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THE ANCIENT HEBREW LAW OF HOMICIDE

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M. S.

THE ANCIENT HEBREW LAW OF HOMICIDE*

I

THE law of homicide is an index to certain sides of national character. Where there is a small, powerful class able to monopolize rule and government, the rights of the great mass of common people are weak and ill-assured. In such a society there is much violence. Arrogant and turbulent spirits are in perpetual rivalry, and compete for mastery. The stronger steadily eliminate the weaker. Life is held cheap. The chiefs, who are always risking their own lives, compel their underlings, who have no great stake in the contest, to risk theirs. It is a kind of feudal system, in which each chief is the head of a clan or other organization with whose aid he hopes to retain or to achieve pre-eminence.

Out of such a condition the early laws of homicide arise.

Clans in juxtaposition are never quite at peace with each other. There may be a kind of truce, but this is liable to be broken at any moment. The murder of a clansman by a member of another clan is *casus belli*, for the sufficient reason that it weakens the assailed clan. If unpunished, the act tends to be repeated, and this process would, in a relatively short time, bring the weakened clan under subjection to the aggressor clan.

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In such a state of society the law of retaliation (the *lex talionis*) becomes inevitable. The assailing clan must be weakened as much as the assailed, if the latter is to retain its relative strength and position. What we call *lex talionis* is therefore, primarily, a means for the defence of the clan, an inter-clan rule. It is one of the early stages of what we now call international law, which even yet knows no final arbitrament but the sword.

The period when this rule began to be applied antedates even primitive history. We know of no stage in which men did not form a kind of society, however small or rude it may have been. And so soon as this point has been reached, individual action ceases to be unrestrained, and must accept limitations useful for society. A member of the blood-covenant may no longer slay his fellow-member. However determined his purpose, the *ḥatan damim* (member of the blood-covenant guild) must forgo it when he learns that the intended victim is also a member (Exod. 4. 24–6).[1]

[1] The text, Exod. 4. 23–6, is of great antiquity. It refers to an early state of the law in which for certain offences the penalty of death is imposed on the eldest son of the criminal. If Pharaoh will not let the people go, if he will enslave JHVH's first-born (*bekor*), then JHVH will slay his first-born (*bekor*). This is the primitive *lex talionis*, traces of which are clear in the Ḥammurabi Code, §§ 116, 210, and 230.

This denunciation of punishment against Pharaoh by killing his first-born son brings to the writer's mind an incident in the life of Moses which he then proceeds to relate. Moses has been guilty of some delinquency which was doubtless plainly told in the old narrative but is here omitted. The Rabbis inferred that when Moses married the daughter of Jethro, the latter as a condition of his assent stipulated that the first-born son of the union should be brought up as a Gentile. Hence the boy Gershom was not circumcised (Ginzberg, *Legends of the Jews*, vol. II, p. 328). As JHVH claimed the first-born of all Israel as his, the failure of Moses to circumcise Gershom was to be punished by the death of the latter. The quick mother-wit of Zipporah saved the situation. She circumcised the boy, cast the foreskin at JHVH's feet uttering (for the boy) the proper formula: 'Now

From the very beginning of organized society, there must have developed two sets of laws, one for those within and the other for those without the clan. The latter is simple and short. A member of clan A has weakened clan B by killing one of its members. Clan B must retaliate by weakening the aggressor clan at least as much.

This policy, however wise as against another clan, would be ruinous if applied within the clan. One member has killed another, and has thereby reduced the strength of the clan. If the aggressor be killed, its strength is further reduced. The direct clan-interest is that the aggressor be kept alive, unless he is likely to further imperil the community. It is this contingency which creates a necessity for devising a lesser punishment than death for homicide within the clan, and hence is evolved the system of imposing a money penalty on the homicide—*wergild*. It is this contingency, too, which creates a necessity for ascertaining the circumstances of the tragedy and its underlying motive. Hence follows a subdivision of homicide into murder, which even within the clan may continue to be a capital offence, and manslaughter, which may readily be compounded for.

Two systems of homicide law are thus made more or less co-existent: an external homicide law, which is the *lex talionis*, a kind of war, and an internal homicide law, which seeks to ascertain the very right of each case—what we would call justice.

This co-existence of two discordant systems of law in each of the many clans composing a state or kingdom, tends

art thou of blood-covenant (*ḥatan damim*) with me!' JHVH forbore his purpose. And then follows the explanation that circumcision constitutes blood-covenant, with the necessary implication that blood-covenantees may not for any cause kill each other.

steadily to undermine the *lex talionis*. With the progress of the state, the relations of its several parts become closer and closer, and the comity between them increases. The justice of the internal law becomes more and more apparent, and with the growth of peaceful relations between the several clans, the idea of the unity of the state is strengthened. The feeling which individuals had for their clan is gradually transferred to the state or kingdom, and it is seen that all the clans together constitute one great clan, which is called the state. When this point is reached the *lex talionis* dies a natural death.

This progress, though curtly described, is very slow, and is reached, not by a leap, but by slow stages. For long ages the *lex talionis* continues to be recited as regulating the relations of men within the clan, and yet it is all the while undergoing decomposition. The Code of Ḥammurabi, if taken literally, would present a shuddering spectacle. Its notions of retaliation betoken fierce barbarism. It is reasonably certain, however, that in very early times its crude literalness was modified, and that the law as administered in later ages was far different from the bald meaning of its words. The marked intermediate stage, which is most important in the consideration of our subject, may be called the *wergild* stage, or, to use the Hebrew term, the *kofer* stage.

When a kingdom has travelled a certain distance on the road to unity, it perceives that a state of war between its parts, however mild or modified, is injurious to its progress. The same necessity which compelled the clan to work out an internal homicide law milder than the external homicide law, presses upon the state. For its purposes the several clans cannot be hostile to each other,

but must constitute one great national family. The distinction between external homicide law and internal homicide law cannot exist for it. Human nature, however, is more powerful than governmental logic; ancient notions and customs are not to be done away with in a day, nor can hereditary feuds be converted into brotherly feeling by mere fiat. Force is necessary, and the growing state exerts it to prevent bloody inter-clan feuds. The first mode of prevention is always the insistence on *wergild* between the two clans, that is, the injured clan, instead of going to war, must accept a money composition for the loss of its member. The central state must, however, have acquired great stability and power before it can effect this end.

When this stage is reached, the kingdom has surmounted a danger leading to disintegration. By way of compensation, perhaps, this improvement leads to another danger. Wealth has acquired a new force. It now enables its owner to kill the member of another clan with much less danger to his own life than before. With the growth of a state's wealth this peril grows more and more formidable. Hired assassins will form a class, and individual safety will be greatly impaired. The weakness of the *kofer* system will become more and more apparent, and the moral power of the internal homicide law will make its way.

When the proper point is reached, the state overthrows the *kofer* law and substitutes for it the inquiry into the circumstances and motive of every homicide, which results in the doctrine that homicide is so great an offence against the state that the private wrong is submerged, and that it is incapable of private composition, no matter what the reparation offered. Then only is the state fully organized to carry on a civil government.

We have no adequate means to ascertain when the pre-Hebraic inhabitants of Palestine passed through these stages. The probability is that long before they were conquered by the Hebrews they had reached the *wergild* stage.

The Code of Ḥammurabi of Babylonia (*circa* 2250 B. C.) has as yet no general state-law punishing homicide. This crime must therefore have been under the jurisdiction of recognized constituent elements of the state, such as clans or the like, which severally protected their clansmen's lives against assault from without and within. There are indications that the *kofer* stage had been reached.

The Hebrew tradition is that the state was formed at the crossing of the Jordan; and by the formation of the state we mean that every male Israelite became a member of a great national blood-covenant which, theoretically at least, overrode all ties of family, clan, or tribe. At Gilgal, before the campaign for the conquest of Canaan began, this great covenant between all Israel and JHVH was entered into (Josh. 5. 2–9). Pesaḥ was celebrated (5. 10–12), and JHVH, by special messenger (*sar-ṣeba-JHVH*), ratified the covenant, and in symbolical language welcomed the new-comers to the land of JHVH, which had become holy in fact by the entrance of the covenant people.

In the course of lectures delivered before this College last year, my endeavour was to show that the pre-Hebraic inhabitants of Palestine were politically organized into small city-kingdoms; that the Hebrews, when they conquered the land, accepted the system, but did away with the kings, converting the petty kingdoms into cantons or districts, which continued to be called cities (*'arim*), and that these became the constituent elements of the Hebrew

state, abolishing, in theory at least, the former dividing lines of family, clan, and tribe.

The process of forming this new Hebrew state lasted for more than two centuries. The settlers advanced further and further, coming into closer and closer contact with the natives. Ancient Canaanite modes of thought impregnated the settlers' minds, and both in religion and in law Canaanite views struggled with Hebraic principles. How bitter the contest was the whole Hebrew literature shows. Though in the view of practical statesmen Hebraism in the end triumphed, both in church and state, yet the idealists were so dissatisfied with the Canaanitic alloy, which always more or less manifested itself, that a reader of the prophetic discourses might almost be misled into believing that Baal had borne off the victory from JHVH, and that the ancient codes had crowded out the *Torah*.

Our present task is to show the contest between the Hebrew law on the one side, and the Canaanite practice on the other; to point out that the *zikne ha-'ir*, infected as they were with the old Canaanite notions and practices, had to be restrained and corrected, at first by federal delegates, and when this measure proved inadequate, had to be deprived of large and important items of legal jurisdiction, which were transferred to federal courts, and then to make clear that for the unity of the state it finally became necessary to deprive the *zikne ha-'ir* of all important judicial functions, and to establish a complete system of federal courts, sitting in every *'ir*, and thus bringing the Hebrew law home to every corner of the kingdom.

In the investigation of this movement we have chosen to begin with the law of homicide, not only because of its fundamental importance, but also because the *Torah* gives

fuller and more detailed information on this branch of jurisprudence than on any other subject of the criminal law. This valuable feature of the *Torah* must not, however, blind us to the fact that its statement of the law on any subject is not exhaustive. The Hebrews had for ages lived a settled pastoral life in a portion of the Egyptian kingdom expressly assigned to them. While subject to the laws of the Empire, they had a numerous community of their own, among whom grew customs and observances which were, in effect, a kind of internal law. The tradition was that they were governed by elders. At the very beginning of the public career of Moses and Aaron, they submitted their plans to this body (Exod. 4. 29–30; 12. 21; 17. 6; 19. 7).

The oral or customary law which thus naturally grew among the Hebrews in Egypt is nowhere recorded. It was a *Torah she-be'al peh*, which, with them, as with all other nations, preceded any written code. Nor did the written code, *Torah she-bi-ktab*, when it came, stop the further development alongside of it, of the old *Torah she-be'al peh*. New and unforeseen circumstances would arise which had to be met by the tribunals, and their decisions, from the time when the Oracle took jurisdiction of certain cases down to the latest period when judges of ordinary law-courts presided, constituted an ancillary body of oral or common law.

We are not without specific evidence on this subject. An examination of the texts of the Pentateuch relating to homicide discloses the fact that their contents are of two diverse kinds, one of them being in the dogmatic form of *mishpaṭim* (statutes), and the other of them *torot*, or summaries of the facts and the law of cases, in the manner of the syllabi of our law reports.

Nor is this a peculiarity of the law of homicide. There are in the *Torah* at least four other instances of reported cases: the case of the blasphemer of the *Shem* (Lev. 24. 10–16), that of the Sabbath-breaker (Num. 15. 32–6), that of Zelophehad's daughters (Num. 27. 1–11), and the second case of Zelophehad's daughters (Num. 36. 1–10). In each of these the facts are narrated and the principle of the decision announced for guidance in the future. They constitute what we call case-law, as distinguished from statute law, and what the Hebrews call *Talmud*, in contra-distinction to *mishpaṭim* or *Torah*. The memory and results of this steady accumulation of case-law during a period of perhaps fifteen hundred years are preserved to a small degree in the Bible, and to a much greater degree in the *Talmud*. It is to be hoped that studies in the vast field of Talmudic literature may give us light on many subjects of which we are, at present, wofully ignorant. We are not able to show the contents of the ancient pre-Mosaic oral law, and cannot therefore pretend to give its provisions in relation to homicide. It is, however, fair to assume that the written law was, in the main, declaratory of the oral law that immediately preceded it. Such, indeed, is the history of law in all ages and among all peoples. The human nature of great masses of people prevents the sudden overturning of a body of ancient habits by mere fiat, and the substitution for them of strange customs contrary to inherited notions.

It is from the written law—from the *Torah*—that we must learn the law of homicide: what constitutes the offence, how the perpetrator is to be ascertained, and when ascertained, how he is to be punished.

Each of the five books of the Torah, from Genesis to

Deuteronomy, contains passages bearing on these interesting questions. The references in Genesis are most widely known and quoted, not because they are parts of any legal code, properly so called, but because they announce broad, general principles, the result of philosophical reflection, and therefore appeal to a large circle who would be repelled by a statement of practical law. From their nature they are fitter for consideration, after we shall have made a study of the book, than as an aid in the preliminary work.

It is from an examination of all this material that we are to learn the Hebrew law of Homicide. This study would, however, be but partial and imperfect unless we shall at the same time endeavour to ascertain the state of the law upon that subject among the people whom the Hebrews conquered. For this there are but two sources: one the Hebrew law itself, in so far as it discloses the nature of the native law which it was combating, and the other the code of Babylonian law, known as the *Ḥammurabi* Code, said to have been promulgated by Ḥammurabi, King of Babylon, about 2250 B. C. It was in the year 1902 that M. de Morgan, while excavating the acropolis of Susa, found three large fragments of a block of black diorite. When joined, they formed a pillar about seven feet high, and tapering from seventy-one inches to sixty-two inches. At the upper end of the front side was a bas-relief representing the seated sun-god Shamash, presenting the code of laws to Ḥammurabi. Then follow on the same side sixteen columns of writing, and on the reverse side twenty-eight columns. On the front side five columns of writing have been erased. When complete the inscription probably contained forty-nine columns, four thousand lines, and about eight thousand words. It is from this inscription

in the Babylonian language that the Code has been carefully studied by experts, many of whom believe that it exerted a powerful influence in shaping legal doctrines and customs in all Western Asia, as far as the Mediterranean Sea. If this view be correct, the Code would be some index at least of the character of the law which the Hebrews encountered and finally overcame.

Before entering on the subject, it may be well to reflect that in the natural course of events, the law of Ḥammurabi must have undergone changes both in Babylonia and in Assyria. All communities must, in a considerable degree, make their laws conform to the necessities of national life, and there is no ground for believing that these great states were, in this respect, exceptional. The fact that the old code was for two thousand years treated with religious reverence is entirely consistent with the obsolescence of some of its provisions.

In discussing this ancient code, I make use of the excellent work of Professor Rogers, *Cuneiform Parallels to the Old Testament* (New York, 1912). The Code of Ḥammurabi is there estimated to have contained two hundred and fifty-two sections, of which thirty-five (those between Secs. 65 and 100) have been erased.

We find but eleven sections in anywise bearing on homicide. They are the following:

Section 153. If a man's wife cause her husband to be killed for the sake of another man, they shall impale that woman.

Sec. 207. (The subject of this section is introduced by the preceding section, which is given here for the better understanding of the matter: *Sec.* 206. If a man have struck a man in a quarrel, and have

wounded him, he shall swear, 'I did not strike him intentionally', and he shall be responsible for the doctor.)

If he die of the blows, he shall swear, and if he be of gentle birth he shall pay one-half of a mina of silver.

Sec. 208. If he be the son of a freedman, he shall pay one-third of a mina of silver.

Sec. 210. (The subject of this section is introduced by the preceding section, 209, which is as follows: *Sec.* 209. If a man have struck a gentleman's daughter and have caused her to drop what was in her womb, he shall pay ten shekels of silver for what was in her womb.)

If that woman have died, they shall put his daughter to death.

Sec. 212. (*Sec.* 211. If through blows he have caused the daughter of a freedman to drop what was in her womb, he shall pay five shekels of silver.)

If that woman have died, he shall pay one-half a mina of silver.

Sec. 214. (*Sec.* 213. If he have struck a gentleman's maid-servant, and have caused her to drop that which was in her womb, he shall pay two shekels of silver.)

If that maid-servant have died, he shall pay one-third of a mina of silver.

Sec. 229. If a builder have built a house for a man, and have not made it strong, and the house built have fallen and have caused the death of the owner of that house, that builder shall be put to death.

Sec. 230. If he have caused the death of a son of the owner of the house, they shall put to death a son of that builder.

Sec. 231. If he have caused the death of a slave of the owner of the house, he shall give to the owner of the house slave for slave.

Sec. 251. If an ox given to goring belong to a man, and have shown to him this vice that he is given to goring, but he have not bound up his horns, and have not shut up his ox, and that ox have gored a man of gentle birth and have killed him, he shall pay one-half of a mina of silver.

Sec. 252. If he be a gentleman's slave he shall pay one-third of a mina of silver.

There is here no hint of a general law of homicide. If a man, having a grudge against another, would hide himself and lie in wait for his coming, and then would fatally stab him in the back, there is nothing in the Ḥammurabi Code entailing any punishment for the act.

This means not that such atrocious deeds were approved or condoned, but that the state had not yet accepted as part of its function the protection of the lives of its citizens in general. Nor does it mean that every individual man was left to look out for himself, without help from anybody. No great state could live in such rank disorder. The reasonable inference is that minor corporations, such as families, guilds, or clans, had jurisdiction over homicide. Strangely enough, the Code itself gives no information, direct or indirect, upon the subject. The eleven provisions cited throw no light upon it.

Section 153, punishing by impalement a wife who causes her husband to be killed for the sake of another man, is not a homicide statute in the proper sense of the word. The wife who is to be so horribly punished has not herself committed the murder. She has procured another to do

the deed. There is no provision in the Code for punishing the actual murderer. It is thus seen that the crime of the wife is her treason, her breach of marital fidelity. Indeed, it would seem that if she procured the death of her husband for any cause other than her preference for another man, the statute would not apply.

Sections 207 and 208 refer to quarrels. The law on this subject is, generally, that if a man is wounded in a quarrel, and the party wounding him swears that he did not intend to inflict a wound, he suffers no other penalty than the payment of the doctor's fees. If, however, death ensues, the penalty is adjusted according to the social status of the victim. If he be of gentle birth, the penalty is a half silver mina; if a freedman's son, a third of a silver mina.

In this case the homicide is viewed as accidental. It is not looked on as a crime, but merely as a trespass for which damages must be paid to the representatives of the deceased. As to the amount thus paid, we learn from Section 252 that the conventional value of a slave was one-third of a silver mina. The penalties imposed for accidental homicide were looked upon as mere compensation for loss sustained, and included no punitive element whatever.

Sections 210, 212, and 214 refer to blows inflicted on a gravid woman. The sections are obscure, and no light is thrown upon the peculiarity of a man's striking a woman in that condition. If we fully understood the technical terms of the Code, we would probably conclude that the cases do not refer to a quarrel between the man and woman, but to an accidental blow received by the woman while the men were quarrelling with each other. Be that as it may, if the consequence of the blow be a miscarriage whereby the child is lost, the amount to be paid is, in the case of a gentle-

man's daughter, ten shekels of silver, and in the case of a female slave, two shekels of silver.

If, however, the death of the woman ensues, the punishment is adjusted according to the social status of the victim. If she be a gentleman's daughter, the daughter of the assailant is to be put to death; if she be a freedman's daughter, the assailant pays as compensation one-half silver mina; if a slave, one-third silver mina.

The death penalty thus imposed in one case, not on the perpetrator, but on his daughter, indicates that there is involved no notion of a crime against the state. All the other penalties are paid as compensation to the survivors of the deceased. One may fairly suppose that by this ancient law the father of the deceased woman was entitled to kill the daughter of the assailant, and that this was supposed to be exact compensation. As you have killed my daughter, we will, if I kill your daughter, be even.

It is not the state which inflicts the death-penalty on the innocent daughter, whose father, even, has not committed a crime. If he had struck a man with the same result, he would merely have paid the conventional value of the deceased. The inference is easy that the dead woman's father could barter his right to kill the assailant's daughter for a reasonable *kofer*, to be agreed upon between the parties, or perhaps to be adjusted by a tribunal. The effect of this apparently dreadful law would then be that the assailant could not be discharged by the payment of the conventional half silver mina, but would have to pay punitive damages in addition thereto. The pervasiveness of money damages in the Code would seem to warrant the conclusion that in the course of time the literal meaning of the Code would be modified in this direction.

Sections 229, 230, and 231 refer merely to one class of persons,—builders whose structures fall down and hurt somebody. If the owner is killed, the builder is put to death; if the owner's son is killed, the builder's son is put to death; if the owner's slave is killed, he shall furnish another slave in his stead. There is here no pretence of a crime. The builder has been guilty of an error of judgement, or, at worst, of some degree of negligence. He certainly never intended to kill any one.

The penalties show that the law does not treat the builder as a criminal. Otherwise his son would not, in a certain eventuality, be put to death, while he is allowed to go unpunished.

From the fact that builders are the only class selected for this sort of legislation, there must have been some peculiar reason which is not at present ascertainable.

For the rest, we may be reasonably certain that in course of time the practice of *kofer* also prevailed in this class of cases.

Sections 251 and 252 cover the case of a known goring ox allowed by his master to roam at large without his horns bound. There the owner, by reason of his negligence, must pay to the family the conventional value of a member thereof who has been killed by the ox,—a half-mina of silver for a gentleman, a third for a slave. Punitive damages there are none.

In none of these cases (except perhaps that of the faithless wife) is there any evidence that the state looked upon the acts punishable by death as crimes against the state, or indeed as anything but private trespasses against individuals. Nowhere is there any consciousness that the intent to kill is a proper subject of inquiry, or that the

presence or absence of such intent is of any moment. Nowhere is there a hint of any public duty or any public officer to enforce the death penalty.

The reasonable conclusion is that all of the acts above enumerated, punishable by death (except perhaps that of the faithless wife), were looked upon as mere civil trespasses; many of them, by the very terms of the Code, adjustable by money settlements, and the rest, in the course of time, falling under the same rule.

In their origin these laws were doubtless parts of a comprehensive system of retaliatory jurisprudence. In order to realize this fully, it will be useful to give certain additional sections of that Code, closely related in spirit to those already cited.

Section 116. If the one seized die in the house of him who seized him, of blows or of want, the owner of the one seized shall call the merchant to account, and if it be the son of a freedman that died, they shall put his son to death . . .

Sec. 192. If the son of a chamberlain or the son of a vowed woman have said to the father who reared him or to the mother who reared him, 'Thou art not my father', 'Thou art not my mother', they shall cut out his tongue.

Sec. 193. If the son of a chamberlain or the son of a vowed woman have known his father's house, and have hated the father that reared him and the mother that reared him, and have gone back to his father's house, they shall pluck out his eye.

Sec. 194. If a man have given his son to a wet-nurse, and that son have died in the hands of the wet-nurse, and the wet-nurse, without consent of the father and mother,

have substituted another child, they shall call her to account; and because, without the consent of the father and mother, she has substituted another child, they shall cut off her breasts.

Sec. 195. If a man have struck his father, they shall cut off his hands.

Sec. 196. If a man have destroyed the eye of a gentleman, they shall destroy his eye.

Sec. 197. If he have broken a gentleman's bone, they shall break his bone.

Sec. 200. If a man have knocked out the tooth of a man of his own rank, they shall knock out his tooth.

Sec. 202. If a man have struck the person of a man who is his superior, he shall receive sixty strokes with an oxtail whip in public.

Sec. 205. If a gentleman's slave have struck the cheek of a freedman, they shall cut off his ear.

Sec. 218. If a doctor have operated with a bronze lancet on a gentleman for a severe wound, and have caused the gentleman's death, or have removed a cataract with a bronze lancet, and have destroyed the gentleman's eye, they shall cut off his hand.

Sec. 226. If a brander, without the consent of the owner of a slave, have made a slave's mark unrecognizable, they shall cut off the hands of that brander.

Sec. 253. If a man have hired a man to oversee his field, and have furnished him with seed-grain, have entrusted him with oxen, and have contracted with him to cultivate that field, and that man have stolen the seed or the provender and it be found in his hands, they shall cut off his hands.

Sec. 282. If a slave have said to his master, 'Thou art not my master', they shall call him to account as his slave, and his master shall cut off his ear.

The perusal of these provisions arouses a feeling of repulsion. We are apt to forget the slow steps by which mankind has been educated. It need not be doubted that when primitive man, before organized society, suffered injury at the hand of another, he sought revenge by inflicting on his enemy all the harm he could. The idea of limiting the punishment to the exact measure of the offence betokens the birth of moderation and of justice. The crude notion that human law can make good human wrong is pathetically ineradicable. The *lex talionis* which shocks us is built on this insecure foundation. The experience of mankind shows that in measuring punishments the feelings or desires of the injured party must be brushed aside as irrelevant, and that nothing can be considered but the interests of society as a whole. The realization of this truth has always destroyed the *lex talionis*, that is, has substituted for specific retaliation, in which there is present a spice of personal malice, general retaliation, which punishes the culprit, but only so much and in such manner as comports with the welfare of society.

When we reflect on these things, we shall be the more ready to do justice to the men of the remote past, who were more like us than we are always ready to admit.

The retaliation statutes of Hammurabi, which we have quoted, were doubtless produced by the conditions of the time.

The readiness to mutilate men evinced in this series of laws, indicates a callousness that may give a clue to their origin. In the military camp, where power dwells in a single person, and instant obedience is indispensable, the spirit of such laws is generated. It is difficult to believe that they were not, as time went on, modified to suit

a more peaceful environment. Whether this was or was not the case, the fact stands out clear as respects homicide, that under the Ḥammurabi Code the state had not yet conceived it as a crime cognizable by it alone, in which no private right can be recognized, and in which every private wrong has been merged.

There is one other feature of the Ḥammurabi Code which is to be noted, namely, the distinction between a superior class of 'gentleman' and the rest of the people. The distinction is preserved all through the law of homicide and the *lex talionis*. That the Palestinian farmers in the twelfth or thirteenth century B. C. had this sharp distinction of classes is very doubtful. The great probability is that the gentleman's law did not seriously affect them, and that we must look to the common people's law if we would get an idea of the Ḥammurabi influence in Palestine.

From this it appears that though the loss of a gentleman's eye was punished by the loss of the aggressor's eye, and the shattering of a gentleman's limb was punished by the shattering of the aggressor's limb, yet if these trespasses were committed against a poor man, the aggressor paid him one mina of silver (Sec. 198), and if they were committed against a slave the penalty was half the price of the slave, to be paid, of course, to the master (Sec. 199).

The deprivation of a tooth in an equal involved the loss of the aggressor's tooth, but a poor man's tooth was atoned for by one-third of a mina of silver (Sec. 201). The death by blows of a gentleman's gravid daughter entailed the death of the assailant's daughter, but if it was a poor man's daughter who died, half a mina of silver paid for her (Sec. 212), and if she was a slave, one-third of a mina of silver was enough (Sec. 214).

Even the doctor who lost his hand when his gentleman patient lost his eye, paid only half the price of the slave if the latter had suffered the same misfortune, the payment, of course, being made not to the victim, but to his master (Sec. 220).

The inference seems reasonable that, if the Ḥammurabi law exerted considerable influence in Palestine, its probable effect was to establish a general custom of money settlements for all kinds of trespasses, from a blow to wilful murder.

As regards the Hebrew law of homicide, you are all familiar with that one of the Ten Commandments which in two words forbids murder, *lo tirṣaḥ* (Exod. 20. 13; Deut. 5. 17). While it, like the other commandments, is a pregnant memorandum of human duty, it can scarcely be called a law, in the ordinary sense, since it denounces no punishment for infraction. In all human societies it has been found that merely telling men what they should do, or what they should refrain from doing, is inadequate to guard society against the hostile acts of individuals dominated by anger, greed, lust and other violent passions. However insistent certain theorists are on trusting to the spiritual strength of every individual to assure his right conduct, practical statesmen and legists have always deemed it necessary to make the element called 'sanction' a necessary feature of law. 'Sanction' means that part of the law which fixes a punishment for its infraction.

It is with the Pentateuchal laws of homicide, which include this indispensable element, that we deal.

The first group of them is found in Exodus, chapters 21 and 22; the second group in Leviticus, chapter 24; the third group in Numbers, chapter 35; the fourth in Deuteronomy,

chapters 4, 19, and 27, and then there is a supplemental group in the Book of Joshua, chapter 20.

We shall now give these texts in full, in the following order: first, the Exodus texts; second, the Deuteronomy texts; third, the Numbers texts; fourth, the Joshua texts; and fifth, the Leviticus texts. In choosing this order of presentation, it is necessary to remark that our purpose is not to ascertain the dates of texts, but the probable course of development of institutions. It may be that there are elements of various ages in the same text, so that one treated lower down may contain material as old or older than one earlier considered. The vast work done by experts in the literary field will enable any one who is interested in that phase of the subject to find ample guidance and instruction.

The Exodus Texts

Exod. 21. 12–14. He that smiteth a man (*makkeh-ish*) so that he die, shall be put to death. But if a man lie not in wait (*lo ṣadah*), but God deliver him into his hand (*ha-Elohim innah le-yado*), then I will appoint thee a *maḳom* whither he shall flee. If, however, a man come presumptuously (*yazid*) upon his neighbour to slay him with guile (*be-ʿormah*), thou shalt take him from mine altar for death.

21. 20. If a man smite his male or female slave (*ʿabdo o amato*) with a rod (*shebeṭ*) that he die under his hand, *naḳom yinnaḳem* (he must be punished).

21. 21. But if he continue a day or two, *lo yuḳḳam* (he need not be); it is his money (*kesef*).

21. 22. If men strive and hurt a wóman with child so that her fruit depart, but no *ason* follow, *ʿanosh ye-*

ʿanesh (he shall pay a fine) according to the claim of the woman's husband so far as it may be approved by the judges (*we-natan bi-flilim*).

21. 23. But if *ason* follow, then thou shalt give *nefesh taḥat nefesh* (life for life).

21. 24. Eye for eye, tooth for tooth, hand for hand, foot for foot,

21. 25. Burning for burning, wound for wound, stripe for stripe.

21. 28. If an ox gore a man or a woman that they die . . .

21. 29. And the ox were wont to push with his horn in time past, and the owner was told of it and has not kept him in, then if he has killed a man or a woman, the ox shall be stoned and his owner also shall be put to death (*yumat*).

21. 30. If, however, a *kofer* be acceptable (to the injured family), he may pay it and save his life.

21. 31. In the case of a son or daughter so killed, the law (*mishpaṭ*) is the same.

21. 32. In the case of a male or female slave so killed, he shall pay the master thirty shekels of silver and the ox shall be stoned.

22. 1 (2). If a thief be found breaking in and be smitten so that he die, for him there is no *damim* (blood-guilt).

22. 2 (3). Unless the sun have risen, in which case there is *damim* (blood-guilt) for him.

The Deuteronomy Texts

The Deuteronomy texts are as follows:

Deut. 4. 41. Then Moses set apart three cities east of Jordan.

4. 42. That the *roṣeaḥ* might flee thither who should kill his neighbour *bi-bli-daʿat* (unwittingly), not hating

him (*lo sone-lo*) before, and fleeing to one of these cities may live.

4. 43. Bezer (in the wilderness) in the plain country of the Reubenites;
Ramoth (in Gilead) of the Gadites, and
Golan (in Bashan) of the Manassites.

19. 2. Thou shalt set apart three cities in the midst of the land which JHVH thy *Elohim* giveth thee (Canaan, the land west of Jordan).

19. 3. Thou shalt construct a road, thou shalt divide thy land into three districts, that every slayer (*roṣeaḥ*) may flee thither (*la-nus shamah*).

19. 4. This is the law of the slayer (*debar ha-roṣeaḥ*), who shall flee thither that he may live:
Whoso killeth his neighbour *bi-bli-da'at* (unwittingly), not hating him (*lo sone-lo*) before.

19. 5. As a man goeth with his neighbour to the forest to fell trees, and his hand fetcheth a stroke to cut down a tree, and the head slippeth from the helve and hit his neighbour that he die, he shall flee to one of these cities that he may live.

19. 6. Lest the *go'el ha-dam* pursue the *roṣeaḥ* while his heart is hot and overtake him, because the way is long, and slay him (*we-hikkahu nefesh*), though it was not a case for capital punishment (*mishpaṭ mawet*); he not hating him before.

19. 7. Wherefore . . . set apart these three cities.

19. 10. Let not innocent blood (the blood of the *naḳi*, *dam naḳi*) be shed in thy land which JHVH, thy *Elohim*, giveth thee for an inheritance, and thus blood-guilt (*damim*) come upon thee.

19. 11. If a man hate his neighbour and lie in wait for

him (*we-arab lo*) and come upon him (*we-ḳam ʿalaw*) and kill him, and then fleeth to one of these cities.

19. 12. The *zikne-ʿiro* shall send and fetch him thence and deliver him into the hands of the *goʾel ha-dam* that he may die.

19. 13. Pity him not, but put away *dam ha-naḳi* (blood-guilt for the innocent) from Israel, that it may go well with thee.

19. 15. One witness (*ʿed eḥad*) shall not be heard against any man for any *ʿawon* (crime) or *ḥaṭṭat* (misdemeanour) with which he may be charged. By the mouth of two *ʿedim* or of three *ʿedim* shall the matter (*dabar*) be established.

The Numbers Texts

The Numbers texts are as follows:

Numb. 35. 11. Ye shall appoint you cities to be cities of refuge (*ʿare miḳlaṭ*) for you, that the slayer (*roṣeaḥ*) may flee thither who killeth any person unwittingly (*bi-shgagah*).

35. 12. And they shall be unto you cities for refuge (*le-miḳlaṭ*) from the *goʾel*, that the slayer (*roṣeaḥ*) die not, until he appear before the *ʿEdah* for judgement.

35. 13. And of these cities which ye shall give there shall be six *ʿare miḳlaṭ*.

35. 14. Ye shall give three cities east of Jordan and three cities in the land of Canaan, which shall be *ʿare miḳlaṭ*.

35. 15. These six cities shall be for *miḳlaṭ* for the Bne-Israel for the *ger* and for the *toshab* among them, that any *makkeh-nefesh bi-shgagah* may flee thither.

35. 16. If he smite him with an instrument of iron that he die, he is a *roṣeaḥ*; *mot yumat ha-roṣeaḥ*.

35. 17. If he smite him with a stone, wherewith he may die, he is a *roṣeaḥ*; *mot yumat ha-roṣeaḥ*.

35. 18. Or if he smite him with a hand-weapon of wood wherewith he may die, he is a *roṣeaḥ*; *mot yumat ha-roṣeaḥ*.

35. 19. The *go'el ha-dam* shall put the *roṣeaḥ* to death; (*be-fig'o bo*) when he meets him he shall put him to death.

35. 20. Or if he thrust him of hatred (*be-sin'ah*) or hurl at him by lying in wait (*bi-ṣdiyah*) and he die;

35. 21. Or if in enmity (*be-ebah*) he smite him with his hand that he die, the smiter (*ha-makkeh*) shall be put to death (*mot yumat*); he is a *roṣeaḥ*.

35. 21 b. The *go'el ha-dam* shall put to death the *roṣeaḥ* when he meets him (*be-fig'o bo*).

35. 22. But if he struck him suddenly without enmity (*belo-ebah*) or have hurled a weapon at him (*belo-ṣediyah*) without lying in wait,

35. 23. Or without looking (*beli-re'ot*) let fall upon him a stone wherewith a man may die and he die, not being his enemy (*oyeb*), nor seeking to harm him:

35. 24. The *'Edah* shall judge (*we-shafeṭu*) between the *makkeh* (slayer) and the *go'el ha-dam*, in accordance with these *mishpaṭim*.

35. 25. The *'Edah* shall deliver the *roṣeaḥ* from the hand of the *go'el ha-dam*, and the *'Edah* shall deliver him to his *'ir miḳlaṭ* whither he had fled, and there he must abide until the death of the *kohen ha-gadol* (who has been anointed with the *shemen ha-ḳodesh* (holy oil)).

35. 26. If a *roṣeaḥ* go out of the bounds (*gebul*) of his *'ir miḳlaṭ*, whither he had fled;

35. 27. And the *go'el ha-dam* come upon him (*maṣa*) beyond such bounds, the *go'el ha-dam* may put the *roṣeaḥ* to death (*we-raṣaḥ*). There will be no blood-guilt for him (the *roṣeaḥ*) (*en lo dam*). Cp. Exod. 22. 1, 2 (2, 3).

35. 28. For he should have remained in his *'ir miḳlaṭ* until the death of the *kohen ha-gadol*. Only after the death of the *kohen ha-gadol* may the *roṣeaḥ* return to his *aḥuzzah*-land.

35. 29. So these shall be for you *huḳḳat-mishpaṭ* in all your *moshabot*.[2]

35. 30. A *makkeh nefesh*: By the utterance of witnesses (*lefi 'edim*) shall he (the *go'el ha-dam*) put to death (*yirṣaḥ*) the *roṣeaḥ*. One witness may not testify in a capital case (*be-nefesh la-mut*).

35. 31. Take no *kofer* for the life of a *roṣeaḥ*, who has been sentenced (*rasha'*) to death (*la-mut*); he must be put to death (*mot yumat*).

35. 32. Moreover, take no *kofer* from one that hath fled to his *'ir miḳlaṭ* to permit his return into the canton (*ba-areṣ*) (from the federal city) before the death of the *kohen*.

35. 33. Ye shall not pollute the land wherein ye are: for blood-guilt (*ha-dam*) pollutes the land, and the land cannot be purified of the blood (*lo-yekuppar la-dam*) shed in it, save by the blood of him that shed it (*shofek*).

[2] For *moshabot*, comp. Lev. 23. 21, 31; Num. 15. 2; and especially Num. 31. 10; Ezek. 6. 6, where the several cities are conceived as constituent parts of larger districts called *moshabot*.

The Joshua Texts

Josh. 20. 2. Speak to the Bne-Israel, thus: Appoint *'are ha-miḳlaṭ* whereof I spoke to you through Moses.

20. 3. That the *roṣeaḥ* may flee thither (*makkeh-nefesh bi-shgagah bi-bli da'at*); they shall be for you *miḳlaṭ* from the *go'el ha-dam.*

20. 4. When he that fleeth to one of these cities stands (*'amad*) at the gate (*petaḥ sha'ar ha'ir*), he shall state his case (*debaraw*) to the *ziḳne ha-'ir* of that city. They shall receive him into the city, and assign him a place of abode.

20. 5. If the *go'el ha-dam* pursues him (and demands his surrender), they shall not deliver the *roṣeaḥ* into his hand, for he smote his neighbour unwittingly (*bi-bli-da'at*), not hating him before.

20. 6. He shall abide in that city until he stand (*'ad'omdo*) before the *'Edah* for judgement (*la-mishpaṭ*) (and if the judgement be in his favour) till the death of the *kohen ha-gadol* for the time being. Then shall the *roṣeaḥ* return to his city and his home (to the city whence he had fled).

20. 7. The cities appointed (*wayaḳdishu*) were:
Kedesh in Galilee, in Mount Naphtali;
Shechem, in Mount Ephraim; and
Kiryath Arba (which is Hebron) in Mount Judah.

20. 8. And east of Jordan:
Bezer in the wilderness upon the plain of the Reuben tribe;
Ramoth in Gilead, of the Gad tribe; and
Golan in Bashan, of the Manasseh tribe.

20. 9. These are the *'are ha-mu'adah* for all the Bne-Israel and for the *ger* who sojourns among them to

flee thither—every *makkeh-nefesh bi-shgagah*—that he die not by the hand of the *go'el ha-dam* until he stand (*'ad'omdo*) before the *'Edah*.

THE LEVITICUS TEXTS

Lev. 24. 17. He that killeth any man (*kol-nefesh adam*) must be put to death (*mot yumat*).

24. 21. . . . He that killeth a man (*makkeh adam*) shall be put to death (*yumat*).

In approaching the examination of these important texts, it is well to keep in mind that our object is to ascertain the view of the Hebrew mind upon homicide in general. We wish to learn, first, whether it was viewed as a trespass against private persons, and therefore adjustable by those immediately interested, or whether, on the other hand, it was viewed as a crime of such gravity against the state that the private wrong incident thereto was extinguished by being merged in the injury inflicted on the state.

We ought, secondly, to determine what tribunal or tribunals had jurisdiction of the matter, and the manner of their procedure.

Our third point will be to discover what we may respecting the execution of the judgement, and, incidentally, to learn the modes of punishment that were practised.

These inquiries, of course, relate to homicide as a legal wrong, and not to excusable or justifiable homicide.

It is obvious that the killing of a public enemy in war does not constitute the offence, since such enemy, so far from being within the peace or protection of the state, is under its ban, as one whom it is useful and meritorious to destroy. Blood so shed is called war-blood (*deme milḥamah*) (1 Kings

2. 5), and for its shedding no blood-guilt (*damim*) arises either against the individual slayer or against the community.

A striking example of this doctrine, which persists even to our own day, is given in the thirty-first chapter of Numbers. War having been declared against Midian, the arch-enemy of Israel, the army gained a great victory. When the officers reported their action, Moses was wroth with them, because they had spared alive some that he deemed the most dangerous of Israel's foes.

Curiously enough, with this view of the matter there was mingled another sentiment at variance with the first. Though it was the army's duty to slay enemies at war with the state, yet even this high purpose did not relieve the slayer from the necessity of purifying himself, there being implied in this the thought that homicide, however justifiable or meritorious, is never quite blameless.

'Do ye abide without the camp seven days: whosoever hath killed any person, and whosoever hath touched any slain, purify yourselves (unsin yourselves, *tiṯḥaṭṭe'u*, from *ḥeṭ'*, sin) on the third day and on the seventh day, and also your captives' (Num. 31. 19).

The peace or protection of the state was, in ancient Hebrew law, supposed to be conferred, not only by the state directly, but by the several cantons or districts as representing the sovereignty of the state, and also by the king himself as the personal incarnation of the sovereignty.

One of the striking episodes of Hebrew history illustrates this: Abner was the general-in-chief of King Saul's army, and cousin to the king. After Saul's death and David's assumption of the crown of Judah, it was Abner who sought to perpetuate the dynasty of Saul by crowning Ishbosheth king over Israel. Civil war followed, Abner leading the

forces of Saul, and Joab the army of David. They met at Gibeon, and Abner was defeated and started to retreat. Asahel, a younger brother of Joab, started in pursuit, flaming with desire to meet the great warrior in single combat. The latter declined, but the fiery youth would not abandon his purpose, whereupon Abner accepted his challenge and slew him (2 Sam. 2. 8–23).

Subsequently, Ishbosheth quarrelled with Abner, and the latter, out of revenge, offered to David his sword, and his influence to make the King of Judah King of all Israel. His negotiations to that end being largely successful, he, at David's invitation, visited the latter's capital, Hebron, to close the matter. David received him with great honour, and when the treaty was concluded, dismissed him, and he went 'in peace' (*be-shalom*) (2 Sam. 3. 21, 22).

When Joab returned from an expedition and learned what had happened, he was in a fury, and angrily chid his royal master for what he deemed a piece of atrocious folly. He did not stop there, but sent lying messengers after Abner to lure him back by a pretended message from King David. They succeeded too well. Joab met him at the gate of Hebron in pretended amity and stabbed him to death (2 Sam. 3. 23–7) under the pretence that the hostilities which caused Abner to slay Joab's brother Asahel were not yet ended.

David's indignation was boundless, but he was powerless to break with the great chieftain. When, however, his death was near and he communicated his last wishes to his son Solomon, he charged the latter not to let Joab's hoar head go down to Sheol in peace (*be-shalom*), because he shed war-blood (*deme-milḥamah*) in peace (*be-shalom*) (1 Kings 2. 5).

The moral of this is plain. Though Judah and Israel had not formally concluded peace at the time of Abner's death, yet the latter was in treaty with David, had visited Hebron on the latter's assurance, in short, was in the king's peace and under his protection, and so being, was foully murdered by Joab.

This doctrine of the king's peace, or the peace of the state, as a protection against homicide, is of the first importance, since its rise marks the era when homicide, from being a private wrong, has become the concern of the state.

An interesting old text, belonging to the *zikne ha-'ir* law, well illustrates that the doctrine had at an early period penetrated to every corner of the state. It is contained in Deuteronomy (21. 1–9).

One is found slain in the field. There is no clue to the murderer. The peace of the state has been violated. As the cities are near each other, accurate measurements must be made in order to ascertain the distance between the place of the crime and the various adjacent cities. Comparison of these distances establishes which is the nearest, and upon it rests the immediate responsibility. In the language of the day, the blood-guilt (*dam*) is upon it, and in order to be relieved of this burden (forgiven, *nikkaper*), solemn ceremonial disavowal is necessary. The *zekenim* measure (21. 2); they wash their hands over the sacrificed heifer (21. 6); they make their solemn protestation of innocence and ignorance: 'Our hands have not shed this blood; our eyes have not seen' (21. 7). And although in one verse (3) the *shofetim* are brought in, and in another (5) the *kohanim bne-Levi* appear, they seem to have nothing to do. Indeed, verse 5 is a commentarial exposition of

a reason for inserting the *kohanim bne-Levi*, and runs thus: 'For them JHVH thy *Elohim* hath chosen to minister unto him and to bless by the *Shem* of JHVH, and by their pronouncement shall every controversy (*rib*) and every assault (*nega'*) be decided.'

That this general assumption of responsibility for a man's life was assumed by the state itself, is clear from such passages as these:

'That *dam naḳi* be not shed in thy land, which JHVH thy *Elohim* giveth thee for an inheritance, and so blood-guilt (*damim*) be upon thee' (Deut. 19. 10).

'Thou shalt put away *dam ha-naḳi* (the blood-guilt for the innocent) from Israel' (Deut. 19. 13).

Perhaps the most striking passage on this subject is Genesis 9. 5: 'Your life-blood will I require from beast and man, from every man's brother (*ish aḥiw*) will I require the life of a man.'

The doctrine of double blood-guilt is here clearly indicated. There is first, the primary blood-guilt incurred by the perpetrator, which is expressed by the first half: 'Your life-blood will I require from man (*mi-yad ha-adam*)', i. e. from the slayer. Then follows the secondary blood-guilt of the whole community, whose bounden duty it was to prevent, or at least to punish, the crime: 'At the hand of every man's brother (*ish aḥiw*) will I require the life of man.'

By this expression, *ish aḥiw*, is meant the community as a whole. Instances of its use in this sense are abundant, as the passages here indicated will show: Exod. 10. 23; 16. 15; Lev. 25. 46; Num. 14. 4; 2 Kings 7. 6; Jer. 13. 14; 25. 26; Ezek. 4. 17; 24. 23; 33. 30; 47. 14; Hag. 2. 22; Zech. 7. 9, 10; Mal. 2. 10; Neh. 5. 7.

The killing of a public enemy in war is, however, not the only form of justifiable homicide. A person condemned to death by law may, by virtue of such condemnation, be killed by the person or persons designated by law, and as such killing is the performance of a public duty, no blame attaches therefor. In the case of Achan, who was condemned to death by the oracle, the execution is fully described. Joshua and the great council (*Kol Israel*) took the condemned to the place of execution. Joshua announced his doom in JHVH's name, and *Kol Israel* stoned him to death (Josh. 7. 24, 25).

In the case of the blasphemer of the *Shem*, JHVH Himself gave directions for the execution by the *'Edah*. Moses communicated them to the *'Edah* (*bne-Israel*), and they stoned the convict to death (Lev. 24. 14, 23).

In the case of the sabbath-breaker, JHVH Himself directed that *Kol ha-'edah* should stone him to death, and they did so (Num. 15. 35, 36).

One convicted of manslaughter may, if he break the bounds of his prison city, be lawfully executed. Such execution is justifiable. It creates no blood-guilt (*en lo dam*) (Num. 35. 27).

Another case of justifiable homicide is when a man defends himself against attack which endangers his life or his home. If a man kills a burglar at night (before sunrise) while breaking in, such killing is justifiable. It creates no blood-guilt (*en lo damim*) (Exod. 22. 1 (2)).

We may at this point pause and, before going further, sum up the contents of this introductory lecture.

The Hebrews in Egypt had some form of internal government and communal law. The latter was orally

transmitted, and presumably much of it was incorporated in the subsequent written law. When they conquered Palestine, they could not at once enforce this law, because the *zikne ha-'ir* of the various cantons had to reckon, or thought they had to reckon, with the indigenous law which was familiar to the large mass of Canaanites who continued to dwell among them. The federal delegates who were sent to the various cantons never succeeded in procuring real compliance with the Hebrew law in many important matters. Probably during the reign of Solomon began a determined effort at a thorough law reform which should sweep away the local customs and establish the supremacy of the federal law. This movement, which lasted perhaps a hundred years, ended in the final triumph of the federal law, though the disruption of the monarchy during that period retarded the full success of the movement in the Northern Kingdom.

It is the history of this struggle for law-reform which we shall endeavour to unravel from the texts.

II

WE have now reached the point when it is our business to examine minutely the texts bearing on the subject of homicide. One of them, however, the Exodus text, has in it elements of complication. All the other texts are simpler. Deuteronomy and Numbers treat of murder and of manslaughter, Joshua of manslaughter only, Leviticus of murder only. Exodus, however, which, like Deuteronomy and Numbers, treats both of murder and manslaughter, deals also with other aspects than are elsewhere considered.

We are brought (21. 20–1) face to face with the ugly slavery question, and learn that though the slave is no longer a mere chattel, he has not yet the full rights of a man, and the general law does not cover his case.

We find two other exceptions to be touched upon hereafter.

Our purpose in this course is to deal with the general law of homicide only. There may be an opportunity at some future time, to consider such important subjects as slavery and its history, as indeed there are many other questions in Hebrew law and polity worthy of study. For the present investigation, the portion of the Exodus texts which immediately concerns us is composed of three verses only (Exod. 21. 12–14).

They begin with the broad proposition that a man who kills another shall be put to death (*makkeh ish wa-met*,

mot yumat), which is followed by a limitation or qualification of its generality, and this again by an emphatic statement or definition of the original proposition as qualified. The effect is to divide homicide into two degrees: the first, for which the death penalty is inexorably imposed, we may, for convenience, call murder; and the second, for which the death penalty is not imposed, may be called manslaughter.

As to the quality of the offence, there is no trace of the idea that it is a trespass merely. JHVH directs Moses to announce these *mishpaṭim* to the community, the *Bne-Israel* (20. 22; 21. 1), and the enforcement of the law is to be by it: I will appoint for *thee* the *maḳom* for the manslayer; *thou* shalt take the murderer from mine altar for death. Private interests are not alluded to. Tribunals are provided. When a Hebrew slave's term of service is to become perpetual, the master brings him to *Elohim* (21. 6); when vindictive damages are to be ascertained, the *pelilim* fix the amount (21. 22); a slave maimed by his master goes free, a right impossible to be enjoyed by a slave without public protection; in the only allowable case of *kofer* the sum is ascertained by a tribunal (21. 30); a bailee who has been robbed must appear before *Elohim* for judgement (22. 8 (9)), and railing at *Elohim* when one's case has been lost, is expressly forbidden (22. 27 (28)). In short, we are dealing here with the prosecution by the commonwealth of a high crime. As befits so serious a matter, the definitions are painfully minute.

If a man comes presumptuously (*yazid*) upon his neighbour to slay him craftily (*be-ʿormah*), he is *makkeh-ish*, within the meaning of the twelfth verse, and must be put to death (21. 14). If he have not lain in wait (*lo ṣadah*),

but Elohim have delivered him into his hand (*ha-Elohim innah leyado*), he is not a *makkeh-ish* within the meaning of the twelfth verse.

The physical acts are the same in both cases, the evil effect is the same in both cases. This old Hebrew law, however, treats these facts as irrelevant in the determination of the perpetrator's degree of guilt and punishment. It looks in this regard solely to intent, to motive. Only the murderer forfeits his life, and this murderer is one who lies in wait, who comes presumptuously, with a set purpose. The words used are impressive. Lying in wait is called *ṣadah*, the term employed to describe the wily tactics of the hunter who pursues his game (Gen. 10. 9; 25. 27, 28; 27. 3, 5, 7, 33; Lev. 17. 13). There are other instances of the use of the same word to describe a man-hunt (1 Sam. 24. 11; Lam. 4. 18).

Coming presumptuously is called *yazid*, a word likewise used in other passages to express insolent defiance of law or right (Deut. 17. 12, 13; 18. 20, 22; Isa. 13. 11).

Coming with a set purpose is expressed by the word *be-'ormah*, meaning prudence, foresight (Prov. 1. 4; 8. 5, 12), or in a baser sense, craftiness (Joshua 9. 4).

The words describing the act of the man who is not guilty of murder, but of mere manslaughter, are equally striking. That he did not lie in wait (*lo ṣadah*) is naturally the first and most important element of his defence. The verse, however, goes further and says *ha-Elohim innah leyado* (*Elohim* has delivered him into his hand). The expression is one indicative of a state of general opinion which does not hesitate to acknowledge, in a very real sense, the government of God in human affairs. Under such circumstances it is not unnatural, it is even logical

to conclude, that when tragedy overtakes a man with stunning suddenness, unforeseen, unapprehended, it must be by the act of God. Whether the tragedy results from what we could call a pure accident, or from the sudden conflict of two impetuous and high-strung men, who never before had cause of quarrel, would make small difference in such a view—the man of that day saw God's hand equally in both cases.

This phrase, *ha-Elohim innah leyado*, would come to have a technical meaning among jurists, but would be so generally understood that a definition of it would not be thought of. Though we have no direct guidance to ascertain its precise meaning, we are not entirely without aid from other texts. There are at least two instances in which a form of this verb *anah* is used in a manner that throws light on our passage.

When Samson fell in love with a Philistine woman, he took the first step in a course of living which finally led to his destruction. His parents sought to dissuade him, but the Biblical writer makes the reflection that they knew not whereof they spoke, since it was JHVH's design to bring Samson into hostile collision (*to'anah*) with the Philistines who were then lording it over Israel (Judges 14. 4).

And that the idea of a quarrel is associated with the word is plain from the well-known story of the Syrian general Naaman. This distinguished man was afflicted with leprosy and could obtain no relief. A little Israelite handmaiden of his wife told her mistress that Elisha, the great prophet of Samaria, could cure him. The king hearing of this, insisted on Naaman's undertaking a journey to Samaria, at the same time giving him a personal letter

to the king of Israel, advising the latter that he had sent his favourite general to him to be cured.

The relations between the two powers were such that the king of Israel, when he read the letter, construed it to be a mere subterfuge. In his consternation he rent his clothes, and exclaimed: Am I *Elohim*, to kill or cure? He surely seeks to quarrel with me (*mit'anneh hu li*). Elisha, however, soon corrected the error by telling the king that Naaman's cure was not to be by the king, but by the prophet (2 Kings 5. 1–8).

In both these cases there is a subtle intimation that Divine wisdom at times foments a quarrel between persons not hostile to each other, in order to attain ends of justice which the narrow wisdom of human courts would be unable to reach.

To minds that hold these views, accidents are, of course, impossible. Everything is ordered by the *Elohim*, and man is responsible only for what he deliberately intends. Hence the term *ha-Elohim innah leyado* comprised a tolerably large range of happenings, from the death of a man by the mere slipping of his neighbour's axe from the helve, to the killing in hot blood.

The law of Exod. 21. 12–14 does not, however, stop with the mere definition of homicide. It points out what happened after a homicide had been committed. Whether it was murder or manslaughter, the perpetrator sought sanctuary; that is, he went to the altar and took hold of its horns.

The words are in the case of manslaughter: I will appoint thee a *maḳom*, whither he shall flee (or go) (21. 13); and in the case of murder: Thou shalt take him from mine altar (*mizbeaḥ*) for death (21. 14).

That *maḳom* and *mizbeaḥ* refer to the same place there can be little doubt.

Before the conquest the country was divided into many little kingdoms, called *'arim* (cities), each of which had a capital city, which was the seat of cantonal government. At its gate sat the tribunals; in the portion devoted to the priests were the paraphernalia of worship. In our lectures on Hebrew Polity we have pointed out the example of Ophrah in the early days of Hebrew domination when the *zikne ha-'ir* practised Canaanite rites and administered the law with, at least, a Canaanite infusion. The *maḳom* was the ecclesiastical section of the capital, and perhaps no better description of it can be given than that of Deut. 12, where the imperative command is given to destroy every one of them.

Ye shall utterly destroy all the *meḳomot*, wherein the nations which ye shall possess served their *Elohim*, upon the high mountains and upon the hills, and under every green tree. And ye shall overthrow their altars (*mizbeḥot*), and break their *maṣṣebot*, and burn their *asherim*, and hew down the *pesilim* of their *Elohim*, and destroy their names out of that *maḳom* (Deut. 12. 2, 3).

The elaborate furnishing of such a *maḳom* indicates that though there may have been humble shrines, popularly called *maḳom*, scattered through the country, yet the generally accepted *maḳom* was an important place in each canton, the capital city. Thus we read of *meḳom Schechem* (Gen. 12. 6), of Bethel, the *maḳom* where his (Abram's) tent had been (Gen. 13. 3); the *maḳom* of the *mizbeaḥ* (Gen. 13. 4), and again of Jacob's calling the name of the *maḳom* at Luz, Bethel (Gen. 28. 11–19).

Perhaps the best evidence is the fact that the Jerusalem

temple, in all its glory, is spoken of by Solomon as the *maḳom* (1 Kings 8. 29, 30, 35).

That in the days of the *ziḳne ha-'ir* the law of every canton was administered in its own capital city cannot be doubted. A person charged with homicide would be tried there. If, however, there was good reason to avoid trial, he could run to sanctuary, and it may be that he was not limited in that respect, but could be protected if he seized hold of the altar in the *maḳom* of any of the *'arim* in the land.

This sanctuary granted protection even to the convicted criminal.

That the Hebrew law of homicide, as laid down in Exodus, was based on ancient Hebrew common law is probable. At all events, it represented the thought that wilful murder generates blood-guilt, not alone in the perpetrator, but in the whole community. Translated into modern phrase, this means that murder is a high crime against the state, and that all elements of private trespass and consequent damages, which would otherwise inhere in it, are submerged and annulled.

We have heretofore enlarged upon the formation of the Hebrew state out of the pre-Hebraic cantons (*'arim*), and have shown that the town-councillors (*ziḳne ha-'ir*) insensibly fell into many of the ways of Canaanite religion and law. The formative period of the state began to show a decided progress towards national unity as early as the time of Samuel, but his administration and that of Saul were too disturbed to complete the establishment of a settled commonwealth. It was the genius of David which completed the work. His life, however, was largely taken up in securing his country against enemies from without

and from within. Much remained to be done. David was, above all, a warrior, and though he had magnificent plans for welding the state into a peaceful and harmonious whole, their fruition was not immediate. That he had conceived a mode of establishing the supremacy of federal law, and that it lacked efficiency, appears from an account in the second book of Samuel.

His son Absalom was ambitious to succeed to the throne. He was renowned for the beauty of his person (2 Sam. 14. 25); he made himself conspicuous by the mode of wearing his hair (2 Sam. 14. 26); he affected a state beyond the usual custom of royal princes (2 Sam. 15. 1). Above all, he was master of the arts of the demagogue. An incidental remark in the narrative telling of this quality, throws light on our subject. Absalom rose up early and stood beside the way of the gate; and it was so, that when any man that had a controversy (*rib*) came to the king for judgement (*la-mishpaṭ*), Absalom hailed him: From which *'ir* art thou? And the answer came: Thy servant is from such and such a place. Then Absalom would say: No doubt your case is good and just, but then the king has appointed no one to hear you. O that he would appoint me *Shofeṭ ba-areṣ*, so that any man that has a *rib* or *mishpaṭ* might come to me. I would right him. All these men made obeisance to him, and he received them with warm marks of affection. So acted Absalom with all Israel that came to the king for *mishpaṭ*, and, the historian adds, so stole Absalom the hearts of *anshe Israel*, the leading men of the nation.

The narrative proves that the administration of law in the several cantons had aroused discontent, and that a movement in favour of larger federal supervision was making

progress, or so supple a politician would not have become its chief advocate. And there are circumstances happening not much later which strongly confirm this view. David died about 970 B.C. One of the first acts of Solomon's reign was to institute a great fête at Gibeon. On that night he dreamed that he prayed JHVH to give him a *leb shomeaʿ*, a mind to hear and to judge (*lishpoṭ*) the people, to discern between the right and the wrong (1 Kings 3. 9), and that JHVH granted his prayer to the full 'so that there was none like thee before nor will be hereafter' (3. 12).

And by way of illustration, there follows the story of the two women and Solomon's wise judgement on their dispute, and all Israel believed that the wisdom of God was in him to administer justice (*la-ʿasot mishpaṭ*) (3. 28).

That he proceeded at once to reorganize the government, so as to bring the central power to bear on each corner of the state, appears from 1 Kings 4. And as a result we are told that Judah and Israel dwelt safely, every man under his vine and under his fig-tree, from Dan even to Beersheba (1 Kings 5. 5 (4. 25)).

In the pursuit of his great federal policy, he planned to make Jerusalem a point of attraction for every inhabitant of the country, and for strangers from abroad. Especially prominent was the group of great buildings of which the Temple was the most striking and impressive. One notable feature of his palace was the *ulam ha-mishpaṭ*, a porch for the throne where he sat as the chief judge of the kingdom (1 Kings 7. 7). Into the Temple was introduced the sacrosanct *Shem*, the Ark of the Covenant, the visible symbol of Divine Justice on earth (1 Kings 8. 21).

And Solomon, by his prayer, indicated that thereafter

its high function of administering justice by oracle would cease, and that ordinary courts would take its place, the judges whereof would impose an oath (*alah*) upon a man charged with injuring his neighbour, invoking God so to order that the guilty might be convicted (*le-harshia' rasha'*) and receive his deserts, and the innocent be acquitted (*le-haṣdiḳ ṣaddiḳ*) as is meet (1 Kings 8. 32).

These facts show the circumstances which led to Solomon's being heralded in legend as the great juridical genius of Israel. There is in his very name a hint that he was determined to put an end, once for all, not only to external wars, but to domestic disorders and feuds. Though the boy was named Jedidiah, probably to conciliate the turbulent Benjamite element in the state, by the adoption of the cognomen of their eponymous ancestor (Deut. 33. 12), yet his father, seasoned old warrior that he was, had come to see that peace was the highest ideal of a prosperous state. And so, as his end drew near, he charged the prince to build the Temple, which privilege, though eagerly sought, had been denied him, because he had delighted in bloodshed and grown great on it, and it had been reserved for a man who would give the country repose (*ish menuḥah*), in whose reign Israel should have peace (*shalom*) and quiet (*sheḳeṭ*) (1 Chron. 22. 6–9).

Solomon (*Shelomo*) was an appropriate cognomen for such a man, and it was David who bestowed it on him (2 Sam. 12. 24; 1 Chron. 22. 9).

It is probable that the first effort of the federal government was to correct the cantonal government's indifference to the offence of *sarah*, which was the active and open advocacy of Baal as against JHVH. In *Ancient Hebrew Polity* (pp. 51–61) I have shown the transfer of jurisdiction

over this offence from the *zikne ha-'ir* to the Federal High Court, there called the *'Am ha-ares*. This was a measure to protect the state against direct assault on the established religion which was its foundation.

Security of life everywhere within the kingdom was a matter of no less importance. To appreciate the gravity of the question thus presented, we must try to understand the pre-Hebraic Canaanite law of homicide.

The common notion that it was in the pure blood-feud or vendetta stage is unsupported by adequate evidence. In placing before you the sources of our information in the first lecture, you will remember that eleven provisions of the law of Ḥammurabi (*circa* 2250 B. C.) were presented, being the only articles of that Code in any wise bearing on the subject of homicide. They show that at the time of the promulgation of that Code, the Babylonian state had not yet assumed jurisdiction over homicide. The inference is that the law of blood-feud or vendetta, in some form, was then in force. Blood-feud or vendetta is a form of true law. Before a state is fully organized, certain functions which ought to be exercised by it are left to the control of subordinate organizations within it, such as families, clans, or guilds. Homicide is one of the subjects with which early governments are not eager to deal.

During such preparatory stages of a state's growth, the vendetta is the only safeguard of human life. It protects society. Far from being an enemy of the nascent state, it is an effective aid to its development. So soon, however, as the proper stage has been reached, the vendetta law is at first modified, and afterwards, when the state has assumed the whole jurisdiction over cases of homicide, it is totally repealed and destroyed. Sporadic survivals here and there

are in the nature of conscious crime, and in no wise impair the force of these general rules.

The result as here sketched is inevitable. State laws against homicide raise questions of fact and law which cannot be determined otherwise than by regularly constituted tribunals.

Vendetta law, on the other hand, is plain and simple, and needs to make no curious inquiry into circumstances or motives. A member of clan A has killed a member of clan B. The latter must retaliate in kind; for, if there were no such redress, the injured clan would become the mark for hostile assault from all quarters.

That state laws which punish a man for his own crime only, cannot co-exist with a system which punishes without regard to the question whether the victim is innocent or guilty, is too obvious for argument.

The reticence of the Ḥammurabi Code on the subject of homicide does not forbid the conclusion that the vendetta law, pure and simple, was no longer dominant; that though tolerated to a degree, it had undergone modification.

It needs but little reflection to understand that the vendetta law is, in effect, a perpetual civil war between constituent elements of a state, and that its unbridled practice can have no other result than the destruction of the state.

The Ḥammurabi Code presents indications that it realized this truth, and though it did not deal with homicide directly, it ordered the several corporate elements of the state to accept *wergild* or money satisfaction for certain kinds of homicide.

One who killed another in a quarrel paid to the bereaved family or clan or guild a certain value in silver, and there the matter ended.

That in course of time this principle of *wergild* also extended to cases of wilful murder is probable. It is not to be believed that great states like Babylonia and Assyria failed to change their laws from time to time. Reverence paid to ancient codes does not mean that they retain their pristine usefulness, or that no part of them has become obsolete.

We may well believe that when the Hebrews entered Canaan, a thousand years after the promulgation of the Ḥammurabi Code, the latter had been essentially changed, and that the vendetta law for murder had been materially modified. Be that as it may, there is no evidence that unmodified vendetta law then ruled in Canaan. Everywhere there were ordered little kingdoms whose existence would have been daily imperilled from within had such licence been tolerated.

The evidence of the Hebrew legislation on the subject confirms the view that the Canaanite law of homicide was vendetta law as modified by *wergild* (*kofer*). While the kings of the various *'arim* did not make homicide an affair of the state, they nevertheless preserved the peace of the *'ir* by permitting the tribunals to assess the proper amount of *kofer*.

This was the state of the law when the Hebrews entered Canaan, and the whole evidence tends to show that the *zikne ha-'ir* of the various cantons failed to administer the Hebrew law whose letter and spirit were hostile to the native practice of *kofer*.

There are hints in the Biblical writings which seem to attest the existence of the practice of *kofer*, and to indicate that the *makom* priests were the intermediaries who arranged terms between the parties.

It will be remembered that Eli's sons and Samuel's sons were, in the popular mind, guilty of abusing their high positions for their own material advantage. After the coronation of Saul, Samuel, smarting under the national repudiation implied by the establishment of the monarchy, delivered a farewell address, in which, with conscious integrity, he challenged any man to point to any questionable transaction in his long public career. One of the acts he repudiates is the taking of *kofer* that blinds the eyes (1 Sam. 12. 1–5).

The Authorized Version renders it *bribe*, evidently under prepossession of the idea that Samuel was a *shofeṭ* in the later sense, a judge of a law-court, and without reflecting that Samuel was the *Kohen's* acolyte; that as a child he ministered before JHVH, girded with a linen *ephod* (1 Sam. 2. 18; 3. 1); that he was to be a *Kohen ne'eman* to replace Eli's sons (2. 35), and that all Israel recognized him as *ne'eman*, as a *nabi* of JHVH (3. 20).

That the sons of Eli, among other things, were charged with profiting by *kofer*, may be fairly assumed, and hence Samuel's defence probably alludes to the well-established custom of the *maḳom* priest to assist in the negotiation between the *roṣeaḥ* and the family *go'el*.

Moreover, the word *kofer* occurs thirteen times, and the Authorized Version renders it *ransom* in eleven of them. The only other exception is in Amos 5. 12 where it also renders *bribe*.

The proper word for *bribe* is *shoḥad*, which means gift, since the ancient Hebrews believed that a gift to a public official by a person who had or was likely to have an interest in a matter before him, was a bribe. It occurs twenty-one times, and in every instance the odious feature

appears that it is designed to curry favour with a person in power. The guilty (*rasha'*), says Prov. 17. 23, proffers *shoḥad* to avert justice, and Micah (3. 11) describes judicial depravity with the bitter words: They judge for *shoḥad*.

While *shoḥad* means giving something for a consideration which no man will avow, *kofer* conveys the idea of a valuable consideration. The money is due as ransom, solace or atonement for an injury committed. It is the *wergild* or damages paid by one who has killed another to the head of the deceased's family or clan, and received by the latter in satisfaction and discharge of all claims and animosities.

However inveterate a custom like *kofer* may have been, the idea that the priests would abuse their functions in relation to it, would be sure to grow and to engender bitterness. Popular hatred would not nicely discriminate between *shoḥad* and the profits of *kofer*, and in fact we find that Samuel's sons were charged outright with taking *shoḥad* (1 Sam. 8. 3).

The one other instance in which *kofer* is rendered *bribe* throws some light on the inveteracy of custom. That the Northern Kingdom was slower than the Southern in purifying the Hebrew law of Canaanite admixture, is highly probable. Amos (about 750 B.C.) visited the Northern Kingdom, apparently for the purpose of effecting some reforms in that respect. That his utterances attracted attention appears from the fact that he was directed to leave the country, the priest of Bethel reporting to the king of Israel that the land was not able to bear all his words (Amos 7. 10, 12). Though not satisfied with conditions in his own Judah, Amos seems to have been horrified by what he saw in Israel. He comments par-

ticularly on evasions of the *Torah*, and gives particulars. They sell persons into slavery who are not liable to this punishment (*ṣaddiḳ*) (2. 6); they violate certain purity statutes (2. 7); they ignore the law (Deut. 24. 12, 13), requiring that a pledged garment be put in the pledger's possession at night (2. 8); they break the law (Num. 6. 3), forbidding strong drink to Nazarites (2. 12); they mock those who pronounce judgements according to the *Torah* (5. 10); they convict the innocent (*ṣaddiḳ*), they take *kofer* (5. 12). He implores them to establish *mishpaṭ* (the law) in the *sha'ar* (courts) (5. 15).

In this powerful invective he charges that taking *kofer*, though forbidden by the *Torah*, is still practised, and puts the conviction of the innocent as an antithesis to taking *kofer*, which is, in effect, letting off with a fine some who should answer with their lives.

Vendetta law, modified by *kofer*, is perhaps the least desirable of all, when a state is increasing in wealth and power. Violence by turbulent chieftains is doubtless a serious evil in the state, but bloodshed that may be paid for in money by peaceful, wealthy citizens is much more shocking.

The time had come when *kofer* for murder had become inconsistent with the safety of the state, and Solomon determined to abolish it, and to enforce the Exodus statute.

There is nothing in the records to show that the *ziḳne ha-'ir* were deprived of their function. That federal legates were sent to sit with them, would appear to be certain from the *ziḳne ha-'ir* law of Deut. 21. 1–9, which prescribes that in murder cases where the perpetrator could not be discovered the *Kohanim* (*bne-Levi*) were to be present, and that their duty was to pronounce the law in

every case, civil and criminal (*kol rib we-kol nega'*) (21. 5). The broad statement of their powers seems intended to negative any inference that their duty was limited to the particular kind of case under discussion.

There is, moreover, no hint that the execution of any judgement they might pronounce was to be in any new mode. Under the vendetta-*kofer* law, the judgement doubtless was that the perpetrator of the homicide was to pay to the *go'el* of the bereaved family a certain amount specified by the *zikne ha-'ir*, failing which payment the *go'el* was entitled to put him to death. Motive and circumstances were not inquired into. A killing by accident was not differentiated from deliberate assassination. The great change to be effected by the new federal movement was that murder was to be carefully distinguished from manslaughter, and that neither *kofer* nor any other defence or device could save a murderer from death. A fatal blow was dealt the old pagan custom of sanctuary. It was no longer to protect the murderer. Thou shalt take him from mine altar for death (Exod. 21. 14).

Concerning manslaughter the matter is not so clear. As the manslayer was still entitled to the privilege of sanctuary, and as nothing is said about subsequent proceedings, the inference is that *kofer* for manslaughter was tolerated. This conclusion is strengthened by the law respecting the goring ox. If the master knew of his vicious habit, and allowed him to go at large, and he killed a person, this was held to be constructive murder by the master, and the punishment denounced was death: 'the ox shall be stoned, and his owner also shall be put to death' (21. 29). In this case, however, *kofer* is expressly allowed (21. 30). As constructive murder is an offence of a higher

grade than manslaughter, the probability that *kofer* was allowable in the latter is heightened.

It may be well worth while to pause here for a moment for the purpose of comparing the Hebrew law's view of homicide with that of our modern law.

The Hebrews noted cases of voluntary and of involuntary manslaughter just as we do. They did not, however, hit upon any line of division between the two. Our common law declares voluntary manslaughter to be the unlawful killing of another, without malice, on sudden quarrel, or in heat of passion. Involuntary manslaughter is, where a man doing an unlawful act, not amounting to felony, by accident kills another.

We also have excusable homicide, where a man doing a lawful act, without any intention to hurt, by accident kills another; as, for instance, where a man is hunting in a park, and unintentionally kills a person concealed. This we call homicide by misadventure.

The Hebrew law put under one and the same head of manslaughter, the voluntary, the involuntary, and the excusable homicide of our common law. They recognized an element of supernatural influence in them all equally, and punished them alike.

To this general classification there were but two exceptions: the constructive homicide by the goring ox, which we have just described, and the act of men, who in a quarrel with each other, accidentally hurt a gravid woman. The provision is obscure and leads to the suspicion of an injury to the text. It nowhere speaks of the perpetrator as killing the woman, or of the victim as dying. It names two kinds of result to the woman, one where there is no *ason*, and the other where there is *ason*. The term *ason* is defined as

meaning mischief, evil, harm (Brown-Driver, p. 62). That miscarriage should be described as no mischief (*welo . . . ason*), and that death should be described as mischief (*ason*), is certainly peculiar. The one appears to understate the fact, the other to overstrain the word. We have before us a case which was evidently part of the Canaanite common law. The Code of Ḥammurabi, as we have seen, has provisions on the subject (Sections 209–14). It distinguishes the victims into three classes: gentleman's daughter, poor man's daughter, and gentleman's female slave. It divides the effect of the injury into two classes: miscarriage and death. For miscarriage the damages are ten shekels, five shekels, and two shekels, according to the social rank of the woman; for death, the penalty, if the victim be a gentleman's daughter, is the death of the perpetrator's daughter; if she be of the other ranks, a half-mina of silver, and a third of a mina of silver, respectively.

The Babylonian law treated the miscarriage itself as a punishable mischief, while the Hebrew law in its present form, declares it to be no mischief, but nevertheless imposes punitive damages (*ʿanosh yeʿanesh*). The probability would seem to be that in the case of accidental death like this, the general rule prevailed that the death penalty could not be imposed for homicide, unless it was committed with malice aforethought. The term *ʿanosh yeʿanesh* would then cover the whole case, *ason* or no *ason*. The *pelilim* would make a just appraisement of the damage suffered by the woman, if she lived, or by her husband in consequence of her death. This would, in effect, take the case out of the list of criminal acts and reduce it to a civil trespass, for which damages were recoverable—a conclusion with which our modern law might readily concur (Exod. 21. 22–5).

That the first effort of the federal government to revolutionize the ancient practice was not very successful, is easily inferable from the fact that important amendments to the law were soon made. These are incorporated in the Deuteronomy statute, and the nature of the changes leads to the suspicion that the taking of *kofer* for murder was still practised. The family *go'el*, who, by immemorial custom, was entrusted with the death-warrant, did not take the murderer from the altar, and it is to be feared that the *zikne ha-'ir* and the *makom* priest connived at this breach of the federal law. The habit of collecting money damages was deemed too valuable a privilege to abandon for the sake of abstract justice or large state policy.

The new remedies introduced by the Deuteronomy statute were:

1st. The positive assumption by the state of exclusive jurisdiction over all homicide cases, or, in the words of the text, the acknowledgement of national blood-guilt (*dam*) for homicide.

2nd. The abolishment of the ancient right of the family *go'el* to receive the warrant of execution from the *zikne ha-'ir*, and the compulsory duty of the latter to entrust it to a newly created federal officer for each canton—the *go'el ha-dam*—who is not the family *go'el*.

3rd. The abolishment of sanctuary for homicide and the exclusion of the *makom* priests from any concern therein.

4th. The establishment of three judicial districts, and the setting apart of one city in each to which every perpetrator of a homicide must go.

5th. The total abolishment of *kofer* for manslaughter, and the substitution therefor of internment in the separated city, as punishment for the crime.

6th. A marked change in the law of evidence, by which the testimony of one witness only became incompetent to convict.

As regards the first and second of these points, it is to be remarked that the name *go'el ha-dam* was the mere adaptation of a word in common use: *go'el*. The *go'el* was that member of the family who, when it lost its head, was the next friend; a kind of sublimated executor and guardian, who looked after the interests of his kinsmen in trouble. And now it was the state whose new measures and principles avowed that it had incurred blood-guilt (*dam, damim*); that an evil fate threatened the country, unless this blood-guilt was redeemed or removed.

A *go'el* or redeemer was needed, and thus the *go'el ha-dam*, a being never heard of before, was created. He was the state's redeemer from blood-guilt, not the avenger of the victim's blood. Had he been the latter, he would have been *noḳem ha-dam*.

The confusion that exists has arisen out of the double meaning of *dam*, blood and blood-guilt, accompanied by an exaggerated notion of ancient views concerning the sanctity of blood. The Hebrews forbade the drinking of blood, because nations with whom they came in contact practised this habit, in association with other habits and rites which the Hebrews deemed demoralizing. *Dam* means blood. It also means blood-guilt, and even in this sense it means two kinds of blood-guilt—the primary blood-guilt of the perpetrator, and the secondary blood-guilt of the community which the latter incurs by its failure to prevent the killing, an error which it must expiate, either by punishing the slayer, or, if he remains undiscoverable, then by formal legal ceremony. It is with this secondary

blood-guilt, the communal blood-guilt, that our investigations are more immediately concerned. Its name is sometimes *dam*, sometimes *damim*.

We have, in our first lecture, referred to the striking passage of Genesis (9. 5), which refers the origin of this keen sense of communal responsibility to the direct instruction of Noah by *Elohim*, at the very beginning of the new world after the Deluge.

The same view is expressed, or implied, in other passages:

Ye shall not pollute the land wherein ye are; for blood-guilt (*ha-dam*) defileth the land, and the land cannot be cleansed (*yekuppar*) from the guilt of blood (*la-dam*) shed therein, save by the blood of him that shed it. Defile not therefore the land which ye shall inhabit, wherein I dwell (Num. 35. 33, 34).

That *dam naḳi* be not shed in thy land, which JHVH, thy *Elohim*, giveth thee for an inheritance, and so blood-guilt (*damim*) be upon thee (Deut. 19. 10).

Jeremiah expresses the same idea:

If ye kill me, ye bring the guilt for innocent blood (*dam-naḳi*) on yourselves, on this city, and on its inhabitants (Jer. 26. 15).

And Joel does the same:

I will cleanse their blood-guilt (*we-niḳḳeti damam*) that I have not cleansed; for JHVH dwelleth in Zion (Joel 4 (3). 21).

We have, moreover, the impressive ceremony of communal purgation from this kind of blood-guilt in Deut. 21. 1–9.

By the force and operation of the new federal policy the realization of communal responsibility for murder

became much keener in the Hebrew state than it is in our modern conditions. They also felt a more urgent responsibility for their own share in any transaction which might result in loss of life, as is seen in this provision:

When thou buildest a new house, then thou shalt make a battlement for thy roof, that thou bring not blood-guilt (*damim*) upon thine house if any man fall from thence (Deut. 22. 8).

This extreme sensitiveness concerning blood-guilt was not due to the fear of savage reprisal, as has been commonly thought. The instance just given is clearly an ancient urban regulation, expressing developed feelings and not primitive passions.

So insistent did this notion of blood-guilt become that it cropped out everywhere. If the law proclaimed capital punishment for an offence, it conceived blood-guilt as somehow inseparable even from a legal execution, and got rid of it by ascribing the blood-guilt to the convicted defendant himself, whose bad conduct compelled the state to slay him. The terms are: *damaw bo*, the blood-guilt for him is upon himself (Lev. 20. 9); *demehem bam*, the blood-guilt for them is upon themselves (Lev. 20. 11, 12, 13, 16, 27; 1 Kings 2. 33).

A community so impressed with the awfulness of blood-guilt will do all in its power to avoid it. There is need for untiring vigilance to ward it off. The functionary whose office it is to see to the community's expiation, may well be called the community's next friend. And for this position there is no Hebrew word more apt than *go'el ha-dam*, the next friend of the community in warding off its blood-guilt.

According to this view the word *go'el* expresses a direct relation with the community, and the word *ha-dam* a con-

dition of the community which is to be protected by that relation. The common notion is that the direct relation of the *go'el ha-dam* is with the criminal. *Go'el* is held to be the *avenger* who smites the criminal, and *ha-dam* is not the blood-guilt of the community, but the blood of the victim. The *go'el ha-dam* would thus be the avenger of the victim's blood. The contrast is sharp. On the one hand the community's friend and saviour; on the other, the criminal's vengeful enemy.

In support of the former view, it may be said that no instance can be found where *go'el* does not mean one who has a friendly function to perform, a function which has a sustaining effect on the person for whom he acts, whose *go'el* he is.

When one exhibits his friendliness by injuring his client's adversary, he is no longer *go'el*, but *noḳem*, avenger.

Isa. 63. 4 brings this out clearly. JHVH is represented as going forth to take vengeance on Edom for wrongs it has perpetrated against His people Israel, and as declaring:

The day of vengeance (*yom naḳam*) (against Edom) is in my heart.

The year of my redeemed (*shenat ge'ulai*) (Israel) is come. And in ver. 8 this relation between JHVH and Israel is expressed by the parallel term *moshia'* (saviour), while in ver. 9 both terms are used together—*hoshi'am* and *ge'alam*.

That *go'el* is uniformly used as here contended, let numerous instances attest:

Jacob invokes for Joseph's sons the blessing of his protecting angel (*ha-mal'ak ha-go'el*) (Gen. 48. 16).

JHVH promises to redeem Israel (*we-ga'alti*) (Exod.

6. 6), and in the song of Moses is worshipped for having done it (*ga'alta*) (Exod. 15. 13).

In Lev. 25, the redemption of the former owner of land, sold by him, is spoken of, and it has the technical name of *ge'ullah* (25. 24), and his act in so redeeming is called *yig'al* (25. 33).

If he be too poor to redeem, his next of kin shall do so for him (*ga'al*), and this friendly redeemer is the *go'alo ha-ḳarob elaw* (25. 25).

Among the list of those who shall act as *go'el* are the uncle, the uncle's son, or indeed any near kinsman (*she'er besaro*) (25. 49).

When Zimri exterminated the whole house of king Baasha of Israel, he left none of his *go'alim* or *re'im* alive (1 Kings 16. 11).

Jeremiah uses the word in the same sense of redemption—*ge'ullah* (Jer. 32. 7, 8).

He (Boaz) is one of our near relatives, of our *go'alim* (Ruth 2. 20; 3. 9, 12, 13; 4. 1–10; 4. 14).

Thus it is seen that the word *go'el* presents only the idea of service rendered to the friend by an act making directly, and not indirectly, for his benefit. It is true that such a *go'el* might render a kind of doubtful indirect service to his friend by hurting the latter's enemy. When such is the case, the word *ga'al* does not present itself to the Hebrew mind as describing the act. As we have seen from Isa. 63. 4, it is *naḳam* which describes the vengeful aspect of an act, because, however friendly it may be to the beneficiary, it is hurtful to the victim. Indeed, it is the only true Hebrew word for vengeance, though there may have been a dialectal variation of it (*naḥam*) which Isaiah uses in alliterative parallelism.

JHVH, the *abir* of Israel, says:

Oh, I will ease me (*ennaḥem*) of mine adversaries, and avenge me (*innaḳemah*) of mine enemies (Isa. 1. 24).

And he uses the word *naḳam* in the same sense frequently (34. 8; 35. 4; 47. 3; 59. 17; 61. 2).

Whoever slayeth Cain, vengeance shall be taken on him (*yuḳḳam*) (he shall be punished) sevenfold (Gen. 4. 15; 4. 24).

Thou shalt not avenge (*tiḳḳom*) nor bear grudge (*tiṭṭor*) (Lev. 19. 18).

Avenge (*neḳom niḳmat*) the Bne-Israel of the Midianites (Num. 31. 2, 3).

Mine is punishment (*naḳam*) and recompense (*shillem*) (Deut. 32. 35).

If I whet my glittering sword and mine hand take hold on judgement, I will punish (*naḳam*) mine enemies, and will recompense (*ashallem*) them that hate me (Deut. 32, 41).

And the sun stood still

And the moon stayed

Until the people had avenged them (*ʿad yiḳḳom goy*) of their enemies (Joshua 10. 13).

Samson shouted at the Philistines: *Niḳḳamti bakem* (I will be avenged on you) (Judges 15. 7; 16. 28).

It is God who vouchsafed me vengeance (*neḳamot*),

And subjected peoples to me (2 Sam. 22. 48).

Jeremiah uses the word frequently (11. 20; 20. 10, 12; 46. 10; 50. 28; 51. 6, 36), as does Ezekiel (24. 8; 25. 12, 14, 15, 17). Nahum does the like (1. 2), as does Proverbs (6. 34).

Perhaps the most impressive use of the word *naḳam* in this connexion is found in passages in which it is employed to denote vengeance against murderers.

He will avenge (*yiḳḳom*) the blood (*dam*) of his servants

And inflict vengeance (*naḳam*) on his adversaries (Deut. 32. 43).

I will avenge the blood (*we-niḳḳamti damim*) of my servants, the prophets, and the blood (*damim*) of all the servants of JHVH at the hand of Jezebel (2 Kings 9. 7).

In law, too, the word *naḳam* is used technically to denote punishment of a severe kind (Exod. 21. 20, 21).

The examples given fairly justify the conclusion that the *go'el ha-dam* was the public executioner, who, by fulfilling the death-sentence against murderers, relieved the community of its secondary blood-guilt.

That the term should in time become disagreeable, and even odious, is inevitable. In our own language there is a sense of shudder in the word executioner, which was even more lively in its predecessor 'headsman'.

We have now reached a point at which we may pause. The old Hebrew law of Exodus has been analysed, the opposition to its enforcement explained. The stern justice of the state, under the guidance of the great king, has entered into a death-struggle with the crude *kofer*-justice of bygone ages. *Maḳom* priests and *ziḳne ha-'ir* are, some openly, some covertly, satisfied with the old and alarmed at the new. The vigorous blow at sanctuary, constricting its jurisdiction and limiting its power, is received with ill-concealed hostility. The substitution for the substantial advantage of *kofer* of an idea, an ideal—justice—a thing barren of personal profit, seems like the destruction of a valuable kind of property, the extinction of a vested right.

In our next lecture we shall proceed with the further examination of the Deuteronomy texts, whose general effect we have stated.

III

THE Deuteronomy texts on the subject of homicide are three in number, and are contained in chapters 4, 19, and 27. Two of them, those in chapters 4 and 27, we may at once set aside as having no important bearing on our investigation.

The first (4. 41–3) is a mere historical note, stating that Moses severed three cities east of Jordan, whither the *roṣeaḥ bi-bli-daʿat* might flee (*la-nus*), he not entertaining hatred against him (*lo sone-lo*) before.

There is here no attempt to define murder. There is, however, an interesting novelty. Manslaughter is characterized by a term which is not used in Exodus. There the expression is that God had delivered the unfortunate victim into the slayer's hand (*ha-elohim innah leyado*). Here it is *bi-bli-daʿat*, that he had acted without intent, that he had acted on the spur of the moment. In the latter sense of stunning suddenness, the expression occurs in Job 36. 12. Isaiah (5. 13), too, uses the related expression, *mibbeli-daʿat*, in the same sense. In short, the idea that death resulting from a sudden quarrel in hot blood is not murder, which prevails in the Exodus text, is not departed from by the use of the new expression.

The third Deuteronomy text on the subject of murder is one line of the old *Arur*-code (27. 15–25): *Arur*, he who slays his neighbour by stealth (*makkeh reʿehu ba-seter*) (27. 24).

Here the term *ba-seter* conveys the idea of being under cover (lying in wait), just as do the words *ṣadah* and

be'-ormah in the Exodus text. (Examples of its use in an analogous sense are 1 Sam. 19. 2; 25. 20; 2 Sam. 12. 12.)

The important Deuteronomy text is the second, the long one in the nineteenth chapter. It opens with the command to divide the country west of Jordan into three districts, to set apart one city in each of said districts, and to construct a road to it in order that every slayer (*roṣeaḥ*) may flee thither (*yanus*). It then describes the slayer who is not subject to the death-penalty, using the expressions employed in the first Deuteronomy text, *bi-bli-da'at* and *lo sone mittemol shilshom* (without intent or previous hatred). One single case is there presented, apparently as an illustration of what is meant by *bi-bli-da'at*. A man goes into the forest with his neighbour to hew wood, and in felling a tree the head of the axe slips from the helve, hits his neighbour and kills him.

That this is *bi-bli-da'at* is obvious, but it is so far short of illustrating the whole meaning of that term, that one is inclined to believe that the case put really belongs to a series similar to those presented in Numbers, and that it was either misplaced, or alternatively, that it was deemed unnecessary to repeat the cases already given in Numbers, and they were therefore omitted as superfluous repetition.

Some such conclusion is inevitable, when we consider the definition of murder, which immediately follows. It is there described as the act of killing a *sone* (a hated person), by lying in wait for him (*we-arab lo*).

The word *arab* in this connexion is new, not being used in the Exodus text. There the idea of lying in wait is expressed by the words *ṣadah* and *be-'ormah*. It is, however, a word in general use, and conveys exactly the same idea as the expressions employed in the Exodus text.

This definition of murder excludes from that category all the cases of manslaughter derivable from the Exodus text, and from the term *bi-bli-da'at* of this text. It may therefore be regarded as certain that the single illustration of manslaughter (that in the fifth verse) is not intended to be exhaustive. Several other forms of manslaughter, such as those we have already inferred from the Exodus text, and such others as are given at length in the Numbers text, are within the meaning and under the protection of this statute.

Passing by the definition of the offence, we come to the main purpose of the statute.

The experiment of limiting and restraining the power of the sanctuary had not proved successful. Sanctuary was therefore definitely abolished. The *maḳom* and the *mizbeaḥ* were no longer of any avail. The *maḳom* priest's function, so far as homicide was concerned, was at an end.

The land west of Jordan was divided into three districts, in each of which a particular city was to be designated, and to each of these cities there were to be highways. The *roṣeaḥ* might flee (*yanus*) to the designated city of his district—that was the purpose of the institution.

For the first time we hear of the *go'el ha-dam*, the federal officer detailed to every canton as sheriff or executioner, to see that the punishment imposed by federal law should be visited upon the culprit, and to guard against the latter's escape by means of *kofer* or otherwise.

If the *roṣeaḥ* has killed any one, *bi-bli-da'at*, is guilty of manslaughter, he must bear the punishment. No *kofer* will be allowed. He *must* go to the designated city (a state-prison city), there to expiate by internment his offence of manslaughter. If he do not, no agreement for *kofer*

with the dead man's family, or with their *go'el*, with or without the connivance of the *zikne ha-'ir*, will protect him. He must die; the *go'el ha-dam* must put him to death. A reasonable fixed time, the length of which does not appear from the records, was, however, allowed, to enable him to reach the designated city. If he dawdled by the way and exceeded the time, he was amenable to the power of the *go'el ha-dam*, and paid for his carelessness with his life.

This rigid law was the reason for the strict injunction that the road should be in proper order, lest the culprit be delayed by reason of its imperfection, and thus perish by the public's neglect to keep the highway in proper repair, without any delinquency on his part.

There is in this text a clear indication of the procedure. The man who had killed another was tried by the *zikne ha-'ir*. The latter ought to have administered the Hebrew law, that is, they should have carefully examined, in order to determine whether the offence was murder or manslaughter. They were, however, as a rule, disinclined to enforce the Hebrew law, because a conviction of murder, punishable by death, would take away the family's opportunity for money damages. Their inclination would be to find the offence manslaughter, especially because the Canaanite law knew nothing of degrees of guilt in homicide. Whichever the finding, murder or manslaughter, the convict would have to go to the separated city, if he would escape death, since in either case the *go'el ha-dam* had a warrant for his execution after the lapse of the given number of days allowed the culprit to reach the designated city. This warrant ran everywhere, except within the designated city.

If the conviction was of murder, the culprit's object

was to take an appeal; if of manslaughter, to undergo the penalty of internment. The Deuteronomy text gives us no clue as to the nature or whereabouts of this appellate tribunal. One might conjecture that the three districts were somehow connected with Solomon's division of the country, as related in 1 Kings 4, and that each of the designated cities had a royal governor to whom certain powers in this connexion were confided. However that may be, there must have been some superior federal authority in the designated city. The *zikne ha-'ir* who had condemned the man for murder, applied to this authority to surrender the appellant. There were, naturally, cases in which the slayer, without waiting for the discovery of his crime, or for his trial, would promptly make the best of his way to the separated city, where he could tell the story of the happening, in his own way, to the *zikne ha-'ir*, who, not being of the immediate vicinage, would have no further information on the subject, and would provisionally receive him into the city, where he was safe from the warrant of the *go'el ha-dam*. In such cases the *zikne ha-'ir* of his own city would try him in his absence, and, in many cases, the result would be conviction. Whether convicted in his absence or in his presence, the *zikne ha-'ir* of his own city, who had condemned him, would have the right to ask for his extradition.

That the case was promptly heard and disposed of, there can be no doubt. If the appellate authority (whatever it was) affirmed the judgement of the *zikne 'iro*, they surrendered the culprit to the latter, and thereupon they, the *zikne 'iro*, delivered the prisoner to the *go'el ha-dam* for execution. It must follow, as a matter of course, that if the appellate authority was of opinion that the defendant was

not guilty of murder, but of manslaughter only, they retained him in the designated city, for the expiation of the minor crime. No mention is made of the term of detention, and it may have been for life. The circumstances show that all opportunity for *kofer* was intended to be taken away. The *go'el ha-dam* did not represent the family, there was no *maḳom* priest to act as mediator, and even if a settlement had somehow been effected, it would not have helped the culprit. As soon as he left the separated city, the inflexible *go'el ha-dam* was compelled by his warrant to put him to death (Deut. 19. 12).

An interesting feature of this nineteenth chapter is the announcement of what was evidently a novel principle in the law of evidence. It must always be remembered that in the Oracle trials witnesses as such had no function. The denunciant or denunciants, under solemn adjuration, made their statements, and on them the Oracle decided, there being no issue joined between parties.

Doubtless, on the discontinuance of the federal oracle tribunal, the denunciant took on the character of witness (*'ed*). The whole literature shows that denunciants were objects of hatred and fear to the general community, and a sentiment against convicting a man on their unsupported testimony naturally grew. Hence the law of 19. 15: One witness shall not be allowed to testify against a man for any *'awon* or *ḥaṭṭat* (i.e. any crime or misdemeanour); at the mouth of two witnesses or of three witnesses shall the matter be established.

The statute also contained a special clause permitting the impeachment of witnesses in cases of *sarah* (a capital offence), and prescribing death as the punishment for perjury in such cases.

There is one expression in the text which requires an explanation. Dwelling upon the necessity of building a proper highway to the designated city, in order that the defendant may, in the limited time allotted, reach that city, these words are used (I cite from the Authorized Version): Lest the avenger of the blood pursue the slayer, while his heart is hot (*ki yeḥam lebabo*), and overtake him, because the way is long, and slay him (19. 6).

From these words a picture has been drawn in many minds, something like this: A man accidentally kills another. Immediately he starts to run for the designated city, hotly pursued by the *go'el ha-dam*, and then there is a race between the two for the gate of the designated city, which is the goal. This view naturally assumes that a valid vendetta law exists alongside of a thoroughly established state law and nullifies it, and that such nullification is itself part of the state law. That this is an impossible position, I have endeavoured to demonstrate. Besides the intrinsic absurdity of the view, a word must be said of the peculiarity of the transaction.

The Version renders *ki* by *while*. *Because* would be at least as good a translation. It takes the expression *his heart is hot* for wild, undiscriminating rage, in which the worthy man is unable to distinguish between a cowardly assassination and an obvious accident. The phrase is a rare one. It does, however, occur in another place (Ps. 39. 4 (3)). The singer utters a penitential psalm. He has been afflicted, and knows that his own backslidings are to blame. He humbly prays to know his end, his hope is in the Lord that he may be delivered from all his transgressions and recover his former health. The state of mind when he thought these things, and before he spoke, he describes as *ḥam libbi*

(my heart was burning (or hot) within me), meaning that he hesitated to utter his prayer though he earnestly desired to do so.

At most, therefore, the expression in our text would mean: For the *go'el ha-dam* is earnest (zealous), and might overtake and slay him if he be delayed by bad roads.

There is an antithetical expression which confirms this view. When Jacob's sons told their father the marvellous tale of Joseph's high state in Egypt he could not at once believe it (*wayaphog libbo*). König's *Wörterbuch* (Leipzig, 1910) renders this with *erkalten*, so that Jacob's heart would have become cold on hearing the narrative. The misunderstanding is produced by the use of the word *heart*. In English we do not use it in that connexion. We receive news coldly or with warmth, without mentioning our hearts. The Hebrews, when they mentioned them, meant no more than we do.

All that is meant by the sentence is that the *go'el ha-dam* would surely execute his warrant if the defendant tarried beyond his allotted time.

If this explanation be rejected, the fact still remains that the code as now before us was fixed at a time when the whole institution had become a thing of the past, and was therefore subject to the interpretation, or misinterpretation, of a later age.

Respecting the change in the law of evidence forbidding the taking of the testimony of one witness, it may be remarked that the records establish it as having been made very early in the new movement. When Naboth was charged with blasphemy against God and treasonable utterances against the king, it was assumed as a matter of course that two witnesses were required (1 Kings 21. 10, 13).

This was in the reign of Ahab (876–854 B.C.), who was a contemporary of Jehoshaphat of Judah (873–849 B.C.), and the narrative runs as if the law were then so old that the memory of its origin had passed away. We cannot be far wrong if we refer it to Solomon's day (970–933 B.C.).

The Numbers text is the next. In some respects it is, perhaps, the most interesting of all.

The designated three cities with their federal legate, and their indefinite function of interference with the *zikne ha-'ir*, have not accomplished the purpose. The *go'el ha-dam* has not proved his ability to prevent the practice of *kofer*. They have evidently learned how to circumvent him. The whole institution is now to be thoroughly remodelled.

It begins with a measure not only new but subversive of a well-established policy. The guild of Levites had early been selected as itinerant agents to bring home to each of the cantons of the country the principles and policies of the national government. Upon this point the authorities are overwhelming.

JHVH spake to Aaron: Thou shalt have no inheritance in their land, neither shalt thou have any part among them. I am thy part (*helek*) and thy inheritance (*nahalah*) among the *Bne-Israel* (Num. 18. 20).

As to the Levites: . . . it is a perpetual statute (*hukkat 'olam*) throughout your generation, that among the *Bne-Israel* they have no inheritance (*nahalah*) (Num. 18. 23, 24).

The Levites were not numbered among the Bne-Israel, because there was no *nahalah* given them among the Bne-Israel (Num. 26. 62).

Levi hath no *helek* or *nahalah* with his brethren. JHVH is his *nahalah* (Deut. 10. 9).

The Levite within your country (*be-sha'arekem*) hath no *ḥelek* or *naḥalah* with you (Deut. 12. 12; 14. 27, 29).

The Kohanim, the Levites, the whole tribe of Levi, shall have no *ḥelek* or *naḥalah* with Israel (Deut. 18. 1).

JHVH is their *naḥalah* (Deut. 18. 2).

Only unto the tribe of Levi he gave no *naḥalah* (Josh. 13. 14).

JHVH, the *Elohim* of Israel, was their *naḥalah* (Josh. 13. 33).

Unto the Levites he (Moses) gave no *naḥalah* among them (Josh. 14. 3).

The fixed policy attested by these many records may already have been somewhat trenched upon. It was at the beginning of Solomon's reign that he sent the *Kohen* Abiathar in disgrace from the court to his estate (*'al sadeka*) at Anathot (1 Kings 2. 26), which then was, and till the exile continued to be, a Levitical city. At all events, the decree went forth that the Bne-Israel should give to the Levites a portion of their own *naḥalah* in the *'arim*, together with appurtenant fields (*migrash*); that is, cantonal jurisdiction over the territory so given should be abandoned. This, though violating the spirit of the older law, was in accordance with its letter, which merely forbade Levites to have a *naḥalah* within the *'arim* (*be-sha'arekem*). The *naḥalah* now acquired by the Levites was no longer within the *'arim*, but outside of them. The Levites were citizens of the federal state only, the jurisdiction over the newly-acquired territory was in them, and the transaction was, in effect, a cession of jurisdiction over the Levitical territory to the federal government.

It was further enacted that out of the forty-eight federal cities thus created (among which, by the by, Anathoth is

reckoned (Josh. 21. 18)), there should be six *'are ha-miḳlaṭ* whither a *roṣeaḥ* might flee (*la-nus*).

And thereupon, the general policy being thus explicitly declared, the specific purpose of the *'are miḳlaṭ* is enlarged upon. The *roṣeaḥ* is now defined (35. 12) as *makkeh nefesh bi-shgagah*, one who kills a person without intending to do so. The city to which he goes is *miḳlaṭ* from the *go'el*, in order that the *roṣeaḥ* may not die before he has been adjudged guilty of murder by the federal court, the *'Edah* (35. 12). Three of these *'are miḳlaṭ* shall be east of Jordan, and three west of it. The right to a federal trial for murder belongs not only to the Bne-Israel, but also to the *ger* and the *toshab*. The *'Edah* is the final court of appeal to determine whether the judgement of the local *ziḳne ha-'ir* condemning the defendant to death for murder, shall stand (35. 24). The issue presented to the *'Edah* is defined as being between the condemned man on the one side and the *go'el ha-dam* on the other.

If the *'Edah* refuses to affirm the conviction of murder, and declares the offence manslaughter, the *go'el ha-dam's* death-warrant is suspended, but not annulled. The prisoner is remanded to the *'ir miḳlaṭ*, there to remain. The term of his confinement in that city is now fixed. He is to be discharged at the death of the *Kohen ha-gadol* (the *Kohen* anointed with the holy oil). If he at any time before commits prison-breach, that is, goes outside of the city wall, the *go'el ha-dam's* death-warrant becomes operative, and it is the latter's duty to execute the prisoner. This execution is lawful and justifiable. No blood-guilt arises from it (*en lo dam*) (35. 27).

At the expiration of the prisoner's term of service the death-warrant loses all force and validity. The manslayer

returns to his home and estate, free from any further consequences. His crime has been fully expiated (35. 28).

Thereupon there is an emphatic prohibition of *kofer* in murder cases; the murderer must be put to death (35. 31). And this is followed by an equally emphatic prohibition of *kofer* in cases of manslaughter; the defendant's term in the *'ir miḳlaṭ* may not be evaded or abridged by compounding (35. 32).

The general policy is then vindicated by a declaration of the principle that murder pollutes the land, and that the land cannot atone for this pollution save by the blood of the murderer (35. 33). And this principle is enforced by the thought that JHVH dwells in the land, that JHVH dwells among the Bne-Israel (35. 34).

To this Numbers text that of Joshua 20 is a mere pendant. It begins by directing the appointment of six *'are ha-miḳlaṭ*, whither the *roṣeaḥ* (*makkch nefesh bi-shgagah, bi-bli-da'at*) may flee, and they shall be for *miḳlaṭ* from the *go'el ha-dam* (20. 3). When the defendant arrives at the gate of the *miḳlaṭ* city he stands before the *ziḳne ha-'ir* of that city and states his case. It is safe to affirm that he always declares that it was no murder, that *ha-elohim innah le-yado*, that it was *bi-bli-da'at*, that it was *bi-shgagah*.

The hearing is unilateral, being, in effect, a motion to grant an appeal from the judgement of the *zeḳenim* of his *'ir*. The probability is, that under such circumstances a *prima facie* case for granting the appeal was generally made out, whereupon he was admitted for detention into the federal city.

If the *zeḳenim* of his city, or the *go'el ha-dam*, believed that there was no proper case for appeal, the latter went to the *'ir miḳlaṭ* and applied to the *ziḳne ha-'ir* for the

surrender of the prisoner to his custody. This he was compelled to do, because his warrant, though it ran everywhere else in the country, was ineffective in the federal territory. Had he executed it there, he would have been himself guilty of murder. It was for this reason that he asked for the prisoner's surrender. This was, in effect, a motion to quash the appeal. Originally the *zikne ha-'ir*, perhaps in conjunction with a federal legate, heard the case on this motion and determined it. If they decided to quash, the prisoner was surrendered to the *go'el ha-dam* (Deut. 19. 12). Under the law, as it was recast, the authorities of the *miḳlaṭ* city were shorn of this power, and the case had to go to the *'Edah* for trial and judgement (20. 6).

And this exclusive jurisdiction of the *'Edah* is emphatically reiterated. 'These are the *'are ha-mu'adah* for all the Bne-Israel and for the *ger* whither any *makkeh-nefesh bi-shgagah* might flee (*la-nus*), and not die by the hand of the *go'el ha-dam* until he shall have been adjudged guilty of murder by the *'Edah'* (20. 9).

There is one other feature of the Numbers text which must not be overlooked. It is a specific law of evidence for homicide cases only, and reads thus:

Homicide (*kol-makkeh-nefesh*).

By the mouth of witnesses he (the *go'el ha-dam*) shall put the *roṣeaḥ* to death. One witness may not testify to procure a person's death (35. 30).

There are new features of this Numbers text which are worthy of remark.

For the first time we hear of *'are miḳlaṭ*. It will be remembered that in Exodus there was sanctuary in the *maḳom*, and in Deuteronomy there were separated cities. These were all in cantonal territory. Now we have federal

cities with a distinctive name. All the versions render the word *miḳlaṭ* with refuge or asylum. The translators, however, all laboured under the prepossession that the ancient institution, the sanctuary, was still in existence, and that it permeated the law always. The fact is, however, that the establishment of the separated city of Deuteronomy extirpated the ancient sanctuary, and created an institution belonging purely to the region of civil law. It did more. It gave a distinct punitive character to the internment of the manslayer in the separated city, though the text lacks definiteness as to the duration of the punishment.

When the system was thoroughly reconstructed, as the Numbers and Joshua texts show it was, the idea of the *'ir miḳlaṭ* was no longer doubtful or confused. It was a place for the detention of a convicted murderer, pending an appeal to the federal court, the *'Edah*, and for the internment of a convicted manslayer during the term of life of the *Kohen hagadol* then in office.

Refuge or asylum gives no adequate notion of these functions of the *'ir miḳlaṭ*.

The word *miḳlaṭ* is obscure. It occurs nowhere else than in the legal and historical passages we have cited, and in their doublets in Chronicles. The root *ḳalaṭ*, from which it is derived, is represented in but one other passage in the Bible. Leviticus 22. 23 speaks of a bullock or of a lamb that is not perfect enough to offer for a vow (*neder*), but may be accepted for a *nedabah*, a gift (not for sacrifice). The characteristics that constitute this defect are spoken of as *sarua'* or *ḳaluṭ*. The Authorized Version renders *sarua'* by *something superfluous*, and *ḳaluṭ* by *something lacking*, recognizing a certain opposition between the two. Kautzsch understands the meaning of *sarua'* to be that the animal

has a limb or limbs which are too long, and *ḳaluṭ* that the limb or limbs are too short. Strangely enough, the antithetical word *sarua'* occurs only in Leviticus, once in the instance cited and again in 21. 18, where the Authorized Version consistently renders *something superfluous*. Here Kautzsch again understands it to mean having a limb or limbs which are too long.

The root *sara'* (from which *sarua'* is derived) is represented by only one other word in the Bible. Isaiah, in the course of a bitter reproach addressed to the Jerusalem magnates, uses the figure (Isa. 28. 20), that the bed is too short for a man to stretch himself on it (*ki ḳaṣar ha-maṣṣa' me-histarea'*). The verb *sara'* therefore means to stretch one's self at will. If the verb *ḳalaṭ* is its opposite, as all seem to agree, it must mean to be 'cabin'd, cribb'd, confin'd', and this meaning would agree exactly with the ascertained function of the *'ir miḳlaṭ*, the prison city.

While we are on this branch of the subject, it may be as well to say a word on the subject of fleeing. The defendant always flees to the *'ir miḳlaṭ*. The verb is *nus*, which undoubtedly means to flee, and that in prehistoric times, when murderers sought altars for asylums, they fled to them, need not be questioned. The point is that the verb *nus* became technical, and long after men had ceased running to the cover of an altar, it continued to be used for the acts men did under later law to stay judgement against themselves. In our own language, when a man loses his case, he promptly says that he will go to the Supreme Court at once, though he sits still.

We may therefore admit that the word was used of old when men sought the protection of the *mizbeaḥ*. When, however, the separated city was established, it was inevitable

that a certain time would be allowed for the defendant to reach it. He was not to run a race. Undoubtedly he had to take his appeal without delay. The modern devices of dilatory motions and endless appeals on trivial and ridiculous points, which bring justice into contempt, would have met with no tolerance. Doubtless the time set for appeal was short. Unless taken within a limited number of days, it was not a *supersedeas*, and the public executioner (*go'el ha-dam*) was in law bound to execute the death-warrant. During the few days, however, the defendant was perfectly safe. Naturally he could not stay at home. It was the part of common sense to proceed at once to take his appeal. And this necessity may easily be described by a word meaning *to act promptly, to hasten, to go at once*. And this, we believe, is all that the verb *nus* means in this connexion, though it many times in other connexions means to flee, to run away.

That it has other meanings than to run away in fear the literature shows:

2 Kings 9. 3, 10. Elisha instructed one of his corps of *nebi'im* to anoint Jehu king of Israel, and having done so, to depart at once, without delay (*we-nastah we-lo teḥakkeh*).

There are others in which the word means to turn to one for help.

To whom will ye turn (*tanusu*) for help? (Isa. 10. 3).

If those to whom we turned for help (*nasnu*) have fared thus, how shall we escape? (Isa. 20. 6).

There are still other instances in which it means an impetuous forward movement, the very reverse of flight from a pursuer:

He breaks in like a confined river

Which the spirit of JHVH drives before it (*nosesah bo*)
(Isa. 59. 19).

Ye would not, but ye said:

No, on horses will we fly (*nanus*)—
Therefore shall ye flee (*tenusun*);
On the fleet (*ḳal*) will we ride—
Therefore shall ye have fleet pursuers (*yiḳḳallu*)
(Isa. 30. 16).

In the one instance, that of Joab, where it means seeking the protection of the altar, there was really no pursuit and no running away. We may be sure that Joab walked calmly to the *ohel* JHVH (1 Kings 2. 28, 29).

The most important passage in which the word is used is in Prov. (28. 17). The Hebrew text is:

Adam ʿashuḳ be-dam nafesh, ʿad-bor yanus; al-yitmeku bo.

The Authorized Version is:

A man that doth violence to the blood of any person shall flee to the pit; let no man stay him.

The translation is not happy, since it conveys no clear meaning. Others understand it to mean that a person guilty of murder must be a fugitive till death, and that no man should aid in softening his hideous fate.

It would seem, however, that these renderings rest on the supposition that the *bor* is the grave, man's last resting-place. We shall hereafter take occasion to show that *bor* is a prison, and, moreover, that *ʿir miḳlaṭ* disappeared no later than 850 B.C., and that thereafter the homicide went to the *bor*. When we consider the Proverb in question in that light, it becomes a sane, popular saying.

When the *ʿare miḳlaṭ* were replaced by prisons in various places, and the accused was sent thither to await his

trial, or the result of his appeal, he would, without doubt, have liked to avoid this confinement.

The Proverb is a warning to friends that helping him will hurt themselves. In plain English: Don't interfere with a murderer's going to prison. The ordinary mode of such interference would be by surreptitiously harbouring him. *Al yitmeku bo* means, therefore, Do not receive him.

Isaiah (33. 15) gives us a fine instance of the use of this verb *tamak* in a sense closely related. It is in his description of the just man:

> He walketh righteously and speaketh uprightly.
> He despiseth the gain of oppressions.
> He closeth his hands against receiving bribes (*mi-tcmok ba-shoḥad*).
> He stoppeth his ears against blood-informers.
> He shutteth his eyes against the sight of evil.

There is another new term in this text. The defendant, who is to be interned in the *'ir miḳlaṭ*, is now the man who has killed *bi-shgagah*, a term not before used in the criminal law, either in the Exodus or the Deuteronomy text. In the former it was *ha-elohim innah le-yado*, in the latter *bi-bli-da'at*. For both these ideas there is now substituted the general statement that the defendant acted in error, that there was no intent to kill, or, as the versions render it, he acted unwittingly.

One may note in this a certain change in the mental atmosphere of the law courts. When the *ziḳne ha-'ir* of the various cantons were to administer the law, the act of manslaughter was described as the act of God, having been perpetrated without intent by man. For the federal (Levitical) courts, however, there was offence in this. The unfortunate slayer, however guiltless of murder, was never-

theless a criminal of a certain grade, and the ascription of the act to God was repellent. It could be defended only on the subtle theory that Heaven punished in some mysterious way men who think or secretly do wicked things which human law and justice are too feeble and short-sighted to reach. According to this theory, both the manslayer and his victim have offended Divine justice, the former in a lesser, the latter in a greater degree. The crude fact that one man had killed another, without warrant of law, brushed aside this subtle theologizing, and the act was now described as a crime, however unintentional, committed by the slayer.

The word itself does not import freedom from blame. Its root-word, *shagag*, has an equivalent, *shagah*, and though this means to err, to go wrong, it frequently reproaches the wanderer that it is his own wickedness which led him astray.

When Saul confesses that he ought not to have sought David's life, he says, *wa-eshgeh* (I have erred), admitting that he had done the wrongful acts, but had not realized how wicked they were (1 Sam. 26. 21).

Isaiah, reproaching Ephraim, says that the *Kohen* and the *Nabi* have erred (wandered from the right path, *shagu*) because of their own bad habit of drunkenness, thus charging them with wickedness as the cause of their error (Isa. 28. 7).

In Leviticus the word is often used to denote certain classes of doings for which men should bring sin-offerings. They are all arrayed under the head of *bi-shgagah* (inadvertence), and may be committed by the high priest (Lev. 4. 3), by the *'Edah* (4. 13), by the *Nasi* (4. 22), and by any member of the *'Am ha-ares* (4. 27); by any person whatsoever (5. 15).

In Numbers there is reference to sins committed inadvertently (*bi-shgagah*) by the *'Edah* (15. 24), and by any individual whatever (15. 29).

The express distinction is, however, made between this class of sin and that other which is deliberate and wilful, and which is described as being done with a high hand (*be-yad ramah*) (15. 30).

Every sinner and every manslayer was naturally apt to plead that his sin or his crime was *bi-shgagah*. It is to be feared that this plea was, in time, looked upon with suspicion. Ecclesiastes (5. 6) throws discredit upon it by intimating that in the Heavenly tribunal it would tend to aggravate rather than to alleviate the sentence. 'Say not, before the angel, it was *shegagah*; wherefore should God be angered by thy speech?'

In the legal passages, however, the word was doubtless used technically and construed scientifically to mean any homicide which lacked the quality of malice aforethought.

The next feature of the text is the vesting of the jurisdiction in the federal high court, the *'Edah*. We are not told where the *'Edah* sits, but where it does not sit is made perfectly plain. The *'ir miḳlaṭ* is not the seat of the *'Edah*. In cases where the latter reverses the judgement of the *zikne ha-'ir*, and declares that the defendant is not guilty of murder, but is guilty of manslaughter, it is the *Edah's* duty to restore him to the *'ir miḳlaṭ* (35. 25). In other words, when the trial before the *'Edah* was to be held, the prisoner was taken, in charge of the authorities, to the seat of the *'Edah's* sessions (probably Jerusalem). There the trial took place, and if the defendant was found guilty of murder, the execution doubtless followed then and there. If, however, the degree of the offence was decided to be

manslaughter, the *'Edah's* officials took him back to the *'ir miḳlaṭ* from which he had come, there to undergo the confinement imposed by the law.

And now follows perhaps the greatest peculiarity of this text. Murder and manslaughter are both to be defined, and their punishment ascertained. Twelve verses (16–27) are devoted to the subject. The first three (16–18) appear to be extracts from records of actual cases where the accused were convicted of murder, each of them being followed by the death sentence in the words of the statute: *mot yamut ha-roṣeaḥ*, and the next verse (19) gives the court formal direction for its execution: The *go'el ha-dam* will put the *roṣeaḥ* to death; will put him to death *be-fig'o bo* (forthwith).

The expression *be-fig'o bo* is technical. When a man was doomed to die for crime, the old Hebrew law permitted no delay (Lev. 24. 14; Num. 15. 35, 36; Deut. 21. 21; 22. 21, 24; Joshua 7. 25; Judges 6. 30). The sentence therefore included the command to the *go'el ha-dam* that he execute it forthwith.

The word is used in this sense in Exod. 5. 3. When Pharaoh declares that he has no knowledge of JHVH and will not let Israel go, Moses and Aaron urge him to relent, because JHVH had commanded a three days' journey into the desert for sacrifice, and failure to obey would be instantly punished with death by pestilence or sword (*pen yifga'enu ba-dever o be-ḥareb*).

When Gideon captured Zebah and Zalmuna and devoted them to death, those sturdy warriors calmly told him to kill them forthwith: *Ḳum attah ufga' banu* (Judges 8. 21).

When the Judahites asked Samson to surrender in order that they might hand him over to the Philistines, and thus save themselves from the latter's forays, he made this

condition: Swear that ye will not yourselves kill me (*pen tifge'un bi attem*) (Judges 15. 12).

When Micah reproached the Danites for their audacious robbery, they bade him be silent or he and his would die on the spot (*pen yifge'u bakem anashim mare nefesh we-asaftah nafsheka we-nefesh beteka*) (Judges 18. 25).

When Saul ordered his soldiers to kill the priests at Nob, they would not (*we-lo abu lifgoa' be-kohane JHVH*) (1 Sam. 22. 17). Doeg, however, did so on the spot (*wa-yifga' hu ba-kohanim*) (1 Sam. 22. 18).

When the Amalekite reported that he had killed Saul, David called one of his men and ordered him to kill the self-confessed assassin of JHVH's anointed: *Gash, pega' bo*, whereupon the soldier slew him (2 Sam. 1. 15).

And the words are used to describe the immediate death of Adonijah at the hands of Benaiah (1 Kings 2. 25).

Solomon also ordered Benaiah to execute Joab forthwith by the words: *Lek pega' bo* (1 Kings 2. 29, 31, 32, 34). And the like happened to Shimei (*wa-yifga' bo wayamot*) (1 Kings 2. 46).

A man escapes a lion, and a bear kills him (*ufga'o ha-dob*) (Amos 5. 19).

This first group of four verses (Num. 35. 16–19) is followed by a separate group of two (20. 21). These define murder. The important elements are previous enmity (*sin'ah, ebah*) or lying in wait (*ṣediyah*). *Sin'ah* and *ebah* are synonymous. In Exodus neither word is used. In Deuteronomy there is *sin'ah*. The words *yazid* and *be-'ormah*, however, which are used in the Exodus text, necessarily imply it. The former indicates an insolent purpose to kill, and the latter deliberate preparation for carrying this purpose into effect.

Ṣediyah is used in Exodus, while Deuteronomy, without using the word, employs a synonymous term (*we-arab lo*).

Thus far Exodus, Deuteronomy, and Numbers are in substantial agreement. The new feature in the Numbers law is the detailed description of the physical acts by which murder may be committed. These are probably not intended to be an exhaustive list, but they certainly go far to cover the field. An iron weapon is presumed to be murderous (35. 16); a stone or a wooden weapon may be. Whether or not these are murderous weapons must be determined by inspection, and by investigation into the previous relations of the parties. If a man kill another with either of them, the law requires that they be such wherewith a man may die, meaning thereby, would be likely to die, before their use raises the presumption that murder was intended. Wherever this presumption arises, it may be negatived by proof of the fact that there was no previous *ebah* between the parties.

Murder, however, may be committed without any weapon. A man may kill another with his hands. In such cases *ebah* or *sin'ah* must be clearly proved (35. 21).

Following the definition of murder is a group of two verses (22–3) defining manslaughter.

The first (22) is a mere negative of 20. The latter declares it to be murder if death is caused by thrusting him (*yehdafennu*) with hatred (*sin'ah*) or hurling at him (*hishlik*) or lying in wait (*ṣediyah*).

The former declares it to be manslaughter if death is caused suddenly (*be-feta'*) by thrusting him (*hadafo*), without hatred (*ebah*), or by casting upon him (*hishlik*) anything without lying in wait (*ṣediyah*).

And to this is added verse 23, which also reduces the

offence to manslaughter, if he cast upon him (*wayappel*) a murderous stone, seeing him not, not being his enemy (*oyeb*), nor seeking to harm him. The same principle would doubtless apply if, instead of a murderous stone, it was a murderous wooden instrument.

It will be noticed that the new term, *be-feta'*, is now introduced. It means an event that not only was not foreseen, but that happened suddenly, like lightning from a clear sky. The expression seems apt to designate one of the many quarrels which arise between high-tempered men who may not even know each other, but who are suddenly brought into contact, under circumstances which induce one or the other to believe that he has been offended. The idea thus conveyed is the same as the *ha-elohim innah leyado* of Exodus, and the *bi-bli-da'at* of Deuteronomy.

The last group, four verses (24–37), are a pendant to verse 12, which provides for trial by the *'Edah*.

Verse 24 affirms this, by declaring that the *'Edah* shall judge between the slayer and the *go'el ha-dam*, according to the *mishpatim* which we have just considered. The term *go'el ha-dam* is here used as representing what we would call the commonwealth, the public in its rôle of the prosecutor of crime.

Verse 25 provides that if the commonwealth's case is not made out, the *'Edah* remands the manslayer to the *'ir miklat*, there to abide until the death of the *Kohen ha-gadol*.

Verses 26 and 27 provide against the manslayer's escape from the *'ir miklat* before the end of his term.

Incidentally, they reveal a feature of the negotiations between the cantonal authorities and the federal government. When the separated cities were found inadequate

for the purposes of the latter, and it had succeeded in procuring from the cantons a cession of their jurisdiction over certain cities in the various districts of the country, the condition was agreed upon that a death-warrant issued by the *zikne ha-'ir* should continue to be valid everywhere in the land except in places under exclusive federal jurisdiction. This is the meaning of verses 26 and 27. So soon as the manslayer broke bounds, he was at any point in the country subject to the enforcement of the original death-warrant, which was merely suspended while he was on federal territory, but was not annulled or made void until he had served his full term in the *'ir miklat*. When that had been done, the warrant was dead.

A word is needed on the evidence law in this text. It differs from the Deuteronomy law in several respects. The latter, as we have seen, is general and applies to the hearing of every crime and misdemeanour. It also affirmatively requires two witnesses or three witnesses (19. 15).

Besides this general law, however, Deuteronomy has another version which limits it to capital cases (17. 6).

The Numbers statute regulates murder trials only (35. 30). It varies from the Deuteronomy law in that while it prohibits judicial action on the testimony of one witness, it prescribes no specific number of witnesses as necessary. It merely uses the plural, witnesses.

The probability is that the general law as stated in Deut. 19, 15 remained unmodified, except in so far as to permit trial and judgement on the testimony of two witnesses without more. The alternative number 'three witnesses', used in Deuteronomy, is difficult to explain. The thought in it seems to be that the denunciant, or the plaintiff, must be corroborated by two disinterested wit-

nesses. By the time of the Numbers statute he had probably been disqualified as a witness. Hence the change.

The Joshua text (20. 2–9) is, as has been said, a mere pendant of the Numbers text. It has the peculiarity that the Deuteronomic term *bi-bli-da'at* is used in verse 3, apparently as an explanatory note to the word *bi-shgagah*, which it follows, and in verse 5 is used without *bi-shgagah*. These, however, are matters of no moment.

The value of the text lies in its supplying details necessary for the completion of the Numbers text.

The latter tells us that the *roṣeaḥ* shall go to the *'ir miḳlaṭ*, and that from it he shall be taken to the seat of the *'Edah*, there to be tried. The Joshua text describes the proceedings when he reaches the *'ir miḳlaṭ*. His admission is a question to be decided by the *zeḳenim*, who, as the city is Levitical and federal, are governed by the federal law alone. As he states his own case, he would in most cases declare such facts as would establish *shegagah*. If he failed to do so, but on his own showing was a mere murderer, they would not receive him, and he would be delivered to the *go'el ha-dam* for execution, but if he were once admitted, the application of the *go'el ha-dam* for his surrender would have to be refused, and he would have to be tried by the *'Edah*. To the *'Edah*, whose seat was probably in Jerusalem, he would be taken by the federal authorities. At that trial his *'ir* would be represented by its *go'el ha-dam*, and perhaps by some of its *zeḳenim*. If the conviction of his *'ir* was affirmed, he would be executed forthwith. If, on the other hand, the *'Edah* ruled that it was manslaughter, he would be remanded to the *'ir miḳlaṭ* to serve his term.

We have still the Leviticus texts to examine. They

are silent as to the distinction between murder and manslaughter, and hence fail to indicate that the latter offence, if it existed in the eyes of the law, was in any degree punishable.

They have, however, one prominent feature which stamps them unmistakably as federal law. The *makkeh-ish* must be put to death (*mot yumat*) (24. 17, 21).

It behoves us, therefore, to ascertain the probable reason for the curtness of the passages.

They form part of a little *Torah* of twenty-four verses (Lev. 24. 10–23). It begins by a rather full report of the case tried by oracle, wherein the son of a Hebrew woman by an Egyptian man was sentenced to death for blaspheming the oracle (cursing the *Shem*), and shows that the principle established by that case was that the Hebrew law held persons not pure Hebrews (*gerim*) answerable to the law as fully as if they were pure Hebrews (*ezraḥ*).

To this, which serves as the text, are added brief notes:

1st. That a *makkeh-ish* must undergo the death penalty.

2nd. That a *makkeh-behemah* must compensate the injured party, *nefesh taḥat nefesh* (beast for beast).

3rd. That a mainer shall be reciprocally maimed (breach (*sheber*) for breach, eye for eye, tooth for tooth).

4th. That *mishpaṭ* (law) is single—the same for *ger* as for *ezraḥ*.

The origin of this interesting and curious document may be conjectured to be somewhat as follows. The projected law reform, we may be sure, was not the work of mere theorists or idealists. It was a practical measure to unify and solidify the kingdom. It demanded the extinguishment of local customs which were hostile to the general principles of the federal law. It had, however, other ends to attain.

By this time the Hebrews were in unquestioned supremacy in the cantons, and the *gerim*, though everywhere considerable in numbers, were relatively powerless, as being hopelessly in the minority. They would naturally protest to the federal government that they were not fairly treated.

In the previous lecture it was intimated that the first step in the law reform was the limitation of trial and sanctuary to the cantonal capital, and that to assure the execution of the law, untainted by Canaanite custom, *Kohanim* or Levites were sent as assessors to the *zikne ha-'ir* in each of the said cities. On this point we have the precious *zikne ha-'ir* document (Deut. 21. 1–9), which happily, though not too relevantly, interjects into the proceedings of the *zikne ha-'ir* this note: And the *Kohanim* the *bne-Levi* shall come near; for them JHVH thy God hath chosen to minister unto Him, and to bless in the name of JHVH, and according to their pronouncement (*'al pihem*) shall be decided every *rib* (controversy) and every *nega'* (assault) (Deut. 21. 5).

If now we imagine one of these *Kohanim* appointed by the federal authorities to go to one of these cantons as assessor, he would naturally be charged to see to it that the *gerim* obtained full justice. The central authorities would give him a *sefer*, containing the great doctrine of the equality of all before the law, and the fact that the foundation case bore rather hard on the *ger* was an additional argument to show that when the case was the other way, it was just that the *ger* should receive the advantage. The notes to this original *sefer* may fairly be presumed to be the memorandum made by one of these *Kohanim* of three classes of cases, in which he succeeded in having the doctrine fairly carried out.

This suggested explanation of the form of the Leviticus text involves the conclusion that it was intended, primarily, to inculcate the doctrine and policy of the state, that the *ger* was equal in law to the *ezraḥ*, whether such equality would operate to his advantage, or to his disadvantage. If such were the true origin and intent of this Leviticus *Torah*, it would be idle to seek in it any elaboration of other doctrines or principles than the one it was specially intended to illustrate. For the purposes of our present investigation, it may therefore be dismissed without further comment.

This review of the texts would lack completeness if we failed to consider the only text, other than the legal ones, which has the term *go'el ha-dam*. It is the fourteenth chapter (vv. 1–24) of 2 Samuel.

The length of this lecture, however, forbids further expansion, and the matter may well go over to the next.

IV

In all the Biblical literature there is no mention that a *go'el* ever killed anybody, nor, indeed, is the term *go'el ha-dam* used in any other than the legal passages cited, and the historical notes relating thereto, save in one instance.

Absalom, having murdered his brother, Amnon, fled from the royal court to his maternal grandfather, King Talmai of Geshur, with whom he stayed for three years.

David's general-in-chief, Joab, was a partisan of Absalom, and favoured him for the succession to the throne. Exile was fatal to such pretensions, and Joab schemed for his recall.

Joab was a masterful character, skilled in diplomacy and great in war, who, in general, accomplished what he set out to do. For good reason he did not himself ask David to pardon Absalom, but contrived to put the matter to David through the agency of a wise woman (*ishah ḥakamah*).

Exactly what an *ishah ḥakamah* was is not clear. There are but two of them in the Bible, and both have dealings with Joab. One is tempted to opine that there were legends current in Israel concerning such women, and that the story we are now considering was one of the series. The wise woman of Abel-beth-maacah (2 Sam. 20. 18) treated with Joab, caused him to raise the siege, and saved the city. Her wit persuaded Joab, her wisdom controlled her towns-

men. And now Joab entrusted a most delicate diplomatic negotiation to another *ishah ḥakamah*, her of Tekoa. Abel-beth-maacah was in the north; Tekoa was in the south.

The story is well told. Joab knew that David longed for Absalom, but would not recall him because he deserved the punishment he was undergoing. The point was to persuade the king that the time had come to pardon the delinquent.

Joab carefully instructed his wise woman. She was to be a mourning widow, one of whose sons had murdered the other. Justice demanded that the murderer should be executed, and his only son likewise. If this was done, her beloved husband's name and family would be totally extinct. She therefore implored him to stay the hand of justice and in his mercy grant a pardon. Her tears and prayers prevailed, and the king swore the great oath (*ḥai-YHVH*) that her son would be saved.

Now was the moment to remind David that he who would pardon the criminal of another family should do the same by his own, especially in view of the fact that the people desired it.

The king at once taxed her with being Joab's envoy, and she owned that she was. Her work, however, was well done. She had persuaded the king to yield to his longing. Joab was sent for and given leave to bring Absalom home.

It is in the course of the woman's fictitious story that she uses the term *go'el ha-dam*. The people who demanded justice against the murderer are called *kol-ha-mishpaḥah*, the ordinary meaning of which would be her husband's brothers and their descendants. The language ascribed to them is peculiar. They all speak together, and they do not address themselves to the *zikne ha-'ir* or to any other authority,

but to a lone widow who is assumed to have the guardianship of her son, who is himself the father of a boy. Their expressed desire is to kill the murderer and his son (*unmitehu be-nefesh aḥiw asher harag we-nashmidah gam et ha-yoresh*) (2 Sam. 14. 7). So runs the story. The king bids her go home, that she shall not be troubled, and then she goes on to pray that the *go'el ha-dam* may no longer destroy, that *they* may not destroy her son (14. 11).

The whole story is obscure, though the account may omit circumstances which would have made it more plausible. The woman may, for instance, have represented herself as coming from a remote place in the northern mountains, where lawlessness prevailed, and where the whole royal power was needed to enforce law. At all events, the touch which says that the community in which she lives is unable to act without her help rather strains belief. Moreover, they do not speak of any one executing the culprit but themselves, in the plural. It is she who bethinks herself of the *go'el ha-dam*, and asks that *he* be restrained, in order that *they* might not kill her son.

If her application is, as it appears to be, for pardon, she says nothing that is inconsistent with the theory that she fears legal prosecution and conviction and the consequent death of her son at the hands of the *go'el ha-dam*, the federal executioner. On this view her conduct is natural, since she asks the king to stay the hand of his own officer.

Above all, it is necessary to remember that the whole is a piece of Joab's biography, intended to exalt his diplomatic wisdom. Biographies are often romantic, and in the case of popular heroes are from time to time retouched. When this story took its present shape may not be easy to

determine. In any event, it can scarcely be looked on as authority for law in the time of David. If we had the biography of Joab from which this story was probably extracted, the difficulties of interpretation might readily disappear. It is significant, however, that the *go'el ha-dam* is never spoken of in the literature after Joab. He was also the last who took refuge by the Altar in Jerusalem, and his death in that holy place marked the downfall of the whole idea of sanctuary.

The general conclusions which we have reached concerning the *go'el ha-dam* and the *'ir miḳlaṭ*, as stages in an extensive law reform, demand that the results of this movement be ascertained.

Its end was the establishment of a federal court in every canton of the land, each of which had executive officers to execute its judgements. 'Judges (*shofeṭim*) and officers (*shoṭerim*) appoint in every one of thy cities (*she-'areka*), who shall judge the people with just judgement (*mishpaṭ-ṣedeḳ*)' (Deut. 16. 18).

It was Jehoshaphat (873–849 B.C.) who, after a hundred years, gave to the grandiose conceptions of Solomon the final touch which assured their triumph.

The story is told in 2 Chronicles.

He began his reign by placing garrisons in all the *'arim* of Judah, and in the *'arim* of Ephraim that had been taken by his father Asa (17. 2). In the third year he sent his *sarim* (princes) into every corner of the land to instruct in the *'are Yehudah* (17. 7), and with them he sent legal experts (Levites and *kohanim*) to re-enforce their statesmanlike arguments with the statement of the principles and practices of the Hebrew law, and they taught in Judah, carrying with them the *sefer torat ℑHVH*, and went about

through all the *'are Yehudah* and taught the people (17. 8, 9).

When the ground was thus carefully prepared and there were sufficient forces everywhere to assure obedience, he took the final step. He set judges (*shofeṭim*) in the land, in all the *'arim* of Judah, city by city (19. 5).

Moreover, he established a supreme court in Jerusalem, composed of Levites, *kohanim*, and eminent chiefs to administer *mishpaṭ JHVH*, and the ordinary *rib* (suits) (19. 8).

For cases concerning the king's revenues or estates, the court had a special president (*Nagid*), Zebadiah ben Ishmael, who was doubtless the king's confidential minister.

The jurisdiction of the court was appellate only. There is no hint of original jurisdiction, even in matters royal. The wording is unmistakable. Every *rib* (cause) which will come up to you from your brethren in the several *'arim* ye shall instruct them so that they trespass not against JHVH and so wrath come upon *you*. And the causes are thus classed: *ben dam le-dam* (homicide cases, whether murder or manslaughter); *ben torah le-miṣwah, le-huḳḳim u-le-mishpaṭim* (this comprehends all other classes of cases).

The establishment of this appellate tribunal at Jerusalem is described at large in Deuteronomy. The charge, however, which in Chronicles is addressed to the judges of the supreme court, is here directed to the judges of the courts of first instance in the several *'arim*.

If there arises a case (*dabar la-mishpaṭ*) of murder or manslaughter (*ben dam le-dam*) or any other cause (*ben din le-din uben nega' la-nega', dibre ribot*), or any law, or an assault, any controversy in thy cities (*bish'areka*), arise and go up to the *maḳom* which JHVH thy God will choose

for thee (Jerusalem). Go to the *Kohanim*, the Levites, and the *shofeṭ* then in office, and inquire, and they shall instruct thee as to the law. According to their pronouncement thou shalt act, being heedful to obey exactly. According to the *torah* which they shall teach thee, and according to the *mishpaṭ* which they shall tell thee, must thou act, swerving therefrom neither to the right nor the left. And he that will act contumaciously (*be-zadon*), not heeding the *Kohen* standing to minister there before JHVH thy God, or the *shofeṭ*, that man shall die that evil may be removed from Israel. And the whole people shall hear and fear, that there be no more contumacy (Deut. 17. 8–13).

Great care was exercised to give specific instructions for the guidance of these judges in the *'arim*. They must have constituted an elaborate little code, fragments of which are still preserved.

One of the most interesting is in Exodus.

Do not heed a popular cry to convict nor decide a cause, either to please the powerful (*rabbim*), or to favour the poor (*dal*, *ebyon*) (Exod. 23. 2, 3, 6).

Abhor a false cause, nor condemn to death the *naḳi* (once acquitted), or the *ṣaddiḳ* (one that is innocent). The guilty cannot escape the justice of heaven (Exod. 23. 7).

Take no gift (*shoḥad*). It blindeth the wise and perverteth the cause of the innocent (*dibre ṣaddiḳim*) (Exod. 23. 8).

Do not oppress a *ger*; ye know a *ger's* life; ye were yourselves *gerim* in Egypt (Exod. 23. 9).

Here is another from Leviticus:

Do no unrighteousness in *mishpaṭ*; respect not the person of the poor (*dal*), nor honour the person of the mighty (*gadol*). Judge in righteousness (*be-ṣedeḳ*) (Lev. 19. 15).

Be not a prosecutor (*rakil*), nor be thou eager for thy neighbour's blood (19. 16).

Hate not thy brother in thy heart, nor wantonly rebuke him, nor fasten guilt upon him (19. 17).

Nurse no vengeance or grudge, but love thy neighbour as thyself (19. 11). Do no unrighteousness in *mishpaṭ* with respect to *middah* (measurement), to *mishḳal* (weight), or to *mesurah* (content) (19. 35).

Deuteronomy has several.

Moses says: I charged your *shofeṭim* at that time: Hear both sides (*shamoa' ben aḥekem*) and judge righteously (*ṣedeḳ*) between them, *ezraḥ* or *ger* (Israelite or non-Israelite) (Deut. 1. 16).

Do not respect persons in *mishpaṭ*, hear the little as well as the great, fear not the face of man, *mishpaṭ* is of God. The cause that is too hard for you, bring it to me; I will hear it (Deut. 1. 17).

JHVH regardeth not persons nor taketh gifts (*shoḥad*); He deals *mishpaṭ* for the fatherless and the widow, He loves the *ger* (Deut. 10. 17, 18).

Shofeṭim and *shoṭerim* appoint thou in all thy cities (*she'areka*) which JHVH thy God giveth thee to thy tribes, who shall judge the people with just judgement (*mishpaṭ-ṣedeḳ*). Thou shalt not wrest judgement (*mishpaṭ*), nor take a gift (*shoḥad*), for *shoḥad* blindeth the eyes of the wise and perverteth the cause of the innocent (*dibre ṣaddiḳim*). Justice, justice shalt thou follow (Deut. 16. 18–20).

The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers. A man shall be put to death for his own crime (*be-ḥeṭ'o*). Pervert not the *mishpaṭ* of the *ger* nor of the fatherless (Deut. 24. 16, 17).

If men have a controversy (*rib*) and bring it for judgement, the judges shall acquit the innocent (*ṣaddiḳ*) and convict the guilty (*rasha'*) (Deut. 25. 1).

Arur he that taketh *shoḥad* to condemn to death one who was once acquitted (*naḳi*) (Deut. 27. 25; cf. Exod. 23. 7).

That the system so established was complete is manifest. The details in Lev. 19. 35 show that the judges were custodians of standards of weights and measures, and this is an index of the care exercised to judge righteously.

The penalty of death for one kind of bribery appears to be fixed in Deut. 27. 25, and the deliberate disregard of the decision of the supreme court was declared a capital offence in Deut. 17. 12.

With the establishment of this system the whole machinery of sanctuary, of separated city, of *'are miḳlaṭ*, of *go'el ha-dam*, as well as the judicial functions of the *ziḳne ha-'ir*, of the several cities and of the *'Edah*, were swept away, and *kofer* fell into oblivion.

The great question of murder or manslaughter (*ben dam le-dam*) was tried in every *'ir* according to the principles of the Hebrew law, as authoritatively expounded by the supreme court at Jerusalem. All vestiges of Canaanite law disappeared, leaving only a few literary survivals buried in this or that phrase or odd sentence of the legal codes.

When Jehoshaphat died in 849 B.C., he well deserved as an inscription on his monument the words of the Chronicler (2 Chron. 19. 4):

'He went out among the people from Beersheba to Mount Ephraim and brought them back to JHVH, the God of their fathers.'

It is a strange trait of universal history that men who accomplish beneficial changes in the law of their country

remain obscure, while the names of warriors, who often afflict it with miseries, go sounding through the ages. It happens that the men who carried through Jehoshaphat's plans are known. The Chronicler has preserved their names. No one reads them. In this legal essay, however, they deserve to be repeated.

The princes (*sarim*) who led the movement were: Benhail, Obadiah, Zechariah, Nethanel, and Micaiah. The Levites were Shemaiah, Nethaniah, Zebadiah, Asahel, Shemiramoth, Jehonathan, Adonijah, Tobijah, and Tobadonijah; and the priests (*kohanim*) Elishama and Jehoram (2 Chron. 17. 7, 8).

All honour to this great company of statesmen and jurists, benefactors of mankind, and to their master, Jehoshaphat!

It is pleasant to fancy that some such sentiment inspired the prophet Joel to name the place where, on the great day, the nations were to be judged, the Valley of Jehoshaphat (Joel 4. 2, 12).

The firm establishment of the Hebrew law in Judah must have influenced the northern kingdom. Jehoshaphat and the kings of Israel were in close alliance, Jehoshaphat's son and successor married King Ahab's daughter, and the two kingdoms marched peacefully side by side. Nevertheless, the movement for *Torah*, law, was slower in the north than in the south. In our second lecture reference was made to the hostile criticism on this subject uttered a hundred years later by the prophet Amos.

The success of these great reform measures had incidental consequences, in modifying methods of legal procedure, and in rooting out some legal principles which revolted the Hebrew conception of justice.

In Canaanite law the presence of the accused was not necessary. The *ziḳne ha-'ir* could try and adjudge his case in his absence. Moreover, at such trial the accuser was the all-sufficient witness. Then, too, a man acquitted might be tried again. Twice in jeopardy was no defence.

These features of Canaanite law are inferred from the energetic opposition to them in the *Torah*. That the old law permitted the trial of a person in his absence, appears from the demand of the *anshe ha-'ir* of Ophrah, that Gideon's father should surrender his son for execution, the latter having been convicted of a capital offence. Had he been present, participating in the trial, the demand would have been superfluous (Judges 6. 30).

And there is another similar case under the law of the *ziḳne ha-'ir*. A woman charged with gross fraud on the marital relation may be tried in her absence and brought out for execution (Deut. 22. 21).

In the Hebrew law a trial in the absence of the defendant was inconceivable. Even in the days of oracle trials, which were not trials in the legal sense, there being no issue between parties, the accused were always present. The reported cases attest this fact (Achan's case, Joshua 7. 14–18; Jonathan's case, 1 Sam. 14. 38–42).

When trials were instituted, the rule was still more strongly insisted on (Deut. 1. 16, 17).

That one witness was all that the Canaanite law required, and that a man might thus be at the mercy of an enemy, is readily inferred from the almost passionate opposition of the Hebrew code to that practice.

'The murderer shall be put to death by the mouth of witnesses. One witness shall not testify against any person to cause him to die' (Num. 35. 30).

'At the mouth of two witnesses, or three witnesses, shall he that is worthy of death be put to death; at the mouth of one witness he shall not be put to death. The hands of the witnesses shall be first upon him to put him to death, and afterward the hand of *kol ha-'am*' (Deut. 17. 6, 7).

'One witness shall not rise up against a man for any crime or misdemeanour charged against him; at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established' (Deut. 19. 15).

In the Northern Kingdom, which was less zealous than Judah in protecting the Hebrew law against Canaanite infusion, the rule of two witnesses was firmly established in the time of Ahab, the friend and contemporary of Jehoshaphat (1 Kings 21. 10, 18).

So rooted was the idea of two witnesses in the Hebrew mind that when JHVH instructed the prophet Isaiah to take a roll and write in it concerning *Maher-shalal-ḥash-baz*, he did so with two witnesses (Isa. 8. 2). Jeremiah called in subscribing *witnesses* to a deed (Jer. 32. 10, 12), and in his prayer afterwards he refers this fact to the express command of JHVH: Thou didst say to me, O Lord JHVH, Buy the field for money and take *witnesses* (Jer. 32, 25).

That the Canaanite law permitted a man accused and acquitted to be tried again, and convicted and punished, is provable by the same character of evidence. The Hebrew law piles protest upon protest against punishing the *naḳi*, the man once acquitted.

When it is remembered that down to the time of David certain cases were tried by the oracle, it becomes apparent that an acquittal, being recognized as the judgement of Heaven, and as such infallible, was necessarily final and

irreversible, and that another trial for the same offence was inconceivable.

Hence the criminal law has a terminology of its own which brings out necessary distinctions. An innocent man is *ṣaddiḳ*, a guilty one *rasha'*. To acquit the innocent is *hiṣdiḳ*, to convict the guilty is *hirshia'*, to acquit one who has committed a transgression, or to allow him to escape conviction, is *niḳḳah*.

The difference between an innocent man and one legally declared to be innocent by acquittal, is also marked. The former, as has been said, is *ṣaddiḳ* (innocent), the latter is *naḳi* (not guilty).

In this exculpatory verdict there lurked then, as in our own day, the hidden thought which the Scotch broadly speak out by their verdict of *not proven*. This comes out clearly in one of the laws of the judge-code, already referred to: Do not condemn to death the *naḳi* or the *ṣaddiḳ*; for I will not acquit the guilty (Exod. 23. 7). The judge is here exhorted to have no scruples about freeing the *naḳi*, however strongly he may be convinced of his guilt, and of the error which produced the former acquittal. He is forcibly reminded that there is justice in Heaven which corrects human errors. In that tribunal a guilty man cannot plead his former acquittal by an earthly court.

So, too, in Deut. 19. 10. Elaborate provision is there made in order that a man guilty of manslaughter, which is not a capital offence, shall not be put to death. The declared object is that the blood of the *naḳi* shall not be shed, an act which would bring blood-guilt (*damim*) upon the whole community. The man guilty of manslaughter and punishable, therefore, is *naḳi* (acquitted of murder).

Indeed, the word *naḳi* very often means to be *freed*

from something, in contrast with the idea of having been entirely *free* from any connexion with it.

If Abraham's messenger should do his errand and others cause it to fail, he shall be *naḳi* (freed, acquitted) of his obligation (Gen. 24. 41). And the word is used in a like sense in Joshua 2. 17–20. If a man's ox gore a man to death, his owner shall be *naḳi* (i.e. acquitted of guilt under certain circumstances) (Exod. 21. 28–32).

When the community has ceremonially cleared itself of blood-guilt (*nikkapper*) for one slain by an unknown, it prays to be *naḳi* (acquitted) (Deut. 21. 8).

A man whose place is in the army is freed (*naḳi*) from that duty when he has newly married (Deut. 24. 5).

There are many passages which bear out our interpretation of *ṣaddiḳ*, *rasha'*, *hiṣdiḳ*, *hirshia'*, and *niḳḳah*. Here are some of them: 1 Kings 8. 32; 2 Chron. 6. 23; Exod. 21. 28; 22. 8; 23. 8; Deut. 25. 1, 2; Isa. 5. 23; 2 Sam. 14. 9; 15. 4; Exod. 20. 7; Deut. 5. 11; Jer. 30. 11; 46. 28; Amos 2. 6; 5. 12; Joel 4 (3), 21; Nahum 1. 3; Ps. 94. 21; Prov. 17. 15, 23, 26; 18. 5, 17; 19. 5, 9; 24. 24; Job 9. 20; 34. 17.

Perhaps the most objectionable feature of Canaanite law was a remnant of a prehistoric *lex talionis*, which had as a consequence that for the crime of the father, the son might be put to death, and perhaps also that for the crime of the son, his father might be put to death.

The only concrete case on this subject is unfortunately hypothetical, and, worse still, fictitious. The wise woman of Tekoa states the law to be that, when a man who has a son and heir, kills another who has not yet a son and heir, the murderer and his son shall both be put to death. Strange as this may seem, it is quite in the spirit of the

Code of Ḥammurabi. The murderer is punished because of his crime; his son is executed because, if he were not, the murderer's position would be superior to his victim's; whereas the object of the Code is to make the criminal's disadvantage just as great as that suffered by his innocent victim. That the son had done nothing to deserve death was purely irrelevant in a system of laws which judged the guilt, in acts which we look upon as high crimes, by results and not by intentions or motives; which, in short, looked upon penalties, however personal and severe, as being in the nature of damages for private trespasses, demanding just compensation, regardless of motive. That children were in some sense the father's chattels, and not free citizens of the state, is a proposition involved in the other. Their feelings or sufferings did not enter into the legal thought of the Ḥammurabi Code. Hence, when a man's son was doomed to death for his father's offence, it was the father who was being punished, just as if he had been deprived of a slave, of a ship, or of any other valuable chattel.

This principle was repellent to Hebrew law, being in direct opposition to the Hebrew thought that before inflicting capital punishment for homicide, the murderous intent, the malice aforethought, of the perpetrator must be established. The rule of individual responsibility thus laid down, swept away all laws based on the contrary principle. Nothing was, however, left to inference. It was set down in plain and unmistakable words. Hence the declaration:

Fathers shall not be put to death for children, nor children be put to death for their fathers. For his own crime only can a man be put to death (Deut. 14. 16; 2 Kings 14. 6; 2 Chron. 25. 4).

Ezekiel, too, incidentally refers to the subject. He is

addressing his fellow exiles in Babylonia (*c.* 590 B.C.). He finds that their patriotic spirit has been weakened, and that they are settling down to the belief that the nation will never be restored to its home. In short, they are comfortable and quite content to remain in the new land. Verbally, however, they declare the Exile a calamity, and invent reasons why they are so severely punished. It is the fault of their ancestors, who, while they ruled the land of Israel, failed in duty to JHVH. It is this insincere casuistry which Ezekiel is belabouring. He reproaches them with applying to their circumstances a heartless and untrue popular saying: The fathers have eaten sour grapes, and the children's teeth are set on edge. He intimates that they are absorbing alien ideas and setting them higher than the wisdom of their ancestors; that they are quoting alien proverbs, and wrathfully exclaims: What mean ye, that ye use this proverb concerning the land of Israel? And then he delivers JHVH'S message, that every individual soul is the Lord's, and goes on with a subtle satire on Babylonian legal conceptions, which are at the bottom of the objectionable proverb: The man that is guilty shall be put to death. If a man be innocent and do what is lawful and right, he is innocent (*ṣaddiḳ*) and shall live, saith JHVH. If his son violates every law and right, he shall be put to death; upon him is the blood-guilt (*damaw bo*). If this wicked son beget a good son, who does what is lawful and right, he shall not be put to death for his father's crime. He shall live. It is the guilty father who must die for his own crimes. Turning on his audience, he tells them that their flippant use of the proverb, in effect, means that the son should be punished for his father's crime, whereas every man is answerable for himself.

And in his peroration he urges them to make for themselves a new heart and a new spirit, and Israel will revive (Ezek. 18. 1–32).

It was the strong assimilative bent of the Babylonian *Golah* which he deplored and was chastising, and in doing so he brought home to them the inferiority of Babylonian justice as compared with Hebrew justice. That he had in mind certain provisions of the Code of Ḥammurabi is scarcely to be doubted (Lecture I, Secs. 116, 210, and 230 of that code).

It was Zionism which Ezekiel was preaching, to rather dull ears, as it seemed to him.

The nations (*goyim*) shall know that I am JHVH, and I will take you from among their midst, will gather you out of all lands, and will restore you to your own land (36. 23, 24).

And the climax of his optimistic eloquence on this theme was reached in his 37th chapter, that wonderful description of the reanimation of the scattered dry bones into a glowing and glorious organism (37. 1–14).

Perhaps the most important and far-reaching of the secondary conflicts between Canaanite law and Hebrew law, arose over the question of the killing of a slave. First-hand knowledge of the former we have none. There is, however, the Ḥammurabi Code, which at least gives us information as to the state of west-Asiatic law a thousand years before the Hebrew conquest of Canaan, and the influence of which must have been appreciable in Palestine.

According to it, there were at least three contingencies to be considered. The slave might have been killed by a freeman other than his master, by a slave or by the master himself.

The whole tenor of the Code shows that the resolutions were as follows. The freeman who killed another man's slave had to furnish another in his stead or pay his value, to wit, one-third of a mina of silver (Secs. 116, 219, 231, 252). This appears to have been the money value of a slave male or female (Secs. 116, 214).

If a slave killed another man's slave, there is nothing in the Code to make his master answerable, in money or otherwise. Nor is there any indication that the slave was punished, except perhaps by the loss of his ear or his ears. The Code had great regard for property, and slaves were property. The only punishment that could be inflicted on them, without materially reducing their working-power and consequent value, was cutting off their ears. Accordingly, we learn that if he have struck the cheek of a freedman (Sec. 205), or have repudiated his master (Sec. 282), in either case he loses his ear. That the fear of abating his value controlled the policy of the statute, appears from the fact that where an assault by a freeman is punishable by mutilation, it is the offending hands that are cut off (Secs. 195, 218, 226), and where a freeman has spoken that which is criminal, it is his guilty tongue that is cut out (Sec. 192).

As the Code does not treat of homicide, it throws no direct light on the question of what would happen to the master if he killed his slave. The general principle, however, is clear, that the slave is the mere chattel of the master. If any one kills or maims him, he must pay the master, who, according to the law, is the only one that suffers legal injury (Secs. 116, 219, 231, 252, 199, 213, 220, 232).

Another noticeable fact is that while assaults without evil consequences are punished if committed on gentlemen or freedmen (Secs. 202, 203, 204), there is nothing said about

an assault on a slave, evidently on the principle that if his value has not been impaired, his master has suffered no injury, and he himself is legally incapable to sustain legal injury, *injuria*.

We may fairly conclude that according to the Ḥammurabi Code, if a man killed his slave it was his own concern purely. He was the only loser.

Whether the Canaanite law of 1000 B.C. was like the Ḥammurabi Code is impossible to know, but that it had points of resemblance to it may fairly be inferred from the attitude of the Hebrew law on the subject.

Exod. 21. 20, 21, 26, 27, 32 is an important little slave-code. It declares as a principle that the slave is the master's property (*kaspo hu*) (21. 21), and then proceeds to enact exceptions which destroy the rule.

They are as follows:

Exod. 21. 20. If a man smite his male slave (*'ebed*) or his female slave (*amah*) with a rod (*shebeṭ*) and death is produced under his hand, *naḳom yinnaḳem* (Authorized Version: he shall be surely punished).

Exod. 21. 21. Notwithstanding if he continue a day or two (*yom o yomayim*), *lo yuḳḳam* (Authorized Version: he shall not be punished), for he is his money (*ki kaspo hu*).

Exod. 21. 26. And if a man smite the eye of his male slave (*'ebed*) or the eye of his female slave (*amah*) that it be destroyed, he must free him.

Exod. 21. 27. And if he smite out the tooth of his male slave (*'ebed*) or the tooth of his female slave (*amah*), he must free him.

Exod. 21. 32. If a goring ox push (to death) a male slave (*'ebed*) or a female slave (*amah*), the owner of

the ox shall pay unto the owner of the slave thirty shekels of silver, and the ox shall be stoned (to death).

The significance of this Code is that the slave is recognized as a member of society, and certain acts injurious to him are declared to be crimes against the state and punishable by it. If he be maimed by the master so that he loses an eye or a tooth, the state frees him. If he be murdered by the master, there is nothing to exempt the latter from the operation of the general law, which punishes that crime with death. If, however, he die under his master's hand in consequence of the latter's whipping, it is not murder punishable by death, but it is a crime, and the state inflicts a punishment, *nakom yinnakem*, whose nature we shall discuss in the next lecture. If, however, he do not die till the day after the whipping, there is no punishment.

If the slave be murdered by another, the latter, whatever be his station, is undoubtedly guilty of a capital offence.

If, however, he be killed by a goring ox, under the circumstances, which in the case of a freeman's death would entail the payment of vindictive damages (*kofer*, *wergild*), the owner of the ox merely pays the owner of the slave thirty silver shekels and the ox is stoned.

When we consider the provisions of this little slave-code in the light of all the authorities, there is much material for reflection. When the Hebrews acquired the land of Canaan they found slavery in existence, and were unable to abolish it. That this failure was a severe blow to the Hebrew authorities the whole literature attests. Upon every occasion it is declared that escape from Egyptian slavery was the beginning of JHVH's kingdom in Canaan, and that freedom is the foundation of JHVH's commonwealth.

Remember this day in which ye came out from

Egypt, out of the house of slavery (*bet 'abadim*) (Exod. 13. 3, 14; 20, 2; Deut. 5. 6).

I am JHVH, your *Elohim*, who brought you forth out of the land of Egypt that ye should not be their slaves ('*abadim*), and I have broken the bonds of your yoke and made you go upright (Lev. 26. 13).

Thou shalt say unto thy son: We were Pharaoh's slaves ('*abadim*) in Egypt, and JHVH brought us out of Egypt with a mighty hand (Deut. 6. 21; 7. 8).

Lest thine heart be lifted up, and thou forget JHVH, thy *Elohim*, who brought thee forth out of the land of Egypt, from the house of slavery (*bet 'abadim*) (Deut. 8. 14; 13. 6 (5); 13. 11 (10)).

I brought thee up out of the land of Egypt and redeemed thee out of the house of slavery (*bet 'abadim*) (Micah 6. 4).

I made a covenant with your fathers in the day that I brought them forth out of the land of Egypt, out of the house of slavery (*bet 'abadim*), as follows: At the end of seven years let ye go every man his brother a Hebrew, who hath been sold unto ye. And one who hath served you six years send him out free (at the end of the six years) (Jer. 34. 13, 14).

Ye have not hearkened unto me in proclaiming liberty (*deror*) every one to his brother and every one to his neighbour (Jer. 34. 17).

Proclaim liberty (*deror*) throughout all the land unto all the inhabitants thereof (Lev. 25. 10).

Efforts to abolish slavery began at an early day. The first step was to destroy the master's absolute power over the life of the slave, and to convert perpetual slavery into serfdom for a limited period (six years) (21. 2). At this

point the opposition was too great, and the federal government had to yield its principle of the equality of the *ger*. The latter was not included in the serfdom statute. Even in its modified form, the emancipation measure was not completely successful. The masters were powerful enough to compel the government to permit the perpetual slavery of the Hebrew *ezraḥ* by the device of a voluntary contract. A form of procedure was invented (21. 5, 6), by which the policy of the state was overcome. Such a law would have been impossible if the government had felt itself able to resist. The ancient Hebrew jurists saw, just as clearly as do we, that fundamental state policies ought not to become the plaything of the greedy and the ambitious, under any circumstances, and that their nullification by private individuals, whether under the name of contract or otherwise, is inconsistent with the state's sovereignty. Nevertheless, they yielded, because no other course was open to them.

Notwithstanding these drawbacks, the advance made inaugurated an era of human progress.

One who kidnapped a man to enslave him, suffered death (Exod. 21. 16). Ḥammurabi's Code had a similar provision for the protection of freemen (Sec. 14), but its fanatical enthusiasm for slavery was displayed by denouncing the death penalty against one who attempted to free a slave (Secs. 15, 16, 19).

The important point, however, was that for the first time the state made the slave's right to life and limb its own concern. That even in this it had to make concessions is true, but with all its incompleteness, it was the foundation of a new world for the very poor. The lordly classes learned that it was not at their will that the underworld enjoyed life, nor was it within their province to destroy it.

The terms *nefesh*, *ish*, *adam*, *rea'* (man, neighbour) took on a new meaning (Gen. 9. 56; Exod. 21. 12; Lev. 24. 17, 21; Num. 35. 30; Deut. 19. 11; Josh. 20. 3). A slave was at last a man, a *ben-adam*.

In the light of this advance, the halting features of the statute are not as important as at first they seem.

The 20th and 21st verses, which define the crime of a master whose slave dies in consequence of his whipping as less than murder, are in harmony with the general law that without malice aforethought there cannot be murder.

In the case put there is everything to exclude the idea of malice. On the contrary, the master is acting according to his right and, in the thought of that day, according to his duty. It is not the case of a wanton assault; it is a case of lawful whipping, not with anything that caprice or anger may dictate, but with the lawful instrument in general use for that purpose, the rod (*shebeṭ*). If it were any other weapon, the master would no longer have the benefit of this provision, but would come under the general law regulating homicide (Num. 35. 16, 17, 18).

It is true that whipping with the *shebeṭ* sometimes resulted in death, but it was permitted by law, and regulations concerning it were enacted (Deut. 25. 2, 3; 2 Sam. 7. 14). No danger was apprehended from it. 'If thou beatest him with the *shebeṭ*, he will not die' (Prov. 23. 13). Parents were admonished to use it in correcting the faults of their children (Prov. 13. 24; 22. 15; 23. 13; 29. 15). It was therefore the master's usual and proper instrument for disciplining the slave.

In view of the master's pecuniary interest in the life and work of his slave, an intent to disable or kill him could not fairly be presumed. If, therefore, the slave died, the

reasonable presumption was to ascribe the death to his constitutional weakness. And it is this presumption which is embodied in the 21st verse, that if the slave do not die on the day of the whipping, the master goes free. But if he die on the day of the whipping, this presumption is rebutted and overcome, and the master must suffer his punishment.

The effect of this law was to compel the master to remember that in administering punishment, he was in a sense exercising a public function, and that the day for considering it his private affair was over. Just as Deut. 25. 2, 3 prescribed moderation in whipping to courts and their officers, so the statute imposed it on masters.

It is certain that this law did not abolish slavery, but it so ameliorated its features that its gradual disappearance might reasonably be hoped for. That these hopes were never realized to the full, it is needless to say. Every advance of mankind begets a desire for further improvement. This is the immutable law of progress.

When slavery had largely disappeared, economic equality did not result. The freed slaves doubtless fell into the ranks of the *sekirim*, the *dallim*, and the *ebyonim* of later ages, who, with their great spokesmen, the writing prophets, agitated for the betterment of their lot.

There remains for consideration the meaning of the term *nakom yinnakem*, which is the punishment imposed by the law (Exod. 21. 20) on the master whose slave dies during a whipping or afterwards on the same day. This involves a consideration of Hebrew modes of punishment for crimes, and may well be deferred to the next—the last lecture of this series.

V

THE notions of punishment, retaliation, and revenge are nearly allied. Revenge is the primitive and unregulated impulse to hurt one who has inflicted an injury. Retaliation is revenge modified by a sense of justice and due proportion. It operates in two ways. Either it inflicts upon the wrong-doer, as nearly as may be, the kind and quantity of harm he has done, or it ascertains the particular portion of his body which has been the instrument of the wrong, and deprives him of it by mutilation. Legal punishment, while it has as basic element the idea underlying the other two, is essentially different in this, that while they keep in mind a certain personal satisfaction to the injured party, it regards nothing but the welfare of the whole community.

Revenge, as a general rule of conduct, necessarily ends when society becomes reasonably organized. It is then that retaliation, the *lex talionis*, is introduced. The state is not yet exercising all of its proper functions, but leaves some of them to be administered by constituent subdivisions, whether they be families, clans, tribes, or guilds.

In doing this it is not neglecting its duty. It has simply not become conscious of it. Early states are all politico-ecclesiastical, that is, they have a civil and ecclesiastical government, however rudimentary, and these constitute the ruling power. By the natural law of self-defence, they resist aggression directed against these functions. Hence it is that the acts which early states recognized as crimes or offences against the commonwealth are those which are of a public nature, a kind of treason against church or state, and they are generally viewed as worthy of death.

Offences against private individuals are, at this stage, looked upon as trespasses, mere civil injuries, with which the community as a whole has no other concern than to preserve the peace, so that the safety of the state may not be endangered. To this end it establishes tribunals which arbitrate between disputants and determine what satisfaction the one shall give the other. This view is so fundamental that even now states do not otherwise interfere between individuals in the great mass of transactions and disputes.

The time comes, however, when states recognize that there are some wrongs inflicted on private individuals which, if not vigorously checked, indirectly sap the foundations of the state. These are then treated as crimes in analogy to those acts which are direct assaults on the state.

Of all the trespasses thus advanced to the degree of crime, the most important is homicide. The advance, however, is not made at one leap; it goes by stages. While the retaliatory state subsists, the individual is never compelled to stand alone. His family, clan, tribe, or guild constitutes a kind of corporation, which assumes the duty of guarding or avenging the lives of its members. Of such corporations there may be many in a state. If a member of one of them kills a member of another, the latter retaliates in kind. There is as yet no sufficient development of comity between these constituent bodies to provide for arbitration, for judicial investigation, and hence the rude justice of the *lex talionis* is established.

If, however, the slayer and the slain are both members of the same subdivision, the rule does not apply. No organization could grow or achieve permanence if it

invariably supplemented the killing of one of its members by the destruction of another in a continuing series. A new interest, the communal, intervenes to regulate private feuds within the organization. Hence arises legal punishment to replace the *lex talionis*.

In a state in this stage of organization, both systems coexist, a rudimentary kind of legal punishment for offences within the subdivision, retaliation for those without.

The superiority of the system which bases punishment on communal policy over that of mere retaliation, becomes apparent by degrees. In time it is fully realized, and then the state withdraws from subordinate organizations the function of dealing with crime and itself assumes it, to the exclusion of all other authority. Then it is that a state may be said to be fully organized.

This form of opinion arises when a country is substantially consolidated, when its inter-clan feuds have been practically abolished, when individual citizens feel themselves in direct and intimate relation with the state, and the state becomes conscious that these citizens are its true and ultimate constituents.

The national mission of keeping the peace between its constituent tribes or clans has been accomplished, and in its place comes the national duty of keeping the peace between its individual citizens. The function of preventing the decimation of one clan by another is replaced by that of preventing one man from killing another. Individual responsibility being established, the mild internal homicide law, which inter-clan hostility created, must be modified so that wilful murder shall be inexorably punished by death, while less guilty kinds of homicide shall not be condoned by mere money payments.

The Ḥammurabi Code shows us Babylonia in the retaliation stage, from which it is scarcely beginning to emerge. It has not yet made homicide the affair of the state. Evidently the *lex talionis* is in full force between the several constituent bodies of the state. As regards minor offences, it has numerous provisions for inflicting on the perpetrator of a personal injury, the same kind of hurt, and has many others for mutilation, by cutting out or cutting off the perpetrator's offending member, the eye for evil looks (Sec. 193), the tongue for evil speech (Sec. 192), the hands for evil blows (Sec. 195), the breasts for a nurse's wrong-doing (Sec. 194), and so on.

It has been many times said, and is constantly repeated, that the *lex talionis* is the law of the *Torah*.

When it is remembered that the Hebrew law provides for a careful trial of the accused, and declares that malice aforethought must be ascertained or the offence is not capital, it is scarcely necessary to repeat that alongside of this law there could not be recognized another which ignores all these points and dooms to death the man who has just escaped the death sentence. The notion that two systems of law so contrary to each other can be applicable in the same case, in the same place, at the same time, is too wild for serious consideration. Yet there is a general opinion that 'the Avenger of Blood' had but to wait outside of the court room until the tribunal had acquitted the prisoner, and that then he lawfully killed him, and that the tribunal acquiesced in this disposition of the case.

It is interesting to trace the history of this widely-diffused error.

There seems to have been in pre-Hebraic times a maxim

professing to sum up in popular speech the character and effect of the law of retaliation. It survives in the Pentateuch in three versions, each somewhat varying from the others. Its origin was probably in the remote past, when it may have been in substantial accord with the law of retaliation as then practised. That it was older than the Ḥammurabi Code is plain. The latter had already advanced to the point that between ordinary citizens it did not demand an eye for an eye, or a tooth for a tooth, but was satisfied with a mina of silver for an eye and a third of a mina of silver for a tooth. Changes in the law, however substantial, do not seem to affect the life of such maxims. Men go on repeating them, unconsciously converting the literal into metaphorical meaning, so as to avoid doing violence to their actual opinions.

Of this truth, the maxim under consideration is a striking illustration. In order that this may be the better understood, we must look not only at the various texts of the maxim, but at the context in which they are embedded. These will show the circumstances under which it was cited, and the purpose of citing it.

The first of the versions is in Exodus, chapter 21. Here are text and context:

Exod. 21. 22. If men strive and hurt a woman with child, so that her fruit depart from her, and yet no mischief follows, *he* shall be surely punished according as the woman's husband will lay upon him; and he shall pay as the judges determine.

21. 23. And if any mischief follow, then thou shalt give life for life (*nefesh taḥat nefesh*).

21. 24. Eye for eye, tooth for tooth, hand for hand, foot for foot.

21. 25. Burning for burning, wound for wound, stripe for stripe.

The Deuteronomy version is contained in the following:

Deut. 19. 16–18 provides for the trial of a witness on the charge of perjury in a trial for the capital offence of *sarah* (*Hebrew Polity*, pp. 51–61).

19. 19. (If convicted) then shall ye do unto him, as he had thought to have done unto his brother; so shalt thou put the evil away from among you.

19. 20. And the rest will hear and fear and will not henceforth commit such evil among you.

19. 21. Have no pity: Life for life (*nefesh be-nefesh*), eye for eye, tooth for tooth, hand for hand, foot for foot.

The Leviticus version is part of a peculiar text, concerning which something was said at the end of the third lecture. It is as follows:

Lev. 24. 10–16 is the report of a trial for blaspheming the *Shem*, the decision and the law promulgated thereupon, that one guilty of that offence must be stoned to death by the *'Edah*, and that the *ger* is just as amenable to this law as the *ezraḥ*.

24. 17. He that killeth any man shall be put to death.

24. 18. He that killeth a beast shall make it good (*yeshallemennah*), beast for beast (*nefesh taḥat nefesh*).

24. 19. If a man cause a blemish (*mum*) in his neighbour, as he hath done, so shall it be done to him.

24. 20. Breach for breach, eye for eye, tooth for tooth: as he hath caused a blemish (*mum*) in a man so shall it be done to him.

24. 21. He that killeth a beast shall make it good (*yeshallemennah*) and he that killeth a man shall be put to death.

24. 22. Ye shall have one *mishpaṭ* for *ger* as for *ezraḥ*. I am JHVH your God.

24. 23. And Moses spake to the *Bne-Israel* that they should bring forth him that cursed out of the camp and stone him with stones. And the *Bne-Israel* did as JHVH commanded Moses.

The maxim refers only to homicide and to maiming. We know the Hebrew law of both. Homicide is either murder, which is a capital offence, or it is manslaughter, which is punishable by a form of imprisonment. Maiming is a form of assault and battery. This offence also has two degrees. It is either simple assault and battery, which is punishable by compensatory damages (Exod. 21. 18, 19), or it is aggravated assault and battery (of which maiming is one kind), which is punishable by vindictive damages to be assessed by the court (*pelilim*) (Exod. 21. 22).

The maxim in any of its forms contradicts the Hebrew law of homicide and of assault and battery. It also contradicts the pre-Hebraic Canaanite law of homicide, and probably of assault and battery, because it excludes *kofer*, or *wergild*, which was a recognized institution, against which the great law reform waged war.

That it was a mere forensic statement appended to the enunciation of a law, with which it had some fancied relation, seems clear enough. The law of Deuteronomy 19 proves it. The offence of perjury in a trial for the capital crime of *sarah* is made capital. The only punishment that could be inflicted was death. It was a new capital crime, and the promulgation of the law itself was followed by the argumentative use of this popular maxim. There could be no question of eye or tooth or hand or foot, and yet we have the whole catalogue. The object is plain.

It is as if the herald who proclaimed the statute had followed up his announcement by reminding them that the perjured witness was only getting his deserts according to the old maxim.

Its use in the Exodus statute is not for any other purpose. I have already indicated that the text is defective. It provides first for the punishment of simple assault and battery, without serious consequences, by compelling the assailant to pay for his victim's cure and for his loss of time (Exod. 21. 18, 19). It then provides for the corporal punishment of an aggravated assault on a slave resulting in death (Exod. 21. 20). Finally it punishes an aggravated assault on a woman which produces the death of an unborn child. The penalty is the payment of vindictive damages, and there the matter ends. That if the woman too should die, corporal punishment would follow, as in cases of manslaughter, is highly probable. By corporal punishment I mean either scourging or imprisonment.

The texts, however, are confused, and are made to say that the death of the unborn child does not change the character of the offence from simple assault to aggravated assault, because no *ason* (mischief, harm) results.

In the teeth of this saying there is the provision for vindictive damages, which is itself the sign that the law considers the injury serious. Then there is, too, the law that manslaughter, the actual killing of a man in hot blood or by casualty, is not to be punished with death.

Keeping this in mind, the idea that a man could be capitally punished who hurt a woman without malice aforethought and without intent even to strike her, is simply inadmissible. One may well suspect that some words

are missing from verse 23, which described an offence of great gravity, and also provided a severe specific punishment for it, and that the maxim was then invoked just as in Deuteronomy. But even if this very probable hypothesis is untrue, the maxim may have been quoted to point a case of damages merely.

This is exactly what has happened in the Leviticus text. He that killeth a beast shall make it good (shall pay for it) (*yeshallemennah*) *nefesh taḥat nefesh*. The Authorized Version translates this leading phrase of the maxim *beast for beast*, instead of life for life. And the translation is a correct rendering of the meaning. It has, however, not been perceived that the text, after it announces a liability to pay money damages, quotes this very maxim by way of support. We have, in effect, a definition which declares that making good by a money payment a loss inflicted, is an instance of the application of the old maxim *nefesh taḥat nefesh* (life for life). And this Leviticus text is the only one of the three which makes maiming (*mum*) a separate form of aggravated assault and battery which is to be punished in kind: 'As he hath done, so shall it be done to him' (Lev. 24. 19). And then follows the rest of the maxim: breach for breach, eye for eye, tooth for tooth.

That this has no other meaning than that money damages adequate to punish for the injury must be assessed against the aggressor, is certainly inferable from the apposition of *yeshallemennah* with *nefesh taḥat nefesh*. So read we have simply the same law as in Exodus 21. 22, that in a case of aggravated assault and battery mere compensation will not suffice, but the judges are to assess vindictive damages against the aggressor proportioned to the gravity of the injury.

There is another thing that must not be overlooked. The maxim in its fullest form is found in the Exodus text, and follows hard on a piece of old Canaanite law (Exod. 21. 22–5). The Hebrew law of assault and battery is uniform, that in no event, whatever the result, can the penalty be death where the intent to murder is lacking. Moreover, the cardinal principle of Hebrew law is that everybody is equal before the law. The Code of Ḥammurabi, however, devotes six sections to the case of assault on a pregnant woman (Secs. 209–14). Five of these provide for the payment of compensation only, the sixth (Sec. 210) provides that if the victim be a gentleman's daughter, the assailant's daughter shall be put to death. We have already, in our first lecture, intimated that in later times this provision must have been interpreted, even in Babylonia and Assyria, to mean the payment of punitive damages, in addition to compensation. It is an offshoot of this piece of Babylonian woman-law which has somehow been preserved in our text, though it is in glaring contradiction to every principle of Hebrew law. The reasonable explanation is that among the old documents which went into the compilation of our books, odd pieces of *zikne ha-ʿir* law, having in them Canaanite admixtures, crept in and remained undetected, because they had become obsolete in practice.

There is just one other similar piece of Canaanite woman-law with retaliatory features. It is contained in Deuteronomy 25. 11, 12, and contrary to all Hebrew law and practice, prescribes mutilation, the cutting off of the offending hand, as punishment. It is, however, quite in line with the Ḥammurabi Code, which prescribed mutilation in no less than twelve sections (Secs. 192, 193, 194, 195, 196, 197, 200, 205, 218, 226, 253, and 282).

When we find obsolete Canaanite laws thus recorded, we need not be surprised to meet a popular Canaanite legal maxim, which everybody quoted at all times, with no definite meaning, but merely by way of illustration. The fullest version of the maxim accompanies the gravid woman's law of Exodus. In Leviticus the maxim is cut in two. Its first and most significant member, *nefesh taḥat nefesh*, frankly means a money payment, and there is no good reason for attributing to the less significant phrases of the maxim a higher value than to its chief portion. In Deuteronomy its use as a mere illustration is palpably plain.

In determining what punishments were imposed by Hebrew law, we ought not to overlook Ezra's views on the subject. He was a *Kohen* and a thorough adept in the law, 'a ready scribe in the law of Moses'. He was a leader of his people and had very definite ideas on the subject of reconstructing the Jewish state in its pristine glory. He must have been a person of eminence, or otherwise he could not have obtained from Artaxerxes the liberal charter which authorized him practically to rule a new state which he was to found on the site of the old Judea of his fathers, there to administer the Torah of JHVH and to enforce its *ḥoḳ* and *mishpaṭ*. Moreover, in the year 450 B.C., there were better means of knowing and understanding the old law than are accessible to us. That the terms of the charter originated with Ezra, can scarcely be doubted. The document is in Ezra 7. 12–26. These are the words: And thou Ezra, according to the *ḥokmat elahaḳ* which is in thy hands, set judges and *dayyanin* to judge all the people beyond the river for all such as know the laws of thy God, and as to those that

know them not, teach them. And whoever will not do the law of thy God and the law of the King, let judgement (*dinah*) be executed speedily upon him, whether for death (*le-mot*), for banishment (*lishroshi*), for amercement of goods (*la'anash niksin*) or for imprisonment (*esurin*).

The Authorized Version renders *shaftin we-dayanin*, magistrates and judges. There can be little doubt that the author was translating *shofetim we-shoterim* (Deut. 16. 18), and that therefore the rendering should be 'judges and officers', *dayyan* being the equivalent of *shoter*, who is the official that executes the judgement of the court in the manner of our sheriff.

The Ezra charter enumerates four kinds of punishment for criminal offences.

The Torah knows of six:

Death: (Exod. 21. 12).

Karet: (Gen. 17. 14; Exod. 12. 15, 19; 30. 33, 38; 31. 14, 15; Lev. 7. 20, 21, 25, 27; 17. 4, 9, 14; 18. 29; 19. 5–8, 13, 20; 20. 5, 17, 18; 22. 3; Num. 9. 13; 15. 30, 31; 19. 13, 20).

Amercement: (Exod. 21. 19).

Enslavement: (Exod. 22. 3).

Scourging: (Deut. 22. 18; 25. 2, 3; Lev. 19. 20).

Nakom yinnakem: (Exod. 21. 20).

Two of these six (death and amercement), are plainly specified in the Ezra charter; two others (enslavement and scourging; a slave's punishment) had become obsolete by the emancipation law, leaving for consideration only *Karet* and *nakom yinnakem*, which stand in the place of Ezra's banishment and imprisonment.

That *Karet* in the early ages meant banishment, is probable. The uncircumcised male (Gen. 17. 14) and

the man who flouted the celebration of the Exodus (Exod. 12. 15, 19; Num. 9. 13), were both to be cut off from among their people. These, however, were grave offences against national duty. The rite of circumcision was, in effect, the admission to the citizenship of the nation, while the Passover celebration was the symbol of the nation's birth which every patriot profoundly revered. That a man who failed in these respects was looked upon as a traitor, is not to be wondered at. Exile was not deemed too severe a punishment.

There are, however, many other cases calling for the punishment of *karet* which could not possibly have been punished by exile. Such cases are the following: eating the flesh of *shelamim* offerings while unclean (Lev. 7. 20, 21); eating the fat of a fire-offering (Lev. 7. 25); eating blood (Lev. 7. 27; 17. 14); killing an ox, lamb, or goat in the camp and not bringing it as a *ḳorban* (Lev. 17. 4, 9); compounding an imitation of the holy oil (Exod. 30. 33) or the holy perfume (Exod. 30. 38); eating of *shelamin* offerings on the third day (Lev. 19. 5–8); committing certain improprieties (Lev. 20. 18); eating of the *ḳodashim* while unclean (Lev. 22. 3); failing to purify one's self when unclean (Num. 19. 13, 20).

These are all trespasses which would be adequately punished by temporary seclusion or excommunication. To have banished from the land all persons guilty of these ecclesiastical peccadilloes would have weakened the kingdom.

That *karet* at any time meant the death-penalty is highly improbable. Perhaps the strongest argument in favour of the view that it did, may be derived from the passages Exod. 31. 14, 15. In the former, one who works

on the Sabbath incurs the penalty of *karet*; in the latter, the penalty is death. This, however, warrants no other conclusion than that the latter provision is an amendment of the former. Indeed, there is distinct evidence that the law was changed in some such manner. In Num. 15. 32–6 there is a reported case of a man who gathered sticks on the Sabbath. The authorities seem to have been in doubt whether the offence was punishable. The oracle decided that the penalty must be death by stoning.

The conclusion would seem to be that the punishment of exile for working on the Sabbath was deemed impolitic, and that the death-penalty, which might be expected to prove a more effective deterrent, was at an early date substituted by way of amendment.

Karet may therefore be said to have two meanings, an older and a newer one; the former being exile, and the latter a lighter penalty to be borne at home for a limited period.

Ezra seems to have adopted the older *karet*, that is exile, for his new commonwealth, calling it *sheroshi* (uprooting) in his Aramaic.

Ezra's *csurin* (imprisonment) has no parallel in the older law, unless it be found in the *nakom yinnakem* of Exod. 21. 20.

These words are rendered by the Authorized Version: he shall be surely punished. No substantial objection can be urged against the mere translation of the words. Literal translations, however, are but slight helps to the understanding of technical terms. And that the term in question is technical, there is little room for doubt. It will be remembered that chapter 21 of Exodus contains a code of laws which prescribe specific punishments for

certain offences. For murder, death (21. 12); for smiting a parent, death (21. 16); for cursing a parent, death (21. 17); for injuring a man in a quarrel, compensation (21. 19); for smiting a slave with a rod which produces death, *nakom yinnakem* (21. 20); for producing miscarriage, punitive damages (*'anosh ye'anesh*) (21. 22). The penalties are all specific, and there is no reason to doubt that *nakom yinnakem* is likewise specific. The only difficulty is to discover what it was. That it was something more than punitive damages, is obvious. It must have been something affecting the person of the culprit with some severity. The particular term is unique, there being no other instance of its use. The root-word is, however, common, and it always denotes punishment of a serious character.

In Judges (15. 7 and 16. 28) Samson uses it to mean the slaughter of a multitude. In 2 Kings (9. 7) Elisha uses it to charge Jehu with the duty of destroying the whole house of Ahab. Jeremiah uses it to describe a day of JHVH's signal punishment of enemies (46. 10; 50. 15; 51. 36). By Ezekiel it is used in a similar sense (Ezek. 25. 15), as also in Esther (8. 13).

That it cannot mean death is apparent from two facts: first, the offender did not intend to kill the man, and was therefore guilty only of manslaughter, and second, the same code uses the technical term *mot yumat* in the several cases when the offence is capital. It is true that the Talmud (Sanhedrin 52 b) construed it to mean 'death by the sword'. Its argument, however, though ingenious, falls before the two facts already stated.

Nor is it likely to mean banishment from the land, which is nearly as severe as the death penalty, and is moreover already provided for under the name of *Sheroshi*. The fact

that a new crime was being created by law must not be forgotten. Before this law the fact that the slave died under his master's correction was no man's concern. In the Code of Ḥammurabi the death of the slave rendered the slayer liable to give the bereaved master another slave in his stead. Other consequences there were none. If, therefore, the master lost his slave by his own act, it was his own money he was losing. This is good Babylonian law, and it is one of the ironies of history that when the Hebrew law fought this system, and won its first great triumph over it, the record should be disfigured by the intrusion into it of the Babylonian principle which it had just overcome: 'The slave is but the master's money' (*kaspo hu*) (Exod. 21. 21). It and the *lex talionis* maxim, which follows hard upon it (21. 23–5), are both of them good Canaanite law. They are, however, in direct contradiction of Hebrew law.

On the other hand, it was not to be expected that extreme punishment should be inflicted for an act which men had just begun to look upon as an offence. This view would negative banishment as the punishment meant by *naḳom yinnaḳem*.

Scourging, on the other hand, was in ancient Israel fit punishment only for children, slaves, and paupers, and would not be thought of for men of good condition. Only for one offence, and that an infamous one, was the punishment imposed on a freeman (Deut. 22. 18). And to this effect writes Josephus (*Ant.*, Book 4, ch. 8, Sec. 21): The punishment of stripes is a most ignominious one for a freeman.

It need not therefore be thought of in this connexion. This leaves for consideration only the question of im-

prisonment. There is a very common belief that the ancient Hebrews did not know deprivation of liberty as a punishment for crime. Against the correctness of this supposition there is a mass of evidence which has not been sufficiently weighed.

Very significant is the fact that there are eight several Hebrew words denoting prisons, and, moreover, two of these words are used in varying forms:

1. *ha-maṭṭarah* is used by Jeremiah (32. 2, 8, 12; 33. 11; 37. 21; 38. 6, 13, 28; 39. 14, 15); and Nehemiah (3. 25; 12. 39).

2. *Masger* is used by Isaiah (24. 22; 42. 7); and by the Psalmist (142. 8).

3. *Bet ha-peḳudot* is used by Jeremiah (52. 11).

4. *Bet ha-bor* is used in Exodus (12. 29); and by Jeremiah (37. 16).

The variant form *bor* is used by Isaiah (24. 22); by Jeremiah (38. 6, 7, 9, 10, 11, 13); and most significantly in Proverbs (28. 17): A man oppressed by blood-guilt (*dam-nefesh*) will flee (*yanus*) to the *bor*; let no man stay him.

5. *Mishmar* is used in Genesis (40. 3, 4, 7; 41. 10; 42. 17, 19); in Leviticus (24. 12); in Numbers (15. 34): 'And they put him in *mishmar*, since it was not declared what should be done to him.' In Proverbs (4. 23): 'As in any prison (*mishmar*) guard thy heart; for out of it are the issues of life.'

6. *Bet ha-sohar* is used in Genesis (39. 20, 21, 22, 23; 40. 3, 5).

7. *Bet ha-asirim* (M.T. *asurim*) is used in Judges (16. 21, 25).

The variant form *bet ha-esur* occurs in Jeremiah (37. 15), and the form *bet ha-surim* in Koheleth (4. 14).

8. *Bet ha-kele'* occurs in 1 Kings 22. 27 ; 2 Chron. 18. 26 : Put this man in prison (*bet ha-kele'*) and feed him on bread and water. And Jeremiah uses it (37. 15, 18).

The variant form *bet ha-keli'* (M.T. *bet ha-kelu'*) occurs in Jeremiah 37. 4 ; 52. 31 ; while the form *bet-kele'* is used in 2 Kings (17. 4 ; 25. 27), and in Isaiah (42. 7): 'To open blind eyes, to bring the prisoner (*assir*) from the *masger*, the dwellers in darkness (*yoshebe ḥoshek*) from the *bet-kele'*.'

Besides these undoubted names for prison, the Authorized Version gives *prison-house* as the rendering of *bet ha-mahpeket.* King Asa being wroth with Ḥanani, the seer (*ro'eh*) put him into the *bet ha-mahpeket* (prison-house) (2 Chron. 16. 10).

When Pashhur, the priest, was angered with Jeremiah for his prophecies, he put him in the *mahpeket* by the upper Benjamin-gate (Jer. 20. 2). A. V. here renders not 'prison', but 'stocks'.

The word occurs but once more. Shemaiah, the Nehelamite, who prophesied in Babylon in a sense contrary to Jeremiah's prophecies at Jerusalem, wrote to the priest in the latter city to put Jeremiah in the *mahpeket* and in the *ṣinoḳ* (Jer. 29. 26), that being the proper place for a *meshugga'* (madman) who prophesies.

This mode of branding a prophet whose utterances are displeasing was not a new thing. Hosea (9. 7), reproaching his age, charges them with calling the *nabi* a fool (*ewil*) and the inspired man (*ish ha-ruaḥ*) a madman (*meshugga'*). And even in our own day the same phenomenon occurs. A statesman who advocates measures we do not like is often called a paranoiac.

The fact is clear that the *mahpeket* is spoken of only in connexion with prophets whose utterances are distaste-

ful to those in power, and who are by the latter branded as madmen. The conclusion would seem to be that the *bet ha-mahpeket* was a place for the detention of lunatics, rather than a house of punishment for criminals. Exactly what *ṣinoḳ* means is doubtful. A. V. renders 'the stocks', but as the word occurs but this once, we can be certain only that it means some place or instrument of restraint.

The common notion that the ancients had no separate institutions for the sick may be questionable. The obscure text (2 Sam. 5. 6, 8), which describes the capture by David of the fortress of Jebus, speaks of the Jebusites' defiant cry to David that unless he could reach the *ṣinnor* and capture the blind and the lame, he would never enter the place. The *ṣinnor* was apparently built on the highest point of what was afterwards the city of David, and the inference is reasonable that it was a place where the blind and the lame were kept. It may be that the *ṣinnoḳ* of Jeremiah and the *ṣinnor* of Samuel are not totally unrelated. Whether the account was historically accurate or was merely legendary by way of explaining the origin of the later law that 'the blind and the lame shall not enter the temple' (*'iwer u-piseaḥ lo yabo el-ha-bayit:* 2 Sam. 5. 8; cp. Lev. 21. 18), is a question. In any event, the narrative seems to indicate familiarity with the idea of segregating persons afflicted with certain infirmities.

There is probably still another name for prison, though the translators have hitherto not recognized it. It is *bet ha-asuppim* (1 Chron. 26. 16). The Authorized Version takes *asuppim* for a man's name, while the Revised Version renders 'the storehouse'.

Sufficient regard has not been paid to the instances

in which *asaph* means 'to imprison'. Joseph put his brothers (*wa-ye'esoph*) into *mishmar* for three days (Gen. 42. 17).

As prisoners are imprisoned, they will be imprisoned in a dungeon, will be shut up in a jail (*we-ussephu asephah assir 'al-bor, we-suggeru 'al-masger*) (Isa. 24. 22).

That there was in Jerusalem a house of detention (which we would call a police station), to which persons arrested for trivial offences were consigned, would appear from certain passages in the Song of Songs, and this may have been the puzzling *bet ha-asuppim* of 1 Chron. 26. 16. When the lady of the song dreamed that she went forth by night to look after her beloved, she found him not, but encountered unsympathetic policemen on their beats (*shomerim ha-sobebim ba-'ir*), who arrested her (*mesa'uni*). She was, however, soon released (*kim'at she'abarti mehem*) (Song of Songs 3. 3, 4).

The current translations do not say 'they arrested her', but give the rendering 'they found' her, on the theory that *masa'*, which usually means to find, does so in this instance. The word also has the meanings to catch, to arrest, to acquire, to take or receive. A burglar caught in the act (Exod. 22. 1 (2)), and a thief caught after the act, are both *yimmase'* (Exod. 22. 6, 7 (7, 8)). The men who caught and jailed the Sabbath-breaker were *mose'im, wa-yimse'u* (Num. 15. 32, 33).

The booty acquired in war is *masa'* (Num. 31. 50). All that a man has acquired (his whole estate) is *yimmase'* (Deut. 21. 17).

Here are other instances:

If a man catch (*yimsa*) his enemy, will he let him go? (1 Sam. 24. 19).

They caught (*wayimṣeu*) an Egyptian and brought him to David (1 Sam. 30. 11).

Was Israel caught (*nimṣa'*) among thieves? (Jer. 48. 27).

I will surrender (*mamṣi'*) them each unto his neighbour's hand (Zech. 11. 6).

If the thief be caught (*we-nimṣa*), he must pay sevenfold (Prov. 6. 31).

And he saith: Do not lower him into the pit. I have taken ransom (*maṣa'ti kofer*) (Job 33. 24).

In the Canticles, therefore, the lady dreams that the police arrest her, but do not detain her long (3. 3, 4). In her next dream, however, she is not so fortunate. The policemen not only arrest her, but beat and wound her, and give her in charge to the policemen of the wall (*shomere ha-ḥomot*), who use her roughly, rending her dainty veil or mantle (5. 7). One may well believe that the policemen of the wall had a station to which the policemen arresting persons whom they considered disorderly, took their prisoners. At the station the prisoners were of course examined, and any endeavour to avoid identification by covering the head or face with veil or mantle, would result in damage to the garment.

That the walls of cities were thoroughly policed, and that they had houses built on them, is certain.

I have appointed *shomerim* upon thy walls, O Jerusalem, who will not be inactive (*lo yeḥeshu*) by day or by night (Isa. 62. 6).

When Rabshakeh shouted the menaces of Assyria to the ministers of the king of Judah, the latter prayed him to speak in the Aramaic tongue, so that those on the wall would not understand. Rabshakeh, however, rudely insisted on addressing his menacing words to the *yoshebim*

on the wall, their purport showing that he looked upon them, not as a rabble of idlers, but as having authority to influence Hezekiah's actions (1 Kings 18. 27 ; Isa. 36. 12).

We may, therefore, fairly conclude that the wall of Jerusalem had a police station to which the *shomerim* brought their prisoners, who were tried by the *yoshebim* there sitting. Such police courts are not otherwise unknown. There was such a court in one of the prisons in the city itself, where the sale of certain land in Anathoth to Jeremiah was duly acknowledged before the *yoshebim* that sat in the prison court (Jer. 32. 12).

Whether the lady of the Canticles was or was not in the police station of her dream-city, is, after all, of no great importance. When we remember that there are at least eight acknowledged names for prison in the Hebrew language, it is no longer to be doubted that the prison was an institution of which everybody had knowledge. Indeed, in the two capital cases for which there was no precedent, and which puzzled Moses and the *'Edah*, the accused were both imprisoned pending the determination of the issue (Lev. 24. 12 ; Num. 15. 34).

Assuming, then, that imprisonment (deprivation of liberty) was well known to the ancient Hebrews as a mode of preliminary or final punishment, the question arises whether the Exodus Code provides for its imposition. That the loss of liberty was known to the Code would appear from the provision (21. 13) for a *maḳom*, to which one guilty of manslaughter would go. This certainly means that the defendant could not stay at home, that he would have to go to an appointed place and live there.

This is not a bad definition of a state-prison, however the details of its management may differ from those of

analogous modern institutions. That the separated city of Deuteronomy and the *'ir miḳlaṭ* of Numbers, which succeeded the *maḳom*, were prison-cities, we think has been demonstrated. It is not, therefore, difficult to believe that a person whose offence was an inferior kind of man-slaughter, would, as a punishment, be deprived of his liberty for a time.

The *go'el ha-dam* and the *'ir miḳlaṭ* both ceased by the time of Jehoshaphat. *Shofeṭim* and *shoṭerim*, federal appointees, were placed in each canton (*'ir*). If there had been no prisons before, they became indispensable then. The evidence adduced warrants the conclusion that they were not a sudden invention. The tradition implied in the multiple names for the institution, is perhaps better evidence than a direct written statement would be.

In this connexion it is pertinent to quote once more the Proverb (Prov. 28. 17):

A man oppressed by blood-guilt must go to prison. Let no man stay him.

The translation here given is not that of the versions, all of which fail to perceive that the word *bor* in the text means prison, being used in that sense in Exodus (12. 29), by Isaiah (24. 22), and by Jeremiah (37. 16; 38. 6, 7, 9, 10, 11, 13). So read, it is a popular legal maxim, just as if we would say: Never be bail for a murderer. Indeed, the Septuagint comes very near to adopting this as the translation.

On the whole, it is probable that the man whose slave died under his rod was punished by imprisonment, and that this is what is meant by *naḳom yinnaḳem*.

Before closing the investigation, a word should be said about the passages in Genesis bearing on the subject of homicide (Gen. 4. 8–16; 9. 5, 6). They are, as has been

said, no part of the legal literature. Cain slays his brother, perhaps in the course of a heated argument. So put, the offence was, according to the law of Exodus and the rest, mere manslaughter. The punishment decreed is that he can no longer remain in the land where the offence was committed. He must leave his home and live elsewhere. The terrors of exile are greater than he can bear, and JHVH sets a mark on him which will diminish its perils. The sentence, however, is not modified. Cain left and dwelt in the land of Nod to the east of Eden.

In God's instruction to Noah and his sons after the Deluge, homicide is dwelt upon. He who kills a man must answer for it. Even a beast must answer for the blood of a man. And the whole community is responsible for bloodshed (*mi-yad ish aḥiw edrosh et-nefesh ha-adam*). And then the general principle is laid down: Whoso sheddeth man's blood (*shofek dam ha-adam*), by man shall his blood be shed.

In all this there is nothing to run counter to the Hebrew law of homicide as we have explained it. The words *shofek dam* may be taken in either one of two senses. They may refer to wilful murder, which must be punished by death, or the principle announced may have no reference whatever to human law. The seer, pondering on the problems of the world, may reflect that bloodshed, whether from malice or by misadventure, always brings misfortune in its train. The Talmud has the same philosophy: With what measure ye mete, so shall it be meted unto you (Sotah 8 b). God's justice is measure for measure (*middah ke-neged middah*) (Sanhed. 90 a). And Shakespeare more than once utters a similar thought. In his *Measure for Measure* he makes the Duke say:

'The very mercy of the law cries out
Most audible, even from his proper tongue,
An Angelo for Claudio, death for death,
Haste still pays haste and leisure answers leisure,
Like doth quit like, and measure still for measure.'

(*Measure for Measure*, Act 5, Scene 1.)

And in the third part of *Henry VI* (Act 2, Scene 6), the Earl of Warwick speaks:

'From off the gates of York fetch down the head,
Your father's head, which Clifford placed there.
Instead whereof, let this supply the room;
Measure for measure must be answered.'

Whether the passages be legal or philosophical, or a mixture of both, the law is always kept in view. That a beast must answer with its life for the blood of man, is the express provision of the statute (Exod. 21. 29, 32). That the whole community incurs blood-guilt when one man murders another, has, we think, been proved in the second lecture. That the perpetrator himself must suffer is a thing of course.

One fact should, however, be kept in mind. *Shofek dam* was rather a literary form than a legal term. Isaiah so uses it in describing the general decadence of morals (Isa. 59. 7); Jeremiah does the same (Jer. 7. 6; 22. 3, 17), as does Joel (4. (3). 19). This use has even become proverbial (Prov. 1. 16; 6. 17).

We have now reached the end of our inquiry, and it remains for us to give a brief summary of its results.

About 1280 B.C. Israel, under the leadership of Joshua, crossed Jordan to enter upon the conquest of Canaan. The conflict thus precipitated was not merely physical;

it was in a greater degree political or social, and moral or religious. Two antagonistic systems of life were facing each other. The Canaanites represented the antique civilization of Western Asia; they had cruel gods and cruel laws, despotism prevailed, slavery was the corner-stone of their institutions. The Hebrews, on the other hand, held that freedom was the true basis of a state, and law and justice its purpose. In their scheme despotism had no place. The chiefs of the state, by whatever name known, could not hold office without the assent of the people, nor could they rule by mere will or caprice, but by law.

The Hebrews finally triumphed, though the contest was long and bitter. By the year 1050, a fairly settled commonwealth had been established under the rule of the priest-shophet Eli. He was succeeded by Samuel, in whose time the headship of the state was transferred to a king, Saul of the tribe of Benjamin (*c.* 1020 B.C.). It was not, however, until a quarter of a century later that Israel was thoroughly united under the reign of David.

During the three centuries between the crossing of Jordan and the hegemony of David, the state was being slowly cemented. The numerous city-kingdoms into which it was divided at the conquest, were deprived of their kings and converted into cantons or counties of the state. These were called *'arim* (cities) and were governed by cantonal councils called *zikne ha-'ir*. To these were confided administrative and judicial powers, which were to be exercised in harmony with the federal constitution and laws. The better to effect this purpose, *Levites and nebi'im*, agents of the central government, visited the

several cantons for the purpose of instructing and otherwise aiding the local councils in their work.

These measures, however, did not prove adequate. The subtle influence of native customs and ideas affected the cantons, especially those in the remote districts. The worship of JHVH was neither orthodox nor exclusive. Canaanite ideas, religious and legal, were absorbed, and a hybrid system resulted, which threatened to imperil church and state.

In course of time, certain branches of jurisdiction were withdrawn from the local councils and assumed by the central government. Homicide was not, at first, one of these. It was at a later period that the conflict concerning the law of homicide became acute.

We do not know by direct evidence what the Canaanite law on this subject was. There is, however, indirect evidence. The laws of the Babylonian Ḥammurabi (*c.* 2250 B.C.) are now accessible to us, and from them may be derived a fair estimate of the legal notions prevalent in Western Asia at that early period. The publication, it is true, antedated the crossing of the Jordan by a thousand years, and it might fairly be supposed that they had become, in great part, outworn. Before passing judgement on this point, we must remember that fifteen hundred years after their publication, they were still studied in Assyria, and five hundred years after that were made a text-book in the Babylonian schools. This shows, at least, that the leading principles of the Code were still accepted, however changed it may have been in some of its details. It is true that we have no direct knowledge that the people of Canaan ever accepted this Code. The intrinsic probability that it influenced them is, however,

considerable. Moreover, there are certain Canaanite admixtures in the Torah, which have already been dwelt upon, which seem to point directly to the Ḥammurabi Code.

Our other indirect evidence is the Torah. We know its legal principles, and when we find them in energetic conflict with hostile principles, it is fair to conclude that the latter are derived from the Canaanite law.

Guided by these helps, we infer that by the Canaanite law of homicide, the killing of a man was not a crime cognizable by the state, but a trespass, which gave the family of the deceased a right to redress. There was no inquiry as to the motive, and there were no degrees of liability. This absolute right of redress in prehistoric times was the right to kill the perpetrator or an equally important member of his family. When the perpetrator was killed, a right accrued to his family to seek redress, and so it went on in a continuing series. This state of affairs we call blood-feud or vendetta.

When the Hebrews entered Palestine, this stage had long been passed by the Canaanites. While the blood-feud persisted in theory, it was rendered practically nugatory by the custom of compounding the trespass for money instead of blood. Such money payment was called *kofer*, our English 'wergild'. The procedure apparently was something of this fashion: The bereaved family impleaded the slayer before the *ziḳne ha-'ir*. The only question before them was whether the accused killed the man; the how or why mattered not. If he was condemned, the representative or *go'el* of the family received a legal warrant to kill him, unless the matter should be properly adjusted. If there was to be chaffering about terms, the culprit

sought sanctuary in a *maḳom*, probably the capital city of his *'ir*, though there is reason to believe that a *maḳom* in any other *'ir* would have availed as a safe place of refuge. From this vantage-point the bargaining was conducted, the *maḳom*-priest being the most likely and convenient intermediary. Unless the culprit and his family were very poor, the matter was usually adjusted. The *go'el* who represented the family, was naturally interested in improving their estate, since, if they came to want, they would look to him for help. The *maḳom*-priest of course expected an offering for his *maḳom*, if he were honest, and if the reverse, a honorarium for his services would not have been unwelcome. These were all the parties concerned, as the state took no cognizance of the crime.

With this law the Hebrew law came in conflict. It declared that homicide could never be a trespass (a mere private injury). It was an offence against God and the state, and its gravity in this aspect was such that all minor interests like those of the family, were wiped out and annulled. The sanctity of human life was the great principle, and it had to be applied thoroughly. Its benefits were accorded to the defence, as well as to the commonwealth. Killing was not necessarily murder. It might have been due to casualty, to misadventure, to an unthinking blow given in hot blood. In such cases it was ranked as manslaughter, for which the punishment was internment away from home in a *maḳom*, or later in a separated city, still later in an *'ir miḳlaṭ*, and finally in a common prison. When the killing was with intent, with malice prepense, it was murder, and the sole penalty was death.

With such principles *kofer* was irreconcilable. No

guilty man could escape by its means. If a murderer, he must die; if a manslayer, he must suffer segregation. Money could not buy off either penalty.

The Canaanite law and the Hebrew law were thus in crass opposition. Use and wont are powerful forces. The *zikne ha-'ir* were affected by them, and murder must often have gone unpunished, save by the enforcement of money damages. The federal legates (Levites and *nebi'im*) doubtless secured some measure of respect for the law. In the turbulent times, before the throne of David became secure, this was probably all that could be accomplished. That great warrior-king, after a life of turbulence, saw clearly that what his kingdom needed was rest. In his solemn charge to his successor, he declared that the word of JHVH had come to him, announcing a son who should be a man of rest (*ish menuhah*), in whose days there should be peace and quietness (*shalom wa-sheket*) in Israel (1 Chron. 22. 8, 9).

And Solomon cherished this ideal. So long as the powerful barons could murder for money, there would be no peace in the land. Then began the earnest and determined course of law reform which we have endeavoured to describe.

The first step was the abolition of the right of sanctuary. As the *go'el* could now drag the murderer from the altar, there was no opportunity for protracted negotiation. The *go'el's* demands, however ruinous, would have to be complied with. However well designed the measure, it did not accomplish its purpose. An ingenious *makom*-priest, an indifferent or perhaps friendly *zikne ha-'ir* council, and a *go'el* keener for money than for blood, could easily manage to defeat the purpose of the government.

The next step was more drastic. The *maḳom* with its priest, and the family *go'el* were all eliminated. The right of sanctuary for homicide was done away with. A new federal officer, the *go'el ha-dam*, was sent to each canton to watch the proceedings and to receive the death-warrant for execution from the *ziḳne ha-'ir*. Separated cities were fixed upon as places to which the convicted murderer would go for his appeal, and if he was a mere manslayer to serve a term.

In this arrangement there was but one weakness. The separated cities had their *ziḳne ha-'ir* who were in friendly relations with many other local councils, and who, moreover, were not free from the taint of Canaanite assimilation.

It would appear that this statute was often evaded by the obstinate adherence of the people to the practice of *kofer*, sometimes in murder and often in manslaughter. There seemed but one way to remove the difficulty and to assure the execution of untainted federal law.

This was the course pursued: Forty-eight cities were selected, jurisdiction over which was to be abandoned by the respective cantons, and ceded to the federal government. These were the Levitical cities, inhabited by persons whose allegiance to the federal government and its laws was unquestionable. From among these the *'are miḳlaṭ* (detention-cities) were selected. The *ziḳne ha-'ir* of these cities were, of course, Levites who were capable and willing to enforce the Hebrew law. A national court (the *'Edah*), sitting at Jerusalem, heard the appeals. In this system every weakness was eliminated, except only that the *ziḳne ha-'ir* of the several cantons were still the court of first instance. True, they had federal assessors (Levites, *Kohanim*) and a federal sheriff (the *go'el ha-dam*),

and one might fairly believe that in such circumstances they could not find a loophole to evade the enforcement of the federal law, especially as there was now an express statute forbidding *kofer*, both in murder and in manslaughter cases.

It is, however, this statute which gives the clue to the defect in the system. The common people, the family *go'el* and the *zikne ha-'ir* were still favourable to the practice of compounding the felony of homicide for money.

That the system, carefully guarded as it was, did not perfectly succeed, may be taken for granted. In more modern times and nearer our own homes, we are not totally free of the sentiment which prefers large damages to convictions for manslaughter. It was Jehoshaphat who finally tore up *kofer* by the roots. I have in a previous lecture described how he abolished the jurisdiction of the *zikne ha-'ir* in cases of homicide, by establishing federal courts and sheriffs in every canton, with a supreme appellate court at Jerusalem.

Thus was the final victory for Hebrew law won after a protracted contest lasting a century. At last, about 850 B.C., every man knew that the element of civil damages or private satisfaction was eliminated from homicide cases, and that the state alone had jurisdiction of this high crime.

And now one final word. I am well aware that there is room to question many of the definitions suggested and hypotheses propounded in these lectures. It would be unreasonable to hope for ready acquiescence in views that run counter to inherited opinions. Many will think the whole scheme of positing a life and death contest

between Canaanism and Hebraism audacious; more, perhaps, will look scornfully upon the endeavour to date one of its most important manifestations, and to trace its progress. With them I have no quarrel. The endeavour has been to look at the facts honestly and without prejudice.

If the labour, which has been one of love, helps an earnest student, here and there, to a better understanding of the Hebrew law of homicide, makes clearer the function and short duration of the *'ir miḳlaṭ*, strips the grisly features from the Avenger of the Blood, and moves the Hebrew *lex talionis* from the solid ground of history towards the shifting sands of fable, it will have accomplished its purpose.

NOTE

THE statement on page 45 concerning the *alah* is too scanty to explain the meaning of Solomon's prayer.

Originally the word probably meant *a curse*. Other meanings however developed.

When a master charged his servant with a special duty he made him solemnly swear to perform it. This oath is called a *shebu'ah*. Attached to this was the penalty for disregarding the oath. This was the curse or *alah* denounced by the master against the servant should he prove recreant to his duty. Of this meaning of *alah* we have the classical example in Abraham's charge to Eliezer (Gen. 24. 2–41).

So when two parties made a covenant or treaty (*berit*) the penal feature of the transaction was the *alah*. An example of this is found in the treaty between Isaac and Abimelech (Gen. 26. 28–31). Other instances of a *berit* with *alah* are to be found in Deut. 29. 12–28 and in Jer. 34. 13–22, though in the latter the word *alah* is not used.

Here, however, we are specially concerned with the juridical *alah*. In its oldest form it seeks to procure a confession from a woman charged with adultery which cannot be proved. The procedure is given in full detail in Num. 5. 12–31.

The later development of the *alah* is that when a tort has been committed and the perpetrator is unknown either to the injured party or to the authorities, there is publicly proclaimed in the temple what we would call a subpoena to confess or to testify. This is an adjuration to the guilty party to come forward and confess or to any witness to come forward and testify. As the circumstances prevent the service of such a subpoena upon any known person, it is, as it were, discharged into the community by proclamation (*ḳol alah*). The imposition of the penalty or curse (*alah*) must of necessity be left to Heaven. The passages bearing on this subject are 1 Kings 8. 31, 32; 2 Chron. 6. 22, 23; Lev. 5. 1–4; Prov. 29. 24.

BIBLICAL PASSAGES CONSIDERED

INDEX

Hebrew Words Considered (which see):

alah; ʿam ha-areṣ; anah; ʿanosh yeʿanesh; anshe Israel; arab; arur; ason; berit; bet ha-asuppim; bet ha-bor; bet ha-peḳudot, bet ha-kele; bet ha-surim; bet ha-sohar; bet ha-mahpeket; bi-bli daʿat; bor; dallim; dam, damim, deme milḥamah; ebah; ebyonim; ʿedah; ezraḥ; be-fetaʿ; gaʾal; goʾel; goʾel ha-dam; ḥam libbo; ḥatan damim; ʿir, ʿarim, ʿare, ʿir miḳlaṭ, ʿare ha-muʿaddah; ishah hakamah; ḳalaṭ; karet; kofer; kohen, kohanim, kohen ha-gadol; ḳol alah; mahpeket; maḳom; maṣa; masger; maṭṭarah; middah ke-neged middah; migrash; miḳlaṭ; mishmar; mizbeaḥ; moshabot; nagid; naḥalah; naḥam; naḳam; naḳom yinnaḳem; naḳi; nebiim; nus; ʿormah; oyeb; paga; be-figʿo; pelilim; rashaʿ; ṣadah, ṣediyah; ṣaddiḳ; saraʿ; sarah; sefer; sekirim; ba-seter; shaʿar; shagah, shagag, bi-shegagah; shebeṭ; shem; sheroshi; shofeḳ dam; shoḥad; sinʾah; ṣinoḳ; sinnor; tamak; ulam ha-mishpaṭ; yad ramah; yaphog libbo; yazid; yeḥam lebabo; yoshebim; zeḳenim, ziḳne ha-ʿir.