



## The Halakic Midrashim

THE HEBREW word Halakha (hence the English form Halakic) comes from the root halakh which means "to go." It represents the way in which a Jew should conduct himself, the rules and patterns of Jewish behavior and consequently it is a term for "Jewish law," for the legal side of Judaism. There is another Rabbinic term Aggadah (from a root meaning "to tell") and this represents all the stories, history, philosophy, folk-lore, science and the like found in Rabbinic literature. In short Aggadah embraces all the non-legal aspects of Judaism, Halakha all the legal side of Judaism.

The word Midrash (plural Midrashim) comes from a root meaning "to inquire" or "to search" or "to examine." The basic idea is the examination of Scripture to make it yield more than lies on the surface. For instance, a close examination of the Scriptural references to the Sabbath will give us a clearer idea of what is meant by "work" on the Sabbath than a merely superficial reading would do. The great teachers of Judaism engaged for centuries in this kind of "search" or "inquiry" and their work has been collected in various forms. These works are known as the Midrashim.

Most of the Midrashim we now have are *Aggadic* in nature. But the earliest and those enjoying the greatest authority are *Halakhic*, hence the term *Halakhic Midrashim*. These date from the second century of the present era and earlier. The Rabbis of this period, whose views are found in the *Halakhic Midrashim*, are known as the *Tannaim* (plural of *Tanna*, "a teacher"). This word *Tannaim* is an Aramaic one, Aramaic being a sister language of Hebrew (like Dutch and German) and widely spoken in this and the next period. Hence another name for the *Halakhic Midrashim* is the *Tannaitic Midrashim*.

The period of the *Tannaim* is the first two centuries of the present era but the *Midrashic* process itself is much earlier going back to the time of Ezra, the fifth century B.C.E. Indeed, some of the material in these *Tannaitic Midrashim* is much earlier than the period of the *Tannaim*.

As will be seen from the examples given in this section, the *Halakhic Midrashim* are in the form of a running commentary to the legal portions of the Five Books of Moses. Verse by verse the passages are examined and the opinions of the Rabbis, often differing opinions, are quoted. The whole process has the aim of connecting the law to the Scriptural verse or of reading it out of the Scriptural verse.

There is no space in this book to consider in detail all the material which we now have belonging to the *Halakhic Midrashim*. Instead the following selections are from the three main *Halakhic Midrashim*—*Mekhila*, *Siphra* and *Siphre*. These three words are all Aramaic and mean: *Mekhila*, "measure"; *Siphra*, "the book"; *Siphre*, "the books." The *Mekhila* is a running commentary on the book of Exodus, the *Siphra* on the book of Leviticus, and the *Siphre* on the books of Numbers and Deuteronomy. (There is no *Halakhic Midrash* on Genesis because there is hardly any legal material in this book.)

## The punishment for stealing

The different classes of stealing and their appropriate punishments.

When a man steals an ox or a sheep, and slaughters it or sells it, he shall pay five oxen for the ox, and four sheep for the sheep.  
EXODUS 21:37

The teachers mentioned in this passage belong to the first (*Johanan son of Zakkai*) and the second centuries.

The slaughterer and the seller were already included in the verse: "If the thief is caught, he shall pay double" (Exodus 22:6). But now Scripture excludes these two cases from that general rule in order to be stricter with them for they have to pay four or five times as much. That is why this passage, Exodus 21:37, is recorded in the Torah.

Scripture says that a thief has to pay double the amount he had stolen when he is caught. This rule would have embraced the case of the thief who slaughters or sells the animal he has stolen. But Scripture states this law separately to teach that for slaughtering and selling the penalty is more severe and is four or five not merely double.

"An ox or a sheep"—to teach that he is to be punished for each of them. "And slaughters it." I know only if he slaughters it, how do I

know that the same applies if he sells it? Because Scripture says: "or sells it." But even if Scripture did not state it explicitly I would have argued: If he is punished when he slaughters it, when he sells it he should certainly be punished. But if this were so you would have derived the punishment by an argument and therefore Scripture states explicitly: "or sells it," to teach you that one does not arrive at a legal punishment merely by means of an argument. Another explanation: Slaughtering is compared to selling and selling to slaughtering. Just as the penalty for selling only takes effect when he removes the animal from the domain of its owner so, too, the penalty of slaughtering only takes effect when he removes the animal from the domain of its owner. Further, just as the case of selling involves an animal which may be eaten, so too the case of slaughtering only applies to an animal which may be eaten. And just as the case of selling involves an animal from which it is permissible to have benefit, so too the case of slaughtering only applies to an animal from which one may have benefit. And conversely, just as the case of slaughtering cannot be undone, so too the penalty for selling is only when the sale is permanent. And just as the case of slaughtering is total, so too the case of selling only applies where the sale is total.

An ox or a sheep means that the penalty is for each and not only when he slaughtered or sold an ox and a sheep. The Mekhilta now argues that even if Scripture had not stated explicitly the case of selling I would have known that the penalty applies in this case, too. For surely a greater penalty should be given to the man who sells it and gains money thereby than to the man who slaughters it and gains no money. If, then, Scripture had simply recorded the case of slaughtering, we would know ourselves that the same penalty applies to the case of selling. Why then should Scripture have to state it explicitly? To this the answer is given that the case of selling is dealt with explicitly in Scripture to teach us that logical argument, strong though it is, should not be used as the sole basis for inflicting a penalty on someone. After all, one's argument, however convincing, may be mistaken. Consequently, Scripture is not content with giving us a basis for argument but states the law against selling explicitly. Another reason for Scripture stating both slaughtering and selling is then mentioned. This is so that we might compare the two and derive some new rules by the comparison. The principle here is that when Scripture compares two cases in the same verse it can

logically be assumed that whatever is true of one case is also true of the other. The following examples are the particular points of comparison.

Obviously a man cannot be convicted of the crime of selling until he has actually sold what he has and he then removes it from its original owner's domain. Supposing a man slaughters his neighbor's animal while it is still on his neighbor's land? The comparison of slaughtering and selling is to teach that just as the law for selling the animal only applies when it has been removed from the owner's domain, so too the law for slaughtering. Furthermore, selling obviously involves an animal which may be eaten. For nowhere in Scripture do we find a law which states that an act of selling an animal renders it forbidden to eat or to have benefit from it. By the same token the law of slaughtering only applies if, after the slaughter, the animal can be eaten and benefit can be had from its meat. This excludes a diseased animal which is teretah—*forbidden to be eaten*—and an animal which killed a man, from which no benefit may be derived when it is slaughtered i.e. its meat must not be sold.

However just as slaughtering is compared to selling, so too selling is compared to slaughtering. A slaughtered animal cannot be brought back to life. The act is irrevocable. Supposing a man sold an animal for a short period i.e. he sold its use for thirty days. Such a sale would not warrant the penalty of four and five because it is not comparable to the irrevocable act of slaughtering. Similarly, one can only slaughter the whole of an animal not part of it. By the same token the penalty of four and five is only demanded where the whole of the animal was sold but not where a part of it was sold.

Another explanation: "When a man steals." You would think that animals set aside as Temple sacrifices are included in this law. So then if a man stole them from the Temple and slaughtered them outside the Temple area he must pay four or five. Scripture, however, in the book of Leviticus, makes an exception in the case of slaughtering Temple animals. It declares that in their case the penalty is a far stricter one than paying four or five and is that of being "cut off." Now one could have argued: If in the case of slaughtering Temple animals there is the stricter penalty of being cut off, how much more should it also include the lighter penalty of four and five? This is why Scripture says: "This is what the Lord hath commanded" (Leviticus

17:2). The law concerning Temple animals is the law of "cutting off." It is not the law of monetary restitution.

Leviticus 17:1-7 says that if a man slaughtered animals set aside for Temple sacrifices outside the Temple area he is to be punished with the penalty of being "cut off from his people." This means a kind of death sentence, not by the human court but at the hand of God at His own time and in His own way. The Mekhilta states here that one might have argued that in addition to the severe penalty of being cut off there is also the penalty of four and five. But in the passage dealing with Temple sacrifices slaughtered outside the Temple Scripture says: "This is what the Lord hath commanded," as if to say this penalty and no other in addition.

"He shall pay five oxen"—that is four and the original ox. "And four sheep"—that is three and the original sheep.

One might have understood the term "five" to mean five in addition to the value of the original animal and "four" to mean four in addition to the original animal. The Mekhilta states that this would hardly be the proper meaning of "four" and "five."

Rabbi Meir said: Come and see how much work is valued by God even though He brought the world into being by merely saying a word. The penalty for the ox which does work is five while the penalty of the sheep which does no work is only four. Rabbi Johanan son of Zakkai said: The Holy One, blessed be He, is concerned about the dignity of His creatures. In the case of an ox, which walks on its own, he has to pay five, but in the case of a sheep, which he has to carry, he only has to pay four.

The question now discussed is why should the thief have to pay more for an ox than for a sheep, why "five" for the ox and only "four" for the sheep? Two reasons are suggested. The ox is an animal which does work while the sheep is kept for its wool and mutton but not for its work. Scripture so values work that it always places a higher valuation on a working animal such as an ox. The second reason is that the thief when stealing the ox did not have to lower his dignity. But the thief when stealing a sheep had to carry it on his shoulder and this lowered his dignity. Scripture respects human dignity, even that of a thief, and therefore releases the man who stole

the sheep from part of the payment because he has already been partly punished in his loss of dignity.

Rabbi Akiva said: "for the ox"—"for the sheep"—this is to exclude a beast of chase. For we might have argued that restitution has to be made when a domestic animal is stolen and restitution has to be made when a beast of chase is stolen. Therefore, it might have been argued, just as the restitution in the one case involves the penalty of four or five, so, too, in the other case. No, the two cases are unlike one another, for the domestic animal can be offered on the Temple altar as a sacrifice but the beast of chase cannot be offered on the altar so it does not warrant the penalty of four or five. But a domestic animal with a blemish which cannot be offered on the altar still warrants the penalty of four and five! This would be an argument to warrant the penalty of four and five for the beast of chase even though it cannot be offered on the altar. No, even though a domestic animal with a blemish cannot be offered on the altar it belongs to a species which can, whereas the beast of chase cannot as a species be offered on the altar. Scripture therefore says: "for the ox"—"for the sheep"—and excludes the beast of chase.

A "beast of chase" is an animal such as a deer. These may be eaten but were never offered on the altar in the Temple. On the basis of this the argument is developed to exclude them from special penalty. To make absolutely sure of this according to Rabbi Akiva, Scripture states "for the ox"—"for the sheep"—to suggest only for these.

## Moral human relations

*The laws of living with others ethically.*

Ye shall not steal; neither shall ye deal falsely, nor lie to one another. And ye shall not swear by My name falsely, so that thou profane the name of thy God: I am the Lord. Thou shalt not oppress thy neighbor, nor rob him; the wages of a hired servant shall not abide with thee all night until the morning. Thou shalt not curse the deaf, nor put a stumbling block before the blind, but thou shalt fear thy God: I am the Lord.

LEVITICUS 19:11-14

**"Ye shall not steal." Why is this stated? Because Scripture states with regard to theft that the thief has to pay double (Exodus 22:3). That is the penalty. How do we know of the prohibition? Therefore Scripture says here: "Ye shall not steal."**

*The Rabbis believed that Scripture nowhere states a penalty for an offense unless it also somewhere warns Israel against committing the offense.*

**"Ye shall not steal." This applies even if you steal only for the purpose of causing the victim anxiety; or if your intention is to pay double or four or five. Ben Bag Bag says: Do not even steal back from a thief that which he has stolen from you lest you appear to be a thief.**

The Siphra interprets the commandment to include cases of theft which are still forbidden even though they might not be considered as real cases of theft. For instance, supposing a man steals, not to keep that which he has stolen, but simply to make the victim anxious and to return the stolen goods eventually; this is still theft and forbidden. Or take the law that if a thief is caught he has to pay double the amount or if he slaughters or sells an ox or a sheep that he has stolen he has to pay four or five times as much. Supposing, then, a man steals in order to benefit the victim by letting him have either double or four or five times the value eventually? The Siphra rules that this, too, is forbidden. Ben Bag Bag was a first century Palestinian teacher. (Some suggest that he was a convert to Judaism and that his curious name is to be explained in this manner: Bag is formed of the letters bet and gimmel which equals two and three. Now "five" is the letter hé which was added to the names of Abraham and Sarah. Hence, since a convert to Judaism is said to be the "son of Abraham and Sarah" he would have been called Ben (the son of) Bag Bag. In fact, there is another teacher of the same period called Ben Hé Hé!) According to Ben Bag Bag it is forbidden to steal even from a thief and even that which the thief has himself stolen. If a man can identify his property he should bring the case before the courts and not take the law into his own hands. Authorities in the Talmud in a later generation said, however, that if there is no possibility of getting redress in the courts then he may take the law into his own hands and steal his own property back from the thief.

**"Ye shall not steal: neither shall ye deal falsely." Why is this stated? Because when Scripture says: "And deal falsely therein" (Leviticus 5:22) we are told the penalty (restitution plus a one-fifth penalty; Leviticus 5:24), but how do we know the prohibition? Therefore Scripture says here: "Ye shall not steal; nor lie to one another."**  
*See the comment on the first paragraph.*

**"To one another" ("a man to his neighbor"). I only learn that it applies to a man offending against a man. What if a man offends against a woman? Therefore Scripture says "his neighbor" to include everyone.**

Obviously the term "man" is not intended to exclude the application of the law to women. A woman is just as much a fellow-citizen, a "neighbor," as a man.

**"Ye shall not steal; neither shall ye deal falsely, nor lie to one another. And ye shall not swear by My name falsely." Which means that if you do steal you will eventually deal falsely and eventually lie and eventually swear falsely.**

This explains itself. The Siphra takes each of the offenses recorded as leading on to the others.

**"And ye shall not swear by My name falsely." Why is this stated? Because Scripture states: "Thou shalt not take the name of the Lord thy God in vain" (Exodus 20:7). From this I might have argued that the penalty only applies when the special Divine name has been used. How do we know that it applies to any of the other names of God? Therefore Scripture states here: "And ye shall not swear by My name" which means by any name I have.**

The "special Divine name" is the four-letter name translated as Lord. In the third of the Ten Commandments this is the term used. Hence the Siphra states that it might have been argued that the full penalty is only where this special name is used. But since in our verse there is simply a reference to "My name" it includes any name by which God is known e.g. God, Almighty, and so forth.

**"So that thou profane the name of thy God." This teaches us that a false oath is a profanation of God's name. Another explanation: if you swear falsely your life becomes profane to the wild beasts.**

Scripture says: "And ye shall not profane My holy name; but I shall be hallowed among the children of Israel" (Leviticus 22:32). The rabbis say that there are two ideas here: 1) The avoidance of Hillul Ha-Shem (the profanation of the Name); 2) Kiddush Ha-Shem (the sanctification of the Name). Hillul Ha-Shem means to do anything which brings religion into disrepute e.g. if a man so behaves that people despise him and the religion he adheres to because it has not succeeded in making him a better

person. Kiddush Ha-Shem means behaving so well that people say: *If this is the kind of person the religion produces it must be supremely worthwhile. The second explanation here is rather difficult. It is probably based on the idea that while God has ordered the animals, as it were, to refrain from harming man, when man sins He does allow the animals to do harm. Furthermore when man sins he causes the world to be devastated and he cannot build a civilized life.*

It is in reference to this that Scripture says: "Therefore hath a curse devoured the earth, and they that dwell therein are found guilty; Therefore the inhabitants of the earth waste away, and men are left few" (Isaiah 24:6).

A verse from Isaiah is quoted in support of what has been said in the previous comment.

**"Thou shalt not oppress thy neighbor." It might have been argued that this applies also to someone who says of a certain man that he is not powerful when in reality he is, or that he is not wise when in reality he is, or that he is not rich when in reality he is. Scripture therefore says "nor rob him." Just as robbery refers to a case where money is involved, so too oppressing refers to a case where money is involved. Which case is that? Keeping back the wages of a hired servant. "The wages of a hired servant shall not abide with thee all night until the morning." I know only that the law applies to the wages of a human being. How do we know that it also applies to the rental fee of an animal or of vessels or of land? Scripture therefore says "Shall not abide with thee" to include anything for which payment is due.**

The beginning of this paragraph is not at all clear in the original text. Our translation follows the suggested reading of the famous scholar, the Gaon of Vilna (eighteenth century). The meaning is that the full penalty of theft only applies to theft of money or property, not to the theft of a man's reputation. This is, of course, a legal distinction. Morally to rob a man of his reputation may be much worse but such theft is difficult to put right in a court of law.

The second part of this paragraph states that any wages owed to

a person falls under the law of keeping back wages, even wages for the hire of tools or land or other property.

**"Until the morning."** This teaches that he does not offend against the law until the first morning after the work has been done. I might have supposed that the law applies even when the hired servant did not demand his wages. Therefore Scripture says "with thee." I only object, says God, to wages you hold back of your own free will. This paragraph states two things: First that he has the whole night to pay and does not offend against the law until the morning. Secondly, if the hired workman does not mind being owed the money and does not claim it right away, his employer commits no offense if he does not pay him right away. This is derived from the words "with thee" which suggest that the employer keeps the money back when requested by the workman.

**I might have supposed that the law applies even where he gave the workman credit at a bank or a shop. Therefore Scripture says "with thee"—it only applies if the wages were kept back willingly.** Since the offense is only where the employer willfully intended to postpone payment it does not apply if, instead of money, he gave him credit at a bank and at a shop i.e. to buy goods there for his needs and charge the bill to the employer. The giving of the credit note then becomes the payment of the wages. Jewish law has it, however, that he may only do this with the consent of the employee, otherwise he must give him money not goods.

**"The wages of a hired servant shall not abide with thee until the morning."** From this I learn only that a man engaged to work by day has all the night to demand his wages. How do we know that a man who works at night has all the next day to demand his wages? Therefore Scripture says: "In the same day thou shalt give him his hire" (Deuteronomy 24:15).

The point here is that there are two verses in Scripture regarding the hired workman. One deals with a man hired for work during the day and he must be paid the next night. The other deals with a man hired to work during the night and he must be paid the next day.

**"Thou shalt not curse the deaf."** I know only that it is forbidden to curse a deaf man. How do we know that it is forbidden to curse any man? Therefore Scripture says: "Nor curse a ruler of thy people" (Exodus 22:27). If that is so why is a deaf man specified? To teach you that the law only applies to one who is like the deaf man, namely one who is alive. But the law does not apply to the dead.

The plain meaning of the verse is that it is forbidden to curse even a deaf man who cannot hear the curse. But it might have been argued that it is only forbidden to do this to one who cannot hear and cannot retaliate. Therefore the Siphra proves that it applies to others as well since there is another verse forbidding the cursing of a ruler. The principle here is that since a ruler and a deaf man are mentioned and are so different, Scripture intends the prohibition to apply to that which both have in common, namely their humanity. It follows that the law applies then to every human being. The Siphra takes the two verses together as meaning that it is forbidden to curse anyone, but that the two cases of ruler and deaf man are specially singled out. The paragraph concludes that when one speaks of a deaf man one must be speaking of a living person who is deaf but has his other faculties. The term would not be used of a dead man. Consequently, the Siphra rules that the full prohibition does not apply to anyone who curses a dead man. Many people think that it is worse to speak ill of the dead than of the living, as in the Latin tag: "de mortuis nil nisi bonum." But the Siphra holds that it is far worse to speak evil of the living, who can be harmed, than of the dead who cannot be harmed by anything we say of them.

**"Nor put a stumbling-block before the blind."** This means before someone who is blind to a certain thing. If for example, a man asks you whether the daughter of so-and-so may marry a priest, you must not tell him that she may when in reality she may not. If a man asks your advice do not give him harmful advice. Do not tell him to get up early in the morning in order that he might be captured by bandits or go out at noon time so that he might suffer sun-stroke. Do not advise him to sell his field and buy a donkey in order to seek an opportunity to get it for yourself. You might argue: I am giving him good advice. But the thing is known in the heart, as it is said: "but thou shalt fear thy God; I am the Lord."

The Siphra argues that the verse can be extended to anyone who is blind to a mistake he is making. He should not be encouraged to persist in his mistake. You must not take advantage of his weakness for your own gain or to vent your malice on him. Certain people were forbidden to a priest—a divorced woman, for example. If a priest asks you whether he should propose to a girl, and he only wishes to do so if he knows that he may marry her, you must not cause pain to both of them by misleading him. The other examples explain themselves. The final comment is to the effect that while a man can fool his neighbors God knows of it and He cannot be fooled.

CHAPTER 3  
SIPHRE ON DEUTERONOMY 22:8, No. 229

### Safety first

*The law of making the roof of one's house safe.*

When thou buildest a new house, thou shalt make a parapet for thy roof, so that thou bring not blood-guilt upon thy house if anyone should fall from it.

DEUTERONOMY 22:8

"When thou buildest a new house." I know only that the law applies when he builds a house. How do we know that it applies also when he buys a house or inherits one or when a house is given to him as a gift? Therefore Scripture says "so that thou bring not bloodguilt upon thy house" and this covers all cases. I know only a proper house. How do we know that the law applies also to a place in which straw is kept or to a stable or to a place in which wood is kept or to any other kind of storehouse? Therefore Scripture says "so that thou bring not bloodguilt upon thy house" and this covers all cases. In that case we might have supposed that the law applies also to a lodge at the gate or to a balcony or to a porch, therefore Scripture speaks of "a house." A house means a place used for living in, but these are not in constant use.

The Siphre argues against a too literal interpretation of the word "build." Since the reason given for making a parapet is to protect people from falling, it obviously makes no difference whether the



house is one newly built or whether bought, received as a gift or inherited. If it has no parapet it is the duty of the owner to make one. The laws here refer to houses with flat roofs since these were often used by people for workspace or pleasure. They were dangerous without proper protection from falling. The Rabbis in the Talmud extend the law developed here to include all manner of dangerous things. They said, for example, that a man must not keep an unstable ladder in his house or a vicious dog. In the Siphre, however, the law is said not to extend to mere casual rooms which are hardly ever used, like the porch at a gateway. One would not normally go up onto the roof of such a place. The reference to the balcony is to the roof of the balcony.

**"Thou shalt make a parapet for thy roof."** I know only that the law applies to a roof. How do we know that it also applies to a pit or a well or a dug-out or a cellar? Therefore Scripture says "so that thou bring not bloodguilt upon thy house" and this covers all cases. If that is so why does it say a "roof"? This is to exclude the ramp to the altar in the Temple. Furthermore, the term "house" includes the Temple itself but the term "roof" excludes the entrance hall of the Temple.

The Siphre goes on to say that the term "roof" must not be taken too literally. If a man had an underground dwelling into which people could fall he is similarly obliged to build a protecting wall around it. But then why mention a "roof"? The Siphre replies that this is to indicate that the ramp leading to the altar in the Temple did not require a protective rail. This may be because the priests who used the ramp were careful where they walked and were used to it. The Temple is called a "house"—the house of God—and hence a parapet should be made around its roof. But the excluding term "roof" meaning the roof of a house suggests that a parapet is not required around the entrance hall of the Temple, probably because it was unusual for anyone but the priests and Levites to walk there and, again, they were used to it.

**"New,"** Rabbi says: Make the parapet while the house is new. How high should the parapet be? If the roof is only used for rolling the earth (to keep out the rain) it need be no higher than three handbreadths, but if the roof is used for human beings to walk on

regularly it must be at least ten handbreadths high. "Thou shalt make a parapet." This is a positive commandment. "So that thou bring not bloodguilt upon thy house." This is a negative commandment.

**"New,"** This term is interpreted by Rabbi (Rabbi Judah the Prince, the editor of the Mishnah, who, because of his importance, is simply called "Rabbi" without his name being added) to mean that it is a religious duty to build the parapet as soon as one builds the house, not to wait until the house is old to some extent. If the roof is only resorted to for the purpose of keeping everything in order only a small protective wall is required, otherwise a better protective wall is called for.

**"If anyone should fall from it."** The man who falls deserves to do so but good things are brought about by good people and bad things by bad people.

This is an interesting comment. It is based on the fact that the Hebrew of the verse can mean "the fallen one should fall from it." The interpretation is given that God would not let man fall unless He had so ordained it. In that case why is the person who neglected to build the parapet to blame? The man would have fallen in any event. Yes, answers the Siphre, but the good person should never be the instrument of God in such a matter. The question raised here is a very important one. Some people argue that it does not matter so much if accidents are caused by one's negligence because if God does not want the accident to happen He will not allow it. This passage in the Siphre reminds us that this is an irreligious attitude. God has given human beings the skills and wisdom to care for life and this is their duty.

**"From it"** And not into it. If the public domain were ten handbreadths higher than the house and someone fell into the house the owner of the house is not guilty, as it is said: "from it" and not "into it."

Although even in this case it would obviously be a good thing for the man to build a parapet, he does not incur any guilt if he fails to do so.



## The Mishnah

**I**N OUR note on the *Halakhtic Midrashim* we remarked that the Midrash process is to connect a law with a Scriptural verse. Side by side with this process there was another in which the law arrived at was presented on its own (i.e. without reference to a verse). Such a statement of a law in concise form was known as a Mishnah (meaning a "teaching"). The plural of Mishnah is Mishnayot. In the course of time many thousands of Mishnayot were known in the great Palestinian schools of learning.

We have already referred, in the note to the *Halakhtic Midrashim*, to the *Tannaim*, the great teachers of the first and second centuries in Palestine. In their schools were taught and handed down from generation to generation both the *Midrashim* and the *Mishnayot*. There were a number of *Mishnayot* collections e.g. from the School of Rabbi Akiva and the School of his pupil Rabbi Meir in the second century. Eventually the famous leader of his people, Rabbi Judah the Prince, edited all the Mishnaic material which had accumulated and put the material into shape in the form of six "Orders"—the Six Orders of the Mishnah. Each order is divided into tractates (known as *Massekhtot*, singular *Massekhet*, an Aramaic word meaning a "web") and each tractate into chapters. Each chapter is in turn

divided into smaller units called Mishnayot. The term Mishnah is thus at one and the same time the name of the smallest unit and the name of the work as a whole.

The Mishnah as edited by Rabbi Judah the Prince around the year 200 of the present era became the authoritative statement of Jewish law then. Rabbi Judah the Prince did not include all the material of the Tannaitic period but was selective. He did not include, for instance, all the Rabbinic studies in traditions which we now have in the *Halakic Midrashim*. Much of what he did not include was, of course, well known in his day. A Tannaitic statement of law that was "outside" i.e. not incorporated into, the Mishnah, is sometimes referred to as a *Baraita*, plural *Baraitot* (from a root meaning "to be outside"). Later teachers frequently rely on *Baraitot* in order to elucidate the teachings of the Mishnah. There is also a work known as the *Tosephta* (the word means "supplement") which is a collection of *Baraitot* dating from the Tannaitic period. It does not have the authority of the Mishnah but it is an important auxiliary help in later Jewish legal discussions.

Thus the main forms in which the teachings of the Tannaim are to be found are: 1) The *Halakic Midrashim* (3 books); 2) The *Baraitot* (quoted by later teachers but nowhere presented systematically); 3) The *Tosephta* (a more systematic collection in book form); 4) The Mishnah. 1, 2 and 3 are all technically *Baraitot* (though usually the term is reserved for 2 while the others are called by their particular name).

The Mishnah in its six orders covers the whole range of Jewish law. Thus the first order deals with all the laws regarding agriculture; the second with Sabbaths and Festivals; the third with marriage and divorce; the fourth with civil law proper, such as damages and theft; the fifth with the Temple and sacrifices; and the sixth with the laws which obtained in Temple times, of purity and impurity. The Hebrew names of the six orders are:

- |                  |             |                    |                 |
|------------------|-------------|--------------------|-----------------|
| 1. <i>Zeraim</i> | — Seeds     | 4. <i>Nezikin</i>  | — Damages       |
| 2. <i>Moed</i>   | — Festivals | 5. <i>Kodashim</i> | — Sacred Things |
| 3. <i>Nashim</i> | — Women     | 6. <i>Tohorot</i>  | — Pure Things   |

It should be noted that almost the whole of 5 and 6 no longer had any practical application after the destruction of the Temple in the year 70, about a century and a half before the Mishnah was edited.

Nevertheless Rabbi Judah the Prince included these rules of *Kodashim* and *Tohorot* because his aim was to give the most complete possible picture of the law.

It remains to be said that the Mishnah was compiled in a lucid Hebrew, which, incidentally, has had a great deal of influence on modern spoken and written Hebrew. Although Aramaic was widely spoken in Palestine during the period of the Tannaim, the scholarly language was still Hebrew. Hence both the Mishnah and the various *Baraitot* are in Hebrew.

his paschal lamb? He is allowed to purchase one from a dealer but should not go into the question of price. If the dealer does not trust him he should leave his cloak as a pledge.

### Making arrangements on the Sabbath

*The arrangements which do and do not infringe upon proper Sabbath observance.*

A man may borrow jars of wine and jars of oil from his neighbor on the Sabbath but he should not say: "Lend me." A woman may similarly borrow from her neighbor loaves of bread. If one of them does not trust the other, the borrower may leave his cloak (as a pledge) and reckon it up after the Sabbath. Similarly, in Jerusalem, when the eve of Passover falls on Sabbath, a man may leave his cloak with the dealer from whom he has obtained the paschal lamb and reckon it up with him after the Festival.

The principle here is that it is wrong to do anything on the Sabbath which looks like business dealings. Consequently, while it is permitted to borrow jars of wine and oil and pay for them after the Sabbath, it is not permitted to say "lend me these" for this kind of expression is the one generally used in commercial transactions.

Suppose the lender does not trust the borrower? Then the borrower may leave his cloak or some other object of value as a pledge and after the Sabbath the amount owing will be reckoned up. The point here is that leaving the cloak as a pledge does not look too much like a business transaction but to make a detailed reckoning of the cost does. In Jerusalem in Temple times it sometimes happened that the eve of Passover (when the paschal lamb had to be brought to the Temple) fell on the Sabbath. Supposing a man had forgotten to buy

A man may reckon up the number of his guests and the choice portions to be served provided that he does it by word of mouth but not from a written document. He may cast lots among his children and the other members of his household for the various portions, but he should not intend to have the lots decide which person is to receive a large portion and which a small for this would be like playing dice for money on the Sabbath. Lots may be cast in the Temple for the Hallowed Things (from the sacrifices offered on the Festivals) but not from the portions (of the sacrifices offered before the Festivals).

It was the custom at large banquets in those days for the host to have a list of the guests and also of the special dainties he was to serve. When checking these on the Sabbath the host should do it all by heart and should not rely on a documented list as he does on a weekday for he may easily forget that it is the Sabbath and make alterations in writing on the list.

It appears that it was customary for the head of the household to cast lots to decide which of the members of the family was to have which portion and who was to be served first and the like. This is permitted even on the Sabbath. But it is not permitted to play off a large portion against a smaller one for then the winner gains a portion of greater value and this is as if they were playing dice for money.

In Temple times the meat of some sacrifices went to the priests. They are permitted to cast lots to decide who is to have which portion but this is only permitted with regard to sacrifices offered up on the Festival. It is not permitted if the sacrifices had been offered up before the Festival for in this case they should have cast the lots then and not left it until the Festival.

A man should not hire workmen on the Sabbath or say to his neighbor that he should hire workmen for him. A man may not go to await nightfall at the Sabbath boundary for the purpose of hiring workmen or bringing back fruit, but he may go to await nightfall

there for the purpose of protecting the fruit and then there is no objection to him bringing the fruit back with him. Abba Saul laid down this rule: I am permitted to await nightfall for those things I am allowed to speak about on the Sabbath.

To hire workmen is a business transaction forbidden on the Sabbath even if no money changes hands. It is even forbidden to ask a friend to hire workmen, although the friend may do this after the Sabbath.

The Sabbath boundary is a line around a city extending 2,000 cubits (just over half a mile). Beyond this it is forbidden to walk on the Sabbath. The question the Mishnah here considers is whether it is permitted to walk to the boundary on the Sabbath so as to be ready to go beyond it as soon as night falls. The Mishnah rules that it is permitted to do this in order to be ready to protect his fruit but not for hiring workmen or bringing back the fruit. However, if he went there in order to protect the fruit and then, after the Sabbath, decided to bring back some fruit it is permitted since he did not go there with that intention. The second century Palestinian teacher Abba Saul explains the difference by a rule. It is forbidden to hire workmen or to bring fruit from outside the boundary on the Sabbath. Consequently it is forbidden to await nightfall for this purpose. But it is permitted to sit beside fruit growing in the field to protect the fruit and therefore it is permitted to await nightfall for this purpose. Hence Abba Saul's rule: If I am permitted to speak about a thing on the Sabbath (I may say to someone: Please protect my fruit) I am allowed to await nightfall for it. But if I am not permitted to speak about something on the Sabbath (I may not say to someone: Hire workmen for me or bring fruit to me from outside the boundary) I am not allowed to await nightfall for it.

It is permitted to await nightfall for the purposes of arranging for a wedding reception or for a corpse, to fetch its coffin and shrouds. If a gentile brought flutes on the Sabbath a Jew must not play dirges on them unless they came from a place nearby. If a grave had been dug or a coffin made for a gentile, a Jew may be buried in it. But if it had been made for a Jew no Jew may ever be buried in it. Even though according to the general rule it is not permitted to await nightfall for purposes which may not be carried out on the Sabbath, the Mishnah here states that the Rabbis made two exceptions. The first is for the purpose of arranging a wedding feast.

This is a great religious duty and so an exception was made. The second is for another important religious duty, that of burying the dead in a fitting manner.

It was the custom in those days to play dirges at a funeral. The Mishnah rules that even if a gentile (who is, of course, not obliged to keep the Jewish Sabbath) brought the flutes for this purpose from outside the boundary on the Sabbath, it is forbidden to use the flutes even after the Sabbath at the funeral. But if they came from a place nearby, i.e. from within the Sabbath boundary, it is permitted. If the gentile had made ready a coffin or a grave without intending it for a Jew, it is permitted for a Jew to use it. But if the grave had been specially prepared for a Jew on the Sabbath then it is forbidden for a Jew to use it. He may not gain the benefit of forbidden work done on the Sabbath (even though it is not forbidden for the gentile to do the work).

It is permitted to do all that is necessary for a corpse, washing it and anointing it for example, provided that no limb of the corpse is moved. It is permitted to take away the mattress from under a corpse in order to preserve the corpse by letting it lie on the sand. It is permitted to bind up the chin, not in order to close the jaw but so that it should not open wider. Similarly it is permitted to prop up a rafter which has broken with a bench or the side pieces of a bed, not in order to elevate it but in order that it may not split further. It is forbidden to close the eyes of a corpse on the Sabbath. Even on the weekday it is forbidden to close the eyes of a man who is about to die. Whoever closes the eyes of a man who is about to die is a shedder of blood.

It is permitted to make a corpse ready for burial. However, the Mishnah rules that it is forbidden to move any limb of the corpse. The idea here is that a corpse, or for that matter anything not generally in use, should not be moved on the Sabbath. Certain exceptions are however recorded.

It was the custom to close the eyes of a dead person. Since this is only a custom it may not be done on the Sabbath. Even on a weekday it is forbidden to close the eyes of a man who is about to die. The principle here is that any such movement may hasten the end and even though the man will die in any event it is wrong to deprive him of any extra minutes of life he may have.

## What do vows cover?

*The different ways in which a man can prohibit certain benefits to himself.*

*Although, generally speaking, the Rabbis discouraged the taking of vows, if a man solemnly took a vow to abstain from certain things or to have no benefit from certain persons he is obliged to keep his word. In all the passages quoted the basic question is one of definition. What is covered by this or that term? What is the scope of the vow? To "have benefit" means to obtain any gain or pleasure from a thing or person i.e. to drink wine or to receive a gift from someone.*

*If a man vowed that he would have no benefit from sea-farers he is permitted to have benefit from dwellers on land. But if he vowed that he would have no benefit from dwellers on land he must not have any benefit even from sea-farers, since sea-farers are included in the term "dwellers on land." The term "sea-farers" does not apply to those who merely go by sea from Acre to Jaffa but only to those who sail for distant parts.*

*A man, who perhaps hated the sea, took a vow that he would have no benefit from sea-farers. The Mishnah rules that the term does not include anyone who may take a sea voyage but only those who have actually done so. Consequently he is permitted to have benefit*

*from dwellers on land. But if his vow covered dwellers on land this term would include all men, since even sea-farers do eventually come back to land. The Mishnah adds that the term "sea-farers" is generally used for those who journey by sea from one country to another. But those who take a trip by boat from Acre, in the north of Palestine, to Jaffa lower down on the same sea coast, are not included. In our parlance, too, a person who goes on a small pleasure cruise at the sea-side is hardly called a sailor.*

*If a man vowed that he would have no benefit from those who see the sun he is forbidden to have benefit also from the blind since his intention was from those whom the sun sees.*

*The term "those who see the sun" must not be taken literally so as to exclude blind persons who cannot see. The term simply means those who dwell on earth, i.e. all men on whom the sun shines.*

*If a man vowed to have no benefit from black-haired people he is forbidden to have benefit also from bald-headed and grey-haired people. But he may have benefit from women and children since only grown-up men are referred to as black-haired.*

*In the times of the Mishnah the term "black-haired" never referred to women and children. On the other hand it was never taken literally so as to exclude men with grey hair or bald men without any hair at all.*

*If a man vowed that he would have no benefit from people that are born he is permitted to have benefit from those yet unborn. But if he vowed to have no benefit from those to be born he is forbidden also to have benefit from those already born. Rabbi Meir permits it also with regard to those already born. But the Sages say that this man only intended to mean those species who bring forth young. The point in this Mishnah is that the term "those that are born" does exclude those still to be born so that if a man took such a vow for many years he will eventually be permitted to have benefit from those born after his vow. But the term "those who are to be born" means in Hebrew all people who are born. In fact, it would include all creatures, including animals, who give birth directly to their young, and would only exclude fishes and birds.*

If a man vows to have no benefit from "those who keep the Sabbath" he is forbidden to have benefit both from Jews and from Samaritans. If he vows to have no benefit from "those who eat garlic" he is forbidden to have benefit from both Jews and Samaritans. If a man vows to have no benefit from "those who go up to Jerusalem" he is forbidden to have benefit from Jews but he may have benefit from Samaritans.

The Samaritans were a sect, with its headquarters on Mount Gerizim, who claimed to be Jews but who were viewed with suspicion by the Rabbis. They kept many of the Jewish laws and certainly observed the Sabbath. They even observed certain minor Jewish customs such as that of eating garlic on the Sabbath. Thus the terms "those who keep the Sabbath" and "those who eat garlic" include the Samaritans. But the Samaritans did not go on pilgrimage to Jerusalem, hence the term "those who go up to Jerusalem" does not include them.

If a man vowed that he would have no benefit from milk he is permitted to have benefit from whey, but Rabbi José forbids it. If he vows to have no benefit from whey he is permitted to have benefit from milk. Abba Saul says that if a man vows to have no benefit from cheese he is forbidden to have benefit from cheese whether it is salted or unsalted.

*Curds and whey are not included in the term "milk." If a man vows that he will have no benefit from milk it can be assumed that he means milk itself and not any of its products. But Rabbi José argues that his intention was to include milk products as well. Even Rabbi José would agree, however, that the term "whey" would not include milk. Cheese was normally salted before use. Nevertheless Abba Saul argues that salted or unsalted the term "cheese" can be said to embrace it.*

If a man vows to have no benefit from meat he is permitted to have benefit from meat-soup or meat-sediment, but Rabbi Judah forbids it. Rabbi Judah said: It once happened that I took such a vow and Rabbi Tarphon refused to allow me to eat even eggs that had been cooked with the meat. The Sages replied: Yes that was so but it only applies to someone who declared: "This specific piece of meat is forbidden to me." For then the law is that whoever vows to abstain

from something and it is mixed with something else so that it gives that thing flavor, the thing, too, is forbidden.

The man who vows to abstain from meat, the Sages argue, means to include in the term only the meat itself but not dishes in which there is a meat flavor. Rabbi Judah disagrees and forbids even a meat flavor. Rabbi Judah seeks to prove his case by a reference to the ruling of his teacher Rabbi Tarphon but the Sages make a clear distinction. If a general vow of abstinence from meat is made, it embraces only meat and not dishes with a meat flavor. But if a particular piece of meat had been placed under a ban by a vow then this piece of meat, being forbidden, has the power of contaminating, as it were, any dishes in which it imparted a flavor.

If a man vowed to have no benefit from wine he is permitted to enjoy a dish which has wine flavoring. But if he said: "This wine is forbidden to me" and the wine fell into a dish, that dish is forbidden to him if the wine flavor can be tasted. If a man vows that he will have no benefit from grapes he may have benefit from wine; that he will have no benefit from olives he may have benefit from olive oil. If he said: "These olives and grapes are forbidden to me" both they and whatever comes from them are forbidden to him.

This paragraph follows on the rule in the previous one. If he forswears some particular wine, it contaminates any dishes to which it imparts a flavor; but if only a general vow were taken to abstain from wine it can be assumed that the term "wine" does not embrace dishes in which there is wine flavor. Similarly, the terms "grapes" and "olives" do not embrace the products of these (wine and olive oil). But if he swore not to touch particular grapes or particular olives then whatever comes from them is forbidden.

If a man vowed that he would have no benefit from dates, he is permitted to enjoy date-honey. If he vowed to have no benefit from winter grapes, he is permitted to enjoy vinegar made from winter grapes. Rabbi Judah son of Betayra says: If a man vowed to abstain from something which is called by the name of its product he is forbidden to enjoy the product as well, but the Sages permit it.

Two further examples of how a general vow does not include the products: Honey made from dates is not embraced by the term "dates" and vinegar made from winter grapes is not embraced by the

term "winter-grapes." Rabbi Judah dissents here because, he argues, dates are sometimes called "honey" and winter-grapes are sometimes called "vinegar."

If a man vowed that he would have no benefit from wine, he may enjoy wine made from apples; that he would have no benefit from oil, he may have sesame oil; that he would have no benefit from honey, he may have date-honey; that he would have no benefit from vinegar, he may have vinegar made from winter grapes; that he would have no benefit from leeks, he may have shallots; that he would have no benefit from vegetables, he may have wild vegetables, since these have a special name.

*Wine generally means grape-wine, not apple wine; oil generally means olive oil, not sesame oil; honey generally means from bees, not from dates; vinegar generally means from wine that has become sour, not from winter grapes; leeks are not generally used as a term for shallots; and vegetables do not normally include wild vegetables, because these have the special name "wild vegetables."*

## To whom does it belong?

*The settlement of conflicting claims of ownership.*

Two men are holding a cloak; This one says: "I found it" and the other one says: "I found it." If this one says: "It is all mine" and the other one says: "It is all mine"—then this one must swear that he does not own less than a half and the other one must swear that he does not own less than a half and they divide it. If this one says: "It is all mine" and the other one says: "Half of it is mine"—then the one who says "It is all mine" must swear that he does not own less than three quarters and the one who says: "Half of it is mine" must swear that he does not own less than a quarter and this one takes three quarters and this one takes one quarter.

*The first case is where two men come before the court each claiming ownership of a cloak. Each one claims that he was the one who found the cloak. (Normally a cloak that is found must be returned to its owner. In this hypothetical case either the garment was found in such circumstances that it is clear it has been abandoned by its owner or all efforts to find the owner have proved futile, in which case it belongs to the finder). Now if one of the men were holding the cloak and the other merely trailing along behind him, the one actually holding the cloak would be allowed to keep it. He has possession and "possession is nine points of the law." But here both of them are holding the cloak, neither of them having a*



greater claim on it than the other. Now what is to be done in such a case?

Now the law could have decided that since there is no way of discovering which of the two is telling the truth the cloak should be divided between them, each receiving a half or its value. But if this were done, justice would not be satisfied since each of them claims the whole of the cloak and to give each a half would certainly be to perpetrate an act of injustice in giving a half belonging to the rightful owner to the trickster. Consequently, the Mishnah rules that each of them must swear that he is telling the truth. The general principle is that while a man may be willing to tell an untruth in order to obtain something that is not his, he will be reluctant to swear in court that he is telling the truth when he is not really doing so. The purpose of the oath is to persuade the trickster to admit he is telling an untruth. But, rules the Mishnah, if both of them do take the oath then there is nothing for the court to do but to give each of them a half of its value.

The Gemara (the later commentary to the Mishnah) explains that actually each of them should swear that he owns the whole of it. Why then the peculiar form of swearing: "I do not own less than a half"? If each one were to swear that he owns all of it and the court could only then give each a half, it would be a kind of public discredit of the court so openly to contradict the words of the oath. As it is each of them only states on oath openly that he owns at least a half. But the Gemara objects that in such a case the trickster can swear "I do not own less than a half" while in his heart he can say: "I do not own less than a half" i.e. I do not own any of it, therefore I do not own less than a half." To this the answer is given that he must swear: "I do own something of this cloak and that which I own is not less than a half."

The second case of the Mishnah is more complicated. One of the two men claims that he found the cloak and it is consequently all his, but the other claims that they both found it together and that, therefore, each owns a half. Since one of them admits that a half belongs certainly to the other, the point at dispute is over the other half. This half is then treated as the whole cloak in the first case so that one swears that he owns three quarters i.e. the half admitted to be his and a half of the rest and the other swears that he owns a quarter. (Actually, as in the first case, they swear that they own not less than three quarters and not less than a quarter respectively.)

The second half of the cloak is then divided between them, this one receiving three quarters of the total value, the other a quarter.

If two men were riding on an animal or one was riding and one was leading the animal: This one says: "It is all mine" and the other one says: "It is all mine"—then this one must swear that he does not own less than a half and the other one must swear that he does not own less than a half and they divide it.

If they both agree or they both have witnesses they divide it without an oath.

This case of the Mishnah concerns a claim to an animal. Actually this, in principle, is exactly the same as the first case. The Gemara suggests that it is repeated to teach that rider and leader of the animal have equal claims to possession, otherwise we might have thought that the rider, for example, is treated as the man in possession and the leader simply has no claim. When it says that the animal is divided it does not, of course, mean that the animal has to be killed and cut up (any more than the division of the cloak in the first case means that the cloak must be cut in two) but its value is divided between them.

The final clause of the Mishnah states that, of course, all this is where there are no means for the court to decide where the truth lies. But if they themselves eventually admit that they found it together or where each of them produces witnesses that he found it, then the court simply orders the cloak to be divided without subjecting them to an oath.

It might have been argued in the case where both of them produce witnesses that he alone found it that an oath be taken, since the witnesses to the claims of one are obviously false witnesses. But the point here is that we do not find in Jewish law anywhere the suggestion that an oath be taken where there are witnesses. To demand an oath in such cases would have the effect of weakening the testimony of witnesses in other cases. Consequently, the general principle is adhered to that there must be no oath where there are witnesses.

A man said to two others: I know that I have stolen a maneh (one hundred zuz) from one of you but I do not know from which one

of you. Or he says: The father of one of you deposited a maneh with me but I do not know to which of you it belongs. He must give a maneh to this one and a maneh to the other one since he himself had admitted it.

In the first case of the Mishnah a man admits that he owes one of two men a sum of money but he cannot recall which of them. He knows for certain that it is one of these two and they themselves cannot throw any light on the matter. Since he admits to having a maneh which belongs to someone else and he wishes to satisfy his conscience, he cannot do this unless he gives a maneh to each of them and then he can be sure that he has satisfied the requirements of justice. The Gemara (the later commentary) explains that he has no legal obligation to do this but a moral obligation if he wishes to ease his conscience. If, however, each of the two men claimed definitely that he was the person who was entitled to the money there would then be a legal obligation for a maneh to be paid to each of them.

If two men deposited some money with a third man, one of them depositing a maneh and the other two hundred zuz: This one says: "The two hundred zuz are mine" and the other one says: "The two hundred zuz are mine"—then he must give each one a maneh and the remainder should be left until Elijah comes. Rabbi José said: In that case what does the fraudulent one lose? But all the money should be left until Elijah comes.

The next case dealt with is that of two men each claiming that he had given a third man two hundred zuz to look after for him. The third man claims that he was only given three hundred zuz in all, two hundred from one of them, one hundred from the other. The point here is that the two men admit that only three hundred was deposited i.e. they deposited the amounts together but they differ on whose was the two hundred and whose the one hundred. Thus their case is not against the man they had left the money with, but rather with each other. What is to be done in such a case?

The ruling is that he must give one hundred to each of them for each is certainly entitled to this. As for the third hundred,

which is in dispute, this must be left in the court "until Elijah comes." This refers to the ancient belief that before the Messiah comes Elijah will come to mankind to herald the coming of the Messiah. At that time he will settle all the unresolved issues in Jewish law. The meaning of the ruling is that since it cannot be determined which of the two is telling the truth the only course is to leave the money in the court indefinitely.

The second century Palestinian teacher, Rabbi José, disagrees with this ruling. He argues that if only the third hundred is left in the court there will be no incentive for the trickster to confess. It is better that all the money be left indefinitely in the court until the court can discover where the truth lies. If this is done, Rabbi José argues, the trickster will see that he is in danger of losing the hundred that is really his and he will confess in order to get this hundred at least.

The same applies to two vessels, one worth a maneh and the other worth a thousand zuz. This one says: "The valuable vessel belongs to me" and the other one says: "The valuable one belongs to me"—then he must give the less valuable vessel to one of them and from the purchase price of the more valuable he must give the value of the lesser to the other and the remainder should be left until Elijah comes. Rabbi José said: In that case what does the fraudulent one lose? But the whole should be left until Elijah comes.

The next case is really the same as the previous one except that here the sale of the valuable vessel is involved and it might have been argued that this complicates the issue. But the Mishnah nonetheless identifies the two cases.

A point to be discussed (and this is, in fact, considered in the Gemara) is why not apply the rule of leaving it until Elijah comes to the case of the cloak described in the first paragraph. The answer is that in the case of the cloak, although one of the two appears to be a trickster, it is just possible that neither of them is a conscious trickster because each of them may genuinely believe that he found it first. In matters of finding something it frequently happens that mistakes of this nature are made. But in our case the trickster cannot honestly imagine that he deposited two hundred if he only deposited one hundred. On the other hand

*it will not do in our case to divide the money between them as in the case of the cloak. For in that case they are both holding the cloak when they come before the court and each has possession. But in our case the third hundred is held by the depositor and neither of the two has possession.*

Can you think of a famous case in the Bible with affinities to the cases discussed here?

