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FEBRUARY 1893.

ON THE *πρόκλησις εἰς βάσανον* IN ATTIC LAW.

THE anomalies and absurdities which are to be found in the legal systems of most countries can generally be explained by the fact that they are relics of a time of comparative barbarism. The procedure in the Attic courts affords a good instance of this. No custom in antiquity has excited such natural surprise and contempt as the principle that the evidence of slaves could only be given under torture; this surprise is enhanced when we find that at Athens evidence so given is always spoken of as being the only absolutely certain way of discovering the truth about a disputed fact. Again and again the Orators insist on the fact that while evidence of freemen is often false or misleading, that of slaves under torture is final and unimpeachable. The fact is too well known to require illustration. For it the strongest words in the language are always used. *ἐὰν ἐξελέγχθῃς ψευδόμενος* says Aesch. (ii. 126) referring to a proposed appeal to the *βάσανος*. It was a common-place of oratory that the *βάσανος* always elicited the truth (Isaeus viii. 12, Dem. xxx. 35, etc.).

Now of course this is all rhetoric and the Orators were not serious in it; there must however have been some reason for the exaggerated importance so often attributed to this kind of testimony. This language is generally used of torture which follows a *πρόκλησις* or challenge. In cases where a slave was himself charged with a crime he was liable to be tortured so as to extort confession either by his own master or by the public authorities (Antiphon, *Herodes* 30 etc., Dem.

xlvi. 16, Lysias i. 16): when this was done, as appears from the passage in Antiphon, the statements of the torturers as to what the slave had said might be used as evidence in the trial of others. Torture used in this way to extort confession requires no comment: it is a barbarous custom which has prevailed in all countries. The superior humanity of the Athenians is shown by the fact that freemen were exempted from it.

The *πρόκλησις εἰς βάσανον* is very different. It could only be used in a suit between two private individuals; it might be a public suit, but where the accuser is the state or the public officials there *πρόκλησις* was not available. If however in the course of the preliminary examination before the Archon or an Arbitrator it appeared that the suit really turned on a disputed point of fact, either party could challenge the other to let the crime be decided by the statement as to this fact made by slaves while under torture. The slaves so tortured would always be such as had knowledge of the fact at issue. If the challenge was not accepted the challenger took care to bring witnesses to prove the fact of the challenge, in order to excite a prejudice against his opponent in the minds of the jury.

The important question is: What happened if the challenge was accepted? The answer is very difficult because of the extraordinary fact that in all the speeches of the Orators not a single case is recorded in which the torture really came off. In the few cases where the challenge was accepted some dis-

pute always prevented the question being really put. This, as I shall show directly, is not accidental. The assumption made, I believe, by all writers on the subject is that, if the challenge was accepted and the slave was tortured, then, at least in most cases, his statements were collected by the parties present, deposed to by witnesses and put among the other documents to be read out in the trial. If this was the case, then the statements of slaves would really be evidence of the same kind as that of free-men, though acquired in a different way. I think however that an examination of the passages shows that this was not the case. The appeal to the Question was not a means of collecting evidence for a jury; it was an alternative method of trial; it was a kind of *ordeal*. The Question only took place if both parties agreed to accept the statement of the slave on the particular fact as a verdict on the whole case, from which there was no appeal. This is the reason why we have not a single case where the evidence extorted from a slave is produced in a trial: had the torture taken place there was no trial. It also explains why it is always assumed that the torture produces the absolute truth; it is comparable not to the statements of witnesses but to the verdict of a jury; it was etiquette to assume that both were infallible.

That procedure by Question was an alternative to procedure before a jury is definitely stated in some passages, and there is much constructive evidence. Isocrates (xvii. 55) says, referring to the refusal to accept a challenge: *ὑπέμεινε καὶ δίκας φεύγειν καὶ τὰς ἄλλας αἰτίας ἔχειν, ὥστε μηδεμίαν βάσανον περὶ τοῦ πράγματος τούτου γενέσθαι*. 'He endured to have an action brought against him and to bear the other accusations, so as to avoid having the test by torture about the matter.' This certainly implies that *βάσανος* and *δίκας φεύγειν* are alternatives. So in Lycurgus *Leocr.* 32 we have the contrast between *βάσανος* and the *δικασταί*: Leocrates has refused to have a *βάσανος*, Lycurgus anticipates that he will complain that he has to contend with a skilful orator. How inconsistent would that be; he has himself chosen to have recourse to the jury who are easily persuaded, instead of trusting to the *βάσανος* which tells the whole truth. In [Demosthenes] xlvii. 39 we find the following clear statement: *ἐξὸν γὰρ αὐτοῖς ἀπηλλάχθαι πραγμάτων καὶ μὴ κινδυνεύειν εἰσιόντας εἰς ὑμᾶς, ἔργῳ βεβαιώσαντας ὡς ἀληθὴς ἐστὶν ἡ μαρτυρία, οὐκ ἠθέλησαν παραδοῦναι τὴν ἀνθρωπον*.

They would have avoided the whole trouble and risk of a trial by accepting the challenge to a *βάσανος*: this would be nonsense were the *βάσανος* only to procure evidence to be produced in court. If the *πρόκλησις* was to be a final verdict it was necessary to agree before what should be the penalties that either party was to pay in case he were defeated. This is we find done in several instances, e.g. Antiphon *Tetr.* A. 8, 8. The speaker who is accused of murder attempts to establish an *alibi*, and offers to let the whole result of the trial depend on the statement of a slave under torture as to this one point: *ἐὰν μὴ φανῶ ταύτῃ τῇ νυκτὶ ἐν οἴκῳ καθεύδων ἢ ἐξελθὼν ποι, ὁμολογῶ φονεὺς εἶναι*. In Dem. xxxvii. 45 we are told the contents of a *πρόκλησις*; the plaintiff in the case, which is one arising out of disputes about a mine, challenges the defendant. *ἀναγινώσκέ μοι πρόκλησιν μακράν, ἀξίων, ὃν φησιν οἰκέτην ταῦτα συνειδέναι, βασανίζεσθαι, καὶ μὲν ἢ ταῦτ' ἀληθῆ, τὴν δίκην ἀτίμητον ὀφλεῖν αὐτῷ, ἐὰν δὲ ψευδῇ, τὸν βασανιστὴν Μνησικλέα ἐπιγινώσκον' εἶναι τῆς τιμῆς τοῦ παιδός*. Sureties (*ἐγγυηταί*) are offered, the challenge is accepted, but breaks down at the last moment owing to a dispute about the arrangements. It is quite clear that if this dispute had not occurred the suit would not have been brought before a jury. This is shown by a sentence which follows; the defendant continues: *καὶ μετὰ ταῦτα προσκαλεῖται μὲν με τὴν δίκην πάλιν, ἐπειδὴ θάπτον ἀνέλιτο τὰς παρακαταβολάς: οὕτως εὐθὺς ἦν δῆλος οὐδ' οἷς αὐτὸς ὥρίσας' ἐμμένον δικαίους*. The challenge having been accepted put an end to the lawsuit, the plaintiff therefore takes back the court fees which he had deposited; then immediately afterwards he summons the defendant again to a fresh action, the old action having been altogether dropped.

In [Demosthenes] in *Neaeram*, lix. 121 the speaker is very explicit. Referring to an argument going to be put forward by the defendant he says he established a *πρόκλησις* on it; if he himself lost he would give up the action: *καὶ ἐὰν φαίνεται ἐκ τῆς βασάνου γήμας Στέφανος οὕτωσ' ἀστὴν γυναῖκα καὶ ὄντες αὐτῷ οἱ παῖδες οὗτοι ἐξ ἑτέρας γυναίκας ἀστῆς καὶ μὴ Νεαίρας, ἤθελον ἀφίστασθαι τοῦ ἀγώνος καὶ μὴ εἰσιέναι τὴν γραφὴν ταύτην*.

Lysias vii. 34 etc. is one of the passages brought by Lipsius¹ to show that sometimes at least the *πρόκλησις* was not final but preparatory to the action before the jury, because the evidence of the slaves was only part of the proof. The words of the orator

¹ *Der Attische Process*, Meier und Schömann, bearbeitet von Lipsius, p. 893 n. 356.

show however that it is not so; the defendant who had made the challenge distinctly says that, had it been accepted and he had lost, he would not have been able to defend himself, *περὶ ἡμῶν μὲν γὰρ εἰ ἤλεγχον, οὐδ' ἂν ἀπολογήσασθαι μοι ἐξέγενετο*: if the result of the Question had been favourable to him, it would, he implies, decide the suit against the accuser, *τούτῳ δ' εἰ μὴ ὁμολόγουν ἂ οὗτος ἐβούλετο οὐδέμια ζημία ἔνοχος ἦν* (37). We are not told the exact question which would have been put to the slaves; it would doubtless have been so expressed that to answer it would have been an answer to the question whether the accused were guilty or not.

There is a passage in the *De falsa Legatione* of Aeschines, which, though it is very exaggerated, is a useful confirmation of this principle. He is describing the events which took place during the embassy; his account is different from that of Demosthenes, and he offers to prove his account by the torture and to stake the whole result of the trial on the torture as to this one fact: *ἄγωμεν δὲ καὶ τοὺς οἰκέτας καὶ παραδιδόμεν εἰς βάσανον. καὶ τὸν μὲν λόγον, εἰ συγχωρήσει ὁ κατήγορος, καταλύω παρέσται δὲ ἤδη ὁ δῆμιος καὶ βασανιῖ ἐναντίον ὑμῶν, ἂν κελεύητε. ἐνδέχεται δὲ τὸ λοιπὸν μέρος τῆς ἡμέρας ταῦτα πρᾶξαι. πρὸς ἑνδεκα γὰρ ἀμφορέας ἐν διαμεμετρημένῃ τῇ ἡμέρᾳ κρίνομαι. κὰν φῶσιν ἀποκοιτὸν με τούτων πώποτε τῶν συσσίτων γεγονέναι, μὴ φείσῃσθέ μου, ὦ Ἀθηναῖοι, ἀλλ' ἀναστάντες ἀποκτείνετε. εἰ δ' ἐξελεγχθῆς ψευδόμενος, Δημόσθενες, ἐαύτην δίκην δός· ὁμολόγησον ἀνδρόγυνος εἶναι καὶ μὴ ἐλεύθερος ἐναντίον τούτων*. This is of course all bravado. A *πρόκλησις* could not be made at this stage, and Aeschines knows that; but he keeps the form of the legitimate challenge, agreeing that if he the defendant loses he shall be considered guilty and pay a fixed penalty, and if the accuser is defeated he shall also pay some penalty. The *λόγοι*, the proceedings before the court, are to be given up and the *βάσανος* substituted for them.

Even in those cases where it is not distinctly said that the *βάσανος* is to give a final verdict we find that as a matter of fact the question to be put to the slave is always to that point on which the whole suit hangs. The distinction from the *μαρτυρία* is very marked, e.g. in the speech of Lycurgus already quoted *μάρτυρες* are presumed to prove each act in a long chain of circumstances; the *πρόκλησις* is to question the slaves *ὑπὲρ πάντων τούτων*, i.e. on the whole case. So in Dem. xxix. 11, a speech by the defendant in a case of perjury, the orator

brings witnesses to prove all kinds of statements which are circumstantial evidence: but he challenges his opponent to produce a slave who will give his statement on the actual fact on which the whole case depends. In Dem. *Onetor A.* xxx. 35 the slaves are to be questioned as to the fact whether a wife continued to live with her husband; as the whole suit depends on the question whether a pretended separation had been *bona fide* or not, this is the cardinal fact. Dem. xlix. 55 is brought by Meier with other passages¹ to prove that the *πρόκλησις* was sometimes used to establish one point in a chain of evidence. It does not however do so. The plaintiff sues for debt: there are four distinct and separate counts; the challenge which he offers is to be final proof on one of these counts. If it had been accepted the case would have come into court, but there would have been only three claims to adjudicate upon, not four. It is true that the speaker says that he would have used this had he been successful in court (*τεκμηρίῳ τούτῳ καταχρήσασθαι πρὸς ὑμᾶς ὅτι ἐγὼ καὶ τᾶλλα ψεύδομαι περὶ ὧν ἐγκαλῶ αὐτῷ*), but what he means by this is that if the defendant cleared himself of the one count by the *βάσανος* he would be able to refer to that when he defended himself on the other counts in court and use it to establish a presumption in his favour.

There is one passage which has wrongly led to the belief that statements made in a *πρόκλησις* were of the nature of evidence. In Dem. liiii. 24 the speaker who has refused a *πρόκλησις* explains his reasons and says: *ἡγοῦμαι τε δεῖν τὴν ἀρχὴν ἢ τοὺς ἡρημένους ὑπὸ τῆς βουλῆς γράφεσθαι, καὶ κατασημαμένους τὰς βασάνους, ὃ τι εἴποιεν οἱ ἄνθρωποι, παρέχειν εἰς τὸ δικάστηριον, ἢ ἀκούσαντες ἐκ τούτων ἐψηφίσασθε ὅποιόν τι ὑμῖν ἐδόκει*. This is explained as though it referred to procedure under a *πρόκλησις*. It does not: it is the procedure adopted in a public suit where the state itself is one of the parties. The speaker says 'If it had been a private suit I should have accepted the challenge; I could not do so, because I was claiming the slaves for the state (*εἰ μὲν ἰδιαν δίκην ἔδικαζόμην αὐτοῖς, εἰ ἐμοὶ ἐξεδίδosan παρελάβανον ἂν, νῦν δὲ τῆς πόλεως εἴη τὰνδράποδα καὶ ἡ ἀπογραφὴ δεῖν οὖν δημοσίᾳ βασανίζεσθαι*). If the evidence of the slaves is wanted, the proper course would be to allow public officials to take over the suit (*γράφεσθαι*): they would then be able to torture the slaves as much as they liked, though not in

¹ The others are Lysias vii. 34, Dem. xxx. 35, liii. 22.

the way of *πρόκλησις*, and bring their evidence into court.

I think then that it may be accepted that whenever recourse was had to a *πρόκλησις εἰς βάσανον* this was an absolute bar to all further proceedings and prevented the case coming before a jury. This is supported by what we know of the analogous *πρόκλησις εἰς ὄρκον*. Either party might either offer himself to take a solemn oath or ask his opponent to do so; the oath would be to the truth of the essential facts on which the pleadings were based: if both parties agreed to have the matter decided in this way, then this was a final decision. Dem. xxix. 52 *ἀν ἀπομόσης τάναντία τούτων κατὰ τῆς θυγατρὸς, ὁφειμὶ σοι πάντα κ.τ.λ.*, xlix. 65 *ἡξίου οὗτος καὶ αὐτὸς ὁμόσας ἀπηλλάχθαι*. So *ib.* xxxix. 3, 4, after it has been agreed to accept it, the oath of a mother as to the parentage of her child is final proof which cannot be disputed. This form of oath is quite distinct from the oath required of suitors and witnesses. These are required to swear to the truth of their statements; if they do not, of course the statement loses all validity; but if they do, it has no further effect than to legitimate their statements as evidence: the oath which is taken by agreement on the other hand contains the final verdict. As I hope elsewhere to point out, the same distinction is found in the Gortynian Code; the oath of purgation is known at Rome; there too it ends the case; it is very common in early Teutonic law.

There were other forms of *πρόκλησις* at Athens. Pollux viii. 62 states of all of them what I have attempted to show is true of the *πρόκλησις εἰς ὄρκον* and *εἰς βάσανον*. His words are very important: *πρόκλησις δ' ἐστὶ λύσις τῆς δίκης ἐπὶ τινὶ ὀρισμένῳ ὄρκῳ ἢ μαρτυρίᾳ ἢ βασάνῳ ἢ ἄλλῳ τινὶ τοιούτῳ*. The general principle is here clearly and lucidly laid down. Hudtwalcker objects that this definition is too narrow¹: 'Denn *πρόκλησις* ist vielmehr, wenn man sie richtig beschreiben will, eine feierliche Aufforderung, entweder zu einer Leistung, auf welche der Provocant ein Recht zu haben glaubte, oder zu einer Handlung, durch welche ein streitiger Punkt erledigt werden sollte, diese sei nun ein gemeinschaftlich oder durch eine von beiden Partheien allein vorzunehmender Act, und bezwecke bloss den Beweis in einen Rechtstreit oder die gänzliche Beendigung eines solchen.' This is correct, but it does not affect the main point that there was a

whole class of *προκλήσεις* which acted as a final solution of a legal dispute and that among them were the *πρόκλησις εἰς ὄρκον* and *εἰς βάσανον*. As to the *πρόκλησις εἰς μαρτυρίαν*, Hudtwalcker himself gives the best definition of it; it was 'nicht eine Aufforderung an den Zeugen, dass er ein Zeugniß ablegen solle, sondern an den Gegner im Processe, die Entscheidung der Sache von dem Zeugniß eines Dritten abhängen zu lassen.' Antiphon *Choreutes* 23, which he refers to, is perhaps an instance of this. Under the words *ἄλλῳ τινὶ τοιούτῳ* is to be understood a procedure like that in Dem. *Onetor* i. (xxx.) 1, a challenge to allow the whole case to be tried by way of arbitration among friends, or as in Dem. (xxxvii.) 12 to conclude the suit by a compromise.²

There were then at Athens several ways in which a decision could be obtained on a dispute. The two parties could agree to refer the matter to the decision of an arbitrator, or to compromise it; if this was not done, it was still possible to avoid the trouble and anxiety of a trial in the public courts; if after the initial proceedings before the archon or the public arbitrators it appeared that the matter in dispute really turned upon some disputed fact, so that a decision on this fact could reasonably be held to convey a verdict on the whole case, then the parties could agree to let the whole matter be decided by the decision on this single fact and make an agreement how the decision on this should be obtained. The methods adopted were these: (1) to agree that the statement of a single man should be considered final: of this we have no satisfactory instance, it is doubtful how far it really was recognized as a proper way of obtaining such a decision; (2) that the matter should be decided on the answer given to certain questions by a slave under torture; (3) by the oath of one of the parties or some one closely connected with them. If an agreement of this kind was made, either party promised with sureties to accept the result of the ordeal as a final verdict, and if he was defeated to pay such a penalty as might have been agreed upon before. It was only when no such agreement had been made that the case was brought before a jury.

In the period of which we have knowledge this alternative procedure was very

² In Dem. xlv. 15 the orator confuses two kinds of *πρόκλησις*: (1) the challenge to produce documents; (2) the challenge to allow the case to be decided outside the court.

¹ *Ueber die Dichteten in Athen*, p. 45.

rarely used. If we are to judge by the customs of other races it must in early times have been the common form of procedure. It is only in an advanced state of society that it is common or possible to find out the truth about a disputed fact by the examination of witnesses. Witnesses in early times are used only for the proof of formal actions, to which they have been summoned beforehand that they may act as witnesses. The capacity of acting as a witness belongs only to citizens of full age: this rule is maintained at Athens even in the fourth century. If a question of fact is to be decided in a court, whether by one judge or a numerous body, it will be found in all early systems of law that it will be decided partly by the previous knowledge of the judge or jury and partly by the effect made by the often unproved statements of either party: it is this which is referred to when, in the Gortynian Code, the judge is ordered to decide cases *πορὶ τὰ μολιόμενα*, 'according to the contention of the two parties.' In the earlier stages of society however men preferred to get a decision on a point of fact in another way; by making the whole depend on what we should call chance and they called the judgment of heaven. This was got either by requiring the accused to clear himself by a solemn oath, as in Crete, Athens, Rome, and Germany; or by the wager of battle or various ordeals, as in Germany. Now just as the *πρόκλησις εἰς ὄρκον* is the method of applying the ordeal of the oath used at Athens, so it seems most natural to see in the *πρόκλησις εἰς βάσανον* the relic of some other form of ordeal. Our authorities, who lived at a time when the procedure was much talked of but rarely used, represent it as an attempt to extract from the slave the knowledge of

the fact which he possesses: I venture to suggest that if we knew more about the early history of Attic law, we should find that the effectiveness of the *βάσανος* depended very little upon whether or no the man who was submitted to it knew anything at all about the matter on which he was questioned, and that it is really a vicarious ordeal, altered and wrested till it has become little distinguishable from ordinary evidence. The peculiarity of the Attic law is that it only allows either kind of ordeal when both parties agree to this method of trial; in most other countries, at least in some cases, the magistrate could oblige the suitors to accept this procedure.

I cannot but feel that this theory will appear bold to the verge of paradox: I offer it with much hesitation, but I can find no other explanation of the phenomena. It is a maxim of Attic jurisprudence that the *βάσανος* is (with the *ὄρκος*) the sure way of obtaining the truth as to facts; the procedure is quite irrational, it is hardly ever used, but always spoken of with very great respect. I therefore conclude that it is a relic of a custom which has the support of antiquity and probably of religious associations. In all countries we find procedure by ordeal used in a similar way to this, which like this is an alternative to argument before a court: the *πρόκλησις εἰς ὄρκον* at Athens is clearly an ordeal; the procedure in the *πρόκλησις εἰς βάσανον* is closely parallel to this and they are spoken of in very similar terms. The natural conclusion is that the *πρόκλησις εἰς βάσανον* arose out of some other kind of ordeal but, as was the case with so many other old customs, had been altered till it is scarcely recognizable.

J. W. HEADLAM.

ON SOME NEGLECTED EVIDENCES OF THE SOUND OF *C*, *V*, AND *S* IN LATIN.

C.

THE pun on *Sosiam* and *Socium* in the *Amphitruo*, 383-4, has often been cited to prove that it is not absolutely certain that *c* was always pronounced like *k*, and it has been a great stumbling-block to scholars who claim that *c* was in all cases a surd guttural.

This pun however has been satisfactorily

explained as due to the fact that Plautus was an Umbrian, and hence was influenced by the sounds of *c* in his native language, in which phonetic development has proceeded further than in Latin. It is a matter of some surprise that, since the Umbrian dialect has been called in to weaken the argument of those who would urge this pun as an evidence that *c* was not always a surd guttural, an argument has not been drawn