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The Hebrew Union College

The Relation of the Jewish Law on Interest to Babylonian Law

A Thesis

Submitted to the Faculty

of the

Hebrew Union College

in Candidacy for the degree of

R A B B I

Department of Talmud

by

Harry Sebee Linfield

June 1918

mic. 11/78

The credit system of the Old Testament is regarded from the point of view of poverty-stricken conditions. "He, who would be kind-hearted, would lend to his neighbor". Altho the money had acquired considerable importance, it was by no means as significant as it was to a very large extent in Babylonia. (Peiser MVG 1:174f) As a result the "Nosse" (creditor in an evil sense) is not a usurer who seeks to acquire a legal advantadge by lending money. Instead, he is the man who has no patience with the debtor; he presses him hard and forces him to the limit so that he, for example, must sell his house or himself as a slave. (I Sam. 22:2, II Kings 4:1, Deut. 15:2, Hi 22:6, Prov. 20:16 etc. In this category of merciless treatment of the poor, belongs also the demand for interest. For, since it is difficult for him to pay back that which he borrowed, it would be next to impossible for him to pay interest along with it. For this reason, the law forbids the demanding of interest from a farmer. It does not prohibit usury but sternly forbids any merciless of unjust oppression of the debtor. (Buhl, Die Socialen Verhaltnisse der Israeliten P97-99 abridged).

There can be no doubt that the foregoing statement, in agreement with the opinions of modern commentators, is correct in the case of the Covenant Code, (E) (Ex.22:24), the Deuteronomic Code (Deut.23:20-21), the Holiness Code (Lev.25:35-38), and Ez.(22:12f), and the priestly code which clearly permits the drawing of interest in the form of anti-chresis (Lev.25:29 and cf.T p379:10 'Ar 31a; Jer.BM 5:2),- all Exilic and Pre-exilic writings. Whether or not, that is the view of Post-exilic Prov.28:8 and Ps.15:5f, we have not, it seems to us, the means to decide. There can be, no doubt as to however, what view concerning interest the Rabbinic law holds. Rabbinic law legislates concerning anti-chresis (M,BM,5,2a); sale

on credit(ibid 2e); commenda, a species of partnership involving the drawing of ~~xxxxxxx~~ profit on an investment of capital(ibid 4a); deals in futures(ibid 7f cf alsoBM 63a:1f). Rabbinic law prohibits the drawing of interest on capital loaned. It also prohibits a man from netting an "increase" on his investment of capital in all sorts of transactions.(T p57:25-27; BM 63b:27f etc.) Rabbinic law prohibits not only the drawing of a fixed interest on an investment of capital but it also prohibits a man from receiving a present from one who has long since paid his debt.(M,BM 5:10b) More than that a man who greets one whom he has not been in the hatit of greeting, but greets him now because he is his creditor, violates the law against the payment of interest.(T p385:7f) Rabbinic law enjoins upon the courts of justice the protection of the debtor from his usurious creditor. In certain cases the courts can force a creditor to return his loot.(BM,61b:43f: 65a:7f; cf. RShBA in BJ JD 161); in other cases, the court may cancel a debt, so that the creditor loses also the principal loaned.(T p383:6-9; BM,72a:18f; cf Tur JD 161 ~~to~~ at the end) And not only should the courts protect the debtor but even laymen should do so under certain conditions: he who finds a contract containing a clause as to the payment of interest,- should tear it up.(T p383:9) Rabbinic law claims that in the case of a loan involving interest, it is not only that the creditor violates the law but also the debtor, the guarantor, and the witnesses, even the scribe; every one that takes a part in the closing of a usurious deal violates the law. (M,BM,5,11; Mkh 19)
Finally Rabbinic law says,"Those who lend on interest declare the Torah as false and Moses our teacher a fool..."(T p385:6f) "He who accepts the yoke of the prohibition against interest, accepts the yoke of Heaven; while whosoever shakes off the yoke of the prohibition against interest shakes off the yoke of Heaven"(Sa Behar5), and in fact,"One who lends on interest.... has no share in Him who commanded against the taking of interest",(Mkh 19).

The phenomenon presented to us in the contrast between Biblical law and Rabbinic law which claims to be based on the former, is well known to the student of Jewish law. It is the phenomenon of the expansion of the law, an expansion not only of the wide and thoro-

application of the principles enunciated in Biblical law, but also in giving those very principles a depth of meaning and spirit undreamed of by the former law-givers. This phenomenon is well known. Almost wherever we turn, we find the ~~expounding~~ expansion of the law. So, thus far we have nothing singular in the Rabbinic law on interest. But we enter upon heavy seas, as soon as we take up the details, the working out of the Rabbinic law.

The anti-chresis is prohibited. A pledge cannot be used by the creditor so that its produce pays the interest on the loan. Very well, but how about a transaction like the following:- B ~~lends~~ borrows 100 dollars from A and hands over his piano to his creditor without any agreement as to what the creditor is to do with that piano. In such a case, the creditor is permitted to use the debtor's object. (BM 67a) Another case,- B desires to borrow 1,000 dollars with his farm as pledge. Banker A satisfies himself that he can realize 250 dollars per year on the farm. He realizes, however, that this would be rather a high rate of interest. So he declares to deduct 100 dollars or more from the principal every year. And then the deal is closed. A lends 1,000 dollars to B. The farm is the anti-chresis and it is expressly stipulated that 100 dollars will be deducted every year from the principal. Such a transaction is legal (BM 67a:19f) altho A realizes an interest of 15 per cent on his money.

The commenda is prohibited. A man is not allowed to enter into partnership with another so that he would invest the capital while the other would trade with it on half profits and af the same time bear the liatility of the invested money or stock. Very well, but how about a case of this sort:- A entrusts into the hands of B 1,000 dollars. The latter is to bear the liability for the whole or half the investment. A is satisfied that the investment will bring him 160 dollars per year which would be too high a rate of interest. So he decides to contribute in one way or another 10 dollars toward the upkeep of B. Such a transaction is legal (M BM5; T p380:2f) altho it is clear that A realizes 15 per cent on his money.

To deal in futures is prohibited. More than that, one is not allowed to lend another a certain quantity of grain to be returned in

kinds, since the price of grain might adavance and thus one may come to realize a profit on a loan. (M BM 5:9) ≠ But cases like the following are permitted:- In the fall B needed 500 bushels of wheat. Having no money to buy, he decided to borrow from A, promising to return it in winter when the price is reasonably certain to be higher. But as it happened he had 5 bu's. so he only borrowed 495 from A. Then again, at another time, B really did not possess any wheat of his own, so A first made him a present of a bucket-ful of wheat and then loaned him 500 bushels to be returned in winter. Such transactions are not only legal but are not even considered circumventions of the law. (M BM 5:9, BM 75:11f, RASh, Resp. 109:6)

It is bad enough to realize an increase on an investment on business but it is worst of all to lend currency or an object to be returned with interest. But notice the following cases:-Money belonging to the Temple may be loaned on interest (T p351:30). A Jew may invest his money in a bank belonging to a non-Jew and then draw interest on it even if his money is later loaned to a Jew (T p382:24f). Then again, a Jew may pay one's wife or son to "tell" the husband or father to lend the "briber" money (BM 69b:10-20). But what is most astounding is this:- People learned in the law are permitted to lend one another money on interest. By "learned in the law" we do not mean sharp-minded jurists. We mean one who knows that the law prohibits the lending of money on interest. One may come to the other and say, "We both know that to lend on interest is prohibited. So lend me a 100 and I will return to you 120,- that is proper (BM 75:23-27.)

Now, we are not dealing with trifles or with people who are trying to cicumvent the law. We know them well. They were people who were glad to bear the yoke of the law. They loved the law and were ready to sacrifice not only their wealth but their very lives in order that the law should not be violated. The "scientific traditional" solution to problems like ours, is, that Rabbinic law represents a deterioration. The ideals and principles, expounded in the Bible, deteriorated in Rabbinic law into legalistic niceties, Pilpul, and absurdities. Aside from the fact that such a view has no basis, this solution does not touch our problem. In the case of the law on interest, there were no lofty ideals to start with

Biblical law expressly permitted the anti-chresis. It was Rabbinic law that evolved that lofty and grand ideal,- practical or impractical,- that one should profit by the work of his hands and not by investment of accumulated wealth. It was Rabbinic law that evolved it but at the same time permitted all sorts of usurious transactions. We must search for much deeper causes. The problem before us is simply this:- On the one hand, we have Rabbinic law bending its might and main during a period of many centuries to develop a great principle of life that involves the categorical prohibition of drawing interest on an investment of capital; on the other ~~ether~~ hand, it had all thru these centuries with all sincerity labored to develop ways and means to circumvent, so to speak, that very principle and prohibition. What were the factors and conditions that compelled Rabbinic law to travel for many many centuries the course it did?

II

In the course of a study of Rabbinic commercial law, the results of which are embodied in a separate study, the author arrived at the conclusion that Jewish law, at least commercial law, is based on the economic life of Babylonia and on the business practices practiced by the people of that country. Three factors seem to have operated in the creation of Rabbinic Commercial law as we have it: 1.The economic life of the Valley of the Euphrates. 2.The business customs of the people of that country. 3.A more or less successful process of Judaization. Thru the Exile, the Jews came into contact as if over night with an infintely higher civilization. They either had to adapt themselves to the new economic life or perish. And they chose the first alternative. At the same time, the Jews possessed a few codified groups of laws and some prophetic writings; all were based on an entirely different economic life and social structure. In this new country with its complex civilization, the Jew could not live as he had done in his native land with its simple law; neither could he give up his God-given law for heathen law. Thus, he entered upon a process

of"adjusting" the law governing the business ofthe land in which he was engaged so that it was in agreement with the law of his book or booklets. During this entire process, the Jew felt that the new law which was being evolved, was a"derivation"from his Book or Booklets. The content of this 'adjustment' seems to have varied with the individual case. At times it consisted in tacking on a "legal argument", which proved that such and such law which seemed to be in opposition to the law of the Torah was really in accordance with it. In other cases, it consisted in the evolution of new conceptions of trades or businesses which a certain law of group of laws regulated. It was at all times a matter of Judaization. These elements make up what is known as Rabbinic law or better Jewish law, in contradistinction to Biblical law. The former is thus a synthesis. On the one hand there were the business practices of the Babylonians based upon the resources of that country and on the other hand there was the Biblical law with its prophetic ideals. Jewish law is the result of the struggle between these two sets of factors.

This struggle with its resulting synthesis began on the day when the Jew first set foot upon the fertile soil of Babylonia. Very small indeed was its beginning but it gained momentum as one generation followed another. The time came when the Jew had the opportunity to return to Palestine and small bands grasped the ,pportunity and ~~Gradually some of them~~ returned to their homeland. These immigrants, thoroly Babylonized, brot with them the new "Jewish law." And as they continued to come, they succeeded in creating in Palestine an activity similar to the one that was going on in Babylonia. In view of the simplicity of a civilization based on the economic life of the barren hills of Judea, the best that Palestine could do was to be an attentive pupil to Babylonia. But after a few centuries, conditions arose in Palestine which brot the making of Jewish law into the limelight. First there broke out a great rebellion against the methods of Judaization. No sooner had this rebellion received its death blow in the destruction of the Temple, when a more formidable opponent arose. This time the opposition was not against the methods used by the law but against the emphasis on the law itself. These two rebellions made the"Making of Jewish Law" all the more prominent in Palestine. And finally the movement arose, demanding a codification of the law in written form. Great activity ensued which resulted in the production of the Mishnah, perhaps as a counter-stroke,

in view of the appearance of some of the New Testament books (Dr. Neumark). Soon persecution followed in the footsteps of the new movement. Jews fled back to Babylonia Abba Arikka and Samuel among them. Soon after, we hear of these two men as the heads of two academies for Jewish law. An activity unsurpassed in Jewish history ensued which ceased only when the Jews emigrated from Babylonia to the Western World where they again came into contact with a new law, the Roman. The result of that unusual activity in Jewish law was that monumental work, the Talmud (Mishnah and Gemara), embodying Jewish Law, the result of the struggle between Biblical law and Babylonian business customs, a struggle which covered a period of more than 1,000 years.(1)

Whatever the origin and development of Jewish law, one thing is cerain. The elements which comprise Jewish Commercial law are, 1. The economic life of Babylonia. 2. Babylonian business practices. 3. A thoro-going process of Judaization. From this point of view the approach to the solution of the problem of a proper understanding of the Jewish law of Interest is clear. It is a synthesis, the result of the struggle of the prophetic ideal which was opposed to interest and the Babylonian usury-ridden business practices which the Jew had to accept.

III

It is from this point of view that we must approach the reconstruction of our conception and grasp of the Jewish Talmudic Laws of interest. It is fortunate that we are unusually informed on this subject. In fact, we possess a tanaitic treatise of the laws concerning interest. I refer, of-course to M. B.M. 5.; T. B.M. Caps 4-6 pp 379:3 - 385:14 runs paralell to M. but we miss its beginning[4] and in places it is slightly confused. The other tanaitic sources (Mkh., Sa, and Se) offer us but little new material of value. On the other hand, the Gemara offers us, in addition to the invaluable discussions, also a few important tanaitic laws and legislations which are not found in the tanaitic sources we possess. Our chief interest is however centered in the M. treatise.

The treatise is introduced by a brief statement to the effect that there is a distinction between the two terms applied by the Bible[2] to usury or interest: heshekh and tarbith. The first, says M. refers to interest derived from the loan of currency or an object to be returned later with interest; while the other term, tarbith refers to an "increase" derived by a transaction other than by lending which brings net gain to the capitalist or employer etc. for his advancing money or valuables. (M.5:1 Sa Ba(or 5)[3] Having made this introductory statement, the treatise confines itself almost wholly

to legislate concerning terbith. The legislations are grouped under three headings: first, those concerning "increase" involved in certain forms of purchase & sales, and rentals. (M 5:2-3 ~~T.4~~) secondly, those involved in certain forms of commenda (M.5:4-6 T.) and thirdly, those involved in dealings in the future (M 5:7 - 10a T) The treatise then concludes by remarking that an increase in whatever form it might appear, is prohibited and that every one concerned in a transactioninvolving interest is guilty of the violation of the prohibition against interest. (M.5:10a to the end T)

Every section of the treatise as well as the treatise as a whole, is well arranged and tersely stated. The redactors evidently took great pains to produce it in the excellent form in which we have it and they succeeded so well that it is hard to conceive how modern commentators could have missed the structure and organization of this treatise.
2. cf. for example, Hoffman Mishnah Nezikin, notes on Cap.5.

The introductory statement is of the utmost importance for our understanding of the treatise, of the laws, and their development. In the course of time, the Jews came to realize that not all usurious practices are forbidden by law. The law of the Torah forbids interest only in that form in which it is known as Neshekh. To the Jews, laymen and jurists, that meant that at first the Jews abstained from usurious practices netted on a loan; while later the teachers of Israel decreed a prohibition against all usurious practices netted on any sort of transaction. Historically, needless to say, that was not what happened. The Torah did not prohibit interest on a loan. The legislation of the law of Moses, as stated above, did not have in view business transactions involving interest, whether in the form of a loan or in any other form (cf. Buhl and all the modern commentators on the Biblical passages cited above) But in the course of time, along with that wonderful expansion of the law both in application and depth of meaning and spirituality, the Jews conceived of those Biblical prohibitions as prohibitions directed against all banking and business transactions involving a profit in the form of interest. On the other hand, the Jews came to realize that only one form of interest is prohibited by the law of Moses, consitutional law; interest derived in any other form than

on a loan is prohibited only by Rabbinic legislation.

Now what did this realization mean to the consciousness of the Jew, layman as well as jurist? It is clear that this realization had the effect of a partial sanction of the greatest number of transactions involving interest. At least as far as the law of the Torah is concerned, there is no prohibition, for example against ~~the~~ dealing in futures. More than that this realization formed a span by which to bridge the chasm that separated the prophetic spirit of the law of the Torah from the Jewish practices in the land of usury-ridden Babylonia. It offered the means by which they might be harmonized. Hence, the R of our treatise starts out by calling our attention to this all-important fact: there is a difference between Neshekh and Tarbith. The former refers to interest netted on a loan. The law of Moses prohibits it. The latter refers to interest netted in the course of a transaction other than a loan. This is prohibited only by the Rabbis. The law of Moses permits it. Entirely unconscious of the real situation our clear-headed R felt that no adequate grasp can be had of the Jewish laws of interest unless this point is made clear at the outset. So he did; and having concisely stated it, he felt justified in confining himself almost wholly to an exposition of the laws of interest in the form of Tarbith.

As if entirely forgetting its invaluable introductory remark, the treatise proceeds by legislating against the antichresis (2a-b) Then comes a statement, seemingly only externally related to what preceeds it (2c) which is followed by examples illustrating it, (2d-e-3a). Thereupon, to our astonishment, M ends its first section with a statement that Jewish law recognizes the validity of the forfeiture clause in the case of a pledge against a loan. "One lends money to his neighbor on his field and the creditor says to the debtor, 'If you do not pay me within 3 years, the field is mine'". (3b) (X) T runs parallel to M except that we miss, as already noted, its beginning (4) It begins with the M statement of 2c (5 P379:4) which is followed by one illustration (P379:7), one different from the one given by M., T then states, seemingly entirely independant from what preceeds or follows,- that the transaction described in Lev. 25:29 is usurious ,- an antichresis pure and simple- But the Torah permitted it (P379:10)

T then turns to its subject and gives several illustrations of its first statement (P379:10-22), whereuponit again takes up the cases of a loan against a pledge (P379:22) (—) Why the first section of our little treatise is so disorganized ~~by~~ both in M and J, especially why legislation concerning loans against a pledge constantly pops upin this section of our treatise, as if against the wishes of the codifiers,- we shall see later. Here we want to call attention to the fact that the Gemara, in discussing the Tannaitic law, speaks with great freedom concerning usurious transactions arising from loans against a pledge. More than that G speaks of 3 legal terms of great importance;- Mashkanta, Binkaita, Mashkanta de-Sura, and Qisutha.

What were the kind or kinds of business transactions that underlay these laws? Our legal treatise like others of its kind everywhere and at all times, does not deal with hypothetical cases; it deals with realities, business practices of the day, a fact which is nowadays commonplace. We can have no true understanding of the laws and legislation of our treatise unless we know first the business and trades the legal treatise deals with. Thus what were those business practices as we can discern them from our study of the treatise and other sources at our disposal? It is perfectly clear what those business practices are with which the first section of our treatise deals. (B T Ev.-M.24) 4 minas of money belonging to Nadin-ahi .....is to be received from Sapik-zir..,His house along the street of Huburra--- with the stipulation that there should be no rentfor the house and no interest on the money,- ~~this~~ is ~~the~~ pledge in the possession of Nadin-ahi. Three years he will dwell in it.... After 3 years, when Shapik-zir will have paid 4minas of money, he will transfer the house into his[pledgor's] possession..... This contract presents to us a case of anti-chresis. The anti-chresis was common in Babylonia. We find it practiced by the people of the valley of the Euphrates in the times of Hammurabi and earlier as well as as late as the Persian period (cf. BRI Pages 15 f, BV Excursus). Our treatise is well familiar with it In fact M begins by legislating against the anti-chresis (2a)

(B T NBK 133 BR 1 P 21) Nergal-uballit lends 2 minas and 14 shekels to one Sula. He takes his debtors house as an anti-chresis. The parties agree that Sula must then rent the house at a rental of 2 1/4 shekels per month.

This transaction is simple enough. Nergal-uballit here realizes

his 20 0/0 interest (27 shekels) on his loan of 74 shekels by renting the anti-chresis to its owner, Sula, his debtor. This usurious practice is likewise well-known in Jewish law. Jews in Babylonia practiced it. (B.M. P 68a:18)

(J 629 = A R 146) Seal of Hanan, owner of the field herewith to be transferred, A field of 3 immer..... bordering on.....; Silim-Ashur... for 1/2 mina and 4 shekels of silver, has acquired has taken. For a number of years he will enjoy its fruits.... As soon as these are over, he must consider the capital given as covering the fruits(?) and his field he must bring forth [return]

This is the case of a Welsh mortgage. Jewish law is well acquainted with it and permits it. (B.M.67b:15f) (5)

The Babylonian business practices in the case of a loan against a pledge are well-known to us. (I): The fruits of the object pledged was to cover the interest on the loan, usually 20 per cent. This is the anti-chresis well known in Jewish law. (II) In case the fruits of the field pledged were more than the interest on the loan, the Babylonians had two proceedures: (a) either the pledgee returned part of the fruits or its equivalent to the debtor (J 73 = A R 137), or (b) the fruits, the interest, in the course of time redeemed the pledge, the so-called Welsh mortgage. Both of these proceedures are dealt with. The former is prohibited by M (2b) = (But cf Mashkanta binkaita to be discussed later); while the latter is permitted (28). (III) In case the fruits of the anti-chresis were less than the interest of the loan the people of Batylonia proceeded in one of two ways: (a) either the debtor paid the difference; or (b) a portion of the loan was singled out and its interest was considered covered by the anti-chresis; while the debtor paid interesf in full for the rest of the loan. (B.T. Camb. 68 = B R I P17) Our treatise avoids any mention of such practices. This is because such transactions involve interesf in the form of a loan pure and simple, i.e. it involves interesy called neshekh while our treatise, basing its legislation on the practices common in its day, deals with tarbith and not neshekh. ~~It however makes it clear to us what Jewish bankers did in all cases like thaf and others, (3a to be discussed later)~~

It is clear that the business practices of the loan against the pledge underlying Jewish legislation in the Talmud, the Mishnah and the Gemara, are the very same ones practiced in the Land of the Two Rivers centuries before the Jews came to that country as well as during the centuries that they lived there. We cannot find the Jewish practices deviate ~~resulting directly~~ from those of the Babylonians in a single instance. They were the business practices and customs of the land,- Babylonians, Persians, Medes, Egyptians, as well as Jews complied with them

In the 6th century before the present era, the Jew was forcibly thrown into a country of a much higher civilization than the one in which he but yesterday lived and worked. In this country, the banking business was highly developed. It was an integral part of the economic life of the land. He either had to adopt it in his trading or divorce himself from living out in full the economic life of his new country. He made his choice as were destined to do later generations of his people in the centuries to come. But in the course of time he came to realize,- and that realization became keener and keener as one generation followed another,- that it was not ethical, just to make a profit on an investment of capital. He came to believe that his ancestors, prophets, and lawgivers, legislated against that practice and condemned it. The moment arrived when he could no more close his eyes to the fact that those business practices were usury-ridden and that they were diametrically opposed to his religious conceptions expressed in the Torah. He was thus led, on the one hand, to abstain,- thaf is to say, he made himself beleive that he did,- from certain practices; while on the other hand, to regard other practices in a light in which, he thot, they appeared as unobjectionable. We have seen that he did his banking as did his Babylonian competitor. At the same time he felt that the anti-chresis was"theoretically"prohibited. But, argued the Jew with perfect sincerity, there are cases of anti-chresis which one can regard from an entirely different angle. They are then not contradictory to the laws of Moses and illegal.

B has a house to rent, the rental of which is 10 shekels per year. But that rental he will receive only after the year is over while he

needs at least 8 shekels now.

A Babylonian in his circumstances would go to the banker, receive the money and give the banker his house. The transaction would be regarded in the following light. The 8 shekels are a loan, the principal and interesf of which the debtor pays by having the creditor dwell in his house worth 10 shekels in rent. The Jew did the same thing but he regarded the transaction from an entirely different point of view. It is not the case of one man lending money to another. It is the case of a man renting a house for a low rental because he advances to the rentor the money. The result is the same. The capitalist nets an interest of 20 per cent on his money. The nature of the transaction is the same. But the conception of the transaction varies: The Babylonian banker regarded it as lending money while the Jewish banker regarded it as renting a house at a low rental. The one, the Jew beleived, was contrary to the law of Moses; while the other was not.

A Welsh mortgage is of-course a loan on interest, the fruits of the pledge of which pays, in time, for the principal and interest. That was how the Babylonian usury-ridden banker regarded it. The Jew practiced the same thing but regarded it in an entirely different light. It is not a loan at all, it is a rental (Ibid) A man rents a field at a low rental because he advances the money to the owner of the field.

These transactions are Babylonian and usurious. But the Jew considered them from a new point of view, one which he believed caused these transactions to be in perfect accord with the prohibitory laws of Moses. This fact is of the greatest importance for our understanding of the Jewish laws of interest. In the course of time, as the Jew became more and more conscious of the fact that the law of Moses prohibits interest, he was led to develop new points of view, new conceptions of the varied businesses of the land and then he set about t o reconstruct those businesses from his new point of view. The "reconstruction", as we see it, was slight indeed. But that was not the way he felt. In all earnestness, he was convinced that his way of doing business was different from thaf of the Gentile. The latter's method was usurious while his was not. (cf.B.M.69b:6)

We are now in a position to understand the legislation of the first section of our treatise. Having stated in the introductory passage, that there are two kinds of interest, neshekh and tarbith, the R of our treatise takes up the matter of the anti-chresis. This sort of interest is very much like, if not just like, neshekh(cf BJ) He therefor took it up first, not only because it is logically in order, but especially because that field of business transactions troubled our intensely religious R mostHere were a group of Jewish practices that bordered very closely on a violation directly of the prohibition against interest in the form of Neshekh.

Thus our treafise starts out by categorically prohibiting the anti-chresis in its simple form.

The creditor must not live in his debtor's court-yard gratis or even at a reduced rate of rental(2a-b) (cf Note 10)

Our treafise then states the new concept(see above p 13)

In the field of transactions involving rent, one may receive an increase because he advances capital; but in the field of purchase and sale it is prohibited. For example, the owner lets his court-yard to a tenant and stipulates,'if you pay me now in advance, you shall have it for 10 selas but if you pay me monthly, you will have to pay me one sela per month'; this is permitted.(6)

This is of-course an anti-chresis in a new light, an anti-chresis which can be regarded as rent. (cf.) Then follows an example illustrating the second half of the antithesis.

One sells his filed and says, 'if you pay me for it now you can have it for one thousand zuz; but if you pay me for it at harvest time, you will have to pay 1200 zuz'. This is prohibited.

This example is very instructive. The transaction is of-course an old friend of the one familiar with Babylonian businesses. It is the sale on credit. In the land of Babylonia a sale was always for cash. In case it was a sale on credit, it was considered a cash sale just the same. The purchase price in that case was considered paid and the buyer gave a promissary note to the seller covering the purchase price. B, the buyer, then became debtor to A. The debtor of-course was to pay interest on the loan. Such a case is a transaction

~~is~~ involving drawing of interest on capital as a loan, But notice, our author considered it a case of tarbith and not neshekh. This is of the greatest importance. The Jews hated to consider themselves violators of the prohibition against neshekh. They evolved the following principle: neshekh is interesf on a loan, pure and simple; any other related transaction should fall under one of two kinds:- either it involves an "increase" in the form of rent,which is permitted; or it involves an "increase" in the form of purchase and sale, which is prohibited. (not by the law of Moses but by the Rabbis) Interest involved in the well-known Babylonian sale on credit, to be sure, is ~~that~~ tarbith and not neshekh, because such a transaction is to be looked upon as one netting an increase on a sale and not on a loan!

The author then gives another example of a sale on the credit of a portion of the purchase money:

A man sells his field, the other gives him only a portion of the purchase price and the seller says to the buyer, 'Whenever you desire, you may bring the money and take what belongs to you.' This transaction is ~~legal.~~ illegal. (7)

This is the case of a sale on credit of a portion of the purchase price. The seller does not deliver the field; instead he uses the fruits of the sold field, as an anti-chresis for the portion of the unpaid purchase price, regarding it as a loan. (cf T.42d) Such an anti-chresis is likewise only tarbith because such a transaction is also t o be looked upon as one netting an increase on a sale and not on a loan .

Having thus dealt laggely with transactions centering around the "loan against the pledge", the R of our treatise deemed fit to end his legislation on the subject by saying that Jewish law recognizes the forfeiture clause; (3b) (8) (23)

One lends money to another against a field as a pledge and says, 'If you do not pay me within three years, the field is mine." It passes to him.(3b)

M fully accomplished his purpose. He succeeded in throwing so many business transactions involving interest netted on a loan into the field of tarbith and he further clearly stated the new point of view,(2c) under which so many business transactions involving the anti-chresis was permitted. T, not being so carefully redacted, gives many more

cases and is on the whole perhaps more liberal (see p379:7; 10; 15-18; etc) But it is ~~this~~ that gives us a true picture of Jewish law and Jewish business methods.

First of all, we notice the varied and liberal application that G makes of the Mishnaic principle (2c). It is G that regards the Welsh mortgage as a rental (B M 67a). G further applied this M principle to another business transaction which practically nullified the M prohibition of the anti-chresis. A lends 60 shekels to B against the latters field bearing fruit worth 13 shekels per year. A agrees to subtract every year one shekel from the principal loaned. Such a transaction called Mashkanta binkaita is permitted by many authorities in G. (10)
As a matter of fact, A still realizes his 20 per cent interest on his capital. But it may be looked upon as an increase derived thru a low-priced lease. And one Rabbi (R. Hama) went so far in his application of the M principle as to permit himself to "rent out" his money. (B M 69b:6) It ~~was~~ a very instructive case; there was a Rabbi who actually lent money on interest, but notice, he did not regard it as such. He looked upon it as a case of renting out money; this is permitted. He was receiving interest on his money as did his Babylonian neighbor, yet he sincerely and without any scruples beleived that he was acting in accordance with the prohibitory laws of Moses; he regarded what he did as something entirely different.

Secondly, we notice that the M prohibition of the anti-chresis without reservation was only an ideal. G permits the anti-chresis if the parties concerned did not expressly state that the fruits of the pledged field are in lieu of interest. The late Batylonaina contracts contain the following clause, or its equivalent, in the case of an anti-chresis, "idi biti ianu hubulu kaspi ianu". As if taking cognizance of that fact, the Gemara says that only in thaf case is the anti-chresis prohibted but not in the case where the contracting parties did not expressly state it (B M 67a:20f; cf 65b:29-35 cf also 64b:20f but cf also 64b:5-19)

G furthermore permits the anti-chresis called qisūtha. A receives B's field as an anti-chresis for 10 years but agrees, after having eaten the fruits of the pledged field for the first 5 years, he will pay him for all the fruits of the field of the succeeding years. (B.M. 67b:4-14) The transaction is simple. B lends 60 shekels for 10 years. Its interest of 20 per cent amounts to 120 shekels which is to be paid at the rate of 12 shekels per year. He gives to his creditor A a field bearing fruits worth 24 shekels per year. Both agree for one reason or another that the creditor should collect his interest on the capital for the whole period, during the first 5 years. Thus A eats the fruits of the field (24 times 5 = 120 S) for the first 5 years while he pays the rental in full for the succeeding years. It is a case of anti-chresis; yet, at least, some authorities in G permit it because the increase of 120 shekels in the deal can be looked upon as realized by having rented the field at a scandalously low rental, which is permitted. (~~x~~)

G finally presents for us the struggle that went on between the Palestinian prophetic principles on the one hand and the Babylonian business practices on the other hand, the two factors in Jewish law.

The anti-chresis is permitted only if the creditor subtracts something from the principal. But a Rabbi should not use the anti-chresis even in that case..... Rabbi Kahana, R Papa, and R Ashi did not use the anti-chresis with subtraction; while ~~the~~ Rabina did. (B.M. 67a)

(Said Rabba) The law is not in accord with the business practices of the "lessors of Marshai"..... They contract as follows; 'NN has pledged to him his field and then leased it from him'....." [(of above p 11-12.) ~~x~~] "And now that it is written as follows, 'I have bought it from him ~~him~~ and I have waited some timeand then he [the pledgor] leased it' [The business trnasaction is as the one preceeding but the contract is differently worded.] -- the transaction is proper; otherwise one could not do business involving a loan(of BH) "But", adds a third one naively, "That is no valid reason". (B M 68a:9-23)

The second section of our treatise legislates concerning the species of partnership called commenda(4a-6b) M begins by legislating concerning the commenda business generally; that of trading with someone's wares on half profits, (4a and following). It then takes up the commenda as involved in the business of cattle raising (4c - 6b) ( ) and as if en passent, also legislates the commenda or what may look like commenda in the business of taking a farm on lease. T (Pages 379:23-383:27) as usual runs paralell to M with one important exception and that is that it legislates also concerning another business: the commenda involved in the export and import trade. (T p 379:23-30) ( ) There is no mention of it in the thoroly Palestinized M. G discusses the legislation of the different commenda business dealt with in M and T. But it also deals with another important trade: the commenda involved in the business of hiring boats for transportation. (B.M.69b:36-70a:3)

The business practices underlying the legislation of the second section of our treatise are perfectly clear. ~~(B.T. Dar.359 B R IV p77) Marduk-Nasir-Aplu enters into a commenda business with one Shamash-eshi-etir for a period of 3 years. The former invests 51 gur of grain. The latter is to trade with it; the profit derived is to be shared in common. All possible loss is borne by Shamash-eshi-eti alone.~~

The commenda described is simple. One invests capital and derives interest from it by having the other, the agent pay half the profit the latter realizes on the capitalist's investment. M knows of this sort of commenda and legislates against it: such a business is usurious, (tarbith) (4a-b) We notice that in the document just cited no mention is made as to who is to stand for the up-keep of the agent and other expenses. The following documents are instructive.

(B.T.NBK 409) The banking firm of Nabu-ahe-iddin hands over a slave girl to one Kalba. The latter is to hire her out as a prostitute. The proceeds are to be divided so that the capitalist will receive 3/4 while the agent receives only 1/4. And daily he must give him lu-me(?)

The highly unsavory business here described was legal. It is similar to the transaction cited above in every respect: the stock

invested is the slave girl. The capitalist is to net interest on his investment by having the agent pay him half the proceeds he will realize on the invested stock. Now, in the case before us ~~shows that~~ there is a definte expense involved. The girl of-course gets nothing but she must be fed and clothed. Who is to stand that expense? The contract thus states that one should pay to ~~another~~ the other daily lu(?) mei. Unfortunafely it is not clear who is to pay whom. The following document is more explicit on this point.

(B.T. NBK 300 BR IV p 78) The capitalist Nabu-ahi-iddin enters into a commenda busines with oneBelshunu. The capitalist invests 120 shekels while the other invests only 37. The latter is therefor to occupy himself with the business. The profits are to be equally divided.

No specification is made for a possible loss. Kohler says, "For the losses Belshunu is apparently responsible." Now, the contract states that in case Belshunu's expenses would be more than 4 shekels he is to be recompensed. Here we see that in Babylonia it was a business practice for the capitalist sometimes to bear more or less the expenses of the other. M knows of this sort of commenda and permits it. (4a and following; T. p380:2 f)

(J 118 = AR673) A man by the name of Danna hands over to 3 people 200 sheep, 150 goats, and 230 one year cattle total 550(?) heads of small cattle. What is to be done in case of increase is not stated, but the agents are responsible for the stock invested. As compensation for raising them, the agents are to enjoy the produce of the cattle; but they are not to receive any share in the profit.

M deals with this sort of commenda and so does T. (M 5a; T. p 381:20-22)

(J 148 = AR 325) .... Three immer of wheat according to the measure of the land of Ja-u-Judi(the northern not the southern Judea) belonging to Adiniha(?) is to be received from Atar-suri,- grain of the Padi. In the month of Ulul, ana qaqqadishu, he will give it at Nineveh. If he should not give it, there should be charged an increase of 50 qa per immer.

(BE IX 51) One man lends another a certain number of bricks.

They are to be returned in kind in a place other than that in which they were loaned.

(BE IX 4) A man lends a quantity of dates. They are to be returned in a place other than that in which they were loaned.

The business transactions underlying these contracts present no difficulties. The capitalist A gives his wares to B. The latter bears their liability and trades with them and enjoys their profit: while A is compensated in the following manner;- at a certain future date B transports those wares free of charge to a place where A sells them at a higher price. In other words the free transportation is in lieu of interest in the form of a share in the profits.

T is well acquainted with this form of commenda and legislates concerning it. T p 379:23f while Palestinized M does not deal with it.

F 43 = CH III 531 Mar puratti hires a boat and its owner to transport grain for 2 months. He will pay so much grain per month. The boat must be returned to Kar-mati in perfect condition.

Thus the contract states that no matter what happens, the boat must be returned in perfect to its original place. Should that not be possible, the rentee must pay for the boat. This is exactly the ~~legis-~~ transaction legislated by the Gemarah "Sephinta 'agra upagra" (BM69b to be discussed later)

But whether or not the last mentioned Jewish law is based on the Babylonian custom of hiring ships, one thing is certain: the business customs of the commenda, pictured in Jewish law, are Babylonian. They are the common business customs of the country. There can be no doubt of that. They were business customs that were based on the economic life of the Valley of the Euphrates. In the course of history Semites and Sumerian, Babylonian and Assyrian, Jew and Persian,- all complied with them and continued the business customs of the land with certain modifications that did not destroy their historical continuity.

The commenda involves a profit on the investment of capital, a profit which was unsavory to the Jew. Hence, as in the case of loan against a pledge, he evolved in the course of time a new concept of the commenda; one which put the varied commenda transactions in a form

that he beleived was not approved by the law of Moses. In order to understand it, we must first make an effort to be well-informed concerning the commenda in Babylonia.(11)

The merchants in Babylonia used to hand over currency or wares to another to trade with. The entire profit belonged to the employer; while the agent (usually a slave) received maintainance(or pay). In such a transaction the agent was responsible for any loss due to neglect but he was not responsible for any loss thaf he could not reasonably avoid. This is also to Jewish law an agent is Shomer Shakhar. In case the Babylonian capitalist wished that his agent should be held responsible for all possible loss, he was in the habit of agreeing with his agent that the invested currency, grain etc. should be regarded as a loan.

(BT, NBN 652 BR II p 58) **Two capitalists give a certain woman , Nubta, 2/3 of a mina to trade with. The capital is regarded as a loan and thus Nubta is held responsible for all loses. The profit belongs to the capitalists.....**

The document is broken so that we do not know what Nubta as agent received for her labor. But for our purpose that does not matter. The transaction otherwise is clear. The interest of 1/3 mina is 4 shekels. But in the hands of business-skilled Nubta it will bear probably 8 shekels. The parties then agree that this sum should go to the capitalists while she will get 4 shekels as wages. The capitalists are satisfied. They are reasonably certain that their capital of 1/3 mina will bring them in 4 shekels(20 per cent). Nubta is a mere hireling at a yearly wage of 4 shekels; yet she is responsible for all sorts of loss to the principal.

This was one kind of commenda practiced by the people of Babylonia. There was also another kind pursued by the Babylonian business men.

(BT NBN 199) **One mina of silver belonging to Marduk-[illegible] Itti-marduk-balatu..... and one mina belonging to Marduk-shapik-zer. They invest together for the purpose of trade. Whatever transaction they might engage in, they share in common.**

This transaction does not fall in the realm of the commenda. It is a simple partnership. Both have equal shares in the capital,

both trade with it, and therefor, both share in the profit as well as in the liability. This is also a Jewish law.

(BT 88 BR II p 57) Nabu-ahi-usallim and Kudura, each invests 2 minas for trading purposes. Whatever transaction they engage in, they share in common. The contracting party that invests the place of business is not to charge rental for it.

This is still a partnership. Now suppose the contracting party that invested the place of business in addition to his share of the capital, desired to be compensated for his property. It was the custom in Babylonia for the other party to pay for it in the form of work. He would have had to put in more time than his partner in caring for the common business and thus he would be paying for his share of the use of the place of business. In that case, the partnership would go over into a commenda. This is the other kind of commenda business that we often meet in Babylonia, especially in the Persian period. Good examples of this sort of commenda are BT Dar 359; BR IV p 77; BT NBK 409; and BT NBK 300 BR IV p 78

The elements involved in the commenda as practiced in Babylonia are as follows:- A invests the capital while B invests the labor. B must be compensated for his labor; while A desires 2 things; first he desires to net an interest on his capital and secondly he desires that B should guarentee the principal invested. The commenda was practiced in Babylonia, as we have seen, in two forms.

Now, the second kind of commenda, the one described in the transaction of Marduk-nasir-aplu and Shamash-eshi-etir (above p 19) is prohibited by Jewish law; while the first kind, the one transacted by the capitalists with Nubta (above p) is permitted.

To be sure, the capitalists are within their rights when they engage Nubta to trade for them for a consideration in the form of wages. The trouble begins when the capitalists insist that Nubta should stand all loses that might happen to the principal. The Babylonian capitalists succeeded in foisting this sort of liability upon Nubta by having her agree that the capital should be regarded as a ~~sort of~~ loan. The transaction was thus objectionable to the Jew. 'But', argued our Jewish friend, 'There is another method by which the same result can be accomplished. Have Nubta obligate herself for any

loss that might occur to the principal even tho she is a mere hireling. The money invested is not a loan to Nubta; she is a mere agent working for a wage, but on her own account she stipulates that ~~xixthe~~ altho she is but an agent, she agrees to stand all loses as if she were a debtor, an obligation upon which she is permitted to enter. (B.M. 94:27) (~~302~~)

The result of this "Jewish business" is like the Babylonian one. The capitalists net an interest on their investment; the nature of the transaction is the same: one contracting party invests the capital while the other invests the labor; but the conception of the business is a different one. The Babylonian regarded the money as a loan while the Jew regarded it as an object in the hands of an agent and Nubta as the avent who agreed to bear the responsibility of the debtor.

This new conception was then applied to the second sort of commenda.

A gives a quantity of grain to B for trading purposes. The latter bears the responsibility for all or half the stock and the profits are then shared in common.

This transaction is prohibited, for the capital is a loan and the half profit is interest. (4a) Now suppose A pays wages to B. The Jew believed that the transaction then takes on an entirely different aspect and becomes legal business, (4a). B is then an agent. As wages he receives a definite yearly wage plus half of what he realizes on the stock entrusted to him. What objection can there be ~~xxtwxxx~~ to such a transaction between an employer and his agent? The fact that the agent bears the highest kind of liability does not matter: in business transactions one may enter into all sorts of obligations. (Qid 19b)

This view of the commenda is illogical and certainly usurious. For, since the fixed wage may be as small as conceivable (T p 380:2f) the capitalist will ~~nevertheless~~ realize an interest on his investment. But that did not matter. The chief point was,- to find in the Babylonian commenda an aspect which was not contrary to the laws of Moses. In the course of time, it was found. The varied commenda businesses were conceived and reconstructed from that point of view and with that aspect in mind. And the busineeses were practiced with the sincere beleif thaf they were not opposed to the prohibitory laws of Moses.

We are now ready to examine the legislation of the second section of our treatise. M starts out by prohibiting the Babylonian sort of commenda and permitting the Jewish one.

> One should not engage a shop-keeper in the business of the sommenda (102) nor should one give money to trade(103) unless he gives the trader wages like an agent. [And one should not engage in a commenda(106)] to breed chickens or raise calves and foals unless he gives the raiser his wages and his maintainance(104) (15)

It is a broad and clear statement of the commenda as applied to three chief businesses,- 1.Town retail store 2.General trading. 3.Cattle raising. M says,the commenda is permitted if the capitalist pays the other party "his wages like an agent". This is of-course only the ideal of the new conception of the commenda. T cites the opinions of three different authorities. One maintains that the agent should be paid "wages in full"; another uses the term,"only as an unemployed worker"; and the third tells us the realities of life(16),-"even if the worker only dips his bread in the brine belonging of the capitalist"- that is considered "wages" that legalizes the commenda. (T p.380:2-6) (17)

The treatise then makes the following statement:-

> One may accept calves and foals on half profits, to raise until they attain one third of their growth(?) and an ass until it is fit to carry burdens.(4a)

The details of the transaction underlying this legislation is not clear. The commentators say it means, the agent agrees to care for the cattle on half profits but refuses to accept their liability. The transaction is permitted since the agent does not bear the liability. In other words, the commenda is no commenda at all. But we must call attention to the fact that T has no paralell to this M legislation. This fact,- taken in connection with the fact that this legislation is obscurely stated and superfluous, if the commentators be right in their interpretation,- should cause us to doubt its genuineness. However, as far as continuity of thot is concerned, there can be no objection whatsoever to this passage. Having dealt with the sort of business in which it was prohibited,- the business of raising calves and foals,- M goes on to state the kind of business in which it was

permitted. Be that as it may, a closer examination than the one necessary for our purpose would be required to determine the genuineness of the passage,- M soon takes up another application of the new conception of commenda.

A cow, an ass, or any other animal that earns its keep by its labor may be appraised at half profits. In the places where it is customary to divide the offspring immediately, they should divide; while where it is customary to raise the animals, they should raise it. (Rabbon Shimon b Gamliel) says, "A calf may be appraised along with its mother as may also a foal".

Two enter into commenda. One invests a cow, the other is to care for it. It is to be sold later and the profit is to be divided equally. The cow is appraised and the agent is liable for that amount. This commenda is permitted, provided the income derived from the cow's labor belongs to the agent. For the income, small as it might be, is looked upon as wages paid by the capitalist to his employee. This is the new application: the wages need not be paid in cash. If they are paid in the form of an income derived from the stock in which the capitalist has no share,- it is just as well. And since the "wages" paid may be infintesmal, one is of the opinion that in such a commenda the capitalist may add to his cow also its calf, altho the agent will not get any income from the calf.

M then continues as follows,

The owner of a field may advance money to the lessee for improvements and charge him therefor a higher rental, without any fear that he is receiving interest on his capital.

This transaction might be mistaken for a commenda. A invests capital and a field as stock while B is to care for them and pay a certain sum to A. But it is really not a commenda, since in the nature of the transaction B does not take the responsibility of the stock, the field upon himself. (cf T p.383:9-12; B.M.69b:26-36) The chief reason why our R stated it here was the fact that he had a saying which was attributed to an authority(R.Simon) and since he had to state the first part of that saying(5c) he also stated the second half(5d) (cf. T p.383:9)

Having legislated avainst the Babylonian commenda and having expounded and illustrated the Jewish commenda, M completes his legislation on the subject by telling us what a Jew did in case he desired to enter into a commenda as practiced by the non-Jews, namely transact it with a Gentile.

Stock insured against all possible loss cannot be accepted from an Israelite; but it may be accepted from a Gentile.(18)

This legislation is based on Deut. 23:20-21. Evidently it was a ~~very~~ common custom to enter into commenda with a Gentile. And thus having been led to mention a non-Jew, M proceeds as follows,

And one may borrow from them and lend to them on interest..... And an Israelite may lend (to another Israelite) money deposited with him by a Gentile, provided he has the Gentile's permission.(19)

This simply means that in the case of a transaction involving a non-Jew, the Jew simply followed the laws of the land. cf. the case of Mari bar Rahel and his non-Jewish debtor. (BM 73b:1f)

Both T and G are highly instructive. Unfortunately the text of T is not in a condition to warrant us to draw a conclusion without careful examination. Since that would lead us out of the confines of the investigation, we shall leave out T but give two instructive cases of G. First of all we must take notice of a brand new way of drawing interest on capital invested in a commenda.

A and B enter into commenda on half profits. A is the capitalist having invested 60 shekels. They estimate the profit on the capital as 24 shekels and B gives a promissary note to A on 72 shekels

The contract suppresses the fact that the transaction is one of commenda on half profits. It states that there should be no interest charged on the 72 shekels. But as a matter of fact B received only 60 shekels while the other 12 is the interest. Such transactions or better, such promissarynotes are known as "The Promissary notes of the Merchants of Maḥuza". (68a) This usurious commenda business is objected to not on the ground that it is usuruous but on the ground that it might lead to extortions on the part of the capitalist. In case B made no profit A may still exact his share of 12 shekels (BM 68a)

Then we find that in the case of renting a boat for transport-

ation purposes, it was the custom to pay a rental and at the same time to guarentee against any loss. It was regarded by the Jews as a sort of commenda. A the owner invests the boat. B is to trade with it, that is, transport grain with it and give to A a fixed profit, at the same time guarenteeing the principal, in this case, ~~of injury to~~ the boat. As stated above, this seems to have been the custom among the Babylonians, as early as the time of Hammurabi. Jewish law also permits it. The passage that deals with it is instructive inasmuch as it shows us the factors at work in the making of Jewish law.

(Said Rabh) In hiring a boat, one pays rent for the boat and is at the same time responsible for ~~all damage to~~ the loss of the boat. Said to him R Kahana and.... if one pays rent he should not be responsible for reasonably unavoidable loss of the object rented; and if one bears all the liabilities on an object, he should not be made to pay rent for that object, and Rabh could not answer..... Said R Papa, the law is ~~says~~, that the one who rents a boat pays rent and bears all the liabilities to the boat. And it is the custom among people who are engaged in trnsportation by boat, that the rentee pays rent from the moment he takes possession of the boat; while in case of the loss of the boat, he pays its value at the moment of the loss. Does the matter depend upon the custom, [one asks naively and he receives the answer,] because of the teaching the custom came into existence. (BM 69b:36-70a:3)

The third and last legal section of our treatise deals with interest involved in dealing in futures as met with in the occupation of the farmer. M first legislates concerning the farmer's sale of his produce and what is ~~selected of~~ related to it, to be delivered in the future, the purchase price of which is received in advance (7) The treatise then deals with the advancing of seed to the farmer to be paid in kind. This situation led M to legislate generally concerning loans of grain to be returned in kind. (8) Whereupon M returns to his subject of dealing with the occupation of the agriculturalist and thus ends his last section by legislating concerning the loan of an amount of work in a field, to be returned in kind. (10a) In addition to the business of the farmer, T deals with futures in the business of the herdsman

and the merchant who deals in oils and wines, as well as, loans of labor of all sorts. (T p 383:16-384:32) And in addition to the two methods of dealing in futures discussed by M, T mentions two more methods. (T p 383:30-384:4; p 383:14-21) These methods were seemingly passed over by the thoro-going Redactor of M on the ground that they were not common in Palestine. One tanaitic legislation deals with the so-called "Verhüllte Wucher", to be discussed later. M does not mention it nor does T as far as we can see. It is quoted by G (BM 74b:38-75a:2) In addition to the occupation of the farmer and the gardener (BM 63b:38f; 64a:11f) and the other occupation dealt with by T, G also deals with the trade in wine, (BM 64a:29f; 73a:17f; 73a:22f (see RH quoted by Ts); 73b:11f; 73b:16f); ~~He also deals~~ and beer (BM 65a:47f) and ~~in~~ merchandise and ~~in~~ all sorts of commodities, (BM65a:52f; BK103a; BM 73a:13f BK 103a; BM 73a:13f; BK 103a(flax) etc.) G also knows of one or two other methods of dealing in futures, ~~to be discussed later~~.

It is hardly necessary to state that the usury-ridden Babylonia knew of the dealing in futures. (cf. HG, ABR, AR, BR Indices)

(BT Cyr 60, BR IV p27) On the 22nd of Ulul, Itti-Marduk-Balatu receives from a certain man 90 shekels. For this sum of money he is to deliver dates according to the present price in Babylonia which is 12 qa per shekel. The dates are to be delivered in the month of Marheswan ( ) (cf. AR p218f and 460f)

M deals with this sort of business and permits it(7a), altho the capitalist will realize a profit from the mere fact that he advanced the purchase-price.

(CT VIII 33b HG III 182) King Abu-eshuh's daughter, the priestess of Shamash, lends a quantity of grain to two brothers. At harvest time they are to return it.

(CT IV 12b HG III 172) A priestess of Shamash lends 1/10 of a gur of grain to a woman. At harvest time she is to return it.

These are cases of a wealthy temple lending a farmer seed without interest. A transaction like this is often met with in the contracts. M deals with such transactions. (8)

(Br M 845-22 311, BR IV p51) In the month of Addar one lends another a quantity of grain. In the month of Simanu, he is to return

either that quantity of grain or money at the market-price at the date of payment. This document is dated 435 B.C. cf.M 26, HG II 176

M deals with such transactions and permits them under certain conditions. ( )

(~~XSxXXXX~~ VS VII 105 HG III 210) So much currency to buy sesame A^milia has loaned from Urranada, the Amuru Secretary. At the time of the harvest of sesame, he will return it in sesame according to the market price of that time.

The case in the document is simple. Urranada gives seed to a poor farmer, say 2/3 of a gur. Ordinarily, it would be returned to him plus 1/3 of a gur as interest. That is to say, at the time of the harvest the lender of the seed would receive one gur of seed in place of the 2/3 gur he loaned. Now, our poor farmer, for one reason or another cannot get seed at the customary rate of interest. Then he comes to Urranada, an Aramean exploiter. He receives the seed, 2/3 gur of sesame, but it is agreed that it is not sesame that the farmer borrows; it is a sum of money(the present value of 2/3 gur of sesame) for which the farmer is to return sesame af harvest time. Now, since at the time of seeding, sesame is worth twice as much or more as it is at the time of ~~seeding~~, the result is that that Aramean exploiter gets 11/2 gurs of grain or more for his 2/3 gur of sesame; in other words he exacts an interest of 100 per cent. This kind of usury called by Kohler "Verhüllte Wucher", is often met with. cf.HG III 206-216 For the neo-Babylonian period cf BV,p151. It is well known in Jewish law. BM 64b f; MKH 19('im keseph talweh); but cf M(9) and T p383:6-8 and 3 loc cit.

To deal in futures involves interest, a profit on invested capital. B needs money and applies to the banking house of A for a loan. He is refused but A is willing to advance the sum, not as a loan but in the following manner,A buys from B 15 gur of grain at a fair price to which they both agree. A pays cash but the corn is to be delivered 6 months later. B is satisfied. ~~B is satisfied~~ He has the money; the corn he can buy 6 months later. A is also satisfied. The deal takes place at harvest time. The price agreed upon was 4 shekels per gur which was a fair price for corn at harvest time altho the mark-

et price was not yet out. But 6 months later, when B deliver his corn, the price will have risen to 5 shekels per gur. The net result of the deal is this,- A gives B ~~x~~ 60 shekels and receives 75 six months later. He has a profit of 15 shekels on his 60. Such a deal is usurious and objectionable. There can, however, be no objection to a deal like the following,- Farmer B sells his corn to A at a fair ~~x~~ price altho the market price was not as yet known. Both agree that the corn should be delivered 6 months later. At that time the price of corn is much higher. Yet the deal is legal. For, says, Jewish law, the deal need not be looked upon from the point of view of A's investment of capital. It can and should be looked upon from the point of view of sale and purchase in good faith. B really possessed the corn. A actually bought and paid for it and it was his. Later the price advanced. It was A's corn that advanced. The fact that B agreed to stock A's corn and to be responsible for it, does not matter. In a word, to deal in futures where the buyer is regarded as investing money with the purpose of realizing a profit is usurious and prohibited. But where the buyer is regarded as acquiring stock in order to speculate with it, the deal is not usurious and permitted. The actual result in both cases is the same. A realizes a profit because he has advanced the money. The nature of the transaction is the same. A pays for the stock and B must deliver it no matter what happens (22). But the point of view ~~x~~ varies with the deals cited (BM 64: 6-17).

It was from this point of view that the Jews reconstructed to their satisfaction, the business of dealings in futures, as practiced in the country, so that they were in harmony with the principles of the Torah of Moses' legislation against interest. We are now ready to examine the legislation of the last section. The legislation of this section, like that of the previous sections, is carefully organized. M first takes up those deals in which one receives an object at a previous low makket price, because he advanced cash(7). It then legislates concerning those deals, in which one receives something at a previous low market price, because he advanced to the debtor that very object as a loan: first, the case of one lending grain to a farmer to be returned in kind(8). second, the case of one lending grain to ~~a farmer~~ any person ~~or~~ to be returned in kind ~~generally~~(9); and third, the case of one lending an amount of labor to be returned in kind(10a).

To deal in futures is permissable only if the market price is out(21). If the vendor was first in the harvest, one may conclude a bargain with him for the grain in the stack.....(7a-b)

The last statement expounds the new conception: wherever a deal in futures may be taken as a sale in good faith it is permissable. Now, the criterion is the possession of the stock by the seller. (BM,64b: 6-17; 63a:1-12; Sa Beher 5; M BM 5:1) Hence,says M, even if the vendor does not have it but can easily buy it, the deal may be looked upon as a bona fide sale. Thus if the market price is out, one may enter into a deal in futures. The same is true, if the stock dealt with is always present, and in the market. Hence says M who has in mind the farmer and his needs,

In the case of manure, one may deal in futures all the year round(7c)

For the vendor can always procure it(cf T p383:29f) In this reference the principle is explicitly stated. M then שנינו states that the vendor may stipulate in case the market price at the time of delivery is lower than the price which prevails at the time he advances the money, he should receive the stock at the"height"of the market price. The point is that even such a deal may still be regarded as a bona fide sale! We must however notice that T seemingly(23) prohibits it(T p384:26f).

One may stipulate that he receive the stock according to the "hight" of the market price at the time of delivery.(Rabbi Jehudah says,) "Even tho he did not stipulate(24) he can say,'give me like that or give me back the money I advanced'(7d)"(22)

M then takes up the legislation which deals in futures where the vendor advances the grain to be returned in kind.

A lessor may lend to his tenants wheat to be returned in kind, for seeding but not for their maintainance....(13) [Likewise] one should not say to his neighbor,"Lend me a kur of wheat which I shall return to you at harvest time"(cf Mkh 11 im keseph talweh); but he may say to him,"Lend it to me until my son comes or until I find the key" But Hillel forbids even this. Thus did he say, "Awoman is not permitted to lend her neighbor a loaf of bread.....(23) lest the price of

wheat advances and they will be found to have violated the prohibition against interest".

One may not lend another wheat to be returned in kind at harvest time,- this is strange, for at harvest time the price of wheat is lowest. This however did not disturb our jurists: dealing in futures is prohibited no matter what the merits of the case are. M however permits such a deal in 2 cases,- 1.One may lend a tenant (under certain conditions?) seed to be returned af harvest time. 2.It is permitted in the case of a loan between two neighbors which is not a matter of trade or business (cf BM 75:17-23) M could do nothing else. These were the general practices of the land.

The last case is instructive. The older law maintained that loans to be returned in kind are prohibited even in the case where it is not a matter of trade or business. M permitted it. Later G misunderstands M. G was even more thorough-going than M. Dealing in futures is prohibted unless it can be regarded as a bona fide purchase-and-sale. G did not like the idea of M making a concession in the case of a loan among neighbors. G said that the cases cited by M- lend me till my son comes- are permitted because they can be regarded as bona fide purchases in the form of exchanges. They are cases of trade but are permitted because they can be looked upon from the point of view of exchanges since the lendor possesses grain. The absurdity thus arose that if one has only one gur of his own, he may borrow many gurs to be returned in kind later (BM 75a:11f) and call the transaction an exchange! M then continues as follows:-

One may say to another, "Weed with me to-day and I will weed with you later....". But he may not say to him, "Weed with me to-day and I will hoe with you later....." or visa versa. (10b)

In the case of a loan of labor, the consideration that labor may be higher later than now, did not occur to the thoroly Palestinized M. T knows of it (T p384:23). M deals with a farmer who asks another for the loan of a day's work to be returned later in kind and his legislation is like the preceeding. In the case where the labor is to be returned in another sort it is prohibited. For the sort of labor "might" be more difficult and thus the lendor will receive more than he gave simply because he first advanced a certain amount of labor. But

in case the labor is of the same sort, it is permitted.

T and other tanaitic legislation as well as G are very instructive inasmuch as they show us the application of the same method to the business and trades of a much higher civilization(T p383:16-384:32, BM 63a(a case of gambling on stock) 64:a, 64b(a case of verhüllte wucher) 72b cf RIPh RShI, 75b, BB 86b; for reference to G cf above p 29 etc.) There is however no need of entering here into a detailed discussion as we have done in the case of the preceeding sections. The result is the same. The trades and business involving deals in futures are accepted by the Jewish law. But the law regarded them from a new point of view; a point of view according to which these trades conformed with the prohibitory laws of Moses.

The conclusion of our treatise is brief and to the point. Feel- that he had dealt with his subject in all its important phases, R ends his treatise by making a few statements as to how cautious one should be to avoid taking of interest. Even to accept a present from a forme r debtor is usury(10b cf.Se.263) yea even to greet a creditor may be usury(ibid). Then again every one who takes part in closing a loan involving interest violates the law(11a cf Mkh 19). They all violate 5 explicit prohinitions written in the Torah against usury(11b, MH 19). Thus our wonderful treatise ends.

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Many and varied conclusions may be drawn from our reconstruction. This much is certain. The Jewish law on interest is imbued with that energetic and untiring effort to judaize Babylonian usurious transactions. It is a synthesis, the result of a struggle between two sets of factors:- Babylonian business customs based upon the economic life of the Euphrates Valley on the one hand and the prophetic ideals of the Bible as developed by the Rabbis on the other

N O T E S

(1) It is not necessary to discuss here the historical probability of this hypothesis.

(2) From the point of view of Jewish law, there is of-course no distinction to be made between interest and usury. We shall use these terms inter-changeably.

(3) The Covenant Code(E), assuming that Ex.22:24b is not a later addition, uses the word Neshekh. The Deuteronomic Code clearly applies it to interest derived from a loan on currency as well as victuals.(Deut23:20-21) Later writers also use the word Tarbith seemingly as a synonym for Neshekh. The Holiness Code stands alone in the use of a third term, the word Marbith, perhaps applied to interest derived on a loan of victuals(Lev.25:35-38)(cf. Toy Prov.28:8) The term applied to interest in Rabbinic law is neither Neshekh; nor tarbith, nor marbith- from the Batylonian root from which Ribitu comes- used by the Exilic and Post-exilic writers; but the straight Babylonian term Ribitu. Interest netted on a loan is known to younger contemporaries of the Redactor of M: as Ribit qesusah; while interest netted on an investment other than a loan, Abhaq Ribith(BM 61b). This distinction is designated by later Rabbis also by the terms,- for the former, Ribith deOraita and for the latter, Ribith deRabbanan. But the Redactor of M felt that it would be best to tack this all-important distinction between the two kinds of Ribbith onto a few words in the BIble, even as an 'asmakhta be'alma (cf.BM 65a: 40-42 and 75b:15f etc.)

(4) Caps. 4,5,& 6 correspond to M 5. Cap.4 begins with the following statement,- "He who sells fruits to another on the assumption that they are in his possession but which, as it was later found, he did not possess, has not the power to destroy the right of another". This obscure legislation offered insurmountable difficulties to the commentators. This much, however, is clear. It legislates concerning a deal in futures which was a sale in deception. But it is evident that it has no relation to what follows. It might be suggested that the situation seems to have been something like this:- The beginning of the chapter, corresponding to M was destroyed. The chapter preceeding deals with sales in decpetion, the chapters to be copied deal with interest(including dealing in futures), so a wise copyist thot fit to attach the

headless chapter to the one preceeding it by a statement dealing with a subject related to subjects dealt with in both chapters. Thus we may entirely disregard 4:1

(5) The Welsh Mortgage is known as Mashkanta deSura, a pledge against a loan instituted by the notables of the city of Sura in Babylonia. This is the prevailing explanation. We cannot see why those Rabbis did not save themselves the trouble of introducing this transaction; for the Welsh mortgage was known in Babylonia at leasf since the days of Cyrus. Mashkanta deSura naturally means the pledge against a loan indulged in by the bankers of Sura.

(6) "For it is written (Ex.22:24) 'if thou lendest currency.....' What singularizes a loan of currency? - the fact that what is given is not the very thing returned. We must thus exclude those cases in which the object given ~~below~~ is the very object returned(an object rented for example)" (T p379:4f) The later Amoraim gave this legal explanation of 'en Shekiruth mishtallemeth ella lifsoph(BM 65:32-42) which was a Babylonian law to which strict adherence was not given in actual practice. Very often a portion of the rental was paid in advance.

(7) Cf.BM 65b:9f. M was evidently misunderstood by the later Amoraim Cf T p379:12

(8) It is worth noting that T has nothing paralell to it in the corresponding section.

(9) Cf. Caro Code JD 172:1

(10) This is the interpretation of the term Mashkanta Binkaita given by all the Jewish commentators. As far as the language of G is concerned, it might as well refer to a transaction dealt with by M in 2b, i.e. one in which the fruits of the anti-chresis is more than the interest due on the loan. The commentators could not accept this interpretation. For that would make G's legislation contrary to M. In fact, even according to their interpretation of the term it cannot very well be reconciled with (26) The commentators felt this lack of agreement. And thus we have the succeeding great Jewish doctors differeing from one another as to the application of this law: RH and Alphasi; RShI; Rbenu Tam; Maimonides; RShBA; the Ittur and Abraham ben David. Maimonides says concerning his predecessors, "They did not fathom the deapth of the matter". RShBA says, "The matter depends upon the custom..... Every one should follow

headless chapter to the one preceeding it by a statement dealing with a

the custom of his place". And one of the greatest and most clear-headed Doctors, Moses Isserlin, let the cat out of the bag when he wrote, "We must allow people to be liberal in the matter; for this law is not firm in our hands; we are not in a position to reach a decision in the matter(cf BJ, JD 172).

(11) Cf BR, Indices for the Commenda in the Neo-Babylonian and Persian periods.

(12) lemahsith shakhar is the technical term for commenda. Cf T for that section.

(13) liqqah..... peroth seems to be the technical term "to trade".

(14) The commentators take the word mezono to refer to the feed supplied by the agent.

(15) G maintains that M deals with a commenda where the agent is liable for only half the stock. That was certainly the case in the times of G. hai 'isqa palga milweh upalga piqqadon.(cf BM 68b:41f) Whether this was the case in the times of M is very doubtdul. Neither M nor T state it. The point is of minor importance to our discussion. But it is interesting to notice the advance in the scale of wages. (Cf. BM 69a:8f)

(16) That this was true to life we know from cases sited in G. Cf.for example the case of R El'azar of Hagrunia. Cf also the case of the 'Ilish- contract. Here we see that the wage was not considered important enough to require its mention in the coomenda agreement(BM 68b)

(17) Why R of M says, "wages as an agent" when he really does not mean it is worth noting. We know that the Redactor of M was keenly conscious of the fact that Christianity was making undue progress. He always grasped the opportunity of emphasizing the principles of Judaism as over against those of its daughter religion. Now, the question rises, was R also interested in giving the law a better appearance? was he apologetic? It is an important question that cannot be answered off-hand.

(18) The exact elements of the coomenda called by M and T qabbalath son barzel are difficult to find from tanaitic statements cf.T p382:13 and BM 69a:8f(?) Nor is G exact in the details of the transaction.

(19) This legislation opened the way for the transaction of another form of usuruous deals which could be conceived of as being in harmony with the prohibitory laws of Moses. The new form referred to was the custom of having a Gentile as a "go-between" in one way or another. It is known as the transaction with jad goi be'emsa. (BM 70b:19 and cf TurJD 168-171).

(20) Cf Jer. and M ed Lowe

(21) The passage is instructive. Does T quote R Jehudah in a different sense than does M?

(22) According to Jewish law, all deals in futures are retractible under the penalty of a curse, knwon as Mi shepara. But it is not because they are deals in futures and they may easily be made unretractible.

(23) The clause following may be a gloss.

A B B R E V I A T I O N S

ABR = Schorr, Altbabylonische Rechtsurkunden.
'AR = Babylonian Talmud, Arakhin
AR = Kohler und Ungnad, Assyrische Rechtsurkunden.
BB = Babylonian Talmud, Baba Bathra
BE = University of Pennsylvania Publications, Babylonian Expidition.
BH = Notes of the Beth Hadash
BJ = Beth Joseph on the Tur
BK = Babylonian Talmud, Baba Kama
BM = Babylonian Talmud Baba Mesia, cited by folio, page, and line.
BR = Kohler and Peiser, Aus dem Babylonischen Rechtsleben I-IV
Br.M = British Museum
BT = Babylonian Texts ed. Strassmaier.

1.Camb = Cambyses	4.Ev M = Evil-Merodach
2.Cyr = Cyrus	5.NBK = Nebuchadnezer
3.Dar = Darius	6.Nbn = Nabun'aid

BV = Peiser, Babylonische Verträge
CT = Cuneiform Texts, British Museum
GH = cf HG
HG = Kohler Peiser Ungnad, Hammurabi's Gesetz.
J = John, Assyrian Deeds and Documents.
JD = Joreh De'ah
Jer.= Jerusalem Talmud, ed.Zhitomir cited by chapter and halakhah
M = Mishnah, cited by chapter and section.
Mkh = Mekhilta
MVG = Mitteilungen des Vorderasiatischen Gesellschaft
Qid = Babylonian Talmud, Qiddushin
R = Redactor (of M)
RASh = R. Asher ben Jehiel
RH = Rab. Hanan'el
RIPh = Rab. Isaac Alpasi
RShBA = Rab. Solomon ibn Adrat
RShI = Rashi to Talmud
Sa = Siphra
Se = Siphre
T = Tosephta, ed. Zuckermandel, cited by page and line.
Tos. = Tosephoth.