

CHAPTER V.

RULES AND REGULATIONS CONCERNING PRELIMINARY QUERIES, EXAMINATION, AND CROSS-EXAMINATION IN CRIMINAL CASES. WHAT MAY OR MAY NOT BE CONSIDERED A CONTRADICTION OF WITNESSES. HOW IS IT IF A DISCIPLE NOT BELONGING TO THE JUDGES SAYS: "I HAVE SOMETHING TO SAY TO HIS ADVANTAGE OR DISADVANTAGE"? BY WHAT MAJORITY ONE MAY BE ACQUITTED AND BY WHAT ACCUSED; AND TO WHAT NUMBER JUDGES MAY BE ADDED, IF THEY CANNOT COME TO ANY CONCLUSION.

MISHNA I.: The court used to examine the witnesses with the following seven inquiries: (a) In what Sabbatic period? (b) In what year of the latter? (c) In what month? (d) On what date of the month? (e) On what day? (f) At what hour? (g) And in what place? R. Jose, however, maintains: "Only on what day? At what hour? In what place?" And also: Did you know this man? Did you warn him?

If the crime was idolatry, they were questioned which idols they worshipped and what kind of worship? He who is more particular and who enlarges the examination is praiseworthy. It happened that Ben Sakkai had examined the witnesses concerning the kind and the size of the figs of a certain fig tree which was connected with the crime.

What is the difference between examination and queries? In the latter, even if only one answered, "I don't know," the complaint is dismissed; while in examination, if one of the witnesses, and even two, claim that they did not know, their testimony holds good. In both cases, however, if they contradict each other, their testimony is ignored. If one says, "It happened on the second of the month," and the second says, "on the third of it," their testimony holds good, as it is to be supposed that to one was known the intercalation of the last month and to the other it was not. However, if one says "on the third" and the other says "on the fifth of the month," their testimony is ignored. If one says "in the second hour" and the other says "in the third," it holds good; but if one says "in the

third" and the other "in the fifth hour of that day," it is ignored. R. Jehudah, however, maintains that it still holds good; but if one says "in the fifth hour" and the other says "in the seventh," even according to R. Jehudah it is ignored, as in the fifth hour the sun is in the east, while in the seventh hour it is already in the west.

After one witness was examined they let the second enter and examined him. And if their testimony correspond, the discussion begins with the defence. Should one of the witnesses say, "I have something to say in behalf of the defendant, or one of the disciples, "I have something to say to the disadvantage of the defendant," the court silences him. If, however, one of the

disciples says, "I have something to say in his behalf," they take him out of his place, and set him among them, and he remains there the whole day; and if his words are reasonable, he is listened to. Furthermore, if the defendant says, "I have something to say in my behalf," he is to be listened to if there is something in his defence. If the judges find a good reason to acquit him, they do so immediately; and if not, they postpone the trial to the morrow. The judges then go out in pairs, and eat something--not much, but do not drink wine the whole day. They continue their discussion (outside of the court) all night, and on the morrow they come early to the court. He who was among the defenders says: I defended yesterday, and am still of the same opinion. The same is it with the accuser--he has to say: I accused, and am still of the same opinion. The one who has accused may retract from his statement of yesterday, to the advantage of the defendant. This is not allowed to him who has defended. If some of them erred in their statements, the scribes of the judges remind them of it. And again, if the conclusion is to the advantage of the defendant they free him immediately; and if not, they arise to be numbered. If twelve of them acquit and eleven accuse, he is acquitted. But if twelve accuse and eleven acquit, and even if eleven accuse and eleven acquit, but the twenty-third says, "I am in doubt"; even if twenty-two are for acquitting or accusing and one says, "I don't know," judges are to be added. And to what number? Two and two, till the whole number reaches seventy-one. And then if thirty-six acquit and thirty-five condemn, he is acquitted; but if *vice versa*, the discussion is prolonged until one of the accusers accepts the opinion of the acquitters.

GEMARA: Whence is all this deduced? Said R. Jehudah:

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[paragraph continues] From Deut. xiii. 15: "Then shalt thou inquire and make search, and ask diligently." And it reads also [ibid. xvii. 4]: "And it be told thee, and thou hearest of it, thou shalt inquire diligently"; and also [ibid. xix. 18]: "And the judges shall inquire diligently." But perhaps the Scripture does not require seven queries in one case, and it is meant literally (namely, in the crime of a misled town three queries, and concerning idolatry two, and the same also concerning collusive witnesses; as in the former searching is mentioned three times and in the latter searching is mentioned twice). As if seven in one case were needed, let the Scripture state all the above cases together, and then all other criminal cases would be inferred from this. Because searching is mentioned in all three cases above, we infer one from the other, so as to apply everything which is in one case to the others. But the law concerning those cases is not similar, as the case of a misled town cannot be equalized to the other two cases, as they are punished only in their body, but not in their estate; while in the case of a misled town all its estates must be destroyed. Neither can idolatry be equalized to the two cases, as the latter are put to death by the sword, while an idolater is to be stoned. And the case of collusive witnesses is also in one respect more rigorous than the others, as they are put to death without warning? One is inferred from the other, because of the analogy of the expression "diligently," which is to be found in all the cases, and would be superfluous if it were not written for that purpose. And to such an analogy, which comes from a superfluous expression, an objection is not to be made. Hence we infer the case which is to be punished with hanging by an *a fortiori* conclusion, from those which are to be punished by stoning or by the sword; and those by burning, by an *a fortiori* conclusion from those by stoning, etc. But such an *a fortiori* conclusion would be correct if all of the rabbis agreed that stoning is a more rigorous death than all the others. But there are some who hold that burning is more rigorous. Hence, according to them, the above *a fortiori* conclusion could not be drawn. Therefore said R. Jehudah: The seven queries of examination are inferred from [ibid. xiii. 15]: "And behold, if it be true--the thing is certain," which term is again repeated in ibid. xvii. 4. The words "certain" and "true," which are repeated,

make four, and in the above three cases "searching" is mentioned seven times. These altogether make eleven, of which seven are to be taken for the seven queries, three of them for an analogy, and the one

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which remains applies to that case of which the punishment is burning, in accordance with R. Simeon's theory that burning is more rigorous. And concerning the rabbis, who hold that stoning is more rigorous, it does not matter if a thing which is to be inferred by the drawing of an *a fortiori* conclusion is nevertheless mentioned in the Scripture.

R. Abuhu ridiculed this statement. Why not say that the superfluous word of the eleven in question is to teach that eight queries are necessary in the examination? Eight queries! What is this? How many minutes are there in the hour? And so, also, a Boraitha states that queries were used. But such a question is correct, according to Abayi, who said that R. Mair maintains that one is not liable to err in the minutes at all, or in a few minutes. But according to him, after R. Jehudah, who maintains that one is liable to err in a half hour, and according to Rabha, who maintains that one can err even in a whole hour, what should be the eighth query? "What period of the jubilee year?" However, he who maintains that the eleventh word mentioned above is applied to something else, maintains that the latter query is not necessary, as they were already questioned: What period of the Sabbatic year?

"R. Jose said," etc. There is a Boraitha: R. Jose said to the sages: According to your theory, if a witness came before the court testifying, "Yesterday this man killed some one," may he be questioned in what period of the Sabbatic year, or in what year, month, and on what day of the month? And he was answered: The same as, according to your theory, that the queries should be: On what day, at what hour, and in what place? How is it if one testifies before the court, "This man has just killed a man"? Nevertheless the above queries are put to him: On what day, and at what hour? Hence, although not necessary, nevertheless he is to be questioned in accordance with the theory of R. Simeon b. Elazar, who maintains that the examination should be made severe, that the witnesses may lose heart in case they do not tell the truth. The same is the case with the other queries--they have to be put although it is not necessary. R. Jose, however, may say: Usually the case is not tried just after the crime is committed, and therefore it is very seldom that the witness has to say: He killed him just now. However, one or a few days after the crime has been committed, it frequently happens that the case is tried.

"Do you know this man?" etc. The rabbis taught: The

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query was: Do you recognize this man as the murderer of him who was slain? Was he a heathen or an Israelite? Have you warned him? Did he accept the warning? Did he answer in spite of this? Did he commit the crime just after he was warned? And if the crime was idolatry: Which idol has he worshipped--the idol Peor or Markulis? Now did he worship it? Did he sacrifice an animal or incense to it, or pour out wine for it, or bow himself down before it?

Ula said: Whence do we deduce that the warning is prescribed biblically? From [Lev. xx. 17]: "And if a man take his sister, the daughter of his father, or the daughter of his mother, and see

her nakedness." Is he guilty because he has seen it? It must therefore be said that it means he is aware of the crime (*i.e.*, aware that she is his sister and that it is a crime). Hence the same is it with all other crimes--that he is not to be sentenced unless he was aware that it was a crime; and to be certain that he was aware, it can only be through warning. And as this verse speaks of a crime for which he is punished with "korath," which means through Heaven, to which warning is not applied, apply to it the punishment of stripes. The school of Hiskia deduces it from [Ex. xxi. 14]: "But if a man come presumptuously upon his neighbor, to slay him with guile," which means it was presumptuously done even after he was warned. The school of R. Ismael inferred this from [Num. xv. 33]: "And they that find him gathering sticks," which means that after they warned him he still gathered the sticks. And the school of Rabbi deduced this from [Deut. xxii. 24]: "Because he had done violence." ¹ And all of them are needed; as if it were stated only in the case of his sister, as to which it was explained that it means the punishment of stripes, one might say that this applies only to stripes, but not to capital punishment. Therefore the cited verse in Ex. xxi. And if the two only were stated, one might say that it applies only to a kind of death which is more lenient than stoning, but to the punishment of stoning, which is very rigorous, it does not apply. Therefore all are needed.

The Boraitha states: Did he answer in spite of this? Whence do we know this? Said Rabha, and according to others Hiskia:

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[paragraph continues] From [ibid. xvii. 6]: "Shall he that is worthy of death be put to death," which means, provided he answered, "I will do this even should it cause my death."

R. Hanan said: Witnesses who testified in case of a betrothed woman, if they be found collusive, are not to be put to death, as they may say: Our intention was to make it unlawful for her to be his wife only, but not that she should be put to death. But did they not warn her? It speaks of when they did not. But in such a case it is self-evident, as without warning she is not to be put to death. He speaks of a scholarly woman, and this is in accordance with R. Jose b. Jehudah, who said in the following Boraitha: Warning does not apply to a scholar, as the purpose of warning is only to recognize if the perpetrator of the crime did it while he was not aware that such was a crime, or he did it although he was aware; and as a scholar is aware of this crime, no warning is needed. And as they are not to be put to death, she also is exempted from death, as the Scripture requires that the collusive witnesses should be punished with the same punishment as the perpetrator of the crime, if it were true; and as they claim that they intended only to make it unlawful for her to be the wife of her betrothed, such a punishment is not applicable to the witnesses, and therefore she also is acquitted.

R. Hisda said: If one of the witnesses testifies that he slew him with a sword and the other says "with a razor," it is not admissible. But if one says that the murderer or the one murdered was dressed in white, and the other testifies, "He was in black," it is to be considered admissible. An objection was raised from the following: "It should exactly correspond," means that if one testifies that he slew him with a sword and the other with a razor, or if one says that he was dressed in black and the other that he was dressed in white, it does not? R. Hisda explains this Boraitha, that it means if both have testified that he strangled him With a muffler, and one said "It was a white one," and the other said "It was a black one." Come and hear another objection: If one says, "He wore black sandals," and the other says, "white ones," it is not considered corresponding? Also this Boraitha may be explained that he kicked him with his sandals and

killed him. Come and hear another objection from our Mishna: It happened that Ben Sakkai examined the witnesses . . . of a certain fig tree? Said R. Jose: Do you want to contradict a man from Ben Sakkai's theory? He was of the opinion that there is no difference between examination and query, and his

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theory is individual. Who was Ben Sakkai? Shall we assume that it means Rabban Johanan ben Sakkai? Was he, then, among the Sanhedrin? Is there not a Boraitha that the age of R. Johanan was one hundred and twenty: the first forty years he was engaged in business, the middle forty he studied, and the last forty he taught? And there is another Boraitha: Forty years before the Temple was destroyed, the Sanhedrin was exiled from the chamber of the Temple to a store. And R. Itz'hak b. Abudimi explained that it means that from that time the Sanhedrin did not try cases of capital punishment. And there is also a Mishna which states that after the Temple was destroyed R. Johanan ben Sakkai enacted, etc. Hence we see that during forty years of his life there were no cases of capital punishment in the court of the Sanhedrin, and it cannot be that the examination in question was made by him. Therefore it must be said that this Ben Sakkai was some one else. And so it seems to be, as if it were R. Johanan b. Sakkai, how is it possible that Rabbi, the editor of the Mishnayoth, should name him Ben Sakkai only. But have we not learned in a Boraitha: It happened that *R. Johanan b. Sakkai* examined . . . the kind of figs? Therefore it must be said that at that time he was a disciple who was sitting in the row before the Sanhedrin, and he said something which was accepted by the Sanhedrin, and therefore it was established in his name. Hence while he was as yet a student he was named Ben Sakkai; and afterwards, when he began to teach, he was named Rabban Johanan. And the Mishna which mentioned him by the name of Ben Sakkai did so because when this happened he was still Ben Sakkai; the Boraitha, however, mentioned him by his name of the latter period.

"What is the difference between examination?" etc. How is to be understood: If two claim, etc.? Is it not self-evident that if the testimony holds good when one says, "I don't know," the same is the case also when two say so? Said R. Shesheth: This statement applies to the first part--namely, if the investigation shows that two of them are aware and the third says, "I don't know," even then their testimony is ignored; and it is in accordance with R. Aqiba, who compares three witnesses to two. As with two, if there is a difference in their testimony, the case is to be dismissed, the same is it with three, if even only one of them says, "I don't know." Said Rabba: How can such an explanation hold good? Does not the Mishna state that their testimony holds good? Therefore said he: It is to be explained

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just in the reverse. Even concerning queries, if two witnesses are aware, but the third one says, "I don't know," their testimony holds good; and it is not in accordance with R. Aqiba.

R. Kahana and R. Saphra used to learn the Tract Sanhedrin in the college of Rabba, and when Rami b. Hama met them, he questioned them: What new have you found in the Tract Sanhedrin, as taught by Rabba? And they rejoined: And how would it be if we had learned Tract Sanhedrin other than at Rabba's college--would you ask us for any news? It must be that there is some difficulty to you in this tract. Tell us, then, what it is. And he answered: The statement of the Mishna, which makes a difference between queries and examination--the reason for which is unknown to me. Are not both prescribed biblically? And they answered: What comparison is

this? In the inquiry, if one said, "I don't know," their testimony is annulled, because the witnesses of such a testimony cannot be made collusive. And there is a rule that such a testimony is not to be taken into consideration; while in examination, if one said, "I don't know," their testimony still holds good. Hence they remain legal witnesses who can be made collusive. Rejoined he: If it is so, then you have brought with you very great news, Rejoined they: Because of the kindness of you, master, not to object to us, it may be named good news; but if you were to use your sagacity to object to us, we would have nothing to say.

"*The intercalation of the month*," etc. Until what date of the current month should the supposition of the ignorance of the intercalation of the last month hold good? Said R. Aha b. Hanina in the name of R. Assi, quoting R. Johanan. Until the greater part of the month is passed (*i.e.*, *e.g.*, if one says, "It was on the twentieth of the month," and the other says, "on the twenty-first," the supposition of the intercalation is not to be taken into consideration, and their testimony is annulled). Said Rabha: This we infer also from our Mishna, which states that, if one says "on the third," and the other "on the fifth," their testimony is ignored. And if the intercalation were taken into consideration, why not say that one of the witnesses was aware of two intercalations (*i.e.*, from the last two months), and the other was not aware of it? Hence the reason must be, because one may not be aware of it during the first half of the month, but in the second half it is impossible that he has not heard of it. (Says the Gemara;) This, however, is not to be taken as a support, as it

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may be said that one is not aware of it even during the second half of the month. And the reason why the Mishna does not say that he was not aware of two intercalations is because, usually, each intercalation was announced by blowing in the cornet and it could happen that one might overhear one blowing, but not two.

R. Aha b. Hanina said again in the name of the same authority., Until what time may the benediction of the moon be pronounced? Until it becomes more round. But until what date? R. Jacob b. Bibi in the name of R. Jehudah said: Until the seventh. And the sages of Nahardea said: Until the sixteenth. And the basis of both is R. Johanan's statement. They differ, however, in the explanation of it. According to R. Jehudah, his expression, "until it becomes more round," means when it is already half; and according to the others, R. Johanan means a full moon. Said R. Aha of Diphthi to Rabhina: Let one pronounce, after the time of the month's benediction has elapsed, the benediction of "Who is good, and does good to the world," And he answered: Do we then pronounce the benediction of "Blessed is He who judges true" when the moon diminishes, so that we shall pronounce the blessing, "Who is good," etc., after the full moon? But why not pronounce both? Because to a custom no such benedictions are used. The same said again in the name of the same authority: He who pronounces the benediction of the moon in time is considered as if he had received the glory of the Shekinah. And this is deduced from the analogy of the expression "zeh" mentioned in Ex. xiii. 2 and *ibid.* xv. 2.

In the school of R. Ismael it was taught. If Israel should have only the meritorious act of receiving the glory of their heavenly Father once a month, it would be sufficient. Said Abayi: Therefore we must pronounce the above benediction standing. Miramar and Mar Zutra used to stand shoulder to shoulder, pronouncing this benediction. Said R. Aha to R. Ashi: In the West they used to pronounce the benediction, "Blessed be He who renews the moon." And he answered: Such a blessing our women also pronounce. We, however, have adopted that which

was composed by R. Jehudah: "Blessed be He who with His words has created the heavens, and with the breath of his mouth all their hosts, to whom he gave order and time, that they should not change His command; and they rejoice and are happy in doing the will of their creator. They work truthfully,

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and what is done through them is truth." [1](#) And to the moon He commanded that she renew herself every month, and that she should be a crown and a guide to the people who were selected by Him from their birth. It is a symbol to the children of Israel that, finally, they also will be renewed like unto her (the moon), and they will praise their Creator, his name, and the glory of His kingdom. Blessed be Thou, Eternal, who dost renew the moon.

[R. Aha b. Hanina in the name of R. Assi, quoting R. Johanan, said: With whom can you fight a war of the Torah? With him who possesses bundles of Mishnayoth. And R. Joseph, who was a master in Mishnayoth, applied to himself (Prov. xiv. 4): "But the abundance of harvests is (only) through the strength of the ox." [2](#)]

"If one says, 'in the second hour,'" etc. Said R. Shimi b. Ashi: This is only when they differ concerning the hour; but if one says, "It was before sunrise," and the other says, "It was after," their testimony is to be ignored. Is this not self-evident? even if one says, "It was before sunrise," and the other says, "At the sunrise." Is this also not self-evident? Lest one say that the one who says it was before the rising of the sun stood at such a place that he could not see it well, he comes to teach us that it is not so.

"The whole day," etc. The whole day only? Have we not learned in a Boraitha that if they accepted his reasons he remains with them all the time; but if his reasons were not accepted, he nevertheless remains there the whole day to the end that his descent should not be a disgrace to him? Said Abayi, Explain, then, our Mishna that he remains there the whole day if his reasons were not accepted.

"They do not drink wine," etc. And why not? Said R. Aha b. Hanina. Because of [Prov. xxxi. 4]: "Nor for *rausnim* (princes) strong drink." By "*rausnim*" is meant that those who occupy themselves with *raus* (secrets) of the world should not drink strong drinks.

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"The opinion of the acquitter." But how is it if he does not accept it? Said R. Aha, and so also R. Johanan., They have to acquit him. Said R. Papa to Abayi: if so, why was he not acquitted previously when they (were still twenty-three)? And he answered: So said R. Johanan. Because they should not leave the court disputing, According to others the answer was . R. Jose of the following Boraitha holds with you. As there is no addition to the court of seventy-one, so there is no addition to the court of twenty-three (but if there is no majority for condemning, the defendant is freed).

The rabbis taught.. In civil cases the court may say: The case becomes old. But this cannot be said in criminal cases. What does this mean? If it means it becomes so old that it is hard to reach a conclusion, and that therefore it must be postponed, then the reverse should be the case. It

means, in criminal cases they must postpone it, as perhaps they will find some defence, but not in civil. Said Huna b. Monoach in the name of Aha b. Ika. Reverse the Mishna. R. Ashi, however, said., The Mishna must not be reversed, as the expression "become old" means that the matter has received a thorough discussion and may not be further prolonged. An objection was raised from the following "The oldest of the judges may proclaim the case old. And this is correct according to the explanation of R. Ashi, as such a proclamation belongs to the oldest. But according to the first explanation, should the oldest blame himself? Nay, it would be a disgrace if some one else should say this to him. But if he himself proclaims this, there is no disgrace. According to others, it was questioned: How could the oldest praise himself, saying that the matter has become so clear that objection cannot be made? Is it not written [Prov. xxvii. 2]: "Let another man praise thee, and not thy own mouth." With a trial it is different, as it rests upon the shoulders of the oldest; for the Mishna states. After the conclusion, the oldest of the judges proclaims: "You, so and so, are acquitted"; or, "You, so and so, are guilty."

Footnotes

[119:1](#) The expression in Hebrew is *al dbar asher enah*, etc.--literally, "the thing which he has violated," etc.; and it should be written "because he has violated," without the term, "dbar" (thing). The Talmud takes the term "dbar," which means "thing," and which if punctuated "dibur" means "talk," to mean that he was *told* was a crime and he did not listen.

[124:1](#) This benediction, which is copied in the prayer books, is not exact as in the original Talmud. And also not of that which was copied by Hananiel, but of that which was copied by Asher. And there is a great difference in the translation. We, however, have translated according to that of the Talmud, as so is our method.

[124:2](#) It is unknown to us why the passage in the text is inserted here; it also quotes a verse from Prov. xxiv., which does not correspond. However, according to our method, we could not omit it.

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