

1916

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Recommended Citation

William Renwick Riddell, First Reported Criminal Trial, 7 *J. Am. Inst. Crim. L. & Criminology* 8 (May 1916 to March 1917)

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THE FIRST REPORTED CRIMINAL TRIAL.

WILLIAM RENWICK RIDDELL.¹

In the first of a collection of pamphlets of great age which have been and are read in almost every known tongue, appears an account of the first criminal trial on record.

The crime does not seem to have attracted very much attention among men for some time; but in the first century of our era it was made the object of much study by the most superb theologian the world has ever seen. His powerful writings were adopted as expressing at least one aspect of the theology of a nascent religious body, and when that religion conquered a great and the best part of the world, his theology went with the conqueror.

Even before this, the story had received some attention at the hands of a small and somewhat obscure nation living in Western Asia, but the result of their care did not make itself appreciably manifest in the world outside.

His Master never, so far as we know, made any mention of the crime or the criminal, but Paul made the story of the crime, its punishment and its effects the foundation upon which to build a symmetrical and logical system. The Story of Adam and his Fall has consequently become an integral part of the apparatus of religion; by necessary consequence it has been mentioned with bated breath, mysticism has grown about it, and seldom has it been discussed but with conventional reverence.

I was brought up to believe implicitly in the story. I do not however, in this paper intend to discuss the question of its historical truth or to express any opinion in that regard. Nor shall I allow the glamour of the story to blind the eye to the precise language employed and the precise facts alleged. In other words I propose to take the story as a purely human document and to examine it from the point of view of the lawyer only—the purely legal point of view. This will enable us to see one of the many sides the narrative possesses, and it cannot affect the faith of those who regard it as veridical.

The story found its first expression (so far as we can be certain) in the Hebrew language; but long before the Masoretes had supplied the vowel points and when Hebrew was written only in its consonants, a number of Hebrew scholars translated the account into that form

¹Justice of the Supreme Court of Ontario.

of Greek in vogue in certain circles in Alexandria. Whether this was to gratify the curiosity of a King of literary tastes, to satisfy the religious needs of the Alexandrian Jews, or to attract converts among those who could not read Hebrew, we need not enquire. That the translation was by competent scholars we cannot doubt, that it was faithful to the text as understood and accepted in the third century before Christ may be taken as equally certain, while the Greek though not that of Xenophon or Thucydides, is the Greek of the commerce and international intercourse of the time, spoken generally throughout the dominion of the Greek Kings, successors of Alexander the Great.

Not having critical knowledge of Hebrew, I am not competent to decide whether changes have been made in the original text, and if any, what; but I adopt as a fair representation of the meaning of the original text, what is expressed in the Septuagint. Translation from this text will also enable us to get rid of traditional terminology, which almost invariably carries with it association, connotation which may for us becloud the real meaning.

It is said that the Hebrew text is a combination of two or more separate narratives. Whether that is so or not I leave to competent critics. The text as it reads in the Septuagint is congruous enough and does not necessitate any dichotomy or trichotomy of source.

One of the very pest methods of finding out exactly what any writing means to anyone is to see how the reader expresses in a foreign tongue the meaning he draws from the text. No better way, I venture to think, can be found to show precisely what the learned Jews understood their sacred writings to mean than to see what is the precise meaning of the Greek into which they translated them.

I therefore take the Septuagint as expressing accurately what the Jew believed his Scripture to say.

The edition I read is the Oxford Edition of 1859 published by the Society for the Promotion of Christian Knowledge, edited by Frederick Field, Fellow of Trinity Colledge, Cambridge. The translation is in my own, as nearly literal as the idioms of the two languages, Greek and English, permit, and claiming no other excellence. (I use the Hebrew "Yahweh" instead of the Greek "Kurios," as it is certain that the Jew did not think of his God as "Kurios", but it is likely did think of him as "Yahweh" or something very like that.

The account begins with the pre-creation condition of the universe, then comes the Creation, and the story continues thus:

"And the God said, Let us make man in our own image and in our own likeness * * * And the God made man, made him in God's image, male and female made he them * * * and the God fashioned

the man, a mass of earth, from the ground; and blew into his face, breath of life; and the man became a living soul. And Yahweh, the God, planted a park in Eden toward the rising sun, and placed there the man whom he fashioned. And the God then caused to grow out of the ground every tree pleasant to the sight and good for food, and the tree of life in the middle of the park and the tree of knowing well good and evil * * * And Yahweh, the God, took the man whom he fashioned and placed him in the park of luxury to work it and guard it. And Yahweh the God enjoined Adam, saying, "From every tree which is in the park, eat thou for food, but from the tree of knowing good and evil, eat ye not from that, but in whatever day ye eat from that ye will die by death." (Then the creation of a woman is described, and the story continues.) "Now the serpent was the most astute of all the animals on the earth, those which Yahweh the God, had made. And the serpent said to the woman, "Why did the God say eat ye not from every tree of the park"? and the woman said to the serpent, "We do not eat from every tree of the park but of the fruit of the tree which is in the middle of the park the God said "do not eat ye from that, and do not touch it, so that ye may not die." And the serpent said to the woman, "Ye will not die by death, for the God knows that in whatever day ye eat from that, the eyes of you will be opened, and ye shall be as Gods, knowing good and evil." And the woman saw that the tree is good for food and delightful for the eyes to look upon and it is adapted for knowledge; and seizing the fruit of it, she ate and she gave also to her man there beside her, and they ate. And the eyes of the two were opened and they knew that they were naked, and they sewed fig leaves and made themselves girdles. And they heard the voice of Yahweh the God, walking about in the park in the late afternoon, and Adam and his wife hid from the face of Yahweh the God, in the middle of the wood of the park. And Yahweh the God, gave a call to Adam, and said to him, "Adam, where art thou?" And he said to him "I heard the voice of Thee walking about in the park, and I was seized with fear because I am naked, and I hid." And He said to him "Who told thee that thou are naked, unless from the tree of which alone I enjoined thee not to eat, from that thou didst eat?" And Adam said "The woman whom Thou didst give (to be) with me, she gave me from the tree and I ate." And Yahweh, the God, said to the woman, "What is this thou hast done?" And the woman said "The serpent deceived me and I ate." And Yahweh the God said to the serpent "Because thou hast done this, accursed thou art of all the domestic and out of all the wild animals of the earth; upon thy chest and upon thy belly shalt thou

go and earth eat all the days of thy life; and enmity shall I place between thee and the woman, and between thy seed and her seed; it shall keep a vigilant eye on thy head, and thou shalt keep a vigilant eye on its heel." And to the woman He said "In full measure shall I fill up thy sorrows and thy lamentations; in pangs shalt thou bear children; thy recourse shall be to thy man and he shall master it over thee." But to Adam He said "Because thou didst listen to the voice of thy woman, and didst eat from the tree, from which alone I enjoined upon thee not to eat, accursed the earth in thy doings, in sorrows eat it all the days of thy life. Thorns and prickly plants shall it bring forth for thee and thou eat the produce of the field. In sweat of thy brow, eat thou thy bread until the return into the earth out of which thou wert taken; because thou art earth and shalt depart into earth" * * * Yahweh, the God, said "See, Adam has become as one of us, from knowing good and evil, and now, lest he should stretch out his hand and take from the tree of life and eat and he should live indefinitely—"And Yahweh the God sent him away out of the park of luxury to work the earth from which he had been taken, and He ejected this Adam and settled him opposite the park of luxury, and placed the Cherubim and the flaming sword turning from side to side to guard the way to the tree of life."

(It has been necessary to use the archaic "Thou" and "ye," the modern "you" does not express the distinction in number.)

The first thing the lawyer will notice is the prohibition "but from the tree of knowing good and evil, eat ye not from that;" the permission to eat is directed to Adam alone but the command not to eat is not directed to him alone; the pronoun in the latter case is in the plural indicating not simply a prohibition personal to Adam but extended to all in the like position. No woman had (according to one account at least) yet come into existence, and there was no express prohibition at any time made to Eve (or Zoe as the Septuagint calls her, i. e. Life). Adam must have communicated the command to her, as we find her in the colloquy with the serpent stating explicitly that the God had prohibited her with the others (or another) from eating of the fruit of the tree—"We do eat," "Eat ye not", etc.

Some unnecessary difficulty has been made by looking at this prohibition as in the nature of a contract rather than a criminal law; that is, looking upon it as a bargain made by the superior that if the man should eat he would *ipso facto* be subject to death without chance of change—as though the God had said "If you will eat of this tree, I shall slay you." Still less is the warning one such as would be given if the tree had poisonous qualities, so that eating the fruit would

produce physical effects without the intervention of the arm of the law.

The real meaning is precisely the same as that of a criminal statute which enacts "Any one murdering another shall be liable to be hanged till he is dead." That does not mean that every one who kills or murders another will necessarily be hanged; it only means that he is liable to be hanged; but there is nothing to prevent clemency being exercised and the death penalty commuted. The power to commute a penalty threatened by the law exists in every community, civilized and uncivilized. One terrible experience in France immediately after the Revolution, when all power of commutation was taken away, a wholly innocent man suffered a painful and ignominious death because no one could free him from the sentence pronounced upon him, has stood as a horrifying lesson for more than a century.

Adam probably added to the injunction. What he was told was not to eat from the tree. What he probably told Eve was they were not to eat of the tree and not to touch it. If he did so add to the command he showed himself prudent, whatever may be said of his honesty. To make the woman afraid even to touch the tree was a good way to keep her from it altogether. It was not a command of Adam's own; he had not as yet been given the power to "master it over" her. If the prohibition not even to touch the tree was given it must have been ostensibly the command of the God.

The other alternative is that the law was correctly transmitted to the woman but that she in her conversation with the serpent added to it from her own consciousness. Either way the addition was wholly natural and such as is happening every day. In addition to this tree of knowing good and evil there was specially named another tree in the park—the tree of life, but it plays no part until after the trial.

The story plunges at once into action. The woman is addressed by the serpent, the most astute of all animals; and it is a real animal, a real bodily serpent, which is contemplated. There is nothing anywhere in the language indicating anything but an actual snake in the creature. He advises the woman—(it is said that this is the first time advice was ever given, and it is to be observed that it, like so much bad advice, was given unsought)—"Ye will not die." It is plain from the number of the pronoun that the serpent expected Adam to eat as well as Eve. This was perfectly good advice if he meant that there was no poison in the fruit which would kill the eaters at once. It was also perfectly true if the prohibition could be considered something in the nature of a contract. It was, however, at least defective,

in the view that the prohibition was a criminal statute; it would be like the case of a lawyer when asked, "If I kill A, what will happen to me?" answering "You will not necessarily be hanged," without adding "But to prevent that result following, executive clemency will have to be exercised." It might perhaps have been the confidence the serpent had in the clemency of the Executive which made him assert so positively that the death penalty would not follow; if so, his confidence was well founded. The remainder of the advice was thoroughly sound; "In whatever day ye eat from that, the eyes of you will be opened and ye shall be as Gods, knowing good and evil." This was, it would seem, the natural and necessary physical effect of eating the fruit. Of course the God knew it, and apparently it was to prevent this occurrence that the command was given not to eat; at all events, nothing else is suggested as the reason. The reason given for driving Adam out of the park after his trial was that he had become like the God, knowing good and evil, and it was not desirable that he should live forever.

How the serpent knew the facts we are not told. That Adam had no idea of this quality seems certain, and Eve was in the same state of ignorance. While the Greek does not expressly say so, it suggests and indicates that the man and the woman were together when the so-called "Temptation" took place. I must confess I fail to see any urging on the serpent's part, but that was not needed.

The appearance of the fruit and its magic quality as described by the serpent were enough for both woman and man—and they ate, and knew good and evil.

Now comes the trial; and thoroughly to appreciate it we must bear in mind the kind of Court which was held in the communities in the East. The Sheik sits in his tent door, the King or Sultan at the gate of the city, and administers justice in person; or it may be that, like Haroun al Raschid, the Sultan walks about his territory and becomes cognizant of what is going on by actual personal observation.

There is not the division (largely modern in most respects) of power between the law-giver, the law-administrator, and the law-interpretor. The King laid down the law as lawgiver, interpreted it as Judge, and administered it, as detective, "Crown Counsel" and executioner. That was the primeval order of things. Direct examination of the accused is quite the right procedure, and it is much if the accused has even an opportunity to defend himself.

The God is walking in his park in the afternoon—the Hebrew says "when the breeze was blowing," but there is no such connotation in the Greek—He misses Adam, and calls him. Adam answers, but

in answering discloses his guilt: "I am naked." The examination begins at once, and a full confession is had immediately. The confession contains rather an excuse, throwing the blame on the God for sending such a helpmeet, and it implicates the woman. She is now challenged and makes full confession, throwing the blame upon the serpent. One would expect the serpent now to be called upon for his defence, but he has not that chance given him.

Nearly two hundred years ago (in 1723) Mr. Justice Fortescue, an English Judge of high standing, said in giving judgment in a case before his Court, "The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion that even God himself did not pass sentence upon Adam before he was called upon to make his defence. Adam (says God) where art thou? Hast thou eaten of the tree whereof I commanded thee that thou shouldest not eat? And the same question was put to Eve also."

All that is true enough, but what about the serpent? A woman making a confession of her own crime, lays blame upon him. Why is he not called on for his defence, just as she was when the man confessing his own crime implicated her? It looks unfair.

It will not do to explain this by the omniscience of the God. That might answer if Adam and Eve were treated in the same way; but it is quite plain that they are convicted not by knowledge of the Judge himself but by their own confession. The serpent, however, is convicted by the confession of an accomplice, not even under oath; something which no modern civilized jurisprudence would permit.

The explanation is no doubt historical. In the early stages of civilization a clean-cut distinction is made between the free and the slave; the free has rights the slave has none. As late as the second half of the 19th century the Chief Justice of the Supreme Court of the United States, in a very well known judgment, expressed the opinion of many Americans that the negro slave has no rights which a white man is bound to respect. In the old jurisprudence—sometimes in jurisprudence not so very old—to convict a freeman requires a confession or evidence under some such sanction as that of an oath; to convict a slave requires but the accusation of a freeman, especially if that freeman be the slave's master.

Here the serpent is considered as a household slave of Adam and Eve, more clever and better educated than master or mistress, as was not uncommonly the case even in comparatively modern times—but a slave nevertheless. The word of the mistress was sufficient; the slave had no rights, his conviction was immediate, and his punishment

followed, swift and dire. The household slave is cast out to live in the field, and is cursed above all animals. To prevent any communication between him and humanity thereafter, each had to watch diligently the other—the man to watch the venomous head, the serpent the crushing heel.

The serpent had not eaten of the forbidden fruit, even if the prohibition extended to him, of which there is no evidence. All he had done was at the worst to misconstrue a statute which Eve and Adam could interpret as well as he, but he paid the penalty of the sharper intelligence which leads astray the more stupid. Numerous examples are to be found in history as well as in fable of the clever underling corrupting the superior whose intelligence was inferior, whether from tender years or natural defect. The underling has always suffered, and rightly; superior intelligence has its duties as well as its privileges. The punishment of a house-servant by sending him out to work with the slaves in the field was perhaps the most severe possible (it would not pay to kill a slave); he had unending toil under severe taskmasters, and lived ever in dread of the *ergastulum*. Death itself was often preferred.

Then came the mistress—the woman's punishment was greater than that of the man—until quite modern times it has always been so; now perhaps the pendulum has swung the other way. If a man had suffered the faith of Edith Cavell, little would have been heard of it, and no woman murderer has been executed in Ontario for many years.

In the early English law the male criminal was drawn to the gallows and hanged, the female was drawn to the gallows and burned at the stake. A servant killing a master, if a man, was hanged; if a woman, was burned to death, although both were guilty of "petit treason." A wife killing her husband was burnt at the stake as a traitor; a man for killing even the King was not. Blackstone in vain attempts to make this difference due to a regard to "the decency due the sex." It was simply brutal disregard for what was considered the inferior part of humanity.

The crime of Eve and the crime of Adam were the same, but Eve was more severely punished by being made subject to the mastership of her fellow convict, as well as in undergoing torture when performing the function which she alone could perform and which must needs be performed if the race was to come into existence. The punishment of death was commuted to one of servitude for life, with periodical torture.

Adam's sentence was comparatively light; he must work hard for a living—no slavery, no torture—followed by ultimate death.

The trial is over, the prisoners convicted and sentenced, but the indirect effect is still to come. Adam had become as one of the Gods from the knowledge he had acquired, he had been sentenced to death at some time, and it must be made certain that he would not avoid this death.

There was a tree in the park of whose qualities we now hear for the first time—the tree of life, which was planted in the midst of the park. It is mentioned incidentally in an earlier part of the story, but no hint is given of its marvelous properties. Now it appears that if Adam should eat of the fruit of this tree he would live on indefinitely, notwithstanding the sentence. To prevent this evasion, Adam is turned out of the park and prevented from ever entering it again. No doubt Eve went with him; she afterwards bears him children; but we have no account of the serpent's fate. It is to be presumed that he also was ejected, otherwise he could not keep an eye on the heel of the seed of the woman.

Of the historical truth of this story I express no opinion; but it is plain that the writer of it believed that what was done was wholly right—nay, more, that it would appeal to his hearers as being wholly right; and if not above, of a surety not below, the current ideas of law and justice.

It must therefore have been written when the law-giver and the law-interpreter were one and the same person, when the Judge was peripatetic and examined into crimes personally, when the accused might be compelled to convict himself, when the slave had no rights, and when the woman was also an inferior creature, whose punishment might and should be greater than that of the man in like case offending. Whatever be the conclusion as to the time of the first telling of the tale, it forms an interesting study in comparative jurisprudence.