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Devoted to the Science of Religion, the Religion of Science, and the
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Founded by EDWARD C. HEGELER

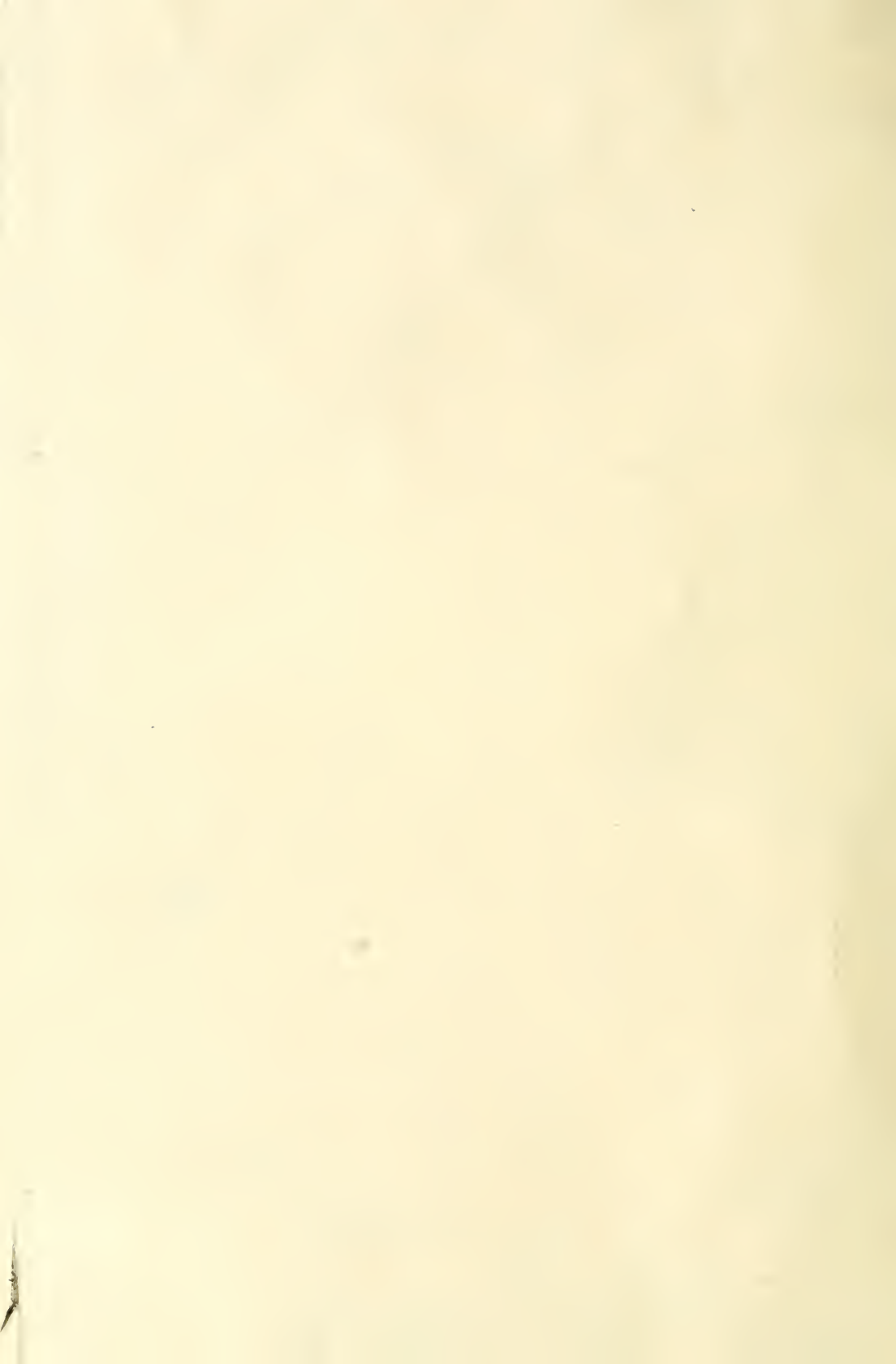


A VOTIVE TABLET OF BABYLON.
On which is carved in relief the figure of Hammurabi.

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THE WOMAN TAKEN IN ADULTERY.
After a painting by Pollienov.

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HAMMURABI AND THE SALIC LAW.

BY THE EDITOR.

IN spite of all the differences between the civilization of ancient Babylon and that of the Teutons at the beginning of the Middle Ages there are remarkable similarities in their legal codes, and Prof. Hans Fehr of Jena has discussed the subject in a treatise on "Hammurabi and the Salic Law."¹ He calls attention to the agreement in form of expression which he calls the technique of the law. Both codes formulate the several regulations thus: If somebody acts in such and such a way he shall be punished in this manner. Both codes are officially declared to be established for the purpose of preserving peace, of preventing individuals from taking the law in their own hands, and of protecting the weak against the powerful; and finally both codes claim to be divinely instituted. Hammurabi speaks of himself as the one to whom Shamash, the sun-god and god of justice, has revealed the law. In the Salic law the people are represented as the power that constitutes the law through four selected men, but even here it is expressly stated that in declaring the law they are inspired by God (*inspirante deo*). These similarities are perhaps natural, but in addition there are others among which we may mention the ordeal, proving that the same kind of religious notions prevailed in both. We let Professor Fehr speak in his own words. He sums up the similarities as follows:

* * *

1. Both the Code of Hammurabi and the Salic Law are similarly elaborated in important points as far as legal technicalities are concerned; and consist of peace regulations founded upon the authority

¹*Hammurabi und das salische Recht. Eine Rechtsvergleichung.* Bonn, Marcus & Weber, 1910. Price 2.80 marks.

of the community. They contain rules which in the conception of the people, man himself is not capable of giving. Law is of divine origin and is under divine protection. Deity inspires the law-giver and by means of direct or indirect intervention helps to separate law from mere pretense of law. It urges the actualization among men of the law which has been given them.

2. The individual, the separate member of the nation, is held by a double bond, that of the family and of the community. He is bound to the family by blood and to the community by the idea of fellowship. From this close union, both human and legal, arises the idea of mutual protection and mutual responsibility. Family and community seem to be bonds which guarantee legal peace, and from this guarantee results the responsibility of the whole community for each individual. But the structure of the community is stronger than that of the family. The idea of the state cast in the background the idea of the family not only in the kingdom of the Babylonians but also in the less compact commonwealth of the Franks. Therefore certain misdemeanors led to the banishment of the criminal from the family circle. The crime severed the blood tie and destroyed connection with the kindred, who were forbidden henceforth to protect the exile.

3. In both systems the sensuous factor in the law is strongly developed. The abstractly defined idea of law is in many respects foreign to the highly cultured Babylonians as well as to the simple Salians. Many legal proceedings and situations demand an external expression comprehensible to the people. Here we have the principle of publicity. Thus bargaining before witnesses takes place; thus symbols change from the hand of one party in a contract to that of the other; thus marks assign the proprietorship of a thing to a certain person or a certain household. So are law and its consequences connected with sense-perceptible transactions.

This is true in another respect. When an injury has been committed, the law does not always look for the inner reason, the guilt, but fastens on the outer shell, the perceptible result. The one who brought about the result must atone for the wrong, not the one who was guilty of the deed. Both nations contend for the spirit in preference to the letter of the law, in that they grant full scope to the principle of obligation as against adhering to the consequences; and here the Babylonians stand on a much higher plane than the Franks. But a dualistic conception of the apportionment for injury and the responsibility for misdemeanors controlled the thought of the people in both countries,

4. The idea of property is clearly defined; in civil law it forms the basis of every regulation. The most conspicuous objects of law, the things which could be said to be owned, are distinguished by Babylonians and Salians alike as movable and immovable property. The law is dependent upon the form and character of the things and originated the statement, among others, that real estate is acquired by a solemn procedure but chattels without ceremony. The actual impossibility of delivering over a piece of ground like a movable object aroused the demand for a ceremonious process of law founded upon the symbols of tradition, and the same symbol, the staff, though equipped with different functions was employed in both countries.

Self-defence was systematically forbidden. The firm and growing power of the state would not admit such an interference with the peace guaranteed by its law. In the same way arbitrary or personal seizure without the intervention of a judge was impossible. Yes, even the same consequence was affixed to illegal seizure: The creditor lost his debt and was compelled to return the seized goods.

5. Missing chattels were recovered by lawsuit. The Babylonian legal process and the Frankish procedure betray a surprisingly similar stamp in their fundamental features as well as in a number of details. Both may be divided into a judicial and extra-judicial part in which the latter intends to bring about the establishment of a judicial court. The illegal possessor of goods is to be compelled to answer for himself before the judge. The grievance is one of a mixed character. Criminal and civil elements are combined in it. It is partly directed to the discovery and punishment of the one who defrauded the rightful owner and who is treated like a thief; and partly devoted to the restitution of the article. Accusation and the system of evidence are built upon the idea of publicity wherein the German treatment still excels the Babylonian in concreteness. However the sense element is usually more strongly developed in the lower grades of civilization.

6. The family has a patriarchal organization. There are no positive traces of a former matriarchy.

Whereas the Babylonian and Salic regulations for the family, as far as we can know to-day, are widely divergent, still three important legal institutions are shown to correspond. The deprivation of family rights (*Entsippung*) on account of misbehavior, the common responsibility of the family (*Gesamthaftung*) with reference to property and personal rights, and communism (*Gemeinderschaft*). The last-named institution originated in the idea that the family wealth represented an economic and juridical unit in the possession

of the head of the family. And this idea of unity is so strongly developed that in many instances heirs do not proceed to a division of the property when the head of the family dies, but remain together with undivided common interests as a so-called community. This communism restricts the individual's ability to dispose of his property so that no member can freely dispose of his own share. Only gradually with the weakening of the solid structure of the family in both nations does the idea of division creep in. The interest of the individual rises triumphantly above the interest of the family. The welfare of the individual pushes the welfare of the family in the background.

7. Marriage is monogamous. Neither people know anything of a group marriage; genuine polygamy is seldom found among the Franks and probably rarely also among the Babylonians. On the other hand the Babylonians show evidence of a virtual polygamy in a union with a secondary wife, an arrangement entirely unknown to the Salians, which approached polygamy if not juridically yet from an ethical and industrial point of view. Here and there concubinage is recognized. The legal status of the children of concubines was however an unfavorable one in so far as the offspring of a bondwoman retained the position of the mother and hence were also slaves.

An actual marriage of full value was accomplished by purchase. The woman, or at least the power over her, was the object of the contract of sale. Marriage by violence, perhaps never carried on among the Babylonians, did not lead in the case of the Franks to a complete marriage. Peaceful neighborly relations led to a peaceful marriage agreement. With both peoples this was divided into two parts, into the legal act of betrothal and the nuptial ceremony. At the latter took place the actual transference of the bride to her husband. As wife she came under his control. If in these relations the woman was looked upon rather as the victim of an outside power than as a self-acting personality, the position of the widow who wished to remarry (and this was allowed both by Babylonians and Salians) was far better; she could engage herself according to her own inclination.

Although in both countries the husband's power was developed very differently yet in neither could it ever rise to the the power of life and death. The guardian rights (*Munt*) of the husband met an impassable barrier when it came to the life of the woman.

Marriage between bond and free was a recognized relation, and thus slaves received a limited legal consideration.

8. Marriage did not unite the property of the two parties into one possession. It exercised absolutely no influence on the relations of the property of man and wife. The property remained separate, and the husband only took charge of the property of his wife for the purpose of management and investment. From this arrangement arose the system which to-day we call "tenancy in common" (*Verwaltungsgemeinschaft*). Both codes consider the purchase price and the dowry as a present from the bride's father to the bride, or a special gift of the husband to his wife, appearing in the Frankish customs as the morning gift. Considered in the light of the history of civilization, the function of the purchase price with both the Babylonians and the Salians is the same. From an actual purchase sum which the bridegroom paid the bride's father it became a gift from the husband to the wife, a gift which was to serve as a provision for her in the case of widowhood. In this respect the Franks were far in advance of Hammurabi's period in civilization, for it was not until a hundred years after Hammurabi's reign that the Babylonians attained this higher conception.

The close connection between the woman's property and the children resulting from a marriage is expressed in the law of implication (*Verfangenschaftsrecht*). Making the property of the woman independent goes back to the thought of preserving this property for the children. Thus when the marriage was broken by death of either husband or wife the woman's property remained, to be sure, in the hands of the survivor but was placed in trust for the children and was therefore withdrawn from the disposition of the husband. A widow had the right of approval (*Beisitz*).

9. Although the penal systems exhibit wide divergencies in fundamental matters, yet even here we find agreements of an important kind.

Both peoples were dominated by a dualistic conception. In Hammurabi the thought of public punishment was uppermost while with the Salians it was that of private reparation. But with the Babylonians we find indications which point also to a private reckoning for misdeeds while with the Franks we see the beginnings of a public penal system.

The idea of retaliation, the fundamental principle of the Babylonians, may also be seen among the Salians in special cases, although probably introduced there by foreign influences. The possibility of commuting by money the most severe sentence, even that of death, was widespread among the Franks and not entirely foreign to the Babylonians. Neither in Mesopotamia nor in the Salic realm did the

people form a united community. On the contrary it was broken up into castes, and in the penal code caste distinctions became distinctly noticeable. In general it was true that the crime must be atoned for in the highest castes by a more severe punishment.

10. In the treatment of special misdemeanors a distinction was made between larceny and petty larceny. The agreement extends so far that the particular objects (hogs, cattle, sheep or ships) which constituted an offense of petty larceny under the Salian law were likewise counted as petty larceny in Babylonian law when the victim was the temple, the court or a high official. Forcible entrance into a building was punished as burglary whether robbery was actually committed or not.

Little can be said about the legal protection of the body against injury. It is specially mentioned again in this connection that the one who commits the injury must pay the cost of remedies in certain cases.

Adultery could be committed only by the woman. In the husband it was no crime. Accordingly both Babylonians and Franks placed only the wife under obligation to preserve her marriage vows. Her violation counted as a crime against the husband to whom belonged respectively the pardon (Babylonian) or punishment (Salic) of the guilty woman.

With both peoples honor was a legal matter requiring the protection of law. Injury to the honor by word or by deed demanded speedy reparation. A series of rules had for its special object the integrity of woman, yet the honor of the woman in many relations suffers injury more quickly and is more difficult to reinstate than that of the man.

Finally, false accusation, whether rendered innocently or against the accuser's better knowledge, received its punishment if a serious crime was charged.

11. Both Babylonian and Salic legal process is founded on the principle that questions of fact are revealed by formal proofs.

Definite measures of legal evidence were prescribed. If these succeeded the proof was successful, otherwise not. Such a system of evidence is most closely connected with the idea that deity demands the actualization of law among men, and therefore takes part in the trial.

Thus we find employed as evidence ordeals or the judgment of God, the oath (sometimes with relation to the parties in a trial and sometimes to witnesses), and documents. The judgment of God rendered an irreversible decision, but this is not the case with the

oath. Counter-evidence is admitted against the oath. The familiar statement in modern law that the defendant receives the benefit of the doubt, was true neither in Babylon nor among the Franks. On the contrary a release from the charge was demanded of the defendant either by oath or by judgment of God, or sometimes the plaintiff was permitted to bring evidence by witnesses. A dualistic principle lay beneath both processes. Reparation was forbidden to the offender caught in the act. Here again the idea of publicity plays its part. It made the criminal act irrefutable. Hence the offender so caught was considered convicted.