

“THE LAW” AND THE LAW OF CHANGE.

A TENTATIVE STUDY IN COMPARATIVE JURISPRUDENCE.

THE CYCLES OF LEGAL HISTORY.

“A general proposition of some value,” says Sir Henry Maine, “may be advanced with respect to the agencies by which law is brought into harmony with society. These instrumentalities seem to me to be three in number, legal fictions, equity and legislation. Their historical order is that in which I have placed them. Sometimes two of them will be seen operating together and there are legal systems which have escaped the influence of one or other of them. But I know of no instance in which the order of their appearance has been changed or inverted.”¹

In explaining these terms, Maine draws occasional illustrations from English legal history which had not been worked out in his day and frequent illustrations from Roman law between the two codes—the Twelve Tables and the Code of Justinian. Of his use of Roman law he says:

“Much of the inquiry attempted could not have been prosecuted with the slightest hope of a useful result if there had not existed a body of law like that of the Romans bearing in its earlier portions the traces of the most remote antiquity and supplying from its later rules the staple of the civil institutions by which modern society is even now controlled.”

It is submitted that the history of Jewish law furnishes another example that could have been used, one with a longer continuous development than even that of the Roman law—so much longer that by its study we are enabled to assign to Maine’s three agencies their proper positions as mere arcs in a cycle, a constantly recurring cycle—of which Maine says nothing. In fact, his explanations suggest that a society that has passed from the stage of custom into that of law uses one instrumentality until the next comes into being; that when the cruder instrumentality finally gives place to the more perfect one, the functions of the cruder have been exhausted for that society. The same general

¹ Maine, *Ancient Law*, Chap. 2.

observation is true of the several modifications of Maine's theory that have appeared from time to time; I shall refer in passing to two of them. Jenks would trace at least all Germanic systems from caste to contract through certain progressive stages. Dean Roscoe Pound, again, speaks of the stage of primitive law as followed by strict law, equity, maturity of law and some fifth stage upon which Europe and America are now simultaneously entering. A closer inspection of Pound's stages will reveal that they represent swings of the pendulum back and forth between strict law and equity.² It is submitted, however, that the periods of strict law and equity are composite and that the same component parts are discernible in each recurrence, that a self-repeating cycle is the result, and that Sir Henry Maine's observation has happily hit upon the main features of this cycle.

We need only write both at the beginning and at the end of his list "codification"—by which we understand a crystallization of law into hard and fast rules definitely stated, to make the self-repeating cycle: codification, fictions, equity, legislation, codification, fictions, equity, legislation, and so on.³

This cycle, subject to a few explanations which follow, it seems, fairly represents the characteristic trends in all legal histories that have so far been explored and mapped out for us.

A code is given to a people or made by them—it makes little difference. They begin by studying the text, and no expansion is possible at first unless consistent with the text. At least new ideas must square outwardly with the words of the text. If they cannot be squared in fact they can perhaps by resort to fictions. The word "fictions" here even in the comprehensive sense in which Maine uses it is too narrow. To him the expression "legal fiction" signifies "any assumption which conceals or affects to

² I have before me the recent restatement of his theory in *The American Bar Association Journal*, Vol. 3, pp. 58-64, January, 1917.

³ No account is given here of the stage known as primitive law. Its characteristics are discussed by the writers mentioned above and by many others. Whatever may be true of it I do not admit that it is the only stage in which religion and law are united. Jewish, Mohammedan and Hindu law have never been divorced from religion, and even modern European law has become isolated from religion only gradually and incompletely. One would hardly call English law primitive up to 1857.

conceal the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified." And this kind of fiction he connects with primitive society and its superstitions. The making of legal fictions, however, is but one manifestation of what I may call literalism. It is the attempt to do the most with the words before you. It is not so much the child of the perversity of the legal mind or the superstition of primitive man as the outgrowth of practical needs that may show themselves in a very concrete way in a highly civilized society as well as in a primitive community. Bound by a code, lawyers become word-students whose work is marked by the elevation of the letter above the spirit, a regard for the jots and tittles of the law, a point of view that we may call "glossatorial." To make the words fit life they may be interpreted artificially as meaning something that they obviously did not mean originally. Again, undue weight may be given to a peculiar turn of a phrase which may have acquired a new meaning in the course of time, and finally resort may be had to methods of doing things technically, though not actually, in order to satisfy the law. Let us call the period of fictions then the period of literalism or the period of the glossators, or word-students.

Long before this period ends, if it ever does end, the second and third points of view may appear—in fact, schools may exist side by side and quarrel for many generations over the relative merits of literalism and equity, but finally we see equity prevailing and a second period in the modification of laws is ushered in. Here, too, I wish to call attention to the fact that the designating word "equity" represents but one manifestation of a whole point of view, a point of view that historically follows the glossatorial. It is the point of view of the student whom I shall call, for want of a better word, the commentator, as distinguished from the glossator. It is a point of view that is concerned with the subject matter rather than the words, with the purposes of the law rather than its method, its spirit rather than its letter, its principles rather than its rules. It is an appeal from the text to common sense, from technical rules to fundamental principles. Maine suggests that:

"The very conception of a set of principles, invested with a higher sacredness than those of the original law and demanding application independently of the consent of any external body [for such consent would constitute legislation] belongs to a much more advanced stage of thought than that to which legal fictions originally suggested themselves."

But the chasm between the two positions is bridged when we consider that the equity stage of the exaltation of general principles may come gradually through a mode of study of the older law whereby principles are first discovered in the growing mass of rules. Glossation itself may be reduced to principles as a first step. More general principles will follow. They may be very indefinite—they may be summarized in such catch-words as "conscience," or in some vague yet potent theory of a word of God or a law of nature, or in a peculiar attitude that invests general practice with legal force; but when principles are discovered and stated they will, it seems, be readily exalted above the mere words, perhaps at first with the aid of such harmless fictions as the omnipresence of the law-makers. The desire to breathe the freer air of general principles comes to all peoples who have suffered from the choking atmosphere of too many particular rules. That desire is natural. The mode in which it is satisfied and the extent to which it can be satisfied are of course largely accidental, and will differ in different times and places. So far as the growth comes through the administration of courts, it is proper to call this period of growth the period of equity. So far as it comes through the work of students and writers, we may call it the period of the commentators, or principle-students.

The possibilities of growth by glossation and commentation, by fiction and equity, are exceedingly great—far greater than the layman would suppose—but there is a limit to what can be done with an old code. When the breaking point is reached, additions and modifications are generally made by legislation. Here again I must warn against too narrow a use of the word. The kind of change that we are now considering is not necessarily connected with a legislature. It may be conscious or unconscious. Maine suggests that legislation necessarily derives its authority from an external body or person. But I prefer to use the term with especial reference to the fact that in this kind

of law obligatory force is independent of general principles. It may be judicial legislation parading under a thin disguise. It may simply be the tacit recognition of new customs. The point is, it is the enforcement of rules alongside of the old code without the pretense that they are to be found in the old code. And when a code becomes overburdened with new matter of this kind, what is more natural than the adoption of a new code?

We must distinguish here between a code and practice books such as the abridgement (a selection) which is apt to appear in a glossatorial period, the *summa* (a summary) which is apt to appear before, and the digest (an analytical compilation) of decisions which is apt to appear after a commentatorial period. These may serve as preparatory works for the codifier. Indeed, the digest may be a pandect, an all-container, and eventually may become a code. But in themselves these books are not codes.⁴ The distinguishing mark of the code is that a people accepts it—probably very gradually—as the correct, authoritative statement of its *corpus juris*. When this stage is reached, we are ready for another revolution of the cycle. In other words: every "Moses," every codifier, is followed by a "Joshua," a faithful disciple who departeth not out of the tabernacle, and "elders" who expound, by "prophets" who expand and by an "assembly" which makes a "hedge around the law," or some other kind of statutes and finally codifies again.⁵ Or more technically the sequence may be illustrated in a table:

Codification
Glossation
(word-study and fiction)
Commentation
(principle-study and equity)
Legislation
Codification

⁴ Many Jewish works of this nature are popularly called codes (*cf.* Jewish Encyclopedia, *s. v.* *Codification of Law*), but their failure to be generally adopted precludes them from the concept as used here. Thus Alfasi's sole object was to make an "abridgement"; that of Maimonides, the philosopher, was to "summarize"; that of Asher ben Jehiel and his son Jacob ben Asher was to "digest" the innovations of their time. See below.

ILLUSTRATIONS.

Before attempting to review Jewish experience under the "Law" in the light of this theory it may be well to illustrate the theory itself by the merest suggestion of its applicability to the two leading systems of law current in Europe and America today—the Roman-continental system and the Anglo-American system.

A. Roman-Continental Law.

Roman law between the Twelve Tables, its first great code, and the famous code or culmination of attempted codes that bear the name of Justinian, represents a perfect cycle, the cycle on which Maine bases his observation. This period sees the strict law and fictions of the Republic, the equity of the praetors and, finally, the legislation of the later emperors. Between Justinian at one end and the series of nineteenth-century codifications of continental Europe from the Code Napoleon to the *Bürgerliches Gesetzbuch* at the other, a second cycle is discernible. The first post-Justinian jurists were glossators—uncritical acceptors of the text till the rise of the school at Bologna; critical thereafter, but glossators nevertheless. Their work ended with the great glossator, Accursius. His followers were the commentators or Bartolists, whose chief work was to adapt the Roman law to the local and temporal conditions in which they found themselves. The sum total of several centuries of this kind of work was the making of a series of national legal systems based on custom with Roman law as the mere background, first as Roman law, then as natural law. At least we can approach the meeting point of Roman law and the *Leges Barbarorum* from this angle without riding "an academic theory to death."⁶ There comes a time in

⁶ Cf. the opening sentence of the Mishnah Tractate, 'Abhōth: "Moses received the Torah on Sinai, and handed it down to Joshua; Joshua to the Elders; the Elders to the Prophets; and the Prophets handed it down to the men of the Great Assembly. They said: ' . . . Make a hedge around the Torah.'"

⁶ The other approach, through the "Barbarian Laws," is in current German writings the more popular. It is reflected in England in Jenks, *Law and Politics in the Middle Ages*.

each country when the national element speaks through legislation and finally comes codification hastened in some countries by Napoleon, retarded in Germany by Savigny and his school. Modern continental lawyers with their codes in their hands are essentially glossators.

B. Anglo-American Law.

The history of Anglo-American law is parallel.⁷ Two cycles are discernible with the year 1290 in the reign of Edward I, the English Justinian, as the turning point. The code or crystallization was the series of writs into which one's case had to fit or perish. The last futile efforts to extend the list had been made in the early years of Edward's reign through a series of famous statutes. For one hundred years before Edward's day the method of making the law grow was by deliberately making new writs for new cases on the basis of a general principle: no wrong without a remedy. We may call this without undue violence a period of growth by equity.⁸ Still earlier and back to the Norman Conquest in spite of a strong pretense of the Norman kings to give back the laws of Edward the Confessor, that is the Anglo-Saxon crystallized customs, there were constantly being introduced reforms on the basis of fictions—especially the fiction that the king's peace was invaded in all cases of interference with possession. Since 1290 a shower of handbooks of the law, and the early Year Books show the lawyers grappling with word-problems in the writs and using fictions to make the law applicable. "*Damnum absque injuria*" delights the technical judges of the Year Books. Soon equity came on the scene. Passing by its early beginnings in the fourteenth and fifteenth centuries we find it the

⁷ The cycles in Anglo-American law are fully worked out in the Introduction to the author's forthcoming book of Select Cases and Documents Illustrative of Anglo-American Legal History.

⁸ Jenks has noticed the puzzling fact—puzzling unless two cycles are recognized in English legal history—that "there is, in fact, a greater resemblance between the register of writs and the praetor's edict, with its list of formulae, than between the edict and the vague processes of the early days of equity." 30 Harv. L. Rev. 16 (Nov. 1916). In view of this very just observation, I regret that I am unable to follow Dean Pound in his description of the whole period between the Norman Conquest and the equity of the chancellors as a period of "strict law."

chief instrumentality in the development of the administration of justice in the 1500's and 1600's. The 1700's show it in the process of hardening and in 1801, when Eldon comes into power, it is so well defined that it has ceased to be useful as a means of making new law. The 1800's witness the application of the third instrumentality, legislation. We have been deluged with it in England and America and today we are seeking refuge in codification. Many parts of our law are already codified. What becomes of these codes? Will a new cycle begin? Perhaps the best answer may be had by reference to a branch of law that was the first to be codified in America,—antedating the period of general codification for peculiar political reasons by a century or more. I refer to constitutional law. The great constitutional decisions of the last century are largely glossatorial. What is interstate commerce? What is a jury? What is the true meaning and extent of the doctrine of *habeas corpus*? What is a postal road? What is due process of law? What is meant by the impairment of the obligations of contracts? What is an *ex post facto* law? What are the privileges and immunities of citizens? The difficulties incident to the amendment of the constitution have even driven us in recent times to the making of some new fictions. One of the boldest fictions ever perpetrated was made in 1844.⁹ It is the wholly gratuitous presumption that all of the members of a corporation are citizens of the state in which the corporation was organized, invented solely to bring certain cases within the constitutional phrase, "between citizens of different states." Has not the whole college of presidential electors become a mere fiction? In addition, the constitution has been submitted to stretching by the giving of a very liberal meaning to certain limited terms—another variation of the use of fiction. Thus in time it became inevitable that Congress should have some control over trusts, over telegraphs, over white slavery, whether commercialized or not; over food and drugs, over meat inspection, over the length of working days and innumerable other subjects and all of these powers have been assumed and justified

⁹ See *Louisville, etc., R. Co. v. Letson* (1844), 2 How. (U. S.) 497; 11 L. Ed. 353; cf. Harlan, J., in *Blake v. McClung* (1898), 172 U. S. 239, 259.

by a single clause: "The Congress shall have power . . . to regulate commerce . . . among the several states."¹⁰

I shall digress a moment to draw a further illustration from the interpretation of the Constitution of the United States. It will serve as a close-up picture of the first stages in the post-mortem history of a code. First it will suggest the necessary incompleteness of all codes even at the time of their writing, and the manner of filling them out by drawing from "common law." It was far from the minds of the draughtsmen of the constitution to enact unwritten English law into the United States Constitution. Indeed, Jefferson, who was of one spirit with many of them, advocated an act forbidding the citation of English cases. At least two of the United States passed such acts. Nevertheless, when courts were confronted with such questions as: what is *habeas corpus*, what is a jury and so on, what could they do? They had to fall back upon English decisions antedating the constitution—in other words, they had to read the common law into the constitution. And this was right—for what else could have been meant by such words, if not what the English law had defined them to be? If you adopt the language of a country, you tacitly adopt its law. A study of the part that language plays in the psychosis of a people would take me too far afield. I shall only call attention to a few coincidences. If you draw a language map of the world you have a law map. The countries speaking English—America, Canada, South Africa and Australia—have essentially English law. The part of Canada where the French language is just dying out is witnessing the simultaneous demise of French law. The countries of South America that speak Spanish are governed by Spanish codes. The countries that speak languages based on the Latin have laws based on the Roman code. In mediaeval France the line that divided the land where "oc" meant "yes" from the land where "oui" [oil] meant "yes" also separated the country of the written law from the country of the oral customs. Lastly, the Pilgrim Fathers wanted to adopt the law of God from the Bible, but before they knew it they had imported with such words as

¹⁰ Article I, Sec. 8.

sheriff, will, heir, chattels, county and a thousand others—the English institutions that they had meant to avoid. The relation between language and law is deep-rooted and wonderfully subtle. But to return to our subject—to interpret a code written in any language one must know the common law of the land whence the language came. Reverting to our study of the periods in the vicissitudes of a code, I may add that this common law is more important in a glossatorial period than in a commentatorial or equity period, and that it gradually loses its force in a statutory period.

JEWISH LAW.

We are now ready to apply these principles to Jewish law.¹¹ The first cycle, that which led to the completion of the Old Testament of the Bible, is not easy to approach. If modern scholarship has removed the warning, "The place whereon thou standest is holy ground," it has at the same time substituted another, "Danger Zone."¹² Without attempting to date any "documents."

¹¹ In the transliterating of Hebrew the scheme used here is that which I employ throughout the new International Standard Bible Encyclopedia. I am also using the abbreviations of book names found in that work.

¹² It seems to me that Maine stopped short of using the Bible for illustrative purposes because of the first of these warnings. Mr. Oko, however, to whom I wish to acknowledge my deep indebtedness for innumerable suggestions, is inclined to suspect him of having feared the second.

[That Maine in his *Ancient Law* should not have drawn illustrations for his principle of legal development also from Biblical legislation, is more than passing strange. That he had more than a "bowing" acquaintance with Biblical law may be inferred from his discussion of the primitive operation of Wills (*Ancient Law*, 5th Ed., p. 197), and of the modern history of crimes (*Ibid.*, p. 397). J. D. Michaelis' *Mosaïches Recht* (1770-75), a work not devoid of merit, was accessible to Maine in an English translation under the title *Commentaries on the Laws of Moses* (4 Vols.; London, 1814), a title, as the translator, Rev. A. Smith, explains, suggested by the analogy of this work to that of Blackstone. It should also be noted that a decisive inroad of German theological scholarship into England had already been made three decades before *Ancient Law* was first published (1861): Milman's *History of the Jews* appeared anonymously in 1829. The liberal dean insisted that the Bible should be studied like any other historical book. Further, the text of the Old Testament was much studied in England towards the middle of the nineteenth century—witness the remarkable volume of *Essays and Reviews* (1860), the work of Bishop Colenso on the Pentateuch, and that of Dean Stanley. The trend of the times is likewise reflected in the appearance (1862) of the anonymous translation of Spinoza's *Tractatus Theologico-Politicus* by the London physician Robert Willis—a work, in which the composite nature of the Pentateuch was pointed out for the first time and in which several results of modern Old Testament scholarship were anticipated. It is quite possible that Maine simply refrained from using freely the Biblical knowledge of his day for secular learning for fear of being dragged into con-

without participating in the controversies that are still the battleground of specialists, one may venture to survey the general legal tendencies of Old Testament times. For after all the Biblical codes, whenever and by whomever they were reduced to writing, are legal codes, subject in the hands of men to the ordinary vicissitudes of codes—a fact too generally overlooked by radical and conservative alike. We must remember that as codes they are incomplete statements of the law of a people, and that they are, like the Constitution of the United States, based on a common law, that they call for interpretation, and that through interpretation they grow.¹³

Biblical common law—the common law of the Hebrews—may need a little elucidation. Let us take a few examples. In the first place Biblical law provides for a refuge from the avenger of blood.¹⁴ Where does it tell what an avenger of blood is? Nowhere. Everybody is presumed to know that part of the common law—and it is not repealed, only mitigated. Again, no mention is made in Biblical law of the rights of sons to inherit, but assuming that everybody knows that principle, the Biblical language¹⁵ becomes clear. It provides rules of inheritance in case a man die and have no son. More particularly the peculiar rules of primogeniture of the Hebrews—the giving of a double portion to the first-born—are nowhere laid down; they are pre-

troversy. We must remember that from 1860 to 1864 English academical and clerical obscurantism was much agitated by the publication of *Essays and Reviews*, by the Colenso "heresy," and finally by the tremendous interest aroused by Darwin's *Origin of Species* (1859). "Maine," Sir Frederick Pollock tells us, "was generally averse to controversy."—A. S. O.]

¹³ Since writing this paper I have been interested to learn that the "consuetudinary" laws presupposed in Biblical legislation were recognized by Michaelis one hundred fifty years ago. (*Commentaries on the Laws of Moses*, Book I, Art. III.) Michaelis uses two of the illustrations above and adds that of divorce, which is checked, though nowhere specifically authorized. Its authorization is in the common law. (Dt. 22 19, 29; 24 1-4, AV and RV are here misled by the paraphrase in Mt. 6 31, and Michaelis is right, cf. Jew. Pub. Soc. translation; Jer. 3 1.) Michaelis fails to see in Jewish tradition an outgrowth of this "consuetudinary" law. Consequently some of the conclusions he draws from his find differ radically from the present author's. Michaelis' readiness to draw upon popular accounts of contemporary Arabic culture for illustrations of the Bible contrasts strangely with his utter inability to see the more obvious illustrations in Jewish history.

¹⁴ Nu. 35 9-28; Dt. 19 1-10.

¹⁵ Nu. 27 8-11.

sumed to be known in the discussion of the illegality of the transferring of the birthright of the child of one wife to the child of another.¹⁶ The levirate law is recited in the Biblical codes,¹⁷ but more attention is paid to the *ḥālīṣāh*, or the formula for its evasion, than to the old custom itself.¹⁸ Now we find traces of all of these institutions and many others in the stories of the patriarchs where they have all the earmarks of common law or custom. There is the vendetta in the relations between the sons of Jacob and the men of Schechem.¹⁹ Inheritance and primogeniture run through the stories of the patriarchs. The levirate is illustrated in the story of Judah and Tamar.²⁰ In short, strange as it may seem to the layman, to the jurist there is nothing remarkable in the Talmudic notion that before the days of the written law, Abraham, the Hebrew, observed the oral Torah, the common law of the Hebrews.²¹ But we need not center our attention on the peculiar institutions of the Hebrews to see the significance of their common law in the interpretation of the Hebrew codes. Every Hebrew word, in even the simplest of sentences, carries with it its bit of Hebrew common law. *Ba-ṣukkōth tēsh^ebhū* — in booths shall ye dwell.²² What is a *ṣukkāh*? How high may it be and still be a *ṣukkāh*? How low? Of what materials may it be made? How may it be covered? What part of its wall space may be open without doing violence to the denotation and the connotation of the term as understood when and where the code was made?²³ The term had some connotation at the outset—in other words, there was on these points a *ḥālākhāh l^eMōsheh miṣṢinai* or, in English, a custom from a time that the memory of man runneth not to the contrary. And the questions are legitimate, legal and logical in a

¹⁶ Dt. 21 16, 17.

¹⁷ Dt. 25 5, 6.

¹⁸ Dt. 25 7-10.

¹⁹ Cf. also Gen. 9 5.

²⁰ Gen. 23.

²¹ See commentaries on Gen. 26 5, "because Abraham obeyed my voice, and kept my charge, my commandments, my statutes, and my laws."

²² Lev. 23 42.

²³ Cf. Mishnah, *Sukkāh* I. 1.

glossatorial study. One source from which to draw the answers would be the opinion of persons who have retained the traditions of the language. The practical interpretations of men in different districts would also be relevant. In like manner the learning of the various kinds of labor prohibited on the Sabbath resolves itself into what is *m^elā'khāh* (labor) and the *'ābhōth m^elā'khāh* (principal divisions of labor) of the society in which the law was declared or in which it grew up are proper subjects for the consideration of the glossator.²⁴

A. The Biblical Cycle.

Just how long the interpretation of Biblical law was *bona fide* explanation of what passages originally meant and nothing more, it is hard to say. Tradition tells us that Moses himself began the process of expounding,²⁵ and Joshua is supposed to have continued it as his faithful disciple.²⁶ I have already suggested an explanation in the light of comparative jurisprudence of Jewish tradition's famous account of itself. It is significant that from a host of possible claimants, including kings and priests, it recognizes as its true bearers only men who characterize the normal stages of legal development.

²⁴ The sacredness attributed to the Bible prevented Jewish law from being anything but glossatorial for a long time. Indeed the glossatorial form runs through Hebrew legal literature for many ages; thus the *halakhic Midhrashim* interpret Biblical law, the Gemara interprets the Mishnah. But if this glossatorial form reveals the beginning of Jewish legal science, even if it points out a predominant feature in it, it must not be taken as an indication that Jewish legal learning remained glossatorial in spirit through all these ages. Indeed one of the logical weaknesses of Jewish jurisprudence from a modern point of view is the very practice that gave it its strength in the past—it is the attempt to base the new code on the older ones, where the basis of the new may be independent of the terms of the old, and just as solid. Thus, "Thou shalt not seathe a kid in its mother's milk," were it repeated ten times instead of three would not suggest anything like the Jewish practice to the modern jurist. Undoubtedly the Jewish practice is based on very ancient tradition. Yet the ancient lawyer who recited that practice, when asked for an authority, did what a modern lawyer frequently has to do when he has no case on all fours with the case at bar: he cited an instance not exactly in point, but one showing a clear tendency in the same general direction. If one of his followers thereafter writes the accepted law in the form of an annotation on the old code, he leaves the impression that the practice is derived solely from the passage cited, a decidedly puzzling impression. "Queer proof assumes the guise of queer inference."

²⁵ Dt. 1 5, where the Hebrew *bē'er* means "to explain"; cf. Josephus, *Contra Apionem*, II. 17.

²⁶ Mishnah, *'Ābhōth*, I. 1; Maimonides, *Mishneh Torah*, Introduction.

It is remarkable, moreover, that the tendencies suggested are borne out by such other evidence as we have of the times covered. Thus, the pre-prophetic age cannot be dismissed as a codeless period. It is a period of literalism. Joshua and Jephthah must live up to the letters of their promises, no matter how repugnant their deeds to the spirit. Even the great Samuel does not tell us that the spirit is greater than the letter, but on the contrary: "Hath the Lord as great delight in burnt offerings and sacrifices as in obeying the voice of the Lord? Behold, to obey is better than sacrifice and to hearken than the fat of rams."²⁷ This archaic pronouncement might serve as the motto of a glossatorial school. In the same period fictions are already rife—for example, the fictitious or symbolic transfer or sale necessary to bind a bargain in the story of Ruth, and the fiction by which a tribe is saved from extinction.²⁸ In the days of the early kings, David's worst enemies cannot be dealt with by Solomon without a technical charge against them.²⁹ Solomon is told to act according to his wisdom in this matter, and the essence of legal *hokhmāh* in his day seems to be to make the words of the law do more than was originally intended. In no other sense was the famous judgment of Solomon *hokhmāh*.³⁰ The pre-prophetic period is a literalistic period; the prophetic, one of equity. "What doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God?"³¹ Isaiah's ideal ruler "shall not judge after the sight of his eyes, neither decide after the hearing of his ears; but with righteousness shall he judge the poor, and decide with equity for the meek of the land."³² The spirit of the prophets is clearly a spirit which our observation of other systems would place in time after the growth of formal law, and here is a new factor with which some of the theorists on the subject will have to cope.

At the end of the prophetic period a catastrophe helped the

²⁷ I S. 15 22-24.

²⁸ Ruth 4 7; Jgs. 21 16-23.

²⁹ I K. 2 6, 36-46.

³⁰ I K. 3.

³¹ Mic. 6 8.

³² Isa. 11 3, 4.

transition from equity to legislation. The Exile forced the people into a conscious readjustment of their lives. And it is not surprising that at the Return a great period of legal reconstructions set in. So many statutes or *Takkānōth* could be traced by tradition to Ezra and his associates³³ that anonymous statutes were in general popularly attributed to the men of this time. These were the men who said, "Make a hedge around the Torah."³⁴ And with Ezra the canonization of the Bible—the authoritative repository of the law—begins. We have a new codification and even while it is in progress a new period of literalism sets in.

(*To be Continued.*)

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³³ Ten in one place, *Bābhā' Kammā'*, 82 a.

³⁴ A Biblical justification for legislation was found in Dt. 17 9.