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JURISPRUDENCE AMONG THE ANCIENT JEWS

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THE period extending from the year 200 B.C. to the year 500 A.D. offers a rich harvest to the student of ancient jurisprudence. It marks the high-point in the rise and development of the Jewish law. The source of information of the greatest value to the investigator is the Apocryphal literature, Josephus, Philo Judaeus of Alexandria, but principally the Talmud—the social, ethical and judicial code of ancient Rabbinic law.

There were three courts that were known at this particular period: first, a court called the Beth Din, presided over by three judges. It dealt with minor cases involving light flagellation or a small fine. There was a second court called the lesser Sanhedrin, consisting of twenty-three men. The third court, the Supreme Court of ancient Israel, was known as the Great Sanhedrin, with a membership of seventy-one judges. This number was derived from the court's prototype, the assembly of seventy elders that Moses gathered about him, he himself constituting the seventy-first member of the court.

The judges had to attain, in order to be eligible to preside over the Beth Din, the age of twenty-five. From twenty-five to the age of forty they served on the lesser Sanhedrin; and a man had to attain at least the age of forty to be eligible for membership in the great Sanhedrin of seventy-one judges. All judges had to be men of irreproachable character, men of intelligence, men of learning, men of fine discrimination and balanced judgment, men who were affable, genial, with a broad sense of the dignity of their office and yet approachable to all men,—men with the milk of human kindness in their hearts. They were not compensated as judges. They were men of all sorts of callings, earning their livelihood by the pursuit of those callings. They were carpenters, blacksmiths, silversmiths, tailors, shoemakers, weavers, perfumers, apothecaries, teachers, physicians. They were reimbursed, however, for any expenses in attending the court such as those incident to the journey and for the time occupied away from their work while in the sessions of the court.

The minor court, the Beth Din, held its sessions at the gates of the little towns. Every town, every city, every center of population in ancient Palestine and the ancient countries in which Jews resided during this period, had, at least, to have its Beth Din.

The larger centers of population had the lesser Sanhedrin which was the court of twenty-three judges. Of course, the great metropolis, Jerusalem, prior to the destruction of the Jewish Temple and the dispersion of the Jews, was the seat of the Great Sanhedrin. Later on the Great Sanhedrin met at the assembly of the Rabbis, at Caesaria, Tiberias, Sura, and Pumbaditha, the two last named being in Babylon.

In the Great Sanhedrin the judges sat upon benches arranged in a semi-circle, with the presiding officer in the center. The officers of the court were these: first, the Nasi, or Prince, the president of the court. The next, the Ab-beth-din, "the father of the house of judgment," as the name literally means, who was the vice-presiding officer; the second vice-presiding officer, whose duty was to preside in the event that the other two could not preside, was known as the Chacam, the sage, counselor, the quaesitor, who brought forth by his interrogation the leading evidence in any case. There were also two secretaries, who were compensated for their services, and who kept a careful record of the proceedings of the court, and two messengers, also compensated, who were the bailiffs of the court. Arranged before the tiers of seats on which the judges were seated, were three benches of probationers, or junior members of the court, who had no vote in the proceedings, but might, if called upon, offer expression of judgment. These were the men who were later to be elevated to a seat on the bench of the court, and they were arranged according to what was determined to be the order of their merit, and therefore, the order of their promotion to the high court.

This court not only functioned as the court of judgment and of justice, but also as the legislature. It not only determined the law, but formulated the law. It had all the functions of the Roman Senate in this respect.

There were different forms of penalties that the courts had to impose where offences called for penalties. Some offences called merely for a light flagellation or a small fine. These cases were referred to the minor court, the Beth Din, presided over by three judges. Other cases called for exile or for banishment for a time. These were the cases of accidental or unintentional homicide. There was a recognition of distinction in homicide similar to that of to-day. There were the justifiable and the unjustifiable, the accidental yet culpable, and the felonious kinds of homicides. Some cases called for penal servitude, such as cases of theft. The offender was fined double the amount of that which he stole. He had, according to the Mosaic Law, to make restitution, if he could, of twice that amount. But failing this, he had to sell himself into servitude which endured, at the most, for a period of not exceeding six years. If at any time within the six years, or within the lesser period for which he was sold into servitude, he found it possible to make resti-

tution, he paid the amount that was due after proper deduction for time of servitude that he had endured. According to the Mosaic Law as derived from a study of the Pentateuch, a man could serve as a bondman to another only for a term of six years. There was a curious proceeding in this connection. If a man declared that he did not want his freedom at the end of six years,—that he had grown to love his master, the comfortable environment of the home and the family life,—he was conducted to the place of tribunal, and there had an awl thrust through his ear and be affixed to the door post for a time. Thenceforward he was to bear that evidence of his ears having been bored with an awl as a stigma upon him as a man who had not proper appreciation of personal liberty.

Offences were classified according to their gravity—those that called for imprisonment for varying lengths of time up to life imprisonment and the felonious crimes that called for the death penalty. The death penalty was executed in several ways. The most severe form of the death penalty was that known as "stoning," which did not, however, mean a literal stoning, but the precipitation of the culprit from a high place. If he were not killed by being thus thrust from this place he was stoned by the by-standers, the witnesses being the first to fling the stones upon him. Another form of the death penalty was that of "burning." This did not mean, however, the affixing of a person to a pyre which was kindled but rather a form of execution after this fashion: A cord, about which was wrapped a soft cloth, was drawn about the throat of the one convicted, gradually tightened until his mouth opened, when a flaming wick was inserted into his throat, death almost instantaneously ensuing. There was also a method of disposing of the culprit by drowning in a stream of deep water. And finally there was the method of execution known as hanging or strangulation. The culprit was hung on a scaffold, never upon a living tree. Or he had this cord, about which was wrapped a soft cloth mentioned above, drawn about his throat so firmly and closely that he strangled as the result. For executions of these kinds the grave, felonious crimes were reserved, numbering in all thirty-six, classed under twelve heads. Thirty-six is a small number comparatively for this period of history when we remember that according to Blackstone in the year 1760 there were 160 offences in England punishable with death. Four of these classifications of the Rabbinic code dealt exclusively with offenses against God, leaving only eight classes of acts of moral turpitude that were thus punished.

The high crimes were those of treason, blasphemy, incest, bestiality, kidnapping, murder, malfeasances on the part of men in offices of the highest trust.

Mention was made above of a distinction in homicide recognized by the Rabbinic code. What was regarded as entirely justifiable homicide was that wherein one person killed another in protection of any other person's life, in protecting the chastity of a woman, or in self-defense. No penalty accompanied this form of homicide.

There was a further distinction between what was called fortuitous homicide and accidental homicide. A fortuitous homicide was said to have occurred when one of the flagellators in administering the strokes upon the culprit according to the law, caused the death of the person flagellated. The flagellator was performing his duty and it was purely a fortuitous matter then that the person died as a result. An instance of accidental homicide, as distinguished from fortuitous homicide occurred when the flagellator did not keep in mind the precise number of strokes he was to deliver upon the back of the culprit, administered too many and killed the culprit as a result. The flagellator then was held responsible and was banished to the city of refuge for a period of time.

Again, this distinction between fortuitous and accidental homicide was recognized in the case of a physician who administered a remedy to a patient. If it was the proper remedy, so far as he was able to determine, or medical science of that time had determined, and the patient died from the effects of the remedy; or, if, again, he performed a surgical operation deemed essential and the patient died—that was fortuitous and no penalty could possibly be imposed. That would be an accidental homicide, as distinguished from a fortuitous homicide, if the physician in any way were careless and wrote out a wrong or mistaken prescription and the patient died or if the physician did not use proper care in performing a surgical operation and the patient died.

It is proper at this juncture to consider the order of procedure in the courts. There was no prosecutor. The witness to an offense were the prosecutors. Upon them lay the burden of convincing the court of the guilt of the accused. There had to be at least two eye-witnesses to any offense to bring an accused person into court. Hearsay evidence was not admitted, nor was circumstantial evidence. Both witnesses had to be conscious of the presence of each other, and had to testify that they both saw the main incidents of the particular crime. Written testimony was not admitted. Witnesses were not sworn by oath. Their yea and their nay was considered to be sufficient. An oath was considered to be a reflection upon the honor and the integrity of a man. The witnesses were, however, very earnestly and solemnly admonished by the Presiding Judge, when they appeared before the judges, as to the responsibility that was in their hands. They were reminded of the fact that a single individual had been the parent of the human race, and were accordingly admonished that if through their evidence a human

being falsely was consigned to death, they would be as morally culpable as if they had destroyed the life of the race; that on the other hand, if through their evidence they were able to preserve a single human life, they would be morally as meritorious as if they had preserved the life of the entire race. They were admonished further that they would not be permitted to change or correct their testimony, and therefore, to be very careful as to that to which they might testify. Their testimony could be disproven and could be confuted. Disproved testimony was that produced by counter witnesses who testified to the fact that the crime could not possibly have been committed by the individual accused; that it was a case of mistaken identity. Confuted testimony was the testimony of witnesses who absolutely demonstrated the fact that these witnesses were false witnesses, and that the crime could never possibly have been committed under the circumstances that were mentioned; that the witnesses themselves could never have been present to witness the events about which they testified. In this case, if a verdict had already been brought in, and the confuting witnesses were introduced to testify after a verdict had been reached, the false witnesses had to suffer the very penalty that they intended the accused should suffer. If the verdict had not as yet been reached they were fined a considerable amount, or they were imprisoned.

The accused could never incriminate himself. A confession from him was never accepted. No kinsman of his, related consanguinously or by affinity, could testify against him. They could, however, testify, as he himself could, for his exculpation from the offense charged against him. He was urged to bring out all possible facts that might in any way cast light in his favor upon the alleged circumstances. He could be acquitted by a divided vote of the judges or by a majority of one vote. He had to be convicted by a majority of two votes at least.

A verdict of acquittal could never be reversed. A verdict of conviction could at any time be reversed. The judges deliberated publicly until the time of reaching their decision. Then they went into executive session. In calling for an expression of opinion the youngest member of the court was called upon first for the very manifest reason that he should not have his judgment or opinion influenced by that of any of the older members of the court.

The courts always convened in the morning. If the case were such as to require a prolonged session they sat throughout the day with recess at noon. If it was evident that they could reach a verdict of acquittal on the first day, the court finally adjourned at eventide. If, however, there was any reason to believe that they would come to a conclusion adverse to the accused, they had to adjourn court in the evening and re-

assemble the following morning, in order that the judges should have opportunity to sleep over the possible verdict adverse to the accused.

Those who were inclined to vote for the acquittal of the accused could change their vote as the result of the deliberation to one of conviction, but were not permitted to give the reason. Those who were inclined to vote for a conviction and later desired to change their vote to acquittal could do so, but were obliged to state the reason. The purpose of this is obvious. The authors of the code did not want men to be influenced by the fact of a change from acquittal to conviction, but they did want them to be influenced by the fact of a change from conviction to acquittal.

The court could never convene on the day of the eve of the Sabbath, or festival, or holiday, for the reason that it would possibly be required to be in session the next day—a day sacred, on which no court could hold a session.

Crucifixion was unknown among the Jews as a form of execution. The forms of execution as was indicated above, were comparatively humane and merciful. Again, this was the spirit of the court as it reflected itself in declarations of the Rabbis of those times, to arbiters and dispensers of justice, to the effect that "a court which in the course of seven years should sentence a single individual to death should earn for itself the name of a *murderous court;*" and one of the Rabbis went so far as to say that "a court, which in the period of seventy years should sentence a single individual to death was entitled to the name of a bloody court." This reflected the sentiment of the men responsible for dispensing justice at this time.

The place of execution had to be at some considerable distance from the court of judgment. Execution followed upon conviction the same day. This was the attitude of the Rabbis regarding all punishment. Punishment was not for retribution, or for expiation of an offense nor was it to vindicate the offended or violated majesty of the law. It was wholly for its deterrent effect upon others. And therefore, they ordered that when it had been determined upon that there should be an execution, it should follow as soon as possible after the conviction in order that it might carry a moral effect to the minds of any evil-doers in the association they must make with the offense of the sure, infallible and quick execution of the sentence.

The procedure leading up to the execution proper was unique and designed to safeguard the rights of the condemned to the last. At the door of the courthouse a man was placed with a white flag in his hand. At a distance from him, as far as the eye could reach, was another man mounted on horseback. The procession with the condemned person moved from the courthouse to the place of execution at a slow pace.

At either side of the condemned were two of the expert members of the court. A herald went before and called in a loud voice upon anyone within hearing of his voice who knew any reason why this sentence should not be executed, to come forward and state such reason. The man at the door of the courthouse stood there with the signal flag in the event that any one should come from elsewhere with some testimony at the last moment that might be helpful to the accused. Should that happen he would wave the flag and the man on horseback would see it and immediately pass on at full speed to the culprit who had gone before him, and bring him back to the court in order that the new evidence might be heard. The two men at his side were each to talk to him encouragingly and urge him to recall if he possibly could anything that he might have to offer in plea for himself, and if he found something after thinking, and submitted it to them, and they thought it was sufficient, they could bring him back to the court. That could be done twice before he reached the place of execution. Every possible safeguard was thus set about the accused person to preserve his life.

In striking contrast to the anicent Jewish criminal procedure is that of England in the seventeenth century. The trials of Sir Walter Raleigh and William Penn were a travesty on justice.[1] Raleigh was without counsel, without witnesses, without the right to be sworn in his own behalf. He was convicted on the confession of an alleged co-traitor although Raleigh produced a letter from the author of the confession repudiating it. Penn suffered the same indignities and worse. When he attempted to present his case to the jury he was hurried from the court room and the trial was completed in his absence. The court refused to accept two different verdicts of the jury because they did not find Penn guilty. The court threatened to starve the jury until the desired verdict was brought in and even to slit their noses. Under such circumstances the will of the king practically meant a conviction.

In the popular conception Magna Charta inaugurated the first era of an enlightened and merciful criminal procedure, our present constitutional guaranties being considered the perfection of a system designed to protect the accused rather than the state. In view of the facts that have been collected in this article it is apparent that criminal procedure has not known a steady progress upward from an era of extreme brutality but that it has traveled in a cycle. Today, our rules of evidence and our method of conducting a criminal trial hark back to the ancient Jewish jurisprudence which assuredly was justice tempered with mercy.

[1] 2 Howell's State Trials 1.