

# THE CONTROVERSIES OF RAB AND SAMUEL AND THE TOSEFTA

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As is well known, the question of the date of the Tosefta and the allied problems of its aim and relation to the Mishnah still await clarification. The primary task in studying this problem is to establish first of all R. Ḥiyya's share in our Tosefta. If R. Ḥiyya's statements which are quoted in Talmudic literature and which have parallels in the Tosefta had amounted to a substantial collection, we could have attempted to define their peculiarities and to examine the Tosefta with reference to them. The number, however, of such quotations is small. Moreover, the majority of them are handed down with the introductory formula of "R. Ḥiyya taught", which raises the question as to whether they originate in fact with R. Ḥiyya or are merely quotations from the Tosefta and the Talmud refers to the Tosefta as a whole by the name of its original author.

A more promising approach would be to examine the utterances of the Amoraim of R. Ḥiyya's school and to see which Tosefta statements correspond to them. As a first step, we propose to deal here with the influence of the Tosefta on the teachings of Rab. Rab's principal teacher was R. Judah, the Patriarch, and his main study was the Mishnah. Yet, as is known, he was also a pupil of his uncle, R. Ḥiyya.<sup>1</sup> He learnt from him "all general rules of the Law"<sup>2</sup> and he quoted him frequently.<sup>3</sup> As to Rab's study of R. Ḥiyya's Tosefta, we find that R. Ḥiyya explained to him a problematic passage of the Tosefta,<sup>4</sup> and many of Rab's statements find support in the Tosefta.<sup>5</sup> Also, it seems that, in the epithet "*tanna*" by which

<sup>1</sup> *babli*: Shab. 66b, Erub. 73a, M. Kat. 16b; *yerushalmi*: Shab. i. 11 (4a), Pes. vii. 11 (45b), Betz. iv. 2 (62c).      <sup>2</sup> *y* Ket. xii. 3 (35a).

<sup>3</sup> *babli*: Shab. 92a, 98a, 99a, 100a, 138a, Erub. 102a, Pes. 85b, 107a, B.K. 115a, B.M. 76b, Hull. 76a; *yerushalmi*: Ber. vi. 5 (10c), Shek. i. 1 (45b), Meg. i. 1 (70a), 4 (70b), Sot. v. 2 (20a); cf. also such cases as "R. Judah said in the name of Rab (and some say) in the name of R. Ḥiyya", in *b* Shab. 101a, *b* Erub. 86a.      <sup>4</sup> *b* B.B. 46a.

<sup>5</sup> Cf. the instances where the Talmud quotes support for Rab from what "R. Ḥiyya taught", e.g. *babli*: Shab. 20a, Pes. 8b, Yeb. 9b, Shebu. 40a; *yerushalmi*: Ter. ii. 3 (41c), Shab. iii. 1 (5d), Yeb. ix. 9 (10b).

both R. Ḥiyya and Rab were exclusively referred to, in the phrases "R. Ḥiyya is a *tanna* and may differ"<sup>1</sup> and "Rab is a *tanna* and may differ", there is an allusion to their being Tosefta "Scholars", just as the same epithet in the formula "a *tanna* taught" alludes to a "scholar" of Baraitot. Indeed, there is some evidence to show that where the expression "Rab is a *tanna* and may differ" occurs it means that Rab relied on the Tosefta.<sup>2</sup>

Now, in the single instance where the Talmud quotes a Tosefta passage and gives its source as "Tosefta" it contrasts it with a passage for which it gives as the source the Baraita collection of the school of Samuel.<sup>3</sup> This shows that the Tosefta did not belong to the regular text-books used in Samuel's college. Indeed, if we examine the controversies of Rab and Samuel in the interpretation of the Mishnah, we find that Samuel's interpretations agree as a rule with the straightforward meaning of the Mishnaic text, whereas Rab's interpretations can only be explained with the help of the Tosefta. As an example, we shall consider here their controversies in the interpretation of the Mishnayot in Tractate Ketubot.

(1) Ket. i. 2 lays down the rule that the *Ketubah* (i.e. the money to which a woman is entitled on her husband's death or in case of a divorce) is 200 *denars* if she was a virgin on marriage and

<sup>1</sup> *b* B.M. 5a.

<sup>2</sup> In addition to the Tosefta, Rab had access to other Baraitot of R. Ḥiyya's collection, cf. e.g. Rab's statement, "I found a hidden scroll at R. Ḥiyya's", *b* Shab. 6b, *b* B.M. 92a. Especially in matters dependent on exegesis, Rab often relied on Sifra. The phrase "Rab is a *tanna* and differs" occurs in the Talmud six times. Two of these (*b* Sanh. 83b, *b* Hull. 122b) in connexion with exegetical questions relating to verses of Leviticus. The others are: (1) *b* Erub. 50b, where Rab is supported by Tos. Erub. iii. 4. (2) *b* Ket. 8a, where he is supported by Tos. Meg. iv. 12. (3) *b* B.B. 42a, where Rab maintains that in the case of a sale in the presence of witnesses but without a deed, the buyer may exact indemnity from mortgaged property, he has the support of Tos. Ket. ii. 1, which in showing the superiority of "deed" over "money" points to the right of exacting indemnity from mortgaged property, whereas in showing the superiority of "deed" over "witnesses" the Tosefta has to resort to "bill of divorce". (4) In *b* Git. 38b, Rab does not seem to have support in our Tosefta, which, however, does not prove that he had no support in the original Tosefta of R. Ḥiyya. On the other hand, the fact that in this case, although the Talmud had already settled the difficulty of Rab's contradicting a Tannaitic text by stating that "Rab is a *tanna* and may differ", it considered it relevant to confront Rab now with a text taken from Sifra, Lev. xxvii. 28 (cf. also Tos. Arak. iv. 24 and Arak. 28a), shows that the argument, "Rab is a *tanna*", is of no avail when he is in disagreement with R. Ḥiyya.

<sup>3</sup> *b* Yoma 70a.

half that sum, i.e. a *mina*, if she was not. In defining this rule Ket. i. 3 states that if a woman who enters marriage had connexion with a man of age whilst she was a minor, or if she had connexion with a minor when she was already of age, ומוכת עץ (lit. or a woman hurt by a piece of wood, i.e. who is not *virgo intacta* through accident) her *Ketubah* is 200 *denars*. So R. Meir. But the Sages say: the *Ketubah* of a מוכת עץ is one *mina*. According to Samuel, *b* Ket. 112a, we have in this Mishnah three separate cases, about the first two of which there is general agreement whereas the third is the subject of controversy. Rab, however, maintains there that "If she had connexion with a minor when she was already of age, he makes her a מוכת עץ", that is to say, the last two cases of the Mishnah are identical and the controversy concerns both. While Rab may have seen no objection to taking the introductory *waw* of ומוכת עץ as explanatory,<sup>1</sup> the text of the Mishnah does not require this, nor does it justify the equation of that expression with "a woman of age who had connexion with a minor". It seems, however, that Rab was influenced by the Tosefta<sup>2</sup> which has instead of the words "her *Ketubah* is 200 *denars*" of the Mishnah, "her *Ketubah* from another one (מאחר, i.e. when she marries another man) is 200 *denars*". The additional words "from another one" clearly show that in all foregoing cases the woman had had connexion with a man.

(2) In the question of the status of a child of unknown paternity dealt with in Ket. i. 9, Samuel decided that if it was conceived in a town where the majority of the inhabitants are of unblemished descent, it may marry into the Jewish community. Rab, however, maintains that for purposes of marriage the majority law does not apply. *b* Ket. 15b links up this controversy with the following one. Maksh. ii. 7 deals with the question of an abandoned child found in a city inhabited by both Jews and non-Jews, and states: "(a) If the majority are non-Jews, it may be deemed to be non-Jewish; (b) if the majority are Jews, it may be deemed to be Jewish; (c) if they are equal, it may be deemed to be Jewish; (d) R. Judah says: It should be determined by which are more wont to abandon children." Rab holds that (a) is concerned with the Jewish court's responsibility for maintenance of the child, but not with the child's status as to

<sup>1</sup> Another case where Rab takes such a *waw* as explanatory is in Suk. ii. 2; cf. *b* Suk. 22a.

<sup>2</sup> Ket. i. 2.

marriage. According to Samuel, on the other hand, (*a*) is concerned with the position of the child's lost property. As to (*b*), Samuel comments that the child is not bound by the Jewish dietary laws, and that the Sabbath laws may be disregarded if there is a question of saving the child's life.

A comparison between Mishnah and Tosefta<sup>1</sup> explains the choice of these definitions which at first sight seem arbitrary, as well as the reason for the controversy. The Mishnah under discussion is found in Tractate Makshirin in the midst of a number of Mishnayot dealing with problems which arise in a city of a mixed population, as above. The two Mishnayot preceding and the first Mishnah following it deal with certain laws of the Sabbath and lost property as they apply in such a city, whilst the second Mishnah following it considers the question whether certain articles of food found there are permitted in accordance with the dietary laws. Samuel, in relating (*a*) of our text to the dietary and Sabbath laws, and (*b*) to the laws of lost property, seems to have been influenced by the sequence of the sections in Mishnah Makshirin. Rab, on the other hand, seems to have relied on the Tosefta which appears to have had a different arrangement from that of the Mishnah, so that our text follows all the above sections. Being thus placed it was rightly interpreted by Rab as being independent of the context of the preceding sections. The first concern when a child is found is its maintenance, not the academic question of its lost property. The second part of Rab's statement, that the child is not considered Jewish as regards marriage, shows, similarly, the influence of the Tosefta. R. Judah's statement, (*d*), reads in the Tosefta: "If there was there (in the city) one . . . bondwoman, it is she who is suspected of abandoning." Whereas R. Judah's statement in the Mishnah could also have been taken by Samuel to concern the question of lost property, its wording in the Tosefta can only be interpreted as concerning the question of marriage, slaves being considered full Jews as regards lost property or, for that matter, the dietary and Sabbath laws. This brings us back to the first controversy of Rab and Samuel, mentioned above. It has long been suggested<sup>2</sup> that Rab's rejection of the majority law for purposes of marriage was based on the consideration that "fornication pursues those of blemished descent". This maxim, however, is no more than R. Judah's statement in the Tosefta, expressed in

<sup>1</sup> Maksh. i. 8.

<sup>2</sup> Cp. ראה אותו פורש *s.v.* Ket. i. 10 (ed. Vilna, 6b), קרבן העדה.

different terms. We may thus conclude that in this instance, too, Rab follows R. Judah's statement in the Tosefta.

(3) Ket. ii. 5: "If a woman said, 'I have been married but am now divorced', she may be believed, since the mouth that forbade is the mouth that permitted." *b* Ket. 22a records in this connexion that Samuel asked Rab whether the same rule would apply in the case where a wife first said to her husband that she was unclean and then, within the prescribed period of uncleanness, said she was clean, and he answered in the affirmative. What made Samuel refer this case to Rab, and why did he expect him to know the answer? It seems that Samuel's query, in which the wife's statements were contradictory, could not be solved by referring to the case of the Mishnah where the woman's statement was consistent. The Tosefta's version of the text of the Mishnah, however, reads:<sup>1</sup> "If she first said, 'I am married', and then she retracted and said, 'I am not married', she may be believed." The latter case, where the woman's statements were contradictory, offered the solution to Samuel's query. It is possible that Samuel consulted Rab in order to ascertain the authenticity of the version of the Tosefta.

(4) Ket. iv. 5: "If the father delivered her (his daughter, a minor, who is betrothed) to the husband's agents, she is deemed within the control of the husband (i.e. she is considered married)." *b* Ket. 48b quotes to this: "Rab says: Delivering her is (considered marriage) concerning everything except (the eating of) heave-offering (if her husband is a priest). But Samuel says: (She is considered married) as regards (the husband's) inheriting her." The Tosefta<sup>2</sup> has the following rider to the above Mishnah: "Concerning what were these things said (i.e. that she is considered as married)? Concerning her *Ketubah*; but heave-offering she may not eat until after she has entered the bride-chamber." The Tosefta thus supports Rab in restricting her from the eating of heave-offering. On the other hand, it also supports Samuel, since "*Ketubah*" in the Tosefta is only another term for Samuel's "inheriting her"; the Tosefta could justify both views as they were not mutually exclusive.<sup>3</sup> It seems probable, however, that while Rab depended on the Tosefta, Samuel relied on a Baraita which, although essentially the same as the Tosefta, differed from it in terminology.

(5) In *b* Ket. 45b, Rab maintains, against Samuel, that the

<sup>1</sup> Ket. ii. 2.

<sup>2</sup> Ket. iv. 4.

<sup>3</sup> Cp. *Tosafot*, Ket. 48b, *s.v.* תיובתא דכולהו and *s.v.* ושמאלי.

raiment of the widow which had been given her by her husband is assessed against the *Ketubah*. Samuel is supported by Arak. vi. 5: "(If a man dedicates his goods) he has no claim to his wife's raiment", which shows that, once given to the wife, the raiment becomes her property. Rab's reason, however, as R. Nahaman explains in *b Ket. ibid.*, is that there is always the implied condition in a husband's gift to his wife, that it may be revoked in case of separation. In giving legal force to an implied condition, Rab seems to follow Tos. Ket. iv. 15; cp. *b B. Bat.* 146b.

(6) The controversy between Rab and Samuel as regards the validity of a *donatio mortis causa*, the deed of which unnecessarily includes the clause mentioning symbolic acquisition, recorded in *b Ket.* 55b, turns on the legal force of implied conditions, as in the case discussed above, under (5).

(7) Ket. vii. 1: "If a man vowed that his wife should derive no benefit from him for the duration of 30 days he may appoint a guardian, etc." *y Ket.* vii. 1 (31b)<sup>1</sup> quotes Samuel's opinion that only if he confined his vow to thirty days is the appointment of a guardian acceptable. If, however, the vow was for an unlimited period, he must divorce her forthwith and pay her the *Ketubah*. Against this Rab maintains that, even if he vows for an unlimited period, he can avail himself of the provision of appointing a guardian for thirty days as he may find a way to revoke his vow. The point at issue is whether the words "for the duration of 30 days" define the period of the vow, or the period for which a guardian may be appointed. The text in the Mishnah was considered to favour Samuel's view.<sup>2</sup> The Tosefta,<sup>3</sup> however, quotes part of the text of the Mishnah in a manner which decisively supports Rab's view. The quotation reads: "For the duration of 30 days he may appoint a guardian, etc." If the Tosefta were of Samuel's view, it would have either extended the quotation so as to include the opening sentence "If a man vowed, etc.", or shortened it so as to begin with "He may appoint a guardian, etc."

(8) Ket. vii. 7: "(a) If a man betrothed a woman on the condition that she was under no vow and she was found to be under a vow, her betrothal is not valid (and no bill of divorce is needed to dissolve the union). (b) If he married her making no con-

<sup>1</sup> In *b Ket.* 71a (cf. also *ibid.* 61b) the names are reversed. I have chosen the version of *yerushalmi* as it agrees with the general theory that Rab follows the Tosefta.

<sup>2</sup> Cf. *yerushalmi*, *loc. cit.*

<sup>3</sup> Ket. vii. 1.

dition, and she was found to be under a vow, she may be divorced without (paying her her) *Ketubah*. *b* Ket. 72 b has on this: "If he betrothed her on condition (that she was under no vow) and married her making no condition (and she was found to be under a vow), Rab says: She needs from him a bill of divorce (for dissolving their marriage). But Samuel says: She does not need from him a bill of divorce." The explanation of the controversy seems to be that according to Samuel (*a*) and (*b*) of the Mishnah are independent of each other, whereas according to Rab (*b*) is a continuation of (*a*): a man betrothed a woman on condition that she was not under a vow and she was found to be under a vow. Had he broken off at this point, a bill of divorce would not have been necessary. If, however, he proceeded and married her without repeating his condition, a bill of divorce is required. The ordinary explanation of the Mishnah seems to support Samuel, notwithstanding the fact that, according to him, the object of "if he married *her*" in (*b*) would not be the woman dealt with in (*a*) but would have an impersonal connotation. Rabba,<sup>1</sup> however, maintains that in the aforementioned case Rab would agree that no bill of divorce was required, and that he would differ with Samuel only "if the mistake concerned one woman who was like two women". According to Rashi such a case would arise if a man betrothed a woman under the condition that she was not under a vow and, in fact, she was not under a vow. He then divorced her and later remarried her without making a condition, when in fact she was under a vow. It is in such a case that Rab would require a bill of divorce. What made Rabba explain Rab's view in such a far-fetched manner? It seems that Rabba knew that Rab relied on the Tosefta. The parallel section to our Mishnah reads in the Tosefta<sup>2</sup> as follows: "(*a*) If a man betrothed a woman on the condition that she was under no vow and she was found to be under a vow, her betrothal is not valid. (*b*) If, however, she went to a Sage and he recalled her vow, the betrothal is valid. (*c*) If he married her making no condition, and she was found to be under a vow, she may be divorced without (paying her her) *Ketubah*." If we consider all parts of this section as interdependent and referring to one and the same woman, we have the example for "a mistake concerning one woman who is like two women". The husband's condition (*a*), having once been complied with by her having her vows recalled (*b*), it has no further force. When he remarries

<sup>1</sup> *b* Ket. 73 b.<sup>2</sup> Ket. vii. 8.

her she is regarded as a second woman who had never been bound by that condition, and (c) if she made a new vow after the betrothal and before the marriage, it does not affect the validity of the marriage.

(9) Ket. ix. 9: "If she (the woman claiming payment of her *Ketubah*) produces a bill of divorce without the deed of the *Ketubah*, she is entitled to her *Ketubah*." The deed of the *Ketubah* may include besides the required basic sum of 100 or 200 *denars* an additional amount which she is to receive in the event of divorce or her husband's death. Rab, *b* Ket. 89a, held that if she could not produce the deed of the *Ketubah* she was only entitled to the basic sum, whereas Samuel was of the opinion that she was also entitled to the additional sum. The Mishnah clearly supports Samuel, since it does not grant her merely the payment of "the *Ketubah*", which is a *terminus technicus* for the basic sum, but states that she is entitled to "her *Ketubah*", which means the special sum contained in her *Ketubah*. The Tosefta,<sup>1</sup> however, is in accord with Rab and reads: "If she produces a bill of divorce without the deed of the *Ketubah*, if (she married as) a virgin she is entitled to 200 *denars*, and if as a widow, she is entitled to 200 *denars*."

(10) *b* Ket. 94a: "If two deeds (referring to one and the same object and issued to two different parties) bear the same date, Rab says: (The two parties) share (the object). But Samuel says: (It should be disposed of at) the judge's discretion." According to the commentators,<sup>2</sup> this controversy is not connected with the case of the four wives whose *Ketubot* bear the same date, dealt with in Ket. x. 5. However that may be, Rab's view certainly has the support of Tos. B. Bathra, xi. 13: "If one says, 'Give 200 *denars* to Joseph b. Simon', and there were two (persons of the name of) Joseph b. Simon, we do not... say, 'This one he loved and that one he did not love', but they share it equally."<sup>3</sup> Samuel, however, decided here in accordance with Babylonian tradition; cf. *b* Git. 14b, where a Baraita quotes Babylonian procedure of "discretion" against Palestinian usage of "division".

(11) Ket. xi. 6: "She who refuses (i.e. an orphan girl who as a minor was given in marriage by her mother or brothers and who on reaching her majority has a right to refuse her husband without requiring a bill of divorce)... may not lay claim to her

<sup>1</sup> Ket. ix. 5.

<sup>2</sup> Cf. *Tosafot*, Ket. 94a, *s.v.* שני שטרות and *s.v.* לימא רב.

<sup>3</sup> Cf. *b* Ket. 85b.



*Ketubah* or to the increase (on her property) . . . or to indemnity (for loss on her property).” *b* Ket. 100b records that, instead of “She who refuses” of the above Mishnah, Rab’s text read, “A minor who is put away by bill of divorce”, that is to say, the rule of the Mishnah would apply even in the case when the husband divorced her before she reached her majority. Samuel, however, maintained that in the latter case she had the right to claim her *Ketubah*, etc. Our text of the Mishnah agrees with Samuel. The Tosefta,<sup>1</sup> however, supports Rab. It reads: “R. Eliezer says: An orphan can lay claim to indemnity (for loss on her property). R. Judah says in the name of R. Eliezer: An orphan can lay claim to the increase (on her property).” This shows that the editor of the Tosefta had in his text of the Mishnah the reading “An orphan”, which covers both the case of her who refuses and that of her who is put away by bill of divorce.

(12) Ket. xiii. 1: “If a man went beyond the sea and his wife claimed maintenance, Hanan says: Let her swear (that she was not left provided for) at the end (viz. at the final settlement of the *Ketubah* claim) and let her not swear at the beginning (i.e. now when she merely claims maintenance). But the Sons of the High Priests disputed with him and said: Let her swear at the beginning and at the end, etc.” *b* Ket. 106b quotes Rab, who says that the Court has the right to grant maintenance to a married woman from her husband’s property, against Samuel, who holds that it has no such right. The Mishnah, according to Samuel, deals with the case where the Court received information of the husband’s death. The text of the Mishnah supports Samuel, since it speaks of swearing “at the end” in a manner which suggests that the husband is dead and that the final settlement of the *Ketubah* is imminent. The Tosefta,<sup>2</sup> however, has an additional clause to the above Mishnah, which reads: “But if he (the husband) came and said, ‘Use the income from your work for your maintenance’, he may do so”, which shows that the husband is alive.

The above examples indicate that whereas Samuel’s interpretation of the Mishnah was based on the Mishnaic text alone, the interpretation of Rab took into account also the parallels in the Tosefta. As a pupil of T. Ḥiyya, Rab regarded the Tosefta as a supplementary work to the Mishnah. An examination of other controversies of Rab and Samuel leads to the same conclusion. Once, however, it has been established that Rab used R. Ḥiyya’s Tosefta systematically, we are justified in inferring that whenever

<sup>1</sup> Ket. xi. 4.

<sup>2</sup> Ket. xiii. 1.

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a Tosefta passage agrees with Rab, this is the result of its influence on him and, consequently, that the same passage belonged to that stratum of the Tosefta for which R. Hiyya was responsible. Similarly, the line of investigation pursued in this article can be used in identifying those parts of the Tosefta which belong to the editorship of R. Oshaya, by examining, for example, the relationship between R. Johanan's statements and the Tosefta, and thus provides us with a sound foundation for the further study of the development of the Tosefta.