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INTRODUCTION TO THE THREE GATES OF SECTION JURISPRUDENCE.

THE three tracts *Baba Kama*, *Metzia*, and *Bathra* (the First, Second, and Third Gates) are unique in the whole Talmud in this respect, that they bear no name indicating the contents, as is the case with all other tracts of the Talmud, and we do not find in any commentary any explanation or discussion of the fact. It may be because the reason is very simple, namely, that these three tracts are the only ones which treat purely of civil law, for even in cases of larceny only the civil side (as the actual damage, and the fine for causing it) is treated of (if there is here and there mentioned some criminal liability, it is only incidentally as a citation in course of the discussion); and as the cases are very numerous and varying in character, no appropriate title could be found to indicate the contents of each tract. Indeed, so numerous are they that we may safely say there is no civil case which can possibly arise between man and man that is not treated of in these tracts. The other tracts of this section, which are enumerated in our introduction to Volume I. (IX.), treat each of a separate and distinct subject and not of purely civil law.

For those especially interested in comparative jurisprudence we give below two articles by prominent publicists, which illustrate only two of the many important principles scattered all over the Talmud.

The first, "The Talmud," by I. D'Israeli, is an extract from "Curiosities of Literature," and is as follows:

In the order of *damages* containing rules how to tax the damages done by man or beast or other casualties their distinctions are as nice as their cases are numerous. What beasts are innocent and what convict. By the one they mean creatures not naturally used to do mischief in any particular way, and by the other, those that naturally or by a vicious habit are mischievous that way. The tooth of a beast is convict, when it is proved to eat its usual food, the property of another man, and full restitution must be made; but if a beast that is used to eat fruit and herbs, gnaws clothes or damages tools, which are not its usual food, the owner of the beast shall pay but half the

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damage when committed on the property of the injured person but if the injury is committed on the property of the person who does the damage, he is free, because the beast gnawed what was not its usual food. And thus, if the beast of A gnaws or tears the clothes of B in B's house or grounds, A shall pay half the damages, but if B's clothes are injured in A's grounds by A's beast, A is free, for what had B to do to put his clothes in A's grounds? They made such subtile distinctions, as when an ox gores a man or beast, the law inquired into the habits of the beast; whether it was an ox that used to gore, or an ox that was not used to gore.

However acute these niceties sometimes were, they were often ridiculous. No beast could be *convicted* of being vicious till evidence was given that he had done mischief three successive days; but if he leaves off those vicious tricks for three days more, he is innocent again. An ox may be convict of goring an ox and not a man, or of goring a man and not an ox; nay, of goring on the Sabbath and not on a working day. Their aim was to make the punishment depend on the proofs of the design of the beast that did the injury, but this attempt evidently led them to distinctions much too subtile and obscure. Thus some rabbins say that the morning prayer of the *Shem'ah* must be read at the time they can distinguish *blue* from *white*; but another, more indulgent, insists it may be when we can distinguish *blue* from *green*! which latter colors are so near akin as to require a stronger light. With the same remarkable acuteness in distinguishing things is their law respecting not touching fire on the Sabbath. Among those which are specified in this constitution, the rabbins allow the minister to look over young children by lamp-light but he shall not read himself. The minister is forbidden to read by lamp-light, lest he should trim his lamp; but he may direct the children where they should read, because that is quickly done, and there would be no danger of trimming his lamp in their presence, or suffering any of them to do it in his. All these regulations, which some may conceive as minute and frivolous, show a great intimacy with the human heart, and a spirit of profound observation which had been capable of achieving great purposes.

The owner of an innocent beast only pays half the costs for the mischief incurred. Man is always convict and for all mischief he does he must pay full costs. However, there are casual damages--as when a man pours water accidentally on another man; or makes a thorn-hedge which annoys his neighbour; or falling down, and another by stumbling on him incur I harm: how such compensations are to be made. He that has a vessel of another's in his keeping, and removes it, but in the removal breaks it, must swear to his own integrity; *i.e.*, that he had no design to break it. All offensive or noisy trades were to be carried on at a certain distance from a town. Where there is an estate, the sons inherit, and the daughters are maintained, but if there is not enough for all, the daughters are maintained and the sons must get their living as they can, or even beg. The contrary to this excellent ordination has been observed in Europe.

The second, of which a literal translation follows, was written in Hebrew by Dr. D. H. Farbstein, a counsellor-at-law in Zurich,

Switzerland, in the "Hashana" (Year-book) for 1900, under the title "One Cannot Grant that Which is not in Existence."

There is no law which has not its reason. Every legal principle is the result of a certain economic and political condition; it is the product of a certain epoch, aiming to benefit the political and economic life of that historic epoch.

The legal principle that one cannot grant that which is not yet in existence had its origin in the Hebrew nation and was the product of a certain epoch, and we shall endeavor here to explain the motives which prompted the development of this legal precept.

This principle existed also in the laws of other Semitic nations in general, and in the Mahometan laws in particular. It was, however, unknown to the Roman law, as according to the Roman law one could grant that which was not yet in existence, and the sale of an article which existed only in expectation was valid, and even the mere expectation could form the subject matter of a purchase or sale.

The reason of this difference between the Semitic laws in general, and the Jewish laws in particular, and the Roman laws on this point lies, in my judgment, in the prohibition of taking usury.

"Thy money shalt thou not give him upon usury, nor lend him thy victuals for increase" [Lev. xxv. 37] is one of the principal Mosaic laws. And as it is prohibited to give money upon usury, so also is it prohibited to raise the price; as, for instance, if the price of an article is such and such in cash, it is prohibited to raise the price of such article if sold on credit for a certain time, for it is nothing but indirect usury.

This law was necessary as long as it was prohibited to give money upon usury; in our own times, however, when industry and commerce have developed so much, it is very usual to buy and sell things which exist only in expectation. In the time of the Talmudists the one who sold that which was not in existence was not an ordinary merchant, but only one who needed money. For instance, a farmer needed money. He applied to the money-lender for a loan. The money-lender was willing to make the loan, but was kept back by the prohibition to give money on usury. In order to evade this prohibition he bought of the farmer the future products of his farm, paying him only a very low price. The difference between the actual value of the products and the price paid by the lender is nothing but indirect usury.

Similar methods are practised even now in those countries where usury is prohibited by the law of the land. The Talmudists, in order to prevent such and similar evasions of the prohibition to take usury, have established the principle that no one can grant that which is not yet in existence; for the same reason, they also prohibited the fixing of a price upon future products before the market price is established. They were, at the same time, careful in stating that one cannot *grant*, and not that one cannot *buy*, affording thereby protection to the grantor only that he may rescind the sale if he elects to do so.

We see, then, that the rule that "one cannot grant," etc., was established with the end in view of preventing any evasion of the prohibition to take usury.

In those days commerce was not so developed as it is in our days, nor was money of such established currency as it is now. Nowadays one invests money in merchandise and then sells the merchandise and realizes his money with a profit, which was not so in those days; and for that reason the taking of usury was prohibited, for money could bring no economic benefit to its owner.

But although it was prohibited to grant that which was not yet in existence, still it was allowed to grant that which would bring benefit in the future--as, for instance, to lease land for cultivation-for the substance producing the benefit is in existence.

This distinction between interest (compensation for the use of money) and rent (compensation for the use of an article producing benefit) was drawn also by the Catholic theologians of the middle ages, who also prohibited the taking of usury, but permitted the receipt of rent.

We, however, cannot fully agree with Dr. Farbstein, for the following reasons:

(*a*) The principal things concerning which this rule was made were marriage and inheritance. If one marries a woman upon the condition that she should become a proselyte, the marriage is null and void, because it is on condition of something which was not yet in existence. The same is the case as regards inheritance-one cannot say to a woman: "I will leave my estate to the children you may bear." In both these cases, usury cannot be the reason.

(*b*) The rule that a man cannot grant that which is not yet in existence is not an established one by all the sages, for there were many of the most popular--as R. Eliezer b. Jacob, R. Meir, and

R. Juhudah the Prince--who held that one might grant that which is not yet in existence (see Kiddushin, 62 *b*, at the end), and certainly all of those sages were aware of the prohibition of usury.

It seems to us, therefore, that the sages who hold that such a thing cannot be sold is because they considered speculative transactions as robbery, so that they prohibited all kinds of gaming existing at that time; and the one who participated in such games was disqualified as a witness, because he was considered a robber. We find, however, in this volume, p. 198, that a woman may sell the benefit of her marriage contract, although it looks like speculation; for she may die during the life-time of her husband, and her husband will inherit from her. But even this is discussed, and seems to be an enactment of some sages for the benefit of the woman. (See text.)

Next: Synopsis of Subjects of Tract Baba Kama (The First Gate)