"JUDICIAL PROCEDURE IN THE BIBLE"

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BIBLIOGRAPHY

1. ENCYCLOPAEDIC:

   a. Hastings, a Dictionary of the Bible
   b. Jewish Encyclopaedia
   c. Smith, A Dictionary of the Bible, 1893

2. An American (anonymous), Incidents of Travel in Egypt, Arabia Petrea and the Holy Land (2Vol),Harper & Bros. N.Y.1859.

Amram, David W, The Zekenim or the Council of Elders.

Blunt, Lady Anne, Bedouin Tribes of the Euphrates; A Pilgrimage to Nedz.

Burckhardt, John L.,Notes on the Bedouins and Wahabys,London 1830.

Cook,Stanley A.,The Laws of Moses and the Code of Hammurabi,London 1903.

Cox,Francis A.,The Manners and Customs of the Israelites,London 1852.

Edersheim,E.W., The Laws and Polity of the Jews, Boston 188 .

Featherman, A., The Arameans, Boston 1881.

Fenton, John.,Early Hebrew Life, London 1880.

Harper, Robert F.,The Code of Hammurabi,Chicago 1904.

Jennings-Bramley,W.E., The Bedouins of the Siniatic Peninsula.

Jeremias,Johannes, Moses and Hammurabi, Leipzig 1903. (German)

Johns,Claude H.W., Babylonian and Assyrian Laws, Contracts and Letters, N.Y. Scribners 1904;-The Relations between the Laws of Babylonia and the Laws of the Hebrew People, London British Academy,1914.

Kent, Charles F., Israel's Laws and Legal Precedence, New York 1907.

Maine, H.J.S., Ancient Law, 1888

Millard, David., A Journal of Travels in Egypt, Arabia Petraea and the Holy Land, Cornish Lamport Co., N.Y. 1848.

Seetzen, U.J., Reisen durch Syrien, Palästina, Phönicien, die Transjordan-Länder, Arabia Petraea and Uriber Aegypten. Berlin 1854.

Smith, H.P., Old Testament History, Scribners 1911.

Sulzberger, M., The Am HaAretz, the Ancient Hebrew Parliament, Phil. 1909; The Polity of the Ancient Hebrews, Phil. 1912.

PREFACE

The subject "Judicial Procedure in the Bible" involves certain limitations, which the writer cannot fail to consider. In the first place, one must confine himself to a treatment of civil and criminal law alone, since the stratas of our codes dealing with humane and ceremonial laws involve no judicial procedure, other than stating the law and the penalty for an infraction of it. Secondly, the writer is obliged to deal with those elements of judicial procedure that presuppose a human practice and participation. The principles of judicial procedure that are decided and handled by the Deity cannot be considered in such a presentation.

My study of the "Evolution of Hebrew Law" and the "Administration of Justice" is based on a thorough and careful examination of the sources. Furthermore, all of my conclusions and deductions pre-suppose a division of the codes as presented in Prof. Morgenstern's classroom and Carpenter and Battersby's "Composition of the Hexateuch." I have accepted the critical analysis of the Bible, which has aided me in tracing the gradual development of Israel's laws and judicial procedure from the primitive pastoral life to a highly organized state under the priestly regime. The data contained in the chapter on "Penalties" was hastily gathered, since my original outline did not call for a discussion of all the punishments. Yet, I felt that a thesis on such a specific legal subject as I had chosen, required a discussion of the penalties in use in Israel from the earliest times to the Priestly Code. It was impossible for me to gather all the available material, but I feel that I have presented as coherently as possible the essential features of Israel's penal system. A study of this phase of judicial procedure would to my mind form an excellent subject for a thesis.

In the treatment of various institutions, such as the Elders and the Monarchy, I confined myself strictly to their judicial prerogatives, since their social and political status has been treated in a separate thesis, by Rabbi Henry J. Berkowitz, a classmate of mine.

In the final chapter, I have cited typical cases from the various codes showing how certain laws that were rude and barbarous at one time, were transformed and revised until they expressed the thoughts of the people of that particular age. These laws and cases reveal as Prof. Kent has aptly said: "the true faith of Israel." They embody the ethical ideals of a people that has striven in each succeeding age to perfect the principles and concepts of justice of the preceding age. Each period in the life of Israel with its legal and social documents sought to express more perfectly the ideals of the preceding period by constantly revising them and giving them a newer and broader meaning.

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Chapter I

EVOLUTION OF THE LAW

Unlike the Code of Hammurabi, the Jewish law was not the result of a single promulgation but rather of a gradual development stretching over a large period of time. It was not the product of one environment. Law in Israel developed from a purely agricultural period, where the people's wealth consisted of cattle and produce, to a highly developed state of society, which is characterized by a theoretical and ideal system of legislation. It, therefore, becomes apparent that the laws enacted during a period when men deal solely in cattle and produce, will be civil in character. There is very little need for this so-called idealistic legislation as is characterized in Ezekiel 40. Likewise there is very little need for a comprehensive and extensive ritual code.

Thus in the light of Israel's continual legal development and judicial expansion, we can see how certain acts which were entirely legitimate at the time of David and Solomon and their contemporaries became condemned by later prophets such as Amos 1:3 and Micah 6:7,8. Those who contend that Israel's legal system is a product of one age and one lawgiver, will find that their arguments in support of such a conservative contention are few and far between. The very fact that the same law is repeated twice and in some instances four or five times does not in itself indicate that the laws are (not) derived from one age and one lawgiver. Although the laws deal with the same subject e.g. inheritance, we note that in each advancing period, they show an increased progressiveness in spirit; for example, the Deuteronomic Code gives a more detailistic scheme and programme of legislation. In many cases the laws that appear in J

and E are fundamentally modified in D. Here they take on new meaning and new spirit because of the different state of affairs. Many laws of D supplant previous legislation. The law of the local sanctuary as found in Exodus 20:24ff is supplanted by Deuteronomic legislation, Deut.12:1ff, calling for a central sanctuary. This alone would indicate that this body of Israelitish law could not be the work of one man at one time. Up to the days of Josiah, when the Book of the Convenant and the J and E codes were the authorities, the prevailing custom was the local sanctuary as is indicated in I Samuel 9:12, and I Kings 18:30-37. Not until the Deuteronomic reformation, is there any tendency for a central sanctuary. And so when we read of David establishing a central sanctuary in Jerusalem, such was not actually the case at the time of David, but was thought to be so by the Deuteronomic writer, who was influenced by his own legislation.

The marked difference in vocabulary and style existing between the various groups of laws is an indication that they are the products of different ages, schools and writers. Some laws have early prophetic characteristics; others late prophetic. Still other laws show a distinct Deuteronomic or Priestly influence. All of this of course substantiates my previous contention that Israel's legal code is the result of a steady and gradual development; the work of different minds under diverse environments.

Prior to the entrance into Canaan, Israel lived a nomadic life, similar to the life of the Bedouins of the desert. It would be unfair to state that Israel <u>adopted</u> the customary Semitic or rather Nomadic law. This would be tantamount to saying that she lacked originality in this nomadic period and was entirely dependant on the tribes round about her for her methods of judicial procedure. It would be fairer to state that the primitive Israelitish tribes

included in their code, certain customs and methods of the surrounding nomads. After all, she could frame a legal code of ethics to suit her specific condition as well as the other Bedouin tribes. Many of the nomadic methods which Israel included, underwent severe modification and interpretation by the leaders. It is extremely difficult to ascertain direct information regarding this nomadic period. In the majority of cases, we would be safe in saying that the general primitive Bedouin procedure was in vogue. After all, society was not so complex and this simple judicial procedure developed by Israel in the desert seemed to satisfy the simple needs of the people.

The settlement in Canaan, however, necessitated a change in the nature of the law. The new circumstances raised new legal problems. For one thing, the conception of private property has for peasants settled on the land a significance quite different from that which it possesses for nomads. Property with the Bedouin is uncertain; it may be gained and lost in a night; for peasants, a certain security of ownership is indispensable. This period of settlement in Canaan is referred to as the Agricultural Period. Here the bonds of clanship came to be gradually loosened and their place taken by local unions.

The text book of legal procedure for this early period is the Book of the Covenant, supplemented by the writings of the Elohistic and Yahwistic schools. Characteristic of this period seems to be the lex talionis and the law of compensation. There are no degrading punishments. Women are not upon an equality with men but are treated rather like slaves, possessing certain rights. There is no centralization of justice, indicating a very primitive notion similar to the nomadic principle. This period knows of no central authority where justice is meted out but men resort to any shrine or sanctuary for a divine decision. The structure of society is of the simplest. About

the end of the seventh century, as this simple society became more complex, we have a greater refinement of morals and ethics culminating in the Decalogues.

The early prophetic period (842-621 B.C.) overlaps to a certain extent with the so-called agricultural period. Here the prophets as champions of ethical and social righteousness hold sway. It is not a period of civil and criminal codification but rather a time of intense political and religious activity occasioned by the great moral and humane laws.

The next important phase in the evolution of Israelitish law is marked by the advance of the Deuteronomic period extending from the reformation of Josiah 621 B.C. to the Babylonian captivity, 586 B.C. Since a single sanctuary at Jerusalem supplanted the many small local sanctuaries throughout the land, it also became necessary to have a more complete and specific codification of the law which up to this time, altho' codified to a certain degree, still remained fragmentary and undeveloped. The old scheme could no longer meet the specific needs of this progressive period. The result is that the old laws found in the Book of the Covenant and subsequent E. and J. writings are gone over, re-written with a more advanced and progressive spirit, expanded and modified. The D code adopted some of the primitive usages, as I shall show in another chapter of this thesis. It seems a strange and curious fact that the older codes discarded the very same primitive ideas which D accepted and incorporated in her body.

This is the first indication that we have of the gradual disappearance of the lex taliones. A more centralized and authoritative executive system is embraced. The Bastinado (1) as a form of punish-

* (1) The Bastinado indicates a persian influence. It was also a common mode of correction in Egypt and Assyria especially for lighter offences. (See G.Jacob, Das Leben Vorislam Beduinen, pg.165; Berlin 1895.)

ment makes its appearance of Dt. 25:2. Pecuniary compensation is stipulated and very much emphasized. The whole Code seems to be marked by the emphasis with which heathen usages are forbidden and by the mitigation of older rude or harsh institutions. The code gives expression to the ideals of the prophets whilst presenting a fairly practical system of legislation and judicial procedure.

Following the Deuteronomic period, we have what are knowmas the Exilic and Post-exilic periods, 586-300 B.C. characterized by the idealistic legislation under the influence of great religious leaders such as Ezekiel and Ezra. The legislation of this period is influenced to a great degree by Babylonia and Persia, two rising powers at the time. In this period, the priesthood reached its highest development. Such being the case, the tendency of the time was toward ceremonialism and specific ritual legislation. Very little civil or criminal laws are enacted during this period. The codification of the previous periods seemed to suffice for this time. The end of the period marks the probable date at which the canon of the law was closed.

I have attempted to show briefly the gradual evolution of Israelitish law from the simple nomadic period to the highly developed period of the Priestly school. One more question in this connection remains to be answered. How were the legal records and writings of these various periods preserved and handed down? It is a question of great speculation. The earliest Hebrew laws were apparently long transmitted in oral form. The simple life of the desert and the early life in Canaan required no written records. Custom and memory preserved all the laws that were needed. Moreover, before Israel came into contact with the Canaanites and Phoenicians, she did not seem to have developed the literary art. Instead, she cast the important commands and laws in the form of pentads and decalogues. This was an

easy and simple way to remember them. The practical aim was to aid the memory by associating a brief law with each finger of the two hands, cf.Exod.34., which is recorded as the oldest version of the simplest decalogue.

For a thorough understanding of the evolution of Hebrew law, one must also be acquainted with the gradual change of the technical terms indicating legal procedure or general legislation. We must understand that at different times, the original Hebrew word for law changed and took on new meaning; sometimes it became more inclusive in meaning and at other times it was more limited in scope and significance. It shall be my purpose in the concluding pages of this chapter to trace the evolution of the various technical terms denoting law.

A. MISHPAT

In all liklihood, the term Mishpat was the first used to designate a law. In fact, the Book of the Covenant, the earliest legal document is known as the MISHPATIM. Originally it must have had reference to a judgement or a decision given in connection with a specific case but gradually it was attributed to those judgements that are used in an abstract sense, Deut.32:4. In Exodus 21:1--22:27 it is used as a title to the body or collection of specific laws. It is introduced in each case by "when" or "if" which anticipated certain crimes and prescribe certain penalties. In Exod.15:25, a mishpat signifies a decision given in an individual case and then established as a precedent for other similar cases.

Originally Mishpat referred to civil laws alone as is indicated by its use in Exodus but later in the priestly writings it was applied to ceremonial laws as well, Lev.18:4,5,26 and 19:37. In the historical books, it is sometimes used in the sense of custom suggesting the

intermediate stage between a verbal decision and a fixed law.(Kent)

B. TORAH

The term "torah" is also very old, meaning originally a decision of a judge like Moses, which decision was established as a precedent and followed in similar cases, Ex. 18:16,20. Ex. 18:16-20(E) no doubt has reference to decisions on secular matters. Moses is seen here dispensing Toroth.

The origin of the meaning of the term "Torah" is very interesting. Kent has the following explanation to give: "It comes from a verb which means "to point out" "to direct" and this in turn is probably to be traced back to an earlier root signifying "to cast or throw" the sacred lot or arrows employed in early times to determine the divine will. In Joshuah 18:6, the verb is used to describe the casting of lots (וירית לכם גורל). Hence "torah" meant originally the decision obtained by the lot and then it stood for the authoritative direction or decision that came from Yahweh and was made known by His official representatives."

In the writings of the prophets the term has reference to the social and moral teachings given in Yahweh's name, Hosea 4:6, Amos 2:4., Isaiah 8:16. It may be said in this connection that in the earlier prophets, it denoted the teachings of the prophets as a whole, while in the later exilic and post-exilic prophets, it had reference to a special contribution of priests cf.Jer.18:18, Mal.2:6 and Haggai 2:11.

At the time of P. it denoted a group of technical directions regarding some specific subject of Lev. 6:7 etc. Its final use is when it becomes applied to an entire code of laws e.g.Dt.1:5;4:8.

After Ezra, when P merged with JED, the term "torah" is used of the entire Pentateuch, I.Chr.16:40 and Ezra 3:2 etc. etc. In the Psalms no doubt, it refers to the legislative parts of the Pentateuch,

Ps.1:2;19:8 and 119:1,18.

Briefly stated, the term "torah" meant first oral tradition, then decisions, then a classification of directions, then a convenient and comprehensive term for an entire and definite code; later for the entire Pentateuch. Thus we see that the term "torah" evolved from a purely judicial designation to a ceremonial one and thence to a moral one.

C MIZVAH

This is a term applied to the law as indicating that it is a charge laid upon men as the expression of God's will and therefore that it must be obeyed. In other words, it emphasizes divine authority back of every given law, cf.Dt. 4:2; 5:29-31. Although this term occurs a few times in the J and E writings, Ex.15:26;16:28 (P) and 20:6 (D), itcan be safely said that it is practically a Deuteronomic characteristic, occuring some forty-three times in this code. After D, the term is found quite often, Lev.22:31 (H) and Nu. 15:22 (P).

D EDAH

This term is used to apply to "moral and religious enactments solemnly proclaimed and attested by Yahweh. " (Kent) As far as the early pentacodes are concerned, it only occurs in Deuteronomy, Dt.4:45; 6:17,20. By that I wish to imply that it is a Deuteronomic creation. After D, in P writings, the term is often used as a statement of God's will forman, Ex. 25:16, 22;27:21 and Num. 1:50 and elsewhere.

E Chok

The term comes from "Chokak" meaning "to engrave", suggesting of course a period when writing on stone or metals was well known,cfIsa.8:1. It was a common practice in antiquity to engrave laws upon slabs of stone or metal and to set them up in some public place where all could read them. This practice was especially common at the time of Hammurabi. The fact that this term occurs frequently in the Deuteronomic and priestly codes suggests that the custom of engraving

and writing on stone was not unknown among the Hebrews, Dt.27:2-4.

The practice of engraving the law on a slab and then setting it in some public place suggests the idea that a Chok was a law immediately enacted by a lawgiver. As soon as the law was enacted, it would be engravened on a marble slab and placed in a conspicuous place.

F PIKKUDIM

This term is found only in Psalms, 19:9, 103:18, 111:7 and 119. It has reference to a whole body of moral obligations. From the nature of its use in Psalms, it seems to apply to rules or counsels provided to suit the various circumstances in which men may be placed.

Chapter II.

ADMINISTRATION OF JUSTICE

I. Nomadic Period

The early primitive life of Israel centered about the family. This phase of societal life seems to be characteristic of all early primitive peoples. The head of the family--in the majority of cases the father--was supreme. He had unlimited powers of punishment. To him was relegated the power of life and death cf.Gen.38:24. Here Judah as the head of the family orders that Tamar, his daughter-in-law, be burnt for having committed harlotry. Under such a condition of society, the members of the family are bound to avenge the blood of an individual member. For if this was not the case, who would assume responsibility for crime? If this was not the case, a reign of lawlessness would be rampant for the perpetrator of the crime would feel no compunction about committing his crime if he knew there was no avenger. This principle of blood revenge plays a great part in early primitive life and is similar to the Bedouin principle. The law of blood revenge had to continue in force in the desert for it was the only means of securing public peace. However, it continued in force in Israel long after it was a settled nation. This I will indicate in another part of this thesis.

In the light of such a marked individualistic plan, it becomes obvious that such a state of affairs even in the desert could not work out--especially as families became larger. The next logical step was to unite a group of families into a clan--those families of common blood and spirit. With this coalescence of families into clans or tribes, a portion of the family jurisdiction naturally passed over to the larger group--the clan, and was henceforth exercised by the heads of the clan or tribe. Here the Elders of the clan administered justice in the same way that the head of the Bedouin tribes was wont to do.

The procedure carried out by the elder of the early Israelitish tribe was the same as the method of the Bedouin sheik. In other words we can safely say that the head of the early Israelitish tribe was a sheik. There is a great deal of speculation regarding the powers and duties of the sheik or elder in the early Israelitish tribes of the nomadic period. When I say that the method of procedure carried out by the elder was the same as the method employed by the Bedouin sheik, I wish the reader to understand that my assumption is only hypothetical based on the theory that all nomadic tribes used the same methods and customs--interpreting them of course in the light of the specific needs of their group. It is at the same time of interest to note that the Arabic word "sheik" means "elder". Whether this proves anything or not is a matter of conjecture. Suffice it to say that it indicates a certain similarity in office. Every tribe composed of a certain number of families is an independent community; it manages its own internal affairs and is not responsible to any central authority outside of the tribe. Each man of the tribe voluntarily recognizes the superior rank of a chief called sheik (or elder) who is honored for his experience, his wisdom and his hospitality and is treated with much deference. (1) No doubt the elder of the early Israelitish tribe, would, like the Bedouin sheik decide small cases of dispute, quarrels between wife and husband, disputes as to ownership in a camel or a sheep; transact the political business of the tribe, sign letters written by the public scribe, receive all strangers and above all keep open house at all hours for his people. (2) The Sheik would also lead the tribe from camp to camp, fixing by the position of his own tent, the everchanging site of

* (1) Featherman "The Arameans". pg 384ff.

(2) Lady Anne Blunt, "Bedouin tribes of the Euphrates"

the rest. The incidents of Abraham moving from place to place followed by Lot and the rest of the kin, sharing his tent to all strangers, and transacting the business of his family or tribe in the acquisition of the Cave of Machpela, would indicate that he was the Elder of the tribe and in the main his duties were similar to those of the Bedouin sheik. There is little or no information available regarding the maximum powers of the elder or sheik in the Israelitish tribes. It is known that a sheik has no power of life or death over the men of his tribe. However, I am of the opinion that the early elders of the Israelitish tribes were not limited in their powers for in the extreme early nomadic period when the family was a unit, the father exercised unlimited powers, and no doubt in the grouping of the families together under the unit of a clan, the elder of the clan still retained these unlimited rights. Still this is a matter one cannot definitely determine. The prevailing custom among the Bedouins was to have a "kadi" who would function as the judge of the customary law and his office would be hereditary. Such an office was absolutely necessary as the decisions of the tribal sheik would carry little weight. I am therefore inclined to believe that my theory claiming greater authority for the Israelitish sheiks is correct assuming that Moses was a sheik with unlimited powers. However, it is quite possible that in Israel, there existed a superior sheik, as among the Aneze, who presided over a group of tribes and his award was without appeal, even when it condemned the sheik. (1) This would also account for Moses' exalted position. Finally, the theory that Moses was no sheik but the kadi, referred to above is also probable. The kadi would usually be a man of great sagacity and almost unerring judgement. He was distinguished for his impartiality and love of justice. When neither

(1) Rambles "Syrian Desert", pg.11.

the sentence of the sheik nor the decisions of his assistants can bring the matter in litigation to an amicable conclusion, the matter can be brought before the kadi. (1)

The elder or the sheik did not lead the tribes to battle. The Bedouin tribes had a special officer known as the Agyd whose duties were to lead the tribe to battle and divide the plunder. From Exodus 17:9ff it appears that Joshuah functions as the Agyd, leading the tribe against the Amalekites.

In this early period, the tent was the law court, Ex.18;13ff. In the chapter on oaths, we shall see how the "oath of the tent pole" is related to the administration of justice at the door of the tent.

II Agricultural Period

In this period, we have the development of the first code of Hebrew law, the Book of the Covenant. The theory that the legislation ascribed to Moses is really his product, is false. Bedouins have no use for an organized code of law. The owner of large flocks and herds must wander in search of fresh pasture lands. The nomad has no time for a highly developed system of judicial procedure. The only thing that Moses did, no doubt, was the framing of certain immediate ritual laws. The majority of decisions were oracular, Ex.18:19ff. Although an agricultural stage of society appears to be a marked advance over the simple nomadic life, we find that Hebrew society is still primitive. The principles of civil and criminal justice are those still current among the Arabs of the desert, namely, retaliation and pecuniary compensation. There are no central courts of authority in this period. On the other hand, an authority could be secured at any one of the shrines or sanctuaries which the Israelites inherited from the Canaanites, Exodus 22:8ff.

The basis of life analyzed in the Book of the Covenant is

(1) Featherman "The Arameans" pg 385.

agricultural; cattle and agricultural produce constitute the chief part of wealth and the laws of property deal almost exclusively with them.

Place of holding Court

Like the tent, which was the entrance into the family and then the clan, so the city gate, the entrance into the group served as the early seat of judgement during this period. Here was the place that the majority of the people would gather for here they were more likely to pass. An open space in the immediate vicinity of the city gate was the usual place for the assemblies of the people. There the formal courts of the law were held of Amos 5:12,15 and Dt.21:19.

Evolution of the Judge

The institution of judges dates from the visit paid to Moses by his father-in-law Jethro (Ex.18), the Midianite, and was rendered necessary by the over-great burden of responsibility borne by Moses alone. The system then indicated by Jethro was made an institution at Taberah, when by divine command Moses was to gather seventy men of the elders of Israel, whom he knew to be elders of the people and officers over them. In this connection I wish to state that Exodus 18:13ff and Numbers 11:16ff and Dt.1:13ff have this feature in common: the elders are placed alongside of Moses as the helpers in the governments of the people i.e. in pronouncing judgements. Thelighter cases are to come up before the elders whilst Moses reserves the graver and more difficult ones for himself. The same conditions continued throughout the later period as we shall see; alongside of the jurisdiction of the tribal heads and of the judiciary officers, that of God as exercised through the priests was still maintained. Moses held office because he was sanctioned by God. Likewise the priest in later times. At the same time it must be remembered that originally the judge was a priest pronouncing oracles as in the

case of Moses.

The system inaugurated by Moses at the suggestion of Jethro, may be characterized as "subordinate judges". It was indeed an innovation in Israel. It was never a part of Bedouin procedure and custom, rather a part of the Midianite custom, Dt.1:19. The system is a practical one adapted for administrative purposes and whereas according to the Elohist writer Ex. 18, Moses chooses the officers, the later Deuteronomic code leaves the choice to the people, a more democratic arrangement.

The agricultural period was marked by much fighting and conquest. It developed great military chiefs and heroes. Thus this period became one of hero worship, for heroism whether in fact or fiction always appeals to the intelligence as worthy of admiration and imitation. The conqueror, the man who could subdue other peoples and collect great spoils was heralded as the military chief; he was championed as a judge. That did not mean that he was a magistrate whose future duties would be to dispense justice but it was rather an honorary title conferred upon him by the people for his valor and heroism displayed in battle. The men referred to as judges in the book of Judges were rather men who had vindicated the rights of Israel in battle. To preserve their titles as "judge", these shoftim as military chiefs forced upon the people questions relating to the civil govt of the territory they conquered. Thus the name of their office was preserved while its jurisdictions and functions were modified. At a much later period Shoftim (1) came to designate civil judges. Num. 25:5.

* (1) The same name "sufet" or "sufes" was borne by the chief magistrates of the Carthaginians. The Suffetes of Carthage are evidently the Shoftim of the Hebrews, showing that a regular magistracy may develop from the extraordinary institutions here described. H.P. Smith in "Old Testament History", pg 88-89. The Phoenician Sufet had chief control in the Sidonian Colonies and to the Hebrew "shofet" was originally attached a similar significance.

The records of Judges show the process of an early stage. From Othniel, the first of them, to Samson the last, they were all so far as we can ascertain successful warriors; even Deborah is not excepted, since she stirred up that great war against Sisera and took a personal part in it. Her position is not as definite as the others. Judges 4:4ff indicates a certain judicial prerogative. Here she is pictured as holding court under a palm tree between Ramah and Beth El and deciding matters for the Israelites who would come to her.

In Judges 8:22ff where Gideon is offered the kingship in order that he may judge, there are indicated two things: first that the judicial prerogative did not rest with the military chieftains and secondly that already at this early time the terms "judge" and "king" were synonomous. Thus we see that the general impression of the people was that the main duty of the king was to judge. This is borne out by the later conception as found in IISam.15:1-6, Amos 2:3 and Hosea 7:7. So when the Israelites applied at the time of Samuel for a king, the thought uppermost in their mind was someone to judge them and hand out judicial decisions. They were dissatisfied with the military chieftains as judges, as borne out by Judges 21:25 and 17:5. These princes and elders at the time of the entrance into Canaan felt that might made right but they made very poor judges as far as judicial matters were concerned. Justice during this early agricultural period was never meted out properly; delinquents were never prosecuted and decisions tho' handed down in a few cases were never put into effect. There was no centralization of judicial authority, therefore "every man did that which was right in his own eyes." It might have been possible for this "caste of socalled judges" to develope into a strong judicial body as was the case in Carthage, but this development was arrested by the Monarchial period.

Before entering upon the Monarchial period, I feel a word should be said about the class known as the "professional Judges". Their existence seems to be an exploded theory founded on the idea that the nobility at one time or for that matter throughout all time, made up the vital part of the Juduciary. It is true that in the middle of the eigth century, judicial functions lay to a certain extent in the hands of the aristocracy and elders, which fact is indicated by the Naboth incident found in I Kings 21. However, this is not enough substantial proof to verify the existence of such a caste. The oldest Israelitish law code, the Book of the Covenant makes no mention of such a body. Neither do the later codes. If there was such a caste, it was a post-exilic creation as is borne out by II Chron. 19:5-11.

III MONARCHIAL PERIOD

The monarchial period seems to be distinguished by three direct phases, namely

1. Administration of justice by the elders.
2. Administration of justice by kings.
3. Administration of justice by priest and Levites.

(1) The elder's period of administering justice extends beyond the rule of the kings and for that matter begins prior to the monarchy. In fact their activity overlaps as it were with the period of the kings and the military judges.

During the three centuries between the crossing of the Jordan and the unification of the Kingdom by David, Israel was being slowly cemented. Her methods of government were undergoing drastic changes. Her methods of judicial procedure were modified and changed from time to time as her national borders were enlarged. The numerous city kingdoms into which Israel was divided at the time of the conquest,

were deprived of their rulers and converted into cantons. These cantons were called "arim" and were goverened by cantonal councils, called "Zikne Ha-Ir" (1) The question immediately arises; what were the functions of this newly created body? In the first place, all administrative and judicial powers were confided to this body. Later, the central government assumed the jurisdiction of the local councils altho' permitting the"Zikne Ha-Ir" to retain some of its judicial functions. Even at the time of Ahaband his successors, this Zikne Ha-Ir still functions. This council of elders was no doubt copied from the institution appearing at the time of Moses. The elders at the time of Moses were subordinate sheiks, representatives of each tribe who would refer all weighty matters to Moses, the superior, or the Kadi. In fact, the rule by elders is one continual process. It began with the early nomadic tribe and developed into a functioning judicial body, when many tribes united, and then finally it evolved into the Zikne Ha-Ir, of I.Kings 21.

Powers of the Zikne Ha-Ir

In the main, their authority extended over cases involving murder and manslaughter, altho they still decided certain minor disputes.

A. They tried murder cases and if the murderer fled to a city of refuge, they would demand and obtain his extradition for the purpose of handing him over to the executioner, the Goel Ha-Dam.,Dt.19:12. If the murderer could not be discovered, they washed the city's hands of innocent blood by a ceremony and sacrifice and thus removed the blood guilt which would otherwise have been attached to the city.

B. If the murderer of the victim, whose dead body was found in a field, could not be discovered, it was the duty of the Zikne Ha-Ir to see to

* (1) The institution of the elders existed among the Egyptians and the Midianites, cf. Num. 22:7.

it that the blood-guilt should not be fastened to their own city unless by careful mensurement it should be ascertained that it was nearer than any other city to the place where the body lay, Dt.21:1 to 9 and 19:12.

C. The Zikne Ha-Ir had jurisdiction over certain delicate matrimonial questions Dt.25:7, involving amercements and other penalties, but extending also to capital punishment, Dt.22:13-21.

D. In many cases especially for certain stated offenses, they were to administer the corporal punishment. (references?)

From the references in the Deuteronomic code, we would say that the institution of the Zikne Ha-Ir was a Deuteronomic creation, existing however to a certain degree before the reign of Josiah. They had the executive authority to carry out their judgements, cf.I. Kings 21:8ff. They no doubt functioned throughout the greater part of the Monarchial period and were incorporated in D. Deuteronomy 22:15 indicates that this body had judicial prerogatives; likewise Deut. 25:7ff. I. Kings 20:7ff and 21:8ff would indicate that at the time of Ahab, they were more of a council, a sort of an advisory board rather than a judicial body. That high authority was vested in this body cannot be questioned for II Kings 10:1 speaks of them as high officials equal to the rulers of Jezreel. In other words, their powers during the period of the kings varied as the king increased or decreased them.

From earliest times, the elders were regarded as the representatives of the people, Ex.4:29-31. They were to be appointed in all the gates of every city. The difficulty of the entire discussion of the elders is; by whom were these elders appointed? After Moses, at the time of the monarchy, these elders were no doubt appointed by the king inasmuch as Isaiah 1:23 considers them a part of the royal system of government.

Place of Meeting of Elders

The elders sat daily, except on Sabbaths, in an open place near the gate of the city, probably close to the market where most of the people would congregate and where probably the majority of the disputes would arise. From the very beginning of the cantonal life down to the highly developed city life, it appeared that all matters of dispute would be settled at the city gate. Moreover all business transactions would take place there. During the desert period, justice was meted out at the door of the tent which after all was the entrance to the domain or locality over which the head of the family and later the Sheik or kadi had jurisdiction. Likewise, then, the city gate was the entrance to the domain over which the Elders and the Kings had jurisdiction. Job 29:7 indicates that the city gate was the spot where the majority of the people passed and congregated.

THE TRIBAL AM

At the same time that the Zikne Ha-Ir functioned, there was evolved the tribal Am, which dealt with the larger matters of the district inhabited by the tribe or canton. To this board were referred all those cases which appeared too difficult or important for absolute decision by the Elders. Although the Zikne Ha-Ir as we learned tried cases of murder and manslaughter, which are important in themselves, I am led to believe that such cases were the only weighty matters they tried. The other complex disputes were turned over to this Am for consideration. Then again this Am was also a sort of District court while the Zikne Ha-Ir were cantonal bodies. The decisions of the Am were binding.

Sulzberger (1) is of the opinion that, as a result of friendliness among neighbors and the necessity of defense against enemies, there were

* (1) Sulzberger M. in "The Am Ha Aretz, the Ancient Hebrew Parliament."

produced alliances between several tribes and finally inthe time of Samuel, a union was effected of all or nearly all the tribes of Israel and there was formed a body, a general gathering of delegates to be known as the Am Ha Aretz. This with the Rosh Ha Keruim, convened by Samuel for the express purpose of electing Saul, were the two judicial bodies. Both houses would have to vote on judicial matters. It is hard to conceive how such well organized institutions as the two mentioned above should be existing at the time of Samuel, when in later years an attempt is made for perfection of the judicial character of the government. Moreover, it was not till the time of David that a complete unification of the tribes took place. Up to his time, there was too much individualism displayed on the part of the tribes and it is extremely difficult to see how such a highly developed system could have been effected in the short period of one man's administration--Samuel. Furthermore, Samuel himself functioned as judge. At Ramah, where his house was, he seems to have exercised all judicial and religious functions and was recognized by his townsmen, I Sam.7:17. He was also a sort of "circuit judge", going from year to year in circuit to Bethel, and Gilgal and Mizpah, I Sam.7:16. He did not intercede in the functions of the Elders of the towns as we see from his visit to the Elders of Bethlehem, I Sam. 16:4ff. Here he comes to perform the task of a priest and to anoint David. Then again the judicial institutions created by Sulzberger could not have existed at the time of Samuel and his judicial successors for in I Sam. 8:1ff, we learn that when Samuel became too old to administer justice in Ramah and the surrounding places, he appointed his sons as judges over Israel. No doubt the office of "circuit judge" was immediately abolished and his sons served as the high judges in the towns surrounding Ramah, while Samuel in his old age remained at Ramah. The elders no doubt presided in the tribes and cantons.

Thus at the time of Samuel, we have the following institutions; The Elders presiding in the cantons and tribes, trying all minor cases, and cases of murder and assault; Samuel with headquarters at Ramah tried all the difficult cases. He also visited other public centers in surrounding towns. He functioned like Moses. When Samuel got too old, his sons took his place, which met with the disapproval of the Elders, I Sam. 8:4ff. Thus we see that at this time and immediately thereafter, there did not exist such bodies as the amHA Aretz and the Rosh HaKeruim. At this point I wish to say that I cannot detect any body known to Sulzberger as the Rosh HaKeruim. Moreover, I am rather skeptical about the existence of the Am, even tho' I have mentioned in another place that such a body did exist. My contention in a previous paragraph is based purely on hypothesis and imagination but I must confess that I was rather hesitant in positing such an organization. However, I hope the reader will bear with me and realize that all discussion concerning the Am is not closed, but is a matter worth while examining. Upon careful study of the subject, one may find that after all this tribal and cantonal or rather district Am is an illusion and never existed--the term referring to the people at large. However, I am not in a position to say.

2 King as Judge

There is the contention of some conservative thinkers(1) that the king in Israel did not function as a judge. Onlyin a few cases, was he called upon to decide disputes. Of course, if one agrees with Sulzberger, then it is easy to see that there was no place for a king as a judicial functionary, since the Am HaAretz and the Rosh HaKeruim performed that work. But the sources bear out otherwise. II Sam.12:

* (1) Sulzberger M. in "The Polity of the Ancient Hebrews".

1-6 would indicate that it was the custom for people having plaints to present them to the king. Here we have the story of Nathan. Although it is a parable, created by Nathan to bring out his point, it indicates that such must have been the custom and procedure at the time. If any dispute arose between individuals, the matter could be brought before the king, if the parties in dispute did not want to present the matter before the elders. No doubt the people would take advantage of the opportunity of trying their cases before the king. We can see how such a procedure could be overdone. The parties in litigation would feel that the decision would be more binding and more just if given out by the king. The result is obvious. Too many cases, some important and some insignificant were brought before the king. In order to be able to meet the needs of the people, he appointed a deputy, II Sam. 15:2-4. Now, it appears that he could have turned these matters over to the elders, whose task was to try these cases. But in the case of David, he knew that the people were bent upon having many of their cases receive royal sanction and since he could not try all of them himself, he appointed a deputy from the nobility. II Sam15:2-4 does not only indicate that Absalom usurped that power because he was determined to disrupt his father's house and establish a kingdom with himself as head, but the passage also implies that someone of the royal house was in the habit of assisting the king; otherwise why would the people come to him and have faith in his decisions? After the Deuteronomic reformation and also in the time offf, there was established a superior court at the capital composed of judges and priests to whom difficult cases would be referred, Dt.17:8ff and numbers 11:16ff.

II Sam.14:15ff further indicates that David functions as a judge and that it was the general practice to try cases or plaints before the king.

As was stated in a previous part of this chapter, justice during the period of the Judges was very poorly exercised. During the administration of justice by Samuel and the elders, it was very difficult to enforce all decisions because of the lack of a central judicial body and authoritative assistants. No one was responsible to another. The sons of Samuel did not exercise their powers correctly. Justice was perverted. In this respect, then, the administration of justice under David reached a high crest. The tribal system which began to weaken at the time of Saul was now gradually disappearing. The elders still functioned alongside of the king but the ruler was the judge par excellance. He constituted a kind of supreme tribunal to which appeal could be made where the judgement of the elders seemed faulty, cf. IISam 14:4ff.

I Chron. 23:1ff speaks of David appointing six thousand officers and judges from the tribe of Levi. However, this narrative dates from the post-exilic period when justice was administered by the priests and Levites. Still the passage indicates that the post-exilic writer thought that David had a highly developed system of government. In I. Chron. 23:4, the term Shoterim is mentioned. According to Driver, (where?) the "Shoter" was a military official until post-exilic literature, when he becomes one with juducial powers. Furthermore he says, that at the time of David and Solomon, this term was descriptive of inferior--perhaps of different orders of magistrates--officers including sheriffs, sergeants, captains, heralds and the like. It appears to me that Driver has missed the real significance of this term. According to Gesenius' Hebrew and English Lexicon, the word "Shotar" means "to Cut", hence to "cut in" or "engrave" with a stylus. Thus the Shoter was a writer or a scribe employed chiefly in the administration of Justice. Every court had a "shoter" who would write down all the cases and record the decisions.

He is always associated with the Shofet, indicating his judicial functions.

The king was the supreme judge functioning like Samuel did to a certain extent. But Samuel could not interfere with the prerogatives of the Elders, while David and his successors still possessed the right of exercising a supreme authority and could without the consent of the elders and subordinate judges imprison those with whom he was displeased, I Kings 22:27 and even order their execution, II Kings 21:16.

With the coming of Solomon, we do not find any marked improvements over David in the legal system. Solomon evidently laid a great deal of emphasis on his position as judge for in I Kings 3:9 he prays that he may have an "Understanding heart to judge." Even in the countries round about, the king must have functioned as a judiciary for the queen of Sheba when visiting Solomon speaks of his judicial capacity in I Kings 10:9 as tho it was the main duty of the king. I Kings 3:16ff indicates that during his reign, people still came with all kinds of plaints and the decision of the king was binding.

I Kings 21 shows that in the middle of the eighth century, judicial functions still lay in the hands of the aristocracy and elders cf.II Kings 15:5. Appeal could be made to the head of the state and the readiness with which a complainant could gain the king's ear is illustrated by the story of the woman of Tekoa and the judgement of Solomon. The incident in II Kings 6:24-30 is very important showing that even when the king was wont to walk on the outskirts of his domain, he would be beseiged by people with all kinds of plaints; similarly the case in II Kings 8:1-6 where the king orders that property be restored to a certain individual.(1)

* (1) The Tel Amarna tablets tell of an incident where the king of Alasia (Cyprus) used his good offices for the return of the property of one of his citizens, who had died in Egypt. (Where?)

COURT OF APPEAL

Whether or not an institution as the Court of Appeal existed at any time is a matter of great discussion. No reference is made of such a court in the early codes, except the mention that Moses would try all the cases that were too difficult for the elders. In the Monarchial period, the king was the court of appeal and even the supreme tribunal. Now there is a possibility that after the Deuteronomic reformation, such a body did exist as is mentioned in Dt.17:8-11. Cases involving bloodshed, conflicting claims or cases of leprosy are supposed to have come before this Supreme Court of Appeal. Its decisions were to be rigidly enforced as is indicated in verses 10 and 11. That such an institution was of an extreme late date is evidenced by the fact that the code says that this court shall be composed of either priests or Levites. The portion of verse nine which says that the judges or magistrates that may be in those days shall compose the court does not indicate an earlier use of this institution for the whole incident is eclipsed by the injunction that the priests and Levites shall make up this court. However, the whole matter is one of speculation as our sources are very meager in determining upon the actual existence of such a body.

EDAH

If such an institution as the Edah existed, it was very late, probably priestly.. This is evidenced from the sources. Only in the priestly writings, do we find mention of the possible existence of such a court. From Numbers 35:12 and similar passages, we might arrive at the conclusion that the Edah was a Federal court existing under a highly centralized government. In this chapter we are not told where the Edah convened but where it did not meet, is expressly stated. It did not sit at the gate of the "city of Refuge". In all probability it

met at Jerusalem. It was a sort of Federal Court of Appeals that had the rights to reverse the judgement or decision of the local Zikne Ha-Ir. After a reversal of a decision regarding murder, the Edah was responsible for the defendant. If it can be proven that such institutions as the Zikne Ha-Ir and the like never existed, then the existence of the Edah and the court of Appeals is a myth. Still one must account for the use of these terms. To my mind, if they ever existed, it was in late exilic and post exilic times. The incident of Jeremiah being tried by the so-called Am, indicates the time of this institution. Then again, if the Am refers merely to the people in Jeremiah 26, then what is the Edah and what is the Zikne Ha-Ir? For such passages as Lev. 20:2, I Kings 21:12 etc must have reference to some prevailing procedure. My efforts to establish these apparent innovations were to no avail. Sulzberger thinks that he has accounted for them but has overlooked, the scientific analysis of the Bible in arriving at his conclusions. He is very conservative and is not bothered by contradictions, lack of references and glosses. The rational interpretation of the Scriptures is ignored by him and he does not distinguish between codes and periods. Although, it may appear that he is on the right track, his conclusions are obviously unscientific and therefore cannot be accepted "in toto" by scholars who accept the modern rational view of the Bible.

3) PRIESTS AND LEVITES AS JUDGES

Not until the rise of the priestly writings, is there any outstanding mention made of the priests or Levites serving in the capacity of judges or legal advisers. There are few instances where the priest serves a two-fold function as is the case with Eli in I Sam.4:18 and 7:14ff. I.Sam.8:1ff, which narrates the story of Samuel making his sons judges, seems to imply something of a hereditary succession. It may be

possible that this idea did not actually exist but was recorded by a later writer, who witnessed the rule of the priests. However, I am led to believe that it was,as it is recorded. In the main however--excepting these few instances-- the institution of Priest and Levites in the Judiciary is very late. In some instances, the priests and Levites overlap the period of the Elders and Kings. Deuteronomy 17:9ff indicate that the Priests and Levites functioned as judicial officers, deciding not by oracle or divine means, as Moses used to do, but by careful investigation. However, the elders still retained within their competency a limited class of offences. The Deuteronomist makes some mention of the priest in the judicial capacity. However, many of the references in D to the priests and Levites are glosses and later insertions. For example, the reference to the Priests and Levites in Dt.17:9 is without doubt an insertion because it does not harmonize with the Shofet mentioned in the same verse. The word "Shofet" is in the singular and is the subject and the terms "Kohanim" and"Leviim" are in the plural. Similarly many instances in D. In Deut. 19:17, where it appears from the context that the terms "priest" and "judge" are used hand in hand or even synonomously, there can be no question that the priestly reference is a later insertion. Up to the time of the priestly codes, the priest's duties were to be guardians of the oracle and judges of certain ritual and ceremonial cases. As guardians of the oracle, in early times,when disputes arose between tribesmen, they would be settled by "bringing them before God." Hence the sanctuaries of repute always had a priest, whose business it was to receive and transmit the decisions of the divinity. It is not difficult to suppose, says H.P. Smith, that the fountain of Kadesh received its name "Fountain of Decision" because the oracle was there.

From the rare cases of priests and Levites serving in the capacity

of judges prior to the Priestly school, one is not able to arrive at a definite method of procedure employed by them. After all they functioned very little prior to P.

At one time in the priestly writings, they appear as instructors in the law, Lev.10:11ff, But throughout the greater part of the P codes, the priest's activities are confined and limited to the care of the sanctuary, to the institution of the ceremonial law and to distinguish between real and apparent cases of leprosy. This last duty is a survival of the power of Moses and the Court of Appeal. The incident referred to in Dt. 21:5 only has reference, to my mind, to the ceremonial purification in which the Levitical priests participate. The part of the verse, 5b, has reference to cases of leprosy which they were to decide. There is an E. document, Dt.33:8aff, which makes mention, of the tribe of Levi rendering oracular decisions only and offering sacrifices. It is possible that the Levite actually functioned in a judicial capacity at some time or other, giving decisions in civil and criminal matters, but it is my belief that the priests practically at all times were authorities on the ceremonial law alone. Ezek. 44:24, a priestly writing, speaks of the priests as judges, in ceremonial-legal controversies, mainly. To decide between holy and profane, between clean and unclean, was their main task.

The Levites in post-exilic times acted as judicial assistants as is borneout in II Chron. 19:8, which speaks of a local court in each city composed of several lay judges and Levitical assistants. I Chron.23:4ff and 26:29 speak of the Levites in a semi-judicial capacity. Thus a superior court composed of a more experienced and wiser body of men heard the more difficult cases. It was no doubt organized with a bench of lay and clerical judges, II Chron.19:8-10. In other words the judicial authority is divided and is no longer the pet possession

of a certain distinct class. The power is divided. From these courts,no doubt, there developed the local Sanhedrins and the great Sanhedrin. The chief purpose of the people was to separate the church from the state, permitting the priests and Levites jurisdiction over the ceremonial and ritual laws and assigning the cases involving civil and criminal procedure to the Sanhedrin, which originally was composed of both lay and clergy representatives. The great Sanhedrin retained for a long time the High Priest at its head. It was composed of seventy-one members deriving its origin no doubt from the priestly injunction in Num. 11:16.

The decisions which were occasionally rendered by the priests were often based on the "toroth" and referred to as Kamishpat, cf. Lev. 5:10 and Num. 15:24. This would lead us to believe that the H. code of laws is but a Judean counterpart of the northern Israelitish "Judgements" and of the religious and humane laws in Ex. 20:23-23:19. The Priestly writers based their codes on the ethical and personal teachings of the early codes. With this as a foundation, they reared their ritual and hierarchy.

Chapter III

Witnesses and Oaths.

I. The Question of Witnesses.

Just as there is no mention made of the method of judicial procedure in the nomadic period of Israel's history, so there is no reference to the number of witnesses for deciding matters in primitive times. However, one may correctly infer that the prevailing custom among Bedouins of the desert that two or three witnesses be required in mostly all cases, was in use in nomadic Israel. If a Bedouin owes another and refuses to pay, the creditor takes two or three men as witnesses of the refusal.(1) In this connection it is very interesting to note that the evidence presented by the witnesses is not admissible if the opposite party objects, unless the witnesses have been summoned in due form by calling on all persons when the transaction takes place and exclaiming "Bear Thou Witness, O------."(2) The nomad insisted that witnesses be had whenever any transaction took place as for instance the purchase of the Cave of Machpela by Abraham must take place in the presence of witnesses, otherwise a dispute regarding the actual ownership could always arise and one party's word would be as good as another.

The earliest document that mentions witnesses is E. and it is very brief. Ex. 23:1-3 insists on the absolute truth of the witnesses, indicating that perjury is a serious crime. I. Kings. 21:10 shows that more than one witness was necessary in the case of a death penalty.

* (1) Millard, David, "A Journal of Travels in Egypt, Arabia Petraea and the Holy Land." pg. 175.

(2) Featherman A, "The Arameans", pg. 386.

When Naboth was falsely charged with blasphemy and treasonable utterances in I Kings 21, it was assumed as a matter of course that two witnesses were required. This was in the reign of Ahab (876-854 BC) who was a contemporary of Jehoshaphat of Judah (873-849 B.C.) and the narrative runs as if the law were then so old that memory of its origin had passed away. We, therefore, cannot be far wrong, if we refer its origin to Soloman's day (970-933 B.C.). However, I am of the opinion and I feel that the facts, bear me out, that from the very beginning of Israel's nomadic life, the institution of witnesses became ingrained in the hearts of the people. The institution of witnesses is a creation of nomadic life.

Having determined that the institution of witnesses is a product of the pastoral period, the question that now arises is: how many witnesses were required in later Israelitish legal procedure. From such passages as Dt. 17:6 and Dt. 19:15, we arrive at the deduction that the Deuteronomist insisted that more than one witness is necessary to convict. Dt. 17:6 limits two or three witnesses to capital cases. From Dt. 19:15, we learn that more than one witness is necessary to testify against a man charged with a high crime or a misdemeanor.

Deuteronomic legislation is very explicit in its denunciation of false witnesses. They are to suffer the penalty of the crime unjustly charged. In cases involving capital offences, death is the punishment for perjury, Dt. 19:19. The reason such stringent penalties are placed on cases of perjury or perjurers becomes obvious when we realize that the function of bearing testimony in ancient Israel as among the Bedouins was a most solemn and awful responsibility. The punishment of false witnesses is similar to that indicated in the Code of Hammurabi. This does not mean that the law which aimed at repressing false

accusations, Ex. 23:1, owed its origin to Babylonian procedure. The same ruling held good in Egypt and indeed the principle of lex taliones has prevailed in all primitive judicial systems.

In the priestly writings, the matter of witnesses is not changed, excepting perhaps the number. In Num. 35:30, the question of witnesses in cases of murder is regulated, prohibiting judicial action on the testimony of one witness but prescribes no specific number of witnesses as necessary. More than one is understood because the plural for "witness" is used. Leviticus 19:16 which is an H. document merely denounces false witnesses, while P in Lev. 5:1 says that the concealment of testimony is a grave offense.

THE QUESTION OF OATHS

The institution of oaths in ancient Israel is an extremely interesting one. It finds its origin in Bedouin life and was usually a substitute for a case where no witnesses could be secured. Among the Bedouins, if there are no witnesses in the case, the kadi requires the defendant to take a solemn oath, protesting that he is innocent of the charge of which he stands accused, which is considered sufficient to entitle the party to a verdict of acquittal. (1) The most common oath in the simple Bedouin life was known as the "oath of the tent pole", where the person taking the oath touches with his hand the middle post of the tent and swearing by the life of the tent and its owner. No doubt the reason for swearing by the tentpole has its origin with the administration of justice in early times at the door of the tent.(2) Among the Bedouins there was the "oath of brotherhood" made between the sheiks of tribes for political or rather advantageous motives. The

* (1) Featherman A, "The Aramaens", pg. 386.

(2) Vide Supra pg. 13.

oath binds those who have taken it in every respect as brothers, except in the matter of marriages for there is no prohibition of marriage between a brother and his brother's sister. (1) Then there is the"oath of the wood", which consists in taking a stick or straw and swearing by it. The kadi takes this small piece of wood or straw from the ground and hands it over to the defendant and tells him to swear with these words "Take the wood and swear by God and the life of Him, who caused it to be green and dried up." (2) There can be no question that Israel developed the Bedouin manner of taking oaths and brought it with them into Canaan. Ex. 22:9-11, speaks of an "oath of the Lord" which was taken in cases of controversy, wherein witness-bearing was impossible, that is, where there was no direct circumstantial evidence. The Shevuah was no doubt to be employed in defending oneself against charges of stealing or losing the property of a neighbor, which had been entrusted to the accused. The simplest form of taking an oath, was no doubt the lifting up of the hand to heaven, cf.Gen.14:22, Ex.6:8 and Dt.32:40 and was considered to be binding forever.

The placing of the hand under a person's thigh (cf.Gen.24:2 and 47:29) is a rare form of taking an oath. It is found only in these two instances. It is from the thighs that one's descendants come, so that to take an oath would be equivalent to calling upon these descendants to maintain an oath which has been fulfilled and to avenge one which has been broken (Delitzsch) (3).

In later literature, Dt. 29:18, an Alah is used. This is an oath containing an imprecation such as "God do so and so to me, etc."

* (1) Lady Anne Blunt "Bedouin Tribes of the Euphrates"

(2) Burckhardt J.L., "Notes on the Bedouins and Wahabys."

(3) Modern instances are recorded of Egyptian Bedouins acting similarly in making a solemn asservation.

The incident in I Kings 8:31 indicates that before the institution of the central sanctuary, the custom must have been to take the oath at every shrine or holy sanctuary. It would be done in the presence of the deity, which was felt to be very efficacious. There existed the fear that if one were to swear falsely in the presence of the deity, surely the deity would avenge himself right there and then. The incident of the guilty Bedouin who agreed to take an oath at a holy shrine, but on his way, fearing the possible consequences and the probable avenging of the crime and perjury by the deity since it was to be taken in his presence, is filled with terror and confesses, (1) indicates the reason for the insistence upon the holy shrine. Therefore, if one took the name of Yahweh falsely, one was guilty of perjury; Dt. 19:17 shows that at the time of D., the oath of purgation was taken before the authorized officials even as among the Bedouins of the present day, it may be made before the sheik.

Closely alligned with the question of oaths is the principle of "trial by ordeal". It is not my purpose to devote any time to a discussion of this phase of legal procedure as it does not involve the workings of the human. It is a procedure dependent upon the deity. Still, before I conclude this brief chapter, a word should be said about its place in Israel. The Code of Hammurabi lays great emphasis on trial by ordeal. Where independent evidence is not available, it lays down the law that a man must appear "before God" or undergo an ordeal. Similarly in Ex. 22:7; the man from whose keeping a neighbor's deposit is stolen can resort "to God" to clear himself. And in a like manner, a suspected herdsman can take the "oath of Yahweh" that he has

* (1) Cook Stanley A., "The Laws of Moses and the Code of Hammurabi," pg. 62-64.

not put his hands to his neighbor's goods and go free, Ex. 22:10.

The practice of trial by ordeal is a primitive one and its use becomes very rare as judicial procedure becomes more complex and developed. A relic of the trial by ordeal idea in later times, is the administration of the Sotah waters. This is similar to the "fire ordeal in the "Todli" country,(1) and to the Fire Ordeal among Bedouins."

The trial of Achan in Joshuah 7, in which the lot separated the guilty man from the rest of his brethern, belongs more correctly to the category of military offencesthan to that of criminal proceedings. It too is a relic of primitive procedure and would seem quite out of place, in later Israelitish judicial practice.

* (1) Featherman A, "The Arameans" pg. 427.

Chapter IV.

PENALTIES.

The beginnings of Israel's penal system are found in the history of her nomadic life. Although the Book of Covenant is the first definite legal code to stipulate certain penalties for certain crimes, the nomads practiced certain modes of punishment that find expression in the later codes. It is true that the practices employed by the nomadic tribes are not general and common to every tribe, yet we find certain principles of punishment in vogue throughout all the tribes. One clan may have adopted one mode of punishment while the other tribe adhered to a different method. Then again, one tribe may enforce a certain law while the other tribe may be very lax and negligent, in the enforcement of the same law. The great difficulty among nomadic tribes is the execution of the law. We find no officer to enforce the decision of the kadi or mebeshae. Public opinion alone seems to compel obedience to the law. In extreme cases and as the utmost penalty, the offender is turned out of the tribe. If someone kills his own father or brother, he is not executed, but banished from his family. He no longer is permitted to enjoy the family rights. (1) The case of Cain, who after slaying his brother Abel, is banished from the clan,--is purely a Bedouin custom dealing with such criminals. A wild and lawless Bedouin, a man who may rob, fight and kill with impunity cannot live under the contempt of his own tribe. (2)

In other cases of homicide, the Bedouin law leaves it to the family of the deceased to do itself justice--for revenge is a duty with all

Arabia Petraea III.

* (1) See Musil pg. 360.

(2) By an American "Incidents of Travel in Egypt, Arabia, Petraea and the Holy Land", pg 205-206.

his relations within the second degree.-- The idea of death purging a death was ingrained in the hearts of the people. This obligation of vengeance is so sacred that men will travel great distances to seek out the murderer of a relation. (1)

Fines among the nomads are arbitrarily imposed as a condonement for crime and are thus made a potent instrument of extortion, corrupting the administration of justice and rendering it an article of merchandise subject to barter and sale. (2) Definite amounts to be paid in fines for certain crimes are very rarely stipulated, thus affording the sheik or the kadi to impose any fine he cares. In the majority of cases, the material wealth of the culprit was taken into consideration and not the merits of the individual case. In general the two guiding principles of nomadic judicial procedure are the lex talionis and the law of pecuniary compensation. In many instances, oxen and sheep took the place of money. In Israel, this principle remained for a long time.

In the Book of the Covenant and other primitive codes we find the death penalty imposed upon cases of deliberate murder, Ex.21:12; improper conduct to parents, Ex.21:15,17 and man-stealing, Ex.21:16. It is difficult to ascertain correctly the different methods of inflicting this death penalty in early Israel. Stoning and the sword seem to have been the common modes among the Hebrews of inflicting capital punishment. When the former method was adopted and this was the more common practice, the witnesses were first to throw and then all the people present. But such a method was very late as is indicated in Num.15:35,36 and Dt.17:7. Capital punishment by the sword was probably

* (1) Lady Anne Blunt "Bedouin Tribes of the Euphrates"
(2) Featherman A, "The Arameans" pg 626.

performed sometimes by the executioner thrusting his deadly weapon into the bowels of the criminal or condemned person; but there is no doubt that little attention was paid to the mode of thus dispatching him. The incidents in I.Sam.15:33, I Kings.2:25,29 show that during the monarchial period the sword was resorted to in striking down federal prisoners.

The case of Gen. 38:24, where the father-in-law orders his daughter-in-law to be burnt reflects a very primitive case where the father had the power of life and death over the household. Joshuah 7:15, is a relic of an extremely primitive custom, which was carried over into Canaan. Lev. 21:9 stipulates burning as a punishment for a priest's daughter that is found to be a harlot. No doubt this was the only case in the late period where burning was the punishment. Beheading, which is mentioned in Gen.40:19 is not common to Israelites but in all liklihood is a form of punishment common to Egyptians, Persians, Greeks and Romans. I.Kings 20:31 indicates that strangling though practised in Israel was very rare. It was a part of the complex system of judicial procedure, characteristic of the monarchial period. In all liklihood, the king laid down these rare penalties as he saw fit.

Amercement is stipulated in Ex.21:19, while enslavement is indicated as a form of punishment in Ex.22:2b. Scourging is mentioned in Dt.22:18 and Dt.25:2-3, indicating a Deuteronomic institution.

Death, Koreth, and amercements are specified in Ezra showing the late use of these form of punishments, Ez.7:12-26. The penalties of enslavement and scourging had become obsolete during the late priestly school being supplanted by Ezra's law of banishment and imprisonment. It is possible that Koreth at all times meant banishment; the decision coming from the oracle, cf. Gen.17:14 and Ex.12:15 and Num.9:13. That Koreth at any time meant the death penalty is highly improbable altho Ex. 31:14-15 would favor the view that it did mean Death.

Koreth no doubt had three meanings:
(a) Exile as indicated by Ezra
(b) A lighter penalty to be borne at home for a limited period as is indicated in Ex.21:20.
(c) Death as borne out by Ex.31:14-15.

There is a great deal of discussion regarding the meaning of the phrase "Nakom Yinakom". Whether it is a specific penalty or not is a matter of speculation. The greater difficulty is to discover what it was. In the first place it might have referred to punitive damages in the case of smiting a slave with a rod that produces death, Ex.21:20; but that would hardly be adequate punishment for such an act. It must have been something affecting the person of the culprit with some severity. The particular term is unique, there being no other instance of its use. In Judges 15:7 and 16:28, Samson uses it to mean "the slaughter of a multitude". Likewise the passage in II Kings 9:7. That "Nakom Yinakom" cannot mean death is apparent according to Sulzberger from two facts: (A) The offender did not intend to kill the man and was therefore guilty only of manslaughter. (b) The same codes use the technichal term "Mos Yumas" in the several cases when the offense is capital. What Nakom Yinakom means, I was unable to definitely ascertain. That it was a survival of the primitive custom of blood revenge, no one questions; but what it has come to mean in later pieces of legislation is difficult to determine. In all liklihood, it was a term which denoted some sort of negative banishment. In certain passages of Jeremiah such as 46:10, 50:15 and 51:36, the term is used as denoting divine vengeance for the wrongs committed by a group. This is a very late use of the term, when ethical and moral teachings as laid down by the prophets held sway. Ezek.25:15 uses the term in connection with national vengeance of one nation upon another. It is possible that the term which was very vague and indefinite was given divers interpretations by the different deciding judges in the different periods.

It is a very common belief that the ancient Hebrews did not know of "imprisonment" as an actual form of punishment. However that deprivation of liberty was used at certain rare times, is indicated by the different terms denoting prisons. The terms "Mishmar" in Gen40:3 and "Beth Habor" in Ex.12:29 indicate Egyptians origin. In Egypt and Phoenicia, imprisonment was a very common form of punishment. Gen. 39:20ff bears this point out. The Philistines resorted to incarceration as a penalty, as is evidenced by the Samson story in Judges 16:21. At the time of the Monarchy, there is found first mention of prisons in Israel. In I.Kings 22:27, Zedekiah orders that Micaiah be put into prison, the "Beth Hakele".

In exilic and post-exilic times, the prison became a common institution in Israel where prisoners would be kept. Those awaiting trial would be remanded to the prison, Lev.24:12, Num.15:34. No doubt this prison was located in the capital city, and here persons arrested for trivial offences would be kept. Thus we see that in early Israel the prison was unknown, except thru Egyptian or Pheonician influence; while later the use of the prison was incorporated in Israelitish legislation. The theory that the Book of Covenant was the first legal code in Israel to stipulate prison confinement is based on the idea that the Makom mentioned in Ex.21:13 is the primitive form of the prison. Here the one guilty of man-slaughter would go. Such a theory is likely. It would also suppose that the "separated city" of Deuteronomy and the "city of refuge" of the priestly writings, were prison cities. If this be true, then it is not difficult to believe that a person, whose offense was of an inferior kind of manslaughter, would as a punishment be deprived of his liberty for a time.

(Note) Hanging is mentioned in the Book of Esther, indicating Persian influence. Mutilation is a Dt. form of punishment for cases of indecent assault cf. Dt.25:11f.

Chapter V.

ACTUAL CASES INVOLVING JUDICIAL PROCEDURE

In this last chapter of my thesis, I shall attempt to cite typical and actual cases involving judicial procedure. In accordance with the limitations of my thesis, the cases cited shall deal only with civil and criminal procedure. Wherever a deduction has to be made, since the case appears incomplete, it will be based solely on the material presented in the other chapters of this thesis. In connection with these cases, terms such as "Goel" and the like will need explanation and I shall attempt to present same in certain footnotes. Moreover, I shall try to show the marked development in the trial processes of a case that involves the same principle, but is being tried at altogether different times under diverse circumstances.

I. PROCEDURE IN CASES OF MURDER, MANSLAUGHTER, AND ASSAULT

A. Codes prior to D.:

In the first place, we must distinguish between murder and manslaugher in the early codes. Ex.21:12-14 points out two degrees of homicide. Where the death penalty is imposed, we call it murder; but where it is not imposed, we refer to it as manslaughter. Ex.21:13 describes manslaughter as acts of violence that are not premeditated and where God directed the man. The Hebrew terms used are אנה לידו and האלהים. A person charged with homicide would be tried in the city where a sanctuary was by the elders. If there was doubt as to the exact case, whether it be murder or manslaughter, the culprit could run to a sanctuary (Makom), Ex.21:13 and be protected there, if he seized hold of the altar of the Makom of any of the cantons in the country (1).

* (1) Solomon did not respect the Sanctuary right cf. I.King 2:28.

It is very likely that some sort of an oath to the Lord, probably known as the "oath of altar" was taken, professing innocence. Of course such an institution did not exist in the desert, for primitive custom did not distinguish between wilful and unwilful murder. It began with the entrance into Canaan and was no doubt not used till the federalization, of the country or to be more correct, not till the Deuteronomic reformation. II Sam.15 would indicate a growing dissatisfaction with the administration of law in the several cantons and a movement in favor of a high federal supervision was making progress.

Ex.21:14 says that an out and out murderer, who seeks protection at the sanctuary shall be taken from there. This passage in the Book of the Covenant deals a severe blow to the pagan custom of sanctuary. The murderer if really guilty could no longer seek protection within the environs of the Makom. The Book of the Covenant which mentions the institution of Kofer (1) in Ex.21:30 permits it only in the case of manslaughter. The nomads permitted this principle to work in certain cases involving murder. Even though the Book of the Covenant stipulates Kofer in cases of manslaughter only, the law was no doubt violated and misapplied to cases of murder for at the time of Solomon we learn, the Kofer as applied to murder cases was totally abolished.

The law of Ex.21:22 which has to deal with a case of miscarriage directly due to two men who were quarreling, is one that involves homicide. In case of accidental death like the incident in the passage, the general rule prevailed that the death penalty could not be imposed for homicide, unless it was committed with malice aforethought,

(1) Kofer means ransom, although in four instances, it means bribe, e.g. "shochad". It usually was a sum of money paid as a ransom for the alleged criminal.

which would be very difficult to determine. The procedure involved in deciding such a case was this: The Pelilim (1) would make a just appraisement of the damage suffered by the woman, if she lived, or by her husband in consequence of her death. The decision in this case is similar to the Bedouin practice: Wenn jemand aus versehen eine schwangere Frau stösst, so dass diese vorzeitig gebiert und das Kind stirbt, muss er für dasselbe den vollen Blutpreis eines Mannes zahlen. Tut es der eigene Mann, so zahlt er nichts.(2) Thus it ceases to be a criminal case and becomes a civil one.

In cases where the murderer fled to the altar, the Exodus law stipulated that the famil Goel (3), who was entrusted with the death warrent, would have to go and take the murderer from the altar.

* (1) The term "pelilim" means in some cases "to level" with a roller; to lay even. Hence it is possible that the term could refer to those who would "lay even" a cause, that is to plead a cause, to adjust a difference or to act as umpire or referee. In other words, the Pelilim were no doubt the lawyers who would plead cases. The Hithpael of the verb "Polal" bears such a contention out. It means to intercede for, to supplicate for anyone. In other words, to act as mediator, cf.Gen.20:7 and I.Sam.7:5 (See Gesenius' Hebrew and English Lexicon) Budde has a different reading for the term (see Stade's Zeitschrift" XI, 101)

(2) See Musil, pg.368.

(3) The family Goel in the primitive times was the next of kin who was allowed to inflict the punishment of death on the criminal. It is a recrudescence of the old Arab code which says that he who sheds blood, owes on that account blood to the family of the slain person. This debt may not only be claimed of the actual murderer but from all his relations. If one death is simply avenged by the death of another, the account is considered settled. (See Millard D, "A Journal of Travels in Egypt, Arabia Petraea and the Holy Land" pg. 176.)

In the later agricultural period, the Goel was a tribal Avenger. The tribe looked to him to avenge the death of a kinsman. (See Fenton "Early Hebrew Life", pg. 50)

D. Code:

It is very important to note the progressive changes D. makes in the procedure involving cases of homicide. The state, and not the family or clan shall have exclusive jurisdiction overall homicide cases or in the words of the text, the acknowledgement of national blood-guilt for homicide. The Deuteronomist abolishes the right of the family Goel to receive the warrant of execution from the elders because he became too corrupt and in many cases did not take the murderer from the altar, as he could be easily bribed. In this connection, there is the theory that the Goel Hadam, referred to in Dt. 19 etc. was the newly created federal officer for each canton, to replace the family or tribal Goel. Such a theory is a very likely one as we know that the old family Goel was corrupt. Still the view that the Goel of the early codes functioned in later times is also credible; Dt. 19:6 which speaks of the Goel-Hadam would indicate that this officer was not appointed by the federal states, else what would be the idea of saying "while his heart is hot". Only one who has direct interest in the case such as a relative or close friend could become "hot" over the slaying of an individual. However, the other theory that the Goel Hadam was a federal appointee a sort of sheriff is highly plausible and deserves consideration. Furthermore, the Deuteronomist abolishes the Makom and establishes three judicial districts and one city in each to which every perpetrator must go, Dt. 4:41ff. This indicates an enlargement of territory and a more highly federalized system of government. The Kofer for manslaughter is abolished and the substitution therefor of internement in the separated city as punishment for the crime is instituted. The tendency of the D. writer is towards communal responsibility in contradistinction to the individual responsibility of the earlier codes. D. characterizes manslaughter

as בבלי אינו יודע , that he had acted without intent; that he had acted on the spur of the moment, cf. Isa. 6:13 and Job 36:12. (These passages are different)

In cases of manslaughter, the following procedure is used: the accused, known as the Rozeach, must go to the designated city. No Kofer is allowed. In this designated city, he is to expiate his crime by internement for his offense of manslaughter. In case he refuses, the Goel-Hadam must put him to death. A reasonable, fixed time, the length of which does not appear from the records was allowed to enable him to reach the designated city. If he tarried on the way, he paid for his carelessness with his life.

Procedure in Dt. 19.

The murderer is tried by the Zikne Ha-Ir of his city. The Goel Hadam would receive the murderer from the Elders and execute him. In the majority of cases, the verdict rendered was manslaughter, rather than murder, because a conviction of murder, punishable by death, would take away the family's opportunity for punitive damages. In case it was manslaughter, he would go to the designated city. If the conviction was murder, he could in all probability make an appeal. The D text is not explicit in its clue to the nature of the whereabouts of this appellate tribunal referred to in Dt. 17:8-11. Even if a settlement was effected between the murderer and the family of the murderer, it did not help the culprit under the D Law, for as soon as he left the designated city, the Goel Hadam was compelled by his warrant to put him to death.

3. P. Codes:

The priestly writings show a marked advance over D, just as the Deuteronomic writings indicated a marked improvement over the earlier codes such as E. and J. Evidently in the eyes of the priestly author, the three designated cities, the Goel Hadam and Zikne Ha-Ir have not accomplished their purpose. The Goel Hadam has not proved his ability

to prevent the practice of Kofer. He has evidently learned how to circumvent the law. Thus the whole institution is remodeled. In Num.35, the guild of Levites act as the judicial authority. P makes the following innovations:

a. Six cities of refuge
b. manslaughter is indicated in Num.35:22 as meaning through error.
c. Instead of a cantonal trial in cases of murder, we have a Federal trial. This makes for less bribe.

Procedure in Num. 35.:

The perpretrator of the crime goes to the city of refuge, in order that he may not die at the hands of the Goel before he has been adjudged guilty of murder by the federal court, verse 12. The Edah(1) mentioned in verse 24 is the federal court of appeal to be used after the decision had been made by the Zikne Ha-Ir. If the Edah refuses to affirm the conviction of murder as laid down by the Zikne Ha-Ir and declares the offense manslaughter, the Goel Hadam, whoever he is at this time, suspends the death warrant but does not annul it. The prisoner is remanded to the city of refuge, there to remain. In P the term of confinement is fixed. He is to be discharged at the death of the High Priest. This was no doubt an indication that a new administration was taking hold of the reigns and would not hold the acts of the previous adminsitration binding; verse 25. If the prisoner should at any time prior to the High Priest's death commit prison breach, that is, go outside of the city wall, the Goel Hadam's death warrant becomes operative and it is the latter's duty to execute the prisoner, cf.v 27. At the expiration of the prisoner's term of service, the death warrant loses all force and validity. The manslayer returns to his home free from any further consequences, cf. v 28. Kofer is absolutely forbidden

*.(1) Vide Supra pg. 26.

in the case of murder, and although denounced in cases of manslaughter, must have been practised at times. The defendant's term in the city of refuge may not be evaded or abridged by compounding cf. 32.

For the first time, do we hear of cities of refuge. In Ex. it is the Makom and in Deuteronomy, it is the separated city. Prior to P, these places were in cantonal or tribal territory, but in the priestly writings, they are Federal cities. Numbers 35. 20 and 21 define murder by the expressions "previous enmity" and "lying in wait".

The injunction in Josh. 20 is similar to the narrative found in Num. 35. Here too, six cities of refuge are to be set aside. When the defendant arrives at the gate of the refuge city, he stands before the Elders of that city and states his case. It appears safe to affirm that he always states that there was no murder; that it was a case of בשגגה or חבלי דעת. If it was ascertained that it was a case of manslaughter, he would be detained in this federal city to which he had fled. Here the prisoner would remain till a new regime under a new High Priest took office. If the Edah actually functioned, then it was a court of appeals in this matter. The Edah heard the appeal of the prisoner and would in the majority of instances grant the appeal, thus admitting the prisoner the federal city, v6.

Procedure in Lev. 24 (H)

This text makes no distinction between murder and manslaughter and hence fails to indicate the latter's offense. Lev. 24:17,21 stamps homicide as a federal law where the murderer must be put to death. Gen. 9:5ff, which is of very late origin states that he who kills a man must answer for it. The whole community is responsible for the blood-shed. National responsibility is emphasized in contradistinction to the early individualistic responsibility. (1)

* (1) Vide supra pg. 43.

Case of man found slain in a field. Dt. 21 (D)

Case: A man is found slain in a field and the murderer is unknown.

Procedure: A. The Elders measure the distances unto the cities which are round about the slain man, Dt. 21:1.

B. The Elders of the city that is next to the slain man shall then wash their hands over the sacrifice of a heifer, v6, making solemn protestation of innocence, v7.

The reference to Shoftim in v 2 is no doubt an insertion since they have no part to play in the incident. The reference to Kohanim in v.5 is no doubt a priestly insertion.

There seem to be no actual cases of assault involving judicial procedure in the various codes. The Book of the Covenant orders payment for loss of time and insists that the one assaulted be thoroughly healed, Ex. 21:18ff. This is similar to the law in the Code of Hammurabi which stipulates the payment of the doctor. The lex taliones is emphasized in the B ook of the Covenant although there is a tendency to substitute a milder penalty, especially when the victim is a slave.

2. Procedure in cases of Robbery and Theft

The cases involving robbery and theft in the Bible deal in the main with crimes against land property although there are a few instances where theft of general possessions is indicated. In the early codes, the principle of lex taliones holds sway. Ex.21:37 says that the stealing of an ox or sheep which the thief kills or sells shall be restored by the robber, five oxen for one ox, and four sheep for one sheep/ This was the nomadic custom of dealing with thieves. If the theft is found in the hand of the culprit alive, he must pay twice its value, Ex.22:3. If the thief had nothing to pay, then he was sold for a sum equal to what he had stolen. If a thief that is found breaking in a certain dwelling, be killed, while it is broad daylight, then the

slayer shall make restitution; but if he is slain at twilight or in pitch dark the slayer is not guilty of murder since he could not see how to defend himself. This appears to be a very advanced law, protecting all sides.

The D code in Dt. 19:14 and 27:17 voices a general prohibition against land stealing and a public condemnation is the punishment. This incident reminds one of the curses of the ancient Babylonian Kings upon those who removed their neighbors' landmarks. (1)

Cases of Kidnapping which come in the category of theft are not evidenced in the codes. Ex. 21:16 merely states that death is the penalty for kidnapping and Dt. 24:7 reiterates the same law. This would indicate that the law of kidnapping never changed in Isreal but was always severe and carried with it an extremely severe punishment for a violation of the law. The Code of Hammurabi is equally severe in the punishment of this heinious crime. In fact all peoples looked down upon the kidnapper as the lowest type of criminal.

3. Cases involving Property Rights

A. Procedure in Ex. 22:9ff: if a man takes an ox or ass or sheep to guard or herd and it dies, or is injured or is carried off and there are no witnesses nor evidence, the shepherd swears the "oath of Yahweh" (2) that he has not put his hands to the goods of the owner and his word is finally accepted and no restitution is made. However, if the animal is stolen, while it is in his possession, he must make restitution because it has been a case of pure negligence on his part. In case a wild beast has destroyed one of the animals entrusted to the guardian shepherd, he must bring the mangled remains as evidence that he is not responsible and then no restitution is made, Ex.22:12. The

* (1) See Johns C.H.W. in "Babylonian and Assyrian Laws Contracts and Letters" pg. 191.

(2) Vide supra pg. 54.

narrative of I.Sam.17:34 indicates that quite frequently a guardian to take care of sheep and other animals was appointed. Such no doubt was a custom common to nomadic tribes. The people of Mosul would entrust their sheep to the Haddedean Arabs. (1) Gen.31:39ff, which is an early document indicates that it is unfair for an owner to require his herdsmen to make good for the ravages of wild beasts. cf Amos 3,12

B. Procedure in Ex.22:8: - If lost property is found in the hands of another and the supposed owner says "this is it", then the accuser, and the accused come "before God" (Oracle) and the one whom the oracle condemns, pays double to his neighbor. The decision in this case was no doubt arrived at by an ordeal. (2) The accused if guilty makes the usual two-fold restitution; the accuser for his false charges pays twice the value of the property as compensation.

C. Cases of Transference of Property

The early codes do not mention such procedure, which would seem to indicate that transference of property in primitive times did not involve actual judicial procedure but was done privately between herdsmen. However, in the later codes we have direct references to cases involving such procedure. Gen.23, which is a priestly product has the transaction take place at the gate of the city. Abraham insists that some exchange take place which would make the deal binding. Witnesses are also required to comsummate the deal, v 16, to make it sure, v20. In Ruth 4:10, the acquisition of a wife is treated as a transaction involving transference of property and a definite procedure is used. In the first place, the transaction takes place before the Elders

(1) See Layard "Ninevah" I pg.88, note.

(2) vide supra pg. 35.

(v9), who are to act as witnesses of the transaction, and to confirm it. The taking off of the shoe and passing it over to the other party was a sign of exchange and confirmation of a deal. (1) (v7). This was no doubt a practice current in Israel up to the close of the seventh century for in Jer. 32:6ff, a more business like practice was in use; at all events in the larger towns. The transaction here, is put in writing. Witnesses are called and the money is weighed out in their presence and they in turn sign their names to the contract. The purchase deed, the Sefer HaMiknah was then sealed and preserved in a receptacle and a duplicate was also drawn up.

In general, a real estate transaction was effected by the elders who acted primarily as witnesses.

D. Cases involving claim on property

Case of I Kings 3:16ff; Two women claim ownership of a child. The matter is to be decided by the King in this instance. The evidence of one woman is heard and then the counter evidence or testimony of the other woman is heard. The king then makes the decision which in this specific case is not based on any definite legal code. The incident shows that the king was supreme and could decide matters which involved human beings as he saw fit. He was not duty bound to guide his decisions by any set standard of laws, for we see that in this case, Solomon resorted to strategy in arriving at a decision. He knew aforehand that whatever his verdict would be, one party would remain dissatisfied so he resorted to strategy in order to show up one or the other of the claimants. The incident also points out the fact that Solomon was not responsible for any new standard of legal procedure.

E. Cases involving inheritance of property.

In early times, when there were no testamentary documents, the

* (1) The striking of the hands was also an indication of the confirmation of a deal. cf. Prov.6:1.

father no doubt made known his wishes in some recognized oral manner probably in the presence of witnesses as was the case of Abraham in Gen.24. In II Sam.17:23, Ahitophel puts his house in order before committing suicide, meaning of course, that he had made some oral testamentary provisions.

After the death of the father, the inheritance was divided by the eldest son in the presence of some official who would act as witness. In later times a contract making the decision binding was also drawn up. The D code in Dt.21:15ff forbids the father on the day he divides his inheritance to leave the double portion (i.e two son's shares) to any other than the first born of his first wife. The laws of inheritance among the early Israelities divided the property among the male children only, as was the case among the primitive Bedouins.(1) It was not until the latest narratives in the Old Testament (P) that daughters were recognized as legal heirs, Num.27:1ff. Although the narrative of the daughters of Zelophehad is of a secondary strata, and bears little weight, the tradition that not until late times did daughters share in the inheritance, can be evidenced from it., Num.27:8.

In passing from the cases that involve property rights, a word should be mentioned about debts. The various codes mention very little about laws regulating the payment of debts. The little legislation that we do have, shows that the debtor at all times was regarded as a victim of circumstances and misfortune; one who was not to be treated severly and oppressively. The Book of the Covenant permits the debtor to be released in the Sabbatical year, while the D. code goes a step further and remits the debt at the same time, Dt.15. In later post-exilic legislation, the Law of Jubilee was instituted, giving the debtor a long-

* (1) Burckhardt J.L. "Notes on the Bedouins and Wahabys" pg.74-5.

er time in which to pay his obligation and at the same time insuring the creditor.

4. Cases of Blasphemy, Slander and Disloyalty

A. Case of Lev.24:10ff. This although recorded among the priestly writings, is an authentic record of an old case.

Crime Alleged: A son of an Israelitish woman, whose father was an Egyptian went out among the Israelites and blasphemed the name of God and cursed Him.

Procedure: He is brought before the presiding Judge (Moses) at the oracle. He is immediately put into prison (1) to await the decision of the oracle. After receiving the decision which attested his guilt, he was sentenced to death. The witnesses to the crime were the first to stone him.(2)

B. Case of Dt.17:2ff:

Crime Alleged: Charge of blasphemy and idolatrous worship.

Procedure: The case is to be investigated thoroughly and if the charges are proven true, then the culprit is brought to the city gates and is stoned. This of course is only to take place upon testimony of two or three witnesses and they shall be the first to raise their hands against him.

The case of Dt. is much later than the inserted case of Lev. 24. The procedure in dealing with a violator of the Sabbath, found in Num. 15:32, is the same as in the case of a blasphemer. The penalty is death.

C. Case of I Kings 21:1-7;13-16.

Crime Alleged: Naboth, the Jezreelite is (falsely) accused of (what?)

* (1) A Post-Exilic institution, vide supra pg. 41.

(2) The throwing of the responsibility of the execution upon the witnesses would act as a safeguard against false witnessess, vide supra pg. 32.

cursing God and the King (Ahab). The charge of blasphemy is stressed over the other charge since it is thought it would create a greater public sentiment against Naboth.

Procedure: The king convened the court, consisting of Elders, noblemen of the city in which Naboth lived. Two witnesses were required to testify against him and confirm the charge. On the day of the trial, a fast was proclaimed by the Elders and Naboth was placed at the head of the court so that all may gaze on him. The reason for proclaiming a fast was somewhat new. It was done no doubt for the purpose of lending the occasion more awe-inspiring and auspicious, or it afforded a better opportunity for drawing the people together. The testimony of the two witnesses were then heard and the verdict of the court was passed upon the victim. Death in the form of stoning was the punishment decreed by the court. (1)

This entire incident is very importance as it points out the fact that at the time of Ahab, the nobility had reached its maximum strength and could accuse a man on very little evidence and convict him. (2) The בעלי mentioned in verse 11, are no doubt the court attaches who had great power and could frame up many charges since they had the support of the king and queen. The term Am in v 13, may refer to the entire body of Elders functioning in a judicial capacity. In other words the term Am, may refer to the court which tried Naboth,

* (1) The penalty imposed was not based on the law in the Bk. of the Covenant, which says that only the murderer, kidnapper and curser or smiter of parent should receive the death penalty, Ex.22:28. The writer of the narrative was no doubt influenced by the account recorded in Lev.24:10ff, or Dt. 17.

(2) Presumably the property of one executed as a criminal passed to the crown.

A similar case of blasphemy occuring much later is the one in which Jeremiah is charged with blasphemy and treason.

D. Case of Jeremiah 26

Crime Alleged: Jeremiah is accused of prophesying evil in the name of the Lord, which is tantamount to blasphemy and high treason.

Procedure: The שרי of Judah (Federal Court) sat in the gate of the city to hear the charges presented. Priests and prophets acted as witnesses. This would show that at this late stage, the priests did not act as official judges except in matters involving ceremonial and ritual legislation. The speech of the prosecution including the testimony of the witnesses is then presented. Unlike the case of Naboth, the defense is permitted to state its case. The defense was led by certain Elders from various parts of the country. They were no doubt experts in legal matters for their defense was based on legal precedent. They cited decisions in the days of Hezekiah, king of Judah. Ch.26:16 contains the charge of the court, acquitting Jeremiah of blasphemy and high treason.

The procedure in the case shows a highly developed state of society, where the prosecution and defense function and the nobility is no longer powerful as in the days of Ahab and his contemporaries.

E. Case of Slander found in Dt.22:13-21.

This law can hardly be an innovation of the Deuteronomic writer but is rather a survival of primitive customs. It smacks of the time when the family was the unit. The most important feature of the narrative, is the fact that the charge after presented by the husband is taken out of his hands and is presented to the Elders for their decision. Such action is obvious for their would be a greater tendency to misrepresent.

the woman, if the handling of the case was left to the husband alone. Any trivial infraction could be enlarged and exaggerated. If the husband was dissatisfied with his wife, he could frame up charges of infidelity and pass decision on her himself. Such a possibility was avoided by turning the entire matter into the hands of the Elders.

Crime Alleged: A man wantonly accuses his wife of non-virginity by saying " I took this woman and when I came nigh to her, I found not in her the tokens of virginity." Dt.22:14.

Procedure: In the first place, the parents of the woman should bring to the Elders signs of the young lady's virginity. The court shall meet at the city gate. The father of the accused woman shall repeat the formula: " I gave my daughter unto this man for wife and he hateth her; and lo, he hath laid wanton charges saying: I found not in thy daughter the tokens of virginity; and yet these are the tokens of my daughter's virginity. " The parents then spread the garments containing the blood stains before the Elders, who examine it and then pass sentence on the husband for slander. The man is publicly reproved and is ordered to pay one hundred shekels to his father-in-law. However if the charges are proven true, then the wife is guilty of unchastity before marriage and should be stoned. The entire procedure is a survival of the primitive idea of virginity.

5. Cases involving Sex Laws, Marriage and Divorce.

A. Law of Seduction.

The earliest law found in Ex. 22:15ff says that the penalty for seducing a virgin is marriage and payment of her dowry. In case the father objects to the marriage, then, the man involved must pay money according to the dowry of virgins. (E Code) The later D. writer is more rigid in his law. He says in Dt. 22:28ff that

the seducer of a virgin must pay her father fifty shekels of silver and must marry her because he has humbled her. He can never divorce her as long as he lives. The Dinah incident found in Gen 34:1ff is a combination of stories from the pens of both the early J writer and the later P author. The point at issue is clear, namely that Dinah was seduced by Schechem, the Hivite. However, the procedure in this case is very vague and indefinite. Both J and P indicate that Schechem offered purchase price. P says something about an additional gift (Matan) in v.12. It is very difficult to conclude what the actual procedure was. It is my opinion that the P version is merely a gloss since at the time of P, a much more systematic program for trying such cases was in vogue. In all liklihood, the early primitive methods were in use. The whole incident bears the touch of primitive usage. The principle of revenge is very primitive.

B. Law of Adultery

The early legal codes in Israel do not condemn adultery as do the later strates of legislation. Gen.12:10ff (J1) implies that Sara, Abram's wife had sexual relations with Pharaoh and no evil was thought of it. However, in a later J strata, Gen.20:6-11, adultery is condemned and entails blood-guilt. The Elohist writings mark a great advance in social morality. Gen.20:1-17, which records the Sarah and Abimelech incident, condemns adultery in the most emphatic terms and regards it as a capital offense. In the later D. and P. literature, adultery is vigorously denounced and death is announced as the penalty for same, Dt.22:22 and Lev.20:10.

The case of Num.5:11ff is one of trial by ordeal. In the absence of witnesses and direct evidence, the waters of bitterness are administered to the woman suspected of adultery. The narrative

contains the signs by which the people may know if the woman is guilty or innocent. This trial of ordeal is a survival of the primitive custom of taking an "Oath of innocence". To-day, a man accused of adultery swears his innocence in the Church of the Nativity in Bethlehem. The Code of Hammurabi has a case analogous to the narrative of Num.5; A woman suspected of adultery, is obliged to leap into the holy river. If she is innocent, she will survive and if she doesn't, she is guilty. All these ordeals clearly reflect primitive usages and are extremely barbarous. The Sotah ordeal was no doubt re-introduced in later times by a priest who wished to vest in himself greater authority. It is interesting to note that similar rites were in use among Hindus and even in Japan, where an accused is made to drink water in which paper inscribed with a certain character is dipped. This is supposed to cause him pain until he confesses guilt, cf. Num.5:23.

C. Laws of Marriage.

From the earliest of times, down to the last legal documents, the institution of marriage was held in high esteem and spoken of with great dignity and honor. Doubtless, in rude pastoral times, economic and social causes were the bases of this esteem. Large families were a blessing to the patriarchs, since the boys could render valuable assistance in tending the flocks and guarding the herds. It is not my purpose to deal with the various laws of prohibited marriages, the legal age of the parties and their consent to the marriage. I am at present concerned only with those laws or cases that involveactual and definite judicial procedure.

D. Levirate marrige in Dt.25:5-10.

Point at issue: According to the law, a brother is duty bound to marry his brother's widow, providing no child is left to her.

In case the widow asked her brother-in-law to marry her and he refused, then she institutes suit.

Procedure: She goes to the city gate where the Elders convene and makes this formal complaint: "my husband's brother refuses to marry me and will not comply with the Yibum law." Thereupon, the Elders summon him and inform him of his sister-in-law's complaint. If he persists in his refusal to marry her and says "I do not wish to take her", then the Elders shall have his brother's wife loosen his shoes and spit in his face and she shall say "So shall it be done unto the man that doth not build up his brother's house." (1)

E. Laws of Divorce

The Deuteronomic writer speaks of a properly attested bill of divorcement that must be drawn up and served on the wife, by the husband who has found disfavor in her because of some event. When she receives this bill of divorcement, she is free to marry a second time, but if the second husband divorces her or dies, the first husband is forbidden in the most emphatic terms to take her again, cf.Dt.24:1-4. Similarly in Babylonian law, the husband was forbidden to have intercourse with his divorced wife. The Deuteronomic stipulation is an innovation and a marked improvement over the primitive law, which was in all probability in practice in Israel prior to D. Among the primitive Bedouin tribes, divorce was the prerogative of the man and no pretext was necessary. There was no written bill granting divorces. A verbal order was sufficient (2). Since marriage was a private contract, the husband felt that

* (1) The Bedouin form of proclaiming a divorce is "She was my slipper and I have cast her off." (Reference 2.)

(2) vide supra pg. 60 note/

he could break it whenever he wished. Jeremiah in Ch.3:1 has reference to the Deuteronomic law, which was no doubt in practice during his time.

6. Miscellaneous Cases and Laws

All the legal documents in Israel mention the law regarding disobedience to parents and the penalty for a violation of it. The Elohist code in Ex.21:15,17 states that the punishment for smiting and cursing parents is death. The later Deuteronomic author mentions the reward for filial piety in Dt.5:16 and also states the definite procedure in a case of wilful disobedience.

A. Case of Dt.21:18ff

Crime alleged: A stubborn and rebellious son will not hearken to his parents even after they have chastized him.

Procedure: His parents shall bring him to the gate of the city where the Elders are gathered and they shall say to the Elders: "This our son is stubborn and rebellious, he doth not hearken to our voice; he is a glutton and a drunkard." The Elders shall then judge the case and if guilty, the men of the city shall stone the son to death.

The other account in Dt.27:16 dealing with the same law is probably a much later product since the death penalty is no longer invoked but a public condemnation of the act takes it place. The priestly writer in the Book of Holiness reiterates the older law of the Deuteronomic code, cf.Lev.19:3a. It is a reversal to the primitive conception of the death penalty, being imposed for disobedience to parents, Lev.20:9.

There are many other laws which could be grouped under this miscellaneous heading such as those dealing with reverence to old age, paternal power, personal cleanliness, sorcery etc. But I feel mention of these laws would be outside of the scope of this thesis since none of

them involve actual procedure. Only the laws are mentioned and no procedure of enforcing them is indicated. No cases embodying these laws are found in the Bible. It has been my purpose to confine myself to the laws which involve the principles of justice that I have set forth in another part of this thesis. If I have digressed occasionally, it was for the purpose of showing the relative development of the various laws. Furthermore, I have attempted to show that Israel's law was not the outgrowth of one particular environment and mind but rather the product of different periods and different minds. Judicial procedure in Israel evolved from the primitive pastoral life to a highly developed state of society where the community interests as against individual concerns were paramount. This evolution did not imply a breaking with the past; on the contrary, Israel retained those systems and programs, which she thought would fit a highly organized state. Thus, the culmination of Israel's legal contribution in the form of the Priestly writings, seem to embody the best procedure for the existing conditions. Those elements of primitive procedure and later Deuteronomic legislation that could fit into the established state of the priests and levites were adopted. Occasionally, the adoption of such principles meant a retrogression, a reversal to some uncouth methods; but in general, the points of primitive judicial procedure that were incorporated in the legal program of the exilic and post-exilic times, spelled advancement. The Sanhedrin, the outgrowth of the legal systems of the time was founded on these self same elements and principles of judicial procedure that I have indicated in this presentation.

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