

The Law of Witnesses in Transferred Operation

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For a variety of reasons the Biblical and early post-biblical provisions concerning witnesses had an extraordinary fascination for rabbinic thought. The following remarks are intended to point out some uses to which they were put outside their original domain.

Let us begin with the biblical requirement of two witnesses in certain trials.¹ I have elsewhere remarked² on the nature of such a trial as a combat between the accused and his accusers—the latter being identical with the witnesses. A man will hold his own attacked by one, but be defeated by two. Even apart from this idea, there is something commonsensical in suspending judgment so long as it is one man's word against another's. According to Philo, in his *Special Laws*,³ a major motivation of the biblical law is that the accused is equivalent to a single witness. Jackson⁴ observes that this equation finds striking expression in the Mishnah: "If a man stole an ox or sheep according to the evidence of two witnesses but killed or sold it according to the evidence of one witness only, or according to his own evidence, he makes twofold restitution but not fourfold or fivefold one."⁵

Ordinarily, in the case of one man's words against another's, any system gives preference to the *status quo*; that is to say, the party that wants a change must have some extra in his favour to win. Aulus Gellius⁶ tells of a significant dilemma he found himself in when sitting as a judge. A man claimed repayment of a loan from another man, who denied the loan. The claimant could produce no evidence; normally, therefore, he would have lost. But he was known as well-to-do and outstandingly honest, the other man as of no substance and given to fraud. Gellius saw no way out and took the oath *non liquet*, which relieved him from rendering a decision.

By Talmudic times, the biblical ordinance is regarded as extending to most trials criminal and private.⁷ Furthermore, the notion that, to upset the *status quo*, one against one does not suffice while two against one does, governs testimony outside trials. For example, the Mishnah

1 Num. 35:30; Deut. 17:6; 19:5;

2 See *The Journal of Jewish Sociology* 3 (1961), 10f.

3 4:54.

4 Bernard S. Jackson, *Theft in Early Jewish Law* (Oxford, 1972), 195.

5 Mishnah *Baba Qamma* 7:4. The Hebrew for "evidence" is *pi*, 'mouth'.

6 14:2.

7 E.g., Mishnah *Sanhedrin* 3:6.

lays down⁸ that if one witness testifies to a husband's death and his wife remarries, this second union is not affected by the contrary testimony of one other witness but it is by that of two.

Quite likely some canons referring to scholarly disputes are indebted to these laws. Besides the well-known principle that the majority of sages is to be followed,⁹ there are more detailed rules—such as that, when two scholars differ and a third one sides with one of them, the latter opinions prevails.¹⁰ How this rule relates to the principle is not easy to say. I suppose the principle envisages widely discussed questions, the rule just outlined more restricted controversies. Not that there is any practical discrepancy; in fact, the rule could be conceived of as an application of the principle.¹¹ Only I suspect that, historically, it did not come into being in this way; or at least not only in this way—it has some genetic connection with the laws about witnesses. Victory goes to two versus one.

Here it may be recalled that, in certain circumstances, a rabbi enunciating a regulation is thought of as “testifying” to it.¹² Sometimes the testifying is done by a single rabbi, sometimes by two. (Illustrations will be found in the Mishnaic tractate *Eduyoth*, which actually means ‘testimonies’.) The concept appears to go back to the Second Temple: R. Jose ben Joezer¹³ and Hanina the Prefect of Priests,¹⁴ are mentioned as testifying to rules and practices.

A yet more imaginative transfer of the law of witnesses is encountered in the field of interpretation. The thirteenth and last rule of interpretation in R. Ishmael's list¹⁵ deals with antinomy: when two scriptural verses contradict one another, to arrive at a decision we need a third which will tip the balance. The conflicting verses are here placed in a trial situation: two witnesses will carry the day. The verb ‘to contradict’ is technical in the province of legal testimony;¹⁶ and the verb ‘to tip the balance’ is occasionally met there too.¹⁷

The analogy is, however, far from perfect. Where two witnesses proper prevail, the opposing evidence is null and void (with marginal exceptions). This cannot be exactly mirrored in the solution of antinomy: no scriptural pronouncement can be simply invalidated. The triumph of one verse over another—with the help of a third—must be a limited one.¹⁸ What Ishmael's rule really means is that one verse will prove to make the major point and the other merely to contribute a subsidiary one. In one verse God says “I have talked with you from heaven,”¹⁹ another says that “the Lord came down upon Mount Sinai.”²⁰ The balance is tipped in favour of the former (against anthropomorphic survivals) by a third verse, “Out of

8 Mishnah *Yebamoth* 15:4.

9 Babylonian *Baba Metzia* 59b.

10 E.g., Babylonian *Shabbath* 39b, *Baba Qamma* 116a, quoted (with other texts) by A. Schwarz, *Die Hermeneutische Antinomie in der Talmudischen Literatur* (Vienna, 1913), 19f.

11 It is explained thus by Levy, *Wörterbuch über die Talmudim und Midraschim*, 2nd ed. (1924), 2:414: “weil nämlich in diesem Fall zwei Autoren gegen einen stimmen und also die Majorität bilden.”

12 See W. Bacher, *Tradition und Tradenten* (Leipzig, 1914), 15f.

13 Mishnah *Eduyoth* 8:4.

14 *Ibid.*, 2:1.

15 Baraitha prefixed to *Siphra* on Leviticus.

16 E.g., Mishnah *Sanhedrin* 5:2, trial; *Yebamoth* 15:5, testimony outside trial.

17 Palestinian *Yebamoth* 10d, *Ketuboth* 26b.

18 A probable implication concerning the way in which the evangelists would have us solve the

heaven He made thee to hear His voice, and upon earth He showed thee His great fire":²¹ God remains in heaven though His activity reaches out to earth.²² It is, of course, conceivable that the rule was formulated in a milieu not conscious every moment of the absolute impossibility of any superfluous or inaccurate clause in the Bible. There are indications in this direction but I shall not pursue them.

The rule is not contained in Hillel's shorter catalogue (seven rules of interpretation instead of thirteen).²³ We may conclude that the treatment of antinomy by drawing on the law of witnesses is a product of the first century A.D. Essentially, this holds good even if we accept Schwarz's reconstruction of the development:²⁴ for him, the rule in its present form is post-Talmudic, but the one he puts in its place still has the relevant features. Perhaps I may add that one part of his thesis at least is most persuasive: Hillel did not yet call for the introduction of a third verse to settle an antinomy, he was content with a distinction freely reached.

It is in the first century A.D., too, that the law of witnesses exercises an impact in an entirely different area. I have in mind the legend making its appearance in that period, to the effect that the translators of the Septuagint worked each strictly on his own and none the less an identical version resulted. As I note in *Ancient Jewish Law*,²⁵ this is an ingenious borrowing of the method—introduced some hundred-and-fifty years before—of hearing witnesses to a crime in the absence of one another: it is their agreement under this condition which establishes their trustworthiness. The legend makes the translators into witnesses passing the same test.

antinomy between the Messiah, David's son, and the Messiah, David's lord, is mentioned in my *The New Testament and Rabbinic Judaism* (London, 1956), 163.

19 Exod. 20:19.

20 Exod. 19:20.

21 Deut. 4:36.

22 *Mekbilta* on Exod. 20:19.

23 Following R. Ishmael's rules in the Baraita at the opening of *Siphra* on Leviticus.

24 *Die Hermeneutische Antinomie*, passim.

25 By David Daube and Reuven Yaron, to appear in the B'nai B'rith Jewish Heritage Classics, edited by Patterson and Edelman.