It is now more than a century since Moritz Steinschneider made the following noteworthy observation: "Das Verhältniss des römischen Rechts und seiner Terminologie zu der des Talmud verdiente eine monographische Behandlung." Since then many attempts have been made to clarify the relations between the two greatest legal systems of antiquity. Half a century later, an English lawyer, Harold M. Wiener, declared: "The jurist who would institute an exhaustive comparison between Digest and Talmud would render an important service alike to


Legal terms are not arbitrary inventions but are the result of legal practice, and the story of the development of a juridical expression contains much valuable legal history.


Cf. Studies in Biblical Law, London 1904 p. 100, Buckland believed that the oriental influence which is marked in the code and the Novels can hardly be felt in the Digest; cf. Résue d'histoire du droit 1930, p. 142.
Jewish history and to the comparative study of Law." On this occasion it is our intention to inquire into certain features of the Jewish law of betrothal, and to display some striking resemblances and contrasts to Sponsalia in Roman jurisprudence.

It is quite true as Prof. Volterra says "Le Mariage romain a une structure juridique tout à fait singulière qu'on ne rencontre dans aucun des autres droits de l'antiquité. Dans ce domaine on ne peut se servir qu'avec la plus grande prudence de la méthode comparative." Nonetheless we are prone to believe, without indulging in easy identifications, that comparisons between these two systems of law will result in illuminating perspectives provided we are clear about the frame of reference in each system and are aware that the subtle distinctions produced by the flux of events, are of far reaching importance.

Among the scholars of those ancient peoples, we find comparatively little disinterested juridical curiosity for the legal institutions of nations other than their own. Mention should be made of an interesting allusion in the Talmud concerning a query, "Thus far we have learnt the form of betrothal in Jewish law, but how is it with the Gentiles, to which R. Abbahu in the name of R. Eleazar replied: Sexual commerce with a married, but not a betrothed woman, constitutes adultery in their law, and finally they conclude in a quite categorical fashion that betrothal has no legal significance in the pagan legal economy."

This interest in the ceremony of betrothal in non-Jewish societies was far from being purely academic or entirely historical. For it was a prevalent doctrine in Tannaic times that עירו, the branch of law prohibiting incest and consanguineous marriages, constituted one of the seven Noachian laws. The concept underlying the seven Noachian laws is the closest approximation to the Roman doctrine of ius gentium. It is most noteworthy, that Paulus, in his book on the Turpillian decree of the Senate remarks that any man who marries a female relative, either in the ascending or descending line, commits incest according to the Law of Nations. Jure Gentium incestum commitit, qui ex gradu ascendentium vel descendientium uxorum duxerit. This reference to betrothal in non-Jewish law acquired a knowledge of Jewish law שמות יִשְׂרָאֵל I shall now become acquainted with Gentile law שמות יִשְׂרָאֵל. Hence Scripture admonishes you not to disengage yourself from the study of them i.e. Jewish law שמות יִשְׂרָאֵל, but to approach them with reverence שמות יִשְׂרָאֵל as if they were revealed on Sinai שמות יִשְׂרָאֵל and are identical with שמות יִשְׂרָאֵל פניקס Sefer נִצְתָּר פָּנָי לְיִשְׂרָאֵל והַדָּבָר הַיּוֹם הַלֵּמי שֵׁם יִשְׂרָאֵל פָּנָי. Cf. Mekilta ed. Horowitz, p. 208, יָשָׁר פָּנָי לְיִשְׂרָאֵל והַדָּבָר הַיּוֹם הַלֵּמי שֵׁם יִשְׂרָאֵל פָּנָי. סְדֵיר פּוֹנָא שֵׁם יִשְׂרָאֵל פָּנָי. The rabbis in connection with Lev. 18.4 remark: You shall be preoccupied only with learning them (i.e. Jewish Law), neither shall you ever mingle your studies with that of other matters, you shall not say since I have already acquired a knowledge of Jewish law שמות יִשְׂרָאֵל I shall now become acquainted with Gentile law שמות יִשְׂרָאֵל. Hence Scripture admonishes you not to disengage yourself from the study of them i.e. Jewish law שמות יִשְׂרָאֵל, but to approach them with reverence שמות יִשְׂרָאֵל as if they were revealed on Sinai שמות יִשְׂרָאֵל and are identical with שמות יִשְׂרָאֵל פניקס Sefer נִצְתָּר פָּנָי לְיִשְׂרָאֵל והַדָּבָר הַיּוֹם הַלֵּמי שֵׁם יִשְׂרָאֵל פָּנָי. Cf. Mekilta ed. Horowitz, p. 208, יָשָׁר פָּנָי L

4 La Conception du mariage d'apres les Juristes Romains, Padua 1940, p. 1. While it is a fact as Prof. Koschaker says "Wenn irgende ein Recht einen besonderen Genius hat, so das Römisiche" (Z. S. S. 63, 1943, p. 446) just the same it is all the more valuable to make use of the analogies of Roman Law for the illumination of Jewish Law, for the study of the former, "is most profitable," to quote E. C. Clark, "towards the acquisition of sound principles and clear ideas as to law in general" (Practical Jurisprudence, Cambridge 1883, p. 3).

5 Curiously enough, the German historian David Gans (1541-1613) remarked in his work that it is still in force among the Gentiles as if it were revealed on Sinai שמות יִשְׂרָאֵל. Frankfurter a. M. 1692 part 2 f. 18b. The confusion with Justinian is quite obvious.

6 Cf. Cicero's remarks: "You will most readily understand how far our way of thinking differs from Roman jurisprudence. It is quite true as Prof. Volterra says "Le Mariage romain a une structure juridique tout à fait singulière qu'on ne rencontre dans aucun des autres droits de l'antiquité. Dans ce domaine on ne peut se servir qu'avec la plus grande prudence de la méthode comparative." Nonetheless we are prone to believe, without indulging in easy identifications, that comparisons between these two systems of law will result in illuminating perspectives provided we are clear about the frame of reference in each system and are aware that the subtle distinctions produced by the flux of events, are of far reaching importance.

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86a-b, for the phrase יִשָּׁר פָּנָי L שמות יִשָּׁר פָּנָי. Sifra, ed. Weiss, f. 86a-b, for the phrase יִשָּׁר פָּנָי L שמות יִשָּׁר פָּנָי. Sifra, ed. Weiss, f. 86a-b, for the phrase יִשָּׁר פָּנָי L שמות יִשָּׁר פָּנָי. Sifra, ed. Weiss, f. 86a-b, for the phrase יִשָּׁר פָּנָי L שמות יִשָּׁר פָּנָי. Sifra, ed. Weiss, f. 86a-b, for the phrase יִשָּׁר פָּנָי L שמות יִשָּׁר פָּנָי. Sifra, ed. Weiss, f. 86a-b, for the phrase יִשָּׁר פָּנָי L שמות יִשָּׁר פָּנָי. Sifra, ed. Weiss, f. 86a-b, for the phrase יִשָּׁר פָּנָי L שמות יִשָּׁר פָּנָי. Sifra, ed. Weiss, f. 86a-b, for the phrase יִשָּׁר פָּנָי L שמות יִשָּׁר פָּנָי. Sifra, ed. Weiss, f. 86a-b, for the phrase יִשָּׁר פָּנָי L שמות יִשָּׁר פָּנָי. Sifra, ed. Weiss, f. 86a-b, for the phrase יִשָּׁר פָּנָי L שמות יִשָּׁר פָּנָי. Sifra, ed. Weiss, f. 86a-b, for the phrase יִשָּׁר פָּנָי L שמות יִשָּׁר פָּנָי. Sifra, ed. Weiss, f. 86a-b, for the phrase יִשָּׁר פָּנָי L שמות יִשָּׁר פָּנָי. Sifra, ed. Weiss, f. 86a-b, for the phrase יִשָּׁר פָּנָי L שמות יִשָּׁר פָּנָי. Sifra, ed. Weiss, f. 86a-b, for the phrase יִשָּׁר פָּנָי L שמות יִשָּׁר פָּנָי. Sifra, ed. Weiss, f. 86a-b, for the phrase יִשָּׁר פָּנָי L
constitutes a curious piece of private international law of the Jews, to which we shall revert subsequently.

Being fortified by the precedent set by the rabbis who were compelled to take note of the Gentile law of betrothal, we shall espy other resemblances in this domain.

In order to gain a better perspective of the institution of betrothal in the Tannaitic era, we wish to make a rapid survey and most important element in the formation of the marriage as law:"

Thus Eliezer negotiates with Bethuel for the marriage of Isaac his son for the marriage of his son Shechem with Dinah (Gen. 34.6). The next important step is the settlement of the amount of the Mohar, i.e. the purchase money for the wife given to the father. This seems to have been the original significance of the term Mohar which occurs only thrice in Scripture. The sederer of a virgin was obliged to give the Mohar to her father, to which the latter would ordinarily have been entitled at her marriage. It is referred to as a well-known law המוחרה בהולות (Ex. 22.17). In important alliances the amount of the Mohar was a matter of negotiation (Gen. 34.12).

Some times the Mohar took the form of personal service. Thus David secured Michal by furnishing 100 foreskins of his captives, as a hero in war. When Jacob worked seven years for Rachel (Gen. 29.27) or when Othniel obtained the hand of Aksa for prowess in battle (Josh. 15.17) it was perhaps a species of Mohar although the term was not mentioned there.

Part of the purchase money was given to the bride, in some instances, as may be gathered from the complaint of Laban's daughters: "He had sold us and has quite devoured our money" (Gen. 31.15). With respect to Eliezer's negotiations for Rebekah's marriage to Isaac, we learn that the slave had presented


with Rebekah, Samson requests his father to procure a wife for him in Timnah (Jud. 14.2). Hamor the Canaanite endeavors to arrange with Jacob's son for the marriage of his son Shechem with Dinah (Gen. 34.6). The next important step is the settlement of the amount of the Mohar, i.e. the purchase money for the wife given to the father. This seems to have been the original significance of the term Mohar which occurs only thrice in Scripture. The sederer of a virgin was obliged to give the Mohar to her father, to which the latter would ordinarily have been entitled at her marriage. It is referred to as a well-known law המוחרה בהולות (Ex. 22.17). In important alliances the amount of the Mohar was a matter of negotiation (Gen. 34.12).

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Rebekah with gold and silver vessels and raiment, while her brother and mother also received valuable gifts (Gen. 24.53). *Mohar* is not mentioned here, and it may well be that the term took the place of *Mohar* when a society with more refined ideas rebelled at the making of the formality of marriage a purely financial transaction.

According to the practice sanctioned by the law, the father gave his daughter in marriage. (Deut. 22.16). We find this custom recorded with regard to Moses and Zipporah (Ex. 2.21) Caleb and Aksa (Jos. 15.17) David and Michal (1 Sam. 18.27). Instances are noted where the sons married against the will of the father e.g. Esau (Gen. 26.34) and Samson (Jud. 14.2). With regard to Rebekah, we learn that she was asked to give her consent. In all likelihood an ancient formula is preserved in the verse “Wilt thou go with this man?” She replied “I will go.”

Then there was the dowry i.e., the money, goods, or estate which a woman brings to her husband in marriage. Dowry in the modern sense of the term is alluded to in Scripture. Thus Rebekah brings female slaves with her (Gen. 24.61). Laban gave Leah and Rachel each a female slave. Caleb's daughter was the business of the head of the family. However, the choosing of the bride was the business of the family. '9

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This reminds one of *Spondesne-Spondeo* used in the early Roman betrothal. 18 However, the dowry was the business of the head of the family.

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term שבעות is commonly used to designate the betrothal of a free woman; יִשְׂרָאֵל is the designation for the betrothal of a Hebrew bondwoman (Ex. 21.8) and סְפַרְפָּה is the term used to connote the betrothal of a Canaanite slave (Lev. 19.20).

Whether a divorce was necessary to terminate a betrothal is nowhere specifically stated in Scripture; but in view of the fact that the parties were termed man and wife, it would seem that it would be required. When we examine the Tannaitic sources, many new features of the institution of betrothal obtrude themselves upon one's notice, which are fascinating to the legal historian. For whenever one studies the development of a legal institution during a given period, one is usually confronted with the following phenomena: (1) the ingredients which are retained from before, (2) the principles which are transformed, (3) the introduction of new elements, (4) the discarding of certain features, (5) the reintroduction of old elements which had been dropped.

What is most intriguing is that curious parallels exist between the Tannaitic law of betrothal and sponsalia of classical Roman Law, whereas these particular rules are missing both in Biblical and pre-classical Roman Law.

The following features in the Tannaitic law of betrothal are either new or show marked deviations from the Biblical law of betrothal. (1) the minimum legal requirements for a legal act of betrothal, (2) Prerequisites for betrothal. (3) Rules concerning the contracting of betrothal. (4) The writing of the Ketubah at the time of betrothal. (5) Betrothal on condition. (6) Rules concerning betrothal by fraud or mistake. (7) Betrothal by Proxy. (8) Gifts during betrothal. (9) Negotiations before betrothal. (10) Juridical effects of betrothal.

Some of these innovations are not entirely new but represent a transformation of older concepts. As we have just seen, the payment of the Mohar to the bride's father, constituted most likely the climax of the act of betrothal in Scriptural times.

In the Post-Biblical era, the betrothal was realized by the performance of an act of acquisition, and the making of a declaration by the bridegroom to the bride in the presence of two witnesses. The consent of both parties, or the consent of the father of the bride, if she were an infant, were legal prerequisites to a valid betrothal. The act consisted either of conveying something to the bride, even if it be merely of nominal value, or the presentation of a writ, or it might well be a single experience of cohabitation (Kid. I.1). Note that the Mishnah says: A woman is...
acquired in one of three ways. Consequently, betrothal in Tannaitic times was a symbolic form of acquisition.

How did this form of betrothal originate? The Tannaim found an allusion to the threefold method of betrothal in Deut. 24.1. However, to the critical student, the proof is hardly

In Tannaitic legal parlance, marriage was viewed as a religious institution which partly impinged upon civil law. In matrimony, the wife became the exclusive possession of her husband in so far as conjugal duties were concerned, and the violation of these sacred vows constituted a major religious offence. At the same time, nuptials secured for the husband certain monetary advantages such as the right to the dowry, and inheritance of the wife, if she predeceased her husband. The Tannaim in search for a term for betrothal that would embrace both concepts, felicitously selected the word נישואין which literally means sanctification.

In betrothal, the bride...
became the sacrosanct possession, res sacra, of her husband, or as the Talmud puts it: הרש posicion של אשתו, or היי הקדשה, or as the Talmud puts it: הרש posicion של אשתו, or היי הקדשה, or as the Talmud puts it: הרש posicion של אשתו, or היי הקדשה.

However, since marriage brings with it the acquisition of certain property rights, it was necessary, that the formalities of betrothal, which was a species of inchoate marriage, represented a symbolic form of acquisition. Since it was usual for the bride to bring in slaves or real estate especially if she hailed from an affluent family, it became customary for the act of betrothal to borrow the formalities which were recognized as valid in the acquisition of slaves or real estate.

The Mishnah teaches us that these are acquired by paying for them with money, by a writ, or by usus (משיכת). It is quite clear that cohabitation becomes the place of usus (משיכת). What is most remarkable, is that we find in Roman law that cohabitation over a period of time is considered usus. Thus in Gaius (Inst. 1.111) we read: Usu in manum conveniabit quae anno continuo nupta perseveret et quia enim veluti annimus usu saepe saepe capiebatur. A woman used to pass into manus by usus if she cohabited with her husband for a year without interruption, being as it were acquired by a usurpcation of one year.

There are of course some very important differences between although the term ת╹ (Lev. 22.11) is interpreted by the rabbis to include both the wife and the slave of a priest as far as eating Terumah is concerned (Sifra ed. Weiss f. 91b). The term for betrothal in Arabic is تizzle (Tamlik). Tamlik is derived from אמלק which means to take possession of.


Usu in Roman Law does not have the meaning that Harmak has in M. Kid. l.3 and 5; the nearest in Roman Law to Harmak would be the term Possessio as it is used in D.41.2.1. Dominiumque rerum ex naturali possessione coepisse, but cf. the illuminating remarks on this point by Albertario, in R. I. D. R. 40, (1932), p. 8, et seq.

Cf. Baba Batra III.3 and Toselha II.11.

Volterra is of the opinion that usus, conformatio, and coemptio are not forms of marriage but exclusively forms of contentio in manum, whereas Roman marriage was originally founded upon the mutual consent of the contracting parties, La Conception du Mariage d'apres les Juristes Romains, 1940, pp. 8-24, cf. also P. Rasi, Consensus facit Nuptias, 1946, pp. 5-11.

The Tannaitic and Roman conceptions. The Mishnah is dealing with betrothal and usus, which we freely rendered by usus. Hazakah here, actually means entering into or taking possession of land by some physical act, by shutting in, making a fence, or breaking it down. Gaius is concerned with contentio in manum, and by usus he means the uninterrupted enjoyment of a certain right, known as usucapio. Furthermore, the rabbis borrowed the modes of betrothal from the manner of acquiring a slave or real estate, whereas when the Romans considered cohabitation as a form of usurpcation, they had in mind the usurpation of chattel rather than real estate, for as Cicero tells us: quoniam usus auctoritas fundi biennium est, sit etiam aedium; at in lege aedes non appellantur et sunt ceterarum rerum omnium, guaram annuus est usus. Bearing these differences in mind, it is sufficiently striking to note that the Jews and the Romans considered cohabitation as a form of usus which would give validity either to betrothal or contentio in manum, as the case may be.

Cf. also Toselha, Kid. 3a s. v. ר KeyEvent who anticipated this view when they remarked: כיון דueil התא_sold, עדין אשתו, שד האן אשר ani המדה, המדה.
At the time of the betrothal the bridegroom made a declaration to the bride. Behold thou art betrothed unto me, or thou art my wife. However, if the declaration were made by the bride to the bridegroom, then the act of betrothal would be invalid. Furthermore the act of betrothal must take place in the presence of two witnesses. The consent of the parties to the betrothal was necessary or being the Rabbinical term, whereas the third formula is in Aramaic, for other formulae, cf. Kid. 6a. and Blau. Festschrift Adolf Schwarz, 1917, p. 200–203, and M. G. W. J. 69, (1925), pp. 139–141. For the Formula, according to the Law of Moses and Israel, cf. Gulak, Orkundenwesen im Talmud, p. 43 and Albeck, p. 14, for the betrothal formula in Clement of Alexandria, cf. Stromata, II, 23.

This rule is presupposed in Tannaitic sources, cf. T. Kid. IV, 1. Kid. 4a; in Kid. 19b it is stated that רשם must be performed in the presence of two witnesses, so also Mekilta di R. Shimon p. 123. In Ruth 4:9–10 we read that witnesses were present at the time of the betrothal of Boaz to Ruth. An Amora as early as Samuel remarked that betrothal in the presence of one witness has no legal significance Kid. 65a. A similar view is expressed by Rab. (Yer. Kid. III, 8). For the folk tale based on the rule requiring witnesses at a betrothal, cf. the story cited by Rashi, Taanit 8a, and the Aruk, s. v. וחיתות which is similar to the crane of Ibycus, for, cf. Heinemann, Phtal en griechische Bildung p. 364, note 2. It was customary to have witnesses at a wedding according to Greek custom, although they were not necessary as far as the validity of the act was concerned. Cf. Lipsius Attisches Recht p. 472 and 492, note 79, but it was in the interest of the parties to have them. Cf. Weiss, Griechisches Privatrecht p. 231 ff. For the Roman custom, cf. Marquardt, Prinzipien der Römer p. 40, note 2. For the canon law, cf. Mayer, Die Rechte der Israeliten II, 334, note 36. For the general rule of betrothal in Canon Law, cf. A. Esmein, Le Mariage en Droit Canonique, vol. I, 2nd ed. Paris 1929, pp. 151–211.

In T. Kid. II, 1 we read בetrothal must take place in the presence of two witnesses. Here and in T. Kid. II, 1 we are informed that a father cannot give his son in betrothal, nor a mother her daughter; Rashi derives the rule that a woman may not be betrothed against her will from the verse כי לא יetrothal Пере הדבר הייתי כדי יהוה Deut. 24:2 (Yeb. 19b). If a woman consents to be betrothed as a result of intimidation (vis et metus to use the phrase of D. IV, 2, 3) there is a difference of opinion between two late Babylonian Amoraim whether the act is valid (B. B. 48a). Maimonides held that if a man betrothed a woman on account of force or fear, the act was legal (Ishut IV, 1). The Maggul Mishnah ed. loc. explains that the reason for this view is that a man may terminate the betrothal without the consent of the betrothed.

The betrothal of a bride or a bridegroom is an act of mutual stipulations and promises between the bridegroom and the bride's father. If the marriage did not take place, then the judge condemned the guilty party to pay a monetary fine (pecuniaria). This was observed until 90 B.C.E. Among the early Romans, it may be assumed that the same rule was in

that of the bride's father, in case the bride did not reach her majority.

As among the Jews, so among the Romans, betrothal preceded marriage. But there is a vast distinction between sponsalia and kiddushin, or the Jewish form of betrothal. The relationship established by Jewish betrothal was pretty close to that of the Greek εὔγνος as it is generally understood by most scholars. For εὔγνος was less an act of affiancing than the beginning of the married state itself, and actually constituted marriage per se, the exercise of conjugal rights occurred after the bride was led to the home of the bridegroom.

Among the Latins, betrothal was a contract based upon mutual stipulations and promises between the bridegroom and the bride's father. If the marriage did not take place, then the judge condemned the guilty party to pay a monetary fine (pecuniaria). This was observed until 90 B.C.E. Among the early Romans, it may be assumed that the same rule was in


Aulus Gellius, Noctes Atticae IV, 4.

force, although the texts are not so explicit. Thus Ulpian remarks, *moris fuit veteribus stipulati sibi et spondere uxores futuras* (D. 23.1.2) and Florentinus defines *Sponsalia as mentio* and *et repromissio* as *nuptiarum futurorum* (D. 23.3.1).

However, even in classical Roman Law, even if stipulations for a penalty were added, it was held that proceedings could not be instituted against the party that broke the engagement, *in honestum visum est vinculu poenae matrimonia obstringi sive iam contracta* (D. 45.1.134). Just as in Jewish law if a woman may be betrothed by a writ, a similar custom existed among the Romans.

In early Tannaitic times, it was an established fact, that the place where the betrothal was by writ, the question arose among the early legal commentators whether the declaration could be dispensed with, cf. Meiri to Kiddushin, ed. Schreiber; Jerusalem 1942, pp. 64–67.


In case where the betrothal was by writ, the question arose among the early legal commentators whether the declaration could be dispensed with, cf. Meiri to Kiddushin, ed. Schreiber; Jerusalem 1942, pp. 4–5.


Similarly it was customary at the time of *γεγονός* to arrange for the ἐφερώ. The purpose of the ἐφερώ was to make divorce difficult, ἵνα μὴ ἐν' ἐκείνῳ γένοιτο ῥαδισι ἀπαλλατισθαι. In connection with ἐφερώ there is an interesting passage which reads as follows: If such and such a woman will hate such and such husband, and subsequently will not desire his partnership, then she shall take half of her ἐφερώ and likewise the one who is betrothed shall take half of his ἐφερώ.

In Jewish law, betrothal can take place in the absence of the contracting parties, if either or both appoint a proxy, or if the girl is a minor, the agent is designated by the father. It was the duty of the agent to follow the instructions of the principal, otherwise the act would be invalid. However if a proxy failed to carry out his commission, and affianced the woman to himself, the action was held to be legally valid, although the agent was not able to arrange for the *Ketubah* or marriage contract was written at the time of betrothal.
deemed to be morally reprehensible. For this was clearly an example of the abuse of the law.

In Roman law too, as we learn from a statement of Ulpian, there was a provision for the contracting of betrothals by means of a proxy (intermittus) and very often the conditions of marriage were settled by the agency of other persons. (et fere plerumque condiciones interpositis personis expeditiuntur).

Papinian gives us this interesting opinion. Where a general mandate has been given to a man by some one to search for a husband for his daughter, it is necessary that the person selected be introduced to the father who must consent to the marriage before it be legally valid.

Ulpian informs us that if a person forwarded a double betrothal in the name of another, he will not be stigmatized with infamy unless that person was in his power. Si quis alieno nomine bina sponsalia constituerit, non notatur, nisi eius nomine constitutum, quemquam in potestate haberet.

In Biblical times, it may be assumed, a father could give his son in marriage at any age. Of Samson, it is told, that he importuned his father to arrange for the nuptials between him and the Philistine girl that pleased him well. However by the Tannaitic period, a change in the law had transpired. The father could not give his son in betrothal, nor a mother her daughter.

With regard to the marriage of a male under thirteen years of age, there was an increasing tendency to declare it null and void. However, the earlier view was still lenient, as may be inferred from the following rule. If a man gave his son in marriage while he was still a minor, the wife had a valid claim to her marriage settlement (Ketubah) since she was married on this condition. This opinion is reflected in a baraita, which approved of a father marrying off his children shortly before they became of age.

The later halakah took a decided stand against this view and did not recognize the legality of the marriage of a male under age, as is shown by the following statutes. If a minor died without children, his wife was exempt from the duty of levirate marriage. If he betrothed a woman, and after reaching his majority, he sent her gifts (dona propter nuptias) as a donation propter nuptias, the marriage remained invalid. It is this attitude toward the minor that accounts for Rab’s severe condemnation of a parent who marries off a son who is under legal age.

While the Amoraim took no note of the discrepancies in the Tannaitic legislation, the medieval legalists were at pains to reconcile the inconsistencies. A Spanish view is represented by Maimonides who declared it a religious duty (לפיון ובעון) to give children in marriage shortly before they reach their majority, but considered it as reprehensible to give a son in marriage before he reaches man’s estate, for sexual commerce with a minor is tantamount to fornication.

A liberal view was maintained by R. Isaac, the French scholar. According to him...
while the marriage of a minor is illegal, yet cohabitation during such a marriage was not sinful in view of M. Ket. IX.9. Furthermore he held it to be meritorious to give a minor son in marriage.

With regard to the betrothal of a female, the rules are quite different from that of a male. A girl may be given in betrothal from the day she is born. However she must be three years and a day, if the betrothal is by way of ḥin·nai. A father may give his daughter in betrothal without her consent, as long as she is still a ni'nah i.e. until she has reached twelve and a half years and a day. However a widow or a divorcee even under the age of 12 and a half years and a day, who was previously given in marriage to a man, may betroth herself without the consent of her father. Any girl who is twelve years and a half and a day (בּוֹדֶד) is no longer in patria potestas and can be betrothed only by her own consent.

In contrast to Jewish law, where a symbolical act is necessary to make a betrothal valid, among the Romans mere consent is sufficient to constitute betrothal. Hence betrothal can take place in the absence of the parties provided they are aware of the fact or later ratify it. For a valid betrothal requires the consent of the contracting parties. The father is understood to consent unless he makes plain his refusal. A son who is under parental control must agree to the betrothal, otherwise it does not take place. A girl who does not refuse is considered to have given her consent, she may withhold her assent if the person selected by her father is unworthy or infamous (si dignum moribus vel turpem . . . eligat). As for the age limit, betrothal can be made before puberty and after. According to a later view, betrothal could not take place before the parties reached the age of seven.

Some general rules governing the contracting of betrothal may be noted. If a Tumtum (cryptorchis) betrothed a woman, or was betrothed to her the act was valid. If he married, his wife may eat Terumah, if he were a priest, although he may not. A hermaphrodite may marry a woman, but not a man.

100 D.23.1.11.
101 D.23.1.13.
102 D.23.1.12. In the Christian empire, another motive was added, namely, difference of religious belief, C.S.I.5.3, for the Jewish law, cf. Ket. 40b, where מלח סופי לשון טמא ושבועותDAY.
103 Sentences of Paulus, 2.19.1.
105 T. Yeb. 11.1, Babli 72a. The amoraim l.c. explain that the betrothal has legal significance to the extent that it requires a Get מִתְנָא רַבּוּ דְַבִּי יֵאָלֶה רַבּוּ דְַבִּי יֵאָלֶה רַבּוּ דְַבִּי יֵאָלֶה רַבּוּ דְַבִּי יֵאָלֶה רַבּוּ דְַבִּי יֵאָלֶה רַבּוּ דְַבִּי יֵאָלֶה רַבּוּ דְַבִּי יֵאָלֶה רַבּוּ דְַבִּי יֵאָלֶה רַבּוּ דְַבִּי יֵאָלֶה רַבּוּ דְַבִּי יֵאָלֶה רַבּוּ דְַבִּי יֵאָלֶה רַבּוּ דְַבִּי יֵאָלֶה רַבּוּ דְַבִּי יֵאָלֶה רַבּוּ דְַבִּי יֵאָלֶה רַבּוּ דְַבִּי יֵאָלֶה רַבּוּ דְַבִּי יֵאָלֶה רַבּוּ דְַבִּי יֵאָלֶה רַבּוּ D.23.1.5. On consent, cf. G. d'Ercole, II consenso degli sposi e la perpetua manifestazione di volontà, 299 298 JEWISH AND ROMAN LAW
According to R. Jose and R. Simon if a hermaphrodite, who was a priest, married the daughter of an Israelite, she may eat Terumah.  

A man may betroth a woman on the day of death of his parents, but may not marry her until thirty days of mourning have passed. However, if the father of the groom or the mother of the bride died after the wedding banquet had been prepared, the nuptials need not be postponed. A man may betroth, but not marry, a woman on Tisha be'Ab and on Hol Ha-Moed.  

According to an early halakah, a woman who had been married could not remarry, unless a period of three months has elapsed, in order to prevent the question of doubtful paternity from arising. This rule did not apply to betrothals, where no such apprehension might exist. Consequently a woman who had been married might become betrothed, and a woman who had been married might become betrothed, and a woman who had been married might become betrothed again.  

As for the rules governing the contracting of sponsalia, the following may be mentioned. A general principle was laid down that one may not betroth a woman whom it was forbidden to marry. A man who violated this law was visited with the stigma of infamy. A guardian may not betroth his ward, nor give her in betrothal to his son. A Senator was not permitted knowingly with malicious intent (sciens dolo malo) to betroth a freedwoman or a woman whose parents were actors.  

Some exceptions to the general rules are the following. An officer in the province may betroth a woman, but may not marry her while holding office. If a widow becomes affianced during the period she is mourning for her husband she committed no wrong. Quae virum eluget intra id tempus sponsam fuisse non nocet. Yet she may not marry until the period of mourning had been betrothed, and was widowed or divorced, might marry without waiting the statutory period. In consequence of the fact that the plain reasoning underlying this law was liable to be misunderstood by the plain people, the rabbis decided to amend the rule. According to the later view accepted at the Academy of Yabneh, a waiting period of three months was required in every case where a woman remarried, even if during her marriage she could not have become pregnant because her husband was in prison, or she was barren or sterile, or even if she were only betrothed, and wishes to become betrothed again.  

For the later view concerning the validity of the marriage of a hermaphrodite, cf. 0.3.2.11 pr. Cf. also D.23.2.66. A man who violated this law was visited with the stigma of infamy. A guardian may not betroth his ward, nor give her in betrothal to his son. A Senator was not permitted knowingly with malicious intent (sciens dolo malo) to betroth a freedwoman or a woman whose parents were actors.  

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has passed, for this is customary in order to prevent the question
of doubtful paternity (turbatio sanguinis).
Augustus, finding that the spirit of the law (vim legis) was
being evaded by betrothal with immature girls, — shortened
the duration of betrothals. In a passage attributed to Gaius, it
is stated that betrothals may be protracted for just and neces­
sary causes from one to four years and even longer, because of
illness of either party, the death of their parents, the accusation
of capital crimes, or for long journeys. According to a law of
Valerian in 260 C. E., a woman who waited three years in vain for her fiancée to marry her, may contract nuptials with
some one else. Diocletian in a decree issued in 293 C. E. per­
mitted a betrothed woman to repudiate her contract (renuntiari
condicioni) and marry some one else. Constantine decreed
that if a man fails to wed within two years the girl he promised
(suis nuptiis pactus est), then his fiancée may contract matrimony with another with impunity, after the lapse of the
two years.

An interesting problem that vexed the Roman jurists as well
as the Babylonian amoraim is the following: What is the status
of a couple who were married without having been previously
betrothed. Thus Julianus was asked whether a marriage con­
tacted (nuptiae collatae) before the twelfth year, takes the
place of betrothal. Labeo held that if no Sponsalia preceded
the deductio in domum, the mere bringing of the woman to
the husband's home could not alter the fact of the absence of
betrothals.

This same problem is discussed by Julianus in connection
with the validity of gifts between husband and wife. This
question is formulated slightly differently. If a minor less
than twelve years of age has been brought to the home of her
so called husband while she is still of a tender age (si in domum
[quasi] mariti immatura sit deducta) and the husband claims,
she is only his betrothed, the reply given by Labeo is the same
as in the previous case. In the Talmud we find the mention of
a very similar case where a couple were married after by-passing
the ceremony of betrothal. Thus R. Huna formulated the
principle of impin, i. e., if a father gave his daughter in mar­
rriage preceded by no formality of betrothal, the marriage
is valid. However this view of R. Huna is generally rejected by
the rabbis of the Talmud, and the later legal writers. In a
single instance, the principle was accepted by Rab who main­
tained that a priest married a widow, the daughter of a priest, without the formality of betrothal, the
nuptials are valid to the extent that the wife becomes disqualified
to eat Terumah in her father's house.

Similarly Ulpian records a view which seemingly is at
variance with the opinion of Labeo. Thus if a girl less than twelve
years of age were brought into the house of her husband
(comm in domum deducta) commits adultery and then remains with him
after she reached her majority, she cannot be accused of adultery,
but she can be accused of being, so to say, betrothed. (quasi
sponsa poterit accusari).

With regard to conditions, the general rule was laid down to
the effect, that if a woman was betrothed on a certain condition,
the act was valid provided that the condition was
fulfilled. However, if an element of fraud entered into the formalities
of betrothal, the act was illegal. For example if a man betrothed

13 D.23.1.17, Volterra (Ricerci, pp. 101 ff.) has shown that the entire passage is due to a late compiler.
14 C.5.17.2.
16 C.5.1.2.
a woman with the explicit understanding that he was a townsman, and he turned out to be a city dweller, the betrothal had no validity. Nevertheless, betrothal by mistake was recognized as valid, where a man betrothed a woman under the mistaken impression that she was opulent, and it happened that she was a pauper, the betrothal is legal, for the woman committed no fraud.

Sometimes the influence of the statutes of other peoples permeated into Jewish law indirectly. A certain change was introduced into Jewish law as a result of a precedent in foreign law, but the modification was in keeping with the spirit and letter of Jewish law. Let us cite as an example the introduction of the conditional clause in the Ketubah by the Alexandrian Jews. This legal enactment has been discussed often in recent times without attaining an understanding of its true import.

It is true that during the early Tannaitic period it was habitual to have the Ketubah written at the time of betrothal even though some of the clauses did not go into effect until the time of marriage. But it is obvious also that the Alexandrian Jews did not act in contravention of Scripture otherwise Hillel would not have considered legal the marriage of the man who eloped with the girl who had been previously engaged. The Alexandrian Jews realized that Jewish betrothal could not be pronounced by either or both parties with comparative impunity as in the case of Roman Sponsalia, with which they were undoubtedly familiar. Hence they resorted to a plan which

allowed them to retain the formalities of betrothal without suffering its juridical consequences. They inserted an escape clause into the Ketubah which read, “When you come into my house you shall be my wife.” In Roman and Greek law the “deductio in domum” or “σεαρεθαινυμακα” was the term used to denote the beginning of marriage although it was not always a necessary condition of marriage.

This conditional clause was strictly in consonance with Jewish Law. For we read in M. Kiddushin III.1 “If one said to a woman, ‘Be thou betrothed (σεαρεθαινυμακα) to me after the lapse of thirty days,’ and another came and betrothed her during the thirty days, she is betrothed to the second.” The issue between Hillel and the sages, who were inclined to declare the second marriage invalid, was waged over the question of the importance of formalism, namely, the doctrine of strict adherence to prescribed forms in the matter of documents and conveyances. The sages were disposed to maintain that the second betrothal was invalid, because they regarded the conditional clause in the Ketubah as an unauthorized departure from the typical and stereotyped form of marriage contract. Just as R. Meir considered a Jewish divorce illegal even when the reference to the civil era was omitted on the ground that any deviation from the prescribed formula of the Get deprived it of legal force, Hillel, however, recognized the validity of a document even if it were drawn up in the flexible language of the layman, in
disregard of the rigid conformity required by law.\textsuperscript{144} In the light of this explanation, it cannot be said that the Alexandrian Jews were acting contrary to Scripture nor intending to justify unfaithfulness after the betrothal.

The idea of introducing a conditional clause in the 	extit{Ketubah} (Jewish marriage contract) might have come to the Alexandrian Jews from the Egyptians,\textsuperscript{145} for we have a Greek text which reads “I have made a contract with the daughter of Hesperos; I will take her home in the month of Mesore.”\textsuperscript{146}

Already in Biblical times it was customary for the bridegroom to bestow gifts upon his bride before the marriage.\textsuperscript{147} In the Tannaitic epoch the practice well nigh assumed the proportions of an inescapable obligation. \textsuperscript{148} Among the masses of the people, the duty to send betrothal gifts (תֵּבְרָית) was deemed such a social necessity,\textsuperscript{149} that a law was framed concerning one, who was evidently so hard put, that he robbed in order to send gifts to his bride.\textsuperscript{150} This was, of course, an exceptional case.

However, there were two matters with which Tannaitic legislation on betrothal gifts were concerned. First, in view of the fact that the gift at betrothal (תֵּבְרָית) could be a mere trilling sum, even a Perutah, considerable sentiment developed among the people that the giving of betrothal gifts was more than a graceful social practice, but that it possessed legal significance.\textsuperscript{151} In order to disabuse the untutored folk of this notion, the rabbis made it clear that a defective betrothal could not be cured by the subsequent sending of betrothal gifts.\textsuperscript{152}

Secondly, life being what it is, some times betrothal was not followed by matrimony either because of the will of one of the parties, or on account of situations beyond human control. Consequently it was necessary to determine the law concerning the return of these gifts. Without developing a general principle, the Tannaim ruled that in the following four instances the gifts could not be reclaimed by the bridegroom: (1) If the bridegroom had been entertained at a betrothal banquet (תֵּבְרָית) at his prospective father-in-law’s home, even if he only consumed a denar’s worth of food, although his gifts amounted to 10,000 denars;\textsuperscript{153} the same rule applied if he ate at a banquet such as among the people that the giving of betrothal gifts was more than a graceful social practice, but that it possessed legal significance.\textsuperscript{151} In order to disabuse the untutored folk of this notion, the rabbis made it clear that a defective betrothal could not be cured by the subsequent sending of betrothal gifts.\textsuperscript{152}

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\textsuperscript{144} For זָר יָסָר, cf. Sachs, \textit{Beiträge zur Sprach- und Alterthumsforschung}, Berlin, 1854, II, 87–89. In early Roman Law, too, formalism played a signal role. Gaius (\textit{Institutes IV.11}) relates that a man who sued \textit{de vitibus succisis} when his grapevine had been cut down, was advised that he had to lose his case because he should have pleaded \textit{prima-quaerere} for his vine. See also T. Berakhot 7b.\textsuperscript{145} For Sachs, \textit{Beiträge zur Sprach- und Alterthumsforschung}, Berlin, 1854, II, 87–89. In early Roman Law, too, formalism played a signal role. Gaius (\textit{Institutes IV.11}) relates that a man who sued \textit{de vitibus succisis} when his grapevine had been cut down, was advised that he had to lose his case because he should have pleaded \textit{prima-quaerere} for his vine. See also T. Berakhot 7b.


\textsuperscript{147} For \textit{αρτοῦ τινος βαλλων}, \textit{ομφαλός} δὲ ἐστι γυναικὸν τῷ τυμβῷ μεσοπ., cf. also the discussion of this passage in Hans Wolff, \textit{Written and Unwritten Marriages in Hellenistic and Post-classical Roman Law}, Haverford, 1939, pp. 73 ff.


\textsuperscript{149} This is the view of R. Jose, whose opinion prevailed in Jewish society at the time. R. Judah, who held that it was optional (מַדּוּע), most likely represents an older view that was no longer popular, cf. Pes. 49a.

\textsuperscript{150} R. Gershon (B. B. 146a, s. v. \textit{תֵּבְרָית}) explains it to mean gifts sent by the bridegroom to the bride the day after the betrothal, and R. Samuel b. Meir repeats the same explanation. The expression \textit{תֵּבְרָית} לְפָת­ְרָית, \textit{לְמַעַלָּה} דְּלָע­ְגָּן בְּהַמֶּר­ֶפְּה, \textit{מַדּוּע}, etc. sounds like a translation of \textit{Morgengabe}, for the latter cf. Grimm, \textit{Deutsche Rechtsalterthümer}, 4th ed., I, 1899, pp. 610–612, and Koschaker, \textit{Rechts­gleichende Studien zur Gesetzgebung Hammurapi}, p. 172, note 1. Cf. also D.16.3.25 which speaks of the father receiving gifts in behalf of his daughter on the day of betrothal or there after (\textit{Die sponsalionum aut postea}).

\textsuperscript{151} Cf. Tosefta B. K. X.20, p. 368.

\textsuperscript{152} Mitteis called attention to the fact that betrothal gifts among the Greeks were a metamorphosis of the ancient bride price, cf. \textit{Reichsrecht und Volksrecht}, p. 273.

\textsuperscript{153} Cf. M. Kiddushin II.10 and Tosefta IV.4.

\textsuperscript{154} M. Baba Batra IX.5.
Rabin the elder in the presence of R. Papa laid down a new rule concerning betrothal gifts (דנאת ענת נישואין).

All betrothal gifts with the exception of food and beverages are to be returned if either of the parties died, or the bridegroom changed his mind. If the bride refused to be married, then she must return even a bundle of vegetables she received as a gift. Rabin's new view has thus superseded the earlier Tannaitic opinion, which was based on the assumption that certain types of gifts were a pure donatio ante nuptias made out of mere generosity to the bride liberalitas gratis, as the Romans would say. Rabin's interpretation reflected a novel attitude. All betrothal gifts were deemed to be made in anticipation of marriage and became void if the nuptials were not celebrated even if no betrothal, which was subsequently entered into the Ketubah, which was found in the Assuan Papyri, cf. Cowley. Aramaic Papyri, p. 44, line 4. For the distinction between Mohar and Siblon, cf. also Volterra, Studio, III, p. 53, 57. Isserles (Eben ha-Ezer) 91.5 says it was not customary to enter into a writ the amount given as Mohar. Justinian (C.5.3.20 pr.) explains that donations which were previously called ante-nuptial gifts, but were not recorded in order to render them ineffective, he ordered the name to be changed to donatio proper nuptias, cf. C. Th. III.5.1. Nos etiam interspousa quoque as sponsas omnesque personas, ... etiam donatae ex promulgatae legis tempore valere sancimus, quam testificatio acturum secuta est.

Gershom: "T. B. B. X.10: 'A. S. a. H. B. Rashes which are worn by the bridegroom, the phrase is awkward. For: 'A. S. a. H. B. Part, the matter is fully discussed."

For the name ר. ס. ב. ה. ר. Bahar, the opinion is repeated and the phrase is changed to read נ. ב. ח. ק. ר. as Pardo ad. loc. suggested, the phrase should be returned personally.

T. B. B. X.10: 'A. S. a. H. B. Rashes which are worn by the bridegroom, the phrase is awkward. For: 'A. S. a. H. B. Part, the matter is fully discussed.

T. B. B. 146b: "This view of Maimonides VI.21 which was adopted by Karo in Eben ha-Emor 50.3. Maimonides was following the explanation of Joseph ibn Migash, (quoted by the Beth Joseph to Tur. Eben ha-Ezer) 50."

As R. Solomon ben Adret observed ... since this is a positive halakhah, it is not explained by quoting by Beth Joseph to Tur. I.c., 50.
tions were attached to the gifts. Perhaps a lowering of the economic conditions of the period contributed to the new juridical interpretation.

Among the Romans in classical and post-classical times, it was customary for the betrothed woman to receive gifts from the sponsus. The jurisconsults were also required to cope with cases concerning the disposal of betrothal gifts in the event that the nuptials were not celebrated. However the Roman legislators were compelled to deal with situations unknown to the rabbis, in consequence of a Roman rule prohibiting gifts between man and wife. While persons engaged to be married were not subject to this restriction, the jurists found it necessary to lay down certain rulings on the subject, which in turn produced new and vexing complications.

Thus from Modestinus we learn that a donation was valid even if it were made on the day of marriage. Now such a ruling called for a legal definition of marriage. Paulus felt that a question of the validity of a gift made on the wedding day was such a delicate matter, that it ought to be submitted to a tribunal for a decision.

Cervidius Scaevola, the teacher of Paulus, however, rendered two interesting opinions on this point. In one case he held that a gift was valid if it preceded matrimony, the latter was considered to have occurred when the parties yielded their consent, itaque nisi ante matrimonium contractum, quod consensu intelligetur, donatio facta esset, non valere. Evidence that the donations were made before the bride was conducted to her husband's home or before the marriage contract was signed would not by itself, make it an ante-nuptial gift. For these features in the marriage ceremony often occurred after the marriage became legally binding.

In another case, he ruled that a gift on the day of nuptials was valid if it were made before the bride passed into the control of her husband, and before she received water and fire from her husband, pruisquam ad eum transiret et pruisquam aqua et ignis acciperetur.
The Emperor Aurelius in a constitution (anno 270–274) ordained that the validity of a *simplex donatio* made on the day of matrimony depended upon the place it was given. If it were delivered in the bride’s house, it is a *donatio ante nuptias*, if it were given in the husband’s home, then it is revocable, for she was already his wife.

Further perplexities were set in motion by a ruling preserved by Ulpian. If a man made a donation to his betrothed to take effect at the time of marriage, then it is illegal. The principle ordained that the validity of a donation was determined by the place it was given. At the moment when the gift was to come into the woman’s possession, it was no longer allowed for her to receive it as she was a married woman.

As an apparent exception to this ruling we may cite the following two situations. In one case, a man sent a ring which was already his wife. 179

As an apparent exception to this ruling we may cite the following two situations. In one case, a man sent a ring which belonged to another, as a gift to his betrothed. After the marriage he gave her one of his own instead. Paulus following Nerva, decided that the gift of the second ring was valid, because it was not a new donation, but a confirmation of the old, *quia tunc factam donationem confirmare videtur, non novam inchoare.* The theory seems to be that the husband originally intended to give the bride a ring of his own, but for some unexplained reason, gave her the ring of some one else as a sort of pledge. 181

In another instance Paulus gives the following decision. 184 If a man gives his fiancée some property as a gift, but the couple were married before sufficient time elapsed for acquiring the property, 186 nevertheless, it was held that the *usufruit* was not interrupted since the possession was transferred without any defect. 185 A new angle is introduced by the following case recorded by Ulpian. 186 A gift was given by the *sponsa* to a certain Titius for his bride before the marriage. However it was delivered to her after the celebration of the matrimony. The question whether the gift was to be treated as a *donatio ante nuptias* hinged upon the fact whether the husband or the wife had appointed Titius as the agent. 187 If the woman was the mandatory, then the gift was valid.

Finally Ulpian reports two cases of gifts during betrothal.


179 The rabbis would have decided just the opposite, to judge from the remark of R. Nahman. If a man said to a woman, “Be betrothed to me with a Minah,” and he gave her a pledge for it, the engagement is invalid, Kid. 8a.


181 Cf. D.24.1.32.27–28, the difficulties, contradictions and interpolations
followed by an illegal marriage. In the first case a man was betrothed to a woman who was a minor, and afterwards married her although it was prohibited for him to do so. In such an instance, he ruled that the validity of the gifts during the so-called betrothals will depend whether the sponsalia preceded the marriage. In the second case, a senator betrothed a freedwoman and afterward married her, although he is not permitted to contract marriage with her. In this instance he ruled that the betrothal was illegal, and the gifts were to be confiscated by the treasury, sponsalia inprobanda et quasi ab indignis ea quae donata sunt ablata fisco vindicari.

There was an early rule\(^{193}\) that if gifts were made after marriage, which was illegal according to Roman custom, such donation was valid, (sed si aliquod impedimentum interveniat, ne sit omnino matrimonium, donatio valebit). However from a later source\(^{194}\) was interpolated the following reasoning. But it is not right that donations of this kind, should be valid, lest the guilty person benefit from his offence, Sed fas non est eas donationes ratas esse, ne melior sit condicio eorum, qui deliquerunt. This calls to mind the rabbinic maxim already found in the Mishnah\(^{195}\) that the sinner should not profit from his sin.

Thus far we have been dealing with legal problems that resulted from the law prohibiting gifts between man and wife. And now we shall turn for a succinct survey of Roman rulings on the disposal of betrothal gifts where the sponsalia did not lead to marriage. Papinian\(^{196}\) drew a distinction between a simple betrothal gift, known as simplex donatio and that given directly with matrimonial design. adfinitis contrahande gratia.

In case of the former, if marriage did not ensue, the gift was considered as an unconditional one, in the second case, it was to be returned to the donor if the nuptials failed to be celebrated through no fault of his.

A similar rule is preserved in a text of Paulus\(^{197}\) where it is stated that a woman who is betrothed to an officer, must return the gifts to him. (arris tantummodo reditis) if she refuses to marry him, (nuptias contrahere).

In 319, Constantine\(^{198}\) introduced the rule that betrothal gifts must be restored by the party breaking the engagement. In 336, a law\(^{199}\) was framed to the following effect. If one of the parties to the betrothal died, then the sponsa or her heirs might retain half of the gifts, provided she has received the betrothal kiss,\(^{200}\) otherwise she must return all of the gifts.

In 380 there appeared for the first time the institution known as Arrha Sponsalia.\(^{201}\) Under the new arrangement, the gifts


\(^{195}\) C. Th. III.5, 6, C. V.3.16.


\(^{197}\) C. Th. 3.5.10–11 C.S.1.3, 5.2.1. Thus we read: Arris sponsalilorum nomine datis. If anything has been given as a pledge for (literally in the name
were given as a pledge\textsuperscript{14} that the promise to marry\textsuperscript{15} will be fulfilled.\textsuperscript{16} It had for its purpose the realization of matrimony, just as the \textit{arrha}\textsuperscript{17} of commercial contracts envisaged the fulfillment of a sale.\textsuperscript{18} Unlike the \textit{donatio ante nuptias}, the juridical effects of the \textit{Arrha Sponsalicia} lasted until the nuptials, if marriage did not follow, the \textit{arrha} was generally returned. However, the ante-nuptial gifts existed during matrimony, and possessed legal significance until the dissolution of the marriage.

\textit{Arrha Sponsalicia} is of oriental origin as is evident from its presence in the Syrian Roman Law Book, and it is a survival of o) betrothal, cf. Kiddushin I.3, cohabitation for the purpose of (literally in the name of) betrothal (\textit{aris sponsaliorum datis}), for the purpose of dowry. For \textit{aris sponsaliorum datis}, cf. R. Nahman in Kid. 6a.

\textsuperscript{14} It is noteworthy that in medieval Jewish law, a pledge given, not to insure a loan, but to guaranty future promises, is not considered a pledge \textit{aris sponsaliorum datis}, but to guaranty future promises, is not considered a pledge. The phrasing of the law seems to imply that R. Nahman was combating a notion has gained currency among the untutored folk. According to one of the provisions of this complicated new law,\textsuperscript{20} a penalty of quadruple restitution (\textit{quadrupli poena}) was imposed upon the betrothed woman, if she were of age, and declined to carry out her part of the engagement. In 472, by a constitution of Leo,\textsuperscript{21} the penalty for breach of promise was reduced to double restitution of the \textit{arrha}.

In medieval times, it became a practice among Jews at the time of the preliminary marriage negotiations (\textit{rasi\textsuperscript{	extregistered}}) for one or both of the parties to give a pledge to insure the inviolability of the agreement under penalty of a specific sum\textsuperscript{22} of the ancient bride price mentioned in the Code of Hammurabi.\textsuperscript{23}

In so far as the \textit{Arrha Sponsalicia} is the transformation of the ancient Semitic bride price, it possesses a common origin with the \textit{muk\textsuperscript{4}} (betrothal money) of the Mishnah, which is also a metamorphosis of the Biblical \textit{Mohar}. However, the conception that a pledge, in the strict sense of the word, could even be given as Kiddushin, was strongly repudiated by the rabbis. Thus R. Nahman remarks:\textsuperscript{26} If one says to a woman: Be betrothed unto me with a \textit{Minah}, and he left her a pledge to guaranty the sum, the betrothal is invalid, for he gave her no betrothal money and the pledge is revocable.\textsuperscript{27} For in Jewish law the \textit{muk\textsuperscript{4}} must be an irrevocable gift. In the Talmud, \textit{muk\textsuperscript{4}}\textit{ru\textsuperscript{3}}\textit{vi\textsuperscript{2}}\textit{tu\textsuperscript{1}}\textit{vi\textsuperscript{1}}\textit{ru\textsuperscript{2}}\textit{vi\textsuperscript{3} in Kid. 13.}

\textsuperscript{20} The source for the medieval Spanish Law which provides as one of the five ways of betrothal, the giving of something to a woman, with this declaration, I give you this as a pledge and I promise to marry you, is of oriental origin as is evident from its presence in the Syrian Roman Law Book, and it is a survival of its name, the betrothal was invalid. For in Jewish law the \textit{muk\textsuperscript{4}}

\textsuperscript{21} This is the source for the medieval Spanish Law which provides as one of the five ways of betrothal, the giving of something to a woman, with this declaration, I give you this as a pledge and I promise to marry you, is of oriental origin as is evident from its presence in the Syrian Roman Law Book, and it is a survival of

\textsuperscript{22} C. Th. 3.5.11; C. 5.2.1.


\textsuperscript{24} Cf. Koschaker, Z. S. S., 33, p. 387, note 1 and \textit{Eheformen}, p. 89, note 4 Kid. 8a-b.

\textsuperscript{25} Tosafot ad loc. s. v. \textit{mo} remark that if the pledge was given as an unconditional gift, the betrothal would be valid. In the Talmud, \textit{muk\textsuperscript{4}}\textit{ru\textsuperscript{3}}\textit{vi\textsuperscript{2}}\textit{vi\textsuperscript{1}}\textit{ru\textsuperscript{2}}\textit{vi\textsuperscript{3} in Kid. 13.

An undated Roman law, probably of the fifth or sixth centuries, limits the commission payable to a marriage broker (προξενητής) to five percent of the dowry (πολεῖον) or the nuptial gifts (πρωγαμαία δώρεα) with an absolute maximum of ten auris librae.

The preliminary negotiations to betrothal, which were customary in Biblical times, assumed a more important character in the Tannaitic era. They were invested with a quasi religious significance. Consequently negotiations leading to betrothal were permitted on the Sabbath according to Beth Hillel over against the objections of Beth Shammai. From a legal standpoint it made a difference in certain cases whether the betrothal was preceded by preliminary talks. The following case was a matter of issue between two Tannaim. If a man was proposing to a woman and subsequently betrothed her without making the formal declaration, R. Jose held it sufficient, whereas R. Judah required the declaration to be made if the betrothal was to be valid. It was merely the engagement, cf. Tosafot Kid. 63a, s. v. קדשה טון ח, cf. Neubauer, Ehegesellschaft, p. 180, note 2. It seems that the term was introduced under the influence of medieval Jewish law, which may be traced to the similar term condicio used with respect to betrothal, cf. C.5.3.1.1. For the analysis of the term cf. C.5.3.3. Aulus Gellius, Noctes Atticas IV.1.2.

In Jewish law, since betrothal partook of the character of an inchoate marriage it is not astonishing that certain rules regulating marriage apply also to betrothal. However, betrothal was primarily a preliminary stage to matrimony, in which ample time was given to the bride to prepare her trousseau and to the bridegroom’s folks to make arrangements for the wedding feast. Hence, the law, on the one hand, denied the future consorts the privileges of intimacy and immunities appertaining to wedded life, and on the other hand, protected the personal and property interests of the parties. For gifts made even before betrothal cf. C.5.28. Si ante matrimonium...licet ante sponsalia, fundum donavit. C.5.27.

The second important innovation instituted in the Amoraic period was a ruling of Rab. According to him, oral stipulations, involving money matters made by the parents of the parties to the marriage, which were followed by a formal betrothal, were legally binding, e.g. 0.23.1.2 C.5.3.3. Aulus Gellius, Noctes Atticas IV:1.2.

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rights of the fiancée. If the latter was under age, her father shared the tutelage with the fiancée. Like nuptials, betrothal could be terminated only by the death of one of the parties, or by a formal divorce. The Tannaim frequently speak of a woman who was widowed or divorced after being merely betrothed. With regard to the formalities attending the severance of the betrothal of a girl under age, there is a division of opinion. According to one view, the girl or her father may receive the Get. R. Judah says this right is not joint and several, rather the father alone is empowered to accept the bill of divorce. If a girl under legal age was given in marriage, after her father's death, by her mother or brothers, she may repudiate the marriage before a Beth Din of three and dispense with a bill of divorce, according to the view of the Beth Hillel. The Beth Shammai limit the exercise of this right only during espousals. A betrothal, that was made contingent upon the fulfillment of a certain condition, becomes null and void with the non-performance of the pact. When a betrothal was ended by the death of the husband, or by divorce, the fiancée was entitled to the full marriage settlement, that is, the minimum amount of 200 Zuz if she were a virgin otherwise 100 Zuz as provided by statute, plus the additional sum the bridegroom obligated himself to pay. According to R. Eleazar ben Azariah, she could only lay claim to the former. If she were under age, the bride's equity belonged to the father.

If a betrothed woman had sexual commerce with some one other than her fiancée, it was deemed adultery, and the penalty was death by stoning. A man who had sexual relations with a woman betrothed to his father or to his son, is subject to the same penalties as if she were married to his father or son. If a man was betrothed to a woman and died without issue, she is subject to the Levirate marriage. A woman who was divorced from her first husband and became betrothed to a second, may not remarry her first mate, according to the view of the majority of the scholars. Nor may a high priest wed a woman whose previous betrothal was ended by the death of her fiancée. All these rulings presuppose that betrothal has the same consequences as nuptials.

As the purpose of betrothal was to lead the future consorts into matrimony, the following rule became established. It was customary for the fiancée some time after the betrothal, to propose to the woman that she prepare herself for the wedding, which was to take place within a year. Now, if a year passed by from the day the proposal was made, and the couple was not married, because of the man's reluctance or fault, then the fiancée was entitled to maintenance from the estate of her betrothed. According to the earlier law, the betrothed woman,
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from this moment on could even eat Terumah if her fiancé were a priest. However, if a daughter of a priest was betrothed to an Israelite, she was prohibited forthwith to partake of the heave offering. If a daughter of a priest was betrothed to a priest, under conditions where such betrothal was sinful according to Jewish law, then she may not eat Terumah during the period she was affianced.

The following rules will demonstrate to what extent betrothal differs from matrimony. During the espousals sexual intimacy is proscribed. However, a plighted woman who had been warned by her fiancé, about undue familiarity with members of the opposite sex, does not undergo the ordeal of waters, but forfeits her marriage settlement. A child born to a betrothed woman was deemed spurious of doubtful legitimacy.

During this period of plighted faith, the fiancé shared with if she she is the daughter of a priest is penalized in that she is not permitted to eat Terumah. This type of rule reminds one of the less than perfect law defined by Ulpian, Minus quam perfecta lex est, quae vetat aliquid fieri, et si factum sit, non rescindat, sed poenam injungit, ei qui contra legem factit. (Rules of Ulpian I.2, cf. also below note 242.}

The following rules were laid down. Property which she inherited before her espousals, she may freely dispose of. If she succeeded to an estate after her betrothal, Beth Hillel concedes her the right to sell the property without let or hindrance, whereas Beth Shammai deemed her act valid, only in the case of a fait accompli. It goes without saying that the fiancé does not enjoy the right to the fruits of her property during betrothal.

If a man deposited money with a third party in behalf of his daughter, with the intention that he buy a field or give it as dowry after his death, the agent (השך) is obliged to carry out the instructions of the principal, despite the fact that the daughter imports the agent to give the money forthwith to her fiancé, because she trusts him.

If a man’s betrothed dies, he need not mourn over her, and if he is a priest, he may not defile himself by attending her funeral, nor does he inherit her dowry, but if he passed away

his future father-in-law the power to annul the vows of his betrothed, provided she were under age.

With respect to the property rights of the betrothed woman, the following rules were laid down. Property which she inherited before her espousals, she may freely dispose of. If she succeeded to an estate after her betrothal, Beth Hillel concedes her the right to sell the property without let or hindrance, whereas Beth Shammai deemed her act valid, only in the case of a fait accompli. It goes without saying that the fiancé does not enjoy the right to the fruits of her property during betrothal.

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M. Ket. VIII.1, Tosefta VIII.1 and parallels.

In Talmudic times we find many laws prohibiting certain acts (라ברד) in the beginning i.e. before it is done; however, if they were done, they are deemed valid, this calls to mind the Ulpian’s definition of the imperfect law. Imperfecta lex est, quae fieri aliquid vetat nec tamen si factum est, rescindu, qualis est lex Cincia. A lex perfecta annuls the act, cf. the view of Raba (ףיעסא היא, The art. 101 of an attempt to carry out a contract, if it is not carried out, it is rescinded, and it is like the law of Cincia. A perfect law annuls the act.)

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while she was affianced to him, she may recover her jointure and may even sell the property that was security for her marriage settlement without the consent of the court.47

A man may not be a witness in a lawsuit in which his fiancée is involved.48 Whether he may appear in a case where her relatives are the litigants is a moot point among the early legal writers.49 Nevertheless he may give evidence in behalf of a woman to whom he is merely engaged unless it is a lawsuit where she is pressing monetary claims.50

A betrothed person was required to perform non-combatant services for the army although he was released from actual combat duty,51 whereas a newly married man was exempt from all military service in a war of aggrandizement during the first year of his marriage.52

Analogous in some respects to the betrothed woman (אשת) is the woman awaiting levirate marriage.53 The latter may not marry an outsider, unless one of the levirs has submitted to the ceremony of Halitsah. From the wording of Scripture, it appears that the consummation of the levirate marriage required no preliminary formalities.54 The rabbis were quite sensitive on this score,55 and consequently they found an allusion in Scripture, to the act of sponsio which should precede the actual levirate marriage. Thus one text56 reads: "I, so and so, promise to provide for the due nurture and support of so and so, my sister-in-law, but the right to dower shall be assigned to her from the estate of her first husband," (Tosefta Yebamot, II.1). While the Tosefta prescribes this form, only when the statement was a written one, there can be little doubt that the formula was recited originally when the declaration was oral, at a later period, the sponsio for some reason, lost its distinctive character, and was completely assimilated to the ordinary betrothal from which it became indistinguishable, and consequently the ceremony was identical in both cases.57

What authority did this new ceremony enjoy? R. Eleazar b. Arak went the full length and ascribed to it legal effects as far reaching as that of an ordinary betrothal. It may also be assumed that he considered this ceremony to possess Biblical sanction. Thus if a levir performed the levirate betrothal, and subsequently gave her a bill of divorce, then Halitsah could be dispensed with.58 According to R. Johanan,59 authorities as eminent as R. Gamliel, the Beth Shamai, R. Simon, ben Azzai and R. Nehemiah, were all of the opinion that the levirate betrothal produced legal consequences of a significant character. His disciple R. Eleazar60 observed that the juridical effect of the levirate betrothal, according to the Beth Shamai, was limited to the same extent as that of a normal marriage.

Now what exactly is sponsio? The term naturally means oral declaration or promise. It seems that at first the prescribed form of declaration at the levirate betrothal read as follows: "I, so and so, promise to provide for the due nurture and support of so and so, my sister-in-law, but the right to dower shall be assigned to her from the estate of her first husband," (Tosefta Yebamot, II.1). While the Tosefta prescribes this form, only when the statement was a written one, there can be little doubt that the formula was recited originally when the declaration was oral, at a later period, the sponsio for some reason, lost its distinctive character, and was completely assimilated to the ordinary betrothal from which it became indistinguishable, and consequently the ceremony was identical in both cases.57

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This problem vexed the Babylonian amoraim also, Rabbah was debating the significance of according to the view of Beth Shammai. Did it possess the force of marriage or betrothal, if the former, then Huppah was unnecessary, if the latter then it was required. Whereas Raba was of the opinion, that levirate betrothal, according to Beth Shammai gave the woman, the positive status of a betrothed woman, and the doubtful position of a married woman.

At all events it seems to have been universally held that if a woman, who had been betrothed by a levir, had sexual commerce with another man, she was not guilty of adultery whereas an ordinary betrothed woman was.

The resemblances and differences between Jewish betrothal and Roman Sponsalia can be most clearly demonstrated in a presentation of their legal effects and consequences. Sponsalia created an affinity which in some respects was similar to that following marriage. Thus Severus very properly says that the term father-in-law, mother-in-law, son-in-law are properly used from the time of betrothal. A man may not contract a legal marriage with a woman betrothed to his father, although she is not properly his stepmother.

Nor may a woman betrothed to a certain person, marry his father although she is not his daughter-in-law. A man may not marry a woman whose mother was previously betrothed to him for she occupied the position of mother-in-law. A prospective father-in-law could not be constrained to give evidence against his daughter's fiance. A sponsus may bring an action for an injury, for an insult (contumelia) offered to his betrothed is an outrage (iniuria) to himself. If a woman is betrothed and marries another, she is charged with infamy. If she is unfaithful during her Sponsalia, she is liable to the penalties of the Lex Julia de Adulteriis. The murder of a sponsus or sponsa was considered as parricide within the meaning of the Lex Pompeia.

Betrothal, on the other hand is distinguished from marriage in the following respects. Gifts which are prohibited between man and wife are permissible between betrothed persons. There was no mourning for one betrothed. Sponsi nullus luctus est. Sponsalia could be ruptured by a mere renunciation consisting of the formula Condicione tua non utor.

If a freedwoman, who was betrothed to her patron, notifies him of the repudiation of the contract, she may marry another, even against the will of the patron. If the patron has betrothed himself to, or destined himself for some other woman, or has sought marriage with another, he must be considered to desire no longer the freedwoman to be his wife.

In connection with betrothal a few relevant rules governing dowry may be cited here. If a dowry was promised before betrothal (sponsalibus nondum factis) at a time when the fiancee refused to consider marriage, and subsequently the couple were married, the dowry must be paid. If a betrothed woman gives a dowry and does not marry, it is held that the privilege which applies to personal actions, should as a matter of courtesy be
Rab maintains that the father may give his daughter money only on the terms expressed in the Mishnah, whereas Samuel held that the gift is valid even if he makes the condition that she may do with the money whatsoever she pleases. From this passage, R. Zera deduced that R. Meir held the view that R. Jose ben R. Judah says, that a rebellious son is not punished in the summary way indicated in Scripture unless he stole from his father and his mother. This passage shows that a wife could have property of her own. Thirdly, there is a rule transmitted in the name of R. Meir that a woman may redeem the second tithes without giving an additional fifth, if she is redeeming the tithes with her own money. The Talmud explains in Kid. 24a that the money was given to the woman with specific purpose to redeem the tithes.

There are three instances in Tannaitic sources which seemed to imply that the wife had independent property of her own, in contradiction to the principle what a woman acquires belongs to her husband (בכף על ידי עצמה) but the Amoraim explained that the wife received the money as a gift on condition that her husband have no control over it. First there is the case of the woman who took the Nazirite vow and set aside sacrifices from her own property. Secondly, R. Jose ben R. Judah says, that a rebellious son is not punished in the summary way indicated in Scripture unless he stole from his father and his mother. This passage shows that a wife could have property of her own. If the husband presented his wife with real estate, the gift is absolute and the husband has no right to the fruits. This view goes back to Rab and R. Johanan and was considered as a fixed rule in the time of Raba. If a stranger presents a gift to a married woman, the principal belongs to her, but the husband enjoys the fruits of the gift, in case he gave a gift to his wife (בכף על ידי עצמה) or to others, which is evidence that a woman acquires nothing apart from her master just as a slave acquires nothing apart from his master. In Roman law, a slave could not give a gift to the wife of his owner, since he is a libertus (iure subjectus).

For the meaning of אט, cf. Yer. Git. VIII.1, and Babli 71a. The Talmud explains in Kid. 24a that the money was given to the woman with specific purpose to redeem the tithes.

In Roman law, a slave could not give a gift to the wife of his owner, since he belongs (sive subjectus) to the master D. 24.1.3.3.

R. Ilish objected to Raba’s statement that the husband present to the wife the place where the Get was so that she may acquire it, cf. also Tosafot Kiddushin 24a, and Eben ha-Ezer 85.7. If a man gave a gift in common to his wife and another man, it is valid, cf. Hoshen Mishpat 243, Beer Heteb, note 15. For the Roman law, when a person gave a gift to a man intended for his wife, cf. D. 24.1.3.13 and D. 24.1.4.

In Roman law, a slave could not give a gift to the wife of his owner, since he belongs (sive subjectus) to the master D. 24.1.3.3.
modifies and supplements the opinion of the sages. According to one recension of this tradition, the gift to a slave is only valid if it is given to him with the specific purpose that he be redeemed by his master. Whereas another recension has it, that the gift is valid, even if given to him merely on condition that his master have no control over it.

It is quite clear that the controversy between the Babylonian scholar R. Sheshet and the Palestinian scholar R. Eleazar, is based on the supplementary Tannaitic tradition available to them. R. Sheshet attributed to the sages the view that a gift made to the slave on condition that the master have no control over it, (יהוה לא י給予 _) modifies and supplements the opinion of the sages. According to one authority, the father would be obliged to set aside a fund for the son equal to the damages, if the son were injured; whereas another authority maintained, that even in the case of a son no damages were available.

If a proselyte dies without heirs and leaves behind an estate including slaves under age, there is a dispute as to the disposition of the slaves. According to one view, since the estate and the slave become derelict property (אוסר) they acquire their own freedom (הרשו נרי), whereas Abba Saul says, the person who takes possession of them first, acquires them for himself.

With regard to compensation for injuries inflicted upon children, Scripture rules that damages awarded for rape or seduction go to the father, but it is silent with respect to other kinds of injury. The Mishnah lays down the rule that if minors are wounded the person who inflicted the injury, is liable. However if they inflicted injury upon others, they are not answerable. Now in case minors are injured the Mishnah does not state to whom the damages are paid. With regard to this point there is a controversy among the Tannaim in the baraitot. If the injury were inflicted by the father, according to one authority, the father would be obliged to set aside a fund for the son equal to the damages, if the son were injured; in the case of a daughter, no compensation would be necessary. Another authority maintained, that even in the case of a son no damages were available.

If a stranger inflicted injury upon children who were minors both son or daughter were entitled to compensation which would be set aside as a fund (ספק). According to another view, in case of the daughter, the money goes directly to the father. In view of the silence of the Mishnah, R. Eleazar

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226 T. Kid. 1.6, cf. also the reading of Ibn Adret.
229 Kid. 1.6, cf. also Maimonides, Mishneh Torah, V.2. Cf. also R. Hai Gaon’s explanation, cf. V. ch. V, ed. Vienna, 1800, f. 12b–13a) in the Mishnah, to which R. Hai Gaon refers. Cf. also Boaz Cohen, ‘A Fraudulent Sale,’ 23. As Maimonides and Tosafot, I. c., 24a, s. v. תמא. Whereas another authority maintained, that even in the case of a son no damages were available.
230 Cf. above, p. 155.
231 B. K. VIII.4.
232 Tosefta B. K., IX.8 and Yer. Ket. I.4 (28) are in an unsatisfactory state as far as the text is concerned as was already noted by Nahmanides’ Tament to B. K., ch. IX. David Pardo emends the text.
233 Cf. R. Johanan who remarked that most likely agree with his view. For the meaning of the Mishnah, cf. Sanh. 49b, B. K. 93a, and אוסר.
asked Rab his opinion concerning the rule if a girl under age were injured by a stranger. To this Rab replied that Scripture gave the father merely the rights to profits that accrued to her while she was still a minor indicating thereby that the damages should be awarded to the daughter. The patent contradiction between Rab and the baraitot was solved by Abaye who maintained that Rab admitted that the part of the damages which compensated for loss of work belonged to the father.

With regard to the wife it is stated that as long as she is married, she does not pay any damages if she inflicted any damages, but is required to make good, if she is divorced.

As for the slave, the Mishnah rules that if a man wounded a slave belonging to another, he is liable on five counts, R. Judah says, he is excused from paying damages for indignity to the person of a slave. The damages, naturally, are paid to the master.

If a slave committed damage he is not liable, but when he is emancipated he is answerable for his previous delicts. With regard to the noxal liability of a slave there is an old controversy between the Sadducees and Pharisees.

The Sadducees say. We cry out against you, O ye Pharisees, for you say “If my ox or my ass have done an injury, they are liable, but if my male or female slave have done an injury they are exempt, now if in the case of my ox or my ass concerning which there is no commandment that I am required to perform (אוסיאו יביכר בהמה ומכות) yet I am responsible for the injury they do, how much more must I be answerable for the injury, my male and female slave do, since I am obliged to perform certain positive commandments (אסיאו יביכר בсолו סולו) with reference to them. To which they replied, No. How can you compare my ox or my ass which have no understanding (איש חיות עלות) with my male or female slave which have understanding (איש חיות עולם) for if I provoke him to anger he may go and set fire to another’s stack of corn, it is I that must make restitution.

Now the question arises, can women, slaves or minors sell anything, in view of their limited rights in property. According to the Mishnah it is permitted to purchase from women woolen garments in Judah and linen garments in Galilee and

The Jewish law took a more humane standpoint upon the infliction of injuries. The Sadducees say. We cry out against you, O ye Pharisees, for you say “If my ox or my ass have done an injury, they are liable, but if my male or female slave have done an injury they are exempt, now if in the case of my ox or my ass concerning which there is no commandment that I am required to perform (אוסיאו יביכר בהמה ומכות) yet I am responsible for the injury they do, how much more must I be answerable for the injury, my male and female slave do, since I am obliged to perform certain positive commandments (אסיאו יביכר בсолו סולו) with reference to them. To which they replied, No. How can you compare my ox or my ass which have no understanding (איש חיות עלות) with my male or female slave which have understanding (איש חיות עולם) for if I provoke him to anger he may go and set fire to another’s stack of corn, it is I that must make restitution.

Now the question arises, can women, slaves or minors sell anything, in view of their limited rights in property. According to the Mishnah it is permitted to purchase from women woolen garments in Judah and linen garments in Galilee and
times, preserved in the Vulgate, which required the master to marry his betrothed bondwoman if during her period of service he took another woman for his wife. The text of the Vulgate to Ex. 21.10 reads as follows: "Quod si alteram ei accepterit, providavit puellae nuptias, et testimenia, et pretium pudicitiae non negabit." It is more than evident that the Latin reading departs to some extent from the Massoretic text and deviates quite far from the traditional interpretation of this passage. The Vulgate means to say as follows: If a man acquires a bondwoman, and then she is betrothed to his son[^2] and the latter subsequently married another woman, then the son is in duty bound to marry his bondwoman in order to insure her the equal and full treatment of a duly wedded wife, to provide her with raiment[^3] and with Mohar[^4] at her nuptials. There is nothing in the Tannaitic sources which is inconsistent with this interpretation. As a matter of fact, this exposition follows logically from the Tannaitic design to elevate the social position of the Hebrew bondwoman.

The Amoraim were puzzled concerning the status of the bondwoman who was betrothed to her master, because she enjoyed certain conjugal rights and privileges denied to an espoused free woman.[^5] They arrived however at the conclusion that רעי conferred the status of betrothal upon the bondwoman.[^6] By a singular construction of the passage מנן קמח they assumed that the spreading of the garment was a form of רעי.[^7] Since the betrothal of a bondwoman was of an exceptional nature, the amoraim[^8] were divided over the rule whether a father could betroth his son to his bondwoman, if he were a minor, or against his will. This right was denied to the father with respect to his son’s betrothal to a free woman.

[^2]: In a decree of Constantine 321 C. E. the donatio martialis is termed a praemium pudicitiae (C.5.16.24.1) which is the closest to praetium pudicitiae, cf. also Corbett, Roman Law of Marriage, p. 205, note 3. In medieval deeds, praemium and praemium are used interchangeably, cf. Du Cange, Glossarium, Niort, 1886, VI.493. Cf. below note 311.
[^3]: Sin autem filio suo desponderit eam, juxta morem filiarum faciet illi. The Vulgate took the phrase as indeed the rabbinic interpreters elsewhere in this sense, cf. for example, Sanh. 11a, according to Yerushalmi., B. Sanh. 11a, according to R. Meir, and B. Sanh. 11a, according to R. Jose b. Judah. There is also a similar phrase in M. Ket. I.5 which seems to remind one of Gen. 31.50.
[^4]: Although at the time the bondwoman was married she was no virgin, because she was permitted to live with her master-lance, she would be entitled to the garment, cf. also Aaron ha-Kohen of Lunel (Kid. 11.73. For the spreading of the garment, cf. also Meiri to Kid. ed. Schreiber, p. 114.
[^5]: For the spreading of the garment, cf. also Meiri to Kid. ed. Schreiber, p. 114. Kid. 18b, according to Yerushalmi Kid. I.2. R. Jose b. Judah considered רעי as betrothal of a free woman. Kid. I.2, according to R. Nahman b. Isaac, the spreading of the garment refers to the betrothal of free women, cf. Strashun’s remarks I. c. that this passage is the origin of the custom for the bride to cover herself with a veil, cf. Aaron ha-Kohen of Lunel (Kid. 11.73. For the spreading of the garment, cf. also Meiri ed. Berlin, 1855, pp. 91–92.
[^6]: R. Yannai held that the father could betroth her to his son who was of age, and with his consent (Kid. 19a). R. Yohanan was of the view that the father could arrange the רעי for his son even if he were a minor and against his will (Yer. Kid. 1.2). R. Lakish shared the view of R. Yannai, according to the Palestinian tradition (Yer. Kid. 1.2) but according to the Babli it was R. Lakish who raised the question whether he could arrange the רעי for his minor son (Kid. 19a).
An instance of Egyptian national law\footnote{18} is to be discerned in the view of a group of scholars in Alexandria, cited by Philo with reference to seriousness of the crime for violating a betrothed woman. Thus we read\footnote{19} Some consider the crime of ὀπογάμων as midway between the corruption of a virgin (φθορά)\footnote{20} and adultery (μονοχεία)\footnote{21} when mutual agreements have affi-
nanced the parties beyond all doubt (ὑπεργεγυνήσων) but before the marriage was consummated.


\footnote{19} Spec. Leg. 111.72, cf. also Wolff, \textit{Written and Unwritten Marriages in Hellenistic and Post-Classical Roman Law}, pp. 74 ff.


\footnote{21} In the laws of Solon μονοχεία meant only adultery, but in later sources the word was extended to include seduction of an innocent maiden or widow, cf. Lipsius, \textit{Das Attische Recht und Rechtsverfahren}, II, 1908, 429 ff., Erdman, \textit{Die Ehe im alten Griechenland}, 1934, pp. 268 ff., Beauchet, \textit{Histoire du droit privé de la République Athénienne}, I, 233, note 1.

\footnote{18} While the Greek ἀδολογία is found in the Yerushalmi as ἀδολογία it refers to paid receipts for money collected, cf. Yer. M. K. III.2. (82a) and Ket. IX.11 (35c) and is equivalent to ἐποικία. The Aruk explains it as ἐποικία πέρασμον. Philo is speaking of betrothal by a document (φοιτήματα ἀποτελοῦσα) and the term ἀπεργεγυνήσων shows definitively that Philo is thinking of betrothal in the Greek sense of ἐγγυπτομετατρέπειν which term he uses elsewhere, cf. Heinemann, \textit{Philons Griechische} and \textit{Judische Bildung}, p. 294, note 4 and Gulak i. c., p. 40. Most likely Philo is using ἐγγυπτομετατρέπειν in the Attic sense where it means betrothal or the beginning of marriage in the Biblical-talmudic sense, cf. Erdman, \textit{Die Ehe im alten Griechenland}, pp. 225 ff. While the term ἐγγυπτομετατρέπειν is not found in the papyri (cf. Wolff i. c., p. 24, note 186) its legal functions were maintained in the papyri full marriages, cf. Huwardas, \textit{Beiträge zum griechischen und Grako-ägyptischen Eherecht der Ptolemäer und frühen Kaiserzeit}, Leipzig, 1931, p. 5, Erdmann, \textit{Rechtschriift Koschaker}, III.126, note 4, Wahrmund, \textit{Das Institute der Ehe im Altertum}, Weimar, 1933, p. 84, note 2, Wolff i. c., p. 79, note 281, Tauben-


(μητω δε των γάμων ἐπιτελεσθεντων\footnote{22}) another, either by seduction, (ἀπαρτήσας)\footnote{23} or violence, (βιασάμενος)\footnote{24} had intercourse with the bride (εἰς ὁμιλίαν θηλῆ),\footnote{25} But this to my mind is also a form (ἔδος) of adultery. For the agreements, being doc-
ument containing the names of the man and woman, and the other particulars pertaining to the nuptials (συνάδες) are equivalent to marriage. And therefore the law\footnote{26} ordains that both should be stoned to death.

Possibly, Alexandrian opinion that the violation of a betrothed woman was less than adultery was an echo of a provincial view which influenced the thinking of a circle of Hellenistic Jewish scholars. This vulgar notion might have originated in a misunderstanding of the Greek\footnote{27} and Roman rule\footnote{28} that an ἐγγυπτομετατρέπειν or sponsalia could be terminated by a mere repudium\footnote{29} without requiring a formal divorcium. Furthermore an erroneous view was current that only the violation of a married woman constituted adultery,\footnote{30} which seemed to imply that sexual

\footnote{22} Literally before the marriage was completed, cf. Kid. 14a, ibid and Tosefta Sota XI.17

\footnote{23} Cf. Septuagint to Ex. 22.15 ἐπιτελεσθεντοι σαρκίνια.

\footnote{24} Cf. Septuagint to Deut. 22.27 ἐπιτελεσθεντοι.

\footnote{25} Cf. Septuagint to Gen. Ex. 21.10.

\footnote{26} As far as the penalty is concerned only the violation of a betrothed woman is by stoning, for adultery with a married woman according to rab-

\footnote{27} In Attic Law the termination of an ἐγγυπτομετατρέπειν required no formal divorce but merely a διαδόγγων cf. Beauchet l. c., I.129, note 2, Liddell and Scott s. v. διαδόγγων and Bozza, \textit{Il Matrimonio nel diritto attico}, in \textit{Annali del Seminario Giuridico della R. Universita di Catania}, 1934, p. 363 ff. and Wolff, \textit{Written and Unwritten Marriages}, p. 78, note 278.

\footnote{28} Modernists in his ninth book of \textit{Differences} remarks: Divorium inter virum et uxor eum fieri dicatur, repudium vero sponsa remittit videtur, quod et in uxor et personam non absurde cadit (D.50.16.101.1). Note that the Vulgate translates τοιοτικον Deut. 24:3 by \textit{libellum repudii}.

\footnote{29} Gaius on the Provincial Edict observes: In sponsalibus quoque discutendis placuit renuntiationem inter se habere pro-

\footnote{30} Again Modernists instruct us. Inter stuprum et adulterium hoc interesse quidam putant, quod adulterium in nuptiis, stuprum in vidam commitemtur, sed lex Julia de adulteriiis hoc verbo indifferenter utitur, (D.50.16.101).
relations with a sponsa was not adultery but was more than stuprum. This crime was denounced ὑπογάμους.

Now a few remarks on betrothal in the private international law of the Jews. During the second century C.E., the Tannaim formulated the concept of the seven Noachian laws, which approximate the ius gentium of the Romans. Since this notion became prevalent at a time when the Jews in Pales-

tine exercised little or no jurisdiction over foreigners, it may be assumed that the germs of this theory hark back to an earlier and more independent era, and it may also be presupposed that the impulse to clarify and develop this concept came from strong feelings entertained during this century for the restoration of a Jewish State in Palestine.

In Jewish Law, as in all ancient legal systems, the application of the principle of personality was admitted, with the consequence that Jewish law was reserved only for the Jews. The question arises as how to deal with Gentiles living under Jewish jurisdiction who violated certain fundamental laws, or of Gentiles who were legally involved with Jews, both parties being subject to Jewish jurisdiction. There were two problems confronting a Jewish judge who would exercise jurisdiction over such cases. First what law should he apply, secondly, what jurisdiction should he follow.

Now, one of the so-called seven Noachian laws was the body of statutes defining incest( nutritur). As to the antiquity, scope, and nature of this group of rules, there was a considerable difference of opinion in early times. According to some rabbis, the laws of incest were first promulgated to Adam, for which they found intimations in Gen. 2:16 and 2:24. Others were of the opinion that the binding character of these laws upon the Gentiles was alluded to in Leviticus 18.6. Still other Tannaim

332 From Ulpian’s remarks it is evident that the punishment for stuprum is less than for adultery Quamvis si vidua esset, impune in ea stuprum committeretur (D.48.5.14.2).

333 The term ὑπογάμους used only here by Philo was probably coined in analogy with ἐκφυσία conubium, or the right of marriage, and means secret and illicit intercourse. The preposition ἐκ introduces the idea of secretiveness into the word. Note the verb ῥημᾶν, which signifies to take, to receive in marriage, where ῥημᾶν possesses the nuance to take secretly, cf. νοεῖν to think and ὠνομαῖν to think secretly. Prof. Schwabe remarked to me that in ὑπογάμους there is the suggestion of “somewhat” married, just as ὑπογάμους means somewhat polished, and ὑπογάμους signifies speaking somewhat barbarously.


335 We advisey say “approximates” because there are many important differences between the ius gentium and the Noachian Laws in origin, scope, and purpose. Furthermore, the term ius gentium underwent changes in meaning in the course of time. To mention one difference. Thus Cicero, De Officio, Ill.17.69 remarks quod civile, non idem continum gentium; quod autem gentium, idem civile esse debet, whereas in Jewish law certain things are permitted to Jews but prohibited to Gentiles. Cf. Hul. 33a יִת אֲשֶׁר דְּרָבָיָא וְתֵשׁוּבִי מִן רָבָיָא וָמָנֵי מִן רָבָיָא וָבָלָי מִן רָבָיָא וָגָם שֶׁל יִשְׂרָאֵל.citation needed

336 The ius gentium as Buckland tells us “originally meant the rules applied in dealings with aliens, whether originally imported from alien usage or of internal origin, the simpler parts of the Roman law applied to aliens, we need not consider.” A Textbook of Roman Law, 2nd ed., Cambridge, 1932, p. 53.

The ius gentium was considered binding upon the Romans unless modified by a lex. (Gaius, I.83) In the following we intend to show that the laws of incest ( nutritur) which was declared by the Rabbis as one of the seven Noachian Laws, were meant by the rabbis to be applied in dealings with foreigners.
deemed these laws to be based on natural reason, and that men would have enacted them of their own accord if they had not been divinely revealed.

In any event, the laws of incest were binding upon the gentiles. The question naturally arises in what way and to what extent. As previously stated, in case of an infraction by a foreigner under Jewish jurisdiction of the law of incest there would be the problem as to what law would be invoked and what method of procedure we would adopt.

To answer this question, it would be necessary to distinguish between the Jewish law of incest, and the law of incest the rabbis considered obligatory upon the Gentiles. En passant it may be noted that the Romans also differentiated between incestum iure civili and incestum iure gentium. The rabbis were in dispute over the scope and content of the laws of incest incumbent upon the Gentiles. According to one opinion, previously mentioned, all the laws of incest specified in Leviticus chap. 18, would be applicable to Gentiles as well as to Jews, in view of the fact that this principle was deduced from Leviticus 18.6 with one single exception, namely, that violation of a betrothed woman does not constitute adultery, as it does in Jewish law.

Thus, in the sources, the principle is formulated as follows: Gentiles are subject to the law of incest just like the Jews. If a Gentile committed incest with a Gentile woman, he is tried and punished according to Gentile law, if he committed incest with a Jewish woman, he is tried and punished in accordance with the provisions of Jewish law. R. Eleazar says the single exception to this rule is the following. If a Gentile violates a Jewish betrothed woman he is guilty of adultery, but if he had sexual commerce with a Gentile betrothed woman he is exempt from the charge of adultery.

This statement of the Amora, R. Eleazar, may be traced back to Tannaitic sources. What is most interesting about the latter is the fact that no Biblical verse is cited as an authority for the rule that sexual commerce with a sponsa does not constitute adultery in Gentile law. However, R. Eleazar found evidence for this rule in an interpretation of Genesis 20.3.

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134 Sifra f. 91b, Yer. Kid. I.1, Sanh. 57b, T. Aboda Zarah VII.4, p. 473. 
135 Yer. Kid. I.1. The view expressed by R. Eleazar is found in the baraita Sanh. 67b, and T. Ab. Zarah VII.4, but in these sources it somehow does not follow logically from the statements that precede it, as was noted already by David Pardo in his commentary on the Tosefa I. c. The statement 'in Roman Law incestum iure gentium is logically connected with the statement??

136 Neither did R. Johanan (Sanh. 57b) who remarked 'Neither did R. Johanan (Sanh. 57b) who remarked ??

137 Neither did R. Johanan (Sanh. 57b) who remarked ??

138 According to R. Hanina, a Gentile man who had sexual commerce with a Gentile woman who has just celebrated her wedding but did not as yet cohabit with her husband, is not guilty of adultery. This of course is not in keeping with classical Jewish law, for in the Digest 35.1.15 we read Nuptias non consubstans sed consensus facti. Marriage does not depend upon cohabitation but upon consent. On this passage cf. P. Rasi, Commentarii facii Nuptias, Milan, 1946, pp. 13 ff. Cf. also Code of Justinian, V.4, 22. Inter partes hominum personas nulla legem impedienda consortium, quod ipsorum consensus tunc ad circrum fide firmatur. Marriage between persons of equal status will take place by their own consent and the testimony of their friends, provided there is no legal impediment to their union. This is a clear case of "etiam de cursu fidis et per litteras eius vel per nuntium posse nubere placent si in domum eius deduceretur. This is a clear case of "etiam de cursu fidis et per litteras eius vel per nuntium posse nubere placent si in domum eius deduceretur. This is a clear case of "etiam de cursu fidis et per litteras eius vel per nuntium posse nubere placent si in domum eius deduceretur. This is a clear case of "etiam de cursu fidis et per litteras eius vel per nuntium posse nubere placent si in domum eius deduceretur. This is a clear case of "etiam de cursu fidis et per litteras eius vel per nuntium posse nubere placent si in domum eius deduceretur. This is a clear case of "etiam de cursu fidis et per litteras eius vel per nuntium posse nubere placent si in domum eius deduceretur. This is a clear case of "etiam de cursu fidis et per litteras eius vel per nuntium posse nubere placent si in domum eius deduceretur. This is a clear case of "etiam de cursu fidis et per litteras eius vel per nuntium posse nubere placent si in domum eius deduceretur. 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This is a clear case of "etiam de cursu fidis et per litteras eius vel per nuntium posse nubere placent si in domum eius deduceretur. This is a clear case of "etiam de cursu fidis et per litteras eius vel per nuntium posse nubere placent si in domum eius deduceretur. This is a clear case of "etiam de cursu fidis et per litteras eius vel per nuntium posse nubere placent si in domum eius deduc...
From the Jewish sources, which may be traced to the second and third centuries, we obtain the definite impression that sexual relations with a sponsa was not considered as adultery in the Roman provincial law of Palestine of this period. This was also the Egyptian national law as late as the year 475 C. E. For in that year, we have a ruling of the Emperor Zeno to Epinicus in which he declared invalid the marriage of certain Egyptians who married the wives of their deceased brothers. This they did because the wives were said to have remained virgins after their marriage. For this they had the sanction of certain legal authorities (quod certis legum conditoribus placuit) who held that since the marriage had not been consummated there was no marriage (cum corpore non convertent, nuptias re non videri contractas). 239

However, according to the classical Roman law of this time, infidelity on the part of a sponsa did constitute adultery. 231 The statement in Collatio 4.6.1 in uxorem adulterium vindicatur iure mariti, non etiam in sponsam, Severus quoque et Antoninus ita scripterunt, which seems to say the opposite, might have been misinterpreted in the provinces and hence may also be the source for the views expressed in the rabbinic sources. The correct interpretation of the passage in the Collatio was given by Prof. Volterra who pointed out that there was no contradiction between it and the Digest. 232

The second question raised in the Yerushalmi in connection with a Gentile who violated a Jewish betrothed woman, relates to the procedure in trying the case and the punishment to be meted out to the criminal. If it be according to the Jewish law of procedure, then the offender could only be convicted by a court of 23 judges, upon the evidence of two witnesses, who also testified that he had been warned before committing the crime. The punishment would be death by stoning. If we were to be tried by the Gentile law of procedure, then he could be convicted by a court consisting of one judge, upon the evidence of one witness, and without any warning giving him before committing the crime. The punishment would be execution by decapitation. 234

In the Yerushalmi no answer is given to the question. But in the Babli, the view is presupposed that the offender is tried according to the Gentile procedure of law, but is punished by stoning according to the requirements of Jewish law. 235

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232 Kiddushin I.1.
233 R. Jacob b. Aha found in a written Agadic book of the Academy the following statement. A Noachite may be convicted for a capital offence by one judge, who must be a male, by one witness, who must be a male, but may be related to the defendant even if he were not warned by witnesses before committing his offense. (Sanh. 57b) R. Judah b. Pazzi maintains that a Noachite is executed by strangulation, upon his own confession of the crime (Yer. Kid. I.1).
234 Sanh. 57b. According to a tradition taught in the school of Manasseh, the death penalty meted out to a Noachite is always in the form of strangulation.
In conclusion, we were chiefly concerned in this study, with a comparative review of the law of betrothal in the classical period of Jewish and Roman jurisprudence. The Tannaitic epoch, which embraces somewhat more than the first two centuries of the common era, constitutes the classical age of Jewish law. This period is the most original and creative in the entire history of post-Biblical law.

The three main achievements of the Tannaim were (1) the development of the technique of interpretation, a system of legal logic, and juridical construction, which made possible the adaptation of Jewish law in a period of great crisis. (2) The accumulation and preservation of a body of legal traditions partly written, but mostly oral. The legal traditions consisted of (a) commentaries on the Law, such as the Tannaitic Midrashim (b) Systematic expositions, such as Mishnah, Tosefta and certain baraita collections, which culminated in the Institutes of Jewish Law known as the Mishnah of R. Judah which serves: Civilized society rests on three foundations, on justice, 3


302 Cf. Bouaz Cohen, Mishnah and Tosefta, p. 4, note 8, and Halevy, Justice is not merely the dispensing of peace, but like pure learning, brings about the Divine Presence... Cf. Berakot 6a


In the first category belong the commentaries on the *Leges*, Edicts, etc. The second group embraces, among others, the *Digesta*, *Institutiones*, *Regulae* and *Differentiae*. The practical writings include the *Responsa*, *Epistolae*, and *Casus*.

Thirdly, the jurists, like the Tannaim, were mainly concerned with the building of a science and system of law, and manifested little interest in a philosophy of law. However, the following statement of Ulpian, of Greek inspiration, reflects what became the Roman concept of law and justice, to which the Tannaim would heartily subscribe. "The precepts of the law are the following: to live honorably, to injure no one, and to give every one his due." *Juris praecepta sunt haec; honeste vivere, alterum non laedere, suum cuique tribuere.*

The main purpose of our inquiry was not to demonstrate the influence of one system upon the other, although individual

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109 Cf. R. Samuel b. Meir commenting upon ד"ז '...popup(.1) that many businessmen rationalize their justification of withholding profits due to their fellowmen who are in worse shape. See also *Sanhedrin* 16a. San Nicola is writing *cum ira et sine studio* when he asserts with such certainty that the *ars boni et aequi* was foreign to the casuistry of the Talmud, cf. his article "Il problema degli influssi greco-orientali nel diritto bizantino" in *Atti del Congresso Internazionale di diritto Romano*, Roma, vol. I, Pavia 1934, p. 276.


111 The problem of interpolations in the Digest has a direct bearing on the problem of influence, in that it helps to solve at least the question which law is prior in time, the Tannaitic rule or the law in the Digest; on interpolations, cf. Mitteis, *Zur Interpolationenforschung*, Z. S. 57, pp. 180–211 and Franc-