The University of Chicago

THE RELATION OF JEWISH TO BABYLONIAN LAW

A DISSERTATION

SUBMITTED TO THE FACULTY
OF THE GRADUATE SCHOOL OF ARTS AND LITERATURE
IN CANDIDACY FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY

DEPARTMENT OF ORIENTAL LANGUAGES AND LITERATURES

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CHICAGO, ILLINOIS

Reprinted from
THE AMERICAN JOURNAL OF SEMITIC LANGUAGES AND LITERATURES
Vol. XXXVI, No. 1, October 1919

THE RELATION OF JEWISH TO BABYLONIAN LAW[1]

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The purpose of the present article is to show that there exists a definite and unmistakable relationship between Jewish law and Babylonian law. Before taking up this subject the writer deems it necessary to state briefly the following: the meaning of the term "Jewish law" and its literature; the two opposing views of the relation of Jewish law to biblical law; the significance of the Jew's sojourn in Babylonia for fifteen centuries; and the meaning of the term "Babylonian law."

The Talmud is a unique book of twelve volumes, the product of the spiritual activity of the entire Jewish people, which came to be the fundamental possession (*Grundbesitz*) of the Jewish people, its life-breath, its very soul. It was a family history for succeeding generations in which they felt themselves at home, in which they lived and moved, the thinker in the world of thought, the dreamer in glorious ideal pictures. For more than a thousand years the external world, nature and mankind, powers and events, were for the Jewish nation insignificant, nonessential, a mere phantom; the only true reality was the Talmud. A new truth received, in their eyes, the stamp of veracity and freedom from doubt only when it appeared to be foreseen or sanctioned by the Talmud. Even the knowledge of the Bible, the more ancient history of their race, the word of fire and balm of their prophets, the soul outpourings of their psalmists, were only known to them through and in the light of the Talmud. The Talmud was the educator of the Jewish nation and his education can by no means have been a bad one, since, in spite of the disturbing influence of isolation, degradation, and systematic demoralization, it fostered in the Jewish people a degree of morality which even their enemies cannot deny them. The Talmud preserved and promoted the religious and moral life of Judaism; it held out a banner to the communities scattered in all corners of the earth, and protected them from schisms and sectarian divisions. It produced a deep intellectual life which preserved

[1] Abbreviations: *AbR*=Schorr, *Urkunden des Altbabylonischen civil- und Processrechts; AR*=Kohler und Ungnad, *Assyrische Rechtsurkunden;* Bab=Babylonian Talmud; *BJ*=Beth Joseph, *Commentary on the Caro Code; BR*=Kohler und Peiser, *Aus dem babylonischen Rechtsleben; BT*=Strassmaier, *Babylonische Texte; BV*=Peiser, *Babylonische Vertraege; CT=Cuneiform Texts; HG*=Kohler und Ungnad, *Hammurabi's Gesetz; HM*=Caro Code, *Hoshean Mishpat; JE=Jewish Encyclopedia;* Jer.=Jerusalem Talmud; JH=Maimonides Code.

the enslaved and proscribed from stagnation, and which lit for them the torch of science. . . . . But while the historian experiences no difficulty in discerning the all-important influence of the Talmud on Jewry, it is a totally different matter to describe the work. For the Talmud must not be regarded as an ordinary work composed of twelve volumes. It possesses absolutely no similarity to any other literary production; but it forms, without any figure of speech, a world of its own, which must be judged by its own peculiar laws. It is therefore so extremely difficult to give a sketch of its character, in the absence of all common standards and analogies.[1]

The Talmud is a work coming from the fifth century of the present era, which contains the best that the Jewish spirit created from time immemorial until the foregoing date, which is not included in the biblical literature. More correctly, the Talmud contains the "law," which prior to its being written down was taught orally with reference to the law in the Bible, which was written. The Talmud thus represents the oral law in contradistinction to the Bible, which is the written law. The written law is also known as the Torah or *Miqra,* while the oral law is known also as *dibhre Qabbalah,* or *dibhre Sopherim,* or *miṣṣoth Zeqenim.*[2] Philo and Josephus call it παράδοσις ἄγραφος, "unwritten traditions," or τῶν πατέρων διαδοχή, "inheritance of the fathers." The New Testament and the church fathers knew it as παραδόσεις τῶν πρεσβυτέρων, "the teaching of the elders." Later Jewish literature also knows it as Mishnah, and so also Hieronymus.[3]

The oral law, to be sure, was not written down at one sitting. Originally the oral law was taught in connection with the written law. Probably already the elder pupils of Šamai and Hillel made collections of the oral law independent of the Bible. So there arose a collection of oral law called *Mishnah Rishonah.* "A large portion of this Mishnah is still preserved in its original form" in our written "oral law." But owing to adverse conditions, and the fact that each teacher taught the *Mishnah Rishonah* according to his own conception, there arose the need for a new collection of the teachings of the oral law. The Synod of Jabneh undertook its creation, and thus arose the collection known as *Eduyoth* ("testimonials"), which we possess in an abridged form. This latter collection had many

[1] Grätz, *Geschichte,* IV, 376–79, abridged.

[2] Bab. *Sukkah* 46*a;* Jer. III. 53*d;* *Pesiqta III.*

[3] Grätz, *ibid.,* n. 2.

advantages over its predecessor, which was consequently superseded, but it itself possessed an inherent weakness: it lacked method in its arrangement. Rabbi Aqiba therefore undertook to re-edit the oral law systematically, grouping the various teachings according to their respective topics. The chief excellence of this latter collection was its systematic and topical arrangement. But due to various causes it suffered from undue brevity and from arbitrary exclusion of many teachings found in the older collections. Rabbi Aqiba himself later edited a work containing comments to his Mishnah, and others adopting his system made collections of their own. Rabbi Mair, one of Rabbi Aqiba's pupils, thus made a new compilation, which attained a wide circulation but was unable to displace the other existing compilations. Thus there continued to exist, with reference to the teaching of the oral law, variation and confusion, both as to the statement of the laws and as to their exposition. Rabbi Judah ha-Nasi, commonly called Rabbi, in the beginning of the third century of the present era undertook to remedy the situation. Adopting Rabbi Aqiba's system of arrangement, and making use of all of the best existing collections, he brought forth a new collection, which soon became the standard Mishnah. Rabbi's work was superior to its predecessors, but it suffered more or less, as did its forerunners, from undue omissions and inconsistency. Some of Rabbi's pupils, already during the life of their master, made additions and emendations to his Mishnah; finally they compiled a rival collection called *Mišnaiẓoth Gedoloth*, since their work was more voluminous than Rabbi's collection. The situation created by that production forced the *Debe Rabbi*, Rabbi's school, to undertake a thorough revision of Rabbi's Mishnah. Even this revised work continued to be amended slightly by later teachers. But, broadly speaking, it remained the standard Mishnah and came to be the official and authoritative written "oral law."[1]

This attitude taken by the rabbis toward the Mishnah had a far-reaching effect. Needless to say, the oral law, in contradistinction to the written law, was never stagnant; it was always alive to changing conditions. Before Rabbi these new laws and teachings were taken care of in the successive editions of the Mishnah. After Rabbi

[1] Cf. Lauterbach, article "Mishnah" in the *JE* and authorities cited there.

the oral law, to be sure, did not cease developing. But no more could the rabbis promulgate new laws and render new decisions on their authority as traditionnaires in conformity with their understanding of the written law. There was the Mishnah, the written oral law, containing the Law for the Jew: every new law must have its basis in it. The rabbis that follow the Mishnah refer to themselves as אמוראים, "interpreters of the Mishnah," or "students of the Mishnah," in contradistinction to the mishnic rabbis whom they call תנאים, "teachers of the oral law." The sayings of the latter are known as tanaitic, and those of the former as amoraic, which have no standing except when based on the former. The universal acceptance of Rabbi's Mishnah as the standard work of the oral law thus caused a new departure in the development of the oral law.

Rabbi's Mishnah was made the textbook of study in the academies of Palestine and Babylonia. Law after law, saying after saying, in the work was taken up and discussed by the members of the academies. In their discussions they made use of tanaitic material, not found in the Mishnah, which is refered to as *Baraita*. We do not possess any collection or collections of *Baraitas*. We do have a bulky collection of tanaitic teaching known as *Tosephta*, arranged topically, running very similar to our Mishnah, and some tanaitic books, arranged with reference to the Bible and running as a commentary to it. These books are known as *Halakhic Midrashim*.[1] Some *Baraitas* quoted are found in the tanaitic works that we possess, while others are not. Evidently, as is to be expected, the Amoraim possessed much of tanaitic material which is lost to us. Thus with the Mishnah as a textbook, with the extra mishnic teachings as valuable material, and with the natural continuous change of economic and other conditions as a background, the Amoraim continued the development of the oral law. The method now was the discussion in the academy. After more than two centuries these discussions were collected and arranged as a sort of commentary to the Mishnah. The complete work is called the Talmud and the discussional part the Gemara. We have two Talmuds, one produced

[1] The one to Exodus is called *Mekhilta*, a new edition of which is being prepared by Dr. Lauterbach for the "Jewish Classics Series"; the one to Leviticus is called *Siphra;* and the one to Numbers and Deuteronomy goes by the name of *Siphre*, an abbreviation of *Siphre Debe Rab*. There are a few other tanaitic works of minor importance.

by the schools in Babylonia and called the Babylonian Talmud; the other produced by the schools in Palestine, and known as the Jerusalem Talmud. The first is well redacted, while the latter is not. For the purpose of this paper we may regard the Jerusalem Talmud as a recension of the Babylonian one.

To sum up, the Bible contains the written law, and the Talmudic literature contains the oral law. The latter consists of tanaitic teachings and amoraic teachings. The standard work of the former is the Mishnah, with the *Tosephta* and *Halakhic Midrashim*, and *Baraitas* quoted in the Talmud as supplementary. The standard work of the latter is the Gemara of the Babylonian Talmud, with that of the Jerusalem Talmud as supplementary. By the term "Talmudic literature" we mean the works that contain that body of "traditions" originally taught orally; and by the term "Jewish law" we mean the legal portions in the Talmudic literature in contradistinction to those in the Bible.[1]

What is the relation of the oral law to the written law? In form, we have already mentioned, some teachings are claimed to be based or "derived" from a verse, or a word, or a letter, etc., in the Bible, while the great majority of the teachings are in the form of independent statements. But what is the intrinsic relation of the oral to the written law from the point of view of the spirit that permeates it and from the point of view of origin and development? This question was a burning one in the days of the Talmudists; for it is clear that the oral law could not gain an authoritative position unless its relationship to the Bible was definitely and satisfactorily established. Thus already the Tanaim felt the necessity of dealing with this question.

The Talmudic literature gives its answer to this question, summarized by Maimonides, as follows:

All the commandments which were given to Moses on Sinai were "given" together with their commentations. Moses wrote down the entire Torah with his own hand, and gave a copy of it to every tribe, and one copy he

[1] Unless specified otherwise we mean by "Talmud" the one compiled in Babylonia, containing Rabbi's Mishnah, *Baraitas*, and the Gemara (amoraic discussions) of the Babylonian Amoraim. According to S. Krauss two-thirds of the material contained in this work are legal and the remaining one-third is homiletical.

deposited in the Ark. But the commentary to the written law he did not commit to writing, but he taught it to Joshua and the elders, etc., orally. That is why it is called the oral law. Thus Joshua received the oral law from Moses, and transmitted it to Eli. Samuel received it from the latter. It was transmitted from prophet to prophet until Ezra received it from Baruch. Ezra and his court are known as the men of the Great Synagogue. Simon the Just was a younger member of that body of traditionnaires of the oral law. Antigonos of Sokko received it from the latter, and so it was transmitted to Hillel and later to Rabbi, the compiler of the Mishnah. His pupils received the oral law from him and transmitted it to younger teachers until it was finally transmitted to Rabbi Ashi, who compiled the Babylonian Talmud and thus marked the "Sealing of the Talmud," the oral law.[1]

The answer to our question amounts to this: The oral law is as old as the written law; both have one and the same origin; and one is inseparable from the other: the written law cannot be understood without its commentary, the oral law, and the latter in turn has no basis without its text, the written law.[2]

As a representative view of the modern school we may take the one by Weiss in his *History of the Oral Law*.[3] The oral law, according to Weiss, is the product of two sets of forces: internal and external. Various political and religious changes that took place in the internal affairs of the Jewish people created conditions that called for new laws. All the while the Jewish people were in contact with foreign peoples, a condition which reacted on Jewish law in two ways: either it forced the Jewish leaders to legislate in order to ward off foreign influence, or it forced the Jewish sages to adopt foreign laws as their own. The foreign peoples referred to were the Persians, the Greeks, and the Romans. From the moment that the Jews were led into captivity into Babylonia and were later scattered all over the countries of Babylonia, Persia, and Media—from that time on until the completion of the Talmud in the fifth century the oral law was influenced by Persian law or culture. Very soon after the time of the conquest of Asia by Alexander and onward, the Jews came into contact with Hellenic culture, which exerted its influence on the oral

[1] Maimonides, *JH*, Preface, abridged.

[2] To be sure, many hard-fought battles took place before this "theory" could be formulated in the bold terms stated above; cf. Taylor, *Sayings of the Fathers*, Excursus 1 and notes. But it won the day at last.

[3] It is the standard work of the subject written in modern Hebrew under the title of דור דור ודורשיו.

law. Finally, with the conquest of Greece by the Romans, the Jews came into contact with the latter, whose law especially influenced Jewish law.[1] Jewish law is thus the product of changed conditions of Jewish life on the one hand and of contact with Persia, Greece, and Rome on the other hand.

In 586 Jerusalem was captured by the neo-Babylonians, and considerable numbers of Jews were forcibly transported from Palestine to Babylonia. Thus there sprang up small communities, especially in southern Babylonia. Half a century later the neo-Babylonian Empire was overthrown by the Persians. The liberal-minded monarch, Cyrus, issued an edict permitting the exiles to return. During the generation that followed that edict small bands did return, from time to time, to Palestine, but the bulk of the exiles remained in their new country. In the days of the successors of Cyrus, Jewish communities in Babylonia were, probably, much more populous than before.[2] Our sources for the history of the Jews in Babylonia, extending over a period of more than sixteen centuries (586 B.C.—1050 A.D.), are meager.[3] We know that their numbers continued to increase, so that during the Parthian period (160 B.C.—226 A.D.) the Jews were able, for a time, to gain complete political control over a certain district of the country. We also know that very soon after the Jews came to Babylonia they entered every phase of the economic life of the country. In the Persian period we find Jews engaged in every sort of business and profession. There was only one profession in which we do not find any Jews, and that was the profession of the scribe. Seemingly, it has been suggested, the Jews were not masters of the Babylonian language and the difficult cuneiform script as were the native Babylonians, or perhaps the profession of the scribe and that of the notary were hereditary ones. In later times we find Jews engaged in trade and commerce and all sorts of professions and handiwork, even canal dredging.

It is important to bear in mind that up to the Sassanid period no political barriers seem to have existed between the Babylonians

[1] Cf. *ibid.*, II, 11–36. [2] Cf. Daiches, *Jews in Babylonia.*

[3] For the presentation of the history of the Jews in Babylonia, as here given, see E. Meyer, *Entstehung des Judenthums*, and his *Geschichte des Altertums;* Weiss, *History of the Oral Law;* Daiches, *Jews in Babylonia;* and Krauss, article "Babylonia" in *JE.*

and the Jews. In early days the Assuan papyri take us to a Jewish-Egyptian ghetto. They show us that the Jews were persecuted by the non-Jewish population, and it was the strong arm of Persia that had to protect them. In the contemporary records that come to us from Babylonia we find no trace of separatism. Babylonian, Persian, and Jew lived peacefully together. In fact the Jews in Babylonia were what we could call today entirely emancipated. "They were free citizens of a free land."[1] Notwithstanding the fact that the Jews enjoyed full citizenship in Babylonia, they were what we could call today nationalists. They were not only devout Jews. They regarded themselves as a part of the Jewish people or nation; they looked with reverence upon Palestine as the national home land, and they hoped for a speedy return of all of its scattered children. Small bands constantly filtered into Palestine, and those that remained supported it financially and in other ways, especially so during the period of restoration, and, later, during the wars with Rome. Like so many Jews today living in New York, London, Paris, and Rome, the Jews of Nippur and Babylonia on the one hand were 100 per cent Babylonian, ready to sacrifice themselves for the welfare of their country, and on the other hand were aglow with enthusiasm for the welfare of Israel. The fire of Jew-consciousness never dimmed.

Still it is hardly necessary to state that the Jews of Babylonia could not withstand that unconscious and uncontrollable process of acclimatization. As the Jews in the United States are Americanized, in England Anglicized, in France Gallicized, so were the Jews in Babylonia Babylonized. We see that in their personal names. One Jedaʿel names his son Ahušunu, an ordinary Babylonian name. Another one by the Babylonian name of Shirka has two sons, one named Shabatai, a Jewish name, and the other Liblut, a very common Babylonian name. Another Shirka had a son Mataniah. One Ninib-etir ("the god Ninib is protecting") had two sons, one called Gubba and the other Hananiah. Another Jew, Ninib-lu-kin ("may Ninib establish the family"), had a son called Hanan; and still another Jew, Šamaš-la-din ("may Shamash judge"?), had a son named Jedaʿiah. As for the later periods suffice it to say here that many famous rabbis bore Babylonian names.[2] The complete and

[1] Daiches, *ibid.*

[2] Cf. p. 52, n. 2.

thorough Babylonization is still more evident in the adoption, by the Jews, of the language of the country, which was Aramaic in vocabulary and grammar and seemingly Assyro-Babylonian in its phonetics. The Jews adopted it, spoke it, and wrote in it all their literary productions, and even long after Arabic superseded that tongue in Babylonia the Jews there persisted in using the "language of their fathers" in their literary activities.[1] In fact that language never lost its hold over Israel. It was always regarded as a national language second to Hebrew. So thorough was their adoption of the language of the country that after some time they could no more pronounce one-fourth or one-fifth of the consonants of Hebrew, their original tongue. This fact led the renowned philologist, Carl Brockelmann, to suspect that the Jews in Babylonia were Babylonians in race who adopted the Jewish religion.[2] There can be no question that there was some intermarrying going on all through that period.[3] But such a conclusion is entirely unwarranted. The linguistic phenomenon is only one of the signs that point to the Jew's thorough acclimatization and Babylonization.

Babylonian Jewry lived in peace and prosperity until the advent of Sassanid supremacy (226 B.C.). Babylonian Jewry was founded by the cream of the Jewish people. No wonder that already in its infancy it was able to bring forth an Ezra and a Nehemiah. Even in its days of decay, during the period of Arabic supremacy, it possessed the vigor and spirituality to produce the *Gaʾonim*, the men of learning who brightened the spiritual life of the Jews not only of Babylonia but also of the entire Diaspora in the days of gloom and darkness. But with the advent of the Sassanids the Jew was made to feel that he was no more a free citizen of a free land. However, in spite of sporadic outbursts of persecutions, many causes combined in producing an unsurpassed literary activity among the Jews. The movement really began in the last days of the Parthian supremacy. But as the persecutions became more and more frequent and violent Babylonian Jewry more and more devoted its energy to build a monumental work which should testify to its spiritual activities during so many centuries. As if feeling that still more oppressive

[1] Krauss, article "Babylonia" in *JE*. [2] Cf. *VG*, p. 49.
[3] Cf. the story of Isur the Proselyte, Bab. *Bab. Bat.* 149*a*.

times were in store for the Jewish people, they did not tire in completing their spiritual legacy to Israel. It was the Talmud, a bulky book, two-thirds of which deal with legal themes. Law: that was its spiritual contribution to the treasury of Israel. Tradition claims that "when the Torah was forgotten in Israel, Ezra came from Babylonia and restored it; when forgotten again Hillel the Babylonian [*ca.* 100 B.C.], came and rehabilitated it; when forgotten once more Rabbi Hijja and his sons came and re-established it."[1] Law: that was the pride of Babylonian Jewry. Its monument was built during the Sassanid period, days of persecution, and completed on the eve of the Arabic period, days of rapid decay and dissolution for Babylonian Jewry. In the second half of the eleventh century Babylonian Jewry was a thing of the past. But it did not live in vain; it succeeded in embodying its law in a book which was destined to become the strength and power of preservation of Israel during the centuries of persecution, misery, and torture.

The economic resources of Babylonia and its law and business customs are well known to us. The earliest known code in the world which comes from that country presents us with an excellent picture of the law of the land of Babylonia in the days of King Hammurabi, more than fifteen centuries before the Jew stepped on the soil of Babylonia. But we have legal and business documents that come to us from centuries prior to Hammurabi's reign, most of them written in a language that is in no way a Semitic tongue, as is the language of the code. Those old contracts clearly posit the very law embodied in the code of Hammurabi, who, by the way, claims to have received it from the god Shamash. To be sure, the code shows minor differences, but they are nothing more than signs of development along the lines of the law of the land, which those old contracts posit. It is clear that as early as we can go back there was in Babylonia a well-defined and thoroughly worked out law of the land based upon the economic life of that country. This law of the land was always alive to changing conditions; it was always developing, never being stagnant, but never suffering a break in its continuity. This is a conclusion that we reach by a comparison of the

[1] Bab. *Suk.* 20*a*.

law of the pre-Hammurabian contracts with that of the code. It is the same truth revealed to us by a study of the contracts coming to us from the foreign, Kassite dynasty, the one that followed the dynasty of Hammurabi, from the Assyrian period, from the neo-Babylonian period, from the Persian period, and from the Greek period. Babylonia was again and again invaded. Between the invasion of the country by the Semitic Akkadians under Šarru-kin in 2750 B.C. and the last Semitic invasion by the Arabs in the seventh century A.D. the country was perhaps invaded a dozen times or more. It was invaded several times by non-Semitic peoples, like the Kassites, the Persians, and the Greeks. But none of these peoples changed the legal and business customs of the country. During its period of fertility and splendor the land of the two rivers changed its language thrice: Sumerian, Assyro-Babylonian, and Aramaic. But not even these changes brought about a break in the continuity of the development of the law and the legal and business customs of the country. Seemingly so immediate and close was the relation of the law of that land to its economic resources and conditions that nothing could direct the former along other channels as long as the latter remained undisturbed. It was left to the Arabs and later the Mongols to introduce a new law in that country. But they succeeded in doing it only after they converted that fabulously rich plain into swamps and steppes; after they totally changed the economic structure of the land. Just before that great catastrophe the Jews, after having lived in that country as free citizens for more than ten centuries, embodied their law in a work known as the Talmud. If we grant the assertion (how can we refute it?) that it shows signs of its native land, it is the last production of that country to reflect its economic and business conditions after a history of more than three thousand five hundred years.

We know that the Babylonians were pre-eminently a people of traders and business men. In the course of the history of the people of the two rivers Babylonian traders were met with in the east and in the west land (Palestine and Syria), in Asia Minor, and on the Nile. This commercial expansion began during the old Babylonian period; it stretched further during the Assyrian period, and it reached its farthermost limits during the neo-Babylonian and

Persian periods. We find Babylonian contracts in Cappadocia; and contracts written in Aramaic, which are, however, essentially Babylonian, were found in Assuan on the Nile. Gradually the Babylonians were superseded by the Arameans. We find the latter even more than we do their Babylonian precursors spread all over the East and Egypt as traders and business men who, notwithstanding the fact that they introduced a new language for their trade, did not disturb the business and legal structure of the land of Babylonia. The commercial Aramean was later superseded to a limited extent by the Babylonized Jew. Just before the final destruction of the civilization of Babylonia its latest commercial citizen, the Jew, embodied his law in a work called the Talmud. Does not the law embodied in that work exhibit a definite relation to the law, business customs, and economic structure of the land of Babylonia?

The method used by Weiss and his school and the statement of his theory of the oral law are open to serious objections.[1] Yet it cannot be gainsaid that Jewish law was influenced by the systems of law with which it came in contact. We cannot expect anything else. Weiss and his school speak of the relation of Jewish law to Graeco-Roman law. Surely the latter system influenced Jewish law, though its workings and its extent are still to be determined. They also speak of the influence of Persian law. If by the term "law" we mean to include ceremonial law and ritual we must grant the contention. But, as we shall indicate later, there is no trace of Persian law in Jewish business law. It also interested scholars to point out "Babylonisms" in the Talmud. It was started and carried forward by Oppert, Halévy, Delitzsch, Tallqvist, and others. Feuchtwang, in *ZA*, was the one, to the knowledge of the writer, who for the first time devoted a long article to this subject.[2] In 1903 Dr. Hermann Pick published a short monograph entitled *Assyrisches und Talmudisches*. It constitutes a fair summary of the most that had been done before, and it contains new material. Schorr's *AbR* likewise contains notes on the subject. But all of those notes and discussions

[1] Cf. pp. 60–62 in this article.

[2] It appeared in *ZA*, Vols. V–VI. Its conclusion, to my knowledge, did not appear.

are lexicographic. Again and again it is pointed out that there are found in the Talmud[1] many Babylonian words and phrases: names of places, personal names, mythological terms, and legal and business terms. It is the purpose of this paper to point out that there exists a definite and an intrinsic relationship between Jewish law and Babylonian law. We shall leave out of consideration, as much as possible, facts of mere similarity: laws and practices common to both systems of law. Likewise we shall, for the present, disregard the existence of Babylonian legal and business terms in Jewish law. We shall confine ourselves to commercial law, citing a number of illustrations which, in the opinion of the writer, demonstrate the intrinsic relation between Jewish law and Babylonian law, Babylonian business customs, and Babylonian economic conditions.

I[2]

Nergal-uballiṭ lends two manas and fourteen shekels to one Sula and takes his debtor's house as an antichresis. Sula then rents it from his creditor for two shekels and one-fourth of a shekel per month [*BT*, *Nbk.* 142].

The transaction represented in the foregoing contract is simple. Nergal-uballiṭ lends 74 shekels to Sula at the usual rate of interest of 20 per cent. The creditor thus desires to realize 27 shekels on his loan. Sula owns a house which rents for 27 shekels per year, $2\frac{1}{4}$ shekels per month. This house he pledges to his creditor. The

[1] Pick includes in the term "Talmud" also the late Targumim and Midrashim. In his comparisons he sometimes cites Midrash Rabah!

[2] Before we enter upon the citation of the legal cases it will perhaps prove of value to present a selected list of Babylonian words and phrases, mostly legal, met with in our Talmudic literature. The comparisons were so apparent that many scholars have pointed them out, at times synchronously. No attempt will therefore be made to assign each word or phrase to its first observer. They are mostly taken from Schorr's *Contracts* (1913), Pick's Monograph, Clay, *BE*, IX, and Feuchtwang's unfinished article. Alphabetically arranged the list is as follows: ארדיכל, *ardu-ekal-rabu;* אריס, *erešu;* [בן בית, *mar biti*, *BE*, IX, 69; cf. note by Clay, *ibid.*, p. 33]; גזבר, (*amel*) *gan-za-ba-ru* (*Dar.* 295); גט, *gittu;* זבורית, *zu-ba-ru;* [(העיר) חזן, *hazannu*]; חזקה, *izqum* (Schorr, p. 421); חלה, *hallatu;* לולב, cf. Schorr, p. 192; מכס, *makasu;* מלוג (נכסי), *muligu;* נכסים, *nikasu;* עיטרא, *ki pi atra* (Feuchtwang); פחת, *piḫat* (Schorr, p. 190); [פי שלפי (גזרה), *pi sul-pu*, *BE*, IX, 48, and cf. note by Clay, p. 38]; personal names: אויבר, *I-bu-u-a;* ביבי, *Bibbua;* זביד, *Za-bi-da-a;* חסדא, *Haš-da-a;* פדא, *Pa-da-a;* רבנאי, *Rab ba-ne* ("master-builder"); זשבי, cf. *šuzubu;* place-names: נהר פקוד, *nar pi-qu-du;* נרש, *nar ešši*, "new canal"; נחר בירל, cf. Pick, p. 12; בב נהרא, *babu naru Šamaš;* מחוזא, *maḫazu;* פומבדיתא (פם בדיתא), cf. *naru Ba-di-ia-tum;* נופר, Nippur; ריבית, *ribitu;* רשו (מרי), *rašu;* שובר, *šebiru;* שטר, *šatru;* סופר, *šapiru;* תלכי תסנסבי למן תצבא, *ešar ṣibata tallak.*

pledge is to be security for the loan and at the same time to pay off the interest on the loan; or, in other words, the house is to be an antichresis. The creditor, for one reason or another, does not want to dwell in the house. He thus agrees with his debtor that the latter should rent it and pay the pledgee 27 shekels. Nergal-uballiṭ thus realizes 27 shekels, 20 per cent interest, on his loan of 74 shekels by renting the antichresis to its owner, Sula.

Jewish law is well aware of this Babylonian business practice. The Jews in Babylonia practiced it and the law legislated concerning it.

> The law is not in accord with the business practice of the Narshean lessees. They contract as follows: A has pledged his field to B, then leased it from the latter. But now that it is written as follows:[1] I kept it in the hands of the pledgee for some time and then leased it from him, the transaction is proper: otherwise one would find it impossible to lend money. But [continues the Talmud] that is no argument [*Bab. Mes.* 68*a*, abridged].[2]

This highly instructive passage needs no comment.

All through the neo-Babylonian period, in case a debt was incurred by two or more persons each one was liable for his co-debtors, each one was responsible for the payment of the entire debt.[3]

So also in Jewish law.[4]

The contracts of the neo-Babylonians contain the clause: *išten put šani našu*.[5] It is an explicit statement that one of the co-debtors is security for the other. There is reason to believe, as does, it seems, Dr. Kohler, that where there was no explicit stipulation to that

[1] The business transaction is the very same one; only the contract is differently worded.

[2] For the text cf. Rabbinowitz, *Variae Lectiones* and *BH*, *ad loc.*

[3] Cf. *AbR*, p. 439, and *HG*, III, 237. As to whether or not this was also the case in the old Babylonian period, there exists a difference of opinion. Cuq maintains that unlimited joint liability was unknown in that period (*NRH*, 34, 1910). This opinion is not shared by Kohler, Ungnad, or Schorr.

[4] Cf. *HM* 71:1 ff. The Babylonian law of joint liability is ambiguous. So also is the early Jewish statement of the law. The later Jewish codifiers could not agree as to the workings of this law. The ROSh and, according to the latter, RMBM also, maintain that even in the case of no default on the part of the co-debtors the creditor may apply to one of the co-debtors for the whole of the debt. On the other hand, the 'Ittur and others maintain that only in the case of the default of one of the co-debtors can the creditor apply for the whole debt to another of the co-debtors; cf. *BJ*; *HM* 71:1.

[5] There is no doubt of the legal meaning of this phrase, although the exact meaning of "put" offers difficulties.

effect one was not security for the other.[1] This is not the legal opinion of the Jewish jurists.

Two persons who borrowed together[2] guarantee for one another, even though the contract did not contain the clause: "they guarantee for one another" [Jer. *Šebhuoth* 5:1].

What does this mean? This fact should direct us to the source of the Jewish law. It was based on the business customs of the land. The practice of joint liability became so common in the business transactions of the land that it was not necessary any longer to stipulate to that effect. For centuries the business men in Babylonia did not take it for granted; it had to be expressed. But at the time of the making of Jewish law joint liability was taken as a matter of course. There was no need to express it; it was common law.

We have here a clear-cut case of the dependence of Jewish law on Babylonian.

Jewish law as well as Babylonian recognizes as valid the assignment of a debt. A creditor has the right to assign his claim upon a debtor to a third party, whereby the latter is then compelled to satisfy the second creditor. According to Jewish law the original creditor continues to possess the right to waive his claim upon the debtor.

He who sells a bill of debt and later waives it, it is waived [Bab. *Kethub.* 85*a*], and even if the buyer stipulated that the vendor should not have the power to waive it if the latter did do it, the act stands. Similarly the original creditor can issue to his former debtor a receipt or he can postpone the date of payment [*HM* 66:24].

The buyer may sue the seller for damages, but he has no claim upon the debtor.

The Talmud ascribes this law to the famous Samuel, the greatest jurist in his day. No legal explanation is offered; neither is it based on any older source like the Mishnah.

An assignment of a claim can be made in one of two ways: either the existing bill of debt is legally transferred to the buyer or the

[1] "Sie garantieren aber nicht in Solidum; eine Solidarklausel findet sich nicht" (*BR*, II, 37). In passing may we notice that the corresponding Jewish law would shed light on the subject discussed there by Kohler.

[2] Read כאחד instead of מאחד? Cf. J.M.P. Smith, *Micah* [I.C.C.], pp. 34 and 361.

original bill is destroyed and in its stead the debtor signs a new bill in which the consignee appears as the creditor, and the fact that the transaction is one of an assignment of a claim is disregarded legally. The significance of the former method over against the latter one is found in the following consideration: an assignment of a debt by the first method can be made without the consent of the buyer, while the second method demands the consent of the debtor and his active participation in the act, which usually cannot be procured without a consideration.

Assignment by the latter method is met with in Babylonia,[1] and it is just the method that Jewish law requires. The Jewish jurists maintain that the only legal and effective way to assign a debt is to make the debtor, for a consideration, to be sure, write a new bill of debt in which the buyer appears as the creditor, the fact that the latter is a consignee being entirely suppressed, מקרקש ליה זוזי וכתב ליה שטרא בשמיה.[2] Any other method is defective.

The relation of Jewish law to Babylonian in the subject under consideration is perfectly clear. The custom of the land was to assign a claim by the second method mentioned above. The Jewish jurists maintain that this custom must be rigidly adhered to; otherwise the assignment is defective and the claim continues to remain in the power of the original creditor, who thus can waive it.

A lends one hundred shekels to B against the latter's fruit-bearing field as an antichresis. The interest on the loan amounts to twenty shekels per year. But the produce of the field pledged amounts to forty shekels. A and B therefore agree that after the lapse of five years the former should release the field without compensation, for during this period the produce of the field will have covered both the interest and the principal. Such a transaction is one involving a pledge of the sort known in Anglo-American law as the Welsh Mortgage.

This kind of antichresis is well known in the usury-ridden Babylonian law.[3]

[1] Cf. *BR*, II, 34.

[2] Bab. *Keth.* 85*a*.

[3] Cf. Johns, *Deeds and Documents*, p. 629; *AR*, p. 146; *BR*, I, 16.

Jewish law categorically prohibits the antichresis.[1] In spite of that fact all jurists agree that in the form stated above the antichresis is permitted.[2] We must assume, in the case before us, the dependence of Jewish on Babylonian law.

One lent his neighbor a sum of money against the latter's fruit-bearing field as a pledge. The parties to the transaction drew up a bill of debt which did not contain a clause specifying the date when the payment of the debt would fall due. Jewish law holds such a bill valid and maintains that the debt is due for payment one year from the date on which the bill was drawn up.[3] This law according to the Talmud is on the authority of the elders of the city of Matha Mehasia.[4]

What was the law in Babylonia, the land where there lived both the jurist who promulgated the law and his authorities? The following neo-Babylonian contract is instructive:

> Zumma lends two minas and eight šeqels to Marduk-naṣir-aplu against the latter's field as a pledge. The creditor is to enjoy the fruits of the field in lieu of interest at the rate of twenty-two per cent [*BT, Dar.*, 491].

The contract contains no date as to the termination of the loan, yet it is clear that the transaction could not be terminated before the lapse of one year. The business transacted in the foregoing contract is simple. The pledge in the hands of the creditor is not only security for the loan but it is also for the purpose of paying off the interest on the loan. It is thus an antichresis. As we shall see later, the bill without terms being a well-established institution in Babylonia, a bill like the one cited above need not contain a date as to the termination of the transaction; all took it as a matter of course, it is clear, that it could not be terminated before one year was over. This was the Babylonian custom, in full agreement with the banking system of the land.

The Jewish jurists quite well understood the importance of this regulation of one year. But they refused to consider the law as owing its existence to that fact. They claimed it to be Jewish and to be on the authority of the elders of the city of Matha Mehasia. The relation of Jewish law to that of Babylonia is clear.

[1] Mish. *Bab. Mes.* 5:2.
[2] Bab. *Bab. Mes.* 67*b*.
[3] Bab. *Bab. Mes.* 68*a*.
[4] *Ibid.*

It was the custom in Babylonia for the commission merchant to buy and sell in his own name. A is principal, B is the agent, and C is the third party. It was the custom that B dealt with C as if A had no concern in the transaction; B's relation to C was that of a principal.

Kabti-ilani-Marduk receives a sum of money from one Nabu-ahe-iddin to buy seed from Nabu-šum-usur. The agent buys the seed and pays for it in his own name and later transfers it to his principal and one Banunu, the latter's associate [*BT*, *Nbn.*, 133 and 132; cf. Kohler, *BR*, I, 10–11].

The relation of the Babylonian agent to his third party, on the one hand, and to his principal, on the other hand, is perfectly clear. His status with regard to his third party is that of a principal, while that with regard to his own principal is that of a debtor or an obligatee. A deal closed by such an agent cannot of course be voided by his principal as far as the third party is concerned. On the other hand the principal may refuse to honor the act of his agent as far as the former himself is concerned, be the basis for his refusal sound or weak; for the agent needs a new legal act in order to square himself with his principal.

This Babylonian business situation clearly underlies the legal decision rendered by the Jewish jurist in Babylonia:

A certain woman gave one a sum of money that the latter should buy for her a certain piece of land. The agent went and bought it for her in such a way that the vendor did not guarantee his title to that piece of ground. The principal then refused to honor the deal. The suit of that woman vs. her agent came before Rabbi Nahman and the jurist said to the agent as follows: You buy that piece of land as you did without the vendor having guaranteed his title, and sell it to the woman under your guaranty [Bab. *Bab. Bat.* 169*b*, abridged].

The dependence of Jewish law on Babylonian business customs in the case under discussion is apparent.

In Babylonian law the bill of acknowledgment is well known. A states that a certain object in his possession belongs to B. No matter what the actual facts in the case are, the maker of that statement must comply with its demands. Such a bill does not contain a *causa debendi*. In this respect it is like the promissory note, but, unlike the latter, it does not contain a clause to the effect that the

maker promises to perform a certain act. The bill merely acknowledges a state of fact, of obligation, or of debt. In Babylonia such a bill was usually drawn up in the following form:

C, D, E, F, etc., these are the witnesses before whom A said the following: So and so is the status of the matter with regard to B [cf. *BT*, *Nbk.*, 344].

So also in Jewish law. Such a bill is known as שטר אודיתא, and its validity is everywhere taken for granted and as a matter of course, as the story of Isur the Convert shows:

A certain Jewess by the name of Rachel conceived from a certain Babylonian by the name of Isur.[1] Before Rachel gave birth to her child the Babylonian was converted to Judaism and married Rachel. When their child was born his father was a Jew, but since at the time when his mother conceived Isur was a non-Jew, the child must legally be regarded as the son of Rachel and not that of Isur. Now Isur, who came to be known as Isur the Convert, deposited 12,000 zuz with Rabha, the famous head of the Jewish Academy of Learning in his day. While Isur's son, named Mari, was away from home attending school, Isur was about to pass away and he desired to make sure that after his death that deposit will come into the possession of his only child. But since legally Mari was not Isur's son, the latter had therefore the legal status of a convert without offspring whose property goes over into the possession of whosoever lays hold of it at the moment of the convert's death. Isur's hours were numbered. The question was, Can Isur find a way by which to transfer that deposit to Mari, or not? Strange as it may seem to us, Rabha desired to keep that sum of money for himself, legally, of course. So when the situation was brought to his attention while he was at the Academy, the famous jurist argued as follows: How can Mari acquire title to that sum of money? If through the institution of inheritance, Mari is no heir; if through the institution of מתנת שכיב מרע, it does not work in a case like Mari's; if by means of משיכה, Mari cannot lay hold on it; if by הליפין, coins cannot be acquired in that way; if by means of אגב קרקע, Isur does not own a piece of land, etc. Isur thus had no means, according to Rabha, by which to transfer the deposit to Mari, and consequently upon the death of its owner the deposit will belong to the jurist. But as Rabha was discussing the case in the Academy, there said to him one, Rabbi Iqa, as follows: Why cannot Isur transfer his 12,000 zuz by the means of acknowledgment? Let Isur acknowledge that those coins are Mari's and the latter will thus acquire title to them by the means of acknowledgment. While the discussion was going on in the Academy, some one brought the suggestion to the dying man and soon word

[1] Note the name. Isur (Issur) is clearly the Jewish pronunciation of the common Assyro-Babylonian name of Ašur . . . . (may the God Ašur . . . . , or, the God Ašur will . . . .).

came that Isur had transferred the money to Mari by acknowledgment. The famous jurist felt provoked, but Mari came into the possession of that money [Bab. *Bab. Bat.* 149*a*, abridged].

This passage in the Talmud with its clear statement of the validity of the bill of acknowledgment caused difficulties to arise among the mediaeval Jewish jurists. Diversity of opinion resulted.[1] But that does not interest us here. What is of importance to us now is the fact that the jurists in the time of the Talmud knew of this business practice, had a technical term for it, and took its legality as a matter of course just as did the non-Jewish inhabitants of the Valley of the Euphrates for centuries. The relation of Jewish law to Babylonian in the case before us is evident.

One rents a boat for transportation purposes. Jewish law maintains that the rentee pays its rent and bears the responsibility for its loss, even though it be reasonably unavoidable. This law caused great difficulties to the jurists. For if the boat is considered as an object rented, the rentee should not be held responsible for its loss; and if he bears the responsibility for the loss of the boat it must be considered as a loan which a Jew must not be charged rent for. It is needless to say that the jurists finally found a way to explain this law. That is not important here. What we must note is the fact that this was the custom of hiring boats for transportation in the land of Babylonia: the rentee paid a rental and was held responsible for its loss, whether avoidable or unavoidable.[2]

It is from this point of view that we must understand the following highly instructive legal discussion. It needs no comment.

Said Rabh, in hiring a boat one pays rent and is at the same time responsible for its loss. Said to him Rabbi Kahana, if one pays rent he should not be responsible for the reasonably unavoidable loss of the object rented, and if he bears all liabilities, he should not pay rent. And Rabh could not answer.

After some discussion by teachers of later generations, claiming that Rabh could answer that he based his statement upon an older tanaitic law,[3] the Talmud continues as follows:

Said Rabbi Papa, the law is that one who rents a boat pays rent and bears all liabilities. And the custom among those engaged in that business

[1] Cf. *HM* 40:1, *BJ* and *ShK*. [2] Cf. *HG*, III, 331, and Kohler's analysis.

[3] Whether or not Rabh's statement is really in accordance with the older source is another question.

is that the rentee pays rent from the moment he takes possession of the boat, while in the case of its loss he pays its value at the moment of its loss. Does the matter depend upon the custom? [asks one naïvely, and he receives the answer that] the case was not so, because of the promulgation of the [Jewish] law, the custom came into being [Bab. *Bab. Mes.* 69*b*–70*a*].

II

All the illustrations cited so far have been drawn from the Gemara, amoraic law. What about tanaitic law? Is it likewise related to Babylonian law, or not? The Mishnah, the standard work on tanaitic law, was redacted in Palestine. Most, if not all, of the teachers cited in that work lived in Palestine. Tradition claims that Hillel (*ca.* 100 B.C.) brought the oral law from Babylonia to Palestine. But how far can we rely on this tradition? We must assume, so it may be argued, that tanaitic law is the product of Palestinean conditions of life on the one hand, and foreign contact of Palestinian Jewry with the systems of law of Persia, Greece, and Rome on the other hand. It will, however, be readily conceded that the Palestinean nativity of the completed Mishnah and of the authors it cites has no direct bearing upon the problem of the nativity of the oral law, which it contains. A code of law, or a text-book of law, composed in the United States and quoting American authorities may, indeed, be essentially a presentation of English common law. Then again, the fact that tanaitic law was influenced by Persian, Greek, and Roman systems of law, needless to state, does not speak against the possibility of its being in relation to Babylonian law.

In fact Weiss's proposition that Jewish law is to a certain extent the product of Persian and Graeco-Roman influence is open to serious consideration. First, the method used by Weiss and his school is mainly that of comparison: a Roman, Greek, or Persian law is selected to which a parallel Jewish law is called up, and the conclusion derived is that the Jew got it from the foreign source. Such a procedure is manifestly open to great objections, especially in view of the nature and character of the sources used. He and his authorities used the Zend-Avesta for Persian law, the various sources for Greek law, and the well-known Roman codes for Roman law. It is especially objectionable to assume that the law embodied in the Roman

codes was the one with which the Jew really came in contact. Frankel has already noted that "it is remarkable that there is not to be found a single Roman legal term in Talmudic law."[1] While this statement is too sweeping the observation as a whole is undoubtedly correct. Nor does this fact appear strange to us now. We at present possess a great multitude of business contracts of all sorts found in Egypt. They are almost exclusively papyri written in Greek. More than that, they "show us the true picture of the law in practice and they call to our mind the truth full of meaning that many a law of the Roman Empire was only on paper," etc.[2]

Secondly, along with the comparisons, those scholars find pleasure in basing conclusions on the fact that many Graeco-Roman legal terms are found in Jewish law. Again and again it is stated that terms like אפותיקי (*ὑποθήκη*), "hypotheca"; דיתיקי (*διαθήκη*), "will," "testament"; אונו (*ὠνη*), "bill," "bill of sale," etc., are taken from Graeco-Roman legal terminology; and that a word like שולחני (שלחן, "a bench," "a table"), "a money changer," "a banker," is a translation of a word from the terminology of the former. Evidently those scholars assume that along with these legal terms there came in also the law that they express. The Jew adopted both the term and its idea. This is a hazardous assumption. To illustrate, we find in Jewish law the Graeco-Roman term "antichresis."[3] According to their assumption we would have to posit that along with the term the Jew was enriched also with the legal idea of the word. Fortunately we possess older sources which clearly deal with the business practice of the antichresis, yet they do not term it antichresis.[4] Clearly the practice and legal idea of the antichresis were known to the people, yet later, by coming into contact with the Graeco-Roman term, they unconsciously adopted it. Does not this instance convince us that it is unsafe to assume that a foreign legal term in Jewish law signifies the adoption of the foreign legal idea and practice which the word stands for?[5]

[1] *Gerichtliche Beweis*, p. 60, n. 1.

[2] Wenger, *Recht der Griechen und Römer*, p. 162.

[3] Jer. *Bab. Mes.* 6:7.

[4] Mish. *Bab. Mes.* 5:2.

[5] In our case there is in addition another consideration. The Mishnah was edited again and again. Is it not possible or even probable that the editors repeatedly substituted new and current terms for those obsolete or obsolescent found in the old teachings? The Mishnah, we should bear in mind, was intended as a textbook for students.

Thirdly, Weiss's theory suffers from the weakness of sweeping generalization. To illustrate, basing himself upon several seemingly irrefutable comparisons in the fields of religion and ethics, Weiss maintains that Persian law influenced Jewish law in all the latter's various branches, religion, ethics, and business law. We may grant that we meet with Persian influence in the Jewish conception of angels, ritual cleanliness and uncleanliness, and in a few ethical sayings, etc. On the other hand, we can be certain that Persian business law did not influence the Jews; for the latter never came in contact with it! First of all, due to Persia's contact with the higher type of Babylonian law, the former's civil law lost its individuality.[1] Then again the Jews met the Persians in the land of Babylonia and west of that country. We have proof positive that the incoming of the Persians made no impression upon the business law of the country. Great numbers of business contracts from all along the Persian period, even those containing Persian names, differ in no way from those of the pre-Persian period. This illustration should guard us against generalization. Granting that Greek culture influenced the Jew in his philosophic speculations, it has still to be proved that it also influenced the latter in his everyday law. Similarly, in the case of Roman influence, we must abstain from generalizing.

The purpose of these remarks is not to deny the influence on Jewish law exerted by Persia, Greece, or Rome. Their object is to point out that the prevailing modern theory is open to objections both as to method and as to statement, and thus should help to overcome the prejudice among scholars in favor of that view to the exclusion of anything else. At all events, it will readily be granted that there is nothing inherent in the fact that Mishnah was redacted in Palestine and that the Palestinian Jewry was influenced by Persian culture and Graeco-Roman culture to exclude the possibility of tanaitic law being in relation to Babylonian law.

In Babylonia, when one paid a contracted debt, it was the custom that the creditor returned or destroyed the bill of debt, the tablet. This custom was already in accordance with the laws of Sumu-la-ilu,

[1] Justi in *Grundriss der Iranischen Philologie*, II, 433.

the predecessor of Hammurabi.[1] To issue a receipt was unusual.[2] In the case of a payment in part the Babylonian either issued a receipt or destroyed the original bill of debt and had a new bill drawn up.[3]

In the light of the foregoing statement we read the following Mishnah:

> He who paid a portion of his debt, Rabbi Judah says, the creditor should exchange his bill of debt for a new bill: Rabbi Jose says he should issue a receipt [Mish. *Bab. Bat.* 10:6*b*].

It is perfectly clear that this difference of opinion among the jurists has not its source in the Bible. It is equally clear that there was no tradition on the subject. We must thus fall back on the common law of the land. In the case of a payment in part, it was the custom of the land either to issue a receipt or to draw up a new bill. The Babylonian, as far as we know, had no laws prescribing the one or the other. The Jewish jurists, however, detected that to issue or not to issue a receipt was of advantage to one of the parties concerned. The underlying principle was, some jurists argued, that the debtor could not be burdened with the effort or the expense involved in keeping a receipt. Hence the custom of the land to draw up a new bill. But as there were also people who used to issue a receipt, there were others who maintained that it was in accordance with the law: the disadvantage must go with the debtor.

The relation of Jewish law to Babylonian is evident.

Jewish law recognizes as valid a note on demand.[4] The bill must, however, contain an explicit clause to that effect.[5] So also does Babylonian law.[6] Jewish law also speaks of a bill of debt that contains neither a date for payment nor a statement that payment should be made on demand. As for payment, we have seen above that in case the loan was made against a piece of real estate as a pledge, the bill is due after a lapse of one year; otherwise let mention be made here that the bill is due after thirty days. In

[1] *CT*, IV*a*. [2] *AbR*, p. 71.
[3] *BT*, *Dar.*, 17, and 333 in connection with 354.
[4] Tur, *HM* 73:4. [5] *Ibid.*
[6] Cf. *CT*, VIII, 36*a*, 37*c*; cf. *HG*, III, 56–57.

another place we shall show that also the Babylonians had more than one fixed date for payment. But leaving all this out of consideration for the present, we must ask here whence comes to Jewish law the institution of the "loan without terms as to payment," of which already the *Tosephta* and other tanaitic sources speak as if of one well known and recognized by all.[1]

In Babylonia the institution of the "bill without terms" is well known.[2] In the banking system of the Babylonians the institution of the antichresis was a matter of daily practice.[3] The creditor received from his debtor a fruit-bearing object and he enjoyed its fruits in lieu of interest. Naturally in such a transaction it is of a minor importance to stipulate when it should terminate: it depends on the nature of the pledge. Under such circumstances it is easy to understand how the institution of the "bill without terms" arose. But Jewish law does not legalize usurious transactions; the antichresis is prohibited. Clearly the Jewish jurists could not ignore the business customs of the land, so they recognized the Babylonian institution of the bill without terms and spoke of it as of one which no one knew whence it came and which no one questioned. The dependence of this tanaitic institution on Babylonian law is apparent.

The receipt, the written acknowledgment of payment of money or delivery of chattels, was highly developed in Babylonia. "Die Quittung hat schon eine exuberante Sinn. Sie ist nicht nur dazu da um den wirklichen Empfang des Geldes zu bestaetigen; sie ist eine Losung von der Schuld, mag nun die Losungs causa Zahlung, Erlass, Novation, Ueberweisung mit Zahlung an eine dritte sein, oder, welche sie wolle."[4]

According to Jewish law one who marries a virgin must write her a bill stating that if the woman be later divorced or widowed she should receive two hundred zuz or their equivalent out of his property. The parties to the contract are not at liberty to agree on a

[1] Tosephta *Bab. Mes.* 10:1, *Bab. Mak.* 3*b*.

[2] Cf. for the old Babylonian period: *HG*, IV, 873, 914, etc.; for the Assyrian period: Johns, *Deeds and Documents*, 37, 54, 32, 19, 239, or *AR*, 243–45, 25, 316, etc.; and for the neo-Babylonian period, *BT*, *Dar.*, 434, quoted above, is a good example.

[3] Cf. Kohler, *BR*, I, 15 ff.

[4] Kohler, *BV*, p. xxvii.

bill stipulating a sum smaller than the one mentioned above. In case the man and the woman agree that the former should obligate himself to pay, for instance, only one hundred zuz, the transaction must be made by means of the receipt.

Rabbi Judah says, if he desires, he writes to his virgin bride a bill of settlement of two hundred zuz and she issues to him a receipt stating: I have received from thee one hundred zuz [Mish. *Keth.* 5:1, and cf. *BJ*, *HM* 73:20 ff., etc.].

Leaving out of consideration the merits of the case, we notice that the Mishnah quoted above evidently presupposes an "exuberant" use of the receipt. For it is clear that the receipt issued to the husband is not a written acknowledgment of the payment of money or the delivery of chattels; it is essentially a release from an obligation. Yet its validity is taken for granted and it is spoken of as a matter of course. Why? It was the common law of the land for centuries.

Silim-Ištar assigns her property to her married daughter. As long as the donor lives she will enjoy the income. She cannot give the property to any other person. Upon the death of the donor the donee will come into the complete possession of the property. And even in the lifetime of the donor the property is no longer hers; it is completely in the possession of the donee; the former has only a claim upon the fruits of the property [*Nbk.*, 283].

The foregoing contract thus explicitly states that the donee secures the possession of the property immediately, while the donor has a claim upon the enjoyment of the fruits during the latter's lifetime. In the light of the foregoing contract we shall now read the following Mishnah:

He who writes his property to his children *retento usufructu* must explicitly state that the children acquire title to the property immediately, although they will enjoy its fruits only after the death of the donor—these are the words of Rabbi Judah; but Rabbi Jose says that it is not necessary to state it [Mish. *Bab. Bat.* 8:7].[1]

What is the meaning of this difference of opinion? The legal situation before us is this: The institution of the *donatio retento usufructu* is well recognized; property donated under such circumstances immediately comes into the possession of the donee while the

[1] "Said Rab the law is in accordance with Rabbi Jose" (Bab. *Bab. Bat.* 136*a*).

donor retains his right to the income as long as he lives. Although all recognized this institution, in spite of that the contract contains an explicit clause to that effect. This being the legal situation in the land for centuries, some Jewish jurists maintained that a bill of a *donatio retento usufructu* must be drawn up exactly like the one current in the land, while other jurists, laying stress on the spirit of the institution, refused to regard the requirement of form as imperative.

The relation of Jewish to Babylonian law in the case before us is evident.

We have cited a dozen cases (to which number many more can be added, especially if we could afford to enter into lengthy expositions) to demonstrate that Jewish law, amoraic and tanaitic, is directly related to Babylonian law. What is the nature of the relationship? Shall we say that the former "borrowed" from the latter and it is thus in a way a mere copy? Or can we maintain that there is no basis for the foregoing assertion, and that the relationship consists in the fact that Jewish law was "built" upon the legal and business customs of the land of the two rivers and its economic structure? Jewish law, we should then say, is entirely the work of the Jewish people, in the creation of which Babylonian legal and business customs, common law, entered as an element. If the case be so, how important was this element, what were the elements with which it combined, and what was the process; or, in a word, what are the elements and the structure of Jewish law? As far as Jewish commercial law is concerned, the writer plans to deal with this problem in another place.