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MILLENNIAL MILESTONES IN LAW

By

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"Time, whose tooth gnaws away everything else, is powerless against truth."

— T. H. Huxley

Recurrent illustrations of coincidence in expression throughout legal history have often posed the question whether humans have not, in some matters at least, thought in parallel channels for centuries. The legal profession has long been cognizant, for example, of the striking resemblance between Scriptural references and certain contemporary legal expressions. These, for the most part, have been dismissed as due to "influence" exerted by Scriptures upon jurisprudence. In so far as our common law is concerned, Blackstone¹ recognized such influence when he said: ". . . we find some rules of the Mosaical, and also of the imperial and pontifical laws adopted into our system." But the *indicia* of coincidence are not confined to the *Pentateuch*, nor solely to the Scriptures for they may be found distributed profusely throughout historical literature.

Consider the modern concern over the integrity of written contracts and then compare what Paul (himself a student of the great lawyer, Gamaliel) said in his letter to the Galatians 3:15: "Brethren, I speak after the manner of men; Though it be but a man's covenant, yet if it be confirmed, no man disannulleth, or addeth thereto." Again, let us look at the following passage in *Commonwealth v. Flood*, 302 Pa. 190, 196: "Persons accused of crime should be brought to as speedy a trial as the exigencies of their case demand, otherwise one of the benefits accruing to society will be lost or seriously diminished." Does this not express the thought exemplified in the Biblical observation:² "Because sentence against an evil work is not executed speedily, therefore the heart of the sons of men is fully set to do evil," and the derisive thought of Horace inspired by impatience over the law's delay, "*pede poena claudo*"—punishment follows on a game leg? Can anyone find a material difference between the degrees of kinship within which

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¹ Book IV, Chap. 33. Mention might also be made of the Charter of John referred to by Wigmore (Panorama of the World's Legal Systems Vol. 1, p. 124) as conferring the right upon English Jews to administer justice among themselves. This certainly brought Jewish law into close contact with the common law.

² Ecc. 8:11.

³ Act 1939, June 24, P.L. 872, § 507; 18 P.S. § 4507.

one may not marry as set forth in the Penal Code³ and those described in Leviticus 18:6, et seq., forbidding the uncovering of the nakedness of one that is near of kin, or of one's father and mother, sister, grandchild, stepsister, aunt, uncle, daughter-in-law and sister-in-law? Or, for that matter, those set forth in the fourth *Sura* of the *Koran* which provides: "Forbidden to you are your mothers and your daughters, and your sisters, and your aunts, both on the father and mother's side, and your nieces on the brother and sister's side, and your foster mothers, and your foster sisters, and the mothers of your wives, and your step-daughters who are your wards, born of your wives to whom you have gone in . . .?"

The Statutory Construction Act⁴ in its fifty-eighth section calls for the liberal construction of laws so as to effect their objects and promote justice. This is but another way of expressing both the observation in 2 Corinth. 3:6, that: "The letter killeth but the spirit giveth life," and the common law *maxim*, "He who confines himself to the letter goes but half way." Likewise, our time-honored rule of cautioning jurors to carefully scrutinize the testimony of an accomplice where uncorroborated⁵ is merely a restatement of the truth uttered in Proverbs 18:5: "It is not good to accept the person of the wicked to overthrow the righteous in judgment."

Of course the coincidence of economies and their concomitants and the dictates of pure logic can always be advanced to explain the presence of seeming consistencies. Thus the observation in 1 Tim. 1:9, that: "The law is not made for a righteous man, but for the lawless and disobedient," springs from an obvious ratiocination which would, in all likelihood, have found expression elsewhere. In fact, it was said by Demonax with this cynical twist: "Probably all laws are useless; for good men do not need laws at all, and bad men are made no better by them." Again, the existence of an exactly opposite conclusion from the same factual situation would argue against either influence, coincidence or parallel thinking. For example, we now declare as a matter of evidentiary law that silence in the face of an accusation is an implied admission of the truth of the accusation⁶ whereas our Biblical antecedents cautioned⁷ "Whoso keepeth his mouth and his tongue keepeth his soul from troubles," and⁸ "Even a fool, when he holdeth his peace, is counted wise: and he that shutteth his lips is esteemed a man of understanding."

It is not our purpose here to propose that every coincidence of expression throughout legal history is evidence that man always arrives at the same conclusion concerning the regulation of human conduct. Nor do we intend to mine the rich ores of philosophy to discover whether there are things which are *mala in se* and not, as some maintain, *mala prohibita* merely. We quote liberally from the Scrip-

⁴ Act 1937, May 20, P.L. 1019, Art. IV, § 58.

⁵ *Com. v. Williams*, 275 Pa. 58, 65.

⁶ *Com. v. Vallone*, 347 Pa. 419.

⁷ Proverbs 21:23.

⁸ Proverbs 17:28.

tures not only because they are ancient, but because their integrity has been scrupulously preserved and, as pointed out by Thomas Hobbes, they lean more to law than to philosophy.

What is proposed is an examination of legal expression over a period of four thousand years for the simple purpose of determining whether there has been a semblance of constancy. Influence is admitted. The Babylonian law influenced the Jewish. The Jewish influenced the Roman and both of them influenced the English. The English influenced ours. This was all pointed out by John M. Zane in his excellent treatise, "The Story of The Law." But he generalized. Our purpose is to particularize and to document each comparison as much as possible.

An ideal springboard for our task is the *Code Hammurabi*⁹ which, because it is the oldest recognized civil code in existence,¹⁰ affords ample evidence of the legal thinking of that day. This we shall consider as our first millennial milepost. The second such monument will be the Mosaic period since that era is approximately one thousand years later than the first. Balancing these two like a fulcrum against the next two thousand year periods will be the early Christian era. Little evidence will be produced from this era since the Sermon on the Mount annulled the Mosaic laws of retribution, divorce, etc., and other Christian teachings ignored the ancient hygienic laws of the Jews and substituted, without restating the civil law, the law of Love. Some evidence from this period might be derived from the Romans since their earliest juristic effort was the twelve tables which dated somewhere around 450 B. C. These, on the surface, remained the Roman law even up to the *Justinian Code* of 529 A.D. and the *Corpus Juris*, 534 A.D., but the development was so slow and the early laws so completely procedural that it was not thought expedient to investigate them for the purposes of this comparison. See Sohn's *Inst. of Roman Law*, (Ledlie) p. 55.

The fourth milepost which we shall consult is the common law period which has been here rather arbitrarily set as beginning with the Norman Conquest. The last marker will be contemporary Pennsylvania law. Thus, we have the following statistical itinerary to mark our way: (1). *Hammurabi*, 2300 B.C.; (2). Moses, 1180 B.C.; (3). Jesus of Nazareth, 5 B.C.; (4). Hastings, 1066 A.D.; (5). 1776 to now.

⁹ For some time prior to 1902, because of archeological finds and references, scholars were aware of the existence of a code of laws known as the *Code of Hammurabi*. *Hammurabi*, who has been identified as one of the conquered kings referred to in *Genesis 14* (Amraphel) was the 6th king of the first Babylonian dynasty. The complete code, with several lamentable obliterations, was discovered by the French at Susa early in 1902. The earliest translations were, of course, into French. Later English translations followed but these are hard to find since no standard legal work on encyclopaedia has seen fit to print one. Wherever used in this article, the code has been restated by the author for clarity since translations have been clumsily made with an eye toward scholarship rather than artistry or the legalistic approach.

¹⁰ There is an older known code—the code of the Babylonian god *Ea*. This code deals with the kingly misdemeanors and not with the mundane business of lesser mortals.

The business of comparison can begin with the very first section of the *Hammurabi Code*, hereafter to be referred to as the Code. This section reads: "Whosoever weaveth a spell to put a curse upon another, and hath not justified himself, the same shall be put to death."¹¹ A comparable provision obtains in *Exodus* 22:18. "Thou shalt not suffer a witch to live."

It thus appears that witches, necromancers, magicians, etc., have fallen under the scrutiny of law for centuries. That they have been feared by humans in each of the selected periods is supported by the evidence. Archbishop Theodore spoke of their existence in England during the period 668-690 A.D. when he wrote:¹² "Of idolatry and sacrilege, and those who pay divine honours to certain angels and evildoers, soothsayers, poisoners, charmers, diviners, etc. . . ." Josephus, in the story of his own life reveals (§ 31) the belief in witchcraft among the Jews of the early Christian era. Blackstone¹³ wrote of the crime of witchcraft, conjuration, enchantment and sorcery which the common law ranked "in the same class with heresy, and condemning both to the flames." Our own state tried a girl for witchcraft in 1684¹⁴ and repeated references to "hexing" among the Pennsylvania Dutch show that the fear of witchcraft is not dead in this Commonwealth. In fact, if we turn to our Penal Code¹⁵ we find this interesting proscription: "Whoever pretends for gain or lucre, . . . to effect any purpose by spells, charms, necromancy, or incantation . . . or to win the affections of a person . . . or to tell where money or other property is hidden, or to tell where to dig for treasure . . . is guilty of a misdemeanor, etc. . . ." In respect to the digging of treasure and the winning of affection, this act is but a reiteration of an act of James I, referred to by Blackstone¹⁶ as forbidding an attempt "by sorcery to discover hidden treasures, or to restore stolen goods, or to provoke unlawful love" under penalty of the pillory for the first offense and death for the second.

It must be observed, in passing, that there are instances where a legal reference exists in the Babylonian code which cannot be traced in some of the later periods but finds expression today. The fourth section, for example, provides: "Whosoever offereth grain or gold to the witnesses shall suffer the judgment of the court." We have been unable to discover a comparable provision in any Scriptural writing but the common law crime of subornation of perjury (which has the added provision that the perjury must actually take place)¹⁷ and our own Penal Code provision¹⁸ penalizing the hindering and dissuading of witnesses sup-

¹¹ This is an odd provision to be found in the laws of a people which has been noted for its devotion to magic and witchcraft and even had a god, Marduk of Babylon, devoted to the business of protecting the necromancer.

¹² *Liber Poenitentialis*, Vol. 37.

¹³ Book 4, Chap. 4.

¹⁴ Sharpless, *HIST. OF PENNA.* p. 61.

¹⁵ Act 1939, *supra*, § 870; 18 P.S. § 4870.

¹⁶ Book 4, Chapt. 4.

¹⁷ Bl. Book 4, Chapt. 10.

¹⁸ Act 1939, *supra*, § 324; 18 P.S. § 4324.

plies a reference to the periods which they represent. That perjurers and suborners abounded in ancient Athens apparently without legal hindrance is amply attested by the term "straw shoes," a name applied to perjurers who advertised their willingness to commit perjury by placing straw in one of their shoes. The suborner, made aware of the perjurer's profession by this signal, approached him with the question, "Don't you remember?" to which straw shoes answered, "To be sure I do." "Then," said the suborner, "come into court and swear it."¹⁹

The same *hiatus* in Hebraic law exists with respect to the provisions of the seventh section of the Babylonian code. This section provides: "Whosoever buyeth silver, gold, manservant, maidservant, ox, sheep, ass or any chattel by whatever name it may be called, from a man's son or slave, without witnesses and bonds, or hath received such chattel as surety, he shall be adjudged a thief and put to his death." Again, although no comparable passage can be found in the Old Testament we find this statement in Blackstone:²⁰ "So likewise . . . if the seller is an infant . . . the owner's property is not bound thereby;" and in the Pennsylvania law²¹ there is this: "Whoever buys or receives from minors . . . or from any person pursuing no trade, labor or employment for a livelihood, any junk, etc. . . . is guilty of a misdemeanor." Furthermore, the lack of responsibility of the vendor has always been an element showing guilty knowledge on the part of one charged with receiving stolen goods.²²

It has long been the law of Pennsylvania that a term of court ordinarily terminates the power of the court to change, modify or otherwise meddle with judgments entered during the term. Thus, a convicted person cannot legally be resentenced after the term of court has ended²³ and it has been held that only by *coram nobis*²⁴ can a judgment be altered after the term and then only when a mistake of fact appears which would have prevented the judgment in the first instance. The Code exhibits a more severe attitude toward judges and their judgments. In its fifth section it provides: "Whensoever a judge who hath made his decision and entered his judgment under seal, afterward altereth it, the judge who altereth his judgment shall be put on enquiry and shall be required to pay twelvefold the judgment penalty; the assembly shall banish him from the judgeship forever." This not only required a high coefficient of accuracy in the first impression of the judges but it represented an entirely different concept of judgments from that of the common law. Blackstone²⁵ pointed out that judgments, though pronounced by the judges, are not their determination or sentences but rather those of

¹⁹ See BLACK'S LAW DICTIONARY, "Men of Straw."

²⁰ Book 2, Chapt. 30.

²¹ Act 1939, *supra*, § 879; 18 P.S. § 4879.

²² WHART. CRIM. LAW, Vol. 2 § 1232.

²³ Moskowitz's Registration Case, 329 Pa. 183, 190.

²⁴ Com. v. Harris, 351 Pa. 325.

²⁵ Book 3, Chap. 24.

the law itself.²⁶ The Israelite law ascribed the judgment to neither the judge nor the law, but to God, for in Deuteronomy 1:17, we find: "Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man; for the judgment is God's . . ."

"Finders keepers; losers weepers" has been a familiar cry among children for many years. Historically the law has not been in accord with such juvenile interpretation. The Code, for example, provides (§ 9): "Whensoever that which is lost is found again in the hand of another and he in whose hand it is found sayeth, 'A giver gave it me,' or, 'I bought it before witnesses,' and the owner of that which is lost sayeth, 'Verily, I will bring to witness those who know my property, then shall testimony be taken of the giver who gave it, or the witnesses who saw it bought and of the witnesses brought by him who claimeth it who know his property, and the judge shall hear their declarations, saying out in the presence of God²⁷ that which they knoweth; then if it be judged the giver was a thief, he shall be put to his death. He who claimeth the lost property shall take it again and the buyer shall be recompensed from the house of the giver." This compares with Israelite law²⁸ which provided: "For all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing, which another challengeth to be his, the cause of both parties shall come before the judges; and whom the judges shall condemn, he shall pay double unto his neighbor." Our own and the common law is in harmony. The Supreme Court in *Hamaker v. Blanchard*, 90 Pa. 377, 379, summarized it thus: "It seems to be settled law that the finder of lost property has a valid claim to the same against all the world, except the true owner . . ."

It is quite evident from reading the Code that the Babylonians had a very complex system of slavery. Sections 14 through 20 deal exclusively with the problems involved in maintaining slaves and in punishing those who enslave free men. The Israelites did not have such a system and their law in this regard is not extensive. Section 14 of the Code fixes the death penalty for enslaving a free man and this compares with *Exodus* 21:16, which provides: "And he that stealeth a man, and selleth him, or if he be found in his hand, he shall surely be put to death."

In that aspect of slavery which concerns the capture and return of escaped slaves, the Code closely parallels the historic provisions of law which helped to bring about our own Civil War. We can readily see this by starting with Section 2 of Article IV of the United States Constitution which required rendition by a sanctuary state of all escaped persons bound in another state to service or labor. This

²⁶ DEAN GAVITT'S NOTES to Chap. XXIV of Blackstone says: "The law as to terms of court still applies, so that a final judgment may not be disturbed after the term at which it was entered has expired unless a proper motion for a new trial was filed . . ."

²⁷ *Samas*—a sun god.

²⁸ *Exodus* 22:9.

was followed by the first fugitive slave law which Washington signed February 12, 1793. This act was enforced by taking the unsupported testimony of the claiming slave owner as sufficient proof of ownership and fixing a fine of \$500.00 for the rescue, concealment or obstructing the retaking of a slave. In its material aspects this differed but little from the provisions of Sections 15, 16 and 19 of the Code which proscribe the aiding of a slave to escape, the concealing of him in one's house and the possession of an escaped slave anywhere. It thus appears that Pennsylvania's famous Passmore Williamson²⁹ was lucky in being held merely in contempt of court in disobeying a writ of *habeas corpus*, commanding him to produce some slaves he had helped to escape. He might, under a different sovereign, have been, in the language of the Code "sent to his destiny." Furthermore, Dred Scott³⁰ who claimed he was free and denied his master's right to beat him would have suffered more than a beating by his master for, by § 282 of the Code, this is provided: "Whensoever a slave shalt say to his master, 'Thou art not my master,' let him be put on enquiry as slaves are put on enquiry and his master shalt lop off his ear."

On the other hand, Williamson, whose theory it was that the slaves were free because their master brought them into Pennsylvania, a free state, would have been perfectly safe in England, for Blackstone³¹ says: "The law as now laid down, frees a slave the instant he lands in England, and he will be protected in person and property," and Dred Scott, his freedom automatically restored, would have been able to maintain trespass against his master.

Burglary was a high Babylonian offense. The Code, in § 21, provides: "Whensoever one is taken in the act of breaking into an house, he shalt be slain there and buried in his blood." A highly comparable provision is found in Exodus 22:2: "If a thief be found breaking up, and be smitten that he die, there shall no blood be shed for him." So also at common law, burglary was a high crime³² as it is by statute in Pennsylvania today.³³ Highway robbery, by § 22 of the Code, was a capital offense. In Israelite law there was apparently no real distinction between larceny and robbery. Proverbs³⁴ refers to the "robbery" of parents in the sense that we use the term larceny. In the parable of the Good Samaritan³⁵ those who were obviously robbers in the modern sense were referred to merely as "thieves." In John 10:1, the term "robber" is used where we would use "burglar." It needs scarcely to be mentioned that robbery was a common law offense³⁶ and is highly penal in Pennsylvania now.³⁷

²⁹ Passmore Williamson's Case, 26 Pa. 9.

³⁰ Dred Scott Decision, 60 U. S. 393, 15 L.E. 691.

³¹ Book 1, Chap. XIV.

³² COKE III INSTR. 63.

³³ Act 1939, *supra*, § 901, 18 P.S. § 4901.

³⁴ 28:24.

³⁵ Luke 10:30, *et seq.*

³⁶ 1 Hale, P.C. 532.

³⁷ Act 1939, *supra*, § 704, 18 P.S. § 4704.

An interesting departure from ordinary criminal procedure obtains in §§ 23 and 24 of the Code. These sections provide that if a man has been despoiled by robbers, the city and the ruler of the province where the assault took place had to repay him what he lost. If the robbers killed a man, a payment of one silver *mina* had to be made to the dead man's relatives. No comparable law seems to have existed among the landmarks we have chosen. It may have been encountered as a theory in Roman or common law but was smothered before it ripened into a precept for there still remains the succinct *maxim, caveat viator*. The right to restitution at the hands of a thief seems to have been well established at common law. The phrase—*spoilatus debet ante omnia restitui*—a party despoiled ought first of all to be restored, seems to exemplify this thought. Our own law³⁸ provides for restitution in all cases involving the larceny, conversion, etc. of personal property.

The agrarian law seems not to have changed much in some particulars. Section 57 of the Code, for example, provided: "Whosoever, without the agreement of the owner, a shepherd causeth his sheep to feed upon the growing grain and to feed off the field, the owner, after the harvest, shall receive from the shepherd who hast caused his sheep to feed off the field, more than twenty gur of grain per gan." This compares to *Exodus* 22:5, as follows: "If a man shall cause a field or vineyard to be eaten, and shall put in his beast, and shall feed in another man's field; of the best of his own vineyard, shall he make restitution." Blackstone³⁹ describes the common law thus: "A man is answerable not only for his own trespass, but that of his cattle also, for if by his negligent keeping, they stray upon the land of another, and much more if he permits or drives them on, and they tread down the herbage and spoil the grain or trees, this is a trespass, for which the owner must answer in damages." Pennsylvania did not follow the rules thus established except where the damaged land had been adequately fenced. The act of 1700, 1 Sm. L. 13, provided for the payment of damages where cattle etc., "shall break into any man's enclosure, the fence being of the aforesaid height and sufficiency . . ." In *Gregg v. Gregg*, 55 Pa. 227, where damages were sought for the destruction of growing oats by defendant's cattle, it was held that no recovery was possible because the plaintiff had not fenced his land as required by statute.

In the matter of cutting down trees without the owner's permission we find this in the Code: "§ 59. Whosoever, without the permission of the owner, cutteth down a tree in another's orchard, let him pay half a mina of silver." The common law was in accord⁴⁰ and Pennsylvania not only follows the rule as to damages but combines the criminal aspects of the situation as well, for its Penal Code provides for double and treble damages in certain instances and makes it a misdemeanor to refuse to surrender the cut trees to the real owner.⁴¹

³⁸ Act 1949, May 27, P.L. 1898; 18 P.S. § 5109.

³⁹ Book 3, Chap. XII.

⁴⁰ BLACKSTONE, Book 3, Chap. 12.

⁴¹ Act 1939, *supra*, § 935; 18 P.S. § 4935.

The Babylonian laws of marriage were rather enlightened for a race usually considered half savage. That they would not recognize a meretricious relationship is indicated by Section 128 of the Code which provides: "Whensoever a man taketh a woman to wed but hath not committed himself to the marriage contract, she is no wife." This is the common law *maxim, consensus, non concubitus facit nuptias*,—consent, not cohabitation makes the marriage. In Pennsylvania it is well established that "Cohabitation and reputation are not marriage."⁴² But in Babylon adultery was a one-sided affair. It was an offense which could be committed by the wife only. That it was also accompanied by dire consequences to her partner in crime, is testified by Section 129 of the Code: "If a married woman be taken in adultery they shalt be bound and thrown into the waters. If the husband desires to pardon the wife and regain her, or the king desires to pardon his subject and regain him, they may be saved." The extent of punishment seems to conform to the Jewish concept for we find a similar provision in *Leviticus* 20:20 "And the man that committeth adultery with another man's wife, even he that committeth adultery with his neighbor's wife, the adulterer and the adulteress shall surely be put to death." Pennsylvania takes a dimmer view on the culpability of the husband and makes him also liable to punishment.⁴³ The partner of the adulterer or adulteress, if unmarried, is guilty of fornication only. Condonation is permissible in Pennsylvania as it was in Babylon in so far as the civil aspects of adultery are concerned.⁴⁴

Enoch Arden provisions obtained in the ancient code, among which is this: "§ 135. Whensoever a man hath been captured and hath left no sustenance in his home for her, if his wife entereth the abode of another and hath borne that other children, and if he regaineth his city, let the woman return to her husband but the children stay with their father." In Pennsylvania the returned spouse has the option of suing for divorce within six months after his return.⁴⁵ No redress could be had by a deserting husband under the Code. It provided, § 136: "Whensoever a man departs his city because he hateth it, and afterwards his wife hath taken up her abode with another, if the husband regains his city, the wife shalt not return to him."

In many respects the Babylonian Code is superior to modern law in regard to alimony. It provides, for example (§ 137): "Whensoever a man turneth away from a concubine who hast borne him children, or a wife who hath done likewise, let him return her dowry and give her the use of his fields, his garden and his tools and let her have custody of the children. If the children become emancipated and of age, she shalt take a share like one of the sons and shalt be free to marry again."

⁴² *Pierce v. Pierce*, 355 Pa. 175, 179.

⁴³ Act 1939, *supra*, § 505; 18 P.S. § 4505.

⁴⁴ Act 1929, May 2, P.L. 1237, § 52; 23 P.S. § 52.

⁴⁵ Act 1929, *supra*, § 10 (3); 23 P.S. § 10.

The next section (§ 138) provides merely for the return of the bride's dowry and marriage portion if she has not borne children, and by § 139, the husband is to give her a silver *mina* if she had no dowry. Commensurate with our present day theory of making alimony payments suit the husband's pocketbook, § 140 of the Code required impecunious husbands to pay their divorced wives but one-third of a silver *mina*. Likewise, if the wife was at fault ("hath determined to go aside and play the fool, to defile her house and dishonour her husband") the husband could divorce her and was excused (by § 141) from paying her anything. This matches the provision in *Deuteronomy* 24:1, "When a man hath taken a wife, and married her, and it shall come to pass that she find no favour in his eyes, because he hath found some uncleanness in her: then let him write her a bill of divorcement, and give it in her hand, and send her out of his house."

Although divorce was not an incident of the common law⁴⁶ the ecclesiastical courts maintained jurisdiction. Alimony was allowed in divorces *a mensa et thoro* (as it is in Pennsylvania today by Act 1929, May 2, P. L. 1237, § 47) and was proportioned according to the rank and quality of the parties. No alimony was granted where the wife ran away and lived with her paramour.⁴⁷ Pennsylvania law agrees with both the Babylonian Code and the ecclesiastical law in refusing alimony to adulterous wives.⁴⁸

Refusal by the wife of sexual intercourse with her husband is not considered a cruelty or indignity in this state⁴⁹ but the ancient Babylonians thought otherwise. After providing (§ 142) that: "Whensoever a woman despiseth her husband and hath said, 'Thou shalt not truly possess me', an enquiry shall be laid to her past whether she hath been frugal and not an evil doer; if it be discovered that her husband hath gone aside and hath been disdainful of her, she shalt take her marriage portion and return to her father's dwelling," the Code made this startling qualification: "§ 143. If she hath not been frugal but hath been a gad-about and profligate with his goods and hath been disdainful of her husband, let her be cast into the waters."

An interesting aspect of the Babylonian divorce law is the acceptance of the "innocent and injured spouse" doctrine now so prominent in Pennsylvania divorce law⁵⁰ and the use in both § 142 and § 143 of the Code of the word disdainful—a form of one of the words so frequently found in Pennsylvania decisions defining indignities to the person.⁵¹ In § 148 we find another remarkable parallel to our contemporary divorce law. This section provided: "Whensoever a man's wife hath been overtaken by disease and he hath determined to marry

⁴⁶ Although divorces *a vinculo* for adultery began, in Blackstone's time, to be granted by the Parliament. BLACKSTONE, Book 1, Chap. 15.

⁴⁷ BLACKSTONE, Book 1, Chap. 15.

⁴⁸ Freedman, MARRIAGE AND DIVORCE, 443.

⁴⁹ Taylor v. Taylor, 142 Pa. Super. 441, 445.

⁵⁰ Act 1929, May 2, P.L. 1237, 10(1).

⁵¹ "Manifest disdain." Upperman v. Upperman, 119 Pa. Super. 341.

another, he may do so but the ailing wife shall not be put away and shall dwell in his house all her life and be provided raiment and nourishment."

At first blush it may appear that this has no present day counterpart but an analysis of the divorce law discloses that in the case of a hopelessly insane wife the laws are practically identical. The divorce law⁵² permits a husband to divorce a hopelessly insane wife upon grounds existing prior to her disease, but it also provides⁵³ for her support for and during the term of her natural life. In other words, although the husband is entitled to remarry in such a case, he is still attached to his first wife by the slender thread of alimony and support.

Comment has already been made of the attitude of the common law, the *Koran*, the Israelite law and the Pennsylvania criminal code toward incest. The Babylonians set the pattern in Sections 154 to 158 of their code which, among other things, made the same proscriptions and provided for the burning together of a man and his mother caught committing incest.

Child adoption, by § 185 of the Code conferred parenthood upon the adopting parents just as it does in Pennsylvania today and, similarly, by § 186, no adoption was possible without the consent of the child's parents.

In the provisions of §§ 195-214 of the Babylonian Code and the laws contained in Exodus 21 there is striking similarity, not only in context but juxtaposition of subject matter as well. This has given rise to much speculation whether the latter was not derived directly from the former. Encyclopaedia Britannica⁵⁴ points to the motif of *Hammurabi* standing in prayerful attitude before *Samas* and receiving the laws (as depicted in relief at the head of the Code) and says that it is "undoubtedly connected with the legend of Moses and the revelation of the Decalogue from Yahweh on Mount Sinai." J. R. Dummelow⁵⁵ says: "It has come to light in recent times that Babylonian and Egyptian influences extended over Canaan and the Sinaitic peninsula before the time of the exodus, and that Babylon and Egypt had much to do with each other at a very early date. Consequently, laws and practices which were supposed to have first come into existence at a comparatively late period in the history of Israel may really have been introduced much earlier." At any rate, it is worth comparing the sections above referred to with *Exodus* 21. This is done below without comment and without reference to the other periods previously considered.

§ 195. "Whosoever striketh his father, let his hands be cut off."
Exodus 21:15. "And he that smiteth his father, or his mother, shall be surely put to death."

⁵² Act 1929, *supra*, § 18.

⁵³ *Ibid.*, § 45.

⁵⁴ Vol. 11, p. 135.

⁵⁵ Bible Commentary, *Exodus*.

- § 196. "Whosoever causeth the loss of a nobleman's eye shalt lose his eye."
Exodus 21:25. "Eye for eye, tooth for tooth, hand for hand, foot for foot."
- § 197. "Whosoever shattereth a nobleman's limb shalt have his own limb shattered."
See *Exodus* 21:25, *supra*.
- § 200. "Whosoever causeth the loss of the tooth of an equal, his tooth likewise shall be made to fall out."
See *Exodus* 21:25, *supra*.
- § 206. "Whosoever a man striketh another in a quarrel, and hath wounded him, if that man shalt swear, 'It was in passion and not deliberate' let him answer for the doctor."
Exodus 21:18. "And if men strive together, and one smite another with a stone, or with his fist, and he die not, but keepeth his bed:
19: "If he rise again, and walk abroad upon his staff, then shall he that smote him be quit: only he shall pay for loss of his time, and shall cause him to be thoroughly healed."
- § 209. "Whosoever a man hath assaulted the daughter of a nobleman, so as to cause her to miscarry her child, let him pay ten shekels of silver for what was in her womb."
- § 210. "If the assaulted daughter departeth to her destiny, let the daughter of the assailant be put to her death."
Exodus 21:22. "If men strive, and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow: he shall surely be punished, according as the woman's husband will lay upon him; and he shall pay as the judges determine.
23. "And if any mischief follow, then shalt thou give life for life."

A similar juxtaposition of subject matter in the Code and *Exodus* 21 appears in Sections 250, 251 and 252, as follows:

- § 250. "Whosoever a mad bull hath gored another and sent him to his destiny, there is no remedy at law."
Exodus 21:28. "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned and his flesh shall not be eaten; but the owner shall be quit."
- § 251. "If that ox hath gored a man before and hath so revealed his vicious character, and the owner hath not blunted his horns, hath not penned him in, and that ox gored a nobleman and slain him, let him pay one-half a mina of silver."
Exodus 21:29. "But if the ox were wont to push with his horn in time past, and it hath been testified to his owner,

and he hath not kept him in, but that he hath killed a man or a woman; the ox shall be stoned, and his owner also shall be put to death."

§ 252. "If a nobleman's servant only, let him pay one-third of a mina of silver."

"*Exodus* 21:32. "If the ox shall push a manservant or a maid servant; he shall give unto their master thirty shekels of silver, and the ox shall be stoned."

The foregoing constitutes only a part of the Babylonian law which compares favorably to the law of the other representative periods. Space does not permit a full examination of all the law. However, mention should be made of the extraordinary fact that emergency price controls were a part of the Babylonian system; that there existed a fully developed concept of the principles of negligence and of descent and distribution, and that there was a fully developed federal postal system.

Consideration of the high spots commented upon this short comparison seems to establish certain fundamental truths, not only as universal, but so far as history records, as impervious to time also. It seems obvious that the law has always regarded the family as an essential element of civilization and an institution which must be protected and preserved at all costs. To this end it has regulated marriage, divorce, descent and distribution, and has punished those who would invade or destroy the sanctity of the marriage relationship. The law has always been jealous of the inherent dignity of mankind, for, even in Babylon where slavery existed, the slave was afforded humane rights, not the least of which was the right to be "put on enquiry as slaves are put on enquiry" for any transgression. The individual, for four thousand years at least, has been protected by the law from attack and has been afforded redress from the intentional or negligent torts of others.

We have seen that although a wide and impassable gulf existed between the Babylonian religion and that of Israel, (for on one side was a complex and grotesque system of polytheism and on the other an uncompromising monotheism) yet in fundamentals, they thought alike in many respects. So, too, the Christian era produced consonance of thought upon similar matters. One important thread winds its way in and out of the legal tapestry which time has woven for us. We find the people always believing in the right of the individual to own, control and possess property. We find that there has always been government by law and not by men. We could not escape noticing that the peoples who promulgated the laws had a deep feeling for their particular religions and let them play important parts in the business of the day. These observations lead to the conclusion that the principles of communism are a complete innovation in the thinking of man. Four thousand years of the regulation of human conduct did not produce anything like modern Marxism and it is comforting to observe that fundamental truths, so well embedded in the hearts of men, have always triumphed in the end.