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

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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 archetype¹.

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 humanity² 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 movables, and therefore strictly connected with the prosecution of theft. As both the proceedings are exhaustively described in an unusually great number of monographies³ 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.

² Cf. R. Schwartz, *Adolf Bastians Lehre vom Elementar u. Völkergedanken* (1909) 36 f., 48, 55 ff.

³ We mention only as the main sources of information on the subject H. Brunner — C. v. Schwerin, *Deutsche Rechtsgeschichte*, II, 648 ff.; K. Rauch, *Spurfolge u. Anefang in ihren Wechselbeziehungen* (1907) and *Sav. Z.* LXVIII Germ. Abt. 2 ff.; H. Meyer, *Sav. Z.* XXXVII Germ. Abt. 382 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 Ribuarica*⁴ and *Lex Salica*⁵ 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 Ribuarica*⁶: „*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*⁷: *Et si ille super quem intertatur, tertiam manum quaerat, tunc in praesente ambo coniurare debent cum dextera 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*⁸ 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.

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 laws⁹. In 1917 P. Koschaker in his brilliant work „*Rechtsvergleichende Studien zur Gesetzgebung Hammurapis Königs von Babylon*“ expressed the opinion that an analogous institution was in the Babylonian law¹⁰. Finally, M. Kaser came to the similiar conclusion as regards the archaic Roman law¹¹. The theory on the existence in certain ancient and medieval laws of the institutions strictly corresponding to the Germanic *anefang*, strongly supported by Koschaker¹² 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

⁹ Cf. M. Boháček, *Listy filologické* 75, 18 ff.

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“.

¹¹ Cf. *Eigentum und Besitz im älteren römischen Recht* (1943) 56 ff.

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 Parallele 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*¹³ attacked Korschaker's fundamental theses. Critical observations on this subject have been recently expressed by G. R. Driver and J. C. Miles¹⁴.

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

THE RECOVERY OF THE UNINTENDEDLY LOST MOVABLES IN THE PRAVDA RUSSKAYA AND IN THE POLISH LAW OF THE XIII-TH CENTURY

A. Pravda Russkaya

The § 35 of Pravda Russkaya determines that the proceeding of the recovery of movables which were lost unintentionally should commence when „somebody has recognized his thing that was lost or stolen from him, be it a horse, clothes or a beast”¹. Under § 32 and 38 P.R. this procedure could be used for the recovery of slaves².

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. *Conférences faites à l'Institut de Droit Romain en 1941* (1950) 155 ff.

¹⁴ Cf. *The Babylonian Laws I* (1952) 84 ff., 97 note 1.

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 theft³. 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*⁴. 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*⁵. 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 thing⁶.

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.⁷ After the expiration of

³ P. R. II, 569, a. 77.

⁴ P. R. II, 360.

⁵ P. R. II, 365.

⁶ Ibid. 368. Cf. A. Yakovliv, *Jahrbücher f. Geschichte Osteuropas* I, 39 ff. The term: „*žimání*” and „*jetí*” in the *Rožmberská kn.* (144, 145, 147, 148, 209) and in the *Řád práva zem.* (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 claimant took the thing and the unsuccessful warrantor had to pay for „whatever was lost with this chattel” as well as he was considered guilty of theft. If a horse was lost, the unsuccessful warrantor 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 unsuccessful 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 confines 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 claimant 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 prince¹¹. 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 fine¹². 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 market¹³.

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 1529¹⁴.

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 claimant¹⁵.

B. The Polish law of the XIII-th century

The Book of Elbing¹ 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

¹¹ P. R. II, 381, a. 33.

¹² P. R. II, 378, a. 37.

¹³ Cf. A. Yakovliv, *op. cit.*, 41 f.

¹⁴ Cf. *Zbiór praw litewskich* (1841) 376 ff., rubr. XIII.

¹⁵ Cf. A. Yakovliv, *op. cit.* 45 f.

¹ Cf. A. Helcel, *Starodawne prawa polskiego pomniki* (1870) II, 19 ff.

until he is taken who has done injury", and the clause IX supplements 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 following 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 *anevangen*³.

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 Polish legal source⁴ we learn that it must have been the seizure of the thing (*detentatio*). But this *detentatio* was not an extrajudicial 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 person 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

² R. Taubenschlag, *Proces polski XIII i XIV w.* 89.

³ *The Book of Elbing*, c. XI. Cf. H. Meyer, *Sav. Z.* XXXVII Germ. Abt. 449 note 5; R. Taubenschlag, *op. cit.* 89 ff.

⁴ *Cod. dipl. Min. Pol.* II Nr 439 (A.D. 1253): „*bona eorum per detentationes quae aneank nuncupatur...*

⁵ 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. Taubenschlag⁶ 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 fine⁷.

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 Ages⁸.

II

THE GREEK LAW

In the Greek law¹ the recovery of the unintendedly lost movables 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 (ἀπαγωγῆ), the stolen thing was to be brought to court as well. In Athens

⁶ *Op. cit.* 91.

⁷ *The Book of Elbing*, c. XI in fine.

⁸ Cf. P. Laband, *Vermögensrechtl. Klagen n. d. sächs. Rechtsquellen d. Mittelalters*, 70 ff.; H. Meyer, *Sav. Z. XXXVII* Germ. Abt. 464 ff.

¹ Cf. M. Kaser, *Sav. Z. LXIV* Rom. Abt. 135; F. Pringsheim, *The Greek Law of Sale*, 5 f.

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 party². To recover a stolen thing the search was made of the house of a person suspected of theft (φωρᾶν). The description of this procedure is found in Plato's Laws XII³ 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 Laws⁵, 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. Kaser) have expressed opinion that after the discovery of the thing the claimant performed an extrajudicial seizure of it (ἐφάπτεσθαι) and declared solemnly his claim⁸. This opinion strictly conformable to P. Koschaker's theory of *anefang* proves to be questionable in the light of the analysis of the term ἐφάπτεσθαι. There is no evidence that ἐφάπτεσθαι means the act of the extrajudicial seizure of the thing. On the contrary in the texts cited by M. Kaser 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 εἰς ἐμφανῶν 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

² Cf. M. Kaser, *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. Kaser, *op. cit.* 162; J. Partsch, *Sav. Z.* XLIII Rom. Abt. 578 ff.

⁷ Cf. M. Kaser, *op. cit.* 161.

⁸ The following presentation is based on the sources discussed by M. Kaser, *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 (*αὐτομαχεῖν*) 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 *ἀνάγειν ἐπὶ τὸν πρατῆρα*. We find no information in them in what manner this person could be indicated. From the meaning only of the word *ἀνάγειν* 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 (*ἐξείλκειν* or *ἐξάγειν*) 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 βιαιῶν* was raised against him. He could raise the *δίκη ἐξούλης*¹⁰ 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 II¹. 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"². 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.

¹ F. L. Griffith, *Catalogue of the Demotic Papyri in the Rylands Library at Manchester* vol. III, 19, 56 (Pap. Louvre E 706).

² Cf. M. San Nicolò, *Schlussklauseln d. altbabil. Kauf- u. Tauschverträge* 168 note 71; J. Partsch, *Aus nachgel. u. verstr. Schriften* 306 note 2.

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”³, 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 4⁴ where we read: „No peasant or any man in the world shall be able to touch my 10 arur. of field”⁵. E. Seidl expressed opinion that the word „sh” (to touch) used in this papyrus as well as in the other papyri Loeb⁶ corresponds strictly to the Babylonian term *baqāru*⁷ 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”⁸ 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 eviction⁹.

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 thing¹⁰. This is clearly stated in the Pap. Eleph. 12 (245 B.C.)¹¹ from which we learn that

³ Cf. F. L. Griffith, *op. cit.* 53, 59; M. San Nicolò, *Schlussklauseln* 168 note 71.

⁴ Cf. E. Seidl, *K.K.J.S.* XXV, 298 ff.; P. M. Meyer, *Sav. Z.* LIV Rom. Abt. 352.

⁵ W. Spiegelberg, *Die demotischen Papyri Loeb* 11—14.

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.

⁹ Cf. J. Partsch, *op. cit.* 307 ff.; K. Sethe — J. Partsch, *Demotische Urkunden* 755.

¹⁰ Cf. J. Partsch, *op. cit.* 307 ff.

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 Timsetheus¹².

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 statement¹³.

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 (*δικαιον*)¹⁴ as for instance by purchase, inheritance or *usucapio*.

If the possessor was deprived of his movable by force (*εἰσβιάζεσθαι*) or was threatened to lose it by unjustified claims (*ἀντιποιούμενος ἀδικῶς*)¹⁵ 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 action¹⁶ 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 thing¹⁷ we can establish that in the Ptolemaic papyri dealing with the sale of slaves occurs the term *ἐπαφή*¹⁸ and *ἀνέπαφος*¹⁹. According to B. Kübler²⁰ 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

¹² Ibid., 756. Cf. J. Partsch, *op. cit.* 308.

¹³ Cf. J. Partsch, *op. cit.* 308.

¹⁴ Cf. Pap. Tor. 1, VII, 22 = U.P.Z. II, Nr 162.

¹⁵ Cf. J. Partsch, *op. cit.* 307 note 1; M. Kaser, *Sav. Z.* LXIV Rom. Abt. 198 note 202; R. Taubenschlag, *The Law of Greco-Roman Egypt*² 246, note 6.

¹⁶ Cf. R. Taubenschlag, *Sav. Z.* LV Rom. Abt. 279 note 8.

¹⁷ Cf. R. Taubenschlag, *The Law*², 246 note 6.

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 Egypt²¹. 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 house²². Another instance of self-help is found in the Alexandrian law²³ 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 law²⁴, 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 goods²⁵. This usage was almost universal in Ptolemaic Egypt.

From numerous tenure contracts we may gather that the tenants were allowed ἀντιεξάγειν τὸν εἰσβιαζόμενον²⁶. The term ἀντιεξάγειν denoted the defence by means of self-help against a similar action of the other party²⁷. 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

²¹ Cf. R. Taubenschlag, *Arch. d'Hist. du Droit Orient.* IV, 79 ff.; F. Pringsheim, *op. cit.* 286 ff.

²² Cf. R. Taubenschlag, *The Law*² 83 f.

²³ Pap. Hal. I, 102.

²⁴ Pap. Rev. 25, 15; 30, 13.

²⁵ Cf. R. Taubenschlag, *Arch. d'Hist. du Droit Orient.* IV, 83 f.; F. Pringsheim, *op. cit.* 292 ff.

²⁶ Cf. M. Kaser, *Sav. Z.* LXIV Rom. Abt. 198 note 202.

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 ὀρίων” in Grenf. I, 11 col. II 14²⁸. But W. Kunkel²⁹ 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.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 dubious 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.² The gravest objections against P. Koschaker's theory were raised by G. Boyer³ which pointed out that P. Koschaker erroneously interpreted the term *mār awīlim* 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 awīlim* 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

²⁸ 28 Cf. L. Mitteis, *Sav. Z.* XXIII, Rom. Abt. 282 ff.

²⁹ Cf. *Sav. Z.* LI Rom. Abt. 252.

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).

² Cf. P. Koschaker, *op. cit.* 73 ff.

³ Cf. *Articles 7 et 12 du Code de Hammourabi* 162 ff.; G. R. Driver — J. C. Miles, *The Babylonian Laws* I, 82 ff.; I. M. Diakonov, *Viestnik Drievniey Istorii* 3 (1952) 228 note 7, 278, 286; J. Klíma, *Zákony Hammurapiho* 40, 147 f.-

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.⁴ cannot be accepted.

The clauses 9—13 and 281 C.H. concern really the recovery of the unintentionally 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 (*iš-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-qī-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 out⁵”.

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

⁴ Cf. P. Koschaker, *op. cit.* 76 ff.; I. M. Diakonov, *op. cit.* 228 note 7.

⁵ See the much criticised translation of § 9 C.H. by Th. J. Meek in J. Pritchard's *Ancient Near Eastern Texts Relating to the Old Testament* 163 ff. Cf. also P. Koschaker, *op. cit.* 50 note 11 and 63 note 18. In the § 40 of the Code of Bilalama, king of Ešnunna (ca 1936—1927 B.C.) is found a similiar rule: „If a man buys a slave, a slave girl, an ox or any other valuable good but he cannot (legally) establish the seller, he is a thief”. Cf. A. Goetze, *Sumer* IV— 2, 63 ff.; J. C. Miles — O. R. Gurney, *Archiv Orientalni* XVII, 3/4 (*Symbolae Hrozny*, pars II, 174 ff.); W. v. Soden, *ibid.*, 359 ff.; J. Klíma, *Arch. Orient.* XIX, 1/2, 37 ff.; M. San Nicolò, *Stud. et Docum. Hist. et Iur.* XV, 25 f. and XVI, 449; E. Szelcchter, *Les lois d'Ešnunna* 27, 89 f., 112 f.

one who had suffered an unintended loss of his movable had a right to start the proceeding provided by this regulation⁶.

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. Miles⁷ 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.)⁸. 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 *iššabat* 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 *iššabat* by P. Koschaker⁹. Nevertheless G. R. Driver and J. C. Miles emphasise that in C.H. appears the verb *baqārum*¹⁰ 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 thing¹¹. According to the opinion of M. San Nicolò the term *baqārum* in the C.H. has this last meaning¹². This author asserted that *sabātum* denotes the act of seizure of the lost

⁶ Cf. P. Koschaker, *op. cit.* 49 f.

⁷ Cf. *op. cit.* 97 ff.

⁸ Cf. M. Schorr, *Urkunden d. altbabyl. Zivil-u. Prozessrechts* 549; J. G. Lautner, *Die richterl. Entscheidung u. d. Streitbeendigung im altbabyl. Prozessrechte* 12 ff.; A. Walther, *Das altbabyl. Gerichtswesen* 13², 213⁴.

⁹ P. Koschaker, *op. cit.* 63 note 18.

¹⁰ The §§ 118, 185, 187 and 188 C. H. Cf. J. G. Lautner, *op. cit.* 6 ff.

¹¹ Cf. M. San Nicolò, *Schlusskl. d. altbabyl. Kauf u. Tauschverträge* 138 ff.

¹² Cf. M. San Nicolò, *op. cit.* 165 ff.; E. Seidl, *K.V.J.S.* XXV, 229 ff.; E. Cuq, *Études sur le droit babylonien* 352 f.

thing by the claimant¹³. 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 estate¹⁴. In this document we read that the judges withdrew the hand of the claimant (*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 mentioned by any Babylonian legal source. Much more justified seems to be the opinion that *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 *sabātum*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 *šabātum* 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.)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, 177¹⁷ 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

¹³ Cf. M. San Nicolò, *op. cit.* 165 f.; P. Koschaker, *Babyl.-Assyr. Bürgerschaftsrecht* 18.

¹⁴ Cf. M. San Nicolò, *op. cit.* 169; P. Koschaker, *Babyl.-Assyr. Bürgerschaftsrecht* 20, 24 f.; E. Cuq, *op. cit.* 205; P. Koschaker — A. Ungnad, *Ham-mur. Gesetze* VI, nr 1757.

¹⁵ Cf. G. R. Driver — J. C. Miles, *op. cit.* 97.

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

¹⁷ Cf. J. G. Lautner, *op. cit.* 11 f.; P. Koschaker — A. Ungnad, *Ham-mur. Gesetze* VI, 14 f. nr 1759.

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 flight¹⁸. 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 *iššabat* 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"¹⁹. 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 „*iššabat*” the initial fragment of § 9 C.H. shall strictly correspond to the first sentence of the clause 33,1 of *Lex Ribuarica*: „*Si quis rem suam cognoverit...*” but in § 9 C.H. nothing is said about laying hand on the disputed thing and of

¹⁸ Cf. M. San Nicolò, *op. cit.* 210 ff. See however I. Mendelsohn, *Slavery in the Ancient Near East* 61 f.; A. Ungnad, *O.L.Z.* X, 143a.

¹⁹ Cf. M. San Nicolò, *op. cit.* 106 f. Inv. Tabl. Tello III, 6439 — T. D., *RA* X, 95, 5.

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 probable²⁰. 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”²¹.

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 thing²².

So far there have been various tentatives, more or less felicitous, yet none satisfactory to explain the true sense of this indemnification²³. The most convincing seems to be the hypothesis of G. Boyer²⁴. This author points that in Babylonian deeds and state correspondence during the reign of Hammurabi we find no evidence

²⁰ Cf. G. R. Driver — J. C. Miles, *op. cit.* 97 f.

²¹ Translation of the clauses 10—12 C. H. by the author of this essay.

²² Cf. P. Koschaker, *Studien z. Gesetzgebung Hammur.* 95 f.; G. R. Driver — J. C. Miles, *op. cit.* 100.

²³ Cf. P. Koschaker, *op. cit.* 97 ff.; M. San Nicolò, *op. cit.* 180 ff.

²⁴ Cf. *Articles 7 et 12 du Code de Hammourabi* 155 ff.

that a death sentence was ever passed for an act of theft²⁵. 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 penalty²⁶. 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 *muškenum* 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 fine²⁷.

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 *a priori* which concerned the interpolations pretendedly introduced by the creators of the Hammurabi's Code²⁸.

What results could be obtained from a detailed analysis of § 12 C.H.? The vendor of the disputed thing „has gone to his fate”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

²⁵ *Op. cit.* 157. Cf. the opinion of M. Schorr, *op. cit.* 350 and the document nr 12 from Nuzi in *HSS IX*; M. San Nicolò, *Stud. et Docum. Hist. et Iur.* XVI, 450 f.; P. Koschaker, *Zeitschr. f. Assyrol.* IX, N. F., 198; G. R. Driver — J. C. Miles, *op. cit.* 104 f.

²⁶ Cf. *op. cit.* 167 f.

²⁷ Cf. *op. cit.* 156.

²⁸ Cf. *Stud. z. Gesetzgeb. Hammur.*, 98 ff. See the critical notes of G. Boyer, *op. cit.* 165 ff. and of G. R. Driver — J. C. Miles, *op. cit.* 98 ff.

²⁹ Cf. G. R. Driver — J. C. Miles, *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^{29a}, 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 claimant³⁰. 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”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 claimant³².

The extant sources of Babylonian law provide no information whether the vendor could in turn name his former selling party³³.

^{29a} Cf. I. M. Diakonov, *op. cit.* 293 f.; J. Klíma, *op. cit.* 165 f.

³⁰ Cf. G. R. Driver — J. C. Miles, *op. cit.* 100 f.; G. Boyer, *op. cit.* 165 ff.

³¹ Translation of § 281 C. H. — from W. F. Leemans, *The Old-Babylonian Merchant* 9 ff.

³² Cf. P. Koschaker, *op. cit.* 86 ff.; W. F. Leemans, *op. cit.* 9 ff.; I. M. Diakonov, *op. cit.* 279.

³³ Cf. P. Koschaker, *op. cit.* 88 note 6.

The § 13 C.H. rules the absence of witnesses³⁴. 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 thing³⁵. 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 § 11³⁶.

In the course of time the proceeding provided by the § 9 C.H. gradually grew obsolete and was finally substituted by a new procedure³⁷. 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^{37a}. The buyer of the thing was then bound to defend it

³⁴ Translation of § 13 by Th. J. Meek.

³⁵ Cf. P. Koschaker, *op. cit.* 99 f.; G. R. Driver — J. C. Miles, *op. cit.* 101 ff.

³⁶ Cf. the opinion of G. R. Driver — J. C. Miles, *op. cit.* 104.

³⁷ Cf. E. Cuq, *op. cit.* 352 f.

^{37a} 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 eviction³⁸.

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 Gaius¹. The offended party *nudus, licio cinctus, lance m 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 *fur manifestus*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 *fur manifestus* to the competent magistrate. There the offender was sentenced to flogging and delivered to the plaintiff to be his slave for lifetime³. Before the institution of the praetorial *actio furti prohibiti*⁴ whoever opposed a solemn search of his house was also considered to be a *fur manifestus*. It appears that a close connexion must have existed between the actions of *lance et licio quaerere*

holomae's, *Zum sassanidischen Recht* II, 42 ff. (Heidelb. Sitzungsber. 14 Abh. 1918); M. San Nicolò, *Schlussklauseln* 195. This principle transferred from the Sassanian law is found in the Syriac lawbook of archbishop Jesubocht. Cf. R. Taubenschlag, *Sav. Z.* XLV, Rom. Abt. 507.

³⁸ Cf. M. San Nicolò, *Beiträge zur Rechtsgeschichte im Bereiche der keilschriftlichen Rechtsquellen*, 206 ff.

¹ Cf. Gaius, III, § 191, 192, 193; Aul. Gell. N. A., XI, 18, 9; C. Bruns, *Fontes*⁷ II, 11 f.; Festus P. 117. This proceeding was abolished by *lex Aebutia*. Cf. Aul. Gell. N. A. XVI, 10, 8; E. Weiss, *Sav. Z.* XLIII Rom. Abt. 455 ff.; F. de Vischer, *La procedure d'enquête „lance et licio” et les actions „concepti” et „oblati”* 4 f.; A. Esmein, *op. cit.* 237 ff.

² Gaius, III § 192; Aul. Gell. N. A. XI, 18, 9—10. On *furtum manifestum* cf. F. de Vischer, *Rev. Hist. de Droit Français et Etrang.* I (1922) 442 ff.

³ Gaius, III § 189; Aul. Gell. N. A. XI, 18, 8. Cf. M. Wlassak, *Sav. Z.* XXV Rom. Abt. 95 ff.

⁴ Gaius, §§ 188, 192. Cf. M. Kaser, *Eigentum u. Besitz im älteren römischen Recht* 37.

and *endplorare* (i. e. loudly calling the neighbours to come and witness the eventual execution of the *fur manifestus*)⁵.

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 Gaius⁶.

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 claimant⁷. This would mean that the two parties were contesting between themselves (*manum conserere*)⁸ 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 magistrate⁹. 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 dicas, qua ex causa vindicaveris?*, to which question the other party was bound to give a full and precise answer¹⁰. 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-

⁵ Cf. M. Kaser, *op. cit.* 38 ff.; F. Wieacker, *Münchener Beiträge* XXXIV, I, 129 ff.

⁶ Cf. Inst. IV, 16, 17.

⁷ Cf. Gaius IV, 16.

⁸ Cf. Aul. Gell. N. A. XX, 10, 7—9.

⁹ Cf. R. Düll, *Sav. Z.* LIV, Rom. Abt. 98 ff.

¹⁰ Cf. M. Kaser, *op. cit.*, 83 ff.

scription, or, finally that he might name the person from whom he had it (*laudatio auctoris*)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 postulo anne fias auctor*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 thing¹³.

In that manner the historians of the law endeavour to reconstruct the archaic Roman procedure of the recovery of unintentionally lost movables. In their opinion this proceeding was an act of legal self-help¹⁴ strictly bound with the prosecution of theft.

¹¹ Cf. M. Kaser, *op. cit.*, 58 ff.; U. v. Lübtow, *Festschr. f. Schulz* I, 263 ff.

¹² Cf. Cicero, *pro Mur.* 12, 26; *pro Caec.* 19, 54; Aul. Gell., *N. A.*, II, 6, 16; M. Kaser, *op. cit.* 59 ff.

¹³ Cf. Kaser, *Münchener Beitr.* 34, I, 106 ff. Several authorities on the subject maintain that the magistrate ordered both parties to prove their claim by an ordeal and that the *sacramentum* was introduced as a substitution of the ordeal by a pecuniary wager. Cf. H. Lévy-Brühl, *Studi Bonfante* III, 81 ff.; R. Düll, *Sav. Z.* LVIII Rom. Abt. 17 ff.; M. Kaser, *Das altrömische ius* 18 ff.; R. Dekkers, *Rev. Int. d. Droits de l'Antiquité* I 55 ff.; M. San Nicolò, *Babyl. Rechtsurk.* I, 147. Contrary opinions are held by I. Luzzatto, *Stud. et Docum. Hist. et Iur.* XV, 296 and P. de Francisci, *ibid.* XVI, 392.

¹⁴ *Vindicare* = to retake. Cf. H. W. Munderloh, *Z.R.G.* XIII, 485 ff.; P. Krüger, *Zur Gesch. d. capitis deminutio*, 164 ff.; H. Meyer, *Sav. Z.* XXXVII, Germ. Abt. 491 ff.; M. Kaser, *Eigentum u. Besitz* 50 ff.; P. Koschaker, *Sav. Z.* LXIII, Rom. Abt. 466 ff.; H. Lévy — Brühl, *Rev. Int. d. Droits de l'Antiq.* VI, 83 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 movables¹⁵ and the term *manus iniectio*¹⁶. 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*¹⁷.

As to the proceeding of extrajudicial solemn seizure of the unintentionally 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

¹⁵ Cf. E. Levy, *West Roman Vulgar Law* 210 ff.

¹⁶ Cf. e. g. C. T. 10, 12, 2; C. T. 9, 42, 15.

¹⁷ C. Bruns, *Fontes*⁷ II, 78. Cf. E. Levy, *op. cit.* 213 f.

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 Justinian¹. We conclude by emphasising that contrary to the opinion of P. Koschaker *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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¹ Cf. G. Boyer, *De la science juridique et de la methode dans l'ancienne Mésopotamie* 5 ff.; G. Furlani, *Stud. et Docum. Hist. et Iur.* (1940) I, 175; I. M. Diakonov, *op. cit.* 228 note 7.