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The problem of 'anefang' in certain ancient and medieval laws

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Tekst jest udostępniony do wykorzystania w ramach dozwolonego użytku.
THE PROBLEM OF ANEFANG IN CERTAIN ANCIENT AND MEDIEVAL LAWS

For about fifty years the analogies of the several clauses of the Code of Hammurabi with the corresponding rules of certain ancient and medieval laws have been a subject of interesting scientific investigation. D. H. Müller endeavoured to explain these extraordinary phenomena with the aid of a fascinating but very dubious hypothesis on the common derivation of the C.H. and several other ancient laws from one unknown archetype.

Many German and other scholars held another view. They found the solution of the problem in Bastian’s theory by which he tried to prove that certain fundamental conceptions commonly shared by humanity could be traced in the laws as well as in all other regions of human culture and that those fundamental views are held by all peoples independently of their strictly national ways of thinking. These universal opinions influence more or less the shaping of legal institutions. It is evident that such a theory encouraged the research for more particular parallels.

One of the institutions which attracted the attention of scholars was the Germanic anefang executed in the cases of the recovery of unintendedly lost moveables, and therefore strictly connected with the prosecution of theft. As both the proceedings are exhaustively described in an unusually great number of monographies their most essential characteristics only will be here reviewed.

1 Cf. Die Gesetze Hammurabis und ihr Verhältnis zur mosaischen Gesetzgebung sowie zu den XII Tafeln (Polish edition, 1905) 73 ff.
Under the Germanic folk laws when the thief or robber was caught „hand-having” or during his flight the robbed party would alarm the neighbours and then himself or with their assistance would kill the offender and take back his movable. But if the fact of the loss was established in the moment when the thief or robber had already run away with it and left fresh trail of his flight then the robbed party could rouse the neighbours (or the people bound to assist him) and together with them would pursue the offender. If an informer or the trail led the pursuing party to a house whose owner declared that the thing was not in his possession then it was permitted to search his house and this act was performed in the same solemn manner as in Greece or Rome. Yet if the owner of the house objected to searching he was declared guilty of theft as if he were caught „hand-having”. Likewise was treated the person in whose house the stolen thing was found concealed in a locked place, or who was caught in the moment of hiding it, or caught by the pursuing party when running away with it. The above described consequences of following the thief’s trail and of solemn searching took place only when the thing was found within a certain fixed period of time from the moment of its loss. Under the Lex Ribuaria⁴ and Lex Salica⁵ this term lasted three nights.

If the thing was discovered after the expiration of the prescribed term the claimant could sue the possessor of the thing charging him with theft or robbery. But for taking this course it was necessary to supply substantial evidence in order to prove that the possessor of the thing had really stolen it or got it by robbery for if he had sworn to his innocence the claim was defeated. That is why in such cases the Germanic folk laws made possible an action which would directly help the plaintiff to recover the lost thing while indirectly it would help to discover and punish the offender.

The first phase of this proceeding was the extrajudicial seizure of the discovered thing. The description of this act (which was known as anefang) is found in Lex Ribuaria⁶: „Si quis rem suam cognoverit, mittat manum super eam”. Naturally, the claimant made also an oral declaration. If the possessor of the thing raised no objections the claimant had the right to recapture it.

⁴ Cf. c. 47, I.
⁵ Cf. c. 37.
⁶ Cf. c. 33, I.
Let us now read the following sentences of the already quoted *Lex Ribuaria*: *Et si ille super quem intertiatur, tertiam manum quaerat, tunc in prae sente ambo coniurare debent cum dextra armata, et cum sinistra ipsam rem teneant. Unus juret quod in propriam rem manum mittat, et alius juret, quod ad eum manum trahat qui ei ipsam rem dedit.* Then if the possessor intended to defend the thing he was bound to vouch his warrantor and swear (as well as the claimant) a preliminary oath. Under the *Lex Salica* the possessor was bound also to make „till sunset” a solemn promise to deliver the thing to court for further proceeding. These acts of both the claimant and the person in whose possession the thing was found belonged to the extrajudicial phase of the proceeding.

In the judicial phase the plaintiff had to prove the identity of the disputed thing and its loss against his will. The defendant was bound to bring to court his warrantor at an appointed time. The laws of Longobardians and Saxons ruled that the defendant had to conduct the plaintiff to the warrantor who in turn could vouch another warrantor. But many of the Germanic folk laws provided that the process of voucher could be repeated until the second resp. third, fifth, sixth or the seventh warrantor was summoned. When the defendant did not know his warrantor nor his place of residence he was bound to state this under oath (with his oath-helpers) immediately after the claimant seized the movable, otherwise he was treated as a thief. If the defendant swore and surrendered the thing to the claimant he would go quit of further consequences of the action.

In order to plead his innocence, in case his vouchee failed to appear in court the defendant had to prove by witnesses (or by his oath-helpers) that he had honestly acquired the thing from the person who was by him duly vouched to warranty. The disputed thing had to be surrendered even if the defendant was acquitted of theft. In earlier times it was permitted to vouch a dead warrantor and in that case the judicial phase of the proceeding took place on his tomb. Then if the heirs of the deceased or his friends neglected to prove that he had honestly acquired the disputed thing he was found guilty of theft and the movable (which was placed upon his grave) was to be returned to the claimant. The original defendant would obtain no indemnification.

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7 Cf. c. 33, I.
8 Cf. c. 37.
If the warrantor declined to defend the thing, the defendant had to surrender it but he might sue the warrantor proving by witnesses his honest acquisition of the thing from the latter. Then the warrantor if defeated was considered a thief. Similarly the vendor was charged with theft when he failed to appear in court or when he was not able to name his warrantor.

When the vouchee appeared in court and admitted that he had handed the thing over to the defendant the latter had to place it in the vouchee's hands. If there were many warrantors present, the thing would be handed over to each in turn. By placing it in the warrantor's hands the original defendant was acquitted of theft and retired from the action which was further carried on by the plaintiff and the warrantor. If the latter was defeated in the lawsuit he was bound under the Frankish laws besides paying a fine to give over the disputed thing to the plaintiff and pay its price to the original defendant.

The parallels to the Germanic *anefang* are successively found in the Slavonic, Greek and Egyptian laws. In 1917 P. Koschak er in his brilliant work „Rechtsvergleichende Studien zur Gesetzgebung Hammurapis Königs von Babylon“ expressed the opinion that an analogous institution was in the Babylonian law. Finally, M. Kaser came to the similar conclusion as regards the archaic Roman law. The theory on the existence in certain ancient and medieval laws of the institutions strictly corresponding to the Germanic *anefang*, strongly supported by Koschaker and his school became for a long time an established opinion. Nevertheless the recent considerable advances in the study of the cuneiform law made possible a more precise interpretation of the cuneiform legal texts. The objections were expressed by G. Boyer who in his

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10 Cf. op. cit. 48—49: „Zwar möchte ich mich hierfür nicht mit Fehr auf § 118 K. H. berufen, wohl aber auf die in den §§ 9 ff. geregelte Klage. Sie zeigt, wie schon beobachtet wurde, die grösste Ähnlichkeit mit dem deutschen Anefang, ja, sie ist direkt der Anefang”.
12 Cf. Sav. Z. LXIII Rom. Abt. 468: „Die neuere Forschung hat gezeigt, dass der Anefang noch weniger ein germanisches Spezifikum ist, als man schon auf Grund der römischen Parallelen annehmen durfte. Er findet sich z. B. im altRussischen Recht und mit Übereinstimmungen, die bis ins Detail gehen, im Kodex Hammurabi, wo er eine sehr alte Schicht semitischen Rechts darstellt“.
lecture on *Articles 7 et 12 du Code de Hammourabi*\(^\text{13}\) attacked Koschaker's fundamental theses. Critical observations on this subject have been recently expressed by G. R. Driver and J. C. Miles\(^\text{14}\).

It is then necessary to revise the theory on the parallels to the *anefang* especially from those points which can be derived from the correct interpretation of the rules of Hammurabi's Code. This is the purpose of our essay. We shall examine the opinions concerning the parallels to the *anefang* in the above mentioned ancient and medieval laws and then shall come to a general conclusion upon the scientific value of the discussed theory. In our considerations we shall preserve the order in which the parallels were reported and we shall present the problem of the *anefang* in its strict connection with the prosecution of theft.

I


A. Pravda Russkaya

The § 35 of Pravda Russkaya determines that the proceeding of the recovery of movables which were lost unintendedly should commence when "somebody has recognized his thing that was lost or stolen from him, be it a horse, clothes or a beast"\(^\text{1}\). Under § 32 and 38 P.R. this procedure could be used for the recovery of slaves\(^\text{2}\).

The proceeding varied and was determined by such circumstances as whether the thief's trail existed, in what manner the thing was lost and when it was found.

In the first instance as soon as he had noticed the theft and discovered the trail the robbed party called the "strangers" and "witnesses"; then he followed the thief's trail in order to recover

\(^{13}\) Cf. *Conferences faites à l'Institut de Droit Romain en 1941* (1950) 155 ff.


\(^{1}\) Pravda Russkaya [ed. Acad. of Sciences of U.S.S.R. (1940—1947) 2 vol. texts and comment.] II, 368.

\(^{2}\) P. R. II, 360, 381.
the thing by means of self-help. If the trail led him and his helpers „to a village or camp” and if the inhabitants of either refused to help in the pursuit then they were bound to pay the value of the stolen thing to the robbed party and a fine for theft. When the trail was lost „in the highway” far away from the settlements or in a wild region the pursuit was abandoned.

No proceeding is described in P.R. from which we might learn of a further action in case the trail led to a building in which — one might suspect — the lost thing was concealed.

The procedure was different in cases when the thief’s trail was not found or when the thing was lost in some other manner and not by theft. The person who had lost the thing proclaimed his loss in the market place. This step was very important in further proceeding. Under § 32 P.R. the person who had found his fugitive slave within three days after having publicly announced his loss had a right to recover the slave by self-help; and the person who had concealed him was bound to pay a fine of three grivna. The § 34 P.R. rules that if the man who had proclaimed his loss and later in the town where he lived he found his horse, or arms, or clothes he had lost he was permitted to use self-help to recover his thing, and the person in whose possession it was found had to pay damages — equivalent to three grivna. If we compare § 34 with § 32 and 35 we see that the recovery of a thing by self-help (provided by § 34) could take place within three days. The paragraph 35 P.R. indicates that the claimant should declare only: „This is mine” in order to recover his thing.

When the term of three days expired or when the loss of the thing was not proclaimed, another form of proceeding was practised which in the P.R. is called a svod. The provisions concerning the svod are laid down in §§ 35—39 P.R. After the expiration of

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3 P. R. II, 569, a. 77.
4 P. R. II, 360.
5 P. R. II, 365.
6 Ibid. 368. C. A. Yakovlív, Jahrbücher f. Geschichte Osteuropas I, 39 ff. The term: „jímání” and „jetí” in the Rožmberská kn. (144, 145, 147, 148, 209) and in the Řád práva sem. (Jireček), 88 — seems to mean simply: „to overtake his lost thing in the unlawful possession of another person”. No evidence is found to prove that these words signify the solemn act of extrajudicial seizure of the thing. Cf. the contrary opinion of M. Boháček, op. cit., 18 note 30.
7 P. R. II, 368 ff.
the term of three days if a man found his lost thing he had no right
to say: „This is mine“ and recover it. Instead he should say:
„Come to the svod wherefrom you have taken it“. Then the person
in whose possession the thing was found should take it with him
and conduct the claimant to the warrantor. The svod ended when
a warrantor was found who was not able to vouch his warrantor
or prove that he had honestly acquired the thing. Then the clai-
mant took the thing and the unsuccessful warrantor had to pay
for „whatever was lost with this chattel” as well as he was consi-
dered guilty of theft. If a horse was lost, the unsuccessful warran-
tor regarded as a horse-thief, was given to the prince for potok, i.e.
for sale as a slave. When the thing was lost from a house the unsuc-
cessful warrantor paid a fine of three grivna for theft8. The clause
36 P.R. implies that he had also to pay an indemnity to the original
defendant for the thing which the claimant had recovered through
the svod.

If the proceeding was carried out in town, the claimant was
bound to go from one warrantor to another but only within the
boundaries of the town. When the last warrantor from this town
vouched to warranty a person who resided out of municipal confi-
nes the svod was discontinued. In that case the warrantor was
bound to bring witnesses or the mytnik (tax-collector) in whose
presence he had purchased the thing. Then the claimant would
take it, the warrantor incurred only the loss of its price9. The clai-
mant who conducted the svod outside his town was bound to go
to three warrantors. The third of them would pay in cash for the
disputed thing and would carry it about till the end of the svod.
The unsuccessful warrantor would pay an additional indemnity
and a fine10.

The proceeding of the recovery of a stolen slave differed a little
from the above described cases. The person who recognized his
stolen slave would seize him and with him he would go to three
warrantors of whom the third had to exchange the slave for another.
The third warrantor would keep the claimant’s slave till the end
of the svod. The last warrantor whom the slave had indicated was
declared a thief. When the offender was discovered in this manner

8 Ibid., 368, a. 35.
9 P. R. II, 385, a. 39.
10 P. R. II, 374, a. 36.
the third warrantor would return the slave to the claimant to get back from him his own slave. The thief had to pay all the expenses incurred and a fine of twelve grivna to the prince\textsuperscript{11}. Should the person in whose possession the thing was found or his warrantor make a statement that he had bought it from an unknown vendor in the market place and could he prove this by the testimony of the mytnik or that of two sworn witnesses then the proceeding would be carried in the same manner as when the warrantor resided outside the confines of the town. If later on the vendor was discovered he was bound to return to the person to whom he had sold the thing the price of the purchase and pay an additional indemnity and fine\textsuperscript{12}. In the case of the recovery of a stolen slave the person in whose possession he was found could not declare that he had bought the slave from an unknown vendor in the market\textsuperscript{13}.

The regulations of the Pravda Russkaya concerning the recovery of the stolen movables developed and modified by the succeeding common law and judicial practice were included in the Lithuanian Statute of 1529\textsuperscript{14}.

In conclusion we may say that in the P.R. we find a much older proceeding than the Germanic anefang because the first procedure is wholly extrajudicial and no inference can be made that any solemn act of seizure of the thing had to be performed by the claimant\textsuperscript{15}.

B. The Polish law of the XIII-th century

The Book of Elbing\textsuperscript{1} from which all the information on the Polish proceeding of the recovery of the movables lost by theft or robbery is mainly drawn, comprises several regulations which testify to the great importance of legal self-help in the Polish law of the XIII-th century.

The clause VIII of the Book of Elbing reads: „The village (i.e. villagers) must with clamour follow the trail of the murderer

\begin{itemize}
  \item \textsuperscript{11} P. R. II, 381, a. 38.
  \item \textsuperscript{12} P. R. II, 378, a. 37.
  \item \textsuperscript{13} Cf. A. Yakovliv, \textit{op. cit.}, 41 f.
  \item \textsuperscript{14} Cf. Zbiór praw lietuwskich (1841) 376 ff., rubr. XIII.
  \item \textsuperscript{15} Cf. A. Yakovliv, \textit{op. cit.} 45 f.
  \item \textsuperscript{1} Cf. A. Helcel, \textit{Staroawne prawa polskiego pomniki} (1870) II, 19 ff.
\end{itemize}
until he is taken who has done injury”, and the clause IX supple-
ments the following regulation: „In the same manner is followed
the trail of the thief or robber from one township to another, from
one village to another, as it has been said”. It is evident that if
a thief was caught through pursuit he was considered to be a fur
manifestus. Naturally, in such cases the offended party had a right
to an immediate taking of his thing.

If the lost thing was found in some other manner (not by follo-
wing the thief’s trail) the offended party could bring an appeal of
larceny against the person in whose possession it was found. The
appellor charged then the appellee explicitly with theft or robbery.

When the offended party had too little evidence for bringing
an appeal of larceny, he could raise a recuperatory claim only,
which was directed „against the thing, for finding the thief in its
possessor or through him”2. At this aimed the Polish procedure
bearing in the Book of Elbing the German name of anevangen3.

According to the clause XI of the Book of Elbing not only the
owner of the thing but also every person from whom it was stolen
had a right to start this proceeding. The Book of Elbing does not
mention what was the first act of the claimant. From another Po-
lish legal source4 we learn that it must have been the seizure of
the thing (detentatio). But this detentatio was not an extrajudi-
cial proceeding. It was performed in court and was followed by
bringing a lawsuit against the possessor of the thing5. The possessor
was summoned by the judge for replication. If the summoned per-
sion intended to defend the thing he was bound to describe the
manner in which he had acquired it.

The Book of Elbing ruled the cases in which the defendant
vouched his warrantor. The defendant was bound to give surety
for his and the warrantor’s appearance in court at a fixed time.
A special regulation provided in certain cases that the defendant
should conduct the plaintiff to the warrantor. In the clause XI of
the Book of Elbing we read: „In some parts of the country it is
determined that he should bring his warrantor to the border of the

1 R. Taubenschlag, Proces polski XIII i XIV w. 89.
449 note 5; R. Taubenschlag, op. cit. 89 ff.
3 Cod. dipl. Min. Pol. II Nr 439 (A.D. 1253): „bona eorum per detentaciones
quae anwank.....nuncupatur...
4 Cf. The Book of Elbing, c. IV and XI.
country; wherever this law is not observed the warrantor should be delivered to a place appointed by the judge, but so near it should be that he might come and depart without difficulty”.

According to the opinion of R. Taubenschlag this regulation referred to a foreign warrantor. As it was not possible to bring him to the Polish court, the law determined that the defendant was bound to take the warrantor to the border of the country so that the plaintiff could see him. As the laws contained in the Book of Elbing come from the period of the feudal division of Poland it is evident that the special regulation of the c. XI ruled all such cases when the warrantor resided on a territory under different feudal jurisdiction from that on the territory on which resided the plaintiff.

The term specified for the appearance of the warrantor in court could have been three times extended and the warrantor had to conduct a further defence of the thing while the original defendant could withdraw from the action.

The warrantor could vouch another warrantor. The Book of Elbing permitted an unlimited vouching to warranty. From the same Book we learn that the defendant was defeated if he was not able to produce his warrantor. In such cases the plaintiff recovered his thing and the defendant had to pay a fine.

As we see, the principles laid down in the Book of Elbing bear close resemblance to the German judicial procedure of anefang practised in the later Middle Ages.

II

THE GREEK LAW

In the Greek law the recovery of the unintendedly lost moveables was performed in the following manner.

If a thief was caught „hand-having“ (ἐπ’ αὐτοφώρω), the offended party had a right to arrest him and lead him to court (ἀπαγωγή), the stolen thing was to be brought to court as well. In Athens

5 The Book of Elbing, c. XI in fine.
the Court of Eleven was competent for such offences, which sentenced the thief to death and the return of the stolen thing to the robbed party\(^2\). To recover a stolen thing the search was made of the house of a person suspected of theft (φωραν). The description of this procedure is found in Plato’s Laws XII\(^3\) and in Aristophanes’ comedy „The Clouds”\(^4\).

If a stolen thing was found in possession of another person the claimant could start a different proceeding. The principal sources from which our information on the subject is mainly drawn are Plato’s Laws\(^5\), a treaty between Delphi and Pellana (III-rd century B.C.)\(^6\) and another concluded between Miletus and Gortyn (III-rd century B.C.)\(^7\). Upon the evidence brought by these sources some authors (chiefly M. Käser) have expressed opinion that after the discovery of the thing the claimant performed an extrajudicial seizure of it (έφάπτεσθαι) and declared solemnly his claim\(^8\). This opinion strictly conformable to P. Koschaker’s theory of anefang proves to be questionable in the light of the analysis of the term έφάπτεσθαι. There is no evidence that έφάπτεσθαι means the act of the extrajudicial seizure of the thing. On the contrary in the texts cited by M. Käser this term seems signify simply „lay a claim to the thing”\(^9\).

These sources bear also evidence that the possessor of the thing was bound to show it to the claimant. He could be compelled to exhibit the thing by δίκη εις έμφανών κατάστασιν if the plaintiff proved that it was really in possession of the defendant. Under the Attic law extrajudicial exhibition was insufficient and the possessor who defended the thing was bound to deliver it to the court. The laws of other Greek states recognised the extrajudicial exhibition of the thing as sufficient and required only that a person

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\(^{2}\) Cf. M. Käser, op. cit. 144 note 29.

\(^{3}\) Cf. XII, 954 A—C.

\(^{4}\) Cf. v. 498—500.

\(^{5}\) Cf. XI, 914 C—E, 915 C—D; XII, 954 A—E.

\(^{6}\) Cf. B. Haussoullier, Traité entre Delphes et Pellana; see M. Käser, op. cit. 162; J. Partsch, Sav. Z. XLIII Rom. Abt. 578 ff.

\(^{7}\) Cf. M. Käser, op. cit. 161.

\(^{8}\) The following presentation is based on the sources discussed by M. Käser, op. cit. 144 ff.

\(^{9}\) Cf. Lidell-Scott, Greek-English Lexicon I, 741.
should be appointed to stand surety for its exhibition in the further course of judicial proceeding.

If the possessor declined to defend the thing he was punished for theft and the claimant took the thing into his possession. On the other hand, if the possessor decided to defend the thing he could either produce the person from whom he had acquired it (ἀνάγειν) or defend the thing himself (αύτομαχείν) by proving that he had a better right to it than the claimant. He could also prove the acquisition of the thing by prescription.

The defendant was obliged to defend the thing himself if he could not indicate the person from whom he had acquired the thing or when he deemed such a measure unnecessary in view of having other means sufficient to prove his right to the disputed thing.

The actions of indication and summoning for appearance in court of the former possessor of the thing are known in Greek legal sources as άνάγειν έπί τον πρατηρα. We find no information in them in what manner this person could be indicated. From the meaning only of the word άνάγειν we may presume that the defendant would have to transfer the thing to its former possessor who was bound to conduct further defence. The plaintiff could oppose the summoning of the former possessor when the latter was insolvent or was not subject to the same jurisdiction as the plaintiff; or when the former possessor had not the legal capacity to act in court against the plaintiff.

The plaintiff could also contest the former possessor’s right of conducting the defence of the disputed thing or the validity of its purchase by the defendant. He could oppose the summoning of the former possessor on the ground that this action was meant only to delay the recovery of the thing. If the court ruled the validity of one of those objections then only the defendant could proceed with a further defence of the thing.

To protect the rights of the plaintiff the Greek law fixed a strict limit of time during which the former possessor of the thing was to be indicated and summoned, and the default caused the loss of the thing by the defendant.

In the Greek legal sources we find no information whether the former possessor who was summoned by the defendant had a right to indicate and summon his predecessor. Certain texts permit to conjecture that the defendant only was allowed to indicate and summon the former possessor of the disputed thing.
The former possessor might be forced to undertake the defence of the thing by δίκη βεβαιώσεως raised against him by the defendant. If the former possessor was defeated in this lawsuit he had to pay a fine.

By indication and summoning of the former possessor or by undertaking the defence of the thing the defendant (or the former possessor) counterclaimed the plaintiff’s action asserting that he had a better right to the disputed thing. This legal contest was decided by a judicial process (διαδικασία). The defendant or the former possessor defeated in the lawsuit had to return the disputed thing to the plaintiff and was punished for theft.

When the judgement determined which party had a better right to the thing there was no need of opening any execution proceeding because the delivery of the thing in question had already been secured by a surety. If, however, the defendant or the former possessor defended the thing by physical means (έξείλλειν or έξάγειν) and resisted to return it to the successful plaintiff, the latter could not try to recover it by self-help for if he did so the δίκη βιαίων was raised against him. He could raise the δίκη έξούλης and as the successful party recovered the lost thing by self-help.

III

THE LAW OF EGYPT

The most ancient deed which mentions the Egyptian proceeding of recovery of the lost thing comes from the 4-th year of the reign of Pharaoh Psammetic II. The text reads as follows: "I am thy slave.... He who shall come to thee on my account, including any man in the land, saying, 'She is not thy slave', he shall give thee any silver, any corn, that shall please thy heart, I being still thy slave with my children: thou being entitled to take me in any house in which thou shalt find me". The last sentence of the deed testifies that the owner was permitted to look for his slaves in the houses of strangers. However, we find no information, whether the

10 Cf. F. Pringsheim, op. cit. 286 ff.
recovery of the slave was performed in the way of self-help or obtained on the ground of a judicial decision.

The other deeds bear evidence that the claimant declared before the possessor of the disputed thing: „This thing is not thine“ yet we have no evidence if he accompanied this declaration by laying his hand on the disputed thing. Supposition that this act was known by the Egyptian law was based on the text of Pap. Loeb. Nr 4 where we read: „No peasant or any man in the world shall be able to touch my 10 arur. of field“. E. Seidl expressed opinion that the word „sh“ (to touch) used in this papyrus as well as in the other papyri Loeb corresponds strictly to the Babylonian term baqaru which according to this author means: „the extrajudicial seizure of the disputed thing“. Seidl’s opinion is unacceptable because the sources bear no evidence that the act of laying hand on the disputed thing was ever performed in Egypt. Thus the text seems to say simply that no one shall disturb the possessor by laying claims to the field.

Upon the text of Pap. Ryland 8 which reads: „He that shall come to thee on account of her to take her from thee saying ‘She is not thy cow’, I am he that will clear her for thee. If I do not clear her for thee I shall give thee a cow of her kind“ we may assume that the possessor of the disputed thing was able to summon to court the vendor of this thing. The latter was bound to „clear up“ the thing from any charges of other parties, and to a compensation or indemnity in case of eviction.

It is certain that the defendant was free to decide whether he would himself defend the disputed thing or retire from the action by producing in court the vendor of this thing. This is clearly stated in the Pap. Eleph. 12 (245 B.C.) from which we learn that

3 Cf. F. L. Griffith, op. cit. 53, 59; M. San Nicolò, Schlussklauseln 168 note 71.
6 Cf. Pap. Loeb. 4, 24; 5, 23; 6, 26; 11, 23; 16, 6, 17, 25; 22, 14.
7 Cf. E. Seidl, op. cit. 299.
8 Cf. F. L. Griffith, op. cit. 59.
11 K. Sethe — J. Partsch, op. cit. 752 ff.
a woman of the name Tahapis laid claim to the real estate being in possession of another woman called Timsetheus. Timsetheus summoned to court the vendor of the real estate for whom appeared as his surety a woman called Tastis. The latter won the lawsuit. The claim of Tahapis was defeated and Tastis obtained the judicial confirmation of the rights of Timsetheus.

It is certain that if the possessor decided to defend the disputed thing himself, the vendor was bound to assist him in defence, i.e. he had to provide necessary testimony or attest by oath the truth of the defendant’s statement.

As we see the above described proceeding contains no penal elements and aims only at the recovery of the lost thing by the claimant.

In the Greco-Egyptian law from the times of Ptolemaic dynasty the possession was protected by law in such cases only when the possessor could claim the legal grounds of acquisition (δίκαιον) as for instance by purchase, inheritance or usucapio.

If the possessor was deprived of his movable by force (ἐνθυπόθεσις) or was threatened to lose it by unjustified claims (ἄντιποιμιούμενος δίκαιος) of another person, the parties were bound to produce in court their legal titles to the possession of the disputed thing. The defendant retired from the action if vouched for his warrantor.

As to the question if the Greco-Egyptian law had known the extrajudicial seizure by laying hand on the disputed thing we can establish that in the Ptolemaic papyri dealing with the sale of slaves occurs the term ἐπάφη and ἀνέπαφος. According to B. Kübler they meant a claim laid by the third person which tended to retrieve the movable by eviction. In his opinion the term ἀνέπαφος is synonymous with the term ἀνέφαπτος which occurs in

13 Cf. J. Partsch, op. cit. 308.
18 Cf. B. Kübler, Sav. Z. XXIX Rom. Abt. 474.
19 Cf. F. Preisigke Wb. s.v.
20 Cf. op. cit. 475. See however F. Pringsheim, op. cit. 465 ff.
Greek inscriptions and denotes a thing free from claims of the third person.

It must be stressed here that self-help played a very important part in Ptolemaic Egypt\textsuperscript{21}. Yet analogically to its history in Greece it was relinquished in general; its application being permissible in certain special cases and prohibited in all others. And thus the Ptolemaic law on the whole prohibited the use of self-help for recovery of movables and immovables, admitting though several exceptional cases.

In the first of them the master of run-away slaves was given a right to capture and lead them back to his house\textsuperscript{22}. Another instance of self-help is found in the Alexandrian law\textsuperscript{23} ruling the space which had to be left between neighbourly buildings. The infraction of this law (when a house was built too close to another and its owner did not demolish it upon the demand of his neighbour) permitted the plaintiff to pull the building down. Also under the Ptolemaic revenue law\textsuperscript{24}, if the tax collectors delayed their cooperation with the cultivators of the vineyards the latter should act without their permission and gather grapes and make wine. This law explicitly exempted the cultivators from any kind of penalty.

Apart from these regulations the use of self-help was authorised by contracts with inserted clauses under which the purchaser had a right to seize the acquired goods\textsuperscript{25}. This usage was almost universal in Ptolemaic Egypt.

From numerous tenure contracts we may gather that the tenants were allowed \textit{άντιεξάγειν τόν είσβιαζόμενον}\textsuperscript{26}. The term \textit{άντιεξάγειν} denoted the defence by means of self-help against a similar action of the other party\textsuperscript{27}. However, we cannot say whether self-help here meant only the application of physical force or whether it was in particular cases limited to symbolic acts preliminary

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\textsuperscript{22} Cf. R. Taubenschlag, \textit{The Law} 83 f.

\textsuperscript{23} Pap. Hal. I, 102.

\textsuperscript{24} Pap. Rev. 25, 15; 30, 13.


\textsuperscript{27} Ibid.
to a lawsuit. For a long time it was believed that a satisfactory explanation was found in the words: "δραξάμενον τῆς γῆς ἀπὸ τῶν ἡρίου" in Grenf. I, 11 col. II 14\textsuperscript{28}. But W. Kunkel\textsuperscript{29} proved that they concerned an oath sworn on a clod of the earth from a disputed piece of land and obviously did not refer to the act of seizure of the disputed thing.

IV

THE CODE OF HAMMURABI

P. Koschaker based his theory of anefang upon the §§ 7,9—13 and 281 of C.H.\textsuperscript{1} From its origin this theory offered many occasions for criticism. Above all P. Koschaker's opinions were not confirmed by any documents of Babylonian legal practice. His theory contained also a very doubtful supposition that the contradictions which apparently occur between some of the above mentioned regulations of C.H. must have resulted from interpolations incompetently introduced by the Babylonian codifiers to whom we owe the redaction of C.H.\textsuperscript{2} The gravest objections against P. Koschaker's theory were raised by G. Boyer\textsuperscript{3} which pointed out that P. Koschaker erroneously interpreted the term mār aui-im and therefore the meaning given by this author to the § 7 C.H. in which this term occurs is also incorrect. If we suppose — asserts G. Boyer — that mār aui-im means filius familias it is then evident that § 7 C.H. refers to a peculiar kind of theft committed on the premises by a member of the household, who was subject either to patria potestas or to the power of the master. In the light

\textsuperscript{28} Cf. L. Mitteis, Sar. Z. XXIII, Rom. Abt. 282 ff.
\textsuperscript{29} Cf. Sar. Z. LI Rom. Abt. 252.
\textsuperscript{1} Cf. P. Koschaker, Rechtsvergleichende Studien zur Gesetzgebung Hammurapis 48 ff. This author translates the text of § 7 C.H. as follows: "Wenn jemand Silber oder Gold oder einen Sklaven oder eine Sklavin oder ein Rind oder ein Schaf oder einen Esel oder was immer von einem Freigeborenen oder dem Sklaven jemandes ohne Zeugen und Vertragsurkunde gekauft oder zur Verwahrung genommen hat, so ist der Betreffende ein Dieb; er wird getötet" (op. cit. 73).
\textsuperscript{2} Cf. P. Koschaker, op. cit. 73 ff.
of G. Boyer's assertions it is easy to understand for what reason § 7 C.H. was placed among other paragraphs that ruled peculiar instances of theft, all classified by the legislator as capital offences. Thus the ingenious argumentation of P. Koschaker concerning the strict connexion of § 7 with § 9 C.H. as well as his opinions concerning interpolations in § 7 C.H. cannot be accepted.

The clauses 9—13 and 281 C.H. concern really the recovery of the unintendedly lost movables but the interpretation of these regulations by Koschaker requires a thoroughgoing revision.

In our opinion the English translation of § 9 C.H. should read as follows: "If someone whose thing has been lost has overtaken (is-sa-ba-at) his lost thing in the hands of another man, (if) he in whose hands the thing has been overtaken said: (A) seller sold (it) to me; I have purchased (it) in the presence of witnesses,—and also the master of the lost thing (be-el-hu-ul-qi-im) said: I will produce the witnesses who know my lost thing,—(if now) the purchaser has brought in the seller who sold (the thing) to him and the witnesses in whose presence he has made the purchase and also the master of the lost thing has brought in the witnesses who know his lost thing, (then) the judges shall consider their declarations. Moreover the witnesses in whose presence the purchase was made and the witnesses who know the lost thing shall declare what they know in the presence of god. And (since) the seller has been the thief, he shall be killed. The master of the lost thing shall take his lost thing. However the purchaser shall take from the house of the seller the silver that he has weighed out."

A semantic analysis of the text shows that the term be-el hu-ul-qi-im appearing in § 9 C.H. may mean either an owner or possessor of a thing and justifies P. Koschaker's opinion that any-

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4 Cf. P. Koschaker, op. cit. 76 ff.; I. M. Diakonov, op. cit. 228 note 7.
one who had suffered an unintended loss of his movable had a right to start the proceeding provided by this regulation.

As to the adequate interpretation of the term *iš-ša-ba-at*, which plays in P. Koschaker's theory a decisive role, this must be said: The meaning of the verb *sabātum* has been recently analysed by G. R. Driver and J. C. Miles who have established that in C.H. this term is used to denote taking and holding property (§§ 30 and 64 C.H.), of catching adulterers *flagrante delicto* (§§ 129—132, 155, 158 C.H.), seizing criminals (§ 109 C.H.) and arresting persons for debt (§ 151 C.H.). Metaphorically it is used to denote disease attacking a person (148 C.H.) and a liability overtaking a debtor (117 C.H.). In the clause 9 C.H. where is said that the owner *issabat* his lost thing, this term may be understood to mean a formal claim to the thing by laying hand on it and declaring, „This is mine”. This is the meaning given to *issabat* by P. Koschaker. Nevertheless G. R. Driver and J. C. Miles emphasise that in C.H. appears the verb *baqārum* which is the technical term for claiming property in action. It is then probable that *sabātum* in these clauses of C.H. where it is applied to taking possession of property, has other than this technical sense.

Let us make here the following observations. In order to explain the terminological doubts one may have about the accuracy of P. Koschaker's opinion M. San Nicolò asserted that the verb *baqārum* which appears also in the documents of the Babylonian legal practice and is used for eviction, recourse or judicial *rei vindicatio* denotes in certain cases a special proceeding of recovery of the lost things, the first act of which was the extrajudicial seizure of the thing. According to the opinion of M. San Nicolò the term *baqārum* in the C.H. has this last meaning. This author asserted that *sabātum* denotes the act of seizure of the lost

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6 Cf. P. Koschaker, op. cit. 49 f.
7 Cf. op. cit. 97 ff.
9 P. Koschaker, op. cit. 63 note 18.
thing by the claimant\textsuperscript{13}. In order to demonstrate that his interpretation is correct M. San Nicolò like formerly P. Koschaker has referred to the deed published in RA XIV, 95 which concerns a claim to a real estate\textsuperscript{14}. In this document we read that the judges withdrew the hand of the claimant (\textit{qātam nasāhu}). In our opinion this is not a satisfactory evidence. Firstly it is still doubtful if the act of extrajudicial seizure was ever performed in the cases concerning immovables; secondly the very conception of the claimant’s seizure of a real estate by laying hand on it is untenable. The symbolic seizure is not mentionned by any Babylonian legal source. Much more justified seems to be the opinion that \textit{qātam nasāhu} meant simply dismissal of the claim. The above discussed doubts have led G.R. Driver and J.C. Miles to declare that even now upon our knowledge of Babylonian law it is impossible to establish the precise meaning of the verb \textit{sabātum}\textsuperscript{15}. We see then what scientific value has one of the fundamental elements of P. Koschaker’s theory.

As to the interpretation of the term \textit{sabātum} we dare present the following suppositions. In the C.H. we find a rule which concerns the following of the thief’s trail in order to recover the stolen thing (§ 125 C.H.)\textsuperscript{16}. During this action the robbed person followed not only the thief but also the movable taken by him. In the result of a successful pursuit not only the thief was overtaken but also the thing which was stolen by him. The pursuit of the thing would take place not only immediately but also at some later time after the fact of theft was stated. The document published in RA XI, 177\textsuperscript{17} seems to concern the researches which lasted a long time. One of the fragments of this deed reads: “On account of (X) whom (B)..... received from (Y). (A) had been in quest of her


\textsuperscript{15} Cf. G. R. Driver — J. C. Miles, \textit{op. cit.} 97.

\textsuperscript{16} Cf. G. R. Driver — J. C. Miles, \textit{op. cit.} 240 f. The similar proceeding is found in the law of Israel (Genesis XXI, 17—37). cf. A. Esmein, \textit{Mélanges d’histoire de droit et de critique} 234 ff.

and then had seen her in the house of (B). After that (A) went to the judge (Z)". It is worth mentioning that § 19 C.H. gives to the master of a runaway slave a right to look for him in the houses of strangers and if found—to retake him immediately. Nevertheless it seems that the possibility of the immediate recovery of the slave was limited by a very short term as in Babylonian contracts of sale the seller gives at most for three days the security that the sold slave shall not take flight. The security for a longer time was unnecessary probably for this reason that after the term of three days the buyer could start himself proceeding provided by § 9 C.H. At any rate the act of overtaking of the thing mentioned in § 9 C.H. was the result of the pursuit of the thing. Therefore we can suppose that the word issabat in § 9 C.H. is metaphorically used to denote ascertainment that the lost thing is in illegal possession of a person.

In the further examination of the elements of P. Koschaker's theory we can establish that the C.H. as well as the Babylonian deeds do not contain descriptions of the act of seizure of the disputed thing. However in order to prove the theory of anefang it is necessary to find evidence that the act of seizure of the disputed thing by the claimant was followed immediately by the oral declaration of his claim. M. San Nicolò assumes that these declarations are found in the clauses of the sale-contracts originating from Larsa and Kutalla as well as in the text from the times of Šu-suen from Ur in which is recorded that the claimant had said: "This is my slave". This assumption can not be accepted because the clauses of the contracts from Larsa and Kutalla and the text from the times of Šu-suen do not concern the proceeding of recovery of the unintendedly lost movables. Also these deeds furnish no evidence that the above mentioned declaration was joint with the seizure of the disputed thing. If we apply our interpretation of the term "issabat" the initial fragment of § 9 C.H. shall strictly correspond to the first sentence of the clause 33,1 of Lex Ribarium: "Si quis rem suam cognoverit..." but in § 9 C.H. nothing is said about laying hand on the disputed thing and of
the declaration of the claimant. Moreover it is impossible to decide with all certitude whether the declarations of the parties mentioned in § 9 C.H. were extrajudicial or judicial. The former tenet seems to be more probable. If the claimant met the requirements of § 9 C.H., i.e. if he brought in the witnesses to attest the loss of the movable and the defendant failed to present the vendor of the disputed thing, or the witnesses to his purchase of this thing then the case was ruled by § 10 C.H. which reads: „If (however) the purchaser has not brought the seller who sold (the thing) to him and the witnesses in whose presence he made the purchase (and however) the master of the lost thing has brought in the witnesses who know his lost thing, the purchaser has been the thief, he shall be killed. The master of the lost thing shall take his lost thing”.

The same penalty is decreed for the cases of unjustified claims by § 11 C.H. where we read: „If (however) the master of the lost thing has not brought the witnesses who know his lost thing he is an impostor for he started a calumny, (he) shall be killed”.

The § 12 C.H. concerns the cases when the vendor died and the witnesses only of either party could be produced. The text of this clause reads: „If the seller has gone to the fate the purchaser may take from the house of the seller fivefold claim for that case”. What sum is meant in this rule we learn by comparing § 12 with § 9 C.H. which provides that the defendant who had returned the disputed thing to the claimant should receive out of the vendor’s estate the price he had paid for the thing. It implies then that the sum fixed in § 12 C.H. amounted to five times the price he had paid for the disputed thing.

So far there have been various tentatives, more or less felicitous, yet none satisfactory to explain the true sense of this indemnification. The most convincing seems to be the hypothesis of G. Boyer. This author points that in Babylonian deeds and state correspondence during the reign of Hammurabi we find no evidence

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21 Translation of the clauses 10—12 C. H. by the author of this essay.
that a death sentence was ever passed for an act of theft\textsuperscript{25}. G. Boyer assumed therefore that the death sentence of which we read in § 9 C.H. was passed on the vendor upon the demand of the defendant who was defeated in the lawsuit. The means was thus provided for an eventual agreement between the vendor of the thing and the defendant allowing for the commutation of death penalty for a fine. Such an agreement could not be reached if the vendor died. For this reason—asserts Boyer—in such cases the Babylonian legislator accorded to the buyer the payment out of the deceased vendor’s estate of the sum which the buyer would have obtained for his consent to the commutation of death penalty\textsuperscript{26}. G. Boyer’s assumption becomes all the more correct in the light of § 8 C.H. under which for stealing the cattle or a ship that belonged to the temple, or court, or maškenuum there was generally administered a fine thirty or ten times as high as the value of the stolen movable, and the thief was sentenced to death only when he had no means to pay the fine\textsuperscript{27}.

The provision of the § 12 C.H. is in an obvious contradiction to the principles of Germanic anefang which aimed not only at the recovery of the lost thing but also at the punishment of the thief. This particular character of the discussed clause was fully appreciated by P. Koschaker. He had admitted that § 12 C.H. is not compatible with anefang but simultaneously he put new assertions \textit{a priori} which concerned the interpolations pretendedly introduced by the creators of the Hammurabi’s Code\textsuperscript{28}.

What results could be obtained from a detailed analysis of § 12 C.H.? The vendor of the disputed thing “has gone to his fate”\textsuperscript{29}, i.e. he is dead. In this case the defendant could produce in court only the witnesses in whose presence the purchase was made. Nevertheless the § 10 C.H. rules that the vendor as well


\textsuperscript{26} Cf. \textit{op. cit.} 167 f.

\textsuperscript{27} Cf. \textit{op. cit.} 156.


\textsuperscript{29} Cf. G. R. Driver — J. C. Miles, \textit{op. cit.} 101.
as the witnesses are to be produced in court. If the possessor of the disputed thing could not meet this requirement he was considered a thief. He was bound to deliver the thing to the claimant and run the risk of death penalty, which, as we can suppose with Boyer, was passed on the demand of the claimant. It is then evident that the vendor who failed to appear in court (and the intentional absence was probably the most frequent) exposed the possessor of the thing to the risk of death penalty which he could avoid by paying the claimant a ransom. As we found in the Code of Hammurabi the principles of talion and collective responsibility\textsuperscript{29}, we can assume, that the defeated possessor could sue the heirs of the vendor for the price of the delivered thing and for the ransom paid to the claimant\textsuperscript{30}. The amount of the claim was fixed in C.H. as fivefold the price of the thing. Then the principle of the equality of compensation which appears in § 9 C.H. is here also observed.

An exceptional case when the vendor could not be brought to court is considered in § 281 C.H. which refers to the purchase of slaves in foreign countries: „If they are children of another country, then the purchaser shall declare before the god the money he has paid, and the master of the male or the female slave shall give the money he has paid to the merchant (tamkārum) and (thereby) redeem his male or female slave”\textsuperscript{31}. When the purchase was made in a foreign country and the slave-trader could not therefore produce the vendor in a Babylonian court he declared under oath the price he had paid for the slave. Since it should be unjust towards him (as he was not able either to defend the object of his purchase or to sue the vendor) that he would lose the money laid out for the purchase, it was determined that he should be bound to deliver the slave whose price would then be paid back to him by the claimant\textsuperscript{32}.

The extant sources of Babylonian law provide no information whether the vendor could in turn name his former selling party\textsuperscript{33}.

\textsuperscript{29} Cf. I. M. Diakonov, \textit{op. cit.} 293 ff.; J. Klíma, \textit{op. cit.} 165 ff.


\textsuperscript{31} Translation of § 281 C.H. — from W. F. Leemans, \textit{The Old-Babylonian Merchant} 9 ff.


\textsuperscript{33} Cf. P. Koschaker, \textit{op. cit.} 88 note 6.
The § 13 C.H. rules the absence of witnesses. In this clause we read: „If that man's witnesses are not in the neighbourhood (then) the judges set for him a term up to six months and if within the six months he shall not bring his witnesses, he is an impostor, it shall be necessary that he bears the penalty of that case”.

The interpretation of § 13 C.H. is very difficult. Till yet it is not found any evidence to prove the correctness of P. Koschaker’s opinion that § 13 C.H. concerns the witnesses of the claimant as well as the witnesses of the possessor of the disputed thing. The most convincing seems to be the opinion that § 13 C.H. concerns only the witnesses of the possessor. We should take here into consideration that the §§ 10—13 C.H. are a logically bound whole: the § 10 rules the absence of the vendor and of the witnesses of the possessor; in that case the possessor is a thief (ša-a-ma-nu-um šar-ra-aq id-da-ak); the § 11 rules the absence of the witnesses of the claimant; in that case he is an impostor (sa-ar); the § 12 rules the absence of the vendor only and § 13 (which is the logical continuation of the phrase in § 12 concerning the purchaser) seems to rule the absence of the witnesses of the possessor; in that last case he is (sa-ar) like the claimant in the case of absence of his witnesses. Then the „penalty of that case” is the death penalty similarly as in the § 11.

In the course of time the proceeding provided by the § 9 C.H. gradually grew obsolete and was finally substituted by a new procedure. The claimant and the possessor of the disputed thing made oral declarations in presence of witnesses. These declarations were recorded. Usually the case ended by an agreement, only if it was not reached the parties came to the judges. The latter decided whether the case should be brought into court. Since the possessor of the disputed thing no longer ran the risk of being charged with theft, it was not necessary to make the vendor appear in court. The buyer of the thing was then bound to defend it.

34 Translation of § 13 by Th. J. Meek.
36 Cf. the opinion of G. R. Driver — J. C. Miles, op. cit. 104.
37 Cf. E. Cuq, op. cit. 352 ff.
38 The obligation of the vendor to appear in court was introduced later by the Sassanian law. Cf. Mātikān i hāzār Datestān 5.5—8 and 6.6—9 in Chr, Bart-
himself and the vendor’s responsibility was limited to an indemnity or substitution in the case of eviction\textsuperscript{38}.

\section*{V
THE ROMAN LAW}

The archaic Roman law had known a solemn search of the house whose owner was suspected of theft. Such proceeding under the law of Twelve Tables is summarily described by Gaius\textsuperscript{1}. The offended party \textit{nudus, lício cinctus, lancem habens} was permitted to search the house. If the stolen thing was found, the possessor of it had no right to the defence of it and was considered to be a \textit{fur manifestus}\textsuperscript{2}. Before the enactment of the law of Twelve Tables the robbed party could kill this person on the spot and retake the movable. Probably no earlier law but this of Twelve Tables introduced the amendment to this effect that the robbed party had to lead the person regarded as \textit{fur manifestus} to the competent magistrate. There the offender was sentenced to flogging and delivered to the plaintiff to be his slave for lifetime\textsuperscript{3}. Before the institution of the praetorial \textit{actio furti prohibiti}\textsuperscript{4} whoever opposed a solemn search of his house was also considered to be a \textit{fur manifestus}. It appears that a close connexion must have existed between the actions of \textit{lance et lício quaeerere} and


\textsuperscript{38} Cf. M. San Nicolò, \textit{Beiträge zur Rechtsgeschichte im Bereiche der keilschriftlichen Rechtssquellen}, 206 ff.

\textsuperscript{1} Cf. Gaius, III, § 191, 192, 193; Aul. Gell. N. A., XI, 18, 9; C. Bruns, \textit{Fon-}

\textit{ters} II, 11 f.; Festus P. 117. This proceeding was abolished by \textit{lex Aebutia}. Cf. Aul. Gell. N. A. XVI, 10,8; E. Weiss, \textit{Sav. Z. XLIII} Rom. Abt. 455 ff.; F. de Vi-


and *endoplórae* (i.e. loudly calling the neighbours to come and witness the eventual execution of the *fur manifestus*). The most interesting is the question what proceeding was started when the robbed party discovered the stolen thing after a certain period of time and not by means of a solemn search of the house (as for instance when the owner of the house did not conceal the thing). In the sources of the Roman law we find no answer to the question. It is only possible to make some suppositions founded on the description of *legis actio sacramento in rem* by Gaius.

It is supposed that if the stolen thing was found the robbed party would seize the thing with his one hand and touch it with the rod that he held in the other and declare this was his own property *ex iure Quiritium*. The person in whose possession the thing was found could defend it and try to free himself from an eventual charge of theft. If, however, the possessor declined to defend the thing he was obliged to restore it to the claimant but then he might run the risk of being charged with theft, and might be eventually punished for *furtum nec manifestum*.

Yet when the possessor decided to defend the disputed movable he would have to perform the same act as that performed by the claimant. This would mean that the two parties were contesting between themselves (*manum conserere*) and that either claimed a legal title to the ownership of the disputed thing. The movable could not be obtained by either party through struggling for it, but had to be adjudged by a competent magistrate. He would arrive in the place where the parties contended to hear the case *in iure*. Acting as an arbiter he would order the parties to yield the thing and would decide which of them had a better legal title to it. Then the claimant asked the defendant: *Postulo anne dicás, qua ex causa vindicaveris?*, to which question the other party was bound to give a full and precise answer. In his reply the defendant might assert that the thing was his own and was in his possession since it came to exist, or that it was acquired by pre-

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6 Cf. Inst. IV, 16, 17.
7 Cf. Gaius IV, 16.
scription, or, finally that he might name the person from whom he had it (laudatio auctoris)\textsuperscript{11}.

To this phase of the proceeding seems to refer the legal formula contained in the fragments of the work of Valerius Probus which probably the defendant used when calling upon the third party (from whom he had acquired the thing) to act as his warrantor: _Quando te in iure conspicio postule anne fias auctor_\textsuperscript{12}. Through this formula the defendant might retire from a further defence. It is possible that the proceeding was suspended for a time if the _auctor_ was not present in the place of dispute. For this period of adjournment the magistrate entrusted the movable to one of the parties who in turn had to bring her sureties for the redelivery of the thing.

The calling and appearance of the _auctor_ marked a new phase in the dispute and therefore all the acts had to be performed anew by both parties. It is impossible to decide whether the _auctor_ could in turn summon another _auctor_. It is believed that he could but in view of the then existing economic conditions the number of the summoned was probably very small. Having heard the evidence of both parties the magistrate decided the fate of the disputed thing\textsuperscript{13}.

In that manner the historians of the law endeavour to reconstruct the archaic Roman procedure of the recovery of unintentionally lost moveables. In their opinion this proceeding was an act of legal self-help\textsuperscript{14} strictly bound with the prosecution of theft.

\textsuperscript{12} Cf. Cicero, pro Mar. 12, 26; pro Caec. 19, 54; Aul. Gell., N. A., II, 6, 16; M. Käser, op. cit. 59 ff.
But the above quoted assumptions are not founded on a convincing evidence.

They are the more unacceptable as the *legis actio sacramento in rem* described by Gaius is a judicial proceeding started only by the owner of the thing and concerning exclusively the movables which could be owned *ex iure Quiritium*. Legal self-help is not used in this proceeding the first phase of which took place before the praetor and the second—before the judge appointed by him.

The discussed proceeding is not found also in the classical as well as in the provincial Roman law. In the West Roman vulgar law frequently occurs the term *vindicare* which denotes the extrajudicial recovery of movables and the term *manus iniectio*. The meaning of this last term can be established upon the definition supplied by Servius, the 4-th century grammarian, who writes:... *nam manus iniectio dicitur, quotiens nulla iudicis auctoritate expectata rem nobis debitam vindicamus*.

As to the proceeding of extrajudicial solemn seizure of the unintendedly lost movables we find no informations in the West Roman vulgar law. It seems therefore correct to believe that no such proceeding was known and practised under this law.

CONCLUSION

Our considerations lead us to the conclusion that in Hammurabi's Code as well as in other laws here analysed hardly any evidence is found sufficient to prove the existence of a proceeding similar to the Germanic *anefang*. The likeness of the procedural rules upon which P. Koschaker and his school based the theory of *anefang* proved to be very dubious. It can no longer serve as the foundation for a scientific hypothesis. It is also necessary to point out that P. Koschaker interpreted several regulations of the C.H. not from the point of view of the principles applied by the Babylonian legislator but from the point of view of the principles of Roman law. He committed also another grave error for he assumed that the codifiers of the C.H. had a very imperfect knowledge of the law then in force and of the legal everyday practice

*13* Cf. e.g. C. T. 10, 12, 2; C. T. 9, 42, 15.
and on the other hand he attributed to them the science of the refined methods of codification applied by the experienced lawyers in the times of Justinian. We conclude by emphasising that contrary to the opinion of P. Kscherker anefang appears to be the specific Germanic proceeding in which found their expression the most characteristic features of the Germanic folk laws.

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