

"THE LAW" AND THE LAW OF CHANGE*

(Concluded.)

B. *The Mishnah Cycle.*

The next cycle, that between the Old Testament canon and the Mishnah, is better known to us for its political and religious history than for its legal development. It is the period of the Second Temple, of the Maccabees, of the birth of Christianity, of the Wars of the Jews, of the destruction of the Temple and of the dispersion of the Jewish people. These great events did not pass without influencing the development of Jewish law, but the period furnishes a remarkable instance of how the common people's law takes its natural course in spite of catastrophes. We are told that Simeon the Righteous, the last of the Men of the Great Assembly, was followed by Antigonus of Soko and he by *Zūghōth*, "pairs," who through four generations conserved the traditions to the days of Hillel and Shammai. Four generations of Tanna'im (*tannā'im*, "teachers," a title in this period), the schools of Hillel and Shammai, carry on the tradition until the next codification, the Mishnah. Though very little has been written of the steps by which this law grew—and for this reason I shall study the period more fully than the others—we have sufficient evidence to support the view that glossation (including fictions), commentation (including equity) and legislation, so far as it appeared, followed each other in the usual order.

Of the first step, the verbal expounding of the Bible, we have several kinds of evidence. The reading of the Torah and the explaining of passage by passage in the synagogūe is supposed to go back to Ezra.³⁵ This method of the study and application of the law to which the name of Midrash (*midhrash*, from *dārash*, "to expound") has been given is, according to a very old reliable tradition, to be ascribed to the pre-tannaitic period. Sherira Gaon in his famous letter on the history of tradition expressly says that the midrashic method preceded other methods of study. Traces of it are to be found in the Bible. Glossations must have become quite complicated very early indeed, for in the period of

* Continued from the May issue, 65 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 679.

³⁵ Neh. 8 1-18.

the *Zūghōth* there had already grown up opposition to it. What were the Sadducees who gave Simeon ben Shetaḥ so much trouble but Jews with Hellenistic leanings, who, though accepting the Bible, rejected the tradition that pretended to interpret every letter of it? What were the early Christians but protesters against the Scribes and Pharisees, who held to every jot and tittle of the law, who tithed mint, anise and cummin, who made fine distinctions between swearing by the temple and by the gold of the temple and against the lawyers also, who, while lading men with burdens grievous to be borne, seemed to leave the commandment of God to hold fast the traditions of the elders? ³⁶

Besides Sadduceism and Christianity, there was a third form of reaction against the literalism, the glossation that marked the period of the *Zūghōth*: it was that of the main body

³⁶I refer here only to "the early Christians," the small community that existed as a sect among the Jews before it developed into a church. For the persistency of the trend in human nature which our cycles represent is illustrated again in the history of the canon law of the Roman Catholic Church. Between the New Testament and the closing of the *Corpus Juris Canonici* in the work of Jean Chappuis in 1500, there is discernible first the period in which the church fathers and the early councils were busy interpreting such matters as the effect of such texts as Acts 11 and 15 on the law, or the proper date for Easter or day for the Sabbath, a glossatorial period. Then comes a period of the growth of local customs and usages and their expression in local councils, a period in which natural and divine law or equity is perhaps the dominant guiding principle. The attempts to collect the decisions from all parts of the world and to extract general principles from them, from Dionysius Exiguus to Gratian's *Concordantia Discordantium Canonum*, belong here rather than under codification, and indeed they have never been recognized in the Catholic Church as codes. From Gratian to the close of the *Corpus Juris Canonici*, there are Extravagantes, the five compilations summarized by Raymond of Pennaforte for Gregory IX (1234) and the Liber Sextus of Boniface VIII (1290), the Clementinae (1314-1317), the Extravagantes of John XXII and Extravagantes Communes. These Extravagantes which precede the final crystallization of the law correspond with what we have called legislation. Upon the code follows the period of literalism that countenanced the wholesale sale of indulgences. By a queer irony the church that had its birth in a revulsion against literalism was now faced by a kind of new Sadducees who demanded a return to the old text, freed from tradition. For them the Bible had to be translated and popularized and fifteer centuries of history forgotten. It is interesting to note, too, how Protestant theology persists in describing Catholicism as it was at the time of the schism, wholly literalistic, just as Christianity in general describes Judaism though in each counter-reformations have set in and the cycles have continued turning on their ceaseless course. "As time goes on," says Professor Auguste Boudinhon, in speaking of the interpreters of the *Corpus Juris Canonici* of this period (*s. v.* Canon Law, Enc. Brit. 11th Ed.), "the works gradually lose the character of commentaries on the text, and develop into expositions of the law as a whole." It will hardly be necessary to remind the reader that Protestantism itself has not escaped institutionalization.

of Israel. Glossation was to be softened by fiction under the influence of Hillel and fiction was to be followed by equity in the School of Hillel.

Let us look at the most famous fiction of this period, the Prosbul (*προσβολή*), a fictitious assignment of a debt to the court in order to toll the bar of the Biblical statute of limitations. In the Mishnah³⁷ we read:

"The Prosbul . . . is one of the things that Hillel, the Elder, instituted. Seeing that the law which prescribed the release of all debts every seventh year³⁸ brought about the harmful consequence that people refused to loan one another and thus violated what was written in the law, namely, that a money loan should not be withheld because of the approach of the sabbatical year³⁹ Hillel instituted the Prosbul."

Hillel in thus making the law respond to the needs of a community that was passing from agriculture to commerce did not deviate from the letter of the law. The institution is based on a peculiar stressing of words in the Bible, "That which is *thine* with thy brother thine hand shall release."⁴⁰ The attitude of later generations to the Prosbul is suggestive: Samuel of the first generation of Babylonian Amoraim, disliked it, whereas Rabbi Nahman, of the third generation, the fiction period of the next cycle, wished to extend it.⁴¹

A better illustration of what can be done by fictions is furnished by *Ērūbhîn*—of several kinds, of "boundaries," of "courts," of "cookery"—all of them fictitious means. The first, that of *t^ehūmīn* or boundaries causes a man's home to be at any spot he may designate in advance so that he may move about in a circle of two miles around this point on the Sabbath. The second, of *hāçērōth* or courts, makes a fictitious unit out of a group of households so as to permit transportation on the Sabbath in a place that would otherwise constitute numerous domains instead of one domain. The last, of *tabhshūlīn* or cookery, constitutes a

³⁷ Mishnah, *Shebhī'oth*, X. 3.

³⁸ Dt. 15 12.

³⁹ Dt. 15 9-11.

⁴⁰ Dt. 15 3.

⁴¹ *Giṭṭīn*, 36 b. For another of Hillel's institutions showing a like tendency, cf. Mishnah, *Ārākhīn*, IX, 4 on Lev. 25 30 as to the sale of houses.

fictional nucleus of the Sabbath meal when a holy day falls on Friday, so as to permit cooking on the holy day for the Sabbath; for, while it is improper to prepare the Sabbath meal on the holy day, there is no objection to the making of additions to a meal already technically prepared. In addition, there is the simple 'ērubh, the fictional completion of an enclosure by extending a pole or drawing a cord across the unfenced part of the boundary of a street or court in order to make an enclosure of it and make transportation on the Sabbath within it permissible. The origin of 'Ērubhān is not easy to trace. I am discussing them as fictions of the pre-Mishnah cycle because they were firmly established in the Mishnah and we know that the followers of Zadok and Boethius, the Sadducees, fought against them⁴² as Sabbath desecration. Later Talmudic writers, however, ascribe to them even greater antiquity, connecting the creation of these fictions with the name of King Solomon. It is not inconceivable that some parts of the fiction date back to the literalistic period that preceded the great equity prophets.⁴³

I have drawn illustrations of the modification of law without deviating from the letter, from the laws of human relations (*bēn 'adhām la-ḥābhērō*) and also from the religious law (*bēn 'ādḥām la-māḳōm*). Now I shall show how technicality was used to mitigate the criminal law. The harshness of the criminal law of the Hebrews has frequently been commented on by critics and apologists. Here, as in English law, the humanity of the judges caused them to indulge in technicalities. The Bible says: "At the mouth of two witnesses or at the mouth of three witnesses shall a matter be established."⁴⁴ This condition, say the rabbis, is not fulfilled if the witnesses differ in their stories in the smallest detail. Again, take the case of the "son, stubborn and rebellious." The Bible condemned him to death. But the rabbis stretched every point in his favor. On the basis of Biblical verses they insisted upon numerous details that had nothing to do with the culpability of the rebellious son. Thus:⁴⁵

⁴² Mishnah, 'Ērubhān, VI, 2.

⁴³ Cf. Isa. 1 13; Jer. 17 21-27; Ezk. 20 12-24.

⁴⁴ Dt. 19 15; cf. *ib.* 17 6.

⁴⁵ Mishnah, *Sandhedrīn*, VIII, 4.

“ . . . he is not declared a son stubborn and rebellious until both parents desire it. If one of them is broken-handed or lame or dumb or blind or deaf—he is not declared a son stubborn and rebellious, as it is said ‘Then shall his father and his mother lay hold on him,’⁴⁶ which is impossible if they be broken-handed; ‘and bring him out,’ which is impossible if they be lame; ‘and they shall say,’ which is impossible if they be dumb; ‘this, our son,’ which is inapplicable if they be blind; ‘he will not obey our voice,’ which is inappropriate if they be deaf.”

In general, capital punishment even for murder was so abhorrent to the rabbis that its infliction was to be prevented by all legal means. A court that condemned more than one man in seven years, or according to others seventy years, was deemed “murderous.” And two learned teachers, Tryphon and Akiba, openly avowed that no one would ever have been condemned to death by a court had they been members.⁴⁷

Hillel, in whom we have found the tendency to develop the law, did not stop with fictions. Though his teachers, Shemayah and Abtalion, were glossators,⁴⁸ in him was realized the true spirit of equity. There is a Talmudic story of a scoffer who asked Hillel’s contemporary, Shammai, to teach him the whole Torah while standing on one foot. Shammai, the glossator, could only express his indignation. Hillel, the commentator, could easily extract the spirit from the letter and in a moment he summarized the law: “Do not do unto others what you would not have them do unto you.”⁴⁹ Among the principles that this commentator developed were his seven rules for the guidance of glossators.

It is, of course, not easy to summarize in a single sentence all the differences between the Schools of Hillel and Shammai. The strictness of the Shammaites is generally contrasted with the leniency of the Hillelites.⁵⁰ One writer,⁵¹ after rejecting various proposed solutions, says: “In all laws enunciated by these schools on the basis of the derashic method, the Shammaitic

⁴⁶ Dt. 21 19, 20.

⁴⁷ Mishnah, *Makkōth*, I, 10 *et passim*; see 12 Jew. Encyc. 34 b.

⁴⁸ “*Darshānīm*,” *Peṣaḥim*, 70 b.

⁴⁹ *Shabbāth*, 31 a.

⁵⁰ 3 Jew. Encyc. 115.

⁵¹ Auerbach, *Obligationenrecht*, p. 72.

school leans to a more literal interpretation of the Biblical texts than does that of Hillel." In the few words of the founders of these schools that have been preserved, it is not surprising to hear Shammai urging us to "definiteness" in learning, and Hillel telling us to love people and bring them near to the Torah. And in the ultimate acceptance of the views of the school of Hillel by catholic Israel, we see the prevalence of equity over strict law.

Occasionally interpretation based pretty clearly on an observed difference between theory and practice completely reverses a Biblical text. Take the *lex talionis*. The Bible says: "Eye for eye, tooth for tooth." The Mishnah tells us that this means damages, payable in money.⁵² Undoubtedly it was so interpreted, but the origin of the substitution seems to have been the influence of the judge on the plaintiff. It is equity mitigating the law.

Or take divorce. Biblical divorce law is one-sided. The Mishnah adds to the Biblical restrictions certain others and mitigates the harshness of the divorce law by throwing technicalities in the husband's way. The formalities in arranging, writing, attesting and delivering the "*get*" (bill of divorcement) are made so burdensome that rabbinic aid is absolutely needed.⁵³ It was made the duty of the learned man consulted to do all in his power to effect a reconciliation of the parties unless a sufficient ground for divorce were found. And though the Bible gave the husband the power to divorce his wife, and the wife no corresponding power, the Mishnah provided that in certain cases the husband could be compelled to write his wife a bill of divorcement.

It is idle to speculate as to what Jewish law would have been had Jewish national life continued uninterrupted from without. The destruction of the Temple, the removal of the Synhedrion from Jerusalem to Jabneh and the taking up of the administration of the law without a government entailed new problems, some of which were met, strange as it may seem, by legislation, by pronouncements from those men who by general consent

⁵² Cf. *Bābhā' Kammā'* 84 a.

⁵³ Cf. *Kiddūshīm*, 6 a.

were entitled to be heard. The chief problem, how to preserve the law, could be met in the long run only by codification. Two types of men were doing this work, types that were destined to become more clearly differentiated as time went on: the law-conservers and the law-improvers. Johanan ben Zakkai at this time called one of his students a cemented cistern that loses not a drop—and another a spring that gets stronger and stronger as it flows. The great law conservers were Simeon ben Gamaliel, who laid the foundations for further building in Palestine, and Eliezer ben Hyrcanus, who boasted that he never taught what he had not heard from his teacher. The great law improvers were Rabbi Eliezer, son of Arak; Akiba and Rabbi Meir. Rabbi Judah the Prince, combined their traits.

So long as possible, codification and ossification were delayed by the wholesome instinct of the people. The recording of *hālākhōth* was understood to be forbidden.⁵⁴ But the danger of forgetting the oral Torah seems to have overcome the prejudice and after several generations of formulation of the tradition in succinct sentences by the schools, a kind of legislation, if you please, there finally appeared the Mishnah, a redaction of several private compilations by Rabbi Judah, the Prince.

C. The Gemara Cycle.

In the four centuries that intervene between the closing of the Mishnah and the completion of the Gemara (*g^emārā*, meaning either "teaching" or "completion"), the great annotation and commentary to the Mishnah, two periods stand out: the period of Palestinian supremacy and the period of Babylonian supremacy. After the first generation of Amoraim (*'āmōrā'im*, "dictators" the title of distinction in this period), Rab and Samuel and Hanina bar Hama—a very great glossatorial interpreter—had passed away, it seems that the two theories of juristic study that had co-existed in pre-Mishnaic days were contending for the upper hand. I should call the one literalism and the other commentation; but the devotees of the two tendencies were soon nick-

⁵⁴ *Gitṭin*, 60 b; cf. *Temūrāh*, 14 b.

named in a manner that shows that the tendencies were distinctly felt: "Sinai," the Mountain of the Torah, and " 'Oḵēr hārīm," Uprooter of Mountains. By "Sinai" was meant the man with the power of acquiring learning from his teacher and of transmitting it. Such a man was only unconsciously or accidentally a law improver. By "mountain-uprooter" was meant the man who could do original work, whose chief business it was to improve the law. In Palestine there was a strong tendency to prefer the Sinai—perhaps because, after all, the great task that confronted its school at the outset was the collection and codification of the law and then its promulgation.

So long as the Palestinian school was supreme it was dominated by the spirit of Rabbi Simeon ben Gamaliel, who had fought valiantly for the theory that Sinai is better,⁵⁵ and his method of study stifled the casual 'oḵ^erē hārīm, the mountain uprooters. Rabbi Meir felt out of harmony with his times, and indeed he was a genius born a century too soon. Another of his contemporaries is said to have milled much grain and to have produced but little meal. In Babylon, however, the traditions had always been freer. There the teachers had no such responsibility as had been assumed in Palestine. Perhaps the reforming tendencies of Hillel are not unconnected with his Babylonian education.⁵⁶ At any rate, in the times of which we are now speaking the differences between the Babylonian and Palestinian schools had become remarkable. An instance or two will serve as proof. Zeera, in the third generation of Gemara scholars, as the story goes, on deciding to leave Babylon for Palestine, had to evade his teacher (Rabbi Judah ben Ezekiel, the Sharp-witted), and before starting determined to spend a hundred days in fasting in order to forget the dialectic method of instruction of the Babylonian schools, that this might not handicap him in

⁵⁵ *Hōrāyōth*, 14 a.

⁵⁶ An interesting story in this connection is recorded in the Palestinian Talmud, *Pešāhīm*, Chap VI. Hillel, some time after his arrival in Palestine was asked a question. He gave a clear answer and argued all day to prove his point, but he was laughed at. Finally, in despair, he cited his teachers as authorities for his position. Thereupon, according to the rather sudden statement of the narrator, they made him president of the Synhedrion.

Palestine.⁵⁷ In the same generation (in the early 300's), we are told,⁵⁸ a vacancy occurred at the head of the Babylonian school of Pumpadita—Pumpadita, where they try to pass the elephant through the needle's eye in their dialectics. Two candidates were being considered—Rabbah bar Nahmani, greatest of the Mountain Uprooters,⁵⁹ and Rabh Joseph bar Hiyya, a Sinai. Messengers were sent to Palestine to ask which the Palestinians recommended. Of course, they preferred the Sinai—but out of deference to Babylonian tendencies, no doubt, he retired in favor of the 'Oḳēr Hārīm. From this time on we see the Babylonian school wresting the supremacy from the Palestinians. Auerbach, remarking on this strange phenomenon, shows⁶⁰ that we know of no political or other external conditions capable of explaining the downfall of the Palestinian school, and concludes: The one inherent cause was the faulty method that had been prescribed for the study of the law in Palestine for all time to come by Rabbi Simeon ben Gamaliel. In other words, the Sinai now gives way to the mountain uprooter, the word student to the student of underlying principles; glossators are followed by commentators.

The next generation, that of Abaye and Raba bar Joseph, is the greatest creative period of the Gemara in Babylon—whereas in Palestine the Gemara is beginning to close its career. It is a period of growth by analogy, a period of formulation of principles, a period in which not the words of the Mishnah, but only the contents are accredited with legal force—in a word, a period of equity. The dissertations of Abaye and Raba bar Joseph led to many new decisions and rulings. With the exceptions of Rab and Samuel, we have more disputations of these teachers and of their immediate predecessors, Rabbah and Rab Joseph, than of any other pairs. Theirs is the greatest period in the development of the civil law. It would be interesting to examine their additions to the body of the law, but this study would take us too far

⁵⁷ *Bāhbā' Meḳḳā'ā'*, 85 a.

⁵⁸ At the end of *Hōrāyōth*.

⁵⁹ *Beḥākkōth*, 64 a.

⁶⁰ P. 102.

afield. A cursory examination suggests that the period witnesses a progress from status to contract.⁶¹ Thus bailees are classified in accordance with the peculiar circumstances of the bailment to a greater degree than had been done in the Mishnah.⁶² In fact, sub-classification on the basis of peculiar circumstances and implied conditions may in general be considered the method of the Babylonian schools at the height of their creative work.

After a generation or two of this work, the bulk of the law becomes too great for human memory to carry—and then Rabbi Ashi (372-427) begins to reduce it to writing. His task is carried on by Rabina (d. 500) and finally closed within another century by men who are no longer "dictators," but mere "suggesters" (*ṣabhōrā'im*). Their work, the Gemara, was not a code either in form or in its object. It was rather a digest of what had gone before. It has generally been recognized in Jewry that decisions cannot be based on the Gemara alone. It is full of the material out of which laws can be formulated, but it stops short of formulation. And yet it was a great step in the direction of codification. By the adoption of certain rules as to whose view shall govern in each class of cases, for practical purposes a digest can be made to do the work of a code—and such principles were adopted by the successors of the "suggesters," the "excellencies" or the Geonim (*g^eōnīm*, plural of *gā'ōn*).⁶³ The geonim did not hesitate to add to the substance of the law by a quasi-statutory method. To make fictions on top of the Talmudic fictions would surely have been "to eat bread with bread." Consequently where changes were demanding attention in this epoch legislation was needed and used. *Takḳānōth* and *g^ezērōth* and *hērems*—in a word, statutes, were promulgated in these times. The best known, though perhaps not the best authenticated, were those

⁶¹ Is not this kind of progress a mark of commentatorial periods rather than a continuous factor in the history of law? Cf. Pollock's Note L, to chapter 5 of Maine's *Ancient Law*, where reference is made to "the reaction against this doctrine which we are now witnessing." The phrase "any provision in any contract to the contrary notwithstanding" is becoming quite

⁶² *Bāhbā' Meḥīrā'*, 94 b; *Bāhbā' Kammā'*, 56 b.

⁶³ In adopting these rules they followed the precedent of the Gemara itself in dealing with undecided disputes in the Mishnah.

popularly attributed to one who was not himself a gaon, Rabbenu Gershom, about the year 1000, prohibiting polygamy and regulating divorce. But under the Geonim gradually, almost imperceptibly, the feeling spread among the Jews of the world that their law was completed, crystallized, or, in the word that I have here adopted, codified.

D. The Post-Talmudic Cycle.

The Geonim were to the Talmud what the Scribes had been to the Bible. They closed it. They legislated or made a hedge around it. They made it a code for the people and closed a cycle in the evolution of Jewish law—but they also began a new cycle by their undertaking of the work of interpreting the Talmud. They were near in time and in spirit to the last of the makers of the Talmud. They spoke the same language, lived in the same country, taught in the same schools. Consequently who could speak with greater authority than they on doubtful questions as to the meaning of the latest codification? Several of the Geonim devoted their attention to the exposition of special parts of the law. One, Zemah ben Paltoi (*ca.* 872) composed a lexicon. Sherira Gaon, whose letter on Jewish tradition we have already mentioned, wrote annotations to explain many difficult terms. Other manifestations of a period of strict law are also apparent. There is even a revolt against the entire traditional law. It is that of the Karaites, bearing a marked resemblance to the reaction of the Sadducees of the next preceding glossatorial period.⁶⁴ The typical handbook for such a period, the "abridgement," appears in Alfasi's work (1013-1103), popularly called the Little Talmud.⁶⁵ The approach of a period of principle study is foreshadowed by the appearance of a *summa*, the famous Mishneh Torah of Maimonides. This great philosopher, though seeking princi-

⁶⁴ Another type of reaction that frequently follows glossation, is mysticism. Corresponding to the Essenes and Judeo-Christians of an earlier day and the Ḥasidim of later times, we find the Kabbalists developing their theories at the close of the Gaonic period.

⁶⁵ The *Hälakhōth Gedhölōth* of this period were the results of an attempt to rearrange the material in the Talmud for practical purposes.

ples, was not far from the glossator in spirit, nor above the making of fictions. Thus he says: There are things resembling usury that are allowed, *e. g.*, a man may buy at a discount bonds belonging to his neighbor; a man may give his neighbor a denarius, on condition that he lends 100 denarii to a third person; A may give B a denarius to induce C to lend him (A) 100 denarii.⁶⁶ This is hardly the spirit of those commentators from whom he had learned to condemn, though not always to prohibit, the "dust of usury" and the "appearance of usury."⁶⁷

All the purely glossatorial work of this period was summarized and superseded by that of Rashi. Rashi (1040-1105) is the Accursius of the Jews—his is the last word on the possibility of the method of the glossators—but his grasp of all parts of the Torah at once is so great that he rises to the height of a commentator in spite of his purely glossatorial form. He is immediately followed by a school of men whom we may well call commentators in the technical sense.

The Tosaphists of the twelfth and thirteenth centuries have been compared to the writers of *Dissensiones* to the Roman code during the first quarter of the twelfth century⁶⁸ The very word *Tōšāphōth* (though its particular application is doubtful) suggests additions rather than mere explanations. The method of the Tosaphists is to select points and deal with all of their ramifications in little essays, rather than to give a continuous explanation of the legal text before them. Rashi's own son-in-law and grandsons were the first of the Tosaphists.⁶⁹

It is a mistake to suppose that the work of the glossators and commentators was purely academic. Jewish law was constantly being applied to life—and still is—and being developed by *pōs'kim*, whose decisions and responses have added a great deal to the bulk of the law. Of course, they adhered as closely as possible to the letter of the transmitted law—but as time went

⁶⁶ *Mishnah Torah*, Book XIII, *Malveh*, Chap. V, Sec. 14.

⁶⁷ *Ib.* Sec. 15.

⁶⁸ 12 Jew. Encyc., p. 202.

⁶⁹ In the printed editions of the Babylonian Talmud Rashi and the *Tōšāphōth* are arranged as a framework around the text of each page.

on and the occupations, locations and conditions of the bulk of the Jews were completely changed, they had to use a good deal of common sense in drawing analogies from the received law. Where judges are forced to use their common sense in this way equity flourishes. The fact that Jews were living under widely different conditions in different countries led to the development of local *minhāghīm* (customs),⁷⁰ just as national elements were to be mingled with the catholic elements of Roman law in the period that I have called an equity period. It was only a question of time till dissatisfaction would arise in some systematic minds over the indefiniteness of this condition. Indeed, quite within the days of the Tosaphists were heard rumblings of the discontent. Perhaps for the embodiment of this we should look to Asher ben Yehiel, and to his son Jacob. Jacob ben Asher (d. 1340) drew the plans and laid the foundation for the next code—but his works, the *Tūrīm*, are not the great code, they are only a digest—a digest, it is true, which takes cognizance of much new matter—but not all of it by any means, for new matter was being rapidly produced even while Jacob was compiling what he had before him. In course of time this new matter led to the making of a digest that was to become a code—the *Shulhān 'Arūkh* (Prepared Table). In one sense this famous work of Karo (1488-1575) is nothing but a revision of the *Tūrīm*. But in another sense it is a code in which the lacunae of the older digest are filled in by a peculiar substitute for legislation,⁷¹ a substitute that had been twice resorted to in the history of Roman law—the counting of hands among highly respected writers of the past. Karo gives a vote each to Maimonides, Alfasi and Jacob ben Asher on all doubtful matters and objectively records the results. It is significant that even this objective method did not please the German and Polish Jews. It failed to take cognizance of the

⁷⁰ It is of course beyond the scope of the present study to investigate the sources of particular legal ideas, for example suggestions borrowed from other systems of law. It is hoped, however, that an understanding of the inner continuity of Jewish law will be helpful in the study of external influences.

⁷¹ For true legislation in the period see article on Takkanah, in 11 Jew. Encyc., p. 669.

customs, the decisions and the writings that had become a part of their law. So Rabbi Moses Isserles, a younger contemporary of Karo, proceeded to revise his work for the benefit of the northern Jews. He modestly characterized his contribution as a cloth for the table that Karo had prepared. But this table covered with the cloth—perhaps concealed by it—soon was recognized by catholic Israel as its code.

E. The Present Cycle.

The definiteness which now marked the law of the Jews once more turned the attention of its practitioners and teachers to glossation. Not only were three great annotations produced within a century, those popularly known as the *Baḥ*,⁷² the *Ṭaz*,⁷³ and the *Shakh*,⁷⁴ but also the whole spirit of Jewish scholarship became the technical spirit of glossation. The tool that scholars were to use for nearly three centuries was by a strange coincidence fashioned almost simultaneously with the *Shulḥān 'Arūkh* itself. I refer to the *pilpul*. Rabbi Jacob Pollak (d. 1541) and particularly his pupil, Shalom Shakna ben Joseph (1510-1558), father-in-law and teacher of Rabbi Moses Isserles (1520-1572), are credited with the invention of the hair-splitting methods of the modern *pilpul*. The word, which means "pepper," might suggest a sharpening of wits of the kind that we have found among the mountain-uprooters of old, who were also *pilpulists* in their way. But unfortunately these modern *pilpulists* did not address themselves to big principles. They did work out a few petty fictions to adapt the law to their life, notably the fictitious sale of unleavened bread on the Passover and the fiction by which a rabbi can be paid. Legally a rabbi should receive no pay for his services, but by the fiction he has some other means of support and is supposed to be paid for time taken from his regular

⁷² *Bayith Hādāsh*, 1640.

⁷³ *Ṭurē Zāhābh*, 1646.

⁷⁴ *Siphethē Kōhēn*, 1646. Two abridgements have in the last century achieved as wide circulation, those of Abraham Danzig and of Solomon Ganzfried. The work of the former is almost a *summa*; that of the latter rather a text-book.

work for the needs of the community. But in general the teachings of the pilpulists—we can still hear echoes of them—were clever, wonderfully clever, disputations, rich in words, woefully poor in principles. Clever for cleverness' sake. Whatever good there had been in the method in the beginning, it had long been over-ripe and rotten in the eighteenth century, when newer growths began to crowd for its place.

The reactions against the modern Scribes have been different in different parts of the world. The Reform in Germany and Ḥaṣīdism in southern Russia, different as they are in externals, are alike protests against exaltation of the letter; and finally a third movement opposed to both of these is also a mark of the progress from the glossatorial to the commentatorial stage, from the stage where growth is by fiction to the stage where growth is by equity. Rabbi Elijah of Wilna was opposed to the pilpul and substituted a method of teaching that looked to the sense rather than the words. I quote Mr. J. D. Eisenstein: ⁷⁵

“The Reform movement on the one side and the ensnaring hasidic tendencies on the other caused the pupils of the Wilna Gaon to deliberate how they might preserve the true Jewish learning and perpetuate the method and style of study inaugurated by the Gaon, who was rather opposed to the pilpul and hillukim [disquisitions] as practiced in the Yeshivot of Poland. With this aim Rabbi Hayyim the chief disciple of the Gaon, organized in 1803 the celebrated Yeshibah [Rabbinic school] at Volozhin.”

The significance of Elijah ben Solomon, the “gaon” of Wilna, is just coming to be understood. Never having studied at any *Y^eshībhōth*, never prejudiced by the perverted methods of study then in vogue, he escaped casuistry. His pupils had to pursue the same plain and simple methods of study that he followed. Though he himself founded no school, his lessons were gradually learned by the Jews of the world. Volozhin became the model of the *Y^eshībhōth* of Poland and surrounding countries, of Palestine and of America. One or two instances of the modernizing tendencies of these *Y^eshībhōth* may be interesting. The *Y^eshībhāh* of the late Rabbi Reines of Lida included modern

⁷⁵ 12 Jew. Encyc. 598, s. v. “Yeshibah.”

subjects in its curriculum, as does Y^eshibhath Rabbi Isaac Elhanan, of New York. Meanwhile, the neo-orthodoxy of western Europe and America has been occupied with a restatement of its whole position, in which equity surely predominates over pilpul. Even Rabbi Isaac Elhanan Spektor, the late leader of modern Russo-Polish orthodoxy and a supporter of the Volozhin Yeshibhah, joined hands with the movement in the West, when he urged Samson Raphael Hirsch, the father of neo-orthodoxy, to write his "*Über die Beziehung des Talmuds zum Judenthum.*"

To go further would be to tread the halls of living men—or even to pierce the veil of the future. I shall do neither. Even if it were possible, it would be irreverent to gaze with too curious an eye upon the mystery of the continuity of Jewish life through the adverse ages—or upon the related mystery of the continuity of any people's law as an expression of its own national life and aspirations.

Nathan Isaacs.

Cincinnati Law School.