# THE

# LAW OF EVIDENCE IN THE TALMUD.

An attempt to organize and systematize the
various principles of Evidence
scattered all over the
pages of the
Talmud.

A GRADUATION THESIS

submitted to the Faculty of

THE HEBREW UNION COLLEGE

February, 1918. Nathan Emanuel Barasch.

# P R E F A C E

This Thesis is an attempt to organize and systematize as far as possible the various rules and laws of evidence found in the Talmud. I make no claim to treat the Law of Evidence, perhaps the most important and most voluminous subject in jurisprudence, thoroughly and scientifically. To do that it would require years of constant study on that subject, a period many times that allowed for a graduation Thesis at the College. If one should only glance at the big volumes on Evidence by Wigmore, the importance of the task would at once become obvious. I do hope, however, to continue on this work in a more thorough manner, and I shall consider it a great privilege, if the College should assist me in this resolution, by allowing me to present this subject more fully in a Thesis for my Doctor's Degree.

I have divided this subject into twelve chapters, following the system of modern jurists on the Law of Evidence. I have endeavored, as far as I was able, to show the parallelisms and variations between the Modern Law of Evidence and the Jewish Law of Evidence and present that part, which is peculiarly and singularly Jewish, in accordance with the views of Jewish scholars.

The sources for this subject are very meagre. With the exception of Zacharia Frankel's "Der Gerichtliche Beweis nach Mossisch-Talmudishem Rechte", which treats of testimony rather than of evidence practically no systematic book has been written on that subject. The subject, therefore, speaks for itself.

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or

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# I N T R O D U C T I O N.

Man differs from all other beings in that he is endowed with a spirit anxiously yearning for the truth. Innumerable methods have therefore been divised as a means for its ascertainment. In an effort to discover facts, veiled in mystery, hidden in the most secret chambers of man's heart countless systems have evolved, but with few exceptions, these methods here availed nothing save the postulation of certain rules and regulations, that if the truth be not known, a new truth shall be construed in accordance with a legal process laid down by men in authority and this new truth shall be accepted in lieu of the true facts.

Little progress has been made towards a peaceful solution of the difference of Nations, no means are sufficiently adequate to determine that which is intended by one nation for another, and very little has, therefore, been achieved in the effort throughout the centuries, to establish harmony and peace among social groups by defining their controversies and settling their disputes, by recognising a law universal for the ascertainment of truth. But with regards to individuals, these methods have received world-wide recognition. Judicial systems of investigation have been accepted throughout the world and by means thereof, we are able to establish or disprove any matter of fact, the truth of which is subjected to investigation. This system of investigation is called Evidence.

In modern courts, Evidence, which comprises all rules governing the admission and rejection of testimony and the weight given thereto, has been clearly organized and systematized. We can with little effort find any ruleoof evidence plainly defined and clearly stated in any of the practicable text books on Evidence. This, however, is not the case with the Jewish Law of Evidence. The Jewish Law of Evidence is scattered all overthe pages of the Talmud, the compendium of all Laws, and in fact the only source of Jewish Law. But this is very little known, and to many as mysterious as the very truth which the Law of Evidence seeks to unveil, due to the fact that the Talmud is written in a singular oriental language, very difficult for the ordinary layman to understand.

Let me state at the outset that I do not intimate to write an opologetic thesis, showing the greatness of the Jewish genius, not merely in matters religious but also in matters judicial. It is not my intention to show by means of Pharisaic homily that the Romans have borrowed their law from the Jews because the Roman Law happens to coincide with that of the Jews. It shall be my object to endeavor, through a study of both, the Anglo-American Law and the Talmud, to gather the rules of Evidence—the subject Iam treating in my thesis—from the scattered pages of the judicial record and court decisions in the diaspora, and present them, more or less systematically, as far as my ability, the time, and the space of this thesis will permit me.

# C H A P T E R I.

## L A W I N G E N E R A L

Law in its broader sense.

When the first man built a fence around a garden or lot and thought of designating it as "his", rules and regulations for determining the right and the privelege to so designate it, at once became urgent, Gradually, these rules developed into a body of norms governing the rights of the primitive man with respect to his person and his property, principles necessary for his existence. Notwithstanding, these principles involved no technicalities and required no jurist or legal genius for their enactments. They owed their existence mainly to the evil results intrinsically connected with their violation, either because of the nature of the act, or by automatic operation of the sanction upon the individual committing the act. But as time advanced, any act of commission or omission offensive to the group was visited with the whole weight of social indignation. In their mildest form, these indignations were manifested in ridicule and contempt. Shortly afterwards, however, society began to express its reprobation by enforcing compliance with the rules that became generally recognized and by punishing noncompliance. The body of rules regulating the relation between the individual and society and the system of precepts ensuring the observance of these rules and maxims constituted the law.

Substantive Law

It goes without saying that disputes and controversies

have soon arisen. Man instinctively recognizes that his person is entitled to protection and even the primitive man already felt that what he earned was his. But no undertaking is more austere and no project more intricate than the task of determining the just claims of an individual with regards to his person or his property. A clashing of rights is so frequent an occurrence that a canon or a standard system of maxims, defining the rights and obligations of man to man and of individual to society, was an indispensable operation and the only solution. This system of rules we designate as "Substantive Law".

Adjective Law.

Of what avail would be the Substantive Law if there were no means of enforcing it? Of what value would be a verdict or a judgement if ther were no means of execution? It thus became necessary to establish rules relating to the means of enforcing the Substantive Law; rules defining the nature and powers of judicial tribunals, rules prescribing the order of procedure in the courts and the method of executing the judgments rendered. This branch of the law is known as "Asjective Law".

Evidence a part of Adjective Law.

As the chances of clashing rights increased and each case had to be decided on its merits, rules were established governing the decisisons of the courts in each particular case. It thus became necessary to subdivide the Sub-

stantive and the Adjective Law into classes, according to the subject matter to which it related. The Law of Evidence, dealing with the principles governing the admission and rejection of testimony and treating of the "the rules of law, whereby we determine what testimony is to be admitted and the weight to be given to the testimony admitted" is a part of the Adjective Law.

Distinction between Evidence and Law of Evidence.

The information imparted to the court by a witness which will warrant the rendition of a final judgment is called Evidence, while the rules which determine weight of such information, and the method used in bringing information to the attention of the courts is recognized as Law of Evidence.

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# C H A P T E R II.

# J E W I S H L A W.

## Jewish Law and what it comprises.

The Jewish term"Law" includes much more than that which is commonly understood by that term. It embraces juridical,ceremonial,as well as moral laws. For although we find many synomyms for the word law as "Toroth" indicating all precepts and decisions,"Mishpatim" decisions,originally applying to civil law only,"Hukoth" statutory laws,and "Mitzvoth" designating any commandment of Biblical sanction,the meaning of these terms have lost their significance when all laws, wirhout distinction came to be regarded as divine commands handed down to Israel through Moses.

## Developement of the Law.

Like any other system,the Jewish system of Law evolved out of customs and usages prevalent at the time of its enactment. The lex taliones,the sacrifice of the first born, and the execution of judgment againdt Achan are striking illustrations of customs inherited from the pre-histiric past. These laws represent the very incipiency of the legal system with all its crudity. Very soon,however,the Jews began to make their own laws,by referring the cases that would come up in the course of time,to an arbiter or judge,and the decision in the various cases served as precedents for similar and analogous cases that followed. Thus,we find that the mutual altercations between parties to a suit would be referred to a judgcial head,that Moses and others would settle cases in

dispute (1),while in Samuel we find that a decision once rendered served as a precedent for subsequent cases of similar nature (2).

The priests were the early judges.

Originally the priests would decide all questions of law. Their decisions were given divine sanction and were known as "Toroth" (3). Moses himself,according to indications in the Bible was a priest and Samuel is referred as both,as priest the successor of Eli,and a judge. These decisions were evidently formulated into small groups of laws (decalogues) intended, it seems,to be committed to memory. These were later reduced to writing as it was the case in the Code of Hammurabi. With the passing of time,various problems have arisen which were not covered by the different decalogues. These problems were settled by the great prophets of the,ninth,eighth,and seventh centuries, who at the same time gave expression to new moral and religious principles,resulting in a well difined and adequately arranged Code of Laws,adapted to the needs of the people of that time but ascribed to Moses in order to give it authority and sanction.

The different Codes.

Modern Biblical scholars find traces of at least six or seven different codes. The book of the Covenant known as C, the YHVH code kneen as J.,the Elohist Code known as E., the Deutronomic Code known as D.,the Priestly Code known as P.,and

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(1) Exodus XVIII.16,ff.

(2) Cf. I Samuel XXX.24,ff.

(3) Cf. Mal. II.7.

the Holiness Code known as H. others add $C_2$, the great book of the Covenant, $J_2$ a revision of $J_1$ and J E a cimbination of both, J and E. These theories, however, must be accepted with a grain of salt. Suffice it to say that all these Codes were finally codified into one system of laws, ascribing to it divine authority and canonized about 400-350 B. C. E. at which time the Laws were regarded as finished._

Later interpretation regarded as part of the Law.

The Torah like any other law-book contained clauses which could be interpreted in more than one way. Different explanations were offered by various expounders and a need was soon felt for an authorized body of experts in the Law to explain the vague and obscure clauses and to interpret the anbiguities and individual phrases contained in the Torah. Thus,as soon as the Torah came to be recognizedas the religious book, governing the conduct of the community,a body of experts known as the "Soferim", became the religious authorities and their expositions of the Torah were quite as binding as the written teachings. The main object of the Soferim was to apply the Law and not to vary it or add to it. New provisions were, however, incidentally created, due to outward circumstances which could not have been forseen by the Torah. No literature has come down to us directly from that period, but we know of laws and decisions, some of which are embodied in the Mishna, which date back to that period.

The Sadducees and the Pharisees.

After the victory of the Hasmonaeans, the leadersof the new Jewish State, wordly-minded throughout, emphasized the Torah alone and refused to recognize any other authority, while

the followers of the Soferim emphasized the value of and the necessity for oral teachings in addition to the Torah. A division, as far as religious teachings were concerned, took place between the two groups, which later developed into two distinct sects, the former known as the Sadducees and the latter as the Pharisees.

The Post-Biblical Codes.

The earliest Code mentioned in Post-Biblical times is the Sadducean Criminal Code. We know nothing about the nature and contents of this Code, except that we read in Megillath Taanith that the Pharisees celebrated the day in which it was burned. The Megilleth Taanith itself is one of the earliest Rabbinical Codes. It treats mainly of minor holidays in which fasting is prohibited.

The Talmudic Code known as תורה שבעל פה had its beginning with Hillel and Shammai, about the first century before the Christian era. They attempted, no doubt, to creat a new Code adopted to the needs of their time but following the spirit of the Bible. Like the Bible, the Code should contain narrative portions as well as legal doctrines, and the former was designated as Aggada while the latter was known as Halakah. This Code was workedout independently from the Bible and was intended, perhaps, to be committed to writing. But inorder to leave the authority of the Torah intact, this has been avoided, and gradually every law contained in these Codes, in order to give it force and effect, had to be derived from or based upon a passage from the Scripture.

Another attempt to codify the Law was undertaken by Eliezer ben Jacob about a century later (Of.Pesachim 32a) Simon ben Azzai refers to it as משנת רבי אליעזר בן יעקב קב ונקי (Jebamoth 49b)

Akiba ben Joseph, less than a century later, was the first one to systematize and arrange the different branches of the Jewish teachings from two points of view. On the one hand he had the "Mishna" containing matters of law, expressed in legal form, while on the other hand the "Midrash", a sort of a commentary to the legalbooks of the Torah. The work of Akiba was improved upon by his pupil Rabbi Meir, which served as the basis to Rabbi Jehuda Ha-Nasi, the compiler of the Mishna, who closed the record and gave form to it. The Mishna, as we now have it, and which is supposed to have attained its present form at thehand ofJehuda Ha-Nasi, is considered the most important production in the field of Rabbinical Code literature, although according to the modern concept of a Code, it hardly deserves that name.

The Mishna was later taken over to Babylon by Rav and Samuel, who mark the beginning of the Amoraic period. The Amorain attempted to explain the Mishna, interpret it, decide a case where a controversy existed between two or more Tanaim, or cite a similar case in the Mishna as authority for their decision. But above all else the Amorain tried to give every Mishnaic law and every Tanaitic decision Biblical Sanction and sound reason for its enactment and utterance. The discussions of the Amorain are carried on in Aramaic and the text is known as Gemara, while the Mishna plus the exposition found

in the Gemara and in other Amoraic sources is known as the Talmud.

The Talmud is often mocked at and ridiculed by scoffers and ignoramuses, who have never penetrated with the spirit which prompted its enactment, who condemn the entire Talmud which re-moulded Judaism into the homogeneous mass which it presented during the whole of the middle ages, because of a few petty casuistries found therein. The real intelligent Jew never connived at incongruities. To quote from the very Talmud; "The Kingdom of Saul did not last because Saul was flawless". It is true that the forced exegesis of the Talmud and the insignificant discussions on trivialities often repel, but on the whole the spirit is very broad, and most of the laws aim at the well-being of Society. It is true that there are still many questions which have been left undecided, but it was the Talmud that brought Jewish Law to a fixed point. It is the Talmud which served as the basis for all later Codes, and it is the Talmud that shall serve me as a guide in my present endeavor.

The Law of Evidence, it is obvious, would come under juridical laws, but as no line of demarcation is drawn between moral, ceremonial, and juridical laws, the Law of Evidence which forms a part of the Jewish law system underwent the same process and its rules are embodied in the different Codes without having any particular or designated field.

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# C H A P T E R III.

## J U D I C I A L N O T I C E

How it is related to Evidence.

The doctrine of Judicial notice is often treated in connection with the law of Evidence. It applies to the Law of Evidence in a negative sense and only indirectly.

What it implies.

The doctrice of judicial notice is an exception to the general rule in law that all facts must be proved to the court by the very best evidence attainable. According to this doctrine, certain facts are regarded to be so well known to the court or so related to it and readily ascertainable, that they need not be established by further evidence or proof. Judicial notice is both mandatory and permissive, that is to say, of certain facts the court must take Judicial Notice, and other facts the court may at its discretion judicially notice.

The Law of Judicial Notice in a formative State.

The Law governing this doctrine is unstable, and the Court with reference to this principle, must keep abreast with the advance of civilization and the progress of the times. That of which the court will not take judicial notice to-day may be recognized to-morrow as out of the realm of proof, and things that require no proof to-day may be disproved by recent investigations. Ordinarily the Court will judically notice

matters peculiarly within the knowledge of that Court, the supreme law of the land, and matters of universal notoriety. Facts which have only a common notoriety the court may in its discretion judicially notice.

The doctrine of Judicial Notice in the Jewish Land.

In the Jewish courts, particularly, every fact and claim must be proved by competent evidence and in a convincing manner. But, the Jewish Court also will take Judicial Notice of the laws in the Bible. The Judge is presumed to know the Bible, and one need not produce the Bible when claiming a right under its sanction. All courts would take judicial notice of the בית דין הגדול שבירושלים . The Courts will Judicially notice the oral traditional law הלכה למשה מסיני

A lower Court will take judicial notice of the decision in a higher court. Infact a court will take judicial notice of any other court without further investigation (1) It is taken for granted that all courts are composed of able bodied men knowing the law.

A Court will take judicial notice of any written document signed by witnesses and executed in a court.

Where an admission is made before the Court, the Court will notice it judicially as being made earnestly and without any intention of jest. Thesame holds true in the case of an admission by a person in extremis. "שכיב מרע". (2) even though it was not made in the court.

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(1) Babba Bathra 138b
בי דינא בתר בי דינא לא דייקו, בתר עדים דייקו

(2) Babba Bathra 175a

The Court may, in its discretion take judicial notice of the decision or execution by any ordained Rabbi. But also inthe Jewish Law this doctrine is in a formative state. Take the case of a woman whose husband had disappeared and was not seen again. The Law is that she may not remarry unless witnesses have seen him dead. The reason is that he might be living in some country impossible to send communication. Recently however, R. Issac Elchanan of Kovno permitted a woman to remarry although there were no eye witnesses who could testify that they saw her husband dead. He justifies his decision by saying that the facilities for communication in modern times warrant a conclusion that if he had been living he would have been heard from.

# C H A P T E R IV.

## O N U S P R O B A N D I

Who has the burden of proof.

Litigation has as its ulterior aim the ascertainment of certain facts and the application of some legal principles to these facts. If one has a grievance he comes to court and rehearses it. It is only fit and appropriate, therefore, to cast the burden of proving his grievance to the court by sufficiently satisfying evidence upon him, who avers it. Hence we have the principle: " Ei incumbit probatio qui dicit, non qui negat". The burden of proof is upon him who asserts the affirmative.

Weight and effect of the burden of proof.

He who has the burden of proof in the beginning of the case has it also in the end. That is to say, where the evidence introduced is counteracted by the negative side and the facts are more evenly balanced, the verdict would be against the party with whom the burden of proof rested originally, unless he succeeds in establishing the truth of his averment by a preponderance of evidence.

The Burden of Proof in Jewish Law.

Like the Anglo-American Law, the Jewish Law casts the burden of proof upon him who makes the averment and the plaintiff must prove his claim to the satisfaction of the court. The general rule is: "The burden of proof is upon him who is trying to change the status quo",[1] or "The case favors him from whom money is to be taken away".[2]

The same principle holds good in the case of real property. There is a presumption that the title to property always abides with him whose title has once been established.(3)

Shifting of the burden.

If the defendant admits part of the claim, the burden of proceeding with the evidence immediately shifts, and the defendant must satisfy the court in respect to the amount denied by him or else an oath would be imposed upon him.(4) The admission, however, must arise out of the same issue and must relate to the same subject matter. For, suppose, A claims one hundred bushels of wheat from B and B admits that he owes A fifty bushels of barley, since the admission is not of the same subject matter, the burden will not shift. But, if A claims both, wheat and barley and B admits that he owes either wheat or barley, the admission would be arising out of the same transaction and the burden of proof would shift. Similiarly, an admission of currency, although of different kinds, is regarded as a "part admission" or an admission of the same subject matter and the burden to proceed with the evidence would shift. (6)

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(1) (Babba Kama 35a) המודיא מחבירו עליו הראיה

(2) (Kethuboth 12b) אוקי ממונה בחזקת מריה

(3) (B. Metzia 37a ) נכסים בחזקתן

(4) (Kethuboth 18a) מודה במקצת המענה ישבע

(5) (Shebuot 40a) There seems to be a difference of opinion on this matter, but this is no doubt the predominant view.

(6) (Shebout 40a)

In criminal cases, the burden of proof lies, without any exception, with the prosecution.

A singular rule is that found in connection with the peculiar maxim in the Talmud that if the ox of a Jew gores and damages the ox of a Gentile, the Gentile cannot sue in a Jewish Court. In consequence of this odd principle, we find that in a place where the majority of the people are Gentiles, and the ox of a Jew gored and injured the ox of another, the burden of proof is upon the plaintiff to show not only that he sustained damages but also that he is a Jew before he could collect in a Jewish Court. (7)

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(7) (Kethuboth 15b) איתי ראיה דישראל את ושקול

# C H A P T E R V.

## P R E S U M P T I O N S

Extensive and intensive meaning of the term.

No term is more indefinite or has been more variously defined than the term "presumption". In trying to illucidate its meaning, the entire subject has become an entanglement of definitions and explanations "filling the mind with meaningless phrases and leaving it in an hopeless state of bewilderment". This is true of the terms in both, in the Anglo-American as well as the Jewish Law.

Originally it was nothing more than an inference which may or may not be drawn. Later the Court instructed the jury that such an inference "should" be drawn, which gradually developed into "ought to be drawn" or "must be drawn". In general, a presumption is a rule which in certain cases, either forbids or dispenses with any ulterior inquiry. (1) Public policy was no doubt the basis for this rule, but in time this inference developped into a binding precept.

The Jewish term for presumption is "חזקה" meaning inferring,

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(1) U. S. Supreme Court (14 Wallace 449)

affirming, or establishing a fact in issue. Thus, the Rabbi, in order to affirm or establish a fact which might be disputed would draw an inference from the Torah, strengthening their statement. (2) Well established facts, found in authoritative texts needed no inference or affirmation. (3) In the course of time, the term came to be identified with "title" or "right", and was in itself sufficient to vest ownership of property in an individual. In the case of real property, the presumption that the possessor had a deed but lost it was amply adequate to warrant good title after a lapse of three years,(4), while in the case of personalty, mere possession was sufficient inference of title and no other evidence was required.

Different Kinds of Presumption.

Presumptions are of two kinds. We have presumptions of Law and presumptions of Fact. These are again subdivided into conclusive presumption (praesumptiones juris et de jure) and disputable presumptions (praesumptiones juris tantum).

Presumptions of Law. (חזקה )

A conclusive presumption of law is a rule of law binding upon the Court, establishing an absolute fact and no evidence can be introduced to rebut it. For example, an

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(2) Kethuboth 84b חכמים עשו חיזוק לדבריהם

(3) Kethuboth Jer. XI. 34c אין דברי תורה צריכין חיזוק

(4) Kedushin 1b נכסים שיש להן אחריות נקנין בכסף בשטר ובחזקה

infant under seven years is incapable of committing a crime. This presumption is conclusive, and if a child under the age of seven has committed an offense, which is ordinarily a crime, the presumption prevails and the child does not become criminally liable. Similarly, we hold that a ritually disqualified animal cannot live longer than twelve months.(5) This presumption is irrebuttable and the fact that the animal had lived more than twelve months would tend to show that the animal was unduly disqualified.

A disputable presumption of law is a rule binding upon the court, establishing a prima facie case. These are very numerous. For example, a child born during lawful wedlock is presumed to be legitimate. There is a presumption inthe Jewish law that a man has not the courage to deny a debt completely in the presence of the creditor. (6)

No man would dare demand money from another unless he has some ~~license~~ to do so. (7)

There is a presumption that no man is reconciled when defrauded with reference to physical defects (8)

There is a presumption that no man wishes to have his wife disgraced in court. (9)

If the names of witnesses appear upon a written document, there is a presumption that it was executed by an adult person. (10)

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(5) Hulin שריפה אינה חיה י"ב חודש

(6) Baba Kama 107a אין אדם מעיז פניו בפני בעל חובו

(7) Shebuoth 40b חזקה אין אדם חובע אלא א"כ יש לו עליו

(8) Kethuboth 75b חזקה אין אדם מפיים במומין

(9) Kethuboth 74b אין אדם רוצה שתתבזה אשתו בבית דין

(10) Kethuboth 19a אין העדים חותמים על השטר אא"כ נעשה בגדול

If one claims payment on an instrument which is not yet due, there is a presumption that it is not paid, for no one pays a debt before it becomes due. (11) Such presumption, however, may be rebutted by further evidence.

Presumptions of fact (חזקת הדבר )

Presumptions of fact are inferences drawn from facts reputed to have existed and which have so far not been disproved. Such inferences, however, are merely circumstantial. For example, every man is presumed to be sane. But once a man has been adjudged insane he is presumed to continue in that state until again proven sane. In other words, there is a presumption that things always remain in the status in which they were once proved to have existed. (12)

When equities are equal, the status quo will prevail. (13)

In a case where two presumptions favor one side and only one presumption favors the other, we overcome the one by the one opposite and we decide the case on the strength of the one left. (14)

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(11) Babe Bathra 5a חזקה לא עביד אינש דפרע בגו זמניה

(12) Niddeh 2a העמד דבר על חזקתו

(13) Baba Kama 17a העמד ממון על חזקתו

(14) Kethuboth 76a

# C H A P T E R VI.

## A D M I S S I O N S .

Direct Admission.

In order to ascertain the truth in a certain case,evidence is introduced to the court and its merits are then considered. This evidence may come either form the parties to the action, or from outsiders. If an answer to the plaintiff's claim,the defendant takes the stand and testifiesin agreement with the plaintiff's claim,and consequently against his interests,his testimony settles the matter and the case is decided against him. Thus, an admission is a voluntary acknowledgment of facts,in a civil suit,material to the issue and against the interests of the party making it.

Indirect admission.

Suppose,however,that the defendant denies the charge of the plaintiff, but there are witnesses who testify that he had admitted the fact to them outside of the court,since the declaration made by the defendant was against his interests,it is admitted in evidence,although it was not testified to by the defendant under the sanctity of an oath, under which circumstances,testimony must ordinarily be given in modern Courts. In either of these cases,it is evident,that the defendant cannot complain of injustice by allowing such declarations to be offered as evidence. The difficulty involved is as to what constitutes identity of interests,which, however,is a question of Substantive Law and does not belong to the Law of Evidence proper.

Jewish Law on Admissions.

An admission by the defendant in the court is the best evidence obtainable. (1) But this admission must be expressly made and the silence of a defendant when charged with a debt, does not always substitute an admission. (2)

If an admission is made outside of the Court but in the presence of witnesses, prompted by the plaintiff to witness the admission, it is competent evidence to all intents and purposes. (3)

Some writers hold that it is within the discretion of the court to admit or to reject silence as an admission of guilt. (4) But silence to a charge in the presence of witnesses outside of court is of no consequence at all.

The admission of a sick person impending death is unimpeachable and irrevocable. But he may, if he recovers refute this admission and show that it is invalid. Similarly, if one made admission of an obligation to a person impending death, it is given full weight, for it is presumed that no one would poke fun at a person under such circumstances. (5)

If a person in extremis makes a statement detrimental to a party present at that time, but remains silent,

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(1) B. Metzia 3b

(2) Cf. Babba Metzia 37a

(3) Sanhedrin 29a

(4) Cf. Rabenu Asher and Zacharias Frankel G. B. p.340

(5) Vidi Babba Bathra 175a

such silence may be introduced as evidence against him. But ordinarily in order for any admission to be valid, it must be made in the presence of at least two witnesses (6) and must admit the same claim and the same species sued for by the plaintiff. (7)

Although in general, the principle "qui facit per alium facit per se" (8) holds good in Talmudic Law, it differs with regards to an admission made by an agent or a member of the firm within the real or apparent scope of his employment.

In modern law such an admission would be binding upon the principal or the firm, while according to Talmudic Law it would not. The reason for this rule is very obvious. It is in perfect harmony with the established principle inthe Talmud that an agent may act for his principal to his benefit, but not to his detriment, (9) and the principle underlying the transactions of partners or members of a firm is also one of principal and agent.

It is worthy of note that even with respect to pleading, the Talmudic Law contains very modern tendencies. Suppose that A brings suit against B for the sum of one hundred dollars to which B replies that he never owed A anything. Witnesses are then introduced who testify that A did loan B the sum of one hundred dollars, but B had paid him back that sum.

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(6) Cf. Sanhedrin 30b

(7) Babba Kama 35b

(8) Berachoth 34b שליחו של אדם כמותו

(9) Kethuboth 11a זכין לאדם שלא בפניו ואין חבין לאדם שלא בפניו

The Court in such a case will render judgment against B in favor of A for the amount of one hundred dollars, because witnesses testify that A owed one hundred dollars to B and B admits that he never paid that sum. (10) To-day the ruling of the courts would be the same way. If B should enter a plea of "general denial" to such a claim by A, because this sum had been paid, A could move to strike this pleading out. The only proper pleading in a case of this sort is "confession and avoidance".

In case of a tort where a penalty or exemplary damages are attached for its commission, an admission by the tort-feaser would exempt him from this fine. (11)

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(10) Shebuoth 41b

(11) Cf. Kethuboth 42a

# C H A P T E R VII.

## C O N F E S S I O N S

Difference between Confession and Incriminating Admission.

Confessions are acknowledgments of guilt made by a person accused of a crime. In their evidential use, they are confined to criminal law only and differ from incriminating admissions in that Confessions relate to the criminal acts themselves, while incriminating admissions are merely acknowledgments of facts tending to establish guilt.

Weight given in Modern and Jewish Courts.

In Modern Courts a confession made spontaneously, voluntarily, and without any inducement of fear or favor held out to the accused by a person in authority, is, according to the weight of opinions, deserving of the highest credit. In Jewish Courts, however, a confession can never be introduced in evidence. The reason for this ruling is self-evident. The Jewish Courts exclude any one from testifying, who is related to any one of the litigant parties (1) and it would naturally follow that a man cannot testify against himself, for no one is nearer related to him than he is himself. (2)

It seems that the Rabbis have been troubled by the fact that since a man is related to himself and no relative

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(1) Cf. Chapter on "Competency of Witnesses"

(2) Sacchedrin 10a אדם קרוב אצל עצמו

is permitted to testify, why, then, do we accept an admission by the defendant as competent evidence? In order to overcome this difficulty, the Rabbis were forced to give expression to another principle, which states that a man is not related to his wealth, and he may therefore testify against himself in civil cases. (3) Others, to avoid this discrepancy, base the rejection of confessions as evidenciary proof on the principle, that no one would, under ordinary circumstances, incriminate himself (4) and he is simply trying to put an end to his life for one reason or another.

Some fine points in the subject of Confession.

Not very long ago, much had been commented on a Dayton case, where the presiding Judge drew the fine distinction between an involuntary confession of the commission of the crime and an involuntary confession leading to the discovery of the crime. In that case the accused cut up the body of his wife, packed it in a case and sent the case off by some Express Co. Through a confession which he involuntarily made, the case was traced and the body found. The Judge in instructing the jury charged them not to convict him on his confession, which is incompetent because it is involuntarily made, but they may base their decision on the finding of the box, with the body cut up, although the finding of the box is the result of his confession. This case

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(3) Sanhebrin 10a אין אדם קרוב אצל ממונו

(4) Sanhebrin 10b אין אדם ממית עצמו רשע

involves very fine points and savors somewhat of homiletics. The judge in that case, drew the very fine distinction between Confession of guilt and incriminating admission and the student of the Talmud can readily and proudly point to its parallel, patterned many centuries ago. We are told in Joshua that Achan was found guilty of a crime and punished by Joshua. But, queries the Talmud, how could Achan be indicted upon his own confession of guilt? And the very modern answer is given: His confession simply led to the discovery of the crime, and the execution was based upon the crime committed and not upon his confession.(5)

Another illustration of the fine legal acumen of the Talmudists, is the case of "Splitting of testimony". Suppose A comes to the court and says that he and B killed X. In accordance with the principle of "A man is related unto himself" his confession would be of no significance. But here the Rabbis have introduced the principle of פלגינן דיבורה (6) that we split the testimony and allow it to go in as evidence against B but is of no significance as a confession against himself. This principle of "splitting evidence" is carried even to a much finer point. Take the case where A comes and confesses that he killed X. His testimony is rejected as incompetent against himself, but we allow this testimony to

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(5) Jer. Sanhedrin IV. 23b

(6) Sanhedrin 10a

prove the death of X and we permit Y, the wife of X to remarry, on the strength of the testimony offered by A that X had been killed. (7)

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(7) Cf. Jebamoth 25a This seems to be the dominating tendency.

# C H A P T E R VIII.

## C H A R A C T E R

Its effect in Capital or Criminal Cases.

As a general rule the character of a person cannot be shown in the court lest the jury be unduly influenced by its allegation. In criminal cases, however, the accused may introduce evidence concerning his character which would make it improbable for him to have committed the offense with which he is charged to have committed. Originally, this was extended to capital cases only, but later the privilege was made applicable to all crimes. The prosecution can never introduce character evidence, but it may adduce such if the defendant has raised the bars by setting up his good character.

In Jewish Law character evidence in capital cases is of no avail. No such evidence can tend to mitigate the case, because in the Jewish Law, circumstantial evidence is unknown and proof as to the good character of the accused is insufficient to upset facts, witnessed by men competent and qualified to testify. Moreover, before any one could be prosecuted for the crime, he must have been warned against its commission by someone and told of the penalty attached for the commission of such an act. (1) He must also have listened to this warning, assuming the consequences of the act and must have acted

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(1) Sanhedrin 80b

upon it immediately before he had time to forget this warning. (2)

Its effect in civil cases.

In civil cases, character evidence can, as a general rule, not be introduced. In cases, however, where the character of a person is a fact in issue, evidence as to character will be allowed. Take the case where one is charged with seduction, Evidence may be introduced to show the character of the woman with regards to her chastity. Similarly, evidence may be introduced to show the bad character of the witness with regards to his veracity. In fact gamblers, usurers, etc., (3) are not permitted to bear testimony because they are reputed to lack the moral instinct for telling the truth. Furthermore, if the Court has sufficient reason to believe that one of the parties to a suit would rather swear falsely than pay the claim made against him, it may at its option, make the other party take the oath and get judgment.

Character of Animals.

The character of animals may be testified to in court. At Common Law the rule was that "Every dog was entitled to one bite", and the owner of the dog was not liable unless the vicious character of the dog was established. This is also the rule with reference to a horse. Its character may be testified to and its vicious tendencies shown.(4) Inthe Jewish Law, we

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(2) Sanhedrin 40b

(3) Cf. Chapter on "Competency of Witnesses".

(4) 75 Michigan p. 472

have the laws with regards to a goring ox. For its offense the owner of the ox is only liable for one half the damages sustained in the first one or two cases. But, if its vicious character could be established by a series of attacks, the owner is liable in full for damages caused by this ox through his viciousness. (5)

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(5) Exodus XXI 35-36 Babba Bathro 35ff.

/Kamma

# C H A P T E R IX.

## T E S T I M O N Y

Testimony in general.

Testimony to be competent must be offered by witnesses in the presence of the court and under the sanctity of an oath. The number of witnesses offering this testimony is immaterial, but all testimonies offered must relate to the facts in issue.

Testimony in the Jewish Law.

According to the Jewish Law at least two witnesses must testify in each case, and their testimony must be offered freely and not under duress or undue influence of compensation or reward. (1)

The entire testimony must be given in the presence of the defendant except in the case where the defendant is sick or the witnesses are sick or are compelled to leave the province. (2)

Ordinarily all testimonies must be offered by word of mouth and in the presence of the Court. (3)

Each of the witnesses, in criminal as well as in civil cases, must testify to all the facts in the case, constituting the entire course of action. (4) Thus, if A testifies that X threatened Y and B testifies that X discharged his gun

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(1) Kethuboth 18 Cf. Chapter on "Witnesses"

(2) Babba Kama 112b

(3) Shebuoth 30a Cf. Chapter on "Written Documents"

(4) Babba Kama 70a

while pursuing Y and C testifies that he found Y dead with a bullet in his head and D testifies that he saw X fire at Y and kill him, there is only the testimony of D that is complete and since two witnesses are necessary, X cannot be convicted on that evidence. (5) In the case of title by "adverse possession" ( חזקה ) the law is somewhat different, With the exception of Rabbi Akiba, they seem to hold that if there are three sets of witnesses, each testifying as to one year, we may add their testimonies and regard them as evidence showing that he had been in possession for three years, the number of years required to vest title by adverse possession. (6)

In criminal cases the witness must not only testify that he saw the crime committed, but also that he saw the other witness observe the same act at the same time. (7)

By a set of witnesses we mean at least two witnesses testifying to the same act. Attention is paid to the manner in which they testify and not to the number constituting the set. Thus a set of two is as competent as, and its testimony equivalent to that of one hundred witnesses. (8)

Hearsay Evidence.

It is evident from the preceeding rules laid down with reference to testimony, that matter, the nature and effect

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(5) Babba Kama 70b

(6) Babba Bathra 56b

(7) Braita Maccoth 6b Cf. Sanhedrin 30a

(8) Maccoth 5b

of which might be improperly estimated, should be kept from the court and jury. This principle excludes evidence which depends solely for its truth and falsity upon the statement or conduct of some person other than the witness in court, known in law as hearsay evidence. The reason for excluding such evidence is very obvious. The original statement has not been made under oath, the opposite party never had a chance to cross-examine the original party, and above all the statement might have been imperfectly heard and reported. Thus in examining the witnesses they are asked whether they actually witnessed the act or they are simply relying upon the statement of some one, who, in their estimation, appears perfectly reliable. (9)

If A says to B that he, B, owes him a garment, to which B replies that he owes that garment not to A but to X. X cannot introduce this statement made to A as evidence in X's favor. It is merely hearsay. (10)

The testimony testified to must be in court or in the presence of witnesses, and the one testifying must know that his statements will be regarded as a deposition. (11)

The importance of the subject, however, does not lie in its exclusions but rather in the exception to the hearsay rule.

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(9) Sanhedrin 37 a

(10) Hosen Mishpat 80.23 (Cf. Z.F. p.255)

(11) Sanhedrin 29a

Exceptions to the rule of hearsay.

The exceptions to this rule are very numerous and some of these "exceptions" are independent rules, dating back prior to the "rules against hearsay". These include statements made by persons who cannot appear and where other evidence is extremely difficult to attain.

Declarations against interest, memorandum, testimony relating to marriage and affirmed testimony form some of the exceptions.

A. Declaration against interest.

Suppose A, a creditor makes a declaration that B, who owed two hundred dollars, has paid him on account one hundred dollars. Such declaration being against his interest is binding and indisputable. (12)

B. Where testimony is written down.

A witness may use a memorandum upon which he had written down his testimony and use that in court to refresh his memory or may introduce it as evidence, although according to the Law of Evidence these statements are nothing short of hearsay. (13)

C. In relation to Marriage.

A man may testify that he heard from another that A, the husband of B had been seen dead, and B is permitted to remarry on the strength of this testimony. " ]y 'DL ]y "

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(12) Hosen Mishpat 126.29

(13) Kethuboth 20a

D. When strengthened by parole.

If one affirms his statements, by shaking hands or by giving his word of honor in order to give his statement force and effect, it is admitted in evidence as competent testimony. (14)

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(14) Hosen Mishpat 126.28 Cf. Z. Frankel p. 357

# C H A P T E R X.

## W I T N E S S E S

Office and duty of a Witness.

A Witness is a person who testifies before a court on judicial officer concerning matters under judicial investigation. The subject of Witnesses is the most important in the Law of Evidence. Herein we see that while society made rapid progress and civilization forced its way among the people, the Courts lagged behind and the court practice remained intact for many years afterward. Thus, the inequality between persons of different political and religious beliefs, recognized in the early stages of the law among a rude and half-civilized people was hard to break away from, and extended to witnesses even at Common Law. In modern law any person who is mentally competent and understands the nature of an oath is allowed to testify as a witness.

According to the Jewish Law, if one has knowledge of facts in a certain case, he is enjoined to testify. (1) This, however, is extended only to criminal cases. (#)

At least two witnesses must testify in order to make the evidence competent and valid. (2)

To this rule there are few exceptions.

A In civil cases one witness may offer evidence and thereby impose an oath upon the party against whom he is testifying, or one may be relieved from taking an oath through

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(1) Shebuoth 30a (#) Babba Kama 56a

(2) Ibid

the testimony of one witness in his favor. (3)

B. One witness may testify that a certain person is dead and his widow would thereby be permitted to remarry. (4) This exception is due, no doubt, to public policy, for it is often impossible to obtain two witnesses in such a case and the woman would have to remain in a supposed state of marriage "Aguna" all her life. This is obvious from the fact that there is a dispute whether she may obtain the amount of her Kethuba on the strength of this testimony and also by the fact that the heirs to the widow's deceased husband cannot inherit, in spite of the fact that the woman was permitted to remarry. (5)

C. If a man had been killed and the murderer is unknown, one witness may testify that he saw the crime committed and thereby make the city perform the cermony of chopping off the head of a heifer to atone for the city. But the same evidence has no bearing with reference to the murderer. (6)

D. Where a woman had been admonished by her husband not to associate with a certain man, the testimony of the one witness with regards to a clandestine relationship is sufficient to prevent her from taking the bitter waters, but inadmissable as evidence against the woman.

E. In ritual cases theevidence offered by one witness is competent to all intents and purposes. (8)

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(3) Shebuoth 40a
(4) Jebamoth 117a
(5) Jebamoth 116b
(6) Sota 47 b
(7) Sota 31a
(8) Gitten 2a עד אחד נאמן באיסורין

Competency of Witnesses.

The credibility of witnesses must be established beyond doubt and their impartiality must be placed above suspicion. By means of a series of stringent regulations, a number of individuals would be disqualified in each case from coming forward as witnesses The primary object of this process was, no doubt, in order to render the conviction of an innocent person practically impossible. Unless all the facts were as clear to them as daylight, and they were convinced of the justice in the case beyond a scintilla of a doubt they would refrain from issuing a verdict against the defendant. To ensure absolute justice the following rules restricting testimony were laid down. No man could incriminate himself. A woman is not qualified as a witness. Slaves, infants, hermaphrodites, lunatics, deaf and dumb,blind people, deaf or dumb,non-believers or non-Jews, thiefs, robbers, usurers, one whose testimony has already been impeached, relatives allied by blood, relatives allied by marriage, existing relationship between the witnesses or between the witness and the judge, a debtor, a creditor, or one who is in any way interested in the case are barred from testifying. Dice-players, professional gamblers, shepherds, friends of the litigant parties, enemies of the litigant parties, men of a low moral standard and illiterates and men who possess no self-respectare regarded as incompetent to testify. (1)

The importance of this rule as in the case of the "rule against hearsay" lies mainly in its exceptions. There are exceptions, practically to each of the classes, ordinarily in-

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(1) Cf. Sanhedrin 27.ff. and Kedushin 40b.

competent to bear witness. What follows are the exceptions to the general rule of barring witnesses.

A. A man may confess judgment against himself (2), although in criminal cases if he wishes to testify against himself we silence him reproachfully. (3)

B. A woman is permitted to testify where the knowledge of such a fact is more apt to be within her sphere. For example, in cases of pedigree, a woman may testify that A is the first born although A will inherit a double share through this testimony. (4)

Similarly a woman may testify concerning the death of a man and the widow is permitted to remarry on the strength of her testimony. (5)

C. The rule that slaves are disqualified as witnesses is derived by a fortiori from a woman. (6) In case of testes domestici, however, since nothing is said to disqualify them, slaves may testify. (7)

D. Children below the age of puberty are incompetent witnesses and may not, even after they have attained majority, testify as to facts witnessed during their infancy. The general rule is, that a testimony once incompetent is always incompetent. (8)

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(2) Sanhedrin 10b; Babba Metzia 3b

(3) Tosefta Perek IX. משתיקין אותו בנזיפה

(4) Kedushin 74a

(5) Jabamoth 115ff.

(6) Babba Kama 88a.

(7) Cf. Z. Frankel p. 258.

(8) Babba Bathra 128a

But persons of mature age may testify, in conjunction with another competent witness, to the fact that he knew his father's, his teacher's or his brother's handwriting when he was an infant; that he remembers that the marriage ceremony of a certain woman was performed in accordance with the practice of a maiden lady; that a certain man would perform the rite required of a priest, that he may be permitted to eat of the heave-offering. (9)

Children may also testify, if stated in the regular course of conversation that a certain man has acquired an easement by virtue of a user, or that they were present at the funeral of a certain man and permit his wife to remarry. (10)

According to the Talmudic law a person attains majority at the age of puberty, ordinarily, a boy when he attains the age of thirteen, and a girl, when she attains the age of twelve. This however, may vary according to physical and psychical developement of the child. (11) But in order to be fully emancipated, so as to be able to dispose of an inheritance or trade in the regular course of business, he must be at least twenty years of age and known to understand the nature of trade. (12)

E. A hermaphrodite is an incompetent witness because his sex is uncertain, his testimony may be used in cases where woman's testimony is also admissible. But since they are not legally recognized as witnesses, the greater number would prevail in such a case rather than the contents of their evidence. (13)

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(9) Kethuboth 28a

(10) Jebamoth 121b; Babba Kamall 4b

(11) Niddah 46ff.

(12) Babba Bathra 155b.

(13) Jebamoth 117b.

F. The testimony of a lunatic is, as a rule incompetent. But if he has sane intervals, he is, during these intervals, regarded as sane to all intent and purposes. (14)

G. There is no express statement declaring the testimony of a deaf and dumb person valid in any case. But we find in the Talmud that a deaf and dumb person may communicate or receive communication through signs, and effect a deal or enter into marriage or give a divorce. (15) Now, all these cases require sufficient evidentiary capacity and it may be safely assumed that the testimony of a deaf and dumb person in similar cases, would be considered to have ample weight in evidence.

H. Although the tendency of the Talmud is to rule out the testimony of a blind man, exceptions are made to this rule. (16) A blind man may testify in matters concerning real estate, according to Samuel. According to Raw Shesheth his testimony is admissible with reference to goods or garments, and Rav Pappe would allow his statements to enter as evidence in case of tangible matter such as gold and silver. (17)

I. The general rule is that a mute person may not testify, either by sign or in writing.(18) But he may testify as to the death of a person and in cases of pedigree so as to entitle the first born to a double share in the inheritance of his parent. (19)

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(14) Rosh Hashana 28a

(15) Gittin 59a

(16) Eruchin 17b

(17) Babba Bathra 128a

(18) Gittin 71a

(19) Ibid; Haggiga 2a

It is remarkable that in both cases it is Rav Shesbeth, who is bent on admitting evidence which is ordinarily excluded, especially with reference to a woman whose husband's whereabouts are unknown.

The predominant view in the Talmud seems to be that deaf or mute persons are qualified as witnesses to all intents and purposes.

J. As a rule a non-Jew may not appear as a witness and his testimony is of no effect. But, he may appear as a witness upon a divorce document and the instrument would receive full force through his signature, and ordinary documents, when the signature of at least one additional Jewish witness appears at the bottom of the signature of the non-Jew. But if the document was issued by an authorized civil court and is attested by two non-Jewish witnesses, it will receive full force and recognition in the Jewish courts, especially when it is executed by men well versed in the law of that province. (20)

The statement of a non-Jew is admissible also in evidence concerning the death of a person whose wife was compelled to remain in a supposed state of marriage because there were no eye witnesses who could testify that they saw him dead. Especially, when this statement is made in the ordinary course of conversation. (21)

The testimony of a non-Jew is also admissible in ritual cases. For example, if prohibited food had been mixed with proper food, the law is that if the taste of the prohibited food is not noticeable it is permitted to eat. In order to find out whether

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(20) (Gittin 10b)

(21) (Jebamoth 121b)

or not there exists a taste of the prohibited food, we give it to a non-Jew to taste and we accept his testimony in that case. (22)

K. A man who violates a ritual law simply because he is a glutton is incompetent as a witness according to the weight of opinion in the Talmud. But if he violates the ritual laws because he does not believe in them or because he thinks that certain rituals like the dietary laws are inexpedient, he is according to Rovo a competent witness, for he may still have scruples about swearing falsely in spite of the fact that he eats unclean food.(23)

L. The opinions with reference to excluding men who are accused of immoral acts seem to be unanimous, Thus, all agree that thieves, robbers and extortioners should be barred from testifying. If, however, the robbed or stolen goods were returned to the original owner and the usury exacted was requited, coupled with sincere repentance, these men would again be qualified as witnesses. (24)

According to the opinion of Rav Nachman men accused of moral degeneration with reference to meretricious indulgencies are, nevertheless, permitteed to testify (25)

M. If the testimony of a man has been impeached, all the testimonies rendered prior to this impeachment are valid, according to the opinion of Rovo, but the law in this case had been decided according Abaye, who maintains that all his prior testimonies are rendered invalid. (26)

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(22) Hulin 97b
(23) Cf. Hulin 27a ~ 2 cf. ib. 3-4
(24) Sanhedrin 25b
(25) Sanhedrin 26b
(26) Sanhedrin 27a

N. Relatives allied by blood in the first degree, as father and son or brothers; in the second degree as cousins; or in the third degree as grandsons of the same ancestor are incompetent witnesses. According to Rabbi Jose any one who is capable of inheriting as a relative may not testify on behalf of that relative. (27)

Relatives allied by marriage who may not testify for or against each other:are: husband and wife, brothers-in-law, husband of his mother's or father's sister, step-father, father-in-law, his wife's brother, their children or their sons-in-law. But, if the marriage relationship had been dissolved either by divorce or death, they may again testify as theretofore. (28)

But a father may testify concerning the primogeniture of his son, and the mother may also testify concerning the primogeniture of her son during the first seven days after his birth. (29) The relationship just referred to must not exist between the parties to the suit, between the witness and the parties, between the judge and the parties or witnesses, or between the debtor, guarantor, or surety. (30)

O. All parties pecuniarly interested inthe suit, such as debtor andcreditor, lender and borrower, pledgor and pledgee, guarantor and debtor or creditor, or surety and debtor or creditor are not qualified to bear witness in a case when the interests of one of these parties are involved. (31)

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(27) Sanhedrin 26b
(28) Sanhedrin 27b
(29) Ibid (Cf. Rabbi Jehudah's view)
(30) Kedushin 74 a.
(31) Maccoth 5ff;Cf. Kethuboth 21a.

Partners may testify for one another in cases where the property which they have in common is not a fact in issue. (32)

A vendor may testify in favor of the vendee concerning the property sold to him, if the property is personal and he does not guarantee title, but he may not testify in case of real property, because there he guarantees the title and he is a party in interest. (33)

A guarantor may testify in favor of the debtor, provided, however, that the debtor has sufficient property to satisfy the debt of the creditor, otherwise the creditor couldrecover from the guarantor and he would thus become an interested witness. (34)

A surety cannot testify in favor of the debtor. In case of a surety, the creditor does not have to exhaust all his rights against the debtor before he comes to the surety. The surety is primarily or collaterally liable. The debtor may choose to sue the surety at once and he is, therefore, a party in interest. (35)

It is remarkable how modern this principle sounds. The law is not different today and a debtor may at any time go after the surety without exhausting his rights against the debtor.

P. Gamblers are disqualified if they make gambling their profession. The reason given is because they become totally absorbed in gambling and are no longer concerned with the welfare of men and the justice of society. Another reason is because

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(32) Babba Bathra 45a

(33) Babba Bathra 42b

(34) Babba Bathra 43a

(35) Babba Bathra 46b

their means for earning a living is illegitimate, relying on chance without doing actual work for it. (36)

Q. For fear their friendship might prompt them to testify falsely, the Rabbis have barred friends from testifying. By a "Friend" the Mishna tells us, we mean a close intimate friend such as the "best man" or Shushbin. Similarly, for fear that this prejudice might influence him, an enemy is considered an incompetent witness. Under this category would come people who, beacuse of ill-feeling existing between them, have not spoken to one another for a period of three days. This, however, does not seem to be the predominating view, andaccording to the weight of opinion, friends or enemies are not disqualified as witnesses.(37)

Best Evidence Rule.

By the best Evidence Rule we mean that the very best evidence must be produced to prove any fact in issue. Secondary evidence is admissible only where the best evidence cannot be produced or is difficult to be produced and the court will then allow secondary evidence to be admitted, which is practically the best evidence under the circumstances.

In modern law written documents properly executed constitute the best evidence obtainable, But in some cases we will dispose of the best evidence when the court is satisfied that secondary evidence willsuffieiently prove the case.

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(36) Sanhedrin 24b

(37) Sanhedrin 27b

Suppose a document is recorded in some court outside of the city or state, the best evidence in this case would be to produce the original document. But the courts in a case of that kind would allow an authenticated copy to be introduced in evidence. (38)

Similarly we admit in evidence declarations against one's own interests and statements made within the regular course of business, where there is no other available evidence.(39)

In modern law ancient documents, thirty years old or more require no other proof and are admitted in evidence under the ancient document rule. In Jewish law, however, the case is different. Ancient documents are subjected to a more rigorous examination and always carry with them a suspicious character. (40)

Examination of Witnesses.

In American courts all witnesses testify under oath, The party against whom testimony is to be offered may require the witness to be sworn on his voir dire, as to whether he has an interest in the case or not. In Jewish law, the witnesses do not testify under oath, but the party may require the witness to take an oath that he knows of no testimony in his behalf. (41)

In England and other countries in Europe, there has been a custom of kissing the Bible before taking the oath, but this is now considered repulsive and a relic of idolatry.

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(38) Cf. Z. Frankel D.G.B. p.413 ff.
(39) Shebuoth 45a
(40) Cf. Z. Frankel 415 ff.
(41) Shebuoth 31a

In many European courts they still require the Jew to keep on his hat and swear by the Penteteuch. Other courts require the Jew to undergo certain formalities such as putting on the shroud and repeat a series of curses read to him, which shall befall him in case he is not telling the truth. But this also has been done away with in most of the civilized countries, and even in the half-civilized countries, this custom is gradually disappearing.

The testimony of a witness is to be given viva voce, in the presence of the court, and in the presence of the defendant according to the Jewish practice. In this way the court will have a chance to observe his behavior and the defendant will have a chance to cross-examine the witness, so that the truthfulness of the statement may be assured. But although the witness is subjected to cross-examinations in order to ascertain the truth, the court will allow him to make use of a written document in order that he may refresh his memory.

In civil cases the process of examining witnesses is very simple. The witnesses would be summoned to appear, the testimony would be taken and the case decided according to its merits. A preponderous of evidence on either side was sufficient to decide the case. In criminal cases, however, the process of examining witnesses was rather a difficult one.(42) The mode of examining witnesses was uniform. A series of

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(42) By criminal cases, Imean offenses which are punishable by death.

questions fixed by law was propounded by the judges and no deviation therefrom was permissible. Two sets of questions were put before the witnesses, a voir dire examination, ascertaining the fitness and competency of the witness inthat particular case, and a cross-examination concerning the facts to which he is testifying, ensuring the veracity of his testimony.

The witnesses, in a criminal case would be brought into the court to testify. The plaintiff was summoned to appear and be present at the trial. At no time would the case be fully decided before the appearance of the plaintiff, although the examination might have started in his absence. (43)

The court would adopt every means to confuse the witnesses, so that if they plotted against the defendant, their plot would have been discovered by means of this process. Thus, the witnesses would be made to walk from place to place and from one room into the other in order that their plotting mind, if they have been plotting, would lose its balance in the strain. They were then told of the seriousness of the case, that through their testimony inocent blood might be shed, and that unless they were sure of the guilt of the defendant they should withdraw from testifying. (44) For once the defendant is found guilty, there can be no reparation as in the case of a civil trial, where reparation could be made by making good the loss in money. Onthe other hand, they were also told that if they

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(43) Sanhedrin 79b

(44) Sanhedrin 32b

if they knew the facts in the case and they were sure of the truth of these facts they were duty bound to testify. Similarly they were told that opinion evidence or circumstantial evidence is unknown in Jewish Law. The Jewish Law requires actual eye witnesses and no other testimony is allowed in criminal cases. (45) But, if after these admonishments they would still insist on testifying, they would then be interrogated concerning all relevent circumstances of the case. These questions were merely with reference to time and place, the object being that this testimony might be overthrown by proving an alibi against the witness, which entailed upon the perjurer the penalty of death.

Upon receiving the answer from the witnesses that they actually saw the crime committed, the following questions were put to them:

1. In what cycle of the jubileum have you witnessed this case?
2. In what year of that cycle,
3. In what month of the year.
4. On what day of the month.
5. On what day of the week.
6. On what hour of the day.
7. In what place.

These seven questions were absolutely required. The answers to these questions were indispensible, and it is easily to be seen that if the witnesses were falsifying, an alibi could have been easily proved, and that satisfactory answers to these questions were more or less sufficent indications of

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(45) Sanhedrin 37ff.

the truthfulness of their statements. (46)

The Bedikoth, consisting of questions referring to the commission of the crime were not limited to any particular number and each individual judge would adopt his own method of investigation. The more thorough the examination, the better. First, the witnesses would be asked whether they knew the person assassinated, if they had cautioned the assassin of the gravity of the crime, and if any time had elapsed between their cautioning and the perpetration of the crime. This is an essential point in evidence, for the Jewish Law does not recognize the maxim: Ignorantia legis neminem excusat. The perpetrator must be warned against committing the crime and the commission of the crime must have taken place before he had time to forget that warning. (47)

Each witness was examined separately and apart from the other witnesses, so that if they were falsifying they would not have a chance of making their testimony correspond, by listening to the evidence rendered and to arrange it accordingly. If any discrepency should occur between testimonies of the different witnesses, the entire evidence would be rendered invalid and the accused would be allowed to go free. (48) The rule in Jewish Law is that all the evidence rendered in any case, regardless of the number of witnesses, is considered one testimony, and if one witness had been disqualified, the entire

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(46) Sanhedrin 40 ff.

(47) Ibid

(48) Ibid

proof would fail.

But, if one of the witnesses is unaware of some details, or even if there is a slight discrepancy with regards to minor details, immaterial to the fact in issue, the testimony would stand. Thus, in a criminal case, if one witness said that the culprit was attired in black and the other testified that he was attired in a white garment, the testimony would not be considered contradicted, because this fact is immaterial to the cases in issue. If, however, there is a discrepancy as to the kind of the weapon that was used by the culprit and one said that it was a knife, while the other testified that it was a dagger, the fact is material to the issue and the entire testimony would be invalidated. Similarly, in a civil case, if the contradiction refers to the object in which the money was contained, it wis immaterial, but if there is a contradiction as to the number of pieces of gold, such a contradiction is material and the entire evidence would be rendered incompetent through that.

Due to the uncertainty, in many cases, as to which day would be pronounced "Rosh Hodesh", the first day of the month, a contradiction with reference to the exact day of the month, provided the discrepancy does not exceed <u>one</u> day, would be deemed probable and would not effect the evidence in that case.

All evidences must be rendered by word of mouthand in a language understood by the court. There were no court-interpreters inthe Jewish courts and it is for this reason that the members of the Senhedrin were reputed to know all of the spoken languages of their time. But if the judge understands

the language of the witness but cannot reply to it, an interpreter may be employed to communicate with him. (49)

After the evidence had been examined and cross-examined, the case is decided and if the witnesses come and say that they have acquired additional evidence, either for or against the defendant, we do not listen to them. The Rabbis felt confident that before the court had reached that stage of the case there was not a scintilla of a doubt left in the mind of any one, that the case was thoroughly investigated and properly decided and it is, perhaps, undue influence that prompts the witnesses to back down on their previous testimony.

It is always within the discretion of the court to pass upon the fitness of the witness to testify. Thus, the court may, if it sees fit, refuse to accept the testimony of a certain witness if they believe that such witness is liable to testify falsely. But the court, however, cannot refuse to try the case of anindividual, who, has in previous instances attempted to produce false witnesses. Such a case is recorded of a woman, who has in a few cases produced witnesses, who were discovered by the court to have testified falsely. Thereupon, the judge, in a subsequent case refused to accept the testimony of witnesses on her behalf. This ruling, however, was shown to be erroneous and no witness may be accused of falsifying, unless it has been proved by sufficient evidence that the testimony rendered was false.

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(49) Maccoth 6b

The Law concerning false witnesses.

The rule in the Jewish Law of Evidence concerning false witnesses is very singular. According to this rule witnesses may be impeached, if two other witnesses prove an alibi against them, that is to say, that two other witnesses come and say that the testifying witnesses have been with them on that day, and could not, therefore, have witnessed the fact to which they are testifying. The words of the Mishna are עד שיזימו את עצמן , the impeachment must concern their own person. If the other witnesses say that the assassin has been with them all day, or that the assassinated had been with them, precluding the possibility of having been killed as it has been testified, it is yet insufficient to declare these witnesses as false. The alibi must refer to the person of the witnesses testifying. (50) This rule seems very peculiar. The Sifre and the Tosefta seem to contradict the statement of the Mishna and declare that the witnesses may impeach their own testimony and also that of the other witness, provided this contradiction takes place before the testimony has been thoroughly investigated and the evidence completed. It is, however, in perfect accord with the general rule that the witnesses cannot back down on their testimony after the evidence had been passed upon by the court. It further shows that the proving of an alibi with the reference to the whereabouts of the witnesses is not the only way of impeaching testimony. Thus, we can readily see that the explanation given to the statement אין נעשין זוממין עד שיזימו את עצמן following the

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(50) Cf. Maccoth 5ff.

word כיוצא is not authentic, as Geiger justly conceives it, but has been misunderstood and incorrectly explained. (51)

Before we may impeach witnesses and subject them to the punishment entailed to them as false witnesses, the entire set must be proved to have testified falsely. This principle was propounded by Simon ben Shetach, who considered the execution of one impeached witness by Judah ben Tabbai as having unduly shed innocent blood. The reason for this principle is, no doubt, the general underlying rule that only competent witnesses could be impeached and since the testimony of one witness is by itself incompetent, it cannot be impeached.

Another principle under this heading is, that false witnesses can only be impeached and are subject to the same punishment which the party against whom they testified would have received, if the case had already been decided by the court, and provided that they were impeached prior to the execution of the would-be culprit. This principle strange as it may seem, has been set forth with the intention of refuting the contention of the Sadducees that the witnesses are to receive death punishment only if the person against whom they plotted, was executed.

Much has been written and said concerning this principle.

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(51) Cf. Baehr's "Gezetz ueber falsche Zaugen" There he argues that the rule found in the Sifre that witnesses cannot be impeached after their testimony had been completed, is not to be found anywhere else. But upon a moments deliberation it becomes evident that his Thesis is erroneous. It is true that their testimony cannot be impeached after the evidence is complete, by a contradiction, but it still may be impeached by outside witnesses, or by an alibi concerning the whereabouts of the witnesses on the day of the commission of the crime.

The Talmud already felt the absurdity in saying that if the person plotted against had been killed, the witnesses cannot be made to suffer the consequence of their criminal plot, while if he had not been killed, the witnesses would suffer death. Thus, an attempt has already been made by the Talmudists to overthrow this principle by a process of a fortiore, namely, if the witnesses are killed in case the supposed defendant did not suffer death how much more that they should be subject to such punishment if death had been inflicted upon their victim. But if we observe closely the reason for this principle we find that it is merely a result of the bitter fight between the Pharisees and the Sadducees. They have laid down this principle simply to show that there is only one interpretation that we may follow and that is the interpretation of the Pharisees. The case of Judah ben Tabbai is a clear indication of this fact. Inthat case, Judah ben Tabbai inflicts death punishment upon one witnesses whose testimony had been impeached, merely to show that the Pharisees are the only authorized expounders of the Jewish Law.

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# C H A P T E R XI.

## EVIDENCE AS A RESULT OF HAVING A BETTER ISSUE.

Its meaning and importance in Evidence.

The Miggoh or evidence as a result of having a better issue is singularly and peculiarly Jewish. Properly, it should be treated under presumptions, because the principle involved is nothing short of a presumption, that the defendant is telling the truth, since he had a choice to keep silent altogether or raise a better issue. However, I am devoting a chapter to it because of its Jewish characteristics and the importance allotted to it in the Jewish Law of Evidence.

The word is Aramaic and means "since". It is elliptical and stands for; since he could have done otherwise we say that the reason he chose to do that is because it is the truth. The term Miggoh is unknown to the Mishna, but the principle is found in the expression of המה שאסר הוא המה שהתיר , the mouth that prohibited is the very mouth that permitted, or the mouth that tied is the very mouth that untied. (1) Thus, we find that if A says to B,:this field once belonged to your father but I purchased it from him, he is believed because he was not bound to say that it ever belonged to B's father. Similarly, if a woman comes and says that she was once married but she is now divorced, we believe her on the same principle. (2) The Miggoh is also the reason for the norm, that he, who returns a certain sum which he claims that he had found need not take an oath if the loser claims that he lost a greater sum than the one returned to him by the finder. (3)

(1) Kethuboth 15b
(2) Ibid 22a
(3) Gittin 48ff.

But not only is the principle of the Miggoh peculiar, but it also seems to be in direct contradiction with another principle laid down in the Talmud and which is often quoted as authoritative. If one makes a partial admission of a debt, the court may impose an oath upon him for the balance, although if he had denied the entire amount the court could not have imposed such an oath. Rabba, in explaining the reason for this principle says: This debtor presumably owes the entire sum and originally intended to deny it all, but he did not have the courage to deny it all and he, therefore, makes a partial admission. (4) Now, why should we not say in that case also, that since he could deny it all and be exempt from taking an oath, we should also believe him in the case where he makes a partial admission because of the Miggoh? Or, on the other hand, why should we not say that the man did not have the courage to deny the fact that the property once belonged to B's father because such a thing might someday become known through the testimony of someone else, or that a married woman had not the nerve to claim that she was never married, nor the finder to deny the finding of a sum altogether. There is not the slightest reason for applying different principles where the facts in the case are practically analogous. Moreover, why should we not rather suppose that they are taking advantage of this principle knowing that it is safer to subject oneself to a prohibition for a while and thereby profit by the principle of: "The mouth that tied is the mouth that untied". It seems, therefore, that even the Talmudists have already recognized the inexpediency

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(4) Babba Metzia 3b

and singularity of such a principle, unknown to any other legal system. Whether it was prompted by public policy, in order to enable one to tell the truth and yet not subject himself to any liability, is merely a matter of speculation and the hypothesis is as vague as the very principle of the Miggoh. The principle is,no doubt, very old. The basis for it is the rule governing admissions and confessions. We know that confessions are inadmissible in Jewish Law, under the precept of: " A man is related unto himself". It follows from that, that the testimony against himself is of no value and he may withdraw it anytime he may choose to do so. Hence: the mouth that tied is the mouth that untied. This originally applied, perhaps, to both, criminal as well as civil cases. Later, expression was given to the precept:the admission of the defendant in a civil case is the best evidence obtainable, Hence; in any case once a statement was made by the defendant it was practically irrebuttable. The Miggoh was, therefore, a necessary rule meeting thepeculiarcases that would ensue as a result of statements made by the defendant. The latter,on the other hand, would rule out practically all statements made by the defendant, and a new principle was established that a part confession should raise a presumption in favor of the plaintiff and the defendant be obliged to take an oath for the balance.

Examples of this principle.

If A should say to B that he owes him a hundred dollars and produce a notewhich B claims that he had paid . A then claims that the hundred dollars paid to him by B was upon a different

transaction, the note is void because A admitted that he received one hundred dollars from B. But if the one hundred dollars were paid to A by B not in the presence of witnesses the note would be good because of the Miggoh. A could just as soon deny entirely the receipt of that sum. (5)

The force of this plea does not prove a fact conclusively, it merely tends to raise a presumption and if there is a presumption existing, the Miggoh would have no effect. (6)

Similarly the plea of the Miggoh is insufficient to bring about a change in the status quo. For example, if A claims a certain sum from B on a written instrument which B claims is forged, and A admits that it is forged but claims that he lost the genuine instrument and reproduced an exact copy thereof, the Miggoh in this case is inadequate to warrant a change in the status quo and B must produce better evidence that A owes him the money before he could collect. But, if B challenges A's title to some property of which A is in possession and A claims that he has a deed which B says is forged. A, thereupon, admits that he lost the original instrument and that the deed which he holds is a reproduced copy, the Miggoh would, nevertheless, give him the right to retain his property because he could just as well have said that the instrument was genuine.

The Miggoh has no force where a presumption in favor of the other is raised through the testimony of witnesses. Thus, if A and B both claim title to a certain property by virtue of

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(5) Shebuoth 41ff.

(6) Babba Bathra 5a

their fathers title, one introduces witnesses showing that it belonged to his father, while the other introduces witnesses showing that he was in possession for three years, the fact that A could have said that he purchased it from B (Miggoh) cannot enter into this case, because a presumption of B's title was raised by the testimony of the witnesses that it belonged to B's father. (7)

A forced rule has been expounded from the statement found in Kethuboth 23, where one witness testifies that a woman had been divorced and another that she had not been divorced there are two witnesses for the marriage and one witness for the divorce and the woman is therefore not allowed to remarry. From this it has been concluded, that an alternative not to speak does not constitute a Miggoh, for in this case, should a Miggoh principle apply, the woman should have been permitted to remarry, because the witness who testified that she was divorced could have kept silent altogether. (8) This is, however, too forced and does not at all follow. Had that witness kept silent, there would still have been one witness to the marriage and the woman would not have been allowed to remarry. Moreover, this case is implied under the above rule, that a Miggoh cannot overcome an existing presumption, and even if there was one witness against one, the woman's status of marriage was proved and she is presumed

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(7) Babba Bathra 31a

(8) Kethuboth 21ff.

to remain inthat state until the contrary has been proved for which the Miggoh is inadequate.

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# C H A P T E R XII.

## W R I T T E N D O C U M E N T S.

Their force and effect.

Although we usually understand by writing more than mere paper and ink, in the Law of Evidence we emphasize the physical thing when we speak of writings. Thus certain transactions are only good if the terms of the agreement between the parties have been put down in writing. An agreement in writing signed by the proper parties and witnessed by competent witnesses is the best evidence in modern law. In Jewish Law, oral testimony is just as binding in any case. In fact oral evidence is preferable and it bases its opinion upon the scriptural statement: "Through the testimony of the mouth of two witnesses shall a fact be established".

The Talmud speaks of two kinds of written instruments. An ordinary instrument signed by two witnesses עדים and a plaited instrument פתקא , which is folded and the name of the witnesses, three in all, were signed on the back of the instrument between these plaits. The reason given for introducing the folded form of an instrument is very trite. It was, it is related, a priestly town and as priests are reputed to be hot-tempered they would become excited and divorce their wives. The Rabbis, then, decreed to make it difficult to write a divorce document and meanwhile the priests would become appeased. (1)

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(1) Babba Bathra 160

A written document to be valid must contain the names of the parties,the place, and the date on which it was written, But if the date had beenleft out it is valid,nevertheless. If, however, the wrong date was inserted, Rav Huna seems to be of the opinion that it would invalidate the entire instrument. (2) This view is very modern. The law today is precisely the same. If a note is not dated it is negotiable and valid in every respect. But if the date was changed, even though the correct date was inserted in place of the wrong date, the entire instrument is thereby invalidated.

All documents must be written in the presence of the parties in interest. But, if the debtor authorizes two witnesses to write it and to sign it, it is sufficient. (3) The instrument should be signed by the proper parties and the witnesses should have read the contents and know the parties and their names. (4) It should end with the words:"Everything is valid and binding". But, if it is written and delivered in the presence of two witnesses although it was not signed,it is valid in every respect as a properly executed document. (5)

In case of an oral obligation even though the defendant admitted the debt in the presence of two witnesses, he may afterwards claim payment and shift the burden of proof upon the plaintiff. (6) But, if the plaintiff has in his possession, a written note evidencing the obligation, signed by the debtor, or

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(2) Babba Bathra 170a
(3) Ibid
(4) Gitten 19b
(5) Cf. Gitten 86b
(6) Babba Bathra 170a

written out by the witness before whom the defendant admitted the obligation and ordered him to write out the instrument, the burden of proof would always remain with the defendant. (7)

The dating of an instrument.

An antedated instrument evidencing an obligation is invalid, while if it is post-dated it is valid. But in case of a deed or a bill of sale even if the instrument is post-dated it is invalid. (8)

If an incorrect date had been inserted, such as Sabbath or any other holiday, on which, according to the Jewish Law, the instrument could not have been written, the instrument would be presumed to be post-dated and therefore valid. (9)

Since the date is not material, witnesses signed upon an instrument are not subject to impeachment by proving an alibi against them, for it is still possible that they have signed the instrument but dated it wrongly. (10)

An instrument may be introduced in evidence and considered valid without any further proof, (a) when it contains a recognizance clause by the court where it was issued; (11) (b) where the signatures of the witnesses could be directly identified by the court; (12) (c) when the signatures could

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(7) Bäbbä Bathra 40a Cf. Rashbam there
(8) Babba Bathra 171a
(9) Ibid
(10) Sanhedrin 32b
(11) Kethuboth 20b
(12) Kethuboth 18b

be identified by the court by comparing the signatures ad quem with the signatures ex quo;(13) (d) in case other witnesses recognize the signatures of the witnesses signed upon the instrument and vouch for their authenticity. (14)

If the witnesses recognize their signatures but claim that they signed under undue influence, fraud, or duress, their testimony is valid, but if the instrument bears a recognizance clause, we pay no heed to their statements. (15)

I have discussed the subject of "Written Documents" merely from the point of view of Evidence. I have attempted to show what documents are admissible in Evidence and under what circumstances. I shall not discuss here the details which must be complied with in the writing of instruments, such as the space required between the body of the instrument and the signatures, the kind of material which must be used,and the form required for the instrument or the recognizance clause. This should be treated in connection with the subject of "Instruments" a subject sufficiently important and deserving of a Thesis.

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(13) Kethuboth 18b

(14) Ibid

(15) Kethuboth 19b

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FINIS

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