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"A Comparison of the Status of Women in the Middle
Assyrian Laws with the Status of Women in the Mishnah"

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A Comparison of the Status of Women in
the Middle Assyrian Laws with the Status
of Women in the Mishnah

by

Alvin J.³ Reines

The purpose of the thesis is to compare the status of woman in the Middle Assyrian Laws with the status of woman in the Mishnah. The status of a person in law is the sum total of the legal relationships into which he enters. We have endeavored to analyze these relationships through the use of the tools provided by analytical jurisprudence. We are thus able to break down the legal relationships into which the woman enters into the atoms which comprise the legal organism, rights, duties, and the various other elements. Since the possible relations between humans are limited and reducible to quantitative terms through the use of scientific techniques it is possible for us to compare any two legal systems on a rational basis.

It has been necessary for an understanding of the status of the woman to investigate the entire patriarchal structure as it is revealed to us in the Middle Assyrian Laws. The patriarchal family is the matrix in which the woman lies embedded, and without describing this larger context there would be neither subject nor predicate for the legal relationships into which the woman enters. The rights, duties, and other elements assume varied configurations as the woman goes from unmarried daughter to married woman to widow or divorcee, and it has been necessary to analyze separately each phase of her legal life.

In the course of our investigation of the status of woman in the Laws we have found it necessary to evolve legal theory which explains the patriarchal family. This has led to what we believe is a probable explanation of the origin of incest in a patriarchal society. We also believe the patriarchal family to be the only one described in the Laws, the Bible, and the Mishnah.

As we have stated above it is possible to compare any two legal systems because of the quantitative reduction which is afforded us by scientific method. However, we discover that the Mishnah continues the basic pattern which the Laws evince so far as the family is concerned. The Mishnah reveals evolution and change - but it is the change which the basic system of legal relations described in the Laws undergo when

confronted with new conditions. We venture to say that had we the Middle Assyrian Laws in Hebrew and no Pentateuch, we would think of the Laws as the forerunner of the Mishnah.

The conclusion we reach in both the Middle Assyrian Laws in the Mishnah is that the woman is a person - but a person who is a member of an inferior class. We are able to draw a more complete profile of the woman's status in the Mishnah than in the Laws, but the two are essentially the same.

PART I
INTRODUCTION

The goal of this investigation is to arrive at an understanding of the legal structure of the Middle Assyrian Laws for the purpose of determining the legal status of the woman. We shall then compare the status of woman in the Middle Assyrian Laws (referred to as MAL) with her status in the Mishna.

Two difficulties present themselves to us. The first is the incomplete records we have from Assyria - in reference both to legal status and actual position in the community. The second difficulty is the scarcity of secondary material which is relevant to the method of analysis we shall pursue.

Driver and Miles in their lengthy treatment of the MAL have assumed that the Laws serve as an Assyrian supplement to the Code of Hammurapi. We assume no such premise and do not accept as valid for our understanding of the Assyrian Laws as an entity in themselves any evidence which is culled from the CH.¹ It is of course valid to make use of the CH in terms of analogy. This is much different from assuming the direct relevancy of the CH. It may be accepted that there was a relationship between Assyria and Babylonia but it may not be assumed without evidence that there is an element of causality present in the relationship. The hypothesis which would seem to us to be most scientific is that there was a development from similiar origins. This explains the evident similarities and also allows for an intelligent understanding of the differences. Cultures may evince similarities but they follow unique evolutionary processes which make for different cultural configurations and therefore different laws and customs.

Because of the paucity of evidence there has been considerable conjecture concerning the underlying principles behind various institutions which are mentioned in the MAL. Unfortunately, it appears to us that many of these conjectures do not base themselves upon the evidence. To our way of thinking the more acceptable hypothesis is the one which best explains the sources and which incorporates a minimum of hypothesis for which there is no proof. Not only is consistency required of a theory but also coherence and economy of conjecture.

METHOD OF ANALYSIS

The success of a legal analysis for scientific purposes is dependent upon the ability of the analysis to break down the legal relations involved into quantitative terms. A major flaw which has invalidated the work of many investigators in this area has been the qualitative rather than quantitative analysis they have employed. For example, it means nothing to say of the marriage at a certain stage in the negotiations that it is "inchoate marriage." It merely describes the situation in qualitative terms and affords no more usable knowledge of what has taken place than the text itself. If, however, we describe the specific rights and duties which have come into existence we have reduced the nebulous and meaningless phrase "inchoate marriage" to quantitative terms and accomplish scientific analysis.

It is our contention that once a legal system has been broken down into quantitative terms any two legal systems become possible of comparison no matter how different the structures when organized into a "whole." However, we do not test this hypothesis in our study for the Mishna exhibits the same basic pattern as the MAL and the comparison becomes evident even when considered organically.

It has been necessary for our understanding of the status of the woman in the MAL to investigate the entire patriarchal structure of the code. The patriarchal family is the matrix in which the woman lies embedded and without describing this larger context there would be neither subject nor predicate for the legal relationships into which the woman enters. The rights, duties and other elements assume varied configurations as the woman goes from unmarried daughter to married woman to widow or divorcee and it has been necessary to analyze separately each phase of her legal life.

The system of analysis we shall make use of is a system of legal relations introduced by Hohfeld.² The use of such terms as property was considered as making over-simple a complicated matter which led to great difficulties in arriving at a clear understanding of legal problems.³ Below is the table of Jural Correlatives - the terms we shall use in our analysis.

JURAL CORRELATIVES

right	privilege	power	immunity
duty	no-right	liability	disability

Legal "rights" are those which have a corresponding or correlative legal duty in the person or persons against whom the right exists; right involves personal relations.

The term "immunity" is used in the "sense of non-liability, or non-subjection to a power on the part of another person."

The term "privilege" in the sense of liberty as used in this analysis means those incidents of enjoyment and use which the owner may exercise and enjoy or not, exactly as he pleases.

The term "power" is "an ability on the part of a person to produce

a change in a given legal relation by doing or not doing a given act." The usual and most significant meaning of power and the meaning which it will have for us is the power of disposition incident to the ownership of anything.

"Liability" for us shall have the specific meaning of the correlative of a power in a person." We are using power only in a limited sense, therefore, the correlative liability as a technical term will not be used.

The term "no-right" we shall use in the manner demonstrated by the following example. A man has the privilege of testifying in certain legal situations, i.e., he may or may not testify as he wishes. The woman, however, is disqualified by law; therefore, she has no-right to testify.

An absolute state of ownership exists when an individual possesses all possible rights in an object. A relationship of equality is established when equal rights and duties exist between two persons. In the MAL many different relationships (i.e., different combinations of rights and duties) between individuals are described. It is necessary to differentiate between ownership of all possible rights in a human which reduces the human to a slave, and ownership of some rights in a human which merely means that although he as a person is obligated by certain duties, he still remains a person at law. A person who has superior rights in another person is in a superior position but still does not necessarily own the other individual. Thus, for example, the employer of a man may insist that the worker produce the amount of work for which he has contracted. The owner of a slave may require him to produce the same amount as the worker. The owner of the slave has all

the rights which the employer has but the employer does not have all the rights the slave-owner has. The employer has rights in a person; the slave-owner has all possible rights in what becomes legally a "thing".

It is now necessary for us to explicitly define the words property and person. It is upon the definition of these two terms that an understanding of the status of woman in the MAL turns and which has led to so much confusion in the past. This is so because of the similarity between marriage and a property transaction in the MAL.

The aggregate of rights which the employer has in the worker is property but the worker is a person. Therefore, we may correctly describe the relationship as have property rights in a person. The worker is a person because at law a person is defined as one who "is capable of rights and duties" and the worker has many rights of his own. Property then, is not the object in which the owner has rights but the rights themselves and the object may be either a person or a thing at law. Whether or not the object will be a person depends upon whether it has rights of its own. We immediately realize that such an expression as property-like is a valueless term for the word property can be so many different things and requires a specific statement of the rights of which it is composed in every instance in which it is used.

Our problem is to determine the status of woman in the MAL. It may be argued that the position which is indicated by the law-code differs from that which was present in real life just as today there are discrepancies and variations in actual life as compared to the positions defined in the law-codes. Therefore, in order to maintain scientific purity we state that this is an analysis of a law-code and nothing more. However, though we cannot offer the corrections which knowledge of

actual practice would afford there is no reason to think that an evaluation which results from an analysis of the law-code differs essentially from actual conditions.

I. THE UNMARRIED DAUGHTER

The father has important rights in his daughter and corresponding to these there are vital duties which obligates a daughter to her father. The material concerning the status of the unmarried girl is not abundant but it is sufficient to indicate the superiority of the father. (The terms "superior" and "inferior" do not have an evaluative connotation in our study. They simply describe the configuration of rights and duties which exist. The father's rights in the daughter are superior to her rights in him we describe the distribution as affording the father superior status in the relationship.) The father has the right to give his daughter in marriage¹, and the right to compensation for her virginity⁵. The father has the power to give his daughter as security for debt⁶. This indicates to us immediately the extent of the limitations that may be imposed upon the unmarried daughter's exercise of her freedom. Nor does the father lose all his rights in his daughter when she is held as security for debt by the creditor. The creditor must ask the permission of the father if he wishes to marry her off to a suitor⁷.

There is an indication of what occurs to the unmarried girl after the death of her father. We are told that if she had been given in debt the creditor does not have the right to marry her off so long as she has brothers. The creditor must ask the brother's consent and if one of them promises to redeem the girl within one month he may do so.⁸ However, if the brother fails to redeem his sister within that prescribed length of time the creditor may marry the girl off in lieu of other payment for the debt. The important point for our consideration is that certain rights of the father in the daughter are inheritable by his sons.

The father and the state both have the right to punish the unmarried daughter for her criminal violations. No age limit is prescribed in the MAL as when liability for criminal actions arises. Neither do the statutes which concern themselves with crimes committed by women concern themselves with whether or not the woman is married. We may assume that the criminal statutes mentioned below apply equally to the married and unmarried women.

A woman who has assualted a man (i.e., laid a hand upon him) is liable to a fine of thirty manehs of lead and to a beating of twenty stripes.⁹ The punishment prescribed for this offense is that which is established for offenses against the state. Driver and Miles properly understand the nature of this law when they write "... any assualt committed by woman the inferior against man the superior is punishable."¹⁰

A woman is liable if she murders someone¹¹ if she steals temple property¹² or if she crushes a man's testicles.¹³ She is guilty of a crime, too, if she is found making magical preparations.¹⁴ We may assume that the woman's liability extends to any criminal act she may perform

although it is not specifically prescribed by our statutes. That is to say she is liable for acts behind the few specifically mentioned in the law-code.

The above crimes are committed against the state and freemen. However, the unmarried girl may be involved in a situation where there is a violation of the rights which her father has in her. Thus any sexual offense which a man commits against an unmarried girl makes him answerable to the father for his deed. Therefore, if a man dishonors a virgin the father takes the wife of the ravisher of the virgin and gives her to be dishonored.¹⁵ She need not be returned to her husband. If the ravisher is unmarried he must marry the girl and is never permitted to divorce her.¹⁶ If the father does not wish for the offender to marry his daughter he receives the "threefold" for the violation of his rights in his daughter's virginity and gives his daughter to whomsoever he pleases.¹⁷

However, if the unmarried girl has consented to sexual intimacies with a man then the wife of the girl's paramour is not given over to the girl's father to be dishonored.¹⁸ In this instance the daughter and the paramour have both violated the rights of the father - but it does not seem that the paramour is primarily guilty of a criminal act. He must pay the "threefold" because of the monetary loss which the father has sustained. It is the daughter in this case who by consenting to sexual intimacies is the real offender and is guilty of a criminal violation of her father's rights. Therefore, she is handed over to her father who may punish her as he sees fit.¹⁹

Our divisions of monetary loss in the case of seduction as over against crime in the case of rape requires further clarification. The "threefold" fine which is thrice the usual price is undoubtedly levied

not only to compensate the father for the loss he has sustained but also to punish the seducer for his unlawful invasion of the father's rights. There is an element of illegality in the seducer's act. However, the unlawful element is an extremely minor one and consists of the seducer's acceptance of the girl's favor - a favor which she had no right to grant, whereas in the case of seduction the wrongdoing of the male is a minor element it is dominant when the male commits rape. The punishment the rapist pays takes various forms.

Certain rights of punishment are granted the creditor. He may punish the girl for those acts which are not considered crimes but rather breaches of discipline. Thus, if in the course of a girl's stay in the creditor's home it becomes necessary to punish her the creditor may "... flog her, pull out her hair, and bruise and bore her ears."²⁰

We must not think that there is only a negative aspect to the legal position of the unmarried daughter. It is because of the constant emphasis placed upon her disabilities and duties that we find her to be loosely equated with "property." There are actually several rights which the girl may be said to possess. Some of these rights may be understood as derivative, in that they originate with the father and are reflections of this rights, but nevertheless they are her rights in practice. The conformation of rights which the code sets before us is sufficient to afford the girl a positive legal personality.

The girl has the right to have her father consulted if the creditor in whose house she is staying as a pledge wishes to marry her off to a suitor.²¹ We notice another limitation of the power of the creditor who holds an unmarried girl as a pledge. The import of the law which permits

the creditor to "... flog her, pull out her hair, and bruise and bore her ears" may naturally be understood as having a limiting effect. That is, the creditor may only carry out the prescribed punishments. Punishment which exceeds these in severity might very well bring about the release of the pledge²²

Is there a limit to the amount of punishment which a father may inflict upon his daughter? We have no clear statement which would answer this question for us, but there are two passages which may be understood as indirectly shedding light on our problem. We have noted above the rights of punishment which are granted to a creditor who holds the girl as a pledge. The creditor's rights are clearly derived from the father. We may assume that the rights of punishment which the creditor derives from the father are exactly the same as the father's rights in the girl and the father has no more rights of punishment than the creditor has - i.e., the father is limited to flogging, bruising, etc.

The second passage implies that whatever the rights of punishment the father has in the daughter may be - assuming they are more than the creditor's - they are still not absolute. The law-code states that a father may treat the unmarried daughter who consents to sexual intimacies as he will²³ We may infer that unless the girl commit a violation the father may not treat her as he will - otherwise the permission which he is granted is redundant. If our construction of the statute is correct the unmarried daughter has an additional right in the limitation on punishment which is placed upon her father.

Evaluation of the Legal Personality of the Unmarried Daughter

We must now attempt to determine whether or not the unmarried daughter was possessed of a legal personality of her own, i.e., whether or

not she would be considered a person at law. "... not every human being is necessarily a person, for a person is capable of rights and duties, and there may well be human beings having no legal rights, as was the case with slaves in English law... A person is such not because he is human, but because rights and duties are ascribed to him. The person is the legal subject or substance of which the rights and duties are attributes."²⁴

We have shown that the unmarried daughter is obligated by many duties and is entitled to several rights. However, we must understand that although her rights are few this does not negate the fact that she is a person. No matter the inequality of rights and duties, so long as there is a person, an underlying substance in which these rights and duties lie embedded we have not "property" but a person, albeit, we must add, a person who is a member of an inferior class. The inferiority results from the rights-duties configuration in which the bulk of the duties are the girl's and the rights the father's and other males with whom she comes into legal relationship.

Evidence of a Positive Legal Personality for the Unmarried Female

The ability to commit a crime indicates to us that there is someone who can commit a crime. The problem as to whether or not it is necessary to be a person to commit a crime may be debated for we find that that a slave is also subject to punishment for committing a crime. It seems to us that the punishment of the slave is really punishment of the owner - and the slave himself is considered as no more than an animal that has destroyed someone's property.

We do not base our conclusion that the unmarried girl in the MAL is a person only upon her ability to commit a crime. However, it may

serve as additional evidence when considered together with other indications.

We have noted above that the wife of a man who seduces someone's unmarried daughter is given over to the girl's father to be dishonored.²⁵ However, if the girl consents, the man need pay only the "threefold" and he is exempt from further punishment (i.e., his wife is not given over to be dishonored).²⁶ The fact of the girl's consent has made the act of the man a different one in the eyes of the law. It would certainly seem to be indicated that only a person may consent and have this consent be so meaningful that the law takes cognizance of it to the extent of making an essentially criminal act an essentially civil trespass.

This very same statute gives us another indication of the unmarried daughter's status as a person at law. We are told that the ravisher of a virgin must pay the "three fold" to her father and then marry her. In addition the ravisher may never divorce a wife so acquired. The logical explanation for this is that the violation has not only been committed against the girl's father - for this the man pays with the dishonoring of his wife and the "threefold", but also against the girl who as a person has had her rights not to be molested infringed upon. We cannot say that it is to the father's advantage to have a daughter who is permanently married because once the marriage ceremony is performed the daughter never again has any legal relationship with her father.²⁷

We are given little information concerning the rights which the unmarried daughter has but this is probably so because the unmarried girl was generally speaking very young and therefore, not unlike most other cultures, very much under the supervision of her father. The time when the rights of the woman would most need clarification and

would most probably cause litigation would be when she was married or a widow. Nevertheless we must keep in mind the rights and privileges of the unmarried daughter which are mentioned, viz., the privilege of wearing a veil²⁸ the right to her freedom when mistreated by a creditor who holds her as a pledge²⁹ the probable limitation upon the powers of the creditor to punish her for small offenses³⁰ the right not to be molested, and the fact that the law-code finds it necessary to grant the father specific permission to punish his daughter if she has consented to sexual intimacies without his permission - implying that there is a limit to the punishment a father may inflict upon his daughter under normal conditions³¹. These may all be cited as positive evidence that the unmarried daughter is a person, albeit a person belonging to an inferior class, at Middle Assyrian Law.

II. MARRIAGE

Many of the statutes of the MAL deal with marriage and the laws concerning married women. As we have pointed out with reference to the term "property" the term "marriage" will vary in its meaning according to the varied aggregates of rights and duties which different societies include in the legal state of wedlock. Therefore, the term requires complete quantitative definition before it becomes of use to us in a scientific study. "Marriage" is a different institution under each different legal systems. It is the failure to realize that legal wedlock under separate systems requires individual formulation that has led to much confusion in understanding "marriage" in the MAL in the past.

THE PRE-MARRIAGE CEREMONY

The form the marriage ceremony takes reflects the legal relation-

ship the marriage effects. For example, if the husband has superior rights in the marriage relationship then the marriage ceremony will serve to invest the husband with his many rights and the wife with her many duties.

In our discussion of the rights which the father possesses in his daughter we noted two that were crucial for marriage, viz., the power to give his daughter to a suitor for the purposes of marriage, and the right to be compensated for his daughter's virginity. If a man wishes to marry someone's unmarried daughter then it is clear that he must first arrange for a transfer to himself of the right to marry the girl and the rights to her virginity. If the bridegroom wishes to acquire these rights then he must arrange for their transmission to himself. It is logical to expect a ceremony of some kind which will serve to effect the transfer of these rights. It is exactly this ceremony which is described in the account of the father of the bridegroom or the bridegroom himself bringing gifts to the father of the girl.³²

It is to these rights which are transferred at the time of the presentation of gifts that we shall give the name of "preconditions." They are necessary preconditions for marriage to the unmarried girl who is under the jurisdiction of her father. However, it is important for us to recognize that the transference of these rights does not yet make for marriage. These are only the preconditions which must be acquired before marriage can take place.

However, the father is in possession of rights in addition to those which make up the preconditions; such as the right to the girl's services, to punish her when she has committed an offense and others which are not necessary for effecting marriage but are necessary once

the marriage has taken place. Are these rights transferred with the preconditions and if not what is their relation to the bridegroom of inherence? From a reading of the sources in the MAL³³ and through comparison with the Mishnaic system it is highly doubtful that there is a transference of these additional rights at the time of the passage of the preconditions.³⁴ They remain in the possession of the father. However, they are not without legal relation to the future bridegroom. With the passage of the preconditions he gains the right to acquire them ipso fact upon marriage to the girl - and with the act which effects marriage he does acquire them and they are part of the bundle of rights included in the marriage transaction. We may then add a third right which passes with the preconditions - the right to acquire through marriage all other rights which remain outstanding in the unmarried daughter.

RIGHTS OF THE FATHER-OF-INHERENCE 35

We shall give the name "father-of-inherence" to describe the father of the future bridegroom in that period after he has brought the gifts for the preconditions to the house of this future daughter-in-law and before marriage to his son has taken place. The girl's father after the time of the transfer of the preconditions and before the marriage we have called the "father-of-incidence." In this section we shall first describe the facts as stated by the code and then interpret them in the light of our discussion of the preconditions.

The father-of-inherence may take a girl who has not yet been given to his son nor left her father's house and give her to his son against her father's wishes. He may even take her from her father if the son who had originally been indicated as her future bridegroom becomes unavail-

able by virtue of another marriage and give her to a different son against the wishes of her father³⁶

We are told in #30 that the father-of-inherence has the right to revoke the agreement after the gifts have been given. The father-of-incidence has no such right and the demand of the father-inherence must return the bridal gifts. But it would seem from #42³⁷ that if the man (father-of-inherence) has poured oil on the head of a lady or has brought certain gifts that no return of the gifts takes place if there is a revocation of the agreement. What is the difference between the situation described in #30 and the one described in #42? Driver and Miles explain the difference in the following manner: #30 describes ordinary marriage whereas #42 describes the marriage of a patrician³⁸ We do not accept this interpretation and suggest the following.

There is no indication in #42 (assuming that this is the subject of the statute: cf. #43) that the marriage agreement is irrevocable nor is such the import of #43. All we construe the statutes to indicate (#42) is that if the wedding agreement is revoked there is to be no return of the gifts made - and (#43) the conditions under which if there has been an anointing there may be a breach of the wedding agreement and the father-of-incidence is still required to return the gifts. Therefore, the significance of the ceremony of anointing the head with oil and the bringing of the hu-ru-up-pa-te is not that of describing a patrician as opposed to a plebian marriage but to create a situation where there cannot be a revocation of the wedding agreement by the father-of-inherence without penalty. #30, and #42 (and #43) are not to be understood as mutually exclusive practices but rather as supplementary. The act performed in #42 is not necessary for marriage, the act performed

in #30 is. However, if the acts described in #42 are performed then the agreement becomes irrevocable without penalty. The benefit of such an institution to the father-of-incidence is clear. Under the conditions of #30 he is at the mercy of the father-of-inherence who is possessed of unilateral rights to breaching the agreement - under the conditions described in #42 he has the protection of a bilateral arrangement.

Under certain conditions the bilateral agreement between the father-of-inherence and the father-of-incidence is revocable without penalty, even if the ceremony described in #42 has been celebrated. This is so if there is no male member of the family of the father-of-inherence who can marry the girl³⁹ In such cases the father-of-incidence returns the gifts that are not edible but is not required to make compensation for the edible gifts⁴⁰

MARRIAGE CEREMONIES WHEN THE BRIDE HAS NO FATHER WITH RIGHTS
IN HER

If we are correct in our analysis that the bridal gifts are essential for marriage only in the sense that it is necessary to transfer the preconditions from the father-of-incidence to the father-of-inherence or to the husband-of-inherence then we should not expect to find marriage gifts mentioned in connection with a marriage in which the bride has no father who is in possession of the preconditions. Thus we find that a man may marry his concubine (?) by veiling her in front of five or six of his colleagues and saying, "She is my wife." The master of the concubine (?) is in possession of the preconditions and therefore marriage takes place merely through the veiling. Neither are bridal gifts mentioned in the statutes concerning the marriage of an almattu. We shall discuss the almattu in detail but it

is sufficient to state here that the almattu is herself in possession of the preconditions and may, of course, transfer them to a husband-to-be for purposes of marriage.

THE MARRIAGE ACT

An important question for us to attempt to answer or to indicate the direction of a solution to is, what is the act that makes for marriage in the MAL. We have described the process whereby the future bridegroom obtains the right to marry the girl - now we are confronted with - how does he marry the girl?

Since the marriage ceremony is primarily a legal situation which involves the transfer of rights from the father to the husband and the acquisition of these and other rights by the husband, the answer to our question will be indicated by an understanding of possibly a general theory of acquisition in ancient semitic laws.

The "ultimate basis of ownership" in every primitive community is possession.¹¹ "While the tribes lived in a nomadic state, moving on to fresh pastures and hunting grounds each year, land was free to all like air and water and was not owned by anyone. Original or first possession of a chattel undoubtedly determined its ownership whether manufactured or captured." (Italics my own.) The method of acquiring a chattel was to take possession of it. This principle is extremely important for us.

As society became more complex, it became necessary to transfer chattels from one man to another. Now even though possession had

lost its original function and meaning as a method of acquisition, it remained as the symbol of acquisition. This means that the only way one could acquire a chattel was to take actual possession of it even though someone gave it to him. Legally speaking the situation was this: A was the owner of a chattel which he wished to give to B. However B cannot be given something in the abstract, to become the owner he must take possession of the article itself. Therefore, B acquires possession in this manner. A first gives up his ownership and possession of the article and he transfers to B the right to possess the article. B now performs an act of ownership through physical possession and the article belongs to him.⁴² It is readily apparent that two distinct acts are required for the transfer of ownership.

Let us now place marriage into the general theory of ownership under semitic law. We have already discussed the bringing of gifts and the transfer of the preconditions. This transfer of the preconditions corresponds to A's action in our example above, viz., the withdrawing of ownership and the granting to B of the right to acquire ownership through an act of possession. And the act which will effect marriage will be the equivalent of taking possession, a physical act of some kind. There is little doubt in our mind that this act is the copula carnalis.⁴³ It may be argued that such an act as lifting up the woman or carrying her might also be called an act, a taking of physical possession. We have no way of giving a definitive answer to this problem but the indications are that sexual relations was the act.

Our description of marriage indicates to us the origin of the form of the ceremony. We must now investigate the nature of the transaction which has taken place. Has the husband acquired a "thing" through this property transaction corresponding to any other object of ownership, such as a chattel or land; or does the marriage ceremony effect another kind of relationship? We shall apply a pragmatic test for the solution of this problem. If the married woman is "property" in the sight of the law then the marriage act is a property transaction. If the married woman is a person, a different statement of the relationship is required.

III. THE MARRIED WOMAN

It may well be that in the earliest times of man's evolution that the rights of the father in his daughter, coincided exactly with the rights of the husband in his wife. This is not the case in the Middle Assyrian Laws. Besides the rights which the husband acquires from his father-in-law, new ones are created by the marriage. The difference between the father-daughter relationship and that of husband-wife is clearly brought out by several of the statutes in the MAL.

If a man ravishes a married woman he is liable to the death penalty.⁴⁴ If he ravishes a virgin (assuming in our examples that the attacker was unmarried), he must pay the "threefold" to her father and if the father of the girl will permit him he must marry the girl and he loses his right to ever divorce her.⁴⁵ The different right created by marriage is demonstrated by the severer penal-

ty inflicted upon the offender.

Another instance which demonstrates the different quality of the right which the husband has in the wife is that of the woman consenting to sexual intimacies. If the woman is single the man receives no punishment beside the payment of the "threefold" to her father.⁴⁶ If she is married, the violation carries with it the death penalty for the man despite the fact that she has consented.

The husband is often both the judge and executor of judgment when his wife commits a crime. A woman who steals an article from her husband is charged and punished by her husband if he so decides.⁴⁸ A woman who commits adultery may be put to death by her husband but in his capacity of judge he may pardon her or mitigate the punishment.⁴⁹ The husband has the privilege of mutilating his wife if she runs away and stays overnight at the home of a married woman.⁵⁰ A man has the right to punish his wife by scourging her, plucking out her hair or bruising and destroying her ears if she displeases him.⁵¹

Under certain conditions the wife is liable to punishment by authorities other than the husband. If a wife steals some article from her husband, who is ill or has since died, she is put to death by others.⁵² Also, if a married woman steals something from the house of a man (not her husband) and the article exceeds five manehs in value, she is punished by the man whose rights of ownership she has trespassed.⁵³ The husband may compound for her and lessen her physical punishment at the hands of the stranger.⁵⁴

Similarly if a married woman acts as a procuress, she is punished by the husband of the woman she has procured in the same measure as his wife.⁵⁵ If the procuress has prostituted the married woman against her will then the procuress is put to death by the husband and the wife is free from punishment.⁵⁶ If a married woman permits the runaway wife of a man to stay with her, the husband of the runaway wife may cut her ears off.⁵⁷ However, the husband of the married woman who permitted the runaway wife to stay, may compound for his wife's offense with a payment of 3 talents, 30 manehs of lead.⁵⁸

The state has the right to punish the wife for crimes committed against it. An assault upon a man is punished by the state.⁵⁹ Such an attack is probably considered to be rebellion, because the class stratification which is sanctioned by the state is violated when one attacks a male who is a member of the superior class (by virtue of his sex).⁶⁰ Thus the wife is punished by the state for uttering blasphemy or sedition,⁶¹ for making magical preparations⁶² and for abortion.⁶³ It appears that in all these offenses against the state, the woman is held responsible and the husband is not given the right to compound for her.

Limitations are placed upon the husband's right to punish his wife. In many instances the husband must first charge his wife before an official before he is allowed to carry out any punishment. He must take his wife before the judges if he wishes to carry out the punishment of beating.⁶⁴ It may also be that a priest's presence is required at the execution of all judgments

which consist of tearing out the breasts or cutting off the nose, ears or fingers.⁶⁵ We may also understand the specific detailing of punishments, viz., the right to scourge the wife, pluck out her hair, and bruise or destroy her hair as limiting the punishment which a man may inflict upon his wife.⁶⁶ It is possible that the husband is held responsible if he exceeds the punishment specified. A limitation of the power of the husband by the state despite its negative formulation may correctly be understood as a right which is granted to the wife.

Of extreme importance is the right which a woman has to apply for dissolution of the marriage if her husband has been absent for a prescribed period of time. If a husband goes to the field, his wife may remarry provided she has no sons after the statutory period of five years has elapsed.⁶⁷ If the husband has been taken a prisoner of, the wife may remarry after a period of two years.⁶⁸ The natural presumption which arises is that he is dead. We learn from these statutes that the husband must perform certain duties or the marriage is dissolved. His rights in his wife are not absolute. Of equal importance is the fact that the rights which the husband loses by virtue of his absence, become the possession of the deserted wife. She is now free to go where she pleases and marry who she will provided she has no father-in-law or sons.⁶⁹

A key element of the legal personality of the married woman is her right to be supported.⁷⁰ We may suppose that it is lack of this support which is one of the important factors making for dissolution of marriage because of the husband's absence. With

this statement of the rights and duties, we are now prepared for the next step of our investigation.

Evaluation of the Legal Personality of the Married Woman

We have defined a person as someone who "...is capable of rights and duties." The many and varied rights and duties which pertain women in the MAL is clearly revealed by our investigation. We must now return to the question we left unanswered concerning the status of the married woman. Does a man acquire "property" (the wife), through marriage? The answer is no. The woman is possessed of certain rights of her own in her husband and this by definition makes her a person at law. The man acquires rights, but not in a thing...in a person.

The nature of these rights may be understood as "property." However, the woman's right to be supported by her husband is also a property right. In fact, all the rights which make an individual a person may be understood as property rights. It is not our purpose to show that in any given society a legal personality is not made up of property elements. It is our purpose to show that the husband does not acquire "property" in a thing through marriage but rather rights in a person.

An analogy taken from modern day society may serve to illustrate our formulation of the marriage. This analogy also helps us to understand the fact of the wife being a person despite the fact that her husband's rights in the marriage relationship are superior to hers. Let us suppose that A has contracted to perform certain labor for B. B may, if there is no stipulation in the con-

tract to the contrary, sell the contract to C. A is now required to perform this labor for C. It is clear that A is not reduced to "property" or slave status because he has contracted to do work for B or C who then holds superior rights in him. In much the same way we may understand the rights of the father and the husband in the unmarried daughter and the wife.

IV. DISSOLUTION OF MARRIAGE AND THE COMPLEXITIES THEREIN

We have seen that two elements are present in the acquisition of an unmarried girl (who has a father) for a wife. The first was that the husband-to-be or his father had to acquire the preconditions from the father and the second was that the man married the girl through the performance of a marriage-act. The fact that the preconditions and the marriage relationship are two distinct and separate entities plays a vital role in the dissolution of the marriage. Inasmuch as they are separate we shall find that which may logically be expected, the dissolution of marriage does not necessarily dissolve the rights which are acquired in the preconditions. It is the continuing existence of these preconditions after the marriage has been dissolved which accounts for the complexities involved in the woman's obtaining complete freedom at that time.

The Widow and the Almattu

The term widow in English does not exactly correspond to the term almattu in the MAL. In the MAL the almattu is a woman whose husband has died and who has neither father-in-law or sons. We shall make use of almattu in the sense it is used in the Laws.

The term widow we shall restrict to those cases where a woman's husband is dead but whose father-in-law or son or both are alive.

A woman whose husband is dead may keep any ornaments he has given to her provided he did not hold land in coparcenary with his brothers and she has no sons.⁷¹ If the husband held his land in severalty and the bereaved wife has no sons she inherits the ornaments.⁷² This seems to be so whether the deceased husband has brothers who survive him or not.

Provision is made for the widow's support. The wife of the deceased patriarchal head for whose support provision had not been made in writing may dwell in whichever of the houses of her sons she chooses.⁷³ If a widower remarries, his children from his first wife are required to support his widow in common in the event of his death. If the second wife has children of her own from a previous marriage it is not necessary for these sons of the first wife to support her. The second wife may choose a house which is convenient for among her own sons and they have the duty to support her. She in return must do work for them.⁷⁴ The sons' duty to support a mother or step-mother is transferred to her husband when she remarries.⁷⁵

The almattu attains the fullest development of legal personality in the "woman class." The almattu may go where she pleases and do as she pleases. Thus we find that the almattu may marry whomsoever she chooses and may live where she will.⁷⁶ She has sufficient legal personality to acquire the possessions of the man who comes to live with her, i.e., marries her and lives in her house.⁷⁷ If a man

cohabits with her for a period of two years she becomes his wife and may not be evicted at will be requires the formality of a divorce.⁷⁸ Her children inherit according to the laws governing legitimate heirs, i.e., they exclude the children of the concubines (?).⁷⁹

We must keep in mind that a widow has not the right to marry whom she pleases and live where she will. Only the almattu with neither father-in-law or sons has these rights.⁸⁰

Preconditions, Inheritance and the Almattu

The laws of succession with reference to the devolution of the preconditions display an amazing consistency as our laws clearly indicate. We shall find that the laws of succession explain the legal status of the almattu as well as that of the widow. We must first restate the rights contained in the preconditions and then we shall endeavor to trace them through their possible stages of ownership.

Two major elements in the preconditions are:

1) The power to give the girl in marriage. This power appears when the preconditions are obtained by the father-of-inherence or if the girl's father transfers them to a creditor in lieu of payment of a debt. When the father-of-inherence acquires the preconditions his power to give the girl to another for purposes of marriage is limited to members of his own family.

2) The right to marry the girl.

Marriage suspends the preconditions. It gives rise to a legal relationship between husband and wife which has a right duty contellation of its own.

Stages of Ownership of the Preconditions

The preconditions belong to the father of a daughter by virtue of the fact that she is his daughter. His being father gives him what may be called original or first possession. The father's right is one of those granted him by the patriarchal system.

If the girl's father dies it seems that the girl's brothers may inherit these rights. Our information is scanty on this point and it may well be that the brother's rights are not as complete as those of the father.⁸¹ If the girl's father transfers the preconditions to a creditor the brother's right of inheritance is undoubtedly eclipsed.

Before marriage may take place the father-of-incidence, must transfer the preconditions to the father-of-inherence or the husband-to-be. If the preconditions have been transferred to the father-of-inherence, he must assign them to his son, the bridegroom. The husband has possession of the preconditions so long as the marriage continues, but as we have stated above, they are suspended.

The death of the husband dissolves the marriage, however the preconditions continue to exist and are inheritable. It is the existence of the preconditions which makes for the difficulties involved in the complete dissolution of the ties a woman has to her late husband's family. Since the preconditions are inheritable the woman can gain the rights to go where she pleases and do what she pleases, i.e., become an almattu, only when she is the one who inherits the preconditions. If there are other members of the family who precede her in the line of succession, they in-

herit the preconditions and the rights involved.⁸² These other members may marry the widow off or marry her themselves.⁸³ (Exceptions to this rule shall be discussed later.) When the widow inherits the preconditions she has the right to marry anyone she pleases, this necessarily follows because an essential right contained in the preconditions is the right to marry the woman. If the woman possesses this right she may transfer it to the man she wishes to marry, in other words, give her consent. The widow who inherits the preconditions is called the almattu.

Once the father of the unmarried girl has assigned the preconditions away and the girl is married, he never again has rights in his daughter.⁸⁴ The reason for this is easily understood, the widow's father doesn't inherit from his son-in-law.

It is clearly indicated that the father and the sons of the late husband inherit the preconditions to the widow. The existence of any of them preventing the widow from becoming an almattu with the consequent limitation upon her freedom. We have before us now the problem of deciding whose right of inheritance took precedence, the sons or the grandfather?

The rights of the deceased's father are clear. He may marry the widow to whichever of his sons he chooses. Does the father-in-law inherit the preconditions if the deceased has sons? We are told in #33 that a woman whose husband is dead may be given to her father-in-law.⁸⁵ Unfortunately the subject, i.e., who the giver is, is missing because of a lacuna in the wording of the statute. Nevertheless, it immediately indicates that there is someone who

precedes the grandfather in the order of succession. That person cannot possibly be the widow's father because our laws clearly imply that the married woman never again enters into a right-duty relationship with her father. This is shown by the fact that the existence of the widow's father-in-law and son are stated as preventing her from becoming an almattu, and the father of the widow (whom we would expect to be mentioned if he once again had rights in his daughter) is not included in this statement. Moreover, if the father of the widow had been mentioned in the immediately preceding phrase or elsewhere in the statute he would surely be included in the final clause, which sums up the statute. Further evidence is that the married woman's father is not mentioned in either #36 or #45 where dissolution of the marriage and the woman's legal relations after the dissolution are again discussed. Therefore our only possible conclusion is that it is the son who takes precedence over his grandfather and who inherits the preconditions to his mother or step-mother.⁸⁶ It is the son who is the missing subject and who may give his mother or step-mother to her father-in-law (his grandfather) in marriage. The son is properly included in the summary at the end of the statute.

V. LEVIRATE AND THE PRECONDITIONS
AND THE INHERITANCE RIGHTS OF CO-PARCENER BROTHERS

We are now confronted with the difficult question of the place of co-parcener brothers in the order of succession to the deceased husband's property rights. If the deceased has brothers who are not holding property jointly with him the widow seems to precede

them in order of inheritance.⁸⁷ Even if there are co-parcener brothers and the deceased has sons, the sons precede the co-parcener brother in the line of succession.⁸⁸ However, the co-parcener brothers, according to the statute, precede the wife in the order of inheritance.⁸⁹ If this is so, should they not inherit the preconditions including the right to take the widow to wife? And if this is true why is there no mention of their right to do so in the MAL? Several possible solutions to this problem present themselves to us.

It is likely that co-parcener brothers do inherit the preconditions to the widow. The lack of references to this may be due to:

- 1) the fact that our statutes are fragments and therefore incomplete.
- 2) the fact that the MAL is case law and the situation where the woman had no sons and the land was held jointly by the brothers and litigation was involved, did not occur.
- 3) the fact that the custom was so well known, inclusion in the Laws was not required.

There is also the possibility that although originally the co-parcener brothers inherited the widow as well as the ornaments that the husband bestowed upon her, that, at the time the MAL was compiled because of reasons unknown this right upon the part of the co-parcener brothers no longer existed.

If the co-parcener brothers do inherit the preconditions to the widow we can readily understand the importance of the legis-

lation contained in our statute. The law concerning the inheritance of the ornaments clarifies the situation where the co-parcener brothers either cannot marry the widow because they are already married⁹⁰ or because they do not wish to marry the widow for other reasons. For in such a case the question would arise as to whether or not their inability or refusal to marry the widow prevents them from inheriting other property which their deceased brother owned.⁹¹

If our assumption is correct that the co-parcener brothers either inherit the preconditions to the widow in the MAL or once did inherit but for unknown reasons no longer do, we may, with profit look for such a statement in another semitic law code which operates under a similar kind of legal theory. Thus we find that it is exactly this situation which is described in the Bible in Deut. 25ff., the statement of the law of levirate marriage. We will not at this time attempt to prove that the domestic legal system of the Bible operates under the same broad general principles as the MAL, but if it be conceded that the Mishna is a continuation and fuller statement of the Biblical law, then this shall become clear in the second part of this study.

Deut. 25:5 says, "If there are brothers living on a joint estate (as co-parceners) and one of them dies, leaving no son, the wife of the deceased must not be married to a stranger; her brother-in-law must go to her, and marry her, doing the duty of the brother-in-law to her;..." By the time Deuteronomy was written the deceased husband's son and father, whose inheritance rights are prior to the co-parcener brothers' had been eliminated, no doubt because of social disapproval. (However, traces of the former practice remained in the

legends of the people, e.g., the account of Judah and Tamar, Genesis 38.) The rights of the co-parcener brother not suffering from the disabilities caused by social disapproval remained.

To round out our discussion of the levirate and its relation to the preconditions we shall discuss here some pertinent information culled from the Mishna. If the levirate is the possession of the preconditions through inheritance then the levir's rights should in the main, coincide with the rights of the husband-to-be who has obtained the preconditions. The one code which gives us adequate details concerning both these states is the Mishna and a comparison of levirate and betrothal as described therein, will enable us to test our hypothesis. (Betrothal is the period after the transfer of the preconditions and before the marriage; zikhah is the period after the death of the husband and before marriage to the levir. During the betrothal period, the husband-to-be possesses the preconditions, during the zikhah period, the levir possesses the preconditions.)

During the betrothal and zikhah periods, a daughter of a priest who is betrothed to an Israelite or who is tied to a levir who is an Israelite, may not eat of the Heave-offering.⁹² (The unmarried or divorced or widowed daughter of a priest may eat of Heave-offering.)⁹³ During the betrothal and zikhah periods, a daughter of an Israelite, who is betrothed to a priest or who is tied to a levir who is a priest may not eat of Heave-offering.⁹⁴

"If the daughter of an Israelite was betrothed to a priest... or awaited levirate marriage with a priest (and the same applies to a priest's daughter and an Israelite) she may not eat of Heave-

offering. If the daughter of an Israelite was betrothed to a levite... or awaited levirate marriage with a levite, she may not eat of Tithe. If a levite's daughter was betrothed to a priest...or awaited levirate marriage with a priest (and the same applies to a priest's daughter and a levite) she may not eat of Heave-offering or of Tithe.⁹⁵

Neither the betrothed husband⁹⁶ nor the levir⁹⁷ has the power to revoke the vows of the betrothed girl or the woman awaiting levirate marriage. A woman that is betrothed or that awaits levirate marriage may not go through the ordeal of the bitter water if accused by her husband or receive her Ketubah.⁹⁸ If a betrothed woman inherits property she may sell it or give it away (without her husband's-to-be permission) and the act is valid.⁹⁹ If a woman awaiting levirate marriage inherits property she may sell it or give it away (without the levir's permission) and the act is valid.¹⁰⁰

Deuteronomy sheds further light on the levirate as the inheritance by the levir of rights in the widow. Deut. 25:7 states, "But if the man does not want to marry his sister-in-law, then his sister shall go to the elders at the city gate, and say, 'My brother-in-law refuses to carry on his brother's name in Israel; he will not do the duty of brother-in-law to me'; whereupon the elders of his city shall summon him, and speak to him, and if he maintains his position, and says, 'I do not want to marry her,' his sister-in-law shall go up to him...and pull his sandal off his foot..." The drawing off of the shoe is an indication of a transfer of property rights. The following statement makes this clear. "Originally acquisition of property was wont to be made by the symbol of the

drawing off the shoe. Later the custom arose to acquire property by kesasah (cutting off); still later they began to acquire by kesef (money), by shetar (written deed), or by hazakah (possession)...¹⁰¹ This is in full agreement with our understanding of the origin of levirate as inheritance of certain rights by the brother of the deceased. The drawing off of the shoe symbolizes the transfer of the preconditions, the rights in her, which the brother of the deceased holds, back to the widow.

Legal Memories of the Period When the Son Inherited the
Preconditions

The fact that the son once did inherit the preconditions has left its imprint upon some of the laws which have come down to us. The most prominent perhaps is the fact that there is no levirate marriage when the deceased has an heir.¹⁰² The reason for this is, as we have explained, that the son precedes the co-parcener in the order of inheritance. Therefore, he inherits the preconditions. Without the brothers' having possession of the preconditions the question of levirate marriage is never raised.

We have other indications from the Mishna, For example, the laws governing the age of inheritance for a boy is the same as that for exemption of the mother from levirate marriage. "A boy one day old...suffices...to exempt his mother from levirate marriage...and he can inherit property and bequeath it;..."¹⁰³

Also, "If a priest's daughter was married to an Israelite she may not eat of Heave-offering; if he died and she had a son by him, she may not eat of Heave-offering. If she was married to a

levite she may eat of Tithe; if he died and she had a son by him, she may eat of Tithe. If she was married to a priest she may eat of Heave-offering; if he died and she had a son by him, she may eat of Heave-offering..." And, "If the daughter of an Israelite was married to a priest she may eat of Heave-offering; if he died and she had a son by him, she may eat of Heave-offering. If she was married to a levite she may eat of Tithe; if he died and she had a son by him, she may eat of Tithe. If she was then married to an Israelite she may not eat of Heave-offering or of Tithe; if he died and she had a son by him, she may not eat of Heave-offering or Tithe..."¹⁰⁴ We may ask ourselves as the origin of these laws. Why should the existence of a son permit or forbid a mother to partake of the Heave-offering or the Tithe. The understanding which suggests itself to us is that we have here a remembrance of the ancient practice where by the son upon the occasion of his father's death inherited rights to the mother.

The institution of the levirate also throws light upon our problem of which act makes for marriage in the MAL. The levir is already in possession of the preconditions and all he need do is marry the sister-in-law. The Mishna states that a man may effect levirate marriage only through sexual intercourse.¹⁰⁵

VI. THE PATRIARCHAL FAMILY, PROTECTION OF THE FATHER'S RIGHT TO THE PRECONDITIONS AND THE ORIGINS OF INCEST

A problem which confronts us upon reading the domestic laws in the Bible is the origin of the incest taboo. What is the origin of the thinking that led to the conclusion that sex relations be-

tween mother and son, sister and brother, etc. were illegal?¹⁰⁶ It seems to us that once the concept of relations with a member of the family being unlawful is originated, it is an easy matter to continually add new prohibitions.¹⁰⁷ Therefore, our efforts will not be directed toward explaining the reason for every prohibited relationship but rather how the concept started in the first place. Our solution is dependent upon a description of the patriarchal family.

The forms which "family" takes in different times and lands are related to the particular needs and requirements of the sociological and economic substratum. This understanding of the family does not deny that the biological and psychological requirements of the individual are not important factors in its development. It does say that the working out of the biological and psychological needs of the individual as expressed by the formation of "family" is going to be molded to a large extent by objective economic and sociological conditions. The patriarchal family is a functional entity. Though we cannot pinpoint its rise as it responds to objective stimuli we may observe that it fits well into both the pastoral and agricultural economies of the ancient Near East.

As the patriarchal family evolves in response to the functional demands of the economic and social forces, it promulgates laws which define the legal relations which have emerged. These laws serve to perpetuate the system which evolves them, for they are able to be taught to the young who in turn live by them and teach them to their young. Also these laws bring about clarification and stability so

that the members of the society can conduct their lives in an orderly fashion.

In the early stages of Near Eastern development the largest social entity was the patriarchal family. It constituted a complete and independent political entity. The authority granted the husband and the father by our code is a remembrance of the time when, before the emergence of the state, the father was the sole ruler of his clan.¹⁰⁸

When the patriarchal family was the largest social unit, it was also a political entity. In its structure, it reflected the larger political organism, the state, composed as it was of a leader and various inferior classes.

The patriarchal clan as "political entity" implies important ramifications for our consideration. It means that the father has rights superior to those of any member of the group. And these rights are not limited to such properties as land and cattle. They also inherited in various members of the family. The sons as well as wife, daughters-in-law, daughters and concubines were subordinate to the patriarchal head of the family. The evidence clearly indicates that severe punishment was meted out for any infringement of the rights of the father in property or persons. Therefore, we shall find that relations between individual members of different classes of patriarchal society will be determined by the prohibitions which result from the father's interests in these persons. The head of the clan promulgates those rules which serve to preserve his position.

The extreme emphasis which is placed upon the protection of the

father's prestige and rights may be understood when we recognize the fact that the patriarchal family was a political entity. For example, the inclusion in the ten commandments of honoring one's father and mother is more than just an innocuous remark.¹⁰⁹ It has as much practical and social significance as the commandment not to steal, for it goes to the heart of the patriarchal structure. The rebellious son, we are told, is to be killed for his crime.¹¹⁰ Surely this must have meaning beyond punishment for a family squabble. And in the same category is the severe punishment meted out to one who curses his father and mother.¹¹¹ The reason for the above legislation is that the prestige and rights of the father symbolized and constituted his position of authority in a political entity and violation of his prestige or rights was construed as rebellion and rebellion is, of course, a cardinal offense in any political structure. These rights of the father not only symbolize the authoritarian structure of the patriarchal family with its various subordinate classes but they are the legal cement which keeps the structure in its authoritarian form - and strictly speaking a violation is actually rebellion.

We may hypothesize that the laws of what we now call incest have their origin in the protection of the father's rights in the various classes which compose the patriarchal family. These rights at the same time constitute and preserve the patriarchal authoritarian structure of the family. Their violation is looked upon as a challenge to authority and therefore rebellion. Rebellion is a cardinal offense in any society and calls forth severe punishment.

It is understandable that we do not have clear cut evidence which reveals to us the development of these laws. By their very nature they emerge in prehistoric times and undergo change and camouflage by the time they are recorded by history. It is probable that in these earliest times a person had relations with his mother when his father died or was deposed by successful revolution. However, the success of the patriarchal system with which such practice was essentially incompatible, must have brought about a suppression of such activity. Sporadic indications of the essential correctness of this theory appear in a comparative study of the law-codes of ancient times and in various accounts in the Bible. The Hittite code sharply differentiates between relations with a step-mother when the father is alive and when he is dead.¹¹² The father seems to violate no legal principle when he lies with his daughter according to the Codex Hammurapi. The Hurrian laws seem to indicate that the brother's right to marry of a sister includes the right to marry her himself¹¹³ - and so the laws from Nusi.¹¹⁴ In the Bible Tamar, a half-sister through the father, may legally marry her half-brother if the father's permission is obtained.¹¹⁵ Relations with a father's concubine is considered rebellion¹¹⁶ or aspiring to inherit his authority if he is dead.¹¹⁷

We do not find records in our sources of relations between mother and son. The reason may be found in the great importance of the prohibition against these relations for the preservation of the patriarchal structure. For if the successful evolution of the patriarchal family is dependent upon the pre-eminent position of the father and a key right which constitutes the posi-

tion is the father's exclusive rights in the mother; then we must assume that the prohibition against the son having relations with the mother while the father is alive, makes its appearance simultaneously with the initial formation of the patriarchal family structure. And because the patriarchal family traces its origins to prehistoric times, this particular interdiction antedates our records.

The great emphasis and the devices used to implement the emphasis placed upon and surrounding the taboo which prohibited relations between mother and son during the life-time of the father probably brought about the extension of the taboo to relations with the mother even after the death of the father. The patriarch's position during his life is certainly strengthened by a taboo which is considered so powerful that it even continues after death. Also some of the incentive to rebellion is taken away by the fact that the mother is prohibited even after the death of the father. And the son who legitimately succeeded the father would not be opposed to having the mother remain inviolate so that she might serve as a symbol of the patriarchal authoritarian structure and as proof the sanctity of his rights. Our reasoning remains conjecture in this area because of our lack of sources, and as we have indicated above the sources by their very nature will never be discovered. We merely attempt to show that it is in full sympathy with patriarchal development that a son-mother taboo is developed and maintained. Though it interrupts the logical order of inheritance in the patriarchal structure, it contributes to the preservation of the entire institution. Such a contribution is of such

functional importance that it takes precedence over a rigidly logical system of inheritance.

The essential taboo in the patriarchal structure is that interdicting son-mother relations. However, the potential for other taboos is inherent in the situation. The father owns the preconditions in the daughter and the sons are then forbidden to have relations with her unless they acquire the preconditions. It may very well be that with brothers and sisters living in close proximity it would be difficult for the father to keep constant watch over them so as to safeguard his rights. Therefore, the taboo was extended to brother-sister relationships and the brother could no longer marry the sister even if he was willing to purchase the preconditions. The reasoning proceeds in the following manner; If the son is prevented from having relations with his sister because he does not possess the predonditions, then it is perfectly alright for him to think in terms of sex relations with her and this in turn because of the close contact would possibly lead to a violation of the father's rights. However, once the sister is prohibited under any conditions and the prohibition is enforced with taboos, then the father's rights stand a greater chance of remaining free of violation.

However, the only essential taboo in the family structure is that against the son-mother relationship. It is quite conceivable that a patriarchal structure should so form where the sons would have more rights than the one we have just discussed. They may have the right to their sister. This development would take place

where for one reason or another the patriarch was not able to gain full control of the political situation.

Let us now review our findings. We have set out to discover a natural origin for the concept of the illegality of sex relations among close members of the family. We find that such a concept originates naturally and logically from a study of the patriarchal family system. The father has superior rights in all the members of the family. (We have given the name preconditions to those which he has in the daughter.) These rights create a class stratification in the patriarchal family. The father's efforts to preserve them and the family structure which grants him his autocratic position leads to the development of the illegality of sexual intercourse among closely related members of the family.

We have not attempted to explain functionally all the relationships among members of the family which are prohibited in Leviticus. Once the concept of an incest taboo among certain close members of the family is evolved, its extension to other relationships may take place without any reference to the original function but for entirely different reasons. For example, the reason for the extension of the taboo to many other relationships in the Bible is (as we have stated), to preserve the institutional identity of Israel. The religious formulation of the laws of forbidden degrees in the Bible have obscured the correct understanding of their genesis. However, we need not be surprised at this obfuscation. Laws which originate for economic and social reasons are constantly reinterpreted and rationalized in religious terms. Particularly

is this so in ancient times when the ideologies for which men fought and the psychological worlds in which men lived were composed of religious ideas.

VII. DIVORCE

Divorce as well as the death of the husband dissolves the marriage. This right, according to the formulation of our statutes, belongs exclusively to the husband.¹¹⁸ The husband may, upon divorcing his wife, give her a parting settlement or he may send her away empty handed.¹¹⁹ He has the right to take back any ornament which he bestowed upon the wife during the marriage, but he may not claim the bridal-gift which he brought.¹²⁰ This is so because he has given the bridal-gift in return for the preconditions which transaction is completed by the marriage. The right to divorce the wife was looked upon as an important privilege. We may see this in the partial punishment of taking away the right to divorce a wife, which is inflicted upon a man who violates a virgin.¹²¹

Our statutes seem to refer to those cases in which a patriarch divorces his wife. We do not know if a son whose father has given him his wife, may divorce her without the father's consent. He most probably has the power to do so as is demonstrated by the probable fact that his marriage completely cuts off his father's rights since his children and not his father have prior rights to the inheritance of the preconditions. It may be that his father contained sufficient control over his son's actions to prevent him from so doing.

VIII. CLASS STRATIFICATION OF WOMEN IN THE MAL

Our discussion of the status of women in the MAL is primarily concerned with the woman who is a regular member of the patriarchal family. There are various other classes of women whose membership in the patriarchal family is not an integral one. The information we have concerning them is scanty but they emerge as individuals with a station carefully defined by the law. Are they persons? The answer to this question requires much more information than we are presented with by our sources. We may say with certainty that they were members of a vastly inferior social class.

Concubine (?)

A concubine (?) who walks with her mistress on the public streets must be veiled.¹²² A man may marry his concubine (?) by veiling her in front of five or six of his colleagues and saying, "She is my wife."¹²³ If the man has not veiled her in front of five or six of his friends saying, "She is my wife," then the concubine (?) is not considered his wife and the concubine's (?) sons do not inherit. However, if the veiled wife has no sons, the sons of the concubine (?) inherit.¹²⁴

Our information concerning the concubine (?) is so scanty that we are not even sure that it is a concubine to whom the laws refer. The evidence indicates that it is someone approximating the position of the concubine who is described. We do not know if this woman is liable under the criminal statutes which refer to regular members of the patriarchal family.

Her master would seem to have more rights in her than in a wife or daughter. He undoubtedly possesses the preconditions to the concubine (?) and may of course marry her without negotiating for them.¹²⁵ Most probably he also has the right to give her in marriage to anyone he pleases. The laws of veiling reveal her low position.¹²⁶ Class lines are sharply drawn and she is undoubtedly far below the social level the married woman and single daughter who are regular members of the patriarchal family.

Heirodule

The married hierodule must be veiled when she walks through the streets. If she is unmarried she may not go about veiled.¹²⁷

Harlot

A harlot may not walk through the streets veiled. Severe penalties are imposed upon her if she violates this prohibition.¹²⁸ It is incumbent upon any man who sees a harlot going about veiled to report her. Failure to report such a breach of conduct brings a severe penalty.¹²⁹ A man who causes a harlot to cast the fruit of her woman pays for it with his life.¹³⁰ The last injunction indicates to us that the MAL protected the civil liberties of the harlot and she could not be maltreated at will despite her inferior station.

The Slave Girl

A slave girl who veils herself in public is severely punished.¹³¹ The man who sees her performing this violation must report her on the pain of suffering a harsh penalty.¹³²

The slave girl is liable to mutilation if she has received stolen property from a married woman.¹³³ Her punishment is remitted if the husband does not punish his wife.¹³⁴

It is not possible to conceive of the slave girl as a person although certain protections are laid down for her in the criminal procedure outlined. The reason for this concern must be attributed to the fact that a citizen owns her. A citizen's rights may not be easily destroyed.

Class Stratification Sanctioned by the State

The state sanctions and upholds the class stratification of women in the MAL. This is disclosed to us by the nature of the penalty which is inflicted upon the apprehended harlot and slave girl.¹³⁵ The penalty inflicted upon the free man who fails to report the crime also indicates the nature of the crime.¹³⁶ Violation of class stratification is considered a crime in the category of rebellion because it is the state which sanctions it.

PART IIThe Status of Women in the Mishna

The Mishna contains much more information concerning the status of women than the MAL. This together with a few changes in her status necessitate a few changes in our divisions of the subject-matter.

The rights and duties which fix the position of a woman in any society may be called her legal profile. We shall find an amazing resemblance between the legal profiles of the woman in the Mishna and the MAL. The various ceremonies and their legal consequences reflect similar origins and indeed to our way of thinking the similarities are to be explained only by the assumption that these two legal systems are derived from models which are essentially the same.

IX. THE UNMARRIED DAUGHTERThe Minor (Ketanah and Naarah)

The father has overwhelmingly superior rights in the minor unmarried daughter. He may marry her off ¹³⁷ or sell her into slavery.¹³⁸ The father may give his daughter in betrothal whether it is effected through kesef, shtar or biah.¹³⁹ He keeps the money when the betrothal is effected through the use of kesef.¹⁴⁰ If blemishes are discovered in the girl after her betrothal the burden of proof lies upon the father to prove they occurred after betrothal.¹⁴¹ He together with the betrothed husband nullify the betrothed naarah's vows.¹⁴² If the girl is divorced or widowed

while she is betrothed the father collects the Ketubah and she returns to his complete control.¹⁴³ Both the minor and her father are eligible to receive her divorce.¹⁴⁴

She remains in her father's control until she enters marriage.¹⁴⁵ He has the right to anything his minor daughter finds and to the work of her hands.¹⁴⁶ If she is seduced he receives the compensation for indignity and blemish.¹⁴⁷ If she has been violated he also receives the compensation for the pain she has suffered.¹⁴⁸

The rights of the father as we have presented them above, make clear the patriarchal family structure into which the daughter is born and in which by the mere fact of her being a minor unmarried daughter, she is subject to many duties. However, there are certain rights which she does possess which are sufficient to make her a person although a member of an inferior class.

She receives maintenance and a place to dwell from her father until she is married.¹⁴⁹ She has a future contingent right in the property of her father which entitles her to maintenance from his estate after his death.¹⁵⁰ Not only is she entitled to maintenance upon the death of her father but she also inherits one-tenth of his estate.¹⁵¹ If there are no sons or sons' offspring she inherits the father's full estate.¹⁵² She also inherits from her mother's estate.¹⁵³ If her father is dead she does not receive maintenance at the expense of her sisters¹⁵⁴ but she does receive it at the expense of her brothers.¹⁵⁵

She has sufficient personality to have possessions of her own. Therefore if her father gave her clothes and new sandals

they are accounted as belonging to her. They may not be included when the father dedicates his property to the temple.¹⁵⁶

A father may not dedicate his minor daughter to the temple. The reason given for this in the Mishna, is the girl's right to be free of her father when she reaches her majority.¹⁵⁷ The right to this future right is invested in the girl while she is yet a minor. If she acquired the right only upon reaching her majority the father could dedicate her to the temple for the period of her minority and she would go free when she became a major.

Limited rights in the unmarried minor whose father is dead are acquired by her brothers and her mother. Either may give her in betrothal.¹⁵⁸ However, the girl has the privilege of refusing to marry the betrothed husband,¹⁵⁹ And if the brother or mother did not ask the consent of the girl before they assigned her to her betrothed husband she does not have to exercise refusal but may simply walk out.¹⁶⁰

Further indication of the act of power upon the part of the brother may be seen in that it is nowhere suggested that the brother nullify the vows of the betrothed naarah when the father dies. Also the brothers are entitled to the work of her hands or to compensation received from a suit brought against a seducer or a violator only if the suit was gained during the lifetime of the father.¹⁶¹ They inherit the father's monetary claim. They do not gain compensation because any rights of theirs in their sister was violated.

The Major (Bogeres)

The father does not have the privilege of nullifying the vows of the major.¹⁶² The bogeres who gains her suit against her violator or her seducer keeps her compensation.¹⁶³ She is entitled to a share of her father's estate as inheritance although she does not share equally with her brothers.¹⁶⁴

The naarah as well as the bogeres may not be sold into slavery.¹⁶⁵ If a minor has been sold into slavery she goes free when she becomes a naarah.¹⁶⁶ We have no reason to believe that the father exercised any control over the bogeres, she is an independent person. However, there are other disabilities which do not flow from the father's rights in her but from the fact that she is a member of an inferior class which prevents her from sharing equal status with the male who has reached his majority.¹⁶⁷

X. BETROTHAL (ERUSIN)

Erusin is effected in three different ways: the presentation of a specified minimum sum of money to the bride; the drawing up of a contract between the betrothed husband and his future bride; intercourse between the man and the woman.¹⁶⁸ A bogeres arranges for these matters by herself and keeps the money if the betrothal is effected through kesef (money).¹⁶⁹ The father of a minor arranges for the betrothal and keeps the money if it is effected through kesef.¹⁷⁰

The erusin is invalid under certain conditions; such as if the man betrothed the girl on the condition that she wasn't under a vow and she was, or if he betrothed her on the condition that

there were no defects in her and there were.¹⁷¹ The general rule is: if there was deceit on the part of the man or the woman to the disadvantage of the other party, the betrothal is void.¹⁷² Even if the woman was given the minimum amount required for betrothal through keseif, consent based upon knowledge of the exact amount of the sum is required of the woman.¹⁷³

The erusin bestows upon the husband-to-be the right to marry his future wife.¹⁷⁴ His right to demand marriage is tempered to some extent in that he must give a virgin twelve months to prepare for marriage once he announces his intention to marry her.¹⁷⁵ A widow is given only thirty days to make the preparations.¹⁷⁶

The betrother may terminate the betrothal for the slightest reason and suffers no penalty.¹⁷⁷ In a very real sense the betrother may use compulsion to force the betrothee to marry him. For if the betrothee refuses to go through with the marriage the betrother may refuse to give her a divorce to free her from the erusin.¹⁷⁸ This would prevent her from ever marrying again. The betrother is unaffected for under the polygamous system he could take himself another wife.

During the betrothal period the father of the girl exercises considerable control over the girl. He may keep the work of her hands and anything she may find if she is not of age.¹⁷⁹ He also receives her bill of divorce.¹⁸⁰ If the betrothee is a naarah both her husband and her father must nullify her vows.¹⁸¹ If the betrothee who is a naarah makes a vow and her father is dead the betrother cannot nullify the vow by himself.¹⁸² If the erusin are

dissolved the girl returns to her father's dominion. This is clear from the fact that he takes the Ketubah for himself if the dissolution is through divorce.¹⁸³

If the betrothee inherits certain goods before the betrothal she may sell or give them away after the betrothal.¹⁸⁴ If she inherits them after the betrothal she may dispose of them and her act is valid in principle only.¹⁸⁵

A priest's daughter who is betrothed to an Israelite is forbidden to eat of the Heave-offering.¹⁸⁶ An Israelite's daughter who is betrothed to a priest may not eat of the Heave-offering.¹⁸⁷

The erusin may be terminated in two ways; intentional dissolution, divorce; and through the death of the betrother.¹⁸⁸ If the betrother dies, the betrothee must enter into levirate marriage with the deceased's brother or receive Halitzah if he does not choose to marry her.¹⁸⁹

The Nature of the Erusin

The question we now have to consider is - what are the erusin? During the period of the betrothal the father's control seems to alternate and sometimes co-exist with the betrother's control. The betrothal seems to serve no real purpose, yet it is crucial for marriage - why? The answer to these questions may be found by investigating that which the erusin accomplishes.

The erusin gives the betrother the right to demand marriage with the betrothee.¹⁹⁰ It forbids the betrothee from having sexual intercourse with any other male on penalty of a death punishment.¹⁹¹ It leaves the girl for all practical purposes under the control of

the father. It transfers permission from the father to the betrother to marry the girl. In a word the erusin accomplishes the transference of the preconditions to the betrother.

Because of the more detailed information which the Mishna gives us we are able to fill in more of the rights which are contained in the preconditions. We have mentioned above in our discussion of the MAL, that the right to marry the girl was the crucial right involved. We may add to this the right to forbid sex relations with the betrothee to all the world - that is, creating in everyone else a no-right to sex activity with the girl beginning with the betrothal - despite the fact that his right to sexual possession doesn't begin until the marriage. There also is the factor that his right to marry the girl is exclusive - no one else may marry the girl while she is betrothed.¹⁹²

Because it is only these rights which are bestowed upon the betrother, the girl's finds or the work of her hands belong to the father during the betrothal period.¹⁹³ The nature of the betrother's rights are largely future rights, therefore, if the erusin are dissolved the girl is in her father's control because she never really has left it. If the girl is a bogeres, she is in possession of the rights to herself and may therefore give away or sell property which she inherits at that time.¹⁹⁴

We now approach a difficulty. If the primary control over the girl is in the hands of the father - how is it that the betrother and the father both must nullify her vows;¹⁹⁵ and how is it that if she is a priest's daughter and she is betrothed to an

Israelite, she is forbidden to eat of the Heave-offering, since the priest, her father, retains control over her?¹⁹⁶

The answer to this question consists of two parts. In the first place extreme caution is exercised with regard to ritual matters. Therefore, no possible precaution which prevented violation of a ritual regulation was overlooked. In the second place, the transfer of the preconditions is a very old ceremony, undoubtedly antedating the peculiar rituals of Israel. When these rituals were instituted the exact status of the woman after the passage of the preconditions to the betrothed husband were no longer remembered, therefore the requirement that both father and betrothed husband nullify the vow (just in case some control was in the hands of the betrothed husband) and the prohibiting of a priest's daughter who is betrothed to an Israelite from eating of the Heave-offering.

The Mishna is, however, fully aware that the betrother does not gain control over the girl. The Israelite's daughter who is betrothed to a priest may not eat of the Heave-offering.¹⁹⁷ The betrothed husband whose betrothee's father dies cannot nullify the vow of his future wife.¹⁹⁸

The Espousal-Meal

The Mishna describes a very interesting custom to us. If the betrother sends siblonos worth ten thousand denars to the house of the father of the betrothee and then consumed an espousal-meal of but one denar's worth they cannot be reclaimed if he afterward divorced his betrothee. If he did not eat the espousal-meal, they may be reclaimed.¹⁹⁹ There is no indication anywhere that the

siblonoth are to be understood as the gifts which are used to effect the erusin. Indeed the Mishna seems to indicate that the siblonos were simply gifts of good-will and served no specific purpose beyond that designated by the betrother. He may specify that they be returned with his bride when she comes to his house. They may be intended for use in her father's house during the erusin period until the marriage.

We cannot understand these gifts as having no relation to the erusin for there could be no question of returning them when the erusin are terminated if this were the case. Neither may they be the gifts used to effect the espousal. What then could be the purpose of the siblonos?

We suggest the same solution which we offered for the explanation of the pouring of the oil and the irrevocability of the gifts in the MAL,²⁰⁰ the two practices seem to be analogous. The betrother has the right to dissolve the erusin at will. The ability of betrothee's father to make the siblonos irrevocable serves to guarantee that the betrother will not exercise this right. The meal which effects the irrevocability made be understood as a mode of acquisition which transfers the siblonos to the betrothee's father.

XI. MARRIAGE

The Mishna gives us no direct statement that sexual intercourse effects marriage. But it cannot be doubted that originally it was so and that at the time of the Mishna it was still the normative practice for effecting marriage. The sexual intercourse is analogous to the act of taking physical possession which is a characteristic mode of acquisition once the preconditions have been

acquired.

The Married Woman

Rights of the Husband in the Wife

The husband has the right to have his wife a virgin at the time of marriage. If it is lacking, he may bring a virginity suit and void the marriage.²⁰¹ The husband may leave his wife for any period of time and she may not remarry without valid evidence of his death.²⁰² If she remarried upon the basis of evidence which was valid but erroneous, her husband may reclaim her and she suffers no penalty.²⁰³

A husband may take his wife from one town to another or from one city to another in the same country even against her will.²⁰⁴ He may compel his wife to up to the land of Israel against her will.²⁰⁵ He may revoke her vows that serve to "afflict the soul,"²⁰⁶ if he does so on the same day - once nightfall comes, he may no longer void it.²⁰⁷

A husband has the right to the work of his wife and anything she may find.²⁰⁸ He may use her inheritance during her lifetime.²⁰⁹ And if the wife inherits money during the marriage, land should be bought with it and the husband has the use of it.²¹⁰ The husband is entitled to the work of his wife's slaves' labor.²¹¹ He has the right to collect from his wife any sum which he has expended in improving her property if he has gained nothing for his efforts.²¹²

He may dedicate his wife's labor to the temple providing he continues to maintain her.²¹³ The wife must tend to his household; grind flour, bake bread, wash clothes, cook food, give suck to the

child, make his bed ready, and work in wool.²¹⁴

The husband is entitled to exclusive sexual possession of his wife.²¹⁵ He may marry other wives, however.²¹⁶ He may safeguard his exclusive sexual possession of his wife by forbidding her to seclude herself with a certain individual or forbidding her to speak to him. If she disregards his warning and does seclude herself or speak to the forbidden individual, the husband may compel the wife to undergo the ordeal of the bitter waters.²¹⁷

If a married woman inherits goods, she may not sell them. If she does, the husband may void the sale.²¹⁸ He may make an agreement which permits his wife to give away or sell her property during marriage.²¹⁹ He may also make an agreement which prevents him from enjoying the fruits of his wife's possessions during his life-time.²²⁰ The husband may also make a vow in which he refuses himself the work of his wife's hands.²²¹ None of the above rights of the husband are considered of the essence to the marriage and permitted without voiding the marriage.

The husband may divorce his wife at will if he gives her Ketubah. He may divorce his wife without giving her her Ketubah if she is barren after ten years of marriage,²²² if she serves him untithed food, has connexion with him in her uncleanness, doesn't set apart the Dough-offering, utters a vow and does not fulfill it, if she goes out with her hair unbound, spins in the street, speaks with men on the street, curses his parents in his presence or is a shrew.²²³

XII. RIGHTS OF THE WIFE

The wife has a right to sexual intercourse.²²⁴ A man may not

deprive his wife by swearing he would abstain if she ate certain kinds of fruit,²²⁵ or wore certain adornments,²²⁶ or went to her father's house,²²⁷ or to a house of mourning or feasting.²²⁸ If he makes such an oath he must give his wife a divorce. She is entitled to both the pleasure of these activities and to sexual relations. Preventing her from enjoying these things goes to the essence of the marriage and it is dissolved.

The wife has a right to maintenance.²²⁹ The husband must give her a certain amount of money for the week's needs and for food. He must give her a bed or rush-mat to sleep on and clothing.²³⁰ If he doesn't give her a silver maah for the week's needs, the work of her hands belongs to herself.²³¹ If the wife is suckling a child they should lessen her handiwork and increase her maintenance.²³² Also the wife should eat with the husband on the Sabbath.²³³

If a wife has received a money payment for indignity or blemish all agree that she is entitled to retain some of the money. One opinion maintains that she is entitled to all of it.²³⁴

The wife may bequeath property to her husband and her maternal uncles.²³⁵ She doesn't inherit from them but she does inherit from her father.²³⁶

A wife has the privilege of making a vow.²³⁷ Some of these vows may be voided by the husband.²³⁸ However, it must be noticed that she as a person may make the vow - her husband's superior rights in them enable him to annul a vow which has been made. The husband may not declare void the vows which his wife will make in

the future.²³⁹ Neither may he revoke her vows after nightfall nor revoke them if they do not "afflict the soul."²⁴⁰

The wife may , under certain conditions, initiate the divorce proceedings. She may demand a divorce and take her Ketubah if she couldn't bear intercourse,²⁴¹ if she claimed she'd been violated by another²⁴² and if her husband was impotent.²⁴³ A husband who is afflicted with boils or who has a polypus, or is employed in a trade which leaves noxious remnants upon him must divorce his wife.²⁴⁴

Evaluation of the Legal Personality of the Married Woman

According to the definition of a person at law which we have accepted²⁴⁵ the married woman in the Mishna has the status of a person.

XIII. DISSOLUTION OF THE MARRIAGE

1. Divorce

A woman acquires her freedom through divorce.²⁴⁶ If a minor was given in marriage and subsequently divorced while still a minor, she is deemed an orphan in her father's lifetime, i.e., her father loses all rights in her.²⁴⁷ Divorce is also required to dissolve the erusin.²⁴⁸ However, a betrothed who is a minor does not acquire independence after her divorce, but returns to the dominion of her father.²⁴⁹ The reason is as we have explained above.²⁵⁰ The betrother never gains control of the betrothed but rights to her in the future. The erusin divorce extinguishes these few future rights and she remains under the control of her father. Marriage on the other hand removes all rights from the father and invests them in

the husband. The divorce does not transfer them back to the father - they remain with the divorcee and she becomes independent of both father and husband. Therefore, the father receives the Ketubah of a minor who is divorced after erusin and the girl herself keeps it if she is a minor who is divorced after marriage.

The divorce is effected when it reaches the possession of the wife and after that time the husband may no longer revoke it.²⁵¹ Originally, if the husband gave the divorce to his wife through a messenger the husband could revoke the bill until it reached the wife's possession even though the messenger has already departed with it. However, this rule was changed so that the wife was divorced as soon as the bill was given to the husband's agent.²⁵² This is a statutory reform which prevents the husband from abusing the wife by annulling the divorce while the agent is en route; for the agent might very well deliver the divorce without the knowledge of the revocation and the wife would remarry to her misfortune.

The divorce ends the husband's rights completely. He may not therefore attach any conditions to it which would limit her freedom after the divorce.²⁵³

A wife who cannot take care of her divorce may not be divorced.²⁵⁴ This provision prohibits a man from divorcing a wife who is mentally ill, or is otherwise incapacitated to the extent that she cannot take care of a divorce - i.e., would be incapable of understanding and acting in accordance with her divorced state.

The husband must pay his wife her Ketubah upon divorcing her.²⁵⁵ A man's whole property is under the charge of the Ketubah. He may not designate any single piece of his property as the only

security for her.²⁵⁶ However, the husband may dedicate his property to the temple even though the charge of his wife's Ketubah is upon them. They may not be redeemed, however, unless the charge is taken care of.²⁵⁷

2. Death of the Husband

A woman is freed of her marriage ties if her husband dies and he has issue.²⁵⁸ If he has no issue, then she is required to marry her brother-in-law.²⁵⁹ If she has no brother-in-law, she is free to go and do as she pleases. Even if the widow is a minor, she is a free and independent person and does not return to the control of her father.²⁶⁰

The widow is entitled to dwell in her deceased husband's house and receive maintenance from his goods so long as she remains a widow.²⁶¹ The widow may also receive maintenance from the property of the orphans but the work of her hands then belongs to them.²⁶²

If the widow does not wish to leave her husband's house the heirs cannot say to her that she should go to her father's house and they will maintain her there. She has the right to stay in her husband's house and the heirs must give her a dwelling befitting her position.²⁶³ If she doesn't wish to leave her father's house, the heirs may insist that she live with them or not receive maintenance. She may, however, claim that she is too young to leave her father's house and the heirs are also too young.²⁶⁴ She then receives maintenance even in her father's house.

A widow may claim her Ketubah at any time when she is living in her father's house.²⁶⁵ If she is being supported in her late

husband's household, her claim is valid only for twenty-five years?²⁶⁶

A widow does not receive payment of her Ketubah from the property of the orphans unless she swears to her claim with an oath?²⁶⁷ (The oath was later changed to a vow.) She may simply testify that her husband has died and she is permitted to take her Ketubah and to remarry. She also becomes permissible to the levir on the basis of her testimony.²⁶⁸

If a widow was married to a High Priest (the High Priest is forbidden to enter into marriage with her) or if a divorcee who had performed Halitzah was married to a common priest (the priest is forbidden to marry either) and the widow or the divorcee or the one who had performed Halitzah brought in as dowry melog slaves and son barzel slaves, the melog slaves may not eat of the Heave-offering but the son barzel slaves may.²⁶⁹ If the daughter of an Israelite was married to a priest and she brought him slaves, be they melog or son barzel property, they may eat of Heave-offering?²⁷⁰

We may ask ourselves the reason the melog slaves are not permitted to eat of the Heave-offering if the widow or divorcee married a High Priest. We cannot say the marriage is invalid and therefore the husband did not gain rights in them and thereby render them eligible. It is through the marriage that the son barzel slaves become eligible to eat of the Heave-offering and if it were invalid they could not eat of the Heave-offering either. Also the marriage is a marriage for a divorce is required in such a case and it is not considered so illegal that the wife does not receive her Ketubah when divorced. The two cases are a remembrance of the difference

between the status of a single woman who gets married and the woman who is in full possession of her rights such as a widow or divorcee. We have already had the occasion to point out this difference in the MAL.²⁷¹ The widow enters marriage in full possession of her rights and her property therefore has a different status during the marriage.

XIV. LEVIRATE

The institution of the levirate has undergone many changes from the most ancient times. Two differences exist between the Mishnaic and Biblical versions of the law. In the Bible levirate marriage takes place only between co-parcener brothers when one dies.²⁷² In the Mishna, the co-parcener brother requirement has been forgotten and any brother serves to impose the duty to enter levirate marriage upon the widow.²⁷³ In the Bible a son exempts the widow from levirate marriage.²⁷⁴ In the Mishna, if the husband has son or daughter, the widow is exempt from levirate marriage.²⁷⁵

The Mishna concerns itself with many complications which arise in the levirate situation because of polygamy.²⁷⁶ We shall restrict ourselves to a study of the basic law.

If a husband dies childless and he has brothers, his wife must be taken in levirate marriage by one of them.²⁷⁷ The duty of levirate marriage falls on the eldest brother and if he is not willing, it falls to the other brothers.²⁷⁸ If none of the other brothers are willing, they come back to the eldest brother and demand that he take the widow in levirate marriage or release her through Halitzah. He may not put off making the decision until

another brother returns from beyond the sea or until a brother that is a deaf-mute or an imbecile should recover (these brothers then are eligible to take the girl in levirate marriage).²⁷⁹

A woman is acquired by the levir through intercourse.²⁸⁰ If a man had connexion with his deceased brother's wife, whether in error, wantonness, constraint or willingly - or any combination thereof on the part of the levir or the woman - the woman becomes his wife.²⁸¹ The manner of the connexion does not interfere with the validity of the act.²⁸²

A levir who is an Israelite, deprives a daughter of a priest, who is awaiting levirate marriage with him, of the right to eat of the Heave-offering.²⁸³ The daughter of a levite who awaits levirate marriage with a priest may not eat of the Heave-offering or of Tithe.²⁸⁴

A boy who is nine years old and one day acquires his childless brother's widow to wife, if he has sexual intercourse with her.²⁸⁵ However, he cannot give her a bill of divorce until he comes of age.²⁸⁶

When a brother consummates marriage with the deceased brother's wife, she is their wife in all respects, save as regards the Ketubah. The Ketubah is a charge on the first husband's possessions.²⁸⁷

The rite of Halitzah must be performed before three judges who may be layman. Halitzah may not be performed with a felt sock instead of a shoe or a sandal that has not a heel-piece.²⁸⁸ The deceased brother's wife takes off the shoe and then spits in the levir's face.²⁸⁹ The Halitzah is valid if she draws off the shoe and spits, but doesn't pronounce the prescribed words.²⁹⁰ However,

if she pronounced the words and spat but did not draw of the shoe, the Halitzah is invalid.²⁹¹ There is a controversy between two rabbis as to whether or not the absence of spitting would vitiate the act. No one suggests that the Halitzah could be valid without drawing off the shoe. Clearly enough we have a ritual remembrance that the giving of the preconditions back to the woman through the mode of acquisition of drawing off the shoe is the essential element of Halitzah.²⁹²

Evaluation of the Legal Personality
of the Divorcee and the Widow

The widow and the divorcee with their many rights are clearly persons at law.²⁹³

XV. CONCLUSIONS

The female is a person at every stage of her life according to Mishnaic law. We have not dealt with the amah and other woman whose status differs from that of a regular member of the patriarchal family. Our concern has been with the life span of the female as lived within the patriarchal family structure, which is the only structure described in the Mishna.

The woman, although easily recognized as a person in the Mishna, must be understood to belong to an inferior class. As we have specifically detailed the rights and duties involved in all the female's relationships, we find that she is a person, not because of equality with the male Θ but because of the fact that she does have certain rights. The total constellation of the female's rights and duties is inferior to the male's at every stage of her life.

A very important development takes place in the Mishna that was not pronounced in the MAL. The extra-family legal entities, state and religion, play an increasingly important role in regulating the life of the woman. And it is in these areas that the woman's inferiority is clearly revealed.

The woman is invalid as a witness at law.²⁹⁴ Her legal status is positively defined in many instances as being the same as the minor male and the male slave.²⁹⁵

She is exempt from many ritual observances in which required participation is the proud privilege of the superior class, the male. Therefore, she is exempt from the recitation of the shema, from wearing phylacteries,²⁹⁶ from the pledge,²⁹⁷ from the mitzvah of Succah,²⁹⁸ and from appearing before the Lord on the Three Festivals.²⁹⁹ She may bring first fruits, but may not make the Avowal³⁰⁰ and is not included in the saying of the grace.³⁰¹ She may take the lulab out of the hand of her husband or son and place it in the box on Shabbos³⁰² (the point here is to permit a member of an inferior group to do that which is forbidden to the superior group because of their full ritual status). She is also exempt from those positive commandments that depend upon a specified time for their performance.³⁰³ The law of oath of testimony does not apply to women.³⁰⁴

If a man and woman are in danger, the man is saved alive first. His lost property must be restored before the woman's is. However, a woman's nakedness must be covered sooner than a man's and she takes precedence in being rescued from captivity. However, when both stand in danger of defilement, the man must be freed before the woman.³⁰⁵

Family Structure

The family structure in the Mishna, which our analysis of the legal rights and duties, depicts for us in one which is essentially the same as that in the MAL. It is true that the woman has come into possession of certain new rights, but these do not result from a change in the basic family structure.

We must point out, however, that there is no clear-cut case of improvement in the woman's legal status in the Mishna over that of the one described in the MAL. Two very important rights are granted the woman in the MAL, which she does not have in the Mishna, indeed, she does not possess the second one until this very day under Jewish law.

The first is the right to be the only wife of her husband. There is no indication of anything but monogamy in the MAL. The other relationships, into which a husband enters with other women in the MAL, are not of equal legal status to the wife's.

The second rights is very important.. In the MAL, a woman who has been deserted by her husband or whose husband has been taken prisoner, may remarry after the statutory period of time has elapsed.

In the MAL and to a large extent in the Mishna, we are able to understand the status of the woman and various institutions which are connected with her life, only when we understand the patriarchal family structure. The female is born into a situation where her father has overwhelmingly superior rights in her. It is the transference of these rights which makes necessary the payment of a teirhatu in the MAL and the institution of erusin in the Mishna. It is the fact

that these rights are able to be inherited that makes for the origins of levirate in the Bible and Mishna and the rights of sons and other members of the family in the widow in the MAI. It is the repossession of these rights by the woman that makes her an independent woman although a member of an inferior class. An extremely important development, which is exhibited by the Mishna is that a woman attains independent status not only through becoming a divorcee or a widow, but also by reaching a prescribed age.³⁰⁶

The Increase in Women's Rights in the Mishna

It is clear in the Mishna, that certain new rights have accrued to the woman. We suggest that the reason for these new rights is not to be found in a new-felt adoration and love for the female, but rather in important economic and sociological changes which have taken place with the advance of history.

In the earliest period the patriarchal family was most probably a political entity. With the rise of the state, the great autonomous power of these independent groups had to be curbed. The keystone of the patriarchal structure was the father's superior rights in the rest of the members of the family - therefore it is natural to expect that the demands of any member of the family, that would weaken the patriarchal power, would be supported by the emerging state. We suggest that objective conditions could incite the woman to demand more rights, but not until the external economic and sociological changes had made the demands amendable to the governing powers, were the demands hypostatized into law.

The break-up of the patriarchal family as an important political entity, competing with the state takes place early. Once the patriarch occupies a secondary position in the economic and political scheme of things, the family is then shaped even more by new economic and sociological developments. Commercialism tends to increase woman's rights and the Mishna was written in a time of developing commercialism. It is another study for us to attempt a correlation of the increased rights of women, with the corresponding changes in the commercial economy of Mishnaic times.

Notes

1. We suggest that a careful analysis of the CH would reveal that the two codes are not only not complementary but are even mutually exclusive in certain areas. Op. C.H. 160 with MAL A 30, 11.29-35.
2. The system was presented in a series of articles. The articles are: "Some Fundamental Legal Conceptions As Applied to Judicial Reasoning" (1913) 23 Yale L.J. 16, and *ibid.* (1917) 26 *ibid.* 710.
3. Wm. F. Walsh, Commentaries Law of Real Property, I, p.a.
4. MAL A 31, Col. iv 11.40-45; MAL A 30, Col. 11. 20-22. The house of the father-in-law (i.e. the head of the house of the father-in-law) receives the gift and the girl is obliged to marry him who brings the gift or one of his sons. Also A 30, Col. iv. 11. 29-31. From this evidence the obligation of the girl to marry the one her father chooses is clear.
5. MAL A 55, Col. viii 11.33-41.
6. MAL A 48, Col. vii 11.32-34.
7. MAL A 48, Col. vii 11.32-37.
8. MAL A 48, Col. vii 11.38-45.
9. MAL A 7.
10. Driver and Miles, The Assyrian Laws, p.30.
11. MAL A 10.
12. MAL A 1.
13. MAL A 8.
14. MAL A 47, Col. vii 11.1-6.
15. MAL A 55, Col. viii 11.23-29.
16. MAL A 55, Col. viii 11.33-37.
17. MAL A 55, Col. viii 11.38-41.
18. MAL A 56, Col. viii 11.42-45.
19. *ibid.*, Col. viii 11.48-49.
20. MAL A 44.
21. S. n. 7.

22. MAL A 39, Col. v 11.34f.
23. MAL A 56, Col. viii.48f.
24. H.C. Black, Black's Law Dictionary, Article entitled, "Person."
25. S.n. 15.
26. S.n. 18.
- 27.
28. MAL A 40, Col. v. 11.46-50. The reading is difficult because of the conditions of the text but this is the probable interpretation.
29. S.n. 22.
30. S.n. 20.
31. S.n. 23.
32. MAL A 30, Col. iv 11.20f.; MAL A 31, Col. 11.40-42.
33. In MAL A 30, Col. iv. 11.33-35 the indication is that after the gifts are given for the preconditions the girl remains in her father's home. We may assume that she is in her father's control until demanded and taken in marriage by the groom. Most probably her services would be welcome in her future father's-in-law household and the fact that she remains in her father's house probably means that she is under her father's control until the marriage.
- 34.
35. Professor Holland in the article cited above (S.n.24) has given the designation "person of inherence" to the subject of a right and the designation "person of incidence" to the subject of a duty. We have therefore given the names "father-of-inherence" and "father-of-incidence" respectively to the father who has brought the gifts and obtained the preconditions and the father who has received the gift and has now the duty of surrendering his daughter for the purpose of marriage. Occasionally we shall make use of the term "husband-of-inherence." This refers to the man who has obtained the preconditions. Once the girl is married the father-of-inherence is called the father-in-law and the husband-of-inherence the husband. In the Mishna section we refer to the male who has obtained the preconditions and who has not yet married the girl as the betrother and the girl for whom the preconditions have been obtained as the betrothee. This additional nomenclature aids us in our analysis.
36. MAL A 30, Col. iv. 11.29-35.
37. MAL A 42, 11.14ff.
38. Driver and Miles, op. cit., 180f.
39. MAL A 43, Col. vi 11.36-39.

40. *ibid.*
41. Wm. F. Walsh, Commentaries Law of Real Property, I, p.1.
42. The Mishna follows the same principle in Baba Metzia, 4.1. Danby in his translation of the Mishna adds this note (p. 353, n.1) "The principle here implied is that the essential element constituting valid purchase is not the receipt of payment by the seller from the buyer, but the buyer's 'drawing' into his possession the article to be purchased; therefore as soon as he has 'drawn' the article he is answerable for it, and if it was destroyed the same moment, although he had not paid money for it, he is still liable to the seller for its value." Another example from the Mishna is Kiddushin 1.4, "Large cattle are acquired by the act of delivery (i.e. the buyer taking hold of it by the bit or hair ...) and small cattle by the act of lifting up."
43. The Mishna seems to indicate that copula carnalis was the effective act for marriage. S.n. Also levirate marriage is accomplished through copula carnalis. Driver and Miles, *op. cit.*, 168ff. also come to this conclusion. The story of Isaac probably demonstrates the whole process. Rebekah's family is given gifts for the preconditions (Gen. 24.53) and then brings her to Isaac. Isaac takes her to his mother's tent, has sex relations with her and thereby she becomes his wife (Gen. 24.67).
44. MAL A 12, Col. ii 1.23.
45. MAL A 55.
46. MAL A 56.
47. MAL A 14, 22, 23.
48. MAL A 3.
49. MAL A 4 and others.
50. MAL A 24, Col. III 11.41-55.
51. MAL A 59.
52. MAL A 3, Col. i 11.23-31.
53. MAL A 5, Col. i 11.68f. The fact that the woman is punished despite the loss to the husband illustrates that there are occasions when the fact that she is a person over rides the husband's superior rights in her. S. Mishna, Baba Kama 8.4 for a case where the husband's rights over ride the wrongdoing of the woman; although she remains culpable - there is no punishment till the marriage is ended.
- 54.

55. MAL A 23, Col.iii 11.14-21.
56. MAL A 23, Col.iii 11.27-36.
57. MAL A 24, Col.iii 11.51-55.
58. *ibid.*, 11.56-60.
59. MAL A 7.
60. Driver and Miles also understand the law this way.op. cit., p. 363.
61. MAL A 2.
62. MAL A 47, Col. vii 11.1-6
63. MAL A 53.
64. MAL A 57.
65. MAL A 58.
66. MAL A 59. Similarly Driver and Miles, op. cit., 292.
67. MAL A 36, Col. iv 11.98-100.
68. MAL A 45, Col. vi.11.46-49.
69. *ibid.*
70. MAL A 46, Col. vi 11.111F.
71. MAL A 25.
72. MAL A 26.
73. MAL A 46, Col. vi 11.89-98; cf. Kctuboth 11.1.
74. MAL A 46, Col. vi 11.99-108. The interpretation of this section was published by Dr. Julius Lewy in OLZ 1923, vol. 535, note 1.
75. S.n. 70.
76. MAL A 33, Col. iv 11.69-70.
77. MAL A 35; cf. Yebamoth 7.1,2. Also s. discussion p.
78. MAL A 34.

79. Since the widow becomes a legitimate wife, the children she has with her husband are the legitimate heirs. There is also a practical difference between the concubine and the widow who becomes a wife, after cohabiting with the man for two years, in that she is provided for in the widow provisions after the man's death.
80. MAL A 33, Col. iv 11.65-70.
81. MAL A 48, Col. vii 11.38-45.
82. MAL A 33, Col. iv 11.67-70.
83. This conclusion is perfectly borne out by the incident of Judah and Tamar related in Genesis. 38. Judah's son Er dies without issue. His widow is then assigned a second brother Onan by Judah. It is not the brother who has inherited the preconditions but Judah and therefore Judah has the 1) power to give her in marriage, 2) the right to marry her. However, Onan does not wish to marry her and is punished with death. Judah again has full possession of the preconditions. He promises Tamar that he will give her in marriage to his son Shelah when he comes of age. Shelah comes of age but Judah does not give Tamar to him. Therefore, she shrewdly tricks Judah into having sexual intercourse with her. This is perfectly proper because Judah has the preconditions and he may either give her in marriage or marry her himself. Since marriage is accomplished through intercourse - once the male has possession of the preconditions, Tamar through the act is legally married to Judah and her seed is legitimate and she has not broken any law. And it is very interesting that we have a regulation in the Mishna which says that a levir marries his sister-in-law even if the sex act is done unwittingly.
84. This is conclusion derived from the fact that the father of the married girl is not mentioned wherever a right-duty relationship involving the girl is discussed. However, the father-in-law and her sons are mentioned. S. MAL A 33 and 45. In the Mishna it is clearly stated that the father has no rights in the daughter even though she is a minor after she has been widowed or divorced.
85. Col. iv 1.65.
86. In the Mishna we have an order of inheritance which agrees with our conclusions. If the preconditions to the mother were still inheritable at the time the Mishna was written, the son would inherit them before the deceased father's father. The Mishna also includes the Biblical statutory reform that daughters inherit. The text of the Mishna is: "This is the order of inheritance: 'If a man die and have no son, then ye shall cause his inheritance to pass unto his daughter.' (Num. 27.8) The son precedes the

daughter, and all the son's offspring precede the daughter; The daughter precedes the brothers (of the deceased), and the daughter's offspring precede the brothers (of the deceased) . . . This is the general rule; whosoever has precedence in inheritance, his offspring also have precedence. The father (of the deceased) has precedence over all his (i.e. the offspring the father of the deceased) offspring, (who are not direct descendant's of the deceased)." That is, the father of the deceased has precedence over his other sons when it comes to inheritance and the deceased's son take precedence over him.

87. MAL A 26
88. MAL A 25, Col. iii 1.85.
89. MAL A 25, Col. iii 1.82-89.
90. There is no indication of any kind of marriage but monogamy in the MAL.
91. The statute then becomes identical in function with the legislation in Yebamoth 4.7 where we are told explicitly that a man who submits to Halitzah from his deceased brother's wife still counts as one of the brothers in what concerns inheritance.
92. Yebamoth 7.4.
93. Yeb. 9.6.
94. Yeb. 7.4.
95. Yeb. 9.4. The Rabbis had already forgotten the meaning of the betrothal and the levirate in its legal sense. Therefore, they do not know under whose control the betrothed girl or the girl awaiting levirate marriage is - father or betrother and levir. The Mishna unwilling to risk a ritual transgression forbids the levite's daughter both the tithe and the Heave-offering, although it is clear under both betrothal and zikah conditions that someone has rights in her since she is not allowed to get married and must marry the betrother or the levir.
96. Nedarim 10.1, 2, 5.
97. Nedarim 10.6. Although Akiba says in this passage that the control of the betrothed husband is different from the levir, the comparison shows that they are approximately the same.
98. Sotah 4.1.
99. Ketuboth 8.1.
100. Yeb. 4.3.

101. Yeruehalmi Kiddushin, Ch. 1, and Midrash Ruth Rabbah. Quoted from The Main Institutions of Jewish Law, Isaac Herzog. (p.142) cf. Ruth 4.8.
102. Deut.25.5-10. Koschaker correctly understands why there is no levirate when there is a son in his article in the Revue Hittite et Asiatique, Zum Levirat Nach Hethitischen Recht.
103. Middah 5.3.
104. Yeb. 9.5.
105. Kid. 1.1.
106. Lev. 18.6ff.
107. The reason implied for an extension of the incest taboo to the long list found in Leviticus is to make Israel different from the surrounding nations and thereby preserve her identity. Lev. 18.3. We know that certain incest regulations are present in other law-codes therefore Israel did not originate the idea of incest, all she did was to extend it for institutional reasons once the concept had been promulgated.
108. The Bible reveals this in the accounts of Abraham, Isaac and Jacob. The patriarchal head obtained wives for his children, conducted wars etc. Also C.H. 117 clearly reveals this. It is not our purpose to give all the evidence for this assumption at the present time. This requires a separate study.
109. Exodus 20.12. A sweet gesture of filial devotion is clearly out of place. Ritual and political injunctions make up the Ten Commandments and this one too must certainly be included those political in nature.
110. Deut. 21.18-21.
111. Exodus 21.17, Lev.20.9.
112. The Hittite Laws, Statute 190, included in Ancient Near Eastern Texts, tr. A. Goetze.
- 113.
114. See Hildegard Levy, Gleanings from a New Volume of Nuzi Texts, in Orientalia 10 (1941).
115. 2 Sam. 13.1f.
116. This is the probable meaning of Gen. 35.22 and 49.4. Reuben attempted to usurp the rights of his father. As first-born son standing next in line for power his efforts are most understandable.

117. This is the probable reason for Solomon's consternation and killing of his brother Adonijah, I Kings 2.13-25.
118. MAL A 37, Col. v 1.15.
119. *ibid.* 11.16-19.
120. MAL A 38.
121. MAL A 55, Col. viii 1.37.
122. MAL A 40, Col. v 11.58f.
123. MAL A 41.
124. *ibid.*
125. *ibid.* All he need do is veil her in front of witnesses.
126. MAL A 40, Col. v 11.58f.
127. MAL A 40, Col. v 11.61-65.
128. *ibid.* 11.66-71.
129. *ibid.* 11.77-87.
130. MAL A 52.
131. MAL A 40, Col. v 11.88-93.
132. *ibid.* 11.94-106.
133. MAL A 4, Col. i 11.46-51.
134. *ibid.* 11.53-56.
135. MAL A 40, Col. v 11.71-76. This punishment is undoubtedly administered by officials of the state. For a full discussion s. Driver and Miles, *op. cit.*, pp.351-367.
136. *ibid.* 11.77-87, 94-106.
137. Ketuboth 4.4.
138. *ibid.* 3.8.
139. Ketuboth 4.4.
140. *ibid.*
141. Ketuboth 7.8.
142. Nedarim 10.1.

- 143. Ketuboth 4.2.
- 144. Gittin 6.2.
- 145. Ketuboth 4.5.
- 146. *ibid.* 4.4.
- 147. *ibid.* 4.10.
- 148. *ibid.*
- 149. *ibid.* 4.11, but cf. *ibid.* 4.6.
- 150. *ibid.* 4.6.
- 151. *ibid.* 6.6 and Bartenora.
- 152. Baba Bathra 8.2, 3, 4.
- 153. *ibid.* 8.4.
- 154. *ibid.* 8.8.
- 155. *ibid.* 9.1. It may be that she does not receive maintenance at the expense of her brothers at the time of R. Gamaliel although it would seem that the older law was that she did.
- 156. Arakhin 6.5.
- 157. *ibid.* 8.5.
- 158. Yebamoth 13.1, cf. Sotah 3.8.
- 159. *ibid.* 1.2.
- 160. *ibid.* 1.
- 161. Ketuboth 4.1. The minor girl inherits the preconditions when her father dies. Therefore, she must consent to a marriage which her brother or mother arranges and she collects the compensation for a violation of her virginity.
- 162. Nedarim 10.2.
- 163. Ketuboth 4.1.
- 164. *ibid.* 6.6.
- 165. Kiddushin 1.2.
- 166. *ibid.*
- 167. S. p. 66.

168. Kiddushin 1.1. The fact that copula carnalis is used here to effect the passage of the preconditions, i.e., the betrothal, rather than the marriage shows the confusion which will overtake a practice when it is far removed from its origins. Nevertheless, the Talmud () limits the intercourse to that one time and the betrother may not have relations with his wife again until the marriage.
169. ibid. 2.1.
170. Ketuboth 4.4.
171. ibid. 7.7.
172. Kiddushin 2.2.
173. ibid.
174. Ketuboth 5.2.
175. ibid.
176. ibid.
177. Gittin 9.10. The reference here is to a wife but we may understand it as certainly applying to a mere betrothal. The decision is rendered according to the School of Hillel.
178. Ketuboth 13.5. Even if we suppose that in the case where her father is at fault the betrother is obliged to marry her or divorce her it is certain from the wording of the statute that if it was her dereliction which prevented marriage she would remain betrothed and unmarried all her days.
179. ibid. 4.4,5.
180. ibid. and Gittin 6.2.
181. Nedarim 10.1.
182. ibid. 10.2.
183. Ketuboth 4.2.
184. ibid. 8.1.
185. ibid. The difference between the betrothed and the married woman is clear. The married woman may not dispose of property which she inherits after she is married (ibid.)
186. Yebamoth 7.4.
187. ibid.
188. Kiddushin 1.1; Ketuboth 13.5.

189. Yebamoth 2.6,7.
190. S.n. 174.
191. Deut. 22.23f. This law of the Bible is automatically in effect for the Mishna.
192. S.n. 178.
193. S.n. 179.
194. S.n. 185.
195. S.n. 181.
196. S.n. 186.
197. S.n. 187.
198. S.n. 182.
199. Baba Bathra 9.5.
200. MAL A 42, 43. S. pp. 18f. Note also the cognate terms: siblonos from the root sbl, zubullu from the root zbl; hu-ru-up-pa-a-te with harufah- modern Hebrew and Talmudic expression meaning betrothed.
201. Ketuboth 1.1. S. however, ibid.1.5.
202. Yebamoth 10.1, by inference.
203. Yebamoth 10.2, cf. MAL A 45 Col. vi ll. 69-78.
204. Ketuboth 13.10.
205. ibid. 13.11
206. Nedarim 11.1.
207. ibid. 10.8.
208. Ketuboth 6.1.
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- 236. ibid. 8.2
- 237. Nedarim 10.2
- 238. ibid.
- 239. ibid. 10.7.
- 240. ibid. 11.1.
- 241. ibid. 11.12.
- 242. ibid.

- 243. ibid.
- 244. Ketuboth 7.9,10.
- 245. S. above, p.12.
- 246. Kiddushin 1.1.
- 247. Yebamoth 13.6.
- 248. Ketuboth 3.6; 4,2.
- 249. ibid. 4.2.
- 250. S. p. 50f.
- 251. Gittin 4.1.
- 252. ibid. 4.2.
- 253. ibid. 9.2.
- 254. ibid. 6.2.
- 255. Ketuboth 4.9.
- 256. ibid. 4,7.
- 257. Arakhin 6.2.
- 258. Kiddushin 1.1.
- 259. Yebamoth 4.5.
- 260. Ketuboth 4.2. S. above 31f. for similar concept in MAL.
- 261. ibid. 12.3.
- 262. ibid. 11.1.
- 263. ibid. 12.3.
- 264. ibid. There would seem to be a contradiction between Ketuboth 11.1 and 12.3. In 12.3 we certainly receive the impression that the widow does not work, but in 11.1 we are told that the work of her hands belongs to the orphans. These two passages may have had their origin in a law similar to MAL A 46. It states that a woman who is a widow must be supported by her sons. However, if she remarried and her second husband died and she is then supported by the sons of the first marriage, she must work for them. Understood in this manner the origin of the apparently contradictory customs in the Mishnah become clear.
- 265. ibid. 12.4.
- 266. ibid.

- 267. Gittin 4.3
- 268. Eduyoth 1.12.
- 269. Yebamoth 7.1.
- 270. ibid. 7.2.
- 271. S.p. 27ff.
- 272. Deut. 25.5.
- 273. Yebamoth 2.5.
- 274. Deut. 25.5.
- 275. Yebamoth 4.2.
- 276. Yebamoth 1.1 et. al.
- 277. ibid. 4.5.
- 278. ibid.
- 279. ibid. 4.6.
- 280. Kiddushin 1.1.
- 281. Yebamoth 6.1.
- 282. ibid.
- 283. ibid. 7.4.
- 284. ibid. 9.4. The legal theory behind this is interesting. As we have pointed out, once the husband dies the woman is no longer under the control of the father, the levite; therefore, she may not eat Tithes. Neither, however, is she under the control of the levir who is a priest for all he possesses are the preconditions. The end result is that she can eat neither Tithes nor Heave-offering.
- 285. Niddah 5.5. It is clear that a boy nine years and day can effect certain legal changes (Yebamoth 10.6, 7, 8, 9.) However, it is equally clear that he is not yet considered an adult. What causes this confusion? We may indicate an answer in brief but a separate study is required. In the MAL it would seem that the age of maturity in matters relating to domestic law at any rate, is ten years (MAL A 43). Dr. J. Lewy has advised me that nine years and a day in the Misshnah may be understood as the equivalent of ten years in the MAL. We have then, in the Mishnah, a memory of the original age of maturity. All legal elements surrounding this memory have not yet been done away with and

cause confusion. In Niddah 5.6 we are told that a boy of thirteen years and one day may make a valid vow. This indicates that legal age in the Mishnah is in a stage of transition.

- 286. ibid.
- 287. Ketuboth 8.7.
- 288. Yebamoth 12.1.
- 289. ibid. 12.6.
- 290. ibid. 12.3.
- 291. ibid.
- 292. S.p. 36.
- 293. S.p. 12.
- 294. Bikkurim 4.3.
- 295. Berakhoth 3.3, 7.2; Shekalim 1.3,5; Succah 2.8, 3.10; Hagigah 1.1; Nazie 9.1; Baba Kama 10.2; Baba Metzia 1.5; Sanhedrin 8.1.
- 296. Berakhoth 3.3.
- 297. Shekalim 1.5.
- 298. Succah 2.8.
- 299. Hagigah 1.1.
- 300. Bikkurim 1.5.
- 301. Berakhoth 7.2.
- 302. Succah 3.15.
- 303. Kiddushin 1.7.
- 304. Shebuoth 4.1.
- 305. Horayoth 7.1.
- 306. Niddah 5.7.