The Talmud--A Gateway to the Common Law

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JEWISH LAW has its source in the Divine Commandments, precepts and ordinances given to the children of Israel through Moses at Mt. Sinai and called the Torah (Torah M'Sinai). In Hebrew, these five books of Moses are referred to as Torah Shebiktab (the written law). They constitute the bedrock of all Jewish law. These commandments, precepts and ordinances as set forth in the written law are enunciatory in nature and required much interpretation. There evolved, therefore, through the many generations, a great mass of oral teachings interpreting these laws, so multifarious as to require orderly arrangement. The work of assembling this vast accumulation of laws and traditions was begun by the great and noble expounder of the law, Hillel, about 200 B.C. and was carried on after him by many teachers (Tannaim), among whom the most outstanding were Raban Johanan Ben Zakkai (circa 70 A.D.) and Rabbi Akiba (circa 130 A.D.) A final redaction was undertaken by Judah the Prince and was completed by him some time before his death, which occurred about 220 A.D. His legacy to the Jewish people was the Mishnah as we know it. The Mishnah is divided into six orders and deals with agricultural laws, prayers, festivals and fasts, family life, civil and criminal jurisprudence, sanitary and food laws of “clean” and “unclean.”

The Mishnah, however, does not include all the sayings of the Tannaim, for in the process of redaction, much Tannaitic material was excluded. These omitted portions are contained in volumes called Baraithoth.1 Upon the death of Judah the Prince, a number of his disciples, called Amoraim, chief among whom were Rab Johan an in Palestine and Rab and Shmuel in Babylon, began the work of interpreting the Mishnah, resulting in two

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1 The Baraitha (the word means “extraneous”) is a collection of the Tannaitic material which was not included in the compilation of the Mishnah. This excluded material was compiled and arranged in an orderly fashion by the disciples of Judah the Prince and is found in the Baraithoth.
works of exegesis each called the Gemara. This interpretation was carried on long after them by their disciples and those who followed them, the last of whom were Rab Ashi and Rabina in Babylon. Rabina died in the year 499 (circa) leaving behind those who, although not his associates, were, nevertheless, close to him and knew his thinking. These men continued the work of interpretation from about 500 A.D. to approximately 540 A.D. They are known as the Saborayim. With the last of the Saborayim the Talmud is completed. The Gemara begun by Rab and Shmuel is called Talmud Babli (the Babylonian Talmud) and the one begun by Rab Yohanan is called Talmud Yerushalmi (the Palestinian Talmud). This extra-Pentateuchal law contained in the Mishnah, in the Baraithoth and in the Gemara constitutes the Oral Law (Torah Shebea'l-peh) and is collectively called the Talmud.

The Talmud, therefore, is a gigantic creation consisting of 63 tractates divided into 523 chapters, and represents the labor of many generations extending over a period of approximately 800 years. In it may be found treasures of the Jewish people, who, over the long centuries, enshrined the most profound and selective thoughts of their most eminent thinkers, who concerned themselves with the preservation of the tradition of Judaism. The Talmud may indeed be said to be a primordial tree of life with massive trunk and numerous branches, its roots deeply and firmly imbedded in the eternal life-giving soil of the Torah Shebiktab (the written law), for it contains the Halakhic laws from the days of Moses through the Amoraim to the last of the Saborayim. It contains Jewish legal and moral concepts, religious philosophy, medicine, astronomy and all branches of science known to the world during those 800 years. There is reflected in it the history of the Jewish people from their beginning to approximately the middle of the sixth century, as well as the impact of the non-Jewish world upon the life of the Jewish people during those 800 years, and the means employed by them against the dangers of physical annihilation and loss of their spiritual identity.

There is in the Talmud Haggadic material which embodies the sacred legends, allegories, fables and pithy sayings of the Jewish people and many philosophic discussions. This portion of the Talmud is essentially moral in character, establishing standards and differentiating between righteous and unrighteous conduct. A few examples of such material may be in order:

He who is loved by man is loved by God.²
The world exists through the breath of school children.³
Commit a sin twice and it is as if it were a sin no longer.⁴

² Pirke Aboth, Chapter 3.
³ Shabbath 119b
⁴ Yoma 8b
An illustration of the random material in the Gemara, which has no relevance to the subject under treatment, is a bit of sound advice found in the discussion of the law of bailments. Here Rabbi Isaac said, "One should always divide his wealth into three parts, investing a third in land, a third in merchandise and keeping a third ready to hand." Although the moral teachings of the legends and parables have come down to us carrying with them lessons of profound ethical significance, they do not possess the binding force of Halakhic pronouncement. Louis Ginzberg, Talmudic scholar who concerned himself primarily with the study of Haggadic literature, in speaking of the life of the Jewish people after the destruction of the Second Temple (70 A.D.) says of this material:

The scripture, or to use the Jewish term Torah, was the only remnant of their former national independence and the Torah was the magic means of making a sordid actuality recede before a glorious memory. To Scripture was assigned the task of supplying nourishment to the mind as well as the soul, to the intellect as well as the imagination and the result is the Halakha and the Hagaddah.

The Halakha deals with the laws of the Jewish people from which Jewish jurisprudence was derived. It embraces laws of purity, chastity, property, contracts, negligence, damages, domestic relations, crimes, evidence—in short, the gamut of basic jurisprudence.

The Talmud has had a long and turbulent history and much has been written about it. In medieval times it was thrown to the flames, but it was also stoutly defended by Jews and non-Jews. In times of dire crisis, when the Talmud was threatened with extinction, the vision of non-Jewish Talmudic scholars, such as Reuchlin and Mirandula, saved it from destruction. Its history is that of the Jews themselves. It has traveled with them and has grown with them; it contains the most encompassing expression of all that is Jewish. The aging and yellowed pages of Talmudic law and lore are a part of the living history of a people which has wandered the surface of the earth and has absorbed in its dispersion the multifarious culture-patterns of man, always retaining intact the cherished treasures of its spiritual heritage.

In appraising the legacy of the ancients to Western culture, surprisingly few mention the impact of Jewish jurisprudence upon our system of laws, most writers attributing our legal legacy to Rome almost entirely. Yet, long before the promulgation of the Justinian Institutes, the Jewish people had developed a very effective system of jurisprudence. More significant perhaps is the foundation upon which this network of law rests. The basic motif of Jewish jurisprudence is the moral law and the leitmotif of the

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8 Baba Mezia 43a
moral law is "Zedek," which connotes both righteousness and justice. (Zedek U'mishpot)

The Jewish word Torah implies a concept more spiritual and less trenchant than the austere Latin word "Lex," for it connotes more than laws regarding rights and wrongs between man and man. It includes duties and obligations not only of man to man, but of man to God.

The Torah is the ultimate source of all law in Judaism and whatever is legally wrong is morally wrong—is contrary to the letter or spirit of the law; if it were not, the law would not have stamped it as wrong. I contend that much of this moral and spiritual aspect of Jewish law has found expression in our common law through the influence of the Church as well as through Mosaic and Talmudic law proper.

It would be presumptuous to give the impression that in an effort as brief as this, a thesis can be developed by which may be established a clearly defined reliance of our common law upon Talmudic jurisprudence. Studies in that direction are now being carried on by Jacob J. Rabinowitz, an eminent scholar and professor of law at the Hebrew University in Jerusalem, whose book in which he treats this subject is about to appear. All I can do here is to present a few aspects of the Anglo-American and Hebraic systems of jurisprudence which are strikingly parallel and suggest that the younger may perhaps have had the benefit of the thoughts and concepts found in the older, without intending thereby to minimize or detract from the majesty of the common law.

I shall concern myself in this short paper with a discussion of some of the concepts found in a few of the tractates in the order Nezikin, taking note of such principles as parallel our common law. A thorough study of this order alone would require years of effort and its complete mastery, perhaps a lifetime. My purpose, therefore, is limited. But if I succeed in stimulating the interest of students of law sufficiently to impel them to seek for themselves the treasures to be found in these books, I shall be well rewarded. For it is my contention that many of our common law principles and many of the legal forms and customs which we find difficult to explain, trace their origin more or less directly to sources in the Written and Oral Law of the Jewish people. This and the striking coincidence in legal thinking in evidence in both legal systems have prompted this effort.  

**LAW OF CONTRACTS**

The law of contracts offers some striking parallels as well as divergencies between the Jewish and Anglo-American systems of jurisprudence. Street, in his Foundations of Legal Liability, divides obligations into two cate-

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1 HERZOG, THE MAIN INSTITUTIONS OF JEWISH LAW 53 (1936).

2 I acknowledge with profound thanks the kindly interest and gracious help of my
categories: those which are made obligatory upon the person regardless of his own will or undertaking and those which obligate him as a result of his prior agreement, promise or undertaking. The former are the obligations and duties breaches of which are denominated "torts", the latter are the obligations falling under the broad general term "contracts."

I shall undertake to show, within the limits of this paper, that the fundamental concepts of each of these categories of obligation were defined in Jewish law with remarkable clarity and that there is a marked similarity between them and our modern understanding of these principles.

Our present day definition of a contract is as follows:

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. 10

When we speak of contracts in modern terminology, there comes to mind immediately either a single binding promise made by one person to another or what is more general, mutually binding promises by two persons to one another. This was not always so; it took many years for this concept to develop.

In Glanville's time, the conception of contract was that of debt, and the obligation arising therefrom was founded not upon the promise made by the parties to the transaction but upon a legal duty incumbent upon them to perform (known in Jewish law as Milveh) The history of English law of contracts is in a measure the history of a transition from the conception of a contractual duty imposed by law to that of obligations resulting from promise.11

According to early English law, a contract to be effective required something more than the parties' mutual consent. The payment or part payment of the purchase price by one, or the delivery of the chattel by the other, in a sale of goods, for example, was required to create the obligation. 12 The concept of barter is here clearly apparent. This according to Street13 was a narrowing of the Roman concept of consensual agreements. This approximates almost identically the Judaic concept of Hijub, which was inherent in Kinyan, as we shall see a little later on in this paper.

Part payment was enough to create a valid obligation, but "earnest" caused difficulty, for the payment of earnest was not sufficient to bind the
parties to a legally valid agreement. What of the buyer who gave only earnest to bind the bargain and withdrew? As to him, the problem was not too difficult of solution for if he withdrew from the bargain, he forfeited his earnest. As to the seller, however, the problem was more complex. In Bracton’s time, this was settled by imposing upon the withdrawing seller a penalty of double the amount he received from the buyer by way of earnest. This did not satisfy the merchants who required agreements in which the obligations undertaken were mutually binding. They therefore established among themselves the earnest as a matter of form recognized by the law of merchants, by means of which a binding and obligatory consensual agreement was created. Nevertheless, during the reign of King Edward I (1303), a statute was passed (Carta Mercatoria) declaring, "every contract between the said merchants and any persons whencesoever they may come, touching any kind of merchandise shall be firm and stable so that neither of the said merchants shall be liable to retract or resile from the said contract when once God’s Penny shall have been given and received from the parties to the contract." Was this form or did this connote consideration? It is difficult at times to differentiate between form and consideration for the two often merge and what seems to be form may be consideration. Whether it be denominated form or consideration, the effect was the same; God’s Penny was an essential requirement to create a valid obligation.

We shall have occasion to call attention to the resemblance of both these doctrines to Jewish law when we discuss "Asmakhta" and "Kinyan."

The Anglo-American theory of contractual sales obligation required much time to free itself from the principle of barter. The Jewish concept of obligation underlying the law of contracts underwent the same difficult metamorphosis. Both systems required compliance with fixed formalities to create a binding sales agreement, and both systems needed much refinement of thought to overcome the constricting influences of form and attach legal liability to contracts per se. The Jewish counterpart of the fixed form in Anglo-American law is Kinyan. Its beginnings stem from the earliest days of Jewish history and may be found in the Book of Ruth.

It will be recalled that when Boaz bought from Naomi the land which her deceased sons had inherited from their father, he did so by drawing off his shoe and calling upon witnesses to attest the transfer. Of this method the Book of Ruth says:

Now this was the custom in former time in Israel concerning redeeming and concerning exchanging, to confirm all things: A man drew off his shoe and gave it to his neighbor; and this was the attestation in Israel.

14 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 208 (2d ed. 1895).
15 2 STREET, FOUNDATIONS OF LEGAL LIABILITY 6 (1906).
16 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 209 (2d ed. 1895).
17 Chapter 4:7.
This device plays an essential role in Jewish law in the transfer and conveyance of property, but it is equally important in the creation of obligations to buy and sell.

Kinyan, or Kinyan Suddar, is defined as a legal form of acquisition of objects or of confirming agreements executed by the handing of a scarf, a shawl, a glove or like article on the part of one of the contracting parties to the other, as a symbol that the object itself has been transferred or the obligation assumed. Note should be taken, however, that the Gemara excludes the use of coins as Kinyan Suddar. By the method of passing a glove or scarf, a transfer of title was effected. Since the process affected the res, it is referred to as "fictional barter" as distinguished from Halifin, which is actual barter. The fulfillment of the requisite of form has played as important a role in the Jewish law of contracts as consideration, if not more so, and is necessary in every agreement in which tangible goods are the subject of the contract. So ingrained is this doctrine in Jewish law, that if the thing purchased is not taken into the purchaser's possession at least fictionally, the agreement between the buyer and seller is called "debarim," that is, a contract of "words only" and therefore not binding on either — one might say "just talk."

But we find in Kinyan the element of Hiyub, a duty to perform an undertaking. Thus, in the case of A and B bartering two articles, X and Y, if A hands over his article X to B, we say article X acquires article Y (Koneh). But where the transaction between the parties is a sale, X being a useful article and Y money, it is wrong to speak of X acquiring Y. The proper expression here is not Koneh but Mehaeb (obligates). The delivery by A to B of the article of use creates an obligation in B to deliver the money to A. This is the identical concept of contracts which prevailed in England in Glanville's time.

It is apparent, therefore, that by the method of Kinyan something more is accomplished than the mere creation of a consensual, mutual agreement. Actually the fulfillment or performance of one part of the agreement is thereby effected; the payment of the purchase price may remain executory but not the transfer of the thing purchased. Since a valid sales contract demands an immediate transfer of the res either actual or symbolic, it follows, therefore, that the thing sold or contracted for is required to be a tangible object then in being and in the seller's possession. It is precisely at this

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18 Baba Mezia 47a
19 Baba Mezia 49a, 74b
20 Baba Mezia 45b
21 2 STREET, FOUNDATIONS OF LEGAL LIABILITY 5 (1906).
22 Baba Mezia 45b.
23 Baba Mezia 66b, Kiddushin 63b
24 Baba Kamma 69b.
point that the concept of contract as barter fell short of the needs of the times. Requirements of commerce and trade demanded a more elastic method of entering into sales agreements. Some way had to be found to make possible the creation of a valid obligation \textit{m praesenti} for the sale of goods not \textit{in esse} and of goods not then in the possession of the vendor. What was needed, of course, was the modern concept of contract which would be free from the constrictions of the principle of barter (Halifin).

To fill this need, the form of Kinyan Etten—an obligation to give or convey in the future—was developed. Much controversy, however, arose as to the validity and the effectiveness of this method of undertaking obligations to sell goods. There was considerable doubt whether an agreement so made was binding on the estate of the person making it.

The method of creating obligations by a solemn oath (Shebuah) did not suffice. Since the oath was taken by the person making it, it was binding only upon him and not upon his heirs or upon his estate.\textsuperscript{25}

A very scholarly and illuminating dissertation on how the Jewish law of sales freed itself from the barter concept, at least according to some authorities, although the point is far from settled, is given by Rabbi Dr. Isaac Herzog of Jerusalem, Chief Rabbi of Israel.\textsuperscript{26}

He points out that some students sought to solve this problem by equating Hiyub with Uditha. Uditha was a recognized device in the Talmud created when A, a dying man, desiring to transfer his money to B, who could not take from him by devolution or by will, declared that he owed B the amount which he sought to leave him, thereby effecting an immediate transfer of the money to B.\textsuperscript{27} It was an admission of a fictional debt. Indeed, it may be said that it was fictional admission of a fictional debt, but it affected a transfer of the res. If this doctrine were applicable, it was argued, Hiyub would have to be an admission of a debt \textit{already in existence} and would therefore hinder rather than promote the purpose of creating a present obligation to effect a future transfer of goods, for the very object sought to be attained was the \textit{creation} of an obligation. It is clear, therefore, that equating Hiyub with Uditha could not bring about the creation of a binding executory obligation to sell goods.

Maimonides equated Hiyub with Areb (surety). But by this concept no property could pass because the Areb assumed a mere monetary obligation. There being no undertaking thereby to sell, convey or transfer any determinate or tangible property, this device could not be made applicable to sales agreements. Furthermore, Kinyan is not generally necessary to

\textsuperscript{25} 2 Herzog, Main Institutions of Jewish Law 99 (1936).
\textsuperscript{26} 2 Herzog, Main Institutions of Jewish Law 93-106 (1936).
\textsuperscript{27} Baba Bathra 149a
create a binding obligation of suretyship, whereas it is the sine qua non of an agreement to sell or transfer tangible goods.

We have seen that a contract to sell property not in the seller's possession, or a sale thereof, could not be effected according to Jewish law. The law, however, permits a creditor to obtain a lien (Shibbud) upon property of the debtor which is not then in his possession by the process of substituting the person of the debtor for the property. The Shibbud, though upon the res, results from the Shibbud upon the person. This was known as Deikni.28

The insufficiencies of the doctrines of Areb, Uditha, Kinyan, Kinyan Etten and Shebuah for the purpose intended resulted in the creation of the concept of Hiyub, or more correctly Hithhayabuth. This was accomplished by combining parts of the applicable and functional principles of the doctrines of Areb, Uditha, Kinyan and Deikni.

Thus through the concept of Uditha the promisor acknowledges a present obligation. Through Kinyan the obligation is made applicable to tangible property. Through Areb an obligation which may be carried out in the future is created, and through Deikni, it becomes possible to obligate the debtor to a sale of property which is not then in his possession or in esse.

According to Rabbi Herzog, who cites Nethiboth and Kzoth as authorities,20 Hiyub thus created is a means of obligating the seller to carry out an executory promise to sell tangible goods. It creates figuratively a lien on his person to perform that promise, although the buyer cannot follow the res. He illustrates his position by giving an example, in which if A binds himself by Hiyub to give a certain object to B, the property does not thereby pass to B. B has a right only to claim the object, which he can enforce through a court against A. So that if A, who thus bound himself to deliver the object to B sells it to C, B cannot recover it from C but he can sue A for its value.30

Rabbi Herzog states categorically, however, that in order to create an agreement through Hiyub or Hithhayabuth, "assuming an obligation binding the person," four elements are necessary:

1. Express Hiyub, "I hereby obligate myself."
2. Kinyan.
3. Writing.
4. The presence of witnesses.

Having fulfilled these requirements, it is the opinion of Rabbi Herzog that Hiyub, through its development into Hithhayabuth, became an instrument for the making of bilateral commercial contracts.31

28 Baba Bathra 157a
29 2 HERZOG, MAIN INSTITUTIONS OF JEWISH LAW 99 (1936).
30 Ibid.
31
CONSIDERATION

The subject of consideration offers parallels and divergencies between the two systems of jurisprudence.

Anglo-American jurisprudence treats consideration as follows:

As a general rule an informal promise is not per se enforceable in our law even though it has been assented to by the promisee. Something more than mutual assent is in general essential to the creation of an informal contract. That something more we know as a "consideration." Consideration has been defined as "anything that is of 'detriment' to the promisee or of 'benefit' to the promisor."[2]

Except for the contrary opinion by Maimonides, the Jewish law of contracts generally makes consideration a requisite for creating a binding contractual obligation. It depends in great measure upon the subject matter of the contract. Thus, for example, in contracts of marriage, suretyship, employment and partnership consideration is necessary. In contracts of sale, however, Jewish law looks more to the presence of Kinyan than to consideration. Form is held to be more important than consideration, but the form imports a consideration. In contracts in which consideration is necessary, a perutah, a coin of little value akin to the English farthing, is sufficient consideration. Thus in marriage contracts the Mishnah provides:

If a man said to a woman, 'Be thou betrothed to me with this date or be thou betrothed to me with this' and one of them (either object) was worth a perutah, her betrothal is valid.[3]

This recalls vividly the statute of King Edward I, which required the transfer of God's Penny to create a valid executory agreement.

But the Jewish theory of consideration offers divergencies, also, from the Anglo-American theory—particularly in the law of sales. The common law does not generally concern itself with the sufficiency of the sales price except in cases which shock the conscience of the Chancellor. The Talmud looks carefully into the sales price. Thus we find in the Mishnah:

Fraud is constituted by an overcharge of four pieces of silver (ma'ahs) out of twenty-four, which is a sela. Hence a sixth of the purchase.[4]

The Gemara interpreting this rule says:

The law is: In the case of less than a sixth, the sale is valid; more than a sixth, it is null; (exactly) a sixth, it is valid.[5]

The standard of comparison is market value. The law of overreaching is applicable to buyers and sellers alike,[6] but it is not as broad in the

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2 Herzog, Main Institutions of Jewish Law 101 (1936).
4 Kiddushin 26a (In the main, reliance is made upon the Soncino translation of the Babylonian Talmud, throughout this article. Soncino Press, London, England.)
5 Baba Mezia 43.
6 Baba Mezia 50b.
7 Baba Mezia 51a.
sale of real estate (Karka) as it is in the sale of personal property (Metal-telin). For whereas in the sale of personality, the law of overreaching declares a sale void if the amount of the overcharge is greater than one sixth of the purchase price, in the sale of realty the measure of overcharge in order to obtain the same result is one half.  

**Is a Detriment to the Promisee Consideration?**

The doctrine of a detriment to the promisee as consideration, although not fully developed, was not unknown to Jewish courts and students of law, and is best exemplified in the law of suretyship.

In seeking to find a consideration sufficient to support the surety's promise, the following example is cited: "If A says to B, 'Toss a manah into the sea and I will refund it to you,'" the contract according to some authorities is binding. Here A, the promisee, receives no financial benefit from B's act of throwing a manah into the sea, whereas B suffers a loss. It would seem that the loss suffered by B should be the consideration supporting A's promise to repay him. The Talmud, however, focuses its attention not so much upon the detriment to the promisee, as upon the gain of the promisor. The consideration is spelled out as a benefit to A, in the nature of the mental satisfaction he derived when B threw the manah into the sea. This is sufficient value to create the obligation. The surety's mental satisfaction is derived from the fact that reliance was placed upon him by the lender.

**Past Consideration**

At common law it is fundamental that past consideration cannot support a simple contract. Jewish law is quite similar, as will be seen from the following example. According to Jewish law, a marriage contract must be founded upon consideration and some form of money or its equivalent must be given by the groom to the bride to fulfill that requirement. In the following case, the validity of the marriage contract was in question. The facts were that the groom, prior to his marriage, had loaned the bride a sum of money which remained unpaid. He offered her marriage in lieu of the payment of the loan. The court held the contract invalid as not supported by a present consideration. In answer to the contention that she thus received value, the court held that this was a consideration which had already passed, for at the time of her promise to

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37 Baba Mezia 57a Tosphoth Amar.
38 Ritba Baba Mezia 71b.
39 Baba Bathra 173b.
40 Kiddushin 47a.
41 Ibid.
marry him, she had already obtained ownership of the money he had loaned her, and Jewish law requires a completely new consideration. It will be noted, of course, that the court in this case went beyond our common law concept of past consideration. Not all Jewish courts, however, reached unanimity as to the exact meaning and interpretation of the term. According to the Rambam (Maimonides), the pre-existing debt is sufficient to support a sale of tangible goods, although not sufficient in Kiddushin (betrothals) \(^42\) Our courts at common law likewise draw a distinction between a past consideration and a pre-existing debt.

**QUASI CONTRACTS**

We find in Jewish law a very well-defined principle which requires payment by the recipient for services rendered or acts performed for his benefit by another, without his request. The obligation stems not from an implied promise to pay, but from the fundamental principle that no one should be enriched at the expense of another without compensation, for to do so is inherently unjust.\(^43\)

In recent years this concept of quasi contracts has gained much ground over the principle of implied contracts, which predominated, in Anglo-American law. For many years the standard concept was the following: "If A allows X to work for him under such circumstances that no reasonable man would suppose that X meant to do the work for nothing, A will be liable to pay for it. The doing of the work is the offer, the permission to do it, or the acquiescence in its being done is the acceptance."\(^44\) In the absence of such an implied agreement no recovery could be had.

Quasi contracts in general developed from the principle of restitution. The action was one of debt for the recovery of money paid by mistake or through extortion, or because of imposition or undue advantage.\(^45\) "By the device of fictional promise the door was opened to the enforcement of those obligations, previously unrecognized by the common law which are now known as quasi contracts."\(^46\) Much litigation was required to alter this view. Even in the days of Lord Mansfield\(^47\) the thought was growing that "the gist of this kind of action is that the defendant upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." Professor Woodward points out, however, how difficult has been the transformation of the concept of quasi contracts from that of implied contracts to one of unjust enrichment:

\(^{42}\) Yad. Mekhira VII 4.

\(^{43}\) Baba Meza 101a, Hoshen Mishpat 375.

\(^{44}\) Anson, Contracts § 27 (Patterson ed. 1939)

\(^{45}\) Woodward, Quasi Contracts 4 (1913)

\(^{46}\) ibid.

\(^{47}\) Moses v. Macferlan, 2 Burr. 1005, 1008 (1760)
Only within the last generation have quasi contractual obligations been commonly so called. They were formerly regarded as a species of contract and to distinguish them from express contracts and contracts implied in fact, i.e., contracts in which a promise is inferred from conduct were called contracts implied in law.

But quasi contractual obligations are imposed without reference to the obligor's assent. He is bound not because he has promised to make restitution, it may be he has explicitly refused to promise, but because he has received a benefit, the retention of which would be inequitable.43

At common law, we make a distinction between one who has been unjustly enriched at the expense of another and is, therefore, required to make restitution, and one upon whom a benefit is officiously conferred by another and who is not required to make restitution. In the first instance, we say that the recipient of the benefit was unjustly conferred, whereas, in the second, we say he has been enriched but not unjustly.49

In other words, if A mows my lawn in my absence thinking he is mowing my neighbor's, who requested him to do so, he may probably recover from me the value of mowing my lawn on the theory that I was unjustly enriched by his mistake of fact. However, if A mows lawns on my street, and, without my knowledge or permission, enters upon my lawn and mows it, assuming that I will accept his labor, he probably would not be permitted to recover. In the second case, I would be enriched but not unjustly. A would be considered as having officiously conferred a benefit upon me. The Restatement illustrates this by giving the following example:50

During A's absence, and in the belief that A will be willing to pay for the work, B improves A's land which is worth and is offered for sale at $5,000 to such an extent that upon A's return he sells the land for $8,000. B is not entitled to restitution from A.

Jewish law treats this subject as follows:51

If one renders a service to another man and confers a benefit upon him, the latter cannot say to him "Thou hast done it as a favor."

Accordingly, if X plants A's field without A's knowledge, he may recover from A the cost of planting or the value of the improvement made to the land, whichever is less, upon the theory that it would be unjust to permit A to become enriched at the expense of X without payment.53

The rationale is that A should not be permitted to enjoy the benefits of another man's labor or property without compensation because the creation of one's work is his property and belongs to him.

43 Woodward, Quasi Contracts 6 (1913).
44 Restatement, Restitution 1,2 (1936).
45 Restatement, Restitution § 462 (1936).
50 Hoshen Mishpat 2644
51 Hoshen Mishpat 375.
The Talmud, however, says further that if the recipient of a boon, such as fencing in property, protests his unwillingness to accept the benefit but it is found thereafter that he is guarding it or that he has performed some other act indicative of his acceptance, he is required to pay the reasonable value of it, based upon a judicial appraisal thereof, for by so doing, he has "disclosed his mind," that is to say, his protestations were not genuine. To cite another example, if a workman, without the request or knowledge of the owner of a field, performs work thereon, at the instance of X, not the owner, who pays him, which work benefits the field, the owner must pay X an amount equal to the value of the benefit he received.

We see here, therefore, that Jewish law does not make the distinction between enrichment and unjust enrichment which is made in our present law of quasi contracts. The Talmud looks rather to the inherent inequity of allowing one to benefit from the labor or property of another without restitution. The formula adopted by this example, namely, that of paying the intervenor the cost of planting or the value of the improvements, whichever is less, expresses the intent of Jewish law. Enrichment neither to the intervenor nor to the recipient is intended. The aim is to avoid an advantage to either at the expense of the other.

Professor Grismore, in discussing quasi contracts, expresses dissatisfaction with the theory of implied contracts as the basis for such obligation, as well as with the use of the term quasi contracts, saying:

It would be better still if some wholly different name were adopted for it, so that it would be clear that this type of obligation which is in fact controlled by wholly different principles has no relationship whatever to contract.

There is a doctrine in our law of quasi contracts known as "dutiful intervention," which deals with the preservation of life and property in imminent danger of harm. The rule seems to be that sans contract, the recipient is under no obligation to pay for the nonprofessional services which one may render him in preserving his life during an emergency. The law creates an irrebuttable presumption that such acts on the part of the intervenor are prompted by natural human instincts to preserve life and are conferred without expectation of compensation. It is presumed that the one performing such acts had no intention to charge for such services. The preservation of another's property may be regarded as dutiful if the circumstances are such that no timely or effective notice can be given the owner that his property is in imminent danger of destruction.

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63 Baba Bathra 4b
64 Hoshen Mishpat 336
65 GRISMORE, CONTRACTS § 8 (1947).
The benefit received by the recipient in either case, as the result of the intervenor’s efforts, is not considered unjust.\textsuperscript{56} Talmudic law presents a most striking similarity with the doctrine. There is in Jewish law a principle known as Mabriah Ari (chasing away the lion). This is a figurative way of stating that if A, without B’s knowledge, does an act by which he prevents damage to B’s property, which is in imminent danger of destruction, such act is considered a Mitzvah, a good deed, for which it is presumed there is no obligation to compensate him. The intervenor is “chasing away the lion,” as it were. Should the performer suffer loss in carrying out this good deed, this presumption is rebutted, and the neighbor must make good such loss. But some Rabbis, at a later date, reinterpreted this principle and held that even under such circumstances no obligation is imposed upon the owner to pay. The act was and must remain a Mitzvah, a deed of kindness and good will. For such deeds no earthly compensation should be expected, and no obligation to pay is thereby created.\textsuperscript{57}

**ASMAKHTA**

There is in the Jewish law of contracts a highly important and far-reaching principle of law called “asmakhta.” Asmakhta is a rule which declares to be invalid an assurance made by one that he will pay or forfeit something in the event of his non-fulfillment of a certain condition, which, however, he is confident that he will carry out.\textsuperscript{58}

In Anglo-American jurisprudence there has been much dispute as to whether a promise to pay a specified sum in the event of the non-fulfillment of an agreement is a penalty and unenforceable, or is in the nature of liquidated damages and therefore valid.

Long before Bracton, this question came before Jewish courts for determination and here likewise, judges and scholars were troubled. The controversy surrounding this problem in the Talmud affords an excellent example of the refinement of the legal reasoning of these men, many centuries ago.

At the very outset the Gemara\textsuperscript{59} raises the question in manner as follows: A and B enter into an agreement whereby A agrees to buy from B, paying B earnest money, and saying: “If I retract, my pledge be forfeit to you,” and B says “If I retract, I will double your pledge.”

It was the opinion of Rabbi Jose that the contract was good, and that B, who breached the agreement, should pay double the amount according

\textsuperscript{56} Woodward, Quasi Contracts 312-314 (1913).
\textsuperscript{57} Baba Kamma 58a
\textsuperscript{58} See Baba Mezia, Soncino, Glossary.
\textsuperscript{59} Baba Mezia 48b
to his contract. Rabbi Judah, however, disagreed, holding that A could recover from B only up to the amount of the earnest money. The agreement to pay double the amount was called asmakhta, "a flaw," the term "flaw" denoting invalidity and a non-binding obligation.

The following question was submitted for determination. Suppose A gives B money to purchase wine for him at the prevailing price during the vintage season when wine is cheap and B negligently fails to do so. What is B's liability? The contention of Rabbi Hama was B must supply A the quantity of wine A's money would have purchased and suffer the loss represented by the difference between the price of wine at the vintage season when wine is plentiful and the price of wine out of season when it is scarce and therefore higher. But he was overruled by Rab Ashi on the ground that B's undertaking did not establish such a legal obligation. It was an asmakhta, "a flaw," because the performance of B's contract to purchase wine in any event was dependent upon market conditions over which B could have no control. To compel him to produce a specific quantity of wine under such circumstances would be to impose a penalty upon him. This could not have been his earnest or serious intention when he made the agreement.⁶⁰

The rationale of this rule, however, was put to the test and the case was distinguished as will be seen from the following example. A, a tenant farmer leased a field for planting under a crop-sharing arrangement, agreeing to pay the owner the estimated value of the latter's share if he failed to do so. The tenant farmer permitted the field to lie fallow and it was ruled that he must pay according to his agreement. The court held that the promise here was not an asmakhta because it was in the tenant's power to cultivate the land. He was free to do so without hindrance from anyone or dependence upon anyone. The tenant farmer undertook the obligation with serious intent to fulfill it and he was, therefore, required to perform. Having failed to do so, he must pay the estimated loss. But the Talmud adds that had the tenant farmer undertaken to pay 1,000 zuz, if he failed to cultivate, and if this amount were greater than the owner's actual loss, the agreement would not be valid. It would then be subject to the flaw of asmakhta as being in the nature of a guzma, an exaggeration, and, therefore, not seriously intended to be performed by him when he made the promise.⁶¹ In other words, the promise would be in the nature of a penalty. Since the tenant farmer had it in his power to cultivate the field and could, therefore, fulfill his undertaking, he intended seriously to carry out his promise when he made it. The wine dealer, on the other hand, could not seriously have intended to carry out his undertaking for when he made the promise he

⁶⁰ Baba Mezia 73b
⁶¹ Baba Mezia 104b
knew that, in order to fulfill it, he would be required to purchase the wine in the open market, and this might be impossible for him to do.

According to Rabbi Herzog the clearest exposition of the underlying principle of asmakhtah was given by Rab Solomon ben Adereth of Spain (1235-1310). It was his opinion that asmakhtah applied when the agreement to pay or forfeit something in the event of non-fulfillment of an agreement was in the nature of a penalty. His rationale was based upon a lack of the promisor's serious intention to bind himself legally when he made the agreement; his promise to pay a penalty being merely collateral to his primary undertaking. Since fulfillment rather than non-fulfillment of his main purpose was intended, his carrying out the promise to pay an additional sum in the event of non-fulfillment was clearly not intended and, therefore, not binding upon him and so subject to asmakhtah.

Our common law arrives fundamentally at the same conclusion. For underlying the phraseology that the law looks with disfavor upon penalties and forfeitures is the rule of intent. Our courts also look to the surrounding circumstances to discover the intention of the parties in order to determine the validity or non-validity of a promise to pay a stipulated sum in the event of a breach of an agreement. The Supreme Court of the United States so held in Sun Printing & Publishing Company v. Moore. Ohio has adopted the same rule.

To determine whether a sum named in a contract is intended as a penalty or as liquidated damages, it is necessary to look to the whole instrument, its subject-matter, the ease or difficulty of measuring the breach in damages, and the amount of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach, and also to the intent of the parties ascertained from the instrument itself in the light of the particular facts surrounding the making and execution of the contract.

Whether a stipulation in any given case is to be regarded as penalty for liquidated damages, becomes a question of intention to be reflected from the whole instrument in connection with the subject-matter. The form in which the stipulation is clothed may be considered, but is not conclusive. In final analysis, the stipulation for damages must be read and considered along with all other provisions, the general scope and subject-matter of the contract, from which must be determined whether the parties intended thereby to fix a fair and just amount for the actual damages, likely to arise, or an ordinary amount as mere penalty to secure performance.

This doctrine of asmakhtah was fraught with important consequences to the laws of commerce and trade. It will be noted in the examples of asmakhtah above given that each agreement which is subject to the flaw of asmakhtah contains the element of a condition precedent.

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2 Herzog, Main Institutions of Jewish Law 85 (1936).
4 Jones v. Stevens, 112 Ohio St. 43, 146 N.E. 894 (1925).
dent were not recognized in Jewish Law—"No 'if' is binding." But conditions subsequent were recognized in Jewish Law. Ingenious devices were invented to avoid the "flaw," so as to permit the easier flow of commerce. These mediums became accepted practice among Jewish merchants during the Middle Ages and were ultimately adopted by their Christian neighbors among whom they lived. One such method introduced by Jewish merchants was the following: A would declare that he owed B a sum certain, which included an amount in excess of the actual sum borrowed. B would agree that if A paid a fixed portion thereof, by a definite date, the balance, would be reduced in amount to the extent of the excess; but if A failed to make the payment as agreed upon, he would be required to pay the full amount he originally promised. By this method the obligation of A was absolute but the waiver of B was conditional and the entire arrangement was valid for the law of asmakhta was not applicable to releases and defeasances, since releases and defeasances were based upon conditions subsequent.

The application of this principle may be found in our daily use in the law of negotiable instruments today. The increased rate of interest, usually from five per cent to eight per cent, upon default in the payment of one installment of interest, provided for in a promissory note, is a pattern familiar to most of us. Many notes carry promises which inverse the process. They provide for the payment of eight per cent interest and reduce it to five per cent if the maker or promisor pays the note promptly according to its tenor. But, considerable litigation was required to establish the negotiability of promissory notes containing such provisions. The attack was generally founded upon the "sum certain" clause of Section 2 of the Negotiable Instruments Law.

The reason for upholding the negotiability of an instrument containing such provisions furnishes us with an interesting observation of the close resemblance between this aspect of negotiable instruments and asmakhta. Brannan gives the following as the reason: "Since the additional interest comes only after default the sum is sufficiently certain." We have seen that in Jewish law the primary obligation is valid and not subject to the rule of asmakhta since the additional promise could take effect only upon the non-occurrence of the condition, namely, the payment of the obligation undertaken by the debtor.

Professor Jacob J. Rabinowitz finds evidence of the principle of asmakhta inherent in our present form of mortgage. The underlying prin-

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6a Baba Meza 66
6b Ibid.
67 Maimonides Yad Mekhlra XI, 18.
68 Beutel's Brannan, Negotiable Instruments Law 234 (7th ed. 1948)
principle of our present day mortgage is that the conveyance made by the mortgagor is a deed absolute, upon condition, however, that should the mortgagor pay the obligation secured thereby, the conveyance becomes void. The intention of the mortgagor, when he conveys his land to the mortgagee, is to pay the obligation secured by the mortgage and not to make the conveyance of his property absolute; his prime purpose is to fulfill his obligation rather than default. Inherent in this method of mortgaging is the principle of forfeit if the mortgagor defaults. In that event two things are left for him to do, (1) redeem the property by paying the obligation, or (2) obtain from the proceeds realized from the sale of the property at public sale whatever amount his equity of redemption may bring over and above the indebtedness and costs. There is involved in this process the feature of redemption. The correlative of redemption is forfeiture. The origin of this mode of security stems from the early English method of placing two deeds or documents in the hands of a depositary to be delivered to one of the persons, either to the creditor upon the non-fulfillment of the obligation, or to the debtor upon the fulfillment of his undertaking. This device was commonly used among Jewish merchants in Spain in the eleventh and twelfth centuries and even earlier to avoid asmakhta. It was also employed by Jewish merchants in England in the twelfth and thirteenth centuries and subsequently by non-Jewish merchants of that era in England as a means of securing obligations of debtors. The following example from the Exchequer of the Jews is cited by Mr. Rabinowitz: "Gilbert de Pelham attached to answer to William de S. in a plea of detention of a starr (Jewish form of deed). The said William complains that whereas a starr in which it was contained that if he paid to Abraham, son of Ben, a Jew, at the feast of All Saints last past, 10 marks, then he should be quit of a debt of 20 pounds in which he was bound to the said Jew, was handed over under his seal to Gilbert to be kept, the aforesaid Gilbert delivered it to the said Jew fraudulently and maliciously to William's damage of 20 pounds."89

In support of his thesis that this method is evident in our present day form of mortgage, Mr. Rabinowitz says: "It is to be noted here that in this case, as in most cases of its kind, the starr of acquittance was delivered to a third party in 'equal hands,' a procedure which as we have seen above was characteristic of such transactions among the Jews as well as of the classical English mortgage in the earliest stage of development."90 He cites another instance of an agreement for the sale of timber, the performance of which

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reads as follows: "And for the faithful performance of the said agreement, he, Michael, made the said Jew a charter for 20 pounds and caused it to be placed in the Cambridge Chirograph Chest, on condition, nevertheless, that if he, Michael, should deliver the said timber to the said Jew at the terms aforesaid, then he should be quit of the said charter of 20 pounds."\(^1\)

Here is exemplified the old Jewish method of avoiding asmakhta by inserting the penalty provision in the agreement proper as a condition subsequent. By the middle of the fourteenth century, the employment of two deeds to secure an obligation became the adopted mode of procedure in England. It was not until the fifteenth century that the single instrument containing both the obligation and the defeasance clause came into use in England. Many of our states employed the old English method until recent times. There are numerous recorded cases throughout the United States in which courts of equity were called upon to declare deeds absolute on their face as being held by the creditors merely as security for the payment of obligations.

Mr. Rabinowitz is continuing his research in this field and his findings, as heretofore stated, will be presented in a book soon to be published. One chapter thereof appears in Vol. XII, No. 4 Jewish Social Studies (October 1950). In it he traces Jewish influences on Lombard law. His findings disclose that the Lombards also used this method of securing a debt as early as the eleventh century, and that its origin is traceable to Talmudic law. The Lombardy mortgages contained a provision which required the creditor to return to the maker the instrument of conveyance securing the obligation "Incisum, capsatum, taliatum" – that is, cancelled. This mode of cancelling legal instruments is prescribed in the Talmud.\(^2\)

It is of more than passing interest that in this same passage in the Talmud is contained the distinction between intentional and unintentional cancellation of instruments which reads with striking similarity when compared with Section 123 of the Negotiable Instruments Law and the decisions applicable thereto.

**Statute of Limitations**

"At the end of every seven years thou shalt make a release. And this is the manner of the release. Every creditor shall release that which he has lent unto his neighbor; he shall not exact it of his neighbor and his brother; because the Lord's release hath been proclaimed."\(^3\) We find here the earliest promulgation of a statute of limitations. This passage in Deuteronomy is one of several which prompted Geo. Foot Moore\(^4\) to characterize much

\(^1\) *Ibid.* n. 30.
\(^2\) *Baba Bathra* 168b
\(^3\) *Deuteronomy* 15:1-11.
of rabbinical jurisprudence as idealistic in character and as being "an inheritance from the Law and the Prophets." According to Moore, the law was not for the Jewish doctors of the law a volume of statutes on all kinds of subjects. It was, he says, "a revelation of God's ideals for men's conduct and character."\(^7\)

But we find in the Mishnah that "The seventh year cancels any loan whether it is secured by bond or not. It does not cancel debts due to a shopkeeper."\(^6\) Mishnaic limitations upon the sweeping Deuteronomic pronouncement became necessary to avoid a burdensome impingement upon trade. For this purpose Hillel created the Prozbol, which was a written and recorded declaration by the creditor, signed by witnesses, made in a court of law, to the effect that he did not intend to relinquish his claim under the terms of the seven year law, by leaving the debt with the court and in the court's prerogative. The form reads as follows: "I transmit to you, the judges of this court, that touching any debt due me, I shall be permitted to collect it whenever I will."\(^7\) This recorded instrument tolled the seven year limitation.

**TRANSFER OF LANDS**

Space forbids more than perfunctory mention of the law pertaining to the transfer of lands in Jewish jurisprudence. It may seem strange for us to learn that Jewish law did not permit the sale of agricultural lands in fee simple. Such lands were entailed to the heirs of those to whom they were originally allotted in the division of lands and reverted to them at the end of every forty-nine years and during the fiftieth year in accordance with the law of jubilees.

And thou shalt number seven Sabbaths of years unto thee seven times seven years; and these shall be unto thee the days of seven Sabbaths of years, even forty and nine years and ye shall hallow the 50th year and proclaim liberty throughout the land unto all the inhabitants thereof. A jubilee shall the 50th year be unto you. In the year of jubilee ye shall return every man unto his possessions according to the number of years after the jubilee thou shalt buy of thy neighbor and according unto the number of years or the crops he shall sell unto thee.\(^9\)

All that could be transferred, therefore, was tantamount to a leasehold in such lands for a term of years no longer than the jubilee year and the price to be paid therefor was based on the number of years remaining from the date of purchase to the date of the next jubilee. It may be of interest to students and lawyers to learn that the phrase "be the same more or less,"

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\(^7\) Ibid.
\(^6\) Moore, Judaism 145 (1944).
\(^9\) Leviticus 25: 8-25.
which appears in the usual deed of conveyance as mere matter of form, may be found in the Mishnah.\textsuperscript{79}

If he said, 'I will sell thee a kor's space of soil as measured by the line and he gave him any less, the buyer may reduce the price; and if he gave him any more the buyer must give this back. But if he said, 'Be it less or more, even if he gave the buyer a quarter-kab's space less in every seah's space or a quarter-kab's space more in every seah's space, it becomes his.

To effect a transfer of real estate (karka) one of the following three prime methods could be employed:

1. Keseph — By paying the purchase price or part thereof;
2. Shetar — By a writing, a deed, which contained witnesses to its execution (generally two) by the vendor, and a delivery thereof to the vendee;
3. Hazakah — By the purchaser going upon the land and performing some act thereon which could be construed as an act of benefit to the land or to the vendee, as for instance, the cutting of weeds on the land, locking, fencing or effecting an opening.\textsuperscript{80}

The English "livery of seizin" resembles closely this form of Jewish transfer.

A feud or fee was created or transferred by a deed of feoffment with "livery of seizin." The ceremony of "livery of seizin" consisted in the feoffor and feoffee going on the land to be conveyed and the delivery to the feoffee of a glove, knife, rod or other object on the land as a symbolical delivery of the land itself.\textsuperscript{81}

Indeed the foregoing sounds almost exactly like Kinyan Suddar or like the passage from the Book of Ruth. The law of conveyance of land by deed with witnesses dates back to Jeremiah 32:44 where it is said: "Man shall buy fields for money and subscribe the deeds and sell them and procure evidence of witnesses." The requirements for witnesses, where their signatures are to appear to avoid misuse and misunderstanding, the form of the deed, the concluding clause "firm and established," erasures harmless or invalidating, are fully treated and analyzed in the Talmud.

Much space is given to two kinds of deeds: (1) plain and (2) folded. The requirements for a plain deed are quite simple: all the writing must appear on one side of the document and the witnesses' signatures on the remaining unwritten portion of the deed but on the inside of the paper.\textsuperscript{82} This is quite reminiscent of the law in Ohio which until recently required the signature of the notary to appear upon the instrument and at such part thereof as contained something more than the formal language of the attestation.

\textsuperscript{79} Baba Bathra 72
\textsuperscript{80} Kiddushin 26a, Baba Bathra 52b
\textsuperscript{81} 1 WALSHE, PROPERTY 134 (2d ed. 1947)
\textsuperscript{82} Baba Bathra 160a
\textsuperscript{83} Ibid.
In a folded or more formal deed the requirement is that the writing appear on alternate lines only. Each written line is to be folded over the blank line adjacent to it and each successive two are stitched together. Each fold must bear on its external upper side the signature of a different witness, the number of folds not to exceed the number of witnesses. In a folded deed at least three witnesses are required. In a plain deed the minimum of two are required.

Adverse possession (Hazakah) is a subject too vast to treat here. Suffice it to say that the requirement in the Talmud is that the possession by the squatter of a cornfield be open, notorious and adverse for a period of three years if he is to acquire title by adverse possession. According to Rabbi Akiba it was enough if he retained possession for one month during the first year, an entire twelve months during the second year, and one month in the third year. But if he occupied a field planted with trees, gathered in his olives, and chilled his figs, even though it be all done in one year, he obtained title because it is presumed that no owner would permit all this to take place upon his land without inquiry and protest.

THE LAW OF BAILMENTS

The Judiac basic law of bailments is found in Exodus 22:6-14. The Mishnah classifies bailees into four groups, as follows:

a. A gratuitous bailee—shomer hinam,
b. A borrower—shoel,
c. A paid bailee—nose sakhar,
d. A hirer—sokher.

The law concerning formation and termination of bailments, evidence pertaining thereto and kindred subjects form an interesting study indeed, but I shall concern myself very briefly merely with the liability of bailees.

THE LIABILITIES OF BAILLEES

1. A gratuitous bailee.

The Gemara, in commenting upon the liability of each of the four categories, reduces the liabilities to three, but retains the four categories, placing the liabilities of the hirer (sokher) and the paid bailee (nose sakhar) on the same level. The gratuitous bailee is liable for negligence only. His responsibility may be compared to the liability of one failing to use ordinary care at common law. The shomer hinam owes the duty of

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84 Ibid.
85 Baba Bathra 28a
86 Ibid.
87 Baba Mezia 78, Shebbuoth 81
88 Baba Mezia 93a
preserving the property in the "manner of bailees" (b'dereh hashomrim). Accordingly, therefore, an unpaid bailee may take an oath that he has kept the object bailed in the way of bailees (b'dereh hashomrim) and be absolved from liability in every case. The "way of bailees" is defined by enumerating the manner in which various objects are to be kept.

Thus, if the object bailed is money, whether sealed or loose, and it is left with a private person for safekeeping, the bailee is expected to secure it in a safe place in his house. If he fails to do so and the object is lost, he is liable for he did not guard the bailment in the manner of bailees or, in the language of the common law, "he failed to use the care ordinarily and customarily used by prudent persons in the same or similar circumstances." If the bailee is a banker and the money is given to him loose, he may commingle it with his own funds. He, therefore, is liable for the loss whether he commingles the money or not, because he has the right to commingle. If the money is given to him "bound up" by the bailor and he so keeps it, he is absolved from liability in the event of loss. Should the banker unseal the container or whatever may be the receptacle in which the money is kept, he is liable in the event of loss. If the article left is a garment, the bailee is held to no more care than keeping it in his house. If the bailment be jewelry or precious stones, it must be kept in a secure place such as a strong box in his house. If it is some heavy object such as lumber, the bailee sufficiently complies with "the way of bailees" if he keeps the same in his open yard.

If the bailee places the bailor's money in the same place as his own and both are stolen, but the place of safekeeping is not as required by the law of bailments (b'dereh hashomrim) the bailee is liable, for the law declares that while one may take risks with his own property, he cannot do so with the property of another. This principle goes beyond what seems to be the law in Ohio, although there has been much discussion on this subject. The editors of Ohio Jurisprudence, however, state the rule to be almost exactly as it appears in the Talmud:

The depository however is not exempt from liability for gross negligence merely because he has kept the deposit in the same place where or with the same care that he has kept his own property.

The gratuitous bailee, however, must be free of negligence in making secure the property upon receiving it. Thus, if he was negligent in the

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90 Ibid.
91 Baba Mezia 42a
92 Baba Mezia 43a
93 Maimonides, She'ela U'Pikadon IV, 2.
94 Baba Mezia 42b
95 5 Ohio Jur. 110, citing Griffith v. Zipperwick, 28 Ohio St. 388 (1876).
first instance and the bailment was lost in some manner other than through such negligent act, the bailee is liable.

By way of example, the Talmud speaks of a case in which a man deposited money for safekeeping with his neighbor, who placed the same in a shack built of reeds (a fowler’s trap) whence it was stolen. It was held that although the bailee used ordinary care in secreting the money in a place where no one would normally look for it, nevertheless, the place of safekeeping was insecure. The bailee should have anticipated that a shack made of bulrushes might burn. He was therefore negligent in depositing another’s money in such a place for safekeeping. Since he was negligent ab initio, the fact that the money was stolen rather than lost through burning did not absolve him.

The bailee may not redeposit with another the object left with him for safekeeping. If he does, he is liable to the bailor for the loss, if any is suffered, because, having given up possession of the article, the bailee cannot take the oath that he has kept it in the way of bailees, and the bailor cannot be required to rely upon an oath from a person in whom he himself has not placed confidence—namely, the substitute. The original bailee has committed a breach of trust. But the bailee may entrust the articles to his mother, his wife, and his children, for they enjoy his confidence as a matter of course. If he swears that he has entrusted the bailed articles for safekeeping to such persons and the person thus entrusted with them swears that the articles were securely placed, “that she (mother) had placed the money in her work basket,” the bailee is absolved from loss thereof.

2. The borrower—shoel.

The liability of the borrower is almost that of an insurer. The cause of his failure to return the property bailed makes no difference. He is liable for the loss of the property resulting even from an act of God. Once return is impossible, the Shoel becomes liable. Harsh as this may seem, the Talmud gives an excellent reason for this view. The rationale is that this bailee should be made so liable because he receives full benefit of the object bailed, since he makes use or may make use of the property which he borrowed. One exception, however, should be noted. When the bailee borrows an animal for labor and the animal dies due to work, the bailee is not liable. The language of the Talmud is very picturesque and definitive, “but even if it died through work, he is still not liable be-

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65 Baba Mezia 42a
66 Baba Mezia 42a, 42b
67 Baba Mezia 93b, Baba Kamma 11b
68 Baba Mezia 94b
cause he can say, 'I did not borrow it that it should stand in a show case.'

The idea is that since the work done by the animal was in contemplation of both the borrower and the lender, the death of the animal must also have been in their contemplation. Both the Mishna and the Gemara are quick, however, to make an exception here, declaring that if the animal should die of cruel treatment by the borrower he is liable.

"I did not borrow it that it should stand in a show case" is another way of saying that when the parties entered into the bailment it was intended that the bailed article would be reasonably fit for the use the bailee intended to make of it.

3. A paid bailee—nose sakhar.

A perutah (farthing), almost anything of value, is sufficient to create the obligation of the nose sakhar. This bailee is held to a very high degree of care, for in the days of ancient Israel, he was generally a shepherd. He is liable for all loss except such as occurs through an act of God. The destruction of his flock or the loss of a portion thereof by a pack of wolves or by armed robbers is considered an act of God.

It is of interest to note how the Talmud treats this subject. The bailee, if he be a shepherd, is expected to drive off one wolf but if the attack is made by two or more wolves he is absolved from liability, for he is not required to place his own life in jeopardy to save the flock. For the same reason the shepherd is likewise excused from loss resulting from armed robbers.


The sokher is liable in all cases in which the hired keeper is liable. He is looked upon as a paid bailee for he also gets the greatest benefit from the bailment by virtue of the fact that he makes use of the owner's property. This bailee is excused from liability if the loss occurs as a result of an attack by robbers who overcome his resistance or if he is so put in fear as to be unable to withstand the threat against him.

A comparison of the foregoing with Ohio law may be of some interest here. Ohio divides bailments into three classes, designating three categories of liability:

1. Such as are for the sole benefit of the bailor;
2. Such as are for the sole benefit of the bailee;
3. Such as are for the benefit of both.

105 Baba Mezia 96
106 Baba Mezia 710
107 Shakh (Sifte Kohen) Hoshen Mishpat 303
108 Baba Mezia 29
109 Ibid.
110 5 Ohio Jur. 99.
While the liability of the gratuitous bailee is for gross negligence, nevertheless the language the Ohio Supreme Court used in defining the degree of care of a gratuitous bailee is remarkable in its proximity to the language of the Talmud. In *Griffith v. Zipperwck*\(^{105}\) the court said:

> The degree of care due from the depository depends upon circumstances such as the nature and quality of the goods bailed and the character and custom of the place where they are kept.

The editors of Ohio Jurisprudence in treating this subject say:\(^{106}\)

> If the bailor expects the property to be put in a certain place and the bailee knows of his expectations, he ought to put it in that place or notify the bailor that he cannot do so — the bailee is bound to place the property where he has reason to believe the bailor expects it to be placed.

**TORTS**

I.

The laws of liability arising from failure to perform a duty or obligation imposed upon a person regardless of his own will or undertaking, are well defined in the Talmud. They are found primarily in the Talmudic tractate Baba Kamma (First Gate) in the order Nezikin (Damages)

The Tractate opens with the Mishnah dividing into four categories the primary sources of damage, as follows:

1. The ox (goring ox).
2. The pit.
3. The chewer (spoliator or grazer).
4. Fire.

Of these the Mishnah says:

> The feature common to all of them is that they are in the habit of doing damage and that they have to be under your control, so that wherever any one of them does damage, the offender is liable to indemnify from the best of his land.\(^{107}\)

From these "principle categories," the Gemara deduces derivative liabilities.

The words "ox, pit, chewer and fire" are all symbolic terms. "Ox," for example does not necessarily apply to damage done by an ox only. The legal principles derived therefrom are applied to the law pertaining to domesticated animals generally and, from the doctrines so derived, laws are promulgated which in some instances are applicable to govern the conduct of humans also.\(^{108}\) The derivatives from "pit" may be a stone,\(^{109}\) a stone,\(^{110}\)

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\(^{105}\) 28 Ohio St. 388, 401 (1876).
\(^{106}\) 5 Ohio Jur. 110.
\(^{107}\) Baba Kamma 11
\(^{108}\) Baba Kamma 84a
knife, luggage or any other object left or placed in the public highway, or any obstruction which creates a nuisance or causes damage.\textsuperscript{109}

II.

Tam and Mu’ad.

The "ox," according to Rab Judah’s view in the Gemara, refers to damage done by "horn," while the "chewer" refers to damage done by "tooth."\textsuperscript{110} According to the interpretation in the Gemara, the "chewer" category includes damage done by "foot" as well as "tooth" and is derived from the Mishnaic generalization, "Whenever damage has occurred the offender is liable."\textsuperscript{111}

This is a figurative way of spelling out liability for damage resulting from acts of ordinary trespass, viciousness or both on the part of domesticated animals. Acts of damage committed by an animal by "tooth" or "foot" (b’shen v’regel) are treated as ordinary trespass for which Jewish law affords redress akin to our own method of awarding damages for such acts. "Horn" on the other hand connotes the doing of malicious mischief.

The Gemara elucidates by explaining that the derivatives of "horn" are collision, biting and kicking. At first glance, it would seem that these are odd derivatives of "horn" and would perhaps more properly be categorized as derivatives of "foot" and "tooth." Yet, this is not so. For what this symbolic language means is that an ox or any other domesticated animal which causes damage by "biting," for example, indicates vicious proclivities. The biting of the ox is here distinguished from the normal use which an animal makes of its teeth for feeding and grazing, which are the natural propensities of all beasts. "Biting," in the sense used here, connotes a purpose to do hurt rather than to fulfill natural physical needs, such as feeding, from which the animal obtains "gratification."\textsuperscript{112}

Where an animal does damage on another’s land by "tooth" or "foot" (b’shen v’regel) the animal is said to be mu’ad ab initio, and its owner must respond in full for the resulting damage\textsuperscript{113} when failing to guard such animal properly.\textsuperscript{114} The owner is under obligation fully to expect this and since the animal is in his possession and under his control, he must answer for its acts. The Mishnah is very illuminating here. The language has an exceedingly familiar modern ring.

\textsuperscript{109} Baba Kamma \textsuperscript{6a}
\textsuperscript{110} Baba Kamma \textsuperscript{2b, 3b, 4a, 9b}
\textsuperscript{111} Baba Kamma \textsuperscript{4a}
\textsuperscript{112} Baba Kamma \textsuperscript{2b}
\textsuperscript{113} Baba Kamma \textsuperscript{15b, 9b}
\textsuperscript{114} Baba Kamma \textsuperscript{55b}
Whenever I am under an obligation of controlling (anything in my possession) I am considered to have perpetrated any damage that may result. When I am to blame for a part of the damage, I am liable to compensate for the same as if I had perpetrated the whole of the damage.\footnote{Baba Kamma 9b}

A question in Jewish law arises here as to whether one who has animals under his control is under strict liability for the acts of trespass of his domesticated animals or whether the liability arises from the negligence of the owner in failing to guard the cattle properly.

The language of Maimonides is as follows:

The owner is liable to pay for the acts of every living being under his control which causes damage, because his property caused damage.\footnote{Nizke Mamon 11.} This might seem to show that the liability of the owner is strict and arises from the mere ownership of the animal rather than from the negligence of the owner. This would parallel the common law concept of strict liability. But, Jewish law even according to this Maimonides concept of liability gives the owner of the animal a defense if he guards properly against its trespassing.\footnote{Baba Kamma 55b; Maimonides, Nizke Mamon 41.} However, the burden of proving proper guarding is placed upon the owner.

Damage caused by an animal while in motion, such as falling upon something or dragging things by its hair, or with its harness, or with the load upon it, is placed in the category of "foot." Acts of damage such as where an animal breaks a wall or fence by leaning or rubbing against it, or trampling upon or damaging fruit or produce, are placed in the category of "tooth."

Injuries resulting from "horn," that is from goring or any of its derivatives are not to be completely anticipated by the owner until the animal is declared mu'ad for they are the products of excitement or the result of the inherently vicious nature of a particular animal of a species usually not vicious.\footnote{Baba Kamma 3a} If the goring is done by an animal that is tam (innocent, harmless), one which has not been declared an "attested danger," (mu'ad), half damages are assessed against the owner, and only out of the body of the tort-feasant animal.\footnote{Baba Kamma 5b.} If, however, the goring is done by an animal which is mu'ad, witnessed against, full payment must be made by its owner out of the best of his estate, for he should have foreseen the act completely. But, he does not pay full damages until the ox has done his fourth goring. A showing by the owner that he had prop-
erly guarded the animal is available to him as a defense in cases of tam and mu'ad as well as in cases of tooth and foot.

Mishnaic distinction between "tam" and "mu'ad" considerably softened the Biblical pronouncement against the goring ox, which is as follows:

And if one man's ox hurt another's so that it die, then they shall sell the live ox and divide the price of it and the dead also they shall divide. Or if it be known that the ox was wont to gore in time past and its owner hath not kept it in, he shall surely pay ox for ox and the dead beast shall be his own. 122

The basic doctrine underlying the principle of "mu'ad" is scienter. Since the owner is not required to anticipate completely the vicious acts of a domesticated animal, his full liability for such of its acts can arise only if it has been declared vicious and its owner has been forewarned. The Talmud says that an animal becomes mu'ad if its owner has been warned in a court of law by the testimony of witnesses given in his presence that the animal has been seen to gore on three successive occasions. 123

Jewish law placed great importance upon this judicial proceeding. The animal was on trial, but the owner was also on trial, for not only was the owner of a mu'ad which gored required to pay full damages if he had failed to guard it properly, but if it killed a human being, the owner, as well as the animal, was to be put to death. 124 The owner, by paying a ransom could redeem his life. The ox could not be ransomed. 125 The law attributed so much importance to the requirement for this judicial inquiry in the presence of the owner that if warning was given in open court when the owner was not present, or was given to the owner but not in a court of justice, the animal could not be declared legally mu'ad. 126

Since an ox which gores a human being to death must be destroyed and its flesh may not be eaten 127 what of a stadium ox? The Tannaim took cognizance of this means of goring human beings to death in "sport," and exempted the stadium ox from the death penalty completely, saying:

In the case of a stadium ox (killing a person), the death penalty is not imposed (upon the ox) as it is written: 'If an ox gore, excluding cases where it is goaded to gore.' 128

At this point it might be well to compare with Jewish law our present

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122 Exodus 21:3.
123 Baba Kamma 24a
124 Exodus 21.29. Death of the human being referred to here is interpreted by the Gemara as a divine penalty which cannot be imposed by a court of human beings. Sanhedrin 33a
125 Exodus 21.29, 30.
126 Baba Kamma 24a
127 Exodus 21.29.
128 Baba Kamma 39a
day law dealing with the subject of harm done by animals. Professor Cooley says the following:

The reason why the common law makes the owner of domestic animals responsible for such injuries as have already been specified, is because, taking notice of their propensities, it is his duty to anticipate that they will commit them as opportunity offers, and to guard against it. He must take notice of the natural propensity of cattle to stray and trample down crops, as one who keeps a beast of prey must take notice that he will kill and destroy animals and human beings if he is suffered to escape.

But there are other mischiefs which may be committed by domestic animals that one is under no obligation to anticipate and guard against, because they are not the result of a general propensity, but are committed, if at all, by exceptionally vicious individuals of the particular species of animals. Thus, though every horse will roam into neighboring fields if not restrained from doing so, it is only in rare and exceptional cases that a horse will attack and injure those who come near him. Therefore, while the owner should anticipate and protect against trespasses on lands by his horses, he is under no moral obligation to anticipate that a horse in which no such disposition has been discovered will suddenly make an assault upon and kick and bite some passer-by who chances to come within his reach. For this reason the keeper of a domestic animal is not in general responsible for any mischief that may be done by such animal which was of a kind not to be expected from him, and which it would not be negligence in the keeper to fail to guard against.

If it be made to appear that any domestic animal is vicious and accustomed to do hurt, and that the owner has been notified, or has knowledge of the fact, a duty is then imposed upon him to keep the animal secure, and he is responsible for the mischief done by the animal in consequence of the failure to observe this duty. To recover the plaintiff must prove both that the animal was vicious and that the defendant had notice of the fact. If the defendant had no notice of the vicious propensities of the animal he is not liable.210

III.

"Half Damages . Out of the Body."

What is the difference (in law) between tam and mu'ad? In the case of tam only half damages are paid and only out of the body (of the tort-feasant cattle), whereas in the case of mu-ad, full payment is made out of the best (of the estate).210

The words "out of the body" caused considerable discussion and required much interpretation. The Mishnah says:

If an ox (tam) of the value of 100 zuz has gored an ox of the value of 200 zuz and the carcass had no value at all, the plaintiff will take possession of the (defendant's) ox (that did the damage).211

According to Rabbi Ishmael, the tort-feasant ox is to be appraised by a court of law and the plaintiff becomes a creditor of the defendant, having only a monetary claim against him. Rabbi Akiba, however, was of the

210 Baba Kamma 16b
211 Baba Kamma 33a.
opinion that the body of the ox becomes transferred to the plaintiff, and the plaintiff and the defendant become owners in common of the tortfeasant ox. Subsequent rulings upheld Rabbi Akiba's view.

Thus we find that where A's ox, a tam, gored B's, each animal being of the value of 200 zuz, and the carcass of B's ox was valueless, it was held that A and B became partners in the live ox, each owning half. In order to make clear the intent of the law that the payment be made out of the body of the animal, this further example is given: Later, A's same ox gores C's ox, valued at 200 zuz. The carcass of C's ox is of no value. The rule is that C becomes half owner of the live ox and A and B share equally the other half interest.

This whole process might, at first, seem strange and primitive to present-day students of the law of torts, but upon closer study one can see here the exemplification of the humaneness of Jewish law. The significance of the payment of half damages in the case of a goring by a tam is that the payment is considered in the nature of a penalty, or rather as a warning to the owner of the animal, and not as compensation to the plaintiff for the damage he may have sustained. And this, as will be seen, is a manifestation of the concern of Jewish law for the protection of life and property. In the opinion of Rab Huna average cattle can so far control themselves that they will not gore. This being so, their owner need not expect them to gore, and in strict justice should not be required to pay anything at all if they start goring. However, since the ox did gore, the ox is suspect; but it is forgiven for it is still tam, but the owner must be warned to watch his cattle so that a like occurrence will not again take place. Rab Huna, therefore, arrives at the conclusion that the payment of half damages is in the nature of a fine against the owner as a deterrent and not compensation to the plaintiff: "Divine law imposed upon him a fine in case of damage so that additional care should be taken of cattle." Rab Papa, on the other hand, contended that all animals are presumptively unsafe. The owner, therefore, is on notice ab initio and should, in accordance with strict justice, respond in civil damages in all events where injury is done by his cattle. Nevertheless, Rab Papa indicates the magnificence of the Jewish concept of law as being justice tempered with mercy. He says:

Strict justice should therefore demand full payment in case of damage. It was only Divine law that exercised mercy and released half payment on account of the fact that the cattle have not yet become mu'ad.

Historians of English law trace the law of deodands to the Talmudic

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132 Hoshen Mishpat 401.
133 Baba Kamma 15a
134 Ibid.
law of half damages "out of the body." Holdsworth says that "until 1846 the law in England was such that the instrument which by its motion caused death was forfeit to the Crown as a deodand." He says that for a long period in English History, the idea prevailed that compensation for damage done by domestic animals could be made only by giving up the animal, and attributes this to Judaic influence: "But sometimes the Anglo-Saxon courts represent the primitive ideas of the Old Testament rather than the primitive ideas of the Teutonic race." Blackstone likewise attributes the law of deodands to the Mosaic law. He enumerates some of these deodands, such as wheels, carts, swords, and even ships plying fresh waters.

In Pollock and Maitland a case is cited in which a man was killed by his own cart. The price of the owner's cart, which caused his death, was given to his children "pro Deo." And where a boat damaged a bridge at Tewksbury, the price of the boat was devoted "for God's sake" to the repair of the bridge.

To this day, the principle of the law of deodands is evident in Anglo-American jurisprudence, for in admiralty law the action for damage done by a ship is in the form of a libel against the ship. In the case of Malek Adhel, which was a suit involving a libel against a vessel, Justice Story quotes, with approval, the following passage:

   The thing is here primarily considered as the offender, or rather the offense is primarily attached to the thing.

NEGLIGENCE

Liability for one's own acts of negligent conduct is thoroughly treated in the Talmud. The Mishnah exemplifies, rather than defines, negligence through a series of colorful and very expressive illustrations, one of which may suffice for our purpose.

   If a man brings sheep into a shed and locks the door in front of them properly but the sheep, nevertheless, get out and do damage, he is not liable. If, however, he does not lock the door in front of them properly, he is liable.

The Gemara interprets "properly" as follows:

   If the door was able to stand against a normal wind, it would be

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125 2 Holdsworth, History of English Law 46 (3d ed. 1922).
127 1 Bl. Comm. *300.
129 Ibid.
130 2 Howard (43 U. S.) 210, 234 (1844).
131 Baba Kamma 55b
'properly,' but if the door could not stand against a normal wind, that would be 'not properly.'

Here we have it—an age-old problem as new today as it was old approximately two thousand years ago.

The Tannain and Amoraim evidently experienced as much difficulty with the concepts of "care," "ordinary care," and "lack of care," as we do today. Their conclusions, however, parallel ours very closely. Prosser defines negligence as:

Conduct falling below the standard established by law for the protection of others against unreasonable risk of harm.

The Talmudic scholars obtained the same result in different form. In the interpretation of "proper," above given, the standard of care is whether the door was firm enough to withstand the pressure of a normal wind. If the door conformed to that standard, the conduct of the man placing the sheep in the shed was reasonable and proper. If the door could not withstand the pressure of a normal wind, it fell below the standard of reasonableness and was, therefore, improper. Again, if the door could not withstand the pressure of an extraordinary wind, the man's conduct was still proper, for failing to equip his shed with doors which would meet such a test would not be subjecting the property of others to unreasonable risk of harm.

It is to be hoped that the mere glimpse of the principle given here may serve to illustrate how well Jewish courts and scholars understood this problem, and how clearly they posited an answer to the need for indicating standards of human conduct, which are virtually imponderable. Except through laying down arbitrary rules for specific situations and specifying that such are the standards of conduct binding upon everybody irrespective of the circumstances in the particular case, who can say what act of anyone is proper or improper at any given time or place? The best we can do is to point the way by example. This method of teaching used by the great Talmudic scholars, namely that of giving simple unforgettable examples to illustrate abstract principles is among the highest expressions of the genius of these men. To make concrete that which is abstract makes easier and more certain the grasp and thorough understanding of a principle which may otherwise remain abstruse. By doing so the concept is no longer in the clouds but is brought down to earth within the reach of every normal human being. What people thoroughly understand, if it meets with their approval, they will adhere to. If they adhere to it, they will generally support it. What people do not understand they either fear or dislike, and, in any event, resent and

143 Ibid.
144 PROSSER, TORTS 175 (1941).
refuse to accept. Talmudic teachers evidently understood this principle well. Because they so understood it, they labored among themselves to distill abstract theoretical principles of law, obtain therefrom the very essence of each principle and clothe the result in a simple understandable example. They understood that the law was promulgated not merely for scholastics or for lawyers but for the guidance of the people, all the people, not merely a segment thereof. Their conception of the law was something more than a set of abstract rules; it was rather a guide and a way of life. They brought the law to a level which all men could understand and to a standard by which all men could be guided. By the simple example of the sheep in the shed and the capacity of the door to withstand the pressure of a normal wind, Jewish scholars brought to earth, in concrete form, an abstract legal principle within the reasonable comprehension of normal human beings.

**CONTRIBUTORY NEGLIGENCE**

The subject of contributory negligence is treated in Baba Kamma 23b, 24b. Limitations of space preclude citing more than one example. After defining tam and mu'ad, the Mishnah says that animals once having been declared mu'ad may become tam again, "when children keep on touching them and no goring results." The Gemara, in interpreting the Mishnah, poses the question whether an inference may not be drawn from this that if goring resulted the owner would be liable, even though the ox was incited to gore by the children. It answers by laying down the rule that if goring results under such circumstances, the ox will not be declared tam, but the owner will be free from liability because the children in inciting the animal contributed to the goring. This is the equivalent of saying, in modern language, that the plaintiff cannot recover from the defendant where his own acts of negligence contributed to bring about his injury.

**BURDEN OF PROOF**

As in Anglo-American law, so in Jewish law, the burden of establishing his claim is upon the plaintiff. The Mishnah says:

> If an ox was pursuing another's ox which was afterwards found to be injured, and the one (plaintiff) says "It was your ox that did the damage," while the other pleads, "not so but it was injured by a rock" (against which it had been rubbing itself), the burden of proof lies on the claimant.

Another example given in the Talmud is one where plaintiff sued defendant for the loss of two oxen by the goring of defendant's two oxen, one of which was tam and the other mu'ad. The plaintiff maintained that

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144 Baba Kamma 23b, 24b
145 Baba Kamma 24b
146 Baba Kamma 35a
the mu'ad injured the big one and the tam the little one. The defendant pleaded "Not so" for it was the tam that injured the big one and the mu'ad that injured the little one. The Gemara resolves the case against the plaintiff, holding that

The plaintiff is entitled to get paid only where he produces evidence to substantiate his claim, but will have nothing at all when he fails to do so.\(^{147}\)

**LAW OF DAMAGES FOR PERSONAL INJURIES**

The Scriptural passages which form the basis for the law of damages for personal injuries read thus:

And if a man maim his neighbor; as he hath done so shall it be done to him: breach for breach, eye for eye, tooth for tooth; as he hath maimed a man so shall it be rendered unto him.\(^{148}\)

And thine eye shall not pity: eye for eye, tooth for tooth, hand for hand, foot for foot.\(^{149}\)

The Mishnaic portion of the Talmud, however, sets out so specifically not only that damages are to be paid for injury to persons by other persons but the measure of damages as well, that I deem it essential to a complete understanding of this subject that the entire portion be set out in full. It reads as follows:

One who injures a fellow man becomes liable to him for five items:

For Depreciation, For Pain, For Healing, For Loss of Time and For Degradation.

How is it with "depreciation"? If he put out his eye, cut off his arm or broke his leg, the injured person is considered as if he were a slave being sold in the market place, and a valuation is made as to how much he was worth (previously), and how much he is worth (now).

Pain — If he burnt him either with a spit or with a nail, even though on his (finger) nail which is a place where no bruise could be made, it has to be calculated how much a man of equal standing would require to be paid to undergo such pain.

Healing — If he has struck him, he is under obligation to pay medical expenses. Should ulcers (meanwhile) arise on his body, if as a result of the wound, the offender would be liable, but if not as a result of the wound, he would be exempt. Where the wound was healed but reopened, healed again but reopened, he would still be under obligation to heal him. If, however, it had completely healed (but had subsequently reopened) he would no more be under obligation to heal him.

Loss of Time — The injured person is considered as if he were a watchman of cucumber beds (so that the loss of such wages sustained by him during the period of illness may be reimbursed to him), for there has already been paid to him the value of his hand or the value of his leg (through which deprivation he would no more be able to carry on his previous employment).

Degradation — All to be estimated in accordance with the status of the offender and the offended.\(^{150}\)

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\(^{147}\) Baba Kamma 35b, 36a

\(^{148}\) Leviticus 24: 20.

\(^{149}\) Deuteronomy 19:21.

\(^{150}\) Baba Kamma 83b Soncino translation.
The interpretation in the Gemara, which follows immediately after this section, is among the most exalted pronouncements to be found anywhere on earth, for we find in it a sublimation of *lex talionis*, which no language can improve upon. The passage is as follows:

Why (pay compensation)? Does the Divine Law not say "Eye for eye"? Why not take this literally to mean (putting out) the eye (of the offender)? Let not this enter your mind, since it has been taught: You might think that where he put out his eye, the offender's eye should be put out, or where he cut off his arm, the offender's arm should be cut off, or again where he broke his leg, the offender's leg should be broken. (Not so; for it is laid down, "He that smiteth any man and he that smiteth a beast" just as in the case of smiting a beast compensation is to be paid, so also in the case of smiting a man compensation is to be paid."

My primary purpose in setting forth copious quotations from the Pentateuch, the Mishnah and the Gemara, is not to show the modernity of the Tannaim in defining the law of damages, but to acquaint the reader with what is perhaps the finest of all examples of the sublimity of the Jewish approach to retributive justice. The concept of vengeance must not enter one's mind. An eye for an eye, and a tooth for a tooth, is vengeance and must not be indulged in by humans for "Vengeance is Mine and Justice is God's" is the Divine Commandment.152

It would do no harm and might indeed be enlightening to those who, on occasion, are wont to refer to the Jewish law as the law of vengeance to familiarize themselves with this passage in the Gemara.

It is a cardinal tenet of Jewish faith that every human being is created in the image of God, and therefore each human being, by reason of birth, is endowed with the unalienable right to life, of which no man is permitted to deprive him. So sacred is human life that in the trial of one accused of murder, a witness when taking the oath is solemnly warned that should he bear false witness he may become the cause of the death of a human being. He is therefore admonished:

For this reason a single man only (Adam) was created to teach you that if one destroys a single person, the scripture imputes to him as though he had destroyed the whole world, and if he saves the life of a single person, the Scripture imputes to him as though he had saved the whole world."154

Since man knows that he was created in the image of God, the body of every human being is sacred. Any injury committed upon his person is therefore an act of irreverence, for in reality the destruction of another's limb is tantamount to taking a part of his body and is the destruc-

151 Baba Kamma 83b
152 Deuteronomy 32:35; Deuteronomy 1:17
153 Genesis 1:27; Psalms 8.
154 Sanhedrin 49
tion of a part of his life. The injury inflicted upon a human being is therefore placed on a higher level than the injury caused to animals. The payment of damages for injury to a human being is not merely compensatory, but expiatory as well. This concept is clearly posited by Maimonides at the very outset of his treatment of the law of damages to human beings. According to the Rambam, (Maimonides)

That which is written in the Torah, "As he hath maimed a man so shall it be rendered unto him" does not mean to cause injury to the aggressor in the manner in which he has caused injury to the plaintiff, but it connotes rather that in strict justice he should lose a member of his body or be injured accordingly and therefore he must pay damages. And the Torah says, "Thou shalt not take ransom for the murderer." For the murderer alone (who should suffer the death penalty) has no ransom, but for causing the loss of organs or other bodily injuries there is ransom.155

The divergence between the Hebraic and the Anglo-American concept of paying damages is made strikingly apparent from this passage of the Rambam and from the Gemara. The common law concept is much more pragmatic. The formula is: injury done—injury compensated for.

The entire blood feud idea, which is the basis for the vengeance theory underlying our early concept of damages for tortious injury was repulsive to Jewish jurisprudence. In Jewish law one was not required "to buy spear from side or bear it." The duty of making peace for the wrongfull act committed was, in concept, owed by the aggressor not to the injured person but to his Maker for trespassing upon one who was created in His image.

**DUE PROCESS.**

Of formal criminal and civil procedure, as we understand it, little is said in the Talmud, but the safeguards against precipitate and inquisitorial methods of trial and pretrial, which are the embodiment of our constitutional and juridic due process, are there clearly expounded.

Ordinary property actions which involved the payment of damages or penalties were triable by courts of three judges.156 In capital cases, however, which involved the death penalty, jurisdiction was lodged in the small Sanhedrin consisting of twenty-three jurists.157 The great Sanhedrin, whose function was legislative as well as judicial consisted of seventy-one judges, and had exclusive jurisdiction in the trial of a high priest or one charged with being a false prophet.

The Scriptural text in Deuteronomy is the wellspring of Jewish adjective law.

And I charged your judges at that time, saying, "Hear the causes between your brethren and judge righteously between a man and his brother

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155 Yad. Hobel U'mazek 13. See also Baba Kamma 83b
156 Sanhedrin 11, 12, 13
157 Sanhedrin 14
and the stranger that is with him. Ye shall not respect persons in judgment, ye shall hear the small and the great alike; ye shall not be afraid of the face of any man; for the judgment is God's.

The Gemara interprets the words, "And I charged your judges at that time," as being a warning to them to use the rod and the lash with caution, and the phrase, "Hear the causes between your brethren and judge righteously" is interpreted by Rab Hanina as a warning to the court not to listen to the claims of a litigant in the absence of his opponent, and to the litigant not to explain his case to the judge before his adversary appears. The phrase "judge righteously" was construed by Resh Lakish to mean, "Consider rightly all the aspects of the case before giving a decision." "Ye shall not respect persons in judgment" was interpreted in the Gemara to mean, "Ye shall not favor anyone even if he be your friend, and ye shall not estrange anyone even if he be your enemy."

Concerning the last admonition, an interesting example is given in the Talmud. A former host of Rab, it is said, came before him with a lawsuit and, according to Rashi's interpretation, said, "Were you not once my guest?" "Yes," he answered, "and what is your wish?" "I have a case to be tried," he replied. "Then," said Rab, "I am disqualified from being your judge," and turning to Rab Kahana he said, "Go you and judge the case.

"Ye shall hear the small and great alike" meant that a lawsuit involving a mere perutah, (a coin of minimal value), must be regarded as of the same importance as one involving a hundred minah, which was a weight in gold or silver equal to 100 shekels. The Gemara asks, "Is it not self-evident that this is what was intended by the passage in Deuteronomy?" The answer is given that it refers also to the priority which is to be given a case of small consequence if it should be first in order.

The concern for the life of a human being, so keenly felt by Jewish law in matters of injury to the person, was even more evident when the State sought to take his life. In this field of jurisprudence Jewish law attained its most humane and most modern expression. Whether the trial involved a capital or non-capital cause, the inquiry and the examination according to Mosaic law, were equally thorough, "for it is written 'Ye shall have one manner of law.'" But only those who were legally trained in the law could act as judges in the trial of cases involving homicide.

155 Deuteronomy 1.16,17.
156 Sanhedrin 7b
157 Ibid.
158 Ibid.
159 Sanhedrin 7b, 8a
160 Sanhedrin 8a
161a Sanhedrin 41
The defendant on trial for murder was clothed with the presumption of innocence, and the questions put to him were required to be such as would elicit reasons for acquittal, not conviction.\textsuperscript{164} Circumstantial evidence, although allowed in civil suits,\textsuperscript{165} was not permitted in capital cases, no matter how convincing, for that is the Deuteronomic decree.\textsuperscript{166} The Gemara speaks of such evidence as follows: "What is meant (by) based on conjecture?\textsuperscript{167} He (the judge) says to them: 'Perhaps ye saw him running after his fellow into a ruin, ye pursued him, and found him sword in hand with blood dripping from it while the victim was writhing in agony. If this is which ye saw, ye saw nothing.'"

A witness's inferences were not admissible in civil or criminal cases; he was required to state what he saw and heard and not his conclusions. Hearsay evidence was also excluded. The Mishnah defines hearsay evidence as "such facts as come to the witnesses second hand." And, even if the source of the statement was, in the opinion of the witness, most trustworthy, it was nevertheless not admissible as being mere hearsay.\textsuperscript{168}

The law required the accusing witnesses to be thoroughly and separately interrogated by the court\textsuperscript{169} before charging the defendant with a capital crime. A full bill of particulars was required of them, and the judges were in duty bound to ask them in detail the year, the month, the day, the hour, and the place of the commission of the crime, all to be answered with certainty.\textsuperscript{170}

The Mishnah places a stern duty upon a judge to cross-examine thoroughly and vigorously, saying: "The more a judge tests the evidence, the more is he deserving of praise." Any discrepancy of a serious nature resulted in an immediate acquittal. For example, "if one (witness) said 'at the fifth hour' and the other (witness) said 'at the seventh,' their evidence becomes invalid"\textsuperscript{171} All witnesses were under oath and had to be sworn according to the Scriptural requirement against bearing false witness.\textsuperscript{172}

Only after a second witness corroborated the statement made by the first could the court proceed to hear defense testimony and, if there was no second witness there was an acquittal. The defendant was permitted

\textsuperscript{164} Ibid.
\textsuperscript{165} Sanhedrin 37b
\textsuperscript{166} Deuteronomy 17:6.
\textsuperscript{167} Sanhedrin 37b
\textsuperscript{168} Sanhedrin 45
\textsuperscript{169} Sanhedrin 52, 54
\textsuperscript{170} Sanhedrin 51
\textsuperscript{171} Sanhedrin 53
\textsuperscript{172} Sanhedrin 45
to take the stand in his own behalf.173 No one could be convicted of
crime merely upon his own confession.174

Shades of Wigmore! What with the stringent requirements for cross-
examination and the prohibition against hearsay testimony, one finds
in these Talmudic rules a striking resemblance to some of our present day
rules of evidence.

After submission of the case, the judges could find the defendant in-
nocent and acquit him on the day of trial. A finding of guilty required
deliberation and could not be made until the next day. During the delib-
eration the judges could eat little and drink no wine; they went together
in pairs and were required to discuss the case among themselves during
the entire night following the trial. On the following morning, they as-
sembled in court for their decision. He who had previously favored convic-
tion could change his mind and declare the defendant innocent; but he
who had previously favored acquittal could not retract and favor convic-
tion.175 If they could not agree, a vote was taken and the decision of the
majority prevailed; a majority of one was sufficient to acquit, but a major-
ity of two judges was required for conviction.176

Once acquitted the defendant could not be tried again for the same
offense, and this rule against double jeopardy was meticulously ob-
served.177 Although a verdict of guilty could be reversed, a verdict of
acquittal was not subject to reversal.178

The defendant, having been found guilty, could, while he was being
led to his execution, be reprieved and be brought back for further con-
sideration if either he, or anyone else, could offer mitigating testimony
in his behalf. A crier on a charger would precede the condemned man
on the way to his execution, announcing: "Such a one, the son of such a
one, is going forth to be stoned for that he committed such or such of-
fense. Such a one and such a one are witneses against him. If any man
knoweth aught in favor of his acquittal, let him come and plead it."179
And he could be brought back four or five times for the purpose of offer-
ing evidence, to afford him every opportunity to prove himself innocent
and obtain acquittal.180

Finally, the Mishnah itself brands a court which executed one man in
seventy years as ruinous.\textsuperscript{181} And Rabbi Tarfon and Rabbi Akiba say: "Had we been in the Sanhedrin, none would ever have been put to death."\textsuperscript{182} Such was the concern of Jewish law for the life of a human being and the treatment accorded him out of respect for the dignity of the individual. This was the logical result of the basic concept that man was created in God’s image.

**CONCLUSION**

In presenting a few of the basic principles of Talmudic law, I was prompted by the conviction that Jewish and Anglo-American legal institutions are, in many respects, quite similar, and that such similarity might be of interest to students of law. I sought likewise to suggest that our Anglo-American legal system, the younger of the two, was in part influenced by the thoughts and concepts found in the older.

It was my purpose also to indicate here and there the moral tenets upon which the Judaic system of jurisprudence rests, and its effect upon our concept of law. Of this aspect of our law, Fritz Berolzheimer has this to say:

> The Mosaic dispensation is historically important not alone because of the measures and institutions which it established among the Jewish people but because of the extensive circulation of the Scriptural idea. Moreover the fundamental features of Jewish institutions were ethical and these ethical concepts in turn shaped the teachings of Christianity.\textsuperscript{183}

In commenting upon the effects of the decline of the Holy Roman Empire he continues:

> Christianity displaced the Greek mythology and through its ethics influenced the development of law, the organization of government and the freest expansion of both.\textsuperscript{184}

We have been witnessing recently a renewal of the controversy between those to whom law is the embodiment of ethical standards and those who think of the law merely as a science aimed at regulating the external relations of men to each other and to their governments.

In a revolutionary era such as ours, in which our fundamental concepts of "property," "rights," "duties," "obligations," "mine," "yours," "state," "is," and "ought" are being weighed in the social balance with two diametrically opposed systems vying with each other for acceptance of their respective concepts to the exclusion of the other, it is important to restudy our jurisprudence and reexamine the fundamental groundwork upon which our legal structure is imposed. Whatever divergent opinions we may hold as to the application of the law, the basic tenet that our sys-

\textsuperscript{181} Makkoth 110

\textsuperscript{182} Ibid.

\textsuperscript{183} BEROLZHEIMER, THE WORLD’S LEGAL PHILOSOPHIES 40,41 (1924).

\textsuperscript{184} Ibid. 89.
Jewish law has much to offer to our entire concept of ethical and legal standards. Jeremiah's synthesis between legal duty and moral obligation is as valid today as when it was uttered: "God will put the law into men's innermost feelings and will write it in their hearts." Here is the doctrine which must ultimately become the guiding juridic and social concept if we are to be free from the principle of statism embodied in the pagan, Hobbesian maxim, "Authority, not truth, makes the law," which has permeated the minds of so many.

For what is right and what is wrong must ultimately be tested in the crucible of the conscience of man and not by the imposition of the rationalized will of one upon the other through the power of might. The same may be said of the motivation for compliance with law. According to Jeremiah's formula, observance of the law must stem from an inner persuasion to do that which is inherently just rather than from fear of punishment. The law is, of course, an agency for compelling obedience to the will of the community. But it would be cynical, as well as harmful, particularly in our present struggle for the minds of men, to rely upon the doctrine of the "bad man's" obedience to law out of fear of an adverse result to the exclusion of the inner impulse which motivates the overwhelming majority of people to comply with legal injunctions. The legal philosophy of the "bad man" is pregnant with the seed of the law's self-destruction.

Justice Holmes, Olympian though he may have been in American jurisprudence, nevertheless, regrettably adopted the "bad man" concept of the law.

What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact and nothing more pretentious are what I mean by the law."

Jewish law differs from Holmes's thesis for according to its concept morality is not alone the depositary from which the law is taken but is in fact itself law. The power of authority, therefore, in Judaic jurisprudence

185 Jeremiah 31:33.
186 Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 461.
is derived from the law, which is first in the order of precedence and is, therefore, of primary importance.

According to Holmes's scientific theory of the law, one may breach a contract irrespective of how morally wrong it may be to do so and pay damages. His debt to society is thereby paid, for scientifically that is all the law requires of him. And that is the end of the matter. If A were to breach his agreement and sell to another, B could feel secure in the prophecy of his lawyer that he would obtain damages, and A could feel secure in his lawyer's prophecy that he need only pay damages. Not so in Jewish law. Something more is expected of him who enters into such a contract, for the one breaking the agreement has committed not only a breach of contract but a moral wrong as well. For Jewish law is not so much concerned with the negative aspect of the breach of an agreement and the result flowing therefrom as with the positive aspect of fulfilling the contract. A's standard of conduct, inherently right or wrong, is here involved. For the breach of the agreement proper there may be no more remedy in Jewish law courts than is permitted at common law, namely, the payment of damages, but there is a greater deterrent to the act of breaching than the payment of damages, namely, the moral duty of fulfilling a promise. In a sense Anglo-American equity jurisprudence has approximated this view.

Jewish law is a part of the Torah. Its application, therefore, is not limited to what courts will or will not enforce. The Torah looks rather to what is inherently right or wrong, to that which is basically just or unjust.

The criterion of Judaic legal doctrine is not alone its momentary utility. Jewish jurisprudence measures the worth of legal principles by the extent to which such principles penetrate the inwardness of the daily life of the masses of the people impelling them to justice, truth, mercy and humility. An example or two may suffice to indicate the interweaving of the moral and the legal concepts in the Talmud. Thus, we find that if A owes B a past due obligation, which B collects from A by way of execution upon his property, A can later obtain, by way of redemption, the property he lost to B, provided B has not in the interim transferred the title thereto to another. This is the meaning of the Jewish principle of law known as "return of evaluation," which is based upon the broad moral Deuteronomic pronouncement, "And thou shalt do that which is right and good."\footnote{Deuteronomy 6:18; Baba Mezia 35a}

Again, if A and B are owners of contiguous lots, Jewish law provides that neither can sell his lot to C without first giving the right of purchase to the other. This is called "preemption" in Jewish law. Preemption has
the force of law through the same Deuteronomic moral exhortation, "And thou shalt do that which is right and good in the sight of the Lord." The theory is that the lot between A and B would be more useful to either than another field not adjacent to theirs, and as to C it might make no difference whether he bought that lot or another.\textsuperscript{168} Again, if between the lots of A and B there is vacant land, C, who desires to make the purchase thereof, is under moral compulsion not to do so until he has afforded either A or B an opportunity to obtain that contiguous property.

It is not to be assumed from what has been said that Jewish law does not recognize the need for temporal government and the efficacy of force for keeping peace among men and for preserving their rights. Jewish law is as practical as it is idealistic and moral in its concept of law enforcement and observance of legal duty. Jewish jurisprudence taught what the framers of our democracy knew so well—that obedience to authority based upon force alone leads to barbarism, but that "no government can be maintained without the principle of fear as well as duty."\textsuperscript{189}

Jeremiah advised his people after they were led captive into Babylon to lead normal lives there and be law-abiding citizens: "Seek ye the peace of the city whither I have caused you to be carried away captive, and pray unto the Lord for it; for in the peace thereof shall ye have peace."\textsuperscript{190}

Jewish law may thus be seen to be a very practical process of establishing rights, duties and obligations between man and man, and man and his government, as well as man's duties to God. Its highest imperative is knowledge of the law, for only through knowledge can conviction be gained. The greater the conviction the less reliance need be placed upon force or fear of force. Such a concept brings about a high appreciation of the legal as well as the moral duties impelling men not to do to others what they would not have done unto them.

In the reestablished state of Israel the laws in process of formulation will, it is expected, be based on Talmudic laws adapted to modern conditions. The needs of the times, the safety of the state, the institutions which immigrants from all over the globe bring with them, will undoubtedly make their impact upon the laws of this state.

Certain it is, however, that the moral law which is the basic motif of Jewish jurisprudence, and Zedek, the leitmotif which connotes righteousness and justice, will be kept steadfast, and upon these the modern legal superstructure will be built.

\textsuperscript{168} Baba Mezia 108a

\textsuperscript{169} Thomas Jefferson, Letter to J. W Eppes.

\textsuperscript{189} Jeremiah 29:7.