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plausibility to my argument in the previous section that the ascription of family ties to Beruriah was also a Babylonian elaboration. Regarding the substantive issue, I do not dissent from the universally held view that Beruriah was an exception to the rule regarding the degree of education of women in rabbinic society. I only argue that the background of this exception is Sassanian Babylonia, not Roman Palestine.

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Lifnim Mishurat Hadin

I. Introduction

CONTEMPORARY jurisprudential analysis of the term *lifnim mishurat ha-din* is premised on the distinction between the letter and the spirit of of the law, with "within the line of the law", or "that which goes beyond the boundaries of the law" representing the higher good, the spirit of the law. As formulated by Rabbi Herzog, "It is thus accentuated that the spirit of the law at times demands from man to conform to a loftier norm and standard than that which its letter can enforce."[1]

Such analysis raises a number of basic problems which Rabbi Herzog, Dr. Cohen and Justice Silberg leave untotouched or unresolved.

1. The neglected child in this entire problem is the phrase *"shurat ha-din"*. Is Dr. Cohen correct in asserting that it is the strict law, and if not what does the phrase actually mean, and why is it used in this context?

2. Perhpas the most basic question is whether there is a consistency to the Talmudic use of the term which can explain why it is used only six times in the legal context and is not used in a variety of cases which subsequent scholars identify as being of the same type.[2]

3. The next question goes to the heart of the function of *lifnim mishurat ha-din*. Is the Talmudic standard, as Silberg insists, a totally self-imposed standard, providing no basis for judicial action,[3] or is Rabbi Meltzer correct in asserting that it is, under some circumstances, a judicially enforceable standard?[4]

4. If *lifnim mishurat ha-din* does transcend the few instances of its use in the Talmud to become a general legal category, is that category designed to produce results in accordance with the "highest degree of ethical perfection" or the spirit of the law? If it were systematically applied in the Jewish legal system, would the result produced by *lifnim mishurat ha-din* always be the more just, the more equitable, the more moral alternative?

5. The term itself has been translated as either "within the line of the law", or "beyond the line of the law" without any particular attention being paid to the antithetical implications of the two alternative formulations. One implies

[1] Isaac HERZOG, *Main Institutions of Jewish Law* (1936) vol. 1, p. 385. Cf. Boaz COHEN, *Jewish and Roman Law* (1966) vol. 1, pp. 51–52; and Moshe SILBERG, *Kah Darko Shel Talmud* (1961) pp. 132–134.

[2] e.g. RASHI, B. M. 83a s.v. בדרך טובים, analyzed infra pp. 48–49.

[3] SILBERG pp. 127–133. COHEN apparently agrees with this position *op. cit.* p. 97.

[4] Rabbi Zvi Yehudah MELTZER, *"Lifnim Mishurat Ha-din"* in *Memorial Volume to the Late Chief Rabbi Herzog* (Jerusalem 1962) pp. 310–315. Since my concern in this paper is the use of *Lifnim* ... in the Talmud itself, I will not enter into the dispute among Rishonim which ultimately leads to the use of *Lifnim* ... as an enforceable standard. The Rabbinical District Court of Tel-Aviv-Jaffo has held that it is enforceable, basing itself on the Bach in *Shulḥan Arukh, Ḥoshen Mishpaṭ* 12. *Decisions* V, pp. 132–153 at p. 151.

that the just result is to be attained by going "beyond" the law itself, the other that justice is attained somehow "within" the law itself. Which, if either, of these implications did the Sages intend, and why did they choose so hidden a way to express their meaning?

The resolutions of these problems will emerge from a careful analysis of all the relevant Tannaitic and Amoraic material.

II. Lifnim Mishurat Ha-din in Legal Contexts

A. The *Shulḥani* — B.K. 99b

In considering the general question of the liability of an independent contractor for error, the Talmud deals with the situation of the money-changer, the *Shulḥani* who errs.[5] The Gemara refers to two contradictory Baraitot, one propounding a distinction between an expert and an amateur, as in the case of the slaughterer, the other insisting on liability of the expert as well as the amateur. R. Papa resolves the conflict by suggesting that the exemption for an expert referred to in the first Baraita refers solely to an exceptional expert, such as Dankho or Issur, who needs no further instruction in his trade. Only such a one is exempt, while all other experts are in fact liable. The Gemara proceeds to challenge this law by telling the following story:

> There was a certain woman who showed a denar to R. Hiyya and he told her that it was good. Later she came again to him and said to him, 'I afterwards showed it [to others] and they said to me that it was bad, and in fact I could not pass it.' He therefore said to Rab: 'Go forth and change it for a good one and write down in my register that this was a bad business' (דין עסק ביש). But why should he be different from Dankho and Issur who would be exempt because they needed no instruction? Surely R. Hiyya also needed no instruction? — R. Hiyya acted *lifnim mishurat ha-din,* on the principle learnt by R. Joseph: (*Exod.* 18:20) 'And shalt show them' means the source of their livelihood; 'the way' means deeds of lovingkindness; 'they must walk' means the visitation of the sick; 'wherein' means burial; 'and the work' means the law; 'which they must do' means *lifnim mishurat ha-din.*

The *Lifnim Mishurat Ha-din* of R. Hiyya consisted of the fact that he assumed liability even though according to the *shurat ha-din* he need not have paid, since he was an expert money-changer who needed no further instruction. Oddly enough, this law of the expert money-changer who needs no instruction — theretofore I will refer to this as the law of the exceptional

[5] *B.K.* 99b;cf. EPSTEIN מבוא לנוסח המשנה II, p. 906 n. 1. The word אתמר is absent in the Hamburg Manuscript as well as in the Rosh, Riph and *OrZarua.* The דקדוקי סופרים fails to note this variation.

expert — here denominated as the *shurat ha-din,* is to be found neither in Mishna, nor in Tosefta, nor in the parallel sections of the Jerusalem Talmud. Beyond that, the very distinction on which this law is based, between the expert and amateur money-changer, is specifically rejected by the Tosefta in a comparison between a slaughterer, to whom the distinction does apply, and a paid worker, to whom it does not, where the Tosefta specified "... A *denar* having been shown to a money-changer [and recommended as good] which is [subsequently] found to be bad — he [the money-changer] is liable to pay, because he is like a paid worker."[6]

Possibly, the Tosefta's specific exclusion of the money-changer from the category of the slaughterer was in response to the dissenting opinion denominated in our Gemara as תני חדא[7] — the first Baraita cited. Be that as it may, there is certainly no source ante-dating R. Papa himself which propounds a law of the exceptional expert money-changer. Given the importance of the money-changer in a variety of Temple transactions as well as in general commercial activities,[8] we might expect that the existence of a law relieving certain money-changers of liability for their errors would find expression somewhere in an explicit fashion.

Epstein, in discussing R. Papa, points out that he appears quite often in the role of resolver of contradictions between Tannaitic sources.[9] One of the standard methods of resolution of contradictory sources is to limit the applicability of one of the opinions to such narrow circumstances as to allow it to be deemed simply an exception to the other opinion which would then be viewed as the general rule.[10] It is for the application of just such an interpretation that R. Papa appears in our Gemara.

The Gemara concerning the money-changer begins with a contradiction between two Tannaitic sources. 1. Anonymous Baraita: Only an amateur is liable, but not an expert. 2. Tosefta: There is no distinction between expert and amateur. R. Papa resolves this contradiction by suggesting that in fact the Tosefta is the general rule, but that the anonymous Baraita actually refers only to a rare case, that of the exceptional expert, and constitutes a valid departure from the general rule. We must realize however that the basic premise of this type of resolution by distinction is that the distinction was

[6] Tosefta *B.K.* 10:10. The question of whether the money changer ought to be categorized with the slaughterer (independent contractor) or the paid worker (employee) is a paradigm instance in Jewish law of Legal categories of competing reference. See Julius STONE, "*Legal System and Lawyer's Reasoning*", pp. 248–252.

[7] The structure of our passage is quite strange, since as EPSTEIN points out, *op. cit.* I, p. 153, the term תניא אידך is usually used to introduce a Baraita which is in conflict with a Mishna which had previously been brought by the use of the terms "תנן" or "תני חדא". In our case, the "תני חדא" introduces an anonymous Baraita while the תניא אידך introduces the law of the Tosefta.

[8] See *mShek* 1:3. Also see S. BARON, *A Social and Religious History of the Jews,* VIII, ch. 36 note 4, on p. 385.

[9] EPSTEIN, *op. cit.* I, p. 391.

[10] Based on EPSTEIN, *ibid.* p. 156.

inherent in the very sources which were being resolved, and for that reason alone non contradiction between them ever existed. This legal fiction is in fact the premise of all judicial interpretation of this sort and should come as no surprise to us. The identical procedure was followed by the Glossators and Commentators in dealing with the Corpus Juris during the 11th — 15th centuries. For both of these groups.

> ". . . the Corpus Juris was not the final product of an historical process but a single authoritative expression of right order. And yet what made their work fruitful was precisely that the harmony had to be sought for and — though they did not see it in this way — imposed . . . In our eyes he [the medieval lawyer] made a choice, in his own he 'distinguished' the unique authoritative solution from those which were, on a proper interpretation, concerned with a slightly different problem. Where different solutions were given by different texts to apparently identical problems, it could be presumed, for example, that in one case, some additional unmentioned fact was to be taken into account."[11]

The identical passage might well have been written with accuracy about the work of the Amoraim in resolving conflicting Tannaitic legal material.

The upshoot of all this is that R. Papa, by judicial interpretation created a new law, that of the exceptional expert money-changer, which our Gemara refers to as a *shurat ha-din* and proceeds to treat as if it had always been the law. It is apparent then that when R. Hiyya, four to five generations prior to R. Papa, assumed liability for the injury which he caused to the woman by his erroneous judgment as a money-changer, he was simply acting according to the law as he may even himself have recorded it in the Tosefta,[12] that even expert money-changers are liable for injury caused by their errors.[13] This would explain why R. Hiyya did not denominate his own action as *Lifnim Mishurat Ha-din,* but rather told Rav to enter in the register "a bad business". This phrase, which has no mate in the Talmud, is apparently a shorthand entry of some sort, which does not mean "I erred, am not liable, but will pay anyway." If anything, the introductory word indicates that R. Hiyya was asserting true legal liability. This analysis also helps to explain why Rav did not object to the procedure by at least asking on what basis R. Hiyya was declaring himself liable. Unless in fact the basis was apparent to both of them, for the liability of even an expert money-changer was a clear matter and no exemption yet existed for the exceptional expert.

[11] B. NICHOLAS, *An Introduction to Roman Law* (Oxford 1962), pp. 47–48.

[12] Ch. ALBECK, מחקרים בברייתא ותוספתא ויחסן לתלמוד, pp. 60–89.

[13] Rashba *B.K.* 99b s.v. הא .
The Rashba poses the question of how the later Amoraim knew that R. Hiyya was an exceptional expert and offers two answers: either that it was a known fact that he was; or that they assumed that in all probability had R. Hiyya not been an exceptional expert he would not have dealt with doubtful situations. Rashba to *B.K.* 99b offers only the second of these answers.

Let us look now to the dynamics of this *Shurat Ha-din*. Firstly, it is apparent that the exemption for the exceptional expert *Shulḥani* from liability for error is based upon a pre-existing law which made no such exception. That pre-existing law, represented by the Tosefta in our case, makes no differentiation between an expert or amateur *Shulḥani*. We may then refer to this law as an undifferentiated law — i.e. undifferentiated specifically as to the factor of expertise. Thus the first stage of the law or *din* with which we are concerned is the undifferentiated *din*.

The second stage of the law is the differentiation introduced by R. Papa providing for the exemption of the exceptional expert. This differentiation, creating a new starting point for the onset of liability of a *Shulḥani*, i.e. anything *less* than an exceptional expert, is denominated by our Gemara as the *shurat ha-din* — i.e. the new line drawn as a limitation on the first state, the *din* itself. We must also note carefully that the origin of this *shurat ha-din* is in an act of Rabbinic interpretation which amounted to legislation.

Let us move now to the term *lifnim mishurat ha-din*. Much as R. Papa had felt the need to resolve the two conflicting Baraitot, the subsequent Amoraim felt the need to resolve the resolution of R. Papa with the story of R. Hiyya. It is as if no single link, not even an oral record of an actual decision, may be omitted from the all-encompassing consistency of the law. Given this need, and an apparent recognition of the distinction between the undifferentiated *din* and the *shurat ha-din*, the Amoraim took the course of least resistance and suggested that R. Hiyya acted in accordance with the undifferentiated *din* in preference to the *shurat ha-din* — that he went *lifnim mishurat ha-din*, i.e. he accepted liability for his own action even beyond the line which had been designated as the departure point for liability in such a case.

It is vital to note at this point that the distinction which I have propounded between the undifferentiated *din* and the *shurat ha-din* exists on two levels. One level is that of the historical development of law, in which regard the undifferentiated din chronologically precedes the *shurat ha-din*. The second level is that of legal analysis with regard to which the undifferentiated *din* constitutes the more general rule of which the *shurat ha-din* is the exception. I am suggesting only that the Amoraim who resolved the conflict between the law of R. Papa and the case of R. Hiyya were aware of the second level of this distinction, not necessarily the first. The serious problem which arises as a result of this suggestion is: the Amoraim accepted the *shurat ha-din* of R. Papa as valid, why should they cite with approval (for that is the function of the bringing of the *derash* of R. Yosi) the fact that R. Hiyya abandoned the case of R. Papa in favour of the undifferentiated *din?* Let us leave over this question until we have dealt with the balance of the Talmudic instances of *lifnim mishurat ha-din*.

One significant question with regard to the case of the *Shulḥani* remains to

be dealt with. The Tosafists[14] raise the question of why R. Papa did not distinguish between the conflicting Baraitot by saying that one referred to a paid *Shulḥani* and the other to one who worked gratis,[15] as the Gemara had just done with regard to a similar pair of contradictory Baraitot dealing with the slaughterer who errs? The Tosafists answer, ". . . because with regard to the evaluation of a coin great expertise is necessary, and one should not view it [i.e. the coin] if he is not as expert as Dankho and Issur." This does not mean that the Tosafists are suggesting that R. Papa emphasized the conflicting Baraitot in order to propound a new law which would grant special economic protection to the exceptional experts so that the others be driven off the open market. On the other hand, the Tosafists do appear to be saying that the problem having arisen (i.e. the conflict of the two Baraitot), and a variety of paths being open before R. Papa to resolve the conflict, he chose a resolution which was neither the most apparent nor the most familiar, because of an economic judgment which he made. Since the distinction between paid and unpaid money-changers operates equally for all, while that between the exceptional expert and everyone else may lead to higher standards of preparation for money-changers, R. Papa chose, according to the Tosafists, the latter distinction as his means of resolving the Baraitot.

B. *The Dignity of an Elder* — B.M. 30b

The next Talmudic instances of the denomination of an act as *lifnim mishurat ha-din* arises in a discussion in the Gemara based on a Mishnah dealing with the obligation of returning lost articles. The Mishnah asserts, "If one finds a sack or a basket, or any object which it is undignified for him to take, he need not take it."[16] The Gemara proceeds to provide the basis for this law,

> "How do we know this? — For our Rabbis taught: 'and thou shalt hide thyself' (*Deut.* 22:1) — sometimes thou mayest hide thyself, and sometimes not. E.g., if one was a priest, while it [the lost animal] was in a cemetery; or an old man and it was inconsistent with his dignity [to lead the animal home]; or if his own [work] was more valuable than his neighbour's — therefore it is said, 'and thou shalt hide thyself'."[17]

[14] *B.K.* 99b Tos. s.v. והניא אידך

[15] Subsequent authorities in any case imported this distinction into the law of the *Shulḥani.* The Rambam (ה' שכירות פרק י' הלכה ה') the Ra'avad *(op. cit.),* the Rosh (to B.K. 99b, sec. 16), and the RaMaH, brought in the *Shita Mekubetzet,* B.K. 99b, all assert that even an exceptional expert who errs *is* liable if he was paid. The distinction then between the exceptional expert and all others is felt only when their service is gratis, then the exceptional expert is not liable for his error while anyone else is. On the other hand, the Rashba *(op. cit.)* insists that the advantage of the exceptional expert is that he will be free from liability for his errors even when he is paid for his services.

[16] *BM* 2:8 — Soncino trans. *BM,* p. 181 (29b).

[17] *BM* 30a — Soncino trans. *BM,* p. 186.

Having propounded the exemption from the duty to return lost articles on behalf of the elder whose dignity would be offended thereby, the Gemara quotes an opinion of Raba asserting that the obligation of returning lost articles is identical in respect of who is obligated, to the obligation of helping his neighbour to load and unload his animals.[18] It is with regard to the consequent position, that an elder is relieved of the obligation of unloading and loading where his dignity would suffer, that the following passage occurs in the Gemara:[19]

> "Rabbi Ishmael son of R. Jose was walking on a road when he met a man carrying a load of faggots. The latter put them down, rested and then said to him, 'Help me to take them up'. 'What is it worth?' he inquired. 'Half a zuz' was the answer. So he gave him the half zuz and declared it hefker [ownerless]. Thereupon he [the carrier] reacquired it. He gave him another half zuz and again declared it hefker. Seeing that he was again about to reacquire it, he said to him, 'I have declared it hefker for all but for you'."

After a brief discussion as to whether it is in fact possible to abandon property but limit who may acquire it the Gemara continues:

> ". . . was not R. Ishmael son of R. Jose an elder for whom it was undignified [to help one to take up a load]? — He acted lifnim mishurat hadin. For R. Joseph learnt: 'And thou shalt show them' — this refers to their house of life; 'the way' — that means the practice of loving deeds; 'they must walk' — to strict law (דין); 'that they shall do' — lifnim mishurat hadin."

Prof. Silberg summarizes this case as follows:

> "Here, the performance of the lifnim mishurat hadin is expressed in the fact that R. Ishmael b. R. Yossi waived the privilege to which he was entitled as an elder and fulfilled the Biblical obligation as an ordinary person."[20]

In order to assume, as Prof. Silberg does, that R. Ishmael waived his privilege, it would be necessary to indicate that such a privilege existed at the time that he acted. In fact, no indication is to be found in either Mishnah or Tosefta, nor in the Jerusalem Talmud, of the existence of an exemption from a positive commandment specifically for the sake of the dignity of the elder.

The one place where we would especially expect such an exemption to be mentioned is in the Tosefta of Megillah where the notion of dignity of the elder is defined at length.[21] While a variety of positive acts are enjoined, and

[18] *ibid.* 30b, p. 187.
[19] *ibid.* 20b, pp. 187–188.
[20] SILBERG, op cit., p. 111.
[21] Tosefta *Megillah* 4:24. Lieberman, Tosefta *Moed* 3:24, p. 360 line 85 to p. 361 line 90.

certain restraints insisted upon, no mention whatsoever is made of any legal exemptions to which the elder is entitled. Nor is the exemption of the elder brought in the Jerusalem Talmud in any of the parallel passages of the three times the exemption is mentioned in the Babylonian Talmud.[22]

There is no reason to question the Tannaitic origin of the use of the word והתעלמת "Thou shalt hide thyself" to prove that there are occasions on which it is permissible not to return a lost article. It is however subject to question whether that part of the passage beginning with the words הא כיצד "how is that? (or "e.g.") until the words לכך נאמר were part of the original Tannaitic statement. That section, which includes the crucial exemption of the elder, is subject to question on two grounds. Firstly, of the three instances cited by that passage as examples of exemption under והתעלמת two of them have external substantiation as to the justification for the exemption. The Gemara itself points out that the word והתעלמת would not even be necessary in order to justify the exemption for the Cohen in a case where the lost article is on a cemetery, nor for the person for whom the loss incurred by stopping to get the article would exceed the value of the article itself.[23] Only the case of the elder has no independent exemption from the obligation of the positive precept and, the Gemara points out, it is in reality only for this case that a special derivation from a Biblical verse (i.e. לימוד) is necessary. But why should anyone who is stating a special exemption group into his statement two other instances where the exemption is not at all dependent upon his לימוד?

The second problem with regard to the section beginning "הא כיצד" is that term itself. The word "כיצד", posing the question of the nature of the practical application of the law, is found a multitude of times in the Mishna.[24] However, the phrase "הא כיצד", with addition of the demonstrative pronoun, is found only twice in Mishna, and in both instances the Mishna in the Jerusalem Talmud lacks the word "הא".[25] The phrase occurs only ten times in the Tosefta[26] and in fully half of those instances variant readings eliminate the word "הא".[27] Given its obvious Aramaism, and the great frequency of the use

[22] *B.T. BM* — *J.T. B.M.* Ch. Mishna; *B.T. Berakhot* 18b — *J.T. Berakhot* ch. 3, Mishna 1; *B.T. Sanhedrin* 18b — *J.T. Sanhedrin* ch. Mishna.

[23] *BM* 30a-b.

[24] See Kasovsky, אוצר לשון המשנה III, pp. 933–935, where he cites over 6 columns full of instances of the word כיצד.

[25] (1) Mishna *Shabbat* 19:5. cf. דקדוקי סופרים. *Shabb.* 137a. (2) Mishna *Sotah* 5:3. J.T. substitutes "אלא" for the words "הא כיצד".

[26] KOSOVSKY, אוצר לשון התוספתא I, p. 141, column 1.

[27] The reading eliminating the word "הא" appears in Tosefta: *Megilla* 4:15, *R.H.* 2:2, *Terumot* 7:9, *Sotah* 5:13, 11:5. Unfortunately, Zuckermandel appears to have missed a few of these variants and cites only two such instances out of the ten. Lieberman cites variants eliminating the word "הא" in three of the first four instances of its use, whereas Zuckermandel cites only one in that same group. For my purpose it is sufficient that doubt can be raised as to its Tannaitic character.

of this phrase within Amoraic passages[28] and its rarity, if not non-existence within Tannaitic usage we can certainly say that question is raised as to the dating of the section of our passage which begins with the words "הא כיצד".[29]

On the basis of the lack of corresponding substantiation in Tannaitic material for the exemption of the elder, coupled with the evident Aramaism and resultant doubt as to the Tannaitic use of the phrase "הא כיצד" it would appear that our original passage must be distinguished into two parts. The first part, "For our Rabbis taught: 'And thou shalt hide thyself,' sometimes thou mayest hide thyself and sometimes not", is probably Tannaitic, having reference to the many cases when according to the established law the obligation of returning the lost article is overridden. The second part of the passage, "E.g. if one was a priest, whilst the lost animal was in a cemetery; or an old man and it was inconsistent with his dignity to lead the animal home; or if his own work was more valuable than his neighbour's — therefore it is said, 'and thou shalt hide thyself'", is probably Amoraic and adds to the two instances of the first category, a third exemption, totally new, for which in fact the verse must serve as the sole basis of exemption. This new law then was the exemption of the elder where his dignity was endangered.[30]

This being the case, the action of R. Ishmael b. R. Yossi was not an act of waiving an exemption, but simply a fulfilment of the law itself as it was in his time — no exemption yet existing for an elder.

Realization that this law, i.e., the dignity of the elder causes him to be relieved of the obligation to fulfil the precepts of returning lost articles and helping to load and unload, is solely of Rabbinic origin and in fact postdates the action of R. Ishmael b. R. Yossi, will help us to resolve a number of basic problems within this passage itself. Rabbenu Asher was apparently the first person to raise the extremely basic and vital question of how an elder such as R. Ishmael has the right to waive the dignity which the Torah has granted him, in order to fulfil a responsibility of which the Torah has relieved him? He concludes that in fact it is not permissible for him to do so: "It appears to me that since the Torah has relieved the elder [of his duty], that he should not make light of his dignity — it is prohibited for him [to perform this act] for he would thereby slight the dignity of the Torah where he is not obligated to do so."[31]

How then does Rabbenu Asher resolve the fact that R. Ishmael apparently

[28] KOSOVSKY, אוצר לשון התלמוד II, pp. 686–88.

[29] Even our passage, the word "הא" is removed in variant readings in two out of the three instances of its citation. See דקדוקי סופרים on *B.M.* 30a and *Berakhot* 18b. Only in the citation is *Sanhedrin* 19b is no variant cited.

[30] The attempt to extend further this exemption to the obligation of burying the dead is evident in the subsequent section of the Gemara in *B.M.* 30b. That section too is clearly Amoraic. For further discussion see the end of section IVB within.

[31] RABBENU ASHER, *BM* (30b) ch. 2 number 21.

did waive his dignity in order to fulfil the precept? He does so by noting the fine point that in reality R. Ishmael never did help the man load his burdens, instead he purchased them from him — in order not to have to either give up his dignity, or actually touch the load. Thus Rabbenu Asher suggests, and his son Jacob b. Asher records as law,[32] that an elder who wishes to act righteously should waive his money as did R. Ishmael b. R. Yossi, but under no circumstances may he waive his dignity.

Contrary to the position of Rabbenu Asher and the Baal Haturim stands the decision of Maimonides, who with apparent lightness dismisses the dignity of the elder to say as follows: "But if one is pious and acts *lifnim mishurat hadin,* even if he is a prince of the highest rank, still if he sees another's animal crouching under its burden of straw or sticks or the like, he should help unload and reload."[33] Both the Shulḥan Arukh[34] and the SeMaG[35] use the identical words of the Rambam in codifying this law. It would be odd in fact for the Rambam to decide the law in this way without providing at least the technical basis for the overriding of the Biblical duty of the dignity of the elder.[36]

The justification of the Rambam, and the resolution of the initial problem of Rabbenu Asher is the fact that the dignity of the elder is not a biblical grant, but rather an Amoraic provision tied to a verse as mere Asmakhta.[37]

What then emerges from this case of *lifnim mishurat hadin?* The primary law in this case is the obligation, upon demand being made, to help load and unload burdens. This law is undifferentiated as to the person being called upon to help. The shurat hadin, the limitation imposed by Rabbinic law on the primary obligation, is that an elder whose dignity would suffer thereby is relieved from that obligation. This differentiation creates a new line for the onset of the obligation to help.

The third stage in this process, the lifnim mishurat had in arises again out of the need of the Amoraim to resolve the conflict between the presently accepted law — the shurat hadin — and the action of R. Ishmael. The resolution is the suggestion that R. Ishmael acted in accordance with the undifferentiated law in preference to the shurat hadin, that he accepted his obligation even beyond the line which had been designated as the departure point for obligation in such case — i.e. he acted lifnim mishurat hadin.

[32] TUR, *Ḥoshen Mishpaṭ,* ch. 272, sec. 9.
[33] RAMBAM, ה' רוצח ושמירת הנפש, ch. 13, sec. 14.
[34] *Shulḥan Arukh, Ḥoshen Mishpaṭ,* ch. 272, sec. 3.
[35] SeMaG, Positive Precepts, sec. 81.
[36] Certainly other biblically granted "dignities" receive their fair share of attention in the Rambam, See — ה' תלמוד תורה ה' יא'
[37] This analysis is also in greater accord with the character of R. Ishmael as reflected in *J. T. Ketubot* ch. 12, Mishna 3.

C. *Rescission*[38] *of a (Contract of) Sale* — Ketuboth 97a

This third instance makes it apparent that the term lifnim mishurat hadin is in fact used by the Amoraim as pure methodological analysis, bearing no essential relationship to any determinable subjective intent on the part of the person who is reputed to have acted in that manner.

Even after a gift[39] or a sale has been completed, there are times when the transfer; remains voidable: 1. due to an express condition made at the time of the transfer; e.g. If the vendor says at the time of the sale: "I sell you this land in America on the condition that I settle in Israel; If I do not settle in Israel then the sale is void."[40] 2. As clear as this is the voidability of a transfer in the case of a manifest implied condition (אומדנא דמוכח) created by legal presumption; e.g. If the vendor says at the time of the sale: "I am selling you this land in order to go and to settle in Israel" — but he does not make his settling in Israel an express condition of the sale, the law presumes that a true condition was thereby implied and the sale will remain voidable subject to whether the vendor actually settles in Israel or not.[41] 3. According to Rashi,[42] a third case of voidability exists, where no express condition or statement was made at the time of the sale, but, in the language of the Ritva,[43] "it was known to the purchasor, and generally well known" that the vendor was selling his property only for one reason, e.g. in order to go settle in Israel. This position is here rejected by the Tosafists,[44] who insist that some explicit statement must be made, or else the supposed condition remains only דברים שבלב "secret thoughts" which have no legal consequence[45] (אינם דברים).

This dispute between Rashi and Tosafot arises with regard to the following passage in the Gemara:

> "The question was raised: if a man sold [a plot of land] but [on concluding the sale] he was no longer in need of money, may his sale be withdrawn or not? Come and hear: There was a certain man who sold a

[38] Since we are here concerned with the legal remedies not with the Law of Equity, the term rescission is more appropriate than cancellation. Cf. *Corpus Juris Secundum* 945.

[39] The Rambam is the only one who distinguished between gift and sale. With regard to gift, the broadest possible implications as to the intent of the donor are considered (ה' זכיה ומת נה י' א') even when he is silent at the time of the transfer (as Rashi even in sale); while with regard to sale, only expressed intent can create an implied condition (ה'מכירה יא' ח' יט') as Tosafot with regard to both gift and sale.

[40] Based on the case in *Kiddushin* 49b.

[41] *Kiddushin* 49b. RAMBAM, *op. cit.* הלכה ח'

[42] RASHI, *s.v.* נבין — *Ketuboth* 97a.

[43] RITVA on *Ketuboth* 97a (edition of 1958 vol 3 p. 158.).

[44] Tos. *s.v.* זבין — *Ketuboth* 97a. The Tosafists are followed by the vast majority of the Rishonim (see SILBERG, p. 116, n. 73) and are preceded in their position by a number of Gaonic Responsa, אוצר הגאונים, לוין, vol. 8 pp. 341–342.

[45] The Tosafot do however contradict this position in apparent agreement with Rashi when explaining the case of sale with intent to go to Israel, *Kid.* 49b where Tosafot asserts at the very end that this case is one of " אנן סהדי ", where there exists general knowledge, but no specific statement of any sort was made at the time of the sale.

plot of land to R. Papa because he was in need of money to buy some oxen, and, as eventually he did not need it, R. Papa actually returned the land to him! — [This is no proof since] R. Papa acted lifnim mishurat hadin."[46]

The apparently mangnaminous act of R. Papa is, however, soon resolved by the Gemara in a different way, for after the citation of an additional case, the Gemara concluded:

"And the law is that if a man sold a plot of land and on concluding the sale was no longer in need of money, the sale may be withdrawn."[47]

Thus whether the man who sold the land to R. Papa had made an explicit statement, as Tosafot assert, or had not, but the reason for his sale of the land was well known, as Rashi[48] insists, the fact that R. Papa returned the land to him ultimately was not an act of lifnim mishurat hadin according to the final position of the Gemara, but was simply in accord with the law itself, which holds the sale voidable under those circumstances.

In the two previous instances of the Talmudic use of the term lifnim mishurat hadin, as well as in all the cases which we will take up subsequently, the story of the action which is so denominated is brought by the Gemara *after* the law had been determined. Thus, after the distinction between the exceptional expert money-changer and all others had been propounded, the Gemara asks about the case of R. Hiyya which appears contradictory. Again, after the establishment of the exemption for the Elder whose dignity would be offended, the Gemara asks how R. Ishmael could have acted in apparent disagreement with that law. In both cases the resolution is that the Rabbis acted lifnim mishurat hadin and the law which had been under discussion is affirmed. This third case, however, poses a very different analytical picture. Here, the question of voidability being posed, the story of R. Papa is introduced not as a question but as a possible basis for a solution to the question — suggesting that the sale is voidable. The statement that R. Papa acted lifnim mishurat hadin is in this case not a resolution which confirms the propounded law, but is rather a rejection of the authority of the action described and thus a return to the intial question of whether a sale under such circumstances is voidable or not.

We must note at this point, that R. Papa, exactly like R. Hiyya and R.

[46] *Ketuboth* 97a. Soncino trans. *Ketuboth* pp. 616-627.
[47] *Ibid.*
[48] The reason I have continued to develop the opinion of Rashi in this discussion rather than just bring the predominant opinion of the Tosafists, is that Rashi's approach has one distinct advantage over the other. For according to Rashi, there is a direct substantive relationship between this passage and the preceding section in the Gemara (*Ketuboth* 96b-97a) which develops the question of whether silence of a widow at the moment of sale of parts of the estate of her deceased husband, constitutes an advantage for her or not. The Gemara then, according to Rashi, continues into the more general question of the consequences of silence at the time of sale. According to the Tosafists, this substantive connection is lacking.

Ishmael, did not designate his own action as lifnim mishurat hadin. In all three cases that designation was made by subsequent Amoraim in treating of their actions. In the case of R. Papa, it is evident why he did not describe his own action that way — because as the conclusion of the Gemara points out, R. Papa in fact did no more and no less than the law itself demanded of him. Why then should anyone have suggested that he acted lifnim mishurat hadin? Let's reconstruct the case of R. Papa in slightly different terms than those used in the Gemara:

1. The undifferentiated din provides that conditional sales are voidable subject to the fulfilment or non-fulfilment of the condition.

2. Amora 1 asks (following Rashi): "If the vendor makes no condition and no express statement of any sort, but we know and the purchaser knew that the reason he was selling his land was that he needed the cash, but after the completion of the sale it turned out that he did not need the cash. Is this a conditional sale and voidable or is this not a conditional sale and therefore final? That is, what is the shurat hadin — at what point of the expression by the vendor do we deem a condition to be in existence and the voidability of the sale to apply."

3. Amora 2 answers: "The shurat hadin is the point at which there exists common knowledge and knowledge by the purchaser that the vendor was selling his property because he needed cash. This is proven by the fact that R. Papa purchased land from a third party. After the sale to R. Papa was completed, the third party backed out and the vendor no longer needed the cash — and R. Papa returned the land to him."

4. Amora 3 rejects: "No evidence can be accrued from the action of R. Papa! Perhaps, in fact, the shurat hadin is the point at which the vendor makes some express statement as to why he is selling his land, and only then will we consider it to be a conditional sale. But mere knowledge of the reason should not justify holding the sale to be voidable. How then will I explain the action of R. Papa? Very simply, he acted in accordance with the undifferentiated law despite the existence of the shurat hadin which limited the scope of the voidable sales. That is, he acted lifnim mishurat hadin.

5. Amora 4 concludes: "No, it is apparent from another source (the story of the famine at Nehardea and the decision of R. Nahman in that case) that the shurat hadin is exactly as "Amora 2" described it, and that R. Papa acted exactly in accordance with that shurat hadin."

This account of the Talmudic discussion makes one point manifestly clear. The Amora who suggested that R. Papa acted lifnim mishurat hadin, did so not on the basis of any tradition, nor with reference to any special personality trait of R. Papa, nor even intending thereby to plumb the actual intent of R. Papa in acting the way he did. The suggestion was made solely on the basis

that the analytic structure of the case lent itself to the use of lifnim mishurat hadin as a means of resolving the conflict between the action of R. Papa and the shurat hadin which that Amora was attempting to preserve as a possibility. Even the fact that no shurat hadin had yet been determined did not deter the Amora from suggesting that R. Papa may have acted beyond it anyway. To put it in terms that the Amora might have used — even if we now determine the shurat hadin to be different from the way R. Papa acted, and given the fact that our present determination is really an uncovering of what the law actually was even at the time of R. Papa, we could nevertheless resolve the case of R. Papa by asserting that he acted beyond the shurat hadin and in conformity with the undifferentiated din.

This is the identical pattern we have found in the two preceeding instances of the use of the term lifnim mishurat hadin, and, as we shall see, the two additional instances follow the same pattern.

D. *Presumptive Abandonment of lost property* — B.M. 24b

We now arrive at the one Talmudic instance where apparently someone (albeit an Amora) uses the term lifnim mishurat hadin to describe a decision which he himself has made. But even if that is so, it is a case in which he is not describing his own action but rather explaining a self-contradictory opinion which he has offered. This is co-joined with an additional case of the identical type to those we have seen before.

The second chapter of Tractate Baba Metziah is devoted to the study of the laws related to the returning of lost articles. In discussing the first Mishna, the Gemara refers to a statement of law made by R. Simeon b. Eleazar:

> "If one rescues anything from a lion, or bear, a panther, or from the tide of the sea, or from the flood of a river, or if one finds anything on the high road, or in a broad square, or *in any place where the crowds are frequent,* it belongs to the finder — because the owner has given it up."[49]

The Gemara proceeds to raise a question with regard to the last case of the statement. They ask whether this law applies only to such places where the majority of people there are heathens, who would not be expected to return lost articles wherefore the owner would abandon them, never expecting their return, or does he state his law even in a case where the majority of people are Jews.

During the course of the discussion of this and a number of closely related problems, the Gemara cites twelve cases to shed light on the issues. Among the cases then cited is the following:

> "Rab Judah once followed Mar Samuel into a street of whole-meal vendors, and he asked him: What if one found here a purse? — Mar Samuel answered: It would belong to the finder. What if an Israelite came

[49] *B.M.* 24a.

and indicated an identification mark? — Mar Samuel answered: He would have to return it. Both? Mar Samuel answered: lifnim mishurat hadin. Thus the father of Samuel found some asses in a desert, and he returned them to their owner after a year of twelve months: lifnim mishurat hadin."[50]

As I noted above, the statement of Mar Samuel that his decision is lifnim mishurat hadin does not relate to any occurrence which gave rise to such action on his part. It was, rather, a theoretical opinion. As such it could obviously not function as case law clarification of the suggested law. The response of lifnim, therefore, was not an attempt to resolve a contradiction between an established law and a judicial decision. However, close analysis will again reveal the three-level analytic construction which we have thus far seen as characteristic of lifnim mishurat hadin.

The undifferentiated din in this case is the law of return of lost objects which draws no distinctions as to where the object is found, except to the extent that the place indicates abandonment. However, as the Mishna specifies,[51] the mere fact that an object is found in public property does not indicate abandonment. The shurat hadin is the law of R. Simeon b. Eleazar which excludes the obligation of return when the object is found in a public square or a place where crowds are frequent.[52] The passage in the Gemara with which we have been dealing poses the question of whether we should limit the law of R. Simeon by holding that it applies only to such places where the majority of people present are heathen.[53] In a case then where the majority of people present would be Jews, the law that would apply would again be the undifferentiated din which imposes the obligation of return.[54]

In his response to the question of Rab Judah, Mar Samuel at first stated the law in accordance with the shurat hadin of R. Simeon, and then when asked a further question[55] on the same case stated the law in accordance with the undifferentiated din. Upon being called upon to explain the contradictory

[50] *B.M.* 24b.

[51] *Mishna B.M.* 2:10.

[52] *Tosefta BM* 2:2 records this law of R. Simeon but omits the words ובכל מקום שהרבים מצויים שם — which are present in the version in our Gemara, *B.M.* 24a.

[53] The Riph concludes that this problem is not resolved by the Gemara, but that the subsequent passages assume that the law of R. Simeon applies only when the majority are heathen. (RIPH, on *B.M.* 24b). The RAAVAD brought by the ROSH (*B.M.* ch. 2, end of sec. 20) maintains that the conclusion of the Gemara is that the law of R. Simeon applies even where the majority are Jews. The position of the Raavad is apparently borne out by a subsequent passage on 26b, but the Rashba resolves this and agrees with the RIPH (*B.M.* 246 s.v. הא).

[54] We might in analytic terms describe the law of R. Simeon as an undifferentiated din in relationship to the shurat hadin which creates a distinction between majority heathen or Jewish occupancy.

[55] The Rashba poses the question of why Rab Judah should have asked the second question when it was evident from the answer to the first. He suggests the possibility that the word "מהו" ought to be removed from the text thus having Rab Judah pose but one question and Mar Samuel answering with two conflicting opinions. (RASHBA *op. cit.*) However, he notes that all the texts do contain the word in question.

opinions he had offered, Mar Samuel responded that his second statement was lifnim mishurat hadin. It is evident in this case that the use of lifnim propounds no more than the total identity of the law so described, and the undifferentiated din.

The second part of this passage in the Gemara denominates the action of the father of Samuel (Abba b. Abba) as having been lifnim mishurat hadin. What exactly he did, is the subject of a dispute between Rashi and Tosafot. Rashi asserts[56] that Samuel's father returned the asses to their owners even though they had been lost for twelve months already[57] and therefore presumably abandoned. Tosafot[58] reject this opinion since nowhere does the Gemara assert that lost objects are deemed abandoned after twelve months. They therefore suggest that Abba b. Abba kept the asses for twelve months after finding them and although at that point he could legally have sold them and later, if the owners appeared, returned the money to them, he instead continued to care for the animals and eventually returned them to their proper owners. We will continue our analysis on the basis of the opinion of Tosafot.[59]

The undifferentiated din in this case is the law cited by the Mishna granting to the finder of lost cattle the right to put them out for hire in order to cover the expense of feeding them until their owner identified them.[60] The Tosefta specifically provides a time limit for the required maintainance of fowl and such other animals which cannot earn enough money for the finder to cover his expenses in keeping them.[61] However, neither in the Mishna, nor in the Tosefta, nor for that matter in the Jerusalem Talmud,[62] is the finder of hireable cattle permitted to sell them and subsequently return cash to the owner. Such a new line, the shurat hadin, limiting the obligation of the finder of large cattle to maintainance of only twelve months is first propounded in the Gemara by R. Nahman in the name of Samuel.[63]

[56] *B.M.* 24b. RASHI, *s.v.* בתר תריסר

[57] The Raavad concerned with the question of how Abba b. Abba could possibly have known that they were lost for twelve months already if they were not in his possession during that time, suggests that in travelling through the desert he saw them there, and in returning via the same route twelve months later they were still there. (Brought in *Shita Mekubetzet, op. cit.* and Ritva).

[58] *B.M.* 24b. *Tosafot s.v.* לבתר

[59] Although the *Shita, ibid.,* brings two possible analogous sources which might indicate abandonment after twelve months, thus to resolve the question of Tosafot, they are at best strained: 1. A deceased person is forgotten after twelve months (בשם תוס' חיצוניות). 2. One who has not seen a friend for twelve months should recite the blessing שהחיינו upon seeing him thereafter. גליון תוס' בשם ר"י. It is surprising that Justice Silberg chose to develop his analysis of this case on the basis of the opinion of Rashi (SILBERG, pp. 112–114) which has substantially less legal content than that of Tosafot. A third approach, independent of both Rashi and Tosafot, might be offered to explain why the asses which Abba b. Abba found were already res nullius, based on the fact that they were found in a desert. To this end see *B.B.* 54b, and RAMBAM, ה' זכיה ומתנה א' א'. See also GULAK, *Yesodei Hamishpat Haivri* I, p. 97 in his discussion of the Rambam, and the *Talmudic Encyclopaedia,* X, pp. 50–52.

[60] *Mishna B.M.* 2:7.

[61] *Tosefta B.M.* 2:20.

[62] *B.M.* 2:8.

[63] *B.M. 28b.* The Riph reads just "Samuel says", while the Rosh reads "R. Judah in the name of Samuel."

Abba b. Abba, even after twelve months had passed did not sell the cattle he found, but continued to maintain them until they could be returned to their owner. This action was described, not by himself, but by subsequent Amoraim, as lifnim mishurat hadin. If in fact the shurat hadin in this case arose first with Samuel, then it would appear, similar to the first cases we studied, that Abba b. Abba simply acted in accordance with the law as it stood in his time, the undifferentiated din, but that his action contravened a subsequently developed shurat hadin and the contradiction was later resolved by the suggestion that Abba b. Abba acted lifnim mishurat hadin. Thus, again the term lifnim . . . is used to resolve a conflict between a prior case and a subsequent law by suggesting that the action was in accord with the analytically undifferentiated din rather than the shurat hadin.

At the outset of the discussion of this passage in the Gemara I qualified my suggestion that the case of Mar Samuel was the only Talmudic instance where someone used the term lifnim mishurat hadin to describe a decision that he himself had made. In fact it is quite likely that even here, the term was applied subsequently. The suggestion is first made by Rabbenu Asher, as quoted in a brief passage in the Shita Mekubetzet[64] as a resolution to the following problem: Once Mar Samuel had responded to Rab Judah's first question by saying that the object belonged to the finder, why should Rab Judah have asked the second question, "what if the owner identifies it?"[65] Rabbenu Asher answers that in fact Rab Judah felt that although there is no obligation of announcement of such an object, there might nevertheless be an obligation to return the article if it is subsequently properly identified. And in fact, that is exactly what Mar Samuel answered him. The question of the apparent contradiction is posed not by Rab Judah, who was completely satisfied by the responses he received, but rather by the Gemara itself in subsequent analysis of the discussion.

If we adopt this analysis of Rabbenu Asher then the picture that emerges is that what transpired between Rab Judah and Mar Samuel was simply the two questions and the two answers, not contradictory, but complementary to each other. Subsequent Amoraim in dealing with this passage see the two statements of Mar Samuel as contradictory of each other and resolve the conflict by suggesting that the latter of opinion was lifnim mishurat hadin. They then proceed to bolster that argument by citing a similar case involving the father of Samuel which was also contradictory to the shurat hadin and which also was to be resolved by the use of the term lifnim mishurat hadin.

I might add that had Mar Samuel himself in fact been the author of the entire passage, it would have been extremely odd to find him referring to his

[64] *Shita Mekubetzet, op. cit.* p. 371.
[65] For the resolution offered by the Rashba see above note 55.

own father as "the father of Samuel" rather than either "my father" or by the use of his proper name "Abba b. Abba."

E. *Zimun* — Berakhot 45b

The final Talmudic instance of the legal use of the term lifnim mishurat hadin differs in only one respect from the previous cases. All of the previous cases have dealt with issues in civil law, this case involves an issue of ritual law. However, it is significant to note that this distinction has absolutely no effect on the manner of treatment of the legal issues and the fashion in which the term lifnim mishurat hadin is used.

The seventh chapter of tractate Berakhot deals with the Blessings to be made after meals and with the "invitation" to be issued prior to the Blessings when three or more people have eaten together. With regard to this latter question, two statements are made in the Mishna propounding the basic obligation. 1. "If three persons have eaten together, it is their duty to invite [one another to say grace."][66] and 2. "If three persons have eaten together, they may not separate [for Grace."][67] Both the Babylonian and Jerusalem Talmud pose the question of why both of these statements are necessary.[68] Whatever the reason for the repetition, the upshot is clear, that at some point in the course of either determination to eat together or in the meal itself, three people eating together become obligated to issue invitation and say the Blessings together after the meal ends.

What if two finish eating before the third, and they desire to issue invitation to the third, say the Blessings and leave, must the third interrupt his meal in order to join them? Or, a second question, what if only one is finished and he desires to leave, must the other two interrupt their meal so that he may leave? These questions are not dealt with at all in either Mishna or Tosefta, although we might assume from the blanket nature of the obligation to act together, that even two should interrupt their meals in order to fulfil the obligation and allow the third person to leave.[69] This would appear in fact to be the line of

[66] *Mishna Ber.* 7:1.

[67] *Mishna Ber.* 7:4.

[68] *Babylonian Talmud — Berakhot* 50a; *Jerusalem Talmud Berakhot* 7:1. While the Meiri assumed that the different resolutions are contradictory (Meiri, *Berakhot* 50a), the OrZarua attempts to resolve the two approaches as being different but not contradictory (OrZarua, I, sec. 203). Albeck maintains that this is an instance of the preservation in the Mishna of two independent sources dealing with the identical law, which were not integrated into one law by the editor. ALBECK, *Mishna Zeraim, Berakhot* — notes to 7:4, on p. 337; and p. 104 of ALBECK, מבוא למשנה

[69] Maimonides is completely silent as to this question. The reference offered by the עין משפט to chapter 7 of ה' ברכות deals with an entirely different matter — mealtime etiquette — not the laws of Blessings after meals. This may simply be because Maimonides in this was following the lead of the Riph in treating this entire passage in the Gemara as a matter of advice rather than a matter of law. Or else, he is in fact by his silence implying his accord with the School of Rav as quoted in the Jerusalem Talmud, building on the general nature of the obligation as stated in the Mishna.

thought of the School of Rav, as recorded in the Jerusalem Talmud, who assume as a matter of course that two interrupt their meals to allow a third to leave.[70]

Counter-indication to this is found in the Babylonian Gemara recorded in the name of Raba, limiting the obligation to issue invitation and say the Blessings together to where all three are ready for it at the same time, or where two have concluded and only the third has to interrupt. Raba specifically excludes any obligation on the part of two people to interrupt for the sake of one. It is at this point that our problem enters the picture in this passage:[71] "Raba said: the following statement was made by me independently and a similar statement has been made in the name of R. Zera:[72] If three persons have been eating together, one breaks off to oblige two, but two do not break off to oblige one. But do they not? Did not R. Papa break off for Abba Mar his son, he and another with him? — R. Papa was different because he acted lifnim mishurat hadin."

What was the nature of the act which R. Papa performed that warranted for it the subsequent appellation of the term lifnim mishurat hadin? For here too, R. Papa does not describe his own action that way, but rather it is described that way by others in dealing with his action. It is apparent that in this case the undifferentiated din is the general obligation resting on three who ate together, to issue invitation and say the Blessings together. Differentiation as to the factor of interruption first enters with the stated law of Raba and his reference to a similar decision in Israel by R. Zeira. This limitation constitutes the shurat hadin in this case, which R. Papa's action clearly contravened. Again the Amoraim were faced with an actual case of action which stood in contradiction to the existing shurat hadin, again they simply suggested that the resolution lies in the fact that R. Papa acted in a fashion which was beyond that line of limitation which the Sages had imposed — i.e. lifnim mishurat hadin, and rather he had acted in accordance with the analytically prior undifferentiated din.

(to be continued)

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[70] *Jerusalem Talmud — Berakhot* 7:1, 51b. „ג' שאכלו כאחת וביקש אחד מהם לילך לו. דבית רב אמרי יברך ברכה ראשונה וילך לו. אי זה היא ברכה ראשונה דבית רב אמרי זו ברכת הזימון."

This passage figures in a dispute between Tosafot (*Berakhot* 46a, *s.v.* עד היכן) and the RIPH (*Berakhot*, beginning of ch. 7) as to the referent of a dispute in the Gemara on 46a which attempts to determine the limit of ברכת הזימון, the question being — for what purpose. The questions which the Rosh poses against the opinion of Tosafot (quoted in the *Derisha to Tur O.H.* 200:1) are resolvable only by the position that we have taken here, i.e. that the passage in the Jerusalem Talmud in fact propounds an independent law which preceded the shurat hadin of Raba.

[71] *Berakhot* 45b.

[72] דקדוקי סופרים — *Berakhot* 45b.