THE JEWISH COURT IN THE MIDDLE AGES

STUDIES IN JEWISH JURISPRUDENCE
ACCORDING TO THE TALMUD, GEONIC AND MEDIEVAL
GERMAN RESPONSA

BY
DAVID MENAHEM SHOHET, M.A.; LITT.H.D.; PH.D.

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FOREWORD

THE following chapters embody the results of several years of study and research in the field of Jewish jurisprudence bearing on various aspects of Jewish life in Germany in the Middle Ages.

Begun several years ago under advice of Dr. Alexander Marx, Professor of History and Librarian of the Jewish Theological Seminary of America, the work has been continued under the supervision of Dr. Richard H. Gottheil, Professor of Rabbinical Literature and Semitic Languages at Columbia University.

It is indeed with deep appreciation that I extend my sincere thanks and render grateful acknowledgments to these Masters of Jewish Scholarship. To Professor Marx, for giving me a point of view at the start of my labors, and for suggestions and criticisms; to Professor Gottheil, for his encouragement to continue the work, and for his readiness to discuss with me various aspects of it; for helping me understand many Arabic sources in the Geonic Responsa, and for suggestions and improvements due to his preliminary reading of the work.

I deem it a privilege to record a feeling of profound reverence to my teacher, Dr. Louis Ginzberg, Professor of Talmud at the Jewish Theological Seminary of America. Master in the domain of Jewish learning, endowed with a phenomenal

analytical mind, he has instilled in those who were privileged to sit at his feet a love for Jewish learning, and a scientific approach to the study of the Talmud and its vast literature. It was his Geonica that gave me an impetus to study Geonic responsa and utilize them in this work to advantage. For his painstaking reading of the manuscript and his valuable notations, I herewith tender heartfelt thanks.

I also wish to tender my thanks to the good people of Congregation Agudas Achim of Yonkers, N. Y., for the many acts of kindness shown me during the years of my ministering in the community. For their encouragement in the past I herewith make grateful acknowledgment.

DAVID M. SHOHET.

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ABBREVIATIONS

ASHERI	—"Rosh" on the Talmud, and Responsa, of Asher ben Yeḥiel.
GEONICA	—Geonica, L. Ginzberg.
HG	—Ḥemdah Genuzah.
HGM	—Haggahot Maimoniyyot.
ḤOZ	—Ḥayyim Or Zarua—sefer Sh'elot U-Te-shubot.
MAFT	—Mafteaḥ to responsa by J. Müller.
MAHARAM	—Meir of Rothenburg
MAIM	—Maimonides
MBRB	—Responsa of R. Meir ben Baruch of Rothenburg, Edition Berlin.
MBRC	—Responsa of R. Meir ben Baruch of Rothenburg, Edition Cremona.
MBRL	—Responsa of R. Meir ben Baruch of Rothenburg, Edition Lemberg.
MBRP	—Responsa of R. Meir ben Baruch of Rothenburg, Edition Prague.
MHG	—Ma'ase ha-Geonim.
MORD	—Sefer ha-Mordecai on the Talmud.
NEZ	—Nezikin
OZ	—Or Zarua.
RABIH	—Sefer RaBiah Eliezer ben Joel Halevi.
RABNA	—Eben ha-Ezer sefer RaBen, Edition Albeck.
RABNR	—Eben ha-Ezer sefer RaBen, Edition Rumania.
RASHBAM	—R. Samuel ben Meir.
RASHI	—R. Solomon ben Isaac, Commentary to the Talmud.
RESP	—Responsa
RHG	—Rokeaḥ ha-Gadol.
SH	—Sefer Ḥasidim.
ST	—Sha'are Teshubah.
SZT	—Sha'are Zedek Teshuboth ha-Geonim.
TGM	—Teshuboth Geone Mizrah u-Ma'arabh.
TH	—Terumat ha-Deshen and Pesakim.
THG	—Teshuboth ha-Geonim by J. Mussafia.
THGH	—Teshuboth ha-Geonim by A. Harkavy.
THZW	—Teshuboth Ḥakme Zarfat We'lotir.
TSA	—Teshuboth ha-Rashba by Solomon Adret.
YAD	—Yad ha-Ḥazakah.
YER	—Yerushalm

Sources infrequently mentioned are referred to by the names of their authors as given in the Bibliography.

INTRODUCTION

AFTER the destruction of the Second Temple, the history of the Jews ceases to be a story of an active national civilization in a physical and political sense. There are no political achievements to record. Even the economic structure reared by the Jews of the Middle Ages, can hardly be called national or typically Jewish. The history of the Jews becomes a record of striving to maintain the racial, national, cultural, and religious identity of the Jewish people.

The historical tragedy of medieval Jewry is as logical an outcome of general European conditions as the inevitable clash between two opposing forces. European political, social, and economic standards were beginning to crystallize into definite form, and in this period of transition the Jews, with their religious traditions firmly established, and with a sense of justifiable pride in the history of their race, found themselves in a most unnatural and anomalous condition. The religious and racial personality of the Jews was so pronounced as to form a religious state within a religious state—a social, political, and economic unit within a larger social, political, and economic unit.

That such a state of affairs should be the harbinger of hatred and persecution on the part of the great majority towards the small minority was entirely to be expected.

It would, however, be wrong to imply that the Jews were not capable of adaptation. A perusal of these pages will convince even the most casual reader that the Jews were, as always, the most adaptable of peoples, ever capable of harmonizing their inner life with outward conditions. Ad-

justment is the keynote of Jewish history of the Middle Ages.

These efforts toward adjustment were being constantly menaced by an intolerant medievalism that strove during the eleventh, twelfth, thirteenth and fourteenth centuries to drive the Jews not only from the body politic, and from the social, economic, and political structure of the larger environment, but which also subjected them to the most cruel and horrifying persecutions.

That such conditions were characteristic of nearly all the Jewries of the Middle Ages, and particularly of the Jewries of the medieval German states, all students of the period will agree.

While Jewish life in Italy and Spain was largely influenced by the highly cultured non-Jewish environment, Jewish life in Germany flourished in a uniquely Jewish fashion; and its cultural development, though not wholly uninfluenced by foreign ideals, was not moved nor dominated by them. Despite civic and religious restrictions, the Jews of Germany could boast of communities which produced men eminent in piety, scholarship, and intellectual productiveness. Especially noteworthy is the city of Mayence, Germany's greatest seat of Jewish learning and activity.

Besides the Kalonymos family in that city, there flourished the authors of the Ma'ase ha-Geonim, Rabbenu Gershom, "Light of the Exile," whose teacher was R. Yehudah Ben Meir Leontin, (OZ I, 695, II, 404, MBRP 264, Mord. Nez. 222) and was a contemporary of Sherira Gaon (Weiss, II, pp. 278-279), and Eliezer ben Nathan (RaBen), whose close contemporaries were Rabbi Yehudah ha-Kohen, the author of the "*Sefer ha-Dinim*," Rabbi Yehudah ha-Gadol, "The First of the Martyrs (OZ, II, 275), and referred

to by later authorities as the "rabbis of the Rhineland"; (Mord. Nez., 556), and the "Sages of Speyer" (OZ, 404); Eliezer ben Joel Halevi (Rab'iah); Rabbi Yehudah ha-Ḥasid, author of the "Sefer Ḥasidim (Book of the Pious); Rabbi Isaac of Vienna, author of the "Or Zarua"; his son, Ḥayyim Or Zarua; Rabbi Meir ben Baruch of Rothenburg; Eliezer ben Yehudah of Worms; Mordecai ben Hillel Ashkenazi; and a host of others. It is therefore with pardonable pride that Rabbi Isaac of Vienna, exulting in the scholarship of Germany and the Rhine Provinces declared: "How numerous are the geonim, the holy men, and our masters of Mayence, Worms, and Speyer: for they spread the knowledge of the Torah to the whole of Israel" (OZ, I, 752, p. 217, bottom).

The high regard accorded the decrees and ordinances of the German Jewish authorities by contemporary and subsequent generations is attested by Asheri. "I have no doubt," he says, "that the traditions and customs transmitted to us by our ancestors, the sages of Germany, are more reliable than those of this country (Spain). For the sages of Germany received their traditions as a direct inheritance transmitted from father to son, from the days of the destruction of the Temple." (Responsum XX,20.)

The Spanish and North African scholar, Rabbi Isaac bar Sheshet, Barfat (14th Century) thus refers to German scholarship: "For from France shall go forth the Law, and the word of God from Germany" (Ribash, 376).

The aim of this work is twofold: historical and juridic. But beyond these main aspects it aims to trace the principle of adjustment not only in the outward manifestations of Jewish life, but also in the attempts of the Jewish authorities to harmonize Jewish law with life. It is only within

the last three or four centuries that rabbinic Judaism has become rigid and fixed. But to the great scholars of the Middle Ages, like their predecessors, the Geonim and the Talmudic authors, Jewish law was a living stream, allowing interpretations and even deviations from traditionally accepted views, whenever conditions required.

We must not, however, construe such deviations as changes or rejections of Jewish laws or traditions in the modern sense. Unlike the laws of other nations Jewish law is held to be the product not of a sovereign state, man-made and enforced by government authority, but a divine revelation taking root in the Torah. Jewish law, therefore, assumes a universal aspect, transcending time and place. Devout adherents of the Law, always deriving their authority from the Talmud, which to them was the only correct interpretation thereof, and from their predecessors, the Geonim, the authorities of the Middle Ages would be the last to sanction drastic changes in order to suit conditions or their convenience. Such interpretations were made within the Law, and deviations, whenever indicated by some exigency of the times, were either directly sanctioned by the Talmud or earlier authorities, or were based on a sanction derived indirectly from these sources.

The rabbis did not protest against the custom prevalent among the Jews of the Middle Ages to help extinguish a fire that had broken out on the Sabbath, though there is no legal authority for it אין להם על מה שיסמכו מן הדין The custom was allowed to remain and was even tolerated, "Because such refusal would be punished by the civil authorities, and would arouse the anger of the Gentile neighbors" (Mord. Moed, 393, 467).

There was no objection to saving prayer books and

Talmudic volumes from a fire on Sabbaths, "Because, unlike former generations who knew the contents of the prayers and the *halakah* from memory, we of the later generation who are permitted to cause the writing down of these books as are the books of the Holy Scripture, are likewise permitted to save them from fire on the Sabbath" (ibid., 396).

The Jewish court in the Middle Ages, deprived of civil and governmental support to enforce its mandates, found it advisable to legislate in accordance with the customs prevalent in the various communities, under the general declaration: "*Minhag milletha hi*"—Custom is to be considered, or, "Nowadays the people are accustomed to act in such and such a manner" והאידנא נהגו עלמא

But the principle of following local custom was sanctioned in the Talmud, which advises in cases of doubt or conflicting *halakot*, "To go out and see what the people are accustomed to do" (Berakot, 45a), or "Hilketha medina," —*Halakah* is the law of the land, (Kid. 38b), or "A custom overrides a law" (Soferim XIV 18, Yerushalmi, Baba Mezia VII, statement of Rabbi Hoshiyyah).

In monetary matters, litigants were to follow the custom of the place, and upon him who deviated from such customs fell the burden of proof in justifying his course. But such customs, as well as all others, must be well founded in law, long established and authoritatively instituted (OZ, Baba Mezia, 28c, based on Talmud, ibid. 86a).

Another source of authority for the rabbis of the Middle Ages in acting in harmony with life, was the institution of the *Takkanot*—ordinances. Maimonides, in distinguishing the term "*takkanah*" from "*gezerah*," says that the former was instituted by sanction for the benefit of the majority

לתועלת הרבים, while the latter is intended as a hedge about the law, in order to ward off a possible transgression. (Introduction to the Commentary on the Mishna).

The term "*halakah*," derived from the root denoting "to go," and which is the equivalent of the Hebrew "*minhag*," has been adopted as the term for an accepted legal opinion based in many instances on practices and usages already in vogue among the people. (Weiss, I, p. 67; Frankel, *Darke ha-Mishnah*, p. 6ff). The term *halakah*, therefore, implies not only fixed law, but also growth and progress. (Frankel, ibid.). In fact, according to the latter authority (ibid., Chap. II, pp. 29, 44, 45) the *Halakah* was a development of the *Takkanah*, until the period of Shammai and Hillel (cf. Tosifta, Sanhedrin, VII, statement of Rabbi Jose.)

The more the Jews came in contact with the Romans and the Persians, the more were the rabbis of the Talmud, practical men that they were in their capacity as judges and legislators, and alive to changed social conditions, obliged to modify the letter of the laws, and to introduce ordinances of the class characterized as necessary. The Talmud speaks of the *Takkanot* of Ezra, (Baba Kamma, 80a), of Hillel the Elder (Gittin, 36a), of Simon ben Shetah (Ketuboth, 82a), of Gamliel the Elder (Gittin, 33a), and of the *Takkanot* of Usha (Ketuboth, 48a), of *Takkanot* for the sake of peace, for the sake of those that return (Gittin, 55a; Baba Kamma, 94a), and for commercial stability (Baba Kamma, 114a). A careful analysis of these ordinances proves the correctness of Maimonides' interpretation of the term.

During the Middle Ages, Rabbinical Synods were frequently convened in order to promulgate new ordinances as circumstances required, and in order to harmonize Talmudic law with conditions as obtained in Christian Europe, (MBRP, 1022; Kol Bo, Edition Furth, p. 117; Finkelstein, Jewish Self-Government, p. 41ff.). Codes of ordinances were also instituted by the communal organizations and sanctioned by the courts, in order to meet the exigencies of the times (Asheri, Responsa, VI, VII; cf. infra, "The Community," Ordinances), frequently against Talmudic legislation and Rabbinic rulings.

It is thus evident that, though Jewish jurisprudence was always responsive to the needs of the times, and the court as an institution actually reflected living interests, they nevertheless maintained their original traditional character, the Bible and the Talmud serving as their foundations.

The historical part of this work is based on a study of Jewish life in Germany, in the hope that it may serve as a background for the study of the Jewish court in the Middle Ages.

Such a study ought to prove of benefit to students of Jewish history, and to throw much light upon the various movements that emanated from German Jewry, and which have had so marked an influence upon later Jewish life and thought.

When the Jewish people lost their political independence with the fall of the Second Commonwealth, Jewish life and learning continued to flourish in an unbroken chain. From Palestine Jewish scholarship migrated to Babylonia, thence to North Africa, to Spain and France, and from France to Germany, where, forming an important station, it branched out North and East, to Poland and Russia. It was for this reason that the period extending from the early ninth

century to the middle of the fourteenth century was selected for this study.*

In the chapters devoted to the study of the Jewish court, only such branches have been selected as would be relevant not only to an understanding of the structure and procedure of the court, but also such as would touch upon Jewish life at various angles, thus bringing out the historical sides of the period. For it is in the court room, where human interests are revealed in their minutest detail, where life's conflicting interests receive their profoundest hearing that a comprehensive view of life can be obtained. To the Jews of the Middle Ages, the *beth din*, as well as the synagogue, was the center around which Jewish life revolved. The rabbi and the *dayyan* were not only their religious representatives, but the personifications of what would be to others their national government.

Due to their reverence for the Torah and the Talmud which the authorities represented, the Jews of the Middle Ages, with but few exceptions, evinced great respect for the authority of the *beth din*. This will account for the influence it wielded upon Jewish life.

As a source of historical material the responsa are unique. They produce a faithful picture of the actual conditions of Jewish life of the times in which they were written. Without design or conscious effort, the authors reveal facts in their

*It was upon written advice by Professor Alexander Marx that the period of study was limited to the year 1350, when the Black Plague occurred. "The spirit which finds expression in the enactments of the period preceeding the Black Plague is quite different from that of the later period. Their whole outlook on life was changed as they gradually were changed from free citizens into bondsmen of the Emperor . . . Their spiritual activity was dwarfed and the legal development of the succeeding centuries show the unhealthy influence of their unfortunate status." (Prof. Marx' Foreword to Dr. Finkelstein's Jewish Self-Government.)

"Questions and Answers," which throw light on the various aspects of contemporary life.

Though the main source of inquiry is based on the responsa of the German school, yet, because of the universal character of Jewish jurisprudence, I have not hesitated, whenever necessary, to utilize source material of other contemporary or even of earlier schools.

Talmudic law is here quoted not merely to show that sometimes conditions demanded a change from or disregard of its regulations, but also because it is basic to Jewish legislation. For the same reason in the study of the Jewish court of the Middle Ages the sources contained in the Geonic responsa are also quoted. These sources are therefore to be construed not merely as introductory material, but as an integral part of the work, thus tracing and describing certain branches of the Jewish Court as they functioned during Talmudic and Geonic times, down through the period of the Middle Ages.

The aim of this work being historical and juridical, here and there the reader may find the contents of a paragraph repeated, but on close examination it will be found that the paragraph in question is to be read either according to its historical or its juridical context.

The contribution of this work to Jewish science lies in its attempt to portray Jewish life in detail, to give an account of the Jewish court in the Middle Ages, and in using all the material to be found in the sources.

CHAPTER I

THE COMMUNITY

1. DEFINITION AND SIZE

The term "ḳahal" was adopted by the rabbis and the communal authorities of the Middle Ages for any congregation of Jews in a given locality organized for the purpose of conducting or supervising communal affairs. Many of the powers of the Sanhedrin were vested in these organizations, and their decisions were held as binding, in many respects, as were those rendered by the Supreme Judicial Court of Seventy One, sitting in the Court Chamber of the Temple.[1]

Unlike the provincial Jewish communities of Palestine, which until the year 70 were governed by orders from Jerusalem;[2] also unlike the communities of Talmudic times, which found their spiritual and political centers in the persons of the patriarchs in Palestine and the exilarchs in Babylonia,[3] the medieval Jewish communities possessed no central authority. In so far as their social, political, economic, and part of their religious life were concerned, they enjoyed, whether de jure or de facto, complete autonomy.[4]

[1] Mord, Nez. 257, 480, 482; Bet Yoseph Tur Hoshen Mishpat 1, 2 quoting Rashba and other authorities.

[2] Ta'anit 19a, Sanhed. 88b; Kid. 54a; Shekalim, chap. IV.

[3] Sanhed. 5a; Erubin 59a, cf. Rashi bottom; Horayyot 10a ff; Baba Batra 89a; Ta'anit 24a; Yer. Hagiga 1, 7, Nedarim X, 8.

[4] MBRG 117, MBRB II, 140; Mord. Nashim, 108; Asheri, resp. XVII, 1, 7; TH 405.

The Talmudic distinctions between the various Palestinian settlements such as כרך "fortified city",[1] עיר "city",[2] and כפר "village",[3] each according to its historical background and the size of its population, must be entirely disregarded, especially for the period during and after the Crusades, when the Jewish population of Germany was decimated and entire communities nearly wiped out.[4] In no settlement did the Jews form a majority of the general population. The largest community of medieval German Jewry would, according to authoritative opinion, be equivalent to that of a village of Talmudic times.

To ward off danger of attack by the multitudes, the authorities permitted Jews living in a sparsely settled Jewish community to help extinguish a fire that had broken out on the Sabbath.[5] (cf. Introduction.)

In many places the Jewish element could hardly be spoken of as a compact communal unit. It hardly functioned as such. In such places the Gentiles exercised a powerful influence. There were no Jewish scholars among them. The Jewish settlement was a mixture of many families, hailing, probably as refugees, from many places. The small Jewish minority would at times inadvertently follow the customs and practices of the Gentile majority.[6] But every Jewish

[1] Megilah 2b, 3b.

[2] Gittin 20b; Sanhed. 17b; Baba Batra 22a; Megilah 8a.

[3] Megilah, 3b, ff; Samuel Krauss, "he-Atid" Vol. 3; Weinberg, Monats. 1897.

[4] Graetz, History, III, 10 ff.

[5] HOZ 65; HM Roz. U-Shemirat Nefesh, 13; Mord. Moed 800; RaBen Prague, 363;

„דאפילו קהילות שלנו חשובים ככפרים בימי התנאים והאמוראים ולפי שאנו מתי מספר ונשארנו מעט מהרבה ויותר היו בכפרים בימיהם מעתה בקהלת."

[6] SH 1301.

settlement, no matter how small, was governed by its own laws and regulations intended to meet all exigencies.[1]

2. POWERS AND FUNCTIONS OF THE COMMUNAL ORGANIZATION

Autonomous government existed. The Jewish communal organization formed as it were, a state within a state. It functioned not only as a religious body finding its center in the Synagogue, but in all matters affecting its members socially, commercially, and juridically. The civil government vested in it the power to formulate laws and to promulgate ordinances of its own. Such extensive privileges were in the main granted because of the principle common in the Middle Ages, whereby every one was to be judged by his own peers; and because of the general application of the principle of personal rights to foreign nationals living in a given state, the Jews, being regarded as crown property, in a class by themselves, were therefore to be left to the jurisdiction of their own authorities.[2]

To the civil authorities the Jews existed as a communal unit, which either as a whole, or as security for the individual members of the community, was held directly responsible to the state for the payment of taxes.[3]

The medieval state was based on the feudal principle, by which everyone was a member of an order first and a citizen of the state next. In the case of the Jews living in the German Empire, especially during the twelfth and thirteenth centuries, this double political allegiance worked untold hardship. The Jews had no status of citizenship in the empire. They

[1] Ibid. 1299, 1300.

[2] Stobbe pp. 140, 141, 142, 152; Schroeder pp. 245, 505 f.

[3] MBRP 38, 813, 943, 944, 980; MBRC 188; HOZ 222, 227, 253; Mord. Nez. 334.

were aliens and the property of the king, his servi camerae, servants of the chamber, a title at first involving protection by the emperor from attack, for which the Jews had to pay a special tax, but later assuming the odious significance of slavery.[1] Yet, besides belonging to the emperor, the Jews were also claimed as the private property of the feudal lords.

These dignitaries considered and treated the Jews as chattels. They frequently required an oath from those living on their estates that they would not change their residence without permission. This gave the masters practical assurance that the Jews whom they wished to retain under their control would not look for another place, where they might expect better treatment. Such an oath was declared null and void by the Jewish authorities, if in his heart, or in a silent undertone, the Jew refused to consider it unconditionally binding.[2]

This confused servitude to two masters, and particularly with forced subjection to a feudal lord, bore many evil results. Litigation between one Jew and another living in the same estate or town would result in conflict. Also, when one Jew succeeded in escaping his subjection, those that remained had to bear the entire responsibility for his taxes.[3]

Though the Jewish authorities declared an oath forced upon a Jew by a feudal lord as not binding, yet it was considered valid in cases involving damages to another Jew. The following is a case in point. A lord demanded from a Jew money entrusted to his keeping by another Jew, asserting that the money was owed by the other Jew to one of his

[1] Stobbe pp. 8 ff; Scherer pp. 69-80, 143-4; Graetz, History, III, pp. 356, 416, 516.

[2] MBRP 103, 105, 226; MBRC 221, 222, 223, 305, 306; MBRL 114; HOZ 179; HM Sheluhim We-Shutfin, IV, 5; Mord. Nez. 181, 163.

[3] Ibid. and MBRP 661; Mord. Nez. 60.

subjects. The trustee denied that he was in possession of the money. An oath was demanded. The rabbi advised the trustee not to take the oath.[1] In cases where failure to live up to such forced oaths would result in desecrating the Divine Name, where, as a result, the Jew would not be believed even under oath, the authorities advised that those concerned should attempt to influence the higher state authorities in their behalf, in order to evade the oath demanded.[2]

An excommunication pronounced by Jewish authorities against a settlement, forbidding Jews to take up residence there, was to be held binding only during the life time of those masters guilty of the wrongs against the Jews provoking the excommunication. The reason given was, "Not to place a stumbling block in the way of future generations, who on account of new conditions might be forced to violate such excommunications."[3]

While the Jews were thus exposed to servile treatment from the upper classes, in justice to the Christian masses be it said that there was no general antagonism on their part towards the Jews. The sources abound with references to the good will of non-Jews to Jews in trade, commerce, and social relations.[4]

Christians rented houses from Jews for religious purposes. Jews manufactured religious articles for church ritual, such as tallow for the making of candles, priestly robes, jewels, ornaments, and wine glasses. The Jewish authorities per-

[1] SH 1400; cf. Nedarim 27b. [2] SH 1401.

[3] Ibid. 1402, a lord forcing his Jews to accept Christianity.

[4] MBRP 83, 116, 254, 885, 903, 904, 916, 970; MBRC 227, 296; MBRL 372, 375, 385; OZ II, 140; ibid. III. 215; RaBen, Prague 97a, cols. 1, 2, 98a, col. 1; SH 689, 1223, 1224, 1225; MBRB 159, 213; Mord. Nez. 392; cf. Berliner, pp. 1, 2; Guedemann, Ges. 1, 4; Graetz, History III pp. 141, 143, 297, 298.

mitted the manufacture and sale of such articles, for the reason that Christians could not be placed in the category of heathens, and because the taxes which Jews paid to the government were used for other than religious purposes.[1]

The Jews were not restricted in their choice of residence to a particular place in the city. By the "Jewish Street"[2] is not meant the ghetto, which became a legal institution in the sixteenth century[3]. Such special Jewish quarters, wherever they existed, were either assigned in order to protect them from chance attacks, or were the voluntary choice of the Jews themselves. The Jewish residential section of Cologne was in the vicinity of the Christian church called "Marporzenkapelle".[4] In most of the cities the Jews lived indiscriminately among the Christians in very close proximity[5]. The Jews could buy slaves, and hire male and female servants in opposition to canonical laws.[6]

In dispensing Purim gifts, Jewish masters made no distinction between Jewish and Christian servants.[7]

Jews employed Christian musicians to play at Jewish wedding parties, even when these occurred on Saturdays.[8]

אבל עכום חמנגן בכלי שיר בבית הנשואין אפילו אם ישראל יאמרו לו לעשותו אפילו בשבת שרי כי אין שמחה לחתן ולכלה בלי שיר ואסור דרבנן שרי במקום מצוה.

[1] RaBen, 291, 292; Mord. Nez. 801, 803, 804, 805, 795, 798, OZ IV, 135, 136, 137, ibid. I, 480; for Talmudic law cf. Aboda Zara 20a, 21a; cf. infra "Attitude toward secular court."

[2] Mord. Nez. 379. [3] Abrahams, Jew. Life p. 63.

[4] Rabiah, 379; Berliner p. 1, Graetz, III, p. 298.

[5] MBRP 28, 29, 611, 614, 675; MBRC 63; MBRL 338; MBRB I, 377, II, 109, 110; HM Toan IXV, 7; HOZ 81; Mord. Nez. 553, Aronius J. Regesten.

[6] MBRP 92, 296, 478; MBRC 5; MBRL 316; HM Sabbath, VI, entire section, and ibid. XII; OZ I, 758; HOZ 85; SH 138; Shibbale ha-Leket, 113, quoting German Jewish life and authorities; Mord. Moed, 250; Graetz, III, pp. 161, 142, 299; Berliner, p. 105; Guedemann p. 82.

[7] MBRL 184; HM Nez. II, 5, for Talmudic law cf. Gittin 61a.

[8] Mord. Moed, 696.

Jewish tax-collectors freely employed Christian solicitors to collect revenue and taxes on Saturdays in their stead.[1]

A prominent Christian of Regensburg sent to a Jew for Jewish wine for medical purposes, stating in his request that if the wine were not forthcoming, he would die.[2] One of the city officials of Regensburg thought that the only remedy for his illness would be a Jewish meal. He sent for one upon the advice of his physician.[3] Jews employed Christian wet nurses for their babies.[4] Jews were to be found in the armies engaging in actual battles.[5] The Jews were not deprived of the right of owning landed property and real estate. The sources abound with references to cases where Jews and Gentiles were involved in the sale, rental, or transfer of estates, tracts of land, and other real property.[6]

The Jews were also engaged in the building trade, contracting to build houses both for Jews and for Christians.[7]

We thus see that so long as the Jews were not molested by the clergy, nor was the mob incited by them, they did not suffer from oppressive legislation. The government (and even some liberal minded individual Christians) offered the Jews certain advantages to insure their safety, and even entrusted to them the management of Jewish communal affairs.[8] The Jewish communities took advantage of these privileges and formed communal organizations, which were governed by local boards.

[1] Ibid. 246.

[2] OZ II, 53; Berliner p. 83. [3] Mord. Moed, 252.

[4] SH 159; MBRL 250. [5] Ibid. 159.

[6] MBRP 28, 29, 92, 660, 661, 671, 685, 691, 698, 836, 872, 905, 907, 908, 997, 1011; MBRL 60, 309, 338, 357; MBRC 63, 271, 276; RaBen "Hashoher et ha-Po'alim" pp. 98-100; HM, "Shekhenim" II, 6; HOZ 257; Mord. Nez. 60, 387, 466, 520, 534, 553; Aronius J. Regesten.

[7] MBRP 671, 674; OZ III, 139, 140; Mord. Nez. 105, 798, 844.

[8] Graetz, III p. 161, 397 ff; Berliner 72 ff.

The Jews of the Middle Ages, in so far as the civil authorities would permit, vested in their communal organizations all the powers and functions which among living nations would properly belong to the state. They exercised supreme religious, social, political, economic and commercial control over the individual life of the Jews. Unlike the communities of Talmudic times, when a "City" was considered a corporate unit, in which the "*b'né ha-ir*," the inhabitants, were considered as partners, and each had an individual juridic standing; and for that reason local residents were disqualified from acting as witnesses in suits touching communal interests,[1] in the Middle Ages it was the community that had juridic standing and not the residents. These were not considered partners in a common enterprise, but individuals owing allegiance to the community as a whole, acting through its communal Board of Directors, (cf. infra) who legislated for them, and instituted and promulgated ordinances which could be nullified only by a majority vote of the legal residents of the community. In Talmudic times most of these functions were vested in the *beth din*, the court, but during the Middle Ages, the communal organization had initiative powers, merely requesting sanction for certain measures of the rabbis or of the court. The Talmudic "*b'né ha-ir*," were understood to refer to the entire organic whole, the community in its totality, implying no particular privileges to any of its individuals. A local resident could, therefore, act in the capacity of witness in matters concerning communal interest.[2]

[1] Nedarim 48a

[2] MBRP 118, 119, 195, 241, 676, 940, 943, 928, 813, 815, 980, 992, 1012, 1016; MBRC 54, 55, 230; MBRL 133, 136, 337; HM "Tefilah" V, 1; Mord. Nez. 108, 395, 396, 478, 479, 489, 515; ibid. Nashim, 15; Asheri and Rashba quoted in Tur Hosh. Nishpat XXXVII, 12; Bet Yoseph ibid. par. 14.

In communities where there were no rabbinic authorities, (such as "*Heber-Ir*"), the communal organization arrogated rabbinic authority to itself, and its decisions were regarded as valid.[1]

The Talmudic distinction between the powers and functions of the communal organization of a village, where the sanction of the entire, or majority portion of the membership of the community was not required to render an act of the governing board legal and effective, and that of a city where the sanction of the members of the community was essential,[2] applied only to those governing boards whose members attained power without election by the people, but it did not apply to communal organizations whose members were elected by the residents of a community entitled by local ordinances to vote. Their acts, or even the acts of an individual member of the governing board, were considered decisive, without the approval of the members of the community.[3]

ז מובי תעיר שחוברו מתחילת מדעת כל אנשי תעיר לעיונו במלי דמתא לקנום . . . אבל כגון אלו שמלבו . . . אם חוברו מתחילת לחנוג קחלתם . . . מה שעשו עשו בתקנת חקהל . . . אבל אם בהרום אפולו בברבים מחני ואפילו יחיד.

3. THE POWER OF INFLICTING PUNISHMENT

"We need not here speak of this aspect from the legal, but from the communal point of view" (cf. infra "Law Enforcement"). Only ordained judges in Palestine were qualified to inflict punishment.[4] Even in Palestine the practice of ordaining judges ceased after the close of the academies, which, according to Nachmanides, took place prior to the

[1] MBRP 231, 546, 712, 740; MBRL 382; MBRC 230; Mord. Nez. 482, 763; RaBen Prague 113a; cf. Megilah 27a. [2] Megilah 28a.

[3] MBRP 969; HOZ 65; Mord. Nez. 482; Baba Batra 8a ff.

[4] Numbers XXIX; chron. I, IV, 23; Sanhed. 13b, 14a; Aboda Zara 8b; Yad. Sanhed. IV 9, 11; Maim. Commentary on the Mishna, Sanhed. I.

fixing of the calendar by Hillel II, in the year 361, C. E.[1] But resorting to the principle that an emergency overrides tradition, and even supplants a law, and strengthened by Geonic practice,[2] the communal authorities took the liberty of legislating upon civil and communal matters and rendering judgments involving punishment, dealing with personal injury or money damages, and imposing fines or forfeitures to go either to the injured party or the communal treasury. They distinguished between crimes punishable by fines, excommunication, expulsion, flagellation, or imprisonment.[3]

שרגילין כל קהל וקהל לקנום את עוברי עבירות ופורצי פרצות מוסרים אותו אם מסר בשעת חזעם אבל ממון להפסיד לחבירו לא יפסוד... כדי ל ק נ ו ם חמכים ולמונעם שלא יעשו עוד על תקנות חקהלות דחפקר בית דין חפקר במיגדר מילתא.

A case in point is the following: A man holding a knife, threatened to break another man's head. The authority before whom the case was brought made this declaration: "It is true he committed a foul deed, and that nowadays we have no authority to render judgments involving fines, or concerning personal injuries, but every community is guided by its own code of ordinances; and if there is a proviso among the ordinances of that particular community to punish the guilty in such cases, the culprit is to be punished in strict conformity with the communal regulation." The same authority observes that in his own community such offences are punishable by flagellation. He further observes, "Even if the community has been accustomed to

[1] Gloss on Main. Sefer ha-Mitzwot, section "Esseh" 153.

[2] Teshuboth ha-Gonim, 180; Harkavi, Zikhron Larishonim, Berlin, 1885 IV, 1; Sha'are Zedek IV, 2, III, 60.

[3] MBRP 994; MBRL 248; HM Hobel u-Mazzik I, 3; Mord. Nez 195, 197; HOZ 142.

impose a fine upon one who beats another, he is not supposed to pay it to the person attacked; but, if there is an ordinance to that effect, the plaintiff is entitled to receive the fine from the defendant, only upon oath."[1]

In communities where there were no ordinances providing punishment for various offences, the custom seems to have been to excommunicate the defendant until satisfaction was given the injured party. If such an arrangement was not possible, the aggrieved person was advised to go to Palestine for adjustment.[2]

Capital punishment, according to Talmudic law, must not be inflicted except by a verdict of a regularly constituted court of twenty-three qualified and duly ordained judges,[3] and only in Palestine, and at the time when the Sanhedrin of Seventy One is sitting in the Chamber of Hewn Stones of the Temple.[4] The Jewish courts, outside of Palestine, were deprived of the right of administering the extreme penalty.[5] In fact that right was taken away from the Sanhedrin about forty years before the fall of the Second Temple.[6] Yet, even during Talmudic times, in cases of emergency, when conditions so required, the authorities were invested with the power outside of Palestine. The acts of Simon Ben Shetah (though he lived about 80 B.C., but whose execution of eighty women took place in Ashka-

[1] MBRP 383, 384, 555, Annotations from Maim. Sanhed. V; 740, 742; Mord. Nez. 781, 782, Note Glosses bottom col. to top Col., also 481; ibid. Nashim 108; cf. RaBen Prague p. 113a. Ginze Schechter II, 271, 274.

[2] MBRP 555, annotations from Maimonides, Yad. Sanhed. V, 5.

[3] Sanhed. 2a; Sifre' Numb. 160.

[4] Sanhed. 52b.

[5] Sanhed. 41a, 6b; Makkot 7a; Aboda Zara 8b; Yer. I, 1, VII, 3; Shürer Geschicte II, p. 23.

[6] Baba Kamma 117a.

lon), of Rab Kahanna,[1] and Rab Shila, are strong cases in point.[2]

While the sources do not speak of the application of the law of capital punishment to other cases, they refer abundantly to the permission granted communal organizations of the Middle Ages to make use of the law to the fullest extent in the case of informers. That this was due to the conditions of the times, there can be no doubt. Where executions were impossible, the communal boards were empowered by Jewish law to transfer the case to the civil authorities.[3]

It seems, however, that not all the communities agreed as to whether advantage might be taken of the permission to deal summarily with informers. The matter was left entirely to the stipulations of the various communal ordinances.[4] Despite the conditions of the times, calling for drastic measures against informers, who were a sore spot on the Jewish body politic, and despite Maharam's statement that "It is permissible to execute an informer at any time or place, and the first to perform such a meritorious act is praiseworthy,"[5] it does not seem that the communal organizations, with the exception of those in Spain, made extensive use of that power even in cases of emergency.[6]

[1] Berakot, 58a; Yad. Ḥobel u-Mazzik VIII, 10; Maggid Mishneh and Mishneh L'Melek, l c; MBRB II, 137; MBRP 485; MBRC 232; Mord. Nez. 186.

[2] Yad. Ḥobel u-Mazzik VIII VIII, 10, 11; HM l, c; MBRP 485, 100; MBRC 232; MBRL 247, 334, 369; Mord. Nez. 186, 532; Asheri. Resp. XVII, 1, 2, 3; Abrahams, p. 4 ff.

[3] MBRP 383, 384, 742; MBRL 247, 248, 334, 374; HOZ 141, 142, 255; Mord. Nez. 195, 196; ibid. 97.

[4] Asheri, Resp. XVII, 6.

[5] MBRP 382, 485; MBRC 232; HM Ḥobel u-Mazzik VIII, 10 ff; Mord. Nez. 186, 517,519.

[6] Asheri, Resp. XVII, 6.

4. THE COMMUNITY AND THE RIGHT OF DOMICILE

The trying conditions of the Jews of Germany are nowhere better indicated than in the questions dealing with the individual's right of domicile, which right lay with the communal organizations either to grant or to refuse. The Jews settling on the estates of the feudal lords, we have seen, were considered chattels. The landlords would, however, in almost all instances give control over the rights of new colonists into the hands of the first settlers. In order to avoid competition, the latter would try their utmost to keep newcomers out. Complications would arise in the cases of refugees from cities where outbreaks against the Jews were taking place, of frequent occurrence during the Crusades. The question of taxation was the determining factor in deciding the status of residents in a community.

In the Talmud the law is explicit: "A resident of a city may prevent a man from another city settling in his community."[1] Rabina upheld the protest of the townsmen against intruding peddlers carrying baskets. Rab Kahanna sustained the contentions of the local merchants against foreign woolen dealers.[1]

No member of a community could, therefore, change residence from one city to another except with the consent of the governing boards in the city chosen. This ordinance was enforced in some communities by excommunication or by a decree from the rabbi.[2] Some communities had no such penalties against newcomers, but followed the constitutional stipulations provided to meet such exigencies.[3] In

[1] Baba Batra 21bff; Yad. Shekenim IV, 6.

[2] MBRP 46, 382, 1001; MBRL 213, 214, 351, 352; MBRC 6; Mord. Nez. 559.

[3] MBRP 101 1001; MBRC 6; MBRL 313; MBRB I, 345; Mord. Nez. 559.

cases where the choice was left entirely to an individual Jew, empowered by his superiors to admit, reject, or expel those whom he did not desire as his neighbors, the communal authorities were powerless to employ constitutional ordinances.[1] Though attempts were made by later authorities to modify the Talmudic strictures, as when R. Tam (12th century) declared that the Talmudic law forbidding strangers to settle in a town against the will of the inhabitants, applied only to those who refused to pay their share of the taxes into the communal treasury,[2] adding that no Jew could be refused admission into a Jewish community if he was willing to accept its rules; and though Maharam vigorously protested against the cruel custom of many communities in withholding permission to settle in a city because of the selfishness and greed of one individual,[3] yet the communal organizations held fast to the opinions of those who would apply the Talmudic restrictions regarding the right of domicile in letter and spirit.

Refugees were permitted to settle in other communities, to loan and to trade there, in order to provide themselves and their families with the immediate necessities of life, without being molested by local residents, until the danger in their own communities was over. They were also exempt from the larger burdens required by the communal budget. They were to pay only to the extent of their earnings in their temporary residence.[5]

The communities were given the power to declare a business or social boycott against a man who, disregarding

[1] MBRP 382, 677; MBRL 111.
[2] MBRL 111.
[3] MBRL 79; Mord. Nez. 519; cf. Baba Batra 21b.
[4] MBRL 77; Mord. Nez. 519; MBRP p. 382.
[5] MBRP 983; MBRL 77; Mord. Nez. 517; cf. Baba Batra 8b.

the authorities, had taken up residence among them; and the rabbi of each community could give the boycott the force of a legal decree.[1]

If, for assigned reasons, the ban of excommunication was removed from a prospective newcomer for a stipulated length of time, the authorities could force him out of the community on his refusal to leave town after the expiration of the grant.[2] Exceptions were made for scholars, on the ground that the frequent change of residence might disturb their studies (ibid.)

A plea of *ḥazakah* (tenant right) on a grant of domicile, without sufficient evidence by witnesses, was disregarded, even on the strength of an oath by the claimant.[3] Where a grant was given a resident through a plea of *ḥazakah*, or other claims, he was accorded the right not merely to settle in the community, but to protest against the admission of other prospective settlers. When substantial evidence was produced against such persons of the crime of informing, they lost not only the right to prevent the admission of prospective residents, but their own right of domicile. For, according to Talmudic law, the claims of *ḥazakah* of a "robber" are invalid.[4]

A man doing no business, or otherwise not engaged in a trade or profession (*pardakhet*), could force out of town any person who had settled there illegally. For he could claim the person's presence as a cause for raising home rentals, or as competition against his own means of obtaining a livelihood.[5]

[1] MBRL 78, 476; Mord. Nez. 517.
[2] MBRP 46; MBRL 351; MBRB I, 390.
[3] MBRP 100; MBRL 369; MBRC 47; Mord. Nez. 513, 514, 518, 519, 532; cf. Baba Batra 47a.
[4] MBRL 215; HM Yad. Shekhenim VI, 4; Mord. Nez. 532.
[5] MBRL 213, 214.

Another problem which confronted the rabbis and the communal organizations was the question of inheritance. The right of inheritance of those legally entitled to domicile was not questioned if the departed had himself been a legal settler. But troubles would arise where the legality of the deceased's residence was questioned. In one case a son-in-law claimed residence on the strength of his father-in-law's *ḥazakah*. The father-in-law had bought and built houses, and planted gardens and orchards in town. But the latter's right of residence had been contested by the townsmen, even during his lifetime. They now sought to oust the claimants. The decision of the rabbi in the controversy was to follow local custom, as not all communities had a uniform understanding on the question, or basic principles by which to be guided.[1] If there was evidence, substantiated by witnesses, that permission had been granted only for a year, and the claimant so stated, he thereby defeated his own contentions, for this was an open confession against the validity of his claims.[2]

5. DECREES, ORDINANCES, AND SYNODS

The decrees and ordinances promulgated by the rabbis and the synods are the standards by which Jewish life of the Middle Ages is to be judged.

The Crusades against the Jews in Central Europe not only had a destructive effect upon the physical life of the Jewish communities, but also a marked influence on their spiritual life. The need of keeping Jewish life in harmony

[1] MBRP 101, 1001; MBRL 313; Mord. Nez. 559; cf. MBRB 217, The Case of a man who was required to make a deposit with the community charity fund to be forfeited if he failed to leave town after the stipulated period had expired.

[2] MBRC 161, 193.

with contemporary events, and of preparing to meet the future, became apparent. Grave problems arose. What were to be the relations between Jews and Gentiles? Under the law were the Christians of Catholic medieval Europe to be classed with the non-Jews of Talmudic times? What should be done to raise the religious and moral standard of the people? How could their economic and social standing be improved?

The Jews of Talmudic times enjoyed the prestige which the patriarchate and the exilarchate had conferred upon them. But who were the central figures of the Jewries of the Middle Ages? The rabbis? We hear complaints that their decrees were often disregarded and even ridiculed.[1] Could the *herem* (excommunication) be used? Such a severe penalty as this could not be freely and loosely applied and left to the individual rabbi or communal leader. These problems and many others called for immediate solution.

In our sources,[2] the following decrees promulgated either by outstanding authorities or by Rabbinical synods which satisfactorily solved these problems are promiscuously reported. The most important ones may be subdivided under the following heads:

I. WOMEN AND THEIR STATUS

A. Prohibition of the practice of polygamy, promulgated by Gershom M'or ha-Golah. This prohibition could be waived only in extreme cases for the best reasons only, and by permission of one hundred rabbis from three different countries.

Many were the causes for this ordinance. Polyga-

[1] MBRC 161, 1930.

[2] MBRC 161.

my was little practiced among the Jews at this time. But the immediate cause may be ascribed to the threatening conditions of the Jewries of Germany and France, which resulted in many defections from Judaism to Christianity. Gershom's own son became an apostate. It was the threshold of the period of massacres, crusades, and forced conversions.

Smaller families to care for became desirable, affording fewer recruits for destruction and for forced or voluntary apostacy.

Maharam interpreted the prohibition in these words: "For the decree of Gershom against polygamy applied only to cases where the marriage of the first woman was a legal act, but not in cases where the betrothal was mistaken, fraudulent, or illegal. No institutions such as these would be promulgated for the benefit of outcasts.[1] The ordinance did not apply where the first wife was incapable of childbearing."[2]

B. A divorce may not be forced upon a woman, though Biblical and Talmudic law leave the matter of divorce almost entirely in the hands of the husband. The consent of the representatives of the community was required for the execution and the granting of a bill of divorce.

C. If absence or poverty renders it impossible for a man to support his wife, the community must provide for her maintenance.

[1] MBRP 865; Ne'Muke Yoseph, Yebamot, VI p. 21.
[2] MBRP p. 159 ff.

II. THE SYNAGOGUE

A. Services in a synagogue may not be interrupted because of a private dispute.

B. The private owners of a synagogue may not refuse admission to anyone on account of personal grievances.

C. Services may be interrupted temporarily in search of a lost article, and he who finds it without reporting the fact makes himself liable to excommunication.

III. COMMUNAL

A. The majority may refuse to obey a regulation of the communal officers, only with the consent of the court.

B. The minority in any community must accept and abide by the ordinances promulgated by the majority.

C. One who is summoned to court by an official court messenger must attend.

D. No case may be carried to a secular court except those involving heavy damages.

E. The jurisdiction of the local court extends not merely to the members of the community, but to any Jew who by chance happens to be in that city.

IV. ETHICAL, SOCIAL, AND CIVIL

A. The privacy of letters must be respected. This ordinance was of special importance in days when there was no mail delivery by the government, but letters were carried by private persons who might be tempted to open letters.

B. Insulting converted Jews who returned to Judaism is prohibited. (*Teshuboth Ḥakme Zarfat Ve-Lotir* resp. XXI, pp. 11, 12a, f).

C. Property held in trust may not be retained maliciously.

D. Cutting book margins is prohibited.

E. In an altercation which bears serious consequences, both parties make themselves liable to punishment.

F. Punishment for one who intentionally enters a thoroughfare against the orders of the court.

IV. ORDINANCES OF SPEYER, WORMS, AND MAYENCE (*Takkanot Shum*)

Following are some of the ordinances which were adopted at the rabbinical Synod at Mayence, known as the ordinances of Speyer, Worms, and Mayence, which convened July, 1223.

Enactments against the clipping of coins; against dealing in counterfeit money; against making injurious reports about a neighbor's standing. An informer was compelled to make good the loss he had caused, was to be disqualified as a witness, his oath was to be held untrustworthy, and until amends were made he was under excommunication by all communities. No books were to be taken in lieu of payment of taxes. A person became disqualified to give an oath, if, under oath, he had underestimated his ability to pay taxes. Court Jews, favorites of the kings and princes, who by the influence they exerted over the rulers were sometimes of service to their fellow-Jews, or to the entire community were not to be exempt from the payment of communal taxes. The claims of a community against an individual must always prevail in matters of taxation, without being carried

to court for adjustment. No religious office was to be obtained through Christian influence. No case was to be carried to the civil court, if it could be adjusted in a Jewish court. No *parnas* (the president or the trustee of a congregation) or rabbi might absolve a culprit from the penalty of excommunication without the sanction of the community. No opposition could be raised against any or all judges sitting in court or about to open a court session. No such insults as calling one "*mamzer*" (bastard), or "*p'sul mishpaha*" (disqualified on account of blemishes in family relationships), were to be allowed. Where no stipulations had been made for wages to be paid a teacher, and the communal treasury was insufficient, the authorities were empowered to draw from bequests, where the will had not made contrary specifications. A Jew was to set a time for study. In the synagogue devotion and decorum must prevail. A brother-in-law was to release his widowed sister-in-law from the levirate marriage without extortion of money and without trickery. He was not to keep the woman in suspense for any unreasonable length of time, pending such release. No morning or afternoon service might be interrupted, nor the reading of the Law, for a complaint against a member who had refused to answer a court summons, unless three evening services had previously been interrupted. Books might not be retained for a defaulted payment of a debt; but Hebrew teachers were to be exempted from this ordinance. He who would not submit to the regulations of the Synod, was to be delivered to the civil authorities for punishment.[1]

In 1245, another synod of rabbis convened at one of the same three cities. The ordinances of the earlier synod were re-enacted and new ones promulgated. A congregation

[1] MBRP ibid.

might not excommunicate a person without the consent of the rabbi. No rabbis from other cities might influence a local rabbi to pronounce the ban, unless this were sanctioned by the local community. If a woman dies within the first two years of her marriage, leaving no child, the husband must return half of her dowry to her family; but he could retain her clothes.

אך על תרינוס ובכל חמלכות סביב תקנו לחחזיר ולחשיב חצי חנדוניא אפילו בחוך שני שנים לבד מבגדיח.[1]

Mordecai (Nashim, 155) quotes an authority (R. David Ginsberg of Regensburg) to the effect that by ordinance of the German communities, the above enactment was made to apply also in the case of a husband who died within the first two years of his marriage and left no child. In that event, half of the dowry was to be transferred to his heirs, in contradiction to Talmudic Law.[2]

Other important ordinances reported in the sources follow: The verdict of the duly elected officers of the community was to be considered final, even if it was learned later that the verdict was a mistaken one. The Talmudic dispute[3] as to the decisions of three cattlemen judges, has reference to the time previous to the rendering of the decision, but there was to be no redress after the decision was rendered. R. Meir of Rothenburg quotes this responsum with the opinion that the validity of decisions rendered by such judges depended on whether their acceptance as judges by the litigants was strengthened by the *kinyan* (symbolical delivery).[4]

[1] MBRP p. 159b.

[2] Baba Batra 101a, 111b; 113a; Baba Kamma 42b; Ket. 47a, 88b; cf. shul. Aruk Eben ha-Ezer 53, Glosses Isserles.

[3] Sanhed. 24a.

[4] MBRC 230, 255; Mord. Nez. 688 quotes this responsum with the opinion that it all depends on the Kinyan.

In cases of controversy between communal organizations and individual members of the community, especially in matters of taxation and the right of domicile, the claims of the community must first be satisfied, before the court renders a verdict.[1]

According to Talmudic law, any public vow declared to be such by the heads of the community is considered binding upon all the members thereof.[2] As a matter of discipline, the Jewish communities ordained that any decision, regulation, or ordinance promulgated by the directors of the communal organizations was to be considered equally binding upon all the members of the community. No one was to claim exemption from the ordinance, nor from the penalty of excommunication attached thereto, either on the plea of absence from town, or of not having been advised, or of not having heard the ordinance or the punishment of excommunication proclaimed; nor on the plea of protests made at the time when the ordinance, and the punishments for its violation, were instituted and announced.[3] The privilege of exemption from such public ordinances, however, was accorded a scholar who had shown interest in the spiritual welfare of the community.[4] A majority of the members might refuse to obey a regulation of the communal directors, only with the consent of the court.[5] Should the interests of the community and public welfare demand it, the authorities of the communal body could annul rules, enactments, and ordinances long

[1] MBRP 46; MBRL 371; MBRC 49; Mord. Nez. 569; cf. Baba Batra 36a; Baba Mezia 73b; Baba Kamma 116b; cf. "Taxation," infra.

[2] Gittin 46a; cf. Tosafot l.c.
MBRC 165; MBRP 153; HOZ 65; cf. Megilah 26a.

[4] MBRP 815; Mord. Nez. 517, glosses; Baba Batra 22a.

O rd. of R. Tam, reported in Maharam, Prague 153.

sanctioned by usage, and promulgate new ones in their stead (ibid.).

The communal organization declared feasts and fast days, and was empowered to pronounce the major and minor excommunications.[1]

6. COMMUNAL INSTITUTIONS

Besides the synagogue, the cemetery, and the hospital, the communal organization owned and managed lodging houses for wayfarers, a public kitchen, a bakery, a community bath house, and a community wedding hall.[2]

The ḳahal cared for the orphans, appointing an overseer to look after their welfare and education.[3] It held itself responsible for the burial of the dead.[4]

The communal organization took care of the police protection of the city at night. It stipulated a certain amount of money for that purpose in its yearly budget. The city authorities transferred the matter of police protection entirely to the control of the Jewish communal organization. Residents were taxed according to their standing and means.[5]

Those in charge of communal funds were authorized to borrow money whenever necessary, and to impose special contributions, to be used in times of general outbreaks against the Jews.[6]

[1] Mord. Nez. 522, 481, 495, 782, ibid., Nashim, 108.
[2] MBRP 233, 118, 153, 139; HM "*Tefilah*," 11; Mord. Moed 675.
[3] MBRP 591; MBRL 239, 286; Mord. Nashim 382; HOZ 171.
[4] MBRC 184; MBRP 149, 1012, bottom; Mord. Nashim 156, 157, 158, glosses.
[5] MBRP 104; Mord. Nez. 475; Baba Batra 7b; cf. TH 345.
[6] Mord. Nez. 495; cf. "Taxation," infra.

7. THE ADMINISTRATION OF CHARITIES

The administration of charities was under the control of the communal government. Though in the main the Jewish communities of the period followed the line of Talmudic legislation and practice, the troubled conditions of the times (frequent outbreaks would reduce many to public charges) necessitated a modification or a reinterpretation of the Talmudic regulations.[1]

The rabbinic authorities endeavored to make contributions to charity a legal tax. Strengthened by the Talmudic law which makes such contributions compulsory[2] the communities were within their rights in compelling legal residents to pay a set sum, even if their possessions were taken as security, and on the eve of the Sabbath.[3] In some communities the penalty of excommunication was imposed for refusal to pay the required charity contribution.[4] No plea of absence at the time when the charity ordinance and the ban for violation were declared, could be made by persons attempting to evade payment.[5]

The Talmud requires the average member of a community to give of his income to charity.[6] Even women and children and the poor themselves, are to contribute their share.[7] Every community was to have a "*kupah shel ẓedakah*," a box containing funds for the support of the indigent,

[1] Mord. Nez. 477, 493, 495.
[2] Baba Batra 7b, 8b; Baba Kamma, 98b.
[3] Baba Batra 8b; Kid. 78b; MBRP 755; Mord. Nez. 490; OZ Ẓedakah 4; cf. MBRP 918; Mord. Nez. 478.
[4] SH 1713.
[5] Takḳanot Shum cf. Tosifta Ḳetuboth 49b.
[6] Ḳetuboth 49b; 50a; 67f; Yad, "Matnat Aniyyim" VII, 10.
[7] Gittin 7a; Ḳetuboth 68a; Baba Batra 10a and b; Yerushalmi Pe'ah, par. 2b, 3a, as to amount.

who on every Friday received money for fourteen meals;[1] also the "*tamḥoi*," a public charity pot for those in immediate need, especially strangers, who besides food were also given money for lodging.[2]

The residents of a city were divided into the following categories for charity contribution: Residence for thirty days obliged one to contribute to the *tamhoi;* for three months, to the *kupah;* for six months to the clothing fund, and for nine months, to the burial fund.[3] In the Talmud Yerushalmi no mention is made of the *tamḥoi*, since not all communities in Palestine seemed to have had such a fund.[4] That the Yerushalmi schedule is the correct one, is evident from the fact that the later codifiers have adopted it.[5]

The communal organizations made provision for the local poor,[6] for the transient poor,[7] for emergency cases involving the public good,[8] for the dowry of poor brides,[9] for those in reduced circumstances,[10] for the burial of the poor dead,[11] and for the ransom of captives.[12]

Besides the regular and the periodic assessments, the communal charity treasury had other sources of income. These were public vows at memorial prayers for the dead,[13] donations on occasions of joy or sorrow,[14] and bequests made by wealthy members of the community, some specific,

[1] Pe'ah, VII; Baba Batra 8b; Yerushalmi Pe'ah, VIII, 6.
[2] Baba Batra, 8a.
[3] Ibid; Tosifta Pe'ah, IV, 9. [4] Baba Batra I, 4; Pe'ah, VIII, 6.
[5] Alfasi, Baba Batra, 5b; Yad, Matnat Aniyyim IX, 3, 12; Shulḥan Aruk 256, 5; cf. Weinberg, Monatschrift, 1897; cf., however, Tosifta, pe'ah 12, 9, which shows that *Tamḥoi* was also common in Palestine.
[6] Mord. Nez. 477.
[7] Ibid. 478; OZ, Ẓedakah 1, 20. [8] Mord. Nez. 495.
[9] MBRL 152; OZ 1, 7, 8, p. 14; Mord. Nashim, 178; SH 1280.
[10] OZ, Ẓedakah 14, 15; MBRP 753; Mord. Nez. 493, 497, 498, 500; SH 860.
[11] MBRP 149; Mord. Nashim, 157. [12] Mord. Nez. 59, 367; SH 928.
[13] OZ, Ẓedakah 5, 10; MBRP 342. [14] OZ, Ẓedakah 26.

others leaving the disposition to the communal boards,[1] general voluntary contributions;[2] and donations derived from proclamations for public fasts in times of general danger and from fasts proclaimed in times of drought or of attacks by wild beasts,[3] and from fasts decreed to avert "*shemad*," (forced conversion to Christianity), and persecutions.[4]

8. CHARITY OFFICERS

The Jewish communities, assigned the supervision of charities to one man, duly elected by the community,[5] despite the Talmudic law which requires two men, *gabbae ẓedakah*, for the collection of funds, food, and clothing,[6] and three men, constituting a *Beth Din* for distribution. This in itself was a compromise, for charity, having the force of *dine nefashot* (capital cases, e.g., the continued existence of human beings), would require a body of twenty-three, qualified to judge the worthiness of applicants.[7] The Or Zarua, in mentioning this custom, adds "Yet it would be best if the communities would appoint two officers."[8] This apparent disregard of the Talmudic law may be ascribed to the sparse population of the Jewish communities. Or it may be due to the cruel conditions in which the Jews lived. When emergency cases were frequent, demanding immediate relief, the communal organization thought that one trustworthy officer would expedite relief.

The *gabbae ẓedakah* seemed to have been men of means. They were occasionally called upon to make loans to the

[1] OZ, ibid, 7, 8, 20; MBRP 474, 752, 343; Mord. Nez. 493.
[2] MBRP 692, 693, 842, 147; MBRL 475, 152; Mord. Nez. 486.
[3] Mord. Nez. 495; OZ, Ẓedakah 10. [4] OZ, ibid.
[5] Mord. Nez. 488.
[6] Demai, III, 1; Baba Batra 8b, 9a; Yerushalmi, Pe'ah IV, 8; Shekalim V, 2.
[7] Yerushalmi, Pe'ah, VIII, 6. [8] Ẓedakah 2, OZ.

charity treasury, or to donate large sums of their own, when necessary. In line with Talmudic legislation,[1] they were trusted without oath, on their mere declaration of the amounts loaned by them to the communal treasury.[2] They were not required to present an account in reimbursing themselves for funds advanced.[3] Strangers or villagers could turn over their public donations to the charity funds of their own communities, especially if there were no *Ḥeber-Ir* in the cities where the donations were made.[4]

The *gabbaim* were not the first to render aid to persons forced to apply for charity. They were called upon only when the relatives were not in a position to render such aid.[5] Only in cases of public welfare were the *gabbaim* allowed to receive favors from charity recipients.[6] A *gabbai* was permitted to resign his office only on complaint of men of standing in the community.[7] It was more desirable that only persons of means, and endowed with a good memory, should assume the office.[8] To applicants for charity, who because of their position in society did not wish the general public to know of their condition, the *gabbai* was allowed to advance the funds, on the mere recommendation of two or three prominent men of the community, without being required to give an account of the sum advanced to the public on demand.[9]

9. CHANGING CHARITY PURPOSES

The idea underlying the Talmudic prohibition against using charity funds for the benefit of individuals, or for institutions other than those specified by the donor,[1] was to prevent loss to the poor for whom the contributions were intended. The *gabbai* could deplete his treasury of its ready cash supply in the face of urgent demands by the poor.[2] This principle, calculated to avoid disputes, was adopted by all the communities.[3] The officers of the communal organizations were to be called into consultation by the *gabbai* when apportionments for various purposes were to be drawn from the general treasury.[4]

A charity pledge made in the presence of the authorities or the *gabbai* constituted a legal debt. Thus the pledger could not claim exemption from payment on the fear of becoming a public charge subsequently. For he had no more claim on the amount pledged than the other poor, who had become the virtual possessors of the pledge as soon as it was made.[5]

Heirs had no legal claims on the funds of a person who was previously favored in the will by a deceased, if the latter had asserted that the funds were given for charity purposes only.[6] Relatives, impoverished subsequent to the death of a rich member of their family, who had specified in his will that a certain portion of his property be applied for charitable purposes, could lay no claim to the portion on the plea of their own impoverishment; for the money was intended for the then existing poor.[7] Relatives could have a legal claim on the funds entrusted for charity, only

[1] OZ, Baba Batra 9a.
[2] OZ, ibid.; Talmud, ibid.
[3] OZ, Zedakah 10; Mord. Nez. 495; Megilah 27a.
[4] OZ, Zedakah 9; Nedarim 65b.
[5] SH 924.
[6] Ibid. 907.
[7] Mord. Nez. 489; OZ, Zedakah, 27.
[8] Ibid. 910.
[9] Ibid. 908.

[1] Arakin Babli 6a; Yerushalmi 1, 2; Tosifta Megilah II, 9; Baba Meziah, 87b.
[2] OZ, Zedakah 5; Mord. Nez. 491, 492.
[3] MBRP 74; OZ and Mord., ibid.
[4] OZ, Zedakah 6; Mord. Nez. 485.
[5] Mord. Nez. 487; cf. MBRP 942; Mord. Nez. 486.
[6] OZ, Zedakah 7; MBRL 152.
[7] Mord. Nez. 398; OZ, Zedakah 8.

in cases where there were no witnesses present at the time the trust was made.[1] No debts were to be paid by the poor with money obtained from charity. For the donors intended their contributions for charity and not to reimburse rich creditors; besides, the families of the poor have a prior claim on the moneys collected for charity.[2] In Talmudic law, persons owning 200 zuz in cash, or owning not more than 50 zuz but doing business with the same amount, are not entitled to receive charity.[3] However, these restrictions were subject to modifications of time and environment. The standard of 200 zuz was to be understood not in terms of actual cash, but in terms of the standard of living and the expenditures sufficient for one year for food and clothing.[4]

10. PREFERENCE IN CHARITY

The ransom of captives is preferred to any other case requiring relief.[5] However, the communal organizations did not deem themselves obligated to ransom out of public funds such persons as had rich relatives, or who were able to release themselves, or who preferred captivity to ransom on account of the expenditure involved. In all such cases the communal organizations reimbursed their treasury by collecting the funds expended either from the relatives or from the released person. In no case were the communities to temporize and wait for a free release by the captors. It was their duty to take immediate steps to effect a ransom. "For there is danger," says Maharam, "of the captives be-

[1] MBRP 474; OZ, Zedakah 20; Mord. Nez. 493.
[2] OZ, Zedakah II; MBRP 753; Tosifta, Pe'ah VI, 16.
[3] Mishnah, Pe'ah, VIII, 8, 9; Ket. 68a.
[4] Mord. Nez. 500, 501; OZ, Zedakah 14, 15.
[5] Baba Batra 8b; Ket. 52a.

coming assimilated with the Gentiles, or of being tortured endlessly, until confession is wrung out of them."[1]

When a contribution for charity was made without any specifications, the relatives of the donor were first to derive benefits therefrom.[2] If such donations were made through the communal boards, relatives were entitled only to a part of the sum contributed. Every member of a family was entitled to equal consideration.[3] A poor father was not entitled to his charity share out of the funds donated to the community by his son, it being contrary to ordinary propriety for a wealthy son to allow his father to become a public charge.[4] Two charity recipients making contributions for charity purposes were entitled to the donations, each being allowed to surrender to the other the amount donated.[5] A brother of the same father was to be preferred to one of the same mother; local poor to the poor of another city. As to the poor of foreign countries, the poor of Palestine had preference.[6] Visitors were not to give charity gifts to the son, slave, or representative of their host except with his permission.[7] A rich traveler might receive charity when in need, and was not obliged to reimburse the donors upon his return home, for at the time he had been entitled to aid.[8] The husband was forced to reimburse the communal treasury for the expense of burying his wife, after his plea of

[1] MBRP 39; MBRC 32, 33; MBRL 345; Mord. Nez. 58, 59; Nashim 270; HM, Nizke Mamon III, 2; Hobel u-Mazzik, VIII, 6. It is, however, interesting to note that Maharam planning that the precedent of imprisoning rabbis to extort ransom from the Jews, would be frequently resorted to in after times, did not permit the German Jews to give Emperor Rudoph (1288) 20,000 marks of silver in order to effect his release from the prison of Einsisheim
[2] Mord. Nez. 494; Nedarim 65b.
[3] Mord. Nez. 502; OZ, Zedakah 22, 23.
[4] OZ, Zedakah 26.
[5] Ibid.
[6] Mord. Nez. 503.
[7] Mord. Nez. 496.
[8] Mord. Nez. 498, 499.

poverty had upon investigation been found out to be false.[1]

Where there were no organized charities, a father could discharge all his charity obligations by giving his funds to his sons, to the exclusion of all others, even if the sons were of the age when a father is not legally responsible for their support.[2]

No person making a contribution for charity could retain even a part of his donation for his pet poor.[3] Preference was given to a person needed for some public service.[4] As between honorable and dishonorable persons the former took precedence, even if the latter threatened conversion to Christianity or the commission of a crime. But if the miscreants threatened to commit murder, they were to be satisfied first.[5] The sick poor were preferred above synagogue needs.[6] Scholars, devoted to study for the sake of observing the Law, were to be preferred to the building of a synagogue.[7] The clothing and the feeding of the poor took precedence over the writing of a Scroll of the Law.[8] Between cases of extreme poverty and the giving a daughter in marriage, relief to the poor seemed to have been considered more meritorious.[9]

With the best of intentions, competition for charitable relief among the poor was discountenanced.[10] No one was permitted to apply for charity, who was not in immediate need, but had ulterior motives.[11]

A person giving charity was not to cause jealousy among the recipients; the poor themselves were likewise enjoined from revealing to one another the amount received.[12]

[1] MBRP 149; MBRC 60. [2] MBRP 75; OZ, Zedakah 22.
[3] OZ, Zedakah 17; SH 683. [4] SH 1675.
[5] SH 857, 1683, 1704; cf. Kid. 72a; Moed Katan 16a.
[6] MBRP 692; SH 862. [7] SH 1707.
[8] Ibid. 1696. [9] Ibid. 890.
[10] Ibid. 875. [11] Ibid. 891. [12] Ibid. 897.

It was not ethically correct for a man to make attempts to obtain extra favors on account of piety and learning.[1]

II. LENDING OR BORROWING CHARITY FUNDS ON INTEREST

The law prohibiting the lending and borrowing of public charity money on interest is derived from the Pumbedita incident related in the Talmud.[2] The poor are to be classed as "brothers," a term employed in the Bible in reference to the prohibition against lending money on interest.[3] The prohibition applied to all cases, whether the amounts allowed for the poor were definite or not, and whether there was probable profit or not.[4] All the strictures of the laws of taking or lending money on interest were applied with full force to charity funds.[5]

However, the custom was prevalent among German Jewish communities of loaning charity money on "fixed interest." Maharam protests against that pernicious usage.[5] The Or Zarua makes a distinction between charity funds ready for immediate distribution among the poor and those held in reserve.[7]

The Talmud forbids doing business with moneys donated for charity.[8] There was, however, no objection to investing public charity money in business, where the poor would not suffer from lack of funds in emergencies.[9]

An heir of a person, doing business with charity money entrusted to him on condition that the dividends should

[1] Ibid. 903, 904. [2] Baba Kamma, 93a, end.
[3] MBRP 73; MBRL 234, 425, 426, 478; OZ, Zedakah 29, 30.
[4] Ibid. [5] MBRL 478; Mord. Nez. 453; Glosses, Nashim, 563.
[6] MBRP 73; MBRL 478, 234. [7] OZ, Zedakah 30.
[8] Shekalim IV, 2; Ketuboth 106b. [9] SH 1679-1680.

be shared alike between him and the donor, was entitled to the benefits as agreed upon by the trustee.[1]

12. OFFICERS OF THE COMMUNAL ORGANIZATION

The communal organization functioned through its officers, who constituted themselves governing boards and councils, serving on various committees.

The communities followed the Talmudic arrangements in the main. However, these were subject to temporary modifications. The term *"ma'amad anshe ha-Ir,"* or *"b'nē ha-Ir,"*[2] was explained to mean an act publicly passed by the *"tube ha-Ir,"*[3] but not requiring the positive sanction of the *ma'amad*. An act of the board of governors was held valid as long as there was no protest registered by the *ma'amad*.[4]

Due to the fact that the communities were smaller in population than those of the Talmudic periods, the number "seven" for the *tube ha-Ir* (representatives of the town), was rather loose. It was interpreted to mean that an act must be proposed by at least seven leading members of the community, presumably giving, or capable of giving sufficient publicity to the proposal, and competent to pass authoritative judgment on public policies (Ḥayyim Or Zarua, ibid.). For matters of lesser importance, three members were sufficient.[5]

Besides the *tube ha-Ir*, reference is made in the sources to the *"Rashe ha-kahal"* (the heads of the community), who were probably identical with the *"heber ha-Ir,"* mentioned in the Talmud;[6] and who seemed to be higher in office than the *tube ha-Ir*, by virtue of their scholarship and

[1] MBRP 147; MBRC 57; Mord. Nez. 147.
[2] Megilah 25b, 26a, b.
[3] Megilah 26b, 27a.
[4] OZ II, 385; HOZ 65.
[5] Mord. Nez. 457, 458.
[6] Megilah 27b, Rashi.

their unremunerated public activities.[1] The terms *"rashe ha-kahal"* and *"hakme ha-kahal"* seemed to have been identical and interchangeable.[2]

The enactments of the governing boards, whose members came into power by due process of communal election,[3] were as binding as those rendered by the law courts of Talmudic times.[4]

An agreement entered into by two contending parties in the presence of the *tube ha-Ir*, could not be broken by either of the parties.[5]

While the governing boards enjoyed absolute authority, they were nevertheless expected to respect the wishes of the community. The extent of power vested in them depended on the stipulations made in the constitution or ordinances of the community.[6]

A majority vote of the governing board was required to validate decisions regarding the purchase, erection, repair, or destruction of public buildings, such as synagogues, wedding halls, bath houses, bakeries, and in fact any public or communal utility. Should certain members refuse to abide by the enactments of the administrative board or oppose these measures, the governing boards could force obedience upon them by court procedure, and when necessary even lodge suit against them in civil courts. All the expenses involved in such litigation were to be borne by recalcitrant minority.[7]

The conditions of the period called for very stringent measures of control. It is true that the principles of demo-

[1] MBRC 230; Mord. Nez. 481, 482.
[2] Mord. Nez. 482; HOZ 65.
[3] SH 1387.
[4] MBRP 38; MBRC 230, 188; Mord. Nez. 334, bottom.
[5] RaBen Prague 100, p. 33; MBRB 228; MBRP 389, 392; Mord. Nez. 681, 679, 680.
[6] Mord. Nez. 482; HOZ 65.
[7] HM Tefilah 11.

cracy suffered thereby, but this undemocratic spirit can be ascribed to the prevailing environment and to the exigencies of the times.[1]

The Jewish communities, despite Talmudic legislation to the contrary,[2] did not deem it advisable and practical to permit their officers to hold office for life. It seems that the average tenure of office was that of one year.[3]

Great honor attached to the office of communal director, for keen competition existed for election to the Board of Directors.[4] The honor of officiating at the public services on the high holidays was as a rule conferred upon one of the members of that body.[5]

The other communal officers were the *gizbar*, (treasurer),[6] rabbi; cantor; *shohet* (ritual slaughterer); *bōdek* (ritual inspector of meats); *shammash* (sexton); court messenger; sometimes the butcher; the scribe; and to a certain extent the *sh'tadlan* (representative sent by the Jewish community to the seat of the civil administration and whose business it was to use his best endeavors to modify unfavorable legislation towards the Jews.)[7]

The title *parnas* appears very rarely in the sources. We are not certain as to whether such an office existed at all at that period. He may probably be identified with the archisynagogue of Talmudic times, as "rashe ha-knesset".[8] Mordecai[9] mentions the *parnas* in connection with the honor of officiating at the high holiday services. It seems that the

[1] Mord. Nez. 481, glosses.
[2] Horayot 13b; Kid. 76a.
[3] HOZ 65.
[4] Ibid.
[5] Mord. Moed, 619.
[6] MBRL 382.
[7] MBRP 73; HM "Issut," 10; Mord. Nez. 203, MBRP 24; cf. Abrahams, J. L.
[8] Graetz III, 279; Guedemann I, 212; cf. Graetz III, 99, *parnase hakenesseth*; Schürer, Die Gemeinderfassung der Juden in Romm, p. 24.
[9] Moed 619.

parnasim enjoyed official recognition by the civil authorities, and at times they saved the people from impending danger.[1] Yet in many instances they seem to have been unworthy and unscrupulous persons. They succeeded in congregational politics through intrigue. They used the office to gratify their own vanity and to acquire material advantage. At times they were even detrimental to their Jewish constituents (Sefer Hasid. 1343). The author of the Sefer Hasidim[2] gives a vivid description of one such personage. He was arrogant. He had access to the court. At civil trials in which one of his relatives or a particular favorite of his was a party, he placed the Jewish authorities in a helpless position, for not only was he a power himself, but he also had a large following. No ban of excommunication could be proclaimed against a person, no matter how criminal, if he happened to be a special favorite of the *parnas*. He would even refuse to employ his influence with the court in behalf of his people in emergencies. Quarrels and disturbances at public services were frequent. There is another interesting description by the same author. A *parnas* employed many Jewish laborers. They left him for the employ of others, who paid higher wages. The *parnas* threatened the other employers. His threats had the desired effect, thus causing suffering to the working men. For he forced them to accept a wage even smaller than previously paid them.[3]

13. THE PROCESS OF ELECTION

Officers were first nominated by officials called *berurim* (nominating board).[4] The election proper was conducted

[1] MBRP, 241.
[2] SH 1344.
[3] SH 1346; cf. 1345, 1340.
[4] HOZ 65.

by a few of the most prominent tax-paying and property-owning members. These electors had to take a special oath, promising that they would honestly and disinterestedly execute the public will in electing proper officers for the community. In case no agreement could be reached, or where as a result of partisan strife the electors themselves were unable to concur upon certain candidates, the election was to be delegated by them to other prominent men of the community, who, admonished under oath to be honest, would cast the deciding vote. The candidates receiving a majority were declared elected.

Ḥayyim Or Zarua (13th century) advised the communities who referred themselves to him to appoint two or three prominent men of the community to act with the administrative board in an advisory capacity, especially as regards the administration of charities and the levying of communal taxes. In cases of controversy among the members of the community, where its sanction was required to make an act of the administration legal and binding, he advised the members of the board to follow the opinions of the majority of the most honored men of the general public.[1]

14. RELATIONS BETWEEN COMMUNITIES

With the exception of the rabbinical Synods to which various communities sent their representatives, we can hardly speak of any federation of communities among the Jews of Germany in the Middle Ages. Nor did the civil government do much to encourage relationships between communities.[2] The use of the cemetery of a larger community by suburban Jews or by those smaller communi-

[1] HOZ 65.
[2] Stobbe p. 146.

ties which had no cemeteries of their own, or the court jurisdiction of a larger community over those suburban Jews who used the cemetery of the community in which the court functioned, are the only instances which give a semblance of connections between communities.[1] The lines of demarcation among the communities, touching their political, social, and religious life, were rather sharply drawn. This attitude is, however, not to be ascribed to a state of animosity or even lack of friendship between the communities. Medieval Jewry could ill afford to indulge in quarrels. Difficult travel conditions and poor communication facilities; the political boundary lines that marked off one state from another; and the distinctive customs and ordinances (*takkanot*) which every community promulgated to suit local needs, may be assigned as some of the causes for this isolation. But the main reasons were undoubtedly the facts that the Jews lacked central authority and that each communal organization was held responsible for the payment of the various tax items imposed by the local and state governments.[2]

Not only were the specific ordinances promulgated by the communal authorities considered limited in their application to those members for whom they were intended, but even universal laws relating to "*kashruth*" (observance of Jewish dietary laws), ceremonies, and Sabbath and holiday observances, were not similarly observed in all communities. The permissible in one community might be prohibited in another. Thus, the meat of a slaughtered animal one of whose lungs was affected at a certain spot (at the edge בשיפולי הריאה *b'shipule ha-reah*), was prohibited for consumption by the Jews of Mayence, but the

[1] Ibid.
[2] MBRB II, 140.

same prohibition did not exist in Worms. In Mayence the use of things or plants attached to the ground (מחובר "*m'ḥubbar lé-karkah*" לקרקע), was forbidden on the second festival day, while it was permitted in Worms. When the Jews of Mayence visited Worms, it was the duty of the latter city to inform the visitors of their local customs, and it was left to their choice to adopt the customs of the place.

מיירי בשני חכמים הדרים בעיר אחת או בשני מקומות אלו אוסרין ואלו מתירין שצריכין לומר למתירין ולחפך דבר זה אתם אוסרין ואנחנו מתירין חלכך בני מגנצא שנוהגין איסור בבואת בשיפולי תרויאת ואוסרין מחובר לקרקע ביום טוב שני של גליות ובגרמייזא מתירין אלו תדברים וכשבאים בני מגנצא לגרמייזא צריכין בני גרמייזא לחודיע לחם ואז כשמודיעין לחם אם דעתם נוחה אחריחם מותר לנחוג כמותם אף על פי שאסור במקומם.

In the Rhineland provinces it was customary to kindle Chanukah candles from left to right, while the Austrians were accustomed to light them from right to left.[1]

Israel Isserlin cites earlier authorities to the effect that in some communities a *takkanah* (ordinance) was in vogue that if a man or a woman died within the first two years of marriage, leaving no children, neither could inherit from the other, the dowry or the property of the deceased going to his or her nearest of kin. No such *takkanah*, however, operated in Austria. Again, in the Rhineland provinces provision was made in the writ of betrothal (*ketubah*) to write that the married couple agreed to abide by all the ordinances and regulations of the community, no such provisions being made in other sections of the country.[2]

In civil and criminal cases involving intervention by the civil authorities, the force of excommunication was held to be binding only upon the members of the local community, members of other communities considering themselves exempt from such punishment.[1] However, in cases involving punishment for transgressing a religious law universally accepted, none of the members of any community could consider themselves immune on the ground of being citizens of other cities or states.[2]

[1] Mord. Nashim 4.
[2] TH 100.

The power of excommunication, which lay mostly in the hands of the rabbis, was in several communities curtailed, in order to prevent the rabbi from wielding his power in too despotic a manner. The ordinances were to the effect that he could pronounce the ban only with the concurrent consent of some of the most prominent members of the community. In Austria the sanction of the government was required before an excommunication could be put into force.[3]

[1] Ibid 210, 321.
[2] Ibid 276.
[3] cf. Isserlin I 276; Mord. Nashim, 108.

CHAPTER II

THE SYNAGOGUE

1. THE SYNAGOGUE A CENTER OF JEWISH LIFE

THE synagogue was the only important organized institution of the medieval Jewish community. It was the center of all communal, religious, and secular, and to a large extent, social activities. To the medieval Jew religion was all inclusive. Every day pursuits were to be hallowed by association with the synagogue.[1] It served as a meeting place for the Board of Directors in the Communal Organization.[2] Persons who because of evil conduct in public life, had incurred the general censure, were denounced by proclamation from the pulpit.[3] Oaths were administered publicly at the synagogue.[4] Excommunications were usually pronounced in the house of prayer.[5] Persons accused of gambling (*Kubia*), were, in some congregations, forced out of the synagogue.[6]

2. THE SITE

In strict accordance with the Talmudic law[7] which said that the synagogue building should stand on the highest spot in the town, and that it should rise above the sur-

[1] Berliner, Aus D. Leben, p. 113; Abrahams, J. L., p. 8 ff. and 15 ff.
[2] SH 461.
[3] HM, Hobel u-Mazzik, V. p. 109.
[4] Mord. Nez. 251.
[5] Ibid. 763.
[6] Ibid. 695.
[7] Sabbath 11a.

rounding edifices, no private home was to surpass the synagogue building in height. Should a private owner wish to raise the height of his property above that of the synagogue, he was forced to contribute the expense of raising the height of one wing of the synagogue building, proportionately.[1]

The site upon which the synagogue stood and its surroundings were considered communal property. Special permission had to be obtained from the communal governing boards when improvements upon a neighboring estate or house might do damage to the environs of the synagogue.[2] However, the complaint of worshippers that the smoke and steam from a bathhouse on a side adjacent to the synagogue inconvenienced them, was not sustained. The owner's claim of tenant right (*ḳazakah*) was declared valid, especially when acquired by consent of the communal authorities, and with no previous protests by the worshippers against the erection of such a building near the synagogue.[3]

3. BETH HA-K'NESSETH AND BETH HA-MIDRASH

As to the synagogue of that period, a sharp line must be drawn between the Beth ha-K'nesseth, the house of assembly—and the Beth ha-Midrash, the house of study. Though the relations between the synagogue and the school were intimate, the two institutions were, nevertheless, independent from one another. The former was devoted mainly to prayer; the latter was the center of Jewish studies and learning, in which only rabbis and scholars would

[1] HM, Yad. Hilkot Beth Haknesseth, 11; Abrahams, J. L. p. 27.
[2] MBRP 235, 236.
[3] MBRP 233; HM "Shekhenim," xi, 4, 5; Mord. Nez. 551.

worship.[1] The distinction was so marked that changes from one to the other caused litigation; and permission to make such changes was given by the Jewish authorities only under certain conditions. The following is a case in point:

A member of a community donated a parcel of land to the community to erect a synagogue. When the community was about to start actual work, it was restrained by the Christians of the neighborhood. The erection of a school house was decided upon. But the donor claimed that his donation of the land was intended for the building of a synagogue only. Maharam, in accordance with the Talmudic law[2] decided in favor of the community. For, as soon as the announcement was made, the community had become the legal owner of the land. However, the donor's consent was required to make such a change, if he had been a previous resident of the community, and in towns where there was no "ḥeber Ir" (scholar),[3] where the law permitting the change of a synagogue into a school house and vice versa is stated.

As regards permission to sell a synagogue, there is a fine distinction in the Talmud. Only a village synagogue could be sold, but the sale of a synagogue in a big city was prohibited. The former was erected usually from funds collected by the villagers only, and they have the right to consider the synagogue building as their own property. But the people of a big city make appeals to outsiders also for the building of a synagogue, hence they cannot consider

[1] Teshubot Ha-Geonim, Lyck, p. 87; Abrahams, J. L., pp. 33, 34, quoting sources.
[2] Megilah 26b.
[3] MBRB, p. 239, resp. 240; Mord. Moed 821; cf. Megilah 27a, where the law permitting the change of a synagogue into a school house and vice versa is stated.

themselves the sole owners of the property.[1] "Therefore," says the Or Zarua, "since there is a custom to make appeals for contributions to outsiders also for the purpose of building a synagogue in large cities, the sale of such synagogues is forbidden."[2] "But," continues the Or Zarua, "if it is certain that the synagogue was erected with the moneys collected solely from the residents of the city, the sale of the synagogue is permitted, and is legal when executed by the Seven Elders. In case outside contributions for the erection of a synagogue in a big city were made solely on the appeal of a very respectable person of the community, out of deference to whom, money was given by the outsiders, the synagogue may be sold with the consent of that person." If a person transferred all his rights to a private synagogue to the community, the latter became the sole legal owner and had the right either to sell or to make alterations in the building, and neither he nor his heirs might interfere. But if he had transferred his rights only as regards the conducting of public services, retaining other privileges, such as the making of alterations or of building additions, the sale of the synagogue could not be legally executed, unless sanctioned by him or his heirs.[3]

Some communities had more than one synagogue, usually one larger and more influential the the other. The more pious would prefer to worship at the smaller synagogue, because prayers were said there more carefully and services there were less liable to be interrupted.[4]

The men of a city in which there was no established synagogue (or *minyan*, i.e., quorum), could compel the other members of the town to contribute their share, ac-

[1] Megilah 26a.
[2] OZ II, 385.
[3] Ibid.
[4] SH 1575.

cording to their means, towards the erection and maintenance of a synagogue, and to purchase Scrolls of the Law.[1] In line with this Talmudic law, Maharam declared that a community could compel the presence of one of their members, if his absence would leave the congregation without the quorum (*minyan*) necessary for public worship. For the high holidays, the custom was general among all the congregations to hire one or two men, in order to complete the quorum for those who did not wish to leave their small towns for the larger cities.[2] Members of a community were to be taxed for synagogue purposes not according to their numbers, but according to their financial standing.[3] Should a fire destroy the synagogue and private homes, it was preferable, according to the opinion of R. Yehudah ha-Ḥasid, to rebuild the synagogue first.[4]

4. ARCHITECTURE AND ORNAMENTATION

The sources present very meagre, or practically no data as to the external shape of the synagogue. Ezekiel Landau, the famous Polish scholar of the eighteenth century, maintained that Jewish law has no bearing on the style and architectural design of the synagogue.[5] We may assume that the style of the country in which the synagogue was built was followed by the German Jewish communities of our period. Allusion has already been made to the Talmudic regulation that no private home might surpass the synagogue building in height.[6] R. Yehudah ha-Ḥasid declared "that it is very desirable that synagogues should be erected on one of the choicest spots of the city. That no private

[1] Tosifta Baba Meẓia, 11; Mord. Nez. 478.
[2] Mord. ibid.
[3] SH 529; Mord. ibid. 479.
[4] SH 527.
[5] Noda Bi'yehudah, I, 18.
[6] HM Hilkot Beth Haknesseth, 11.

Jewish home should be built on a site more beautiful than that on which the intended structure of the synagogue is to be erected."[1] However, the sources do make reference to the interior decorations of the synagogue.[2] Figures of birds, lions, reptiles, horses, fishes, and many other etchings of living things, even the figures and faces of human beings on the curtains, were to be seen on the walls and in the prayer books.[3] We are also informed of floors built of costly stones and marble, covered with expensive carpets. Objection against the latter was raised only when they were inlaid with pictures suggestive of religious symbols, the deity and places of worship of other faiths, so that the cantor might not seem to pay homage to these, when bowing or kneeling.[4]

There seem to have been no serious objections to such pictures and etchings in the scheme of synagogue decoration. The second commandment, forbidding the making of images, was interpreted to apply only to relief, plastic, or sculptural work, but not to painting.[5] The authorities, nevertheless, disapproved of figures of plants, birds, and beasts on the synagogue walls and in prayer books, for such pictorial embellishments might distract the attention of the worshippers.[7] Maharam ordered a coat of varnish to be put over the pictures of lions and snakes painted on the walls of the synagogue of Cologne. It is especially to

[1] SH 535. [2] SH 1626.
[3] MBRP 610; MBRL 496; MBRC 24; Tosafot, Yoma, 54a, beg. "K'rubim"; Mord. Nez. 840; MBRB 335, p. 52; HM, Ab. Zara, 111, 3; OZ iv, 23; cf. also MBRL 303, index of contents; Berliner Aus D. Leben, pp. 117, 118; Abrahams, J. L. p. 29; Kaufman, Jewish Quarterly Review, Vol. IX.
[4] MBRB 11, 94, p. 132; Mord. Moed 807.
[5] MBRC 24; Mord. Nez. 807; Tosafot, Yoma, 54b, beg. 54a.
[6] MBRP 610; MBRL 496; Mord. Nez. 840, Tosafot, Yoma 54a, b.

be noted that the same synagogue had stained glass windows, probably in imitation of the non-Jewish houses of worship.[1] The Or Zarua considered the pictures of plants and birds on the walls of the synagogue at Meissen (מיישין) as against the law.[2]

The Ark of the Law, was not as a rule a movable piece of furniture, constructed apart from the wall of the synagogue building. On the contrary, it appears that generally the Holy Ark was fashioned as a recess in the wall, or constructed separately out of stone[3] "וארון של אבן בגון שלנו" The question was asked whether it was lawful to remove or destroy an ark of stone, the dampness of which had done damage to the Scrolls of the Law, and replace it by an ark of wood.[4] That as a rule the Arks of the Law were provided with locks, and were kept locked, appears from an incident related by R. Yehudah Ḥasid, wherein the congregation found itself in a predicament when the keys of the Ark were lost, and they were unable to take out the Scrolls for reading on a Sabbath.[5] The doors of the Ark were sometimes decorated with figures of plants, preferably of vines, or of candelabra, or of lions. Stones graced the steps leading to it.[6] The approach was by an elevation lower than the Ark, and surrounded by an enclosure, called *Bimah*.[7]

In front of the Ark, probably a little to the side, there was a stand made of stone or wood, on which were placed rows of candles.[8] In Mayence these stands were removed

[1] MBRP 610; Mord. Nez. 840; OZ IV, 203.
[2] Ibid. bottom; cf. Kaufmann, Zur Geschichte der Kunst in den Synagogogen, Vienna, 1897.
[3] SH 486, p. 137; OZ 11, 386; Mord. Moed 822.
[4] OZ and Mord. ibid. [5] SH 489; 494, p. 138.
[6] Kaufmann, ibid. [7] SH 486, p. 137.
[8] MBRL 436.

on the Day of Atonement, in order not to interfere with the priestly blessings as the priests spread forth their hands before the Ark.[1]

In the synagogue auditorium was the *Bimah*, the elevation for the reading of the Torah. In the sources the *Bimah* is frequently referred to as Kathedra.[2] It appears that a seat was reserved on the Kathedra for the rabbi, or for any prominent visitor, "*Ḥakam*" (scholar).[3] The children privileged to hold the Torah, while another Torah was being read, sat on the Kathedra.[4]

Oil was generally used for lighting the auditorium of the synagogue. In case the odor from the oil caused inconvenience to the worshippers, it was substituted by wax or tallow candles.[5]

5. SEATING ARRANGEMENTS

The greatest drawback to congregational progress was the undemocratic methods used in the disposing of the seats of the synagogue. A seat might be secured only through purchase. When bought, the seat remained the owner's private property. He could sell, pawn, mortgage it, or defray the payment of a debt therewith, or give it in lieu of a tax-payment.[6] At the death of the owner, the seat was inherited by his nearest heir. The administration, however, retained the power to prohibit the sale to or the use of a seat by one delinquent in the payment of his dues or of regular or irregular taxes.[7] The value of a seat increased or decreased in proportion to its distance from, or its prox-

[1] OZ 11, 34, p. 16.
[2] SH 404; OZ 48, p. 21.
[3] SH ibid.
[4] OZ ibid.
[5] MBRL 269; MBRP 223; Berliner, Aus D. Leben pp. 116, 117.
[6] Asheri V, 4.
[7] Ibid. 5.

imity to the Ark, much to the advantage of the wealthy and to the disadvantage of the poorer members. A rich man might buy a great number of seats and dispense them at his pleasure. This would raise the price of the remaining seats, to the exclusion of the less well-to-do. Moreover, a seat holder might partition off his seat, thus obstructing the view of those sitting to the rear or on the side. Quarrels, litigations, and the deterioration of the auditorium were the natural consequences of such poor management.[1]

The following extract from the sources referred to, shows conclusively that these methods of seating were the rule in nearly all medieval Jewish congregations. Says Asheri: "Moreover, in all the countries which I visited, I observed that the members of the communities have permanent seats in the synagogues, and that each seat is partitioned off from the others. In these countries, the custom is prevalent to sell the seats, their value depending on their distance from or proximity to the Altar."[2]

Final arrangements as to seats rested with the governing board of the congregation. This body was empowered to impose fines and the penalty of excommunication upon those who violated its regulations by occupying seats belonging to others during divine services.[3]

A certain section in the synagogue auditorium was as a rule partitioned off for the use of the younger men and boys. Rows of smaller and lower chairs were usually placed in that section during divine services.[4]

6. SYNAGOGUE HONORS AND DECORUM

The same unfavorable comment must be made on the methods of distributing honors attendant upon public

[1] Ibid. V, 3, 6; SH 447, 495, 1632.
[2] Ibid. V, 3.
[3] Ibid.
[4] MBRC 145.

worship. Honors were procured through purchase. Groups of people might combine to buy certain honors for all the year. Such monopolies would arouse the resentment of the other members of the synagogue.[1] Protest might be made against the acquisition of honors by individuals which rightly belonged to the officials of the synagogue, the rabbi, or the cantor.[2]

For a long time before, and in many communities during the period under review, the custom was prevalent for each man called to ascend to the desk (*Aliyah*) to read his allotted portion aloud. The honor of being called to the desk was thus limited to the learned men of the community. "But," writes the Or Zarua, "the communities have adopted the meritorious custom of calling to the desk anyone, even the unskilled and uneducated, the reading of the allotted portion being the duty of the cantor or the sexton."[3]

With the exception of the Kohen and the Levite, who were called first, men were summoned to the desk in the order of their importance or learning; so that in some communities, notably in France, the rabbi, contrary to modern usage, was called last, or was given the seventh call (*Sh'vii*), the reason being the rabbinic principle, "One may only rise in the order of holiness."[4]

A summons to pronounce the benediction over the Torah was an occasion for personal offerings, or donations for the synagogue or charitable purposes.[5]

Within the synagogue, and usually during worship, hearings were allowed of claims or grievances by the community against an individual,[6] by a member against the commu-

[1] SH 1592, p. 390.
[2] OZ II, 115, p. 41.
[3] OZ II, 42.
[4] OZ II, 42, p. 19, col. 1, bottom.
[5] Mord. Moed 833.
[6] SH 1344.

nity, or by one Jew against another Jew. This privilege, prior to the ordinance of the Synod of Speyer, Worms and Mayence (Shum), was shamefully abused. Even fist fights would ensue, the contending parties not permitting the resumption of services until full justice had either been done or promised. On one Sabbath, in a synagogue in Cologne, the interruption of the services lasted all day.[1] Such disturbances might cause the closing of the synagogue;[2] or, disgusted by frequent interruptions, scholars would leave the synagogue altogether, and pray in other places.[3] The same interlude might occur on any day on which the Torah was read, including fast days.[4] In Mayence it was customary not to allow any interruption of services, until the congregation had reached that portion of the service commencing with the word "*Yishtabach*" and the *Kaddish* had been recited.[5]

It was not the custom to interrupt public worship for the redress of grievances during the month of Nissan, or at the services on the high holidays. Country people were allowed hearings at public worship on days set aside for that purpose by the authorities.[6]

The privilege was eventually suppressed by ordinance of the Synod of Speyer, Worms, and Mayence (*Takkanot Shum*).[7]

Lack of decorum at divine services was a long-standing grievance of the synagogue. Gossip of all sorts was indulged in.[8] Even learned men would prove inattentive to the service.[9] Scholars, and sometimes ordinary laymen, were

[1] OZ II, 45.
[2] SH 462.
[3] Ibid. 1575.
[4] SH 463.
[5] Rabiah, 32.
[6] Mord. Nez. 149.
[7] Cf. Supra., MBRP 1023.
[8] SH 1589.
[9] OZ I, 11, p. 22.

permitted to have their meals in the synagogue or the *Beth* ha-Midrash.[1]

These breaches of decorum were not, however, indulged in because of disrespect to the synagogue or to the services. They show that the synagogue was the chief meeting place of medieval Jewries. Yawning, spitting, or sneezing in the synagogue was forbidden. He who yawned was ordered to place his hand in front of his mouth.[2] The religious authorities were untiring in their attempts to enforce strict rules of behavior and reverence during prayer.[3]

7. SYNAGOGUE OFFICIALS

Any portrayal of the medieval Jewish congregation would be incomplete, without an account of the functions of the various synagogue officials, such as the cantor, the *shoḥet*, the *bodek*, the butcher, and the *shammash*.

The cantor was an official salaried by the congregation.[4] His election had to be unanimous. In many of the Rhine provinces there was an ordinance to the effect that the objection of a small minority, even the dissenting vote of one member, could invalidate the election of a cantor. The cantor, by virtue of his office, was considered the people's representative before God in prayer. He could not, therefore, be sincere in his prayers before God for such families and persons that objected to his election. Besides, the cantor, being also the reader,[5] might cause the curses pronounced in Leviticus XXVI and Deuteronomy, XXVIII to take effect upon those not friendly disposed towards him.[6] One

[1] OZ II, 388; cf. Megilah, 26, a, b.
[2] OZ I, 98.
[3] OZ I, pp. 41, 42; cf. Abrahams, J. L., pp. 19, ff.; SH 1576, 1581, 1602, 1612, 1617, 517, 533.
[4] OZ I, 113.
[5] OZ II, 42, p. 19; MBRL 109, 112 (as to salary); SH 1594.
[6] OZ I, 114; MBRL 109.

of the duties of the cantor was to call worshippers to the Torah. Those not friendly disposed towards him might refuse to respond to the call of honor.[1]

R. Isaac of Vienna, the author of the Or Zarua, protests in most vigorous terms against this custom. "I do not dispute the right," he says, "of a congregation to render the election of a cantor invalid, if a majority, or if at least several members or residents or taxpayers, object to the cantor, but for a community to abide by the objection of an individual and thus deprive a cantor of his livelihood, is nothing short of damnation and sodomy."[2]

The cantor could not be stopped from officiating throughout the year, excepting on the high holidays, when the unanimous consent of the congregation was required to allow him to officiate.[3]

A cantor, once elected, could not be removed from office on the mere plea of his opponents. He could be removed only on grounds of personal misconduct.[4]

In case the office was left vacant by the death of a cantor, preference was to be given to a son who might be able to officiate. He was advised to overcome opposition by personally soliciting the good will of his opponents.[5]

No court influence was tolerated in the matter of choosing congregational officials, especially the cantor. In answer to a congregation asking his opinion about the validity of a certain cantor's election, who attempted to use influence upon those members of the congregation who opposed his election, Maharam has this to say: "He acted in a wrong

[1] SH 1594, 1595.
[2] MBRL 111; OZ I, 115.
[3] MBRL, Rosh Hashana, 33b.
[4] OZ I, 114.
[5] MBRL 110; OZ I, 114.

manner, in his attempts to bring the duke's influence to bear upon those who objected to his election."[1]

The following incident, which occurred during the lifetime of Rabbi Eliezer Ben Joel Halevi (1160-1235),[2] is cited as precedent and a case in point: The congregation of Cologne elected a cantor; one of the members of the congregation, wishing to pay special homage to the newly elected cantor, caused the latter to be introduced to the duke of Cologne, by having an invitation extended to the cantor by the duke. The duke, to show his approval of the election, removed his hat. But the cantor refused to accept the position, saying: "I do not wish to accept the sacred office from your hands." And he resigned from the position to which he had been elected.[3]

Besides his regular salary, (and especially in communities which were not able to pay a regular salary to a cantor) collections were made for the cantor at weddings and on holidays.[4] In Poland, Russia, and Hungary, the cantors were also called upon to perform some of the functions of a rabbi and also to act as Hebrew teachers in order to maintain themselves.[5] As a class the cantors did not seem to have had a high standing in the eyes of the public.[6] The privilege of officiating as precentor was an honor coveted by many laymen, at times leading to actual bloodshed.[7] It is for this reason that the authorities of the congregations imposed upon the synagogues the duty of engaging permanent cantors.

[1] MBRP 137; MBRC 190; Mord. Nez. 107.
[2] MBRP 137.
[3] MBRP 137; MRBC 190; Mord. Nez. 107.
[4] MBRL 112; OZ I, 113.
[5] Maharam; OZ, ibid.
[6] SH 470, 471; Abrahams, J. L., p. 91.
[7] MBRL 112; OZ I, 113.

The cantor seems also to have performed the functions of a *shoḥet* (ritual slaughterer).[1]

The *shoḥet* was an official, who to a large extent was dependent upon the good will of the butcher, who in turn, was hired by the community to provide *kosher* (ritually slaughtered) meat upon conditions drawn up in his contract. The butcher was the cause of much trouble to the *shoḥet*, especially when the latter was too exacting and scrupulous in the carrying out of the strict requirements of his office.[2]

The care of the synagogue was left to the charge of the *shammash*. The Talmudic "*ḥazzan ha-k'nesseth*" became the *shammash* (beadle) of medieval Jewries, as well as of modern times.[3] He acted as the town-crier. It was his duty to wake the members of the synagogue at dawn for attendance at the morning services, especially on Sabbaths and holidays, by rapping on their windows or gates.[4] Besides these functions, the *shammash* was an official of the community with considerable powers and responsibilities. He was the official executor of the *Beth-Din*, (the court) in which capacity he also inflicted corporal punishment on those whom the Jewish Court condemned to such penalties.[5]

The *melammed*, or Hebrew teacher, does not appear to have been a communal personage. The responsa invariably refer to him as a man hired by individuals for the purpose of instructing their children in Jewish studies.

[1] MBRP 90.
[2] MBRP 90.
[3] OZ II, 42, p. 19, col. 1; 90, p. 47.
[4] Mord. Moed, 696; cf. also Berliner Aus D. Leben, p. 114; Abrahams, J. L., p. 55, 145.
[5] Cf. "Taxation," infra.

CHAPTER III

TAXATION

1. GREATEST OF COMMUNAL PROBLEMS

THE matter of taxation was one of the most difficult problems with which a medieval Jewish community was called upon to cope. It consumed the greater part of their organized activities. The items of taxation were so numerous that a Jew in poor circumstances found himself, when all of his obligations were met, to have expended nearly half of his income in such contributions.

The responsa inform us of regular and irregular taxes; of a poll tax and of communal taxes; of special imposts, fines, and assessments.[1] The amount to be turned in was not a fixed and settled matter. It all depended upon the king and the conditions of his treasury.[2] Such a state of affairs would necessarily require readjustment nearly every year and upset the existing order of things. Conditions were seldom taken into consideration. The levying of taxes suffered no haggling or compromise. The medieval high or petty official was very extortionate and exacting, especially so when dealing with Jews; and when pressure from without ran high, the Jews in most cases found themselves insufficiently prepared to meet other exigencies of the moment.

[1] Mord. Nez. 177, 179, 475; TH 341, 342, quoting earlier authorities. אבל אם חשר רוצה שיתנו כל אשר לחם אן חצי ממונם או מס גדול שאינו חושש מאין לוקחין אותו אז יתנו מן הכל ואפילו מן חבתים.

[2] MBRP 38; TH ibid.

Arrests, personal injury, confiscation of property were to be expected.[1]

The difficulties were the more acute when we take into consideration the fact that practically none of the communities had a unified system or method of levying taxes. No general rules or regulations were laid down, and every community took its own course of action.[2]

2. NO UNIFORM SYSTEM

The question of taxation was thus a very complicated affair, and it greatly troubled the heads of the communities. In fact, the information we have touching upon this question has been gathered from a number of responsa, written by their authors in reply to communities seeking advice, and from many references to litigations between one community and another, or between a community and one of its members, or between one member and another.[3]

Most of the communities collected the amount in lump from the members, who were taxed according to their rank and means, and the lump sum was turned in by a tax-committee responsible to the government.[4] Other communities, though their number was small, had every individual member pay his share directly to the government tax collectors.[5]

3. TAX ITEMS

The items of taxation, as indicated above, were numerous. The following were the most important ones.

[1] MBRB II, 19, p. 146; 127, pp. 204, 205, 206; MBRP 106; MBRC 49; MBRL 371.
[2] MBRP 106, 941; MBRL 371; Mord. Nez. 552.
[3] MBRP 131; Mord. Nez. 183.
[4] MBRP 331.
[5] MBRP 941; Mord. Nez. 481.

The regular tax was levied by the king on the land owned and on income.[1] In the Rhineland provinces and in Austria an irregular tax was levied on houses, orchards, and vineyards, to cover the maintenance of the city police, and of the forts protecting the city.[2] Though as a rule no regular tax was levied on houses used as private residences, a regular tax was levied on real estate owned for business purposes.[3]

Under the class of irregular taxes may fall certain articles on which some countries levied a special tax. Thus, in Austria and in the adjoining provinces, a tax was levied on ornaments, and precious stones, including such as were inlaid, or attached to the wearing apparel of men or women.[4]

A tax on land was levied only where there was a communal regulation to that effect. The heads of a community, in their attempt to add new taxable items to those already listed, wished to promulgate an ordinance by which the owner should pay a tax on a tract of land of a minimum value of one pound. On being asked for his opinion, Mordecai made the following reply: "In this country no tax is levied on land. Many attempts have been made by certain interested parties to introduce land as an item of taxation, but we objected to such attempts, on the ground that no innovations were to be allowed where they would cause a loss to one class and a gain to another."

A ten percent allowance was made on ornaments and other articles of luxury to those who had paid ten times their value in other taxes. Thus, those who had paid one hundred pounds were given an exemption on precious articles valued at ten pounds. The reason for this exemp-

[1] MBRP 104; Mord. Nez. 475.
[2] Mord Nez. 475.
[3] TH 342.
[4] MBRP 941; Mord. Nez. 481.

tion was that rich persons were not likely to turn their jewels into merchandise. For the same reason no taxes were levied on clothes and bedding.[1] A tax was levied on money loaned on interest.[2] No tax, however, was to be exacted from a person in possession of someone else's money. This is elucidated in the following statement: "In answer to your question," wrote Mordecai, "as to whether a Jew who is in possession of someone else's money for the purpose of transacting business therewith, is obliged to pay an extra tax to the *ḳahal* (community), in their endeavor to raise the required unlimited tax imposed upon them by the king —I wish to say that the claims of certain members of the *ḳahal* that the knowledge on the part of the king of the possession of such money by certain members would tend to make the communal burdens still heavier, are not valid. For the kings, prior to their levying the imposed tax, base their estimates on data of the actual possessions in money and value of the taxpayers, Jews or Gentiles, furnished him by his agents, and the amount apportioned to be paid by the several Jewish or Gentile communities is allotted on the basis of perfect equality among the several members of the above communities, according to their standing. It is, however, left to the discretion of the individual persons to report such cases to the king, to relieve the community of the anxiety of such extra burdens."[3]

No special legislation was, however, required for the levying of taxes on salable land. To enforce his argument, Mordecai cites cases where towns exempted from taxes those of their citizens who, besides owning land for their

[1] Mord. ibid. MBRP III, 141.
[2] Ibid.
[3] MBRP 331.

own use, were not engaged in other remunerative enterprises.[1]

Any loan which the lender had not given up for lost was subject to taxation.[2] No tax, however, was levied on money loaned, where the time for payment was not specified in the terms of the loan.[3]

4. TAXABLE PERSONS

Nearly every person was held accountable for the purpose of taxation. This included boys who had reached a certain age, and orphans in possession of taxable property. (In some communities they became liable to taxation only after reaching a certain age or after having been married). Widows, and women possessing property independent of their husbands, were liable to taxation.[4] Nearly everybody had to pay a poll tax. The head of a family was held responsible for his whole family, including small children. In some communities even household servants were subject to taxation by their masters.[5] In Austria the Scroll of the Law was an item of taxation. In the same country any person in possession of five Viennese pounds, either in cash or property, was ratable for taxation.[6]

In some German communities, however, the standard of rating was much lower. Any person in possession of even less than one standard gold coin with which to do business,

[1] Mord. Nez. 179.
שהרי המלך אומר לעבדו גבו מן העכום כך וכך והם קוצבים לכל אחד ואחד לפי מה שיש לו וגם מן היהודים אומר לגבות כך וכך ולא ימירו משפטם לרשעה מן העכום לקצוב על כל אחד ואחד יותר ממה שיש לו לפי ממונו יתן כל אחד ואחד ולא ממון חבידו וגם המלך יודע וכל השרים יודעים שדרך היהודים לישא ולתן בשל אחרים.
[2] MBRL 135. [3] Ibid. 132. [4] Mord. Nez. 191.
[5] MBRB II, 127. [6] TH 342.

was rated for taxation.[1] No oath was administered by the Jewish court for claims less than five pounds, (5 pfenig to a pound).

Exceptions were made for rabbis, cantors, and other religious representatives, who in most communities were exempt from taxation. But in order to enjoy this privilege, a rabbi had to be an officially acknowledged head of a congregation, the chief judge of the *beth-din*, and the head of the rabbinic academy, and his various religious functions had to be his only sources of income.[2]

No exemption from taxation was granted to the rabbis of the Rhine provinces, for in those communities there was hardly a rabbi who made a profession of his calling.[3]

The cantor was not treated as liberally as was the rabbi. Only in very exceptional cases and under very extenuating circumstances, and not ungrudgingly, was he exempted.[4] Also exempt were persons who pleaded poverty or financial embarrassment.[5] Hebrew teachers, scribes (*soferim*), or servants owning less than two pounds, were exempt,[6] but if they engaged also in business or in money they had to pay.[7]

The community could force a person who happened to be a court favorite to pay taxes. Such personages would usually take advantage of their favorable position at the expense of the community.[8]

No two communities could tax the same person at the same time. Members of one community could be transferred to another community as regards tax payment, the

[1] MBRP 130.
[2] TH 342, quoting the Geonim, Asheri and the OZ.
[3] TH 342.
[4] Ibid.
[5] MBRP 930; HM "Shekhenim," VI.
[6] MBRP 716; MBRL 131.
[7] MBRP 716.
[8] MBRP 930, 932.

parties concerned having no choice in the matter. Without the permission of the governing board of the community in which he was a resident, no person could change his residence to another community. In any event, a term of thirty days had to be allowed before his duties to his former community expired.[1] No tax was imposed by the tax committee upon a new member who moved to town after the communal tax became due. If, however, the new member, prior to his settling, had purchased or hired a home with intent to settle, he was made to pay his allotted share to the communal tax-committee, even if he took up actual residence after the tax became due.[2]

No member of a community was permitted to negotiate with the civil authorities in matters of taxation, as this might be detrimental to the cause of the entire community.[3] No person could claim exemption from payment of the communal tax on the ground of being excused by the king in consideration of burdensome loans, extra assessment, or payments and taxes imposed upon him by the civil authorities. The plea of being "beaten by the two butt ends of the stick," that is, of being doubly taxed, might as well be referred to the civil authorities as to the *kahal*.[4]

In his reply to the Jewish community of Stendal, asking whether they could enforce the payment of taxes upon a member of another community who, to escape sharing the burdens of his new community, had obtained permission from the civil authorities to pay his annual dues directly to the royal treasury; and also whether Jews have the right to take advantage of royal exemptions, for any cause whatsoever, Maharam wrote: "No one has the right to negotiate

[1] TH 342.
[2] MBRL 134.
[3] MBRC 134.
[4] MBRB II, 122; MBRC 222.

with the civil authorities in such matters, for as regards the payment of taxes the members of a community are to be regarded as partners sharing all burdens alike. For, if every member of a *kahal* were to pay his tax as an individual, the results would be very deplorable. Everyone would throw the burden upon someone else. You may therefore employ all the means at your disposal, even such severe punishments as excommunication, public rebuke, or flagellation, to enforce this ruling."[1]

5. FEDERATION OF COMMUNITIES AND POLITICAL BOUNDARIES

In order to facilitate the collection of taxes, and perhaps also for the purpose of rendering the yoke less burdensome, several communities in certain districts would band themselves together into federations of communities. Such federations, however, were subject to political limits. Communities of one state would not coalesce with those of another state. The political transfer of a certain section of a country meant also that the communities affected by the severance might evade paying their share into the treasury of a federation.[2] When in 1282 the Emperor Rudolph transferred Austria, Styria, and Corinthia to his son Albrecht, the communities of those districts preferred to pay their share of the taxes to the federation of communities of the empire, on the ground that they now belonged to a different state. The decision was that refusal of the communities to pay to the general tax fund could be justified only if the emperor had transferred those countries to another jurisdiction without claiming any part of their revenues.[3]

[1] MBRL 108.
[2] MBRP 131; Mord. Nez. 183.
[3] MBRP 134.

6. METHODS OF ASSESSMENTS AND COLLECTIONS

The method of assessing and collecting taxes was quite a complicated affair. A Board of Supervisors, usually twelve in number, was elected by the community. It had to draw up the rules and regulations. The supervisors were to rate every taxpayer according to his standing. They might, at their discretion, increase or diminish the list of goods subject to taxation. A date was then set for the submission by the taxpayers, under oath, of an exact statement of property and income. This was to contain a detailed account of all possessions, real or personal, subject to taxation, and a correct valuation of the items. These records would then be copied by the supervisors, who would submit them for review by a tax-appraiser, especially appointed for that purpose. A committee was then sent to investigate the correctness of the sworn statements. When the assessment was made on this basis, all members under threat of excommunication, were ordered to pay their taxes at stated times.[1]

Though this method seems to have been the prevailing one, it can hardly be said to have been satisfactory. One would hear complaints about unfair rating; that while the rating of one taxpayer was too high, that of another was too low. The obligation to take an oath and the penalty of excommunication were quite irritating. But above all, the objection was raised that this procedure gave undue publicity to the standing of a person who might otherwise wish to keep it secret.

Besides, the *gizbar* (treasurer) seems to have been the all powerful person where public funds were concerned.

[1] OZ IV, Baba Batra.

He might indefinitely delay the date for the submission of statements, after it had been set by the supervisors.[1]

In case of controversy between the community and a taxpayer, the custom prevailed of giving the claims of the community preponderance over those of the taxpayers. The community was always the plaintiff and the taxpayer the defendant. It was the individual member who was to present his claims before the court and seek adjustment. But before a hearing could be granted, the claims of the governing board were first to be satisfied, that is, the sum required was to be turned over to the tax committee. Should the court, however, decide in favor of the taxpayer, the community refunded the amount taken.[2]

A person made himself liable to imprisonment for trying deceitfully to escape his due tax payment. Non-payment of taxes was never tried by a *beth-din;* the representatives of the community selected special judges for that purpose.[3] The culprit was not released from prison until he had paid the required amount; or in case he had no available funds, somebody had to pledge himself or sign a note payable at a stated time.

No evidence from local persons who did not pay their taxes was accepted in case of tax controversies between an individual and the communal organization, because of possible partiality.[4]

[1] MBRP 941; Mord. Nez. 481.
[2] MBRP 136.
[3] Ibid. 941.
[4] Mord. Nez. 483.

CHAPTER IV

LEGAL ATTITUDE TOWARDS THE NON-JEW AND THE SECULAR COURT

1. STATUS OF THE NON-JEW IN JEWISH LAW

It would take us too far beyond the scope of the present work to detail all Talmudic and post-Talmudic legislation on the status of the non-Jew in Jewish law. This matter in itself would form an interesting field for research. Our purpose is to show that certain legal enactments concerning the Gentile, which appear to be intolerant, contemptuous, or legally exclusive were either temporary, a result of the exigencies of the times, or were later modified or abrogated.

At the outset let it be stated that in the Talmud the terms "*Nokhri*" and "Cannanites" in the Bible, are not understood civilized Gentiles, much less Christians and later the Mohamedans. R. Ḥiyya Bar Abba (Palestinian Amora who lived at the end of the third century and pupil of R. Yoḥannan), lays down the general principle that the *nokhrim* (Gentiles) abroad (outside of Palestine) are not to be considered devout idolaters, that they only adhere to the faith of their forefathers.[1] That this statement is not to be taken as an occasional dictum by one particular teacher becomes evident from the fact that it was uttered

[1] Ḥullin 13b.

in the name of his teacher, the great authority R. Yoḥannan, and is also repeated in Bekhoroth 2b.[1]

Very significant indeed is the incident of the Amonite who asked to be admitted into Judaism. The president of the college, R. Gamliel refused admission, citing the verse in Deuteronomy XXIII "that neither the Amonite nor the Moabite are permitted to join the community of God," in support of his contention.

Thereupon one of the most prominent members of the college, R. Yehoshua rose and said: "It is permitted," stating that the Biblical prohibition against these nationalities is not in force any longer, for king Sennacherib through his many campaigns jumbled together all nations so that today it is impossible to ascertain precisely to which tribe a man belongs. The majority of the college decided on these lines and the Amonite was admitted into Judaism.[2]

Though this incident deals with a specific case, it is nevertheless a decided step forward towards a more tolerant interpretation of the stringent laws against the Gentiles, that some of the Biblical laws against the Gentiles are not valid any longer and that it is wrong to misapply the term "Gentiles" indiscriminately to all non-Jewish peoples referred to in the Talmudic precepts and laws. A distinction must therefore be made between civilized non-Jewish races and degraded idolaters.

The Seven Noaḥian Commandments completely embraced the fundamental principles of Christianity and Mohamedanism. Any Christian or Mohamedan who observes the dictates of humanity in his religion is to be considered

[1] Note the significant statement of the Tosaffists in Ḥullin ibid., where R. Ḥiyya's interpretation of the term "*nokhri*" applies also to Palestinian Gentiles.

[2] Berakot 28a.

as a "*Ger Toshab*" (a sojourner—proselyte) on equal footing with every Jew.[1]

2. APPARENT TALMUDIC DISCRIMINATORY LEGISLATION EXPLAINED

In judging legal enactments against the non-Jew one must keep in mind that the Jews under Roman domination were struggling for self-preservation within a treacherous and degraded heathen environment. Certain it is that the discriminatory measures were influenced largely by anger, or were imperative expedients of retaliation, and were not due to an inherent contempt for the non-Jew. In fact, in most cases the reason for such anti-Gentile legislation is expressly given.

A few notable examples will confirm this contention.

The Talmud declares[2] that a Jew who sells a non-Jew landed property adjacent to the land of another Jew makes himself liable to the penalty of excommunication, first, because the Gentile laws "make no provisions for neighbors' boundary rights" (*Bar meẓra*); again, because the neighboring Jew may plead: "Thou hast caused a lion to lie on my border." The last statement is significant since it illustrates the danger to which a Jew was exposed in having a Gentile neighbor. However, if the seller of the landed property assumes responsibility for all accidents and damages that may accrue to the Jewish neighbor from the Gentile buyer, the sale is valid, and the penalty of excommunication is lifted. This plea of danger on the part of the neighboring Jew, is, at all events untenable, if the Gentile makes a larger bid for the landed property than the Jewish buyer.[3]

The Biblical command to restore a lost article to its

[1] Abodah Zarah 64b; Yad, Issure Biah XIV, 7.

[2] Baba Kamma 114a.

[3] Ibid.

original owner did not, in the Talmud, apply to a Gentile owner, for the reasons that the latter would certainly not reciprocate;[1] but as will be seen later, this law was entirely abrogated.

Non-Jews were declared disqualified as witnesses, either in criminal cases or in civil suits, because from personal experience, the authorities knew that they could not be depended upon to keep their promise, or their word of honor.[2]

Non-Jews could not acquire real property by deed or by three years of undisputed tenure (*Ḥazakah*), because as a rule, they obtained property by seizure.[3] Hence, in the eyes of Jewish law, the added privilege of tenure by *Ḥazakah* or deed would be unjust.

However, all the anti-Gentile laws in the Talmud were, as we shall see, modified, explained away, and even abrogated by the rabbinic authorities of succeeding periods. A large part of the Talmudic legislation against Gentiles applied only to the harsh Romans, to the heathen, and other barbarians of those times.[4] It was inapplicable to Christians, or even to Moslems.

3. A MORE TOLERANT VIEW

Already in the Geonic period, where the reliability of the Gentiles was beyond question, the Geonim did not hesitate to decide affirmatively as to the validity of bills of sale, notes of indebtedness, or deeds executed in a secular court and affirmed by non-Jewish witnesses though this was contrary to an earlier Geonic authority.[5] "Because," says the later decision, "in the city in which we live"—that is, Bagdad—"the courts accept as witnesses only such persons

[1] Baba Kamma 113b. [2] Bekorot 13b. [3] Kid 14b.
[4] Yebamoth 63b, 98a; Ketuboth 3b; Aboda Zara 22a; Baba Kamma 117a; Mishnah Mikweh, VIII, 4.
[5] Probably referring to resp. 199, TGN.

as are trustworthy and reliable, those who are of outstanding prominence in the community by reason of their wealth or culture, and those who have never been suspected of robbery or falsehood, who are faithful followers of their religion and are called 'Almedlin.' The same is true of nearly all Babylonia; and for that reason, it is a daily occurrence with us to accept the validity of such documents among all the Jewries of Babylonia."[1]

A note of indebtedness in possession of a non-Jew against a Jew might be collected after the death of the latter, either by the Jewish court or the secular court from the property inherited by his minor orphans. Preference was to be given to the Jewish court, only if it were known that the secular court would make unjust claims, or if such claims were to be substantiated by untrustworthy Gentile witnesses.[2]

Jewish witnesses were permitted to appear in a secular court to confirm a verdict rendered by the Jewish court, and the secular decision became valid if the defendant refused to obey the latter's mandate. In a place without a regular Jewish court or otherwise qualified scholars, Jews might render testimony in the secular court, though the case had already been adjusted by prominent, but inexpert, Jewish laymen.[3]

Where the two parties were Jews, bills, notes, or deeds executed by the secular court lost their validity only if there were a confiict between the Jewish and the secular mode of legal execution.[4]

Failure to take action in a secular court against a Gentile who had robbed him, was considered a resignation of the claim by the Jewish plaintiff. The purchase of the stolen

[1] THGH 278; MBRP p. 660. [3] Ibid. 424.
[2] Ibid. 233. [4] Ibid. 82, 491.

property by another Jew was legal; nor could the original owner claim any part thereof.[1]

A verdict rendered by the secular court in a suit in which one of the litigants was an apostate Jew, was upheld by the Jewish authorities before whom the case was retried.[2]

According to the Talmud, no Jew was to enter into partnership with a Gentile, because of the possibility of legal suits in which the Gentile might be required to take an oath by the name of his divinity, which a Jew was forbidden to hear. The prohibition against the oath did not prevail, however, when taken by a Christian because a Christian oath is not idolatrous. "Because," says R. Tam, "the present form of oath contains no mention of a heathen divinity."[3] A non-Jewish oath administered by a secular court was as effective and as binding upon Jews as a Jewish oath.[4]

R. Sherira Gaon permitted Jews to bring suit in a Gentile court, on the defendant's refusal to have the case adjudicated by a Jewish court. "And indeed it is to be considered a meritorious act for anyone who has knowledge, to testify before the Gentile tribunal, even if the Jew be the robber and the Gentile the one robbed."[5]

A decidedly fairer view of Gentiles is to be found in the writings of the rabbinic authorities of the Middle Ages. There is no question that this benevolent attitude was due, in large measure, to a more proper estimate of the religious and ethical teachings of the Christians among whom the majority of the Jewish people lived.

[1] TGM 188. [2] Ibid. 201.

[3] Ibid. 102; cf. Sanhedrin 63b and opinion of R. Tam, Tosafot, l.c. Bekorot 2b; Alfasi; end 1st chapter, Aboda Zara; Mord. Nez. 809.

[4] THG, Lyck, 1864; resp. 41.

[5] Bet Yoseph, Tur Hoshen Mishpat, 2601; Be'er ha-Golah, Shulḥan Aruk 26, gloss 7; Pithe Teshubah, ibid, l.c.; Ginze Schechter II, 118, 126.

Saadiah Gaon (10th century) declared that, disregarding the crude trinitarian belief of the common people, עמי הארץ שבהם and the various philosophical errors concerning the divinity of the founder of Christianity, he would nevertheless make an earnest effort to discuss the speculative value given by Christian thinkers to the trinity אבל. אכון להשיב לחכמיהם. The fact that so erudite and pious a thinker as Saadiah, a man who did not live in Christian lands, devoted so much earnest speculation to one of the cardinal doctrines of the Christian belief indicates that the Jews of the Middle Ages did not class the Christians with the heathens, idolaters, and barbarians of Talmudic times.[1] Still more appreciative of the ethical teachings of the Moslems or the Christians were R. Gershom, The Light of Exile, of Mayence, (D. 1040), Yehudah Halevi (1085-1140) who, as did Maimonides[2] later, declared that Christianity and Mohammedanism serve the divine purpose of preparing the way for the Messiah . . . for they spread the words of God and the law of truth throughout the world, and despite their errors, they (the Christians and the Mohammedans) will at the time of the arrival of Messiah turn to the truth.[3] The Tossafists of the French School:[4] "Because the Gentiles among whom we live are certain not to be idol worshippers" — נראה דטעם ההיתר משום דעכום שביניינו קים לן בנויהו דלא פלחו לעבודת כוכבים.

We cannot but marvel at the tolerant spirit manifested by the Jewish authorities towards the followers of other religions, despite the persecutions of an intolerant medieval

[1] Emunoth we-Deoth II, 5, p. 92; Edition Warsaw, 1913; cf. also Guttmann, "Die Religionsphilosophie des Saadia," pp. 103–113.

[2] Ha-Ḥoker, 1, 2, 45.

[3] Kuzari, I, 5; IV, 11. Maim. Responsa, 51.

[4] Aboda Zara 2a.

church. If here and there, as we shall see later, an attitude other than generous seems to pervade the responsa, this is due not to an inherent contempt for the Christian world. It is the result of faults of the clergy, corrupt local institutions and individuals, and to the measures of precaution taken by Jewish authorities to safeguard the Jewish group, lost in a hostile majority.

Maimonides, the great codifier of the 13th century, in his commentary on the Mishna[1] declares very significantly, "if some people imagine, that it is permissible to cheat a Gentile, is erroneous and is based on ignorance." Deception, duplicity, and circumvention towards a Gentile are abominable unto God."

This ethical principle was codified into law by Maimonides—that it is forbidden to defraud or deceive any person in business, whether Jew or non-Jew.[2]

The modification or even abrogation by medieval authorities of Talmudic legislation which dealt chiefly with heathens and barbarians shows the changed attitude of medieval Jewish authorities. To cheat a Christian in money transactions, in weight or measures, is a greater offence against the law than to cheat a Jew, declared the authorities.[3]

No Israelite, declares the Talmud, may conduct business with a Gentile three days preceeding the non-Jew's religious festival, lest the heathens use the benefits from such a transaction for religious purposes.[4] "But," say the later authorities, "nowadays not only are such transactions permitted within this period, but they may be carried on even

[1] Maim. Perush Hamishnayyot Kelim, XII, 7.
[2] Yad, Mekira, XVIII, 1; cf. Baba Mezia 58a ff; Ḥullin 94a ff.
[3] RABNA 3; SH 133; MBRP 252, 802, 803; Mord. Nashim 255, 256.
[4] Aboda Zara 2a-18.

on the day of the festival,[1] because the Christians of today are not considered idol worshippers."[2] An article may be sold or loaned to a Gentile or money given him by a Jew, even if it is to be given to the priests or other attendants of the church, for direct church ritual.[3] Christians were permitted to rent houses for religious worship from Jews. Jews manufactured religious articles used in church ritual, such as tallow for the making of candles, priestly robes, jewels, ornaments, and wine glasses. "For," asserted the authorities, "according to their belief and mode of worship, the present Gentiles cannot be placed in the category of heathens," and "besides, we pay taxes to the government, which uses the money for other than religious purposes."[4] Jews were permitted to employ Christian wet nurses, contrary to Talmudic restrictions,[5] particularly when the presence of other Jewish women precluded any danger to the lives of the Jewish children.[6] Because a Jew may not safely entrust his life to a heathen, Talmudic law prohibits him from receiving medical treatment from a non-Jewish physician,[7] or from having his hair cut by a non-Jewish barber,[8] but these restrictions were removed by later authorities.[9] An obvious distinction was made between an expert physician from whom Jews less seriously ill might accept medical attention.[10]

Significant is the modification of the Talmudic restrictions concerning the use of wine manufactured or touched

[1] Mord. Aboda Zara, 790.
[2] Mord. Nez. 790.
[3] Yad. "Abodat Kohabim," IX, 1.
[4] RABNA 291, 292; OZ pt. IV, 135, 136, 137 and ibid. pt. I, 480; HM Abodat Kohabim, IX, 10.
[5] Aboda Zara 26a.
[6] Raben, ibid. 294; SH 195; MBRL 250; Mord. Nez. 812.
[7] Aboda Zara 27a, and b.
[8] Ibid. 29a.
[9] RABNA 295; HM Yad, "Rozeach" XII, 9; Mord. Nez. 815, 816.
[10] Ibid.

by Gentiles. The rabbinic authorities of the Middle Ages were inclined to be rather lenient regarding this prohibition.

Like everything else associated with idolatry, wine consecrated for worship was forbidden. The prohibition applied even to indirect benefits, such as carrying the wine in the capacity of a porter.[1] Ordinary wine (*s'tam yenam*), even when not consecrated to idolatry, was forbidden, in order to avoid suspicion of contact with wine thus consecrated (*nesek*), and, according to others, in order to prevent social relationships which might lead to intermarriage.[2]

These regulations, however, lost a great deal of their importance in view of changed conditions, and in view of the fact that Christians and Moslems are not idol worshippers and do not consecrate beverage wine for ritual purposes. According to the authorities, therefore, a Jew may receive Christian wine in payment of a debt;[3] because of the pagan custom not to use cooked wine for libations, a Jew may drink cooked wine with a Gentile, even from the same cup.[4] From the case recorded in the Talmud[5] that of Samuel (the Amora), who drank wine from one cup with the Gentile, Ablat, R. Tam did not prohibit the use of wine which had been handled by a Gentile.[6] The use of wine purposely touched by a Gentile in order to cause damage or loss to the Jew was not prohibited; it might even be drunk. The

[1] Aboda Zara 30b.
[2] Aboda Zara 36b; Tosafot Yom Tob, Aboda Zara II, 3.
[3] Mord. Nez. 846, Raben A3, 306.
[4] Ibid.
[5] Aboda Zara 30a.
[6] Mord. Nez. 847; MBRP 377; HM Ma'akalot Assurot XI.

אם כן בזמן הזה דעכום שאין בני ניסוך ננהו דלא ידעי בטיב עכום ושמושיה וחשיביה כתינוק בן יום אחד היה מתיר מגע עכום על ידי דבר אחר אף על פי שחוא יודע שהוא יין — כיון שאינו בר ניסוך ולא אתי לכלל בונת ניסוך ועוד דאין ניסוך בזמן חזה דגוים שבחוץ לארץ לאו עובדי עבודה זרה חן.

source cites the case of a devout Jew, (who, later became a martyr for Judaism) and who drank wine which had thus been touched by a Gentile's defiling hand.[1] The authorities were inclined to be lenient in questions arising from the presence of non-Jewish maids or other Christian help in Jewish houses.[2]

The permission to take a fixed rate of interest from a Gentile on loans is subject to various interpretations and restrictions in the Talmud. In one place the Talmud declares it unethical for a Jew to charge a Gentile interest on money loaned.[3] A Jewish money lender is permitted to take interest from a non-Jew only to the extent of obtaining a livelihood. Exemption from this restriction is granted only to a scholar, because in this case there is no danger that he may acquire a passion for taking usury.[4] The opinion of Maimonides[5] that for Jews to charge Gentiles interest is a positive command of the written law, has been explained away as incorrect by Ibn Daud, and by the author of the Haggahot Maimoniyyot.[6]

No such restrictions, however, existed for the Jews of the Middle Ages. The authorities declared it legal to charge Gentiles interest, "because no other avenues of trade or commerce are open to Jews and the lending of money is the only means of livelihood left to them"; and since they were everywhere a minority bound by restrictions, requiring large sums for bribing corrupt officials to offset special decrees against them, and subject to discriminatory and

[1] Mord. ibid. 847, quoting Geonic sources; cf. also RABNR Aboda Zara Resp. 309.
[2] Mord. Nez. 347; HM Ma'akalot Asurot XI-XII.
[3] Makkot 24a.
[4] Baba Meẓia 71a.
[5] Yad, Malweh, V, 1.
[6] L. C. ibid.

burdensome taxation.[1] For similar reasons, the rabbinic authorities permitted Jewish borrowers and money lenders to give and take interest in an indirect way.[2]

JUDICIAL ATTITUDE

4. GENTILES AS JURIDIC PERSONS

Gentiles have a judicial standing in Jewish law, because they are recognized as personae in juris, or juridic persons.[3] Contrary to strict Talmudic law[4] Gentiles, whose honesty and integrity is beyond question, were qualified in the Middle Ages as witnesses in cases in which Jews were parties to a suit.[5] Jewish law recognizes the right of bequeathal to a non-Jew;[6] for that reason Gentile heirs have the right to collect debts, or deposits from a Jew after their father's death; here, Talmudic law, in addition to allowing such rights of inheritance, declares the related prohibition against robbery to apply also to non-Jews.[7]

Contrary to Talmudic legislation,[8] no Jew is allowed to derive any direct benefit from errors committed by a non-

[1] R. Tam, Baba Meẓia RABNR 70b; OZ Baba Meẓia, Resp. 208; Mord. Nez. 439.

[2] RABNR pp. 204, 205; OZ Baba Meẓia 202, 203, 210, 211, 212, 213, 214, 215, 217, and ibid. 180; MBRP 142, 146, 337, 391, 792, 794, 795, 796, 797, 798; ibid. MBRL 446, 447, 448; MBRC 57; MBRB III, 151; Mord. Nez. 333, 334, 336, 338; ibid. Nashim 379; Resp. Asheri, CVIII, 1, 2, 3.

[3] OZ Baba Kamma section "Arkaoth," 3, 4, 5.

[4] Baba Kamma, 15a.

[5] Glosses to Asheri, Gittin 10b, quoting Mordecai, ibid., 324. Consult, however, Ḥoshen Mishpat, XXXIV, 19.

[6] Kiddushin 17b, 18a.

[7] Baba Kamma, 113b; RABNR p. 194b; Mord. Kid. 491; Glosses to Asheri, Kid. 17b.

[8] Baba Kamma, 113b.

Jew. One may not steal from a Jew or from a non-Jew.[1] From a Talmudic reference,[2] quoted in the sources, we find the prohibition applicable even where the non-Jew is not conscious of his mistake.[3]

Under Jewish law, a Gentile cannot act as the agent of a Jew, either to bind him or to acquire anything for his benefit, in civil or religious matters,[4] yet a Jew may give power of attorney to a non-Jew to represent him in court for the recovery of money, land, or goods. The only stipulation required in such cases is that the "*Harsha'ah*" (the letter of attorney) should read, "And the Gentile acquired," instead of the ordinary readings: "And it has been acquired of him."[5] As regards the powers of acquisition, Geonic authorities make no distinction between Jews and Gentiles:

חזינן דלענין שליחות איכא לשנויי בין ישראל לגוים אבל לענין הקנאה ישראל וגוי שוים.

As to whether a Jew may collect a debt from another Jew living in a distant place through a Gentile, an affirmative answer to that query was given by the Gaon:

הלכך כד מקני לגוי ההוא ממון קאני ליה ודאי כישראל ובלשון שכותב לישראל בהקנאה כך הוא כותב לגוי.

Even the changed reading in the letter of attorney was not made a prerequisite to validate the power of attorney.[6]

The privilege of acquisition "in the presence of us three" (*Ma'amad Shelashtan*), the owner, the trustee, and the

[1] RABNA Resp. 3, quoting Geonic authority, e.g. Ẓemach Gaon, cf. Commentary on OZ, Abne Shoham, glosses; ibid. edition RABNR p. 194b; SH 133, 1257; MBRP 802; MBRB III, 163; Mord. Nez. 158, 168, 169, ibid. Nashim 256.

[2] Yerushalmi, Baba Meẓia II, 5.

[3] Ibid.

[4] Baba Meẓia 71b, cf. opinion of R. Assi to the contrary; Kid. 41b; Gittin 23b, Yad, Sheluḥin Weshutfin II, 1.

[5] R. Tam, Tosafot, Kid. 3a, bottom; Mord. Nez. 71.

[6] THGH 237.

recipient,[1] does not, for technical reasons, legally apply to a Gentile.[2] The authorities believe that since the law of acquisition "in the presence of us three" is merely a tradition, and has no legal foundation,[3] "no other legal deductions or extensions of its application are to be made from it."[4] The same privilege, however, was granted also to Gentiles, where failure to employ it would result in their being robbed.[5]

The property of a Gentile was considered just as private as that of a Jew, and therefore just as inviolate. According to law, a Jew employed in the fields or vineyards is allowed to pick as much fruit as he can eat while working,[6] but if the employer were a Gentile (not "*re'akha*" i.e. neighbor), the Jewish worker was forbidden to eat anything without permission from his Gentile employer, because in that case it would mean robbery, and "robbing a Gentile is forbidden."[7]

The principle of retaliation was directed not only against heathen Gentiles, but it also operated, in the Talmud, against lawless Jews, particularly herdsmen of sheep and small cattle, who trespassed on private property in Palestine, in defiance of the ordinance forbidding them to raise their flocks inland.[8] .ורועי בהמה דקה לא מעלין ולא מורידין

[1] Gittin 13b, 14a, Kid. 48a; Baba Batra, 144a, 148a.

[2] R. Tam Tosafot Gittin 13b; OZ, Baba Batra 166, 167, 168; HOZ 229; MBRP 192; Mord. Nashim 329; ibid. Nez. 614.

[3] Cf. Rashi, Talmud ibid.

[4] Cf. Responsa, ibid.

[5] MBRP 327: MBRB II, 123; MBRC 157; Mord. Nashim 32; HOZ ibid.

[6] Deut. XXIII, 25–26.

[7] Baba Mezia 87b; Baba Kamma, 113b; Bekoroth 13b; Tosafot Baba Mezia ibid; OZ ibid. 282; ibid. Baba Kamma 445, 446.

[8] Tosifta, Baba Kamma chapter VIII; Sanhed. 57a.

All measures of reprisal, whether applied to Jews or Gentiles, are based on the principle of eminent domain: "The judicial authority has the right to annul ownership of property, and declare it ownerless—"*Hefker Beth Din*".[1]

In civil matters, or monetary affairs, the court is authorized to apply this judicial principle even against a Biblical law.[2] However, Tosafoth, (Gittin 36a) and Maimonides (Yad, ibid.) sanction the application of the principle of reprisal only against a rabbinic ordinance, but not when a Biblical law is involved.

On the other hand, the judicial principle of *Hefker* (public property) does not operate against a Gentile, who, it appears, has not resigned his rights, or has not given up hope of recovering the claim in which the two Jewish litigants are involved.[3]

Temporary forgetfulness on the part of a Gentile is no ground for declaring his property *hefker*. A Jewish plaintiff has no legal title to surplus money given in error in a business transaction by a Gentile to the Jewish defendant. For the Gentile may remind himself of his mistake and reclaim his loss.[4] Besides the legal principle involved, the authorities added the ethical principle against profaning the name of God (ibid. above).

Since Jewish law requires the evidence of at least two witnesses in order to establish a claim, a Jew who in a lower secular court voluntarily offers .ולא תבעו מיניה his testimony

[1] Yebamot 89b; Gittin 36b; Shekalim 3b.

[2] Rashi Gittin 36b; also ibid. Yebamot 89b; Abraham Ibn Daud, Glosses, Yad. Shemitah IX, 16.

[3] Teshubot Maim. Kinyan, 22; RABNA 3; MBRP 802, 803, 817, 823; MBRC 50; MBRL 335; Mordecai, Nashim 256, 257.

[4] RABNR p. 194b; Teshubot Maim. Kinyan, 20; MBRP 326, 327, 953, 959; MBRC 50, 227; MBRL 335; Mord. Nashim 258; ibid., Nez. 168, 169.

in favor of a Gentile plaintiff against a Jewish defendant, makes himself liable to the punishment of excommunication—since the Jew would lose his case by means declared Jewishly illegal. But the loss of the litigation would not be illegal, if such voluntary testimony were rendered by a Jew in a superior, or government court, (בי רואר) because these courts also require two witnesses to establish a claim.[1] Under all circumstances, and in all secular courts, however, two Jewish witnesses may offer voluntary evidence in favor of a Gentile against a Jew.[2] In practice, the testimony of even one Jewish witness was sufficient to refute the claim of a Jewish plaintiff against a Gentile defendant, establishing a status-quo possession in favor of the Gentile.[3] R. Eliezer b. Nathan (RaBiah) sanctioned the custom prevalent in some communities of accepting joint testimony of a Jewish and a Gentile witness.[4]

A Jew taking possession of a Gentile's landed property cannot claim superior legal rights in a suit against a neighboring Jew, the general judicial principle being that "A Jew who comes in consequence of a Gentile receives the legal status of the latter."[5] The plea of "*ḥazakah*" (tenure right) is untenable, since Gentiles take possession of Jewish property by force, the Jew being afraid to protest. But the same status would apply to a Jew taking possession of landed property from a lawless Jew, the latter having been deprived of the legal tenancy right, as in the case of a lawless Gentile,[6] comparing the status of a lawless Jew or Gentile to that of the Exilarchs in Babylonia,[7] who sometimes took

[1] Baba Kamma 113b, 114a.
[2] Opinion of R. Tam, Mord. Nez. 157, 212, 117.
[3] Mord. ibid.
[4] RABNR 194b.
[5] Baba Batra 36a, b.
[6] RABNR p. 211b, col. 2; MBRP 28.
[7] Baba Batra 36a

illegal possession of strangers' property, the owner fearing to protest.[1]

5. ATTITUDE TOWARDS THE SECULAR COURT

Deprived of political independence, curbed in their social contacts with the outside world, subject to discriminatory laws and prejudice, the only institutions left to the Jews of the exile were the Synagogue and the *Beth Din*, or the Court. These institutions helped as no other agency could to maintain Jewish individuality, and identified them as a distinct group.

Had the Jewish court been tampered with and an unduly liberal attitude been maintained towards the secular court, Jewish intellectual activity would have been starved. The wealth of the responsa literature—"Questions and Answers" —revolving largely around social and commercial litigations, in which the Geonim of Babylonia, and the great rabbinic authorities of Spain, North Africa, Provence, and Germany play so distinguished a part—itself explains the apparent illiberal attitude towards the non-Jewish court.

We have already seen that the Jewries of the Middle Ages formed, as it were, a state within a state, due to the autonomy granted them by the civil governments. Permission to resort to the civil courts would have undoubtedly disrupted their inner independence. If we add also the low standards of the medieval secular courts, the prejudice of the judges against Jews, the rampant corruption and bribery, the prohibition against resorting to non-Jewish courts becomes more justified.

[1] Ibid. 675; MBRP 63, MBRL 338; HM Toan XIV, 7; Mord. Nez. 553, 614, 659; Asheri Resp. XVIII, 15.

The following Geonic statement is illustrative of the low standard of the non-Jewish court, not only in civil but also in capital cases: "It is certain that their laws are not binding, because they commit a person to execution without due legal process" דלא דיני וקטלי even those of their own co-religionists, and certainly a Jew. They rely on the mere testimony of witnesses, and all these are known to be perjured and false."[1] The fact that the Geonim point out how few were the reliable courts, those of Bagdad and some other larger cities, (cf. supra), shows to how a low level justice had sunk in these countries.[2] In fact, contrary to a previous Talmudic sanction,[3] the Geonim, because of the general untrustworthiness of the secular courts, declared business documents executed by them to be illegal.[4]

That not much improvement upon the judicial standard would be found in Christian countries, especially in relation to the Jews, becomes evident from the greater rigor with which the authorities applied the prohibition against litigation in Christian secular courts. It would seem that in so far as Jews were concerned, conditions became even worse. To initiate suit in a Gentile court was considered a crime equal to informing. Not only could Jews not expect an equitable judgment, but they even exposed themselves thereby to danger to life and property.[5] There is no doubt that behind this ordinance of Rabbennu Tam, later upheld at the Synod of Speyer, Worms, and Mayence, decreeing

[1] TGM 179.
[2] THGH 278, 424, 491.
[3] Gittin 10b, 11a.
[4] THGH ibid.; TGM 199.
[5] MBRP 897, 341, 994, 383; Mord. Nez. 195, 196, quoting Maharam. Note statement in 195; HM Ḥobel u-Mazzik I, 3; Mord. Nez. 686; HOZ 141, 142, Kol Bo, 116; cf. Also Responsa Asheri XVI, 4; XVIII, 5. כשישראל נופל בידם כל דהו מעלילים עליו כל כך עד שהרבה פעמים בא לידי סכנת נפשות.

excommunication for resort to non-Jewish tribunals, were these very reasons.[1]

Maimonides[2] and Solomon ben Adret agree that litigation by Jews in a secular court amounts to blasphemy and treason against the law of Moses and the God of Israel for "those who voluntarily submit for adjudication before 'their' judges cause the walls of the Law to fall, and uproot it root and branch. . . . Far be it from an Israelite to do such things, lest the Torah girdle itself with sackcloth." It is thus evident that zeal for the Law, and a desire for the continued cultivation of Jewish learning prompted the rabbinic authorities of the Middle Ages to give preference to the Jewish *Beth Din.*

6. TALMUDIC ATTITUDE TOWARDS THE SECULAR COURT

It is noteworthy that no direct prohibition against the use of the secular court exists anywhere in the Mishna, nor is the prohibition any too explicit in any other branch of Tannaitic literature. The entire interdict hinges on the homiletic interpretation of Exodus XXI,[3] Because the word "*lifnehem,*" (before them), is used in the Biblical text, the law derives the theory that only before them—Jewish judges—may one put these judgments, to the exclusion of non-Jewish judges,[4] even if the judgment is rendered according to Jewish law (ibid.). It is however, characteristic,

[1] Takkanot R. Tam and Shum, end MBRP pp. 158–162.
[2] Yad, Sanhedrin, XXVI, 7.
[3] Quoted by Beth Yoseph, Tur Ḥoshen Mishpat XXVI, 6; cf. Responsa of Ribash, 179 and Responsa of Yoseph Colom 186. Note: St. Paul in his letter warned the Christians not to submit their litigations to Gentile courts, 1 Corinthians, VI.1.
[4] Statement of R. Eliezer ben Azariah, Mekhilta to Exodus, XXI and of R. Tarfon in a Baraita, Gittin 88b.

that in the statement of R. Eliezer ben Azariah the term "*Kuthim*" is used; and it is very possible that R. Tarfon in using the term "*Agurayyot*" "אגוריות" (assemblies) refers to the assemblages (Rashi) of the Kutheans, whom the Talmud calls "*Gere-Arayyot*," converts to Judaism because of an attack by lions.[1] These Kutheans, identified as the Samaritans,[2] caused a great deal of trouble to Ezra, when he refused their request to participate in the rebuilding of the Temple.[3] The Jews bore a particular hatred for the Kutheans, because in later periods they aligned themselves with their enemies. In fact, they were considered enemies from within. In their letter to Antiochus Epihanus (2nd century B.C.E.) the Kutheans repudiated and denounced Judaism, and offered to change the name of their temple to "Yapis Helena."[4] During the Tannaitic period the opposition of the Tannaim towards the Kutheans was particularly emphatic. R. Eliezer declares their bread to be forbidden as is the flesh of swine;[5] another Tanna declares them treacherous and suspicious.[6] The general principle is laid down, "in all things, in which there is suspicion they are to be declared untrustworthy."[7] זה הכלל כל דבר שנחשדו בו אינן נאמנין. With this historical background, the conjecture that the statements in the Mekilta and the Baraita (cf. supra) have particular reference to the Samaritans is fairly reasonable inasmuch as they would be the only ones

[1] 2d Kings, XVII, 25.
[2] Josephus Antiquities, IX, 14, p. 3,
[3] Ezra, IV.
[4] Josephus Antiquities, XII, 8; 13; I Book of Hasmoneans., III, 10; Ben Sira, III, 28; for other references, cf. Josephus, Antiquities XVIII, 2; ibid. "Wars" II, XII; Tosifta Adayyot, 3; Rosh Hashana, 81a.
[5] Shebi'it VIII, 10; Ḥullin 4a.
[6] Yerushalmi Pesaḥim I, 1; Tosifta Demai, XXV, 23.
[7] Masseket Kuthim, I.

of whom it could be said, "even though their judgment is rendered according to Jewish law.... אף על פי שדיניהם כדיני ישראל.

The Talmudic requirement to institute courts of justice in every city and state applies not only to Jews, but also to non-Jews. For, in the case of forbidden marriages, such as consanguinity or incest,[1] or the prohibition against idolatry, and the punishment therefor, these enactments are included among the seven Noaḥian laws.[2] For this reason the Or Zarua declares that the decision of a secular court not in conflict with Jewish law is valid if the two Jewish litigants of their own accord, and without any Gentile coercion, have given preference to the secular court for the adjudication of their suit.[3] Should one of the parties to a suit refuse to appear before a Jewish tribunal, the other party must first summons him through a Jewish court, and if the summons is not heeded permission is granted to initiate suit in the secular court.[4]

7. WHERE THE VERDICT OF A SECULAR COURT IS VALID

Legal papers, such as bills of sale, notes of indebtedness, and bonds brought into a secular court for adjustment receive legal validity, even if the signatories to these documents are Gentiles.[5] Jewish law recognizes the validity of business documents executed in a secular court,[6] declaring even heathens to be Biblically disqualified, not as such, but only on account of their wickedness, and are even qualified

[1] Sannedrin 57b.
[2] Sannedrin 56a and b.
[3] OZ, Baba Kamma, section "Arkaot," 3, 4, 6.
[4] Yad, Sannedrin 6, 7; Mord. Nez. 74, 195, 196, 197; Ḥoshen Mishpat XXVI, 1.
[5] Gittin 9b.
[6] Rashi, ibid.; cf. Tosifta Gittin I, 9.

as witnesses whenever their trustworthiness is beyond doubt.[1] Any oral business transaction, such as sales or transfers, made by Gentile judges in court, is binding.[2] Should conditions warrant, a Jew may directly validate a sale or a purchase in a secular court, and have it certified by document, in order to prevent another Jew from acquiring the property from a Gentile, or of claiming priority rights.[3]

In the written power of attorney, "*Harsha'ah*," one of the specifications reads: "And he (the attorney) is herewith authorized to initiate suit in any court, Jewish and non-Jewish, and if he (the defendant) is stubborn אינש אלם and refuses to submit to a Jewish court, he (the attorney) may directly start suit in a secular court.[4]

ויש לו רשות לדון בכל בית דין שירצה בין בדיני ישראל בין בדיני עכום דאי אינש אלם הוא ... מותר לכופו בדיני עכום.

However, Maharam, who concurs with Maimonides, would sanction the attorney's action in the secular court only after permission therefor has been granted by the Jewish court.[5]

Jewish business men maintained attorneys on a regular salary, to represent them in the secular courts,[6] whence it becomes apparent that business men in Germany also had been accustomed in earlier times to pay legal representatives in the civil court.[7]

[1] Mord. Nashim 324, quoting Sefer ha-Hakhma and R. Yakkar. Note, however Mordecai's own opinion; Asheri, l c.
[2] Mord. Nashim 325; OZ pt. III, p. 4.
[3] Mord. Nez. 550, 551; Gittin 44a; Aboda Zara 13a; Moed Katan 11a; Erubin 47a; Asheri, Responsa 18.
[4] Mord. Nez. 74. [5] Ibid.
[6] Responsa Rashba, III, 141 and TH 354.
[7] Cf. also MBRP 357; MBRC 175; MBRL 126.

If a Jew accepted (and the acceptance was strengthened by a *kinyan*—symbolical delivery) a Gentile to act as one of the judges trying his case, the decision of the court could not be invalidated on the plea of the presence of a Gentile trial judge, even if he were suspected of having taken bribes.[1] That Jewish judges sat at trial together with non-Jewish judges, appears from the fact that the Roman court in Palestine had Jews among its personnel—and even the defendant or the debtor was granted the right of preference in the selection of a tribunal for litigation.[2] The judges in these courts were, it seems, regularly appointed by the Roman authorities.[3]

During the Middle Ages in Germany, Jewish and Christian judges sat together in court in the synagogues where Jewish and Christian litigants were parties in a suit in order to render impartial judgment. In places where Jews were sparsely settled and no men of judicial standing were to be found, the verdict rendered by the local Gentile court was to be considered binding. The decision of such a court takes precedence over the decision of local, unqualified Jews.[4]

We thus see that all-sufficient latitude in this matter was granted by the Jewish authorities of the Middle Ages, particularly before the Crusades, when Jews came into more frequent and closer contact with the non-Jewish world. Conditions demanded a more liberal attitude to-

[1] Mord. Nez. 686.
[2] Sanhedrin, 23a, cf. Rashi, "Arkaot She'bsuria"; cf. Asher Gulak yesode ha-Mishpat ha-Ibri IV, p. 27.
[3] Glosses to Asheri, Sanhedrin, l. c. quoting the OZ.
[4] SH 1301.
[5] Stobbe p. 144.

ויש מקומות שהגוים דנים באמת ולא היהודים מפני שמעט תלמידי חכמים שם או ממשפחות מרובות או. ממקומות מרובות ואותם שבאו ממקום אחר שתרבותם רע מתעים אותם אחריהם.

wards the non-Jew in general and towards the secular court in particular. The Jews were engaged in commerce and trade on a wide scale, their business activities extending far beyond the borders of their own country. R. Eliezer b. Nathan halevi (Raben) speaks of trips to Russia and other Slavic countries[1] and also of trips to Greece.[2] R. Meir of Rothenburg speaks of international trade carried on between the business men of Poland, Hungary, and France and the Jews of Germany.[3] The Or Zarua mentions merchants of Bulgaria and Constantinople who visited Germany for business transactions with the Jewish merchants there.[4]

8. CHANGE OF ATTITUDE AFTER THE CRUSADES

The deplorable conditions following the periods of the Crusades had a marked influence upon the attitude of the Jews towards Christians and their institutions. Jews were restricted in their commercial activities.[5] Trading in money was the only branch of commercial activity left to them. High state officials and church dignitaries vied with one another in devising means of emptying the Jewish purse. "They (the Christians)," complains R. Meir of Rothenburg, "demand ten times as much as one has for the ransom of a captive. They use intimidation in order to hasten relief at all costs."[6] "The Christians would sooner kill a Jew than set him free without ransom," testifies Ḥayyim Or Zarua.[7] Jews whom the community or their relatives

[1] RABNA, RABNR, 5; MBRP 397. [2] RABNR, p. 193b.
[3] MBRP 885, 903, 904; Mord. Baba Kamma 11.
[4] OZ pt. I, 694. [5] RABNA 288; HOZ 75.
[6] MBRC 305; 32, 33; MBRL 345; MBRP 39; Mord. Nez. 58; ibid., Nashim 270; HM Nizke Mamon III, 2; Ḥobel u'Mazzik VIII, 6.
[7] HOZ 76.

were not quick in ransoming were murdered, and their remains thrown to the dogs.[1]

The Jews found it necessary to carry weapons for self-protection against attacks by the Gentiles. The matter of self-protection was so urgent that the carrying of weapons on the Sabbath was permitted, contrary to rabbinic prohibition. "There is so much the more reason," declared the authorities, "to permit the carrying of weapons under such conditions when they may attack us suddenly, plunder, and even murder us."[2] The responsa abound with questions arising out of frequent assassinations of Jews and the drowning of Jews by the Christians.[3]

As a result of unfriendly, restrictive, and oppressive decrees by the civil legislative bodies, which not only barred the Jews from social, political, and economic contact with the Christian environment, fostering hate and suspicion, there arose corrupt practices in the legal tribunals, where a Jew could not hope to find redress for his grievances. The Jews lost all faith in their Christian neighbors. "Their mouth speaks falsehood, their right hand is treacherous," is a frequent reference to the Christians of the period.[4]

With such conditions as a background, the Jews considered litigation in a Christian court a crime punishable, as was the informer—by excommunication. The word "*Anas*" אנס oppressor, robber, lawless—is an oft repeated term in the responsa, designating the "unjustice," or the lack of justice, which a Jew may expect from Christian judges.[5]

[1] Ibid.
[2] OZ pt. II, Sabbath, 84, par. 13; MBRB I, 33.
[3] Mord. Moed 898, 899; ibid. Nashim 128; ibid. Nez. 124; Rabiah, 108.
[4] SH 698, 1021; MBRL 86; RABNA 99, 101; HOZ 253.
[5] Mord. Nez. 195, 196; ibid. 54; HQZ 141, 142 and 28; Takkanot Shum, end MBRP.

Even to force a recalcitrant defendant to employ a Jewish court, by authority of the civil court, was considered a misdemeanor punishable by fine or flagellation, because Gentile intervention in such cases was also considered as informing and as exposing a Jew to the mercy of unfriendly Christians.[1]

[1] Mord. and HOZ ibid.

CHAPTER V

THE LAW OF THE LAND— (*DINA DEMALKUTHA*)

1. JEWISH JURISPRUDENCE AN OUTGROWTH OF DISABILITIES

JEWISH jurisprudence of the Middle Ages is an outgrowth not only of an intense devotion to Jewish law, which was the only outlet for the Jew's intellectual activities, but also of the disabilities under which Jewries found themselves suffering. Aliens, socially ostracised and legally proscribed, the "servi camerae," personal property of the king, they were wholly outside the pale of the ordinary laws of the lands in which they dwelt. Hardly any provision was made for the Jews in the civil courts, because society as well as law assumed Christians as litigants. The Jew was therefore forced to seek justice elsewhere.

Throughout the entire period of the Middle Ages no Jew was allowed anywhere to give testimony in the civil courts. In many places the old Roman restrictions as regards aliens were applied to the Jews.

In Gosslar the Jews were placed in the category of minors, fools, the insane and women as regards admission of their testimony in court.

The Jews were required to take a special form of oath accompanied by certain humiliating formalities in the civil courts of law in cases involving a Christian plaintiff or defendant. This disability dates back to the Byzantine Em-

peror Justinian (527-565), who declared that neither Jews nor heretics should be admitted as witnesses against Christians.[1]

Though the Jews were deprived of a judicial standing in the civil courts, they nevertheless enjoyed the privilege of having their rights protected and justice administered by their own tribunals which found expression sometimes in a single individual called the Jew-Bishop (communal representative) or in their own regularly constituted courts of justice.

In the year 1084 the Jewish Bishop of Speyer was officially recognized by the civil government with the power to administer justice among his co-religionists. In the year 1090 by charter granted by King Henry IV. their powers were extended including also provision that Jews should be judged according to their own laws.[2]

Barring certain modifications, the same judicial privileges were also granted the Jewish communities of Nuremberg, Cologne, and Regensburg. In these and in all the other communities, the Jewish Bishop was subject to election by the members of the community. Of the two judges in Regensburg, one was elected by the community, the other was appointed by the Duke.[3]

[1] Stobbe p. 148 ff; Brunner pp. 273–277; Scherer p. 297. It is however to be noted that in certain places the secular courts did not recognize this disability, and Jews and Christians were treated equal. Thus in special decrees guaranteeing the safe conduct of the Jews issued by the Carlovingian Kings in the 9th century, the testimony of Jews whether under oath or not was equal in value to that of the Christians (Stobbe p. 151). In the charter granted by King Henry IV. the Jews of Speyer, the removal of this disability was specified (1090), ibid. pp. 141, 142). The law of Duke Frederick II. of Austria (1244) which has served as a model for other legislation on the Jews, merely required that a Jew shall swear by the Torah (Scherer p. 182).

[2] Stobbe pp. 141, 142.

[3] Ibid. pp. 140–141.

Probably in order to prevent Jewish judges from coming in closer contact with the Christians, no Jewish court was allowed to hold sessions in Thuringia except in the synagogue or on the synagogue premises.[1]

Add to these outward limitations also the inner restrictions placed by the Rabbinical Synods of the 12th and 13th centuries prohibiting resort to the secular courts by Jewish litigants, and we have a Jewish judicial autonomy almost completely segregated from and little influenced by the laws of the land.[2]

One of the major problems which the medieval Jewish communities were called upon to solve, was that of taxation. The entire community was held, as we have seen, responsible by the government for the payment of the regular and the special Jewish taxes. An autonomous jurisdiction thus grew up among the Jewries of the Middle Ages, which called for special, and at times drastic, legal measures controlling the conduct of individual members of the community—in order to carry out their share of the communal responsibility. All the rabbinic authorities of the period devote a large part of their attention to questions arising from this purely internal matter of taxation.

These circumstances, however, though they worked untold hardships upon the Jews, were not altogether devoid of good. They made Jewish life typically Jewish, juridically as well as socially.[3]

It would, however, be wrong to infer from this that the Jews were completely isolated from Christian society and that they had no contact with the outside world. We have

[1] Ibid. p. 143.

[2] Ibid. p. 140; Schroeder pp. 505, 506.

[3] For a further study on this question cf. Scherer, Vol. I, 1901; cf. Supra "Taxation."

already seen (in the first chapter) that the Jews were engaged in commerce and trade, that part of the exporting and importing business was in their hands, that the Jews were engaged in the building trade and were permitted to own houses and real estate, etc. These and the problems connected with the levying of taxes in which the government was directly interested, of necessity made Jewish life a part of the general Christian population involving litigations in which the laws of the land had to be reckoned with. The authorities were therefore confronted with the problem of harmonizing Jewish life with the laws of the country. Does Jewish law approve in principle of the laws of the land? Are there anywhere in the realm of Jewish legislation to be found precedents showing the influence of foreign, legal systems on Jewish law?

In trying to solve these problems the Jewish authorities of the Middle Ages found no difficulty. The Talmud and the Geonic Responsa furnished ample material to draw upon for their decisions.

2. EVIDENCES OF FOREIGN INFLUENCES ON JEWISH JURISPRUDENCE

Throughout the Talmudic, the Geonic and the medieval periods, the tendency of Jewish jurisprudence was towards submission to the laws of the land and even be influenced by them in all civil cases wherever no obstacles were placed by the civil authorities. The Talmud being a product of nearly a thousand years of legislative activity, it is self-evident that foreign elements from the great civilized nations of the ancient world must have exercised an influence on it. In the Talmud there are many evidences of the influence of foreign legal systems on Jewish jurisprudence. Note-

worthy in this regard are the Assyrian, Babylonian, Persian, and the Greco-Roman systems. The Talmudic terms for written documents, such as "*get*," "*zober*" זבר (receipt) and "*shetar*," have been directly traced to an Assyro-Babylonian origin respectively.[1] Rab Yehudah, the Amora, reproduces the text of a contract concerning the sale of slaves, the origin of which is Assyrian (Gittin 86a). According to Frankel a majority of the legal cases in the Talmud have parallels in the Roman codes.[2] For centuries the Jews lived under Persian rule, under the regimes of the ancient Achaemenidae and the Persian Sassanid dynasties. There can, therefore, be no doubt that Persian law exercised its influence upon Jewish law during Talmudic times.[3] The only Amora who seems to have opposed the influence of Persian laws upon Jewish jurisprudence and who actually annulled the decisions of the Exilarchs of Babylonia regularly deciding according to Persian law, was R. Nakhman.[4]

The influence of Persian law upon Jewish life is evidenced by the opposition it met from other Talmudic authorities. Samuel the Amora considered it impudence (חציפא) to claim private tenure rights at the edge of a river, because this would be an infringement upon the privileges of the general public whose property the beach is. This assertion is contrary to Persian law, which did grant such private rights.[5] It is, however, to be noted in this case that while

[1] L. Blau, Althebräishces Buchwesen, p. 18; H. Peck, Assyrische und Talmudische Kulturgeschichte und Lexicalische Notizen, pp. 22, 30.

[2] Frankel, Geschichtlicher Beweis, pp. 58 ff; cf. also Zuns, "Etwas uber die rabbinische Literatur"; Jost, Geschichte IV, p. 144.

[3] "*Dine Deparsa'ah*" Baba Kamma 58a and 59a; "*Dine d'megesta*"; and "*Dine Debe Devar*" ibid. 114a.

[4] Baba Kamma 58b; Shabuot 34b.

[5] Baba Meẓia 108a. That the incident related here is not a question of property right, but of Persian law see Rashi (l. c.).

Rab Nakhman would invalidate such tenure outright, and would remove the claimant from the bank of the river, the Amora Samuel, who, as we shall see, declared the law of the land to be binding, said that it was merely impudence, but not a cause for removal. — חציפה הוי סלוקי לא מסלקינן ליה. Contrary to Persian law, Talmudic law recognizes priority rights to adjacent property.[1] From the fact that the Persians considered mere receipt of an article a rightful form of acquisition, the *Amora* Ameмar declared the right of "*meshikah*"—taking possession by drawing to one's self the object to be acquired—to be applicable also to Gentiles.[2] According to Jewish law, watchmen set to guard an orchard have no right to eat of its fruits. But according to Persian law same is permitted, consequently the Talmud ordains that the guards of an orchard may eat of the fruits in accordance with the law of land (Baba Mezia 93a). שומרי פירות אוכלים מהלכות מדינה אבל לא מן התורה This is an open disregard for a Biblical law.

In criminal cases Jewish law had practically surrendered its authority to the law of the land. The Sanhedrin in Jerusalem as we have seen adjourned forty years before the destruction of the Second Commonwealth. The Jewish court has since then been deprived of the jurisdiction involving capital cases.[3]

Even in civil matters, as will be seen later, (chapter VI.), Talmudic law relinquished a large body of cases for adjudication in the civil courts. Only such cases as occurred frequently and involved actual loss to one of the parties in a suit might be judged in a Jewish court.[4]

[1] Baba Mezia 108b; Baba Kamma 114a.

[2] Aboda Zara 71; note that R. Tam, l. c. Tosafot favors this declaration as legally binding; cf. also Gittin 19b.

[3] Aboda Zara 8b; Sanhedrin 41a, 52b; Yad, Sanhedrin, XIV, 11–13.

[4] Baba Kamma, 84b; Yad, *Sanhedrin* V, 8.

The relation of Jewish jurisprudence to the law of the land was definitely fixed by Samuel (Babylonian Amora, 165-257 c.e.), who declared, "The Law of the Land is Law" —(*Dina Demalkutha Dina*). From its connections in the Talmud, it becomes evident that this dictum of Samuel was intended to apply to a large number of civil cases. It applies to government regulations concerning the payment of taxes and custom duties.[1] to legal documents prepared in the secular court,[2] and to the right of the government to eminent domain for general improvements.[3]

This principle was made particularly applicable to cases involving Jewish and non-Jewish litigants, where the law of the land superseded Jewish law. In any event the non-Jewish litigant was to be informed by what system he was to be judged.[4]

An outstanding instance is the question of "*Ḥazakah*" (tenure right). According to Jewish law three years of uninterrupted possession of landed property establishes title, but Persian law required forty years of undisturbed possession of real estate to establish full rights. This Persian law also held good for the Jews of the land.[5] It is interesting to note that the Exilarch, Ukban bar Nehemiah, (who lived two generations after Samuel) established the validity of the following three principles before the Amora, Rabbah: That the law of the land is binding; that the Persian period of forty years tenancy held good for the Jews; and that real estate confiscated by the government for non-payment of

[1] Baba Kamma, 113a.

[2] Gittin 10b, 11a.

[3] Baba Kamma ibid. Yad, "*Gezelah*," V. 17; OZ; Baba Kamma III, 446.

[4] Baba Kamma, 113a.

[5] Baba Batra, 55a; MBRP 28; MBRL 338; MBRC 63; RABNR p. 215; OZ Baba Kamma 447; HM "*Gezelah*," V. 14 ff; Mord. Nez. 552, 553; ibid. Nashim 325.

taxes may be purchased by Jews of means in order to reimburse the government.[1]

3. OPINIONS OF MEDIEVAL AUTHORITIES

The extent to which the principle of *Dina Demalkutha* is to be applied is a moot question among the rabbinic authorities.[2] The Geonim did not construe it as having the power to supersede Jewish law in cases which are purely civil.[3]

According to the Or Zarua only cases arising from the sale and purchase of landed property touching the payment of taxes to the government should be treated according to this legal principle.[4]

It would seem, however, that a careful study of the sources should settle the question beyond doubt that the principle of *Dina Demalkutha* applies to all civil cases. We have seen previously, in studying the Jewish attitude towards the civil court, that Jewish law recognizes non-Jews as juridic persons, because among the seven Noachian commandments the non-Jews are enjoined to establish courts.[5] The principle of *Dina Demalkutha* is invoked in the Talmud in the question of the validity of business documents prepared in a Gentile court.[6] The statement of Rashi (Gittin 9b and 10b) is quite illuminating. He declared: "The law of the land is binding even if the parties in a suit are Israelites, excepting bills of divorce, because in this

[1] Baba Batra, 55a.
[2] OZ Baba Kamma 447.
[3] Mord. Nez. 553; cf. also, RABNR Baba Batra p. 215.
והשיב ר' מתתיהו גאון — וישראל יש לו לעשות כדיני ישראל. מה לנו ולנמוסות שלהם — וכי גניח תלמוד שלנו. —
[4] OZ III; Baba Kamma 447; cf. RABNA 112.
[5] Sanhedrin 57a; OZ Baba Kamma; *Arkaoth*; Rashi, Gittin 9b.
[6] Gittin 10b.

instance they are excluded by Mosaic laws, but they (non-Jews) are enjoined concerning civil laws."[1] Equally explicit is the declaration of Rashbam, in his commentary to the Talmud;[2] "Has not Samuel declared the law of the land to be binding, which applies to the payment of regular and special taxes, and to all decrees promulgated by the government — ומנהגות של משפטי מלכים, because all the inhabitants of the land willingly accept the statutes and rulings of the government? These are therefore binding. And for that reason no one may consider as robbery money held by another Jew, which holding is legal according to the law of the land." It is evident that in civil cases the law of the land is binding even if it is contrary to Jewish law. Equally clear on the subject is Maimonides, who, though dealing with the question of real estate, yet makes the general statement: "In all civil cases, the law of the government is binding." עושין כפי משפט המלך שכל דיני המלך בממון על פיהן דנין.[3]

4. DECISIONS CONTRARY TO TALMUDIC LAW

Mordecai[4] declares, contrary to Talmudic ruling,[5] that in conformity with the law of the land a Jewish creditor may legally sell securities or deposits held by him against a Jewish debtor after the expiration of one year. Quoting Meir of Rothenburg,[6] Mordecai, in the face of Geonic opposition (cited) decides that the law of the land regarding open spaces between two adjoining buildings prevails in all cases, whether the claims for the freedom of the air are

[1] דדינא דמלכותא דינא ואף על פי שתקנותן והמקבל ישראלים הם, חוץ מגיטי נשים דלאו בני כריתות נינהו חואיל ולא שייכו בתורת גיטין וקדושין אבל על הדינין נצטוו בני נח. —
[2] Baba Batra 54b.
[3] Yad, *"Zekhiyah U-Mattanah"* I, 15.
[4] Mord. Nez. 153.
[5] Baba Mezia 80b.
[6] MBRP 28; MBRL 338; MBRC 63; HM *Toan*, XIV, 7.

directed by a Jew against a neighboring Jew, by a Jew against a Gentile, or vice versa.[1]

Maharam[2] upheld the principle of the law of the land, which requires one of several bondsmen who secured a loan to pay the entire debt in default of the other bondsmen.[3]

The law of the land was declared binding in all cases involving commercial stability—"*takkanot hashuk.*"[4]

Even Solomon Ben Adret, who vigorously opposes litigation by Jews in the secular courts, makes a distinction between "*hurmana demalkah*" (government regulations) and "*arkaoth*" (secular courts). All government regulations are strictly binding upon the Jews in accordance with the principle of Samuel regarding the validity of the laws of the land.[5]

The same authority, though he disagrees, cites opinions of other authorities to the effect that even in marriage relationships, any subsequent litigation touching the question whether the husband or the father has the right to inherit the dowry in case of the woman's death, the law of the land supersedes Jewish law, "because," say these authorities, "the marrying parties nowadays enter into the bond of matrimony with the laws and customs of the country of their sojourn in view."[6]

[1] Mord. Nez. 553. [2] MBRP 116.

[3] Cf. also Asheri, Resp. XVIII, 6.

[4] Mord. Nez. 257; ibid. Baba Kamma 164 ff. entire section on commercial stability.

[5] Quoted by the Bet Yoseph, Tur Hoshen Mishpat XXVI, end.

[6] Bet Yoseph, ibid.

— גם פסק חרב אם אמר חשר מעצמו איני חפץ ששום יהודי ידור כאן אלא ברשות ראובן דראובן יכול לעכב מדינא דמלכותא. —

According to the Or Zarua the principle of *Dina Demalkutha* applies to all enactments and judgments which emanate from courts that are trustworthy and are constituted by the government and function under its supervision. Very significant is the declaration of R. Eliezer b. Nathan, who permits Jewish witnesses to testify in favor of a Gentile against a Jew in a secular court, "because the courts form a branch of the government of the country, and therefore they fall under the principle of the law of the land."

— אבל בי תדי לא משמתינן ליה כיון דבעדות גמודה מפקינן מינה ותו דדינא מלכותא היא — ודינא דמלכותא דינא.[1]

The principle of *Dina Demalkutha* touching land questions does not apply to Palestine, since Palestine was apportioned to the Israelites by Joshua according to their tribes, prior to the establishment of the kingdom, and every Jew has incontrovertible right of possession to his landed estates; so that no king or government has the right to expropriate a Jewish citizen of Palestine for non-payment of taxes, or to exile him from the country for non-obedience to government regulations. The entire Jewish race is considered a corporate partnership in the possession of Palestinian soil.[2] There can be no question that the non-application of the principle of *Dina Demalkutha* to Palestine means only when the king or the government of Palestine act in autocratic fashion, without authority in law or without sanction

[1] RABNR Baba Kamma p. 194b; Mord. Nashim 325.

[2] Rabenu Nissim, quoting the Tosafists, Nedarim 28a; OZ Baba Kamma 447.

וכתבו בתוספות דדוקא במלכי עובדי כוכבים אמר דדינא דמלכותא דינא מפני שהארץ שלו ויכול לומר להם אם לא תעשו מצותי אגרש אתכם מן הארץ אבל במלכי ישראל לא לפי שארץ ישראל כל ישראל שותפין בה. —

from the court.[1] Otherwise it applied to Palestine to its full extent.[2]

In all cases, and under all circumstances the principle of *Dina Demalkutha is operative* only when the demands of the government are just and are not discriminatory; otherwise they are demands of violence and robbery, and are not legally binding upon any Jew. The inhabitants of one section who are discriminated against as compared with those of another section of the country under the same government are not legally bound to abide by the government regulations in such matters. A Jewish tax collector who had acquired by purchase from the government the right to collect taxes from a community either in lump or individually would have no redress in a Jewish court against the individual members or against the community as a whole, if the payment of taxes were refused on account of well sustained claims of government discrimination.[3]

The government has no legal right of acquisition to the landed property of a Jew who has fled town at a time of general outbreaks against Jews. A Jew who has purchased the estate from the government must return the estate to the original owner upon receipt of the amount paid the government. Violence even by the government does not constitute an act of legal acquisition, and the principle of "*Yiush*" (giving up hope of recovery) does not hold good

[1] Sanhedrin 20b; Berakot 3b.

[2] N'mukeh Yoseph, Alfasi, Nedarim, l. c.; cf. Maimonides, commentary on the Mishna, Nedarim, l. c., who makes no distinction as regards the powers of a tax collector whether appointed by non-Jewish or Jewish kings; cf. also Tosafot, Sanhedrin 20b explaining why Ahab deserved punishment for taking the vineyard of Naboth the Jesre'elite.

[3] Commentary of Asheri, right margin Nedarim 28a; OZ, Baba Kamma 447; MBRP 134; MBRC 222, 306; MBRL 358; Mord. Nez. 177.

in respect of landed property.[1] A well-to-do captive who has been ransomed, even though without his request, must repay the mount spent for his ransom. He cannot claim exemption from payment on the ground that the government may hold one Jew legally responsible for another as regards the payment of taxes, because the demand for ransom is not a legal but a criminal act on the part of the government.[2]

It was not, however, an act of violence or discrimination on the part of the government to expropriate the landed estates of an individual or a group of inhabitants against whom it harbored prejudice or displeasure. These estates are, by Jewish law, on account of the application of the principle of *Dina Demalkutha*, declared "*Hefker*," (public property), to the extent that the government may sell them to any purchaser without redress in law to the original owner.[3]

Violent acquisition of Jewish books by the government or by individual Gentiles does not constitute legal possession. The purchaser of the books must return them to the owner "because they are of no value to any but to a Jew, and the principle of "*Yiush*" and "*Dina Demalkutha*" are not operative. The purchaser is entitled to reimbursement only to the extent of the value of the books.[4]

In conformity with the civil law which considered undeclared articles, or money saved from shipwreck as stolen

[1] Mord. Baba Kamma 60, ibid. Ketubot 275; HM *Gezelah*, V 13; MBRP 661.

[2] MBRP 39; MBRC 32, 33; MBRL 345; MBRB 384; ibid. II, 128, 129; HM *Niske Mamon* III, 11; ibid. *Hobel u-Mazzik* VIII, 6; HOZ 80; Mord. Nez. 58, 59; ibid. Nashim 274.

[3] Mord. Nez. 215; cf. Yad, *Gezelah*, V, 12 ff.

[4] MBRP 289; HM *Gezelah* X, 1; Mord. Nez. 60, 151.

goods, and their possessor a thief, R. Gershom M'or Ha-Golah decided in an actual case that the articles and money bought by a Jewish defendant from a Gentile, who had saved them from a shipwreck should be returned to the Jewish plaintiff. The defendant is entitled only to be reimbursed for the cost of saving these articles. This decision is to a certain extent contrary to Talmudic legislation.[1]

Interesting and significant is the decision of R. Solomon Ben Adret, that a Jewish official of the government, whether in the capacity of a judge or of any civil office, has the full right and authority, in accordance with the principle of "*Dina Demalkutha*," to render decisions and wield powers beyond the legal prerogatives of a Jewish Judge in a Jewish court.[2]

Does Jewish civil law harmonize with life, does Jewish legislation take cognizance of public law, and to what extent? The Talmud and the Rabbinic authorities of the Middle Ages would, no doubt, answer these questions affirmatively. It is only in the realm that is purely religious that the Jewish authorities throughout the centuries stood guard against intrusion from without, but in so far as civil laws were concerned not only did they maintain a liberal attitude towards the outside world and took cognizance of the laws of the countries in which the Jews lived, but even went to the extent of interpreting, at times even in disregard of, an express Biblical or Talmudic law, in order to suit conditions.

Not only were the laws of the land applicable to Jews, from a Jewish legal standpoint, where they lived together

[1] Mord. Nez. 257; based on Talmudic reference Baba Mezia 22a.
[2] Responsa Rashba, edition Vienna, p. 81b, Responsum 637; cf. infra. "Limitations of Jewish Court in the Diaspora."

with Gentiles under the lex loci,[1] and a Jewish litigant would have no redress in a Jewish court, or when the Government appoints a civil tribunal for Jewish litigations,[2] but even Jewish judges adjudicating Jewish parties in a suit would make every attempt to harmonize Jewish law with the laws of the land.

[1] Brunner, pp. 273–277.
[2] Stobbe, p. 140 ff.

CHAPTER VI

THE LEGISLATIVE POWERS OF THE COURT AND OF THE COMMUNAL ORGANIZATION

1. ORDINATION IN PALESTINE AND IN THE DIASPORA. BRIEF SUMMARY

JUDICIAL autonomy existed. But to what extent? The Jewish communities of the Middle Ages acting through their Communal Boards and Courts, we have seen, wielded supreme control over the individual members of their respective communities, but we also know that Jewish law limits the legislative powers of adjucation in the Diaspora. Was scholarship, mere number of judges, or delegated power by the members of the community the standards of authority to judge all cases? Could a *Dayyan* (judge) outside of Palestine be considered duly ordained, and enjoy the judicial prerogatives of his Palestinian colleague? Conditions of Jewish life were such as would make strict adherence in practice to all the limitations and restrictions imposed by Talmudic law well-nigh impossible. The Jewish authorities were confronted again with the problem of adjusting Jewish law to life. In these as well as in all the other problems facing them, the Talmud and the Geonic sources served them as guides in order to perfect the desired adjustment. It would seem, therefore, that in order to define the powers and limitations of the legislative authority of the Jewish communal organizations and the Court in the Diaspora to inflict punishments, and impose

fines and penalties, an understanding of the system and validity of Ordination in Palestine and without to be prerequisite. For the entire Jewish legal system was dependent on the "semikha"—the authority to judge criminal and civil cases and to decide religious questions.

We are not here concerned with the history and development of ordination in Biblical, Talmudic, and post-Talmudic times,[1] but in the effect of the changing conditions of Jewish life upon the legal requirements of ordination, and upon the courts and their judicial prerogatives.

In Palestine the great Sanhedrin, sitting at the Temple in the Chamber of Hewn Stones (*Lishkat ha-Gazit*) designated the qualifications of the local judges. These judges who as a rule were recruited from the localities in which they were to function became eligible to fill vacancies in the great Sanhedrin.[2] They were brought into the presence of the Sanhedrin in session at the Chamber and there received their ordination. At times judges were also deemed worthy of appointment from among the rows of scholars sitting before the Sanhedrin.[3]

After the destruction of the Second Temple, (70, c.e.), when the Sanhedrin had been driven from the Chamber of Hewn Stones and had lost its political standing, a Court of Three was sufficient to grant ordination,[4] but it would seem that frequently, especially during the Hadrianic persecutions, ordination (*minui*) was valid even if conferred by teacher upon pupil.[5]

[1] Wilhelm Bacher, Zur Geschichte Der Ordination, Monatsschrift, XXXVIII pp. 122–127.
[2] Sanhedrin 88b; Tosifta, VII.
[3] Ibid. 37a; Shabuot 31a; Tosifta, ibid. 1, 4.
[4] Sanhedrin 2a.
[5] Yerushalmi Sanhedrin 1, 2 p. 6a; Babli Sanhedrin 14a.

When peace and order were restored after the Bar Kochba revolt, (135, c.e.), the custom of ordination was again restored to the Sanhedrin during the Patriarchate of R. Simon, B. Gamliel and R. Yehudah, the Prince (2nd century), provided that the appointment of the court receive the sanction of the Patriarch; though this procedure might be reversed.[1] Thus was the original power of the Sanhedrin to a limited extent reestablished.

The custom differed in Babylonia. During the Amoraic period, (219-500, c.e.), when the Jewish courts were well established and received juridical authority from the government through the exilarchs (who were recognized by the state as political representatives of the Babylonian Jewries), the judges received their appointments from the exilarchs upon the recommendation of the heads of the academies and their courts who testified to the qualifications of the judges.[2]

The difference between the Palestinian and the Babylonian courts was the extent of power which they could legally wield. The Palestinian courts had unlimited authority. They could inflict punishments, impose fines, and exact penalties. The Babylonian courts were restricted, due to the fact that no ordination of judges could take place outside of Palestine.[3] The statement of the Talmud[4] that the Sanhedrin may exercise full judicial authority in the Diaspora as well, has been explained to refer to a Sanhedrin whose members received their ordination in Palestine and from Palestinian authorities.[5]

[1] Yerushalmi Sanhedrin ibid.
[2] Pesahim 49a; Sanhedrin 5a, 14a.
[3] Sanhedrin, ibid.
[4] Makkot 7a; Sanhedrin, ibid.
[5] Yad, Sanhedrin IV, 6, 12; Tur Hoshen Mispat, *Dayyanim*, I, Commentary Beth Hadash.

2. SCOPE OF THE PALESTINIAN COURTS AND THOSE OF THE DIASPORA

After the close of the academies in Palestine, which according to Nachmanides,[1] took place prior to the fixing of the calendar by Hillel the Second in the year 361, the ceremony of ordination within its original meaning was abandoned even in Palestine, and from that time on its practice has ceased. Judges in Palestine are therefore not to be considered as duly qualified—*mumhin*—but merely acting as deputies with delegated powers of the earlier authorities.[2]

Judges outside of Palestine act merely as the judicial agents of the Palestinian courts.[3] Their powers and functions are delegated and, therefore, limited. They may not adjudicate capital cases, and those involving personal injury, nor impose fines. They cannot force litigants to trial.[4] They are legally empowered to adjudge only the payment of the principle in suits involving damages, when these are of frequent occurrence and involve actual loss of money.[5] They may adjudge cases arising from loans, confession of debts in the presence of witnesses, and litigation arising from disputes regarding legacies, gifts, and marriage con-

[1] Commentary on Sefer ha Mitzwot by Maimonides, 153. The ceremony of ordination continued in some form in Babylonia in geonic times.

[2] Tossafot, Gittin 88b; Tur Hoshen Mishpat, Beth Yoseph, and Beth Hadash Dayyanim, I, 4.

[3] Gittin 88b; Baba Kamma, 84a.

[4] Baba Kamma and Gittin, ibid.; Sanhedrin 5a; Yad, Sanhedrin IV, 14. Cf. however, Tosafot Sanhedrin 5a, where statement is made that a learned judge may force a litigant for trial even outside of Palestine.

[5] Baba Kamma 84b; Gittin, ibid.; Yad, ibid. Tur Hoshen Mishpat, Dayyanim, I.

tracts:[1] also damages caused by indirect action (*Dine De 'Garmi*);[2] and the case of the informer.[3]

All Talmudic references to cases where fines were imposed upon defendants outside of Palestine[4] have been explained by the later authorities as seizures by the plaintiff in the amount involved; and the trials were ex post facto, which may be adjudicated even outside of Palestine,[5] or where the plaintiff has summoned the defendant to appear before a court in Palestine, and he has refused, despite the threat of excommunication.[6] The summons to appear for trial in Palestine does not have to be an actual one. Even if it becomes evident that the defendant would be willing to stand the expenditure attached to such a venue, if it were issued, the case may be tried and fines imposed even outside of Palestine.[7]

During the Geonic period a special ordinance was promulgated through all Jewries to force the losing defendant under penalty of excommunication to placate the injured

[1] Tossafot, Sanhedrin 3a, Commentary of Asheri, l. c., and ibid. 8a.

[2] Cf. case of Rafram, who forced R. Ashi to pay for the burning of a note of indebtedness, Baba Kamma 88b; Yad, Hobel u-Mazzik. VII, 9; HM l. c., Yad, Sanhedrin V, 15; RABNR 192b; OZ, Baba Kamma 325; MBRP 103, 148; MBRC 59; MBRL 375; MBRB I, 420; ibid. II, 118; ibid. III, 323; MBRP 300, 383, 694, 733; Mord. Nez. 114, 118, 213.

[3] Baba Kamma 116a, 117a; Yad, Sanhedrin V, 16; OZ, Baba Kamma 461, 462, 462, 386, 387, 388, 389, 390; HOZ 141, 142; MBRP 307, 485; MBRC 232, 822, 826, 894, 979, repeated in 717, 994; Mord. Nez. 186 ff; ibid. 654, cf. infra, "Status of the informer."

[4] Baba Kamma 19b, bottom, case of Rab. Yehudah; 37a, Hanan Bisha and R. Huna; 96b and 115a, Ma'arsha and Abaye; 116a, Exilarch and Rab. Nakhman.

[5] Baba Kamma 84a, ibid. 15; Ketubot 41b; Tosafot l. c. Yad, Sanhedrin V, 17; RABNR Baba Kamma 191.

[6] Ketubot, ibid.; RABNR 187a; OZ Baba Kamma 96; Mord. Nez. 14, 15, 42; cf. Tosafot 94b—"*I Nami.*"

[7] OZ Baba Kamma 97, and Responsa references ibid.

party and to reimburse the plaintiff to the extent of the loss in question, without regard to his actual claims or his satisfaction.[1] The Geonim also authorized the local judge and the elders of a community to meet out punishments and to impose fines according to their discretion, in order to safeguard the religious and social morale of the people.[2]

During the Middle Ages the scope and power of the court were widened still more. Many restrictive laws circumscribing and limiting its powers were either modified, explained away, or entirely abrogated. In this regard they were guided by the principles laid down in the Talmud, that under emergencies decisions contrary to Biblical law and legal precedent may be rendered, (*Hora'at Sha'ah*), in order to check lawlessness and religious laxity. On the strength of this prerogative the Talmud declares that the *Beth Din* is authorized to inflict corporal punishment, and even impose the death penalty for offences which normally would not be liable to such severe punishment. In order to set an example to others, Simon Ben Shetah caused the execution of eighty women in Ashkalon in one day, though according to law no two executions may take place in one and the same day and no women were to be executed by strangulation.[3] The court stoned a man to death for riding a horse on the Sabbath "not because he deserved it (the

[1] Sha'are Zedek, IV, gate I, pars. 1, 2, 3, 4, 13, 14, 15, 16, 17, 19; cf, Hemdah Ge'nuzah, 60, 120; Teshubot Geonim Kadmonim, 135, 125; Alfasi, Baba Kamma, on 84b, Asheri, Baba Kamma 84a and b, quoting Geonic opinion, ibid. 15b; Yad, Sanhedrin V, 17; HM l. c.; OZ, Baba Kamma 326, 327, 328; MBRP 293, 555, 937; Mord. Nez. 92.

[2] THGH 165, based on Yebamot 90b; cf. also ibid. 169, 170, and 444 regarding the circumstances under which the penalty of excommunication is to be imposed for refusal to placate the injured person, or the plaintiff in civil suits.

[3] Sanhedrin 34a (see Rashi, l. c.); ibid. 46a.

transgression being merely contrary to the rabbinic "*shebuth*"), but conditions so required." For the same reason a man was flogged for having intercourse with his wife in public.[1] Rab Hunah (Babylonian Amora, 216-297, c.e.) cut off the hand of a certain offender who habitually used his hands against his neighbors.[2] Rab Nakhman (Babylonian Amora, died 320, c.e.) imposed a heavy fine upon an inveterate robber (גזלן עתיקא) though in strict accordance with the law, no fines are to be imposed in Babylonia.[3]

Very clear and sweeping indeed is the declaration of Rabbi Solomon Ben Adret of the thirteenth century, who says: "It is left to the discretion of the officers of the communal organization to trust the witnesses on their mere testimony, in order to administer monetary or bodily punishment for the benefit of society. For if justice were to be administered only within the limitations of the Torah, the world would be destroyed. *This is particularly true of lands other than Palestine, where we are not permitted legally to impose fines; and strict adherence to such limitations would cause the increase of lawlessness, chaos, and confusion. . . . We are permitted to do so everywhere and at all times, whenever conditions so warrant.* . . . The court could convict on the strength of circumstantial evidence without requiring *hatra'ah* (warning) or on indirect testimony of witnesses who had themselves not seen the crime committed, but had been told of it by persons who actually witnessed the crime; even the evidence of relatives were to be accepted under such emergencies.[4] *The Beth Din which does not take advantage of its prerogative to act against the Biblical law, or*

[1] Sanhedrin 46a; Yebamot 90b.

[2] Nidah 13b.

[3] Alfasi on Baba Kamma 96b.

[4] Quoted by the Bet Yoseph, Tur Hoshen Mishpat, Dayyanim II, 1.

against established legal precedence when the needs of the hour demand and is afraid to impose illegal penalties will not share in the world to come."[1]

If we bear in mind that Rashba makes reference here to mere laymen, such as communal officers, his statements are the more significant when related to scholars or judges.

The judicial prerequisite of ordination even in lands other than Palestine, seems to have fallen into desuetude during the Middle Ages. The ordinary seven elders of a community (*Shib'ah tube ha'ir*), when duly elected by the congregation, had the right to impose all sorts of fines and to inflict punishments. These ordinary laymen received the status of ordained judges, or of the *Ge'dole Ha-dor*.[2] Asheri extends the authority of the court to surrender one who defies its mandates into the hands of Gentiles, not only to the recalcitrant husband who refuses a divorce to his wife,[3] but to all cases of disobedience to the orders of either the court or of the elders of the congregation.[4]

3. CITATION OF CASES

Following are decisions rendered in actual cases by the authorities during the period under review:—

The punishments of excommunication, flagellation, humiliating indignities, fines, and bodily injury were imposed upon husbands for mistreating their wives.[5]

[1] Ibid.

[2] Yad, Sanhedrin XXIV, 6; Mord. Nez. 480, 487; 257, quoting R. Gershom; ibid. 755, quoting Responsa of Rashi; ibid. Nashim 384; OZ, Baba Kamma 394; Responsa Asheri XVIII, 3; MBRP 153, ordinance of R. Tam; cf. also Alfasi on Baba Kamma 96b.

[3] Gittin 88b.

[4] Responsa Asheri VII, 12; cf. also MHG 69, 74, 81.

[5] MBRP 81, 927; MBRC 291; MBRL 311.

The same punishments, including surrender into the hands of the Gentiles for a flogging, were meted out upon an intended son-in-law who refused to live up to the points of agreement between father and father-in-law on the selection of a permanent residence after the marriage. It was here evident that the groom purposed to take material advantage of his father-in-law.[1]

Insulting a married woman (spitting in front of her) was considered a crime calling for an apology to the husband and the payment of a fine. Refusal to do so made the offender liable to the penalty of the ban or of social ostracism.[2]

In addition to bodily chastisement and social ostracism, a heavy fine was also imposed for the offence of calling one "*Mamzer*" (of illegitimate birth).[3]

Every community had a clause in its Book of Ordinances (*Sefer ha-Takkanot*) specifying the fine to be paid for intent to do personal injury to another. In all such cases the judges were to receive the sanction of the communal authorities.[4]

Bodily punishments and monetary fines were imposed upon persons who through unfair business methods had aroused the anger of government officials, thereby threatening the peace of the other members of the community.[5]

A man who had suffered personal injury was allowed a remunerative fine. But when the case, though indirectly, reached civil court, the culprit was granted by the Jewish

[1] MBRP 250, 251; MBRL 386; Mord. Ketubot 279, 280, 313; Ahseri on Ketubot 110b; cf. also Tosafot Gittin 88b; and ibid. Baba Batra 48a; HM Yad, Ishut, XII, 17, 18.

[2] OZ, Baba Kamma 373, 374; MBRP 293; Mord. Nez. 81, 82.

[3] MBRP 132; MBRC 285; MBRL 492.

[4] MBRP 383; Mord. Baba Kamma 195, 196; HM, Hobel u-Mazzik I., Ginze Schechter II, 271, 274.

[5] MBRP 980.

court a reduction from the original sum to the extent of the loss he (the defendant) had sustained by being drawn into the secular court.[1]

R. Meir of Rothenburg imposed a monetary fine and authorized bodily chastisement upon a father who had influenced his son to break a betrothal engagement.[2]

No fines or damages, however, were to be paid, in all cases of injury, if the plaintiff was unable to give an idea or estimate the extent of the loss he had sustained.[3]

4. LEGISLATIVE POWERS OF THE COMMUNAL ORGANIZATIONS

As regards the legislative powers of the communities, opinions differ. According to Rabbenu Gershom (10th century), the local courts are the successors of the great Sanhedrin, or of the courts of Shammai and Hillel, or of Rabban Gamliel, and are, therefore, equal in authority. The Nasi (patriarch), or the President of the Sanhedrin did not wield judicial powers because of scholarship but because of the fact that the Sanhedrin over which he presided was the judicial representative of all Jewry, and was recognized as such by the Jews everywhere. Any corporate body or individual recognized by the community, was therefore, to enjoy the legislative prerogative of the Supreme Judicial Tribunal of Palestine, and had the powers to enforce its mandates upon the individual members even in opposition to Talmudic law.[4]

[1] MBRP 994; HM, Ḥobel u-Mazzik, I, 3; Mord. Nez. 195, 197; Responsa Mamuni Nezikin 15.
[2] MBRP 854; MBRC 90; HOZ 152.
[3] MBRP 742.
[4] Mord. Nez. 257; THZW 97.

The basis of the legislative powers, according to Rabbenu Gershom, was not so much personal qualification as that of invenstiture.

Different, however, was the view held by Rabbenu Tam. (1100-1170). According to him it is only the foremost scholars of any generation that can rightfully claim to be the heirs of the Sanhedrin, and enjoy their judicial prerogatives. In support of his contention Rabbenu Tam cites the fact that when the Bene Batyra found that Hillel was greater in scholarship then themselves, they made way before him and surrendered the presidency of the Sanhedrin into his hands.[1] Personal qualifications in learning and scholarship are prerequisites and basic to all legislative and juridic powers.[2]

The principle underlying these two conflicting opinions is more far reaching than ordinarily appears. It concerns the extent of the legislative powers each would grant the individual communities. If the legislative powers were to be lodged only in the hands of the greatest scholars of any generation, the individual communities would be limited in their legislative powers. The only way the communities could overcome these limitations, according to Rabbenu Tam is by obtaining the unanimous consent of all the members of the community in order to make its decisions, decrees, or enactments binding upon the individual member.

It seems, however, that though the view of Rabbenu Tam had some following,[3] it did not prevail. The older view, that of Rabbenu Gershom was the one accepted.

[1] Pesaḥim 66b.
[2] Asheri (Rosh), Sanhedrin, section 41:—

ובזמן חזה סובר (ר' חם) שהחשובישבדור נקרא בית דין הגדול וכן היה אומר רבנו תם שהמיד היו ממנים הגדול שבדור לנשיא כמו שבני בתירא ירדו מנשיאותם ומינו את הלל נשיא לפי שהיה גדול מהם לכך נקרא בית דין הגדול.

[3] HOZ 222.

Rabbi Eliezer ben Joel ha-Levi-Rabiah (1160-1235) lays down the rule that the communal board consisting of the "*shib'ah tube ha-ir*" (seven best men of the city) had as much power in civil matters as the Sanhedrin had over all Israel. Should the legality of an enactment by the communal board be disputed or called into question, a majority of votes in a public referendum, would finally decide the issue at stake.[1] Fifty years later, R. Meir of Rothenburg (1215-1293), aligns himself with the opinion of Rabbenu Gershom and Rabiah giving the community legislative powers over the property of its members with full authority to impose fines and exact penalties.[1]

The Rabbi seems to have acted as the court of last resort whenever it became evident that the communal organizations worked injustice, or utilized their legislative powers in an arbitrary or dictatorial fashion.[2]

[1] Ibid.

[2] MBRB II, Responsum 140; ibid. III 865; MBRP 968, where, though he seems to follow the opinion of R. Tam, he, nevertheless, adds that if the communal board had been unanimously elected it might act for the entire community in all civil and penal cases; cf. also Teshubot HOZ 65. Maimuni, Kinyan 17.

CHAPTER VII

LAW ENFORCEMENT

1. JEWISH SOCIETY UNPROTECTED BY THE STATE

UNLIKE any other society under protection of an ordered government the Jewries of the Middle Ages, particularly those of Germany during this period, had no such protection. It is true that the Jewish communities enjoyed autonomous government (supra, Chap. I), but it is also true that, as aliens and chattels, the Jews were placed in a class by themselves, the government seldom interfering in their internal affiars. As such they were left entirely to the jurisdiction of their own authorities to maintain social order and to guard the general morale of the people.

Before the Crusades, the Jews lived fairly peaceably with their Christian neighbors. During the glorious period of Charlemagne in the eighth century, and the century and a half following, the Jews were not only protected, but even maintained a distinguished social, cultural, political, and commercial position among their neighbors. The court physician under Charles the Great was a Jew. Among the three envoys sent by Charlemagne on a political mission to the Sultan Harun Al Rashid, was a Jew, Isaac, who distinguished himself in the task.[1] The Jews carried on commerce between Germany and foreign countries. They journeyed from East to West and from West to East,

[1] Güdemann, Vol. 1, Chap IV; and Graetz, Vol. III pp. 141-144.

partly on land and partly by sea. They established trade relations with Russia and other Slavic countries, with Greece, Hungary, Italy, and with lands as far south as Turkey.[1] And as Jewish merchants carried their goods from Germany to foreign countries, Jews in these lands exported their merchandise to German markets, which were largely controlled by Jews as is evident from the fact that market days were held on Sundays instead of on Saturdays.[2] It was natural that these journeys and the visits of foreign merchants, making contacts with foreign cultures possible, should have had a very favorable influence on the social conditions of the Jews in the Middle Ages. Add to this the favorable political conditions, and we have a healthy and normal Jewish society.

But with the advent of the Crusades, at the end of the eleventh century, when Jews not only suffered degradation and humiliation, but untold martyrdom at the hands of a loose mob incited by church and king, who had declared Jews outlawed in life and porperty, it was natural that a certain amount of demoralization should set in. To be sure, no serious crimes such as murder, rape, theft, or false swearing were to be laid at the doors of medieval Jewish society. The sources speak of them as isolated instances,[3] yet such crimes as informing, wife beating, wife desertion, coin clipping, dishonesty in business transactions, evasion of tax payment, and other social, ethical, and religious lapses were frequent. Without the civil law coming to their assistance, without police force to compel respect for the mandates of the communal organizations and the orders of the court, the medieval Jewish tribunal on the whole main-

[1] RABNA 5; ibid. p. 76; MBRP 885, 903, 904; Shib. Ha-Leket, 60.
[2] Güdemann, ibid. [3] Abrahams, Jewish Life, p. 102.

tained a high moral standing, and was able to compel obedience by means much stronger than ordinary police authority. These were the infliction of punishments, such as flagellation, and isolation by major and minor excommunications.

2. CAPITAL PUNISHMENT

According to Talmudic law capital punishment must not be inflicted except by the verdict of a regularly constituted court of twenty-three qualified and duly ordained judges,[1] and (except in Palestine) at the time when the Sanhedrin of Seventy One is in position to sit at the Chamber of Hewn Stones in the Temple, and when the High Priest can perform his ritual functions.[2]

The right of a Jewish Court, in countries other than Palestine, to administer the extreme penalty, was conditioned upon its members being ordained in Palestine and by Palestinia authorities, and upon the existence of the Sanhedrin in Palestine with the right to judge capital cases.[3] Even in Palestine the right to judge capital cases was taken from the Sanhedrin by the Romans forty years before the fall of the Second Temple, when the court was exiled from the Temple (cf. supra). For that reason, according to previous restrictions, the Jews were everywhere deprived of the power to inflict capital punishment.[4]

Yet, despite these legal restrictions, we know that even during Talmudic times the Jewish court was empowered

[1] Sanhedrin 2a, 32a; Yad, Sanhedrin V, 2, XI, 1.
[2] Sanhedrin 52b; 87a; Ma'kot 71.
[3] Makkot 71; Berakot 58a; Yad, Sanhedrin XIV, 14.
[4] Sanhedrin 41a; Aboda Zara 8b; Sabbath 15a; Rosh Hashana 31a; Yerushalmi Sanhedrin I, 1, VII 2; Yad, Sanhedrin XIV, 13; OZ I, 112; cf. Schürer, II, p. 212.

to practice capital punishment in cases of emergency, or when conditions required. References have already been made to such instances in the foregoing chapter. We might add here the case of Rab Kahanna, who struck an informer dead in his attempt to prevent him from committing an act of informing.[1]

The statement of Asheri[2] that the abolition of the power to administer capital punishment after the exile of the Sanhedrin holds good only for cases requiring a trial by due legal process, but that the prohibition does not apply to preventative measures, such as do not require testimony by witnesses or forewarning (cases enumerated in Sanhedrin 73a), is very significant. It goes without saying, continues Asheri, that such permission is conditioned upon the sufferance of the civil government:

גם כי בטלו ד' מיתות בית דין מיום שגלו סנהדרין היינו הוקא שאין לדון את האדם לחייבו מיתה על אחד מהעברות שחייבין עליהן מיתה, דכיון שאין סנהדרין במקום אין אדם שולט לדון את חברו למיתה. אבל אלו דקא חשיב בסנהדרין (ענ-א) שמצילין אותן בנפשו שאין נהרגין לשעבר אלא להבא להציל את הנרדף ממות או מפגעים אותם לא בטלו במקום שהורשה לזה לבית דין מצד המלכות. —

Though the sources make no reference to actual applications of the right to judge capital cases even under emergencies, they abound with references to the full permission granted by Jewish authorities to medieval communal organizations to impose the penalty of death in the case of informers. That this grant and its application was due to the exigencies of the times there can be no doubt (cf. infra on the informer). Where execution was impossible, the communal authorities were empowered by the Jewish court

[1] Baba Kamma 117a; cf. Responsa of R. Yitzhak B. Sheshet, 251.
[2] Responsa Asheri XVIII, 1.

to surrender the case ot the civil authorities for the exaction of the penalty.[1]

It seems, however, that not all the communities, nor all the rabbinic authorities agreed as to whether advantage might be taken of the permission to deal with informers as granted by law. The question of corporal punishment was left entirely to the various communal ordinances.[2] No case is reported where an actual execution took place under Jewish judgment, excepting in Spain. In this connection the statement of Asheri to the *Beth Din* of Cordova is very illuminating: "You have surprised me exceedingly with your question concerning capital punishment, which, with the exception of the Spanish communities, is not being exercised by any community of which I have knowledge. When I asked them how they could inflict capital punishment without the sanction of the Sanhedrin, they told me that this was done on the strength of a special royal decree, in order to prevent the conviction of many innocent defendants brought before the Gentile court. I have allowed their custom in this matter to remain, though I have never sanctioned such executions."[3]

Under such legal restrictions and precedents the only measures left to the Jewish court wherewith to curb crime were corporal punishment, outlawry by proclamation throughout the Jewish communities, complete religious and social ostracism by major and minor excommunica-

[1] Yad, Ḥobel u-Mazzik, VIII, 10, 11; HM l.c. MBRP 485, MBRC 37, 242; MBRL 247, 334, 369; MBRB 137, p. 208; Mord. Nez. 186 Asheri, XVII, 1, 2, 3.
[2] MBRP 383, 384, 742; MBRL 247, 248, 334, 374; OZ Baba Kamma 329; HOZ 141, 142, 255; Mord. Nez. 195, 196.
[3] Responsa Asheri XVII, 8; Bartenora, Sanhedrin I, 3; cf. also Shulḥan Aruk, Ḥoshen Mishpat II, Glosses Isserless.

tion, in which not only the culprit but also his family were involved, disqualification as witness, declaring one's oath untrustworthy, or exile.[1] The punishments varied, of course, with the seriousness of the crime.

Complicity in murder, or murder by indirection, were treated with the same severity as actual murder.[2]

3. CORPORAL PUNISHMENT

Malkot and Makkat Mardut

Only crimes punishable by excision (*karet*—that is judgment by the Heavenly Court) were included by the Talmud among offences penalized in the Pentateuch by stripes (*Malkot*); but not such crimes as would deserve capital punishment by human courts.[3] In capital cases, the right to inflict *Malkot* was vested only in judges duly ordained in and by Palestinian authorities.[4] The Jewish courts, therefore, could not condemn a culprit to that sentence in the Diaspora.[5] Another reason for this prohibition is that since the Pentateuch (Deut. XXXV, 2, 3) prohibits only an excess of the legal number of stripes, but not a reduction, the culprit's ability to stand the ordeal being determined by the judges,[6] no judges, outside of the Sanhedrin, were considered by the Talmud competent to determine the number where "estimation" was required by Bibilical law.[7]

[1] HM Rozeach, V, 2; HOZ 25; Mord. Nez. 727; SH 172, 175, 176, 181, 1298.
[2] Yad, Rozeach, II, 21; HM l.c.; SH 158, 159, 160.
[3] Makkot 13a; b; Baba Kamma 74b; Ma'aseh ha-Geonim, 82, p. 73.
[4] Sanhedrin 1a, 10a; HM, Edut, V, 1.
[5] Aboda Zara 8a; Sabbath 15b; HM ibid.
[6] Makkot, ibid.; Yad, Sanhedrin XVI, 12 ibid. XVII, 1, 2, 3, 4; HM l.c.
[7] Makkot 22a.

Hence the rabbis of the Talmud substituted for the Biblical stripes the rabbinic beating for discipline—*makkat mardut*. This rabbinic measure was employed for capital as well as for other offences, and for disobeying ordinances of the Scribes (*Takkanot Soferim*). It was often employed in order to compel the performance of a duty. The punishment of *makkat mardut* was to be carried out without the judicial formality which surrounded the Biblical forty stripes.[1]

The Biblical *malkot* were inflicted with a strip of calfskin redoubled, and the strokes were administered on a specified part of the culprit's body; the rabbinic disciplinary beating (*mardut*) was done by means of a stick,[2] by a doubly twisted cord,[3] and on any part of the body.[4]

In Geonic times corporal punishment was inflicted in this manner: The culprit was set down before the court with his hands and feet tied, the right hand to the right foot, and the left hand to the left foot. The court placed the man's belt on his neck, and the whipping cord on the shoulder of the clerk of the court. The crime for which he was to be punished was read to him as well as any other offences he might have committed. The court clerk, stationed at the head of the prisoner, administered thirteen strokes on the right side, thirteen on the left, and thirteen on the back, all the while reading verses from I Samuel, II, 24; Deuteronomy, XXVIII, 58, 59; and Deuteronomy

[1] Tosifta, end Makkot III; Yebamot 54a; Nazir 23a; 58b; Pesahim 41a; Sabbath 40b; Kiddushin 28a, b, Hullin 141b; Teshubhot ha-Geonim, HG 20; Sha'are Zedek pt. V, gate I, 7, 37, 38; ST 9; Yad, Sanhedrin VI, 2, 3, Maimonides' Commentary on the Mishna, Nazir IV, 3.
[2] Rashi, Sanhedrin 7b.
[3] SZ pt. IV, gate 7, 38; Teshubot ha-Geonim, HG 20; THGH 440.
[4] MAFT p. 6.

XXV, 2-3. His hands and feet were then loosed, he stood up, and with the belt still suspended from his neck, he uttered a formal confession, and a prayer for atonement. The court then prayed for his forgiveness.[1] This ceremony was as a rule carried out in the court room (ibid.); while during the Middle Ages it was generally done in the synagogue, immediately preceding the *ma'ariv* (evening) service, in order that the entire congregation might offer atonement through the prayer "*Vehu Raḥum*". . . "And He being merciful, forgiveth iniquity, and destroyeth not . . ."with which the evening service begins.[2]

As to the number of strokes to be inflicted,opinions differ. According to the Tosifta,[3] the beating was continued either until the culprit repented, or until death fainting set in עד שתצא נפשו[4] Hai Gaon reckoned the number of *makkat mardut* the same as that of the Biblical *malkot*.[5] It seems however, that the number of strokes was left entirely to the discretion of the court, and that in no case was the number to be specified.[6]

The effectiveness of the penalty is indicated by the following incident, related by R. Yehudah Ḥassid. A murderer came before Hai Gaon (during his customary visits to Jerusalem on the Festival of Booths) and Ebjathar Kohen Zedek, asking atonement for his crime. The two authorities commanded a lashing until the blood came. The criminal, however, prayed for no mercy, and begged for a continuation of the lashing, which was done. When exhaustion set in,

[1] THGH 440; SZT, ibid.
[2] MAFT 192; Asheri, Orḥot Ḥayyim, Hilkot Erev Yom Kippur.
[3] End, Makkot III.
[4] ST 181; SZT, ibid., 39; cf. also Yerushalmi Nazir, IV, 3.
[5] THGH and SZT above, ibid.
[6] Natronai Gaon, SZT, ibid. 39; ST 181; HG 20; MHG 73.

he was relieved for three weeks. After that period, he was deposited in a sand pile with a small opening for breathing. He was tortured three times more. When it became evident that death would ensue if the punishment continued, his crime was declared sufficiently expiated, and forgiveness affirmed, because of his willingness to stand the ordeal. But the criminal was still in doubt as to whether he had received sufficient punishment and the authorities had to reassure him in the name of God.[1]

A cantor who unwittingly committed murder was permitted to resume his office upon accepting penance in addition to the punishment of flagellation.[2]

The penalty of flagellation was a substitute for the payment of fines, which could not be imposed in the Diaspora.[3] It was imposed for murder if the injury was done on the Sabbath and Day of Atonement, in addition to other penance;[4] for insulting a married woman;[5] for calling a respectable person "*mamzer*" (of illegitimate birth)[6]; for engaging in occupations on the Sabbath, forbidden only rabbinically—*Shebut*;[7] for adultery;[8] for the crime of informing, as a partial requirement of expiation and repentance;[9] for eating bread baked by a Gentile on the Sabbath, the sin committed being not in eating bread baked by a non-Jew, but for making use of work performed

[1] SH 630 see A. Epstein in Monatsschrift Vol. 47 pp 340-45, who justifiably considers the story somewhat exaggerated.
[2] OZ I, 112-115.
[3] MHG pp. 70, 72, 73.
[4] OZ, Baba Kamma 328, 329.
[5] Ibid. 373.
[6] MBRP 115; MBRC 285; MBRL 492; Mord. Nez. 105; cf. Kiddushin 28a.
[7] Responsa of R. Gershom M'or ha-Golah, quoted in Responsa of THZW 93.
[8] MHG 73; TH Ḥemdah Genuzah, 20; SZT above, ibid.
[9] MBRP 485; MBRC 232; Mord. Nez. 186.

on the Sabbath.[1] The Or Zarua was an eye witness to the flagellation administered by his teacher, for violation of the dietary laws by a butcher;[2] for wife beating;[3] for attempting to assault a neighbor;[4] for the payment of damages, in case the defendant was not able to furnish the sum required.[5]

Women were not exempt from the penalty of flagellation.[6] Husbands were not legally held accountable for their wives' penalties for injuring others.[7]

Flagellation did not take place on Sabbaths and Jewish holidays. In case of emergency, the culprit was imprisoned until the expiration of the Sabbath or holiday.[8] However, the Gaon Kohen Zedek did permit flagellation on the Sabbath.[9]

4. EXCOMMUNICATION

The chief weapon employed by the Jews of the Middle Ages to maintain discipline and force obedience to authority, was the punishment of excommunication, which in its major form meant complete isolation and ostracism, involving even the family of the excommunicated, unless it too renounced him. To be sure, this punishment was harsh and cruel, and much hostile criticism has been hurled against its employment in the extreme form; yet if we consider the conditions of medieval Jewries, deprived of all legal means of enforcing obedience, the effect of its actual or threatened employment was on the whole a healthy one. Organized

[1] OZ II, Hilkot Yom Tov, 358, o. 150, 2d column, bottom.
[2] Responsa of Solomon Luria, quoting Rabiah as having administered the penalty in the synagogue in the presence of a large audience.
[3] MBRP 81, 927. [4] Ibid. 383.
[5] Asheri, Responsa VI, 27; Mord. Nez. 195, 196.
[6] Mord. Nez. 92.
[7] OZ, Baba Kamma 347. [8] ST 182; TGM 146.
[9] TGM, 10; Shibbale ha-Leket, 60.

life was rendered possible, great moral and social reforms were thereby launched, Jewish solidarity strengthened, and authority maintained.[1]

Although the *herem* is a development of the Biblical ban (Leviticus XXVII, 28, 29; Deut. VII, 26: Joshua, VII, Ezra X, 8), which implied confiscation, the type of excommunication employed during the Talmudic, Geonic, and the Middle Ages, is really a rabbinic institution.[2]

The Talmud speaks of three forms of punishment under the ban, and distinguishes them according to their severity and period of duration. They are the *nezifah*, or rebuke; *shamta*, or anathema (cf. definition passim), and *niddui* and *herem*—minor and major excommunications.

Nezifah was a rebuke administered by the *nassi*, or a scholar for insults, or self imposed by one conscious of insolence towards his superiors in learning.[3] In Babylonia, the period of *nezifah* lasted only one day, while in Palestine not less than seven days[4] and in one instance even thirty days (e.g. R. Hiyya). During the period of *nezifah*, the offender did not dare appear before him whom he had displeased; he was kept in isolation at his home, refrained from pleasures, spoke little, and in general manifested regret. His behavior during this period was considered sufficient apology.[5] *Nezifah* was the mildest of the bans. It was intended merely to insure respect for authority and scholarship.

Niddui was a higher and more severe form of excommuni-

[1] Abrahams, Jewish Life, pp. 52-3.
[2] J. Wiesener, Der Bann.
[3] Moed Katan, 16a, b, Yerushalmi ibid. III, 1; Sanhedrin 68a; Sabbath 31a, 97a.
[4] Moed Katan Babli and Yerushalmi, ibid. [5] Babli, ibid.

cation. The Talmud[1] mentions twenty-four offences punishable by *niddui*. Maimonides actually enumerates them.[2] None, not even scholars, were exempt from this penalty.[3] Following is a partial list:—Disobedience to the orders of the court;[4] refusal to pay damages;[5] refusal to go to Palestine for trial (ibid.); testifying against a fellow-Jew in a non-Jewish court, thereby causing the Jew a money loss not possible in a Jewish court;[6] insulting a messenger of the court;[7] and preventing the community from discharging its duties.[8] The penalty of *niddui* became effective immediately after its pronouncement. If the offender showed no evidence of penitence or regret, the ban might be renewed for a period of thirty days, at the expiration of which it might be renewed for another thirty days. After sixty days, the court pronounced the major excommunication, the *herem*, also known as *hardafah*—persecution.[9]

The *herem* is the major form of excommunication. Its use extended over an indefinite period of time, and was very drastic in its application.

Under the milder forms of excommunication, the offender was to go into mourning. He was not permitted to bathe, to cut his hair, or wear shoes. At his death, during the period of penance, his kin were not required to observe the laws and customs of ordinary mourners. A stone was placed on his hearse—symbol of Biblical stoning.[10] He was not eulogized, nor was he entitled to an escort following the hearse.[1] His isolation was not, however, complete. He was allowed to associate with his family and his immediate household.[2] His family was not in any way to suffer on his account. He was not to be subjected to bodily injury or indignities. He was permitted to teach and to be taught; he could hire labor or be employed for a livelihood (ibid.).

[1] Berakot 19a; Yerushalmi Moed Katan III, 1.
[2] Yad, Talmud Torah, VI, 14.
[3] Baba Mezia, 59b; Pesahim 52a; Yerushalmi Moed Katan, ibid.
[4] Baba Kamma, 112b, 113a; Moed Katan 14b.
[5] Baba Kamma, ibid.
[6] Ibid. 113b ff.
[7] Ibid. 112b ff.
[8] Yerushalmi Moed Katan III, 1.
[9] Moed Katan, 16a; Yad, Talmud Torah VII, 6.
[10] Moed Katan, 14b-16b.

In the case of major excommunication the religious and social ostracism was complete. In addition to all the rigors under the minor ban, the offender under the *herem* was exposed to bodily indignities amounting to cruelty and persecution. While he suffered bodily indignities, the culprit was fastened hands and feet to a pole. He was abused, cursed, and insulted. His hair was plucked. The court had the right to confiscate his accessible property if necessary, and all his other possessions declared *hefker*, (public property.)[3] It is not without reason that the *herem* was also called *hardafah*, persecution, or that the term *shamta* was interpreted as the equivalent of death—"*Zu mitah.*"[4]

While no warning was required when disobedience to authority was involved, a triple warning, on Monday, Thursday, and Monday, was required during Talmudic times for excommunication on account of money matters.[5]

During Geonic times more stringent measures were applied to the excommunicated. A person made himself liable to the penalty of the minor ban for speaking to an excommunicate or worshipping in a synagogue where one

[1] Moed Katan, ibid; Baba Mezia, 59b.
[2] Sanhedrin 68b; Moed Katan 15a.
[3] Moed Katan 16a; Yad, Sanhedrin XXIV, 7, 8, 9.
[4] Moed Katan 17a; Alfasi to Pesahim 17b.
[5] Moed Katan 16a; Baba Kamma 113a; Yad, Sanhedrin XXV, 8.

was present.[1] A proclamation was sent throughout the Jewish communities, specifying the guilt of the culprit and exhorting against contact with him. He was not to be allowed a Jewish burial. His male children were not to be circumcized. His wife was excluded from the synagogue, and his children from school. His bread was declared "*pat kuthi*," his wine "*nesek*," his books anathema. He was to be deprived of all means of livelihood (contrary to Talmudic permission to keep a store, Moed Katan, 17a). No burial was granted to members of his family (*al tikberu lo*). The *mezuzah* was removed from his door. He could not wear *ẓiẓit*. He was not to be admitted to any religious or secular society ("*lo la-haburath mitzvah, lo la-haburath reshut*"). In general, he was to be given the status of a heathen.[2] "However," says the Bet Yoseph, "though the Geonim wielded authority over the Diaspora equal to that of the Sanhedrin over the whole of Israel, yet after their period only the measures permitted in the Talmud were to be applied" (ibid.). This opinion is concurred in by the Ribash.[3]

Though our sources are replete with references to general excommunications for violations of communal ordinances, little mention is made of their use against individuals. The *ḥerem* was used to enforce the proper apportionment and collection of taxes;[4] to compel legal residents to contribute

[1] Bet Yoseph, Yore Deah, 334, quoting Hai Gaon.

[2] Bet Yoseph, ibid., quoting Paltai Gaon and others; Teshubot ha-Geonim, Lyck, Responsum 10; SZT IV, 7; cf., however, Hai Gaon, ST 41, who objects to some of these drastic measures; cf. also N'muke Yoseph, Alfasi to Baba Kamma 36a, who calls it Geonic persecution, and Tur Yoreh Deah 334.

[3] Responsa 173, 299, 395; Isserlin, TH 277.

[4] Baba Kamma 460; MBRP 813, 940, 941, section on Takkannot Shum; MBRL 42, Kolbo 139; SH 1386, 1387, 1390, 1292, 1407; Mord. Nez. 478, 482.

to the charity chest;[1] for bringing suit against a fellow-Jew in a non-Jewish court.[2] By communal ordinance, enforced by the *ḥerem*, no member of a community had the right to refuse to sit in court as judge,[3] or to withhold testimony.[4]

The right of domicile was enforced by *ḥerem* in some communities.[5]

Individuals could apply to the court for a decree of excommunication against defendants in suits involving damages.[6]

Some communities used the *ḥerem* (major excommunication) against lowering of the standard market price on merchandise and produce;[7] against marrying off daughters without permission or sanction of the communal governing board;[8] against those suspected of false swearing.[9]

The *niddui* (minor excommunication) was used in lieu of fine for bodily injury, and it continued until the injured party was satisfied;[10] also for insulting a married woman;[11] for imputing adultery to a respectable married woman.[12] A woman made herself liable to an involuntary divorce for failure to obey the mandates of the *ḥerem*. She was considered as an "*overet al dat*"—a transgressor against the law.[13] The major ban was imposed for cruel and abusive

[1] OZ I, Hilkot Ẓedakah 4; MBRP 153; Takkannot Shum 918; MBRC 10; MBRB II, 132; SH 1713, 1715; Mord. Nez. 478, 482, 490.

[2] MBRP end, Ordinance of R. Tam, and substantiated by the Synod of Shum.

[3] MBRP 526; MBRC 282, 715; SH 1380; Mord. Nez. 676. 677.

[4] SH 138; MBRP 712; Mord. Nez. 763.

[5] MBRP 382; MBRL 77, 78, 478; Mord. Nez. 517; SH 1301, 1302.

[6] MBRP 575; 814, 184; Mord. Nashim 207.

[7] SH 1293. [8] Ibid. 1300, 1301.

[9] MBRP 842, 462. [10] OZ, Baba Kamma 327, 328.

[11] MBRP 293; OZ, Baba Kamma 373. [12] Mord. Nez. 181.

[13] MBRC 185; MBRL 248, 393; HM, Ishut XXIV, 4; Mord. Nashim 196.

treatment of a wife.[1] Meir of Rothenburg sanctioned the penalty for disciples who encroached upon the exclusive trading rights of their teacher with his Gentile customers, called—*ma'arufia*.[2] The principle involved here is the question of "*nikseh hagoi*" (property belonging to a Gentile), whether the profits derived from trading with a Gentile is to be considered a free commodity, and could, therefore, not be monopolized by any particular Jew, or not. R. Tam did not sanction such a *herem;* (cf. also Sefer Ḥasidim, 1292, the case of an Israelite who undersold his property to his Gentile business associate—*ma'arufia*—in order to evade the payment of communal taxes).

Women, whether in crimes arising from business dealings or family relationships, were not exempt from the penalty of the *herem*.[3] The penalty was imposed upon a married woman defendant, who was not taken to court or to synagogue to swear an oath for a husband in possession of her property.[4]

As to the ban by scholars for personal abuse the authorities of the Middle Ages followed the advice of Maimonides, who says: "Although the power is given to the scholar to

[1] MBRP 81, 297; MBRC 291; OZ, Baba Kamma 373.

[2] MBRP 60, 393, 815; HM, Shekenim VI, 8; Mord. Nez. 339, 515; Berliner p. 75; Hoffmann, p. 95; Wiener, Monatschrift, 1863, o. 169. Concerning the etymology of the term ma'arufia opinions differ. J. Müller (introduction Teshubot Ḥakme Ẓarfat We'lotir p. XXXVII) thinks it to be a French term derived from "mire," or "mirer" (livelihood) and "fier" (making certain); Brill (Jahrbücher für Jüdische Geschichte und Literatur VII, 94) derives it from the Syriac Orp'na (business exchange) while Rappaport (introduction to the Rechtsgutachten der Geonen, edition Cassel par. 16) definitely decides that the term ma'arufia is of Arabic origin, meaning business acquaintance or "customer."

[3] MBRP 184, 443, 704; HM, Ḥobel u-Mazzik Iv, 20; RABNA 115.

[4] MBRL 424; OZ, Baba Kamma 349-353.

excommunicate a man who has slighted him, it is not praiseworthy for him to employ this measure too frequently."[1]

In general, it seems that serious attempts were made to put a check upon the unrestricted use of the ban. Among the ordinances of Speyer, Worms, and Mayence (Takḳanot Shum), there was a rigid stipulation against a rabbi or a communal organization wielding the power of the ban without each other's consent. Bans pronounced contrary to this stipulation were declared invalid.[2]

A ban of excommunication pronounced at the behest of the government, or through the influence of the civil authorities, was null and void. The persons affected by such a ban were not even legally required to apply to the Jewish authorities for its removal.[3]

The ban was as a rule pronounced in the synagogue,[4] in the presence of ten men.[5]

The formalities were weird, awe-inspiring, and vindictive.[6] The precentor—*hazzan*, pronounced the ban and curses without mentioning the Ineffable Name of God;[7] and the lighted candles of the synagogue were extinguished to the blasts of the ram's horn (based on Talmud, Sanhedrin 7b;96a; Moed Katan 16a). When the *herem* was used in promulgating a new ordinance of the community a written document signed by the most prominent and pious men of the community accompanied the verbal pronouncement of excommunication.[8]

[1] Yad, Talmud Torah, VII, 13.

[2] Takḳanot Shum, end, Responsa MBRP.

[3] MBRP 813, 938; MBRB III, 135; SH, 1294 ff.

[4] OZ, Baba Kamma 349; MBRP 184, 443, 712; Mord. Nez. 763.

[5] HOZ 2, quoting his father: cf. also Rashi, Shabuot 38b.

[6] SH, 1297.

[7] Ibid. 1291.

[8] SH, 1294; 1925.

No *herem* document was to be signed if the communal authorities, who had decreed the punishment of excommunication against violators of communal ordinances, had taken no previous steps to punish actual violators.[1] No two decrees were to be promulgated in the same day;[2] neither were two persons to be punished with excommunication in one day (ibid.) The promulgation must take place in the daytime, and not on the Sabbath.[3] It seems, however, that during Geonic times the ban was decreed, and became effective even on the Sabbath.[4]

The Talmud[5] stipulates the conditions for the removal of the ban of excommunication. But Maimonides makes it permanent, and ineradicable when decreed for a crime deserving capital punishment by a Jewish court with unabridged powers.

גם כן מן המקובל בידינו והמפורסם לעשות על פיו שהאיש העושה עבירה שחייב עליה מיתת בית דין הואיל ואין אנו יכולים היום לדין ריני נפשות היו מחרימים אותם חרם עולם אחר שמלקין אותם ואין מתירין אותן לעולם. —

From the language of Maimonides, the permanent ban was an old standing penal tradition, and applied to countries other than Spain, because in that country the Jews were empowered to impose capital punishment.[6]

In the course of time, because of its common and frequent use, the *herem* lost much of its force and terror, and consequently fell into desuetude.[7]

[1] Ibid., 1295.
[2] Ibid., 1296.
[3] Ibid., 1296.
[4] Teshubot ha-Geonim edition Mantua, 10; Geonica, Vol. II, p. 154.
[5] Nedarim, 8a ff.; Moed Katan 15 ff.
[6] Commentary on the Mishna, Hullin 1, 2.
[7] Abrahams, J. L., p. 53; Graetz. V. 3.

CHAPTER VIII

LEGAL STATUS OF THE INFORMER

1. BRIEF HISTORIC SUMMARY

THE habitual informer, who treacherously delivered his fellow Jews and their property into the hands of the civil authorities or of the lawless Gentiles, had no legal standing in Jewish law. In the eyes of Jewish law informing was considered the highest kind of treason against the congregation of Israel. The person guilty of the crime of tale-bearing, denunciation, or informing against an individual Jew or against the congregation was stigmatized as a shedder of blood, a villain and an outlaw. His life and property were outlawed.[1] The extermination of informers was made a public duty, in the accomplishment of which every one was required to render his utmost assistance (cf. infra).

This drastic attitude towards the informer is easily explained by the tragic conditions of Jewish life through the centuries. Already in the first century of the common era, when Palestine chafed under the Roman yoke, a form of curse upon the "malshinim" (denunciators, slanderers) was fixed in the Jewish ritual, to be recited three times daily.[2] These internal enemies did more mischief to their own coreligionists than the heathens or the early Christians, the Minaeans.[3]

[1] Baba Kamma 117a; 119a, 5a; Aboda Zara 26b: Berakot 58a; Yad, Hobel u-Mazzik VIII, 10; HM, l.c.; MBRP 485; MBRC 232; Mord. Nez. 184, 567.
[2] Berakot 28b, Megilah 17b.
[3] Rashi, Torat Kohanim, Leviticus, XXVI, 17; Sabbath 33b.

During the Hadrianic persecutions in the second century, informers brought unspeakable suffering to their countrymen, and the disastrous results of the Bar Kokhba uprising must be ascribed in great measure to the Jewish renegades, who betrayed to the Romans the stratagems and devices employed by the Jews in their last struggle for independence.[1]

We have already seen that the capital jurisdiction of the Jewish court in criminal cases ceased with the destruction of the Jewish commonwealth, but in the case of informers the penalty remained in force,[2] and wherever the right to judge capital cases was granted by the civil government, the penalty was carried out (cf. infra). The informers were denied the world to come, and were condemned to eternal damnation.[3]

The use of Scrolls of the Law, phylacteries, or *mezuzot* written by an informer was prohibited.[4]

The Geonim declared informers disqualified as witnesses and their oath untrustworthy.[5]

In civil suits arising from damages caused by the informer, the latter received the status of a robber—"*gazlan*."[6]

2. DURING THE MIDDLE AGES

The Jewries of the Middle Ages adopted the rigors of the law against informers as sure measures of self defence. Dreadful mischief was wrought by the informers by their lying evidence against a congregation or its members,

[1] Graetz II, 425-7; cf. ibid. pp. 464, 570, 378.
[2] Yad, Ḥobel u-Mazzik, VIII, 10, based on Baba Kamma 117a.
[3] Sanhedrin 91a; Yad, ibid., Rosh Hashana 17a.
[4] Gittin 45b; Yad, Tefilin I, 13; Mord. end of Halakot Ḳetanot.
[5] SZT pt. IV, gate VII, 42.
[6] Baba Kamma 47a; Shabuot 44b.

leading to massacres and to exile. These unscrupulous renegades made a profession of informing. Maimonides speaks of them as a class against whom the Jewries of the western countries were accustomed to apply the severest penalties.[1]

While Maimonides probably referred to the Jews of Maghreb in North Africa, the conditions in German countries were still worse, because there not only did the government and the feudal lords welcome every bit of inside information against an individual Jew or an entire congregation, that they might thereby extort money from the victims, but they actually gave protection to the renegades.[2]

Under these circumstances, the authorities of the Middle Ages made additions to the list of crimes to be considered acts of informing, and additional penalties were promulgated. In the Talmud,[3] the question whether the person suffering a money loss through informing enters the category of those who by special rabbinic ordinance (*takkonnat ha'nigzal*), are entitled to restitution upon their mere declaration of loss, on oath (*nishba ve'notel*) is unsettled. But the later authorities decided affirmatively in favor of the sufferer, and the ordinary trial procedure of a civil suit was suspended.[4] Raben, while concurring in this affirmative decision, nevertheless requires that the claims of the plaintiff be substantiated by witnesses.[5] However, in order to protect those accused of informing, certain communities had an ordinance requiring the plaintiff to swear that the

[1] Ḥobel u-Mazzik, VIII, 11.
[2] Güdemann, . . . I, pp. 108-9; Abrahams, Jewish Life, pp. 49-50.
[3] Baba Kamma 62a; Shabuot 44b.
[4] OZ, Baba Kamma 281; MBRP 485, 822, MBRC 232; HM, Ḥobel u-Mazzik VIII, 7; Mord. Nez. 55, 63.
[5] RABNR, Baba Kamma, p. 193b.

loss sustained was due to informing only.[1] Informers were deprived of the right of tenancy (*hazakah*—title by virtue of the prescribed period of undisturbed possession), as in the case of a robber,[2] and like a robber, the informer was compelled to make good the harm caused by him, and to reimburse the complainant to the fullest extent.[3]

By ordinance of the Geonim, R. Gershom M'or ha-Golah, and R. Tam, informers were subject to the penalty of excommunication, if their crime was substantiated by witnesses. A person excommunicated in one community was considered excommunicated everywhere.[4] The Jewish authorities were also permitted by these enactments to surrender the culprit into the hands of the civil authorities for punishment.[5] In addition to reimbursing the plaintiff in cases of money losses, the informer was to make amends by subjecting himself to flagellation, by a public disavowal of his crime, and by fasting intermittently.[6] Until such amends were made, the informer remained disqualified as witness and his oath was untrustworthy.[7] The rabbinic Synod which met at Mayence, July, 1223, renewed and confirmed these and the other enactments of the Geonim, R. Gershom, and R. Tam.[8]

3. OFFENCES CONSIDERED CRIMINAL INFORMING

The following offences were considered criminal informing: Oral denunciation of a fellow-Jew, causing damage

[1] MBRP 314.
[2] MBRP 100; MBRC 47; MBRL 369; Mord. Nez. 532.
[3] Mord. Nez. 180.
[4] Responsa MBRP pp. 158b, 16a; HOZ 255.
[5] MBRP, ibid. [6] Ibid. p. 159b.
[7] MBRP 307, 485, 822; MBRC 232; OZ, Baba Kamma 284; Mord. Nez. 186; HOZ 141. [8] Ibid. p. 159; Graetz III p. 517.

to the latter;[1] an Israelite offering testimony in a non-Jewish court in favor of a Gentile, thereby causing wrongful loss to the Jew. The informer in such cases was merely rebuked, but was not required to make restitution to the extent of the loss sustained. The rebuke was administered in order to prevent the offender from becoming an habitual informer. The illegality in such instances consists in the fact that according to Jewish law only the evidence of two qualified witnesses is valid, while in the civil courts a verdict could be pronounced on the strength of the testimony of even one witness. The rebuke, however, was not administered if the facts in the case proved that the Jewish defendant tried to evade the truth, against the rightful claims of the Gentile plaintiff;[2] that violence was used, that the civil authorities were influenced against a creditor in order to avoid the payment of a just debt;[3] that underhanded methods had been used by Jews in scattered suburban districts to obtain from the civil authorities an unfair rearrangement of the district, for the purposes of avoiding the due payment of taxes;[4] that attempts had been made to deprive a fellow-Jew of the right of domicile in a certain locality;[5] that an enemy wishing to render damaging information against a fellow-Jew had made such declaration of intention in the presence of witnesses. The offender was stigmatized as "*masur*" and "*rasha.*"[6] Retaliation in kind for informing was considered a greater offense than the original offense.[7] Escape from damage by the person affected did not exonerate the informer.[8] In such cases the informer was exempt from bodily punishment only, but

[1] MBRP 822; Mord. Nez. 185, 186, 187, 188.
[2] Mord. Nez. 157, 117. [3] Ibid. 118.
[4] Ibid. 180. [5] Ibid. 188.
[6] Ibid. [7] Ibid. 195. [8] HOZ 255.

not from penance, the ban, and the payment of the money loss (ibid.).

4. SEQUENCE IN CRIMINAL INFORMING

Of two offenders, whose successive crimes caused an actual loss to a fellow-Jew, the information of the first constituted the major crime; he had to make restitution to the extent of the loss sustained, while the second offender was absolved after making amends by penance, flagellation, and the minor ban. Should there, however, be a doubt as to the sequence of the crimes, the two offenders were made to share alike in the punishment.[1] The plea of poverty on the part of the first offender did not turn the full share of responsibility upon the second. If, however, it was evident beyond doubt, that the first offender had sufficient and justifiable cause for a feeling of resentment against the affected party, he was to be entirely relieved of the crime, the entire responsibility then to be fixed upon the second offender. The crime itself, must be substantiated by two qualified witnesses testifying that the two informers were equally guilty of the offense. Testimony rendered by Gentiles was, for obvious reasons, considered worthless in such cases.[2]

5. NO SEX DISTINCTIONS

Generally Jewish law makes no distinction between the sexes as regards responsibility for criminal or civil offenses. A woman informer received the same status as that of a man. The claimant, in case of a money loss caused by a

[1] Mord. Nez. 55; GM Nizke Mamon XII, 19, quoting Maharam.
[2] Ibid.

married woman informer, was given the right to reimburse himself, from her personal estate, over which her husband had no control, and from the principal of the "*nikse mulug*" (a wife's estate to the interest of which the husband is ordinarily entitled, but not to the principal). Should a woman informer die during the lifetime of her husband, the latter was deprived of the right of inheriting the entire estate, the principal and fruit thereof going to the party affected by her informing.[1]

The claimant was not entitled to reimbursement from the estate of an informer, who died before trial proceedings were instituted against him. But if the informer died while trial was pending, the plaintiff could legally lay claim to the informer's estate.[2]

Heirs were not held responsible for their father's crime of informing. They were not subject to the payment of any losses suffered through him.[3] The heirs were, however, held liable to the claimant, if the death of the informer occurred after judgment in favor of the plaintiff had been rendered by the court.[4]

6. EXTENUATING CIRCUMSTANCES

The plea that the crime was committed in anger was held valid only as regards exemption from public rebuke, or from infliction of flagellation, but not from the payment of the damage caused. The following is a case: A son seeing his father bleed from a blow caused by another, became furious and denounced the asasailant to the authorities. Maharam refused to consider his filial indignation an excuse.[5] He,

[1] MBRP 599; Mord. Nez. 90.
[2] MBRP 590; Mord. Nez. 91.
[3] MBRP 460.
[4] HM, quoting Gershom, Hobel u-Mazzik, VIII, 1; Mord. Nez. 145.
[5] MBRP 717, 994, 979; MBRB III, 327; HM, Hobel u-Mazzik 1, 3, 13; Mord. Nez. 195, 196.

however, upheld communal ordinances not punishing severely informing under extraordinary and extenuating circumstances.[1] No person was considered an informer if the damaging information was extracted under compulsion or duress by Gentiles.[2]

The drastic measures adopted by the Jewries of the Middle Ages against informers were fully justified. They were, as was pointed out, measures in self defense. The criticism, therefore, advanced against medieval Jewish society for dealing with the informers in their own coin, by surrendering them into the hands of the civil authorities,[3] for bodily punishment, or for the confiscation of their property, on the plea that an individual crime is not mitigated when committed by society,[4] is wholly unjustifiable. The good old Talmudic maxim that it is permissible to slay a person himself in the act of slaying, in self defence, when there is no other alternative — כל חבא להרגך השכם להרגו — was never more honorably and justifiably applied than in dealing with the informers, who endangered the lives of whole congregations.

[1] MBRP 994; Mord. Nez. 195, 196.
[2] Mord. Nez. 187, 193, 194.
[3] Responsa Asheri XVII, 6; HOZ 142.
[4] Guedemann, . . . I, p. 109.

CHAPTER IX

ORGANIZATION OF THE COURT

I. NO DEFINITE COURT ORGANIZATION

THE Jewish court of the Middle Ages is an outgrowth of the privilege of self-government which the civil government granted the Jewish communities. It was the agency through which the various Jewish communities found their autonomous self expression, and the pivot around which practically all the inner life of organized Jewry of the Middle Ages revolved.

With the exception of the power to inflict capital punishment, exercised, as we have seen, only by the Jews of Spain,[1] the *Beth Din* was allowed a free hand in all other cases. The judges were considered final authorities and their decisions binding upon all legal, civil, and religious matters.

We can, however, hardly speak of a definite uniform court organization among the Jews of the Middle Ages, much less so among the Jews of Germany. External conditions and inner legal restrictions made a definite and well constituted court system well-nigh impossible.[2]

The details of the prerogatives and composition of the various branches of the Jewish judicial system, as it func-

[1] Responsa Asheri, XVII, 6.
[2] RABNR Sanhedrin p. 227b; MBRP 740; Mord. Nez. 709. The Jewish community of Schweidnitz (German Silesia) had an administrative council consisting of four members or judges besides the Rabbi, while in Worms, justice was administered by a council of thirteen including the Rabbi (Stobbe p. 141 ff; Zimmel p. 41).

tioned in Palestine during Temple times and as described by Biblical and Talmudic legislation, must be entirely disregarded in a discussion of the Jewish courts of the Middle Ages.

2. BRIEF HISTORICAL SUMMARY OF THE JEWISH JUDICIAL SYSTEM

The Sanhedrin, or the Supreme Court of Seventy-One, whose jurisdiction covered a wide range of legal and religious cases,[1] ceased to function, as has been said, forty years prior to the destruction of the Second Commonwealth. The Lesser Court of Twenty-Three, the Sanhedrin *Ketanah*, judging capital cases,[2] met with the same fate.[3] The only court which survived, though restricted in jurisdiction and authority, was the Court of Three.[4]

Josephus, whose writings are the only historic documents contemporaneous with the Jewish court, though not altogether reliable, merits consideration because his statements are somewhat borne out by Talmudic references. He tells us that there was a court in every city, having jurisdiction over civil cases only as laid down in Deuteronomy: "Thou shalt place judges and court officers in all thy cities,"[5] but

[1] Mishnah, Sanhedrin I, 1; Sanhedrin 88b; Sifré "Shoftim," 152.

[2] Mishnah ibid; Tosifta on ibid. and III, 9.

[3] Sabbath 15a; Rosh Hashana 31b.

[4] Sanhedrin ibid.; Weiss, D. D. V. I, chap. 21. Though there is no direct evidence of Courts of Three in the time of the Second Commonwealth, there can be no question that such courts did exist. It is evident from the number of judges who were to adjudicate monetary affairs. The phrase "Dine Mamonot bi'shelosho"—monetary cases are to be judged by three would have been impossible had there been no such courts.

[5] Deuteronomy XVI, 18.

in cities with a population greater than two hundred and thirty there was also a criminal court.[1]

Josephus tells us also that the number of the judges in these city courts was seven.[2] Though no mention is made in the Talmud of a Court of Seven, it does speak of the "shib'ah tube-ha'Ir," the seven elders of the city. It is very possible that the Courts of Seven were instituted by Josephus as expedients during the war when owing to conditions, a Court of Twenty-Three would assemble with great difficulty, and besides, since the Jewish courts were deprived of the right to judge capital cases, a smaller court of seven was deemed sufficient to administer justice in local or communal matters. The Court of Seventy which he mentions to have been instituted by him in Galil is explainable, if at all true, as an emergency war measure.[3]

3. COURT MEMBERSHIP

In discussing the court system among the Jews of the Middle Ages, we must bear in mind that the Court of Three, and the Seven Elders of the City continued to function as the popular tribunals in most communities.

[1] Antiquities IV, 8, 14; "Wars" II, 20, 5; cf. opinion of R. Nehemiah, Mishnah, Sanhedrin 2b; Tosifta, Sanhedrin III, 5. Note the decision of the Tosifta: "and the law is according to him, (R. Nehemiah)". This opinion seems to be the oldest and most authentic, since it goes back to the ancient Biblical organization.

[2] Antiquities VI, 8, 13; "Wars," ibid;

[3] Cf. Supra, "The Community," and infra; cf. Schürer, II, Geschichte des Jüdischen Volkes pp. 190-214; Weyl, "Die Strafrechte bei Josephus," p. 14. Note that in ancient Jewry the departments of justice and administration were not separated; this double duty was carried out by the elders, who were the council of aldermen as well as the members of the court. For these duties seven seems to have been a suitable number (Megilah, 23a ff.)

During the Geonic period in practically every community there functioned a regularly constituted Court of Three. The members of the court were appointed either by the heads of the academies, or by the exilarchs.[1] The Talmudic statement[2]—"A scholar recognized by the public as an experienced judge may render decisions by himself"—יחיד מומחה לרבים דן אפילו יחידי—was so limited by the Geonim as to make such decisions practically invalid.[3]

Even during the Amoraic period (219-500 c.e.), when the practice of the one judge court seems to have been introduced in Babylonia and then in Palestine, due undoubtedly to the large number of cases resulting from the increase of business in those lands, the institution was severely criticized by the Palestinian authorities.[4]

Membership in the Court of Three was not limited to scholars, or to commissioned judges. Even three plain men possessing only a rudimentary legal knowledge and common sense, had the Talmudic right to bring litigants before them and to pronounce judgment.[5] This power given to ordinary men even in Palestine must have followed the removal by the Roman authorities of the right of ordination.[6] An error committed by such judges, due to incorrect reasoning or faulty judgment—"*shikul ha-da'at*,"—did not invalidate the verdict, though the members of the court were required to pay the damage they had caused thereby. But the judges

[1] SZT IV, VII, 33; THGH 69, 180.

[2] Sanhedrin 5a.

[3] SZT ibid. 37, 38, TGM 133, 135, 144, 146, 147; Yad, Sanhedrin II, 11.

[4] Yerushalmi Sanhedrin 1b ff.

[5] Tosafot, Sanhedrin 5a; Asheri "Rosh" l.c.

[6] Baraita Gittin 88b ff. ibid. Tosafot; Mishnah Bekorot 28a; Sanhedrin 3a.

were not held responsible for errors, if the parties had jointly agreed to be tried by them.[1]

The jurisdiction of the Court of Three—ordinary men—covered only cases dealing with contracts and obligations, disputes arising out of the rights of inheritance, the sale by a widow of her estate, the annulment of vows, the execution of wills at the bedside of dying persons, cases involving tenancy rights (*hazakahs*), and validating a bill of divorce brought by messenger from another place.[2] Cases involving robbery or assault and battery could be judged only by a Court of Three, whose members had been duly ordained and commissioned.[3] However, owing to the limited juridical powers of the Jews, and because of the requirements of ordination, this latter court ceased to function in the Middle Ages.[4]

Similar in character, but different in standing was the Mandatory Court, or the Court of the Chosen Three (*Beth Din Shel Borerim*), each party choosing one judge, and the two judges electing the third.[5] From the fact that the judges were chosen by the litigants, it is evident that their eligibility did not depend on ordination, commission, or scholarship.

From the matter of fact way in which the Mishnah speaks of the Mandatory Court, there can be no question that it functioned as a regular and popular tribunal.

During the Hadrianic persecutions, when, according to the Talmud,[6] the Jews were deprived of the right to judge

[1] Sanhedrin 5a, 6a; Yad. Sanhedrin VI, 4; Asheri "Rosh," Sanhedrin chapter 4; Tur Hoshen Mishpat, 25.

[2] Baba Batra 39b, 113b, 120b; Baba Mezia 32; Ketubot 26a; Bekorot 37a; Gittin 5b; Nedarim, 77a.

[3] Sanhedrin 8a, 13b ff; Aboda Zara 8b; Baba Kamma 84a ff.

[4] Cf. Shulham Aruk, Hoshen Mishpat, II, and Tur ibid.

[5] Sanhedrin 23a, "Zab'la."

[6] Yerushalmi Sanhedrin I, 1.

monetary cases, and of ordaining and commissioning judges,[1] R. Meir (2d century) was prompted to review in detail the status of the Court of *Borerim*. Unless otherwise legally disqualified (as by consanguinity; infra, "Qualifications of Judges"), none of the contending parties could dispute the rights of the opposing judges to sit in court.[2] The choice of the judges was confirmed by a written statement signed by the litigants.[3] No claims were allowed against the judges or their verdict after the execution of these papers (ibid.). Though, within legal tenets, the "*borer*" had the unlimited right to uphold the side of the litigant that selected him, he could not, however, do so if he himself was convinced of the guilt of the side he represented.[4]

In the communities of Geonic times, the custom prevailed that when two judges were commissioned by the heads of the academies or by the exilarchs, they would in turn co-opt a local leader or scholar, in order to constitute a Court of Three for monetary cases. This court enjoyed such great popularity that even the scholars of the *Yeshibot* (academies) would apply to them for adjudication.[5]

4. THE MANDATORY COURT OF THREE

From casual references in the Talmud, it would seem that the mandatory court of the Chosen Three functioned only in Palestine, where Roman oppression was strongest. The Talmud,[6] asks: "What are *Shetare Berurin?*" The answer is:

[1] Sanhedrin 5a, 14a.
[2] Ibid. 23a.
[3] Baba Batra 167a; Yerushalmi, Moed Katan, III.
[4] Rashi, Sanhedrin 23a.
[5] SZT IV, VII, 33; THGH 69, 178, 180; TGM 163, 187; cf. Aptowitzer, J. Z. R., N. S. IV pp. 25-30.
[6] Baba Batra 168a.

"Here"—in Babylonia—"it means documents in which the claims and the arguments of the litigants are written down, while in Palestine it means papers signed by litigants confirming the choice of judges for their trial,"[1] on the question "Why is it done so?"—the answer is given: "Because in the name of R. Ze'ira it is said, that in the west—'*b'ma'arava*,' or Palestine, they are accustomed that each party selects a judge." As far as it is possible to ascertain, no case is cited in the Talmud or in the Geonic responsa, showing the existence of the Court of the Chosen Three among the Jews of Babylonia, either in Talmudic or Geonic times. During the Middle Ages, even this limited Court of Three did not function within the meaning of the Talmudic or Geonic arrangement. No judge could consider himself a "*mumhe*" (learned), within the legal and Talmudic meaning of the term.[2] Any scholar superior in wisdom and following, though not commissioned by any authoritative personage like the Palestinian patriarch or Babylonian exilarch, constituted a "*Beth Din Gadol*," an authoritative court.[3]

Not all communities seem to have had judicial tribunals,[4] the existence of such bodies depending upon the appointment of the communal organization.[5] Judges were compelled to sit in court under penalty of excommunication, and by communal ordinance.[6]

The Talmudic reference to a "*Beth Va'ad*"—an assemblage of scholars[7]—who were reckoned as a court of higher in-

[1] Cf. Rabbenu Gershom, l. c.; cf. Sanhedrin 23a.
[2] Mord. Sabbath 761; ibid. Sanhedrin 709, 712.
[3] RABNR, Sanhedrin p. 227b; OŻ, Baba Kamma, 436, 437, 439; HM, Sanhedrin VI, 9; Mord. Nez. 709.
[4] Mord., Baba Mezia 427.
[5] RABNR, Sanhedrin p. 224a; MBRP 546; Mord. Nez. 707, 708, 709.
[6] MBRP 715; Mord. Nez. 676.
[7] Sanhedrin 31b, 32b.

stance, was interpreted by the authorities of the Middle Ages as applying also to an individual scholar considered superior in wisdom and following,[1] since no community could really boast of an assemblage of learned men.[2]

The Talmudic *"Beth Din ha-Gadol,"*[3] which originally referred to the *nassi* in Palestine, was made to apply to an outstanding scholar of the time.[4] The Jewish community of Würzburg, appealing to R. Meir of Rothenburg for a decision, thus addressed him: "From the time we have been deprived of the table of Maharam (literally, the presence), quarrels and disputes have increased in our community. . . . We have therefore decided to appeal to a *high court*, to enlighten our eyes."[5]

5. POSITION OF THE RABBI

We have no definite information in the responsa as to the position of the rabbi in the community, and this lack may undoubtedly be ascribed to the fact that most of the writers of the responsa were the rabbis themselves, yet from occasional passages in the sources, it appears that the rabbis were not only the religious representatives of the communities, called upon to decide purely religious and ritual questions, but that they also acted as judges in legal, civil, and monetary cases between individual members of the community, or between members and the community

[1] HM Sanhedrin VI, 9.
[2] RABNR, Sanhedrin 227b; OZ, Baba Kamma 436-7; MBRP 740, 960, Mord. Nez. 709.
[3] Baba Kamma 112b.
[4] MBRP 523; MBRC 280; MBRL 128; HM Sanhedrin VI, 9, HOZ, 222; Mord. Nez. 709; ibid. Baba Batra, 435.
[5] MBRP 92; MBRC 4; MBRL 357; MBRB I, 396, MBRB II, 180, MBRB III, 137, 138.

as a whole.[1] The more prominent rabbis acted as a Court of Appeals, whose decisions were sought either by local rabbis, or by individual members against a community, or by a community as a whole.[2] No local court, consisting of ordinary men was to render decisions without first consulting the local rabbi, or a competent judge (*Dayyan Mumḥe*) of the community.[3]

From the sources we gather a few glimpses as to the position of the rabbi in the community. They indicate that with a few notable exceptions, distinguished by their great learning, authority, and leadership, the status of the rabbinate was not unduly exalted.

We can hardly speak of a communal rabbi. Many communities had more than one rabbi who enjoyed equal authority and prestige. The sources mention the communities of Vienna, Krems, and Mayence as having more than one rabbi (Terumat Hadeshen, II, 27).

The rabbi achieved his office either by communal appointment, by inheritance, or by recommendation from another rabbi. In the Rhine Provinces, the rabbi was to be confirmed by the state. Such interference by the government entailed many difficulties for both rabbi and community. A *takkanah* was, therefore, promulgated that under the penalty of excommunication no election to a communal office was to be considered valid if there was the slightest suspicion that the aspirant had sought to bring the influence of the civil authorities to bear in his favor.[4]

[1] MBRP 677, 996; MBRB III, 82; Mord. Nez. 486, 554, 568, 569, and from the nature of the questions directed to the authors of the responsa.
[2] Cf. Supra; HOZ 55; MBRC 161, 193, 194; Isserlein, Pesakim 175; Terumat Hadeshen, II, 27.
[3] Mord. Nez. 484.
[4] Ter. Had. Ibid.; Mord. Nez. 486; Maharam Cremona, 78.

The rabbi was not a salaried officer. No stipulations were made in the communal ordinances relative to his maintenance. The sources of his income were wedding ceremonies, divorces and the giving of *halizah* (release from the levirate marriage). He seems to have received some compensation for rendering decisions in legal, ritualistic, religious and civil questions. Added to these were the fees he received for matchmaking.[1]

Nothing but competition, and conflict among the rabbis of the same community and a general degradation of the calling could be expected. Their decisions were ignored and their decrees disobeyed and at times even held up to ridicule.[2]

No rabbi could wield authority over communities outside of his country. In this respect the rabbinate may be said to have had political limits (Ter. Had., II, 128).

In view of such flagrant abuse of the sacred calling, due, undoubtedly, to persecution and the consequent decrease in the number of the competent rabbis, Rabbi Meir b. Baruch Halevi of Vienna, in the year 1370, aided by some of the more conscientious and competent rabbis, introduced into Germany the rabbinical system of ordination. This prescribed that no Talmudic student might officiate as or perform the functions of a rabbi unless previously ordained with the title "*Morenu*." Previously the title of the spiritual head of the congregation had been "*haber*" much humbler in its connotation than *morenu*.

Next in importance to the scholar or rabbi was the Court of Three, consisting either of scholars or ordinary men. It was the one popular tribunal in vogue among the Jews of

[1] Ter. Had. ibid.
[2] Maharam Cremona, 193, 194, cf. ibid. 61.

the Middle Ages.[1] These three judges were appointed by the communal organizations, and functioned as a regularly constituted and permanent court.[2] This communal court was known as the "*Beth Din Hashub*"—the Court of Standing.[3]

Besides this Court of Standing, there continued also to function in the Middle Ages the Talmudic Mandatory Court of the Chosen Three (*Za'bla*), each, as was seen, representing his client, and the two electing a third impartial judge.[4] Their decision was as valid as "a court presided over by Moses, the lawgiver."[5]

6. QUALIFICATIONS OF JUDGES

We leave out here the discussion on the question of the qualifications of judges because according to the Talmudic ruling all those who are qualified to testify, whether on account of consanguinity, bodily defects or religious transgressions are also qualified to judge,[6] and the question of the qualifications of witnesses is dealt with minutely in the next chapter.

[1] Ter. Had., II, 128, - RABNR, Baba Mezia p. 199a, Sanhedrin, ibid. p. 224b; MBRP 898, 854, 740; MBRC 90; HM, Sanhedrin II, 10; Mord. Nez. 761 ibid. Sanhedrin 678, 686; Responsa Maimuni "Kinyan," 26.
[2] RABNR, Sanhedrin p. 224a; OZ, Baba Kamma 437; MBRP 544, 715, 906; HOZ 222; Mord. Sanhedrin 676.
[3] MBRP 493, 854, 996; Mord. Baba Mezia, 321, 323, 324, ibid. Baba Kamma 44.
[4] RABNR, Sanhedrin p. 224; OZ, Baba Kamma 436; MBRP 917, 526; MBRC 17, 282.
[5] MBRP 854, 528; MBRC 90; HM II, 10; Mord. Nez. 675, ibid. Baba Batra, 595, 600; ibid. Shabuot 761.
[6] Sanhedrin 27b.

CHAPTER X

RULES OF EVIDENCE

1. EVIDENCE REQUIREMENTS

EVIDENCE by witness, by document, or by admission determined an issue in civil cases, when an assertion was made by one party in the presence of the court and contested by the other. Basic as testimony is to a correct court decision and scrupulous as Jewish law is about determining the truth in an issue involved, yet even here time and conditions wrought certain changes.

Evidence was admitted after the two contending parties had produced their arguments, according to the Talmudic principle: "He who seeks to take away from his neighbor is required to present the proof"—המוציא מחברו עליו הראיה.[1]

The following requirements must be followed in order to decide a case: Two witnesses must testify to the same fact. The testimony of two witnesses is as valid as that of a hundred witnesses.[2] The witnesses may give their testimony in court even if no declaration has been made by the party desiring their testimony: "You are my witnesses."[3] No hearsay evidence can be admitted.[4]

In criminal cases the two witnesses must have actually seen the act at the same time, and must have seen each

[1] Tosifta, Baba Mezia, I, 1; ibid. Shabuot, VI, 1; Mishna Bikurim, II, 10.

[2] Shabuot, 42a; Yad, Edut, XVIII, 3.

[3] Sanhedrin 29b; Kiddushin 42a.

[4] Ketubot 23a; Zebahim, 103b.

other; but in civil cases the dual evidence was accepted, even if the witnesses had not seen the transaction simultaneously, nor each other.[1] The testimony of one witness was sufficient only to force the defendant to take an oath.[2] A similar right was accorded the defendant, to be released from the obligation of an oath if his counter claim was substantiated by one witness.[3] In certain religious or religious civil cases if the circumstances in the case conclusively proved the truth of the testimony, or if the court was fully convinced of its correctness, evidence even of one witness was valid.[4] The evidence of one man testifying to the death of a husband who had disappeared released the *agunah*.[5]

When a man was obliged to take an oath through the testimony of one witness, but through doubt or unwillingness refused to take it, judgment was nevertheless rendered in favor of the claimant.[6] One witness could not disqualify the testimony of another except where a Biblical oath was required.[7]

The giving of testimony was a legal as well as a religious duty.[8] Litigants could compel persons to appear in court to testify.[9]

In the Middle Ages, the court could force the appearance of witnesses, under threat of excommunication, at the request of the parties in a suit.[10]

[1] Sanhedrin 30a; Ketubot 27b; Yad, Edut, IV, 2; HM l.c.
[2] Sanhedrin 40a; Ketubot 87b.
[3] Asheri, section, 13, Baba Meẓia 27, 28; Tur Ḥoshen Mishpat LXXV, 33; Bet Yoseph l.c.
[4] Sota 6a; Ketubot 85a.
[5] Yebamot 117b.
[6] Shebuot 47a; Baba Batra 33b, 39a.
[7] Ketubot 88a, Tosafot, ibid. For other cases, purely religious, where the testimony of one witness was valid, cf. Gittin 2b, Kiddushin 65b ff.
[8] Leviticus, V; Baba Kamma 56a. [9] Shebuot 29a, 31b, 37a.
[10] Cf. Supra, Excommunications; Asheri, Responsa X, 26.

The court could compel a litigant to produce witnesses, if the other party could not get them to testify due to threats made by his opponent.[1]

2. ESTABLISHING CLAIMS BY ORAL OR WRITTEN TESTIMONY

In all criminal cases, and in all suits involving damages or penalties, testimony must be given in open court, orally.[2] Written depositions were admitted in *agunah* trials only.[3] Testimony must be rendered in a language understood by the court, and not through an interpreter.[4]

For reasons of commercial stability written testimony was, however, accepted in actions involving contracts, bonds, and notes of indebtedness.[5]

Testimony must be given in open court and in the presence of the defendant, so that he might assist the court in cross-examining the witnesses. For this reason no testimony was to be accepted against a minor, because a minor would be of no assistance to the court in directing its cross-examination.[6]

Under extraordinary circumstances written testimony might be admitted, on condition that the opposing party had been so notified by the court. No such previous notification was, however, required if the witnesses could not personally appear on account of serious illness, or because of their preparing to go abroad, or if the defendant was on

[1] Ketubot 27b; Baba Meẓia 39a; Yad, Edut, III, 4; Tur Ḥoshen Mishpat 28, 106.
[2] Ketubot 20a.
[3] Gittin 71a.
[4] Makkot 7b; Yebamot 31a; ibid. Yerushalmi, end; Sifre Deuteronomy 188.
[5] Baba Kamma 88a ff, Yebamot 31b; Yad, Edut, III, 4.
[6] Baba Kamma 112a; Tur Ḥoshen Mishpat, XXVIII, 8, 9.

his death bed, or if he had wilfully absented himself from other sessions, after summonses had been sent.[1]

The subject matter of evidence was somewhat modified by the authorities of the Middle Ages, showing deviations from Talmudic legislation.

The presumption that the possession of a disputed article established ownership[2] did not apply to property customarily loaned or rented. Loaning or renting were considered acts of friendship, which the authorities were anxious to promote. Only the legal period of undisputed possession for three years established title;[3] but if the plaintiff was accustomed to sell his articles for a livelihood, the status of possession abided with the defendant regardless of the testimony.[4] The power of the court to decide the status of possession was extended also to movable property.[5]

The testimony of one witness was sufficient to compel or obviate an oath from either of the parties, even if the witness was certain only of a debt due the plaintiff, but not of the counter claim that the debt had been paid. If, however, the debt claimed by the plaintiff had been collected, but the creditor contested the right of collection, the plaintiff was released from taking an oath, because he had been sustained by the witness.[6] A teacher was entitled to his tuition fees only after denying on oath the testimony of a witness

[1] Baba Kamma 112b; Yerushalmi Sanhedrin III, 9.
[2] Baba Meẓia 2a ff, 6a; Baba Batra 29a; Yad, Toan IX.
[3] Mord. Shebuot 787; RABNR, Baba Meẓia p. 207a; OZ, ibid, 371, 372, 373; MBRP 180, 407, 481; MBRC 104; Mord. Baba Kamma 162.
[4] MBRP 407.
[5] MBRP 281, 481; MBRC 274; MBRL 241; cf. Tosafot, Baba Batra 34a; Ketubot 94b; Tosafot ibid.
[6] MBRP 487; cf. also ibid. 954; MBRC 202; HM Toan, I, 3; Mord. Baba Meẓia 219.

that he was not competent to teach at the time he was hired.[1]

The evidence of the depositary was accepted over against both contestants, without an oath, if he had originally been accepted by them as such.[2]

3. JUDGE AS WITNESS

No further evidence was necessary if all three judges had witnessed the fact: "For seeing is better than hearing."[3] A judge who had witnessed the fact but withheld his testimony had the right to sit in court only in civil, but not in criminal cases.[4]

A witness could not act as judge also in cases involving Biblical legislation, but he could serve in this dual capacity in cases involving rabbinic law. A judge could act as witness in order to establish the identity of signatures on written documents, such as bonds or notes of indebtedness.

A judge could not act as witness also, except when his testimony was needed and actually rendered; but this restriction did not apply where a man had appeared in court as witness, and during the course of the trial sufficient evidence had come to light to render the testimony of the judge unnecessary.

The witness of an act was disqualified as judge only in capital cases, but "having seen," without intent to render testimony, did not disqualify one in civil and monetary cases.

If among the original three judges one of them happened also to have witnessed the transaction in dispute, the entire

[1] MBRP 488.
[2] MBRP 739; MBRL 306, 503; Mord. Gittin 405; Baba Meẓia 218.
[3] HM Sanhedrin V, 8.
[4] Ibid. V, 9.

court was dissolved, since only two qualified judges were left.[1] In such an event, the witness-judge might appear as witness in another court.[2]

Though no witness might act as judge simultaneously, a witness and a judge, were, however, permitted to endorse a legal note produced in court (*henfek*), even though the endorsement certified the signature of only one witness, or of but one judge.[3]

Two men visiting a dying person might write down the testament, and act as witnesses, but not as judges.[4] But, if the two men had been invited to come and act as witnesses, they were, according to later authorities, permitted later to serve as judges, for the testimony in such cases was documentary and not oral. The Biblical requirement, "They (the witnesses) shall rise before God (the court)," was thus fulfilled.[5]

4. TESTIMONY OUT OF COURT

The giving of testimony was compulsory, under penalty of excommunication by the communal organization, in obedience to the Biblical command "listening to the voice of admonition" — ושמע קול אלה.[6] No one could claim exemption from giving testimony on the ground of ignorance of the communal ban, or of his absence when it was promulgated.[7] The court, or the communal organization, was obliged to carry out the demand of a litigant, to pronounce the ban against one who had refused to volunteer

[1] RABNR, Baba Kamma p. 191b.
[2] Mord. Gittin, 321; cf. case of Rab Huna, Yerushalmi Sanhedrin I.
[3] MBRP 48; MBRL 354.
[4] Baba Batra 113b ff; RABNR Baba Batra p. 217b.
[5] HM, Sanhedrin III, 6; cf. Tosafot Baba Batra 114a.
[6] MBRP 712; MBRB III, 268; HOZ 28; Mord. Shebuot 760, 763.
[7] Maharam and Mord. ibid.

his testimony while the trial was pending. The ban was not, however, granted where depositions to be used at a subsequent trial were concerned.[1]

No testimony was to be heard or accepted out of court, nor admitted in court before it could open its sessions and hear the claims of the two parties. Evidence was not admitted against a defendant who from the start had refused to appear in court on account of a request for a change of venue ואין הנתבע רוצה להשיב אלא אומר לבית דין הגדול קאזלינא יום זה קרו פתחו לו בדיניה עד אשר יטענו שניהם בפניו. —[2]

After the trial opened, if the defendant failed to appear because of his illness or that of the witnesses, or because the witnesses were preparing to go abroad; and the plaintiff insisted that his own witnesses be heard, the court notified the defendant to arrange to hear the evidence for his opponent; and if the defendant would not heed this request, the court immediately admitted the plaintiff's testimony.[3] As regards the Talmudic stipulations:—"refusal to appear in court," "illness of the defendant," or "illness of witness" opinions differ as to whether all three conditions were required to admit evidence, or whether any of the three was sufficient.[4]

Witnesses residing in a distant city could write down their testimony in the presence of the local judges, or before the officers of the communal organization, who certified the evidence to the court in which the trial proceedings had been started.[5]

A woman was granted alimony and other necessaries of life, if within a period of six months the husband, as de-

[1] HOZ 28; RABNR, Baba Kamma p. 190a; MBRB I; HM, Edut, I, 1.
[2] HOZ ibid.
[3] MBRP 166; MBRC 207; Mord. Baba Kamma 147.
[4] OZ, Baba Kamma 436, 438; Mord., ibid. 147; difference of opinion based on textual reading of the Talmud. [5] OZ, Baba Kamma 439.

fendant, had failed to appear in court, or to produce testimony against his wife's claims.[1]

The general tendency during the middle ages was to explain away Talmudic restrictions and make broad allowances for the admission of evidence in the absence either of a litigant or of counter evidence. Testimony was accepted against an informer without requiring his presence in court[2] or when witnesses were afraid to face the defendant in open court.[3]

During the Geonic period, testimony was as a rule heard in the absence of either litigant, in order to avoid serious altercations between the litigants and the witnesses.[4] For the same reason the judges were to withhold the identity of the witnesses and their testimony.[5] Written certification by witnesses of a document was as valid as oral testimony rendered to the court.[6]

The validity of a document was annulled on the assertion of the witnesses that they had affixed their signatures under compulsion, such as threats made upon their lives, or that they were minors at the time of the signing, or that they had been disqualified through consanguinity. Claims of compulsion, through threats of financial loss, did not annul the document.[7]

Written testimony must be specific. If one of the witnesses had merely substantiated the testimony of his colleague by counterwriting the statement: "And I testify

[1] Mord. Ketubot 266.
[2] Asheri, Responsa XVII, 1.
[3] Isserlin, Pesakim, 175.
[4] Shilte ha-Gibborim, glosses on Mord., Baba Kamma 147.
[5] Ibid.
[6] HM, Edut, VIII, 5.
[7] RABNR, Ketubot 258a interpreting the Mishna, Ketubot 18b.

likewise . . .", the document was not valid in cases involving money.[1]

Subsequent relationship to any of the parties by the signatories or signatory to a document, rendered the document void, unless there were another set of witnesses to testify that they witnessed the signatures before any of the signatories became related to one another, or to the parties.[2]

5. QUALIFICATIONS AND DISQUALIFICATIONS OF WITNESSES

Those qualified to act as judges were also qualified as witnesses, excepting close friends or enemies, who though disqualified as judges, were permitted to serve as witnesses.[3]

Talmudic disqualifications are: Consanguinity, transgression of religious laws, mean occupations or behavior, and personal interest in the case on hand. Minors, women, suspicious persons, the mentally unsound, and physically imperfect were also unavailable.

Consanguinity:—Witnesses were disqualified because of relationship either to the litigants, to one another, or to the judges.[4] If one of three witnesses was a relative, the testimony of the two remaining witnessses was valid only in civil cases; but in capital cases the entire evidence became void.[5] Those entitled to an inheritance were considered relatives and were disqualified.[6] Relationships might be divided into three classes.

[1] RABNR, Shebuot 23ob; Mord. Sanhedrin 718.
[2] MBRP 115; MBRC 31; MBRL 355; MBRB II, 101; Mord. Sanhedrin 696; HM V, 6.
[3] Sanhedrin 27a, Nidah 49b.
[4] Makkot 6b. [5] Ibid. 6a.
[6] Sanhedrin 27b; Yad, Edut, XIII, 1.

The first class included fathers, sons, brothers, husbands, and wives. The second included first cousins, children of brothers, grandsons and grandfathers. The third class included the grandchildren of brothers, as well as great-grandfathers and great-grandsons. But third and second degree relationships, third and third, qualified witnesses for one another.[1] As to the qualifications of third and first degrees Alfasi favors them and R. Tam disapproves.[2]

In cases of conversion to Judaism, only brothers on the paternal side were qualified as witnesses, but not on the maternal side.[3]

Relationship by marriage: Husband and wife received an equal status. Those disqualified to render testimony for the wife, were equally disqualified for the husband, and vice versa.[4] A son-in-law or step-son had the status of a son. Disqualifications were removed by death, or by dissolution of marriage relationships.[5] Original qualifications were, however, not maintained in the face of subsequent disqualification through marriage.[6]

If the parties agreed to accept witnesses related to one another, or those otherwise disqualified, the testimony was valid.[7]

Disqualification through personal interest: Any person who might derive profit or pleasure through the judgment; partners; anyone expressing prior reasons for the dispute to be adjudged in favor of one of the parties;[8] and receivers of fees for testimony.[9] Local witnesses were disqualified if

[1] Baba Batra, 128a; Sanhedrin 21a.
[2] Ibid. l.c.
[3] Yebamot 25.
[4] Sanhedrin 28b.
[5] Ibid. 27b ff.
[6] Baba Batra 128; Arakin 17b.
[7] Sanhedrin 24a.
[8] Baba Batra 29a, 43a, 44b, 46b.
[9] Bekorot 29a.

the question in dispute involved a matter of communal concern.[1]

Disqualifications through religious transgressions: Those for which flagellation is the punishment; transgressions of Biblical commands, the punishment for which is not flagellation; robbery;[2] habitual lying or false swearing; presenting testimony refuted by counter evidence,[3] thieving, loaning on interest, or giving interest,[4] gambling,[5] tax-collecting,[6] and in general, readiness to forfeit honor and religious principles for the sake of gain.[7]

No man could disqualify himself by his own evidence. Other witnesses must testify to his religious transgression.[8]

Those disqualified for religious offences might retrieve their legal rights, after having received their punishment and assumed penance, expressed public regret,[9] and returned the stolen object to the original owner. If return were not possible, one could give a donation to some charity organization or fund.[10]

Disqualifications for physical reasons: Women;[11] minors, under thirteen years and one day,[12] mental deficients,[13] the deaf and dumb, or those either deaf or dumb,[14] those blind in both eyes.[15]

Disqualifications because of mean occupations or conduct: Gamblers, or drivers, with no other means of liveli-

[1] Baba Batra 43a; Yad, Edut, XV.
[2] Sanhedrin 27b, Rosh Hashana 22a.
[3] Sanhedrin 26a.
[4] Ibid. 25b.
[5] Ibid. 24b.
[6] Kiddushin 40b.
[7] Sanhedrin 24b, 25b.
[8] Ibid. 9a.
[9] Makkot 23a; Tosifta, Sanhedrin V, 3.
[10] Yad, Edut, XII; Tur Ḥoshen Mishpat CXXXX, 3.
[11] Shebuot 30a; Baba Kamma 88a.
[12] Baba Kamma, ibid.
[13] Tosifta, Teruma I, 4.
[14] Ibid.
[15] Gittin 23a; Sanhedrin 24a.

hood;[1] herders suspected of having their cattle graze in neighbors' fields; men without sense of shame or personal dignity, such as those who eat on the streets, or go about uncovered in public. These persons might recover their rights by relinquishing their occupations, or by improving their personal conduct.[2]

The Geonim enumerated eighty disqualifications on account of consanguinity and marriage alone, besides other disqualifications.[3]

But, according to Solomon Ben Adret, the Talmudic disqualifications through relationship and the disbarment of women and minors, applied only to courts whose procedure was in strict accordance with Biblical law; but if the conditions of the times required, all these restrictions were to be removed by community ordinance.[4] וכן דבר פשוט ביננו ובין המקומות שיש תקנה על דברים אלו.

In the Talmud and among the Geonim opinions conflict as to whether a litigant who had originally agreed to allow a relative or an otherwise disqualified witness to render testimony, might change his mind and disqualify the witness.[5] The later authorities finally disposed of the question by declaring that if the agreement had been strengthened by *kinyan*, no change was permitted; otherwise the opponent had the right to impeach the testimony originally agreed upon.[6] R. Meir of Rothenburg would not allow impeachment of the testimony even of a non-Jew, if it had been agreed by *kinyan* to allow the Gentile to give testimony.[7] He would not invalidate testimony already offered,

[1] Sanhedrin 24a; Yad, Edut, X. [2] Ibid. 25a.
[3] Quoted by Maharam, MBRP 920; Mord. Sanhedrin 689; RABNR Sanhedrin p. 227. [4] Responsa Rashba, IV, 311.
[5] Sanhedrin 24b; Alfasi, quoting geonic sources, Sanhedrin III, p. 4a.
[6] MBRP 707; Mord. Sanhedrin 686; Alfasi concurs. [7] Mord., ibid.

if the opponent, knowing that the witnesses had a personal interest in the outcome of the trial, had already accepted them as such.[1]

All authorities agree that a court verdict finally rendered on the basis of the testimony given in court by witnesses originally accepted though impeachable, could be annulled.[2]

Maharam settled the question as to the distinction between capital and civil cases, concerning the validity of testimony rendered by several witnesses, one of whom, during the course of the trial, was found disqualified through relationship or other reasons. He stated that the entire testimony was thereby annulled, in civil as well as in capital cases.[3]

A note of indebtedness became invalid, if one of the signatories became related to either of the parties subsequent to the supposed draft of the note; unless two witnesses testified that the signature had been affixed prior to the occurrence of the relationship.[4]

The testimony of a witness related to one of two plaintiffs in a suit, was thus applied. Only the plaintiff not related to the witness could collect his share of the claim, but not the other.[5] The testimony of relatives of a murdered person was valid if the relationship was remote in line of the right of inheritance. The disqualification for bodily imperfection did not apply to mortally wounded persons testifying in their own behalf.[6]

[1] MBRP 708, 915; MBRC 48; MBRL 370.
[2] MBRP 551, 109; HM, Sanhedrin VII, 7; Mord., Baba Batra 582. ibid. Sanhedrin, 687.
[3] MBRP 397; Asheri, Makkot 6a.
[4] MBRP 115, 919; MBRC 31; MBRL 355; MBRB, II, 101; Mord. Sanhedrin 696; cf. Baba Batra 159a, Tosafot.
[5] RABNR, Sanhedrin p. 224b, bases on Yerushalmi Makkot, I, 12; Gittin, I, 1. [6] Mord. Sanhedrin 695.

Disqualification on account of personal interest, or partiality, did not apply to a guardian appointed to administer the estate of minor oprhans, because the guardian is merely an agent, having no personal interest in the issues involved.[1] One who had stood surety for the debtor might testify for him against the creditor, provided the debtor had other real property from which the witness might collect his bond in case of default.[2] Contrary to Talmudic restrictions, local witnesses were admitted to testify in suits involving public interests. In many communities certain members of the community were appointed as official communal witnesses to act in such cases. Their testimony was to be trusted even where it proved favorable to their own relatives:

מנהג פשוט הוא בכל ישראל שאין מביאים ערים מחוץ לעיר להעיד על תקנתם והסכמתם אלא מקבלים ערי העיר להעיד על כל עניניהם וכשרים אפילו על קרוביהם כיון שקבלום עליהם אנשי העיר. — [3].

In cases involving the administration of communal charities, local witnesses might testify only on declaration that they expected no personal benefits from the charity funds in question.[4]

An informer, whether actual or intentional, was disqualified as witness under all circumstances.[5] A murderer was forever disbarred from the right of giving testimony.[6] Lifting a hand against a neighbor, or attempts at beating a neighbor were acts sufficient to disqualify one as witness.[7]

[1] MBRP 458; MBRC 147.
[2] MBRP 459; cf. Baba Batra, 43b.
[3] MBRL 214; Asheri, Responsa V, 4.
[4] Asheri, 18, 5.
[5] SZT, IV, Gate VII, 42; OZ, III, Baba Kamma 284; MBRP 485; MBRC 232; HM, Edut, X, 15; Mord. Baba Kamma, 185, 186, 187, 188, 193.
[6] OZ, I, 112.
[7] MBRP 383; Mord., Sanhedrin 695; ibid. Baba Kamma 102.

A witness who contradicted his own testimony received the punishment of flagellation, and was forever disbarred.[1]

Professional or habitual gamblers were disqualified,[2] but not the occasional or moneyless gambler.[3]

Tax-collectors were disbarred, but not tax-officers appointed by the government.[4] Gentiles known to be trustworthy were admitted as witnesses.[5]

A scholar, or any outstanding personage in a community, was exempt from the duty of appearing in court to give testimony in civil cases. This exemption, however, did not apply to cases involving religious transgressions. He might at any time forego this exemption.[6] A scholar was assumed qualified until conclusive reasons for his disbarment were shown. An illiterate stood disbarred, until by his worthy deeds he could prove himself deserving admission into the class of qualified witnesses.[7]

Suspicion of unchastity was no cause for disqualification, but actual unchastity, or suspicion of unchastity with Gentile women, was sufficient. "For it is assumed that a person unable to control physical pleasures, will not be able to control passions for material gain."[8]

With few exceptions, all those disqualified might recover their legal standing by restitution of goods or by personal amends.[9] Those suspected of false swearing could retrieve their rights by self-denunciation before a legal tribunal.[10]

[1] SZT IV, VII, 24, 48.
[2] RABNR, Sanhedrin 224b, 226b; Mord. Sanhedrin 690, 695.
[3] Mord. ibid. 691. [4] Sanhedrin 695.
[5] Mord. Gittin, 324; Asheri, glosses, Gittin 10b; MBRC 245; MBRB I, 284.
[6] RABNR, Sanhedrin 224b.
[7] MBRP 535; Mord., Sanhedrin 695.
[8] MBRP 463; MBRB I, 93; Mord. Sanhedrin 695.
[9] RABNR, Sanhedrin 226a. [10] Mord. Sanhedrin 698.

CHAPTER XI

TRIAL PROCEDURE

1. TAKING COURT ACTION

IN the court room Jewish authority was supreme, and rules of procedure were definite. Laboring under the disadvantage of adjusting the inner life to outward conditions, it was within the court chamber that medieval Jewry found its strongest self-expression. It was here the communal organization enjoyed autonomy. Here too, though court action was based on Talmudic and Geonic legislation, the authorities did not hesitate to deviate from their predecessors to suit conditions. In speaking of the Organization of the Court, we had occasion to point out that Jewish jurisprudence did not sanction a one-judge court, yet any ordinary individual even not a scholar,[1] could act as judge in his own behalf, and was not required to take his case for trial before a court, if it was evident beyond doubt that justice was on his side.

In the Talmud[2] where the question as to whether an individual may act as judge in his own behalf עביד אינש דינא לנפשיה is a matter of dispute between Rab Yehudah and Rab Nakhman, the latter sanctioning self-adjudgment. The opinion of the majority of the "*Rabbanan*" (the scholars) is decidedly in favor of the contentions of the latter.[3] Alfasi (l.c.) decides the law accordingly. Any

[1] Kessef Mishne, Yad, Sanhedrin II, 12.
[2] Baba Kamma 27b.
[3] Ibid. 28a.

person, therefore, who sees his property in the possession of another, or while the act of robbing or stealing is taking place, may take it away by force, or may even resort to violence causing personal injury to the culprit, if he is not able to recover his property otherwise. Such self-adjudgment was permitted, even if the defendant would suffer no loss of time due to recourse to court for trial. The court was obliged to uphold the act of self-adjudgment, should the defendant become a plaintiff and summons his opponent to court.[1] If, however, on the face of it it appears that there was some justification for the original act of lawlessness, and the merits of the case throw the act of self-adjudgment in doubt, trial procedure must take place. A lender may not attach or take by force any article given by the borrower in security for his debt, or to enter by force into the house of a debtor and take valuables covering the amount of the debt, without due trial procedure.[2]

This principle of self-adjudgment had a wider application in cases of disputes arising between individual members of a community and the communal organization regarding the payment of taxes. At all times, even in the event of doubtful indebtedness, the communal organizations were given the legal right by the medieval authorities to collect the amount in question by force, and if no legal counter action was taken by the individual member, the act of the community became ipso facto legally binding. R. Meir of Rothenburg in giving this decision gives a logical reason for his opinion, which reflects conditions. He says: "Besides the legal aspects in the case, logic compels me to give the decision accordingly, for otherwise, each and every one

[1] Yad, Sanhedrin II, 12.
[2] MBRP 950; MBRC 102; MBRL 148; Mord, Nez. 30.

could tell the *Ḳahal* that he is legally exempt from the duty of paying taxes, or that he had paid already, and if you doubt these contentions of mine, let you (meaning the *Ḳahal*) and I take an oath in support of the respective claims. Each and every member of the *Kahal* (community) would then be subject to take the oath which would be done very reluctantly, especially in cases involving small amounts. In such cases the community would then be on the losing side, and the communal treasury would suffer the loss."[1] The principle of self-adjudgment whether as regards the individual or the community becomes more significant when we consider the fact that it was enacted into law in the face of the Deuteronomic legislation "That only at the mouth of two or three witnesses shall anything be established."

The Talmud prohibits the starting of a law suit on less than a *peruta* (the smallest amount Jewish law takes cognizance of to become a subject for law suit), but the court is obliged to continue hearing the case and render a verdict, even if during the course of the trial the claim turned out to be below that value.[2] According to Asheri, however, (l.c.), trial proceedings were to be discontinued, and no verdict rendered for amounts less than a *peruta*.[3]

In civil cases the court did not initiate trial proceedings, but had to start action upon application by the plaintiff.[4] Should one of the judges refuse to take part in the trial, because of threats made upon him by one of the litigants, the court had the right to refuse to start action.[5]

[1] MBRP 106; MBRC 49; MBRL 371; Mord. Nez. 522, 569.
[2] Baba Meẓia, 55b; Yad, Sanhedrin XX, 11.
[3] Cf. Tosafot, Baba Meẓia, 55a; Leḥem Mishna, Yad, ibid.
[4] Yerushalmi Sanhedrin I, 1; Babli, ibid. 7a; Yad, Sanhedrin XXII, 1; ibid. XII, 1, capital cases. [5] Sanhedrin 6b ff; Yad, ibid.; HM, l.c.

Only personae in juris—juridical persons—might become parties to a suit, and request court action. Minors, the insane, the deaf and dumb had no juridical personality.[1] A person either deaf or dumb was entitled to full rights.[2] Intoxicated persons were in the same category as the insane.[3]

Excepting partnerships, philanthropic institutions, and communal organizations, Jewish jurisprudence does not seem to know of corporate bodies as having a juridical standing.[4]

The court was not obliged to start trial proceedings, if it appeared beyond doubt that the claims were fraudulent or deceiving.[5]

Each of several parties with a combined claim against an individual might start court action, if the rest of the parties were local residents, so that they could appear in court upon summons. The trial might then proceed even in their default. For the claimant starting suit received the status of an agent for his partners.[6] According to Rashi (l.c.), the defaulting parties could not appeal from the decision, even if they advanced additional claims or arguments they might have presented, had they been in court.

Action might be taken not only for claims requiring immediate disposal or for collection, but also to obtain security from the defendant for payments falling due later—עקול.[7]

[1] Baba Kamma 86b ff.
[2] Gittin 59a.
[3] Erubin 65a.
[4] MBRP 46, 101, 104, 118, 131, 825, 918, 932, 969; MBRB I, 307; cf. supra, "Communal Organization."
[5] Mord. Sanhedrin 710, quoting Maharam; cf. Shebuot 30b.
[6] Kethubot 94a.
[7] Tur Ḥoshen Mishpat, LXXIII, 17, quoting Geonic authorities and Asheri, Responsa 97; MBRP 335; MBRC 144; MBRB I, 3; HM Toan, VIII, 6; HOZ 167; Mord. Baba Meẓia 406, Shebuot 778.

2. COURT DOCKET

Ordinarily there was no precedence in the court docket. The court was obliged to dispose of suits in the order of their presentation. However, the case of orphans preceded that of a widow; the widow's a scholar's; the scholar's case a common person's; a woman's suit that of a male.[1] When, through a counter charge, during the course of the trial a plaintiff became a defendant, the claims of the original plaintiff were heard first and a judgment rendered before the reversed case was tried. Such contingencies were always dealt with separately.[2] Where a lawsuit involved a religious offense and a civil judgment, the court first disposed of the religious offense, and then proceeded to the civil part of the case.[3]

3. SUMMONS

After the presentation of the plaintiff's claims the court sent a summons to the defendant, demanding his appearance. The summons, delivered by the court messenger or court clerk, might be spoken or written.[4] It had to be delivered by authority of the entire court, excepting on Mondays and Thursdays, the regular court days, when it was valid even if delivered in the name of one judge.[5] A written summons had to be signed by the judges, or judge.[6] Were the defendant out of town when the messenger called, he could hand the summons to a neighbor or acquaintance, even though it be a woman, to be delivered to the defendant

[1] Shebuot 30a; Ketubot 105b ff; Yehamot 100a; Yad, Sanhedrin XXI, 6.
[2] MBRP 598, 746; HM, Sanhedrin XXI, 6; RABNR Responsa 76; Mord. Baba Kamma 53.
[3] SH 1372.
[4] Gittin 88a; Yerushalmi Ketubot IX, 8.
[5] Sanhedrin 26a.
[6] Gittin, ibid.

of the ban was no excuse, and did not exonerate the culprit from making due apology to the court for disobedience—for sufficient publicity was always given to court acts.[1]

A litigant might thus be denounced and called "*sarban*"—סרבן—only when the summons had been issued by a court whose mandates he was legally bound to respect. But he might refuse to honor the summons of a tribunal inferior in authority to another court in the same city,[2] since before the opening of the trial the defendant had the right of preference among tribunals in the same city:—דשלא פתחו בדינו מצי אמר לו לבית הדין הגדול קאזלינא.[3]

By ordinance of R. Tam, even a visitor was liable to excommunication for refusal to appear in court for trial, but in this case the summons must be served in the presence of two witnesses.[4]

4. MEASURES TO FORCE APPEARANCE FOR TRIAL

Another measure to compel litigants to appear for trial was the privilege granted any Jew with a grievance against a fellow-Jew, to interrupt synagogue services until he had gained a promise of redress or trial.[5]

The interruption of public worship as a means of bringing defendants to justice was already in vogue in Talmudic times in Palestine.[6]

This action became so common that the authorities, to introduce a semblance of order, prescribed the Sabbaths

[1] Mord. Kethubot 268.

[2] Sefer ha-Teruma III, quoted by Beth Joseph, Tur Ḥoshen Mishpat XI, 1.

[3] Baba Kamma, 112b. [4] MBRP 153, and end, ibid.

[5] Kolbo, edition Rimini p. 134a, par. 116.

[6] Yerushalmi, Peah, I, 1; SH 463; Sefer ha-Teruma 62; Responsa Sølomon Ben Adret, IV, 561; Dr. B. Halper, ha-Tekufah, XX, p. 266.

and the portions of the prayers when such interruptions might take place.[1] Excepting during the months of Nissan and Tishri, services could be interrupted at all times.[2]

This method was effective, as it brought public pressure to the defendant, but the authorities were compelled in the course of time to restrict the privilege, and eventually to suppress it altogether, because of the abuses it brought about.[3]

Still another method employed by the court to coerce defendants was to place a lien—עקול—upon the money or property of the defendant, whether in his own possession or in the hands of a depository. And though the authorities never sanctioned the practice, it was customary to order such a lien on the mere request of the plaintiff, even if his claim were unsubstantiated by a note of indebtedness, or other securities — נשתרבב המנהג לפעמים על ידי הכרת פנים עד שנתפשט לעכב ולצוות — אפילו דלכא אמתלא יפה ברברי המעכב והמעקל. —[4]

The most effective method of bringing defendants to justice was that of the Geonim. The *pessiḳa*, the written ban of excommunication, was sent not only to the defendant, but to all Jewish communities, with a request to announce in the synagogue that the culprit had been placed under the ban, and that any one disregarding the ban would make himself liable to the same penalty. In some

[1] OZ, Sabbath, 45; SH 1712; Ratner, Hazofeh Me-eretz ha-Ger, 2d year, p. 97; Aptowitzer, ibid. 1st year, p. 88.

[2] OZ, Baba Kamma 444; Mord. Baba Kamma 149., Rashba, Resp. 4, 56; SH. 1712; based on Yerushalmi Kid. 61c and Peah I, 5.

[3] SH 462, 1975; Dr. Rosenthal, Sefer ha-Yobel, 1890, in honor of Hildesheimer. Though the interpretation of the passage in the Yerushalmi is a matter of debate and the question whether services were interrupted in Palestine is very doubtful.

[4] THGH 234, 434; Asheri, Responsa LVI, 4; TH 405.

communities, in addition to the ban, the disobedient were subject to the punishment of flagellation.[1] If, after the expiration of the thirty days of the minor ban, the culprit still refused to come to justice, the major excommunication was imposed, supplemented by a proclamation circulated through all the communities (ibid.).

All court expenses attached to the proceedings following a refusal to come to justice, must be borne by the person guilty of such refusal.[2]

5. EXPEDITING JUSTICE AND COURT SESSION

All possible delay in expediting justice was to be avoided by the court. It was not to wait for regular days to hold court, as was originally ordained by Ezra, because of the unscrupulous, who might make attempts to escape justice.[3] A visitor passing through a city was subject to excommunication for refusing to come to justice when served with a summons—even if in the streets, but in the presence of two witnesses.[4]

A plaintiff, who had made a definite appointment for trial, with the promise that should the date pass without it taking place he would discontinue the action altogether, was held accountable to his word only if the promise had been strengthened by a *kinyan* (symbolic delivery). Otherwise the court, on request, set another date for trial.[5] Under all circumstances a single period of thirty days grace was

[1] Responsa Geone Mizraḥ u-Ma'arabh 42.
[2] MBRP 497; Asheri, Sanhedrin 31b, section 40; HM, Yad, XXV, 5.
[3] Tur Ḥoshen Mishpat "Dayyanim" V, 1, quoting Yehuhda Barcelona; OZ, Baba Kamma 443, 444.
[4] Ordinance of R. Tam, MBRP 153, sustained by the Synod of Speyer, Worms, and Mayence, ibid., end.
[5] MBRP 718; Mord. Sanhedrin 677.

granted to a defendant adjudged guilty, wherein to bring additional evidence, by witnesses living in a distant place or by documents. The court could then reopen the case and reverse the decision, if the additional testimony served to vindicate the defendant.[1]

Disregarding Ezra's institution of special days, court sessions were permitted on any week day,[2] excepting those preceding the Sabbath or holidays. But the Jews of the Middle Ages arranged court sessions on Fridays and the eves of festivals, in order to accommodate teachers, who had no other free days.[3]

Court sessions continued from morning services until noon[4] but if necessary they could be continued in the afternoon, and in civil cases in the evening.[5] No original judicial proceedings of any nature could begin at night,[6] but, if through error the court had held sessions in civil cases at night, the decision could not be reversed.[7]

The Talmudic distinctions among litigants, witnesses, and judges as to which should sit or stand during the course of the trial,[8] were entirely disregarded by the authorities of the Middle Ages, "Because nowadays we have no competent judges in the Biblical or rabbinic sense to be classed as '*Adonai*,' implied in the verse Deutoronomy XIX:—'And they (the witnesses) shall stand before God'."[9]

[1] Mord. Sanhedrin 706; cf. Mishna Sanhedrin 31a for varying opinions.
[2] Baba Kamma 82a; Rashi, Ketubot 3a.
[3] TH 224.
[4] Sabbath 10a.
[5] Sanhedrin 32a, 34b; Yad, Sanhedrin II, 1.
[6] Sanhedrin 35a.
[7] HM, Sanhedrin III, 3; Bet Yoseph, Tur Ḥoshen Mishpat end XXVIII, quoting Solomon Ben Adret, and Asheri to Baba Batra; cf
[8] Shebuot 30b.
[9] HZ 98.
[10] Mord. Shebuot 761, quoting a number of authorities.

6. CALL FOR SETTLEMENT

When all parties appeared in court, the trial began. Before the court heard the arguments a call for settlement was issued,[1] as preferable to a legal process; and even during the course of the trial similar proposals were made. A settlement was still in place even after the arguments had closed and a decision was ready, in order to avoid the administration of an oath, which would evidently be required.[2] After the final verdict, only outside parties could propose a settlement.[3]

If a settlement was refused, the trial proceeded, and the court admonished the litigants that their case was in the hands of the Heavenly Court for judgment—thus to influence the guilty party to satisfy the rightful claims of his opponent, without recourse to trial.[4] But, if the litigants were quarrelsome persons and given to disputes, the court proceeded with the trial and delivered a verdict severer than that of the Heavenly Tribunal.[5]

7. TRIAL IN THE ABSENCE OF LITIGANTS OR WITNESSES

The plaintiff spoke first and made his charge; whereupon the defendant presented the countercharge or rebuttal. The arguments of each of the parties must be produced in the presence of both; the court might not hear one without the other.[6] The instance of King Janaeus, whose presence was demanded by the court to state the charge against his

[1] Sanhedrin 6a.
[2] Asheri, Responsa V, 5; Tur Ḥoshen Mishpat XII, 3; cf. Bet Ḥadash, quoting Rabiah, RaBen. Cf., however, Ginze Schechter, II, 181.
[3] Bet Yoseph, ibid., quoting the Agudah.
[4] RABNR, Baba Kamma, 190a; SH 1381.
[5] SH, ibid.
[6] Shebuot 31a.

slave, who had killed a person, is a case in point.[1] While all authorities agree that the arguments of the parties must be heard in the presence of each other, according to some the verdict might be rendered in the absence of one of the litigants. For the right of appeal from the decision of the court was always granted.[2]

Under extraordinary circumstances, the court was permitted to hear the testimony of witnesses even in the absence of both parties. To the question: "How can we admit witnesses in the absence of the litigants?"—the Talmud answers: "Such admission is possible in case of sickness of the other litigant or his witnesses, or when the witnesses cannot wait for the opening of the trial, due to their preparing for a distant journey."[3] The Geonim permitted the admission of witnesses in the absence of the principals, in order to avoid quarrels between the litigants, while the witnesses rendered their testimony only in cases that did not involve money matters.[4] During the Middle Ages, the authorities admitted evidence against an informer in his absence, or where the defendant was a violent person whom the witnesses were afraid to face in open court.[5]

In any event, the verdict of the court could not be invalidated, even if the court had admitted (*b'di'abad*) testimony in the absence of the litigants.[6] The court might render

[1] Sanhedrin 19a.
[2] Responsa Rashba, II, 192, 344; cf. Ḥoshen Mishpat, XVIII.
[3] Baba Kamma 112a.
[4] Shilte ha-Gibborim, quoting Geonic institutions, Mord. Baba Kamma Chapter X; cf. Rama, glosses, Ḥoshen Mishpat, XXVIII.
[5] Asheri, Responsa XVII, 1; Responsa Ribash, 238; I. Isserlin, Pesahim 175.
[6] Mord. Ketubot 145; 266; cf. MBRP 166; MBRC 207, who concludes, that if court had opened, and the defendant continued to refuse to come to justice, the evidence of the witnesses would be admitted in his absence; cf. Mord. Baba Kamma 147.

its verdict in the absence of the defendant, if it were clear beyond doubt that the claims of the plaintiff were just, as proven by a certified note of indebtedness; that the defendant could not be reached by the court clerk within a period of thirty days; and the plaintiff was willing to take an oath that the debt has not been paid by the defendant. The court then proceeded to collect the debt.[1] This was done to prevent persons making loans in one place and then establishing residence in a distant locality beyond the reach of the court (ibid.). In such an event the court acted as the representative of the defendant, and presented arguments in his favor.[2]

8. ARGUMENTATION AND COURT DISCRETION

The outcome of the trial depended as much on the arguments presented by the two opposing sides as on the testimony of the witnessses. Though the judges were supposed to be silent listeners during the argumentation, Jewish legal procedure laid down definite hints for the judges in weighing their conclusions. These regulations were derived from practical experience or reasoning.

Jewish jurisprudence speaks of "*umdana*"—estimation. The court estimates, from practical experience, that things are done in a certain way. The Talmud uses the expression "*adam asui*"—a man is accustomed to do.[3] If the *umdana* is based on regular occurrences, then it is more than an estimated opinion; it becomes a certainty, "*ḥazakah;*" as when the Talmud declares: "It is a *ḥazakah* that no man

[1] Ketubot 88b; Alfasi, l. c.; Yad, Malweh XIII, 1, 2, 3; Asheri Resp. LXXIII, 3; Mord. Ketubot 233.
[2] Tur Ḥoshen Mishpat 106, end.
[3] Baba Batra 31a, Shebuot 34a, 41a.

pays his debts before they become due";[1] or "It is a *ḥazakah* that a messenger or agent will carry out his mission." These presumptions were of great aid to the court in the support or rejection of claims.

This is the process of presumption based on logic. The court carefully weights the arguments presented, and tries to find out whether contradictory statements were made by any of the parties. The rule of "*miggoi*," meaning "since," is one of the strongest logical instruments which the court may use in ascertaining the truth. The court deliberates in this manner: "Since" he could have argued in a way that would exonerate him entirely of the claim, but instead he argues in a manner that leaves a legitimate medicum of doubt, he is for that reason to be held trustworthy.

Any of the judges had the right to ask questions during the argumentation in order to clarify statements of the litigants and to prevent fraudulent claims. When the case involved a debt, and the defendant put in a counter claim, the court must ascertain the meaning of the counter claim, whether the debt had been paid, or whether he had never borrowed from the plaintiff. These questionings by the court, though somewhat contrary to Talmudic regulations, were instituted by the Geonim because of the prevalence of fraud. The authorities of the Middle Ages even sanctioned the administering of an oath to the defendant.[2] Should any of the parties, however, be unavoidably prevented from strengthening his arguments, as when he originally claimed two groups of witnesses, but could present only one, that fact would not militate against him.[3]

[1] Ibid. 5a.
[2] Mord. Baba Meẓia, 222, 223, 224, 225; cf. also MBRP 701, 838, 451; MBRC 162; HM, Ḥobel u-Mazzik IV, 3.
[3] Mord. Sanhedrin 685.

Confession by a defendant was to be admitted and acted upon by the court only when made in court upon due summons; but not when made out of court, or in court without summons, because in these events he might change his mind and his utterances.[1]

Confession in court upon summons did not require the parties to say: "Be witnesses to my confession." The person could not deny his statements, nor later assert that he was trying to deceive or mislead the court משטה אני בך.[2]

Though the court, or any of the judges, had no right to interfere with the litigants while they were presenting their arguments, to avoid confusion, the judges were allowed to help a pleader if for any reason he could not state his case accurately.[3] The judges were to render assistance during the argumentation, if they saw points in his favor, which he was unable to bring out evidently true, but faulty because of fright or confusion.[4] The judges were permitted to direct the argumentation, when it was apparent beyond doubt that mistaken statements were being made, which, if not corrected, would lead to an erroneous verdict.[5]

9. LAWYERS

The arguments were delivered orally. In order to prevent later denials, the court clerk took them down in writing. The cost of employing clerks for this purpose was to be covered by both parties, if the writing down had been sanctioned by them.[6] The litigants were to plead their case

[1] Tosifta, Baba Kamma I.
[2] OZ, Baba Kamma 470, five rules concerning confession.
[3] Yerushalmi Sanhedrin III, 8.
[4] Mord. Sanhedrin 705.
[5] MBRP 871.
[6] Baba Batra 167a.

directly, no lawyers being permitted.[1] Jewish law looked askance at legal representation in court; for psychologic and practical reasons. It was assumed that a man feeling himself guilty, or that the claims of the plaintiff were just, would not have the impudence to be free in his statements when face to face with the plaintiff. Also an oath could be administered only to the parties in the suit, but not to legal respresentatives, who are not personally involved in the case. The privilege of sending a representative—"*murshe*" —was extended only to the plaintiff, if the trial took place in another city.[2] For the plaintiff was supposed to have tangible rights to tangible things whether property or money, and such rights could be transferred to an agent by the act of *kinyan*, while the defendant had only spoken replies, which could not be transferred. The latter's representative would thus be a lawyer, which office was forbidden by Jewish law.[3]

As to the defendant's right to employ representatives, opinions differ. In the case of a high priest being judged, the Talmud asks:—אם ימסור לו חבירו טענותיו בפני עדים במקומו יכול לעשות כן ו כ ן מ נ ה נ. וכעין זה יש בירושלמי פ׳ כהן גרול . . . וימנה אנטלר ומשנה שנפלה עליו שבועה — אלמא אדם יכול למסור טענותיו לחבירו. —[4]

Let him appoint an "antler"? (note the Greek term), the answer is that if an oath be taken, the representative could not legally take it.

It would seem that the custom of employing legal representatives did exist. Alfasi, Saadiah Gaon, and Hai Gaon

[1] Mekilta, Mishpatim 20; Shebuot 31a.
[2] Tur Ḥoshen Mishpat CXXIII, 16; cf. Bet Yoseph, l.c., quoting earlier authorities.
[3] Asheri, Shebuot 4a.
[4] Yerushalmi Sanhedrin II, 1.

would not permit the defendant to employ legal representatives.[1]

In Spain, however, legal representatives were allowed to both sides as a matter of course, and they would receive a regular salary[2]—in some instances only when they won, in others regardless of the outcome.[3]

In Germany also the custom was prevalent of allowing representatives to the defendant also. These were engaged in the presence of witnesses.[4]

There seems to have been no objection to this procedure, provided the litigants were also present in court, to take an oath when required.[5]

10. Influencing the Court. Examination of Witnesses

The defendant was not permitted to have intimate friends present in court during his argumentation, nor was the presence of a partner desirable when a case was tried with an outsider—lest these associates, by their eyes or gestures, influence the course of the trial procedure. But in justice to the defendant, the plaintiff was also prohibited from bringing in outsiders who might have a similar effect.[6] Of several partners in a suit, one might be selected to represent the rest, or each of the partners could present his

[1] Asheri, Shebuot, Chapter I, THGH 180; cf. Sefer ha-Ittur; MBRL 62a; Responsa cf. Rashba, quoted by Bet Yoseph, Tur Ḥoshen Mishpat, CXXIV, 1.
[2] Responsa Rashba, III, 141; cf. ibid. II, 393, 404; ibid. V, 287.
[3] Nachmanides, Responsa, quoted in Tur Ḥoshen Mishpat, CXXIII, 12; cf. Bet Yoseph, l.c.
[4] MBRP 357; MBRC 175, 246; MBRL 126.
[5] Mord. Baba Meẓia, 276, ibid. Baba Kamma, 71, 72, 73, 74, 75.
[6] MBRP 333; Mord. Shebuot 761.

case and then leave the court. If it proved too burdensome for the court to remember the arguments of each of the litigants, they might select two, or three courts; or the same court might listen to the arguments of each on separate days; or the arguments might be written down.[1] In order to avoid any influence on the judges by the personal bearing of the two litigants, the plaintiff and defendant were not allowed to wear clothes differing too widely in worth.[2]

Since the Jewish courts of the Middle Ages had almost no occasion to judge capital cases, the examination and cross-examination of witnesses did not occupy an important part in the trial proceedings. Later Talmudic law relinquished the requirements of "*hakira* and *derisha*," (examination and cross-examination of witnesses) for minor civil cases, where the matter involved was only money. This was deemed necessary to obviate too many difficulties in the way of collecting debts.[3] But if the case sounded suspicious to the court, a cross-examination was deemed necessary.[4]

Before the witnesses gave their testimony, the court admonished them to tell the truth, and to give all the information they possessed.[5] This admonition was done publicly.[6] Afterwards everybody was asked to leave the court, and the required examination began. The witnesses were examined one by one.[7] Then they were put face to face, and were made to repeat the testimony in open court.[8]

The examination in civil cases consisted of primary and secondary considerations. The main points were time and

[1] Ibid. Mord. Ketubot 299, 300.
[2] MBRP ibid.; Mord. Shebuot 761, based on Talmud; Shebuot, 31a.
[3] Sanhedrin 32a ff.
[4] Mord. Sanhedrin 706.
[5] Sanhedrin 29a.
[6] Yad, Edut, XVII, 2.
[7] Ibid. Sanhedrin.
[8] Tosifta, Sanhedrin III.

place. The secondary were those bearing directly upon the case. If there were any contradictions among the witnesses, the testimony was nullified.[1]

Though originally testimony had to be deposited orally, and only in the presence of the litigants,[2] during the Middle Ages written evidence was also admitted in court.[3]

11. ADMINISTRATION OF OATH

We leave out a detailed discussion on the question of administering the oath as part of trial procedure, because during the Middle Ages the Jewish court seldom administered an oath. Already during the Geonic times the Jewish courts had substituted the *herem* for an oath. This was not considered as serious as an oath, but was more effective in obtaining the desired results.[4] The *herem* took the place even of the rabbinic oath, the *"shebuot hesset."*[5] Very frequently the general term *"arur,"* "cursed be he," was used by the court instead of the oath.[6]

Whenever the administration of the oath was deemed necessary, the court was very scrupulous in examining the eligibility of the person to whom it was to be administered, because too great readiness on the part of the litigants was suspicious.[7]

As a rule the oath was publicly administered in the synagogue in the presence of at least ten men,[8] the cantor holding a Scroll of the Law.[1] Since no Biblical oath could be administered, the person to whom the oath was administered was not required to answer *"amen"* after the oath. The language of the oath was not couched in direct terms, but was a form of a curse in the Biblical phraseology—*"arur"*—(cursed be . . .) pronounced in the name of God and in the name of the *Beth Din* upon him who gives false information or for telling lies.[2] During Geonic times the blowing of the shofar and the bringing in of the hearse were parts of the formalities incidental to an oath upon demand of the plaintiff. This was done in order to strike fear in the heart of the defendant.[3]

[1] Sanhedrin 30a.
[2] Baba Kamma 112b.
[3] Tur Ḥoshen Mishpat, XXVIII, 6, 7, quoting R. Tam; Mord. Kiddushin 57.
[4] Hai Gaon, quoted in Tur Ḥoshen Mishpat, LXXI, 16.
[5] Mord, glosses, end Shebuot.
[6] Rashi, quoted in Tur Ḥoshen Mishpat LXXXVII, 35.
[7] Mord., quoted by Bet Yoseph, Tur Ḥosehn Mishpat, LXXXVII, 23.
[8] Mord. Nez. 251.

12. VERDICT AND APPEAL

The court must write its verdict down, in order that it might be used in case of appeal from the decision of the local court to an outside court, or to another local tribunal. No oral statement by the judges in regard to the guilt or innocence of any of the parties in a suit was to be admitted or accepted unless the original parties were present.[4]

[1] MBRP 606; MBRC 171; MBRL 379; Mord. Nez. 765.
[2] OZ III, Baba Meẓia 6.
[3] Mord. Nez. 766.
[4] Mord. Baba Meẓia, 250.

Though the question of appellate jurisdiction in Talmudic law is somewhat confusing and conflicting opinions may be reconciled only with difficulty (cf. Babli Sanhedrin 31b, and Yerushalmi, Sanhedrin, 21a; Babli, Baba Kamma, 112b), in the Responsa the problem is somewhat solved more satisfactorily. A distinction is made between claims for the payment of money and matters of assault and denunciation before Gentiles. In money matters, owing to the expenditures involved in a change of venue, the defendant would be at an advantage, but in cases of assault and denunciation, a change of venue was granted the plaintiff who may summon a defendant to appear in court before any of the communities, the choice of the community in which the trial is to

Though the validity of the court verdict did not depend upon it—a specified date was set for its carrying out by the defendant, in order to avoid complications when two partners had a common claim against a defendant, but sued individually and at different times.[1]

The verdict must be signed either by the judges, or by witnesses testifying to their presence at the time the decision was rendered.

Though during the Middle Ages the judges were not required to pay in case they rendered a mistaken verdict, since they had been compelled by possible communal *herem* to sit in court, not only was the right of appeal granted, but the aggrieved party had the right to summons the judges for trial. There was no *herem* nor other ordinances in any of the communities forbidding such action by the wronged party. The Talmudic statement[2] to the contrary was explained as referring to a one judge court, but not to one of three or four judges.[3]

The court was compelled to reverse its own decision, if, after the verdict was rendered, additional evidence rendered their decision erroneous. The court was in such an event not to stand on its own prestige.[4]

be held being left to the defendant. (Maharam, Berlin, III, 679, 677; Prague, 546; Mord. Sanhedrin, 707, gloss, where actual cases establishing precedents are cited.) One of the reasons for this grant is that the party involved may claim that in a local court justice may be tempered with due to undue pressure being brought on local judges by men of influence in the community. In view of all this, it is safe to assume that in all instances an appeal to another court would be granted after the case had originally been tried in the local court.

[1] MBRP 525; MBRC 281.
[2] Sanhedrin 6a.
[3] MBRP 715, 717, 979; Mord. Sanhedrin 676.
[4] RABNR, Baba Batra, p. 210a.

It would seem that the court was accustomed to write a humility clause in the verdict, to the effect that if they had erred, they requested other authorities to examine the case and yield to any litigant's demand for a review. It was considered unethical for an authority to answer that demand unless he found such a clause in the written verdict.[1]

Though there was no legal requirement to state the reasons for the decision, it was considered advisable to give a statement of reasons.[2]

In any event the litigants had the right to request that statement of the court. There was no time limit for such a request.[3]

[1] MBRP 410; RABNA 414.
[2] HOZ 43.
[3] MBRP 524; Mord. Sanhedrin 708; HM Sanhedrin VI, 6.

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