



Shemittah: The Jewish Sabbatical Year

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Shemittah: The Jewish Sabbatical Year (2003 Third Year Paper)

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Shemittah: The Jewish Sabbatical Year

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Abstract

The laws pertaining to the Jewish Sabbatical year are explored. The laws derive from a Biblical commandment to let the land (of Israel) lay fallow every seventh year. The first part of this paper is an exposition of the laws, including the types of agricultural work proscribed and the different prohibitions associated with produce grown during the Sabbatical year. The second part presents an analysis of the controversial ‘‘hetter mechira,’’ the legal device developed by Rabbinic authorities in the 1890s, whereby farmland is sold to a non-Jew to avoid the harsh constraints imposed by observance of the Sabbatical year.

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Introduction

The commandment to let the land lie fallow is seemingly a simple isolated commandment in the Bible. During the seventh year, the land must rest, and what grows of itself is subject to certain dietary restrictions. However, even a perfunctory review of the rich literature on the subject reveals the deeply complex legal issues and deeply meaningful ideological concepts this commandment present. Shemittah¹, the Jewish Sabbatical Year, has long been recognized in Jewish scholarship as embodying the fundamental aspects of the Jewish philosophy of life: human dignity, freedom, equality, trust in God, rejection of the worship of property, support for the poor, and deemphasis of the mundane to free oneself for spiritual pursuits.

The most natural place to begin is the Bible itself, where Shemittah is discussed in several passages:

Six years shall you sow your land and gather in its produce. And in the seventh, you shall leave it untended and unharvested, and the destitute of your people shall eat, and the wildlife of the field shall eat what is left; so shall you do to your vineyard and your olive grove.

Exodus 23: 10-11

¹Alternate spellings include: Shmita, Shemita, Shmitoh, Shemittoh.

God spoke to Moses on Mount Sinai, saying: Speak to the Children of Israel and say to them: When you come into the land that I give you, the land shall observe a Sabbath rest for God. For six years you may sow your field and for six years you may prune your vineyard; and you may gather in its crop. But the seventh year shall be a complete rest for the land, a Sabbath for God; your field you shall not sow and your vineyard you shall not prune. The aftergrowth of your harvest you shall not reap and the grapes you had set aside for yourself you shall not pick; it shall be a year of rest for the land. The Sabbath produce of the land shall be yours to eat, for you, for your servant and for your maidservant; and for your laborer and for your resident who dwell with you. And for your animal and for the beast that is in your land shall all its crop be to eat. You shall count for yourself seven cycles of sabbatical years, seven years seven times; the years of the seven cycles of sabbatical years shall be for you forty-nine years. You shall sound a broken blast of the shofar, in the seventh month, on the tenth of the month; on the Day of Atonement you shall sound the shofar throughout your land. You shall sanctify the fiftieth year and proclaim freedom throughout the land for all its inhabitants; it shall be the Jubilee Year for you, you shall return each man to his ancestral heritage and you shall return each man to his family...The land will give its fruit and you will eat your fill; you will dwell securely upon it. If you will say: What will we eat in the seventh year? Behold! We will not sow and not gather in our crops! I will ordain My blessing for you in the sixth year and it will yield a crop sufficient for the three-year period. You will sow in the eighth year, but you will eat from the old crop; until the ninth year, until the arrival of its crop, you will eat the old.

Leviticus 25: 1-12;19-22

At the end of seven years you shall institute a remission. This is the matter of the remission: Every creditor shall remit his authority over what he has lent his fellow; he shall not press his fellow or his brother, for the Lord's remission has been proclaimed...If your brother, a Hebrew man or woman, will be sold to you, he shall serve you for six years, and in the seventh year you shall send him away from you free. But when you send him away free, you shall not send him away empty-handed. Adorn him generously from our flocks, from your threshing floor, and for your wine-cellar, as the Lord, your God, has blessed you, so shall you give him. You shall remember that you were a slave in the land of Egypt and the Lord, your God, redeemed you; therefore, I command you regarding this matter today.

Deuteronomy 15: 1-2; 12-15

As the passages indicate, there are three different components of Shemittah, the Sabbatical year: the obligation to let the land lie fallow, the obligation to set a Jew who has been

sold as a servant free, and the annulment of debts so that creditors are legally barred from collecting money owed to them. Yovel, the Jubilee year, has an additional feature: hereditary properties are returned to the original owners or their heirs.

Throughout the centuries of Jewish scholarship, the purpose of the Sabbatical year is discussed and pondered. Maimonides sets forth the most straightforward and natural reason for the commandment: let the land rest in order that the land be rejuvenated.² He points to the benefit the land derives from a year of laying fallow. Others, however, are not satisfied with this explanation. They point to passages in the Bible describing the consequences of not keeping the laws of the Sabbatical year -- the exile of the Jewish people from the land.³ If the purpose is the rejuvenation of the land, then the punishment should not be exile of the Jewish people, but rather the natural consequence of depriving the land of its rest - land that is not fertile. Furthermore, the exile of the Jewish people, and the inhabitation of the land by non-Jews who will certainly not observe the Sabbatical year does not serve the purpose of rejuvenating the land!⁴

Two major moral components of the commandment are suggested by scholars: support for the poor⁵ and the rejection of worship of property. Many of the laws of Shemittah are aimed at providing equal access to all. For example, a field owner is obliged to relinquish ownership of the produce that grows of its own accord in the seventh year. He must not lock or otherwise bar access

²Maimonides, Guide to the Perplexed

³See Leviticus 26:33-35, where in a long solemn warning about the consequences of neglect of the Torah laws, the Bible reads: "...And I will scatter you among the nations, I will unsheathe the sword after you; your land will be desolate and your cities will be a ruin. Then the land will be appeased for its sabbaticals during all the years of its desolation, while you are in the hands of your foes; then the land will rest and it will appease for its sabbaticals. All the years of its desolation it will rest, whatever it did not rest during your sabbaticals when you dwelled upon her."

⁴See Commentary of Kli Yakar on Leviticus 25:2.

⁵See e.g. Maimonides, Guide to the Perplexed

to his field, in order that the produce be freely accessible to all. Some of the laws pertaining to the sanctity of such produce place limitations on its sale in order that it should be accessible at a low cost to all. This purpose of supporting the poor is even more pronounced in the closely related laws of Yovel. During the Jubilee (Yovel) year, hereditary properties are returned to their original owners.⁶ This requirement, which took effect every fifty years, served the purpose of avoiding accumulation of land in the hands of a few wealthy land owners, and ensured there would be no landless population. Yovel served to restore the property to the poor man who was forced to sell it, and restore the freedom to a slave who was forced to sell himself for want of money.

Others⁷ discuss how the requirement that one relinquish ownership during the Sabbatical year teaches not to place too much stock in ownership. The laws of the sabbatical year teach that not only are the powers of the individual subsumed under the general rights of the community, but also that individuals do not have the right of exclusive dominance over their own property. This notion is reflected in the verses that require that the produce of this year be available to all people and animals to eat. This theme is also apparent in the laws pertaining to the sanctity of produce grown during the Sabbatical year, which prohibit the disposal or waste of such produce. As destruction is perhaps the clearest expression of ownership, refraining from destroying property is the clearest acknowledgment that the property does not really belong to us.

On a more spiritual level, the observance of the laws of the Sabbatical year is intended to

⁶Upon conquest of the land in the time of Joshua, the land was distributed in an equitable manner among the twelve tribes. Each household was given property within the tribal land.

⁷See e.g. Sefer haChinuch (13th century) commandment # 84

cultivate a sense of trust in God, and serve as a testimony that everything belongs to God. The verses describing the Sabbatical year plainly indicate that it is a test of supreme trust: “The land will give its fruit and you will eat your fill; you will dwell securely upon it. If you will say: What will we eat in the seventh year? Behold! We will not sow and not gather in our crops! I will ordain My blessing for you in the sixth year and it will yield a crop sufficient for the three-year period.”⁸ It is meant to be a test of faith on the national level as well as on the personal level, that God will provide in economic matters. Rabbi S.R. Hirsch writes⁹ that the observance of the Sabbatical year is the greatest act on the part of a whole nation of the recognition that God is the sole, one and real Owner and Master of their land, inasmuch as in that year they lay it in homage at His feet and refrain from exercising their rights of ownership. The year is meant to remind the Jewish people of God’s ownership of the Earth and the fact that all of its produce is only as a result of His allowing it to be produced, as reflected in the verse stressing, for the Land is Mine.¹⁰

In the words of Dr. I. Grunfeld¹¹, the Sabbatical and Jubilee years not only introduce morals, but also metaphysics into economics. Similar to the weekly Sabbath, the Sabbatical year is intended to remind the Jewish people of God’s creation of the world, which in turn reflects on His ability to affect events on earth and perform miracles at will.¹² By renouncing exercise of purposeful control of natural objects and forces, the Jew proclaims God as the source of all power -- one day in seven, and one year in seven. The Bible indicates that the rain and productivity of the soil of Israel are conditioned on the Jewish people’s observance of the

⁸Leviticus 25: 19-21

⁹See commentary to Leviticus 25.

¹⁰Sefer Hachinuch, commandment #84.

¹¹Jewish Dietary Laws, Vol 2, p. 100

¹²Ibid.

law in general, and the laws of Shemittah in particular.¹³ The produce of the land of Israel is thus not only conditioned by agricultural and other physical elements, but by the moral factor of the Jewish people's observance of the law.

In more recent times, the spiritual rejuvenation that observance of Shemittah affords has been stressed. By forcing a Sabbatical year (in the academic sense), God could insure that people would have time to study Torah¹⁴ and to refocus their energies on spiritual matters. As Shemittah is described in the Bible as a "Sabbath for God," its purpose is not only to refrain from certain activity, but also to set aside time for spiritual pursuits. This goal has actually come to fruition in Israel today, as farmers who commit to observance of Shemittah participate in programs of study for the twelve months of the Sabbatical year.

This remainder of this paper will focus on the agricultural, as opposed to fiscal aspects of the Shemittah year: the requirement to let the land lay fallow. The paper is divided into two parts. Part I is a brief exposition of the laws of Shemittah. Part II presents an analysis of the controversial *heter mechira*, the legal device developed by Rabbinic authorities in the 1890s, whereby farmland is sold to a non-Jew to avoid the harsh constraints imposed by observance of Shemittah.

¹³In general, see Deuteronomy 11:13-16 "...if you hearken to My commandments...to love the Lord, your God, and to serve Him with all your heart and with all your soul, then I shall provide rain for your land in its proper time, the early and the late rains, that you may gather in your grain, your wine, and your oil. I shall provide grass in your field for your cattle and you will eat and be satisfied." Shemittah in particular, see Leviticus 25:19, as a reward for observance of the Sabbatical year, The land will give its fruit and you will eat your fill; you will dwell securely upon it."

¹⁴Torah refers to the Pentateuch, but also to the entire body of Biblical and Halachic scholarship.

PART ONE: THE LAWS OF SHEMITTAH

This exposition of the laws of Shemittah is not meant to be comprehensive, but rather to give an overview of the laws and legal issues that arise. In some instances greater attention is paid to differences of opinions among authorities and the differing rationales that lead to the adoption of those views.¹⁵

A. Introduction to Jewish Law

In Jewish Law, the supreme source of law is the Pentateuch, given to Moses at Sinai. The Pentateuch, known in Hebrew as Torah, is the source of all civil, religious and criminal law. The oral law, also given to Moses at Sinai (albeit not in written form) functions to supplement and explain the written Torah. The oral law remained unrecorded in writing until the end of the second century of the Common Era (C.E.) when Rabbi Judah the Prince compiled the Mishna. Centuries of discussion and exegesis of the Mishna were incorporated into the Talmud between the fourth and sixth centuries C.E. The Talmud is therefore not an organized code of black letter law, but a description and discussion of various opinions, which often does not arrive at a definitive conclusion. There are two versions of the Talmud, the Palestinian and the Babylonian, both named after the countries where they were redacted.

In later centuries, scholars attempted to codify Talmudic discussions into an organized code of black letter law. The two most prominent and widely accepted of those codes are Maimonides',¹⁶

¹⁵For an exhaustive treatment of the laws of Shemittah, see Kahana, Mitzvos haAretz; Karp, Mishmeres Hasheviyis.

¹⁶Moses ben Maimonides (1138-1204), renowned medieval scholar, is widely recognized as one of the greatest Torah scholars of all time, and one of the great philosophers of the Middle Ages.

Mishna Torah, compiled in the 12th century, and Rabbi Joseph Caro's Shulchan Aruch¹⁷, compiled in the 16th century. Maimonides' code is more comprehensive in that he incorporated laws that did not apply in his day, such as laws relating to the Temple service, whereas the Shulchan Aruch is limited to laws that were applicable in the 16th century. Since Jews did not populate the land of Israel in the 16th century, Rabbi Caro did not include laws pertaining to agriculture, such as the obligation to tithe produce and the laws of Shemittah. Consequently, this paper will focus on the Maimonides' code. A later code modeled after the Shulchan Aruch dealing solely with agricultural laws applicable in the land of Israel was compiled in the 18th century. This code, entitled Pe'as Hashulchan by Rabbi Israel Mishklov will also be periodically referred to.

Jewish law, or halacha, does not vest the authority to make or adjudicate laws in any clearly defined individual or group. Reconciliation of cases and determination of the law is generally based on a consensus of opinion or an individual who is recognized by the community to have authority due to his scholarship and leadership. Because the Talmud, as a codification of the Oral Law, reflects a range of opinions as to how to interpret the law, students of the law over the centuries have developed a systematic approach as to which of those opinions to accept.

In general, two rules govern the assignment of weight to differing authorities: (1) the time period in which the individual lived, and (2) the stature of the individual. Opinions of earlier

He worked in Spain and Egypt in the twelfth century, and also served as chief physician to the Egyptian Emperor.

¹⁷Rabbi Joseph ben Ephraim Caro (1488- 1575), leader of the Sephardic (The Orient and Mediterranean Rim) school of learning, composed the most authoritative code of Jewish law, which was accepted throughout the Jewish world, and served as the basis for all future development of Jewish law.

authorities carry more weight than those of later authorities. The basic rationale for this approach is that Jewish law presupposes an oral tradition dating back to Moses. The earlier an individual lived, the closer he is in this chain to the original transmission. As an earlier link in the chain, an individual's opinion is considered more reliable. Thus, a clear pronouncement of law from the Talmud will never be questioned by later codifiers or halachists. Where there is disagreement in an earlier source, later halachists, may of course, argue in favor or against a particular side. The general rule that earlier sources are given more deference is especially pronounced as between eras in halachic jurisprudence. The order of these eras are: The Talmud (4th c. -- 6th c.), Gaonim (7th c -- 10th c.), Rishonim (11th c. --15th c.), Acharonim (16th c. -- 19th c.), and contemporary Acharonim (19th c. -- present). Thus, an 18th century halachist will not refute the ruling of Maimonides. (He may however support his opinion by a contrary ruling of a contemporary of Maimonides).

Sometimes, the stature of a particular halachist is such that the law is usually decided in his favor. For example, 16th century halachists and codifiers relied more heavily on the rulings of three codifiers in the Rishonim era (Maimonides, Rif¹⁸ and Rosh¹⁹). The law is rarely decided against their rulings. Although hundreds of commentaries on Maimonides have been written, when there is a dispute in understanding the language or intent of Maimonides, the opinion of the Kesef Mishna (Rabbi Joseph Caro, also the author of Shulchan Aruch) often prevails, due to his stature. In rare cases, the stature of an individual can be so great that it is considered as if he lived in an earlier era. Such is the case of the Vilna Gaon, who lived in the 18th century, but who, in halachic jurisprudence, is considered to have issued rulings

¹⁸Rabbi Yitzchack Alfasi

¹⁹Rabbi Yaakov ben Asher

in the era of the Rishonim.

B. The nature of the obligation of Shemittah today

Jewish Law, is divided into two categories: Biblical and Rabbinic, known in halachic literature as d'oraisa and d'rabanan, respectively. Biblical requirements or prohibitions are either set forth explicitly in the text of the Bible or have been transmitted as part of the oral tradition given to Moses at Sinai. Rabbinic law consists of later decrees and ordinances set up by the Rabbis and often provide additional requirements or prohibitions to ensure compliance with the Biblical law. The classification is not merely a formal one -- it is meaningful and bears on many aspects of the law, including: the stringency associated with the law, the level of consciousness required for a violation, the instances in which exceptions may be made, the status of an object that was obtained through a violation (e.g. fruits grown improperly), and resolution of the law in cases of doubt or uncertainty.

There are some commandments, or parts thereof, whose classification as Biblical applies only when certain conditions are met. The most prevalent example of such a contingency is the existence of the Temple. There are many commandments that clearly depend on the Temple's existence, such as bringing sacrifices and visiting the Temple during the holidays. Those areas of law simply do not apply at all when there is no Temple. Another category of commandments, however, only indirectly depend on the Temple's existence. It is in this category of law that commandments or prohibitions may be reclassified from Biblical (when the Temple exists) to Rabbinic (post-destruction).

Whether the laws connected to the soil of the land of Israel (mitzvos haTluys ba'aretz) are considered Rabbinic after the destruction of the Temple is a complicated and controversial question. It is dealt with in many passages of the Talmud²⁰, and in the writings of Talmudic scholars and halachists from the post-Talmudic times to the modern era²¹.

The controversy is connected to the question of whether the sanctification of the land of Israel continues after the destruction of the Temple. This, in turn, depends on whether the Land is in the possession of the Jewish people. The land of Israel was sanctified twice: by Joshua upon conquest of the land (Kedusha Rishona), and again by Ezra after the return from the Babylonian Exile (Kedusha Shniya). The view of Maimonides and others is that the sanctification of Joshua lapsed upon the Babylonia conquest, but the sanctification of Ezra survived the Roman conquest²². Maimonides explains the difference between the two sanctifications²³: Joshua's was on the basis of conquest alone, whereas Ezra's was on the basis of the legal title of Usucaption (Chazaka) -- since Cyrus permitted the return of Jews to the land. According to this view that the second sanctification is still in effect, the laws pertaining to the soil of Israel (including the laws of Shemittah) would retain their Biblical status even today.

However, the analysis is complicated by another passage in the Talmud²⁴, in which an unusual expression used in the Bible to introduce the laws of Hallah,²⁵ 'B'voachem' (lit. 'when

²⁰Unless otherwise indicated, all referenced to the Talmud refer to the Babylonian Talmud. See Yevomos 16a, 81a, 82b; Kesubos 25a; Niddah 46b; Gittin 36a; Makos 19a; Shabbos 16a; Zevachim 60b.

²¹See Maimonides, Hilchos Trumos 1:5, 22, 26; Hilchos Shemittah v'Yovel 4:25, 9:1, 10:9

²²This view is based on a passage in the Talmud (Yevomos 82b), which interprets Deuteronomy 30:5 to mean that only two sanctifications of the land were necessary since the sanctification brought about by Ezra is forever.

²³See Maimonides, Hilchos Trumos 1:5

²⁴Kesubos 25a

²⁵The laws of Hallah pertain to the land of Israel: the obligation involves separating a portion of bread baked to donate to the Priests working at the Temple.

you come [into the land]''²⁶) is discussed. The Talmud deduces that for Hallah to maintain its Biblical status, the all of the Jewish people must be present in the land of Israel. It follows then, that during the second commonwealth, when some of the Jewish people remained in Babylonia, the laws of Hallah did not apply as Biblical Law. Maimonides extends this principle to the laws of Trumos and Ma'asros (tithing of produce)²⁷.

The foregoing analysis applies to mitzvos haTluyos b'aretz in general, but there are further complications when considering whether Shemittah ought to be considered Biblical or Rabbinic in our time. The Babylonian Talmud²⁸ records a debate as to whether the laws of Shemittah and Yovel are interdependent to the extent that Shemittah only applies as Biblical law when Yovel applies as Biblical law. According to Rabbi, Shemittah law applies as Biblical law only when Yovel applies as Biblical law. According to the Sages, Shemittah law may continue to apply as Biblical even during a time when Yovel does not apply as Biblical law. This in turn, has led to a dispute in later halachic literature about the nature of Shemittah law today. For the majority of authorities who opine Shemittah is Rabbinically ordained today, the logic is as follows: From verses describing Yovel, it is deduced that Yovel only applies when "Kol Yoshveha Aleha"- when all of the Jewish people are in the land of Israel²⁹. Since the condition is not fulfilled today, Yovel, and by inference, Shemittah, no longer apply as Biblical law today³⁰. The other school of thought sides with the Sages, and concludes that regardless of

²⁶Numbers 15:8

²⁷Note this extension of the requirement of Hallah to Trumos and Ma'asros is not accepted by all Talmudic scholars.

²⁸Mo'ed Katan 2b

²⁹Rashi and Tosfos (Erechin 32b) differ as to the meaning of this phrase. Rashi understands "all" to mean literally all of Israel. Tosfos understands "all" to mean "all of the twelve tribes" -- meaning that a representation of each tribe would satisfy this condition. This was especially relevant during the time of the second commonwealth, when all of the Jewish people were not present in the land, but representatives of each tribe were brought back by Jeremiah.

³⁰Some of the authorities holding this view include: Ritva, Rashba, Semag, Semak, Ba'al Yereim, Sefer Hachinnuch, Tur.

the applicability of Yovel, Shemittah is still in its full Biblical force.³¹

There is a third, minority view that Shemittah no longer applies today and that its observance is merely a pious custom.³² In this opinion, although the destruction of the Temple rendered Yovel (and Shemittah by association) Rabbinic, the subsequent abolition of the central court in Jerusalem caused the cessation of Yovel observance completely. This opinion reasons that since Yovel and Shemittah are interdependent (the opinion of Rabbi in the Talmud), the laws of Shemittah also no longer apply.³³

If, as the majority opinion holds, the laws of Shemittah are Rabbinic today, certain leniencies apply. Chiefly, in a case of dispute among authorities regarding any specific law of Shemittah, the more lenient of the opinions may be adopted. Second, in a case of doubt or uncertainty about what has or has not been done, one may rely on the principle ‘‘safek d’rabanana l’kula’’ -- one can make the assumption that results in the more lenient outcome. Regarding the inherent stringency of the laws, due to their classification as Rabbinic, several authorities maintain that although the Biblical stringency does not exist, there is an additional stringency added by the oath the Israelites took during the time of the rebuilding of the second Temple.³⁴ This refers to a passage in the book of Nehemiah:

³¹Some of the authorities holding this view include: Sha’agas Aryeh, Netziv, Beis Halevi, Ridbaz, Aruch Hashulchan and S.R. Hirsch.

³²This view is held by R. Zerachiah ben Isaac haLevi Gerondi (known by the abbreviation Razei)

³³For a more detailed description of the halachic dispute and the three different opinions about the status of the laws of Shemittah today, see Grunfeld, The Jewish Dietary Laws, v.2, p.105 and Karp, Mishmeres HaShviyis, p.25 (fn. 1)

³⁴See Beis Halevi 3:1; Netziv, Meishiv Davar, Kuntrus Hashemittah

The remainder of the people, the Kohanim, the Levites, the gatekeepers, the singers, the Nethinim and everyone who had separated themselves from the peoples of the lands to [accept] Gods Torah, their views, their sons and their daughters, all those who had knowledge [and] understanding, supported their bretheren, their dignitaries, and entered into a curse and an oath to follow God's Torah, which was given through the hand of Moses, the servant of God and to observe and fulfill all the commandments of God, our Lord, and His laws and His decrees; ... and that we would relinquish [the land] and all loans during the seventh year.

Nehemiah 10:29-32 (emphasis added)

According to many, this oath was taken as an oath on future generations to keep the laws of Shemittah.³⁵ As such it carries with it the stringencies associated with oaths.

C. Forbidden agricultural activities during the Shemittah year

Aside from the gross classification of the entire area of Shemittah law as Rabbinic or Biblical today, subclassifications within the laws of Shemittah determine which aspects or laws are Rabbinically or Biblically mandated (these subclassifications apply even during the existence of the Temple, when the entire body of Shemittah law is considered Biblical in nature). The Biblically mandated prohibitions include those that are explicitly mentioned in the text of the Bible: sowing, pruning, reaping and picking³⁶:

your field you shall not sow and your vineyard you shall not prune. The aftergrowth of your harvest you shall not reap and the grapes you had set aside for yourself you shall not pick; it shall be a year of rest for the land.

Leviticus 25:4-5 (emphasis added)

³⁵Chazon Ish 18:4, Netziv, Kuntrus Hashemittah

³⁶Maimonides, Hilchos Shemittah v'Yovel 1:2

Plowing is also a forbidden activity, based on the positive commandment ‘‘you shall desist from plowing and harvesting.’’³⁷ Planting is included by way of logical deduction from sowing and pruning. Since the verse refers only to pruning a vineyard, some authorities maintain that pruning is only biblically prohibited on fruits of the vine, but not other trees.³⁸ Reaping and gathering are forbidden for any fruit or produce that is considered to have the sanctity of the seventh year³⁹, even if it is harvested and gathered after the seventh year. Conversely, produce that is not considered to be sacred may be harvested and gathered even during the seventh year. The reaping and gathering that is forbidden is only that which is performed in the usual manner of reapers and vintagers: reaping the whole field or vine using regular reaping tools. Reaping and gathering grapes in small quantities is permissible.

In order to ensure compliance with the Biblical requirements, the Rabbis mandated that other agricultural activities fall within the prohibition. Specifically, any other type of work one is accustomed to performing in the field, orchard, or vineyard is the subject of this Rabbinic prohibition.⁴⁰ They include, but are not limited to: clearing fields of stones, weeding, manuring, hoeing, and watering. Any type of work necessary for a tree’s existence was not, however, included in this prohibition. Thus, one may engage in any of the Rabbincally prohibited activities if necessary to save the tree.

Note that the Biblical prohibitions of the Shemittah year include agricultural activities but not consumption. As far as Biblical law is concerned, produce is permitted for consumption.

This applies equally to produce sown in the sixth year which grew in the seventh, to the aftergrowth

³⁷Exodus 34:21. See Maimonides, Hilchos Shemittah V’yovel 3:2

³⁸Chazon Ish, Sheviyis 21.

³⁹For a discussion of which produce is imbued with this sanctity, see section entitled ‘‘kedushas sheviyis,’’ infra p. 37,

⁴⁰Maimonides, Hilchos Shemittah V’yovel 1:3-5

or spontaneous growth (sefichim—to be discussed later) caused by the seeds that accidentally fell to the ground and grew on their own in the seventh year, and even to produce which was illegally sown. The Rabbis, however, prohibited consumption of the aftergrowth and of the produce illegally sown to prevent potential transgressors from sowing during the Shemittah year.

D. Upon whom/what does the obligation devolve?

The Biblical source of the laws of Shemittah is the positive commandment ‘‘When you come into the land that I give you, the land shall observe a Sabbath rest for God.’’⁴¹ It is not clear from the verse on whom this obligation devolves. Is it the land-owner or the hired worker who must refrain from working the land? The Talmud in tractate Avoda Zara 15b states that the obligation of the land resting is an obligation on an individual for his own field. The commentary of the Tosfos explains that the obligation is not contingent upon ownership, but rather any Jew who works the land must refrain from doing so during the seventh year. There is fundamental disagreement as to whether the obligation applies to the individual (be it an owner or a worker) or whether it applies to the land itself. Some authorities maintain that the text of the verse ‘‘the land shall observe’’ signifies the obligation applies to the land itself.⁴² The implications of this approach include the prohibition of employing gentiles to work the field. If the obligation is on the land itself, the field may not be worked by

⁴¹Leviticus 25:2

⁴²See the commentary of the Ritva on Avoda Zara 15b. It seems clear that this is the majority view, and although not stated explicitly by Maimonides, it is inferred that he shared this view.

any individual. The question arises, then, of how attenuated the work on the land may be to the initial activity of the Jewish landowner or worker. For example, if a Gentile accidentally spilled seeds onto the land of a Jew, can this be considered a violation of the commandment? Furthermore, if the wind blew seeds onto the land, would this constitute a violation? If it is in fact an obligation on the land, to what extent must the landowner guard his land to ensure that his land indeed “rests” during the seventh year? It seems clear that there must be a more direct causation between the act and the resultant lack of “rest.” The landowner is not responsible for accidental occurrences of the sort mentioned above. It is equally clear that he may not hire a Gentile for the express purpose of working his land.⁴³ It is unclear however, what the obligation is in a case of a Jewish landowner who rented his land to a Gentile. If the rental period coincides exactly with the seventh year, most authorities maintain that the landowner has an obligation to ensure that no work be done on the land. When the rental period overlaps exactly with the Shemittah year, there is a presumption that the Gentile is renting it for the purpose of working it for that year. If however, the rental period includes more than the seventh year, some authorities release the landowner from the obligation of ensuring his land “rest.”⁴⁴ When the rental period is greater than the Shemittah year alone, halacha considers the Shemittah portion of the rental period to be mixed with the other portion, and it is as if the landowner has no knowledge of what transpires on his land.

⁴³See commentary of Tosfos Rid on Moed Katan 3b

⁴⁴Mabit, Vol 2, Chapter 62.

E. Tosefes Shviyis

During the time of the Temple, the laws of shviyis took effect some time before the beginning of the seventh year. The Biblical requirement of tosefes shviyis included the last 30 days of the sixth year. Depending on the type of field, Rabbinic law mandates the laws of shviyis to take effect either from the festival of shavuot (approximately four months before the Jewish New Year, Rosh Hashana) or from the preceding Passover (approximately five and a half months before Rosh Hashana). Since the destruction of the Temple, the consensus is that laws of shviyis do not take effect until Rosh Hashana of the seventh year.⁴⁵ There is some discussion, however, suggesting that tosefes shviyis may apply at a time when the Temple does not exist, if the majority of people living in the land of Israel are Jews. The source of this debate is whether the sanctity of the land, which invokes tosefes shviyis, is restored when Jews return from exile despite the fact that the Temple has not been rebuilt.⁴⁶

Although most of the laws of Shemittah do not apply until Rosh Hashana, a Rabbinic ordinance prohibits the planting of fruit-bearing trees 44 days before Rosh Hashana (this prohibition is thus in effect from the 16th of the month of Av). The source for this number is found in Tractate Sheviyis (Mishna) 2:46 which records a dispute as to whether the prohibition of planting a fruit-bearing tree extends 30 days or 14 days. The Talmud clarifies that the opinions recited refer to the time preceding the 30-day biblically mandated tosefes shviyis⁴⁷. The dispute is resolved in favor of the 14-day opinion, leading to a prohibition of planting fruit bearing trees 44 days preceding Rosh Hashana of the seventh year. The two week period represents the

⁴⁵Maimonides, Hilchos Shemittah v'Yovel, 3:1;

⁴⁶See Tosfos, Rosh Hashana: 9a; Tosfos HaRosh, Moed Katan: 4a.

⁴⁷Tractate Rosh Hashana: 10b

time in which the plant takes root in the soil after the initial planting. The two week prohibition seeks to ensure that the plant will not take root during Shemittah. Despite the fact that no work is being done by the farmer, the consequence of the plant taking root may not occur when the laws of Shemittah apply.⁴⁸ Therefore, the 44 day prohibition ensures that no fruit bearing tree will take root during the biblically mandated 30-day tosefes shviyis period. There are opinions however, that after the destruction of the Temple, when tosefes shviyis does not apply, the 44 day prohibition is reduced to a 14 day prohibition, since the ordinance is merely trying to prevent the taking root during a time where the prohibition actually applies.⁴⁹ A similar Rabbinic ordinance prohibits the planting of non-fruit bearing trees and decorative plants and flowers 14 days before Rosh Hashana of the seventh year. Some vegetables and plants whose stalks are low are subject to shorter three day prohibition, since they are thought to take root within 3 days after planting.⁵⁰ There is a view, however, held by Chazon Ish, that one may plant such trees and plants until the eve of Rosh Hashana.⁵¹ In his opinion, the initial prohibition was not intended to prevent plants from taking root during shviyis or tosefes shviyis, but was rather a flat prohibition against planting during tosefes shviyis. Since tosefes shviyis no longer applies, the Chazon Ish maintains that one may plant until the eve of Rosh Hashana.

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⁴⁸This reflects the notion that the prohibitions of shemittah devolve not only the individual, but on the land. Despite the fact that the individual is not engaging in any activity, since the land is not "resting," but rather is taking root, this constitutes a violation of shemittah laws.

⁴⁹See the commentaries of the Rash and Meiri on Rosh Hashana 10b. The opinion that the 44 day prohibition is reduced to a 14 day prohibition in our days is not unanimous because there is a difference of opinion as to the reason for the 44 days. Other considerations, beyond the scope of this paper, relate to a separate area of halacha, orla (the prohibition of eating the fruits of a tree during its first three years) and lead other authorities to conclude that the 44 day prohibition should be in place, regardless of the existence of tosefes shviyis. (Those authorities include Nachmanides (Ramban) and Rashba). In cases where it is clear that the considerations of orla do apply, there is a unanimous consensus that the prohibition begins only 14 days before Rosh Hashana, or on the 14th day of the Jewish month of Elul.

⁵⁰Terumas Hadeshen, 191.

⁵¹Chazon Ish 25:3

⁵²Due to the considerations of orla, however, Chazon Ish only allows the planting of non-fruit

One who planted during this prohibited time, and subsequently realized his error, must uproot the plant.⁵³

If, however, he neglected to uproot the tree, most authorities maintain that the fruits may be eaten.⁵⁴ Other authorities, such as Nachmanides, adopt the more stringent view that the fruits of such a tree are forbidden.

F. Hefker – abandonment of ownership

Anyone who owns a field, vineyard or orchard must relinquish absolute ownership of them so as to guarantee free access to all those who want to collect or eat the produce in his field during the Shemittah year.⁵⁵ He must relinquish ownership of the fruit, but need not relinquish ownership of the branches from which the fruit grow or trees that do not bear fruit. Hefker (relinquishment of ownership) can only be accomplished when the owner allows access to his field, vineyard or orchard. He may not surround it with a locked gate or otherwise hinder people from gaining access to his fruit. The requirement is that there must be equal access to all -- one may not even try to hinder the efforts of the wealthy to gain access to his fruits in efforts to save them for the poor.⁵⁶ If his field is in a place where it is likely people will misuse or waste the produce, or that people will gather more than is permissible by the laws of Shemittah, the field-owner may place a guard in his field to prevent these activities. The guard may not, however, deny access to anyone wishing to pick the fruits in permissible bearing trees or other trees to which the considerations of orla do not apply.

⁵³Tractate Sheviyis: 2:46

⁵⁴Jerusalem Talmud, Sheviyis 2:4; Maimonides, Hilchos Shemittah v'Yovel 3:11

⁵⁵Maimonides, Hilchos Shemittah v'Yovel 4:24

⁵⁶see commentary of Nachmanides on Leviticus 25

ways. Additionally, an owner may not gather in all the fruit in his orchard, since it must be made available to all. He may gather in fruit only to meet his family's needs.

An owner may guard his field from animals for the purpose of preventing destruction of crops and fruits. If however, an animal does gain access to the field or orchard, the owner of the animal is not required to repay the owner of the field for the destruction or consumption of the produce. (Normally, the animal's owner would be required to repay).⁵⁷

The issue of *hefker* has implications for non-owners as well. If a field-owner wrongfully does not relinquish ownership of his produce, are others nonetheless permitted to take from the produce? This depends on whether the requirement to renounce ownership is viewed as a commandment or a decree. If it is merely a commandment to the field-owner, then it would be theft for anyone else to take from it. The majority opinion, however, seems to reflect the notion that *hefker* is a decree. In other words, the fruit themselves are considered legally to be ownerless even though the owner has not relinquished ownership. Those who wish to pick *Shemittah* produce may do so without concern they will transgress the laws of trespassing or theft. There is a minority view, however, that the relinquishment of ownership (symbolized by unlocking a gate etc.) is necessary for the fruits to become legally ownerless.⁵⁸

Although the fruits are ownerless, one who seeks to collect them should ask permission to enter the field or orchard. It is proper to ask permission so that Jews will not become accustomed to entering others' fields and disregarding property rights (after the *Shemittah* year has passed). Since the fruits are legally ownerless, one who collects produce may not pay the owner of the field. He may nevertheless

⁵⁷Maimonides, *Hilchos Shemittah v'Yovel* 5:5

⁵⁸For a detailed analysis of this dispute, see *Minchas Chinuch*, Commandment 82.

thank the owner of the field, presumably for access to his property (and not for the fruits themselves).

There is a dispute amongst early authorities about the consequences of failing to relinquish ownership of the Shemittah produce. The dispute is based on the understanding of two derivations from a passage in Leviticus. The Bible states “and the grapes which you have set aside for yourselves you shall not pick.” On the first portion of this passage, the Sages said⁵⁹: “you cannot pick what you have guarded (set aside for yourselves), but you may pick what you have left ownerless.” From the words “you shall not pick,” the Sages deduced “you may not pick in the manner of the pickers but only with a deviation.” Early commentators on the Talmud struggled with what these derivations were meant to teach.

Some started out by saying that the first derivation cannot be taken literally.⁶⁰ Since the Bible tells us in other places that reaping is prohibited during Shemittah regardless of whether the produce is guarded or ownerless, the first derivation cannot be saying that reaping of ownerless produce is permissible. Instead, they say that the first derivation teaches that produce which grows while being guarded may not be consumed while produce which grows when not being guarded may be consumed. Having understood the first derivation this way, these authorities understand the second derivation to be saying that the prohibition on reaping ownerless produce only applies to reaping done in the normal manner. Reaping with a deviation is permitted with regard to ownerless produce. Produce to which ownership has not been relinquished, however, may not be reaped even with a deviation.

⁵⁹Toras Kohanim (compilation of early (pre-Talmudic) Rabbinic interpretations on Leviticus)

⁶⁰This is the view of the Tosfos.

Other authorities⁶¹ understand the first derivation quite literally. They take it to mean that reaping of produce to which ownership has not been relinquished is prohibited while reaping of ownerless produce is permitted. The second derivation comes to add that even with regard to currently owned produce, reaping is permitted if performed with a deviation. Thus, while the first approach forbids the picking of guarded produce under all circumstances, this approach allows picking such produce with a deviation.

Furthermore, because of the way the second school of thought understands the first derivation, they do not say that produce which grows while being guarded is prohibited for consumption. Instead, they see ‘‘guarded’’ produce as a prohibited state. As long as one changes that state from ‘‘guarded’’ to ‘‘ownerless’’ before the produce is cut down, the produce may be eaten (the relinquishment of ownership may be done immediately prior to cutting). The first school of thought, on the other hand, maintain that all growth which takes place while the fruit is owned is prohibited growth. In order for the produce to be permitted, one must make the produce ownerless and then allow it to grow for a longer period of time while ownerless than it grew while it was owned. In this way, a majority of the fruit which you reap will be permitted. Based on the principle in Jewish law that we follow the majority, the entire fruit is thus permissible.

Although there is disagreement over the status of produce grown in a guarded (or ‘‘owned’’) field, there is more agreement among halachists that produce grown in contravention of the agricultural laws of Shemittah is prohibited for consumption. This category is known as ‘‘ne’evad’’ or ‘‘worked.’’ For example, produce grown from seeds sown during the seventh year, or produce

⁶¹This is the view of Rashi.

grown on a field which was ploughed is prohibited. There is some dispute regarding the status of produce grown in a field which was worked, but where the work involved did not have a direct effect on the produce. For example, the removal of stones is considered prohibited agricultural work during the Shemittah year, but produce grown in a field whose rocks were removed may nonetheless be eaten.

G. Determining to which year a crop belongs

The year to which a crop belongs is relevant for several reasons: (a) Produce which grew during the seventh year must be made ‘‘ownerless’’ (hefker). Everyone must have an equal right to produce grown. Consequently, there is no obligation to tithe the produce of the seventh year (no obligation of trumos and ma’asros); (b) produce of the seventh year has ‘‘kedushas sheviyis’’ -- it must be treated with respect and not wasted; (c) money given in exchange for Shemittah produce has the status of ‘‘dmei sheviyis’’ -- and certain prohibitions apply regarding the use such money.

Whether a fruit is considered produce of the seventh year depends on whether it reached the stage of ‘‘chanata’’ at any point during the year. Chanata is defined as the stage in which formation of the fruit appears blossoming out. Fruit which reached this point during the sixth year and are still growing on the tree when the Shemittah year begins are considered produce of the sixth year.⁶²

⁶²Maimonides, Hilchos Shemittah v’Yovel 4:9

The Talmud discusses the different standards for determining to what year produce other than fruit belongs. Grains, grapes and olives are considered the produce of the seventh year if they complete the first third of their ripeness within the seventh year.⁶³ The standard for vegetables is if they have their ‘‘lekita’’ (picking) within that year.⁶⁴ Other legumes such as rice, millet and sesame are considered part of the Shemittah year if they merely take root during this year. The Talmud explains the reason for this last category: although legumes may be sown at the same time, they do not ripen at the same time. Since they ripen, and may be picked at different times, perhaps spanning the date on which the new year begins, lekita (picking) is not a workable standard.⁶⁵

H. Sefichim- produce grown spontaneously

Sefichim refers to all spontaneous growth. Some examples include seeds which fell from produce during harvesting and took root themselves; produce which grew from roots left in the ground after the last harvest; wild herbs and vegetables. Tree fruit are also a form of sefichim since although the tree was planted intentionally, the fruit grow by themselves.

The general rule is that crops that could be intentionally sown and later claimed to have spontaneously grown are prohibited. Thus, vegetables, grains and legumes that grow spontaneously are prohibited.⁶⁶ Since trees do not bear fruit for some time after planting, people are not suspected of sowing them during Shemittah and later claiming they grew spontaneously.

⁶³Talmud, Rosh Hashana 13b

⁶⁴There is a dispute, however as to what ‘‘picking’’ means. For a clear explication of the opinions of Rabbi Yossi Hagligi and Rabbi Akiva in the Talmud, see Marchant, Understanding Shmittah, pp. 132-135

⁶⁵Ibid.

⁶⁶Maimonides, Hilchos Shemittah V’Yovel 4:10

The Talmud records a dispute as to whether the prohibition of sefichim is Biblical or Rabbinic in nature.⁶⁷ In general, for a law to be considered Biblical, it must have some direct link to a verse in the Bible. Rabbi Akiva proposes such a link for sefichim in the verse ‘‘and should you say ‘what shall we eat during the seventh year, behold, we are not to sow and we are not to pick (gather in) our produce’’⁶⁸ Rabbi Akiva reasons that if there is no sowing, then obviously there will be no produce for picking, if not for sefichim. Thus, the verse must be referring to crops that grow spontaneously (the verse means to say ‘‘what shall we eat during the seventh year, behold we are not to sow and we are not even to pick produce which was not intentionally sown by us and grew by itself.’’) The Sages reject this reasoning and understand the verse in the following manner: even if sowing is prohibited, it is necessary to prohibit picking as well because of the obligation of biyur. (When a type of food no longer exists in the field, available to all, no stocks of it can be kept. The obligation of ‘‘biyur’’-divest oneself of ownership of these products, sets in). The Sages understand the verse to mean ‘‘behold we are forbidden to sow, what we have gathered into storage, You tell us to dispose of (biyur), therefore, what shall we eat if we cannot pick?’’ Although the Sages are not willing to recognize a Biblical prohibition against the consumption of sefichim, they recognize a Rabbinical decree. The Rabbinical decree was made for the purpose of ensuring that individuals will not secretly sow vegetables during Shemittah and claim that they grew wild. The Biblical verse ‘‘The Sabbath produce of the land shall be yours to eat’’⁶⁹ is referring to the fruit of the tree, which is not included in the prohibition against sefichim.

According to the Sages, the decree prohibits the consumption of sefichim as well as deriving

⁶⁷Pesachim 51a

⁶⁸Leviticus 25:20

⁶⁹Leviticus 25:6

any benefit from them. According to Rabbi Akiva, the Biblical prohibition is only against consumption, since the verse refers only to eating.

Although sefichim are generally prohibited, there are four types of fields in which there is no prohibition.⁷⁰ These types of fields are exceptions because it is not likely they would be cultivated, or cultivation would be against the owner's interest. They are: (a) sadeh bor: a field where difficult conditions of the areas make it unlikely that people would sow in it; (b) sadeh nir: a field which has not yet been ploughed and needs to be free of plantation (it is against the owner's best interests to sow there); (c) sadeh kerem: a vineyard (one would not intentionally sow vegetables in his vineyard), and (d) sadeh zerah: a field which is sown with fenugreek (people would not sow other vegetables there since it would spoil the fenugreek.)

The prohibition of sefichim applies equally to produce grown and picked during the seventh year and to produce grown during the seventh year but picked during the eighth year.⁷¹ The Rabbinical decree extended this far to prevent people from picking sefichim during Shemittah and storing them until the eighth year, claiming that they were picked during the eighth year, in order to sell them. The prohibition of produce picked during the eighth year extends until the time each particular species could have grown and ripened had it been sown after the start of the eighth year. If a particular species would not have reached this stage by the time of Hannukah (25th day of Kislev, approximately 3 months after the start of the new year), its sefichim are nonetheless permitted, since it is unlikely that one would store produce illegally picked during the seventh year for that long.⁷²

⁷⁰Maimonides, Hilchos Shemittah V'Yovel 4:4

⁷¹Maimonides, Hilchos Shemittah V'Yovel 4:10

⁷²Maimonides, Hilchos Shemittah V'Yovel 4:6

I. Kedushas Sheviyis

Produce of the seventh year which is permitted for consumption (fruit of trees and certain vegetables and legumes that escape the reach of the sefichim prohibition) are subject to certain rules due to the sanctity inherent in them. Kedushas Sheviyis (lit. ‘‘sanctity of the seventh year’’) is said to apply to such produce.

The produce must be used only in the ways described by the Biblical passage:

The Sabbath produce of the land shall be yours to eat, for you, for your servant and for your maidservant; and for your laborer and for your resident who dwell with you. And for your animal and for the beast that is in your land shall all its crop be to eat.

Leviticus 25:6-7

The Mishna⁷³ derives that the produce of the seventh year may be used only for food and drink, for anointing, for lighting purposes, and for dyeing. Food that is suitable for human consumption may not be used for food for cattle. Similarly, food gathered for human consumption may not be used as ointment. The general rule set forth in the Mishna is that the produce must be used for its customary purpose: wine may be used for drinking, not for steeping or washing; oil may be used as an emollient, but not for drinking; food generally eaten cooked may not be eaten raw and vice versa. Although the verse is written in the imperative, there is no obligation to eat the produce of the seventh year -- the passage merely permits consumption in this manner.⁷⁴

⁷³Tractate Sheviyis, chapters 7,8

⁷⁴But Cf. Nachmanides, Pos. Comm. 3. For a discussion on whether Nachmanides maintains a positive obligation to consume produce of the seventh year, see Karp, Mishmeres Hasheviyis, p.193, fn. 1

The produce must be used in a manner of optimum utility: it must not be thrown away, wasted, or treated in an undignified manner.⁷⁵ This applies to any amount of food for human or animal consumption, even a seemingly insignificant amount. Even if fruit is no longer edible for man or animals, if it may be used for dyeing or anointing, it may not be discarded.⁷⁶ Leftovers may not be discarded, but must be placed in a container until they decay. Once it is no longer fit for animal food, it may be discarded. Despite the obligation not to waste or discard produce of the seventh year, there is no obligation to preserve it. For example, a vegetable soup to which kedushas sheviyis applies need not be refrigerated to prevent its spoiling. On the other hand, one may not hasten the spoiling or decay of leftover food by placing it in a container with food that has already begun to decay.

Kedushas Sheviyis attaches not only to the produce itself, but also to anything imbued with its taste. Even water used to cook Shemittah produce must be treated with the same deference.⁷⁷ Kedushas Sheviyis also attaches to the peel and pit of Shemittah produce, if such parts of the fruit can either be consumed or used for other purposes. Pits that are soft and may be used to extract oil, like the pits of an olive may not be discarded. The same is true of pits that may be eaten by animals such as the pits of dates and carobs. Furthermore, care must be taken not to discard inedible pits such as that of peaches and apricots if some flesh of the fruit still remains attached. Edible peel also are subject to the laws of Kedushas Sheviyis. Although one may peel an apple or pear in the usual manner, the peels may not be discarded, but rather must be placed in a separate container until they decay and are no longer fit for consumption by an animal. Examples of peels that are not considered fit for any use are garlic

⁷⁵Maimonides, Hilchos Shemittah V'Yovel 5:17-18

⁷⁶Ibid, 5:7

⁷⁷Sternbuch, Shemitta K'hilckisa 3:1

peels and onion peels.⁷⁸

Whether kedushas sheviyis attaches to produce grown on lands belonging to a non-Jew in the land of Israel is a debated issue. Maimonides writes that the fruit sown and grown on the field of Gentile in the seventh year are permitted.⁷⁹ Commentaries on Maimonides explain that the fruit are permitted completely -- and do not have the restrictions of kedushas sheviyis associated with them. Other halachists understand Maimonides' designation of the fruit as 'permitted' to mean that the produce, including sefichim are permitted to be eaten, but that all produce retains kedushas sheviyis.⁸⁰ Their reasoning is based on the principle that the sale of land to a non-Jew does not revoke the sanctity of the land. Different customs exist regarding this issue in Israel today. The custom in Jerusalem and in northern parts of Israel is to consider such produce lacking in kedushas sheviyis.

J. Prohibition on selling Shemittah produce

Another restriction flowing from the sanctity of Shemittah produce is the prohibition on its sale. Since the verse stipulates that "the Sabbath produce of the land shall be yours to eat," one may not sell produce that has kedushas sheviyis.⁸¹ The restriction on sale is primarily due to the inherent sanctity of the fruits, but it also ensures that the produce remains "ownerless" in the sense that one cannot claim monetary rights in the produce.⁸²

⁷⁸For a more detailed discussion of these laws, see Karp, *Mishmeres Sheviyis*, chapter 16

⁷⁹*Hilchos Shemittah V'Yovel*, 4:29

⁸⁰Primarily Mabit. See also Chazon Ish.

⁸¹Talmud, Bechoros 12b, Avoda Zara 62a

⁸²This is the opinion of Netziv

The Talmud⁸³ attached great significance to this prohibition and declared that one who transacts business with Shemittah produce will eventually be forced to sell his personal belongings. Such admonitions are meant to warn that those who seek to profit from prohibited activity will ultimately become impoverished.

This prohibition is chiefly aimed at those who would pick the fruit and then sell it in the marketplace. It is also meant to prohibit the purchase of Shemittah produce at a low cost in order to sell at a profit.⁸⁴ The guiding principle in determining what manners of sale are permissible is whether it has the appearance of the normal course of business transactions. Thus, one may sell the leftover produce he collected, since this is not the normal course of business. Furthermore, one may have another sell produce he collected, since this was not the normal course of business either. Others explain that these exceptions are meant to exclude activities that will not yield a great profit.⁸⁵

Even when one sells the produce in a permitted manner (through a third party or selling his leftover produce), his sale may not resemble an ordinary sale. Thus, he may not sell produce in the marketplace, but rather from his home or on a side street. Additionally, he may not weigh the produce and charge by weight. This is intended to have the effect of the produce being sold at a lower price than it would ordinarily sell for. Again, the purpose is to ensure equal access for all to the Shemittah produce. These restrictions on the manner of sale are also intended to set the produce apart, so that buyers are aware the fruits are fruits of Shemittah, to which kedushas sheviyis applies.

Use of Shemittah produce to repay a debt is considered a sale and is similarly prohibited.

⁸³Succah 40b, Kiddushin 20a.

⁸⁴Tractate Sheviyis 7:3. See also Maimonides, Hilchos Shemittah v'Yovel 6:2

⁸⁵Aruch Hashulchan, §25

Similarly, one may not use Shemittah produce to pay workers or other fees. The sale of Shemittah produce may only be done in exchange for food items or money. As will be discussed in the next section, the sanctity associated with the produce is transferred to the money received in exchange. Thus, one who sells Shemittah produce may not receive in exchange an item which cannot (ritually) bear this sanctity (such as a wild animal).

K. Dmei Sheviyis

The sanctity inherent in Shemittah produce is transferable upon sale. Thus, the money or food received in exchange for Shemittah produce is considered to have kedushas sheviyis. For food items, the rules of kedushas sheviyis apply just as they do to Shemittah produce (i.e. the food may not be wasted or otherwise treated in a disgraceful manner).

Money that is received in exchange for Shemittah produce may not be used to satisfy debts or loans, to pay workers, or even to satisfy charity obligations. (Jewish law requires individuals to give one tenth of their earnings to charity. Monies received for Shemittah produce may not be used to satisfy this obligation). The money may be given as charity (beyond the 10% requirement), provided that the recipient is made aware that the money has kedushas sheviyis. The money may also be used to purchase food items, which in turn must be treated with the same dignity as the original Shemittah produce itself.

L. Biyur

Tree fruits of the seventh year and vegetables sown in the sixth year and picked during Shemittah may be consumed. Such produce that has been gathered in may be stored up and eaten only as long as the same kind of produce is still available in the field. Once there is no more of a particular species left in the field, an individual may retain enough of the food for three additional meals, and then must remove the rest of that species in his house or storage place. This is known as the obligation of biyur (lit. ‘‘removal’’). It applies equally to money received in exchange for Shemittah produce.

The obligation is derived by the Talmud⁸⁶ from the verse ‘‘And for your animal and for the beast that is in your land shall all its crop be to eat’’⁸⁷ The Talmud poses the question: if the verse stipulates that the food shall be for the wild beast of the field, isn’t it clear that the produce would also be for domestic animals (whose nourishment the owner is responsible for!)? The Talmud thus interprets the verse to be drawing a parallel between wild beasts and domestic animals: as long as the beast can eat from the field, domestic animals may also eat; once there is no more produce in the field for the beast, you must ensure that there is no more of that produce for the domestic animal either. Maimonides⁸⁸ explains that the obligation to remove produce includes not only food for animal consumption, but also produce for human consumption that remains in the owner’s home.

The purpose of this obligation is to ensure that all have equal access to Shemittah produce.

The produce the land bears is ownerless and the obligation of biyur ensures that the owner

⁸⁶Pesachim 52b

⁸⁷Leviticus 25:7

⁸⁸Hilchos Shemittah V’Yovel 7:1

of the field may only have use of its produce in participation with all others.⁸⁹ It prevents the field owner from hoarding produce in effort to save it for himself -- when there is no more of that type of produce left in the field, he must remove that which he stored.

The manner in which the removal of the Shemittah produce, or the money substitute for them, must be carried out is a controversial matter among commentators and halachists. Maimonides is of the view that the produce must be burned or discarded in the ocean, and it remains forbidden for consumption. Nachmanides holds the view predominantly accepted by most later halachists⁹⁰: Biyur is accomplished by taking the food to a public place and declaring it ownerless. ‘‘Removal’’ in this view does not refer to removal from existence, but rather removal from individual ownership.⁹¹ Once the produce is declared ownerless, the individual may again take the fruit and eat them. According to both opinions, when the time of biyur has passed for a given fruit, if biyur was not accomplished, the fruits are forbidden to all. While most later halachists hold this second view, it is the practice of many Sephardic Jews (of Spanish/Moroccan descent) to follow the opinion of Maimonides.

The time the obligation of biyur sets in obviously differs depending on the type of fruit or vegetable. It is the responsibility of the Rabbinat to research the dates in which types of produce are no longer available, and to publish their findings. As some of these dates may be poor estimates, many authorities maintain that for a certain period surrounding the date, an individual should perform biyur on produce in his possession every day. Since the produce becomes forbidden if the time of biyur passes, this ensures that the individual never consumes forbidden fruit.

⁸⁹See S.R. Hirsch's commentary on Leviticus 25:6-7

⁹⁰Including Pe'as Hashulchan, Chazon Ish.

⁹¹See Commentary of Nachmanides on Leviticus 25:5-7

M. The institution of Otzar Beis Din

As mentioned previously, one of the main purposes of Shemittah is to ensure equal access to produce of the land to all. The prohibition on sale, however, seriously undermines this goal. Israel is not an exclusively rural land. Although in theory, the produce is ownerless and may be collected by anyone to meet his needs, practically, this is an impossibility for residents of cities. If farmers are not permitted to bring produce to the cities for sale, city dwellers would be left without produce.

In order to deal with this problem, the Rabbis of the Talmudic era instituted storehouses in each city to be supervised by the Beis Din, the court. At the time each type of fruit became ripe, the court would send representatives to collect figs, grapes, olives etc. and store them in the storehouse. Each week, the produce would be distributed to the people.

Despite the description of this practice in early literature, the reestablishment of such storehouses upon the return of the Jews to Israel in modern times was seriously debated. Those who opposed the reestablishment of such storehouses has two primary concerns. The first concern was that that farmers would not be following the laws of hefker: guarding produce, even for the purpose of sending it to an storehouse, runs afoul of the principles of hefker. The second concern raised questions about whether the practice resulted in neglecting the obligation of biyur⁹².

⁹²See Ridbaz, 7:3

N. Boundaries of the land of Israel

In order for proper observance of the laws of Shemittah, it is imperative to know the boundaries of land of Israel. The boundaries circumscribing the land the Bible considers to be holy land do not necessarily match the boundaries of a present day map of Israel.

The laws of Shemittah also do not apply equally in all areas of Israel. The Mishna⁹³ divides the land into two categories: the land conquered by those who came from Egypt (with Joshua), and the land reinhabited by the returnees from the Babylonian exile. As was discussed earlier, the first sanctification of the land by Joshua expired upon the destruction of the temple and the exile of the Jewish nation, whereas the second sanctification of the land by Ezra upon return from Babylonia lasts forever. Thus, land in this second category is subject to all the laws of Shemittah, including agricultural work and prohibitions on consumption. Land merely conquered by Joshua but not reinhabited by the Babylonian returnees is subject to fewer of laws: the agricultural laws prohibiting work on the land certainly apply, prohibition on consumption of sefichim do not, and it is questionable whether kedusha sheviyis attaches and whether there is an obligation of biyur in these areas. Furthermore, produce grown from land that was worked in contravention of the Shemittah laws in this area may nevertheless be consumed.

There is considerable dispute as to the boundaries of the land conquered by Joshua and the land reinhabited by the Babylonian exiles. It is clear however, that there is some territory in present day Israel that was only conquered by Joshua and not reinhabited -- rendering it subject to fewer of the laws of Shemittah. It is beyond the scope of this paper to discuss

⁹³Tractate Sheviyis 6:1

the different opinions regarding the boundaries.⁹⁴

O. Counting the Shemittah cycle

Determining exactly when Shemittah occurs is a complex topic in the literature. In order to assess what stage a given year is in the Shemittah cycle, it is important to trace the observance of Shemittah from the first time Shemittah was observed.

The Bible does not specify a fixed time for the beginning of Shemittah observance, but rather states:

God spoke to Moses on Mount Sinai, saying: Speak to the Children of Israel and say to them: When you come into the land that I give you, the land shall observe a Sabbath rest for God. For six years you may sow your field and for six years you may prune your vineyard; and you may gather in its crop. But the seventh year shall be a complete rest for the land, a Sabbath for God; your field you shall not sow and your vineyard you shall not prune.

Leviticus 25:1-2 (emphasis added)

The Talmud⁹⁵ explains that the first Shemittah cycle began after the Jewish people inherited the land of Israel -- i.e. when the land was ‘‘given’’ to them in accordance with the verse. When the Jews entered the land of Israel with Joshua, there was a seven year conquest period followed by a seven year period in which the land was distributed among the tribes. It was only after these fourteen years that individual ownership over land existed. This fourteen year period of conquest and distribution was a prerequisite to the laws of Shemittah—without

⁹⁴For an overview of the different opinions with a map, see Edri, Shabas Ha'aretz, p. 132

⁹⁵Arachin, 12b

distribution of lands, a farmer would not be able to identify which is ‘his vineyard’ and ‘his field.’ Thus, the Shemittah cycle began fourteen years after entry into the land of Israel (which occurred on the 10th of Nissan in the Jewish year 2488), resulting in the first Shemittah being observed twenty one years after entry into the land (2509).

There is a dispute in the Talmud⁹⁶ over the chronological relationship between Shemittah and Yovel. The Bible declares Shemittah to occur every seven years, and Yovel to occur every fifty years -- after the completion of seven cycles of Shemittah. The Sages maintain that the Yovel year is not part of the following Shemittah cycle, whereas Rabbi Yehudah maintains that Yovel, the 50th year, is also the first year of the next Shemittah cycle. Obviously, this dispute has chronological consequences that affect the reckoning of the Shemittah year.

For convenience, the observance of Shemittah and Yovel for the purpose of reckoning the Shemittah year is divided into three time periods: (1) from the beginning of the first Shemittah cycle fourteen years after entry to the land of Israel until the destruction of the first Temple; (2) From the destruction of the first Temple to the rebuilding of the second Temple; and (3) from the building of the second Temple to its destruction.

The first period

It is clear from Scripture⁹⁷ that the first Temple was constructed 480 years after the Jews left Egypt, and that the Temple stood 410 years until its destruction in the year 3338. After deducting the 40 years the Jews spent wandering in the desert and the first 14 years of conquest and distribution of the land, we arrive at the conclusion that the construction of the temple

⁹⁶Nedarim 61a, Rosh Hashana 9a

⁹⁷I Kings 6:1

occurred 426 years after the beginning of the first Shemittah cycle. Thus, the first period of Shemittah observance extended 836 years (426 + 410).

According to the Sages (Yovel is counted separately and not part of the Shemittah cycle), the Jews observed sixteen Yovels (sixteen Yovels in 800 years), and the destruction took place in the thirty sixth year of the seventeenth Yovel. Accordingly, the destruction took place in the first year of a Shemittah cycle (the thirty fifth year was a Shemittah year). This is consistent with the Talmudic passage⁹⁸ reporting that the Temple was destroyed on the ninth of Av in a year following a Sabbatical year.

According to Rabbi Yehudah, (Yovel is counted as part of the next Shemittah cycle), to determine the number of Yovel years in a given time period, one divides by 49 instead of 50. In the 836 years of Shemittah observance, then, the Jews observed seventeen Yovels, and the destruction took place in the third year of the next Yovel cycle (which is also the third year of the next Shemittah cycle). However, according to some, the counting of Yovel years during this period was interrupted by the exile of the trans-Jordanian tribes (Reuven, Gad, and half of Menasheh). In the previous discussion on the applicability of Shemittah in our days (supra p. 18), the requirement of ‘‘Kol Yoshveha Aleha’’ for the observance of Yovel was explained. All of the Jewish people, or at least a representative of each of the tribes must be present in the land in order to observe Yovel. Thus the counting of Yovel may have been interrupted by the exile of the trans-Jordanian tribes. When Jeremiah brought these tribes back in the eighteenth year of the rule of King Josiah the counting of Yovel resumed, with the eighteenth year of Josiah’s rule being the first year of a Yovel cycle.⁹⁹ There were 36 years from the eighteenth year

⁹⁸Taanis 29a

⁹⁹Seder Olam, Chapter 24. See Grunfeld, The Jewish Dietary Laws, p. 187

of Josiah's rule to the destruction of the temple (fourteen more years under Josiah's rule, eleven years under Jehoyakim, and eleven years under Zedkiah's rule). Thus, according to this reckoning, the destruction took place in the 36th year of a Yovel cycle, the year after Shemittah. (This reckoning is consistent with that of the Sages, and with the Talmud's report that the Temple was destroyed in a year following a Sabbatical year)

The second and third periods

After the destruction of the first Temple, it is clear that Yovel was no longer observed. The question arises, however, of whether or not the Jews counted the Yovel year in order to preserve the proper reckoning of the Shemittah cycle.¹⁰⁰ It seems that Maimonides follows the view of the Sages that the Yovel years were counted, despite the fact that the laws of Yovel were not observed.¹⁰¹ He submits, however, to the view of the Geonim (since they had an uninterrupted chain of transmission) that during the seventy years of Babylonian exile and after the destruction of the second Temple, Yovel was not counted. In the view of the Geonim, during the time of the Temple, Yovel was counted as a separate year (in accordance with the opinion of the Sages in Nedarim 61a), whereas after the destruction Yovel was counted as part of the next Shemittah cycle (in accordance with the opinion of Rabbi Yehudah).^{102 103}

There are also opinions that during the time of the second Temple, not only was the Yovel year counted to preserve the reckoning of the Shemittah year, but it was actually observed since Jeremiah brought

¹⁰⁰see Talmud Arachin, where this dispute is found.

¹⁰¹Hilchos Shemittah V'Yovel 10:47

¹⁰²Note that the "counting" according to the method of Rabbi Yehuda (where the Yovel year does not occupy time aside from the Shemittah cycle), is the equivalent of "not counting" the Yovel year. Either way, Shemittah occurs every seven years. (Contrast this with "counting" the Yovel year by the method of the Sages, where Shemittah occurs every seven years for forty nine years, at which point the cycle pauses for Yovel and resumes in the fifty first year).

¹⁰³For a detailed explanation of the view of the Geonim, see commentary of R. Meir Simcha HaKohen (entitled Meshech Chochmah) on Leviticus 25. See also Chidushei R. Chayim Halevy (commentary on Maimonides) Hilchos Shemittah v'Yovel, ch. 10)

back representatives from each of the 10 exiled tribes in fulfillment of the ‘‘Kol Yoshveha Aleha’’ requirement.

Post destruction of the second Temple

It is clear that after the destruction of the second Temple, the law follows the view of Rabbi Yehudah, namely that Yovel is part of the Shemittah cycle, and thus, Shemittah cycles follow each other in uninterrupted succession. It is also apparent from the Talmud¹⁰⁴ that the destruction of the second Temple, like that of the first, coincided with the end of Shemittah. The year of destruction, therefore, begins the new cycle of Shemittah counting until our day. This would be a straightforward calculation if not for the dispute over when the destruction actually occurred.

While all agree that the second Temple stood for 420 years, there is disagreement over whether it was destroyed in the 420th year of its existence, or if it stood for a complete 420 years and was destroyed in its 421st year.¹⁰⁵ Rashi espouses the former opinion, and in his view the starting of the new Shemittah cycle begins in this 420th year. Rabeinu Tam, however, opines that the destruction was in the 421st year, marking it as the beginning of a new Shemittah series. Maimonides agrees with Rashi that the destruction took place in the 420th year, but disagrees that the 420th year represents the first year in the new series of Shemittah. He reasons as follows: since the Temple was destroyed in the month of Av, less than two months from the start of a new year, the Sages of that time started counting the new series of Shemittah cycles from the beginning of the new year and not retrospectively, from the beginning of that 420th year. In his opinion ‘‘the end of the Shemittah year’’ in the Talmud refers not to the year

¹⁰⁴Taanis 29b

¹⁰⁵see Talmud, Avodah Zara 9b

following a Shemittah year (as previously understood by Rashi and Rabeinu Tam), but rather to the close of the Shemittah year.) Thus, Maimonides holds that the destruction took place in the 420th year, but the counting of the new series of Shemittah cycles did not commence until two months later -- the beginning of the 421st year.

Despite the fact contemporaries of Maimonides cast doubt on his reckoning, and halachists over the subsequent three centuries still debated the issue, a 16th century conference of Rabbis in Jerusalem calculated the Shemittah year in accordance with the view of Maimonides and fixed the Shemittah year of that time to be the Jewish year 5313 (1552-1553).¹⁰⁶ The calculation from then on was a straightforward one: every seventh year was deemed a Sabbatical year. The most recent Shemittah year was 5671 (2000-2001). A convenient way of figuring out what year of the Shemittah cycle a given year represents is dividing the Jewish year by seven. The remainder is the year in the Shemittah cycle. For example, this year, 5763 when divided by seven yields a remainder of 2; we are currently in the second year of the Shemittah cycle.

¹⁰⁶Grunfeld, *The Jewish Dietary Laws*, v. 2. p. 191

PART TWO: THE HETTER MECHIRA

A. The beginnings of the hetter mechira

In response to difficult circumstances in the land of Israel when Jews began again to repopulate it in the last quarter of the 19th century, some halachic authorities permitted the temporary sale of land in Israel to non-Jews as a means of overcoming the rigorous restrictions the laws of Shemittah impose. This has become known as the hetter mechira. The heated worldwide debate the hetter mechira engendered among Rabbinic authorities is of great interest on many levels. Primarily, the inherent intricate halachic issues raised by the proposal has given rise to an impressive body of halachic scholarship.¹⁰⁷ An exposition of the legal principles on which the ruling was based, and an analysis of the objections to the application of those legal principles raised by opponents of the hetter mechira will be presented in the second portion of this section. The literature is also of great interest because it highlights fundamental disagreements in ideology and halachic jurisprudence.

After the Russian pogroms of 1881, Russian Jewry began returning to the land of Israel. In 1882, a shemittah year, there were still very few Jewish farmers in Palestine, and those farmers did indeed let their fields lie fallow during the sabbatical year. By the time the sabbatical year of 1889 approached, however, the population had grown substantially, and the Jewish settlers earned their livelihood mostly from the production and export of wine and citrus fruits. The settlers, their sponsor Baron Edmond de Rothschild of Paris, and most of the leadership of

¹⁰⁷The literature on this topic includes: Maimonides, Hilchos Shemittah v'Yovel, chapters 1, 10, with commentaries; Sefer Hachinuch; Rashba (responsa); Sefer haTrumah; Kaftor vaFerach; Mabit (responsa); Avkas Rochel; Shemen HaMor; Chasam Sofer (responsa), Isaac Elchonon Spector (responsa and Iggeres HaShemittah; Yehoshua Leib Diskin (responsa); Pe'as haShulchan, Netziv (responsa, Kuntrus HaShemittah); Beis HaLevy (responsa); Minchas Chinuch; Aruch HaShulchan Ha'asid; Torah Temimah, A. I. Kook, Shabbas Ha'aretz; S. J. Zevin, Leor haHalachah, Y.M. Tukotzinsky, Sefer haShemittah; S.Z. Aurbach, Ma'adanei Aretz, T. P. Frank, Har Tzvi; K. Kanaha, Shnas HaSheva, Chazon Ish, Sheviyis. Helpful secondary literature includes: Kerem Zion Hashalem; Grunfeld, The Jewish Dietary Laws V.2, Appendix II.

the Chovevei Zion movement claimed that the entire project of new agricultural settlements for Jews in Palestine would collapse if the land of the existing settlements would lay fallow for the year. Despite persistent urging to issue a *hetter* (permit) permitting the settlers to till the land, the Rabbinate in Palestine, led by Rabbis Yehoshua Leib Diskin and Shmuel Salant, refused. Their refusal forced the settlers to turn to Rabbinic authorities in Europe for such *hetter*. Their insistence was based on the claim that actual physical survival of the settlers was at stake, and the strict observance of *shemittah* would certainly cause the destruction of the new Jewish settlement in the Palestine.

The threat of the collapse of the Jewish settlements, and the withdrawal Baron Rothschild's support led to a meeting of three well known halachic authorities in Vilna. The three, Rabbis Shmuel Mohilever of Byalistok, Yehoshua Trunk of Kutno, and Shmuel Zanvil Kleppfish of Warsaw, agreed on a *hetter* permitting the temporary sale of Jewish farmland to a non-Jew in order to overcome the strict obligations of *shemittah*. Even in this scenario, however, the permit only allowed working of the land by non-Jews, or when not economically feasible, working of the land by Jews approved by the Jerusalem Rabbinate, which would include only work which was of Rabbinic prohibition. This original *hetter* was agreed upon provided that it was to be of a temporary nature and provided that the great and famed Rabbi Yitzchok Elchonon Spector agreed to it. The *hetter* was in fact agreed to by Rabbi Spector, who issued a long halachic discourse in its support.¹⁰⁸

Despite the support of such a distinguished luminary, the Jerusalem Rabbinate (Rabbis Diskin and Salant), and most of the Rabbinic authorities in Europe were vehemently opposed to the *hetter*. The most vocal

¹⁰⁸see Igerres HaShemittah, reprinted in Betzes Hashana, Jerusalem 1960 (heichal shlomo)

opponents included Rabbis Yosef Dov Soloveitchik of Brisk (known by the name of his Responsa, Beis Halevy)¹⁰⁹, Naftali Tzvi Yehuda Berlin of Volozhin (known by the abbreviation of his name, Netziv)¹¹⁰, David Friedman of Karlin¹¹¹, and Rabbi Samson Raphael Hirsch of Frankfurt. The Lithuanian Rabbis objected to the heter mainly on halachic grounds, and the Jerusalem Rabbis, in addition to objecting on halachic grounds, alleged that Rabbi Spector was misled into believing that the observance of shemittah in its entirety would jeopardize the survival of the Jewish settlement.

Because of the opposition of the Jerusalem Rabbinat, there was no officially recognized heter mechira for the shemittah year of 1989. In the two subsequent sabbatical years (1896, 1903), Rabbi Diskin, due to a restructuring of the sale arrangement that in his view avoided the chief halachic difficulty of the original heter, issued formal permission of the Jerusalem Rabbinat to abide by the heter mechira¹¹². Again, the permit was explicitly temporary, due the stressful economic conditions of the time. Prior to the shemittah year of 1910, a new round of debate began, with Rabbi Abraham Isaac Kook, the chief Rabbi of Jaffa and later of Israel, as the main proponent.¹¹³ New opposition also surfaced, the most vocal of whom were Rabbis Yaakov Dovid Willosky (known by the abbreviation of his name, Ridbaz)¹¹⁴, and later, Avraham Yeshaya

¹⁰⁹Rabbi Soloveitchik's discourse regarding the heter mechira is incorporated into his Responsa

¹¹⁰Netziv's discourse regarding the heter mechira is incorporated in his Responsa entitled Meishiv Davar, under the separate heading of kuntrus hashemitta, located at the end of section II.

¹¹¹Rabbi Friedman's discourse regarding the heter mechira is incorporated into his responsa entitled Sheilas Dovid.

¹¹²The new version of the sale only effected the sale of the trees and the soil that nourished them as opposed to the entire parcel of land. At least in Rabbi Diskin's view, this served to overcome the prohibition against sale of the land of Israel to a non-Jew. This subject is dealt with in greater depth on pp.84-85

¹¹³Rabbi Kook's discussions of the heter mechira are contained in his treatise Shabbos Ha'artez, and in his Responsa, entitled Mishpat Kohen.

¹¹⁴Ridbaz's discourse regarding the heter mechira is incorporated into his commentary on the classical 18th century work of Rabbi Israel of Shklob codifying agricultural laws pertaining to the land of Israel, Pe'as Hashulchan. Ridbaz's commentary is entitled Beis Ridbaz.

Karelitz (known by the name of his work, Chazon Ish).¹¹⁵

While the rulings of the respective Rabbinic authorities are primarily based on their interpretation of halachic principles, the rulings are undoubtedly also influenced by differing ideologies and approaches to halachic jurisprudence. Netziv, for example, who maintained that the laws of shemittah retain their Biblical status even today, emphasized the metaphysical nature of the commandments as well as the metaphysical nature of the Jewish people:

The life and existence of the Jewish nation are not merely based on antural causes, economic or otherwise, as are the life and existence of other nations. We can only exist because we are continually upheld and supported by the Everlasting Arms. The same applies to the land of Israel. It is different from all other countries, and the forces sustaining it are not the natural, economic forces working in other states and communities; there is a special divine Providence in the Holy Land which works in a supernatural way. In order to earn the intervention of that divine Providence, we must observe the special laws referring to the soil of the Holy Land an its produce.¹¹⁶

This theme is echoed in the moving introduction of Ridbaz to his work. Ridbaz is also apparently drawing on the Biblical impersonation of the land, where the land is granted ‘‘reparations’’ for the Sabbatical years denied to it by the neglect of Shemittah law.¹¹⁷ He appeals to the land:

¹¹⁵Chazon Ish’s discourse regarding the *hetter mechira* is included in his commentary on Tractate Sheviyis and in his Responsa, entitled Chazon Ish.

¹¹⁷See Leviticus 26:33-35, where in a long solemn warning about the consequences of neglect of the Torah laws, the Bible reads: ‘‘...And I will scatter you among the nations, I will unsheathe the sword after you; your land will be desolate and your cities will be a ruin. Then the land will be appeased for its sabbaticals during all the years of its desolation, while you are in the hands of your foes; then the land will rest and it will appease for its sabbaticals. All the years of its desolation it will rest, whatever it did not rest during your sabbaticals when you dwelled upon her.’’

Our land, our Holy Land, we beg of you not to accuse your children before our Father in Heaven on account of the perpetrated breaches of the law of Shemittah. Look upon the broken hearts of our Sages and our holy people who shed tears of sorrow on account of the desecration of the Sabbatical year. We implore you to intercede on our behalf, that our Maker may have mercy on us to redeem us speedily and gather the remnants of our people and bring them back to the Holy Land so that they may observe the Sabbatical year in holiness and in purity.¹¹⁸

Rabbi Kook's writings, in contrast, emphasize the importance of easing the economic burden on individual Jews and maintaining the viability of the Jewish settlement. He repeatedly stresses the temporary nature of the hetter and the desirability of the ideal fulfillment of the laws of Shemittah when possible. He praises those who are able to keep the laws of Shemittah without reliance on the hetter, but warns:

Far be it from us to level accusations against those Jewish settlers who make use of the hetter mechira. Although this hetter is not ideal, and our hearts ache because of the deplorable plight of the Jewish settlers in the Holy Land who are forced to take recourse to such legal devices...nevertheless what has been done out of dire necessity is flawless in a legal sense. And it behooves the great Sages of Israel to comfort those, who with broken hearts, find themselves constrained to make use of such legal devices. To enlarge the Jewish settlement in the Holy Land is a religious duty that devolves upon all Jewish generations and the strengthening of the settlement brings near our final redemption when we can fulfill the Shemittah in its entirety.¹¹⁹

B. The halachic dispute over the hetter mechira

The ruling permitting the temporary sale of land to a non-Jew is based on the following findings and legal principles: (1) most authorities today maintain that Shemittah is mandated by Rabbinic Law today and not Biblical law (see supra p. 14, "the nature of the obligation today"),

and there are even some authorities that maintain Shemittah is not even Rabbinically mandated, but is merely a pious custom; (2) The debate as to whether sale of land in Israel to a non-Jew can “cancel” the sanctity of the soil and nullify obligations such as Shemittah, Trumos and Maasros should be resolved according to the more lenient opinion, since a Rabbinically mandated law is involved; (3) the general prohibition on sale of the holy land to a non-Jew does not apply to (i) Muslims since they are not idol worshippers but rather monotheists nor to (ii) a temporary sale of the land which is in the interest of the Jewish seller; (4) Such a sale is valid despite its not being entered in the land registry; (6) The halachic principle that in strained circumstances (sha’as ha’dechak), one may rely on the view of an individual as opposed to the majority and may thus rule leniently; and finally (6) The hetter mechira should not be considered an impermissible loophole designed to evade the Shemittah laws.

1. The Rabbinic status of Shemittah

As discussed earlier, the status of Rabbinic law lends the subject to more lenient rulings. Since most authorities maintain that Shemittah is of Rabbinic nature today, halachic authorities were more willing to issue this permit. The few authorities that maintain Shemittah retains its Biblical status (e.g. Ridbaz, Beis Halevy) were vehemently opposed to the hetter mechira. The reliance on the outlying opinion of Razez, that Shemittah is in our day merely a pious custom with no formal obligations, in support of the hetter, is viewed with much skepticism by opponents of the hetter.

2. Whether sale of land to a non-Jew “cancels” the sanctity of the land

In the context of the question whether produce grown on the land of a non-Jew is imbued with kedushas sheviyis we discussed the concept of non-Jewish ownership revoking the sanctity of

the land (see supra p. 39). The source of this debate is in the Talmud (Gittin 47a), where Rabbah and Rabbi Eleazar hold different opinions. The resolution of this debate bears on many aspects of laws relating to the soil of the land, including many aspects of Shemittah law, and it is at the heart of the *hetter mechira*. The resolution of this debate bears directly on the efficacy of the *hetter* in the first place. If non-Jewish ownership does not revoke the sanctity of the land, and does not remove the obligation to keep the laws associated with the land, then sale to a non-Jew accomplishes nothing. The land may still not be worked, and if it is, the produce is prohibited. On the other hand, if non-Jewish ownership does indeed cancel the sanctity of the land, then the laws of Shemittah do not apply to the sold field, rendering its produce free of restrictions.

It seems clear from early codifiers and halachists like Maimonides¹²⁰ that the law is in accordance with the Talmudic opinion that states sale of land to a non-Jew does not remove any obligations connected with the soil. Thus, explains Maimonides, were a Jew to sell land to a non-Jew, the obligation to tithe the produce once again resumes when the property returns to Jewish hands. Had the sanctity of the land been cancelled in the interim, the reacquisition of property by a Jew would be considered merely a ‘‘private conquest’’ and he would not be obligated in tithing. However, continues Maimonides, it is considered as the land was never sold to a non-Jew, and the owner is obligated in tithing of produce.

The controversy over whether this is a valid basis for the *hetter mechira* is rooted in different interpretation of Maimonides. The leading commentary on Maimonides, *Kesef Mishna* (R. Joseph Caro), explains that Maimonides only meant to apply the rule that the sanctity of the land

¹²⁰Hilchos Trumos 1:10

is not revoked in the case of the land being repurchased by a Jew. In other words, while the land is under the ownership of the Gentile, there is no sanctity attached to the land, and consequently no obligations relating to its soil apply. The sanctity is not forever lost, however -- it is automatically restored upon repurchase by a Jew. This interpretation bears directly on the efficacy of the *hetter mechira*: while the land is under non-Jewish ownership, the laws of *Shemittah* do not apply; Maimonides' ruling that the sanctity of the land is not revoked is only relevant when the Jew reacquires the land. Although this interpretation of *Kesef Mishna* is not without its opponents,¹²¹ the authority of the *Kesef Mishna* would probably be sufficient to resolve the issue according to his interpretation. However, a historical controversy arose over whether Rabbi Caro later retracted this opinion expressed in his commentary on Maimonides. This controversy involves the testimony of two of his contemporaries, the authors of *Sefer HaCharedim* and *Shla*, who assert that Rabbi Caro indeed retracted this opinion. Such testimony is refuted by the biographer, Chida, who points to a ruling Caro issued on the subject (consistent with his approach in his *Kesef Mishna* commentary) in a responsa dated shortly before his death. However, the integrity of the date on the responsa is also in question.¹²²

The *hetter mechira* does not rest solely on the opinion of the Rabbi Joseph Caro as expressed in his *Kesef Mishna* commentary. Some early and prominent authorities such as the *Sefer haT'rumah* and the *Vilna Gaon*¹²³ maintain that when laws of Rabbinic nature are concerned, the Talmudic debate is to be resolved in favor of the opinion stating sale of land does nullify its sanctity, thereby removing obligations associated with the soil. Since *Shemittah* in our days is Rabbinic,

¹²¹See *Mabit* (responsa)

¹²²See Chazon Ish, *Sheviyis* 20:7

¹²³See Commentary on *Shulchan Aruch*, *Yoreh Deah* 331, notes 6, 28. Cf. Chazon Ish (*Sheviyis*, 20) who maintains that in this citation the Gaon of Vilna is merely explaining the view of others. The "Vilna Gaon" (lit. "genius of Vilna") was the leading authority in the 18th century in Lithuania.

regardless of the dispute over Rabbi Caro's opinion, sale of the land to non-Jew does indeed release the land from Shemittah laws. This opinion is based on a Talmudic passage in Gittin 47a where it is stated that non-Jewish ownership over land in Syria releases the land from tithing obligations. (Syria, although not part of Israel proper, was for various reasons included in Rabbinic decrees extending laws pertaining to the soil of the land of Israel. Thus, the tithing obligation of a Jewish landowner in Syria is of Rabbinic origin).¹²⁴ Opponents of the heter mechira have held the rule that sanctity of the land is cancelled as far as Rabbinic laws are concerned relates only to Syria and not to Israel proper. Chazon Ish, for example, points to Maimonides, who spends an entire chapter discussing the differences between Syria and Israel proper as far as the law relating to produce are concerned.¹²⁵ Thus, although Shemittah is of Rabbinic nature today, since it still involves land in Israel proper, he argues the rule that the sanctity of the land is revoked cannot be applied.¹²⁶

3. Prohibition on sale of the Holy Land

In order for the heter mechira to be legal, the prohibition against sale of real estate in the land of Israel to a non-Jew must be overcome. This prohibition is derived from a verse in Deuteronomy (7:3). The entire passage reads:

¹²⁴See Pe'as haShulchan 16:40 for a detailed explanation of this view.

¹²⁵Hilchos Trumos, Chapter 1

¹²⁶See Chazon Ish, Sheviyis, 20; Ridbaz commentary on Pe'as haShulchan, chapter 16.

‘‘When the Lord, your God, will bring you to the Land to which you come to poses it, and many nations will be thrust away from before you -- the Hittite, the Girgashite, the Amoriate, the Cannanite, the Perizzite, the Hivvite, and the Jebusite -- seven nations greater and mightier than you; And when the Lord, your God, will deliver them before you, and you will smite them -- you shall utterly destroy them; you shall not seal a covenant with them nor shall you show them favor. You shall not intermarry with them; you shall not give your daughter to his son, and you shall not take his daughter for your son; for he will cause your child to turn away from after Me and they will worship the gods of others; then the Lord’s wrath will burn against you, and He will destroy you quickly. Rather, so shall you do to them: Their altars shall you break apart; their pillars shall you smash; their sacred trees shall you cut down; and their carved images shall you burn in fire. For you are a holy people to the Lord, your God; the Lord, your God has chosen you to be for Him a treasured people above all the peoples that are on the face of the earth.’’

Deuteronomy 7:1-6 (emphasis added in verse 3)

The context of this passage sheds light on the purpose of the commandments enumerated therein. The war against the inhabitants of the land of Israel at the time of conquest was aimed at eradicating the savage cruelty and immorality practiced by those peoples. The practices and beliefs of the Canaanites were in stark opposition to the ideal of human dignity, sanctity of life, and monotheistic ideology of the Jewish people. To prevent the incoming nation of Israel from being influenced by their corrupt ways, God commanded the people not to have intimate

contact with the Canaanites and not to praise them. The commandments were intended to shelter the Jews from their influence. The positive directives to destroy their alters and other idol worship were intended to remove these influences from the land of Israel.

The Talmud¹²⁷ derives three specific prohibitions from the verse ‘‘you shall not show them any favor.’’ All three prohibitions listed in the Talmud are derived from the different meanings of the word ‘‘tichanem’’ (translated above as ‘‘show them favor.’’). The first prohibition, of most relevance to this discussion, is not to allow idolatrous nations to settle in the land of Israel (Hebrew for settle, ‘‘chaniya’’ is similar to ‘‘tichanem’’). The second is the most straightforward interpretation: not to be gracious to them by praising them. The third prohibition is not to give idolaters free gifts (Hebrew for free gift, ‘‘mantas chinam,’’ similar to ‘‘tichanem’’). In addition to the verse ‘‘lo tichanem,’’ another source for the prohibition on sale of the Holy land is rooted in a passage in Exodus:

I shall set your border from the Sea of Reads to the Sea of the Phillistines, and from the Wilderness until the River, for I shall deliver the inhabitants of the Land into your hands and you shall drive them away from before you. You shall not seal a covenant with them or their gods. They shall not dwell in your Land lest they cause to you sin against Me, that you will worship their gods, for it will be a trap for you. (23:31-33) (emphasis added)

Maimonides codifies these laws and writes:

¹²⁷Avodah Zara 20a

It is forbidden to sell to them real estate in the Land of Israel...Why can you not sell to them? For it says ‘lo tichanem.’¹²⁸ We therefore derive, do not give them a place to settle in the land, for they have no land, their dwelling will be temporary... At a time when the hand of Israel is powerful over them it is forbidden to allow worshipers of stars amongst us even temporarily...until he accepts on himself the seven Noahide laws¹²⁹ as it is written ‘They shall not dwell in your Land,¹³⁰’ even temporarily. And if they accept the seven laws, this is a ‘ger toshav’ [sojourner that dwells with you]. A ger toshav is not be accepted except when the Yovel year is conducted.

Hilchos Avodas Kochavim, 10: 3, 4, 6

These laws raise serious concerns about the legality of selling land to non-Jews via the *heter mechira*. In fact, opponents of the *heter*, such as *Netziv* warn that it is imprudent to risk transgressing Biblical prohibitions (of sale of the land) in order to avoid transgression of Rabbinic prohibitions (*Shemittah* in our day), and writes regarding this ‘they have fled the wolf and fallen into the claws of a lion.’¹³¹

(i) Applicability to Muslims today:

As the purchasers of land in a *heter mechira* agreement would generally be Muslims, the question turns on whether they would qualify as an exception to the prohibition. It is clear that Muslims are not considered idol worshippers (any monotheistic religion certainly meets this requirement), and that in terms of practical observance, they fulfill the seven Noahide laws. As such, they do not fall under the prohibition ‘lo tichanem.’¹³² The difficulty resides in a more technical

¹³¹See Responsa, ‘*kuntrus hashemitta*’

¹³²That the prohibition only extends to ‘idol worshippers’ or anyone practicing polytheism is not a unanimous opinion. Others maintain that the ‘lo tichanem’ applies to all Gentiles, even monotheists. According to these opinions, the legal theories which place Muslims in the category of ‘ger toshav,’ exempting them from the reach of this prohibition, are to no avail. Of particular interest regarding this dispute is a discussion in the Jewish Dietary Laws (v. 2, pp. 201-203) by Dayan I. Grunfeld dealing with the medieval and post-medieval tampering of Jewish literature by Christian censors. In an effort to conceal any references to Christians that may be perceived in a negative light, there was an indiscriminate substitution of the word

aspect of the law: although a Muslim may functionally qualify as a ger toshav, formally, rules Maimonides, since Jubilee is no longer observed, the status of ger toshav can no longer officially be conferred upon anyone.

Ravad's gloss on Maimonides again plants the seeds for later controversy¹³³. Ravad disagrees that observance of Yovel is required for the acceptance of a ger toshav for the purpose of settling the land. In his view, a person qualifying substantively as a ger toshav would be permitted to settle the land regardless of the observance of Yovel. The leading commentary on Maimonides, Kesef Mishna, writes the purpose of the law is served when interpreted according to the view of Ravad. The prohibition against permitting idol worshippers to settle in the land of Israel is to prevent the Jewish people from learning from their ways, as is explained in the verse "They shall not dwell in your Land lest they cause you to sin against Me, that you will worship their gods."¹³⁴ Once this fear is removed by the qualifying factors of a monotheist who observes the seven Noahide laws, the prohibition on settlement ought not to exist. The formal classification as a ger toshav is of no relevance as far as settling the land is concerned. However, even reliance on the opinions of Ravad and Kesef Mishna do not bring us to the conclusion that sale to a Muslim is not prohibited. Ravad only disagreed with Maimonides's opinion that observance of Yovel is required with respect to settlement of the land, not with respect to the prohibition on sale of real estate. In order for the heter mechirah to be legal, the prohibition on the sale of real estate must also not apply to Muslims.

"goyim" (Gentiles) with the word (Akum), "star worshippers." Although early halachists used the terms Gentile and idol worshiper quite precisely, after the censorship, it is hopeless to draw conclusions based on the use of a particular term. In our version of Maimonides' code, the term "Akum" is used, meaning that the prohibition only extends to star worshippers, or any polytheistic religion. However, Rabbi Dr. Grunfeld points to the Cambridge manuscript of Maimonides which uses the word for Gentile rather than star worshiper, suggesting that the prohibition extends to all non-Jews, even monotheistic ones.

¹³³Gloss of Ravad, Maimonides Hilchos Avodas Kochavim, 10:6

¹³⁴Exodus 23:33

Rabbi A.I. Kook addresses this difficulty in two ways¹³⁵. First, he maintains that the formal acceptance of the ger toshav is only necessary because of the duty incumbent upon Jews to keep and support the alien sojourner. It was necessary for the court to be able to formally change the status of an individual to a ger toshav so that he would be able to make a claim of support. With regard to all other matters, maintains Rabbi Kook, the status of ger toshav is automatically conferred if the individual observes the seven Noahide laws. An even stronger case can be made when an entire nation or religion is known to observe these fundamental Noahide laws (such as the Muslim nation): there is no need to confer ger toshav status separately upon each individual of that nation. In Rabbi Kook's opinion, there is no need for observance of Yovel to establish a ger toshav – a Muslim is automatically considered a ger toshav, thereby qualifying as an exception to the prohibition of sale of land.

The second way Rabbi Kook addresses the difficulty of exempting Muslims from this prohibition in light of Maimonides ruling that only a formal ger toshav (declared by the court at a time when Yovel is conducted) is exempt utilizes Ravad's gloss. As mentioned above, Ravad disagrees with Maimonides at least regarding settlement of the land. He maintains that an individual who substantively qualifies as a ger toshav (observes the Noahide laws) is exempt from this prohibition regardless of the observance of Yovel. Although Ravad's view is restricted to settlement in the land, Rabbi Kook maintains that Ravad's view is extended from the permission of settlement to sale of the land. The rationale behind Ravad's view, namely that once the seven Noahide laws, the foundation of any decent human civilization, are observed, the fear

¹³⁵Mishpat Kohen 58, 63.

of corrupting the Jewish nation and inducing them to idol worship no longer exists, can be applied equally to settlement of the land and sale of the land. Thus, the hetter mechira is valid because there is no requirement for the observance of Yovel to ensure that Muslims are not within the prohibition against the sale of real estate.

Opponents of the hetter mechira strongly disagree with the opinions expressed by Rabbi Kook. Netziv had addressed the very arguments made by Rabbi Kook some fifteen years before Rabbi Kook formally made them. In the section of his responsa entitled ‘‘Kuntrus haShemittah’’ he addresses these arguments and refutes them. He maintains that Maimonides ruling is in full force today: Land may not be sold except to a formally accepted ger toshav. Since a ger toshav may only formally be accepted during a time when Yovel is observed, there are no such exceptions today, and all sale to non-Jews in the land of Israel violates this prohibition. Specifically, he rejects the claim that Ravad’s opinion that formal acceptance of a ger toshav is not necessary for settlement of the land can be extended to sale of real estate. On its face, Ravad’s opinion is restricted to settlement, and nothing indicates his intent to include sale by extension. Had Ravad intended to include sale in this category, he would have done so explicitly. Moreover, the opinion of Ravad is not universally accepted in the first place. Another leading commentary on Maimonides, Mishne LaMelech does not agree that formal requirements of ger toshav are waived even for settlement of the land. In addition to addressing the specific reasoning of Rabbi Kook, Netziv also refutes other legal theories in support of waiving the formal ger toshav requirement. One of these such theories relied on the Talmud’s recounting of Rabbi Yehudah sending a present to a heathen friend, Abidarna and Rabba sending a similar gift to a heathen friend, Bar Sheshak.¹³⁶ According to those theories, non-Jews who were not idol worshippers

¹³⁶Avodah Zara 65a

must not have been included in the prohibition ‘‘lo tichanem’’ (Recall that this expression is the source for the prohibition on sale of land as well as on giving free gifts). Netziv demonstrates, however, that the gifts reported in the Talmud were given in circumstances ruling out the prohibition of lo tichanem. Therefore, no conclusion may be drawn from the story in the Talmud.

Chazon Ish echoes the views of Netziv that sale of the land of Israel is prohibited to any non-Jew since there can be no formal acceptance of a ger toshav in the absence of observance of Yovel. Extending this logic, he maintains that the sale itself, even if attempted, is ineffective. The sale of land in a hetter mechira arrangement is done through the Chief Rabbinate of Israel. The halachic principle ‘‘ain shliach l’dvar aveira’’ teaches that there can be no agency for something that amounts to the breach of Jewish law.¹³⁷ In other words, an agent has no authority to complete a transaction that transgresses the law. According to Chazon Ish, since it is a Biblical transgression to sell real estate in Israel to a non-Jew, such an attempted sale by the Chief Rabbinate is not effective. Since there can be no proper agency for an illegal transaction, it is as if the transaction never occurred. Chazon Ish reflects that the principle (seller) is actually benefited by the agency being invalid, since it acts as safeguard against his violation of selling the land. This argument of Chazon Ish is refuted by Rabbi T. P. Frank, who held the position of Chief Rabbi of Israel. Rabbi Frank argues that earlier halachists (Rishonim) indicate that the principle ‘‘ain shliach l’dvar aveira’’ only applies to situations where the agent knows he is violating Jewish law.¹³⁸ If the requisite mens rea is not present, the agency is not defective. In the case of the hetter mechira, the Chief Rabbinate is of the

¹³⁷The rationale for this principle is expressed in the rhetorical question ‘‘divrei harav, divrei hatalmid, mi shom’im?’’ (lit., the words of the Master [God] and the words of the student [man, the principle], whose words should he [the agent] listen to?)

¹³⁸See Commentary of Tosafos, Kiddushin 42b.

opinion that there is no transgression -- and in forming that opinion relies on sound halachic authority.¹³⁹ Even Chazon Ish and other opponents of the hetter mechira would agree that protagonists of the hetter sincerely held these views. Thus, according to Rabbi Frank, while there may be debate regarding the prohibition against sale of land to a non-Jew, there can be no debate about whether the agency is effective. Rabbi Kook, however, devises a method to avoid defective agency that satisfies even those opinions that do not require any knowledge on the part of the agent to invalidate an agency whose mission involves the breach of Jewish law. He suggests that the Chief Rabbinate sell all of the properties to a Jew (a clearly permissible transaction according all opinions). That Jew will then personally sell his newly acquired property to a gentile. This avoids the agency problems raised altogether.

Finally, there are those who side with the Netziv/Chazon Ish camp in terms of the specific ruling that the prohibition against the sale of land applies to all non-Jews today, but nevertheless are willing to use the fact that there is great debate over this issue in support of the hetter mechira. For example, after discussing both sides of the debate, Rabbi Y. M. Tukotchinsky favors the opinion of Netziv, that there remains a Biblical prohibition to sell land in Israel to a Muslim. However, the fact that there are others who hold differing views is sufficient to add support (above the other principles on which the hetter is based) to issue a lenient ruling in a time of need.

(ii) Applicability to a temporary sale

Since the hetter mechira arrangement provides for the sale of Jewish farm land to a non-Jew for only two years, the question arises whether the temporary nature of such a sale puts it

¹³⁹See T.P. Frank, Har Tzevi

outside of the prohibition.

The protagonists of the matter rely heavily on the responsa of R. Mordechai Robbio who squarely addressed this issue in a responsum in the seventeenth century.¹⁴⁰ Rabbi Robbio, then Rabbi of Hebron writes:

It was asked: An Israelite who purchased a vineyard in Hebron, and it was arranged that a Gentile work and guard it for such and such portion of the fruits thereof, for in this city it is impossible except through non-Jews, for their hand is powerful and they would steal [the grapes] and completely destroy [the vines] if there were not a Gentile central to the operation. In light of this, the man asked what to do in the year of Shemittah that the work the Gentile employee will certainly do in the Jew's field should not cause the Jew to have sinned.

The questioner's predicament leaves him with few options: (1) sell the land to a non-Jew, thereby violating the prohibition against sale of land in Israel, (2) sell the land to a Jew, causing the new Jewish owner to transgress the laws of Shemittah, (3) keep the Gentile employee and transgress the laws of Shemittah, or (4) dismiss the employee and allow the vineyard to be destroyed by neighboring Gentiles.

Rabbi Robbio's first response suggests that the prohibition against sale only applies to land solely in the Jew's possession. During the time the question was asked, Jews were not the sovereign power in the land of Israel. Rabbi Robbio writes that all the fields are liened to the Gentile king to give him his portion, and thus the landowner is perhaps considered as a sharecropper. He further writes that Biblical prohibition was meant to apply only at a time

¹⁴⁰Shemen Ha'maor, Yoreh Deah, Chap. 4, reprinted in Kerem Zion

when Israel dwells on their land, when the other nations do not have a settlement in the land. Since the land then was primarily occupied by non-Jews, with only a tiny percentage of Jews, this condition for the prohibition to be in effect was not present. Thus, Rabbi Robbio recommends to the questioner to

sell the vineyard to the Gentile a complete and decided sale, the actual body of the land, with a clear contract, stating for two years (one year prior to Shemittah and the Shemittah year itself), for that which the vineyard is worth...that he should be the master and controller in it as if he made an eternal purchase, and it should be returned immediately after two years.

The logic of this leniency, allowing a temporary sale of the land, is rooted in the words of Maimonides. In his discussion of the prohibition of *lo tichanem*, Maimonides writes: ‘‘we therefore derive, do not give them [Gentiles] a place to settle in the land, for they have no land, their dwelling will be temporary...’’¹⁴¹ These words seem to support the contention that sale of land is only prohibited if it is of a permanent nature. While a temporary sale is still a legal sale, it does not encourage settlement of non-Jews in the land.

Similar reasoning is explored by Estori haParchi in his classical thirteenth century work, *Kaftor VaFerach*. He writes: ‘‘If a Jew lives in a town in the Holy Land which is entirely populated by non-Jews and he wants to move to another town to be in a more Jewish surrounding, he is permitted to sell his house to a non-Jew. The same applies when a Jew lives in a Jewish surrounding in the land of Israel and is unable to sell his house to a Jew, even for a cheap price.’’¹⁴² Since the sale to a non-Jew in such circumstances does not afford him a ‘‘new settlement,’’ there is no prohibition.

¹⁴¹Hilchos Avodas Kochavim, 10:4.

¹⁴²Kaftor Va’Ferach, Chapter 10

Rabbi Z.P. Frank, a supporter of the *hetter*, concludes on this basis that there is similarly no ‘‘new settlement’’ afforded to Gentiles in the two year temporary sale arranged by the *hetter mechira*.¹⁴³ Since the sale is constructed to be temporary and in the context of real finance is somewhat artificial, it will never result in any non-Jewish settlement in the land of Israel. In addition, Rabbi Frank introduces the following novel approach: By the Bible’s uses the words ‘‘*lo tichanem*,’’ and not ‘‘*lo timkor*’’ (do not sell), one can conclude that the Bible does not issue a blanket ban on sale. Rather, it forbids activities that facilitate the settlement of a non-Jew in Israel. He argues on this basis, that it would be entirely permissible to exchange land with a non-Jew in Israel, since this does not facilitate his settlement. If no new settlement is effected, he argues, no prohibition applies. In the case of the *hetter mechira*, the purpose of the sale is not to afford settlement to a non-Jew, but rather to avoid the rigorous laws of *Shemittah*. Furthermore, since the Jew reacquires the land after two years, no new settlement is given to the non-Jews. As such, the temporary sale does not come within the prohibition. Along these lines, Rabbi A.I. Kook¹⁴⁴ quotes *Aderet*,¹⁴⁵ who writes that the main point of this prohibition is to ensure that the land remain in Jewish hands. If we are too strict with this law prohibiting the sale of land to a non-Jew, and the *hetter mechira* is deemed invalid, he writes, we will defeat this objective of ensuring the land remain in Jewish hands, since Jewish settlement will be made impossible by the rigorous laws of *Shemittah*.

In addition to the rationale offered by Rabbi Frank, Rabbi Kook uses the logic of Rabbi Robbio and likens the taxes of the colonial government of his day (circa 1909) to the situation where

¹⁴³See Responsa, *Har Tzvi*, 34-38

¹⁴⁴See Responsa *Mishpat Kohen* 58

¹⁴⁵Abbreviation for A.D. Rabbinowitz-Tunim

“all fields are liened to the Gentile king.” In this sense, the landowner may not in fact be a complete landowner, and the prohibition against sale may not apply.

Opponents of the *hetter* completely reject these rationales. Chazon Ish¹⁴⁶ voices his opposition stating that it is forbidden to sell any parcel of land in Israel to a non-Jew “in all times under any circumstances.” He rejects the novel approach of Rabbi Frank, quoting the halachic dictum “Torah lo nitna l’shiurin,” (literally, “the Torah is not given for us to measure”), that the law was not intended to be defined by our perception of the purposes it was designed to achieve. Thus, it matters not whether to our eyes a temporary sale in fact encourages settlement or affords a “new settlement” to a non-Jew; what is forbidden by the clear dictate of the Talmud and Maimonides is forbidden. Chazon Ish refutes the permissibility of a temporary sale with the following argument: The Talmud (Avoda Zara 14b) writes that the sale of a tree in the land of Israel is incorporated in the sale of land. Although the sale of a tree would be a “temporary” sale in that it does not last as long as a plot of land, it is nevertheless forbidden. Thus, a temporary sale falls clearly within the reach of this prohibition.¹⁴⁷

Regarding Rabbi Kook’s rationale that the land is not really in the Jew’s possession since it is subject to pervasive taxes, Rabbi D. Karlin¹⁴⁸ points out that most fields were taxed by non-Jewish governments during the time of the Talmud as well. Since the prohibition of selling land is taught in the Talmud without discriminating between fields subject to such taxation and fields not subject to taxation, this consideration must be insignificant.

Aside from refuting the arguments of Rabbi Kook, Rabbi Karlin challenges the *hetter mechira*

¹⁴⁶Chazon Ish, Sheviyis 24:1

¹⁴⁷Rabbi Frank responds however, that the analogy is not appropriate: a tree lasts significantly longer than the two-year sale contemplated.

¹⁴⁸She’elas David, p. 43

on other grounds. An explicit Rabbinic prohibition forbidding the rental of land to a non-Jew is recorded in the Talmud.¹⁴⁹ The prohibition was enacted as a safeguard to ensure that a Jew would not come to sell his land to a non-Jew. If a mere rental is prohibited, argues Rabbi Karlin, certainly a two-year sale would be prohibited on the same grounds. In response to this, Rabbi Kook¹⁵⁰ argues that temporary sale is not addressed in this Rabbinic prohibition. If a particular situation was not included in a Rabbinic prohibition, there is no need (or even right) to extend such prohibition. He suggests that the Rabbis may not have include a temporary sale in the prohibition simply because situations which rarely occur are not generally the subject of Rabbinic decrees.¹⁵¹

One final strategy the supporters of the *hetter* employed to avoid the prohibition against the sale of land involved a scheme whereby the land itself would not actually be sold. The suggestion is based on one opinion expressed in the Mishna, recorded in the Talmud regarding this prohibition¹⁵²: ‘‘one may not sell to them that which is still attached to the ground, but one may sell to them from when it [the produce] is severed. Rabbi Yehuda says, one may sell on condition that he cut.’’ Since the opinion of Rabbi Yehuda permits the sale of trees or other produce still attached to the ground on the condition that the Gentile cut it, the *hetter mechira* was designed to sell the produce of the land, but not the land itself, to the Gentile. The contract was drafted on the condition that the buyer cut the fruits and produce, in accordance with Rabbi Yehuda’s opinion. If this condition is not fulfilled, the contract states that the sale shall be a valid sale of the entire land. As discussed, above, the *hetter mechira* is based on the

¹⁴⁹Avoda Zara 20b

¹⁵⁰Mishpat Kohen 66

¹⁵¹This concept is reflected in the Talmudic principle ‘‘*milsa de’lo shchicha, lo gazru ba deraban*’’ -- a situation which seldom occurs is not included in Rabbinic decrees.

¹⁵²Avodah Zara 19b

premise, that sale to a non-Jew cancels the sanctity of the land. Although there is much disagreement over whether a complete land sale does in fact cancel the sanctity, there is no question that sale of mere produce does not affect the sanctity of the produce. In order to maintain the efficacy of the hetter, its supporters reasoned that trees and plants, while still connected to the soil have the status of ‘‘land’’ rather than ‘‘produce,’’ thereby enabling the nullification of their sanctity. They further stipulated that the soil which nourishes the trees and plants be sold as well, on the condition that it later be uprooted. This stipulation ensures that all produce growing on the field, even after the time of transfer, will be in the non-Jew’s dominion and will not be subject to the laws of Shemittah.

This tactic was considered seriously by at least one fierce opponent of the hetter, Rabbi Y.L. Diskin. Some record that this was the cause of his change of heart regarding the hetter¹⁵³, while other report that he saw in it academic value, but did not change his opinion regarding the practical law¹⁵⁴. Nevertheless, most opponents dismissed it without difficulty. Chazon Ish¹⁵⁵ expressed skepticism that sanctity of the land can be nullified by selling anything less than the entire bundle of rights associated with the property. He rejected the piecemeal sale of plants, trees, and their nourishing soil as an effective way to achieve the purpose of the hetter. Others point to Maimonides’ codification of this law, where he explains that such a sale is only permissible if the non-Jew indeed cuts the produce.¹⁵⁶ Since the non-Jew in the hetter mechira arrangement does not really cut and uproot the soil, the sale is effectively a complete sale of land (the default clause of the contract), well within the scope of the prohibition. It is unclear then, how the prohibition is avoided by the clause at all. Rabbi

¹⁵³See Sefer HaShemittah, p. 61

¹⁵⁴See Kerem Zion, p. 27

¹⁵⁵Sheviyis, 21:9

¹⁵⁶Hilchos Avodas Kochavim, 10:4

Y.M Tuckochinsky¹⁵⁷ explains the difference between a contract for a sale of land, and one which sets the default clause to a straight sale of land: In the first case, the Jew is selling land to a non-Jew, whereas in the second case, the Jew is only selling trees, plants and soil on the condition that the non-Jew cut them. The ultimate result of a straight sale of land is not effected by the Jew in this instance, but rather triggered by the actions (or lack thereof) of the non-Jew. Therefore, although a straight land sale may be the end result, since the Jew did not cause the sale in a strict sense, he avoids the prohibition against sale.

4. Halachic validity of sale not recorded in the Land Registry

The *hetter mechira*, as originally designed, does not contemplate recording the sale in the official land registry. To record the two year sale in the land registry would be prohibitively expensive, and risky (in that the re-transfer after two years may not be accomplished with ease). Sales that are not recorded in the official land registry in the state of Israel, known as *Tabu* (an Islamic legal term), are not recognized by the government as valid sales. The question arises, then, of whether in a halachic sense, the sale is valid regardless of the fact that secular law does not recognize the validity of the sale.

Two halachic issues are raised by halachists debating this issue. The first is a principle known as ‘‘*dina d’malchusa dina*’’ (lit. ‘‘the law of the government is the law’’). The law of the sovereign land in which Jews reside is considered the law for religious purposes as well. Thus, at least when there is no conflict between the obligations and restrictions of secular law and Jewish law, a Jew is religiously obligated to abide by the laws of the land.¹⁵⁸

¹⁵⁷Sefer HaShemittah

¹⁵⁸Interesting questions arise for devout Jews regarding whether violating a speed limit would constitute a violation of Jewish law in view of this principle. More offensive violations, such as income tax evasion, whether accomplished in a manner that would amount to theft in Jewish law or not, would certainly constitute a violation of Jewish law by way of *dina d’malchusa dina*.

Furthermore, in monetary matters, legal principles of the secular government are controlling in most transactions. The question in this context is whether a sale not recorded in the land registry, and therefore not enforceable, may still be considered a valid sale. The second issue raised concerns a general issue in Jewish contract law. For a contract to be valid, there must be clear assent by both parties, known as ‘‘smichus ha’daas.’’ The Talmud¹⁵⁹ indicates that real estate may be acquired by the exchange of money or by a written deed. In cases where it is customary to write a written deed, however, the exchange of money alone is not sufficient to effect a change in title. Where there is an absence of a written deed in such cases, it is considered as if at least one of the parties was lacking the required assent.¹⁶⁰ It is possible that this applies to recordation in the land registry as well as a written deed, such that if a sale of land is not recorded in the registry (as is customary with all real estate sales), the required consensus of the parties may be lacking. The result would be that the sale of Jewish farmland by the *hetter mechira* would not be a valid *halachic* sale, rendering the entire *hetter* ineffective. The Jew is still the owner of the land and is obligated in *Shemittah* observance.

The second issue of *smichus ha’daas*, or required assent, is a simpler issue to overcome. If it is customary that a sale is not considered complete until entry into the official land registry, then the absence of registration seems to be a flaw in the requisite assent. The Talmud, however, provides that where the parties stipulate explicitly that the sale should be valid and binding without a written deed, the sale is nonetheless binding.¹⁶¹ To overcome the problem of lack of assent, the contract must merely stipulate that the sale shall be valid without recordation

¹⁵⁹Kiddushin, 26a

¹⁶⁰Ibid. See Rashi’s commentary on Kiddushin 26a.

¹⁶¹Ibid.

in the land registry. Even were this clause inadvertently omitted from the contract, another legal theory has been proposed to address the problem of *smichus ha'daas*. Intent or assent to sale may be more easily found in cases where the seller is anxious to dispose of property because of some inconvenience or embarrassment it imposes. In such cases, even if the usual indications of assent are not present (i.e. written deed, land registration), assent may be assumed. Since the Jewish farmland owner is anxious to relinquish ownership of his property in order to avoid a religious prohibition, the sale need not conform to all requirements of an ordinary commercial sale for constructive assent to be found.

The challenge posed by the *dina d'malchusa dina* principle is more difficult to overcome. In fact, an 18th century responsum¹⁶² invalidated a gift of land by a Jewish father to his son since it had not been officially registered. The lack of registration was sufficient for the holding of the sale invalid, based on the principle that the law of the sovereign government controls transactions. Based on this precedent, it seems that land cannot be sold in a halachic sense if it is not considered sold by the secular government. Regarding this issue, Ridbaz writes ‘‘Think yourself, if the Rabbi of Jaffa¹⁶³ wrote on a piece of paper a contract of sale to an Arab, that all Jewish land holdings in Israel belong to him, does the Arab become owner and cancel the holiness from the Land of Israel? This scrap of paper is of value only to stuff a bottle.’’,¹⁶⁴

Proponents of the *hetter mechira* rely on a responsum of Chasam Sofer, a prominent 18th century Rabbinic figure in Germany to overcome this challenge. The responsum¹⁶⁵ relates to the sale

¹⁶²Yitchack ben David, *Responsa Divrei Emet*.

¹⁶³A reference to Rabbi A.I. Kook, who prepared the first *hetter mechira* while in his post as Rabbi of Jaffa.

¹⁶⁴Introduction to Beis Ridbaz

¹⁶⁵Chasam Sofer, *Orach Chayim*, 113

of chametz, leavened bread. The laws of Passover dictate that a Jew may neither eat nor possess any leavened bread during the eight days of the Passover holiday. Although it is preferable to consume products defined as chametz before Passover commences, if hardship is involved, or if a significant loss would result from the disposal of such products, the chametz may be sold to a non-Jew for the duration of the Passover holiday. After the holiday, the Jew may repurchase the items he sold. The Chasam Sofer records a case where Jewish informers notified the government that Jews were evading stamp duties selling chametz without affixing the stamps required on all sales. The government responded that they were only concerned with sales of economic significance, and that in purely religious matters, the stamp duty did not apply. Chasam Sofer states that the sale of chametz is a valid sale in Jewish as well as secular law. The only consequence of not affixing the stamps, he writes, is when the purchaser wishes to claim his purchased property, he must first pay for the missing stamps. It seems from this responsum, that in the view of Chasam Sofer, a religious transaction is not valid if done only according to religious law without regard for secular law. It is only valid when the transaction can be enforced by secular law at the purchaser's option (here, by affixing the missing stamps). On this point, Divrei Chaim, a contemporary of Chasam Sofer, differs. He was asked whether the sale of chametz was valid when the contract was written in Hebrew but where the local law required that any sale contract be written in the language of the state. He replied that it is not necessary to conform to governmental requirements in contract law for the transaction to have halachic validity.

Rabbi T.P. Frank develops the legal theory grounded in these two responsa further and distinguishes between transactions for religious purposes and transactions for commercial purposes.¹⁶⁶ All

¹⁶⁶see Kerem Zion, p. 43

transaction for purely religious purposes, such as the sale of chametz during Passover, and the sale of Jewish farmland during the Shemittah year, would not be required to conform to secular contract law to be valid.

The opposition to the hetter mechira does not refute this theory as strongly and unanimously as it does other theories on which the hetter is based. The Chazon Ish did not clearly articulate a position on this issue and his opinion is thus a subject of dispute.¹⁶⁷ In the context of explaining why the hetter is not valid, Chazon Ish writes that ‘it was not registered with the Tabu, and, if the Arab would endeavor to uphold the sale, they would tell him ‘such is our law, without Tabu registration is not valid.’’,¹⁶⁸ Seemingly, in his opinion, lack of registration alone is not an impediment - rather it is invalid because the transaction can never be certified, and the purchaser’s opinion to claim it cannot be secured. Recall that this was the opinion of Chasam Sofer -- dina d’malchusa dina is fulfilled as long as the purchaser may exercise his option to claim the property in question. It seems, however, that the contract drafted by Rabbi Kook ensures that the purchaser’s options are indeed secured. It reads, in relevant part:

...permission being granted in the hand of the master, the purchaser mentioned above, to certify the validity of this sale in any government that he chooses, particularly the validation of the government of Palestine, the government of the land, and to transcribe with any language that he chooses, and which all circumstances which are beneficial which he chooses to certify through them, all shall be pursued on behalf of upholding and certifying this contract.

¹⁶⁷Rabbi S.Y. Zevin maintains that Chazon Ish did not see the lack of registration as an impediment, but invalidated the hetter mechira on other grounds (Le’or halacha, p. 93). Rabbi K Kahana states that Chazon Ish changed his opinion in his later works and invalidated the hetter on these grounds as well. (Shnas Hasheva, p. 210)

¹⁶⁸Chazon Ish, Sheviyis, 27:7

Hetter Mechira, 1916.

6. Shaas Hadechak: the effect of strained circumstances on halachic jurisprudence:

(i) in general

The tenuous legal arguments in favor of the hetter mechira would never have been proposed were it not for the dire economic situation facing Jews in the land of Israel (then Palestine) at the turn of the century. Even those who offer the theories and arguments expressly state that they do so in light of the strained circumstances.¹⁶⁹

In halachic jurisprudence, in circumstances that involve danger or threat to human life, the laws are unequivocally held in abeyance. However, in the case of economic hardship or other strained circumstances, laws may not simply be disregarded. Nor may the existence of strained circumstances be viewed as a broad license to rely on outlying opinions. Rather, there are specific principles that govern how and when one may be lenient in issuing rulings in such cases.¹⁷⁰

A basic rule in halachic jurisprudence is "yachid, v'rabim, halacha k'rabim" -- when there is a difference of opinion between one authority and many authorities, the opinion of the many is adopted. This is true regarding disputes in the Talmud, and has held true for subsequent eras

¹⁶⁹See e.g. A.I. Kook, Mishpat Kohen, 63

¹⁷⁰It is interesting to compare the halachic system to the American system of law in practice. While there are some doctrines that expressly take into account "undue hardship," there is no general principle in Anglo-American law that seeks to issue "lenient" rulings in cases presenting sympathetic situations. In fact, the true test of a doctrine's strength is how it is maintained even in the most unsympathetic cases. Nevertheless, the tendency to rule leniently or contrive legal arguments to get around a harsh doctrine, is quite prevalent in the courts, and has become known as the maxim "bad facts make bad law." Halacha's position is quite the opposite. It openly embraces the use of leniencies when justice will not be served, or when the circumstances otherwise warrant. Rather than being perceived as "bad law," such attempts to issue lenient rulings and ease any suffering of the Jewish people is regarded in high esteem in the Rabbinic world.

of jurisprudence. The question of when, if at all, it is proper to rely on the opinion of a single individual, is hotly disputed in the hetter mechira debate.

As we have seen, the majority of authorities maintain that Shemittah is of Rabbinic origin today. A small minority maintain that it still retains its Biblical status, and the single opinion of holds that is merely a pious custom and does not retain its status as a commandment at all in our day. When, if ever, would it be permissible to rely on this outlying opinion of Razez?

Rabbi David ben Samuel Halevy, author of Taz, a well known commentary on Shulchan Aruch¹⁷¹, writes that in a case of emergency, one may rely on a lenient opinion that has not otherwise been accepted by halachists. Rabbi Shabbetai ben Meir HaKohen, in an equally well known commentary on Shulchan Aruch called Shach, qualifies the statement in Taz, explaining that it only applies to laws of Rabbinic, and not Biblical origin.¹⁷² Since the consensus is that Shemittah is of Rabbinic origin, Shach's comment would include Shemittah in the category of permissible lenient rulings. Nearly all protagonists of the hetter mechira use this outlying opinion of Razez in one way or another. Rabbi Y. Engel¹⁷³ directly states that under the dire circumstances, where the livelihood of thousands of people were at stake, we ought to rely on the opinion of Razez. Others, such as Rabbi A.I. Kook, explain that the situation facing the Jews then (in the early 1900s) was a much greater emergency than that facing the Eastern European Jews which was the basis for the Taz's ruling. Furthermore, he argues that reliance on a single opinion is even more proper in this case, since the majority of authorities maintain Shemittah

¹⁷¹See Yoreh Deah 293:4. Shulchan Aruch is a nearly-universally accepted 16th century codification of Jewish Law, authored by Rabbi Joseph Caro.

¹⁷²See commentary on Yoreh Deah 242.

¹⁷³Otsros Yosef, p. 46

is Rabbinic in our day.¹⁷⁴

Opponents attack this reasoning from two angles. First, they argue that while it may be proper to rely on a minority opinion in cases of emergency, it is never proper to rely on an outlying opinion, like that of Razeḥ. Since his opinion has been refuted by all other halachists, early and later alike, even the author of Taz would agree it is improper to rely on Razeḥ's opinion. Furthermore, Rabbi Y.D. Soloveitchik writes that Razeḥ himself did not rely on his own opinion with regard to the observance of Shemittah.¹⁷⁵ Second, they challenge that an "emergency" within the meaning of one that would form the basis of a lenient ruling exists. Specifically, Rabbi Soloveitchik argues that there were always poor landowners in Israel, but there is no mention in the Talmud of any special consideration given to them to lessen their obligations of Shemittah. Furthermore, where the constraint is the very substance of the commandment, there can be no "extenuating circumstances" exempting individuals from its observance. In the case of Shemittah, where the whole purpose of the commandment is to relinquish ownership over the land and proclaim our trust in the Almighty that he will provide sustenance, it is illogical to find the existence of "strained circumstances."

(ii) Rabbi Yannai's call to sow the land

The Talmud, in Sanhedrin 26a records that at a certain time, the Roman government officials exhorted heavy taxes from the people in the form of produce. The situation worsened to the point that Rabbi Yannai issued a decree: "Go out and sow your seed in the Sabbatical year because of the collectors of arnona." This calling of Rabbi Yannai has been understood in different ways, and has been used both in support of and in opposition to the heter mechira.

¹⁷⁴As opposed to the situation the Taz addressed (in a different area of Jewish law).

¹⁷⁵Beis Halevi, 3:2. He explains that Razeḥ relied on his own opinion with regard to the monetary aspects of Shemittah -- the annulment of all debts, but not regarding the produce of the land.

Rashi, in his commentary, explains that Yannai was able to issue his lenient proclamation since Shemittah was considered to be of Rabbinic nature. Yannai was justified in seeking to lift the burden this arnona (the required measure of grain per annum to be delivered to the Roman legions) imposed, since Shemittah is merely Rabbinic law. Tosfos offer two alternative justifications in their commentary. The first echoes the view of Rashi, that since Rabbinic law is involved, Yannai was justified in ruling leniently. The second adds another limitation -- specifically, that in this case, there was a danger to human life. Tosfos explain that if the Jewish farmers were unable to pay the tax, they would be imprisoned in dungeons, and few if any would survive.

Supporters of the hetter mechirah rely on Rashi's interpretation (and the first interpretation of Tosfos). They argue that Yannai encouraged working the land during the Sabbatical year to avoid difficult economic conditions. The Rabbinic nature of the law permitted him to do so. By analogy, if this permission was given merely because of heavy taxes, it should certainly be available when the entire income of thousands, and the viability of the settlement altogether is at stake, as was the case at the turn of the century.¹⁷⁶

Putting the second interpretation of Tosfos aside for a moment, the rationale advanced in accordance with Rashi's views was rejected by opponents of the hetter. Rabbi Y.D. Soloveitchick argues that Yannai was not trying to preserve a favorable economic situation, but rather sought to maintain the peace with a potentially hostile regime. In support of this position, he quotes Maimonides,

¹⁷⁶See Sefer HaShemittah, p.72

who writes that Yannai only permitted sowing things which were required by the king's men.¹⁷⁷

There is no justification, therefore for issuing a permit to work the land during the Sabbatical year solely for economic reasons.

Netziv¹⁷⁸ argues that although economic loss might be sufficient to justify such a proclamation, the economic hardship during the time of Yannai and that existing during his day (the turn of the 20th century) were different in a critical respect. The strained circumstances facing the Jews in Israel was the potential loss of income from refraining from agricultural work -- the essence of the commandment. The strained circumstances facing the Jews of Yannai's day was an actual loss in substance. The Jewish farmers were required to pay the taxes in kind, even if they did not work the land. Yannai's call is thus not applicable to the situation in the Land of Israel at the turn of the century.

Even Rabbi Kook,¹⁷⁹ a staunch supporter of the hetter, understands that Yannai's proclamation was limited to a state of duress originating from the government. He explains that only when the burden comes from the king, can we say that to the extent a Jew works the land to pay the king his share, the Jew is not working his own land, but rather the land of the non-Jewish king.

Rabbi Karlin¹⁸⁰ further builds on this theme, extrapolating that Yannai's decree was only proper because nonpayment of the tax would result in the field's expropriation by royal forces. In such a case, the land can properly be considered as belonging to the king, or government, and not the Jewish landowner. Where the government imposes even a burdensome tax, but does not

¹⁷⁷Hilchos Shemitta v'Yovel 1:11

¹⁷⁸Meshiv Davar, Kuntrus HaShemittah

¹⁷⁹Mishpat Kohen, 63

¹⁸⁰Sheilas Dovid, p. 135

expropriate the field in a case of non-payment, ‘‘extenuating circumstances’’ like those of Yannai’s day do not exist. He brings further support for this argument from a passage in the Book of Nechemia, where the Jews upon returning from the Babylonian exile, recommit themselves to the fulfillment of the commandments:

Behold today we are slaves, and the land that You gave to our fathers to eat its fruit and its bounty, behold we are slaves upon it. And our grain in large amounts [we give] to kings whom You have placed over us because of our sins; they rule over our bodies and over our animals as they please, and we are in great distress. But, despite all this, we hereby forge a covenant... to observe and fulfill all the commandments of God, our Lord, and His laws and His decrees; ...and that we would relinquish [the land] and all loans during the seventh year.’’

Nehemia, 9:36 -- 10:1, 32

From this passage, it is clear that even under burdensome taxes like those described, there was a consensus to observe the laws of Shemittah, and refrain from agricultural activity during the Sabbatical year.¹⁸¹

Rabbi Y.D. Soloveitchik,¹⁸² in rejecting that the call of Yannai is applicable to the situation of the Jews in his day, brings the opinion of Ravad in his responsa. Ravad, in a gloss on Maimonides¹⁸³, maintains that Yannai’s call was never issued for the land of Israel proper, but rather only for the land that was not reconsecrated by Ezra’s (second) conquest. Thus, the entire analogy is inapposite.

¹⁸¹It is noteworthy that at least according to some, Shemittah at this point in history still retained its Biblical status (since Jeremiah had brought back representatives from each tribe). If so, the passage has little bearing on the question at hand. The question regarding Yannai’s call is whether onerous taxes were a sufficient justification to suspend the obligation of Shemittah, where Shemittah is Rabbinic in nature (the case in Yannai’s day, after destruction of the second Temple). The fact that the Babylonian returnees accepted to observe the Sabbatical year in the face of burdensome taxes, where such obligation is Biblical, is of no consequence.

¹⁸²Beis Halevi, p. 62

¹⁸³Hilchos Shemittah v’Yovel 1:11

Finally, there are those who argue that Tosfos's second justification of Yannai's instruction, namely that there was some danger to human life involved, is the more correct interpretation. Netziv, for example, argues that if the Jewish farmers were not able to pay the taxes (because they did not work the land), they would have been subject to the harsh punishments of the Roman authorities. This surely would qualify as risking their safety, if not their lives. Furthermore, others¹⁸⁴ bring historical support for this view of Tosfos. Historians¹⁸⁵ are of the opinion that the year of Yannai's call was 216 -- the Sabbatical year during the Roman-Parthian war. It is possible that in times of peace, the Roman authorities exempted the Jews from paying an agricultural tax during the Sabbatical year, but not in times of war. During the year 216, the Roman legions were encamped in Palestine, the geographical link between Rome in the West and Parthia in the East. The Roman emperor of the time, Marcus Aurelius Antoninus Caracalla, was known for his ruthless cruelty, even against his own countrymen. Certainly, when his legions were in need of food, he would not be well disposed to Jews, who for religious reasons, did not supply the necessary provisions. Viewed in this historical context, Yannai's call is justified not by mere economic hardship, but by a direct danger to life.

It is interesting to note that Yannai's message was in the imperative form "go out and sow," and was not merely an allowance (e.g. "You may sow"). In Jewish law, when human life is in danger, not only is it permissible to disobey the law, but it is obligatory. The very wording of Yannai's call lends itself more the interpretation of Tosfos that a risk to life justified the instruction.

(iii) Ruling leniently in strained circumstances in cases of doubt: the uncertainty of the correct Sab

¹⁸⁴See Grunfeld, *The Jewish Dietary Laws*, v. 2, appendix II, pp.217-219.

¹⁸⁵H. Graetz, *Geschichte der Juden*, V.3, p.213; M. Auerbach, *Jahrbuch der Juedische-Literatischen Gesellschaft*, v. 5, pp. 162-163.

As described above, the calculation of the Shemittah year is not a straightforward one (see supra, ‘‘counting the Shemittah cycle’’ p. 48). The prevailing opinion, established by a consensus of Rabbis in 1552, counts the years according to Maimonides’ method. However, there are sources of uncertainty at different stages in the calculation.

First, a leading commentary on Maimonides, Ravad, casts doubt on Maimonides’ interpretation of the view of the Geonim. Specifically, he questions whether the counting of Shemittah cycles preceding the destruction of the second temple included the fiftieth Yovel year. Whether or not this year was counted obviously has ramifications for what year of the cycle the destruction took place, and consequently, the calculating of the present day cycle.¹⁸⁶

Second, Rabbi Kook points out that even after Maimonides’ ruling, the exact year of Shemittah is still subject to doubt¹⁸⁷. The controversy between Rashi, Maimonides, and Rabbenu Tam regarding the year in which the second Temple was destroyed (see supra p. 53) was never resolved in a formal way. Although the traditional understanding of this debate results in a one-year discrepancy, rendering any two years of the Shemittah cycle subject to doubt, Rabbi Kook understands the controversy to relate to a four year discrepancy.¹⁸⁸ Thus, four years of a given Shemittah cycle are in doubt. Since the majority of the seven years are in doubt, Rabbi Kook concludes that one may be lenient with the laws of Shemittah to permit the heter mechira, since we are uncertain whether the Shemittah being observed is in fact the correct Sabbatical year. Rabbi Y. D. Soloveitchik (known as Beis Halevi) develops this subject at length, and comes to remarkably

¹⁸⁶See Ravad gloss on Maimonides, Hilchos Shemittah v’Yovel 10:6

¹⁸⁷Mishpat Kohen, 63

¹⁸⁸Ibid.

different conclusions from this uncertainty.¹⁸⁹ Specifically, he states that rather than issuing leniencies in the case of uncertainty, one should strictly observe the laws of Shemittah for each year that may be the true Sabbatical year. It should be noted, however, that Beis Halevi maintained Shemittah is of Biblical origin, even today. A general rule of halachic jurisprudence is that in cases of uncertainty, Biblical law is interpreted stringently, whereas Rabbinic law is interpreted leniently. It is no surprise, then, that Rabbi Kook (who maintains Shemittah is of Rabbinic mandate today) uses this uncertainty to rule leniently, whereas Rabbi Soleveitchick does not.

6. Is the hetter mechira an impermissible use of ha'arama (legal device)?

Ha'arama has often been translated as "artifice" or "artful evasion." The concept of ha'arama, however, is not fully captured with the use of these terms. Black's Law dictionary defines artifice as "a clever plan or idea, especially one intended to deceive." Ha'arama, while a creative plan, does not carry with it the connotation of deception.¹⁹⁰ Its function in halachic jurisprudence can be to lessen the brunt of a stringent law or protect against a law falling into neglect. Fulfillment of the law through ha'arama, although perhaps not in the spirit of law, is nevertheless embraced by the Rabbis. The Jewish legal system prefers fulfillment of the law through loopholes rather than transgression.

Examples of ha'arama abound in the Talmud.¹⁹¹ As the examples in the Talmud indicate, there

¹⁸⁹See Beis Halevi, III, 94

¹⁹⁰Interestingly, the Hebrew root of the word does mean "trickery." However, the phenomenon of ha'arama is jurisprudence has not been perceived as trick to evade the law.

¹⁹¹Brochos 31a; Shabbos 64b, 95a, 117b, 120a, 124a, 139b; Beitzah 11b, 13a, 17b; Moed Katan 11b, 12b, 19a; Nedarim 43a, 48a; Bava Metzia 62b, 90b, 108b; Temurah 24b. For a detailed discussion of ha'arama, see Encyclopedia Talmudit (Talmudic Encyclopedia) under heading "ha'arama." For more explication on this subject, see A.I. Kook, Shabbos Ha'artetz,

are some forms of ha'arama that are legally acceptable, and others which are not. Because the guidelines defining permissible use of ha'arama are not made explicitly clear, there is considerable discussion as to whether the *hetter mechira* is considered a permissible or impermissible form of ha'arama.

Some examples of ha'arama in the Talmud might help elucidate this phenomenon. The Jerusalem Talmud¹⁹² records the story of Rabbi Tarphon, a wealthy Kohen (priest). A portion of the tithes from all produce is set aside for the priests and their families. This portion, known as *teruma*, is forbidden to be consumed by anyone other than a priest or his immediate family. During a time of economic distress, Rabbi Tarphon conducted a marriage ceremony with 300 poor women¹⁹³, to enable them to eat *teruma*, which was cheaper and easier to obtain than other food. Although the marriage ceremony was legal and binding, its purpose was obviously not marriage, but to change the status of the women to enable them eat *teruma*. In this case, ha'arama was used not to evade any law, but as a creative way to give charity.

The Talmud in Nedarim 48a states that if one who has vowed not to benefit from his neighbor's property or goods is now in a predicament in which he has nothing to eat, the neighbor may transfer food to a third party, who will in turn give the food to the one who has vowed. Although clearly a device to avoid the stringency of the vow, this instance of ha'arama permits the one who had vowed to partake in the food. The Talmud continues to recount a story where a father had taken such a vow not to benefit from his son's property or goods. When the son made a wedding (for his son), he sought a legal device to enable his father to partake in the banquet. He therefore approached a third party and transferred his courtyard and banquet as

Introduction, section 13 and M. Sofer, Responsa Chasam Sofer, O.C.: 62.

¹⁹²Yevomos 4:12

¹⁹³Note this was prior to the Rabbinical decree banning polygamy.

a gift, stipulating that the gift was for the purpose of his father being able to participate in the wedding. The third party, apparently unconvinced that this device would legally enable the father to participate, said ‘‘If they [the courtyard and banquet] are mine, let them be consecrated to Heaven!’’ (the consequence of consecrating goods to Heaven prevents all people from partaking in them). When they brought the matter before the Sages, the Sages ruled: ‘‘every gift which is not so given that if the recipient consecrated, it is in fact consecrated, is no gift at all.’’ In other words, when restrictions were placed on the gift (here the restriction being the inability to designate as consecrated), at least where those restrictions were derived from the true intent of the transaction, the transfer is ineffective. From this episode in the Talmud it is clear that there is some degree or category of restriction, which so characterizes the transaction as a legal fiction, that the ha’arama is inadmissible.

Other examples of ha’arama, more analogous to the hetter mechira include the permissible sale of pregnant animal to a non-Jew in order to avoid the obligations of donating the first born animal to the priest¹⁹⁴, and the permissible sale of chametz (leavened bread) to a non-Jew for the duration of the Passover holiday. In both cases, as in the case of the hetter mechira, the sale is effected as a temporary sale in order to avoid religious obligations or prohibitions that follow from ownership. On the subject of the sale of chametz, Rabbi M. Sofer writes in his Responsa¹⁹⁵:

¹⁹⁴See Mishna, Tractate Temura 5:1

¹⁹⁵Responsa Chasam Sofer, O.C. (Orach Chaim) 113.

The Ha'arama of this sale is completely permissible without any doubt, because the owner carries out a proper sale in one of the modes of acquisition in which the non-Jew can acquire the property; and although both parties to the contract are clear in their minds that they desire the return of the chametz to its previous owner after Passover, nevertheless for the present it is sold; and the buyer, in turn, is entitled to sell it, to eat it, to consecrate it, or even to destroy it; without anyone being able to object. However, as a friend of the seller, he will not do such a thing. On the contrary, he keeps the chametz until after Passover, at which point, he resells it to the Jew. The Jew can even say explicitly to the non-Jew: "If there is any chametz left in your possession after Passover and you want to resell it, then in all probability I shall buy it from you at an equitable price."

It follows from this responsum that even though both parties to the transaction may fully acknowledge the true purpose of the sale -- to protect against the stringency of the law -- the transfer is valid as long as it formally meets the legal requirements of sale. The fact that the buyer will not eat, sell or destroy the chametz is of no consequence -- as long as he has the formal right to engage in these activities, the sale is effective.

Before drawing any analogy to the heter mechira, it is important to consider certain guidelines regarding permissible versus impermissible forms of ha'arama that have been set forth by the Talmud and elucidated by later halachists. The Talmud¹⁹⁶ seems to distinguish between ha'arama used to avoid the stringency of Biblical law and that used to avoid the stringency of Rabbinic law. Even in the area of Rabbinic law, the Talmud only permits ha'arama performed by a knowledgeable

¹⁹⁶Shabbos 139a

scholar who is careful in his actions (as opposed to a layperson). Whether the Biblical-Rabbinic distinction is a hard and fast rule is the subject of debate. Rabbi M. Sofer maintains that most authorities have rejected this bright line distinction, in favor of a case by case analysis. The Talmud¹⁹⁷ also distinguishes between a blatant and discreet ha'arama, obviously favoring the discreet form. It seems that this is a factor to consider, and not a general rule prohibiting the use of a blatant ha'arama.

Rabbi A. I. Kook¹⁹⁸, expressing the view of hetter mechira proponents, equates the sale effected by the hetter mechira to the sale of chametz and the sale of the pregnant animal. All transactions are entered in order to evade obligations or prohibitions that follow from ownership. As long as the sale is formally valid, like Rabbi M. Sofer's description of the sale of chametz, it is a valid transaction and a permissible use of ha'arama.¹⁹⁹

Rabbi J.D. Willowsky²⁰⁰ (Ridbaz) distinguishes the hetter mechira from the sale of chametz.

Recall that Ridbaz is of the opinion that Shemittah has retained its Biblical status even today.

He argues that the Talmud only contemplated ha'arama used in connection with Rabbinic matters,

¹⁹⁷Ibid.

¹⁹⁸Shabbos Ha'aretz, Introduction, Section 13

¹⁹⁹Rabbi Kook, also addresses the question of why this seemingly simple ha'arama was never used before to avoid the stringent prohibitions associated with Shemittah. Especially since there is clear evidence of economic duress in previous eras in which Shemittah was observed, the absence of a hetter mechira is conspicuous. Rabbi Kook responds, in his introduction to Shabbos ha'Aretz, and explains that during the period up to and including the Talmud, the majority of the land cultivated was Jewish owned. As a result, the Rabbis decreed that the laws of Shemittah would apply to produce grown on non-Jewish land as well. This was to safeguard against Jews erring and considering the Jewish grown produce to be unrestricted as well. In these circumstances, there was no advantage to selling the land to a non-Jew -- either way, the Shemittah restrictions applied with the same force. Rabbi Kook argued that in his day, since there is only a small settlement of Jews among the vast Arab farmlands, this decree is not in force. Consequently, this is the first time such a sale would have any meaning in terms of evading obligations of Shemittah. Rabbi Kook further accounts for possible demographic shifts that would again put Jewish farmland in the majority (which is clearly the case today), stating that the Rabbinic decree of the time of the Talmud does not automatically become reinstated when Jews again resume the majority.

²⁰⁰Introduction to Beis Ridbaz

not Biblical ones. The sale of chametz, he asserts, is effected to avoid a Rabbinic prohibition.²⁰¹ Furthermore, he argues that the land sale is a more blatant, and hence impermissible, ha'arama.²⁰²

7. New problems with the hetter mechira:

Even those who initially agreed with the reasoning of the hetter may find new reasons to discredit the hetter as applied to modern day life in Israel. In this context, it is important to note that from the time of its conception, the hetter was meant to be temporary in nature. Rabbi Kook, the greatest proponent of the hetter, repeatedly justifies the temporary hetter by the terror and desperation of the times and by the threat to survival of the Jewish presence in Israel. He repeatedly urges that the hetter should be dispensed with as soon as the current emergency condition has passed.²⁰³

While full Shemittah observance certainly puts a heavy economic strain on individual farmers and agriculture at large in Israel, the situation today hardly mirrors the desperation of the early 1900s. Nevertheless, the chief Rabbinate has reluctantly reissued the hetter mechira each Sabbatical year since then.

Observance of Shemittah in Israel today

There are basically two divergent practices regarding the observance of Shemittah in present day Israel. One camp accepts the hetter mechira ruling initiated in the late 1800s and endorsed by successive chief Rabbinate since that time. Observance of Shemittah is therefore quite limited: it involves the sale of land by the agency of the chief Rabbinate, and following a set of guidelines that govern farming under the hetter. Depending of differing customs,

²⁰¹Although the obligation to rid oneself of possession of chametz is certainly Biblical, Ridbaz explains that the Biblical requirement is fulfilled by a sincere renouncement of ownership. A later Rabbinic decree demanded the removal or sale of chametz to safeguard against insincere renunciation of ownership. The sale of chametz, thus avoids a Rabbinic, not Biblical prohibition.

²⁰²For more on this subject see Rabbi R.I. Weiss, Responsa Minchas Yitzchack, 96, who asks why the facile solution of hetter mechira has never been suggested before our time.

²⁰³See Mishpat Kohen, 58, 63

some may treat produce grown on such fields as sacred produce. The other camp rejects the hetter mechira ruling and observes the laws of Shemittah completely. Those committed to full Shemittah observance rely heavily on Arab produce from surrounding areas. While the decision to accept or reject the hetter mechira is a halachic question and not a political one, the divide in observance mirrors a political divide in the Orthodox community in Israel.

The farmer that chooses to observe Shemittah in the complete sense faces enormous economic hardship: he has to lay off his workers, close his plant, cut off his suppliers and forfeit his customers for one year, while at the same time he still has to cover the rent on his premises, pay off his loans, maintain his equipment and feed his family. After the Sabbatical year is over, he has to bounce back into the market. Despite this daunting challenge, a growing number of farmers have been observing Shemittah. According to figures released by the National Center for Shemittah Observing Farmers, a Bnei Brak-based organization which promotes the observance of Shemittah as well as providing practical assistance to farmers, 4,000 farmers, in 250 farms observed Shemittah in the 2000-2001 Shemittah year. This reflects a 14% increase from the previous 1993-1994 Shemittah year. To offset some of the financial hardships, private organizations and government grants by the Agricultural ministry have been arranged to farmers who observe the Sabbatical year.

While the observance of Shemittah on a national level in Israel today is hardly ideal, the wholehearted observance by a segment of the population and its token observance by another portion has resurrected a commandment that remained unfulfilled for centuries. As Shemittah observance continues to grow, the religious and moral imperatives it seeks to implement are slowly being realized.

GLOSSARY OF TERMS AND PHRASES

Ain shliach l'dvar aveira: a halachic principle teaching that there can be no agency for something that amounts to a breach of Jewish law

Biyur: the obligation to remove produce from one's home or storage place once no more of that species is available in the field.

Chanata: the stage of a fruit's development rendering it a fruit belonging to a particular year

D'oraisa: Biblically ordained

D'Rabanan: Rabinically ordained

Dina d'malchusa dina: literally, "the law of the government is the law." It refers to the principle that at least to the extent that there no conflict between the obligations and restrictions imposed by the sovereign government in which a Jew resides, the law of the land is also the law for religious purposes.

Ger toshav: a non-Jew who is not an idol worshipper and accepts upon himself the seven Noahide laws as a code for civilization.

Ha'arama: a legal device or artifice structured to avoid the stringency of the law

Ha'arama: legal device (sometimes translated as artifice) employed to avoid the stringency of the law.

Halacha: Jewish law (also spelled Halacha)

Halachist: Jewish legal scholar

Hallah: refers to laws relating to the tithing of bread baked for distribution to the Priests

Hetter Mechira: the halachic ruling permitting the sale of land to a non-Jew to avoid adhering the agricultural restrictions of Shemittah.

Kedusha Rishona: the first sanctification of the land of Israel, by Joshua

Kedusha Shniya: the second sanctification of the land of Israel, by Ezra

Kedushas Sheviyis: the sanctity attaching to produce of the seventh year.

Kol Yashveha Aleha: the requirement of the Jubilee year that all of the Jewish people must be present in the land of Israel.

Lekita: the stage of a vegetable's development rendering it a fruit belonging to a particular year (lit. picking)

Lo tichanem: lit. "do not show them favor." This expression from Deuteronomy 7:2 is the source of the prohibition against sale of land in Israel to a non-Jew.

Mitzvos haTluys Ba'aretz: laws connected to the soil of the land of Israel

Ne'evad: refers to the status of produce grown in a field that was worked in a prohibited manner

Otzar Beis Din: Storehouse of Shemittah produce overseen by the court of each city.

Rosh Hashana: the Jewish new year, beginning on the first of Tishrei

Sefichim: produce grown spontaneously. Examples include seeds which fell from produce during harvesting and took root themselves.

sha'as ha'dechak: 'strained circumstances' that give rise to leniencies in the law.

Shaas Hadechak: strained or difficult circumstances that may provide the basis for lenient ruling.

Sheviyis: lit. 'seventh.' Refers to the seventh year of the shemittah cycle, the sabbatical year.

Smichus hadaas: the requirement in Jewish contract law that both parties must clearly assent to a contract

Torah lo nitna l'shiurin: literally, 'the Torah is not given for us to measure,' It refers to the concept that the law was not intended to be defined by our perception of the purposes it was designed to achieve.

Tosefes Shviyis: the additional time preceding the seventh year in which certain prohibitions apply.

Trumos and Ma'asros: refers to laws regarding the tithing of produce grown in the land of Israel

yachid, v'rabim, halacha k'rabim: principle in halachic jurisprudence: when there is a dispute between a single individual and many, the opinion of the many is adopted.

Yovel: refers to the Jubilee year, the year concluding seven cycles of Shemittah.

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