

## SURVEY OF RECENT HALAKHIC PERIODICAL LITERATURE

### THE DEVICE OF THE "SAGES OF SPAIN" AS A SOLUTION TO THE PROBLEM OF THE MODERN-DAY *AGUNAH*

In recent years numerous attempts have been made to alleviate the plight of the modern-day *agunah*, i.e., the woman whose husband declines to cooperate in the execution of a religious divorce despite the irreversible breakdown of the marital relationship as evidenced by the issuance of a divorce decree by a civil court. The simplest remedy by far would lie in the drafting of an antenuptial agreement between the bride and groom which would bind the husband to the payment of an extravagant sum of money upon failure to execute a religious divorce within a specified period of time subsequent to entry of a judgment of divorce by a court of competent jurisdiction. There are, however, a number of considerations which effectively serve to bar consideration of such a remedy:

1) Realistically, in order to be effective, any remedy for the problem posed by the recalcitrant husband must be enforceable in secular courts. The husband who, for whatever reason, refuses to alleviate the plight of his estranged wife is unlikely to abide by the conditions of any agreement or voluntary undertaking unless he recognizes that judicial proceedings may be initiated in order to compel fulfillment of the terms of such an undertaking. Hence an agreement providing a penalty for non-performance of an undertaking to deliver a *get* will be of little avail since penalty agreements are, in most cases,

unenforceable in a court of law. In common law, penalty agreements are regarded as being in violation of public policy and hence are not actionable.

There is some disagreement with regard to the precise nature of the public policy which renders penalty agreements odious. Many scholars accept the proposition that it is "obviously against conscience that a person should recover a sum of money wholly in excess of any loss incurred"<sup>1</sup> but disagree with regard to the nature of this violation of conscience. It has been contended that enforcement of such stipulations would lead to taking unconscionable advantage of an accident,<sup>2</sup> would constitute unfair recovery in excess of justifiable reliance,<sup>3</sup> or that contracting parties, overly optimistic about capacity to perform obligations, would be subject to severe hardship.<sup>4</sup> It may also be the case that the legal prejudice against enforcement of penalty clauses is rooted in the concept that imposition of punitive sanctions is the exclusive prerogative of the State and cannot be made the subject of an agreement between private parties. Individual citizens cannot stipulate the punishment to be imposed for a crime committed by one party against another; nor are private persons competent to criminalize actions which are not so categorized by the State. Other authorities maintain that the public policy offended is the concern to limit

recovery for breach of contract to damages actually suffered in order to discourage performance of contractual undertakings in situations in which adherence to the provisions of an agreement would be uneconomic. Legal theory assumes that uneconomic performance is wasteful and hence not in the public interest.<sup>5</sup>

2) Penalty clauses, in many if not most instances, are similarly unenforceable in Jewish law, albeit for other reasons. In Jewish law such agreements constitute an unenforceable *asmakhta*. The essence of a contract is the "meeting of the minds."<sup>6</sup> In Jewish law this is reflected in the need for *gemirat da'at* on the part of the person bound by the contract, i.e., finality of intent and determination to be truly bound hereby, and of *semikhat da'at* on the part of the beneficiary, i.e., satisfaction with regard to the other party's determination to perform and mental reliance thereon. Absent these reciprocal psychological phenomena no binding contract exists.

Inclusion of a penalty clause in a contractual agreement is designed to spur performance of the primary obligation. Characteristically, a person obligating himself to payment of a penalty for non-performance agrees to such a stipulation only because he is confident of his ability to perform and does not seriously anticipate that he will be called upon to fulfill the secondary undertaking. Accordingly, since at the time of assumption of the obligation there is no seriousness of intent with regard to payment of the penalty, the requisite element of *gemirat da'at* is lacking and hence the penalty is unenforceable. Thus, for example, a contractor who enters into an agreement to construct a building, and binds himself to complete the project by a certain date under penalty of payment of a stipulated sum should he fail to complete construction by that date, will not be compelled to pay the contractually stipulated penalty for non-performance. No prudent contractor enters into such an agreement unless

he firmly intends to perform on the contract. He agrees to insertion of a penalty provision solely because he is confident of his ability to perform and does not seriously anticipate that he will be called upon to fulfill the contingent obligation, viz., payment of the penalty.

Since a penalty agreement is unenforceable in Jewish law any attempt to compel payment by means of recourse to secular courts or otherwise is, from the vantage point of Halakhab, indistinguishable from extortion. Any attempt to enforce such an undertaking is tantamount to coercion of the *get* itself and hence a religious divorce granted under such circumstances would be invalid by reason of duress.<sup>7</sup>

3) Even if the defect of *asmakhta* were to be obviated and the penalty rendered actionable, the validity of a religious divorce executed pursuant to such an agreement would remain under a cloud. The validity of a *get* executed under circumstances of self-imposed duress (*onsa de-nafsheli*) is the subject of considerable dispute among early authorities. *Bet Yosef*, *Even ha-Ezer* 134, cites *Teshuvot ha-Rashba* as maintaining that a *get* executed pursuant to an actionable undertaking to indemnify the wife's family for failure to deliver the *get* is invalid by reason of not being executed voluntarily. Similarly, *Shulhan Arukh*, *Even ha-Ezer* 134:4, rules that if the husband swore an oath to grant a *get* the oath must be annulled prior to execution of the *get* since the oath, although voluntarily assumed, constitutes a form of duress. *Rema*, *Even ha-Ezer* 134:4, rules that a *get* should not be executed in a situation in which delivery of the *get* serves to avoid a voluntarily assumed financial obligation but that *post factum* a *get* executed under such circumstances is valid.

The first step in crafting an acceptable device for assuring the cooperation of the husband is to find a means of curing

the defect of *asmakhta*. Given the extreme and well-founded reluctance on the part of rabbinic authorities to sanction any procedure which would render the *get* invalid even according to a minority view,<sup>8</sup> the remedy must avoid the taint of *asmakhta* in a manner accepted by all authorities. Such a device was fashioned by early authorities in an entirely different context.

Engagement contracts have from time immemorial provided for a penalty to be imposed for breach of promise. Ostensibly, such penalties are not enforceable by reason of *asmakhta*. *Tosafot*, *Zohar Metziah* 66a, propounds the theory that the penalty is actually compensation for the shame and humiliation caused to the rejected party. As such, the stipulated penalty is actionable in a manner closely resembling the concept of liquidated damages which figures prominently in other systems of law. In common law, penalties are enforceable to the extent that they are designed to compensate for damages suffered provided that the precise extent of the damages are difficult to ascertain and there is a reasonable relationship between the stipulated payment and the extent of actual or consequential damages.<sup>9</sup> Rambam, *Hilkhot Mekhilah* II:8, apparently rejecting this theory, advises that the contract be drafted in a particular and innovative manner in order to avoid the *asmakhta* defect:

When the sages of Spain wished to convey by means of *asmakhta* thus did they do: They entered into a *kinyan* with this [party] that he owes his friend a hundred dinari. After he obligated himself they entered into a *kinyan* with his creditor that "whenever thus and so shall transpire or [whenever] he shall do thus and so the debt is forgiven retroactively, but if it shall not transpire or he shall not perform I will claim the money to which he has obligated himself." We acted in this manner in all engagement contracts between a man and his wife and in all similar matters.

The device crafted by the "sages of Spain" and reported by Rambam

provides for two separate and ostensibly unrelated undertakings. The first consists of a unilateral and unconditional obligation undertaken *ex gratia* to pay a specified party a certain sum of money. The second consists of a conditional forgiveness of that obligation by the beneficiary of the undertaking. Forgiveness of the already assumed unconditional obligation is made contingent upon fulfillment of a stipulated condition. Thus, for example, a prospective groom enters into an obligation in favor of his fiancée for the payment of one hundred dinarii. She, in turn, predicates her forgiveness of that debt upon solemnization of a marriage between the groom and herself.

That the groom's undertaking is free of any taint of *asmakhta* is quite evident. His obligation is unconditional and unequivocal. The binding nature of the bride's release is somewhat more problematic. Her forgiveness is predicated upon the groom's performance. To be sure, her release is in the form of an inducement to perform rather than in the nature of a penalty for non-performance. Nevertheless, according to some authorities, conditional obligations of such nature are categorized as *asmakhta*. Thus, Rambam, *Hilkhot Mekhilah* II:3, rules that a person who stipulates "If you will go with me to Jerusalem on a certain day, or if you will bring me a certain object, I will give you this house, or I will sell it to you for so much and so much" is not bound by his undertaking unless the beneficiary takes possession of the house immediately, thus rendering the condition a condition subsequent rather than a condition precedent.<sup>10</sup> However, *Rabbeinu Nissim*, *Nedarim* 27b, maintains that forgiveness is never rendered nugatory by reason of *asmakhta*. The distinction between a promissory undertaking and a release in this regard is essentially psychological. A person undertaking an obligation in the nature of an *asmakhta* lacks seriousness of intent with regard to performance whereas forgiveness, by its very nature,

pertains to situations in which the beneficiary is already in possession of the funds or property to be conveyed. Hence the person accepting such a stipulation is quick to realize that fulfillment of the stipulated condition will simply cause possession to ripen into title and that, since possession has been confirmed, repayment of funds or return of property will not be forthcoming.

Nevertheless, *Maggid Mishneh*, in his commentary on Rambam's ruling, remarks that the device of the "sages of Spain" conforms to the view of only "the majority of opinions."<sup>7</sup> The minority view not satisfied by such a procedure is presumably that of Rashi, *Baba Metz'ia* 47b, as elucidated by Rabbeinu Nissim, *Nedarim* 27b, who maintains that forgiveness is also governed by principles of *asmakhta* coupled with the position that *asmakhta* applies not only to penalties but to inducements as well.

The expedient devised by the "sages of Spain" can readily be adapted to assure that a recalcitrant husband would find refusal to grant his estranged wife a *get* to be inimical to his financial interests. The groom might be required to enter into an antenuptial undertaking obligating himself to the payment of a specified sum to the bride. The monetary obligation, undertaken in consideration of marriage, would be unilateral and would be entirely unconditional. The undertaking would provide that the specified sum might be claimed by the wife at her discretion at any time. The bride would deliver a release forgiving the groom's obligation subject to the execution of a religious divorce. Assuming that a husband would prefer to divorce his wife rather than pay the stipulated sum, the wife would, in effect, be able to secure a *get* upon demand. It is of course obvious that, since the husband can readily avoid performance of his undertaking by executing a *get*, no woman desirous of continued marital bliss would attempt to compel performance of the husband's undertaking by presenting a claim for satisfaction of the stated obligation.

A similar expedient can be utilized to avoid situations in which the husband desires a religious divorce but the wife refuses her cooperation in its acceptance. Since, by virtue of rabbinic edict, a woman cannot be divorced against her will, the husband is barred from entering into a new marital relationship unless he is able to establish grounds for a *heter me'ah rabbanim* which serves as dispensation from the ban of Rabbeinu Gershom prohibiting polygamous marriage. It is only because of the specter of the husband's ability to establish grounds for a *heter me'ah rabbanim* that many such situations are avoided with the result that the incidence of recalcitrant wives is much less frequent than that of recalcitrant husbands. Nevertheless, such situations do arise on occasion and might be entirely avoided by means of this expedient.

In order to avoid such situations the bride would similarly enter into a unilateral and unconditional undertaking to pay a specified amount to the groom. Thereupon the husband would enter into a separate undertaking to forgive that obligation upon acquiescence of the wife to the execution of a religious divorce. In order to assure the cooperation of both parties, the bride and the groom would each be required to enter into an undertaking of this nature and to execute a conditional release of the opposite party's obligation. The net result would be that when both parties agree to a *get* both undertakings become extinguished. So long as neither party desires a *get* the reciprocal obligations, provided they are for an identical sum of money, have the effect of cancelling one another and remain dormant. If one party desires a *get* and the other does not, the monetary obligation of the party willing to execute a *get* is *ipso facto* forgiven while the obligation assumed by the recalcitrant party remains in full force.

The expedient devised by the "sages of Spain" is endorsed by Rambam and is codified by *Shulhan Arukh*, *Hoshen Mishpat* 207:16 and *Even ha-Ezer* 50:6,

and hence must be regarded as normative. Even an understandable desire on the part of rabbinic scholars not to sanction execution of a *get* when its validity is subject to challenge even on the basis of a minority opinion should not serve as a barrier to utilization of such a device. To be sure, as indicated by *Maggid Mishneh*, some authorities would regard the conditional release of the undertaking herein outlined as invalid by reason of *asmakhta*. However, since the undertaking and the release are entirely separate and discrete, the onus of *asmakhta* does not at all taint the primary undertaking. Thus the unconditional undertaking to pay the specified sum is enforceable according to all authorities. Accordingly, there can be no question that an action to enforce that undertaking does not constitute extortion. Similarly, since the assumed obligation is not at all linked to failure to execute a *get* there arises no question of self-imposed duress. According to the minority view, the obligation with regard to payment of the specified sum is simply not extinguished by the actual execution of a religious divorce because the release is defective by reason of *asmakhta* and hence the original obligation survives despite the cooperation of the party. Yet no person need hesitate to enter into such an agreement for fear that he will be called upon to satisfy the financial undertaking despite his cooperation in the execution of a religious divorce. Since a Bet Din cannot act to compel payment in accordance with the minority view, no Bet Din will be in a position to compel performance of the undertaking once a *get* has been executed.<sup>10</sup>

A proposal for an antenuptial undertaking along these general lines, but which incorporates significant modifications, has been outlined by Rabbi Judah Dick in an article published in *Tradition*, vol. 21, no. 2 (Summer, 1983), pp. 91-106. A Hebrew version of the same proposal appeared in *Sefer ha-Yovel li-Kevod ha-GRYD Soloveitchik* (Jerusalem, 5734), I. 226-236. The latter

publication contains an addendum by Rabbi Saul Isaac expressing a number of objections to the proposal focusing upon the validity of the device of the "sages of Spain" when applied to a situation involving execution of a *get* in order to avoid satisfaction of a financial undertaking.

The expedient devised by the "sages of Spain" was carefully crafted to avoid the defect of *asmakhta*. There remains, however, the further question of whether an undertaking of this nature constitutes a form of self-imposed duress, such that a *get* executed pursuant to its provisions by a person unwilling to grant a divorce other than because he is faced by the prospect of financial loss would be invalid according to the opinion of *Rashba*, *Teshuvot ha-Rashba*, IV, no. 40.

In essence, *Rashba's* position is that a *get* is invalid when executed under duress even if such duress is indirect. Hence duress compelling a person to fulfill a perfectly binding undertaking to pay compensation for failure to execute a religious divorce invalidates the *get* since it is simply an indirect means of securing compliance in executing the *get*. Those who disagree with *Rashba* maintain either that self-imposed duress does not constitute duress<sup>11</sup> or that, since the enforceable demand is for financial compensation rather than for a *get*, a religious divorce executed under such circumstances is not to be regarded as executed under duress; i.e., so long as satisfaction of a lawful claim remains a viable option in order to avoid execution of the *get*, execution of the *get* in order to avoid payment of a just debt is regarded as a voluntary act motivated by the self-interest of the husband.<sup>12</sup> Essentially, the controversy between *Rashba* and other authorities is with regard to situations in which the husband is subject to duress of some nature; he is compelled either to execute a *get* or to pay a certain sum of money upon failure to do so. Since the husband is under no independent obligation to make payment and can avoid the

*get* only by means of such payment, a *get* executed under such circumstances is regarded by Rashba as having been obtained by duress—indirect duress, but duress nonetheless.

However, this is not to say that, according to Rashba, all conceivable forms of indirect duress invalidate a *get*. This can be demonstrated on the basis of a *reductio ad absurdum*. Were it the case that in every instance in which the husband executes a *get* in order to relieve himself of a financial obligation the *get* is thereby rendered invalid, virtually no divorce would be valid. It is quite true that in our day the primary motive in many, if not most, instances prompting a husband to execute a *get* is a desire to be free to enter into a new marital relationship. Nevertheless, it must be remembered that under biblical law the husband need not execute a *get* in order to achieve that end. Since biblical law sanctions polygamy the husband does not lack capacity to enter into a second marriage without terminating the first. The husband's sole motivation, then, is a desire to free himself of the financial and conjugal obligations which flow from the marital bonds. The existence of those financial obligations and the desire to be free of them do not constitute duress; rather, considerations of such nature lie at the essence of a determination to dissolve the marital relationship. A husband may choose either to continue a marital relationship and both to enjoy its privileges and bear its burdens or he may terminate the relationship by means of a *get* and thereby deny himself the advantages of marriage and avoid its concomitant burdens. Similarly, a person in need of cash who sells property in order to realize the purchase price cannot void the sale for reason of duress. No one would ever sell property unless he has determined that, given the attendant circumstances, he prefers the money to continued ownership of the property. It is for precisely the same reason that a *get* executed in return for a freely accepted financial inducement is regarded by all

authorities as voluntary in nature. The fact that, absent such inducement, the husband would refuse to grant the *get* does not render his act involuntary. The husband enjoys complete freedom of choice with regard to continuing of the marital relationship or receiving the benefit of the proffered sum. Accordingly, a *get* executed in return for financial inducement is regarded as valid by all authorities. R. Shimon ben Zema Duran, *Tashbatz*, II, no. 68, rules that a *get* executed pursuant to an agreement to forgive an outstanding debt is similarly valid. In effect, *Tashbatz* rules that forgiveness of a debt is no different from delivery of cash. To be sure, failure on the part of the husband to acquiesce to the arrangement may result in application of various sanctions designed to compel payment of the debt. Those sanctions are, however, not designed to enforce execution of a religious divorce but rather to compel payment of a lawful debt entirely unrelated to the *get*.

The sole difference between the situation described by *Tashbatz* and that addressed by Rashba is that, in Rashba's case, assumption of the debt is coupled with, and made contingent upon, failure to grant a *get*. Rashba's objection is based upon the fact that a financial obligation of such nature is generated solely as a means of enforcing the *get*. Since there is a direct linkage between the financial undertaking and the *get*, enforcement of the financial undertaking, although it is self-imposed, is regarded as duress with regard to the *get* itself. The compulsion is, to be sure, indirect but is regarded by Rashba as compulsion with regard to the *get* nonetheless.

A unilateral and unconditional obligation by the groom in favor of the bride coupled with an agreement to cancel the debt in return for a *get* would appear to be identical in nature to the situation described by *Tashbatz*. Since the groom's undertaking is not linked to non-execution of a *get* Rashba's objection would not appear to be pertinent.

However, further analysis of this matter must be undertaken in light of the comments of a 16th century scholar, R. Moses di Trani, *Teshuvot Mabit*, II, no. 138. In commenting upon the ruling of *Tashbatz*, this authority writes:

... for also that which *Tashbatz*, of blessed memory, wrote that if they coerced him with regard to other matters and in order to preserve himself from that coercion he agrees to divorce, it is not a coerced *get*. ... It appears to me that this is when they coerce him with regard to another matter not with intent of divorce, and he, of his own accord, in order to avoid that punishment, divorces of his own accord, as R. Shimon, of blessed memory, twice wrote in his phraseology "of his own accord (*me-atzmo*)." ... However, when they wish to compel him with regard to the divorce, and they would not have been concerned to compel him and to insist upon some other matter with regard to which they would have been able to compel him, but in order to compel him with regard to the *get* they compel him with regard to some other matter which they know that he cannot fulfill and [therefore] he will divorce, then it appears that the coercion is precisely with regard to the *get*.

Although the terminology of Mabit is not entirely unequivocal he may be understood as regarding a *get* to be invalid in one of two circumstances: (1) either when the husband is financially incapable of meeting the demand made upon him; or (2) when the financial claim is not pressed for its own sake but solely for the purpose of securing a *get*.

The qualms expressed by Mabit in circumstances in which the husband is financially incapable of meeting the demand made upon him are readily understandable. An attempt to press an illegitimate claim is tantamount to extortion. The husband's acquiescence to a *get* in order to avoid extortion constitutes

execution of the *get* under duress. Jewish law prohibits pressing a debtor for payment of even a just debt when it is known that the debtor is insolvent. This prohibition is derived from the biblical verse "If you lend money to any of my people . . . you shall not be to him as an exactor" (Exodus 22:24). Mabit regards an attempt to exact payment under such circumstances as the equivalent of extortion since the claim is, practically speaking, not actionable, i.e., although the debt is not extinguished, a claim may not legitimately be pressed when it is known that satisfaction is not possible.

Nevertheless, the concern expressed by Mabit does not serve to bar utilization of the agreement which is the subject of this discussion. In light of Mabit's position care must simply be taken to limit any actual claim for recovery to an amount within the financial capability of the husband. Any remaining balance will continue to be due and owing to be paid when the husband is financially capable of doing so.

Rabbi Israeli, however, is concerned that a *get* granted pursuant to such an agreement would be defective by virtue of the second consideration raised by Mabit, viz., that the primary interest in enforcing the agreement is compliance in the delivery of the *get* rather than enforcement of the financial undertaking. Indeed, if the groom's undertaking and the bride's release subject to execution of a *get* are merged in a single instrument this concern may well be cogent. Under such circumstances there may be strong reason to construe the undertaking regarded in its entirety as designed primarily to assure the execution of a *get*. In order to obviate this objection the groom's undertaking and the bride's release should be drafted as entirely separate instruments. Under such circumstances the wife may institute a cause of action on the basis of a document that declares only the husband's unconditional undertaking. Since, under such circumstances, the sole relief demanded by the wife is financial,

and that financial claim is the sole subject of the instrument upon which her claim is predicated, there is no *prima facie* reason to assume that the wife's expressed desire to press a financial claim is merely instrumental to obtaining a *get*. In pressing the claim and in any pleadings drafted by the wife or drafted on her behalf scrupulous care should be taken not to refer to the husband's ability to exonerate himself from his financial obligation by executing a *get*. Any offer to execute a *get* should originate with the husband—in the words of *Tashbatz*—"of his own accord." The existence of a conditional release already signed by the wife should be of no significance provided that, in pressing her claim, she makes no attempt to secure a *get* but institutes a bona fide claim for fulfillment of the husband's financial undertaking—an undertaking which, were the husband desirous of renewed marital bliss, he would be compelled to honor and to recognize as being entirely compatible with continued domestic harmony.

A more serious obstacle is presented by the position expressed by R. Ya'akov of Lissa, *Torat Gittin* 134:4. *Torat Gittin* addresses himself to the oft-occurring situation in which, following negotiations between the parties, the husband agrees to execute a *get* and thereupon the wife seeks some form of assurance that the husband will not renege on his agreement. The expedient devised by the "sages of Spain," i.e., an unconditional monetary undertaking on the part of the husband coupled with a conditional release executed by the wife, is rejected by *Torat Gittin* for utilization in such situations. *Torat Gittin* argues that, although the husband's undertaking is ostensibly unconditional in nature, he nevertheless retains the option of legitimately withdrawing from his commitment should the wife subsequently fail to execute a conditional release. *Shulhan Arukh, Hoshen Mishpat* 195:6, rules that any agreement entered into by means of a *sudar* (seizing of a "kerchief")

may be rescinded until such time as "the parties rise," i.e., so long as the matter remains the subject of unadjudged conversation between the parties. It is clear, argues *Torat Gittin*, that, under the circumstances, were the wife not to execute a conditional release, the husband would retract his own undertaking as he is legally empowered to do. Hence, concludes *Torat Gittin*, a linkage does in fact exist between the husband's undertaking and the wife's conditional forgiveness with the result that the husband's undertaking assumes the guise of a self-imposed penalty for non-execution of a religious divorce.

It is important to clarify the precise nature of *Torat Gittin's* objection. *Torat Gittin* does not challenge the validity of the procedure adopted by the "sages of Spain" insofar as commercial or engagement contracts are concerned. In those contexts such undertakings are entirely valid since the sole impediment to actionability of a penalty agreement is the defect of *asmakhta* which is entirely cured by the remedy crafted by the "sages of Spain." Although, as *Torat Gittin* points out, the husband's undertaking is in reality contingent upon the wife's conditional forgiveness, the undertaking itself, once assumed, is unconditional. The wife's release is a condition precedent for the husband's assumption of his stipulated obligation but, once assumed, the husband's obligation is undertaken in the form of an unconditional obligation. Insofar as *asmakhta* is concerned the form of the undertaking is crucial. An absolute undertaking is free from the defect of *asmakhta*. Although the person entering into the undertaking may freely withdraw if a conditional release is not forthcoming, nevertheless, once the undertaking becomes effective, it is unconditional in nature. *Torat Gittin's* objection is that although the undertaking is not defective by reason of *asmakhta*, when employed in the context of an agreement to grant a divorce, the linkage between the husband's undertaking and the wife's conditional forgiveness

is such that *de facto* it constitutes a penalty for non-execution of a *get* and hence, according to *Rashba*, a *get* executed pursuant to such an agreement is void for reason of duress. *Torat Gittin's* contention is that duress exists wherever there is linkage of any nature between the undertaking and the granting of a *get*.

The position advanced by *Torat Gittin* does indeed serve as a formidable barrier to adoption of the proposal as heretofore outlined.<sup>11</sup> However, a modification may be made in the proposal which will render it entirely compatible with the position of *Torat Gittin*.

As will be shown, the modification earlier advocated to render the agreement compatible with the view expressed by *Tashbatz* will overcome the concerns expressed by *Torat Gittin* as well. *Torat Gittin* speaks of a situation in which the husband's undertaking and the wife's conditional release are both executed at a single sitting. Were the respective instruments to be executed on two separate occasions his objections would not obtain. Having risen from the deliberations subsequent to the assumption of an unconditional undertaking, the husband no longer enjoys the option of renouncing his undertaking even if the wife fails to execute a conditional release as anticipated by the husband. Indeed, it is precisely for that reason that a husband who has agreed to grant a divorce (which is the situation discussed by *Torat Gittin*) will not allow the parties to rise with his undertaking in force unless the wife executes a release at the same sitting. The husband cogently fears that the wife will accept a *get* and then insist upon fulfillment of the financial under-

taking or, if a conditional release is subsequently demanded prior to execution of the *get*, she may refuse to accept a *get* in lieu of payment of the financial obligation assumed by the husband.

An antenuptial undertaking on the part of the groom is another matter entirely. The groom should be advised to execute his undertaking at the time of the couple's engagement or during the course of a prenuptial conference in the rabbi's study. On the same occasion the bride should execute a similar obligation in a like amount in favor of the groom.<sup>12</sup> Immediately prior to the wedding ceremony the bride should be advised to execute a release of the groom's obligation contingent upon the granting of a religious divorce by the groom. At the same time, the groom would be required to execute a similar release contingent upon the wife's agreement to accept a *get*. Since, in accordance with this procedure, the instruments and the releases are executed at different times no linkage whatsoever exists between the husband's financial undertaking and an agreement with regard to a *get*. Thus, *Torat Gittin's* objection does not pertain to an arrangement of this nature. Insofar as financial consequences are concerned, neither party need fear that he or she will be burdened with an onerous debt as a result of the other party's subsequent refusal to execute a conditional release, since failure to execute mutual releases would leave the parties with reciprocal obligations which effectively nullify one another. Moreover, the aggrieved party would retain the option of refusing to proceed with the marriage unless the requisite instruments are exchanged.<sup>13</sup>

## NOTES

1. W. S. Holdsworth, *A History of English Law*, V (Boston, 1927) 293.
2. *Loc. cit.*, Holdsworth also suggests that a person seeking to enforce such an agreement "might, in some circumstances, come perilously close to committing a fraud."
3. See Ian Macneil, "Power of Contract and Agreed Remedies," 47 *Cornell Law Quarterly* (1982) 495, 499-501.
4. See Charles T. McCormick, *Handbook on the Law of Damages* (St. Paul, 1935), p. 601.

5. See, for example, Charles J. Goetz and Robert E. Scott, "Liquidated Damages, Penalties and the Just Compensation Principle," 71 *Columbia Law Review* (1977) 554-594.
6. See *Tashbatz*, I, no. 1; *Teshuvot Mahit*, I, no. 22 and II, no. 138. Cf., however, *Teshuvot Ribash*, no. 126.
7. See *Teshuvot R. Betzael Ashkenazi*, no. 15; *Bet Me'ir*, *Even ha-Ezer* 134:4, and *Mishkenot Yaakov*, *Even ha-Ezer*, nos. 38-41, who maintain that all authorities are in agreement with Rashba in maintaining that the *get* is invalid in situations in which the husband regrets his prior financial undertaking in the event that he fails to grant a *get*. Cf., however, *Hazon Ish*, *Even ha-Ezer* 99:3 and 99:5.
8. See 5 Corbin, *Contracts*, ch. 58 (1964 and Supp. 1980); 5 Williston, *Contracts*, §§776-89 (3d ed. 1961); and *Restatement (Second of Contracts)* §356 (1).
9. According to the authorities, in order for such an agreement to be actionable the recipient must take physical possession of the property, become conditionally conveyed; according to other authorities transfer by deed or payment of the purchase price is sufficient. See *Bet Yosef*, *Hoshen Mishpat* 207. The author of *Perushah*, *Hoshen Mishpat* 207:14 and *Senet*, *Hoshen Mishpat* 207:6, maintains that the crucial distinction is whether the primary desire is fulfillment of the condition or validation of the conveyance. If the primary concern is the transfer of property and the condition is stipulated as a material aspect of the conveyance the transaction is not void by reason of *asmakhta*, but if the primary concern is the fulfillment of the condition, and the transfer of property is effected merely as an inducement designed to secure performance of the condition, the transaction is void by reason of *asmakhta*.
10. Moreover, if both bride and groom enter into identical undertakings such reciprocal undertakings have the effect of cancelling one another. However, this does not mean that the recalcitrant party may rely upon the minority opinion in claiming that his or her release of the other party's obligation is void for reason of *asmakhta* and hence that the respective obligations are always extinguished. Such a pleading (*kin li*) is, in this case, perforce predicated upon a minority view rejected by *Shulhan Arukh* and *Rema* and for that reason does not serve as a defense against a legitimate claim. See R. Yonatan Eibeschutz, *Tumim*, *Kitzur Tokpo Kohen*, sec. 124. Nor can such a pleading be advanced on the basis of a minority view as a counterclaim when the validity of the original claim is incontestable. See *Teshuvot Rabaiah*, II, no. 1; *Pri Tzavah*, no. 47; and *Divei Ge'otim*, *klaf* 91, sec. 11. Since, in this case, the monetary undertaking is not subject to dispute, the defending party can advance his or her own claim for an identical sum only as a counterclaim. However, since this pleading can be sustained only on the basis of a minority view (which regards the reciprocal undertaking as unextinguished because the release is void by reason of *asmakhta*) it cannot be interposed as a counterclaim in order to secure exoneration from satisfaction of an obligation the validity of which is incontestable.
11. See the responsum of Rivka cited in *Bet Yosef*, *Even ha-Ezer* 154; *Teshuvot Maharik*, no. 63; *Tashbatz*, II, no. 68; and *Rema*, *Even ha-Ezer* 134:5.
12. See the responsum of R. Maimon Nagar cited in *Bet Yosef*, *Even ha-Ezer* 134 and *Rema*, *Even ha-Ezer* 134:5.
13. Rabbi Dick endeavors to accommodate the view of *Torat Gittin* by conditioning the wife's release upon execution of a *get* within a specified period of time. *Torat Gittin* declares that the husband's obligation is enforceable under such circumstances provided that a timely *get* is not executed because the two instruments are no longer interdependent after the expiration of this specified period of time. See *Tradition*, p. 100, note 29. Rabbi Israeli correctly observes that such an arrangement renders it impossible for the husband to execute a *get* within the time period unless the obligation is forgiven, but if the obligation is indeed forgiven there is nothing to prevent the husband from refusing to grant a *get*. Moreover, according to *Torat Gittin*, the husband can totally avoid both the *get* and the monetary obligation by offering to execute the divorce within the stipulated time period. According to Rashba, such a divorce would be invalid since it is executed in order to avoid a penalty for non-execution. However, since the husband is not permitted to execute the *get* despite his willingness to do so within the stipulated time period, he cannot be required to pay the stipulated penalty after the stipulated period has elapsed. See *Nefer ha-Yovel*, I, 239-240.
14. A single, unconditional undertaking to be entered into by the groom is not advised because such an undertaking would remain binding even if the engagement is later broken. An undertaking of that nature could, of course, be made contingent upon subsequent solemnization of the marriage by rendering it actionable only after marriage has occurred. Such a procedure is not advised because it may possibly be argued that *Torat Gittin*'s position renders such an expedient defective. To wit: The groom certainly has the option of rendering the agreement nugatory by refusing to enter into the marriage. Indeed, it may be presumed that he would refuse to do so were the bride to refuse to execute the anticipated conditional release. Hence, it might be argued, a linkage is created between actualization of the actionability of the undertaking at the time of marriage and the bride's conditional release. In the opinion of this writer, since it is the prior undertaking rather than the marriage that binds the groom and the agreement itself cannot be rescinded unilaterally, no linkage is created between the actual undertaking and the contingent release. Be that as it may, a procedure involving reciprocal undertakings by the bride and groom is certainly not subject to such objection and, additionally, affords protection against a recalcitrant wife as well.
15. For a remedy based upon an entirely different expedient requiring but a single document rather than four separate instruments and which makes no reference whatsoever to the contingency of divorce see J. David Bleich, "Modern-Day *Agunot*: A Proposed Remedy," *The Jewish Law Annual*, IV (1981), 139-154.