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494TH ORDINARY GENERAL MEETING.

MONDAY, MARCH 15TH, 1909.

FREDERIC S. BISHOP, ESQ., M.A., J.P., IN THE CHAIR.

The Minutes of the previous Meeting were read and confirmed.

The following candidates were then elected to the Victoria Institute :—

MEMBER.—Miss M. D. McEwan.

ASSOCIATES.—H. H. L. Chichester, Esq. ; George Evans, Esq.

The following paper was then read by the Author :—

THE LEGISLATIONS OF ISRAEL AND BABYLONIA.

By HAROLD M. WIENER, M.A., LL.B.

IN the year 1902, M. de Morgan discovered a black diorite stele on which were inscribed "the judgments of righteousness which Hammurabi the mighty king confirmed." Some 35 sections had been erased, apparently with a view to engraving a fresh inscription on the portion of the monument they occupied, but the rest of the code was practically intact. While there are many points in the translation, history and interpretation on which uncertainty must long prevail, we have sufficient materials to form some general conceptions of the legal civilisation of the subjects of "the mighty king."

The subject matter of jural laws is human life in its social aspect. It deals with the acts and omissions of human beings in their relations to one another, and as a necessary result the influences that mould any given legislation are both manifold and diverse. Nowhere does the student realise more vividly that the roots of the present lie deep in the past, and accordingly the first task in taking a general view of the Babylonian code must be to distinguish the primitive ideas that Hammurabi and his contemporaries brought from a remote past. We must next consider the geographical and other conditions of their task, the means of which they could dispose,

the nature of the problem with which they were faced, the state of mental development to which they had attained, and we shall then be in a position to form some conception of their views and policy. In other words we must glance successively at the Ideas the nation had inherited from its Infancy, at its Geographical Environment and Historical Circumstances, at the Conditions and Tasks of its Daily Life, and at the Quality and Development of its Intellect; only when that is done can we hope to see something of its Soul. In the case of the Babylonian code the occupations of the people and its history were almost entirely determined by the geography and can for the most part be dealt with under that head.

In dealing with the historical portion of our subject nothing is possible in the present condition of our knowledge beyond a few generalities. The legal antecedents of the code are too largely unknown, and it would be quite impossible to attempt to separate the elements that are due to the Sumerians from those contributed by the Babylonians. But we have seven sections belonging to some Sumerian legislation, and these are sufficient to show that the code of Hammurabi merely represents a particular stage in an orderly historical evolution. Thus we read in the Sumerian laws, "If a wife hates her husband and has said, 'You are not my husband,' one shall throw her into the river."* This penalty of throwing into the river remains in the case of the undutiful wife of Hammurabi's code, though there the law is somewhat more elaborate and testifies to more advanced legal reflection. Evidently the two enactments rest on the same theory of punishment. Again the Sumerian laws provide that "If a husband has said to his wife, 'You are not my wife,' he shall pay half a mina of silver."† Precisely the same idea of compensating the wife for a divorce reappears in the code; but there the amount is either a sum equal to the bride-price, or if there was no bride-price, one mina in the case of well-to-do persons, one-third of a mina in the case of a plebeian‡. The fundamental principle is identical, but social inequalities have led to some differentiation in detail.

But if our present knowledge of Babylonian history enables us to do little to trace the antecedents of the code the same

* Johns' *Babylonian and Assyrian Laws*, p. 42.

† § 143. If she has not been economical but a goer about, has wasted her house, has belittled her husband, one shall throw that woman into the waters.

‡ *Op. cit.*, p. 42.

§ §§ 138-140.

cannot be said of the comparative method. A few examples will show how this elucidates the provisions of the legislation and illuminates their *Vorgeschichte*.

"There is no system of recorded law," wrote Sir Henry Maine, "literally from China to Peru, which, when it first emerges into notice, is not seen to be entangled with religious ritual and observance."* The code of Hammurabi to a very great extent belongs to a later stage of development than that contemplated in this dictum; and this by itself is sufficient to mark it as a fairly mature system, yet slight remains of the earlier state of affairs may be traced in provisions for ordeals (§§ 2, 132), and oaths as methods of proof (§§ 20, 23, 103, 120, 206, etc.). In such cases this survival from ancient ideas has, however, been worked into the system to fulfil a definite purpose. There are parallels all the world over, but perhaps the best short explanation that can be quoted is to be found in a few paragraphs of the late Indian law-book known as *Nārada*. Here the principle underlying the supernatural methods of trial and the object of their retention in relatively late times are very clearly brought out:—

"28. Proof is said to be of two kinds, human and divine. Human proof consists of documentary and oral evidence. By divine proof is meant the ordeal by balance and the other (modes of divine test). 29. Where a transaction has taken place by day, in a village or town, or in the presence of witnesses, divine test is not applicable. 30. Divine test is applicable (where the transaction has taken place) in a solitary forest, at night, or in the interior of a house, and in cases of violence, or of denial of a deposit."† On paragraph 29 Asahāya, a standard Indian commentator, remarks, "In the case of all those transactions which take place during daytime, eye and ear-witnesses are present. Documentary evidence, likewise, is generally available in such cases. Therefore, divine proof should not be resorted to. Where a transaction is known to have taken place in the presence of witnesses, divine proof is also not applicable." Similarly on paragraph 30 he writes, "In all the places and occasions mentioned in this paragraph human proof is not applicable, wherefore divine test has to be resorted to."

The sections of the Hammurabi code conform to these principles.

* *Early Law and Custom*, p. 75.

† *Nārada*, Introduction, ii, 28-30.

More important for our present subject are the conceptions of talion, sympathetic talion and so on. The idea of talion is world-wide. The wrong-doer is to suffer precisely the same injury as he has inflicted. It belongs to primitive ideas, and as society advances it is always mitigated in whole or in part by some system of pecuniary compensation. Very frequently distinctions are drawn between the members of different classes, and for our ultimate purposes it is important to note that this is the case with Hammurabi. For instance we read:—

“If a man has caused the loss of a gentleman’s eye, one shall cause his eye to be lost.

“If he has shattered a gentleman’s limb, one shall shatter his limb.

“If he has caused a poor man to lose his eye or shattered a poor man’s limb, he shall pay one mina of silver.” (§§ 196-8.)

Such rules not only show us the principle of talion in full operation, they also point very clearly to the division of the people into well-marked social strata and to the conception of justice that such divisions had fostered. But while there is nothing uncommon in these provisions the same cannot be said of the provisions for slaying the child of a guilty or negligent parent for the parent’s offence. For example:—

“If a builder has built a house for a man and has not made strong his work, and the house he built has fallen, and he has caused the death of the owner of the house, that builder shall be put to death.

“If he has caused the son of the owner of the house to die, one shall put to death the son of that builder” (§§ 229 ff.).

These enactments are believed to be unique, and it will be necessary to return to them when we consider the mental element in the legislation. For the moment we are concerned with them only as showing that the principle of talion was retained to the fullest extent.

Sympathetic talion is also much in evidence in the code. The idea is sometimes that punishment should be inflicted on the offending member, and sometimes that the instrument of the offence should also be the instrument of the punishment. Numerous examples come from all over the world. One of those given by Post is worth quoting. A German forest ordinance of the year 1546 provides that anybody felling a tree shall have his right hand hewn off with the axe he used in committing his offence.* Here we have both branches of the

* A. H. Post, *Grundriss der Ethnologischen Jurisprudenz*, ii, 239, note 5.

theory exemplified simultaneously. But more frequently a legal rule illustrates one or other branch. Thus we find Hammurabi ordaining, *e.g.*, that the hands of a man who strikes his father shall be cut off (§ 195), while the man who comes to extinguish a fire and "lifts up his eyes to the property of the owner of the house and takes the property of the owner of the house" is to be "thrown into that fire" (§ 25).

Other provisions that show the influence of early ideas are those relating to theft. In treating of the ordinary procedure in early societies all over the world Dr. Post writes as follows:— 'He in whose possession the stolen article is found is *prima facie* presumed to be the thief. But if he pleads that he had bought the article or had acquired it by some other honest means from another, he must name that other person and conduct the owner of the stolen property to him. The person so vouched can in turn name another person whom he vouches as his predecessor in title, and so the enquiry proceeds until it ends with somebody who cannot vouch a predecessor in title. This person is then regarded as the thief. This procedure shows many variations in detail.'* Similarly in Nārada we read that "where stolen goods are found with a man, he may be presumed to be the thief."† It will be observed that this outline is reproduced in §§ 9 ff. of the code.

With regard to the punishments for theft the Babylonian system conforms here also to well-known types. The early form of remedial procedure in cases of theft is private violence. When society interposes to prevent self-redress or blood feuds, it endeavours to bribe the aggrieved party, not to take the law into his own hands. "In the infancy of society," writes Mr. Post, "it is an important object to the legislator to induce an injured person to have recourse to the public tribunals instead of righting himself, that is to say, constituting himself both lawgiver and judge. That such was really the motive of the legislator we have historic evidence in the declaration of Rotharis, ruler of the Langobards, A.D. 643. He gives the relatives of the slain their election between the primitive vengeance for blood (feud or vendetta), and a composition or pecuniary fine (wergeld or poena) to be recovered by action before the public tribunals. He says that he fixes a high fine in order to induce plaintiffs to forego their right of feud; and

* *Grundriss*, ii, p. 586.

† xiv, 18, cp. vii, 4 and Manu, viii, 201.

implies that he would gladly have abolished the right of feud or private war, but felt that it was too deeply rooted in the habits of his tribe to be extirpated by legislation.*

It is probably in the light of such ideas as these that we ought to contrast the threefold restitution imposed by § 106 on the agent who takes his principal's money with the tenfold restitution that is to be exacted from the dishonest shepherd by § 265. Probably the rule that concerns the shepherds had its first origin in a far earlier and less orderly state of society than that which was called upon to decide on pecuniary transactions involving the relationship of principal and agent. On the other hand it must be noted that this influence alone may be insufficient to account for all the penalties in cases of theft and the allied subjects. It explains the severity of the punishments for theft and many of the penalties involving manifold restitution, but when we read in § 107 that in the converse case the dishonest principal is to pay not a threefold but a sixfold penalty to his agent, we seem to see traces of a moral judgment on the relative heinousness of offences by principals against agents and agents against principals. It must however be noted that this is a question of correct translation.

In another department of law the code exhibits the influence of early ideas greatly weakened. The *patria potestas*, the absolute power of the head of a family over his children, has been greatly lessened and reduced by the time of Hammurabi. Yet there are sections dealing with "cutting off from sonship" (a phrase as to the meaning of which it would be unwise to hazard a guess without knowledge of the original) (§§ 168 ff.) and with the penalties for undutiful sons (§§ 192, 193, 195). There is moreover a section (§ 7) enacting that "if a man has bought from the hand of a man's son, or of a man's slave, without witness or power of attorney, or has received the same on deposit, that man has acted the thief, he shall be put to death." The proprietary restrictions of the Roman *filius familias in potestate* are at once recalled by this section, though it must be confessed that this may only be due to the translation. The following passages from Nārada may, however, be quoted: "In the same way, the transactions of a slave are declared invalid, unless they have been sanctioned by his master. A slave is not his own master. If a son has transacted any business without authorisation from his father, it is also declared an

* On *Gaius*, iii, §§ 189 ff.

invalid transaction. A slave and a son are equal in that respect.* And again: "If a man buys from a slave who has not been authorised (to sell) by his master, or from a rogue, or in secret, or at a very low price, or at an improper time, he is as guilty as the seller.†"

Turning now to the geographical influence we may note that we are dealing with a country of great rivers. Hence it is natural to find rules which are readily paralleled from the river civilisation of India. "For a long passage," says Manu, "the boat hire must be proportioned to the places and time." And he adds a remark which is characteristic of the geography of his country: "Know that this (rule refers) to (passages along) the banks of rivers; at sea there is no settled (freight).‡" Hammurabi proportions his boat-hire to the times and class of vessel. Characteristically enough he fixes the exact daily amount.§ Again, when Hammurabi provides that where a boatman has been careless and grounded the ship, or has caused what is in her to be lost, he shall render back the ship which he has grounded and whatever in her he has caused to be lost,|| we may compare Manu, viii, 408 and 409: "Whatever may be damaged in a boat by the fault of the boatmen, that shall be made good by the boatmen collectively (each paying) his share. This decision in suits (brought) by passengers (holds good only) in case the boatmen are culpably negligent on the water; in case of (an accident) caused by (the will of) the gods, no fine can be (inflicted on them)." In this passage "whatever" is referred by some commentators to "merchandise," by others to "luggage."

The geography of the country must be held responsible for other provisions. "On Hammurabi's accession," says Mr. King, "he first devoted himself to the internal improvement of his territory. In the past both Babylon and Sippar had suffered from floods, and the recurrence of these he sought to diminish by erecting dams and cutting canals."¶ "It was an alluvial plain," Professor Sayce writes of the country, "sloping towards the sea, and inundated by the overflow of the two great rivers which ran through it. When cultivated it was exceedingly

* i, 29 ff.

† vii, 3.

‡ viii, 406.

§ §§ 275-7

|| § 237.

¶ *Encyclopædia Biblica*, col. 445.

fertile, but cultivation implied a careful regulation of the overflow, as well as a constant attention to the embankments which kept out the waters, or to the canals which drained and watered the soil.

"The inhabitants were, therefore, necessarily agriculturists. They were also irrigators and engineers, compelled to study how best to regulate the supply of water, to turn the pestiferous marsh into a fruitful field, and to confine the rivers and canals within their channel. Agriculture and engineering thus had their natural home in Babylonia, and originated in the character of the country itself. The neighbourhood of the sea and the two great waterways which flanked the Babylonian plain further gave an impetus to trade. The one opened the road to the spice-bearing coasts of Southern Arabia and the more distant shores of Egypt; the other led to the highlands of Western Asia. From the first the Babylonians were merchants and sailors, as well as agriculturists. The 'cry' of the Chaldeans was 'in their ships.' The seaport of Eridu was one of the earliest of Babylonian cities, and a special form of boat took its name from the more inland town of Ur. While the population of the country devoted itself to agriculture, the towns grew wealthy by the help of trade."*

Thus the geography, combined with the policy of Hammurabi, must be held directly responsible for such provisions as those of §§ 53-56, which deal with the liability of those who neglected to strengthen their bank of a canal with injurious results to other people's property, or had caused damage through careless manipulation of the water, and again for the special provisions protecting watering machines as well as other agricultural instruments (§§ 259 ff.). Special rules of this latter type are not at all uncommon,† and need no explanation. It need scarcely be added that the code testifies clearly to the nature of the products of the country in which it originated—corn, sesame, dates, etc. Indirectly the geography must also be held responsible for the rules necessitated by the great commercial and economic development, and for the history which resulted in so great a royal power. But before passing to that branch of the subject something may be said about the land laws and certain other topics that may conveniently be disposed of at the same time.

* *Babylonians and Assyrians*, p. 8 ff.

† See Post, *Grundriss*, ii, 421-3.

Where agricultural land is leased for payments in kind it becomes to the landlord's interest to compel the cultivator to do his duty in tilling the land energetically by forcing him to pay what the land can be made to bear, even if he has not in fact cultivated it. The code contains provisions to this effect (§§ 42 ff.), which again find a singularly close parallel in India—this time from Âpastamba.

“If a person who has taken (a lease of) land (for cultivation) does not exert himself, and hence (the land) bears no crop, he shall, if he is rich, be made to pay (to the owner of the land the value of the crop) that ought to have grown”*. On this Böhler writes: “This Sutra shows that the system of leasing land against a certain share of the crops, which now prevails generally in native states, and is not uncommon in private contracts on British territory [*i.e.* in India—H. M. W.], was in force in Âpastamba's times.”†

Like all other ancient legislators who were concerned with peasant landholders, Hammurabi had to face the question of giving some relief to poor peasants who had mortgaged their holdings and were prevented by bad seasons from meeting their obligations. The first section which deals with this (§ 48) is so humane that it should be quoted *in extenso* :

“If a man has a debt upon him and a thunderstorm ravaged his field or carried away the produce, or if the corn has not grown through lack of water, in that year he shall not return corn to the creditor, he shall alter his tablet. Further, he shall not give interest for that year.”

The following sections (§§ 49–52) appear to be conceived in a similar spirit and to provide relief for those who handed over their fields to their creditors for cultivation. So far as an opinion can be formed they seem to embody well-devised and equitable rules for the protection of the borrower from oppression by the usurer.

But if Babylonia was a land of rivers and tilth, it was also a country of pastures and live stock. Hence the code contains provisions for the remuneration of herdsmen, for their responsibility for the protection of their charges and for their liability for injury inflicted by them on the property of others. Owing to the similarity of conditions we once more find admirable parallels to all these in the Indian books.

* Âpastamba, ii, 11, 28, 1.

† *Sacred Books of the East*, vol. ii, 166.

Thus with § 261* we may compare *Nārada*, vi, 10. For (tending) a hundred cows, (a heifer shall be given to the herdsman) as wages every year; for (tending) two hundred (cows), a milch cow (shall be given to him annually), and he shall be allowed to milk (all the cows) every eighth day.

Similarly when we read the sections† relating to the liability of shepherds we are reminded of Indian provisions.

Thus Manu writes: "During the day the responsibility for the safety (of the cattle rests) on the herdsman, during the night on the owner, (provided they are) in his house; (if it be) otherwise, the herdsman will be responsible (for them also during the night).

"The herdsman alone shall make good (the loss of a beast) strayed, destroyed by worms, killed by dogs or (by falling) into a pit, if he did not duly exert himself (to prevent it).

"But for (an animal) stolen by thieves, though he raised an alarm, the herdsman shall not pay, provided he gives notice to his master at the proper place and time.

"If cattle die, let him carry to his master their ears, skin, tails, bladders, tendons, and yellow concrete bile, and let him point out their particular marks.

"But if goats or sheep are surrounded by wolves and the herdsman does not hasten (to their assistance), he shall be responsible for any (animal) which a wolf may attack and kill.

"But if they, kept in (proper) order, graze together in the forest, and a wolf, suddenly jumping on one of them, kills it, the herdsman shall bear in that case no responsibility."‡

And with §§ 263, 267, we may also compare *Āpastamba*, ii, 11, 28, 6. "If (a herdsman) who has taken cattle under his care allows them to perish, or loses (them by theft, through his negligence), he shall replace them (or pay their value) to the owners."

Rules of this kind spring from the very nature of the contract between an owner and his shepherd. The whole object of employing a shepherd is to have a guardian of the sheep who shall be responsible for their safe custody. Ac-

* § 261 runs as follows:— If a man has hired a herdsman for the cows or a shepherd for the sheep, he shall give him eight Gur of corn per year.

† §§ 263–267, especially the last two of these sections, providing that where animals are lost through an act of God, or a lion's attack, the loss is to fall on the owner, while the shepherd is liable for losses through negligence.

‡ Manu, viii, 230, 232–6. See further *Nārada*, vi, 11–17.

cordingly he must always be liable for loss caused through his own negligence or want of skill. On the other hand, in cases where loss occurs through some cause that is beyond his control and that could not have been prevented through any exercise of care or skill, *e.g.*, *vis major* (Hammurabi's lion), act of God, inevitable accident, the principle *res domino perit* necessarily finds application in the absence of agreement to the contrary.

The kindred question of the liability for damage done by sheep is dealt with by Hammurabi in §§ 57 ff., making the shepherd responsible for the depredations of his sheep on green corn. An Indian parallel may be cited.

"If damage is done by cattle, the responsibility falls on the owner. But if (the cattle) were attended by a herdsman (it falls) on the latter. (If the damage was done) in an unenclosed field near the road (the responsibility falls) on the herdsman and on the owner of the field. Five mâshas (is the fine to be paid) for (damage done by) a cow, six for a camel or a donkey, ten for a horse or a buffalo, two for each goat or sheep. If all is destroyed (the value of) the whole crop (must be paid and a fine in addition)."*

It will be seen that with some differences of detail the principle is substantially the same.

Another department of the law may be traced to the influence of the geographical situation of the people and its consequent economic development acting on marriage customs that in themselves are not exceptional. Gifts by bridegrooms to the parents and relations of the bride, and dowries given by the father on his daughter's marriage are common to many races. In Babylonia, owing to the general wealth, these gifts became of great importance and developed a number of rules relating to their disposition in various events. For example, the marriage portion being the wife's will generally follow her in the event of a dissolution (§§ 138, 142, 176, etc.). It descends to her children, not to the children of another wife and so on (§§ 167, 173, 174, etc.).† These rules call for no more than passing mention here.

The geography of Babylonia was probably the chief influence to which the formation of a strong centralised monarchy may be attributed, and accordingly it will be in place at this stage to notice the group of sections dealing with certain royal

* Gautama, xii, 19-26; cf. also Manu, viii, 239-241.

† An excellent note on these by Professor E. Cuq will be found at the end of Father V. Scheil's *La Loi de Hammourabi*.

officials called by Mr. Johns gangers and constables. The property which such officials enjoyed by virtue of their office is rendered inalienable (§§ 35-38). On the other hand they are subjected to special provisions to secure their efficient attendance to their duties. The details are not at present clear in translation: but the general purport of the rules appears sufficiently. Hammurabi enacts that for the benefit of the state these men shall enjoy special rights and be subject to special duties. Clearly he protects their property in order to provide for efficient public service. Similarly the law at present in force in this country contains special provisions as to the effect of a bankruptcy on the pay of an officer of the army or navy or a civil servant.

The marriage laws give effect to two or three principles. Generally the marriage tie is protected, but where the husband has been taken in captivity, poverty is recognised as justifying the wife in entering the house of another (§§ 134). The wife is expected to be economical, attend to her household and be dutiful to her husband (§ 142 ff.). The man is regarded as having a right to obtain children. Various provisions regulate divorce, and would apparently act in general as checks on the exercise of that power.

Of this and many departments of the law it may be said generally that there is evidence of that common sense without which no code of this length could possibly have been devised for a people of the material civilisation of the Babylonians, and that they further testify to the well-developed economic instincts of the people. Ethical considerations only play a very small part.

We have seen something of the legal machinery that was inherited by the contemporaries of Hammurabi from far more primitive times. It is necessary also to notice the machinery of a more modern type and the use that was made of it. The general diffusion of writing made the duly authenticated deed the best proof of commercial transactions. We find provisions in the code which appear to be inspired by the same motive as the English Statute of Frauds.* It was, no doubt, "for prevention of many fraudulent practices" that the Babylonian legislator enacted (§§ 104 ff.) that "a sealed memorandum of the money he has given to the merchant" should be required in certain disputes between "merchants" and "agents," and that the depositor who effects his deposit without "witness and

* 29 Car. I., c. iii.

bonds" should have no remedy if the depositary denied his title (122 ff.). The legal statesmanship of such provisions is beyond question.

Other legal tools of ancient Babylonia find analogies in modern English law. For example, a father making a settlement of a field or a garden on a "lady, a votary or a vowed woman," could if he so desired give her an absolute testamentary power over the property to the exclusion of her brothers (§ 179). On the other hand he might refuse to do this. In that case she only had a life interest without power of alienation, and even this interest was subject to a right on the part of her brothers to undertake the cultivation of the property and pay her corn, oil and wool, according to the value of her share. Indeed, speaking generally, it may be said that the rules of succession and settlements are such as usually spring up in communities in an advanced economic condition.

In another branch of the law the machinery adopted is of a less modern and permanent type. The Babylonian legislator appears to have sought to prevent disputes as to the remuneration for services rendered by fixing the amount by statute, and accordingly we find the fees for the work of doctors, veterinary surgeons, builders, etc. These rules are usually flanked by others, providing more or less savage punishment in the event of the contractor's showing want of care or skill. Thus in the case of certain unsuccessful operations, the doctor is to lose his hands (§ 218) if his patient is a "gentleman." This doctrine of the legal responsibility of a physician for failure may be paralleled from India. This we read in Vishnu:—

"Also, a physician who adopts a wrong method of cure in the case of a patient of high rank (such as a relative of the king's) [shall pay the highest amercement]; the second amercement in the case of another patient; the lowest amercement in the case of an animal;* similarly Manu says, "All physicians who treat (their patients) wrongly (shall pay) a fine; in the case of animals, the first (or lowest); in the case of human beings, the middlemost (amercement)."[†] An Indian commentator on this latter passage adds, "But this refers to cases when death is not (the result of the wrong treatment); for if that is the case the punishment is greater."

It is interesting to note the gradation of ranks leading in

* Vishnu, v, 175-177.

† ix, 284.

India as in Babylonia to differential treatment of the physician's failure. Want of skill or success is more heinous when the victim is great than when he is little.

Of the intellectual element in the law we have already seen something, but an example may be taken of the way in which a principle relating to property is worked out. We may select for this purpose the aphorism *res domino perit*—if property is destroyed, the loss falls on the owner. In the simplest cases the principle is so obvious that no question can possibly arise. If I accidentally drop my handkerchief into the fire, I am the only person on whom the loss can fall. The same holds good if my corn or my sheep are destroyed by a storm or a lion while in my custody. But not all the cases that may arise are as clear as these. For instance, A's field is being cultivated by B, who in return gives him a proportion of the produce. If the calamity occurs to that which remains in the field after A has received his proportion, what is to be done? Here Hammurabi rightly decides that the ownership is definitely fixed at the time of the receipt. Therefore, the produce remaining in the field had become B's, and B's only. Consequently it is on B alone that the loss must fall (§ 45). If, on the other hand, A had not received his share, the two are joint owners, and the loss must be divided "according to the tenour of their contract" (§ 46), *i.e.*, proportionately, as Mr. Pinches renders it. In each case the loss falls on the owner. Again, suppose that A's slave dies of purely natural causes while in the house of B, who has lawfully distrained on him. Here again *res domino perit*; the owner must bear the loss (§ 115). Or if B has hired A's ox and "God has struck it and it has died," or again in the case already cited, if by the act of God or *vis major*, A's sheep have perished while under the charge of C, a shepherd, the rule is the same (§§ 249, 266). On the other hand, in some cases of purchase there was a right of rescission within a given time (§ 278), and here the principle is subject to this rule. The adoption and application of principles of this sort are necessary incidents of the growth to maturity of any legal system, but they show the sound sense and grasp that characterise certain portions of the Babylonian code.

On the other hand nothing very satisfactory can be said of the general treatment of the intellectual element in offences. The limits of Babylonian reflection on the matter are only too clearly shown. The authors of the code are usually willing to excuse anybody who acted under compulsion or under a

misapprehension induced by another's fraud. For example, the agent who, while on a journey, is robbed by an enemy, is recognised as innocent (§ 103), and so is the trader who has been deceived into wronging the owner of a slave (§ 227). They go further and recognise that the owner of a vicious ox should only be punished if he had reason to know that the animal was vicious and had failed to take proper precautions to prevent its inflicting injury (§§ 250-2). They even realise that in a fight a blow may be given that has unexpectedly grave results (§§ 206-208), and that in such a case the mental element must be taken into consideration in determining what the legal consequences of the action should be. Once more, in estimating a wife's conduct they consider her character as evidenced by her past, and also her husband's treatment of her (§ 42 ff.). But further than this they do not go. They never realise in its entirety the maxim, *non est reus nisi mens sit rea*. Indeed they often fall immeasurably below it. The builder who does his work carelessly or unskilfully or dishonestly, forfeits his life if the house kills the owner (§ 229), though he certainly had no murderous intent. Still worse, if the collapse of the building results in the death of the owner's son, the innocent son of the builder is to be killed. In his case at any rate both mental element and overt act are lacking. No doubt much must be attributed to the primitive condition of legal reflection in Hammurabi's Babylonia. Yet these provisions are more barbarously unjust than any known legal rule of any primitive people. And so we come to the last branch of the Babylonian section of our enquiry with the question, What has the code to tell us of the character and ideals either of its framers or of the nation for which it was intended? We have seen that it is the work of men whose intellectual powers are in some respects worthy of admiration; can the same be said of their legislative ideas?

The answer, however reluctantly given, must in the main be unfavourable.

In the first place the code is on the whole of a savage type. It is true that the comparative material fully explains the origin of the barbarous penalties that we have encountered; but it also does much to increase our wonder at finding that penalties so cruel should have been retained in such numbers at so advanced a stage of material civilisation. The extreme limit is reached when death is inflicted by way of talion not on the person actually responsible for the offence it is sought to prevent, but on his innocent child. Many legislators have

punished the innocent with the guilty, or the innocent in mistake for the guilty; it was reserved for the Babylonian or those from whom they may have derived these rules to undertake knowingly and of set intent to punish the innocent in lieu of the guilty. No doubt the punishment was usually or always commuted. Not all offenders can have had children on whom could be inflicted the penalties prescribed by "the judgments of righteousness which Hammurabi the mighty king confirmed and caused the land to take a sure guidance and a gracious rule." Nevertheless, the sections remain on record to show the ideas of justice that were prevalent in ancient Babylonia and to illustrate the character of the people. And this savagery reappears in one penalty after another. Nowhere is the operation of the principle of talion limited to any degree.

Secondly, for good or for evil, the protection of property is the paramount object of the code to the exclusion of almost all other ideals. To some extent, this is inevitable, and not at all remarkable. Every legal system designed for a people that has attained to some degree of economic maturity must necessarily be concerned with that which constitutes the main subject matter of their daily occupations. But in Hammurabi's code the interest in property leads to some regrettable principles. The penalties for theft are, in some cases, altogether excessive, as may be seen by comparison with the rules of the Romans—a people who were certainly not conspicuous for gentleness. When the Romans adopted manifold restitution their maximum penalty was fourfold. Hammurabi runs up to a thirtyfold payment. On the other hand, he recognises the duty of the government to secure public safety. In the prologue to the code he boasts of himself as "the wise, the active one, who has captured the robbers' hiding-places, sheltered the people of Malkâ in (their) misfortune, caused their seats to be founded in abundance," and to his credit be it said that his ideas of the duty of a government in this respect found legislative expression in §§ 23 ff., which provide that where a man is robbed by a brigand, "the city and governor in whose land and district the brigandage took place shall render back to him" compensation if the brigand has not been caught. A similar view is found in India.*

Moreover, in two instances, other considerations are allowed to modify the claims of property: the peasant whose power of payment is destroyed by natural misfortunes enjoys the benefit

* See Gautama, x, 46-47; Vishnu, iii, 66-67.

of protection against the demands of the moneylender (§ 48), and again the wife and child of a debtor recover their liberty after only three years' service to the creditor (§ 117).

Thirdly, it may fairly be said that Hammurabi expects every man to do his duty, and holds that he ought to be properly remunerated for his work. With this object, we find numerous provisions dealing with the remuneration of various craftsmen and inflicting punishment for unsatisfactory work. A similar idea appears in the provisions that are inspired by the Babylonian theory of wifely duty. And this brings us to a fourth characteristic of the code, its treatment of various trades and crafts. Hammurabi believed that he could best regulate by legislation matters that might have been left to contract or judicial discretion. Probably he knew the circumstances of his own age and country best, and was right in taking this course. At any rate we have no materials which would justify us in blaming the grandmotherliness of his legislation.

Fifthly, the Babylonian conception of justice—like that of the Indian law-books—is fundamentally warped by the caste system. Throughout there is one law for the rich, another for the poor. The dignity of man was unknown in Babylonia.

It is probable, too, that the provision for drowning a wine merchant who makes the price of wine less than that of corn (§ 108), though it sounds a little strange to our ears, is really a temperance enactment which should be noted with approval.

The highest ideals of the code may be summed up very briefly. Hammurabi held that it was the duty of "the shepherd of the people" to make them dwell safely and prosperously. His ethics, his morality, his theory of legislation, in so far as they are not merely inherited from past ages, are alike economic.

On the other hand it would appear that he did give his people strong and certain rule with its attendant benefits, and it must be remembered that even inferior laws, if enforced rigorously and impartially, are greatly preferable in their practical consequences to a legislation that is not applied strongly and uniformly, even if the latter be superior on paper.

It is a misfortune for the posthumous reputation of the Babylonian king, that in our days circumstances necessitate the comparison of his famous statute with the noblest monument of legislative idealism that history has produced. The interest that is felt in Hammurabi's code by the general public is largely due to the supposed possibility that it may have exercised some considerable influence on the law of Israel. The Babylonian

system could far better stand a comparison with the law-books of India, the law of Imperial Rome or the law of England in, say, the eighteenth century, than with the work of him whose labours were directed to teaching that "man doth not live by bread only, but by all that cometh out of the mouth of the Lord doth man live."*

In dealing with the second division of my subject, it is not my intention to answer those who maintain that Hebrew law was borrowed from or greatly influenced by the Babylonian system. Such a theory is so absolutely preposterous on the face of the legislations, that no comparative jurist could be found to defend it, and I should not be justified in wasting the time of this Society in discussions of this nature. A word may, however, be given to the patriarchal customs evidenced by the book of Genesis. It is sometimes said that the patriarchs lived under the code of Hammurabi. This result is attained by the familiar method of emphasising such portions of the evidence as appear to support the theory, while leaving out of account all the other relevant facts. For example, the Hebrew patriarch, like the Roman *pater familias*, exercised absolute powers of life and death over the members of his household, including his children and daughters-in-law. The code of Hammurabi, on the other hand, shows us a society in which the paternal power had long since been reduced to more moderate dimensions. There can, therefore, be no question of the code's being the law of the patriarchs. On the other hand, there are resemblances between the early Hebrew customs and the Babylonian law; and it is not impossible that these are due either to community of origin or to direct influence.

The comparisons I have to suggest will, I trust, be more fruitful of historical profit than any speculations of influence which are fore-doomed to sterility. I purpose to take up the factors and influences in the formation of the legislation that we have seen at work in Babylonia, and show how they operated in ancient Israel. But this process can only be repeated with a necessary difference. While in the older system we had only to note the uncontrolled operation of such ideas as the conception of talion, in the younger we should continually have to stop to examine the checks and restraints that were imposed on them by the theory of legislation that inspires the work throughout.

It is for this reason that before embarking on the considera-

* Dt. viii, 3.

tion of the various formative influences that we have seen at work in the code of Hammurabi, we must consider the distinctive currents of thought that dominate the whole. The historical student of, say, English legislation in the nineteenth century, is compelled to take into account the great intellectual forces that moulded its history—such as utilitarianism, *laissez faire*, collectivism. The nearest analogy in the case of Hammurabi (if there be one) appears to be the theory that extensive state regulation is for the benefit of the community, and the main interest lies in the political, social and economic conditions—in the external elements of human life. In the case of the Pentateuchal legislation the exact opposite is true. Here the internal and spiritual compel our fascinated gaze, and the external is of interest mainly in so far as it manifests the influence of the former. The greatness of Israel lies in his soul.

The jural laws contained in the Mosaic legislation form a portion of a larger corpus which was given to the Hebrew tribes by the God with Whom at the period they entered into a special relation. By an act that is unparalleled in history a God took to Himself a people by means of a sworn agreement. Some words that are fundamental for our purpose must be quoted from the offer: "Now, therefore, if ye will obey my voice indeed, and keep my covenant, then ye shall be a peculiar treasure to me from among all peoples: for all the earth is mine; and ye shall be unto me a kingdom of priests and a holy nation."* The views here expressed dominate the legislation. Holiness—the correlative holiness to which the Israelites must attain because the Lord their God is holy†—embraces much that is not germane to our subject this afternoon, but it also covers the whole field of national and individual righteousness. The duty to God that is laid upon the Israelites in these words is a duty that has practical consequences in every phase of social life. I have already quoted a sentence from Sir Henry Maine in which he speaks of the uniformity with which religion and law are implicated in archaic legislations. There is a stage in human development where life is generally seen whole, and it is to this stage that the Pentateuch belongs. But no other legislation so takes up one department of man's life after another and impresses on them all the relationship of God and people. Perhaps nothing will so clearly bring out my meaning as a statement of some of the more fundamental differences between the Pentateuchal legislation and the old

* Ex. xix, 5 ff.

† Lev. xix, 2

Indian law-books which often provide excellent parallels to it. Those to which I desire to draw particular attention are as follows. The Indian law-books have no idea of national (as distinct from individual) righteousness—a conception that entered the world with the Mosaic legislation and has perhaps not made very much progress there since. There is no personal God: hence his personal interest in righteousness is lacking: hence, too, there can be no relationship between God and people: and while there is a supernatural element in the contemplated results of human actions there is nothing that can in the slightest degree compare with the Personal Divine intervention that is so often promised in the Pentateuchal laws.* The caste system, like Hammurabi's class system, leads to distinctions that are always inequitable. The conception of loving one's neighbour and one's sojourner as oneself are alike lacking. The systematic provisions for poor relief are absent, and the legislation is generally on a lower ethical and moral level, while some of the penalties are distinguished by the most perverted and barbarous cruelty. All these points are embraced in the special relationship of the One God and the peculiar treasure with its resulting need for national and individual holiness.

The primitive ideas of proof by oath or ordeal meet us again in Israel as in Babylonia. After what has already been said they need not detain us. Sympathetic talion only occurs once in the jural laws, though it holds a rather more prominent place in the precepts which have purely supernatural sanctions and are for that reason excluded from comparison with Hammurabi. Talion occupies a somewhat more important position. I have elsewhere given my reasons for thinking that it was always subject to composition except in the case of offences involving capital punishment.† Be that as it may, it is instructive to note that the principle is carefully controlled. In lieu of the penalties striking at innocent children we read, "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"‡—a provision that was perhaps called forth by some legislation or custom that resembled

* *E.g.*, "And if ye shall say, what shall we eat the seventh year? behold, we shall not sow, nor gather in our increase; then I will command my blessing upon you in the sixth year, and it shall bring forth fruit for the three years" (Lev. xxv, 20 ff.)

† *Studies in Biblical Law*, ch. vi.

‡ Dt. xxiv, 16.

Hammurabi's code. Again the principle of talion is here free from all class differentiations, which are repugnant to the spirit of the Mosaic law, whose only favourites are the weak and helpless. The principle of making manifold restitution for theft, and in certain kindred offences, is found here as in so many other ancient legislations: but the provisions are far more equitable and humane than those of Hammurabi.

On the other hand the laws relating to filial duty show how much nearer the age of Moses was to the days of unrestricted paternal power than the age of Hammurabi, death being the penalty for striking a parent. It should, however, also be pointed out that the religious element enters into the conception, filial duty being regarded as a constituent in holiness.

In dealing with the Hebrew system we have to assign far more weight to history and far less to geography than in the Babylonian. The Hebrew tribes and their customs had a more varied past to look back upon than their Babylonian kinsmen. They had been nomads who for some time had sojourned in Canaan, and had even had some agricultural experience there. Thence they had migrated to Egypt, where again they had tilled the soil, and during the legislative period they were homeless wanderers in a desert, making ready to fall upon the land they yearned to possess. Without doubt the geographical influences must have been effective as well as varied, but owing partly to the history and partly to the spiritual nature of the people they do not exercise the predominating power that they are seen to possess in Babylonia. It will be well to treat the historical and geographical factors together.

The land for which the legislation was intended was not a land of great rivers and fertile plains irrigated by canals, a land of sesame and dates, "but a land of hills and valleys that drank water of the rain of heaven" (Deut. xi, 11); "a land of brooks of water, of fountains and depths springing forth in valleys and hills, a land of wheat and barley and vines and fig trees and pomegranates, a land of oil, olives and honey, a land whose stones are iron and out of whose hills thou mayest dig copper" (Deut. viii, 7-9).

It is at once obvious that in view of these natural features we cannot look for any provisions relating to navigation or canals. It is equally obvious that the economic condition of the people was necessarily far more primitive than that of Babylonia. Hence we shall not find the well-developed system of trades and industry. There are a few rules dealing with the simplest cases of danger by or to cattle, but this is one of the

departments of law that shows the greatest similarity all the world over and calls for little comment. The real interest lies elsewhere—in the land laws, the slave laws, the tribal theory and so on. These subjects we must now consider.

The land laws are the product of many independent ideas and circumstances. Their consideration is in place here because the conditions of the problem and the opportunity for grappling with it show the influence of history with such singular clearness. First such a system as that expounded in the 25th chapter of Leviticus could only be put forward by one who had to work on what is so very rare in history—a clean slate. In other words the system of land tenure here laid down could only be introduced in this way by men who had no pre-existing system to reckon with. Secondly, there is (*mutatis mutandis*) a marked resemblance between the provisions of Leviticus and the system introduced in Egypt by Joseph (Gen. xlvii). The land is the Lord's as it is Pharaoh's; but the towns which are built on that land are not subject to the same theory or the same rules. Perhaps the explanation is that Joseph's measures had affected only those who gained their living by agriculture, *i.e.*, the dwellers in the country. Thirdly, the system shows the enormous power that the conception of family solidarity possessed in the Mosaic Age—a conception to which we shall have to return directly. And fourthly, the enactment is inspired and illuminated by the humanitarian and religious convictions and ideals to which reference has already been made.

In the economic sphere the contrast between Moses and Hammurabi is very marked. Taking human property first we find that the Babylonian code is careful to guard the rights of slave owners, inflicting the death penalty on those who effectively aid runaway slaves (§§ 15–20). Contrast with this the Hebrew provisions, "Thou shalt not deliver unto his master a servant which is escaped from his master unto thee: with thee he shall dwell in the midst of thee, in the place which he shall choose within one of thy gates, where it liketh him best: thou shalt not oppress him" (Deut. xxiii, 15ff.). It has been said with some truth that such provisions can more easily be enacted for a primitive community than at a more developed economic stage, but this is only a portion of the truth, and if taken by itself a very misleading portion. Economic circumstances may have been one of the conditions of the enactment of the rule (at any rate in its present form): they could not provide its *Motive*. The difference between the two legislations

here indicated is further emphasised by other provisions which secure the slave from mal-treatment by his master. Here it cannot be said that economic development necessitates or justifies the Babylonian code. In a word, where Hammurabi safeguards the rights of property, Moses for the first time in history protects the rights of humanity.

The same holds good of the laws relating to loans, pledges and poor relief. The legislator's object is always the same—to give practical effect to that doctrine of holiness which conceives the love of God's creatures as part of the Israelite's duty towards his God.

We now come to two points that are best treated together, the strength of the family and tribal sentiment, and the weakness of the central administration. These appear to be due mainly to historical causes. In lieu of a people subjected to a strong centralised royal power with class distinctions, as were the Babylonians, history had made of the Hebrews a loose aggregation of undisciplined tribes unaccustomed to community of government, community of interest or community of action, knowing little of class distinctions, but profoundly imbued with family sentiment. The enormous strength of this feeling is to be seen in the influence it exercised on the law of succession to land. Here the possible effect of the Mosaic provisions led to a deputation of remonstrance, which pointed out that the possessions of heiresses might by their marriage become permanently vested in members of another tribe. It was accordingly enacted that in such cases they must espouse men of their own tribes, but the incident and the resulting law testify very vividly to the nature of the feeling. It is probably to this feeling of tribal separateness that we should attribute, in part at any rate, the great defect of the system—the failure to create a central government, which in those days could only have been effected by giving hereditary authority to one family. Probably no tribe would have submitted to a king who was chosen from some other tribe. Neither Moses nor Joshua appears to have had a son who was capable of ruling, and for the purposes of conquest a general was the only possible head of the people. Hence the defect was probably inevitable, but the weakness of the Hebrew system at this point is the measure of the strength of the Babylonian. The strong security for life and property, the compensation for robbery that Hammurabi could afford were out of the question for tribes with the historical antecedents of the Israelites. It should further be pointed out that the geographical character of the country, with

its hills and valleys and the survival of a large alien population filling in the interstices between the Hebrew settlements, must have made a centralised national power impossible for long after the days of Moses.

With regard to legal machinery everything is very primitive. With the single doubtful exception of the bill of divorce, the use of writing by private persons in the ordinary course of every-day life is never contemplated. Hence we find, as in so many primitive communities, that legal business was habitually transacted in the most public place possible, *i.e.*, at the gate of the city, where the facts would necessarily become known to those who would be judges or witnesses or both in case of any future dispute.

Turning now to the intellectual element in the law we find that the state of legal reflection is also very primitive. A distinction between intentional murder and other forms of homicide is introduced for the first time, and in terms that show clearly how difficult the conception was to contemporaries of Moses. The same holds good of the law of rape. In the case of the savage ox the Hebrew legislator reaches the same stage of reflection as the Babylonian, but the undeveloped state of thought is further attested by sacrificial provisions relating to sins committed in ignorance and wilfully, which, however, strictly fall outside the scope of this paper. An act committed in ignorance may be a sin, calling for atonement. On the other hand no atonement can be made for wilful sins, and all sins are regarded as either ignorant or wilful. Such conceptions are the best witness to the extremely archaic nature of the legislation.

To sum up the results of our survey: In dealing with any legal system it is necessary to separate the accidental from the essential, the universal from the characteristic. Every progressive race necessarily passes through certain stages of growth. Every race will be affected by its environment, the surroundings of its life, the tasks that it must accomplish if it wishes to exist. Every progressive race will have to deal with certain problems that arise in all countries, the problems presented by those who kill or injure their neighbours, the ownership of property of various kinds, the commonest forms of social intercourse, and so on. In some of these cases all men of ordinary ability will reach substantially the same solutions; but in others, the interplay of the various factors causes considerable variety. The study of the results is a task of some interest, but it must yield in fascination to the consideration of national and legislative ideals and national character.

These two are inseparably linked, for there must be a more or less close correspondence between the character of the legislation and the sentiments of the governed. Legislative ideas of our own and past ages readily present themselves to the mind in abounding number—*τὸ εὖ ζῆν*—with all that it meant to the Athenian; the imperialism of Rome; liberty, equality, fraternity; utilitarianism; *laissez faire, laissez passer*; nationalism, and so on. If we interrogate the Babylonian code for its ideas, we learn that its watchword is "Security and Prosperity"; if the Israelitish, we receive the answer "Holiness."

The fate of the legislations has corresponded to their respective characters. A generation or two after the death of Hammurabi, no man could have doubted that his work had been successful; probably few would have said as much of the work of Moses at a corresponding interval after he was gathered to his fathers. "In those days there was no king in Israel; every man did that which was right in his own sight." But to-day the verdict is different. The code of the Babylonian had its period of utility, and was then flung aside like an old shoe. For thousands of years its very name was forgotten, and to-day, when the bulk of it has been exhumed from the dust of centuries, we find that it is without value for our life or its problems. The people to whom it was given have passed away after doing their part for the material and intellectual advancement of the world, but without contributing one iota to its higher life. The work of the Israelite, on the other hand, has given to his own people the quality of immortality and has borne mighty fruit among other peoples in both hemispheres; so far as human vision can see, it will continue to do so in ever-growing measure; and throughout a century of generations, the work of him who was powerless to create machinery that could maintain public security in the national territory for a single generation, has remained for millions of people all over the world *par excellence* the law.

DISCUSSION.

The CHAIRMAN (F. S. BISHOP, Esq., M.A., J.P.) expressed the thanks of the meeting to Mr. Wiener for his able paper. He then asked for discussion, pointing out that it was once again shown how any comparison of the Sacred Book with contemporary documents only serves to exalt the former.

Mr. ST. CHAD BOSCAWEN acknowledged the ability and interest of the paper, but differed from the writer in some not unimportant points. In the first place he did not think that the religious element was so absent as Mr. Wiener would have the meeting believe, from the code of Hammurabi. He would instance the perpetual reference made to the oath by god—that was of course the private god and goddess whom each man had in honour (reference to this would be found in the Babylonian penitential psalms). The whole introduction to the code and the first few paragraphs of the epilogue were full of strong nationalist and religious feeling, and the laws were alleged to emanate from the sun god.

To what extent the government and religion had been centralised might be seen from the stele placed in the Temple of the god Merodach. The state was just on the edge of a transition from local to centralised government, and so it was in religion: the change was due to Hammurabi. Merodach, the local Babylonian god, was fast becoming the national deity. For religious sincerity they might look to the prayers of Nebuchadnezzar to Merodach. If the name of Merodach were taken from these they might well be prayers from the Bible, with their references to “the city thou lovest” and “the people whom thou favourest.”

In his opinion the code of Hammurabi stood by no means alone, but was founded on a code four or five centuries older (not merely Sumerian fragments), which was drawn up on much the same lines, as might be seen from the cylinders of Godir. The object of this earlier code is laid down as being “to protect the weak from the strong, that the poor be not oppressed, and the widow and orphan be not robbed.”

He differed from Mr. Wiener in his remarks on p. 163. It could not be said that Hammurabi's code was in any degree thrown away. From it came all the commercial legislation of Babylonia to within a century of the Christian era, and it was used and studied right up to the Christian era (the cuneiform script was known to have been in use as late as 47 B.C.).

A grave fault of the lecturer would seem to be the enormous weight attached to the book of Deuteronomy: is this really a Mosaic book?

Mr. WIENER.—Certainly, in his opinion it was (hear, hear).

Is it not rather the legislation of a settled people with a

king and a centralised worship, modelled exactly on the code of Hammurabi? First the Historical Introduction, then the laws and legislation, many of which were identical with those of Hammurabi, then as in the other code an epilogue of blessing and cursings. This resemblance in structure was more than remarkable.

The form of the book of Deuteronomy, though unique in the Bible, was that common to all documents of the Babylonian civilisation. All ended in the series of blessings and cursings. In fact, the whole form and phraseology of the book of Deuteronomy pointed to a Babylonian model.

He had but one more remark to make, concerning the treatment of the slave. Meisner had shown that the principles of humanity had full play here. When the slave grew old or was injured, or after long and faithful service, the master must give him bread and oil for the rest of his life.

Mr. WIENER, in replying, said that it did not appear to him that Mr. Boscawen had made good his criticisms on material points. He regarded the oaths on which Mr. Boscawen relied as extremely commonplace. Such oaths were to be found in all ancient legislation, so much so, that one came to look on them as mere stage property. Naturally every nation took the oaths in the forms that harmonised with their particular religious observances, but the fundamental idea—that of appealing to higher powers in certain cases for proof—was universal. With regard to the introduction and epilogue he had purposely refrained from using them, and also the materials in the contract tablets for this paper, because he had no knowledge of cuneiform, and felt that in the circumstances he had better heed the warning given by Mr. Johns not to build elaborate theories on the introductory and concluding sections of the code. Professor Kohler had promised to utilise the material afforded by the contrasts in the second volume of Hammurabi's *Gesetz*, and as he co-operated with an Assyriologist, Dr. Pusey, he could safely undertake work that would be dangerous for a lawyer who did not enjoy expert assistance. With regard to the criticism that there had been endless legislation he had endeavoured to bring out in his paper the fact that the code merely represented one stage in a long development. Nor again had he meant to convey any notion that the code was not acted on for a long period. He meant that while the code was useful in its day it did nothing whatever to elevate humanity in the long run.

As to the authorship of Deuteronomy he was satisfied that the whole of the laws and speeches were (subject only to the qualification introduced by textual criticism) Mosaic, *i.e.*, the work of Moses, in the language of Moses. Unfortunately it would take too long to deal in detail with Mr. Boscawen's arguments on this point, but he could refer them to his published writings on this. With regard to the view that Deuteronomy was drawn on the model of Hammurabi's code he could only express his unqualified dissent. Unlike any other known legislation Deuteronomy and certain other portions of the Pentateuch were in form sworn agreements. Instead of a legislation enacted by some law-making power and imposed by it on the people, we find a series of internal agreements (called covenants) of which the laws were terms. Deuteronomy in many respects resembled an English deed. Its central speech began with date and title, followed by a recital of a former covenant between the same contracting parties, then came the body of the agreement in properly articulated form, then the directions for its due execution, the blessings and curses, and lastly a colophon saying that this was a covenant made in addition to a former covenant. The blessings and the curses replaced the form of jurat which would have occurred in a covenant between men. Such sworn covenants between men who could only appeal to a Divine tribunal might be likened to treaties which in the Europe of the middle ages and in many other societies had often been ratified by oaths. In this case God was a party to the covenant, and so there was no external superior power to which both parties could appeal to enforce their right. Hence the jurat was replaced by blessings and curses. Allowing for this and the fact that it belonged to a state of society in which sworn agreements had not yet been replaced by contracts, Deuteronomy *mutatis mutandis* resembled in form a modern deed. Hammurabi's code, on the other hand, showed not the least approximation to this type. Assyriologists should bring to bear the knowledge of comparative jurists before they put forward theories of influence.

As to the contracts relating to the support of slaves, these in no way altered the provisions by which Hammurabi guarded the rights of owners or the contrast with the Mosaic enactments.