HEBREW UNION COLLEGE JEWISH INSTITUTE OF RELIGION

LIBRARY COPYRIGHT NOTICE

www.huc.edu/libraries

Regulated Warning

See Code of Federal Regulations, Title 37, Volume 1, Section 201.14:

The copyright law of the United States (title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

accepted

THE RABBINICAL LAW OF TORTS

AS COMPARED

WITH

THE AMERICAN AND ENGLISH COMMON LAW

Submitted as partial requirement for graduation.

Hebrew Union College
Cincinnati, Ohio
May, 1924

Walter Gilbert Peiser

Mic. 6/79

* THE RABBINICAL LAW OF TORTS *

INDEX

INTRODUCTION

A

Before any two systems can be compared it is always necessary to find in them a marked general contrast or similarity. Otherwise it would be nigh impossible to discuss them in the same connection. In order, therefore, to compare the Talmudic law of Torts with the Code of Torts under the Common Law we must first find this common or opposed basis in each of the larger systems. Even in a slight perusal of the Talmudic civil law there appears immediately a similarity between many of its norms and those that we are bound by today. This, however, might be a result of a like accidental growth, in the few cases we consider, from universal ethical maxims. Should we, tho, be able to notice a similarity in origin nearer to the specific than the mere universal maxim; should we discover a resemblance in motive, purpose, or method we may then find general ground for our more specific comparison in the case of Torts.

At first glance we might infer that there is no similarity between the two systems, for there is an apparent contrast, since the emphasis of the one, the Jewish law, seems to be the provision for one need; of the other, the Common Law, another. Religious precepts, ethical injunctions, ritual commandments seem to be the specific province of the one; civil obligations with their corresponding fines and punishments the particular field of the other. The fact that the two overlap as in the case of the few norms, the similarity of which originally attracts our attention, may be hastily explained on this imperfect analysis, as being due primarily to the "over-dicta"[1] on the part of one system or the other.

This first impression seems more and more evident as we find that

---

1. Irrelevant amplification

the rules of conduct in the Talmudic law have rather the sanction of divine and oracular origin than the rationalistic reasoning of skilled and learned jurists. Thus the greatest authorities thruout the Talmud will rarely depend on their own arguments or principles; but will clinch the decision with the question "Upon what scriptural verse is it based?" or "What traditional authority is there for it?" These traditional מסורת they, likewise, traced to God, (thru Bible verses in most cases). For that reason it would seem that the Talmud derives its authority solely from Scripture and has no other right or reason for existance than that it succeeds in interpreting and expanding what the Bible says and applying it to new cases.[2]

The individual cases mentioned may then be merely explanatory examples of general principles already established rather than the specific facts on the basis of which general principles are formed. In other words, the Jewish Law may not be law at all, in the sense in which our modern courts understand it, that is as statutes agreed upon by the members of the society composing the state, but rather a succession of deductions from general ethical principles.

This, however, is not the case. On closer inspection, it will be found that the Talmudim and the codes it embodies and those that are based upon it, constitute a law book not in the sense usually understood, as a collection of biblical interpretations with a few examples from the courts of the day, but in our modern sense, of a case book or a digest of specific cases from which the general applications are derived and upon which all the rest of the contents depend.

B

Now in order to understand more fully and clearly the relation that

---

2. M.W. Rapaport, "Der Talmud und sein Recht". p. 4.

must exist between Talmudic Law if it is a real legal code and the American and English common law, it must be remembered that Law itself is not man made but natural and universal. Just as the law of gravity is everywhere applicable, so is the legal code. If one defies the law of gravity and attempts to walk on air he must necessarily fall. If one defies the law concerning the rights toward a fellow man he must necessarily be punished. Now these rights are substantially the same whether found among the Hottentots or the English. Natural law is universal and just so also is legal law which is merely a form of the natural law.

Of course, it may be found that many people who hold to the same or practically the same code have been in contact with each other for a greater or a lesser period; but this in itself would not be sufficient to explain the extraordinary similarity between the systems obtaining among such people of whom such a mutual contact cannot be presupposed, especially not in their development. This general idea is expressed by J. Kohler.[3]

The similarity between the Judicial systems of people living in different sections of the world has been commented upon by a number of authorities. This, many of them try to explain on the ground of their being in contact at one time or another. For instance, the prevalence of the same or similar well known norms in the law of the Assyrians, the Chaldeans, the Persians and the Greeks, and in the code of Hammurabi, is ascribed to the fact

---

3a. Introduc. to "Der Talmud und sein Recht." Rapaport. p. 4

3b. ("Besonders wohltuend aber wirkt die Humanität des judischen recht.") Ueber die Methode der Reichts vergluckung" Gruenhut's Zeitchr. Vol XXVIII p. 273 quoted in English - I.H. Levinthal "Jewish Law of Agency."
("The more we proceed in our study of humanity, the clearer and more evident it becomes to us that the whole human family, despite national peculiarities, are actuated not only by similar instincts and desires, but especially in law and in the development of public institutions, they show the influence of similar cultural forces.")

there were invasions made by these people into Babylonia and that the whole Babylonian law is a product of the interplay of them and their cultures.[4] This explanation may satisfy in this particular case, but there still exists a likeness between many systems that have never, or probably never, been contiguous. At any rate parallels do occur in many systems, whether we succeed in explaining them or not.

In this connection it may be well to point out the similarity that has been noted between our Jewish laws and those of the two great legal systems of the world.[5] It has been pointed out by a Jewish scholar that there is a definite correlation between the Jewish judicial system and that of the Eastern Christians,[6] and by another scholar that there exists also a peculiar likeness between the Roman and Jewish codes.[7] The latter, however, instead of ascribing this similarity to the contact of the two systems, attributes it to the fact that they existed during the same age and were therefore induced by a similar environment to conceive like laws.[8] Furthermore another writer has commented upon the existence of a marked resemblance between the Talmudic law and the law, as known in the modern courts,[9] and the dependence of the

---

4. Encyc. of Religion and Ethics - Art. on "Law." p. 817

5. The Laws of the Christian Orient (Greece, Balkans, Russia) and Western Rome.

6. V. Aptowitzer "Influence of Jewish Law on the Development of Jurisprudence in the Christian Orient." - Jewish Quarterly Review (N.S.) vol. 1.

7. Frankel "Gerichlicher Beweis" p. 58 ff. ("The same subjects are often treated in both, and form a basis for the application of the legal principles."

8. idem "This resemblance was due to conditions and requirements of the time, and for the same reason many legal provisions are common to both codes."

9. Lazarus "The Ethics of Judaism "Vol II, 167. "The Rabinnical spirit in its capacity as the exponent of the public conscience, dealt with such questions (as concerns the modern law courts) two thousand years ago.")

of the modern law on the Mosaic teachings is noted by the former President of the United States, the late Woodrow Wilson.[10]

That these peoples of antiquity the Romans and the Semites, with the influence of the former on the modern common law and that of the latter on all the Jewish codes, had contact cannot be denied; but both their law codes reach back into the dim past before either of these peoples suspected the other's existence. The truth is that all people must have rules of conduct. No matter how backward, no matter how savage they are they cannot live in anarchy. These rules are the logical growth and expansion of one simple norm which is an apriori demand even in the cannibal; and that is that he be treated justly and squarely, and in order to be sure of this fair treatment of himself he acknowledges his fellow's right to similar treatment. No magic or superstition govern these simple rules as govern the religion, the government, the agriculture, etc. of the savage. They are always the rational outgrowth of the first innate demand of man. Thus fundamentally all expansions of the original urge are logically arrived at or at least to a very great degree is such the case; and insofar as this is true, the laws of all peoples must be substantially alike. True the subject matter may differ, owing to different conditions; or similar matter may be subsumed under different general laws in different systems, but fundamentally the general rules are always the same. Sometimes this does not hold rigidly true; there are exceptions, but this is merely due to the majority opinions being contrary. There will, however, usually be found upon investigation in any of these cases a minority corresponding to the majority of the apparently different decision.

It may be immediately mentioned again, in contradiction to this that whereas the civil codes of modern governments may be based on these rational and logical norms, the Jewish law is always, invariably traced back

---

10. "The State" Sec. 220 ("The Laws of Moses, as well as the laws of Rome contributed suggestion and impulse to men and institutions which were to prepare the modern world; and if we could have eyes to see the subtle elements of thought which constitute the gross substance of our present habit, both as regards the sphere of private life and as regards the action of the state, we should easily discover how much beside religion we owe to the Jews.")

to the Bible and thence to divine origin. In the first place all law has been attributed in its genesis to some divine source. Thus the law of the Babylonians was supposedly divinely and supernaturally ordained; the code of Hammurabi is attributed to the sun god Shamash. Demosthenes has said: "Every law is a discovery and gift of God."[11] and Cicero showed the Roman conception too to be that law is divinely ordained. "Lex nihil aliud nisi recta et numine deorum tracta ratio."[12]

By the divine origin of law, however, a very definite and specific thing is meant. It does not rule out at all the idea that men bound themselves to respect each others' rights. These rights and their conception of them were products that God had inspired into their minds. "Not those things alone are from God which He institutes and ordains by His own immediate act, without the concurrence or interposition of men; but those likewise which men themselves, by the guidance of good reason, according as the different circumstances of times and places required have taken up, in order to aid the fulfillment of some obligation laid upon them by God's command."[13] This idea is likewise suggested by the Talmud where it is said, "Three things did the human authorities perform which God or the Heavenly authorities endorsed."[14]

This rational general law which is thought out very definitely by the inspired men universally is what Blackstone called the law of nature. He explains "This law of nature being coveal with mankind is of course superior in obligation to any other. It is binding over all the globe, in all countries and at all times; no human laws are of any validity, if contrary to this, and such of them as are valid derive all their force and all their authority mediately and intermediately, from this origin."[15]

---

11. Aristogut A. 16
12. Phil. 11:12, Encyc. Relig. & Ethics article "Law" (Roman)" P. 885
13. Puffendorf "Law of Nature and Nations." L. 7c 362
14. Maccoth 23b
15. Commentaries "ed Lond. 1857 i. 27)

CHAPTER I

TALMUDIC AND COMMON LAW

CONSTITUTIONAL AND COMMON LAW

In both the Jewish and the English systems there are set constitutions of which all laws must be the natural and logical extension. The Bible being the Jewish constitution, the basic law, contains these major cases, such as for instance the case of the pit,[16] or the case of dangerous animals,[17] only to mention two of the cases which we will discuss more specifically further on. In English law the constitution likewise is a compilation of these court decisions governing major and type cases. Many of these will be discussed later. The Magna Charta, the treaties, the legislative enactments, tho, also part of the constitution of England are only incidental parts; but the main body consists in previous and some even antique court decisions. In referring to a new decision the English court is just as punctilious in its demand of "Upon what previous decision is this based?" as our Talmudists are when they ask "Upon what Scriptural verse is it based?" The American constitution is misleading, for it is a code of theory merely summarizing the general rules of the cases contained in the English constitution; but for the meaning of those rules the American court invariably looks to the original interpretation of the English court which first formulated it. So just as the Talmud derives its authority solely from Scripture and has been produced for the purpose of interpreting and expanding what the Bible says,[18] so also does the law court of today find its authority in those original decisions that make up the basis law of the place where it sits.

Constitutional norms are necessarily limited. No two cases can possibly arise that all facts are entirely alike, where every detail fits the

---

16. Ex. 21:33, 34
17. Ex. 21:28-36
18. "Der Talmud und sein Recht." M.W. Rapaport, P. 4

precedent. It is, therefore, extremely necessary that the precedent be expanded. New economic, new social conditions repeatedly arise to make a troublesome legal point for the minds of trained jurists. No mater how new or novel the subject matter, the facts of a case that is brought before the modern law court may be, the justice must discover some analogous case, some "case in point" that will serve as an example to follow. Therefore piling up on the top of the small ~~small~~ number of original constitutional decisions is a large mass of expounding and extending cases that serve as a commentary and which immediately, provided they are registered by the proper court, become of the same binding force as the basic law and thereby becoming a part of it. This we call the Common Law or Unwritten Law. The similarity of this to the idea expressed by David Amram is evident. "The Mosaic law, the foundation of the legal system of the Hebrews, cannot be understood unless it is read by the light of its commentary, the Talmud."[19] The Talmud itself together with its subsequent codes is in every detail the Common Law of the Jewish people. It not only gives fuller and more concrete expression to the precedents but it, in itself, becomes a part of the constitutional law, the law of the Torah or as it is designated, תורה שבעל פה .

The names given the two branches are synonymous, the one, the Talmud being called the Oral Law, the תורה שבעל פה as distinct from the Written Law, the תורה שבכתב and is therefore synonymous with the other name under which common law is classified, the "unwritten law". Furthermore there is another similarity. In both cases the names became almost misnomers, for they were retained even after those codes became written. The Jewish oral law is bound in a great mass of written literature, both Talmuds, the Midrashim, the codes, the Tosefta and so forth; while the modern unwritten law is written down in tomes upon tomes of digests, encyclopedias, case books, etc.

---

19. "The Jewish Law of Divorce". p. 12

They both have in common also that out of some small word or sentence found in the primal norm a whole mass of legal code has been expounded. Students are taught in the law schools as to how the law increased in geometric proportions, of how out of one class five derivatives may be found and out of each of those derivatives again a multiple of sub-derivatives and so on. It is the same way with the Jewish law. There has been compilation upon compilation of the original few legal precepts of the Bible so that Lazarus is able to compare these precepts to "mustard seeds" which grow up under the rabbis' interpretations into great plants." "And in the fifteen hundred years since the close of the Talmud," he continues, "the same intellectual work has continued almost without cease; a considerable literature has been produced to explain not only the Bible, but also the Talmud, to establish every truth, elucidate every notion, and develop every precept."[20] Or again he says of law--"The original notion, tho essentially remaining the same, is modified, elaborated, endowed with ampler fulness, and expressed in more definite forms."[21]

THE TEST CASE

The expanding of an individual decision into a general principle is what is known in common law as the extending of the test case. It follows a legal rule of which the similarity to Talmudic hermaneutic rule[22] may be noted. "Quando lex specialis, ratio autem generalis, generaliter lex est intelligenda"-"When the law is special, but its reason general, the law is to be understood generally." Thus should a case decide under common law that a pleasure car that recklessly breaks something is responsible for all the damage done, it may be taken to apply not only to pleasure cars but all automobiles, not only to all automobiles, but to all vehicles, etc. This mode of extending

---

20. "The Ethics of the Talmud" vol II p. 175
21. ibid p. 153
22. כלל ופרט וכלל

the more particular to the more general is likewise the basis of the Jewish legal expansion and commentary. To cite a couple of examples:- The particular case in the basic law states that an ox and an ass may not be used to plow together.[23] The oral law extends it to take in not only the ox and the ass, but any two different animals and not only for plowing but for doing any manner of work.[24] And another example is that of the Biblical law that no man shall take the mill or the upper millstone as a pledge,[25] which likewise is extended to include not only the millstone but every manner of thing that is used for preparing food.[26] Mielziener comments upon this process of enlarging the law giving us as general principle that "Any special law found in the Mosaic legislation is assumed to be applicable to all similar or analogous cases."[27] The first case is called the test case according to the common law; the אב or father according to the Jewish law while the extended decisions are derivatives and בנים (children) respectively.

Of course, due to this generalizing of the particular case almost anything can be proved from precedent. Thus in Common Law we find many decisions that are decided in accordance with older decisions that must be stretched and pulled in many different directions to provide a cover for a new and necessary judgment. This is no less true in the Jewish law than in the English law. In differentiation of a derivative from the test case an explanation is always given by the jurist to explain why this is necessary and how it is that, despite the seeming strain, there is nevertheless harmony and conformity. This principle in the Talmud is also fulfilled when our rabbis council, in the face

---

23. Deut. 22:10
24. Sifre p. 131 — § 231
25. Deut. 24:6
26. Mishnah Baba Metziah 9:13
27. "Introduction to the Talmud" p. 157

of a decision that does not just conform to the test "[28] that the Biblical precedent in all of its original meaning must never be overturned. This seemingly stretched adherence to a precedent is merely the response to a desire "to provide an established custom and norm with a Scriptural precedent."[29]

Now because of this facility in the straining of precedents it is easily conceivable why there should be a number of controverted decisions. A doubtful case may always be pulled in the direction of either of two or more different precedents. This gives rise to what are known as controversial or dissenting decisions. In Common Law the first and ruling decision is called the majority, in the Talmud it is known as the [illegible] decisions while in both, the dissenting decisions are delivered immediately afterwards, citing the names of the jurists and Talmudists respectively who do not agree.

It may here be pointed out just in passing that some of these arguments between competent jurists of the Talmud were concerned with cases in which there is still a lack of unanimity of decision. Lazarus points out that such questions of monopoly and competition came before the old time Jewish court.[30] He says further that "the Rabbinical spirit, in its capacity as the exponent of the public conscience dealt with such questions (that concern the modern law courts) two thousand years ago.[31]

WEIGHT OF AUTHORITY

In the American and English Common Law it often becomes necessary to distinguish between authorities. The system of precedents provides that once a case is decided it cannot be overruled by any but a more competant court.

---

28. Sabbath 63a. Yebamoth 11b; 24a

29. Kiddushin 9a; Erubim 4b; Succah 28a.

30. "TheEthics of the Talmud" vol ii p. 166

31. Ibid p. 167

And this provides much discussion as to what court is the better authority. Ordinarily if two courts, all else being equal except their age, give contrary decisions, the decision of the older court will be accepted. Also the nearness or the renown of the court giving the decision or the qualification of the jurists rendering such decisions will enter into the final conclusion as to which authority should finally be accepted.

This attempt to arrive at the better authority is also to be found in the Talmud. The question is repeatedly asked "Whose opinion is the Mishnah?"[32a] or "Whom does this follow?"[32b] The answers also are very similar to the ones given in the modern courts. Whereas, however it might be expected that there would be even more respect for an older decision in the Talmudic law because of the amount of insistancy on the divinity of the original revelation, the contrary is true. The Sanhedrin always reserves the right to offer and have accepted a distinctly contrary decision to the established one to suit the exigency of the time.[34] Another passage even goes further, giving a later court the right at all times to reject a former decision, even when based on the decision of a higher court.[35] And even further yet, the Biblical law, the Torah shebichsav may be set aside temporarily to serve the needs of the time.[36a] Such laws would seem horribly radical to the courts of today. A decision such as that of Rabbi Hillel in regard to the Prosbul would be almost impossible. The Torah provides that there should be a complete release from debt in the Sabbatical year.[36b] so that the poor would be given the chance to get on their feet again. In the course of time, however, the very poor that the law intended to help found that it had proved a hardship for them. When it came near to the Sabbatical

---

32. {a | b
33.
34. Hilkot Mmrim 1:1; MoedKa Katan I;1
35. ibid 2:1 also Mish Ber. IX:5, 54a; Yoma 69a
36a. ibid 2:2
36b. Deut. XV:2

year the rich men would refuse to lend them money. Hillel saw the only way out and that was to permit a creditor to transfer a debt in writing so that he might collect it in spite of the Sabbatical year.[37]

This example, however, instead of proving the point that the Jewish law may be changed more easily than the modern law might be referred to, as another merely apparent difference. If we analyze the incident we find that Hillel is using in that case what has been known to Roman law and its offspring legal systems as a "legal fiction." The ideas of making a corporation or living person, of introducing imaginary characters, John Doe and Richard Roe, respectively into ejection proceedings, of perpetuating of the homage to a king whom we have not, all these are no more than the same general principle underlying the Prosbul.[38] There is really no attempt to supersede the old authority but rather to bring it in harmony with the times. The legal fiction in Roman Law was carried to such an extreme that, according to Thering, "to efface the unfavorable consequences of an emancipation, it was declared not to have happened--a daughter was proclaimed a son, a stranger was declared to be a citizen so that he might be given the right of inheritance, and children were attributed even to the chaste Diana."[39] Thus were also a number of other laws in the Talmud set aside completely, but the original law was not supposed to be abrogated. The solemn rite of expiation for the murder, of which the murderer was unknown,[40] and also the trial of adultery with the Sotah water[41] were explained away from the Jewish statutes.

The necessity of a court being more competent before it can set aside a decision is approved with no uncertain words by the Talmud. "A later court (that is an authoritative assembly of scholars) may abrogate the decision of a former court only when it is superior in learning and in numbers."[42]

---

37. Mishna Sheb. X:3,4
38. "Legal Fictions" by Raphael Demos - International Journal of Ethics vol 34
39. "Geist des romischen Rechts" IV, 158
40. Sotah XIV:1
41. ibid IX:9
42. Mish. Edy 1:5

Furthermore the respect given to the older authority is very evident throughout. If, for instance, the Common Law is set and that means that it is the custom of the entire Jewish people, no court, even of higher jurisdiction than the one that first decided it can abrogate it.[43] Again it is very specifically stated that after one rabbinical court of competent jurisdiction renders a decision no court of even higher jurisdiction can override it.[44] And finally it must be mentioned here that the idea of suiting a decision to the exigency of the times was the method employed only after trying to make it binding on the ground of precedent or interpretation of that precedent.[45] In this connection, Mielziner says "The strongest argument against a proposition advanced by an Amora is to show that it conflicts with the authoritative decision laid down in a Mishnah or Baraitha."[46]

Just as in the Common Law there is every effort made by the unfavored litigant to prove that the case he has does not fall under a certain precedent, so, too, in Talmudic law there is that same endeavor. The argument from precedent may be refuted in a number of different ways. It may be argued first of all that the opponents brief is based on an entire misapprehension of the authority cited.[47] It may be contended also that the precedent does not concern the case under consideration as it is said " שאני התם " "The case there was different"[48] or "הכא במאי עסקינן" "Here we treat a special case"[49] Then finally a good refutation may be had in proving that the passage cited as a precedent is really not binding at all because it is disputed by another and more competent decision. Passages for instance hold that " תנאי היא "[50] explaining that the original Tannaim differed on the question or that " היא דאמרה כי האי תנא "[51] proving there is a basis for the authority of the

---

43. Ab. Zarah 36b. Maim. "Yad " Mamrim II:4
44. Baraita in Nid. 20b. Ber. 63b
45. Hilkot Mamrim 1:1
46. Introduction to the Talmud" p. 257
47. B.K. 14a. Zeb. 15a. B.M. 32b. Kidd. 7a
48. B.M. 10a
49. B.K. 8a; B.M. 10b
50. B. Metziah 62a, R. Hashana 19b.
51. Maccoth 10b; 12a

opposition or finally a frank dispute between authorities seeking which is to be held the more weighty "הא מני פלוני ..... הא"[52]

Thus we have seen that in comparing the Jewish law code with the current common law in its general aspects, the similarity is obvious. They are both supposedly derived from original divine authority--developing from a basic code into an ever increasing bundle of decisions or unwritten law. We have seen that they have both test cases which give ground for authorities and we have learned that under similar circumstances similar authority has been binding. In the next chapter we shall depart from the general and start on our way to the particular. In it will be contained a transition from the general laws of both codes to their more specific laws referring to torts.

---

52. Sabbath 11b; B.K. 10a, Whole subject is also discussed - "Mielziner Introduc. To Talm" P. 256.

CHAPTER II

SCOPE OF THE FOLLOWING CHAPTERS

In limiting our subject there is one main point that we must keep constantly in our minds. The Romans and Greeks were peoples who exulted in classification. They attempted to divide everything into its component parts. For them the study of religion meant something different than the study of philosophy; ethics, logic, and law, all became different subjects to be treated by specialized scholars. This so-called system that separates everything from everything else is a quality not felt by ancient Jews. The Jewish mind, insofar as it is Jewish, has learned to consider everything as bearing close relation to everything else. No wtwo things are entirely independent of each other. If we, therefore, should expect to find a fully systematic treatment of law in the Talmud we would be hoping for the impossible. Whereas in the modern world natural laws come in the sphere of physics, moral laws within the confines of ethics, and legal laws under the heading of jurisprudence, our forefathers knew of such distinctions but vaguely. True they put cases bearing on the same subject matter in juxtaposition and thereby gained a semblance of classification as will be shown in more detail later. There were always cases, however, that were decided in accordance with all the three types of law; but the inter relation between the norms was never broken by any consideration for system. This is commented upon favorably by a modern writer. "There is indeed a beautiful alliance between theology, ethics and jurisprudence. These sciences have a common origin, a common basis, and a common end. The science of legislation, in effect, embraces our relations to God, to individual man, and to society."[53]

The Roman law had a clear cut division and this division was inherited by the modern common law. They found general law to be separated into

---

53. "The Laws of the Ancient Hebrews." Wines.

the "fas" and the "ius" and also had a threefold division into the "ius sacrum", the "ius publicam", and the "ius privatum".[54] This distinction was entirely unknown among Jews either in its two-fold division into jus and fas[55a] or its classification into the moral, ritual and legal.[56b]

We do, however, find a sort of an unintentional semblance of division throughout the Talmud because of the grouping of similar cases (as was hinted above). Tho purely legal norms may be discovered in almost every book of the Talmud they are for the most part concentrated in one division, "נזיקין". Here we can find in the rough practically all the principles that would be grouped together at Common Law under the ius, as distinguished from the fas.[56]

Legal principles are again subdivided into two main classes. There is first of all the "Adjective Law" a compilation of precedent cases teaching us how to go about administering justice. There are rules providing for the composition of our courts. The tribunals are therein furnished with their powers and privileges, rules concerning the procedure in the courts, how judgments are to be executed, what authority or jurisdiction two rival courts have and so on. These subjects are classified under the laws of "Legal Procedure", "Evidence", "The Summons", "Damages," "Conflict of laws", etc. under the American and English Common Law. In the Talmud these subjects are discussed to a degree, thruout its many pages, for laws of procedure in legal cases are in a great degree similar to those in religious cases. Most of them, however, are found within נזיקין in both the Mishnah and Gemara of שנהדרין, מכות, and in Mishnah Tractate עדיות.

---

54. Encyclopedia of Religion and Ethics. Art on "Law" p. 883
55a. R. Sohm "The Institutes" 3 ided p. 22 note 2.
55b. Attempts by modern scholars of Mosaic law to adduce such a classification are entirely foreign. In fact it has thus been attested to by Nathan Isaacs who is thoroly familiar with both systems. "The Law and the Law of Change." p. 4
56. Even here with have whole sections, as for instance the entire tractate of אבות, that are devoted exclusively to non-legal discussions; but it must be remembered that even our common law cases abound with learned jurists' testimony as to the philosophy and ethics underlying the decisions until many of our cases are more full of overdicta than they are of truly legal decision.

The other division of legal norms is into the "Substantive Law" or that law which concerns the decision to be reached when certain conflicting sets of arguments are advanced. Under such and such facts resulting in dispute such and such a decision must be reached. This branch contains those rules which decide the rights of the litigant. Just claims of all sorts are here set up to property, to contract and to invasion of a less tangible right. With this clashing of conflicting claims a standard of rights, a set of maxims, deciding just wherein man could do thus and so was established. These rules of substantive law are to be found mostly in the remaining books of Nezikim.

Now substantive law is again subdivided into cases concerning those invasions of the rights of the entire public, which we term "criminal" and those rights that belong to one or a group of citizens, which we call "civil". For the most part the former are contained in the tractates סנהדרין and עבודה זרה, the latter considering the laws of religious infidelity with very much the same viewpoint as the Common Law takes towards treason. The civil laws on the other hand are to be found almost in their entirety in the first three tractates of the order נזיקין,(Baba Kama, Baba Metziah and Baba Bathra).

Common law distinguishes finally in the realm of Civil Law between actions "ex contractu" (arising out of contract, agreements of all sorts entered into between man and man, concerning property, concerning labor, concerning interest and so forth) and those that are "ex delicto" (arising from an infringement of a God-given right, invasions of which are considered as liable under the law of Torts). So far our definition of a Tort has been negative.

---

57. The three were originally one tractate but were divided thus for convenience as we would divide the volumes of a book. H. Strak - Einleitung in Talmud" N.Ed. p. 24 - 366

It may be well to include here two definitions given in our American Common Law, so that the subject under discussion shall be carefully narrowed down. "A tortuous act" says a test case, "consists of the commission or omission of an act by one, without right, whereby another receives an injury, directly or indirectly in person, property or reputation."[58] or as one eminent jurist puts it, "When the law of the land undertakes to declare and protect rights and establish a standard of conduct for the purpose, any acts or omissions which disturb or impede the enjoyment of such rights may be treated as legal wrongs or torts."[59]

In the Roman Law actions ex delicto are treated under the eighth of the twelve tables. The existence of such laws, however, is found among all peoples since the earliest historical records and probably there were decisions given for tortuous offenses by those savages living long before the age of history. In fact one authority says "As in the primitive stages of social development, force and violence constituted the chief wrongs, society must at an early date have been called upon to settle many questions which are now placed under the head of torts, and the comparative antiquity of this branch of jurisprudence seems manifest."[60] It is, therefore, a fact to be expected that Jewish law reaching back to remote antiquity should furnish norms of this nature. A gentile writer on legal history makes this observation: "No department of Jewish law is more illustrative of the great primitiveness of that system than is the law of torts."[61] Then he proceeds to show his awareness of the similarity existing between the Jewish and the modern conception of the law of negligence, the discussion of which code will form the greater part of this thesis. He says "In the case of liability for negligence of for damages done

---

58. Hayes:.V..Mass. Mutual Ins. Co. 1. L.R.A. 303; 18 N.E. 322

59. Cooley "Torts" p. 4

60. 38 Cyc. 417

61. "History of Jurisprudence" 117 Guy Carleton Lee

by certain animals, (also negligence) there is a close resemblance to modern law."[62]

In treating of the comparison between the law of Torts in Jewish and English courts a series of very important difficulties in an orderly development presents itself. We are faced with the necessity of comparing concrete with abstract, the specific with the general. The Talmudic law emphasizes the individual case. "According to the habit of the Talmud," says Lazarus, "no abstract laws are enumerated, but numerous examples are adduced to illustrate what should be avoided as a breach of morality and sanctioned custom."[63] In the Roman law on the other hand, the broader rule was emphasized. A Jewish writer exaggerates the difference as follows: "General principles of law, only, are given in the Roman law, and it was the function of the judge to decide the detailed case before him upon these stated principles. In the Talmud, however, the reverse is the truth. System and arrangement is lacking. The Talmud is not a code of general legal principles, but rather a compilation of discussions of detailed and specific cases of law."[64] This is, of course, a harsh extravagance in generalization. It is both untrue that general principles of law only are given in Roman law and that the Talmud is not a code of general legal principles. It is only a question of difference in emphasis and method. Otherwise the manner of treating the subject is similar. The difficulty, however, is manifest just because of this difference in emphasis and method. One cannot compare a cat with reality even tho the cat may be real. However, luckily, there are enough specific cases cited under the general principles in the Common Law, for us to be able to make the comparison.

---

62. "Ethics of Judaism" vol II p. 168

63. ibid

64 "Jewish law of Agency" p. 15 I.H. Levinthal

Another difficulty looms quite large, that of taking legal decisions, assorting them, systematizing them, discovering in a great conglomeration of discussion and debate the final decision. Thus has stated the writer of many of the legal articles in the Jewish Encyclopedia.[65] Then the difficulty is further enhanced by the fact that the discussions in the Talmud represent growth. They are not static, but dynamic. We find in the Jewish law of Torts a change not only from the period of the Bible to that of the Talmud,[66] but the Talmud itself shows repeated evidence of change and growth within its own time.

Now because of these difficulties it becomes rather puzzling as to what method to pursue in the division of the subject. To take the order of the Talmudic cases would mean repeating the general rule for each case as it arises, in which case unnecessary repetition would be unavoidable. On the other hand in taking the Common Law classification there is likewise a necessity of repetition because in many of the cases there is more than one rule in point. All things considered, however, the latter manner will necessitate less repeated discussion and therefore an adherence to the modern divisions will be followed for the most part. The discussion of Negligence, being the greater part of the subject will be dealt with first and at length and the other Torts, such as Assault and Battery, Slander, etc, will be discussed later and more briefly owing to the fact that the cases on those subjects are comparatively scarce in the Talmud.

The writer has been unable to discover any systematic presentation of the Rabbinical law of Torts. Modern scholars have written many systematic treatises on almost all other phases of Jewish legal import,[67] but this one field has seemingly been left entirely neglected. This is very surprising, for

---

65. Dembitz in "Critical Review of the Legal Articles, etc. by Eisenstein, p.17 "It is easy enough to repeat a good story, but it is difficult to abridge a mass of discussions on law and bring out from the conflicting opinions the true result.

66. Waxman: "Civil and Criminal Procedure in Jewish ~~xpix~~ Courts"p. 263 ("While the latter (the criminal law) ~~xxxxxxx~~ retained all thru the course of its existence its Mosaic character, the former (the civil law) was practically a Talmudic edifice reared on Mosaic principles"), i.e. the growth of the Criminal law was arrested since the criminal jurisdiction departed from the Jews c. 100.

67. For note 67 see the next page.

there is no field of law so bound up with the life of a people, so concerned with their every day actions, so illustrative of their behavior toward their neighbors as the subject matter arising in cases ex delicto.[68]

---

67. Harlstein has written upon what we would call "labor laws" in his "Das Recht der unfreien und der frein Arbeiter." Marriage laws among the Jews have been discussed by a number of authors, many in English (Mielziner, Holdheim, Amram, Billauer, Dwight and many others) Evidence has been treated by Levinthal, the Summons by Amram, Procedure by Waxman; Deeds by Fischer, Many men have written essays on Jewish law in general, some of which are cited in Chapter I.

68. Steinberg: "Lehre von Verbrechen in Talmud" discusses the law of Torts in connection with the Criminal law, but the approach is from the criminal rather than the civil point of view, and as such is useless for the purpose of this thesis.

My taking into consideration of the later codes in this thesis is due entirely to the fact that they have preserved in most cases the fuller meaning of the Talmud.

CHAPTER III

NEGLIGENCE

A. DUTY TO EXERCISE CARE

To constitute grounds for an action of negligence three things must be shown. The defendant must have had a duty to protect the plaintiff from the injury. It must be shown that he failed to perform this duty and that finally thru such failure the plaintiff suffered directly the injury of which he complains.[69] Supposing for instance a man owned a pit on a road where oxen were accustomed to stroll and knowing that the oxen might fall therein and be hurt, making him responsible to the owner, he decides he will cover his excavation. Thereupon he goes about his own business with a sureness that no matter what happens he has protected himself from the law. The covering of the pit is easily loosened by the nosing around of some different kind of beast, a camel for instance, and the danger is restored. Then along comes an ox and is injured. Is the owner of the excavation liable or not? The Gemara[70] answers the question practically the same as does the Common Law. The answer is it all depends. Had the defendant failed to perform a duty? It was his duty, of course, to protect the oxen from his dangerous pit; but he did protect them to a degree. Yes, but if he had been able to foresee that the camels might come and loosen it he had not fulfilled his duty. So if camels should be expected to be near the pit, the Jewish law answers the pit owner is liable, otherwise he is not. In other words, it all depends on what he should have been able to contemplate, what any reasonable man would foresee. If the camels were to be expected, he had the duty to protect the plaintiff's oxen from them; he

---

69. "Torts" Wilton; Faris v. Hoberg 134 Ind. 269, 274; 33 N.E. 1028

70. Baba Kama 52a; Comp. Niz. Mom. 2:5; Chos. Mish 410:27

had failed to perform this duty and had thereby caused injury. If the camels were not to be expected then all three of these necessary elements would be lacking.

It, therefore, becomes evident that under certain conditions the law imposes a certain duty on the defendant to act in a certain way toward all that belongs to the plaintiff.[71] This principle set forth in the Common Law is inherent in the Jewish Law also. The Talmudic law as summarized by the Maimonides in "Yad"[72] states that a man must not injure the property of his fellow man; and what is more he must not even, in some causal chain be a link in the responsibility for such damage. Even should that possession of his neighbor be insignificant, to him valueless, he must respect his neighbor's right to it. And so he is to be held legally responsible for any tort he commit in connection therewith even when it is not wilful, but merely due to his carelessness, inadvertant or accidental.[73]

To illustrate how these principles have been applied in both laws the following cases may be cited. In the Common Law there is a case where a woman was tending the bar in her husband's public house. The defendant who was a driver accidently, but nevertheless carelessly, drove his van into the inn. The woman became very frightened and being pregnant, bore her child prematurely. The result was the child was an idiot. The court held the defendant liable and commented upon its decision in these words: "Once get the duty and the physical damage following on the breach of the duty and I hold that the fact of one link in the chain of causation being mental only makes no difference."[74] The similarity between this case and the one that appears in the Mishnah is manifest. There one is frightened sufficiently to become ill and the rabbis likewise decided that the fact of one link in the causal nexus being mental did not relieve the defendant from his duty. They however could not bring themselves to exact any legal remedy, but said the case was one of those

---

71. Chapin "Torts" p. 501
72. חש משפט שעח:א
73. Quoted by ש״ע from "יד" חובל ומזיק ו:ב
74. Dulien vs White & Sons, 2 Kings Bench 1901

peculiar kind which are to be left to Divine retribution.[75] Again to cite another pair of cases decided on similar rules. In the Talmudic case the plaintiff put vessels in the entrance to a mill where it was customary for people to leave their vessels. The defendant kicked into the vessels and broke them. The court decided that one is liable for such damage when he does not take care.[76] This rule is practically the same as the rule advanced in the following Common Law case. The plaintiff gave chests of tea to a shipping company to be transported for him. Because the company did not cover them properly they were spoiled by the wetting of a storm at sea. The court here also decided that one is liable for damage to another's goods when he does not take care, that he owes a duty to handle what is now his own carefully.[77]

However it is necessary first of all for the plaintiff to prove that there was such an obligation upon the defendant to exercise care toward him.[78] Were this not the case, anybody could stupidly stroll anywhere and be rewarded for his folly by having an innocent man forced to pay him damage money. It is unfair to expect any man to be constantly guarding every move he makes, so that he will not injure some one who, if minding his own business, should be miles away. For instance, when there is no expressed contract which would otherwise take the case entirely out of the field of Torts, the owner of premises has no duty not to let them in a dilapidated or unsafe condition. A number of American and English cases so held.[80] Thus the Talmud has the same rule relieving a court owner of all responsibility unless he expressly assumes care.[81] The same principle also seems to affect the the decision in the case of the man who entered a carpenter shop without express permission and while therein was struck with a splinter and injured. It was decided that he could not

---

75. B.K. 48a
76. Baba Kama 27b
77 Hart v Allen, 2 Watts 114
78. Flint & Waling Mfg Co. vs Beckett, 167 Ind. 491; 79 N.E. 503
79. Smith v State Use of Walsh, 92 Ind. 518, 48 Atl. 92, 51 L.R.A 772
80. Lane vs Cox (1897) L.R.I. Q.B. 415
81. Baba Kama 48b

collect damages for the carpenter owed him no duty.[82] In this connection the Shulhan Aruk comments that when one is injured upon the defendant's property, the defendant is innocent until it can be established that he wilfully caused the damage.[83] Furthermore, the owner of these premises leases them to someone else, he is not bound to make repairs not stipulated by contract. The tenant now substitutes him in responsibility.[84] Tho there can be found no strictly analogous case to this in the Talmud, the general rule is that if one transfers something he owns to another for his use, this second one always substitutes the owner as to responsibility for damage.[84]

It is an established rule of Common Law that if one leases premises to be held for the use of the public and he fully realizes that they are unfit for the use to which they are to be put, then he is responsible for damages to all people rightfully using them. For instance the mere fact that a dangerous bathing beach is no longer in the possession of its owner and he can no longer be aware of people strolling into the danger that he has negligently allowed to remain, does not release him from the least of his responsibility.[85] The similarity to a Mishnaic case may here be noted. In that case a man does not rent dangerous property but he abandons it. He digs a pit in ground where the public are accustomed to pass,[86] and someone comes along and falls in and becomes hurt. The digger of the pit is, of course, liable.[87]

---

82. B.K. 32b. Comp Chov. Umaz. 1:14; Chos. Mish. 421:9

83. Chos. Mish. 378:4

84. B.K. 44b and 45a

85. Barnett v Lake Ontario Beach Imp Co. 174 N.Y. 310

86. Whether it be public or private ground evidently makes no difference 66 N.E. 968, 61 L.R.A. 829

87. Mishnah B.K. 49b; Niz Mom. 12:2; Chosh Mish. 410:7

B. DUTY OF OCCUPANT OF LAND.

The Common Law rule states generally that the owner of premises owes the trespasser no duty of affirmative care and can only be liable to him for wilful acts.[88] This the Shulhan Aruk passage quoted above, in commenting upon the mass of Talmudic law, also holds:- "But when they take place on the property of the injuror (or defendant), he is innocent, until it be established that he actively caused the injury."[89]

In this connection the following Common Law case is in point. A Railroad Company owned half an acre of land between its tracks and the public highway. On this land there stood a building that had been used as a freight house but had long before been abandoned for that purpose and now performed merely the function of an old dilapidated storehouse of wood. A small boy, to avoid a heavy rain storm, sought shelter under its roof and during the storm a fragment of that roof fell upon him. The decision was that the Railroad Company was not liable. The logic underlying it is evident. The defendant owed the plaintiff no duty whatsoever. He had neither invited him nor had he offered him "any enticement, allurement, or inducement." The boy took his safety into his own hands when he trespassed on another's property.[89] Another case to illustrate this rule is this: If one digs a pit far enough from the highway that it will not be a public nuisance, he will not be responsible if some one falls therein.[90]

The Mishnah has similar cases. Thus if a person puts his grain upon another's land and leaves it there and along comes the owner's beast and provides himself with a good meal upon that grain, the owner of the grain cannot hold the owner of the beast responsible.[91] His grain should not have been left

88. Maynard v. Boston & Maine R. Co. 115 Mass 458; 15 Amer Rep. 119
89. Choshen Mish. 378:4
89. Lary v. Cleveland R. Co. 78 Ind. 323; 41 Am. Rep. 572
90. Knapp v. Doll, 180 Ind. 526; 103 N.E. 385
91. Mish. B.K. 59b; Compt Niz Mom. 3:15; Chos. Mish. 393:4

there in the first place. The owner of the land can not be put at a disadvantage by a mere licensee or trespasser. And similarly supposing A permits his ox to graze upon B's land and while thus trespassing it be bitten by B's dog or gored by B's ox, B cannot be liable.[92] He owes A no duty whatsoever. A should have kept off his land. The general rule also is found in the Gemara stated even more clearly and succintly than in the Common Law. " A court owner is not liable (for damages occurring on his court) unless he expressly assumes care", say our rabbis.[93] Another case expressing this idea is the one cited above. A man enters a carpenter shop without expressed permission and is struck by a splinter and injured.[94] And another such case is the one where a woman brings her wheat to another's mill and it is there consumed by an animal.[95] In neither case is the defendant, the owner of the shop or mill, respectively, liable.

To every rule, tho, there are exceptions. At modern common law it is a firmly established principle that the owner of a piece of land must remember that he cannot treat a trespasser like a rat or an outlaw, setting traps for him or baiting him with cheese or loot. The owner who uses for his protection pits, man traps, spring guns which are calculated to result in serious bodily harm, will have such use adjudged unreasonable.[96] So, too, is the distinction made according to Jewish law. The early Biblical code has the rough idea of it when it prescribes that the man who opens or digs a pit and neglects to cover it shall repay the injured person for the damage done thereby to his ox or ass.[97] The Mishnah extends this case still further by saying he must <u>properly</u> cover it.[98] Mere covering is not enough; he must take

---

92. Mishnah B.K. 47a and b.
93. B.K. 48b
94. B.K. 32b.
95. B.K. 48a
96. Bud. v. Holbrook, 4 Bing. 528; Burrill v Alexander, 75 N.H. 554, 78 Atl. 618; Hooker v Miller 37 Iowa, 613; 18 Am. Repub. 18.
97. Ex. 21:33, 34
98. B.K. 52a; 46a; Comp. Niz Mom. 2:4; Chos. Mish 410:22

accurate care that the pit he owns be not a trap for another or his property. It is not only the case of the pit that holds thus, however. There are several other analogous cases in Talmudic law. If A covers his pit with a board that belongs to B and B comes and takes away his board, then A is liable for any damage done thru his open pit.[99] To cover it with the property of another which may later be removed by its real owner does not constitute a proper covering. Likewise if one build his fence less than four ells in height and a fire passes over it and does damage he is alwo liable.[100] Also commenting upon the duties owed by a landowner to a person on his land, the Shulhan Aruk states very affirmatively, "When it is proven that there was on it something likely to prove dangerous to his fellow he is obligated to reflect upon it.[101]

The question whether one should reasonably expect a violation of his property rights and should be careful not to do anything that would injure the trespasser of them is a moot question in both systems. In the Common Law the question usually arises in regard to people crossing railroad tracks where there is no proper crossing. Must the engineer exercise care in regard to such persons who might in some remote and foolish instant, cross the tracks? Some cases hold he must.[102] Others say that he need not.[103]

The Jewish law, tho long before the time of Railroads, has some cases that might be deemed analogous. For instance, if one is running in public he is thereby violating a right owned by all pedestrians in common. Supposing now a pedestrian duly conscious of his right does not take precaution against a possible runner, collides with him and hurts him, is he liable or not? One group says he can never be liable, and another that he is liable always, and so on without decision.[104] One more case, mentioned above in another connection

---

99. B.K. 30a
100. B.K. 61a
101 Choshen Mishpat 378:5
102. Brown v. Boston & M. R.R. 73 N.H. 568; 64 Atl. 194: Jeffries v. Seaboard Air Line R. Co. 129 N.C. 236; 39 S.E. 836
103. Sheehan v. St. Paul & D. Ry Co. 76 Fed. 201:204. 22 C.C.A. 121
Baltimore & O. Ry Co. v. Welch, 120 Md. 319; 87 Atl. 676
104. B.K. 32a

may be again cited. If one enters a carpenter shop without permission and he is struck with a splinter, the carpenter is held not to be liable; but, and this is important here, there is a great deal of dissension to this seemingly simple decision.[105]

In these cases just cited the crossing was one where only the defendant was within his right; but where both parties are entitled to equal privileges then the one owes the other party a duty to exercise vigilance. In Common Law this principle is again set forth in regard to people who cross railroad tracks at crossings and the railroad company is always held liable.[106] The test case in the Talmud is in regard to two pedestrians, one of whom carries a beam and the other a jug or barrel; or likewise a similar case, one who carries a lighted lamp and the other some inflamable material as flax. One combination of circumstances may be enough to set forth the idea underlying this series of cases which is found discussed in the Talmud[107] as well as the codes the "Yad" of Maimuni[108] and the Shulhan Aruk[109] at some length. A typical instance is the following. Two men walk along the street, one of them carrying a beam, and one following him with a barrel. The first one stops with his beam still poised without having exercised the precaution of warning the man behind him. Naturally the man with the barrel accidently runs into the beam and his barrel is probably broken. Now the Jewish law rightfully holds the man with the beam liable and goes on to say that it does not matter for what reason he stopped, even if he grew tired of holding the beam on the one shoulder and changed it to the other. It was his duty to exercise reasonable care and this he would only be doing if he would give warning.[110] The similarity in principle between this and the Common Law is entirely evident. There is an

---

105. B.K. 32b
106. Baltimore & O. R. Co. v Owings, 65 Md. 502; 5 Atl. 329. Raftery vs. Erie R. Co. 66 N.J. Law 444: 49 Atl. 456.
107. B.K. 31a - 32B. Chos. Mish. 379
108. Chevel Umazik 6:8
109. Choshen Mishpat. 37
110. B.K. 31a: comp. Chev. Umkz. 6:8; chos. Mish. 379:1

active duty arising in favor of the public that due care must be exercised at all crossings where persons may be met. This is a duty that is expected in all human conduct that one must "make all reasonable effort to avert injury to others from means which can be controlled."[111]

It is, of course, clear and evident that if one enters on another's land by permission of the owner he is no longer a trespasser but now rather a licensee and the owner must exercise due care toward him, that is to say, he must not be reckless toward him. But here, surprisingly and unjustly, the Common Law stops and holds that the owner owes the licensee no other duty. Such words as these are common among court decisions: "But the general rule is that a licensee goes upon land at his own risk, and must take the premises as he finds them. An open hole, which is not concealed otherwise than by the darkness of the night, is a danger which a licensee must avoid at his peril."[112] or again, "That where a person is a mere licensee he has no cause of action on account of the dangers existing in the place he is permitted to enter."[113] In a case of this sort, where a member of a fire department is called upon to extinguish a fire on the premises of the defendant he has no action for the injury he receives when he accidently falls into an unprotected well.[114]

To the credit of the Jewish Courts may it be said that most cases are decided contrary to this principle. To leave an innocent party without any means of recovery for an injury that was carelessly permitted to happen to him is not only unjust, but owing to the difficulty in proving intention capable of making a malicious revenge an easy matter. The contrary rule is set forth very truly in this case. The plaintiff's ox is on the defendant's land with the owner's e xpressed permission. While there he is bitten by the owner's dog or gored by his ox. It is held without exception that the defendant is

---

111. Sheehan v. St. Paul & D. R. Co. 46 U.S. Appeals 498
112. Reardon v. Thompson, 149 Mass. 267
113. Holmes v. Northeastern R. Co. L.R. 4 Exch.254, 256
114. Beehler v Daniels, Connel & Co. 18 R.I. 563, 29 Atl. 6: 27 L.R.A. 512 49 Am. St. Rep. 790

115.

liable.[116] Likewise it is held that if a potter places his pots on the land of another with the permission of the owner, the owner is liable for breaking them.[116]

These are, however, Jewish cases contrary[117] to this general rule. For instance, it clearly says in connection with the above cases that there is no liability on a court owner's part for damage to another's property unless care is expressly assumed.[118] In the same manner also speaks the generalization of the Shulhan Aruk.[119] On the other hand there are decisions in the Common Law contrary to its majority rule and in accordance with the general Talmudic rule. For instance a letter carrier falls into an elevator well where he is accustomed to leave letters[120] or a policeman falls into an uncovered well where he was called to quell a disturbance.[121] In both cases the plaintiffs collected damages and properly so. Such decision, however, is only possible in one state, Massachusetts, and the rest of the Union follows the other and inferior rule.

---

115. B.K. 47b; 59b

116. B.K. 47a; Comp. Niz. Mom. 3:13; Chos. Mish. 393:1

117. Nothing better proves the lack of rigidity, the constant growth, the dynamic urge of the rabbinic law, than these contrary decisions to the general rule.

118. B.K. 47b; B.M. 81b; Biloh 40a; Comp Niz Mom. 7:5; 2:3; Chos. Mish. 393:1, 398:5

119. Choshen Mishpat 379:3

120. Gordon v. Cummings, 152 Mass, 513

121. Beayroyd v. Godfrey, 138 Mass. 315

C. DUTY TO OWNER OR OCCUPANT OF ADJOINING PREMISES.

There is a maxim of latin law which says "Sic utere tuo ut alienum non laedus". So use your own that you may not injure another's property. The rule also is found in the Pentateuch[122] and also finds expression in both the Mishnah and Gemara most especially in reference to property rights in Baba Bathra chapter II and also in regard to various torts thruout Baba Kama. This principle underlies all decisions in regards to the duty owed by one land owner to his neighbor. The text case at English Common Law is that of Rylands v. Fletcher[123] a case that is probably cited more than any other case in the English and American law courts. The facts were these. The defendant owned a reservoir; the plaintiff an adjacent colliery. The water escaped from the reservoir and seriously damaged the colliery. After going thru numerous appeals it was finally adjudged in favor of the plaintiff; and therein did the learned justice, Blackburn, propound the following decision, "The person,who for his purposes, brings on his land and collects there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape." Another English jurist has said in respect to a defeddant's action in a similar case "but for his act in bring it (his dangerous property) there, no mischief could have accrued . . . . . it seems but just that he should have kept it there."[124]

The Jewish rule, likewise shows a similar significance in point. The Biblical injunction states, for instance, that "he that kindles a fire must surely make restitution."[125] Rabbi Simon discusses this aspect in a fire which passes over a fence and consumes material beyond the fence. In commenting thereon he cites the above Pentateuchal injunction and goes on to say

---

122. Ex. 22:5
123 L.R.I. Ex. 265, 279
124. L.R. 3 H.L. 330, 339
125. Ex. 22:5

"he must make restitution for all that was burnt thru the fire he started."[126] Very much in point is a set of similar circumstances found in the Mishnah. "One cannot dig a well near his neighbor's property, nor a channel, cave, aqueduct or a basin for bathing unless it be removed at least three spans from that of his neighbor and plastered with lime."[127] Of course, this is duscussed under the rights of property holding rather than under torts, but it can easily be inferred that the regulation is made to avoid tortious injury to the adjacent neighbor. The fact that it must not be too close and must be provided with lime encasing to insure it against escaping is adequate proof that such a rule of tort was conceived of by the rabbis. There is some disagreement of authorities in the Gemara but the majority opinion holds firmly to the precedent. Rabbi Jose summarizes as follows: "Even tho each of the two neighbors has the right to do with his own property as he pleases the other fellow has the similar right to claim 'Each time you use the spade at my boundary, you weaken my estate.'"[128] Another case may be cited. One who chops wood on private ground and does damage thereby upon another's property is held liable according to the Talmud.[129] The rule is twice summarized very briefly in this manner--one who allows a fire started by him to spread is the same as one who shoots an arrow from a bow and thereby does damage.[130] In other words, one who conducts upon his property anything likely to escape and do damage is just as liable as if he shot off weapons promiscuously from his property.

American courts, however, have never rested content under the limitation of this English precedent. The principle has seemed to them altogether too hard on the owners of private property, and so they have repeatedly sought exceptions and limitations to escape its real implications. So they have hunted

---

126. B.K. 61b; Comp. Niz Mom. 14:2. Chos. Mish 418:3
127. B.B. II:1
128. B.B. 18a
129. B.K. 32b
130. B.K. 22A: B.K. 60B.

up other English cases, decided by the House of Lords, which to a degree distinguish themselves from Rylands vs. Fletcher and to a degree reverse its decision. In England these two cases are not the accepted rules, but in America they are becoming so. In the case of Box vs Jubb[131] the overflow of the defendant's reservoir was caused by an emptying into it of more water by a third party. In the case of Nichols vs Marsland[132] the water escaped because of a rain fall more violent than need have been anticipated.

There are also some Talmudic cases that hold similarly. If wheat is bent toward a fire with blankets and there is an unusual wind that causes the injury there is no liability,[133] the idea being that such an occurrence was not to be expected. Likewise if a fire is kindled by a wind there can be no liability.[134]

However, even the American courts have very often recognized the justice of this law as set forth in Rylands v. Fletcher and while retaining the loopholes offered them by the two exceptions, they have decided that, not only must a dangerous appliance be kept under control during ordinary conditions, but also extraordinary events that may reasonably be anticipated must likewise be provided against. And so we find that in the case of dams, reservoirs, and embankments, it has often been held that the owner must take precautions not merely against freshets alone but also against extraordinary floods.[135] Similarly hold these two Talmudic cases. To be properly ~~blanked~~ bolted a door must be able to withstand an ordinary wind.[136] Likewise ~~where~~ where there is a fire in a court, and a fence that should have prevented its spread is in a dilapidated condition and the fire spreads into a second court, even tho the owner was not responsible for the dilapidated condition of the fence, he is liable for all damage if he has allowed time to elaspe before rebuilding it.[137]

---

131. L.R. 4 Ex. Div. 76
132. L.R. 2 Ex. Div. 1
133. B.K. 56A.
134. B.K. 59B
135. Gray v Harris 107 Mass 492; 9 Am Rep. 61. Mayor of City of N.Y. v Bâley 2 Denis. (N.Y.) 433
136. B.K. 55b: Comp. Niz. Mom 4:7. Chos. Mish. 336:1
137. B.K. 23A. Comp Niz. Mom 14:4. Chos. Mish. 418:13. Thus Talmudic law assumes that any negligence either active or passive may serve as ground for liability.

There are perils however that can happen without being even remotely in contemplation and the law does not hold one responsible for carelessness and negligence in such a case.[138] And such exceptions as this are likewise freely admitted by the Talmudic law. In the case above cited, where the fence was dilapidated but not because the owner's desire was to have it so, or by his act, and the fire spread outside his court, if the owner had no time between the two contingencies to repair the fence, there could be no liability.[139] Likewise if an enclosure wall which was previously in good condition breaks down or is broken down by burglars and an animal escapes and does damage, its owner is not liable.[140] Also if a wind blows something off a roof and it does damage, if the wind be extraordinary, the one who placed the thing there is not liable.[141]

At any rate, inrespective of the side taken in the extreme case, the principle remains evident that one shall not and must not use dangerously his property unless he gives adequate guarantee to the safeguarding of the property of others. The case above mentioned from the Talmud that one must see to it that his fence be not allowed to remain in a dilapidated condition for any length of time finds a direct parallel in the Common Law. A wall forming the ruins of an old building was likely to fall and do damage. It was held that to maintain it after the expiration of a proper time, for investigation and removal ,would not be a reasonable use of one's property. [142]

One of the recognized duties which one landowner owes to his neighbor is that of lateral[143] or subjacent support.[144] That is to say, the owner

---

138. Faburg Buick Co. v Chic. R. I. & P. Ry Co. 79 Neb. 854
Ohio & M. Ry Co. v. Ramey, 139 Ill 9: 28 N.E. 1087

139. B.K. 23A

140. B.K. 13B

141. B.K. 29a (If the wind is ordinary he is)

142. Ainsworth v. Lakin 180 Mass. 397, 399: 62 N.E. 746

143. Moellering &s. Evans 121 Ind. 195, 22 N.E. 989

144. Marvin &s Brewster Iron Mining Co. 55 N.Y. 534, 14 Am Rep 323

must be very careful that he in no way uses his land so as to undermine his fellow's property and cause it to sink. This principle is likewise well known to the Rabbis. One must not so plough his field so as to deprive the next door property of its lateral support.[145] Nor will one be allowed so to dig a pit that being close to another pit, it undermines his neighbor's property.[146] Also the question of planting a tree near a well is debated and it is decided that one must not do so for the roots might make the earth crumble and harm the bottom of the well. This case is also subsumed under the class of those that shoot arrows promiscuously.[147]

---

145. B.M. 80A

146. B.B. 17A

147. B.B. II:11

D. DUTY OF MAKER OF CHATTEL

In the American and English Common Law it is a question of dispute as to whether a manufacturer or even vendor of property is in duty bound to exercise care toward any one beside the original vendee. There is a growing tendency in the favor of recognizing such a cause of action although the law on the point is still by no means definite.[148] The principle has been asserted in cases, where the want of the proper care "of a manufacturer or ventor, which is immanently dangerous to the life of health of mankind" in regards to "the preparation or sale of an article intended to preserve, destroy, or affect human life is actionable"..[149] The articles coming under this rule are noted as "intrinsically" dangerous and include drugs, foods, beverages and explosive substances.[150]

In the Jewish law we have a case similar, tho not directly analogous. The principle is stated that if a butcher slaughters wrongly, he thereby makes the food ritually unclean, and so religiously dangerous. The law allows the owner of the animal damages for the deterioration in its value,[151] for it can no longer be of use for food. It may therefore be inferred (although it is not explicitly stated) that if this error in slaughtering should not be discovered until after the meat has been sold to a third party, the dishes of that party would be ritually profaned and a monetary loss would result. This, then, under the doctrine of Proximate Cause, to be discussed below, should be actionable.

---

148. Chapin on Torts, p. 517, 518

149. Huset v J.I. Case Threshing Co., 120 Fed. 865, 870

150. Chapin on Torts, p. 518

151. B.K. 99b. It must be remembered that the rule in point here has nothing to do whatever with that hereafter discussed of employments requiring skill. Also it should be noted that the analogy here is only a bare inference.

E. DUTY OF KEEPER OF ANIMALS.

According to Common Law the general rule is that people are liable for their trespassing animals and the owner must endeavor to keep these his animals at home. So held all the cases[152]. Such a general rule we also find in the Talmud. One rabbi decided that even when an owner properly ties his animal and nevertheless he succeeds in coming out and doing damage the owner is liable and this applies not only when the animalx is vicious but even when it is non-vicious.[153a]

This point, however, as to whether non-vicious animals are to be in cluded in the above general rule is a matter very much discussed and dissented from in both systems of law. A second rabbi considers this as a fallacy in the former rabbi's decision. He says it is right to the point that an owner must keep his vicious animals at home at his peril; but he insists that the rule must not be extended to those that are non-vicious.[153b] The same discussion finds a similar place in many of the modern cases where the argument is raised that the law should not be applied to domestic animals.[153c]

At any rate at least the narrower rule must be applied and damages exacted for its violation. There is a well known and old English precedent thatis usually cited to confirm this rule. " If, from the experience of mankind a particular class of animals is dangerous, tho individuals may be tamed, a person who keeps one of the class takes the risk of the damage it may do. If on the other hand the animal kept belongs to a class which according to the experience of mankind is not dangerous and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that that particular animal he keeps is likely to do mischief."[154]

---

152. McBride v. Lynch, 55 Ill 411: Hartford &s Bradley, 114 Mass, 466
153a B.K. 55b (by R. Meir) discussed also B.K. 45B. Shabbath 52B
153b ibid (R. Judah)
153c Brownes v Giles, 1 C & P. 118; 12 E.L.L. 79
154 Filburn v. People Palace & Aquarium Co. 25 Q.B.D. 258, 261.

Such is the law as formulated in England and as taken over into the American codes and such is the law as the rabbis applied it. Two chapters of the Talmud[155] are devoted to a formulation of this very same principle applying it in the case of the ox who is "Tam", that is not likely under any conditions to get into any damaging mischief neither because it is a member of a vicious specie nor has itself proved to be vicious and in the case of the ox that is "Muad", warned, belonging to such a specie or having otherwise shown its vicious propensities.

The following statement from American law is interesting when conpared with the analogous talmudic statement. After setting forth that the question of liability for the torts committed by an animal is one of "their natural propensity for mischief," the case at hand continues, "If they are ferocious and savage, like the lion, tiger, etc, the keeper is bound to know the danger incident to their confinement, and the mere charge of not having been so constrained as to avoid injury is tantamount to an allegation of negligence."[156] The statement in Baba Kama implies a similar rule, tho only the fact is stated. "The wolf, the lion, the bear, the leopard and the bardalis and the serpent are considered vicious."[157] Also might be cited here another English legal statement "Though ~~thx~~ he have no particular notice that he did any such thing before, yet if it be a beast, that is ferae naturae, as a lion, a bear, a wolf, yea an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage."[158] American cases also hold to this rule.[159]

SCIENTER.

If the animal, however, is not of one of these ferocious species, and yet there is proof that the owner had knowledge of its existing vicious

---

155. B.K. I & II - Discussed also in Choshen Mishpat: 410 Shulhan Aruk
156. Parsons v. Mauser, 119 Iowa 88, 92; 93 N.W. 86; 62 L.R.A. 132
157. B.K. 16b
158 Hales Plea of the Crown, 430, Part I, c. 33
159. Hayes v. Miller, 150 Ala. 521; Copley v. Wills, 152 S.W. 830

propensities (such knowledge called in law "scienter") his liability is absolute for the damage done by his animal without regard to the degree of care with which the animal was guarded. Most of the cases decided in modern courts coming under this heading are cases involving dogs.[160] However, there are also cases involving other animals as the cow[161] and the stag.[162]

Similar rulings are very frequent in the Talmudic law regarding this point. For instance it is said "There is no other care (for an animal that has been warned) than the knife."[163] --meaning it should be slaughtered.[164] Again Rabbi Jehudah decides the test case, in which a vicious animal is properly looked up but nevertheless gets out and does damage, in favor of the plaintiff.[165]

Should it be impossible to prove scienter, the knowledge of the animal's vicious propensities, then the case resolves itself again into the problem of how much care was taken to prevent the mishap. It is no longer negligence per se but a question for discussion.[166] And such an attitude is also taken in the Talmud. For instance in the case of sheep which are neither ferae naturae and therefore imminently dangerous, nor are they even likely to develop that vicious propensity, when they manage to get out of the pasture and do damge, the question of whether their keeper exercised due care in guarding against this eventuality immediately arises. If he properly bolted the gate, that is to say, if he used the necessary precaution to keep his sheep from mischief, he is not liable. However, if he did not, he is liable.[167] Likewise if one, while looking in his cattle, exposed them to the sun he is naturally violating all the precaution that he is duty bound to exercise. If they then break out and do damage, he should have expected such a thing to happen and is held liable.[168]

---

160. Domm v. Hollenback, 259 Ill, 382; 102 N.E. 782
161. Klenzberg v. Russel 125 Ind. 531; 25 N.E. 596
Twigg v. Ryland, 62 Md. 380; 50 Am Rep. 226
162. Congress Y.E. Springs Co. v Edgar, 99 U.S. 645; 25 L.Ed. 487
163. B.K. 55B
164. There are damages also allowed in the case of the "Tam but these are rather cases of equity than of law for the maximum is half damage paid to no greater extent than the value of the damaging ox.
165. B.K. 55b
166. Farber v. Roginsky, 123 App. Div. 38; 107 N.Y. Supp 755 Healey v Ballantine & Sons, 66 N.J. Law 339; 49 Atl 511.
167 next page.
168

If viciousness is manifested by the animals, only under certain conditions as when in heat or with young, there is no absolute duty to restrain them at other times and their breaking forth and doing damage at some such other time does not implicate their keeper in negligence per se.[169] A similar idea seems to be recognized n the classification of animals that are "vicious to some and not to others" that appears in the Talmud.[170]

Some arguments have been advanced in cases that an animal must commit an injury first before he can be considered vicious as a "popular delusion" in English law has it "Every dog is entitled to one bite." This is grossly untrue as regards the current common law. The knowledge of its vicious propensities may be brought home, its disposition displayed in many other ways.[172] The Jewish law is rather unclear in this point.

Hermann Cohen calls attention to this case when he says "Civally not only are damages allowed but the doctrine of the "one bite" notorious in the case of the English dog, is implied in the distinction between the known and unknown propensities of the animal""in regard to the Talmudic law against keeping a vicious animal.[173] It is nevertheless questionable whether such an idea is really implied. He makes the mistake, first of all, in his idea that the "one bite" is the English doctrine, as has been shown above. He, as many lawyers even had mistaken the doctrine of "scienter" for that of the "one bite" and since the term Muad is used in very much the same connection as "scienter"

---

167. B.K. 55B; comp. Niz. Mom 4:1 Chosh Mish. 396:1,2. I am not discussing the question as to whether the owner is liable to pay for the benefit of the food but only for the damage.
168. B.K. 55B; comp. Niz. Mom. 4:5. Chos. Mish. 396:5
169. Tupper v. Clark 43 Vt. 200, Van Etten v. Noyes, 128 App. Div. 406
170. B.K. 37A, Comp. Niz. Mom. 6:8
171. Chapin on Torts, p. 522
172. Warner v. Chamberlain, 7 Houst. 18, 30 Atl. 638
173. Brice v. Bauer, 108 N.Y. 428: 15 N.E. 695
"Notes on Resemblances of Hebrew & English Law" J.Q.R. vol 20 p. 790

it may be that the rabbis, too, would not insist on an animal first committing an injury before it would be considered "muad." In fact, it is asserted very affirmatively that the wolf, the lion, the bear, the leopard, the bardelais, and the serpent are always to be considfed vicious and the word used here for vicious, as elsewhere is "Muad."[174] Of course, Scripture does say "If it be known as a young ox"[175] but the change from the very specific term " " to the less clear term "ר ע" (which may mean merely having the tendency to injure) may contain some significance.

Finally it may be here mentioned that in some jurisdictions it is contended that the mere keeping of a vicious animal is in itself a wrong,[176] and certainly the Talmudic idea that "there is no other care (for the vicious animal) than the knife"[177] is very similar.

---

174. B.K. 15B

175. Ex. 21:35 (to commit an injury)

176. Woolf v Chalker 31 Conn. 121; 81 Am. Dec. 175

177. B.K. 55B (cited above also)

F. STANDARD OF CARE.

Much discussion has arisen in the courts of our days as to whether negligence can be differentiated by degrees. The type case[178] divides negligence into three kinds, slight, ordinary, gross. There is a minority opinion in this country in support of such a division.[179] That there are different degrees of negligence is implied in a few places in Baba Kama. For instance it is said "Negligence almost amounts to intention at times" and an example of such a situation where the negligence is so gross is the one where a man promiscuously throws a stone into a public place where he is liable to kill another person.[180] The question of gross or slight negligence is discussed in another place[181] and it is considered that to subject an x inflammable substance, such as thorns, to fire is gross negligence.

Most cases of Common Law, however, hold that negligence is without degrees. An action is either negligent or not and according to one case[182] consists "in the failure to exercise that degree of care under given circumstances which a person of ordinary prudence would exercise under similar circumstances." Such seems to be the logic under the decision of the rabbis that if a pit is properly covered for oxen but the camels loosen it and then the oxen fall in it and become injured that the owner of the pit is liable if the camels are accustomed to wander around that vicinity. The reason that is given is that the pit owner "should have had it (this succession of events) in contemplation."[183] A person of ordinary prudence would be able to foresee such an accident if he knew that camels were wont to come to his pit, but if he lacked this knowledge

---

178. Coggs v. Bernard, 2 Ld. Raym. 909
179. Astin v. Chicago M. & St. P. Ry Co. 143 Wis 477; 128 N.W. 265
180. B.K. 32B
181. B.K. 60A
182. Stedman v. O'Neil 82 Conn. 199, 205, 72 Atl. 923
183. B.K. 52A. Comp. Niz. Mom. 2:5, Chos. Mish. 410:27.

is considered as otherwise having exercised the proper amount of care. Again it is said[184] that a man (meaning an average man) is always expected to be using care--"he is considered always as warned."

In other words, the circumstances attending an act determine how great a degree of care should be exercised in the fulfillment of that act. "The greater the hazard the more complete must be the exercise of care."[185] This idea is also hinted at in the rabbinical decision in regard to covering the pit, mentioned above[186] that the more the danger there is of an injury resulting from a certain set of circumstances, the more careful must be he who can prevent the fulfillment of those dangerous conditions.

---

184. B.K. 26A

186. Galveston City Ry. Co. vs. Hewitt, 67 Tex. 473, 478; 3 S.W. 705
Chapin, Cases on Torts, p. 332

186. See F.N. 183

G. EMPLOYMENTS REQUIRING SKILL

In the Common Law when "determining whether a defendant's conduct comes up to the standing of reasonable care, regard must be had to the fact that his situation or employment may call for ability not possessed by the ordinary individual."[187] One who is supposed to be skilled as an attorney,[188] a physician,[189] or a pilot,[190] has the duty of exercising the degree of care that is expected to be used in his peculiar calling. So also in the Jewish law if a butcher slaughters wrongly he is liable[191] as are also the repairer, the carpenter and the builder who spil what was given them to do and who should have been able to have done the job right if they possessed the ability that their trade requires.[192]

If one be skilled, however, and it can be proven that he is so, that is to say, he is so acknowledged, he is not accountable for any unfortunate results, due to an error of judgment, for he did not guarantee his result. To cire an example, at common law--a man practising a peculiar profession binds himself to exercise the average skill possessed and exercised by others "engaged in the same profession" in the same place"[193] In the Talmudic law the same principle is adhered to. Rabbi Jochanan tells the slaughterer who has spoiled the meat that he should go bring witnesses that he is an expert in slaughtering cocks, and he will be relieved of the responsibility.[194] Again a case with

---

187. Chapin on Torts p. 526

188. Gambert v. Hart 44 Cal. 542

188. Carpenter v. Walker 170 Ala. 659; 54 South, 60.

190. The Tom Lysle (D.C.) 48 Fed. 690

191. B.K. 99B (comp. above)

192. B.K. 98B. Sichuith 10:4, Chov. Umaz. b:11 Chos. Mish. 306:2, 384:3

193. Pilky v. Palmer, 109 Mich, 561; 67 N.W. 561

194. B.K. 99b; Sechuoth 10:5; Chos. Mish. 306:6

the following facts is cited. A person gives a coin to a banker to examine and the latter judge it wrongly; is he liable? The answer is, it depends on whether he is an expert or not. If he is an expert he is not liable; otherwise he must make good his mistake.[195a] Another Talmudic case in this connection is interesting. A shepherd was acquitted when one of the cattle he was pasturing slipped and fell into the river. It was said he was not liable because "he guarded them as is usual with shepherds."[195b]

195a. ibid. (Of course, if one wants to make good any damage he may. Such an apparent exception is cited about Rabbi Hyya who made such a mistake and tho an expert, he held himself liable; but the Gemara explains that in reality he was not but rather simply wanted to be generous.)

195b. B.M. 92A

H. DETERMINING STANDARD OF CARE.

At Common Law what would be the conduct of a man of ordinary prudence under a certain set of circumstances is most often a matter grave difference of opinion.[196] In Jewish law, likewise, we find the rabbis attempting to ascertain what a man of ordinary prudence should have been expected to do. It is in no small number of cases, therefore, that we find a similar disagreement among the rabbis, as we do in the Common Law, as to just what constitutes the standard of care necessary under the circumstances. For instance (and of these examples there are many) one rabbi decided[197] that if an owner of an animal properly tie up his charge and lock him in and yet he gets out and does damage the owner is liable irrespective of whether or not the animal is vicious. Another rabbi, however, when faced with a similar state of circumstances could not see where an owner was in duty bound to assume responsibility and absolute care for all his animal's actions if the said animal was not vicious; and so he holds that the older decision referred only to vicious animals. Again in the case[198] where one causes grain to be burned down and there happens to be vessels within it, it is held by one rabbi that the burner is liable for the vessels while the rest of the rabbis say he must pay only for the grain. ~~Thus~~ It is a question entirely as to whether one of ordinary intelligence would expect vessels to be therein. These are not isolated instances but practically every page of Baba Kama has record of such disagreement as to what constitutes the care of an ordinary man under certain given conditions.

But there are cases where, if the facts are undisputed there can be no doubt of the negligence of the party to it. For instance, it is held at common law that one should not cross a railroad track without first making "a vigilant use of his eyes and ears to ascertain the presence of ~~an~~ a train"

---

196. Chapin on Torts p. 532
197. B.K. 55B-- R. Meir & R. Jehudah
198. B.K. 61B

and when it is proven or admitted that he did not do so there is no doubt that he cannot collect for injuries done him by the train.[199] This case has its parallel in the Talmud. Of course, being two thousand years before the days of the railroad the analogy may be a little stretched. Supposing tho, that one comes from the right with a beam while a second comes from the left with a barrel and the barrel is thereby broken. The Mishnah rightly holds that there is no liability for each had a right to go his way, in other words, the owner of the barrel should have been careful not to collide, a rule similar to the common law. The Mishnah adds that it is the same case with fire and hemp, that is, that one carrying hemp should stop, look and listen before rushing into something that may ignite it.[200]

RES IPSA LOQUITUR.

It is always the place of the plaintiff to prove his case before he can obtain a recovery. If at the end of the case both sides are even in the scales of justice then the defendant wins. However in a certain number of cases it is rather difficult to prove the cause of action, even tho it might seem evident; and such is sometimes the case with negligence which after all is a state of mind, hence extremely difficult to ascertain. In cases of negligence, therefore, where all else is even, the rule res ipsa loquitur ~~is~~ the thing speaks for itself, the facts are evident and may be introduced to upset the balance in the plaintiff's favor.[201]

So if the carrier of a beam stops without warning and the carrier of the barrel who was following broke his barrel by running into the other's beam, the former is liable for all damages thus accruing and so also if the barrel

---

199. Judson v. Central V.A.R. Co. 158 N.Y. 597,605
Davis v. New York Cent. & H.R.R. Co. 47 N.Y. 400

200. B.K. II:6; Chov. Umaz. 6:8; Chosh. Mish. 379, 1,3.

201. Guiffin v. Manice, 166 N.Y. 188

was followed by the beam and the beam hastened too much, hitting into the barrel which was being carried along at a constant rate of speed.[202] It can easily be seen that no facts of evidence need be brought up in either of these cases. The thing speaks for itself.

The rule has also been applied where things have fallen on people in public places;[203] and to this too we may adduce a similar Talmudic case. One throws a stone intending it to go two or four ells and it goes four or eight ells respectively. He is held liable.[204] There is no negligence proven or even a proof attempted but the fact speaks sof itself.

In fact such seems to be the principle underlying many of the Talmudic cases regarding negligence. There are very often found no arguments advanced for the negligence but the decision is rendered just on the basis of the fact of the injury.

However the case must be one where the injury complained of could not have possibly taken place without negligence in accordance with the ordinary experience of mankind.[205]. Thus to cite the Talmudic case, if a wall in the process of being built, falls, the builder is free, providing it is not proven that it fall as a direct result of his stroke.[206]

---

202. B.K. 31B; Chov. Umaz. 6:8; Chos. Mish. 379:3

203. Keamey v. London R. & L.C. Ry Co. 40 L.J.Q.B.N.S. 285
Gallagher v. Edison Illuminating Co. 72 Mo. App. 578

204. B.K. 26B; Shabbath 73A. Chov. Umaz. 1:15. Chosh Mish. 421:10

205. Davis v. Crisham 213 Mass. 151. 99 N.E. 959

206. B.K. 98B.

I. CONTRIBUTORY NEGLIGENCE.

It is an evident and most just rule of all law that a plaintiff has no right of action against a defendant unless he himself is free from blame in the injury committed. Surely, otherwise he might be enabled to profit from his own wrong. If both parties have been negligent, therefore, neither has a right of action against the other. It is thus held in the case of Templeton's Adm'r. v. Lynchburg Traction and Light Co,[207] our American Common Law, that the "law will not weigh or apportion the concurring negligence of a plaintiff and defendant." Many other cases recite a similar rule.[208] In the Talmud we may also find such a rule.. "If one does an unusual thing and another does an unusual act there is no liability." [209]

There are very many cases in the Jewish law in accord with this point of view a few of which should be cited. For instance there came before the court one who claimed that he put his jugs in the court of another and since they were an obstruction the defendant carelessly entered and stumbled over them, thereby shattering them. The decision was that the plaintiff could not collect and the logic presumably underlying such a judgment was that the plaintiff himself was in fault.[210] All the more so if one places a jug in the highway and another person stumbles over it and breaks it there can be no liability.[211] If one has property he is supposed to put up a fence to protect it and if he negligently does not and the goats of another party do damage to that property because of the absence of fence, the property owner has no cause for action.[212] If a person is running on public ground, on any day but

---

207. 110 Va. 853, 854. 67 S.E. 351

208. Memphis Consol. Gas & Elec Co. v Simpson, 118 Tenn. 532; 109 S.W. 1155
Marble v. Voss, 124 Mass. 44

209. B.K. 20A

210. B.K. 28A

211. B.K. 27A; Niz. Mom. 13:5; Chosh. Mish 412;1

212. B.K. 23B

erev Sabbath when running is a "mitzvoh", he is acting very carelessly and so if he is hurt by another either walking or also carelessly running, the injured party has no action,[213] for he contributed to his own injury thru his disregard for his own safety. If one puts a stack of grain on another's land and the beast of the land owner takes his dinner therefrom the land owner is not responsible.[214] If A with a beam is followdd by B with a barrel and the barrel is broken it is held that there is no liability for it is said, "B should have watched out".[215] The same principle is followed in the rest of the barrel and beam cases.[216] If one drops a vessel from a roof and before it falls another party strikes it and breaks it the second party cannot be liable[217] because the originadf action of the one who dropped it contributed to the breaking. These cases will suffice to ahow the general tendency of the Talmudic law to follow the rule of contributory negligence.

---

213. B.K. 32A; Chev. UMaz. 6:9; Chos. Mish. 378:8. Shab. 46A

214. B.K. 59B; Niz. Mom; 3:15; Chos. Mish. 373:4

215. B.K. 32A; Chev. Umaz. 6:8; Chos. Mish 379:2

216. ibid & ff

217. B.K. 26B.

J. LAST CLEAR CHANCE.

The English courts have arrived at a limitation to the rule of contributory negligence in what legal circles know as the "famous donkey case"[218] The plaintiff therein, left his donkey to graze upon the public highway. The defendant's servant came along at a "smartish pace" and ran into the donkey. Of course, here both parties were guilty of negligence. There is no question about that; none was raised in the case. But it was already too late for the plaintiff to start using due care while the defendant with a little diligence could have avoided the accident. It was held that he had "the last clear chance" and was therefore guilty of negligence in neglecting to take it. The negligent conduct of the plaintiff in such a case ceases to be a cause of the injury and becomes merely a condition thereof. American cases follow the same rule.[219]

There are several Talmudic cases that likewise follow such a rule of law. In the case above mentioned, where a plaintiff obstructs the court of another with jugs and a second person comes along and breaks them, if the breaking is not due to stumbling then it almost amounts to intention and an action will lie.[220] Likewise if a man with a beam follows one with a barrel and the barrel be broken by the beam after the one with the barrel has warned the other to stop, the latter is liable.[221] Also if a butcher is chopping meat and his hatchet slips and kills him who is standing in front of him[222] the mere fact that to stand immediately in front of a butcher is a very negligent thing to do, does not relieve the butcher of liability for his carelessness.

It has been thought at times, that the doctrine of "last clear chance" is either irreconciliable with or an exception to the former rule of contributory negligence. This is not the case. In fact all true cases under

---

218. Davies v. Mann 10 M & W. 546
219. Louisville & N. R. Co. v. East. Tenn V & O. R. Co. 60 Fed 993,996 9th C.C.A. 314; Bragg v Central N.Eng Ry Co. 152 App. 444; 137 N.Y. Sup.p. 273
220 B.K. 28A; Niz. Mom. 13:5; Chosh Mish. 412;1
221. B.K. 32A; Chov. Umaz. 6:8; Chosh Mish. 379:3
222. Maccoth 7B

the rule exclude the possibility of contributory negligence. The question is whether the negligence of the plaintiff was the remote or proximate cause of the injury. If the former, the defendant had a last clear chance to avoid the accident; if the latter, the plaintiff himself is guilty of contributory negligence.[223] The distinction was evidently also in the minds of the rabbis when they decided so many of their cases. If for instance, one places hot coals on a person and he dies therefrom, there is no liability, for it is wisely observed he could have removed them. This is clearly a case of contributory negligence. On the other hand if he burnt the plaintiff's clothes by placing the coals there he would be liable,[224] for he alone had the "last clear chance" of avoiding the danger. A similar case is also stated. If A throws B into the water and B makes no attempt to get out and lets himself drown A is not guilty for B has been contributorily negligent. On the other hand, if A held him down he is, of course, guilty.[225]. Again, if one places a barrel on public ground and a second person comes along, stumbles over it and is hurt, if the barrel is visible it would be a pure case of contributory negligence and so the Talmud rightly holds that the defendant is not liable.[226] If the defendant so places the barrels, however, that they cannot be seen, he alone has the last clear chance of removing them and for not so doing, is liable.[227] So also in the case cited above of the butcher whose hatchet slipped, if the injured party was standing in back of him he is not guilty for he did not have the last chance of avoiding the product of his carelessness, while the plaintiff was guilty of contributory negligence for standing so close.

---

223. Farmer v. Wilmington & W. R. Co. 88 N.C. 728
224. B.K. 27A; Chosh. Mish. 383:1, 418:18
225. ibid
226. B.K. 27B
227. ibid
228. Maccoth 7B

K. PERSONS BAD TO MEET.

There are certain cases where the party defending cannot be held to the same standard of care as a fully competent person. They are therefore considered, according to law, as"persons bad to meet" because they can commit any number of extravagant carelessnesses without being held liable. "An infant,too young to possess and exercise discretion in the care of himself - non sui juris - cannot be charged with contributory negligence."[229] This is likewise held by the Mishnah.[230] The Common Law also holds that " a similar ruling should be applied to a person who is non compos mentis"[231]while the Mishnah above cited includes also such a one with the infant. In fact, the exact equivalent of the term "persons bad to meet" is used in another place, signifying those whom, if hurt, cause liability but if they hurt others are not liable.[232] If one, at Common Law is mentally competant, however, that is to say, if he is neither a minor nor a fool, but yet he is deficient in one or more of his senses or limbs, etc, he will be held liable to the "standard of care of a reasonable man who labors under like disabilities."[233] The difficulty is likewise felt by the Rabbis, altho a clear cut ruling is lacking. The Mishnah above cited applied the "non compos mentis" rule to the deaf mute, and the Gemara[234] worries about it and divides in opinion as to whether the deaf mute who starts a fire is free or liable for the damage he does. The question remains for them undecided and has no definite solution as has the modern law.

---

229. Chapin on Torts p. 546
230. B.K. 59B
231. Chapin on Torts, 548
232. B.K. 87A
233. Paul ~~vs~~St. Louis, K.C. & N Ry Co. 72 Mo. 168
234. B.K. 59B; B.K. 22B; B.K. 56A; Kiddushin 42B: Niz. Mom 14:5; Chosh Mish 418:7

L. THE SERVANT RULE.

There are certain cases in the American and English Common Law where negligence is to be imputed. As a general rule a third party cannot be charged with the want of care exercised by another with whom he has happened to be in contact. In some few peculiar incidents, however, the negligence of a third person may make the defendant liable. One of these cases is where there exists the relationship between the defendant and the third party of master and servant respectively. The defendant is then held responsible for his servant's actions under what is known as the "Servant Rule" or the rule of "Respondeat Superior".[235] The rabbis considered very seriously the same rule. In fact it was one of the points of dissension between the Pharisees and the Sadducees, the latter holding in accordance with the present Common Law rule and the former holding contrary to it. The rabbis argued that a slave has a mind of his own and he might do a wrong deed in order to avenge himself on his master and have him punished.[236] They held to the principle also that the obtaining of an agent to commit a transgression is not the equivalent of the transgression itself.[237] However we do find a case where one was held liable for the act of his agent. A third party dug a pit for the defendant in which the plaintiff was hurt. It was decided that the defendant was liable for the work of his servant.[238] However, this may be because the third person was hired specifically for the purpose of digging the pit and the diggin, in itself, constituted no injury. The pit's existence, for which the defendant alone was liable, caused the harm. Thus it seems the rabbis were opposed to the rule "respondeat superior."

---

235. Read v. City & Suburban Ry Co, 115 Ga. 366; 41 S.E. 629.
Wood v. Coney Is. & B. R. R. Co. 133 App. Div. 270; 17 N.Y. Supp. 703
236. Yodayim 4:7
237. B.K. 6:4
238. B.K. 53A; B.K. 13A. Com Niz. Mom. 12:18, Chosh. Mish. 410:31

M. PROXIMATE CAUSE.

"The maxim of the schoolmen (i.e. philosophers) 'cause causantis a causa est causati'[239] may be true; but it obviously leads into a labyrinth of refined and bewildering speculation, whither the law cannot attempt to follow,"[240] says a very eminent jurist. If one should attempt to hold responsible for an injury all the causes leading up to that injury he would be able to arrive nowhere. There must be some limitation on the responsibility of each cause or every one in the world would be liable for all the wrongs of every other one; we are thus closely interrelated. A limitation has therefore been presented to the general philosophic rule in the form of the maxim "cause proxima non remota spectatur". Of course, tho the logic of the rule is evident, its application involves a lot of difficulty. To determine just what is the proximate cause and what is the remoter cause is not always so easy a matter. ""It is generally held that, in order to warrant a finding that negligence or an act not amounting to wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural and probably consequence of the negligence ow wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."[242] By "foreseen" here is meant merely that the wrongdoer might have foreseen that some injury might happen from his negligence.[243]

Our rabbis come independently to the same decision. The case under consideration is one in which the defendant threw a lump of stone at a date tree and the dates fell off and killed some one. The whole argument of proximate and remote cause is here considered. According to one rabbi this is not the remote cause but the direct cause. An example of a remote cause would rather be if the defendant hit a bare branch and that struck the date-laden

---

239. "The cause of the thing causing is the cause of the thing caused."
240. Gilman v. Noyes 57 N.H. 629, per Cushing, J.
241. "The proximate not the remote cause is the one to be considered."
242. Milwaukee & St. P. R. Co. v. Kellogg, 94 U.S. 469, 474, per J. Strong.
243. Pullman Palace Car Co. v. Saack 143 Ill, 242, 246.

branch and the date fell off and did the killing.[244] Another case was one in which a wall was little by little removed by the rubbing of an ox until the very moment it fell; and this was held to include a direct line of sequence from the act of the ox so that he was considered the direct or "proximate" cause of the falling.[245] Again a builder is free from liability even tho a wall he is working on falls, providing the stroke of his tool is not the "proximate" cause of the falling.[246] An interesting statement is made by Isserles:- "There are some who say that in all indirect torts (meaning presumably all torts in which the nature of the direct cause may be questioned) if a result if is frequent and customary (that is to say can be foreseen) the causer is liable to fine."[247]

INTERVENTION OF NATURAL FORCE.

The intervention of a natural force, a wind, or a storm, etc, does not break the sequence of the defendant's negligent act toward the injurious result. Thus, tho no one is responsible for an inevitable accident, if human agency is combined with it and neglect to watch out for such possible emergencies occurs then liability for the damage on the part of the defendant likewise results.[248] If a wall has been left standing in a dangerous condition, due for instance to a fire, and the defendant, knowing the fact, neglected to secure or support the wall or take it down and some days thereafter it was blown down by a high wind and damaged the plaintiff's house, it was held that the defendant could not shield himself under the plea of "vis major" (outside and larger force) and so was liable for the damage caused.[249]

So also do we find a case in the Shuhan Aruk. It is held that if one fall from a roof (which is a place where one should take exceptional precaution*) and causes damage whether the cause of his fall was a commanded

---

244. Maccoth 8A
245. B.K. 44A
246. B.K. 98B
247. Choshen Mishpat 386:3
248. Chidester &s Consolidated Ditch Co. 59 Cal. 197
249. Nordheimer v. Alexander, 19 Can. Sup. Ct. 248

wind (an act of God) or not so, he is responsible for the whole damage.[250]

However, there is such a condition of affairs that even where the defendant had not taken precaution against an intervention of nature when that intervention is a veritably inevitable accident and impossible of being foreseen, he is not liable. "To constitute an act of God in such sense as to relieve the defendant from liability for injury it must have been so far outside the range of ordinary experience that the duty of exercising ordinary care did not require it to be anticipated or provided against." An example is the following. A tow boat was towing a raft of logs across the waters. The logs were broken up and scattered by an unprecedented storm and drifted against the plaintiff's breakwater, injuring it. It was held that the defendant was not liable as this storm was a "vis major" or "Act of God."[253]

The following Talmudic cases may be cited in support of this principle. If a fire is kindled by a wind there is no liability.[254] If wheat be bent toward a fire with blankets and an unusual wind causes the fire to catch on to the wheat there is no liability.[255] If cooks fly and the wind blows their wings and thereby causes breakage there is no liability.[25] Other rabbinic cases in support may be quoted. One climbs a ladder and the step break loose from under him, and he falls and does damage. Now if the step was previously solid and contrary to his knowledge it was broken or came loose or became decayed then he is free for this is an "Act of God". It should be noticed especially that the term "Act of God" is here used.[256] The Shulhan Aruk adds this case. If a freight ship is forced thru the unnatural conditions of the sea to lighten its load and tries to do this by the crew throwing some of it into the sea, the ship is not liable for the damage.[257] Finally this case may also be mentioned from the Talmud. A shepherd entered the city while his cattle were pasturing without. While he was there a wolf pounced on his flock and seized

---

250. Chosh. Mish. 378:3
251. 29 Cyc. 441
252. New Orleans etc. R. Co. vs. McEwen 49 La. Ann. 1184, 22 So. 675
253. B.K. 59B. Niz. Mom. 14:7; Chosh Mish. 418:19
254. B.K. 56A
255. B.K. 17B

(for notes 256 and 257 see following page)

a sheep. It was decided that he must not be held responsible until it be adjudged by the court that his presence could have prevented the mishap.[258]

FRIGHT AND MENTAL ANGUISH.

Where fright intervenes in the causal chain between the act of the defendant and the injury experienced by the plaintiff the majority view at common law is that such fright breaks the causal chain. In the usually quoted case the plaintiff was a pregnant woman. She was standing on a crosswalk when the defendant negligently drove his horses very near to her, so that she suffered fright and unconsciousness and the result was a miscarriage. The court held that since there was no physical impact the chain of causation had been broken and the negligent driving of the horses was merely the remote cause of the final miscarriage.[259] There is a set of facts in the Talmud analogous to the preceding but there is no decision advanced. In that case a pregnant woman enters an inn and a dog barks, causing her to be frightened and that condition results in a miscarriage. The landlord says "Fear not." The woman replies that he is already too late, but the case rests here and there is no decision as to his responsibility.[260] Many cases in the Common Law hold contrary to the majority view.[261]

INTERVENTION OF IRRESPONSIBLE INDIVIDUAL.

If a person not capable of using the ordinary degree of care of a normal adult man intervenes in the causal chain between the act and the injury the chain is held to remain unbroken and the defendant is still liable.[262] There is a similar set of facts in the Talmud. A man sends fire in the hands of one who cannot take care of it. However in this case he is not liable for damages in the human court, for it is expected that he will receive heavenly retribution for his wrongful act.[263]

---

256. Choshen Mishpat. 378:3 Commenting on Maccoth 7B מכה בידי שמים
257. Choshen Mishpat. 380:4
258. B.M. 93B
259. Mitchell v Rochester Ry Co. 151 N.Y. 107; 45 N.E. 354
260. Shabbath 63B
261. Dulien v. White, 2 K.B. 669;70 L.J. K.B. 837
262. Lynch v. Murdin 1 Q.B. 29: 10 L.J.Q.B. 73
263. B.K. 6:4

CONCURRING CAUSE.

"Where the injury is the proximate result of the wrongdoer's act or neglect, he is responsible, tho the act or neglect of a third person or an accidental cause concurred in producing it."[264] There is no necessity for the defendant's act being the sole cause of the injury. If it is one of the efficient causes it is enough to hold him liable. In one common law case the defendants negligently piled up logs on a gangplank. A third party drove a tram carelessly catching into the logs and threw down the pile, causing injury. It was held that the defendant who originally piled up the logs was liable.[265] Likewise where the defendant negligently left barrels of brine on the street where a third person spilled them and a cow licked up thereof and died, it was held that the defendant was liable.[266] In both of these cases both the defendants and the third party were jointly responsible for the injury and so each was liable as a result of it. This is the spirit of the case presented in the Shulhan Aruk of the five men who sit down on a bench together. It makes no difference that no one of them could have caused the injury by himself. As long as together they caused it they are equally liable.[267]

However if the act of the defendant merely furnishes a condition or gives rise to a situation making the injury possible, it cannot be considered as a concurring proximate cause and the defendant cannot be held liable. For instance a conductor negligently carries a person past his destination and advises him to stay at a hotel in the place where he does let him off and that he will pay all expenses and carry him back to his destination in the morning. The conductor is held not liable for the injury caused to his passenger by the explosion of the hotel lamp.[268] In the same way also are the Talmudic cases decided. If one digs a pit and another deepens it the first is not liable.[269] If one build a fire and another adds burning fuel thereto the first is no

264. Chapin "Torts" p. 97
265. Pastene v. Adams 49 Cal. 57
266. Henry v. Dennis, 93 Ind. 452; 47 Am. Rep. 378
267. Chosh. Mishpat. 381:2
268. Central of Ga. Ry Co. v. Price, 106 Ga. 175; 32 S.E. 77
269. B.K. 10A. Niz. Mom. 12:13; Chosh Mish. 410:15

longer responsible for the fire.[270] If five people sit on a bench and without the last there would be no damage, the last alone is liable.[271] If C dig a pit and A's ox throws B's ox inti, C cannot be held responsible.[272] If a pit belongs to two partners and the first passes it by without covering it and then the second passes, the second only is liable for the injury that happens thereafter.[273] Maimuni, however, is of the opinion that also the first is liable.[274]

A FEW ADDITIONAL CASES.

Before closing this subject of proximate cause entirely there are a few more Talmudic cases that have not as yet been mentioned in this connection and, since they are interesting for showing the general trend of the rabbis' decisions according to this rule, they will now be cited. If one drops a jug and breaks it on the street and a second slips and is hurt by its fragments it is held that the one who dropped the jug is liable.[275] (One rabbi says that only when the dropping of the jug was intentional is this the case) One who allows a fire started by him to spread is the same as one who shoots an arrow[276], the idea being that he sets into motion a causal nexus for which he should have foreseen a possible injurious result. A man attaches an article to the foot of a cock; the cock does damage because of it. It is held that the man is liable; his action was the proximate cause of the damage.[277] A dog takes a burning cake to a barn and with it burns the barn. The dog's owner is not liable at law for the action is too remote, tho he has a case at equity.[278] (half damages). If one leads an ox into the territory of another

---

271. B.K. 10B: Chov. Umaz. 6:15; Chosh Mish 381:1
272. B.K. 13A
273. B.K. 51A
274. Niz. Mom. 12:6
275. B.K. 28A. Niz Mom. 13:7; Chosh Mish; 412;4, 410:1
276. B.K. 22A. Niz. Mom. 3:16, Chos. Mish. 330:12
277. B.K. 19B; Niz. Mom. 2:10; Chosh. Mish. 330:10
278. B.K. 21B. B.K. 18B; Niz. Mom. 2:17, Chosh. Mish 392:1

without his permission and the ox kill the owner of the land, the one who lead the ox in is liable for the death of resulting directly from his wrong act.[279] In the case where one drops a child from the top of a roof and before it reaches the ground an ox kills it with his horns,[280] there is a dispute as to whether or not the act of the one who dropped the child was the proximate cause of the injury and whether he is therefore liable or not. If a wall or a tree fall on a public thoroughfare and cause damage after the owner thereof was given time to repair it he is liable, for his negligence in the repairing directly causes the damage.[281] There might also be added to these many more such cases; but the principle is already entirely evident.

---

279. B.K. 26A
280. B.K. 27A
281. B.M. 8:4

CHAPTER IV

INFRINGEMENT OF PERSONAL ~~PROPERTY~~ LIBERTY

Owing to the fact that before the existance of the concept of personal property there nevertheless existed in the primitive mind the belief in one's right to personal liberty we find contests between parties over cases involving an infringement of this right at the very dawn of history.[282] This type of case may stand out in our mind as the initial triumph of law over force. It is, therefore, not at all surprising that there are several verses in the Bible, a few in its earliest codes, that prescribe codified law in reference to situations involving the violations of these rights.[283]

The Bible rule, however, is in accordance with a primitive view rather than with the modern law. The old lex talionis, the law of retaliation, "an eye for an eye" is rigidly laid down by the Bible. Thus originally the Jewish law was entirely concerned with the penal compensation rather than the legal. It was with great difficulty, therefore, that the rabbis realizing fully that the old "eye for an eye" law was antiquated, found support in a semblance of scriptural authority, for modernizing the concept to suit the idea of damages instead of punishment.[284] With great effort a substitution satisfactory to them was arrived at thru the interpreting of the Bible according to their desires by means of hermaneutic rules.[285]

The rabbis, however, were by no means unopposed in their desire to change the literal conception of the law. The "Boethus men" probably the Sadducees fought with all their power against this violation of what they considered a divine injunction;[286] but here as elsewhere the Rabbis eventually

---

282. ~~xExKxxSSE~~ Jewish Encyclopedia Artic. "Assault & Battery" p. 224
283. Ex. 21:18, 19, 22-25. Lev. 24:19,20, Deut. 19:21; 25:11,12 (indirectly)
284. B.K. 83B
285. For instance the fact that in Lev. 24:17 ff the injuries done by animals are treated in juxtaposition to those done by man is sufficient to prove them that just as the animals' injury should be paid by damage money, so too should man's. Or again, a blind man certainly could not give an eye for an eye and since it says also (Lev 24:22) "You shall have one manner of law" it must mean the blind and the seeing should both pay

(continued next page)

won their point. That this was not so easily accomplished is seen by the fact that many of the rabbis were with the opposition.

The distinction between the idea of penal punishment for these violations and legal remedies has been carried down into the common law. Thus both criminal assault and battery and civil assault and battery exist side by side even down to the present day. There is practically no difference between the two codes except in the former the guilty is punished by the state and in the latter he repays the injured one. Most times an offense is actionable under both laws at the same time and tho one has already been punished criminally he may still have to pay civally.

In Common Law even man-killing may be prosecuted under both codes and the slayer may have to pay damages to the deceased. In Biblical law, however, the injunction is given:- [287] "You shall not take damage money instead of the life of the man-slayer." The Bible may have been trying to guard against the wealthy killer escaping the just punishment, for the blood avenger was also the prosecutor and he might be thereby bribed. In Common Law, on the other hand, the heir may only prosecute for damages, the state, as a corporate body enters into the criminal side of the case and the family of the deceased may only be prosecuting witnesses. Also it is a rule in Jewish law that one cannot be twice punished or even put in jeopardy for the same offense. Thus, tho if a lamb is tied within a stack of grain and a man destroys the stack he is liable for the injury to the grain; if these be a slave tied within instead and the slave is thereby killed the man does not have to pay for the grain. If he were guilty at all it would be of the more serious offense of

---

for their tort in damages. Again stress is laid on the word _____ which usually when used with the idea of restitution means restitution in money.

286. Megillat Taanis IV

287. Num. 35:31

man-slaying and so he is not responsible for the grain, for otherwise he would possibly have to face two accusations for the one act. In Common Law this is not the same except in a case involving one's life or liberty. The subject under discussion being the law of Torts, only the civil side of the action will here be referred to.

A. ASSAULT.

At Common law there is an offense called an assault which is defined thereby as "any attempt or offer with force or violence to do a corporal hurt to another, whether from malice or wantonness, with such circumstances as denote at the time an intention to do it, coupled with a present ability to carry such intention into effedt."[289] This offense must be distinguished from another that usually follows as its natural consequence, Battery. In the former there is necessary only the apprehension on the part of the plaintiff that a wrong is about to be committed. The injury is mental rather than physical. Thus where A had a heated argument with B while in the company of a group of other men, and A advanced toward B with clenched fists and threatening mien, he is guilty of an assault even tho he was stopped by one of the company from carrying out his apparent intention.[290] Nor is it necessary for the plaintiff to have the intention or the ability to carry out the assault for the offense to be actionable. Where the defendant walks nto the plaintiff's office and aims a gun at him in a threatening manner, the mere fact that the gun was unloaded and the defendant knew it could do no harm is not a defense for his assault.[291]

In Talmudic law there is no case analogous to the "assault"; for there can be no punishment in that system for intentions. There is the case,

---

288. B.K. 6:5
289. Tawer vs. State, 43 Ala, 354, 356
290. Read v. Coker - Pounds "Cases on Torts" p. 3
291. Beach v. Hancock, 27 N.H. 223

however, where one is frightened but here sufficiently to become ill; and even tho a definite injury has followed nevertheless the earthly court has no jurisdiction. The punishment must be left entirely to the will of the heavenly court.[292] Shame however is actionable per se even if there be no other injury[293] and this may be extended thru inference to the case of assault because the element of damage therein is usually due to the insult or disgrace.

BATTERY[294]

When the plaintiff has been actually touched by the defendant or something set in motion by him there is said to have been a battery.[295] The mere fact that the force of the impact is slight does not bar the recovery;[296] but in such a case a question of motive may be introduced and one cannot be liable for touching another in discourse, to attract attention, or to persuade.[397] Similarly there is a Talmudic case which holds that if one enters the grounds of another, the owner may, after warning, eject him with a little force, that is, an amount of persuasion but he must not use excessive force and is liable if he harms the trespasser.[298]

---

292. B.K. 48A
293. B.K. VIII:1 Mishnah and Gemara
294. The awarding of damages in cases of Battery is very interesting but outside the subject of this thesis which is limited to the nature of ~~the~~ the Tort alone and has nothing to do with the adjective law. It will be sufficient to add here in this foot note a few words. In the first place there must be injury to constitute any action on tort. "Injuria sine damno" (Webb v. Portland Mfg Co, 3 Sumn. 189; Fed case no. 17,322) However such injuries as shame and humiliation are included in the generalization at Common law (Ashly v White, 2 Ld. Raym. 938, 955; 92 Eng. Repr. 126). Similar damages are allotted by both the Talmudical law (B.K. VIII Mish and Gemara) and the Common Law in respect to such injuries as damage (touching), pain, stoppage of work, cost of cure, and shame; and the methods of determining the monetary amount of damage are surprisingly similar.
295. Most cases in this connection are discussed in the various sections of the chapter on "Negligence." It may be mentioned here that all trespass on either person or property is always actionable if intentionable ander common law as well as, presumably under Talmudic law. The subject of intentionable trespass will therefore be left undiscussed herein as there is no point of law ever involved, but rather point of fact.
296. Sweeden v. State, 19 Ark. 205
297. Chapin on "Torts" p. 257
298. B.K. 48A

Tho it is stated that the battery can only be consummated by the immediate contact of the person assaulting with the person assaulted, the term "person" is taken in a very broad sense and includes all articles in immediate contact with the person, so that snatching paper from another's hand or striking a horse hitched to a carriage in which is the plaintiff both constitute battery.[299] Similarly does the Talmudic law hold a defendant liable for spitting so that the spittle falls on the plaintiff, stripping him of his garment, or baring the head of a woman in public; in none of these do the actual bodies of the litigants come in contact.[300] Likewise the wrong may be accomplished by the defendant pouring a liquid over the plaintiff, an offense found in both the Talmudic[301] and the Common law.[302]

The early Common Law did not recognize as a defense the plea of self-defense, for it was deemed that since an injury had been committed it must be paid for. However since 1400 self defense has been admitted as valid at common law.[303] Thus when there is a show of force on the part of another and this be sufficient to seem menacing to a reasonable man, one does not need to wait until a fatal blow has been delivered but may protect himself in "self-defense"[304] So also holds the Rabbinical rule. If a woman stretches forth her hand in self-defense, she is not to be punished therefore, because she has merely fulfilled the function of a court.[305] Similar to this is the case where one is held not to be liable for killing one who himself is attempting to kill or who is running after a bethothed damsel.[306]

---

299. Chapin on Torts. p. 257
300. B.K. VIII:4
301. B.K. 85B
302. Murdock v. State, 65 Ala. 520
303. Chapin on Torts, p. 259
304. ibid
305. B.K. 28A
306. Sanhedrin VIII;9 This case would probably be considered only at criminal law; but the logic of it is in point here.

The question here arises as to whether in the case of a mutual affray, a fight by consent, the one can bring an action for battery against the other, and if such action is brought whether the other can set up the defense of "self-defense." It is held that an action may be brought for such battery by either of the parties and since neither had been forced into the fray, neither could set up a plea of "self-defense". Fighting, even boxing is unlawful and the consent of the parties does not excuse injuries.[307] However an Ohio case holds that the fact that the parties fought by agreement may be offered in mitigation of damages, tho no bar to action.[308] Very similarly does the Shulhan Aruk give the Talmudic law by holding that tho"self-defaase" is a justification, nevertheless, if there is a fight, each is liable to the other. The amount of damages paid is the difference between the two injuries which is similar to the Ohio rule of mitigation of damages.[309]

Finally force may also be used in defense of property, real or personal,[310] but it must not exceed what is necessary for protection and must be directed to the end designed.[311] For ~~in~~ instance, the possessor of a piece of land may remove a trespasser if necessary by force, but nevertheless, he is in duty bound to warn him first.[311a] Just so holds the Talmudic case cited above. If one enters the grounds of another, the owners may, after warning him, eject him with force, but he is liable if he harms him (thru excessive force).[312]

FALSE IMPRISONMENT

There is one more offense at Common Law that deserves mentioned within this chapter. "False Imprisonment consists in the unlawful detention of the persom of another for any length of time whereby he is deprived of his

Y

---

307. Pounds "Cases on Torts" Bell v Hansley p. 18
308. ~~Chm~~ Chapter v. State, 14. O.S. 437
309. Hoshen Mish. 421:13
310. Morris v. McClellan, 154 Ala. 639; 45 South, 641.
311 Gunlay v. Reed 1 C & P. 6
311a B.K. 48a
312. ~~Tuttle~~ Civ Code. Ga. 1895 - 3851 quoted by Thorpe Vs Wray, 68 Ga p. 359,367

personal liberty." It is not necessary at all that this restraint be under the color of any legal or judicial proceeding.[313] The only case even slightly resembling this found by the writer in the Talmud, is that discussed under the subject of damage due to stoppage of work. It is the case where damages for stoppage of work may be awarded because of this mere restraint even tho there be no actionable mutilation nor pain nor need of cure.[314] However, it is uncertain whether the Talmud means just this or whether it is not merely intended to apply in case of a battery where the injury is slight and cannot be calculated.

---

313. Comer v. Knowles, 17 Kan. 436, 440
314. B.K. 85b - J. Encyc. also calls it a case of "False Imprisonment" Art. Assault & Battery, p. 225

CHAPTER V

DEFAMATION

"By defamation is understood a false publication calculated to bring one into disrepute."[315] The tort arises out of the violation of the right of having one's repuration remain inviolate; when spoken it is called slander; when written, libel. Under Common Law this offense is actionable and so a minute code of rules has been established to determine whether or not an action really comes under the heading of slander. Thus in some cases there must be definite construction assigned to the alleged offensive language. Damage must always be present but in some cases its presence is presumed without proof, such as in cases of the defendant charging that the plaintiff has committed a crime, or has a loathsome or contagious disease, or is unfit for the office he holds, or, if a woman, she is unchaste. In defense tho, the defendant may plea that his words were the truth, or that he was offering but a fair comment or that he was a privileged person to give the advice or counsel inherent in the slander, due to profession or relationship, etc.[316]

In the Jewish law, however, tho the offense is recognized as such, it is not actionable in court nor punishable by man but is left in the province of the Dinye to punish him as He sees fit.[317] The Biblical prohibitions of the offense are numerous among which are two Torah injunctions.[118]

Surprisingly the rabbis have not on the basis of these precepts in the Torah invented appropriate legal remedies. The difficulty is felt by the rabbis. "Injury thru words is exempt from liability"[320] They, however, believed that severe heavenly punishments would fall upon the head of the slanderer.[320] They also tell of the punishment they would like to exact

---

315. Cooley on Torts (3rd Ed) Vol 1 p. 266
316. Chapin on Torts (p. 292-345) full discussion of the offense under Common law.
317. In Rabbinical literature the technical term for defamation is _____. In the Bible also _____ are used in this connection.
318. see next page.

of having the slanderer cast to the dogs.[321] Likewise there finally arose a later custom of fining the slanderer[322] as is done today; but such a procedure is not found in the Talmud.

There are two specific cases that are actionable but not because of their being slander alone, but due primarily to the particular circumstances involved. Both of their punishments are provided by the Biblical law. The man who slanders his wife is fined[323] and the collusive witness receives the punishment that his falsification might make possible.[324]

---

318. Ex. 23:1 Lev. 19:16

319. B.K. 91A

320. The exile and destruction of the kingdom is ascribed to David's listening to slander. (Shab. 56B) The condemnation of the generation of the desert was due to the slanderous reports of the spies (Av. 15A) Furthermore the slanderer is a denib of God and is thereby doomed in the future. (Av. 15b) The slanderer is included in the four classes who cannot see the Divine presence (Sotah 42A) Slander is equal to the worst of sins. (av. 15b) The slanderments leprosy as a punishment (ibid) Disease casts him from society (Av 16B) Quincy is attributed as the punishment for slander. (Shab. 36A, 36B).

321. Pes.118A

322. Responsa of Asheri (10169)

323. Deut. 22:13-19

324. Deut. 19:16-21

CHAPTER VI

FRAUD

Another tort at common law is fraud. It consists in deception practised in order to induce another to part with property or to surrender some legal right and which accomplishes the end designed.[325] To constitute an action for fraud there must be found present all of the following elements. There must have been a representation,[325b] a statement that so and so is a fact. Mere slience is not sufficient.[325c] Thus in Talmudic law, too, when one sells fruit and grain and there is no stipulation relative thereto; if they do not sprout the seller is nevertheless not liable.[326] However, it is necessary according to both law codes that there be "mere" silence. Silence with the idea of fraud in back of it amounts to representation; as if one selling a ship leaves it afloat thereby hiding its ~~xxxxxxxxx~~ worm eaten hull, the sale is void according to the Common Law.[327] Likewise in Talmudic law if one sold seeds for gardens that could not be used the seller is liable,[328] or if one sells an ox, even with no stipulation whatsoever and it is found to be a goring ox, the sale is void.[329]

Further elements that must be present are the falsity of the statement, the scienter (the defendant's consciousness of such falsehood, deception)(bythe defendant on the plaintiff) and injury (resulting from the deception).[330]

The following case appears at Common Law and may here be cited as a single example of the many fraud cases in modern times. A manufacturer of farm implements sold a land roller with cross-grained wooden tongue with a knot hole therein plugged with putty and paint. It was held that the manufacturer was responsible for injury done thereby to the buyer.[331] Similar cases

---

325. Cooley on Torts. (3rd ed.) 905
325b Arthur v. Griswold, 55 N.Y. 400, 410
325c Boileau v. Records & Breen, 154 Iowa 134, 144
326 B.B. VI:1
327. Schneider v. Heath, 3 Campb. 506
328. B.B. VI:1
329. B.B. 92A and B
330. Arthur v. Griswold, 55 N.Y. 400, 410
331. Kuelling v. Roderick Lean Mfg Co, 183 N.Y. 78

to this have been discussed above under the subject of negligence.[332]

Examples of actionable fraud under Talmudic law are the following: dying a bondsman's beard black, thereby obtaining for him a better price than if he were old; drugging an animal so as to raise and stiffen his hair and make it thereby appear more valueable; painting over old implements to make them seem new; mixing bad grain, and good grain to pretend it is all good; mixing water and wine, different kinds of wine, different kinds of grain, making thereby seem what they are not.[336] Falsifying weights or measures also comes under this generalization and this is considered by the rabbis as a most heinous offense.[337]

---

332. Employments Requiring Skill.

336. B.M. 60A. (A sale is void in case of fraud, but the question whether the plaintiff can recover for useless outlays these engendered is left undiscussed in the Talmud. However, the Shulhan Aruk (Chosh Mish 232:21) gives such extra damages)

337. B.B. 88b ff.

CHAPTER VII

NUISANCE

Differing from actual trespass is the tort of nuisance, which, tho not causing a serious immediate injury, is objectionable because of the likelihood of its causing harm or its constant annoyance to the rights of a citizen. A citizen possesses a number of such inalienable rights that he may claim to the exclusion of some other's absolute freedom of action. Further than this, the tort is difficult to describe and it has been said that "the term 'nuisance' has been regarded as incapable of definition, so as to fit all cases, because the controlling facts are seldom alike,[338] and each case stands on its own footing"

At Common Law one has the inalienable right of having the air he is accustomed to breathe free from pollution.[339] It constitutes a recognized wrong for any one to conduct a business for instance, where the fumes thereof are odorous and disgusting. Likewise articles giving off disgusting odors must not be possessed to the objection of a neighbor. So also holds the Talmudic law. Thus one must not locate his dyer's shop under another's granary; and likewise he must not make a stable there. Neither can a stable be located under a wine store. It is easy to conceive the intent of this law; for the fumes from the industries that are proscribed might contaminate the grain and wine.[340] Likewise carcasses, cemeteries, and tanneries must be removed at least fifty ells from the city and are restricted to the east end of the town in order that the wind may not carry the fumes into the city and pollute

---

338. Melker v. City of N.Y., 190 N.Y. 481, 487
339. Roessler & Hasslacher Chemical Co. v. Doyle, 73 N.J. Law, 521; 64 Atl. 156
340. B.B. II:2

the air in spite of the other precautions.[341] One must also remove his vats for decomposing flax from his neighbor's herbs,[342] and also cover wastes of all kind and remove them a short distance[343] presumably for the same reason.

Likewise the Common Law defines as an inalienable right, the keeping pure of one's water supply and thus if the emptying polluting substances of any nature into one's stream or well that the water is made impure is considered a nuisance.[344] So also in ~~thexMish~~ accordance with the Mishnah one may not dig a well near that of his neighbor, or a basin for washing unless it be removed a short distance and plastered with lime.[345]

Also one has the right according to Common law to enjoy his peace without an excessive and unnecessary amount of noise.[346] Members of a family have a right to sit at home, talk, sing, and dance with open or closed doors; but they must not "wantonly" or needlessly" do these in an unusual manner for the purpose of annoying their neighbors. Thus also in the Talmudic law a resident can object to a noisy business being established on his street, but one may make things in his house even for the purpose of sale if to be delivered (outside) and even tho in the case of ~~the~~ teaching, the customers, the pupils come to the house, one may teach nevertheless without a resident having the right to stop it,[347] for the sake of education.

Again, the Common Law forbids the keeping of premises in such a condition as to make them dangerous to a neighbor.[348] In the Mishnah likewise where there is prescribed definite conditions for the construction of an ~~xxx~~ oven or a cooking stove,[349] or the erection of a well or a ladder[350] a similar idea must have animated the minds of the rabbis.

---

341. B.B. II:20
342. ibid The steeping of the flax is a process of fermenting or rotting it. (Encyc Brit. art "Flax " p. 294)
343 BB II:1
344 Nolan v City of New Britain, 69 Conn. 668, 38 Atl. 703
345. B.B. II:1
346. Bishop v. Banks, 33 Conn, 118; 87 Am. Dec. 197
347. B.B. II:3
348 Pennsylvania R. Co. v. Kelley, 17 N.J. Eq. 129; 75 Atl. 758
349. B.B. II:2
350. B.B. II:5

The common law forbids the keeping of any sort of illegal business in a residential district where the people object thereto. The maintenance of a house of assignation is therefore deemed a nuisance.[351] Possibly a similar thought pervades the forbidding of cemeteries[352] in the Mishnah, besides the liability of pollution of air, for such businesses may sort of lower the standing of the district.

The common law also forbids the using of one's property so as to jar thru concussion the property of another.[353] Probably the same idea influenced the Mishnah to forbid a fixed threshing floor, unless outside the city limits or a temporary [illegible][355] one unless surrounded by ample space apparently to absorb the concussion.also, though the Gemara disagrees, and claims it was because of marring the beauty of the city; there is probably a similar idea under the proscription against planting giant trees too near the city walls.[356] Such trees might grow and their spreading roots jar the city walls and buildings.

According to common law public highways must not be obstructed in any manner.[357] Similarly the Mishnah says that an owner must cut off the branches of his tree that obstruct the highway enough to prevent the full passage of a [illegible] camel driver;[358] and also objectionable materials must not be left on public.ground for any length of time.[359]

---

351. Hamilton v. Whitridge, 11 Md. 129; 69 Am Dec. 184
352. B.B. II:10
353. Quelner v California St. R. Co. 66 Cal. 171; 4 Pac. 1162
354. Interpreted as temporary by the Gemara
355. B.B. II:9
356. B.B. II:8
357. Perry v. Peoples Gas & Light & Coke Co, 119 Ill. App. 389
358. B.B. II:14
359. B.M. 8:5

The common law terms the keeping of a vicious animal with the owner's knowledge of its vicious propensities as a nuisance.[360] Thus also says the Talmud: "The only case for the vicious one is the knife."[361]

One more example of the tort of nuisance may be cited. The common law considers that a property ownerx has a right to light. Now ordinarily an adjacent owner has the right to build to the limit of his property, but many legislatures have enacted laws that if one does this from the sole motive of depriving his neighbor of light he is thereby constructing a nuisance. If one builds a fence from malicious motives, not to improve his property, but to obstruct his neighbor's light and air, then in some jurisdictions he is liable.[362] This is statutory law however, and the common law is usually opposite.[363] The Mishnah follows the former principle that "spite fences" or "spite walls"[364] must not be erected. In the same ~~xxxxxxx~~ passage it also provides against another nuisance, not found by the writer in the common law, that of infringing on the right of privacy by building a wall in such a position as to enable a person to look therefrom into the window of another. However there is difference of opinion on this case.

---

360. Speckmann v Kreig, 79 Mo. App. 376
361. B.K. 65B - whole subject of vicious animals discussed above chapter III Section E.
362. Rideout v. Knox, 148 Mass, 368; 19 N.E. 390
363. Letts v. Kessler, 54 Ohio St. 73: 42 N.E. 765
364. B.B. II:4

CHAPTER VIII

INTERFERENCE WITH ADVANTAGEOUS RELATIONS.

There is one more tort at common law to which some consideration should be given here. There is a moot question at Common law that arises mostly in cases of competition or in trade unionism as to whether one man may establish his business or trade where he pleases and conduct it as he pleases providing he respects all the rights heretofore mentioned. This gives rise to a supplementary controversy as to whether any man or group of men have a right to object to such an establishing or conducting. An authority on torts says the "question whether a cause of action will arise. . . . . is one of extreme difficulty" because "it cannot be answered solely through legal reasoning for it must likewise be viewed from the standpoint of sociology and economics."[365] The cases that would come under this discussion, therefore, seem to suggest modern economic questions that could not have existed before the Industrial Revolution. Two large cases we will discuss here;--that of competition and that of trade unionism.

Under the subject of competition we find this very usual common law case. A banker, a man of great wealth and standing in his community decided to ruin the village barber. To this end he established a rival barber's trade.[366] The barber was allowed to recover damages. The similarity is very marked between this and the following Talmudic decisions. One may not establish a handmill in the same court where there is already another, for the owner of the former may say "You are cutting off my livelihood."[367] Likewise one may not fish within a limited radius from a competitor for he may catch the other's fish.[368]

However, this restraint of free competition, "restraint of trade" is not permitted under certain conditions such as where business interests are

---

365. Chapin on Torts P. 424 and 5
366 Tuttle v. Buck, 107 Minn. 145; 119 N.W. 946
367. B.B. 21B
368. ibid

to be protected in their "so-called" right to compete.[369] Also in Talmudic law there is opposition to the case of the handmill competition being illegal.[370] Furthermore it is stated that one may open a store or a bath house near or even opposite that of another, and each has a right to his own trade.[371] It is considered in common law that competition is the very life of trade. Thus in the absence of set statutory prohibition a merchant may offer inducements of mostly any nature such as rebates[372] or cut prices[373] in order to get his competitor's trade. In Talmudic law the majority opinion is contrary holding that it is unfair competition to entice children with presents of nuts to deal ~~xxkx~~ in one place rather than another. However there is the dissenting opinion that this procedure is perfectly legal and ethical for if one storekeeper says "I will give you nuts"; the other can retort "I will give you plums."[374]

This interference in restraint of trade we find even more pronounced today in the so-termed "labor controversies." It arises usually in matters of boycott. Supposing a number agree together in unison to obstruct another's business.[375] It is usually held that the injured party can recover. The Talmudic law holds contrarily that a newcomer in a court may not open a tailor shop, tannery, school or specialist's establishment; but it insists on an exception corresponding to the common law that an inhabitant of the same court has the right to enter into free competition in the court.[376] A question is also brought up in the Talmud as to whether butchers have a right to bind themselves into a union and thereby limit competition by appointing a day for each one to pursue his trade.[377] All agree that they have such a right but that they should not take the law into their own hands.

---

368. Wesley v. Native Lumber Co. 97 Miss, 814;53 South. 346
370. B.B. 21B
371. B.B. 21B
372. Munhall v Penn R Co, 92 Pa. 150
373. Passaic Print Works v. Ely & Walker Dry Goods Co, 105 Fed 163; 44 CCA 426
374 BB 22A: 375: Amer Fed of Labor v Bucks Stove & Range Co, 33 App DC 83, & 32 L.R.A. (N.S) 748
376. B.B. 22A
377. B.B. & 9A

CONCLUSION

Thus the writer feels he has found a marked similarity between the treatment of that branch of laws known as "Torts" under the Common Law and the similar cases as decided by the Rabbis in Talmudic literature. It is sincerely regretted by the writer that neither time nor ability permits him to make an exhaustive study. The thesis that he here sets forth is but a beginning and a very small beginning in the investigation of this very large and interesting field; and it is his hope that sometime he will be enabled to continue the subject or at least that some other will do so.

Law to be law must be both universal and eternal. Legal codes as well as natural law must always fall into the same general norms and principles; or the laws are not true or real. They are not human discoveries but human inventions. If, however, they are really discoveries thru true scientific experiments in jurisprudence a similarity between any two systems in regards to any single subject matter is to be expected more to be sought for.

SECONDARY AUTHORITIES

AUTHOR	TITLE
Amram, David	"The Jewish Law of Divorce."
Aptowitzer	"Influence of Jewish Law on the Development of Jurisprudence in the Christian Orient" Jewish Quarterly Review (N.S.) Vol 1, p. 117
Blackstone	"Commentaries"
Chapin	"Cases on Torts"
Chapin	"Torts"
Cohen, Hermann	"Some Notes on the Resemblance of Hebrew and English Law" Jewish Quarterly Review (O.S. Vol 20, p. 784.
Cooley	"Torts"
Demos	"Legal Fictions" International Journal of Ethics . Vol 34,p. 37.
Demosthenes	"Aristogut"
Eisenstein	"Critical Review of the Legal Articles in Jewish Encyclopedia". Repr: American Hebrew, Aug..Sept. 1901.
Frankel, Z.	"De Gerichtliche Beweis, etc." 1846
Hale	"Pleas of the Crown"
Isaacs, Nathan	"The Law and the Law of Change". Repr. Univ. of Penn. Law Review vol 64 M & G 1917.
Jhering	"Gust des romischen Rechts."
Kohler, Jos.	"Neber die methode der Reichts vergluckung" Gemeinheits Zeitchrifft, vol XXVII p. 273
Lazarus	"The Ethics of Judaism"
Lee	"History of Jurisprudence"
Levinthal	"Jewish law of Agency" New York 1923
Mielziner	"Introduction to the Talmud"
Pound	"Cases on Torts"
Puffendorf	"Law of Nature and Nations."
Rapaport, M.W.	"Der Talmud und Sein Recht" Stuttgart, 1900
Sohm, R.	"The Institutes" (3rd ed).

Steinberg	"Die Lehre von Verbrechen im Talmud" Stuttgart, 1910
Waxman	"Civil and Criminal procedure in Jewish Courts" Jew. Theol. Sem. Stud. Annual, N.Y. 1914
Wilson, Woodrow	"The State"
Wilton	"Torts"
Wines	"The Laws of the Ancient Hebrews" N.Y. 1853

PRIMARY AUTHORITIES CITED

Bible

Talmud (Mishnah quoted by chapter and Mishnah)
Gemara quoted by double page - A being the left side and B the right.

Sifre

Shulhan Aruk - Caro, Isserles

Yad Hachazokok - Maimonides

Responsa of Asheri

"Einleitung in Talmud" - H. Strak

Encyclopedias - Hewish Encyclopedia
Encyclopedia of Religion and Ethics
Encyclopedia of Law and Procedure
Encyclopedia Brittanica

The National Reporter System.
Cases reported as to section of the country
NORTHWESTERN (N.W.) PACIFIC (PAC) NORTHEASTERN (N.E.)
ATLANTIC (ATL) SOUTHWESTERN (S.W.) SOUTHEASTERN (S.E.)
SOUTHERN (SOUTH) AND FEDERAL CASES (FED)

State Reports
Cases reported according to State

State Appeallate Reports
(Ill. App. Mo. App)

Lawyers' Reports Annotated (L.R.A.)

American Reports (Am. Rep.)

U.S. Circuit Court of Appeals Reports (C.C.A.)

American State Reports (Am. St. Rep.)

United States Appeals (U.S. Appeals)

United States Reports (U.S.)

Lawyers' Edition Supreme Court Reports (L. Ed.)

American Decisions (Am. Dec.)

Appellate Division, N.Y. (App. Div)

New York Superior (N.Y. Supp)

Barbour's Supreme Court Reports (Barb)

Watt's Pennsylvania Reports (Watts)

Appleton's Reports (Maine) (App)

New Jersey Equity Reports (N.J. Eq)

Civil Code of Georgia.

ENGLISH CASES.

Law Reports, Queen's Bench (1866-1875 L.R.Q.B.)

Bingham's Reports, English Common Pleas (Bing)

English Law,Reports, Exchequer (L.R. Ex or Exch.

Law Reports, Exchequer Div. (L.R. Ex. Div)

Law Reports, House of Lords (L.R.H.L.)

Queen's Bench Division (Q.B.D.)

Corrington & Payne's English Nisi Prius Reports (C. & P.)

English Cases Chancery (E.C.C.)

Lord Raymond's English King's Bench Reports (Lor Raym L.J.K.B.)

Law Journal Reports (L.J.Q.B.)

Meeson & Welsby's Reports (M & W)

Canada Supreme Court Reports (Can Sup Ct)

Campbell's Reports (Campb)

King's Bench Reports (K.B.)