

"The Time of Burial in Jewish Law and in Modern Jewish Practice."

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## Foreword.

The following paper is an attempt to treat but one feature of an age-old institution- the institution of burial. I have not desired to treat any rite which does not bear directly upon the time of burial; in this study, I have come to realize that each of the customs connected with burial could make an essay in itself, but in these pages I have, because of the limited phase of my subject, avoided the discussion of all of them, not germane to the time of burial. It has been my effort to set down the time of burial in Jewish law with the support generally adduced for its observance, likewise to give the striking legal deviations from the established custom, and finally to indicate how in recent times Jewish practice was called into question by the change in the practice in Jewish burial. The results of that change are evident in Jewish life to-day.

The essay does not pretend to be exhaustive in every detail; a study of this subject might be carried on for a much longer period than it was given me the opportunity to do. I do, however, feel that in a general way I have covered the most important literature that bears on the subject. It is to my regret that some of the references found in my investigation could be neither consulted nor verified because of the absence of the material necessary. Although I do not present this essay as the last word on the subject, I do believe that it can form the basis of further study along this line.

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Chapter I.

The Law of Early Burial

A study of any practice or custom in Jewish law and tradition would make interesting investigation, because of the persistent observance of that custom among our people, but especially absorbing is the study of a practice so fixed and unchanging as that connected with death. There has always seemed to be a definiteness and sacred rigidity about ceremonies and observances which center about birth, death and marriage. It is to be expected, therefore, that when a change in any of these matters is contemplated and effected, a storm of protest will be occasioned. Such a disturbance took place at the end of the eighteenth century in the discussion of the time of burial. The controversy that ensued as a result will probably account for the particular title of this paper, for the time of burial "in modern Jewish practice" differs from the time of burial according to established Jewish law. What that law was and how it was applied under all circumstances and at all times shall constitute the basis of discussion in the following pages.

A. Causes for Early Burial.

The Jews, as well as other Oriental peoples of antiquity, observed the custom of immediate burial of the dead. Students who have made a study of comparative rites see in this fact <sup>of</sup> a common ~~reason~~ ~~for~~ early burial not a religious significance so much as a physical necessity. When, for example, Genesis 23:4 reads: "Let me bury my dead out of my sight" it is conjectured that the intense heat of the East made it imperative that the dead be laid away promptly otherwise decomposition would set in.<sup>1</sup> That this reason advanced for early burial is justified can be seen in the fact that among Oriental Jews to-day

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1. Jewish Encyclopaedia- "Article Burial"- also Krauss- Talmudische Archaeologie- p.62.

and likewise among Mohammedans a corpse is buried before night.<sup>1</sup> Friedländer gives the same explanation when he writes that "in Palestine and the neighboring countries, where in consequence of the higher temperature, decomposition of the body begins soon after death, burial takes place on the same day. In colder climates two or three days elapse between death and burial."<sup>2</sup>

Identifying early burial with ancient customs of taboo and ritual, the passages which deal with the defiling nature of the corpse are pointed to as relevant. Numbers 19:11 says: "He that toucheth the dead body of any man shall be unclean seven days." Winer, citing the case in Acts V6-10, identifies immediate burial of the Jews with the passage in Numbers.<sup>3</sup> The dead body was believed to defile the Holy Land and the people.<sup>4</sup> Discussing the case of the hanged upon a tree, to whom alone originally applied the rule of not allowing a corpse to remain overnight, Grundt refers to Galatians 3:13 to show that hanging is a curse to God; hence a corpse should not be left thus suspended.<sup>5</sup>

As it is expected, later Jewish sources, which shot through with religious and didactic subject matter, find other reasons for early burial. The commentator which in the Shulchan Aruch remarks that the reason given in the Zohar ( חסדן 5 ) for immediate burial is that as long as the body is unburied, it is being denied the portion of God, as is also found in ~~הלכות~~ to Ruth; "we learn also in the book ~~הלכות~~," he continues, "in the name of scientists, that about the corpse of a man hover many angels of destruction; making it unclean and disturbing the soul; therefore, we should not allow a body to remain overnight."

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1. Dictionary of the Bible - Article "Burial."

2. The Jewish Religion - M. Friedländer - p. 492.

3. Biblisches Realwoerterbuch - Liber II - p. 317; cf. also Jewish Encyclopedia - Article on "Burial".

4. For reference see "Die Trauergebräuche - Grundt - p. 22.

5. Die Trauergebräuche - Friedrich Immanuel Grundt - p. 22; Mishnah Sanhedrin 6:4

6. Shulchan Aruch - Yoreh Deah - Hilchos Aveloth - 357.

The Sefer Ha Chayyim admits that "without cogent reasons the corpse must not be kept long uninterred. 'For thou art dust, and unto dust thou shalt return' (Genesis 3:19) was the sentence pronounced by the Eternal and wise Providence over all mankind. Of what avail, therefore is this useless delay? Let us rather endeavor to bring both the body and the soul to their places of repose, and thus fulfill the words of holy writ: 'Then shall the dust return to the earth as it was, and the spirit shall return unto God who gave it.' (Ecclesiastes 12:7).<sup>1</sup>



### B. Sources for the Law of Early Burial

The law of early burial in Jewish law is based upon the verse in Deuteronomy 21:23: "His body (i.e. the hanged one) shall not remain all night upon the tree, but thou shalt surely bury him the same day..." The Rabbinical interpretation which demands that a corpse be not left uninterred overnight uses its authority the above quotation. Additional biblical support for such a practice is found in Numbers 20:1.. "and the people abode in Kadesh; and Miriam died there, and was buried there." From this case it seems certain that burial followed immediately upon death. It is remarkable to observe how, through the ages, this law remained unchanged and constant. The repeated reference to its binding character in all Jewish legal literature will indicate how important was considered the observance of this rite.

Allowing a corpse to remain overnight, except in certain specified instances which will be enumerated later, was a violation or a negative command. "Said Rabbi Jochanan in the name of Rabbi Simeon ben Jochai - 'whence do we know that one who allows his dead to remain over night transgresses a negative command.'"<sup>1</sup>

Originally the law demanding that no corpse be left hanging overnight was applied to the blasphemer who was hanged upon the gallows. Later it was expanded to include not only transgressors and criminals, but all dead. "It is a positive command to bury all those sentenced to death by the court on the day of the slaying as it is said: 'but thou must surely bury him the same day' and not only those killed through the court order but anyone who permits his dead to remain overnight transgresses a negative command."<sup>2</sup> That only the hanged corpse required interment

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1. Mishnah Sanhedrin 6:4; Sanhedrin 46b; Yad Hachazakah - Hilchos Sanhedrin 15:7,8; Hilchos Abel 4:8  
2. Yad-Hilchos Sanhedrin 15:8 - listed as positive command number 104 in Sefer Mitzvoth Hagadol.

Numerous cases can be adduced to show that this law was carried out to the letter. In Acts V;5-10 we read of how Ananias was buried just three hours after death, and how his wife being told the news "gave up the ghost" and was buried immediately by the side of her husband. The case of Jesus likewise comes under discussion. His time of burial, as also the other details in his life-time were carried out in strict accordance with Jewish law and tradition: "And when even was come, there came a rich man from Arimathaea, named Joseph, who also himself was Jesus' disciple: this man went to Pilate and asked for the body of Jesus... and Joseph took the body, and wrapped it in a clean linen cloth, and laid it in his own new tomb which he had hewn out in the rock; and he rolled a great stone to the door of the tomb and departed."<sup>2</sup> This case, however, is one of crucifixion. Joseph would not allow the body to remain unburied overnight. Similarly we read in the Apocrypha of Tobit who sat down to a good meal on the festival of Pentecost but who, before partaking of the meat, commissions his son to fetch a poor man who might eat at their table. The son returns and tells of "one of our number who is strangled." Tobit, before eating, goes for the corpse, brings it into a room and "after the going down of the sun made a grave and buried him." There is, however, doubt as to

1. Mishnah Sanhedrin 6;4.
2. Mathew 27:57-60, also with slight variation Mark 15:42-47; Luke 23:50-56; John 19:38-42.
3. Tobit 2:1-7.
4. Mold Katon 28a.
5. Semachoth 11, quoted by Krauss-Talmudische Archaeologie- p.62.

One of the many things enumerated of Jerusalem for which it merited praise was the faithful keeping of this law.<sup>1</sup> Luncz points to the example of the people in Jerusalem when he urges that the dead should be buried as close as possible to departure and should not lie in the house except long enough for the washing and cleansing, and even if it be at night, he says, the dead should be brought out immediately for burial.<sup>2</sup> This shows that early burial was still rigidly carried out at this late time.<sup>3</sup>

Except for the controversy at the end of the eighteenth century, which I shall treat, there has been, as I indicated a faithful adherence to the custom of immediate burial. As late as 1805 it was customary in Frankfurt a.m. to bury the dead on the day of death. An inscription on a tombstone speaks of one who died Friday at noon and was buried before the Sabbath.<sup>4</sup> Naphtali Sofer, rabbi of Pecze-Ujfalú, Hungary, directed in his will that he be buried within twenty-four hours after his death.<sup>5</sup> His case is typical of many others, who left such requests particularly after the controversy hinted at above. Devout Jews wished to guarantee themselves against delayed burial as a result of the civil order in Bavaria and elsewhere. This matter, however, will be treated more fully in the last chapter of this essay.

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1. Aboth de Rabbi Nathan 35; Tosefta Negaim 6:2; Baba Kama 82b.

2. Yerushalmi (1882) - p.12; Luach (IV-1898) - A.M. Luncz

3. Luach - IV - (1898) - A.M. Luncz - p. 21, Footnote.

4. Sefer Abnai Zicharon - Horowitz - p. 539.

5. R. Eini: Ollelos Ephraim, p.12; A. Munkacs, 1914; quoted by Dr. G. Deutsch in his (notes H.U.C. Library)

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### C. When Is the Law of Burial Violated?

It can readily be seen that if the Jewish people observed so exactly this rite of burial, legal and general discussions would be entered into to determine what constitutes burial and what constitutes a violation of the negative and positive commands which govern the disposing of the corpse. Every exigency connected not only with burial, but perhaps with every custom among our people was carefully provided for in the various legal codes and responsa which have passed down to us through the ages. As times and customs changed the representative spokesmen there always were to re-interpret the law of the past to the needs of the present.

We are told, for example, that if one places his dead in a coffin and does not place it in the ground one thus transgresses a negative command; but if one places him in a coffin and puts it in the ground there is no violation of the command involved.<sup>1</sup> It is to be understood in connection with this custom, however, that the tomb need not of necessity be closed immediately. Even though one be placed in an open tomb, therefore, provided it be in the ground one is thus considered buried. This matter of the open tomb is of extreme importance since it constituted the basis of contention in later time between those who favored and those who opposed early burial. We read that people can go out to the cemetery and visit the dead for three days to see whether the dead had come to life again;"it once happened that they visited a certain man who afterwards happened to live for twenty-five years and begat five children and then died."<sup>2</sup> It is interesting to note that the reason advanced for allowing the tomb to remain open is avowedly to detect signs of life in those already consigned to the grave. Caution was exerted to prevent burial of people alive, contrary to arguments subsequently adduced. No matter relative to the care of the dead or the reciting of prayers attendant upon his departure, can

<sup>1</sup> Shulchan Aruch- Yoreh Deah- Hilchos Aveloth-362.

<sup>2</sup> Semachoth 8, quoted by Perles, Leichenfeierlichkeiten p.10.

be looked after until "his soul go out".<sup>1</sup>

The question is asked: what constitutes night in the negative command 'you shall not allow the corpse to remain unburied over night? In פתח תשובה, in his responsa, Rabbi David ben Zimrah quoted the Shulchan Aruch in Tove Deah 357,1, where he stresses the fact that if the corpse remain unburied all night, then certainly this is a violation of the command, but if only a part of the night then there is no violation. However, he adds, it is most praiseworthy when the burial is immediate.<sup>2</sup> The Talmudic limits to "night" deduced from various discussions of law are sun-down and the morning dawn. In this question of the time of burial have we violated the negative command when we have kept a corpse beyond sunset or has the law been infringed when ben Zimrah (רבי'ן) thinks that we transgress the negative command by keeping the dead until קמח השחר because לילה means as long as the morning dawn; many references in the Talmud prove it, he says (cf. Chagigah 14). Another Rabbi, the author of Ginis Vardim, however, believes that we violate the command of burial if we have kept a corpse beyond sunset. He brings proof for his contention from a Boraitha in Siphre.<sup>3</sup> A note is added in the same source by Abraham Baruch Pipirno who says that he believes one transgresses if he keeps the body unburied until sunset for the verse reads: ביום ההוא. This discussion of the definition of night being delimited by either sunset or the morning dawn can be read in detail in Machazik Berocho.<sup>4</sup>

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1. Tur-Yoreh Deah - 339.

2. Shulchan Aruch - פתח תשובה - 357/

3. Pachad Yitzchak - Article .

4. Machazik Berocho - Orach Chayyim 527.

Chapter II.

Departures from the Law of Early Burial.

Under certain very special conditions exceptions to and deviations from the general law of early burial were allowed. Necessity oft-times made no other course possible. I shall classify these departures from the law of early burial under three divisions: Keeping the dead for his honor, delay due to the Sabbath, and postponement because of holidays. We will see even under such circumstances where a change in the practice is permitted that there is very often a determined insistence upon as close observance of the law as the changed circumstance will allow. There are, to be sure, recorded instances of the preservation of the corpse contrary to established custom, but these need not concern us long. For example, we learn that the corpse of Eleazar ben Simon was kept by his wife more than twenty years in the garret of their house, according to his injunction, in order that he might not be subjected to the mode of interment intended for him by his hostile fellow-teacher.<sup>1</sup> We read of the case of Herod keeping the corpse of a girl preserved seven years in honey.<sup>2</sup> Similarly unnatural is the recorded incident of Chiya ben Abuhu's keeping of the skull of King Joachin wrapped in silk.<sup>3</sup> The legendary character of these stories is evident on the surface and has been pointed out by others who have treated this question.<sup>4</sup>

A. Keeping of the Dead for His Honor.

The general rule has been stated often; hasty burial was considered praiseworthy unless preparations for the honor of the dead made delay necessary. To hasten burial with father or mother, for example, was considered shameful except it be Erev Sabbath, Erev Yomtov or if the rains fall heavily upon his or her bier;"the reason

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1. Baba Metzia 84b.

2. Baba Bathra 3b.

3. Sanhedrin 82a; 104a.

4. On Interment of Dead in Post-Biblical Judaism- Perles- p.73.

for the delay is only for the honor of father or mother."<sup>1</sup> A reason is given for the exception in the case of parents when we read that it is meritorious to bury others immediately, because we do not mourn over them very long; but with the case of parents, where it is customary to mourn and lament a great deal it is not good to hasten the funeral.<sup>2</sup>

The best known example, perhaps, of not violating the negative command by keeping the dead over night, is when the dead is kept for his honor - which is "to fetch him a coffin, funeral shrouds, procure wailing women, bring relatives, or to assemble the cities."<sup>3</sup> These are the classic illustrations of permitting a corpse to remain unburied. The reason that has been given in various places for not changing the burial-place of the dead is because of the belief, prevalent among many peoples, that it is hard on the dead to be moved about.<sup>4</sup> According to Sefer Hachayyim a man can be transferred to his ancestral grave when he expresses the wish therefor in his will.<sup>5</sup> He adds, also, that the dead may be kept uninterred for his honor one or two days, but not longer.<sup>5</sup> Here we see already a precedent set for the custom which has persisted among those who do not observe the ancient Talmudic law but who are not yet so lax as to have departed from its observance altogether.

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1. Moed Katon 22a; Maimonides Hilchos Avel 4:8; Shulchan Aruch Yoreh Deah. Hilchos Aveloth 357.

2. Shulchan Aruch 357:1; cf. Bear Hatov - Yoreh Deah - Hilchos Avelos 357.

3. Mishnah Sanhedrin 5:6.

There was another instance of honor to the dead and that was to exchange his burial-place to that of his ancestors. Ordinarily when the body was once interred there was great reluctance in having it removed for any purpose. The exception was readily made, however, when the transfer placed the dead in the family burial-ground, for, continues the discussion "it is sweet to man to rest among his fathers."

4. Yerushalmi - Moed Katon 2:4; Shulchan Aruch - Yoreh Deah - Hilchos Avelos 363:1.

5. Perles - On Interment of Dead p. 95.

6. Sefer Hachayyim - Translated by Benjamin Henry Ascher - pps. 211-212.

There are several individual cases of departure from the law of early burial which might also be construed as honor to the party involved and which bear mention at this point. We are told in the Teshuvoth of Josef Ometz (פד"ו 89) that there was a certain Talmid Chochem who was sick and weak all his life, and who feared that at any time he might fall into a faint, and believing him dead people might bury him. Therefore, he ordered that upon his death he should not be buried before two days and two nights; should his burial occur on Thursday, he requested that he be buried at the conclusion of Sabbath. It so happened that he did die on Thursday and in accordance with his request his body was kept until after Sabbath. Did the respecting of his wishes constitute keeping the dead for his honor? Rabbi Moses Chayyim Siskine, a rabbi of Italy, in his responses said of this case that the command of the Talmid Chochem should not have been heeded. In this opinion many have concurred.<sup>1</sup>

A case very much like the above occurred just after the controversy with regard to early burial<sup>to be discussed below</sup>. In the year 1812 a banker Loeb Gans who was quite prominent in the Jewish community was stricken and died. In his last will it was found that he had expressed the desire to be kept two days before being buried. It happened, however, that the day of his death was Thursday and in order to carry out strictly his request he would have to be buried on Sabbath. This was manifestly impossible and so the funeral would have to be postponed until Sunday. Many there were who contended that a wish of this kind should not be respected. The Land-Rabbiner Loeb Berlin who was appealed to, however, differed with the opinion of the many and ruled that a man's last testament should be carried out in every detail.<sup>2</sup> This case, contrary to the one previously quoted would seem to indicate that adhering to a man's last will is showing him honor and comes within the jurisdiction of the law.

1. Pachad Yitzchak- Article JD, - Lampronti  
2. Sulamith- vol. 4- footnote p. 162.



There is one other case I would mention where burial is only momentarily deferred. It does not involve an infraction of any law, but it is interesting merely because I am treating incidents where delay in burial is possible. If a death and a wedding happen to coincide, we first attend to the bride and then attend to the dead, "for the Mitzvah concerning the living always takes precedence over motzvoths concerning the dead."<sup>1</sup>

There are several illustrations presented to test the case of "keeping for one's honor." For example, there is asked in the Teshuvoth of Rabbi David ben Zimrah paragraph 107 whether a man who dies on Thursday and is kept for burial until the next day so that he might be interred just before Sabbath and thus be kept from **חבוס הקבר** is being shown honor? The belief obtains that hell is quiet on Sabbath and hence if one keep another from Thursday to Erev Sabbath to save him the burial inconvenience that comes to one just buried, that certainly such an instance falls under the category of **לכבודו**. The answer given is that even though this procedure save one from **חבוס הקבר** it cannot be called for one's honor nor is it of the desire of Heaven. It goes on to state that **לכבודו** is limited to procuring a coffin and a funeral shroud.<sup>2</sup>

Finally, I shall mention the case of the man who is found killed without sufficient evidence at first blush to identify him. There is reason to suppose, however, that he is a married man; are we permitted therefor to leave him over night until his wife may come and identify him? It is answered that perhaps this is honor for by identifying him it might be found that sons of his could come and say Kadish. This would constitute honor for the dead, and in this case delay of burial is permitted.<sup>3</sup>

1. Quoted in Chochmas Adam 155:26.

2. Shulchan Aruch - Yoreh Deah - Hilchos Aveloth - **פתי תשובה** - 358<sup>2</sup>.

3. Shulchan Aruch - Yoreh Deah - Hilchos Aveloth - **פתי תשובה** - 358<sup>3</sup>.



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Yerushalmi Kelaim where we learn that the day on which Rabbenu Ha-Kodesh died was Erev Sabbath and all the cities gathered to mourn him."<sup>1</sup>

It was only under the most exceptional circumstances that a burial was permitted on the Sabbath. It was pointed out that all due haste was urged to bury the dead before the Sabbath when death occurred only a few hours before the Day of Rest set in. But once it was too late to carry out the burial program, delay was necessary until after the outgoing of the Sabbath. Within recent years there have been sporadic instances of burial on the Sabbath say. Some of these I shall present here. Rabbi <sup>famous orthodox Rabbi</sup> Eleazar Rokeach <sup>is reported to have</sup> of Belz <sup>on Sabbath</sup> permitted the burial of soldiers killed upon the battle-field.<sup>2</sup> Death which resulted from infectious disease demanded immediate burial, even if it happened to be on Saturday. Three Jews who died of the yellow fever in Vicksburg, Mississippi during the epidemic of 1878 were buried on Sabbath after Rosh Hashanah.<sup>3</sup> Similarly, a case occurred in Rome, Mar. 28, 1896 when the health office for reasons of hygiene insisted on the immediate burial. All work, however, was performed by Christians and no religious services were held.<sup>4</sup> Another case occurred some years later. I shall quote verbatim: "The Parisian Rabbinate has just had to deal with a very delicate question. Last Friday a Jewish child died of an infectious disease, and the municipal authorities required that it should be buried on the following day. The administration of the Jewish consistory intervened and represented that the Jewish religion did not permit of burial on Saturday. The authorities replied that in a state which is separated from religions, and which ignored all in the same degree, it was not possible to take religious traditions into consideration and that the public health did not permit the postponement of the funeral until Sunday. In these circumstances, and in order to

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1. Pachad Yitzchak- Article

2. Hamburg Isr. Fambl. 1914, No. 52; quoted by Gotthard Deutsch.

3. American Israelite, Oct. 18, 1878.

4. Vessillo 1896 p. 129- quoted by Gotthard Deutsch.

prevent the family from having recourse to a purely secular funeral, the Grand Rabbin authorized a religious burial. The service was read by Rabbin Israel Levi.<sup>1</sup>

The above illustrations are indicative of <sup>cases</sup> more of which must surely be on record <sup>when delayed burial was permitted</sup>. I have garnered these few only to show how slow to violate a custom hallowed through the centuries were "Catholic Israel." They should suffice to show that rarely was deviation from the law of early burial encountered and this only when necessity forced it.

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1. Jewish Chronicle- May 15, 1908. - p.9.

C. The Holidays and Burial.

We read in the Talmud; "Raba says: 'If a man die on the first day of Yom Tov, let the Goyim occupy themselves with his burial; if it is the second day let the Israelites occupy themselves with his burial even on the second day of Rosh Hashanah.'" <sup>1</sup> Maimonides enlarges on this ruling when he enumerates which duties the Israelite may perform on the second day of the Yom Tov; he may attend to all his needs, such as arranging his bed, sewing the funeral shroud, and cutting of the spices and similar things." For the second day of Yom Tov with reference to the dead is considered like a week-day and even on the two days of Rosh Hashanah. <sup>2</sup>

It is expressly stated that if one die on the first day of a holiday it is forbidden to keep him overnight until the second day in order that Israelites might occupy themselves with his burial. <sup>3</sup> This, of course, means also that he may not be kept overnight in order that his wife and children should attend the bier. At this point is also added the note that if one die on Yom Kippur or the Sabbath we cannot occupy ourselves with one at all- even by the help of the Goyim; we cannot even employ the Goyim to bear the dead one out and place him in the grave previously prepared. <sup>4</sup>

The question was asked in one of the responsa concerning a man who happened to die Erev Pesach which fell on Thursday and Friday; they could not place him in his sepulchre on Yom Tov because of a calamity, but had to wait until Sabbath was over which would be the third day of his death; could he be cleaned on the second day of Yom Tov so as to avoid putrefaction setting in and could he be placed in his coffin before the end of Sabbath. The answer given is that we can prepare the body and put it in the coffin on the second day of Yom Tov even

1. Sabbath 139 b; Beza 6a; 22b.

2. Yad-Hilchos Yom Tov-1:23; also Shulchan Aruch- Orach Chayyim- Hilchos Yomtov- 496; 526:1.

3. Shulchan Aruch- Orach Chayyim- Hilchos Yomtov 526:2.

4. Ibid.- 526:3.

though we do not bury, for this constitutes a portion of burial. If it is the first day we can bury at night when necessity demands it for we have a precedent in the case of Rebecca who, according to the Midrash, was buried at night.<sup>1</sup> That placing the corpse in a coffin and closing it even though it is not in the cemetery constitutes under certain conditions burial e.g. when a city is besieged, is seen in the Shulchan Aruch.<sup>2</sup>

If one die on Erev Pesach the rule is that the regular meal (for later in the day because of Chometz it would be prohibited) can first be eaten (i.e., if the time is short) and afterwards the dead is taken out; if, however, a start has been made to remove the dead, the procedure is not interrupted for the sake of eating. Similarly, we do not take out the dead close to the time of the reading of the Shema, but once we have started to remove the dead we do not pause in our burial procedure in order to recite the Sh'ma.<sup>3</sup>

The law of burial effective on Yom Tov is summed up in the Sefer Hachayyim: "When one die on Yom Tov, the making of the coffin, the digging of the grave, the depositing of the coffin into it and the filling up thereof is to be done by a non-Israelite, but in case there is none to undertake it, the corpse must remain uninterred until the following day, when the depositing of the coffin into the grave may be done by Israelites who are also allowed to carry back every tool necessary for the interment to the place it is generally kept..... In some communities no funeral takes place on the first day of Yom Tov, fearing they might not be able to do for the deceased according to the laws, rites, and customs, or that a profanation of the holiday might ensue, save in such cases where the corpse might through this delay remain too long uninterred."<sup>4</sup>

Israelites may not occupy themselves with a funeral on the first

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1. Shevus Jaacob-Chelek II- responsum 26.

2. Shulchan Aruch- Yoreh Deah- 375:4.

3. Chochmas Adam 155:32,33.

4. Sefer Hachayyim- Translated by Benjamin Ascher- p.221.

day of Yom Tov even though the body may begin to disintegrate. But on the second day, even though the body will not disintegrate, the Israelites may bury the dead. All work prohibited by the Bible is forbidden to the Israelites with regard to the dead on Yom Tov; work allowed by the Rabbis can be done by Israelites on Yom Tov toward the dead.<sup>1</sup>

As was indicated in the case of Sabbath burials from time to time, so likewise were there instances of burial on the holidays contrary to law. One stray case was that of Herz Isaac Schiff who died in Leipsic October 1, 1826 and who was buried by Jews or Goyim on New Year's Day, Oct. 2.

The liberty granted with respect to burial on the second day of Yom Tov is quite extensive and indicates once more the desire of the Jews to observe the letter of one law without infringing upon another keeping the burial regulation without being unduly unobservant of the festival. On the second day of Yom Tov, for example, Israelites may conduct a dead body beyond the limit of the *dina* in case there is no cemetery in their town; indeed, they may even hire a ship to send him from one place to another.<sup>2</sup> Isserles in his note to this passage, however, remarks that among the Ashkenazim the above is not the rule; but wherever it is possible for Goyim to make the grave, coffin and shroud on the second day they do so; Israelites do the rest as on the first day of Yom Tov. If Goyim cannot do these things then the Israelites do all the work.<sup>3</sup> Furthermore, we learn that if it has been discovered that a man in a distant locality has died and it will take many days to reach him - even if the distance is so great that people could not arrive, at all events, until after the holiday, they may still set out, at all events, on the second day of Yom Tov to take care of his burial.<sup>4</sup>

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1. Chochmas Adam - 156:1

2. Sulamith VII:1 - p. 280.

3. Shulchan Aruch - Orach Chayyim - 527.

4. Chochmas Adam - 156:4

When one dies on the second day Yom Tov ten men arise early in the morning and bury him at the time of the morning service; if, however, it is a distinguished man who has departed - a man whose funeral following will, in all likelihood, be large then he is brought to the cemetery after the morning service, and the funeral takes place after dinner.<sup>1</sup>

It is interesting to note that Rabbi David ben Zimrah allows one to keep his dead unburied from the first day of Yom Tov until the night of the second day in order that fellow Jews may occupy themselves with his burial. Rabbi Abraham, author of Ginis Vardim, however, objects to this decision and says that the law is law; allowing the corpse to remain longer than sunset is a violation of the negative command, he maintains.<sup>2</sup> Abraham Isaac Costillo and Eliezer Sadin do, however, while mentioning that they have read of a ruling where a man being very prominent and distinguished can be kept from the first day Yom Tov to the night of the second day "for the honor". Note, however, that in their estimate of this practice, however, this procedure is unadvisable and can find little support for its justification.<sup>3</sup>

The laws of burial concerning babes were carefully gone into, not only for the holidays but for all exigencies which might arise. Preparation for the burial, prescriptions for the method of procedure, and the time of burial for stillborn, and mutually developed children and such who die before the circumcision were set down in the various legal literature of our people. They are recorded in a general way in the Sefer Hachayyim which I shall quote. "A premature birth, or a child born dead, **נפל בטרם** may not be buried on the first day nor on the second day of Yom Tov. A child who dies on Yom Tov soon after birth, or should he even die on the thirtieth day after birth, **נפל נכח**, may only be buried when identified that it was naturally born, viz., when the child has hair and nails:

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1. Chochmas Adam - 156:5

2. Machzik Berocho - Orach Chayyim 527.

3. Ibid. - quoted in Pachad Yitzchak (**נא**) by Abraham Baruch Papirno.



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but in case it was a male child that was not yet circumcized, we are not allowed to bury it until after Yom Tov, since the circumcision must be operated on the dead body on the burial ground before the interment, which operation must not be performed either on the first or second day of Yom Tov. Also if an infant older than thirty days die, which was not yet circumcized, it must alike not be buried until after Yom Tov, on which day circumcision is performed before the interment."<sup>1</sup>

I have attempted in the foregoing pages to show how comparatively uncommon was the departure from the established law of early burial. Whenever an individual case was presented for decision in a matter of this kind there was always strenuous expression of opinion on both sides. Gradually, however, the custom was infringed upon and the controversy of 1772 which I shall now discuss in the last chapter, augmented Jewish literature and scholarship as no previous discussion on the matter of the time of burial had done before or has accomplished since.

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1. Sefer Hachayyim- Translated by Ascher- p.223.

Chapter III. The Controversy of 1772 Concerning Early Burial.

It is to be imagined that as the Mishnaic law of early burial was insisted upon in more modern days with man's increased knowledge of scientific fact, that the cry would be raised that quick burials involved the danger of burying people alive. Scholars of ancient times contended that they, too, used every precaution to avoid such a happening as the reference in Semachoth 8 ( see page 12 ) seems to indicate. We likewise learn that the body was surrounded by watches in the early hours of death (Berachoth 18a) <sup>probably</sup> for the reason of detecting signs of life, if any be there in the person pronounced dead.<sup>1</sup> In spite of these seeming guards against entombing alive, the alleged occurrence of actual cases soon created a lively discussion of this question. In our day, for example, when medical authorities claim that they can revivify waning life by the injection of adrenalin or other fluids into the system, we could readily expect those to arise who would object to early burial. But even in Mendelsohn's day such there were who objected to the traditional custom for probably the same reason as that just given.

"The cruelty of such quick burial was more apparent than real," says Perles. "It is a very one-sided interpretation of the law that finds in this use (of early burial) any warrant or justification for the very altered circumstances of later times. Bachya ben Asher and Chaskuni declare expressly that it was applicable only in Palestine itself; while Menasseh ben Israel, who, in spite of his extensive culture, was still controlled by many superstitions, pronounces for its unqualified retention.<sup>2</sup>

On April 30, 1772 the duke of Mecklenburg-Schwerin issued to the Jews of his territory the command that in the future they shall keep their dead unburied for at least three days.<sup>3</sup> ~~In the same year~~

1. Die Leichenfeierlichkeiten in Nachbibl. Judenthum (Monatsschrift, vol. X, 1861. Perles.
2. "On Internment of the Dead in Post-Biblical Judaism" p. 78- Perles.
3. Moses Mendelssohn- Kayserling- pps. 276ff.- "Measser" 1772.

ways, Graetz says that it was in a mild, fatherly way that the duke forbade the Jews to bury their dead in order to avoid the dangers of premature internment.<sup>1</sup> Notwithstanding this gentility of the duke an uproar immediately followed the order. The people raised the cry that the authorities were thus compelling them to betray the religion of their fathers and to transgress the Mosaic law.<sup>2</sup> Surely, there was no reciprocation of the "mild, fatherly" spirit of the duke, if there was any manifested in the first place. What could be done under the circumstances? The Rabbi of the community affected was Mordecai Jaffee and he was appealed to. At that time the exponent of strict Orthodox procedure was Jacob Hirschel, better known as Jacob Emden, ~~and XXXX XXXXXX~~ ~~Rabbi of Hamburg~~ who was delegated to produce Talmudic and Rabbinic laws against prolonged exposure of the corpse. Emden, however, who probably realized that there were others who could represent with greater effect in an official capacity the community affected, said that Moses Mendelsohn could draw up a better case in German than he could himself and asked that he be called upon to do so.<sup>3</sup> What was the surprise of the Jews when almost immediately thereafter (May 1772) Moses Mendelsohn, complying with the request, upheld the governmental order and attempted to bring proofs therefor!

Mendelsohn claimed in his defense of the ducal order that every effort should be exerted in order to preserve <sup>notwithstanding</sup> life <sup>to the contrary</sup> the seeming of the stringent religious law; if we allow the dead to remain overnight for his honor, to fetch him a coffin and shroud, how much more should we be zealous to keep the dead to save his life,<sup>4</sup> since life there might be. He cited the case ~~for~~ Semachoth 8 where he showed that the Jews of old deposited their dead in a hole which remained open for three days and a close watch kept so that there could be no possibility of burying alive;<sup>5</sup>

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1. History of the Jews- Graetz- vol.V- pps. 318ff.
  2. Moses Mendelsohn- Kayserling- p.276.
  3. History of the Jews- vol.V- Graetz- p.318ff.
  4. Shulchan Aruch-Yoreh Deah- quoted in אורח חיים נאנא -357.
  5. Moses Mendelssohn- Kayserling- pps.276ff.

he mentioned also the instance of the man recorded there who lived for twenty-five years after he was believed dead and begat five children. In ancient times, said Mendels<sup>s</sup>ohn, people were buried in niches and it was possible to go about and knock on the vault to see if the entombed body still lived, but in his day when people were buried in the ground thus precluding the possibility of saving those only apparently dead then it was necessary to allow the dead to remain overnight.<sup>1</sup> He held further that the order of the duke was not a violation of a Jewish religious law, even though many claimed that this was in the mind of the government.<sup>2</sup> Quoted by <sup>P</sup>חזו"ן are the responsa of Chasam Sofer (section 335) to this point where the latter speaks of "that question in the scientific periodicals of the time in which are included the letters of the year 1772 by the scholar Moses of Dessau; where he argued to permit the prohibition of the sages of Israel" concerning early burial for he contends that "the physicians of our time assert that we cannot draw the line between the living and the dead." Mendels<sup>s</sup>ohn says that it is impossible to make this division except when the flesh of the person begins to decay. For this point he brings proof from the end of Masechta Niddah. These constitute Mendelssohn's arguments. How were they received?

First of all, Emden objected bitterly to this ruling of the Dessau scholar. He continued to refute Mendelssohn's words which he said were by no means conclusive and pointed to the fact that the custom was universal among all Jews-Italians and Portugese as well as Germans and Poles.<sup>3</sup> Jacob Emden gave us the essence of his argument that when the Torah says "a body shall not lodge overnight" it means immediate burial and

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1. Shulchan Aruch - פתח תשובה - Ibid.

2. Ibid.

3. History of the Jews - Vol. v - Graetz p.318ff.; Shulchan Aruch - Ibid.

Jacob Emden gave as the essence of his argument that when the Torah says "a body shall not lodge overnight" it means immediate burial and he who disobeys violates a negative and positive command. As to Mendelssohn's proof from the end of Niddah, this is no proof at all, he holds, for the matter which Mendelssohn mentions as possible therein might have happened but once in a thousand years and hence was the rarest of occurrences.

To the attack of Emden, Mendelssohn countered with additional proofs (which are contained in the periodicals of the day).<sup>1</sup> After the death of these two men- Mendelssohn and Emden- the correspondence which passed between them was uncovered and then it was that a literary controversy over this question raged. Ezekiel Landau had ordered the Jews to bury their dead within twenty-four hours (July 12, 1786).<sup>2</sup>

One of those who early took up the cudgels against those who wished to violate the established custom was I. D. Michaelis.<sup>2</sup> But Joel Loewe, teacher in the Wilhelm School in Breslau and for a time teacher in David Friedlander's house, turned against the custom of early burial.<sup>2</sup> He opposed this practice strongly defended by the Orthodox Hebra Kaddisha and in 1793 he wrote saying that his desire was not to bring anything new into the controversy, but merely to collect the old data against the prevailing custom of early burial.<sup>3</sup> At this point the Oberconsistorialrath Büsching interfered with great earnestness in behalf of the Jews to contest the abuse of their hallowed custom. Then David Friedlander in the Berlin Monatsschrift of 1787 wrote: "Ueber die frühe Beerdigung der Juden ein Brief aus Prag nebst einigen Urkunden."<sup>4</sup>

Friedlander found a hearty second in DR. Marcus Herz who in

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1. Berlin Monatsschrift 1787 II 317ff.
  2. Zeitschrift für die Geschichte d. Juden in Deutschland-1889- Geiger, p. 211ff.
  3. "Meassef" 1794-p. 160 quoted in Monatsschrift für Wissenschaft des Judenthums 37 (1893) 570-579.
  4. Zeitschrift für die Geschichte d. Juden- 1889- Geiger- p.211ff.

several articles tried to establish the point that early burial is not advisable since doctors, themselves sometimes mistake the death signs:- how much the more laymen.<sup>1</sup> He also held that the practical, moral and religious grounds for early burial rest upon misunderstood and very subtle interpretations of the Talmudic passages involved.<sup>2</sup> He had, however, to take into consideration the fact that DR.M.I. Marx another physician of his time in the Journal von und für Deutschland 1784 defended early burial: "Genauere Prüfung der frühen Beerdigung der Töten bei den Juden." "Of course, sides were formed; the Hebra Kaddisha of Berlin refused to participate in the burial of a member of the Gesellschaft der Freunde because the latter would not bury its members on the day of death.<sup>3</sup> This decree was given out by the Gesellschaft Feb. 1794. Here we read that they speak with praise of Dr. Markus Herz for his two articles of 1787 and 1788 in which with many others he condemned the practice of early burial as a "shameful custom."<sup>4</sup>

At such a stage in the controversy medical data had to be considered. In 1797 the father of the accomplished Dr. Zadig died and the son wanted to keep the body three days.<sup>4</sup> The leaders of the burial society, however, wanted him buried within twenty-four hours. The matter was complicated further when, in the middle of the following November, it was declared that a child had been falsely pronounced dead. A Jewish commission was appointed to investigate the matter and then it was that the people again took sides. It was held that burial could wait three days. At the same time Dr. Zadig wrote a book entitled "Reflections on the Procedure with the Dead among the Christians and the Jews." Then arose a defender for the pious in the person of Solomon Seligman Pappenheim, who by word and writing upheld the tradition. He wrote "The Necessity of Early Burial among the Jews."<sup>4</sup>

1. Ibid.- also Sulamith IV:2- p.149-165.

2. Zeitschrift für die Geschichte d. Juden- 1889- Geiger p.221ff.

3. Chronik d. Gesellschaft der Freunde: Lesser, p.27.

4. Monatsschrift für Wissenschaft des Judenthums, 37(1893) 570-579.

It was his desire that the matter be referred to an able commission of theologians and learned men. Finally, there was a new organization formed of forty members who planned to do away with early burial but to follow the old ceremonials connected with burial. Pappenheim again was forced to take up the cudgels and the decision of early burial seemed once more about to triumph.

But other things were happening elsewhere. The banker Abraham Moses died March 24, 1790 about 3:45 P.M. and against the wishes of his widow was buried 5 o'clock of the same day.<sup>1</sup> Because of the doubt of death even among Christians a circular was issued by the inspector of Brandenburg Dec. 12, 1793 against early burial. On Dec. 18, 1793 the Mecklenburg<sup>governing</sup> body issued an order that Jews of that place should not bury their dead before three days and suggesting that a similar decree be made binding upon the Jews of Berlin. They were ready and willing, however, to destroy this edict upon a receipt of a reply conclusive enough to show why such an edict should not be imposed. <sup>It was dated</sup> New Strelitz Dec. 20, 1793.)<sup>1</sup>

The Rabbi Hirschel Löbel responded to this request and called attention to the fact that not only the Jews but most Oriental peoples and the Greeks observed the custom of early burial as well as modern European nations.<sup>1</sup> He also pointed out that extreme care is taken during sickness and upon death by the attending physicians to see that death has really taken place. Besides, he continued to show, early burial is an immemorial custom among Jews as is indicated by many passages in the Talmud and as was shown by "such rabbis as Nubschütz (~~Rabbi of Sprenberg~~) Jacob Hirsch (Emden) and Ezekiel Landau (Prague)."

He then tried to answer the objection to early burial given by Joel Loewe and quoted Dr. Hirschberg of Königsberg and Dr. Marks of Hanover as holding contrary opinion. In trying further to prevent the passing of the edict which would necessitate the keeping of the body three days he gives the Biblical law in Deuteronomy 21:23 and its Talmudic

1. Zeitschrift für die Geschichte d. Juden- 1889- pps. 211ff.- Geiger.

explanation in Sanhedrin 4:6. He refers likewise to Berachoth 19. Finally, he adds that Kabbala feels earnestly the need for early burial because of peace for the soul. (cf. page 6). The letter is signed Berlin, Nov. 4, 1794.

The matter lagged on in one way or another and was brought to discussion when such cases occurred as that in which a child was believed to be buried alive in Breslau. Additional order were then sent out by the General-Director on Sept. 4, 1798. Again the Rabbis made a plea for early burial based on the Mosaic law and Talmudic passages in an article which consumed thirty-four portfolio sides. Finally, as was indicated above, the argument centered about a question of physiology - how to detect life signs - rather than upon religious grounds.<sup>1</sup>

This controversy spread to other territories as might have been expected. Early burial was prohibited by the law of Feb. 9, 1784 in the electorate of Mayence, although the religious liberty of the Jews was to be respected.<sup>2</sup> In 1798 we are told that early burial is prohibited in Prussia.<sup>3</sup> The constitution of Sept. 13, 1804 prohibited early burial in Schleswig; on July 27, 1811 and Jan. 2, 1813 the matter was again taken up and it was repeated by the ordinance of Feb. 8, 1854.<sup>4</sup> A stray reference which I have gathered says that the Jews of Inowrazlaw opposed the order of the government not to bury a corpse within the first seventy-two hours after death, but I have not been able to find the source.<sup>5</sup> So far is Luncz guided by the precedent set for early burial that he attempts in his pious zeal to outdo, if possible, the faithfulness shown by others in the observance of this law. He says that when a man dies on Erev Sabbath every detail of haste should be adopted to have him buried before the Sabbath actually sets in. His instructions are that the corpse should be conveyed to the cemetery where a few graves shall already have been prepared to receive it; should those attending the burial see that

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1. See note 1, page 30.

2. Salfeld: Verboten, 361: quoted by Gotthard Deutsch - card index H.U.C.

3. Quoted by Dr. Deutsch (H.U.C.)

4. Allgemeine Zeitung des Judenthums 1854 - p.145.

5. Quoted in Dr. G. Deutsch's card index - H.U.C. (Burial).



Sabbath might overtake them, then they should have a Goy cover the grave. In the Synagogue they should wait with the "Kabbalath Sabbath" until some one stationed on the house-top shall see that the corpse has been lowered for burial into the grave.<sup>1</sup> He does, however, cite a case of a prominent man (Judah Diskin of Jerusalem) whose burial was permitted postponed overnight because it was realized that a large crowd wanted to attend; should the burial be held at twilight, as would have been necessary. It was feared that it would be a menace to life amid the vast gathering. Besides, it would be difficult in the gloaming to ascend and descend the hills of Jerusalem. This shows that early burial was still rigidly carried out at this late time.<sup>2</sup>

This controversy of 1772 did not really subside until after Reform took on a definite hue. Geiger, Einhorn and others discussed the same question and deviated from the ancient law of early burial in their explanation of Jewish rites.<sup>3</sup> A delay in burial was accordingly permitted until a lapse of seventy-two hours. The result is that although Eastern Jews and pious Jews elsewhere adhere to the old custom of immediate burial, many modern Rabbinical authorities have adopted the view which, has resulted from the decision of Mendelssohn.<sup>4</sup> Modern Jewish practice, therefore, as I have said at the beginning of this paper differs from the time of burial according to Jewish law but the difference no longer occasions the alarm and struggle it would have caused up until the last century.

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1. Luach - LV - (1898) - A.M. Lunz - p.21.

2. Ibid. - Footnote.

3. Ueber die Nothwendigkeit der Einrichtung von Leichenhäusern in "Sinai" - 1862 pp. 213ff, 243ff.

4. Jewish Encyclopedia - Article "Burial".