THE HEBREW UNION COLLEGE-JEWISH INSTITUTE OF RELIGION
New York School

"INTRODUCTION TO JEWISH EQUITY JURISPRUDENCE"

By Kenneth E. Stein

Mr. Kenneth E. Stein in his thesis "Introduction to Jewish Equity Jurisprudence" has done a good piece of work in collecting and interpreting a considerable mass of legal material of the Seder Nezikin relating to his theme. Some of the interesting topics he deals with in his thesis are: Religious law and equity, the relation of ethics to Jewish law, the relation of religion to Jewish law, the principle of atonement, the principle of humanitarianism, human rights versus property rights, etc. He generally namifests good understanding of the material which he analyses for proving the relation of Hebrew law to ethics and for establishing the place of equity in Jewish law.

H is education in American law and jurisprudence serves him well in his analysis of Talmudic material. However, some of the passages he treats in his thesis have no immediate relationship to his theme. The thesis would have gained much in stature if it would have been smaller in size. There are also some incorrect interpretations, some of which I have noted with a pencil. I have also noted those passages which should be omitted.

In spite of these shortcomings, it is a creditable piece of work, and Mr. Stein is worthy of encouragement in the direction of applying his general education in law to the study of Talmud law. He manifests a fine understanding of Jewish legal concepts and an excellent legal training.

It gives me pleasure to recommend its acceptance as a thesis in partial fulfillment of the requirements for the rabbinic degree and Master of Hebrew Letters at the New York School of the Hebrew Union College-Jewish Institute of Religion.

Dr. Samuel Atlas

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(Based on Seder Nezikin)

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FOREWORD

The ensuing survey is, of necessity, interpretive. Where the standard interpretations of classic commentators have been found to be in conflict, the writer has reserved to himself the right of choice, nor has he hesitated, when the need seemed proper, to introduce such interpretations of his own, without calling specific attention thereto, as seemed necessary and proper in order to clarify that, which in his best judgment, he believed to be the meaning and conclusions of the Rabbis.

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ABBREVIATIONS

B.B.	Baba Bathra
B.K.	Baba Kamma
B.M.	Baba Mezia
Mak.	Makkoth
Sanh.	Sanhedrin
Sheb.	Shebu'oth
Yeb.	Yebamoth

INTRODUCTION TO JEWISH EQUITY JURISPRUDENCE
(Based on Seder Nezikin)

I. THE NATURE OF EQUITY

1. The Concept of Equity

The oldest concept of equity is that of natural or divine justice directed toward the effecting of perfect equality, a philosophic concept with which no system of jurisprudence, and certainly not the Jewish, is concerned. Jewish equity jurisprudence places reliance upon the Law of God, explicit or implicit, concerns itself with the spiritual welfare of its litigants, seeks to effect relief in the absence of any adequate remedy at law and on moral grounds, acts without hesitation to offset the rigidity of the law, wherever the danger of injustice threatens.

Jewish equity is *sui generis* and should not be confused with other systems of equity. To the Greeks, equity was a system of arbitration, a government of men and not of laws. (Aristotle, *Rhetoric*: Bk.I,Ch.13) Jewish equity always remained firmly planted within the fabric of the legal system as such.

Roman equity was a mere development of the formulary system, from the time of its initiation under the Praetor Peregrinus who was not empowered to employ the formalized *legis actionis* down through the period of

Constantine where it constituted an oral adjective law which only the Emperor could apply as against the jus scriptum (Code 1.14.1). Thus the distinction between law and equity at Rome, one which carried over into Canon Law, was procedural rather than substantive and was directed toward remedy rather than right. Jewish equity, on the other hand, differed from law in no respect as to procedure, but was solely concerned with matters of substance.

In modern Continental Systems, we find equity directed toward social dogmas and political expediency. Save in a few rare instances, specifically discussed below, the Jew employed equity solely to subserve the rights of the individual.

The history of equity in England falls into three main periods: the first where both law and equity were administered by the regular courts with no sharp dichotomy between them, the second where equity lay within the province of the Crown over against the courts of common law, and the last where equity finally emerges as the law of the courts of chancery, representing a completely sealed system of law running parallel with, and frequently in opposition to, the system of common law. In Jewish law, equity was never developed into any species of recognized system but always remained a fixed and necessary part of law, itself.

Thus we find that Jewish equity was 1) administered by the regular courts as 2) a part of substantive law, that it 3) subserved the rights of individuals, and that it 4) never developed into a unique system of its own, in which four respects, cumulatively considered, it differed from all other comparable systems. It will be the thesis of this essay to demonstrate that, reduced to ultimates, the entire body of Jewish law was, in substance, but a system of equity jurisprudence.

2. Religious Law and Equity in Jewish Jurisprudence

While law and equity are one in Jewish jurisprudence, nonetheless, as opposed to them both, we have the unique phenomenon of religious law. This latter law governs all matters relating to ritual purity and cult, and should not be confused with religion in the broader acceptation of the word. The religious law, with which this essay will not be concerned, was constituted into a self-contained system and the rule was laid down again and again that it bore no relationship to the ordinary system of law even to the point of arguing by analogy as between the one and the other. If anything, it can be said that the religious law was far more rigid than the ordinary law, to a degree, in fact, where it would appear that it does not contain the slightest suggestion of any mitigating factor or equitable influence.

Despite the foregoing, however, in that cult practice constituted so important a part in the lives of the people, it is to be expected that certain aspects of cult, especially in terms of offerings and tithes, should find their way into the litigation arising out of ordinary law. Where this occurs, the two elements of the action are invariably severed, and only so much of cultic matters are considered in terms of ordinary law as are amenable to that law in terms of contract, tort, domestic relations and the like. In support of these contentions, the entire body of Jewish Law en masse might well be cited since the problem is of such repeated occurence.

3. The Entire Body of Jewish Law as a System of Equity

It is an historic fact that during the Golden Age of Jewish legal development, the Jews themselves were subservient to foreign power, more particularly the Romans on the one hand and the Persians and their successors on the other. It is the more remarkable, therefore, that Jewish law shows practically no traces of foreign influence, albeit even a cursory reading of Talmud makes it manifest that the Jews were well acquainted with the laws of the controlling foreign jurisdictions. Nonetheless, the dictum is proverbial that the law of the ruling power is even for the Jew, the controlling law, if for no other reason than as a matter of realistic practicality. How,

however, is this dictum to be understood?

In a discussion of the differences in law and custom as between Jews and non-Jews in conjunction with determining title to certain lost property, the foregoing dictum is repeated (B.K.113b)[1]. Raba argues that it is valid Jewish law and cites by way of example certain trees which were felled by the government without consent of their owners for the construction of bridges, which were freely used by the Jewish populace. Under Jewish law, such governmental action would have been discriminatory and violative of the principle of equal protection of the laws, and all persons using the bridges would, by confirming the government's illegal action, make themselves, technically at least, joint tort feasors with the government - certainly on moral or equitable grounds - and yet such persons are not deemed to be wrong doers, from which it can be concluded that the government's action, while contravening Jewish law, is not considered illegal by it, since the law of the state is recognized by Jewish law to be binding. Abaye attacks this reasoning on the ground that it might well be that the original owners of the timber had abandoned their right thereto and in doing so had conferred legal title upon the government, so that, while the initial taking might have been illegal, nonetheless the subsequent holding and use would have been lawful. But, objects Raba, if the original

taking was unlawful, why should the owners have abandoned their rights? The presumption would appear illogical. By way of rebuttal a further argument is brought forward to the effect that while the state certainly has the police power to exercise the right of eminent domain and condemnation, the illegality would lie in levying exclusively upon the trees of one locale, instead of effecting an equitable apportionment of the levy throughout the area, and herein lies the element of discrimination. It is asked, however, whether the levy was effected by the government <u>per se</u> in this illegal fashion or only by the duly constituted authorities of the state. This question is brushed aside on the grounds that the authorities, as agents, act for the state, and the state is therefore responsible for their official actions. The question thus remains as to how the law of the foreign state, when in derogation of Jewish law, can still be binding under Jewish law, and the resolution of the problem seems most revealing.

It is held that under both Jewish and foreign law the basic act of the state was legal and the illegality lay in the method by which it was committed, viz. by placing the entire burden upon the residents of one portion of the area instead of apportioning the burden throughout. This illegality, however, is apparent and not actual,

since justice can be effected by recourse to Jewish courts where the original owners of the timber can compel all other property owners within the area to reimburse them for their loss on a pro tanto basis.

It is clear that this ruling is founded wholly on equity and is closely akin to the remedy of contribution recognized by Anglo-American equity jurisprudence. Indeed, a close parallel is seen in the case of Willmon v. Koyer (1914) 168 Cal.369, 143 P.694, L.R.A. 1915B, 961. where a tenant in common, having paid taxes and other expenses for the benefit of the common property, was entitled to contribution from his co-tenants.

In the case of the timber, therefore, we see Jewish law giving equitable relief from the rigors of the foreign system of jurisprudence, in a relationship in which it would appear that the foreign law is law in full accordance with Jewish dictum, but the Jewish law is equity.

4. Exclusive Equity Jurisdiction of Courts in Palestine

While the preceding case would seem to indicate that Jewish law is equity in terms of external law, yet within the body of Jewish law itself, the following gives evidence that the Babylonian Courts were devoid of equity jurisdiction, these being vested exclusively in the Palestinian Courts.

The lex talionis is interpreted in Jewish law in terms of monetary damages. Liability in cases of personal injury are measured by depreciation, pain, medical expenses, loss of time and degradation. (B.K.83b). This last is unique in Jewish law, and more will be remarked thereon hereafter, but in brief, degradation is the suffering occasioned by being held up to public ridicule by reason of physical defect flowing from the suffering of personal injuries. To this extent it may be looked upon as a species of defamation effected by act rather than by word. Clearly the determination of damages resulting from such injury cannot be determined by an ordinary law court, and such, indeed, was the Jewish Court at Babylon, holding its power derivatively through authority of the court at Palestine. By the same token, in the absence of penal statutes, the court at Babylon could not impose fines in criminal cases.

The jurisdictional limits of the Babylonian Court are well summarized in its own words (B.K.84b)[2] "It must therefore be said that we act as their (i.e. THE PALESTINIAN COURT) agents only in a matter which is of frequent occurence and where actual monetary loss is involved, whereas in a matter of frequent occurence but where no actual monetary loss is involved, or again in a matter not of frequent occurence, though where monetary loss is in-

volved, we cannot act as their agents...Similarly in respect of degradation, though it is of frequent occurrence, since it involves no actual monetary loss, we cannot act as their agents."

From this it is clear that the Babylonian Court was limited in its jurisdiction to that which was ordinary and certain but could not go beyond this limit, nor could it exercise undue discretion. So also the English Court of Chancery left such matters to the Courts of Common Law, reserving to itself what was termed "extraordinary jurisdiction" with the widest possible powers of exercising judicial discretion. To this extent the Palestinian Court would seem akin to the English Court of Chancery, albeit the former could also hear all causes which were proper to the jurisdiction of the Babylonian Court as well. If then, as the cases prove, the Babylonian Court did have some measure of equity jurisdiction, this was nonetheless limited as is the case in many of our American inferior courts at the present day; it was, in brief, that species of equity known to the ancient courts of common law as referred to above, where it was almost impossible to determine where law ceased and equity began.

5. Religion in the Body of Ordinary Jewish Law

To the extent that equity is ethics, and to the extent that on the practical plane of existence religion and ethics cannot be separated, it is not surprising that certain elements of religion should have found their way into ordinary civil and criminal Jewish law.

According to the Mishna (B.K.32a) if two persons collide with resultant injury while passing along the public way, neither is liable for damages, whether both were running or but one was running while the other was walking. The court raises the obvious question: "If in the case where one was running and the other walking there is no liability, could there be any doubt where both of them are running?"[3] Yet the rule is stated to cover both instances. Why? The court rules as follows: "Where one was running and the other walking there is no liability; provided, however, it was on a Sabbath eve before sunset. For if on a weekday, one ran and the other walked, there would be liability. If both ran, even if it were a weekday, there would be no liability."[4]

From this it follows, that haste and eagerness to fulfill one's religious obligations to prepare for the Sabbath toll the operation of the ordinary law covering liability for negligence. Certainly this is an equitable

ruling founded upon the application of the Law of God.

The foregoing element becomes manifest in another case where the Mishna holds that a dealer in wine or oil, having poured out the liquid into the purchaser's container, must thereafter allow three additional drops to fall from the side of his vessel into that of the buyer, but the Mishna adds that this does not apply to the ordinary shopkeeper, to which R. Judah cryptically adds that one is exempt from allowing the drops to fall on Sabbath eve toward dusk.

The problem presented itself to the court (B.B.87b) as to whether R. Judah's statement is intended to exempt all persons on the eve of the Sabbath from the rule of the three drops, or whether it is intended to limit the exemption allowed to shopkeepers solely to Sabbath eve.

Here there is a conflict of ethical or religious or equitable principles. If the statement of R. Judah applies universally, we have a recapitulation of the ruling in the last case but at the same time the danger is run of encouraging short measures. If on the other hand, the shopkeeper is treated as any other dealer except on the eve of the Sabbath, that danger is greatly minimized and there is, further, an encouragement held out to the general populace to make their Sabbath preparations with

a minimum of delay. It was ruled: "A shopkeeper, on Sabbath eve at dusk, is exempt, because a shopkeeper is much occupied."[5] From this it is clear that none are exempt from the rule of the three drops except shopkeepers, and they only at the one time stated.

A third case, also relative to the Sabbath, but in another connection, is instructive. R. Eliezer had laid down the rule that title to real property could only be acquired by payment, possession of a valid deed or usucaption, and to personality by actual or symbolic possession. From the Ten Commandments it is also clear that all legal transactions on the Sabbath are impossible. Yet we find R. Levi (B.B.156b) ruling as follows: "Acquisition may be acquired from a dying man even on the Sabbath, but not in consideration of R. Eliezer's view, but to the possibility that the man's peace of mind might be disturbed."[6] This can be explained as having been prompted by the fear that had the right not been allowed the dying man to dispose of his property, the subsequent agitation he may have experienced could well hasten his death, and as an equitable principle the law is well settled that the saving of a life takes precedence over all laws for Sabbath observance. It should be explained that this matter arose in connection with a discussion of the validity of R. Eliezer's view over against the doctrine that the

verbal testamentary instructions of the dying are sufficient to vest title in the named beneficiaries. In the Mishna following, the matter is resolved, with the help of the Gemara immediately thereafter. It is held that since one cannot legally write on the Sabbath and since the needs of the dying in this respect are urgent, the verbal testament will be deemed valid. From this it is argued that if it is valid at any time (the Sabbath), it should be valid at all times, (weekdays included), since clearly, whatever is allowed on Sabbath is a fortiori allowable on weekdays.

6. Religious Issues in Ordinary Jewish Law

At the time of the iniquitous fiscus judaicus under Vespasian, the impost was collected by "tax farmers", who, under Jewish law, were placed in one category with thieves and robbers. To protect the people from their rapacity any method of legal casuistry and even false statements were allowed by Jewish law in dealing with them. R. Ishmael thereupon propounded a ruling that in any action as between these specific non-Jews and Jews, the Jew must be made to prevail, by applying either Jewish law or the law of the non-Jew, whichever would effect that end. While in complete harmony with the purposes of R. Ishmael, R. Akiba, who was even then seeking to stir up

a revolt against the cruel and oppressive Roman power, nonetheless disagreed sharply with the methods R. Ishmael proposed, in that such methods, according to Akiba, constituted a Profanation of the Divine Name. He stigmatized this species of procedure as robbery and stated (B.K.113a): "Whence can we learn that robbery of a non-Jew is forbidden? From the significant words: 'After that he is sold he may be redeemed again', which implies that he could not withdraw and leave him. You might then say that he may demand an exhorbitant sum for him? No, since it says: 'And ye shall reckon with him that bought him' to emphasize that he must be very precise in making the valuation with him who had bought him."[7]

Thus we find, that even in times of unspeakable stress, when the law lent itself to chicanery in the national interest, equity, through Akiba, intervened on behalf of the non-Jew, founding itself upon strictly religious considerations. Unlike the preceding cases, here we are not dealing with a specific religious matter embedded in the body of the law, nor are we using a specifically religious type of reasoning, as in cases which will be considered hereafter, but here there is a deliberate insinuation of a religious issue into a case which is otherwise devoid of equitable overtones.

In a case in which an agent acted contrary to in-

structions in the matter of a purchase, the question is raised as to the liability of the principal. A parallel is drawn in the instance of a householder, who, by law, is empowered to act as agent in dealing with the possessions of his wife and children, and who consecrates all property lying within his power of control to the Temple. Would such an act of consecration extend to the inclusion of the garments of his dependents? Abaye remarks (B.K.102b): "...no man would in his mind include the garments of his wife and children as this would create ill-feeling."[8] Such an intent would not be presumed by the court since his act of consecration would, in fact, become a profanation. R. Abba thereupon adds: "One who declares his possessions consecrated is regarded as having from the very beginning transferred the ownership of the garments of his wife and children to them."[9] Thus it is ruled that where the agent manifestly and grossly exceeds his authority, there is a novation in the contract of purchase and the agent is subrogated to the position of principal and his principal is absolved of liability.

Here, again, we find a religious issue literally forced into a case where it properly does not belong so that, by the very force of the conceptions of consecration and profanation, the court may be led to an equitable and just decision.

7. Ethics in the Body of Jewish Law

While the following is Aggada rather than Halacha, it is valuable in defining an attitude assumed in Jewish legal circles. "Rab Judah said: He who wishes to be pious must fulfill the laws of Nezikin. But Raba said: The matters of Aboth. Still others said: The matters of Berakoth." (B.K.30a).[10]

As Nezikin has to do with the making of restitution for injury to person and property, we see here that there was a strong view that the very business of the law courts was deemed to fulfill a religious purpose and an ethical end. Law, by its very nature, is itself equity. Since Aboth is called by some the "handbook of Jewish ethics" and is construed by others as a manual of instruction for law students and judges, the same conclusion can be drawn as from the mentioning of Nezikin. As for Berakoth, here we have the substance of blessings, expressions of man directed toward God, and perhaps the implication is that the law court should be deemed a temple and the administration of justice, itself a divine service. What this passage clearly shows, however, is that in the Jewish mind, law, religion and ethics are inextricably intertwined; and equity, is but the imposition of religion and ethics upon the crude fabric of law, - the overlaying of Right upon the claims of rights.

8. Ethical Issues in Jewish Law

The expression repeatedly occurs "beyond the line of law" (B.K.99b et al.),[11] indicative of that which lies beyond the narrow confines of what the Romans would denominate *jus* and what in substance would constitute *aequitas*. Indeed, Prof. Marcus Jastrow in his *Dictionary* has not the slightest hesitancy in rendering the entire expression into English by the use of the single word: equity. Its practical application would seem to make it clear that the term refers to that which the law, in its narrower sense, would deny or ignore, but which the mandates of ethics brand as imperative.

R. Chiyya, acting in good faith, ruled in a certain case that a suspect coin was good, whereas it later proved to be counterfeit. When, thereafter, the unfortunate holder of the coin again brought it before him, he exchanged it for a valid coin out of his own pocket, although, under the law, having ruled in good faith and with full knowledge of the legal issues involved, he would not have been liable for the incorrectness of his ruling. The explanation is that he acted "beyond the line of law" (BK 99b - last line) "on the principle learned by R. Joseph: 'And shalt show them' means the way to live: 'the way' means deeds of loving kindness; 'they must walk' means the visitation of the sick; 'wherein' means burial; 'and

the work' means the law; 'which they must do' means beyond the line of law."[12] Certainly, despite the legal exemption, R. Chiyya was equitably liable to make good the loss which his incorrect ruling had occasioned.

In a similar vein we find the following (B.M. 24b) which scarcely requires comment. "Rab Judah once followed Mar Samuel into a street of whole-meal dealers and he asked him: What if one found a purse here? He answered: It would belong to the finder. What if an Israelite came and indicated an identification mark? He answered: He would have to return it. (ARE) both (THESE VIEWS CORRECT)? He answered: Beyond the line of law. Thus the father of Samuel found some asses in the desert, and he returned them to their owner after a year of twelve months. Beyond the line of law."[13] Here, too, equity is seen to dictate what the law itself does not require.

One is required by law to assist another in loading and unloading bundles, provided this is consistent with one's own dignity, as determined by whether one would do such work on one's own behalf. We are told that R. Ishmael b. R. Jose, although an elder for whom it was undignified to help another to load, nonetheless felt himself under an obligation to do so. This is explained by a restatement of R. Joseph's interpretation of Scripture as quoted above.

The argument then continues (B.M.30b): "The Master said: 'They must walk' - this refers to sick visiting. But that is the practice of deeds of loving kindness! That is necessary only in respect of one's affinity; for a Master said: A man's affinity takes away a sixtieth of his illness - yet even so he must visit him. 'Therein' - to burial. But that is identical with the practice of deeds of lovingkindness. That is necessary only in respect of an old man for whom it is undignified. 'That they shall do' - this means beyond the line of law."[14] It should be explained that the reference to one's affinity refers to one born under the same or a similar zodiacal configuration. The passage continues with the most significant statement: "For R. Jochanon said: Jerusalem was destroyed only because they gave judgments therein in accordance with law. Were they then to have judged in accordance with untrained jurists? Say rather: Because they based their judgments upon law and did not go beyond the line of law. (equity)"[15] No statement could more strongly underscore the importance of equity in Jewish jurisprudence than this.

The classic, and no doubt most celebrated, example of the application of equity in Jewish law is here set forth in full (B.M.83a): "Some porters broke a barrel of wine belonging to Rabbah b. R. Huna. Thereupon he seized

their garments. They went and complained to Rab. 'Return their garments to them', he ordered. 'Is that the law' he enquired. 'Even so,' he rejoined; "That thou mayest walk in the way of good men."' Their garments having been returned, they observed: 'We are poor men, have worked all day, and are in need. Are we to receive nothing?' 'Go and pay them,' he ordered. 'Is that the law?' he asked. 'Even so', was his reply, '"and keep the path of the righteous."'"[16] Clearly the employer-defendant in this case was legally entitled to damages by reason of the loss suffered by him through the negligence of the plaintiffs and had a right to attach the plaintiffs' property. Still, the peculiar circumstances of the case were such, that equity here intervened to effect justice clearly outside of the provisions of law.

In Rome, only the bona fide citizen of the City could have recourse to the Praetor Urbanus and the special remedies of the legis actionis, which were exclusively his to apply. How much more universal and democratic were the Jewish courts in their attitude toward non-Jews generally! "R. Meir used to say: Whence can we learn that even where a non-Jew occupies himself with the study of Torah, he is equal to the High Priest? We find it stated: '...which if a man do he shall live in them'. It does not say: 'priests, levites and Israelites' but 'a man' which shows that even

if a non-Jew occupies himself with the study of Torah he is equal to the High Priest." (B.K.38a,) (Sanh. 59a)[17]

In connection with the foregoing, Talmud recounts that a Commission was sent from Rome to investigate the merits of Jewish law. At the conclusion of their study they reported favorably upon it except for the one point that where the ox of a Canaanite gores that of an Israelite, the Canaanite is liable for full damages, regardless of circumstances which would ordinarily allow the payment of but half-damages,* whereas if the Canaanite's ox suffers goring by the ox of an Israelite, no liability is spelled out. This, to the Romans, seemed highly inequitable. Elsewhere the rule is explained on the grounds that since the Canaanites refused, save under compulsion, to recognize the validity of Jewish law, the law would accordingly not step in to take them under its protection, but would instead apply Canaanitish law in dealing with them, mutatis mutandi.**

The liberality and humanity of Jewish law, as also the high calibre of its judges, is well illustrated by the ensuing passage (B.K.87a): "R. Judah says: A blind person is not subject to degradation. So also did R. Judah exempt him from all commandments stated in Torah...R. Joseph stated: If

* If the ox were ⟋O⟍

**See Jerusalem Talmud.

someone would tell me that the Law is in accordance with R. Judah who declared that a blind person is exempt from the commandments, I would make a festive occasion for our Rabbis, because, though I am not enjoined, I still perform commandments."[18] The full understanding of the foregoing is only possible when it is understood that R. Joseph was himself blind. It will also be noticed that since the blind already suffer from a physical defect, which cuts them off from the rights which they would otherwise enjoy under the law covering degradation, referred to above, they are, by the same token, relieved of duties. This is most equitable. This is one of the rare instances where equity has invaded the realm of strictly religious law.

In B.K.113b ff. an unresolved moot question with interesting equitable implications is raised. Under Jewish law no judgment for the payment of money is valid based on the evidence of less than two competent witnesses. The law also requires of a man, that if he knows evidence that will favor a litigant he is under an obligation to come forward and testify. Nonetheless it is held that where a witness, being a Jew, knows evidence favoring a non-Jewish litigant before a non-Jewish court and goes into that court to testify against a Jewish litigant, he is subject to being placed under a ban for the reason that Jewish law considers the judgment of the non-Jewish court to be illegal, since

there it will be rendered on the testimony of but one witness and hence is unjust. If the foreign court, despite its acceptance of but one witness, nonetheless, in the particular case at bar, accepts the testimony of two witnesses, the Jewish law will recognize the validity of the procedure and the foregoing rule will be inapplicable. The general rule will apply to the inferior Persian courts but not to the Persian Circuit Court because of the high regard in which that court is held by Jewish law by reason of the justness and circumspection of the members of its bench. There it is held that they are so careful in ascertaining the character and credibility of witnesses, that one witness may well be the equivalent of two. Even so, the Rabbis are reluctant to accept this modification of the general rule and the question is raised whether it is proper for a prominent Jew to testify as sole witness before even that court. Considering his very prominence, however, would he not be placing himself in jeopardy in the eyes of the Persian government if he failed to testify, for which reason in the interests of his personal safety and well-being, would it not be more equitable on the part of the Rabbis if they permitted him to submit his evidence? The problem, as stated, is undecided.

It was set forth above that as between religious and ordinary law, under the system of Jewish jurisprudence,

there is a sharp dichotomy. Now the ordinary law states that the finder of any lost documents issued by a court of law, must, perforce return them. It has been determined that this certainly refers to records of pleadings. By every right it should also apply to a bill of divorcement, duly endorsed by the court. This indeed was the ultimate decision of the court. Nonetheless, in the course of the argument we find R. Amram turning to Rabbah and asking (B.M.20b): "How does the Master derive a law relating to a religious prohibition from a civil law?"[19] The implication here is that the question of the determination of the validity of a divorce is essentially a moral and religious question, and that while the document, itself, as one relating to domestic relations, clearly within the purview of the civil courts administering ordinary law, should be treated on a level with documents relating to commercial transactions and the like, still, by reason of the essential subject matter, the document should be deemed at best to be quasi-religious so that the ordinary rules of law will not apply thereto.

9. Ethical and Religious Reasoning in Jewish Law

Jewish law forbids the castration of bulls and construes this prohibition to extend not only to acts of castration performed by Israelites but to such acts when performed by Arameans as well, since this is deemed tear-

ing flesh from living animals, one of the seven prohibitions "of Noah" applicable to all mankind. Many Jewish farmers, desiring oxen, would arrange with Arameans to execute a fraudulant theft, castrate the cattle so stolen, and then effect a recovery. R. Papa held that this was illegal for Israelite and Aramean alike since the Israelite violated the biblical precept: "Ye shall not put a stumbling block before the blind," i.e. lead the Aramean into the performance of a wrongful act. The question of penalty had then to be determined. "Now, Raba thought to interpret: They must be sold for slaughter. Thereupon Abaye said to him: It is sufficient that you have penalized them to sell." (B.M.90b)[20] Needless to say, cattle sold for meat, brought a less market price than that sold as draft animals.

In this example we see not only an extension of law to include an accessory before the fact in culpability, but we see, as well, in the words of Abaye, the strict justice of the law, tempered by considerations of mercy. To Abaye it was sufficient that the wrong-doer was deprived of the fruit of his illegal act by being denied the use of the oxen. It goes without saying that the Jewish court could exercise no criminal jurisdiction over the Aramean, the actual perpetrator of the act.

Joint owners of realty can employ the freehold in no way without permission of the other joint owner or owners. "R. Jochanon said in the name of R. Bana'ah: Joint owners of a courtyard can stop one another from using the courtyard for any purpose, save that of laundering, since it is not fit that the daughters of Israel should expose themselves to public view while laundering. It is written: 'He that shutteth his eyes from looking upon evil' and R. Chiyya b.Abba said: This refers to a man who does not look at the women when they are laundering. How are we to understand this? If there is another road, then he is wicked. If there is no other road, how can he help himself? We suppose that there is no other road and even so it is incumbent on him to constrain himself." (B.B.57b)[21]

Here the general rule of law is given an exception in the interests of strict morality. The presumption in the last sentence, moreover, is one in favor of the moral integrity of the ordinary man, and, as such, is highly revealing. Elsewhere in Talmud, reference is also made to this exception to the general rule of law.

The incorrigible criminal was not unknown to Jewish law. The criminal, who was twice flagellated and then committed a third crime, was placed in a cell and fed first

on water, to shrink the lining of his alimentary tract, and then on barley bread until his stomach burst. Technically, this was not considered public execution. The question is raised as to whether this is equitable. According to one view, the moral depravity of the criminal is such that he is already subject to being cut off by the Hand of God and hence under a divine sentence of death, whence the action of the court merely accelerates his death. R. Jacob could not accept this reasoning. He remarks (Sanh.81b): "Come, I shall interpret it to you. This treats of flagellation for one crime involving divine punishment (BUT REPEATED TWICE); where there are two or three different crimes each involving divine punishment, it may merely be his desire to experience crime, and not a complete abandonment thereto."[22] According to this lenient interpretation, R. Jacob holds out hope for the criminal's regeneration and reform with the ultimate purpose of returning him as a useful member of society - an interpretation which clearly evades the rigor of the law.

In the main, the sages of Israel enjoyed an extremely enlightened attitude toward criminality in general, and, capital punishment in particular. The following passage from Mak. 7a clarifies the point:

"A SANHEDRIN THAT EFFECTS AN EXECUTION ONCE IN SEVEN YEARS IS BRANDED A DESTRUCTIVE TRIBUNAL; R. ELIEZER B. AZARIAH

SAYS: ONCE IN SEVENTY YEARS. The question was raised whether it was meant: one death sentence in seventy years branded the Sanhedrin a destructive tribunal; or that it ordinarily happened but once in seventy years. The question stands. R. TARFON AND R. AKIBA SAY: WERE WE MEMBERS OF A SANHEDRIN, NO PERSON WOULD EVER BE PUT TO DEATH. How could they give effect to that? Both R. Jochanon and R. Eleazar suggested that the witnesses might be plied with questions such as: Did you take note whether the victim was suffering from some fatal affection or was he perfectly healthy? R. Ashi said: And should the reply be 'Perfectly healthy, 'they might further be embarrassed by asking: 'Maybe the sword only severed an internal lesion?'[23]

Certainly the desire was to avoid the necessity of imposing the death sentence. Moreover, note the desire to ascertain extenuating circumstances.

In civil law we find several cases decided upon the words of Deuteronomy 6:18: "And thou shalt do that which is right and good." This forms the foundation of the Jewish concept of an equity of redemption. In this connection, accordingly, the Jewish law is extremely liberal. We read (B.M.35a): "The Nehardeans say: Distrained property with a legally fixed valuation is returnable until twelve months. Amemar said: Though I am of Nehardea, I hold that

distrained property with a legally fixed valuation is always returnable. Nonetheless, the law is that distrained property with a legally fixed valuation is always returnable because it is said: 'And thou shalt do that which is right and good.'"[24]

Where a field is put up for sale, Jewish law gives an automatic option to the owner of the adjoining field to buy it, and only if he refuses to avail himself of his right (called the right of pre-emption), can the property be sold to another. In this connection we find (B.M.108a): "Rab Judah said in Rab's name: If one takes possession between brothers or partners, he is an impudent man, yet cannot be removed. R. Nachman said: Even he, also, can be removed; but if it is only on account of the right of pre-emption, he cannot be evicted. The Nehardeans said: He is removed even on the score of the right of pre-emption, for it is written: 'And thou shalt do that which is right and good in the sight of the Lord.'"[25] Here, it should be understood that the right of pre-emption as a legal, rather than an equitable right, extended only to the fields bordering that which is the subject of the controversy, and that the brothers or partners had not as yet exercised their option at the time the field in question was purchased. Since, however, they could exercise their option as to the bordering fields and would thereafter have had the right to

purchase the field in question, assuming that as of that future time it would not as yet have been sold, equity intervenes and anticipates the future purchase of the adjoining fields as an already accomplished fact.

In a number of instances, the right of pre-emption does not apply. This is so where the vendor sells to a non-Jew. We learn (B.M.108b): "If he sells to a non-Jew - because a non-Jew is certainly not subject to 'And thou shalt do that which is right and good in the sight of the Lord.' Nevertheless, the vendor is placed under a ban until he accepts responsibility for any injury that might ensue through him."[26]

In Jewish law there is a presumption that one is honest and law-abiding, although, to be sure, this is rebuttable. Note the following case in point (B.M.112b ff.): "It is a presumption that the employer will not transgress: 'The wages of him that is hired.' But have you not said that he is busy with his employees? That is only before his obligation matures; but when it matures he charges himself therewith and remembers it. But is the employee then likely to transgress: 'Thou shalt not rob'? There we have two presumptions, while here we have only one. Thus: In respect of the employer there are two presumptions: First: that he will not transgress: 'It shall not abide...all night'; and second: that the employee will not

permit delay of his payment."[27] Here, what the court is seeking to do is to balance off the equities.

The lex talionis in criminal matters is interpreted not in terms of effecting a quid pro quo but rather for the moral regeneration of the wicked. Thus (Mak.2b): "'Ulla said: Where is there found an allusion in Torah to the treatment of false witnesses? Where is there found an allusion in Torah to false witnesses! Is it not prescribed: 'Then shall ye do unto him as he purposed to do unto his brother'? What is meant is some allusion in Torah for inflicting a flogging on false witnesses. It is written: 'And they shall justify the righteous and condemn the wicked; and it shall be if the wicked man deserve to be beaten, that the judge shall cause him to lie down and be beaten...forty.' Now is it because the judges 'justify the righteous and condemn the wicked' that 'the wicked man deserve to be beaten'? But if you refer the text to a case where witnesses had incriminated a righteous man; then came other witnesses who 'justified the righteous' and 'condemned the wicked' then 'if the wicked man deserve to be beaten, the judge shall cause him to lie down and be beaten.'"[28] The ethical element herein is clear.

In the last two cases discussed, it was found that

not only did Jewish law believe in the essential goodness of man, but it sought to reform him who may have gone astray. In this third example, it will be noted, the Rabbis expected the goodness in man to operate by means of self-chastisement in helping to bring about moral improvement. The quotation is solely from the Mishna (Mak.12b): "Similarly, a manslayer, if on his arrival at the city of his refuge the men of that city wish to do him honor, should say to them: 'I am a manslayer'"[29] and thereby, by denying himself the honor which would otherwise be his, and by publicly debasing himself, he, through suffering, brings about atonement. (The entire question of atonement, itself, is discussed below.) Actually, however, if the townspeople persist, the manslayer may then accept the honor.

10. The Principle of Atonement

There is no sharp line drawn in Jewish law as between civil and criminal causes and in this very fact we find morality taking precedence over the technicalities of criminal statutory enactments. Thus it is held that if five persons each claim ownership of a chattel found in the hands of a thief he may surrender possession thereof and thereby relieve himself of all liability. Here we find a criminal being enabled to take advantage of what

is recognized in Anglo-American jurisprudence as the remedy of interpleader, a remedy which this latter law would never make available to a thief under the doctrine that "He who comes into equity, must come with clean hands." In Jewish law the thief is presumed to have clean hands since he comes forward and admits the charge of theft, and clearly not more than one, if indeed any, of the claimants are honest. If, however, the thief confesses, there being no claimants, and he does not know which of two was his victim, he is required to pay the full amount of the theft, or the full value of the stolen merchandise (?), to each of them. Why this distinction? "There they were claiming from him; here it means that he came to fulfill his duty in the sight of Heaven. This may be proved too, for it is stated: 'Since he himself confessed. 'This proves it." (B.M.37a)[30] (The entire problem of interpleader will be dealt with more particularly hereafter.)

Rabbi Akiba, in the first instance referred to above, is not satisfied that the thief comes forward with clean hands, nor will he presume any lack of integrity on the part of any of the five claimants. He therefore dissents by saying (B.M.37b): "That is not the way to clear him of his crime, but he must restore the theft to each one"[31] for only in that way can he accomplish complete atonement.

An almost identical line of reasoning is to be found in Yeb.118b. There a man became betrothed to a certain woman, agreeing that upon the dissolution of the marriage either through his death, or by reason of his divorcing her, she would be entitled to a certain money settlement either from him or his estate, this being the usual custom. Unfortunately, at a subsequent time he did not know which of five women was the one whom he had betrothed. R. Tarfon ruled that if he gave each a formal divorce and surrendered the amount of the settlement, he would thereby absolve himself of all liability. R. Akiba again dissented on the grounds that the man here was in no better position than the thief in the case cited above, as it was to be presumed that there had been cohabitation, and that, therefore, only by giving to each of the five the full amount of the settlement, could there be any certainty that the actual aggrieved party would receive full compensation. Moreover, only in this way could the conscience of the husband be cleared.

Where an article has been lost, and where the owner has abandoned all hope of its recovery, and has thereby renounced his ownership, it is held that such renunciation has the force of vesting ownership and title in the finder. The question is raised as to whether a thief can also acquire valid title to stolen merchandise on the strength

of the victim's renunciation of ownership. "Are we to say that this case is not comparable to that of a lost article? For it is only in the case of a lost article that the law applies, since when it comes into the hands of the finder, it does so lawfully, whereas in the case of a thief into whose hands it entered unlawfully, the rule therefore might be merely of rabbinic authority, as the Rabbis might have said that the ownership should be transferred by renunciation in order to make matters easier for repentant roboers." (B.K66a)[32] (Italics supplied.)

This same reasoning appears in another place (B.K.94a): "Where the article has been improved, the robber may take the increased value, but where it has deteriorated he may say to him: 'Here, take your own,' as a change leaves the article in its previous status. But if so, why should it not be the same where the article was improved? We may reply: In order to make matters easier for repentant robbers."[33] (Italics supplied.)

There is yet a third instance of this dialectic (B.K.94b): "R. Chiyya b. Abba said that R. Jochanon stated that according to law (as opposed to equity) a misappropriated article should even after being changed be returned to the owner in its present condition, as it

is said: 'He shall restore that which he took by robbery' - in all cases. And should you cite against me the Mishnaic ruling, my answer is that this was merely an enactment for the purpose of making matters easier for repentant robbers."[34] (Italics supplied) The Mishnaic ruling referred to in the text is to the effect that restitution should be made in accordance with the value at the time of the robbery.

In the discussion which follows the foregoing quotation, there is obiter dicta that, where a robber repents and desires to make restitution, the courts do not favor acceptance by the rightful and legal owner. This is so, since in some instances such action might result in rendering the robber destitute and thereby would discourage repentance. Yet it is asked, why, if the stolen material is not to be accepted, should the robber seek to make restitution? To prove, it is answered, that "they are prepared to fulfill their duty before Heaven." (ibid.) There is the implication that if the restitution is made only to escape legal liability, and not for the sake of repentance, the restitution should be consummated by the legal owner.

In B.K.103b there is a discussion of the Mishnaic enactment that where an actual robber pleads innocence under oath, he is thereafter obliged to return the stolen merchandise to the owner no matter what the loss in time,

effort and out-of-pocket expenditure. In this connection reference is made to the earlier case, cited above, of the robber who has stolen from one of five claimants. The specific question is whether this is in conformity with R. Tarfon's view, permitting him to surrender the stolen loot and depart, or with that of R. Akiba, who demands that he pay the full value to all claimants. R. Tarfon's ruling would apply even after oath, while R. Akiba's even without any oath. It is suggested that actually R. Akiba's ruling referred only to a time subsequent to the taking of an oath, as the actual wrong doing was perjury to which the biblical verse could be applied (Leviticus 5:24): "And give it unto him to whom it appertaineth in the day of his being guilty." It is argued, however, that despite the oath, R. Tarfon's ruling would apply, as this would facilitate repentance. This, however, it is concluded, does not outlaw R. Akiba's position, since the Mishnaic enactment only applies where the robber knows the identity of his victim, whereas R. Akiba speaks of a situation in which he does not.

In BK.109a there is a lengthy discussion to the effect that a dishonest fiduciary and a dishonest bailee cannot effect atonement until they have completely divested themselves of their illegal gains. Their victims are not empowered to exonerate them, nor can the subter-

fuge of rendering the embezzled sums into a loan avail. If the victim is dead, the money must be returned to the heirs. If there are no heirs, as there would not be legally in the case of a proselyte whose kin did not convert, restitution must be made to the priests. Moreover, a partial remittance is not valid for effecting atonement, as where the victim forgives the principal and only accepts the penalty. In addition, confession of wrong is usually required. R. Joseph goes so far as to say, that if restitution cannot be made in any other way, the money must be dedicated to charity. As a matter of law, moreover, the Mishna provides (B.K.108b) that where there is voluntary confession of a false oath having been taken in the case of misfeasance the schedule of penalties is less severe.

"R. Chiyya b. Abbah said that R. Jochanon stated: If a man says to another: 'You have a maneh of mine,' and the other says: 'I am not certain about it', he would be liable to pay if he desires to fulfill his duty toward Heaven." (B.K.118a).[35] Yet R. Jochanon himself admits that the obligation would not be enforceable at law. This is an example of the limits beyond which even equity cannot proceed, of which two more instances will be cited hereafter.

In B.K.74b ff. it is stated that one cannot in-

criminate himself to the extent of suffering a penalty. Thus, he who confesses to a wrong, while he is liable for restitution, avoids all penalty. If, following confession, his liability is legally proven, the fact of his earlier confession is sufficient to exempt him from penalty. How else explain this enactment except on the grounds that it is designed to encourage confession, the first step in effecting atonement? It is nonetheless provided, that the confession must be made voluntarily and in open court.

Following the foregoing principle, we also find (B.K.105b) that where a defendant in an action for robbery perjures himself and the perjury is subsequently proven, he becomes liable for all damage which may have been suffered by the stolen property while in his possession. Where, however, having perjured himself, he immediately confesses to having perjured himself, the perjury is ignored and he is merely liable for the principal plus the penalty imposed for robbery.

11. The Principle of Humanitarianism:

That humanitarianism, along with atonement, enjoy a unique place in the body of Jewish law, as ethical doctrines of especial importance, is well borne out by the Text of Torah alone. It is, therefore, not surprising

that these should be participants in the later development of that law.

Actually, the Talmud adds little to the rules of kindness toward animals which we find in the Bible (B.M. 32a ff.), nonetheless one passage is particularly compelling (B.M.32b): "If a friend requires unloading, and an enemy loading, one's obligation is toward his enemy, in order to subdue his evil inclinations. Now you may think that the other is preferable. Even so, in order to subdue his evil inclination is better."[36] The force of this passage is found, not alone in the mandate to assist animals in distress - which certainly is truer of the friend's beast, tottering under its load, since it requires unloading, than of the enemy's, - but in the positive injunction to befriend an enemy in order to relieve him of the evil inclination, which renders him an enemy.

While the greater part of the treatment of humanitarianism tends away from law and equity into the purer fields of abstract ethics, one more example will not prove amiss. In a discussion of the method to be employed in effecting execution by the sword as prescribed by law, whether through piercing, beheading or by other means, the basic and guiding principle in respect of the

convict is expressed as follows (Sanh.52b and 45a): "R. Nachman answered in the name of Rabbah b. Abbuha: Scripture saith: 'But thou shalt love they neighbor as thyself.' Choose an easy death for him."[37]

12. The Fiduciary Role of the Jewish Court as a Court of Equity

That the Jewish court, especially when sitting in equity, should have had fiduciary powers is not remarkable. (cf. B.M. 39a, by implication)*

In the Talmudic period, coins of different countries and of different values frequently shared common designations, which naturally led to confusion. In an action involving liquid damages, the prevailing plaintiff learned to his disgust that instead of recovering a large sum he was recovering but a trifling amount, by reason of this confusion of names, whereupon he haughtily and in open court stipulated that the amount of the judgment be given to the poor. Immediately thereafter he regretted his hasty action and sought to retract. "But R. Joseph said to him: The poor have already acquired a title to it, for though the poor were not present here, we act as the hands of the poor, as Rab Judah said on behalf of Samuel: Orphans do not require a formal declaration in court to protect their interests; and so also

* סופרופסו שדיקנו לפי מוקמינן

Rami b. Chama learned that orphans do not require a formal declaration in court to protect their rights, since Rabban Gamliel and his court of law are the fathers of orphans." (B.K.36b ff.)[38]

In a discussion of the law of adverse possession (usucaption), the following is encountered (B.B.29a ff): "Mar Zutra said: If the claimant demands that two witnesses should be produced to testify that the occupier lived in the house three years, day and night, his demand is valid. Mar Zutra admits that where the claimant is an itinerant peddlar, even if he does not raise the plea, the court raises it for him. R. Huna also admits that in the case of the shops of Machuza, because they are only used by day and not by night."[39] Here, by reason of the peculiar demands of their occupations, the application of rigid and objective rules of law would tend to deprive legitimate claimants of their rights, wherefore the court steps in as quasi-guardians of their interest - indeed, as their advocate - in order to work substantial justice.

13. The Limitations of Equity in Jewish Law

There are certain instances where the attempt to do equity would but result in the very defeat of equitable ends. Where this occurs, equity will fall back

upon law.

The Bible provides that in cases of seduction and rape, the man is required to pay a fine to the woman. In the development of the law, however, certain women were set down as beyond the pale, and, as such, were not entitled to recover the penalty. Yet R. Meir allowed recovery in a case involving one of these proscribed women. Why? Abaye suggested that this was done so that the seducer should not be able to profit by his wrongful act. But, it is argued, why could the seducer not be compelled to pay the fine to the poor instead? According to R. Mari this would defeat the very purpose for which it was intended, for the poor are but a vague class and there would be no definite claimants, for any poor man, as a specific claimant, could be turned aside by the seducer on the grounds that he desired to make payment to another. Thus payment is directed to be made to the seduced woman, despite her proscription, as thereby, at least, the seducer is assured of his punishment. (B.K.38b ff) In this case, the modification of the law, which resulted in proscription on equitable grounds, has to be set aside because of the equities of a specific case at bar, and the court is compelled to fall back on the law in its earlier and more rigid form.

A far more complicated situation is encountered, starting at B.K.89a and based on the enactment of Usha as found in the Mishna: "A slave and a woman are awkward to deal with, as he who injures them is liable, whereas if they have injured others they are exempt."[40] Now women are not without property and property rights at Jewish law. Among others, they possess "plucking property",* i.e. property the use of which is vested in the husband but only for the life of the marriage, and also the right to a contractually agreed marriage settlement,** payable upon the husband's death or divorce. The problem before the court is to ascertain in what respect the enactment of Usha is incorrect, in that the woman can pay damages for causing injury. To hold otherwise would be inequitable.

Why, it is asked, can she not sell her plucking property and pay off the judgment creditor with the proceeds? To be sure the purchaser would have to take subject to the husband's interest during the life of the marriage. The difficulty arises where the wife has no plucking property in the first instance, having been poor at the time of marriage. She could certainly sell her future interest in the marriage settlement. To this her husband could not legally consent, since, during the duration of the marriage, he is compelled to have a stand-

*נכסי מלוג **כתובה

ing agreement to compensate her, personally, in the event that he should divorce her, lest she be rendered destitute. The reason for this law, is to discourage the husband from granting his wife a divorce, as if he were relieved of this obligation, he might be tempted the more readily to give her a divorce. This argument does not seem valid, however, in that those who purchased of the wife would be subrogated to her rights in the marriage settlement. On the other hand, is the sale of a mere future interest valid? Apparently not, since it constitutes but a debt which could be cancelled by the creditor at any time before maturity. Here the wife can be looked upon as a creditor, and there is no doubt in the premises that she would, immediately upon sale of the future interest, release her husband as debtor, which would certainly operate as a fraud against the innocent purchaser. It is suggested that she assign her interest to the judgment creditor by way of satisfying the judgment debt, as in that case, even should she invalidate the debt of her husband in respect of the obligation to pay off the marriage settlement, the judgment creditor would be none the worse off than he is under the enactment of Usha where he is left without any remedy whereby he can collect his judgment. Should this be the case, the entire suit would be improper since the court

can not be troubled with vain litigation. From all this it is seen that the enactment of Usha, despite the hardship that it works upon the judgment creditor, is forced to stand, since by the sale or assignment of the marriage settlement the wife divests herself of her protection against divorce, which, in the eyes of equity, is unconscienable and hence unlawful. Here once again, the equities of the judgment creditor and those of the wife being equal, the law is forced to prevail. It may be argued that upon purchasing the future interest, the purchaser, and not the wife, becomes creditor to the husband's debt under the marriage settlement, but this is not the case in Jewish law since the debt is in personam and the purchaser's equity only lies through the wife during the life of her husband.

14. The Problem of Conscience

In the matter of conscience, let the text speak for itself.

"Both offenders who are liable to divine punishment, and offenders who are liable to death by sentence of the court are alike subject to the sanction of forty lashes. These are the words of R. Ishmael. R. Akiba says that only those who are liable to divine punishment are subject to the sanction of forty lashes because if

the offendersshould betake themselves to repentance, the Heavenly Tribunal would grant them remission; whereas those who have become liable to death by sentence of the court are not subject to the punishment of forty lashes because if they should do penance, the earthly tribunal would not grant them remission." (Mak.13a ff.)[41] "But why should not R.Akiba, in that case, even exclude as well those liable to divine punishment ? And if you argue: Suppose the offenders should betake themselves to repentance, then what ? Now, after all they have not yet done so ?" (Mak.13b)[42] Who can judge of the conscience of another, whether the repentance was or was not sincere ? If, then, the repentance was sham, those liable to divine punishment would have been twice punished, once by Heaven and again by the flogging, whereas those executed by the earthly tribunal would have paid but once for their offense. Probably no other system of law has ever probed its <u>own conscience</u> as searchingly as is illustrated here. The entire discussion, of which the foregoing is but a fragment, is finally summed up by Rabina (Mak.13b last line) who says, that while it is true that we cannot judge of the repentance of the convict, at the same time neither can we judge whether there has been a final decision on High as to the imposition of the penalty of divine punish-

ment. Hence, by following the doctrine of Akiba, the danger of unjust earthly punishment, by flogging, is considerably minimized.

It might be stated in passing that this entire matter of divine punishment makes its appearance again and again throughout the whole of the Tractate Makkoth, and for a full understanding of the nature of equity at Jewish law one cannot conclude without reference to Divine Law in Jewish equity.

15. Divine Law in Jewish Equity:

In a broad sense, Jewish equity is law, and it shouldnot, therefore, be confused with the philosophic concept, mentioned earlier herein, as the attempt to bring about a condition of perfect equality. Equity must, of necessity, depend upon rules of law, and upon orderly court procedure and rules of evidence, and for this very reason it cannot accomplish that perfection of justice which alone lies in the hands of God. Where, therefore, the human court at Jewish law could offer no relief, the Rabbis concluded that the plaintiffs had no remedy but resentment here on earth, although perhaps God would intervene on their behalf through Heavenly Channels of Justice. Even the harboring of resentment was frowned

upon by the Rabbis as morally wrong unless it was founded on some admittedly justifiable cause. Frequently, therefore, where the courts can offer no redress, they will nonetheless state whether resentment is justified.

"Our Rabbis taught: Three cry out and are not answered: He who has money and lends it without witnesses; he who acquires a master for himself, and a henpecked husband. He who acquires a master for himself - what does this mean? Some say: He who attributes his wealth to a non-Jew; Others: He who is badly off in one town and does not go elsewhere." (BM.75)[43]. The reference, here, to the non-Jew, has to do with the common practice of lending money on interest in violation of law by claiming the money not to be one's own but that of a non-Jew to whom the prohibition against the taking of interest was inapplicable. Clearly, once the money was legally vested in the non-Jew, he could, if he wished, claim it as his own and the Jew would be without any means of reassuming legal title. Certainly, in the premises, equity wouldnot intervene on his behalf. It will be observed that in all these examples, the loss is occasioned by some wilful act on the part of the loser, and if that act was justified by some unusual or noble condition, only God would be in a position to judge and grant relief. In these cases, the court does not even

specify that resentment is justified.

Over against this, we find in the Mishna immediately following the above quotation: "If a man engages artisans and they deceive each other, they can only cherish resentment against each other."[44] The "man" referred to here is construed to be an agent of the employer, sent out on the employer's behalf to enter into a contract of hiring. It is assumed that both he and the artisans deal with each other at arm's length, and if the resultant contract is unjust either to one side or the other, nonetheless, both having been sui juris, in the absence of fraud or illegality, the court will not step in to grant redress, albeit, on moral grounds, one may well have taken unfair advantage of the other. The deception referred to here is not fraud, but, for example, as stated in the Gemara, where the agent being authorized to pay four, nonetheless offers but three, and by reason of sharp bargaining prevails, so that the artisans agree to accept no more than three, later learning that, had they held out, they could have forced the agent to agree to payment of four. No matter how unfair, no court under any legal system will presume to frame a contract for the parties contrary to the terms to which they, themselves, have agreed. Where, however, the deception, while not actually

fraud, nonetheless consists in the withholding of pertinent information causing one side to sustain an actual loss, the court will step outside the four corners of the contract and will permit recovery for the reasonable value of services or of lost time. Thus, if laborers are employed to plow a field and devote time in going to the field with their equipment only to find there a swamp unfit for plowing, they will be compensated for their time even though they accomplished no work. (B.M.76b). Another frequent example of deception is where the employee completes but part of the work required under the contract and leaves off, so that the employer must engage others to finish the work. He may harbor resentment against the first laborer but he has no remedy against him. If, however, he is unable to find others to complete the work, or is compelled to pay a higher wage for the remainder of the work, then he has a right of action against the first worker for breach of contract. A mere breach however, without resultant loss, even though it puts the employer to additional trouble, is not actionable. Jewish law permits the aggrieved party to harbor resentment if that will serve to calm his outraged feeling. Here we find Jewish law to hold a situation to be even beyond the relief of equity.

A far more normal situation is reported in B.M.79a: "Rabbah b. R. Huna said in Rab's name: If one hires an ass for riding and it perishes midway, he must pay him his hire for half the journey, and can only bear resentment against him."[45] This is a simple case of impossibility of performance for which neither contracting party can be held responsible. A more complicated situation is encountered further along on the page cited.

A man hired a ship for a specific journey and when he had covered but part of the distance he brought the ship into a port and unloaded it He paid for so much of the journey as he had pursued, whereupon the ship's owner sued for the difference. The court ruled that the ship owner was justified in harboring resentment but could effect no recovery in court. It is assumed that the ship could have been rehired by another so that the owner would have suffered no loss. But in that event, where was there justification for resentment? If, on the other hand, he could not immediately rehire the ship out to another, clearly he would have been entitled to recover the difference for which he brought his action. It is brought forward that he could have rehired the ship out to another at once, but that, since a ship suffers a certain depreciation through wear and tear every time it is loaded and

unloaded, and since in these circumstances there was placed upon the ship the added burden of one additional loading and unloading, he had, at the very least, cause for resentment. Even if it be argued that there was no unloading, but that the cargo, while yet on board, was sold to another, who, himself, thereupon, hired the ship for a further journey, it may well be that the ship's owner did not desire to do business with this third party, and still as a practical matter, by reason of the circumstances, was forced to do so, and hence was justified in harboring resentment. Again, and in any event, the ship was delayed in transit, thus causing a loss to the ship's owner which he had every right to resent aside from the added cost of operation.

There are times when actions are deemed so unconscionable by the court that it will leave the parties in statu quo. The ensuing example is sufficiently humorous to warrant quotation in full.

"A man once bought a boat load of wine. Having nowhere to store it he asked a certain woman: Have you a place for renting? She replied: No. So he went and married her, whereupon she gave him a place for storage. He then went home, wrote a divorce, and sent it to her. So she went, hired carriers to be paid (OUT OF THE WINE,

ITSELF) against that, itself, and had it put out in the road. Said R. Huna b.R. Joshua: 'As he did, so shall be done unto him, his requital shall recoil upon his head.' Not only if it is not a courtyard that stands to be rented, but even if it is a courtyard that is for renting, she can say to him: To anybody else I am willing to rent it, but not to you, because you appear to me like a lion in ambush." (B.M. 101b)[46]

II. THE METHODOLOGY OF EQUITY

1. The Jewish View of Equity:

Equity had a unique function among the Jews which probably was not shared by courts of equity among any other people, a function not only to be just but also to be merciful by administering the law with gentleness and human understanding that would work a minimum of hardship.

The law prohibited the breeding of small animals capable of harming growing crops or the possession of animals ritually declared unclean or of dogs incapable of being chained up securely, and certainly the law took a very serious view of the meticulous fulfillment of vows. Yet we read the following (B.K.80a): "Our Rabbis taught: If a shepherd desires to repent it would not be right to order him to sell (HIS SMALL ANIMALS) immediately, but he may sell by degrees. So also in the case of a proselyte to whom dogs and pigs fall as an inheritance, it would not be right to order him to sell immediately, but he may sell by degrees. So also if one vows to buy a house or marry a woman in the Land of Israel, it would not be right to order him to enter into a contract immediately, until

he finds a house or a woman to suit him. Once a woman, being annoyed by her son, jumped up and swore: Whoever will come forward and offer to marry me, I will not refuse him; and as unsuitable persons offered themselves to her, the matter was brought to the Sages, who thereupon said: Surely this woman did not intend her vow to apply save to a suitable person."[47]

Jewish equity recognizes two scales of justice, whereas other systems of equity recognize but one scale. In the Jewish view it is possible to do justice in a material sense and thereby injure one spiritually, which is itself an injustice; and by the same token it is possible to do justice to one's spiritual welfare and by that very token injure one's material well-being, which result might appear quite unjust. Equity, generally, is only concerned with material justice, but the Jewish courts, just because they recognize the two scales of justice, will, in all cases in which the two conflict, lend their weight to the spiritual scale of justice.

A case in point is found in B.K. 99b. A man brought a certain beast to a butcher to be slaughtered. The butcher began the operation lawfully but midway through the process made a mistake and rendered the meat ritually unclean and

hence forbidden for use. Rab, sitting as judge, ruled that the meat was indeed forbidden but that the butcher was exempt from liability. The owner of the meat discussed the case with two other judges: R. Kahana and R. Assi. They pointed out to him that materially he may have suffered two injustices at the hands of the court: first, that the meat might have been declared lawful in accordance with a prior ruling of R. Jose b. Judah, although his was a minority opinion; and second, that, having declared the meat unlawful for use, the butcher should have been declared liable for having occasioned the loss. The court censured the judges for having discussed the matter at all, since this was a breach of professional ethics as laid down in the law. It was then pointed out that on the spiritual scale the court had avoided two injustices: first, that by declaring the meat unfit for use, in accordance with the majority opinion, the owner was saved from transgressing the law by eating it; and second, that the plaintiff was restrained from recovering a judgment which might subsequently have proved to have been a misappropriation.

Jewish equity will on occasion invade the realm of law, properly so-called, to impose an equitable explanation of the law, without, thereby, in any respect altering it, since, in essence, Jewish law is equity. As mentioned above,

it is sometimes held that renunciation of ownership will transfer title, even to a robber in respect of stolen goods. It is also held that where a thief steals property he must make two-fold restitution, except in the case of cattle, which if slaughtered or sold, requires either four-fold or five-fold restitution. Clearly, in this latter case, restitution of the specific head of cattle becomes impossible. R. Akiba asks why this law has been laid down in respect of the thief.

"Because he became thereby rooted in sin. Now when can this be said of him? If before renunciation, could he then be called rooted in sin? It must therefore be after renunciation. But if you assume that renunciation transfers ownership, why should he make four-fold and five-fold payments when it is his that he slaughters and his that he sells? It may, however, be as Raba stated elsewhere, that it means because he doubled his sin, so likewise here it means because he doubled his sin." (B.K.67b ff.)[48] For the passage referred to, which is almost identical, see B.K.68a.

Another example of this same principle is the explanation of why the penalty for theft (sneak thievery) is so much more severe than that for armed robbery. It is

stated (B.K.79b) that the robber, acting openly, performs his misdeed in the sight of God and man, whereas the thief by acting covertly, operates only in the sight of God, for he fears detection by his fellow men. Hence the thief stands more in fear of man than of God and profanes the Name of Heaven, especially since he acts as if he did not believe that God were cognizant of his wrongful act.

2. The Problem of Self-Help:

Since it is the function of equity to step in where the law would seem incapable of affording relief, it may well be asked how far a person in need of relief can advance, without recourse to the courts, in serving his own interests. Certainly, such action would appear proper as being directed toward the accomplishment of the same ends for which equity, itself, has been established. How is this problem dealt with by the Rabbis?

Two men were co-tenants of a well and agreed that they would be allowed each the use of the well on alternate days. One of them used it on a day reserved for the other. The other, finding him in the act, gave due and sufficient warning without effect and thereupon struck the first co-tenant a severe blow with the blade of a hoe he happened to have in his hand. It was held that the situation failed to

spell out any liability, for, even if there were a general rule prohibiting self-help, it would not apply in the case of a pending irreparable loss, such as the wasting of the limited supply of water then in the well. The law of the case is then summed up:

"It has indeed been stated: Rab Judah said: No man may take the law into his own hands for the protection of his interests, whereas R. Nachman said: A man may take the law into his own hands for the protection of his interests. In a case where an irreparable loss is pending, no two opinions exist that he may take the law into his own hands for the protection of his interests: the difference of opinion is only where no irreparable loss is pending. Rab Judah maintains that no man may take the law into his own hands for the protection of his interests, for since no irreparable loss is pending let him resort to the Judge; whereas R. Nachman says that a man may take the law into his own hands for the protection of his interests, for since he acts in accordance with law, why take the trouble (TO GO TO COURT)?" (B.K.27b)[49]

Continuing the discussion, it is pointed out that Ben Bag Bag forbids self-help carried on furtively, as this stimulates thievery, but allows one to reclaim one's own property by "breaking the teeth" of the other and say-

ing: "I am taking possession of what is mine." It is suggested that "breaking the teeth" is but figurative for bringing the other into court. If, in the application of self-help, one causes unnecessary damage to the property of another, there is liability. R. Nachman allows one to damage the property of another in the course of self-help, but only as a necessary adjunct to formal legal action through recourse to law. In the case of dealing with slaves, self-help is allowable, even if accompanied by injury, and even if resorted to only to prevent the commission of a crime by the slave, if the slave's master, in his own good judgment, believes that there is a likelihood of a crime being perpetrated. (B.K.28a).

Closely associated with self-help, is the right of the private citizen to take such steps on his own initiative as may prove necessary in the maintenance of law and order. Jewish law even extends this right to cover the prevention of sin. Indeed, in certain instances it is mandatory to save others from sinning.

Note the following Mishna (Sanh.73a): "The following must be saved even at the cost of their lives: He who pursues after his neighbor to slay him; after a male (TO COMMIT PEDERASTY); after a betrothed maiden (TO DIS-

HONOR HER). But he who pursues after an animal (TO ABUSE IT), or would desecrate the Sabbath, or commit idolatry, must not be saved at the cost of his life."[50]

The foregoing is strictly law, but, in the following Gemara, much of ethical worth is derived therefrom, as that one is obliged to save another from drowning or from being mauled by a beast or attacked by robbers. This ethical approach to the subject is nonetheless woven back into the fabric of the law to safeguard the material and spiritual rights of the intended wrong-doer and to prevent a breach of the peace, not for social security, but for the spiritual advantage of the potential offender.

We read (Sanh.74a): "For Raba said: If a man was pursuing after his fellow (TO SLAY HIM), and broke some utensils, whether of the pursued or of some other person, he is free from liability. Why so? Because he is liable to be killed. If the pursued broke some articles: if they belonged to the pursuer, he is not liable for them; if to some one else, he is. If they belonged to the pursuer he is not liable - because his property is not more precious than his own person. But if to someone else, he is - because he saved himself at his neighbor's expense. But if one pursuer was pursuing another pursuer to save him (THE THIRD PARTY, THE INTENDED VICTIM OF MANSLAUGHTER) and broke some utensils whether of the pursuer or the pursued or of any other person, he is not liable for them. This does not

follow on legal grounds, but if thou wilt not rule thus, no man will save his neighbor from a pursuer."[51]

It may well be asked whether a man may deliberately violate the law in order to save his own life. The law is well established (Sanh.74a) that wherever the Torah reads: "Transgress and suffer not death," one may transgress, except in the cases of idolatry, incest (including adultery), and murder. This general rule was narrowed somewhat by R. Dimi, who held that it applied only when there was no proscription of Judaism, as otherwise, martyrdom was mandatory to avoid the trarsgression of the least of the precepts. According to R. Jochanon, even in the absence of such proscription, transgression to save life is forbidden except in private. Beyond this point, as is obvious from the general drift of argument here indicated, the discussion moves from the realm of ordinary, to the realm of religious, law.

3. Human Rights vs. Property Rights:

It was stated above that one may not save one's own life at the expense of another. Yet note how, the circumstances permitting, equity is able to circumvent the harshness of its own rule:

"A certain man had a purse of money for the redemption of captives deposited with him. Being attacked by thieves he took it and handed it over to them. He was thereupon summoned before Raba who nevertheless declared him exempt. Said Abaye to him: Was not that man rescuing himself by means of another man's money? He replied: There could hardly be a case of redeeming captives more pressing than this." (B.K.117b)[52]

Another example, tending to the same ultimate end, follows immediately after the foregoing. A man forced his ass aboard a ferry boat before the passengers had had an opportunity to disembark. The added weight of the beast put the boat in danger of sinking, whereupon one of those present pushed the ass over the side and into the water, causing it to drown. Needless to say, the owner of the animal sued, but Raba, who, it will be recalled, had previously ruled that one may not save himself at another's expense, nonetheless found for the defendant, him who had shoved the ass over the side. Abaye dissented on the basis of Raba's own previous ruling. Raba, in his formal opinion, justified his decision, however, by equating the owner of the ass with one who pursues another with intent to commit manslaughter. Hence he, who pushed the ass over the side, was likened to one

who pursues a pursuer and who, we have learned, is not responsible for injury which he may have visited upon the property of the potential manslayer.

In the turbulent times, when the Jews were under the heels of Rome, there was scarcely one less deserving of protection under Jewish law than the informer. He could be injured in body and killed if need be in the public interest. (Avodah Zera 26b, Sanh.74a, B.K.117b). Yet, a controversy arose as to whether it was legal to destroy his property. Certainly, it was argued, if his body can be attacked,how much more so is that true of his property. The rule does not follow, for in destroying his property one may thereby be penalizing his innocent children. (B.K. 119a) In another connection (same page) "R. Jochanon said: To rob a fellow-man even of the value of a perutah is like taking away his life from him."[53]

In discussing the matter of human and property rights under Jewish law, special attention should be given to the problem of degradation. It will be recalled that degradation is one of the five measures of liability in personal injury cases; that it is the suffering occasioned by being held up to public ridicule by reason of physical defect, flowing from the suffering of personal injury; that it can,

in a sense, be looked upon as a species of defamation effected by act rather than by word; and that persons already subject to physical injury - specifically, the case of the blind was mentioned above - are not eligible to receive compensation on the grounds of degradation. Here, indeed, there is a fusion of property rights and personal rights, and it has already been shown that the courts of Babylon considered the subject as properly falling within the purview of equity alone.

Where a man has committed a sexual act with a beast, both are stoned in conformity with biblical law. The Mishna enquires as to why the beast should be made to suffer and gives as its reason: "That the animal should not pass through the streets, whilst people say: "This is the animal on account of which so and so was stoned." (Sanh.54a)[54] The Gemara points out that an ignorant man might have committed the act without realizing that he was transgressing the law. Nonetheless, he would suffer degradation. Therefore, as a preventative measure, to protect him from further suffering, and so also his family, in that he has already degraded himself by the commission of the act alone, the Rabbis have thus interpreted the biblical injunction. Here, indeed, degradation has been afforded a meaning by no means in consonance with its technical connotation. (Sanh.55a ff.)

Another case, illustrative of stretching the meaning of the term degradation, is afforded in Mak.2a. A false witness by law is to be punished by the lex talionis, i.e. the punishment which would have been meted out to the defendant, had the false testimony remained unrefuted, is instead visited upon his perjurer. Where a witness falsely swears to the moral turpitude of a priest or of his parents, so that the priest, as a result, would have been stigmatized and disqualified from continuing in the priestly office, the witness is punished by flogging. "What is the sanction for this penalty? Said R. Joshua b. Levi: R. Simon b. Lakish said that it is based on the text: 'then shall ye do unto him as he purposed to do'; that is to say, punish him and not his offspring. But why should not he alone be stigmatized, and not his offspring? We must needs fulfill: 'as he had purposed to do' and in such a case we should have failed to do so."[55] Here once again it will be noticed, the protection of the innocent children of the offender is a controlling factor of the court's reasoning.

In the Mishna (Mak.22b) it is stated that if a culprit in the course of being flogged should befoul himself by the defecation or loss of bladder control he is immediately to be discharged without further punishment, it be-

ing implied that, by thus having suffered humiliation, he has suffered sufficiently for his crime. Again Mak. 23a indicates that if, while being tied to the whipping post, the prisoner should escape, he is exempt from further punishment by having dishonored himself. By the second stroke he is also deemed to have been humiliated, so that, should the thong then snap, no more physical punishment is meted out to him. Here again, we see how seriously public degradation was looked upon, since, as punishment, it was due substitute for thirty seven strokes of the lash.

In the Mishna (B.K.90a ff.) there is an extended enactment covering civil penalties payable as damages to the plaintiff in cases of insult and holding one up to public scorn, as by boxing the ear, striking the face with the palm, or with the back of the hand (a more grevious insult), pulling the ear, plucking the hair, spitting, or removing the garment. It was considered particularly outrageous to uncover the head of a woman in public. The measure of damages is not absolute but dependent upon the dignity and position enjoyed by the plaintiff, the victim of the insult, in the community. It is held that even if a person is able to debase himself in public and does so, that does not mitigate damages where, subsequent thereto,

another debases him in like manner. The Gemara states as obiter dicta (B.K.91a) that a mere insult in words is not actionable. It should be mentioned, in passing, that one's dignity in the community was not measured by his wealth, so that the rich were not entitled to receive from the defendant an aggravated penalty. (ibid.) (Akiba's position)

4. The Public Welfare:

In Jewish courts concern was not only felt for the welfare of the individual but for that of the community and the state as well, and here, too, equity played its part.

Equity tended to close its eyes to the letter of the law where the public good stood to benefit. Thus the Mishna enacted that if one dug a well on his own ground, where the public could nonetheless be injured by it, or on public ground or on private ground, where his neighbor could nonetheless be injured by it, he would be liable in case the injury materialized. (B.K.49b). Yet we read (B.K.50a): "Our Rabbis taught: If a man dug and left it open, but transferred it tothe public, he would be exempt, whereas if he dug it and left it open without dedicating it to the public he would be liable. Such also was the custom of

Nechonia the digger of wells, ditches and caves; he used to dig wells and leave them open and dedicate them to the public. When this matter became known to the Sages they observed: This man has fulfilled this enactment. Only this enactment, and no more? Read therefore: this enactment also."[56]

The public good is referred to in B.M.12a by the expression "ways of peace."[57] While a minor, a deaf mute and an imbecile are not sui juris, nonetheless we find that the court, acting through equity, will regard them as sui juris in matters of robbery, lost articles, and the right to glean (Sheb.41a) since, by denying them this status in accordance with the rigid letter of the law, "ways of peace" (the public welfare), would suffer. In a similar vein, we find in B.M.102a that if a man builds a dovecote and wild doves nest there but go far afield for their food, so that actually he exercises no control over them, while in law they remain ferae naturae, they are nonetheless deemed by equity to have been reduced to his possession so that they are subject to the laws of robbery, and this for the "ways of peace".

One, whose sole means of support is gambling, is ineligible by law to serve as witness in court. (Sanh.24b).

Some hold that this is so since a gambling wager is a contract based on speculation, which type of contract is not legally binding. R. Shesheth held that the prohibition stemmed from the fact that gamblers do not concern themselves with the public welfare. The prevailing opinion is that they are ineligible for the sake of the welfare of humanity, since those gamblers who do not rely upon their gambling as their sole means of support, but have other means of livelihood as well, and hence do contribute to the public good through their work, are not, under the law, ineligible to testify as witnesses in court.

5. Equitable Intent:

In its desire to serve the cause of justice, equity will not alone look at individuals separately and in their social relationship, but it will even pry into the minds of men to determine their thoughts, and, not infrequently, it will impute intents to them that in actuality were nonexistent that the ends of justice and right may be accomplished.

As has been stated repeatedly, the matter of whether renunciation is able to bring about transfer of title, especially in cases of theft and robbery, is unsettled. In-

deed, so complicated is the matter, that a special study might well be devoted thereto, but it need concern us here only collaterally. It has also been pointed out that "tax farmers" are deemed robbers under Jewish law. There is a body of opinion that, due to fear of revenge, since robbers are bold and dangerous men, their victims abandon hope of recovery, do not seek to regain their property, and thereby effect renunciation, whereas, in the instance of theft, since thieves prove by their furtive methods that they are pusillanimous, there is always hope of finding them out and effecting recovery, whence renunciation would not follow. Thus, according to this view, robbers have legal title to their loot, and since "tax farmers" are robbers, they have legal title to all imposts which they collect.

With the foregoing in view, we turn to the Mishna (B.K.114a) and read as follows: "If tax farmers took away a man's ass and gave him instead another ass, or if brigands took away his garment and gave him instead another garment, it would belong to him, for the owners have surely given up hope of recovering it."[58] This would be true if the view expressed above were accepted. Certainly, however, the view lacks equitable character, though, since the foregoing appears in Mishna, it is good law. Commenting on

this very statement, we read at the beginning of Gemara following the above: "A Tanna taught: If he was given, he would have to restore it to the original owners. This view thus maintains that renunciation by itself does not transfer ownership, and consequently the misappropriated article has at the very outset come into his possession unlawfully."[59] Now in Tosafoth (ibid) we are told that presumably the original owner only effected renunciation after the transfer from the possession of the tax farmer to that of the third party. To be sure, this explanation would uphold the view expressed in Mishna, but it certainly does not take into account the view of the Tanna. What, then, is the Tanna seeking to say? Simply this, so it would appear: Legally, perhaps, the presumption in favor of renunciation is sufficient to enable the tax farmer to confer good title upon the third party, but this is nonetheless unconscionable and equity will not accept the legal presumption and will, instead, impute to the true owner an intent eventually to recover his chattel, and that, even if he has patently and overtly expressed renunciation. Legal title may indeed vest in the third party, but equitable title remains in the original owner.

There is a middle view which states that as between the legal and eqitable views here expressed, the former, as a

practical matter must prevail, although morally, if the third party senses the justice of the equitable view, he should voluntarily act in accord with that which equity would decree,as otherwise, by standing on his legal rights, he violates morality.

The argument continues over some length during which the entire problem of renunciation is aired and expounded from all sides, with the expression of sharply divergent views, even in terms of strict law. Certain cases in point are referred to in passu relative to intent. Thus we learn that if the problem arises as to whether raw hides are to be considered merely raw hides or whether, constructively, they are already to be deemed finished products, it is to be determined by the intent of the owner, even if the hides are in the hands of a tanner at the time the question is raised. If, however, the owner is the tanner, and he does not intend to use them for himself but to sell them to another, as yet undetermined, then, even though the tanner may intend them for some ultimate finished purpose, the court cannot give weight to his intent but only to that of the actual purchaser when such purchaser eventually comes forward, from which it follows, that regardless of the intent of the tanner, the raw hides remain raw hides so long as they rest in his hands. Hence,

it follows, only the legal owner of the finished product, whether or not that finished product has come into existence, can exercise control over it. Nonetheless, we learn further along on the same page,where a thief, robber or brigand consecrates stolen merchandise, or sets it aside for a heave-offering or tithe, his act is recognized as final and binding both in law and equity, albeit the ruling conflicts with almost every view that might be taken in respect of the problem of renunciation. Here it will be seen, a religious issue having entered into the configuration, the equities are equalized, and equity and law become one. In this case we again find that the law, itself, is equity, since academically, scanning the several views, if renunciation confers title on a thief, it doesnot do so in the instance of a robber, and vice versa, and so also, some hold that it will confer title on a brigand but not on a robber of the tax farmer category, and yet, most inconsistently, while the strictly logical view is unanimously held to be that where there is patent renunciation title will pass, this, as we have seen, equity, itself, will not accept. In the interest of religion, however, both law and equity will render the rights of the individual subordinate.

In respect of the matter just discussed, i.e. renunciation, but in its purely legal aspects, much additional

material will be found in all of the "Three Gates" (B.K., B.M. and B.B.) passim. and elsewhere in Nezikim. It has been pointed out above, that the problem also extends to the matter of lost articles, where the finder is vested with legal title, since it is assumed that the loser has abandoned hope of recovery, and,hence, has effected renunciation. There are certain legal exceptions to this rule which have no bearing on equity. (See Mishna, B.M. 21a) One interesting point however, is worthy of note. Suppose that a person should find certain property at a time prior to that at which the original owner is aware of his loss. Are we justified in assuming a theory of anticipatory abandonment by saying that as of some future time, when the loss is ultimately discovered, the owner will abandon hope of recovery, thereby effecting renunciation, such that we can say, even now, prior to such renunciation, title already vests in the finder, since we impute an ultimate, but as yet, latent, intent to renounce on the part of the true owner? Raba espoused the doctrine of anticipatory abandonment, whereas Abaye opposed it. The law was decided in favor of the doctrine where the original owner, by reason of the nature of the lost property could never subsequently identify his former possession; but where this is not the case, the doctrine will not apply (B.M.21b)

Clearly, the intent to renounce is not actual, since the original owner does not even know of his loss, but it is nonetheless an intent read into the situation by equity, since, in the case of produce for example, if the finder had to wait for actual renunciation, there might be complete spoilage where both finder and loser could not gain, and which, resulting in the waste of agricultural commodities, would transgress the public interest.

Among the Jews, it was common practice for a landowner to sell growing fruit trees, which remained permanently in the original position, without severance or transplantation, the purchaser being enabled to exercise absolute control over them as much as if they stood on his own land. The Mishna states that he who purchases two trees, standing on the land of another, has a right to the fruit and to fell the trees but he acquires no right to the freehold; whereas he, who purchases three trees, acquires, as well, certain rights in the land itself. (B.B.81a). According to R. Jochanon, in this latter case, the purchaser only acquires so much ground as would reasonably be necessary for him to use in conjunction with gathering the fruit. R. Eleazar dissents from this view since it seems to conflict with the failure of the law to confer an easement of ingress and egress to and from the trees across the fields

of the vendor. This is logical, since one would not likely buy three trees, widely separated, and hence three trees close together with the ground under, between and around them, which R. Jochanon concedes would pass to the purchaser with the trees, would, in itself, constitute a small field, albeit, perhaps, an enclave, in which event, presumably, it would be for the purchaser to buy as well a right of way. What, then, in this respect, are the rights of the purchaser of two trees, who acquires no land rights whatsoever? According to R. Zera, equity will read into the sale of two trees an implied intent on the part of the seller to include in the sale an easement of access. If equity will take this position in respect of one purchasing two trees, is not R. Eleazar's position rather severe in respect of one who buys three trees? " R. Nachman b. Isaac said to Raba: Does this imply that R. Eleazar is in disagreement with Samuel, his master? For Samuel said: The law is in accordance with R. Akiba's position that he who sells does so with a bountiful eye."[60] Hence, even in the case of three trees, equity will imply an intent to confer an easement. (B.B.82b)

Equitable intent is sometimes employed in order to aid the public welfare. If a thief stole merchandise and sold it to a fence, and thereafter there was renunciation,

the true owner can sue the fence for the recovery of his chattel. If a thief stole merchandise and there was renunciation and the thief then sold to a fence, the sale would be valid, since renunciation would have transferred title, and the true owner can sue the thief for the value of his chattel. If property was stolen by one and consumed by another and there was no renunciation, either may be held liable. (B.B.115a). If, however, the sale to the fence was made in open market, there is a presumption that the fence was in fact an innocent purchaser acting without criminal intent (this lack of intent being deliberately read into the facts by equity), lest, were the law otherwise, people would fear to buy in open market, since, if they innocently bought stolen merchandise and there was no renunciation, they would stand to suffer loss. On the basis of this intent of innocent purchase, the true owner can recover his chattel only upon paying the purchaser the price with which he parted at the open sale. (M. Jung: The Jewish Law of Theft, pp.91 ff., Cf. also pp.15 ff.) Thus the intent imposed by equity, of innocence, avoids restraint of trade.

6. Moral Obligation:

It not infrequently occurs that while there is no

binding legal obligation, the merits of a set of circumstances are such that justice demands performance. In such instances, equity will step in in order to force the fulfillment of moral obligations.

There are instances in which equity deems itself impotent to enforce moral obligations, but where it will nonetheless commit the parties to Divine Law to the end that God may effect justice. "It was taught: R. Joshua said: There are four acts fromwhich the offender is exempt from the judgments of man but liable to the judgments of Heaven. They are these: To break down a ferce in front of a neighbor's animal, to bend over a neighbor's standing corn in front of a fire, to hire false witnesses to give evidence, and to know of evidence in favor of another and not to testify on his behalf." (B.K.55b).[61] A proper understanding of the foregoing requires explanation.

The rule as to the fence will apply only where the owner had allowed his fence to deteriorate. A wilful breaking of a good fence would render the offender liable. In the case of the corn, what is meant is that by bending the stalks the corn is concealed until destroyed, so there is no available proof that the corn ever existed, none having seen it but the owner and the offender. As to suborna-

tion of perjury, when the witnesses are hired to swear falsely on one's own behalf, there will be liability, but not if they are so hired for the sake of another, for even the one for whose benefit they were hired could plead innocence, though profiting from the act. Here, again, the problem is one of availability of evidence. It is much the same as in the case of the fence, where, by reason of its poor condition, it is almost impossible to lay the destruction to have been wrought at the hands of the offender. Finally, the instance of withholding evidence applies where there is but one witness available other than the offender, for the law, as stated, requires a minimum of two witnesses to establish a prima facie case.

There is considerable discussion (B.K.28a ff.) as to whether in the case of accident, the courts can spell out negligence, in which event there will be liability, or whether the accident can be referred to force majeure, where, obviously, no liability will lie. Numerous instances are mentioned, some falling in the one category and some in the other. In the midst of the argument, however, we find this remarkable statement concerning an unavoidable accident (B.K.28b ff.): "If his pitcher broke and he did not remove the potsherds; his camel fell and he did not raise

it; R. Meir orders payment for any damage resulting therefrom, whereas the Sages maintain that no action can be instituted against him in civil courts though there is liability according to divine justice."[62] Apparently there is doubt as to how far the courts can go in enforcing moral obligations, although R. Meir feels that despite the initial accident over which the defendant could exercise no control, the subsequent accident cannot be said to issue from it, but rather that the defendant's negligence in not taking the requisite steps to remove a dangerous condition was alone the predisposing cause of the second mishap.

In passing, be it noted, that the foregoing position of R. Meir is again referred to at B.K.99b.

Rab takes a view quite in harmony with that of R. Meir, but on somewhat different grounds (B.K.28b). It is his position that, so long as title to property has not been abandoned, the owner is liable for any damage which his property may occasion, so that neither the question of intent nor the question of negligence enters into the essence of the matter. It is the moral obligation of every property owner to see to it that his property does not cause injury. Here, in effect, he brushes aside all considerations of <u>force majeure</u> and takes up his position on the well recog-

nized grounds of res ipsa loquitur. If it be argued that the owner of the property is morally as innocent as the one suffering injury through the property, then, perhaps, Rab would say: "Where there is injuria occasioned by one of two innocent parties, he who made possible the injuria must be held responsible," and this, be it understood, even where he made it possible in all innocence.

The above, while equitable, being founded upon moral principles, is nonetheless harsh, and to that extent inequitable. Jewish law, itself equity, specifically departs from the above in certain cases (Mishna B.K.34b): "If cattle causes degradation, there is no liability; whereas if the owner causes degradation there would be liability. So also if an ox puts out the eye of the owner's slave or knocks out his tooth, there is no liability; whereas if the owner himself has put out the eye of his slave or knocked out his tooth, he would be liable."[63] The owner, under biblical law, would be liable to manumit his slave forthwith. Here the owner of the instrumentality of injury, in contravention of the prior rule, is not held to any moral obligation to make good the loss. A still finer distinction is found at B.K.43a. There we learn that if an ox kills a slave through no fault of its own the ox is not destroyed and the owner is not fined. Where the ox, in

like circumstances, kills a free man, the ox is destroyed but no fine is laid upon its owner. If, however, the owner openly admits that his ox killed a free man, then he is liable for simple, but not punitive, damages. If it were shown, however, that the owner already knew that the ox was a dangerous animal,* then on his own admission of the killing of the free man, corroborated by witnesses, the punitive damages would lie. In the case of a slave having been killed, if there are witnesses and if, in addition, the owner of the ox admits liability, simple damages are paid; but in the absence of witnesses, even where admission is present, no damages are assessed either simple or punitive. It should be understood, that in all of the preceding instances, the killing was not an intentional act on the part of the ox but resulted wholly from accident. This is a signal departure from the positions taken by Rab and R. Meir in respect of moral obligation in the absence of intent and overt negligence. In the passages immediately following the foregoing, there are cited a number of dissenting opinions, most of them posited upon the inequity of drawing a distinction between slave and freeman both in respect of the payment of simple damages and of punitive damages. Raba also dissents, quite consistently, on any distinction being drawn between a case of intention-

* NOTE

al killing and that of unintentional killing on the part of the ox. Parallels are drawn throughout between loss of life through fire and loss through the act of the ox, but unfortunately no final determination of the matter is accomplished.

In Jewish law, the defendant in criminal actions is always given the benefit of any doubt. This principle is carried over into civil actions, so that, if injury result, and there is a question as to whether the injury resulted through accident or through deliberate intent, there will be a presumption in favor of its having occured through accident. This being so in the case of men, it is equally applicable in the case of beasts. Hence, if an ox should kill a man, and there is doubt as to whether that was the animal's intent, it will be assumed that it was not. Hence, R. Simeon goes so far as to say that where an ox intended to kill one man and actually killed another, no liability will result. This is not the law, however, as if there was intent on the part of the ox to kill a man, any man, and the ox did in fact kill a man, although not the one actually intended, liability will result. (B.K.44b). The Mishna, itself, enacts (B.K.44a): "If an ox, by rubbing itself against a wall, killed a person, or if an ox, while trying to kill a beast, killed a human being, or

while aiming at a non-Jew killed an Israelite or while aiming at non-viable infants killed a viable child, there is no liability."[64] Here, once again, we find a marked departure from the doctrine of moral obligation imposed on an owner in respect of a dangerous instrumentality in his possession.

Returning to our original theme of liability under the Law of God, but not the law of man, we are told that if an animal is marred such that it cannot be used for religious purposes, but can nonetheless be fully employed for all other purposes, no liability will lie at law, but he who marred the beast will be liable to judgment at the hands of Heaven. (B.K.98a) Here there is a clear instance of moral obligation although unenforceable at law.

The following, although Aggadah, casts some interesting light on the question of Divine Justice. The passage refers to Leviticus 35: 36,38; Numbers 15:38,41 and Leviticus 19:36. "Raba said: Why did the All Merciful mention the exodus from Egypt in connection with interest, fringes and weights? The Holy One, blessed be He, declared: It is I who distinguished in Egypt between the first-born and one who was not a first-born; even so, it is I who will exact vengeance from him who ascribes his money to a non-Jew and

lends it to an Israelite on interest, or who steeps his weights in salt, or who uses vegetable blue and maintains it is (REAL) blue."[65] The reference to interest has been explained above. Here, again, we have three examples of wrongs which, for lack of evidence, cannot be remedied by the courts but where, nevertheless, a moral obligation obtains which God will demand be fulfilled. (B.M.61b)

We read (B.B.53a): "R.Assi said in the name of R. Jochanon: If a man by placing a pebble or removing a pebble confers some advantage, this action gives him title to the land. How are we to understand this placing and removing? If we say that by placing the pebble he stops water from overflowing the field or by removing the pebble he allows water to run off from the field, he is merely in the position of a man who chases a lion from his neighbor's field."[66] This is mentioned in connection with proving title to land acquired by gift, inheritance (where there has been partition as between heirs), or by seizing realty to which none can claim legal ownership. The law stipulates that possession requires the performance of some overt act of improvement. Now inthe case of a proselyte, none of whose relatives converted, upon his death he is deemed to have died without heirs, whence it follows that his land is such that none of his survivors can claim

legal title thereto. If one should therefore seize the land, while it would be legal, it would nonetheless be at the expense of the proselyte's survivors. Therefore, we find R. Assi giving expression to the quotation set forth above, for clearly the act of irrigation done without effort, or the equally simple act of preventing damage to the soil through flood, as described by him, constitutes that species of neighborly conduct which it is incumbent upon every man to perform for his fellow as a moral obligation, and hence, such acts will not be deemed to have resulted in improvements to the freehold sufficient to vest title in the claimant. The passage continues by stating that reference to the pebble has to do with setting up a system of water conservation or of permanent irrigation, which last two are certainly valid improvements to the freehold hence beyond the scope of mere moral obligation.

A contract based on speculation and carrying provision for a penalty,* as do all such contracts at Jewish law, is not valid to pass title to that set forth as the penalty, as such contracts are illegal. R. Jose's opinion that they are valid to pass title is not the law. "Amemar said: Whether a guarantor subjects himself is disputed by R. Judah and R. Jose. According to R. Jose, who said a contract based on speculation conveys title, a guarantor is responsible.

According to R. Judah who said a contract based on speculation gives no title, the guarantor is not responsible. Said R. Ashi to Amemar: Surely it is the daily custom that contracts based on speculation give no title - but a guarantor is held responsible! Indeed, said R. Ashi, having regard to the pleasure of being trusted he determines to undertake the responsibility." (B.B.173b)[67] The manner in which the court treated this particular case is unique. Here we have an obligation which is clearly illegal and unenforceable at law. The creditor, by reason of its illegality, could not possibly proceed against the debtor. Nonetheless, the debtor's surety is held liable, since, having assumed a position of trust, he is under a moral obligation to stand behind his undertaking, and from this the court will not relieve him.

Needless to say, the most solemn of all moral obligations is the promise. "He who punished the generation of the flood and the generation of the dispersion, He will take vengeance of him who does not stand by his word." (Mishna B.M.44a)[68] Jewish law does not spell out a contract by the mere interchange of promises. Therefore, the promise falls within the purview of equity in Jewish law. In the sale of personalty, it would appear under biblical law that the contract becomes binding upon the completion

of payment, but in both biblical and later law, the true measure of the binding character of a contract of sale of personal property is the formal act* of taking physical possession of the subject of the contract by the vendee, which act can be actual or symbolic.

Assume that the vendee pays money into the hands of the vendor. This in itself is an irrevocable act, for Jewish law does not recognize the doctrine of revocation of offer prior to acceptance. At this point in the negotiation the vendor can still retract. Is this equitable? The Rabbis held that it was, for while it gives the vendor an advantage, yet that advantage but counterbalances the disadvantage under which he labors in conformity with biblical law, since, if the payment confirms the contract and the vendor wishes to go forward with it, he becomes insurer on behalf of the vendee until the time of final delivery. The majority of the Rabbis refused to recognize the biblical law as holding that mere payment confirms the contract, and preferred to believe that in biblical, as in later, law, this was only accomplished by the formal act of taking physical possession. In this case, both vendor and vendee can retract, despite the payment of money. In this we see an equitable modification of the law, and this represents the majority opinion.

* מעשה קנין

Despite the foregoing, however, the Rabbis were not satisfied that they were justified in so interpreting the biblical law. Assume, they said, that the payment of money did confirm the contract, or assume that it did not: as an equitable proposition would not the rule be the same in any event? Why? Because retraction after an implied promise would be no less reprehensible than retraction after an explicit promise, and by the vendor's acceptance of the money, there is an implied promise to sell. Wherein lies the implication? Suppose that there had been delivery prior to payment. Clearly in that case there could be no retraction for the sale would have been consummated by the formal act of reducing the chattel to possession and the vendor would then have become a creditor and the vendee, a debtor, and their relationship would change from one of contract to one of obligation. While, as a matter of law, the converse does not hold, as a matter of equity it does. A mere promise without payment, however, is a nullity. Despite the equitable obligation here established, the court is without power of enforcement, yet "He will take vengeance of him who does not stand by his word." (B.M.47b ff.)*

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* Hence the remedy of specific performance is unknown to Jewish equity.

"R. Kahana was given money for flax. Subsequently flax appreciated. Thus he came before Rab. 'Deliver to the value of the money you received," said he to him, 'but as for the rest, it is a mere verbal transaction, and a verbal transaction does not involve a breach of faith.' For it has been stated: A verbal transaction. Rab said: It involves no breach of faith. R. Jochanon ruled: It does involve a breach of faith."[69] (B.M.49a) Abaye commented that one must not speak one thing with the mouth and another with the heart, which Rashi explains signifies that at the time of entering into a transaction one should have no intention of withdrawal, yet if one does enter into a verbal transaction in good faith one may subsequently withdraw in view of market fluctuations.

A gratuituous bailee is not responsible if the bailment is lost or stolen. As the taking of interest is illegal in Jewish law, a lender is never compensated for making his loan. Where a loan is made on pledge, the lender becomes a bailee. As a matter of pure syllogism it would therefore follow, that should the pledge be lost the lender would be absolved of all liability, as, of necessity, he is a gratuitous bailee. Neither R. Joseph nor R. Akiba take this view, however. The matter is worthy of exploration.

The Mishna states that where a pledge has been lost, and where the borrower and lender both admit that its value was less than the face of the loan, but where the borrower sets a higher value on the lost pledge than does the lender, the borrower is liable for the difference between the admitted value of the lost pledge and the face of the loan. Yet, consider, since the pledge was accepted as security for the loan, does not its loss wipe out the obligation? No, for it is assumed that the pledge was accepted as security only up to the amount of its value. This is the view of R. Eliezer. R. Akiba holds that the pledge was the consideration for the loan and that the loss of the pledge was a breach of trust forfeiting the loan. In this way the lender, as gratuitous bailee, is held liable in the amount equal to the face of the loan. The pledge is not merely a symbol of the loan, for frequently it is accompanied by bond. The pledge is held as a possible source of repayment in the event of default. But why, nonetheless, should he lose the loan by reason of having lost the pledge? Certainly, if the pledge and loan were of equal value, the loss of the one would cancel out the other, yet R. Eliezer would hold that as gratuitous bailee the lender is not liable and hence, despite having lost the pledge, he is entitled to recover the full amount of the loan. The problem is whether the pledge

served as security, in which case there would be liability, or whether it was a mere reminder, where the pledgee would be a gratuitous guardian. R. Isaac holds that the creditor actually "possessed" the pledge since the Bible (Deuteronomy 24:13) deems its return an act of righteousness, and wherein, asks R. Isaac, would there be righteousness in returning that which one did not "possess" but which one was obliged under all circumstances to return. Hence the pledge was security rather than reminder, and as security, was equal to the loan. If the pledge were taken by court process subsequent to the extension of the loan, R. Isaac's position might well be tenable, but suppose it was taken at the time of the making of the loan? In that event the pledgee would be similar to a guardian of a lost object, whom Rabbah deems to be a gratuitous bailee with no liability for loss, and whom R. Joseph holds to be a paid bailee who is liable. Why does R. Joseph hold the guardian liable? Because guarding a lost object is a meritorious act equal to the fulfillment of a Divine Commandment* for which the performer of the act receives a Divine Reward. To lend to another who is in straits is similarly such a meritorious act. Suppose, however, that the lender desired the pledged article for his own use and was willing to deduct from the face of the loan so much as he would have had to pay for hiring it had there been no loan. R. Akiba, still mindful of the loan,

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cannot overlook the fact that the pledgee is still performing a meritorious act in the eyes of Heaven, but R. Eliezer sees no merit in the loan, since its extension brings the pledge into his hands to employ for his own needs. (Sheb.44a ff.) The court ultimately ruled in the case that the pledge is merely a reminder and that it does not equal the amount of the debt and that, therefore, the lender will only lose so much of his loan as is equal to the value of the lost pledge and is entitled to recover the difference, this being in strict conformity with the Mishna. The portion of the controversy reported above, however, affords a clear perspective into the equitable reasoning of the Rabbis in terms of moral obligation outside of the strict letter of the law. The case was decided on the proposition that a debt, unsecured by pledge, or, unsecured by pledge equal to its face value, is automatically cancelled in the Sabbatical year, and hence it cannot be said that a pledge, regardless of true value, is deemed in law equal to the value of the debt which it secures.

We saw that where a prime obligation is voidable by reason of illegality so as to excuse the principals, this will, nonetheless, not operate as a release of the surety, since his is a moral obligation from which equity will

grant no relief. We have also seen that where a pledge is taken by court process, subsequent to the extension of a loan, all agree that it constitutes security and that title vests in the pledgee in the event of default. Ordinarily, however, contracts of obligation do not involve pledges, and come into being, not when the money passes to the borrower, but by formal act* (not unlike that in the case of sale), symbolizing the assumption of the obligation by the obligor. It is therefore logical to suppose, and the courts have so held, that where the surety guarantees the debt at the time of the passing of the money, the formal act of obligation is not necessary to spell out his liability, since his guarantee was itself consideration for the extension of the loan. By the same token, if the guarantee is made only at a time subsequent to the prime obligation, the formal act is necessary, as in the first instance there is a bona fide suretyship, where the surety and principal debtor are on equal footing, and the creditor can proceed against either at will in the event of default; whereas, in the second case, we have, in effect, a secondary contract of guarantee, so that the creditor would have to exhaust all his remedies against the principal debtor before he could turn to the guarantor, and the guarantor, in turn, would have to reserve to himself the right to recoupment from the principal debtor, in the event that he

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should be called upon to make good his obligation.

Now, since a pledge acquired through court process at a time subsequent to the extension of a loan is recognized as security in both law and equity, and since a guarantor after a loan obligation enjoys a measure of protection greater than one who comes forward at the time of the extension of the loan, it would follow a fortiori that a guarantor appointed by the court at a time subsequent to the lending should enjoy the highest measure of protection. The rule is otherwise, however, for such a guarantor is in no better position than one who guarantees the obligation at the time of its inception and thereby becomes a mere surety "for he has regard to the pleasure he has that he is trusted and he subjects himself to him," (B.B.176b end),[70] i.e. by reason of the confidence reposed in him by the court he assumes a moral responsibility that forces him to shoulder the entire obligation.

7. Equity's Attitude Toward Usury:

While in common parlance, usury is understood to mean the charging of an exorbitant rate or amount of interest, the less common definition, and that which is meant here, is the lending of money with an interest charge for its use. Usury, at Jewish law, as the Bible makes manifest, is ille-

gal, nor did this change in any respect during the subsequent development of the law. While references to usury cases are legion throughout the Talmud, we are only concerned with those instances in which an equitable element was involved. One such case has been twice referred to above, that in which the Jew would establish legal title to his money in a non-Jew, over whom Jewish courts exercised no control, so that the non-Jew, acting as agent for an undisclosed principal, without revealing his agency, could lend the money at interest; and quite frequently, to be sure, the non-Jew availed himself of the merits of the situation by standing on his legal rights as to the title to the money, a situation from which equity, quite obviously, would grant the original owner no relief.

We read (B.K.103a): "R. Kahana transmitted some money for the purchase of flax. Now as flax subsequently went up in price, the owners of the flax sold it. He thereupon came before Rab and said to him: What shall I do? May I go and accept the purchase money? He replied to him: If when they sold it they stated that it was Kahana's flax, you may go and receive the money, but if not, you may not accept it."[71] The motive behind Kahana's question, for he was a law-abiding man, was his doubt as to whether the flax in the situation might not indeed be deemed a subter-

fuge, so that, by removing it from the situation, he would merely have paid out a small sum of money and received back a larger sum, which would be usury, the more particularly since the flax had never actuallycome into his physical possession. Legally, there was a purchase and resale, but Kahana, himself a judge, recognized at once that, on the equitable side, this transaction might not have been deemed a sale at all, and he feared to transgress the law. Rab's reply quite clearly was in accord with Kahana's thinking, for if the name of Kahana as vendor had been mentioned, then the physical possessors of the flax would have been acting only as his agents, and, since the act of an agent is that of his principal, it would follow that through their instrumentality Kahana, himself, was in possession of the flax and was actually making a profit out of the sale of merchandise and not realizing interest on the extension of money. Moreover, legally, if Kahana's name had not been mentioned, there would have been no legally recognized agency, the sales price would have been legally vested in the actual vendors, and Kahana would merely have been entitled to the return of his money, the more so, since, we have learned, under later law, the mere payment of money wouldnot constitute a confirmation of a contract of sale, since, at any time before delivery, the vendor may, according to the Rabbis, retract. This latter interpretation is original and

may be in error, for certainly it is not to be found in any of the recognized commentaries. The Talmud takes the position, however, that there had been a bona fide sale by symbolic reduction to possession and that the vendors, as unauthorized agents, were guilty of misappropriation, which is robbery, and that robbers must make restitution in accordance with the value of the stolen merchandise at the time of the robbery, the robbery, in this case, having been committed at the very moment of the second sale. Even, however, if there had been no formal taking into possession so as to make the first sale to Kahana binding, yet, one might say, that there had been a contract here for present payment and future delivery, and in that event, Rab, himself, had previously ruled, that should future delivery prove impossible, the obligor is bound to substitute therefor payment of money in accordance with the value of the merchandise at the time when delivery was to have been made. The significance of the foregoing lies in the demonstration of the scrupulousness with which equity sought out all instances which might possibly be suspect of usury.

B.M.60b to 75b is given over wholly to the matter of interest. Only two specifically equitable elements, however, appear, as the remainder can well be construed as strict law. One example, afforded by the Mishna it-

self, of the extension of the concept of usury, is that in which "short-selling" is so defined. This appears at the very beginning of the reference above. A man buys a future in wheat, but at the current price, which is altogether legal. Prior to delivery, there is a rise in the market. The vendee then approaches the seller and demands his wheat, telling him that he wishes to liquidate at once and purchase wine with the proceeds. The vendor then asks to be relieved of his obligation and offers, in consideration of his release, to render himself liable to the vendee for wine in a value equal to that of the wheat at the time of the demand for delivery, but, in making his offer, the vendor has no wine! Here he is making a profit on merchandise not in his possession so that in the eyes of equity all that he is doing is realizing, or seeking to realize, a usurious return on his money. It need hardly be stated that a return of merchandise in an amount greater than that originally lent is no less usury than where money is substituted for the merchandise. In this case, however, the rule goes beyond the limits of an augmented return of either merchandise or money.

At B.M.62b a case arose to which certain members of the court attempted to apply the foregoing rule, albeit their reasoning was not accepted. A sought a loan of money

from B. Since B did not have the money to extend the loan, he gave A, instead, wheat equal in value to the amount sought at the then current market. Laber B purchased the wheat from A at five sixths of its former value. At this point A stilled owed B the full value of the original loan. With the purchase price received from B, he could pay off five sixths of the loan in cash and would then still be liable for the remaining sixth. B now comes forward and tells A that he wishes to buy wine in an amount equal in value to the face of the loan and demands repayment. If A had wine up to that value he could pay off the loan with the wine and neither law nor equity would object. In that case he would have received merchandise in a fixed value and he would have satisfied his obligation by paying back merchandise, albeit of another species agreeable to the creditor, in equal value. But A had no wine! Therefore B demanded that he pay in cash the full amount of the wheat which he had received in terms of the amount of the wheat at the time of the loan. This, as stated, certain members of the court frowned upon as a usurious demand. They argued that since B already had received back all the wheat which he had loaned to A, and had given in exchange therefor five sixths of the original value, since wheat had in the interim depreciated, he had morally been paid in full subject only to the return by A to B

of B's purchase price, given in exact exchange of the wheat. To seek to recover the purchase price plus the additional sixth in cash would be to seek interest, for here, on the basis of market fluctuations, he is seeking to profit at the debtor's expense. Here A, the debtor, is likened to the vendor in the case set forth in the Mishna, but as is obvious, here, clearly, "the shoe is on the other foot", and to that extent the reasoning is fallacious. Why is reasoning, such as that set forth in the last example, more properly denominated equitable rather than legal? The reason is two-fold. As shown, there was fear that the creditor was unjustly profiting at the debtor's expense, since, having received back the wheat originally loaned, he sought additional payment as well. Actually this was not the case, but to the extent that it was believed to be, it constituted a case of unjust enrichment which invariably falls within the four corners of equity. The other element involved is that wherever a case "shocks the conscience of the court" that case is amenable to equity, yet the court, itself, does not distinguish in these cases between law and equity.

Technically, as repeated so often herein, the great bulk of matters applicable to usury are legal rather than equitable, and yet, in an Aggadic sense, the Rabbis looked

upon the entire matter as of the essence of equity for (B.B.90b): "Our Rabbis taught: Concerning those who hoard produce (THOSE WHO SEEK TO 'CORNER THE MARKET'), lend money on usury, reduce the measures and raise prices, Scripture says: 'Saying: When will the new moon be gone that we may sell grain? And the Sabbath that we may set forth corn? Making the ephah small, and the shekel great, and falsifying the balances of deceit.' And it is written in Scripture: 'The Lord hath sworn by the pride of Jacob: Surely I will never forget any of their works.'"[72]

In conjunction with the above quotation (B.B.91a) we learn that middlemen in Palestine who dealt in the necessities of life were deemed to be userers, these necessities including wine, oil and certain types of flour. R. Eleazar b. Azariah excepted oil since it was so plentiful that the market price remained permanently low and the profit realized thereon could not be deemed usurious. R. Judah b. Bathyra excepted wine because he was willing to overlook usurious profit, resulting in a high market price, since this diminished the availability of wine thus reducing consumption and excessive intoxication.

8. Equity's Attitude Toward Witnesses:

False swearing, while unconscionable, is nonetheless a matter of law and not of equity. We know, moreover, that while equity frowns upon him who, knowing of evidence favoring a litigant, yet fails to testify, equity is without power as a practical matter to remedy the situation. Reference has also been made to the problem of a Jew testifying in a non-Jewish court whose rules of evidence and procedure Jewish law looks upon as tending toward the defeat of justice. There are other instances as well, however, where equity will interpose in the matter of witnesses.

It is obvious that a person testifying in a case may well give utterance to a false statement, a deliberate instance of perjury, and at the same time testify to much that is true. Usually where this occurs, and where the perjury is shown, his credibility is so shaken that none of his testimony will be accepted as true. This is not a matter of law but of psychology. In Jewish law, once a witness has been shown to have committed perjury, he is thereafter utterly disqualified from appearing as a witness, anything he may say then or in the future, even under oath, being deemed false.

With this in mind, we come to a case of one who testified that a certain person had robbed another of cattle and had then had the cattle slaughtered. It will be recalled that for the offence of robbing, double damages will lie, and for the second offence of slaughtering, the damages will become five, or at the least, fourfold. Hence, the burden of the evidence is serious. In the course of the trial it was clearly proven that the charge of slaughter was without foundation, whence, as to that statement, the witness was clearly shown to have perjured himself. What view should be taken of the earlier statement of the witness as to the commission of robbery?

At Jewish law, the general rule is that one is deemed to speak the truth until proven to be a perjurer. As the proof of perjury was effected as to evidence given by the witness subsequent to that as to robbery, it would therefore appear that the testimony as to robbery must stand as true. This is very fair treatment of the past reputation of the perjurer, but might not the result, in terms of the welfare of the defendant, prove, at the least, somewhat inequitable? So it appeared to certain of the Rabbis. The majority opinion had been that where two statements are made, one immediately after the other, as in this case,

with no more time between them than that sufficient for the uttering of a greeting, they nonetheless constitute two separate statements; whereas R. Jose opined that they became fused into a single utterance. In R. Jose's view, therefore, the testimony as to robbery would have been inadmissable. But do we properly construe R. Jose's view, for if two statements are made as here, but not under oath and not as testimony, but in the ordinary course of daily living, while R. Meir would accept the first as expressing intent and disregard the second, R. Jose would accept both, even if an inconsistency should be involved? In R. Papa's view, two such statements would merely be indicative of a change of mind, and hence, if both constitute one statement, then the second portion should serve as a modification of the first. Only in this way can R. Jose's position be made to harmonize with common sense. Actually where one speaks of the time necessary for a greeting it is a prerequisite to determine what type of greeting is referred to: that as between inferior and superior, which being more respectful is consequently the longer, or the terser greeting returned by a superior to an inferior. Where the longer interval extends between the two statements, R. Jose holds that they are two and apart, thus agreeing with the majority opinion, but, where the shorter greeting is applied to the measure of the interval,

then only will he view the two statements as undergoing consolidation. (B.K.73a ff.) In the foregoing one sees in the argument of R. Jose a desperate attempt in the interests of equity to avoid the requirements of the law as explicitly set forth, in order to hold the witness retrospectively a perjurer that the defendant may not, through the witness's earlier testimony, suffer an injustice.

In Jewish law, as in modern law, it was common for heirs to adjust their equities through an action for partition. "There came a brother to Mari b. Isak from Be Chozai saying to him: 'Divide with me!' I do not know you,' he replied. So they went before R. Chisda. Said he to him: 'He speaks truly to you for it is written: "And Joseph knew his brethren but they knew him not," which teaches that he had gone forth without the stamp of a beard and came with one. Go then,' he continued, 'and produce witnesses that you are his brother.' 'I have witnesses,' he replied, 'but they are afraid of him because he is a powerful man.' Thereupon he said to the other: 'Go you and bring witnesses that he is not your brother.' 'Is that justice?' he exclaimed, 'the onus of proof lies on the claimant.' 'Thus do I judge in your case,' he retorted, 'and for all who are powerful men of your like.' 'But after all,' he retorted, 'witnesses will come and not testify'. 'They will not

twice trespass,' he rejoined. Subsequently there were witnesses that he was his brother."[73] (B.M.39b) In this passage we again are reminded of equity's attitude tothose who withhold evidence by refusing to testify, as also of the presumption in favor of the credibility of a witness until the contrary has been proven. Here, however, the litigant is called upon to prove a negative contention. In this respect Jewish law can be said to be inequitable and wanting, always assuming that the foregoing can be taken as precedent. In another sense it is equitable, since the defendant, by instilling fear, silenced the plaintiff's witnesses, the defendant is forced, in effect, to an "inquest."

Equal treatment of litigants and witnesses, devoid of partiality even in respect of formalities is demanded, "Our Rabbis taught: 'In righteousness shalt thou judge thy neighbor' that one should not sit, and the other stand; one speak all that he wishes, and the other bidden to be brief. Another interpretation: 'In righteousness shalt thou judge thy neighbor': judge thy neighbor in the scale of merit. R. Joseph learned: 'In righteousness shalt thou judge thy neighbor': he who is with thee in Torah and precepts - endeavor to judge him favorably." (Sheb.30a)[74]

The foregoing is primarily Aggadah but is typical of much that is found on the general theme throughout Talmud, including some of the extremely pertinent aphorisms in Aboth, which are not quoted here, being more ethics than equity. One more example, however, offers too overwhelming a temptation toproduce for it to be denied. (Sheb. 30b ff.): "How do we know that a judge should not appoint an advocate for his words? Because it is said: 'From a false matter keep far'. And how do we know that a judge should not allow an uncultured disciple to sit before him? Because it is said: 'From a false matter keep far.' And how do we know that a judge who knows his colleague to be a robber, or a witness who knows his colleague to be a robber should not join with him? Because it is said: 'From a false matter keep far.' Andhow do we know that a judge who knows that a plea is false should not say: Since the witnesses give evidence I will decide it, and the chain will hang around the neck of the witnesses. Because it is said: 'From a false matter keep far'".[75]

The word אונאה, it would appear, is to be found but three times in all Talmud. It is defined by Jastrow in his Dictionary as either equity or consuetudinary law. In all three places of its appearance (B.M.5a, B.M.62 and Sheb.40b ff.) it is always used in conjunction with an oath to be

taken by a litigant where no oath is required by law. Thus we find that in the absence of legal requirements for the taking of oaths, as in the plea of general denial,* equity will interpose this "equity oath" in the interests of enforcing truth. This draws into sharp focus the intervention of equity in the matter of testimony, at least in respect of the litigants themselves in the drawing of their pleas. Apparently, therefore, equity will tolerate the entry of no plea except under oath, in which respect the Rabbis have far exceeded the requirements of biblical law. (See p.124 ~~bottom~~)

*כפר הכל

III. REMEDIES AT EQUITY

1. Fraud, Mistake and Reformation:

Fraud is essentially a legal question. Precisely what it is has never been defined nor will ever be defined, since, by the very endeavor to define it, it is set within limits, clearing the way for *de facto* fraud beyond the powers of the court. Five elements are necessary to spell out fraud: misrepresentation, scienter, intent, reliance and loss. Thus, where these are lacking, the courts of law are without jurisdiction. Equity then deals alone with the anomalous situation of fraud that is not technically fraud. It is here, where there is no clear-cut fraud, but merely the suggestion or danger of fraud, that fraud is primarily a matter for equity, and it is with this latter situation alone that we are concerned.

Mistake of fact or of law on the part of a contracting party may lead to gross injustice should the contract be enforced. Clearly, in such instance, only equity can grant relief. Where, therefore, there is danger of either fraud or mistake occasioning an unjust loss in the case of a contract or other formal instrument, one of the prime

remedies afforded by equity is that of reforming the written instrument.

It is to the several considerations, set forth above, that we must now address ourselves.

Possession, in Jewish law, is necessary to effect ownership. As a matter of common sense, he who first takes possession of a lost object is its finder, and, as a general proposition (the law lists many exceptions), the finder is entitled to ownership. Assume, however, that the first to seize a lost object, through physical causes, is not able to continue in its absolute possession. In law, the first absolutely to possess it could claim ownership, but in so claiming, would this not effect a species of fraud against the interest of the de facto finder? To be sure, the first to seize the object could bring his claim to court but the possession had by the other would bear against him. The rule has therefore been established that in cases of conflict of claim as between finders, let us say of a garment, "Two hold a garment. One of them says: I found it. And the other says: I found it." (B.M.2a - Mishna)[76] In this way, formally at least, they symbolize the existence of equal and simultaneous possession and their case can then be adjudicated solely upon the merits.

(B.M.12b) "Mishna: If one finds notes of indebtedness containing a mortgage clause pledging property, one shall not return them, because the court will enforce payment on the strength of them. If they contain no such mortgage clause, one shall return them, because the court will not enforce payment on the strength of them. This is the view of R. Meir. But the Sages say: One shall not return them in either case, as the court will enforce payment."[77] This means that neither party is to have the instruments returned to him. Where all agree the court will enforce payment, reference is of course made to payment out of the property, itself, which may not necessarily stand any longer in the name of the original debtor but rather of innocent purchasers. R. Meir holds, however, that if they are innocent purchasers the court will not presume that they either assumed or took subject to an implied mortgage, but this is not the law. Any analysis of the foregoing will show that the circumstances bristle with possibility of fraud which the Rabbis desire to prevent. Therefore, for a clearer understanding of what is involved, a detailed study of the entire Gemara following is well in order.

If the debtor should confess his indebtedness, what harm in returning the instruments? Because if he cannot

satisfy the obligation the creditor can proceed against the property now in the hands of innocent purchasers. On the other hand, in the absence of mortgage, if the debtor denies the obligation, why should the instruments be returned? If the creditor cannot proceed against innocent purchasers, still, he has a right to attach the debtor's own property, but this may be unjust if the debtor's claim that he has satisfied the obligation is true. Let us assume that the case is one in which the debtor confesses liability; nonetheless, there is the possibility that the instrument of indebtedness was predated many months before the actual loan was extended, so that the creditor, relying on the date recited in the instrument, might attach property in the hands of purchasers from the debtor which passed at a date prior to the actual extension of the loan. Certainly here there would be no implied mortgage and a fraud would certainly be perpetrated against the purchasers, the more so since the creditor would know the actual date that the loan was effected. But if there is fear of fraud through predating would not all documents be suspect? That is beside the point because here, the documents having been allowed to become lost, the situation raises a presumption in favor of their invalidity, since people are not careless with instruments of worth. It will be noted that here we are not dealing

with actual fraud, but solely with the danger of fraud. It should be borne in mind, to be sure, that one of the conditions of the granting of the loan might have been that property be mortgaged back to the date set forth in the instrument, and this is quite proper. The assumption cannot be made in the case of an instrument already suspect by reason of having been lost. The validity of an instrument and its terms is supported by evidence of execution over the signature of witnesses when the instrument is brought forward by the creditor. But a lost instrument may never have been in the hands of the creditor recited therein, or may have left his hands lawfully, and it would be wrong under the circumstances of doubt, here obtaining, to place an instrument in his hands to which he may well not be entitled. The fact that it is not in his hands is prima facie evidence of cancellation.

There is always the possibility that the instruments were deliberately thrown away because at the time they were known to be illegal. It would be inequitable to create the temptation to use them for a second time. There is also the danger of collusion, as where the debt had become extinguished through payment and where the borrower, in conspiracy with the lender, dropped the instrument where it could be found in the hope that, upon its being returned,

the lender would satisfy it a second time out of the property of the debtor which had found its way into the hands of innocent purchasers, with a subsequent division of spoils between borrower and lender. Again, there is always the possibility that the instrument may be a forgery, dropped in a moment of conscience. It is logical to suppose, however, that if the instrument was no longer operative through the satisfaction of the obligation that it would be returned to the debtor who would at once destroy it. Hence, the very fact of its being found is extraordinary, since, the debtor would destroy it if it were without value and the creditor would be at pains not to lose it if it were. Now R. Meir had held that in the absence of a specific mortgaging clause there is no right to proceed against property, there is no implied mortgage. This would avoid the problem of the innocent purchaser. Hence only debtor and creditor are left to be dealt with and, if there is the possibility of forgery, certainly neither of them should have the instrument.

If the debtor denies the validity of the obligation and there is no mortgage involved, even if the instrument were lost and never found, the oral testimony of the witnesses to the instrument would be sufficient to enforce the obligation. But where the instrument is lost in a place

where it can be found, and is, indeed found, why believe the witnesses more than the borrower when an odor of suspicion permeates the circumstances? The borrower's contention of forgery raises a valid presumption of illegality as to the entire alleged transaction. Where there are no innocent purchasers involved, however, and where the debtor admits the debt, there is no possibility of fraud and the instrument may then be returned. Where he does not admit, even if he fails to allege forgery, there is still the possibility that the debt may have been satisfied. The sole difficulty, therefore, lies in the existence of innocent purchasers. The more especially where there is no mortgage and there is the difference of opinion as to whether an implied mortgagecan be assumed to exist. The doctrine of implied mortgage rests on the assumption that all notes of indebtedness will recite some measure of security, and that, if this is lacking, it is due to the negligence of the notary.

This assumption is actually an unfounded presumption as no purchaser of land is an innocent purchaser, every deed containing warranties of title and against encumbrances if these can be given, and frequently a clause is inserted protecting the buyer against claims against the property by subsequent creditors of the seller, all details of such conveyance undoubtedly being communicated to the creditor

at the time of the drawing up of the loan instrument. The omission of a mortgage clause in a note of indebtedness may well be deliberate. Yet, as against this, there is the presumption in favor of security, and in the absence of pledge, where, but in the debtor's land, would security be found? Actually, the land may be security for the debt and there may be warranties in the deed of transfer, inwhich event, as between creditor and grantee, the latter has the superior right, and this is even so in the absence of express warranty, since equity will imply the warranty. This implied warranty, running to the benefit of the grantee, would protect him against the creditor's fraud, if indeed there is fraud, even were the note of indebtedness to be returned to his hands. It should be understood that the creditor has a right to take the land, if it is set up as security for the debt, and can oust the grantee, but the grantee can thereafter proceed against the creditor for the value thereof.

At this point in the argument, the Rabbis depart from the subject of fraud potential, and describe a situation which might be construed as actual fraud, although legally it is not so considered. Assume that the creditor appears before the grantee has entered into possession. In that case, as we now know, there is no sale, and the grantee

is able to retract. If, however, he has just entered into possession, he is without recourse against the seller under his warranty until seizure by the creditor has been judicially declared legal. Suppose, however, that, properly, the field is already the creditor's, so that the whole is a fraudulant conveyance; then the grantee can sue for the selling price plus the cost of improvements, although Samuel says only for the selling price. The Rabbis feel, however, that there is always an implied agreement to compensate for improvements so that Samuel's opinion could not be sustained on these grounds, much less where there was an express agreement to that effect. The only explanation is that possibly the improvements are deemed non-existent, since made on land which, for the grantee, never existed, since title was defective, so that he would be getting a return on property he never possessed, which, as a species of "short-selling" is, as shown above, usurious, hence illegal. The situation described here is not considered a fraudulant conveyance at Jewish law.

The above discussion extends part way down B.M. folio 14b. Continuing on 16b we find that deeds to land, if found, are returnable, since the situation here doesnot lend itself so readily to fraud, and this is so even when the deed served as a mortgage, i.e. security for a debt, for in the case at hand, as to the debtor, "he has himself to blame for the loss,

for at the time when he paid he should have torn up the document or he should have another document to be written (GIVING HIM LEGAL TITLE TO RECLAIM THE LAND), and it is only because 'and thou shalt do that which is right and good in the sight of the Lord', that the Rabbis declared that it should be returned; therefore he is buying anew and he ought to ask for a deed of sale to be written."[78] Here we have another example of the use of the biblical expression referred to above in several connections but here interpreted to create a measure for the prevention of fraud, but the Rabbis will not protect against fraud where it is made possible through negligence.

Notes of indebtedness are not returned, when found, even if endorsed by the court, thus ruling out the possibility of fraud in inception, since they may, nonetheless, have subsequently been paid off. There is yet another reason. The testimony of the debtor, as witness, may not be acceptable because he has previously been convicted of perjury. (This has been explained above.) Hence, were the debtor to plead payment, his plea wouldnot be acceptable under the laws of evidence, and if the plea were true, although barred, and the instruments were returned and produced in court, the debtor might be the victim of a quasi-

fraud by reason of his earlier perjury in an altogether different connection. Thus we find that equity will even protect the wrong-doer!

Following the foregoing, the Gemara considers the matter of fraud which may flow from false pleadings. Every pleading of a defendant in court must be verified under oath (B.M.5a)[79] as every plaintiff is assumed to have a cause of action, (Sheb.40b) so that an unverified general denial is deemed nugatory in Jewish law. When a judgment debtor swears in open court that he has satisfied judgment, he is believed. Thereafter the judgment creditor cannot resort to issuance of execution and levy. If, however, a debtor has judgment issued against him, and then in supplementary proceedings (which in Jewish law is deemed a separate action) pleads that he has already satisfied his obligation, his oath is not accepted and execution will issue in favor of the creditor. R. Zebid in the name of R. Nachman dissented from this ruling of R. Nachman as reported by R. Joseph b. Manyumi on the ground that the two situations are identical and that the defendant should be believed in both instances, although in the first case, actually, he pleads that he has paid the judgment, and, in the other, that he has already paid that for which the original action was brought to effect recovery.

The rule is, that if, following judgment, the creditor, in the presence of witnesses, demanded the payment of the judgment and was refused, it is assumed that the debtor would not subsequently have paid in the absence of witnesses and his oath of payment is deemed perjurious. If, however, his assertion of payment is made in court, but not addressed to the judgment, and witnesses show that subsequent to judgment demand was made upon him for payment which was refused, then his subsequent oath in open court of payment of the obligation upon which the primary action was brought is merely looked upon as a delaying action to induce the court to reconsider the merits. Hence, in the first instance, the obviously false oath is deemed an attempt to defraud the creditor, whereas where there is an opportunity to interpret the false oath in the defendant's favor and against being indicative of fraud, the court readily embraces that interpretation. Thus equity not only seeks to prevent fraud but also to avoid it, the two being, clearly, by no means synonymous.

Statements under oath, not made in open court, are not deemed perjurious, even if untrue, since it is assumed that such oaths were made under pressure and were not designed to defraud.

Returning to the theme of notes of indebtedness found on the street; even these, though bearing date of the day in which they are found, are not returnable since even then there is a possibility of their having been paid off. Another species of fraud anticipated in this connection by the Rabbis was that in which a note would be given for a valid debt; the debt would be paid off; a new debt would be negotiated orally; and the old note would be held by the creditor in order to cover the new debt. This holding would be illegal for the reason that, under Jewish law, one could attach a debtor's property for the satisfaction of a debt memorialized by a written instrument, but not for the satisfaction of an orally contrived obligation. Hence, to return a note to a creditor which could actually be used by him for the enforcement of a parole obligation in contravention of law, would be to enable him to perpetrate a fraud, and was accordingly disallowed.

All stipulations entered into in open court and with the concurrence of the court are binding. A plea, even under oath, of performance of such stipulations, is not acceptable unless supported by other evidence. To such an extent was Jewish jurisprudence willing to go in order to set up what it deemed the necessary preventatives in respect of fraud.

The following Mishna (B.M.18a) appears immediately after the Mishna next above quoted, exclusive of the intermediate passages of Gemara just outlined. "If one finds bills of divorcement of wives, liberation of slaves, wills, deeds of gift, and receipts, one shall not return them, for I say, they were written, but he changed his mind, not handing them over."[80] Here, once again, the court seeks to avoid fraud on the part of the beneficiaries named in the instruments against the drawers thereof. The foregoing enactment is modified however, when the drawer admits it to be genuine. If he does not, there is also the danger of mistaken identity as where two have the same name and return might be made to the incorrect party. Within certain limits, however, if the document can be identified by certain distinguishing marks, it is subject to return. Certain persons of known veracity, as, for example, outstanding Rabbinic scholars, are entitled to return if they are able to say candidly that they recognize the document as their own on sight.

The same difficulty in respect of innocent purchasers presents itself in the case of bills of divorcement as in notes of indebtedness, when the documents may possibly have been predated. The rule is different, however, for the note of indebtedness is <u>prima facie</u> evidence of the rights of the

creditor, whereas, for the recovery of property of a former husband under a billof divorcement, the bill is insufficient without corroborative proof through judicial process. Hence, in this respect, the problem of fraud is avoided.

In the case of instruments of manumission, return is allowed if the slave owner admits the genuineness of the document. As to the problem of predating and innocent purchasers, the slave is in all events compelled to bring proof of the actual date of original delivery of the deed of liberation.

In the case of other documents set forth in the Mishna above, except the will, validity is only effected by delivery, and where these have been lost, the proof of delivery is lacking. If a party in interest, as the son of the deceased, testifies that valid delivery of an inter vivos deed of gift made in anticipation of death was given to some outsider, testimony clearly against the heir's interest, even then delivery is in question, as there may be some element of collusion, and the son, in that case, would be called upon by the court to substantiate the truth of the testimony by making over a deed of his own to the third party after inheriting the property himself, the father having been deemed to have died intestate thereto.

In the foregoing case, should it transpire that there is a second deed of gift drawn in favor of another party, then certainly the testimony of the heir at law will be disregarded and the existing deed which was not lost will prove controlling, as in that event the court greatly fears collusion as between the heir at law and the party favored by him, in that they may plan to share the property.

Finally, the case is again referred to of a receipt, the validity of which is denied by a wife. This involves the sale of a wife's interest in her marriage settlement, where she could renounce the debt and relieve her husband of liability, thus defrauding the innocent purchaser. If she denies its validity, then to return it would cause her loss. Even if she admits its validity, there is, as just shown, the danger of fraud being visited upon the innocent purchaser, but, as has been shown, the equities of the wife are comparable to his and the court will not step in on his behalf. Here, the equities being equal, the law prevails, and the law holds that a receipt has validity from its date, which, though delivered subsequently, is nonetheless accepted as valid from the date recited therein no matter what the hardship worked upon innocent purchasers during the period between the date and delivery. (B.M.20a)

We read (B.M.80a): "R. Jochanon said: If one sold a cow to another and informed him: This cow is a butter, a biter, an habitual kicker, and prone to break down; and it possessed one of these defects, which he inserted among the other blemishes, it is a sale in error. (BUT IF HE SAID): It has this defect and another too; it is not a sale in error. It has been taught likewise: If one sold a female slave to another and informed him: This female slave is an idiot, an epileptic and a dullard; and she possessed one of these defects, which he inserted among the others; it is a sale in error. (BUT IF HE SAID): This defect and another too; it is not a sale in error. Said R. Acha b. Raba to R. Ashi: What if she had all these defects? R. Mordecai observed to R. Ashi: Thus do we say in Raba's name: If she had all these defects, it is not a sale in error."[81]

Certainly, in the foregoing, we are not dealing with fraud. If anything, it cannot be gainsaid that the vendor is "leaning over backwards". Yet common sense assures us that the statement in the first part of each of the two examples was made with the obvious purpose of being discredited and it had every right to be discredited and would be discredited by the reasonable man. The buyer, therefore, took the cow or the slave, feeling certain that it suffered from none

of the defects ennumerated. In this belief he labored under a mistake of fact and equity will permit rescission. Where, however, the vendor admits two defects and names but one, he is dealing with the purchaser at arm's length and the purchaser acts at his peril if he buys before ascertaining the nature of the undisclosed defect. He walks into the sales transaction with his eyes open and is not a victim of mistake and is entitled to no relief. On the other hand, if all the defects listed were actual, even if the fact would strain the credulity of the ordinary man, nonetheless, we cannot possibly impute a dishonorable motive to the vendor nor can the vendee be said to have labored under a mistake of fact.

It will be recalled, that where land is to be sold, the owner of the adjaining parcel has a right of pre-emption. Suppose A and B to be neighbors. If A wishes to sell, B, owning the next parcel of land, could exercise his right of pre-emption. Suppose, however, that A sells a tract of land to C, which tract lies in the very center of A's estate, so that it is not contiguous to B's property at any point. B could then come into court and seek to have the contract rescinded as a deliberate evasion of the spirit of the law and hence invasion of his rights. In that event the court would inquire into the nature of the tract conveyed to C. If it

differed from the rest of A's land by being inferior or superior thereto, it could be said that there was validity in the sale and that no attempt was therefore made to deprive B of his rights, and certainly, on technical grounds, B would have no recourse to law. If, however, the tract was in all respects identical in quality with the remainder of A's land, equity would see in the transaction a deliberate invasion of B's equitable rights and would declare the sale to C to be void. (B.M.108a - bottom)

The Mishna (B.M.49b) specifically enacts that an overcharge of one-sixth constitutes fraud and that the purchaser has both a legal and equitable right to void the contract of sale. If he wishes to avail himself of this relief, however, he may not do so if he is guilty of laches. Laches is here defined as time in excess of that necessary for the vendee to determine that he has been illegally overcharged. In Lydda, however, an overcharge of one-third is substituted for one-sixth and the period for seeking relief is lengthened. As this latter was not acceptable to the Lyddan merchants, they voluntarily reverted to the general rule of the shorter period and the measure of one-sixth.

The law is unsettled as to whether overcharge should be determined in accordance with the genuine purchase price

or in accordance with the actual money that changed hands in the course of the transaction. It is possible that the vendee can defraud the vendor by buying at a price below five-sixths of value. Since the wording of the Mishna is taken literally, the rule of laches will not apply to the vendor, who can seek to have the contract voided at any time subsequent to its execution. Hence, overcharge includes "undercharge".

Rescission is not the only remedy available to the aggrieved party, for if he does not wish to go into equity he may go into law and sue for the return of the amount of which he was defrauded. Here equity and law enjoy concurrent jurisdiction. The law, not equity, went further, however, for if there was an overcharge of precisely one-sixth in excess of value, law would still allow suit for the recovery of the overcharge, whereas equity afforded no remedy. If there was an overcharge, but under one-sixth, the aggrieved was utterly without redress.

Finally, in this connection (B.M.51a) we find a conjoining of the matter of fraud and that of error. Clearly, the innocent party in a case of under- or overcharge, would have desisted from entering into the transaction altogether but for error of fact as to true value. The question is raised as to why laches should apply to the vendee, but not

to the vendor, and the reason is given that the vendee, having the purchase in hand, can compare prices and inquire as to its value and learn at once whether or not he was overcharged, whereas the vendor, not having the item subsequent to the sale, does not enjoy this advantage until a similar item eventually falls into his possession.

None of the foregoing applies to sale by a non-merchant of "intimate" property, since such property may well be enhanced by sentimental value. Where this condition is lacking, the law is technical and equity is not involved, except as set forth above.

Speaking of a conveyancer of land, R. Judah tells us (B.B.69b) "If he says: I sell you the land with the date trees; we have to consider: If there are date trees in it he has to give them to him; and if there are none: it is a sale made under a mistake of fact"[82] and as such the transaction is a nullity and can be declared void. Here, clearly, there is not the slightest suggestion of fraud, but both parties were laboring under a misapprehension which would have operated to the disadvantage of one of them, wherefore equity will grant relief by rescinding the contract.

The Mishna enacts as follows for the equitable remedy of mistake (B.B.83b): "One has sold wheat as good and it turns out to be bad: the buyer may withdraw. (IF) bad, and it turns out to be good; the seller may withdraw. (IF) bad, and it was found to be bad; good, and it was found to be good: neither may withdraw. (IF) red-colored, and it turned out to be white; white, and it turned out to be red; olive wood, and it turned out to be sycamore; sycamore, and it turned out to be olive; wine, and it turned out to be vinegar; vinegar, and it turned out to be wine: both may withdraw."[83] In all these cases, both parties are innocent of any intent to defraud, but are victims of an unfortunate condition brought about by a mistake of fact, and equity will grant relief. We are told in the Gemara that where one, but not the other, may withdraw in consequence of the above Mishna, the one who is not specifically given permission to withdraw in this Mishna may not withdraw under the rule of under- and overcharging in the event that the value changes by reason of market fluctuations, in that the mistake of fact is nonetheless looked upon as tinged with fraud, and, in essence, "he who comes into equity, must come with clean hands." Further, even if the price technically violates the rule of excess charge, the excess does not come about through deliberation, and

where it can avoid it, equity will not impose its own rules to work an injustice.

2. Interpleader:

Where one has in his hands that which admittedly is not his, and where he wishes to protect himself from the possibility of costly litigation brought on by two or more claimants, he may proceed against all claimants in equity through the remedy of interpleader, whereupon the claimants are called upon to establish the validity of their several claims, which are, of necessity, conflicting, and the possessor of the property constituting the res may avail himself of the right of deposit with the court. So also, if one of several claimants in a like situation should proceed against the holder of the property in order to effect a recovery, the defendant may avail himself of interpleader by impleading all other claimants as co-defendants.

The matter has already been referred to above. Thus when a thief voluntarily confesses and wishes to make restitution, but does not know which of two was his victim, he is required to make full restitution in kind or in value to each. Where a thief admits his guilt and claims are brought against him by five, R. Tarfon would permit him to avail himself of the remedy of interpleader, but R. Akiba insists

on full restitution to each of the five claimants. On the same principle, where one has entered into a marriage settlement with one of five, and all claim against him, R. Tarfon will allow him to employ interpleader, but R. Akiba insists on full payment in accordance with the agreement to each of the five, since R. Akiba assumes cohabitation, and, hence, moral turpitude, in no less sense than in the case of the thief. To all of this, as has been stated, reference has heretofore been made.

R. Tarfon, in defending his view as to the case of the marriage settlement, takes the position that the court is without right to presume the happening of cohabitation, and, therefore, moral turpitude not being present, the husband in the case stands in the same position as would a bailee. (Yeb.118b) What then is the position of the bailee?

We note (B.M.37a ff.) that where a bailee wishes to return the bailment to its rightful owner, but does not know which of two is indeed the rightful owner, he is required to make a full return to both, precisely as in the case of the confessing thief, but whereas the rule as to the thief stems from considerations of atonement, here, so at least it would appear, the bailee is being penalized

for his negligence in being unable to determine the true bailor. No matter how innocent the bailee may have been, nonetheless, where one of two innocent persons must suffer a loss, he who made possible the loss will, in the eyes of equity, be compelled to bear it, as has been pointed out before. It is made clear, however, that where the bailor, himself, is guilty of contributory negligence in being unable both to identify and to prove ownership of the bailment, but nonetheless enters his claim for its return, the bailee is not penalized, the bailor receives only so much of his bailment or its value as he can identify and prove to be his, and the remaining portion continues on deposit until such time as the bailor can justify his right thereto, if ever. In this latter instance, there being two claimants and two bailments of unequal value, both claiming the more valuable, neither is allowed to profit at the expense of the other in the absence of proof, as this would be most inequitable. While the Talmud does not afford a case of five bailors each claiming the same bailment from one bailee, there being the configuration of negligence and contributory negligence as above, yet, it is to be assumed on the basis of the marriage settlement case,cited above, that the bailee could exercise his right of interpleader without further liability or penalty.

The laws of negligence are, of necessity, more severe in dealing with a borrower thanwith a hirer. Assume, then, that one should be the bailee of two cows, both belonging to the same owner, one having been hired and the other borrowed, and assume, moreover, that one of the two died. Clearly it would be important to ascertain the identity of the dead cow, whether it was that which was hired or that which was borrowed, in order to ascertain the correct scale of liability to be applied to the case. Whereas in the cases set forth above, we did not know the identity of the bailors in terms of their respective bailments, here we are presented with the difficulty of identifying the bailments themselves. If the problem can be determined by trial at law, the matter is readily settled, and indeed, the law sets forth the method whereby this can be accomplished. If, however, both bailee and bailor are themselves in doubt and openly confess their ignorance in the matter, while there is here no opportunity for interpleader, yet equity affords relief by causing each to bear one half of the loss. (B.M.97b) So also if a building owned by co-tenants should collapse, and it is impossible to determine which of them should bear the liability, equity will cause them to bear the loss equally between them. (B.M.116b)

3. Injunction:

Injunctive relief is one of the oldest and most firmly established of all equitable remedies. That it runs to the very essence of equity, itself, is obvious from its preventative characteristic. That it was known to Jewish law is not remarkable, but that it should have been employed in cases involving unfair competition is somewhat astounding, since we have come to think of that concept as extremely modern.

We learn (B.B.21b ff.) that if the resident of an alley sets up a handmill, he may restrain another from setting up a handmill next door, as such an act would interfere with his livelihood. One may not fish where another has set up his nets. Legitimate means of advertising, as by employing "give-aways", is not deemed unfair competition.

In this connection, a question arose as to whether, by denying a man the right to engage in any calling of his choice on his own property on the grounds of unfairly competing with his neighbor, there is not the danger of infringing the rights of property owners to quiet enjoyment. It is held, in answer, that the residents of an alley can establish zoning restrictions prohibiting any

of the property owners therein from letting their premises to tailors, tanners, teachers or other craftsmen [sic], but that the individual property owner may not have the right of preventing this through seeking injunctive relief. R. Simeon b. Gamliel, nonetheless, would allow the restraining order to issue.

R. Huna b. R. Joshua would allow injunctive relief where a craftsman in one town threatened unfairly to compete with a similar craftsman in another town, provided, however, that the craftsman who threatened competition was not a local taxpayer, yet he would not allow relief as between craftsmen in a common alley. Here, apparently, he is drawing a distinction between competition patently unfair and that between bona fide residents. In no event, however, would he issue a restraining order to one teacher to be served upon another, because "the jealousy of scribes increaseth wisdom," nor to one itinerant spice-dealer against another. Should they cease to be itinerant, however, the rule would be otherwise, unless they used this means to earn a livelihood while studying. It will be noted how the unique Jewish love of learning and of the scholar is here a strong factor in determining opinions at equity.

"Certain basket sellers brought baskets to Babylon. The townspeople came and stopped them, so they appealed to Rabina. He said: They have come from foreign parts and they can sell people from foreign parts. This restriction applied only to the market day, but not to other days; and even on the market day only for selling in the market, but not for going around to the houses.

"Certain wool sellers brought wool to Pum Nahara. The townspeople tried to stop them from selling it. They appealed to Rab Kahana, who said: They have a perfect right to stop you. They said: We have money owing to us here. 'If so,' he replied, 'you can go and sell enough to keep you till you collect your debts, and then you must go.'" (B.B.22a)[84] Here, yet another example is afforded of equity violating equity for the sake of equity.

Injunction, in Jewish law, as elsewhere, is by no means limited to unfair competition, and one can be restrained from any act that may possibly cause damage to others: e.g. the erection of a ladder, the digging of a pit, blood-letting in a place where ravens might be attracted who could do harm to neighboring fig trees, constitute three such cases specifically mentioned, where, had the prohibition been lacking, damage might have ensued. (B.B.22b ff.)

4. Cy Pres:

The doctrine of cy pres, as used here, is that which allows equity to interpret written instruments in such fashion as would best express the intention of the drawers.

In B.B.124a we learn that there is no difference of opinion among the Rabbis as to whether the bequest of a young palm tree would have had the intent* of passing title to a full grown fruit tree, which the palm tree had become subsequent to the drawing of the will; or that of arid land when it produced alluvial soil. Clearly the intent included the possibility of the appreciation in value and the slight transformation of form. There is a difference of opinion, however, as between Rabbi and the majority where corn only fit for fodder turned into that fit for human consumption, or where undeveloped dates became full-ripened. While Rabbi held these to be natural improvement, the majority ruled that they constituted complete transformation.

The reason for the rule of the majority is that not only does the name of the object bequeathed change, but so also does its nature, from which it follows that the thing bequeathed had ceased to exist and had been supplanted by something entirely different as to which the testator was deemed to have died intestate. If, in one's personal opin-

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* See Page 143a.

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It should be understood that the word "intent" as used here and hereafter is employed by the writer to give clarity to the exposition. The beneficiary is not taking under a will but as a distributee "under the statute". The legal effect, however, is the same as if there were a problem of testamentary intent, and viewed in that light the operation of the Jewish equivalent of the cy pres doctrine can best be understood.

ion, the ruling seems strained and inequitable, nonetheless it should be remembered that the very remedy which permits recourse to the court for an adjudication of the matter is itself an equitable remedy.

Where one bequeaths grapes on the vine and olives on the tree, and these are subsequently cut or plucked, the intent is nonetheless clear that the beneficiary is entitled to recover them. Where, however, they are pressed into wine and oil, the intent is lacking, as a bequest of grapes and olives is scarcely a bequest of wine and oil. R. Joseph insists, however, that there could be neither wine nor oil if there had not first been grapes and olives. Actually, the case as presented (B.B.126a) is not quite as simple as the foregoing would lead one to believe, for at the time of death the pressing had not as yet taken place, although it took place prior to the time for distribution of the decedent's estate. Hence, it is held, that the wine and oil never were in the testator's possession so that it would be ludicrous to say that he had any intent to bequeath them. Against the hardship that this would impose on the heir, however, it was R. Assi's view that the heir should have protested against the making of the improvements before they were initiated, or, at least, forestalled them by protest until after the distribution of the estate. It

might be noted that the right to protest would itself have constituted a right to injunctive relief.

In this final instance of cy pres we find the Rabbis departing a great distance both from modern legal usage and from justice. If a testator establishes a life estate with remainder over, it is the law as laid down by R. Simeon b. Gamliel that not only can the life tenant commit waste according to his wont but that he can even alienate the freehold, or any part of it, not alone for his own life, but in fee simple absolute, and that the rights of the remainderman are limited only to that which may possibly be left on the death of the life tenant. However, if the life tenant attempts to make a gift of the freehold in anticipation of death and the life tenant's beneficiary enters into possession, an action in ejectment will lie when brought by the remainderman. It is conceded by the Rabbis that morally, this configuration leaves much to be desired, but the rights of the remainderman are interpreted in the will of the testator as having been expressed merely as precatory and consequently as not having constituted an intent such as would be recognized as binding by the court. "Abaye said: Who is a cunning rogue? He who counsels to sell an estate in accordance with R. Simeon b. Gamliel." (B.B.137a)[85]

5. Quieting Title:

Defects in deeds and other instruments affecting title were no less common in former times than today, and equity in Jewish law was, therefore, called upon for remedy.

The following discussion is based on B.B.168b ff., and it will be noted how once again equity is extremely circumspect in seeking to avoid any possibility of fraud.

If a creditor's bond became defaced he could apply to the court for an attestation by three witnesses who had examined the bond and the original witnesses to the bond and this attestation would constitute a valid substitute for the bond itself.

When Pumpeditha was infested with bands of marauding Arab brigands who were seizing both lands and the owners' deeds thereto, certain land owners applied to Abaye for duplicate deeds, lest if theirs be stolen, they would still have proof of title. It is unlawful, however, to issue duplicate deeds since a deed, as has been shown above, can be hypothecated and the mortgagee might be able to recover twice from the same land. All the relief that Abaye could afford was to give them copies of their deeds on paper on

which there had been nonesense syllables, subsequently erased. This would memorialize their title without having any legal value in and of itself, since a deed on erased paper is invalid. The reason for the nonesense syllables lies in the fact that if the original writing were restored it would be without legal effect. By like reasoning, no bond of indebtedness may be duplicated. Nonetheless, a deed, incapable of hypothecation, may be issued in duplicate. Where a deed is capable of hypothecation there is always the possibility of a conspiracy between two scoundrels if each has one of the deeds, since, posing as debtor and creditor, they can continually sell to third parties and then seize, the "debtor" becoming the "creditor" and the "creditor", the "debtor" alternately. The constant reference to frauds of these several types bears with it certain striking historical implications!

In the case of a new deed (duplicate) omitting the hypothecation clause, the Talmud points out, we have proof that a deed can exist without the recital of security and hence the absence of the recital does not constitute a Notary's omission. (This matter was referred to above.)

An agent secured land for his principal without having the seller insert a clause in the deed that in the event the

warranties of title were invalid, the seller pledged other of his land holdings as security. Since this clause was customary, the deed could be said to be defective. The agent had certainly not been instructed to bring back a defective deed. R. Nachman set aside the defective deed, caused the agent to buy the property in his own name in place of his principal's, taking in exchange a deed bearing the same defect, (to protect the grantor) and then had him make over the property to his principal with a proper deed. By this means not only was the principal's title cured, but the principal was able to hold the agent, rather than the original seller, in the event that the property should be seized by creditors of the original seller.

Title to land is established by possession of a deed rather than by proof of undisturbed possession according to the majority, albeit R. Simeon b. Gamliel takes the contrary position, since in his view the naked delivery of a deed into the hands of the grantee does not constitute in and of itself the grantee's having been vested with title. Why? Since one of the witnesses to the deed may have been disqualified, by reason of consanguinity or interest, to serve as a valid witness. In fact b. Gamliel goes so far as to hold that even if the grantor admits the deed to be valid in all respects, there must yet be proof of possession to

establish title. Aside from land, however, title is proven by witnesses to the act, if these are needed, rather than witnesses whose signatures appear on the instrument itself, that which gives the right to act.

CONCLUSION

To one who may ask whether in fact the entire body of Jewish law is not equity, not only externally, in relation to foreign systems of jurisprudence, as has been shown above, but inherently as well, let R. Chananiah b. 'Akashia give reply (Mak.23b): "The Holy One, blessed be He, desired to make Israel worthy, wherefore He gave them Torah and many commandments, for it is said: The Lord was pleased for his righteousness' sake to make Torah great and glorious."[86]

NOTES

1. דינא דמלכותא דינא

2. אלא כי עבדינן שליחותייהו במילתא דשכיחא ואית ביה חסרון כיס אבל מילתא דשכיחא וליכא ביה חסרון כיס א״נ מלתא דלא שכיחא ואית ביה חסרון כיס לא עבדינן שליחותייהו... בושתא ע״ג דשכיחא כיון דלית ביה חסרון כיס לא עבדינן שליחותייהו

3. השתא אחד רץ ואחד מהלך פטור שניהם רצין מיבעיא

4. אחד רץ ואחד מהלך פטור בד״א בע״ש בין השמשות אבל בחול אחד רץ ואחד מהלך חייב שניהם רצין אפילו בחול פטורין

5. ע״ש עם חשכה חנווני פטור מפני שחנווני טרוד

6. קונין קניין משכיב מרע אפילו בשבת ולא לחוש לדברי רבי אליעזר אלא שמא תטרף דעתו עליו

7. מנין לגזל כותים שהוא אסור ת״ל אחרי נמכר גאולה

תבריה לו שלא ימשכנו ושלא יבול עלומו עליו תלמוד לומר
וחשב עם קונהו ידקדק עם קונהו

8. קא מהדרנא ואין דעתו של אדם על כסות אשתו ובניו משום
איבה

9. כל המקדיש נכסיו נעשה כמי שהקנה להן כסות אשתו ובניו
מדיקרא

10. א"ר יהודה הכי מאן דבעי למהוי חסידא לקיים מילי דנזיקין
רבא אמר מילי דאבות ואמרי לה מילי דברכות

11. לפנים משורת הדין

12. לפנים משורת הדין הוא דעבד כדתני רב יוסף והודעת
בית חייהם את הדרך זו גמילו' חסדים ילכו זו ביקור חולים
בה זו קבורה את המעשה זה הדין אשר יעשון זו לפנים משורת
הדין

13. רב יהודה הוה שקיל ואזיל בתריה דמר שמואל בשוקא דבי
דיסא א"ל מצאו כאן ארנקי מהו אומר ליה הרי אלו שלו בא
ישראל ונתן בה סימן מהו א"ל חייב להחזיר תרתי אמר ליה

לפנים משורת הדין כי הא דאבוה דשמואל אשכח הנך
חמרי במדברא ואהדרנהו למרייהו לבתר תריסר
ירחי שתא לפנים משורת הדין

14. אמר מר אשר ילכו בה ביקור חולים היינו גמילות חסדים
לא נצרכה אלא לבן גילו דאמר מר בן גילו נוטל אחד מששים
בחליו ואפ׳ הכי מבעי ליה למיזל לגביה בה זו קבור׳
היינו גמילות חסדים לא נצרכה אלא לזקן ואינו לפי כבודו
אשר יעשון זו לפנים משורת הדין

15. דא״ר יוחנן לא חרבה ירושלם אלא על שדנו בה דין תורה
אלא דיני דמגיזתא לדיינו אלא אימא שהעמידו דיניהם על
דין תורה ולא עבדו לפנים משורת הדין

16. רבה בר בר חנן תברו ליה הנהו שקולאי חביתא דחמרא
שקל לגלימייהו אתו אמרו לרב אמר ליה הב להו גלימייהו אמר
ליה דינא הכי אמר ליה אין למען תלך בדרך טובים יהיב להו
גלימייהו אמרו ליה עניי אנן וטרחינן כולה יומא וכפינן ולית
לן מידי אמר ליה זיל הב אגרייהו א״ל דינא הכי אמר ליה
אין וארחות צדיקים תשמור

17. ר״מ אומר מניין שאפי׳ גוי ועוסק בתור׳ שהוא ככהן גדול
ת״ל אשר יעשה אותם האדם ולא נאמר כהנים לוים וישראלים

לא נאמר אלא אדם הוא לאתויי אפי' כותי שעוסק בתורה הרי הוא ככ"ג

18. רבי יהודה אומר סומא אין לו בושת וכן הי' רבי יהודה פוטרו מכל מצות האמורות בתורה.. א"ר יוסף מריש ה"א מאן דאמר הלכה כר"י דאמר סומא פטור מן המצות קא עבידנא יומא טבא לרבנן מ"ט דלא מפקדינא וקא עבידנא מצות

19. היכי בשוגג מר איסורא ממונא

20. סבר רבא למימר ימכרו לשילהי א"ל אביי דיין שקנסת עליהם מכירה

21. א"ר יוחנן משום רבי בנאה בכל שותפין מעכבין זה את זה חוץ מן הכביסה שאין דרכן של בנות ישראל להתבזות על הכביסה ועוצם עיניו מראות ברע א"ר ח"א בר אבא זה שאין מסתכל בנשים בשעה שעומדות על הכביסה היכי דמי אי דאיכא דרכא אחריתי רשע הוא אי דליכא דרכא אחריתי אנוס הוא לעולם דליכא דרכא אחריתי ואפ"ה מיבעי ליה למינס נפשיה

22. תנו אוספרא לך במלקות של כרת אחת אבל של שתים

ושל שלש כריתות איסורי הוא דקא עביד ולא מותר כולי האי

23. סנהדרין ההורגת וכו': איבעיא להו אחת לשבעים שנה נקראת חבלנית או דילמא אורח ארעא היא תיקו: רבי טרפון ור' עקיבא אומרים אילו היינו וכו': היכי הוו דבדי רבי יוחנן ור' אלעזר דאמרי תרוייהו ראיתם טריפה הרג שלם הרג אמר רב אשי אם תימצא לומר שלם הוה דילמא במקום סייף נקב הוה

24. אמרו נהרדעי שומא הדר עד תריסר ירחי שתא ואמר אמימר אנא מנהרדעא אנא וסבירא לי שומא הדר לעולם והלכתא שומא הדר לעולם משום שנאמר ועשית הישר והטוב

25. אמר רב יהודה אמר רב האי מאן דאמצר ביני אחי וביני שותפי חציפא הוי סלוקי לא מסלקינן ליה ורב נחמן אומר נמי מסלקינן ואי משום דינא דבר מצרא לא מסלקינן ליה נהרדעי אומרי אפילו משום דינא דבר מצרא מסלקינן ליה משום שנאמר ועשית הישר והטוב בעיני ה'

26. זבין לנכרי נכרי ודאי לא עבר ועשית הישר והטוב הוא שמותי ודאי משמתי' ליה עד דמקבל עליה כל אונסי דאתי ליה מחמתיה

27. חקירה אין בעל הבית עובר משום בל תלין והא אמרת ב"ה

טריד בפועלין הוא הני מילי מיקמיה דלימטייה זמן חיוביה
אבל מטא זמן חיוביה רמי אנפשיה ומידכר וכי שכיר עובר
משום בל תעשק והתם תרי חנקי הכא חדא חנקה אבי בעל
הבית איכא תרי חנקי חדא דאין בעה"ב עובר משום בל
תלין וחדא דאין שכיר משהא שכרו

28. אומר עולא רמז לעדים זוממין מן התורה מניין רמז לעדים
זוממין הא כתיב ועשיתם לו כאשר זמם אלא רמז לעדים
זוממין שלוקין מן התורה מניין דכתיב והצדיקו את הצדיק
והרשיעו את הרשע והיה אם בן הכות הרשע משום והצדיקו
את הצדיק והרשיעו את הרשע והיה אם בן הכות הרשע אלא
עדים שהרשיעו את הצדיק ואתו עדים אחרינא והצדיקו את
הצדיק דמעיקרא ושוינהו להני רשעים והיה אם בן הכות הרשע
ותיפוק ליה

29. כיוצא בו רוצח שגלה לעיר מקלטו ורצו אנשי העיר לכבדו
יאמר להם רוצח אני

30. התם דקא תבעי' ליה והא קא בעו לצאת ידי שמים דיקא נמי
דקתני שהורשה אבי עצמו שאנו מינה

31. לא נו הדרך מוציאתו מידי עבירה עד שיגלה גלילה לכל תו ותו

32. דילמא לאו בעיא לאפיגה איגרא הכא דכי אתנוי לידיה בהיתירא הוא דאתנוי לידיה אבל האי כיון דבאיסורא אתנוי לידי' מדרבנן הוא דאמר רבנן ניקני מפני תקנת השבים

33. השביחה גזלן שבחו כמו שאמ' לו הרי שלך לפניך דשינוי במקומו עומד אלא אפילו השביח נמי אמרי מפני תקנת השבים

34. א"ר חייא בר אבא א"ר יוחנן דבר תורה גזילה הנשתנית חוזרת בעיניה שנא' והשיב את הגזילה אשר גזל מ"מ ומ"מ משנתינו משום תקנת השבים

35. א"ר חייא בר אבא אמר רבי יוחנן האומר לחבירו מנה לי בידך והלה אומר איני יודע חייב בבא לצאת ידי שמים

36. אוהב לברוך ושונא לשמעון מצוה בשונאו כדי לכוף את יצרו ואי סלקא דעתך צער בעלי חיים דאורייתא הא עדיף ליה אפ"ה כדי לכוף את יצרו עדיף

37. ר"נ אומר רבה בר אבוה אמ' קרא ואהבת לרעך כמוך ברור לו מיתה יפה

38. א"ל רב יוסף כבר צוו ביה צדיקים ואדה"ם דליכא צדיקים הכא

אנן יך עניים אנן דאמר רב יהודה אמר שמואל יתומים אינן
צריכין פרוזבול וכן תני רמי בר חמא היתומים אינן צריכין
פרוזבול ר״ג ובית דינו אביהן של יתומין הוין

39. אמר מר זוטרא ואי לאו ואמר ליתו תרי סהדי לאסהודי ליה
דדר ביה תלת שני ביממא ובליליא לעניבה לענה ומודי
מר זוטרא בגרוכלין המחזירין בעיירות דאמ״ל דלא
לאו דמצינן ליה אותן ומודה רב הונא מחזי תאו דמחזיקא
דליממא עבידא לליליא לא עבידנא

40. העבד והאשה פגיעתן רעה והחובל בהן חייב והם שחבלו
באחרים פטורין

41. אחד חייבי כריתות ואחד חייבי מיתות ב״ד ישנן בכלל
מלקות ארבעים דברי ר׳ ישמעאל רבי עקיבא אומר חייבי
כריתות ישני בכלל מלקות ארבעים שאם עשו תשובה
בית דין של מעלה מוחלין להן חייבי מיתות ב״ד אינו
בכלל מלקות ארבעים שאם עשו תשובה אין בית
דין של מטה מוחלין להן

42. ולרבי עקיבא אי הכי חייבי כריתות נמי מאי אומר׳
שאם עשו תשובה השתא מיהת לאו עבידי

43. תנו רבנן שלשה צועקין ואינן נענין ואלו הן מי שיש לו
מעות ומלוה אותן שלא בעדים והקונה אדון לעצמו ומי
שאשתו מושלת עליו קונה אדון לעצמו מאי היא איכא דאמרי
תולה נכסיו בנכרי איכא דאמרי הכותב נכסיו לבניו בחייו
איכא דאמרי דביש ליה בהא מתא ולא אזיל למתא אחריתי.

44. השוכר את האומנין והטעו זה את זה אין להם זה על זה
אלא תרעומת

45. אמר רבה בר בר חנה אמר רב השוכר את החמור
לרכוב עליו ומתה לו בחצי הדרך נותן לו שכרו של
חצי הדרך ואין לו עליו אלא תרעומת

46. ההוא עבדא דזבן אורבא דחמרא לא אשכח דוכתא לאותביה
אמר לה לההיא איתתא חזי לי דוכתא לאותבי אמרה
ליה לאו אוכל קדשא והבה ליה דוכתא לסי״ לוי אזל
לביתיה כתבה לה גיטא שדר לה אזל ההוא אומרא
שקלוהו מיניה והיב שוביקתיה ומותביה בשבילא אומר
רב חנן בריה דרב יהושע כאשר עשה בן יעשה לו גמולו
ישוב בראשו לא מבעיא חלר דלא קיימא לגופיה אלא
אפי׳ חלר דקיימא לאומרא אמרה ליה לב״ע ניחא לי
לאומרי ולך לא ניחא לי דנמית עלי כי אריא ארבא

47. ת"ר רועה שעשה תשובה אין מחייבין אותו למכו' מיד
אלא מוכר על יד על יד וכן מי שנפלו לו כלבים וחזירים
בירושתו אין מחייבין אותו למכור מיד אלא מוכר על יד על יד
וכן מי שנדר ליקח בית וליקח אשה בארץ ישראל אין
מחייבין אותו ליקח מיד עד שימצא את ההוגנ' לו ומעשה
בא' שנשאת שהיתה בתה מגדלת לה וקפצה ונשבעה כל מי
שיבא אינה מקבלתו וקפצו עליה בני אדם שאינן מהוגנין
וכשבא הדבר אצל חכמי' אמרו לא נתכוונה זו אלא
להוגן לה

48. מפני שנשתרש בחטא אימת אילימא לפני יאוש מי איכא
נשתרש אלא לאחר יאוש ואי ס"ד יאוש קני אמאי משלם
תשלומי ד' וה' שלו הוא טובח שלו הוא מוכר אימא
כדאמ' רבא מפני ששנה בחטא ה"נ מפני ששנה בחטא.

49. ואתמר רב יהוד' אומר לא עביד איניש דינא לנפשיה
רב נחמן אומר עביד איניש דינא לנפשיה היכא דאיכ'
פסידא כ"ע לא פליגי דעביד איניש דינא לנפשיה כי פליגי
היכא דליכא פסיד' רב יהודה אומר לא עביד איניש
דינא לנפשיה דכיון דליכא פסיד' ליזיל קמי דיינא רב
נחמן אומר עביד איניש דינא לנפשיה דכיון דבדין
עביד לא טרח

סט. ואלו הן שמצילין אותן בנפשן הרודף אחר חבירו להורגו ואחר הזכר ואחר הנערה המאורסה אבל הרודף אחר הבהמה והמחלל את השבת והעובד עבודת כוכבים אין מצילין אותן בנפשן

ע. ואמר רבא רודף שהיה רודף אחר חבירו ושיבר את הכלים בין של נרדף ובין של כל אדם פטור מ"ט מתחייב בנפשו הוא ונרדף ששיבר את הכלים של רודף פטור של כל אדם חייב של רודף פטור שלא יהא ממונו חביב עליו מגופו של כל אדם חייב שמציל עצמו בממון חבירו ורודף שהיה רודף אחר רודף להצילו ושיבר את הכלים בין של רודף בין של נרדף בין של כל אדם פטור ולאו מן הדין שאם אי אתה אומר כן נמצא אין לך כל אדם שמציל את חבירו מיד הרודף

עא. ההוא גברא דהוה מפקיד גביה ארנקא דפדיון שבויים סליקו גנבי עילויה שקלה יהבה ניהלייהו אתו לקמי' דרב' פטרי' א"ל אביי והא מציל עצמו בממון חבירו הוא א"ל אין לך פדיון שבויים גדול מזה

עב. אי"ך יתכן כל המציל את חבירו שהיה ברודף כאילו נוטל נשמתו ממנו

54. שלא תהא בהמה עוברת בשוק ויאמרו זו היא שנסקל
פלוני ע״י

55. מנהני מילי א״ר יהושע בן לוי אומר ר״ש בן לקיש בשומר
קרא ועשיתם לו כאשר זמם לו ולא לזרעו וליפסליה
לבידיה ולא ליפסליה לזרעו׳ בעינן כאשר זמם לעשות
וליכא

56. ת״ר חפר ופתח ומסר לרבים פטור חפר ופתח ולא מסר
לרבים חייב וכן מנהגו של נחוניא חופר בורות שיחין
ומערות שהיה חופר ופותח ומוסר לרבים וכשמעו
חכמים בדבר אמרו קיים זה הלכה זו הלכה זו ותו לא
אלא אימא אף הלכה זו

57. דרכי שלום

58. נטלו מוכסין את חמורו ונתנו לו חמור אחר נטלו לסטים
את כסותו ונתנו לו כסות אחרת הרי אלו שלו מפני
שהבעלים מתייאשין מהם

59. תנא אם נטל מחזיר לבעלים הראשונים קסבר יאוש
כדי לא קני ומזיק׳ באיסור׳ אתאי לידיה

60. א"ל רב נחמן בר יצחק לרבא לימא ר' אליעזר לית
ליה דשמואל רביה דאמר שמואל הלכה כר' עקיבא
דאומר מוכר בעין יפה מוכר

61. א"ר יהושע ד' דברים העושה אותן פטור מדיני אדם
וחייב בדיני שמים ואלו הן הפורץ גדר בפני בהמת
חבירו והכופף קמתו של חבירו בפני הדליקה והשוכר עדי
שקר להעיד והיודע עדו' לחבירו ואינו מעיד לו

62. נשברה כדו ולא סלקו נפלה גמלו ולא העמידה ר"מ מחייב
בהזיקן וחכ"א פטור מדיני אדם וחייב בדיני שמי'

63. שורו שבייש פטור והוא שבייש חייב שורו שסימא את עין
עבדו והפיל את שינו פטור והוא שסימא את עין עבדו
והפיל את שינו חייב

64. שור שהיה מתחכך בכותל ונפל על האדם נתכוין להרוג
את הבהמה והרג את האדם לכותי והרג בן ישראל
לנפלים והרג בן קיימא פטור

65. אמר רבא למה לי דכתב רחמנא יציאות מצרים בריבית
יציאות מצרים גבי ציצית יציאות מצרים במשקלות אומר

הקב"ה אותי הוא שהבחנתי במצרים בין טיפה של
בכור לטיפה שאינה של בכור אני הוא שעתיד ליפרע
ממי שתולה מזונותיו בנכרי ומלוה אותם לישראל
בריבית וממי שטומן משקלותיו במלח וממי שתולה
קלא אילן בבגדו ואומר תכלת הוא

66. א"ר אסי א"ר יוחנן נתן צרור והוציא נטל צרור והטיל
ה"ז חצובה מאי נתן ומאי נטל אילימא נתן צרור
וסכר מיא מינה נטל צרור ושפיך מיא מינה הסוי
מבריח ארי מנכסי חבירו הוא

67. אמר אמימר דרגא דמשתעבד מחלוקת רבי יהודה ורבי
יוסי לר' יוסי דאמר אסמכתא קניא דרגא משתעבד לרבי
יהודה דאמר אסמכתא לא קניא דרגא לא משתעבד
אמר ליה רב אשי לאמימר הא מעשים בכל יום דאסמכתא
לא קניא ודרגא משתעבד אלא אמר רב אשי בההוא
הנאה דקא מהימן ליה גמר ומשעבד נפשיה

68. מי שפרע מאנשי דור המבול ומדור הפלגה הוא עתיד
להפרע ממי שאינו עומד בדיבורו

69. רב כהנא יהבו ליה זוזי אכיתנא לסוף אייקר כיתנא

אתאו לקמיה דרבא אמר ליה במאי דנקיטת בגוי
הבלא ואידך דברים ש׳נהרו ודברים אין דברין
משום מחוסרי אמנה דאיתמר דברים רב אומר
אין בהן משום מחוסרי אמנה ורבי יוחנן אומר
יש בהם משום מחוסרי אמנה

70. דבה הדיו רבנוה מהימן ליה טפי ומשעבד ליה

71. רב כהנא יהב זוזי אכיתנא לסוף אייקר כיתנא
זבניה מרוותי׳ דכיתנא אתא לקמיה דרב א״ל
מה אעביד איזיל אישקול זוזי א״ל אי כי קא
זבני אמרי האי כיתנא דכהנא הוא זיל שקול
ואי לאו לא תשקול

72. ת״ר אוצרי פירות ומלוי רבית ומקטיני איפה ומפקיעי
שערים עליהן הכתוב אומר לאמר מתי יעבור החדש
ונשבירה שבר והשבת ונפתחה בר להקטין איפה
ולהגדיל שקל ולעוות מאזני מרמה וכתיב נשבע
ה׳ בגאון יעקב אם אשכח לנצח כל מעשיהם

73. מרי בר איסק אתא ליה אחא מבי חוזאי א״ל פלוג לי
אמר ליה לא ידענא לך אתא לקמיה דר׳ חסדא א״ל

שפיר קאמר לך שנאמר ויכר יוסף את אחיו והם
לא הכירוהו מלמד שיצא בלא חתימת זקן ובאו
בחתימת זקן א"ל זיל אייתי סהדי דשותור את אומר
ליה אית לי סהדי ודחלי מיניה דגברא אלימא הוא
א"ל לדידיה זיל את אייתי סהדי דלאו אחוך הוא א"ל
דינא הכי המוציא מחבירו עליו הראיה א"ל הכי
דיינינא לך ולכל אלימי דחברך אמר ליה סוף סוף אתו
סהדי ולא מסהדו א"ל תרתי לאו עבדי לסוף אתו סהדי
דאחיה הוא

74. תנו רבנן בצדק תשפוט עמיתך שלא יהא אחד יושב
ואחד עומד אחד מדבר כל צרכו ואחד אומר לו קצר דבריך
ד"א בצדק תשפוט עמיתך הוי דן את חבירך לכף זכות
תני רב יוסף בצדק תשפוט עמיתך עם שאתך בתורה
ובמצות השתדל לדונו יפה

75. ת"ר מניין שלא יעשה סניגרון לדבריו ת"ל מדבר שקר
תרחק ומניין לדיין שלא ישב תלמיד בור לפניו ת"ל מדבר
שקר תרחק מניין לדיין שיודע בחבירו שהוא גזלן וכל עד
שיודע בחבירו שהוא גזלן מניין שלא יצטרף עמו תלמוד
לומר מדבר שקר תרחק מניין לדיין שיודע בדין שהוא
מרומה שלא יאמר הואיל והעדים מעידין אחתכנו

ויהא קולר תלוי בצואר עדים תלמוד לומר מדבר
שקר תרחק

76. שנים אוחזין בטלית זה אומר אני מצאתיה וזה אומר אני
מצאתיה

77. מתני׳ מצא שטרי חוב אם יש בהן אחריות נכסים לא
יחזיר שב״ד נפרעין מהן אין בהן אחריות נכסים יחזיר
שאין ב״ד נפרעי׳ מהן דברי ר״מ וחכ״א בין כך ובין
כך לא יחזיר מפני שב״ד נפרעין מהם

78. איבעיא להו דאודסיף אנפשיה דכל יזבנו דכתביה אודעי ליה
למקרעי׳ לשטריה או״נ למכתבא שטרא אחרינא עילוה
דמדינא ארעא לא בעיא למיהדר ומשום ועשית הישר
והטוב בעיני ה׳ הוא דאמר רבנן תהדר הואיל מרישא
הוא דקא זבין אודעי ליה למכתבא שטר זביני

79. ומשביעין אותו שבועת היסת

80. מצאו גיטי נשים ושחרורי עבדים דייתיקי מתנה
ושוברין הרי זה לא יחזיר שאני אומר כתובין היו
ונמלך עליהן שלא ליתנן

81. אמר רבי יוחנן המוכר פרה לחבירו ואומר לו פרה
זו נגחנית היא נשכנית היא בעטנית היא רבצנית
היא והיה בה מום אחד וטמנו בין המומין הרי זה
מקח טעות. מום זה ומום אחר אין זה מקח טעות.
תניא נמי הכי המוכר שפחה לחבירו ואומר לו
שפחה זו שוטה היא נכפית היא משועממת היא
והיה בה מום אח' וטמנו בין המומין הרי זה
מקח טעות. מום זה ומום אחר אין זה מקח טעות.
א"ל רב אחא בריה דרבא לרב אשי הוו בה כל המומין
הללו מהו אמר ליה רב מרדכי לרב אשי הכי אמרי'
משמיה דרבא' הוו בה כל המומין הללו אין זה מקח
טעות.

82. אורכו בדיקלי חזינן אי איתא בהו דיקלי יהיב ליה
ואי לאו מקח טעות הוא

83. מכר לו חטין יפות ונמצאו רעות הלוק' יכול לחזור
בו רעות ונמצאו יפות מוכר יכול לחזור בו רעות
ונמצאו רעות יפות ונמצאו יפות אין אחד מהם
יכול לחזור בו שחמתית ונמצאת לבנה לבנה ונמצאת
שחמתית עצים של זית ונמצאו של שקמה של שקמה ונמצאו
של זית יין ונמצא חומץ חומץ ונמצא יין שניהם יכולין
לחזור בהן

84. הנהו דיקלאי דאייתי דעקלאי לגבל אתו בני מתא קא
מעכבי עלוייהו אותו לקמיה דרבינא אמר להו מסלמא
אתו ולדלמא ליצבענו והני מילי ביומא דשוקא אבל
בלא יומא דשוקא לא וביומא דשוקא נמי לא אמרינן
אלא לזבוני בשוקא אבל לאהדורי לא תנאו דמוראי
דאייתי חמרא לגבול נהרא אתו בני מתא קא מעכבי
עלוייהו אותו לקמיה דרב כהנא אמר להו דינא הוא
דמעכבי עלייכו אמרו ליה אית לן אשראי אמר להו
זילו זבנו שיעור חייתייכו עד דעקריתו אשראי
דידכו ומצליתו

85. אומר אני אימתי רשע ערום זה המשיאו עצה למכור
בנכסין כרבן שמעון בן גמליאל

86. רצה הקב"ה לזכות את ישראל לפיכך הרבה להם
תורה ומצות שנאמר ה' חפץ למען צדקו יגדיל
תורה ויאדיר