

CHAPTER IX.

RULES AND REGULATIONS CONCERNING THOSE TO WHOM BURNING AND THOSE TO WHOM SLAYING APPLIES. WHO IS CONSIDERED A MURDERER DESERVING CAPITAL PUNISHMENT AND WHO IS TO BE EXILED. THOSE WHO RECOVERED AFTER THEY WERE DIAGNOSED TO DIE; KILLING SOME OTHER ONE INSTEAD OF THOSE WHOM HE HAD INTENDED.

MISHNA *I.*: To the following the punishment of burning applies: To one who has intercourse with a woman and her daughter, and to a daughter of a priest who has sinned. Under the general rule of a woman and her daughter comes his own daughter, the granddaughters of his daughter and son, the daughter of his wife, her granddaughters of her daughter and her son, his mother-in-law, and the mother of his mother and father-in-law.

GEMARA: The Mishna does not state a woman whose daughter he has married, but "a woman and her daughter," which seems to be that the intercourse with both of them was a sin, and this can only be with his mother-in-law and her mother. And from the expression, "Under the general rule of a woman and her daughter," it is to be assumed that both are mentioned in the Scripture, which is not so, as the mother of his mother-in-law is only inferred from an analogy. Read: If one has had intercourse with a woman whose daughter he has married. Whence is this deduced? From what the rabbis taught: It reads [Lev. xxi. 4]: "And if a man take a woman and her mother." This is concerning a legal wife and her mother. But whence do we know that the same is the case with the illegal daughter of a ravisher (referring to Deut. xxii. 28), and her granddaughters from her daughter and her son? From the analogy of the expression "incest" (*zimha*), which is to be found here in the verse cited and also in Lev. xviii. 17. And as there it speaks of an ordinary woman, and it is plainly mentioned the granddaughters of her son and daughter, the same is the case here (that all of them must be punished by burning).

[paragraph continues] And whence do we know that the males who have committed the crimes in question are also to be punished by burning, the same as the females? Again from the same analogy of the expression *zimha*. As there the verse speaks of the male perpetrator of the crime, so also in the case here we are not to make any difference in the punishment between males and females. And whence do we know that the latter generations--*i.e.*, the daughters and the granddaughters--are to be equalized to the earlier generations--*i.e.*, the mothers of one's father and mother-in-law? Again from the analogy of the same expression. As there the Scripture does not make any difference between the expression in verse 15, which speaks of a father with his daughter-in-law, and that of the seventeenth, which speaks of the latter generations, and at the end of which it reads: for *they* are near kins-"women," which refers to all of them, so here the punishment of the earlier generations is to be equalized to that of the latter. [1](#)

The father of R. Abbin taught: Because there is no definite commandment in the Scripture concerning the daughter of a ravisher, it was necessary for the scripture to state [Lev. xxi. 9]. "And if the daughter of *any* priest"--"esh cohn," instead of "cohen." From which we infer that, were she a legal or an illegal daughter, if he sins with her, she must be burned.

But if so, let the punishment of burning apply only to the daughter of the abuser, but not to the abuser himself, as so is the case with the daughter of a priest in which the punishment applies only to her, but not to her abuser. Said Abayi: Concerning the daughter of a priest it reads: "Her father does she profane." Exclude this case, in which the father is profaning her. Rabha, however, said: For this no verse is necessary, as it is common sense. In the case of a priest's daughter, if you have excluded her abuser from burning, he is nevertheless left under the category of choking, which applies to any one having intercourse with a married woman. But here, if you exclude the abuser from the punishment which applies to her, under what category can you put him? Should you put him under the category of those who have had intercourse with single women, who are free from any

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punishment, is it possible that she should be burned for this crime, and he who is the abuser of her mother and the seducer of herself should be free? Now we have had the punishment for such, but where is the warning? It is correct for both Abayi and Rabha as they infer the warning from the same which states the punishment. But according to the father of R. Abbin, whence is deduced? Said R. Ailea, from [Lev. xix. 29]: "Do not profane thy daughter, to cause her to be a prostitute." R. Jacob, the brother of R. Abba b. Jacob, opposed: Is not the verse just cited necessary to that of the following Boraitha: "Thou shalt not profane thy daughter," etc? Lest one say that it speaks of a priest who marries his daughter to a Levite or an Israelite, therefore it reads "to cause her to be a prostitute." Hence it speaks only of him who gives his daughter other than in marriage. From the "ll" in the word "techallel" (profane), instead of "tochal," which would have the same meaning, the warning in question may also be inferred. And both Abayi and Rabha, who have inferred the warning in this case from the same verse mentioning the punishment--what do they infer from the verse just cited? Said R. Mani: Him who marries his daughter to an old man, as the following Boraitha states: "You shall not profane your daughter," etc. According to R. Eliezer: He who marries his daughter to an old man is meant; and according to R. Aqiba, he who leaves his daughter unmarried until she becomes "vigaros."

R. Kahana in the name of R. Aqiba said: There is none poor in Israel, but a shrewd-wicked and he who has left his daughter unmarried until "vigaros." How is this to be understood? Is not one to be called a shrewd-wicked if he left his daughter unmarried for his own benefit, that she should do the housework until "vigaros"? Said Abayi: He means thus: There is none poorer than he who is compelled because of his poverty to leave his daughter unmarried until "vigaros," as then he is equal to a shrewd-wicked.

R. Kahana in the name of R. Aqiba said again: Be careful in your counsellor in order that you shall not listen to him who counsels you for his own benefit.

R. Jehudah said in the name of Rabh: He who marries his daughter to an old man and he who marries his minor son to a woman of age; to both the verses [Deut. xxix. 18, 19]: "In order that the indulgence of the passions may appease the thirst (for them): The Lord will not pardon him," apply.

The rabbis taught: Concerning the verse Lev. xx. 14, in which

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the words "him and them" are mentioned, R. Ismael and R. Aqiba differ. According to the former it means "him and one of them," and according to the latter, "him and both of them." What is the point of their differences (even R. Ismael agrees that both of them are to be punished)? Said Abayi: They differ only as to the texts from which the law is derived. According to R. Ismael, who maintains "him and one of them," it is because in Greek $\epsilon\nu$ {Greek *en*} means one, and the expression in the passage is "es'-en." Hence, biblically his mother-in-law is to be burned, while her mother is inferred only rabbinically by an analogy of expression. And according to R. Aqiba both of them are meant in this verse. Hence both, biblically, are to be burned. Rabha, however, maintains that the point of their difference is an intercourse with one's mother-in-law after the death of his wife. According to R. Ismael, even then she must be burned, as in the verse cited it reads "and them," which makes no difference whether his wife is still alive or dead. And according to R. Aqiba, after the death of his wife, it is only a prohibition, but not a crime to which burning applies.

MISHNA II.: To the following, punishment with the sword applies: To a murderer and the men of a misled town. A murderer who strikes his neighbor with a stone or with an iron so that he dies; if one pressed down a person while he is in water or in fire, preventing him from coming out, until he dies--he is guilty. If, however, he pushes him into water or into fire and he was able to come out, but nevertheless dies without being prevented by him who pushed him, he is not guilty of a capital crime. If he sets a dog or a serpent upon him, he is not guilty of a capital crime. If, however, he applies the snake to his body with his hand, and it bites him to death, R. Jehudah makes him guilty of a capital crime, and the sages free him.

GEMARA: Samuel said: Why is there not mentioned in the Scripture the word "yod" concerning iron in Num. xxxv. 16, as is done concerning stones and wood in *ibid.*, *ibid.* 17, 18? Because even a fragment of iron brings death. So also we have learned in a Boraitha: Rabbi said: It is known to Him who created the whole world by one word, that a fragment of iron may bring death, and therefore He has not prescribed any size concerning iron. (Says the Gemara:) This is only when he pierced him with it; but if (he struck him with iron), it must be of a size to cause death.

"*If he presses down,*" etc. The first part teaches a preponderance, and so does the second. The preponderance of the first

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part is that, although he did not push him, but only prevented him from coming out, he is nevertheless guilty of a capital crime. And the preponderance of the second part is that, although he pushed him in, yet, so long as the victim could come out and was not prevented, he is not guilty of a capital crime. But whence do we know that one is guilty for pressing down? Said Samuel: From [*ibid.*, *ibid.* 21]: "Or if in *enmity* he have smitten him with his hand," which means to include him who pressed him down.

There was one who urged cattle of his neighbor into the sun until they died. And Rabbini made him liable, but R. A'hal b. Rabh freed him. The former made him liable because of an *a fortiori* conclusion drawn from a murderer. As concerning a murderer the Scripture makes a difference between intentionally and unintentionally, between accident and premeditation, and nevertheless makes guilty the presser; and as concerning damages, where there is no difference between intentionally and unintentionally, between accident and premeditation, so much the more should a pusher be liable. And as to the reason of R. A'hal, who freed him, said R. Mesharshia: The reason of my grandfather, who freed him, is the above-cited verse: "He that smote him shall surely be put to death, for he is a murderer," meaning only in case of murder is one guilty of pressing, but not in a case of damages.

Rabha said: If one bound a person, and he died thereafter of hunger, he is not guilty of a capital crime. If, however, he bound him and put him in a sunny place, and he dies because of the sun, or he puts him in a cold place and he dies of cold, he is guilty. But if he put him in a sunny or a cold place, where there was not as yet either sun or cold, and thereafter, when it came, it caused his death, he is not guilty of a capital crime.

The same said again: If one bound a person and left him before a lion, he is not guilty of a capital crime. (Rashi explains that he could not save himself from the lion even if he were unbound. Rashi's reasons are not quite clear to us.) But if he bound him in a place where mosquitoes are abundant, he is guilty. R. Ashi, however, maintains that even in the latter case he is not guilty, as the mosquitoes which were on his body at the time he tied him, went away, and others came. Hence he did not cause his death directly.

It was taught: If one places a vat over a person and he dies from heat, or he removes the ceiling to let the cold come in,

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and he dies from cold-Rabha and R. Zerah--one of them makes him guilty and the other frees him. Says the Gemara: It seems that Rabha is the one who frees him, as it is in accordance with his theory. Said above: If one bound a person and he dies of hunger, he is free. On the contrary, it seems R. Zerah is the one that makes him free, as it is in accordance with his theory elsewhere: He who puts a person in a house closed from all sides so that the air cannot go out, and lights a candle, which causes his death, is guilty. Hence we see that the reason of making him liable is the lighting of the candle, and if this were not done he would be free? Nay! It may be said that the heat which caused his death began with the lighting of the candle. The same is the case with the vat-the heat began just when he turned it over him.

Rabha said again: If one pushed a person into an excavation in which a ladder stood for coming out, and someone came and removed the ladder, or even if he himself removed it after he pushed him in, he is not guilty of a capital crime, as at the time he pushed him in he was able to come out.

The same said again: If one shot an arrow at a person who wore an armor and someone removed the armor, or even if he himself removed it after he shot, he is not guilty of a capital crime, as at the time he shot the arrow it could not injure him.

And he said again: If one shot an arrow at a person who was supplied with spices which could cure the wounds from the arrow, and someone came and scattered them, or even if he himself scattered them before the arrow reached him, he is not guilty, because the victim, at the time he shot, could be healed by the spices. Said R. Ashi: According to this theory he would not be guilty if there should be spices in the market which could cure the wounds? Said R. Ahbah, the son of Rabha, to R. Ashi: How is the law if it happened that spices were brought to him after he was shot, and he did not make use of them? And he answered: In such a case the court would not overlook this, and would accept the defence to his advantage.

Rabha said again: If one throws a stone at a wall, with the intention of killing a person with it, the stone, however, killing the man only by the rebounding, he is guilty of a capital crime. In explanation of this, it was taught, *e.g.*, ball-players--if one threw a ball with the intention of killing someone, he is to be put to death, and if it was unintentionally, he is to be exiled. Is this not self-evident? The teaching that one is to be put to death, if done intentionally, was necessary. Lest one say that such a

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warning was of a doubtful nature, as who could predict that the ball would kill him by rebounding so that he should be forewarned of it, he comes to teach us that he is nevertheless guilty.

R. Tachlifa of the West taught in the presence of R. Abuhu concerning those who play ball: If the ball killed one by rebounding within a distance of four ells from the wall, he is free from exile, but if it exceeded four ells, he is guilty.

Said Rabhina to R. Ashi: Let us see, how was the case! If the player was pleased with the rebounding of the ball, then let him be guilty if the man was killed even within a nearer distance (as the law of killing a man unintentionally prescribes). And if he was not pleased with the rebounding, let him be free even at a greater distance. And he answered: The greater the distance a ball rebounds, the more is the pleasure of the ball-player.

It was taught: R. Papa said: If one bound a person and turned a stream of water upon him, it is considered as if the man were killed directly by his arrow, and he is guilty of a capital crime. However, this is only when he was killed by the first stream which poured upon him; but if he dies from the continued flow, it is not considered direct killing, but only a cause of death.

The same said again: If one throws a stone on high and it swerves and kills a man, he is guilty. Said Mar. b. R. Ashi to him: Let us see what is the reason of your theory! Because the stone went by his force? But if so, the force must only be considered when it went on high; and when his force ends it should fall down vertically. But according to your theory it swerves, hence it is not by his force. It must be said, however, if this cannot be called his exact force, it may nevertheless be considered a part of his force.

The rabbis taught: If one was assaulted by ten different persons, no matter whether at once or at different times, and was killed, none of them has to suffer capital punishment, as according to the Scripture it must be known who was the cause of the death. R. Jehudah b. Bathyra, however, holds: In case the assault was made by one after the other, the last one is guilty, for he hastened

his death. ¹ Said R. Johanan: Both parties took their theories from one and the same passage [Lev. xxiv. 17]: "And he that taketh the life of all the soul of man." ² The rabbis hold that all the "soul" means one is not guilty unless he

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takes the whole soul. And R. Jehudah holds that it means all that was as yet left of the soul.

Said Rabha: All agree that if one kills a person whose windpipe and larynx (gullet) are cut, or whose skull is fractured, he is free (for it is considered as if he had attacked a dead man). And they agree also that, if one killed a person who was struggling with death through sickness caused by Heaven, he is guilty of a capital crime. And the point of their difference in the above Boraitha is, if one killed a man who was struggling with death through sickness caused by man. According to the rabbis, it is similar to him whose windpipe, etc., are cut. But according to R. Jehudah b. Bathyra, it is similar to him who was struggling with death through sickness caused by Heaven.

A disciple taught in the presence of R. Shesheth: The above cited verse, which commences with "and a man," means if one struck a person with an article which can cause death, but the man was not entirely without life, and another came and put an end to him entirely, the latter is responsible, as the ordinary opinion is in accordance with R. Jehudah b. Bathyra.

Rabha said: If one kills a person whose windpipe and larynx are cut he is free; but if the latter killed a person, if this was in the presence of the court, he is guilty. As it reads [Deut. xiii. 6]: "And thou shalt put the evil away from the midst of thee." But if not in the presence of the court, but in the presence of other witnesses, he is free, as their testimony cannot be taken into consideration, because they cannot be made collusive (as their intention was to kill a man already dead). And there is a rule that such a testimony as was given by those cannot be made collusive is not considered as testimony at all.

And he said again: Although the witnesses who had testified against the man whose windpipe, etc., were cut were thereafter found collusive, they are not to be put to death; if the windpipe, etc., of the witnesses themselves were cut at the time they testified, and thereafter they were found collusive, they are to be put to death, because of the above-cited verse. R. Ashi, however, maintains that they are not, because the witnesses who made them collusive could not be punished if their testimony were found false, as their intention was to kill men who are considered already dead.

And Rabha said again: An ox of such a kind, if he killed a person, is guilty. But if the ox was a healthy one and his owner was of that kind, he is free; because it reads [Ex. xxi. 29]: "The ox

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should be put to death and the owner also." And as in this case the owner is considered already dead, and the expression "he shall also be put to death," does not apply to him, we therefore do not apply to the ox the beginning of the verse. R. Ashi, however, maintains that even if the ox was of that kind, he is also free for if its owner would be such it would be free; therefore it is to be free when it itself is of this kind.

"If he set a dog or a serpent," etc. Said R. Abbah b. Jacob: If you wish to know the reason of their difference, it may be said thus: According to R. Jehudah, the venom of the serpent is always between its teeth (*i.e.*, with the bite of the serpent the venom is injected into the body, which causes death directly) and, therefore, if he applied the serpent to the body he is to be decapitated, and the serpent is free. And according to the sages, the poisoning comes after the bite, from the venom of the serpent Hence the biting did not cause death directly, and therefore the serpent must be stoned and he who applied it is free from capital punishment.

MISHNA III.: If one strikes a person with a stone or with his fists, and he was diagnosed (by the physicians of the court) to die, and thereafter he improved, and was diagnosed to live, and then again becomes worse and dies, he is guilty of a capital crime. R. Nehemiah, however, maintains that he is free, because it is reasonable to say that he did not die directly from the blow, but from some other cause.

GEMARA: The rabbis taught: The lecture of Nehemiah concerning this matter was thus: It reads [Ex. xxi. 19]: "If he rise again and walk abroad upon his crutch, then shall he that smote him be acquitted." Can it be supposed that one should be put to death because he struck a person who later walks in the market, if there were not a passage which commands the contrary? We must then say that the passage means that if when he was struck he was diagnosed to die, and thereafter he improved, walked in the street, and was diagnosed to live, and then became worse and died, he is nevertheless free. What do the opponents of R. Nehemiah infer from the words "be acquitted"? That the person who struck must be kept in arrest until the outcome shall be known. R. Nehemiah, however, maintained that no verse is necessary for this, as this is to be inferred from the woodgatherer, who was arrested immediately after committing the crime. Why did not the rabbis also infer from the woodgatherer? (Moses was aware that) he was surely guilty of a capital

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crime, but did not know [what](#) kind of death applied to him. But concerning the murderer in question, it is not known whether he came under the category of capital punishment at all? R. Nehemiah, however, infer this from the blasphemer, of whom Moses did not know whether he came under the category of capital punishment at all, and nevertheless he was imprisoned. The rabbis, however, do not infer this from the blasphemer, as according to their opinions it was only a decision for that time, as we have learned in the following Boraitha: Moses our master was aware that the woodgatherer was guilty of capital crime. As it reads (Ex. xxxi. 14): "Everyone that defileth it shall be put to death." But he did not know what kind of death; as it reads: [Num. xv. 34]: "Because it had not been declared what should be done to him." Concerning the blasphemer, however, it is not so written, but "To the decision of the Lord," hence Moses was not aware whether he came under the category of death at all.

The rabbis taught: If one struck a person and he was diagnosed to die, but he nevertheless remained alive, they may free him. And if he was diagnosed to die and he improved, the sick man must be examined again, and appraisal made concerning the money which is to be collected from his smiter; and if thereafter he becomes worse and dies, he must be charged according to the second examination. So is the decree of Nehemiah. The sages, however, maintain that there is no other examination after the first. There is another Boraitha: If he was diagnosed to die, but he did not, he must be examined again. But if the first opinion was that he

would live no second examination as to dying may take place (for if it happened that he dies, it is probably not from the previous blow). If, however, he was diagnosed to die, and he becomes better, the sick man must undergo an appraisal concerning money. And if thereafter he becomes worse and dies, his murderer must pay for damages and the suffering of the deceased, to the heirs from the time he was struck till his death. And this anonymous Boraitha is in accordance with R. Nehemiah, who frees such from capital punishment.

MISHNA IV.: To the following, capital punishment does not apply: To one who intended to kill an animal and killed a man, an idolator and killed an Israelite, a miscarried child and killed a mature one. The same is the case with one who intended to strike another on the loins with an article which was not sufficient to cause death, but the blow was made on his heart, for which it was sufficient, and he dies; or if he intended to

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strike him on the heart with an article which was sufficient to cause death if striking same, but he struck the loins and the man dies, although it was not sufficient to cause death if struck on the heart or even if he intended to strike an adult with an article which was not sufficient for such, but it happened that he struck a minor and he dies, as for a minor it was sufficient; or, on the contrary, if he intended to strike a minor with an article which was sufficient for such, but not for an adult, and it happened that he struck with it an adult and he nevertheless dies. To the following, however, capital punishment does apply: To one who intended to strike a person on the loins with an article which was sufficient for this purpose, and he strikes him to death on his heart, or if he intended to strike an adult with an article which was sufficient to cause his death, but it happens that he strikes to death a minor with it. R. Simeon, however, maintains: Capital punishment does not apply even to him who intended to kill a certain person, and it happened that he killed another.

GEMARA: To which part of the Mishna belongs R. Simeon's, theory? If to the latter part only it should read: And R. Simeon frees him (*i.e.*, him who intended to kill an adult and killed a minor). We must then say that it belongs to the first part, which states: an animal--an idolater--an Israelite--a miscarried child, etc., to which capital punishment does not apply, from which it is to be understood that if there were two resembling persons, and he intended to kill one and killed the other, capital punishment does apply. And to this R. Simeon came to say that even in such a case capital punishment does not apply. Now, let us see! If, *e.g.*, there were Reuben and Simeon, and the murderer said, "I intend to kill Reuben and not Simeon," and finally Simeon was killed, and not Reuben--this is the case in which the first Tana and R. Simeon differ. But how is it if the murderer said, "I intend to kill one of them"; or the murderer mistook Simeon for Reuben? Does R. Simeon differ even in this? Come and hear the following Boraitha: R Simeon said: Capital punishment does not apply, unless one said, "I intended to kill so and so," and he did so. And what is his reason? [Deut. xix. 11]: "But if any man be an enemy to his neighbor and lie in wait for him," which means only when he killed the intended person. Said the disciples of Janai: And what do the rabbis say to this verse? It excludes him who throws a stone into an excavation in which men are standing without the intention of killing any particular one. Now, let us

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see! According to the rabbis, who apply capital punishment to him who killed one person,

although he intended to kill another, the verses Ex. xxi. 22 and 23, "If men strive . . . then shalt thou give life for life," are in accordance with the explanation of R. Elazar, stated above, that the verses speak about him who intends to kill. But how should this passage be explained in accordance to Simeon's theory? In accordance with Rabbi of the following Boraitha: "Thou shalt give life for life" means money (*i.e.*, the value of the woman should be paid to her heirs). You say "money," but perhaps it means literally it life"? The expression here "thou shalt give," is to be explained similarly to *ibid.*, *ibid.* 22: "He shall give according to the decision," etc. As there it means money, the same is the case here.

Rabha said: The following statements, taught in the school of Hiskia, correspond neither with Rabbi nor with the rabbis mentioned above. Namely: It reads [Lev. xxiv. 21]: "And he that killeth a beast shall make restitution for it, and he that killeth a man shall be put to death." As in the case of a beast there is no difference whether it was intentionally or unintentionally, by an error or by premeditation, while he was ascending or descending, he is always liable and must pay. The same is it in the latter case of a human being: there is no difference whether it was intentionally, etc.,--he is absolved from any money payment.

Now let us see what is meant by the expression "unintentionally" concerning a human being. Shall we assume, *i.e.*, that it was done without any intention? Then it was an error, which has been already mentioned. Why, then, the repetition? You must then say that it means, if he intended to kill one and killed another person, and nevertheless it states that he is absolved from any payment. Now, if he should hold with the rabbis that such is guilty of a capital crime, then such a statement is not necessary, as there is a rule that no payment is required in a case of capital punishment. We must therefore say that it does not agree with them; nor can we say, on the other hand, that it agrees with Rabbi, as the latter requires payment, while Heskia does not.

MISHNA V.: A murderer mixed up among others--all of them are free. R. Jehudah maintains: All of them must be taken to $\chi\upsilon\phi\omicron\varsigma$ {Greek *xufos*}; (a life-long prison, to be done with as explained farther on). If it happen that the persons sentenced to deaths of different

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kinds, and are so mixed that it is not known who comes under this kind of death and who under another, all of them must be executed with the more lenient death, *e.g.*, if those who are to be stoned are mixed up among those who are to be burned, according to the sages all of them must be executed by burning, as stoning is more rigorous; and according to R. Simeon all of them are to be executed by stoning, as burning is more rigorous. Said R. Simeon to the sages: Were burning not more rigorous, it would not apply to a daughter of a priest who had sinned. Answered the sages: Were stoning not more rigorous, it would not apply to a blasphemer and an idolater. If they who are to be slain by the sword are mixed among those who are to be choked, according to R. Simeon they must be decapitated, and according to the sages, they must be choked.

GEMARA: What does the Mishna mean by the words, "among others"? Does it mean others who are innocent? Is it not self-evident that they are all free? And secondly, could R. Jehudah say that such are to be imprisoned? Said R. Abuhu in the name of Samuel: It speaks of a murderer who was not as yet sentenced, and was mixed among those who were already sentenced; and as the verdict of death must be rendered only in the presence of the criminal, therefore all of them are free from execution according to the rabbis. R. Jehudah, however,

maintains that such cannot be entirely free, since they are murderers, and therefore, they must be taken to the kyphos.

Resh Lakish said: The Mishna does not mean human beings at all, but oxen--*i.e.*, whether an ox which was not as yet sentenced to death was mixed among others which were already sentenced is the point of their difference. According to the rabbis the ox must be judged the same as its owner. As its owner cannot be sentenced to death if not present, the same is the case with the ox; and as he is now mixed among others, all of them are free. And R. Jehudah maintains that all of them must be taken to the kyphos.

Said Rabha: How can such an explanation be given to the Mishna? Does not a Boraitha add to this: Said R. Jose: Even if among the others was Abbah Halafta (who was known as a great man). How, then, can the Mishna be interpreted that it means other murderers or oxen? Therefore explains he: It means if, *e.g.*, two were standing shoulder to shoulder and an arrow came out from one of them and killed a person, both of them are free. And to this R. Jose said: Even if Abbah Halafta was among the

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two, and it is certain that Abbah Halafta would not commit such a crime. Nevertheless, the other is free. And the saying of R. Jehudah belongs to another case, as the Mishna is not completed, and should read thus: And if an ox which was sentenced to death was mixed among other innocent oxen, they must all be stoned. R. Jehudah, however, maintains that all of them must be taken to the kyphos, and it is in accordance with the following Boraitha: If a cow has killed a human being, and thereafter gave birth, before she was sentenced to death, the offspring is valid; but if it happened after she was sentenced, the offspring is invalid. And if such were mixed among others, and even if some of the others among which it is mixed were mixed with still others, all of them must be taken to the kyphos. R. Elazar b. Simeon, however, maintains: All of them are to be brought to the court and stoned.

"*All who were sentenced to death,*" etc. Infer from this that if one is forewarned of a rigorous crime, it suffices for a lenient one. (This question was not yet solved.) Said R. Jeremiah: The Mishna speaks of a case where the criminal was warned in general; and it is in accordance to the Tana of the following Boraitha: All the crimes to which capital punishment applies, the perpetrators of them are not put to death unless there were witnesses who warned them, and unless they warned them that they were liable to die by the decision of the court. And according to R. Jehudah, only when they notified them by which kind of death they would be executed.

The first Tana, who does not require that they should be notified by which death, infers it from the case of the woodgatherer; and according to R. Jehudah, nothing is to be inferred from the case of the woodgatherer, as it was only a decision of that time.

"*Among those who are to be burned,*" etc. R. Ezekiel taught to Rami his son: If those who are to be burned were mixed among those who are to be stoned, according to R. Simeon, they are to be executed by stoning, as burning is more rigorous. Said R. Jehudah (his older son) to him: Father, do not teach so, for, according to your teaching (as "those who are to be burned were mixed among those who are to be stoned") it seems that the majority of them come under the category of stoning: Hence the reason why they are to be stoned is not because it is more lenient, but

because so was it to be done with the majority. And to the question of his father: How, then, shall I teach? The answer was: As our Mishna states: If those who are to be stoned

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were mixed among those who are to be burned, R. Simeon said, etc. But if so, how is the latter part, "And the sages said that they are to be executed by burning, because burning is more rigorous," to be understood? Also here the reason may be that the majority who are to be executed come under the category of burning? Nay! The expression of the rabbis, "stoning is more rigorous," was not as a reason, but as an answer to R. Simeon. And it is to be explained thus: If they were mixed among those who are to be burned, it must be done with them in accordance with their majority. And your supposition to care about the minority, because we have to select for them a lenient death, does not hold good, as in reality stoning is more rigorous. Said Samuel to R. Jehudah: Genius! do not express yourself in such terms to your father, as there is a Boraitha: If a son saw his father transgressing what is written in the Scripture, he must not say to him, "Father, you have transgressed the law," but, "Father, so and so is written in the Scripture."

But is it not finally one and the same? It means he shall say: "Father, there is a verse in the Scripture which reads so and so," and in such a tone that it shall not seem a rebuke, but an intimation.

MISHNA VI.: If one committed a crime which deserves two kinds of death (*e.g.*, one who has intercourse with his mother-in-law who is married, commits two crimes--with a married woman, to which choking applies, and with his mother-in-law, to which burning applies), he must be tried for the more rigorous one. R. Jose, however, maintains: According to that act, he began first. (Illustrations in the Gemara.)

GEMARA: Is this not self-evident? Should one who has committed another crime which brings an easier punishment be benefited by it? Said Rahba: It speaks of where he was tried for a case which deserved a lenient death, and was sentenced, and then committed a crime to which a more rigorous death applies. Lest one say that this man is to be considered as already killed and not to be tried again, it comes to teach us that he must be tried and punished with the more rigorous death.

The brother of R. Jose b. Hanna questioned Rabba b. Nathan: Whence is this law deduced? (And the answer was:) from Ezek. xviii. 10-13; ". . . Upon the mountains he eateth . . . and his eyes he lifteth up to the idols of the house of Israel . . . and the wife of his neighbor he defileth . . ." To bloodshed the sword applies, to adultery with a married woman choking

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applies, and to idolatry stoning applies, and it ends with "his blood shall be upon him," which means stoning. Hence he is to be executed with the more rigorous one. R. Na'hman b. Itz'hak opposed: Perhaps all the crimes mentioned in this passage come under the category of stoning, namely, a "dissolute son," means a stubborn and rebellious son, to whom stoning applies; "he defileth the wife of his neighbor" means a betrothed damsel, to whom also the same applies; "to the idols he lifteth up," which is idolatry, to which stoning applies? If it were so, then what came

Ezekiel to teach? And lest one say that he was only repeating what is in the Scripture, then he ought to have done as did Moses our master, who said [Deut, xvii. 18]: "He shall write the *repetition* of the law." [1](#)

R. Abhah b. Hanina lectured about the passage [ibid. 6]: Upon the mountains he eateth not," which ends with [ibid. 9]: "He is righteous, he shall surely live." Is it possible that, because he has not committed such crimes, he should be called righteous? Therefore these verses must not be taken literally, but "upon the mountains he eateth not" means that he does not live upon the reward of the meritorious acts done by his parents; "his eyes he lifteth not up to the idols" means that he never walked overbearingly; "and the wife of his neighbor he defileth not," means that he never tried to compete in the special trade of his neighbor; "unto a woman on her separation he cometh not near" means that he never tried to derive any benefit from the treasure of charity-- and to this it reads: "He is righteous, he shall surely live."

Rabban Gamaliel, when he came to this passage, used to weep, saying: It seems as if he who has done all of them is righteous, but not he who has done only one. Said R. Aqiba to him: According to your theory, the verse [Lev. xviii. 24]: "Do not defile yourself with all of these things," also means with all of them, but one of them is allowed? Hence it means to say with "any" of them. The same is to be said here: If one does one of the things mentioned above, he is righteous.

"*A crime which deserves two kinds,*" etc. There is a Boraitha: How is R. Jose's decision in our Mishna to be illustrated?--*e.g.*, if the crime which he committed with this woman was that she became first his mother-in-law and then married. Hence the prohibition of having intercourse with her applied, even before she

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married again. Then he must be tried under the crime "with a mother-in-law." But if she became his mother-in-law after her marriage, then he must be tried under the crime "with a married woman," as the prohibition against intercourse with her existed already before she became his mother-in-law.

Said R. Adda b. Ahabah to Rabha: In the first case, in which she married after she became his mother-in-law, why should he not also be tried for the crime with a married woman? Did not R. Abuhu say that R. Jose agrees in case a prohibition were added. (*E.g.*, when she was his mother-in-law but unmarried, she was prohibited to him only, but allowed to the whole world, and when married she became prohibited to the whole world. Hence one prohibition was added. And in such a case R. Jose agrees that the second crime must also be taken into consideration.) And Rabha answered: Adda, my son, do you want us to execute him twice? (R. Jose considers the added prohibition to be only concerning sin-offerings, when incurred through error.)

MISHNA VII.: He who receives stripes, and relaxes into the same crime, and is punished again and does not repent, the court takes him to the kyphos, and feeds him with barley until his abdomen bursts.

GEMARA: Because he received stripes twice, should the court imprison him in the kyphos forever? Said Jeremiah in the name of Resh Lakish: The Mishna speaks of crimes to which

korath applies, and he was forewarned of stripes, and was punished twice for the same crime. And as this man deserves death by Heaven, but his time has not yet come, and we see that he devotes his life to sin, the court imprisons him to hasten his death. Said R. Jacob to R. Jeremiah b. Tahlifa: Come and I will explain to you the real meaning of Resh Lakish: The Mishna means that he has committed the same crime thrice, for two of which he has received stripes. And as the court does not see any remedy for him, it puts him in the kyphos after the third time. If, however, he has committed different crimes to which korath applies, he is not taken to the kyphos, as he is not considered as devoting his life to this crime, but as one careless concerning prohibitions.

"He who receives stripes twice," etc. Twice, although he was not punished a third time! Shall we assume that our Mishna is not in accordance with R. Simeon b. Gamaliel, who says that until one has repeated the same crime thrice it is not considered

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a hazakah 1 (habit), Said Rabhina: It may be even in accordance with R. Simeon, as the crime was committed thrice, and he considers it a habit, although he was not beaten thrice.

An objection was raised from the following: He who has committed a crime twice to which the punishment of stripes applies receives the stripes twice; repeating same a third time, the court puts him in the kyphos. Abba Shaul, however, maintains that even to the third time he receives stripes, and only after he has committed the crime a fourth time does the court imprison him. Is it not to be assumed that the Tanaim of this Boraitha differ in the same point as R. Simeon b. Gamaliel and Rabbi differ--namely, whether it should be considered a hazakah after two times, which is the opinion of Rabbi, or after three times, according to R. Simeon? Nay; all agree with R. Simeon. And the point of their difference is that, according to the first Tana, the crimes which were committed thrice counted, and according to Abba Shaul, the stripes, and not the crimes, are to be counted.

Where is to be found an allusion in the Scripture to the kyphos in question? Said Resh Lakish [Ps. xxxiv. 22]: "The evil will slay the wicked." And the same said again: It reads [Eccl. ix. 12] "For man also knoweth not his time, like the fishes that are caught in an evil net," from which the same is to be inferred.

MISHNA VIII.: He who kills a person, not in the presence of witnesses, is taken to the kyphos and is fed on scant bread and water.

GEMARA: But whence do we know if it was not in the presence of witnesses? Said Rabh: If there was only one witness, or even if there were two who saw this from separate places. And Samuel said: If he committed the crime without forewarning. And R. Hisda in the name of Abimi said: Even when the witnesses contradicted themselves in unimportant matters--as, e.g., a Mishna stated above. Ben Sakkai examined them concerning the size of figs, etc., and they were not contradicted in the examination.

"*And is fed with scant bread and water.*" And above it was said that he was fed with barley? Said R. Shesheth: In both cases it is meant that he was first fed with scant bread and water till his abdomen shrank, and afterwards with barley, from which it swelled till it burst.

MISHNA IX.: If one steals a kisvah, or one curses his

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neighbor, Invoking God as "a carver," or one has intercourse with a female heathen, zealous people (like Pinehas) have a right to strike him when caught in the act. If a priest performed the service in the Temple while he was unclean, his fellow-priests would not bring him to the court, but the youths would take him out of the sanctuary and split his head. If a common Israelite served in the Temple, according to R. Aqiba, he was choked by the court, and according to the sages he would come to his death by Heaven.

GEMARA: What is meant by "*kisvah*"? Said R. Jehudah: It means service vessels [cf. Num. iv. 7]. And where is there to be found an allusion to this in Scripture? [Ibid., *ibid.*, 20]: "That they may not go in to see when the holy things are covered, and die."

"*Who curses*," etc. R. Joseph taught: May the carver strike his carving. And another explanation by Rabah b. Mari is: May the carver strike him himself, and his creator and his creation.

"*One who has intercourse*," etc. R. Kahana questioned Rabh: What is this punishment if there were no zealous men? Rabh forgot his traditional answer to this, and it happened that it was read before R. Kahan in a dream, etc. [Mal. ii. 11]: "Judah hath dealt treacherously, and an abomination hath been committed in Israel and in Jerusalem; for Judah hath profaned the sanctuary of the Lord which he loveth, and hath married the daughter of a strange god." And he came to Rabh and told him that so was it read to him, and therefrom Rabh recollected that this passage was an answer to his question, as it reads immediately after it: "The Lord will cut off, unto the man that does this, son and grandson, out of the tents of Jacob, and him that bringeth near an offering unto the Lord of hosts"--which means, if he was a scholar, that he should not have a son among the scholars or a grandson among the disciples; and if he was priest, that he should not have a son who should bring an offering, etc. Hyya b. Abuhu said: He who has had intercourse with the daughter of an idolater is considered as if he mingles himself with the idols. As it reads: "He hath married the daughter of a strange god." Has, then, an idol a daughter? Hence it means as is just mentioned above.

When R. Dimi, or Rabbin, came from Palestine, he said that the court of the Maccabees decreed: He who does so transgresses concerning the following four things: Neda (menstruation), Shif'ha (female-slave), Goiye (strangers in faith), and prostitution.

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Said R. Hisda: If one comes to the court with the question, "May one take revenge on the criminal mentioned above?" his question must not be answered. And so also said Rabba b. Hana in the name of R. Johanan, and not only this, but if it should happen that Zimri were killed by Phinehas after he separated himself from Cozbi, Phinehas would be put to death for this crime. Furthermore, if Zimri, seeing that Phinehas seeks his life, were to kill him in self-protection, he would not be punished, as Phinehas would be considered a seeker of life.

It reads [Num. xxv. 5]: "Moses said to the judges of Israel," etc. The tribe of Simeon went to

Zimri ben Saul and said: They (the judges) are judging cases of capital punishment, and you keep silent! What did he do? He gathered twenty-four thousand of his tribe and went to Cozbi, pleading with her to listen to him. And to her answer, "I am a princess, the daughter of a king, and my father commanded me not to listen to any one but the greatest of Israel," he said: I myself am a prince of a tribe in Israel, and I am greater than Moses, as I am from the second tribe, while he is from the third. He took her by the locks of her hair, and brought her to Moses, saying: Son of Amram, is this damsel allowed to me, or prohibited? And should you say that she is prohibited, I would ask you, Who allowed to you the daughter of Jethro? Moses, however, had forgotten the traditional Halakha, and he and all who accompanied him wept. As it reads [ibid., ibid. 6]: "And these were weeping by the door of the tabernacle of the congregation."

And farther on it reads: "And Phinehas saw." What did he see? Said Rabh: He saw Zimri's act, from which he recollected the traditional Halakha. And he said to Moses: Granduncle, didst thou not teach me, on thy descending from Mount Sinai, that zealous men might take revenge on him who has had intercourse with the daughter of an idolater? To which Moses answered: Let him who reads the letter be the carrier--*i.e.*, let him who gives the advice be its executor.

Samuel, however, said: Phinehas saw [Prov. xxi. 30]: "There is no wisdom, nor understanding, nor counsel against the Lord--*i.e.*, in a case where there is a violation of the Holy Name the honor of the master must not be considered (and therefore Phinehas did it without the consent of his master Moses).

R. Itz'hak, in the name of R. Elazar said: He saw the angel who destroyed the people. It reads: "Arose and took a javelin in his hand." From this it may be inferred that one must not

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enter with arms into the house of learning. He took out the javelin from its sheath, sharpened it, and replaced it in the sheath so that it should not be visible; and went to the headquarters of Simeon's tribe, saying: Whence do we know that the tribe of Levi is greater than Simeon's? And the people who were there thought: Phinehas himself is coming to do the same as Zimri has done. Hence the scholars decided that this is allowed.

Said R. Johanan: Six miracles occurred to Phinehas when he came to smite Zimri. One--Zimri has not separated himself, etc (The continuation of the Haggadah will be translated farther on.)

"*If a priest performed the service while he is defiled,*" etc. R. Ahbah b. Huna questioned R. Shesheth: Is a priest who does service, being defiled, deserving of death by Heaven, or not? And he answered: This we have learned in our Mishna: "A priest who does service in the Temple, being defiled, his fellow-priests would not bring him to court, but the youths would take him out and split his head." Now, if it should be supposed that he was guilty of death by Heaven, why did not they leave him to the heavenly punishment? Rejoined he: Do you mean to say that he was not guilty at all? Is there such a thing--that Heaven frees him and we should put him to death? Yea! Does not the court put one who is twice beaten with stripes in the kyphos and cause him to die? (What comparison is this?) Did not R. Jeremiah say that it speaks of crimes of a kind to which korath applies? Hence such an offender deserves death. But is the case not the same with him who steals a kisvah, and with the two other cases mentioned in our Mishna? To all of them it is taught that there are allusions in the Scripture implying that they deserve death, viz.,

concerning a kisvah [Num. iv. 20]: "That they may not go in to see when the holy things are covered, and *die*," concerning one cursing his neighbor, etc., it was explained by R. Joseph that it looks like blasphemy, and concerning an intercourse with a daughter of an adulterer, Rabh recollected his tradition, as said above.

An objection was raised from a Boraitha which states: And the following are liable to death by Heaven: An unclean priest who served in the Temple, etc. Hence we see that his punishment is death, R. Shesheth being objected to, and the objection remains.

The same Boraitha continues thus, The following deserve death by Heaven: One who eats grain in which the heave-offering

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is mixed, an unclean priest who eats a heave-offering while defiled, and a commoner who partakes of the heave-offering, a commoner who performs service in the Temple, a priest, while defiled, serving in the Temple, a priest who has had a legal bath after defilement and performs the service in the Temple before sunset, the same is if he performs the service without the prescribed dress, or he who performs service before the prescribed offering after defilement is brought, and also he who serves without the prescribed washing of his hands and feet, or he serves while drunk, or without having cut his hair at the prescribed time. However, one uncircumcised, a mourner while the corpse is not yet buried, and he who worships while sitting, do not come under the category of death by Heaven, but are only forewarned. A priest who has a blemish and he who derives benefit from the sanctuary intentionally--according to Rabbi he comes under the category of death by Heaven, and according to the sages he comes under the category of the forewarned.

Concerning heave-offering mentioned in the Boraitha, said Rabh: A commoner who partakes of heave-offering is to be punished with stripes. Said R. Kabana and R. Assi to him: Let the master say he deserves death by Heaven. And he answered: It reads [Lev. xxii. 9, 10]: "They die therefore . . . I am the Lord who sanctify them. And no stranger shall eat of a holy thing." Hence between "they will die" and "no stranger shall eat" intervenes "I am the Lord," etc., to teach that the punishment of death does not apply to a stranger. But does not the above Boraitha state that such comes under the category of punishment by Heaven? Do you want to contradict Rabh from a Boraitha? Rabh is a Tana, and has the right to differ. [1](#)

"*If a common Israelite served in the Temple*," etc. There is a Boraitha: R. Ismael said: It reads [Num. xviii. 7] "And the stranger that cometh nigh shall be put to death"; and [ibid. xvii. 28] "Everyone that cometh near at all unto the tabernacle of the Lord shall die." As the verse just cited speaks of death by Heaven, the same is the case with the former.

R. Aqiba, however, said: Here the Scripture says: "And die therefore"; and [Deut. xiii. 6]: "And that prophet, or that dreamer of dreams, shall be put to death." And as there it means by stoning, the same is the case here. And R. Johanan

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b. Nuri said: As a false prophet is punished with choking, the same is the case here. What is the

point of their difference? R. Aqiba holds that the expression "put to death" must be analogized with "put to death," and not "put to death" with "shall die." And R. Ismael holds that we should equalize a commoner with a commoner, and not a commoner with a prophet. According to R. Aqiba, however, a prophet who has misled is worse than a commoner.

And the point of difference between R. Aqiba and R. Johanan b. Nuri is the same wherein R. Simeon and the rabbis differ in the following Boraitha: To a prophet who has misled, stoning applies; according to R. Simeon, however, choking applies. But does not a Mishna above state ([p. 239](#)): R. Aqiba said: Choking applies. There are two Tanaim who differ concerning R. Aqiba's statement. Our Mishna mentioned R. Simeon, who said so, in accordance with R. Aqiba's theory; but the Boraitha is in accordance with the rabbis, who are of the opinion, with R. Aqiba. that choking applies.

Footnotes

[223:1](#) It is impossible to give a literal translation of this Boraitha with even an abstract of the explanation as discussed by the Amoraim at length in the text. It is so complicated that the Amoraim themselves could not explain it without correcting the Boraitha or without giving to it an entirely strange interpretation. As was said by Rabha: "In any event, the analogy of expressions cannot be used without objections and difficulties." We therefore give a free rendering of the Boraitha, omitting the discussion.

[228:1](#) Against our method, here are repeated a few lines from First Gate, pp. 55 and 56; but we could not do otherwise, because of the explanation in the text.

[228:2](#) Leeser's translation does not correspond.

[237:1](#) Leeser's translation, "a copy of the law," is entirely wrong.

[239:1](#) See footnote, Vol. XIV., p. 217

[243:1](#) All that is mentioned in the Boraitha cited is inferred from different passages in the Scripture by analogy of expression, followed by a discussion at length about them, which does not belong here and is therefore omitted.

[Next: Chapter X](#)