CIRCUMVENTION OF THE LAW IN TALMUDIC LITERATURE

*Shmuel Shilo**

A. *Introduction*

A cursory examination of the Talmudic sources relating to circumvention of the law is sufficient to show that two approaches exist, one affirmative and permitting it and one negative and forbidding it. "A person may contrive to bring his produce in whilst still in its chaff so that his animal may eat it without its becoming liable to tithe".[1] "A person may contrivingly mix his grain with stubble in order to exempt it from tithe".[2] There are many similar dicta. On the other hand, for example, in the *Tosefta Taharot* we find in a number of matters "provided he does not act contrivedly for if he does they are impure".[3]

Can these sources be reconciled to give a more or less clear picture of the way in which the rabbis approached the question of circumvention of the law? Rosh (R. Asher b. Yehiel, Germany, Spain c. 1250–1327), for instance, conscious of the attendant difficulties, observed with regard to rules of rabbinical provenance: "Not every circumvention... is the same. Some are generally permitted... Others are permitted only to students of the law... Still others are entirely forbidden and the rabbis treat them more rigorously than deliberate acts... And then there are those over which opinion is divided".[4] Rosh thus sets out the problem but suggests no solution. In the view of the present writer the sources lend themselves to systematic explanation which rebuts the remark of Rashba (R. Solomon Ibn Abraham Adret, Spain c. 1235–1310) that no two cases of circumvention are alike.[5]

* Head of the Institute for Research in Jewish Law, Faculty of Law, the Hebrew University of Jerusalem.

1 *Berakhot* 31a; *Pesahim* 9a; *Avodah Zara* 41b; *Niddah* 15b.

2 *P. Berakhot* V, 1 (8, d).

3 *Taharot* X, 8; *ibid*, X, 12; *Parah* IV, 13; *Kelim B.M.* V, 14; *Oholot* VIII, 4.

4 *Piske HaRosh, Shabbat* XX, 5.

5 *Hiddushei HaRashba, Bezah* 11b, s.v. *"R. Ada b. Ahavah"*.

By way of preamble, one important observation must be made which may help, in some degree, to answer the question posed. Not infrequently in Talmudic literature the term "circumvention"—*"ha'aramah"* is used in the sense of deception or fraud.[6] The latter is not the subject of the present study. Indeed some of the sources that seem to be inconsistent can be reconciled by having regard to the difference between circumvention and deception or fraud. Apart from that, there is no short cut to arriving at a precise understanding of circumvention other than to examine carefully on its own each Talmudic passage dealing with the subject. The conclusions drawn by some authorities—such as Maimonides (R. Moses b. Maimon, Spain, Egypt 1135–1204) who in his Commentary on the Mishnah writes "the artifice that it permissible is termed circumvention (*ha'aramah*) and that which is forbidden, deception (*mirmah*)"[7]—are too sweeping.

What renders the problem still more difficult is the need to keep in mind the many instances in which the act involved is not expressly defined as circumvention even though it is that in fact. These instances must be considered in any discussion of the subject.

Both the rabbis and scholars frequently confuse two different concepts—circumvention and legal fiction. These have common elements which are the reason they are resorted to and the outcome anticipated from their respective use. In fact, however, they are entirely distinct. The present study is confined to circumvention of the law and not legal fiction. The latter has been defined by one scholar in the following manner: "The nature of a fiction is a change in the law, to say of a particular phenomenon that it is to be deemed as if it were something else and by such legal identification to have the law embrace both of them".[8]

The significant phrase here is "as if", that one situation is as if it were another. Circumvention, by contrast, is avoidance of the consequences of applying the law by finding some loophole in the law itself thereby enabling

[6] See e.g. *Shabbat* 38a; *P. Kiddushin* III, 4 (64a); *P. Pe'ah* I, 5 (16,c). In Scripture the root "u'rm" sometimes relates to shrewdness and prudence without a negative connotation, as in the verse "To give prudence (*u'rmah*) (sharpen the wits) to the simple (ignorant), to youth knowledge and discretion (foresight)" (Proverbs 1:4). Even in the Bible, however, it is most commonly used to denote a sense of contrivance and wiliness as it does today in modern Hebrew.

[7] *Tmurah* V, 1.

[8] S. Atlas, *Netivim beMishpat Halvri* (New York, 1978) 224. On legal fiction, see Lon. L. Fuller, *Legal Fictions* (Stanford U.P., 1967); H. Vaihinger, *The Philosophy of "As if"—a System of the Theoretical, Practical and Religious Fictions of Mankind* (London, 1924) a translation of a nineteenth century German work.

a person to avoid the consequence of its application by placing himself in a different legal context which will lead to other results. Our subject is therefore the question of avoidance of the law and not legal fiction. It might be argued that the law can never be circumvented, that an act is either permissible and in accordance with the law or forbidden and contrary to the law and that no third possibility exists. What is possible, is the performance of an act which is seemingly in accordance with the letter of the law but contrary to its clear intention. Perhaps the law itself views such an act as being contrary to the law although, ostensibly, one is acting in accordance with the law. As Holmes put it, "We do not speak of evasion, because when the law draws a line, a case is on one side of it or on the other, and if on the safe side, is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the letter of the law".[9]

The legal fiction is generally intended to extend the application of a law to a matter which previously did not come within its confine. A fiction is not conditional upon a change in the state of things; it is a creation of law determining that a given factual situation is henceforth to fall within the province of a particular law which was never designed to apply to the situation. Circumvention is generally intended to take a particular case out of the ambit of a law which would, in the ordinary course of events, apply to it.

Investigation of the question of circumvention in Talmudic law leads one to the conclusion that avoidance of the law may be classified under two principal categories, each with its sub-groups. The first is the use of a rule of law in order to by-pass another rule that would have applied if one proceeded in the normal manner. A sub-group of this category consists of cases in which ownership is transferred (particularly to a non-Jew) in order to avoid the law. The second principal category involves a situation where the determinative element as to the permissibility or otherwise of an act is subjective intention, the actor claiming that his intention was such as to render what he did legitimate when in fact his intention was quite different. It is difficult to define this category since it is very close to deception and fiction (though not legal fiction). This article is concerned only with the first category and then not with every relevant Talmudic example but only with some illustrations from which general conclusions may be drawn.

[9] *Buller* v. *Wisconin* 36 S.Ct. 473, 474 (1916).

It may perhaps be argued that some forms of circumvention mentioned in the Talmud belong to neither of the above groups. Even conceding that that may be so, the ovewhelming majority of instances are nevertheless subsumed in one or the other of the two principal groups that have been indicated.

One reservation: we will not deal with what may have theoretically been derived from circumvention but had already become established legal institutions in Talmudic times either by being incorporated in a *takkanah* (legislative act) or otherwise. Such is the *prosbol* (a legal formula whereby a creditor could still claim his debt after the Sabbatical year despite the Biblical injuction against doing so) which apparently rests on circumvention as we have defined it,[10] as does the *urkhetah* or *harsha'ah* (mandate).[11]

B. *Trumah, Ma'aser and Hallah*

One area of the *halakhah* which yields a relative abundance of material regarding circumvention is that which concerns the obligation to separate *trumah* (the priestly due), *ma'aser* (tithe) and *hallah* (the priestly due of a portion of dough). At first glance it seems that there are differing and perhaps contradictory rabbinic views here. Reasons may be found for both permitting and prohibiting circumvention of the law. The subject of *trumah*, it may be suggested, exemplifies most clearly our present topic and its problems. Although *hallah*[12] is really one type of *trumah*, long usage has treated the former as a separate matter.[13]

A person is not obliged to set aside *trumah* and *ma'aser* until the agricultural work involved has been completed and the produce has been "brought home" in the usual way. If the "bringing home" is done in a manner that is not customary, the owner is exempt from the obligation to give *trumah* and *ma'aser*, at least under strict law.[14] It is easy to see that this situation lends itself to avoidance of the obligation by a departure from normal practice. How, then, did the sages deal with a person who deliberately adopted such a course?

[10] Much has been written about the *Prosbol*. See N. Rakower's bibliography *Otsar HaMishpat* (Jerusalem, 1975) 152–53; M. Silberg, *Talmudic Law and the Modern State* (New York, 1973) 37–41.

[11] Silberg, *op. cit.* at 33–34; N. Rakower, *HaShlihut veHaHarsha'ah baMishpat Halvri* (Jerusalem, 1972).

[12] *Me'ilah* 15b. This is implicit in Numb. xv, 20.

[13] Thus in Maimonides' code the law relating to *hallah* does not appear in the part dealing with *trumot* but *bekhorot*.

[14] See p. 155 below.

Further, in this area, where the obligation depends upon ownership of the produce, what will the halakhic position be when a person transfers ownership with the object of avoiding the obligation? One form of such avoidance is to abandon or renounce one's property (*hefker*) and then acquire "new" rights to it. Another form is to effect a fictitious technical transfer to another (Jew or non-Jew). Each of these forms needs to be considered.

One apparently universal rule, called "a decided rule of law",[15]—an expression which still awaits precise definition[16]—is cited in the name of the *tannah* R. Oshayah (or Hoshayah).[17] "A person may contrive to bring his produce in whilst still in its chaff so that his animal may eat it without its becoming liable to tithe".[18] Another rule, or perhaps the same rule in a different guise[19] is attributed to the same authority: "A person may contrivingly mix his grain with stubble in order to exempt it from tithe".[20]

15 *Berakhot* 31a, but *cf.* Y. Emmanuel, "Ma'arim Adam al Tvuato" (1979) 19 *Hama'ayan* 34 n. 2 and S. H. Kook in *Iyunim uMehkarim* (Jerusalem, 1959), vol. 1, pp. 72–73.

16 Atlas, *op. cit.* at 226–28, n. 5, who shows that Rashi's understanding of the expression, that such statements present no difficulties that require attention, is not quite correct. But Atlas' own effort to explain the expression is not sufficiently persuasive. See S. H. Kook, *op. cit.*, at 72–76 who is of the opinion that it refers to a rule which is not universally accepted but only accepted as law for those who transmitted it, which is also far from convincing. In the Palestine Talmud the expression is "a fixed rule of law" instead of the Babylonian "decided": P. *Berakhot* V, 1 (8,d).

17 I am inclined to accept the view of Ginsberg in *Perushim veHiddushim ba-Talmud*, pp. 119–20, that R. Hoshayah, a younger contemporary of the editor of the Mishnah, is meant and not the Amora of the same name. Not all scholars think that this is correct. The author of *Dikdukei Sofrim* to *Berakhot* 31a leaves the question open. One of the main grounds for Ginsberg's view is the use of "Tani R. Hoshayah" in P. *Berakhot* IV; 1. This view is supported by another source, also dealing with a case of circumvention that R. Hoshayah permitted where the term "Tani" is again used: "The Mishnah refers to large utensils but in the case of small utensils one avoids the law and they are ritually immersed. And R. Hoshayah taught ("tani"): A person fills a defiled utensil from a well and circumvents the law and immerses it. And we have learned if his pail fell into the well or his utensil fell into the well he contrivedly has ritually immersed." (P. *Terumot* II, 1).

18 *Berakhot* 31a; *Pesahim* 9a; *Avodah Zara* 41b; *Menahot* 67b; *Niddah* 15b.

19 Opinion differs among the commentators as to whether these rules are indeed the same. See Ginsberg, *op. cit.*, who thinks that the two Talmuds take opposite views. See also Ratner, *Ahavat Zion v'Yerushalayim* on *Berakhot*, p. 120, but *cf.* for example *Gilyonei HaShas* to P. *Berakhot* V, 1 (8,d).

20 P. *Berakhot* V, 1 (8,d).

We are not concerned with the particular questions that arise in connection with the cited passages—whether temporary or regular feeding is intended,[21] or whether only an animal may be fed in this way and not a human being[22] —but with the fact that circumvention is explicitly permitted by bringing in one's crop before it is winnowed. However these passages and their interrelationship are understood, it is clear that one may, or at least can[23] do a deliberate act intended to vary contrivedly the pattern of harvesting and thus bring about an exemption. To all appearances, an unfavourable view of the device is not even hinted at.[24] This stands in contrast to another instance of circumvention for a similar purpose which the rabbis looked upon with disfavour.

"Rabbah b. Bar Hanah also said in the name of R. Yohanan on behalf of R. Judah b. Ila'i: See how earlier generations differ from later generations. Earlier generations would bring in their produce by way of the kitchen-garden [i.e. directly] in order to make it liable for tithe. Later generations bring in their produce by way of roofs, courtyards[25] or enclosures in order to exempt it from tithe, for R. Jannai has said that untithed produce is not liable to tithe until it has come within sight of the house since it is said 'I have put away the hallowed things out of my house' [Deut. xxvi, 13]. R. Johanan, however, says that even a courtyard is determinative since it says "That they may eat within thy gates and be satisfied' [*ibid.* 12]".[26]

Any doubt that may linger as to whom R. Judah b. Ila'i preferred—the earlier or later generations—is immediately dispelled by the passage preceding the one just cited. "Rabbah b. Bar Hanah[27] said in the name of

[21] See Rashi, *Tosefot* R. Judah Serlio and Meiri to *Berakhot* 31a; and R. David Bonfil's commentary to *Pesahim* 9a; *Rashba Resp.* I, 361.

[22] See the authorities cited in n. 21 above and *Hiddushei HaRan* to *Pesahim* 9a; *Hiddushei HaRamban* to *Avodah Zara* 41b; *Tosefot Menahot* 67b; *Tosefot Niddah* 15b; *Tosefot HaRosh Niddah, ibid.;* S. Goren, *HaYerushalmi Hamefurash* to *Berakhot* V, 1.

[23] As to whether circumvention is initially permissible or initially forbidden but valid *ex post facto,* see p. 163 below.

[24] At least in its original formulation, a negative approach is not implied. Later possibly this mode of circumvention fell into disfavour. See *Menahot* 67b and p. 163 below.

[25] See *Dikdukei Sofrim* to *Berakhot* 35b regarding "courtyards". It would seem more correct to omit this as in the parallel passage in *Gitin* 81a.

[26] *Berakhot* 35b.

[27] This according to the printed texts. The better text is "Rabbah b. Bar Hanah said in the name of R. Yohanan" or "Rabbah b. Bar Hanah said in the name of R. Judah b. Ila'i". See *Dikdukei Sofrim ad locum.* This matter seems to derive from P. *Ma'aserot* III: 1: "R. Ullah b. Yishmael in the name of R.

R. Yohanan on behalf of R. Judah b. Ila'i: See how earlier generations differ from later generations. Earlier generations made study of the Torah a regular thing and their employment incidental; and in both they prospered. Later generations who have made their employment a regular thing and study of the Torah incidental prosper in neither".[28]

The rule therefore seems to be that an unusual gathering procedure will release one from his obligation to set aside a tithe. The difference between the passages citing R. Oshayah and R. Judah b. Ila'i respectively is that the latter refers to the device used in unfavourable terms. We shall return to this aspect below.[29] In another passage we find that R. Judah b. Ila'i saw two leading rabbis who engaged in circumvention of the law "by way of roofs" and made some unfavorable comments to them about it.[30]

Another mode of circumvention is, as we have indicated, the renunciation or transfer of ownership. As we shall presently see, these devices ostensibly evoked different attitudes.

According to the Torah, a person must go up to Jerusalem and eat the second tithe. If, however, he does not wish to transport his produce, he may redeem it, add a fifth of its value and then go up with the money and purchase food in Jerusalem for consumption.[31] The additional fifth is not necessary if the redemption is effected not by the owner but by another.[32] As R. Yohanan says: "A tithe is not increased by a fifth, if it and its redemption money are not the property of the same person".[33] No wonder that a "fictitious" transfer to another is mentioned in the Mishnah as a way of avoiding the law. What is surprising is the attitude of the *Tana'im* in this regard.

The Mishnah reads: "How may one avoid the second tithe? A person may say to his grown-up son or daughter or to his Hebrew man-servant or maid-servant, 'Take this money and redeem this second tithe for yourself'. But he may not say this to his minor son or daughter or to his Canaanite man-servant or maid-servant because their hand is as his own".[34]

Lezer, Rebi and R. Jose b. R. Judah used to bring in produce over the roofs. R. Judah b. R. Ila'i saw them and said to them: See how you differ from earlier generations. R. Akiva used to take three types of crops for a *prutah* in order to take tithe from each one of them, whilst you bring in your basket of crops over the roofs".

[28] *Berakhot* 35b.

[29] See p. 163 below.

[30] P. *Ma'aserot* III, 1 (50,c).

[31] Lev. xxvii, 31; *M. Ma'aser Sheni* IV, 3; *M. Baba Metsia* IV, 8.

[32] *Pesikta Zutra Behukotei*, Lev. xxvii, 31; *Baba Kama* 69b.

[33] *M. Ma'aser Sheni* IV, 3, IV, 4 (55a) in the Venice edition.

[34] *M. Ma'aser Sheni* IV, 4; *Gitin* 65a. See also *P. Ma'aser Sheni* IV, 2.

Since the money is given as a gift it no longer belongs to the owner of the produce and redeeming the produce with it—the main purpose of the transaction—will avoid the addition of the fifth. The Mishnah that follows illustrates a converse form of circumvention with the same purpose in mind. "A person standing on his threshing-floor who has no money at hand may say to his neighbour, 'Look, I give you these crops as a gift' and then go on to say, 'Let them be exchanged for money which I have at home' ".[35]

Apparently, the method indicated in the first Mishnah cited was the original form of circumvention. Only when "deception increased" was the method suggested by the second Mishnah adopted.[36] The latter form of circumvention is expressly justified—although its exact meaning is disputed[37]—in the following statement of R. Abun: "R. Lezer and R. Jose b. Hanina differ. One says that one may contrive because a blessing is associated with it.[38] The other says that one may redeem at the lowest price because a blessing is associated with it".[39] From all the above-mentioned sources it is clear that circumvention is permissible by a "fictitious" transfer of property, because the transfer is technically valid, the usual legal consequences of such a transfer are assured, and there is perhaps not even a moral stigma attached to such conduct.[40]

[35] *M. Ma'aser Sheni* IV, 5; *Baba Metsia* 45b–46a.

[36] See Tosefta *Ma'aser Sheni* IV, 3; "One acts shrewdly with the second tithe in order to exempt it from the additional fifth. A person can tell his grown-up son and daughter or his Hebrew bondsman: 'Here is some money; go and redeem the tithe with it'. He should not say: 'Redeem it for this money'. R. Yehoshua b. Korha said that people did so originally, but when deception spread, a person would say to a companion: 'I give this yield to you as a gift', and he repeats and says: 'they are redeemed in lieu of the yield I have at home', but he should not say that it is redeemed in lieu of the money I have in my purse until the owner transfers title to him or leases to him the actual place where the crops are". The reason for the change from a transfer of money to a transfer of the yield is explained in P. *Ma'aser Sheni* IV, 3: "At first they gave money which was taken and absconded with. It was then enacted that the yield should be given". Further, *ad locum*, it is pointed out that even the latter method did not prevent absconding so a different method for avoiding the law was devised at a later period.

[37] *Cf.* the differing commentators to the Mishnah and P. Talmud, *ad locum*. See also *Hatam Sofer* Resp., Or. H. 62.

[38] "And if the way be too long for thee, so that thou are not able to carry it, because the place is too far from thee, which the Lord thy God shall choose to set His name there, when the Lord thy God shall bless thee; then shalt thou turn it into money and bind up the money in thy hand, and shalt go unto the place which the Lord thy God shall choose" (Deut. xiv, 24–25).

[39] P. *Ma'aser Sheni* IV, 3 (55a).

[40] See *Hatam Sofer, op. cit.*, who explains the circumvention as encouraging the

From other Talmudic sources an apparently different attitude is taken to a circumventing transfer of ownership in order to avoid the payment of tithes, but on closer examination the seeming inconsistency falls away.

Legally, renounced or abandoned property is exempt from *trumah* and *ma'aser.*[41] Thus there is no better way for avoiding these obligations than for the owner to renounce and then reacquire title to his harvested crops. The sages were aware of this possibility; a *Beraita* expressly prescribes: "A person who renounces his vineyard and rises early next day and removes the grapes is... exempt from tithe".[42] To prevent such an easy mode of circumvention, the law was amended so that renunciation is valid only if it is effected in the presence of three individuals so that one of them could, if he so wished, acquire title and the other two act as witnesses.[43] Furthermore, although a renunciation, in strict law, took effect at once[44] in connection with tithes, a waiting period of three days was prescribed by the rabbis because of "deceitful people" who renounced their fields and then immediately retook possession in order to avoid the liability to tithe.[45] According to the rabbis' 'new rule', reacquisition of the land within the three days has no legal effect. This ordinance and its consequences have been variously construed by the commentators[46] but this does not concern us here. What is clear, in any event, is that the ordinance

flow of money to Jerusalem instead of produce because the promised blessing refers only to the former. *Cf.* Learned Hand in one of his decisions: "a transaction otherwise within an exception of the tax law does not lose its immunity because it is activated by a desire to evade taxation. Any one may so arrange his affairs that his taxes shall be as low a possible; he is not bound to choose a pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes": *Helvering* v. *Gregory* S. F. 2d, 224, 225. And see: Marvin A. Chirelstein, "Learned Hand's Contribution to the Law of Tax Avoidance" (1967–1968) 77 Yale L. J. 440–474. From the above example, and from other examples, it appears that Jewish law does not ascribe to the doctrine of "lifting the veil" which is more or less accepted in other legal systems, and Jewish law is also not willing to void transactions to a "straw man", as is usually the case in other legal systems.

[41] *M. Hallah* I, 3; *M. Pe'ah* I, 6; *M. Shevi'it* IX, 1; *M. Trumot* I, 5; *M. Ma'aserot* I, 1.

[42] *Baba Kama* 28a and 94a; *Nedarim* 44b; *Hullin* 134b; *Tmurah* 6a; *Niddah* 51a.

[43] *Nedarim* 45a.

[44] *Ibid.*, 43a.

[45] *Tosefta Ma'aserot* III, 11; *Nedarim* 43a–45a: *Cf. P. Pe'ah* VI, 1 (19,b).

[46] See *Tosefot, Rosh* and *Ritba* to *Nedarim* 45a; *Tosefot* to *Shabbat* 18b and to *Pesahim* 4b and *Baba Metsia* 30b; Ramban at the commencement of *Pesahim; Nimukei Yosef* to *Baba Metsia* at the end of the second chapter; *Meiri* to *Nedarim ibid.*

was intended to prevent the avoidance of the obligation of tithing by renunciation and reacquisition of title.

This approach seems to be inconsistent with the more "liberal" one dealt with above with regard to a transfer of property. On closer examination, however, the inconsistency turns out to be only apparent. On the validity of circumvention, whether by transfer or renunciation, both approaches are essentially the same. The very need for an ordinance to regulate the matter of renunciation shows very obviously that for the rabbis there was no possibility under existing *Halakhah* to invalidate a fictitious transaction by reason only of its moral deficiency. Transfer and renunciation took effect in accordance with objective criteria and any act which satisfied these criteria could not be declared void simply because of the hidden intention of the actor. Where, however, serious apprehension of the dangers of circumvention was felt, legislative changes were introduced to meet the situation and its negative halakhic and religious implications without disqualifying the particular form the circumvention took.[47] It also appears that the extension of the obligation of *trumah* and *ma'aser* to the produce of non-Jews was occasioned by the fear that "men of wealth"[48] would avoid the obligation by transferring their land to non-Jews.[49] We shall, however, not dwell at length on this ordinance since the true motive for its enactment is not clear. It may have been enacted not to contend with mere circumvention but with deception and fraud whereby the rich landowners would falsely claim that their fields were owned by non-Jews where in fact this was completely false,[50] or for other reasons.[51] Be that as it may, if the first explanation we have given for its enactment is correct, it provides a further example of the fact that the sages did not regard themselves as having the competence to proscribe some act or another because

[47] *Cf.* Marluyn, *First Principles of Human Law* (Capetown, 1954), p. 137; "It cannot be stated too emphatically that there can be no such thing as 'evasion of law'; the phrase itself is completely devoid of any meaning whatsoever: any specific act on the part of any given citizen at any given time is or is not an infraction of the law as it exists at that time, and it is the judge's duty, as interpreter of the law, to state whether or not that specific act did or did not constitute an offence against the law as it existed at the time the alleged offence was committed;... if a law is so badly framed that it fails to fulfil its intent, then it must be re-drafted".

[48] It is not clear to whom "men of wealth" refers and how they tried to circumvent the law. The commentators took different views; see for example Rashi to *Menahot* 67a and Maimonides *Trumot* IV, 15.

[49] *Menahot* 67a.

[50] Maimonides, *op. cit.*

[51] Rashi, *loc. cit.*

it circumvented the law; the most that they could do was to legislate, where desirable, such as the extreme enactment whereby the produce of fields owned by gentiles were liable to *trumah* and *ma'aser*, a liability not enjoined by strict law.

Another instance of valid circumvention which was not regarded with favour and was even prohibited but not invalidated concerns the separation of *hallah*. For the obligation of *hallah* to apply, a minimum quantity of dough is necessary.[52] This minimum is small and it is therefore an easy matter to divide dough into quantities smaller than the minimum and thus escape the obligation. To do so appeared objectionable to the rabbis and they forbade it[53] but without declaring this artifice invalid. It is difficult to say unequivocally why the circumvention here was specifically prohibited while circumventions in other cases, as we have seen, were not prohibited. One reason suggested is they were trying to prevent the law concerning *hallah* from falling into oblivion,[54] but no explanation is given why this would be the case with *hallah* and not with *trumah* and *ma'aser*. Perhaps the answer to this question is as follows: circumvention of *hallah* is easy to effect and it does not seem to be so obviously circumvention as do other forms that are permitted. But *trumah* can be circumvented just as easily by renouncing the produce and immediately resuming title. Yet there the law was changed whereas here, for one reason or another, no change was made directly or indirectly. Most certainly the sages could have introduced a radical variation of the law by exercising their inherent power of appropriation of property under the rule that *hefker bet din hefker*.[55] In the case of *hallah* however—which is a matter of religious precept alone—they did not wish to extend the obligation to the smallest quantity of dough, because of some avoiders of the law, especially in view of the fact that the rule of a minimum quantity is derived from Scripture[56] and the rule is that one who kneads dough which is less than the minimum amount required by law, does not set aside *hallah*. The law was therefore left as it was and any quantity less than the legal minimum did not attract the obligation.[57] This instance reinforces what was said before—as long as the rabbis did not vary the law by *takkanah* (enactment), they did not consider themselves at liberty to void the act because of its circumventing nature, even when they

[52] *Sifrei Zuta, Shelah; M. Eduyot* I, 2; *Eruvin* 83a–b; *Pesahim* 48a; *M. Hallah* IV, 3.
[53] *Menahot* 67a–b.
[54] Meiri to *Hallah*, Chap. 2, explaining the second Mishnah.
[55] *Tosefta Shekalim*, commencement of Chap. 1; *Yevamot* 89b; *Gittin* 36b.
[56] *Sifrei Zuta, loc. cit.; Eruvin* 83b.
[57] Maimonides, *Bikhurim* VI, 16; *Sh. Ar. Y. D.* 326.

took an adverse view of the act in question, if it was performed in accordance with the technical rules of the law.

Furthermore, we have seen that the produce of a non-Jew was made liable to *trumah* and *ma'aser* in apprehension of circumvention—or real deception—by "men of wealth".[58] Did this change also affect *hallah* which is normally treated like *trumah*?[59] That it should apply equally to *hallah* is not contested but on a number of grounds a distinction was eventually made between the two and this change was confined to *trumah*. The reason for this ostensible anomaly is of relevance in the present context.

In the Talmudic discussion of the question an attempt was made to extend this enactment concerning non-Jews to *hallah*.[60] The opinion is advanced, however, that there would be no point in doing so because it would be without effect since the setting aside of *hallah* could still be avoided by other means. If a person really wanted to avoid the law he could, with ease bake less than five quarters of a *kab* (according to one view a *kab* equals 1,382 cm^3 or, according to another view—2,389 cm^3) of flour, which is the minimum quantity for the obligation of *hallah* to attach. Should he desire to bake a larger quantity in circumvention of the law, he could divide his dough into smaller quantities, each exempt. If so, the *Talmud* continues, why was an enactment made in order to prevent circumvention in respect of *trumah* and *ma'aser* where there too, other modes of circumvention remain possible? As we have seen, R. Oshayah was explicit that circumvention was possible by, for instance, bringing produce unwinnowed or "by way of roofs and enclosures". Why then decree that the produce of a non-Jew is liable to *trumah* and *ma'aser* because of "men of wealth" since there are still other ways to avoid the giving of the tithe? The Gemara concludes that the two cases are to be distinguished: "In the case of [*trumah*] since it is done openly he would be ashamed of it; in the case of [*hallah*] it is done in private and he would not be ashamed of it".[61] In other words, in both cases, circumvention is available and the liability imposed on the produce of non-Jews can be non-effective. In the former case, however, the circumvention must be done in public i.e. bringing in the produce of his field through the roof of his house, that by itself may be deterrence. In the latter case, since we are dealing with people who are inclined to avoid the law for financial reasons, there will be no deterrence since the operation can be carried out in secret

[58] See p. 160 above.
[59] See text to nn. 1 and 2 above.
[60] *Menahot* 67 a–b.
[61] *Ibid.*, 67b.

in his own kitchten. Hence, in the case of *trumah* and *ma'aser* the *takkanah* may effectively obstruct circumvention by a dealing with a non-Jew, whilst other modes of circumvention which have to be carried out openly and in public might *ipso facto* be deterred. As regards *hallah*, the situation is different. Making the dough of a non-Jew liable as well, will not help when a person is really intent on avoiding the law since he can achieve his purpose far more easily and discreetly by dividing his dough into portions smaller than the minimum. Hence in contrast to *trumah* and *ma'aser*, a *takkanah* relating to *hallah* has little or no point. Therefore the law remains as it was—the dough of a non-Jew is not liable to *hallah*.

Two matters at least may be inferred from this discussion in the Talmud, the importance of which goes beyond the questions of the priestly gifts and circumvention. First, the sages were very careful to make ordinances only when there was a prospect that the consequences they desired would thereby be attained. Secondly, although the mode of circumvention of *trumah* and *ma'aser* suggested by R. Oshayah might appear to have been morally neutral in the eyes of the rabbis, it emerges that not only they but the public in general regarded it with disfavour; though people might be inclined to avoid the law, they felt some shame in publicly doing so. From the treatment of the question in the Talmudic source just discussed, it appears that this mode of avoidance, attended as it was by publicity, was infrequent, and thus it made sense to prevent breaches through employment of a non-Jew. Clearly avoidance of *trumah* and *ma'aser* was not regarded in a favourable light by the rabbis and they endeavoured to prevent it, but that was only possible within the framework of the law by means of a *takkanah*. Nonetheless—and this is surprising—there were rabbis, such as Judah the Prince and Jose b. R. Judah,[62] who were ready to practice avoidance and "bring in the basket by way of roofs". These differing attitudes may perhaps be explained by reference to varying historical circumstances and attitudes toward the setting aside of tithes in different periods,[63] e.g. before or after the destruction of the Temple.

[62] See n. 27 above. The two were respectively the student and son of R. Judah b. Ila'i. Probably because of the close relationship, he allowed himself to preach morals to them in the manner of his own master R. Akiva. The continuation of the incident as related, again indicates surprise at their action. Apparently, R. Jose was consistent in his view that the law permitted the circumvention, since in two matters affecting the Sabbath he disagreed with the rabbis and permitted circumvention: *Tosefta Shabbath* XIII, (XIV) 7 and *Shabbath* 117b. The printed text of P. *Shabbath* XVI, 3 should be amended to read R. Jose b. Judah instead of R. Jose b. R. Bon. Similarly he allowed circumvention in connection with prohibitions regarding Festivals. *Mo'ed Katan* 12b.

[63] See for example E. E. Urbach, "Political and Social Tendencies in Talmudic

C. *Family Law*

We will now turn to an entirely different area which also provides examples of circumvention of the law where an act generally done for one purpose is effected for another. As we understand it, in all the instances to be mentioned the circumvention is valid. However, where the general objective is positive, the rabbinical approach is one of approval and where it is not, the act is seen in a negative light though valid in itself since its effectuation is in accordance with recognized legal principles.

Let us first consider an incident in which R. Tarphon was concerned. "R. Menahem b. Nafah said in the name of R. Eliezer Hakfar: R. Tarphon once in a period of famine betrothed three hundred women so that they might eat of *trumah*". In the Palestine Talmud, where the story is repeated, his act is called a circumvention of the law. "May one circumvent the law? Did not R. Tarphon, the father of all of Israel circumvent the law? In a period of famine he betrothed three hundred women so that they may eat of *trumah*".[64] Rabbi Tarphon was of priestly lineage[65] and women betrothed or married to priests were allowed to partake of *trumah*.[66] In the ordinary sense this was an evasion of the intention of the law. Betrothal is the first stage towards complete family life and Scripture treated a betrothed woman as having the status of a fully married woman in almost every respect.[67] Since she was therefore very close to entering the home of the man who had betrothed her, she was allowed to eat of *trumah* along with him if he was a priest. In the case of R. Tarphon the situation was somewhat different; he had no intention of marrying the women and thus no intention to bring them into his house and under his control. The legislative intention of enabling the wife of a priest to eat *trumah* with him was not attained—and that purposefully from the very outset. At first glance the law should have opposed such a course, but since one does not inquire into the purpose of man's betrothing a woman, the absence of any

Concepts of Charity" (1951) 16 *Zion* 1, 11. A Oppenheimer, "The Separation of the Firts Tithe in Practice during the Period of the Second Temple", *Volume In Memory of Benjamin De Fries,* (Jerusalem, 1969) 70, 80, writes; "The sages themselves were aware of the difficulty in observing the precept of *ma'aserot* in all its details and within the framework of the *Halakhah* they made concessions and allowed circumventions of various kinds, which in certain instances enabled the avoidance of the separation of *ma'aser.* Although these rules figure most prominently in the period after the destruction of the Temple, they have their roots in the preceeding period".

[64] *Tosefta Ketubot* V, 1; *P. Yevamot* IV, 12.

[65] *Kiddushin* 75a.

[66] *Sifrei* to Numbers XVIII: 11–13.

[67] See the entry "Arusa" in the Talmudic Encyclopedia.

true intention to enter into actual marriage in the fullest sense will not prevent betrothal from taking effect and the betrothed woman may eat *trumah* as occasion may arise. Thus where marriage is for a purpose generally foreign to married life and by the same token merely to enable the woman to eat *trumah*, the marriage or betrothal, as the case may be, will be entirely valid.[68] It should be noted that the underlying tone of the Talmudic discussion of R. Tarphon's action is that it was not only effective but also commendable, a feature which distinguishes it from other cases of circumvention where the purpose was not positive.

Conceptually, the case of R. Tarphon may be compared with that of the man who, the Talmud relates, married a woman because he needed storage space for goods of his, which she had available but was not prepared to rent to him. After marriage and after storing his goods by virtue of his marital right, he divorced her. Although the rabbis viewed the man's action critically, it did not occur to them to find any defect in the marriage as such by reason of the "foreign" motivation.[69]

Another incident which, it is suggested, may be placed alongside those already mentioned is the one related about R. Huna the son of Moshe b. Azri. R. Huna was a young married student of the law living in very poor circumstances. His father, a man of means, was the guarantor for the *ketubah* (marriage contract) of his wife and therefore financially liable thereunder in the event of the marriage being dissolved. R. Huna tried to obtain financial support from his father but without success. He was advised by Abaye, one of the leading rabbis of his age, to divorce his wife so that she might collect her *ketubah* from her father-in-law and then to remarry her. This plan could not be implemented, as it turned out, however, because R. Huna was a priest and therefore prohibited from marrying a divorcee even though she was his former wife. The Talmud wonders how Abaye could have advised such a dishonest stratagem for the sake of getting money. The explanation given is that the case was unique in two respects: firstly, the situation involved a father and his son, and secondly, the son was a scholar.[70] In other words, had an ordinary person, not a student of the law, been concerned, and had the guarantor of the wife's *ketubah* been a stranger, Abaye would not have given the advice he did, although even in that event the divorce would not have been invalidated, and as stated in the Talmud the adviser should be called "a cunning

[68] Similar to the fictitious marriages of present times: Silberg, *op. cit.* at 27.

[69] *Baba Metsia* 101b.

[70] *Baba Batra* 174b; *Arakhin* 22a–b. These explanations may be independent or cumulative. The commentators differ on this point.

rogue".[71] However that may be, what follows is that it is possible to divorce a woman in order to put into play certain rules regulating her status even if from the outset the couple intend the divorce to be "fictitious" and to remarry at the first opportunity. The encouragement given by Abaye, it seems, was motivated by the fact that a wealthy person ought to support his learned son and family who are without means of their own.[72] The divorce remains valid in principle and takes effect for all purposes.

In the instances of R. Tarphon and R. Huna the purpose of the circumvention was estimable, with R. Tarphon to provide for a group of starving women and with R. Huna to provide maintenance for a scholarly son. With both what was done or advised was valid in law: R. Tarphon betrothed three hundred women in due and proper manner; R. Huna would have divorced his wife in like manner. In each instance, the outcome was or would have been in accordance with the law. In both, the purpose was commendable and the rabbis refrained from expressing any displeasure. Where, however, the purpose is not quite so estimable—and this is clearly shown by the second instance—whilst the act and its consequence are legally effective, the sages would regard the act in an unfavourable light and term it the doing of "a cunning rogue".

D. *Conclusions*

We have touched upon a few of the cases in the Talmud that involve circumvention of the law. No mention has been made of other important cases, such as the sale of *hametz* (unleavened bread) before Passover, and circumventions concerning vows and the first born of cattle.[73] The main features of the latter are, however, fully in line with those examined in this essay. The general points which notably emerge from our discussion are as follows:

1) Circumvention is commended when the over-all purpose finds favour with the sages of the *Halakhah*. Repugnance of the act of circumvention yields to the positive results it engenders, as in the cases of R. Tarphon and R. Huna. The idea that a rule of law may in effect be set aside to attain an end that is deemed to be just is not strange to the Jewish legal system. There is for example the *dictum* (which incidentally formed a basis for holding that a man must act equitably beyond the strict require-

[71] *Ibid.*

[72] See *Rashba Resp.* III, 292.

[73] On these and other matters—including the second category of circumvention mentioned in the introduction to this essay—see at greater length the present writer's *"HaHaramah baTalmud"*, (1981) 8 *Shenaton HaMishpat HaIvri* 309.

ments of law) that Jerusalem was destroyed only because people insisted on the strict application of the law.[74]

2) Circumvention is disallowed where the general purpose is not positive, although it will nevertheless have legal effect if implemented.[75]

3) Circumvention, at least externally, abides by the formal requirements of the law. The formal aspect of the law is highly important, a view similar to that taken by other ancient legal systems.

4) The employment of one legal rule to avoid the consequences of another legal rule is always valid even if the concomitant act is improper. The only means for impeding a given consequence lies outside the law relating to circumvention. That can be effected by the enactment of an ordinance of extensive range, as that *hefker* will only take effect after an interval of three days, or by the imposition of a "private" fine under the rule that "a person should be treated in the manner he has acted, his recompense should recoil on him".[76]

5) Notwithstanding the very many Talmudic passages dealing directly with circumvention, the rabbis made no comparative study of the ensuing problems. They considered each case on its own as it occurred and from a narrow viewpoint, and offered *ad hoc* solutions. The attempt to distil broad basic principles was left to the modern scholar.

6) Most of the instances of circumvention reviewed here are directed against the Scriptural law maker. They do not directly concern interpersonal relations. Where the latter are involved—for example, the concealment of assets from creditors by a fictitious transfer to a third party—the *Halakhah* was far more ready to condemn and even invalidate the transaction. That is exemplified by the contrasting treatment of a fictitious sale to avoid the prohibition of *hametz* during Passover and a similar sale to evade the claims of creditors.[77]

[74] *Baba Metsia* 30b. See S. Shilo, "On One Aspect of Law and Morals in Jewish Law: *Lifnim Mishurat Hadin*" (1978) 13 Is.L.R. 359.

[75] Here as elsewhere, even if the act is a negative one and forbidden, it remains valid. This is another example of a far wider problem in Jewish law, *lex imperfecta*, which goes beyond our present purpose and calls for individual treatment.

[76] A similar approach may possibly be observed in another area, of that of the validity illegal acts or contracts. A. Shochetman in his comprehensive and basic study of the subject, *Ma'aseh Haba B'Averah* (Jerusalem, 1981) 255, writes: "Every legal act arising out of an illegal contract is of full effect... The obligation is binding even though its effectuation is forbidden... In those cases where the court is of the opinion that it would be unjust to enforce the obligation arising out of an illegal contract, it may penalise the plaintiff and deny him his right".

[77] See the references to such attempts on the part of debtors in the index to M. Elon, *Herut HaPrat BeDarkhei Gviyat Hov BaMishpat Halvri*, (Tel Aviv, 1964) 283.

7) Proper regard must be paid to what every student of the subject points out as being the main feature—at times, with some exaggeration—that circumvention is only a means of dealing with a situation rendered intolerable by a change in circumstances, for which the *Halakhah* could find no other solution.[78]

Although at the beginning of this paper a clear distinction was drawn between circumvention and legal fiction, it is necessary to bear in mind the common element they share regarding the consequences desired to be achieved by their use. As Blackstone put it: "No fiction shall extend to work an injury, its proper operation being to remedy a mischief, or remedy an inconvenience that might result in the general rule of law: so true it is that *in fictione juris semper substitut aequitas*".[79]

[78] See for example Ch. Tchernowitz, *Toledot Ha-Halakhah* (New York, 2nd ed., 1945) vol. I, pp. 179 *et seq.*; Z. W. Falk, *Introduction to Jewish Law of the Second Commonwealth* (Leiden, 1972) vol. I, p. 21–23.

[79] *Commentaries on the Law of England*, vol. 3, ch. 4, p. 43.