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THE STATUS OF THE DEAF IN EARLY RABBINIC LITERATURE

by

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Thesis submitted in partial fulfillment of
the requirements for the Degree of Master
of Arts in Hebrew Letters and Ordination

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DIGEST

The status of the deaf in rabbinic literature is both fascinating and interesting. Because of my work with Jewish deaf over the past few years and because I noticed that the Jewish deaf were relegated to a secondary position by the Jewish Establishment, I was motivated to make a detailed study of the legal and social status of the Jewish deaf in talmudic times. The present day discrimination against the deaf may have origins in ancient, including rabbinic literature.

Our rabbis, defined the "heresh" as one who is congenitally deaf and mute and because of his physical impairment he does not have full mental competency. The "heresh" was a special person in rabbinic literature who require unique treatment. His religious and legal status was most affected by his physical impairment and his consequent lack of full mental competency.

The rabbis believed that the deaf mute was mentally incompetent in many ways of life. This is most evident when they stated: "he has the capacity of action but not of intention." They were even more far reaching when they said: "In the majority of cases, what they do is bungled." Consequently, many legal practices and religious rites were denied to him and his legal status was on a much lower level than a hearing individual.

I specifically make a study of "the limited validity" of a rabbinic marriage involving a deaf mute or one deaf person and hearing person. I saw that such a marriage led to various complications demanding special legal treatment. For example, the deaf could not perform the "halizah" rite; the deaf could be neither

the subject nor the object of a legally valid "halizah" therefore if any action was taken in a levirate situation involving deaf mutes, it would have to be levirate marriage.

In capsule form, I would maintain that all the amendments to the regular marriage process were considered necessary by the rabbis because of the "limited validity" of the deaf mute's marriage.

In essence, I must state that I feel the rabbis were not only legally motivated to give the deaf a separate status but were also psychologically motivated to do so.

Even though the rabbis felt that a deaf person could cope with his environment (since they legalized marriage) and even though they attributed to him a sense of personal worth and honor, they still considered him to be mentally incompetent in many areas of life. This psychological motivation was grounded in the rabbinic axiom that "a deaf person has the capacity of physical action but not of intention."

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PART ONE

DEFINITION OF THE HERESH IN RABBINIC LITERATURE

I. Definition of the Heresh in Rabbinic Literature

At the outset of this paper it is extremely important for us to define the word "heresh." As we will see, there were many restrictions governing the life of the "heresh." The status of the "heresh" was unique in rabbinic times and so it is crucial for us to define the "heresh" as understood by our rabbinic sages.

The definition is offered to us in Mishna Terumoth

חרש שדברו בו חכמים
בכל מקום שאינו לא שומע
ולא מדבר.

"The HERESH of whom the rabbis speak¹
is one who cannot hear nor speak."

Bertinoro to this mishna elaborates on the definition. He maintains he cannot hear nor speak because he was born deaf from his mother's womb and since he never heard sound it is impossible that he should have the ability to speak.² Tosefta Terumoth adds to our definition. The tosefta questions.

Who is a deaf man

איזה הוא חרש

and answers

כל שהיה חרש מחילתו

any one who was deaf from birth.³

Thus our definition of a "heresh" is extended and enlarged.

"A heresh is one who was born deaf and cannot hear nor speak. A heresh is a deaf mute."

This is the "heresh" of whom the rabbis⁴ speak when they classify him with the imbecile and the minor.

This is the "heresh" of whom the rabbis speak when they exclude him from participating in certain "mitzvot," and introduce certain rules and regulations governing his life. This is the "heresh" I will be dealing with in my paper as I discuss the status of the deaf in rabbinic literature.

Nonetheless, it is important, especially at the outset of the paper, to give an alternative definition of "heresh" as used by the rabbis and to explain the frequent term "illem." Let us examine the other definition of a "deaf" person. The tosefta maintains

שומע ואינו מדבר זה הוא אילם,
מדבר ואינו שומע זה הוא חרש.
וזה וזה הרי הוא כפיקח לכל דבר.

"He who hears and cannot speak this is an illem, he who speaks and cannot hear this a heresh. And both are considered in possession of their faculties for all purposes."⁵

At first glance, this definition of "heresh" seems to contradict our previous rabbinic definition. However, if we probe the rabbinic literature further, we will reconcile these apparent contradictory definitions. The difficulty we are having in trying to reach a consistent rabbinic definition of "heresh" is resolved when we turn to Tractate Gittin and follow a discussion our rabbis are having.

R. Kahana said in the name of Rab
If a deaf person can signify his meaning
by writing, A Get may be written and given
to his wife. Said R. Joseph, What does this
tell us? We have learnt in a mishna
"If a man is struck dumb and when they say to
him, shall we write a Get for your wife, he nods
his head, he is tested with three questions,
if he signifies "no" and "yes" properly each time
then the Get should be written and given for him?"

R. Zera replied to him You have quoted a statement about an "illem." An "illem" is different as it has been taught in a baraita "One who can speak but not hear is called heresh and one who can hear but not speak is called illem and both are considered to be in possession of their faculties for all purposes."⁶

Rashi comments on the last statement and clarifies all our ambiguities and reconciles all our contradictions that we have been meeting. He states that the "Heresh" in the above baraita is not the "heresh" of whom the rabbinic sages speak of for our rabbis put the "heresh" in the same category as an imbecile and a minor, however this "heresh" of R. Kahana whom we encountered above cannot hear nor speak,⁷ he is a deaf mute.

Thus our former definition is buttressed and supported by Rashi's commentary to Gemara Gittin 71a. The rabbinic "Heresh" is a deaf mute. Also if we turn to Hagigah 2b-3a. our contradictory definitions of the "Heresh" will again be reconciled. Our rabbis are in a detailed discussion as to who is exempt from appearing at the temple and finally Raba states

"All are bound to appear (at the temple) and to rejoice except a heresh that can speak but not hear or hear but not speak, who is exempt from appearing at the temple, but though he is exempt from appearing, he is bound to rejoice. One however that can neither hear nor speak, an imbecile and a minor are exempt from even rejoicing since they are exempt from all the precepts in the torah."⁸

So thus the "heresh" that is traditionally grouped with the minor and the imbecile is the heresh who cannot hear nor speak. This is the "heresh" of whom the rabbis talk throughout the rabbinic literature.

The rabbis in discussing the "heresh" in tannaitic and amoraic literature use a formula which is generally consistent throughout rabbinic literature. The formula is הרש שוטה וקטן Whenever the rabbis want to speak about the "heresh" or when the rabbis want to stipulate certain rules governing the life of the "heresh" they usually, in the same mishna, or ^{baraita} (tosefta), discuss the status of the minor and the imbecile. The basic reason why these three groups are categorized together is that the rabbis felt that all three groups are

9 לאו בני דיעה נינהו

A loose or general translation of the above would be "mentally incompetent." However, one must translate the above differently as it applies to minors, deaf people, and imbeciles.

Broadly speaking, the minor was considered mentally incompetent due to his immature age, the imbecile was termed mentally incompetent due to his lack of intelligence, and the deaf person was classified as mentally incompetent due to his physical impairment which retarded his ability to learn and to fully comprehend the legal and social transactions of the day.

This was the opinion of the rabbis and so they enacted rules and regulations governing the lives of these three groups of people and also exempted them from actively participating in many of the "mitzvot."

And so our definition of a "heresh" is enlarged

"a heresh is one who was born deaf and consequently cannot hear nor speak and ^{therefore} ~~therefore~~ one who is a לאו בני דיעה (mentally incompetent)"

Now it could be said that rabbis concluded that לאו בר דעה results from his physical impairment, nonetheless, I also feel it is axiomatic to state that every "heresh" was a לאו בר דעה according to rabbinic literature.

My enlarged definition could be supported by Hagigah, chapter one, where it says

"all are duty bound to appear (at the temple on the three pilgrim festivals) except a deaf mute an imbecile and a minor."¹⁰

The gemara to this mishna states:

קחני חרש דומיא דשוטה וקטן
מה שוטה וקטן דלאו בני דעה
אף חרש דלאו בר דעה הוא.

"Our mishna speaks of heresh similarly as of the imbecile and the minor; just as the imbecile and minor lack understanding so heresh (means) one that lacks understanding."¹¹

Thusly my definition of "heresh," the "heresh" of whom my paper deals with is this

"A heresh is one who is congenitally deaf; he cannot hear nor speak and is mentally incompetent."

II. The "Mental Incompetency" of the Heresh Vis-A-Vis His Limited Legal, Religious and Social Status in Rabbinic Literature

The factor which led the rabbis to assert that a deaf mute is a "mentally incompetent" was his "deafness" rather than his "dumbness." For according to rabbinic literature, there is no doubt about the mental competency of the "illem" - the dumb who can hear - and even though the "illem" is somewhat limited vis-a-vis his legal and religious status, he for the most part ¹¹ given the same legal and religious rights as those who can hear. ¹² Also in the talmud the verse "That they may hear and that they may learn," ¹³ is also applied to the hearing mute, who can learn because they can hear. There is a very moving story in the talmud of two "dumb" men who regularly came to the synagogue and who listened diligently to the teachings of R. Yehudah Ha Nassi. Whenever the Rabbi spoke, their heads nodded and their lips moved trying vainly to respond to Rabbi's teaching. Rabbi sympathized with their plight and prayed and prayed for them, whereupon they miraculously obtained the power of speech and were found to be well versed in the disciplines of rabbinic literature. ¹⁴

So we see the rabbis did make a distinction between the "deaf mute" and the "hearing dumb."

Because of his "mental incompetency" the deaf mute was excluded from the religious life of the community.

ואת שאיננו לא שומע ולא מדבר
ושוטה וקטן פטורין אף מן השמחה
הואיל ופטורין מכל מצות האמורות
בחורה.

"One however, that can neither hear nor speak, an imbecile and a minor are exempt even from rejoicing, since they are exempt from all the precepts of the torah."¹⁵

Since the deaf were free from the privilege of performing the "mitzvot," they could never of course assume any leadership role in the community.

חרש שוטה וקטן אין מוציאין את
הרבים ידי חובתן. זה הכלל, כל
שאינו מחייב בדבר אינו מוציא את
הרבים ידי חובתן.

"A deaf mute an imbecile or a minor cannot assist the many to fulfill their duty. This is the general principle; Whoever is himself not liable to perform an act cannot aid the many to carry their obligation."¹⁶

They cannot blow the shofar,¹⁷ nor can they lay an "erav-techumin,"¹⁸ nor can a deaf mute priest bestow upon his wife the privilege of teumah.¹⁹ One minor exception is found in the case of "shechita" which cannot be performed by the deaf mute "lechatechila" but if performed ~~by~~ "bedi-avad" under the supervision of a "mentally competent" person their act is accepted.²⁰

So thus we see that because of physical impairment the deaf mute was considered "mentally incompetent" to actively participate in the religious activities of the community. The talmud gives us a good insight of how the rabbis viewed the mentality of the deaf and why they excluded him from the religious activities of the community when it states

יש לו מעשה ואין לו מחשבה

"he has the capacity of physical action but not of intention"²¹

That is, only such actions of his are valid which require physical capacity but not those which require mental capacity. In Tractate Chullin this attitude of rabbis vis-a-vis the deaf mute is more exaggerated and far reaching when it states

"Because in the majority of cases what they do is bungled"²²

ורוב מעשיהן מקולקלין

The deaf mute because of his limited "mental competency" also had very little legal standing in the community. Due to his physical deficiency he was not held responsible for any mishap and accordingly was not liable to damages for assault upon others while others were liable for assault upon him.²³ His claims on others were not heard nor could an oath be administered to others on his account.²⁴ Because of his supposed lack of mental competency the rabbis prohibited deaf mutes from formulating vows or making assessments while all other people (except the minor and the imbecile) were deemed capable of vowing to consecrate objects for the sanctuary.²⁵

^{In} The legal matters the deaf mute was not held culpable to guilt as was his hearing counterpart. A striking example of this is found in Tractate Meilah

"if one sent (money by) a deaf mute or a mentally defective person or a minor (to buy food belonging to the temple) and they carried out

his errand then the owner has committed sacrilege; if they did not perform his errand then the shopkeeper has committed sacrilege."²⁶

In order for us to understand this mishna we must be aware of the rabbinic maxim

אין שליח לדבר עבירה

"the sender is not subject to sin
with the exception of מעילה"
(sacrilege i.e. making holy things of
temple illegally profane). With מעילה"
the rabbis ordained"
"אין שליח לדבר עבירה"
"the sender is subject to sin"²⁷

Now according to this logic and according to the details of our mishna it appears that the "heresh" should really be guilty but since the deaf are not "בני שליחות" and cupable to guilt the guilt is transferred from the deaf person to the shopkeeper.²⁸

Another example of the limited legal status of the "heresh" is illustrated in Tractate Yebamoth where it states that the "heresh" cannot execute any kinyan.²⁹ (an act of acquisition) (Nevertheless due to mitigating circumstances and rabbinical decrees thereof the latter principle was altered with regard to marriage which will be discussed at great length in the following chapter.)

The rabbis relegated the deaf mute to a second class position in the religious and legal community. They were of the opinion that because of his serious physical impairment his mental competency suffered. He was considered "לאו בר דעה הוא"³⁰ and consequently "רוב מעשיהן מקולקלין".³¹ The consequences were - limited religious and legal status in the community.

Today we are aware that there is no correlation between one's intelligence and one's deafness. Yet the rabbis of old did not hold to that opinion. However in all fairness to the rabbis it must be admitted that their

insight into the effects of deafness on the individual concerned was far reaching and brilliant for their day. As stated above the rabbis felt that " 32 יש לו מעשה ואין לו מחשבה with regard to the deaf. This could be interpreted as

"he has the ability for physical achievement but due to his hearing loss at birth (for this is how the rabbis defined heresh) his reasoning abilities became clouded."

It is fascinating to note that three modern and eloquent psychologists of the deaf today have reported similar findings.

"A sensory deprivation limits the world of experience. It deprives the individual of a portion of the natural resources from which the mind and personality develop. Inasmuch as total experience is reduced there is an imposition on the equilibrium of all psychological processes. When hearing is lacking it alters the integration and functioning of the other sensory processes. Experience is constituted differently; the world of perception, conception imagination, and thought has an altered foundation, a new configuration. These statements are not mere speculation because scientific evidence regarding the importance of a sensory deprivation for learning and adjustment is being accumulated in many centers through the world. While these findings cannot be reviewed here the guidance councillor must be cognizant of the fact that research is indicating that it is more difficult for abstract intelligence to develop normally when deafness is present from early life, that the stress deriving from impaired hearing causes wholesome emotional adjustment to be more difficult to achieve, that deafness is a handicap which causes greater dependence on others, and that the limitation in communication which results greatly increases the difficulties of understanding and relating to other people."³³

The ancient rabbis of the talmudic period were, to a limited extent, aware of the above as evidenced by the different rabbinic literature

we have been reading. And if the rabbis meant by the phrase

34

"

לאו בני דעה נינהו

or "mentally incompetent"

"a loss in hearing alters the integration and functioning of the sensory processes.... and limitation in communication greatly increases the difficulties of understanding and relating to other people"³⁵

They were quite accurate. Nonetheless the rabbis did not make any concerted efforts to educate the deaf, to capitalize on his innate intelligence, and mostly to include the deaf as active participants in the religious and legal community of Israel. It must be remembered that the deaf were more or less excluded from the religious life of the community³⁶ and their legal status was definitely inferior to a person who had control of all his sensory equipment. The rabbis even went as far and said that

"רוב מעשיהן מקולקלין"

37

In the majority of cases what they do is bungled

III The Legal and Religious Status of the Deaf Mute Vis-a-Vis the Legal and Religious Status of the Imbecile in Rabbinic Literature

Even though the rabbis included the deaf mute in the same category as the imbecile it must be stressed that rabbis did not place the deaf mute on the same low level as that of the imbecile.

That is the rabbis recognized degrees of mental incapacity. This is most amply proven by Tosefta Baba Kama where it states:

"ר' אומר, אומר אני לחרש יש לו בושח,
ולקטן אין לו בושח, שוטה פעמים יש לו
בושח ופעמים אין לו בושח"

"Rabbi said, I say a deaf mute is subject (to be paid) for degradation and minor is not subject to be paid for degradation a fool at times is subject to be paid for degradation and at times is not subject to be paid for degradation."³⁸

The corresponding talmudic passage states that a deaf mute is subject (to be paid) for degradation but an idiot is not subject to (to be paid) for degradation where a minor is sometimes subject to be paid and sometimes not subject to be paid.³⁹

Schwarz's commentary to the tosefta comments on why the deaf mute is subject (to be paid for degradation). הגי' אריה maintains that even though he is not intellectually oriented, he still can get embarrassed for embarrassment is not only dependent on "לע" but also on man's understanding of his general environment. Thus he feels that the rabbis credit the deaf with a sense of personal honor and a greater understanding than the imbecile or the minor.⁴⁰

Also in Tractate Yebamoth we find that the rabbis legalized the marriage of two deaf mutes or one of sound senses to one who was deaf, for they felt two deaf mutes or a couple involving a deaf mute could lead well adjusted marital life. However, the rabbis could not validate the marriage of two imbeciles, or one of sound senses to an imbecile for they felt there could be no marital bliss between such a couple.

"חרש ותרשח דקיימא תקנתא דרבנן
 תקינו להו רבנן נישואין. שוטה
 ושוטה דלא קיימא תקנתא דרבנן
 דאין אדם דר עם נחש בכפיפה אחת,
 לא תקינו דרבנן נישואין"

"In the case of a deaf man or a deaf woman where the rabbinical ordinance could be carried into practice, the marriage was ordained (i.e., legalized) by the rabbis; in that of a male or female imbecile, where the rabbinical ordinance cannot be carried into practice, since no one could live with a serpent in the same basket, the marriage was not legalized by the rabbis."⁴¹

The difference in status between the deaf mute and the imbecile is most strikingly shown in the matter of the validity of sales. Business transactions by the imbecile, whether in movable goods or real estate are invalid⁴² while the commercial transactions of the deaf mute are valid with regard to movable goods but not in real estate. The deaf mute can buy and sell movables by "gestures of the hand" or by "movements of the lips."⁴³ They must however be quizzed to illustrate that they are fully aware of the nature of the deal which proves once more that the mental competency and the rationality of the deaf mute was challenged in every way.

IV Conclusion

The "heresh" as defined by our rabbis, is one who is congenitally deaf and mute.- he cannot hear nor speak - and because of his physical impairment he does not have full mental competency.

The "heresh" was a special person in rabbinic literature who required unique treatment. His religious and legal status was most affected by his physical impairment and his consequent lack of full mental competency. The rabbis definitely believed that the deaf mute was mentally incompetent in many ways of life when they said

"יש להן מעשה ואין להן מחשבה"

"he has the capacity of physical action
but not of intention."

Consequently the practice of many religious rites were denied to him and his legal status was on a much lower level than a hearing individual's.

PART TWO

THE DEAF MUTE VIS-A-VIS MARRIAGE AND DIVORCE

I. The "Limited Validity" of the Marriage of Two Deaf Mutes or One Deaf Mute to a Physically Sound Person

"In the Post-Biblical era the betrothal was realized by the performance of an act of acquisition and the making of a declaration by the bridegroom to the bride in the presence of two witnesses. The act consisted of conveying something to the bride, even if it be merely of nominal value, or the presentation of a writ or it might well be a single experience of cohabitation.

האשה נקנית בשלוש דרכים וקונה עצמה
בשתי דרכים. נקנית בכסף, בשטר ובביאה.

"A woman is acquired in one of three ways
and acquires her freedom in two. She is
acquired by money, by deed or by intercourse."
(Kid. 1:1)

Note that the mishna says: "A woman is acquired in one of three ways." Consequently, betrothal in tannaitic times was a symbolic form of acquisition.¹

It is important to note at the outset that the marriage of a deaf mute was regarded as invalid biblically by the sages due to the fact that a deaf mute was considered to be mentally incompetent, due to his physical impairment, and consequently unable to make a valid acquisition,² which is part and parcel of the marriage process. Yet it is crucial to note that the rabbis of the talmudic period did legalize the marriage involving deaf mutes. And consequently their marriage was rabbinically valid.³ Though it was not legitimate biblically. The marriage of a deaf mute male was not given biblical sanction because of his inability to

execute any legal acquisition.⁴ Also if the woman was deaf and the man was hearing the marriage was still only given rabbinic validity and not biblical sanction. The reason behind this legislation was that the rabbis felt that a deaf mute was 5
לאו בני דעה נינהו

and consequently the deaf woman would not be sufficiently capable of understanding the full meaning and consequences of betrothal. Nevertheless, the rabbis did give rabbinic legality to the marriage of two deaf mutes or one of sound senses to one who was deaf, for they felt that two deaf mutes or a couple involving a deaf mute could lead a well adjusted marital life.⁶

However since the deaf mute's marriage was only rabbinically valid it is important for us to mention at this point that the consequence of a deaf mute's marriage was that it had only "limited validity."

Let me illustrate the legitimacy of this statement by quoting Mishna Yebamoth 13:9

"מי שהיה נשוי לשתי תלומות קטנות ומת.
בא יבם על הראשונה וחזר ובא על השניה
או שבא אחיו על השניה לא פסל את הראשונה.
וכן שתי חרשות. קטנה וחרשת, בא יבם על
הקטנה וחזר ובא על החרשת או שבא אחיו על
החרשת לא פסל את הקטנה. בא יבם על החרשת
וחזר ובא על הקטנה, או שבא אחיו על הקטנה,
פסל את החרשת."

"If one were married to two orphan minors and died, if the brother in law copulated with the first and then again copulated with the second, or if his brother had sexual intercourse with the second he has not disqualified the first one. And similarly too with two deaf mute women. If one were a minor and the other a deaf mute and the brother in law had sexual intercourse with the minor and then again with the deaf mute he has not disqualified the minor. If the brother in law had sexual intercourse with the deaf mute and then again had sexual intercourse with the minor or if his brother copulated with the minor he has thereby disqualified the deaf mute."⁷

It is the last part of our mishna that substantiates the thesis that when a man marries a deaf mute the marriage only has "limited validity."

Bertinoro elaborates and explains this phenomenon when he comments on the mishnaic statement

"he has thereby disqualified the deaf mute"

Bertinoro maintains that when a man in the levirate situation has sexual connection with a minor there is the possibility of a complete acquisition but when the levirate situation a man has intercourse with a deaf mute there is only partial acquisition.

"וחרשה קנויה ומשויירת כלומר קנויה
במקצת ואינה קנויה קנין גמור"

"but a deaf mute is an acquisition but it is acquired partially and is not a complete acquisition."⁸

Nevertheless the marriage of a deaf mute was granted rabbinic sanction.⁹ However, there were restrictions made on such a marriage and a rabbinic marriage did not possess the full validity of a perfect biblical marriage and the fact of "partial validity" of such a marriage led to various complications demanding special legal treatment which will be discussed in part two of this section.

II The Legal and Social Ramifications of Deafness in the Rabbinic Period Vis-A-Vis the "Limited Validity" of a "Rabbinic" Marriage

A. The Deaf Mute and his Status Vis-A-Vis the Kethubah Institution.

In this section we will discuss at great length the legal and social complications that confronted a deaf person and his or her partner when they assumed this special marital status of "partial validity."

In rabbinic tradition the institution of the "kethubah" was originated by Simon Ben Shatach, President of the Sanhedrin in Jerusalem (about 100 B.C.)¹⁰

The "kethubah" or marriage contract was an instrument to safeguard the wife's rights.

"In order to protect the wife in the event of her becoming widowed or divorced it was established by the Jewish Law that, before the nuptials, the husband was to make out an obligation in writing which entitled her to receive a certain sum from his estate in the case of his death or in the case of divorcement. This obligation was termed "kethubah." The minimum of this obligation was fixed at a sum of two hundred denarii at the marriage of a virgin and one hundred silver dinarii at the marriage of a widow. This amount could, in either case be increased at the option of the husband, whose increase was termed "thosaphoth kethuba." For the security of the wife's claim to the amount fixed in the kethuba all the property of the husband, both real and personal was mortgaged.

In later times the document of the kethuba was to contain also some articles of marriage settlements, setting forth the general duties of the husband to his wife and stating the amount of value of the portion she brings to him in marriage, which amount, with an addition of fifty percent, she was to receive in case her husband died or divorced her."¹¹

Thus we see that the wife's legal and social rights and status were protected by the "kethubah" institution.

Nevertheless a deaf woman, according to rabbinic law was not legally entitled to her "kethubah." This rule was stipulated to facilitate the marriage of deaf women.

"וחרשת מנלן דלית לה כחובה. דנתיא חרש ושוטה שנשא
פקחות אע"פ שנחפקת חרש ונשחפה השוטה אין להם עליהם
כלום. רצו לקיימן, יש להם כחובה ופקת שנשא חרשת או
שוטה אפילו כתב לה מאה מנה, כחובה קיימת מפני שרצה
לזקק בנכסיו. שעמא דרצה. הא לא רצה אין לה דאייכ
מי מנעו ולא נסבי לה."

"And whence is it inferred that a deaf woman is not entitled to her kethubah? From what was taught if a man who was deaf or an imbecile married women of sound senses (the latter) even though the deaf man recovered his faculties or the imbecile regained his intelligence, have no claim whatsoever on (either of) them. But if (the men) wished to retain them (the latter) are entitled to a kethubah of the value of a maneh. If, however, a man of sound senses married a woman who was deaf or an imbecile, her kethubah is valid even if he undertook in writing to give her a hundred maneh, since he himself had consented to suffer the loss. The reason then, is because he himself consented; had he not consented, however she would receive no kethubah since otherwise men would abstain from marrying her."¹²

Epstein comments on the above talmudic passage and succinctly describes the legal rights of a deaf person vis-a-vis the "kethubah" institution in his book "Jewish Marriage Contracts."

"The deaf mute woman is by rabbinic ordinance not entitled to any mohar at all, in order to make marriage to her easier on the man. Yet if a normal man married a deaf mute woman and gave her a kethubah of ever so large an amount, he must pay that amount on divorce not as a kethubah but as mere promise for a consideration. On the other hand, he has no claim on her for any of the rights of a husband. Similarly, if a normal woman married a deaf mute husband, he is entitled to all the privileges of a husband while she has no claim on him at all. If the court entered into an agreement with a normal man on behalf of a deaf mute woman for the consideration of his marrying her, that agreement is binding. Without specific stipulation or in the case of the marriage of two deaf mutes to each other where stipulation has no legal power, the kethubah terms do not apply and the husband has no legal rights over his wife's property."¹³

From the above we are keenly aware and most acutely informed of the legal status of a deaf woman or man vis-a-vis the "kethubah" institution.

B. The Relationship of the Deaf Mute to the "Terumah" Privilege

In discussing the legal and social ramifications of deafness vis-a-vis the "partial validity" of a rabbinic marriage, one cannot pass over the question of "terumah"¹⁴ and the role it plays in the marriage of two deaf people or one deaf person to a hearing person. As I mentioned before the rabbinic validity of such marriages led to various complications demanding special legal treatment.

The phenomenon of "terumah" and the role it plays in a marriage of deaf mutes is illustrated in Yebamoth mishna 7:4. This mishna explains the relationship of "terumah" vis-a-vis a marriage which has only rabbinic sanction.

העובר והיבם והארוסין
והחרש ובן חשע שנים ויום אחד
פוסלין ולא מאכילין.

"An embryo, a yavam, betrothal, a deaf mute, or a boy of nine years old can deprive (a woman) of the right to eat (from the terumah) but they cannot bestow (on her) the right."¹⁵

Before I explain the relationship of "terumah" to a rabbinic marriage involving deaf mutes it is important to comment on "betrothal" (in the above mishna) and the effect it has on the terumah privilege. This will give us background and further insight in understanding the complications that arise when a deaf mute marries a hearing person and is subsequently out off from the "terumah" privilege.

Bertinoro interprets "betrothal" vis-a-vis the "terumah" privilege as follows.

He states that a priest's daughter betrothed by an Israelite loses her "terumah" privilege because betrothal represents legal acquisition and the woman is the acquired property of the non-priest. On the other hand an Israelite's daughter betrothed by a priest, who would be biblically allowed the privilege of "terumah," was denied this privilege by the rabbis as a preventive measure against the possibility of her treating it to other people.¹⁶

Against this background and understanding of "terumah" and "betrothal" we can easily explain the other part of our mishna concerning a deaf mute, his marriage partner and the "terumah" privilege.

Our problem can be succinctly phrased in a question. Why is a woman married to a deaf mute deprived of the "terumah" privilege? The answer is quite clear. A deaf mute Israelite husband deprives a priest's daughter of "terumah" because he acquired his wife by rabbinical enactment and consequently his marriage has only rabbinic validity. However a deaf mute priest does not qualify his wife because the acquisition was only rabbinically valid and not biblically valid. Thus the rabbinically valid marriage could not qualify the woman for biblical "terumah."¹⁷

There were, however, certain conditions under which woman might eat "terumah," if she were married to a deaf mute priest.

בן ישראל פיקחת שנישאת לכהן חרש
אינה אוכלת בחרומה. עוברת לא
חאכל וילדה חאכל.

"If a hearing daughter of an Israelite is married to a deaf mute priest she is not permitted to eat terumah. If he made her pregnant she is not permitted to eat, but if she bore (a child) she may eat."¹⁸

And so we see that a living child of priestly stock qualifies its mother (even though she is married to a deaf mute priest) to eat from the "terumah."¹⁹

C. The Relationship of the Deaf Mute to the "Halizah" Rite

Another instance illustrating that certain legal and social complications confronted a deaf person due to his special marital status was the relationship of the deaf mute to the "halizah" rite. A deaf mute person in a levirate situation could not perform a valid "halizah" rite. This is most explicit in both Mishna Yeb. 12:4 and Tosefta Yeb. 2:6.

The mishna runs as follows:

החרש שנחלץ והחרשת שחלצה
והחולצת לקטן חליצתה פסולה.

"If a male deaf mute submitted to halizah or if a female deaf mute performed halizah or if a woman performed halizah on a minor her halizah is invalid."²⁰

Bertinoro to the above mishna explains that a female deaf mute cannot be freed by "halizah" and that she has no other course of action than to contract "levirate marriage" after which she may be divorced.²¹

Tosefa Yebamoth 2:6 runs as follows:

"החרש והשוטה מייבמין ולא חולצין"

"The deaf mute and the imbecile
may perform levirate marriage
but may not perform halizah."

The corresponding talmudic passage to our Tosefta and Mishna ask why the deaf are not subject to the "halizah" rite. Two possible answers are given. (one which necessarily results from the other) The first states that the deaf are לאו בני דעה נינהו That is, they are mentally incompetent to understand the full implications and meaning of halizah, due to their physical impairment. That is, since a deaf person couldn't hear the spoken word our rabbis reasoned that he couldn't

understand the full implications of the "halizah" ceremony.

The second reason why the deaf were not subjected to "halizah" was that due to their physical impairment a deaf mute lady could not recite the prescribed words of the "halizah" ceremony²² and thus she, according to law could not be subject to "halizah" rite.²³

Thus the deaf mute can be neither the subject nor the object of a legally valid "halizah." Therefore if any action is taken in a levirate situation involving deaf mute, it would have to be "levirate marriage" (which will be discussed in a part E of this section).

D. The Deaf Mute and Divorce

Thus the deaf mute cannot perform "Halizah" because he cannot utter the spoken word necessary to activate and realize the prescribed "halizah" formula. However if a deaf person wanted to marry or divorce another deaf person or a hearing person he could do so by means of "sign language" or "ברמיזה".

For there is no biblical injunction making speaking a "sine qua non" for marriage or divorce. This is explicitly stated in Tractate Yebamoth.

הרש שנשא פקח ופקח שנשא
חרשת אם רצה יוציא, ואם רצה
יקיים. כשם שהוא כונס
ברמיזה כך הוא מוצא ברמיזה.

"if a deaf mute married a woman
of sound hearing or if a man of
sound hearing married a deaf mute,
if he desire he may divorce her
or if he wish he may continue.
Just as he marries by gesture so
he may divorce by gesture."²³

So our mishna suggests that just as a deaf mute may perform a marriage by signs, a deaf mute can also divorce by this procedure.²⁴

Tosefta Yebamoth 13:7 tells us how this method of divorce is to be performed and states that a divorce document is required.

כיצד צד מוציא ברמיזה?
רומז ונותן לה גיטה.

"How does one divorce her by
means of a gesture? One
gestures and gives to her a
divorce document."²⁵

חזקוני's commentary to the above tosefta elaborates on this procedure and explains it in fuller and greater detail. He maintains that the deaf mute is permitted to gesture with his head or his hand but he cannot use lip movements to show his desire for this is not a recognized way of "רמיזה" with regard to giving a get.²⁶

At this point as we are discussing the status of the deaf mute vis-a-vis divorce, it is interesting to note that a deaf person, according to rabbinic law, may even write out his own letter of divorce.

Mishna Gittin states:

הכל כשרין לכתוב את הגט
אפילו חרש, שוטה וקטן.
האשה כותבת את גיטה.

"All are qualified to write out a letter of divorce even a deaf person, an imbecile or a minor. A woman (not a deaf one) may write out her letter of divorce....."²⁷

Bertinoro, accepting the interpretation in Gittin 23a, qualifies the above mishna and consequently limits the legal status and power of a deaf mute when he states that a deaf person may write a letter of divorce provided that an adult is standing by him and says "write for such and such a purpose."

The reason why a deaf person may write out a letter of divorce, provided an adult is present, is because he is not a בן נעם.

That is, our talmudic sages felt that since the deaf were stifled mentally, due to their physical impairment they would follow without argument the dictates of an adult. However, an idolator, a priori, is not permitted

to write out a letter of divorce for he is considered a "בן דעה"
 and might be persuaded to follow his own conscience. Nonetheless, the
 deaf mute may only write the "טופס" (the blank form); the "תורף"
 (the formal part) must be written by a Jew who is physically sound and
 is a "בן דעה"²⁸

E. The Status of the Deaf Mute When Confronted with Divorce and a Levirate Situation

A question might confront us. What if a man of sound senses (who has a deaf brother) marries a woman of sound senses and a "levirate situation" exists shortly after? Can the deaf man divorce his "yebamah-wife" by means of gestures? The tosefta answers no.

פיקחח לפיקח ולו אח
חרש כונס ואינו מוציא
לעולם.

"If a woman of sound hearing is married to a man of sound hearing and he has a deaf mute brother, then he must consummate levirate marriage with and he can never divorce."²⁹

The reasoning behind this is logical. The original marriage was biblically valid. A "levirate situation" confronted the new couple. A deaf mute, because of his physical impairment was not considered mentally competent to dissolve a biblical tie.³⁰

Thus he cannot divorce his newly acquired "yebamah-wife" by means of gestures although he could divorce a normal wife by such means. Also, a biblical levirate tie could not be broken by means of signs or gestures. However, if a rabbinic levirate tie existed the man could divorce his hearing wife. Tosefta 13:9 confronts this situation:

פקחח לחרש ולו אח חרש
חרשת לפקח ולו אח פקח,
חרשת לחרש ולו אח חרש
כונס. אם רצה להוציא - יוציא.
אם רצה לקיים - יקיים.

"If a woman of sound hearing is married to a deaf mute and he has a deaf mute brother or if a deaf mute woman is married to a man of sound hearing and he has a physically sound brother, or if a deaf mute woman is married to a deaf mute man and he has a brother of sound hearing, or if a deaf mute woman is married to a deaf mute man and he has a deaf mute brother, then he must consummate levirate marriage. If he desires to keep her he may keep her; if he desires to divorce her he may divorce her."³¹

In all the above cases the original marriages are rabbinically valid. A rabbinic levirate tie exists and since the deaf mute in question is unable legally to be an active participant in a valid "halizah" rite, levirate marriage is necessary. And since the levirate situation that we are confronting is rabbinic, the man, even if he is a deaf mute may later divorce his "yebamah-wife."³²

At this point we enter into more intricate and complicated territory. Mishna Yebamoth 14:4 and its corresponding tosefta deal with the legal social problems of two brothers marrying two sisters. In all of these cases at least one of the spouses is deaf.

In order to illustrate the situation and the problem involved I will present the mishna:

"שני אחים אחד חרש ואחד פקח
נשואים לשתי אחיות פקחות. מה
חרש בעל הפקחה, מה יעשה פקח
בעל הפקחה. תצא משום אחות אשה".

"If two brothers one a deaf mute and the other of sound hearing were wedded to two sisters of sound hearing and the deaf mute husband of her of sound hearing died, what shall the one of sound hearing, the husband of the other of sound hearing do? She goes free because she is the wife's sister."³³

We realize that the widow cannot enter into levirate union with her brother in law because of the law of two sisters living with one man.³⁴

Our mishna continues:

מת פקח בעל הפקחת. מה
יעשה חרש בעל פקחת. מוציא
אשתו בגט ואשת אחיו אטורה
לעולם.

"If he of sound hearing, the husband of her of sound hearing died, what shall the deaf mute, husband of her of sound hearing do? He must release his own wife with a bill of divorce and his brother's wife is forbidden to him forever."³⁵

He must divorce his wife for his marital relation with his sister-in-law is greater than his marital status with his wife. That is, the levirate relation with his sister-in-law whose marriage was pentateuchally valid overrides his present marriage which is only rabbinically valid. Thus, there is no strength in his marriage to override his "yebamah." And he can't marry his brother's wife because she is his wife's sister.³⁶

As we continue to read our mishna in question we are made more aware that legal and social complications can arise when one marries a deaf person.

שני אחים פקחים נשואים לשתי אחיות
 אחת חרשת ואחת פקחה, מה פקח בעל חרשת,
 מה יעשה פקח בעל פקחה. תצא משום אחות
 אשה. מה פקח בעל פקחה, מה יעשה פקח
 בעל החרשת. מוציא את אשתו בגט ואח אשת
 אחיו בחליצה.

שני אחים, אחד חרש ואחד פקח נשואים
 לשתי אחיות, אחת חרשת ואחת פקחה, מה
 חרש בעל חרשת, מה יעשה פקח בעל פקחה.
 תצא משום אחות אשה. מה פקח בעל פקחה,
 מה יעשה חרש בעל חרשת. מוציא אשתו בגט
 ואשת אחיו אסורה לעולם.

"If two brothers sound of hearing
 were married to two sisters, one a
 deaf mute and the other sound of
 hearing, the husband of the deaf mute
 died, what shall the other of sound
 hearing, the husband of her of sound
 hearing do? She goes free since she
 is the wife's sister. If he of sound
 hearing, the husband of her of sound
 hearing died, what shall the other
 sound of hearing, the husband of the
 deaf mute do? He must put away his
 own wife by a bill of divorce and
 free his brother's wife by submitting
 to halizah.

If two brothers, one a deaf mute and
 the other sound of hearing, were
 wedded to two sisters one a deaf mute
 and the other of sound hearing and the
 deaf mute, husband of the deaf mute died,
 what shall the other of sound hearing
 husband of the other of sound hearing
 do? She goes free by virtue of being
 the wife's sister. If the one of sound
 hearing, husband of her of sound hearing
 died, what shall the deaf mute, husband of
 the deaf mute do? She goes free by
 virtue of being the wife's sister.
 If the one of sound hearing, husband
 of her of sound hearing died, what

shall the deaf mute husband of the deaf mute do? He must set his wife free by a bill of divorce and his brother's wife is prohibited for all time."³⁷

By reading our mishna we see that in the above cases the living brother must divorce his wife and realize that his brother's widow is also forbidden to him for all time. It is interesting to note that the corresponding Tosefta contradicts our mishna with regard to the fact that the living brother must divorce his wife.

"שני אחין חרשין נשואין שתי אחיות פיקחות, או שתי אחיות חרשות, או שתי אחיות אחת פיקחת ואחת חרשת, וכן שתי אחיות חרשות נשואין לשני אחין פיקחין, או לשני אחין חרשין, או לשני אחין אחד פיקח ואחד חרש. שני אחין פיקחין נשואין שתי אחיות אחת פיקחת ואחת חרשת, חרשת לפיקח ופיקחת לחרש - אין כאן לחליצה וליבום אלא אשתו עמו הלזו וחצא משום אחות אשה"

"If two deaf mutes brothers marry two sisters of sound hearing or two deaf mute sisters, or two sisters of whom one is hearing, the other mute, and likewise if two sound of hearing brothers or two deaf mute brothers, or two brothers of whom one is hearing, the other deaf mute, and likewise if two sound of hearing brothers marry two sisters of whom one is sound of hearing, the other deaf mute or if a deaf mute (sister is married) to a brother sound of hearing (sister is married) to a deaf mute brother, there is here neither halizah nor levirate union, but instead his wife remains with

him and the other women is exempt
because of the prohibition of marry-
ing a wife's sister."

We note that the ruling of the tosefta here is radically different than that of our mishna. In such cases as the above, our mishna would dictate that the living brother divorce his wife and realize that his brother's widow is also forbidden to him for all time. The tosefta takes a different stand and maintains that neither "halizah" nor levirate union operates here but the man stays with his original wife and her sister is exempt from marrying him. Nevertheless, it is obvious that many controversies and difficulties can arise when one marries a deaf person, and that not only is the deaf person's status vis-a-vis marriage unique in rabbinic literature but the legal and social status of his or her hearing partner becomes subject to change and occupies a special position in the post-biblical era.

III. Conclusion

From our reading and study we have seen that the "limited validity" of a rabbinic marriage involving two deaf mutes or one deaf person and one hearing person lead to various complications demanding special legal treatment.

The rabbis legalized the marriage of deaf people for they were of the opinion that such a marriage could be a successful marriage/ That is, a deaf couple could lead a harmonious, well adjusted marital life. Nevertheless, they were exempt from participating in certain of the basic institutions of which marriage entailed. A deaf woman was not entitled to her "kethubah."³⁸ As a result the wife's legal status was on a much lower level than her hearing counterpart.

The deaf could not perform the "halizah" rite³⁹; the deaf mute could be neither the subject nor the object of a legally valid "halizah." Therefore if any action was taken in a levirate situation involving deaf mutes, it would have to be levirate marriage. A man could divorce his deaf mute wife for the rabbis felt that a deaf mute was mentally and socially enough aware to protect her person and guard her get; in essence to cope with her environment. However if she married by "sign language" so she must be divorced by sign language.⁴⁰

All the above amendments to the regular marriage process were considered necessary by the rabbis because of the "limited validity" of the deaf mute's marriage. Nevertheless I am some-

what compelled to state that I feel that the rabbis were not only legally motivated to give the deaf couple a separate status but were also psychologically motivated to do so. Even though the rabbis felt that a deaf person could cope with his environment (since they legalized his marriage)⁴¹; and even though they attributed to him a sense of personal worth and honour

"לחרש יש לו בושח" 42

they still considered him to be mentally incompetent (due to his physical impairment) in many areas of life. The deaf were

לא בני דעה ניהו⁴³ according to the rabbis and consequently they (rabbis) maintained that a "deaf person has the capacity of physical action but not of intention."⁴⁴

(יש לו מעשה ואין לו מחשבה)

And further more the rabbis are quoted as saying "In the majority

of cases what they (deaf people) do is bungled."⁴⁵ (רוב מעשיהן מקולקלין)

Thusly the deaf mute was given a special status in rabbinic literature and consequently his marriage had only "limited validity."

FOOTNOTESPART ONE

1. M Terumoth 1:2.
2. Ibid.
3. T Terumoth 1:1.
4. Tosafot to Hagigah 2b. ^{A.V.} quotes two exceptions to the rule that the "heresh" is one who cannot hear or speak. The first exception is found in Megillah 19b. where it is maintained that "all are fit to read the megillah except a deaf person an imbecile and a minor." Tosafot states that this is not evidence or proof that the rabbinic "heresh" is one who can neither speak nor hear for here we must be dealing with one who speaks since it cannot be assumed that he would lead others with gestures or sign language. Tosafot brings forth another exception in Mishna Chullin (mishna one) where it states that "all may slaughter except a deaf person an imbecile or a minor lest they impair what they slaughter." Again Tosafot states this cannot be evidence that a heresh according to the rabbis is a deaf mute because the rabbis in this instance believe that the "heresh" will be able to confirm his act of slaughtering.
5. T Jerumoth 1:1.
6. B Gittin 71a.
7. Ibid.
8. B Hagigah 2a.
9. Ibid.
10. M Hagigah 1:1.
11. B Hagigah 2b.
- 11a. Ibid.
12. T Terumoth 1:2.
13. Deut. XXXI, V. 12. found in B Hagigah 3a.
14. B Hagigah 3a.
15. B Hagigah 3b.
16. M Rosh Hashanah 3:8.

17. Ibid.
18. B Eruvin 31b.
19. T Yebamoth 9:3.
20. B Chullin 2a.
21. M Machshirin 6:1.
22. B Chullin 86a.
23. M Baba kama 8:4.
24. M Shevuoth 6:4.
25. M Arachin 1:1.
26. M Meilah 6:2.
27. Bertinoro to M Meilah 6:1.
28. Bertinoro to M Meilah 6:2.
29. B Yebamoth 68a.
30. B Hagigah 2b.
31. M Machsh^hirin 6:1.
32. B Chullin 86a.
33. "Guidance and Counselling for the Deaf" by Helmer R. Mykelbust, Ed. D., Arthur Neyhus, Ph.D., Ann M. Mulholland, M.A., American Annals of the Deaf, Vol. 107, No. 4, p. 371.
34. B Yebamoth 104b.
35. American Annals of the Deaf, Vol. 107, No. 4, p. 371.
36. B Hagigah 3a [.....מדבר ולא שומע ולא שאינו
ופטוריק מכל מצות האמורה בחורה.
37. B Chullin 86a.
38. T Baba kama 9:13.
39. B Baba kama 86b.

40. T Baba kama 8:4, (by Rektor, Prof. Adolf Schwarz, p. 91, Wien 1912, Verlag Ber Israel - Theol. Lehranstalt)
41. B Yebamoth 112b [this comparison vis-a-vis the marriage of a deaf mute and the marriage of an imbecile will be discussed in greater length and detail in the following chapter.]
42. Rashi's commentary to Gemara - B Hagigah 3a.

"איזהו שוטה.
האמור בכל מקום שפטור מן המצות ומן העונש
ואין קנינו קניין ואין ממכרו ממכר"

43. B gittin 59a, 71a.
44. Ibid. 71a.

FOOTNOTES

PART TWO

1. Boaz Cohen, "Betrothal in Jewish and Roman Law" in Proceedings of American Academy for Jewish Research, Vol. 21 (1952) pp. 75-76 (Bloch Publishing Co., New York, N.Y. 1952.)

2. T Yebamoth 68a.

3. T Yebamoth 112b.

4. Ibid. 68a.

5. Ibid. 104b.

6.

חרש וחרשת דקיימא חקנתא
 דרבנן תיקנו להו רבנן נישואין

"In the case of deaf man or
 a deaf woman where the rabbinical
 ordinance could be carried into
 practice the marriage was legalized
 by the rabbis." (Yeb. 112b)

Rashi comments and elaborates on the above talmudic passage. He states that the rabbinic ordinance could be carried into practice because a marriage of two deaf mutes or a marriage involving one deaf mute could definitely lead to a happy, well adjusted matrimonial life.

Rashi states:

שדרכן להיות שלום ביניהם
 אפילו חרש עם חרשת וכ"ש
 כשהאיש נקח.

So we see that for the rabbis a successful marriage was one in which the couple lived in peace. Boaz Cohen, in his article, "Concerning Divorce in Jewish and Roman Law" (found in "Proceedings of American Academy for Jewish Research" vol. 21, p. 20.)

States: "While the end of marriage was primarily the procreation of children, yet it was considered also a partnership in which both parties should live in peace. The Mishna alludes to the state of a happy marriage as one which is peaceful (

שלום בינו ובינה)

and to an unhappy marriage as one which is punctuated by quarrels (

קטטה בינו ובינה)

7. M Yebamoth 13:9.

8. Bertinoro to M 13:9

9. Both page 68a. and 112b. of T Yebamoth point out that a special marriage of rabbinic validity can be enacted if a deaf mute wants to enter into marriage. In order to understand the full import and meaning of 68a in the talmud it is necessary to look at the mishna of this gemara. The mishna (M. Yeb. 7:4) states that a deaf mute deprives a woman (if she is the daughter of a priest) of the right terumah but cannot bestow the privilege upon her. (if she is the daughter of an Israelite.)

The gemara explains the reasoning behind this on Yeb. 68a. It maintains that a deaf mute deprives his wife of the privilege of "terumah" since he acquired her by virtue of a rabbinical enactment.

דהא קניניה בחקנתא דרבנן

Rashi explains the meaning of חקנתא דרבנן in this context. He explains that even though a deaf mute is not בר דעת the rabbis granted him a legal marriage. (חקינו בה רבנן נישואין) Another example showing that the rabbis did make marriage rabbinically valid for a deaf person and his spouse if they desired to enter into marriage is found in Yeb. 112b. Rashi states that the marriage and betrothal of a deaf person is valid (יש נישואין) even though he is of inferior intelligence and despite the fact that in other circumstances a deaf person could not execute a kinyan. However, his acquisition here is rabbinically valid though pentateuchally it is not legitimate.

10. M. Melziner, "Marriage and Divorce" (Bloch Publishing Co., 1884) p. 86.
11. Ibid.
12. B Yebamoth 113a.
13. L. M. Epstein, "The Jewish Marriage Contract" (Jewish Theol. Seminary, New York 1927), pp. 232-233.
14. We know that when a priest marries a woman (and both of which are of sound hearing) this woman is entitled to the terumah privilege; so are members of his household and slaves granted this privilege. (This is learnt from the sifra, the tannaitic midrash, as it comments on Leviticus 22:11)

"מנין לכהן שנשא אשה וקנה עבדים שיאכלו בחרומה? ח"ל וכהן כי יקנה (נפש) קנין (כספו) הוא יאכל בו מנין לאשה שקנתה עבדים ועבדים שקנו עבדים שיאכלו בחרומה שנאמר וכהן כי יקנה קנין) אף קנינו שקנה קנין אוכל".

15. M Yebamoth 7:4.

16. Bertinoro to M Yeb. 7:4.

"אי בת כהן לישראל היא פסיל לה בקתני לה בהויה ומשעת הויה אפסילה לה כדכחוב (ויקרא כב') 'ובת כהן כי תהיה לאיש זר' אי בת ישראל לכהן לא מאכיל לה גזירה שמע ימזגו לה כוס יין של חרומה בבית אביה ותשקה לאחיה ולאחיותיה"

17. B Yebamoth 68a.
18. T Yebamoth 9:4.
19. We notice that this ruling in the T has its parallel in M Yeb 7:5 - " (if she gave birth she may eat) Thus it is established that the power of a child is, in this specific instance, greater than that of a father.
20. M Yebamoth 12:4.
21. Bertinoro to M Yebamoth 12:4.
22. Deuteronomy 25:9 - "then his brother's wife shall go up to him in the presence of the elders and pull his sandal off his foot and spit in his face; and she shall answer and say - 'So shall it be done to the man who does not build up his brother's house'"
23. B Yebamoth 104b.
- 23a. M Yebamoth 14:1.
24. Even though the rabbis included the deaf mute in the same category as the imbecile it must be stressed that the rabbis with regard to marriage and divorce, did not place the deaf mute on the same low level as that of the imbecile. As mentioned before in my thesis, the marriage of two deaf mutes or one deaf mute to a hearing person was legalized by the rabbis and given a separate status in rabbinic law. Their marriage had rabbinic validity. For the rabbis felt that such marriages could definitely be successful and that two deaf mutes or a couple involving a deaf mute could lead a well adjusted marital life. However, the rabbis could not validate the marriage of two imbeciles for they felt there could be no marital bliss between such a couple. (Yeb. 112b)

Also with divorce the rabbis laid down different rules for the imbecile and for the deaf mute. The rabbis recognized that the deaf mute was mentally more alert. And so the rabbis said:

הרש
הבם שונא פקח ופקח שונא
הרשח אם רצה להוציא הוציא.
ואם רצה לקיים יקיים.

"A deaf man who married a woman of sound senses or a man of sound senses who married a deaf woman may, if he wishes to divorce her do so. And if he wishes to retain her he may also do so."

פקח שנשא פקחה ונתחרשה אם
רצה יוציא ואם רצה יקיים. נשתטית
לא יוציא.

"If a man of sound senses married a woman of sound senses and she became deaf he may if he wishes divorce her and if he wishes he may not divorce her. If she became an imbecile he may not divorce her." (Yeb. 112b)

The deaf mute can be divorced because, in all likelihood the rabbis felt she was mentally competent to take care of her person and guard her get. The rabbis vested a degree of social and mental awareness in her. However the rules governing divorce with regard to an imbecile or insane person were different. Boaz Cohen in his article "Concerning Divorce in Jewish and Roman Law" (op. cit.)

p. 24-26, brings in many insights and valuable information concerning divorce and the insane. If the wife became insane after marriage her husband could not divorce her. R. Isaac, a Palestinian Amora stated that the rabbis prohibited divorce if the woman became made in order to protect the woman from illicit relations with other men. (שלא ינהגו בה מנהג הפקר)

The school of R. Yannai stated that a woman who becomes insane should never be divorced because she might succumb to improper advances. (מפני גרירה)

R. Zera and R. Illa stated that she must be retained

by her husband because she did not have the mental competency to guard her get. (שאינה יכולה לשמור את גיטה)

From this footnote we see that even though the deaf mute and the imbecile were categorized in the same formula of "heresh, shotah v'katan" and were consequently denied many religious and legal privileges, the deaf mute was on a higher level and granted a higher status than the imbecile vis-a-vis the laws of marriage and divorce. The deaf mute could be divorced because the rabbis felt that she was mentally and socially alert to cope with her environment. The rabbis could not allow a man to divorce his

insane wife for they felt she was both mentally and socially unfit to cope with her environment.

25. T Yeb. 13:7 Zuckerman¹ Edition (however חזון יחזקאל Edition has
26. T חזון יחזקאל B Yebamoth 13:9 " כי צד " instead of
כי זה צד Jerusalem
27. M Gittin 2:5.
28. Bertinoro to M Gittin 2:5 following Gittin 23a.
29. T Yeb. 13:7.
30. חזון יחזקאל commentary to this T where he states (in commentary
T. Yeb. 13:9) - חזון יחזקאל
"ייבמה, היא נעשה אשתו מן החורה
והוא אינו בגירושין דאורייתא
משום שאינו בן דעת"
31. T Yebamoth 13:9 (Edition חזון יחזקאל)
32. חזון יחזקאל commentary to T Yebamoth 13:9.
33. M Yebamoth 14:4.
34. Lev. 18:18 "And you shall not take a woman
as a rival to her sister, uncov-
ering her nakedness while her
sister is yet alive."
35. M Yebamoth 14:4.
36. Bertinoro to M Yebamoth 14:4.
37. Ibid.
38. B Yebamoth 113a.
39. M Yebamoth 12:4, T Yeb. 2:6.
40. M Yebamoth 14:1.
41. B Yebamoth 112b.
42. T Baba kama 9:13, B Baba kama 86b.

43. B Yebamoth 104b.

44. M Machsir^hin 6:1.

45. B Chullin 86a.

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