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Dayan Shetaah- Consequences of Erroneous Decisions by a Bet Din or a Rabbi as Reflected in the Major Codes of Mishneh Torah, Tur, and Shulchan Aruch

BY

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of the requirements for Ordination

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DIGEST

This thesis is about a Judge of a Jewish Court erring in the decision-making process. The focus is on the three law codes of Mishnah Torah, Tur, and Shulchan Aruch. The basis of the discussions were taken from Talmud Bavli, Sanhedrin 33a.

The first part of the thesis is original translation from the three codes mentioned. It is hoped that these translations provide the reader with an adequate understanding of the basic material on the subject.

The second part of the thesis is the notes to the translations. In the notes the supplementary material necessary to a fuller and more complete understanding of the sources can be found. The notes also provide information about the various personalities encountered in the codes. Reference is made therein where further information may be found in regard to related subjects.

The third part of the thesis is comments on the sources. The issues raised therein attempt to bring together the material to some sort of coherent whole. The questions raised included the importance of the judge's status, the types of error that could be committed, and the specific circumstances of the case. The consequences of the various factors are discussed in the light of the issues presented.

There are also at the end, comments made concerning the system of Jewish Jurisprudence. There is much that can be learned from the codes that is applicable in this day and age. Those aspects are discussed and commented upon.

I wish to thank Dr. Alexander Guttmann for his guidance in the preparation of this thesis. But more, I am grateful to him for being my Rabbi and teacher. I am privileged to be able to have both Dr. and Mrs. Guttmann as my friends.

To my parents Anna and Harry Allen, my love and respect. Their love, guidance and support have enabled me to begin to fulfill my potential.

A special thanks to Marsha Bernstein for having typed this thesis. Her patience as well as friendship is greatly appreciated.

To Mary Lou,

without whom my life would be empty and the world joyless,

TABLE OF CONTENTS

INTRODUCTION

> A nation, community, culture or religion in an extended period of existence, experiences many significant changes. Nevertheless even a long period may properly be considered a single epoch if it possess throughout certain fundamental characteristics peculiar to the period in question.[1]

The same can be said about the subject of law within the codes of the Jewish people. In order to better understand the process of that law, its basis and continuity of its growth, an area within law was selected for study. That subject is Dayan Sh'Taah- the case of the erring judge.

A system of jurisprudence reveals much about a society that creates it. The subject of the case of the erring judge enables one to better understand the developing culture of Rabbinic Jews. It helps us to understand our own current meanderings better.

The background material used as the basis for further study in the codes was Talmud Bavli:Sanhedrin 33a. The discussion on that page begins with the Mishnaic statement in "Monetary cases the decision may be reversed." The ensuing gemara delves into the problem of a judge's error in adjudicating a monetary case. It presents material which allows for the formulation of ideas and question about the erring judge. This page directs one to examine certain sections from three major codes. They are: Mishneh Torah,

Shoftim, Hilchot Sanhedrin, chapter 6:1-5 and the section Choshen Mishpat, chapter 25 in both the Tur and the Shulchan Aruch.

These three codes present an opportunity for understanding the subject and a beginning understanding of the process of codifying Jewish law.

Mishneh Torah was written by Maimonides. His code has become the basis of so many other books of Jewish law. No work dealing with a subject of Jewish law would be complete without the inclusion of Maimonides' opinions.

The Tur is formally the Arbaah Turim (the four rows) written by Jacob ben Asher. He compiled the opinions of Jewish legalists from the time of Maimonides until his own day. Not least among these included in the Tur are the opinions of Rabenu Asher, the father of Jacob.

The Shulchan Aruch is the most widely used of the codes to this day. It is the guide in the daily religious lives of many Jews. It was written by Joseph Caro with important notes by Isserles. The positions taken in the Shulchan Aruch end a significant period in the development of Jewish law.

Throughout these texts, from Talmud to the Shulchan Aruch certain areas to be considered remain constant: The importance of the judge's status, the implications of the judge's error both for himself and the litigants, the types of error committed, the circumstances surrounding the trial. These and secondary issues will be considered in due course.

Law seems to be inexorably linked to the philosophy of a people. More specificly, to the political ideas by which a people lives and governs itself given the opportunity. It is the belief of the author that there are many political ideas found in the body of material examined. These ideas will be the basis for an essay dealing with Jewish Politics. The attempt will be made toward finding applicable political ideas for our own time/place setting.

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[1] A. Guttmann, ~~Making of~~ in the Making Rabbinic Judaism, Introduction

MISHNEH TORAH - SHOFTIM- HILCHOT SANHEDRIN, CHAPTER 6:1-5

ALEPH

Every judge[1] who adjudicated a monetary case[2] and erred, if he erred in a matter that was obvious and known, for example laws explicitly given in the Mishnah[3] or Gemara[4] that decision is annulled.[5] After the annulment of the decision, the case is judged in accordance with the law. If it is not possible to retry the case, for example the litigant who received the money illegally left for a distant land[6] or that this same litigant was a mute[7] or that the judge had declared unclean an object that was clean[8] or the judge decided that a cow that was kosher was not kosher[9] and was thus fed to the dogs, and in similar cases, behold the judge is exempt from paying.[10] Even though the judge caused damages he had not intended to cause damages.

BET

If a judge erred in the weighing of opinions,[1] for example a matter that was an argument between Tannaim[2] or Amoraim[3] and there was no explicit decision in favor of one of them[4], and the judge did in accordance with one of their positions unaware that already the wide spread practice in the world was in accordance with the other,[5] if this judge was an expert,[6] and he had received authorization from the Exilarch,[7] or he had not received authorization but the

litigants in the case accepted him,[8] since he is an expert, the decision is annulled (and then reversed).[9] If it is not possible to reverse the decision the judge is exempt from paying.[10] This is the same whether he has authorization from the Exilarch or has authorization from the Court of Israel,[11] in the land of Israel. But this does not apply outside the land of Israel as we have explained.[12]

GIMEL

If the circumstances were that an expert erred but was not authorized to judge,[1] and had not been accepted (unconditionally) by the litigants.[2] Or the judge was not an expert but had been (unconditionally) accepted by the litigants to judge for them in accordance with the law, and he erred in the weighing of opinions. If the judge took (the money or object personally) and gave it to the other litigant,[3] what is done is done[4] (stands) but he must pay from his own pocket.[5] If the judge had not taken and given personally, the judgement can be reversed. And if it is not possible to retry the case the judge must pay compensation from his own pocket.

DALED

However, if one is not an expert and was not unconditionally accepted by the litigants, although he received authorization we note that this man is included in the category of violent people[1] and not included in the category of legitimate judges.[2] Therefore, his decision does not

stand regardless of whether he erred or he did not make an error. And everyone of the litigants, if he so desires, can have the judgement reversed and adjudicated before a legitimate court.[3]

And if the judge errs in judgement[4] and takes and gives (money) personally[5] he is obligated to pay out of his own pocket. Subsequently he takes (the money) from the one litigant to whom he gave it illegally.[6] If he does not have the money to return it or he declared (an object) unclean (which was clean) or that the litigant gave that which was permitted as food to the dogs,[8] the judge must pay according to the law pertaining to every person causing damages,[9] because this man is considered as one intending to cause damages.

HEY

A judge who erred and obligated an individual to swear[1] who does not have to swear and the litigant made a compromise with the other litigant in order that he will not have to swear and afterwards[3] he realizes that he did not have to take an oath or he can not swear an oath,[4] even though they make a formal commitment[5] with regard to the compromise, this is null and void because he[6] accepted the obligations to give the money to his opponent or to renounce any claims only so that he would not have to swear an oath to which the erring judge obligated him. Every erroneous transaction is null and void, likewise in all similar cases.

TUR- HOSHEN MISHPAT -25

I

(Laws pertaining to) a judge who adjudicated a case and erred. If the error was in a matter of weighing of opinions,[1] for example a matter that was a controversy between Tannaim[2] or Amoraim[3] and it[4](the law) was not decided according to one of them[6] and he decided according to one of them[7] and the general discussion reflects the other opinion, for example in an annonymous Talmudic passage a question is raised about this topic[8] or the like[9] and Rashi[10] explains it, but the general discussion follows the other interpretation, meaning that for the majority of the judges the words of the second[11] authority appear to be correct (are better); If this judge[12] is an individual judge[13] and he is not an expert[14] or even if there are two judges who are not experts and both litigants accepted them unconditionally (or the judges have authority from the Exilarch), what they have done is done[15] and they must pay from their own pocket[16] even if they did not take and given physically.[17] In this case the individual judge can not say to the litigant who won the case[18] return what the other litigant gave you because I made an error. Even if there is a higher judge[19] who would make him return the money[20] the litigant in whose favor he (the lower judge) judged does not have to return the money because it is a fine

that the Rabbis imposed,[21] that the decision stand and he[22] pay from his own pocket.[23]

To what case does this refer: (To the situation where) the litigants accepted him in a general way,[24] but if they accepted him explicitly[25] whether he judged correctly or whether he erred, he, the judge, is exempt from paying. The same is the law for one or two experts that were not accepted unconditionally by the litigants, and who had not received authorization from the exilarch and erred in the weighing of opinions. What they did was done and they must pay from their own pockets even if they did not phusically participate in the transfer of funds. The same is the law when a court of three laymen[26] who had not been accepted unconditionally by the litigants and had not received authorization from the Exilarch erred in the weighing of opinion. What they did is done and they must pay from their own resources even if they did not take and give (the money) personally. If they (all the three judges) agreed "to one opinion"[26a] they split the payment between the three of them. If the decision was effected by two judges,[27] then the two judges shall pay the fine it being divided into two portions[28] and the third judge is exempt,[29] the litigant suffers the loss of the remaining third. If there were four or five judges and the judgement was rendered by three they[30] pay the entire fine for the damages. The three majority judges can not say: "had you[31] not been with us the decision could not have been rendered by us alone" because three judges are able to judge

a man against his will.[32] Also had there been three judges and the erroneous decision was made by two of them and one out of the two was an expert, the two judges who erred would have to pay all because the decision could have been made by these two alone since one of them is an expert and is able to judge a case against a litigant's will. (The situation could have been) one or two experts that the litigants have accepted unconditionally, even if they did not receive authority from the exilarch, or even three laymen whom the litigants had accepted unconditionally and they erred in the weighing of opinions they are exempt from paying; even if they took from one litigant and gave to the other physically, even if there is (a higher court or) a greater judge, the decision is not annulled but the judgement stands and they are exempt (from paying restitution). The same is the law if all three were experts even if the litigant had not accepted them unconditionally.

II

The Rema[1] wrote: (This is so) only if they were ordained in the manner that they are qualified to judge according to the Torah,[2] but if they were not ordained even if they were learned and able to reason[3] they must pay. Who ever receives authority from the Exilarch even if he is an individual layman and was not accepted unconditionally by the litigants and erred in the weighing of opinions, his decision stands and he is exempt from paying even if he took and gave physically. But only if he is learned, even

if he is not able to reason, but if he is not learned and not able to reason he is unfit to adjudicate a case as I have explained above. And one or two laymen that the litigants have not accepted unconditionally and were not authorized by the exilarch even if he did not err, their decision does not stand.[4]

Wrote the Baal HaItur[5] (~~Jacob ben Asher~~ Isaac b. Abba Mari) in the name of Rav Hai Gaon[6]: One that is not an expert and was not accepted unconditionally by the litigants and erred in the weighing of opinions, the law pertaining to him that he should pay from his own resources applies only when the litigant in whose favor he made the decision is not present[7] or he is present and can not pay. However, if he[8] is before us[9] and he is able to pay he[10] takes away from him that which he gave to him[11].

Harash[12]-My master my father(Rabenu Asher ben Yechiel) wrote: In every instance in which the judge must pay from his own pocket, for example; an individual judge who is not an expert but was accepted unconditionally by the litigants or three laymen that were not accepted by the litigants. In all these cases even if the litigant who won the case erroneously is present and is able to pay the judge can not take the money from him[13] and give it to the other litigant. The judgement stands and they (the judges) must pay from their own pocket.

Rambam[14] wrote: An expert who received authority[15] or was accepted unconditionally by the litigants because he is

an expert the decision can be annulled. If it is not possible to annul[16] the decision the judge is exempt from paying.

If the judge who erred was an expert and had not received authority and was not accepted unconditionally by the litigants or he was not an expert but the litigants accepted him unconditionally and he erred in the weighing of opinions; If he took and gave personally what is done is done and he must pay from his own resources. But, if he did not take and give physically the judgement is annulled. If it is not possible to annul and retry the case[17] he must pay for damages from his own pocket, here ends Rambam's comment. What I wrote is the conclusion of my father Rebenu Asher, may his name be for a blessing.

III

If the error is in a simple matter, for example a thing explicitly stated in the Mishnah[1] in every such instance the judgement is annulled[2] even if the judgement was made by three experts, even if the litigants accepted them unconditionally because there is no decision at all since the error is in a simple matter. However, if it is impossible to annul for example, if he who had been given the money went to a distant land or he was a mute or he does not have anything with which to pay or that he (judge) decided something[3] that was kosher was trefe and the litigant due to the judges decision fed it to the dogs, Rambam wrote;

that the judge is exempt even though he caused damages because he did not intend to cause damages.[4]

Then wrote also the Remah[5] but he differed with him[6] in the following: That if the judge had not taken and given physically the judge is exempt. If he had taken and given physically and if he was an expert, learned and able to reason and the litigants had accepted him unconditionally he is exempt, otherwise he is responsible. But a layman even if the litigants accepted him unconditionally he is liable because where ever the error was in a matter of the weighing of opinions what is done is done and he is liable to pay, if the error was in a matter found in the Mishnah under such circumstances and the litigant suffered the loss, if the judge took and gave the judge is obligated.[7] My master my father Harash[8] wrote: that under all circumstances he[9] is liable[10] even if they[11] are experts, even if they did not take and given physically.

IV

Abraham ben David of Posquières[1] wrote: There is not a man in our time[2] who is permitted to differ with the opinions of a Gaon,[3] in order that he deviate in his decisions from the words of a Gaon except in a well known difficulty[4] and this is a matter that does not exist. Therefore, the one who differs in his decisions with the words of the Gaon, it is like he erred in a matter of Mishnah. Likewise, if he erred in view of the decision of the Gaon, meaning that he

did not hear their words[5] but had he heard them he would have retried the case, this is called an error in a matter of Mishnah.

My master my father Rabenu Asher wrote: Certainly one who erred in a matter of the Gaonim, namely that he did not hear their words, and when they[6] said to him this is what the Gaonim decided, it was correct in his eyes,[7] this is called the same as an error in a matter of Mishnah.[8] It is not necessary to say that this refers only to the decision of the Gaonim. It holds true also for the wise of every generation[9] that came after the Gaonim because they were not cutters of reeds in the swamps.[10]

If the judge rendered a decision of law contrary to their[11] words and when the judge heard their words they were correct in his eyes and he acknowledged that he committed an error, this is the same as the case of erring in a matter of Mishnah. The case is "returned".[12] But if the words are not correct in his eyes and he brings proof that was accepted by the men of his generation,[13] then "Yiftach in his generation is like Shmuel[14] in his".[15] You can do nothing but accept every judge who lives in those days.[16] He may contradict or refute their words because all their matters are not explained clearly in the Talmud that was redacted by Rabina[17] and Rav Ashi.[18] You can refute and build something new,[19] even to the point of disagreeing with the words of the Gaonim. And where two great men differ on a halachic[20] decision the judge should not say I decided

in accordance with any one of the two of them, whomever I so desire. If he did do this it is a false decision[21] unless he is a great wise man learned and able to reason and knows how to decide according to one of the two of them with the help of clear and correct proof.[22] Then the permission is at hand[23] even if a great man made a decision in this matter. A wise man can refute his words with clear proofs and can disagree with him as I[24] wrote above.

And all the more so if there is support by one of the authors of halachic works[25] who disagreed with him. If he[26] is unable to do so he should not take away money[27] because of a doubt, because where ever there is a doubt about the law you do not extract money away from one who possess it. If he did not know about the decisions pertaining to the controversy of the great sages and afterwords it became known to him and he is not qualified[28] to decide the matter or that he can not decide whether the words of one of them appear plausible to the majority of the sages and he acted like the other sage, this is considered as erring in the weighing of opinions.[29] If it is impossible to establish a matter (for lack of evidence or tradition) there is no error, and what he decided stands. End of quotation.

V

The Remah[1] wrote: A judge that erred and the one who was to collect[2] did not have enough time to collect the things from the one from whom he demanded the money[3] before it was clarified that the judge had erred, there is no

in accordance with any one of the two of them, whomever I so desire. If he did do this it is a false decision[21] unless he is a great wise man learned and able to reason and knows how to decide according to one of the two of them with the help of clear and correct proof.[22] Then the permission is at hand[23] even if a great man made a decision in this matter. A wise man can refute his words with clear proofs and can disagree with him as I[24] wrote above.

And all the more so if there is support by one of the authors of halachic works[25] who disagreed with him. If he[26] is unable to do so he should not take away money[27] because of a doubt, because where ever there is a doubt about the law you do not extract money away from one who possess it. If he did not know about the decisions pertaining to the controversy of the great sages and afterwords it became known to him and he is not qualified[28] to decide the matter or that he can not decide whether the words of one of them appear plausible to the majority of the sages and he acted like the other sage, this is considered as erring in the weighing of opinions.[29] If it is impossible to establish a matter (for lack of evidence or tradition) there is no error, and what he decided stands. End of quotation.

V

The Remah[1] wrote: A judge that erred and the one who was to collect[2] did not have enough time to collect the things from the one from whom he demanded the money[3] before it was clarified that the judge had erred, there is no

difference whether the judge is a layman and no difference whether he is an expert, no difference whether he erred in a matter found in the Mishnah and no difference whether the error is one of weighing of opinions, as long as the one who sued did not collect his money the decision is annulled.[4] Even if he collected half of it[5] and the other half remained with the other litigant, this half which he collected, if the error was in the weighing of opinions, he keeps it, according to the views which I explained with respect to one who makes an error in the weighing of opinions. The other half, remains with him (the losing party), there is no difference in the case of one who erred in a matter of Mishnah, no difference in the case of one who erred in a matter of weighing of opinions, no difference whether he is (the judge) an expert and no difference whether he is a layman, they do not take the money from him.[6]

VI

There is a case where they called him a mouse who lays on the money.[1] When he[2] was about to die and he said[3] who loaned me money? So and so loaned me money.[4] People came and made a demand for their money from estate in front of Rabbi Ishmael[6] and Rabbi Yose.[7]

Rabbi Yose said: When do we say a man usually doesn't make himself look rich? When he is alive[8] but, after he dies it's not so, therefore this Rabbi tells the heirs to go and pay those people whom your father pointed out.

Then they went and paid half of it[9] and with respect to the other half they went to Rabbi Hiyya.[10] He said, just as a man has the nature not to make himself look rich, thus does he not want to make his sons look rich.[11] They said to him: Shall we go and retrieve the other half of the money which we already paid? He said: an old sage already taught about this.[12] Until here is a quote. But he differed with him only in reasoning.

My Master my Father wrote about this: Rabbi Ishmael did not err in the weighing of opinions since there was no controversy between Tannaim and Amoraim about this issue before.[13] Rabbi Ishmael according to his reasoning declared the one obligated had to pay. Rabbi Hiyya did not have the "strength" (traditional source) to prove that Ishmael erred but he differs with him in reasoning.[14] And it appears from his words that had the error been a matter of weighing of opinions, immediately when the case was decided then though the man has not yet collected it[15] from the other fellow, the decision would stand and what is done is done. The judge is obligated to compensate every judge according to laws pertaining to him as I have explained above.[16]

The reason here[17] (that we let the case stand[18] as is) is because Rabbi Hiyya disagrees with Rabbi Yishmael in reasoning, therefore, the decision can not be reversed.[19] However, what was not yet collected should not be collected because Rav Hiya disagrees with Rav Ishmael's reasoning.

VII

Rambam wrote: A judge who erred and made obligated an individual to swear an oath who is not obligated to swear an oath and this man made a compromise with the other litigant in order that he not have to swear and afterwords he learned that he did not have to swear, even though he made "Kinyan" (firm commitment) to compromise this pledge is void, since he did not accept it upon himself either to give the other fellow the money or to give up the right to collect money, only in order to be exempt from swearing an oath to which the erring judge obligated him. Every obligation based on error is annulled and this is the case in all related instances.[1]

SHULCHAN ARUCH CHOSEHN MISHPAT CHAPTER 25

When may a judge who gave an erroneous decision "retract" (i.e., annul the erroneous decision) and when must he make compensation: Five sections.

ALEPH

Every judge[1] who adjudicated a case dealing with money[2] and erred, if he erred in obvious and known things for example in laws explicity stated in the Mishnah[3] or in the Gemara[4] or in the words of the codifiers,[5] the verdict is reversed and the case is subsequently retried in accordance with the law.

Gloss: Yet some say that if it appears to the judge and the men of his generation[7] on the strength of indisputable proof that the law is not in accordance with what is stated by a codifier, he can differ with him since it is not mentioned explicitly in the Gemara. Nevertheless, one should not adopt the lenient position[8] in a matter that finds a strict ruling in the codes spread among the majority of the Jews, unless he received a tradition from his teachers that this stringency is not being practiced. (Israel Isserlein, Terumat haDeshen section קי"ג)

Text: However, if it is impossible to reverse the verdict for example, where the one who illegally received the money[10] went to a land across the sea or that he is a

mute or where the judge said something clean was unclean or decided that a kosher animal was trefe and they fed it to the dogs or anything similar to this, note in these cases the judge is exempt from paying.[11] Even though he caused the damage, he did not cause the damage intentionally.

Gloss: And some disagree (Rabbi Jacob ben Asher in the name of Asher ben Yechiel) (and in regards to the matter of ritual law) if the man is old enough to be ordained even though he is not officially ordained his judgements are like that of an expert (N'mukay Yosef by Rabbi Joseph ben Chabiba and the "Rif" Rabbi Isaac Alfasi section [illegible]). See Yoreh Deaon section [illegible] on the laws of ordination today.

BET

If a judge erred in the weighing of opinions for example, in a case where there is an argument between Tannaim or Amoraim,[1] but the law is not explicitly[2] decided according to one of them and the judge judged according to one of them and did not know that the general practice in the whole word was like the other. If this judge was an expert and obtained authority from the Exilarch or did not have authorization[3] but the litigants accepted him unconditionally, since he is an expert the verdict can be reversed (in a new trial) and if it is impossible to reverse the decision he is exempt from paying.

Gloss: The decision of three laymen is like that of one expert.[4] See above, end of section three, in what manner (to what extent) obtaining authority from the king is

effective. One should not say I will judge in accordance with whom ever I desire, in a matter in which there is an arguement. For if one acts thus, note it is regarded as a false verdict, unless if he is a great wise man and knows how to render a decision on the basis of evidence, he has authority to act thusly, but if he is incapable of this he can not exact money out of uncertainty, because where ever there exists a doubt regarding a law, we do not exact money from the possessor (The Tur, Rabbi Jacob ben Asher). And if it is a matter of ritual law and the (disputed) matter is forbidden in the Torah, go with the stringent position and if it is a matter (prescribed by) the rabbis go with the lenient position. This is true only if the authorities argueing are equals, but one should not rely on the opinions of a minor authority against the opinions of one greater than he in wisdom and in "numbers" even in times of emergency unless it involved serious loss.[5] And thus, if it was one against the majority follow the majority in all places (Maimonides, Mishnah Torah section ב''ו), and even if the majority agree but not for one reason, but each one has his own reason since they agree regarding the law they are regarded as a majority and we adopt their opinions[6] (Rabbi Joseph Karo, Shulchan Aruch, Hoshen Mishpat section

If the custom in a city is to have the lenient point of view because one sage had ruled it for them thus, we follow his opinions.[7] If another sage comes and prohibits that which they (the former sages) permit the practice follows

the prohibition of the later sage[8] (Responsa of Rabbi Shimon ben Elezar section ס"ג). In all places where the words of the first authorites are written in a book, and they are well known and the codifiers who are later disagree with them, like sometimes the codifiers disagree with the Gaonim, we follow the later for the law rests with the later authorities beginning with Abaye and Rav onwards (Rabbi Joseph Karo, Shulchan Aruch, CHoshen Mishpat section ל"ט). But if some times we find a Gaonic responsum and it was not written down in a book and we find that others disagree with him (the Gaon), it is not necessary to decide according to the later authorities. It is possible that they did not know the words of the Gaonim and if they had heard them they would have changed their statements (Rabbi Joseph Karo, Shulchan Aruch, CHoshen Mishpat section א"ג)

GIMEL

If the judge who erred was an expert for a court and had not obtained authorization from the Exilarch and the litigants did not accept him unconditionally or if he was not an expert but the litigants had accepted him unconditionally to judge the case for them and he erred in the weighing of opinions, if he had taken (money) from one and given it to the other physically what is done is done and he must pay from his own resources. But if he had not taken and given to the other physically the judgement can be reversed. If it is impossible to reverse the judgement he must pay from his own pocket.[1]

Gloss: Some say that even if he did not take and give physically what is done is done and he must pay from his own pocket. The verdict is not reversed (Rabbi Asher ben Yechiel, Jacob ben Asher and many others). This is applicable where the litigants had not accepted them whether (the judgement would be) in accordance with the law or in error. However, with the law or erred (Rabbi Asher ben Yechiel and Jacob ben Asher) or in this time where the community compels the judges by threat of being banned[2] to act as judges against their will, they do not have to pay even if they erred[3] for what (else) could they have done. Nevertheless, they should retract (retry the case) if they erred and if they do not want to retract they must pay (Mordecai, head of the Sanhedrin). And when they err and must pay, if all the judges agree unanimously[4] they all must pay. However, if there were only three judges and the decision was made by two of them they[5] must pay two parts and the third part the litigant suffers the loss.[6] But if there were five judges and the decision was made by three, who constitute a majority, they must pay the full fine (Rabbi Jacob ben Asher).

DALED

But one who is not an expert and the litigants did not accept him unconditionally, even though he had authority, behold he comes under the class of violent men and is not considered to be a judge. Therefore, his verdict does not stand whether he erred or he did not err. Each of the litigants, if he so desires, can have the decision annulled

and argue his case before a court.[1] And if the incompetent judge errs and takes and gives physically he is obligated to pay from his own pocket and then he may attempt to revoer the money from the other.[2] And if the litigant does not have anything (money) to return or where something had been declared unclean or given to the dogs to eat something that was kosher he must pay indemnity according to the law of one who causes damage for this judge (is regarded as one who) caused damage intentionally.

HEY

A judge who erred and declared a litigant obligated to swear an oath to which he was no obligated and this (litigant who was to swear) made a compromise with the other litigant in order not to take an oath. Afterwards he learned that he was not obligated to swear an oath, even if he made the compromise by means of kinyan[1] it is not effective for the kinyan was made in error and may be retracted. And this applies to all similar cases. However, this applies only where the litigant had revealed his thinking that he made the compromise because of the oath, or for a similar reason (Rabbi Jacob ben Asher in the Name of Rabbi Isaac Alfasi).

NOTES ON MISHNEH TORAH

ALEPH

The examples found in this section deal with a judge's errors for which he need not pay compensation.

1. Judge: may be an ordinary individual, not necessarily qualified as a jurist.

2. Monetary case: These cases are referred to as civil in nature as opposed to criminal. They deal with laws of inheritance, loans, property, sales of items, etc.

3. Mishnah: For our purposes here it is a reference to the legal code compiled and redacted by Rabbi Judah HaNasi on the basis of previous collections of legal material and arraigned logically. It is divided into six orders. For further information see: Jewish Encyclopedia Vol8 p. 609, article by J.Z. Lauterbach; Encyclopaedia Judaica Vol 12 pp. 93ff., article by E.E. Urbach.

4. Gemara: This refers to either of two great works. Talmud Bavli or Talmud Yerushalmi. Each are collections of the records of academic discussions and of judicial administration of Jewish Law. It was done by generations of scholars and jurists in several academies of Palestine and Babylonia during several centuries. The Gemara is the section of Talmud following each Mishnah, which is both a commentary on and supplement to the Mishnah. For more information see:

Jewish Encyclopedia, article on Talmud, Vol 12 p. 1, article by W. Bacher; Encyclopaedia Judaica, article on Babylonian Talmud, Vol 15 p. 755 article by Eleizer Berkovits Editorial Staff; and Mielziner, M., Introduction to the Talmud, N.Y. 1967.

5. Annulled: (Chozer) In this context the meaning of a case being annulled is that the decision is voided and the case is retried.

6. Distant lands: This could mean that the litigant fled to another part of the country as well as to another land. The phrase "the land by the sea" could refer to one fleeing from Jerusalem to the coast.

7. Mute: The deaf, imbecile and minor are exempted from many observances on account of lack of "intelligence." Unfortunately often times women have been placed by Jewish law in the same category. For further information see: Jewish Encyclopedia, Vol 4 p. 479, article by Julius H. Greenstone; and Encyclopaedia Judaica Vol 5 p. 1419, article by Louis Isaac Rabinowitz.

8. clean declared unclean: The judge for some reason decided that an animal that was fit for consumption by Jews (i.e. kosher) was not actually fit (kosher). In this case the animal could be used as food for other animals. We have such an example here. It complicates the retrying of the case since the disputed object does not exist any longer. A case of this nature is found in Talmud Bayli, Sanhedrin 33a.

9. not kosher: (trefe) This is a reference to food not being acceptable for consumption by Jews according to Jewish dietary laws. The Talmudic discussion of this is found in Tractate Hullin, chapter three.

10. exempt from paying: (Patur) The category of being patur, exempt from fulfilling some sort of obligation is one into which people fit at different times.

BET

1. weighing of opinions (Shikul HaDaat): The idea of the weighing of opinions has reference to two items. The first is that in order to weigh opinions there must be a conflict of opinion. The first consideration is how well a judge reasons. The second consideration is the weighing of opinion of a majority of the court.

2. Tanna: A teacher mentioned in Mishnah or a Baraita living during the first two centuries of the common era. The period begins with the death of Hillel and Shammai and ends with R. Judah Hanassi. For further information see: Jewish Encyclopedia Vol 12 p. 49, article by J.Z. Lauterbach; Encyclopaedia Judaica Vol 15 p. 798 ff., article by Daniel Sperber; also A. Guttmann, Rabbinic Judaism in the Making; and Mielziner, op. cit.

3. Amoraim: Title given to the Jewish scholars in Palestine and in Babylonia in the third through the fifth centuries of the common era. Originally the amora was one who expounded views of previous scholars. Later amoraim

expounded their own views. For further information see: Jewish Encyclopedia Vol 12 p. 49, article by J.Z. Lauterbach; or Encyclopaedia Judaica Vol 2 p. 863 ff., article by Shmuel Safri. The comment here is in reference to an arguement between two equals. The arguement was either between two Tannaim or two Amoraim. This is important since were it an arguement between a Tanna and an Amora the Tanna would mostly win.

4. not explicitly: meaning that the opinion or law was not written down or recorded in any document.

5. other: the opinion of the Tanna or Amora not used by the judge.

6. expert: (Mumheh) one who was skilled, qualified or experienced as a judge. A scholar well qualified by his attainments to deal with matters of law, such as the remission of vows. * For further information see Jewish Encyclopedia Vol 7 p. 375 article on judges by Julius H. Greenstone.

7. Exilarch: (Resh Galutha) Title of the head of the Babylonian Jewish community. The office was hereditary and its holder legendarily of the house of David. He appointed judges and exercised criminal jurisdiction among his people. See: Jewish Encyclopedia Vol. 5 p. 288, article by W. Bacher; or Encyclopaedia Judaica Vol 6 p. 1023, article by Eliezer Bashan.

8. litigants accepted him: The litigants had the option of accepting the judge unconditionally. If they did, the case was like a matter of binding arbitration to which

they had given their consent. In our context, the acceptance by the litigants is almost always unconditional.

9. reversed: see Mishneh Torah, notes on Aleph #4.

10. paying: paying for damages caused by his erroneous decision.

11. Court of Israel: The court in Israel served the same function as the exilarch in that they were responsible for appointing judges.

GIMEL

1. not authorized to judge: the judge had not received authroization as a judge from the Exilarch or the Court of Israel.

2. had not been accepted unconditionally by the litigants: the judge here is imposing himself into this situation.

3. Took and gave physically: (Nasah V'Natan B'Yad) This phrase means that the judge personally participated in the carrying out of the judgement. The judge took the money from the liable litigant and gave it with his own hand to the litigant in whose favor he had decided the case. This point is important since if the judge had not personally participated there is the possibility of more easily changing the decision.

4. what is done is done: the decision stands.

5. own pocket: The judge personally is responsible for paying for the damages. He might be an official judge etc., but there are no provisions for the "state" paying for damages. The judges are, by virtue of their office, culpable for their own actions.

DALED

1. violent people: Rashi defines this phrase in Pesachim 57a as men of strong arms. In Sanhedrin 108a violent men are quoted with robbers.

2. legitimate judges: those judges that have been appointed by the Exilarch or the Bet Din of Israel.

legitimate court: a judge or court, group of judges, duly appointed.

4. errs in judgement: an error in the weighing of opinions or by not knowing a certain law applicable to the case found in Mishnah or Gemara.

5. gives and takes personally: see Mishneh Torah notes, Gimel #3.

6. one litigant: to whom he incorrectly gave the money.

7. litigant: in favor of whom the original judgement was made.

8. food to the dogs: thus there is no reversal possible.

9. damages: for a discussion of intentional damages see Tractate Baba Kama p. 1a ff.

HEY

1. swear: The topic of swearing an oath is dealt with in Tractate Shebuoth. The act of swearing an oath for a Jew was very significant. It was a very weighty act, one with serious implications. It was not an act to take lightly.

2. compromise: One litigant agreed to some sort of settlement so that he would have have to take an oath. The exact nature of the compromise depends on the individual case.

3. afterwards: after the compromise has been made.

4. oath: Not every person is capable of taking an oath. Consult Tractate Shebuoth.

5. formal commitment: This was probably an official action, recorded by the court.

6. he: the litigant who compromised instead of swearing an oath.

NOTES ON ARBAAH TURIM

It should be noted that paying refers to the paying for damages caused because of an erroneous decision.

I

1. weighing of opinions: see notes on Mishnah Torah, Bet #1.

2. Mishnah: see notes on Mishnah Torah, Bet #2.

3. Gemara: see notes on Mishnah Torah, Bet #3.

4. it: refers here to the law.

6. according to one of them: the law was not written down in a code that stated which of their opinions was correct.

7. them: the judge accepted one of the Tanna's or Amora's position and adjudicated the case in accordance with it.

8. This topic: a judge who erred.

9. Talmud: An elaborate discussion of the cases of the erring judge are found in Talmud Bavli, Sanhedrin 33a.

10. Rashi: Rabbi Solomon ben Isaac (Solomon Yitzaki) 1030-1105. He was a French rabbinical scholar. He wrote major commentaries on the Tanach and the Talmud. For further information see: Jewish Encyclopedia Vol 10 p. 384ff., article by Morris Liber; or Encyclopaedia Judaica Vol 13 p. 1558ff., article by Aaron Rothkoff, Avraham Grossman, Menahem Zevi Kaddari, Sona Fraenkel, and Israel Moses Ta-Shma.

11. second: the second Tanna or Amora presents a better

position than the first.

12. judge: the one who erred in judgement.

13. individual judge: This could possibly be a reference to a lay judge, one who is neither an expert nor authorized.

14. expert: Mumheh - see notes on Mishnah Torah, Bet #5.

15. what is done is done: the decision stands.

16. pay from their own pocket: The funds for payment of damages caused by erroneous judgement were the responsibility of the judge who erred.

17. take and give physicially: See note on Mishneh Torah Gimel #3. This phrase should read "take (money from the litigant found culpable erroneously) and give it to the other litigants (who should have been paying, not receiving funds) physically."

18. litigant: the one to whom the money was incorrectly awarded.

19. higher judge: one with more authority, a higher ordination probably an expert.

20. return the money: had the power to make another judge carry out some action. The case would then be retried.

21. Rabbis imposed: the fine was imposed upon the erring judge who would then have to pay damages since the money is not returned. The Rabbis on their own did a great deal of legislating. Many of their decisions are referred to as Takanot.

22. he: the judge.

23. from his own pocket: the judge will have to pay for damages to the litigant who should have received the money.

24. general way: This is not a case of unconditionally acceptance by the litigants.

25. explicitly: unconditionally

26. court of three laymen: The minimum number of persons necessary for a Bet Din is three. The number on the court always increases by two so that there can never be a case where there is a tie vote on the court.

26a. one opinion: a unanimous decision.

27. two judges: Two of three judges constitute a majority of the court and can thus make a decision.

28. two portions: each portion would be 1/3 of the total.

29. third judge is exempt: the third judge would not have to pay for damages since he dissented from the majority.

30. They: the three concurring judges who in this case constitute a majority.

31. you: reference here is to the other judges who did not agree with the majority.

32. against his will: Three judges have the power and authority to judge a case even if one of the litigants does not agree.

33. annul the decision: and then retry the case.

II

1. Remah: Rabbi Meir Halevi Abulafia, 1170-1244. He was a talmudic commentator and poet. He was rabbi in Toledo Spain. Among his works are the YadRamah and Or Zaddikim. For further information see: Jewish Encyclopedia Vol 1 p. 140, article by Moritz Kayserling; or Encyclopaedia Judaica Vol 2 p. 190 ff., article on Meir Abulafia, by Israel Moses Ta-Shma.

2. judge according to Torah: The judge possessed a level of knowledge and was recognized as a Rabbi so he could judge for them laws of Torah.

3. learned and able to reason: two technical words which refer to ones capacity to make logical deductions in the reasoning process and an expert versed in law.

4. decision does not stand: The decision is therefore annulled and the case retried.

5. Baal HaIttur: Isaac ben Abba Mari. Twelfth century rabbinic scholar in Province and Spain. Wrote commentaries on Mishnah and on the code of Isaac Alfasi. Wrote a book on practical Halacha titled Sefer HaIttur. For further information see: Jewish Encyclopedia Vol 6 p. 618, article by Louis Ginzberg; or Encyclopaedia Judaic Vol 9 p. 12, article by editors.

6. Rav Hai Gaon: also referred to as Hai ben Sherira Gaon. 939-1038. Was from the academy at Pumpeditha. Noted as one of the foremost molders of Halacha. 1/3 of all extant Gaonic responsa are his. For further information see:

Jewish Encyclopedia Vol 6 p. 153, article by Max Schloessinger; or Encyclopaedia Judaica Vol 7 p. 1130, article by Haim Hillel ben Sasson.

7. not present: the meaning here is that the individual was not in the locale of the court of trial.

8. he: the one who wrongly received the money.

9. before us: Another term meaning being in the locale of jurisdiction. It refers to a physical area.

10. he: the judge.

11. which he gave to him: which the judge wrongly assigned to him.

12. Ha-Rosh: Rabenu Asher ben Yechiel, the Rosh 1250-1327. He was a talmudist and codifier. He was a pupil of R. Meir of Rutenburg. His responsa and decisions are found in Piskei Ha Rosh and also in the Tur written and compiled by his son Jacob. For further information see: Jewish Encyclopedia Vol 2 p. 182, article by Gotthard Deutsch; or Encyclopaedia Judaica Vol 3 p. 706 ff., article by Encyclopaedia Hebraica.

13. can not take the money from him: Since it was the fault of the judge who was culpable in this case and not permitted to annul the decision.

14. Rambam: Moses ben Maimom also known as Maimonides 1135-1204. He was a rabbinic scholar, codifier, philosopher and physician. His two greatest works are the Mishneh Torah also known as Yad Hachazakah which is a legal code. The other is the Moreh Nevuchim, a Guide for the Perplexed. It

is a philosophical work. His writings in philosophy caused a grear controversy in the Jewish community. For further information see: Jewish Encyclopedia Vol 9 p. 73ff., article by J.Z. Lauterbach; or Encyclopaedia Judaica Vol 11 p. 754ff., article by Louis Isaac Rabinowitz, Jacob I. Dienstag, and Arthur Hyman.

15. authority: from the exilarch or the Court of Israel.

16. annul: and therefore retry the case.

17. not possible to annul and retry the case: This could be due to the fact that the litigant is not present or is incapable for some reason or the evidence, as with the cow fed to the dogs, is not existent.

III

1. Mishnah: see notes on Mishneh Torah Aleph #2.

2. annulled: and the case is retried.

3. something: the example found in Sanhedrin 33a is a cow.

4. damages: this section is almost identical in specific content to Mishneh Torah Aleph.

5. Remah: Rabbi Meir HaLevi Abulafia. See note on Tur II:1.

6. him: Maimonides.

7. obligated: The judge is obligated to pay for damages caused by his error in judgement.

8. Ha-Rosh: Rabenu Asher, see note on Tur II:12.

9. he: the judge.

10. liable: for damages

11. they: the judges

IV:

1. Rabad: Rabbi Abraham ben David of Posquieres 1125-1198. He was a talmudist in Provence and an outspoken critic of Maimonides. See: Jewish Encyclopedia Vol 1 p. 103, article by Louis Ginzberg; or Encyclopaedia Judaica Vol 2 p. 136, article by Isadore Twersky.

2. in our time: mid twelfth century.

3. Gaon: The formal title for the head of the Babylonian Academies of Sura and Pumpeditha. See: Jewish Encyclopedia Vol 5 p. 567, article by W. Bacher; or Encyclopaedia Judaica Vol 7 p. 315, article by Jehoshua Brand. The comment here is probably directed against Maimonides.

4. well known difficulty: a matter of either continuing discussion or an unresolved problem in the Talmud.

5. hear their words: This means that one was not acquainted with the position of the Gaonim on the point under discussion.

6. They: the other scholars in the arguement.

7. correct in his eyes: He agreed with the Gaonim after hearing their position.

8. Sames as error in Mishnah: This is the case because if one made a decision and then was proven wrong by virtue of a Mishnah now known to him, there would be no arguement.

The decision would be changed in order to be in line with the Mishnah. The same is true here of a Gaonic statement.

9. wise of every generation: The ongoing ability to make a legal decision is here attributed to each generation.

10. reed cutters in the swamps: This is a reference to a discussion in Talmud Bavli, Sanhedrin 33a. It is affirming the authority of whoever is the current generation of scholars.

11. their: the Gaonim.

12. returned: the decision is annulled and the case retried.

13. his generation: Each generation must accept the decisions of the greatest men of its own time.

14. Shmuel: The prophet Samuel (Rosh Hashanah 28b), i.e., "you have to rely on the greatest sages of your own generation, even if they are inferior to the sages of the past."

15. in his: Each generation must accept the authority of the leaders of its own generation.

16. those days: It here refers to the time when a decision is made. currently.

17. Rabina: Ravina, Rav Avina, Babylonian Amora. died 422c.e. He was a pupil of Rava. In Baba Metzia 86a it is told that R. Ashi and Rabina arraigned the material which up to their time represented the authentic body of legislation. They are thus considered early editors of the Talmud. Thus a law not mentioned in their editing

could be refuted. For further information on Rabina see: Encyclopaedia Judaica Vol 3 p. 972, article by Yitzhak Dov Gilat.

18. Rav Ashi: 335-427. The most celebrated of Babylonian amoraim in his day. He was head of the Academy at Sura. Began the job with Rabina of editing the Talmud. see: Jewish Encyclopedia Vol 2 p. 187, article by W. Bacher; or Encyclopaedia Judaica, Vol 3 p. 709, article by Moshe Nahum Zobel.

19. new: a different decision.

20. Halachic: Halacha is a general term for Jewish law. A halachic decision is a decision of law.

21. false decision: This is the case because the average judge is unable to make a correct judgement.

22. clear and correct proof: This is a reference to a proof based on sources correctly interpreted.

23. at hand: permission is now available.

24. I: Jacob ben Asher.

25. halachic works: This is a reference to Jewish law codes.

26. he: the judge.

27. money: This is the money given as settlement in the case adjudicated erroneously.

28. qualified: The judge was either not an expert or had not been authorized or ordained.

29. weighing of opinions: See note on Mishneh Torah Bet #1.

V

1. Remah: Meir HaLevi, see notes on Tur II:1.

2. one who was to collect: the litigant in whose favor the judgement had been made.

3. one from whom he damanded money: the loser in the case.

4. annulled: the case would be retried.

5. it: the money awarded the litigant who won the case initially.

6. him: the litigant incorrectly awarded the money.

VI

1. lays on the money: This is a way of saying you can't take it with you but some men try. It is a reference to being stingy. See Babylonian Sanhedrin 29b.

2. he: Ploni ben Ploni, an anonymous person about whom this case is drawn.

3. said: on his death bed.

4. money: I owe the following people money.

5. people: the one the dying fellow said he owed.

6. Rabbi Ishmael: Ishmael ben Elisha, a second century Tanna. He devised thirteen hermenutical principles of logic. He was a collector of halachic midrashim. The most famous is the collection Mechilta de Rav Ishmael. See: Jewish Encyclopedia Vol 6 p. 648, article by S. Mendelsohn; or Encyclopaedia Judaica, Vol 9 p. 83, article by Shmuel Safri.

7. Rabbi Yose: This is Yose ben Halafta a second century Tanna who was a pupil of Rabi Akiba. See: Jewish

Encyclopedia Vol 7 p. 241, article by Max Seligsohn; or Encyclopaedia Judaica Vol 16 p. 852, article by Shmuel Safri.

8. alive: When a person is alive he tends to say that he owes money, so that he will not appear to be wealthy becuase of the "evil eye" (envy). However, when men are near death they are truthful. Therefore, assuming this kind of thought, Rabbi Yose tells the man's sons, who when near to death, said he owed money, to go and pay their father's debts.

9. paid half of it: They paid half the money to each person that their father said that he owed money to.

10. R. Hiya: Rabbah, a second century Tanna and pupil of Judah HaNasi. He was a leading halachist of his time. See: Jewish Encyclopedia Vol 6, p. 430, article by Isaac Broyde; or Encyclopaedia Judaica Vol 8 p. 793, article by Zvi Kaplan.

11. sons look rich: This means that he might lie even on his death bed to benefit his sons. The sons took this to mean that the money was not really owed by their father.

12. taught about this: The meaning is to let the matter stand as is. The sons paid half the supposed debts, that is enough. The old sage is a reference to R. Ishmael son of R. Yose who had already given a ruling. Note that this passage in its entirety is based on Talmud Bavli Sanhedrin 29b.

13. before: this is the issue of inheritance and claims upon the estate just mentioned.

14. erred: Hiya, though he might have disagreed with Ishmael, could not find fault with his reasoning.

15. it: the money the dying man said he owed.

16. judge is: This is a reference to whatever the judges status may be. Each status implied different levels of culpability and this led to differing levels of compensation.

17. here: in this case.

18. stand: the sons payed half the debts owed.

19. can not be reversed: In this case erroneous judgement can not be proven. It is a matter that could be decided either way.

VII

1. This section is a quote. It may be found in this paper in Mishneh Torah section Hey. It appears there with notes.

NOTES ON SHULCHAN ARUCH

ALEPH

1. judge: This term is used here to indicate we are dealing with an authoritative judge as opposed to a lay judge.

2. money: the subject of the cases are all in the category of monetary cases.

3. Mishnah: The laws dealing with monetary cases are found mostly in Seder Nezikin.

4. Gemara: Most of them in Seder Nezikin, but many are found in the other Sedarim. Specificly those cases concerned with the erring judge can be found on Sanhedrin 33a.

5. codifiers: The various codes and codifiers are here afforded the same status as Mishnah and Gemara.

7. men of his generation: On Baba Batra 130b-131a a helpful discussion is found. There Raba said to R. Papa and to R. Huna ben Joshua; When a written verdict of mine comes before you and you see in it something objectionable, do not tear it up until you come before me. If I have a reason for my verdict I will tell you; if not I will retract it. After my death you shall neither tear it up nor derive any law from it....because a Judge must be governed only by what his eyes discern.* From here we are able to understand that a judge could rule even contrary to the written laws or verdicts of his teachers.

8. lenient position: In many areas of Jewish law there are various positions which one may adopt. The person holding a lenient position is known as Mekil, the one holding a strigent position is called Machmir.

9. we do not accept this stringency: Not accepting a certain position has basis in a section from Avoda Zarah 36a. There three principles are found. 1) If a prohibition issued by one court has spread among the large majority of Jews, another Court cannot annul this decision even if it is superior in wisdom and strength. 2) If a prohibition of a court has not spread among the people but the people are able to abide by it then another court superior in wisdom and numbers can annul the decision. 3) If a prohibition of a court did not spread among the Jews because it was too hard to follow then a lesser court can annul it.*

10. money: due to the erroneous judgement.

11. paying: This case is discussed on Sanhedrin 33a.

BET

1. Amoraim: likewise in a case of a disagreement between codifiers.

2. explicitly: see Sanhedrin 33a the view of Rav Papa.

3. authorization: In Sanhedrin 5a Rab stated that whoever desires to render decisions in monetary cases by himself and be exempt from liability in the case of giving an erroneous decision should obtain authorization from the Exilarch.

4. expert: If the litigants accepted the judge he is not liable.

5. serious loss: a discussion on this point is found in Niddah 9b.

6. adopt their opinion: In Sanhedrin 18b regarding three oxherders whose conversations were overheard by the Rabbis in which each one stated a different reason for intercalating the calendar is cited. When the Rabbis heard the discussion they themselves intercalted the calendar. The point is that they agreed that the year should be intercalted even if for different reasons.

7. his opinion: In Shabat 130a the views of individual sages were adopted in their own localities even though the majority of Sages elsewhere were opposed to the ruling.

8. later sage: which sage's opinions should be followed? In Eruvin 41a it states that in the generation of Raban Gamliel people acted in accordance with the views of Raban Gamliel, but in the generation of R. Jose, who came after Gamliel people acted in accordance with the views of R. Jose.

9. Abaye: ben Kaylil 278-338. He was a Babylonian Amora and head of the Academy at Pumpeditha. He is noted for having developed the talmudic dialectic. He and Rava were constantly arguing. See: Jewish Encyclopedia Vol 1 p. 27, article by W. Bacher; or Encyclopaedia Judaica Vol 2 p. 44, article by E.E. Urbach.

10. Rav: Raba was a Babylonian Amora, son of Joseph bar Hama. He established an academy in Mahoza. After Abaye's death he became the head of the academy at Pumpeditha. See: Jewish Encyclopedia Vol 10 p. 288, article by J.Z. Lauterbach; or Encyclopaedia Judaica Vol 13 p. 1579, article by Moshe Baer.

GIMEL

1. This section may be found in Mishneh Torah section Gimel.

2. banned: The judges also faced the possibility of being compelled to judge lest a penalty be imposed upon them.

3. erred: The reason that the judge does not have to pay even if he erred is found in Sanhedrin 3a. There we are informed that in monetary suits any layman may act as a judge so as "not to bolt the door against borrowers". The situation which was feared was the creditors will refuse to grant loans because they might not be able to collect their money if expert judges be required. The Gemara asks why should <u>non-mumhim</u> not be protected against a claim of compensation in the event that they give an erroneous decision. The same answer as above is given. But this reason is applicable only where the lay judge tried the case willingly. Where they were compelled to act as judges the reason does not apply. Thus, they must not pay indemnity in case of an erroneous decision.*

4. one: unanimous.

5. They: the judges who were the majority.

6. suffers the loss: On Sanhedrin 30a we learn that without the third judge it would not have been possible to settle this matter since monetary cases are judged by three.

DALED

1. court: This is in accordance with the position of R. Meir. He adjudicates liability for damages done directly. See: Baba Kama 100a.

2. other: The judge pays the litigant who lost the case due to his error for the damages caused by his decision. The judge attempts to collect the money given erroneously to the litigant who won the case. In this way the loss will not be as substantial or possibly not a loss at all for the judge.

HEY

1. Kinyan: The act of causing a thing to become the property of another or volunarily acquiring legal rights. There are many fine points in a discussion of this subject. See: Talmud Bavli Kidushin chapter one. Maimonides Hilchot Mekirah and Hilchot Zekiyah. Also Jewish Encyclopedia Vol 1 p. 394, article by Lewis N. Dembitz; and Encyclopaedia Judaica Vol 2 p. 216 ff., article by Shalom Albeck.

* Please note that after the translations the author discovered a volume containing the translations of these sections. The material where the asterik appears was taken in whole or part

from that volume. The book was most helpful with notes. The book is Code of Hebrew Law, Dr. Chaim N. Denburg, Jurisprudence Press, Montreal. 1955.

COMMENTS ON THE SOURCES

The implications of an erroneous decision in a Jewish court of law are found as a rule in the specifics of a case. General statements are seldom available. Therefore, the first part of this thesis presented the textual cases from which to draw examples. The starting point of understanding the material that has been presented is to begin with the underlying assumption that it puts forward. It is assumed that a judge's errors, as a judge, are a legitimate subject for discussion. Unless this were the case why would such time and energy have been expended in order to discuss this area of concern.

To fully understand the case of the erring judge there are three elements that need to be considered. The first is the implication of the judge's error. The second is to understand the types of error. Thirdly, there are the circumstances surrounding the trial. The errors on the part of the judge have significance on two levels. They are significant for the judge and the litigants. They are also significant as categories of law, status or types of error in and of themselves. The implications of the erroneous decision by the judge and its consequences for the litigants will be the first item for consideration. The second section

will deal with the categories of error which merit their own status and discussion. The last segment will deal with the circumstances at court.

I

The judge has committed an error in the proceedings of a monetary case. What happens to the judge? The answer to this question in large measure is dependent upon three factors, singlely or in combination. 1) Is the judge considered an expert? 2) Did the litigants accept the judge unconditionally to adjudicate their case? 3) Is the judge authorized? Each of these items has great influence upon the outcome of the case for the judge. It is therefore important to know what these various factors mean, and how they effect the judge.

It is known that in many instances, a layman could act as a judge. In most instances, however, an expert judge is preferred, often called a mumheh. And who is a mumheh? "The Tur citing R. Sherira Gaon writes; Who ever is considered like R. Nahman in his generation (Sanhedrin 6a) and is versed in the Mishnah and Talmud and likewise is an expert in the weighing of opinions and deciding between opposing positions and has persued legal texts for a number of years and was examined numerous times and gave no erroneous decisions, such a one is recognized as a mumheh." It is evident from this comment that although the mumheh was a learned individual his status was not an official one in terms of having any stamp of approval.

Being a mumheh did not mean that one had graduated from a school to train mumhim. It was apparently a title agreed to for an individual by a community through a process of persons having exposure and experience in the legal field and the general communities' approval. This status as a mumheh carried with it the authority of being able to reverse one's judicial decisions. Thus, if a mumheh erred in a judgement he could reverse the decision and retry the case. This would also mean that since in most cases no damage was incurred, the judge is not liable to pay compensation. A case in point is found in Mishneh Torah section Bet. There the case is one of an expert erring. "Since the judge is an expert the decision is reversed. If it is not possible to reverse the decision the judge is exempt from paying."

Another case in point is in Sanhedrin 33a. There the case of a cow wrongly judged trefe is given. Rabbi Tarfon, on learning of his erroneous decision because of his lack of knowledge cries out that he will have to sell his donkey to be able to pay compensation for his error. Rabbi Akiba said to Rabbi Tarfon: You are exempt from reparations since he who is publicly recognized as a mumheh is exempt from making compensation. It is evident from this that the status of memheh had its advantages. It gave the judge a certain amount of immunity and protection.

Much of this same protection was given to a judge if the litigants in a case accepted him unconditionally to adjudicate a case. In Sanhedrin 5a Mar Zutra bar Rav Nahman

and Rabba bar Hana each adjudicate a case alone and each gave an erroneous decision for unspecified reasons. They were both informed that since the litigants in each instance accepted them as their judges, they were not obligated to make restitution for the damages caused.

The process of acceptance of the judges by the litigants may occur in two ways. The distinction lies in the status of the judge. If a judge is a mumheh, the act of the litigant appearing for trial is the same as unconditional acceptance of the judge by the litigant. Therefore if the judge errs he is not liable. This is for two reasons, one because he is a mumheh and second he is accepted by the litigants.

However, the case may be tried by three laymen. In Sanhedrin 4b-5a our rabbis taught that monetary suits can be tried by three judges who are laymen. However, one who is a publicly recognized mumheh may judge alone. Since three laymen are equal to one mumheh one might assume that the process of acceptance is the same. In fact, it is not. When the litigants appear in a court of three laymen they must expressly state their unconditional acceptance of the judges for the judges to receive immunity from paying compensation should they err. Though they may possess immunity from paying compensation the three lay judges do not possess the authority to reverse their decisions as does a mumheh.

The concept of the litigants accepting the judge unconditionally is an important one in all discussions of

the erring judge. It is often juxtaposed to the judge being a mumheh or having authority or both. In one case in the Mishnah Torah the criteria for the final outcome of a case is that the mumheh either received authorization or had been accepted by the litigants. It can be seen that these two criteria seem to be on an equal footing, both secondary to the judge being a mumheh.

Authority if not by virtue of being a mumheh was granted to an individual to be a judge. This authority was granted either by the court of Israel (Bet Din L'Israel) or the Exilarch (Resh Galutha). In Sanhedrin 5a Rab states "Who ever desires to render decisions in monetary cases by himself and be exempt from liability in the case of giving an erroneous decision, should obtain authorization from the Resh Galuth." How this authorization was obtained is not specificly known. It could have been a political favor. However, it is most probable that authorization was given to those who were qualified. A problem does arise that a decision of one or two authorized laymen is not considered valid as opposed to one or two mumhim. Since three (unauthorized) laymen are acceptable, the question of authorization seems not to play a major role. In fact, it is only important as a criteria on a secondary level.

Authorization by the Bet Din of Israel would appear to be on the same lines as that of the Exilarch. The major difference seems to be the use of the word "ordination" for those judges granted authority in Israel. This can be

understood since Israel was the place where ordination was granted. The Babylonian Jews used other titles.

The Remah discusses the criteria of ordination. He comments that in order to judge one must have the correct level of ordination. Even if one is well learned if he does not have ordination he would have to pay damages. He goes on though, to give considerable weight to one who is authorized. This individual who is authorized, his decision even if not accepted by the litigants, stands according to this view.

Rabenu Asher tries to clarify this in the light of the categories of judges. If one is not a mumheh but accepted unconditionally by the litigants or is a mumheh who is not accepted unconditionally by the litigants the judgement stands and the judge must make compensation for the damages. The question of authorization is again clearly secondary.

It is evident that a clear generalization is difficult to make on the exact order of various statuses and their importance. So much depends on the case at hand. These three factors of the judge's status however, do affect the judge and the litigant directly. The status of mumheh, though is still the most important factor however, the element of litigant acceptance may be more important than the judge having authorization. It seems that there is the assumption of litigant acceptance. If the litigant were not accepting of the judge why would he be adjudicating the case? This is true except in those instances where the judge is empowered to judge against an individual's will.

As mentioned, the litigant is almost always the secondary figure. It is more difficult to draw from the cases presented the consequences for the litigant of a judge's erroneous decision. The general consequence is that the litigant stands to lose some money. Linked to this idea however is the idea that the litigant does have some rights, albeit limited.

The crux of any of the cases is money. Does litigant "A" owe money to litigant "B" for some reason? If the case were judged, and no error committed, the "A" or "B" could end up making payment to the other. However, when there is a judge's error the situation is changed. "A" or "B" wrongly makes payment to the other person. Now the situation is on two levels. First, what happens to the case? Can the error be corrected before payment is made? If so, then the case is retried and returns to the normal first situation where one or the other litigant will pay a fine. This presents no major problem. However, what if the error can not be corrected? Then the situation is that one litigant received money illegally, one litigant paid illegally and damages have been incurred. The judge is responsible for the damages. However, he does not always have to pay compensation because of his special status. Thus one consequence for the litigant is that he could lose a case illegitimately and receive no compensation having been twice victimized. The generalization that might be drawn here is lest the litigant beware.

The consequences of the judge's error is that a litigant stands to lose money illegitimately. The implication follows that the limited rights of the litigant are in the area of judge selection since that is one of the determining factors which controls whether the judge pays compensation or not. However, this is the case only if the judge is not a mumheh. The litigant is most certainly secondary in concern of the law. Its primary function is to protect the judge during the process of administering the judicial system.

The effect of these three factors mentioned about the judge and the consequences for the litigant are centered in the codes on the judge. Depending on the case, and the judge's status, the final question in all discussion is, will the judge be required to pay compensation for damages incurred due to his erroneous decision? The implications for the litigant are never given an important place in the discussion. This is probably because judges and scholars wrote about the laws and cases, not the litigants. As with any group there were vested interests to protect. What is important to note is that even with these vested interests in self protection the judge often did have to pay compensation. While the judge's status at these times was important, it is the conclusion of this author that the categories of error and the circumstances of the case were also important and significant to the case. These will be dealt with in following sections.

II

There appear in the three codes examined two major types of error. The first is Davar Pashut, the error in a simple matter. The second is the category of Shikul Hadaat, the weighing of opinions. Each category is found in each code and the specifics of the cases there will provide the opportunity for an understanding of the erros.

Davar Pashut is referred to also as a matter that is obvious and known. The Mishnah Torah explains it as laws explicitly stated in the Mishnah or Gemara. It is apparent that in those writings the rabbis felt that an error in a simple matter involved a lack of knowledge. Certainly it makes good sense to say that a judge can not adjudicate a case contrary to existing law. Existing law was accepted to be primarily the Mishnah and Gemara. Since the codes are a continuing expression of Rabbinic Judaism, it follows naturally that the documents of an earlier period of Rabbinic Judaism would be the basis of law for a lter group.

It is important to note that in each successive code the attempt is made to add to what is considered the legitimate body of law. In the Tur the attempted additions are the statements of the Gaenim. Abraham ben David of Posquieres states that "There is not a man in our time who is permitted to differ with the opinions of a Gaon." In order that he deviate in his decisions from the words of a Gaon there must be a well known difficulty, and this is a matter that

does not exist." The well known difficulty to which reference is made is a machloket, a disagreement in the Talmud. Certainly there are unresolved problems in the Talmud. What Rabad is stating is his own idea that there are no major unresolved problems in the Talmud. The words of a Gaon therefore, have the same weight as the Talmud. If a judge's error is because of a lack of knowledge of Gaonic opinion, the case can be reversed since on can not adjudicate a case contrary to law. In fact, Rabad states "one who differs in his decision with the words of a Gaon, it is like he erred in a matter of Mishnah."

Rabenu Asher concurs with Rabad's thinking. "Certainly one who erred in a matter of the Gaonim, namely that he did not hear their words when others said to him this is what the Gaonim decided, and it was correct in his eyes, this is called the same as an error in a matter of Mishnah." However, Rabenu Asher goes beyond the Gaonim to include many others. He provides the open end clause that will allow for continual change. "It is not necessary to say that this (example) refers (only) to the decisions of the Gaonim. It holds true also for the wise of every generation." Each generation is legitimate in rendering decisions of law. The reason Rabenu Asher gives is the same as is found in Sanhedrin 33a. A discussion there occurs between two sages where one continues to ask the other about the authority of each succeeding generation. Each generation is accepted as legitimate in the way they decide laws. The arguement

concluded with "Are we reed cutters in the bog?" That is to say, that the wise of every generation are men of worth, equal in stature to their colleagues before them. We too, in this generation, the quote tells us, are also men of worth.

Jacob ben Asher supports his father's position. "If the words (of the Gaonim) are not correct in his eyes and he brings proof that was accepted by the men of his generation "Yiftach in his generation is like Samuel in his. You can do nothing but accept every judge who lives in those days." What Jacob ben Asher has given here besides support is also a criterion by which to judge legitimate differences on points of law. The criterion is acceptance by men of one's generation. Later he adds that "a wise man can refute his words (those of previous great scholars or Gaonim) with clear proofs." Thus a second criterion is added, that of the arguement out of logic. Finally, he adds that one can have a new halachic position and "all the more so if there is support by one of the authors of halachic works."

These arguements in favor of continual interpretation are reinforced from Talmud Baba Batra 130b-131a. There Raba tells R. Papa and R. Huna that after his death they should "neither tear it (Raba's decisions) up nor derive (any law) from it. You shall neither tear it up because were I there I might have told you the reason, nor derive (any law) from it, because a judge must be governed only by what his eyes discern."

By the time that Joseph Caro is writing and compiling the Shulchan Aruch two things have happened. First the codifiers have been placed on the same level as the Mishnah and Gemara. Second, the ability of each generation to continue to interpret the law has been limited.

In section one of Shulchan Aruch it is stated "if he erred in obvious and known things for example in famous laws stated in the Mishnah or in the Gemara or in the matters of the codifiers, the verdict is reversed and it is judged in accordance with the law."

The matter of accepting the codes as legitimate law, part and parcel of the oral tradition, the essence of Rabbinic Judaism, is no longer a problem. Codes, by this time have been duly legitimatized. However, the second problem, that of the openness of an ongoing legitimacy for every generation has been lost between Jacob ben Asher and Joseph Caro. Caro himself does not raise the issue of possible disagreement with a code by a judge. This is done by Isserles in his Mappa, his glosses to Caro's text.

Isserles acknowledges that judges can "differ with the decision which is not mentioned explicitly in the Gemara." The opening is getting smaller. One can no longer disagree with the Gemara, used here as a generic term and taken to include Mishnah. If one differs with a code it is acceptable, but the previously discussed criteria are applied. The disagreement must be agreed to by the men of one's generation then and they have the strength of

indisputable proof. Furthermore while it is possible to disagree it is certainly not encouraged. Isserles adds the criteria of acceptance of a position based on the width of its acceptance among the people. Isserles' position is that if a matter is generally accepted by the people a decision can not be made contrary to that position. This idea is found in the Talmud but it does not appear in our codes on this subject until this comment by Isserles. This is a move on Isserles' part to ameliorate the differences between two positions. On the one hand there is the lessening of areas and issues with which a judge can disagree. On the other hand, there is this newly revived principle that the people have power to determine the law by means of actual practice. This might be termed legislation and adjudication according to socialization. Another way of saying the same thing is that one should not violate Minhag Hamakom, the local custom or practice, for it takes on its own authority.

Generally, the idea of a judge committing an error in a simple matter changed little over the course of time. A simple matter began as an error because of lack of knowledge of the law, a law limited to Mishnah and Gemara. It also did not allow for any new insight by a judge. The category grew to include more laws, specifically in the codes, and allowed for limited new insight by the judge but also came to include the people. It is interesting to note that the most open people concerning what should be the limits of their own influence were found in the Talmud, not the later

sages who are in each generation usually assumed to be the more progressive people.

The second major category of error pertains to Shikul Hadaat, the weighing of opinions. The basic characteristic of this category is that there is a disagreement between equals on a point of law. It is never explicitly stated in a book which of the two positions is the correct one. Hence, when a judge is deciding a case in which the point of law fits this category, he must exercise his own judgement. He must balance the opinions and opt for one opinion upon which to base his decision.

In Talmud Bavli Sanhedrin 33a Rav Papa states his idea on the weighing of opinions. It should be noted that the opinions are necessarily conflicting. If this were not the case it could be assumed a decision of law would have been made on any given issue. In reply to a question on the subject Rav Papa answered "for example, if two Tannaim or two amoraim are arguing and it has not been stated explicitly (in writing) with whom the law rests and it happens that the judge ruled according to one of the persons but the discussion points to the other one, this is a case of error in the weighing of opinions."

This statement is well accepted throughout the codes as a useful and usable definition of the weighing of opinions. The example given by Rav Papa is found in similar form and wording in Mishnah Torah and Shulchan Aruch. In most of

the sections of the Tur examined here only the phrase weighing of opinion is used. The understanding of the phrase appears to be assumed. However, at one point further insight is given by Rabenu Asher concerning a practical example of the weighing of opinions.

The case was one where a father died and supposedly left debts for his sons to pay. After consulting Rabbi Ishmael they paid half the sum of the debts. Then they went to get another opinion. This one was from Rabbi Hiyya. Hiyya disagreed with Ishmael but did not have the strength to prove him wrong. Rabenu Asher tells us that Ishmael "did not err in the weighing of opinions since there was no controversy between Tannaim and Amoraim;" Since there was no error in weighing of opinions Hiyya had no recourse but to go along with Ishmael even though he, Hiyya, did not agree with Ishmael's reasoning. The important thing here is that Shikul Hadaat is not merely a matter of a difference of opinion. It is not even a matter of questioning the reasoning process. For an error to be considered in the category of weighing of opinions the point of law must be unresolved arguement between Tannaim or Amoraim or equals on some level.

An error of Shikul Hadaat must be determined in some fashion, this is where at times, the important element of the people's practice comes into play. Note that in the previous section also concerning a simple matter the people

play an important role. Here, it is the people whose practice may determine the correctness of one position over the other. In Shulchan Aruch it states that "the law is not explicitly stated according to one of them and the judge adjudicated the case according to one of them and did not know that the general practice in the whole world was like the other...etc." The implication here is that if there was no wide spread practice there would not have been an error. Since, however, the people had through their practice opted for a certain position the opposite opinion was therefore an incorrect one. There is a leniency allowed for the judge in this case. Even though he erred in the weighing of opinions since he opted for the uncustomarily accepted position and since there is no formal decision of law the judge is exempt from paying compensation for damages.

The categories of error of the judge, be it in a simple matter of in the weighing of opinions, are important elements in determining the outcome and settlement of a case. The category of error in conjunction with the judge's status present two of the three important elements toward an understanding of the implications of the case of the erring judge.

III

The third element helpful for an understanding of the case of the erring judge is the circumstances in the court. The first concern is in the disposition of the judgement.

Did the judge after rendering a decision personally participate in the transfer of funds? What effects does this actions have vis a vis the judge's culpability and the litigant's reception of funds for damages? Did the litigants accept the judge unconditionally? This matter has already been discussed in part in an earlier section. There it is one element of three that has implications for the judge and litigants. Here the category bears on the court room circumstances and thus on the outcome of the trial.

The judges personal involvement in carrying out the judgement handed down in known as Nasa V'Natan B'Yad- the taking and giving by hand. What this means is that the judge would take money from the litigant judged quilty and give it to the litigant who was awareded the settlement. It should be kept in mind, this is all done illegally since the judge's decision was erroneous. What effect will this act have upon those involved?

In Sanhedrin 33a Rav Hisda raises a question concerning the problem when a mumheh is liable to pay compensation. He cites a case to prove his point.

The case is that a cow was judged trefe and the owner fed it to the dogs. It was then discovered that the decision was wrong as proven by a Mishnah. The case is both in Sanhedrin 33a and Bekoroth 28b. The Mishnah showing the error is in M. Hullin 3:2 (and in 54a). The problem is how to resolve the differences in the two Mishnayot. Rav Hisda answered the contradiction in the following manner.

If one that was not a [properly qualified] expert behld the firstling, and it was slaughtered at his word, it must be buried, and [this examiner] must pay compensation from his own possessions. If [an unqualified person] gave a legal decision, declaring the guilty exempt or declaring the innocent culpable, or declaring the clean unclean or declaring the unclean clean, what he has done can not be undone, but he must compensate [the wronged litigant] from his own means. But if an [authorised] expert approved by the court [to act as judge gave a wrongful decision], he is exempt from having to make restitution. It happened once that a cow had its womb removed, and R. Tarfon declared the carcase terefah and fed it to the dogs; and when the matter came before the Sages they declared it permitted. Todos the physicial said, No cow nor sow leaves Alexandria before they cut out its womb so that it can not bear offspring. R. Tarfon siad, 'Gone is thine ass, Tarfon!' R. Akiba said to him, 'R. Tarfon, thou art an expert [qualified] by the court, and every expert [authorised] by the court is exempt from having to make restitution.'

(M. Bekhorot 4:4)

And these [conditions are deemed] valid among cattle: if the windpipe were pierced or slit--how large may the defect by [for validness]? Rabban Simon ben Gamaliel says, [Not larger] than an Italian issar--if the skull were cracked but the membrane of the brain were not pierced, if the heart were pierced but not up to the chamber thereof, if the spinal column were broken but the spinal cord was not severed, if the liver were gone but there [still] remained an olive's bulk thereof [in its place and other olive's bulk at the gall-bladder or bile-duct], if the third stomach or the second stomach were pierced [with the perforation leading] the one into the other, if the spleen [or milt] were gone, if [one or both of] the kidneys were gone, if the lower jaw were gone, if the womb thereof were gone, or if [a lung] were dried up by an act of heaven. If it have lost its hide [before slaughtering], R. Meir delcares it valid, but the Sages declar it invalid.

(M. Hullin 3:2)

"Here in Bekorot 4:4 (28b) the case is that the judge took from one and gave it to the other with his own hand." Thus the decision can not be reversed since the judge actually participated. "Here in our Mishnah Bekhorot 4:4 cited in Sanhedrin 33a the judge did not take from one and give to the other with his own hand." The litigant in the case transfered the funds or fed the cow to the dogs by themselves. In this circumstance the decision may be reversed. The effect of the physical involvement is to make a previously non-liable judge liable. The act is such that it reaffirms the judges own erroneous decision to the point of culpability for damages.

If the judge had not participated physicially he could claim immunity in one of two ways. First, because he was a mumheh or the litigants had unconditionally accepted him or both. Secondly, the litigant is found to be responsible for carrying out the decision of an erring judge. In the case of the cow Rabbi Tarfon should be exempt because a Mishnah exists showing his error. In this case, therefore, if the cow were in existence Tarfon could have reversed his judgement. The majority opinion is that the owner of the cow was wrong to have listened to Tarfon. In our society the answer would be that he should have waited to execute the judgement and appealed the decision.

Mishnah Torah agrees with the position found in Talmud. "If the judge took and gave personally what is done is done and the judge must pay from his own pocket." The opinions

in the Tur concur with Maimonides. In fact Jacob ben Asher quotes Rambam's text verbatim. After which he says that Maimonides' position on the subject was the same as his father's, Rabenu Asher. This indicates that this position was the acceptable one.

By the time the Shulchan Aruch was written this idea of the judge's liability if he participates in carrying out the judgement was firmly entrenched. Caro deals with the case of an incompetent judge as opposed to the mumheh. He assumes, though it is stated, that a judge, mumheh or not, is liable for his active participation. He says "and if he, (judge) errs and takes and gives physicially he is obligated to pay from his own pocket. Then he returns and tries to recover from the other (litigant to whom he gave illegally) and if the litigant does not have something to return or where something had been declared non-kosher and given to the dogs to eat...he must pay indemnity according to the law of one who causes damage." This is opposed to a mumheh who would at this point be exempt.

The implication for the judge of his action in the case is crucial. Assuming the judge to be a mumheh, if he really believes his decision to be correct, helping to carry out the judgement would seem to be a public display of self worth. The judge would be saying that he trusts his judgement even to the point of assuming possible unnecessary liability. On the other hand, non-participation could be

a safety device for the judge. However, for the litigant it could be disastrous. This would especially be true when the case dealt with something perishable, such as meat.

Isserles however raises the question that even if a judge did not physically participate in the execution of the judgement he is still liable and the verdict is not reversed. As to the conflict between the Mishnayot discussed earlier Isserles accepts the explanation of Rav Shesheth.

That explanation is that it matters not whether the judge is a mumheh and the litigants did not accept him, or if he is not a mumheh and the parties accepted him. If, however, the judge pronounced the innocent guilty and the latter had not yet made payment the verdict is reversed since the judgement was not carried out. It should be noted at this time that when speaking of carrying out the judgement with one's hand it refers to carrying out the entire judgement. However, if only part of the judgement was executed it is legally effective only in proportion to that part.

The principle of the judge's personal involvement is an important one. It contains the assumption of a whole pattern of political thought. This intriguing subject will be discussed in a later section. The second aspect of the circumstance surrounding the court scene is that of the litigant's acceptance of the judge.

Part of this problem has been discussed earlier. The focus here is the trial and what is meant by unconditional

acceptance. Much of this is still dependent on the judge's status. If the judge whom the litigants accepted was a mumheh then even if the litigant explicitly stated "Give us a decision in accordance with the Torah" the acceptance is valid and in the case of an error the judge is not liable to make compensation.

Imagine the importance of accepting or not accepting a judge. The litigant is showing tremendous faith in the court by unconditional acceptance. The problem, however, is that this choice was not always real. As was seen earlier, a litigant showing up for court with a mumheh as judge was by virtue of his presence accepting the legitimacy of the court.

Another complication in the system of litigant acceptance is another problem with the judge. Judges were often considered as involuntary public servants. If one were capable of being a judge yet refused he could be fined. In order to enhance the forced occupation of a judgeship immunity for mistakes was granted. For this reason, a mumheh who was accepted by the litigants is exempt in the case of an erroneous decision for one who is a mumheh is under compulsion to act as a judge.

Where the litigant's choice is important in the proceedings is when the judge is not a mumheh. If the judge is not an expert then at least for Maimonides, litigant acceptance becomes the next most important factor. "If one is not an expert and was not unconditionally accepted by the litigants although he received authorization we note the man is

included in the category of violent people...therefore the decision does not stand."

In Tur again a small glimmer of the importance and possibilities surrounding the conditional acceptance of a judge are given. There it is stated that the litigants accepted the judge in a general way. That is, in a conditional manner dependent upon the outcome of the case. However, this is an unusual case. It is the only time such a statement appears in the text dealt with in this paper. It appears to mean that conditional acceptance is possible. However, it certainly would not have been encouraged. If it had been encouraged there would have been comments made about the phrase.

The conclusion that can be drawn from this material is that the circumstances in the court are important. They do bear heavily on the final disposition of the case. The elements of the judge's personal participation in the execution of a judgement and whether or not and to what degree the litigants accept the authority of the judge are crucial to a full understanding of the subject. Without these elements the other questions previously raised are not found in their proper perspective.

IV

"I am told that religion and politics are different spheres of life. But I would say without a moment's hesitation and yet in all modesty that those who claim this do not know what religion is." Mahatma Ghandi, Ghandi Museum

The cry is heard throughout the world for liberation. To be liberated is the new panacea of all ills. The apparent meaning of liberation translates into the colloquial phrase "Do your own thing." In more thoughtful language liberation is the process of attaining the power of self determination.

Many thoughtful people today have posed the question "On what basis liberation?" What are the foundations or the underpinings which persons or peoples claim as their right of liberation. Who or what has the power to grant such rights?

In this very brief examination of a very small segment of the vastness of Jewish law answers to some of these questions begin to emerge. They appear in phrases, not sentences, in fragments of thought not complete systems of philosophy. Nonetheless, they are there to be found. The political positions of a people long imbued with an understanding of ethical monotheism are waiting to be added to the other great ideas the Jews have given to the world.

This author is not in a position to formulate out of the ideas found here a comprehensive system of political thought. Nor is this essay an attempt to discover new truths. Rather, it is written in the hope that out of some understanding of the Jewish legal tradition the right questions can begin to be asked to help society improve. Politics is the art of the possible and Jewish law presents the possibilities.

Modesty on the part of the writers perhaps, but there seems reason to believe that much of the reason for such a long discussion of a judge's error and their consequences was because it was hard to find first rate judges. No, human nature was not then so different than it is now. However the ethic of the times was definitely different. Today in order to seek high office one needs the force of personality and the forces that money can buy. In the codes one needed knowledge of the law and acceptance of the community.

It was not the case presented in the codes that the people all wanted to be judges. Shulchan Aruch, in one of those short yet revealing phrases talks about "Nowadays the community compels the judges by means of a ban." Men were forced on pain of penalty to act as judges. In order to compensate a judge for his often unpleasant work, he was granted immunity in certain instances.

It could be said that judges were often not held responsible for their mistakes since any system is designed to protect itself and its participants. Certainly if the men writing the laws were not judges they were of the same class as the judges. It would only be logical for the laws to act as protection for this group. The codes come to dispute this thinking. A judge by virtue of any given status was not immediately immune from paying compensation for his error.

Many are the examples of even a mumheh paying compensation under certain circumstances. The fact that a system of law

provides for individual responsibility of its judges is an uncommon occurance. Is it imaginable in our society today that if a judge's ruling is reversed by a higher court the judge should pay for damages incurred?

(The question is being asked in government and political circles today about such issues. What is the level of culpability of the government? Can the government be sued? Should society provide assistance and compensation for the victims of crime, including error by the government? To what extent could such principles be applied?)

Jewish law long ago recognized this question as valid and important. By extrapolating from the codes one can come to the legitimate conclusion that there should be in our society more direct accountability of the judiciary. Society does have obligations not only to prosecute and penalize criminals but to compensate victims as well. Much of this kind of thinking is dormant in the American political system as it was in the codes. (But just as it is evident in the codes so these principles need to be revived in American political life.)

One of the many slogans of political liberation is power to the people. The study of the erring judge in Judaism shows that people were entitled to have power. The litigant did have the right in certain instances to either accept conditionally or unconditionally the presiding judge. The option to reject the expert judge did not seem to exist.

Nevertheless the conclusion is inescapable that people were entitled to power. However, there must be limitations in the exercise of that power.

(The limitations on the litigant's power of choice are not necessarily the same limitations that would or should be chosen today. The importance of the concept is that power to the people should be phrased legitimate power to the people. In and of itself power is not legitimate. Power is legitimate only when found within the confines of a system that allows for justice. The litigant in the case of the erring judge is a case in point.

Today such questions of legitimate power center on issues of personal freedom versus the rights of society. The issues are those such as the right to abortion, the right to die, the question of capital punishment and others. Similar and related issues are those in the category of first amendment rights; the rights of a free press, the rights of the people to know versus the right of government to function in private for the sake of security.

All these issues of rights are in turmoil. The country is faced with a dilemma of competing ideas. The cases of the litigant and the erring judge offer a principle to apply towards solution of these perplexing questions. The answer is to apply the principle of justice. Justice in this case is the process of providing as much for each person while protecting the whole of the people. In this

process persons will face limits, rights will have restraints. The key is to enable these rights to be maximal and limits minimal while still maintaining the structure without which there would cease to be rights all together.)

Justice does not mean that a litigant can get everything to which he is entitled. The case arose as we saw that two of three judges, that being a majority, erroneously adjudicated a case. The injured litigant received 2/3's of payment for the damages and absorbed the loss of the remaining 1/3. This is an example of justice. The rights of the victim were protected as well as the rights of the correct judge.

These rights were not always the same. One of the more important insights gained from this study is that the answer of one generation need to be validated if they are to be used by any subsequent generation. Rabina asks R. Asi on Sanhedrin 33a if a law in the tosefta carries the same weight as one in the Mishnah or Gemara. Asi replies yes. Rabina then asks the same question about laws stated by the Gaonim after the Tosophists. Again the answer is in the affirmative. Rabina then asks about his own authority to legislate. Again he is told that he possess legitimate authority equal to that of Mishnah or Gemara. The point was not that each generation was obligated to rewrite Jewish law. The point is that they had the option of reevaluating the law when the necessity arose. The fact that the bulk of law remained fairly constant reflects that each generation validated its

predecessors decisions in large measure. The basics remained constant, the interpretation was shaped for the times.

(The late Chief Justice Earl Warren would probably have been comfortable with just such a statement. The basis, the constitution remains constant. The nuances of understanding necessary to live in an ever changing world became increasingly important. The idea of judicial review is not new. It is to be found in the law codes of the Jews long before the constitution of the United States. Our historical political thinking has been validated by a new generation.

In all of these areas one note continues to be sounded; it is the strong blast of the shofar of freedom calling men to the law. Law is the base upon which rights, freedoms, and power should exist. Law is for the defense of the weak not the offense of the strong. In the cases examined, the law protects the innocent whether he was the judge of the litigant. The protection, it could be argued, was imperfect. But the principle that such protection was a good thing was never in doubt.)

Our past has a great deal to offer for the future. In an ever increasingly cruel and tumultuous world, it comes, in the case of the erring judge, to offer a sane judicial program. Law is the basis of true liberation. Only through law can the weak be protected, the healthy thrive and the strong not become oppressive. Life, liberty and justice have long been the road signs in a system of Jewish jurisdiction.

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