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THE LAW OF EDUS IN THE TALMUD

by

Joseph B. Glaser

Submitted in partial fulfillment
of the requirements for the
Master of Hebrew Letters Degree
and Ordination

Hebrew Union College-Jewish
Institute of Religion
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Referee:
Professor Eugene Mihaly

J. Kleiner

DIGEST OF THESIS

This thesis, "The Law of Edus in the Talmud," deals with the Talmudic law covering oral testimony and the witnesses who render it.

In the Introduction, there is a brief exposition of the Biblical means of evidence, i.e., trial by ordeal, the admission of circumstantial evidence, the use of lot. It is shown how the Pharisees changed the law of evidence by placing their chief reliance upon the oral testimony of two eligible witnesses. The reasons for the change and the resultant problems are discussed. The concern of the Rabbis for a fair trial is mentioned and outstanding examples are referred to. The revulsion against capital punishment is pointed out and is discussed.

Chapter I, "Questioning of Witnesses," includes the methods the judges used to admonish and examine the witnesses, the types of questions that are asked, and the distinctions between the two major categories of questions. The law of retraction of testimony is also covered.

Chapter II, "Requirements," deals with such requirements for admissibility of testimony as: How testimony is combined, the necessity of direct observation, oral testimony and warning in criminal cases. The law of one witness, and the effect and standing of many witnesses,is dealt with, as is the law concerning the presence of parties at the trial. Throughout the chapter, distinctions are made between civil and criminal cases.

Chapter III, "Eligibility," takes up the categories of those who are ineligible to testify, thereby defining the kosher witness. Each category is discussed in detail, and exceptions are listed.

Chapter IV, "Safeguards," covers the hearsay rule, the prohibition of circumstantial evidence and the requirement of the presence of witnesses at the trial.

Chapter V, "Disqualification of Testimony," sets forth the law of Hazamah and Hakhashah, and explains the differences between the two. The chapter deals with false witness in general, as well.

The notes are collected in Appendix I at the back of the thesis. The notes to the Introduction follow immediately after the Introduction.

Appendix II contains the Bibliography. The Bibliography is in two sections. The first section contains a list of primary sources used, together with lists of all Biblical verses cited and all Talmudic tractates referred to. The second division contains secondary sources, and is evaluated, at the request of the referee.

DEDICATION

I lovingly dedicate this Thesis to my patient, devoted wife, Agathe, whose aid and encouragement helped so much to make this work possible.

PREFACE

It has been a most gratifying experience to have been involved in this study. Since evidence is a procedural subject, it has logically carried the student into many professional fields, so that he has had some insights into much of Talmudic law. Further, it has been inspiring to see how advanced and fully was the jurisprudence of our ancestors of two thousand years ago, as a time when brutality as well as apathy were the order of the day, to [illegible] self-incrimination and secrecy, were jealously guarded, yes, embattled rights even today; to discover a revulsion against capital punishment at a time when our own highly civilized society still cried out for bloody revenge against even mentally disturbed offenders who are impelled by their inner torments to violate our laws, to see the double leniency exerted by the Rabbis in the case of deserted women that they may remarry and again live in dignity and love - all this has been a most exciting and rewarding experience.

Without the meticulous and generous concern of my mentor, Professor Eugene Minsky, this endeavor could not have been in any way the rich and exciting learning experience that it has proved to be. His unselfish devotion of his time, his wisdom and his extensive knowledge of the law have labored inestimably to the successful completion of this work.

TABLE PREFACE ENDS

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INTRTABLE OF CONTENTS

The development of the law of evidence, from Biblical through Talmudic times, parallels, in a sense, the development of other legal systems. In another sense, it is unique. It is like the development of the Anglo-American Common Law in that, at its primitive beginnings, findings of fact were established by ordeal, in the case of each; and that, as the cultures served by the respective legal systems matured, the methods of finding facts matured, too.

An example of trial by ordeal and oath is found in Numbers in the case of the suspected adulteress. The passage there provides that a husband who suspects his wife, yet has no witnesses, brings his wife before the priest who adjures her. The priest then pronounces a curse upon her, conditioned upon guilt, writes the curse, then blots it into water, and she drinks. If her belly swells and her thigh withers, she is deemed guilty.

The Book of Joshua reports a case of trial by lot, as a means of determining fact. In this case, one of the children of Israel had looted at Jericho, in disobedience to a strict prohibition. The process whereby Joshua is to apprehend the criminal is described as follows:

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An example of trial by ordeal and oath is found in Numbers in the case of the suspected adulteress.[1] The passage there provides that a husband who suspects his wife, yet has no witnesses, brings his wife before the priest who adjures her. The priest then pronounces a curse upon her, conditional upon guilt, writes the curse, then blots it into water, and she drinks. If her belly swells and her thigh withers, she is deemed guilty.

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"...and it shall be that the tribe which the Lord taketh (upon whom the lot falls) shall come near by families; and the family which the Lord taketh shall come near by households; and the household which the Lord shall take shall come

near man by man."[2]

The passage goes on to indicate that circumstantial evidence was permitted under the Biblical law of evidence, in the case of bailment of an animal, providing that if the animal "be torn in pieces, let him bring it for witness; he shall not make good that which was torn."[3] We shall see that the Rabbis did not permit circumstantial evidence, infra.[4]

In addition to oath, ordeal, lot and circumstantial evidence, the Bible also clearly provides for witness as means of proof. There are numerous passages dealing with the law of witness, passages upon which the Rabbis were able to rely heavily in their successful attempt to establish witness as the chief evidentiary reliance in the Jewish law. Leviticus establishes the duty of an Israelite to testify: "If one sin in hearing the voice of adjuration, he being a witness, whether seeing or knowing, if he utter it not then shall he bear his iniquity."[4] The passage is used by the Gemara to clearly establish the duty to testify.[5]

The requirement of two or more witnesses in order to inflict the death penalty is laid down explicitly in the Book of Deuteronomy;[6] and the law dealing with the false, plotting witness is based there also.[7]

As this thesis shows, the Rabbinic formulation of the law of evidence called for the establishment of fact mainly through witness, thus doing away with lot, ordeal and circumstantial evidence. With the exception of the last mention-

ed, the development represents progress, and thus, as stated above, is like the historical development of the Anglo-American legal system in that it also represents maturation. The rigidity with which the Rabbis applied the requirement of witness, makes for, as we said, a unique situation, developmentally speaking. For, today, although there is some question of its basic validity, and much actual abuse of it in actual practice, circumstantial evidence has become accepted as an excellent means of finding proof. It is, as, after all, when properly applied, nothing but the scientific method of inductive logic, which, when applied in the laboratory, has caused society to rise high on the verities it has established. [illegible] What was the reason for this rigidity, this unyielding reliance upon witness as the chief means of proof, the refusal to accept hearsay testimony, circumstantial evidence, self-incrimination? Why were the Rabbis so insistent upon leaving behind the old Biblical methods of oath, ordeal and lot, and placing their emphasis squarely upon the requirement of two witnesses? [illegible] The answer is that the Rabbis were attempting to establish a consistent legal process. As superstition gave way to rationality in the ancient world, the illogical nature of the old forms became repugnant to the more progressive forces. In command of the political situation of the Jewish nation, at the time of the molding of the Mishna, were the Pharisees, who are noted for the progressive character of it-

of their thought. Concerned with establishing reason as the basis for court procedure, as well as in other legal areas, they sought to make the testimony of two witnesses the means of proof, as the most reasonable method they could employ. In order to establish it, they were compelled to view anything short of the testimony of two witnesses as not meeting the standard, and therefore inadmissible, are testifying only again. The task presented the Rabbis with many difficulties, the most critical of which was the problem of the false witness, or the contradictory testimony of two sets of witnesses. Since the reliance had been placed on the testimony of two witnesses establishing the fact beyond question, when two non-contradicting sets appeared and testified, there could be no fact. If such were the case, then the whole system would break down. One would cancel the other out, and there could be no determination of culpably false testimony. lity of the

Out of this dilemma grew the whole field of Edim Zomemim, plotting witnesses.[8] The law, briefly, was as follows: Two or more qualified witnesses must be confronted by[9] two or more other qualified witnesses who testify that the first set must be lying because they (the first set) were with the second set in a different place at the same time that the matter to which the first set are testifying was supposed to have taken place. This makes the first set Edim Zomemim; false, plotting witnesses, and consequently, subject (with certain limitations) to the same punishment or liability that would have been inflicted on the accused.[8] But wit-

nesses, who are confuted simply on the facts do not suffer this punishment, and it is questionable as to whether they suffer any punishment at all. In this manner, the Rabbis were able to preserve the basis of witness, while yet punishing some false witnesses. For in the case of the Edim Zomemim, the second set are not testifying as to the matter, the fact, but are testifying only against the other witnesses. Thus, the troubling question, "Which witnesses do you believe?" did not arise, as there was only one set of witnesses involved for each fact.[9] Furthermore, punishment for mere contradiction could be punishment for nothing more than an improper estimate. Knowing this, witnesses would not be likely to volunteer their testimony, and without a steady flow of witnesses, courts constructed as the Pharisees wished could not even begin business. On the other hand, there was no possibility of the witnesses misunderstanding the safety of testifying if the law of false witness were placed upon the basis as outlined, supra. There, the element of estimate is removed completely.[9]

A further anomaly involved in the law of false witness arises in regard to the time of execution of Zomemim. The rule insisted upon by the Pharisees is that the Zomemim can be executed (in a capital charge) after the judgment has been rendered against the accused, but not after he has been executed.[10] The illogical nature of this is obvious, as the Saducees are quick to point out. A fortiori, the Zomemim should be executed after execution. But again, the Pharisees

Another concern that emerges is the apparent concern that the Rabbis had about capital punishment. It is difficult to draw any conclusion but that the Rabbis were attempting to legislate it out of existence. The Bible, of course, provides for many capital penalties. Since the Pharisaic commitment was to preserve the letter of Scripture, the Rabbis found it necessary to legislate within the context of capital punishment. Moreover, the rules of evidence which they laid down made it next to impossible to convict a man of a capital offense.

In this vein, Tzernovich points out also that the underlying reason for killing the Zomemim after the judgment, was not on the literal basis of their tortuous exegesis, but because the Zomemim had misled the court, and that some deterrent against this must be provided so that people would know that the Beth Din meant business.[9] Finkelstein concurs, saying that the Pharisees were concerned with Hazamah as a crime against the state while the Sadducees could not, or would not, see that the abstract matter of testifying was an act.[10]

Uppermost among the concerns of Talmudic Law, is an extreme concern for fairness. The prohibitions against hearsay and self-incrimination are demonstrative of this. As is pointed out in Lann's article on Self-Incrimination,[11] Maimonides gives as the reason for the prohibition, the fear that a man may be obsessed with a masochistic desire ranging from the urge to self-punishment to suicidal tendencies.[12] It is interesting to contrast this reason with the reason underlying the prohibition in the Anglo-American law, i.e., the fear of torture. The reason for the distinction may be happily, the absence of the use of torture by the Jewish authorities. Of its existence we have no word.

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Proof exists that the Rabbis' motive in making it virtually impossible to convict in a capital case was in order to do away with the death penalty. The Mishna states:

"If a man committed murder and there were no witnesses, he is placed in a cell..."[14] The Gemara explains that this means "a disjoined evidence (the witnesses weren't standing together as is required)." Samuel said, "Without a warning (also required for conviction)."[15] Thus, the Rabbis did provide a penalty for capital crimes, indicating that they were well aware that under their rules, technically no person accused of a capital offense could be executed.

Further, Rab is reported in the Gemara, in the context of capital crimes, as saying: "We impose the punishment of lashes even on the ground of an evil report."[16]

Finally there are the following Mishnaic statements: "Eliezer b Azariah said: A Sanhedrin that puts one man to death in seventy years is called destructive." And, "Tarphon and Akiba said: Had we been in the Sanhedrin, none would ever have been put to death."[17]

NOTES TO INTRODUCTION

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1. Nu. 5:12 ff

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2. Josh. 7
3. Ex. 22:12
4. Lev. 5:1
5. B.K. 56a. See also Ker. 26a where a sin-offering is prescribed for those who refuse to give evidence.
6. Deut. 17:6; 19:15
7. Deut. 19:16 ff

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8. See Chapter V.

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9. Tzernovich, *Toledoth Halakah*, Vol. 1, Part 2, pp 330 ff
10. Finkelstein, *The Pharisees*, pp 142-144

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11. Norman Lann, "The Fifth Amendment and its Equivalent in the Halaka". Judaism (1955, Winter).
12. M.T. Sanh. 18:10

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13. See Chapter 2
14. Sanh. 9:5
15. Sanh. 81b
16. Kid. 81a
17. Mak. 1:10

CHAPTER I: QUESTIONING OF WITNESSES

SECTION A: HOW THE WITNESSES WERE QUESTIONED

Since the Talmudic law of evidence rested almost solely upon the oral testimony of witnesses[1], it follows that much attention was paid to the manner of questioning witnesses. The Bible commands: "Then shalt thou inquire and make search and question diligently."[2] The Mishna states the warning of Simeon b. Shetach: "Examine the witnesses diligently and be cautious in thy words lest they learn from them to swear falsely."[3]

The Mishna depicts the atmosphere of the court-room before the actual questions are put to the witnesses. "How are the witnesses examined? They are brought into a room and awe is instilled into them."[4]

Another mishna warns further: "Perchance ye do not know that we shall prove you by examination and inquiry. Know ye moreover, that capital cases are not as non-capital cases; in non-capital cases a man may pay money and so make atonement, but in capital cases, the witness is answerable for the blood of him and the blood of his posterity to the end of the world. For so we have found it with Cain that slew his brother, for it is written, 'The bloods of thy brother cry.'[5] It says not 'The blood of thy brother' but 'The bloods of thy brother' - his blood and the blood of his posterity. Therefore but a single man

was created in the world, to teach that if any man has caused a single soul to perish from Israel, Scripture imputes it to him as if he caused a whole world to perish; and if any man saves alive a single soul from Israel, Scripture imputes it to him as if he had saved alive a whole world. Again (but a single man was created) for the sake of peace among mankind, that none should say to his[12] fellow, My father was greater than thy father; also so that the heretic should not say, There are many ruling powers in heaven. Again (but a single man was created) to proclaim the greatness of[1] the Holy One Blessed Be He, for man stamps many coins with the one seal and they are all alike one another, but the King of Kings, the Holy One Blessed Be He, has stamped every man with the seal of the first man, yet not one of them is like his fellow. Therefore everyone must say, For my sake was the world created. And if perchance ye would say, Why should we be at these pains? - Was it not once written 'He being a witness whether[7] he has seen or known.'[6] And if perchance ye would say, Why should we be guilty of the blood of this man - was it not once written, 'When the wicked perish there is rejoicing!?"[7,8]

The Gemara continues: "How are they cautioned? R. Judah: We admonish them thus: 'As vapors and as wind without rain, so is he that boasts of a false gift.'[9] Raba said: 'As a maul and a sword and a[8] sharp arrow, so is a man that bears false witness against his neighbor.'[10]

facts. This formula consisted of seven questions called

Ashi said:[19] False witnesses are despised by their own employers as it is written, 'And set two men, base fellows, before him, and let them bear witness against him, saying, Thou didst curse God and the King.'[11] After this severe admonition concerning the seriousness of the testimony, the Mishna goes on the describe the order in which the witnesses are questioned: "Then they[12] are sent out save for the oldest[13] to whom they say: Tell us, how dost thou know etcetera?... After that, the second witness is admitted, and similarly examined. If their statements tally[14], they proceed to discuss the case."[15] Another example of the method used in determining the reliability of witnesses is proposed by R. Judah: "We speak to them thus: Who can tell that it is as ye say? Ulla objected: But don't we thereby shut their lips? - Then let them be shut. Has it not been taught: R. Simeon b. Eliezer said: The witnesses are moved from place to place[16] that they may become confused and withdraw?"[17] From this we see that although the rabbis depended almost exclusively upon oral testimony to establish the evidence, they were keenly aware of the necessity to safeguard against abuses, even at the risk of confusing the witnesses. Thus, the words "inquire," "search" and "diligently" are mentioned seven times, which

SECTION B: THE QUESTIONS - HAKIROTH AND BEDIKOTH

Once the witness was standing[18] before the court, a formula was utilized in order to establish certain basic facts. This formula consisted of seven questions called:

Hakiroth.[19] After the seven questions[19] were asked, the Bedikoth were asked.[20] Whereas the former type of question was formal, as we shall see, the latter consisted mainly of questions about the case, or about the testimony already rendered in response to the Hakiroth, and could be called cross-examination.[21]

The Hakiroth are listed in the Mishna as follows: "They used to question witnesses with seven inquiries: In what week of years? In what year? In what month? On what date in the month? On what day? In what hour? In what place? Rabbi Jose said: On what day? In what hour? In what place? Do ye recognize him? Did ye warn him? If a man had committed idolatry, What did he worship and, How did he worship it?"[22]

The Gemara discusses the origin of the seven inquiries. "Whence is this inferred? R. Judah said: Scripture states (in reference to a condemned city), 'Then shalt thou inquire and make search and question diligently'[23]; and it says, (in reference to the trial of an idolater), 'Then thou shalt inquire diligently'[24] and again it says (in reference to false witness) 'and the judges shall inquire diligently.'[25] In these three verses, as Rashi explains, the words "inquire," "search" and "diligently" are mentioned seven times, which exegetically, gives us the seven Hakiroth.

Although objections were raised to the artificiality of the seven question formula, the Rabbis stuck to it. In the Gemara, the following interesting exchange takes place:

"It has been taught: Rabbi Jose said to the sages: According to your view (of seven Hakiroth) one who comes and testifies: 'He killed him last night,' must be asked: 'In what septenate, etc.' But even though the questions are unnecessary, they are put to them in accordance with the view of R. Simeon b Elazar (who said that they should take the witnesses from place to place in order to confuse them.)[26] As pointed out above, the Rabbis were aware of the necessity of carefully safeguarding the somewhat perilous system of evidence they had decided upon using.

The general rule is that Hakiroth were limited to criminal cases.[27] The Gemara explains: "Why were civil suits exempted from this procedure? In order not to lock the door against borrowers (by making it so difficult to prove a loan or obligation that obligees would be frightened off.)"[27] This was in answer to the statement of R. Hanina who had cited scripture: "One manner of judgment shall ye have"[28] in opposition to the distinction between civil and criminal cases with regard to whether or not Hakiroth are used. Raba goes on to explain the distinction in the face of the lack of such a distinction in the Mishna which stipulates and lists the Hakiroth. "Our mishna refers to kenas (a fine, and thus in the area of criminal law); the other teachings to the admission and transaction of loans."[29] However, R. Papa disagrees with Raba who says that this mishna refers only to kenas, and says: "This and other teachings deal with the admission and transaction of loans. Here, however,

the suit is dishonest."[29] Thus, R. Papa also brings in the criminal element, though through another door, and the concomitant necessity of the Hakiroth. The Bedikoth, the informal cross-examination by the judges that followed the formal Hakiroth, are enjoined in the Mishna: "The more a judge tests the evidence, the more he is deserving of praise...Ben Zaccai once tested the evidence even to the inquiry about the stalk of figs."[30] The Gemara goes on to describe types of Bedikoth: "R. Hisda said: If one testified that he slew him with the sword, and another that he slew him with a dagger, it (their combined testimony) is not certain (and therefore inadmissible.) If one says, 'His clothes were black,' and the other, 'His clothes were white,' the evidence is admissible."[31] Here, then, we see an example of grievous divergence, and one of substantial agreement, between the individual testimonies of the witnesses offering themselves as a pair. At this point, the general rule can be formulated: The testimony of two witnesses, completely alike in the matter of Hakiroth, and substantially alike in the matter of Bedikoth, is necessary to establish their combined testimony as evidence.

We now return to the controversy in Sanhedrin 5:1, up between the sages and R. Jose. The sages had listed the Hakiroth as seven in all, dealing only with time and place. R. Jose had listed only three dealing with time and place, and had listed other pertinent inquiries dealing with the

Gemara[36] that if one says his clothes were black and the

people and the deed involved. The Gemara comments on the additions made by R. Jose, specifically the question, 'Do you recognize him?' "Our rabbis taught: Do you recognize him? Did he kill a heathen? Did he kill an Israelite? Did ye warn him? Did he accept your warning? Did he admit his liability to death? Did he commit the murder within the time needed for the utterance? Where he committed idolatry, which did he worship? Peor? Merkolis? How did he worship? Sacrifice, incense, libations or prostration?"[32] Commentator Bertinora indicates that these additional are not to be considered hakiroth, but are bedikoth.[33] The Gemara does not make any distinction.[34] This problem acquires a great deal of significance when we consider the distinction in terms of effect between hakiroth and bedikoth. As we have seen above, with bedikoth, a substantial deviation in the testimony of the pair of witnesses is required to invalidate their testimony. On the other hand, where hakiroth are being asked, we saw that the slightest discrepancy resulted in a nullification of the entire testimony. Before more precisely defining the difference between the two types of questions, let us examine a further discussion in the Gemara, which goes on to take up the problem that arises as a result of the confrontation of the statement in the Mishna[35] that voids the evidence if there is a contradiction in the testimony of the pair even in regard to bedikoth, and R. Hisda's statement in the Gemara[36] that if one says his clothes were black and the

other says that his clothes were white, the evidence is still admissable. The objection is raised from scripture[37], "and if the thing be certain..." "'Certain' implies that the evidence must be certain." R. Hisda resolves the conflict by restricting the requirement of certainty in bedikoth to facts of substantial relevance: "R. Hisda interpreted this as referring to the (color of the) cloth with which he strangled him, which comes under the same category as sword or dagger. Come and hear! If one says that his sandals were black, and other that they were white, the evidence is not certain! There too the meaning is that he kicked him with his sandal and killed him."[38] Questioning as to the color and size of figs is brought in to prove that this sort of reasoning is not applicable here, as the figs themselves could not be used as an instrumentality of murder, thus implying that contradictions of any sort[40] invalidate the evidence. There is consternation in the academy when it is realized that it is "ben Zaccai to whom this view must be laid, i.e., that he assimilated bedikoth to hakiroth." Composure is restored when the conclusion is reached[41] that this "ben Zaccai" is not the Jochanan ben Zaccai whose rulings cannot be taken lightly, but must indeed be a disciple, or at worst, this is Jochanan but in his earlier days. Thus, the view of Hisda is held to be the correct view, and contradiction with regard to non-salient facts does not render the entire testimony inadmissable,[42] in spite of the troublesome language of the Mishna.[38] mination, we are now in a

The Gemara adds another point of distinction between hakiroth and bedikoth: "In hakiroth, even if two say, We know, and one is in doubt (that is where there are three witnesses) their evidence (that of all three) is invalid. With whom does this agree? With R. Akiba, who treated three as equal to two...Now consider that both are Biblical. Why then should hakiroth differ from bedikoth? They said to him: How compare them? In hakiroth, if one says, I don't know, the evidence is invalid because it can't be refuted, but with bedikoth it can be refuted."[39] This is held so because hakiroth deal with time and place, which brings in the problem of hazamah, that is, refutation and condemnation of false, plotting witnesses. It would be impossible to condemn a plotting witness on the basis of an "I don't know" answer, so such a response to hakiroth is not permitted in order to avoid such an anomolous situation.[40]

In the Gemara, R. Judah states: "Testimony that is contradicted in bedikoth is valid in civil suits. Raba said: This logically refers to a case where one witness said: A black bag, and the other said, A white bag."[41] This refers to the bag out of which the money was taken, and is not considered a salient, material fact. But the Gemara goes on to point out what an instance of a salient fact would be: "But if one said, Black (old) money, and the other said, White (new) money, the testimony would be invalid (since the money is more of a salient factor in proving the case.)"[42]

Having made the above examination, we are now in a

position to generalize more safely concerning the definitive distinction between not hakiroth and bedikoth, but between those questions to which conflicting testimony invalidates all testimony, and those questions to which conflicting testimony does not invalidate all testimony. For surely we have seen that there are questions that are admittedly beyond the realm of hakiroth, conflicting testimony to which invalidate all the testimony yet rendered by the witnesses who now conflict. The rule would appear to be that testimony which conflicts that has been given in answer to a question that goes to the body of the matter, is inadmissible. This is as specific as the rule can become. The application of the rule must be left to the good judgment of the court and to following the pattern set by the examples given in the Gemara, as illustrated above.

CHAPTER II: REQUIREMENTS

One of the distinguishing characteristic requirements of the Talmudic law of evidence is the necessity of having two witnesses testify to a matter. (For discussion of exceptions, see Infra.) The Gemara[43] cites Scripture as proof that this requirement is Biblical: 'One witness shall not rise up against a man for any iniquity or for any sin.'[44] The Mishna[45] cites Scripture to the same effect: 'At the mouth of two witnesses, or three witnesses, shall he that is to die be put to death.'[46] The Mishna goes on to point out that the evidence of two witnesses is void, if one of them is disqualified.[47] (For discussion of disqualification, see Infra.)

The above cited verses are the chief Biblical reliance for the general requirement of two witnesses to establish a matter. In the case of the first[44] the statement is made as a general juridical proposition, and continues, 'at the mouth of two witnesses or at the mouth of three witnesses shall a matter be established,' indicating that any matter that is to be established in court must be done so by two or more witnesses. The second verse[46] is set in the context of a prohibition against idolatry, but as we saw, is used as a general legal rule.

Not only did one witness have no effect in a criminal charge, but he himself was charged with the crime of slander.[48]

The rule of two witnesses held true for civil as well

as criminal causes.[43] The Gemara makes a further restriction on the admission of testimony, stating that the evidence "of witnesses cannot be combined and therefore admitted, unless the witnesses simultaneously[53] saw what they state in the evidence. However, the Gemara goes on to show that this restriction does not apply in the case of monetary matters, but, as stated by R. Joshua b. Korcha, and upheld in the subsequent discussions, the witnesses may have viewed the matter separately.[49] Not only must the witnesses have been together at the time of viewing the matter in criminal cases, but they must also have observed the entire offense, that is, as a pair.[50] The Gemara quotes a dictum of the Tanna, Akiba, "The matter, and not half the matter."[51] However, in this gemara, attention is drawn to a situation of theft and sale on the Sabbath where simultaneous observation of the entire offense did not take place and yet the accused was convicted. In this case, the Rabbis and R. Jochanan are pitted against Hezekiah who is the Amora who quotes Akiba in this case.[52] Two other cases where Akiba's dictum is invoked are distinguished: one, in the case of a woman who has become engaged and subsequently has intercourse with another man, on the grounds that "each testimony should be considered a matter in itself, since the evidence of betrothal does not presuppose the evidence of intercourse." Thus there would be no "half-matter." This gemara then adds the case involving the pubic hair test of maturity[57] where one witness testifies to

a pubic hair in back and another testifies to a pubic hair in front. (In order to establish maturity, two pubic hairs must have been seen.) This is clearly "half a matter", says the Gemara, and such testimony is not allowed to be combined.[53] The same problem arises in the case of adverse possession. It is stated in the Mishna that if two false witnesses testify that the claimant to title by adverse possession used the land the first year, two others testified to the second year and two others to the third, then payment of restitution (what he would have lost had not the false witnesses been found out) is divided between them into three parts. This implies that the whole matter need not have been observed in this case, but that the independent testimony with regard to each of the years will be combined, and so the gemara rules.[54]

A further requirement in the admission of evidence is that all of the witnesses must testify together. Of course, as one Amora wonders, this does not mean simultaneously, as we know that the others are sent from the room while the first is questioned.[55] But it means that one must testify immediately after the other on the same day.[56] Again, however, this rule applies only to criminal cases, and not to civil cases. The distinction is made in this gemara, and in others. It is stated in one passage: "R. Nachman stated that in monetary suits disjoined testimony is admissible since Holy Writ prescribes 'By the mouth of one witness he shall not be put to death.'[57] It is only in a capital charge

that disjoined testimony is inadmissible; but in monetary suits it is admissible.[58] In another gemara, the question is asked about a case involving a note, where there is one signature (see Documents, Infra.) and one witness testifying. Surely this is a case of disjoined testimony. Yet, the two are combined and admitted.[59] Even where one witness has testified to a matter at one court and another witness has testified to the matter at another court,[64] the courts are allowed to come together and combine the testimony of the two.[60]

In its discussion of the basis for the disqualification of disjoined testimony, the Gemara expounds yet another requirement for the admission of testimony, i.e., that the witnesses must have seen each other while they were witnessing the matter.[65] "Rab[66] said: How can it be shown that disjoined testimony is disqualified? Because Holy Writ prescribes: 'He shall not be put[67] to death at the mouth of one witness.' But if it be taken literally as one sole witness, is this not already implied in the earlier context: 'At the mouth of two or three witnesses.'? What then is the meaning? To cover instances where two see the malefactor without seeing each other - then evidence cannot be joined."[61] However, Raba adds that, if both witnesses saw the admonitor (infra) or if they saw them both, the requirement of mutual awareness is filled.[62] As in the cases of the other requirements, where the cause is monetary, the requirement of mutual awareness is relaxed, and it is held: "In civil suits, witnesses needn't see each other and needn't testify together."[63]

This is illustrated[63] in a statement in the Gemara by Rab who says that an admission after an admission by a debtor of a debt, and an admission after a loan may be combined. Thus, if one witness heard the debtor admit that he owed money, and later another witness hears the same thing, or if one witness sees the actual transaction, and the other witness hears an admission of the transaction subsequently, their testimony can be combined in court.[64]

With notable exception, (i.e., documents) the general rule is that the testimony of witnesses must be oral. In several places, the Gemara quotes the well-known maxim concerning testimony, "from their mouths ('at the mouth of two witnesses ...shall a matter be established' says the Bible[65]) and not from their writings."[66] The Mishna further relies on the above verse[65] to prohibit the court from hearing the evidence at the mouth of an interpreter.[67] The Gemara reports a case where Raba did appoint an interpreter, but it is explained that he understood the testimony and used the interpreter only because he could not speak the foreign language being used.[67] The converse of the general rule is that a witness may not submit written testimony to the court. This is illustrated in the Gemara, which permits a person to write down his testimony in a document "and may through it give evidence even after many years." The succeding remarks of R. Huna and R. Jochanan, and the commentary of Rashi indicate clearly that if his memory is not jogged by the paper, but instead he relies solely on the memorandum, his testimony

is not admissible.[68] but that one is admitted for the purpose of al We have seen that the requirements for admissibility of evidence are not as stringent in civil cases as they are in criminal cases. And yet, the Gemara points out, Scripture says, 'Ye shall have one law.'[69] Although the Biblical context is dealing with the stranger in the land, the Amoriam are nonetheless disturbed by the challenge, and justify the difference with the rabbinic maxim 'So as not to close the door to borrowers.' It is feared that if proving an obligation is made too difficult by all the requirements stipulated in the case of criminal offenses, would-be lenders would become loathe to lend, and those who need to borrow would be the ones ultimately penalized.[70] It should be pointed out here that the Biblical 'at the mouth of witnesses' is controverted by this Rabbinical enactment.[71]

It is clearly stated in the Bible that two witnesses, or more, are required to establish a matter. In the matter of murder, scripture says: "Whoso killeth any person, the murderer shall be slain at the mouth of witnesses; but one witness shall not testify against any person that he die."[72] Another passage extends the prohibition against admitting the testimony of one witness, even in non-capital cases; in "One witness shall not rise up against a man for any iniquity, or for any sin, in any sin that he sinneth; at the mouth of two witnesses, or at the mouth of three witnesses, shall a matter be established."[73] The Sifre comments that this means that one witness is not admitted in either criminal

or civil matters, but that one is admitted for the purpose of allowing a woman to remarry, when he testifies that her husband is dead.[74] The Gemara also states this principle, covering also the case where a bearer of a bill of divorce from a husband in foreign parts is deemed to submit sufficient testimony to the effect that the document was written and signed, provided he recites the following: "In my presence it was written and signed."[75]

Another exception to the rule of two or more witnesses is stated in the Gemara: "Wherever two witnesses make him liable for money, one witness makes him liable for an oath."[76] Thus, when a defendent is confronted by only one witness testifying to his pecuniary liability, he is presented with the choice of two alternatives: either pay up what the witness says he owes, or take an oath that he does not owe the money. Again, the Sifre comments on the verse in Deuteronomy saying that it means that one witness is not admitted for the purpose of finding civil or criminal liability but comes to impose an oath.[74]

In the case of a suspected adulteress, where there are no witnesses to her defilement, she is forced to go through the ceremony of drinking the bitter waters as prescribed in Numbers in order to determine, in trial by ordeal, whether or not she has actually committed adultery.[77] However, the Mishna rules that the testimony of one witness to her defilement is enough to do away with the ritual requirement of drinking the water.[78] Not only is the ritual requirement dis-

posed of as a result[84] of the testimony of one witness, but the Mishna goes on to hold "And not so only, but even if a bondman or bondwoman (usually ineligible to bear witness altogether, infra) they are accounted trustworthy even to disqualify her from receiving her ketubah."[79] Since the receipt of a ketubah by a divorced woman means that she receives a pre-arranged financial settlement, it is here seen that one witness can effect a party's pecuniary punishment.[86] The Gemara explains the exception by using the verse "'One witness shall not rise up'[80] to prove that 'there be no witness against her'[81] means one witness is allowed here as, wherever Scripture says 'one witness' it means one, but where 'witness' it means two."[82]

The case of the heifer is handled the same way. According to Scripture, if someone is slain between two cities, and the slayer is not known, the nearest city sacrifices a heifer as a community ransom. If the slayer is known, of course, the heifer need not be slain.[83] As in the case of the suspected adulteress, if one witness can be found who saw the slayer, the heifer need not be sacrificed, although the slayer cannot be put to death on the testimony of the one witness.[84] Thus we see that in another ritual matter, one witness is sufficient. The Gemara here bases the acceptance of one[85] witness with regard to the heifer on the verse 'And if it be not known who hath smitten him...'[85] Here, the Gemara points out, it is known who has smitten him, and even though by only one witness. Thus the neck of the heifer

need not be broken.[84] At very important rule of evidence is laid down in the Mishna by "Rabban Gamaliel: "And the rule was established to suffer a woman to marry again on the evidence of one witness, from a witness (even hearsay!) or from a slave or a woman or a bondwoman (these last three being ordinarily ineligible; infra.). In this mishna, Rabbis Eliezer, Joshua and Akiba are recorded as registering strong dissents.[86] The problem involved here is the one of the married woman whose husband becomes unaccounted for either during wartime or a trip to distant parts. Under either of these circumstances, with a requirement of two kosher Jewish witnesses in force, she would have a most difficult time legally proving that her husband was dead. In battle there is confusion; and in far-off lands, a dearth of kosher Jewish witnesses, as well as the problem of subpoena. Thus, this important leniency.

There occurs the problem: How are more than two witnesses to be dealt with, when they come as a group with the intention that their testimony be combined? Scripture states in one place, "At the mouth of two witnesses or at the mouth of three witnesses shall a matter be established."[87] In another place, we find, "At the mouth of two witnesses or at the mouth of three witnesses shall he that is to die be put to death."[88] The Mishna makes it clear that three or more coming as a group are to be regarded as two.[89] Once the testimony is combined, it is deemed an independent entity, and there is no numerical value with regard to its source. This

has particular bearing when the problem of contradiction and refutation arises (Infra.) as the statement is made in this mishna: "Like as two cannot be put to death (as plotting witnesses) unless both are proved false, so with three, unless both are proved false, so with three, unless all three are proved false." Similarly, two witnesses can prove false a hundred witnesses, on the same reasoning, that once the testimony has been combined, it is of equal value to other testimony that has been combined, without regard to the number of witnesses whose testimony made up the combined evidence.[90] The Gemara is in accord, as stated by Akiba: "The third witness is mentioned in the Torah to increase his responsibility by making his status equal to the other two."[91]

The Mishna goes on to show that this principle has bearing also in the field of ineligibility of witness. (Infra.): "As the evidence of two witnesses is void if one is a kinsman or not qualified, so with three and so with a hundred." R. Jose distinguishes between capital and non-capital cases by applying the rule to capital cases only. In non-capital cases, he points out, the evidence can be sustained by the remaining eligible witnesses (as long as there are two.) A further distinction is made in the mishna when it is allowed that the evidence can be sustained by the remaining eligible witnesses if it can be shown that the ineligibles did not join in the warning. If they did join in the warning, however, all the witnesses are declared ineligible on grounds of association.[92]

The Gemara goes on to refine this point: "We ask the witnesses whether they have come (on the scene) as mere onlookers or to give evidence. If they say, To give evidence, and one is ineligible, the entire evidence is disqualified, but if they say that they came as mere onlookers (the evidence stands.)"[93]

The Gemara, in taking up the question of the mishna "What could two brothers do that saw someone slaying a person?" shows a split of authority between R. Judah in the name of Samuel in the name of R. Jose on the one hand, and Nahman in the name of Rabbi on the other. It is Jose who says that the association of disqualified witnesses does not vitiate the whole evidence in monetary suits. It is Rabbi who says that even in monetary suits if they came to give evidence, ab initio, they disqualify the whole evidence.[94]

The general rule with regard to the requirement of the parties to the suit being present is stated in the Gemara as follows: "R. Ashi said that Sabbatai stated: Witnesses may be accepted even though the other party to the case is not present. Thereupon R. Jochanan remarked in surprise: Is it possible to accept evidence of witnesses if the other party is not present? R. Jose b Chanina accepted from him the ruling in the case where he was ill or where the witnesses were ill or where the witnesses were intending to go abroad and[95] the party in question was sent for but did not appear.[96] Thus we see that the general rule is that the parties must be present at the suit, unless there are extenuating circum-

stances as detailed above. The gemara goes on to supply a procedure whereby a party may provide for his absence without incurring jeopardy. Rab begins by saying that a document can be authenticated even not in the presence of the other party, but he is challenged in this by R. Jochanan. Raba then qualifies, and in so doing, upholds Rab by saying: "If however, he (the party not appearing) says, Give me time until I can bring witnesses, and I will invalidate the document, we have to give him time.[97] If he does not appear, we wait again three sittings of court.[98] If he still does not appear, we write a warrant against him to take effect after ninety days.[99] Thus it is shown that the rabbis were anxious to provide every opportunity for the parties to be present.

The gemara takes up the case of the minor who, not having legal status, cannot appear in court as a party. In taking up the case of R. Jeremiah versus his minor brother-in-law, R. Joseph b Hama quotes the law stated by R. Oshiah: "If a minor collected his slaves and took possession of another's field, claiming it was his, we do not say, Let us wait until he comes of age (to try the case) but we wrest it from him forthwith and when he comes of age, he can bring witnesses and then we will consider the matter."[99] Here, though the Gemara recognizes the principle of the necessity of the presence of parties, it is careful to avoid injustice in applying the principle. However, the gemara adds, in a case where the minor has a presumptive title from his father,

this (the wresting of the property from the minor) should not be so. This qualification further decreases the possibility of an injustice.[100]

Another statement in this gemara further establishes the general proposition that the presence of parties is given requirement precedent to the admission of evidence: "R. Ves, Judah said that Samuel stated that witnesses may be accepted even if the other party is not present." Mar Ukba, however, represents Samuel as having said this only where the case has already been opened and the party in question was sent for but did not appear.

Witnesses are not permitted to retract their testimony.[101] This rule is stated in a gemara that comments on the following mishna: "If witnesses said, This is our handwriting, but we were forced, we were minors, we were disqualified witnesses, they are believed."[102] In the ensuing amoraic comment, Raba and Resh Lakish are quoted to show that oral testimony cannot be retracted. R. Meir is credited with a baraitha which states: "They are not believed to disqualify it."[103]

CHAPTER III: ELIGIBILITY TO BEAR WITNESS

In order[111] to determine who is eligible to testify, it is necessary to establish the categories of P'sulei Edus, those ineligible to bear witness.[112] According to the breakdown given in Maimonides' Mishneh Torah, these are ten: Women, slaves, minors, idiots, deaf-mutes, blind, transgressors, self-abased, kinsmen, interested witnesses.[104] We now take them up in this order.

1. Women

The Mishna operates within an obvious context[105] of the general ineligibility of women to bear witness.[113] "This is the general rule: any evidence that a woman is ineligible to bring; these (dice players, usurers, etc., infra.) are not eligible to bring."[106] Another mishna states: "The oath of testimony (witnesses denying on oath that they know any testimony for a litigant) applies to men and not to women."[107] The Gemara comments: "How do we know? Because the Rabbis taught: 'And the two men shall stand:'[108] the verse refers to witnesses."[109]

However, women are eligible to testify in some matters.[114] In the matter of testimony by one witness to the effect that a suspected adulteress has been defiled,[110] a woman is heard as a witness to this effect so that the suspected adulteress need not drink the bitter waters that test whether or not she has been defiled.[115] Moreover, a woman witness is "accounted trustworthy even to disqualify her from receiving her

ketubah, the effect of which is to deprive her of the pre-arranged monetary settlement made in contemplation of divorce or widowhood.[111] Further, "the testimony of a woman is accepted with regard to identification of the type of blood."[112] Thus, if a woman testifies that a specimen of her blood before the court is not menstrual, and that therefore she is permitted to have relations with her husband, she is believed.

The Mishna permits a woman's testimony to be received when she testifies that her husband, with whom she had gone beyond the sea, is dead.[113] In a subsequent mishna, although Beth Hillel agrees with Beth Shammai in allowing her to remarry, the former prohibits her from receiving her ketubah, at first, but later changes its opinion to permit her to receive it.[114] The Mishna states that all are permitted to testify to a woman that her husband is dead, but excepts her mother-in-law, her mother-in-law's daughter, her co-wife, her husband's brother's wife and her husband's daughter.[115] The gemara explains these exceptions on the basis of possible hatred and fear of her squandering his money in a very realistic and interesting discussion on familial relations.[116]

Another case where the testimony of a woman is admissible is in the matter of establishing the arrival of puberty in a girl. Women are allowed to examine the girl in question for the signs of puberty and their testimony regarding their examination is received in court.[117]

With these exceptions, however, women are generally not

permitted to testify. The Gemara gives the basic underlying reason for this in discussing the verse which commands the appearance of "all thy males"[118] at the Temple on the festivals. It maintains that women are excused from fulfillment of all positive commandments that are dependent for fulfillment upon a fixed time because of the delicacy of women.[119] In another gemara, the view is put forth that a woman's time belongs to her husband, and that therefore she should not be expected to fulfil such positive commandments that are dependent for fulfillment upon a fixed time. Otherwise the very necessary tasks that keep a household, and consequently, society, operating smoothly, would be left undone.[120] Thus we see that the exclusion of women did not develop from a theory of the inferiority of the female sex, as so many have held is typical of Judaism, but, quite the contrary, stems from a consideration for their delicacy and from a realistic approach to social needs.[121]

Although the Talmud does not take up the case of the tumtum (one whose sex is doubtful) or the hermaphrodite (one who has double sex) with regard to their eligibility as witnesses, the Gemara does exclude them from normal male inheritance,[122] from the necessity of appearing on the festivals at the Temple (supra), and includes them with daughters in the matter of cursing the father.[123] It follows from this treatment that tumtum and the hermaphrodite are equated with women in the matter of eligibility, and so Maimonides holds.[124]

Then the eligible witnesses testify to what they have heard. The Mishna expressly disqualifies slaves[132] from giving testimony stating in two places: "This is the general rule: any evidence that a woman is not eligible to bring, these are not eligible to bring."[125] The Talmud make minors ineligible. The Gemara goes on to include slaves with women as ineligible to testify, on the reasoning[133] that the slave, like the woman (supra) is "not subject to all the commandments and should therefore be disqualified from giving evidence."[126] The Gemara offers a further rationale for the exclusion of slaves. Huna cites the verse "'Before the Lord God.'[127] One that has one Lord; this one (the slave) therefore is excluded because he has another lord (his human master)"[128] Of course, if a slave has been freed, he is able to testify. However, before he can exercize the rights and obligations of a free man, he must have acquired a deed of emancipation.[129] But a slave who has been set free is not believed as to what he witnessed while he was yet a slave.[130]

As in the case of women, so in the case of slaves there are exceptions to the general rule disqualifying them from giving testimony. A slave is believed to prevent a suspected adulteress from drinking the waters and can prevent her from receiving her ketubah.[131] Some develop these exceptions. Although neither women nor slaves can testify as to the death of a husband so as to permit another woman, his widow, to remarry, the Mishna allows eligible witnesses to testify to having received a report from women or slaves.

Then the eligible witnesses can testify to what they have heard, and the woman is permitted to remarry.[132]

3. Minors

Just as women and slaves are generally disqualified from testifying, so does the Talmud make minors ineligible. The Gemara gives the same explanation; i.e., that minors are not subject to all of the commandments.[133] As in the case of the slave, minors are not permitted to testify of what they witnessed when they were minors, but the following cases are excepted: "A minor may be believed when he says 'This is my father's handwriting; this is my teacher's, or my brother's handwriting. I remember that that woman went out (to her wedding) with a hinuma and uncovered head (indicating virginity); that that man used to go out from school to immerse (meaning he was a priest)' and other ritual matters. But a man is not believed when he says: So and so had a right of way in this place" and when he testifies to other civil matters involving possible pecuniary loss to a litigant.[134]

Since minors are disqualified, the question of how long one remains a minor is important. The general rule is that a minor becomes an adult at the age of thirteen with two hairs showing in the pubic region.[135] Some develop these signs of maturity slower than others, eventually giving rise to the question: Is this one a eunich and therefore eligible to testify? The ruling is that where no symptoms of being a eunich have developed, a person remains a minor

until he has passed middle age.[136] This gemara also takes up the case of the one who, although he has reached thirteen and shows the required signs of puberty, doesn't know anything of business. The Gemara places him in a semi-minor category which has the effect of disqualifying him from giving evidence with regard to business transactions.[136]

4. Mentally Deficient

The Talmud defines insanity as follows: "Huna holds that an imbecile is one who roams around alone at night, who spends nights in cemeteries, who tears his garments. R. Jochanan holds that any one of these will suffice.[137] The Gemara goes on to describe insanity: "If a man is sometimes in his sound senses and sometimes crazy, when he is in his senses he is regarded as a sane man in all particulars and when he is crazy he is regarded as crazy in all particulars."[138]

The Gemara then applies this to the case of giving evidence: "If a person possessed evidence affecting another before he became ineligible, and subsequently became ineligible, he is disqualified. If however, he possessed evidence before he became ineligible, and he subsequently regains his eligibility, he is qualified. This is the general rule: Whenever his beginning or his end was under a disqualification, he is disqualified. If at his beginning or his end, he was in suitable condition, he is permitted."[139]

and who is still blind.

5. Deaf-Mutes is called upon to testify. In discussing whether or not a deaf-mute can give a valid get, the amoraim go into his ability to testify. It is decided that since a mute cannot testify orally, which is a necessary condition (Supra, REQUIREMENTS) and that a deaf person cannot be tested by cross examination, also a necessary condition (Supra, REQUIREMENTS) deaf-mutes are not eligible to testify. However, R. Shesheth is quoted as allowing a dumb person to testify by signs that a husband who has gone beyond the sea is dead, so as to permit the widow to remarry.[140] This is in accord with the leniency already discussed in this type of case.[141]

The Gemara points out that the reason that deaf-mutes are allowed to marry and divorce (in spite of the fact that they are not permitted to testify) is only due to the fact that in their case marriage is rabbinically allowed.[142] In the following page, R. Eleazar expresses some doubts as to the soundness of the mind of the deaf-mute, which may have had some effect on the disqualification from testifying, but if so, such is not expressed.[143] In fact, another gemara holds that the deaf and the dumb "are considered to be in possession of their faculties for all purposes."[144]

6. The Blind

The general rule laid down in the Gemara that a disqualification at either the beginning or the end disqualifies one from testifying,[139] is excepted to in the case of the blind man who observed the matter before he became blind

and who is still blind at the time he is called upon to testify. Samuel feels that it is possible for a blind person to gauge the boundaries of a piece of land, but not a cloak as so many cloaks are alike. Shesheth says: even a cloak, as he can gauge the measurements of its length and breadth, but not a bar of metal. R. Papa says even a bar of metal for it is possible for him to gauge its weight.[145]

7. Transgressors

The Mishna lists as transgressors who are ineligible to testify the following: "Dice players, usurers, pigeon flyers, traffickers in seventh year produce."[146] The Mishna goes on to explain the last category: "R. Simeon said: Beforetime, they used to call them gatherers of seventh year produce (that is, produce of the sabbatical year, which is biblically prohibited) but after oppressors (tax farmers) grew many, they changed this and called them traffickers. R. Judah said: This applies only if they have no other trade, but if they have some other trade they are not disqualified."[147] The Mishna, after listing the categories, goes on to say: "Any evidence a woman is ineligible to bring, these are not eligible to bring."[148] The gemara to this mishna asks the question: "I infer from this that any testimony which a woman is qualified to bring, they are too?[149] R. Ashi answered: This is equal to saying that one who is rabbinically accounted a robber is qualified to give the same evidence as a woman."[150] Thus we see that the converse is not true, and that those whom the rabbis have deem-

ed transgressors are disqualified from testifying in all matters. Mare (nobility). Wherein do they differ? If he (the dice Not only is the court prohibited from receiving testimony from transgressors, but also witnesses who know that the other witness with whom they are paired is a transgressor, are enjoined from pairing with such a one to combine testimony. The Gemara asks: [154] "How do we know that a witness who knows his colleague to be a robber should not join with him? For it is written: 'From a false matter keep far.'"[151]

In addition to the categories listed in the Mishna, supra, who are transgressors by Rabbinical fiat, the Talmud, in a number of places, indicates that those who transgress Biblical negative commandments are also ineligible to testify.[152] The Gemara takes up the distinction between the Biblical transgressor who transgresses for the sake of gain, and the one who transgresses to be provocative. In the case of the former, all disqualify him. In the case of the latter, there is a controversy between Abaye and Raba. Raba would make him eligible, but Abaye would disqualify him too.[153]

Returning to the rabbinically disqualified transgressors listed in the Mishna, supra, we find the Gemara discussing them. "What does a dice player do? Rammi bar Hama said: Because it is an asmakta (a fortuitous agreement, i.e., gambling) and asmakta is not legally binding (and therefore taking the winnings is tantamount to illegal possession.) R. Shesheth said: Such cases too do not come under the category of asmakta (which he considers to be something else)

but the reason is that they are not concerned with the general welfare (stability). Wherein do they differ? If he (the dice player) acquired another trade. We learned in the Mishna: R. Judah said: '...If they have other means of livelihood, they are eligible.' This proves that the ruling of the Mishna is for the sake of the welfare of humanity, which refutes Rami bar Hama."[154] Thus the Talmud shows us the important rationale for disqualification of the transgressors listed in the Mishna. If they do not have the welfare of humanity at heart in the pursuance of their life's work, they are not deemed responsible enough to bear witness. The giving of evidence was rightly deemed by the rabbis as a function affected with the public interest.

Not only was a lender on interest disqualified, but a borrower as well. Raba changes the vocalization of the word m'laweh to make it read "loan" instead of "lender" thus disqualifying either party to the illegal transaction.[155]

A dispute develops in the Gemara as to whether a pigeon flyer is a racer of pigeons or one who decoys pigeons away from their owners. The Amora who feels that it means a decoyer claims that pigeon flying is in the same category as dice playing, and therefore the Mishna must mean something else, i.e., a decoyer. However he is answered by the contention that in pigeon racing, one must rely on both the ability of the pigeons as well as the ability of the trainer (whereas with dice, barring tampering with the cubes, no ability is required) so it is different and thus pigeon

racer is meant.[156] The Gemara finds in non-Mishnaic tannaitic sources additions to the list in the Mishna, supra. "A Tanna taught: (To those enumerated in the Mishna) were added robbers and those who compel a sale. But are not robbers (disqualified) by Biblical law (on the basis of 'Put not thy hand with the wicked to be an unrighteous witness'?)[157] Only It was necessary in respect of one who appropriates the finds of a deaf-mute, an imbecile or a minor. (Such a one would not necessarily be considered Biblically a robber, but the Rabbis deemed him such.)"[158] Further additions are listed: "A Tanna taught: They further[161] added to the list herdsmen, tax collectors and publicans." But the gemara goes on to qualify, making ineligible only shepherds in Palestine, because they let their sheep graze on the lands of other Jews, not be able to tether them. Tax collectors are made ineligible only if they are found to make exhorbitant collections.[158]

The Gemara also records the case of certain grave diggers who buried a corpse on the first day of Shmini Atzereth. They were disqualified by R. Papa.[159] A requirement pertaining to rabbinically ordained transgressors, i.e., those enumerated in the Mishna and added in the Gemara, supra, is that they must be proclaimed ineligible at the Beth Din. In one case, where a certain deed of gift was witnessed by two robbers, and attempt was made to declare the deed valid on the grounds that the robbers in question

had not been proclaimed ineligible at the Beth Din. Raba frustrated this attempt by saying, "Granted that proclamation is required in the case of persons declared only by the Rabbis as robbers (those who force a sale, or those who appropriate the findings of a deaf-mute, imbecile or minor); must those defined as such by Biblical law also be proclaimed!"[160] Thus we see that it was only necessary to 'proclaim Rabbinic transgressors, but that Biblical transgressors were ipso facto ineligible. Also disqualified from testifying are those who are ignorant of the Law, on the reasoning that they do not know what is a transgression, and therefore are likely to transgress.[161] The Gemara states: He who is versed in Bible, Mishna and secular pursuits will not easily sin. ...He who lacks these, says R. Jochanan, is unfit to testify."[162] Also, "Our rabbis taught: Six things were said of the amei ha'aretz: ...We do not commit testimony to them; we do not accept testimony from them."[163] The Rabbis would not accept the testimony of a man against himself, the effect of which would be to incriminate him, to make him a transgressor. This is illustrated in the case against Bar Binithus where one of the witnesses charged that Bar Binithus had lent money on interest (a transgression) in his presence, and the other witness, in confirming this, said that he (the second witness) had been the borrower. Raba disqualified Bar Binithus (from ever giving testimony, since he was now a Rabbinically ordained transgressor.) The

objection was raised however, "But did not Raba himself rule: A borrower on interest is unfit to act as witness? (And hence, the court should not have accepted the testimony of the second witness, who by his own admission, proclaimed himself a transgressor since he was a borrower.) Consequently, he (the second witness) is a transgressor, and the Torah said, 'Do not accept the wicked as a witness.'[164] But Raba here[167] acted in accordance with another principle of his. For Raba said: Every man is a relative (infra.) in respect to himself, and no man can incriminate himself."[165] Thus, the portion of the second witness's testimony that incriminates himself, i.e., the part where he says that he himself was the borrower, is stricken from the record, and the other part is allowed to stand.

However, R. Joseph teaches: "If a man says that X committed sodomy with him against his will, he with another witness can combine. If however, he admits that he acceded to the act, he is a wicked man (and therefore disqualified) since the Torah says, 'Put not thy hand with the wicked to be an unrighteous witness.'[164] Raba said: Every man is considered a relative to himself, and no one can incriminate himself."[166] Thus we see that R. Joseph does not add the twist used by Raba who strikes out the self-incriminatory part of the witness's statement but retains the accusation against the defendant;[166] while Joseph, on the other hand, accepts the self-incriminatory statement for the purpose of completely disqualifying the witness.

Furthermore, a wife is treated as one's self in the matter of self-incrimination, so that one spouse cannot testify against the other.[166] The Gemara goes on to make clear that the self-incrimination rule does not extend to a man's property.[171] Thus, in a case where a man testifies with another that X committed sodomy with his (the witness's) ox, both the man and the ox and punished.[167]

Provision is made for repentence and rehabilitation of transgressors, whereupon the ineligibility is removed. The Gemara asks: "And when are dice-players considered to have repented? When they break up their checkers and undergo a complete reformation; so much so that they will not play even as a past-time.[172] A usurer is judged to have repented when he tears up his bills and undergoes so complete a reformation that he will not even lend (on interest) to a gentile. Pigeon trainers? . . . When they break up their coops and undergo so complete a reformation that they will not practice their vice even in the wilderness. Sabbatical traders . . . cannot be rehabilitated until another Sabbatical year comes around and they desist from trading."[168]

The Mishna indicates that punishment can also remove the ineligibility. "All they that are liable to kerithoth, if they have been scourged, are no longer liable to it, for it is written, 'And thy brother seem vile to thee',[169] when he is scourged, then he is thy brother."[170]

8. The Self-Abased

Also ineligible to testify were the self-abased. The Gemara states: "Our rabbis taught: He who eats in the market place is like a dog, and some say that he is unfit to testify. R. Idi b Abin said: The halacha agrees."[171]

Also considered self-abased are those who accept charity from Gentiles, and, according to R. Nachman, they are incompetant as witnesses, provided however, that they accept it publically, but not if they accept it in private. "And even if publically, the law is applicable only if, when it was possible for them to obtain it privately, they yet degraded themselves by open acceptance. But where impossible (privately) it is vitally necessary (and they are not disqualified)."[172]

9. Kin

The Mishna lists those kin who are not qualified to be witnesses: "Father, brother, father's brother, mother's brother, sister's husband, father's sister's husband, mother's sister's husband, mother's husband, father-in-law or wife's sister's husband, together with their sons and their sons-in-law; also the litigant's step son only (but not the step son's offspring.) R. Jose said: Such was the mishna of R. Akiba, but the first mishna included also the litigant's uncle, first cousin, and all that are qualified to be his heirs. Moreover all that were kinsmen at the time; but kin that have ceased to be kin become qualified. R. Judah says: If a man's daughter died and left children, her husband still

counts as a kinsman."[173] Thus learnt about condemnation. Whence do we know the converse? The Gemara comments: Whence is this law derived? From what our rabbis taught: The fathers shall not be put to death for the children, nor the children for the[176] fathers; each man shall be put to death for his own sin![174] What does this teach? Is it that fathers shall not be executed for sins committed by their children and vice versa?[177] But is it not already explicitly stated: Every man shall be put to death for[178] his own sin? Hence, 'they shall not be put to death' must mean that fathers shall not be put to death on the testimony of their sons and similarly, the sons shall not be put to death on the testimony of their fathers."[175] Is so

The Gemara goes on to explain hermeneutically the rest of the exclusions in the Mishna. Cousins are excluded because of the use of the plural[179] "sons" in the Biblical text; otherwise "son" would have sufficed.[176] a woman is as her

Relatives[180] are shown to be ineligible even when they are testifying in the case of a third unrelated person because one of the witnesses might be declared a zomem (plotting witness, infra.) on the basis of the false testimony of his kin, with whom his own[181] false testimony is combined.[176]

But all this, notes the Gemara, refers to paternal kinship. "Whence do we know of maternal relations? Scripture says 'fathers' twice.[181] Since (the repetition) is unnecessary in respect to paternal relations, we may refer it to maternal relations."[176] a kinsman to the case where there are

Another problem disposed of by the Gemara is stated

thus: "Now we have thus learnt about condemnation. Whence do we know of acquittal? Scripture states 'they shall be put to death' twice. Since the (repetition) is unnecessary in respect of condemnation, refer it to acquittal."[176] And yet another problem! "Again we have learnt in capital cases. Whence is the same known in civil suits? Scripture says, 'Ye shall have one manner of law,'[177] meaning that the law must be administered similarly in all cases."[178]

The Gemara gives the reasoning for[182] treating a woman as her husband in the matter of not testifying. "R. Huna said in R. Nachman's name: Whence do we know that a woman is as her husband? From the verse, 'The nakedness of thy father's brother thou shalt not uncover; thou shalt not approach to his wife, she is thine aunt.'[179] But is she not actually thy uncle's wife? Hence we infer that a woman is as her husband."[180]

But the fathers of the bride and the bridegroom may testify for or against each other; their relationship is deemed as "no more than that of a lid to a barrel." This according to R. Hisda.[181]

The question of whether or not one may testify for his betrothed wife is answered in the negative, on the ground of mental affinity.[181]

The Mishna applies the rule of ineligibility where one of two witnesses is a kinsman to the case where there are three whose evidence has been combined.[182] The situation

contemplated here is one where the evidence has already been admitted, and the kinship has subsequently been discovered. The evidence is then voided in toto. The Mishna goes on: "Whence (do we learn that this applies even to one out of) a hundred? Scripture says, 'Witnesses'. R. Jose said: This applies only in capital cases; but in non-capital cases the evidence can be sustained by the remaining witnesses. Rabbi says: It applies alike in non-capital and capital cases. When (does it apply in capital cases)? When they (the ineligible witnesses) joined in the warning."[182]

The Gemara explains further the procedure used when such a difficulty arises: "How do we put it to the witnesses? Said Raba: (We ask them) whether they had come as mere onlookers, or to give evidence. If they say to give evidence, and one is found to be a near kinsman, or disqualified person the entire evidence is disqualified, but if they say they had come as mere onlookers (the evidence is allowed to stand)."[183]

None of the law of kinship applies to proselytes, for R. Jose is quoted as saying: "One who becomes a proselyte is as a child new-born."[184] He is therefore deemed as having no "relatives."

10. Interested Parties

A party who has an interest in the outcome of the case, whether it be a personal interest in one of the litigants, or a financial interest in the disputed res, is ineligible to testify. The Talmud quotes R. Meir as saying: "One who

is suspected with regard to a matter may neither judge nor also offer testimony in connection therewith."[185] is labor, and he share The Mishna disqualifies a friend or an enemy. "By friend is meant groomsman, and by enemy any that hath through enmity has not spoken with him for three days." It However, even in the Mishna itself, there is a relaxation of this exclusion; for, "They replied: Israelites should not be suspected for such a cause."[186] as interested witnesses. However, if the rent The Gemara comments on: 'By friend is meant groomsman.' "How long (is he regarded as such)? R. Abba said in the it, name of R. Jeremiah in the name of Rab:[190] The whole seven days of the marriage feasts. The Rabbis said on Raba's authority: After the very first day, he is not regarded as such any longer."[187] ...ties are suspect when they offer testimony on be- half But, although here, in this extreme case of exclusion, the Rabbis relaxed the requirement, they were watchful in ... other matters. Partners are allowed to testify for[191] one an- other only where the partner testifying has made a written declaration[192] stating for instance "I have no claim on this field," (the subject of the litigation). Furthermore, since there is a question as to the legally binding character of such a declaration, the Gemara goes on to require a formal[193] transfer of any title from the testifying partner to the litigant partner.[188] In the following case of robbery and sale: "A tenant farmer is allowed to testify as to the title of his landlord only if there is no produce on the land. But if there is produce, he is ineligible."[189] (If there is)

produce and the landlord loses the land, the tenant would also lose since the produce is the fruit of his labor, and he shares in its market value.

Similarly, if two men come and say that they hired a house (the title to which is being litigated) from the defendant and lived in it for three years, if it is found that they have already paid the rent to the defendant they are considered as interested witnesses. However, if the rent has not been paid, and the witness-tenants come with the rent payment, inquiring to whom of the litigants to give it, they are accepted as witnesses.[190] Clearly, in the latter case, they would not be prejudiced by the loss of the defendant. He is responsible to him for it."[194] However, if the

Sureties are suspect when they offer testimony on behalf of the borrower.[196] However, the presumption is rebutted if the borrower has other land to which the surety can look should the land in question be lost to the claimant.[191] The same is the case with a lender, and with a first purchaser on behalf of a second purchaser.[192]

The Talmud extends the prohibition against sureties to the near kin of the surety on the reasoning "...if the debtor were unavailable, would not the creditor come down on the surety?"[193] The Gemara states: "According to your own

Included also is the following case of robbery and sale: "X wrongfully takes a field from Y and sells it to Z, and then W comes and contests Z's title, Y must not then go and give evidence in favor of Z, thinking that (if Z retains it)

it will be easier for him to recover it (since Z does not have a firm title, having purchased from a wrongful taker.) However, in the case of chattel, where a similar series of circumstances prevails, a sale by the robber[201] cuts off any claim by the original owner, and he is allowed to testify. If the robber does not sell, the original owner still[202] has an interest in the chattel and is thus barred from testifying. (Here we are dealing with the case of a robber who has died.)[194]

The difference between the cases of realty and personalty is due to creditors' rights.[195] It follows as stated: "Our Rabbis taught: If a man sells to another a house or a field, he is not allowed to testify to the latter's title to it because he is responsible to him for it."[194] However, if the seller has other property to which the creditors can satisfactorily look, he may testify for the purchaser.[196]

If a man leaves property to a town in his will, and the will is contested, the case must be tried by judges from another town and none of the townsfolk of the beneficiary town can testify as it is a public matter affecting the interest of all the inhabitants.[197]

11. Heathens

The Talmud clearly makes heathens ineligible, as a general rule.[198] The Gemara states: "According to your own statement you are an idolater and no idolater is eligible to tender evidence."[199] Elsewhere we find "In all cases, if he was a heathen and he became a proselyte...he is not believed (as to what he saw when he was a heathen)."[200]

However, if, in the case of freeing a woman whose husband has gone beyond the sea or to war and died, a heathen's statement that the husband died is believed, provided that he had no intention to act as a witness.[201] The Gemara illustrates: "Alas for the Jew who was with me . . . for he died." In that case, the wife was allowed to remarry.[202] of witnesses, prohibition is plainly and completely laid down:

"How did they admonish the witnesses in capital cases? brought them in and admonished them: 'Perhaps ye will say that is but supposition or hearsay or at secondhand, or, heard it from a man that was trustworthy. Perchance ye not know that we shall prove you by examination and investigation.'[203]

In another place, the Mishna prohibits hearsay in money cases also:

"How did they prove witnesses? They brought them in admonished them; then they put them all forth and kept back the chief among them and said to him: Say how dost thou know that he is in debt to the other? If he said: He said to me, I am in debt to him, or such a one said to me that he was in debt to him, he has said nothing. He must be able to say: In our presence he said to the other that he owed him 200 zuz."[204]

However, the Mishna relaxes the strictness rule considerably in the case of proving the death of a husband so that widow can remarry. "Even if a man hears some saying, Such a one is dead, that suffices. R. Judah said: Even if he

Further, "They may suffer a woman to marry again (solely on the evidence afforded by) HEARSAY (an echo. Once a man stood on the) The Talmud is explicit in prohibiting the admission of hearsay testimony. (In the Mishnaic admonition of witnesses, the prohibition is plainly and completely laid down:

"How did they admonish the witnesses in capital cases? They brought them in and admonished them: Perhaps ye will say what is but supposition or hearsay or at secondhand, or, We heard it from a man that was trustworthy. Perchance ye do not know that we shall prove you by examination and inquiry."[203]

In another place, the Mishna prohibits hearsay in monetary cases also:

"How did they prove witnesses? They brought them in and admonished them; then they put them all forth and kept back the chief among them and said to him: Say how dost thou know that he is in debt to the other? If he said: He said to me, I am in debt to him, or such a one said to me that he was in debt to him, he has said nothing. He must be able to say: In our presence he said to the other that he owed him 200 zuz."[204]

However, the Mishna relaxes the hearsay rule considerably in the case of proving the death of a husband so that widow can remarry. "Even if a man heard women saying, Such a one is dead, that suffices. R. Judah said: Even if he

B. CIRCUMSTANTIAL EVIDENCE

The Mishna clearly states that circumstantial evidence is inadmissible: "Perhaps ye will say what is but supposition..."[205] The Gemara elaborates:

"Our rabbis taught: What is meant by supposition? He says to them: Perhaps ye saw him running after his fellow into a ruin, ye pursued him and found him sword in hand with blood dripping from it, whilst the murdered man was writhing. If this is what ye saw, ye saw nothing."[207]

The Gemara continues: "Thus only in capital charges do we disallow supposition, but permit it in civil suits. Who knows this?" challenges an Amora. The answer is given: "R. Aha. For it has been taught: R. Aha said: If among camels there is a lustful one, and a camel is found killed at its side, it is certain that this one killed it." However, the Gemara does not accept this view, but points out that even though circumstantial evidence is not specifically prohibited in monetary cases in the Mishnaic mandate, nevertheless such evidence is not acceptable in monetary cases.[208]

heard children saying, 'We are going to bewail and bury such a one,' that suffices..."[205] is troubled by the language of the Mishna. Further, as "They" may suffer a woman to marry again (solely on the "evidence afforded) by an echo. Or Once a man stood on the top of a hill and called out, 'Such a one is dead; will?" and although when they went they found no man there; they ra- suffered his wife to marry again."[206]

"Seeing without knowing - How? 'You owe me I counted out
B. CIRCUMSTANTIAL EVIDENCE
you before X and Y (who didn't know the nature of the
The Mishna clearly states that circumstantial evidence transaction). Let X and Y come and bear testimony (that they is inadmissible: "Perhaps ye will say what is but supposi- saw the money being counted out).' This is seeing without tion..."[203] The Gemara elaborates: knowing. Knowing without seeing - How? 'You admitted that

"Our rabbis taught: What is meant by supposition? He you owed me 100 zuz before X and Y. Let X and Y come and says to them: Perhaps ye saw him running after his fellow bear testimony.' This is knowing without seeing."[204] into a ruin, ye pursued him and found him sword in hand with

blood dripping from it, whilst the murdered man was writhing.
C. PRESENCE OF WITNESSES[207] If this is what ye saw, ye saw nothing."

Witnesses must have been present as witnesses at the oc- The Gemara continues: "Thus only in capital charges do currance to which they testify. "For R. Judah said in Reb's we disallow supposition, but permit it in civil suits. Who name: One must definitely instruct them: Ye are my witness- said this?" challenges an Amora. The answer is given: es. Moreover, if he hid witnesses behind a fence and said "R. Aha. For it has been taught: R. Aha said: If among to him: You owe me a maneh, and he answered, Yes, and he camels there is a lustful one, and a camel is found killed owed, Are you willing to make this admission in the presence by its side, it is certain that this one killed it." How- of X and Y, and he replied, I am afraid to do so lest you ever, the Gemara does not accept this view, but points out compel me to go to court, and on the following day, on his that even though circumstantial evidence is not specifically demanding it from him, he retorts, I was only jesting with prohibited in monetary cases in the Mishnaic warning, never- you - then he is not liable."[210] Thus is added an addition- the less, such evidence is not acceptable in monetary al req[207]ement: Not only must the witnesses know that they cases.

"In light of the rules against hearsay and circumstantial evidence, the Gemara is troubled by the language of the Biblical command: "He being a witness, whether he hath seen or known."[208] Does this not open the door to either hearsay or circumstantial evidence by the use of the words "or known?" R. Jose the Galilean explains away the apparent contradiction:

"Seeing without knowing - How? '100 zuz I counted out to you before X and Y (who didn't know the nature of the transaction). Let X and Y come and bear testimony (that they saw the money being counted out).' This is seeing without knowing. Knowing without seeing - How? 'You admitted that you owed me 100 zuz before X and Y. Let X and Y come and bear testimony.' This is knowing without seeing."[209]

C. PRESENCE OF WITNESSES

Witnesses must have been present as witnesses at the occurrance to which they testify.[211] "For R. Judah said in Rab's name: One must definitely instruct them: Ye are my witnesses. Moreover, if he hid witnesses behind a fence and said to him: You owe me a maneh, and he answered, Yes, and he added, Are you willing to make this admission[212] in the presence of X and Y, and he replied, I am afraid to do so lest you compel me to go to court, and on the following day, on his demanding it from him, he retorts, I was only jesting with you - then he is not liable."[210] Thus is added an additional requirement: Not only must the witnesses know that they

are witnesses but the defendant must know it too.

Furthermore, the defendant must give his permission to the use of witnesses whom he cannot specifically see. "A man hid witnesses against his neighbor behind the curtains of his bed, and said to him: 'You owe me a maneh.' 'Yes,' he replied. 'May all present, whether awake or asleep be witnesses against you?' then asked. 'No' was the reply; R. Kahanah observed: Surely when answered 'No' (and so refused to admit his debt in the presence of witnesses) and is not liable.)"[211] The ruling was the same in a similar situation where the witnesses were hidden behind a gravestone.[211] Rabina sums up by "We may infer from the above that the dictum of R. Judah in Rab's name, viz., One must definitely instruct them: You are my witnesses, holds good no matter whether the debtor says it or the creditor says it while the debtor keeps silent. For it is only because the debtor said 'No'; but had he kept silent, it would indeed have been so."[211] Thus, witnesses are appointed as such by express indication of either lender or borrower, and if, in the case where the lender has made the appointment, the borrower fails to indicate his disapproval of the appointment, the witnesses are considered acceptable to both parties.[212]

The Mishna states the basic theory of the law of hazamah by saying: "Witnesses become subject to the law against zomemin witnesses only if they bear false witness against themselves. Thus, if they say, 'We testify that A committed murder,'...and if others answered and said, 'How

CHAPTER V: DISQUALIFICATION OF TESTIMONY

The law of disqualification of testimony[215] is the most unusual area in the entire field of the Talmudic law of evidence. There are two types of disqualification of testimony which has been given before the court. One is known as Hakhashah,[216] which is best translated as "contradiction"; it is the denial by one set of witnesses of the deposits of the preceding set; counterevidence or the rejection of evidence owing to counterevidence.[213] The other type of disqualification of admitted testimony is known as Hazamah,[214] "the refutation of witnesses by proving an alibi; the conviction of false witnesses."

A. HAZAMAH

Hazamah, the refutation of witnesses by proving an alibi, operates as follows: Witnesses testify against a man in either a civil or a criminal suit. Then other witnesses come and testify that the first set of witnesses could not have seen the matter to which they have testified, because they (the first witnesses) were with them (the second witnesses) at the time when they were supposed to have been viewing the matter.

The Mishna states the basic theory of the law of Hazamah by saying: "Witnesses become subject to the law against zomem witnesses only if they bear false witness about themselves. Thus, if they say, 'We testify that A committed murder,'...and if others answered and said, 'How

can ye testify so, for Lo! YE WERE WITH US that same day in such a place,' they are condemned as false witnesses and "are put to death at the mouth of the others".[215] The Gemara gives us the Biblical basis for the punishment of Zomemim (this is the term for witnesses who have been refuted by hazama): "Ulla said, Where is there found an allusion[216] in the Torah to the treatment of Zomemim? Where? Is it not prescribed, 'Then shall ye do unto him as he purposed to do to his brother.'"[217] Thus, the general rule is that the punishment of Zomemim is the same as that which would have been inflicted on their victim.[218]

Another consequence of Hazamah is that a Zomem in a civil suit is henceforth disqualified from testifying in future cases, even one involving a capital charge, on the reasoning that he is now a transgressor by reason of his evil doing.[219] This ruling is dissented by R. Jose who maintains that one proved a Zomem in a civil suit is competent to testify in a capital case.[220]

The question then arises: Is the disqualification of the Zomem retrospective or prospective? Abaye rules that the disqualification is retrospective, going back to testimony given before the disqualification, reasoning, "He was a wicked man from the time of testifying and the Torah says, 'Do not accept the wicked as a witness.'"[221] Raba holds that he is disqualified only for the future saying, "Now the entire law of Hazamah is anomalous (since it involves two witnesses against two witnesses); why accept the evi-

dences of one against another? Thus it can only take effect from the time that this anomalous procedure is employed."[222] This is interesting and clever reasoning, but we shall see later that the underlying assumption here is not compatible with the basic theory of hazamah. The conclusion is that in Abaye represents the weight of authority and therefore, the disqualification is retrospective. the fact that the Gemara However, another gemara indicates that the retrospective view is the minority view.[223] This There the allegation involves two acts - theft and slaughter. If the witnesses are found to be zomemim with regard to the slaughter, if the retrospective view holds, then they are automatically deemed zomemim with regard to the theft which necessarily preceded the slaughter. But a contrary ruling is made. verse in Exodus: "If In the case of zomemim against a daughter of a priest[225] and her alleged paramour, the question arises: "Which retaliatory punishment is inflicted on the zomemim: the burning which would have been the lot of the daughter, or the strangling which would have befallen the paramour?[224] not An-other mishna answers that in such case of doubt, the more stringent punishment is applied,[225] but the Gemara rules as follows: "The Torah sayeth '...To have done unto his sister.' brother.' It teaches 'to his brother' but not to his sis-ter." Thus, strangulation is the punishment.[226] zomem is not The Talmud reports four observations that were made about zomemim: "They are not stigmatized; they are not banished; they are not made to pay ransom; they are not sold as

slaves. "...They are not made to pay ransom because ransom is held to be atonement and these fellows stand in no need of that." (The argument involved here is the question of whether payment for injury by one's ox is to be deemed pecuniary satisfaction or expiation of guilt.) Nevertheless, in regard to the amount to be paid assessed according to the value of the injured (in spite of the fact that the Gemara seems to prefer the ransom theory, though citing heavy authority contra)."[227] In this way, the Gemara makes it possible to punish zomemim in a case like this. The reason that zomemim are in no need of atonement is because their ox did not gore anyone.

The reason given for them not being sold as slaves is on the basis of the interpretation of the verse in Exodus: 'If he has nothing, then he shall be sold for his theft'.[228] The gemara points out that since "for his theft" is redundant this clearly "directs that he be sold for his theft, but not for his insidious scheming."[229] Another reason given is that since the accused had money to pay, he would not have been sold, so why sell the zomem. However, this applies only where the accused actually did have money. When he didn't the zomem would be sold. This is answered by raising the implication that the zomen thought he had the money. The final rule is: If either has the money, the zomem is not sold.[229]

To justify non-banishment of Zomemim, Resh Lakish points out the repetion of the personal pronoun in the verse deal-

ing with banishment: "It is based on the text which reads 'He, He shall flee unto one of the cities of refuge,' which asserts that he alone shall flee, but not the zomemim."[229]

Other[234] cases are dealt with in the Mishna. "How are witnesses dealt with under the law against zomemim? In an allegation of impaired priest stock (because the father-priest had married a divorcee or one who had undergone halitzah) we cannot make him (the zomem) of impaired priest stock, but he must suffer the forty lashes."[230] Thus we see that the substitute penalty, where exact retaliation is impossible or ruled out for some other reason, is lashes, which explains why the law of zomemim is found principally in Tractate Makkoth. So in the case of banishment and sale as a slave.

Where zomemim have alleged that a man divorced his wife and did not pay her her ketubah,[231] "they establish how much a man would be willing to pay (now) for her ketubah on the chance that she might be widowed or divorced (they made such speculative assignments), whereas if she died her husband might inherit it from her."[232]

Another means for assessing the pecuniary punishment of zomemim is shown in the case where zomemim "testify that X owes his fellow 1000 zuz with a condition that he shall pay him within thirty days, whereas actually it was within ten years, they estimate how much a man would be willing to pay to have in his hands a 1000 zuz, which, instead of being repayable within thirty days, shall be repayable within ten years."[233]

The Talmud makes clear that "monetary impositions are shared among the offenders, but lashes are not...they divide the corresponding damages...but...each one receives his forty lashes."[234]

In the accompanying gemara, Abaye explains the requirement that the full forty lashes be administered each zomem by a gezera shava between Deut. 25:2-3 and Nu. 35:31. The common term is rasha 'the wicked one'. In the first reference, he is commanded to be beaten. In the second, he is commanded to get the death penalty. "Just as the death penalty cannot be effected in half measure, so a flogging likewise cannot be effected in half measure."[235] Raba finds a different basis: "We require to fulfil the words, 'Then shall ye do unto him as he purposed to do unto his brother'[236] and this would not be done (unless each got forty, his full due)." The question is then asked of Raba: "Then if that be so why should not the same obtain with regard to monetary imposition?" (which they are allowed to divide). The answer he gives is that money can be unified into one total, whereas lashes cannot be so unified.[237]

The scriptural basis for flogging in lieu of retaliation is set forth in the Gemara: "What is meant is some allusion in the Torah for inflicting a flogging. It is written, 'And they shall justify the righteous and condemn the wicked; and it shall be if the wicked one shall deserve to be beaten, that the judge shall cause him to lie down and be beaten... forty.'"[238]

but an Amora, not satisfied by Ulla's reasoning, asks what would seem to be an obvious question: "Cannot the sanction for the flogging be derived from the eighth commandment: 'Thou shalt not bear false witness against thy neighbor?'" -- No, it cannot be, as that is a prohibition applying to no action, and wherever a prohibition is contravened without action, no flogging is inflicted." [239] So, in other Gemaras, the general rule is laid down in accordance that mere words do not bring the [247] punishment of flogging when uttered in disobedience to a negative prohibition. [240] Elsewhere, however, we find a statement, by R. Eleazar as follows: "If witnesses were self-contradicted (not Hazamah) as to their evidence regarding a charge of murder, they would be flashed." [241] In the extreme, the Although R. Meir would both flog and suffer zomemim in a pecuniary suit to recompense, the sages hold otherwise: "He that makes wrecompense does not suffer forty lashes." [242] The Gemara explains: "The Rabbis' view here is in order since it is written there 'according to his misdeed' [243] but not for two misdeeds." [244] threaten the Pharisaic position.

The Mishna shows, through the example of the Zomemim, the legal effect of a pair of witnesses: "At the mouth of two witnesses or three witnesses shall he that is to die be put to death." [245] If the evidence can be sustained by two witnesses, why has scripture said three in particular? To compare three to two; as three may prove two false, so may two prove three false. Whence can two prove a hundred false? 'Witnesses' says Scripture. R. Simeon said: Like two can-

not be put to death unless both are proved Zomemim, so three cannot be put to death unless all three are proved so."[246] The law of Hazamah is carried to the extreme in the Mishna where it is held that if one pair followed upon another, even up to a hundred pairs, each proving the previous pair zomemim, that all but the last pair would be put to death.[251] To this R. Judah dissents, saying: "This would be a conspiracy: but the first pair alone would be put to death."[247] Another interpretation of this mishna is that what is meant is that successive witnesses came to charge the accused, and the witnesses who came to his defense challenged them in turn as plotting witnesses.[248] Regardless of the interpretation, the mishna does show in the extreme, the operation of the law of Hazamah.

The Gemara takes up the case of the woman who brought witnesses who were discredited: she then brought others and they were discredited. She then brought a third set who were not discredited. Resh Lakish holds that the woman is suspect. But this would threaten the Pharisaic position.[249] So Eleazar retorts: "Assuming she is suspect, are all Israel to be held as suspects? Those who came last happened to have knowledge of the question, and the former had not."[250]

The difficult problem of warning arises with hazamah. It is a basic requirement of the Jewish criminal law that the transgressor have been warned of the nature and consequences of his act prior to its commission. But the criminality of testifying falsely is only discovered post facto!

The Gemara takes up the problem: "And what lesson do the Rabbis derive from the text 'Thou shalt not bear false witness against thy nabor!? They must needs utilize it as the statutory admonition to zomemim." It is only at this point that the Talmudic law is similar to the Common Law in this area, with its well-known maxim "Ignorantia legis neminem excusat."

Another gemara contains a discussion on the same problem: "Eleazar said: the zomemim pay money and do not receive lashes because they can't be warned. Raba said: You may know it from the following: When shall we warn them? At first? They will then say, We have forgotten. During the deed: They would withdraw and not give any evidence (even true evidence, which would endanger the Pharisaic position). At the end? They would say, What has been has been (as testimony cannot be withdrawn). Abaye demurred: Let us warn them immediately after they have given their evidence. Aha b. Ika demurred: Let us warn them at first and gesticulate to them (after). Abaye said: If one were to say that zomemim require a warning (it would follow that) if we have not warned them we would not kill them. Surely it is necessary (to fulfil) 'then shall ye do unto him as he thought to do unto his brother' and this would not be. To this R. Samma b. Jeremiah said: But now, the case of the son of a divorcee or a halutzah, since this case is not included in 'as he had thought to do' (since the zomem cannot be made the son of a divorcee) a warning should be required!?

The verse says: 'Ye shall have one manner of law'[252] a law that is equal for you all. (And since in most cases a zomem can't be warned, he needn't be warned here either.)[253] This last seems to settle the issue - a zomem cannot be warned except by statute (supra).

Another example of what might be called Talmudic civil rights, in addition to the strict injunction against self-incrimination (supra) is the provision that zomemim must be rebutted in their presence.[254]

Just as certain types of transgressors must be publicly proclaimed, so must zomemim be publicly proclaimed.[255]

The question of pecuniary payment by zomemim presents a number of problems, one of which is the basic issue of what the nature of such a payment is. The Gemara brings a baraitha of Rabbi Akiba to shed light on the issue: "In the name of R. Akiba, it is stated that they do not pay on their own admission. What is R. Akiba's reason (for this exemption)? He considers this compensation as kenas and kenasin, is not payable on one's own admission."[256] The reason for this ruling is found in the nature of kenas. Kenas is a fine, a criminal penalty, like corporal punishment. We have seen (supra), that self-incrimination is not allowed. Thus it follows that if the payment made by zomemim to the falsely accused is to be considered kenas, then he cannot admit to his liability for he would be incriminating himself.

Odd complications arise, in the case of zomemim who testify that a master knocked out his slave's tooth and then

blinded his eye. When their evidence is refuted, they are ordered to pay to the master the value of the slave and the value of the eye.[257] The reasoning behind this is that at the first act of brutality, the slave is permitted to go free. The master would then have lost his slave, so the retaliatory punishment is that the zomemim must pay the value of the slave to the master. After the slave would have gone free, the master would then have been sued by the slave for the value of the eye which the master allegedly knocked out.

The theft and/or sale of an ox or a sheep presents a complicated situation due to the provision in Exodus 22 for four or five fold restitution for such a crime. It follows clearly from the Biblical text that if one set of witnesses testify falsely to both the theft and sale, they pay the entire penalty provided in Scripture. But when there are different sets of witnesses, one false, or the other false, or both false, to the two acts involved, some apportionment must be made. Accordingly, if both sets are found to be zomemim, the set testifying to the theft are held for two fold restitution and the set testifying to the sale are held for three fold restitution. If only the second set were proved zomemim, then the thief makes two fold restitution and the zomemim still make three fold restitution. If one of the second set is found to be a zomem, then of course the evidence of the second set is voided as there must be two witnesses to a matter. However, if one of the first set is found to be a zomem, the entire evidence of both acts is

voided, since the second act of sale hinges on the first act of theft.[258] For a discussion of the legal standing of the one zomem, see infra.

Another difficult situation brought up in the mishna involves false testimony concerning Hazakah, which is the Talmudic law of adverse possession. In order to prove title, the adverse possessor had to prove three consecutive years of possession of the land. It follows, as the mishna states, that "if two testify that A had the use during three years and they are zomemim, they must make full restitution to the owner (who would have otherwise been divested of his property). But if one set of witnesses testify of each of the three years, the full restitution is divided in three parts."[259] An oddity develops, however, in the case where three brothers separate into three different sets and testify falsely with the same witness for the three different years required. They are allowed to offer three separate acts of witness (brothers cannot testify together, supra) but if they are all four proved zomemim, the brothers' testimony is considered a single act, and together, they pay only half of the full restitution, while the fourth witness who coupled with them for the three successive testimonies pays the other half.[260] The gemara to this mishna does not explain this curious distinction.

As in the case of hazakah, three sets of witnesses (it can be the same set) are necessary to condemn a goring ox to death, since three separate gorings are necessary to es-

tablish its guilt. Similar to hazakah, although the effect of the three individual testimonies is to establish one lie-guilt, the testimonies are taken in the eyes of the law as[262] independent. However, and also similar to the hazakah situation, the three are taken as one testimony with regard to[263] hazamah. Thus, even if the first pair are found to be punish-zomemim, not only does the defendant escape liability, but of the zomemim do not have to pay. Of course, if all three sets were zomemim, they would all pay.[261]

The law of zomemim is carried to its logical extreme[264] in the case of witnesses refuting witnesses who have refuted witnesses. The case involving this point is one where a husband produces witnesses testifying to his wife's guilt as an adulteress, and her father brings witnesses refuting their evidence, making them zomemim and thus liable to the death penalty the wife would have received. If the husband then brings witnesses who refute the father's witnesses, the father's witnesses get the death penalty because the first witnesses would have been executed on the refutation of the second set.

In the case of the first refutation, the first set are only executed, and do not pay damages (the value of the ketubah of which the wife would have been deprived) because zomemim pay only the graver penalty, which in this case is execution. However, the second set of refuted witnesses both pay and are executed on the reasoning that there are two injured parties as a result of their plotting: the hus-

band, to whom the money goes, because he would have been fined a hundred pieces of silver for bringing a false allegation; and the husband's witnesses, who would have been put to death.[262]

One of the specific requirements of the law of zomemim is that both must be proved zomemim or neither can be punished, and this applies to the case where the set is made up of three.[263]

The Gemara comments: "And such could be sustained only where they had all given their evidence in unintermittent utterance."[264]

Judah b Tabbai is reported in the Gemara as telling of an instance where he proved a witness zomem and had him executed. Simeon b Shetach explodes: "May I never see the consolation if you have not shed innocent blood because the sages declared that witnesses found to be zomemim are not to be put to death until both have been proved such, and are not flogged until both have been proved such."[264]

Since the kidnap and sale of a human was a capital offence, a problem arises as to whether or not the zomemim witnesses of either but not both are executed. There is a division of opinion. Hezekiah says that they are not executed; Jochanan says that they are. The Gemara represents Hezekiah as agreeing in this with Rabbi Akiba, quoting his well known ruling, "'The matter', the whole matter and not half the matter." Jochanan, however, is shown to be in agreement with the Rabbis, who said, "'The matter' implies

even half the matter." R. Assi attempts to resolve the conflict: "If witnesses of the sale are zomemim, they are not executed - This view may agree even with the rabbis (who say even half the matter proved will suffice for execution of the zomemim) providing there were no witnesses of abduction, (and thus no capital crime)."[265] An argument a fortiori against One of the strangest phenomena in the entire Talmudic law is the ruling concerning when zomemim who have testified to a capital offense are executed. The Mishna states that zomemim are put to death only after the judgment has been given. The Sadducees countered, and are recorded as having done so right in the Mishna, with "Not until after the accused has been executed, for scripture says: 'Life for life.'"[266] But the Sages (the Pharisees) answer: "Is it not also written, 'Then shall ye do unto him as he had thought to do unto his brother?'[267] - thus his brother must still be alive." But again the Sadducees ask in wonderment, "If so, then why was it written 'Life for Life'? Could it be that they were put to death as soon as their evidence was received (and found false)?" The Pharisees answer: "But Scripture says, Life for life; thus they are not put to death until judgment has been given (against the falsely accused.)"[268]

Actually, the last statement of the Pharisees is no answer to the latter statement of the Sadducees, inasmuch as it does not at all address itself to the question. Logic appears to be on the side of the Sadducees.

[271] The Gemara states the anomoly well: "It is taught: An eminent disciple put the principle in this form: If they have not slain (but have only caused judgment to be given) they are slain; and if they have slain (having caused the falsely accused to be executed); they are not slain. My son, said the father, is there not an argument a fortiori against your rule? (It would seem the more logical inference, that if they are executed for causing a judgment of death against the accused, how much the more so would they be put to death if they actually caused (such a) judgment to be carried out.) Our master; have you not told us: No penalty is inflicted on the strength of a logical inference." (And since there is no specific provision for executing zomemim after the execution, except 'Life for life' which the Pharisees choose to completely ignore, the matter rests there.)[269] Usually, it is the Sadducees who are the literalists in their interpretation of the Bible. Here, unquestionably, it is the Pharisees who are going to literal extremes to make their case. They seize upon the words "thought to do" and in the face of actually overpowering logic from the opposing Sadducees, refuse to admit their fallacy.

Why? The reason is basically political. We have already seen, in this very area of hazamah, that the Pharisees go to illogical lengths by failing to make hakhashah, without regard to motivation, a criminal offense, so as to establish the power of the Beth Din, and to establish the method of Edus as the sole means of arriving at fact finding in

court.[271] There are certain people against whom a false accusation does not result in the false witnesses being treated as Zomemim. One of these is the case of a man who had already been convicted before the day that the false witnesses said he had been convicted, they are not executed as Zomemim even though the formula "Lo! Ye were with us," is fulfilled, because by the time they had given their evidence, the man charged had already been sentenced to death. The same is true in cases of kenas (a fine).

Likewise, if witnesses testify falsely against a terefah, a dying person, and are confuted with the formula "Lo! Ye were with us," they are not executed because the man would have died anyway. But, continues this gemara, if witnesses who are themselves terefah are confuted, they are executed in accordance with the law of Zomemim. To this rule there is a dissent by Ashi who holds that even these are not slain, because those who disprove their evidence are not liable if their own is subsequently confuted.[273]

B. HAKHASHAH

We saw, supra[274] that Hakhashah is defined as "contradiction, the denial by one set of witnesses of the deposits of the preceding set; or the rejection of evidence owing to counter-evidence.

The same mishna that states the basic theory of Hazamah also presents the circumstances that are Hakhashah:

"Witnesses become subject to the law against Zomemim only if they bear false witness about themselves. Thus, if they say, 'We testify that A committed murder', and others answered and said, 'How can ye testify so, for LO! HE THAT WAS KILLED', or 'HE THAT (you say) KILLED HIM WAS WITH US THAT SAME DAY IN SUCH A PLACE' they (the first pair) are not condemned as zomemim."[275]

Thus we see that only when the false witnesses are alibied, are proved to be in a different place than the place where the matter to which they are testifying is supposed to have taken place, are they considered zomemim and dealt the same fate that they purposed for the accused. Otherwise, and that is hakhashah, retaliatory punishment is not meted out.

The Gemara asks: "What is the Scriptural warrant for this (distinction)? Said R. Adda: The text says, 'And Lo, if the witness be a witness of falsehood',[276] (Using the term sheker which conveys that he is not a zomem) until the lie is given to the body of the evidence."[277] (Here "body" means literally the body, that is, the false witness himself.)

Raba, in two examples, shows that the recital of the formula, "Ye were with us" is not always enough to convict the first set as zomemim, but that the necessary corrollary is that the being with the second set at the same time in another place makes it impossible for the first set to have witnessed the matter. Thus if the first set charge that the murder occurred on the "east side of the citadel," and the second set testify that "ye were with us on the west side of

the citadel," it is still possible that the first set could have viewed the murder, if it is possible to see from one side to the other. If such is found to be the possibility, they are not condemned as zomemim. So, if one side testifies to a murder on Sunday morning at Sura, and the second set charges that the first was with them Sunday evening at Nehardea, if it is possible to travel from the one place to the other in one day, they are not zomemim.[278]

The question arises; what, if any, is the punishment for false witnesses who have been contradicted by means of hakhashah but not hazamah? As discussed, supra,[279] there is authority to the effect that there is none, not even for disobedience to the eighth commandment since "that is a prohibition applying to no action, and wherever a prohibition is contravened without action, no flogging is inflicted."[280] False testimony, being words, is not considered action. However, elsewhere we find a statement by R. Eleazar to the contrary: "If witnesses were contradicted (using hakhashah) as to their evidence regarding a charge of murder, they would be lashed."[281]

Hakhashah is involved in the area of One Witness.[282] We saw there that in the case of the suspected adulteress, by one witness' saying that she was defiled, she was no longer required to take the Biblical test of drinking the bitter waters. However, the Mishna states: "If one witness says she was defiled, and another said she was not defiled, she must be made to drink. If one said she was de-

filed, and two said she was not defiled, she must be made to drink."[283] Here, hakhashah places her guilt again in doubt, and, it being the purpose of the test to dispel doubt, she is made to drink. But "if two said she was defiled, and one said she was not defiled, she need not be made to drink."[283] Here, there is no doubt, and thus no need for the test, "as the matter has been established by the mouth of two witnesses. So we see also that hakhashah can be made against one by two and against one by one, but not against two by one. The same is true in the case of the Heifer Whose Neck is to be Broken.[284]

In the case of women testifying to the death of a woman's husband so as to permit her to remarry, the number of women testifying to either the fact that he is dead or isn't dead makes a difference only where there are women on the other side. In that case, numbers prevail and the most are believed. However, where even a hundred women (who are ordinarily ineligible) are opposed to one man who is testifying, all the women are regarded as but one and hakhashah by them is not allowed.[285]

Concerning the view of the Rabbis on the procurer of false witnesses, the Gemara states the case of the scholar saying to his disciple: "You know I wouldn't lie. B owes me money, but I only have one witness. Go over there and stand by him so as to give the appearance that I have two witnesses." The scholar's disciple is warned in this gemara to not lend himself to the nefarious scheme on the

basis of the verse 'From a false matter keep far'.[286] The same is the ruling, of course, where the scholar asks the disciple to actually join the one witness in testimony.[287]

The Gemara quotes a baraitha on hirers of false witnesses where the statement is made that they are "exempt from the judgments of man but liable to the judgments of Heaven." Mar qualifies: "Under what circumstances? If we assume for his own benefit, should he not pay the money and should he thus not also be liable even in accordance with the judgments of man? It therefore must mean (that he is exempt from punishment and recompense only when he hires false witnesses) for the benefit of his neighbor."[288]

11. 1 K. 21:10; Sanh. 29a

12. There is a question as to whom is meant by "they". The Gemara in Sanh. 30a indicates that the witnesses are meant. So Asheri and Alfasi. But the text of the Mishna parenthetically reads "(all the people)" indicating that the entire court is cleared, possibly.

13. Witness is meant, for the judges then proceed to question him. This helps prove the contention that those that are sent out are the witnesses, as the language is employed, supra, Note 8.

14. However, if the witnesses are noticed to have used pre-

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1. Git. 71a; Sif. Deut. 19:15, p. 84b; M.T. Edus 1:4
2. Deut. 13:15
3. Aboth 1:9
4. Sanh. 3:6
5. Gen. 4:10

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6. Lev. 5:1
7. Prov. 11:10
8. Sanh. 4:5
9. Prov. 25:18
10. Prov. 25:18

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14. However, if the witnesses are noticed to have used pre-

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closely the same language, a suspicion of collusion

Maimonides in M.T. Edus 1:4 makes a third category: arises. cf H.M. 28:10

Derishoth. An example he gives is a conflict in tes-

15. Sanh. 29a

timony as to whether the disputed res was a barrel of

16. Rashi translates this physically, that is, from room wine or oil. He rules that such a conflict in answer to room. cf Maimonedes who translates "from matter to to a derisha would void the testimony, as in hakiroth. matter". M.T. Edus 1:4

Sanh. 5:2

17. Sanh. 32b

Sanh. 41a

18. Sheb. 30a

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Deut. 13:15 and 17:14

19. Sanh. 5:1

Sanh. 41a

20. Sanh. 5:2

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21. M.T. Edus 1:6 (Hershman translation)

Sanh. 41b

22. Sanh. 5:1

Infra., Chapter VI

23. Deut. 13:15

Sanh. 40a

24. Deut. 17:14

Ibid

25. Deut. 19:18; Sanh. 40a,b

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26. Sanh. 40b

Ket. 87b; Shet. 40a

27. Sanh. 32a

Deut. 19:15

28. Lev. 24:22

Mak. 1:7

29. Sanh. 32b

Deut. 17:6

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Mak. 1:6

30. Sanh. 5:2

Ber. 11b

31. Sanh. 41a

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Sanh. 40a,b

32. Sanh. 40b

Sanh. 40a,b

33. Bert. to Sanh. 5:1

Page 7, continued
Page 12, continued

34. Maimonides in M.T. Edus 1:4 makes a third category:
51. Ibid

Derishoth. An example he gives is a conflict in tes-
52. Thus indicating the final halacha goes against applying timony as to whether the disputed res was a barrel of Akiba's dictum.
wine or oil. He rules that such a conflict in answer
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to a derisha would void the testimony, as in hakiroth.
53. B.K. 70b
35. Sanh. 5:2
54. B.B. 3:4; B.B. 56b; Sanh. 30b
36. Sanh. 41a
55. Sanh. 30a

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56. Ibid
37. Deut. 13:15 and 17:14
57. Deut. 17:6
38. Sanh. 41a

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58. Mak. 6b
39. Sanh. 41b
59. B.B. 165b
40. Infra., Chapter VI
60. Ibid
41. Sanh. 30b
61. Mak. 6b
42. Ibid
62. Ibid

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63. Sanh. 30b

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43. Ket. 87b; Sheb. 40a
64. Ibid
44. Deut. 19:15
65. Deut. 19:15
45. Mak. 1:7
66. Yeb. 91b; Gitt. 71b
46. Deut. 17:6
67. Mak. 1:10; 6b
47. Mak. 1:8

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48. Pes. 113b
68. Ket. 20a,b

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69. Lev. 24:22
49. Sanh. 30a,b
70. Sahh. 32b
50. Sanh. 86a,b
71. For this leads to acceptance of documentary evidence.

51. Ibid

52. Thus indicating the final halacha goes against applying Akiba's dictum.

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53. B.K. 70b

54. B.B. 3:4; B.B. 56b; Sanh. 30b

55. Sanh. 30a

56. Ibid

57. Deut. 17:6

58. Mak. 6b

59. B.B. 165b

60. Ibid

61. Mak. 6b

62. Ibid

63. Sanh. 30b

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64. Ibid

65. Deut. 19:15

66. Yeb. 31b; Gitt. 71b

67. Mak. 1:10; 6b

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68. Ket. 20a,b

69. Lev. 24:22

70. Sanh. 32b

71. For this leads to acceptance of documentary evidence.

72. Nu. 35:30

73. Deut. 19:15

Ibid Page 17

74. Sifre to Deut. 19:15 ay in the commentaries* as to whether

75. Git. 2a,b ng here is "and the party in question was sent

76. Sheb. 40a "or the party was sent for." The text in

77. Nu. 5:1 ff Sanh. 3:9 confirms the former reading.

78. Sot. 6:2a

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79. Ibid 118a designates 30 days.

80. Deut. 19:15 rsday and Monday

81. Nu. 5:12a,b

82. Sot. 31b Page 25

83. Deut. 21:1 ff

84. Sot. 47b

85. Deut. 21:1 ff

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86. Yeb. 16:7 M LII

87. Deut. 19:15 Page 24

88. Deut. 17:16 :1

89. Mak. 1:7 In the Mishna is the statement made: Women are

not eligible to bear Page 20 However, the following

90. Ibid reasons make the underlying assumption clear. Also,

91. Sanh. 8b to Deut. 19:17 specifically makes women ineli-

92. Mak. 1:8

93. Mak. 6a:8

93. Ibid. 4:1

94. Ibid. 19:17

95. There is a controversy in the commentaries* as to whether the reading here is "and the party in question was sent for," or "or the party was sent for." The text in Jerusalmi Sanh. 3:9 confirms the former reading.

96. B.K. 112a

Yeb. 15:1. However, Page 22nd conditions, there must

97. B.M. 118a designates 30 days. and peace in the world.

98. Monday, Thursday and Monday tween them or war in the

99. B.K. 112a;b is not believed.

Yeb. 15:3 Page 23

100. B.K. 112a;b

101. Ket. 18b 2a

102. Ket. 2:3b

103. Ket. 18b; Pal. Ket. 2:3 n 26

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Bag. 4a; B.K. 88a; KPage 24a; B.M. 22; Shab. 30

104. M.T. Edus 9:1 Bar. 20b; Arub. 27a

105. Nowhere in the Mishna is the statement made: Women are not eligible to bear witness. However, the following references make the underlying assumption clear. Also, the Sifre to Deut. 19:17 specifically makes women ineligible. ty is doubtful in disqualifying, for it is on the evidence given by the witness that the money is trans-

106. R.H. 1:8 and the sentence of conviction is passed, and

107. Sheb. 4:1 to biblical law no money is to change hands,

108. Deut. 19:17 shment to be inflicted, in a case of doubt.

109. Sheb. 30a 3:11, B.B. 9:6

110. See page 18 and notes. Page 27

125. R.H. 1:8; Sanh. 3:3 Page 25

111. Sot. 6:2

112. Nid. 20b:17

113. Yeb. 15:1. However, the Mishna conditions, there must have been peace between them and peace in the world. If there was contention between them or war in the world, she is not believed. d notes.

114. Yeb. 15:3 Page 28

115. Yeb. 15:4

116. Yeb. 117a

117. Nid. 48b; Ket. 88a,b

[illegible] See Page 12. Page 26

118. Exod. 23:17 Page 29

119. Hag. 4a; B.K. 88a; Kidd. 29a; R.H. 22; Sheb. 30

120. Kidd. 33b; Ber. 20b; Erub. 27a

121. B.B. 140b

122. Hag. 4a 8a; accord Ar. 17b, 18a. N.B.: This rule ap-

123. Sanh. 66a all cases of ineligibility wherever applicable.

124. M.T. Edus. 9:3. no Maimonides adds: as Anyone whose eligibility is doubtful is disqualified, for it is on the evidence given by the witnesses that the money is trans-

ferred and the sentence of conviction is passed, and according to biblical law no money is to change hands, nor is punishment to be inflicted, in a case of doubt. See B.K. 3:11, B.B. 9:6

125. R.H. 1:8; Sanh. 3:3

126. B.K. 88a

127. Exod. 23:17

128. Hag. 4a

129. Gett. 39a

130. Ket. 28b

131. Sot. 6:2 and see page 18 and notes.

132. Yeb. 16:7

133. B.K.88a

134. Ket 2:10; Ket 28a,b

135. See Page 12.

136. B.B. 155b

137. Hag. 4a

138. R.H. 28a

139. B.B. 128a; accord Ar. 17b, 18a. N.B.: This rule applies to all cases of ineligibility wherever applicable. Thus it would not apply in the case of women (query what ruling in the case of Christine Jorgenson), but would in the case of transgressors, infra.

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pp 31, 32.
140. Gitt. 71a

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141. See Note 132
Sanh. 26b
142. Yeb. 112b; M.T. Ishut. 4:9 accord.
So explains Maimonides, M.T. Edus 10:1 ff
143. Yeb. 113a,b
Kiod. 40b
144. Gitt. 71a
Pes. 49b

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145. B.B. 128a
Ex. 23:1
146. R.H. 1:8; Ed. 2:7; Sanh. 3:3
Sanh. 25a
147. Sanh. 3:3
Sanh. 9b, 10a
148. R.H. 1:8

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149. See pp 24, 25
Sanh. 10a
150. R.H. 22a
Sanh. 25a

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Deut. 25:3
151. Ex. 23:7; Sheb. 30b
Mak. 3:15
152. Sanh. 25b; Sheb. 30b; B.K. 72b; B.K. 88b

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153. Sanh. 27a
Kid. 40b

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Sanh. 26b; The reasoning given by Rashi is that un-
154. Sanh. 24b
necessary acceptance of charity from Gentiles is
155. Sanh. 25a
, profanation of God's name, and tantamount to

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transgression. Thus Rashi would include the self abased
156. Sanh. 25a,b
in the category of transgressors. It is Maimonides
157. Ex. 23:1. This is the main Biblical reliance for the
who sets up a separate category, but he does not give
disqualification of Biblical transgressors.
any reason for the distinction. M.T. Edus 9:1; 11:5
158. Sanh. 25b

159. Ibid 26b. Rashi points out that they were disqualified because they transgressed for the sake of gain. See

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173. pp. 31, 32.

174. Deut. 24:16

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160. Sanh. 26b

161. So explains Maimonides, M.T. Edus 10:1 ff

162. Kidd. 40b

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163. Pes. 49b 22

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164. Ex. 23:1 14

165. Sanh. 25a; See also p 35

166. Sanh. 9b, 10a

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167. Sanh. 10a by.

168. Sanh. 25a

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169. Deut. 25:3

170. Mak. 3:15

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171. Kid. 40b

172. Sanh. 26b; The reasoning given by Rashi is that unnecessary acceptance of charity from Gentiles is B.B. 43a, profanation of God's name, and tantamount to transgression. Thus Rashi would include the self abased in the category of transgressors. It is Maimonides who sets up a separate category, but he does not give any reason for the distinction. M.T. Edus 9:1; 11:5

192. B.B. 46b

193. Mak. 7a

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173. Sanh.43:4

174. Deut.424:16

175. Sanh.427b 45a

176. Sanh.428a

190. M.T.Edus.11:10 readsPage40lows: "As to informers,

177. Lev.24:22 and apostates, the Rabbis did not deem it

178. Sanh.28a to include them among the ineligibles, be-

179. Lev.18:14 enumerated only the wicked among the Israel-

180. Sanh. 28b; Seealsobp135ous disbelievers are on a lower

181. Sanh. 28bn heathens. In the case of heathens, we are

182. Mak.11:8;thisrulealsoappliesinotherecasesofhin-eligibility.them are assured of a portion in the world to come." Page 41

183. Mak. 6ba

184. Yeb.48b

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185. Yoma 78b

186. Sanh.13:5

187. Sanh.29a IV

188. B.B. 43a Page 45

189. B.B. 46b

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190. B.B. 29a Page 47

191. B.B. 46b

192. B.B. 46b. This is in accord with the general rule:

193. Mak.7ab is dealt leniently in the case of the abandoned

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194. B.B. 43b

195. B.B. 44b

196. B.B. 44b, 45a

197. B.B. 43a

198. M.T. Edus. 11:10 reads as follows: "As to informers, epicureans and apostates, the Rabbis did not deem it necessary to include them among the ineligibles, because they enumerated only the wicked among the Israelites. But these rebellious disbelievers are on a lower level than heathens. In the case of heathens, we are bound neither to rescue them, nor cast them, and the pious among them are assured of a portion in the world to come."

199. Yeb. 47a

200. Ket 28b

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201. Yeb. 16:5

202. Yeb. 122a

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203. Sanh. 24:5

204. Sanh. 3:6

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205. Yeb. 16:5

206. Yeb. 16:6. This is in accord with the general rule: The rabbis deal leniently in the case of the abandoned

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woman.

207. Sanh. 37b

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208. Lev. 5:1

209. Sheb. 33b

210. Sanh. 29a

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211. Sanh. 29b

212. Another notable safeguard is that against self-incrimination. See page 35 f.

NOTES TO CHAPTER V

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213. Jastrow 1:350

214. Ibid 1:342

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215. Mak. 1:4

216. "Allusion" is interesting language. Perhaps it indicates that the Rabbis were aware of the unusual character of the law of Hazamah.

217. Deut. 19:19; the verb is zamam - to plot. Thus the term zomemim - plotting witnesses.

218. Mak. 2b

219. See Chapter III on Transgressors

220. Sanh. 27b

221. The verse is an interpretation of Ex. 23:1 - "put not thy hand with the wicked to be an unrighteous witness."

Sanh. 27a witness.'" Apparently, then, Eleazar and Rashi differ with [illegible] Page 52 rule.

222. Sanh. 27a

223. B.K. 73a,b

224. Sanh. 11:6

225. Sanh. 9:4

226. Sanh. 90a Page 52

Mak. 1:7 Page 53

227. Mak. 2b

228. Ex. 22:2, 20:5

229. Mak. 2b [illegible] page 4.

Mak. 3b Page 54

230. Mak. 1:1 Page 53

231. See Chapter III, p 25

232. Mak. 1:1 Page 53

233. Mak. 1:1

Mak. 5a Page 55

234. Mak. 1:3

235. Mak. 5a

236. Deut. 19:19

237. Mak. 5a Page 50

238. Mak. 2b

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239. Mak. 2b

240. Mak. 13b, 16a

241. B.K. 74b; Rashi comments: "Because of 'Thou shalt not

bear false witness.'" Apparently, then, Eleazar and Rashi differ with the general rule.

242. Mak. 1:2; 10a

243. Deut. 25:2

244. Mak. 4b

245. Deut. 17:6

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246. Mak. 1:7

247. Mak. 1:5

248. M.T. Edus 20:5

249. See Introduction, page v.

250. Mak. 5b

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251. Mak. 4b, 5a

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252. Lev. 24:22

253. Ket. 33a

254. Ket. 20a

255. Sanh. 89a

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256. Mak. 2b; 3a

257. B.K. 73b

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258. B.K. 7:3

259. B.B. 3:4

260. B.B. 3:4 Ibid 19b, 20a

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261. B.K. 24b and see note 241. For discussion of the significance of the distinction between Hakhamhak and

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262. Sanh. 9b, 10a Introduction.

263. Mak. 1:7

264. Mak. 6a

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265. Sanh. 86a,b

266. Deut. 19:21

267. Deut. 19:19

268. Mak. 1:6

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269. Mak. 5a

270. See definition on page 47; and discussion, infra.

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271. See Introduction for further discussion.

272. Mak. 5a

273. Sanh. 78a

274. See page 47

Page 67

275. Mak. 1:4

276. Deut. 19:18

277. Mak. 5a

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278. Mak. 5a

279. pp 53 f.

280. Mak. 2b, Ibid 13b, 16a

Page 68, continued

281. B.K. 74b; and see note 241. For discussion of the significance of the distinction between <u>Hakhashah</u> and <u>hazamah</u>, see Introduction.

282. See p. 16 ff.

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283. Sot. 6:4

284. Sot. 9:8

285. Yeb. 88b

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286. Ex. 23:7

287. Sheb. 31a

288. B.K. 55b, 56a

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