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RECENT
ADDITIONS TO THE KETUBAH
A Halakhic Critique

The "amendment to the Ketubah" announced some five years ago by the Conservative movement has been hailed by its leaders as "something which may very well place the Rabbinical Assembly not only on the map of the world, but also on the map of history."¹ That the world has not been shaken by this action is already evident from the more recent pronouncements from Conservative sources indicating that their project is not meeting with the desired success, and that even many Conservative rabbis have decided not to make use of the "amended Ketubah."² As for history, no one can accurately predict what the judgment of the future will be on the merits of this endeavor. But certainly history will record that its introduction generated sufficient controversy to rock to its foundations a Jewish community already sadly distinguished by its divisiveness and disunity. To this day most Jews remain confused, uninformed, and unenlightened by the polemics, for that is the only possible result when issues of religious moment are presented with immodest ex-

1. Rabbi Louis Finkelstein in *Proceedings of the Rabbinical Assembly of America*, XVIII (1954), 71.

2. Reported in the *National Jewish Post & Opinion*, May 24, 1957. As late as September, 1957, only one case of a refusal to grant a *get* had come before the Conservative tribunal in which the Conservative Ketubah was used. No "compensations" were imposed upon the husband, and the case was not reviewed before the secular courts, for the husband had yielded to the tribunal's moral persuasion (*Conservative Judaism* [July, 1958], 33, 34).

TRADITION: A Journal of Orthodox Jewish Thought

aggragation and met with immoderate emotion, all in the public press.

The Orthodox opposition to this innovation is based mainly on two factors: The competence of the proposed Beth Din (religious court), and the halakhic validity of the amendment itself. The first matter is serious indeed. How can Orthodox Jews — or, for that matter, any intellectually honest person — be expected to recognize the authority of an ecclesiastical court which denies (or, at the very least, seriously questions) the origin and hence the authenticity of the very Halakhah in whose name it presumes to speak and whose tenets it seeks to interpret? There are rules which guide us in choosing the officers of the law, just as there are rules for applying the law itself. Nevertheless, we shall in this essay restrict ourselves to the somewhat more impersonal and dispassionate second factor: the amendment proper. The appeal of the Conservatives for the acceptance of its amended Ketubah is based upon the absolute confidence of its members in the halakhic integrity of the document and the eminence of its author.³ While such implicit faith is often praiseworthy, we must not allow ourselves to be deterred by sentiment, and must proceed to investigate with vigorous objectivity the halakhic validity of the proposed *tekanah*.

The leaders of Orthodoxy in America have stated unequivocally that the amendment is not halakhically valid. Unfortunately, no detailed refutation by a competent scholar has been published to date. This essay, without laying claim to scholarly thoroughness, is an attempt to make good, in an elementary and popular manner, a debt that the Orthodox rabbinate owes to the American Jewish public. This is done despite the fact, that, as previously indicated, the whole issue may soon be academic because of the lack of public acceptance of the revised Ketubah. We shall limit ourselves to a critical halakhic analysis of the suggested amendment in a manner intelligible to the interested layman who may not be able to follow the argument in Hebrew but is still willing to risk an adventure in the deep "valley of the Halakhah."

THE KETUBAH

Jewish marriage, in addition to its many other aspects, has specific

3. Cf. Rabbi Judah Goldin, *Proceedings, ibid.*, 81.

Recent Additions to the Ketubah

legal and contractual implications. When a man and woman marry, they accept certain obligations and are awarded certain privileges. Biblical law imposes three obligations upon the husband: to provide his wife with food, clothing, and conjugal rights. Rabbinic law adds seven obligations to this list and confers upon him four privileges.⁴ First among these seven obligations is the "Principle of the Ketubah" (*ikkar ketubah*). This is an obligation by the husband for a certain fixed minimum sum which is placed under lien to his wife, so that in case of his death or of divorce, that amount is transferred to his wife, and is collected from his estate, real or chattel (and, in the case of real estate, even if it had been sold or gifted since the wedding). The reason the Rabbis ordained this "Principle of the Ketubah" is the protection of the wife. The Ketubah thus accomplishes two things: First, it discourages hasty divorce action by the husband, and second, it provides for the financial welfare of the woman who has been left a widow or divorcee.⁵

These legal relationships between husband and wife are presumed to be automatically effective from the time of the wedding, whether or not they were specifically agreed to, orally or in writing. Nevertheless, and because of a variety of reasons, it was deemed necessary to draw up a Marriage Contract (commonly referred to as the "Ketubah") which enumerates some of these obligations by the husband. Most prominent among these is the aforementioned "Principle of the Ketubah." Although it is understood that the sums mentioned are to be placed under lien to the wife for the specific eventualities of death of husband or their divorce, no explicit mention of death or divorce as the causative factors is made in the document.⁶

There are, in addition, two more parts to this Ketubah document. First is a provision for the bride's dowry (*nedunya*), whose principle the husband guarantees to return to his wife in case of death or divorce. And then there is the *Tosefet Ketubah*, literally the "addi-

4. There is a body of opinion which holds some of these have biblical and other rabbinic sanctions.

5. This is one of three of the 14 obligations and privileges that cannot be forfeited even by the couple's mutual consent. The other two are conjugal rights of the wife and inheritance rights of the husband. See Maimonides, *Hil. Ishut* 12:6, 9.

6. The only mention of death is the husband's statement, in the document, that he recognizes his wife's claims on his estate as valid not only during his lifetime but even afterwards.

TRADITION: A Journal of Orthodox Jewish Thought

tion to the Ketubah," which means the amount by which the husband voluntarily increases the value of the Ketubah proper from the minimum fixed at 200 zuzzim for virgins and 100 for non-virgins.⁷

The Ketubah document we use nowadays is generally a printed form, with blank spaces provided for the names of the bride and groom, for the minimal sums, depending on the previous marital status of the bride, and for the signatures of two reliable witnesses. The Ketubah mentions only the obligations of the husband and not his privileges, i.e. the wife's obligations to her spouse. It is therefore a unilateral document and requires the explicit consent only of the husband. Although mere verbal permission to draw up the document would suffice, we require the husband to perform a *kinyan* to indicate his unqualified consent. The term *kinyan* refers to the grasping of a handkerchief or other such article by the groom, generally handed to him by the marriage performer, and is a concretized symbolic act of consent. *Kinyan* is that which effectively binds the contract, and its equivalent in our contemporary American society would be the handshake; a physical act, in itself meaningless perhaps, which symbolizes consent to a contractual relationship. After this *kinyan*, the two witnesses sign the document.

What this institution of Ketubah achieves, therefore, is a kind of combined life insurance policy and alimony guarantee. It protects the woman's financial status at a time when she is in a most precarious personal and economic condition and in greatest need of legal safeguards, and, by providing this form of alimony, it discourages hasty divorce.

The form of Ketubah which we use today has, with minor changes, been employed for at least over a thousand years. It represents, in its very legalism, the deep concern of our Rabbis for the protection and honor of the woman and, consequently, for the inviolate sanctity of the Jewish home.

7. While the latter two parts were originally determined by the husband on a voluntary basis, they later became fixed amounts. Their total value, in terms of modern currency, has been estimated as varying, in different eras, between \$2,000 and \$10,000. Our modern Ketubot fix the dowry and additional jointure each at 100 silver zekukim, giving a total of 200 silver zekukim, which is worth today approximately \$4,000. V. Irving Agus, "Sheiur Ha-ketubah" in *Horeb*, (1939). Cf. Rabbi Joseph E. Henkin in *Ha-pardes*, (Oct. 1957) who calculates the 200 zekukim at over \$2,000.

Recent Additions to the Ketubah

THE PROBLEM

The Conservatives have seen fit to amend this Ketubah in order to solve certain distressing problems. Since a *get* (divorce) according to Halakhah is a document which must be issued by the husband and received by the wife, then if either party is missing or refuses to consent to a divorce, no such action is possible. A woman placed in this particular predicament of being classified as a married woman, thus unable to marry anyone else, and yet not living with her husband, is called an *agunah*. The classical case of *agunah* occurs when the husband has disappeared, there being no reliable witnesses as to his being dead or alive. The Halakhah, from the earliest times on, has been preoccupied with alleviating the distressing problem of *agunah*. From the Mishnah until the very latest works of Responsa, our rabbis have dealt sympathetically with this tragic matter. Much has been done, and probably much will yet be done, within the halakhic framework, to alleviate the problem even further.

Another type of *agunah* has appeared in recent years and was largely unknown in earlier times. This is an *agunah* who has received a civil divorce, but whose husband refuses to issue her a religious divorce. The reason for his refusal can be anything from obstinacy, spite, or blackmail to simple unwillingness to be divorced. While, from the point of view of civil law, the power to grant divorce rests with the court, which also has the power of coercion, Jewish law places the right of issuance of the divorce not with the court but with the husband. In addition, Jewish courts are, in most cases, prevented by the Halakhah from coercing either party to consent to a *get*.⁸ And even where theoretically coercion by a Beth Din would be permitted, practical conditions in the Diaspora usually make it impossible to exert anything but moral pressure. In the State of Israel, where rabbinic courts can enforce their decisions in this area of law, the situation is a much happier one than in the Diaspora.

THE CONSERVATIVE AMENDMENT

The Conservative amendment is addressed to this particular *agunah*-problem. It attempts to set up a rabbinic court (their "Beth

8. There are certain exceptions when coercion is permitted. See Maimonides *Hil. Ishut*, Chaps. 14 and 21, and *Sh. Arukh, Even Ha-ezer*, 77 and 154.

TRADITION: A Journal of Orthodox Jewish Thought

Din"), and endow it with the power of coercion by getting both husband and wife to accept voluntarily, at the time of marriage, the authority of the court to impose fines. This recognition of the Conservative Beth Din is accomplished by the addendum to the Ketubah, and presumably will be backed by the civil courts as a binding agreement. Following is the English text of the Conservative amendment (which differs in many respects from the Aramaic text which will be used as the basis for halakhic criticism later):

And in solemn assent to their mutual responsibilities and love, the bridegroom and bride have declared: as evidence of our desire to enable each other to live in accordance with the Jewish law of marriage throughout our lifetime, we, the bride and bridegroom, attach our signatures to this Ketubah, and hereby agree to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America, or its duly appointed representatives, as having authority to counsel us in the light of Jewish tradition which requires husband and wife to give each other complete love and devotion, and to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of the Jewish law of marriage throughout his or her lifetime. We authorize the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision.⁹

By thus obligating husband and wife to submit to the authority of its Beth Din, with its right to impose financial penalty, the Conservative movement hopes to be able to coerce an unwilling partner to submit to divorce proceedings.

The Conservative amendment has essentially no bearing on the classical case of *agunah* where the husband has disappeared or is missing in military action. In its approach to the new type of *agunah*, it has nothing to do with "strengthening the Jewish home." It is certainly not calculated to discourage what some Conservative spokesmen have unfortunately called "frivolous" divorces. On the contrary, the effect of the amendment is to put their Beth Din in the position of forcing an unwilling spouse to consent to divorce, not preventing one.

9. V. *Proceedings*, *ibid.*, 67. Cf. *New Provisions in the Ketubah* by A. Leo Levin and Meyer Kramer (New York: Yeshivah University, 1955) for a critique of the proposed amendment from the point of view of its enforceability in the secular courts.

Recent Additions to the Ketubah

The Conservative Ketubah, therefore, does few of the things that have been claimed for it. Orthodox Jews recognize that there is indeed a problem, a grave human problem, and one which we shall have to solve by genuine halakhic means. But the Conservative proposal cannot even pretend to fulfill the role of a legal panacea for the *agunah*. Were the Conservatives to concentrate their efforts upon personal suasion and the bringing to bear of social pressure on the recalcitrant husband, we certainly would have no objection. Any constructive work they might have done so far in this manner is praiseworthy. The trouble is, however, that they began with the bold step of setting up their own "court" and formulated their approach in a manner publicly proclaimed as an "innovation" in Jewish law. It is our contention that, as a halakhic instrument, this amendment is invalid. It is a failure in its avowed purpose.

In attempting to demonstrate the halakhic weakness of this document, we must make it abundantly clear that we have no objection to an amendment *per se*. The Ketubah was meant to be a working and workable instrument, and it was not unusual to append conditions to it or otherwise amend it—provided, at all times, that the additions were halakhically valid. Furthermore, our objections both to the legality of the document and the competence of the proposed Beth Din neither detracts from the seriousness of the problem, nor in any way releases Orthodox scholars of the Halakhah from the sacred obligation to find relief for fellow human beings in distress.

For purposes of this analysis it will be necessary to use, as our basis, the Aramaic version of the amendment, since the English text is truncated, with the main body of the Ketubah missing from it. While the English version carries the amendment as one long clause, the Aramaic has it in three distinct clauses, each prefixed by a statement of acceptance on the part of bride and groom. The three clauses are as follows:¹⁰

1. The bridegroom and the bride agree to enable each other to conduct themselves all the days of their life in the way of Torah according to Jewish law.

2. Of their own free will they agree to recognize the court of the Rabbinical Assembly and the Jewish Theological Seminary of Amer-

10. Where alternate translations of individual words or phrases were possible, we have followed the "official" Conservative English text. See *Proceedings*, *ibid.*, 67.

ica, or its representatives, as the sole authority to teach them to go in the way of the Torah and to love and respect one another during the entire course of their marriage.

3. Each one agrees to empower the other to summon him to the court mentioned above, should there occur any dissension between them, in order that each of them shall be able to live, as he may desire, according to the laws of the Torah all the days of his life. They have authorized the above court to impose indemnities on the one who will refuse to come before it for judgment or will not consent to obey its court decision.

THE FIRST CLAUSE

The first clause, as stated, is the one in which husband and wife promise to enable each other to live according to Torah. Halakhic considerations aside, this seems completely unnecessary and even somewhat amusing. What did the Conservative rabbinate expect to accomplish with this piece of piety, especially when it is no secret that most young couples, unfortunately, neither do nor expect to "conduct themselves all the days of their life in the way of Torah?" Will this clause ameliorate the situation in any perceptible way?

Halakhically, the clause is entirely superfluous. It is true that the Halakhah permits the taking of an oath to perform the *mitzvot* or any one *mitzvah*.¹¹ Yet it is unnecessary to do so, since the Halakhah recognizes every Jew as being under prior oath to observe all of the Torah.¹² Hence, an additional oath or promise serves no real purpose. The Conservative first clause, not being in the form of an oath, is certainly superfluous. One seeks in vain for a valid reason for including a clause which is both unrealistic and ineffective in an "amendment" addressed to a serious, real, and pressing problem.

But there is an even more serious objection than irrelevancy or ineffectiveness. If we accept the Conservative amendment, then this clause becomes an integral part of the Ketubah, the violation of which entails forfeiture of the rights of the Ketubah by the violating spouse. Thus, for instance, if a day after the wedding, the young bride, in her first culinary venture, should serve her husband a non-kosher dish, the husband would legally have the right, upon suing

11. *Nedarim* 8a; Maimonides, *Hil. Shevuot* 11:3.

12. *Ibid.*

Recent Additions to the Ketubah

for divorce at some later date, to refuse to honor his financial obligations to his wife, as stipulated in the Ketubah, because she did not "enable" him to live in "the way of Torah." Considering the present low level of religious observance and living according to "the way of Torah," this clause actually threatens to deprive the woman of the rights granted to her by the traditional Ketubah. What we have here, therefore, is an absurdity — because, practically speaking, it negates the entire intention of the Ketubah, which is the protection of the woman.¹³

The first clause is thus seen to be irrelevant, ineffective, and absurd in that it defeats the whole purpose of the Ketubah which is the safeguarding of the woman's rights.

13 The halakhic point here requires some clarification. It is true that where the husband can prove that his wife has transgressed the Law (*overet al dat*), she forfeits all the rights of her Ketubah. (See *Ketubot* 72, *Shulchan Arukh Even Ha-ezer* 115). However, when the husband is himself non-observant and transgresses these same laws, his wife does not lose her Ketubah rights. (See Rama on *Sh. Arukh*, *ibid.*). The reason for this is that a non-observant wife forfeits her rights only when her transgression is deceitful and adversely affects husband or children, such as in the case of representing herself to her husband as ritually clean when in point of fact she is not, or serving him untithed bread under the pretense of having tithed it. (See *Bet Shmuel*, *E. Ha-ezer*, *ibid.*, and commentary of R. Asher on *Ketubot* 72.) Where, however, the husband himself does not observe such laws, the wife cannot be accused of willful deceit (*makhshellet*), and hence does not forfeit her Ketubah.

It is extremely doubtful, however, if these considerations will hold true in the case of the Conservative amendment, where both parties promise to "enable each other" to live in accordance with the Torah. Consider the case mentioned, where the wife serves her husband non-kosher food or allows herself to be approached while ritually unclean, and where the husband is himself non-observant. At no time in the future can he, under the normal law of *overet al dat*, deny her the rights of her Ketubah, since she never was a *makhshellet*, that is, there never was any *willful deceit* on her part in religious matters. Under the terms of the Conservative document, however, this same husband can refuse to honor his obligations to his wife, since she defected too; she had agreed to "enable him" to observe, and while it is true that she did not *deceive* him, it is equally true that she did not *enable* him (*le-mishvak*) to observe by serving non-kosher food or indulging in the marital act while in a state of *niddah*. The point may be nice, but it is valid.

Proof can be adduced from a similar case which we find in a responsum of Maimonides concerning a decree, relating to the Ketubah, enacted by the Egyptian Rabbinate about 790 years ago. A considerable number of Jewish women had abandoned the ritual immersion prescribed for purification from the state

TRADITION: A Journal of Orthodox Jewish Thought

THE SECOND CLAUSE

Before proceeding to a critique of the next two clauses, it is necessary to present some background material on how contracts become halakhically valid and binding.

Any sale, gift, or obligation involves a contract between two parties. Now before such a contract (written or oral) can be regarded as effective and authoritative by the Halakhah, it is necessary that both parties fully and completely agree to the contract. There must be nothing in the minds of either party which prevents a complete knowledge of and unqualified consent to all the terms of the contract. Frequently, in order to ascertain and reenforce this exclusive focus of attention, awareness, and consent of both parties on the contract (that is, to make sure that the agreement is not in the category of a mere promise) we insist on the performance of a *kinyan* which, as we previously explained, is a physical act indicating that

of *niddah* in favor of a form of a shower that was clearly Karaite in origin and nature. Leaders of the Jewish community, headed by Maimonides, agitated against this practice and legislated a *tekanah* whereby the bride must abide by the halakhic rules for *niddah*, and desist completely from the heretical customs then in vogue, under penalty of forfeiture of all rights of the Ketubah. (See *Responsa of Maimonides*, ed. Alfred Freiman, No. 97. From No. 194 it would seem that the essence of the *tekanah* was occasionally written into the Ketubah.)

Subsequently, a host of inquiries were directed to Maimonides concerning this *tekanah*, asking when the Ketubah is to be regarded as forfeited as a result of its violation. When the wife deceives her husband as to the state of her ritual purity, Maimonides rules that she reverts to the status of *overet al dat*, under which category the case would normally be subsumed even without the special enactment, and the wife loses her Ketubah protection. (*Ibid.* 194). Now, where it is ascertained that the husband was aware of her impurity and nevertheless willingly acquiesced to the transgression, Maimonides again rules that she forfeits her Ketubah (*ibid.* 193 and 194. In addition, he advises the inquiring courts to fine the husband for the amount of the Ketubah.) Here, then, was a case in which the wife is not a *makhshellet*, since there was no deceit, and so she cannot be regarded as an *overet al dat*. Yet the ruling of Maimonides, *after* the enactment of the new provision, is that the wife cannot collect.

The same reasoning applied to our hypothetical — yet probable — case would similarly result in the forfeiture of the Ketubah by the wife even when the husband is not observant, whereas the same would not hold true without the Conservative amendment. This Conservative action, therefore, in their first clause, is clearly against the best interests of the non-observant Jewish wife, whose protection is the pretext for the Conservative action.

Recent Additions to the Ketubah

both parties hereby unreservedly agree to all terms of the contract and henceforth are so bound that they will not and cannot revoke. This *kinyan* can take the form of actual transfer of the object sold or gifted from the property of the giver to that of the receiver, or of a written note certifying sale, or of money paid, or of a purely symbolic act such as the grasping of the kerchief previously discussed or its equivalents depending on local custom. Each of these examples of *kinyan* may bind a contract, some being valid in general, others more specifically for individual kinds of contract.

Kinyan thus assures the *subjective* validity of any transaction. It focuses the mind and volitions of the parties upon the transaction and assures us of what we may call the psychological integrity of the contract. But obviously, if we are going to concentrate the attention and focus the intention of parties to a transaction, there has to be a transaction; that is, there has to be an immediate, objective, physical reality, whose legal status we are concerned with, at which we are to direct these subjective considerations of both parties. In short, there must be an *objective reality* at which we aim the *subjective* effect of *kinyan*.

Let us cite an example from the Talmud itself.¹⁴ Two partners own, in common, a courtyard. They decide to divide it (to "divide" in this case meaning not to build a fence, but simply to agree to the idea of division, with details to be determined at a later date). In order to reenforce their decision, they participate in a *kinyan*, such as the grasping of a kerchief. Is the agreement binding so that each partner is legally forbidden to revoke without the other's consent? The ruling of the Talmud is clear: the contract is not binding, and either partner may revoke. The reason: *kinyan devarim be-alma hu*, it is a "mere *kinyan* of words." For *kinyan* to be of any effect, there has to be a concrete and physical reality — such as the sale or gifting of a table or other object, or a lien upon real estate — with which we are to concern ourselves. In this case, however, the *kinyan* was effected on an abstraction — "to divide" — which in itself lacks the objective basis for *kinyan* to work. "To divide," without stipulating what, where, and how much, is insubstantial, and so *kinyan* is meaningless here.¹⁵

14. B. *Batra* 3a.

15. Maimonides (*Mekhirah* 5: 14), following this talmudic principle, formulates the rule: Those matters which are insubstantial cannot be contracted

TRADITION: A Journal of Orthodox Jewish Thought

In addition to such insubstantial matters as are based on the verbs "to divide," "to become partners," and "to go," there are opinions of early authorities that "to give" and even "to build" are insubstantial abstractions upon which *kinyan* cannot be performed.¹⁶ It is obvious, therefore, that "to recognize" or "to accept the authority of" are certainly in the category of those matters too insubstantial to be the objects of *kinyan*.

With this introduction, it will become self-evident that the second clause of the Conservative amendment is invalid. The second clause is the one in which bride and bridegroom accept and recognize the authority of the Conservative Beth Din. Now for the clause to be binding and legally valid there must be some legal procedure by which that binding is effected, and by which bride and groom submit themselves to the authority of this Beth Din. If there is no special act of commitment, the whole clause is invalid, since if it is to be enforceable it must be more than mere promissory language; it requires legal, halakhic formulation which indicates clear intent to contract. The only possible act of legalization is through the *kinyan* of the grasping of the handkerchief which the marriage performer has the groom (and now the bride) engage in for the Ketubah proper. Thus, it might be argued, by virtue of this symbolic act of consent by which the groom accepts the financial terms of the Ketubah itself, he also accepts the authority of the Beth Din and its sole jurisdiction in all matters affecting the married life of this couple.

But the mistake in this reasoning is obvious. You simply cannot perform a *kinyan* on a matter which is objectively insubstantial. "To recognize" is a mental process and is certainly no stronger than "to divide"; both are overly abstract, and therefore in both cases *kinyan* is ineffective even when performed. Since there was no acceptance of this Beth Din by this couple, the Beth Din can never exercise its authority over them at any later date.¹⁷

through *kinyan*. For instance, if a man write a contract and say in it that he has participated in a *kinyan* to "do business" with another, or that they will "divide a field" between them, or that they will become "partners in business," and similar matters, these are mere verbal promises and *kinyan* has no effect, for he has not contracted for a known and well-defined object.

16. *Tur* and *Bet Yosef*, *Choshen Mishpat* 157.

17. It is true that the Talmud (*Sanhedrin* 24) permits two parties to a dispute to agree mutually upon a judge or witness who is unqualified either because of

Recent Additions to the Ketubah

We thus see that the second of the three major clauses of the Conservative amendment is invalid and ineffective, and, in effect, their amendment and Beth Din both fall at the same time.

consanguinity with litigants or unreliability or other reason. This extra-legal procedure is recognized through the performance of a *kinyan*. It might be argued, then, that since the recognition of this unqualified court is valid and is not regarded as *kinyan devarim* (mere verbal promise), so too should the bride and groom, in our case, by virtue of the *kinyan* of the grasping of the kerchief, be able to accept the Conservative Beth Din, without such action being regarded as *kinyan devarim*.

The problem is a theoretical one and exists even without recourse to our present situation. How does one reconcile the law of *kinyan devarim* and the acceptance of an unqualified court by *kinyan*? The problem is already considered by early authorities. While the position of *Nimukei Yosef* (on *Sanhedrin* 24) is anomalous, in that he seems to accept the validity of a *kinyan devarim* in many instances despite the talmudic aversion to it, others are not prone to dismiss the matter so lightly. Raavan, quoted by *Siftei Kohen* on *Sh. Arukh Choshen Mishpat* 22:4, maintains that mere recognition or authorization (i.e. a *kinyan* not to revoke) is not sufficient because it remains too abstract in nature. He requires an outright and explicit statement that both parties *will act in accordance with the edict of the judges*. It is a fine semantic distinction, but there is a real difference, for one remains an abstraction, a mere *kinyan devarim*, while the other is sufficiently concrete to be valid. A careful perusal of the Conservative Ketubah in both its Aramaic and truncated English versions — especially the second clause per se — will reveal that it remains *kinyan devarim* according to Raavan.

More early authority can be cited in support of this opinion. See Rabenu Simchah quoted by Mordecai on *B. Metziah* 108, and Mordecai as quoted in *Chidushey Anshey Shem* on *Sanhedrin* 24. Compare too the decision of the author of *Responsa Chut Ha-shani*, No. 36, who would agree with our classification of the second clause as *kinyan devarim* despite his tendency towards a more restricted definition of this concept. It might be added that secular law also recognized this distinction. See reference in *New Provisions in the Ketubah supra* n. 9.

Other pertinent differences can be pointed out. In the case of the acceptance of an unqualified court, at least we have a specific court ready to hear an actual case being presented to it now, at the time of *kinyan*. In our case, however, we ask the couple to accept and carry out the decisions of an essentially unspecified court which is to decide a case at present neither real nor expected and which might never occur. Certainly this is a *kinyan devarim*. What is more abstract than a situation, which we ask the couple to imagine, in which they are bitter litigants before unknown judges in an unspecified place, but which situation does not exist yet? See too *infra* n. 20.

THE THIRD CLAUSE

The third condition or clause is the one in which each partner allows the other in advance to summon him or her to appear before the Beth Din in case of marital discord, and to permit the Beth Din to impose penalties in case of failure to respond to the summons or failure to carry out its decisions. This is the most complicated point (halakhically speaking) of the entire Conservative Ketubah. Whereas in our discussion of the second clause we showed that the Conservative amendment lacked the *objective* basis on which to perform *kinyan*, we shall now see that even if we should grant its objective validity, which we cannot, nevertheless there are grave deficiencies in the *subjective* aspects of *kinyan* performed on this Ketubah.

We stated at the outset that the Halakhah demands of both parties to a contract the complete and total knowledge of and consent to what is being transacted. Both parties must have full knowledge of what they are doing and must agree to the proceedings without reservation. *Kinyan*, when present, assures us of this subjective or psychological validity of the transaction.

Now there is a kind of contract which, by its very nature, precludes this complete and undivided focusing of, commitment to, and reliance on the terms of the contract to the exclusion of any and all outside factors. This contract is such that because of some element in it, it is improbable that there will be achieved this total psychological awareness of all the consequences of the matter. This element of *unsureness* or distraction is called אַסְמַכְתָּא¹⁸, a word which defies easy definition. A contract which partakes of the nature of *asmakhta* is deemed invalid, although there are prescribed ways of neutralizing or circumventing a state of *asmakhta* by reenforcing the psychological integrity of the contract. There are several kinds of *asmakhta*, as well as several different definitions of this sometimes elusive legal concept. We shall mention the more important ones and, with them, test the validity of the Conservative third clause.

1. *Contracts Involving Undetermined Sums*

In this category we can place all transactions in which the amounts

18. From the root סָמַךְ which means "to rely upon," i.e. there is an external factor which stimulates unfounded overconfidence.

Recent Additions to the Ketubah

concerned are undetermined. Even when *kinyan* is performed upon such transaction, the opinion of Maimonides is that it is invalid, since the sum is undetermined and, hence, it is impossible for either party to have full and exact knowledge and consent. Thus, in the 11th chapter of *Mekhirah*, where he discusses a series of such cases of *kinyan* where there is doubt as to the totality of the commitment, he writes:¹⁹ "If a person obligated himself for an undetermined sum, i.e. if he said 'I obligate myself to feed or clothe you for five years,' even though a *kinyan* was performed, there is no obligation." Notice that Maimonides regards even an obligation for a fixed time (five years) as an undetermined sum, since it is not clear how much food or clothing will be consumed in this five-year period; and such unfixed amounts invalidate the contract despite *kinyan*. The unsureness that is attendant upon the indeterminate nature of the sums involved characterizes the entire contract as an *asmakhta* which is, hence, invalid.

Certainly, therefore, our case is, on the same principle, invalid. Here bride and groom obligate themselves to pay, at the demand of the Beth Din, penalties of undetermined sum.²⁰ And this is to be done only if they become involved in controversy, and if they summon each other to Beth Din, and if they fail to appear or if Beth Din finds against one of them. And then the amount of the fine is undetermined at present, when the young couple are preparing for the supreme moment of marriage. Complete awareness of and consent to a contract of an undetermined sum in an improbable situation is a virtual impossibility. Hence, *kinyan* under such conditions is a meaningless act.

However, this would not in itself be a sufficiently valid point of criticism. Although a legal opinion of Maimonides is never to be treated lightly, in this case most other medieval authorities are in opposition to Maimonides. Raavad, Rashba, and Ramban maintain that *kinyan* in the case mentioned by Maimonides would bind the obligating party. But even then, not all those opposed to Maimonides make use of the same reasoning. Thus, while the majority maintain the effectiveness of *kinyan* in principle at every occasion of

19. *Hil. Mekhirah* 11:15.

20. It is interesting to note that this third and crucial clause was *purposely* planned as a vague and undefined commitment. See Rabbi Jacob Agus, *Proceedings*, XVII (1953), 77, and the response of Prof. Lieberman, *ibid.*, p. 78.

such undetermined amounts, some disagree with Maimonides as to whether his particular case is subsumed under the category of undetermined amounts.²¹ They believe that the five-year provision sufficiently limits the obligation to make the *kinyan* one characterized by sufficient knowledge, awareness, and consent. And this second group of opinions opposing Maimonides on this particular case, but agreeing with him in principle, would hold that the case under discussion, the Conservative amendment, is obviously a case of undetermined amounts since no limit is placed on it whatsoever. Hence they too would invalidate the third clause on the basis of its indeterminate character.

Let us, however, for the sake of argument, dismiss the opinions of Maimonides and those who oppose him only as to this specific case but not in principle. Even then it can be clearly shown from the following definitions of *asmakhta* that this same third clause is invalid.

II. Contracts Involving Penalty-Conditions

There is general agreement that contracts providing for the payment of a fine or penalty upon non-compliance with a specific stated condition are subsumed under the category of *asmakhta* and are thus invalid. Let us cite two examples of this kind from the Talmud, both involving penalty conditions.

A. A borrower paid back only part of his loan at the time stipulated for complete payment. He then asks for an additional period of grace, and agrees with the lender to give the note (for the complete amount) to a third party, who will return this note to the lender if the borrower has not paid back the remainder of his debt by the end of the new time-limit. Thus if the borrower does not fulfill this condition (of paying the remainder by the new dead-line), the lender can use the note to demand *full* payment of the debt, although the borrower has already paid in part. This partial over-payment is thus stipulated as a fine or penalty.²²

B. A sharecropper (i.e. a farmer who contracts to work the owner's field on a percentage basis of the produce or profits) promises the landlord that if he allows the land to lie fallow and does not

21. See *Lechem Mishneh* on *Mekhirah* 11:15.

22. *B. Batra* 168a.

Recent Additions to the Ketubah

plow, plant, and reap (in which case the landlord will sustain a certain loss), he will pay the landlord 1,000 zuzzim (a penalty, since the case concerns a field whose total produce is worth less than that sum.)²³

In both cases, the *asmakhta* invalidates the transaction, and the agreements between lender and borrower and between sharecropper and landlord are not binding and hence the penalties cannot be collected.²⁴ The reason for the invalidity of this kind of transaction because of *asmakhta* is that the penalty-condition makes it impossible to obtain a clear and unreserved commitment. This is so either because the one who submits to the penalty-condition is over-confident, and does not at all expect to fail in his mission of fulfilling the condition (thus, in the second example cited, the tenant does not expect to leave the land lie fallow, and does not, therefore, wholeheartedly and with foreknowledge accept the terms of contract); or he uses the penalty-condition only as a means of reassuring the other party of his honorable intentions (thus the borrower, in the first case, promises the entire note as a means of convincing the lender that this time he will pay his debt on time.)²⁵

Both these reasons, making for a lack of the psychological-legal integrity of a contract, are present in the matter of the penalty-condition which is the third clause of the Conservative amendment. Certainly, at this tender moment of marriage, both bride and bridegroom are fully confident—who knows, perhaps overconfident—of the success of their cooperative venture of married life. There is no serious contemplation at this time of marital controversy, of separation and divorce and court-settlements and maneuvering for financial advantage vis-a-vis a spouse. This self-confidence, then, accounts for a lack of complete realization and awareness of the full significance of the clause. And as for the second reason, we can say that in this case too, both parties willingly sign to the penalty-condition as a means of reassuring each other that it is ridiculous even to think of such eventualities. The reader can prove this to his own satis-

23. *B. Metzia* 104b.

24. Although in the second case the tenant is required to pay the landlord for estimated losses. But this is not a penalty. See Maimonides, *Hil. Sekhirut* 8:13.

25. See Rashi, *Sanhedrin* 25b, for first explanation, and Rashi, *B. Metzia* 45b for the second.

faction by contemplating the following situation: Imagine the consternation and indignation of the bride or the bridegroom if the other party were to balk at this clause and demand to know just how much this "compensation" will amount to, or complain that it seems that the fine is going to be too high if divorce proceedings or other instances of marital discord will take place. What we have here, then, is a clear case of *asmakhta* which invalidates the entire clause.

It is in place to add here some further considerations. It is the opinion of some authorities²⁶ that even conditions not in the nature of penalties can be defective as *asmakhta* and invalidate contracts. The classic case, mentioned by Maimonides, is where one person says to another, "If you will accompany me to Jerusalem next month, I will give you this house as a gift." Here there is no penalty involved, and nevertheless, the contract is invalid, even if the condition was later fulfilled and the house given over, as a result, to the "fellow traveller."

Of course, this does not mean that any and all conditions automatically invalidate a contract. The difference between a defective condition — such as the one mentioned — and a permissible condition, according to some commentators on Maimonides,²⁷ lies in the time the transaction was actually consummated. Where the substance of the contract — the house in our case — is immediately transferred to its new owner, the contract is valid and the condition is binding. Where, however, the transference or possession is effected at the time of compliance with the condition — the time of the trip to Jerusalem in our case — and not at the time of contract, we have an *asmakhta*, and the contract is invalid (and the condition, of course, is not binding). The reason is obvious. Because there was no actual transference of property at the time of contract, then, at that time, there was an element of doubt and lack of certainty in the minds of the parties to the contract. It is this element of uncertainty (will he go to Jerusalem? will he give me the house?) that renders the entire transaction invalid.

Other authorities²⁸ maintain that where there was a *kinyan per-*

26. R. Hai Gaon, *Sefer Ha-mekach* 17; Maimonides *Hil. Mekhirah* 11: 2 and 3; *Sh. Arukh Choshen Mishpat* 207:2 as a second opinion.

27. See *Maggid Mishneh* and *Kesef Mishneh*, *Mekhirah*, *ibid.*

28. *Kesef Mishneh*, *ibid.*, and *Bet Yosef*, *Choshen Mishpat* 207.

Recent Additions to the Ketubah

formed at the time of contract,²⁹ the contract is valid; if there was no *kinyan* at that time, even if it was performed later,³⁰ it is of no avail, and the entire contract is null and void.

Now according to both interpretations of this opinion of Hai Gaon and Maimonides, the Conservative clause remains a case of *asmakhta* and invalid, since there was no actual possession of the total amount of the penalty at the time of contract — that is a virtual impossibility — and the only *kinyan* performed was the purely sym-

29. Only actual possession or, according to some, even a *kinyan* of less real nature, such as the payment of money or the writing of a note, can neutralize an *asmakhta*. However, under no conditions does a *kinyan sudar* — the grasping of a kerchief — suffice.

It should be made clear that in our case the written document of the *Ketubah* is not a case of *shetar*, or written note, which counteracts the *asmakhta*. This will become clear by careful study of *Kesef Mishneh*, *Mekhirah* 11:7, where in one solution which he offers to reconcile a seeming contradiction in Maimonides, he maintains that a written document, even without an explicit retroactive clause, is free from *asmakhta*. This attempted reconciliation seems to be completely contradicted, however, by Maimonides himself who explicitly states (*ibid.*, 7) that a contract may remain an *asmakhta* even when written and signed by witnesses. Closer inspection, however, will reveal that there is a decided difference between both cases of written contract (*shetar*), and that this dichotomy is the key to the problem. The *shetar* which is free from *asmakhta* is the one which is used, per se, as one of the accepted methods of *kinyan*. It is an ordinary and unconditional kind of deed which states that so-and-so sells or gifts this house to so-and-so, and is given by one party to the other together with a *verbal* stipulation that it is on condition that he accompany him to Jerusalem. This case is not *asmakhta* (Maimonides, *ibid.* 2), since the deed is in itself an instrument of *kinyan* which becomes immediately effective and thereby demonstrates a complete focus of attention, awareness, and consent by both parties. In the second case, however, which is subject to invalidation by *asmakhta*, the *shetar* is not in itself a *kinyan* but merely the record of a conditional obligation included in the text (i.e. the donor writes, "I will give you this house if you accompany me," etc.). Hence the contract is still open to *asmakhta*, and logically so, because the actual change in ownership is not in the present but remains contingent upon — and effective from the time of — later compliance with the stated condition.

Now the *Ketubah* with its Conservative clauses is certainly no *shetar kinyan*, but rather a record of obligation containing in it the specified conditions, and hence remains an *asmakhta* and is invalid. (The grasping of a handkerchief, or symbolic *kinyan*, is as explained above, of no help here).

30. Even if the *kinyan* was in the form of an actual transfer of the substance of the contract.

bolic one of *sudar*,³¹ the grasping of the handkerchief, which does not help in neutralizing an *asmakhta*.

III. Contracts Involving Commitments Which Are Only Partially Under Control of the Obligating Party

This involves another definition and another phase of *asmakhta* contracts. The fulfillment of any contractual agreement fits into one of the three following categories:

A. Those which depend solely upon the obligating party. In this case the contract is valid, since the obligating party does, rightly so, trust in his own capacity to fulfill any commitment. He appreciates in full the conditions and obligations he sets and completely and sincerely intends to abide by them. Thus, in the case of the sharecropper mentioned above, if it were not an instance of a penalty-clause, but merely an obligation to compensate for actual loss in case of negligence, the contract would be valid, since the care of this field is entirely up to the sharecropper himself.³²

B. Those which are completely independent of the obligating party. A pure game of chance is a good illustration. The fulfillment of the condition is completely independent of the bettor's wisdom, exertion, or direction. Here, too, the contract is valid and cannot be termed *asmakhta*, because the gambler, in this particular case, is at the time of contract (or bet) completely cognizant of the fact that it is possible that the undesirable event may occur, and that there is absolutely nothing that he can do to influence the outcome. In other words, he fully accepts this contingency in all its ramifications at the time of contract. Hence, it is not regarded as *asmakhta*.³³

C. Those which depend only partly upon the obligating party. One illustration might be a game which is partly a matter of chance and partly a matter of skill.^{33a} The talmudic case is where the first party appoints the second to buy wine for him at a low price, on condition that if he should fail to do so he must pay the first party the diff-

31. See n. 29, *supra*.

32. The above follows the opinion of the Ashkenazic authorities (Rashi and the Tosafists). The Sephardic Sages, however, such as Ramban (in the name of Hai Gaon), Rashba, Ran, etc., believe even this case to be *asmakhta*, but they nevertheless affirm its validity for other reasons.

33. See *Hagahot Maimonut*, *Mekhirah* 11: 13, and *Bet Yosef*, Ch. M., 207.

33a. *Ibid*.

Recent Additions to the Ketubah

erence between the current and the lower price.³⁴ Here the fulfillment of the condition is only partially in the hands of the obligating party; it is up to him to offer to buy the wine, but it is up to the wine-merchant to be willing to sell it to him. Either one can frustrate the transaction.

In this case, the entire contract is invalid as *asmakhta*, and the second party is not required to pay the difference. The reason for this is the element of distraction resulting from overconfidence. The second party, relying completely on his capacity to buy, never really considers the possibility that the merchants may not sell to him. His mind is distracted from that possibility by his overconfidence in himself. It is possible that were he fully aware of all ramifications of the contract he would not obligate himself so readily. It is on the basis of this element of distraction, because of the dual nature of the terms, that the Halakhah considers the second party's possible lack of consent under more favorable psychological conditions. This contract is therefore invalid because of *asmakhta*.

If we now investigate the third clause of the Conservative addition to the Ketubah as to categorization, it is obvious that it belongs in the third group. The success or failure of a marriage is always contingent upon two independent wills — husband and wife. The very fact that in the case of this Conservative Ketubah the document is bilateral, and both bride and groom obligate themselves to each other by the same clause, makes it obvious that the entire matter is as much in the province of the one as of the other. The psychological pattern here is analogous to that of the wine contract. Both parties are distracted from the prosaic considerations of the uncontrollable element, the independent behavior of the spouse, by overconfidence in the controllable element — the bride's or groom's own personal desire to make a success of the marriage venture. From this point of view, too, then, the contract is invalid because of *asmakhta*.

What we have demonstrated, therefore, is that the third and crucial clause of the Conservative amendment is subsumed under any one of the three — actually four — different definitions of *asmakhta*, and is hence invalid.³⁵ The essential fault of the Conservative pro-

34. *B. Metzia* 73b.

35. Several objections may be advanced against my attempt to consider the Conservative third clause as *asmakhta*. For the sake of brevity and clarity,

posal with regard to all these phases and definitions of *asmakhta* is its extremely indeterminate nature, a vagueness which Jewish law cannot tolerate as the proper basis for legal negotiation.

I have omitted these from the main body of my essay, already overburdened with technical halakhic reasoning, and will now present them, with refutation, only cursorily.

1. It may be argued that one of the methods of circumventing an *asmakhta*, sanctioned by talmudic law, is by making the contract retroactive to the present, i.e. "If you go with me to Jerusalem next week, I will give you this house *as of now*." The reasoning behind this method should be obvious: since the donor is giving him the house as of the present, it is a manifest indication of his unreserved consent to the whole of the contract.

The Conservative Ketubah contains no such retroactive provision. However, it might be further argued that the very fact that we are dealing with a written document means that the entire contract is to take effect as of the present, based on the halakhic principle that a *kinyan* is as valid as a retroactive clause, and a written document (*shetar*) is one of the accepted modes of *kinyan*. However, this does not hold for our case because, as developed in *supra* no. 28, this Ketubah is a record of obligation and not in itself an instrument of *kinyan*, and hence cannot be considered as a *kinyan* which circumvents the *asmakhta* nature of a contract.

2. Another talmudic principle that might be argued is the one developed in *B. Batra* 136a that the date written into a document automatically makes the contract's effectiveness retroactive to the time of contract (the date). Hence, it might be argued, since the Ketubah is also a dated document it becomes retroactive, just as in the case of wills. Careful study of the reason for this principle, however, will reveal that it is not applicable at all to our case. Both in the commentary of Rashbam (on *B.B.*, *ibid.*) and the Code of Maimonides (*Hil. Zekhiyah Umatanah* 12:15), who is also quoted verbatim in *Shulchan Arukh* (*Ch. Mishpat* 258), the reason given is as follows: if it were not intended to make the entire contract effective retroactively to the present why date the document at all? Study of the commentaries and supercommentaries on *Shulchan Arukh* (*ad loc.*) will reveal that this is more than a convenient rationalization, but is an operative legal principle. Applied to our case, such reasoning does not produce the desired results. Why, you may ask, write a date if not to make the eventual penalties imposed by the Conservative Beth Din retroactive to the time of the wedding? Simply because the text of the Ketubah proper, in use for centuries before the Conservative rabbinate decided to amend it, carries the date in it (and, it might be added, the principle of the Ketubah is actually retroactive since the husband's entire estate is under lien to his wife from the time of contract). Furthermore, strictly technical considerations necessitate the dating for purposes of the additional jointure (see *Tos. Gittin* 18a s.v. *af Ketubah*). These antedate the Conservative amendment by several centuries and hence the reason for dating cannot be expressly to make the penalties

Recent Additions to the Ketubah

CONCLUSION

In summary, we have analyzed the three parts of the proposed Conservative *tekanah*, and found that the first is not only superfluous but can actually prove prejudicial to the interests of the wife, whose protection the *tekanah* ostensibly seeks to enhance. The second is invalid because its subject matter is objectively too insub-

of their Beth Din retroactive. Had it been intended to make these penalties retroactive, the clause itself would have so stated by the word מֵעַכְשָׁיו ("as of now") written into it by its Conservative authors. The fact is that they did not do it, and they obviously could not — for to do so would be to expect the penalties later imposed to become effective and payable from time of wedding, thus having the estates of both parties under lien to each other for improbable action and unknown sums.

3. Let us now go one step further. Let us concede that a) the date does make it retroactive and b) the grasping of the kerchief is a valid *kinyan*. Even then, however, R. Tam and Maimonides will invalidate the contract because of *asmakhta*, and will not allow it except if the contract be agreed upon before a בֵּית דִּין חָשׁוּב "significant (or worthy) court" of three. (*Beth Din Chashuv*, according to Maimonides, is a completely ordained court which is non-existent in modern times). A rabbi, even with the gracious assistance of a cantor, does not constitute a "significant" court at every occasion of the signing of a Ketubah. The Rabbinical Assembly Beth Din, whose authority is accepted in the Conservative document, does not satisfy the conditions for a *bet din chashuv*. Even if we grant them expertness in *asmakhta*-law (which is sufficient to qualify a court as *bet din chashuv* according to one opinion in Rama, 207:15) and grant that their immediate presence is unnecessary (*ibid.*), still the Conservative Ketubah makes no mention of *kinyan* before a qualified court. Acceptance of their jurisdiction in future disputes is not the same as stipulating that the contract is now validated by means of *kinyan* on their authority. The opinion of *Nachalat Shiveah* (39:1) establishing that every rabbi in his community is to be regarded as a *bet din chashuv* of and by himself, does not apply here. Not every rabbi officiating at a wedding qualifies as an expert in *asmakhta*-law. Cf. Rama, *ib.*; *Sefer Meirat Einayim* (*ib.* 42), and *Beur Ha-Gera* (*ib.* 44). Also, see *Turey Zahav* (end 14) on the need for *me-akhshav* in all circumstances. And see *supra* n. 29.

4. Let us go even further in our concessions. In addition to granting the validity of the *kinyan* in this case and the retroactive effect of the date, let us reject the opinions of R. Tam and Maimonides who require a "significant court" of three, and let us accept the decisions of Hai Gaon and Alfasi that a retroactive clause (the date in our case) and especially with a *kinyan* (the bridegroom's grasping of the cloth in our case) is sufficient to neutralize the *asmakhta*-nature of a contract and validate it. (The opinions of those mentioned, with proper references, will be found in *Nimuke Yosef*, 3rd chap. *Ned-*

TRADITION: A Journal of Orthodox Jewish Thought

stantial to be legally contracted. The third is by nature so vague and indeterminate that it fails to satisfy the minimal subjective requirements for valid contracts.

arim.) Granted all this, let us not lose sight of the basic reason for finding fault with *asmakhta*, which is the element of distraction and unsureness which clouds the minds of the parties to a contract. Now let us bear in mind the fact that these two people are approaching the bridal canopy and entertain no morbid thoughts of a deterioration of their marriage. They have no quarrel at present. They do not know the people who act as the members of the Conservative Beth Din. They do not know who will summon whom in case of this improbable marital dispute. They do not know who will refuse to appear in response to a summons and who will be found guilty and be penalized. They have no conception of the nature of the penalty and, if monetary, they do not know who will fine whom how much for what. Is it even remotely possible, even by the longest stretch of an elastic imagination, that these two people accept the undetermined fine imposed by an unknown Beth Din on an unknown party in a non-existent dispute *as of now*, retroactively to the present? — which means that they are psychologically prepared to set aside that amount this moment, and thereby assure and affirm their complete, exclusive, undistracted, unreserved, and undiminished awareness, knowledge of, and consent to this contract in all its consequences? Is this not imputing a rare degree of cynicism to the bridal couple? It is, of course, utterly absurd and illogical, and hence, granting them every benefit of doubt, the Conservatives' third clause unquestionably remains an *asmakhta*.

5. Another refutation which will in all likelihood be presented against the thesis here expounded is the matter of *boshet*, or embarrassment. Briefly, it was once the prevailing custom — and still is with some Jews — that the parents of the bride and groom would draw up a contract (called *Shiddukhin* or *Tenaim*), some time prior to the wedding, in which they promise their children in marriage and make a special provision such that if either party retracts, they are to be penalized a specific sum. Here too was a problem of *asmakhta*. Sephardic scholars circumvented the matter by resorting to an ingenious legal method adopted for just such purposes. (See Maimonides, *Mekhirah* 12:18). Other authorities however (see *Sh. Arukh* and *Rama, Ch. Mishpat* 207:16) did not find it necessary to resort to this legal maneuver, and although they admitted that this form of contract was a decided *asmakhta*, declared the contract valid because in any case the amount stipulated as penalty was to be paid for *boshet*, or embarrassment, caused to the rejected party. (see *Tos. B. Mezia* 66). Thus, it might be maintained, even if the third clause of the Conservative amendment is an *asmakhta*, the penalty should be paid by the punished party because of embarrassment caused to the offended mate.

The trouble is that in case of *shiddukhin*, the charge of embarrassment is laid to the party who severs, or refuses to submit to, the marital bond. There is naturally embarrassment for a man or woman who is rejected by the other.

Recent Additions to the Ketubah

Let us emphasize once again that we have here dealt with the Conservative amendment only as a problem in the halakhic validity of contracts. Two issues of far greater consequence have not been treated at all — the acceptance of a non-Orthodox Beth Din which presumes to render a halakhic decision while representing a move-

Our case, however, is the reverse: the Conservative Beth Din will in all probability fine the spouse who refuses to consent to divorce, i.e. the one who wants to *retain* the integrity of the marital bond. If anything, on the basis of *boshet* (whether or not *boshet* actually calls for full payment in its own right or is only a matter of nominal damages serving as a legalistic excuse for circumventing an *asmakhta* — see *Ketzot Ha-choshen* on *Ch. Mishpat*, *ibid.*) the wrong party is being penalized. In addition, while the parties to a contract of *shiddukhin* set comparatively high penalties, that merely indicates that they rate as high the embarrassment of rejection, and the sums are therefore commensurate with the extent of embarrassment (see *M'eirot Enayim* on *Ch. Mishpat*, *ibid.* 47). In our case, however, even if we should concede to the propriety of the wrong party being charged with embarrassment, still the penalties ultimately to be imposed by the Conservative Beth Din, unknown at the time of contract (unlike the case of *shiddukhin*), will be, according to newspaper reports and intimations in the official organs of the Conservative movement, levied so high as to be onerous to the recalcitrant spouse and force him to yield. We reserve the right to guess that such "compensations" will not generally be commensurate with the extent of embarrassment of the offended spouse, but will rather be determined by the financial status of the offending mate. Another possibility should be mentioned — that of a penalty imposed by their Beth Din of such sum that while the husband, let us say, may be able to pay that much in later life, at the time of argument, he may not own anything approaching it at the time of contract. Such a situation is frowned upon by *Turei Zahav* (on *Sh.Aruch*, *ib.*).

6. While there are times that Jewish law accepts the authority of state law (*dina de-malkhuta dina*), this principle would not apply to our case. Many early scholars restrict this principle only to such cases as affect the government or the public weal, not those which are solely between two Jewish litigants (see *Maggid Mishneh*, *Hil. Malveh ve-Loveh* 27:1; Ramban on *B.B.* 55a; *Siftei Kohen*, *Ch.M.* 73:39). Even those who disagree and accept the authority of civil law in cases of private litigation as well, do so only where no clear *halakhah* exists. Where, however, the *Halakhah* does offer a judgment, there state law must yield to Jewish law (*Siftei Kohen*, *ib.*; *Levush* 369). The comment of Rama (end of 207:15) establishing the validity of *asmakhta*-contracts on the basis of *dina de-malkhuta* applies only where the contracts were drawn up "according to the laws of the Gentiles and their contracts." By making the whole arrangement part of the traditional Ketubah, the Conservative authors demonstrated their intention of treating this as a Jewish, not a secular, contract. The parties to the contract — bride and groom — undoubtedly regard the procedure as a purely religious matter.

ment whose philosophical approach to the Halakhah is decidedly negative, and at best highly ambiguous; and the extremely consequential question of *get me'useh* — that is, a divorce acquired from the husband by coercion under circumstances that make it invalid, thus bringing into question the wife's second marriage and the legitimacy of all progeny from such further unions.³⁶

We can only hope that the apparent failure in practice of the Conservative adventure will in some measure make up for the lack of foresight in initiating it. And at the same time, we earnestly pray that this attempt, ill-fated and ill-advised though it was, will cause our leading halakhic scholars to intensify their search for an authoritative remedy for this most distressing problem.

7. The statement by Nachmanides (*Chidushei Ramban* on B.B. 168) that *asmakhta* applies only to financial law, not to marriage and divorce, has no bearing on our problem. It is clear that he refers to a condition involving the fact of marriage or divorce itself, i.e. where the existence of the marital state is made conditional upon some extraneous happening. In our case, however, the status of the marriage is ulterior to the immediate issue in which the failure to respond to a summons determines the payment of a fine. Furthermore, the laws of *asmakhta* apply fully even in marriage and divorce where the contract is not substantive but involves penalty payments. See *Bet Yosef*, Ch. M. 207, s.v. *katav ha-Ramban*.

8. Finally, the words דלא באסמכתא which appear at the end of the Ketubah, and which mean "and (this document is) not (to be considered) as an *asmakhta*," cannot be used to legalize an *asmakhta* contract of the nature of the Conservative addendum. The reader may prove this to his own satisfaction by referring to the following: *Responsa R. Asher* 72:7; *Tur Ch. Mishpat* 113 (and commentaries); *Tur* and *Sh.Arukh Ch.Mishpat* 207:18 (also Rama and commentaries, *ibid.*).

36. A thorough halakhic discussion of this aspect of the problem by Rabbi Benjamin Rabinowitz-Tummim is found in the first volume of *Noam*, published by the Torah Sheleimah Institute, Jerusalem, 1958. It appears that the Conservative group itself is not fully satisfied that its recourse to the secular courts in the case of an obstinate husband is halakhically proper. In the first case of a refusal to grant a *get* where the Conservative Ketubah was used, the Conservative group made a special effort to avoid threatening the husband with legal action (based upon the amendment to the Ketubah) for fear of invalidating the *get*, obviously as a *get me'useh*. "In order to guard against any *pesul* in the *get*, we were careful not to threaten him with any legal action were he not to give the *get*; our 'threats' had been made simply to get him to sit down with us to discuss the matter." ("Report on Divorce Cases" in *Conservative Judaism* [June, 1958] p. 34).