PRINCIPLES AND CASES: THE THEFT LAWS OF HAMMURABI

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Inconsistencies in ancient legal documents provoke from scholars a variety of responses. The historical approach seeks to explain how the inconsistencies arose. Its technique is the identification of interpolations or of different original sources. On the other hand, the commentator aims to explain how apparent inconsistencies were interpreted. His technique is harmonisation or distinction. These two approaches are not incompatible, and a combination of the two is often found.

Roman law, particularly the Digest of Justinian, has been the principal battle-ground for these competing approaches. But strong echoes of them have been heard in the study of the ancient Near Eastern legal compilations. There, too, a reaction is now being felt to the extremes of the historical school (*1*).

It is not my purpose to evaluate these approaches. Rather, it is to suggest that there is an even more important issue hidden beneath the surface of the debate. The ancient Near Eastern legal corpora are composed, for the most part, of casuistically framed laws dealing with specific situations. Every such text raises, or ought to raise, the question: "Is it legitimate to treat this case as evidence of a principle?" (*2*). A "principle" here means any statement of more general import than the case upon which it is based. A "case" is the (casuistically formulated) law found in the text itself. Inadequate attention to this problem often vitiates the approach of the historian and that of the commentator equally.

An analysis of the debate concerning the theft laws of Hammurabi is here offered in illustration.

The laws of Hammurabi are notable for the variety of the sanctions imposed for theft (*3*). These sanctions have been divided into two

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(*1*) G. Boyer, "Les articles 7 et 12 du Code de Hammurabi", *Publs. de l'Inst. de Dr. Rom. de l'Univ. de Paris* vi (1950), 169, reprinted in *Mélanges d'Histoire du Droit Oriental* (Paris, 1965), p 27; G. R. Driver & J. C. Miles, *The Babylonian Laws* (Oxford, 1952-5), e.g. at i.99; G. Cardascia, "La Codification en Assyrie", *RIDA* iv (1957), 55-60; M. Greenberg, "Some Postulates of Biblical Criminal Law", *Yehezkel Kaufmann Juibiee Volume* (Jerusalem, 1960), pp. 5-8.

(*2*) For a fuller theoretical consideration of this problem, and its application to the study of Biblical law, see B. S. Jackson, "Reflections on Biblical Criminal Law", *JJS* xxiv (1973), 8-15.

(*3*) Excluded from consideration are property offences not described by the verb *šaraqu*, as LH 19, 21, 22, 25. On LH 112, 120, and 124, see *infra* pp. 165f. On the distinction between *šaraqu* and *ḫabatu* (LH 22), see B. S. Jackson, *Theft in Early Jewish Law* (Oxford, 1972), pp. 11-13.

groups: first, a group imposing the death penalty, consisting of LH 6, 7, 9-10, and 14; second, a group imposing lesser penalties, comprising LH 8, 253-6, 259-60, 265. LH 8 and probably also 256 envisage death as a last resort, where the offender is without the means to pay.

This variety is viewed as raising a problem by both historians and commentators alike. The first group of provisions is said to establish the existence of capital punishment as the general penalty for theft (4). The second group appears to represent a conflicting principle. The one approach explains the conflict in terms of historical periods (5). The other does so by means of a principle distinguishing theft from conversion (6). Both equally identify the problem by constructing principles from cases. The commentator constructs a further principle in order to resolve it.

But before resort is had to such techniques, it is necessary to be certain that there is in fact a conflict between the cases from which the principles are derived. To the extent that there is such conflict, a solution ought first to be sought in the cases themselves, not in the principles based upon them. My contention is that the cases do not exhibit a conflict of principle over any alleged 'general penalty for theft'. They conflict only in one particular, the penalty for theft of palace or temple property, and the solution to that conflict is probably historical.

The evidence for a general death penalty for theft is based on LH 6. 7, 9, 10 and 14. LH 6 refers only to the theft of property belonging to a temple (lit. "god") or palace *namkur ilim ù êkallim.* In LH 7, the subject-matter is more generally described, being silver, gold, a slave or slave-girl, an ox, sheep, or ass 'or anything else whatever', *ù lu mimma šumšu.* But the circumstances of the offence are special, concerning only purchase or receipt in deposit without witnesses or contract *ina qát mar awilum* (!) *ù lu warad awilim.* The meaning of this phrase has been debated. Koschaker took the *mar awilim* in the commonly attested sense of 'a free man' (7). Later writers have preferred the more literal rendering 'the son of a man',

(4) P. Koschaker, *Rechtsvergleichende Studien zur Gesetzgebung Hammurapis* (cited *RvSGH*) (Leipzig, 1917), p. 74; Driver & Miles, *BL* i.80.

(5) D. H. Müller, *Die Gesetze Hammurabis und ihr Verhältnis zur mosaischen Gesetzgebung sowie zu den XII Tafeln* (Vienna, 1903), p. 84; Koschaker, *RvSGH*, pp. 75-6; M. Mühl, *Untersuchungen zur altorientalischen und althellenischen Gesetzgebung* (Leipzig, 1933, repr. Aalen, 1963), p. 22 (Beihefte zur Klio, 29); M. San Nicholò, "Diebstahl", *Reallexikon der Assyriologie* (Berlin, 1928-), ii.213; T. J. Meek, *Hebrew Origins* (New York, 1950), 2nd ed., pp. 66-7; R. Yaron, *The Laws of Eshnunna* (Jerusalem, 1969), p. 89. My acceptance of the historical solution, at *Theft in Early Jewish Law* (Oxford, 1972), p. 17, is to be qualified in the light of the present discussion.

(6) Driver & Miles, discussed *infra*, pp. 165f.

(7) *RvSGH*, p. 73. Koschaker's discussion of the history of theft penalties is bound up with his examination of the evidentiary rules surrounding deposit. For a critical examination of the latter see Boyer, op. cit. (n.1 *supra*).

and have interpreted this, in the light of *warad awilim* (the slave of a man), to refer to a *filius familias* (*8*). The offence thus consists of accepting property in sale or deposit from a dependant son or slave without special evidentiary safeguards, a far cry from a general offence of theft (*9*). This interpretation certainly appears preferable to that of Koschaker, but even if the latter were correct, the provision would still fall far short of providing a general death penalty for theft.

LH 7 concludes with the statement *awilum šú šarraq iddak*, "that man is a thief; he shall be put to death." Similar expressions are used in LH 9 and LH 10 of persons who on indirect evidence (sale or possession of stolen property) are regarded as guilty of theft. They are not to be taken out of context to mean that *anyone* who is regarded as having stolen is to be put to death. Driver and Miles (ii.155) note of *šarraq* that 'the permansive state describes the circumstances, whether temporal or causal, attending the act described by the following verb', and compare *sar* in LH 11 and 13. But it does not follow that the same cause always produces the same consequence, as the comparison with *sar* shows. In LH 11 the offender *iddak*, in LH 13 *aran dinim šuati ittanašši*, a reference back to the five fold penalty of LH 12. Similarly the designation *šarraq* does not imply a single penalty as a consequence in every case. In the contemporary documents from legal practice, including one closely resembling the circumstances of LH 9/10, the death penalty is conspicuously absent (*10*). Indeed, it may well be that the function of the permansive form in these provisions has nothing to do with the nature of the penalty which follows it. LE 40, in substance a close parallel to, and probably a precursor of LH 9/10, provides *šumma awilum wardam amtam alpam ù šimam mala ibašuú išamma nadinanam la ukin š(um)a šarraq*. The permansive here implies no cause for a succeeding penalty, for no succeeding penalty is stated. It might be argued that *šarraq* here refers by implication to a customary penalty for theft. But we are not in a position to assert of LE that there was a single customary penalty. Rather, *šarraq* here stresses the legal status of the offender who (claims to have) bought any of the items mentioned but is unable to produce the vendor. Similarly the use of *šarraq* in LH 7, 9, and 10 is of an offender convicted by indirect evidence, and hence the stress upon his status.

(*8*) Boyer, op. cit. (n.1 *supra*), at *Mélanges*, pp. 21-3. Cf. Driver & Miles, *BL* i.84-6; J. J. Rabinowitz, "Seif 7 shel ḫukei ḫammurabi le'or halakhah aḫat batalmud", *BIES* xvi (1957), 26-28, citing Bar.B.B.51b; E. Szlechter, "L'Interprétation des lois babyloniennes", *RIDA* xvii (1970), 99. *Aliter*, S.E. Loewenstamm, *IEJ* vii (1957), 193-4.

(*9*) Cf. Boyer, *Mélanges*, p. 23.

(*10*) B. Landsberger, "Die babylonischen Termini für Gesetz und Recht", *Symbolae ad iura orientis antiqui pertinentes Paulo Koschaker dedicatae* (Leiden, 1939), pp. 221-2 n.11; Boyer, op. cit. (n.1 *supra*), at *Mélanges*, p. 17; W. F. Leemans, "Some Aspects of Theft and Robbery in old-Babylonian Documents", *Riv.d.St.Or.* xxxii (1957), 661-6, esp. 664-5, for LB 1028.

LH 9 and 10, really a single provision (as may be seen from the partially shared protasis), also describe the stolen property in very general terms (*mimmušu ḫalqú,* "anything lost"), but again refer to special situations. In LH 9 the thief is a seller of the property (who, presumably, cannot establish an honest title); in LH 10 he is a possessor who alleges that he bought it but is unable to produce witnesses to the sale. He thus seeks to avoid responsibility by involving his "seller" in a capital charge under LH 9, and it may be presumed that the "seller" in LH 9 would similarly attempt to avoid responsibility. The seller of stolen property and the possessor who falsely accuses another of having sold the stolen property to him are thieves for whom the death penalty is prescribed, but we are told nothing of the punishment of the possessor of stolen property who makes no such false accusation. That a distinction should be made between such cases is supported by Biblical law, which early came to punish a thief convicted by evidence of sale more severely than one convicted by evidence of guilty possession (*11*). Thus these provisions also fail to provide reliable evidence of a general penalty for theft. LH 14 is also specific, referring only to the theft (*12*) of the small son of a free man, *mar awilim ṣiḫram.*

Driver and Miles concede that these provisions contain no general statement of the law of theft, and that the proposition that death was the usual penalty can only be a matter of inference (*13*). But it is an inference which they are prepared to make. Certainly, the gap between the cases and the principle sought to be derived from them is not here a tremendously wide one. But there is a gap, and the justification for filling it can only be the view that a single normal penalty for theft is to be expected. Such an assumption is readily made by jurists trained in modern, integrated systems of law, as are most of those who deal with *Keilschriftrechten* (*14*). But even the early history of Roman law ought to warn against such assumptions, as may be seen from the differing penalties for *furtum manifestum, furtum conceptum,* and *furtum nec manifestum.* The Hittite Laws provide a wide range of penalties for theft, none of which may be regarded as the norm.

The argument for two competing principles of punishment for theft is even less persuasive when the evidence for the second is considered. For opposed to an alleged general death penalty we find not a single, alternative system, but a variety of sanctions ranging from fixed fines of 5 and 3 shekels in LH 259 and 260, to tenfold restitution in LH 8 and LH 265, thirtyfold also in LH 8, and mutilation in LH 253. What distinguishes these cases from the first group is only the absence of

(*11*) Jackson, *Theft,* pp. 41-8, 130-35.
(*12*) The verb used is the normal *šaraqu.* See further Jackson. *JJS* xxiv (1973), pp. 17-18.
(*13*) *BL* i.80.
(*14*) Thus, the comment of Koschaker, *RvSGH,* p. 74; "Vor allem ist die Beobachtung zu machen, dass die Strafsätze des Gesetzes für den Diebstahl sehr ungleichmässige sind".

the death penalty, and even this is contemplated in LH 8 and LH 256 where the offender is unable to pay.

Driver and Miles seek to reconcile the two groups by means of a distinguishing principle. LH 8 is excepted from their argument, and explained otherwise (*15*). This leaves two groups, distinct not only by the presence or absence of the death penalty, but also by their distribution in different parts of the corpus. The capital cases occur near the beginning of the Laws, the non-capital near the end. Driver and Miles do not, however, rely on the arrangement within the code, and it would be dangerous to do so. Citing in support the English Common Law concept of larceny, they distinguish the two groups by means of a principle. They argue that the second group consists of cases where a bailee misappropriates property lawfully entrusted to him. " . . . The thief is one who wrongfully takes property from the possession of another man without his knowledge or consent, and the bailee therefore is not a thief." "Babylonian law distinguishes between a common taking from another's possession and misappropriation by a bailee" (*16*).

The evidence does not support such a conclusion. The principle is not explicit, but is inferred from the cases. It does not explain all the non-capital theft cases. LH 259 imposes a payment of five shekels "if a man has stolen a waterwheel on the water-land"; LH 260 a payment of three shekels if he has stolen a plough or a harrow. Driver and Miles are forced to suggest that the offender, described simply as an *awilum,* is a farmer, who illegally borrows farm equipment from a neighbour, the offence being comparable to the Roman *furtum usus* (*17*). But there is no indication of this in the text. Even if we were to concede that the farm labourer is likely to be the commonest offender under this provision, it would be unreasonable to exclude such theft by others, which falls squarely within the terms of the provisions. Moreover, such an interpretation does not make the offender into a bailee. He has illegally taken his neighbour's implements, even if he has no intention permanently to deprive. Driver and Miles concede that the offence "seems however to have been regarded as theft" (and this is supported by the use of *šaraqu*) and and thus that there is no uniform death penalty for theft. But once it is admitted that theft attracted both capital and non-capital sanctions, there is no longer any need to explain other non-capital cases as distinguishable from theft. The only justification for so doing

(*15*) *Infra,* pp. 167ff.
(*16*) *BL* i.452; i.80, 208. LH 124 might have been cited by them along with LH 112 and 120. The reason for its omission appears to lie in the absence of mention of a "taking" or *contrectatio* by the bailee. Cf. D.47.1.1.2. For talmudic law, see Babylonian Talmud, Baba Kamma 105b; Jackson, *Theft,* p. 32, and at "Liability for Mere Intention in Early Jewish Law", *HUCA* xlii (1971), 218-9.
(*17*) *BL* i.450.

would be an explicit distinction in the text, such as a difference in terminology. But that, too, is lacking.

Despite the difficulty presented by LH 259-60, Driver and Miles prefer to support their distinction by differences in penalties rather than in terminology. For *šaraqu* is not restricted to theft in their sense. It occurs also in LH 253, 255, and 265, examples of misappropriation by a bailee. Their concept of theft is thus more technical than the usage of the Babylonian term (*18*). The terminological objection to Driver and Miles is not merely that they are prepared to accept the use of *šaraqu* both for theft and for misappropriation. If the term were used quite generally for all property offences, their view might still be admissible. But this was not the case. Driver and Miles cite LH 112 and LH 120 as further examples of misappropriation by a bailee. But in these provisions *šaraqu* is not used. Thus, their principle is supported neither by consistency of penalty or of terminology. Death penalties are not found explicitly for misappropriation by a bailee, though a bailee could be the offender in LH 10. But non-capital sanctions are found for theft. *šaraqu* is used both for theft and misappropriation, but not consistently for the latter.

The result of a classification based on terminology—a far more reliable criterion than that of a vague equivalence of penalties—is that three unambiguous 'bailee' cases, LH 253, 255 and 265, are included in theft, but two others, LH 112 and 120, are not. Two possible explanations are available. The absence of *šaraqu* in LH 112 and 120 may be due simply to inconsistency. Such an inconsistency is far more readily understandable than one which asserts that theft excluded misappropriation by a bailee, but that *šaraqu* was nevertheless used in several such cases. But we are not obliged to resort to such an explanation. The distinction between these two groups may lie in cases rather than in principles. The first group deals with a hired cultivator and a herdsman, the second with a carrier and a warehouseman. Apparently, a hired servant was regarded as capable of theft, whereas an independent contractor was not. But even this would be imputing a degree of generality for which there is no evidence. We should be content to find that a cultivator or herdsman was capable of theft, whereas a carrier or warehouseman was not. It is the anachronistic search for principles which insists on finding common ground between these cases, by subsuming them all beneath the common concept of a 'bailee'. But the Laws of Hammurabi have no word for a 'bailee'. Such a general conception is entirely absent.

Our conclusion is that there is no conflict in the cases as regards a general penalty for theft. Rather, there is a series of specific cases, including some where the offender has been entrusted with the property

(*18*) San Nicolò, *Real.d.Ass.* ii.212-3; Jackson, *Theft*, p. 17 and further literature cited. Note also Koschaker, *RvSGH*, p. 75 n.4.

by the owner, which attract a variety of penalties. But there are two provisions which contain a real inconsistency, and it is to these that we may now turn.

LH 6: *šumma awilum namkur ilim ù êkallim išriq awilum šuú iddak* . . . "If a man stole property of a god or a palace, that man shall be put to death . . ."

LH 8: *šumma awilum lu alpam lu immeram lu imêram lu šaḫam ù lu elippam išriq šumma ša ilim šumma ša êkallim adu 30-šu inaddin* . . . "If a man stole an ox or a sheep or an an ass or a swine or a boat, if of a god or if of a palace, he shall pay 30-fold".

These two provisions are identical as regards the offender (*awilum*), the act (*išriq*) and the victim (*ilim*, *êkallim*). They vary only in the subject-matter. LH 6 refers generally to *namkurum*, LH 8 specifically to four domestic animals and a boat. There are three possible ways of resolving this conflict.

The first, suggested by Driver and Miles, again distinguishes the cases by means of a principle. 'In §6 the property must be presumed to have been regarded as *sacra*, whether belonging to a god or the king, and to have been stolen from within the precincts of the temple or palace, whereas in §8 it is described as various cattle or a ship, i.e. movable property kept without the precincts, and so is only *profana* according to ancient opinion. Consequently the theft in §6 involves, in §8 it does not involve, violation of the sanctity of the temple as the house of god or of the palace as the king's house' (*19*). But this solution is open to serious objection. First, there is no explicit support for it in the text, which makes no reference to the place from which the theft is committed. Second, the reference to 'ancient opinion' rests upon Attic, Roman, and perhaps Egyptian (*20*) law, but Biblical law made no such distinction (*21*), so that the comparative argument is less than conclusive. Further, the distinction found elsewhere is expressed in terminology (*22*) as well as penalties, unlike the alleged Babylonian parallel (*23*).

A second possibility is a distinction based on cases. A modern court, faced with one provision relating to 'property', and another relating to an 'ox, sheep, ass, swine or boat', would construe the particular provision as an exception to the general provision (*24*). It would

(*19*) *BL.* i.81.
(*20*) Jackson, *Theft*, pp. 66-7 n.8, and literature cited.
(*21*) *op. cit.*, p. 67.
(22) For the Attic distinction between *hierosylia* and *hierôn chrêmatôn klopê* and between the Roman *furtum* and *sacrilegium* see Jackson, *Theft*, p. 67 n.8.
(*23*) Possible support may be derived from HL 126 and the Egyptian Pap.B.M. 10335 (per Blackman, *JEA* xi (1925), 249-55). In the latter, the "garments of Pharoah" were stolen from the storehouse of a temple. But in neither system is there explicit evidence of a distinction.
(*24*) *Craies on Statute Law* (London, 1971), 7th ed. S. G. G. Edgar, pp. 222-3.

not apply the *eiusdem generis* rule, thereby taking the particular exceptions as representative of a wider class (or principle), both because the five items listed do not constitute a single *genus,* and because they are not themselves followed by general words (25), such as the *ù lu mimma šumšu* of LH 7. But such a rule as that of *eiusdem generis* seems far too technical for the Babylonians (26), and it may be doubted that the legislator intended LH 8 merely as a specific exception to LH 6. Some resolve the difficulty by arguing that *namkurum* is not completely general, but refers to a different type of property than that contemplated in LH 8. Even Koschaker (27), who was normally disposed to look to the historical solution, took the possibility that *namkurum* may refer to valuables as worthy of consideration. Similarly Cruveilhier (28) observes that *namkurum* in the context of a temple or palace often signifies treasure, and, having excluded animals and boats (LH 8), suggests that the term here refers to other moveable goods, especially silver and gold. These suggestions all restrict *namkurum* solely by context, and in order to resolve the conflict with LH 8. They do not suggest that there is anything inherently restrictive in the word itself. Indeed, elsewhere in the Laws it is commonly used for the whole estate of a deceased (29), which may have included the items mentioned in LH 8, and in LH 235 it may well refer to the materials from which a boatman is required to make repairs. San Nicolò has rightly rejected solutions of this kind, observing that 'Heute wissen wir aber aus den Urkunden, dass *namkurum* alles Tempelgut, Grundstücke sowie Nutztiere, bewegliche Sachen und Naturalien, umfasste' (30).

The conflict thus remains, despite attempts to resolve it by principles or by cases. The solution must be an historical one. LH 6 and LH 8 represent differing traditions, whether from different times (31), places, or schools. It may well be significant that *ilim* appears as an ideogram in LH 6, but not in LH 8 (32). Indirect support comes also from the neo-Babylonian archives of the Eanna temple at Erech, which show that the thirtyfold penalty of LH 8 was still

(25) op. cit., pp. 178-82. For the view that the animals mentioned in LH 8 are to be taken as representative of domestic animals, see Koschaker, *RvSGH*, p. 74; Boyer, *Mélanges*, p. 16. Even such an inference constructs a principle from cases. Here, it may well be reasonable to do so, but there can be no certainty that the rule was in fact applied, in the time of Hammurabi, to all or any other domestic animals.

(26) Cf., in general, Driver & Miles, *BL* i.52-3.

(27) *RvSGH*, p. 74 n.2, following D. H. Müller, *Die Gesetze Hammurabis* (Vienna, 1903), p. 79. Both, however, preferred to adopt the historical solution, *infra.*

(28) *Commentaire du Code d'Hammourabi* (Paris, 1938), p 48.

(29) LH 165, 166, 167, 170, 171, 180, 181, 182, 183, 191.

(30) "Parerga Babylonica VI-VIII", *Ar.Or.* iv (1932), 328. Cf. W. von Soden, *Akkadisches Handwörterbuch* (Wiesbaden, 1965), pp. 589-90.

(31) Müller, *Die Gesetze Hammurabis*, pp. 84-5; Koschaker, *RvSGH*, pp. 75-6. M. Jastrow, "Older and Later Elements in the Code of Hammurapi", *JAOS* xxxvi (1917), 13.

(32) Cf. Cruveilhier, *Commentaire*, p. 48, who does not, however, adopt the historical solution.

commonly practised more than a millenium after Hammurabi. It was applied to theft of the domestic animals mentioned in LH 8, but also to other animals, such as ducks (*33*), and to fish, wood, natural produce, and money (*34*). Indeed the word *namkurum* itself appears as part of the subject-matter in one document (*35*).

The evidence from Erech is unlikely to represent a conscious neo-Babylonian interpretation of LH 8. Even if it does, it is no evidence for the interpretation intended in the first Babylonian dynasty. It may be objected that the historical interpretation is not sufficient. An answer is still required to the question 'how this section as it stands can have been interpreted by a Babylonian court' (*36*). But in fact there is no evidence that the Laws of Hammurabi were intended to be interpreted as statutes by the Babylonian courts (*37*).

The approach here suggested may appear to lead to anarchic results. It implies that it is always hazardous to draw from a casuistic law conclusions of a higher level of generality than the law itself. But though certainty will always be lacking once one departs from the terms of the law, it may be reasonable to do so in some cases. The principles so obtained will, however, become less trustworthy the more they increase the level of generality beyond that of the casuistic law on which they are based. The type of legal system which adherence to this method reveals may be very different from that expected by the modern jurist. But it is the legal system as presented by the ancients themselves. They dealt not in principles, but in cases, and the unjustified attribution of principles to them is a distortion of history. It may be that such a view argues from silence; that the absence of explicit does not necessarily signify the absence also of implicit principles. Nevertheless, the presence or absence of explicit principles is itself a matter of extreme significance (*38*).

That Babylonian law dealt in cases, not principles, should not cause surprise or alarm (*39*). It is a characteristic of legal systems at

(*33*) H. H. Figulla, "Lawsuit Concerning a Sacrilegious Theft at Erech", *Iraq* xiii (1951), 95-101. For other domestic animals, see San Nicolò, *Ar.Or.* iv (1932), 331-2, 339-42; S. von Bolla, "Drei Diebstahlsfälle von Tempeleigentum in Uruk", *Ar.Or.* xii (1941), 113-20.

(*34*) YBT VI 122, TCL XII 70, 106, Nbk 104, in *Ar.Or.* iv (1932), 327-44.

(*35*) YBT VII 7 (I.1). See M. San Nicolò, "Parerga Babylonica IX", *Ar.Or.* v (1933), 61.

(*36*) M. Greenberg, "Some Postulates of Biblical Criminal Law", *Yehezkel Kaufmann Jubilee Volume* (Jerusalem, 1960), p. 7, citing Driver & Miles, *BL* i.99.

(*37*) Jackson, *JJS* xxiv (1973), 9-10, and literature there cited.

(*38*) op. cit., p. 13.

(*39*) For aspects of mesopotamian legal science, see G. Boyer, "De la science juridique et de sa méthode dans l'ancienne Mésopotamie," *Semitica* iv (1951-2), 5-11 reprinted at *Mélanges*, pp. 45-51; G. Cardascia, *Les lois assyriennes* (Paris, 1969), pp. 39-40. *Aliter*, E. Szlechter, "Les anciennes codifications en Mésopotamie", *RIDA* iv (1957), 73; idem, "L'Interprêtation des lois babyloniennes", *RIDA* xvii (1970), 81-115.

an early degree of advance (*40*). It is the legacy of the Roman tradition that predisposes us to look for principles in any set of laws. But even some modern systems, influenced by that tradition, are now tending away from it (*41*), (*42*).

(*40*) See already in 1857, J. F. McLennan, *Law* (Edinburgh, 1857), p. 9 (reprinted from *Encyclopedia Britannica,* 8th ed., xiii.255, s.v. "Law"): "History is clear that in the infancy of society men had no idea of regulating their relations on general or uniform principles . . . " See also A. S. Diamond, *Primitive Law* (London, 1935), pp. 344-6.

(*41*) e.g. Scots Law. For the present position, see D. M. Walker, *Principles of Scottish Private Law* (Oxford, 1970), i.63.

(*42*) This paper, in a slightly different form, was read at the XXVIIe Session de la Société Internationale des Droits de l'Antiquité, held in Dublin, September 1972. I am grateful to Dr. T. F. Watkins, and Mr. A. Harari for helpful criticism.