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INTRODUCTION TO SECURED TRANSACTIONS IN HALAKHA AND COMMON LAW

I. THE IMPORTANCE OF SECURED TRANSACTIONS

Security interests are indispensable if there is to be any lending of significant amounts of money. Lending, in turn, is crucial to economic development and expansion. This truism is hardly a modern discovery. The earliest form of security, the pledge, is mentioned in the Torah, and even there, it is not a new concept but a well established business transaction whose basic format needs, and receives, no elaboration.[1]

The necessity of having some form of secured transaction can be demonstrated by assuming a world without them. Lender A consents to loan Businessman B $25,000. B looks like a good risk; A checked with various people who have dealt with B and word on the street is that he is a careful manager whose company is thriving. B owns real estate worth $100,000. Appearances are often deceiving, though, especially in the business world. Actually, B is in desperate straits. He uses the $25,000 from the loan to pay off a loan shark and sells his propery at a fraction of its value to cover various debts. Then he disappears. A cannot be reimbursed from the real estate that B sold off since he never had a lien on it, nor is the $25,000 any longer within his reach. Knowing that such an unsavory prospect is a distinct possibility against which it is impossible to totally protect oneself, A is not likely to loan large amounts of money. Such a situation is untenable in a free market entrepreneurship economy; more important for the Halakha, the needy, who are notoriously bad business risks, will be unable to *secure* loans necessary for their survival.[2]

II. THE PLEDGE

Clearly the lender requires a guarantee that he will be satisfied in some other way if the borrower fails to repay the loan. One method developed in both Halakha and Common Law is to have a third party co-sign the note, thereby creating a primary or secondary liability against this third party.

However, a suitable guarantor is not always available and even if one is, the lender may still feel that the protection is inadequate.

Security interests, then, represent a more stable method of reducing the risk that every lender faces. The pledge is the simplest form of security. At the time of the loan, the lender takes from the borrower some object of comparable worth to the amount of the loan. If the borrower fails to repay the loan, the lender keeps the collateral or sells it, providing the creditor with complete protection against default. In ancient Jewish life the earliest practice seems to have been to take a pledge not at the time the loan was made but at the time the loan was due if the debtor was unable to pay.[3] Halakhic literature discussed both types of pledges.[4]

Although the Torah maintains the basic format of the pledge, a number of special laws are added which typify the biblical concern for the impoverished. For example, certain articles may not be taken at all as a pledge.[5] Other items which may be taken, but are needed by the borrower, must be returned to him every day or every night as circumstances require.[6]

While the Talmud and the Codes do include a full discussion of pledge law, I will omit any further comment on pledges due to their limited use in the modern world. Business today gobbles up huge amounts of capital to build the industrial complexes that are the signature of our times. A developer spends millions of dollars to build a factory, for instance. He owns nothing of comparable worth that he can leave in the hands of the bank which lends him the money to finance his project. Instead, some way must be found to give the bank an interest in the factory being built, or perhaps in another factory that the developer owns. The factory must be left in the hands of the owners, though, to enable them to generate sufficient funds to pay the debt and show enough of a profit to make continued effort worthwhile.

Therefore we will focus on non-possessory security interests, that is, an arrangement whereby the creditor takes an interest in property that remains in the hands of the debtor. Only in the event of default will the creditor take possession of the security. Such arrangements go back in Jewish Law to at least the Tannaitic period,[7] and according to the accepted view in the Talmud, form a part of the biblical law.[8]

III. LIENS

A. INTRODUCTION

We call the non-possessory security interest a lien in English, and a *shibud* or *ahrayut* in Hebrew. As an introductory matter, we must understand the primary differences from the legal viewpoint between the pledge and the lien. In a pledge situation we are dealing with two parties, the borrower and

the lender. There are no third parties to protect, since anyone interested in the pledged item will be foolhardy (and as such not deserving of special protection) to purchase it before insuring that is has been redeemed. However, in the case of a lien, some way must be found to warn prospective purchasers of the property under lien, of the risk of foreclosure by the creditor. The largest part of Halakhic and Common Law analysis in the area of secured transactions is an effort to balance the rights of the creditor with those of innocent third parties.

Our model example will be as follows: A loans B $5,000 on January 1, due on July 1. On February 1, B sells a plot of his land to C for $3,000. When the loan becomes due on July 1, A can collect any and all property in the hands of B at that point, whether real or personal, up to $5,000. Let us assume, though, that A was only able to collect property worth $2,000 from B. Since the Halakha gives A a lien on the property that C bought, as we shall see, A is entitled to seize that land from C. C is then given the opportunity to collect what he can from B (which is not likely to be much).

The primary question for both legal systems under discussion is how to control lien law so that it is useful for A but not unfair to C.

B. THE HALAKHIC GENERAL LIEN

The fundamental principle for the Halakha here provides the creditor with an automatic general lien on all real property in the possession of the debtor at the time of the loan. This means that in addition to the right to sue the debtor personally in the event of default, the creditor can foreclose on realty which the debtor owned when the loan agreement was entered into, even though the land has since been transferred to a new owner.[9] As we shall see, this general lien is available only if the loan was evidenced by a writing.[10] Of course, an oral loan empowers the creditor to collect from the debtor himself,[11] but he may not foreclose on alienated property.[12]

Halakha differs here from the English and American systems developed under the Common Law, which credit the lender with a lien only on property which is explicitly listed in a security agreement and in a financing statement which is available for public examination.[13] This recording system protects potential purchasers as well as subsequent lenders in search of unencumbered collateral, who, by checking the public records, can determine whether a lien exists on the property under examination.[14] If the third party determines that there is a lien, he has a number of options. He may offer the creditor a different collateral from the debtor, walk away from the deal, or accept it and at least have warning of the potential risk.

How does the Halakha, which has never provided for a recording system, deal with potential prejudice to third parties? A celebrated Talmudic passage at the end of Tractate Bava Batra[15] discusses the issue. The focus of

that discussion—whether liens are of Biblical or Rabbinic origin—need not concern us here. Instead, we will examine the delicate balance which the Rabbis of the Talmud forged to mediate between the rights of creditors and third parties.

If all creditors were granted the sweeping general lien described above, undue hardship would result to unsuspecting buyers of property subject to liens. On the other hand, if creditors could never foreclose on alienated property, they would refrain from making loans altogether, to the detriment of the economy in general, and the poor, in particular.

The compromise solution distinguishes between oral loans and those evidenced by a writing. Only in the latter case is the creditor entitled to collect from encumbered property. The Talmud itself provides the rationale for this distinction: even when observed by the requisite two witnesses, oral loans do not tend to become public knowledge (*kala let lei*—it has no "voice"). A written document, in an age before printed forms, generated wide interest. Presumably, a scribe was called and the witnesses signed in what was almost the equivalent of a public ceremony. Such a proceeding did make an impression on the general community; *kala it lei*—it has a "voice." Thus the drafting and witnessing of a document served essentially the same purpose that the recording system does in our society; it publicized the type of information that purchasers of real estate and others interested in the status of real property must know.[16]

C. AFTER ACQUIRED PROPERTY

Both the Halakha and the Common Law address a related question, the applicability of the lien to property acquired by the debtor subsequent to the loan. The legal objection to applying the lien to such property was expressed by Talmudic authorities as follows: *ein adam makne davar shelo ba laolam*[17] and by Common Law scholars as *"qui non habit, ille non dat."* One cannot transfer something not yet in the world or not yet in one's possession.[18]

The first Talmudic mention of an after-acquired property clause is made by the *amora* Shmuel who questions the validity of such an arrangement.[19] The Talmud decides that if the clause is written into the original loan agreement, it is valid, therby creating a rare exception to the oft-quoted rule *"ein adam makne davar shelo ba laolam".*[20] The commentators offer a variety of justifications for the exception; perhaps the most subtle, offered by the Maharit, is that the lien on the future acquired property is affixed to the body of the debtor which is, of course, in existence throughout.[21] Rashbam and Nimuke Yosef offer the simpler possibility that the law is a Rabbinic *takana* designed to encourage lenders *(shelo tin'al delet bifne lavin).*[22]

The Common Law also overcame initial opposition and permitted an after-acquired property clause.[23] However, the two systems contain one

important difference in their treatments of this clause. The Common Law retains entirely the rule of priority of an earlier secured holder over a later one (discussed below).[24] Consider the case of three lenders who lend money to the same borrower and include an after-acquired property clause in the loan agreements. X lends on January 1, Y on February 1 and Z on March 1. On February 15, Borrower purchased a piece of real property. On July 1, all three loans are due and the creditors have only that property bought on February 15 to divide, as the remainder of Borrower's property was destroyed by fire and there was no insurance. The rule of priority provides that X must be paid in full before Y receives a penny, and that Y in turn must be satisfied before Z can be paid.

In this case, Halakha would reach a different result. The halakhic priority of X would operate only against Z, whose lien came into existence after the new property was purchased.[25] Y, though, whose lien was also created prior to the the new purchase, is on the same level of priority as X. Y will be paid something even if X is not repaid in whole. A discussion of how X and Y divide an insufficient pie will follow in Section VI.

This difference between the Halakha and the Common Law approaches is not insignificant. After-acquired property clauses are quite popular today since they permit using inventory and accounts receivable, which are constantly shifting, as collateral. Such usage would be made difficult by the more limited Halakhic priority. However, there is a far more serious barrier to the use of inventory as security in the Halakha, and this leads us into our next topic.

IV. CHATTEL MORTGAGES

At first, both Halakha and Common Law rejected the idea of permitting non-possessory security interests in chattels (also known as "personalty," *metaltelin* in Hebrew).[26] To be sure, chattels still in the possession of the debtor at the time the loan becomes due are collectable by the creditor. However, once the object was transferred, the creditor lost all rights in it.[27] The Talmudic formulation of the rule, *metaltalim lebaal hov lo mishtabdi,* is supported by the rationale that transferees will be unable to ascertain the existence of outstanding liens on personalty they seek to purchase.[28] In addition, lenders aware of the ease of transferring chattels or hiding them do not look to them in a meaningful way as security for their loans.[29]

Twyne's Case, 3 Co. Rep. 806, 76 Engl. Rep. 809 (Star Chamber, 1601), was the leading Common Law case forbidding chattel mortgages. The court held that the transfer of interest in personal property not accompanied by a transfer of actual possession was, in essence, a fraudulent conveyance, and invalid against purchaser and other creditors. A lien is the transfer of interest, which is not the same, of course, as a transfer of title.

The great advantage of *Twyne,* as well as the original Halakhic position, was that purchasers and other transferees of personal property could rest easy knowing that the creditors of the transferor could never reach this item.

Similar circumstances fifteen hundred years apart necessitated a change in both systems. Halakha does not always admit that development has occured.[30] Here, as elsewhere, the exception carved out to the general rule, *metaltalim lebaal hov lo mishtabdi,* is mentioned in the same passage as the rule itself with no hint that it represents a change.[31] However, the assumption of modern researchers that the exception was legislated and not an original part of the lien system is confirmed by Meiri, who writes, "no one ever suggested that chattels are subject to the biblical lien."[32]

The lien on chattels was accomplished through a *kinyan agav karka,* a method used elsewhere in Halakha with regards to acquisition of property.[33] The chattels were attached onto the lien on real property. Therefore, provided that the debtor owned any land, the lien could be affixed to all personal property as well. The reason that this development was so crucial was that in the Amoraic and Geonic periods, the Jews became traders and artisans, and fewer engaged in farming. Therefore, there was less Jewish owned land to be used for collateral, and lenders required interests in chattels to secure their loans.[34] Later, when fewer and fewer Jews owned land, the Aggadic statement that each Jew owns four ammot of land in Israel was employed to effect the *kinyan agav karka.*[35]

The parallel development of chattel mortgages in England and America is striking. The Industrial Revolution in the one, and the post-Civil War boom in the other, created the need for huge amounts of capital.[36] With the development of the new technology, machinery and factories, not real estate, became the "principal repository of wealth."[37] As we have seen, the pledge was inappropriate as a security tool for the machines. Clearly *Twynes Case,* which had stood largely unchallenged for over two hundred years, had to bow to the new reality. Yet the revered case died hard. Long after the chattel mortgages were codified by commercial statutes, judges, still fearful of fraud against purchasers, continued to restrict their use. Eventually a recording system for chattels, similar to the one we've discussed for real estate, was established, and the courts strictly applied the recording requirements.[38]

The absence of a recording system in the Halakha created a serious problem which was never resolved. How were third parties to be warned that the chattel they sought was subject to a lien? Purchasers of real estate knew to take extraordinary steps to make sure that the land was clear of liens. However, such an effort seemed uneconomical for mere chattel purchases. Rabbi Asher ben Yechiel (Rosh) writes in his Responsa that when he moved to Spain he discovered that all loan agreements utilized the *kinyan agav karka,* and that people were fearful of purchasing any chattels.[39] Clearly, such a situation was untenable, and Rosh, in one of the most star-

tling displays of post-Talmudic Rabbinic innovation, suspended the chattel mortgage for the Spanish communities under his sway.[40] Rabbi Joseph Caro accepted the suspension for all communities in the *Shulhan Arukh,* based on the *takkanat hashuk* (legislation necessary to permit business to function properly).[41] The Shakh (*Sifte Kohen*), no doubt shocked by the affrontery of medieval Rabbis altering Talmudic Law, and also aware of the necessity of chattel mortgages, argues against Rabbi Caro's position.[42] Most of the *akharonim,* though, seem to view the chattel mortgage as no longer operable, leaving a gaping hole in the Halakha.[43] The most obvious solution to Rosh's concern is Halakhic approval of a recording system. But of that, more later.

V. APOTEKE

The *apoteke* is a special type of lien, quite similar to the type of security interest which the Common Law provides. The word itself clearly is of Greek origin, but the institution is different in purpose and mechanics from both its Greek counterpart and similar devices used in other ancient legal systems.[44] The normal halakhic lien, as we've seen, applies equally to all of the debtor's property.[45] If the *apoteke* is used, however, the creditor must look primarily or exclusively (depending on which of the two types of *apoteke* is employed) to the hypothecated property.[46]

A distinction is drawn in Halakha between the normal *apoteke, apoteke stam,* and the specific *apoteke, apoteke meforash.*[47] The *apoteke stam* focuses on particular property from which the creditor will collect in the event the borrower defaults on the loan. However, the general lien on all of the debtor's property is not extinguished. Thus if the *apoteke* field is damaged, the creditor will collect from other property. Property subject to an *apoteke stam* is freely alienable by the debtor. If the debtor does indeed transfer the property, the creditor must exhaust all of the resources in possession of the debtor before he forecloses on the hypothecated field.[48]

The specific *apoteke,* though, cuts off the general lien. At the time of the loan, the parties agree that recovery shall be made exclusively from this property in the event of a default.[49] If the hypothecated field is damaged, the creditor has no alternative remedy.[50] The Talmud disputes whether the debtor may transfer such a field, but does not argue that if he does so and then defaults, the creditor may move against the *apoteke* regardless of whether the debtor has sufficient other property to cover the loan.[51]

There are excellent reasons for both the debtor and the creditor to utilize the *apoteke* system, especially the specific *apoteke.* From the creditor's point of view, it enables him to know which property will come to him as a result of default. The Halakha prescribes that real estate be paid only if the debtor has insufficient cash or chattels to reimburse the creditor.[52] The creditor, though, might prefer to be paid with a particular piece of real estate. The *apoteke meforash* assures this in the event of default.

The *apoteke* is also a boon to the debtor. A debtor may find it difficult to engage in normal business since the creditor, with his general lien, lurks everywhere. Prospective purchasers are aware that the property they buy might be taken away from them at any time, and they may refuse to deal with the debtor. If the reach of the creditor is limited to one specific piece of property, transactions involving other property, real or personal, can go on unimpeded. This parallels the modern system of providing a security interest only on those properties listed in the recording office.

Halakha has limited the *apoteke* to use in real property.[53] The Talmud does not permit a creditor to foreclose on a chattel *apoteke* in the hands of a third party.[54] There is an exception made for an *apoteke* slave; the statement in the Talmud that a slave has a *kol* (voice) is perhaps to be understood literally. He himself can inform the new master that he is an *apoteke*.[55] In any event we do find slaves compared to real rather than personal property elsewhere in Halakha.

For chattels, though, the Tur and subsequent codifiers agree that no *apoteke* lien is valid against third parties, since the purchasers do not expect that the chattel could be an *apoteke*.[56] Recording the chattel *apoteke* in a document *shetar* does not help.[57] Even if the transferee has actual knowledge that the creditor and debtor intended the chattel as an *apoteke*, he cannot lose the item to the creditor, since the rabbinic restriction here is prophylactic *(lo plug)*.[58] Although some scholars disagree with this last point of the Tur, most of the commentators do agree with him.[59] The implication of the Tur's approach seems to preclude the type of recording system used under the Common Law to warn the public about pre-existing liens against personal property. If the Tur is correct, then Halakha seems to reject the the idea of notice through recordation. One could argue, though, that awareness by people today that chattels are regularly used as collateral might operate to change the presumption which existed in talmudic times.[60] If that is true, then a recording system may be acceptable within the halakhic framework.

VI. PRIORITIES

To this point we've demonstrated the benefits that accrue to secured creditors vis-a-vis unsecured parties. Now we turn to the question of priorities among the secured creditors themselves.

We must widen our discussion somewhat here, to include two other categories of creditors who have the same status as secured lenders. These are victims of torts committed by the debtor or his property, and a divorced woman or widow claiming her *ketubba*. These claims are collectible from property transferred by the debtor under the same conditions as a secured loan.[61]

As between two or more secured claims, the basic rule in both Halakha and Common Law is "first in time, first in right."[62] The due date on the loan is irrelevant in establishing priority; we are concerned only with the time the debt is created.[63] Students of the Talmud will recall that Halakha provides different qualities of land to tort victims, *ketubba* collection, and loans.[64] Let us assume, though, that all of the debtor's property is of the same quality.

Thus if a debtor was liable for a tort incurred January 1, a *ketubba* signed on February 1, and a loan taken on March 1, the order of priority is tort, *ketubba* and loan. That means that the tort will be paid in full from property in the hands of the debtor, plus transferred property subject to the lien, before the other debts can be paid. If the debtor's wife seeks a divorce on July 1, at the same time that the loan comes due, she must be paid before the lien operates to reimburse the lender. However, even if the loan is repaid while she is still married to the debtor, her lien is not extinguished. If she is divorced in July the next year, and the debtor has no property with which to satisfy the *ketubba,* she can foreclose on the property which had been taken by the lender the previous year, since she has priority over the lender.[65]. The lender, then, is forced to find whatever remedy he can against the debtor. Of course, any buyer of property from the debtor prior to the transactions is not subject to the subsequent liens.

Sometimes no priority exitsts at all, whether among the secured creditors or among the unsecured creditors. For example, two lenders lent this debtor money on the same day and no evidence exists which was earlier. Common Law, in such a situation, would divide the assets pro-rata. If debtor A owes creditor B $100 and creditor C $200, and only $150 is available, B will receive $50 and C $100; since C is owed twice as much, he is paid twice as much. This pro-rata approach is mentioned in Halakhic literature, but does not carry the day.[66] Instead, a special method, which protects the smaller creditors, is used.[67]

The best way to explain this method is through an example borrowed from Rambam.[68] A owes $100 to B, $200 to C, and $300 to D. None of the creditors has priority over any of the others. The method calls for each of the creditors to be paid up to the same level before the larger debt is paid. The chart below demonstrates:

Amount Available	**$150**	**$300**	**$400**	**$500**	**$550**	**$600**
B collects	50	100	100	100	100	100
C collects	50	100	150	200	200	200
D collects	50	100	150	200	250	300

VII. SECURED VS. UNSECURED CREDITORS

One of the fundamental principles of secured transactions in Common Law is that secured interests have priority over unsecured claims.[69] In other words, whichever creditors have taken liens on the various properties owned by the debtor must be paid in full before any of the unsecured creditors receive a penny from these properties. (Of course there is no priority with regard to property not included in the security agreement.)

Strangely, in Halakha, this point is far from clear. It is the subject of a major controversy involving most of the halakhic authorities of the Middle Ages. The parallel to secured and unsecured loans in Halakha is, as we've seen, written and unwritten loans, respectively. To be sure, only a loan evidenced by a writing can lead to foreclosure of property now in the hands of a third party. Is there priority, though, for holders of written notes of indebtedness over oral lenders with regards to property still in the hands of the debtor?

The question was first presented in a Responsa of Rav Hai Gaon as follows: "If [a debtor engaged in] an oral loan and a written loan, and the oral loan was first in time, then the oral loan has priority in collecting from unencumbered property (that is, property still in the possession of the debtor) since we conclude that *shibud* is Biblically enacted."[70] Rambam[71] and Rashba[72] wrote in support of Rav Hai's position. Rif[73] and the Terumot[74] disagreed with Rav Hai, and Ramban, who quotes Rav Hai in full argues that "this decision is not correct, and perhaps was not written by the Gaon."[75,76] Rabbi Joseph Caro, writing in the Bet Yosef on the Tur seems to side with Rif,[77] yet in his review notes on the Bet Yosef, as well as in his own Shulkhan Arukh, he reverses himself, primarily because of the pull of Rambam, and gives priority to the oral creditor.[78] The Shakh disagrees with R. Joseph Caro.[79] All I can say at this point is that (thus far) this serious question has not been finally resolved.

VIII. EXEMPTIONS

The final topic we address is treated by Common Law as a section of the law that Halakha does not recognize: bankruptcy.

American bankruptcy law is far more radical than other modern systems, permitting in many cases the extinguishing of all debts and a fresh start.[80] The Biblical *shemita* accomplished the same task every seventh year,[81] but since Hillel's *takkanat prosbul,* no such method has been available in Halakha to enable the debtor to be free of his creditors without paying.[82]

In the area of exemptions, though, the Halakha and American bankruptcy law are on parallel courses. Known in Halakha as *siddur baal hov,*

the law puts certain of the properties of the debtor beyond the reach of the creditors. In the United States, the list of exempt property varies from state to state; a typical one would include: an interest in real property (up to a certain amount) which the debtor or his dependents use as residence, an automobile, household goods, tools of trade, and health items.[83]

The halakha of *siddur baal hov* is, oddly enough, derived from the law of vows. One who vows to donate to the Temple an amount of goods or money equal to his own market value, or that of another, is obligated to pay.[84] However, various items necessary for survival need not be pawned to satisfy the vow. There was considerable debate in Amoraic times before the *siddur* was accepted.[85] Even among *rishonim,* there was sharp disagreement whether the law referred only to the temporary confiscation of property at the time the loan was due, or also to exempt these properties from the final settlement. The consensus now is that the law deals with the post judgement effort by the creditor to collect his debt; even at that point certain property is exempt.[86]

The items which Halakha exempts are a bed (there was no need to exempt the house itself as that was obvious), food for thirty days, clothing for a year, tools necessary for artisans to work, essential house furniture, and *tefilin.*[87]

IX. THE FUTURE OF *HOSHEN MISHPAT*

A well-known Rabbi once told me that he had been asked thousands of halakhic questions during his years in the rabbinate, but was still waiting for his first in *Hoshen Mishpat.* A glance at recent *teshuva* literature *(Seridei Eish, Iggerot Moshe, Yehave Daat, Ziz Eliezer)* reveals the sparcity of *Hoshen Mishpat* questions, and almost a total lack of real business law questions. A recent visitor to a *din torah* concerning a business agreement had the distant impression that the *dayanim,* while experts in Halakha, had no real grasp of the existing business realities.

This was not always the case. Until the 18th century, nearly all practicing Jews used only Jewish courts to resolve their business questions no less than religious ones. Rabbi Meir of Rothenberg, the great German Tosefist, was especially noted as an expert in business law and he faced the challenge of analyzing the various new types of business transactions that grew up tn his day, in the light of halakhic requirements.[88]

If *Hoshen Mishpat* is to be restored to its rightful place in Jewish life, certain questions will have to be addressed. Halakha has always been understood as the total guide to how the practicing Jew lives. As such, all of its parts must be studied, and understood in light of societal changes. The laws of *Eretz Yisrael* permit arbitration of any matter, with the agreement of both parties, in a Rabbinical Court. But in view of some of the unresolved

questions and needed changes, some of which are cited above, Halakha is at present unable to present a clear, unified business law system to prospective litigants.

A takkana, or some recognition of a recording system, would permit the use of inventory as collateral. It is possible that accounts receivable, which are today widely used as collateral, can be included even without any amendment.

As a demonstration of the flexibility that exists in Halakha, even short of a major breakthrough or *takkana,* I suggest that types of heavy equipment, which are often financed through security interests in today's economy, can be included in a traditional *shibud* by an update in the demarcation line between real property and chattel. The distinction between the two is easy enough to visualize at the extremes. A three acre plot of land is realty and a watch is personalty.[89] However, how are we to analyze the huge machinery which we see all around us in the industrialized world? Gilmore writes, "The concept of realty includes not only the land itself, but also the trees and crops that grow on it, the minerals that lie beneath it, the buildings that are erected upon it, and at least some of the appliances and equipment that may be installed in, and more or less permanently affixed to, the buildings."[90]

The halakhic equivalent of this argument is phrased, *"mehubar lekarka kekarka dami,* (that which is attached to the land is treated as land)".[91] Trees and structures are thus treated like land. To include heavy machinery, which is nailed to the floor, seems not too great an expansion and, if so, can be made subject to liens.

Halakhic scholars have never stopped meeting challenges that have confronted the contemporary Jew. To this day, in medicine, and *shemirat shabbat* especially, the wealth of new literature is staggering. Yet *Hoshen Mishpat* remains a closed book. Let us re-open it, learn it and live by it.

NOTES

1. Thus the verses in the Torah which discuss the pledge do not explain the mechanics of taking the pledge, but rather refer to specific requirements that Halakha imposes on the transaction: Exodus 22:25-26 requires the return of the pledge to the (presumably poor) debtor every evening since he requires it for use at night. Deuteronomy 24:6 forbids the taking of a handmill or upper millstone as a pledge. Deut. 24:10-13 forbids the creditor to enter the home of the debtor to collect the pledge, then repeats the law of Exodus, though, here, explicitly limiting it to a poor debtor. Talmud and subsequent literature explicate these verses in great detail.
2. We must recall that prior to the *heter iska,* there could never be a profit-motive for a lender who abided by Halakha, so long as the debtor was Jewish, since the Torah prohibits a Jew's taking interest from another Jew. Therefore it is not surprising that the Rabbis extrapolated from the verse, "If you shall lend money to any of my people" (Ex. 22:24), a mitzva to make loans to the needy. (See *Mekhilta deRabbi Yishmael,* Horowitz-

Rabin, 2d Edition, *Mishpatim, Parasha* 19, lines 1-13; Rambam *Yad haHazaka, Malveh veLoveh* 1:1; Tur, *Hoshen Mishpat,* 97.)

3. Deut. 24:10. See discussion in *Encyclopaedia Judaica,* s.v. Pledge, Volume 13, pp 638-639.
4. *Ibid.* Also, Tur, *H.M.* 72-74.
5. Deut. 24:6.
6. Ex. 22:25-26; Deut. 24:10-13.
7. Mishna *Bava Batra* 10:8; Mishna *Kiddushin* 1:5.
8. For a discussion of the interrelation of the concept *deorayta, derabbanan, Torah Shebikhtav and Torah Shebe'al Peh,* see Jose Faur, "Law and Justice in Rabbinic Jurisprudence," pp. 17-19 in *Samuel K. Mirsky Memorial Volume,* Gerson Appel, editor, Sura Institute for Research and Yeshiva University, 1970.
9. Rambam, *Malveh veLoveh* 18:1-2; Tur, *H.M.* 39.
10. Rambam, *Malveh veLoveh* 11:4; Tur, *H.M.* 39.
11. *Aphilu migelima d'al katfei,* B.B. 157a, B.K. 11b.
12. *Op. cit., n. 10.*
13. Uniform Commercial Code, Article 9, Sections 201, 203, 303, 402.
14. *Ibid.,* Sec. 9-401.
15. B.T., *Bava Batra* 175 a-b.
16. *Ibid.,* also *Bava Batra* 44b and Rashi ad loc. B.T., *Bava Batra* 175 a-b.
17. B.T., *Bava Metzia* 33b; *Bava Batra* 79b, 131a, et al. Rambam, *Mehira* 22:10.
18. See, Cohen and Gerber, "The After Acquired Property Clause," University of Pennsylvania Law Review 635 (1939).
19. B.T., *Bava Batra* 157a.
20. *Ibid.,* 44b; Rambam *Malveh veLoveh* 18:1.
21. Responsa Maharit, *Hoshen Mishpat* 23.
22. Rashbam, B.T., *Bava Batra* 157a s.v. *Ela ki tiba'i lakh aliba derabbanan.* Nimuke Yosef, s.v. *De'akane mahu,* 74a on Rif.
23. U.C.C. Sec. 9-204.
24. See Official Comment to 9-203, Note 1: "Subsection (1) makes clear that a security interest arising by virtue of an after acquired property clause has equal status with a security interest in collateral in which the debtor has rights at the time value is given under the security agreement."
25. Rambam, *Malveh veLoveh* 20:1-2; Tur, *H.M.* 60, 113.
26. B.T. *Bava Kama* 11b; Rambam, *Malveh veLoveh* 18:1; Tur, *H.M.* 113.
27. Rambam, *Malveh veLoveh* 18:2; Tur, *H.M.* 113.
28. B.T. *Bava Batra* 44b. See Rashbam, ad loc.
29. Tur, *H.M.* 113.
30. The same point is made in relation to the Kabbalah by Gershon Scholem in *Encyclopaedia Judaica,* Vol. 10, p. 493, s.v. "Kabbalah." See also Haim Cohn's review of Zev Falk, *Mavo Ledinei Yisrael Bimei Bayit Sheni,* in *Mishpatim,* Volume 2, No. 1, p. 190 (1970).
31. B.T. *Bava Batra* 44b.
32. Bet Habehira, *Bava Batra* 175b. See also Rashbam, *Bava Batra,* 174a, s.v. *Rav Huna,* who writes of the need for modification in an age in which few Jews own land, notes a *takkana* by the Geonim permitting a divorcee or widow to collect her *ketubba* from encumbered chattels.
33. Mishna *Kiddushin* 1:5, and Gemora ad loc: Rambam, *Mekhira,* 3:8.
34. Rashbam *op cit.* 32.
35. See Tosafot, *Bava Batra* 44b, s.v. *"Delo hava."*
36. *A Guide to Secured Transactions,* Leonard Lakin and Howard J. Berger, Callaghan and Co., Illinois, 1970, p. 1.
37. Gilmore, Grant, *Security Interests in Personal Property* (2 Vol.) Little Brown and Co., Boston and Toronto, 1965, p. 25.
38. *Ibid,* pp. 25-41.

39. Responsa, Rosh 79:3-4
40. *Ibid.*
41. Shulhan Arukh, *H.M.* 60:1
42. Shakh, ad loc.
43. See, for example, Arukh haShulkhan 60.
44. See *"Mossad Ha'Apoteke beDinei haTalmud (Mitokh Hashva'a Im Mishpat haPapirim)"* by Yisrael Osterzatser, in *HaZofe leHakhmat Yisrael,* ed. Dr. Yitzchak Aryeh Halevi and Dr. Zadock Hevesi, Budapest, 1931, pp. 185-194.
45. Rambam, *Malveh veLoveh* 18:1.
46. *Gittin* 41a; Rambam, *ibid.,* 18:3; Tur *H.M.* 117-119.
47. Tur *H.M.* 117.
48. *Ibid;* Rambam, *ibid.,* 18:4.
49. *Gittin* 41a.
50. *Ibid.*
51. P.T., *Shevi'it* 5:1.
52. Rambam, *Malveh veLoveh* 1:4; Tur *H.M* 101.
53. *Bava Batra* 44b.
54. *Ibid.,* see Tosafot, *Gittin* 40b, s.v. *"Hekdesh,"* who holds that the bar to the use of chattels for *apoteke* is *peseda delekuhot.*
55. Tur *H.M.* 117; See Responsa, Rosh 86:11, who makes this suggestion.
56. Tur, *ibid.*
57. *Ibid.*
58. *Ibid.*
59. The divergent opinion is quoted by Meiri in the *Shita Mekubetzet* to *Bava Kama* 11b. It is also mentioned by the *Terumot, Sha'ar* 43, in the name of the scholars of Lunil. Meiri and the *Terumot* themselves side with the Tur.
60. That is, that creditors don't look to chattels as the primary security for their loans.
61. For the right of a woman to collect her *ketubba* from an encumbered field see Rambam, *Malveh veLoveh* 1:4. See also Rambam, Commentary on the Mishna, *Ketubbot* 9:2, where the Rambam writes that the lien created by a *ketubba* is equal in force to that fashioned by other debts.

    For the right of a tort victim to collect from encumbered property, see Mishna, *Bava Kama* 1:3, and Gemara, ad loc, 14b, *"bifne bet din"* and Rashi, s.v. *"Perat lemokher nekhasav"* and *"shema mina."* See also Tosafot, *Bava Kama* 14b, s.v. *"Shema Mina,"* who analyzes the status of torts in relation to written and oral loans.
62. Rambam, *Malveh veLoveh* 1:4; Tur H.M. 104. See B.T. *Ketubbot* 90 a-b for a discussion of the issue, and Tosafot ad loc, s.v. *"Shema Mina."*
63. Tur, *ibid.*
64. Mishna *Gittin* 5:1.
65. Rambam, *Malveh VeLoveh* 1:4.
66. Tur *H.M.* 104, in the name of Rabbenu Hananel.
67. *Ibid.,* following Rif, Rambam and Rosh.
68. Rambam, *Malveh veLoveh* 20:4.
69. U.C.C. Sec. 9-301.
70. *Otzar haGeonim,* ed. B.M. Levin, Volume 8 *(Ketubbot),* p. 300, Responsa 700 and 701. Rabbenu Hai Gaon's point is that since *shibud* is activated automatically by Biblical law, there is no difference Biblically between oral and written loans, and the Rabbinic decree forbidding an oral lender to collect from encumbered property had no effect on the right of an oral lender to collect from unencumbered property, which remains on the same level as the parallel right of a creditor holding a note.
71. Rambam, supra, 20:1; see Maggid Mishna ad loc.
72. Quoted in Maggid Mishna, *ibid.,* and Bet Yosef, Tur *H.M.* 104, s.v. *"Ve'im yash"* (note 13).
73. Ad loc. to B.T. *Ketubbot* 90b.

74. Sha'ar 65.
75. In *Shita Mekubetzet,* 90b, s.v. *"Vekatav haRamban."*
76. *Op. cit.* note 71.
77. *ibid.* Tur 104, ad loc.
78. Shulhan Arukh, *H.M.* 104:13.
79. *Sifte Kohen,* ad loc.
80. I refer here to the distinction between Chapter 7 liquidation which extinguishes all liabilities, and a Chapter 11 or 13 reorganization which restructures the company and sets up a schedule for debt payments.
81. Deut. 15:2.
82. Mishna *Shevi'it* 10:3.
83. See United States Bankruptcy Code Sec. 522.
84. Mishna *Erchin* 6:3–4.
85. *Bava Metzia* 114a. See *Gidule Terumot* to *Sefer Terumot* 1:3:1.
86. For a summary of this topic see Dr. Shmuel Shiloh, *"Nihse haHayav she'Ainam Nitanim Litefisa beMishpat halvri" Mishpatim,* Vol. 2, No. 1, 1970.
87. Rambam, *Malveh veLoveh* 1:7.
88. For a view of "the astonishingly complex commercial life" reflected in the Responsa of Rabbi Meir of Rothenberg, see Robert Schwartz, "Two Sources of Medieval Business History," in *The American Journal of Legal History,* Vol. 2, pp. 237-255 (1958).
89. See Shulhan Arukh, *H.M.* 60:1.
90. Gilmore, supra, p. 54.
91. See Rama to Shulkhan Arukh, *H.M.* 95:1 and Shakh ad loc. note 8.