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REVIEW OF RECENT HALAKHIC PERIODICAL LITERATURE

Specific Performance

An interesting analysis is made by Dr. Z. Warhaftig in the Cheshvan-Kislev, 1958 issue of *Sinai* of "Specific Performance of Contracts" in Jewish Halakhah as contrasted with the current secular law in Israel. Can a party to a contract be compelled to carry out its provisions, or is a monetary penalty the only recourse against the defaulter?

As we know, Israeli law derives to a great extent from English law which was introduced into Palestine after England obtained possession of the country under the mandate. The author, himself a learned attorney and a member of the Israeli Knesset, states that in the event a contract is not honored, most legal systems require only the payment of a penalty stipulated in advance or the payment of damages. Thus, Roman law and the European systems derived from it "recognize money payments as in fact the only means of compensation for non-fulfillment of a contract." This attitude we are told, stems from the Roman concept of ownership which was always regarded as absolute and unqualified. "Roman law did not tolerate limits on ownership, whether created by contracts or by other obligations. Consequently, the result of contractual agreement could only be pecuniary, through the imposition of penalties or an obligation to pay damages by the party which defaulted. But the contract could not assure rights of any sort to the object itself with which the contract was concerned, certainly not by compelling the party to the contract to produce the object, to hand over the property. . . . . Transfer of ownership occurs simultaneously with the agreement to sell or else the contract does not affect in any way the fact of ownership."

In English law however the institution of "specific performance" of a contract did develop as part of the doctrine of equity which "recognized that not in every case could a monetary payment suffice to compensate the party desiring performance of the contract." Nevertheless, specific performance of a contract remains in theory a remedy secondary to that of payment of damages. "Where payment of damages will fully compensate the innocent party, he cannot request specific performance." As a result, specific performance as a remedy is left entirely to the judgment and discretion of the judge who decides whether or not the contract is of the kind where payment of damages will constitute compensation in full. In contracts dealing with the transfer of land, the court will "almost always apply

the principle of specific performance."

At first, the courts in Palestine and in Israel, once it gained its independence, attempted to limit the concept of specific performance to "contracts dealing with the sale of real property and even then only when the contract was legally valid, where the entire price had already been paid, and where the purchaser had already taken possession of the purchase; or where a beginning had already been made in carrying out the contract and payment of damages did not appear to the court sufficient compensation to the party desiring fulfillment of the contract." Later, particularly after the establishment of the State, Israeli courts no longer insisted on the conditions that the purchaser already be in possession of the land and that he must have already paid its price in full. The courts instead accepted the principle that in contracts involving land transactions, damages cannot equal the loss of the land.

The Halakhah on the other hand recognizes the institution of specific performance as a fundamental concept of its legal system. In the Talmud, *Avodah Zarah* 72a, we read of a case of a person who makes a contract to sell an item to another at an unspecified time in the future. If the contract specifies the price, and it is understood that the sale is independent of the future willingness or unwillingness of the seller to sell his property, then such a contract is legally valid and must be carried out (and financial compensation is insufficient). Jewish law compels specific performance of a contract wherever a valid contract has been entered into between the parties. To establish validity, Jewish law requires an act of *kinyan*, the affirmation of the validity of the contract by a symbolic act by the parties to the contract. English and Israeli law too require that a contract must be legally valid if specific performance is to be compelled. The contract must in these systems be in writing. However, if a beginning has already been made in carrying out its terms, the contract can even be an oral one.

In Jewish law, most authorities do not require transfer of the property to the purchaser at the time the contract is entered into. In Israel too, the Supreme Court does not require such transfer of the property as a condition for specific fulfillment of the contract.

In Jewish law, payment of the sales price has no bearing on the validity of a request for specific performance of a contract. "If the contract is valid, made so by an appropriate *kinyan* . . . then the contract is effective and its performance can be compelled even if the purchaser has so far paid not even a penny of the purchase price." English and Israeli law, however, require payment by the purchaser of the entire sum specified in the contract of sale, befor a request for specific performance is to be honored. "The order compelling performance of a contract is designed to complete the fulfillment of a contract whose partial performance began with the payment of the prices specified therein."

In contrast to other legal systems, Jewish law does not grant "unlimited rights of ownership. Only God has unlimited rights. The rights of man as an owner are limited and re-

stricted. There are kinds and degrees of ownership. Therefore, it is possible to obligate oneself, by a contractual agreement, to limit one's exclusive rights of ownership. A mortgage confers property rights in the property to the mortgagee. A self-imposed obligation to sell limits in some measure the property rights of the owners.....The expected result of a contract is that it should be performed as is. Only where this is not possible can we substitute compensation and penalties agreed upon in advance, or the payment of damages to which one becomes liable according to law."

It is of interest that in the case of contracts for personal services, such as the performance of labor, specific performance cannot be compelled. "The source of this halakhah is the principle that 'To Me are the people of Israel slaves' (Leviticus 25:55) and not the slaves of slaves." Therefore a worker can abandon a job he has agreed to perform even if nonperformance should lead to monetary loss. Of course, in such a case, the worker may have to pay for the damage caused. However, "compelling a person to work even in the name of fulfilling a contract smacks of servitude."

This principle is found in English law too and was first expressed in an English court in 1890, some 1700 years after its appearance in Jewish law. In the United States also one may not compel the specific performance of a contract dealing with personal services. This is considered a violation of the 13th Amendment to the Constitution which forbids involuntary servitude.

Medicines on Passover

In the *Ha-pardes* of Nissan, 1959, Rabbi I. B. Ness discusses certain aspects of the laws of Passover as they relate to medicines. An individual whose life would otherwise be endangered by his illness may of course use, for medicinal purposes, even during Passover, material containing *chametz* (Leaven). The Torah is a law of life and permits such deviation where life is jeopardised.

But what is the law with regard to a person whose illness requires him to use medicines containing *chametz*, not to preserve his life but to relieve him of otherwise constant pain and bodily distress? The particular case discussed concerns an ill person for whom his doctor has prescribed certain pills and who has been using the prescription for some period before Passover.

Jewish law is quite lenient with substances used for medicinal purposes. Thus, for a sick person who is not in any mortal danger, most materials forbidden to a healthy person may be used medicinally. The only condition to be met is that the substance must not be used or eaten in its customary fashion. (Of course, as stated, where life is in danger the invalid may be given any substance in any manner prescribed by the doctor.)

Rabbi Ness states that most tablets are coated with sugar or chocolate to disguise the taste of the prescription itself and that this coating is applied to the tablet with a paste of flour and water. Are medicinal tablets in the same category as almonds coated with sugar, which are forbidden on Passover because the

coating is applied with a flour and water paste?

Rabbi Ness notes that since the flour paste on the pills is actually eaten and is tasty, it must be considered a food and should be adjudged *chametz*. He therefore suggests that before Passover, each pill be broken into several parts and the pieces inserted into a celluloid capsule. In this way, no part of the original pill will touch the mouth or palate of the sick person. Therefore, this manner of swallowing the pill may be considered different from the normal fashion of eating substances since the palate receives "neither taste nor pleasure from the medicine" and is permissible for one who is ill.

Rabbi Ness adds that non-coated pills which are bitter to the taste may be swallowed as they are on Passover by a sick person. Such tablets are generally made, he says, of synthetic materials which are not leaven. In addition, the bitter substance which has been added to these pills qualifies their consumption as "not the usual manner" of eating or using them.

Royal Jelly

In the Sivan, 1959 issue of *Hapardes*, an interesting current question is discussed by Rabbi S. Efrati of Jerusalem. Does Jewish law permit the use of "Tony Royal?" Tony Royal is presumably used for medicinal purposes and consists of a mixture of honey and royal jelly in an approximate proportion of one part of royal jelly to 35 parts of bee honey. The Torah teaches indirectly that honey is kosher, even though it is produced by a non-kosher creature. Royal jelly is not honey, but rather a natural secretion from the stomach of the bee and should therefor fall into the category that "all which issues from a forbidden source is itself forbidden."

Rabbi Efrati cites the basic talmudic sources and, after a detailed analysis, concludes that royal jelly falls into a permissible category, since the Talmud teaches that "one may not eat a non-kosher flying creature, but one may eat what it brings forth."

Rabbi Efrati is of the opinion that royal jelly is permitted even by those authorities who would not apply the above halakhic principle, because:

1) The royal jelly is bitter, and since it does not improve the taste of the honey with which it is mixed it is permitted.
2) We can apply a more lenient halakhic ruling, since the Tony Royal is used for medicinal purposes. As noted in the previous section, almost any substance may be prescribed, if necessary, for even a minor illness. Consequently, though we would generally reject the decision of a solitary scholar, in this case we can avail ourselves of it, since we are here concerned with an area which is more permissive, that of healing the ill. The scholar in this case is Rabbenu Yonah who permitted the use of honey into which some forbidden substance fell "because honey has the tendency to transform whatever falls into it to honey."

Hebrew Pronunciation

In *Sinai,* Adar II 1959, Rabbi Y. J. Weinberg discusses the question of the Sephardic pronunciation of Hebrew. In areas where the congregation is accustomed to the Ashkenazic pronunciation, may a Bar Mitzvah who has learned Hebrew according to the Sephardic pronunciation read the Torah?

The Talmud in Tractate *Megillah* 24b forbids a *Kohen* who cannot pronounce the words correctly to utter the Priestly Blessing. The reason given by the commentators is that as a result of his mispronunciation of certain letters, the *Kohen* may utter a curse in place of a blessing. "The difference between the Sephardic and the Ashkenazic pronunciations is not so great that it can cause a word signifying blessing to sound like a curse or lead to blasphemy or profanation. Indeed, the opinion of experts that the Sephardic pronunciation is superior in many respects to the Ashkenazic, is now generally accepted."

A person conducting the service who mispronounces his words demeans the dignity of the congregation and is a source of derision. This cannot be said of one who uses the Sephardic pronunciation "since we are accustomed to it for at present very many people come from Israel who speak Hebrew with the Sephardic pronunciation." Consequently, even if the Sephardic pronunciation were incorrect, it would be similar to the case of a *Kohen* who has certain physical defects which normally would disqualify him from publicly pronouncing the Priestly Benediction. But if the congregation has become completely accustomed to him and to the defects, he is permitted to do so.

Essentially, all the reasons cited in the Halakhah for disqualifying an individual whose pronunciation differs from the norm derive from the fact that the pronunciation in question is incorrect. "But this is not the case with the Sephardic pronunciation which is the most precise."

"In the case of a Bar Mitzvah who wishes to read the Torah, there should be no objection, first, because we are concerned here with the *mitzvah* of educating a child Jewishly, and second, for the sake of communal harmony."

Microphones on the Sabbath

The Nissan 1959 issue of *Hadarom,* the halakhic journal of the Rabbinical Council of America, presents an interesting three-pronged discussion of the halakhic problems involved in using a microphone on the Sabbath. The discussion was precipitated by an article in the Elul 1958 issue by Rabbi M. M. Poliakoff who concluded that the microphone may be used in the synagogue if it is completely arranged before the Sabbath commences.

First, Rabbi S. Hibner analyzes the earlier article by Rabbi Poliakoff. Prohibition of the microphone can be argued on several grounds and Rabbi Hibner discusses these in turn.

1) It might be argued that the voice effects a change either in the electric current flowing through the tubes in the microphone or in the electric glow in the tubes. However, Rabbi Hibner decides that we should rely on Rabbi Poliakoff who studied

the technical construction and functioning of the microphone and insists that no such changes take place.

2) It is forbidden to construct an object on the Sabbath. But using a microphone on the Sabbath does not involve construction since nothing is fashioned, nor are we confronted with an object which must be assembled on the Sabbath or whose use requires specialized knowledge.
3) It is forbidden to complete or to perfect an object on the Sabbath. However, if the microphone is arranged and ready to be used before the Sabbath, we cannot prohibit its use for this reason.
4) It is forbidden, on the Sabbath, to draw forth sounds from any instrument. Here, Rabbi Hibner disagrees with Rabbi Poliakoff who limited this prohibiton to musical instruments and argued that since the microphone is not a musical instrument, its use is permitted. Rabbi Hibner cites authoritative opinions which forbid creating any sounds, musical or otherwise, on any instrument especially designed to produce sounds.
5) Rabbi Poliakoff cited as an additional reason for permitting the use of the microphone its role in facilitating the observance of religious commandments, by aiding the congregation to hear the prayers and the sermon. Rabbi Hibner takes issue with this point too and cites halakhic decisions to support his position. In addition, he points out that many congregations hear the prayers and the sermons quite well without the aid of a microphone.
6) Rabbi Hibner's final reason for prohibiting the use of the microphone derives from the effect on other Jews who will be unaware that the instrument had been set and turned on before the Sabbath and will conclude erroneously that one is permitted to turn on the microphone on the Sabbath itself. He compares the use of a microphone to the use of a mill into which one is forbidden to place grain just before the Sabbath so that it should be ground during the Sabbath. Here too the action is automatic, requiring no human aid. Yet it is forbidden because passers-by who hear the mill in operation will be certain that the grain must have been placed into the mill on the Sabbath.

And he concludes: " 'Blessed is the man . . .who keeps the Sabbath from profanation' (Isaiah 56:2); that is to say, he who keeps the Sabbath in such manner so as not to cause its profanation either on his part or on the part of others, now or in the future."

The second article in this symposium is by Rabbi Poliakoff who responds to the criticisms leveled against his first article by Rabbi C.D. Chavel, editor of *Hadarom*. Rabbi Chavel concludes the discussion with a rebuttal of Rabbi Poliakoff's defense.

Rabbi Poliakoff states that an electric current is not to be considered a flame, whose kindling or extinction is forbidden on the Sabbath. In his analysis of the functioning of the microphone, he mentions that talking into it causes the

electric current in some cases to begin and in other cases to cease, although there is no effect on the glow in the cathode tubes. Furthermore, these electronic currents are invisible, even under a microscope, "which means that they are not considered in the slightest as substantial materials" whose creation or manipulation might be prohibited.

Rabbi Chavel contests all these points and argues that even if electricity is not a flame, it is forbidden to cause a flow of electrons or to cause their cessation. He also disagrees with Rabbi Poliakoff's thesis that the microphone is permitted because it is not a musical instrument but only an amplifier of the voice. Rabbi Chavel cites authorities who forbid the use on the Sabbath of any instrument which is specifically designed to produce sounds, musical or otherwise.

(In addition to the question of the violation of Sabbath law, use of the microphone involves the problem of fulfilling the obligations to hear prayer, reading of the *Megillah*, the *Shofar*, etc., by way of an intermediary instrument rather than directly from the one performing the service.)

Blended Whiskey

In this issue of *Ha-darom* there is also an interesting exchange of letters between Rabbi B. Friedman and Rabbi P. Teitz who discuss whether one is permitted to drink blended whiskies. The problem arises from the practice, cited by Rabbi Teitz, of adding a small quantity of wine to the whiskies in order that they should mix well. Non-Jewish wine is of course forbidden to Jews. Does the admixture of a small quantity of wine render the whiskies forbidden?

Rabbi Teitz points out that "Civil law which requires the label to list all ingredients, applies only where the added ingredients comprise at least 2½%—one fortieth—of the total product. If the added ingredients are less than this quantity, for example if they total only one forty-first, then the added materials are overlooked and there is no need to list them on the label."

On this basic point, whether wine is or is not added to blended whiskies, Rabbi Friedman disagrees and gives the opinion of his late father-in-law, an expert chemist and a devout Jew, that "blended whiskey is precisely what its name indicates, a mixture of two or three types of whiskey . . . and there is absolutely no reason to suspect the addition of any forbidden materials."

If wine is added to blended whiskey, it may only be kosher wine, that is, prepared by Jews. Normally, if non-kosher wine had been added, Jewish law requires that there be sixty parts of kosher materials to every part of the non-kosher material in order that the latter be nullified. However, Rabbi Teitz would forbid the product even in such a case because "the wine is intended to improve the taste and does not become nullified even if it is only one-thousandth of the total."

Rabbi Friedman makes a distinction between a forbidden ingredient whose function is to produce taste in a substance which previously lacked taste, and an ingredient added merely to improve the taste of an already tasty substance. In wine

added to blended whiskey, the purpose is to improve a taste which is already satisfactory. Therefore, a proportion of one to sixty is sufficient to permit use of the whiskey. Moreover, the wine, if it is added, loses its separate identity, since we perceive no taste of wine but only the taste of whiskey. Therefore, we no longer need consider that wine is present in the mixture and it is considered nullified.

If 2½% of wine were added, the proportion of forbidden ingredients would be only one to forty and not the one to sixty needed for nullification. However, Rabbi Friedman states that even if the manufacturers of blended whiskies were to avail themselves of the opportunity afforded by law to add non-kosher ingredients to their product, they would add several different kinds of non-kosher ingredients and not 2½% of non-kosher wine alone. In such a case "we can apply the principle that differing forbidden items nullify each other" and can be added to the kosher quantity (so that the latter is increased). In this way each of the prohibited fractions is nullified by a proportion of 60 to 1.

Residence in Egypt

Several interesting articles have appeared in various issues of *Machanayim,* a religious weekly for soldiers issued by the Chaplaincy Corps of the Israeli Defense Army. The standards of the articles are invariably high and make no concessions to mass appeal or to a desire for popularity.

In the special issue for Passover 1959, one of the many fine articles deals with "The Settlement of Jews in Egypt according to Halakhic Sources." The author, Israel Ta-Shma, asserts that we need not go to great lengths to show that Jews settled in Egypt as individuals and in entire communities, "from the dawn of our history as an independent nation until the present day. Besides, at certain periods, Egypt was transformed into a veritable center of Torah by those outstanding Jewish scholars whose devoted disciples we consider ourselves to be and who established their homes there. These things are accepted and known to all. But they are apparently in complete contradiction to what we read in the portion concerning the king (Deut. 17:16), 'But he shall not multiply horses to himself, nor cause the people to return to Egypt, to the end that he should multiply horses; for as much as the Lord hath said unto you, Ye shall henceforth return no more that way.' From this we learn the clear and specific prohibition to return again to Egypt."

The Jerusalem Talmud in *Sanhedrin* 10:9, explains this verse as meaning, "You may not return to dwell therein, but you may return for trade, for merchandise, and for conquest."

After citing numerous sources, the author concludes that "if one descends to Egypt for purposes of trade, even though this may require him to settle in Egypt for a lengthy period and to become somewhat established there, it is not prohibited because it is still considered 'for purposes of trade.'" It is only prohibited to live in Egypt "if settling there has no connection with trade or making a living but one goes to

Egypt because he is enamored of the land or its inhabitants, its ways, its climate, and the like. It is my opinion that Maimonides and the other great scholars, as well as the Jewish communities who were exiled there, relied upon this interpretation. For they went there for no other reason save the needs of livelihood and trade and hence their settling in Egypt was not forbidden."

Warfare on the Sabbath

In the issue of December 19, 1958 of *Machanayim*, Rabbi Gideon Shammai discusses "Halakhic Fundamentals Permitting Warfare on the Sabbath," and states that the basis for permitting prosecution of military campaigns on the Sabbath is the verse in Deut. 20:20, "and thou shalt build bulwarks against the city that maketh war with thee, until it be subdued." From these last words we learn that warfare is permitted even on the Sabbath as is explained in *Shabbat* 19a.

However, prosecution of a war is not a commandment which one is obligated to perform. If it were, one who is occupied in performing this commandment would be freed of the obligation to perform other commandments which may conflict with the prosecution of the military campaign. "The Sabbath restrictions are thrust aside or relaxed where war is concerned, not because war is a *mitzvah*, a commandment, in its own right, but by the very fact of war. The Sabbath simply does not apply to activities of war, without regard whether or not there is a command to wage war."

Halakhah and the Modern Age

The May 12, 1959 issue of *Machanayim* contains the response to a letter by the Israeli writer I. Burla who disputes the "Eternal Validity of the Jewish Halakhah." Mr. Burla complains that religious authorities in Israel "ignore the fact that in the last 2,000 years a tremendous change has occurred in the life of man in general and, in particular, in the life of the Jewish people. Do conditions of war, weapons of war, and techniques of war in our day resemble the conditions and situations of two thousand years ago? Certainly, so far as you are concerned, the Halakhah is eternal. I too admit this. The Halakhah is eternal, but if the times change fundamentally, if different basic conditions develop, then the Halakhah must include within its framework ... the new conditions and situations; it must assess and weigh them and determine anew what the law is. Therefore, I maintain, our situation requires an entirely different approach.... The concept of a telegram of course did not occur to our earliest scholars and I have no doubt that if they had thought of it or if it had existed in their time, they would have considered it in a different light. They would, to begin with, have denied that there is any prohibition against sending telegrams on the Sabbath, perhaps because it is not included among the forty (sic!) categories of labor which are prohibited on the Sabbath and therefore is not considered a forbidden activity. In addition, with reference to the army, this prohibition against sending telegrams might, once in a thousand

times, bring defeat and ruin."

The answer to Mr. Burla is comprehensive, written with a deep understanding of the bases of Jewish law, and offers a clear exposition of the analysis which must be made of modern problems facing Israel. The anonymous writer states that as a result of experiences gained in determining the Halakhah "in matters of military security, war, and other vital services of the State which brook no disturbance or interruption. . .I can state categorically that it is entirely possible to base the daily life in the State on the laws of the Torah and the Jewish Halakhah. This is said not from a theoretical and abstract point of view alone."

In his response to Dr. Burla, the author takes up a usual misconception in the minds of those unfamiliar with the Halakhah who feel that every new situation contains no elements which are familiar and must be considered in a totally new light. "Why is it important whether the concept of the telegram occurred to our scholars or not, since both the sending and the receiving of a telegram involves writing which is definitely one of the thirty-nine categories of labor prohibited on the Sabbath by the Torah, and since the operation of systems of communication involves, according to the data in our possession, several other Sabbath prohibitions. Clearly, if not for the security problems which are involved in it, we should certainly be required to forbid the sending of telegrams."

In order to determine the *halakhot* applicable to the operation on the Sabbath of technical apparatus which may involve the security of the State or affect other services vital to the State, three aspects must be carefully analyzed:

"1) A fundamental clarification of the technical and scientific problems connected with the operation of the apparatus and how it operates.
2) A comprehensive and profound clarification from the point of view of the Halakhah, using all the sources of the great authorities to establish the meaning of the Halakhah as it relates to the possibility of operating the apparatus on the Sabbath when a question of State security is not involved.
3) A precise appraisal of the situation from the standpoint of the security of the State."

The author states that from the studies of the Chief Rabbinate of the Army, along the three avenues outlined above, "there has become possible, from the point of view of the Halakhah, a complete harmony between the needs of public security and the demands of religious law."

He concludes that "only on the basis of a reliable assessment of a particular situation is it possible to judge in each case. This is not the place for generalizations or for superficial analyses, as for example: 'if it had existed in their time they would have considered the matter in an entirely different light.' It is clear that there is no other way to reach a conclusion save on the basis of specific, professional knowledge, both in the realm of Halakhah and in the sphere of State security, and in the light of our responsibility to guard, with all our soul and with all our might, our national and spiritual independence, achieved at so great a cost in blood and by a vision so exalted."