

היו בודקין פרק חמישי

משנה א: היו בודקין אותו בשבע הקירות באי זו שבוע באי זו שנה באי זה חדרש בכמה בחדש באי זה יום באי זו שעה באי זה מקום. רבי יוסי אומר באי זה יום באי זו שעה באי זה מקום מפירין אתם אותו והתרייתם בו. העוֹבֵד עֲבוֹדָה זָרָה אֶת מָה עֲבַד וּבִמָּה עָבַד:

⁰**Mishnah 1:** They were investigating him in seven ways¹: In which Sabbatical period, in which year², in which month, which day of the month, which day, which hour, at which place³? Rabbi Yose said, which day, which hour, which place⁴, do you recognize him, and did you warn him⁵? If one worshipped idols, what did he worship and how did he worship⁶?

0 For this Chapter and the next, there exists a Genizah text, published by M. Assis in *Tarbiz* 47 (1977) 29-90, 321-329, compared to the Leiden text. Additions from this text will be denoted G.

1 The number seven may be taken from Roman law, formulated in Quintilian's hexameter which enumerates the questions to be answered in a trial: *Quis, quid, ubi, quibus auxiliis, cur, quomodo, quando?* "Who? What? Where? By means of what? For what purpose? How? When?" But questions 4,5,6 are reserved for cross-examination, not investigation (cf. Chapter 4, Note 1) (E. G.).

2 In the Sabbatical period. It is clear from this Mishnah that for capital crimes there is no statute of limitations.

3 The Mishnah is a direct continuation of the preceding Chapter. Testimony is acceptable in court only if given under the possible penalties of perjury. But the only

way the biblical penalties can be imposed is that the witnesses are proven not to have been at the indicated place of the crime at the time indicated. Therefore, exact determination of time and place are prerequisites to the trial.

4 He has only three questions before the actual crime is investigated.

5 A conviction in biblical law is possible only if criminal intent is proven. This is provable only by two witnesses who testify that they saw the defendant intent on committing a crime and informed him that his intended action was prohibited and that he exposed himself to such and such penalties.

6 Actions which imitate worship of Heaven or are specific for a certain deity are capital crimes; any other actions are punishable only by whipping or not at all (Mishnah 7:12).

22c line 55) **הלכה א:** **היו בודקין אותו בשבע חקירות כול.** ולא תנינן. באי זה יובל. שאין הדבר מצוי. אשכח תני. רבי שמעון בן יוחי אומר. אף באי זה יובל. וקיימונה בהוא דעאל ובהוא דנפק.

Halakhah 1: “They were investigating him in seven ways,” etc. But we did not state, in which Jubilee period? For that is not current⁷. It was found stated: Rabbi Simeon ben Iohai says, also in which Jubilee period⁸? We confirmed that in a year which started or concluded [a Jubilee period]⁹.

7 Since the Jubilee was not observed during Second Temple times (cf. *Ševi`it* 1:1 Note 7, *Qiddušin* 1:2 Notes 190-191) except possibly for the determination of Sabbatical periods, one cannot assume that the witnesses were able to determine the year by its position in a Jubilee period.

8 Cf. Babli 40b.

9 At least during the existence of the Temple, close to the beginning or the end of

a Jubilee period everybody can be assumed to be alerted to the change in computation of Sabbatical periods induced by the (not observed) Jubilee. Everybody agrees that after the destruction of the Temple, the determination of the Jubilee period was meaningless. Therefore, the Mishnaïot dealing with procedures in criminal trials are attempts of reconstruction of Hasmonean or even earlier procedures.

22c line 57) מניין לשבע חקירות. תנא שמואל תזקן קומי רבי אחא. ודרשת וחקרת ושאלת היטב והנה אמת נכון. אמר ליה. לא תהא קרא ואזיל אלא ודרשת וחקרת ושאלת היטב והוגד לך ושמעת ושאלת היטב. היטב היטב לגזירה שנה. ליתן [ל] כל-אחת ואחת שמועה שאלה דרישה וחקירה. רבי יצחק מקשי לה. הוון תפיסין בחד ליסטיס דטיבריא אמרין. קדון קטול קדון קטל. ומניין לזה שבע חקירות. איסי אומר. כל-זמן שאילו העדים יכולין להזדמם על אותו העדות אין ההורג נהרג.

From where the seven investigations? Samuel the Elder stated before Rabbi Aha: *You shall inquire, investigate, ask in depth, and behold, the matter is well founded*¹⁰. He told him, this verse does not work¹¹; but: *you shall inquire, investigate, ask in depth; it will be told to you, you shall listen, ask in depth*¹². In depth, in depth for an equal cut, to require in each case listening, asking, inquiry, and investigation¹³. Rabbi Isaac asked about this: If they caught an armed robber in Tiberias and said, this is the murderer, this is the murdered; why does this need seven investigations¹⁴? Issi said, any time that the witnesses could not be proven perjured, the murderer cannot be executed on that testimony¹⁵.

10 *Deut.* 13:15. The judicial inquiry is described by seven words.

11 At least another word has to be added to reach the next dividing accent; stopping at נָכוֹן is unjustified. On the other hand, the two words דְּרֶשֶׁת הִטָּב represent a single notion.

12 *Deut.* 17:4.

13 Both verses 13:15 and 17:4 mention five notions each of inquiry; eliminating the words appearing twice one is left with seven

different words. Babli 40a, *Sifry Deut.* 93.

14 Is the situation not obvious?

15 Since perjured witnesses in a capital case can be executed if it was shown that they could not have seen the act since at the pretended time they were at another place, a criminal trial can proceed only if the witnesses can be made to testify about the exact time and place where the observed criminal act took place.

22c line 65) מְכִירִין אֹתָם אוֹתוֹ. מָה הָיָה. גוֹי הָיָה אוֹ יִשְׂרָאֵל הָיָה. נִשְׁמָעִינָה מִהֶדָּא דְּמַר רַבִּי יוֹחָנָן. נִהְרַג מִטִּיבְרָא לְצִיפּוֹרִי חֲזָקָה שֶׁיִּשְׂרָאֵל הָיָה.

“Do you recognize him?” Who was he, a Gentile¹⁶ or an Israel? Let us hear from what Rabbi Johanan said: If he was slain between Tiberias and Sepphoris, it is *prima facie* evidence that he was an Israel¹⁷.

16 Then it would be a case for the king's court, not the Sanhedrin.

17 In order to remove the case to a police court, the defendant would have to prove

that the slain person was a Gentile. As a practical matter, an unknown corpse found on the road between Tiberias and Sepphoris is a *corpse of obligation* (*Nazir* 7:1).

22c line 67) הִתְרִיתֶם בּוֹ. מַנִּיין לְהִתְרִיָּה. רַבִּי שְׁמוּאֵל בְּרַ נְחֻמֶּן בְּשֵׁם רַבִּי יוֹנָתָן. וְאִישׁ אֲשֶׁר־יִקָּח אֶת־אֲחֹתוֹ. חֲסֵד הוּא. אָמַר רַבִּי בּוּן. קָזַן נָשָׁה אֲחֹתוֹ. הִבֵּל נָשָׁה אֲחֹתוֹ. חֲסֵד עֲשִׂיתִי עִם הָרָאוּשִׁים שֶׁיִּבְנֶה עוֹלָם מֵהֵן. כִּי־אֲמַרְתִּי עוֹלָם חֲסֵד יִבְנֶה.

תָּנִי. רַבִּי שְׁמַעוֹן בֶּן יוֹחִי אוֹמֵר. עַל־פִּי | שְׁנַיִם עֲדִים יוֹמֵת הַמֶּת. [וְכִי] הַמֶּת מֵת. אֶלָּא לְהוֹדִיעוֹ בָּאִי זֶה מֵיִתָּה מֵת. תָּנִי. רַבִּי יוֹדָה בִּירְבִּי אֶלְעָאִי אוֹמֵר. וְכִי־גִזַּד אִישׁ עַל־רֵעֵהוּ לְהוֹרְגוֹ בְּעֶרְמָה. שֶׁיִּעְרִמוּהוּ בָּאִי זֶה מֵיִתָּה מֵת.

הָיְתָה מֵיִתָּתוֹ בְּחִמּוּרָה וְהָתֵרוּ בּוֹ בְּקֻלָּה. יָכִיל מִימֵר. אֵילוּ הָיָה יָדַע שֶׁמֵּיִתָּתוֹ בְּחִמּוּרָה לֹא הָיָה עֹבֵד הָדָא מִלֵּתָא. הָיָה מֵיִתָּתוֹ בְּקֻלָּה וְהָתֵרוּהוּ בּוֹ בְּחִמּוּרָה. עַל דְּעִתִּיהָ דְּרַבִּי יוֹדָן בִּירְבִּי אֶלְעָאִי שֶׁיִּעְרִמוּהוּ בָּאִי זֶה מֵיִתָּה מֵת.

הָיוּ מִתְרִין בּוֹ וְשׁוֹתֵק. מִתְרִין בּוֹ וּמְרַכִּין בְּרָאוּשׁוֹ. אִף עַל פִּי שְׁאוּמֵר יוֹדֵעַ אֲנִי. פְּטוֹר. עַד שְׁאוּמֵר. עַל מִנְתָּ כֵּן אֲנִי עוֹשֶׂה. רָאוּהוּ שׁוֹפֵד דָּם. אָמְרוּ לוֹ. הֵי יוֹדֵעַ שֶׁבֶן בְּרִית הוּא וְהִתּוֹרָה אֶמְרָה שֶׁפֶּד דָּם הָאֵלִים בְּאֵדָם דְּמוֹ וְשֶׁפֶד. אִף עַל פִּי שְׁאוּמֵר. יוֹדֵעַ אֲנִי. פְּטוֹר עַד שְׁאוּמֵר. עַל

מִנֶּת כֵּן אֲנִי עוֹשָׂה. רְאוּהוּ מְחַלֵּל שָׁבֵת. אָמְרוּ לוֹ. הֲנִי יוֹדֵעַ שֶׁהוּא שָׁבֵת וְהַתּוֹרָה אָמְרָה מְחַלְלֶיהָ מוֹת יוֹמָת. אַף עַל פִּי שֶׁאָמַר. יוֹדֵעַ אֲנִי. פְּטוּר. עַד שֶׁאָמַר. עַל מִנֶּת כֵּן אֲנִי עוֹשָׂה.

“Did you warn him?” From where warning? Rabbi Samuel bar Nahman in the name of Rabbi Jonathan: ¹⁸*A man who would take his sister . . . , it is hesed. Rabbi Bun said, Cain married his sister, Abel married his sister. It is charitable, I was charitable with the first generations so the world could be inhabited; I said, the world was to be built on hesed*¹⁹.

It was stated: Rabbi Simeon ben Iohai said, *by the mouth of two witnesses shall the dead die*²⁰. Does he die when dead? But to tell him by which kind of death he will be executed.

It was stated: Rabbi Jehudah ben Rabbi Illai said, *and if a man intentionally kill his neighbor knowingly*²¹; they shall inform him by which kind of death he will be executed.

If his death should have been a severe one²² but they warned him about an easy one. He could say that had he known that his death was to be severe, he would not have committed that crime. If his death should have been an easy one but they warned him about a severe one; in the opinion of Rabbi Jehudah ben Rabbi Illai they have to inform him by which kind of death he will be executed²³.

“If they warned him and he remained silent, they warned him and he nodded his head, even if he said, I know, he cannot be prosecuted unless he say: for that purpose I am doing it.²⁴” “If they saw him spilling blood; they told him, know that he is a son of the Covenant²⁵ and the Torah said, *he who spills a man’s blood, by man his blood shall be spilled*²⁶, even if he said, I know, he cannot be prosecuted unless he say: for that purpose I am doing it²⁷.” “If they saw him desecrating the Sabbath; they told him, know that today is Sabbath and the Torah said, *its desecrators shall be put to death*²⁸, even if he said, I know, he cannot be prosecuted unless he say: for that purpose I am doing it²⁹.”

18 Lev. 20:17. In a slightly different setting, this paragraph also is in *Yebamot* 11:1, Notes 25-26. Incest with one’s sister is criminal (although by the earthly court

only punishable by flogging) while it was permitted to earlier generations. Therefore, it cannot be assumed that everybody knows it to be prohibited. People found engaged in

incestuous acts cannot be prosecuted unless before the act informed of its criminality.

19 Ps. 89:3.

20 Deut. 17:6. In the Babli, this is an Amoraic argument. The verse is read as: *by the mouth of two witnesses shall the dead kill himself*, i. e., in the presence of two witnesses he accepts to be killed.

21 Ex. 21:14, Babli 41a. Babli and *Mekhilot* read the verse as freeing the mentally disabled from prosecution.

22 Mishnah 7:1, Note 1.

23 R. Jehudah finds the warning deficient, preventing the imposition of a death

sentence. By contrast, in the Babli, 80b, it is stated as commonly accepted that a warning about a painful death implies the same of an easy one.

24 Tosephta 11:2. Cf. also Note 20.

25 A Jew.

26 Gen. 9:6. The quote seems to be slightly out of place since it is directed at Gentile criminal courts which are not under the severe restrictions imposed at Torah courts.

27 Tosephta 11:4.

28 Ex. 31:14.

29 Tosephta 11:3.

מִשּׁוֹם תּוֹלֵשׁ אוֹ מִשּׁוֹם מְקוֹשֵׁשׁ מִשּׁוֹם מָה מִיַּחֲיִיב. מִשּׁוֹם תּוֹלֵשׁ אוֹ מִשּׁוֹם קוֹצֵר. וְיִשְׁמְעִינָהּ מִהֲדָא. וַיְהִי בְּגִי' יִשְׂרָאֵל בְּמִדְבָּר וַיִּמְצְאוּ. מִלְּמַד שֶׁמִּצְאוּהוּ תוֹלֵשׁ עֲצִים מִן הַשָּׂדֶה.

רַבִּי חִיְיָה בַר גַּמְדָּא שָׁאַל. מְקוֹשֵׁשׁ בְּמָה הֵיא מֵיתָתוֹ. בְּסָקִילָה. וְיִשְׁמְעִינָהּ מִהֲדָא. יוֹדְעִין הֵיוּ שֶׁמְקוֹשֵׁשׁ חַיִּיב מֵיתָה וְלֹא הֵיוּ יוֹדְעִין בְּמָה הֵיתָה מֵיתָתוֹ. אֲשֶׁכַּח תִּנָּא רַבִּי חִיְיָה. הוֹצֵא אֶת-הַמִּקְלָל מִחוּץ לַמַּחֲנֶה. בְּמָה הֵיתָה מֵיתָתוֹ. בְּסָקִילָה.

Rebbi Hiyya bar Gamda asked³⁰: What was the gatherer's guilt? Because of tearing off or because of reaping³¹? Let us hear from the following: *The Children of Israel were in the desert when they found . . .* This teaches that he was tearing wood off the ground³².

Rebbi Hiyya bar Gamda asked: How was the gatherer put to death³³? By stoning. Let us hear from the following³⁴: "They knew that the gatherer should be executed but they did not know how he should be put to death." It was found that Rebbi Hiyya stated: *Take the blasphemer outside the camp*³⁵. How was he put to death? By stoning.

30 His question is about the degree of specificity required in the warning delivered to a person ready to commit a crime punishable by death. Is it sufficient to deliver a general warning as described in the preceding paragraph (Note 27) or does one

have to specify the exact paragraph of the law being violated? In the case of the Sabbath, is it enough to warn a person not to do any work or does he have to be warned about which of the 39 prohibited types of work he is going to perform? The biblical

evidence about the gatherer (*Num.* 15:32-36) shows that the Tosephta was correct in requiring only a general warning.

31 In the list of the forbidden categories of work (*Mishnah Šabbat* 7:2-4) only reaping is mentioned, which means cutting off the produce from its root. All forms of harvesting are forbidden as derivatives of reaping. The question remains whether a warning about tearing off from the ground would also cover reaping; a warning about reaping certainly covers all forms of harvesting.

32 *Sifry Num.* 113.

33 According to R. Jehudah, he could not

be put to death if the specific way of execution was not known even though the fact that violating the Sabbath was known to be a capital crime.

34 *Sifra Emor Parashah* 14(5).

35 *Lev.* 24:14. This proves that from the pentateuchal stories nothing can be inferred for the rules of procedure required at later times. While it was known that a Sabbath infraction was punishable by death (*Note* 28), nothing was known about the penalty for blasphemy. Therefore, the first time these crimes occurred after the epiphany on Sinai, the law was only being formed; it was not yet consolidated (*Babli* 78b).

אֶת מָה עָבַד. לַפְעוֹר אוֹ לַמֶּרְקוּלִיס. בְּמָה עָבְדָהּ. בְּעִבּוּדָתָהּ עָבְדָהּ אוֹ בְּעִבּוּדֵת גְּבוּהָ. נִישְׁמָעִינָהּ מִהֶדָא. מַעֲשֵׂה שְׂבָאוֹ שְׁנַיִם וְאַמְרֵי. רָאִינוּ זֶה עוֹבֵד עֲבוּדָה זָרָה וְאֵין אָנוּ יוֹדְעִין פְּעוֹר הָיָה אוֹ מֶרְקוּלִיס הָיָה. דִּנְיָן אוֹתוֹ בְּשִׁתְיָהּ וּבְאֵי זֶה מִזְדָּכָה פּוֹטְרִין אוֹתוֹ.

“What did he worship?” *Peor* or Mercury³⁶? “And how did he worship?” In its proper worship or the worship of Heaven³⁷? Let us hear from the following: It happened that two [witnesses] came and said, we saw that this one was worshipping idols, but we do not know whether it was *Peor* or Mercury³⁸. One judges him for both and for the one in which he was found innocent one lets him go³⁹.

36 As explained in *Mishnah* 7:12, the worship of *Ba'al Pe'or* was by defecating in front of his statue; the worship of *Mercurius*, the Greek *Hermes*, was by throwing an additional stone on the heap surrounding the *Hermes*, the pillar representing the divinity. Both forms of worship would be an insult if performed for any other idol and, therefore, not punishable.

37 Any imitation of Temple worship for an idol is a capital crime. Any other sort of worship is punishable only if ordinarily it was performed for that idol.

38 Clearly, this is inadmissible testimony.

39 Since the accused must be found innocent of one of two mutually exclusive allegations, one may accept the witnesses by basing a trial on their testimony even if a not-guilty verdict is a foregone conclusion.

(fol. 22c) **משנה ב:** כל המרבה בבדיקות הרי זה משובח. מעשה ודק בן זכאי בעוקצי תאנים. ומה בין חקירות לבדיקות. אלא שבחקירות אחד אומר איני יודע עדותו בטילה. בבדיקות אומר אחד איני יודע ואפלו שנים אומרים אין אנו יודעין עדותו קיימת. אחד חקירות ואחד בבדיקות בזמן שהן מכחישין זה את זה עדותו בטילה:

Mishnah 2: Anybody who adds inquiries⁴⁰ is praiseworthy. It happened that Ben Zakkai⁴¹ cross-examined about fig stalks. What is the difference between investigations and cross-examinations? In investigations, if one said “I do not know”, their testimony is worthless⁴². In cross-examinations, if one said “I do not know”, or even two say “we do not know,” their testimony remains valid⁴³. Both in investigations and cross-examinations, if they contradict one another their testimony is worthless⁴⁴.

40 About the details of the crime which are investigated after time and place have been established.

41 According to the Babli, 41a/b, it is possible that he is Rabban Johanan ben Zakkai. During the time that capital jurisdiction was still in the hands of a Jewish court, not yet in that of the Roman governor, he was not yet the head of the Synhedrion and, therefore, had no title.

42 As testimony which cannot be shown to be perjured.

43 The credibility of the witnesses may be impaired. This is a matter to be decided by the judges, not an absolute obstacle.

44 A conviction requires testimony by two witnesses. If there are conflicting testimonies and the judges believe one of them, no conviction could result since it would be based on the word of one witness alone.

(22d line 18) **הלכה ב:** כל המרבה בבדיקות כול. במה לקטן. בעוקציהן לקטן. במה אכלו. בגלעיניהן.

Halakhah 2: “Anybody who adds inquiries,” etc. How did he pluck them⁴⁵? He plucked them with their stalks. How did he eat them? With their pits⁴⁶.

45 An example of Ben Zakkai’s inquiry; cf. Babli 41a.

46 Referring to olives.

(22d line 19) תמן תנינן. מי שהיו שתי כתי עדים מעידין. אילו מעידין שני שיתים ואילו מעידין שני חמש. בית שמאי אומרים. נחלקה עדותן. אין כאן נזירות. ובית הלל אומרים. יש בכלל חמש שיתים. ויהא נזיר שיתים: רב אומר. בכלל נחלקו. אבל בפרט כל-עמא מודי

נחלקה העדות. ורבי יוחנן אומר. במונה נחלקו. אבל בכולל כל-עמא מודו שיש בכלל חמש שתיים. הידינו כולל והידינו מונה. כולל. אהן אומר תרתי ואהן אומר חמש. מונה. אהן אומר תדא תרתי. ואהן אומר תלת ארבעי.

⁴⁷There, we have stated: “If two groups of witnesses were testifying against a person, one group say that he vowed *nazir* twice, the others say that he vowed *nazir* five times. The House of Shammai say, the testimony is split and there is no *nezirut* there. But the House of Hillel say, five contains two; he should be a *nazir* twice.” Rav said, they differ in the overall testimony. But in detail, everybody agrees that the testimony is split. Rabbi Johanan said, they differ in counting. But in an overall testimony, everybody agrees that five contains two. What is overall and what is counting? Overall, this one says two, the other one says five. Counting, this one says one, two, the other one says three, four.

47 Parallel texts to this and the following paragraphs are in *Yebamot* 15:5

(Notes 115-134) and *Nazir* 3:7 (Notes 110-112).

(22d line 26) רב אומר. הכחיש עדות בתוך עדות לא בטלה העדות. ורבי יוחנן אומר. הכחיש עדות בתוך עדות בטלה העדות. דברי הכל הכחיש עדות לאחר עדות לא בטלה העדות. חיליה דרבי יוחנן מהדא. דמר רבי בא בר חייה בשם רבי יוחנן. הויחזק המונה. זה אומר. מן הכיס מנה. וזה אומר. מן הצרור מנה. הכחיש עדות בתוך עדות אוף רב מודה שבטלה העדות. מה פליגי. בשחיו שתי כיתי עדים. אחת אומרת. מן הכיס מנה. ואחת אומרת. מצרור מנה. הכחיש עדות בתוך עדות בטלה עדות. וקרב לא בטלה עדות. אחת אומרת. לתוך חיקו מנה. ואחת אומרת. לתוך פונדו מנה. דברי הכל הכחיש עדות בתוך עדות לא בטלה העדות. אחד אומר. בסייף הרגו. ואחד אומר. במסל הרגו. הכחיש עדות בתוך עדות אוף רב מודה שבטלה העדות. מה פליגי. בשחיו שתי כיתי עדים. אחת אומרת. בסייף. ואחת אומרת. במסל. הכחיש עדות בתוך עדות בטלה עדות. וקרב לא בטלה עדות. אחת אומרת. לצפון נטה. ואחת אומרת. לדרום פנה. דברי הכל הכחיש עדות לאחר עדות לא בטלה העדות. חיליה דרב מהדא דתינן תמן. רבי יודן ורבי שמעון אומרין. הואיל וזו וזו מודות שאינו קיים ונשא. ולא שמיע דמר רבי לעזר. מודה רבי יהודה ורבי שמעון בעדים. מה בין עדים ומה בין צרה. לא עשו דברי צרה בחבירתה כלום. אמר רבי יוחנן. אין אמרה רבי לעזר מיני שמעה ואמרה. מתניתא פליגא על רב. אחד חקירות ואחד בדיקות בזמן שהן מכחישין זה את זה עדותן בטילה. מה עבד לה רב. אמר רבי מנא. פתר לה רב עד בעד. אמר רבי אבין. אפילו יפתר פת בכת שמיא היא לדיני נפשות. דכתיב צדק צדק תרדוף.

Rav said, if testimony was contradictory in its essence, the testimony is not void. Rabbi Johanan said, if testimony is contradictory in itself, the testimony is void. In the opinion of everybody, if testimony was contradictory in aspects that belong after the fact, the testimony is not void. The strength of Rabbi Johanan is consistent with what Rabbi Abba bar⁴⁸ Hiyya said in the name of Rabbi Johanan, if it was agreed that he counted but one [witness] said, he counted from a wallet, and the other said, he counted from a bundle, that contradicts the essence of the testimony, and Rav will agree that the testimony be void. Where do they disagree? If there were two groups of witnesses, one says he counted from a wallet and the other says he counted from a bundle. That contradicts the essence of the testimony: the testimony is void, but according to Rav, the testimony is not void. One said, he counted into his bosom, but the other said, he counted into his money-belt: everybody agrees that this contradicts the essence of the testimony but the testimony is not void. If one [witness] said, he killed him with a sword, the other [witness] said, he killed him with a mace, that contradicts the essence of the testimony; Rav will agree that the testimony be void. Where do they disagree? If there were two groups of witnesses, one says he killed him with a sword and the other says, he killed him with a mace. That contradicts the essence of the testimony, the testimony is void, but according to Rav, the testimony is not void. One says, he turned to the North and one says, he ran away to the South, everybody agrees that the testimony was contradictory in aspects that belong after the fact, and the testimony is not void. The strength of Rav comes from what we have stated there: "Rabbi Jehudah and Rabbi Simeon say, since both agree that he is not alive they can be remarried." He did not hear that Rabbi Eleazar said, Rabbi Jehudah and Rabbi Simeon concede in the case of witnesses. What is the difference between witnesses and the co-wife? They do not consider the co-wife's words compared to those of her companion. Rabbi Johanan said, if Rabbi Eleazar said this, he said it because he had heard it from me. The Mishnah disagrees with Rav: "Both in investigations and cross-examinations, if they contradict one another their testimony is worthless." What does Rav do with this? Rabbi Mana said, Rav will explain it as referring to single witness against single witness. Rabbi

Abun said, even if you say groups and groups. There is a difference in criminal cases, as it is written: *Justice, justice you shall pursue.*

48 Read with the parallel sources: R. Abba, R. Hiyya.

משנה ג: אָחַד אוֹמֵר בְּשָׁנִים בְּחֹדֶשׁ וְאֶחָד אוֹמֵר בְּשָׁלֹשׁ בְּחֹדֶשׁ עֲדוּתָן קִיָּמָת שְׁזָה יוֹדֵעַ בְּעֵבוּרוֹ שֶׁל חֹדֶשׁ וְזֶה לֹא יָדַע. אָחַד אוֹמֵר בְּשָׁלֹשׁ וְאֶחָד אוֹמֵר בְּחִמְשָׁה עֲדוּתָן בְּטִילָה. אָחַד אוֹמֵר בְּשְׁתֵּי שָׁעוֹת וְאֶחָד אוֹמֵר בְּשֶׁלֶשׁ שָׁעוֹת עֲדוּתָן קִיָּמָת. אָחַד אוֹמֵר בְּשֶׁלֶשׁ וְאֶחָד אוֹמֵר בְּחִמְשׁ עֲדוּתָן בְּטִילָה. רַבִּי יְהוּדָה אוֹמֵר קִיָּמָת. אָחַד אוֹמֵר בְּחִמְשׁ וְאֶחָד אוֹמֵר בְּשֶׁבַע עֲדוּתָן בְּטִילָה שְׁבַחֲמֵשׁ חֲמָה בַּמִּזְרָח וּבְשֶׁבַע בַּמַּעֲרָב:

Mishnah 3: One says, on the second of the month, but the other says, on the third of the month⁴⁹, their testimony may be valid, since one knew about the addition to the month but the other did not know⁵⁰. One says on the third, the other says on the fifth, their testimony is invalid⁵¹. One says, at two hours⁵² but the other said at three hours, their testimony is valid⁵³. One says at three but the other says at five, their testimony is invalid; Rabbi Jehudah says it is valid. One says at five but the other says at seven, their testimony is invalid since at five hours the sun is in the East but at seven in the West⁵⁴.

49 In the investigation of the date on which the alleged crime was committed.

50 In the absence of a published calendar, one cannot assume that everybody knew when a thirtieth day was added to a month. In the published calendar used today, only the eighth and ninth months are variable but the Mishnaic calendar (Babli *Arakhin* 8b-10a) admitted up to four variable months. It is up to the court to determine whether the witnesses intended to testify about one and the same day.

51 Two days' difference cannot be explained away.

52 The time between sunrise and sunset is divided into 12 hours. At all calendar dates, 6 hours is about noontime. At the equinoxes, 2 hours is 8 am, 3 hours 9 am, 5 hours 11 am, 7 hours 1 pm.

53 From people who have no watches.

54 The last statement is needed only for R. Jehudah. R. Jehudah does not accept testimony that differs by two hours in all cases; he notes that daylight between 9 am and 11 am is not very different; but the shadows are quite different between am and pm hours.

(22d line 49) **הלכה ג:** אחד אומר בשנים בחדש כול. עד היקא. רבי יסא בשם רבי יוחנן. עד רוב החדש. אומר רבי יוחנן. כגון העירונין הללו. וחכמים אומרים. אינן כלום. ואמר רבי יסא. כגון אגא דמן יומי לא צלית מוספא דלא ידע אימת ירחא.

Halakhah 3: “One says, on the second of the month,” etc. Until when⁵⁵? Rabbi Yasa in the name of Rabbi Johanan: Up to the greater part of the month⁵⁶. Rabbi Yose said, e. g., those village dwellers⁵⁷. But the Sages say, it is nothing⁵⁸, and Rabbi Yasa said, for example I, who never in my life prayed *musaf*⁵⁹, since I do not know when the month starts⁶⁰.

55 May one assume that people do not know which day of the month a given day is.

56 After the 16th, everybody knows how the month was determined.

57 They have a need to know the day of the week, but not of the month.

58 It is unclear whether the Sages object to the Mishnah or to R. Johanan's statement.

From R. Yasa it seems that they object to R. Johanan.

59 The additional prayer which distinguishes the morning service of the New Moon from the weekday services.

60 He and his colleague Immi (Ammi) never were part of the Academy of Tiberias; it seems that they never were invited to the meetings at which the calendar was determined. This was his way of protesting.

(22d line 52) רבי מאיר אומר. משש שעות ולמעלה מדבריהן. רבי יודה אומר. משש שעות ולמעלה מדברי תורה. מאי טעמא דרבי מאיר. אף ביום הראשון. זה המשה עשר. יכול משתחשף. תלמוד לומר אף חלק. הא כיצד. תן לו שעה אחת קודם שקיעת החמה. מאי טעמא דרבי יהודה. אף ביום הראשון. זהארבעה עשר. יכול כל-היום. תלמוד לומר אף חלק. חציו לחמץ וחציו למצה. מחלקת שיטת רבי מאיר. תמן אומר. אף לרבות. וקא אומר. אף למעט. אמר רבי שמואל בר אבדומי. מיעטו שאינו מחמץ. רבי מאיר אומר. לא-תאכל עליו חמץ. על אכילתו. רבי יהודה אומר. לא-תאכל עליו חמץ. על עשייתו.

רבי יודן אית ליה עשה ולא תעשה על אכילתו. עשה ולא תעשה על ביעורו. עשה על אכילתו. שבעת ימים תאכל-עליו מצות. לא חמץ. כל-לא תעשה שבא מכח עשה עשה הוא. ולא תעשה על אכילתו. לא-תאכל חמץ. עשה על ביעורו. שבעת ימים תשביתו שאר מבתיתכם. לא תעשה על ביעורו. שבעת ימים שאר לא ימצא בביתכם.

הא רבי מאיר אומר. משש שעות ולמעלה מדבריהן. ששית אסורה משום גדר. חמישית למה. משום גדר. ויש גדר לגדר. אלא חמישית מתחלקה בשביעית. מחלקה שיטת רבי יהודה. תמן אומר. אין חמישית מתחלקת בשביעית. וקא אומר. חמישית מתחלקת בשביעית. אמר רבי יוסי. תמן מסור לנשים והן עצילות. הקא הדבר מסור לבית דין והן זריזין. אמר

רבי יוסי בִּירְבִי בֵּן. תִּמְנָן תְּחִילַת חֲמִישִׁית סוּף שְׁבִיעִית. הֲכָא סוּף חֲמִישִׁית תְּחִילַת שְׁבִיעִית.
וְתִנִּי כֹן. תְּחִילַת חֲמִשׁ בְּמִזְרַח וְסוּף שְׁבַע חֲמָה בְּמַעֲרָב. לְעוֹלָם אֵין חֲמָה נוֹטָה לְמַעֲרָב
אֲדָא בְּסוּף שְׁנַע.

⁶¹Rebbi Meïr says, from noontime on it is from their words; Rebbi Jehudah says, from noontime on it is biblical⁶².

What is Rebbi Meïr's reason? *Only on the first day*⁶³, that is the fifteenth⁶⁴. I could think at nightfall; the verse says *only*, to separate⁶⁵. How is this? Give it one hour before sundown⁶⁶.

What is Rebbi Jehudah's reason? *Only on the first day*⁶³, that is the fourteenth. I could think the entire day; the verse says *only*, to separate. Half for leavened matter, half for *mazzah*.

Rebbi Meïr's argument seems inverted. There, he said *only* to add; here he said *only* to diminish⁶⁷. Rebbi Samuel bar Eudaimon said, he diminished, lest it be for⁶⁸ leavened matter.

Rebbi Meïr said, *do not eat leavened matter with it*⁶⁹, while it is eaten. Rebbi Jehudah said, *do not eat leavened matter with it*, while it is prepared⁷⁰.

Rebbi Jehudah has both a positive and a negative commandment concerning its eating⁷¹, a positive and a negative commandment concerning its⁷² removal. A positive commandment concerning its eating, *seven days you shall eat unleavened bread for it*⁶⁹, not leavened. Any prohibition which is implied by a positive commandment has the status of positive commandment⁷³. A negative commandment concerning its eating, *do not eat leavened*⁷⁴. A positive commandment concerning its removal, *seven days . . . you shall remove sour dough from your houses*⁶³. A negative commandment concerning its removal, *for seven days sour dough shall not be found in your houses*⁷⁵.

Now Rebbi Meïr says, after noontime it is forbidden because of their words. The ⁷⁶(sixth) [seventh] hour it is forbidden because of a fence. Why the (fifth) [sixth]? Because of a fence. Is there a fence around a fence? But the (fifth) [sixth] may be confounded with the seventh⁷⁷.

Rebbi Jehudah's argument seems inverted. There⁷⁸, he says that the fifth cannot be confounded with the seventh. But here⁷⁹, he says that the fifth can be confounded with the seventh. Rebbi Yose said, there⁸⁰ the matter is given

over to women who are lazy, here⁸¹ the matter is given over to the court who is careful. Rabbi Yose ben Rabbi Abun said, there⁸¹ it is a matter between the beginning of the fifth and the end of the seventh hour. Here⁷⁹ it is between the end of the fifth and the start of the seventh⁸². It also was stated thus⁸³: At the start of the fifth hour, the sun is in the East, and the end of the seventh the sun is in the West. The sun never starts setting before the end of the seventh hour.

61 Most of this text belongs to *Pesahim* 1:4. The scribe of the Leiden ms., after the text translated here in the first 5 paragraphs, wrote: "one continues in *Sanhedrin* until 'the sun never starts setting'." The corrector who prepared the ms. for the Venice printer added the omitted portion; his text differs from the one given here by both an addition and a lacuna. It is impossible to decide whether the corrector's *Pesahim* text is copied from a different ms. or represents the corrector's emendations of the *Sanhedrin* text. In neither text is the use of references "here" and "there" (either *Pesahim* or *Sanhedrin*) completely consistent.

62 The main topic of the following section is the prohibition of leavened matter on Passover. It is agreed by everybody that leavened matter must be disposed of by noontime (the end of the sixth hour) of the 14th of Nisan. In Mishnah *Pesahim* 1:4, R. Meïr states that "one eats [leavened bread] during all of the fifth hour (between 10 and 11 am local time) and burns the remainder at the start of the sixth hour (shortly after 11 am). R. Jehudah says, one eats during the entire fourth hour (9 to 10 am local time), one suspends leavened matter during the fifth hour and burns the remainder at the start of the sixth. ("Suspending" means that eating leavened matter is forbidden but usufruct is permitted.)

The anonymous majority in *Sanhedrin* 5:3 is presumed to represent R. Meïr's opinion. The question now remains whether the disagreement between R. Meïr and R. Jehudah in *Sanhedrin* is the same as in *Pesahim* or not.

63 Ex. 12:15: *Seven days you shall eat mazzot; only on the first day you shall eliminate sour dough from your houses . . .* 78 might also be translated as "certainly".

64 Ex. 12:14 states: *This day shall be a remembrance for you; you shall keep it as a holiday of pilgrimage for the Eternal . . .* Num. 28:15-16 require that the 14th of Nisan be *pesah* for the Eternal; starting from the 15th for seven days it is the holiday of *mazzot*. Since *pesah* (i. e., the day of the slaughter of the *pesah* sacrifice) is connected inextricably with the holiday of *mazzot*, the reference in v. 14 to the "first day" is intrinsically ambiguous, whether it refer to *pesah* or to the holiday.

65 A similar argument is in the Babli, *Pesahim* 4b, *Mekhilta dR. Ismael* (ed. Horovitz-Rabin p. 28), *Mekhilta dR. Simeon b. Iohai* (ed. Epstein-Melamed p. 17).

66 I. e., the only biblical requirement is that all leavened matter be completely disposed of before the holiday at sundown.

67 It seems that this refers to Ex. 12:16: . . . *no work shall be done [on the holidays], only what may be eaten by any soul, it alone*

may be made by you. Everybody agrees that food may be prepared on a holiday. According to R. Meïr (i. e., the anonymous opinion in Mishnah *Megillah* 1:8) only food may be prepared, not preparations necessary for the preparation of food. According to R. Jehudah (*Megillah* 1:8), anything that in the end leads to preparation of food is permitted on a holiday. R. Meïr reads *only* as a restriction in v. 16 and as an addition in v. 15!

68 Read with the *Pesahim* text בחמץ instead of מחמץ. The extension of a prohibition parallels the restriction of a permission.

69 *Deut.* 16:3, referring to the *pesah* sacrifice which is slaughtered on the afternoon of the 14th and eaten in the night of the 15th.

70 In the afternoon of the 14th. This supports R. Jehudah's contention that leavened matter is biblically forbidden in the afternoon of the 14th; *Sifry Deut.* 130.

71 "It" here refers to *mazzah*.

72 "It" here refers to leavened matter.

73 It is not an indictable offense; cf. *Bikkurim* 1:5, Note 103. If a positive commandment is in conflict with a negative one (a prohibition), the positive is stronger. But an obligation which is both positive and negative is stronger than anything else.

74 *Deut.* 16:3; the word גָּלַי is missing here, supplied in *Pesahim*.

75 *Ex.* 12:19.

76 The numerals in parentheses are from *Sanhedrin*; those in brackets are the corrected ones from *Pesahim*. For R. Meïr, the biblical prohibition of leavened matter starts at the 11th hour (5 pm local time). The

earlier afternoon hours, including the 7th, are rabbinically forbidden as a "fence around the law". Then it is difficult to understand why leavened matter has to be burned *at the start* of the 6th, extending the rabbinic prohibition for another hour as a fence around the fence, a practice generally rejected.

77 It is not a fence around a fence but consistent with the opinion of the Sages (R. Meïr) in *Sanhedrin* 5:3. In a society without watches the difference between 11am and 12am is not generally recognized; a prohibition enforced after noontime must practically be enforced starting from 11am.

78 This is here, in the Mishnah *Sanhedrin*. R. Jehudah agrees that while without watches people cannot distinguish between two morning or two afternoon hours, he explicitly agrees that people distinguish between fifth (10-11am) and seventh (12am-1pm).

79 In *Pesahim* he requires one to stop eating leavened matter two hours before the start of the seventh hour when the biblical prohibition begins.

80 In *Pesahim* one speaks of household chores.

81 In *Sanhedrin* the Mishnah does not require the court to accept any testimonies where the witnesses differ widely in fixing the time of a crime; R. Jehudah admonishes the court under certain circumstances to investigate whether the witnesses do not in reality testify about the same time; Babli *Pesahim* 12b.

82 In *Pesahim* the period of doubt is little more than 60 min., in *Sanhedrin* close to 180 min. The apparent inconsistency is due to the informal use of "hour."

83 A similar *baraita* is in *Pesahim* 12b.

(fol. 22c) **משנה ד:** היו מכניסין את השני ובודקין אותו. נמצאו דבריהן מכניסין פותחין בזכות. אמר אחד מן העדים יש לי ללמד עליו זכות או אחד מן התלמידים יש לי ללמד עליו חובה משתקין אותו. אמר אחד מן התלמידים יש לי ללמד עליו זכות מעלין ומושיבין אותו ביניהן ולא היה יורד משם כל היום כולו. אם יש ממנו בדבריו שומעין לו. אפילו אמר הוא יש לי ללמד על עצמי זכות שומעין לו ובלבד שיש ממנו בדבריו:

Mishnah 4: They brought in the second [witness] and examined him. If their testimonies were coherent, one starts with arguing for acquittal⁸⁴. If one of the witnesses said, I have an argument for his acquittal⁸⁵, or one of the students said, I have an argument for his conviction, one forces them to be silent. If one of the students said, I have an argument for his acquittal, one brings him up and lets him sit among them⁸⁶. He was not demoted from there the entire day; if his argument has substance, one listens to him. Even if he⁸⁷ said, I have to argue for my acquittal, one listens to him if there is substance to his words.

משנה ה: אם נמצאו לו זכות פטרוהו. ואם לאו מעבירין דינו למחר. ומזדווגין זוגות זוגות ממעטין במאכל ולא היו שותין וכן כל היום ונושאים ונותנים בדבר כל הלילה ולמחרת משפיעין ונכאין המזקה ואמר אני הוא המזקה ומזקה אני במקומי. והמחייב אני הוא המחייב ומחייב אני במקומי. המלמד חובה מלמד זכות. אבל המלמד זכות אינו יכול לחזור וללמד חובה. ואם טעו בדבר שני סופרי הדנין מזכירין אותו.

Mishnah 5: If they found him innocent, they free him. Otherwise they hold his case over to the next day, split into groups of two, eat little and refrain from wine the entire day, and discuss during the entire night⁸⁸. The next morning they start early. One who voted for acquittal says, I am for acquittal and I remain for acquittal. One who voted for conviction says, I am for conviction and I remain for conviction. He who voted for conviction may vote for acquittal; but he who voted for acquittal may not change and vote for conviction. If they erred in the matter, the two clerks of court will remind them.

84 Mishnah 4:1.

argues for acquittal undermines his own

85 A witness for the prosecution who

testimony. Anyhow, no witness can become

judge in the same case (Halakhah 5).

86 The judges.

87 The accused.

88 The topic of discussion is not mentioned; it seems to be the case under

consideration. In the Tosephta, the judges are required to review the legal background, if a murder case the laws of murder, if an incest case the laws of incest.

(22d line 75) **הלכה ד'**: הוּי מְכַנְסִין אֶת הַשֵּׁנִי כו'. תַּנִּי. אִם מִצָּאוּ לוֹ זְכוּת פְּטָרוֹהוּ וְאִם לֹא מַעֲבִירִין דִּינוֹ וּמַדְיוּגִין זִיגוֹת וּמִמְעָטִין בְּמֵאֶכְל וְלֹא הִיוּ שׁוֹתִין יָנ וְנוֹשְׂאִין וְנוֹתְנִין כָּל הַלֵּילָה. וְלִמְחַר מִשְׁפִּימִין וּבָאִין. וְחֲזָנִי כְּנִסְיוֹת מִחֲזָרִין אַחֲרֵיהֶן וְאוֹמְרִין. אִישׁ פְּלוֹנִי לְבָן אִישׁ פְּלוֹנִי. וְהוּא אוֹמֵר. בְּמִקוּמִי אָנִי.⁸⁹ מַחֲזִיב הֵייתִי וּמַחֲזִיב אָנִי. מִזְכָּה הֵייתִי וּמִזְכָּה אָנִי. מַחֲזִיב הֵייתִי וּמִזְכָּה אָנִי. שׁוּמְעִין לוֹ. מִזְכָּה הֵייתִי וּמַחֲזִיב אָנִי. לִמַּד תְּחִילָה. תַּנִּי. טָעָה אֶחָד מִן הַדִּינָנִין. אִם הָיָה מִזְכָּה סוֹפְרִי הַדִּינָנִין מְזַכְּרִין אוֹתוֹ. אִם הָיָה מַחֲזִיב אוֹמְרִין לוֹ. לִמַּד תְּחִילָה.

Halakhah 4: “They brought in the second,” etc. It was stated⁸⁹: “If they found him innocent, they freed him; otherwise they hold his case over, split into groups of two, eat little and refrain from wine, and discuss during the entire night. The next morning they start early, the beadles of the synagogues come for them. They ask, Mr. X [ben Mr. Y. He says, present.]⁹⁰ I was for conviction and I still am for conviction; or I was for acquittal and I still am for acquittal; I was for conviction and now I am for acquittal; one accepts his vote. I was for acquittal and now I am for conviction; argue as before.”⁹¹ It was stated: If one of the judges erred, the clerks of court remind him. If he was for conviction, they tell him, argue as before.

89 Tosephta 9:1.

Tosephta.

90 Addition from the Genizah text (Note 0); not absolutely necessary for the understanding of the text and not in the

91 In the Tosephta: “They tell him, consider your earlier argument.” This is understood here.

(23a line 6) אָמַר רַבִּי לֹא. מִפְּנֵי מָה כּוֹתְבִין דְּבָרֵי הַמִּזְכָּה. מִפְּנֵי הַמַּחֲזִיב. שְׂמָא תִּיטְרֹף דְּעָתוֹ. וְאִין חֲלִיף מִילָא יִמְרוֹן לֵיהּ. הָדָא אֶמְרַת הָדָא לֹא אֶמְרַת. [הָדָא אֶמְרָה].⁹² צְרִיכָה שְׁנֵי [כִּיתִּינִי]⁹³ עָדִים. נִמְצָא דִּינוֹ מִשְׁתַּקֵּעַ. רַבִּי יוֹדִי בִּירְבִי בּוֹן אָמַר. מִפְּנֵי הַמִּזְכָּה.

Rabbi La said, why does one record the argument of him who argues for acquittal? Because of him who argues for conviction, maybe his memory will fail him. If he switches his argument, they could say to him, this you said, this you did not say. [Does this mean] that it needs two [groups of] witnesses⁹²? It

would mean that the trial would be extended. Rabbi Yose ben Rabbi Abun said, because of him who argues for acquittal⁹³.

92 The text in brackets is from the Genizah; it is not a better text. The Leiden text seems to follow R. Jehudah (Mishnah 4:9) who requires that the arguments of each judge be recorded by two scribes, i. e., two witnesses who may prevent him from changing his mind. The Genizah text asks whether if an acquitting judge now wants to

vote for conviction one has to start the entire proceedings anew. This would preclude pronouncing sentence on that day and would amount to forbidden procrastination in administering justice.

93 Mishnah 5 alone is justification enough.

מִשְׁנָה ו: וְאִם לֹא עוֹמְדִים לְמִנְיָן. שְׁנֵי עֶשֶׂר מְצִינִין וְאַחַר עֶשֶׂר מְחַיִּיבִין זָכָא. שְׁנֵים עֶשֶׂר מְחַיִּיבִין וְאַחַד עֶשֶׂר מְצִינִין וְאַפְלוּ עֲשָׂרִים וְשָׁנִים מְצִינִין אִוּ מְחַיִּיבִין וְאַחַד אוֹמֵר אֵינִי יוֹדֵעַ יוֹסִיפוּ הַדִּינִים. (fol. 22c)

Mishnah 6: If they found him innocent, they free him; otherwise they tally the vote. If twelve are for acquittal and eleven for conviction, he is found innocent. If twelve are for conviction and eleven for acquittal⁹⁴, or even twenty-two are for acquittal or conviction and one says, I do not know⁹⁵, they shall add judges.

94 A criminal conviction needs a qualified majority of at last two (Mishnah 4:2). Since there was no majority for acquittal, the accused is neither acquitted nor convicted; this is a case of a hung court.

95 A judge who abstains in the final vote is counted not present. Then the court is no longer composed of 23 members; there is a mistrial.

9 (23 line) **הלכה ה:** אִם מְצָאוּ לוֹ זָכוּת פְּטָרוֹהוּ כֹל. תִּנְי. אֶחָד מִן הָעֲדִים שָׁאָמַר. יֵשׁ לִי לְלַמֵּד עָלָיו זָכוּת. וְבֵא חֲבִירוֹ וְסִייעוּ וְבֵא חֲבִירוֹ וְסִייעוּ. אֶת מִי מְמַנִּין. לְרֹאשׁוֹן לְשֵׁנִי לְשֹׁנִי. נִשְׁמָעִינָה מִהֶדָּא דְּרַבִּי יוֹחָנָן. וְהוּא שָׁנְדִּיכָה מִפִּי עֲצָמוּ אֵין מוֹשִׁיבִין אוֹתוֹ דִּין. הָרִי שָׁנְדִּיכָה מִפִּי עֲצָמוּ וְנִמְצָא עַד וְדִין לֹא מְצִינוּ עַד נִעֲשֶׂה דִין.

Halakhah 5: “If they found him innocent, they free him,” etc. It was stated: If one of the witnesses said, I have an argument for his acquittal, and another came to support him, (and another came to support him,)⁹⁶ whom do

you co-opt ⁹⁷? Let us hear from the following of Rabbi Johanan: If somebody was acquitted following his own pleading, one does not place him with the judges. Therefore, if he was acquitted following (his own)⁹⁸ pleading, then one person would be simultaneously witness and judge. We do not find that anybody can be both witness and judge.

96 Corrector's addition, to be deleted.

Only R. Yose ben R. Jehudah admits pleading by a witness (Tosephta 9:4).

97 Following Mishnah 4 which, however, speaks of law students, not of witnesses.

98 This must read: "the witness".

(23a line 14) אומרים בדיני ממונות. נזדקן הדין. [ואין אומרים בדיני נפשות נזדקן הדין.]⁹⁹
והגדול שבדינין אומר. נזדקן הדין.

In civil suits one declares the judgment as definitive⁹⁹ [but in criminal suits one does not declare the judgment as definitive.]¹⁰⁰ The greatest among the judges declares the judgment as definitive ¹⁰¹.

99 A strictly literal translation would be: "the judgment became old." The interpretation of this otherwise unknown expression follows Rav Ashi in the Babli, 42a. The case can neither be appealed nor retried.

100 Addition also found in the Babli, implied by the preceding sentence. As long as a criminal sentence was not executed, the trial may be re-opened at any time if a new argument for acquittal can be presented.

101 Babli 42a.

(fol. 22c) **משנה ז:** עד כמה מוסיפין שנים שנים עד שבעים ואחד. שלשים וששה מצפין ושלשים וחמשה מחייבין זכאי. שלשים וששה מחייבין ושלשים וחמשה מצפין דנין אילו כנגד אילו עד שיראה אחד המחייבין את דברי המצפין:

Mishnah 7: Up to what number does one add? [One adds] two and two up to 71¹⁰². If 36 vote for acquittal and 35 for conviction, he is found innocent. If 36 vote for conviction and 35 for acquittal¹⁰², they have to continue to argue with one another until one of the voters for conviction is convinced by the arguments of those in favor of acquittal.

102 The size of the Supreme Court is the upper limit for the size of any court.

103 This is a *de facto* vote for acquittal since for conviction a majority of two votes

is required and the judges voting for acquittal are barred from changing their vote. Since no judges can be added, the

only way to conclude the trial is for one of the convicting judges to become one of the acquitting.

ה'לכה ז' עד כמה מוסיפין כול'. תני. כמה מוסיפין דיינין. שאם היו שנים מן הרשונים קוצין ואחד מן האחרונים ליגמר הדין בשלשה. אמר רבי לא. מכין שניא דינו ליגמר בארבעה אין גומרין אותו בשלשה.

Halakhah 7: “Up to what number does one add,” etc.¹⁰⁴ It was stated: Why does one add judges? For if there were two of the original judges voting affirmatively¹⁰⁵, together with one of the later ones judgment will be rendered by three. Rabbi La said, since the judgment can be rendered by four, one does not render it by three¹⁰⁶.

104 This and the next paragraph refer to Halakhah 3:3; the subject is civil suits.

105 Even if two judges vote for the claimant but the third abstains, no judgment can be rendered by a court of two.

106 Although only one additional judge is needed, one always adds two. If only one

judge were added, he would be unable to change the outcome; he is not really a judge of equal standing with the others. But two judges could force the addition of another two by voting for the defendant.

23 line 18) אמר רבי יוסי. ותשמע מיניה. שלשה שדנו ומת אחד מהן. חותמין בשנים וכותבין. אף על פי שחתמנו בשנים בשלשה דנו. אמר רבי חיי. מותיתא אמרה כן. הדיינין חותמין בו מלמטה או העדים. ולמידין מידת הדין מפרוזבול. אשבח תני. הוא למד מידת הדין מפרוזבול.

Rebbi Yose said, one understands from here:¹⁰⁷ If three sat in judgment and one of them died, two sign and note: Even though we are two who sign, we were three in judging. Rabbi Haggai said, a Mishnah implies this: “The judges sign at the bottom or the witnesses.” Does one learn court documents from *prozbol*? It was found stated: This about court documents he inferred from the rules of *prozbol*.

107 This is from *Ševi'it* 10:3, Note 91 where *prozbol* is explained. The text there

and in the Babli, *Ketubot* 22a, is in the name of the earlier Amora R. Abba.

(12a line 22) לֹא רָאָה. רַבִּי יוֹחָנָן אָמַר. זָכָאִי. רִישׁ לְקִישׁ אָמַר. חַיִּיב. אָמַר לִיה רַבִּי יוֹחָנָן.
וְהָלֵא זָכָאִי הוּא. וְלָמָּה דָּנִין יְלֹוּ כְּנֶגֶד אֵילָן. שְׁלֹא יִירָאָה דִּין זֶה יוֹצֵא מִעֲמֻעָם.

If nobody changes his opinion¹⁰⁸? Rabbi Johanan said, he is acquitted¹⁰⁹. Rabbi Simeon ben Laqish said, he is convicted¹¹⁰. Rabbi Johanan said to him, is he not acquitted¹¹¹? Why do they have to continue to argue with one another? So the judgment should not be in question¹¹².

108 This refers to the Mishnah. If no one voting for conviction changes his mind, at the end of the day judgment must be rendered. What is the practical consequence of 36 votes for conviction, 35 for acquittal?

109 Since the votes for conviction fall short of the majority required, it is an automatic acquittal (Babli 42a).

110 Since there is a majority for conviction, there can be no acquittal. R. Simeon ben Laqish will agree that if it is a capital case, the accused cannot be executed except the missionary for idolatry (Tosephta 10:12).

111 Mishnah 4:2.

112 To discourage any attempt at a retrial.