was a capital crime; three, that he was cognizant of all the facts surrounding his actions, that he knew for instance that his life was not threatened by the assaulted, that the same belonged to the Jewish community (*אדם חיה*); four, that he was aware of trespassing the law of homicide and of the consequences for its perpetrator.

a) The first fact is ascertained by court with the help of witnesses and experts. The former testify as to the nature of the

weapons, as to the force the defendant apparently applied in wielding it, as to the part of the body he assaulted, ect.; (297) and court decides whether death was the consequence of the attack, or it was due to some condition of the deceased. This is the view of R. Akiba. Simon Hatimoni, however, requires that court itself ~~should~~ view the weapons. (298)

Hence, if the weapon was lost before the witnesses viewed it, the defendant was freed. (298) Again, if he hit him with a stone, and the stone fell among stones, so that the witnesses were not able to decide which of the stones had hit him, then if the smallest stone of the pile was sufficient to kill him, the defendant is guilty; otherwise, he is free, in accordance with the principle of mercy. (299)

b) The second element of murder, namely, the killer's evil intent is ascertained either by expression, or by implication. If one announces in the presence of witnesses that he is going to kill a Jewish person and he kills such a person, there is no doubt that the killing was intentional. (300) Yet one's intent may also be inferred from the given facts, such as the act and the nature of the weapons. There is a rule in tannaitic criminal procedure that court must warn the witnesses not to testify on a supposition. (301) The sages comment upon it that even where the witnesses saw one man persuing another to a ruin, and they ran after them, and found the persuer with a sword in his hand from which blood was dripping while the murdered man was still writhing in agony, their testimony is invalid, since they had not seen the actual killing. (302) Nevertheless, while there is such a rule in regard to the act which offers itself to the eye, the intent-with the exception of one's announcing it-is necessarily inferential; and there is no rule at least in the Mishna which requires more proof for one's intent to kill than that based on inference.

However, there must not be the slightest doubt as to the connection between the act and the intent, though there is one opinion at tannaitic law that regards a strong motive as sufficient evidence for one's evil design. Thus, it is stated in the Mishna that an enemy who killed the other apparently through negligence, does not go into exile. R. Jose ben Judah says that he must be put to death. R. Simon says that if there is evidence that he had killed intentionally, he does not go into exile, but if there is some evidence to the contrary, he must be banished. (303)

The basis of this argumentation is obvious. The anonymous Tanna holds the opinion that though the killing looked like an accident, the motive of hatred made it uncertain whether the act was accidental or intentional. The defendant is, therefore, exempt from banishment as well as from the penalty of death. R. Jose ben Judah, however, regards the motive of hatred as conclusive proof of one's evil intent. The killer is, therefore, to be arraigned for murder. R. Simon, on the other hand, presumes that of the acts which look like accidental ones, there are some which point with more probability towards accidental homicide than others, but capital punishment requires more positive proof than merely a motive to commit the crime.

Likewise, under Roman law the use of the instrument indicates the intent. (304) Mommsen cites Seneca that even if the weapon was not fit to kill, as in a case where the poison was spoiled and did no harm to the supposed victim, the defendant would be arraigned for murder, since it is reasonable to assume that he did not know that the poison was harmless. (305)

Under common law, prior quarrels between the defendant and the deceased, preparations for homicide, the use of a deadly weapon, are evidence for one's evil intent. Yet all the facts and circumstances must be considered together in order to decide whether the act was in-

tentional or accidental.

c) Though the third and the fourth elements of murder, namely, a knowledge of the facts as well as of the law are essential factors of one's mens rea, Roman and English jurists accept merely ignorantia facti as a lenient factor in homicide, but not ignorantia iuris. (307) The assumption is that every man is cognizant of the Law, or ought to be.

On the other hand, tannaitic jurists of the Hadrianic period required that in order to secure a conviction for murder, proof had to be forthcoming that the defendant knew not only the facts but also the law. Furthermore, according to a statement in the Tosefta he could not be convicted unless before committing the crime he had announced his willingness to die for it. (308) R. Judah and R. Simon held the opinion that he also must have known the kind of death prescribed (309) for the crime he was contemplating.

Proof of his knowledge of the gravity of the crime and of his willingness to suffer its legal consequences are established through witnesses who had warned the accused prior to the commission of the crime, (310) and had informed him that his intended victim was a Jew, that his killing was a capital crime, and that the defendant had declared his assent to die for his deed. (311)

Yet it was not necessary that the same witnesses who testified to the commission of the crime should have forewarned him. It sufficed that any man did the warning in their presence. R. Jose, however, (312) insisted that the witnesses should forewarn him.

It is very likely that during the Second Commonwealth, the rule of the "preliminary cautioning" was applied merely to the innumerable pure religious laws which the average man could hardly be aware of. In later years when the rule was only known by tradition, it was ex-

tended to all criminal law including the law of homicide.

At the same time, there is disagreement among Tannaim whether the "forewarning" was an institution indispensable for a conviction, or its only object was to prevent the condemnation of a person ignorant of the gravity of the offence he had committed. R. Jose ben Judah asserts that in the case of a properly instructed man, preliminary cautioning was not necessary in order to procure a conviction. (313)

In addition to this, the fact that he also claims that an enemy needs no forewarning, (314) indicates that according to him whenever there is no doubt as to one's intent and knowledge, no forewarning is needed. Nevertheless, the prevalent opinion is that a conviction to death depends upon the forewarning under all circumstances. (315)

Hence, it is obvious that if the Tannaim of that period had jurisdiction over life and death, capital punishment would become a rare event, for what normal person would commit murder in the presence of witnesses while announcing his determination to die for it? Yet, this does not mean that they favored murderers, and that they actually advocated laws which against all principles of justice would allow known criminals to go free. This surely was not their intention. They were merely opposed to capital punishment, and desired to restrict it as much as possible. But they never intended to let loose dangerous killers upon the people. If one in spite of being forewarned three times, refused to express his readiness to suffer the death penalty, he was to be imprisoned (probably for life) to live on frugal bread and water of misery. (316) Moreover, even if there were no witnesses at all to the commission of the crime, but all the evidence pointed to him as an intentional killer, he was to be secluded and fed on that frugal bread and water. (317)

This all leads to the conclusion that at tannaitic

law, murder as a capital crime occurs when the killing is done knowingly, wilfully, and unlawfully. (318)

The Victim

Though the law of homicide embraces all men in one way or another, murder as a capital crime occurs only if the victim is a ben berith, or is a slave belonging to a ben berith, (319) and is at least one day old (320) known to be of mature birth, (321) or thirty days old and born premature. (322)

This law partly agrees with English law according to which the killing of a child in its mother's womb is not murder, since murder must be of some "in being." (323)

Persons Not Capable of Committing Crimes

We have mentioned before that all jurists agree that the act per se is not punishable. To constitute a crime against human laws, there must be first a mens rea, and second an act consequent upon the mens rea. But where there is a defect of understanding, the mind does not guide the conduct. The act is not conditioned by the actor's free choice, and he is consequently not responsible for it.

1. The following are for that reason not subjected to the penalties of the law of homicide: the deaf and dumb, the insane, and the minor. (324) In regard to the status of a minor, there is a distinction between a girl and a boy. The former is a minor until the age of twelve years and a day, the latter until that of thirteen and a day. (325)

2. If one is sometimes insane, and sometimes sane, he is amenable to the law for homicide committed during his lucid period. (326)

3. Drunkenness is no excuse for murder. (327)

Under common law, if evidence is produced that the defendant was suffering from mental disease at the time of the act, or shortly before, or after, he is not responsible. (328) Likewise, if he was so drunk that he was unable to form an intent to kill, he can only be charged with

manslaughter. (329) Again, in regard to minors, there is a Children Act (330) forbidding to sentence a person under the age of sixteen to death.

4. Besides these, under tannaitic as well as under common law, the king is not subjected to the law of homicide. (331) Likewise according to Roman law, the highest official of the state could not be brought to trial during the time for which he was elected. Hence a king, (332) or an emperor elected for life was beyond trial and punishment.

Chapter V

The Court

1. Organization of the Court

All cases of homicide were tried before a court composed of twenty three judges.⁽³³³⁾ At the head of the court stood the presiding judge whose title was "the greatest of the judges."⁽³³⁴⁾ Besides the judges, each court had two secretaries⁽³³⁵⁾ and court officers.⁽³³⁶⁾ There was one court in every important city in Judea, and two courts in Jerusalem.⁽³³⁷⁾ In fact any town which counted a male population of one hundred and twenty souls, or more, had the right to establish such a court.⁽³³⁸⁾ The main condition for its establishment was the finding of two eminent scholars able to expound the Law, and twenty one capable to follow their discussion.⁽³³⁹⁾

In Rome since the time of Sulla there existed a special tribunal to try murder cases but not manslaughter and accidental homicide. Since each court tried only the cases falling under a certain lex for which that particular court was established, the same tribunal could not try murder and the lesser crimes of homicide, because the former was prosecuted under the Lex Cornelia de Sicariis while the latter seemed to have been arraigned sine lege.⁽³⁴⁰⁾

Whereas the latter were probably tried before a single praetor, or magistrate, the tribunal established to try murder was composed of judge and jury. But the judge was not necessarily a learned lawyer. He was a man who had served in most of the important offices of the State with merit. And elected by the comitia centuriata as a praetor for one year, he took over besides other duties also the presidency of one of the courts.⁽³⁴¹⁾

When the tribunal for cases arraigned under the Lex Cornelia was established, Sulla allowed only senators to sit in

juries. But Aurelius Cotta transferred the privilege or duty of serving on juries to a mixed body of senators, equites, and tribuni aerarii.

He also imposed on the praetor urbanus the task of making out a general list of jurors drawn from the three orders. This album judicum contained the names of the men of whom the different courts summoned the jurymen during one year. Nevertheless, since there were several courts in Rome, each praetor was supplied with a part of the names, which was then reduced by the process of challenging by accuser and accused to the number required by a statute. The number of the jurors was usually about
(342)
fifty.

In England all indictable offences may be tried before the assize courts. At the head of such a court while in session, stands a judge well versed in Law. Now, if a person indicted, pleads not guilty before the judge, he is tried by his peers consisting of twelve representatives of his countrymen.
(343)

At the same time, in each county the sheriff returns a list at every assize of persons whom he has summoned. From this panel the court clerk calls twelve names, and prosecutor as well as defendant have the right of challenging any of these jurors, if
(344)

they give a reason for the challenge.

On the other hand, peers when accused of homicide are tried by their noble peers. They are, thus, arraigned before the House of the Lords under the presidium of the Lord Chancellor, or the Lord High-steward.
(345)

2. Qualifications of the Judges

Under tannaitic law, those who would qualify to try capital cases must have the qualifications of civil judges and more.
(346)

They must be wise, pious, humble, of good character, enjoying the esteem of their fellow men,
(347)

and Jews of good birth.
(348)

At the same time, they ought to be men who love the truth, and are not desirous of gain. It is, therefore

fore, desirable that they be wealthy before their appointment as judges.⁽³⁴⁹⁾

It is also the requirement of the juridical office that its holder should be sympathetic toward his fellow men. Hence, a eunuch, one who is childless, and a very old man must not be appointed to this office.⁽³⁵⁰⁾ For that same reason if members of court saw the killing, they are disqualified to sit trial in this case, since the sight of the deed might turn their hearts against its perpetrator.⁽³⁵¹⁾ Likewise, two enemies are not to sit on the same trial, because out of spite to each other they might disagree with another.⁽³⁵²⁾ Again, the king is disqualified from trying capital cases,⁽³⁵³⁾ because of his high station that forbids opposition; hence his participation at a trial might hamper justice. And, finally all those who are disqualified as witnesses are likewise unfit as judges.⁽³⁵⁴⁾

According to Roman law, the jurors must be men of substance: senators, knights, and persons who had been in charge of the State treasury. They must not be younger than thirty years of age, and must have been born as Roman citizens. No limit of old age was set. But if older than sixty, the summoned had the right of refusing to serve as a juror. On the other hand, one who had a criminal past, or was known as an enemy, or as a very good friend of the defendant was disqualified as a juror.⁽³⁵⁵⁾

At common law, one may serve as a juror, if he is over twenty years of age, is the owner of some property, or of another source of income worth at least ten pounds a year, has never been convicted of an infamous offence, is no enemy of the defendant, and is no kin of the same.⁽³⁵⁶⁾

3. Selection of the Judges

There are two different descriptions as to the selection of judges in tannaitic literature. In a Tosefta it is told that the Great

Sanhedrin sent messengers throughout the country to examine men for the office of judge. Whoever was found to be wise, ect., was installed as magistrate in his own city. From there he was promoted to the court situated on the Temple Mount, from there to the court which was at the entrance of the Temple Court, and from there to the Great Sanhedrin. (357)

In the Mishna, however, a different account of the selection is given. The judges sat in a half circle. And before them sat three rows of scholars. If it was necessary to ordain a new judge, one from the first row was ordained. One from the second then came and sat down in the first row, one from the third into the second, and from the congregation was selected to take the last seat in the third row. (358)

Still another method for the appointment of a court member is reported in the Tosefta. If one of the disciples who sat in one of the rows arose during a capital trial and announced his intention to plead in favor of the defendant, and he did it so affectively that he actually saved his life, he was ordained and appointed permanent member of the court. (359) The ordination was performed by three judges. (360)

Now, since these two main accounts, the one in the Tosefta and the other in the Mishna are presented in a historic tone, they appear to be based on facts, yet we have not enough evidence to be able to decide whether they refer to different periods in Jewish history, or to varied practices at one and the same period, since one method of selection not necessarily excludes the other.

For a comparison with Roman and common law see above pages 58.59.

4. The Court Sessions

The members of the court sat in a half circle, in order that they might see one another. Before them sat three rows of scholars of whom in case of need a new judge was appointed, and on both sides of the court members, stood two scribes. One wrote down the words of them

that favored acquittal, and the other the words of them that favored ~~ee~~ conviction. ⁽³⁶¹⁾

The courts were in session every day of the week except on Saturdays and holidays. Josephus tells us that Caesar Augustus wrote to the governors of the provinces that the Jews should have liberty to follow their own customs according to the law of their forefathers, and that they should not be obliged to appear in court on a Sabbath-day, or on the day of preparation before it, after the ninth hour. ⁽³⁶²⁾ This is in agreement with the tannaitic law that neither a trial, nor an execution is allowed on Saturdays and holidays. ⁽³⁶³⁾

In addition to that, they did not try capital cases on the eves of Saturdays and holidays. The reason for this tradition is not specified in the Mishna. It is merely stated there that "one may be tried and acquitted on the same day, but he can not be tried and convicted on the same day. Consequently, one may not be tried on the eves of Saturdays and holidays." This is explained in the Talmud as follows. If court was unable to find anything in favor of an acquittal, the fate of the defendant was not yet final, since there was the rule of postponing the verdict for one night (*לילה אחד*) on which court studied the case and its law in the hope of discovering a rule which might help to exonerate him. ⁽³⁶⁴⁾ But court held no session on a Saturday. Hence, if Friday were a trial day, the verdict would have to be postponed for Sunday. This might lead to an injustice as some of the judges would forget some salient points they had conceived during the trial which could be decisive in forming their decision. ⁽³⁶⁵⁾

S. Zeitlin, however, gives another reason as to why the courts held no sessions on the eves of Saturdays and holidays. He says: "Since Saturdays and holidays were not court days, they would have to postpone the verdict of guilty to the following days. This was against the Jewish conception of justice and was called *לילה אחד* ⁽³⁶⁶⁾

Now, according to this the postponing of the verdict is called יבד ויני, and it is supposed to be against the tannaitic sense of justice. Yet, though this seems to be the opinion of R. Joseph too, (367) the tannaitic conception of יבד ויני refers to the postponing of the execution only. Thus, R. Akiba says that the rebellious judge is not executed by the court of his town. But after being sentenced to death by it, he is taken to the Great Sanhedrin in Jerusalem, kept there in prison until the feast days, and executed on one of the feast days. R. Judah, however, maintains that the execution of the sentence can not be postponed because of יבד ויני. He must, therefore, be put to death immediately after the verdict. (368) Likewise, it is asserted in the Talmud that there is no יבד ויני unless the verdict has already been pronounced. (369) This is also the opinion of Rashi (370) and Tosphoto. (371)

At all events, it stands to reason that though court did not try capital cases on the eves of Saturdays and holidays, it assembled on those days to take the final vote for the verdict; and in the event of a conviction to superwise the execution on the same day because of the rule forbidding its postponing for the following days. For if there were no court sessions on a Friday at all, there could be no trials on a Thursday either, since a sentence of guilty would have to be delayed till Sunday.

However, at nighttime there was no court session at all. (372) And even in the daytime court could not try more than one offender in the same session though the offenders were indicted under the same law. (373) Rav Chisda, however, interpreted this tannaitic rule to apply merely to persons accused of different offences. (374)

Again, the trial was conducted in open court near the gates of the city, or in the Temple Halls for the sake of publicity; and in case of conviction, a herald preceded the condemned person to

the place of execution announcing that if anyone knew in favor of an acquittal, he should come forward and plead for him. (375)

Likewise in Rome it was traditional to conduct the trials publicly, though this custom never became law. (376) Usually a tribunal was erected in the marketplace. The praetor sat in a chair on a high platform with his advisors and assistants on high seats near him. Beneath the tribunal on benches placed on an elevation the jurors had their seats, while the defendant, the witnesses, and the public reclined on benches arranged on the ground. (377)

The terms and sessions of the court were regulated by law. In the early days of the Republic the number of court days was small. With the growth of the population and the increase of crimes, Roman legislators raised the number of court days. Of course, all religious holidays as well as the days of the people's festivities remained juridical vacation days. Likewise, no court sessions were held at nighttime. (378)

Under common law, all courts vested with authority to try homicide have their sessions either in regular or in special terms. The former are fixed once and for all by law. The latter are called or appointed for a particular purpose by the legislature. But it may delegate its power to the governor of the State, to county commissioners appointed for that purpose, or to the judges who preside at the trials. (379)

The sessions are usually held in the daytime. But if the presiding judge finds it convenient to hold some sessions in the nighttime, he may do it provided he announces it in open court. (380)

The places for the sessions are generally designated by constitutional or statutory provisions. But where a place for the holding of a session is not prescribed by law, it may be held at the discretion of the judge anywhere within his territorial jurisdiction. (381)

5. The Territorial Jurisdiction

It is stated in Scripture that if an intentional killer escapes into one of the cities of refuge, the elders of his city must send and fetch him from there and deliver him into the hand of the blood avenger. ⁽³⁸²⁾ This passage cited in tannaitic law ⁽³⁸³⁾ seems to indicate that no matter where the killing took place, it is upon the judges of the city of the killer's residence to see to it that justice is done. Maimonides, however, maintains that it is the court of the place ⁽³⁸⁴⁾ where the crime was committed that delivers him to the avenger.

Nevertheless, this does not mean that the Tannaim limited the authority of the local courts to exercise jurisdiction over persons living, or crimes committed in their respective localities only. The Mishna merely describes the usual procedure. But, generally all courts of a Jewish State which have jurisdiction over homicide, have authority to try and punish homicides committed in the State as well as abroad. This is clearly seen in the following law. If a man was convicted of murder by a Jewish court abroad, and the convict managed to escape to the Holy Land, the verdict should be put aside and a new trial ordered, as the holiness of the land might protect him against a second conviction. ⁽³⁸⁵⁾ Nevertheless, any court for which two men testify that one was convicted by such and such a court in the Jewish State, ⁽³⁸⁶⁾ he is to be put to death without a new trial and without extradition.

In Rome at the time of the Empire, a criminal was extradited to the governor of the province where he had committed the crime for trial and punishment. ⁽³⁸⁷⁾ Mommsen, however, believes that in the event of murder, the province where he had killed, the province where he had residence, the province where the victim had lived, and the tribunal of the city of Rome had concurrent jurisdiction whereby the court which gets him first excludes the others from the right of

administering justice in this case. (388)

In the United States, one state has no jurisdiction to punish crimes committed in another state. (389) In England, on the other hand, each criminal court has jurisdiction over the whole country. (390)

6. The Death Penalty

Though the Sanhedrin had the power of inflicting four kinds of death penalties, (391) they could not inflict them deliberately, since each crime had its penalty prescribed by law. The punishment for murder was beheading (392) by the sword. (393) R. Judah, however, said that such a death would be too shameful; consequently the culprit's head was placed on a block and chopped off with an ax. (394)

Nevertheless, if for any reason death by the sword could not be affected, he was killed with any kind of weapon and in any mode of death. (395)

The right to try capital cases and to carry out the death penalty is valid also abroad as long as it is sanctioned in Israel. (396) But regarding the conditions of this right there are conflicting statements. According to one statement court's authority to inflict the death penalty depends on the existence of the Temple and its sacrificial services, (397) while according to another it also depends upon the Great Sanhedrin holding its sessions in the hall of hewn stone in the Temple. (398)

Likewise, as to the actuality whether the court of twenty three had the power to sentence a man to death after Judea became a Roman province there are contradictory declarations in Talmud. In a Baraita, it is alleged that the Jews lost their right to pronounce sentence of death forty years before the destruction of the Temple. (399)

On the other hand, Rav Joseph, Rav Hyiah, And the school of Hezekiah as-

sert that they lost it at the time the Temple was destroyed.⁽⁴⁰⁰⁾

In agreement with the later is the account of Josephus that Titus in his appeal to the Jews to surrender reminded them of the Roman tolerance toward them, how the Romans had granted to the Jews the right to put to death any foreigner who passed beyond the limits of the Temple.⁽⁴⁰¹⁾

It is, therefore, safe to agree with S. Zeitlin that what it was abolished several years before the destruction of the Temple was the right of the political sanhedrin to inflict capital punishment for political crimes;⁽⁴⁰²⁾ and it was done by the Romans. But the religious court had full jurisdiction to try capital cases and to carry out executions until the Temple was destroyed, and Judea ceased to be a Jewish state.

Whereas tannaitic law does not distinguish between the murder of a kin and that of a stranger, the Romans have always kept apart parricidium from homicidium. Whatever originally the meaning of the former term might have been, in the Republic as well as in the Empire it signified the killing of a ~~parent~~ near kin. Before the Cornelian law was enacted a parricide used to be enclosed with some noxious beasts in a sack and drowned in the sea.⁽⁴⁰³⁾ The penalty for homicide was beheading.⁽⁴⁰⁴⁾ Under the Lex Cornelia de Sicariis, in the last century of the Republic, the punishment for both was a qualified death sentence. If one was found guilty of murder, he was interdicted from fire and water. This meant that he had to hurry away from Italy, for if he did not leave Italy, or if after he had left, he came back, he was seized and put to death.⁽⁴⁰⁵⁾

Again, while according to tannaitic law the punishment for the same crime must be uniform for all the Jews, Roman law differentiates between persons of higher rank and between those of inferior rank. Since Tiberius, deportation to an island and the confiscation of

all property took the place of the interdiction from fire and water.
 If, however, the killer was a man of inferior rank, he was punished capitally by being thrown to wild beasts. (406) Nevertheless, the distinction between parricidium and homicidium still held true. Thus, Hadrian forbade those included in the order of Decurions to be punished capitally (407) unless they had killed one of their parents.

Under common law, the penalty for murder is death. In England since time immemorial the form of death has been hanging. But on February sixteenth of 1956, the House of Commons adopted an amendment in favor of the abolition of capital punishment. But the fate of this amendment is still pending upon the decision of the House of the Lords. (408) Likewise, in some states of the United States the death penalty has been supplanted by life imprisonment. In most of the states, however, it is still death. In some of them, it is inflicted by hanging, in others, by electrocution, and in one, by lethal gas.

Chapter VI

The Procedure

1. The Indictment

There is a difference between a system of criminal law which is accusatorial in character and one which is inquisitorial. This difference may be expounded by comparing the systems of law of our concern with each other.

In the early and middle Roman Republic, if a man was suspected of having committed murder, and it came to the knowledge of a magistrate with jurisdiction over the case, no matter whether he was informed by a private individual, or by other means, it was his duty to investigate the matter thoroughly, and to issue his decision. No formal indictment was necessary. The informer did not become a party to the case. The magistrate had free hand to arrest the suspect and to proceed with the investigation on his own as he thought fit. If after investigating the case, he decided for an acquittal, the matter was at an end. If, however, he decided for a death sentence, the condemned could appeal to the comitia centuriata. The comitia did not act as a higher court weighing the evidence for his guilt or innocence, but as a sovereign power having the right of pardon. This can be concluded from the Horatius legend. The killing of his sister was recognized as murder, the perpetrator was known. Nevertheless, the people pardoned him because of the victory he had won and the patriotism he had evinced. (409)

This system of justice was purely inquisitorial in character. No private person initiated the prosecution by presenting an official accusation before the judge. Neither was there an official indictment by a grand jury, or even by the magistrate himself. He plainly suspected a person of a crime, arrested him if necessary, investigated the crime, and issued a decision.

contrasted with this inquisitorial system of criminal law is the accusatorial prevalent in the last century of the Republic. Since the Lex Cornelia de Sicariis was enacted and a permanent tribunal was ----- established to try murder by praetor and jury, the judge ceased to be investigator, prosecutor, and judge in one person. He no longer acted on his own in beginning a criminal process. If there was no private person willing to accuse the criminal before judge and jury, the killer could not be brought to trial. (410) However, anyone could lodge the name of a person whom he wished to accuse with the praetor; and if the praetor thought that the accusation was legitimate, he put the name down on the list for trial. This act of putting down the name on the list of persons for trial was the "indictment." The accused person, however, was not arrested. He was merely informed of the indictment, and given a chance to escape from Italy in case of conviction. He was tried usually while absent but presented by a jurist who acted in his defense; and the trial appeared like a contest between the private accuser and the jurist for the defense. The evidence was produced by the parties and not by the judge, though the accuser had the assistance of public officials in collecting it. (411)

Like the later system of Roman justice, so is the tannaitic decidedly accusatory. If there was no private accuser there was no trial. Even if court itself saw the commission of the criminal act, they could do nothing more than to come as private persons and to accuse the culprit before another court. (412) However, whereas at Roman law the indictment was based on the accusation of one man, according to tannaitic law one could not be indicted unless accused by at least two men who themselves witnessed the crime. (413) The reason for it is obvious. Whereas in Rome circumstantial evidence was sufficient for a conviction, tannaitic law relied on witnesses only.

The general procedure for an indictment was, therefore, as follows. Two witnesses appeared before a court of twenty three, and accused a certain person of the crime of homicide. If the charge was of murder, court warned them not to base their denunciation on supposition, or on hearsay, or on the testimony of other witnesses. It also admonished them that they would be examined and cross examined; and that in case of a wrongful conviction, the blood of the executed and that of his posterity until the end of the world would cling to the witnesses. On the other hand, it also reminded them of their duty to bring the guilty to justice, for it is written: "When the wicked perish,
(414)
there is joyful shouting."

It is obvious that this address offered the accusers the choice between withdrawal from the accusation and between going ahead with it. If they chose the latter course, the accused was "indicted," for court was bound now to place him on trial. Hence, after the indictment, court's first act was to send officers to bring the indicted to court in order to secure his being at the trial; and in case of conviction to be able to speed his execution. Though there is no special statement in tannaitic law that the criminal's presence was indispensable for his trial, the Jewish sense of justice that the execution must immediately follow the sentence, and the fact that it did not occur to the Sanhedrin to convict Herod for the murder of Hezekiah in his absence,
(415)
indicate that this was the law. Likewise, in the Talmud it is stated that a person could not be sentenced to death unless in his
(416)
presence.

At the same time, it was not absolutely necessary for an indictment that the victim of the attack should have been dead already. If a man struck his fellow, and court considered his injuries to be fatal, the assailant could be indicted for murder, since though the

victim's condition grew better for some time, if it later became worse again and he died, the attacker was tried for murder. ⁽⁴¹⁷⁾ In this case and in similar cases, he was held in custody to await the fate of his victim. ⁽⁴¹⁸⁾ While under common law there is a time limitation of one year and a day between the attack and its resulting death, ⁽⁴¹⁹⁾ no such limitation is mentioned in tannaitic law.

Again, there is no difference under tannaitic law in the procedure of indictment between ~~murder~~ ⁽⁴²⁰⁾ and manslaughter. Of course, the version of admonition to the witnesses differed in manslaughter from that in murder. That there was a warning in the former instance may be concluded from the fact that the witnesses were warned even in civil cases. ⁽⁴²¹⁾

Now, while under tannaitic as well as under Roman law the procedure of indictment was simple indeed, it is quite complicated under common law. This complication ~~is~~ is due to the dual character of its system of justice. On one hand, it is accusatory, since the duty of deciding the issue of guilty or not guilty is cast upon an impartial jury consisting of twelve private persons who base their decision on evidence given to them by witnesses for the prosecution and for the defence. Also the indictment is usually presented by a grand jury composed of a group of private people. On the other hand, there are the coroners, the police, and the district attorneys, in England representing the Crown, and in the United States, the sovereign people against the individual. On one hand, the defendant is warned during the preliminary investigation not to give himself away, while on the other hand, all kinds of pressure are applied on him to draw from him a confession of guilt.

The following is the usual procedure of an indictment under common law. The first step is to lay the facts before a magistrate,

This can be done by any person who is aware of them. If this is done in writing and upon oath, and if the charge is murder, the judge will issue a warrant for the arrest of the accused. He is then brought before a magistrate where he, the witnesses, and all the other evidence are examined. The magistrate then considers whether there is any justification in committing the defendant for trial. In case of the presumption of a probability of his guilt, he sends him to prison to await trial. (422)

After this preliminary examination, the prosecutor writes a "bill of indictment" and presents it before a grand jury composed of not less than twelve men who examine only the evidence of the prosecution; and if at least twelve men agree that the bill is a true bill, the defendant is "indicted." (423)

2. The Qualifications of the Witnesses

Since in the tannaitic system of justice neither circumstantial evidence, (424) nor a confession (425) are admissible as proof for one's guilt, but the whole trial is based upon the testimony of witnesses, their qualifications are of utmost importance. Several classes of people are, therefore, excluded from giving testimony in capital cases, since their qualifications are not good enough to regard their testimony as reliable. They are as follows: women, (426) slaves, (427) minors, (428) lunatics, (429) deaf persons, (431) blind people, (432) professional gamblers, usurers, traders in the produce of the sabbatical year, robbers, those who take things by force though they pay their value, (433) (434) tax collectors, (435) (436) tax farmers, those who violate an oath, (437) herdsman, self abased persons, (438) and all those who either do not know the laws of the Torah, (439) or they do know them and transgress them anyway. (440)

Further, a plotting witness (p. 1381) is disqualified from giving evidence in any lawsuit. This is the view of R. Meir. R. Jose, however, maintains that this rule is valid provided he was made collusive in a case of capital punishment, but if in money matters, he remains eligible as a witness in capital cases. (441) Nevertheless, though R. Johanan's rule generally prevails that in any legal argument between R. Meir and R. Jose, the latter's point of view must prevail, it is proven in the Talmud that R. Meir's opinion has been accepted in the Mishna as the prevalent rule. (442)

Likewise, the following relatives of the defendant are unfit to give testimony: his father, brother, uncle, brother in law, stepfather, father in law; they, their sons, and their sons in law, also the defendant's stepson. This law is valid provided they are related to him at the time of the trial, (443) or at the time of the commission of the act. (444)

But, if a person witnessed a man committing murder to whom he later became related through marriage, and the relationship was severed, or if a normal person saw the commission of a crime who subsequently became demented and then normal again, his testimony is valid. The rule is that the interval of one's ineligibility as a witness does not disqualify him for ever. (445)

Again, if the two witnesses are related to each other, their testimony is invalid. (446) This has been explained in the Talmud that such persons run no risk of being punished as collusive witnesses, since according to the biblical law a kinsman should not suffer death by the testimony of the other, while in case of their being proven as plotting witnesses, the conviction of each one would indirectly be caused by the testimony of the other. (447) For that same reason, it is maintained in the Talmud that the witnesses should

not be related to the judges either. (448)

Finally, the king is disqualified from bearing testimony, because it is below his dignity to appear before court and to comply with its rules. (449)

Unlike tannaitic, Roman and common law admit as evidence besides witnesses, one's confession and circumstantial evidence. (450) (451) (452) But it should be noticed that in these two systems of law, there is a cardinal distinction between "evidence" and "proof." Evidence is merely a means to obtain proof of one's guilt. Hence, in English courts judges are averse to accept the prisoner's confession at the arraignment, and they advise him to retract it and to stand trial before judge and jury, where other evidence might support or repudiate his confession. (453) Likewise, Emperor Severus ordained that a confession should not be regarded as proof of guilt unless corroborated by other evidence. (454)

This distinction between evidence and proof is the reason for their admitting almost everyone as witness for and against the defendant, since "from every witness's evidence whether true or false, instructive inference may be drawn." (455) Yet, whereas common law admits everyone as a witness with the exception of lunatics and infants who are not capable to distinguish between fact and fancy, (456) Roman law disqualifies from giving testimony criminals, persons of bad reputation, (457) (458) children against their parents and vice versa. (459)

Again, while under tannaitic law a boy of thirteen years of age is considered an adult, (460) under common law an intelligent infant is a qualified witness; (461) and so is he under Roman law, but his testimony must be corroborated in both systems of law. (462)

Similarly, under Roman law relatives such as a son in law, a father in law, a stepfather, a stepson, a cousin; they and their

Chapter VII

The Trial

1. Opening of the Trial Session

Since under tannaitic law there was no provision for a preliminary investigation, court opened for trial immediately after the indictment and the securing of the presence of the indicted. The twenty three judges occupied their seats in a semicircle, with the two court clerks on their right and their left, one ready to record the evidence and the arguments for an acquittal, and the other, for a conviction. Before them sat three rows of young scholars, and behind these stood the defendant, the witnesses, the court officers, and the spectators. (470)

While the defendant's presence was absolutely necessary for the trial, so that if he did not come willingly, he was brought to court forcibly, (471) the law assumed that the appearing of a witness before court and the giving of the testimony ought to be a voluntary act based on his free will to contribute to the cause of justice. (472)

At the same time, it was the duty of the accused to remain standing all through the trial. (473) And he stood according to Josephus in a submissive manner, with his hair disheveled and in black garment. (474) But tannaitic jurists in order to guard him against possible annoyance from the public, preferred him to appear in his usual attire, and to stand between the witnesses, so that the public should not know which of them was the prisoner. (475)

As in Judea, so in Rome the trials were conducted publicly. The praetor sat in a chair on a high platform with his assistants and heralds near him. Beneath the tribunal on benches placed on an elevation sat the jurors, while the defendant, the witnesses, and the

children, a freedman against his former master and vice versa, a client against his patron and vice versa are untrustworthy as witnesses; and consequently can not be compelled to give testimony for or against the defendant. (463) Likewise, while women are qualified to testify, slaves are believed only if there is no other way to ascertain the truth. (465) Also a friend, an enemy of the defendant, and a poor man are to be mistrusted. (466) Beside these, one witness is not sufficient for a conviction. (467)

Again, Roman and common law in contrast with tannaitic regard two blood relatives as for instance father and son, or two brothers as fully qualified to testify in behalf of a stranger. (468) In addition to this, there is a peculiarity in tannaitic law which probably has no parallel in any system of justice. If, namely, one of the witnesses was found to be a kinsman or disqualified, the whole set of witnesses even if it consisted of a hundred persons became disqualified. (469)

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public reclined on benches on the ground. (476)

The defendant sat in a submissive manner, attired in filthy clothing, and wearing his hair long and disheveled. And not only was it the accused alone who exhibited these tokens of mourning, but also his relatives, clients, and friends; and not merely during the trial but from the day of the indictment until after the final judgement. For some reason, however, this custom was modified by a law in the first century of the Empire forbidding all but the defendant's close relatives to observe this practice in public. (477)

Again, unlike tannaitic procedure, in Rome it was customary to give the defendant at least ten days to prepare his defence. It is told that a few days before Cicero's term of office had expired, a certain Manlius was indicted before him on a charge of fraud. On his demanding several days for the preparation of his defence, he granted him only one day. This aroused the people's anger against him because it was customary for the praetor to grant the accused not less than ten days. (478) On the other hand, the accuser was given all the time he needed to prepare the case. Cicero tells in one of his orations against Verres that the supporters of the latter in fear for Cicero as a prosecutor, tried to set up a rival prosecutor who requested only one hundred and eight days for the preparation of the case instead of the one hundred and ten Cicero had asked. (479)

Another discrimination between accuser and accused was that the former had the right to enforce the appearing of the witnesses before court, but not the latter. (480)

Roman law also differs with tannaitic in regard to the presence of the accused during the trial. In Rome in the last century of the Republic, capital trials were often held in the absence of the accused, so that if he was found guilty, he escaped death by going

into exile. (481) Nevertheless, under the Empire when instead of the interdiction from fire and water, the death penalty was actually executed, the presence of the accused became a necessity. Hence, it was ordained (482) that no one should be convicted to death in his absence.

As in Rome and Judea, so in the countries trying under (483) common law, the trial takes place in open court. The judge sits on the bench, the twelve jurors in the jury-box. Facing them sit the prosecutors, the defence lawyers, and the defendant; and behind them the public. The defendant's presence is absolutely necessary to the (484) trial. But "he must be brought to court without irons or any matter of shackles, or bonds, unless there be reason to believe that he will (485) attempt to escape, or be guilty of violence."

again, as in Rome, so in England and the United States of America the trial never takes place immediately after the indictment, because time is given to the defendant and the prosecutor to prepare the defence and the case. But in contrast with Roman justice, no discrimination is made between the former and the latter in reference to the length of time. (486) Likewise, no preference is given to the one over the other in regard to the enforcing of giving testimony. Summoned by the defence, or by the prosecution the witness must come before court and testify under threat of arrest. (487)

2. Examination of the Witnesses

The actual procedure of the trial began with the examination of the witnesses. The testimony was given standing (488) in a language understood by the judges without the help of an interpreter, (489) by one witness after the other. For that reason, all the witnesses were dismissed from the courtroom with the exception of the most important (490) person among them.

Then the judges tested him by two kinds of questions:

queries(*וְהַיָּחָד*) and cross-examinations(*וְהַיָּחָד*). The former consisted of seven queries applicable to any crime, as they related to the time and the place of the act; and of a number of queries relevant to the particular offence charged with, as they referred to the circumstances under which the act had become a crime. The cross-examination pertained to things which were indirectly connected with the offence.

The seven queries were as follows: In what sabbath of years was the murder committed? In what sabbatical year? In what month? On what date of the month? On what day of the week? On what hour?
(491)
On what place?

Even if the witness said, he killed him to-day, he was tested by these seven queries, in order to confuse and to embarrass him, so that he might retract his accusatory testimony against the prisoner.
(492)

Another advice to bewilder him was by ordering him to move from place to place during the testimony.
(493)

Besides the seven queries, he was asked: Do you recognize the accused? Did you warn him? What was the nature of the weapon he killed with? On what spote of the body did he strike? Which direction was he facing at the time he struck? Did you know that the victim was a ben berith? Did he understand the warning and agreed to die for his act? Did he strike immediately after the warning? Did you see at least one of the other witnesses at the time you saw the killing?
(494)
(495)

All the queries were vital to the testimony, as they determined the persons involved in the act, the act, the time, the place, the intent, and the result of the act.
(496)

Hence, there is quite a difference in point of law between the queries and the cross-examinations. If to one of the former a witness said, he did not know, the testimony became invalid, but

to one of the latter even if all witnesses said, they did not know, the testimony remained valid. (497) Furthermore, even if there were a hundred witnesses, and one of them said to a query, he did not know, the whole testimony became untenable. (498)

However, if the witnesses contradicted one another, there was no difference between queries and cross-examinations; in all cases they were disqualified. (499) As in the former, so in this case, there is the peculiarity of the law that if one witness contradicts a hundred, since he is disqualified, the others also are ineligible. (500)

Yet, if the witnesses disagreed on the date of the month in one day. One witness for instance said, the murder was committed on the second of the month, and the other said, it happened on the third, the testimony held true, because one might have known that the month was intercalated, and the other might not have known it. (501) Similarly, if they disagreed in one hour, the testimony remained effective, because people may err in one hour. (502)

Whereas there is disagreement among medieval rabbis as to whether all the queries were obligatory, or merely the first seven of them, while the others were rather indispensable to the indictment, (503) the number of the cross-examinations depended upon the judges; and the more a judge cross examined the witnesses, the more praiseworthy was he. At a trial of murder alleged to have been perpetrated under a fig tree, the witnesses were asked to describe the stalks of the figs. (504)

After the examination, the witness was dismissed, and not allowed to retract any part of the testimony. (505) Then the second witness was called in and examined in the same way as the first, and then the third, and so on. If then the case was not substantiated, because of disagreement among the witnesses, or because all the queries

were not answered in the affirmative, the defendant was released immediately. (506)

In Rome the trial began when the herald called the names of the jurymen, the accused, and the accuser. (507) After that the prosecutor opened the case for the prosecution with a speech to the jury. The speech was in the rule quite long, for it not only stated the nature of the charge and of the evidence which will be given in support of the charge, but it also described the life history of the accused, the facts leading up to and culminating in the alleged crime, and the trouble the prosecutor went through in collecting these facts. (508)

After the address of the prosecutor, the counsel for the defense made a speech hardly shorter than that of his opponent in which he tried to refute the charges against his client, and promised to support the refutation by evidence. (509)

When the speeches were concluded, a herald summoned the first witness on the tribunal who after being sworn, (510) gave the testimony. If he was a man of rank, he gave it on the tribunal, but if he was a plebeian, he was sometimes taken to the centre of the forum, or to an other place where in the presence of judge and jury, he was cross-examined under torture; and if he was a slave, he was generally questioned under blows. (511)

The witness was examined by the party which had summoned him, and cross examined by the other party. (512) Together with the testimony, documents and all other objects supporting or refuting the charges were presented to court. (513) Hearsay was not accepted. (514)

On the other hand, character witnesses for the accused were admissible. (515)

In the early days of the Republic as well as in the Empire, the accused also was examined and cross examined, while in the last century of the Republic, he was not questioned, but he had

the right to participate in the procedure by supporting or denying certain statements of the witnesses as he thought fit. ⁽⁽⁵¹⁶⁾⁾ Likewise, whereas in the early Republic and in the Empire, the praetor participated in the cross-examinations of the witnesses, in the last century of the Republic neither the praetor, nor a juror had the right to question a witness. ⁽⁵¹⁷⁾ And, since there were neither concluding speeches, ⁽⁵¹⁸⁾ nor deliberations by the jury, because of the fear of being influenced one by the other, ⁽⁵¹⁹⁾ the jurors stood up immediately after the examination of the evidence to vote for a verdict. ⁽⁵²⁰⁾

Under common law, the session opens with the arrival of the judge who opens court. ⁽⁵²¹⁾ The court clerk then calls the names of the twelve persons appearing on the jury panel, and they take seats in the jury-box; and if there are no challenges against them, they are sworn in. ⁽⁵²²⁾ After that he reads the indictment to the jury and "gives the prisoner into their charge." ⁽⁵²³⁾

As in Rome, so in England and the United States, the prosecutor opens the case with a speech to the jury stating the nature of the charge and of the evidence which will be brought forward to support that charge. After the speech the witnesses are usually ordered to leave the courtroom with the exception of one who is summoned to the witness-box, where as in Rome but not as in Judea, he gives the testimony under oath, ² and sitting. The witness for the prosecution is first examined by the prosecutor. The questions must be relevant to the case and must not lead to the desired answers. Following the examination is a cross-examination by the defense lawyer, and if necessary a reexamination by the prosecutor. ⁽⁵²⁴⁾

Besides the defense and the prosecution, the judge may question any witness at any stage of the proceedings. ⁽⁵²⁵⁾

Again, as in tannaitic and Roman law, hearsay is

not accepted as evidence for the facts, ⁽⁵²⁶⁾ but as in Rome witnesses ⁽⁵²⁷⁾ to the defendant's character are admissible.

Finally, when the case for the prosecution is concluded, and if the defendant has no witnesses to matter of fact, he himself may give evidence on oath and be cross examined upon it. The prosecutor may then make a second speech followed by an address of the defense ⁽⁵²⁸⁾ counsel.

But, if the defense intends to call witnesses, the procedure is similar to that practised in Rome. The defense, namely, opens by a speech; ^{it} and its conclusion the witnesses for the defense are called, examined, cross examined, and reexamined. But, in contrast with Roman practice, the counsel for the defense and the prosecutor make concluding speeches whereby the latter makes the final speech which gives ⁽⁵²⁹⁾ him the advantage of having the last word with the jury.

In conclusion of the final speech, the judge sums ⁽⁵³⁰⁾ up the case to the jury, and they retire to consider the verdict.

3. The Deliberation (tannaitic procedure continued)

If the statements of the witnesses were found to agree, the presiding judge began with the defense by appealing to the members of the court to advance arguments in favor of the prisoner. ⁽⁵³¹⁾ Court then began with the deliberations. These deliberations were in the form of pleadings and decisions, since every judge who expressed an ⁽⁵³²⁾ opinion, furnished the ground for it, which the clerks put on record.

At the same time, if one of the judges pleaded for the defence, he was not allowed to change his mind and to plead for the prosecution, though if he pleaded for the latter, he was permitted to plead and to ⁽⁽⁵³³⁾⁾ vote for the former.

Hence, since the pleading were often decisive in the forming of the verdict, the junior judges were asked to give their opinion ~~in a first~~

ions first, ⁽⁵³⁴⁾ for should the senior judges speak first, some of the junior members might yield to the point of view of the former without forming an opinion on their own.

Like the judges, anyone of the young scholars of the three rows might participate in the deliberations, provided he argued for the defense. ⁽⁵³⁵⁾ Likewise, the accused was admitted as a pleader on his own behalf, if there was some substance to his words. ⁽⁵³⁶⁾ The witnesses, however, were precluded from arguing for or against the defendant. ⁽⁵³⁷⁾

Roman law differs with tannaitic, as it assumes that every juror has reached his decision on the case during the hearing of the trial. ⁽⁵³⁸⁾ Common law, on the other hand, makes no such assumption. Hence, after the summing up by the judge, the jurors deliberate together on a verdict, either in the jury-box, or in a convenient place designated for the purpose. The deliberation must be secret; ⁽⁵³⁹⁾ and the verdict must be arrived at by discussion and agreement. ⁽⁵⁴⁰⁾ At the same time, there is no time limit for reaching the verdict. It may occasionally take a jury only a few minutes to agree upon a verdict, ⁽⁵⁴¹⁾ and it may also take several days. Yet, in the latter case it is in the discretion of the trial judge to discharge the jury, if after sufficient and reasonable time an agreement can not be reached. ⁽⁵⁴²⁾

4. The Verdict (tannaitic procedure continued)

If the prisoner brought witnesses who refuted the testimony of the prosecuting witnesses, or if he adduced proof that the latter had been disqualified from the beginning of the trial, or if court became convinced through some of the pleadings that he was innocent, he was acquitted on the same day and set free immediately. Otherwise, court adjourned for the next day. ⁽⁵⁴³⁾ They judges then went home in pairs; they ate but little, drank no wine the whole day, discussed the matter all night, and early in the morning returned to court. Those

judges who had favored an acquittal the previous day repeated their statements from yesterday, as they were not permitted to change their opinions, while those who had favored conviction might retract or not retract their previous conclusions. (544) In case one of those who had declared him innocent erred in his words, the clerk reminded him of his previous arguments. On the other hand, if one of those who had declared him guilty forgot his previous arguments, he was not reminded of them. (545)

In such a way, if all the members of the court finally agreed on his innocence, he was at once set at liberty. (546) Otherwise, they voted orally. Everyone announced his decision; and a majority of one was sufficient for an exculpation, but a majority of two was needed

(547) for conviction. Still the minimum of votes needed for acquittal was eleven. (548) At the same time, if eleven favored acquittal, eleven, conviction, and one was undecided, or if eleven advocated acquittal, and twelve, condemnation, court added two young scholars to participate in the voting. (549) Moreover, even if twenty two said, he was innocent, and

one said, he did not know, two scholars were added to the number of the members of the court, since the undecided member was regarded as absent, and consequently only twenty two judges had acted in the final deli-

beration. (550) Thus, in case of necessity court might increase its number to seventy one whereby this number was its limit. Hence, if there happened to be thirty six against thirty five for conviction, they began again with the deliberations until one changed his mind and voted for acquittal. (551)

Nevertheless, in the event of a deadlock, the prisoner was freed anyway. (552)

On the other hand, if found guilty, he was immediately led forth to the execution. (553) No respite was granted even to a pre-

pregnant woman unless she was about to be delivered. (554) Yet, a verdict of doom might still be reversed by the same court, but a verdict

of acquittal could never be reversed.

Whereas under tannaitic law, the votes were taken orally, in Rome since Sulla the accused decided whether the voting should be orally and open, or secretly and in writing. (556) If he chose the oral form, the lot decided the order of the voters. (557) But in case of his preferring to vote by ballot, the order was of no matter. Every juror received then a tablet which had the letter 'A' (absolvo) on one side, and the letter 'C' (condemno) on the other side. He wiped out one of them, covered the other, and threw the tablet into an urne standing on the tribunal; and if he had formed no opinion he either wiped out both of them or neither. (558) The praetor then counted the votes; and if he found a majority of at least one for conviction, he pronounced him guilty; otherwise he acquitted him immediately. (559)

But unlike tannaitic law whereby a verdict of condemnation could be reversed by the same court, according to Roman law the finding by a jury could not be modified by any one with the exception of the emperor. (560) Even where the decision was based on a false supposition, alone the emperor had the right to annul it. (561)

Another distinction between the two systems of law lay in regard to the time of execution. In contrast with tannaitic ruling that the execution must follow immediately after the verdict, Roman law left it to the discretion of the praetor to set the date of the same. (562) Sometimes, the prisoner was seized and executed immediately after the pronouncing of the verdict. (563) But more often he was held in prison for a long time; and especially those who were condemned to be thrown to wild beasts were held until the people's festivities. (564)

In -During the Empire, however, a respite was granted the prisoner to appeal to the emperor for mercy. (565) The only postponement of execution sanctioned by law was that of a pregnant woman until after delivery. (566)

Under common law the procedure of arriving at the verdict is similar to tannaitic and not to Roman, for the decision must be reached by oral discussion and agreement. Yet, unlike both systems of law, common law demands an agreement of all the twelve jurymen on any verdict. Failure to achieve general accord results into a new trial by another jury. (567)

Again, while in Roman tradition the nature of the answers "A" and "C" indicates that the verdict must comply with the indictment, under common law the jury may find the defendant guilty of a lesser offense of the same nature, as for instance on a charge of murder they may find him guilty of manslaughter. (568)

Thus, if the jury agrees on a verdict of not guilty, he is discharged immediately, unless there is another indictment against him. (569)

If, however, they agree on guilty, and there is no reason for an "arrest of judgement" the judge pronounces sentence immediately. (570) Nevertheless, the execution must be postponed until after the decisions

of the courts of appeals and the heads of the state. In England all the appeals are directed to the Court of Appeals, and its decision is final. (571)

Alone the Crown may commute the sentence by the exercise of the royal prerogative of mercy. (572)

In the United States every state supreme court acts as a court of appeals for that particular state. (573)

In the event of a rejection of the appeal by the state's court, the supreme court of the United States may review the case whereby its decision is final. (574)

The court of appeals may set aside the sentence, may order a new trial, or may confirm the original verdict. (575)

In the latter case, only the governor of the state, or the president of the United States may grant him a full or conditional pardon. (576)

Chapter VIII

I

A. The Execution

When a sentence of death had been passed, the prisoner was led away to the place of execution, which was at some distance from the courthouse. The judges remained in session, still debating the case and hoping for a reversion of sentence. For that reason, a flag-bearer was stationed at the entrance of the court, and another man was mounted on a horse at a distance from where he could see the signal of the flag; and if one of the judges found an argument in favor of the prisoner, the flag-bearer waved the flag, and the rider hastened and (577) turned the procession back to the courthouse.

Even, if the prisoner himself said that he had something to say in his favor, he was returned even five times, provided it was recognized that his contention was not a mere subterfuge. (578)

At the same time, a herald went before the procession proclaiming: "Such a one, the son of such a one, is going forth to be decapitated, because he had committed murder. Such a one and such a one are witnesses against him. If anyone knows a reason as to why the sentence should not be executed, let him come forward and state it." (579)

When the convict was about ten cubits from the place of execution, he was exhorted to make a confession of this crime as well as of his other sins. (580) And, if he was too confused to enumerate his crimes and sins, he was taught to say: "May my death be an atonement for all my sins." (581)

After confession, he was given a cup of wine and frankincense to induce a state of stupor in him, so that he might not realize his painful end. (582) In this state, he was led to the place of execution, and delivered into the hands of the blood avenger, who chopped off his head with a sword. (583)

However, if a murderer sentenced to die by decapitation became mixed up with criminals sentenced to another death-penalty, they were all executed by the more lenient death. By the same principle of leniency, if the killer became mixed up among innocent persons, all of them were free. R. Judah, however, maintained that they (584) were all imprisoned.

Now, before describing the proceedings of the execution of a killer under Roman law, a word must be said about the two different grades of an intentional killer. The Romans distinguished between homicide and parricide. But the concept of parricide changed in the course of time. At the time of Pompey, it embraced all relatives, including uncles, aunts, stepfathers, stepchildren, conjugals, parents-in-law, and patrons. (585) But under Hadrian, it became confined to ancestors only. (586)

Thus, the Romans distinguished in regard to the procedure of the execution between a parricide and a homicide. During the time of the Republic, whenever the praetor decided that the execution should take place, and in the Empire after the emperor had rejected the appeal for mercy, a herald went through the streets blowing a trumpet and calling the people to the tribunal. Now, if the culprit was a parricide, the praetor ascended the tribunal dressed in a converted toga as a sign of mourning, and commanded the lictors to do their (587) work. The prisoner was then beaten with rods until they were stained with his blood. After that, he was sewed up in a sack with a dog, a cock, a viper, and an ape, and dragged to the sea, if the sea was (588) near; otherwise, he was thrown to the beasts.

On the other hand, a homicide in the middle Republic was (589) beheaded, and under the Empire if he was a person of inferior rank, he was thrown to the beasts during the people's festivities. (590)

As in Judea and Rome, so in England and the United States of America all executions used to take place in public, but in the late decades of the nineteenth century public executions were abolished everywhere. Since then the executions have been taken place within the walls of the prison in the presence only of the sheriff, the warden, a chaplain, a physician, the near relatives of the prisoner, and some persons invited by the sheriff. (591) The modes of the death-penalty are described above on page sixty eight.

B. The Burial

According to tannaitic law, the executed murderer was buried before sunset. (592) But he was not buried in his ancestral tomb among other Jews. There were two special burial places, one for those executed by stoning and burning, and one for those, by decapitation and strangulation. Only when the body was completely decomposed, the bones were gathered and buried in his family burying place. (593)

The relatives of the executed were forbidden to observe open mourning ceremonies. (594) This injunction included the preparation of a meal of comfort for the near of kin of the executed. (595)

On that day when court was compelled to convict a man to death, its members did not eat any food; (596) and it was customary that the relatives of the executed came and greeted the judges and the witnesses to show that they had no ill feeling against them and that they approved the verdict. (597)

Under Roman law, the parricide was thrown either into the sea, or to the beasts, while the homicide was usually thrown to the latter. (598)

On the other hand, under common law, the body of the offender is buried within the prison precincts, if it is not claimed by his relatives. (599)

C. The Property of the Offender

Under tannaitic law, the property of the offender descended
 (600) to his heirs. On the other hand, under Roman law, it was confiscated
 (601) by the State.

II

Beast and Fowl Under the Law of Homicide

Though beast and fowl were arraigned before a court of twenty three, most of the rules pertaining to man were invalid for them. An animal could kill either unintentionally, or intentionally. In the former case, it was freed, (602) while in the latter, it was condemned to die. But whereas man was decapitated, an animal was stoned. Again, man's verdict of conviction must be delayed until the next day; and was pronounced at daytime, that of the animal was issued on the same day, and ~~it might be~~ pronounced also at nighttime. Whoever pleaded for its acquittal was allowed to change his pleading in favor of a conviction; and even a disciple was admitted to argue not merely in favor of its acquittal, but also in that of its conviction. (603)

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(33) IV Macc., XII

(34) *ibid.*, note 19

(35) II Macc., Introduction, p. 82, S. Zeitlin

(36) Taanit, 29a

(37) Ket. 103b

(38) *ibid.*, "Agahot R. Jacob Hemdin."

(39) Lehem Shomaim on Sanhedrin, 10: *היה נאמר אצלם אשה*

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(41) II Macc., VII, note 41

(42) Git., 57b

(43) Sanh., 10, 1

(44) *ibid.* Tos., 12, 9

(45) B.K., 8, 6; p. 91a

(46) Ber., 32b

(47) B.K., 91b; Gen. Rabbah, 34

(48) Jewish War, III, 368-376; Josippon, p. 413

(49) Loc. cit.

(50) The status of suicide may occasionally become a factor in actual murder. According to the sages no man can be convicted of murder unless he has intended to commit murder, though he has not aimed at that particular killing. (Sanh. 9, 2) Hence, the degree of the crime of a man who while intending to kill himself has killed another depends upon the status of suicide. If suicide is murder, then he has intended and committed murder, and is consequently guilty of a capital crime. But, if suicide is merely a felony per se, then he has not intended murder, and can, therefore, not be convicted of it.

(51) Servius in Virgil, Aen., XII, 603

(52) Livy, III, 58

(53) Tacitus, Annals, IV, 29: "damnati publicatis bonis sepultra prohibebatur, eorum qui de se statuebant humabatur corpora manebant testamenta, pretium festinandi."

(54) The Epistles, XII, 10

- (55) Gen., 9, 6
 (56) Mek., 21, 28
 (57) Mek. de R. Simon ben Yohai, "Mishpotim," 28 (Hoffmann, 1905)
 (58) B.K., 2b: *אפפלה דהיי* *pile*
 (59) *ibid.*, 5, 7

- (60) Sanh., 1, 1
 (61) Eduy., 6, 1
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 (63) Kil., 8, 6
 (64) Tos. B.K., 8, 17

- (65) Niddah, 3, 2
 (66) Yer. Kil., 8, 4
 (67) Niddah, 32a
 (68) Shab., 121b
 (69) *ibid.*, 6, 6.9

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- (71) Sifre Deut., 20, 18

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- (76) Caesar, De Bello Gallico, I, 28, 2

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- (78) Deut., 17, 7

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- (83) Dig. 48, 19, 8

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(112) Dig. 48, 8, 4, 9: Furem nocturnum si quis occiderit, ita demum impune
feret, si parcere ei sine periculo suo non potuit.

(113) Stephen's Com., IV, 42

(114) Ab. Zarah, 26b; R. Chananel; Alphasi, Chap. 2; R. Asher, Chap. 2

(115) Tos. B.M., 2, 33

(116) Tos. Sanh., 13

(117) Tos. Hor., 1, 5; 11a

(118) B.K., 117a; B.M., 83b

(119) Sifre Num., 15, 31

(120) Ab., 2

(121) Antiquities, X, 117

(122) Sanh., 99ab; Yer. 10, 1

(123) Hir. Patrologiae, Tomus XXII, Epistula 112: Usque hodie per totas
Orientis synagogas inter Judaeos haeresis est, que
dicitur Minaeorum, et a Phariseis nunc usque damnatur: quos vulgo
Nazaraeos nuncupant, qui credunt in Christum... sed dum volunt et
Judaei esse et Christiani, nec Judaei sunt nec Christiani.

(124) Ber., 9, 5

(125) Sanh., 91a

(126) Sifre Num., 15, 39

(127) Yer. Sanh., 10, 3

(128) Ab. Zarah, 65a; Hul., 13b; Pes., 87b

(129) Cic., De Leg., II, 8, 19: Separatim nemo habesit deos neve novos neve
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(130) Cambridge Ancient History, Vol. XII, Chap. 21

(131) Sanh., 9, 6

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(133) ibid., 7, 5; 56a

(134) Jolowicz, Historical Introduction to Roman Law, p. 175, note 1.

(135) De Leg., II, 9, 22

(136) Mak., 2, 1; Tos., 2, 6

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(138) ibid., 613; Mak., 7b; Yer. 2, 4

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- (191) Mak., 2, 5
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- (206) Mak., 2, 8
- (207) Sifre Num., 35, 20
- (208) The Law of Homicide in the U.S., sec. 6.170
- (209) ibid., sec. 59
- (210) Mak., 2, 2; Sifre Deut., 19, 5
- (211) Kenny, Outlines of Criminal Law, p. 115
- (212) The Law of Homicide in the U.S., sec. 18
- (213) ibid., 125
- (214) Dig. 48, 8, 15: Nihil interest occidat aliquis an causam mortis praeb-
beat.
- (215) Stephen's Com., IV, 45; Dig. 48, 8, 1, 5
- (216) Sanh., 74a
- (217) Mak., 2, 6
- (218) Outlines of Criminal Law, p. 124
- (219) supra, p. 26
- (220) Sanh., 9, 1

(221) For a comparison with Roman and common law, see *supra*, p.38

(222) *Sanh.*, 9, 1

(223) *Sifre Num.*, 35, 20

(224) The Law of Homicide in the U.S., 373; *Outlines of Criminal Law*, 128

(225) *Kid.*, 43a

(226) *loc.*

(227) *Dig.* 48, 8, 15; *Strafrecht*, p.627

(228) *Sanh.*, 78a

(229) The Law of Homicide in the U.S., 328, 329

(230) *Dig.* 29, 5, 3, 12; *Strafrecht*, p.627

(231) *Supra*, p.28

(232) *Sanh.*, 73a

(233) *Dig.* 48, 8, 1, 4

(234) The Law of Homicide in the U.S., 72-74

(235) *B.K.*, 15b

(236) *Sifre Deut.*, 22, 8

(237) *Tos. Ab. Zarah*, 2, 1; 15b

(238) *Num.*, 35, 25

(239) *Sifre Num.*, 35, 25

(240) *Yer. Yoma*, 7, 3

(241) *Mak.*, 2, 3; see *supra*, p.24

(242) *ibid.*, p., 25

(243) *ibid.*, p.27

(244) *Mak.*, 2, 2

(245) *B.K.*, 32b

(246) *Mak.*, 2, 2

(247) *Deut.* 19, 5

(248) *Tos. Mak.*, 2, 5; *Sifre Deut.*, 19, 8; *Mak.*, 8a

(249) There is a rule stated by R. Johanan, a disciple of Rabbi that the opinion of the anonymous Tanna is always the prevalent law. The Tosafot, however, assert that his opinion is merely regarded as that of a majority. (*Yeb.*, 42b) It follows that even according to Tosafot his view must prevail against that of R. Eliezer ben Jacob,

in accordance with the rule that the majority rules. (Tos. Ber. 1) On the other hand, the rule established by Issi ben Judah that R. Eliezer's statements are few but exact, may be applied to cases where he disagrees with a single Tanna only. The Talmud, however, appears to view the anonymous Tanna and R. Eliezer as being in accord.

(254)

(250) Mak., 8a; B.K., 32b

(251) Dig. 9, 3, 1, 2

(252) Stephen's Com., IV, 50

(253) Tos. Mak., 2, 1: *אין אדם שחטגו אדם בלחץ ידו ונפלו עליו ענפי עץ ונפלו עליו ונפלו עליו ונפלו עליו*
Sifre Deut., 19, 5: *אין אדם שחטגו אדם בלחץ ידו ונפלו עליו ענפי עץ ונפלו עליו ונפלו עליו ונפלו עליו*

There is an abstruse statement in the Tosefta which reads as follows:
היה אדם שחטגו אדם בלחץ ידו ונפלו עליו ענפי עץ ונפלו עליו ונפלו עליו ונפלו עליו
Now, the meaning of the statement seems to be that if the wood cutter killed a man by hitting him with the ax, he is not to be exiled. But, this rule formulated in the Tosefta Mak. (2, 1) would contradict the

law recorded in the same Tosefta (2, 1). This contradiction, however, may be obviated if we interpret the latter case in the Tosefta to mean that the tree killed the man and if we concede that the Tosefta differs with Sifra Deut. (19, 5) on that point. According to the former, the killing by means of a tree is misadventurous, while the general opinion in the latter is that it is the result of negligence.

(254) Mak., 7b

(255) Shab., 136a; Lieberman, Tosfat Rishonim, II, p. 163

(256) Sanh., 9, 2; Tos. Sanh., 12, 4

(257) supra, p. 25, 26

(258) ibid., p. 28

(259) Sanh., 77b

(260) supra, p. 26

(261) Stephen's Com., IV, p. 49

(262) Mak., 3, 14

(263) ibid., 23a

(264) B.K., 32b

(265) Kid., 42b:

- (266) Tos. Mak., 5, 12

 (267) loc., 13

 (268) Mak., 2, 3

 (269) Tos. Mak., 2, 9; Sifre Num., 35, 23; supra, note 242

 (270) Er., 46b

 (271) Tos. Mak., 2, 7; 8b

 (272) Mak., 2, 3; Tos., 2, 3; supra, p. 30. 31

 (273) Mak., 2, 7

 (274) ibid., Tos., 2, 12; 12b

 (275) Mishneh Torah, Rozeach, 7, 5

 (276) Mak., 2, 7

 (277) ibid., 10a

 (278) loc.

 (279) ibid., Tos., 2, 4

 (280) loc., 6

 (281) Yer. Mak., 2, 4

 (282) Tos. Mak., 2, 5

 (283) loc., 6

 (284) Mak., 2, 2

 (285) ibid., 7b

 (286) Mishneh Torah, Rozeach, 6, 10. 14

 (287) Mak., 2, 1

 (288) Tosafot, Sanh., 77b

 (289) At Roman and common law the omission of an act also occasionally
 constitutes murder. See supra, p. 41, sec. 5

 (290) Mek., 21, 14; Dig. 48, 8, 12; The Law of Homicide in the U.S., 2

 (291) Dig. 48, 19, 18: cogitationis poenam nemo patitur.

 (292) Dig. 48, 8, 1, 3: qui hominem non occidit, sed vulneravit ut occidat,
 pro homicida damnandum.
 (293) Stephen's Com., IV, p. 58. 59

 (294) Sanh., 9, 2: view of the anonymous Tanna; Tos. Sanh., 12, 4: opinion of
 R. Judah against that of R. Simon; Mek., 21, 22; see supra, note 242

- (295) Sanh., 9, 2: view of R. Simon; Mek., 21, 22: opinion of R. Isaac; Yer. Sanh.
 9, 4: view of R. Nathan
- (296) Tos. Sanh., 11, 4
- (297) Mek., 21, 18; Sifre, 35, 17
- (298) Tos. Sanh., 12, 3; B.K., 90b: according to R. Akiba.
- (299) Tos. Sanh., 12, 4
- (300) Yer. Sanh., 9, 4
- (301) Sanh., 4, 5
- (302) ibid., Tos., 8, 3; 37b
- (303) Mak., 2, 3; Tos., 2, 10
- (304) Dig. 48; 8, 1, 3: nam si gladium extrinxerit et in eo percusserit, indubi-
 tate occidendi animo it eum admisit.
- (305) Strafrecht, p. 627
- (306) The Law of Homicide, 39
- (307) Dig. 3, 2, 11, 4; Strafrecht, p. 92, note 2; Stephen's Com., III, p. 283
- (308) Tos. Sanh., 11, 4
- (309) ibid., 11, 1; 8b; Yer., 5, 1
- (310) Sanh., 5, 1
- (311) ibid., Tos., 11, 4
- (312) Mak., 19
- (313) ibid., 9b
- (314) ibid., 2, 3; Tos., 2, 10
- (315) Sanh., 5, 1; Tos., 11, 1
- (316) ibid., Tos., 12, 7
- (317) Sanh., 9, 5
- (318) If the killer is a heathen, he is condemned to death even though
 no proof can be established that the crime was committed inten-
 tionally, as it is very likely that it has been done purposely.
 (Sifre Num., 35, 15)
- (319) Mek., 21, 20
- (320) Niddah, 5, 3
- (321) ibid., 44b
- (322) Tos. Shab., 16, 7

- (333) Sanh., 1, 4. There is a statement in the same Mishna that the high

priest is tried before the Great Sanhedrin consisting of seventy one judges. And it is the unanymous opinion of the Amoraim that this rule refers to all cases where his life is involved. (Sanh. 16a, 18b) S. Zeitlin, however, believes that the rule relates only to instances where he is accused of an offence against the State, or the Temple. (JQR, Vol. 31, p. 335) This assertion seems to be supported by the following Baraita cited and rejected by the Amoraim: If the high priest killed a person intentionally, he is killed; if, unintentionally, he is exiled; and he trespasses positive and negative commandments, and he is like a commoner in reference to all things.

(כהן יצא לא לזרית ולא הכהן עמו... וכו' ולא נכנסו אליו) (Sanh., 18a; רבותי בלתי קלה... ואם כן נכנסו אליו)

But there is also another tannaitic reading which possibly affirms the amoraic point of view. It reads, if the high priest killed a person intentionally, he is killed; if, unintentionally, he is exiled to one of the cities of refuge. If he trespassed positive, negative, or other commandments, he is like a commoner in all things. (Sanh. Tos., 4, 1: *בן אדם כגוי*).

הבן יקרא לפניו את הפסל מעץ ועבדו באלו העצים.
ועבדו לא יעלה להם אל המזבח ולא יאכלו עליו.

In addition to that, the amoraic allegation may find some confirmation by the fact that the statement: "he is like a commoner in regard to all things," is also expressed in reference to the king, though he is immune against trial and punishment. (ibid., 4, 2)

- (341) Srafrecht, Zwetes Buch, Funfter Abschnitt.

- (342)loc.cit.;Strachan-Davidson,J.L.,Problems of the Roman Criminal Law,

Vol.II, chap.17,passim
- (343)Outlines of Criminal Law,p.472

- (344)ibid.,p.475

- (345)loc.cit.

-----cit.
- (346)Niddah,6,4

- (347)Tos.Sanh.,7,1;Tos.Hag.,2,9

- (348)Sanh.,1,2

- (349)Mek.,18,25

- (350)Tos.Sanh.,7,5;36b;Hor.,1,4

- (351)Tos.Mak.,3

- (352)Sanh.,29a

- (353)ibid.,2,1

- (354)Niddah,6,4

- (355)Strafrecht,Zweites Buch,Funfter Abschnitt,passim

- (356)Outlines of Criminal Law,p.475

- (357)Tos.Sanh.,7,1;Tos.Hag.,2,9;Shek.Tos.,3,27

- (358)Sanh.,4,4

- (359)ibid.,Tos.,9,3

- (360)ibid.,1,1;13b

- (361)Sanh.,4,3

- (362)Antiquities,16,6,2

- (363)Betza,5,2;Mek,35,3

- (364)Sanh.,5,1;Tos.,9,1

- (365)ibid.,55a

- (366)JQR.(Apr.1941)p.336

- (367)M.K.,14b

- (368)Sanh.,11,4;Tos.,11,7

- (369)ibid.,35a

- (370)loc.

(371) Sanh., 89a

(372) ibid., 4, 1

(373) ibid., 6, 4; Tos., 7, 2

(374) ibid., 46a

(375) ibid., 6, 1

(376) Strafrecht, p. 359

(377) ibid., pp. 360. 361

(378) ibid., pp. 362-65

(379) Corpus Juris, "Courts", 219. 245

(380) ibid., sec. 256

(381) ibid., sec. 264

(382) Deut., 19, 11. 12

(383) Mak., 2, 6

(384) Mishneh Torah, Rozeach, 5, 7;

הוראה פה דורש להחליט

(385) Tos. Sanh., 9, 11; Mak., 7b

(386) Mak., 1, 10

(387) Dig. 48, 2, 22: Alterius provinciae reus apud eos accusatur et damna-
--- natur, apud quos crimen contractum ostenditur.

(388) Strafrecht, p. 358

(389) Corpus Juris, "Criminal Law", sec. 195

(390) ibid., sec. 183

(391) Sanh., 7, 1

(392) ibid., 9, 1

(393) ibid., 7, 3

(394) loc.

(395) ibid., 45b

(396) Mak., 1, 10

((397) Sanh., 52b

(398) Shab., 15a: R. Isaac ben Abdimi; Mek. de R. Simon b. Yohai (ed. Hoffman),

p. 126: According to the latter, both are needed: the Great Sanhedrin holding its sessions in the Temple, and the sacrificial services.

(399) Yer. Sanh., 1, 1; 7, 2

(400) Sanh., 37b; Sota. 8b

(401) Jewish War, 6, 2, 4

(402) JQR., April, 1941

(403) Cic. ad Herrenium I, 13, 23

(404) Strachan-Davidson, Problems of the Roman Criminal Law, Vol. I, 23

(405) ibid., II, 68

(406) Dig. 48, 8, 3, 5: Legis Corneliae de sicariis ut veneficis poena insulae deportatio est et omnium bonorum ademptio....humiliores enim solent vel bestiis subici, altiores vero deportantur in insulam.

(407) ibid., 48, 19, 15: Hadrianus eos, qui in numero decurionum essent, capite puniri prohibuit, nisi si qui parentem occidissent.

(408) The Economist, July 14, 1956

(409) Strafrecht, pp. 339-47 155-67

(410) Cic. pro Sex. Roscio, 20, 56: nocens, nisi accusatur fuerit, condemnatur non potest.

(411) Strafrecht, pp. 339-47

(412) Tos. Mak., 3, 7; 12a

(413) Sanh., 4, 5

(414) loc. cit.

(415) Antiquities, XIV, Chap. 9

(416) Sanh., 79b

(417) ibid., 9, 1

(418) Mek., 21, 19

(419) Stephen's Com., IV, 47

(420) Tos. Sanh., 7, 3; Tos. Mak., 3, 7

(421) Sanh., 3, 6

(422) Stephen's Com., IV, Chap. 20

(423) ibid., Chap. 21; Outlines of Criminal Law, p. 455

(424) Sanh., 4, 3; Tos., 8, 3; 37b

(425) Tos. Sheb., 3, 8

(426) ibid., 30a; Sifre Deut., 19, 17

(427) R.H., 1, 8

(428) Tos. Sanh., 9, 11; Meg., 20a. As to the age of a minor, see above p. 56

(429)Tos.Sheb.,3,8

(430)loc.;Git.,71a

(431)Tos.Sheb.,3,8.The statement in Tosefta Terumot(1,2)that the deaf and the mute are regarded as norma in reference to all things ~~ea~~ can not include testimony in capital cases,since they can hardly be properly queried and cross examined.

(432)loc.cit.

(433)Sanh.,3,3;Tos.,5,5;25b

(434)loc. Tax collectors and tax farmers were regarded as dishonest.

(435)ibid.,27a

(436)ibid.,Tos.,5,5;25b:They are dishonest as they occasionally feed their cattle on somebody else's pasture.

(437)Kid.,40b

(438)Tos.Sanh.,5,5

(439)Pes.,49b

(440)Mek.,23,1:R. Nathan,according to the version of the Gaon of Wilno.

(441)Sanh.,27a

(442)ibid.,27b

(443)ibid.,3,4

(444)ibid.,Tos.,5,4

(445)loc.;B.B.,128a;Ar.,18b

(446)Sifre Num.,35,23

(447)Yer.Sanh.,3,9.In the Babylonian Talmud it is rejected by Raba.

(448)loc.cit..There is a statement in Sifre Num.(35,23)that if

the witnesses are enemies to each other,they are in~~competent~~ as witnesses.Yet the majority opinion in the Mishna is that Jews are not to be suspected of bearing false witness because of enmity or friendship.(Sanh.,3,5)It is,therefore,to conclude that the statement in Sifre expresses the view of the minority.

(449)Rashi in Sheb.,31a

(450)Dig.48,18,20;Outlines of Criminal Law,p.374

(451)Cic.pro Lig.,I,2;Stephen's Com.,IV,389

(452)Strafrecht,p.442;Outlines of Criminal Law,p.334

(453)Stephen's Com.,IV,331

(454) Dig. 48, 18, 1, 17: Divus Severus rescripsit confessiones reorum pro
 ---- exploratis fascinoribus haberi non oportere, si nulla proba-
 tio religionem cognoscentis instruat.

(455) Outlines of Criminal Law, p. 374

(456) *ibid.*, pp. 374, 375; 400-408

(457) Dig. 48, 11, 6, 1: Hac lege damnatus testimonium publice dicere out
 ---- iudex esse postulareve prohibetur.

(458) *ibid.*, 22, 5, 3, 4: nam quidam propter reverentiam personarum, quidam
 ---- propter lubricum consilii sui, alii vero propter notam et in-
 famiam vitae suae admittendi non sunt ad testimonii fidem.

(459) *ibid.*, 22, 5, 9: Testis idoneus pater filio out filius patri non est.

(460) Niddah, 5, 6

(461) Outlines of Criminal Law, p. 375

(462) Dig. 48, 18, 15, 1: De minore quoque quattuordecim annis, in caput al-
 ---- terius questionem habendam non esse divus Pius rescripsit max-
 ime cum nullis extrinsecus argumentis accusatio impleatur, nec
 tamen consequens esse, ut etiam sine tormentis eisdem credatur.
 Stephen's Co., p. 395

(463) Dig. 22, 5, 4, 5

(464) *ibid.*, 22, 5, 18: Ex eo, quod prohibet lex Iulia de adulteriis testimo-
 ---- nium dicere condemnatam mulierem, colligitur etiam mulieres
 testimonii in iudicio dicendi ius habere.

(465) loc. 7: Servi responsi tunc credendum est, cum alia probatio ad cru-
 ---- endam veritatem non est.

(466) *ibid.*, 22, 5, 3, 1: Testium fides diligenter examinanda est. Ideoque in
 ---- persona eorum exploranda erunt in primis conditio eiusque,
 utrum quis decurio an plebeius sit... an locuples vel equi-
 gens sit, ut lucri causa quid facile admittat: vel an inimicus
 ei sit, adversus quem testimonium fert, vel amicus ei sit, pro
 quo testimonium dat.

(467) *ibid.*, 48, 18, 20: unius testimonio non esse credendum.

(468) *ibid.*, 22, 5, 17: Pater et filius... item duo fratres... testes utrique
 ---- in eodem testamento vel eodem negotio fieri possunt, quoniam
 nihil nocet ex una domo plures testes alieno negotio adhiberi.

(469) Mak., 1, 8

(470) Tos. Sanh., 8, 2

(471) see above, p. 71

(472) Sanh., 4, 5: *לפי שם הדין*

(473) *ibid.*, Tos., 6, 3

(474) Antiquities, XIV, 4

(475) Tos. Sanh., 8, 2

(476) see above, p. 64

(477) Dig. 47, 10, 39: vestem sordidam rei nomine in publico habere capillu-
 ---- mine summittere nulli licet, nisi invitatus in rem testimonium
 dicere cogi non possit.