THE DEPENDENCE OF THE TALMUDIC PRINCIPLE OF ASMAKHTA ON BABYLONIAN LAW

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THE LAW which governed and regulated the life of the Jew in former days is contained in two distinct literatures: Biblical literature, especially the five books of Moses, and Talmudic literature. In the latter we must distinguish between an elder stratum and a younger one. The chief work containing the former is known as the Mishnah, a book compiled about 219 A. D.; the chief work containing the latter is known as the Babylonian Gemara, which is a sort of a running commentary to the older stratum of law, especially the Mishnah. The most striking difference between these two literatures as law is the following. The immediate and sole authority for the law in the Bible is God. The Bible reads, as we all know: 'And God spoke to Moses saying, speak to the children of Israel saying,' etc. On the other hand, the Talmudic legal literature resembles our own Anglo-American law: the immediate authority for a certain law is the opinion of this or that judge or jurist. It reads as follows: If one does so and so, he should do this, in the opinion of Rabbi A; but Rabbi B says he should do that; and sometimes there follows the opinion of Rabbis C and D. These were not considered as the ultimate authority for the laws. As in the Bible, so in the Talmudic literature, God is looked upon as the ultimate and sole authority. Yet, for various reasons, the Jews could not regard the law contained in both literatures as one and the same. Thus, the problem arose, what is the relation of the one to the other? After a long struggle, the Mishnah propounded the following theory: Moses on Mount Sinai received two bodies of law: the Law and a sort of a running commentary to it. He was commanded to write down the former, while the latter was to be taught orally. The Law written down is the one we have in the five books of Moses; the other which was intended to be taught orally is the one now embodied in the Talmudic literature. Thus there were given to the Jews a written law and an oral

law, both intrinsically related to each other, both contemporaneous with each other, and both possessing the same divine authority. This oral law, commonly known as Rabbinic law or as Talmudic law, we shall designate as Jewish Law. The older stratum in this we shall refer to as Tannaitic Law, because the jurists cited are known as Tannaim; the latter we shall call Amoraic Law because the jurists cited are known as Amoraim.[1]

One of the outstanding features of Jewish commercial law is the principle known as Asmakhta. Its legality was a bone of contention among the Jewish jurists for a long time. And finally when it was decided in favor of that principle, the doctors could not agree as to its application and exposition. Writes one of the famous Rabbis of the Medieval period: 'The scholars of former and later generations have fought concerning the principle of Asmakhta—what is the so-called Asmakhta and what does it depend upon; and I have not seen one that agreed with his colleague' (Solomon ibn Adrat, *Responsa,* vol. 1, Resp. 933).

The following exposition has the merit of, at least, being put forth by the latest Jewish Code.[2] An obligation is valid only in the case when there could be no question raised as to its *bona fide* nature on the part of its maker. Now there are three kinds of obligations in which the question could be raised. They are called Asmakhta obligations.

First, there is the kind of obligation the execution of which depends from the very first upon the good-will of persons other than the maker. For instance:

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[1] In the course of studies that I have made in Jewish commercial law, I have come to the conclusion that three elements entered into its creation: the economic life of the valley of the Euphrates and the business customs of the people of that country—the Babylonian element; Biblical laws and the Prophetic spirit of the Bible—the Palestinian element; and the formulation of the new law as if it were an outgrowth of Biblical law—the element of Judaization. We meet with cases, for instance the institution of inheritance, which show no trace of Babylonian influence. But, as a whole, Jewish commercial law is the product of a harmonious and thorough-going blending of those three elements, though the proportions of the elements vary in the different groups of laws. The results of the present paper fall in line with this conception of the nature and rise of the law embodied in the Talmudic literature, though they do not necessarily presuppose it.

[2] Cf. Moses Isserel's *Hosh. Mish.* 207. 13. We do not mean to subscribe to this presentation. It is hardly possible to arrange all the cases of Asmakhta under three headings (cf. *Baba Mes.* 67a).

A commission merchant received money from his dominus to buy wine, the delivery of which was to be made at a later date when wine would be higher in price. The time for delivery arrived but the commission man did not deliver the wine. Instead, he brought back the money received from his dominus. The latter refused to accept the money; he demanded his wine or a sum of money sufficient to buy the same quantity at the present market price. Jewish law instructs the courts to render a judgment in favor of the commission man. (Bab. *Baba Mes.* 73b.)

The Jewish jurists give the following legal explanation:—At the time of the promise, the commission merchant could not be absolutely certain that he would be in a position to fulfil it, since the execution depended upon the consent of others: other people had to agree to sell him that sort of wine. The obligation was thus dependent upon conditions over which the promisor had no absolute control. Such an obligation is an Asmakhta and hence void (*ibid*).

Secondly, there is the kind of an obligation the execution of which is indeed in the hands of the maker, but which contains an element of exaggeration. For instance:

A man leases a field to till, and makes the following stipulation: 'Should I not till it, I hereby agree to pay you the exorbitant sum of $1,000.' He did not till the field, and he was willing to pay the owner of the field the actual loss that he made him incur, but he refused to pay the $1,000. Jewish law instructs the judges to return a verdict in favor of the lessee. (Bab. *Baba Mes.* 104b, Misnah *ibid.* 9. 3, and Caro Code 207. 13.)

For, the obligation from the very beginning was not bona fide.

Thirdly, there is the kind of obligation, the execution of which is neither in the power of the maker nor in the power of others; it is a case of chance. For instance:

A says to B, 'I make a bet that so and so will turn out. If I lose, I shall pay you a certain sum of money.'

In the case before us, it would seem that the bona fide nature of the obligation could certainly be attacked. Contrary to all our expectations, Jewish Law maintains that such an obligation is valid. This is not an Asmakhta-obligation (cf. Bab. *Sanhed.* 24b and *Tur Hosh. Mish.* 207. 7, Caro Code 207. 13).

Jewish Law claims no Biblical basis for it. Was there any certain tradition for this far-reaching legal principle? Let me cite further:

If one paid off a portion of his debt, the creditor deposited his bill and the debtor said to the depository, 'If I shall not have given you the rest of my debt between now and a certain day, return the bill to the creditor.' The day set arrived, and the debtor had not paid. R. Jose says the depository should give the bill of debt to the creditor, but R. Judah says he should not give it to him. (Mishnah, *Bab. Bat.* 10. 5.)

The Mishnah offers no hint as to the basis underlying the difference of opinion between these two authorities. If they knew of the principle, we must say that R. Jose does not recognize it, while his colleague does. This is really the opinion of the Amoraim (Bab. *Baba. Bat.* 168a). But we must notice the following:

He who pledged a house or a field and said to the pledgee, 'If I shall not have given payment to you between now and a certain day, I have nothing in your hands.' The set date arrived and the maker did not carry out his obligation. His stipulation must be carried out—these are the words of R. Jose. Said R. Judah, 'How can the pledgee acquire title to something that is not his?' 'Surely he must return the pledge.' (*Tosephta Baba Mes.* 1. 17.)

This is also a clear case of Asmakhta as expounded by the Amoraim. But did those Tannaim know of this principle? R. Judah says that in our case there is nothing that could transfer the object from the possession of one to that of another. What does this mean? Does the jurist deny in such a case the very existence of a state of contingent ownership, as does the principle of Asmakhta? Or does he merely say that the mere fact of the pledgor's failure to pay the debt does not convert the state of contingent ownership in which the pledge finds itself, into a state of ownership vested in the pledgee? Tannaitic Law goes on to say that all authorities[3] agree that the following obligation is valid:

Two people laid claim to a house or a field and one said to the other, 'If I do not come with my substantiating evidence before a certain day, I agree to waive my claim.' The day set arrived but he did not present his evidence, surely he lost his claim. (*Tosephta Bab. Mes.* 1. 17b).

So if we say that Tannaitic Law knew of the principle of Asmakhta we must conclude that all agreed that such a case is

[3] Read, in the Tosephta 'R. Judah' instead of 'R. Jose.' Evidently a copyist misread 'RJ.'

not one of Asmakhta. Now, Amoraic law deals with exactly such a case, and there the Amoraim regarded it as a clear case of Asmakhta. We are not interested here in the exposition of these Tannaitic laws.[4] Do the Tannaitic sources know of the principle of Asmakhta or not? This is the question that concerns us here. Later Amoraic teachers assure us that they did. But that is not the point; do we have internal evidence that Tannaitic law knows of the principle of Asmakhta? It is certain that the Tannaim do not speak of this principle as such. More than that, even the early Amoraim like Rabh, Samuel, R. Johanan, etc., do not mention the principle of Asmakhta, although we find sometimes that the late Amoraim speak of the principle 'in the name of' certain early Amoraim.[5] And even the later Amoraim could not agree as to the legality of the principle. One famous judge (R. Nahman) lived long enough to change his mind on that subject. Finally, we may notice that even the late compilers of the Talmud did not agree as to the extent of the legality of the principle. We have at least three 'decisions' rendered by them concerning it:

The law is in accordance with R. Jose's statement that an Asmakhta obligation is valid (Bab. *Baba Bat.* 168a). The law is that an Asmakhta obligation is valid provided the failure to carry out the obligation was not due to unavoidable causes and provided further that the obligation was sanctioned by the *'qinian sudar'* and in the presence of a recognized court (Bab. *Ned.* 27b). The law is not in accordance with R. Jose's statement; but under all circumstances an Asmakhta obligation is void (Bab. *Baba Bat.* 168a).

It is perfectly clear that there did not exist a tradition concerning this principle. And, thus, we come to the conclusion that the principle had its origin neither in the Bible nor in tradition. This will become even clearer when we cite two or three judicial decisions which involved or should have involved the principle of Asmakhta.

[4] The Jerusalmi states that all agree that when a man hires his son out to learn a trade, all Asmakhta obligations are valid; otherwise, continues the Jerusalmi naively, people will be unable to make a living (Jer. *Git.* 5: 8). Cf. also Maim., *Mekhirah*, 11. 4, and commentaries.

[5] R. Huna (in Bab. *Ned.* 27a-b) does not mention the principle. Jer. mentions R. Abahu (*Bab. Bat.* 10. 5) and the Bab. mentions later teachers who spoke of the principle 'in the name of' Rab and R. Johanan, (*Baba Bat.* 168a, *Ned.* 27b).

One deposited his papers with the court and said, 'If I do not come with additional evidence within 30 days, I agree that the papers deposited should be considered void.' He met with an accident and did not come. Said R. Huna, the papers deposited are void. . . . But, continues the Talmud, is not this a case of an Asmakhta?—and an Asmakhta obligation is not binding. Here it is different; the papers were deposited, and whenever the object of litigation is deposited, there can be no question of Asmakhta. Did we not learn as follows: 'He who paid a portion of his debt and the creditor deposited the bill of debt,' etc. And R. Nahman said the law is not in accordance with R. Jose's statement in which he does not recognize the principle of Asmakhta. Here it is different, since he said he agreed that his papers should be considered void. But, the Talmud continues, the law is that an Asmakhta obligation is valid provided. . . (Bab. *Ned.* 27a-b.)

R. Kahana claimed money from Rab Bar Sheba. Said the latter, 'If I do not pay you within a certain time, collect from this wine before thee.' R. Papa was of the opinion that an Asmakhta obligation is void only in the case of land, since, as a rule, it is not sold; but in the case of wine, since there is always a market for it, it is like ready cash. Said R. Huna, the son of R. Josua, to R. Papa, 'Thus it was said in the name of Rabha, "any obligation involving an 'if' is not valid." ' (Bab. *Bab. Mes.* 66b.)[6]

This is the earliest statement with reference to the applicability of the principle of Asmakhta. The famous late jurist Rabha is said to be its author.

In view of the fact that this legal principle is not based on the Bible or tradition, and in view of the fact that, as far as internal evidence is concerned, it is a product of Jewish jurists who lived in Babylonia, a product of Babylonian Jewry, it is natural that we should inquire what was the Babylonian law and business custom with regard to it.

There can be no doubt that the Babylonians knew nothing of an invalidating principle of Asmakhta.[7] But first of all, we

[6] For further instructive examples, cf. Bab. *Baba Mes.* 104b, 109b, and 73b-74a.

[7] Thus from the Old Babylonian law: 'He who breaks the agreement, in as much as he has sworn, should pay a certain sum and in addition he will have his head covered with hot asphalt' (cf. *Hamm. Gesetz*, 3, p. 223). And from the Assyrian period: 'He who breaks the agreement should place in the lap of Ninlil 10 minas of silver and 10 minas of gold' [an enormous sum] (John, *Deeds and Doc.*, 161). From the Neo-Babylonian period: 'One rents a house at a rental of five shekels per annum. Both parties agree that he who breaks the agreement should pay the other party 10 shekels' (Camb. 97, see also Dar. 25, and 378, Nbk. 103, Dar. 434, and Artax. in *BE.* vol. 9 by Clay).

must notice that the Babylonians had their own conception of obligations involving a fine in case of default. 'It seems,' writes Prof. Joseph Kohler, 'that a debtor had the right to pay the fine in place of the fulfilment of the obligation; the agreement to pay a fine was conceived as an alternative obligation' (*Aus Babyl. Rechtsl.* 1, § 6). Now this is just the Jewish view. The principle of Asmakhta, in part, simply says this: An agreement to pay a fine in case of default is void, unless it is conceived, as it was by the Babylonians, as an alternative obligation.

Then again we must bear in mind that an agreement involving a forfeiture clause was sometimes drawn up as follows:

> If on the 29th of Nissan, Marduk-naṣir-aplu shall not give 3 minas to Bel-ibni, Bel-lu-šulmu and Lu-balaṭ then belong to Bel-ibni the three minas as the complete purchase price (Dar. 319. 2, cf. also 309 and Kohler's note, *op. cit.* 3, p. 33).

This simply means that at the time the loan is made the creditor says to the debtor, 'You will either pay your debt at the date stated, or this money that I am now giving you is purchase price for the object which you are now handing over to me as a pledge.' This is just what Jewish law requires. The principle of Asmakhta says that a debtor can forfeit his pledge only if the agreement is made out in a way similar to the above mentioned Babylonian contract (קני מעכשיו).

We are now in a position to approach the problem before us.[8] In as much as the Jewish business men followed the common law of the land in which they lived, they had no principle of Asmakhta. But in the case of an obligation involving a fine in default, they had a peculiar notion; and in the case of a transaction with a forfeiture clause, the contracts were at times drawn up according to a certain fixed form. The causes underlying that form do not concern us here.[9] What does concern us is that there existed such facts. Some Jewish jurists then insisted upon that form, claiming that otherwise the obligation would not be binding; while others did not insist upon

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[8] No attempt is made here to give a detailed history of the principle of Asmakhta. We are here interested in showing its dependence on Babylonian business and legal customs.

[9] Cf. Kohler's observation quoted above.

it. Such a situation was however intolerable to the Jewish jurists; they wanted every practice to be fixed and provided with a legal basis. The early jurists knew nothing of a principle of Asmakhta. Seemingly, they did not progress far in their expositions of the existent cases (cf. Tosephta quoted above, במה יקנה הלז). As time went on, the jurists were more and more inclined to favor the existent practices of the land mentioned above. Those, on their surface, involved the question of the state of mind of the maker of the obligation. This then formed the starting point for discussion in the schools. In the course of time, there was evolved a full-fledged theory which covered the existing cases and similar ones. The doctors in the Babylonian Law Schools then coined for it the technical term of Asmakhta, a word unknown not only to Tannaitic Law but also foreign to the Palestinian Amoraim. That was all accomplished mainly within the four walls of the law academies. The judges and jurists refused to subscribe to it. It was not until the time of the famous judge R. Nahman that the judges began to pay attention to it. That judge himself at first refused to recognize it, but later reversed his position. A younger contemporary succeeded in bringing forth a clear statement of the principle, כל דאי לא קני. And it was a generation later that one authority felt justified in claiming that it was a matter of daily practice that Asmakhta-obligations are void (Bab. *Baba Bat.* 173b).[10]

Thus the Jewish legal principle of Asmakhta means on the one hand the legalization of a few Babylonian practices, and on the other hand the extension of its own legal theory to cover all other similar cases.

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[10] The statement cannot however be taken too literally, for we find that the latest editors of the Talmud were not agreed as to its application, as stated above.