THE BEARING OF THE RABBINICAL CRIMINAL CODE ON THE JEWISH TRIAL NARRATIVES IN THE GOSPELS.

SUMMARY OF THESIS.

The problem stated.

(I) The customary methods and conclusions, and the premisses on which they are based.

(II) (*a*) External evidence on the Sanhedrin's powers under the Romans to hold a criminal trial: Josephus, New Testament, procedure in Egypt.

(*b*) Whether the Gospels point to such a trial. The Marcan versus the Lucan tradition.

(III) Value of evidence afforded by the Rabbinic sources.

Conclusion.

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THE last century has seen the growth of a voluminous literature around the question of the justice of the trial and condemnation of Jesus.[1] The method and results of every fresh study of the available evidence have, with the fewest exceptions, never varied. The descriptions which the Gospels give us of the trials before the Jewish and Roman authorities are placed side by side with such information as can be gathered elsewhere concerning Jewish and Roman law and procedure; by this means the Jewish trial is easily demonstrated to be the veriest travesty of justice, and the sentence of Pilate that of a man deliberately going against his own conscience in a cowardly attempt to placate a threatening mob. The conduct of the Roman trial, owing to the almost entire absence of evidence as to criminal procedure in the Roman provinces, does not, like the supposed Jewish trial, lend itself to such clear-cut comparison between what should have happened and what did happen; but the Gospel accounts, in their vivid portraiture of the Procurator, provide abundant matter for passing judgement on Pilate's conduct, which 'beginning with indecision and complaisance, passed through all the stages of alternate bluster and subserviency; persuasion, evasion, protest, and compromise; superstitious dread, conscientious reluctance, cautious duplicity, and sheer moral cowardice at last; until this Roman remains photographed for ever as the perfect feature of the unjust judge'.[2]

The present study is, however, restricted to our Lord's examination before the Jewish authorities; and even so, it is not primarily

[1] See bibliography in R. W. Husband *The Prosecution of Jesus*, 1916, pp. 283 ff.

[2] A. T. Innes *The Trial of Jesus*, 1899, p. 93.

concerned with the justice or injustice of the method and the result, but simply with the question: How far can evidence contained in the Mishna and kindred literature as to the Sanhedrin's procedure in cases of crimes punishable by death be regarded as of value for the criticism and illustration of the Gospel narratives?

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(I) The usual way of investigating the judicial fairness of our Lord's trial may be seen in such works as H. A. Bleby *The Trial of Jesus Christ considered as a Judicial Act*, London 1880; Giovanni Rosadi *Il Processo di Gesù*, Florence 1904; A. T. Innes *The Trial of Jesus Christ: a Legal Monograph*, Edinburgh 1905; Septimus Buss *The Trial of Jesus, illustrated from Talmud and Roman Law*, S.P.C.K., 1906; M. Brodrick *The Trial and Crucifixion of Jesus Christ of Nazareth*, London 1908.

The narratives of the proceedings before the Jewish authorities (Mt. xxvi 57–68, xxvii 1; Mk. xiv 53–65, xv 1; Lk. xxii 54, 63–71, xxiii 1; Jn. xviii 12–14, 19–24, 28) are assumed to be complementary, and are roughly harmonized. The main outlines of the episode are then found to be as follows:—

Those who arrested Jesus brought Him first to Annas (Jn.) who, after a private examination, sent Him, bound, to the High-priest Caiaphas (Jn.), in whose house the scribes and elders were assembled (Mt. Mk.). This is regarded as a formal sitting of the Sanhedrin. The whole council sought evidence on which to put Jesus to death, but at first were unsuccessful (Mt. Mk.). At last certain witnesses accused Him of saying that He would (Mt.; but Mk. has 'could') destroy the Temple and rebuild it in three days (according to Mk. even in this their evidence did not agree). The High-priest asked Jesus if He had any reply to make to this (Mt. Mk.) and, on getting no answer, demanded outright whether He were the Christ (Mt. Mk.). Jesus acknowledged the claim in such terms that the High-priest rent his clothes and accused Him of blasphemy. When he appealed to the rest of the council they all condemned Jesus to death (Mt. Mk.). They (the members of the council according to Mt.; the guards and perhaps the members of the council according to Mk.; but only the men who had arrested Jesus according to Lk.) then reviled and buffeted Him. As soon as it was morning, the chief priests, elders, and scribes met a second time in consultation (Mt. Mk.), and Jesus was questioned afresh as to His claims to be the Christ (Lk.). He again admitted the claim (Lk.), whereupon, without more ado, He was led away to Pilate (Mt. Mk. Lk.), whose duty it was to confirm and carry out the death penalty.

The sum-total of this composite narrative is (*a*) a private examination before Annas, (*b*) a trial before the Sanhedrin during the same night, as a result of which Jesus is condemned to death for blasphemy, and (*c*)

quite early in the morning a second sitting of the Sanhedrin preparatory to handing over the Prisoner to the Roman court.

This, then, was the treatment meted out to Jesus by the highest legislative court of the Jews. Was the mode of trial fair? and was the condemnation justified? All but two or three of the innumerable writers on the subject answer both questions with an emphatic negative, and appeal to the Jews' own system of law as set forth in the Mishna.

In the Mishna we possess what it has become customary to describe as a *corpus iuris* of Judaism. It deals with the greatest minuteness with every legal enactment in the Pentateuch, codifying scattered details, reconciling apparent contradictions, working out general principles, interpreting and explaining difficulties, and pressing home to their logical conclusions every item of the Mosaic legislation. One of the tracts of the Mishna is entitled *Sanhedrin*, which, as its name implies, treats of the Jews' supreme court of law, its constitution, authority, and method of procedure. It is to this document that recourse is had for testing the regularity and legality of the proceedings as described in the Gospels.

Taken as it stands, the tract purports to be a manual drawn up to control the procedure of the greater and lesser Sanhedrin. Just as *Sota* is a book of instructions for the correct carrying out of the trial of a woman accused of adultery, and *Yoma* a manual for the service and details connected with the Day of Atonement, so *Sanhedrin* is a judge's hand-book regulating the proceedings of the courts charged with the conduct of capital trials.

Here is a short summary of the contents of the tract.

Those cases are first passed in review which can be settled on the basis of a money payment [דיני ממונות]; they are dismissed with just the briefest mention. They do not come within the real scope of the tract—the functions of the major and minor Sanhedrins—since they can be adjudicated by a court or jury consisting of as few as three members. The constitution of the greater and lesser Sanhedrins is then given, with a brief outline of the types of case which come before each—ordinary capital cases before the latter with its minimum of twenty-three judges, and those of national importance (such as communal apostasy [עיר הנדחת], condemnation of a High-priest, a false prophet, or a whole tribe) before the former, a body of not less than seventy-one members. Then follows a section on the relations which were to hold between the greater Sanhedrin on the one hand, and the High-priest and the King on the other. The real subject of the tract is now entered upon. First comes the question of judges and witnesses—who are eligible to serve as such? Then there is described the method of legal procedure in non-capital cases, followed by that in capital cases; a comparison of

the two serves to bring out the special features which are peculiar to, and which emphasize the importance of, the latter. The mode of carrying out the four death penalties is next discussed, in the order of their relative severity—stoning, burning, decapitation, and strangulation. This is followed by a catalogue, arranged in four corresponding divisions, of the criminals who are liable to these capital punishments.

Here, then, would seem to be adequate material for basing a comparison between the accepted methods of dealing out Jewish law and the action of the Jewish authorities in the case of Jesus. The material has been used time and again. Salvador,[1] one of the earliest investigators of the problem, who accepted the above composite story drawn from all four Evangelists, and believed the Mishna rules to have held good for the early part of the first century, satisfied himself that the condemnation of Jesus was according to law. Another, a Hindu writer,[2] arguing from the same premisses, comes to the same conclusion. But these are veritable *tours de force*, almost isolated, and not altogether free from dishonesty in their manipulation of the facts.[3] The bulk of the remaining writers, eager to discover irregularities, have no difficulty in finding what they want. Assuming the Gospel narratives to be complementary and the regulations contained in the Mishna to be valid for the period in question, they lay bare the grossest examples of illegality.

Thus they point out that Annas had no right to examine Jesus alone (Jn. xviii 19, *Pirk. Ab.* 4, 8) nor to seek to make Him incriminate Himself[4]; both sittings of the Sanhedrin violated the rule according to which (*Tos. Sanh.* 7, 1) 'the court sat from the time of the morning offering till the evening burnt-offering'; a capital charge may not be tried on the eve of a Sabbath or festival (*Sanh.* 4, 1), nor may it be tried

[1] J. Salvador *Histoire des Institutions de Moïse et du Peuple hébreu* (3rd ed.), 1862, i 383–393.

[2] Aiyar and Richards *The Trial of Jesus*, 1915.

[3] Cf. Salvador *op. cit.* p. 391 : 'Un fait certain, c'est que le conseil se rassembla de nouveau dans la matinée du lendemain *ou du surlendemain*, comme la jurisprudence l'exigeait, pour confirmer la sentence ou l'annuler : elle fut confirmée.'

[4] This same assertion is made in every study of the subject, and seems to be copied each time without verification. There is no trace of such a prohibition in the Mishna or Tosefta. It is first put forward as a principle of rabbinical jurisprudence in the commentary of Maimonides, followed by Bartenora and Cocceius (all of whom were made accessible to Christian students for the first time in Surenhusius's Latin translation of the Mishna, Amsterdam, 1698) on *Mish. Sanh.* 6, 2 : 'Lex nostra neminem condemnat mortis propriâ ipsius confessione.' Salvador (p. 373) quotes this as a final authority—'Le principe des docteurs sur ce point est précis'—and since his time every writer on the Trial has brought this 'rule' forward, and made great play with it as a standing indictment against the conduct of the High-priest in demanding what might be a confession of guilt from the Accused.

by night (*ibid.*); the Sanhedrin was prejudiced in favour of conviction, taking the initiative in the prosecution, and deliberately seeking out witnesses who should give hostile testimony (Mt. xxvi 69; Mk. xiv 55), and therefore they were ineligible as judges (*Tos. Sanh.* 7, 5); a verdict of conviction must not be reached the same day, nor may such a verdict be uttered by night (*Sanh.* 4, 1); the witnesses were not admonished (*Sanh.* 4, 5), nor, when their evidence was found false, did they suffer the penalty to which the accused was liable (*Sanh.* 11, 6); no attempt was made to find witnesses or arguments for the defence (*Sanh.* 5, 4); the admission by Jesus (Mt. xxvi 64; Mk. xiv 62) was not technically blasphemy, since He did not expressly utter the Divine Name (*Sanh.* 7, 5); the High-priest, as chief judge, had no right to offer first his opinion as to the verdict (Mt. xxvi 65; Mk. xiv 64; *Sanh.* 4, 2); a unanimous verdict of conviction (Mk. xiv 64) was null and void (*Sanh.* 4, 1); though a second sitting of the Sanhedrin was in accordance with correct procedure when the sentence was to be one of conviction, it ought to have been postponed for a whole day (*Sanh.* 4, 1); it is regarded as highly doubtful whether the necessary quorum of twenty-three members (*Sanh.* 1, 5) could have been present at such a hurried, midnight trial; and, lastly, it was illegal to pass sentence of death anywhere except in the Hewn Chamber [בית הגזית] (*Sanh.* 37 *a*, *Ab. Zar.* 8 *b*).

Of the items in this long arraignment many are but dubious arguments from silence, others are drawn from the later stratum of the *Talmud Babli*, and another is but an expression of opinion; but even so, sufficient is left to condemn the conduct of the Jewish trial as utterly irregular and unjust. The best and most restrained of the many investigators along these lines can, granted his presuppositions, quite fairly sum up the case in such terms as:

'Our conclusion on the question of Hebrew law must be this: that a process begun, continued, and apparently finished, in the course of one night; commencing with witnesses against the accused who were sought for by the judges, but whose evidence was not sustained even by them; continued by interrogatories which Hebrew law does not sanction, and ending with a demand for confession which its doctors expressly forbid; all followed, twenty-four hours too soon, by a sentence which described a claim to be the Fulfiller of the hopes of Israel as blasphemy —that such a process had neither the form nor the fairness of a judicial trial.'[1]

Obviously the soundness of this and the like conclusions turns on the soundness of the two premisses: (*a*) that the Gospels combined give us

[1] Innes *op. cit.* pp. 58 f.

an essentially complete description of a formal process before a Sanhedrin which had power to condemn to death (though not to carry out the death penalty, Jn. xviii 31), and (*b*) that what Jewish scholars at the end of the second century thought to be correct law and procedure was necessarily the accepted practice at the beginning of the first. If either of these points fails to be established the comparison breaks down: the Hebrew sources will no longer be available as a criterion for the Greek. If the Gospel narratives will not bear the interpretation traditionally given to them—that Jesus was formally condemned to death as a direct result of a trial by the highest Jewish legislature—the rabbinic codes which governed such a trial cannot be adduced as evidence; nor, even if the Gospel narratives will bear such an interpretation, can the usual indiscriminating use be made of the Mishna regulations unless we can be assured that its provisions were valid at a period some two hundred years earlier.

And there are reasonable grounds for questioning both premisses.

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(II) The first premiss assumes two things: (*a*) that the Sanhedrin under the Romans had power to condemn to death, and (*b*) that the Gospel records treat of a formal trial by the Sanhedrin ending with such a death penalty. These two points may be taken separately.

(*a*) The question whether the Jews could actually *inflict* the death penalty does not here concern us[1]; the point is whether they had criminal jurisdiction at all. *A priori* it might fairly be assumed that with the coming of the Roman procuratorship in A. D. 6 after the deposition of Archelaus, powers over life and death would be taken out of the hands of the Jews and invested in the person of the governor. This applies not merely to the infliction of the death penalty, but also, naturally, to the examination of the evidence justifying the penalty; the Romans would try as well as execute the prisoner. The reasonableness of this is never disputed; such powers constitute a weapon which every conquering nation seeks to preserve to its own use. But since our knowledge of Roman usage in this matter is of the scantiest, and, until recently, almost non-existent, it has always been tacitly taken for granted that the Jews were more privileged in this respect than other provinces, and that, e. g., the Romans would not interfere in a religious dispute, even though it were a capital charge, except to carry out the sentence themselves.[2] Actually, however, there is no evidence to prove

[1] It is now generally accepted that they could not. The arguments hitherto brought to bear on the question have not been altogether conclusive: by use of the same evidence diametrically opposite conclusions have been reached. See Stephen Liberty *The Political Relations of our Lord's Ministry*, Oxford 1916, pp. 141–157.

[2] See Mommsen *Provinces of the Roman Empire*, London 1886, ii 187–188.

this, except what may be inferred, whether rightly or wrongly, from the New Testament and Josephus.

Most of the evidence brought forward is of little value. Josephus, *Ant.* XVIII i 4, speaks of the Sadducees holding magistracies (ὁπότε γὰρ ἐπ' ἀρχὰς παρέλθοιεν); but, judging from the context, these were petty offices depending on popular favour, and the term is too general to be restricted to the highest judicial positions. *Bell.* II viii 9 says of the Essenes that 'they do not pass sentence in a court of less than a hundred men'; but we have no reason to suppose that this refers to anything beyond private quarrels and minor disputes touching their own internal affairs. *Ant.* XVIII iii 5 speaks of a man who fled from Palestine to Rome to escape punishment for an offence against the law; but it does not follow that he was to have been judged by a Jewish rather than a Roman court. *Ant.* XX ix 1 tells how Annas summoned the Sanhedrin and had James, the brother of Jesus, stoned. He admittedly exceeded his powers; but whether by the fact of executing the sentence, or by the actual trying of the case, is not stated; we gather further, from the same passage, that the Sanhedrin could not be summoned except by the Procurator's consent, but we have no right to assume that even when so summoned it could pass judgement in capital cases.

When we turn to the New Testament (leaving out of account for the moment the trial narratives of the Gospels) the evidence is equally slender or ambiguous. It is difficult to believe that the stoning of Stephen (Acts vii 57–60) was the result of a formal trial and sentence; the description reads much more like an outbreak of mob law. The case of Peter and John (Acts iv 3) certainly proves that the Sanhedrin had powers to arrest, but the examination which followed cannot be construed as a formal trial, but only an attempt to discover whether or not there was a charge for which they could be placed on their trial before a court empowered to inflict sentence. The second arrest (Acts v 17–18) was followed by their release; this, again, did not resemble an acquittal by a properly constituted court of law so much as a decision not to carry the case further, i. e. perhaps to the Roman court. The episode of St Paul and the Sanhedrin (Acts xxi ff) is not a case in point, since he was never out of the control of the Romans, and was, further, a Roman citizen. Again, Jn. xviii 31 (ἡμῖν οὐκ ἔξεστιν ἀποκτεῖναι οὐδένα) denies the right of the Jews to carry out sentence of death, but it does not follow that they had therefore the right of trying such a case or of passing sentence.[1] Stronger proof may

[1] It is in itself conclusive evidence as to the Jews' rights to pass judgement on lesser offences, but not in more serious, capital cases. Pilate had asked (λάβετε αὐτὸν ὑμεῖς κτλ.) why it was not within their power to judge Him themselves.

be derived from Mk. x 33 (*παραδοθήσεται τοῖς ἀρχιερεῦσιν καὶ τοῖς γραμματεῦσιν, καὶ κατακρινοῦσιν αὐτὸν θανάτῳ καὶ παραδώσουσιν αὐτὸν τοῖς ἔθνεσιν*), though the form that this saying takes may have been influenced by the trial narrative as given in the same Gospel. *Yer. Sanh.* 18 *a*, 24 *b* (קודם לארבעים שנה עד שלא חרב הבית נוטלו דיני נפשות 'The Jews were deprived of the right of trying capital cases forty years before the destruction of the Temple') does not help. It cannot be concluded that if the Jews had lost this power forty years before the destruction of the Temple, they therefore possessed it at the date of our Lord's trial. 'Forty years' is a round number, and may well refer to the change brought about in A. D. 6 when the procuratorship was introduced.

Such evidence, then, as we can glean from these sources is of a neutral character. There is nothing in it to nullify the traditional view of the Sanhedrin's powers, and, in default of further and opposing evidence, the traditional view might stand; but, on the other hand, there is in it nothing positive or decisive against good evidence to the contrary.

A certain amount of the obscurity which hitherto surrounded the question of treatment of criminal cases in the Roman provinces has, in the case of Egypt, been removed. Among the papyri found in recent years a few deal with criminal procedure. The knowledge to be derived from them is still slight, but sufficient to enable us to understand roughly the general outline of the system adopted by the Romans in one at least of their provinces. The results of the information so far accumulated from this source may be summed up briefly as follows[1]:—

At the head of the province was the prefect (*ἡγεμών, ἔπαρχος*), appointed by and answerable to the emperor. The country was divided into three judicial districts over each of which was an *ἐπιστράτηγος* also appointed by the emperor, but responsible to the prefect. The country was further divided into smaller districts called *νόμοι*, and at the head of each of these was an inferior official, the *στρατηγός*. So

'We cannot', they answered, 'because the charge against Him is a capital charge, involving His death if He be found guilty.' Pilate's immediately subsequent interrogation shews what was the charge they preferred against Him. Pilate, however, does not then say that they should themselves find Him guilty of this, but himself, to all appearances, starts the trial *de novo* on this charge, without accepting the verdict of the Jewish authorities—which he presumably would have done on the accepted hypothesis that it was for the ecclesiastical authorities to pass sentence and the civil arm to carry it out.

[1] For the points here summarized, see *Corp. Inscr. Graec.* 5089; *Aegyp. Urkunden aus den K. Museen zu Berlin, Griechische Urkunden* 1, 5; 1, 168; 2, 17, 256, 33; 2, 58 a; 3, 871, 10; *Oxyrhynchus Papyri* 237, v 7; 486 ? 37; *Greek Papyri in the British Museum* ii p. 172; Mitteis-Wilcken *Grundzüge und Chrestomathie der Papyruskunde* ii n. 93. A more detailed discussion is to be found in R. W. Husband *The Prosecution of Jesus*, Princeton 1916.

far as our information goes the latter were generally chosen from the subject-race. Periodically the prefect used to make the round of the province to settle such points as required his authority. For our present purpose, the important facts which emerge in this connexion are: (1) owing to the stress of business the cases were prepared in advance, (2) cases of only minor importance were handed over to the local authorities, who were also possessed of police powers, while (3) graver matters were decided by the prefect personally.

It does not of necessity follow that Egyptian methods were applied in every detail to Judaea; but it is improbable that the general principles varied very much in the two neighbouring provinces, and, in the entire absence of any other direct evidence to the contrary, we are justified in assuming that what held good for Egypt may, with some variation of local detail, have held good for Judaea also.

Exactly to what extent the Romans would recognize the rights of the Sanhedrin it is not possible to determine. Such a passage as John xviii 31 *λάβετε αὐτὸν ὑμεῖς, καὶ κατὰ τὸν νόμον ὑμῶν κρίνατε αὐτόν* (cf. Acts xviii 15 *εἰ δὲ ζητήματά ἐστιν περὶ λόγου καὶ ὀνομάτων καὶ νόμου τοῦ καθ' ὑμᾶς, ὄψεσθε αὐτοί· κριτὴς ἐγὼ τούτων οὐ βούλομαι εἶναι*) points to the not improbable course that minor matters affecting the Jewish religion would be left to the Jewish court, who, moreover (cf. Acts v 40), were empowered to inflict lesser penalties. The Sanhedrin would thus hold very much the same position as the Egyptian strategi; like them they could be native officials, with the power to arrest, and the duty of examining and preparing the evidence which, if the case were of sufficient gravity, would be submitted to the Roman governor. If we are right in assuming these points, the proceedings taken by the Jewish authorities, as recorded in the Gospels, will fit without difficulty into the scheme of things as we find them in Egypt.

Possessed of police powers, the delegates of the Sanhedrin were able to seize the person of Jesus on the ground that He was either a breaker of the law or a menace to the public peace. They examined such witnesses as offered themselves, and made it their business, by examining the Prisoner and searching out whatever testimony was available, to prepare an adequate case against the Accused to present to Pilate on the occasion of his visiting Jerusalem in the course of his circuit through the province.[1]

(*b*) We come now to the evidence, hitherto purposely left out of account, of the Gospel narratives themselves. We at once notice that the method of procedure before the Jewish officials is put forward in

[1] The wording of the interpolation in Josephus (*Ant.* XVIII iii 3) favours this limited view of the Jewish power: . . . *καὶ αὐτὸν ἐνδείξει τῶν πρώτων ἀνδρῶν παρ' ἡμῖν σταυρῷ ἐπιτετιμηκότος Πιλάτου* . . .

two forms, Matthew and Mark agreeing in one, and Luke and John, though with differences, giving us the other. According to Matthew and Mark, immediately after the arrest, Jesus was taken before a court of the chief priests and scribes and elders, presided over by the High-priest, and found guilty of blasphemy; in the morning the court re-assembled, and, after consultation, delivered Jesus up to Pilate. According to Luke, after the arrest, Jesus was taken to the High-priest's house, but there was no midnight trial. As soon as it was day He was led away into their council before the chief priests and scribes, and examined as to His claims. As a result of His confession they disclaimed the need of further witnesses, and, without any passing of sentence, took Him at once to Pilate. According to John, after the arrest, Jesus was taken before Annas, who again passed Him over to Caiaphas; by one of them—the narrative leaves it doubtful whether it was Annas or Caiaphas—He was subjected to a private examination concerning His teaching, but there is no mention of anything resembling a trial by the Sanhedrin. Then, early in the morning, Jesus was taken to the Praetorium.

The moment we begin to criticize or harmonize these different forms of the proceedings, or attempt to revise or restate what happened, or prefer one of the Gospels' evidence to the detriment of the others, we are in the realms of mere conjecture, and any conclusions arrived at must be to a marked extent subjective and precarious. We can only be guided by probabilities. The more conservative way of looking at the variations is to regard Matthew and Mark as giving only what was at an early period more or less public knowledge, Luke as giving only the second sitting of the Sanhedrin, because it was that second sitting alone which, according to rabbinic details of Sanhedrin procedure, could utter the final condemnation, while the fourth Gospel, with its description of a private examination, is assumed, after its customary fashion, to supplement the earlier Evangelists' account by information unknown to them at the time. Those who adopt a more critical attitude suggest that 'the placing of the trial at night is possibly due to a corruption of the tradition, preserved more accurately in John, of the hasty, informal questioning in the house of Annas; the description of the proceedings, on the other hand, was derived from the tradition of the morning trial, preserved by Luke, of which the mention of the morning meeting [in Mt. and Mk.] was a further reminiscence'.[1]

At bottom, these rival interpretations turn on whether we accept the Marcan version of a formal trial and condemnation by night, followed by ratification by a fuller court in the morning; or whether we accept the Lucan version, which implies that there was no night trial nor any

[1] A. H. McNeile *Gospel of St Matthew* p. 397.

trial at all in a real sense, but only a preliminary examination of the prisoner, and (perhaps) examination of witnesses, which aimed at ascertaining whether sufficient evidence was forthcoming to condemn the prisoner when brought before the Roman tribunal.

The objections to the Marcan version mostly turn on the general improbability of such a midnight trial and the difficulty of summoning witnesses and judges at such an hour. The defence that an exceptional case called for exceptional methods, and that the night trial was prearranged and witnesses and judges warned beforehand, does not wholly account for the breakdown of the witnesses. If the witnesses were false the likelihood is that the evidence was carefully worked up in advance, and that witnesses and judges were in collusion.

Objections are also brought on textual grounds. In Mark the verses describing the midnight trial are interwoven with the account of Peter's denial, and bear, so it is alleged, marks of being an interpolation. The original account is assumed to have contained only the arrest, the taking of Jesus to the High-priest's house, the denial, the mocking, and then the morning trial or examination. The verses describing the night trial are introduced in such a way in Matthew and Mark as to make it appear that the members of the Sanhedrin were the men who indulged in the mocking. But if the trial section is omitted the offenders will be the soldiers who made the arrest, who would be far more likely to indulge in such rough horse-play. Wendling,[1] again, argues for the omission of these verses on the ground that the section was not a part of the primitive tradition (the *Ur-Marcus*), but was composed later out of material drawn from the description of the trial before Pilate.

Much more cogent is the general objection to a state of things according to which, if we accept the Marcan account in its entirety, the Sanhedrin convicted Jesus on a charge of blasphemy, and then asked Pilate to put Him to death for treason—a charge on which they had never even examined Him.

Although the arguments brought forward are by no means such as wholly to condemn it, it may perhaps be admitted that the Marcan account is not altogether free from improbabilities. On the other hand, the Lucan version in itself is free from any suspicion of unreality, and a respectable body of evidence can be brought up in support of it as against the opposing Marcan account.

In the first place, that Luke is to some extent verbally dependent on the Marcan version throughout this section (Lk. xxii 54–xxiii 1) can scarcely be denied (cf. Lk. xxii 54 b with Mk. xiv 58; xxii 61 with xiv 67; xxii 71 with xiv 63 b); yet the outstanding fact remains that Luke treats this particular source, both at this point and throughout

[1] E. Wendling *Urmarcus*, Tübingen 1905.

the whole of the Passion-narrative (xxii 14–xxiv 10), in a way strikingly different from his own treatment of it in every other portion of his Gospel which has any appearance of being grounded on Mark.[1] This bare fact, of course, by itself, is no argument against the Marcan version, yet the traditional explanation, that 'Luke does not exclude the possibility of the midnight trial and condemnation, but gives only the morning meeting of the fuller council, because their condemnation only was formally valid', has nothing to support it; for at the morning meeting Luke refrains from mentioning the fact of any passing of sentence. The examination ends by the council's decision, 'What further need have we of witnesses?'

Again, that Luke's version is not a casual abbreviation but a deliberate emendation is borne out by a comparison of Lk. xviii 32 with Mk. x 33 (= Mt. xx 18–19). According to the Marcan version, our Lord, forecasting His Passion, says: 'They [the chief priests and scribes] shall condemn Him to death, and shall deliver Him unto the Gentiles'; and the course of the trial in the second Gospel is in agreement with this. In Luke, however, the forecast is modified to suit his particular version of the event, and our Lord is made to say simply: 'He shall be delivered up to the Gentiles.' Luke seems consistently to present a state of things according to which the Jews could carry out initial investigations but could not pass sentence; he tacitly maintains that they could not condemn—a state of things confirmed by John (xviii 31; cf. p. 57, note 1).

It may be noted further that it is Mark alone who gives the technical expression for condemnation (*κατέκριναν*). Yet though Matthew omits it in the account of the trial, he uses the word in the forecast (xx 18–19).

Yet again, it is no longer possible to ignore the fact that when St Luke intervenes with a new detail in the Gospel story, especially when it relates to official dealings between the Jews and the Romans, his evidence must not be summarily rejected; wherever means have been discovered for checking his statements on these occasions he has hitherto been proved to be correct.[2] In his version of the proceedings against Jesus he introduces two fresh features: the modification in the Marcan Jewish trial, and the Herod episode. That it is unwise to dismiss the latter as a legendary accretion has more than once been shewn[3]; and though the former cannot be said to introduce any new fact, the modification bears signs of being deliberate, tantamount

[1] See Hawkins *Oxford Studies in the Synoptic Problem* p. 84 f.

[2] See W. M. Ramsay *The Bearing of Recent Discovery on the Trustworthiness of the New Testament*, 1915, *passim*, especially chs. 18 ff.

[3] See B. H. Streeter *Oxford Studies in the Synoptic Problem* pp. 229 ff, and A. W. Verrall *J.T.S.* vol. x pp. 321 ff.

to a correction of the existing tradition in the light of better information.

A point of difficulty in the Marcan tradition, already pointed out, is corrected (or elided) in Luke. Mark makes the Jewish officials condemn Jesus for blasphemy, and straightway accuse Him before Pilate on a new charge, not mentioned in their own proceedings, of treason. There is no mention of blasphemy in Luke. The council tax Jesus as to His pretensions to be the Messiah—a claim which would be looked upon as treasonable by the Romans. To this they get no definite reply, but when He confesses Himself to be 'the Son of God' they accept this as sufficient, apparently regarding the title as embracing Messianic claims, and making further investigation uncalled for.

There is another point, though of a less tangible nature, which can be urged in favour of the Lucan presentation. The Church very early began to lay the chief blame for our Lord's death on the Jewish people (1 Th. ii 14–15; cf. Acts xiii 27–28) rather than on Pilate, and this tendency to compare Pilate favourably with the Jews gradually became more marked until it reached its culminating point in the *Acta Pilati*. It is argued that this same tendency must have played its part even in the earliest traditions. Thus Loisy[1] explains the emphasis placed on the Jewish condemnation as a piece of necessary apologetic when preaching the Gospel to the Roman world. 'Il importait à la nouvelle religion que son fondateur ne parût pas avoir été condamné par une juste sentence de Pilate; d'autre part, il était fort délicat d'accuser de prévarication Pilate lui-même, et il était impossible de nier que la sentence de mort eût été rendue par lui; restaient les dénonciateurs et les accusateurs du Christ, les Juifs, adversaires du christianisme naissant, détestés eux-mêmes dans le monde païen; rien n'était plus facile que d'élargir leur rôle, de façon à transporter de Pilate sur eux la responsabilité entière du jugement rendu contre Jésus. . . . Ainsi le supplice du Christ n'était pas une action de la justice romaine: ce n'était que le crime des Juifs.' It is therefore extremely unlikely that St Luke, whose work, it is supposed, was intended more definitely than the others to meet the needs of the Gentile world, would so weaken the force of this apologetic as to omit the formal condemnation, unless in the interests of historical accuracy.

[1] *Les Évangiles synoptiques* ii 610; Goguel *Juifs et Romains dans l'histoire de la Passion* ('Revue de l'Histoire des Religions' lxii pp. 165–182, 295–322) would even insist that in the primitive tradition the arrest also was carried out entirely on the initiative of the Romans, and that the Jews had no part whatever at any stage of the prosecution. See also the same writer's *Les Sources du Récit Johannique de la Passion*, Paris 1910.

Even if we leave out of account the presuppositions aroused by the new light from Egyptian sources as to criminal procedure in the Roman provinces, and judge solely from internal evidence contained in the Gospels, the case on behalf of Luke's version is not negligible; but when we find that the external evidence from every available quarter either directly supports, or is in complete harmony with, that version, it is difficult to avoid the conclusion that in the third Gospel we are nearer the truth of the matter than in the Marcan tradition.

. . . . . .

(III) The *second* premiss, that in the *Tract Sanhedrin* we have a code valid for the first half of the first century, indicating the correct lines which governed the Sanhedrin's proceedings when confronted by such a case as that of Jesus, cannot, any more than the first premiss, be passed over unquestioned.

A few summary details should be borne in mind as to the origin of this compilation which we call the Mishna.

After the fall of Jerusalem, whatever measure of self-government the Jews may have possessed was abolished, and the Sanhedrin, the embodiment of their surviving political independence, such as it was, ceased too. A new court was, with very little loss of time, set up at Jabne, a court perhaps modelled on, and certainly regarding itself as the true successor of, the old national council. In its beginnings, however, it was nothing more than a body of teachers of the Law. It could pretend to no legal title; its powers depended solely on the moral influence which it held over the pious remnants of Judaism. For two hundred years the Pharisees had been making steady progress in popular favour, and, with the end of the Temple and priesthood, they passed naturally to the position of leaders of the people. Even at its best this 'Sanhedrin' never seems to have outgrown its position of an influential but purely academic body. Under a succession of famous rabbis its members undertook the interpretation and preservation of their law and customs. No tradition was too unimportant, and no law too antiquated. They omitted nothing. The attempt at codification seems to have been begun by Rabbi Akiba (*circ.* 130) and continued by his pupil Rabbi Meir. The Mishna, as we now have it, is, with the exception of a few and unimportant later additions, the work of Rabbi Yehuda ha-Nasi, who presided over the Jabne 'Sanhedrin' at the close of the second century. 'Taking the unfinished work of R. Akiba and R. Meir as basis, and retaining, in general, its divisions and arrangement, he examined and sifted the whole material of the oral law, and completed it by adding the decisions which his academy gave concerning many doubtful points. Unanimously adopted opinions he recorded without the names of their authors or transmitters, but where

a divergence of opinions appeared the individual opinion is given in the name of its author, together with the decision of the prevailing majority, or side by side with that of its opponent, and sometimes even with the addition of short arguments *pro* and *con*.'[1]

We can best arrive at some estimate of the value of the Mishna *Tract Sanhedrin* as a criterion for early first-century jurisprudence, by comparing its provisions, when it is possible to do so, with the facts as we know them from other available sources. We can most readily do this by a comparison of the authority, the constitution, and the procedure of the court as we find them described in the rabbinic literature on the one hand,[2] and in Josephus and other non-rabbinic sources on the other hand.

According to the Mishna the Great Sanhedrin is all-powerful. We receive not the slightest hint that its doings were ever subject to the control of any person or external power. It was the sole arbiter in home and foreign affairs. Changes in the Temple, the Holy City, and local government could only be carried through by their permission; and war could be waged only by their express sanction (*Sanh.* 1, 5). The doings of the King and the High-priest fell within the scope of the court's control, and even their appointment was subject to the Sanhedrin's consent (*Tos. Sanh.* 3, 4). The High-priest was of no greater importance than any ordinary member, and could also be made to stand his trial before them (1, 5; 2, 1). The King has higher privileges. He is beyond the reach of the law, yet at the same time he has no power to interfere with its course. 'He can neither judge nor be judged, bear witness nor be witnessed against.' Further, both his family and public life were subject to certain restrictions (2, 2–3). Though nominally head of the state, his foreign policy must be guided by the views of the Sanhedrin. The Mishna knows nothing of combination in the one person of the royal and high-priestly offices. Thus, according to the Mishna, the Jerusalem court is su preme alike in matters sacred and secular.

A study of the history of the Sanhedrin[3] makes it evident that the authority exercised by this court might vary within very wide limits. So far as the scanty evidence allows us to come to any conclusions, it may be said that the Sanhedrin reached its maximum power at two periods: during the reign of Salome (78–69 B.C.), and during the rule of the procurators (6–70 A.D.). In the age of the early Hasmonaeans we seldom hear of its existence; under Aristobulus II and Hyrcanus II

[1] See M. Mielziner *Introduction to the Talmud*, New York 1903, p. 5.

[2] See H. Danby *Tractate Sanhedrin, Mishnah and Tosefta*, London 1919.

[3] See Schürer *History of the Jewish People* II i 163 ff; Bacher on 'Sanhedrin' in Hastings's *Dictionary of the Bible.*

it does not appear to have been able to exert any effective authority; while under Herod it seems to have been all but suppressed. The rabbinic writings looked back on the reign of Alexandra Salome as the golden age,[1] an age when pharisaic ideals obtained such recognition as they received neither before nor after until the Jews ceased to be an organized nation.

During the procuratorship, however important the Sanhedrin may have been, it still was confined within very definite limits. There was no native king, only a Roman governor who could interfere at pleasure in the nation's affairs. Cases affecting life and death must be submitted to him. Also, the Sanhedrin could have had no control over the High-priest, since he was a creature of the Procurator, who could appoint him or remove him at will. And it would seem that the court could not even assemble without the Procurator's permission.[2]

It follows, therefore, that the Mishna picture, if it can ever have been true to facts at all, can only relate to the state of things during the former of the two stated periods, a short space of nine years.

The High-priest Hyrcanus was a negligible quantity, *διὰ τὴν ἡλικίαν, πολὺ μέντοι πλέον διὰ τὸ ἄπραγμον αὐτοῦ*, while the queen *πάντα τοῖς Φαρισαίοις ἐπέτρεπεν ποιεῖν . . . τὸ μὲν οὖν ὄνομα τῆς βασιλείας εἶχεν αὐτή, τὴν δὲ δύναμιν οἱ Φαρισαῖοι.* But even so, she appears to have reserved to herself a measure of power hardly consonant with the Mishna's conception of what a monarch should be: *ἐποιεῖτο μέντοι καὶ ἡ γυνὴ τῆς βασιλείας πρόνοιαν, καὶ πολὺ μισθοφορικὸν συνίστησιν, καὶ τὴν ἰδίαν δύναμιν ἀπέδειξεν διπλασίονα, ὡς καταπλῆξαι τοὺς πέριξ τυράννους καὶ λαβεῖν ὅμηρα αὐτῶν.* She was also able to secure the safety of the party who had aroused the murderous hostility of the Pharisees, and appears to have undertaken an expedition against Ptolemy Menneus of Damascus, without, so far as we can gather, any consultation with the Senate (*Ant.* XIII xvi 3). Towards the end of her reign Josephus gives us the impression that though she relegated considerable powers to the 'Elders of the Jews', it was not so much constitutional as physical disabilities which prompted her policy (*Ant.* XIII xvi 5).

In view of what is laid down in *Sanh.* 2, 2, prohibiting the marriage of a king's widow, it should be noticed that the ideal monarch Salome was the wife of King Aristobulus before marrying Alexander Jannaeus, Aristobulus's eldest brother (*Ant.* XIII xii 1). R. Jehuda (ben Ilai), however, opposes the Mishna, holding that a king may marry a king's

[1] See *Taanith* 23 *a*.

[2] *Ant.* XX ix 1 *τινὲς δ' αὐτῶν καὶ τὸν Ἀλβῖνον ὑπαντιάζουσιν . . . καὶ διεδάσκουσιν, ὡς οὐκ ἐξὸν ἦν Ἀνάνῳ χωρὶς τῆς ἐκείνου γνώμης καθίσαι συνέδριον.* See also *Ant.* XX ix 6.

widow—instancing the case of King David. According to Maimonides and Bartenora the *halaka* is according to R. Jehuda.

The tract gives us but the most meagre details as to the constitution of the court. We are told no more than that the Greater Sanhedrin consisted of seventy-one, and the Lesser of twenty-three members (*Sanh.* 1, 6), that this latter might, as occasion required, be increased to seventy-one (5, 5), that certain disreputable members of society could not sit as judges (3, 3), that only 'priests, Levites, and Israelites who could marry into priestly families' can try capital cases (4, 2), and that, as the need arose, the Sanhedrin was recruited by the appointment (lit. 'ordination' סמיכה), in regular order of seniority, of those who made up the ranks of the 'students of the learned' תלמידי חכמים (4, 4). There are many other things we should expect to learn from a tract which lays itself out to describe the Sanhedrin, such as the period of tenure of membership, and the qualifications which were necessary for a seat in the highest national court. But what is most extraordinary is the entire omission of any mention of who is the president of this council. We hear, only once, of the 'chief judge' (הגדול שבריינים) who is to announce the verdict (3, 7). This may mean either the 'eldest' or the 'most important' of the members, and affords us no definite data.

Examination of other Tannaitic material provides us with more definite titles of presidents of the Sanhedrin. We find ראש בית דין (*Yom.* 7, 5, mentioned immediately after the king; but the text is dubious, and probably בית דין alone should be read). He is again mentioned by the same name in *Ta'an.* 2, 1, where he is next in order to the נשיא. Here by *Nasi* is meant the head of the state, as in Ezekiel (cf. *Horayoth* 3, 3: ואיזהו הנשיא זה המלך). In *Pirke Aboth* 1, 4–15 we find mentioned five pairs (זוגות) of prominent rabbis, Jose ben Joezer and Jose ben Jochanan, Joshua ben Perachya and Nittai (or Mattai) the Arbelite, Judah ben Tabbai and Shimeon ben Shatah, Shemaia and Abtalion, Hillel and Shammai, who received and handed on the 'tradition' in succession during the last two hundred years B.C.; and of these same rabbis it is said (*Hag.* ii 2) הראשונים היו נשיאים ושניים להם אב בית דין; but this statement stands isolated in the whole of the Mishna. In *Shabb.* 15*a* a Baraitha is quoted to the effect that הלל ושמעון גמליאל ושמעון נהגו נשיאותן לפני הבית מאה שנה; in *Tos. Sanh.* 2, 6 there are three letters attributed to Gamaliel I, in which he writes in an authoritative manner to certain Jewish communities on matters connected with tithes and the arrangement of the calendar; and in *Tos. Pes.* 9 mention is made of the appointment of Hillel as *Nasi*. In the Amoraitic literature we find fully established the system of the *Ab Beth*

Din sitting side by side with the *Nasi*, the latter as president and the former as vice-president of the Sanhedrin (cf. *Horayoth* 13 *b*), but these refer to the Jabne period and later.

But all this gives us no hint of the state of things as we find them in the New Testament, Josephus, or the Maccabaean books. Nowhere else do we hear of such an office as that of the *Nasi* or *Ab Beth Din*. Where individuals, who, according to rabbinic views, held such offices, are mentioned, it is only as ordinary, though it may be more or less prominent, members of the Sanhedrin: cf. 'Pollion and Sameas' (Abtalion and Shemaia) *Ant.* XVI i, and Gamaliel, Acts v 34 'a certain Pharisee in the Sanhedrin, Gamaliel by name'. Josephus several times (*Vita* 38, 39, 44, 60; *Bell.* IV iii 9) mentions Shimeon ben Gamaliel, and once (*Vita* 38) speaks of him as γένους δὲ σφόδρα λαμπροῦ; but we receive no impression that he was president of the court, nor can we conclude from his distinguished birth that the Hillel family held the position of *Nasi* over the nation by hereditary right.

Throughout the whole course of the history of the Sanhedrin, from the time of its problematic existence in the Persian period till its abolition by the Romans, the non-rabbinic sources constantly and unanimously describe the High-priest as the chief member of the national council.

The High-priest's position is clear from 1 Macc. xiv 44 (καὶ οὐκ ἔξεστιν οὐδενὶ τοῦ λαοῦ καὶ τῶν ἱερέων ἀθετῆσαί τι τούτων καὶ ἀντειπεῖν τοῖς ὑπ' αὐτοῦ ῥηθησομένοις, καὶ ἐπισυστρέψαι συστροφὴν ἐν τῇ χώρᾳ ἄνευ αὐτοῦ), Josephus *Apion.* ii, 23 (φυλάξει τοὺς νόμους, δικάσει περὶ τῶν ἀμφισβητουμένων, κολάσει τοὺς ἐλεγχθέντας), *Ant.* IV viii 14 (in cases where there is an appeal, the parties are to go up to Jerusalem καὶ συνελθόντες ὅ τε ἀρχιερεὺς καὶ ἡ γερουσία τὸ δοκοῦν ἀποφαινέσθωσαν), *Ant.* XX x 5 (τὴν δὲ προστασίαν τοῦ ἔθνους οἱ ἀρχιερεῖς ἐπεπίστευντο). The High-priest is directly spoken of as occupying the presidency of the court in *Ant.* XIV ix 3–5 (Hyrcanus II), XX ix 1 (Ananos), and consistently in the New Testament. We hear of him presiding at the trials of our Lord (Mt. xxvi 62–65), the Apostles (Acts v 17–40), St Paul (Acts xxiii 2 ff), St Stephen (Acts vii 1), in all things taking the leading part (cf. Acts ix 1–2; xxii 5; xxiv 1).

On the question, therefore, of the president of the Sanhedrin, the Mishna is misleading and inadequate, and, whenever it makes a definite statement on the matter, it is unhistorical.

There exists but little material for comparing the other constitutional points mentioned by the Mishna tract. The traditional number, seventy-one, who sat in the court, need not be doubted. [In the Mishna itself, on three occasions, *Zebah.* 1, 3; *Yad.* 3, 5; 4, 2, the number 'seventy-two' is given. But none of these passages bears

directly on the subject of the national judicial court.] Josephus gives the number as seventy (*Bell.* II xx 5, treating of the court which he extemporized to take charge of affairs when organizing the rising in Galilee; cf. IV v 4, where the Zealots oust the existing authorities and establish in their place a court of seventy members), and this is the number given by R. Jehuda (*Sanh.* 1, 6). The difference of one will depend on whether or not the president is included in the total.

There is evidence in the Greek sources for the existence of local courts, but not, as is assumed in the Mishna (*Sanh.* 1, 4). courts of sufficient authority to undertake the trial of capital cases. Provincial Sanhedrins seem to be referred to in Mk. xiii 9 (= Mt. x 17), where believers are spoken of as being delivered εἰς συνέδρια; cf. Josephus *Bell.* II xiv 1, where Albinus τοὺς ἐπὶ λῃστείᾳ δεδεμένους ὑπὸ τῆς παρ' ἑκάστοις βουλῆς ἢ τῶν προτέρων ἐπιτρόπων ἀπελύτρου τοῖς συγγενέσι. From *Ant.* IV viii 14, 38 it appears that these local courts consisted of seven persons, a number for which Josephus even claims Mosaic command; and when (*Bell.* II xx 5) he tried to introduce what was apparently a model Jewish constitution into Galilee, he set up courts of seven judges in each town. But they had jurisdiction only over lesser crimes, τὰ μείζω πράγματα καὶ τὰς φονικὰς δίκας concerned the court of seventy.

Nowhere outside of the Mishna do we find the mention of any court consisting of twenty-three members, the number required for the Lesser Sanhedrin. Yet it is difficult to imagine that this number had not some basis in actual practice, considering the Mishna's heroic effort to find scriptural sanction for it (*Sanh.* 1, 6). Perhaps it was the number necessary to form a quorum of the 'court of the one and seventy' (cf. *Sanh.* 5, 7; *Tos. Sanh.* 7, 1). The same explanation may also underlie the number, three, competent to judge non-capital cases (*Sanh.* 1, 1–3), as opposed to Josephus's court of seven. (Cf. *Sanh.* 1, 2, where the number three, when required, can be raised to seven.)

As to the qualifications for membership the tract tells us nothing definite: it only gives us the impression (*Sanh.* 4, 3; 5, 4) that the position was the reward of rabbinical learning.

The later strata are, as usual, more explicit. Cf. *Sanh.* 17 *b*, 88 *a*, *Sifre* on Num. xi 6. The would-be candidate must be humble, learned, popular, strong, courageous, of tall stature, of dignified bearing, of advanced age, acquainted with foreign tongues, and initiated into the mysteries of magic.

The Greek sources are likewise silent as to the mode of election and the tenure of office. As for the latter point, it can be safely argued, from the non-democratic nature of the Sanhedrin, that a seat would be held for a lengthy period, if not for life; also, from its normal lack

of independence, that new members were probably appointed by the supreme authority—the reigning native ruler, or the Roman governor.

The Mishna tells us nothing of different parties, priests, Sadducees and Pharisees, who made up the council. (The rules laid down in *Sanh.* 1, 3, as to the need of a priest in deciding certain matters, are self-evidently theoretical only, and even so are concerned merely with non-capital cases.) But the evidence provided by Josephus and the New Testament is plentiful. Thus we find sitting in the Sanhedrin ἀρχιερεῖς, γραμματεῖς καὶ πρεσβύτεροι (Mt. xxviii 41; Mk. xi 27; xiv 43, 53; xv 1; cf. Mt. ii 4; xx 18; xxi 13); and ἄρχοντες, πρεσβύτεροι καὶ γραμματεῖς (Acts iv 5, 8), where ἄρχοντες is synonymous with ἀρχιερεῖς (cf. Acts iv 23). Josephus speaks of οἵ τε ἀρχιερεῖς καὶ δυνατοὶ τό τε γνωριμώτατον τῆς πόλεως (*Bell.* II xiv 8), τούς τε ἀρχιερεῖς σὺν τοῖς γνωρίμοις (*Bell.* II xv 3), οἱ δυνατοὶ τοῖς ἀρχιερεῦσιν καὶ τοῖς τῶν Φαρισαίων γνωρίμοις (*Bell.* II xvii 3). That Sadducees sat together with Pharisees is abundantly clear from the constant collocation of 'chief priests' and 'scribes', not to mention such an outstanding instance as Acts xxiii 6.

On the procedure of the court there is no lack of detail in the tract (cf. *Sanh.* chs. iii–v), but unfortunately it is just here that our non-rabbinical authorities fail us. It might be imagined, on the other hand, that the New Testament trials, and especially the trial of our Lord, would afford us ample material for comparison, but as has been already shewn they are but a very uncertain criterion.

We have no external authority which can act as a means of checking the contents of the latter part of the tract—the four death penalties and those who are subject to them.

In the *pericope adulterae*, Jn. viii 5, the Pharisees say that according to the law of Moses the woman is to be 'stoned', whereas according to *Sanh.* 11, 1 she is to be 'strangled'—unless τὰς τοιαύτας is arbitrarily taken to mean 'betrothed virgins'. Then, as laid down in *Sanh.* 7, 5, 'stoning' would apply. Stephen's case does not afford us any help, for there, it would seem, the crowd took the law into their own hands.

A few slight parallels can be culled from Philo and Josephus, but these only touch on the most immaterial points. Cf. Philo *De Humanitate* 14 with *Sanh.* 11, 2 ('kidnapping'); *De Specialibus Legibus* 2 (p. 211, ed. Wendland) with *Sanh.* 8, 9 ('the burglar'); III 19 (p. 180) with *Sanh.* 9, 3 ('delayed death') agreeing with R. Nehemia, not with Mishna; p. 190 with *Sanh.* 1, 4 ('owner of goring ox'); Josephus *Ant.* IV viii 17 with *Sanh.* 2, 5 f ('king and Sanhedrin'); IV viii 21 with *Makk* 3, 10 ('forty stripes save one'; according to Josephus it is the punishment inflicted on those who refuse to allow the poor and strangers to glean).

But though such external means are so unsatisfactory for our purpose,

the internal evidence which the Mishna provides is of a nature which can give us but little confidence in the laws as a practical working code governing the life of the nation before or after the fall of Jerusalem. We find great attention given to the theoretical working out of Pentateuchal enactments, which for long must have been obsolete (if indeed they ever were practicable), side by side with a quantity of misapplied erudition having as its object the finding of scriptural sanction for usage not obviously ordained by Scripture.

It is worth while examining the method by which the Rabbis attached a definite punishment to a particular crime where Scripture itself is silent as to what means of death is to be adopted.

Eighteen offences (*Sanh.* 7, 5) are punishable by stoning: —

(1) Blasphemy, Lev. xxiv 16.
(2) Idolatry, Dt. xvii 2–7.
(3) Sabbath-breaking, Nu. xv 32–36.
(4) Seduction of betrothed virgin, Dt. xxii 23–24.
(5) Rebellious son, Dt. xxi 18–21.
(6) The Ba'al 'Ob. Lev. xx 27.
(7) The Yidd'oni, Lev. xx 27.
(8) Enticing to idolatry, Dt. xiii 7–12.
(9) Offering children to Moloch, Lev. xx 1.
(10) Bestiality by a man, Lev. xx 15.
(11) Bestiality by a woman, Lev. xx 16.
(12) Connexion with daughter-in-law, Lev. xx 12.
(13) Connexion with mother, Lev. xx 11.
(14) Connexion with step-mother, Lev. xx 11.
(15) Cursing parents, Lev. x 9.
(16) Witchcraft, Ex. xxii 17.
(17) Enticing to communal apostasy, Dt. xiii 1–6.
(18) Pederasty, Lev. xx 13.

Against the first nine of these the Pentateuch issues the direct sentence that they should be stoned. But since in (6) and (7) there is added to this direct sentence the expression דמיהם בם, it follows, according to the rabbinic law of *gezera shawa*, that wherever the same expression is attached to the mention of any other crime stoning must be applicable there also. Therefore (11), (12), (13), (14), (15), and (16) are punishable in this way. In the case of (11), besides this same expression 'their blood is upon them', the verb הרג is used; therefore in (10) the use there of this same verb, 'he slew', implies that stoning is applicable to that case too. In (8) the verb הדיח is used of a crime for which stoning is prescribed; therefore since the same root is used again in describing (17) stoning there must be the penalty. Yet again, since the sentence against the witch (16) is לא תחיה 'she shall not live' she likewise must be stoned, because we find in Ex. xix 13, לא יחיה 'he shall not live', used side by side with the root סקל 'he stoned'.

As for the sentence of 'burning with fire', we find it issued directly against the priest's daughter (Lev. xxi 9), and the case given in Lev. xx 14. And since this latter crime is further specified as זמה 'lewdness', it follows that all crimes which are so described must also be punished in the same way as Lev. xx 14. Cf. Lev. xviii 10, xviii 17.

'Decapitation' is regarded as the penalty attaching to all those who are guilty of communal apostasy; cf. Dt. xiii 13–16, 'Thou shalt smite the inhabitants of that city with the edge of the sword.' The only others who are to be so punished are 'murderers'. They are mentioned in Ex. xxi 12 and Lev. xxiv 17. But there we are not told of the means of death. Yet in the passage in Ex. xxi 20, also relating to murder, it is said נקם ינקם; and in Lev. xvi 25 we find the expression חרב נקמת; therefore it follows that the act signified by the verb נקם 'be avenged' must be carried out by means of the 'sword'!

'Strangulation' is not mentioned in the Pentateuch, but in the rabbinic code it is applied to those criminals for whom death is decreed without specifying the mode of death. In regard to these it is argued (*Sanh.* 52 *b*, 53 *a*) that since the Law must not be construed with severity the most lenient form of death, i.e. strangulation, must be applied. Another line of argument is: Sometimes 'death at the hands of Heaven' is ordained (Gen. xxxviii 7, 10; Lev. x 7, 9); and as death from Heaven leaves no visible marks, so must the death inflicted by the tribunal leave no mark. And such is only possible by death from strangulation.[1]

The post-mortem 'hanging' of the blasphemer and the idolater (*Sanh.* 6, 7 f) is self-evidently a rabbinic fiction to fulfil the letter of the law given in Dt. xxi 22.

Stress should be laid on the fact that since the first decade of the first century the Jews had lost the right of carrying out the death sentence; and even if the Romans recognized the validity of the Jewish capital laws (Jn. xix 7) they always, so far as our evidence takes us, carried out at least the punishment in accordance with their own rules. Therefore the Mishna tract, throughout most of its pages, is discussing modes of capital punishment which had been in complete disuse for two centuries past. It is exceedingly doubtful how far their tradition can be trusted in bridging this gap.

What makes the abstract character of Mishnaic jurisprudence still more clear is the incessant opposition of opinion expressed in the name of some one or other demurring teacher. This is sufficiently conspicuous in the Mishna alone. If the contents of the Tosefta and numerous Baraithas are taken into account the differences will be still more striking and numerous. Nor can we overlook the fact that these opposing opinions are not concerned with what was thought to have been the ancient usage; they differ in what they imagine to have been the custom because of the conclusions they, personally, find themselves able to draw from some biblical text. Instances of this can be found on almost every page of the Mishna. Ancient precedents counted for

[1] See Art. 'Capital Punishment', *Jewish Encyclopedia* vol. iii.

little or nothing (cf. *Sanh.* 6, 8 ; 7, 2) ; they could easily be set aside on the ground of some rabbinic scruple, or passed by as invalid owing to the ignorance of former times.

It passes belief that a penal code with any claim to actual utility can ever have been drawn up on such a basis of literary criticism and interpretation. We have the rabbinic principles of hermeneutics and logical discussion—so obviously the laborious product of students with more love for the minutiae of vocabulary than recognition of practical needs or even of prosaic possibility—applied to a code whose provisions had in mind the requirements of the nation as it existed long ago, some six or eight hundred years past ; and the result of this effort is offered, at the end of the second Christian century, as a manual of Jewish legal administration as it was any time from the return from Babylon to the fall of Jerusalem.

Though not constituting a fair argument against the historicity of the Mishna's contents, there is another feature which must, to say the least, have coloured the whole presentation of its subject. One of the rabbinic canons of truth seems to have been that their code must 'shew mercy in judgement' to the highest degree. This *middath r'hamim* 'quality of mercy' is carried to lengths which it is difficult to believe can ever have been possible in practice. We certainly find no example of its working in what we know of Jewish criminology from non-rabbinic sources. But according to the Mishna the judicial body was imagined as best fulfilling its functions when it sought to act as 'counsel for the defence'. If there seemed to be no extenuating circumstances in the prisoner's favour, the judges were to do their utmost to find some. The whole scheme of judicial procedure is characterized by the same attitude. The verdict of acquittal can be reached quickly, but that of conviction only as a result of the most leisurely deliberation. The prisoner must be robbed of no chance which might in any way tell to his advantage. The excessive mercifulness of the rabbinic ideal finds its strongest expression in *Makkoth* 1, 10 : 'The Sanhedrin which condemns to death one man in seven years is accounted murderous. According to R. Eleazar ben Azariah it would be a murderous court even if it condemned one man in seventy years. R. Tarphon and R. Akiba assert that if they had been in the Sanhedrin no man would ever have been condemned to death by it.' Rabban Shimeon ben Gamaliel may well have replied : 'Then they would simply have multiplied bloodshed in Israel.'

Enough has been said to shew the marked disparity between our two sets of sources, a disparity so marked, indeed, as to leave but little room for doubt concerning the unhistorical nature of most of the Mishna's picture.

An able and ingenious defence of the latter's presentation has been urged by Büchler (*Das Synhedrium in Jerusalem*, Vienna 1902), who, while admitting the truth of the Josephus and New Testament versions, and the gulf which lies between their account and that of the Mishna, explains the problem by the simple theory that they describe two distinctly different courts; according to his hypothesis there were two Sanhedrins, each having its own separate history, constitution, and authority. The one which we find in Josephus and the New Testament was a political body, possessed of civil jurisdiction; while the other, the 'Great Beth Din' of the Mishna and Talmud, was concerned exclusively with religious matters. The former necessarily came to an end with the Jewish state, while the latter was enabled to continue its existence unbroken throughout the whole of the nation's vicissitudes. Neither Josephus nor the Gospels speak of their Sanhedrin as passing decrees dealing with the priests, the Temple service, ritualistic purity, or anything touching on matters of a purely religious nature; they ascribe to it cases dealing only with ordinary judicial processes, penal sentences, and matters of definitely political interest. With these, Büchler holds (p. 36), the Sanhedrin of the Talmud never concerns itself. While the former was the supreme court, the highest political authority, alone empowered to deal with criminal cases, and to inflict the sentence of capital punishment, the latter was the highest court dealing with the religious law, and the body entrusted with the religious instruction of the people.

However much this dual government would explain, there is a conspicuous lack of evidence for proving its existence. Neither in the Gospels nor in Josephus is there any suggestion, much less proof, of such a state of things; while in the Talmud, the hints, even if they can be described as hints, are of the slenderest value. Granted a purely religious Sanhedrin, the total lack of any reference to it in the Gospels is inexplicable. Also Josephus, in his survey of the Jewish constitution (*Ant.* IV viii), must surely have made some definite allusion to it. Büchler (pp. 36 f) quotes two passages from Josephus as proving his point, *Bell.* II xvii 2–4, *Ant.* XX ix 6, but they are scarcely such as to carry conviction. Equally unconvincing is the supposed proof derived from the rabbinic literature (*Yer. Sanh.* 19*c*) that the 'mention of "Sanhedrin" without the epithet "great" presupposes another body than the Great Sanhedrin that met in the Hall of Hewn Stone' (*J.E.* vol. xi p. 42a).

This dual system, a sort of 'House of Convocation' side by side with a national parliament, each working independently of the other, seems especially out of place in the Jewish constitution. The Jews' outstanding claim to national distinction was the theocratic nature of their

government, in which civil and religious matters were everywhere interpenetrating, and for all practical purposes identical. Finally, this hypothesis lands us into the contradictory state of things in which we find essentially civil affairs presided over by a priest, while it is a layman who takes the lead in religious disputes!

The obvious explanation of the differences between the Hebrew and Greek sources must surely be the true one. The Mishna fails to agree with the earlier accounts of the Sanhedrin because the historical Sanhedrin had ceased to exist, and the Sanhedrin which it did know, on which it based its description, was a purely academic institution, having purely academic powers and purely academic interests. It had no national territory to govern, only a national literature to expound.

It was almost inevitable that R. Jehuda ha-Nasi and his brother rabbis should, in drawing up an account of the Jewish Sanhedrin, regard it as a glorified, all-powerful reproduction of the tribunal as it was known to them. The three or four generations which had passed by, while providing the substance for the Mishnaic tradition, served as a solvent modifying in a most marked way the historical facts of more than a century ago. The Jews have always idealized their past history and institutions, and naturally in an account of their judicial court would make it embody all of what to them was highest and best in legal theory and practice. That which had a genuine basis of fact, and that which, in their pursuit after the ideal, they had evolved from a mixture of piety and artificial scriptural exegesis, would become inextricably mingled. What to them did not appear perfect was therefore not true. Excellent though such a method may be in the drawing up of a new code, it has its drawbacks as a historical process.

. . . . . .

It can only follow from all this that such a summary of our Lord's trial or examination before the Jews as 'The trial and condemnation from first to last violated every canon and principle of Jewish jurisprudence', or 'The whole trial before the Sanhedrin, therefore, being conducted contrary to Jewish law, was null and void' (Buss *The Trial of Jesus, illustrated from Talmud and Roman Law*, London 1906), must be subjected to considerable modification. The two premisses on which such a conclusion is based are by no means sound enough to bear the weight imposed on them. That our Lord was in the literal sense placed on His trial by the Jews is at least questionable; but that we have at our disposal authentic matter for testing the legality of the forms of that trial, if trial it was, is still more questionable. It is not a matter which admits of absolute proof, but the bulk of our evidence points to the probability that the Jewish authorities in Jerusalem were empowered to carry out no more than a preliminary investigation of the

evidence against their prisoner, and a study of the Gospel narratives makes it doubtful whether they can justly be said to have overstepped this permission. Consequently, to measure the justice of these inconclusive proceedings by a code which is supposed to lay down rules and regulations for the conduct of a capital trial before an all-powerful Sanhedrin, is pointless.

Furthermore, even if, in face of all the evidence to the contrary, we go so far as to admit the existence of a genuine trial by the Sanhedrin, a Sanhedrin possessed of full powers of uttering sentence of death, we have no criterion enabling us to check the validity of its methods. The compilation which has been habitually brought forward with this object is of such a nature that it is of little or no value as a picture of native law as practised during the period in question.

H. DANBY.

THE THRENUS SEILAE.[1]

THE high authority of Dr Montague James has added to the interest of this Latin document by his judgement that it is a 'version of a comparatively early Greek document, dating perhaps from the first century'. Short as it is its problems are numerous. From its title down to almost the last word of its text of about thirty lines long, these questions make their appearance. The title reads: 'Threnus Seilae Iepthitidis in Monte Stelac'; and its opening sentence: 'Venit filia Iepte in montem Stelac et cepit plorare'. The phrase 'in montem Stelac' has raised an insoluble problem in geography; and as such it can only be solved on the ground that it is a mountain on the maps of Fantasy, whence, sometimes, material is drawn for the composition of apocryphal literature. Such a conclusion could be said to be a safe one; and it would not help a jot towards the understanding of the document for or upon which it had been made. The *Threnus* itself offers another solution. Twice in this short threnody the daughter invokes the mother: 'O mater, inuanum peperisti unigenitam tuam et genuisti eam super terram, quoniam factus est infernus thalamus meus. Confectio omnis olei quam praeparauit mihi mater mea effundatur' etc. For 'in montem' it is suggested to read 'in matrem'. The Greek prepositional clause can be seen in the Latin. What of the name 'Stelac'? One of Lamech's wives was *Tselah* צִלָּה,[2] and these folk were grandparents to

[1] James *Texts and Studies*, 1893, ii 3, 182.

[2] Gen. iv 19f.