

The Ethics of
Hishmah

Baba Kamma, Baba Mezi'a
and Baba Batra.

~~Volume I.~~

Abraham Cronbach.

May 7, 1906.

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Preface.

The present effort is a step in my attempt to learn something about post-Biblical Hebrew literature. Thoroughly to understand a small part of the Mishnah is all that I have aimed at; to understand, however, not only the text and its interpretation but also the deeper import that lies beneath.

Already at my first reading of Baba Kamma, Baba Mezi'a and Baba Batra, the impression came to me, that some sort of unity underlies the diversities of the subject matter handled. It therefore, became my line of procedure to search for and to find out this unity and then to attempt the exhibition of this unity in its relation to the many details of the text.

As will be seen, this search took me far into first principles. A standpoint had to be attained. A conception of property right had to be worked out. Fundamental ideas such as those of goodness and of ownership had to be clarified and brought into play; the results

of this study constituting the entire of the introductory chapter. My plan was, after putting together a consistent scheme of property right, to show how, into this scheme, there might be fitted every detail of the *hishmah tractates* I was studying. Nothing was to be ignored as too minute for treatment. Besides, *Bertinoro* was to be quoted wherever his commentary strikingly favors the use to which I have put any given passage. The work, in a word, was to be accurate, thorough, and exhaustive.

The day, however, was too short and the work too great and perhaps also, the worker too indolent fully to realize this aim. Considerably more leisure was necessary than I could command. And so, notwithstanding the extension of time granted me by the kindness of the President, I am still unable to look upon my work and to say that it is good. The utmost that I could do has not saved this paper from the imperfections that I had hoped to avoid.

The deficiencies of which I am especially

aware are as follows:

1. It is probable that I have misinterpreted a number of passages. In many instances, I have been led aright by the kind assistance of Prof. Feldman. But, sufficient time was not at my disposal to consult the Professor as frequently as was needful. The haste with which a part of the work, and especially that of the later chapters, was done makes me apprehensive that a number of errors may have crept in.

It is needless to say that any corrections suggested by the reader will be thankfully accepted.

2. Various topics could not be treated exhaustively. Numerous details and sometimes interesting details had to be omitted. Through sheer lack of time, I have had to content myself with mere references to the passages in which these details can be found. This is noticeably the case in the chapters on theft and

¹ A careful analysis of Baba Kamma 2³, 3³, "and 4" was contemplated; as well as a discussion of the subject "insurance".
See foot note page 144.

on joint ownership and in the paragraphs on slavery and on the position of women.

3. It may be that, owing to the haste with which this copy has been prepared, some of the references are inexact. Should the occasion present itself, to make another copy, I shall correct such errors as I may be able to detect.
4. My original intention was to have the tables entirely in English. But, here again, the extreme need of being concise caused me to deviate from my plan. In the tables, as a rule, I have used the shortest expressions available; quoting the Hebrew of the text, or introducing English phraseology, according to the demands of brevity.
5. Finally, in point of literary style, I find much to be desired.

"What I strove to be but was not comfortable me", is my feeling, as I submit this paper to the respected President and Faculty of the College.

Abraham Brouback

May 7, 1906.

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Introduction.

I

Moral goodness is sympathy¹.

It is with this implication that the word "ethical" is to be used in the discussion upon which we are about to enter.

Sympathy, "mitleid", suffering along with! What is sympathy? In terms of Psychology, sympathy is that type of imagination by which one person becomes aware of what other persons feel.² Sympathy is self-transcendence. It is the condition of mind whereby the individual tends to become so enlarged as to include within his own being, the beings of creatures not himself.

Now this fact of sympathy is that which

1.

This doctrine is exhaustively set forth by Schopenhauer in "Grundlage der Moral" Leipzig 1871. It has also the support of Herbert Spencer. "Social Statics" Chap. V par. 5. Principles of Psychology Vol. II Part III Ch. V. "Data of Ethics" etc.

2.

This phenomenon is extensively and beautifully described by Adam Smith in "The Theory of Moral Sentiments" Part I Section I.

primarily underlies^{e.} all of those phenomena more or less vaguely designated by the term "moral" Justice and mercy, equity and benevolence - whatever is lauded as ethically good will be found to be ultimately but an expression of this trait. Whether a given act be painful or pleasant matters little. That act is morally excellent if only "sympathy" has been its impulse. "Jew or Gentile", "Greek or Barbarian", learned or unlearned, strong or weak, - it is only when their souls are large enough to take in other souls, that men are, in a moral sense, good. Men are virtuous to the extent that the boundary line between self and not-self moves outward and tends to disappear. Men are holy, in so far, as they become swallowed up in the Infinite.

II

Let us picture to ourselves now, a society in which every individual is perfectly moral i.e. perfectly sympathetic. What do we find? - we have a state of affairs in which any man can say to his neighbor "Thy will is my will and my will is thy will". No one cherishes

a wish that contradicts, in any way, the wishes of anyone else. Love and friendship, as we find them to-day in the world about us, amply illustrate what would then universally obtain. "I wish you all that you wish for yourself" is, among us Jews, a familiar holiday greeting - a great religious occasion calling forth temporarily those sympathies that would, under ideal conditions, be permanent.

The point to be noted here is, that where things are morally ideal, there exists no conflict of wills. In the "Kingdom of Heaven" upon earth, I heartily wish my neighbor the fullness of joy for which his own nature craves. And he, in turn, desires nothing that would stand in the way of my complete gratification. I desire food; his desire is equally great that I shall have food. He desires shelter; my wish is equally strong that he shall have shelter. He is in pain; I exert myself for the relief of that pain as though that pain were my own.

~~Let~~ ^{we} ~~can~~ now see wherein essentially lies the
 imperfection of a society that is not ideal. Between
 the ideal society and the unideal society, the
 difference seems to be this: In the ideal society
 there exists a universal harmony of wills: in
~~the~~ a society tainted with moral imperfections,
 there frequently arises a conflict of wills. The
 drunkard in the slums wills to enjoy the
 luxurious home and the wholesome food of
 the millionaire in the mansion. The millionaire,
 however, wills the opposite of this and accordingly
 persists in keeping the drunkard away from
 that home and that food. A tenant wills to
 occupy a house without paying rent; but the
 landlord wills the antithesis of what the tenant
 wills, the consequence being that the tenant
 is in danger of ejection. One of two rival candidates
 wills to hold an office - only to have his will
 antagonised by the other candidate who himself
 wills to occupy that office. Jacob wants one thing
 to occur; and Laban wants the very opposite to
 occur; the story is too familiar to need repetition.

All the murders and thefts and oppressions and aggressions in human history might be cited to illustrate this conflict of wills.

4.

As a result, it is hard to unravel, the tangle in which human life has become involved. On the one hand, there is sympathy, the quality that makes for concord of wills. On the other hand, there is lack of sympathy - let us call it "narrowness" - the quality that makes for discord of wills. Alongside of one another have sympathy and narrowness existed from the very dawn of sentient life on earth. Sympathy has been the moralizing force. Narrowness has been the demoralizing force. Sympathy has been the righteousness whose work is peace. Narrowness has been the unrighteousness which knows not peace but which, like the troubled sea, casts up mire and slime.

5.

Now, it is through the interplay of these

opposing forces that there arises, among other things," the phenomenon we are preparing to study. This phenomenon is property right. Property right, the theme of Krishnak Babu Kamma, Babu Mezi'a and Babu Patra, is a subject that can be understood only in the light of the psychological facts just contemplated. Sympathy and lack of sympathy, harmony of wills and conflict of wills are the stuff whereof property right is made.

To show how this is, we must analyse the concept of property right, first putting the question: "What is meant by 'property'?" What is property or ownership or possession?

The answer to this question that is best able to stand scrutiny appears to be somewhat thus:

A person's possession is a thing¹ in connection with which that person's will is the

¹ "Such as" the right to live, "the right to be free" etc.

² See Appendix I.

only human will that is operative.

"I own this coat." The statement means that when I will to put on the coat, I put it on. When I will that my friend shall wear it, on my friend's back it goes; provided, of course, my friend accept the gift. When I will to burn that coat, I apply the fire or have the fire applied. If I will that the coat be ripped to pieces, it is only the absence of appliances for ripping that can ^{keep} ~~prevent~~ my will from being carried out. As far as the coat itself is concerned, no human being can stay my hand.

1. The friend that will not accept the coat, the cutter that refuses to sell me the shears, ^{and} ~~the~~ the tailor that refuses to be employed by me are modifying circumstances, in this connection, that can serve to illustrate the point brought out in ^{division} ~~paragraph~~ 12.

Be it also observed, my neighbor may desire very much to wear that coat; but his desire is inoperative until he can make my desire harmonize with his desire. This harmonization takes place when I sell him the coat or give him the coat. The moment he makes his will prevail in antagonism to my will - as in foreclosure or theft - he is said to deprive me of that coat. I cease to be the owner. The prerogative passes from me to him. This is what Edward Carpenter has in mind when he says of "legal ownership" that it "is essentially negative; it is the power to prevent other people from using" ¹.

It must also be noted that the wills excluded from operation, in case of ownership are necessarily human wills. To illustrate: Suppose a man owns a crop of wheat. He consumes or sells or squanders that wheat

¹ "In" *England's Ideal and Other Papers on Social Subjects* London 1887. page 117.

according to his wishes and according to the wishes of no other man. However, immunity against the domination of a will higher than that of man, this ownership does not imply. When the will of man is arrayed against "the will of God", the latter inevitably prevails. Without consulting the owner of the wheat worm or flood or tempest may damage or destroy. Hence, our need of the word "human" when we define "ownership".

To own a thing, therefore, is to be the only human being whose will is operative with reference to that thing. It is to be so situated that all other human wills - in so far as they are other i.e. contradictory - are, in connection with that thing unrealizable.

Thus it becomes almost self evident how property implies a social order that is imperfect morally. To have property, there must be a conflict of wills. There

must be somewhere, on the part of the individual, a lack of sympathy for his fellows. Given conditions under which there are no moral deficiencies and the sine qua non of property is not at hand. To our ideal society; property is a thing unknown. In those blessed realms, the wishes of each man are, at the same time, the wishes of everyone else. By using an object to his own heart's content, each person uses that object to the content of everybody else's heart. All human wills are mutually inclusive and none are mutually exclusive. Property is therefore out of the question.

8.

And so it happens that for property right, we must have a mixture of the morally good and the morally evil. The phrase itself conveys this duality. Almost paradox-

"William Morris' "nowhere" would serve here as illustration.

trally "right" expresses goodness, sympathy, harmony of wills; while "property" presupposes evil, lack of sympathy, conflict of wills. Property right, accordingly, requires a society in which the two elements are combined. In an ideal society, as we have seen, the factor "property" would be lacking. In a perfectly immoral order, on the other hand, the factor "right" would not exist. The might of the *Libermensch* would hold sway¹. The Haid with his 750 7501 750 150 and the Rasha^c with his 150 7501 150 150², both typify, respectively, social orders in which property rights would have to be sought in vain.

¹ To what extent there may ever have existed a society devoid of right is a question for Anthropology to decide. Reliable information seems to favor the view that already in the most primitive communities some form of property right existed. (Spencer)

² Abot II-10

Now there can be, within a community, this combination of the good and the evil, we can understand by an inspection of our own moral feelings. Looking out upon the world in which we live, we behold the spectacle of men arrayed against their brethren. We see human wills in conflict. And in all conflicts, we observe, one will necessarily dominates and other wills are necessarily overridden. Almost in the language of Physics, we might say "Two wills can not occupy the same place at the same time".

What, then, are we going to do about it? In behalf of the defeated wills and the broken hearts, what shall we undertake? Reform humanity? To be sure - if we can! Work for the diffusion of righteousness? In Heaven's name - yes!

Nevertheless, we must face the fact, that however much we may strive for that goal, our ideal society is still in the distance afar off. The Messiah still delays

to come. The perfection of human nature is not yet being reached. Conflict of wills is still inevitable and correspondingly inevitable is the domination of one antagonist over the others.

Yet in the face of all this, we can still hear what morality i.e. sympathy has to urge. "Is the domination of one will really inevitable?" she asks. "Well then - let it be determined by me which will shall dominate. Which of the conflicting wills is to have preference, let not greed but mercy decide. Determine what adjustment of the conflict involves most good and least bad." Thus does morality make itself heard in the midst of the stress and the strife.

A homely example will illustrate the working of this sentiment. Suppose we are acquainted with a carpenter - call him John. Actuated by humane sentiments, we are interested in John. We are interested in John not only because of John himself but also because of the

benefits he is able to confer upon other human beings that interest us.

But notice! If John is to confer these benefits, it is necessary that he be an owner. There must be some things that are strictly his. In a thousand instances, John's will must dominate over conflicting wills.

John must have food and have it all to himself. Otherwise he would lose the life and the strength wherewith to benefit mankind. If he lives in constant peril of having that food snatched from his mouth by others who also want that food, John's good work can not be carried on.

Moreover, John must own a place of shelter. Somewhere in the world, there must be a spot from which all other men are excluded. Otherwise, John would perish from fatigue and exposure and with him would perish all of his capabilities.

Furthermore John must own clothing. The interests of mankind require that no one should strip John naked lest he sicken and die.

The example is, of course, a crude one and ignores many points that are to be taken into account later. We must let it serve however to show how some property can be right. We must let it help us understand how there may be, over a situation that is imperfectly moral a control that is moral and how by the words "property right" precisely this control is implied.

II.

Having thus seen how property is sometimes right, we next proceed to ask: "When is property right and when, failing to be right, is the ownership of things wrong?" Here again our first appeal must be to our own "moral sense". What do we ourselves feel to be right must be the

primary consideration. Anthropology and history will avail us here but little. For what Romans or Arabs or Goths may have said about property will not answer the question: "What kind of ownership is really moral"? Our initial task must be that of introspection. In fact the studies of Anthropology and History can have for us a meaning only after we have brought to clear utterance the vague notions on this point flitting about in our own minds¹.

12.

Let us venture then, ^{with certain qualifications,} to lay down a maxim - a maxim that will serve as a fairly clear statement of our own deep feelings on this subject. The maxim is as follows:

¹ Emerson says in his essay "History": "Civil history, natural history, the history of art and the history of literature - all must be explained from individual history or must remain words"

It is right that every man
own the things that he creates¹:

At the outset, we notice that one important qualification is inherent in the statement itself. This we shall understand if we recall our definition of what it is to be an owner. To be an owner, we found, is to exercise ones will to the exclusion of all other (i. e. all conflicting) human wills regarding the thing said to be owned. Now it is inter-

¹"We see that creation by his own labor is the most original and indeed valid claim which a man can have to private property in material wealth and taking all in all, - sufficient duly allowed for - the most widely accepted." - Edward Carpenter in "Private Property" p. 123 of "England's Ideals".

"The origin of personal appropriation seems then to have been an industrial effort." - Ches.

Letourneau in "Property" p. 365. Attorney Alfred Bettmann has supplied me with this reference.

esting to reflect that outside of a totally unrighteous society, no human ownership can be complete. For human ownership to be complete must rest not on right but on might. The primitive *libermensch*, if he ever existed, may alone be said to have been ~~the~~ an owner absolute. The club that he owned he wielded without restraint. Upon his deference, the lives and productions of others had no claim. His was the club and as much as was pleasing in his eyes did he do with that club. And in this ownership he continued until there came a bigger "*mensch*" with a bigger club similarly exercising ownership unbounded. To have absolute ownership, force unmitigated by sympathy is the ^{condition indispensable} ~~same for man~~.

The moment that force ceases to dominate and the moment that right comes into question, human ownership must needs be less than complete. To illustrate,

John, let us say, owns a knife and, as we shall see later, rightly owns the knife because he has created it. This means that John may use that knife to the best of his ability, making food or clothes or utensils; or defending himself against beasts and enemies. No other human being may assert with regard to that knife a prerogative that is equally right. But, suppose John wills to use that knife for ~~the~~ cutting into shreds the tent created by Henry. Can John rightly exercise his will to this extent?

Our answer here must be "no" - and this, in accordance with our own maxim. For the maxim recognises also Henry's property right, Henry too having created something. Hence, to allow John to destroy what Henry has made would be a self-contradiction. Over the tent, the domination of Henry's will must be maintained and by reason of this

will domination John's willing with reference to the knife must find curtailment. When, therefore, in our maxim we use the word "own" we mean not the unlimited ownership possible only by means of force but ownership within those limits that must be implied if our maxim is to be self-consistent.

Further limits to the denotation of the word "own" become apparent when we recall the import of the word "right". A right, we have seen, is a dictate of sympathy. But sympathy's first demand is that life be maintained. Consequently, anything that hinders the maintenance of life may not be called right. Indeed, we are going to find that lack of our maxim, the maintenance of life is one of the ethical motives. Property right will be seen to be, in a measure, but a phase of a larger right, namely, man's right to have life.

Ownership that infringes upon the right to live is therefore not right ownership. John, though he has created the knife, may plainly not own the knife so far as to use it to bring about Henry's death; except, of course, the killing be defensive and thus more conducive to life than destructive of life.

Moreover, by the right to live, ownership to be right, must also be restricted in its negative aspect. This negative aspect, it will be recalled, is the "power to prevent others from using." But preventing others from using is obviously not right when death or great suffering would result. Parents, for instance, have no right to withhold the nutriment needed by infant children. Strictly speaking, the rightful owner, in this case, is not the parent who has created the food but the child who must have the food in order to live. So, in all cases of hunger or of pain, no one except the sufferer

has a right to the morsel that will prevent starvation or to the medicine that will ease ^{dystress} ~~pain~~. If Jean Valjean was really starving the bread that he took was rightfully the property of Jean Valjean, not the property of the baker by whom the loaf was made.

13.

Understanding then, with what qualifications the word "own" ¹ is to be employed, let us reiterate our maxim.

It is right that every man own ~~that the~~ ^{which} things that he has created. ²

We must now attempt to show two things:

- 1.) How this maxim emanates from the breadth of sympathy that we have identified with moral goodness.
- 2.) How this maxim is applicable to

¹ Correspondingly the words "ownership" and "property"

² It is of interest that the Hebrew word ^{731P} means both "creator" and "possessor".

ownership by purchase, gift, inheritance etc. which are the most familiar types of ownership and the treatment of which by the Vishnu is afterward to be examined.

14.

A man shall own the things of which he is the creator.

The stuff that a man has fashioned from ~~the~~^{the} bough of the primal forest shall be his property. The land that he has redeemed from the non-human forces of nature; the land that he has cleared of forest; the land that he has freed of weeds and worms; the land that he has shielded with fences against the ravages of wild beasts; the land that he has plowed and sown and made fruitful - that land, we hold, a man shall own^{*}

^{*} See appendix II.

Now this is a dictate of sympathy need not be hard to understand.

a.

In the first place, the actual inconvenience or pain experienced in the act of creation¹ calls forth sympathetic regard. For creation means exertion and exertion means distress²; and regarding distress sympathy ever urges "prevent! relieve! at least-solace!"

But how shall we solace when unable to prevent or relieve? Solace by providing some compensation for the pain. Indeed, the demand that compensation be afforded him who suffers is, ^{a sentiment} strongly characteristic of human nature. What but an expression of that sentiment is the belief in a Heaven beyond the grave? What but an assertion of this feeling

¹) The quantity of labor required to make things is described by Hull as "all the feelings of a disagreeable kind, all the bodily inconvenience and mental annoyance connected with the employment of ones thoughts or muscles or both in a particular occupation". ²) Is there any connection of ideas between the Hebrew words עָמַל and אֵינָם ?

is the promise that after the visitation is past, waters of joy shall here or hereafter be drawn from the wells of salvation? ¹ With profound insight does Carlyle speak of the "worship of sorrow" ². Sorrow worship is as natural as the shower that follows the heat of a summer's day. Before the crucifix, we all, in some way or other, lie prostrate. If the agonies of Jesus furnish the theme of Christian worship; the vicissitudes of our martyr fathers are and always have been the undertone of worship amongst us Jews. It is a craving no more than human that suffering should have its recognition and compensation. ~~Thus~~ ^{Hence} inevitably does sympathy insist that the joy of ownership shall

¹ "Progress and Poverty", Henry George's great plea for rightful ownership ends with a disquisition upon the immortality of the soul.

² "Sartor Resartus", Bk. II, Chap. IX.

be the solacing reward of him who has had the sorrows of creation.

b.

That the title to ownership be creation is in the second place required by the interests of peace. Says sympathy: "In terra pax!" Peace only can bring life and health and joy and plenty. Peace only can foster ~~the~~ harmony of human wills.¹ Strife means destruction, poverty, anguish, death. Strife, itself the outbreak of will conflict, must needs perpetuate the fatal discord.² Therefore, says the moral law within us, "Let there be peace".

But peace is impossible if the creator's ownership be disputed. For, the only one besides the creator that can conceivably

¹ v. p. 12.

² This psychological truth is abundantly illustrated in Herbert Spencer's "Principles of Ethics".

be the owner is he who, by force or cunning overrides the creator's will; legitimate purchase, bequest and donation being, as we shall learn, but aspects of ownership by creation. To abolish the creator's will-dominance, therefore, force or cunning must come into play. But force and cunning are the antitheses of peace. Assert the rightfulness of force or cunning and you assert in the same breath, the rightfulness of meeting force with force and of answering cunning with cunning. Unending warfare would thus be sanctioned and the self-contradiction of calling strife morally desirable would be the import of the statement. Sympathy accordingly, in demanding peace, demands that creator and owner be one*.

* See appendix III.

Finally, ownership by creation is called for by the general material interests of our fellow-men. If men are to live and thrive, crops must be planted and harvested, houses must be built, and garments must be sewed. Effort must be expended in the creation of a thousand necessary things. Sympathy accordingly urges that such an important function as creating be duly made possible and encouraged. But, without access to food, clothing and shelter and without exemption from disturbance, men could plainly not work at all. Moreover, the highest excellence in workmanship is impossible unless the worker is stimulated by the hope that, as a result of his toil, somewhere in the midst of life's struggle, his will is to be dominant.

This will domination, be it again recalled, does not mean that others shall forever

be debarred from the benefits that the worker calls into being. Quite to the contrary, as we shall see, the very assertion of that ownership by acts of selling bequeathing and donating, makes others rightful participants in those benefits. If only the creation of things be furthered, the advantages will ultimately fall to an ever-widening circle of men*. Hence it is the dictate of sympathy that what a man creates shall be his own.

15.

Having ~~now~~ seen how our maxim is a correct statement of the moral law, we must proceed to answer a question already anticipated a number of times: "How does this maxim provide for ownership by purchase, inheritance, donation etc? A

* The thought of this paragraph could be illustrated by the case of "John, the Carpenter" in section 10 pp. 13-15.

man indisputably has a right to own that which he has bought or that which he has received as a present; (provided, of course, the seller or donor is himself the rightful owner). Evidently, in many cases, it is right to own objects that one has not created. Would it not seem then that there are instances of property right that our maxim fails to cover?

Indeed so it seems but only seems. The truth is that the rights of purchase, donation inheritance etc. are but corollaries of this maxim. For the right to own, involves, among other things, also the right to transfer ownership. A creates a house. As a consequence A rightfully owns that house. According to his will, therefore, A occupies or neglects or destroys that house. But A may also will regarding that house, that, after a certain moment, X shall be the owner. A's ownership

up to that moment thus involves X's ownership after that moment. ~~The~~ The very realization of A's will consists in the transfer of that ownership from himself to X; and unless X really own the house after the specified moment, A's ownership is infringed upon.

But X, in order really to own that house, must have the privilege of transferring, at his will, the ownership to Y. Y's ownership, in turn, involves the right to transfer the ownership to Z; and so on ad infinitum. In this way, the long and intricate series of transfers through which an object may rightly pass are but the realized will of the original owner.

16.

From our maxim, then, we may derive the following corollaries:

1.

Right is all ownership that is the will-expression of the previous rightful

owner.

Involved in this corollary, are the following sub-corollaries:

a.

Right is the ownership of objects that are the gift of the previous rightful owner. Ownership by donation and ownership by bequest are species under this genus, ownership by gift.

b.

Right is the ownership acquired by fulfilling conditions of exchange satisfactory to the previous rightful owner. Ownership by purchase and ownership by barter are the species of ownership by exchange. How and when loans, rent and wages involve ownership by exchange will be considered later.*

* v. Chaps. VII, VIII, IX.

2.

The rightfulness of a given ownership involves the wrongfulness of infringing upon that ownership. For, where the domination of a man's will with reference to an object is the dictate of sympathy, then necessarily is the suspension or abrogation of that will domination forbidden by sympathy.

Such wrongful suspension or abrogation of the rightful owner's privileges is what is meant by "infringement on property rights".

Species of infringement on property rights are theft and vandalism. To say that theft is wrong plainly presupposes that the domination of a will other than the thief's is right.

To the corollary that infringement on property right is wrong, the following is a sub-corollary:

All measures really effective for preventing this infringement are right

These measures are, (a.) moral education and (b) according to prevailing view, legislative coercion.

17.

Thus have we perceived the import of the maxim, "It is right that a man shall own that which he has created". In this maxim, we have found a rule that sympathy enjoins, should be followed because society is morally imperfect. Also in this maxim have we discerned a principle which can be applied to all the phases of ownership that come to our attention.

But even more than this is to be gained from the maxim. The maxim, reached as it is, independently of historical considerations, will serve in studies of history, as a guide. With the maxim as a criterion, the moral calibre of the various property laws can be fairly gaged. Roman law, English law, French law, American law - to show the

ethical tenor of their respective clauses on property right, we need only inquire whether those clauses can have our maxim as their basis. It need only be determined whether the several provisions can be deduced from our maxim as special applications of an all-pervading principle. Do the property laws of any given code harmonize with the doctrine of the maxim - then are those laws in keeping with the moral imperative. Do they conflict with the doctrine - then are they in opposition to the moral imperative. Interesting and perhaps startling would be the results obtained by testing the various law systems according to this standard.*

18

In the following pages, we shall ^{subject} ~~select~~ for such testing one of the numerous law

* The bearing of the maxim on modern economic issues is suggested on pages 152, 153, 183, 184.

systems that history has evolved. Of this law system, however, we shall study not the entire but merely a fragment. For obvious reasons, we shall limit ourselves, as rigidly as possible to the legislation of Baba Kamma, Baba Mezi'a and Baba Batra, the first three Tractates of Mishnah Nazikin.

This study will enable us to do two things; first, to illustrate more fully than we have already done, the application of our maxim to property rights in their various details; and secondly, to judge the moral status of the Mishnah itself.

Of course, nowhere in the three Babot, is it said explicitly that a man shall own what he creates. A clear admission of our maxim we should seek in vain. But we may attempt to find an admission of the maxim implied. We may undertake to show that the several Mishnaic statements fit into the maxim; that in the maxim, so to speak, the diversities of the

hushna have their moral unity.

In so doing, we shall lay bare certain reaches of their own thought that the makers of the hushna did not, could not, and perhaps, would not realize. The bundle of feelings at work, unknown to them, in the dim recesses of their souls, we, as students of Psychology shall try to detect. To what extent those feelings were sympathetic and to what extent they were not sympathetic; to what extent they were such as we can call righteous and to what extent they were such as we can not call righteous; to what extent they accord with high moral conceptions and to what extent they indicate a defective moral view - this is ~~the inquiry~~ ultimately the question to which the following pages are devoted.

List of Abbreviations.

K	=	Baba Kamma
M	=	Baba Mezi ^a
B	=	Baba Batra.
Bert.	=	Bertinoro.
Hoff.	=	Hoffmann.

Chapter II.

Limits of Property Right
Imposed by the hushnah.

In pursuing the investigation designated at the close of the introduction, our attention is first of all arrested by a number of provisions imposing upon the extent of ownership, various limits. As we have seen¹, if ownership is to be right, life and health must not thereby be antagonised. An owner's will domination must be restricted by regard for the right that other men have to live and to escape pain.

Now it is to be noticed that there exist in the three Babot statements that may justly be said to have this thought underlying them.

Thus, it is unlawful for the owner of an object so to place the object in a public thoroughfare (עצמו במקום) as to occasion the injury of pedestrians. For a misdemeanour of this kind, payment of damages is the penalty (כסף). A

¹ Introd. p. 20

similar penalty awaits the owner of thorns, glass, straw or stubble who, by storing these objects in a public thoroughfare, causes the injury of those that pass by (K 3^{2,3}). Indeed, according to R. Simeon b. Gamliel,

כל המקלען ברשות הרבים וחזיקו חבין לשלם; וכל הקודם
בין זכה.

with similar intent is the law forbidding a person to delay in removing from a public thoroughfare, working materials that he may be using. When manuring or building, a man must hasten the work by taking an assistant so that,

ה מוציא מוציא והמזבל מזבל

ה מביא אבנים מביא והבונה בונה (M 10⁵)

Even under this precaution, damages must be paid for injuries caused by the presence of building material in the street (M 10⁵).^{*} Brick baking

^{*} R. Simeon b. Gamliel would allow exemption from this liability during a period of thirty days, while preparations ^{for building} are being made.

and the mortar stirring preparatory to brick baking may not take place in a public thoroughfare at all.¹

But, in a yet broader sense must the safety of others be considered in the assertion of ownership; the right to health being among the rights that the Mishnah seeks to safeguard. Accordingly, it is unlawful for a man to erect a threshing mill (גורן)² or a tannery³ within a radius of fifty cubits from anybody else's residence (B2^{4,9}): while a tannery in the vicinity of a town is permitted to stand only to the East of where the town is situated⁴. Within a radius of fifty cubits from a town^{moreover,} it is not allowed that graves or carcass heaps be placed.

A person's will domination is further limited in the actual handling of that which he owns. To

1. Because the process is a slow and lengthy one - Rashi.

2. Bert. מכניז המין טמאין את בני אדם

3. Bert. מטמא ריח נע

4. Owing to the direction of the wind - Bert.

split wood even on ones own premises in a manner dangerous to other people is unlawful (K3⁷). For the same reason, it is unlawful to leave open a pit even though one has dug the pit on ones own premises (K3⁵).

In this connection, also belongs the law adopted by the mishnah from Ex 21²⁶

וְהָיָה שֶׁסִּמְאַח אֶת פֶּן יַבְיָ וְהָיָל אֶת שְׁנֵי חַיִּיב (K3¹⁰)
the penalty being the liberation of the slave¹: Even in this singular instance, ownership is distinctly limited by regard for human life and limb

A further limit to ownership is that involved in the obligation to be watchful over ones belongings lest physical injuries to others result. Thus it is subject to penalty for the owner of a vessel, through carelessness so to break the vessel in a public thoroughfare as to occasion injury to pedestrians, the penalty here being payment of

¹ That personal injury to persons is here meant is shown by the statement preceding

2. v. p. 163.

damages ($\text{K}3^1$). Of similar nature is the clause declaring it unlawful for the owner of a wall so to neglect the wall as to allow it to fall over into a public thoroughfare; the penalty likewise being damage payment for the injuries occasioned ($\text{K}3^2$).

Also assertive of limits to ownership are the laws enjoining watchfulness over dangerous animals. A dog must be kept chained ($\text{K}7^1$)²; while, for injuries effected by an ox, upon human persons, the owner of the ox must

¹ To this statement R. Judah remarks:

במקום חייב באינו מתכוין פסוק. According to the interpretation of some (as Bert.) the remarks would serve to emphasize the above word "owner". According to others (Hoff. note 8 to $\text{K}3$), the remarks call for the substitution of the word "intentionally" (opposed to "accidentally") for the expression "through carelessness". In any event, we have here a limit to ownership dictated by regard for human life and limb.

2.

Bert.

אפי' שישנו ומנהג ומסלול אשה מיראתו

answer. A payment of 7515 (E21³⁰) under certain circumstances (K4⁵⁵³) and also, under certain circumstances, the killing of the ox are the penalties imposed (K4⁵⁶⁷⁵³). An ox known to be dangerous (7515) must, according to R. Eliezer be slaughtered; although R. Judah thinks that chain and lock are sufficient (K4⁹)¹.

A final instance of the thought that the prime right is the right to live appears among the regulations set forth in B8⁴, 9¹². Here we learn that it would be unlawful for a man's heirs to withhold from his unmarried daughters that which the girls need by way of sustenance.²

הבנות מצותן מן הכסף והאבן it says (B8⁴), although by the laws of intestate inheritance בן קורין 25 (B8²). Admon's complaint (B9¹)

¹. That this Mishnah may be taken as a provision not only for safeguarding property but also for safeguarding life and limb, is evidenced by its proximity to K4⁵⁶⁷ that have the protection of life as their explicit object.

². v. p. 21, 22.

is but a further assertion that human life is a right by which ownership must be limited.

From these passages we have been enabled to see in how far the Mishnah complies with our maxim by imposing upon ownership certain limits - limits required by the rights of man to live and to escape pain. The other limits inherent in our maxim¹ v3. the limits involved in the corresponding property rights of others are to be discussed later under the caption "Damages to Property"².

In the next chapter, we shall observe, how according to the Mishnah property may be acquired and whether these modes of acquisition are altogether such as harmonize with the principle: A man shall own that which he creates.

1. v. pp. 18-20.

2. Chapter V.

Chapter III

Gifts.

It has already been intimated that certain modes of acquiring what one has not created comport with the maxim: A man shall own what he creates. And we have seen that among the ways in which the owner's will (and especially the will of him who made the thing) may be asserted, is that of willing the transfer of the ownership to someone else; the several ways of willing transfer of ownership having been classed as "gifts" and "exchange".¹ In contrast with gifts and exchange stand the modes of transfer that conflict with our maxim. These modes are known as the misdemeanors of ~~theft~~ ~~and~~ overreaching and theft; the immorality of overreaching and theft consisting in the fact that they are infringements directly or indirectly upon the right of a person to own that which he has made.

¹ v. pp. 30-32.

It is therefore relevant to our present study of the Mishnah to inquire: "What are the modes of transfer that the Mishnah endorses and what are the modes that it condemns?"

One of the modes of transfer that the Mishnah endorses is that of gifts. In using the word "gifts", it will be convenient to employ it as a general term including what the Mishnah calls *מתנה* "donations",

קבלה "bequests" and *קניין* "finds"; the characteristic common to all three being that the owner transfers his property to another without obtaining in return an equivalent amount of other property.

1.

Donations.

That the rightful owner of a thing may rightly will the transfer of the thing by way of donation is expressed in a number of passages. Thus, in enumerating the cases in

which tenure (חזקה) constitutes an evidence of acquisition, it is stated that a claim on the grounds of tenure receives validity if accompanied by the contention

(B33) שנתת לי בחתונה או אבך נתן לי בחתונה

Of similar import is the provision allowing a creditor to yield to the debtor a part of the sum due (K96) or the provision allowing a seller of wine to deliver to the buyer a better quality of wine than was bargained for (M4")

Even though anomalous conditions result, ownership acquired by donation is recognized as valid. For instance, ~~although~~ it is ordained that the eldest son receive two parts ^{of the} inheritance (B84); yet when it comes to donating, any dispensation made by a man is binding.

המחלק נכסו לבניו על פיו, רבה לאחר ומעט לאחר
השוה להן את הבכור דבריו קימין' כתב בין בעה"ל
בין באמצע בין בסוף משום חתנה דברין קימין. (B84)

"בלשון חתנה (Bert)

Similarly

(B8⁵) דכורב אה נכסו לאקררים והניח את בנו אתה שעתה עטוי

- an act which, though disapproved of by the Rabbi is regarded by R. Simon b. Samuel as highly commendable when the sons are not deserving (B8⁵). There is, in fact, recorded an instance in which sons were so undeserving that their mother on her death bed, circumvented the laws of inheritance by donating (with the approval of the Rabbi) a valuable garment to her daughter (B9^r)

Further, if we agree that the essential thing about donation is the will of the donor, we ~~will~~ ^{shall} recognize in many passages, ~~measures~~ ^{measures} for determining that will. In the first place, the Mishnah provides various symbols of ~~the~~ ~~will to donation~~ will to donation. For real estate, an act symbolic of donation consists in allowing the intended recipient to erect a door or a fence or to make a breach in a fence (B3³). Another mode of expressing donation is the written

document *ד"ח'ק'י כחנה* (K17) or *ש"ס* (B97): and also, in the case of a person lying at the point of death, the spoken word (B8:96,7)¹.

In addition to providing these formal expressions of the donor's will, the *hushuah* also takes into consideration the subtler aspects of the donor's mental state for which formal expression can not be provided. Thus, if one sends to a bridegroom on his wedding day² wine and oil

¹ This is the opinion of R. Joshua. The other sages regard the spoken word as valid not every day but only on the Sabbath when it is forbidden to write. However, the cogency of the *המחלוקת* by R. Joshua in B97, like that of R. Tarphon in K25 is hard to perceive.

² So according to Maimonides. According to Roshbam and Rabed, any handing over of wine and oil is regarded as a donation. (Hoff. note 31 to B9).

(B94), the presumption is that there are not objects of sale or barter but objects of donation.

That is

אין נגבין בבית דין שהין גמילות חסדים

Again, the objects sent by a man to his betrothed are presumed to be donations, provided the alleged donor partakes of a meal in the house of his betrothed¹ or provided the objects be *be'atzumot* "small articles". In the case of *be'atzumot* "large articles", it is presumed that the fiance intends them, so to speak, as loans which are to be returned, when his betrothed becomes part of his own household, *שיחזרו עמה לבית בעלה* (B95). The formal act of donating a field or a vineyard is presumed to include the transfer of everything connected with the field or vineyard; this being in contrast with the formal act of sale in which various accessories such as staves, stones, watchers

¹. (BerX.) דחקת חבת שמחת אכילה נחל

lodge, cisterns, vats, dove-cotes, Carube and Sycamore trunks, produce already plucked etc. do not enter into the transfer (B 49). The reason given by the Gemara is

(B 71a)

מֵאֵן דִּיקֵיב מִיֵּנָה בְּעֵין יִפֵּק יִהְיֶה

i. e. a friendly sentiment is presumed back of the mere formality of donating.

A final instance, in this connection, we find in B 96. Here it is stated that a person dangerously ill (שֶׁכִּיב מֵרֹצ) sometimes donates his property, donates it however on condition that his illness terminate fatally. It follows that the recovery of the sick man invalidates the transfer. Now to determine whether, in any given case, this condition was willed by the alleged donor, the Mishnah imposes a shrewd test. It says

שִׁיר קִרְקַע כֹּל שֶׁהוּא מִתְּנָתוֹ קִימָה. לֹא שִׁיר קִרְקַע כֹּל

שֶׁהוּא אֵין מִתְּנָתוֹ קִימָה.

The retention by the owner of something for himself shows an unconditional donation.

since it indicates the hope of recovery.¹ On the other hand, failure to retain something shows a donation conditioned by death of which the donor is apprehensive.

Thus donation, in so far as it is property transfer willed by the rightful owner, is endorsed by the Mishnah.²

¹. Hoff. note 44 to B9.

². The thought is here suggested that, according to the Biblical and Rabbinic conception the original title of the Jews to Palestine rests on donation, God being the donor. (הארץ אשר יהוה אלהינו נתן לנו) nowhere, as far as I have heard, is the conquest of the country by Moses and Joshua held to constitute the right of ownership.

God's right to donate the land is that of having created it. (Gen. Rab. and Rashi to Gen I').

2.

Inheritance.

The peculiarity of transfer by inheritance is that the transfer takes place, not like donation during the life of the giver¹ but after the decease of the giver (B 87). This is brought out in B 9^{6, 9, 10} where, in cases of catastrophe causing the death of father and son (B 9⁸), husband and wife (B 9⁹), mother and son (B 9¹⁰), the problem of inheritance is always to determine who died first, this person being the bequeather.

When the deceased is a man, the order of precedence in matters of legacy is:

1. Sons (K 7^{2, 4} B 8^{1, 2, 4, 6, 9}), of whom the first born receives two parts $\frac{2}{3}$ (B 8^{3, 5})
2. Daughters (B 8^{3, 8})
3. Father (B 8^{1, 2, 4, 9})

¹ v. Bert. to B 8⁶ and Hoff. note 62 to K 9¹⁰.

When the deceased is a woman, the order of precedence is:

1. Husband (B8'99)
2. Son (B8'149'10)¹
3. Father (B89)

That this arrangement is valid however only when it is the will expression of the ^{father} bequeather is shown by the fact that the husband furnishes ample devices ~~by~~ by which this rule of inheritance can be circumvented. A formula is ~~furnished~~ provided whereby a man may withhold from his first-born the ~~נכסיו~~ (B8⁵)² or may even

"The first born does not receive ~~נכסיו~~ of the mother's property according to B8⁴. Talumud and Tosefta hold that over mother's property daughters and sons have equal prerogatives. Hoff. to B8⁴

² It is merely a matter of using the proper formula to avoid the consequences

disinherit his son entirely (K 9'10)¹. Besides, there is the scheme of donating the property away as the giver pleases, previous to his death - a scheme extensively discussed by the Mishnah as a means by which the inheritance laws can be evaded (B 85:4 p 3, 6, 7)².

Now salient in the matter of inheritance is the will³ of the giver, may further be gleaned from such provisions as those to be found in B 9². The case contemplated is that of a father dying before the expected birth of his child. The Mishnah ordains that the dictates⁴ of the dying father be carried out as minutely as possible and that girl, boy or unborn child (בן או בת) receive, as far as feasible, the sums that the father has respectively allotted.

1.) For ב"ח" ו' ב' מוקד it were best to read with Jerusalemi ב"ח" ו' ב' מוקד (Hoffkote 63 to K 9'). | 2.) see pp. 49, 50.

3.) We use the word "will" to denote a document of bequest!

4.) Says Netz. ad loc:

קצא בשניב מרע שזכה לבנו קנה שדעתו של אדם קרובה אצל בנ

Request, therefore, in so far as it is property transfer willed by the rightful owner, is endorsed by the Mishnah.¹

3.

Finds

A third way of becoming the rightful owner of an object is to find that object after it has been lost and after its previous owner has given up the hope of recovering it. Here again, we have a transfer of property the rightfulness of which depends upon the assent of the owner from whom the transfer takes place. The situation may be conceived somewhat thus: A man loses an object. After a time and under certain circumstances, he ceases to hope that he will ever recover that object. But, in thus giving up his hope, he practically consents that

¹ The contradictions of this principle in K10¹ and B3³ will be considered in Chapter X.

anybody that finds the object shall become its proprietor. Ownership by find, therefore, is right in so far and only in so far as it is the will expression of the previous rightful owner.

To a recognition of these facts, the Mishnah is very much alive. For, in order that a person may rightly own an object that he finds, he must be sure that the object has been "given up" by him who owned it previously. This principle of *נתיב* "giving up", the Mishnah enunciates already before entering upon the subject of funds proper (*נתיב*). In *K10²*, we have the statement, that an ass may be accepted from publicans or a garment from robbers because, under the circumstances, the rightful owners have ceased any longer to claim these things; in Mishnah language, *מכאן שהבעלים מתיאשים בהם*. For similar reasons, a man may appropriate what he fishes up from a river or what he rescues from marauders or robbers; so also with a swarm of bees

Now in keeping with this principle of ye'ush, a finder may appropriate the following objects because they are such as an owner would not expect to recover:

A vessel found on a stone pile (M 2³)

" " " in an old wall¹ "

" " " in the outer half of a wall "

A fledgeling found more than fifty

cubits from the dove-cote (B 2⁴)

That which is found in a public shop (M 2⁴)

That which is found in front of a

money changer's table (M 2⁴)

Coin found in a bunch of fruits². (M 2⁴)

Then there is an entire class of lost

(Ber. x.)

ב'דא' נה'אש'ם קב'על'ם

2. If bought from a public dealer, not, however if bought directly from the cultivator. (Ber. x.)

objects presumed to have been given up. These are objects that have no sign ($\mu 2^5$ סימן) by which the owner can hope to recognize them. For this reason, a finder may, without hesitation appropriate the following:

($\mu 2'$)

פירות מפוזק

מעות מפוזרות

עגולי דביל

כריכות ברשות הרבים

כפירות של נחתום

מחרוזות של דגים

חתיכות של בשר

גזי צמר הבאות (הלוקוח) ממדינתם

אניפי פשגן

לטונות של ארגמן

כלי אנפוריא (According to Simon b. Elazar)

Now essential the Ye'ush is can further be seen from the regulations enjoining the return of objects when it is not probable that the "giving up" has taken place. Thus, upon find-

ing any of the following objects one must advertise (הכריז) the find in order that the owner may be informed:

(M²²)

פירות בכל

"

כלי כמות שקוא

"

מעות בכיס

"

כיס כמות שקוא

"

צבורי פירות

"

צבורי מעות

(M²⁴)

שלשה מטבעות זה על גב זה

(M²²)

כריכות ברשות היחיד

"

ככרות של בעל הבית

"

גזי צמר הקלוקחות מבית האומן

"

כרי יין

"

כרי שמן

(M²⁵)

שאלה

also an open vessel on a dunghill (M²³)

The reason for thus dealing with these objects is, as Bert. says, "יטבין סימן" "they have a sign" by which they can be recognized;

The principle here ^{being} ~~is~~ that given in *M 2³*, where, from a midrashic interpretation of *Deut. 22³*, the Mishnah derives the idea, כל דבר שיש בו סימנים ויש לו תובעים חייב להכריז (*M 2⁵ cf. M 4⁷*).

The Mishnah further declares that proclamation must be made until the find is well advertised (*M 2⁶*) and that the finder must not yield the object until he is reasonably sure that the claimant is the rightful owner (*M 2⁷*).

In the case of a stray ass or a stray cow, the returning of the animal to its owner is a pious obligation¹. (*K 5⁷ 9⁷ M 2^{9,10} 4⁹ B 6⁷*) so important that, in order to discharge it a man may disobey his parents (*M 2¹⁰*). Still, the Mishnah is careful to define what is meant by "stray" (*אבדן*) (*M 2^{9,10}*) and to exempt from the obligation the priest, if in fulfilling it, he become

¹ Announced by *Deut 22³*.

defiled (M 2'0).

The Ye'ush, as we have seen, implies the transfer of the lost object from the loser to the finder. To determine, however, who the finder actually is, may, in many cases be a problem. Sometimes two or more persons claim to have found the object. In such exigencies, what is to be done in order to maintain the principle that the finder shall become the owner?

For some instances, the Mishnah provides that the value of the object found be, after certain legal procedure divided between the two claimants. This is brought out with reference to a garment (M 1'); a beast of burden (M 1²) and a fledgeling (B 2⁶). In other cases, he who seizes the object (הַחֹזֵק הַקֵּדָּם (M 4⁴) or he who is first to pronounce the formula אֲנִי זָכֵיתִי בָּהּ (M 1³) is the finder. In yet

other instances, the "finder" is determined by the place in which the lost object is discovered. Accordingly:

a.

The owner of a field has a right to a lost deer or fowl that he sees in his field; provided the deer be so maimed or the fowl so weak that it can easily be caught. (M¹⁹)

b.

The owner of premises has a right to whatever is found in the inner half of the surrounding wall (מחציתו של חומה) (M²³)

c.

A tenant has a right to whatever he finds inside of the premises rented by him (M²³)¹.

d.

A merchant has a right to whatever he finds behind his counter (בין קריבך לחדריך) (M²⁴).

1.

Perf. מחצית חומה

e.

A money lender has a right to whatever is found behind his stool
(מִן הַכֵּסֶף אֲחֵרֵי שֶׁנֶּחֱמָה) (M 24)

f.

The owner of a dove-cote has a right to the fledgelings found within fifty cubits of his cote (B 26)¹.

Back of all this is the principle that the finder shall be the owner. And this, in turn, means that there shall be fulfilled the previous owner's will involved in his "giving up" the object.

¹ There exists a probability that the merchant, the money-lender and the dove-cote proprietor are the respective owners of the lost objects; the position of the objects being their p'ro. Perhaps a better place for the above statements d, e, and f would have been among the illustrations on page 62.

Thus acquisition by finding, in so far and only
in so far as it is property transfer willed by the
rightful owner has the endorsement of the hukmah.

we now proceed to examine what the Mishnah has to say upon the subject of exchange.

In exchange, be it sale or barter, we have two owners each of whom wills the transfer of his property to the other provided a certain amount of property be received in compensation. Property acquisition by exchange is therefore right as long as the requisite compensation is yielded. Property acquisition by exchange is an infringement upon right as long as the requisite compensation is withheld. Plainly, if the rightful owner receives less for his property than would induce him, of his own will to part with it, his right of will-destination is being controverted.

Now we shall find, notwithstanding the maze of details, that, in the Mishnah, this principle is generally maintained.

The thought is already implied by those regulations that make the sale of a stolen article a special misdemeanor. In keeping with the law of Ex 21³⁷, the *חוקי המכירה והמכירה* are in-

fixed as a penalty for slaughtering and selling a stolen animal; in addition to the 500 ^{sheqels} ^{which} constitute the penalty for mere theft (K 7¹⁻⁵).¹ With similar intent, the Mishnah declares invalid the purchase of wool, milk (and cattle) from shepherds and of wood and fruit from orchard keepers (K 10⁹). In fact, it is forbidden to purchase any object from any person who ^{tries to} conceal the transaction (K 10³). When a stray animal belonging to someone else is found, the finder is forbidden to sell the animal except in case the animal itself fails to yield the worth of that which is required to keep it (M 2⁷³⁶); in which event the money realized by the sale must be turned over to the owner of the animal when he appears.

Evidently a sale, to be right, must be the will expression of him who rightly owns the object sold.²

¹ v. pp. 104, 105.

² In M 3² R. Jose remarks:

Likewise requiring that the transfer of property be the will expression of its rightful owner are the many provisions insisting upon what we call "fairness in business".

Thus it is forbidden to conclude a bargain before the market price of the commodity is known or surmizable (B57); any advantage taken by a seller over a buyer by reason of a change in market values, rendering the sale invalid. Also invalidating the sale is the delivery of goods of a quality different from that bargained for. Whether in the sale of grain (B58) or in the sale of wine (B63), the purchaser may retract if the goods delivered be of a quality inferior, and the seller may retract if they be of a quality superior to that stipulated in the contract. Again, if the grain delivered have a different color or if the wood delivered be of a different species from that called for in bargaining, the transfer need not stand. (B56)

There may also be cited, in this connection,

the law that if fruits are sold (B6) under conditions indicating the buyer's intention to use them for seed, the seller is under obligation to supply fruits that will serve this purpose.

As a further precaution against unfair dealings, the Mishnah contains regulations especially applicable to merchants; merchants being forbidden to do the following:

1. To put the dregs of one cask into the wine of another (M 4").
2. To mix poor wine with that which is sold as good wine (M 4" 12).
3. To mix water with wine when the purchaser can not be duly aware of the adulteration (M 4' 2).
4. To mix fruits of diverse kinds (M 4")
5. To clean the beans that lie on the surface of a measure of beans, thus giving the impression that the entire measure is cleaned (M 4' 2).
6. To adorn a slave or an animal that is

offered for sale (M 4'2).

7. To polish up old utensils so as to give the impression that they are new (M 4'2).

Also against dishonesty in measurements is the mishnah arrayed. Hence:

1. In weighing, it is forbidden to deviate from the mode of computation familiar to the customer. (B 5'').
2. The retailer must clean his scales after every weighing (B 5'').
3. The wholesaler selling liquids must dry his measure once every thirty days (B 5''); the retailer twice a week (B 5'10); and the private individual, once a year (B 5'10).
4. Weight and measure must not be stinted (B 5'11, 8)'.¹

¹ Only on Erev Shabbat, according to R. Judah, may the merchant forego giving the "extra three drops" (B 5'8); as Bert. says, 7176 X17W 195.

Other regulations recognizing the validity of a sale only when it is the will expression both of buyer and of seller are included in the laws of *ḥanīḥ*, overreaching. Overreaching to the extent of $16\frac{2}{3}\%$ ¹ of the value of the article transferred, whether on the part of the buyer² or of the seller renders the transfer illegal (*Me 4 9*). The purchaser must be allowed ample time in which to discover any disadvantage to which he may have been subject; he being permitted ^{before the expiration of this time,} to return the commodity and to receive his money back (*Me 4 3, 7, 10*)³. Similarly if

1. A very small amount would pass as a gift *v. p. h.* 48-54.
2. Rabbi Judah holds that a merchant has no 'Ana'ah right, *ḥanīḥ* *ḥanīḥ* *ḥanīḥ* as Bert. puts it.
3. R. Tarphon would ~~allow~~ ^{permit} overreaching to the extent of $33\frac{1}{3}\%$. At the same time, he would allow purchasers a longer period within which to discover the deception and rescind the sale. ~~However~~, his proposal was not favored by the merchants. (*Me 4 3*).

a defective coin is passed, the sale may be rescinded: according to R. Meir, if $\frac{1}{24}$ of the coin is missing; according to R. Simon, if $\frac{1}{16}$ is missing; according to R. Judah, if $\frac{1}{12}$ is missing (Be 4⁵). Also for the detection and return of defective coins adequate time must be allowed,

בכרכים עד כדי שיראה לשולח. ובכפרים עד ערבי שבתות.
אם היה מכיר אפילו לאחר שנים עשר חדש מקבלה היטנו (י 44)

Further precautions that transfer by exchange be the will expression of him who rightly owns that which is transferred are the various symbols of transfer that the Mishnah mentions. These symbols are:

1.

שטר . document

When the document of sale is made out, both buyer and seller must be present (B 10³). The Mishnah also contains detailed prescriptions as to how such documents should be constructed, attested (B 10¹²) and paid for (B 10³).

2.

הִלָּקֵת "lifting up."

The Mishnah mentions the acquisition of animals ($\kappa\gamma^6 \mu 3^2$), of vinegers ($\mu 3^4 6^5$) and of flax¹ ($\beta 5^7$) by this means.

3.

הַשִּׁכָּה the "drawing" of the object by him who takes possession.

In this way, there may be acquired animals ($\kappa\gamma^6 \mu 8^4$), metals ($\mu 4^1$)², chattels ($\mu 4^1$) fruits ($\mu 4^2 \beta 5^7$) and slaves ($\mu 8^4$).

4.

קֹדֶם "money".

That is, the payment of the price ($\mu 4^2 5^7 \beta 9^7$)³. This is not as rigid a mode of acquisition as הַשִּׁכָּה. While human judges may recognize transfer

¹. In $\beta 5^7$ "אֵלֶּיךָ שֶׁכָּסֵּפְךָ" i. e. the acquisition of vegetable products by plucking them would seem to be a species of *Hagbahah*. However, Hoff. (note $\gamma 4$ to $\beta 5$) takes it to be a species of *Hagbahah*. ². So Bert. and Hoff. note 2 to $\mu 4$.

³. cf. *Tiddushin* I³.

by *דאס שטעל* (1489), transfer by *גוס* is judicially recognized only by the *Quirne* Judge (1482).

5.

דאס שטעל דא דא, acquiring, if only temporarily, the ground on which the object of sale lies (1457-1458).

6.

דאס שטעל occupation (133397)

In *Hazakah*, the presumption is that the seller, upon receipt of the stipulated price, permits the purchaser to settle down upon the land, or otherwise to ~~make~~ use of ^{the} ~~any~~ object sold. Therefore, if a dispute subsequently arise as to who is the rightful holder of the property, the fact of having for a certain length of time "used" the object unchallenged constitutes an argument (*תשובה*) in favor of the occupator (1333).

Various circumstances are, of course, taken into consideration. Thus, in order that a *Hazakah* claim have force, the alleged seller must have had ample opportunity to challenge the contentions of the occupator. Accordingly, *Hazakah* can

not be urged as evidence of purchase by the alleged seller's partner, steward, guardian, hired laborer, husband (if ^{alleged} seller be a woman), father or son (B3³). The reason is, that persons standing in these relations to the owner of the property would be allowed to make use of the property without their having purchased it.¹ Moreover, occupation must be of a certain duration (B3^{2,2}); *Hazakah* being a valid claim only after there has been adequate time in which the alleged seller might have discovered and contested any trespass on his belongings (B3^{2,6}). For the following objects, therefore, the term of *Hazakah* is three complete years:

בורות, בית קבדן, בתים, מרחצאות, מערות, עבדים, שובכות, שידין.

(B3¹)

וכל שהוא עושה פירות תדיר.

For a *טדה קבע*, the period is one year plus a part of the preceding year and a part of the following year. According to R. Ishmael², three months

1. Bert.

2. R. Ishmael holds that the controversy refers to the species of *טדה קבע* called *טדה קבן*. On his view regarding the species called *טדה קבן* see table.

Acts and circumstances
constituting *Hazakah*

עשה מחיצה לבה מותו (נחצו)

גבוק י" ספקים (ב' 33)

עשה מחיצה לחדור גבוק י" ספקים

" " " " " " " " " " " "

הכניס תרנגולין לתוך הבית

עשה חקוקים לזבול פחוק גבוק

erecting of מורבב

" " מחזקילה

Erecting a "סולם צור" (ב' 34)

making a "חלון צור"

making a "זיכור סכך"

In case of a שדה א"י, R.

Ismael holds (ב' 33) that

כנס א"י חבואתו, מסק א"י זיתו

כנס א"י ק"י

constitutes *Hazakah*.

Acts and circumstances
not constituting *Hazakah*

היה מעמיר בקמה בחדר

" " " " " " " " " " " "

" " " " " " " " " " " "

היה מגדל תרנגולין בחדר

היה נותן את זבול בחדר

Erecting a "מזרח"

making a "מזרח"

making a "מזרח מסכת"

1. The Mishnah contains definitions of these objects.

I do not see the warrant for Hoff's statement in note 74 to B. 5.

of the preceding and three months of the following year are needed. According to R. Akiba, one month of each suffices.

Certain special acts that constitute *Hazakah* together with certain special acts that fail to constitute *Hazakah* are also enumerated. Lists of these will be found on the accompanying table:

In this way, the *Mishnah* indicates the several acts symbolizing the owner's will to transfer his property. But the *Mishnah* does even more than this. It goes so far as to establish the precise meaning of the words employed in commercial dealings. Since language is the most common vehicle of will expression, all possible precision must be given to words if the rule is to accord with the intentions both of buyer and of

" Regulations concerning witnesses and law court procedure for *Hazakah* cases are given in B34

seller. Misunderstanding must be obviated. Each party in the transaction must be enabled to know exactly what the other party expects to receive and exactly what he expects to yield.

Accordingly, the Mishnah devotes a number of chapters almost exclusively to the definition of commercial terminology. Precisely what is included and precisely what is excluded by certain words is carefully set down. As an example: If a field or vineyard (שדה) is sold (ב 4 8:9), the Mishnah would have us understand, ^{that} the term שדה does not include the branchless trunk of a Sycamore tree (סדן השקמה) standing on the field; although it does include the unplucked produce

(המבואה שהיא מחובר לקרקע); while such an item as plucked produce (מבואה שהיא חלושה) is included only if the seller employ with the word שדה, the formula הוא וכל מה שבחוכה, excluded, however, in the absence of the formula.

accompanying is a list, in alphabetical order, of the commercial definitions propounded.

The Mishnah also gives commercial definitions of various other expressions:

1.

In selling wine (B 6³),

ש"י means wine of the previous year.

ש"כ means wine of the second year previous

ש"כ"א means spiced wine of a quality that will keep until Shabu'ot without spoiling.

2.

In selling land for a building or in making a contract for the erection of a house, certain dimensions must be understood by the wording employed (B 6⁴)

בית חתם has dimensions 4x6 cubits (Akiba)

בית א'מנוח " 4x6 " "

רפת בקר " 4x6x5 " (Ishmael)

בית קטן " 6x8x7 " "

בית גדול " 8x10x9 " "

טרק'ל " 10x10x10 " "

3.

The amount of land and the kind of structure called for in purchasing a קבר is likewise minutely specified (B6^r). Tosefot Yom Tob (Gemara 101a) contain the diagrams illustrating this Mishnah.

4.

The force of the following phrases relating to the purchase of land is also set forth:

B7 ¹	בית כור עפר אני מוכר לך
"	כבית כור עפר אני מוכר לך
B7 ²	בית כור עפר אני מוכר לך מדה בחבל
"	בית כור עפר אני מוכר לך הן חסר הן יתר
B7 ³	בית כור עפר מדה בחבל אני מוכר לך הן חסר הן יתר
"	בית כור עפר הן חסר הן יתר אני מוכר לך מדה בחבל
"	בית כור עפר אני מוכר לך בסימניו ובמצריו
B7 ⁴	חצי שדה אני מוכר לך
"	חציה בדרום אני מוכר לך

With a minuteness for an exhibition of which we may not take up the space here, the

must determine the commercial consequences of each one of these provisions

Finally, with regard to such matters as dregs, refuse and other useless stuffs that attach to objects of sale, an understanding is established as follows:

1.

With oil, dregs to the amount of $\frac{3}{20}$ must be accepted by the purchaser (M 3^o). The proportion in case of wine is probably the same (M 4^o)

2.

With fruits, refuse to the amount of $\frac{1}{24}$ must be accepted. (B 6²).

3.

With figs, wormy ones to the extent of $\frac{1}{10}$ must be accepted (B 6⁴)

4.

With a cellar of wine, jars of sour wine (n 1001p) to the extent of $\frac{1}{10}$ must be accepted (B 6²)

with a lot of Sharon fare bad over to the extent of 110 must be accepted (B62)

The few drops clinging to the bottom of the measure after a sale of wine belong to the seller (B59)

Thus by insisting that only the rightful owner may transfer property by exchange; by contending for honesty in transactions; by indicating the symbols of transfer; by giving precision to commercial terminology; and by effecting certain other fixed understandings between buyers and sellers; the *kushnah* falls into line with our maxim. Transfer of property by exchange is declared to be right in so far and only in so far as it is the will expression of the rightful owner.

Chapter V.

Damages.

We have observed to what extent the *hushnah* conforms with our maxim as regards the manner in which property may be transferred. And we have seen that many of the *hushnah* laws covering donations, bequests, funds and sales satisfy the ethical requirement that a man's will domination over certain things be maintained. We shall now proceed to examine in how far the *hushnah* laws relative to damages and thefts also satisfy these ethical requirements.

Beginning with the subject of damages, we first consider those acts whereby a man's property is damaged through some other man's personal aggressiveness. Examples of this class mentioned by the *hushnah* are the cutting down of another's plantings (*K 8⁶ 10²*); unsettling another's wall by urinating against it (*K 2¹*) and especially the destruction of another's property by fire (*K 1³ 3⁰*). The law ordains that, for such damage complete restitution be made (*K 1⁴ 2⁶ 6⁴ 3¹⁰ and*); as we should put it, the

rightful owners will domination over a given amount of property must be restored

With this class of damages may also be enumerated those acts of assault whereby one man disables another in such a way as to occasion, besides the expense of a physicians services, also the financial loss suffered by the injured man in having to suspend his ordinary employment. The *hushnah* require that for injuries thus committed there shall be paid by the offender, the "doctor's bill" (197) as well as the amount of income lost to the injured man because of ^{his} absence from ~~his~~ work (120) (18'2)'.¹

Closely akin to damages by direct personal aggression, is a class of damages in the recognition of which the Jewish law is said to be peculiar²: damages committed as to speak, negatively are forbidden by the *hushnah*. For instance, as declared in Levit. 22¹⁻³

¹ v. appendix IV

² Rabbimowitz - "Législation Civile du Mahomed" p. x.

the owner of a stray animal is entitled to the kindly services of anyone that is in a position to return that animal (K 5⁷ M 2⁹ 10 6⁷ 7⁹).¹

Moreover, failure to aid in releasing and also, according to R. Eliezer, failure to aid in unburdening an animal that has fallen down by the wayside is censured as a violation of Ex 23¹ (M 2¹⁰).² In fact, if the driver be aged or feeble, the service of unloading or unburdening must be rendered even though the driver take no part in the work (M 2¹⁰).

Also prescribed is the proper caring for an animal until its owner appears (M 2⁷).

It is furthermore a duty to take charge of another's lost scrolls, garments, utensils, sacks or boxes, and, while taking charge of these things, to do everything needful to prevent them from becoming moth-eaten, rusty or otherwise spoiled. (M 2⁸).

1. v. p. 63

2. According to R. Jose the Galilean, provided the owner of the animal be not guilty of heaping upon the animal excessive burdens (M 2¹⁰)

more relevant to a later paragraph of this study'. Those cases in which damages need not be paid are enumerated on the accompanying table. There they will serve to explain by way of contrast, those instances in which the *Mishnah* does insist that restitution for the damage be rendered.

Multifarious though the details, there appears from the table one underlying principle viz: the rightful owner has the right of exercising his will over the object owned to the exclusion of all other wills. And we can see that the damage payments required amount not only to a restoration of things to their rightful status but also to a deterrent from further infringements.

Yet another class of damages against which the *Mishnah* takes precautions is that arising from the assertion of property right itself.

It has been noted that ownership, to be right,

must be limited by corresponding property rights of others, the use of one's own belongings in a way damaging to the belongings of another being therefore a breach of right¹.

Accordingly the Mishnah enumerates a long list of objects in the disposition of which the owner is subject to various restraints. The owner of olive refuse נזק (B21), for instance, is forbidden to deposit this substance within three spans of an uncemented wall belonging to another, the reason being, as Bert. explains, that olive refuse weakens a wall of this construction. As another example may be cited the restrictions imposed upon owners of trees. Briefly stated, these are.

- a. A tree may not stand within 25 cubits from a city². (B27)

An unfruitful tree (קרוק) may not stand within 50 cubits from a city.³

1. v. pp. 17-20.

2. Bert.

3. Bert.

- b. One tree may not stand within 25 cubits from another's cistern¹ (B2¹)
- c. One tree may not stand within 4 cubits from another's field² (B2¹²)
- d. If a tree hanging over into a public thoroughfare, the lower branches must be cut away. To what extent this is necessary is a matter of discussion between R. Simon and R. Judah; the underlying idea of their discussion being that traffic along a thoroughfare must not be hindered. (B2¹⁴)
- e. a man must pay for damage caused by the falling of his tree into a public thoroughfare; provided that, having been duly apprised of the necessity to chop down the tree, he has failed to do so within the time allowed him for that purpose (M104).

neither time nor space being available for

¹ Roots of tree damage cistern. (Hoff. note 76 to B2)

² It hinders plowing (Berx.)

presenting all of the mishmic regulations concerning this class of damages; it must suffice merely to enumerate the objects mentioned by the mishnah, together with references to the passages that set forth what precautions are incumbent upon the respective owners:

B 2 ^{7, 11, 12, 13, 14, M 10⁸}	א'ין	B 2 ³	כבעים
See also בורב and שקמה		B 2 ^{7, 11, 13}	חרוב
B 2 ¹	אמח קמ'ם	B 2 ¹⁰	חררל
B 2 ³	ור	B 2 ²	כירק
B 3 ⁸	גדוד טראות	B 2 ³	כלים
B 2 ¹²	פן	B 2 ¹⁰	כריטין
B 2 ¹	גפת	M 10 ⁴ B 2 ^{4, 5}	כותל
B 2 ⁸	קבוע	B 2 ¹	מחרשה
B 3 ⁸	הלל	B 2 ¹	מלח
B 2 ¹	בב	B 2 ^{11, 12}	מערק
B 3 ⁸	ג'ין	B 2 ¹⁰	משרק
B 2 ¹	גרע'ם	B 2 ¹	נברכס כובס'ם
B 2 ⁴	חלון	B 2 ¹	ס'ר
B 2 ³	מחלוק של נחחומים	B 2 ⁵	סלם

B 2'	עליו	B 2'	ש"ק
B 2'	ח"מ	B 2' 11/13	שק"ק
B 2'	ק"ב ק"ב	B 2' 1/2	ק"ב
B 2'	ש"ב		

Finally there are the restrictions and obligations imposed upon the owners of vicious animals. Generally speaking, the Mishnah declares that everyone possessing a dangerous animal is, in duty bound, to watch that animal (K 1') and to take all necessary care, lest, by the animal's savages, another's property be destroyed (K 496'2). Naturally, for damages occasioned by such an animal as the result of the owner's negligence, restitution must be made (K 5'2, 36').

Now, as in all controversies over damages, the claims of both sides must be heard. The defendant as well as the plaintiff has his property rights. These rights, however, are overridden if the defendant is compelled to pay for damages arising from no fault of his own. "Judicial

theft", as we shall call it", would be committed

The *kushrah*, accordingly requires full restitution (p 30 p 31) for damages caused by an animal that is *hu'ad*; while only partial restitution, more exactly "half restitution" (p 30 p 31), need be made for an animal that is not *hu'ad*, for an animal that is, in *kushrah* language "Tame".

The word *hu'ad* means literally "testified against". It is an adjective applied to those qualities of an animal from which, it is to be expected, the animal will do certain damage. One would readily expect, for instance, that an animal walking along will tread upon and damage any vessel that may be lying in its way. With reference to damage of this kind, the animal is said to be *hu'ad* (K2). On the other hand, damage may be caused by the pebbles sent flying through the air as the animal's feet strike the ground. Damage of this kind is something that is unusual, some-

thing that can not be foreseen, and therefore something with reference to which the animal is Tam (literally "innocent") and the owner entitled to certain leniency when it comes to making restitution.

In the accompanying table, the first column contains the names of the animals specified by the Mishnah; the second column contains mention of the damaging acts with reference to which the animals are respectively mu'ad; while the third column contains mention of the damaging acts with reference to which the animals are Tam.

With regard to the α , let it be noted, the Mishnah specifies conditions - under which the various acts placed in the "Tam" column would have to be placed in the "mu'ad" column. These conditions exist when the α is mu'ad not merely in the sense of "being by nature likely to damage"; but in the more literal sense of "being formally testified against as having done the

goring, kicking, biting or crushing and as being therefore likely to do it again". The following statements exhibit the Mishnaic conception of *hinn'ad* in the latter sense:

1.

a.) According to R. Judah, an ox is *hinn'ad* if its owner has heard testimony that for three successive days the ox has gored, kicked, bitten or crushed.
(K 24)

b.) According to R. Meir, an ox is *hinn'ad* if its owner has three times (even on the same day - Bert.) heard testimony to the effect that the ox has gored, kicked, bitten or crushed.
(K 24)

2.

a.) According to R. Judah, an ox once *hinn'ad* becomes *Tam* (i. e. not *hinn'ad* also in this latter sense) if it has for three
(K 24)

Or three heard testimony? The point comes up for discussion in the Gemara (Hoff.)

successive days refrained from doing damage - (although subject to provocation Bent.)

- b.) According to R. Meir: An ox once *hinn'ad* becomes *Pam* ~~when~~ if children may safely trifle with it.
(K 29)

3.

An ox is, in this sense, *hinn'ad* only with reference to the kind of creature (whether a man or a given species of animal) and with reference to the size of the creature specified in the testimony delivered to the owner" (K 4^e of K 4^e)

According to R. Eliezer (K 49). the owner of an ox known to be vicious is in duty bound to slaughter the animal. At any rate, it is agreed that special precautions with bolt, lock (K 496¹) and watchman (K 496²) are oblig-

"According to R. Judah, also with reference to the occasion on which the goingth took place i.e. whether the going etc. took place on a Sabbath or on a week-day.

atory¹

We have then abundant evidence of the hushuk position regarding those limits on a man's property rights required by the corresponding rights of others. In fact, we have seen, how extensive are the measures taken to prevent and to rectify damages of any kind, committed by one man upon that which another possesses. We are, therefore, warranted in saying that the right to be shielded from aggression is recognized by the hushuk as a prerogative included within the right to own.

That such a conception of ownership is consonant with the maxim on property right that we have come to regard as the ethical dictate has already been pointed out.²

¹ A comparison between these laws and those of Q. 2/28-37 would furnish an interesting illustration of Tab-mudic hermeneutics. Such comparison however is beyond the scope of this treatment.

² Introduction pp. 17-20, 33.

Theft, like damages, being an infringement upon property right, we are not surprised that the Mishmic regulations aiming to prevent theft are numerous and intricate. We are taking the word theft, of course, to mean not only stealing in the ordinary sense but ^{also} all of those fraudulent tactics whereby one acquires by means other than gift or exchange the property that one has not himself created!

Now besides imposing for certain kinds of theft the trespass offering (עֹרֶךְ) required by the Bible (Lev. 5²⁵) (K 9⁸, 9¹¹, 12), the general contention of the Mishnah is that the thief shall make restitution for that which he has stolen². This is set forth with reference to fields fraudulently acquired (K 10⁵); with reference to stolen timber

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1. The 'Ona'ah discussed in Chap. III would be a species of theft.
 2. nowhere is there the remotest suggestion of imprisonment or of ~~slave~~ enslavement (E 22²) as a penalty for theft.

(K9¹); animals (K9^{1,2}),¹ money (K9^{entire}, 10⁷), coins, slaves, wine and fruits (K9²). The stolen objects must, in certain instances, be returned to the rightful owner, even though the act of restoration involve a journey to distant regions (K9^{5,6}, 10⁶). Should the guilty individual die before the restitution takes place, the duty to make good the theft devolves upon his children (K10¹)². Correspondingly the heirs of him who has been defrauded inherit the claims against the defrauder (K9^{5,9,14,3}).

The mishnah, we are interested to find, is also opposed to the acceptance of "tainted money" be it only by way of exchanging coins of a large denomination for coins of a smaller denomination, not to speak of philanthropic purposes. אין פורטין לא מתבב המוכסין וצ"ל מביא שם ב"אין

¹ also of bearing here are K5⁷, 7^{1,2,3,4,5,6,7}, K3¹, discussed on p.

² the children are exempt however, if there has been *Ye'ush* (Bert.) v. pp. 58-64, and p.

אין 1361ן מהם כדק (K101)

Likewise forbidden is the subtle kind of
thieving committed by a merchant, when, in
order to entice customers away from his com-
petitors, he lowers prices or advertises by distrib-
uting gratuitously dainties among the children
(K412)¹.

Particular attention is bestowed by the
Mishnah upon the matter of theft in con-
nection with deposits (117קס) i.e. objects
entrusted by one man to another. Evident-
ly under the impression that this is a
prolific source of infringement upon
property right, the Mishnah devotes to the
subject of deposits most of M3 besides numerous
other passages (K97, 8). The keeper of a deposit

¹ The idea of preventing theft can ~~also~~ be recognized
in the complicated cases of M106 M85 B57: and
perhaps also in the provision of M27

must not touch the object (177 π 50), except by special understanding with the owner (M 3^{6, 7, 9, 11, 12}). He must return the deposit upon demand (π 9⁵ M 3³), taking, as he does so, various legal precautions to make sure that the person claiming the object is the rightful owner (M 3^{4, 5}). At the same time, the keeper of the deposit is ^{himself} ~~also~~ protected. As an example, there is the law asserting that if A take charge of grain belonging to B, B is not entitled to demand the full amount of ^{the} grain entrusted. There must be made a specific allowance for that which is lost through circumstances over which B has no control such as, for instance, the depredations of mice (M 3⁷)¹.

Against judicial theft, as already noticed the mishnah is also on its guard. Of this,

"A merchant is, under certain circumstances, not held responsible for the loss of money left in his care (M 3¹). Perhaps the privilege of using the money is a sort of an insurance premium v. h. 144 ft. note.

the tables ~~following~~ ^{preceding} pages 88 and 94 will be found illustrative. By the hair-splitting niceties of the Mishnah we are constantly made aware that in a damage or a larceny suit, the property rights of the defendant are protected no less than those of the plaintiff.

As regards the payment of "half-damages" exacted from the owner of a ox, the following interpretation suggests itself: As ox kills his ox, it being, under the circumstances, not responsible for the damage. Such a happening must be looked upon as one of those natural calamities of which the cause is not human. It must be accounted as an effect of blind cosmic forces which is different from any human infringement. In such cases, the best that can be done is to have each one effected by the calamity

¹ Introd. pp 8, 9. a like tenor characterizes K 6⁴
in 7 9, 10

assume a part of the loss. Now this sharing of the loss takes place when, by means of the *qan* principle, A, who is so unfortunate as to own a vicious ox and B, whose ox was killed shoulder the common disadvantage.

Other safeguards against judicial theft may be found in K 4^{4, 6, 7, 5} - 11^{3, 4, 6, 8, 2} likewise regarding damages caused by animals; in K 3¹ regarding damages done by placing a vessel where someone ~~may~~ happens to stumble over it; in K 6^{4, 5} regarding damage done by fire; in K 10⁷ regarding dishonest retention of another's money; in K 10⁸ regarding the secret removal of an animal from someone else's flock; in B 5⁹, regarding the liabilities of a merchant¹; in

¹ according to the Tosefta, the merchant must be protected from the parent that has fraudulent intentions in sending the child to make a purchase (Hoff.)

in 10⁴, regarding the responsibilities of a tree owner;
 in 3^{9,12} regarding deposits; in 3^{6,8} regarding
 the payments exacted of one convicted of
 assault; in 9⁴, regarding blunders of workmen,
 under certain circumstances.

Of similar import, may be considered the
 statement

כִּי כִּשְׁמֵן מִשְׁלֵמִין כֹּשֶׁת הַלֵּל 327

which refers to the restitution to be made for
 stealing an object whose value changes between
 the time of theft and the time of making good the
 theft (K 9¹² K 10⁶ but cf. 3¹²). A thief, who by his
 exertions enhances the value of the stolen object
 is not deprived of the fruits of his labor.

However, it must be admitted that entirely
 free from legislation making a loop-hole for
 judicial theft, the mishnah is not.

The justice and consistency, for instance,

1. 2. p. 135 ft. note.

Thus, ~~to a~~ to a large extent, though not entirely, the mishnah in its regulations about theft is in harmony with the ethical requirements contemplated by this study.

Chapter VII.

Joint Ownership.

Thus far we have found in the hushnah abundant illustration of the ethical principles underlying property right.

Our illustrations however have been derived almost exclusively from those cases of ownership in which the owner is one individual. We shall now take up those cases in which the property belongs not to one individual but to a group of individuals. Joint-ownership, as it is called, comes now to be considered.

How property is jointly owned, we have constant opportunity to observe. Just as an individual asserts his will over an object to the exclusion of all other human wills, so may there be groups of individuals asserting their concurrent will. In fact, everything designated by the terms public property, partnership, loan, rent, ^{and} employment, may be treated as a phase of joint-ownership and may be tested by the moral criterion that we are applying to property in

general.

Turning then to the Mishnah, we notice first, that regarding what we call public property the three Babot have not much to say. The rights of the Temple as a public institution are occasionally referred to (K 4^{3,7,8,9} 2^{1,4} K 9² M 4^{6,7,8,9} 7⁷ B 4⁹); and the phrase מ'ב'ר' ה' נ'ש' "public domain" is used from time to time. (K 3^{3,4,5-5} M 2¹⁰ B 2¹⁴ 3^{7,8,6} cf. rights of city 7⁸, B 2^{7,8}).

It is mostly ~~however~~ in connection with the Mishmic laws of partnership (י'ג' נ'ש') that we can observe the applicability to joint ownership of the principles we have discussed.

Now a large part of what the Mishnah says about partnership refers to their relations with one another; that any one of the partners assert ownership over the share of the property rightly belonging to the other partner, being by the Mishnah expressly forbidden. Thus, in

case there should break down a house owned by two persons, the obligation to repair the structure ^{or} and to furnish the funds for such repairing rests upon both (B1023). In fact, regarding improvements of all kinds, that must be made upon property jointly owned, the hushnah establishes a fixed understanding as to each man's duties and privileges (B1123, 4, 5 B1045).¹ At the same time ordinances are laid down to prevent judicial theft (B145) in any of the law suits to which such exigencies may give rise.

The hushnah further requires that the profits yielded by goods jointly owned be fairly divided among the several proprietors (B5+1394).

¹ R. José's statement in B13 may be interpreted thus: The moment I admit being benefited by a wall that my neighbor has erected, I become a partner in the ownership of that wall. I must therefore warrant my title to that ownership by bearing a ^{share} ~~part~~ of the expense of erection (next)

Now the Mishnah precludes fraud committed ~~against~~ by one partner against the other through an unfounded Hazaqah claim, has already been pointed out."

Finally, when it comes to dissolving a partnership, there must be observed various conditions whose end is plainly the safeguarding of each partner's rights from aggressions on the part of the other (B1⁶ M10¹)

As to the rightful means by which property is jointly acquired, mention is made both of finding (M1¹²) and of inheritance (B8^{7,8,9,3,4,9,107}).

Furthermore, like the right of individual ownership, so is the right of joint ownership understood to include the right of restitution in

"v. h. 77 Interesting in this connection is the law in B9⁴ חסל צמח נחרפא נחרפא חסל צמח. See Barta's remarks.

case of theft (K 9⁹); as well as the right to have the property ~~shielded from~~ ^{secured against} that lowering of values that is caused by the intrusion of strangers upon the privacy of a residence (B 3⁷).¹ Nor does the Mishnah fail to insist that for damage (K 5-6⁴) or for theft (K 7⁵ B 3⁴) committed jointly, the usual restitution must be made.

2.

Another species of joint ownership is represented by the transaction of borrowing and lending.

We need only bear in mind what is meant by ownership² in order to see that the borrower is, in a measure, and for a time, really the owner of the object borrowed. To a greater degree, however, the lender is also the owner of the object. The relation of borrower and lender

¹ v. beginning of Appendix IV and B 6⁵ 6.

² ~~cf. K 4⁵ and K 3¹¹~~ ² Introd. p. 7 ff.

thus presupposes mutual limitations upon the rights of each; an obstruction on the part of either beyond these limits, being a violation of moral requirements. To the matter before us, in other words, our familiar categories of gift, purchase damages and theft can, without great difficulty, be made to apply.

First there is the borrowing in which the partial ownership acquired rests, so to speak, upon donation. The borrower here is called by the kushnah "שׂוֹאֵל" "the asker" i.e. the individual who obtains the favor for the mere asking; being thus contracted with the "נָשִׂיא" "the lender", who pays for the favor he receives. If the object borrowed be an animal (ק 49), the sho'el assumes the obligation to pay "half-damages" or "full damages", as the case may require, for any harm that the animal may do (ק 49). Should

the animal borrowed be stolen, go astray, ~~die or~~ suffer injury or die, the Sho'el must make to the owner complete restitution ($\text{M} 7^8 \text{M} 8^{23}$)¹. However, there are mentioned two conditions under either of which the Sho'el does not bear this liability:

1. If the animal is borrowed with the explicit request that the borrower be free from liability for the loss or injury of the animal; special stress being laid upon the form of the request ($\text{M} 7^9$)²;
2. If the owner accompany and remain with the animal ($\text{E} 22^4$) ($\text{M} 8^1$).

Moreover, if the person leading the animal from the lender's place to the borrower's place has not been selected for

¹ Based on $\text{E} 22^{17,18}$ may not the responsibility assumed by the Sho'el amount to a compensation for the loan—being a species of insurance? v. p. 144 ft. note.

² Formula based on $\text{Kor} 32^{29}$ of Kaddushim 3⁴

that purpose by the borrower, the borrower is not responsible for accidents that might befall the animal while in that person's charge (M 83).

In this connection must also belong the provisions about money lending. Interest as we shall see, is rigidly forbidden: we shall therefore have to regard the money borrower as a Sho'el, as one whose temporary ownership of the money is obtained purely through the generosity of the lender.

Now the general trend of Mishnaic legislation on money lending is, as we might expect, to shield the creditor from being robbed (K 99, 10). As long as the alleged debtor acknowledges having borrowed money, he must restore the sum, even though he profess having the impression that the debt has already ^{been} disposed of. (K 107). He is obliged, if

if such has been stipulated, to journey to out of the way places for the purpose of paying what he owes (K 10⁶).

Then there are the laws about loan documents (217 176W) the writing (B 10^{3,7}) and attestation (B 10^{1,2,8}) of which are carefully described. Of these laws, ^{well as of} the laws governing the care of such documents (B 10^{5,6}) and their return (M 1^{6,8}) if lost, the aim is, naturally, to prevent fraud on the part of either party concerned.

Particularly in the interest of the creditor is the law entitling him to a lien on the debtor's property (B 10⁸)¹. Mention is also made of the surety (275 B 10^{7,8}) from whom, in certain instances the debt may be collected. At the same time, infringements upon the property right of

¹ Bent. to M 1⁶ says that, according to the Hekamin, every loan document implies such a lien whether this be explicitly stated or not.

the surety are carefully precluded; Ben Hanor (B108) insisting that a man is not liable for another's debt unless he has unmistakably expressed his willingness to be so. The kishmah, ^{in fact} ~~in fact~~, contains a number of measures by which the surety is protected (B107⁵).

In the interests of the debtor, the kishmah requires that one alleged to owe a sum of money be free from the obligation to pay provided he pleads uncertainty as to whether or not he has borrowed the sum in question (K107)¹. Should a debtor meet with a violent death, the claims of his heirs have a slight preference over the claims of his creditors. (B98). But it is especially

-
1. He must, however, according to the interpreters substantiate his plea with an oath (נִסְיָא נְיָאָה).

by the laws governing pledges that the interests of the debtor are ^{secured} ~~secured~~. A pledge may not be exacted at all, except with the consent of the court (49'3) and then, only under a rigid and extended application of the humanitarian laws in Dent. 24^{6, 11, 17} (49'3)¹. Furthermore, the Mishnah holds the creditor responsible for the pledge of which he has assumed charge. (46⁷)².

Not much different from the laws regarding the Sho'el, the gratuitous borrower,

1. However, in connection with pledges, the Mishnah proposes
 ואם מה אינו מקדיר (49'3) - a point in favor of
 the creditor. R. Simon b. Zambiel goes so far as
 to say אך לעולם אינו מקדיר אלא עד שלושים יום
2. That is, the creditor being a שומר שכר is sub-
 ject to the obligations of a שומר שכר (47⁸) v. l. 11ff.

are the laws regarding the *haker*, the hirer.

The hirer may be considered as one who acquires by purchase, a partial and temporary ownership of a thing. Anticipatory however of what will be said later on, we must observe here a peculiar feature about lending for pay. To reap profit from the loan of an object is accounted by the *hishmah* as taking of interest and interest, as we shall find,¹ is rigidly forbidden. The payments, therefore, that the lender is permitted to accept are, by no means, to be regarded as profits. It is merely as restitution for the wear and tear on the object borrowed that these payments are allowed. Says Emil Cohn²: „Wie aus dem interressanten

1. v. Chap. IX.

2. "Der Wucher im Talmud. Seine Theorie und ihre Entwicklung" In "Zeitschrift für vergleichende Rechtswissenschaft" Bd. XVIII h. 54

Fall vom Kessel im Hause des Mar Samuel¹ hervorgeht, geschah es dadurch das der Pächter das Leihgeld nicht als eine Bezahlung des Kredites auffasste, sondern einfach als Ersatz für die Abnutzung im Gebrauche des Entleihers (agra = pachtha). Wenn ich meinen Kessel verkaufe und ihn mir später mit einem Leihzins zurückgeben lasse, so stelle ich durch eben diesen Leihzins die durch Abnutzung und Metallverlust über dem Herd des Entleihers gestörte Gleichheit der Äquivalente wieder her, so das von welcher gar keine Rede sein kann.

Accepting this statement as applicable to the Mishnah as well as to the Gemara, we may say, that the 7014 is one who acquires by purchase a temporary ownership over an object; and that this ownership particularly includes the possession of those parts of the

¹ Gemara Baba Mezi'a 70a

object that are, during that time, worn away by use.

Among the regulations protective of the lender, is the law declaring that the Soher, like the Sho'el, if the object borrowed be an animal, is responsible for the damage that the animal might cause (K 49). To the lender ~~of~~ ^{himself} ~~the animal~~, he is liable for any damage that might befall the animal or the implement hired along with it; provided the damage be due to the hirer's recklessness (M 6^{3,4,5}). An example of recklessness would be, overburdening the animal, or exposing it to danger in such a way as to be violating stipulations for the animal's safety, expressed or implied at the time of borrowing (M 6^{3,4,5}). The extent of the hirer's liability for mishaps, though not so great as that of the gratuitous borrower, is yet considerable. Finally protective of the lender is the law requiring that the hirer be prompt

in paying his due. (M 9¹²).

Of the measures safeguarding the hirer's rights, the following will serve as a synopsis:

1. For damages that the hirer was powerless to prevent (OS 18) he is not constrained to pay (M 7⁹⁽¹⁰⁾). As elsewhere¹, so also here, discrimination is made between damages caused by a human agency and damages caused by the irresponsible forces of nature.
2. In hiring the animal, the hirer may stipulate his exemption from the obligations of oath-taking, of damage payment etc. mentioned in M 7⁹ (M 7¹⁰). As in the case of the Sho'el, so here also distress is laid upon the form in which the stipulation is worded (M 7¹¹).
3. The hirer is not liable for harm that befalls the animal or the implement borrowed with it, provided he has faith-

¹ v. 14/102, 103.

fully observed the stipulations for the animal's safety expressed or implied at the time of borrowing (in 6^{3, 4, 5}).

3.

In connection with the loans that are paid for, the laws having to do with rental should be studied. When renting, be it observed, the tenant actually purchases from the landlord the privilege, for a specified period, of asserting his will over the premises rented. Hence it is that in renting as in all other acts of exchange much hinges upon the meaning of the terminology employed¹; precisely what each party wills to do with that which he owns, being essentially the point of concern.

We are not surprised therefore to find that here as elsewhere² the Mishnah determines the meanings of various phrases. Thus in 4:5²,

1. v. p. 78 ff.

the landlord is supplied with formulae for expressing unequivocally his terms. If he expect for a leap year thirteen months' rent, he must explicitly let his house "by the month" (ב' חודש); if the landlord let the house "by the year" (ב' שנה), the benefit of the intercalation goes to the tenant: while, in cases resembling that of the bath house at Zephphoria, where the terms of rental were "twelve gold pieces a year", R. Jose' and $\text{R. Simon b. Gamliel}$ have decided that a compromise should take place, the landlord yielding not all, but one-half of the rent for the intercalated month (מ' 8'). Similarly, it depends upon the formulae employed, whether or not the tenant of a field be free from paying rent for the Sabbath year (מ' 9'). There is also furnished a phrase (מ' 9') to express the understanding by which a tenant is allowed a reduction of rent should a field, thought to be well-watered, prove to be arid; or should it turn out that

trees, thought to be growing on the field, have been chopped down. At the same time, a formula is given which implies the willingness and consequent obligation of the tenant to pay the stipulated sum, even though his expectations be disappointed.

In the interests of the landlord's property rights, yet a number of other laws claim our notice. Particularly where the condition of rental accepted by the tenant is the sharing of the field's produce with the landlord (*muq'*), do we find measures requiring that the *aris* (i.e. he who takes a field on this condition) do nothing to evade the terms of his contract. The *aris*, for instance, is forbidden to deprive the landlord of income by neglecting the field placed in his charge (*muq' 3, 5*), the *kushnah*, somewhat severely it must be admitted, constraining the *aris* to work on the field even when its productiveness is scant¹. The tenant

¹ Still, in the interests of the tenant, the

is also forbidden to substitute, for the part of the field's produce belonging to the landlord, produce of an inferior quality purchased on the market. (M 97)

Yet other laws shielding the property rights of the landlord are those requiring the tenant to bestow upon the field, the attentions necessary to keep it from deteriorating (M 9^{1, 2, 4, 8, 9}). Chiefly as determined by local custom, the tenant must be governed in his plowing, planting harrowing etc. by the consideration that his term of occupancy is limited and that the landlord

Mishnah implies, that, when the productiveness of the field falls below a certain minimum, the tenant is no longer obliged to expend his energies upon it (M 9⁵)

when resuming charge of his field should not find its value needlessly depreciated.

Further in the interests of the landlord are: the law entitling him to the manure of animals crossing the rented grounds (1487); the law ^{defining} ~~specifying~~ what repairs on a house are to be made at the tenant's expense (1487); and the laws specifying when the landlord may lay claim to objects found near the premises. (1423). The law (1333) designed to keep the Aris from defrauding the landowner by a Hayabaki claim, has already been pointed out.²

Finally protective of the landlord is a provision—seemingly a reverse one—that has

¹ That is of animals not belonging to the tenant. The tenant has a right to the manure left by his own oxen (Bert.)

² v. p. 17.

every acquirer of property is subject ¹³: the risk of losing by natural calamity that which has been acquired.¹ And just as a purchaser of a garment would be wrong to exact from the seller restitution for damage sustained after the sale; so would a tenant be guilty of infringement were he to exact from the landlord payment for losses suffered after the land has been rented. Yet, be it emphasized, the Mishnah says nothing that forbids the landlord to be generous. Quite to the contrary, generosity on the part of landlords is encouraged (MS⁸).² By way of gift, a landlord, touched by his tenants' misfortune is always free to make an allowance of the rent.

Nor should we overlook the laws by which the tenants' interests receive especial attention. The tenants' right, for instance to the

¹ v. h. 8, 9.

² v. h. 171.

ashes produced on the premises is explicitly set down (1487); likewise his right to various objects found within the grounds (1423). All repairs of such a nature as to require skilled labor (1414 2051) - doors, locks, bolts - must be paid for by the landlord (1487). Should the house itself break down (1489), the landlord is obliged to construct for the tenant, a house, as nearly as possible, resembling in size and structure the house originally rented; any deviations from the original structure being permissible only with the tenant's consent.

Of special importance, are the laws of removal in 1486. Here it is stated, that, when a tenant is notified of the landlord's desire that the house be vacated, a certain length of time must be allowed the tenant in which to make the necessary arrangements. The length of time required, in any given case, is determined by the season of the year, by the opportunities of finding another abode and

by the tenants' general special business interests¹:

In this way does the *kushrah* preclude those infringements upon property right that are likely to arise from the relation of tenant and landlord; both tenant and landlord being ^{the} subject to regulations conserving their ~~respective~~ ^{respective} rights to own.

¹ Also in favor of the tenant is the law in M 97 forbidding the landlord to demand of the Aris grain of a quality better than that produced on the farm rented. cf. M 95 in ft. note pp. 124, 125.

Chapter VIII

Employment.

Before taking up what the husband says regarding employment, it would be in place to consider briefly the import of employment according to our present standpoint.

"Every man shall own that which he has created", we have found to be the dictate of morality. Accordingly the laborer should own that which his labor produces, indeed all that his labor produces.

But here a difficulty confronts us. In civilized communities, the labor that has to be done is rarely applied to matter that is untouched by human hands. The work of the laborer is usually expended upon things that are themselves the products of labor and things which by reason of gift or exchange are already the rightful property of someone. Few workers create things absolutely anew whether he cultivate a farm or build a house or manufacture shoes, the laborer merely increases the

value that somebody else's property already possesses.

As a consequence, the completed product of the laborer's work is rightfully his possession only in part. The ownership he enjoys must be shared with him who furnishes the "raw material". Employer and employe, in other words, stand in the relation of joint owners; it being necessary before either can become the sole proprietor for him, in some way to acquire the other's portion.

Now sometimes the laborer first obtains the raw material and then proceeds to perform the labor. But, very often, it is the owner of the raw material who becomes the sole proprietor. It is he who buys, so to speak, his partner's share of the finished product; the money paid for the share thus purchased" being what we

"The Mishnah contemplates instances of labor rendered as a gift. *Ḥoṣṣa 71b* *l. 144*. Labor may also constitute an interest payment. *v. l. 154*.

call the "laborer's wages".

Wages, then, from the ethical standpoint, constitutes the purchase money for the laborer's portion of the thing created; whatever may be the ethical requirements in purchase, being here also applicable. Wages must represent the will assertion both of him who buys and of him who sells that which work has produced. Besides, as in all other cases of joint ownership, so also here, must theft and damaging be condemned as antagonistic to that which is right.

We turn now to the Mishnah with the purpose of ascertaining in how far, the three Babot embody a recognition of these ethical demands.

In the first place, we find the Mishnah enjoining that between employer and employe, dealings be fair and square. In the matter of wages, the employer is forbidden

to disappoint his workmen; while the workmen are similarly forbidden to deceive or embarrass their employer (46'). A person, for instance, who has hired porters and carters may, if disappointed by these engage others, the additional expense to be met by the unreliable employee. In fact, regarding infidelity to a contract on the part either of employer or of laborer, the rules applied are

כל השנה ידו על התחומה

(46²) כל החורבו ידו על התחומה

that is to say, the benefit that may result from any change in the price of labor belongs to him who remains faithful to the contract, the unreliable party suffering a corresponding loss.

Of laws especially favorable to employees:

¹ It is curious that by the principle of מלך מלך

the following are examples:

1.

The hours of labor are fixed by local custom. A longer work-day than is ^{usual} ~~customary~~ in the neighborhood, the employer may not expect. (M 7')

2.

The quality of food furnished workmen by their employer must not fall below the customary standard. (M 7')

3.

The laborer has the right to insist upon the form in which his wages are to be paid. Example: If a laborer undertake to work in straw or stubble under the stipulation that his wage be paid in coin, the

75327 (K 9') even a thief is entitled to the results of the care he bestows upon a stolen object.

cf. p. 104.

employer must pay the wage in coin; he may not foist upon the laborer a portion of the straw or stubble as a substitute. Likewise must the employer abide by the stipulation if a share of the straw or stubble has been specified as the wage (Lev. 19¹³).

According to the commentators on Lev. 19¹² the laborer's consent is also needed before the wage may be paid in the form of an order on a merchant or on a banker.¹

4.

Derived from Lev. 19¹³ and Deut. 24¹⁵ are the laws regarding what may be called "the wage collection period". The "wage collection period" is a certain period of time after the completion of the laborer's tasks beyond which period the employer may not postpone handing over to the laborer his wages.² a

¹ Hoff. note 58 to Lev. 19.

² an employer, however is not guilty of violating Lev. 19¹³ if the laborer fails to apply for his wages during the collection period.

laborer who works during the day must be paid before the end of the subsequent night; one who works during the night must be paid before the end of the subsequent day. For laborers hired by the week, month, year or year week, the period within which wages must be paid is similarly defined (M 9¹).

In case an employer, contending that the wages have already been paid, repudiates the laborer's claim for wages, the following rules are applicable (M 9²):

- a.) If the claim be made during the "collection period", the employer's refusal to pay can be overridden by the testimony of witnesses or by the laborer's oath. Bent. explains this law by saying that the employer is likely to be in error owing to the numerous other matters with which his mind is occupied.
- b.) If the claim be made after "the collection period", the employer's refusal

to pay can not be overriden by the laborer's oath. Merts. explanation here is, that the employer, having had time in which to reflect, is less likely to be ~~making~~^{making} a mistake.

Next in order are the laws that are ~~are~~ particularly conservative of the ~~an~~ employer's interests.

Among these, the most noticeable are those intended to secure the employer's property against damage at the hands of the men he employs. Mention is made of the responsibilities resting upon artisans, carpenters, builders and dyers; persons of these callings being obliged to make restitution for certain damages done to the materials placed in their hands. ^(K93.9) Another safeguard of the employer's property is the principle ⁽²⁴⁶⁾ שכר הן שומר . In order to ~~point~~^{bring} out the meaning of this

statement and in order to present other specimens of the laws defining the laborer's rights and obligations we must make clear how, according to the *hushnah*, the status of the "care-taker" is defined.

Care-takers are divided into two classes, the *שומר שכר* and the *שומר חנם* (*Ex 22⁶⁻¹⁰*).

a.) *שומר שכר* (*Ex 22⁶ 24⁹ 25¹⁰*), one who takes care of an object for pay; the pay in question having a quaint variety of forms. Thus, a reciprocal service of care-taking (*24⁶*); the benefits involved in holding the entrusted object as a pledge for the fulfillment of obligations (*24⁶*); and even, according to the commentaries on *24⁷*, the privilege of performing a *hiyuvah* are reckoned as care-taker's remuneration.

b.) *שומר חנם* (*24³ 25⁷ 25⁸*), one who takes care of a thing gratuitously. To the exact phraseology by which a man signifies

his desire or willingness to act as
שומר דגים, The hushnah naturally devotes
special attention (M 6⁴)

1.

שומר שכר

In connection with the paid care-taker,
the laws securing the interests of the employer
may be summarized as follows:

- a.) One who takes care of a vicious animal
assumes the owner's responsibility for
the damage that the animal might do
(T 4⁹).
- b.) The care-taker must pay for that
which is stolen or lost (M 7⁸).
- c.) The care-taker is obliged to support by
oath his asseverations regarding that which
is damaged (T 7¹², also in M 6⁴), captured
(T 7¹¹) and regarding that which dies
(T 7¹⁰). (M 7⁸)

This oath, however, may also be taken

as a provision in favor of the נמיש; inasmuch as it enables him to escape liability for damage or loss by establishing that the mishap was a case of עשיא (literally, compulsion);

עשיא being a term applied by the Mishnah to those mishaps for which the care-taker is not at fault, mishaps, strictly speaking, which he is powerless to prevent. Illustration of

עשיא is furnished by the accompanying Table on which are presented, in parallel columns, the Mishnaic examples of what, in case of a cattle-tender, constitutes עשיא and what does not constitute עשיא.

Besides the privilege of pleading [✓]עשיא, the following also are points favoring the נמיש:

- 1.) He is not obliged to make the above-mentioned payments for slaves, documents or sacred things" (הקדשות) (M 49).

"For real-estate (הקרקעות) (M 49), I do not see

- b.) He may, by resorting to the proper formalities stipulate exemption from the above-mentioned liabilities (M 7'10, 11)

2.

אנין גמול

In connection with the אנין גמול, the provisions securing the interests of the employer are these:

- a.) He who has charge of an animal relieves the owner of responsibility for damages caused by the animal (K 49)
- b.) It is required that the care-taker establish his innocence by oath in case an animal entrusted to him dies, or in case it is lost, stolen, injured or captured (M 3'75).

how one would ever have occasion to pay. How can real-estate be subject to גמול or גמול? /

The latter regulation, like the similar one in case of the גזלן may, at the same time, be regarded as favorable to the גזלן since it enables him to obtain complete exoneration (לכ 3'). Further provisions in his favor are:

- a.) In case of slaves, documents, sacred things and real estate, the גזלן is not required to take an oath (לכ 4').
- b.) He may, by resorting to the proper formalities, stipulate his exemption from the obligation to take oath in case some accident were to happen (לכ 4' 10").
- c.) By making payment for an animal that is lost or stolen, the גזלן acquires the opportunity to reap whatever benefits might result from the recovering of the animal (לכ 3')¹.

What may be the actual reason for these

¹ Hoff. Note 3 to לכ 3

unique privileges of the *אגודת חסידים*, aside from the ostensible hermeneutic reasons offered by the *hushnah*, I am able only to guess. Most likely the law-makers felt that the generosity of a *אגודת חסידים* ought to be reciprocated. The *אגודת חסידים*, as already suggested, furnishes an example of labor given as a present. Hence the propriety of taking for granted a more lenient attitude toward the care-taker on the part of the man owning the object cared for.²

Yet there are not the only matters with reference to which the *hushnah* establishes

¹ v. h. 132 ft. note.

² May not the liabilities of the *אגודת חסידים* be regarded somewhat like those of a modern insurance company, a part of the money paid for his services corresponding to premium payments? I am inclined to suppose that the conception of insurance is not entirely strange to the *hushnah* (Ms. 5-6273")

an understanding between laborer and employer. The Mishnah also determines for instance, when a fuller, combber, tailor or carpenter may appropriate the waste of the material upon which he is employed to work. The underlying idea here, according to Bent. is that when the waste is sufficiently small the employer is presumably willing to yield it. (K10¹⁰).

Then there are the laws governing the compensation of one who saves from ruin another man's property; one who, for instance, comes to the rescue of a drowning ass or one who saves another's honey by promptly supplying a receptacle to take the place of a jar accidentally broken (K10⁹). Also interesting is the law providing for the compensation of one who returns to its owner a stray animal. The wage for work of this kind is that of a 502 5y15 i.e. of one undertaking a task ~~that~~ which is for him comparatively

easy and for which, accordingly, he is entitled to a wage smaller than his regular earnings¹. This, however, does not mean that he who returns a stray animal must needs suffer loss of income. Quite to the contrary, he may, by making the necessary stipulations before a court², receive full compensation for the losses resulting from the suspension of his ordinary employment. (M 2⁹) If there be no court in the locality to hear his stipulation, the finder of an animal is free from the duty to restore the animal to its owner³.

Finally there are the laws governing the laborer's privilege to partake of the fruits he is engaged in cultivating. This privilege, apparently, a part of the laborer's wage (M 7⁵; 6)⁴ may,

¹ Best.

² M 10⁴ the stipulation need be made only before the person benefited by the service rendered.

³ V. pp. 85 & 86.

⁴ Derived from Deut. 23²⁵ 26²⁵.

according to the Mishnah (M 72) be assumed only by laborers engaged in the production of fruits and vegetables (פירות וירקות מן הארץ). Not permitted 'to eat' are those occupied with such stuffs, Bert. explains, as milk, curds, or cheese. The extent of this right in the laborer's favor and the limits of this right in the employer's favor are exhibited by the accompanying table.

Back of all of these regulations, it will be seen, the unifying principle is that both employe and employer have property rights calling for mutual respect. Here, as in numerous other transactions, ownership obtained by work, gift or purchase is recognised as right while ownership obtained by infringement upon this right is recognised as wrong.

Chapter IX

Interest.

One more point, in connection with employment, remains to be considered and that is the Muslim position with regard to matters economic. Protecting the laborer's rights in so many ~~ways~~ particulars, does the Muslimah also shield him from economic exploitation? Do the three Babot contain any laws that would preclude industrial oppression?

The answer to this question is, in my opinion, "yes". Indeed the very Muslim principles we have just studied may be taken as a demand for economic equity. Believing as I do that most industrial evils are the result of military aggression - the result, that is, of organized and legalized robbery - I naturally find that in the Muslimah these evils are deemed and counteracted:

But, in yet another and a more direct way, does the Mishnah offer a palliative for economic ills. This palliative is the prohibition of interest. An application of Lev. 25^{36, 37}, the interest law of M⁵ aims to provide the poor debtor with opportunities to better his condition. This law, however, is, at the same time, potent of economic consequences that are yet deeper. For, if the prospect of drawing interest be an incentive to accumulate and concentrate wealth, then plainly, is the prohibition of interest the abolition of such an incentive. Ultimately we may recognise in the interest law of Baba Mezi'a another instance of the idea that a man's ownership of a thing to be right must be limited by the rights of other men. In this case, it is the ownership enjoyed by the rich that is limited by the right which the poor^{also} have to live and to possess whatever their toil produces.

So contrary to the dictates of right does the mishnah regard the paying of interest (ד'כ"ז) that it discountenances not only the exacting of interest by the creditor but also the consent of the debtor to accept a loan on such terms and even the part taken in the transaction by the surety the witnesses and the notary (ד'ה"ה).

Money interest and interest on money loans is, moreover, not the only kind of interest that the mishnah recognizes. Labor may also constitute a payment of "increase". This takes place, for instance, when a man performs hard work in compensation for work of a lighter kind previously rendered by his fellow; or when a debtor in consideration of the loan, secures for the creditor certain information that the latter may desire (ד'כ"ז ו'כ"ח) (ד'ה"ה). Similarly, one lending money or goods to a merchant or one lending animals to a

cattle breeder or to a poultry dealer (Le 5-4-5) may not demand for the loan a share of the profits; unless the merchant, by receiving wages, become the lender's employe or the cattle breeder by being partly relieved of the risks connected with the cattle borrowed becomes, as it were, the lender's business partner.

In fact, the mere assumption of responsibility for cattle borrowed is regarded by the *kushnah* as a payment of interest. Of this, the law forbidding one Israelite to lend to another Israelite 5:12, 18 (Le 5-6) is the example. Saye Hoffmann: "Als eisernes Kleinvieh wird es deshalb bezeichnet weil der Uebernehmer für jeden Schaden haftet, und für den Eigenthümer bei den Schafen, wie bei eisernem Vieh, keinerlei Risiko entstehen kann". Here again, so it seems, we meet with

"p. 71 note 52 to Le 5. in "Uebersetzung."

the idea of insurance', interest in the form of insurance on cattle being the subject of the Mishnaic prohibition.

Likewise forbidden is interest in the form of produce taken from a field by the seller during the period in which, having received part of the purchase money, he waits for the payment to be completed. ^(M 5-3) The produce, in such a case, would be regarded as interest paid by the purchaser for the privilege of retaining a greater length of time, the money that the seller is to receive. Also in the category of interest is the produce taken from a field by him who has paid for the field only a part of the price. Bert's explanation is that the sale may never be completed and that the intended purchaser, eventually receiving his money back, will have obtained the produce as interest on the

¹. v. h. 144 ft. note

sum held in part payment by the intended seller. Similarly forbidden is it for one holding a field, as a pledge, to appropriate the fruits of that field, lest the fruits thus appropriated constitute interest on the loan. (M 5:3)¹

Prohibited also is interest in the form of the privilege accorded a creditor to occupy premises belonging to the debtor without paying rent or at a reduction of the usual rental price (M 5:2).—Grain may not be loaned with the expectation of receiving in return a greater quantity (M 5:1^a) or of receiving the same quantity at a time when a rise in prices may give it greater value. According to Hillel, it is even unlawful for one woman to lend to another a loaf under such circumstances that the prices at the time

¹ Bert.

the loaf is returned would enable her who lends to profit by the transaction (M 5-9). Similarly is it prohibited for a purchaser of wine (M 5-1), fruits, dung or pottery (M 5-7) to effect an arrangement whereby a change in price before the delivery of the goods would accrue to his profit, thus bringing him interest on the money paid by him at the time he made the purchase.

In short, the exaction of interest in any form whatsoever is strictly forbidden, not even the consent of the borrower legalizing the transaction.

What would be the consequences of such a law on our present economic order?

Chapter X

Deviations from the
maxim.

on the *נתינת כסף* payments imposed for defrauding.¹ The various considerations mitigating the injustice of these provisions have also been dwelt upon. All that remains yet to be pointed out in connection with these laws is a statement in the first half of *ת"ק* which, we ^{have to} ~~must~~ admit, seems to place honesty at a discount. According to this statement, he who defrauds another of a deposit by swearing that the thing entrusted has been lost, must, if he confesses his guilt bring to the Temple a trespass offering; and must pay besides the principle of that which he has appropriated, an additional fifth ~~of the principle~~. On the other hand, he whose wrongdoing is disclosed without his having confessed

¹ Also perhaps as an instance of humane approval of material theft may be cited R. Gamliel's statement (*ת"ק*) quoted on p. 41. כל המקללן ברשות הרבים והזיקו חייבין לשלם וכל הקורם בהן זכה. Any passer-by is allowed to appropriate those goods, in the disposition of which the owner has taken excessive liberties with a public street.

is subject to no other penalty than the payment of the principle.

However, in the second half of this Mishnah a better moral tone becomes apparent. The case contemplated here is that of one who has defrauded another of a depositum by swearing that the thing entrusted has been stolen. If, in this case, the disclosure be made by means other than the culprit's confession, the penalty is the usual 500 ז'בט; while, if the confession take place, the penalty is not 500 ז'בט but the lighter one of 200 ז'בט.

Also antagonistic to the moral dictate are the various discriminations against women (K 5:4 8:4 7 Me 1:5 B 8:1, 2, 4 9:8, 9, 10); women being, in some passages, degraded to the level of chattels (K 5:4 of K 5:1 K 8:4). Much of the harshness in these enactments however, is compensated for in K 8:6 by a lofty regard for woman's personal dignity. נזקין ארבע מאות 313 It says, 779 ארבע מאות 213.

Yet other instances of antagonism to our maxim are the various discriminations against non-Jews (K1^{2,3} 4^{7,8} 5^{3,5}). The non-Jew (K4³), for instance, is denied the benefit of the *Tam* and *hu'ad* laws; there being expected complete payment for damage done by his ox even when the ox is *Tam*. At the same time, if an ox belonging to a non-Jew be injured by the ravages of an ox belonging to a Jew, it is not required that restitution be made.

Less unfair than this is the interest law in M5⁶; for here, while it is permitted to lend to the non-Jew on interest, it is also permitted that the non-Jew receive interest on his loans.

Particularly out of accord with the doctrine that every man shall own that which he creates is the toleration exhibited by the *huishnah* toward slave ownership and

slave traffic (K¹ 3⁸ 4⁵ 5⁵ 6⁸ 7⁴ 8¹ 9¹²
 7⁶ 8³ 9⁴ 10⁷ 11⁵ 12¹)

Still, by adverting to the law in Ex 21²⁶ff;

(K 3¹⁰) קרא שומא אה עין עבד והפיל אה שנו ח"ב

the mishnah provides the slave with a certain protection. It is also of interest that the theft and damage laws regarding slaves differ from the theft and damage laws regarding other chattels (M⁴⁹). Thus, for slave trade, no Ana'ah rights are recognized; by stealing a slave, one does not incur the penalty of "two-fold, four-fold and five-fold payments"; while, in contrast with the responsibilities ordinarily resting upon the care-taker, it is said regarding slaves

(M⁴⁹) שומר חנם אינו נשבע ונושא שכר אינו מטעם

¹ According to an interpretation given in the Talmud, 7650 is not a man but the fields encircling the city. (Hoff. note 46 to B4).

2. galley slaves.

Likewise at variance with our ethical dictate are some of the inheritance laws.

- a.) First there is the law granting to sons the right to retain the property of which the deceased father has defrauded a proselyte; provided that proselyte be also deceased. (K 9¹)

This law, however, will not appear so extremely out of accord with ethical requirements if we reflect that the proselyte had no heirs (K 47 B 4⁹) and that the property in question could be considered as property that had been "given up".¹

- b.) Similarly to be justified by the principle of "giving up" ($\text{נָתַן$) is the law in K 10¹,

$\text{הָיָה לְיָדוֹ מִכֵּל אֶחָד בֵּן וְהָיָה לְפָנָיו סָמָרִים כֹּל שֶׁלָּם}$

- c.) Not so easy to justify is the law in B 3³, where, speaking of the need for proof to substantiate a claim to property on grounds of tenure (קִנְיָן)²; the Mishnah

1. v. pp. 59-61 ff.

2. v. pp. 76-78.

remarks:

הבא משום ידושה אינו צריך טענה,

which as Bert explains:

אין צריך טענה לכרר אין באה ליד אביו.

To the student of modern industrial conditions and especially to one who suspects that military aggression and commercial cunning are largely the cause of economic ills, these statements are highly interesting. For, the acquisition of property by force and deceit being wrong, the bequest of property thus acquired is naturally the perpetuation of the wrong. It would seem that, by some social arrangement prohibiting the inheritance of ill-gotten possessions, many an economic difficulty might have been obviated.

Likewise difficult to justify from our standpoint, are two of the laws governing the relations between laborer and employer.

a.) One of these laws is that relating to

the consequences that a dyer must bear in the event that his work is unsatisfactory (כאור) (K94). The Mishnah says:

אם השבס יחר על היציאה נותן לו את היציאה
ואם היציאה יחרה על השבס נותן לו את השבס

In other words, the dyer must risk the loss without enjoying the opportunity to have a share in the gain.

- b.) Another of these laws is that permitting one who hires laborers, to make deceptive promises in order to keep the men from breaking their agreement. (246'). ⁴⁵ This law, however is not entirely without excuse.

Finally we have a statement that apparently permits the law of damages to be evaded by means of "red tape". (K3"). Contemplating a case in which two oxen, each belonging to a different man do injury to an ox belonging to a third man, the Mishnah says:

היו שנים רודפין אחר אחד זה אומר שורך הקיץ וזה אומר

שורר הקצק שניהם פטורין.

A mere legal formality, it thus appears, deprives him whose ~~or~~ was injured, of the right to obtain restitution.

There, then are the instances in which the Mishnah, false, as it were, to itself, deviates from moral requirements. Still, compared with the statements that conform with these requirements, the deviations are neither numerous nor pronounced. The great bulk of the ^{legislation} ~~law~~ in Baba Kamma, Baba Mezi'a, and Baba Batra, it can be truly said, comports with our standard of right. The maxim, "Every man shall own what he creates", is, with but few exceptions, complied with; the demands of sympathy being thus heeded to a degree highly commendatory of the Mishnic law.

Chapter XI

The Higher Outlook.

Before concluding this study, let us call to mind once more a thought set forth in our 'Introduction'. Property right, we saw there, indicates a social order that falls short of perfection. A mixture of good and evil; a moral control over immoral tendencies; a rightful adjustment of conflicts that are wrong - this, we found, is essentially what property right implies.

To the sympathetic in human nature, we accordingly found, property right is not altogether satisfactory. It suffices not that wrong be held in check. Sympathy requires more than this. Sympathy requires that wrong be made impossible. The ultimate goal is a higher order of society, in which property and property legislation will not be needed. The narrowness, the imperfection, the conflict of wills that necessitates owner-

ships must be overcome. "The brotherhood of man", the harmonization of human wills must be established.

Now thoughts such as these are not entirely foreign to the Mishnah tractates we have studied. For, in the books before us, something higher than legalism from time to time appears. Amidst the subtleties of the law, are interspersed fine bits of Haggadah that touch up the Halahic portions with a strange beauty and impart to them, at times, a significance that is inspiring.

Having referred to what the Mishnah says about accepting "tainted money" (K10') for philanthropic purposes¹; about the duty to return to one's fellowman the property that has been lost²; about the obligation to aid

¹ v. p. 99

² v. p. 86

laborers regarding the food with which they were to be provided. When the son returned, the father said to him:

"My son, shouldst thou prepare for them a banquet like that of Solomon in his glory¹; thou wouldst not be doing toward them thy duty. For they are the children of Abraham Isaac and Jacob."

The beauty of spontaneous self-denial is also taught. Thus Rabban Gamliel when lending grain to his tenant was wont to give the tenant the benefit of changes in prices, "not because the Halakah required it, but because R. Gamliel desired to make things rigid for himself" (M^s 5-8). Correspondingly gluttony is deprecated, the sage urging men to be moderate "lest they cause the doors to be closed before them". (M^s 7⁵).

¹. Literally "in his hour".

Particularly exalted is the admonition that, when injuries have been committed, forgiveness should be sought by the offender and readily granted by the person injured. Says the Mishnah: "Whence do we infer that he who hesitates to forgive is hard-hearted? From Gen. 20¹⁷ and Abraham prayed to God and God healed Abimelech." (K 87)

Another noteworthy Haggadic passage is that in Lu 4¹⁰:

"Just as there is overreaching (פנין) in trade, so also is there overreaching in speech (Lev. 25¹⁷).

Let not a man ask 'how much is this worth?', when he does not intend to buy.

If there be a penitent sinner, let no one say to him, 'Be mindful of thy former deeds'.

If there be one descended from a proselyte,

let no one say to him, "Remember thy fathers' doing". For it is said in Ex 22²⁰ 'Thou shalt not vex a stranger (72) nor oppress him'.

Also worthy of notice are the cases (K 6⁴ M 4²⁵) in which the Mishnah leaves to the will of Heaven the correction of various misdemeanors. Thus in K 6⁴, one who instigates a deaf person, an imbecile or a minor to commit arson is subject, not to human penalties but to penalties divine.

Did the Mishnah perhaps realize the futility of human punishments?

And now, as a tribute to my teachers at the Hebrew Union College, I conclude by quoting one of the finest of all the expressions indicative of the higher outlook. This is the well-known saying in M 2¹. The interests of ones

Teacher, according to this Mishnah, very often
take precedence over those of ones father.

טאבין קביאן לעולם דיד

ורבו שלמדו חכמה מביאן לקיי קעולם דבא

"The father caused him to enter this
world; but the teacher, he who imparts
knowledge, causes him to enter the life
of the world to come".

The End.

Appendices.

Appendix I.

Referred to on page 6.

Naturally the "thing" in question is a thing outside of the owner's body. This thought is conveyed by the very syntax of the sentence: "A man owns a thing;" the sentence implying not only an object owned but also an owning subject. A distinction is brought out between *habens* and *habitu*. Something, therefore, that is not in the structure of the *habitu* must exist in the structure of the *habens*. That "something" is the body of the owner.

The rights of will domination over one's body come not under the caption "property right" but under "right to life", "right to freedom", "right to exemption from pain".

It follows, that in a careful study of

* See on page 6, foot-note 1.

ownership, we may not speak of a person's owning his hand, his stomach or his head. - the possessive case here being highly infelicitous. The hand, stomach and head are needed to make up the owner; only things outside of the sphere of hand stomach and head are things to be owned.

That this distinction between owner and owned is, from a metaphysical standpoint arbitrary and inexact can not, of course be denied.^{*} It must be remembered, however, that, outside of metaphysical studies all inexactness can not be avoided. For the very use of language compels us to be inexact. Language having grown up under interests far from that of exhibiting metaphysical niceties, is sure to play us false if we aim at being metaphysically ac-

^{*} Especially by one who has read Bradley's "Appearance and Reality", Chap. XIX.

curate in everything that we say. Of this fact, the proverbial obscurity of works on metaphysics furnishes abundant evidence.

Human expression must content itself with imparting truth, notwithstanding the inaccuracies of speech.

Appendix II

Referred to on page 23.

The pioneer, be it observed, has created something. He has taken from nature raw material in the form of a stretch of territory and has adapted that material to human purposes by converting it into a farm.

Possibly, in this connection, an objection will arise. "The thing owned," it may be urged, "is, in the last analysis, soil and soil is obviously something that the pioneer did not create".

The root of this objection lies in the

metaphysical inaccuracies of language and especially of the troublesome word "thing". It is overlooked that a farm as such is a thing different from soil as such. In the farm, the soil as such has ceased to exist. It has lost its identity by being absorbed into a thing that is more than soil pure and simple.

Indeed, men create things only when, by virtue of human strength and ingenuity, things already in existence lose their identity by entering into the make-up of new things*. In this sense only do bakers create bread and cobblers create shoes and carpenters create houses; neither a thing not created, yielding its identity to the shoe, the bread, the house or whatever other thing human contrivance is said to effect.

* V. p. 191.

Now, in the light of these facts, intellectual pursuits are also creative processes, will be considered in Appendix IV.

Appendix III

Referred to on page 27.

That the desirability of peace was a consideration operative already at the historical beginning of property right, there can be maintained on good authority.

Says Herbert Spencer:

"The consciousness that conflict and consequent injury may result from the endeavor to take that which is held by another, ever tends to establish and strengthen the custom of leaving each in possession of whatever he has obtained by labor and this custom takes, among primitive men, the shape of an overtly admitted claim"—
Principles of Sociology Vol. II² p. 554 h. y. 1896.

John Stuart Mill writes:

"Enough is known of rude ages both from history and from analagous states of society in our own time, to show, that tribunals (which always precede laws) were originally established..... to repress violence and terminate quarrels. With this object chiefly in view, they naturally enough gave legal effect to first occupancy, by treating as the aggressor the person who first commenced violence, by turning, or attempting to turn, another out of possession. The preservation of the peace, which was the original object of civil government was thus attained."

Principles of Political Economy Vol. I p. 259

N. Y. 1880.

Appendix IV

Referred to on page 85. and 105

The entire eighth Perek of Baba Kamma does

not, strictly speaking, deal with property law.¹ The payments of 753 (K 8'' 7,7) and 502 (K 3'08'', 2,6,7); with which may be connected the law of B 376''⁶ forbidding people to intrude upon the privacy of others; - not to mention the death-penalty for bruising one's parents (K 3'08'') and the damage payments for ^{the} infringements discussed in Chap. I; really have their place in the study of those rights that are other than property rights as such.² The Za'ar and Boshet laws have presumably been placed in Perek 8 of Baba Kamma because suggested by the regulations about vicious animals in the preceding Perek.

Still, between the requirements of Za'ar and Boshet on the one hand, and of property right upon the other, this connection is discernible:

1.

The rightful owner of property has a right

¹ v. Appendix I

² v. Appendix I and foot note, h. 6.

to the various enjoyments that his property affords.

2.

But if this owner be humiliated or pained, he loses much of the ~~happier~~ happiness that his property would otherwise furnish. In other words, if we humiliate or pain a man, we reduce in a measure the value of everything he owns.

Correspondingly, if we instruct or entertain a man, we augment to that degree the value of all his belongings.

3.

Now just as the Teacher or artist or entertainer, like any other workingman is entitled to pay representing the increase of values he has created"; so does a just law require that he who pains or insults another make restitution for the resulting depreciation of property values.

When placing the Za'ar and Boshet laws in Baba Kamma, the compiler may possibly have been animated by some such sentiment.

Appendix V.

Referred to on page 152.

The power of the so-called "capitalist" over the laborer depends upon the former's great wealth. To only a part of this wealth however is the "capitalist's" title a rightful one. For the other part rests not upon human creation and not upon gift or purchase from the creator but upon exploitation conquest and cunning.

In other words, only a part of the great estates owned by the wealthy are rightly owned. Only a part represents creative work done either by the present owner or by those from whom the property was purchased, inherited or received as a gift. Much of these estates represents acquisition by means of swords and guns¹; acquisition by means that are

¹ That this part is extremely large, I have found

morally wrong.

An application of the principles we have found the hushnah extensively vouching for would, to say the least, considerably alter the present distribution of the world's goods.

attested by J. S. Mill - "Principles of Political Economy" Vol II. I dare say that few students of history would challenge the statement.