

## THE TOSEFTA AS A COMMENTARY ON AN EARLY MISHNAH

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Since 1989 I have been arguing that much of the Tosefta (T) precedes the Mishnah (M) and serves as its basis.<sup>1</sup> I have supported this new model with much textual evidence. Even so, the question naturally arises, how can the Tosefta have been a source of the Mishnah, if the Tosefta, in essence, is a wide-ranging commentary on and supplement to the Mishnah? Certainly there are many passages in the Tosefta that make no sense on their own and can only be understood when read together with the passage on which they comment. But the better question to ask is, to which text do these Tosefta passages respond? Which text do they cite, in part or in whole, and then explain? It is all too easy to conclude that the text is the Mishnah. But it is not necessarily so.

A new answer to this query is that the Tosefta often comments on *a*

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<sup>1</sup> “*Pesiqah Lehumra Bemishnat Gittin*,” Proceedings of the Tenth World Congress of Jewish Studies, Division C, Jewish Thought and Literature, Jerusalem, 1990 [Hebrew]; “Women and Procreation,” *Tikkun* 6 (1991); “Women’s Voluntary Performance of Commandments from Which They Are Exempt,” *Proceedings of the Eleventh World Congress of Jewish Studies*, Jerusalem, 1994 [Hebrew]; “Women and Inheritance in Rabbinic Texts,” in *Introducing Tosefta*, eds. Harry Fox and Tirzah Meacham (New York 1999) 221–240; “Mishnah as a Response to ‘Tosefta’”, in *The Synoptic Problem in Rabbinic Literature* (Providence 2000) 13–34; “Nashim Bemassekhet Pesahim,” in *Atarah Lehayyim, Mehqarim Besifrut Hatalmudit Veharabbanit L’khevod Prof. H. Z. Dimitrovsky* (Jerusalem 2000) 63–78 [Hebrew]; “Does the Tosefta Precede the Mishna?” in *Judaism* 198 (2001), 224–240; “How Old Is the Haggadah?” *Judaism* 201 (2002), 5–18. For other recent studies, see Shamma Friedman, *Tosefta Atiqta* (Ramat-Gan 2002), and bibliography.

Mishnah but not *our* Mishnah.<sup>2</sup> Careful examination of paragraph after paragraph of Mishnah and Tosefta shows that the Tosefta sometimes quotes a phrase from some other text and explains it, but the quotation, although similar to the Mishnah, does not match word for word. It has long been observed that when the Tosefta asks “X, how so?” (*eizehu X, X keizad*), X is a phrase from the Mishnah. For instance, T Kiddushin 1:5 asks, “How does a Hebrew slave redeem himself by *gera'on kesef* (deduction from the purchase price)?,” and this exact phrase appears in M Kiddushin 1:2. But the Tosefta also says, a little later in the same paragraph, “How does one accomplish *hezqat qarqa'ot* (taking possession of land)?,” again apparently quoting a phrase from the Mishnah, but the Mishnah says something different, "נכסים שיש להן אחריות נקנין ... בחזקה" (assets with backing are acquired by means of presumptive ownership). The Mishnah's phrase “assets with backing,” although it, too, refers to real estate, is quite different from the Tosefta's *qarqa'ot* (lands). I don't think a commentary would cite the source text in very different words.<sup>3</sup> To say this a little differently: if the Tosefta cites the Mishnah verbatim more than 80% of the time, how do we account for those relatively few places where it does not?

Many cases like these made it clear that the Tosefta was not quoting our Mishnah but some *other, ordered, older* collection.<sup>4</sup> If so, I had found a solution to the problem of the dual nature of the Tosefta. It is both a commentary on an earlier text, which I will dub *urMishnah*, and also the basis of a later one, our Mishnah.<sup>5</sup>

Such discrepancies between the Tosefta's citation of the Mishnah and the Mishnah itself have been noted in the past. D. Halivni says

<sup>2</sup> My paper on the early Mishnah was presented at the 34th annual conference of the Association for Jewish Studies, December 2002. This article is the full version of that paper.

<sup>3</sup> If the Tosefta is a commentary, one may presume that the text upon which it comments has arrived at a reasonably high degree of fixity. Small variations in the source document and its citation in the commentary are to be expected, however. A word like “and” appears in some versions but not in others.

<sup>4</sup> Note that an old Mishnah is a necessary assumption only if the Tosefta predates the Mishnah. If this is not so, the Tosefta might be commenting on a different version of our Mishnah. See below.

<sup>5</sup> The new model I am proposing fits the first four orders of the Tosefta well, as evidenced by many examples. It remains to be seen if Qodoshim and Tohorot adhere to this model or to some other. See below and n. 15.

that the tanna in T Baba Qamma (BQ) 1:1, who cites a text that is somewhat different from the parallel *mishnah* (BQ 1:2), knew “a different recension of an old *mishnah*.”<sup>6</sup> This is not an unreasonable claim. But I suspect Halivni formulated his findings in this way because of his preconceived notion that the Tosefta is a commentary on the Mishnah. If so, whenever the Tosefta appears to quote the Mishnah, even if the words are different, it is still our Mishnah, just some other recension. However, if one acknowledges the possibility that the Tosefta is often the basis of the Mishnah and hence earlier, then an alternative explanation comes to mind: the Tosefta cites not an alternative version of our Mishnah but a forerunner of our Mishnah. I am thus agreeing with Halivni but nuancing his assertion. Yes, the Tosefta cites a different recension of the Mishnah, an earlier one.

A. Goldberg also noted, in a long article on the first two chapters of T BQ, how common it is for the Tosefta to cite our Mishnah *in a different wording*.<sup>7</sup> Goldberg, who consistently sees the Tosefta as a continuation and completion of the Mishnah, says that in these instances the Tosefta deliberately changed the wording of the *mishnah* it was citing in order to explain it.<sup>8</sup> To my mind, this understanding fits neither the words nor the rhetoric of the Tosefta. When the Tosefta says “they have said”<sup>9</sup> and then cites a phrase from its Mishnah and explains it, there is no reason to think the Tosefta changed the citation’s wording.<sup>10</sup> It was necessary for Goldberg to make this

<sup>6</sup> D. Halivni, “Al Herkevah shel Hamishnah Harishonah Bebava Qamma,” in *Iyyunim Besifrut Hazal, Bamiqra, Uvetoledot Yisrael* (Ramat-Gan 1982), 114. He says that the Mishnah and the Tosefta each knew “גירסא אחרת של משנה עתיקה.” This is not a reference to an early Mishnah collection but to the fact that M BQ 1:2,3, as they appear in our Mishnah, seem to date from an early period.

<sup>7</sup> “Seder Hahalakhot Utekhunot Hatosefta,” in *Mehqerei Talmud* 2, eds. Moshe Bar Asher and David Rosenthal (Jerusalem 1993), 152ff.

<sup>8</sup> “אחת התכונות הבולטות של התוספתא היא להביא את המשנה בשינוי לשון כדי לתת פירוש” ללשון המשנה ... 251.

<sup>9</sup> Some of the phrases the Tosefta uses to quote an outside source are: שאמרו, למה אמרו, אע”פ שאמרו, מפני מה אמרו, אימתי אמרו, שהרי אמרו. See, for example, T Berakhot 1:5 and T Ta’anit 1:5,6.

<sup>10</sup> M. Jaffee (electronic communication, 1.28.04) says that in the ancient world citations were not exact. However, since the Tosefta’s citations of the Mishnah are so often exact, I will follow the evidence before me in rabbinic literature rather than the experience of other literatures. Exact citation, which assumes a fixed formulation, seems to be a self-proclaimed characteristic of much of

conjecture in order to reconcile the empirical data with his theory of the Mishnah's primacy.<sup>11</sup>

By presenting cases in which the Tosefta cites a Mishnah that differs from ours, I will bring evidence of the existence of an early Mishnah.<sup>12</sup> Many scholars have posited the existence of such a Mishnah but did not provide proof. They merely based themselves on scattered references in the Talmud to Mishnah collections of a number of tannaim, such as the "Mishnah of R. Akiba."<sup>13</sup> Y. N. Epstein did begin to demonstrate the existence of an early Mishnah, a *mishnah qedumah*, by showing that our Mishnah occasionally cites an earlier text.<sup>14</sup> He did not, however, apply this method to the Tosefta. I will. My innovative point will be that the non-matching formulations in the Tosefta are relics of an older Mishnah collection. The Tosefta

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rabbinic literature. See below. For further references, see M. Jaffee, *Torah in the Mouth* (Oxford 2001), bibliography.

<sup>11</sup> Others, too, talk about early texts. S. Lieberman says, on occasion, that the tannaim of the Tosefta were not commenting on the Mishnah but on a *baraita* (*Tosefta Kifshuta*, Baba Qamma, 9). J. Neusner, in *The Tosefta, Its Structure and Its Sources* (Atlanta, Georgia 1986), 4ff., says that it cannot be shown that the Tosefta is consistently later than the Mishnah. The Tosefta's pericopes comment on the Mishnah's individual pericopes. But the Mishnah, he says, probably underwent a further stage of redaction, after the completion of the Tosefta. The final redaction of the Mishnah, he says, contributed to its generalizations, larger introductory materials, and probably concluding ones, too.

<sup>12</sup> I cannot speculate on the nature of the urMishnah or its extent. But if it exists, I think that the Tosefta both explains this earlier collection and vastly expands it. On some occasions the Tosefta appears to comment on an older text and on others it seems to develop it, not just quote and explain it. I am further suggesting that the Tosefta may preserve for us some sense of the ancient mode of learning. The tannaitic circles may have begun their deliberations with a Mishnah collection that was already in existence and then proceeded to explain and expand the early collection, as they saw fit. The wide-ranging commentary and the growing base text did not merge but probably circulated together as text and associated comments.

<sup>13</sup> See *Mevo 'ot Lesifrut Hatannaim* (Jerusalem 1957), 71–87. Epstein suggests that R. Akiba's Mishnah collection lies at the base of our Mishnah today. Since it dissolved into R. Meir's collection, which then dissolved into Rabbi's, one cannot identify it. See D. Henshke's theories of an early Mishnah, n. 31.

<sup>14</sup> *Mavo Lenusah Hamishnah* (Jerusalem 1948), 726ff.

comments on *that* collection, not on our Mishnah.<sup>15</sup> I thus differ from Epstein in two ways: 1) He sees our Tosefta as a commentary on our Mishnah;<sup>16</sup> I see it as a commentary on an urMishnah; 2) He does not see our Tosefta as a source of our Mishnah. I do.

To demonstrate this model of the Tosefta as a commentary on urMishnah and also as the basis of our Mishnah – to show how this theory arises from the texts themselves – I will first present several examples in which one can readily see that the Tosefta quotes an earlier text but that it is not our Mishnah. I will then read and compare an entire chapter of Mishnah and Tosefta to show how their inter-relationship is best explained according to the new model.

How does this approach mesh with orality theory which rejects the model of text and commentary for the evolution of rabbinic works and replaces it with multiple, parallel performances of oral and written pre-redactional materials?<sup>17</sup> In my opinion, conclusions emerging from close, synoptic readings of rabbinic texts may offer a corrective to the orality hypothesis.

1) The Tosefta's stringent stand on dogs and the Mishnah's more liberal one

#### משנה בבא קמא ז:ז

<sup>15</sup> Epstein came close to saying that the Tosefta comments on an early version of the Mishnah when he posited that there once was an early Tosefta that commented on an early Mishnah and that remnants of that early Tosefta are found in our Tosefta (*Mavo Lenusah* 242). This theory originates in BT Sanhedrin 86a which speaks of anonymous Tosefta passages as attributable to R. Nehemiah and anonymous Mishnah passages to R. Meir, and that both collections are based on, or “according to,” R. Akiba. But Epstein is still saying that our Tosefta is a commentary on our Mishnah. He does not suggest that any part of the Tosefta serves as the basis of our Mishnah. S. Friedman (“Tosefta Atiqta,” *Tarbiz* 62 (1993), 321), in his analysis of M Shabbat 16:1, notes that the words *af al pi she'amru* introduce a text that does not match the parallel *mishnah*. He suggests that this paragraph of the Tosefta knew an early *mishnah*, a *mishnah qedumah*. But he does not turn this observation into a more general theory. He does not suggest, as I do, that the Tosefta is a commentary on an urMishnah. See below.

<sup>16</sup> See previous note.

<sup>17</sup> M. Jaffee, “What Difference Does the “Orality” of Rabbinic Writing Make for the Interpretation of Rabbinic Writings?” (unpublished paper); *Torah in the Mouth*, Chapter 6.

אין מגדלין בהמה דקה בארץ ישראל ...  
לא יגדל אדם את הכלב אלא אם כן היה קשור בשלשלת.

**תוספתא בבא קמא ז:ז**

אע"פ שאמרו איו מגדלין כלבים ביישוב  
אבל מגדלין בעיירות הסמוכות לספר  
בימים וקושרין אותם בשלשלאות של ברזל  
ומתירין אותן בלילות.  
ר' ליעזר או' המגדל כלבים כמגדל חזירים.

**M Baba Qama 7:7**

One may not raise small cattle in the land of Israel. ...  
One may only raise a dog if he ties it with a chain.

**T Baba Qama 8:17**

Even though they have said, "One may not raise dogs in a settled area,"

But one may raise them in towns which are near the frontier.

By day one ties them up on iron chains, but one unties them by night.

R. Liezer says: one who raises dogs is like one who raises pigs.

M BQ 7:7 says that a person may not raise a dog in the land of Israel unless he keeps it on a chain. The parallel Tosefta passage (BQ 8:17) quotes a text about raising dogs, presumably from the Mishnah, and then draws a distinction between sparsely and more densely populated areas. Even though the cited text says that one may not raise dogs at all in a settled area, the Tosefta says that a person may do so in border towns, provided he keeps them tied up on iron chains by day and lets them loose only at night. Since our Mishnah says that one *is* allowed to raise a dog on a chain anywhere in Israel, even in a settled area, and the Tosefta's cited source does not allow a dog in a settled area under any circumstances,<sup>18</sup> the Tosefta cannot be quoting our

<sup>18</sup> I am suggesting that the cited source ends with "in a settled area" because the Tosefta passage begins with the words "even though." When it continues and says "*but* one may raise them," it sounds as if the Tosefta is contributing its own point, a limitation of the older text. It is also possible that the cited source ends with "near the frontier" and the Tosefta contributes the point that one may

Mishnah. The Tosefta's source is likely, therefore, to be an earlier version of the Mishnah, an urMishnah.<sup>19</sup> The innovative point of the Tosefta is that dogs are allowable in border towns if certain precautions are taken. The Redactor of the Mishnah later fused together the urMishnah and the Tosefta. Instead of saying that one may not raise dogs at all in a settled area, as does the urMishnah, the Redactor of the Mishnah says that a person may raise a dog, anywhere, provided he keeps it restrained. The Redactor of the Mishnah added the Tosefta's point about chains to the urMishnah's restrictive statement to create a new, more liberal rule for his Mishnah. This interpretation of the Mishnah and the Tosefta, which arises from a model in which the Tosefta is a source of the Mishnah and the urMishnah is the base text of the Tosefta, fits the words well. If one were to assume the opposite, that the Tosefta comments on the Mishnah, it would be hard to explain how it does so.

## 2) Divorcing a Husband Who Develops a Major Blemish

### משנה מסכת כתובות פרק ז משנה י

ואלו שכופין אותו להוציא מוכה שחין ובעל פוליוס והמקמץ והמצרף נחושת והבורסי  
 בין שהיו במ עד שלא נישאו ובין משנישאו נולדו  
 ועל כולן אמר רבי מאיר אף על פי שהתנה עמה יכולה היא שתאמר  
 סבורה הייתי שאני יכולה לקבל ועכשיו איני יכולה לקבל  
 וחכמים אומרים מקבלת היא על כרחיה חוץ ממוכה שחין ...

### תוספתא מסכת כתובות (ליברמן) פרק ז הלכה יא

tie them with chains by day, etc.

<sup>19</sup> A negative attitude to dogs is also found in 4QMMT (=4Q396), one of the Dead Sea Scrolls:

(8) ... And one should not let dogs enter the h[o]ly camp because (9) they might eat some of the [bo]nes from the temp[le with] the flesh on them.

For (10) Jerusalem is the holy camp. ...

(*The Dead Sea Scrolls Study Edition*, eds., Florentino Garcia Martinez and Eibert J. C. Tigchelaar, Vol. 2: Leiden 1998). The citation from 4QMMT provides some support for my claim that the urMishnah said that one may not raise dogs in a settled area. Note that the 4QMMT passage is somewhat similar to an earlier section of this very *mishnah* (BQ 7:7): "One may not raise chickens in Jerusalem because of the holy [foods]." I thank Prof. Zvi Steinfeld for bringing this text to my attention.

אי זהו מקמיץ זה בורסי ויש או' זה המקמץ צואה  
 מצרף נחשת זה המתיך  
 ר' יוסה בי ר' יהודה בעל פלפס זה ריח הפה  
אימתי אמרו יוציא ויתן כתובה  
 בזמן שהוא רוצה והיא אינה רוצה, היא רוצה והוא אינו רוצה.  
 אם היו שניהן רוצין יקיימו...

### **M Ketubot 7:10**

And these [are the cases of men] who are forced to divorce: those afflicted with boils, a man with polyps, a *meqammez*, a coppersmith, and a tanner.

Whether they were this way before marriage or became this way after marriage.

Regarding them all, R. Meir said: even though he stipulated with her [before marriage], she may say,

I thought I could tolerate [the blemish] but now I [see that I] cannot tolerate [it].

But the Sages say, she must tolerate [the blemish] even against her will, except for a man afflicted with boils ...

### **T Ketubot 7:11**

What is “a *meqammez*”? This is a tanner. But some say, one who collects dung. “A coppersmith,” this is a metal-pourer.

R. Yoseh b'R. Judah: a man with polyps is one with bad breath.

When did they say “he must divorce and pay the ketubah”?

If he wants [to remain married] but she does not, or if she wants [to remain married] but he does not;

If they both want [to remain married], they remain married....

M 7:10 says that men with certain defects, or with defective occupations, are forced, presumably by a rabbinical court,<sup>20</sup> to divorce their wives. The Mishnah's list includes a man with boils or polyps, a *meqammez*, a coppersmith, and a tanner. The parallel Tosefta passage

<sup>20</sup> The expression אֹתוֹ/אוֹתָהּ/אוֹתָם כּוֹפִין appears about 20 times in the Mishnah and about 50 in the Tosefta. It never has a subject. It can be translated as “he/she/they are forced,” in the passive voice, or as “a rabbinical court forces...,” in the active voice.

explains various terms, all of which appear in the Mishnah. It asks what a *meqammez* is and what a coppersmith is and gives an answer. R Yoseh b'R. Judah defines a polyptic. The Tosefta then asks, “when did they say ‘he must divorce [her] and pay the ketubah,’”<sup>21</sup> and answers, when either she or he wants to end the marriage; if both choose to stay married, they need not divorce.

A close look at the wording of the Tosefta’s question shows that the text it quotes – introduced by “when did they say” (*eimatai amru*) – does not match the Mishnah. The Mishnah uses the word כּוּפֵיין, which means that it forces divorce, whereas the Tosefta cites the Mishnah as saying, “... he must divorce her and pay the ketubah,” יוּצִיא וּיְתֵן כֶּתוּבָה. These two expressions differ in degree: the Mishnah calls for the court to intervene (or for divorce to be compelled in some other way); the Tosefta does not. Note also that the Tosefta first defines the various blemishes and only then discusses divorce, as if that is the order in which these phrases appeared in the Mishnah. But the Mishnah first says that he is forced to divorce and only then lists the various blemishes. If the Tosefta knew the Mishnah as we have it, why does the Tosefta cite the Mishnah in different words when it comes to explain it? Why does the Tosefta reverse the order of the Mishnah’s clauses and even change the order of the blemishes?<sup>22</sup> A likely answer is that the Tosefta was not citing our Mishnah but an early Mishnah, worded and ordered somewhat differently from our Mishnah.

M Ketubot 7:10 seems to have passed through three stages of

<sup>21</sup> In 16 out of 46 times that the question מִפְּנֵי מָה אָמְרוּ appears in the Tosefta, it is asked by a named tanna. The phrase suggests that he is reacting to an earlier text or ruling. If the Tosefta precedes the Mishnah, then the text or ruling that these tannaim react to, which differs from our Mishnah, is an earlier version of our Mishnah. The question אֵימָתֵי אָמְרוּ appears 15 times in the Tosefta and only once in the Mishnah. It, too, usually introduces citations from an earlier collection.

<sup>22</sup> Mishnah: boils, polyps \\*meqammez*, coopersmith, tanner;

Tosefta: *meqammez*, tanner, coopersmith \\*polyps*, boils.

The Mishnah lists the physical blemishes first and then the occupations and the Tosefta does the reverse. Note also that the *meqammez* and tanner are distinct from each other in the Mishnah but one and the same according to the anonymous first view of the Tosefta. It is hard to understand how an explanation of the Mishnah, one that asks “How do we understand X,” could suggest that what the Mishnah sees as different occupations the Tosefta sees as one and the same.

development:

1) If we connect the snippets of the text that the Tosefta cites, we get the oldest formulation of the rule: “a *meqammez*, a coppersmith, and a polyptic, they must divorce their wives and pay the ketubah.”

2) In responding to this (hypothetical) *urmishnah*, the Tosefta explains the various blemishes, one by one, and then stipulates an exclusion from the obligation to divorce: if both wish to remain married to each other, they may do so.

3) The Mishnah, even later, reworks both of these texts. It says, in rather strong language, “for the following [blemishes] men are *forced* (by others) to divorce their wives.” By using this phrase and placing this statement about forced divorce at the beginning of the paragraph, the Redactor of the Mishnah suggests that even though the husband may not be troubled by his major defect, his wife will be.<sup>23</sup>

A previous *mishnah* in this chapter (7:7) said that should *she* develop a physical blemish, he has the right to divorce her, but, by implication, is not required or forced to do so. This *mishnah* (7:10) says that should *he* develop a significant blemish, he is pushed into divorce against his will. The couple is not given the choice of staying together. This final version of the rule differs from the initial one. He is not just told to divorce his wife, as in the Tosefta. He is compelled to do so.<sup>24</sup> The point I am making is that these discrepancies between the Mishnah and the Tosefta’s citation of the Mishnah make perfect sense if the Tosefta is not a commentary on our Mishnah but on some other, early collection.

Further good evidence for this conclusion can be brought from the rest of the chapter. The expression “he must divorce [her] and pay the

<sup>23</sup> Later in the same *mishnah* (M 7:10), R. Meir puts the following words into a woman’s mouth: “I thought I could tolerate it [the blemish]; I now see that I can not.” The case is one in which he stipulated in advance that she accept him with a blemish and she did so. She later claims that she cannot tolerate him. R. Meir says that in such a case they force him to divorce her. A later voice in the Mishnah says that if she accepted him from the outset with this stipulation, she must stay with him. If the husband became defective *after* betrothal, however, and there was no stipulation from the outset that she would accept such a defect, the Mishnah says that he is forced to divorce her.

<sup>24</sup> I cannot attribute this change in phrasing only to women’s divorce disability, that they cannot initiate divorce on their own and require the court’s intervention. The Tosefta knows of this disability yet uses the expression “*yozee veyitten ketubah*” nonetheless.

ketubah” appears eleven times in the first five *mishnahs* of Ketubot 7. The last two *mishnahs* of the chapter (7:9,10), as already noted, express the same general idea differently: “they force him to divorce [her].” The parallel chapter in the Tosefta says “he must divorce [her] and pay the ketubah,” ten times over, never switching to “they force him to divorce [her],” *even when discussing major defects*. If the Tosefta knew the Mishnah, and the Mishnah switched terms towards the end of the chapter, why didn’t the Tosefta do the same?<sup>25</sup> My answer is that the Tosefta did not know a *mishnah* worded in this fashion. It was commenting on an *urmishnah*. *Kofin* is a later addition by the Redactor of the Mishnah who deliberately altered the Tosefta to make a point: women do not have to live with men they cannot tolerate. The court will force a divorce.

Even more evidence for this conclusion can be found in the immediately preceding *mishnah* (7:9) and the parallel Tosefta passage (7:10).

**משנה מסכת כתובות פרק ז משנה ט**

האיש שנולדו בו מומין אין כופין אותו להוציא  
אמר רבן שמעון בן גמליאל במה דברים אמורים במומין הקטנים אבל  
במומין הגדולים כופין אותו להוציא

**תוספתא מסכת כתובות (ליברמן) פרק ז הלכה י**

... כנסה סתם ונמצאו בה מומין ונדרים הרי זה יקיים  
רבן שמעון בן גמליאל אום' אם היה חיגר מאחת מרגליו וסומא באחת  
מעניו מומין גדולים הן ויוציא ויתן כתובה

**M Ketubot 7:9**

If a husband develops blemishes they do not force him to divorce [his wife].

Said R. Simon b. Gamliel: When is this so? For minor blemishes. But for major ones, they force him to divorce.

<sup>25</sup> One cannot say that the Tosefta does not know the word כופין. It uses it in many places, marital contexts and otherwise. See n. 20. Should one argue that stylistic leveling accounts for the consistency of phrasing in the Tosefta, I would respond, then why is the parallel material in the Mishnah inconsistent? For this argument to make sense, it has to apply to both texts under consideration since they are so closely bound up with each other.

**T Ketubot 7:10**

If he married her without specification [of blemishes] and she was found to be blemished ... lo, he must maintain her [as his wife].

R. Simon b. Gamliel says: if he was lame in one foot or blind in one eye, these are major blemishes and he must divorce and pay the ketubah.

R. Simon b. Gamliel (RSBG) says, in M 7:9, that a man is *not* forced to divorce his wife if he develops a minor defect but *is* forced to divorce her if he develops a major one. The paragraph does not give any examples but is probably talking about blemishes like lameness or blindness. In the parallel Tosefta passage, which also cites RSBG, the tanna does not say he is “forced to divorce [her]” but “he must divorce [her] and pay the ketubah.” The most likely explanation for two versions of the *very same* tanna’s comment is that one of them has been deliberately altered by an editor.<sup>26</sup>

Is there a way of explaining the discrepancy in divorce terminology according to the old theory, that the Tosefta comments on the Mishnah? I imagine that a traditionalist would say that the two expressions are sufficiently close in meaning that they are interchangeable; or that the Tosefta knew a different recension of the Mishnah, one that did not change the expression in the last two paragraphs; and that there is no special significance to the altered order in which the Tosefta cites the Mishnah. Although this explanation works, I consider mine more plausible. Rather than deny the existence of problems, I provide solutions.

To my mind, the various modifications suggest that the Redactor of

<sup>26</sup> I am again assuming fixed formulation of the text upon which the Tosefta comments. It may not be *ipsissima verba*, but R. Simon b. Gamliel (RSBG)’s statement in the Mishnah and the Tosefta should not vary significantly. Note further that RSBG does not disagree with the first tanna in the Mishnah. He restricts the first tanna’s view of *not* forcing a divorce to small blemishes only. For large ones, a husband is forced to divorce. In the Tosefta, RSBG disagrees with the first tanna, whose view is not cited, but who seems to hold that no divorce is recommended for blemishes (like the first view in the Mishnah). RSBG says that for major blemishes, he must divorce. It is possible that the Redactor of the Mishnah changed a *dispute* between the first tanna and RSBG into an *assertion* by the first tanna followed by a *qualification* of RSBG.

the Mishnah felt strongly that a woman should not have to live with a man who, in the course of the marriage, had become severely impaired. Reading the Tosefta as a response to an urMishnah, and the Mishnah as a rewriting of both urMishnah and Tosefta, leads to a more precise understanding of the Mishnah and the goals of its redactor.

3) Freeing Unpaid Bailees From Liability: The Mishnah and the Tosefta both cite an older text

The highlighted words appear in both the Mishnah and the Tosefta.

**משנה מסכת בבא מציעא פרק ג משנה א**

המפקיד אצל חבירו בהמה או כלים ונגנבו או שאבדו:  
שילם ולא רצה לישבע--שהרי אמרו "שומר חנם נשבע ויוצא"--  
נמצא הגנב משלם תשלומי כפל...  
למי משלם? למי שהפקדון אצלו.

**משנה מסכת בבא מציעא פרק ז משנה ח**

... ארבעה שומרין הן שומר חנם והשואל נושא שכר והשוכר  
שומר חנם נשבע על הכל והשואל משלם את הכל  
ונושא שכר והשוכר נשבעים על השבורה ועל השבויה ועל המתה ומשלמין  
את האבדה ואת הגנבה

**M Baba Mezia (BM) 3:1**

One who deposits a beast or utensil with someone else for safekeeping and it is stolen or lost:

If the bailee paid but did not want to take an oath – for they said “an unpaid bailee takes an oath and goes free” –

If the thief is found, he pays double...

Whom does he pay? The one with whom the deposit rests...

**M Baba Mezia (BM) 7:8**

There are four bailees: the unpaid bailee and the borrower, the paid bailee and the renter.

An unpaid bailee takes an oath in all cases and the borrower pays in all cases.

And the paid bailee and the renter take an oath if it was broken, or taken captive, or if it died, but have to pay for loss and theft.

**תוספתא מסכת בבא מציעא (ליברמן) פרק ח הלכה יג**

אימתי אמרו "שומר חנם נשבע ויוצא"?

בזמן ששומר כדרך השומרין,

נעל כראוי וקשר כראוי ...

נתנו בשידה בתיבה במגדל ונעל בפניו ואבד

הרי זה נשבע ויוצא

**תוספתא מסכת בבא מציעא (ליברמן) פרק ח הלכה יד**

נעל שלא כראוי קשר שלא כראוי ... חייב....

**תוספתא מסכת בבא מציעא (ליברמן) פרק ח הלכה טו**

אי זהו "שוכר" שכר ממנו בהמה שכר ממנו כלים

אי זהו "נושא שכר" שכרו לשמר לו את הבהמה שכרו לשמור לו את

הכלים ...

**T BM 8:13**

When did they say "an unpaid bailee takes an oath and goes free"?

If he cared [for the object] as bailees do

If he locked [it up] as was appropriate or tied [it up] as was appropriate...

Or placed it in a container [of various kinds], and locked it, and it was lost,

Lo, he takes an oath and goes free...

**T BM 8:14**

If he did not lock it up as was appropriate or tie it up as was appropriate... he is liable...

**T BM 8:15**

Who is "a renter"? If he rented from him a beast or an object...

Who is "a paid bailee"? If one hired him to watch his beast or hired him to watch his utensil...

The opening *mishnah* of BM 3 describes a case in which one person deposits an item with another for safekeeping. It is then stolen. The bailee (*shomer*) opts to pay for the stolen item rather than take an

oath. The reference is apparently to the oath of deposit, mentioned elsewhere in the Mishnah.<sup>27</sup> The paragraph continues, “for they said, an unpaid bailee (*shomer hinnam*) takes an oath and goes free.” The *mishnah* goes on to deal with the matter at hand, what to do if the thief is apprehended. To whom does he pay restitution – which for theft is double indemnity – to the depositor, the original owner of the stolen item, or to the bailee, who has already paid the depositor for it? Who pockets the extra payment? The *mishnah* answers that it goes to the bailee, the one with whom the deposit now resides.

The question on my mind is, what is the source of the *mishnah*’s quote about the unpaid bailee, that he “takes an oath and goes free”? It is necessarily a quote from somewhere else.<sup>28</sup> Since the rules of bailees have not yet been stated, the first place to look is elsewhere in the same tractate.

M BM 7:8 lists the four bailees and provides an overview of their liabilities. It does not cite the rule of M 3:1 that an unpaid bailee takes an oath and goes free but says instead that an unpaid bailee takes an oath in all cases, meaning in all those instances in which he is unable to return the deposit to its owner. It follows (but is not stated explicitly) that upon doing so he is free from liability. Since M 3:1’s citation is not found here or anywhere else in the Mishnah, we may conclude that M 3:1 was citing an external, earlier source.

The rule that the unpaid bailee takes an oath and goes free does appear in the Tosefta, not in conjunction with M 3:1, as one might anticipate, but with M 7:8, about all four bailees. T BM 8:13 asks, “when did they say ‘an unpaid bailee takes an oath and goes free?’” and answers, “in those cases in which he guarded the deposit as bailees do.” If he did not, says the next paragraph, he is liable.

It is surprising that when commenting on M 7:8 the Tosefta cites not M 7:8 but M 3:1. It is also surprising that the matter under consideration in T 8:13 is the concept “goes free” and not the range of circumstances that could prevent the bailee from returning the object intact, which is the focus of M 7:8. M 7:8’s phrase “an unpaid bailee swears in all cases” means that whether the animal or object left in safekeeping was destroyed or stolen or struck by lightning, the unpaid

<sup>27</sup> M Shevuot 5:2, I swear that your deposit is not in my possession. See M BM 3:10.

<sup>28</sup> Either from a document that predates or is coterminous with the one in which it is embedded.

bailee takes an oath and is free from paying. The parallel Tosefta paragraph is interested in a somewhat different point, namely, under what circumstances does he “go free upon taking an oath.” It therefore spells out the cases in which he is free from paying because he took care of the animal or object in a responsible manner (and conversely the ones in which he is liable because he was negligent).

These differences suggest that M 7:8 underwent several stages of development. 1) The original statement, as it appeared in the urMishnah, was: “the unpaid bailee takes an oath and goes free.” 2) The Tosefta provided this statement with further explication. The point the Tosefta makes is that in order to swear and go free, the unpaid bailee is required to have cared for the object in the manner that bailees, as a matter of course, do. 3) The author of M 3:1, interested in what happens if a deposit is stolen and paid for and the thief is then apprehended, needed to make reference to the rule of the unpaid bailee and cited the urMishnah’s statement that he takes an oath and goes free. 4) Sometime later, when editing M 7:8, about the four bailees,<sup>29</sup> the Redactor of the Mishnah altered the existing rule about the unpaid bailee, that he takes an oath and goes free, and made it say that he is free of liability in *all* cases, not just unforeseen circumstances but even theft and loss. He changed it to make it match the rules he was formulating for the other bailees. Note how the rule about the unpaid bailee and the borrower are expressed in similar terms. One of them takes an oath *in all cases* and the other pays for the unreturnable deposit *in all cases*. This similarity of formulation makes them easy to remember.

Stages of development of this rule of liability:

urM text, in BM 7 שומר חנם נשבע ויוצא

T BM 8:13 explains this statement, "אימתי אמרו שומר חנם נשבע ויוצא..."

M BM 3:1 cites it, "שהרי אמרו שומר חנם נשבע ויוצא"

M BM 7:8 alters it for the sake of mnemonic device to שומר חנם נשבע

<sup>29</sup> T BQ 9:1 includes the four bailees on its list of the major sources of damage (*arba' avot neziqin*). The Redactor of the Mishnah inserted the rules of the four bailees here, in BM 7, prefaced with ... ארבעה שומרין הן. The formulation “he swears in all cases” and “he pays in all cases” may derive from M Shevuot. See n. 31. For further consideration of mnemotechnic formulation in the Mishnah, see Appendix 8 (367) in Avraham Walfish’s unpublished doctoral dissertation, “The Literary Method of Redaction in Mishnah Based on Tractate Rosh Hashanah” [Heb.], Hebrew University 2001.

...השואל משלם את הכל... like ...על הכל...

In short, within the Mishnah itself we find the same rule presented in two different formulations, the older one (in 3:1) and the newer one that served a mnemonic purpose (in 7:8). One cannot say, therefore, that the Tosefta cites and interprets a different, no-longer-extant recension of the Mishnah. Both versions of the rule are found in the Mishnah. A more reasonable explanation for the Tosefta commenting on M 7:8's rule *but employing the formulation found in M 3:1* is that the rule in M 7:8 underwent change over time.<sup>30</sup>

My point is that these minor, but significant differences between how a *mishnah* appears in our texts today and how it is cited by the Tosefta, or elsewhere by the Mishnah, have been noticed by scholars in the past<sup>31</sup> but dismissed as simply a different version of the Mishnah that we no longer have in our possession.<sup>32</sup> This is a

<sup>30</sup> Others might say that the Tosefta (8:13) cited a similar but not identical statement about the unpaid bailee. My response is that the two statements do not mean the same thing.

<sup>31</sup> Epstein (*Mavo Lenusah* 728) notes that M BM 3:1 cites an earlier Mishnah text, that M BM 7:8 cites the same text differently, and that T BM 8:13 had before it a different version of M BM 7:8. He did not turn these significant observations into a coherent theory. The general point he makes in these pages is that our Mishnah cites an even earlier Mishnah. D. Henshke, in *Mishnah Rishonah Betalmudam shel Tannaim Aharonim* (Ramat-Gan 1997), strives to prove the existence of an early Mishnah that is embedded in our Mishnah. In his lengthy analysis of the *sugya* of the four bailees, he notes that it is surprising that M BM 3:1 is located where it is since it is dependent (*nismekhet*) on a *halakhah* from elsewhere, "for they have said the unpaid bailee swears and goes free." This *halakhah*, and all the rules of the four bailees that relate to it, he says, should introduce the topic of the bailees in BM 3. He resolves this difficulty by saying that this statement, "for they have said..." is a later addition to the mishnah that distinguishes between unpaid and paid bailees (25). He also mentions, in passing, that the formulation of this rule in M BM 3:1 differs from the formulation in M BM 7:8, but does not suggest why. Henshke and I, although we approach the issue from different perspectives, are both interested in demonstrating the existence of an early Mishnah collection. He finds it in the Mishnah; I find it in the Tosefta.

<sup>32</sup> In his major work on the Tosefta, *Mehqarim Bevraitat Uvetosefta* (Jerusalem, 1969), Albeck makes many astute observations about the relationship of the Tosefta and the Mishnah. He notes so many different ways in which the Tosefta is independent of the Mishnah, or ways in which the Tosefta demonstrates that

convenient resolution. But why assume that T 8:13 had a *different* version of our Mishnah when M BM itself, in Chapter 3, knows the version of the rule found in T 8:13?! How do we explain two versions of the same rule in the same Mishnah collection? My answer is that one is earlier and the other is a later reworking of that earlier statement. As for the Tosefta, it knew the earlier version and cited it.

#### 4) Mergers and Acquisitions: A sustained example of Tosefta citing urMishnah

I will now compare a whole chapter of Mishnah to a whole chapter of Tosefta. This close reading will again yield the result that the Tosefta cites not our Mishnah but urMishnah. The first chapter of M Kiddushin divides itself rather neatly into two parts, the first dealing with acquisitions and the second with *mizvot*. The chapter opens with the general statement that a woman is acquired in three ways and can buy herself back in two. The next several *mishnahs* mention other instances of acquisition – of a Hebrew slave, a Canaanite slave, real estate, and movables – and indicate how the individuals or properties can be bought, and also, for slaves, how they can buy themselves back. M 1:6 discusses barter. The next and last group of *mishnahs* (7-10) address obligations to and exemptions from *mizvot*. The passages first talk about children's and parents' obligations to each other and then about men's and women's obligation to and exemptions from *mizvot*. The chapter ends with a discussion of *mizvot* connected to the Land of Israel and of reward and punishment for complying or not complying with *mizvot*.

When we turn to the Tosefta, we find the same set of topics, presented in more or less the same order, first acquisitions and then *mizvot*. The opening paragraphs of the Tosefta talk about the three modes of acquiring a wife, defining each of them in detail (T 1:1-3). An aggadic excursus on non-marital sex follows (T 1:4). As the chapter unfolds, we see instance after instance in which the Tosefta cannot be understood independently of the Mishnah. T 1:5 asks, what is meant by *חזקת קרקעות*, *גרעון כסף* and *חזקת עבדים*. None of these phrases appears in the Tosefta in the context of a full statement, only

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it is not merely a commentary on the Mishnah, that it is surprising he did not take the final step and say that the Tosefta was commenting on an early Mishnah. See p. 139 ff.

as a phrase cited from elsewhere, but all of them appear in the Mishnah in the context of one of the laws of acquisition. Similarly, T 1:7 asks for a definition of משיכה and T 1:8 of מסירה. These terms, too, appear in the Mishnah. Finally, the Tosefta asks for a definition of time-bound and non-time-bound *mizvot*, and of obligations of children to parents and parents to children. Every one of these concepts appears in the Mishnah in the context of one rule or another. The Tosefta continues with an excursus on the obligation of a father to teach his sons how to support themselves.

At first glance, this chapter appears to be perfect proof that the Tosefta is a commentary on the Mishnah. In thirteen(!) distinct instances, the Tosefta cites a phrase and explains it. In every single one of these cases the phrase is found in the Mishnah, in the same or in similar wording. In yet another instance, the Tosefta cites a large part of a *mishnah* (1:3b) and glosses several of its clauses.<sup>33</sup> Aside from the last section of the Tosefta (1:13-17), which appears to serve as the basis for M 1:10 (as I discuss elsewhere),<sup>34</sup> the Tosefta seems to have had our Mishnah in front of it as it seeks to help the reader (or hearer) understand the Mishnah in detail.

Such a theory is seriously flawed, however. First, in a number of places the Tosefta presents its material in a different order from the Mishnah. The Tosefta asks about taking possession of land (T 1:5) after talking about acquiring Hebrew slaves and before talking about Canaanite slaves. The Mishnah mentions taking possession of land much later (M 1:5), after discussing the acquisition of slaves and animals and before discussing the acquisition of movables. The Tosefta talks first about women's and men's obligation to and exemption from *mizvot* and only then about mutual obligations of

<sup>33</sup> It is remarkable that the Tosefta's comment on this Mishnah begins, "and he (the Canaanite slave) acquires his freedom if maimed in a major organ," and yet the Mishnah makes no reference here, in Kiddushin, or anywhere else, to that biblical rule (Exodus 21:26,27). There is an offhand reference to it in M BQ 3:10. Didn't the Redactor of the Mishnah accept freeing a slave in these circumstances? Should one ask, why need the Mishnah repeat the Bible?, I would answer that this is exactly what the Mishnah does, time and again, most often to elaborate. See, for example, M Succah 2:9, which says that a person must dwell in the succah for seven days. Note that T BQ 9:23-27 deals extensively with the issue of harming and maiming one's Canaanite slave.

<sup>34</sup> "Does the Tosefta Precede the Mishnah?," *Judaism* 198 (2001).

parents and children (T 1:10,11). The Mishnah presents these topics in reverse order (M 1:7).

Second, and more critical, is that the Tosefta often cites the Mishnah in different words altogether. Whereas the Mishnah simply uses the term *חזקה*, when talking about taking possession of real estate and slaves, the Tosefta says *חזקה קרקעות* and *חזקה עבדים* (T 1:5). The Tosefta calls land *קרקע* but the Mishnah calls it “assets with backing” (M 1:5). The Tosefta asks, “in what circumstances did they say that one acquires *movables* by means of *משיכה*” (T 1:8), but the Mishnah says “*assets without backing* are *only* acquired by means of *משיכה*” (M 1:5). The Mishnah’s law has essentially the same meaning as the Tosefta’s but its formulation is very different. Finally, the Tosefta comments that “the same for a man and the same for a woman,” they must both care for parents (T 1:11). But the Mishnah says, “the same for *men* and the same for *women*,” in the plural (M 1:7).

Since in the majority of the cases in which T Kiddushin 1 cites a text the citation matches the Mishnah verbatim, scholars have generally concluded that the Tosefta is quoting the Mishnah. But since in a minority of cases the Tosefta cites a text that differs somewhat from the Mishnah, I think it more reasonable to conclude that the Tosefta is citing not our Mishnah but an earlier Mishnah. That is, the array of texts that the Tosefta cites that differ from our Mishnah, together with the array that matches our Mishnah, all constitute the urMishnah. The non-matching citations indicate that the Tosefta is not a commentary on our Mishnah but on an older or earlier one, snippets of which the Tosefta happens to preserve.<sup>35</sup>

Applying these insights to M and T Kiddushin 1, I suggest the following: the urMishnah of Kiddushin 1 was made up of a series of rules on acquisitions and *mizvot*. The rules were presented in a straightforward manner, without explanation of their technical terms. Tannaim studied these rules and explained the terms one by one. The collected explanations, i.e., the Tosefta, accompanied the old rules, i.e., the urMishnah, but did not merge with them. Aggadic excurses

<sup>35</sup> One might challenge this theory and say that I am making too much of exact formulations. When someone wants to refer to what someone else said, he does not need to do so verbatim but only formulate the essence of it, using the same key words. This is a reasonable point but in the examples that I bring the reformulation is extensive.

were added to the Tosefta where relevant.<sup>36</sup> At an even later time, the Redactor of the Mishnah studied the urMishnah together with the Tosefta. Not satisfied with several of the urMishnah's halakhic formulations, the Redactor of the Mishnah modified them, changing "land" to "assets with backing," and "movables" to "assets without backing" (for reasons to be discussed below). He also changed "the same for a man and the same for a woman" to "the same for men and the same for women."<sup>37</sup> Aside from the concluding aggadic statement (M 1:10), he does not seem to have added anything from the Tosefta into his collection.<sup>38</sup>

Another practice of the Redactor of the Mishnah was to change the order of the urMishnah's rules, as he saw fit. He moved the rules of women and *mizvot* from where it was, before parents' and children's obligations, to after. This made it possible for him to continue the topic of women and *mizvot* in the next *mishnah* (1:8).<sup>39</sup> Note that there is no Tosefta passage parallel to M 1:8. He also moved the rule of

<sup>36</sup> It is possible that they were present in the urMishnah.

<sup>37</sup> T Sotah 2:8, האיש עובר על מצות עשה שהזמן גרמא מה שאין כן באשה, provides evidence that the passage about men's and women's obligations was originally formulated in the singular. The parallel passage in M Sotah 3:8, which compares men and women with regard to a wide variety of matters, is also formulated in the singular. Why did the Redactor of M Kiddushin change singulars to plurals, in both parts of M Kiddushin 1:7? I imagine because he formulates the next *mishnah* (1:8) in the plural. It has no parallel, although the long list of sacrificial activities also appears in M Megillah 2:5, in the singular(!).

<sup>38</sup> Elsewhere he does, as we saw above in the earlier examples.

<sup>39</sup> A. Weiss ("Haza'at Hahomer Bemassekhet Kiddushin," in *Al Hamishnah* [Ramat-Gan, undated], 209–211) also notes the difference in order of topics between the Mishnah and the Tosefta. He says that the Mishnah changed the Tosefta's original order in this case so that the statement about obligations of parents to children comes first. The reason it did so, he says, was to provide a segue from the section on acquisitions to the section on *mizvot*. The first section of the chapter, which talks about marriage, the purpose of which is to have children, leads to the second section, which begins its discussion with rules about parents and children. The Mishnah, he says, placed the two old collections—on acquisitions and *mizvot*—side by side. Were that not so, he says, the Tosefta would have within it a source even older than the one from which our Mishnah flows (211, n. 35). In these words Weiss comes very close to describing an urMishnah. He does say clearly, though, that the Mishnah (i.e., Redactor) had before it readymade collections.

taking possession of land from where it was in the Tosefta, right before taking possession of slaves, and placed it right after taking possession of animals and before taking possession of movables. The reason he did so was to make it possible to add other related texts that were formulated in these same terms (see below). Finally, he discusses acquisition by handing over (*mesirah*) before acquisition by pulling (*meshikhah*), although the Tosefta discusses them in the opposite order.

It is of interest that the Redactor of the Mishnah did not think it necessary to include explanations of the rules alongside the rules. That is, his collection of rules is more like urMishnah than Tosefta.<sup>40</sup> One might speculate that he left out the glosses because he wanted to keep his collection short. He felt that he could rely on the reader or hearer to find the explanations elsewhere, in the Tosefta.<sup>41</sup>

The Redactor of the Mishnah also supplemented his *mishnah* units with passages from elsewhere in his own collection. For instance, he adds a dispute of the Houses about how much money effects betrothal, a dinar or a *perutah*, and the definition of a *perutah*, from M Eduyot (4:7). The reason this dispute of the Houses seems to be a later addition to this chapter from Eduyot, rather than an addition to M Eduyot from this chapter, is that here it disturbs the symmetry of the first five *mishnahs*, whereas in Eduyot it perfectly fits the context, a series of leniencies of Bet Shammai<sup>42</sup> and stringencies of Bet Hillel.<sup>43</sup>

<sup>40</sup> The same was true above, regarding M Ketubot 7:10, where the Mishnah does not include any definitions of its difficult terms, such as *meqammez*. The Tosefta defined every one of them.

<sup>41</sup> The Mishnah can only be fully understood when read with the Tosefta. See my remarks in *The Synoptic Problem* (33).

<sup>42</sup> Requiring a dinar for betrothal is a leniency because it protects a woman from unintended betrothal that would have to be followed by divorce. Giving her a *perutah* might have been only in jest. See BT Kiddushin 9a.

<sup>43</sup> M Eduyot brings a series of disputes between the Houses on the subject of marriage and divorce law. Note also that the verb “to betroth” is *mitqaddeshet* in Eduyot but *nigheit* in Kiddushin. If the dispute of the Houses originated in Eduyot, the Redactor is suggesting that they disputed *kiddushin*, not *qinyan*. The author of Kiddushin 1 termed betrothal *qinyan*, meaning acquisition. The Houses’ dispute was interpolated into the discussion of acquisitions. From that time on it looked as if the Houses called marriage an acquisition. Note also that the line of the Mishnah, “how much is a *perutah*, one eighth of an Italian *issar*,” is apparently taken from T BB 5:11, except for the word Italian. Since

The Redactor of the Mishnah added material from elsewhere to M 1:5. The reason he changed the term for land from *qarqa'*, as in the Tosefta, to “assets with backing,” and placed the rule about land in this particular place, is that he supplements the rules about purchasing land and movables with two other rules about land and movables, one from T Baba Batra (BB) 2:13 about purchasing movables together with land, and the other from M Shevuot 6:3 about oaths relating to movables and land. These other rules call land “assets with backing” and movables “assets without backing.” In order to maintain consistency of phrasing, he changed the first rule to match the other two.

One other significant difference between the Mishnah and the Tosefta, in this chapter and elsewhere too, is that the Tosefta includes much *aggadah* and the Mishnah relatively little. The Redactor of the Mishnah makes no mention of sex outside of marriage or of teaching one’s son to earn a living. He also eliminated most of the material at the end of T Kiddushin 1 about the critical significance of every successive act, but summarizes much of the Tosefta material in two rather opaque statements (M 1:10a). That is, he compresses the *aggadah* and includes it at the end of the halakhic discussion, often at the end of a chapter. The Mishnah seems to be primarily halakhic. The Tosefta allows itself many more aggadic digressions.

Note that many scholars, including Y. N. Epstein,<sup>44</sup> A. Weiss,<sup>45</sup> and D. Halivni,<sup>46</sup> have argued for the antiquity of M Kiddushin 1. I am not disagreeing with that claim but modifying it and suggesting that the Redactor of the Mishnah took an old collection on acquisitions and *mizvot* and edited it in the ways described above.

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that passage of the Tosefta appears nowhere else in the Mishnah except for Kiddushin and Eduyot, but not in BB where we would have expected to find it, it seems that the Redactor of the Mishnah introduced it here to explain this *perutah*. He decided where to place this definition. A. Weiss arrives at the same conclusion, that the Houses’ debate was transferred from M Eduyot to M Kiddushin, for somewhat different reasons (“Haza‘at Hahomer,” 85).

<sup>44</sup> Epstein (*Mevo‘ot* 52–54, 414) says that the first chapter of M Kiddushin is old. It speaks of a time when women were bought like slaves.

<sup>45</sup> In “Haza‘at Hahomer” (208), Weiss suggests that the first six *mishnahs* of Kiddushin 1, all on acquisitions, are an old source that was later incorporated into the Mishnah. At the time of its composition, betrothal was still called an acquisition. This article was first published in *Horeb* 1 (1956).

<sup>46</sup> The Use of Q.N.H in Connection with Marriage,” *HTR* 57 (1964), 244–248.

*Conclusions*

These are only a handful of the examples I have come across that can best be explained by the urMishnah theory. They are the clearest and most dramatic. In every instance one can say that there are other ways to resolve the various textual difficulties. True. But I am suggesting that the urMishnah theory is the best of these many ways. It solves problems in the text, stays close to the plain sense meaning of the words, and allows us to assess the agenda of the Redactor. In the past, scholars pointed to the existence of texts that precede the Tosefta. They called them a *baraita* or a different recension of the Mishnah. I am taking the step of viewing these early texts as an ordered, early Mishnah collection.

In this way I believe I have solved the problem of the Tosefta's dual character. There is no denying it is a source of the Mishnah. There is also no denying that it is a commentary on some other text. So much of it cannot stand alone. But the text upon which it comments is not the Mishnah, as we know it today, but the urMishnah, a forerunner of the Mishnah. However, since so much of that early text entered into our Mishnah, with or without change, the Tosefta functions at one and the same time as the basis for many paragraphs of our Mishnah and as a commentary on many others.