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THE ALMOST-FORGOTTEN LAW BOOK

The dramatic and striking in trial technique is ever interesting. One of my earliest — and most vivid — courtroom memories involves a lawyer's use of the Bible, with telling effect. The prosecution's witnesses had told almost exactly the same story, verbatim. Counsel argued that substantial agreement is an earmark of truth, but that verbal exactness is a badge of perjury. He clinched his point by citing the general agreement, but minor disparity of the four Gospels as to what was written on the Cross when Christ was crucified.¹ An equally interesting use of the Bible was made by the late Virgil Lusk to discredit a woman's identification of her assailant when she had merely a glimpse of him in dim moonlight as he ran from her room.² He opened his speech to the jury with the story of Jacob working seven years for the beautiful Rachel only to lose her by trickery on his wedding night when sly old Laban substituted his plain, older daughter, Leah, as the bride. Then with measured emphasis he made his point: Jacob did not discover the fraud until next morning — after he had ratified it! Skillfully he drew his analogy, that if Jacob, under the circumstances, could make such an error, it was beyond belief that the prosecuting witness, half asleep, in terror, and with but an instant glimpse in dim moonlight, could truthfully identify

¹ "This is Jesus the King of the Jews." *Matthew* 27:37; "The King of the Jews." *Mark* 15:26; "This is the King of the Jews," written in Greek, Latin and Hebrew, *Luke* 23:38; "Jesus of Nazareth the King of the Jews," written by Pilate. *John* 19:19. Counsel, with telling effect, declared, "Even four saints who had walked with the Master did not report in exactly the same words." Since the Bible is accepted by jurymen as the absolute standard of truth, counsel could not have used a more forceful example. The jury rejected the "coached" witnesses and acquitted the defendant.

² I am indebted to Justice S. J. Ervin, Jr. for this story. He, as an accomplished raconteur, tells the story in colorful detail, as he saw it. Mr. Lusk, at the time was the nestor of the Buncombe (N.C.) bar and was past ninety, but still a great trial lawyer. The "Jacob" story is found in *Genesis* 29. Incidentally, Jacob's entire story is rich with fraud and deception; from tricking his blind father into believing that he was the favored son, Esau, to his own dubious practices in acquiring Laban's best sheep for himself, it is a saga of shrewdness.

her assailant later. Nearly every experienced trial lawyer can recall similar examples of "old school" advocacy where Biblical allusions and stories were used with marked effect.

The Bible did not serve merely as a sourcebook of analogies and examples. It yielded, also, powerful, persuasive statements of the basic ethical ideas upon which most of our legal rules are grounded. Finally, the elevated, stately and sonorous style of the King James version served many generations of American lawyers as the model for public discourse. For sheer rolling eloquence and majestic beauty, this version of the 2000 year old anthology of a people is still without a peer. But a sophisticated age which is more interested in clarity than beauty has permitted dust to cover this "five foot shelf of books."³ Why? Perhaps our predecessors overdid it. Maybe there were so many second-rate disciples of this method that the few masters were discredited by the indiscriminate crowd. More probably, the stepped-up tempo of life became too fast-paced for this deliberate, unhurried technique.⁴ Whatever the cause, we rarely hear a Biblical reference in a courtroom today. Public reference to the Bible is almost as taboo today as public comment on sex was two generations ago. Possibly it is better so. Perhaps I am merely waving the standard of a lost cause as the age leaves me straggling in the rear. Possibly my feeling is but a wistful nostalgia looking upon an imperfect past through the

³ Dr. Rudolph Flesch, the consultant for press and radio (and a powerful influence in meeting this age's demand for clarity) constantly emphasizes "readability" almost to the exclusion of other values. By his standards, much of the King James version is "hard reading." See his *THE ART OF PLAIN TALK* (1946) and *THE ART OF READABLE WRITING* (1949). Our age wants everything "easy," from dishwashing to reading. However, life has not changed its basic rules. Mastery, superlative command, of any subject is still "hard." Dentists tell us that we ruin our teeth with too many sweets and soft foods. It is not a happy thought, but sugar-coated ways of life and "soft" ideas may be taking their toll in our moral and mental life. Witness: the Kefauver investigations.

⁴ We stopped reading to listen to the radio and now we have stopped listening to look at television. If we pick up a magazine, we are more likely to look at pictures than to read. If we read a book, we must have it in a digested capsule which we can swallow with one gulp. Our minds no longer "chew" anything. Scientists say that an organ removed from use eventually atrophies. This is not a pleasant thought, either.

rose-tinted glasses of memory. But I feel — and with conviction — that in our professional neglect of the all-time “best-seller,” we, as lawyers and as individuals, are the losers. I trust the following comments will serve, in some small measure, to restore interest within the profession in this great, neglected, and all-but-forgotten Book of the Law.

An Unwritten Story

Although in many periods of English history, judges were appointed or replaced largely because of their religious views, it is strange indeed that apparently no one has undertaken a study of the influence of the Bible upon English law or, for that matter, upon American law. The index to Holdsworth's magnificent twelve volume *History of English Law* gives no reference to the Bible. This is true also of Pollock and Maitland, *History of English Law*, in two large volumes. Studies have been made of the influence of particular legal works, such as Blackstone's *Commentaries*, upon the development of English and American law,⁵ but the larger problem of the influence of the Bible upon our law has apparently been too much for even the most tireless researcher to undertake. Since Christianity, with the Bible, has been an important influence in English history from the coming of St. Augustine in the 6th century, and since, for a long period, many of the judges were chosen from the clergy, it is obvious that the Bible was a continuing influence throughout the formative period of the common law. The truth seems to be that the ideals of the Old and New Testament have dominated the Anglo-American ethical and spiritual thinking for so many centuries that we have taken them for granted as basic assumptions.

The learned among the English leaders were familiar with the Bible for centuries before Tyndale and Coverdale, in the

⁵ See, for example, the chapter assigned to this subject in LOCKMILLER, SIR WILLIAM BLACKSTONE 169 (1938); See also the entire text of BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* (1941).

16th century, brought to the common man a translation in "vigorous, ploughboy English"; after that, the Bible certainly became a part of the English tradition, a heritage which the American colonists fervently embraced.⁶ As religion was a vital interest of the colonists, many Biblical ideas are implicit and explicit in such early documents as the Mayflower Compact, Virginia's Establishment of Religious Freedom, and the constitutions of the thirteen colonies. In fact, in early America the Bible occupied the position of a divine constitution; in the very first charter granted in the New World Sir Walter Raleigh was permitted to enact only statutes that "be not against the true Christian faith."⁷ And Blackstone, in his statement of the common law which served as the foundation upon which American law was raised, declared, "No human laws should be suffered to contradict" the revealed law of the Scriptures.⁸

The Old Testament and Modern Law

Breaking sharply with the past and turning to a modern courtroom, what do we find? The judge, the counsel, the court officers, the jurors and the witnesses are all sworn "on the Bible." Three thousand years ago the Hebrew, to make his oath sacred and binding, raised a hand⁹ or both hands¹⁰ to Heaven; we follow the same practice today, but we em-

⁶ Pomeroy clearly implies that portions of the primitive Saxon codes of England re-enacted certain precepts of the Scripture. 1 POMEROY, EQUITY JURISPRUDENCE §10 (5th ed. 1941). William Draper Lewis, in his 1902 edition of BLACKSTONE, COMMENTARIES, v. 1, p. 64, makes it clear that King Alfred began his *Dome-Book* with the Ten Commandments and many other Mosaic precepts, followed by the sanction given them by the Master, "Think not that I am come to destroy the law, or the prophets: I am not come to destroy, but to fulfill." *Matthew* 5:17. After quoting the Golden Rule, Alfred declared that if a man would follow this one doom he need heed no other doom-book. See also CLARK, BIBLICAL LAW 43 (2d ed. 1944).

⁷ See grant of Queen Elizabeth to Raleigh (1584), mentioned in *The Church of the Holy Trinity v. United States*, 143 U.S. 457, 12 S. Ct. 511, 36 L. Ed. 226, 230 (1892), and given in 2 CONSTITUTIONS AND CHARTERS 1379 (2d. ed. 1878). This grant was the documentary beginning of North Carolina history.

⁸ 1 BL. COMM. *42.

⁹ *Deut.* 32:40.

¹⁰ *Daniel* 12:7.

phasize the impressive solemnity of the oath by grasping the Bible as we swear. We notice as the trial proceeds that each man is judged responsible for his own conduct; this basic, fundamental idea of personal responsibility was a part of the Mosaic law as it is a part of ours.¹¹ Before the law, all men, rich and poor alike, stand equal; this, too, is Mosaic.¹² The judicial inquiry is a search for truth in order that justice may be done among men; both truth and justice were Mosaic ideals.¹³ We seek in our judges today the same qualities demanded by Moses.¹⁴ Even the primary notion, which we consider so essentially American, that we must enforce the law because we voluntarily accepted it, had its democratic counterpart at Mount Sinai when the Jews voluntarily entered into the covenant with Jehovah and pledged obedience to His laws.¹⁵

It is rather startling to note that these bedrock ideas — the oath, individual responsibility, equality before the law, freedom from discrimination, the respect for truth, the ideal of justice, able and God-fearing judges, and government by consent of the governed — go back, not only to early England, but 3000 years to ancient Palestine. They come from the very oldest part of the Old Testament, a source which also gave us that most important of all socio-ethical

¹¹ "The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers: every man shall be put to death for his own sin." *Deut.* 24:16. More primitive codes involved *family* responsibility, where innocent relatives might suffer for the wrong of a kinsman. Personal responsibility was one of the very important advances from primitive law.

¹² "Ye shall do no unrighteousness in judgment, thou shall not respect the person of the poor, nor honor the person of the mighty; but in righteousness shalt thou judge thy neighbor." *Leviticus* 19:15. There is one law for all men. *Exodus* 12:49. See also: *Leviticus* 24:22; *Numbers* 9:14, 15:15, 16.

¹³ The lie was forbidden by *Leviticus* 19:11, and doing that which is just is enjoined in *Deut.* 16:20.

¹⁴ ". . . [A]ble men, such as fear God, men of truth, hating covetousness. . . ." *Exodus* 18:21. Justice Johnson, of the North Carolina Supreme Court, took his oath of office with his hand upon these magnificent words, ". . . what doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God?" *Micah* 6:8.

¹⁵ "And all the people answered together, and said, all that the Lord hath spoken we will do." *Exodus* 19:8. See also GETTELL, HISTORY OF POLITICAL THOUGHT 29-30 (1924).

standards, the Golden Rule.¹⁶ The Hebrews call these first five books of the Bible the Torah ("the Law") or the "Books of Moses," as they credited Moses with their authorship.¹⁷ These books are rich sources of the background of many of our present laws.¹⁸

Legal Ideas in Genesis

The Jewish term, Torah, is an apt title for the first books of the Bible.¹⁹ Even *Genesis*, dealing with the Creation and the antediluvian patriarchs of the pre-Mosaic period, contains many legal ideas. The word "law" comes from the Anglo-Saxon "lagu," meaning "things lying in due place," or "in order."²⁰ Law appears on the first page of the Bible;

¹⁶ ". . . thou shalt love thy neighbor as thyself. . . ." *Leviticus* 19:18.

¹⁷ Any good Bible commentary, such as *THE BIBLE COMMENTARY* (Abingdon Press 1928) or *OLD TESTAMENT COMMENTARY* (Alleman & Flack ed. 1948), will reflect the debate among scholars about the authorship of the Pentateuch (the Torah). The so-called "higher criticism" [of which DRIVER, *AN INTRODUCTION TO THE LITERATURE OF THE OLD TESTAMENT* (10th ed. 1912) is a striking example] which flowed from the German and English universities during the late 19th century, so discredited the Mosaic authorship that only the most courageous scholar will now defend it. NAVILLE, *ARCHAEOLOGY OF THE OLD TESTAMENT* (date of publication unknown) is such a scholar, and I am by nature so skeptical of sophisticated learning that overthrows traditional truth that he finds a warm defender in me. I am even inclined to agree with his view that Moses wrote these books on clay tablets in Babylonian cuneiform. WADDELL, *EGYPTIAN CIVILIZATION: ITS SUMERIAN ORIGIN* (1930) also supports this view. One is reminded of Mark Twain's astute observation, that if Moses did not write the Books of Moses, they were written by another old Jew with the same name, who looked like him.

¹⁸ "Israel's law is the connecting link between the earliest and the latest legal systems and has proved itself one of the most influential forces in the evolution of the world's law." Lobingier, 4 *CHINA L. REV.* 362 (1931), quoted in CLARK, *op. cit. supra* note 6, at 43.

¹⁹ Before Christ, the Alexandrian Jews secured a translation of the Hebrew Scriptures into Greek for use in their synagogues. This was called the Septuagint because there were supposed to have been seventy odd translators. In this Greek translation, which largely influenced the Christian Old Testament, the Mosaic books were called the Pentateuch, meaning "five books." This is the less apt Christian title.

²⁰ *III CENTURY DICTIONARY* 3375 (1889) indicates that "law" was derived from Middle English *lawe* or *laghe* which in turn was derived from Anglo-Saxon *lagu*, the same as Old Saxon *lag*, meaning literally "that which lies" or is fixed or set. SKEATS, *ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE* 332 (4th ed. 1924) gives a more complete derivation, indicating that the Anglo-Saxon *lagu* was borrowed from the prehistoric Old Norse *lagu*, found in the Icelandic *log*, which in turn came directly from the Teutonic *lag* ("to lie"), and which in the sense used here means "that which lies" or "is in due order."

God's first act was to bring order into the universe.²¹ Only God and chaos are older than law. Of all the creation stories of antiquity, only *Genesis* presents the magnificent conception of the essential unity and order of all nature.

The Creator established the Sabbath and Moses established the first "Sunday Blue Laws" in support of it.²² Cain committed the first homicide of history; because he killed his brother, Abel, in the heat of passion, it was not adjudged murder and his life was not forfeited.²³ Here is the beginning of the division of homicide into degrees; Moses later made specific the distinction between manslaughter and murder.²⁴ Capital punishment for murder, as a part of the law of strict retribution (*lex talionis*), was expressly laid down to Noah after the flood.²⁵ If we accept Josephus as sufficient authority, it was Cain, in his wanderings under the curse, who "first of all, set boundaries about lands," thus laying the basis for the modern law of real property.²⁶

The law of estates appeared with Abraham,²⁷ whom the Lord promised to make the father of many nations,²⁸ but at

²¹ "In the beginning God created the heaven and the earth. And the earth was without form, and void. . . ." *Genesis* 1:1, 2. The following verses describe an orderly, systematic creation.

²² See *Genesis* 2:2, 3 and *Deut.* 5:12. *Exodus* 35:3 prohibited the kindling of fires in the habitations on the Sabbath.

²³ *Genesis* 4:3-15.

²⁴ Manslaughter was distinguished from murder in *Exodus* 21:13, *Deut.* 19:4.

²⁵ "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man." *Genesis* 9:6. *Lex talionis*, i.e., a life for a life, eye for an eye, tooth for tooth is found in both *Exodus* 21:23-25 and the later *Leviticus* 24:17-21. It was probably brought from Mesopotamian Ur by Abraham. Though Hammurabi possibly lived several centuries after Abraham — who, it is speculated, lived before 2000 B.C. — it is found in Hammurabi's Code §§ 116-231. Hammurabi certainly codified "old" laws two or three centuries later. See DAUBE, *STUDIES IN BIBLICAL LAW* c. 3 (1947).

²⁶ 1 WORKS OF FLAVIUS JOSEPHUS 48 (1897). Flavius Josephus lived in the first century after Christ and was on the whole, a truthful, accurate historian. 16 ENCYC. AMERICANA 213 (1950).

²⁷ When the Lord promised the century-old Abraham and ninety-year-old Sarah an heir, they both laughed because it sounded preposterous. (See *Genesis* 17, 18, particularly *Genesis* 17:17 giving their ages.) For this reason, when the son was born, he was named "Isaac" meaning "laughter." *Genesis* 21:3. This origin of Isaac's name is not clear in the King James version, but is vividly presented in Dr. Meek's excellent translation in *THE COMPLETE BIBLE* (Smith & Goodspeed ed. 1939) where the Hebrew proper names are translated.

that early date distributions were not by will but by gift inter vivos when the father reached an advanced age.²⁹ Abraham's purchase of the burial place for Sarah records the first purchase of real estate.³⁰ There was a bargain and sale from the Hittite owner to Abraham, in the presence of witnesses, Abraham paying in silver the price asked, although the owner offered it to him as a gift.³¹ Ancient Hittite law offers confirmation of this story.³²

Rape appeared with the story of Dinah; it was punished not only by death, as at present, but also by total forfeiture of all property. And it was enforced at the hands of her brothers under the primitive idea of self-help.³³

²⁸ God's covenant was to run with Abraham's blood forever. *Genesis* 17:7, *Genesis* 17:5. In her effort to give Abraham an heir, Sarah sent her maid, Hagar, the Egyptian, to him, but she later regretted it. Note that the maid was property of the wife and Abraham recognized the right of Sarah to treat Hagar as Sarah's own chattel. *Genesis* 16.

²⁹ *Genesis* 25:5, 6.

³⁰ *Genesis* 23.

³¹ *Genesis* 23:12-20. The Hittites were very sympathetic when Sarah died, and Ephron, the owner of the cave at Machpelah, offered it as a gift to Abraham, as a prince, but he preferred to buy it at its full value as a burial ground of his own to avoid the risk of others claiming it. Later this spot became the burial place of Abraham, *Genesis* 25:10, and of his grandson, Jacob, *Genesis* 50:13. Hebron, too, was to be the first part of the "Promised Land" occupied by Caleb, and still later it was the first capital of the kingdom under Saul. Thus, a family burial place became a symbol of the covenant promise of Yahweh to Israel.

³² An old Hittite code, dating about a century before Moses and showing an old code and a revision, is almost as elaborate and complete as the two most complete ancient codes, Hammurabi's and Moses'. Tablet 1, Section 6 of the older version provides: "If a person, man or woman, dies in another town, he on whose property he or she dies shall set aside 100 gipsessers [probably cubits] of his property and the heir shall receive it." PRITCHARD, *ANCIENT NEAR EASTERN TEXTS* 189 (1950). This explains why the Hittite offered to give the property to Abraham; the law directed him to do so. It thus becomes clear that it was not the Hittite but Abraham, in his insistence that he pay for the land, who was generous. As the Hittite Code deals extensively with larceny and thievery, we may be sure that the Hittites were very much impressed by Abraham's marked sense of integrity. See Dr. Albrecht Goetze's translation of the Hittite Laws in *id.* at 188-97.

³³ *Genesis* 34. This revenge of Dinah was marked by the treacherous cunning and fraud so often found in *Genesis*; and, one suspects, was marked as definitely by greed as by a sense of outrage. Another example of deception is the story of the forgotten widow, Tamar. *Genesis* 38:11-26. Still another is Jacob's revenge on old Laban for substituting Leah for Rachel on his wedding night. See *Genesis* 30:27-43, which tells how Jacob built up his own flock while working for Laban. For a fine contribution to the field of Biblical law, see the study of "legal fraud" in DAUBE, *op. cit. supra* note 25, at 190.

Joseph may perhaps be regarded as the first victim of kidnapping.³⁴ Certainly, he was one of the first innocent men to be thrown into jail because of an unscrupulous woman.³⁵ As "Commissioner of Internal Revenue" for Pharaoh, he was one of the earliest tax administrators; when we read that he furnished the land and the seed, but took only a fifth for taxes, we may be pardoned a passing sigh for "the good old days."³⁶ Finally, the first adoption appeared late in the Joseph story, when the aged Jacob adopted Joseph's two sons as his own, giving preference to the younger over the elder in his blessing.³⁷ Jacob's division of his estate is an early example of the partiality of a father toward a favored son.³⁸

Legal Codes Before Moses

As we leave the patriarchs of *Genesis* behind us, we gradually move from the realm of tradition into the dim light of early recorded history. Writing is mentioned in Mosaic books,³⁹ and it is likely that Moses wrote with a stylus on tablets in Babylonian cuneiform.⁴⁰ With the appearance of writing, history acquires an atmosphere of authenticity, and this is particularly true of legal history. Archaeology in the 20th century has done much to lay a sound foundation for the true history of primitive law.⁴¹ We are beginning to see

³⁴ *Genesis* 37:28.

³⁵ *Genesis* 39:1-20.

³⁶ *Genesis* 47:23-6.

³⁷ *Genesis* 48:1-20. By adopting Ephraim and Manasseh as sons, to receive shares as his heirs, he reduced the shares of his other sons. This would indicate that no general power of testamentary disposition was recognized, but shrewd old Jacob found a way to permit his grandchildren to share in his estate.

³⁸ *Genesis* 48:21, 22. That the father had the right to favor one son over others is clearly shown by the gift to Joseph of an extra portion.

³⁹ The Ten Commandments - *Exodus* 34:28, and *Deut.* 4:13. Joshua wrote on the stones a copy of the Mosaic laws. *Joshua* 8:32.

⁴⁰ This is the view of many scholars. See NAVILLE, *op. cit. supra* note 17, at 166-7, and Diringer, *Early Hebrew Writing*, 13 *BIBLICAL ARCHAEOLOGIST* 74, 76 (1950).

⁴¹ MAINE, *ANCIENT LAW* (1888), is no longer a dependable authority. See DIAMOND, *PRIMITIVE LAW* (2d ed. 1950). For an intermediate view, leaning toward Diamond's, see DAUBE, *op. cit. supra* note 25, at 62 n. 1, 2.

how the ancient Egyptian, the more ancient Mesopotamian, and even Indo-European cultures came to bear upon little Palestine, land-bridge of the ancient world, and contributed to its thought and customs. Of these influences, the Mesopotamian (Babylonian) appears to have been overwhelmingly the most important, particularly in legal history.⁴²

Half a century ago, Hammurabi's Babylonian law code was found at Susa. Covering some two hundred eighty sections, it still is second only to the Mosaic code in fullness and length. The laws cover a wide range: theft, slaves, land, commerce, debt, family, torts, builders and cattle. General rules are completely lacking; for example, no rule is given governing murder and in sales only a few specific transactions are covered.⁴³ Too, religious and ritual rules are absent, and general legal principles (in the modern sense) are neither stated nor clearly implied. This separation of legal from religious rules indicates an intermediate period of development which presupposes an earlier extended period of growth; on the other hand, the lack of general ideas and principles places this code as prior to early *modern* law. The code was class-conscious, since it prescribed a different punishment for slaves, freemen and for nobles.⁴⁴ The law of retribution (*lex talionis*) was applied in a peculiarly literal manner to make the punishment fit the fault; for example, if a negligently built house fell upon and killed the owner's son, the life of the builder's *son* was forfeited.⁴⁵ Much of the

⁴² For a fascinating, popular (and authoritative) treatment of the Sumero-Akkadian culture, see Speiser, *Mesopotamia, The Light That did not Fail*, 99 NAT. GEOGRAPHIC MAG. 41 (1951). For a stimulating but more technical study, see Goetze, *Mesopotamian Laws and the Historian*, 69 J. OF THE AM. ORIENTAL SOCIETY 115 (1949).

⁴³ Old translations of the Code may be found in JOHNS, *THE OLDEST CODE OF LAWS IN THE WORLD* (1903), or JOHNS, *BABYLONIAN AND ASSYRIAN LAWS, CONTRACTS AND LETTERS* 44 *et seq.* (1904). An excellent, improved translation is given in PRITCHARD, *op. cit. supra* note 32 at 163 *et seq.* A satisfactory summary and comment is given in DIAMOND, *op. cit. supra* note 41, at 22 *et seq.* A better summary is Yankwich, *The Cultural Background and Some of the Social Phases of the Code of Hammurabi*, 4 SO. CALIF. L. REV. 20 (1931).

⁴⁴ Code of Hammurabi §§ 196-205, JOHNS, *BABYLONIAN AND ASSYRIAN LAWS, CONTRACTS AND LETTERS* 62 (1904).

⁴⁵ Code of Hammurabi § 230, *id.* at 64.

code is a schedule of prices to be charged for specific services and hiring. Actually, the code itself is a somewhat lengthy schedule of concrete fact situations followed by the judicial result; as, "If a son has struck his father, his hands shall be cut off."⁴⁶ Modern lawyers, by present-day standards, would not consider it a true "code" of laws. It was rather an extended catalogue of instructions to judges covering a wide range of case situations and was essentially statutory in character, although based, no doubt, upon prior laws and decisions. Formerly, Hammurabi was assigned a date about 2000 B.C. and his code was widely heralded as the "oldest legal code"; but modern scholarship has moved forward his dating several centuries to a possible date in the 17th or 18th century B.C., and we now have codes definitely older than Hammurabi's.⁴⁷

Two older legal codes were recently found and translated. The codes of Eshnunna and of Lipit-Ishtar, like Hammurabi's, belong to the Mesopotamian tradition. The Tigris-Euphrates valley appears to have been the cradle of civilization (the Garden of Eden was probably located here); the province of Sumer arose in the south and a short time later Semitic Akkad developed in the north. Eshnunna was an Akkadian city; Lipit-Ishtar was one in Sumer. Although Sumer was an older culture than Akkad, the Akkadian code, that of Eshnunna, is probably a little older than that of Sumerian Lipit-Ishtar and each is not far from 4000 years ago.⁴⁸ Both codes were written on tablets in cuneiform, that of Eshnunna in Semitic Akkadian and that of Lipit-Ishtar in

⁴⁶ Code of Hammurabi § 195, *id.* at 61. Compare it with *Exodus* 21:15. The *Exodus* treatment of the law of personal injuries, *Exodus* 21:12-27, is quite similar to Hammurabi's Code, §§ 195-214, JOHNS, *op. cit. supra* note 44, at 61-2.

⁴⁷ See, for example, Goetze, *supra* note 42, at 117.

⁴⁸ For translations and authentic data on these codes, see PRITCHARD, *op. cit. supra* note 32, at 159-63. Dr. E. A. Speiser and Dr. Albrecht Goetze think the Eshnunna code older, but Dr. W. F. Albright considers it later than that of Lipit-Ishtar. They both probably date from about 2000 B.C.-1900 B.C. Dr. Speiser of the University of Pennsylvania, Dr. Goetze of Yale, and Dr. Albright of Johns-Hopkins have each kindly furnished me valuable opinions on these recent discoveries.

Sumerian. Happily for the purposes of legal history, both Eshnunna and Lipit-Ishtar were small city-states which were shortly absorbed in Hammurabi's Babylonian empire. These codes are so similar to that of Hammurabi that it seems quite evident that Hammurabi's code is largely a compilation made up from these and the codes of the other city-states.

As the Hebrews were Semites, the oldest known legal code belongs to the same legal tradition as the Mosaic Code of the Covenant, in *Exodus*, the oldest of the Biblical codes. As Abraham, the father of the Hebrews, came from Ur⁴⁹ in southern Babylonia at about the time of the codes of Eshnunna and Lipit-Ishtar,⁵⁰ he might have carried with him to Haran and to Canaan this Babylonian legal tradition, certainly in memory and possibly on tablets.⁵¹ It becomes clear that, in part at least, both the Code of Hammurabi and the later Mosaic Code of the Covenant were derivative and based upon a Sumero-Akkadian legal tradition which was older than either. Moses may have learned of these ancient laws by tradition or tablets handed down from Abraham, or he may have studied them when he was a young prince in Egypt, or he may have come upon them during his years with his father-in-law, Jethro, in Midian. Whatever the explanation, he must have known of them, for there are striking similarities in the Mosaic laws.⁵² Thus, we can trace this Mesopotamian legal tradition back to about 2000 B.C.;

⁴⁹ Abraham's father, Terah, was born at Ur, and he left Ur with Abraham, emigrating to Canaan. *Genesis* 11:27-32. Ur was a large city in Sumer near the modern site of Baghdad.

⁵⁰ Albright, *The Old Testament and Archaeology* in OLD TESTAMENT COMMENTARY 139 (Alleman & Flack ed. 1948).

⁵¹ Scholars seem to agree that Terah, and later Abraham, led a large group. At Hebron, he was called a prince or tribal chief. A leader of a large tribe would naturally carry with him a copy of the law for the government of the tribe, and the law they brought from "home" was Babylonian.

⁵² For example, the penalty provided when a vicious ox gored a man to death shows that Moses recognized and punished the same offense (and in similar language) which had earlier been punished in the Code of Hammurabi and still earlier in the Code of Eshnunna. That the Mosaic Code followed a more ancient line than either of the others is shown by the primitiveness and severity of the punishment: both the ox and the owner were put to death, *Exodus* 21:29; in the Codes of Eshnunna and Hammurabi, the owner of the ox was permitted to

and new archaeological finds may enable us to carry it further back into antiquity.⁵³ It is even possible that one day we may find, in some form, an early parent code (probably in ancient Sumer) from which all of these later Mesopotamian codes were derived.

The old Hittite code was mentioned in connection with Abraham. It dates from about a century before Moses and, next to the code of Hammurabi and the Mosaic Code of the Covenant, is the most elaborate and complete of all the ancient, legal codes.⁵⁴ It is one of the most primitive codes, dealing largely with wrongs, civil and criminal, and marriage, but having little to say about contracts or commercial dealings. The classes of free men and slaves are recognized, and there is occasional mention of "merchants." Marriage by purchase is dealt with in some detail. There are references to land tenure, and elaborate treatment of the larceny of domestic animals. The prices of oxen, cows, sheep, horses, etc., were fixed. The code is particularly interesting as the earliest of any Aryan-speaking people, the most northern of these ancient eastern codes, and as our oldest legal heritage from the Indo-European influence which was to dominate the westward march of civilization for 3000 years. It came from the outskirts of the then civilized world and probably arose from an independent legal tradition. It certainly has less in common with the other ancient codes than do those showing Mesopotamian influences.

compensate for the injury by the payment of a fixed amount of silver, more under Eshnunna than under Hammurabi. Laws of Eshnunna § 54, Code of Hammurabi § 251, JOHNS, *op. cit. supra* note 44, at 65.

⁵³ Keiser, *The Historical Relationship of the Old Testament (Babylon)* in OLD TESTAMENT COMMENTARY 25 (Alleman & Flack ed. 1948), and Albright, *supra* note 50, at 139.

⁵⁴ Dr. Albrecht Goetze's translation of the Hittite laws is in PRITCHARD, *op. cit. supra* note 32, at 188. A recent translation, with a detailed commentary by a Hebrew scholar, is NEUFELD, *THE HITTITE LAWS* (1951). One interesting section (section 197) demands quotation: "If a man seizes a woman in the mountains, it is the man's crime and he will be killed. But if he seizes her in her home, it is the woman's crime and the woman shall be killed. If the husband finds them, he may kill them; there shall be no punishment for him." Thus, the "unwritten law" appears to have been one of the first written.

The Hittite code is valuable as reflecting the law of a people standing on the fringe of civilization, already possessing elementary ideas of property but only beginning to discover commerce. The most primitive societies are made up of hunters and nomadic wanderers; as they settle, they turn to agriculture and simple forms of trade and commerce appear. Both the Hittite and the Biblical Covenant codes belong to this period of transition; they had not reached the point of development reflected even in Babylonian (Mesopotamian) codes which were older. For example, both codes show a marked absence of underlying or abstract "first" principles and are made up of specific "case" situations.⁵⁵ The blending of the Hittite and Mesopotamian legal traditions, possibly through Abraham, as the background of the Mosaic Code of the Covenant, poses an interesting problem for scholars; the influence of these Aryan Hittites upon the Semitic Hebrews may have been greater than heretofore suspected.

A fragmentary Middle-Assyrian code, dating from the time of Moses or somewhat earlier, has also been found.⁵⁶ It deals with a transition culture which has moved from nomadic grazing to a more settled agricultural life and thus reflects the type of existence among the Hebrews just after Moses but before the period of the kings. There is a broad, general resemblance to the Mesopotamian laws; for example, the elaborate rules governing marriage-by-purchase follow the same general patterns and, to give a specific instance, the penalty of death exacted from a wife and lover taken in

⁵⁵ For example, in the pre-mosaic Hittite Code, we find a clear statement of the law of levirate succession which wise, old Naomi used so cleverly centuries later to secure a rich husband for her beloved and widowed daughter-in-law, Ruth: "If a man has a wife, and then the man dies, his brother shall take his wife, then his father shall take her. If in turn also his father dies, one of his brother's sons shall take the wife whom he had." Hittite Laws § 193, PRITCHARD, *op. cit. supra* note 32, at 196. Levirate marriage was widely accepted in the ancient world. See 3 WESTERMARK, HISTORY OF HUMAN MARRIAGE 210 (1922); FRAZER, FOLKLORE OF THE OLD TESTAMENT 266 (1923).

⁵⁶ PRITCHARD, *op. cit. supra* note 32, at 180 *et seq.*

adultery⁵⁷ had its counterpart in the Mesopotamian tradition. The resemblance to the Biblical laws is less noticeable, but there are portions similar to the Mosaic laws. For example, a variation of the law of levirate succession (invoked in the Ruth and Boaz story) provided that the father-in-law marry the childless widow of his son or give her to another son in marriage.⁵⁸ Another is that the status of the children of maidservants (such as Ishmael, son of Hagar and Abraham, until Isaac was born to Abraham's wife, Sarah) was that of an heir where no heirs were born to the wife.⁵⁹ Further indication of similarity lies in the fact that death was the punishment of sorcerers and magicians among the Hebrews as well as the Assyrians.⁶⁰ Wives were rigorously protected as property; the man who kissed another's wife had his lower lip cut off with an ax,⁶¹ and one who slandered her was flogged with staves, sent on the "roads" for a month, fined and castrated.⁶² Yet, the wife's lot was not an easy one. If the husband abandoned her without resources, she was forced to wait five years before marrying another; ⁶³ if the husband decided to divorce her, he was not required to make any provision for her.⁶⁴ In company with this rather brutal and unenlightened social code, it is something of a surprise to find a more advanced law of real property. For example, there was a procedure for guaranteeing title to real property which included advertising by herald for a month the intention to purchase so that adverse claimants

⁵⁷ Section 15, tablet A, *id.* at 181. Compare with Code of Hammurabi § 129, JOHNS, *op. cit. supra* note 44, at 54. However, if the husband pardoned the wife, the lover was pardoned also, but the husband could cut off the wife's nose and mutilate the lover's face while rendering him a eunuch — an effective, if brutal, form of preventive punishment.

⁵⁸ PRITCHARD, *op. cit. supra* note 32, at section 33, tablet A, p. 182; section 43, tablet A, p. 184.

⁵⁹ Section 41, tablet A, *id.* at 183.

⁶⁰ Section 46, tablet A, *id.* at 184; *Exodus* 22:18 and *Leviticus* 20:27.

⁶¹ PRITCHARD, *op. cit. supra* note 32, at section 9, tablet A, p. 181.

⁶² Section 19, tablet A, *id.* at 181.

⁶³ Section 36, tablet A, *id.* at 183.

⁶⁴ Section 37, tablet A, *id.* at 183.

failing to assert their claims would be barred.⁶⁵ There was also a procedure for compelling co-operative projects in well-digging and irrigation.⁶⁶ Of the several tablets of Assyrian laws, not all are legible; laws touching the family are more fully preserved than are laws concerning other subjects. The earlier laws reveal that the wife continues to live in her father's house and the later ones assume that the wife lives with her husband, thus probably reflecting a transition in family life. The punishments for crimes were the most brutal of any of these primitive codes; in addition to those mentioned, there were: mutilation of the face, impalement upon a stake without burial, and the pouring of hot asphalt on the head.⁶⁷ Generally, the laws are marked by a rough sense of justice, with the idea of *lex talionis* fitting the punishment to the crime in a crude effort of equality.

It would be quite interesting to compare the Egyptian and Canaanite law with the Mosaic code, but those codes have not been preserved. Very little Canaanite law has come to light. Egyptian findings have been extensive, and documents with legal aspects have been found, but as Dr. Speiser has pointed out, the Egyptian king was an absolute dictator who minutely regulated the life of the people to such an extent that there was no place for the development of a law of rights and duties.⁶⁸ The memory of the bondage in Egypt must have been distasteful to the Hebrews and it is not likely that they adopted many of the legal notions reminiscent of the slavery. Too, nomadic peoples have always been marked by a sense of independence and self-reliance similar to that of our own Western pioneers during the covered-wagon days. These people do not yield their freedom readily. The Hebrews, again and again, "murmured" against even

⁶⁵ Section 6, tablet B, *id.* at 185.

⁶⁶ Sections 17, 18, tablet B, *id.* at 186; section 6, tablet O, *id.* at 188.

⁶⁷ For general comments on these Assyrian laws, see DIAMOND, *op. cit. supra* note 41, at c. 5.

⁶⁸ Speiser, *Ancient Mesopotamia and the Beginnings of Science*, 55 THE SCIENTIFIC MONTHLY 159 (1942).

Moses, and on one occasion revolted. This love of freedom and individualism, implicit in the nomadic culture and the Mesopotamian legal tradition, lies at the very heart of Hebrew law and religion. Out of it came the long line of independent, courageous, out-spoken prophets of the Old Testament. The free spirit of the wilderness crying out against the softening captivity of the city was not mere chance; it flowed out of the history of the Hebrews as they turned from wandering to agriculture and from agriculture to trade in the cities.

All of these ancient codes preceding the Mosaic code are secular. Dr. Diamond has found this absence of religion in the most primitive codes to be general and typical.⁶⁹ They show primitive beginnings of morality (for example, in the laws relating to marriage, the family and sex offenses), but religion is strikingly absent. It is true that Hammurabi represented his code as coming from the sun-god, Shamash (and there are some late religious additions to the Hittite code), but he insisted that the laws were his own and he boastfully claimed credit for establishing them among the people.

This lack of moral and religious qualities in the older codes points up the significance of the Mosaic code and of Moses individually. Moses had the nomadic individualism of his Mesopotamian ancestry. When he saw his people at the mercy of the Egyptians, his heart cried out that there must be a better way of life. He must have there first recognized the need for the establishment and recognition of the rights and duties of every human being, the dignity of man as an individual. We recall how quick he was to resent the abuse

⁶⁹ DIAMOND, *op. cit. supra* note 41, c. 16. In the classic MAINE, *op. cit. supra* note 41, at 16 *et seq.*, it was insisted that law grew out of religion. DIAMOND, *op. cit. supra* note 41, WESTERMARK, *op. cit. supra* note 55, and others have made it quite clear that secular, primitive law appeared first and the blending of moral and religious ideas came later. The great achievement of Moses, in legal history, is that he raised the level of law to a moral, ethical and spiritual level never before known — and never since forgotten.

of the Israelite at the hands of the Egyptian overseer,⁷⁰ and, still later, his quick sympathy for Jethro's unprotected daughters when the unfriendly shepherds molested them at the well.⁷¹ These incidents reveal an awakened sense of humanity and justice which was to flower forty years later at Sinai in his great work as lawgiver and judge.⁷²

Unique Character of Mosaic Law

The secular character of the other primitive codes is the key to the unique qualities of the Mosaic code.⁷³ The oldest of the Mosaic laws are the Ten Commandments and their implementing laws, the Code of the Covenant.⁷⁴ When these laws are examined against the background of the pre-Mosaic codes already mentioned, the reader will be struck by several distinct impressions. *First*, they are based on a religious premise: the acceptance of Jehovah as the one God.⁷⁵ *Second*, they are founded on exalted ethical and moral concepts, and enjoin love of Jehovah as the perfect model for human conduct.⁷⁶ *Third*, they reflect a spiritual idealism and are

⁷⁰ *Exodus* 2:11-2.

⁷¹ *Exodus* 2:17.

⁷² See note 69 *supra*. Moses' dual task was to establish a religion and a legal system. In establishing Jehovah as God and in binding the people by covenant to Jehovah's law of the Ten Commandments and the Code of the Covenant, he accomplished both purposes, one of the most magnificent achievements of any figure in history.

⁷³ For a very stimulating discussion of this, see ADAMS, *ANCIENT RECORDS AND THE OLD TESTAMENT* (1946). Perhaps Dr. Adams overemphasizes the originality of the Mosaic laws, but he is certainly correct in his primary thesis that Moses acted as a man inspired in selecting the fundamental tenets of Mosaic Law.

⁷⁴ Turn to *Exodus* 20-3 and read these. The trend of modern scholarship seems to be a return to what has always been the traditional Jewish view, that Moses in fact wrote these earliest of Biblical laws. See ALBRIGHT, *ARCHAEOLOGY OF PALESTINE* 224 *et seq.* (1949).

⁷⁵ To the west, in Egypt, the worship of Aton as the one God, arose near the period of Moses. Akna-Aton's attempt to supplant Amon's worship was in the 14th century B.C. But Atonism was more a philosophy of individualism than a true religion. To the northeast, with the rise of Babylon to power, the god, Marduk, was raised to supremacy over the other gods, although they did not entirely disappear from memory. Hammurabi in his code called on many gods by name to aid him. In a very real sense, monotheism appeared with Jehovah at Sinai.

⁷⁶ The other primitive codes are singularly lacking in the statement of general principles. Too, they are stated in the third person as "case situations"

not to be obeyed as ends in themselves or because they are authoritative, but as guides to conduct acceptable to Jehovah as true, righteous and just.⁷⁷ *Fourth*, the basic commandments are universal and timeless, applicable everywhere and in any age.⁷⁸ *Fifth*, these commands have an absolute finality that is startling to our age which regards everything as relative.⁷⁹ These moral and spiritual elements were both new and unique, although many of the legal elements in the Mosaic code were old. Moses moved as an inspired leader when he picked here and there among the pebbles of ancient learning and unerringly selected those ideas which are timeless and priceless, choices which history has shown to be marked by deep spiritual insight and high standards of justice.⁸⁰

The Legal Aspects of the Ten Commandments

We customarily think of the Ten Commandments as moral and ethical rather than legal. When first given at Sinai,

("If a man. . ."), but the Mosaic laws are direct commands in the second person ("thou shalt . . ."), as statutory orders issued by the new ruler, Jehovah. General principles enter the law with the Ten Commandments which also set up for man, for the first time, an ideal standard by which to pattern his life.

⁷⁷ Earthly sanctions and punishments mark the other primitive codes, which were to be obeyed out of respect for the king and out of fear of the punishments specified. The Mosaic Code definitely rose above these limitations.

⁷⁸ Moses employed them to bring peace and order to a wild, nomadic tribe reveling in its freedom after centuries of slavery, but they are just as true, vital and usable today in America.

⁷⁹ Without change, repeal or modification they have stood for 3000 years as standards of behavior, the fundamental demands of decent conduct for all time. Could we dispense with a single commandment today? Can any man suggest another new commandment the equal of these? To those "practical" lawyers who feel that this study is more religious than legal, I suggest that they examine Sayre, *An Introduction to a Philosophy of Law*, 36 IOWA L. REV. 415 (1951). This quotation, *id.* at 415, will give an inkling of what awaits them: "There is no such thing as an act without a moral element to some degree. . . . Morals are an attribute of law that cannot be separated from the law itself."

⁸⁰ The author of *Acts* declared that Moses was wise in the learning of the Egyptians, *Acts* 7:22, and the ancient scholar, Philo, added that he was also wise in the learning of the Assyrians, the Babylonians, and the Chaldeans. Ethical and moral ideals were by no means unknown to the Mosaic age. For example, Hammurabi's code not only paramounted the idea of justice, but also the application of justice without discrimination. Something of an ancient oriental moral code is reflected in such sources as the Egyptian "Book of the Dead" and the Babylonian "Catalogue of Sins."

they served a very real, practical, political and legal purpose in unifying the Israelites under law. In the very first commandment, directing the Israelites to love Jehovah, who had redeemed them from bondage in Egypt, there is the ancient legal idea of "redemption." When one was sold into slavery, or taken for debt, there was an ancient duty imposed on the kinsman to "redeem" him or "buy him back." When this was done, the redeemer had a property right in the one redeemed and the one redeemed was in an actual legal sense "subject" to his redeemer.⁸¹ In the covenant at Sinai, the Israelites recognized Jehovah as the historic Redeemer, and as such, entitled to issue these binding commands to them. This covenant established Jehovah as the Lord, or Chieftain, of the tribes. He expressly prohibited images which might weaken their loyalty to Him as the invisible but ever-present Lord, and He promised rewards to His loyal subjects and punishment for traitors. Even His name was to be held in respect, not to be called on lightly or to be used carelessly. These were the proclamations of His royalty, designed to protect the prerogatives of the "tribal leader" among His people. The next command established the Sabbath, a periodically recurring time already known to the Hebrews from their Mesopotamian past, which was dedicated to the recognition of His position of pre-eminence over the people. This assured the worship of Jehovah as God and also obedience to Him as leader, as did the next command enjoining respect for parents. Since the parents would naturally bring up their children to revere the tribal God, as long as the children respected the parents and their teachings, His worship would be safe from heretics and traitors. This early recognition of the family established it as the basic unit in a healthy society. This command is a pivotal one; it concludes the early commandments binding the tribal

⁸¹ For an excellent study of redemption as a legal idea, see DAUBE, *op. cit.* *supra* note 25, at 39 *et seq.*

community to God's law, and it also introduces the second pentad which bound the individuals, one to another, into a close-knit community. Thus, we see that the first half of the Ten Commandments (which we usually regard as distinctly "religious") in their historical setting, served an important political and legal purpose. Too, although these commands were addressed to individuals, they were addressed to individuals as a part of the group and were designed to promote community solidarity and preservation.

The second pentad of the Commandments may be considered the "ethical" half as opposed to the first pentad which is "religious." Certainly, the last five are more "legal" in character. They impose five distinct *duties* on every individual, thus raising in every other individual the *right* to be free from the five *wrongs* which are the violations of these duties. Here we have fundamental legal theory, for, even today, the entire doctrine of individual liberty rests primarily on a single basic premise — the right to be let alone.⁸² These latter commandments are distinctly social commands, protecting the individual in the interest of the group. Four essentials of community existence are singled out for protection: life, marriage, property and social honor. They are safeguarded by the Commandments condemning homicide, adultery, theft, slander and greed. The first four Commandments of the second pentad are all characterized by the prohibition of objective acts capable of objective proof before courts. The final command is unique — the prohibition of a subjective state of mind, greed, which is impossible to *prove* objectively. In the sense that it is addressed almost exclusively to the individual as a standard for gauging his personal attitudes and thinking, this is the most distinctly ethical of all the Commandments. This prohibition of envy

⁸² See Simmons, *Man's One Fundamental Right: To Be Let Alone*, 36 A.B.A.J. 711 (1950).

and covetousness was designed to curb the one most anti-social attitude which, if not eliminated, destroys the very fiber of community life. It is so dangerous to the community that it was prohibited not only when it had found its way into action, but at its inception in the minds of men. The unique character and importance of the Tenth Commandment, directed against selfishness, has rarely been sufficiently emphasized.⁸³

These Commandments Moses established as the Constitution of the Hebrews. Upon this constitutional foundation, he erected the law of Israel. In creating a system of law, he founded a nation and began a religion. Any reader wishing to examine the earliest of the Mosaic laws may turn to the Code of the Covenant in *Exodus*.⁸⁴ The legal codes in *Deuteronomy* and *Leviticus* came many centuries later than the Code of the Covenant and reflect markedly the rising priestly influence in Jewish life. The Code of the Covenant is both more secular and more primitive than the other Biblical codes. It is worth noting in passing that *Leviticus* contained the commandment which Jesus, centuries later, was to raise to pre-eminence: "Love thy neighbor as thyself."⁸⁵ This, and the often repeated command to love God, constitute the great Mosaic commandments. All the ethical commands and legal enactments of the Mosaic books send their roots down to the fertile soil of these two commandments: A man must do what is just and right to others because he worships a just and righteous God. Arising in the prehistory of ancient Sumer, it took form at Sinai. Through thirty centuries it has

⁸³ For a more elaborate and extremely provocative interpretation of the Ten Commandments in their original, historical setting, see BUBER, *MOSES 119 et seq.* (1946).

⁸⁴ *Exodus 20-3* The King James version is more accessible, but the American Revision is clearer. From the standpoint of clarity, my own preference is Dr. Theophile Meek's translation of *Exodus* in *THE COMPLETE BIBLE 51* (Smith & Goodspeed ed. 1939).

⁸⁵ *Leviticus 19:18.*

stood as the basic precept of the Judaic-Christian tradition. From Sinai to Jerusalem to Alexandria to Rome to England, and through Babylonian, Old Hebrew, Square Hebrew, Greek, Latin and finally English, it has reached us in America. This is our ancient legal heritage. This was Moses' message to modern man.*

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