COMMUNICATIONS

The Conservative Ketubah

To the editor of *TRADITION*:

It was with a great deal of interest that I read the article "Recent Additions to the Ketubah" by Rabbi Norman Lamm, in the Fall 1959 edition of Tradition.

However, I cannot agree with his halakhic conclusions or with his logic, and beg to take issue with his contention that the Conservative Ketubah is invalid because it is an *asmakhta*.

Rabbi Lamm lists three definitions of *asmakhta* under which he classifies the third clause of the new Conservative Ketubah and concludes that the Conservative amendment is an *asmakhta* and therefore invalid. The first category of *asmakhta* mentioned is "Contracts Involving Undetermined Sums." He quotes Maimonides (*Mekhirah* 11:16) to the effect that an obligation to pay an undisclosed sum, even with a *kinyan*, is not a legal obligation. Using this reasoning he desires to invalidate the Conservative Ketubah, stating that it too obligates the party who refuses to meet with their Beth Din or accept its decision to pay an undetermined fine.

What Rabbi Lamm does not quote is the very next statement of Maimonides (*Mekhirah* 11:17) which is: "Why then is it that if one makes an agreement with his wife to feed her daughter he is bound to do so? Because the agreement was made *at the time of the wedding* and this is an example of verbal promises by which one can take possession." Maimonides specifically states that an agreement to pay an undisclosed sum, made at a wedding ceremony, is binding, even though it would be invalid if made under any other circumstances. A *kinyan*, also, is unnecessary according to Maimonides.

The Conservative amendment to the Ketubah is part of the marriage ceremony and cannot be included in this category of *asmakhta*.

(The *Mishneh Le'melekh* [*Mekhirah* 11:2] remarks that Maimonides may possibly consider a contract containing *any* type of *asmakhta* valid, if it is made during the wedding ceremony.)

Another reason why the Conservative Ketubah is an *asmakhta,* Rabbi Lamm claims, is that it is a "Contract Involving Commitments Which Are Only Partially Under Control of the Obligating Party." As proof of this contention he compares the amendment to the talmudic case where the first party commissions the second party to purchase wine for him at a low price. Should the second party fail to do so, he must pay the difference between the price paid and the lower price. Because this agreement is contingent upon the willingness of the wine merchants to sell it to him at a low price, it is an *asmakhta* and invalid.

"Similarly," writes Rabbi Lamm, "the success or failure of a marriage is always contingent upon two independent wills—husband and wife . . . the psychological pattern here is analogous to that of the wine contract."

Rabbi Lamm fails to note that there are differences between these two cases; that the involvement of a third party does not make either case an *asmakhta.* Maimonides (*Ishut* 6:12) writes that if a man says to a woman, "I will marry you on condition that Mr. X will sell his field to me," the condition and the contract are valid even though it involves a third party.

The reason why the talmudic case involving the wine merchants is invalid is due to the fact that the fulfillment of the second party's commitment can be hindered by a third party, i. e. they can refuse to sell to him at a low price.

In the case of the Ketubah amendment the husband (or wife) states that he will come to court if summoned or pay a fine—no one hinders him in the fulfillment of his obligation.

The Ketubah amendment is in no way contingent upon a third party for its fulfillment and is therefore not invalid because of *asmakhta.*

I fail to understand Rabbi Lamm's note 35:4. He concedes that a retroactive clause and a *kinyan* are sufficient to neutralize the *asmakhta*-nature of a contract and validate it, and these conditions are present in the Conservative Ketubah. After granting all this, he proceeds to prove that there are many conditions of an uncertain nature in the Conservative Ketubah and therefore it is invalid because of an *asmaktha.*

Once Rabbi Lamm concedes that the Ketubah contains neutralizing factors, it is a valid, legal, and binding contract despite all of its *asmakhta* clauses. This concession automatically means that the Conservative Ketubah cannot be invalidated as an *asmakhta.*

Rabbi Lamm also writes that the second clause is invalid because it is a commitment to mere words and there is no substance to an agreement "to accept the authority of the court." However, Rabbi Lamm quotes the Talmud which states that a financial stipulation would remove it from the category of a contract to mere words and validate it. The Conservative Ketubah does

stipulate that a penalty is to be paid for not accepting "the authority of the court."

Rabbi Lamm errs when he separates the second clause from the third clause of the Ketubah and considers each an entity by itself. Actually they are in one contract, contingent and dependent upon each other. The second clause establishes the Conservative Beth Din as the authority and the third clause gives it power to penalize the one who does not adhere to its decision. Since there is a financial obligation, even though it is to pay a penalty, it is not a *kinyan devarim*—an agreement to mere words —but a legal contract.

In conclusion, and for the purpose of clarification, I want to state that I am neither an advocate of the Conservative Ketubah, nor do I claim halakhic validity for this amendment. I merely contend that it is not in the category of an *asmakhta.*

(Rabbi) CECIL WALKENFELD
Woodhaven, N. Y.

RABBI LAMM REPLIES:

Rabbi Walkenfeld's first objection to my critique is based on *Mekhirah* 11:17, where Maimonides rules that an agreement by a man to feed his prospective wife's daughter is binding if the agreement was made at the time of the wedding. The point seems to be well taken, except that closer study of Maimonides' opinion, particularly in *Ishut* 23:17 and 18, yields different results. In the latter halakhah Maimonides deals with the same issue in greater detail, as he does in the whole latter half of chapter 23. And he consistently refers to specific commitments, e.g., "he who marries a woman and specifies that he will feed her daughter *so-many and so-many* years," etc. Why the difference? Because in *Mekhirah* 11:17 he states a *general* principle — that agreements contracted during a wedding are binding — in contrast to the previous halakhah (11:16) where an obligation for an undetermined sum is ruled invalid. In *Ishut* 23, however, he treats the whole problem of arrangements concluded at weddings in greater detail. Here he insists on a more specific commitment. Evidently Maimonides regards the "five year" limit as unspecific in normal cases, but sufficiently determined to be contracted during or right before a wedding. Even at a wedding, however, *some* specification is necessary; a blanket agreement will not do.

I am not sure I understand Rabbi Walkenfeld's second stricture. It seems that his objection is based upon a fallacious comparison of the Ketubah situation with that of the wine merchant. The willingness of the husband or wife to answer the summons or pay the fine is independent of any outsider, he argues, and is thus not analogous to the case of our wine merchant. Agreed. But neither does anyone hinder the wine merchant from paying *his* penalty. Rabbi Walkenfeld's error consists of comparing, as it were, apples with pears. The willingness to pay, which is completely independent, was never questioned in either case. The real test is in the nature of the transaction that brings the two parties before the court in the

first place. And here both are similar — the wine merchant and the husband (or wife) agreed to a transaction which was only partially controllable by them, a purchase of wine in one case and a happy marriage in the other. The quotation from Maimonides (*Ishut* 6:12) does not prove anything. The condition there stipulated is completely independent of the skill or intelligence of the husband, in which case, as I pointed out in paragraph B p. 112 of my article, there is no question of *asmakhta*.

Rabbi Walkenfeld is right when he implies that in my footnote 35:4 I did not add any new halakhic objections to the Conservative Ketubah. The purpose of the note was to clarify the highly conjectural nature of the contract. But he is wrong in assuming that, since I "conceded" the validity of the *asmakhta*-neutralizing factors, the amendment stands. My "concessions," it should be perfectly obvious, are not substantive but argumentative. They are not meant to indicate agreement to the points I had previously mentioned as possibly supporting the halakhic integrity of the amendment. They were merely in the category of "even if" I should concede the points in favor of the amendment — which I emphatically do not, as should be amply evident from the first three parts of note 35.

His next point, questioning my criticism of the amendment's second clause, is also unacceptable. First, it is inaccurate to refer to a "financial stipulation" as removing the objection to *kinyan devarim* according to the Talmud. Second, had Rabbi Walkenfeld read carefully note 17, where I raise the problem, he would have found the solution too.

Furthermore, Rabbi Walkenfeld ought not to register his objections as to classification of the clauses with me, but with the writers of the amendment. The punctuation clearly distinguishes between the second and third clauses by means of a period. (In fact, the third clause itself is broken down into two, but I have treated them as one since I concentrate on the very last part to the exclusion of the first half).

Finally, while I find I cannot accept Rabbi Walkenfeld's objections, I do want to thank him for studying the article and checking the sources as carefully as he did. *Ye-yashar kocho!*

Errata

The correct wording of the passage in Mr. Israel Gan-Zvi's article "Against 'Separation' in Israel" appearing at the bottom of p. 222 of the last (Vol. II, No. 2) issue of Tradition is as follows:

> Education is the major source of controversy between the secular and religious camps in the country. It constitutes the plane of political friction, the only complex of factors because of which the idea of Separation can possibly come to the mind of an Israeli citizen. All other issues, even that of civil marriage, are of secondary and tertiary importance in comparison . . . This struggle has two aspects: 1) a battle for the self and spiritual outlook of the coming genera-