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THE PROCEDURE OF THE GORTYNIAN INSCRIPTION

I PROPOSE in the following article to inquire what can be determined concerning the procedure of the Gortynian Inscription. It is scarcely necessary to insist on the importance of the subject. This is the only document that we have that gives us an authentic record of the earlier stages of Greek law. The history of Greek law is little known; knowledge of it is most valuable for the light that it throws on the social and political life of Greece, and especially because it supplies a most important element in the comparative study of law. The legal side of history can never be neglected with impunity. Even though the Greeks never became such accomplished lawyers as the Romans, their legal and political institutions were closely connected, and our ignorance of their laws often prevents us from understanding their politics.

It is however for its relation to the laws of other nations that Greek law deserves chiefly to be studied. Our knowledge of the early legal antiquities of European races is still very limited. For the Teutonic and Scandinavian law we have a large quantity of evidence, some of it of the greatest value. To compare with this we have only the Slavonic and Celtic records. The former are not generally accessible; the political subjection and anarchy which has been the fate of nearly all Celtic races has prevented their law from having that practical importance which is necessary to its efficient development. Our knowledge of early Roman law is singularly scanty; the very great and unique development which—to a great extent from political reasons—it received in later times did away with most that was primitive in it. In Greece alone of all European races the highest political and literary achievements came at a time when the introduction of writing was so recent that law had not had time completely to supersede primitive custom. Greek cities in their highest prosperity still retained many of the usages peculiar to the tribal communities from which they had grown. An examination of Greek law, as it was even in the fifth and fourth centuries, may therefore, if properly interpreted, give many interesting points of comparison and contrast with the earliest records of German law.

There is another reason why Greek law is of peculiar value. It alone is certainly a purely indigenous growth. Even in the earliest records of the Teutonic races it is difficult to eliminate entirely the influence of Christianity. The very fact that the German records are chiefly in Latin betrays some

amount of influence from Roman civilization. Roman law—at least in the period at which our contemporary authorities begin—shows largely the influence of Greek thought and philosophy. In Greece alone no external influence is possible. Cretan, Spartan or Athenian law must have been the natural development from autochthonous custom.

Our chief difficulty in investigating the subject has been the want of technical evidence. This we have for the first time in the Gortynian inscription: there is every reason to believe that in the course of time similar inscriptions will be discovered in Crete or elsewhere. The evidence however is often very difficult to interpret. It is impossible to use the code for comparative purposes till its meaning has been established. I propose in this paper to confine myself to the elucidation of one point, that of procedure. Much in it must remain doubtful, and even incomprehensible; some points of considerable interest can however, I think, be established. I have occasionally added a few illustrations from other laws which seem to corroborate my interpretations.[1]

Throughout the code all cases are tried before a single judge, or δικαστής: there is no trace of any trial before a jury for civil causes. It appears moreover as if the whole of a suit was tried before the same δικαστής. The code itself however contains a very important distinction as to the duties of this judge. In some cases he is required δικάζειν, and in some ὀμνύντα κρίνειν. With the exception of one doubtful passage,[2] the distinction is always maintained: when he 'gives judgment' (δικάζει) he does not take an oath; when he 'decides' (κρίνει) he always does. The distinction is not accidental: one passage contains an express reference to it and explains when each procedure is to be adopted.[3] Our first step then must be to ascertain the meaning of this distinction.

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[1] The editions of the Inscription and comments on it to which I have had access are: FABRICIUS (*Mittheilungen des deutschen Archaeologischen Instituts zu Athen*, Bd. ix.).—This contains a drawing of the inscription, with an edition founded partly on his own collation and partly on that of Halbherr. COMPARETTI (*Museo Italiano di Antichità Classica*, Vol. i.).—This also contains a copy of the original writing, with an edition in modern character as well as a translation and notes. This too is founded on the collation of Halbherr and Fabricius. These are the two authorities for the text: all other editions depend on them. BÜCHELER and ZITTELMANN in the *Rheinisches Museum*, 40ter Band, 1885, Ergänzungsheft, give an edition of the text with translation, notes on the language, and full legal commentary. This is the only edition which deals fully with the legal matter of the whole. It is supplemented by an article by the same writers on the two smaller fragments in the *Rheinisches Museum* for 1886. LEWY (Berlin, 1885) has published an edition of the text with translation and short notes. BAUNACK (Johannes and Theodor), Leipzig, 1885.—A text and translation, with elaborate notes on the dialect. JACOB SIMON (Vienna, 1886).—An edition of the first half, with translation and a valuable legal commentary. There is a translation into English by ROBY in the *Law Quarterly*, Vol. ii., and into French by DARESTE in the *Bulletin de Correspondance Hellénique*, Vol. ix.; and an article with useful suggestions on legal points by BERNHÖFT in the *Zeitschrift für vergleichende Rechtswissenschaft*, Vol. vi. In transcription I have followed the spelling of the stone. I have however used the letters η and ω, neither of which occurs in the original.

[2] ix. 37.

[3] xi. 26.

Zittelmann, who has discussed the point, leaves it unsettled.[4] He states moreover in his discussion that 'there is no trace visible of a division of the procedure *in jure* and *in judicio* like that known in Attic and Roman law.' I hope to be able to show that the distinction between the two functions of the judge answers exactly to the distinction between the proceedings before the praetor and judex in Roman law, and to the distinction between *ἀνάκρισις* and *κρίσις* at Athens. The peculiarity of the Cretan is that both parts of the trial take place before the same person. This fact however makes the maintenance of the distinction in procedure all the more remarkable. It will also throw much light on many obscure points in the Attic and Roman law.

The proceedings at the *ἀνάκρισις* at Athens or *in jure* at Rome had the object, not as a rule of finally deciding the case, but of determining what exactly the object of dispute was. The magistrate before whom they took place had to see that all the formalities required by law or custom were complied with; the accuser or plaintiff had to state his case, to produce the documents or other *formal* evidence on which it was founded, and if the defendant was not present to show that with the proper formalities he had been summoned to appear. If the formalities were not complete the case was not proceeded with; if the defendant did not appear, although he had been summoned, or if he did not *in the manner and with the formalities prescribed by the law* deny the charge or claim made by the claimant, judgment was given for the claimant. Only if both sides had properly performed all that was required did the suit pass out of this stage; if however a point of law or fact remained to be decided for which the law provided no purely formal criterion, and which therefore required a consideration of the merits of the case and the evidence, then the *ἄρχων* or the praetor referred it to the decision of a *δικαστήριον* or a judex: before him the parties had to plead their cause, and prove it by argument or by evidence. The important point to notice is that in the first stage the magistrate is bound strictly by the letter of the law: the law orders that a man trying to recover a debt shall begin by doing certain actions and bringing his claims in a certain manner; if he does so, judgment follows for him as a matter of course, unless his opponent performs certain acts and with his friends says certain words; if both do as required, then the judge can do no more, he has to hand over the case thus defined to another court.

This distinction exactly answers to the distinction between the two functions of the *δικαστής* at Gortyn.

This is referred to in the following words:—

xi. 26.—*τὸν δικαστάν, ὅτι μὲν κατὰ μαιτύρανς ἔγρατται δικάδδεν ἢ ἀπώμοτον, δικάδδεν αἳ ἔγρατται, τῶν δ' ἄλλων ὀμνύντα κρίνειν πορτὶ τὰ μωλιόμενα.*

[4] *l.c.* p. 68, &c.

> The judge, in whatever it has been written that he shall give judgment according to witnesses or oaths, shall give judgment as has been written, but in other matters he shall take an oath and decide according to the contentions.

The differences are thus that :—

A.—He δικάζει in those cases only where the law specially enjoins it; he is then bound to give judgment in accordance with the law, and in the judgment he is always bound either by witnesses or oaths.

B.—In all other cases where the law does not order him δικάζειν he decides himself. When he acts in this way, he himself takes an oath and decides on the contentions apparently freely, without being bound by law, witnesses or the oaths.

Now here the important words are κατὰ μαιτύρανς ἢ ἀπώμοτον. We must first establish their meaning.

1. *Witnesses* (μαίτυρες).

It is this expression which has caused the difficulty in understanding the procedure. It has been assumed that the witnesses here referred to include witnesses whose evidence concerns the final matter of dispute between the parties. If this was the case it is clear that the real trial would take place before the δικαστής and so we should not have the distinction between κρίσις and ἀνάκρισις. The passages however in the law where witnesses are mentioned show that this is not the case. The μαίτυρες are not witnesses to any fact; they are formal witnesses to the proper performance of processual acts. Before a man can bring a case into court he has to go through certain formalities, these must be performed before witnesses, the presence of the witnesses is necessary to the validity of the acts, and their statement is the proof required by the law that the acts have been performed. This proof has to be laid before the δικαστής or else the trial cannot proceed. Witnesses are also used to prove contracts, gifts, or transference of property; any actions of this kind to be finally valid must be performed before witnesses specially summoned for the purpose: if a lawsuit arises concerning this contract, their evidence on oath is final proof that the contract or transference did actually take place. If *e.g.* a man has made an engagement before witnesses to pay a sum of money at a certain date, and does not do so, his creditor when he brings the matter into court produces his witnesses who swear to and thereby prove the engagement. This is final on this point, the debtor (except and only by a separate action for perjury against the witnesses) cannot dispute the promise to pay : unless then he has some other defence, *e.g.* that he has already paid, the suit is at an end; it must be decided by the judge κατὰ μαιτύρανς. If he has paid, the payment to be valid must have taken place before witnesses. If the contract has not been made before witnesses and is denied, then the case cannot be settled so easily, and will have to be tried in some other way.

I will now deal with the passages in order to show that this interpretation is correct:—

(I.)

i. 38.—*αἰ δέ κα ναεύῃ ὁ δῶλος, ὧ κα νικαθῇ, καλίων ἀντὶ μαιτύρων δυῶν δρομέων ἐλευθέρων ἀποδεικσάτω ἐπὶ τῷ ναῷ ὁπῆ κα ναεύῃ, ἃ αὐτὸς ἃ ἄλος πρὸ τούτω· αἰ δέ κα μὴ καλῇ ἃ μὴ δείκσῃ, κατιστάτω τὰ ἐγραμένα.*

If the slave with regard to whom he has been defeated takes sanctuary, summoning him before two witnesses, runners, freemen, let him show him at the temple where he is in sanctuary, himself or another for him; but if he does not summon him or does not show him, let him pay what has been written.

If a man *A* has had in his possession a slave who is judged by the court to belong to *B*, an order for restitution is made; if this is not obeyed *A* incurs certain penalties. Suppose however that the slave has fled to a temple so that *A* cannot restore him. *A* must then go to *B* accompanied by two witnesses and point out where the slave is; if he does so, even though *B* never recovers the slave, *A* has to pay only the price of the slave without any penalty. If *B* sued for the penalties, the plea of *A* that he had gone to asylum supported by the evidence of the witnesses that notification had been given would be an absolute bar to all further proceedings. The judge must decide according to the witnesses, and the case would never proceed beyond the first stage.

(II.)

Fr. B. 5.—*αἰ δέ κα τιτνάκῃ ἃ μὴ νυνατὸν ᾖ ἐπιδιέθθαι, καλῆν ἀντὶ μαιτύρων δυῶν ἐν ταῖς πέντε, αἰ δεικσεῖ, ὁπῆ κ' ᾖ, κ' ὁρκιώτερον ἤμην αὐτὸν καὶ τὸνς μαρτύρανς, αἰ ἐπεδίετο ἃ ἐπήλευσε ἃ ἐκάλη δεικσίων.*

Fr. A. 6.—*αἰ δέ κα μὴ ἐπιδίηται τὸ παρωθὲν ἃ μὴ ἐπελεύσῃ τὸ τετνακὸς ἃ μὴ δείκσῃ, αἴ ἔγρατται, μὴ ἔνδικον ἤμην.*

If it dies or he is not able to pursue it he shall summon him before two witnesses within five days to show where it is, he and the witnesses shall be on their oath,[5] as to whether he pursued it or brought it to him or summoned him to show it.

But if he does not pursue before, or does not bring the dead animal to him or does not show it to him as has been written, there shall be no case.

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[5] *ὁρκιώτερον*: for the meaning of this cf. *infra*. p. 64.

A has lost cattle owing to the action of animals belonging to *B*; if he wants to recover in a court he must perform certain actions. He must first of all look for the strayed cattle: if the animal is dead he must take it to *B* and lay it before him claiming restitution; if he cannot find it he must go to *B* and ask where it is. All these acts must be performed before witnesses. Unless by witnesses he can prove that he has performed them, he has no case (*μὴ ἔνδικον ἤμην*); and his suit falls to the ground at once. If he has done so then there will be a *prima facie* case against *B*, and judgment will be given for *A* unless *B* has some defence. If *B* pleaded *e.g.* that the animal which did the damage was not his, then the case would proceed to the next stage; otherwise it is decided at once *κατὰ μαιτύρανς*.

(III.)

iii. 44.—*αἰ τέκοι γυνὰ κερεύονσα, ἐπελεῦσαι τῷ ἀνδρὶ ἐπὶ στέγαν ἀντὶ μαιτύρων τριῶν. αἰ δὲ μὴ δέκσαιτο, ἐπὶ τᾷ ματρὶ ἔμεν τὸ τέκνον ἢ τράπεν ἢ ἀποθέμεν, ὁρκιωτέρως δ' ἔμεν τὼς καδεστὰνς καὶ τὼς μαιτύρανς, αἰ ἐπήλευσαν. αἰ δε Fοικέα τέκοι κερεύονσα ἐπελεῦσαι τῷ πάστᾳ τῶ ἀνδρὸς ὃς ὤπυιε, ἀντὶ μαιτύρων δυῶν.*

iv. 6.—*κόρκιώτερον δ' ἔμεν τὸν ἐπελεύσαντα καὶ τὼς μαιτύρανς. γυνὰ κερεύονσ'αἰ ἀποβάλοι παιδίον πρὶν ἐπελεῦσαι κατὰ τὰ ἐγραμμένα, ἐλευθέρω μὲν καταστασεῖ πεντήκοντα στατήρανς, δώλω πέντε καὶ Fίκατι, αἴ κα νικαθῇ.*

If a woman gives birth to a child when separated from her husband (by divorce or death), she shall cause the child to be brought to her husband to his house before three witnesses. If he does not receive it, the child shall belong to the mother, to rear it or to put it away, and the relatives and the witnesses shall be on their oath, whether they brought it to him. But if a slave-woman bears a child when separated from her husband, she shall cause it to be brought to the master of the man who is the father before two witnesses, ... and he who brought it and the witnesses shall be on their oath. If a woman who is separated puts aside a child before causing it to be brought according as it is written, in the case of a free child she shall pay 50 staters, in the case of a slave 25, if she is defeated.

Here, again, the witnesses are witnesses to a formal action, called beforehand for the express purpose of being witnesses. If the father brings an action, or the master of the father, to get damages for the exposure of a child, and the defendants can prove by the required number of witnesses that the father had an opportunity of claiming it, then the *δικαστής* will at once give judgment *κατὰ τοὺς μάρτυρας*: there will be no case to have a regular trial about.

(IV.)

ii. 28 etc.—The case is that of a man being caught in the act of adultery in the house of the father, brother, or husband of a woman. The master of the house may seize him, when he has done so—

> *προϝειπάτω δὲ ἀντὶ μαιτύρων τριῶν τοῖς καδεσταῖς τῶ ἐναιλεθέντος ἀλλυέθθαι ἐν ταῖς πέντ' ἀμέραις, τῶ δὲ δώλω τῷ πάσται ἀντὶ μαιτύρων δυῶν. αἰ δέ κα μὴ ἀλλύσηται, ἐπὶ τοῖς ἑλοῦσι ἔμεν κρῆθθαι ὁπαῖ κα λείωντι.*

Let him give information before three witnesses to the relations of him who has been taken, that they may ransom him within five days, in the case of a slave, to his master before two witnesses. If he is not ransomed, he shall belong to the captors to do with him what they will.

Here just in the same way the law requires him to act according to certain formalities; the formalities must be performed before witnesses, if they are not then they are not valid. In this case the proper performance of the formalities helps to protect the captor against a charge of false imprisonment or violence. If he, after waiting five days, then killed the adulterer and was afterwards accused of murder, the evidence of the witnesses would protect him from the lawful revenge of the relatives.

So far we have had to do purely with preliminary acts necessary to legitimate the process. In some cases the witnesses have to be present to prove the proper performance of an act which has to be performed in execution of the order of the court after the trial.

(V.)

xi. 46.—*γυνὰ ἀνδρὸς ἃ κα κρίνηται, ὁ δικαστὰς ὄρκον αἰ κα δικάκσῃ, ἐν ταῖς Ϝίκατι ἀμέραις ἀπομοσάτω παριόντος τῶ δικαστᾶ. ὅτι κ' ἐπικαλῇ, προϝειπάτω τὸ ὑπάρκον τἀδίκας τᾶ γυναικὶ καὶ τῷ δικαστᾶ καὶ τῷ μνάμονι προτέταρτον ἀντὶ μ*[*αιτύρων*].

If a woman is separated from her husband, supposing the judge has given judgment that she shall take an oath, let her take the oath within twenty days in the presence of the judge. Whatever charge he brings against her, let him proclaim the matter of the suit to the woman and to the judge and to the mnemon four days before, before witnesses.

This refers to an oath of purgation (cf. *infra*, p. 65).

The accuser has here to bring witnesses when he formally reads the charge of which the woman has to clear herself, in order that the record of the oath may be clear and undoubted.

Besides processual acts, witnesses are also called to prove contracts or agreements; in this case also however they are not chance witnesses, they are men who have been present at the transactions to which they give evidence, having been summoned for the express purpose of giving evidence to it. Their evidence is necessary to its complete validity: *e.g.* when an inheritance is divided between the heirs, it is expressly enjoined that witnesses (*μαίτυρες*) should be present.

(VI.)

v. 51.—*δατιομένοιδ δὲ κρήματα μαιτύρανς παρέμεν δρομέανς ἐλευθέρονς τρίινς ἢ πλίανς.*

When they divide the property witnesses shall be present, runners freemen, three or more.

The evidences of three witnesses in a court would be final and absolute proof that the division had been made, and would give a title for the possession of any property the ownership of which was disputed.

(VII.)

We have also a case which deals with the process for recovery of a debt—

ix. 43.—*αἴ τίς κα πέραι συναλλάκσαντι ἢ ἐς πέρας ἐπιθέντι μὴ ἀποδιδῷ, αἰ μέν κ' ἀποπωνίωντι μαίτυρες ἡβίοντες, τῶ ἐκατονστατήρω καὶ πλίονος τρεῖς, τῶ μείονος μέττ' ἐς τὸ δεκαστάτηρον δύο, τῶ μείονος ἕνα, δικαδδέτω πορτὶ τὰ ἀποπωνιόμενα· αἰ δὲ μαίτυρες μὴ ἀποπωνίοιεν, ἢ κ' ἐ[πι]θῇ ὁ συναλλάκσανς, ὅτερόν κα ἕληται ὁ μενπόμενος, ἢ ἀπομόσαι ἢ συν-*

If any one made a promise for a date, or did not pay back to some one who had made a loan up till a certain date, if witnesses declare of full age, in a matter of 100 staters or more, three; of less down to 20 staters, two; of less, one; let him give judgment according to the statement of the witnesses; but if witnesses did not declare, or if he who made the promise . . . . . [6], let him either take an oath or . . ., whichever the plaintiff chose.

This is a very valuable case. If a man has made a promise to pay before witnesses and does not do so, the creditor has only to prove the promise by the witnesses, and judgment follows as a matter of course. There is really no trial, the judge only orders the execution of the agreement which has been made. If however the contract was not before witnesses, or if there is some further defence so that the evidence of the witnesses is not final, another way of making a decision is necessary.

[6] Reading and meaning are doubtful.

(VIII.)

One of the most important passages is unfortunately very obscure.

ix. 24.—*αἰ ἀνδεκσάμενος ἢ νενικαμένο[ς ἢ . .] ὀιότανς ὀπέλων ἢ διαβαλόμενος ἢ διαϝειπάμενος ἀποθάνοι, ἢ τουτῷ ἄλλος, ἐπιμωλῆν τῶ πρώτω ἐνιαυτῶ. ὁ δὲ δικαστὰς δικαδδέτω πορτὶ τὰ ἀποπωνιώμενα· αἰ μέν κα νίκας ἐπιμωλῇ, ὁ δικαστὰς κ' ὁ μνάμων αἴ κα δόῃ καὶ πολιατεύῃ· οἱ δὲ μαίτυρες οἱ ἐπιβάλλοντες, ἀνδοκὰδ ἔκεν κοἰοτᾶν. καὶ διαβολᾶς καὶ διρεσίος μαίτυρες οἱ ἐπιβάλλοντες ἀποπωνιόντων· ἢ δέ κα ἀποϝείπωντι δικαδδέτω ὀμόσαντα*[7] *αὐτὸν καὶ τὸνς μαιτύρανς νικῆν τὸ ἁπλόον.*

If any one who has become surety, or has been defeated in a suit, or is in debt (?), or claims to postpone payment, or has brought in a counter-plea, die; or if the creditor die; then the case must be brought afresh into court within a year. The judge shall give judgment according to the statements (of the witnesses). In the case of a suit already decided the judge (who has decided it) and the recorder shall give evidence, if he is alive and in the city; in the case of a surety or a debt the witnesses whose duty it is (or the relations as witnesses); also if the defendant has claimed a postponement or has made a counter-plea, the witnesses whose duty it is (or the relations as witnesses) shall give evidence; but if they refuse the evidence the judge shall give judgment that the claimant and his witnesses shall support their statement on oath, and that he shall get the sum claimed (but that no additional fine be imposed).[8]

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[7] Fab. *ὀμόσας τὰ αὐτῶν.*

[8] It is impossible to discuss all the difficulties of this passage here: on some points however my translation requires justification. For *ὀιότανς* (or whatever the word really is) no satisfactory explanation has been given. *διαβαλόμενος* and *διαϝειπάμενος* must refer to some action on the part of the debtor who makes some counter-plea to show why he need not pay. After his death the object of the court is to put the claimant in the same position with respect to the heirs of the debtor as he was to the debtor himself; in order to achieve this object each party has to bring forward proof for each stage in the proceedings which has already been reached. The claimant has (*a*) in the case of a suit already decided to prove this by the officials of the court; (*b*) in the case of a surety, or other form of debt to bring formal evidence of the contract. If the debtor, while alive, has entered no defence, judgment will then be given for the claimant: if the debtor has made a defence, then his heirs have to bring evidence that he has done so; this is expressed in the words *διαβολᾶς καὶ διρεσίος.* This is evidence not as to the validity of the defence, but as to the fact that there was a defence. If this evidence breaks down (this seems the only possible meaning of *ἀποϝείπωντι*, cf. xi. 11) then judgment for the claimant follows as though the defence had not been set up. The law then adds two regulations: (*a*) that the claimant and his witnesses shall take an oath to the truth of their statement; (*b*) that notwithstanding the failure of an attempt to escape payment no fine shall be imposed, but only the simple debt paid.

The peculiarity of this interpretation is that I take *ἀποϝείπωντι* to refer only to the witnesses for the *διαβολὰ* and *διρεσίς.* This seems the only possible deduction from the fact that judgment for the claimant follows the refusal of

At least part of this is clear: if a man dies in debt, the creditor has to bring the matter before the court afresh (*ἐπιμωλεῖ*). If he can bring witnesses who have been called officially at the time to witness the debt, then judgment will be given for him. One special case is, supposing the matter has already been tried in court, then the officials of the court, the judge and the 'recorder' (*μνάμων*) are the witnesses.

It is noticeable that the officials are chosen to be the witnesses of a judgment in court; in other communities we find that the people present in the court are solemnly called on to bear witness.

(IX.)

x. 25.—*ἄντρωπον μὴ ὠνῆθαι κατακείμενον, πρίν κ' ἀλλύσσηται*[9] *ὁ καταθένς, μηδ' ἀμπίμολον, μηδὲ δέκσαθαι μηδ' ἐπισπένσαθαι μηδὲ καταθέθαι· αἰ δέ τις τούτων τι Fέρκσαι, μηδὲν ἐς κρέος ἔμεν, αἰ ἀποπωνίοιεν δύο μαίτυρες.*

It shall not be lawful to have sold to one a man who is deposited in trust until he who has deposited him have redeemed him (or *v.l.* have arranged), nor one about whom there is a lawsuit, nor receive him (as a present), nor have him promised or receive him as a pledge; if he do any of these things, then it is invalid, if two witnesses make a declaration.

Here the declaration of the witnesses is clearly to the fact that the slave is in pledge, or that there is a lawsuit about him. The original owner has only to prove it by the witnesses present when the agreement was made, and the later transaction becomes null and void.

In all these cases *μαίτυρες* refers to witnesses of formalities. The form or act that they have to prove is sometimes proceedings in court, sometimes those parts of a process which are essential but take place out of court, sometimes contracts or agreements. In all cases the witnesses are official, they must have been summoned beforehand for the purpose of witnessing the act; it does not include the evidence of accidental spectators.

These passages are sufficient to show that this is the common meaning of the word; there remain two groups of passages where the meaning is at first less obvious. We may however use those which are certain to interpret the others.

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the witnesses to give evidence. The point of the words *νικῆν τὸ ἀπλόον* is that it guards the heirs from the additional fine or double penalty which was generally imposed on those who sought to evade an obligation. Before the heirs are required to pay, the claimant must make formal proof in court of his claim. In xi. 31, &c., we have further regulations on the matter. The heirs may, if they like, instead of paying the debt, resign the whole inheritance to the debtor.

If this is right we shall have for *ἀνδοκάδ* in v. 5 to read *ἀνδοκάν*. Until a fresh examination of the stone is made it is however improbable that any satisfactory interpretation will be found.

[9] Baunack, *ἀλλύσεται*; Bü. *ἀρτύσ-*; Fab. *καττύν-*.

(X.)

i. 1, etc.—*ὅς κ' ἐλευθέρῳ ἢ δώλῳ μέλλῃ ἀνπιμωλῆν, πρὸ δίκας μὴ ἄγεν. αἰ δέ κ' ἄγῃ, καταδικακσάτω τῶ ἐλευθέρω δέκα στατήρανς, τῶ δώλω πέντε ὅτι ἄγει, καὶ δικακσάτω λαγάσαι ἐν ταῖς τρισὶ ἀμέραις. αἰ [δέ] κα μὴ λαγάσῃ, καταδικαδδέτω τῶ μὲν ἐλευθέρω στατῆρα, τῶ δώλω δαρχνὰν τᾶς ἀμέρας Fεκάστας πρίν κα λαγάσῃ. τῶ δὲ κρόνω τὸν δικαστὰν ὀμνύντα κρίνεν. αἰ δ' ἀννίοιτο μὴ ἄγεν, τὸν δικαστὰν ὀμνύντα κρίνεν, αἰ μὴ ἀποπωνίοι μαῖτυς.*

The question which the judge has to settle here is whether an illegal seizure of a slave has been made; one party asserts it, the other denies it. This being a question of fact which the law does not know, the judge has to decide on oath, *unless a witness makes a declaration.* The passage itself gives no clue to what the witness may be supposed to make a declaration about. It may be a witness for the defendant who came with him and proves that a legal and peaceful transference took place, and not a violent seizure. It may also be a witness that the slave had been adjudged to the defendant in a court, in which case he was allowed to seize him.[10] It is possible that he is a witness of the plaintiff who was present, and who was called on (*ἐπιμαρτύρομαι* in Attic law) to bear witness to the assault. At present we have however no other instance of this kind of *μαρτυρία* in this law. The fact that the judge must follow his evidence shows that he is formal evidence of the same kind as that in the other cases.

If however the agreement has not been made before witnesses, then it has to be proved in some other way. The witnesses are here too formal witnesses summoned beforehand for the express purpose of witnessing the agreement.

1. 14, etc.—*αἰ δέ κα μωλῇ ὁ μὲν ἐλεύθερον, ὁ δὲ δῶλον, καρτόνας ἔμεν . . . ι*[11] *κ' ἐλεύθερον ἀποπωνίωντι. αἰ δέ κ' ἀνπὶ δώλῳ μωλίωντι πωνίοντες Fόν Fεκάτερος ἔμεν, αἰ μέν κα μαῖτυς ἀποπωνῇ, κατὰ τὸν μαίτυρα δικάδδεν· αἰ δέ κ' ἢ ἀνπότεροις ἀποπωνίωντι ἢ μηδατέρῳ, τὸν δικαστὰν ὀμνύντα κρίνεν.*

This, as Zittelmann points out, is a 'contravindicatio.' Each party maintains a positive plea: each says that the slave is his: he does not simply say 'the slave is not yours' but 'the slave is mine.' The *μαίτυρες* are witnesses to some formal action or agreement on which the possession is grounded, *e.g.* if the slave had gone to one of the parties on the division of his father's property the *μαίτυρες* who were present would give their evidence; unless the other party can produce a title at least as good, there is no cause to go on with the case.

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[10] i. 55.—*τὸν δὲ νενικαμένω καὶ τὸν κατακείμενον ἄγοντι ἄπατον ἔμεν.*

[11] C. and Bü. *ὅττοι.*

If however he brings witnesses to assert that they were present as formal witnesses when the slave was transferred to him legally by a sale or as a present, then as both sides have a title the judge must decide which is the best. This may be a very simple matter: it may be merely a question of date, but for such matters witnesses are not used, the judge has to decide on oath. This passage, interpreted by the others, shows certainly the nature of *μαίτυρες* and the way in which they were used.

Only one passage remains; it is one which has been frequently misunderstood.

(XI.)

ii. 16.—*αἴ κα τὰν ἐλευθέραν ἐπιπέρηται οἰπῆν*[12] *ἀκεύοντος καδεστᾶ, δέκα στατήρανς καταστάσει, αἰ ἀποπωνίοι μαῖτυς.*

If he seduces a freewoman, who is in the charge of a relation, he shall pay ten staters, if a witness declares.

It is not quite clear whether the passage refers to seduction or to secret marriage. The peculiarity of the case is that the woman is in the keeping of a *καδεστής*, *i.e.* obviously not of a father, brother or mother. The punishment is a fine to be paid to the *καδεστής*. The *καδεστής* then in order to recover damages for the loss of chastity has to prove his right to sue. The witness is not a witness to prove the injury: no witness has been required in the preceding cases. We must suppose that the charge of the woman has been formally assigned to the relation before witnesses; otherwise he has none of the legal rights and privileges of guardianship. Cf. ix. 50.

I think then it may be considered proved that in this code the word *μαίτυρες* refers to formal witnesses of processual or contractual acts: there is no single case where it refers certainly to evidence which is brought to settle disputed points of fact.

In other early systems of law this seems to be the common and regular meaning of the word. What we call evidence, the attempt to get at the truth of an event by the sworn statement of any one who may have any accidental knowledge bearing on the event, is of late growth. It was of course not unknown, but it was unregulated and not much confidence was attached to it. In the early German codes we can distinguish between 'testes' or *zeugen*, and 'probatio.' In the earliest codes the word *testis* is nearly always, if not universally, applied to formal witnesses to processual acts or contracts. It is also used of the evidence of neighbours or members of the community to matters of common notoriety, such as the ownership of land. The two uses are closely akin: the title to freedom or property depended on the record of the community to which all belonged, and all members of it, especially the oldest, were always liable to be summoned as *testes* or *zeugen* of this: it was so to speak one of their public duties. On

[12] C. *ἐπιπερέταιο φενακεύοντος.*

the other hand, in cases of murder or robbery and generally speaking of facts, in the early codes *testes* are never summoned to prove: they are only used to prove the *mannitio* and other similar acts. According to the earliest German law, if a question of fact remained to be decided witnesses were not used: the regular procedure was by ordeal, trial by combat or the purgatory oath. On the other hand, just as at Gortyn, witnesses are frequently used to prove formal acts, such as a summons or a sale, and the codes are full of reference to these witnesses. It is only necessary to quote a few passages to illustrate this. For the summons to court which occupies such an important place in Roman and Attic law, cf. Lex Sal. l. 2. et ille qui alium mannit cum testibus ad domum illius ambulare debet.

Ib. lvii.—Ibi duodecim testes erunt qui per singulas vices tres jurati dicant, quod ibidem fuerunt ubi rachineburgii judicaverunt ut aut ad ineo ambularet aut fidem de conparibus faceret.[13]

For the case of a slave who has to be produced to answer a charge cf.

Lex Rib. xxx. 11.—Quod si .... fuga lapsus fuerit, ad placitum veniens (dominus) cum tribus testibus in harario conjurat, quod servus illi, quem ad igneum representare debuerat, extra ejus voluntate fuga lapsus sit.

The testes here prove not the flight of the slave, but the oath of the master. For witnesses to a sale cf.

Lex Rib. lix.—Si quis alteri aliquid venderit et emptor testamentum vindicionis accipere voluerit, et in mallo hoc facere voluerit, precium in praesente tradat, et rem accipiat, et testamentum publici conscribatur. Quod si parva res fuerit, septem testibus firmetur, si autem magna duodecim roboretur.

Et si quis in posterum hoc refragare vel falsere voluerit, a testibus convincatur.

Here there is a written document, but the procedure is obviously the same; the older procedure is shown in a passage that follows on this:

Ib. lx.—Si quis villam aut vineam vel quamlibet possessiunculam ab alio comparaverit, et testamentum accipere non potuerit, si mediocres res est, cum 6 testibus, et si parva, cum tres, quod si magna, cum 12 ad locum tradicionis cum totidem numero pueros accedat, et sic eis praesentibus

[13] In the oldest of the codes, the Lex Salica, this distinction is preserved almost without exception. An apparent exception, ii. 13, is not a real one, for though testes are referred to in connection with the probatio, the point that they prove is 'quod votivus fuit,' *i.e.* a solemn act of consecration. Similar is xxxiii. 2: 'Si quis cervum domesticum signum habentem furaverit aut occiderit, qui ad venationem mansuetus est et hoc per testibus fuerit adprobatum quod eum dominus suus in venationem habuisset.' The testes prove not the act of theft but the condition of the stag.

xxxvi.—'Si quis homo ex quolibet quadrupedem domesticum occisus fuerit et hoc per testibus fuerit adprobatum,' is a real exception. As is also ix. 8, 'si convinctus eum fuerit ad testibus.' At least one of the MSS. however adds in the first case the words 'quod non soluerit.'

pretium tradat et possessiones accipiat, et unicuique de parvolis alapes donet et torquet auriculas, ut ei in postmodum testimonium praebeant.

With the local variations we have here formal witnesses called to prove the title. Just however as in (VII.) ix. 51 if witnesses could not be got the matter was decided by oath, so the clause continues—

Si autem testes non potuerit admanire, ut ei testimonium praebeant, tum rem suam cum 3 sibi[14] cum 7 cum sacramentis interpositione sibi studeat evindicare.

If he cannot get witnesses to prove the original transfer he does not prove possession by witnesses but by oath with the oath of others. This oath of the 'eideshelfer' is of course in some ways evidence: but it is never spoken of as 'testes' 'zeugen' and is quite different in its origin.

In one of the Capitularies of Chlodovicus is a long paragraph giving regulations for discovering a murderer; in the Lex Salica, xliii., regulations for discovering who is guilty when a man was killed in 'contubernio': in neither case is there any mention of 'testes.' The procedure is to find out the people against whom there is *prima facie* ground for suspicion and then make them clear themselves by an oath. Testes are not used to prove facts unless they have before the fact been deliberately summoned by one of the parties to witness his action. The best account of it is given by Brunner, who says: "The proof by witness (Zeugenbeweis) had in the old German law a much smaller application than in modern law. Accidental knowledge did not suffice to form the legal character of a witness. Had any one the most minute knowledge of the matter in dispute he could not appear as witness if he had not been *at the time led by the parties to the action in question in order to give evidence if necessary*.[15] Besides these witnesses in the strict sense, who *i.e.* are 'led' (gezogen) formally to confirm legal acts, and so may be called 'geschäftszeugen,' there were known only the 'gemeindezeugen' who gave testimony to conditions and actions which were notorious in the place or community, in their character as neighbours or members of the same country. The proof of judicial acts, which in later times meets us as a special form of evidence legally distinguished, was in the oldest period given, not as 'Dingzeugniss' by the judge and the *Schoffen*,[16] but simply by the party with the help of the ordinary proof." [17]

In the Anglo-Saxon laws the word witness is without exception used in a similar sense: it means those who were present at a contract or sale, in order to be witnesses of it, *e.g.* 'Let no man exchange any property without the witness of the reeve, or of the mass-priest, or of the land-lord, or of the "herderc" or of other un-lying men.' [18]

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[14] *Sc.* 'sive' (as in Codex B).

[15] This passage is quoted from Beaumanoir, xxxix. 57: 'Nus tesmoins combien qu'il seust de le coze ne soloit rien valoir, s'il n'estoit appelés des parties à le coze fere proprement per porter tesmonage de le coze qui feu fête de se mestiers estoit.'

[16] Contrast this with ix. 32.

[17] Brunner, *Entstehung der Schwurgerichte*. Cf. also Ib. *Geschichte des Deutschen Rechts*, ii. 392, &c.

[18] Aeth. i. 10.

'And let every man, with their witnesses, buy and sell every of the chattels that he may buy or sell, either in a "burh" or in a wapentake; and let every of them, when he is first chosen as witness, give the oath that he never, neither for love, nor for fear, will deny any of those things of which he was witness, nor declare any other thing in witness, save that alone which he saw or heard: and of such sworn men, let there be at every bargain two or three as witnesses. And he who rides in quest of any cattle, let him declare to his neighbours about what he rides, and when he come home, let him also declare with whose witness he bought the cattle.'[19]

'And let no one buy anything above the value of four pence, either living or lying, unless he have the true witness of four men, be it within a burh, be it in the country. For if it then be attached and he have no sure witness, let there be no vouching to warranty, but let his own be rendered to the proprietor.'[20]

It is a peculiarity of the old English law that the witnesses are an official body of men appointed once for all from whom all witnesses for each suit are to be taken. They have to prove not only legal actions to which they are witness, but generally ownership or title to property; they are the records of all transfer of property, their declaration is legal proof. In no case however do witnesses prove actions, such as robbery or murder; it is not till the Norman law has supplanted the English that the word witness is used in this sense.

In Icelandic law a similar distinction is made. Witnesses (vatterd) are used and required in all ceremonial actions. On the other hand the truth of doubtful points of fact is determined by a sworn committee of enquiry (quiþr) who occupy a position something between that of a jury and of witnesses. The word vatterd is restricted in its use just as is μαῖτυς, zeugen, gewittness or testis.

In Roman law there is abundant evidence that this was the original meaning of the word 'testis' and its derivatives. It is only necessary to refer to the words of the XII. Tables:[21] 'Si in jus vocat, ito. Ni it, antestamino igitur eum capito.' The word testimonium and all the proceedings connected with the making of a will are simply an instance of the regular procedure with 'testes.' The *Litis Contestatio* is the calling on those present in court to bear witness to the proceedings.

At Athens it is interesting to notice that the law of evidence never really progressed. As is well known in a δικαστήριον there was no examination of witnesses, all that could be done was to read out the μαρτυρίαι that had been heard in the ἀνάκρισις. Of course these μάρτυρες were in later times called with a view to the later proceedings before the δικασταί and were no longer confined to witnesses to formal acts, but the old rule was maintained that μαρτυρίαι belonged to the preliminary and formal proceedings. This is also shown by the rule which excluded slaves and women from giving

[19] Edgar, *Supp.* 6. [20] Cnut. 24. [21] Bruns. i. 1.

evidence. At Rome this custom was broken through at an early period; witnesses were freely heard and examined by the judex.

It appears then that in all our earliest authorities we have no record of witnesses used as now of casual spectators who are required to give evidence which may throw light on the matter in dispute. On the other hand the old laws are full of regulations with regard to these formal witnesses. The distinction of the two kinds is that while according to modern notions the statement of a witness is something to be weighed, of which the credibility and importance has to be estimated, the statement of the formal witness is for the time absolute proof of the fact to which he has been witness. The procedure belongs of course chiefly to the period before the introduction of writing. It was soon superseded by written records and written contracts. When this was done the words for witness got a more extended use. It is therefore only in the oldest authorities, the English codes, the Lex Salica,[22] the Scandinavian authorities and the Gortynian code that we can expect to find the word used with its one meaning alone; in them as a matter of fact and in them alone the words are used only in this technical sense.

The fact then that when the δικαστὰς δικάζει he has to do so κατὰ μαιτύρανς, is not a reason for supposing that the real trial took place at this stage; μαρτυρία in its technical sense was as in other laws confined to the purely formal procedure, which is to be distinguished from the real settlement of a disputed point by bringing the minds of one or more men to weigh opposing evidence or pleas. The production of the μαρτυρίαι was like the production of signed contracts or official records of a transaction in a modern court. The proof of a payment by μάρτυρες was like proof by producing a receipt to a bill.

2. *Oaths.*

The second characteristic in the preliminary procedure is that it may be ἀπώμοτον. In order to understand this it is necessary to draw attention to a distinction of great importance in the wording of the code, which has been ignored by Zittelmann. In the code we must distinguish between two kinds of oaths. There is the oath by which the formal assertions of witnesses or of either of the parties to a suit are supported. We do not know whether witnesses and pleaders were always obliged to take an oath, probably the opponent could always require them to do so; this oath is referred to in the expression ὁρκιώτερος. Quite distinct from this is the oath by which after the charge or plea has been formally established the accused clears himself; this is the purgatory oath so common in German law, and is closely akin to the ὅρκος in the πρόκλησις εἰς ὅρκον of Attic law.[23] This is always referred to as ἀπόμόσαι. When the pleas on both sides had been made, the usual course was for the judge to take an oath and

[22] For the Lex Salica see however Brunner, *op. cit.* ii. 394–5. This volume did not appear till after the above was written.

[23] On the πρόκλησις εἰς ὅρκον see an article in the *Classical Review*, Feb. 1893.

then decide the point of dispute which remained. In some cases however the law says that this shall be decided not by argument before a sworn judge but by the solemn oath of the accused. This is clearly quite distinct from the oath by which the witnesses confirm their statement; as the distinction however has not been noticed I must justify it by referring to the various passages.

The meaning of *ὁρκιώτερος* is determined by the fact that, in three of the four places where it occurs, it is used of *μαίτυρες*: it is used to confirm their statement and that of the party.

These passages are:—

> Fr. B 3 etc.—*ἵππον δ[ὲ κ'ημ]ίονον κ'ὄνον τὸ μὲν νυνατὸν ἐπιδιέθθαι, ᾧ ἔγρατται· αἰ δέ κα τετνάκηι ἢ μὴ νυνατὸν ᾖ ἐπιδιέθθαι, καλὴν ἀντὶ μαιτύρων δυῶν ἐν ταῖς πέντε, αἰ δεικσεῖ, ὁπᾶ κ'ᾖ, κ' ὁρκιώτερον ἤμην αὐτὸν καὶ τὸνς μαιτύρανς αἰ ἐπεδίετο ἢ ἐπήλευσε ἢ ἐκάλη δεικσίων.*
>
> If it dies or he is not able to pursue it, he shall call him before two witnesses within five days whether he will show it where it is, and he himself shall be on his oath and the witnesses, whether he pursued it or called him to show it.

And in the passage quoted above (III.):—

> iii. 44.—*αἰ τέκοι γυνὰ κερεύονσα ἐπελεῦσαι τῷ ἀνδρὶ ἐπὶ στέγαν ἀντὶ μαιτύρων τριῶν —· ὁρκιωτέρως δ' ἔμεν τὼς καδεστὰνς καὶ τὼς μαιτύρανς, αἰ ἐπήλευσαν.*

In the case of a slave it is *κὸρκιώτερον ἔμεν τὸν ἐπελεύσαιτα καὶ τὼς μαιτύρανς*.

It is quite clear that in both cases the oath here referred to is one which accompanies and confirms the plea and the witnesses who support it. Whether or not they were always put to the oath we cannot say; or, if the rule varied, what it was that fixed it for each case. It is not the oath of purgation which belongs to a subsequent stage; we may suppose that if one party stated his case with the evidence of the procedure witnesses, his opponent could require that he should be compelled to make the statements on oaths; if he did so they were proved, if not they fell to the ground, The oath however did not as a rule complete the case, it only confirmed the grounds on which it was begun; it took place at the same time as the *μαιτυρία* and was part of it.

The other case is more difficult. The law is giving the fines to be paid in cases of rape: the last clauses of the chapter refer to rape on a slave-girl by her own master.

> ii. 11.—*ἐνθοδιδίαν δώλαν αἰ κάρτει δαμάσαιτο, δύο στατήρανς καταστασεῖ, αἰ δέ κα δεδομναμέναν πεδ' ἀμέραν, ὀβελόν, αἰ δέ κ' ἐν νυκτὶ δύ' ὀβελόνς, ὁ ρ κ ι ω τ έ ρ α ν δ' ἔ μ ε ν τ ὰ ν δ ώ λ α ν.*

If he forcibly violates a slave-girl who belongs to the house, he shall pay two staters, if [he violates] by day one who has been (already) overpowered, one obol, but if it be at night, two obols, *and the slave-girl shall be on her oath.*

In order to determine the meaning of this we must see in what this case differs from the others just preceding where there is no such provision. The preceding clauses relate to violence offered to a free man or woman, a woman who is in the charge of one who is not a citizen, or a slave (*Ϝοικέας—Ϝοικέαν*), presumably one belonging to some one else; the *ἐνθοδιδία δώλα* differs from the other cases in that she is completely in the power of her master. In all the other cases the suit would be brought by the guardian or husband of the freewoman, or by the master of the slave. This is shown clearly by a comparison of iii. 45, etc., where the *πάστας* in the case of a slave takes the place of the *καδεσταί*. The slave-girl then who is violated by her own master has naturally no one who can bring a suit or through whom she can obtain redress. To remedy this the law especially directs that she should be permitted to lay a charge against him *herself*, and support it by an oath. The accused would of course be allowed to clear himself by oath or in some other way. It is sufficiently extraordinary that at this early period a slave should be allowed to bring an action against her own master and apparently exact damages; the statement however is so clear that we must accept it. It is impossible to agree with Zittelmann in his explanation that the oath of the woman in this case, like an oath of purgation, decided the matter, and was followed by the condemnation: this affords no explanation of the fact that it applies only to the *ἐνθοδιδία δώλα*, and is unconnected with the other uses of the word *ὁρκιώτερος*. As we shall see in all the undoubted cases where an oath absolutely ends the proceedings and is followed by judgment, the oath is taken by the accused, and the word *ἀπομόσαι* is used.

The following instances are undoubted cases of the purgatory oath; in not one of them is the word *ὁρκιώτερος* used.

iii. 6.—The matter in question is that an accusation is brought against a woman who is separated from her husband, of having taken away some property that belongs to him. If she acknowledges the charge, she is to pay a fine of five staters: it then continues.

ὧν δέ κ' ἐκσαννησήται, δικάκσαι τὰν γυναῖκ' ἀπομόσαι τὰν Ἄρτεμιν παρ' Ἀμύκλαιον παρ' τὰν τοκσίαν. ὅτι δέ τίς κ' ἀπομοσάνσᾳ παρέλῃ, πέντε στατήρανς κατασταθεῖ καὶ τὸ κρέος αὐτῶν.

With regard to that which she denies, he shall pass judgment that the women deny it on oath by Artemis near the Amyclaean near the Bow-woman. And whatever he takes away from her after she has denied it on oath he shall pay five staters and the value.

Here we should have expected to find: whatever she denies, on that he shall decide on oath (*ὀμνύντα κρίνειν*). The procedure in which the accused takes the oath is the substitute for the procedure by trial before a sworn judge. Judgment was given in this form: she shall deny it on oath, or pay. A later passage quoted above (V. xi. 46) gives further details with regard to the oath. It must be taken within twenty days, in the presence of the judge, and witnesses are to be present to read exactly the details of the charge of which she is to clear herself.

ii. 36.—The next passage is equally clear. The case is: a man has caught an adulterer; according to the regular procedure he has warned the relatives. They, or the man himself, bring an action against the aggrieved husband accusing him of unlawful imprisonment (*δωλώσαθαι*). Again, instead of ordering that the judge shall take an oath and decide the matter, the law orders that the husband (who is now become the accused) shall clear himself by oath.

> *αἰ δέ κα πωνῆ δωλωσάθθαι, ὀμόσαι τὸν ἑλόντα τῶ πεντηκονταστατήρω καὶ πλίονος πέντον αὐτόν, Fὶν αὐτῷ Fέκαστον ἐπαριόμενον, τῶ δ' ἀφεταίρω τριτὸν αὐτόν, τῶ δὲ Foἰκέος τὸν πάσταν ἄτερον αὐτὸν μοιχίοντ' ἔλεν, δωλωσάθθαι δὲ μή.*
>
> But if he contends that he has enslaved him, let him swear who seized him, in the case of fifty staters and more with four others, each one calling curses on himself; in the case of one who is not a full citizen, with two others; in the case of a slave, the master with one other, that he took him in adultery and did not seize him as a slave.

The peculiar interest of this passage [24] is that it is the only mention in Greek law of the 'eideshelfer' so common in German law. As a single instance which gives also the different number of oaths required for a freeman or a slave, we may quote Lex Rup. xvii.: Si quis hominem per noctem latenter incenderit, 600 solidos culpabilis judicetur, et insuper damno et dilatura restituat. Aut si negaverit, cum 72 jurit.

Si servus hoc fecerit, 36 solidos culpabilis judicetur, et insuper damno et dilatura restituat. Aut si negaverit, dominus ejus cum 6 jurit.

ix. 54.—In this passage which was quoted above (VII.) we find that if a man tries to recover a debt and has no witnesses to prove it, then the defendant is allowed to clear himself by an oath.

These are all the passages in the law where the word *ἀπομόσαι* is used; it is clear that in xi. 28 *ἀπώμοτον* must refer to this procedure and not to the oaths which are referred to under the word *ὁρκιώτερος*. In all these cases the procedure by oath is a substitute for trial before a sworn judge.

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[24] Compar. *ad loc.*

If the period of μαρτυρίαι is passed, if both pleas are established and there remains a point of fact to settle, then instead of deciding it on his oath the law in some cases orders the judge to pass judgment at once, the judgment taking the form that the defendant shall clear himself of the charge by oath, *or* pay the penalty required by the law.

Here, as in deciding κατὰ μαιτύρανς, the magistrate is only carrying out the letter of the law; there is no occasion for him to use his own discretion. Hence he does not have to take an oath. The procedure by oath belongs to the department of the unsworn judge, just as at Athens the πρόκλησις takes place before the ἄρχων not the δικαστήριον, and in Rome an oath, if taken, is before the praetor not the judex.[25]

The characteristic of the procedure in this stage is then that it is confined to that part of the trial in which there is no subject for decision to which the letter of the law cannot be applied mechanically. There is excluded from it all decisions on matters of right which the law does not decide, or the amount of a penalty which the law does not ordain, or a question of fact which is not decided by formal witnesses or by a purgatory oath of the defendant. These must be decided by the judge on his oath.

The law gives us little information as to procedure before the judge when on his oath, just for the reason that this action of the judge began where the operation of the law ceased.

As the law did not settle that point, he decided it absolutely according to his own opinions, with the single safeguard that he swore to do so honestly. This of course is just as was the case with the Athenian δικασταί. There is one expression in the law which though perhaps accidental is useful. In one passage instead of the formula ὀμνύντα κρίνειν, it is said that the judge shall swear (ὀμόσαι). The question is one of theft: the thief 'shall pay ten staters, and the thing double, whatever the judge swear that he has taken it' (ὅτι κ' ὁ δικαστὰς ὀμόσει συνεσσάκσαι). (iii. 15.) Now we find that in English manorial law, if there was a dispute to be decided, it was decided by a court of twelve men on their oath; the decision or verdict is expressed in the form: the court say on their oath that so and so is the case; the answer to the plea is the sworn statement of the court, whether it be on a question of law or one of fact. What this court says, that is law or is fact; so we may conclude that at Gortyn if the matter came before a sworn judge, he was no longer bound by witnesses, but on his own knowledge prior to the case, or on any other source of information he could get by inquiry of any kind, he gives his decisions on the pleas (πρὸς τὰ μωλιόμενα). The judgment is absolute, no reasons are given.

I do not think then that there can be any doubt that the distinction of procedure from which we started is strictly analogous to that *in jure* and *in judicio*. If this is granted we have a most interesting illustration of the development of this distinction. It is I believe the only example that we

[25] *Dig.* xxxix. 3.

have of the maintenance of the distinction of procedure with unity of person. Here alone the actual trial is before the magistrate, who also receives and arranges the pleas and give orders for the execution of the law. At Rome and Athens in historical times the trial was not before the magistrate; we are however told that in both states the magistrates had originally tried the whole case. As Aristotle says,[26] *κύριοι δ' ἦσαν καὶ τὰς δίκας αὐτοτελεῖς κρίνειν καὶ οὐχ ὥσπερ νῦν προανακρίνειν* (*οἱ ἄρχοντες*). At Sparta civil[27] cases were always tried by the Ephors alone. The discovery of this Cretan code justifies us in asserting that in early times this was the general if not the universal rule among the Latin and Hellenic races, at least for civil cases.

A careful analysis of the cases however shows also that the distinction of procedure in this form in civil cases was comparatively modern, and was subsequent to the introduction of written laws. The law expressly requires the judge to decide without oath only in those cases where the written law is there to guide him. If, *e.g.*, in an assault the fact is ever so clear, the judge cannot pass judgment without oath unless the law says what the penalty is to be; if there is no written law the punishment or fine must be assessed by some one speaking authoritatively instead of the law. If the law regulating succession to property was not written, in order to give a judgment some one must have solemnly stated what the law was. In Germany, as we know, this was provided for. In every tribe there were stated 'Urtheil-finder' who under different names and in different ways gave judgment on each case. When the laws were written a special clause was sometimes added that the law-giver should speak in accordance with the new code. Generally, if not always, the judgment had to receive the assent of the whole people; almost always the judgment-giver was different from the magistrate who presided and before whom the case was brought, and who executed the judgment.

So far as our information goes, in Greece this duty of 'giving-dooms' was performed by the magistrate, the king was in this point the mouthpiece of the people; so it is in Homer and so we are told it was in Attica. When by the side of the king and archon thesmothets were introduced it seems as if they not only had to lay down the law, *i.e.* state the *θεσμοί*, but also as magistrates heard the suit from the beginning and executed the law. The magistrate who tried the case was himself the recorder of the law and customs of the city. There was no authoritative order which he was obliged to obey. There could not then be a distinction of procedure between that part of the trial where he acted as the administrator of a law delivered by others, and that in which he decided doubtful questions of fact or equity. The distinction of procedure then at Athens dates from the time of Draco; it was from his time specially enjoined that henceforth the magistrates should judge according to the laws: if they did not an appeal was allowed to the Council. Now the laws could not decide the whole of a case: they could not

[26] Ar. *Ἀθ. Πολ.* iii. [27] Ar. *Pol.* ii.

always say whether a fact had happened or not, nor did they, we may be sure, provide a penalty for every crime or foresee every disputed question of ownership. Points of equity then on which the laws did not provide a purely formal means of deciding, and points of fact which were not decided by the formal method of oath or ordeal, would as before be decided by the magistrates at their discretion speaking as 'Urtheil-finder'; in points where the law guided they would act as executive magistrates, carrying out the laws and strictly bound under penalty to obey them. From the time of Draco to the time of Solon Attic civil procedure must have been in the same stage as that which we find at Crete. The introduction of a large court of jurymen Solon borrowed from the criminal procedure and by so doing took away from the magistrates the last power of acting as judges that remained to them.

The whole procedure in criminal matters was quite different; in them undoubtedly from the earliest times the judgment was given by the people or their representatives, the Council. Criminal matters are those in which an injury is done to the whole community. Murder especially was treated in this way; not only because the community was injured by the lawlessness, but because bloodshed involves religious impurity. I do not propose to enter into a discussion of criminal procedure here, it will be sufficient to point out that we have sufficient evidence that at Gortyn as elsewhere cases of this kind were decided in a popular court. When an adoption took place, it had to be proclaimed in the market-place before the whole body of citizens. It was a public act concerning all. Now if to be valid it had to take place in this manner it must at one time have required the express assent of the citizens, an assent which could have been refused. But if the assent was required to an act of this kind, it must have belonged to the same assembly of the people to determine whether any action was an injury to them, *i.e.* whether it was a crime, and if so what penalty was to be exacted. Here then the people themselves were the judgment-givers, not the magistrate. In the murder trial in Homer it is the γέροντες who give judgment: when the ἐναγεῖς at Athens were tried, they were brought before a court of 300. In Draco's laws we have the earliest direct and clear reference to the distinction between the two parts of the procedure:[28] δικάζειν δὲ τοὺς βασιλέας αἰτιῶν φόνου ἢ [ἐάν τις αἰτιᾶται τὸν βου]λεύσαντα· τοὺς δὲ ἐφέτας διαγνῶναι.

J. W. HEADLAM.

[28] *C.I.A.* i. 61.