Rabbi Joseph Weiss
~~56 BENNET AVENUE~~
NEW YORK CITY
560 Audubon Ave.
WADSWORTH ~~3-1293~~
8-0283

Dear Rabbi Lamm, Jan 12, 1955

As I already indicated to you over the phone, your article on the Ketubah pleased me very much for its keen analysis, good reasoning and clear presentation. Nevertheless, in response to Rabbi Hollander's request I am writing down my comments for your consideration before going to publication. We must make certain that our opponents find no ground to argue, Halachically. Therefore our arguments must stand the test of the most strict scrutiny. Most of the comments contained here do not refute your main thesis and adjustments could therefore be made.

On page 2 you speak of the ancient law which made a man sole and complete owner of his wife's property and that its abuse brought about the institution of the Kesuba.

Min HaTorah the husband owns nothing of his wife's property. MiDrabonon he gets פירות which is part of the Kesuba institution as seen in כתובות מ״ז ע״ב - תקנו פירות תחת פרקונה. See there רש״י ד״ה פירקון that the motive was her redemption in return of which the Rabonon granted him פירות.

On page 4 you illustrate a modern Aguna - a woman whose husband issued her a civil divorce but who refuses her a Jewish Gt. You continue to say that by Jewish Law he cannot be forced to give her a 'Get'. Now I assume that this person does not wish to live with his wife anymore, for otherwise there would be no problem. He could then be classified as a מאיס עלי who may be pressured into giving a Gt (עי׳ אה״ע סי׳ ע״ז ס״ב וש״נ). He may also be in the category of (המונע אישתו מעונות ומזונות) for whom there is a provision of כופין להוציא (עי׳ סי׳ קנ״ד ס״ג ברמ״א) I do not wish at this point to discuss the force which the כפי׳ may take in these cases.

The source for ~~this~~ כפי' in this case is (מרדכי פרק הזהב כתו' את לוי) - also see (פ"ס כתו' סק ו"ח ד"ה והאומר רב) also in שלו and ברכ"י there too.

On page 6 you write that the Kesuba carefully avoids mentioning the occasion of death or divorce. While it is true that divorce in indicated indirectly by the word חיי, death is openly mentioned in the נוסח הכתובה of the רמב"ם פ"ד יבום וחליצה, where it reads בחיי ובתר מותי. Our present form has בחיי ובתר חיי which means the same thing.

On page 8 you declare that a Beth Din is required to recognize the Divine character of both the Written Law and of the main aspects of the Oral Law (Halach Le Moshe MiSinai), I think that the wording should be changed to 'the Divine character of both the Written and Oral Law'. The entire תושבע"פ is סיני.

On the same page you speak of ammendments and changes and interpretations of Halachah. I confess that I am ignorant of such things as ammendments and changes of Halacha. If you mean תקנות והגזירות דרבנן, these are not ammendments or changes - rather additional safeguards to the Halacha.

On page 10 you say that the Kesuba is by nature unilateral. This is true with our Kesuba in its present form. Please see רמב"ם פי"ב אישות ה"ה that one might emmerate in the Kesuba both the 10 obligations of the husband and the 4 of the wife. However the ב"ש says that it is not necessary. Still, it seems that their inclusion does not violate the spirit of the Kesuba. I grant that extraneous matter such as they are including is foreign to the Kesuba - but make this as your point of argument.

On page 12 you raise the fear that a 'Get' might be forced on the woman who serves a trefa dish to her husband.

Don't we have exactly such a 'din' in משנה כתובות ד"ז ע"א in the case of מאכילתו שאינו מעושר. This is true even today after חרם דרבנו גרשום as found in ב"ש סי' קט"ו ס"ק ז'.

Rabbi Joseph Weiss
56 BENNET AVENUE
NEW YORK CITY

WADSWORTH 3-1293

On page 13 you write that the Kenuba needs a Kinyan and that the budar is the only one possible - Actually the obligations of the [illegible] need no Kinyan, since they are a [illegible] as clearly stated by the [illegible] on [illegible]. However there is the adopted ruling by [illegible] that one must issue a [illegible] for the sake of her [illegible] - so that he may not claim later on [illegible]. But, in order to issue a [illegible] one need only to direct the witnesses witnesses to do so [illegible]. True, that Kinyan implies direction also, because [illegible]. The reason we make Kinyan when issuing a [illegible] is either as a 'go ahead signal' or because of [illegible] as in [illegible]. For other reasons see [illegible] and [illegible].

On page 15 and 16 you develop the theme that to accept an authority as one's [illegible] is of the nature [illegible], which, no Kinyan could make it effective.

This needs more clarification since we do find a [illegible] in the case of [illegible] where the [illegible] says that if he made a [illegible] it is binding even [illegible] and even by [illegible]. Rashi explains there that the Kinyan is [illegible]. The [illegible] makes note that this is like [illegible] and cites other examples in [illegible] where a Kinyan of this nature is employed.

The answer is that the [illegible] explains that the din of [illegible] is valid because of [illegible]. This means that he is [illegible] in advance to whatever verdict the judges will pronounce. The controversy in the [illegible] whether this is valid by [illegible]

must be understood to mean as a הודאה whether his acceptance of these judges is strong enough to mean admission even or a promise to give or even if he did so בקנין, or not. Kinyan however surely indicates a determined הסכמה to everything the judges will rule. Therefore this is not a קנין דברים, ~~but~~ since it is ~~only~~ no Kinyan at all, only an indication of one's determination. In our case of course there are no arguments at all and the Kinyan has no validity - as you well explain.

However, notice the opinion of the רשב"א in ([illegible]) and in his [illegible] cited by [illegible] where he maintains that קנין
is valid for the reason that one could bind himself to and accept in advance ~~of~~ any ב"ד, even הדיוט, who shall have the authority of deciding controversies concerning ממון and even to levy fines. This may be done by a קנין לקבל ב"ד, and the ב"ד has then the right to summon to court (see חו"מ סי' ...).

Now, to be sure this ~~is~~ has no application in cases of איסור והיתר. The question may be raised that since this so called ב"ד of הדיוט of theirs adopts the authority to impose fines in case of disobedience to their edicts which do concern א"ו, whether this is a case of ממונות or not. I believe that since the ממונות is only secondary to their role of arbiters and judges on דיני א"ו, an authority which you cannot bind yourself to, therefore the קנס which they should impose is also not binding, being that it is imposed for disobeying an order that has no validity.

On page 20, you attempt to prove that קנין ... קנס invalidates the third clause of their Kesuba, though it is a case of א"ו, citing תנאי כתובה as support. This I don't understand. The question of א"ו is about conditions on ~~of~~ the effect of the איסור proper. Kesuba and תנאי כתובה are pure matters of ממונות and the fulfillment of conditions set on them have no bearing on either א"ו or איסור. They effect only the conditions for payment of the fines.

Rabbi Joseph Weiss
56 BENNET AVENUE
NEW YORK CITY
WAdsworth 3-1293

On page 21 you write that מחילה which could solve the problem of אסמכתא is impossible to be ~~em~~ employed in this case. Just why, I couldn't understand. Furthermore every שטר contains an automatic מחילה because דמניה שלא אמנה (ב״ב קע״ו).

On page 22, you state that Kinyan, which implies מחילה and which should also remove the question of מחילה, is only the real kind of Kinyan, not the symbolic.

The ר״ן נדרים כ״ז who pronounces the סברא that Kinyan in case of conditions does not imply מחילה (אי״נ דבלא מחילה נמי הוי חל הט דהקנו׳ סוברא לאחר), he will hold the same for חזקה which is a ~~real~~ real Kinyan. By כסף או שטר there is even no הוה אמינא that they imply מחילה since they are good even לאחר ל׳. So what are the real Kinyanim that do imply מחילה? The ר״ן in ב״מ ס״ו in גמ׳ speaks of חזקה and says that מחילה is good to remove the אסמכתא. (See תוס׳ וקנאות ע״ג in ד״ה קנו׳ where it stated openly that חזקה isn't good לאחר ל׳) [I mention this reference, although it is obvious].

If you mean the רמב״ם who holds when property is transferred there is no need for מחילה then this is not because it implies, ~~for חזקה as stated~~ מחילה, since it is good even if he omitted it, and by כסף או שטר או חזקה it doesn't imply at all. The reason is because the רמב״ם holds that by מחילה there is no אסמכתא and it is based on the answer of the תוס׳ נדרים כ״ז:

[ע״ר״ן שם ונדעתי גם משנ׳ הכנ״ה הו׳ אבל פשטות לשון הרמב״ם דהנ״ל: שאני התם דגלי לבטלן ע״למז מורה כמ״ש הר״ן - וגם הכנ״ה פלה לומר רק שכתו שמחילה מהני כן בחזקת הדרכים נמי מהני אבל לא הוי מכין מחילה כמו שאתה כתבת אלא שלא דמי למחילה - ואף גם הכנ״ה מביא אות כמ״ש הר״ן והספים לו]

However you could have used another argument based on the [illegible] of the [illegible] brought down by the [illegible], who says that by אסמכתא it requires קנין ואחריות בב"ד חשוב because it was involuntarily made. This is also true in the case under discussion. Also the opinion of [illegible] is that every אסמכתא needs קנין ואחריות בב"ד חשוב, which of course lacks in our case.

In your discussion however, you fail to realize that the שטר itself is good enough as a Kinyan for whatever it specifies, since one could obligate himself with a שטר and since a שטר with [illegible] has automatically אחריות, then we have in this case קנין ואחריות without the Sudat. שטר ~~even~~ according to the [illegible] ([illegible]) doesn't even need אחריות and is what you call a real Kinyan. So your discussion about the Suddat ~~is~~ cannot be considered when we have a שטר. [see [illegible]] on this point about שטר being a Kinyan.

I personally wonder whether the question of אסמכתא couldn't be treated here just as by [illegible] and [illegible] which are exempt from אסמכתא as [illegible] says that where there is בושת or הפסד the terms are binding even when conditional, based on the משנה in [illegible] by [illegible]. The [illegible], indicated above, explains that the [illegible] is not the [illegible] since it is only [illegible] also by [illegible] and by [illegible] it is only [illegible]. The reason why we say that the terms of the condition are binding is because that in case when one party promises to pay another in case that a damage will be caused by him or an embarrassment, then such a promise is binding and he is מחויב because he is ~~[illegible]~~. [illegible]. It could be said that failure to reach a settlement with a ~~partner~~ party in marriage will cause בושת and הפסד and a promise to pay fines is not an אסמכתא but is [illegible].

Rabbi Joseph Weiss
56 BENNET AVENUE
NEW YORK CITY

WAdsworth 3-1293

Furthermore where two parties promise to each other to abide by certain regulations and stipulate penalties in case of violations then these fines are effective even though it is a קנין דברים and an אסמכתא. This is the opinion of several פוסקים based on the [illegible] in the case of [illegible]. I do not want to treat this here at length but please see the [illegible] and the [illegible] where this point is developed that ([illegible]). (With this they answer the קושיא of [illegible] which might present the problem of אסמכתא.) (The [illegible] answers this קושיא in his own way that a condition which is beyond his control is not אסמכתא). Now in our case agreement is made between husband and wife and is of mutual benefit, why not say here too that it ~~nots~~ is free from אסמכתא? I know that this opens a vast subject of partnerships in general (see [illegible] and [illegible]), however it should be explored for clarification. If I should have occasion, I should like to ask Rabbi Soloveichik [illegible] for his opinion.

On page 25 you discuss ~~the discuss~~ the question of coercion by [illegible] on a [illegible]. There are many possible cases for coercion which you fail to mention and which our opponents could ~~you answer that~~ use as a springboard for counter rebuttal. I mentioned before the case of a man leaving his wife. [illegible] also takes up the case of a man desiring to leave the country but whose wife refuses to join him. [illegible] also deals with a [illegible]. Even where a woman says [illegible] the [illegible] permits coercion but the [illegible] strongly oppose it - and we follow the [illegible] ([illegible]).

Of course they do not intend to follow the rules of the [illegible], but we must make clear by illustration those cases which are not

permitted to have coercion. There is certainly a large area of cases in modern times which would permit coercion – although one has to decide what form the coercion may take. (עי' אה"ע סי' קנ"ד מחלוקות

הר"ן והנ"י וזה גם בהגר"א סי' קנ"ד ס"ק מ"א ובפתחי תשובה דכמה מקומות ואכ"מ)

לפי דעתי אם הב"ד שלהם יכפו לאחד שיתן הגט אף אם הדין נותן לכפות יש לדון אם מותר משום דהוה שאלה אף אני מפקפק על גיטי הני הדיוטות אינן ומתרץ משום דאנן שלוחותייהו עבדינן (עי' גיטין פח: ובתוס' ד"ה דשלחתא) ואנ"ל זה מהני בשום הדיוטות אבל באלו אנשים אשר אינם מאמינים בתורה בנביאים ובחכמינו ז"ל ואינם מודים בכחם של קמאי אשר שלוחותייהו אנו עושים מסתבר שלא ניתן להם הכח אפי' דינא לכפות והוי כמו שאר הדיוטות בלי כח השליחות מכיון שהם אין מודים בשליחות ועושים על דעת עצמם. ודומה לזה אותו בשו"ע הרב מלובלין. תוך הל' שחיטה סי' ב' דקו' ס"ק ט' שכתב שם שאותן שמחללו [illegible] כבודם בזה"ר שובנו והסכין להם מה זה דוקא על לודעם ור"ש ומוחזק להיות נזהר ורבים יותר. ובלשון השו"ע שם „ולהם מחללו כבודם כי הם להכעיס ולמרוד" אבל בשאר בנ"י אשר אינם מחלקים לזה "ל שלא האמינו להם, ולכן בזה"ל צריך להיות יותר יש לגדר הנלמוד כי אין הכוונה ספיקא ערוכה, עכ"פ ונעבי שאין מקום לום כא' אה אפי' בה רחוק בכל ע' אלו לעבי דלמא הבאתי כי הוי דומה לזה.

I think I have written enough and I shall pause here. Please let me hear from you concerning these points.

With best regards I remain

Cordially yours,

Joseph Weiss