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An Analysis of the Literary and Substantive Traits
of Rabbi Israel Mayer Hacoheh Kagan's Mishnah Berurah;
Sections 243-247, 252.

Simcha Fishbane

A Thesis
in
The Department
of
Religion

Presented in Partial Fulfillment of the Requirements
for the Degree of Doctor of Philosophy at
Concordia University
Montréal, Québec, Canada

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ABSTRACT

An Analysis of the Literary and Substantive Traits
of Rabbi Israel Mayer Hacoheh Kagan's Mishnah Berurah;
Sections 243-247, 252.

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Concordia University, 1988

This study examines the literary and substantive traits found in the Mishnah Berurah, a six volume commentary on Rabbi Yosef Karo's Shulchan Aruch, Orach Chaim (published in 1565-66) and Rabbi Moses Isserles' detailed gloss thereon (published in 1583). Furthermore, this project explores the *Weltanschauung* of the Mishnah Berurah both by analyzing its legal rulings and by spelling out those perceptions implicitly conveyed through the manner in which this commentary expresses itself.

The study will proceed to analyze the content, form and literary style of the Mishnah Berurah. Moving beyond the question of literary interpretation it will deal with the question of implicit social meanings encoded in its literary structure. To further understand this gestalt the redactor of the Mishnah Berurah, Rabbi Kagan's system of adjudication will be identified.

To date there has been no scholarly work of note produced in the area of nineteenth-century halachah in

general, and on the Mishnah Berurah in particular. The Mishnah Berurah, which after its publication almost immediately became the accepted basis for halachic behaviour of the East European Jew, was edited and published by Rabbi Israel Mayer Hacoheh Kagan of Radin Poland (1838 - 1933), popularly referred to as the Chafetz Chaim. Rabbi Kagan's commentary has continued to have impact upon the behaviour of the twentieth-century halachah observant Jew. Therefore, the Mishnah Berurah not only offers an insight into the social order of nineteenth-century Eastern European Jewry, but it also provides a greater understanding of contemporary rabbinic society.

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I am grateful for the assistance provided by the faculty of the Department of Religion both in the preparation of the dissertation and for financial assistance throughout my doctoral studies. Most of all to my thesis advisor, Professor Jack Lightstone I express my deep gratitude for sharing his knowledge, with patience, courtesy, encouragement and trust. Such things can never be repaid. Whatever is of secure foundation in this study is owed to him. To Professor Ira Robinson for his inspiration, constructive criticism and friendship.

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CHAPTER 1

INTRODUCTION

This study examines the literary and substantive traits found in the Mishnah Berurah, a six-volume commentary by Rabbi Israel Mayer, Hachohen Kagan on Rabbi Yosef Karo's Shulchan Aruch, Orach Chaim (published in 1565 - 66) and Rabbi Moses Isserles' detailed gloss thereon (published in 1583).¹ Furthermore, this project explores the *Weltanschauung* of the Mishnah Berurah both by analyzing its legal rulings and by spelling out those perceptions implicitly conveyed through the manner in which this commentary expresses itself.

The study will proceed to analyze the content, form and literary style of the Mishnah Berurah. Moving beyond the question of literary interpretation it will deal with the question of implicit social meanings encoded in its literary structure. To further understand this *Gestalt* the system of adjudication used by Rabbi Kagan the redactor of the Mishnah Berurah will be identified.²

To date there has been no scholarly work of note produced in the area of nineteenth century *halachah* in general, and on the Mishnah Berurah in particular. The Mishnah Berurah, which after its publication almost immediately became the accepted basis for halachic behaviour

of the East European Jew, was edited and published by Rabbi Israel Mayer Hacohen Kagan of Radin, Poland (1838 - 1933), popularly referred to as the Chafetz Chaim. Rabbi Kagan's commentary has continued to have an impact upon the behaviour of the twentieth century *halachah* observant Jew. (Elon 1973a, 1208; Schweid 1977, 12-14) Therefore, the Mishnah Berurah not only offers an insight into the social order of nineteenth century Eastern European Jewry, but it also provides a greater understanding of contemporary Rabbinic society.

This chapter provides a more detailed introduction to the problematic and methodology outlined above. The material is organized as follows: a. problematic, b. methodology, c. the redaction of the Mishnah Berurah.

Problematic

Scholars³ of late antique Judaism have successfully demonstrated that social and cultural perceptions are communicated through the texts of early Rabbinism.⁴ Their studies examine the contents, forms and formulaic patterns of these documents. They dissect as well their structural and redactional forms. In addition, the social-historical data of the era of late antiquity, however meager though it is, is explored. These studies emphasize both what can and cannot be inferred from the rabbinic literature of the period.

Eilberg-Schwartz, in his study The Human Will in Judaism, refers to his method of analysis as a deduction of intention in the Mishnah text. Through 'intention' he claims:

We can see to expose the fundamental categories which the framers of the Mishnah use in thinking about the world . . . that the way intention operates in the Mishnah depends upon the particular world view and theological assumptions of the group which formulated this system. (1986, 7)

Lightstone, when presenting the theoretical framework of his study, refers to this analytical approach as "implied from within the text." He discusses this endeavour clearly in his interpretation of Geertz:

Geertz here makes four theoretical points germane to our enterprise. First, the beliefs and practices of religion are integrally related to style of life, or ethos, on the one hand, and to world-view, on the other. Second he describes these relationships as one of 'congruence'. Third, these beliefs and practices implicitly communicate a 'metaphysic', or 'world view'. Fourth, this congruence of religion, style of life and world view correlates with strong collective sentiments of an aesthetic and moral nature. Fifth, the overall effect is to 'sustain' that is, to render plausible, both world-view on one hand, and style of life on the other. (1978, 7-8)

Bokser, is also identified with this school. He presents this conceptual framework in his study of the Passover rite and early-rabbinic Judaism.

As a literary document deriving from a particular historical context, the Mishnah can be analyzed in terms of the aims and images that its editor wished to project. In the Mishnah, earlier traditions were shaped into a new unity by the process of redaction, which makes the sources and contents of work subservient to their context. Therefore, even though elements of the Mishnah may have a prehistory or precedent in earlier literature, what the editor-redactor of the Mishnah has

done with the earlier heritage constitutes something new and historically significant.

The point of the Mishnah is not always immediately discernible. Its arguments are oblique, and not explicit, because it took shape during a time when Jews could not openly or consciously accept discontinuity with the earlier period. The Mishnah wants us to believe nothing has changed. (1984, 2)

Although Green alerts his readers to the shortcomings of structural analysis of early rabbinic texts he still supports the argument that a text conveys the implied view of its redactor. He states:

A text represents the views and interests of its authors, editors, and creators, not a neutral description of the external world. (1983, 195)

Neusner in his work Judaism, the Evidence of the Mishnah, discusses the evidence of the Mishnah as the basis for interpreting and discovering the formation of 'Judaism'. He states:

I speak of what Mishnah has to say and of the sources, in logic and in Scripture, of its thoughts on one side and of the social-perspectives of its thinkers, on the other. Under discussion is the evidence of the Mishnah. ... My hope is to tell what that evidence allows to report about the state of mind of people who flourished at diverse moments in the accumulation and agglutination of the document, the Mishnah, which has been dissected and forced into decomposition. (1979, ix)

These studies have convincingly argued that a religious text can reveal some of the social-cultural patterns of its ideal projected social system, and contains, especially, evidence of the cosmology of the editors and their close associates.⁵ Geertz's understanding of cultural patterns would further strengthen this methodological approach. He argues that the pattern of religion is evidence

of the interpretation of a social system; it is a model of its members belief. A religious text will reflect its culture. Thus Geertz defines religion as:

(1) A system of symbols which acts to (2) establish powerful, pervasive and long-lasting moods and motivations in men by (3) formulating conceptions of a general order of existence and (4) clothing these conceptions with such an aura of factuality that (5) the moods and motivations seem uniquely realistic.
(1973, 90)

In his discussion of 'a system of symbols' he states:

This point is sometimes put in the form of an argument that cultural patterns are 'models,' that they are sets of symbols whose relations to one another 'model' relations among entities, processes or what-have-you in physical, organic, social or psychological systems by 'paralleling,' 'imitating,' or 'simulating' them. The term 'model' has, however, two senses - an 'of' sense and a 'for' sense - and though these are but aspects of the same basic concept they are very much worth distinguishing for analytic purposes. In the first, what is stressed is the manipulation of symbol structures so as to bring them, more or less closely, into parallel with the pre-established nonsymbolic system, as we grasp how dams work by developing a theory of hydraulics or constructing a flow chart. The theory or chart models physical relationships in such a way - that is, by expressing their structure in synoptic form - as to render them apprehensible; it is a model of 'reality.' In the second, what is stressed is the manipulation of the nonsymbolic systems in terms of the relationships expressed in the symbolic, as when we construct a dam according to the specifications implied in an hydraulic theory or the conclusions drawn from a flow chart. Here, the theory is a model under whose guidance physical relationships are organized: it is a model for 'reality.' For psychological and social systems, and for cultural models that we would not ordinarily refer to as 'theories,' but rather as 'doctrines,' 'melodies,' or 'rites,' the case is in no way different. Unlike genes, and other nonsymbolic information sources, which are only models for, not models of, culture patterns have an intrinsic double aspect: they give meaning, that is, objective conceptual form, to social and psychological reality both by shaping themselves to it and by shaping it to themselves. (1973, 93)

The above mentioned students of Late Antique Judaism condignly continue their studies with the analysis of the text, predominantly the Mishnah, exploring the text for its implied message, but invariably introducing a maieutic 'question mark'.⁶ Conclusions may be implied from the data, and not from traditionally accepted interpretations thereof. To illustrate this point, nowhere in Tannaitic literature is the name of the editor or editors of the Mishnah (traditionally attributed to Rabbi Judah the Prince) to be found. Therefore the identity of the editors of Mishnah must remain a question, though the literary form of the Mishnah offers clear evidence of a person or group of editors (most likely editor) as the redactors of this document.

As stated above, the text offers the researcher an opportunity to discover aspects of its perceptual world. Neusner sees in these documents the ideas, social and cultural patterns of the group with which the literature is identified. He states:

If we claim to "relate ideas" to a specific group or people and their social world, we have to justify the effort to correlate what is said with the historical period and society of the group. Now it is easy to justify doing so for the final generations of the redaction of the Mishnah. The people who have given us this document clearly propose to tell us about their view of the world as they see it or as they want to see it. Consequently, the Mishnah, in its present condition, does tell us a great deal about the perspective on the world of the people in the last half of the second century who are responsible for the present condition of the Mishnah. (1981, 15)

To borrow a phrase from Geertz, "we have been trying to stage Hamlet without the Prince quite long enough." The above school of scholarship, conceivably due to insufficiency of data, has not been concerned with the wider impact and milieu of the editor or group of editors. But with what social milieu does the redactor of the document identify? Further what do we know of the editor's *Zeitgeist* and of his relationship to his environment? With such knowledge the social cultural patterns reflected in the text can be mapped with a greater insight.

Mary Douglas in her discussion of Aaron Cicourel's theory considers the above question:

The first source of our troubles as cultural anthropologists is that we have no adequate conception of the individual. Necessarily somewhat parasitic upon sociology, we share its strengths and weaknesses; and this particular failing is one we all have in common. Aaron Cicourel attacks sociology for setting in the middle of role theory a mindless robot in place of an intelligent being. Any account of roles and statuses, he says ultimately presupposes an active perceiving person, able to read cues and size up situations. The theory always pays lipservice to intellectual activity going on inside the head of the performers, but it is a mere token salute, recognising rewards and penalties, judging what amount of deviant behaviour will be tolerated, punishing the deviance of others. A formidable list of textbook quotations shows that our students are given a stereotype of society consisting of well-trained sheep-dogs picking their way through institutional mazes. Whereas we know that many social situations are fraught with ambiguity: each individual has latitude to misroute, redirect and even reconstrue. If their actual procedures of interpretation were taken seriously, claims Cicourel, sociology, would install something more like human beings at the centre of its theory, instead of automatons. It follows that instead of a fixed institutional structure, it would be faced with an infinite vista of social transformations. The theory

would not be static, but perhaps too uncontrollably dynamic. (1978; 5)

The study of Kagan's Mishnah Berurah, in contrast to that of the Mishnah, permits these questions.⁷

We may not only plot Hamlet with the Prince, but we can stage the whole in Denmark. About Kagan himself we know much. A large collection of hagiography, oral history and Kagan's own numerous publications^a can testify to the social milieu with which the Chafetz-Chaim identified and which he represented. Although this is not independent data, I see no reason to dispute the generally accepted fact that Rabbi Kagan can be identified with the halachic observant Jewry of nineteenth century Eastern Europe.^b Furthermore, his dress can be observed in pictures, his position as head of a rabbinical academy, and the content of his many books of ethics as well as his letters are evidence of his religious allegiance.

To map Rabbi Kagan's cosmology, I offer Mary Douglas' taxonomy of social types 'high group, high grid'. Bergesen in his discussion of these social contexts writes:

Her interest is how individuals are controlled by society. Following Bernstein's lead, she makes two distinctions, group and grid. "Group means the outside boundary that people have erected between themselves and the outside world. Grid means all the other social distinctions and delegations of authority that they use to limit how people behave to one another". From these two dimensions she creates a fourfold table: strong grid strong group, strong grid weak group, weak group weak grid, weak grid strong group. Strong grid involves moral and normative prohibitions which limit or highly structure individual interaction. (Wuthnow and others 1984, 119-120)

Rabbinic Judaism can be placed in the strong grid strong group category. *Halachah* obligates observant Jews to construct a boundary excluding all others.¹⁰ Furthermore, this religious system has created a clearly defined system of authority to control the group's behaviour. The Mishnah Berurah (as we hope to demonstrate) is an example of the literature that projects this social structure. An examination of Douglas' description of her categories will offer a better understanding of Rabbi Kagan's cosmology.

Square C (top right diagram)

Strong group, strong grid.

1 The social experience of the individual is first and foremost constrained by the external boundary maintained by the group against outsiders.

2 The extreme case of strong group will be one in which the members gain their whole life - support from the group as such. The more unregulated commerce a member may have with other groups or individual outsiders the weaker the controls exerted at 3 below.

3 Individual behaviour is subject to controls exercised in the name of the group.

4 Following from the strong grid condition, C is organized internally into separate graded compartments, has scope for internal specialization of roles and may accordingly distribute its resources unequally between members.

5 Consequently on 4, it has an armory of different solutions to internal conflicts, upgrading, shifting sideways, downgrading, resegregating, redefining.

6 Consequent on 4 and 5, the group can be bigger than groups at D since it can devolve, federate, become tributary to another etc. in the various ways that entitle any given case to be located at C.

7 Consequent also on 4 and 5, the C group can expect to persist longer without fission.

8 Consequent on the evident feasibility of persisting as a group into the future, it can make levies on the individual members to ensure capital investment to endow its posterity.

9 Consequent on 8, the feasibility of persisting as a group being made realizable through the capital invest-

ments undertaken. for the group, it does persist in fact longer than groups at D. (1978, 20)

Two additional social structures complete the scenario of Kagan's *Weltanschauung*. They are, Eastern European society, and Eastern European Jewish society of the latter part of the nineteenth century.

In the second half of the nineteenth century a wave of social and economic modernization in Europe was in process.¹¹ Goldscheider and Zuckerman describe the period:

While the general political modernization and the specific changes within the Jewish community were conspicuous features of European modernization, other changes were no less important. Shifts in the occupational and industrial structure, expansion of educational opportunities, declining centrality of extended family networks, the emergence and spread of technology and new forms of transportation and communication, population expansion, redistribution, and urbanization were among these changes. Together, they transformed the general societies and the Jewish communities. Moreover, these changes implied that the social, economic, cultural, and political relationships between the Jewish community and the broader society were undergoing radical redefinitions as well. (1984, 42)

As a result of these changes "the Jew" (as the non-Jew) threw off the chain of traditions. This new reality offered new opportunities.

Many turned away from the traditional world. They rejected what they saw as the backward, uncultivated, uneducated, poor Jews of the provinces. The standard of the new civilization replaced those of the old order. Some as we have seen in France, distinguished the religious dimension of being Jewish from its political organization. Some applied the new secular philosophies in an effort to reform Judaism. Others, and relatively few left the religious community entirely. As a result, this movement within the economic elite necessarily weakened the cohesion of the Jewish community. ...

Religious decline resulted neither from the inability of old ideas to adapt to new conditions nor

from the less demanding nature of some of the new religious ideologies, but from transformations in social conditions. Migrations to towns and cities with weak Jewish institutions, the growth of secular public education, and interaction with the non-Jews in jobs and in new neighborhoods had much more to do with declining levels of personal religious observance. (*ibid.*, 46-64)

The Torah-observant community of Eastern Europe was however, not suffering disintegration. The ethnographic reports of the period report a viable community. For example, the traditional schools, *hederim* and *yeshivot* flourished and grew. (*ibid.*, 51) This phenomenon can be considered representative of the society of which these educational institutions are a part.

On the other hand, the wave of modernization also confronted the halachically observant community with new social realities. When Jews migrated to urban centres they entered a setting that lacked the institutional support and sanctions of the traditional community. This different social, economic and political milieu did not permit the transplanting of social structures from rural Jewish society. The new setting required a restructuring of social and religious mechanisms and institutions in accordance with this new reality. For example, urban settlement entailed new types of welfare and financial burdens upon the urban community. In addition the wave of modernization created, for the rabbinic leadership, new legal and ethical problems and challenges. For example the economic and political situation gave rise to the question

of greater interaction with the Gentile population, an area of great concern to the rabbinical authorities. This interaction, as well as 'change' in general, threatened the 'high grid high group' structure of the rabbinical society. Goldscheider and Zuckerman point out:

The established organizational bases of Jewish communal life weakened with modernization. Kehillot were disbanded, courts were closed, and the political power of the rabbis and the centrality of the synagogue declined. They did not disappear but were joined by new institutions. Following the process of differentiation, the new organization centered around specific aspects of Jewishness - ethnic, occupational and class, political, religious, and social. Few integrated more than one element. (*ibid.*, 25)

Jewish migration at the end of the nineteenth century not only occurred within the European borders, but extended also to other continents such as North America. The rabbinical leadership saw the movement to these 'new lands' as a threat to religious structure and control. Rabbi Kagan, for example, published a book in 1893 entitled *Nidchei Yisroel* (The Dispersed of Israel) as a response to emigration. In this work he describes a situation of laxity in Jewish observance and gives his ethical and halachic recommendations to improve the situation. This work is directed to the Jews in "America, England, Africa and other countries."

This study will integrate the theoretical framework of the above mentioned scholars who deal with Judaism in Late Antiquity, with a methodology permitted by our knowledge of Kagan and his milieu. The problem is not to corroborate the

method of this school; they have proven their point to my satisfaction. Rather, I will adapt this conceptual framework to the study of the Mishnah Berurah. This is a novel approach to the study of modern rabbinic texts.

This project will proceed on three levels. First, it will focus on the explicit data related to the social reality of Rabbi Kagan's society. Secondly it will explore the areas tangentially related to the Jewish milieu of the nineteenth century. Lastly it will analyze the world view of the editor as implied within his text. To achieve this end, I have selected one topic, the Jewish and Gentile relationships occurring on the Shabbat. This topic is mostly dealt with in the six sections of the Shulchan Aruch, numbered 243 through 247 and 252, sub-paragraph 8-34.¹² It is my hypothesis that these chapters are representative of the total structure of the document.

Methodology

This study's methodological framework takes as its point of departure William Scott Green's caution concerning the application of social theory and method to rabbinic literature:

The very attempt to draw a social description out of a document necessarily entails the assumption that literature, especially anonymous literature, is the product of a community and reflects its life. But the presence of a document in a particular group does not attest to the role of the group in its production, nor does it reveal how members of the community regarded the status or content of the text. The relations between literature and society are complex and frequently

obscure; to assume that the former always reflects the latter is naive, facile, and unwarranted. In addition, our capacity to construct a social context from a literary document is limited by the character, quality and quantity of the information it provides. A text, a document, no matter how unpolished, simply does not constitute the sort of raw material out of which the "thick description" (Geertz, 1977:3-30) of a society and its idiosyncracies can be composed. A text represents the views and interests of its authors, editors, and creators, not a neutral description of the external world. This, to be sure, is no novel insight, but the current scholarly passion for the social description and explanation of ancient religion may justify a brief belaboring of the obvious. The close reading of a text, no matter how delicate the scrutiny, is not the equivalent of field-work. Texts provide no evidence of movement and gesture, facial expression and vocal pitch, to say nothing of the host of other verbal and nonverbal behaviors that order social relations and effect communication. One merely has to read reliable ethnography or view the slides of a village in which an anthropologist lived for two years to see how much about the real social world of the Mishnah or Talmuds, or the Gospels for that matter, we do not and never can know.

These limitations mean that the social contexts deduced from literature are bound to be schematic, for scholars are forced into an over-reliance on social theory to fill the gaps left open by the text. But social theory as an autonomous, self-conscious intellectual activity is a modern concoction, designed initially to evoke, direct, explain, and often to obstruct or proscribe, change and development in modern societies. . . . The astonishing congruence, the uncanny fit, between some modern social theories and ancient texts, therefore, may reveal less about the explanatory capacity of the theory than it does about the common attitudes, shared values, and confluence of interests between the theory and the text. . . . Social theories appear to work best on literary materials with which they are in fundamental sympathy, and this possibility should encourage caution about our use of theory in the construction of the social context of rabbinic documents. . . . All this suggests that the unconsidered application of sociological categories to rabbinic texts proves unhelpful in, and may even be dangerous to, the construction of the social context of rabbinic literature. First, sociological concepts develop and make sense only within particular theoretical structures. To remove them from those structures weakens their analytical force and results in an unproductive eclecticism. Second, sociological concepts, like inex-

perienced and insecure travelers, carry too much baggage. Honed on living societies, they specify a wider range of data than our sources provide and thus preshape a context we cannot fill out. (1983, 195-199)

It may be concluded from Green that the adaptation of the theoretical and methodological framework employed by scholars of late antique Judaism would be more condign to modern rabbinic documents. Furthermore, as stated above, much of the data absent for the Mishnah is disponible for the Mishnah Berurah. But even in a modern religious text we still have the problem that Green points to, namely the study of society through the analysis of a religious text. It follows from Green's caution that any inquiry must take the Mishnah Berurah, itself, and its divisions, as a point of departure. Similar to the scholars who examines Mishnah¹³ we cannot assume that all rabbinical documents share a common view of matters, even where they evince common concerns. To illustrate, I will borrow an analogy from Ann Jefferson's discussion of Saussure:

He cites the Chinese gesture of bowing down to the ground nine times before an emperor. Although this might seem in one sense to be an unequivocal expression of deference, it becomes clear that it is purely conventional as soon as one imagines an Englishman acting in this way in the presence of his Queen. Whereas in a Chinese context the meaning of the gesture would seem perfectly transparent, in an English context this behaviour would be totally bewildering because it is not part of the English conventions of politesse. And for an Englishman observing Chinese manners, the exact significance of this gesture would be lost on him unless he was acquainted with the system as a whole. Only then would he know whether the Chinaman's gesture expressed the utmost in humility, and if so, whether this is marked in the depth or in the number of bows. (1982, 86 - 87)

Similarly a text like the Mishnah Berurah must be viewed as an independent document. Moreover, we must take seriously the hypothesis that the editor of the Mishnah Berurah has communicated his ideas not merely by preserving what he has found in earlier rabbinic literature, but also by selecting from this rabbinical literature and shaping its sources into a new whole. (Lightstone 1983, 28) The Mishnah Berurah must be "dissected and interpreted as literary 'wholes' in their own right." (*ibid.*, 27) The diachronic approach must be complemented with a synchronic one.¹⁴ In a discussion of his method, Lightstone emphasizes this motif;

Only in this way can we discern if the various documents of rabbinic literature each make differing statements about the 'way things are' or 'ought to be', despite their shared assent to the authority Scripture points out as a basis for the definition of 'the world'

The content and development of the Mishnah largely represent the minds of the penultimate editors. The work of these editors also extend to the language and formulation of Mishnaic pericope. Any analysis of the Mishnah that bypasses the synchronic approach will seriously fail to understand the character, function and meaning of this complication. (*ibid.*, 27 - 28)

Informing our analysis of the explicit and implicit meanings of the Mishnah Berurah will be this text's

1. literary structures, 2. content, 3. literary traits or patterns, 4. literary forms. This classification of our data (except for 2. content) accords with Polzin's presentation of structural analysis. Polzin identifies three objects of structural analysis a. organization of the text, b. expression or language analysis, c. content or meaning

analysis. He asserts that these three objects are interdependent components of structural analysis: Furthermore he emphasizes the structural analysis is centrally concerned with synchrony, rather than the diachrony. The theory of structure analysis as applied to biblical documents is summarized by Polzin:

Structuralism, then, deals with the law-like relationships that can be discovered between elements of a whole. If I claim to have discovered such relationships, I view my object of study as a whole; otherwise it remains for me an aggregate. . . . A whole or system, like a house, has certain laws of composition that a heap of stones lacks. . . .

On the other hand there are law-like relationships that obtain between elements of a whole once that whole is already structured. For example, because of the particular stability of that particular structure we call a house, it is possible to transform a living-room into a study, or a kitchen into a bath; but it is not possible to transform a basement into an attic. . . .

A structure maintains itself by and is enclosed within the transformations that comprise it: this is what is meant by the self-regulating nature of a structure. Such a property of structure does not preclude in any way the fact that some structures can be related to others either as co-, sub-, or superstructures. . . .

Whatever may be the larger relationships of a whole with larger wholes, if it can be considered in any real sense a structure itself, it will reveal certain stable laws that cannot be lost but only integrated with the rules of its superstructure. I can discover intelligible things about the servant's house even before I consider or even discover the fact that it is part of an estate.

These three characteristics, then lie at the heart of structuralism: structuralism studies wholes, studies them as a system of transformations, and studies them as self-regulating or closed.

. . . Now that we have discussed what the general characteristics of structure are, we can describe certain major classes of structures that one may encounter in the interpretation of texts. Structures may be found on the plane of expression or on the plane of content. Secondly the kind of structures analyzed can be either diachronic or synchronic. And finally we can

isolate and describe either syntagmatic or paradigmatic structures in a text. . . .

My understanding of the interrelationships between the plane of expression and the plane of content in all language phenomena leads me to accept the following positions: 1) structural analysis is possible on the plane of content as well as the plane of expression; 2) in principle, analysis on the plane of expression is not more secure nor less subjective than analysis on the plane of content; 3) there is therefore no hierarchical order of analysis of a given text; i.e. first on the expression plane, then on the content plane; 4) nevertheless, the analysis articulated on each plane must be compared and interrelated as a means of complementing and adjusting discovered patterns one with the other. If indeed signs operate on both planes simultaneously, the structures of both planes must somehow interact. An analysis on only one plane is as incomplete as expression without content or content without expression. (1977 2-5, 10-13)

Let us unpack Polzin's insights as they will pertain to our analysis of the Mishnah Berurah.

Structure

"The first step in any hermeneutics is the process of segmentation"; (Polzin 1971, 30) or what I shall refer to here, as the process of structuring text. By 'structure' I mean in part a closed system, the law-like rules of which limit the range of a system's permissible content and the relations which will entail among its items. Furthermore a structure imposes the internal content that it embodies. The cognizant and purpose of a document is construed by Lightstone:

Structures convey meaning because of law-like rules governing 1) the elements of the structure, 2) the relations among those elements and 3) the range of permissible content of any one element. Such meanings remain distinct from the particular content at any one instance of the structure. In the realm of narrative,

the stock plots of films about white men and Indians in the American West provides an apt example. The very fact that we have come to recognize their plots as 'stock' implies that we acknowledge a set of meanings (here about relations between the moral worth of Whites and Indians) that is distinct from content of any one movie. Whether it concerns the Apache or the Blackfoot nations, Sitting Bull or Geronimo, the particulars of the plot are immaterial. That law-like rules of the structure convey a world-view is obvious to any one who has watched children play Cowboys and Indians'. In encountering the pattern on a multitude of occasions we 'experience' these law-like relations as 'the way things are in reality,' as part of our world-view. (1983, 32)

We shall therefore commence with a description of the 'Cowboys and Indians' of our study.

In the Mishnah Berurah's text both a larger structure and sub-structures can be identified. The larger structure is a commentary on Rabbi Joseph Karo's code of Jewish law, the Shulchan Aruch, section Orach Chaim.¹⁵ Kagan formatted his page by publishing the standard popular edition of the Shulchan Aruch at the head of this page. Beyond the Shulchan Aruch text he included Rabbi Moshe Rivkash's Beyur Ha-Golah,¹⁶ Rabbi Yehudah Ashkenazi's Ba'eyr Heytev,¹⁷ and Rabbi Chaim Margoliot's Shaarei Tshuvah.¹⁸ These three texts were also published in the standard editions of the Shulchan Aruch. Only below these works does Kagan position his commentaries. This style of formatting suggests Rabbi Kagan's conscious attempt to win approbation for his treatise from the 'group' he (literarily) identified with. Since these three external works were already accepted amongst halachic-observant Jews, Kagan by association, expected comparable acceptance for his own contri-

bution. Furthermore, such acceptance would enhance the book's marketing opportunities, a substantive concern for the editor of the Mishnah Berurah.¹⁹ This format also offered the reader an easily accessible text of the Shulchan Aruch and its popular commentaries, thus ameliorating the salability of his product.

Rabbi Kagan redacted three commentaries which were printed below the 'external' commentaries. 1. The Mishnah Berurah: The stated purpose of the Mishnah Berurah commentary is to construe the rulings of the Shulchan Aruch.²⁰ A Hebrew letter is interpolated adjacent to the word or phrase of the Shulchan Aruch to be discussed. The Mishnah Berurah then commences with the citing of this letter and word or phrase. 2. The Beyur Halachah commentary is identified by an asterisk placed in the Shulchan Aruch adjacent to the word or phrase to be considered. This commentary expatiates upon fewer topics than the Mishnah Berurah. It rather offers a detailed rabbinical discourse on the theme under consideration. 3. The Shā'ar Ha-Tziyun footnote commentary is identified by a letter placed in the Mishnah Berurah adjacent to the word it will relate to. The majority of this third commentary offers sources for the Mishnah Berurah's citations that have not been identified in the text. In addition Kagan exploits these footnotes to append exegesis to the Mishnah Berurah and Beyur Halachah.

In addition to the 'larger structure' of the Mishnah Berurah a substructure classification can be identified. These are smaller literary units or pericopes which, as the larger structure, determine the content of individual units. The Mishnah Berurah's sub-paragraphs are one example of these substructures. But the pericope need not be divided according to Kagan's own intermediate divisions, namely those marked by letter in asterisks. This paradigm may be initiated within the sub-paragraph by topic or formulary only. A representative example from the Mishnah Berurah, (section 246 sub-paragraph 34) will help demonstrate this model.

(34) Provided that he publicizes, etc. See Beyur Halachah, where we cite that all these ways of rendering it permissible are not to be recommended for use other than in a time of pressing need - as opposed to those persons who deliberately sell their oxen to a non-Jew for the purpose of doing work with them on Shabbat, the work being widely known as the Jew's.

Even though one need not protest against those who follow the lenient view in this, since they have an opinion upon which to rely, nevertheless every person who seeks to keep *mitzvot* carefully should take heed not to act in such a way, except in a case of pressing need and following a decision by a learned scholar.

Although the phrase 'even though' (*mikol makom*), appears in the middle of this sub-paragraph, it is employed as a formulary to initiate Rabbi Kagan's view. This opinion may not necessarily be in agreement with the other rulings cited in the sub-paragraph, thus creating a pericope or new substructure.

Content

In addition to the methodological classification system suggested by Polžin we analyze the particular, idiomatic content of the Mishnah Berurah in those sections studied. Furthermore, in addition to the Biblical structuralists' data, we use the substance of the document to reveal Kagan's world view as projected through the Mishnah Berurah. Our analysis of the content shows that the rulings, and the type of society they project, will define the 'grid' that the Mishnah Berurah employs to erect boundaries, first to keep the 'group' in and second to prevent entrance by outsiders. The content of the Mishnah Berurah is classified into a fourfold taxonomy: a. commentary, b. adjudication, c. ethics, d. contemporary issues. Although 'ethics' and 'contemporary issues' can be considered an aggregate component of 'commentary' and 'adjudication', for our purposes we will classify them as separate units. This distinction is in accordance with the fashion in which the Mishnah Berurah itself structures its content. Kagan also underlines the importance of these themes by placing them in separate sub-paragraphs and endeavors to deal with them in a manner dissimilar to the rest of the text.

a. commentary

These passages may be concerned with the Mishnah Berurah's interpretation, clarification, glosses, and textual corrections of the Shulchan Aruch.

b. adjudication

In cases of dispute between Karo and Isserles or other rabbinical authorities who gloss the Shulchan Aruch, Rabbi Kagan presents his rulings. Furthermore, he offers his halachic decisions in instances not discussed by the rabbinical adjudicators. Kagan deals with situations related to the statements of the Shulchan Aruch, (but not explicitly dealt with by these rabbinical authorities) as new halachic concerns of his social milieu. These rulings stand in addition to Kagan's halachic decisions based upon the adjudications of the Shulchan Aruch or 'latter rabbinical authorities' (acharonim).²¹ For example in section 252, sub-paragraph 11, Kagan examines Isserles' gloss concerned with a Gentile removing an object from the house of a Jew on Shabbat. Isserles rules that the "it is proper to follow the stricter view here /and forbid this/." Rabbi Kagan comments:

(11) It is proper to follow the stricter view. So as not to accustom the non-Jew to /do/ this.

See the Acharonim whose consensus is that from the halachic standpoint/, not merely as a matter of strictness, one ought not to be lenient in this. For in Section 440, the ruling for leavened bread owned by a non-Jew but in a non-Jew's house/ is the same: /even/ setting aside a place for /the non-Jew/ is of no avail. Aside from this, an observer will /still/ assume that the Jew has ordered him to remove it /from the premises/. One should therefore, not be lenient here except where loss of money or great need is involved.

If the non-Jew is a man of power it may be permitted even without having reserved him a place, for under such circumstances the Sages did not mean to have their prohibition apply.

The Olat Tamid writes: "It would appear that if one rents the room /in which the objects are found/ to the non-Jew for the duration of Shabbat for a small coin, there is no need at all to be strict." (See there.) But the Magen Avraham and other Acharonim hold that even where the room has been rented, this is not enough to rely on for being lenient /and permitting it/.

The onset of this sub-paragraph clarifies Isserles' stringent opinion. Kagan opts to be contingent upon a 'latter rabbinical source', the Tosafot Shabbat's accommodation, and rules that it is permitted "where loss of money or great need is involved." The Mishnah Berurah continues with a gloss of the Shulchan Aruch and adjudicates in the case when "the non-Jew is a man of power." His ruling is cited from a 'latter rabbinical source', the Taz.

The sub-paragraph concludes with a dispute between the 'latter rabbinical authorities'. Kagan identifies his preference for the latter opinion in the statement "the Magen Avraham and other Acharonim".

Placing his ruling last as well as stating that his is the intention of the majority of the rabbinical authorities, Rabbi Kagan informs the reader of the Mishnah Berurah's halachic partiality.

c. Ethics

Rabbi Kagan, the Chafetz Chaim, is widely identified as a 'man of ethics' (*musar*).²² His multitude of ethical publications stress the search for moral and religious perfection through a stringent observance of the *halachah*. Furthermore, the hagiography concerning him²³ emphasizes his

belief in, and fear of, God, thus defining his intendment of ethics and piety. My analysis of the Mishnah Berurah will explore Kagan's employment of *musar* in his work and its role in the 'implied meanings' of the text. An illustration of an ethical statement in the Mishnah Berurah is found in Section 244 sub-paragraph 35. The Shulchan Aruch in this instance is concerned with the accommodative maxim 'in the case a loss of money is involved'. Rabbi Kagan, after discussing the lenient possibilities related to this maxim concludes with an ethical suggestion; "but fortunate is he who trusts in God and does not seek out various leniencies for Shabbat."

d. contemporary issues

Although the Mishnah Berurah was structured as a commentary on Karo's sixteenth century code, Kagan suggests in his introductory remarks to volumes one and three that his concern is also contemporary halachic issues. His intention in preparing the commentary is to offer the reader a guide to proper halachic behaviour. Kagan states this purpose in the introduction to volume three:

From the works of the Acharonim I have also collected many new ideas applicable to everyday life nowadays.

My aspiration is that with the help of God, whoever will now study this /body of/ law will come to know each law, together with the reason and underlying thesis /for it/, in both theory and practice.

In addition to the fourfold taxonomy, the analysis of content subsumes talmudic and halachic principles. For

example, in sub-paragraph 32 cited above, Kagan discusses the talmudic principle concerning a 'Torah prohibition' and the halachic principle of 'permitted in the case of monetary loss'. Furthermore, this particularly encompasses the analysis of the Mishnah Berurah's explicit and implicit accommodative and stringent views and rulings. These terms accommodative, (*kuláh*) and stringent (*chumrah*)²⁴ in Kagan's text are to be understood within the context of the 'latter rabbinical authorities' adjudications. Precisely, Rabbi Kagan's decisions are dependent upon the analysis and rulings of the 'latter rabbinical authorities'. Therefore, when the Mishnah Berurah's adjudication chooses to be lenient or stringent, or when it refers to one of these terms in its text, its intention reflects the lenient or stringent view of the 'latter rabbinical authorities'. For example, in section 245, sub-paragraph 5, the Mishnah Berurah discusses Karo's ruling concerned with a partnership between a Jew and Gentile in a field on Shabbat. Kagan deals with the division of profits and expatiates:

(5) Or as great. Now, if subsequently, at the time of division /of the profits/, they make a reckoning, saying: "How much have you taken /for the work on Shabbat/? I/, though, /have taken little /for the day I worked alone/. Let us split the remainder so that we will both end up evenly," the view of the Magen Avraham is to rule in accordance with the Ra'avad who is stringent /and forbids this/ because, in retrospect, it now becomes apparent that the original stipulation was a mere subterfuge. Others, /Tosafot Shabbat, Peri Megadim/ however, rule leniently since originally they did make a stipulation.

In this representative illustration Kagan explicitly affixes the accommodative and stringent opinions to the views of the 'latter rabbinical authorities'.

Form and Literary Traits or Patterns

For a definition of form I turn to Lightstone's statement:

By form I mean a fixed and recurrent pattern of speech which is not determined in any one instance by the contents or theme treated. Forms in other words, are disciplined ways of saying things without regard to what exactly is said thereby. (1979, 154)²⁵

Formularies are an aspect of these recurrent patterns, for they are indicators of the type of literary content that follows in the text's pericopae. The formularies found in the Mishnah Berurah are not unique to this treatise. Rabbi Kagan remains loyal to his literary antecedents and their rhetorical style; he adopts the genre of the 'latter rabbinical commentaries' of the Shulchan Aruch. Formularies are one component of this genre.

Examples of formularies employed throughout the Mishnah Berurah text are: "that is" (*hainu*), initiates interpretation; "i.e." (*ratza lomar*) suggests his own interpretation; "nevertheless" (*mikol makom*), initiates Rabbi Kagan's accommodative view.

In addition to formularies this study will also examine the genres themselves; these are the basic literary components of the Mishnah Berurah. I turn again to the analysis of early rabbinic texts to apprehend the purpose of

an exploration of genre. Green points out the advantages and disadvantages of this analysis:

The identification of the Mishnah's literary genre makes it hard to be sanguine about extracting its social world, for it is difficult to imagine a literary form more removed from social reality and less able to capture anything of it than a list. . . .

The genre of the Mishnah, then, reflects a literary procedure in which the ideas and words of individuals have been removed from the social and intellectual contexts in which they were thought or spoken, and frozen into frameworks of permanent opposition. Its thematic catalogues present an overdetermined, over-generalized picture of the world that obliterates the frame reference of individual thought. This construction blocks any perception of the social meaning of ideas and consequently of the network of social relations behind the image the Mishnah seeks to project. . . .

Among the obvious features of rabbinic literature, especially of its halakic content, is the considerable information it presupposes. The most elementary and concise halakic statement in the Mishnah or the *gemara* assumes knowledge of a host of implicit rules and behaviors; presumes a universe of tacit understanding. Rabbinic literature is produced from within and is directed to other specialists, the rabbinic cognoscenti. It virtually ignores the world outside of its own preoccupations and obsessions. Its syntactic and didactic constructions are cryptic and compact; it is a literature almost wholly self-absorbed. These traits in part explain why it is so difficult to reconstruct the social world of rabbinism from its texts and why emphasizing the political context of these texts distorts their meaning. The study of rabbinic writing draws us inexorably into the world of a small number of men whose primary activity was reflecting on ideas, opinions, and behaviours, sometimes those recounted in scripture, but most often those of one another. This picture might seem a dead end for analysis were it not that rabbinic literature presents a nearly continuous record of rabbinic thought and disputation through at least five centuries. In this respect it provides not social or political background, but intellectual context - a record of the modes of analyzing and transmitting received ideas, evidence of distinctive styles of classification, argumentation, and interpretation. The arduous and exacting work of delineating the Mishnah's classificatory schemata and prosopography of ideas is already well under way. The remainder of this essay suggests very cursorily how a further look at some of

the Mishnah's formal traits can provide another perspective on Rabbinism's intellectual world and how attention to these features might help to illuminate something of the 'dynamics' of tradition, the mechanisms of persistence, that characterize rabbinic culture.

Two considerations legitimize the use of the Mishnah's formal traits for this exercise. First, as we have seen, it is impossible to regard the document as mimetic. Its interests and preoccupations speak of a nonexistent world, and its literary genre not only makes no effort to imitate life, it frankly obscures the social relevance of its content. Although the Mishnah's abounds with the opinions about actually behaved this way. Thus we must read it, at least initially, as an intellectual construct, a fantasy, a fiction. Second, the Mishnah does not imitate earlier Jewish writing. Its formal discontinuity with Jewish literary past suggests that the document constituted something novel in ancient Judaism and encourages us to recognize a strategy and purpose in its producers' selection of genre and the elaboration of a discourse. This understanding and interpretation of rabbinic literature surely imposes a consideration of its structure of imagination and intellect. (1983, 200-202)

As in Mishnah there also exist queries concerning the extraction of social and historical evidence from the genre of the Mishnah Berurah text. Most of the latter's text also relates to a non-existent world. However, in contrast to Mishnah, Kagan's text does imitate extensively earlier rabbinic writings. Thus the genre of the Mishnah Berurah can not only provide a cursory perspective of the Chafetz Chaim's intellectual milieu but also a thorough understanding of his perceptual world.

As stated above Rabbi Kagan employed the genre of the detailed commentaries of the Shulchan Aruch. Especially evident is the genre of the commentaries most frequently cited in the Mishnah Berurah, namely the Magen Avraham, Ba'eyr Heytev, and the Elya Rabba. The genre of these

commentaries differs from other genres of halachic literature, such as responsa and codes. Roth in his discussion of The Language of Pesak emphasizes the dissimilarity among the genres of Jewish law:

No two genres listed above are composed in the same literary style, and no two are identical linguistically. This, of course, is not to deny that later genres appropriated, to a certain degree, some of the vocabulary and style of the earlier ones, but to emphasize that each genre also added its own distinctively individual element to the vocabulary and style of halachic literature. Moreover, at each of its stages halachic literature appropriated - again to a certain degree only - elements of the vocabulary, style and method of analysis of the contemporary non-Jewish legal literature. The introduction of foreign words, phrases, and idioms capable of expressing new ideas with greater precision than would have been possible in the primary languages of *pesak*, Hebrew and Aramaic was never considered inimical to halachah. Indeed, although Hebrew (itself containing significant amounts of Aramaic) has remained the most common medium of formal halachic composition, it is not unusual to find halachic discussions and decisions in language other than Hebrew.

Halachah is religious law and has always been so recognized by both its adherents and authorities. Thus, since all of the genres listed above are part of halachic literature, it follows that there is no particular literary style, no unique vocabulary, nor any specific method of analysis that qualifies as the *sine qua non* of halachic literature. The responsa are religious even though their style is different from that of the Tosafot; the Tosafot are religious even though their method of analysis is not identical with that of the Talmud; and the Talmud is religious even though its vocabulary is very different from that of the Bible. (1986, 305-306)

Although there is no one consistent genre in halachic literature, what Roth fails to identify is that within a specific category of halachic writings such as Shulchan Aruch commentaries, there subsists a genre which is distinguishable and characteristic.

The Mishnah Berurah commentary to the Shulchan Aruch represents this characteristic genre. The literary traits may be identified as²⁶:

1. Employing traditional rabbinic vocabulary, constructed from Mishnaic and Talmudic Hebrew and Aramaic, as well as expressions and phraseology related to the theme under discussion which is found in the post - Talmudic rabbinic jargon.

2. Verbatim duplication of 'latter rabbinic authorities'.

3. Interpolating the author's interpretation within the quotes found in the text.

4. Formularies, as I discussed above.

5. Interpretation of texts, concepts and words.

6. Adjudication, based upon the majority of the most recent authoritative rulings cited. (*hilchata k'batrai*)²⁷

7. The adaptation of accepted halachic principles. For example, in the case of Torah law one must rule stringently.

8. 'Former rabbinic authorities' are employed only when essential as in a case when their decision is required to render a solution to a problem not satisfactorily resolved by the 'latter rabbinical authorities', or when cited by other commentaries referred to by the author.

9. External, non-rabbinic sources are not included in the decision making.

10. Lists of 'latter rabbinical authorities' are cited.

11. The method of analysis; when a dispute between 'latter rabbinical authorities' is presented the latter opinion is dominant.

12. Dependency on the textual version of the 'latter rabbinical authority' rather than the source.

13. To side with a primary 'latter rabbinical authority' who disputes the Shulchan Aruch.

14. The incorporation of non-halachic materials such as ethics.

15. Short decisive statements with minimum dialectics (*pilpul*).

16. Cross referencing through the Shulchan Aruch and the commentaries.

17. Textual corrections.

18. The sources referred to in the text are predominantly other adjudicators and Shulchan Aruch commentators, not responsa and Talmudic commentaries.

19. Relating to themes discussed by the 'latter rabbinical authorities'.

20. Not citing the entire or exact source.²⁸

To illustrate the application of these 'canons' I will first cite and analyze one representative sub-paragraph, number 32 of section 244. Subsequently the Shulchan Aruch commentaries of the Magen Avraham, Ba'eyr Heytev and

Tosafot Shabbat on the identical sub-paragraph will be examined. In the following quotation from the Mishnah Berurah I have place in square brackets the verbatim citations of these 'latter rabbinical authorities' (the authors' name is in italics).

(32) If it is under a job contracting agreement. [For in such a case it is permitted, just as far as any actual violation of law is concerned, *Magen Avraham*] [just as skins for tanning are permitted *Tosafot Shabbat*] (at the beginning of section 252) to be given to him before sunset. If it is under a job contracting agreement, [because he works on his own behalf: *Tosafot Shabbat*]

[Now, even though in that situation /of skins given for tanning/ it is forbidden to schedule his work specifically on Shabbos *Magen Avraham*] and, [besides, it is /different in our case since it is/ a widely known affair], *Tosafot Shabbat*] for it is well known that the /tax collection/ enterprise belongs to a Jew, and it is therefore the same as if the non-Jew would be doing work at the Jew's house (which in that case /of the skins/ would be forbidden), [nevertheless in this situation they permitted it due to the monetary loss involved. *Magen Avraham*] [For a person becomes confused in the case /a potential loss of/ his money *Tosafot Shabbat*], and [if we would not permit him *Magen Avraham*] /to hire the non-Jew/ [he would collect /the taxes/ himself and *Tosafot Shabbat*] [might come to /violate/ a Torah prohibition: *Magen Avraham*] [he might write out a record /of the tax payment/, as is usual for tax collectors. *Beis Yosef Tosafot Shabbat*]

[From this /last clause/ it would appear *Tosafot Shabbat*] [that in the case of a tax that does not involve writing--as, for example, in the case where various sorts of foods are taken as a levy--it is forbidden *Magen Avraham*] /to collect the taxes/ through a non-Jew, since /the Jew/ would not be brought to /violate/ a Torah prohibition even if we were not to permit him /to hire the non-Jew/. However, the Taz and the *Magen Avraham* conclude that even in such a case we permit /the collection of taxes/ through a non-Jew, [because of the monetary loss involved. *Magen Avraham*]

[However, it is forbidden /for the Jew/ to personally collect even a tax of various sorts of food (even if it has not been brought from outside the /city's/ *techum* and no question arises concerning a violation of the labor trapping, or of /the food/ having

being attached to the ground /at the beginning of Shabbos/). /This is forbidden /on account of the prohibition of "Seeking your concerns" as written in Section 306. {Elya Rabba} Elya Rabba]

[A Jew who has leased a salt-distilling concession Magen Avraham] [from a lord Geraz] may [hire workers under a job contracting agreement, stipulating with each worker/ that in return for the production of each specified amount of salt he will be paid a certain amount of money. Magen Avraham] This is permitted [even through the vessels Geraz] and the wood /fuel/ belong to the Jew.

[{/This is only/ as long as they do not take Geraz] wood from the Jew's premises on Shabbos. For all job [contracting /with non-Jews/ is permitted only if everything that one intends to provide them for purposes of the work has been provided for them prior to Shabbos, and has also been removed from the /Jew's/ premises before Shabbos] Geraz]

[There can be, however, no permission to hire a non-Jew by the week or month since the Jew will, after all, profit from his work. There is, therefore, no permissible way other than by job contracting. {Chayei Adam} Chayei Adam]

A cursory examination of this sub-paragraph would suffice to reveal the majority of the 'rules' of the Mishnah Berurah's genre.

We can denote the following characteristics we classified in our discussion of genre;

1. Employing traditional rabbinic vocabulary.
2. Verbatim duplication of 'latter rabbinic authorities'.
3. Interpolating in a quotation.
4. Formularies, such as 'however' (*mikol makom*).
5. Interpretation of texts, such as the opening statement of the sub-paragraph.
6. Adjudication based upon the majority of the last authoritative rulings cited.

7. The adaption of accepted halachic principles, such as 'violating a Torah prohibition'.

8. 'Former rabbinical authorities' are employed only when cited by other commentaries.

10. Lists of 'latter rabbinical authorities' are cited.

11. The method of analysis, such as when a dispute between 'latter rabbinical authorities' is presented the latter opinion is dominant.

13. To side with a 'latter rabbinical authority' who disputes the Shulchan Aruch, such as when the Bet Yosef is refuted.

15. Short decisive statements.

16. Cross references.

18. The sources referred to are predominantly other adjudicators and 'Shulchan Aruch commentators'.

19. Relating to themes discussed by 'latter rabbinical authorities',

20. Not citing the exact or full source of a quotation.

The rules that are not found in this sub-paragraph will be discussed later.

Rabbi Avraham Gombhiner the author of the Magen Avraham, a seventeenth century commentary on the Shulchan Aruch, who was widely recognized by the rabbinical arbi-

trators as a primary authority, discusses the same issue as Kagan:

(17) Under Job Contracting. For such a case it is permitted, as far as any actual violation of laws is concerned, as it is cited at the onset of section 252. Now, even though in that situation it is forbidden nevertheless here it is permitted due to monetary loss, for if we would not permit him he might come to collect the taxes himself and /violate/ a Torah prohibition and write /the record/. This is, as we have learned in section 266 the reason why it is permitted here even though it /the work/ is performed in public. (Beis Yosef).

Therefore, in a case of a tax that does not involve writing, for example, as in cases where various sorts of foods are rendered /for tax payments/ it is prohibited. However, it seems to me it is permitted due to monetary loss, that he /the Jew/ should not lose his money. This is permitted even though there are opinions that prohibit *Shevut deshevut*²⁹ in the case of monetary loss, as in section 307 paragraphs 5 and 19.

However, as the Mordechai wrote, here it is permitted for it is as saving /money/ from their /gentiles/ hands. In other words, one should not lose all his money to a non-Jew /on Shabbat/, as stated in the first chapter of tractate Avodah Zarah.

A Jew who leased a salt-distilling concession may hire workers under a job contracting agreement, that in return for the production of each specified amount of salt he will be paid a certain amount of money. (Rashal, section 100), see section 245 paragraph 3.

It is not necessary to examine the complete array of commentators employed by the Magen Ayraham to reveal characteristics of genre. An exploration of the Bet Yosef, Mordechai, Maharshah and Taz's topics and phraseology will support the following traits;

1. Employing traditional rabbinic vocabulary.
2. Verbatim duplication of rabbinic authorities. (In contrast to later 'latter rabbinical authorities', the Magen

Avraham, who lived in the seventeenth century, was compelled to be more dependent upon 'former rabbinical authorities').

4. Formularies, such as 'however' (*mikol makom*).

7. The adaptation of accepted halachic principles.

10. Lists of rabbinical authorities are cited.

11. Method of analysis; when a dispute between rabbinical authorities is presented, the latter opinion is dominant.

13. To side with a primary 'latter rabbinical authority' who disputes the Shulchan Aruch. In this instance the Taz is preferred to the Bet Yosef.

15. Short decisive statements with minimum dialectic.

16. Cross references throughout the Shulchan Aruch and the commentaries.

19. The themes referred to by other rabbinical authorities.

20. The complete and exact source is not always cited.

Rabbi Yehudah Ashkenazi the author of the Ba'eyr Heytev, an eighteenth century Shulchan Aruch commentator, who in addition to the Magen Avraham is repeatedly cited in the Mishnah Berurah explains the topic of job contracting on Shabbat as follows: (For the purpose of clarification quotations from the Magen Avraham will appear in italics, the Taz is underlined).

(9) Job contracting agreement. For in such a case it is permitted as far as an actual violation of law is concerned and even though there is a difference in a case of a job contracting agreement, when the Jew does

not determine the non-Jews work on Shabbos as was written in section 252. But in the case of taxes where he designates /the work to the Gentile/ specifically on Shabbos, it is, however, permitted because of the monetary loss involved. For this reason it is permitted here even though it /the work/ is done in public.

It is problematic to me, why in the case of a bath-house in section 243 not permitted as a result of /the principle of/ monetary loss, /We can answer/ for they only permitted in the case of a major financial loss. See Taz.

A Jew who rents a salt-distilling concession may hire workers under a job contracting agreement, that in return for the production of each specified amount of salt he will be paid a certain amount of money, Rashal, section 100, See that which the Yad Aaron cited in the name of the Book Nachalat Yehoshua and the Book Dat V'din section 6.

The 'rules' of the genre predicated in the Ba'eyr Heytev can be identified as;

1. Employing traditional rabbinic vocabulary.
2. Verbatim duplication of 'latter rabbinical authorities'.
4. Formularies; as 'for this reason', (*mehai tama*).
5. Interpretation of texts, concepts and words.
7. The adaptation of accepted halachic principles, such as 'monetary loss' (*pesiadah*)
8. 'Former rabbinical authorities' are employed only when cited by other commentaries.
10. Lists of 'latter rabbinical authorities' are cited.
15. Short decisive statements with minimum dialectics.
16. Cross references.
18. Sources referred to are predominately, other adjudicators and Shulchan Aruch commentators.

19. Discussing the themes referred to in the 'latter rabbinical authorities'.

20. The complete or exact source is not always cited.

Rabbi Rafael Meizlish the author of the Tosafot Shabbat an eighteenth century Shulchan Aruch commentary frequently quoted in the Mishnah Berurah's, laws of Shabbat, expounds on the same theme. (Quotations from the Magen Avraham and Taz will be identified as above. Other rabbinical authorities will be determined by their name placed in square brackets at the conclusion of the quotation).

(16) If it is under job contracting, then it is permitted as far as any actual violations of law is concerned as in the case at the beginning of section 252 of skins given for tanning. [Maharshah] But here, in the case of tax collection the reason is that the greater the tax income the greater his /the Jew's) profit and he /the Gentile/ has a conscious realization of this activity /work on Shabbos/, even though it is forbidden to designate his /the Gentile's) work on Shabbos. Furthermore, it /the work/ is performed in public, and being a case of 'detached from the ground' it is forbidden as was written previously. However, they have permitted it since resulting from a monetary loss a person may become confused in the face of /a potential loss of/ his money and we would not permit him /the Gentile/ to collect, he /the Jew/ would collect /the taxes/ himself and come to /violate/ a Torah prohibition; he might write out a record /on Shabbos/ as is usual for tax collectors to do. This is written by the Beis Yosef.

Therefore in my opinion it is forbidden in a location where it is not customary to write /on Shabbos/ {the following is not a verbatim quote from the Taz but structured according to his phraseology}. and the Taz stated that even here it is permitted since we fear he may transgress a greater prohibition by personally receiving /the collected money/, even though /the possibility of later transgressions/ it is only a rabbinical prohibition, /it is preferable to permit it/. He /the Taz/ brought proof to this /ruling/ from chapter

When it Darkened /tractate Shabbos/; see that source, until this point is his /the Taz's/ words.

Now, what he has simply written is that even in a rabbinical prohibition it is possible to say such a law has been deleted. For^d we have learned that the Trumah and Tur dispute this in section 334, paragraph 2, see there. Moreover, from the chapter "When it Darkens" /Tractate Shabbos/, there is no proof and an examination of the source will reveal this. Thus there is no need to elaborate on this matter. See the Mishneh Lemelech, chapter 6 that elaborated and was analyzed the statement of the Beis Yosef.

Furthermore, in section 307 I query the Mishneh Lemelech, for the Magen Avraham has here permitted all cases because it is as he is saving from their /gentiles/ hands, that is the tax concession should not be lost to the idol worshipers. This law is as the Mordechai explicitly stated. Therefore it seems, according to what the Rema wrote in section 245 at the conclusion of paragraph 1, that in this instance it is considered payment for work on Shabbos, {This is the phraseology of the Rema} Therefore, /the Gentile/ must commence his work shortly prior to the Shabbos while it is still day. This is in order that it be part of an overall payment as it is implied from the statements of the Magen Avraham sub-paragraph 18, see there. In any event, in the case of monetary loss it is permitted in all instances.

The Maharshah wrote in his responsa, regarding a Jew who leased a salt-distilling concession, it is permitted to have workers under a job contracting agreement, that in return for the production of each specified amount /of salt/ they will be paid a specified amount, then they can tell him /the Gentile/ to perform work on Shabbos since it is not attached to the ground. Furthermore, the /Jews/ name is not identified with it /the work/. This not comparable to the case of an oven that is recognizable as his /the Jews/. Moreover, this specifically refers to when the work is not designated to be done on Shabbos. for it is not comparable to taxes that is permissible in any instance, for then there is a greater loss, look there.

The Magen Avraham briefly copied his /Maharshah's/ statements, but since one might err and claim that it is identical to /the case of/ tax /collections/ I have therefore copied his statements as they are.

Although we have only identified a select number of sources cited by the Tosafot Shabbat it will suffice to exemplify the following 'canons' of the genre being studied;

1. Employing traditional rabbinic vocabulary.
2. Verbatim duplication of 'latter rabbinical authorities'.
3. Interpolating the author's interpretation within the quotations cited.
4. Formularies.
5. Interpretation of texts concepts and words.
6. Adjudication based upon the majority of the last authorative rulings cited.
7. The adaptation of halachic principles.
8. 'Former rabbinical authorities' are employed only when cited by other commentaries.
10. Lists of 'latter rabbinical authorities' are cited.
11. Method of analysis: when a dispute between 'latter rabbinical authorities' is presented, the latter opinion is dominant.
13. To side with a 'latter rabbinical authority' who disputes the Shulchan Aruch.
15. Short decisive statements with minimum dialectics.
16. Cross references.
18. Sources referred to are predominately other adjudicators and Shulchan Aruch commentators.
19. The topics discussed are found in the 'latter rabbinical authorities'.
20. The complete or exact text is not always cited.

All the traits of genre need not appear in each subparagraph, but they are employed to formulate the body of literature they represent. The following table summarizes the use of the characteristics of the genre in the above Shulchan Aruch commentators.

TABLE 1
CHARACTERISTICS OF THE GENRE OF 'LATTER RABBINICAL
'AUTHORITIES' / SHULCHAN ARUCH COMMENTATORS

Rule	Mishnah Berurah	Magen Avraham	Ba'eyr Heytev	Tosafot Shabbat
1	Y	Y	Y	Y
2	Y	Y	Y	Y
3	Y	N	N	Y
4	Y	Y	Y	Y
5	Y	Y	Y	Y
6	Y	N	N	Y
7	Y	Y	Y	Y
8	Y	Y	Y	Y
9	Y	Y	Y	Y
11	Y	Y	N	Y
13	Y	Y	N	Y
15	Y	Y	Y	Y
16	Y	Y	Y	Y
18	Y	Y	N	Y
19	Y	Y	Y	Y
20	Y	Y	Y	Y

(Y = the rules used; N = the rules not used)

Evidence that rule 9, (external, non - rabbinic sources) is not included in the decision making, is seen in its absence in all the texts. Moreover, Kagan cites earlier rabbinic texts when he requires external data for his commentary. For example, in the law of *Channukah* (section 670, sub-

paragraph 1) the Mishnah Berurah presents his understanding of the history of this holiday. His source is Maimonides' Mishnah Torah, which is also quoted by other rabbinical authorities.

To illustrate number 17, textual corrections I cite the Mishnah Berurah in section 244 sub - paragraph 31:

(31) And hires out a non-Jew. The /language/ "hires out" is not precise, since the intended meaning is that he hire a non-Jew. (/in the name of the/ latter rabbinical authorities/).

Rabbi Efraim Margolis' Yad Efraim, an early nineteenth century commentary published in the standard texts of the Shulchan Aruch, is one of these 'latter rabbinical authorities' referred to by Kagan.

Evidence for rule 14, the incorporation of rabbinic non-halachic materials, is present in the Mishnah Berurah section 244 sub-paragraph 10. Kagan comments on the Shulchan Aruch's prohibition concerning a Gentile working for a Jew on Shabbat within the city limits. He cites a thirteenth-century book of ethics:

(10) Permit him. It is stated in Sefer Chasidim, section 348: It once happened that a certain person hired a non-Jew to build his house under a job contracting agreement, and the non-Jew built it on Shabbat. People were angry with him, but he paid no heed. Before long, none of the land remained in his or in his children's possession.

This identical non halachic source is also cited in Shalom Schwadran's Shulchan Aruch commentary, Daat Torah,³⁰ section 244, sub paragraph 1.

An additional illustration of the inclusion of non-haláchic literature can be found in section 583 paragraph 2. There Isserles concludes from the Palestinian Talmud that a Jew should not sleep on New Years during the day time. Such Shulchan Aruch commentators as the Taz, Bá'eyr Heytev, Gra and the Mishnah Berurah address this theme. They cite a mystical concept "He who is silent /sleeps/ on the New Year, his fortune will also be silent /sluggish/."

This same discourse in the Palestinian Talmud is an illustration of rule 12, the dependency on the textual version of the 'latter rabbinical authorities' rather than on the source. Neither the statement "he who is silent on the New Year, his fortune will be silent", nor the topic of sleeping on New Years day, does not appear in the Palestinian Talmud.³¹

The Redaction of the Mishnah Berurah

This section deals with four themes: a. date of redaction and publication of the Mishnah Berurah; b. its authorship; c. Kagan's intent; d. the translation used in our study.

a. date of redaction and publication of the Mishnah Berurah

Rabbi Kagan published volume one of the Mishnah Berurah in Warsaw during 1883-4 (5644 A.M.).³² The redaction of the remaining five volumes extended an addi-

tional twenty-three years. The final sixth volume was published in St. Petersburg during 1907.

Rabbi Aaron Kagan reports in his biography of his father Israel Mayer Hacoheh Kagan, (1953, 41) that subsequent to volume one, the Chafetz Chaim prepared and published volume 3, the Laws of Shabbat. Rabbi Aaron explains that his father felt that the complexities of the laws of Shabbat warranted immediate attention even if it required ignoring Rabbi Karo's order of the Shulchan Aruch. Volume 3 was published in 1893. This new disposition in the first edition of the Laws of Shabbat was published as volume two. After the completion of the remaining volumes the proper order was restored and the Laws of Shabbat became volume three. The remainder of the commentary was redacted in accordance with order of the Shulchan Aruch. First, volume two, the Laws of Blessings, was concluded and was succeeded by four, the laws of Eruv, five, the Laws of Passover and six, the Laws of Other Holidays.

b. its authorship.

Rabbi Aaron Kagan, in his unfinished biography of his father, claims to have participated in the writing of the Mishnah Berurah. Rabbi Aaron states that as a result of his financial difficulties his father offered him a salary to contribute to the preparation of the Mishnah Berurah.

But I was to remain in my city and study in great detail the laws of Shabbat. He /the Chafetz Chaim/ would indicate to me the sections of the Shulchan Aruch that I

would be required to study, analyze and explain. I then would be required to write what I understood, whether it be commentary on the Shulchan Aruch or the Beyur Halachah. I was to forward these manuscripts to my father. He /the Chafetz Chaim/ would review them with his son-in-law Rabbi Zvi and choose the best from these writings to be incorporated into the text of the Mishnah Berurah. . . .

Since the Mishnah Berurah was not compiled by one author there are at times contradictions that the Rabbi author /Rabbi Kagan/ neglected. The Torah student should examine Mishnah Berurah section 328 sub-paragraph 14 etc.... (*ibid.*, 45)

Rabbi Aaron continues to cite additional sub-paragraphs from the Mishnah Berurah to illustrate his argument:

In addition to the claim by Rabbi Aaron, the^o Chafetz Chaim's son, to have contributed materials to the Mishnah Berurah, I was apprised by grandchildren of the Chafetz Chaim that their father, Rabbi Zacks, among others, also augmented the materials included in the Mishnah Berurah.

It is not my purpose in this study to deal with the credibility of the above assertion and establish the authorship of the Mishnah Berurah. I have no reason to dispute the popular view of Kagan as the author of the Mishnah Berurah. Rather, I am concerned with the redaction of this treatise. By redaction I mean, following Neusner,

An orderly sequence of steps from (1) the formulation of individual units, through (2) their revision into their ultimate form, and finally (3) their being juxtaposed and linked through diverse devices of joining into a single fabric. (1981 b, 36)

My evidence shows that the Mishnah Berurah complies with Neusner's requirements³³ and that therefore one person

edited this commentary. This conclusion derives from the Mishnah Berurah's form, structure and content. For example, we find the consistent cross references throughout the Mishnah Berurah, as when one sub-paragraph refers to another one hundred sub-paragraphs later. That one editor, I hypothesize, implicitly conveys his perceptual world through his redaction of the text:

c. Kagan's intent

We suggest that three reasons motivated Rabbi Kagan to compose the Mishnah Berurah: 1. to aid the orthodox layman in the study of the Shulchan Aruch; 2. to combat the penetration into the community of forces that were minatory to observant Jewry (2 is directly related to 1); 3. to generate income.

1. Rabbi Kagan in his introduction to volume one of the Mishnah Berurah states that he redacted his commentary in order to guide the observant Jewish layman in the complexities of proper halachic behaviour. A multitude of legal works had appeared subsequent to the publishing of the Shulchan Aruch. Therefore, Kagan's legal treatise would help to overcome the layman's frustration and despair resulting from the vast amount of halachic literature one was required to study. Kagan, subsequent to discussing the relevance of Torah study, states his intention:

The main purpose of study is to convert theory to performance. The Rabbis of blessed memory said (Babylonian Talmud Berachot 8b) "The Lord loves the

gates of Zion more than all dwellings of Jacob?' The Lord loves the gates that are distinguished through halachah more than the synagogues of Jacob's houses of study". Furthermore, examine the section in Yoreh Deah (section 246) in the Shach who cites in the name of the Perishah, that one is obligated to study laws daily in order that study might engender performance. Also, through the study of laws one is guaranteed a life in the next world. However such a person must be careful to study every day. This is in accordance with what we have learned in the Talmud. It was stated in the name of the Tanna Debe Eliyahu; "All who study laws etc." . . . Now, in accordance with our explanation, the study of Orach Chaim has priority, even though all sections of the Shulchan Aruch are required to be studied. In any event, this section /Orach Chaim/ has priority since it is essential for the daily observance of the Torah. Without it an Israelite cannot lift his hand or foot. We therefore can state that this is the intention of the passage, "My ordinances and statutes you shall keep, which if a man does this he shall live by them". /Leviticus 18:5/, (as Rashi explained in the weekly portion of Emor) "For observance signifies what a person will study at first etc.". This refers to the studies that have a practical relevance each day of ones life. If we intently examine the situation, we will discover that in this world there are few individuals who designate their studies for this purpose. This even includes those persons whose souls God has 'touched' so that they crave to become stronger in the fortress of Torah and the fulfillment of mitzvot. It would be proper if these individuals' priority should be to become proficient in this section /Orach Chaim/ in order to know the correct paths to follow.

I have inquired after the reason for this phenomenon, and discovered two. First, the Shulchan Aruch without the Tur is as an obscure book . . . For a person to study every individual law of the Shulchan Aruch including its sources and reasons as applied from the Tur and Bet Yosef, would be a great effort in our times. This is because, due to our many sins, in our day souls have become diminished. Furthermore, the trials and tribulations of our times have increased so that if a person would favour this mode of study, he would be required to struggle days and at times weeks to properly understand the practical application of one average section, (for example section 32).

A second reason, in my opinion, that caused the diminishing study of the Shulchan Aruch results from the multitude of 'latter rabbinical authorities' opinions that frustrated a person's halachic behaviour. One does not know whether to turn right or left. Even if this

individual concludes to act stringently, this is also incorrect, for it may be 'a stringency that produces a leniency'. In addition, I have discovered that better than one hundred and twenty years have passed since the Ba'eyr Heytev had compiled and abridged selected earlier commentaries such as the Magen Avraham and the Taz. Since then, there have evolved other famous rabbinical scholars who produced commentaries on the Shulchan Aruch. e.g. Elya Rabba, Mateh Yehudah, Maamar Mordechai. We even find that the Shaarei Teshuvah only cited selected portions from the rabbinical authorities. Furthermore, the Peri Megadim, whose adjudications are renowned throughout Israel, and who has written a very revered book, should be named especially. Although this work explains in every section new practical topics, it was almost ignored by the Shaarei Teshuvah. This is because he did not cite the commentaries in full, for instead of copying from the vast number of responsa literature available to him, he was dependent upon the readers examination of these texts. This is also true of many other great rabbinical scholars whose teachings have become wide spread throughout the world after the publication of the Shulchan Aruch. For example, the Gaon Rabbi Akivah Eiger, Devrei Hachaim, Magen Giborim, Orchot Chaim etc. Also, I saw with my eyes that presently, when a person seeks a ruling concerned with a practical issue that is not clearly explained in the Shulchan Aruch, he is compelled to research the multitude of "latter rabbinical authorities", such as the Peri Megadim, Derech Hachaim, Rabbi Akivah Eger, Chayei Adam, Machzit Hashekel, etc. There is no end to his toil. Therefore I awoke and strengthened myself through the graciousness of God, to correct all these shortcomings. For I have, in my opinion, with the help of God, prepared an adequate commentary on the Shulchan Aruch, until the conclusion of the laws of prayer. I titled this work Mishnah Berurah (The Lucid Teaching) and have explained, with the help of God, every law in the Shulchan Aruch, its reason and cause as it is expounded from the Talmud and adjudicators. I also explained disputes and offered halachic conclusions of the 'latter rabbinical authorities', for each ruling. (This commentary is compiled from the 'latter rabbinical authorities', Bayit Chadash, the Derishah and Perishah, Eliyahü Rabba, Beur Hagra, Peri Megadim, Berchei Yosef, Maamar Mordechai, Mate Yehudah, Nahar Shalom, Dagul Merivavah, Ba'eyr Heytev, Shaarei Teshuvah, The Shulchan Aruch of the Geraz, Levushei Seraad, Shulchan Shelomo, Derech Hachaim, Chedushei Rabbi Akivah Eger, Yeshuot Yaacov, Chayei Adam, Machtzit Hashekel, Magen Giborim, Eretz Hachaim and many more. Also included is data from selected responsa). In the margins of this page I opened

a section entitled Sha'ar Ha-Tziyun. In it I indicated all the sources of the Mishnah Berurah so as to know where these pearls originated. In instances where I saw different opinions amongst the 'latter rabbinical authorities', I was not idle and searched through all other works of the 'latter rabbinical authorities' to discover who dealt with the case. I especially examined the commentary of the Gra, blessed be his memory, who is the light of Israel and a "peg" upon whom all are dependent and who is worthy of this reliance. I also searched in the works of the 'former rabbinical authorities', for the possibility that I might reveal an explicit explanation or proof. For thank God, I have in my possession many books of the 'former rabbinical authorities'. In addition I compiled adjacent to these commentaries an additional commentary entitled Beur Halachah. It entails a lengthy explanation of selected rulings that I dealt with in the Mishnah Berurah, and did not have sufficient space in the Sha'ar Ha-Tziyun to clarify. Further included are a number of profound themes. The reader should not consider that my copying of the adjudicators was unintentional and random. For it is not so. I have examined, thank God, in each section the sources found in the 'former rabbinical authorities' and in almost all the 'latter rabbinical authorities' stated above. God has assisted me to obtain the commentaries on Orach Chaim, the Kenneset Hagedolah and Sherai Kenneset Hagedolah, the Olat Tamid and the Levush with the Or Zarua. All these commentaries assisted my anthologizing their contents, reasons and causes in full so as not to suffice with short statements of law. To reproduce abridged discourses can incur ruin. (This exclude the rulings the Ba'eyr Heytev cites from specific responsa that I do not have when the Peri Megadim and other above mentioned works did not refer to them. In such an instance I had to copy them as is.) I hope to God, that from our commentary every person will have a lucid understanding of his studies.

Rabbi Kagan's stated purpose is to respond to the exigencies of study and its application in his generation. This argument is not unique in rabbinic literature. For example, Maimonides in his introduction to the Mishneh Torah,³⁴ and Yaacov ben Asher in his introduction to the Tur,³⁵ employed similar reasoning. These works of Rabbi Kagan, who sought acceptance for himself and his writings

in his milieu, could not deviate from the accepted religious patterns or from the recognized authorities. (This point will be developed throughout my study). By adopting in the Mishnah Berurah the already established rationale of Maimonides and ben Asher, Kagan both enhances their authority and bolsters his own. The Chafetz Chaim expresses his dependency upon earlier rabbinical authorities even in providing a reason for his redacting the Mishnah Berurah.

2. As I discussed above, the halachically observant society of nineteenth century Eastern Europe was threatened by the development of the secular Jewish movements. Many rabbinic authorities attempted to combat this new phenomenon by demanding from their followers enhanced ethical and religious behaviour. Consequently this era saw the rise of the 'musar movement'.³⁶ Rabbi Kagan incorporated such teachings into his writings concerned with social *halachah* and contemporary issues such as Torah study, conscription, male-female relationships, speech and charity. He thereby created his halachic *musar*, which dealt stringently with behaviour related to social interaction. These works were accepted by traditional Jews as *musar* literature, rather than as halachic interpretation. Schweid, showing insight into the generation, personality and works of the Chafetz Chaim, describes this development:

/The generations/ revealed new internal threatening patterns. Materialism and pragmatism become recognizable in the orthodox society, especially during a time of distress. For example, the temptation is great for

parents that 'fear God' to educate their children in Gentile schools. They do this in order to acquire a viable trade for their children. It is certainly not their intention, God forbid, to drive their children from Torah and mitzvot, but in reality, it seems that material success has a greater value for them. The orthodox spiritual leadership had to wrestle with these dispositions. This could mean that only at the onset was the orthodox position self-evident in terms of the Jewish way of life that existed prior to the period of emancipation. In a short time it became evident that what was once simple and clear required support and renewed confirmation. Anew, one had to desire it, justify it, and persist in its preservation. Now, to desire, justify and persist is an activity of self-defense which is daunting and which constitutes a sort of creativity. We will direct our attention towards two works of this type; first, the legal treatise of Rabbi Israel Mayer Hacoen, the author of The Chafetz Chaim (1838/9 - 1933). He was a unique person who accepted upon himself a ambitious project to repair the cracks in the walls of halachah in order to prevent the penetration of the destructive influence of the enlightenment. Furthermore, he did this in order to assist those who found themselves cut off for a greater or lesser period of time from a stable Jewish framework. Indeed, when an organized and authoritative communal framework existed, the individual members had a sense of belonging and protection. They were not confronted daily with the temptation to transgress the mitzvot, or were filled with doubts how to observe them. Their lives flowed in secure channels of customs and habit. There was no need to compromise halachic decisions for every matter by paying attention to all possibilities. Therefore, if an individual was confronted with an "out of the ordinary" plight, there were always rabbinical scholars to render a solution. But, when the community is unstable and many individuals sever themselves from it, these "out of the ordinary" situations no longer seem abnormal. In such circumstances one cannot depend upon previously constituted authorities and leadership. Thus each individual must be equipped with definite and decisive knowledge on how to conduct himself. Furthermore, he must be prepared for situations which could occur to him. For example, conscription into the military, travelling distances for business purposes, or emigrating to a country across the ocean. Moreover, there is a need to strengthen his will and show him the way even when he is settled and closely affiliated with the community. This is because the ongoing conditions of life stand against the existence of the way of life of the community. Furthermore, within such a society there

are worrisome signs of disintegration. The "Chafetz Chaim", working as a diligent and persistent builder, responded to this need with unflagging labour. He saw the walls of his fortress collapsing in the waves surging roundabout. He replaced every stone which had fallen from the embankment prior to this calamity, he erected an embankment and protective wall in order to prevent its collapse, or at least to delay it. One must try to defend one's position another hour, another, and yet another; every minute of postponement is precious. For at any moment he was convinced salvation must arrive from the heavens and the fortress of the community will be established and stand firmly. In this spirit the author of Chafetz Chaim wrote his many halachic compositions. He did not enter into ideological or theological debates and did not develop his own philosophy. His work was a halachic construction concerned with how to conduct oneself when conscripted into the military; how to behave during 'emigration'; how to deal with children's education? To all these questions came detailed clear and precise answers, (*Mishnah Berurah*). From this literature evolved the Chafetz Chaim's influence upon the form of our era's orthodoxy. He responded to its immediate needs. We will not exaggerate if we characterize his project as a reconstruction of a traditional life pattern during its process of collapse. The foundations of this structure were old, the materials were old, but the quality of construction and its new architecture were designed in compliance with the needs of the time. This is a clear testimony of a great creativity. (1977, 12-14)

Although the Mishnah Berurah is only one example of the works Schweid termed Kagan's halachic literature it greatly differed from the rest in structure, style, form and content. This treatise was almost entirely halachic in contrast to Kagan's *musar* literature. Alternatively, even though the Mishnah Berurah so differed, there is no reason to assume its goal was dissimilar from than the rest of Kagan's popular writings.³⁷ Therefore Schweid in this sense correctly classifies the Mishnah Berurah with the rest of Rabbi Kagan's popular works.

This hypothesis can further be substantiated when examining one aspect of the Mishnah Berurah's content. In contrast to the stringent demands of *musar*, Kagan employed in the Mishnah Berurah a philosophy of lenient rulings,³⁸ but only accommodative decisions that were in accordance with the rulings of the 'latter rabbinical authorities', and not of explicit concern for his 'group'. (as I discussed above). While the area of social interaction or ethical and moral behaviour demanded stringency, most of Kagan's comments on the laws in Orach Chaim were concerned with themes such as business, rituals, Sabbath and holidays which permitted leniency. This implies that to maintain the 'high group' within its 'boundaries' and exclude the intruders and their influences, Rabbi Kagan felt it adequate to require the stringent observance of halachic *musar* in contrast only to *halachah*. Furthermore, once the '*musar* behaviour' was strong the 'high grid' required for this *Zeitgeist* would not be threatened even if the other components of *halachah* were accommodative. Thus, the Chafetz Chaim in his Mishnah Berurah employs a general underlying principle, to rule according to the accommodative position.

This lenient pattern of adjudication thereby attempts to suggest to its reader that it is not too difficult to remain an observant Jew, and part of the 'group'. Therefore

there is no reason to 'cross over' to more liberal Jewish movements.

This penchant for lenient rulings was not unique to Rabbi Kagan. Rabbi Shalom Hachohen Schwadran, a leading rabbinical authority in Eastern Europe published a commentary on the Shulchan Aruch entitled Daat Torah.³⁹ Rabbi Zvi Hirsh Shapiro author of the Darchei Teshuvah (a commentary on Shulchan Aruch Yoreh De'ah, written in Hungary during the twentieth century, not grasping the sensitivities of the nineteenth-century Eastern Europe Jewish milieu, wrote in his introduction:

Now, I do not refrain in my work, the Darchei Teshuvah to include the writings of the accommodators, for example, the book Daat Torah, that with all due respect is too lenient in its adjudications, which are against the opinions of our great Rabbis, the great 'latter rabbinical authorities', from whose words we live and from whom comes forth Torah and teachings. This lenient work is also contrary to the popular stringent rulings.

Thus Rabbi Kagan in digesting the major latter rabbinical authorities' into a concise, accessible and readable work, while emphasising the lenient views, had provided his Mishnah Berurah to Eastern European Jewry as an additional weapon against the 'enlightenment' enemy.

3. Rabbi Kagan's concern about marketing his works played an additional role in the publishing of the Mishnah Berurah. The Chafetz Chaim's major source of income, for himself and his rabbinical academy, stemmed from the sale of his books. Kagan personally marketed his works, travelling throughout Eastern Europe to sell his

publications.⁴⁰ Therefore, his choice of topics was strongly influenced by and dependent upon the question of salability.

In contrast to the Mishnah Berurah, the majority of the Chafetz Chaim's publications were concerned with *musar*. The market for this type of literature was saturated. During a period of confusion and disintegration, as the period of the Chafetz Chaim, *musar* literature was dominant. The rise of the *musar* movement contributed to these supererogatory works. Rabbi Kagan, realizing the potential marketing possibilities of a diverse type of literature, produced the Mishnah Berurah. His forecast was correct. During his lifetime Kagan published a number of editions of this commentary.

The argument of salability as an impetus to the publication of the Mishnah Berurah, is further borne out by the fact that Rabbi Kagan did not wait to complete all six volumes before publishing. Immediately after the redaction of volume one in 1884 it was published and distributed.

d. the translation used in our study.

In 1980 volume three of the Mishnah Berurah, the laws of Shabbat was translated into English by the Pischah Foundation and Feldheim Publishers. The translator attempts to remain loyal to Rabbi Kagan's text and identifies his interpretations or editorial insertions with slashes on either end (a format adopted for other additional

translations in this study). I have employed the Pisgah/Feldheim translation and although I have made some minor changes to the latter; they bear no relevance for the meaning of the Mishnah Berurah. For example, for the sake of uniformity of transliteration I have adopted the sephardic pronunciation of Hebrew as opposed to ashkenazic, therefore Shabbos would have read Shabbat.

CHAPTER 2

243: THE LAW OF ONE WHO RENTS A FIELD

OR A BATH-HOUSE TO A NON-JEW

(Contains Two Paragraphs)

Shulchan Aruch

1. A person must not rent out his (1) bath-house (2) to a non-Jew, (3) because /a bath-house/ is well-known to the public as belonging to /the Jew/ and now this non-Jew will be doing work there on Shabbos. Now, (4) a bath-house, ordinarily, is not given over under a profit-sharing arrangement. (*Explanation: a profit-sharer (aris) is a person who labors in order to receive a share of the improvement he creates for the owner.*) People will therefore assume that all the profit belongs to the Jew; that he has hired the non-Jew for a certain amount per day; and that, in effect, the non-Jew is doing work (5) as the Jew's agent.

/In the case of / (6) a field, however, this is permitted. Since it is common practice to undertake /to work/ a field under the profit-sharing arrangement, then even though people know that the field belongs to the Jew, they will assume that the non-Jew has entered into a profit-sharing agreement with him and that he is /thus/ working for himself.

The law (7) for an oven is the same as for a bath-house, and that (8) for a mill the same as for a field.

Gloss: (9) Even though the non-Jew holds /the field/ under an agreement to receive (10) merely a third or a fourth /of the profits/, in which case the Jew profits from the work the non-Jew performs on Shabbos, it is still permitted since the non-Jew is working on his own behalf /as well/. (...)

Mishnah Berurah

A person must not rent out. Know that there are three categories: The first is profit-sharing (*aribus*), where one hires a non-Jew to do the work of a field or a bath-house, with the profits or the crops to be shared. The second is rental, where the non-Jew takes all the profits or crops, giving the Jew a fixed amount annually for his field or

bath. These two categories are permitted completely in the case of a field, and in the case of a bath-house /are permitted/ as far as any actual violation of a law is concerned, since the non-Jew is working on his own behalf. However, in the case of a bath-house, the Sages forbade these two categories because of *mar'is ha-ayin*; /i.e./ since /the bath-house/ is known as the Jew's, it will be suspected that the non-Jew is working as the Jew's agent.

The third category is job contracting (*kabbelanus*), whereby all the profits belong to the Jew but the Jew gives the non-Jew a fixed amount each year for his work. Now this is certainly forbidden, in the sense that an actual violation is involved, for a bath-house. For the non-Jew is the Jew's agent; the Jew profits from the Shabbos work; since if /the non-Jew/ would not work one day, the Jew would forfeit the profit of that day.

Accordingly, if it is customary for most of the townspeople to rent these out or give them out under profit-sharing agreements (as explained in Par. 2), the bath-house then has the same law as the field; the first two categories are permitted; the third is forbidden.

Whatever is said here regarding the permissibility of renting involves a case where such rental is made part of an overall rental that includes the weekdays as well. Where, however, it is for Shabbos alone, it is forbidden even for a field--and even where /the arrangement/ is generally known.

This constitutes a brief resumé of the main laws in this Section.

Analysis

Rabbi Kagan begins his commentary to section 243 of the *Mishnah Berurah* with preliminary introductory remarks. In this introduction he writes: "This constitutes a brief resumé of the main laws of this section." Through this statement the reader is informed of Rabbi Kagan's agenda from the onset.

Rabbi Kagan's introductions are not unique in this genre of rabbinic literature. Already in the *Mishneh Torah* Maimonides used this format. (See the laws of Chanukka chapter 1). The *Ba'eyr Heytev* commentary on our section of

the Shulchan Aruch also writes in the same literary style. The author of the Mishnah Berurah in this instance copies the Ba'eyr Heytev almost verbatim, a matter which I will discuss later.

We may first note that the Mishnah Berurah text here does not contradict the Shulchan Aruch, but rather comments upon it. Rabbi Karo's text is explained, glossed and developed, but not contradicted. The introduction, even though it deals with disputed topics, remains loyal to this principle. Rabbi Kagan abstracts three main areas of Shabbat laws from the Shulchan Aruch (section 243, paragraph 1). One cannot identify these three areas with any specific law found in our section. Rather they serve as general categories for the classification of laws which deal with renting property to a non-Jew.

In addition, even though not explicitly stated by Rabbi Kagan, his introduction serves two additional purposes. First, to present a dispute with the Ba'eyr Heytev; second as a prelude to the system of halachic decisions that are concerned with the relations of Jews and Gentiles on Shabbat. I will deal with each purpose separately.

As mentioned above, the Mishnah Berurah in his introduction to section 243, quotes the Ba'eyr Heytev virtually word for word. Two types of modifications are made by Rabbi Kagan in the opening. The first change is done

solely for the purpose of clarification and not dispute. Approximately ten words in the Ba'eyr Heytev's text are altered. For example, after the word "Jews", the Ba'eyr Heytev writes, "etc." The Mishnah Berurah completes the "etc." by writing "it will be suspected that the non-Jew is working as the Jew's agent." Another example of clarification is when the Ba'eyr Heytev, after the word "categories", uses the words "in the laws of ritual." The author of the Mishnah Berurah finds the phrase superfluous, and instead, after the words "the second" he adds the Ba'eyr Heytev's terminology "is rental". Still further examples are expressed when Rabbi Kagan adds the words "is profit sharing" and "is job sharing". These phrases were not included in the text of the Ba'eyr Heytev.

A final clarificatory change in the Mishnah Berurah's introduction serves to differ with an opinion of the Ba'eyr Heytev. This disagreement establishes a basic principle for Rabbi Kagan's legal decision that deals with the Jew Gentile relationship on Shabbat. His halachic flexibility is demonstrated by the fact that he sides with the lenient view. The source of the argument is found in this subparagraph of Mishnah Berurah, where Rabbi Kagan writes that the prohibition in category three in the case of a bath-house is a certainly forbidden violation (*medina*). However, he does not include "field" in this prohibited category, which is only effectively forbidden. This halachic

decision disagrees with the author of the Ba'eyr Heytev, who writes, "even in a field, even more so in a bath-house". Rabbi Kagan does not explain the reason for his decision, but, consistent with his literary format he refers to the debate with the Ba'eyr Heytev in a footnote in his commentary Sha'ar Ha-Tziyun 1. There the author of the Mishnah Berurah directs the readers' attention to early rabbinic authorities who are in agreement with his view. Simultaneously, he avoids other sources which disagree with his opinion. Rabbi Kagan writes: "Even though the Ba'eyr Heytev writes that even in a field it is forbidden, that is not what the Magen Avraham wrote at the end of sub-paragraph 2. This was copied in the Mishnah Berurah sub-paragraph 10." The Chafetz Chaim remains faithful to his style and quotes the Magen Avraham in sub-paragraph 10 of section 243.

The significance of the dispute with the Ba'eyr Heytev will be further explored when discussing the Shulchan Aruch's laws in sections 243 through 247. As mentioned the above difference of opinion will demonstrate its relevance when Rabbi Kagan sides with the more lenient halachic opinions to solve the specific social problems with which he was confronted.

In addition, the style in which the Mishnah Berurah author's decision was presented is consistent with the attempt to present his case 'on the back of' earlier rabbinic authorities, thus giving greater legitimacy to his

work in the eyes of rabbinic Jews and leaders. (This point will be shown to be basic to understand the Mishnah Berurah commentary.)

The analysis of this sub-paragraph suggests that even though Rabbi Kagan presents almost the same theoretical introduction as the Ba'eyr Heytev, he is laying the foundation to deal later with the social and especially social-economic problems that the Jew and Gentile Shabbat relationship entails.

(1) His bath-house. Whether he built it himself or bought it and occupied it, so that it is widely known as his.

Analysis

In sub-paragraph 1 Rabbi Kagan expands upon the law of the Shulchan Aruch. He adds details and explains the *halachah* under discussion. After the word "himself" in this sub-paragraph we are referred to Sha'ar Ha-Tziyun 1. The footnote directs us to the Magen Avraham commentary sub-paragraph 3. Indeed the phrase used in the Mishnah Berurah "bought it and occupied it, so that it is widely known as his", reflects the Magen Avraham's language, but is not a verbatim citation. Rather, through the emulation of the Magen Avraham's literary form, the Chafetz Chaim implicitly conveys two points to the student. First, he shows his dependency upon earlier accepted rabbinic sources. By this means used throughout the Mishnah Berurah, Rabbi Kagan

seeks acceptance for his commentary by rabbinic Judaism and its leaders. Second, he sensitizes the reader to additional information found in Magen Avraham sub-paragraph 3. This text states: "I do not know why he (Rema, section 243 paragraph 2) wrote 'rented', for the Bet Yosef wrote even if he bought it from an idol worshipper it is permitted to rent it since he had not occupied it and it is not widely known as his." The above opinion of the Bet Yosef, that deals with the ownership of bath houses, is not found in the text of the Shulchan Aruch. Rabbi Kagan in sub-paragraph 1 chooses to bring to our attention the *halachah* of Karo's other commentary and refers us only to the Magen Avraham and additional *acharonim*. The Chafetz Chaim informs us of the law through the Magen Avraham's commentary and language. A reference to the Bet Yosef is conspicuously absent.

This examination poses the query as to why Rabbi Kagan does not cite the Bet Yosef, which is the original source for the law found in sub-paragraph 1. An inspection of Mishnah Berurah suggests that wherever applicable he consistently quotes the Magen Avraham, even when the opinions of the *rishonim* ('former rabbinical authorities') are relevant. The rejection of an earlier source in favour of, and in accordance with a later authority is an instance of the Chafetz Chaim's system of halachic decision making. It is similar to the concept referred to in rabbinic adjudication history as *hilchata k'batrai*. The Mishnah

Berurah's choice of the Magen Avraham in favour of the Bet Yosef in sub-paragraph 1 is a further indication of this method of adjudication.

Further analysis of sub-paragraph 1 offers the student an additional insight into the literary form of the Mishnah Berurah. In this law, under the guise of a commentary, Rabbi Kagan is offering an adjudication. Other rabbinical sources (e.g. Bet Yosef section 243) discuss the different opinions related to the topic before deciding the law; the Mishnah Berurah limits himself to a decisive statement, a footnote that refers indirectly to the dispute and an acharon who is in agreement with his view. Thus the Chafetz Chaim presents his judgement without having to deal with the conflicting opinions that so often constitute rabbinic law.

(2) To a non-Jew. All the more so, it is forbidden to rent it to a non-observant Jew since then one also violates the law, "Do not place a stumbling block before the blind." This reason applies also to a field as well as to anything else.

Analysis

The author of the Mishnah Berurah in sub-paragraph 2 glosses the Shulchan Aruch. Rabbi Kagan extends the law by introducing the question of heretic (mumar), a category that Rabbi Karo and other Shulchan Aruch commentaries do not include in their discussion of section 243. The gloss commences with the formulary, "all the more so" (kol

sheken), and uses this vocable to emphasize a particular point. Furthermore, this unit of speech gives the reader an impression of certitude and clarity for what follows, while maintaining his dependence upon an earlier statement. Therefore, the use of the term *kol sheken* enables the Mishnah Berurah author to augment the Shulchan Aruch and give the impression that his additions are a natural continuation of Rabbi Karo's *halachah*.

The prohibition for a Jew against renting a bath house to a *Yisroel mumar* is the theme of the above sub-paragraph. *Halachah* proffers two interpretations for the term *mumar*, a non-observant Jew and an apostate, both of whom are obligated to observe rabbinic law. It is not clear from the Mishnah Berurah text in sub-paragraph 2 how this word is construed. A perulstration of Rabbi Kagan's commentary ascertains that in addition to sub-paragraph 2, the word *mumar* is used in two accessory laws of Shabbat. In section 304, sub-paragraph 15, he writes: "It is forbidden to instruct a *mumar* or a *karaites* to do work for him on Shabbos because one transgresses the prohibition of 'before a blind person' [do not place a stumbling block] (*Peri Megadim*)."
Concurrently, in section in 347 sub-paragraph 7 the Mishnah Berurah states: "Because of 'before a blind man . . . and to a *mumar* to idol worship it is forbidden . . ."

As stated above section 304 sub-paragraph 15 refers the reader to the Peri Megadim commentary in which a *mumar*

is identified as either a "mumar with respect to the whole Torah" or a "mumar with respect to idol worship". In section 347 sub-paragraph 7, Rabbi Kagan paraphrases the language of the Tosafot (B.T. Abodah Zarah 7b) which also states "mumar with respect to idol worship". This terminology is also found in 'latter rabbinical sources', such as the Ba'eyr Heytev, that deal with this theme in section 364. The introduction of *mumar* in section 243 sub-paragraph 2 is not substantiated by rabbinical sources. *Mumar* is often related to 'before a blind person', as in sections 304 and 347. The Talmudic source for the laws of section 243, B.T. Avodah Zarah 21b, uses the phrase "before a blind person".⁴¹ Rabbi Kagan consequently amends the law of 243 to include *mumar*.

His concern for 'Jewish heretic groups' encouraged Rabbi Kagan to state the prohibition regarding *mumar* at the beginning of the laws of Shabbat. Furthermore, this *halachah* that deals with heretic manifests his concern with respect to the rise of secular Jewish groups in his era.

The concern for the 'heretical' movements⁴² that developed in his epoch is further exemplified by the concluding statement in section 243 sub-paragraph 2: ". . . As well as to anything else." This phrase, while not a clear halachic term as such, is nevertheless general and all encompassing. It would be inappropriate in the context

of sub-paragraph 2 unless it was placed to emphasize the Chafetz Chaim's anxieties.

The Mishnah Berurah's use of the term mumar clearly reflects the *Zeitgeist* of his time. Rather than using the terms with any legal precision, he uses the terms *mumar*, '*yisroel mumar*', and '*mumar with respect to idol worship*' as if they were synonyms, even in different contexts. I contend that Rabbi Kagan's constant transposition of the term *mumar* explains the usage of the word here, as well as expressing his attitude towards the secular Jew of his period.⁴³ The Mishnah Berurah does not differentiate between categories of *mumar*. His use of the term signifies that they are all obligated to observe rabbinic law. Alternatively, his personal perception of the secular Jew is that of an idol worshiper. This apprehension is further substantiated in the Mishnah Berurah's introduction to the laws of Shabbat and his Nidchei Yisroel, Laws of Shabbat (1951, 204). In the latter book Kagan writes: ". . . That he who has cast away the prohibition of the Sabbath and trespasses thereon a number of times in public is a rebel (*mumar*) against the entire Torah and is governed by the same law as that pertaining to a real heathen." Moreover, in the only footnote to the Mishnah Berurah's introduction to the laws of Shabbat Rabbi Kagan states that his comparison between a Sabbath transgressor and an idol worshiper is cited from Maimonides' Mishneh Torah, chapter

30 of the Laws of Shabbat. Although this opinion can be traced to B.T. Chulin 5a (according to the interpretation of Rashi), Rabbi Kagan follows his literary pattern and prefers to refer to a later rabbinical authority.

Attributing the status of an idol worshiper to the Sabbath transgressor was not accepted by the majority of 'latter rabbinical authorities'. In addition to the social ramifications of such a decision, to accept this view would be considered a stringent ruling. Ellinson in his analysis of Rabbi Kluger's responsum (nineteenth century Europe), expresses this consideration. (1985, 103 - 105)

Rabbi Kagan elected to convey the message of *mumar* at the onset of the laws of Sabbath. He informs his reader that one may be accommodating within the halachic boundaries set by the rabbinical authorities, but if one crosses the set boundaries he is to be considered and treated as an idol worshiper.

(3) Because a /bath-house/ is well known. I.e., as far as any actual violation of the law is concerned, it is permitted to rent it out for a year or a month to a non-Jew, where the latter gives him a specific amount /in payment/ regardless of whether the non-Jew will operate it, with all the profits going to the non-Jew.

/Under such conditions,/ there is no prohibition of *sechar Shabbas* (profits earned on Shabbos) since it is rented out to him for a whole year. Certainly, too, the prohibition of ordering a non-Jew /to work/ does not apply to renting, since the non-Jew is working in his own interest (for even if the non-Jew has only a share in the profit of the bath, we still consider him to be working in his own interest--as stated at the end of the Paragraph). Nevertheless, this is forbidden because of *mar'is ha-ayin* (it will arouse suspicion), since it is known as the Jew's and people

will say /the non-Jew/ is a day-worker and /therefore/ his agent.

All of this applies only to cases where he rents it out by the year or the month. But to rent it out to a non-Jew by the day, where the non-Jew will give him a specific amount for each day that he operates it (even though in this case, too, he is working on his own behalf), is nevertheless forbidden because it involves an actual violation of law, since /the money received/ is considered a Shabbos profit.

See below, Sec. 244, that something forbidden because of suspicious appearances is only forbidden within the *techum* of a Jewish settlement.

Analysis

In this sub-paragraph the Mishnah Berurah makes good on his opening formulary, "perush" (explanation). He clarifies Rabbi Karo's phrase "because it is well known" by providing a detailed analysis of the prohibition to rent to a Gentile, and a deliberation on whether it is forbidden intrinsically (*medinah*) or because one gives a false impression to others, (*mar'is ha'-ayin*).

Following the word "perush" there is a reference to the Sha'ar Ha-Tziyun 3, which directs the student to the Magen Avraham along with additional comments by Kagan (*tosefet be'ur*). Kagan's consistent dependency upon earlier rabbinic sources and especially the Magen Avraham is again apparent in Sha'ar Ha-Tziyun 3. The "additional comments" referred to in footnote 3 clarify the Magen Avraham's commentary on the Shulchan Aruch and do not resolve a rabbinic dispute.

These additional comments are interpolated into the corpus of the Magen Avraham's text to form the Mishnah

Berurah's sub-paragraph 3. To further clarify this point I will again copy sub-paragraph 3. The words in italics are those that Rabbi Kagan appended to the Magen Avraham:

"I.e. as far as any actual violation of the law is concerned, it is permitted to rent it out for a year or a month to a non - Jew, where the latter gives him a specific amount /in payment/ regardless of whether the non-Jew will heat it, with all the profits going to the non-Jew.

/Under such conditions/ there is no prohibition of profits earned on Shabbos since it is rented out to him for a whole year. Certainly, too, the prohibition of ordering a non-Jew /to work/ does not apply to renting, since the non-Jew is working in his own interest (for even if the non-Jew has only a share in the profit of the bath, we will consider him to be working in his own interest - as stated at the end of the Paragraph). Nevertheless, this is forbidden because of mar'is ha-ayin, since it is known as the Jew's and the people will say /the non - Jew/ is a day-worker and /therefore/ his agent.

All this applies only to cases where he rents it out by the year or the month. But to rent it out to a non-Jew by the day, where the non-Jew give him a specific amount for each day that he heats it (even though in this case, too, he is working on his own behalf), is nevertheless forbidden because it involves an actual violation of law,

since /the money received/ is considered a Shabbos profit.

See below, Section 244, that something forbidden because of suspicious appearance is only forbidden within the techum of a Jewish settlement."

Rabbi Kagan, in dealing with the Magen Avraham, converts the words "idol worshipper (oved Kochavim) to Gentile (eino yehudi). The question arises whether the Chafetz Chaim alters the terminology of the Magen Avraham to avoid the rabbinical dispute (as to whether contemporary Gentiles in Eastern Europe are to be considered "idol worshippers"), or whether he remains consistent in his role as commentator on the Shulchan Aruch and substitutes the Shulchan Aruch's expression "eino yehudi". The Mishnah Berurah texts that I am concerned with do not offer an answer to the above question. I suggest that the literary pattern of the Mishnah Berurah as rendered in later sections substantiates the latter hypothesis.

Sha'ar Ha-Tziyun 4 (following the word "behalf") refers the reader to the Tur and the Magen Avraham. The preceding reference in footnote 3 to the Magen Avraham suggests that the repetition of this citation is superfluous. This reference to the Magen Avraham allows Rabbi Kagan further to emphasize his dependency upon "latter rabbinic authorities" (acharonim) and especially the Magen Avraham, even in the presence of the Tur. The Tur is viewed by rabbinic authorities as a basic source in halachic

decision making. The Mishnah Berurah also eliminates the reference to the Rosh, which is the second citation of the Magen Avraham. Kagan instead shows preference for the Tur, which is quoted.

Sha'ar Ha-Tziyun 5 introduces two additional eighteenth century rabbinical scholars (*acharonim*), the Elya Rabba and the Peri Megadim. Despite the fact that the laws which the Sha'ar Ha-Tziyun 5 footnotes can be found in 'former rabbinic authorities' (*rishonim*), such as the Rosh, the Mishnah Berurah continues to stress his own judgment of *halachah* as determined by 'latter rabbinic authorities' (*acharonim*).

(4) A bath-house, ordinarily. I.e., it is stated below that it is permitted to rent out a field because people will assume it to have been given out under a profit-sharing agreement. It is now being stated regarding this, that this reason for permitting it does not apply to the case of a bath-house, since it is not usual to give it out under a profit-sharing agreement. Moreover, no one will assume, as well, that he has rented it out (which is actually the case), since this is not common.

Analysis

The term "explanation" (*perush*) is repeated as the introductory word in sub-paragraph 4. Rabbi Kagan's commentary anticipates the Shulchan Aruch's law that deals with a bath house. "Explanation" (*perush*). In sub paragraphs 3 and 4, is a formulary that suggests a substantive interpolation of Karo's law. This formulary, in this instance, contrasts the Mishnah Berurah's formulary

"refers to" (*hai'nu*), that restates the law with an explanatory interpretation for the purpose of clarification. The difficulty of "explanation" over "refers to" is highlighted by the regular footnotes that accompany "explanation". In sub-paragraph 4 the reader is referred to Sha'ar Ha-Tziyun 6 that predicates the Ran at the end of B.T. Avodah Zarah. This argument will be further explored and developed when dealing with at each encounter of the formularies "explanation" and "refers to".

An additional literary pattern used by Rabbi Kagan is 'doubling' or repeating a similar pattern in every two (or at times three) sub-paragraphs. For example, in sub-paragraph 3 and 4 he begins his commentary with the word "explanation" (*perush*), which serves as a formulary for what follows. Sub-paragraphs 1 and 2 serve as glosses to the Shulchan Aruch, where Kagan amends a new law. I will pursue this argument in my further analysis of the Mishnah Berurah.

The Mishnah Berurah's use of the term "truth" (*emet*) is not frequently employed in halachic literature. In this instance, Rabbi Kagan may be transposing his style of writing developed through his interest in ethical or supererogatory issues and his many works on the subject into his legal treatises. I suggest that the word 'truth' goes beyond literary expression; it represents a literary concatenation of ethical and legal issues. This theory will be demonstrated further in subsequent sub-paragraphs.

(5) As the Jew's agent. This constitutes a full-fledged prohibition since, as stated in many places, ordering a non-Jew /to do work/ is rabbinically prohibited. The Rabbis found as *asmachta* /for this prohibition/ in the verse, "All work must not be done on them"; the formulation "you must not do" was not used, to allude to the act that work should not be done even by the agency of /non-Jews/. Even where /the non-Jew/ does the Jew's work for him on his own initiative, /the Jew/ must protest /so as to stop him/.

Analysis

In sub-paragraph 5 the Chafetz Chaim digresses from his standard literary form. In lieu of reflecting only upon a word or phrase in the Shulchan Aruch, he dissertates the law of "ordering a non Jew to do work is prohibited" (*am'e'ra l'eino yehudi shevut*) a basic principle in the laws of Shabbat. This principle is fundamental to understand the role the Gentile may play on Shabbat.

Rabbi Kagan's terminology, "this constitutes a full fledged prohibition" (*zehu isur gamur*), or "the Rabbis found a proof text (*asmachta*) in the verse 'all work must not be done on them (*v'asmechuhu akra d'kol melacha lo yaase bahem*)" suggests a decisive ruling and that the rule 'ordering a non Jew is prohibited' (*amira leino yehudi shevut*) is a scriptural prohibition (*isur d'oriyta*). Sha'ar Ha-Tziyun 7 modifies the authoritative language of the Mishnah Berurah. He writes: "Examine what the Bet Yosef at the end of section 244 wrote concerning the Mechilta in the name of the Semag that it is doubtful (*sefukei mesafka lei*) if it constitutes a full fledged prohibition . . ." The

footnote commentary then disputes Karo's law and writes: ". . . But, from all the adjudicators it is suggested that it is only rabbinical. Examine the Rambam who wrote also that it is an error in the text of the Mechilta. The Gra agreed in his comments on the Mechilta that the main text is as copied in the Yalkut /Shimomi/. Therefore it is clearly explained that it /amira l'eino yehudi shevut/ is no scriptural prohibition (isur d'orayta)." In sub-paragraph 5 the Chafetz Chaim demonstrates that he prefers not to negate the Shulchan Aruch. An alternate opinion may be conveyed in the Sha'ar Ha-Tziyun or the Beyur Halachah. The Mishnah Berurah's decision to affix his commentary to a specific phrase or word of the Shulchan Aruch usually coincides with the commentary of a 'latter rabbinical authority'. The theme of sub-paragraph 5 has no parallel in the 'latter rabbinical authorities' that discusses the equivalent phrase.

Furthermore, in sub-paragraph 5 Rabbi Kagan discloses his sensitivity towards the relations of Jews and Gentiles on the Shabbat. This sensitivity is further emphasized when the Mishnah Berurah adds his commentary to the phrase of the Shulchan Aruch, "as a Jew's agent" (*b'shlichato shel Yisrael*). The reader therefore receives the impression that since the Gentile is the Jew's agent the work performed on Shabbat is the Jew's responsibility and is therefore a transgression by him. This concept of 'responsibility' is

related to the rabbinical law of "the action of a messenger is the responsibility of the sender" (*sh'lucho shel adam k'moto*). Alternately, in *Sha'ar Ha-Tziyun* 7, he establishes the *halachah* concerning the work of a non Jew on Shabbat. Rabbi Kagan stresses the lenient standpoint of this *halachah* to allow greater flexibility in deciding subsequent legal issues. To support this precarious standpoint the Chafetz Chaim cites 'former rabbinic authorities' (*rishonim*) as sources.

The conclusion of sub-paragraph 5 appends a new regulation. Rabbi Kagan writes: "Even where /the non-Jew/ does the Jew's work for him (*b'shvilo*) on his own initiative, /the Jew/ must protest /so as to stop him/." The references adverted to in *Sha'ar Ha-Tziyun* 8, the *Hagahot Maimoni*, the *Levush*, and the *Chayei Adam*, do not confirm such an adjudication in the case of "the Jew must protest" in the case of "for him" (*b'shvilo*), which term refers to the task a Gentile does for himself and not for the Jew. The employment of the phrase "the Jew must protest", and not "it is prohibited", suggests Rabbi Kagan's preference for leniency. Alternately he does not want to negate the stricter views as expressed by the *Hagahot Maimoni* and the *Chayei Adam*. Thus Kagan does not explicitly permit this case. This literary style is also used in subsequent sub-paragraphs. The use of the footnote references further demonstrates the *Mishnah Berurah's*

knowledge and dependency upon rabbinical authorities. The word "full fledged" (*gamur*), is that of the Levush referred to in Sha'ar Ha-Tziyun 7. The Chayei Adam (an early nineteenth century code of Jewish Law) cited in Sha'ar Ha-Tziyun 8, uses the expression "must protest" (*tzarich l'mchot b'yado*).

(6) A field...is permitted. To rent to a non-Jew for a fixed amount. Even though, like a bath-house, it is also known as /the Jew's/--for any landed property will, in general, be known under the name of its proprietor--and renting it out is also not so common, nevertheless it is permitted. For /the non-Jew/ will not be suspected of being a day-worker, as is explained /in the next sentence/: "since it is common practice /to work a field under a profit-sharing arrangement/." Consequently, it will be assumed to have been given out under a profit-sharing arrangement. (A profit-sharing agreement is permitted since the Gentile is working on his own behalf--as follows in the gloss.)

Analysis

In sub-paragraph 6 Rabbi Kagan explains the circumstances under which the Shulchan Aruch alleges that to rent a field to a Gentile is permissible on Shabbat. Prefixing his opening word with the Hebrew letter *lamed*, sub-paragraph 6 of section 243 Rabbi Kagan's commentary reads as a continuation of Karo's text.

The foregoing section and its Mishnah Berurah commentary serves as an introduction to the subsequent laws dealing with the relations of Jew and Gentile on the Shabbat. Sub-paragraph 6's explanation of the Shulchan Aruch reflects the direction of the introductory laws in the whole of 243. The format of the Chafetz Chaim's legal

discourse in sub-paragraph 6 is extrapolated from that of the Shulchan Aruch. Kagan sets his guidelines to be refined in the Beyur Halachah which will analyze the issue, to what degree profit-sharing is permitted on Shabbat.

Following the word "also" (*nami*) the Sha'ar Ha-Tziyun 10 refers the reader to a 'former rabbinic commentator' (*rishon*), the Rabbi Nissan. Once again Rabbi Kagan manifests his dependency upon established rabbinical authorities. The complete text of the Ran, at the conclusion of Chapter Kol Kitvei; B.T. Avodah Zarah, is cited in the Beyur Halachah, while the Sha'ar Ha-Tziyun only introduces the name Ran.

Rabbi Kagan's reliance on rabbinical sources is further demonstrated by the terminology he uses, which is reminiscent of the Ran. For example, the Mishnah Berurah writes the phrase "given out under a profit sharing arrangement" (*yitlu b'arisut*).

(7) For an oven. Renting out an oven for the purpose of baking in it has the same law as a bath, for, similar to a bath-house, it is likewise not common practice to rent an oven or to give it out for profit-sharing. It will therefore be suspected that the non-Jew is a day-worker for him.

Analysis

In sub-paragraph 7, Rabbi Kagan explains under what circumstances the Shulchan Aruch alleges that to rent a Gentile an oven on Shabbat is forbidden. Prefixing his opening word with the Hebrew letter 'lamed' sub-paragraph 7

of section 243 of Rabbi Kagan's commentary reads as a continuation of Karo's text. It is apparent that one may differentiate the literary structure created by the Chafetz Chaim in sub-paragraph 6 from the content, so that the literary pattern is used again in sub-paragraph 7. The repetition substantiates the claim that the Mishnah Berurah uses a 'doubling' literary style.

(8) For a mill, etc. Because like a field, it is usual to give it over for profit-sharing; therefore, it is also permitted to rent it out, as above. See *Ran* whose choice of words implies that if it is not the practice of the townspeople to give out a mill for profit-sharing, then its law is the same as that of a bath-house--/it is/ forbidden. For, in fact, everything in all these matters, whether this will result in a lenient or a stringent ruling, depends on the practice of the locality, as below in Par. 2.

Analysis

In sub-paragraph 8 the Mishnah Berurah preserves the literary style of sub-paragraphs 6 and 7. Sub-paragraph 8 explains the Shulchan Aruch's law concerning the prohibition of renting a mill to a Gentile. The explanatory form of this sub-paragraph is accentuated by the opening vocable "because" (*m'pnei*). The omitting of footnote references is consistent with sub-paragraph 7 and further emphasizes the preservation of the latter's literary style. Rabbi Kagan incorporates his sources into the text of the commentary.

In addition, sub-paragraph 8 continues to introduce the laws of the Mishnah Berurah dealing with Jew and Gentile relationships on Shabbat. As in sub-paragraph 4,

the Chafetz Chaim, suggests his social and ethical views (*musar*). "In truth, everything in all these matters, whether this will result in a lenient or a stringent ruling, depends on the practice of the locality . . ." Rabbi Kagan, for the second time in section 243, cites the word "truth" (*emet*). Although this term is accepted as a halachic expression, I have argued the formulary 'truth' may serve to introduce implicit social ethical issues which will be discussed in subsequent sub-paragraphs. This literary style is consistent with the Mishnah Berurah's pattern in section 243, the chapter which serves as an introduction to the laws of Shabba.

The Ran is quoted as in sub-paragraph 6. "It is difficult to understand why Rabbi Kagan chose the Ran over other commentaries that he more frequently cites. It would appear that since the Mishnah Berurah had already begun to cite this commentary, he continued to do so. This again provides evidence of the 'grouping' style of the Mishnah Berurah.

(9) Even though, etc. This refers to a field or a mill. The Shulchan Aruch has been discussing renting, to which is added /by the Rema in this gloss/ that even profit-sharing is permitted. The Shulchan Aruch agrees with this, too; it was, after all, for this very same reason that he permitted renting, as above. /The Rema/ is merely re-stating this explicitly.

Analysis

In sub-paragraph 9 the Mishnah Berurah continues the literary style noted in sub-paragraphs 7 and 8. The explanatory form and the lack of footnotes again suggests the 'grouping' hypothesis.

The Chafetz Chaim in sub-paragraph 9 explains the comment of the Rema on the Shulchan Aruch and indicates that both commentaries are consistent with each other. Rabbi Kagan's indication of the consistency stresses his role as a loyal commentator on Karo's text. In the place of a halachic debate between Karo and Isserles, Kagan, an Ashkenazic Jew, would be obligated to adhere to Rabbi Isserles's decision. (Although, in later sub-paragraphs there are specific instances when Kagan feels obligated to rule against Isserles's adjudication.)

(10) Merely a third, etc. This holds true only in a case where he gives the non-Jew a share in the crops /themselves/. Where, however, he hires the non-Jew /for a monetary payment/ to work on it the entire year and the Jew will take the entire harvest of the field--even though as far as any actual violation of a law is concerned, this, too, would be permitted, since the non-Jew works on his own behalf (for even if he does not fertilize, plow, and harvest the field on Shabbos, he can do it on the weekdays and is therefore increasing his pace for his own benefit)--it is nevertheless forbidden because it will be suspected that he is a day-worker. It will not be assumed that there was a profit-sharing arrangement when ultimately it will be seen that he gets no share in the produce of the land (as below, beginning of Sec. 244).

Know, that for a bath-house in such a case (i.e. where the non-Jew is hired to work it the entire year with the Jew receiving all the profits of the Shabbos days), this is forbidden because an actual violation is involved. The same holds true for a mill in such a case. For that which we previously permitted, in the sense that no actual violation

of law was present, concerned only the case of a field and the like, where the work /requirement/ is fixed, and the option is given to complete it at any time. Consequently, the Jew has no profit from the fact that the non-Jew does work on Shabbos--for if he does not do it on that day he can do it on another day. In such a case we can say that he is working on his own behalf. But in the case of a bath-house and a mill, where the work required is not fixed and each day's profit is distinct (so that if he does not do work one day, the Jew will forfeit the profit of that day), then the work is being done essentially for the Jew, and is forbidden as an actual violation of the law. For this is like the case of a day-worker, who, even though he receives wages, is not deemed to be working on his own behalf, since the Jew profits from the Shabbos work. [Even according to the Taz (below, Sec. 244, sub-Par. 5) who permits /a similar instance/ according to the Rambam, it would appear that in this case it is forbidden as an actual violation of the law, since it is normal to hold it against the non-Jew if he omits the day of work.]

Since, then, it is forbidden as an actual violation of law, therefore even where it is generally known that he has hired him for a year and it is also outside the city's *téshum* (so that there are no suspicious appearances), it is still forbidden. There is, therefore, no permissible way /for this case/; unless the non-Jew has some share in the profits of the Shabbos days (in which case we deem him to be working for himself). In such a case, in a situation where the matter has become generally known (as in Par. 2), a mill and a bath-house will be permitted. All the more so is it permitted where /the Jew/ sells them to him completely every Erev Shabbos.

Analysis

Sub-paragraph 10 of the Mishnah Berurah interprets the Rema's statement, "merely a third etc". Within the context of this interpretation, Rabbi Kagan discusses in detail his point of contention with the Ba'eyr Heytev's law referred to in the introduction to section 243. The Ba'eyr Heytev considers renting of a field to a Gentile on a yearly basis for monetary payment as a "certainly forbidden violation" (*asur medinah*). Rabbi Kagan categorizes this law,

under the lesser prohibition of "causing a false impression" (*mar'is ha-ayin*).

The five footnote references in sub-paragraph 10 direct the reader to a variety of rabbinical commentaries with emphasis upon 'latter rabbinical' authorities' (*acharonim*), in particular the Magen Avraham. The Sha'ar Ha-Tziyun footnotes in sub-paragraph 10 are further evidence of the Mishnah Berurah's dependency upon previous rabbinical sources and the principle that legal decisions accord with latter authorities (*hilchata k'batrai*).⁴⁴ Thus footnote 11 states: "/See/ the Magen Avraham referred to above in section 244, and which accords with the opinion of Maimonides and the Ran there." The Magen Avraham, a 'latter rabbinical authority', is first cited as the primary source. So too does Sha'ar Ha-Tziyun 12 state: ". . . And the 'latter rabbinical authorities' agreed with the Bet Yosef in the name of the Mar'i that it is a "certainly forbidden violation" (*asur medina*).]" Here the Chafetz Chaim implies that his halachic decisions are dependent upon 'latter rabbinical sources' and the principle that legal decisions accord with 'latter rabbinical authorities' (*hilchata k'batrai*).

Rabbi Kagan, a rabbinic authority for nineteenth century Ashkenazic Jewry, was obligated (in most instances) to predicate his halachic conclusions on the Rema, thereby explaining the legal options for the Ashkenazic Jew. In

order to promote greater acceptance of his laws amongst his followers, he elected to analyze the dispute with the Ba'eyr Heytev in the commentary on the Rema's law. (This pattern will be further explored in subsequent sections.) Rabbi Kagan does not refer to the Ba'eyr Heytev in subparagraph 10 or its footnotes. The formulary "know" (*da*) used both by the Ba'eyr Heytev and the Mishnah Berurah (sub-paragraph 10) as the opening word of the introduction, implicitly connects their dispute.

Shulchan Aruch

2. Even a bath-house or an oven, once one has been renting them out year after year, so that it has thereby become widely known that it is not his practice to hire laborers but rather to rent out these /facilities/, or it is the practice of most of the local inhabitants to rent out such /facilities/, or to give them out under a profit-sharing arrangement (11) may be rented to a non-Jew or given over to him under a profit-sharing arrangement.

Gloss: Even in a situation where it is forbidden, if the bath-house or the oven do not belong to the Jew (12) but he has merely rented them (13) from a non-Jew (14) and /now/, in turn, he rents them out to another non-Jew, this is permitted since it is not well known that they belong to the Jew. (...)

Similarly, if there is a bath (15) in a residential building used for bathing exclusively /by the residents/ of the building, who are aware that a non-Jew has rented it, this is permitted. (...)

If, in violation of the law, one rents out a bath-house under circumstances where this is forbidden, (16) some /authorities/ hold that /use of/ the rent payment is permitted. (...) Some hold it is forbidden, and this /ruling/ prevails. (See below, end of Sec. 245.)

Mishnah Berurah

(11) May be ... or given over, etc. For then there is no more suspicion. Even though it is the usual practice of /people in/ that place or of that person only to rent, it is still permitted to give it out under a profit-sharing

arrangement since it will be assumed that he has rented it out.

Analysis

Sub-paragraph 11 of the Mishnah Berurah clarifies the law cited in paragraph 2. Karo, in this paragraph, is concerned with how the Jew may rent to a Gentile so as to avoid the prohibition of 'it is well known to the public as belonging to the Jew' (*nikra al shmo shel yisroel*). Rabbi Kagan clarifies the text of Shulchan Aruch, leaving no doubt that Karo's case is permitted.

Footnote references or sources in the Mishnah Berurah's text are not provided to the reader. Since the topic of Kagan's explanation is not disputed or discussed by prior rabbinic authorities, supporting sources are unnecessary. Alternately, when the Shulchan Aruch provides circumstances that permit Jew and Gentile business to interact on Shabbat, the Chafetz Chaim considered it necessary to emphasize the law. This emphasis is evidence for my argument that the predisposition of Rabbi Kagan in an area of *halachah* concerned with economic relations with a Gentile on Shabbat is to be lenient (*l'kula*). Further evidence for my hypothesis will be explored subsequently.

(12) But he has merely rented them. The *Beis Yosef* cites a responsum of the Geonim to the effect that the same holds true where he buys the bath-house from a non-Jew and immediately, even before occupying it, rents it out; for then it is not widely known as his. One may rely on this view [M.A. and other Acharonim.]

Analysis

Emulating the Magen Avraham and other 'latter rabbinical sources' the Mishnah Berurah in sub-paragraph 12 glosses the Rema with a new but related law concerned with the purchase of a bath-house from a Gentile. Rabbi Kagan cites the Bet Yosef and the Teshuvat HaGeonim as the sources. The Magen Avraham and other 'latter rabbinical sources' are adduced at the conclusion of sub-paragraph 12. In addition to emphasizing his reliance upon the Magen Avraham and upon 'acharonim', Kagan adjudicates (*machriya*) the rabbinical dispute whether a Jew who bought the bath-house from a non-Jew is permitted temporarily to use the facilities before subsequent rental to a non-Jew. The issue is whether a minimum period of residence activates the principle, "is well known to the public as belonging to the Jew" (*n'kra shmo shel yisroel*), and thus forbids the rental of a bath-house to a Gentile. The condition under which the Mishnah Berurah permits one to rent a bath-house is only if there is immediate occupancy by the Gentile. Kagan states "and immediately even before occupying it rents it out: for then it is not widely known as his."

Sub-paragraph 12 continues to use the literary form of sub-paragraph 11. The Sha'ar Ha-Tziyun is not cited; all references are stated in the Mishnah Berurah text.

(13) From a non-Jew. But if it belongs to a Jew, it would seem that it is forbidden, since that Jew who owns the bath will thereby be suspected of having hired the non-Jew as his day-worker.

Analysis

Sub-paragraph 13 of the Mishnah Berurah explains why in sub-paragraph 2 the Rema requires that the bath-house be rented from a Gentile and not a Jew. The student adept at studying the Mishnah Berurah would find this explication superfluous. Rabbi Kagan has repeatedly discussed in section 243 the reason why rental to a Gentile is prohibited. I suggest that sub-paragraph 13 is evidence for one of the purposes of the Chafetz Chaim in his Mishnah Berurah commentary. In addition to halachic decisions, ethical and social interpretations, Kagan offers the reader a simple summative and clarification of the Shulchan Aruch. Thus the absence of rabbinical sources in the Mishnah Berurah text or in the Sha'ar Ha-Tziyun.

Furthermore, I have argued that section 243 provides an encompassing introduction to the topic of Jew and Gentile relationships on Shabbat. The principle discussed in sub-paragraph 13 is a further expression of the section's introductory remarks.

(14) And, in turn, he rents them out. Some say that even in a case of renting, it is permitted only if the Jew has not occupied it as yet (just as the Beis Yosef states in connection with the case where he bought it). However E.R. and other Acharonim state that where he rented it from a non-Jew even though the Jew occupied it, it is permitted to rent it out to a non-Jew since it is not known as his.

Analysis

Sub-paragraph 14 adjudicates a rabbinical dispute beyond a gloss of the Rema's law. The Mishnah Berurah is concerned with whether or not a Jew who rented a bath-house from a Gentile is permitted temporarily to use the facilities before subsequent rental to a non - Jew. Unlike previous adjunctive statements, sub-paragraph 14 cites both opinions without explicitly supporting either. The Beyur Halachah explicitly sides with the Mishnah Berurah's second, more lenient opinion. Rabbi Kagan's literary style adheres to the principle repeatedly used in rabbinic adjudication; when an author presents two opinions in a dispute, the latter is preferred.

The Chafetz Chaim's sensitivity to this adjudication is adumbrated in his opening statement, "Some say (yesh omrim) that even in a case of renting it is permitted only if the Jew has not occupied it as yet, just as the Beis Yosef states in connection with the case when he bought it." The Beyur Halachah clarifies that the rabbinical authorities referred to in the phrase "some say" (yesh omrim) are the Taz and Magen Avraham. In view of his ongoing dependency upon the Magen Avraham, the Mishnah Berurah may not wish to defy the Magen Avraham's opinion. Kagan does so in the Beyur Heytef.

As we have seen, the author of the Mishnah Berurah is dependent for his rhetorical patterns upon his sources; the opening phrase in sub-paragraph 14 replicates the Rema in paragraph 2, who writes ". . . some hold that the rent payment is permitted (the Bet Yosef in name of the Geonim)." In addition, the Mishnah Berurah's statement "Only if the Jew has not occupied it as yet, just as the Bet Yosef states . . ." is a quotation from the Taz, referred to in the Beyur Halachah.

(15) In a residential building. That is, the bath-house is not a public thoroughfare but in his courtyard, in one of the houses. Therefore, if on weekdays only /the people/ of his house bathe there, it is permitted, since other people do not know that there is a bath there, while those in his house who do know of the fact are also aware that he has rented it out to a non-Jew.

However, if others bathe in it as well, then it will have become, after all, generally known that there is a bath (which has already been known as the Jew's for some time) located there. And when they subsequently see smoke issuing from it on the Shabbos days, they will assume the non-Jew to have heated it up as /the Jew's/ agent.

All this applies where /the bath/ is in his house. If, however, it is located in a public thoroughfare (where it is in the public eye) then even if only the inhabitants of the house use it for bathing, it is nevertheless forbidden, because /while/ everyone knows that there is a bath facility there, not everyone knows that he has rented it out to a non-Jew. (So write numerous Acharonim.)

Some are lenient beyond this point, holding that if it is located separately on another's property, not in his own courtyard, then even if other people bathe in it as well, it is still permitted, since it is assumed that except for those neighbors of the bath facility, not everyone knows that it is his. Those who do know in all likelihood also know that he has rented it out to a non-Jew.

Analysis

Sub-paragraph 15 interprets and glosses the Rema's law. Of concern is the bath-house location and the individuals who frequent its facilities. The sub-paragraph's opening formulary, "that is" (*d'hinu*), gives the reader the impression of a straightforward explanation of the Rema's text. 'Latter rabbinical sources' dispute the topic under discussion.⁴⁵ As will be seen in sub-paragraph 16, Rabbi Kagan consciously attempts to create a false impression in order to avoid dispute with other 'latter rabbinical authorities'.

Adjacent to this interpretation, the Mishnah Berurah glosses two additional laws. The first deals with a bath-house located in a public thoroughfare (*reshut harabim*). The latter law concerns a bath-house located outside a Jew's estate but not situated in a public thoroughfare. Rabbi Kagan further sides with the Rema's stringent view that it is forbidden to rent a bath-house in a public thoroughfare to a Gentile. The phrase, ". . . so write numerous 'latter rabbinical authorities'", is cited at the conclusion of the law. It gives the impression that the *halachah* concerning a public thoroughfare is substantiated by additional sources. Only an examination of the 'latter rabbinical sources' listed in Sha'ar Ha-Tziyun 17 reveals that this phrase refers not to the gloss but to the previous interpretation of the Rema's law. Otherwise there

is ambiguity as to the 'latter rabbinical authorities'—with which Kagan sides. The sources show that the Magen Avraham cited in Sha'ar Ha-Tziyun 17 disputes the other 'latter rabbinical authorities'. Thus the upshot of the Chafetz Chaim's obfuscation is to veil his disagreement with the Magen Avraham in order to remain loyal to the Rema. This is further emphasized in the last statement of Sha'ar Ha-Tziyun 17, ". . . see Taz who questions the Rema on two points and the response of the Elya Rabba." Again this is emphasized in Sha'ar Ha-Tziyun 18, ". . . and in my humble opinion the Rema and the Bet Yosef intentionally excluded this law."

The Mishnah Berurah's second law opens with the phrase "some are lenient". In view of the previous stringent decision Kagan includes and emphasizes an additional lenient adjunctive. This lenient decision is consistent with his prior halachic policy where the economic relationship between the Jew and Gentile is concerned.

(16) Some hold that the rent payment is permitted. The consensus of the Acharonim is that there is really no controversy: Where it is permitted as far as any actual violation of the law is concerned--where he rents out the bath-house to a non-Jew for a year or a month so that there is no prohibition of *sechar Shabbos*, (profiting from Shabbos), since /the rental for Shabbos/ is part of an overall rental, and the only prohibition is that of *mar'is ha-ayin* (arousal of suspicion), as stated above in Par. 1--it is permitted post facto to accept the rental from the non-Jew. Where, however, he rents it out by the day, in which case it is forbidden as an actual violation of the law as *sechar Shabbos* then even if the non-Jew brings money /in payment of the rental/ on his own initiative, it is forbidden to accept.

it from him (as stated in Sec. 245, Par. 6--see what we write there in the Mishnah Berurah).

As for a case where the work is incumbent upon a Jew, see beginning of Sec. 245.

Analysis

Sub-paragraph 16's opening formulary, 'latter rabbinical authorities', preserves the 'grouping' format introduced in sub-paragraph 15. The Mishnah Berurah in sub-paragraph 16 glosses, the Rema's law while emphasising the lenient approach. This consistent leniency is suggested by means of the formulary 'latter rabbinical authorities'. Further elucidation of this formulary merits attention.

The Mishnah Berurah suffices with the phrase "the consensus of the 'latter rabbinical authorities", without identification of the authorities. Kagan selectively examines these 'latter rabbinical authorities'. They are broadly identified in the introduction to volume one of the Mishnah Berurah. The remainder are dispersed throughout the Mishnah Berurah, Sha'ar Ha-Tziyun and Beyur Halachah.

Rabbi Kagan focuses upon the Magen Avraham as the most prominent text in his halachic decisions. In sub-paragraph 16, though not outrightly stating his source, Kagan quotes the language of the Magen Avraham, with interpreting remarks. As an example, italics will be used in sub-paragraph 16 to identify the Magen Avraham. "The consensus of the Acharonim is that there is really no controversy: Where it is permitted as far as any actual

violation of the law is concerned - where he rents out the bath-house to a non-Jew for a year or a month so that there is no prohibition of profiting from Shabbos since it is a part of an overall rental, and the only prohibition is that of arousal of suspicion, as stated above in paragraph 1 - it is permitted post-facto to accept the rental from the non-Jew. Where, however, he rents it out by day, in which case it is forbidden as an actual violation of the law concerning profiting from Shabbos, [(the following underlined words are paraphrased and not quoted)] then even if the non-Jew brings it on his own initiative, it is forbidden to accept it from him as stated in section 245 paragraph 6 - see what we write there in the Mishnah Berurah. As for a case where the work is incumbent upon a Jew, see beginning of section 245."

To further emphasize Kagan's halachic accommodations, sub-paragraph 16 precedes the fragmentary statement "Some hold that the rent payment is permitted", and not the Rema's conclusion, "some hold that the rent payment is prohibited."

In sub-paragraph 16, the Sha'ar Ha-Tziyun 19 glosses the Mishnah Berurah's explanation with an additional prohibition attributed to the Peri Megadim. Kagan does not inform the reader that the Peri Megadim deduces his decision from the Magen Avraham. The consistent dependency upon the Magen Avraham in principle requires the inclusion

of footnote 19's prohibition. Reference is made to the Peri Megadim, thus permitting the Magen Avraham to retain his status of an halachic accommodist. My analysis of the Peri Megadim is not intended to lessen the Mishnah Berurah's consideration of this rabbinical authority. Kagan in his introduction to volume one states: "In addition, I have discovered that better than one hundred and twenty years have passed since the Ba'eyr Heytev had compiled and abridged selected earlier commentaries as the Magen Avraham and the Taz. Since then, there have evolved other famous rabbinical scholars who produced commentaries on the Shulchan Aruch . . . Furthermore, the Peri Megadim, whose adjudications are renowned throughout Israel, and who has written a very revered book, should be named especially."

The Mishnah Berurah then uses the lexicon of the 'latter rabbinical authorities' to secure approval for his commentary. To further emphasize this reliance, Kagan quotes from the 'latter authorities'. The majority of the citations in section 243 are found in the opening subparagraphs. This literary style is repeated in subparagraph 16; the conclusion of section 243; thus providing an additional reinforcement.

CHAPTER 3

244: WHAT TYPE OF WORK A NON-JEW MAY DO ON BEHALF OF A JEW

(Contains Six Paragraphs)

Shulchan Aruch

1. Where a person concludes (i.e., arrives at an agreement) with a non-Jew over work (1) and stipulates the wages /that the non-Jew is to receive/, the non-Jew then works on his own behalf, and /thus/ even if he /subsequently/ works on Shabbos, (2) this is permitted.

But this is only /where he does the work/ (3) out of public notice, (4) so that not everyone is aware that the labor being done on Shabbos is for the Jew. If, however, it is widely known /that it is the Jew's work/ it is forbidden, since someone seeing the non-Jew at work will not know that the exact wages which the non-Jew is to receive for the job have been stipulated, and will think: "So-and-so/, the Jew, / has hired the non-Jew to perform work for him on Shabbos."

(5) Therefore, if a person arrives at an agreement with a non-Jew /by which the non-Jew is obligated/ to build up (6) his courtyard or wall or (7) harvest his field for him, then, if the job is (8) within the *medinah* or (9) its *techum* /the Jew/ must not (10) permit him to do work for him on Shabbos, because of /possible/ observers who will not know that he has so contracted.

Gloss: Even, (11) if one resides among non-Jews, one must bear in mind the possibility of guests who might be visiting or of one's own family who are liable to suspect him. (...)

If the work is outside the *techum* (12) and, in addition, there is no other town within the *techum* of the work-site, (13) it is permitted.

For a non-Jew who brings a Jew's sheep into his field-pen, (see below, Sec. 537, Par. 14.)

Mishnah Berurah

(1) And stipulates the wages. This refers to a job contracting agreement, where he stipulates that he perform some job for him in exchange for a fixed payment.

If he does it for him in exchange for a favor, see below, Sec. 247, Par. 4 and Sec. 252, Par. 2.

Analysis

In section 244, sub-paragraph 1, the Mishnah Berurah explains Karo's phrase "and stipulates the wages" (*kotzev damim*). The opening formulary "'this refers to" (*d'heinu*), denotes this sub-paragraph as explanatory and not an interpretation or gloss of the Shulchan Aruch. The Mishnah Berurah's clarification was necessary to avoid confusion with the third category referred to in section 243 where the Jew's and Gentile's relationship is proscribed as a "full fledged prohibition" (*asur medina*). "This third category pertains to job contracting, whereby all profits belong to the Jew but the Jew gives the non-Jew a fixed amount each year for his work. Now this is certainly forbidden, in the sense that an actual violation is involved for a bath-house." (Mishnah Berurah, section 243, introduction)

Sub-paragraph 1 concludes with an additional gloss, "if he does it in exchange for a favour." Rabbi Kagan prefers to avoid discussion of this law and refers the student to subsequent sections in the Shulchan Aruch. The inclusion of this gloss is consistent with the Chafetz Chaim's literary style. He is concerned with the major issues raised by 'latter rabbinical authorities' (*acharonim*). The Elya Rabba, a Shulchan Aruch commentary authored by a 'latter rabbinical authority' repeatedly

quoted in the Mishnah Berurah, begins his commentary to Karo's section 244 with a discussion of the law "if he does it for him in exchange for a favour." Kagan, therefore, felt required to refer to this law, even without analysis. Thus the Mishnah Berurah continues to establish his credibility and enhance the opportunity of acceptance through his dependency upon accepted 'latter rabbinical authorities.'

(2) This is permitted. For since he has specified the payment, /the non-Jew/ works on his own behalf /on Shabbos/ to finish the work more quickly. For the Jew does not care/ whether he works on Shabbos or not/; if he does not do it today, he can do it tomorrow. If, however, /the Jew/ fixes Shabbos as the time of work it is forbidden, as below in Sec. 247, Par. 1.

Analysis

Sub-paragraph 2 interprets Karo's law that permits job contracting on Shabbat with a Gentile. The Magen Avraham, referred to in Sha'ar Ha-Tziyun 1, serves as the basis for the interpretation, "for the Jew does not care, if he does not do it today he can do it tomorrow." This quote is preceded and followed by the Mishnah Berurah's interpretive comments, leaving little doubt about Rabbi Kagan's intention and halachic stand. Kagan's reference to the Magen Avraham further emphasizes of his dependency upon the 'latter rabbinical authorities' and especially the Magen Avraham.

This sub-paragraph concludes with a reference to a latter section of the Shulchan Aruch. Through this literary

format the Mishnah Berurah preserves the 'grouping' style discussed in section 243.

In sub-paragraph 1 and 2 of section 244 there is no explicit reference to the Chafetz Chaim's social reality.

(3) Out of public notice. This refers to work "out of public notice"—in the sense that not everyone knows that it is on behalf of the Jew, as is explained /further on/. It may, however, be done even in public, since the work itself is not known to be for the Jew.

Analysis

Rabbi Kagan divides sub-paragraph 3 into two sections: the first, introductory and explanatory remarks: the second, an interpretation of the Shulchan Aruch's law dealing with "work out of public notice" (*b'tzinah*). The explanatory remarks are preceded by the formulary "this refers to" (*heinu*), which introduces the exegesis statement. To further emphasize the explanatory content of this assertion, Kagan concludes with the phrase "as is explained" (*k'mo shemefaresh*). This phrase refers to the immediate continuation of the Shulchan Aruch's law in section 244, paragraph 1.

The second section in sub-paragraph 3 interprets Rabbi Karo's law. Kagan places the emphasis upon the status of work. He is concerned whether the work is known to be that of a Jew and not if it is executed in public or private. The formulary "even" (*afilu*) is used to indicate the interpretive content it precedes. The Mishnah Berurah

abides by this literary style and omits the different elements and variants discussed by the 'latter rabbinical authorities.' With simple and decisive terminology, Kagan presents his law. Only in Sha'ar Ha-Tziyun 2.3 and the Beyur Halachah, is the complexity of the law revealed.

The basis for the Mishnah Berurah's interpretation is cited in the Sha'ar Ha-Tziyun 2 as the Bet Yosef. Karo's commentary on the Tur Shulchan Aruch. In the opening citation of the Sha'ar Ha-Tziyun to section 244, the Chafetz Chaim expresses his loyalty to the Shulchan Aruch. The Magen Avraham, Chayer Adam, Tosafot Shabbat and the Levush, which are among the most frequently quoted 'latter rabbinical sources' in the Mishnah Berurah's law of Shabbat, are cited as additional sources. The array of sources presented expresses Rabbi Kagan's need to place the responsibility for his halachic decision on accepted rabbinical authorities. The frustration with the legal problem is clearly expressed at the conclusion of Sha'ar Ha-Tziyun 2 in the phrase "in this, examination is required," (*bze tzarich iyun*). Only in Sha'ar Ha-Tziyun 3 and Beyur Halachah "Work Out of Public Notice", is the problematic of the law partially defined and analyzed.

Sub-paragraph 3 contains no explicit references to the social needs of the East European Jew on the Shabbat, but, implicitly, the halachah offers the reader a lenient legal approach in his domestic relationships with Gentiles. Rabbi

Kagan has indicated that his lenient stand in section 243, dealing with economic relationships between Jew and Gentiles on the Shabbat, applies as well to their domestic associations. The application of this *halachah* to Jewish social reality of the nineteenth and twentieth century is discussed in sections 247 and 253.

This legal accommodation on the part of Rabbi Kagan is distinctive. The rabbinical leadership, living in a Gentile society, was conscious of the need for halachic leniency in the area of Jew and Gentiles economic relationships on *Shabbat*. (Katz, 1961, 1989) The *Chafetz Chaim* is not only concerned with the economic reality of the Jew, but is aware of his domestic requirements in a diaspora milieu. Further examination of the *Mishnah Berurah* will manifest the limits as well as the application of this halachic accommodation.

(4) So that not everyone is aware. Even though there are some who know that it is the Jew's work, it is permitted. Even though it is apparent from the following gloss that one must be concerned about visitors and family members who might suspect him, it is only required to be so stringent in that case which involves work on something attached to the ground since, in general, what is attached to the ground is known under the name of its proprietor.

Analysis

Sub-paragraph 4 commences with the identical formulary cited in sub-paragraph 3 "even though" (*afilu*), used to indicate interpretation of Karo's text. This interpretation presented in the opening statement of sub-paragraph 4. "Even though there are some who know that it is the Jew's

work, it is permitted" creates the impression of being direct and not enigmatic. Kagan emphasized this point by not referring to rabbinical sources either in the Mishnah Berurah text or the Sha'ar Ha-Tziyun.

The interpretation is immediately followed with an additional formulary "even though it is", (*af al gav*) which introduces a problem or contradiction. Kagan advances what appears to be a contradiction between Karo and Isserles. In the same clear and simplistic style applied above, the Mishnah Berurah resolves the contradiction. Again we find the omission of rabbinical sources. Through this stylistic format, Rabbi Kagan continues in sub-paragraph 4 his constancy to Karo and Isserles. A complex problem is avoided and simple solutions are offered.

An examination of the 'latter rabbinical sources' reveals that the topic of sub-paragraph 4 is discussed. In fact the Mishnah Berurah's opening statement, except for the formulary "even though", is a quote from the Magen Avraham. Furthermore, the remainder of this sub-paragraph is a paraphrase of the Magen Avraham. Unlike Rabbi Kagan, the Magen Avraham's opening formulary is "even though it is" (*af al gav*), which initiates a contradiction.

Only in the previous Beyur Halachah, "Out of Public Notice" (*btzinah*), does the Chafetz Chaim allude to rabbinical sources concerned with the topic.

(5) Therefore, etc. I.e., something attached to the ground is, generally speaking, deemed widely known as belonging to the Jew.

Analysis

Sub-paragraph 5 clarifies the Shulchan Aruch's intention of the term "therefore" (*l'fichach*). Kagan, who earlier avoided the concept of 'attached to the ground,' (*mechubar*) now states the topic and a related principle. Thus he avoids ambiguity and confusion in the comprehension of subsequent laws. To emphasize the explanatory content of this sub-paragraph, he begins with the formulary "i.e." (*ratzah lomar*).⁴⁶

The social significance of sub-paragraphs 4 and 5 are implicit, to be made explicit and incorporated into subsequent laws.

(6) His courtyard or wall. Even if it is located in a place where it is not /widely/ known that it belongs to him it is likewise forbidden, because one must be concerned about neighbors who know it is his and who will suspect that he hired him as a day-worker. [M.A. and other Acharonim]

Analysis

The Mishnah Berurah in sub-paragraph 6 interprets and adds a gloss to the Shulchan Aruch's law. The opening formulary "even though" (*afilu*), as stated above, initiates an interpretation. Though the Magen Avraham, the source, quoted as the basis for the Mishnah Berurah's law, presents this *halachah* as a gloss, Kagan has chosen to abide by his simple style and emphasize the interpretive facet of the

commentary. To illustrate the relationship between the Mishnah Berurah and Magen Avraham, I will quote the Magen Avraham using bold letters to signify when the Mishnah Berurah adduces this 'latter rabbinical authority'. "Since it is not right just to build for him a house, and it seems specifically that he knows that it is his place, but if it is located in a place where it is not known that it belongs to him it is permitted as is written at the end of section 243, in any case it seems to me that it is prohibited because one must be concerned about neighbors who know it is his and will suspect as is written in the gloss." The Mishnah Berurah adds to this text of the Magen Avraham the opening formulary "even though", and the concluding phrase "that he hired him as a day worker".

Although the Mishnah Berurah in section 244 has an accommodative position in regard to laws pertaining to Jew and Gentile relationships on the Sabbath, the *halachah* in sub-paragraph 6 favors the stringent opinion. Through this he continues his adherence to the Magen Avraham's halachic decisions. This point is emphasized at the end of sub-paragraph 6, where the reader is referred to the Magen Avraham and additional 'latter rabbinical sources'. Even though the other latter rabbinical sources, such as the Elya Rabba, use the same phraseology as the Magen Avraham and arrive at the identical legal decision, only the Magen Avraham is referred to by name.

(7) Harvest his field for him. And even though a field is customarily given over under a profit-sharing agreement and it will therefore be assumed that /the non-Jew/ has taken it for profit-sharing, as stated in Sec. 243, Par. 1, this is nevertheless forbidden. For it is different in that case /of Sec. 243/, since when the matter will be investigated, it will be found to have been so, that the non-Jew has a share in the produce. Here, however, on seeing, at the time of the harvest, that the non-Jew does not take any of the profit, it will be known retroactively that he was not a profit-sharer, and he will therefore be suspected to have been a day-laborer, since it is common to hire workers for a job by the day.

Even if the local custom is to hire workers by the job, it is the opinion of the Taz that one must be stringent and not permit the non-Jew to work in the field -- even more so in building a house -- on Shabbos or Yom Tov, for they will still suspect him to have been hired as a day-worker, since this, too, is common. But some rule leniently where the city-wide custom is to hire by the job.

[It is called "contracting by the job" only if all the work is by job contracting, but not where the architect alone works by the job and the general practice is for all other assistants to be hired, at times, by the day. This is forbidden even if in fact he did hire them all by the job.]

See Beyur Halachah where we have shown that in the case of a field one may rely on the latter opinion where loss is involved. But in the case of a house, it requires further study /to decide/ whether it is proper to allow the lenient view, since this goes against the opinion of many Poskim. (See Sha. T., citing the No.B., Sec. 12.)

Analysis

In sub-paragraph 7, the Mishnah Berurah is concerned with nineteenth-twentieth century Eastern European social reality: the Jewish need to contract non-Jews to build houses. This contract posed the problem of work on the Sabbath. Kagan does not explicitly identify this motif as a contemporary issue, but an examination of this period's historical literature will bear evidence to this social reality.⁴⁷

Rabbi Kagan, pursuing his lenient halachic position, prefers to accommodate the reader but is confronted by strong opposition in halachic literature. Therefore his opening segment, even though not directly relevant to the topic of house building, is proffered to strengthen his rabbinic credibility and further establish his authority in this fastidious issue. Here he deviates from his literary pattern of referring to 'latter rabbinical authorities' (*acharonim*) and cites the adjudication of Rabbi Nissim and the Magid Mishneh, two 'former rabbinical authorities' (*rishonim*) who have halachic prerogative. Alternatively, the phraseology cited in these passages is quoted almost verbatim from the Magen Avraham. In Sha'ar Ha-Tziyun 4, related to this opening statement, reference is made to these two 'former rabbinical authorities'. Only at the end of this segment, where the Magen Avraham appends the Rabbi Nissim's law with "therefore be suspected to have been a day laborer", does the Mishnah Berurah in Sha'ar Ha-Tziyun 5 identify the author. Through the quote from the Magen Avraham, Rabbi Kagan has maintained his intellectual honesty as well as continuing his adherence to the legal principle of *hilchatah k'batrai*.

The Mishnah Berurah appends the Ran's statement with a gloss and concludes "... even more so in building a house." thus incorporating the primary theme. Within the text of this gloss, the Taz, a 'latter rabbinical author-

ity',... is cited by name, to further establish the Mishnah Berurah's credibility on this sensitive halachic issue.

Immediately following the initiation of the theme concerning 'building houses', Kagan offers a second opinion ". . . but some rule leniently where the city-side custom is to hire by the job." An examination of pertinent rabbinical sources reveals numerous authorities who prohibit the contracted Gentile to build for the Jew on the Sabbath even when the "city-wide custom is to hire by the job". ✓ Rabbi Kagan, aware of these opinions, does not allow himself to permit explicitly such a contract to be enacted. Alternately, he does not want to prohibit this behavior, and therefore states ". . . but in the case of a house, it requires further study whether it is proper to allow the lenient view, since this goes against the opinion of many Poskim."

In the Beyur Halachah and in Sha'ar Ha-Tziyun 6, Rabbi Kagan explores in detail the different possibilities to permit this case. Only the lenient adjudications are presented in Sha'ar Ha-Tziyun 6, while in the Beyur Halachah both opinions are analyzed in detail. Although both arguments are examined in the Beyur Halachah, the lenient opinion is emphasized. The Beyur Halachah concludes with the statement that "in reality this case needs further examination".

(8) Within the "medinah". I.e., within the city, which is sometimes called "medinah".

Analysis

Sub-paragraph 8, which opens with the explanatory formulary "i.e.", (*hainu*) explains Karo's use of the vocable "medinah". Although not explicitly stated in his introduction, Rabbi Kagan has now identified the explanation of words as an additional intent of his Mishnah Berurah commentary.

In addition, Kagan, in sub-paragraph 8 is attempting to avoid causing confusion for the reader. The term 'medinah' which is customarily translated 'state', is frequently construed as 'city' in halachic literature.⁴⁸ This clarifies which *halachot* are prohibited. The definition of *medinah* as city, narrows the area in which a Gentile is prohibited to be contracted by the Jew to a smaller area. This direction in the Mishnah Berurah commentary, which contributes to understanding the status of the *halachah*, is explicitly discussed in the introduction to volume 1, ". . . and one will not know whether to turn to the right or left. If one will constantly desire to be stringent in something this is also not a proper path, for to be more stringent may bring one to be excessively lenient."

Due to the simplicity of the explanation, Rabbi Kagan felt that no references to rabbinical sources are necessary

here. An examination of the 'latter rabbinical commentary' Tosafot Shabbat (sub-paragraph 5), reveals that the Mishnah Berurah has quoted it verbatim.

(9) Its "techum". Where the townspeople at times customarily go.

Analysis

In sub-paragraph 9 the Mishnah Berurah continues his simplistic explanation of terms and concepts. The reason why a Jew is forbidden to permit the Gentile to work on Sabbath "within the city limits" (*techum*) is explained. Thus, in addition to the explanation Kagan continues his grouping literary style.

Again, no references to rabbinical sources are proffered.

(10) Permit him. It is stated in *Sefer Chassidim*, Sec. 348: It once happened that a certain person hired a non-Jew to build his house under a job contracting agreement, and the non-Jew built it on Shabbos. People were angry with him, but he paid no heed. Before long, none of the land remained in his or in his children's possession.

Analysis

In sub-paragraph 10, the Chafetz Chaim digresses from his legal treatise and incorporates into his commentary the ethics of Judaism (*musar*). Throughout the Mishnah Berurah commentary, Kagan retains the methodological framework of *halachah* i.e. literature. The majority of adjunctions are dependent upon legalistic rabbinic sources. Furthermore,

references are volunteered to identify these sources. In sub-paragraph 10, without affecting his legal interpretations and resolutions, Kagan nevertheless offers a distinctive non halachic suggestion, which is in the realm of ethics rather than *halachah*.

The Sefer Hasidim, a thirteenth century work, is provided as the source for this ethical consideration. The nineteenth-twentieth century observant Jew perceives that this book incorporates both rabbinic law and ethics or moral issues. The Chafetz Chaim, although not concerned in sub-paragraph 10 with *halachah*, nevertheless considers his source to be a rabbinical authority. Thus he does not deviate entirely from his literary form: thus Sefer Hasidim.⁴⁹

(11) If one resides, etc. I.e., if he lives outside the *techum* of the city, and moreover, there is no other city within his *techum*, even then it is forbidden -- because one must be concerned about guests who might be visiting and will suspect him.

The lenient ruling, /following/ below, regarding /work done/ beyond the *techum*, applies to a case where only the work is being done there, but where he himself lives in the city.

(12) And, in addition, there is no other town. The same holds true if any Jew lives within the *techum* of the /place of/ work: it is likewise forbidden. He should /therefore/ order the non-Jew before Shabbos not to do it on Shabbos.

Analysis

In sub-paragraph 11 the Mishnah Berurah explains Isserles' phrase "if one resides". The source for this

explanation, referred to in Sha'ar Ha-Tziyun 7, is the Bet Yosef, Karo's commentary on the Tur and complementary work to his Shulchan Aruch. In this sub-paragraph Kagan explains the Rema as being a gloss to Karo's law and not a dispute, this being the way he often interprets the Rema's comments. The opening formulary "i.e." (*ratza lomar*) initiates the explanatory purpose of this sub-section.

This explanation discussed by the Mishnah Berurah suggests the stringent aspects of "residing among the non-Jews". He continues his literary style of referring to lenient accommodations and concludes sub-paragraph 11 with "... the lenient ruling ...". This accommodation is explicated in Sha'ar Ha-Tziyun 8, where he emphasizes that the law only refers to 'attached to the ground' (*menchubar*). Furthermore, in Sha'ar Ha-Tziyun 8, the Magen Avraham is listed as the source for this. Thus, the Mishnah Berurah has connected the three rabbinical sources Karo, Isserles, and the Magen Avraham, upon whom his halachic dependency is greatest.

Sub-paragraph 12 is a direct continuation of sub-paragraph 11. In sub-paragraph 12 the explanation is offered for the phrase "and, in addition, there is no other town." An examination of this explication will again manifest the Rema as a gloss of, rather than a dispute with, Karo's law. This perception is further emphasized in the opening formulary "The same holds true" (*hu hadin*), as well

as Sha'ar Ha-Tziyun 9, when Rabbi Kagan writes, "that certainly this is no worse than the possibility of guests who might be visiting."

(13) It is permitted. For then there is no longer any question of *mar'is ha-ayin* (arousal of suspicion); furthermore, whatever the non-Jew does, he does for himself.

Now, from what has been explained in this Paragraph, it becomes clear that it is forbidden to hire a non-Jew by the job to remove garbage from a courtyard where he will do this on Shabbos, since this constitutes improving the courtyard and is therefore included in the category of "work done on things attached to the ground."

There are localities, however, where the practice is to permit hiring someone to remove garbage from the streets even though he engages in this work on Shabbos. The M.A. writes that their reason for /permitting/ this is that there is no problem of suspicion in what pertains to the public. (Where the worker is hired by the day, however, it is obviously forbidden.)

The Acharonim, however, question this reason. In their view, there is no significant difference in this respect between the public and a private person. Moreover, /the M.A./ himself states in conclusion that in a place where there is no such established practice to permit it in the city streets, one should not be lenient in the matter. (See the reason he gives there; namely, that this involves a desecration of the Name /of God/ (*chillul Ha-Shem*), as below.)

The M.A. agrees that even if we should say that there is no problem of suspicion regarding what pertains to the public, nevertheless, building a synagogue under a job contracting agreement on Shabbos should not be permitted. For in our time when the gentiles among whom we live do not permit any person to do work publicly on their festival, it would constitute a desecration of the Name if we were to permit work to be done on Shabbos or Yom Tov.

Nevertheless, many Acharonim state that if there is reason to fear that the construction of the synagogue would thereby be halted altogether, God forbid, then one may allow a non-Jew to build it under a job contracting agreement -- provided it is known to everyone that it is being /done/ by job contracting.

Analysis

The Mishnah Berurah divides sub-paragraph 13 into two segments: First an explanation of Karo's assertion "is permitted" (*mutar*); second, a gloss to the Shulchan Aruch's law. The literary style of the explication that of a direct continuation of Karo's text. "It is permitted, for then there is no longer any question of arousal of suspicion." The traditional Talmudic Aramaic phraseology is implemented to indicate that this statement is authoritative, binding and acquiescent.

The gloss to the Shulchan Aruch discusses the Magen Avraham's adjudication concerned with the removal of garbage from a courtyard on the Sabbath. Rabbi Kagan, who is constantly dependent upon and the vindicator of the Magen Avraham, is confronted by the disagreement of the majority of 'latter rabbinical authorities'.⁵⁰

He opens this segment with a declaration of his constancy to the Magen Avraham. "Now, from what has been explained in the paragraph, it becomes clear that it is forbidden to hire a non Jew by the job to remove garbage from a courtyard where he will do this on Shabbos. . . . There are localities, however where the practice is to permit . . . The Magen Avraham writes that their reason for permitting this . . ." The Magen Avraham offers two cogitations for his decision: "That there is no problem of

suspicion in what pertains to the public" and "a desecration of the Name of God" (*chillul Ha-Shem*).

The Magen Avraham's analysis of this case is challenged by many 'latter rabbinical authorities'. The Mishnah Berurah, confronted with this dispute, adverts to these sources, "the Acharonim, however, question this reason . . .", but immediately vindicates the Magen Avraham. "Moreover /the Magen Avraham/ himself states in conclusion . . . the Magen Avraham agrees that even if we should say that there is no problem of suspicion regarding what pertains to the public . . ."

The second theme, "desecration of the Name of God", although based on *halachah*, is often applied to Jewish ethics (*musar*). The majority of 'latter rabbinical authorities', preferring not to combine *halachah* with ethics, reject the Magen Avraham's application of this theme. Rabbi Kagan, also favouring to preserve his halachic format, is hesitant to apply the Magen Avraham's reasoning. Alternately, he does not explicitly dismiss the Magen Avraham, but rather glosses his law with "nevertheless, many Acharonim state . . . then one may allow a non Jew to build it under a job contracting agreement . . .", thus remains constant but implicitly emphasizes his hesitancy.

The 'latter rabbinical sources' (*acharonim*) referred to in sub-paragraph 13 are partially identified in Sha'ar Ha-Tziyun 11 and 13. In my analysis of section 243 sub-

paragraph 16. I have further explored the convention of this formulary by the Mishnah Berurah.

Shulchan Aruch

2. (14) Hewing stones and fashioning beams are forbidden /to be done by a non-Jew/ even in the non-Jew's house, since (15) these /jobs/ are for the sake of something attached to the ground. (16) If such /work/ was done, /the stones and beams/ should not be used in any building.

Gloss: (17) Some /authorities/ hold that if is not widely known that it belongs to a Jew, (18) it is permitted. (...)

Mishnah Berurah

(14) Hewing stones. This is only if the stones or beams belong to the Jew, and he has given them over to the non-Jewish craftsman to hew or fashion them. If, however, the non-Jew hews his own stones or fashions his own beams, the Jew having made a contracting arrangement with him concerning the entire job, and the non-Jew still has the option of hewing other stones and retaining these for himself, then even if he does this for the sake of the Jew, it is permitted -- if it is not /being done/ at the Jew's house. /This is/ even though it is generally known that he is doing it for the sake of the Jew, since this is not considered work being done for the Jew.

This /last opinion/ is given by the *Dg.Mr.* But he was already preceded in this by a responsum of the *Radvaz* (VI, Sec. 56) where, however, it is concluded that it is not proper if the non-Jew hews the stones near the building site on Shabbos, for reasons of *mar'is ha-ayin* (arousal of suspicion) -- lest it be said that he is /the Jew's/ hired day-worker.

Analysis

In sub-paragraph 14. the Mishnah Berurah quotes the Dagul Meyrevavah, a eighteenth century commentator and author of Nodeh Biyehudah, a commentary on the Talmud that was familiar to and regarded as significant by rabbinical authorities in the nineteenth century. This source is

quoted as an interpretation of the Shulchan Aruch's law on hewing stones. Although the original source opens with the phrase "according to my opinion", the Mishnah Berurah commences with the formulary "this is only" (*davka*), thus incorporating the Dagul Meyrevavah as part of the clarification. The use of this source is first suggested by the Shaarei Tshuvah, a 'latter rabbinical authority' printed on the page of the Mishnah Berurah.

The Mishnah Berurah, confronted with the sensitive issue of permitting hewing of stones by Gentiles on the Sabbath, "even though it is generally known that he is doing it for the sake of the Jews", favours to cite an influential rabbinical source such as the Dagul Meyrevavah in addition to a 'former rabbinical authority' the Radvaz.

This issue is sensitive as it permits work that is considered by various 'latter rabbinical authorities' as "attached to the ground" (*mechubar*), which is prohibited by a full fledged prohibition (*asur medina*). What makes this even more sensitive is that the work is permitted although it can be identified as being performed for a Jew. This is especially relevant since most of the 'latter rabbinical authorities' only permit work to be done where it is known to be for a Jew if it is "not attached to the ground" (*talush*).

Although Rabbi Kagan wants to emphasize the lenient and permissible possibilities of the law, his hesitation is

recognized in the concluding statement of sub-paragraph 14, "but he was already preceded in this by a responsum of the Radvaz, where, however, it is concluded that it is not proper if the non-Jew hews stones near the building site on Shabbos, for reasons of arousal of suspicion--lest it be said that he is /the Jew's/ hired day-worker."

(15) These are for the sake of something attached. In order to use them in a building. It is thus considered the same as something attached to the ground. One must /therefore/ protest /to the non-Jew/ if this is within the city's *techum*, even though he works far removed from the building.

Analysis

In sub-paragraph 15, Rabbi Kagan continues his dependency upon the Radvaz (Sha'ar Ha-Tziyun 14). In this sub-paragraph the Mishnah Berurah explains the Shulchan Aruch's intention in the phrase "since these are for the sake of something attached to the ground". Kagan is careful to emphasize that the job is only 'considered' as being in the same category as something attached to the ground. This choice of terminology permits him not to prohibit this outright as in the case of "attached to the ground", but to limit himself to the phrase "one must protest". The legal implications of this are clear. In addition, Rabbi Kagan has avoided becoming involved in the complicated halachic discussion: whether an object being prepared to be used as "attached to the ground" already has that legal status even before it is installed.

Although the Chafetz Chaim does not cite the Geraz as the source of the phraseology employed by him in sub-paragraph 15, he is quoting this rabbinical authority verbatim.

(16) If such work was done. See below what I have written on this.

(17) Some hold that if it is not, etc. This variant opinion refers to all /of the cases here/. That is, even in a case of /work on/ something actually attached to the ground, job contracting is forbidden only under ordinary circumstances -- for most probably this will be known as the Jew's. Where, however, we know for a fact that the building is not widely known as the Jew's, a job contracting agreement is not forbidden. The reason the Rema cites this variant opinion in reference to a case of hewing stones /for a building/ is that in a case of actual construction, such /a situation, where the building is not widely known as the Jew's, / would not be usual.

Analysis

As discussed above, Rabbi Kagan prefers to present the Rema as a gloss to the Shulchan Aruch and not as a contradiction. Sub-paragraph 16's reference to 'below', in this instance sub-paragraph 17, is further evidence to this suggestion. Rabbi Kagan's decision to view Karo and Isserles as being in agreement is not in accordance with all commentaries on the Shulchan Aruch. (Thus some authorities are of the opinion that the formulary employed by Isserles "some hold" (*yesh omrim*), initiates a dispute.) In the latter segment of this sub-paragraph, opening with, "the reason the Rema cites this variant opinion in reference to a case of hewing stones . . ." Rabbi Kagan further emphasizes

this agreement. Although the argument made in this segment differs from the former in the case of permitting work "attached to the ground", such as hewing stones. This additional segment is incorporated to provide evidence of Isserles' and Karo's agreement even by the rabbinical sources who dispute the first adjudication. This agreement is explicitly referred to in sub-paragraph 16.

Sub-paragraph 17 commences with an interpretation of the Rema which is initiated with the formulary "that is" (*d'hino*). This interpretation, which is not accepted by many rabbinical authorities, motivated the Mishnah Berurah to list an array of rabbinical sources in Sha'ar Ha-Tziyun 16. In addition to the Kol Bo cited by the Rema as his source, Kagan offers other authorities that are in agreement with him. Furthermore, preserving his accommodative view the law discussed in sub-paragraph 17 emphasizes the lenient possibilities related to "attached to the ground", this law being the most stringent of the legal structures in the Jew and Gentile relationships under consideration, in this section.

(18) It is permitted.. That is, one need not protest against the non-Jew doing his work on the Shabbos -- as long as he does not tell him to do it on Shabbos.

All this, however, applies solely to the case where the non-Jew does it in his own house, or at least far removed from the building site so that it is not recognized that it pertains to the Jew (as mentioned above).

From many Acharonim it appears that with respect to hewing stones, the Halachah follows the view of this variant opinion /since this is merely for the sake of something

attached to the ground/. (Possibly, the Shulchan Aruch himself agrees with /the Rema/ in this.)

However, regarding that which is actually attached to the ground, one must ~~not~~ be lenient -- even though the building is located in a place where people do not know that it belongs to him. For one must be concerned about one's neighbors or members of one's family who know it to be his and who will suspect him (as above in sub-Par. 6).

Analysis

In sub-paragraph 18 the formulary "that is" (*hinu*) is reiterated to initiate interpretation. This serves as an introduction for the second segment of the sub-paragraph. Rabbi Kagan is evidently not completely at ease with the discussion presented in sub-paragraph 17, and clarifies his argument in sub-paragraph 18 with the phrase "possibly the Shulchan Aruch himself agrees with /the Rema/ in this." Alternately, he rejects the accommodation concerning "attached to the ground" discussed in sub-paragraph 17. This rejection is related to the adjudication of the majority of 'latter rabbinical authorities' who prohibit the work of a Gentile under such circumstances.

By presenting both opinions the Mishnah Berurah has managed: 1. to offer the reader a lenient view which can be applied when necessary. This opinion is explicitly expressed by the Geraz, Kuntros Acharon, section 4; 2. to remain loyal to the opinion of the Magen Avraham, as pointed out in Sha'ar Ha-Tziyun 20; 3. not to deviate from the opinions of the majority of 'latter rabbinical sources' and thereby retaining his credibility. The Mishnah Berurah's

halachic flexibility in this case is further emphasized by his choice of terminology, "one must not be lenient", rather than stating it is prohibited. The former phrase halachically allows for accommodations when required.

Shulchan Aruch

3. If, (19) contrary to the law, non-Jews construct a house for a Jew on Shabbos, (20) it is proper to act stringently and (21) not enter it.

Gloss: However, if the Jew stipulated with the non-Jew not to work for him on Shabbos, but the non-Jew did so (22) against his wishes so as to finish his work sooner, one need not be concerned. (... See Below, Sec. 543.)

Mishnah Berurah

(19) Contrary to the law. That is, that it was /worked on by the non-Jews under/ a job contracting arrangement within the /city's/ *techum* -- which is prohibited only because of *mar'is ha-ayin* (it will arouse suspicions) since they were really working on their own behalf (as mentioned above). If, however, they were day workers, in which case it is prohibited because an actual violation of the law is involved, then /even/ post facto this is forbidden by law and not merely "proper" /not to enter the building/. So writes the *M.A.*, and so appears to be the viewpoint of the *Bach* with respect to a day-worker.

Similarly, the *Ch.A.* writes that in the case of a day-worker in a situation where it is a matter of public knowledge, /the finished product of his work/ is forbidden by law for /the Jew, for whom the work was done, / himself/ to use it/ forever, and for others /to use it/ during the time-span it would take to have the work done (as below, Sec. 325, Par. 14 -- see what is written there). Some take a lenient view to the effect that even in such a situation it is forbidden, in the sense that an actual violation of the law is concerned, only during the time-span it would take to have the work done. (See below, Sec. 325, Par. 14, the *Mishnah Berurah* there.)

Analysis

Sub-paragraph 19 opens with the formulary "that is" (*d'hinu*) which initiates interpretation. The Mishnah Berurah's interpretation is first concerned with the status that the Shulchan Aruch attributes to the prohibition, since Karo cites the phrase "it is proper to act stringently" (*nachon l' hachmir*). If a comprehensive prohibition was to be enacted this phrase would not be sufficient, thus the leniency is emphasized.

Rabbi Kagan continues with a discussion concerning the comprehensive prohibition to hire a day worker in the case at hand. To strengthen his argument, he cites 'latter rabbinical sources': the Magen Avraham, Bach and Chayei Adam.

Although thereby contradicting the Magen Avraham, with whom he commonly makes an effort to concur, Rabbi Kagan does not want to abandon his structuring principle of including the presentation of the accommodative opinions. Thus, without specifying further, he notes briefly that "some take a lenient view" (*yesh makilin*). The reader is referred to a later section and the Sha'ar Ha-Tziyun for further information. In Sha'ar Ha-Tziyun 21, the lenient view is first presented in greater detail, and its promulgator is identified as the Taz, a 'latter rabbinical authority'. Rabbi Kagan, to further strengthen this accommodative halachic position, identifies in the discussion of Sha'ar Ha-Tziyun

21 the names of 'former rabbinical authorities'. Subsequently, in section 325 sub-paragraph 13 the Mishnah Berurah explicitly construes 'this difference in opinion. Furthermore, in section 325 the lenient option is emphasized, when the Mishnah Berurah writes ". . . I further found in a number of 'former rabbinical authorities' and therefore one must not be stringent when not needed."

(20) It is proper to act stringently. The Acharonim /, however, / write that where /the work/ has already been done under a job contracting arrangement, one may rely on the view of Rabbeinu Tam, and it is permitted even for the person /for whom the work was done/ to live there himself. Likewise, with respect to the hewing of stones and fashioning of beams, if it was done under a job contracting agreement, one may, post facto, permit using /the stones and beams/ in building.

Analysis

In sub-paragraph 20 the Mishnah Berurah cites almost verbatim the Magen Avraham. An example of where Rabbi Kagan makes a change in the text is in the opening word. Furthermore, the name of the 'latter rabbinical authority' (*acharon*), the Bach is replaced with "the Acharonim". To strengthen the credibility of his commentary in the eyes of the reader he prefers not to specify one rabbinical source if more are to be had. In Sha'ar Ha-Tziyun 22 the 'latter rabbinical authorities', beginning with the Bach, and continuing with the Taz, Chayei Adam, etc. as well as the term "additional Acharonim" are identified.

This sub-paragraph continues to preserve the lenient pattern of the Chafetz Chaim and emphasizes the accommodative possibilities in a realm which could have relevant social implications for the nineteenth-twentieth century East European Jew.

(21) Not enter it. Forever -- even for others. However it is permitted to benefit from it and sell it to a non-Jew.

Analysis

In sub-paragraph 21 the Mishnah Berurah clarifies the statement of the Shulchan Aruch "and not enter it". After establishing the accommodative elements of this law in sub-paragraphs 19 and 20, the Chafetz Chaim citing the Magen Avraham presents the ethically more stringent approach, but only in a separate sub-paragraph. This preserves the literary structural pattern, discussed above, that distinguishes between ethics and law. Yet despite this stringency, Rabbi Kagan emphasizes that even in ethical behaviour there is a possibility of leniency. Thus, he writes "however, it is permitted to benefit from it and sell it to a non-Jew."

(22) Against his wishes. That is, he violated the stipulation made originally; consequently /the Jew/ need not be concerned over this -i.e., he must not even voice another protest when he does the work. [So it may be gathered from the Mordechai and from Rabbeinu Yerocham, who are the source for this law, cited in Beis Yosef below. So, too, does the Beyur Ha-Gra imply.]

But see the M.A. who has strong reservations about this ruling. For since /the work is being done/ on something attached to the ground (which is a matter of public

knowledge), there will be suspicion by observers who will not be aware that he has stipulated such a condition. Similarly, the E.R. finds the ruling of the /aforementioned/ Mordechai /the source for this opinion, / difficult to comprehend. Therefore, one should not follow the lenient view in this case. Rather one should see to it to express one's protest /to the non-Jew/ and to restrain him from his activity.

The E.R. writes: "It would seem, however, that one need not pay /non-Jews who work on Shabbos/ money to stop, since a stipulation was made originally to that effect and they consented to it." It may be implied from this /quotation/ that if one did not make such a stipulation at the outset, his protest alone is not enough, but he must /even/ freely spend money to get them to stop. The reason /behind this ruling/ would appear to be his negligence; he should have made a stipulation at the start /that they not work on Shabbos/

As for the correct halachic practice, this requires further study.

Analysis

In sub-paragraph 22, the Mishnah Berurah explains and interprets the Rema's phrase, "against his wishes" (*baal korcho*). The two formulæ "i.e." (*ratash lomar*) and "that is" (*d'hinu*), respectively initiate these clarifications. Rabbi Kagan in this sub-paragraph discusses both the lenient and stringent views of the Shulchan Aruch commentators. Following the stringent opinion of the Magen Avraham, the Mishnah Berurah writes "but see the Magen Abraham who has strong reservations about this ruling. . . . Therefore, one should not follow the lenient view in this case. Rather, one should see to it to express one's protest and to restrain him from his activity." The Mishnah Berurah preserves his structuring principle in which he is conscious of the readiness of the East European Jew to accept and

adhere to the majority of *halachah*. He thus perceives that a demand to protest the work of the Gentile would be needed. This would make an accommodation unnecessary and his loyalty to the Magen Avraham can be maintained.

The last segment of sub-paragraph 22 is concerned with the case when a Jew did not stipulate to a Gentile that he should not work on the Sabbath. The Elya Rabba is cited as demanding that the negligent Jew "must even spend money to get them to stop." Rabbi Kagan is faced with a conflict of interests. On the one hand he does not want to contradict this 'latter rabbinical source', yet he is reluctant to accept this stringent view. This frustration is expressed in his concluding statement: "As for the correct *halachic* practice, this requires further study." Through this statement, Rabbi Kagan declares that this may not be the law, but he avoids negating the Elya Rabba. Furthermore, he retains his credibility by not insisting on a ruling that would be difficult for his Jewish reader to accept and practice.

Shulchan Aruch

4. Work done in public even on movable property such as a boat (23) known to belong to a Jew, falls under the same rule as work done on something attached to the ground.

Mishnah Berurah

(23) Known to belong to a Jew. This does not refer to a case where he does /the work/ on the Jew's premises, for in such an instance, even if /the boat/ had the legal status

of ordinary movable articles it would also be forbidden. For it is evident from Sec. 252, Par. 2, that even concerning movable objects, if the work is being done in a Jew's house, it is forbidden. Rather our case involves a situation /where the work is being done/ removed from /the Jew's/ premises.

See *M.A.* and other Acharonim where it is stated that this refers only to a case where the boat is being constructed in an exposed, public area. Where, however, it is concealed from the public eye, one need not be stringent, as is clear from Sec. 252, Par. 3.

Analysis

In sub-paragraph 23, Rabbi Kagan clarifies the circumstances under which Karo prohibits the category of work described in paragraph 3. The latter segment of this sub-paragraph introduces a second interpretation. This is cited in the name of the Magen Avraham and other 'latter rabbinical authorities'. The interpretation offers the reader an accommodation if the work is done "concealed from the public eye." Thus the Mishnah Berurah continues to preserve his literary and adjudicative style by concluding the sub-paragraph with an accommodation.

The sub-paragraph ends with reference to section 252, paragraph 3. An examination of Karo's law in 252 reveals a contradiction to the Shulchan Aruch's halachah in 244, paragraph 4. In section 252 Rabbi Kagan refers the reader to section 244, where in addition to a contradicting reference he will find a brief allusion to the conflict. Thus the Chafetz Chaim has avoided involvement in this contradiction in the Shulchan Aruch.

Shulchan Aruch

5. If someone hires a non-Jew for a year or two (24) to write for him (25) or to weave a garment for him, he may write or weave on Shabbos -- just as if he had contracted with him to write a book, or weave a garment for him, in which case he may work at any time he chooses. This is provided (26) that he does not make a reckoning with him on a day-by-day basis and he does not do the work (27) at the Jew's house. (28) Some /authorities/, however, prohibit it if he hires the non-Jew for a set period of time.

Gloss: But this refers exclusively to a case where he hires him (29) for a specific job, such as garment weaving or book writing. If however, he hires him (30) for all sorts of work which might be needed within the hiring period, it is, in all views, forbidden. (Beis Yosef, as will be explained at the end of Sec. 247)

Mishnah Berurah

(24) To write for him. The M.A. writes that the *Rambam* /, the source of this law, / refers to the manner of lords who keep a special scribe or tailor who is obligated to write /, etc. / whenever the lord needs to have something written, but who may remain idle when he has no such need.

He may therefore write or weave on Shabbos since he is free to do the work whenever he so desires. For the Jew does not order him to do the work on Shabbos and he has the option of doing the work another day. Also, the Jew has no profit from the fact that he works on Shabbos.

If, however, he hires him to weave or write for him continuously during the course of the year, then even according to *Rambam* he is forbidden to write /, etc. / for him on Shabbos. For even though /the Jew/ may not be exacting with him if he remains idle for a day from his job, nevertheless the Jew profits by his working /on Shabbos/.

From the *Taz*, however, it appears that even in such a case the *Rambam* considers it the same as any other job contracting agreement since he is not exacting with him if he is idle any one day. However, if he insists that he not be idle from work for even one day, then according to all opinions it is forbidden, since this is tantamount to ordering him to work on Shabbos.

The *Taz* also writes that if he hires him to complete a book or garment within /a definite/ period of time, it is the same as being exacting with him /over being idle for a day/. But this is only if it is known to be impossible to complete the job without working on Shabbos, as well. Even though he could conceivably complete it during the weekdays by forcing himself and staying up nights, nevertheless, this

is as if he ordered him to do the work on Shabbos. [The P.M. thus explains /the Taz's/ view, and agrees with him, as opposed to the E.R.]

Analysis

Sub-paragraph 24 clarifies the circumstances under which "to write for him" refers. The Mishnah Berurah as he states verbatim at the commencement of the sub-paragraph, quotes the Magen Avraham until the phrase "if, however"; In sub-paragraphs 19 and 21 as well as here Rabbi Kagan uses the words "if however" (*aval*) as a formulary to introduce a stringent argument. When the vocable "however" (*mikol makom*) on the other hand implies that a lenient suggestion follows. The Mishnah Berurah presents this accommodation in the latter segment of sub-paragraph 24, which is quoted in the name of the Taz.

This quote from the Taz is brought in its entirety, thus presenting a section which demands stringent behaviour when the job is unlikely to be completed without work on the Sabbath. The Mishnah Berurah, not wanting to negate the Taz but nevertheless favouring a lenient suggestion, concludes "the Peri Megadim thus explains /the Taz's/ view, and agrees with him, as opposed to the Elya Rabba", thus the lenient opinion.

(25) Or to do weaving for him, he, etc. This is the correct reading.

Analysis

In sub-paragraph 25 the Mishnah Berurah without stating his reasons, extracts the word 'garment' from Karo's text. Rabbi Karo, in stating his law, quotes verbatim Maimonides (Mishneh Torah, laws of Sabbath, chapter 6, law 12). As the word 'garment' does not appear in the standard texts of the Mishneh Torah, Rabbi Kagan chooses to eliminate it from the text of the Shulchan Aruch. This correction is unique to Rabbi Kagan. I have not found it suggested by other 'latter rabbinical authorities'.

In itself this does not seem a sufficient reason for Rabbi Kagan to modify Karo's text. In doing so the Mishnah Berurah is able to incorporate the Magen Avraham's understanding of the Shulchan Aruch. The Mishnah Berurah quoted the Magen Avraham in sub-paragraph 24, "the Magen Avraham writes that the Rambam refers to the manner of lords who keep a special scribe or tailor who is obligated to write whenever the lord needs to have something written, . . ." Therefore, for the Shulchan Aruch to state, "weave a garment", or perform any other designated task would be inconsistent with the Magen Avraham.

Although not explicitly stated as one of the purposes of his commentary, the Mishnah Berurah is concerned with textual corrections. Further evidence to this purpose is found in sub-paragraph 31 where he writes "the /use of the/

expression is not precise, since the intended meaning is that he hire a non-Jew."

(26) That he does not make a reckoning with him. i.e., that he not be exacting with him if he takes off a day from his work.

Analysis

The Mishnah Berurah in sub-paragraph 26 commences with the formulary: "i.e." (*ratzah lomar*) which initiates an explanation. Kagan continues to explain the intention of Maimonides, as quoted by Karo. The Chafetz Chaim, continuing his literary style, prefers to use the phraseology of confirmed rabbinical authorities, thus cites the Rabad's terminology although he is the disputant of Maimonides. No reference is offered for the phraseology implemented.

(27) At the Jew's house. For in such a case even actual job contracting is forbidden, as below in Sec. 252.

Analysis

In sub-paragraph 27, the Mishnah Berurah continues his explanation of Karo's text. Kagan, through his explanation, restates the prohibition for a Gentile to perform work for a Jew in the Jew's house, but avoids the complexities of this subject. The reader is referred to section 252 for details. An example of such complexities is a situation in which when it is an accepted occurrence throughout the city for Gentiles to work in the house of Jews on the Sabbath.

The Mishnah Berurah in sub-paragraph 27 emphasizes the stringent aspect of the law. Although Rabbi Kagan's halachic pattern is to show preferences for the lenient position either economic or domestic, in the case of Gentile's activities in the house of a Jew his ruling shows stringent preferences. This pattern, in both the economic and domestic areas, is exemplified and generated in sub-paragraphs 29 and 35.

(28) Some, however, prohibit it. This is the opinion of the *Ra'avad*. Now, according to the above-mentioned opinion of the *Taz*, the reasoning of the *Ra'avad* is obviously clear: he holds that even though he is not exacting with him with respect to remaining idle, nevertheless the Jew does, after all, profit through him.

This /opinion of the *Ra'avad*/ can also be understood according to the above-mentioned interpretation of the *M.A.*: it is the *Ra'avad's* view that /even in this case/, the Jew profits from the work /the non-Jew/ performs on Shabbos -- for conceivably he might need writing to be done on the following day, and /had he not worked on Shabbos/ he would not be able to do both jobs simultaneously.

Analysis

In sub-paragraph 28, the Mishnah Berurah clarifies the interpretation of Maimonides' law according to the Magen Avraham and the Taz. Rabbi Kagan does not explicitly convey his adjudication but prefers to use Talmudic casuistry so as to be able to show each 'latter rabbinical authority' as a correct interpretation of the text.

In this sub-paragraph the reader receives the impression that no adjudication is being suggested, but, the

impression is nevertheless given that the emphasis is to be placed upon the first, more lenient view. Only in the Beyur Halachah does Rabbi Kagan clarify his opinion. He writes: "See the *Elya Rabba* that decides according to the first opinion /Maimonides/. But in any case ab initio it is better and more proper to fulfill his /Rabad's/ opinion as well, since the *Maggid Mishneh* concludes, Maimonides' law with 'further study is required' (*tzarich Iyun*). The *Levush* too wrote that it seems that the law is according to the *Rabad*. It seems though that the *Levush* explains the dispute according to the *Taz*, and it appears that according to the *Magen Avraham*, the *Levush* will say that all cases are permitted." Thus in the Mishnah Berurah text he has not negated the Magen Avraham, and in the Beyur Halachah the suggestion is "better and more proper" because of the ruling of a 'former rabbinical authority', but Kagan does not state this decisively.

The segment of sub-paragraph 28 referring to the Magen Avraham is a direct quote from the latter.

(29) For a specific job. For in such a case it is possible that the Jew will not profit from the fact that the non-Jew is doing work on Shabbos -- where the Jew will not need so much weaving or writing.

If, however, /he has hired him/ for all jobs, then it is almost certain that on a subsequent day, he will need him for some other piece of work; and in that eventuality the Jew will benefit from the fact that the non-Jew is doing work on Shabbos. Therefore, even if he does not make his reckoning with him on a daily basis, it is still forbidden.

Analysis

In sub-paragraph 29 the Mishnah Berurah interprets the Rema's intention in his phrase "for a specific job". Kagan's interpretation, as specified in the Sha'ar Ha-Tziyun 31, is based upon the Magen Avraham's understanding of the Rema. The segment, ". . . then it is almost certain that on a subsequent day he will need him for some other piece of work; and in that eventuality the Jew will benefit from the fact that the non-Jew is doing work on Shabbos. . . .", is a direct quote from the Magen Avraham. In the sections prior to and after the quote from the Magen Avraham, the Mishnah Berurah elaborates upon this commentator's interpretation.

(30) For all sorts of work. For this reason one should object to maidservants doing their employers' work on Shabbos -- even when they do it outside the Jew's house and even if not instructed by their employers to do it -- for they have been hired for all jobs. All the more so is it forbidden if they do it in the Jew's house, in which case it is forbidden even where they are hired for a particular job, as mentioned above.

See Taz, sub-Par. 1, quoting Rabbeinu Simchah, who forbids a maidservant to do even her own work at her employer's house, the reason being concern that observers should not think that she is doing the Jew's work. E.R. cites the S.Hat. to the effect that /doing/ her own work is permitted; it is his opinion that even Rabbeinu Simchah agrees with this view (see what he says there). The P.Mg., however, explains the Taz's view (see there).

See, also, Ch.A., Sec. 64, that according to all opinions it is permitted for the maidservant to repair her clothes in /her/ employer's house since it is clearly evident that she is doing her own work. See, too, what he writes there on this. (See, also, what we state in sub-Par. 35).

Analysis

In sub-paragraph 30, the Mishnah Berurah refers to a halachic issue that relates to the domestic ambit of a specific social strata among nineteenth-twentieth century Eastern European Jewry; the employment of maidservants. Although in most of the situations concerned with Jewish and Gentiles relationships on the Sabbath, Rabbi Kagan offers a lenient view; when the work is done in the Jew's house he generally suggests the stringent view. This conceptual framework suggests a hint of the Chafetz Chaim's 'ethical' (*musar*) side, in lieu of the familiar cold halachic rationale of the Mishnah Berurah. The impression of this 'ethical' suggestion is indicated in the opening statement of sub-paragraph 30, "for this reason one should object." The impression nevertheless remains that Rabbi Kagan does not deviate from his literary pattern and retains the halachic discussion rather than venturing into an ethical discourse. He is concerned with the statement of the Taz (section 244, sub-paragraph 1), ". . . in the name of Rabbi Simchah that one should learn from the Palestinian Talmud that the maidservants are forbidden to do work in the Israelites house on the Sabbath." Furthermore, he must take note of additional rabbinical authorities as the Elya Rabba, the Peri Megadim and the Chayei Adam, who deal with this statement. Therefore, I suggest that Rabbi Kagan is not necessarily involved with contemporary reality, but rather

with a halachic discourse which related to the reality of 'latter rabbinical authorities' who lived a century earlier. This point is emphasized in the conclusion of sub-paragraph 30, "(see, also, what we state in sub-paragraph 35,)", where a contemporary issue of the Chafetz Chaim is discussed. An examination of sub-paragraph 35 reveals that it has no direct bearing on the topic in sub-paragraph 30, but rather emphasizes the different problematic of the case. The reader is therefore instructed to conclude that the contemporary and ethical issue is not in sub-paragraph 30 but in sub-paragraph 35. The non-ethical nature of this comment is further implied in that Rabbi Kagan chooses to argue the lenient view in sub-paragraph 30 against the Taz.

In my analysis of sub-paragraph 30, I have accented the Chafetz Chaim's halachic structure that differentiates between legal and ethical discourse. This suggestion does not negate the fact that the reader would also regard the laws pertaining to a 'maidservant', as a nineteenth-twentieth century reality to which "one should object . . .", as suggested by the Mishnah Berurah.

Shulchan Aruch

6. A Jew has acquired the /right to collect/ taxes (31) and hires out a non-Jew to collect the taxes on Shabbos: this is permitted (32) if it is under a job contracting agreement, i.e., if he promises him, "When you collect 100 dinarim, (33) I shall pay you such-and-such an amount."

Gloss: Similarly, he may hire out the taxes of all the days of Shabbos /of the year/ to a non-Jew, (34) where the non-Jew will take the profit of the Shabbos days for himself. We do not concern ourselves with the possibility

that it will be said he is doing it for the Jew; for in a case where loss of money is involved, such as this, (35) /the Sages/ were not concerned about this. (...)

A Jew who is in charge of the royal coinage (36) has the same law /apply to him/ as one who is in charge of taxes -- even though there will be noise on Shabbos caused by the process of coinage. (...See below, Sec. 252.) But (37) the Jew should be careful not to sit beside the non-Jew on Shabbos while he is engaged in his work of coinage or collecting taxes. (...)

Mishnah Berurah

(31) And hires out a non-Jew. The /use of the/ expression /"hires out" (Heb. maskir)/ is not precise, since the intended meaning is that he hire (Heb. socher) a non-Jew. [Acharonim]

Analysis

Sub-paragraph 31 is further evidence of Rabbi Kagan's desire to add textual corrections to the purposes of his Mishnah Berurah commentary, (see my analysis of section 244, sub-paragraph 25). In this instance Kagan has based his change upon the suggestion of the Levushey Serad, a 'latter rabbinical authority' published in the standard editions of the Shulchan Aruch. The Mishnah Berurah refers to 'latter rabbinical authorities' in general, rather than specifying the Levushey Serad.

(32) If it is under a job contracting agreement. For in such a case it is permitted, as far as any actual violation of law is concerned, just as skins given /to a non-Jew/ for tanning are permitted (at the beginning of Sec. 252) to be given to him before sunset /on Friday/, if it is under a job contracting agreement, because he works on his own behalf.

Now, even though in that situation /of skins given for tanning/ it is forbidden to schedule his work specifically for Shabbos and, besides, it is /different in our case since it is/ a widely known affair, for it is well-known that the

/tax collection/ enterprise belongs to a Jew, and it is therefore the same as if the non-Jew would be doing work at the Jew's house (which in that case /of the skins/ would be forbidden), nevertheless in this situation they permitted it due to the monetary loss involved. For a person becomes confused in the face of /a potential loss of/ his money, and if we would not permit him /to hire the non-Jew/ he would collect /the taxes/ himself and might come to /violate/ a Torah prohibition: he might write out a record /of the tax payment/, as is usual for tax collectors. [Beis Yosef]

From this /last clause/ it would appear that in the case of a tax that does not involve writing -- as, for example, in cases where various sorts of foods are taken as a levy -- it is forbidden /to collect the taxes/ through a non-Jew, since /the Jew/ would not be brought to /violate/ a Torah prohibition even if we were not to permit him /to hire the non-Jew/. However the Taz and the M.A. conclude that even in such a case we permit /the collection of taxes/ through a non-Jew, because of the monetary loss involved.

However, it is forbidden /for the Jew/ to personally collect even a tax of various sorts of food (even if it has not been brought from outside the /city's/ *techum* and no question arises concerning a violation of the labor *Tzeydah* (trapping), or of /the food/ having been attached to the ground /at the beginning of Shabbos/). /This is forbidden/ on account of the prohibition of "Seeking your concerns" (*Mimetzo Cheftzecha*), as written in Sec. 306. [E.R.]

A Jew who has leased a salt-distilling concession from a lord may hire workers under a job contracting agreement, /stipulating with each worker/ that in return for the production of each specified amount of salt he will be paid a certain amount of money. This is permitted even though the vessels and the wood /fuel/ belong to the Jew.

[/This is only/ as long as they do not take wood from the Jew's premises on Shabbos. For all job contracting /with non-Jews/ is permitted only if everything that one intends to provide them for purposes of the work has been provided for them prior to Shabbos, and has also been removed from the /Jew's/ premises before Shabbos.]

There can be, however, no permission to hire a non-Jew by the week or month since the Jew will, after all, profit from his work. There is, therefore, no permissible way other than by job contracting. [Ch.A.]

Analysis

In sub-paragraph 32, Rabbi Kagan is concerned with two distinct themes. The first deals with the issue of

'contracting agreement' in the case of a Jew who acquires the right to collect taxes, and the second with a Jew who has leased a salt-distilling concession from a Gentile. Although these two issues should be separated into two sub-paragraphs, the Mishnah Berurah duplicates the literary style of the Magen Avraham, who includes both in one sub-paragraph.

The segment concerned with contracting interprets and glosses the Shulchan Aruch's law. Incorporated within the interpretation is a new concept: "Permitted due to monetary loss" (*hefsed*). This concept plays an important role in lenient adjudication. For Rabbi Kagan, whose halachic structure is closely related to its practical application and its adherence by the Jews of his era, this perception plays an important role. The topic of 'permitted due to monetary loss' is further developed in the subsequent sub-paragraphs of this section.

The gloss deals with a situation where food is received as a tax payment instead of money. Throughout the sub-paragraph Kagan emphasizes the lenient view, which permits the economic interaction with the Gentile on the Sabbath. As sources for his decision he presents the Magen Avraham and the Taz. Furthermore, to form the phraseology of the first segment of sub-paragraph 32 he exploits the terminology of three 'latter rabbinical authorities', the Magen Avraham, the Elya Rabba and the Tosafot Shabbat. To

illustrate these strata, I will print within the text of the Mishnah Berurah sub-paragraph 32, first segment, the Magen Avraham in bold letters, the Tosafot Shabbat as underlined and the Elya Rabba in superscript.

"For in such a case it is permitted, as far as any actual violation of law is concerned, just as skins for tanning are permitted (at the beginning of section 252) to be given to him before sunset, if it is under a job contracting agreement, because he works on his own behalf.

Now even though in that situation it is forbidden to schedule his work specifically on Shabbos and, besides, it is a widely known affair, for it is well-known that the enterprise belongs to a Jew, and it is therefore the same as if the non-Jew would be doing work at the Jew's house. (which in that case would be forbidden), nevertheless in this situation they permitted it due to the monetary loss involved. For a person becomes confused in the face of his money, and if we would not permit him he would collect himself and might come to a Torah prohibition: he might write out a record as is usual for tax collectors. [Beis Yosef]

From this it would appear that in the case of a tax that does not involve writing -- as, for example, in cases where various sorts of foods are taken as a levy -- it is forbidden /to collect/ through a non-Jew, since /the Jew/ would not be brought to a Torah prohibition even if we were

not to permit him. However the *Taz* and the *Magen Avraham* conclude that even in such a case we permit /collection/ through a non-Jew, because of the monetary loss involved.

However, it is forbidden to personally collect even a tax of various sorts of food (even if it has not been brought from outside the *techum* and no question arises concerning a violation of the labor trapping, or of having been attached to the ground on account of the prohibition of "seeking your concerns" as written in Section 306. [*Elya Rabba*]) Although attributed to the *Elya Rabba*, this section is a direct quote from the *Magen Avraham* sub-paragraph 20.

The phraseology of the second segment, concerned with the leasing of a salt-distilling concession, is also drawn from the terminology of three 'latter rabbinical authorities', the *Magen Avraham*, the *Geraz* and the *Chayei Adam*. I will illustrate this as above: the *Magen Avraham* in bold print, the *Geraz* in superscript and the *Chayei Adam* underlined. "A Jew who has leased a salt-distilling concession from a lord may hire workers under a job contracting agreement, that in return for the production of each specified amount of salt he will be paid a certain amount of money. This is permitted even though the vessels and the wood belong to the Jew, as long as they do not take wood from the Jew's premises on Shabbos. For all job contracting is permitted only if everything that one intends to provide them for purposes of the work has been provided for them

prior to Shabbos, and has also been removed from the premises before Shabbos.]

There can be, however, no permission to hire a non-Jew by the week or month since the Jew will, after all, profit from his work. There is, therefore, no permissible way other than by job contracting. (Chayei Adam)

Sub-paragraph 32 concludes with the adjudication of the Chayei Adam, who adds a stringent point to the concept of 'permitted due to monetary loss'. The Mishnah Berurah, bothered by his text, clarifies the point in Sha'ar Ha-Tziyun 33. He explains that there are different possibilities in the interpretation of the Magen Avraham. One interpretation is the Chayei Adam previously cited; as the Sha'ar Ha-Tziyun writes: ". . . Since some of the 'latter rabbinical authorities' agree with the Maharshal, I copied the words of the Chayei Adam as law, although it seems the Peri Megadim disputes him." The Peri Megadim perceives the Magen Avraham as being lenient even in the circumstances presented by the Chayei Adam.

Rabbi Kagan thus does not contradict the Magen Avraham and remains loyal to the Chayei Adam, while proclaiming the possibility for an accommodation as suggested by the Peri Megadim.

In addition the above quote from the Sha'ar Ha-Tziyun 33 suggests a principle in Kagan's system of adjudication.

(33) I shall pay you such-and-such an amount. I.e., he does not mention the Shabbos day to him at all but /stipulates/ in a general manner: "If you will collect such-and-such an amount /of taxes/, I shall pay you such-and-such an amount /of money/." In this case, he is not considered a day-worker; nor is there any problem of *sechar Shabbas* (profiting from Shabbos) involved here, since he has already leased the taxes from the lord for the entire year, with the Shabbos days included. [P. Mg.]

Analysis

The opening formulary in sub-paragraph 33 "i.e." (*d'hinu*), initiates interpretation. Kagan offers an explanation of Karo's law in which he clarifies the concept of 'contracting agreement'. This clarification, other than the opening formulary is a direct quote from the Peri Megadim, a quote which is extracted from a larger discussion.

This sub-paragraph serves as an introduction for sub-paragraph 34 where the accommodation of "profiting from Shabbos" (*sechar Shabbat*) is discussed in detail. In addition, the Mishnah Berurah in sub-paragraph 33 establishes that according to Karo 'profiting from Shabbat' is permitted and is not considered in the category of 'day worker'. Thus he places Karo in agreement with Isserles' law discussed in sub-paragraph 34.

(34) Where the non-Jew will take, etc. I.e., here it is even permitted in the sense that there is no violation of the law involved, since the non-Jew is working on his own behalf.

The M.A. writes that there is also no problem of *sechar Shabbas* here even though he leases it to him specifically for the Shabbos days, since it is as if /the non-Jew/ purchased the taxes from him.

[It is, therefore, analogous to a case where, knowing that a non-Jew will bring him merchandise on Shabbos, /a

Jew/ sells it to /another/ non-Jew prior to Shabbos so that the latter will accept it from /the first non-Jew/ on Shabbos -- which is obviously permitted.] Similarly, in the case of the coinage, he is merely selling him the concession which he has from the king, with the non-Jew taking the full profit. There is, therefore, only /a problem of/ mar'is ha-ayin (suspicious appearances) involved here: people will say that he is working for the Jew, the Jew having hired him to write on Shabbos and collect the taxes. This, then, is what the Rema means in stating: "And we do not concern ourselves . . . for in a case of loss, etc.," altogether omitting mention of /the problem of/ sechar Shabbas. (See Beyur Halachah.)

Analysis

Sub-paragraph 34 commences with the formulary "i.e." (ratza lomar), which initiates explanation. The plurality of the sub-paragraph is quoted from the Magen Avraham's (sub-paragraph 18) clarification of the Rema's adjudication. This quote is not verbatim. Kagan freely omits segments of the Magen Avraham to form his sub-paragraph 34.

Based upon the Magen Avraham, Rabbi Kagan shows in sub-paragraph 34 that in the Rema's law there is no question of 'profiting from Shabbat'. Only in the Beyur Halachah does he reveal that the Magen Avraham does not adhere to this accommodation. To justify his lenient decision Rabbi Kagan cites the majority of the 'latter rabbinical authorities' generally referred to in the Mishnah Berurah commentary: "And according to this the Taz, Tosafot Shabbat and Gera are all of one opinion and it also appears like this in the Levush; and see the Elya Rabba that also in the response of Rabbi Y.T. Tzahalon it seems so, therefore one should be lenient in this. . . ."

Thus while in the Mishnah Berurah's text the reader is given the impression that Rabbi Kagan through his adherence to the Magen Avraham is dependent for his adjudication upon this 'latter rabbinical authority'; only in the Beyur Halachah, an appendix produced for rabbinical scholars, does he fully clarify the Magen Avraham's halachic position.

¶35) /The Sages/ were not concerned. Know, that it appears to be the opinion of all Poskim that even in a case where a great loss is involved it is permissible only in the manner described in the Shulchan Aruch: i.e., either under a job contracting agreement or by leasing the profit itself to /the non-Jew/ -- for in all these instances the non-Jew is working on his own behalf. In the case of an actual "day-worker", however, it is forbidden in all cases.

From this one may gather that liquor store owners who, prior to Shabbos, engage some non-Jew as a liquor salesman for their stores for the Shabbos day are not acting in accordance with the law. For even if we were to deem the loss of the Shabbos day income "a great loss," nonetheless, this was never permitted in the case of a true day-worker. Besides this might possibly be considered merely a loss of potential profits, as the Acharonim state in connection with an oven and a bath-house. In any event, this must not be permitted except in the manner described by the Shulchan Aruch and the Rema.

Alternatively, one may transfer to /the non-Jew's/ possession all the items he gives him to sell prior to Shabbos. Even though in any event the business is still known as the Jew's, this is permitted, because of the loss involved.

According to what we write below (quoting the Taz), in such a case the Jew may sit at a distance to guard against the non-Jew stealing from the business. However, he must be careful not to intervene in the business dealings nor to talk to him about anything pertaining to these matters. This, although, is something difficult to adhere to -- not to say anything while sitting there.

It is common practice, however, for people to be permissive /about this matter/ and therefore /one should apply the maxim/: "Leave them alone! It is better that they sin unwittingly than that they sin wantonly." [To.Sh.] But fortunate is he who trusts in God and does not seek out various leniencies for Shabbos.

Analysis

Sub-paragraph 35 commences with the formulary "know" (*da*), a vocable which, when Kagan does not quote from an outside source (as in the introduction to section 243 and 245), initiates Rabbi Kagan's own halachic view. The Mishnah Berurah in this sub-paragraph explicitly deals with a social economic reality of the nineteenth-twentieth century East European Jew. The case concerns the instance when a Jew hires a Gentile to work in his liquor establishment, which is housed in the Jew's residence.

The first segment of sub-paragraph 25 introduces the topic by restating the basic law of 'great loss'. Kagan employs the phrase "all Poskim" (halachic adjudicators), thus permit no room for deliberation. Furthermore he permutes his terminology for Gentile from *eino yehudi* (not a Jew) to *oved gelilim* (idol worshipper). This latter term is frequently employed by early Talmudical commentators as well as many 'latter rabbinical authorities'.

Rabbi Kagan begins his discussion of 'liquor selling' with the phrase "from this one may gather" (*mizeh teda*). The same formulary "*da*" is repeated here to signify Rabbi Kagan's personal contribution. In addition, this phrase carries with it a tone of an ethical command (*musar*) and a reprimand. With the lenient view in mind, the Mishnah Berurah then instructs the reader how to bypass the halachic prohibition and thus be permitted to employ the services of

the Gentile in his liquor establishment. The suggestion proffered, refers to different 'latter rabbinical authorities'.

Through this discussion the Chafetz Chaim reveals his conceptual structure in forming his pattern of adjudication. He writes, "it is common practice, however, for people to be permissive and therefore leave them alone! It is better that they sin unwittingly than that they sin wantonly." Although Rabbi Kagan cites this source as Tosafot Shabbat, it is not a direct quote. Instead, the Mishnah Berurah has compiled extracts from the Tosafot Shabbat concerned with the theme of tax collecting, thereby permitting himself to proclaim that the social economic reality of the East European Jew is an integral component in his adjudications. The Mishnah Berurah does not choose to take this responsibility upon himself and therefore, as mentioned above, cites the Tosafot Shabbat in the body of the text, although this source is not directly related to liquor selling.

Sub-paragraph 35 concludes with an ethical recommendation, "but fortunate is he who trusts in God and does not seek out various leniencies for Shabbos." The Chafetz Chaim follows his literary pattern and presents in a separate sub-paragraph the explicit contemporary issue. In addition, he therefore acquiesces to the incorporation of the ethical motif in this paragraph which, as the contemporary issue,

remains outside his standard analysis. (This issue will be further developed in the summary of this study.)

(36) Has the same law as, etc. Therefore because of the loss involved it is permissible to give the non-Jew the silver while it is yet day /before Shabbos begins/ under a job contracting agreement, with the stipulation that if he makes a certain amount /of money/ for him from the silver he will give him such-and-such an amount /in return/; or, alternatively, that the Jew lease the profit that will result from this on Shabbos to the non-Jew, as mentioned above.

Analysis

In sub-paragraph 36 the formulary "therefore because" (*al ken*) initiates clarification. The Mishnah Berurah clarifies the phrase of the Rema "has the same law as one who is in charge of taxes." Kagan in this sub-paragraph emphasizes the accommodative possibilities of the case discussed. His suggestion is short, clear and simple. Only in the Sha'ar Ha-Tziyun 38 does he introduce the complexity of the theme. He writes "... and not in the case of loss, for example when another man submits silver to the Gentile . . ." Although the stringent aspect of the law is discussed in this Sha'ar Ha-Tziyun, it concludes with the lenient possibility.

(37) The Jew should . . . not to sit. Neither the one who has leased it out nor his agent /should sit there/.

The Taz writes: It is prohibited to sit there only where the purpose is to observe the nature of the dealings conducted by the non-Jew and to receive a pertinent reckoning from him on these /dealings/ the following day. This is forbidden because of "Seeking your concerns" (*Mimetzo Cheftzecha*), as below, Sec. 306, Par. 1. If,

however, one sits there solely for the purpose of guarding against theft of the taxes by the non-Jew, this is permitted. It is, therefore, understandable why those who have taken a milling concession from a lord are accustomed to place a Jew there /in the mill/ even on Shabbos. However, they should be careful not to speak of anything connected with the business. (End quote /of Taz/.) Other Acharonim write the same.

Analysis

In sub-paragraph 37, the Mishnah Berurah clarifies the Rema's statement that "the Jew should be careful not to sit beside the non-Jew on Shabbos." This clarification emphasizes the lenient elements in the Rema's gloss. To achieve this purpose, the Taz appears to be quoted verbatim. This is indicated by the phrases "the Taz writes . . . end quote" (*ad kan leshono*). To further support his clarification the Mishnah Berurah states "other Acharonim ('latter rabbinical sources') write the same." In Sha'ar Ha-Tziyun 39 they are identified as the Geraz, Chayei Adam, Shulchan Shelomoh, Tosafot Shabbat and the Magen Avraham.

An examination of the Taz text (sub-paragraph 7), reveals that the Mishnah Berurah is not quoting exactly verbatim. First, he is selective in the choice of sentences to incorporate. Second, the statement "this is forbidden because of seeking your concerns, as below, section 306, paragraph 1." is not found in the Taz. I have examined all available texts of the Taz and this statement is wanting. The Chafetz Chaim, while quoting the Taz, has evidently incorporated the gloss of the Tosafot Shabbat. In his

discussion of the Taz, this 'latter rabbinical authority' added this statement, although he also writes *ad kan leshono*. I therefore suggest that the Mishnah Berurah has adopted the literary style of the Tosafot Shabbat and that the phrase *ad kan leshono* is not intended as a direct quote.

CHAPTER 4

245: HOW A JEW WHO HAS A NON-JEWISH PARTNER SHOULD ACT WITH RESPECT TO SHABBOS

(Contains Six Paragraphs)

Shulchan Aruch

1°. A Jew and a non-Jew who jointly own (1) a field, an oven, a bath-house, or a water-mill, or who are partners in merchandise in a store: (2) if at the start, when they entered the partnership, they stipulated (3) that the proceeds earned on Shabbos, (4) as small (5) or as great as they may be, belong exclusively to the non-Jew, and that the proceeds earned on one /other/ day corresponding to Shabbos belong exclusively to the Jew, (6) this is permitted.

(7) If they did not so stipulate originally, then when they divide the proceeds, the non-Jew must take the proceeds of all the Shabbos days, while the rest is split. In the event that the exact /amount of the/ Shabbos proceeds are not known, the non-Jew must then take one-seventh of the proceeds for himself, and the rest is divided.

Gloss: Post facto, some /authorities/ permit /the Jew to accept his share of the proceeds even though they did not make such a stipulation but (8) divide /the proceeds evenly/ without defining the terms /of the division/. (...) It appears to me that in a case where a great loss is involved one may rely upon them.

Some /authorities/ say that all this refers only to a partnership where /to fulfill the terms of the partnership/ each works (9) one day /against any day the other works/. (...) But where both of them, jointly, work all the weekdays, while on Shabbos, the non-Jew works alone, it is permitted to split evenly all the proceeds with him, since /then/ the non-Jew /when he works on Shabbos/ (10) is working on his own behalf, (11) nor does the Jew benefit from the /non-Jew's/ working on Shabbos, since it is not incumbent upon /the Jew/ to do that work. Nevertheless, he should not accept any Shabbos earnings except (12) as part of an overall payment in which /the profits of/ the other days are included. (...)

Mishnah Berurah

A Jew and a non-Jew, etc. Know, that where a Jew has any enterprise or a job in partnership with a non-Jew, it is completely permitted /for the non-Jew to work on Shabbos/ if a stipulation is made in advance, before they enter into the partnership /, the Jew saying to the non-Jew/: "You work on Shabbos and take /profit/ in accordance with your work, be it much or little. Corresponding to this, I shall work one other day of the week and I, too, shall then take /profit/ in accordance with my work." At the time of the division /of the earnings/, then, the non-Jew takes his income for Shabbos, whereas the Jew, corresponding to this, takes /his income for his/ one day, be it much or little.

If, however, they did not originally so stipulate, and at the time of the dividing /of the profits/ /the Jew/ tells the non-Jew: "You take /an amount/ in accordance with your work on Shabbos, and I, for a weekday"--this is certainly prohibited.

If originally they did not so stipulate, and at the time of the splitting /of the profits/ they divide equally without mentioning any terms /of the division/--this /i.e., whether a division of this sort is permitted/ is the subject of a Talmudic problem left undecided. The *Rambam* rules /the case/ stringently, /forbidding it/, whereas the *Rosh* is lenient. The *Shulchan Aruch* follows the *Rambam's* view; the *Rema* in the gloss rules, where it is a situation involving great loss, according to the *Rosh*.

If before entering into their partnership they stipulated in the manner stated above, but at the time of dividing /the profits/ they agree to split /them/ evenly, this is permitted even according to the *Rambam* (as written in Par. 2).

These are the basic ideas behind the laws in the first Paragraphs. The remaining details together with their reasons will be explained below.

Analysis

As Rabbi Kagan specifies in his introduction to the Laws of Shabbat, certain sections will have prefaces. Thus, he commences his commentary to section 245 with a preface. Analogous to his introduction in section 243, the Mishnah Berurah's text here is almost an exact replication of the Ba'eyr Heytev's preamble. The differences suggested by

Rabbi Kagan are mostly for the purpose of clarification. To illustrate this I will adduce the text of the Mishnah Berurah with the words of the Ba'eyr Heytev printed in bold. "Know, that where a Jew has any enterprise or job in partnership with a non-Jew, it is completely permitted if a stipulation is made in advance before they enter into the partnership: 'You work on Shabbos and take in accordance with your work, be it much or little. Corresponding to this, I shall work one other day of the week and I, too, shall then take in accordance with my work.' At the time of the division, then, the non-Jew takes his income for Shabbos, whereas the Jew, corresponding to this, takes one day, be it much or little. If, however, they did not originally so stipulate, and at the time of the dividing, /the Jew/ tells the non-Jew: 'You take in accordance with your work on Shabbos, and I for a weekday'--this is certainly prohibited.

If originally they did not stipulate, and at the time of the splitting they divide equally without mentioning any terms--this is the subject of a Talmudic problem left undecided. The Rambam rules stringently, whereas the Rosh is lenient. The *Shulchan Aruch* follows the Rambam's view; the Rema in the gloss rules, where it is a situation involving great loss, according to the Rosh.

If before entering into their partnership they stipulated in the manner stated above, but at the time of

dividing they agree to split evenly, this is permitted even according to the Rambam (as written in paragraph 2).

These are the basic ideas behind the laws in the first paragraphs. The remaining details together with their reasons will be explained below." The Ba'eyr Heytev does not conclude his introduction at this point, but rather discusses a difficulty with the text of the Magen Avraham.

As seen above, a modification offered by the Mishnah Berurah is that the phrase "any enterprise or job" replaces the Ba'eyr Heytev's vocable "field". Kagan is not in disagreement with the Ba'eyr Heytev, but rather prefers to incorporate the language of, the Rambam, the source of this law. Furthermore, the Mishnah Berurah prefers to discuss and emphasize the problematic of "field" in subsequent subparagraphs and in the Beyur Halachah. To Rabbi Kagan, this is especially relevant, as it involves issues concerning the Magen Avraham.

In addition, there are two other minor discrepancies between the Ba'eyr Heytev and Mishnah Berurah's texts: a) the Mishnah Berurah modifies the order in which the Ba'eyr Heytev presents the Rosh and the Rambam, thus presenting them in their chronological order; b) the first letter of the word atah in the Ba'eyr Heytev is spelled with an alef meaning "you", while the Mishnah Berurah spells it with a ayin translated "now". I suggest that the Ba'eyr Heytev text is correct and the Mishnah Berurah is no more than a

printer's error. An examination of the textual context will substantiate my argument.

(1) A field, an oven, etc. The reason for this statement (why it is necessary that they make /this/ stipulation), is, that if they do not, then since from the inception of the partnership the work was incumbent upon both of them jointly, then if /the Jew/ subsequently tells the non-Jew: "You work on Shabbos yourself and take all the profits of the Shabbos day, and I shall correspondingly work one day during the week by myself and take it (the profit of that day) for myself," he is considered to be actively employing the non-Jew as a worker--as if telling him: "You do work for me on Shabbos and I, against this, shall work for you during the weekday period." Accordingly, /the non-Jew/ would be his full agent. [Tosafos]

Therefore, if his non-Jewish partner does not work personally, but, instead, other non-Jews, desiring to bake, fire the jointly owned oven and pay some fee for the use of it, the Jew may accept from his partner the income due him proportionate to his share, even if they did not make the /above-mentioned/ stipulation. This is so only as long as he does not accept payment from him for Shabbos separately, but rather accepts /the payment/ without specifying any terms, and as part of an overall payment that includes /the earnings of/ the other days of the week, so that it does not constitute *sechar Shabbas* (profiting from Shabbos). We are not concerned about *mar'is ha-ayin*--that it might be said he is doing it for the Jew--since it is well known that the non-Jew has a share in it. [M.A. and other Acharonim]

Analysis

In sub-paragraph 1, the Mishnah Berurah clarifies Karo's adjudication "a Jew and a non-Jew who jointly own a field . . ." Rabbi Kagan commences with the formulary "the reason" (*taam*) which initiates an analytical clarification as in the style of Talmudic commentaries. The Magen Avraham, as well as 'additional rabbinical authorities' (*shaar achronim*), are cited as the source for this clarification but Rabbi Kagan, in contrast to most of the previous sub-paragraphs which we have examined, does not

quote the latter. Instead, he employs the phraseology and matrix of the Magen Avraham and other rabbinical authorities to form sub-paragraph 1. For example, he includes the Talmudical commentary Tosafot as part of the Magen Avraham's discussion. This reference to Tosafot in the Mishnah Berurah, "... he is considered to be actively employing the non-Jew as a worker--as if telling him: 'You do work for me on Shabbos and I, against this, shall work for you during the weekday period.' Accordingly, /the non-Jew/ would be his full agent (Tosafot)", is in reality derived and adapted from the language of this earlier commentary. The Magen Avraham limits himself in his text to the phrase, "he is considered to be actively employing the non-Jew as a worker".

The latter segment of sub-paragraph 1, subsequent to the vocable "Tosafot", is cited from the section of the Ba'eyr Heytev not subsumed in the Mishnah Berurah's introduction to section 245. Although the Ba'eyr Heytev refers to a dispute between the Magen Avraham and the Elya Ràbba, Rabbi Kagan, following his dependency upon the Magen Avraham, disregards the polemic by accepting and citing the adjudication of the Magen Avraham unequivocally.

(2) If at the start ... they stipulated. The reason is that since the stipulation was made at the very inception, the duty of performing work on Shabbos did not become incumbent from the start upon the Jew at all, so that the non-Jew is not his agent.

Analysis

In sub-paragraph 2, the Mishnah Berurah clarifies the reason for Karo's condition, "if at the start, when they entered the partnership, they stipulated." Analogous to sub-paragraph 1, Rabbi Kagan commences his commentary in sub-paragraph 2, with the formulary "the reason" (*taam*) which initiates analytical clarification. The clarification is in accordance with the suggested explanation of the 'latter rabbinical authorities', whose basis for the accommodation is "that since the stipulation was made at the very inception." Although, as stated in Sha'ar Ha-Tziyun 1, the source and the majority of the phraseology incorporated in sub-paragraph 2 is from Rashi, Rabbi Kagan quotes almost verbatim the Magen Avraham, who does not refer to Rashi as a source.

(3) That the proceeds earned on Shabbos, etc. In the case of a field, he must tell him: "You work, sowing and plowing on Shabbos, and at harvest time you will receive an amount corresponding to your work on Shabbos; whereas I or my agent will work on a weekday, and I shall likewise receive an amount corresponding to my day."

Analysis

The theme of 'field' which was omitted from the Mishnah Berurah's introduction to section 245 is descanted in sub-paragraph 3. Kagan designates the conditions under which partnership is permitted with a Gentile on Shabbat. Bar the vocables "or my agent" (*o shelucho*) sub-paragraph 3, as footnoted in Sha'ar Ha-Tziyun 3, is a direct quote from

the Magen Avraham, sub-paragraph 2. The Magen Avraham, who adapts the phraseology of the Bet Yosef, omits this phrase; the Mishnah Berurah reinstates it in his text. Kagan in sub-paragraph 3, does not dispute the Magen Avraham but rather edits this commentary.

(4) As small, etc. For, since they do not make a reckoning with each other over taking equal shares, they are therefore not partners at all for Shabbos and Sunday, but only for the other days.

This excludes a case where at the time of agreeing on the conditions /of the partnership/ he stipulates with them that when subsequently they make a reckoning, the profit is to belong to the two of them evenly. This is forbidden since then, necessarily, he becomes his partner for the Shabbos days as well.

Analysis

In sub-paragraph 4 the Mishnah Berurah continues to discuss the segment of the Ba'eyr Heytev omitted from the introduction. Rabbi Kagan, in contrast to his prior discourse on this theme, here is not explicit when presenting his deliberation. The Mishnah Berurah, in sub-paragraph 4, discusses the Ba'eyr Heytev's adjudication that states "agreeing on the conditions /of partnership/ he stipulates with them that when subsequently they make the reckoning" (*hitnu-yavo'u l'chesbon shaveh*). Rabbi Kagan bases this statement upon the Magen Avraham. At first, the Ba'eyr Heytev suggests the accommodative view but concludes, "the Magen Avraham, in sub-paragraph 2, did not write this." The Mishnah Berurah, retaining its loyalty to the text of the Magen Avraham, although adopting the stringent view of

Kagan's own ruling, develops the decision of the Magen Avraham. To emphasize his view, the Mishnah Berurah contrasts the Ba'eyr Heytev's list of rabbinical authorities with additional sources. In Sha'ar Ha-Tziyun 3, 'employing the sources discussed by the 'latter rabbinical authorities', Rabbi Kagan directs the reader to a later section of the Shulchan Aruch, Yoreh De'ah, and cites the Shach's and the Taz's interpretation of the Magen Avraham. The reference to the Taz in Yoreh De'ah is offered to contrast his commentary on section 245 sub-paragraph 4. To strengthen his stringent ruling and explain the adjudication of the Magen Avraham, the Mishnah Berurah writes in Sha'ar Ha-Tziyun 3, ". . . and the Taz there adjudicates this way"; as Rabbi Kagan wants to understand the Magen Avraham.

Throughout the sub-paragraphs of section 245, the Mishnah Berurah has proffered the reader an analysis of the Shulchan Aruch's laws with no explicit reference to his social reality. There is no doubt that these laws had a bearing upon the Chafetz Chaim's social environment, but he does not emphasize the accommodative views, thus deviating from his prior legal structural pattern. I suggest that Rabbi Kagan, even in the instances when the adjudications are relevant to his social reality, sanctions the stringent view when he is conscious of alternate opinions offered to the Jew to bypass the more rigorous ruling. For example, one finds the Rema's accommodation in paragraph 1, of "it

appears to me that in a case where a great loss is involved one may rely upon them" (i.e. upon the Magen Avraham). This halachic pattern thereby allows Rabbi Kagan to remain loyal to "his" 'latter rabbinical authorities' as the Magen Avraham, while still taking into account the reality of the halachic observance in his society. Sub-paragraph 4 is an example of the stringent direction, while further illustrations of accommodative solutions will be offered in subsequent sub-paragraphs.⁵¹

(5) Or as great. Now, if subsequently, at the time of division /of the profits/, they make a reckoning, saying: "How much have you taken /for your work on Shabbos/? I /, though, / have taken little /for the day I worked alone/. Let us split the remainder so that we will both end up evenly," the view of the M.A. is to rule in accordance with the view of the Ra'avad who is stringent /and forbids this/ because, in retrospect, it now becomes apparent that the original stipulation was a mere subterfuge. Others, however, rule leniently since originally they did make a stipulation. (See E.R. who also discusses the matter at length and finally concludes that /any ruling in/ this requires further study.)

Analysis

In sub-paragraph 5, the Mishnah Berurah continues with his discussion of sub-paragraph 4, concerning "on condition" and "reckoning" (*hitnah, cheshbon*). Here, in sub-paragraph 5, he emphasizes the consideration, "now, if subsequently, at the time of division." Although Kagan now proffers the reader the accommodative view, he is confronted with the Magen Avraham's stringent ruling. Following his literary style, he first elaborates upon the law of the Magen

Avraham, citing additional rabbinical authorities and their reasons for their decisions. Subsequently, the Mishnah Berurah briefly mentions the "others, however, /who/ rule leniently" (*yesh mekilim*). Only a footnote reference in Sha'ar Ha-Tziyun 4 lists those who hold this view. In the Mishnah Berurah text itself, Rabbi Kagan refers to only one adherent of the lenient view, the Elya Rabba. Kagan concludes the sub-paragraph with a proclamation of his adjudicative frustration, initiated by the formulary, "this requires further study" (*tzarich iyun*).

This uneasiness by Rabbi Kagan is further illustrated in Sha'ar Ha-Tziyun 4; "former" and early rabbinical authorities are offered as references to substantiate the lenient view. This pattern is only used by Rabbi Kagan when he is concerned with a sensitive subject that requires "strong backers". Rabbi Kagan concludes Sha'ar Ha-Tziyun 4 with his own analysis: ". . . And so the Taz there /Yoreh De'ah/ is stringent in this and he contradicts his words here in sub-paragraph 2, so writes the Tosafot Shabbat. Examine the Peri Megadim that answers /this contradiction/ problematically." This is a further example of the Mishnah Berurah's hesitation.

Sub-paragraph 5 is formed by using the phraseology of the 'latter rabbinical authorities' as the Taz, Magen Avraham, Tosafot Shabbat and the Geraz. For example, the sentence "now, if subsequently, at the time of the division,

they make a reckoning, saying, 'How much have you taken" is quoted from the Geraz. The subsequent phrase ". . . I have taken little. Let us split the remainder . . ." is the Magen Avraham: ". . . In retrospect, it now becomes apparent that the original stipulation was a mere subterfuge" is from the commentaries of the Taz and the Tosafot Shabbat.

(6) This is permitted. If, subsequently, the profits belonging to each one for his day cannot be determined--as, for example, in a store--they may, even to begin with, split /the profits/ evenly. [M.A., citing Ralbach]

Analysis

In sub-paragraph 6, the Mishnah Berurah explains Karo's accommodation stated in paragraph 1. This sub-paragraph quotes almost verbatim the accommodation of the Magen Avraham, and permits one to "split the profits evenly" (*lachelok b'shaveh*) if it "cannot be determined" (*v'im lo nedah*). The Mishnah Berurah omits the Magen Avraham's phrase "Sabbath salary" (*mascoret Shabbat*) and inserts "the profits belonging to each one for his day cannot be determined . . ." Through this editing Rabbi Kagan preserves his literary style to clarify the Magen Avraham's ruling whenever he feels this is necessary.

Adjacent to the phrase "they may", the Mishnah Berurah places a footnote reference, Sha'ar Ha-Tziyun 5. In this footnote, Rabbi Kagan continues to develop his accommodative view and appends a further consideration: "It seems in this

case the Israelite may force the non-Jew to divide the profits equally . . ." This suggestion is not discussed by the 'latter rabbinical authorities' generally cited in the Mishnah Berurah commentary.

(7) If they did not so stipulate originally. This is phrased without /mention of any additional/ specification to indicate that it is prohibited /to divide evenly/ where they did not make a stipulation even where he did not tell him: "You work on Shabbos and I on a weekday," or even where at the time of division /of the profits/ he does not mention /anything concerning the income from/ Shabbos to him but wishes to divide /the profits/ with him equally without specifying any terms /of the division/--even then it is forbidden, since they did not make the /proper/ stipulation before entering into the partnership.

Analysis

In sub-paragraph 7, the Mishnah Berurah clarifies Karo's phrase "if they did not stipulate originally." Kagan emphasizes by stating, "this is phrased without specification to indicate . . .", that this sub-paragraph only clarifies the Shulchan Aruch's stringent ruling. Karo's adjudication is disputed among the rabbinical authorities, such as the Bet Yosef and the Rema. Kagan, through his clarification, preserves his literary strategy that defines and clarifies the Shulchan Aruch but at the same time conveys implicitly that he favours the accommodation of the Rema, the adjudicator of Ashkenazic Jewry.

The phraseology of sub-paragraph 7 is adapted from the 'latter rabbinical authorities', especially the Tosafot Shabbat, sub-paragraph 3.

(8) Divide without defining the terms. I.e. at the time of the division /of the profits/ the Jew does not mention /the income of/ Shabbos to him by saying, "You take corresponding to your day of work on Shabbos, and I will take corresponding to my day of work on a weekday," but rather, they split equally without specification of any terms /of the division/.

The case in discussion refers, too, to where he did not tell him beforehand: "You work on Shabbos, and I shall work on a weekday as a counterpart to your work"; rather, the non-Jew did /the Shabbos work/ on his own, not as a result of any order of /the Jew/. For otherwise, all of this would be forbidden according to every view, for /the Jew/ would thereby have demonstrated that /the non-Jew/ was working against this on a weekday--since from the start the work was jointly incumbent upon the two of them.

Bear in mind that this entire Paragraph deals with a case where the Jew and the non-Jew are partners in the oven or the bath-house itself. Where, however, the non-Jew has no share in the oven itself but merely receives a part of the profit in exchange for baking and firing the oven, some are of the opinion that here even if he stipulates from the beginning, "You take your share on Shabbos /i.e., all the income of Shabbos/ and I /will take the income of/ one day during the week," this is of no avail. For since the oven itself belongs to the Jew, this is the equivalent of /the Jew/ renting out his oven to /the non-Jew/ for Shabbos, in return for which /the non-Jew/ must fire the oven for him on one of the weekdays--and it is forbidden to accept Shabbos profits. See M.A. who concludes that it is proper to heed this view and be stringent accordingly.

But this refers only to where this is not part of an overall arrangement. Where, however, it is part of an overall arrangement (as for example, if he tells the baker: "You take /as your share/ two or three days' /profits/ and I shall take /for my share/ two or three days"), this is permitted if he made this stipulation at the inception of the partnership.

Some Acharonim, however, hold that where the non-Jew has no share in the oven itself, it is not required that they initially make a stipulation, since /the profit/ is part of an overall payment.

Analysis

In sub-paragraph 8, Rabbi Kagan interprets the Rema's accommodation, "post facto, some /authorities/ permit/ the Jew to accept his share of the proceeds even though they did

not make such a stipulation but divide the proceeds evenly /without defining the terms/ of the division" This sub-paragraph does not quote verbatim the 'latter rabbinical authorities'. Opening his commentary with the formulary "i.e." (*dhinu*) Kagan interprets the law and explains under what conditions the Rema states his lenient opinion. Following his literary style the Mishnah Berurah in sub-paragraph 8 employs the phraseology of the 'latter rabbinical authorities' who have themselves incorporated the language of a 'former rabbinical authority', the Rosh. Even though the terminology is similar and the topical structure is that of the Magen Avraham, this sub-paragraph, in contrast to earlier sub-paragraphs, is introduced separately by Rabbi Kagan. Evidence of this suggestion can be found in the formulary "bear in mind" (*da*). As I have argued above, this formulary is not copied from an outside source, but rather comes to initiate Rabbi Kagan's own adjudication.

Sub-paragraph 8 is divided into two segments. The first stipulates two stringent conditions for the Rema's ruling. In the Beyur Halachah, Rabbi Kagan discusses in detail the reasons for his adjudication. To support his decision for the stringent ruling the Chafetz Chaim feels it necessary to deviate from his adjudicative pattern that is based upon 'latter rabbinical authorities', and to quote and discuss the Babylonian Talmud and 'former rabbinical authorities'. Furthermore, in the Beyur Halachah, he

reveals to the reader part of his halachic preferences; to seek acquiescence in the opinions of the rabbinical authorities rather than dispute. He writes ". . . and according to my opinion . . . Why say that Rabbi Yerucham should dispute with all? Rather the opinion of Rabbi Yerucham is to explain . . ." Through the opinions Rabbi Kagan offers in the first segment of sub-paragraph 8, acquiescence is reached between the rabbinical authorities in their interpretation of the case under discussion.

As mentioned above, the latter segment of sub-paragraph 8 initiates the Mishnah Berurah's adjudication of the halachic problem discussed. Kagan, following the topical structure of the Magen Avraham, analyzes the *halachah* concerned with the case "where the non-Jew has no share in the oven itself." The Magen Avraham's complicated analysis of the rabbinical authorities is simplified and clarified by the Mishnah Berurah. Although Rabbi Kagan writes, ". . . see the Magen Avraham who concludes that it is proper to heed this view and be stringent accordingly"; he continues to emphasize the accommodative possibilities that are found in the Magen Avraham's discussion. Thus the Chafetz Chaim preserves his loyalty to the Magen Avraham and is able to conclude this segment with the lenient option.

Kagan's desire not to contradict the Magen Avraham is further expressed in Sha'ar Ha-Tziyun 7, where the Mishnah Berurah writes, "even according to the Magen Avraham it is

not specifically necessary to specify a condition . . .", and he continues to explore the accommodation. In addition he turns for support to the 'latter rabbinical authorities', the Elya Rabba, Peri Megadim and Yad Efrayim.

(9) One day. For then, since the Jew works /alone/ every Sunday, the non-Jew is considered his appointed agent to work for him every Shabbos day. For this reason, it is necessary that he stipulate at the start as explained above.

The Acharonim write that the same holds for a case where the non-Jew gives the Jew money with which to do business on weekdays, while he himself does business with it on Shabbos. It is then forbidden for the Jew to receive any part of the profits earned on Shabbos--unless the Jew stipulates with him originally that /working on/ the Shabbos day is not at all to be incumbent upon him. Otherwise, since this work is incumbent upon the Jew and /consequently/ the non-Jew will be acting as his agent, it is forbidden.

Analysis

In sub-paragraph 9 the Mishnah Berurah clarifies and glosses the Rema's statement: "some say that all this refers only to a partnership where /to fulfill the terms of the partnership/ each works one day. . . ." As in sub-paragraph 8, in sub-paragraph 9 the Mishnah Berurah follows the topical pattern and phraseological style of the Magen Avraham. To illustrate this point I will quote the Mishnah Berurah while underlining the phrases of the Magen Avraham. "For then, since the Jew works /alone/ every Sunday the non-Jew is, considered his appointed agent to work for him every Shabbos day. For this reason, it is necessary that he stipulate from the start as explained above.

The Acharonim write that the same holds for a case where the non-Jew gives the Jew money with which to do business on weekdays, while he himself does business with it on Shabbos. It is then forbidden for the Jew to receive any part of the profits earned on Shabbos--unless the Jew stipulates with him originally that /working on/ the Shabbos day is not at all to be incumbent upon him. Otherwise since this work is incumbent upon the Jew and /consequently/ the non-Jew will be acting as his agent, it is forbidden." An examination of the Mishnah Berurah shows that, in addition to similar phraseology, Rabbi Kagan's commentary claims to follow and clarify the same literary structure of the Magen Avraham.

Although the second segment of sub-paragraph 9, commencing with "the Achronim", does not appear to be directly related to the Magen Avraham, Sha'ar Ha-Tziyun 8, which footnotes this segment, refers the reader to the Magen Avraham; thus the Mishnah Berurah is a clarification of the Magen Avraham. It is interesting to note that Rabbi Kagan does not include in his reference the Tosafot Shabbat and the Elya Rabba, both of whom offer the same ruling. Furthermore, the concluding sentence of the Mishnah Berurah, ". . . since this work is incumbent upon the Jew and /consequently/ the non-Jew will be acting as his agent, it is forbidden", is found verbatim in the Tosafot Shabbat.

The second segment of sub-paragraph 9 glosses the ruling of the Rema. This addition of the Mishnah Berurah is only alluded to in the Magen Avraham, therefore Rabbi Kagan prefers to attribute his adjudication to additional 'latter rabbinical authorities', the Olat Shabbat and the Kneset Ha-Gedolah. As discussed above, the Tosafot Shabbat and the Elya Rabba are disregarded.

This latter segment is concerned with the problem of a Gentile who furnishes a Jew with working capital. This topic is not a major theme of the 'latter rabbinical authorities' in section 245, yet Rabbi Kagan decides to emphasize it and to issue a stringent ruling. I suggest that implicitly the Chafetz Chaim is concerned with such dependency of the Jew upon the Gentile, especially in the East European society where the boundaries between Jews and Gentiles were being threatened. Furthermore, to lend weight to this stringent adjudication the term 'latter rabbinical authorities' is used. This is in accordance with Kagan's halachic pattern suggested in section 247 sub-paragraph 13.

(10) Is working on his own behalf. On account of his share. For he is then like a profit-sharer /in a field/, who is permitted /to work/, as far as any actual violation of law is concerned (as explained above, at the beginning of Sec. 243), since he is deemed, because he receives a share of the produce, to be working on his own behalf, the Jew's share being thereby improved merely as an indirect result. The same holds true here.

Even though there, /in Sec. 243, Par.1,/ it is forbidden /to give it over to a profit-sharer/ in the case of an oven because of *mar'is ha-ayin* (in that people will suspect that /the non-Jew/ is /the Jew's/ hired worker), in

our case, however, there is no problem of *mar'is ha-ayin*, since it is generally known that the non-Jew has a share in it.

Analysis

In sub-paragraph 10, the Mishnah Berurah continues to clarify the Magen Avraham's interpretation of the Rema's adjudication. The phraseology is interspersed with the Mishnah Berurah's explanations. Furthermore the lexicon of the Tosafot Shabbat is found in this sub-paragraph. To illustrate this point, I will copy sub-paragraph 10, underlining the Tosafot Shabbat and printing the Magen Avraham in bold letters. "On account of his share. For he is then like a profit-sharer who is permitted /to work/, as far as any actual violation of law is concerned (as explained above, at the beginning of Sec. 243), since he is deemed, because he receives a share of the produce, to be working on his own behalf, the Jew's share being thereby improved merely as an indirect result. The same holds true here.

Even though there, it is forbidden in the case of an oven because of *mar'is ha-ayin*, in our case, however, there is no problem of *mar'is ha-ayin*, since it is generally known that the non-Jew has a share in it."

The Mishnah Berurah's clarification in sub-paragraph 10 emphasizes the accommodative possibilities of the law concerning where both Gentile and Jew "jointly work all the week, while on Shabbos the non-Jew works alone."

(11) Nor does the Jew benefit, etc. I.e., such benefit as he derives from /the non-Jew's work/ is merely an indirect benefit, since the non-Jew is not doing his work in order to benefit /the Jew/--which would make him his agent for this. For since it is not at all incumbent here upon the Jew to work on Shabbos--for on weekdays both of them fire it, and on Shabbos the non-Jew does not have the right to force him to work with him, he is therefore certainly considered to be working on his own behalf.

(12) As part of an overall payment. For otherwise it appears like *sechar Shabbas*.

Analysis

In sub-paragraph 11 the Mishnah Berurah, initiated by formulary "i.e." (*ratza lomar*) suggests his own interpretation of the Rema's law. Kagan is not in dispute with the 'latter rabbinical authorities', but appends the rabbinical sources generally prevalent in the Mishnah Berurah commentary.

To form this sub-paragraph, the Mishnah Berurah employs phrases and terminology of the rabbinical sources related to this theme. For example, the phrase "for since it is not all incumbent here upon the Jew", is a quote from the Yad Efrayim, a 'latter rabbinical authority' printed in the standard editions of the Shulchan Aruch. Furthermore, the sentence, "the non-Jew does not have the right to force him to work with him, he is there certainly considered to be working on his own behalf", is a direct quote of the Levush and the Geraz.

This clarification initiated by the Mishnah Berurah is intended to emphasize the accommodation of the Rema.

Sub-paragraph 12 continues the literary style of sub-paragraph 11. It explains why "an overall payment" (*b'havlaah*) is a requirement for the Rema's accommodation, "but where both of them, jointly, work all the weekdays, while on Shabbos the non-Jew works alone, it is permitted . . ." Although ~~Rabbi~~ Kagan offers no sources for his clarification of sub-paragraph 12, he quotes Rabbi Nissim, the "former rabbinical authority" referred by the Shulchan Aruch, as the source of the ruling. It is interesting to note that the phrase that composes sub-paragraph 12, "for otherwise it appears like *sechar Shabbos*", is not found in Rabbi Nissim's commentary of the Babylonian Talmud Shabbat, as cited by the Shulchan Aruch, but rather in his commentary to the Babylonian Talmud Avodah Zarah, the alternate source of this theme.

Shulchan Aruch

2. Where at first they did so stipulate, if subsequently, at the time of the division (13) the non-Jew consents to split evenly, this is permitted.

Mishnah Berurah

(13) The non-Jew consents. I.e., the share earned on Shabbos (concerning which they had agreed /that it belongs to the non-Jew/ regardless of whether it be large or small) exceeds that of the one weekday belonging to the Jew, and at the time of division /the non-Jew/ agrees to split /the earnings/ evenly.

We nevertheless do not deem this retroactive evidence proving the non-Jew to have been the Jew's agent with

respect to the Shabbos work. Rather, we consider the non-Jew to be merely giving him a gift, since at the start they had stipulated that the /earnings of the/ Shabbos day belong to him alone.

All this, however, holds true only in a case where the non-Jew's willingness to make an equal division was expressed in a general manner, not as a result of the calculation of the income of the two days.

If, however, it resulted from such a calculation (the Jew tells the non-Jew at the time of division: "You have received 100 zuz on Shabbos, whereas I have received 50 zuz on the weekday; accordingly, compensate me for my deficit"), and the non-Jew accordingly agrees to make up for this /by making an even division/, I have already written above, in sub-Par. 5, that there are various opinions for this.

Analysis

In sub-paragraph 13, the Mishnah Berurah interprets Karo's law "where at first they did not stipulate; if subsequently, at the time of the division, the non-Jew consents to split evenly, this is permitted." Rabbi Kagan continues his 'grouping' style and commences with the formulary "i.e." (*ratzah lomar*) which initiates interpretation of Karo's text. Furthermore, correlating to sub-paragraph 11, this formulary suggests Rabbi Kagan's own terminology is implemented to form this sub-paragraph. This terminology is reconciled with the language employed by the 'latter rabbinical authorities' concerned with this topic. For example, the Mishnah Berurah's statement "if, however, it resulted from such a calculation (the Jew tells the non-Jew at the time of division: 'You have received 100 zuz on Shabbos, whereas I have received 50 zuz on the weekday; accordingly, compensate me for my deficit')", is analogous

to the wording of the Taz, who in turn has adopted his statement from the Bet Yosef.

The Taz, sub-paragraph 2, discusses the lenient and stringent positions that relate to the topic of "stipulated" (*hitnu*). Kagan, following his literary pattern, is only interested in interpreting the decision of Karo as stated in paragraph 2 of section 245. Alternately, aware of the dispute discussed by the Taz, the Mishnah Berurah proffers a detailed explanation of Karo's resolution without reference to the other opinion.

The latter section of sub-paragraph 13 is concerned with the law of "calculation" (*chesbon*). Kagan, preserving his literary style, subsumes this discussion within his commentary, as it is part of the deliberations of the 'latter rabbinical authorities' such as the Taz. The Mishnah Berurah does not conclude with his adjudication, but rather refers the reader to his assertion in sub-paragraph 5 of this section where "there are various opinions for this." This literary structure is further suggested by the formulary "i.e." (*ratzah lomar*), where the law is identified as Karo's and not necessarily in agreement with Kagan and other 'latter rabbinical authorities'.

In sub-paragraph 5 I have argued that Rabbi Kagan was confronted with the dilemma of the Magen Avraham's stringent view and his own preference for the lenient adjudication, thus adopting a literary style which avoids this conflict.

The Mishnah Berurah here, as he was able to do in sub-paragraph 5, continues to avoid this predicament of confrontation with the Magen Avraham, and refers the reader to his discussion in sub-paragraph 5.

Shulchan Aruch

3. Where at the first they did not make such an agreement, /the matter/ can be rectified (14) by having the seller return them the sales-price for the land, or by their selling it to someone else, and the re-buying it in partnership, making, at the time of re-purchase, the /proper/ stipulation.

If they formed a partnership in a store without making the /proper/ stipulation, then each should take back his share, cancel the partnership and then re-form it, making the /proper/ stipulation at its inception.

If /they/ accepted the land to work it /as profit-sharers/ in partnership they should cancel the partnership, have each forgive any claims on the other, and then re-form the partnership, making the /proper/ stipulation at its inception.

Gloss: (15) If /the Jew/ desires to lease the non-Jew his share on Shabbos or to hire him /to work on Shabbos/ as a job contractor, this is permitted. For just as it was explained above, at the end of Sec. 244, that with respect to /the collection of/ taxes and coinage this is permitted, all the more so is it permitted here, where a partnership with the non-Jew exists.

Mishnah Berurah

(14) By having the seller return them. In *Choshen Mishpat* it is stated that a new act of acquisition is now required to return possession to the seller. It is not enough here that he return him the money and the sales contract. (See there, Secs. 189 and 194, with respect to acquisition by a non-Jew.)

Analysis

In sub-paragraph 14, Rabbi Kagan glosses Rabbi Karo's law concerned with the case of "when at first they did not

make such an agreement." This gloss instructs the reader of additional stipulations to rectify and permit the situation discussed in paragraph 3.

Although Rabbi Kagan does not cite references, his source is the Magen Avraham, sub-paragraph 7, who writes "note the Hoshen Mishpat, Section 189, that he needs a new act of possession, and note there Section 194 regarding an act of possession by a non-Jew." Furthermore, the Mishnah Berurah's terminology is almost adopted verbatim from the vernacular of the Tosafot Shabbat, sub-paragraph 7. The only addition made by the Mishnah Berurah is the word "money", while he excludes from the text of the Tosafot Shabbat, the words "the oven or bath-house", which is found after the phrase "is required to return possessions to the seller." Thus Rabbi Kagan is able to express his dependency upon the Magen Avraham, but to embrace the more elaborate and detailed analysis of the Tosafot Shabbat.

(15) If /the Jew/ desires, etc. See M.A. and Taz who find great difficulty in understanding why this should be permitted. For it is not analogous to Sec. 244 /Par. 6/ where such a case is permitted only on account of loss.

The M.A. explains this finally by saying that here we refer to a case in which he hires out his share of the Shabbos /profits/ to him as part of an overall arrangement, (i.e., he rents him all of his /entire share in the profits of the/ Shabbos days together with two or three weekdays) so that there no longer exists any problem of *sechar Shabbas* (profiting from Shabbos). The job contracting permitted refers likewise to a situation in which he did not specify /any work to be done on/ Shabbos with regard to the contracting, but phrased it generally: "Whenever you will of yourself do work, and will earn such-and-such an amount for me, I shall give you such-and-such an amount." The principal point, then, which the *Rema* intends to teach us is

that we are not concerned here with *mar'is ha-ayin* (i.e., that it will be suspected that /the non-Jew/ is working for the Jew) since it is widely known that the non-Jew has a share in it. That which /the *Rema*/ states, "Just as it was explained /above, at the end of Sec. 244/," means: Just as in that case we are not concerned about *mar'is ha-ayin*--all the more so here, where there is no *mar'is ha-ayin* at all since it is in partnership with a non-Jew.

Similarly, the *Taz* concludes that in halachic practice such a case is permitted only as part of an overall arrangement. But even in such a case, one should be careful not to discuss anything concerning the deal with the non-Jew on Shabbos, as Acharonim state at the end of Sec. 244:

Analysis

In sub-paragraph 15, the *Mishnah Berurah* discusses the *Magen Avraham*'s contention with the *Rema*'s adjudication, "if /the Jew/ desires to lease the non-Jew his share on Shabbos or to hire him /to work on Shabbos/ as a job contractor, this is permitted." Rabbi Kagan, confronted with the accommodation of the *Rema* and the contrary stringent opinions of the *Magen Avraham* and *Taz*, elects to side with the latter two. To further strengthen this preference, the *Geraz* is cited in *Sha'ar Ha-Tziyun* 11 and interpreted to concur with the *Magen Avraham* and the *Taz*. The *Mishnah Berurah*'s desire to accord with the *Magen Avraham* and the *Taz* is further evidence to the structure of his adjudicatory pattern, as well as his dependency upon the *Magen Avraham*. Thus Rabbi Kagan's adjudications concur with the decisions of the popular and accepted 'latter rabbinical authorities' such as 'the *Magen Avraham*, *Taz*, *Tosafot Shabbat*, *Geraz* etc. who lived a century earlier. Although contrary to his accommodative halachic preference and the views of earlier

'latter rabbinical authorities' such as the Rema, Rabbi Kagan elects to follow the adjudication of these later, 'popular' authorities, thus implicitly he expresses an adjudicative principle in the structure by which he forms his halachic decisions.

Alternately, the Mishnah Berurah's preference for the lenient opinion does not allow him to completely reject the possibility to elude to the accommodation available. Rather than presenting the stringent law of the Magen Avraham and Taz as decisive, he offers his discussion of their adjudication. This style of discourse is initiated by the formulary "see . . ." (*ayen*). Rabbi Kagan further states this purpose in his statement, "see the Magen Avraham and Taz, who find great difficulty in understanding why this should be permitted." Furthermore, the Mishnah Berurah chooses segments of the Magen Avraham which discuss under what circumstances the accommodation is permitted, while the cases of greater stringency, which are "not permitting even in the case of great loss" are only considered in the Sha'ar Ha-Tziyun 12. The discussion of the more stringent cases in the Sha'ar Ha-Tziyun 12 also remain evasive when Rabbi Kagan concludes, "see the 'latter rabbinical authorities' Tosafot Shabbat and the Peri Megadim and the Levush."

The phraseology of sub-paragraph 15 suggested by the formulary "see . . ." (*ayen*), is that of Rabbi Kagan. The

form of this sub-paragraph is analogous to that of the Geraz, sub-paragraphs 13-14.

It is important to note, for the purpose of my future analysis of section 245, that the Magen Avraham completes his commentary on this section at this point.

Shulchan Aruch

4. A Jew may give a non-Jew money with which to do business, and then, even though the non-Jew does business with it on Shabbos, may split all the proceeds with him evenly, (16) since this work is not incumbent upon the Jew (17) so that we should say that the non-Jew is acting as the Jew's agent (18) nor is it visibly evident whose business it is.

Gloss: But this is true only where the non-Jew alone does business with the money. If, however, each one alternately does business /with the money/ for one day, and /as a consequence/ the Jew must do business /with the money on one other day/ equivalent to what the non-Jew does on Shabbos, (19) it is forbidden. (...)

As for the Jew who has a pawn received from a non-Jew, see below, Sec. 325, Par. 2 and Par. 3.

Mishnah Berurah

(16) Since this work is not, etc. But, if it were incumbent upon him, it would be forbidden by law--as stated in Par. 1, that where he did not make a /proper/ stipulation it is forbidden.

Analysis

In sub-paragraph 16, Rabbi Kagan explains the logic of Rabbi Karo's explanation of the statement, "... since this work is not incumbent upon the Jew." This law is understood by the Mishnah Berurah in light of the previous discussion in sub-paragraph 15. The brief explanation, as in sub-paragraph 16, which refers the reader to an additional

discourse in the Shulchan Aruch, is initiated by the formulary "but if" (*she'im*). A similar formulary and literary form is employed in sub-paragraph 19, which also cites the same reference as in sub-paragraph 16. In addition, sub-paragraph 21 adopts this formulary and includes a later source in the Shulchan Aruch. The three sub-paragraphs 16, 19 and 21, in addition to the above analysis, offer evidence to Rabbi Kagan's 'grouping' pattern discussed above.

The phraseology in sub-paragraph 16 is quoted verbatim from the Gera. I therefore suggest that the formulary "but if" (*im*) is unique to this specific group of sub-paragraphs, which is influenced by the Gera and forms the Mishnah Berurah's present 'grouping' pattern. This suggestion concurs with my argument that the lexicon used by Rabbi Kagan is adapted for each issue or theme from the 'latter rabbinical authorities' related to the topic discussed.

(17) So that we should say, etc. Furthermore, there is no problem of it appearing like *sechar Shabbos* since it is part of an overall payment (see below, Sec. 307, Pars. 3 and 4, and what I have written there in the Mishnah Berurah).

Analysis

The Mishnah Berurah, in sub-paragraph 17, explains the reason for Karo's statement "so that we should say that the non-Jew is acting as the Jew's agent." In the latter segment of sub-paragraph 17, the reader is referred to section 307, paragraph 3, as well as "what I have written there in the Mishnah Berurah." Rabbi Kagan, in section 307,

discusses the law concerned with the giving of money by "a Jew to a non-Jew with which to do business" on Shabbat. The Mishnah Berurah's preference to direct his discussion to this subsequent section enables him to incorporate the 'latter rabbinical authorities' that address their commentary to section 307. This especially is relevant for the inclusion of the Magen Avraham. Furthermore, preserving his literary structure, Rabbi Kagan prefers not to deviate from the literary form of the 'latter rabbinical authorities', thus section 307 paragraph 3 and a further declaration of his dependency upon the 'latter rabbinical authorities'.

Rabbi Kagan's son Aryeh Leib in his brief autobiography of his father writes "and after discussion between us, my father proposed to me to take part in his work on the *Shulchan Aruch* . . . but I had to sit at home and deal with the laws of Shabbos in great depth . . . both in the commentary on the *Shulchan Aruch* and in the *Ba'eyr Heytev* . . . I then accepted this difficult task which took all my time . . . and I sent him my work on a number of sections" (Hacohen, 1975, p. 42). As a result, contemporary rabbinical scholars have questioned the authorship of the Mishnah Berurah commentary. I suggest that although the statement in sub-paragraph 17 "see below . . . what I have written there in the *Mishnah Berurah*" cannot shed light upon the authorship of this work (it is evidence of the editing.

The reference to sixty-two subsequent sections implies one editor whomever he may be.

(18) Nor is it, etc. That is, there is also no problem of *mar'is ha-ayin* (suspicious appearances) in that people might think the non-Jew is his hired worker, since it is not evident to whom the business belongs. But if it were evident and known as the Jew's, "it would be forbidden (as stated in Sec. 243, Par. 1, in connection with a bath-house; see there).

In any event, all this is permitted only if he does not tell the non-Jew to do business with /the money/ on Shabbos, but the non-Jew does it of his own account (just as he states in a similar vein in Par. 5).

Analysis

Initiated by the formulary "that is" (*ratzah lomar*) the Mishnah Berurah interprets the statement of the Shulchan Aruch "nor is it visibly evident whose business it is." The structural form of this sub-paragraph is analogous to that of the Geraz sub-paragraph 15, but the terminology conforms with the words of the Gera and Tosafot Shabbat. Reference to both the Gera and Tosafot Shabbat are cited in the Sha'ar Ha-Tziyun 14 and 15. The Mishnah Berurah's statements, "but if it were evident", and "it would be forbidden as stated in section 245 paragraph 1", is quoted from the Gera. The phrase "is permitted only if he does not tell the non-Jew to do business with the /money/ on Shabbos" is quoted from the Tosafot Shabbat.

(19) It is forbidden. Unless he made a stipulation with him regarding this prior to going into partnership with him (as stated above, Par. 1).

Analysis

The Mishnah Berurah's brief statement of sub-paragraph 19 is typical of his literary and adjudicative style, that emphasises the lenient possibilities of the *halachah*. In his commentary on the vocable from the Shulchan Aruch, "forbidden", Rabbi Kagan reminds the reader under which conditions the case discussed is permissible.

For further discussion of sub-paragraph 19 I refer the reader to my analysis of sub-paragraph 16.

Shulchan Aruch

5. A Jew is permitted to give a non-Jew merchandise to sell (20) if he fixes wages for him, (21) provided he does not tell him to sell on Shabbos.

If a Jew accepts an oven from a non-Jew as collateral for a loan, the non-Jew obligates himself to give the Jew the profits of the oven as ((fixed)) interest for his money, (22) it is permitted /for the Jew/ to accept the proceeds of /the non-Jew's baking on/ Shabbos, since /the oven/ belongs to the non-Jew, while the Jew owns no part of it. Moreover, the Jew does not tell him to work on Shabbos; the non-Jew therefore labors on his own behalf to fulfill the condition to which he agreed.

Mishnah Berurah

(20) If he fixes, etc. For then we say he is doing it on his own behalf and he is not considered /the Jew's/ agent.

(21) Provided, etc. But, if the market day is on Shabbos, then it is forbidden even without any specific order, since this is tantamount to telling him "Sell for me on Shabbos." [Acharonim, below in Sec. 307. See there for more on this.]

Analysis

In sub-paragraphs 20 and 21, the Mishnah Berurah clarifies Karo's adjudication, "a Jew is permitted to give a non-Jew merchandise to sell if he fixes wages for him provided he does not tell him to sell on Shabbos." Rabbi Kagan uses a similar literary structure as the Ba'eyr Heytev, sub-paragraph 4. Other 'latter rabbinical authorities' frequently quoted by the Mishnah Berurah do not discuss paragraph 5 of the Shulchan Aruch. To preserve his literary structure which requires dependency upon the rabbinical authorities, Rabbi Kagan turns to the Ba'eyr Heytev. Thus the Mishnah Berurah is able to realize two of his halachic decision making principles; first, to discuss and apply the major issues proposed by 'latter rabbinical authorities', and second, to continue his commentary, structured according to the literary form of the 'latter rabbinical authorities'.

The first segment of the Ba'eyr Heytev is concerned with the status of the Gentile as the Jew's agent. Rabbi Kagan, in contrast to the Ba'eyr Heytev but not negating him, takes the positive accommodative position and explains when the Gentile is not the Jew's agent, thus permitting the activity on Shabbat. An examination of the Ba'eyr Heytev will further clarify this point, "And if the non-Jew gives money to the Jew to deal with them and the non-Jew works on the Sabbath it is certainly forbidden, since because in this

work on the Sabbath the Jew was responsible to do it, and the non-Jew is acting as his messenger . . ."

In sub-paragraph 21, Rabbi Kagan again presents a brief statement concerned with the second segment of the Ba'eyr Heytev. The Ba'eyr Heytev writes "if the market day is on the Sabbath one is forbidden to give the non-Jew /money/ before the Sabbath so that he can buy for himself on the Sabbath." Although the topic of 'market day' is discussed in section 307, as the Mishnah Berurah states at the conclusion of sub-paragraph 21, as I suggested above is to preserve his literary form. Furthermore, in section 307, the Chafetz Chaim proffers specific ethical considerations that concern the 'market day'. This concurs with his literary style that distinguishes his commentary on the Shulchan Aruch from the discussions of his social reality and ethical suggestions. The ethical suggestion in section 307, sub-paragraph 15, is expressed in a quote from the Sefer Chasidim: "A person should not dwell in a city where the market day is on Shabbos since it is impossible that he will not sin . . ." Thus in sub-paragraph 21 where the Mishnah Berurah presents his commentary on Karo's law, and not concerning an ethical issue, he simply alludes to this issue is discussed in section 307.

(22) It is permitted to accept, etc. That is, even though it is not part of an overall payment. Moreover, he need not make any stipulation.

Analysis

In sub-paragraph 22, the Mishnah Berurah interprets Karo's statement "it is permitted to accept." This interpretation is initiated by the formulary "that is" (*hinu*). Through this explanation, Rabbi Kagan emphasizes and develops the Shulchan Aruch's accommodation. Two aspects of this lenient opinion are discussed. The first, "even though it is not part of an overall payment", is quoted from the Geraz. The second, "moreover, he not make any stipulation", is Rabbi Kagan's own addition.

Shulchan Aruch

6. (23) If non-Jews bake in a Jew's oven on Shabbos against his will (24) and give him bread in payment for the use of the oven, it is forbidden to derive any benefit from it.

Mishnah Berurah

(23) If non-Jews bake, etc. See *Bach*, end of Sec. 243, who writes that this refers to where they baked in it on Shabbos alone. Thus, even though they baked in it against his will, if he will accept the bread he will be receiving Shabbos profits. If, however, they baked in it on other days as well, it is permissible to receive the Shabbos profits from them as well, as part of an overall payment. See *Beyur Halachah* to the effect that this would be permitted even if the baking was not done against his will. For even though he committed a transgression by permitting them to do so (as mentioned above, beginning of Sec. 243), nevertheless, post facto the earnings /of the oven/ need not be forbidden since the prohibition here /of a non-Jew using his oven on Shabbos/ is only for reasons of *mar'is ha-ayin* (as written at the end of Sec. 243; in Mishnah Berurah, sub-Par. 16).

Analysis

Initiated by the formulary, "see . . ." (ayen), Rabbi Kagan in sub-paragraph 23 introduces his own analysis of Karo's law, "if non-Jews bake in a Jew's oven on Shabbos against his will . . . it is forbidden to derive any benefit from it."

In sub-paragraph 23, the Mishnah Berurah attains three purposes. First, he amends his statement in section 143 sub-paragraph 16, where he writes "it is permitted post-facto to accept the rental from the non-Jew . . . as stated in section 245 paragraph 6--see what we write there in the Mishnah Berurah."

Second, the reader at the conclusion of sub-paragraph 23 the reader is also referred to section 243 sub-paragraph 16, where Kagan quotes and explains the Magen Avraham. Thus Rabbi Kagan is expressing his dependency upon the Magen Avraham, although, as mentioned above, the latter had already concluded his commentary on section 245. In addition, the Mishnah Berurah through this amendment to the former statement of the Magen Avraham, is able to delegate the authority of the 'latter rabbinical authorities' to sub-paragraph 23.

Third, the Mishnah Berurah explicitly emphasizes the lenient view of the case discussed, "if non-Jews bake etc." Preserving his halachic style, Rabbi Kagan does not contradict Karo's stringent law, but rather glosses it with the

accommodative possibilities. The formulary "nevertheless" (*mikol makom*), as discussed in my analysis of section 244, initiates Rabbi Kagan's accommodative presentation.

The reference at the conclusion of section 243 sub-paragraph 16 to sub-paragraph 23, as well as the reverse is further evidence for my argument that attributes the editorship of the Mishnah Berurah commentary to one person.

(24) And give him bread. This is not to be taken literally, for the same would hold true if they gave him money /as the payment/, which, likewise, he would not be permitted to accept from them. It is only that the source case referred to involved bread. [E.R.]

Analysis

In sub-paragraph 24, the Mishnah Berurah cites Elya Rabba's stringent interpretation of Karo's adjudication. The accommodative possibilities discussed in sub-paragraph 23, which are also applicable to sub-paragraph 24 permitted Rabbi Kagan to cite the stringent view without threatening the reader's lenient decision. To further strengthen the lenient interpretation, an additional discourse of the accommodative view is presented in the related Beyur Halachah. Rabbi Kagan states there: ". . . But post facto if he /the Jew/ received /money/ benefit from this, it is not forbidden."

* * * * *

The literary style of section 245 is analogous to section 243. In both sections, as I discussed in section 243, the 'latter rabbinical authorities' are quoted verbatim in the former segments of the section's sub-paragraphs. The sub-paragraph in the latter segments of the section are formed mainly from Rabbi Kagan's vernacular. Although using Kagan's own words, the Mishnah Berurah continues to adopt the terminology prevalent for the specific themes which are found in the literature of the 'former' and especially the 'latter rabbinical authorities'.

CHAPTER 5

246: Laws of Lending and Renting to a Non-Jew on Shabbos

(Contains Five Paragraphs)

Shulchan Aruch

1. (1) It is permitted to lend or rent one's articles to a non-Jew even if he performs work with them on Shabbos, since Jews are not commanded to have their articles rest on Shabbos.

Some /authorities/ say that work-tools, such as a plow (2) and the like, are forbidden to be rented to a non-Jew on Erev Shabbos; however, on Thursday it is permitted to rent /these/ out. In any event, one must not receive payment for Shabbos except that which is included (3) as part of an overall payment--for example, one should rent it out for a month or a week. (4) Lending him \something\ is permitted even on Erev Shabbos.

Gloss: The prevailing ruling follows the latter view.

It is permitted, too, to lend /an article to the non-Jew/ on Erev Shabbos (...), even if it is stipulated that the non-Jew lend him /something/ in return. In such a case, (5) we do not deem this to constitute a form of rental. (...)

Mishnah Berurah

(1) It is permitted to lend, etc. This is the opinion of the Rif and the Rambam. They hold that the law taught in a Baraisa, "One should not rent out one's implements to a non-Jew on Erev Shabbos but on Wednesday and Thursday it is permitted," is due to a commandment requiring that one's articles rest from work on Shabbos. This means that /the Baraisa/ follows the view of the School of Shammai, who held that one is obligated to have his objects rest on Shabbos just as /he is obligated/ to have his animals rest. The School of Hillel, however, hold that a person is not obligated to have his articles rest. From this it follows that it is permitted to lend and rent out one's articles even on Erev Shabbos--even such implements as are used for work.

Even /the Rif and Rambam/, however, would hold that it is only permissible to rent out all implements as part of a more inclusive rental--not, though, for Shabbos alone (even if one rents them out at the beginning of the week)--since this would constitute *sechar Shabbos* (Shabbos profits) (as stated further on /in this Paragraph of the Shulchan Aruch/ in the opinion beginning with "some say etc.," regarding which /i.e., the part in that opinion dealing with Shabbos profits/ we find no opinion that is lenient).

The /second/ opinion beginning with "some say etc.," is the view of Rabbeinu Yonah which is that this Baraisa does not forbid /renting implements/ because of a commandment that one's articles rest, but, rather, is the opinion of all schools of thought. For the reason /of the prohibition in the Baraisa according to this view/ is that if one gives over implements of work on Erev Shabbos and the non-Jew works with them immediately thereafter on Shabbos it appears as if he is doing work by the Jew's order. This would be forbidden, since telling a non-Jew /to work/ constitutes a rabbinical prohibition.

Even though in Sec: 252, Par. 2, it is stated that it is permitted to give /a non-Jew/ skins for tanning near dusk /on Erev Shabbos/ since, because he has fixed his wages /for the completed job, the non-Jew works on his own behalf, that case differs in that the Jew has no profit from the fact that the non-Jew does work on Shabbos. But in renting out implements, however, it is clear that if the Jew were to stipulate with the non-Jew that the latter have the implements lie idle on Shabbos, he would not pay him the same amount of rent. Consequently, since the Jew thus derives a profit from the fact that the implements are hired out to the non-Jew without any specifications /that he do not work with them on Shabbos/ and the latter performs work with them on Shabbos, he appears to be the Jew's agent for this. However, it is permitted where he gives it over to him on Wednesday or Thursday, for then he does not appear so obviously to be his agent.

Analysis

In sub-paragraph 1, the Mishnah Berurah preserves Kagan's literary style and commences with an introduction to section 246. Unlike in sections 243 and 245, where he institutes the style of the Ba'eyr Heytev and indites an introduction which is separate from the sub-paragraph commentary. Here he incorporates his introduction within the

sub-paragraph commentary of the section. Turning to the 'latter rabbinical authorities' he chooses to copy the opening sub-paragraph of the Taz, which offers the most detailed commencing statement of all the 'latter rabbinical authorities'. The quote from the Taz serves as the basis for sub-paragraph 1 of section 246. In addition, 'latter rabbinical authorities' such as the Machatzit Ha-Shekel, Tosafot Shabbat, and the Levushey Serad, as well as the Bet Yosef, are briefly incorporated in sub-paragraph 1. Furthermore, as in previous introductions Rabbi Kagan succinctly includes his interpretive suggestions. To illustrate my point, I will duplicate sub-paragraph 1 with the Taz in bold print, the Levushey Serad in superscript, and the Machatzit Ha-Shekel underlined. The citations from the Geraz, Bet Yosef and Tosafot Shabbat will be identified by name.

["This is the opinion of the Rif and the Rambam. -Tosafot Shabbat] They hold that the law taught in a Baraita, 'one should not rent out one's implements to a non-Jew on Erev Shabbos but on Wednesday and Thursday it is permitted,' is due to a commandment requiring that one's articles rest from work on Shabbos. This means that it follows the view of the School of Shammai, [who hold that one is obligated to have his objects rest on Shabbos -Bet Yosef] just as to have his animal rest. The School of Hillel, however, hold that a person is not obligated to have

his articles rest. From this it follows that it is permitted to lend and rent out one's articles even on Erev Shabbos--even such implements as are used for work.

Even they however, would hold that it is only permissible to rent out all implements as part of a more inclusive rental--not, though, for Shabbos alone (even if one rents them out at the beginning of the week)--since this would constitute *sechar Shabbat* (as stated further on in the opinion beginning with 'some say, etc.' regarding which we find no opinion that is lenient).

The opinion beginning with 'some say, etc.' is the view of Rabbeinu Yonah which is that this Baraita does not forbid it because of a commandment that one's articles rest, [but rather is the opinion of all schools of thought. For the reason is that if one gives over implements of work on Erev Shabbos and the non-Jew works with them immediately thereafter on Shabbos it appears as if he is doing work by the Jew's order. This would be forbidden, since telling a non-Jew constitutes a rabbinical prohibition. [similar to the Geraz]

Even though in section 253 paragraph 2, it is stated that it is permitted to give skins for tanning near dusk since, because he has fixed his wages for the completed job, the non-Jew works on his own behalf, that case differs in that the Jew has no profit from the fact that the non-Jew does work on Shabbos. But in renting out implements,

however, it is clear that if the Jew were to stipulate with the non-Jew that the latter have the implements lie idle on Shabbos, he would not pay him the same amount of rent. Consequently, since the Jew thus derives a profit from the fact that the implements are hired out to the non-Jew without any specifications and the latter performs work with them on Shabbos, he appears to be the Jew's agent for this. However, it is permitted where he gives it over to him on Wednesday or Thursday, for then he does not appear so obviously to be his agent."

The Mishnah Berurah in the Sha'ar Ha-Tziyun 1 and 2 identifies only the Bet Yosef and Taz, but does state "as we copied", thus one can deduce that Rabbi Kagan informs the reader of his literary style, the quoting of sources.

(2) And the like. Such as a mill or any kind of workman's tool. (Rosh). See P.Mg. that the same applies to such vessels with which work itself is not done--such as a tank for brewing beer or a cooking-pot and the like. Since the non-Jew is, in any case, doing work with them, he appears to be the Jew's agent.

What Rabbeinu Yonah does mean to exclude is a case where he rents him a shirt or a garment, etc.--some type of object with which work is not meant to be performed--which one may rent out to him even on Erev Shabbos.

Analysis

In sub-paragraph 2, the Mishnah Berurah interprets Rabbi Karo's statement "some /authorities/ say that work tools, such as a plow and the like are forbidden to be rented to a non-Jew on Erev Shabbos." Rabbi Kagan, in this sub-paragraph develops the Shulchan Aruch's stringent

adjudication based upon the Bet Yosef's commentary. *The Mishnah Berurah continues his literary halachic structure and does not dispute the Shulchan Aruch, but rather interprets it. To stress this point, that this is an interpretation of Karo's law and not his halachic preference, he forms sub-paragraph 2 by citing by name rabbinical authorities as the Semaq, Rosh, and Rabbeinu Yonah. Furthermore, the following statements are quoted from the Bet Yosef commentary: "To such vessels with which work itself is not done--such as", "doing work with them, he appears to be the Jew's agent" and "where he rents him a shirt or a garment, etc.--some type of object with which work is not meant to be performed--which one may rent out to him even on Erev Shabbos."

The Mishnah Berurah, who frequently does not cite 'former rabbinical authorities' expresses his reservation about Karo's stringent ruling in the opening quotation from such an authority, the Rosh, a source whose halachic acceptance surpasses the 'latter rabbinical authorities'. In addition, Rabbi Kagan refers the reader in Sha'ar Ha-Tziyun 3 to the Babylonian Talmud, an authority cited infrequently within the literary style and structure of the Mishnah Berurah sections being analyzed.

While in the Mishnah Berurah text Rabbi Kagan does not contradict the Shulchan Aruch in the Ba'eyr Heytev, s.v. "As a Plow", he suggests a more lenient opinion. He cites Rabbi

Akiva Eiger who writes: "One can answer that it is referring to specific items that one does with them work of a Torah category it is permitted, since it only seems as he is transgressing the prohibition of rest of rest (*shevut deshevut*).⁵²

(3) As part of an overall payment. But it is forbidden according to all opinions to take Shabbos profits separately, even for an object not used for work, or for renting him a room to live in (as will be explained below in Sec. 306, Par. 4).

Analysis

In sub-paragraph 3, the Mishnah Berurah explains the stringent conditions of Karo's stipulations for the law that renting to a Gentile must be "part of an overall payment." Rabbi Kagan, following the lead in the footsteps of the 'latter rabbinical authorities' such as the Geraz, Tosafot Shabbat, Elya Rabba and the Taz, also quotes the Magen Avraham. The Mishnah Berurah offers two modifications in the Magen Avraham's text. First, for the purpose of clarity, he writes: "Or for the renting him a room . . ." instead of the Magen Avraham's phrase "even in a room rented." Second, he adds the statement "according to all opinions", and omits the Magen Avraham's conclusion, "in this are cancelled the words of the Olat Shabbat who disputes the Hagot Maimoniot." Rabbi Kagan's modification here is an example of his literary form, where he prefers to avoid dispute among rabbinical authorities and to emphasize

concurrence, thus strengthening the acceptance of his commentary.

(4) Lending, etc. For since the Jew has no profit from the non-Jew's work, it will not be said that he is his agent for this purpose. Therefore, it is permitted to lend him even implements with which the non-Jew will do work, even for the day of Shabbos alone.

Analysis

In sub-paragraph 4, the Mishnah Berurah interprets, develops and emphasizes the accommodative statement of the Shulchan Aruch, "lending him is permitted even on Erev Shabbos." Although Rabbi Kagan cites no references, two of the three segments of sub-paragraph 4 are quoted from 'latter rabbinical' authorities'. The opening statement, "for since the Jew has no profit from the non-Jew's work, it will not be said that he is his agent for this purpose", is quoted from the Geraz. The concluding statement, "even implements that the non-Jew will do work with them", is quoted from the Magen Avraham.⁵³

The second segment, "therefore it is permitted to lend him even implements with which the non-Jew will do work, even for the day of Shabbos alone" is analogous to the statement of Rabbi Akiva Eiger. Rabbi Kagan's preference to emphasize the lenient view forces him to offer Rabbi Akiva Eiger's accommodation, although it is only suggested in this one source. This literary style of the Mishnah Berurah is

employed only in instances when it does not contradict other major 'latter rabbinical authorities'.

(5) We do not deem, etc. I.e., even though he does not lend it to him free of any obligation but for a consideration that he will in turn lend him /something else/ subsequently. This is nevertheless permitted since this does not follow the usual form of renting, where one would say: "I shall give you this so that you will lend me your articles." (B.Y.) See Beyur Halachah.

Analysis

Sub-paragraph 5 is initiated by the formulary "i.e." (*d'hinu*). Rabbi Kagan interprets the accommodation of the Rema's statement, "we do not deem this to constitute a formal rental." As inferred, at the conclusion of sub-paragraph 5, the majority of this sub-paragraph is quoted from the Bet Yosef. Thus the Mishnah Berurah is able to indicate concurrence between Karo's and Isserles's opinions. This literary style preserves Rabbi Kagan's purpose not to dispute or cause dispute amongst the Shulchan Aruch authors within the Mishnah Berurah text, but rather, when possible, to show their concordance. Only in the Beyur Halachah does Rabbi Kagan challenge the Bet Yosef. This disagreement is presented to afford the reader with an additional accommodation. The Chafetz Chaim, after citing a series of 'latter rabbinical authorities' as the Gra, Elya Rabba and Peri Megadim to support his argument, concludes with "this must be further explored" (*tzarich iyun*), thus proclaiming his uncertainty regarding his decision.

Shulchan Aruch

2. It is forbidden to lend (6) any article to a non-Jew on Shabbos or (7) even on Erev Shabbos if it is close to dusk, when there is not sufficient time to remove it from the lender's premises (8) before dusk. For an observer might assume that the Jew (9) has ordered him to carry it out.

Mishnah Berurah

(6) Any article. That is, even articles not used for the performance of work. This is forbidden even according to the first opinion.

(7) Even on Erev Shabbos if it is, etc. It is then forbidden even to sell it to him or give it to him as a gift, as is explained below. Sec. 252, Par. 1. (See Mishnah Berurah there for what I have written on this.)

Analysis

In sub-paragraph 6, the Mishnah Berurah interprets the conditions of Karo's law "it is forbidden to lend any article to a non-Jew on Shabbos or even on Erev Shabbos." This interpretation is initiated by the formulary "that is", (*d'hinu*). In this sub-paragraph, Rabbi Kagan attributes his explanation to Karo's commentary of the Tur Shulchan Aruch, the Bet Yosef. Thus the stringent view is proffered in sub-paragraph 6. In addition this is further evidence to the literary style of the Mishnah Berurah, as well as the application of the formulary, "that is" (*d'hinu*).

The first statement of sub-paragraph 6, "that is, even articles not used for the performance of work", is quoted from the 'latter rabbinical authority' the Olat Shabbat. Rabbi Kagan does not cite a reference in this sub-paragraph.

In sub-paragraph 7, the Mishnah Berurah continues to explain Karo's law discussed in sub-paragraph 6. Sub-paragraph 7, which commences with the phrase "and is forbidden" (v'asur) reads as a direct continuation of the above sub-paragraph. The statement in this latter sub-paragraph, "even to sell it to him or give it to him as a gift, as explained below, section 252 paragraph 1" is quoted from the Elya Rabba. No reference is offered in sub-paragraph 7.

The Mishnah Berurah concludes sub-paragraph 7 with reference to "section 252 paragraph 1, see Mishnah Berurah there for what I have written on this." In section 252 Rabbi Kagan cites a series of 'latter rabbinical authorities', including the Elya Rabba quoted in sub-paragraph 7. The Mishnah Berurah here prefers to analyze the law on lending an article to a Gentile through the texts of other 'latter rabbinical authorities', thus he presents a principle of his literary style and shows further dependency upon the 'latter rabbinical authorities'.

Furthermore, this concluding statement gives further evidence to my suggestion as to the editorship of the Mishnah Berurah commentary.

(8) Before dusk. . . I.e., before sunset. [Maggid Mishneh]

Analysis

In sub-paragraph 8, Rabbi Kagan interprets and defines Karo's phrase "before dusk." Through the formulary "i.e." (*d'hinu*), which initiates interpretation, the Mishnah Berurah continues his 'grouping' style. The 'latter rabbinical authorities' most frequently cited in the Mishnah Berurah commentary are not concerned with this issue, therefore Rabbi Kagan turns to the Maggid Mishneh, a less frequently cited 'latter rabbinical authority', but of equal rabbinical status, for this definition.

(9) Has ordered him to carry it out. Out to the public domain. It is forbidden even /in our towns where we/ do not have any true public domain, since telling a non-Jew /to do work/ constitutes a rabbinical prohibition, even in connection with rabbinical injunctions.

Accordingly, if the city is encompassed by a wall, in which case it is permitted to carry throughout the city, and the non-Jew lives there as well, it is permitted to lend him articles not used for performing labor. But it is forbidden to sell or rent him /articles/ even in such a case, lest it be said that he sold or rented him /something/ on Shabbos.

On the other hand, if they are implements of work, it is forbidden even to lend them to him unless he takes them out of the entrance of his house before Shabbos, so that it not be said he is doing work as the Jew's agent on Shabbos.

Analysis

In sub-paragraph 9, the Mishnah Berurah clarifies the conditions for Karo's adjudication discussed in paragraph 2. This sub-paragraph is formed from the statements of the Elya Rabba, Magen Avraham, Taz and Peri Megadim. All these 'latter rabbinical authorities' are identified in Sha'ar Ha-Tziyun 6 through 10, which are footnoted in sub-paragraph 9.

To illustrate this formation I will reproduce sub-paragraph 9 with the Magen Avraham in bold print and the Taz underlined. The Peri Megadim and Elya Rabba will be identified by name:

["Out to the public domain. -Elya Rabba] It is forbidden even in our towns where we do not have true public domain, since telling a non-Jew constitutes a rabbinical prohibition, even in connection with rabbinical injunctions.

Accordingly, if the city is encompassed by a wall, in which case it is permitted to carry throughout the city, and the non-Jew lives there as well, it is permitted to lend him articles not used for performing labor. But it is forbidden to sell or rent him even in such a case lest it be said that he sold or rented him on Shabbos.

On the other hand, if they are implements of work, it is forbidden even to lend them to him unless he takes them out of the entrance of his house before Shabbos, so it is not to be said that he is doing work as the Jew's agent on Shabbos." -Peri Megadim]

The phrase "in our towns" (*didan*) may imply to the reader a contemporary issue discussed by the Mishnah Berurah, but Rabbi Kagan is not concerned here with his reality. Rather, using his literary style he quotes the 'latter rabbinical authorities' of a century earlier and incorporates their lexicon. For the Chafetz Chaim "Torah"

is relevant and a reality even if it hails from an earlier era.

The segment of sub-paragraph 9 not quoted verbatim, as footnoted in the Sha'ar Ha-Tziyun 8 and 9, is analogous to the Peri Megadim.

The Mishnah Berurah in sub-paragraph 9 emphasizes his preference for the lenient opinion when he writes "accordingly, if the city is encompassed by a wall, in which case it is permitted to carry throughout the city." Although this statement is quoted from the Magen Avraham, this 'latter rabbinical authority' only suggests such an accommodation where there is a "required situation" (*l'et hatzorech*). Rabbi Kagan is prepared to "stretch" the Magen Avraham's law to all situations and not specifically "required situations." By doing so, the Mishnah Berurah does not dispute the Magen Avraham, but elaborates upon his adjudication. This decision of Rabbi Kagan is based upon the Elya Rabba's and Taz's conclusions, as stated in Sha'ar Ha-Tziyun 7.

Although not relevant to this section, Rabbi Kagan permits himself to discuss the issues of sub-paragraph 9 within the context of section 246 since 'latter rabbinical authorities' also present here their analysis of the topic. This point is emphasized in the Sha'ar Ha-Tziyun 8 and 9 where he writes: "Magen Avraham in section 252, and the

Peri Megadim copied it to our issue. (Peri Megadim on this section)"

Shulchan Aruch

3. (10) It is forbidden to rent or to lend one's animal to a non-Jew. (11) to do work with it on Shabbos, since a person is obligated (12) to have his animal rest on Shabbos.

Gloss: However, one may rent it or lend it /to the non-Jew/ on the condition that he return it to him before Shabbos. But it is not sufficient that one stipulate with the non-Jew that the animal rest on Shabbos, since (13) the non-Jew is not trusted for this. (...)

In a case where he did lend it or rent it to a non-Jew and made a condition with him that he return it before Shabbos, but he withheld it for Shabbos, (14) /the Jew/ should either (15) privately declare it ownerless property (*hefkeyr*) before Shabbos, or else declare the (16) ownership of his animal transferred to the non-Jew--(17) by which he will be saved from /violating/ a Torah prohibition.

Gloss: He may, if he wishes, declare it ownerless in front of three people, which is the law for all other declarations of ownerlessness. Despite this, no other person will have the right to take possession of it, (18) since certainly his intention is only to free himself of the Shabbos violation. (...)

All this refers only to Shabbos. As for Yom Tov, (19) a person is not obligated to have his animal rest on Yom Tov. (...)

Mishnah Berurah

(10) It is forbidden to rent. Even on Sunday, and even as part of a more inclusive rental.

Analysis

In sub-paragraph 10, the Mishnah Berurah briefly clarifies the stringent law of the Shulchan Aruch. As in sub-paragraph 7 the opening formulary "even" (*afilu*) initiates the stringent statement proffered in sub-paragraph 10. In Sha'ar Ha-Tziyun 11, Rabbi Kagan attributes his

statement of "the concurrence of the adjudicators" (*haskamat haposkim*). Although there is no dispute among the 'latter rabbinical authorities', sub-paragraph 10 is quoted from the Olat Shabbat.

As stated above, the Mishnah Berurah elects to commence his commentary of paragraph 3 with a brief stringent law. Rabbi Kagan implicitly conveys to the reader that his subsequent discourse on paragraph 3 will present the stringent view. Only in sub-paragraph 12 does he explicitly state this purpose and offer the reader his rationale.

(11) To do, etc. This should read: "Lest he do work with it." [*Gra*; and so it is evident from the *Shulchan Aruch* itself.]

Analysis

Initiated by the formula "this should read" (*tzarich lomar*), the Mishnah Berurah in sub-paragraph 11 proffers a textual amendment. As I have discussed in my analysis of section 245, this is one of the purposes of the Mishnah Berurah commentary, although Rabbi Kagan does not identify it explicitly. Sub-paragraph 11, as noted in the Mishnah Berurah text, is a direct quotation for the *Gra*.

(12) To have his animal rest on Shabbos. As it is written: "In order that your ox and donkey may rest, etc." Even though he rents out the animal to the non-Jew, the halachic ruling is that "Renting does not constitute acquisition." Consequently, it is the Jew's animal, and he is commanded to have it rest on Shabbos.

Some, on the other hand, hold that we deem renting it to constitute acquisition in such a case where this would result in our acting more stringently; therefore, if a Jew rents an animal from a non-Jew, he is commanded to have it

rest on Shabbos. It is proper to follow the more stringent view since there is a Torah prohibition involved.

If he has rented it from a non-Jew and rents it out to another non-Jew, it is permitted whichever way one looks at it.

If he acquires an animal from a non-Jew or sells it to a non-Jew through the mode of *Meshichah* (drawing) alone or through payment of money alone, this constitutes a doubt in law, in which we must be stringent as regards the commandment requiring resting one's animal /and therefore forbid having it work/. [To. Sh.]

Analysis

In sub-paragraph 12 the Mishnah Berurah glosses and clarifies Karo's law found in paragraph 3. This sub-paragraph, structured as a rabbinical discourse, is formed, in addition to Kagan's interpretive remarks, from the Tosafot Shabbat and the Magen Avraham. To illustrate this I will copy sub-paragraph 12 with the Tosafot Shabbat in bold print and the underlining for the Magen Avraham.

"As it is written: 'In order that your ox and donkey may rest etc.' Even though he rents out the animal to the non-Jew, the halachic ruling is that 'Renting does not constitute acquisition.' Consequently, it is the Jew's animal, and he is commanded to have it rest on Shabbos.

Some, on the other hand, hold that we deem renting to constitute acquisition in such a case where this would result in our acting more stringently; therefore, if a Jew rents an animal from a non-Jew he is commanded to have it rest on Shabbos. It is proper to follow the more stringent view since there is a Torah prohibition involved.

If he has rented it from a non-Jew and rents it to another non-Jew, it is permitted whichever way one looks at it.

If he acquires an animal from a non-Jew or sells it to a non-Jew through the mode of drawing alone or through paying of money alone, this constitutes a doubt in law, in which we must be stringent as regards the commandment requiring resting one's animal."

Sub-paragraph 12 proffers a basic discourse of the law concerned with the transferring of animals to a Gentile on Shabbat. In this sub-paragraph, Rabbi Kagan reveals an additional variable of the methodology that forms his halachic decision-making. He states "as it is written 'In order that your ox and donkey may rest etc.' . . . it is proper to follow the more stringent view since there is a Torah prohibition involved." The *halachah* related to a Torah prohibition demands of Rabbi Kagan to limit his accommodative position, a position which he is able to apply more readily in a rabbinic law. This point is further emphasized in the *Be'ur Halachah* where Rabbi Kagan discusses his social reality, the function of the horse, and its relationship to the law of "your animal resting on Shabbos."

Alternately, although a Torah Prohibition is involved Rabbi Kagan is not deterred from adopting the lenient position when applicable. This is revealed first in *Sha'ar Ha-Tziyun* 13, where the *Mishnah Berurah* clarifies his

statement "it is proper to follow the more stringent view . . ." He writes: ". . . Some 'latter' rabbinical authorities' claim that it does not infer this /prohibition/ since it is only written it is good to be careful, since this was said from the mouth of a Gaon . . . and therefore I wrote it is proper to follow the stringent view." (Sha'ar Ha-Tziyun. 13)

The Chafetz Chaim, in addition to reducing the severity of the Torah prohibition, enlightens the reader on his literary style. An adjective (or as I suggest any similar word) in the Mishnah Berurah text found before the prohibition vocable, as the verb "stringent" (*l'hachmir*) for the Mishnah Berurah is a suggestion not a direct prohibition. Thereby Rabbi Kagan is able to convert the majority of Torah prohibited adjudications in sub-paragraph 12 to accommodations. Rabbi Kagan's search for the lenient opinion is further exemplified in the two concluding laws where both are explicit accommodations.

(13) The non-Jew is not trusted. Nor will he be afraid to do work with it, for since it is in his domain through borrowing or renting, he will not be treated, if apprehended, as a thief for this.

This is unlike the previously mentioned situation /where it is permitted/ where /the Jew/ stipulates that /the non-Jew/ return it to him prior to Shabbos, for there the /arrangement between them of/ borrowing or renting has already ended before Shabbos. (See below, Sec. 305, Par 23.) [Acharonim]

Analysis

In sub-paragraph 13, the Mishnah Berurah explains the reasons for the Shulchan Aruch's conditions stipulated in a case when the Gentile is not believed. Although the terminology of sub-paragraph 13 is not analogous with that of Rabbi Kagan's prior sub-paragraphs, the majority of the language is quoted from the 'latter rabbinical authorities' found in the Mishnah Berurah texts. Although most 'latter rabbinical authorities' do not discuss the theme of sub-paragraph 13, the Mishnah Berurah, influenced by the Taz and Ba'eyr Heytev, incorporates this topic in section 246. Furthermore the phrases, "afraid to do work with it" and "he will not be treated, if apprehended, as a thief for this", are quoted from the Taz, even though not used in the same context. In addition the general vocabulary and language of sub-paragraph 13 is styled as a rabbinical discourse based upon the phraseology of the Rabbi's discussion of this topic.

At the conclusion of sub-paragraph 13, Rabbi Kagan attributes this adjudication to the 'latter rabbinical authorities'. In contrast to previous sub-paragraphs, he does not identify who these 'latter rabbinical authorities' are. Furthermore, at this conclusion the reader is referred to section 305. An examination of Karo's law in section 305 reveals a contradiction between that section and this one. Preserving his literary style Rabbi Kagan prefers to discuss

this disagreement and merely refers his reader to the later source.

I suggest that the Mishnah Berurah, by choosing to convey the theme of sub-paragraph 13 here, although the majority of 'latter rabbinical authorities' discuss it in section 305, Rabbi Kagan is implicitly conveying his attitude or lack of trust in the Gentile. This feeling is also conveyed, in later sub-paragraphs of this section. Alternately, Rabbi Kagan does not wish to miss the opportunity to emphasize an accommodation. This is found in the latter segment of sub-paragraph 13, where the Mishnah Berurah states: "This is unlike the previously mentioned situation /where it is permitted/ where /the Jew/ stipulates that the /non-Jew/ return it to him prior to Shabbos, for there the /arrangement between them of/ borrowing or renting has already ended before Shabbos."

(14) /The Jew/ should either declare it ownerless property, etc. This, however is only after the fact, where he stipulated with him /to return it/ and he withholds it on Shabbos. As a matter of first preference (*lechatchilah*), however, it is forbidden to rent it out with an intention to render it ownerless when Shabbos arrives. This is even if he should declare it ownerless before three people--since not everyone will be aware of its having become ownerless, and people will therefore suspect that the Jew's animal is doing work on Shabbos.

Even in the case of a sale, it is permitted only if he sells his animal to the non-Jew through a valid sale for all the days of the week; not, however, if he sells it to him for Shabbos alone---because of possible suspicion, as mentioned above.

The Bach, however, permits, even as a matter of first preference, renting it out with the intention of subsequently declaring it ownerless before three people. For since three people will know about it, the matter will

become widespread knowledge and no suspicion will arise. In a case of pressing need (*sha'as ha-dechak*) one may perhaps rely on his opinion. (We shall elaborate /on this/, God willing, at the end of the Section.)

Analysis

In sub-paragraph 14, the Mishnah Berurah clarifies the circumstances for Karo's law, "the Jew should either privately declare it ownerless property." Sub-paragraph 14 is structured from the commentary of the Magen Avraham and the Tosafot Shabbat, with Rabbi Kagan's interpretive remarks. To illustrate this I will copy sub-paragraph 14 with the Magen Avraham in bold print, the Tosafot Shabbat in superscript and the Geraz underlined.

"This, however, is only after the fact, where he stipulated with him and he withholds it on Shabbos. As a matter of first preference however, it is forbidden to rent it out with an intention to render it ownerless when Shabbos arrives. This is even if he should declare it ownerless before three people--since not everyone will be aware of its having become ownerless, and people will therefore suspect that the Jew's animal is doing work on Shabbos.

Even in the case of a sale, it is permitted only if he sells his animal to a non-Jew through a valid sale for all the days of the week; not, however, if he sells it to him for Shabbos alone--because of the possible suspicion, as mentioned above.

The Bach, however, permits even as a matter of first preference, renting it out with the intention of subsequently declaring it ownerless before three people, ~~for~~ since three people will know about it, the matter will become wide spread knowledge and no suspicion will arise. In a case of pressing need one may perhaps rely on his opinion. (We shall elaborate, God willing, at the end of the Section.)"

Although only a brief statement is quoted from the Geraz, the latter segment of sub-paragraph 14 is analogous to this 'latter rabbinical authority', sub-paragraph 11.

The Mishnah Berurah following its literary style, commences sub-paragraph 14 with the stringent opinion but concludes with the lenient view of the Bach. Furthermore, Rabbi Kagan writes "in the case of pressing need one may perhaps rely on this opinion", but concludes "we shall elaborate /on this/ God willing, at the end of the section." As I discussed above in previous sections, the Mishnah Berurah does not confuse his social reality and ethical suggestions with his halachic discourse. Thus he refers the reader to the conclusion of section 246, where he discusses his social reality, and a continuation of the lenient view that commences in sub-paragraph 14. This same pattern, where the reader is referred to the section's conclusion for a discussion of the social reality, is repeated throughout the Mishnah Berurah's commentary to section 246.

(15) Privately. For them he is not commanded to have it rest since it is not his, for he has rendered it ownerless.

Even though a declaration of ownerlessness must be made before three persons, this is merely a rabbinical requirement, since by Torah law it is sufficient that such a declaration be made in private. In a case such as this, therefore, where he has already rented it out and he stipulated with him that he return it but /the non-Jew/ withholds it, this is sufficient for avoiding /the violation of/ a Torah prohibition.

See *Beis Yosef* that there are Poskim who hold that here, too, (even where it is after the fact) we require three persons. As a matter of preference, therefore, it is good, if possible, to be scrupulous in this respect.

In any event, one should at least take pains to see to it to make the declaration of ownerlessness before one person, since many of the outstanding Poskim hold that even by Torah law it is not deemed ownerless property unless the declaration of ownerlessness be made at least before one person. It is enough here that this one person be one of the members of his family.

Analysis

In sub-paragraph 15, the Mishnah Berurah continues with the purpose, content and literary style with which he began in sub-paragraph 14. Rabbi Kagan clarifies Karo's law, "the Jew should either privately declare it ownerless property before Shabbos" and deals with the issue of "declaring it ownerless before three people." As in sub-paragraph 14, sub-paragraph 15 is written in the style of a rabbinical discourse, employing the phraseology of the 'latter rabbinical authorities'. For example, the statement "even though a declaration of ownerlessness must be made before three persons", is quoted from the Geraz. The phrases "such a declaration be made in private" or "this is sufficient for avoiding /the violation of/ a Torah

prohibition", are found in many 'latter rabbinical authorities' such as the Tosafot Shabbat and Elya Rabba. Furthermore the sentence, "therefore, it is good, if possible, to be scrupulous in this respect", is quoted from the Peri Megadim. ✓

Although Rabbi Kagan applies the terminology of these 'latter rabbinical authorities', they are not necessarily in agreement with his adjudication. I suggest that because the Mishnah Berurah elects to present both views in his commentary, he chooses as a literary style quotations from a variety of 'latter rabbinical authorities' that represent both opinions. Furthermore Rabbi Kagan explicitly states his problem with this disagreement among the 'latter rabbinical authorities', and writes, as a matter of preference, therefore, it is good, if possible, to be scrupulous in this respect. In any event . . . since many of the Poskim hold . . ."

Preserving his literary pattern, the lenient view is presented at the conclusion of the sub-paragraph, thereby, as in other rabbinical literature, giving it greater authority. Although only partially stated the accommodative opinion is fully stated, here, in Sha'ar Ha-Tziyun 18.

(16) Ownership of his animal transferred to the non-Jew. See M.A. whose view is that this is valid only if he tells him in his presence, "My animal is hereby your acquisition," in which case the non-Jew has the proper intention for acquiring it. It becomes his by this pronouncement since at that time it is in his domain, and /we apply the rule/, "His courtyard acquires it for him."

If on the other hand, he says this is not in his presence, the non-Jew does not in any way acquire it. Even if he transfers it to him through another Jew, this, too, is of no avail, as explained in *Choshen Mishpat*, Sec. 243. Par. 14. The *P.Mg.* and other Acharonim agree with the *M.A.*

It is obvious that even if he says, "My animal is hereby your acquisition," it is required that there be a setting of the sales-price as well, for otherwise it can in no way be a valid sale. (*Chayei Adam*, Sec. 58, holds the same.)

Analysis

In sub-paragraph 16, the *Mishnah Berurah* continues his discourse on the theme presented in sub-paragraph 14 and 15. Kagan's wording continues to mirror the 'latter rabbinical authorities', especially the *Magen Avraham*. In contrast to sub-paragraph 14 and 15, sub-paragraph 16's style of clarification is initiated by the formulary "see . . ." (*ayin*).

Rabbi Kagan preserves his halachic pattern and adheres to the opinion of the *Magen Avraham*, although this is a stringent view. The *Mishnah Berurah's* unease with his decision is expressed in sub-paragraph 16 when he finds the need to declare "the Peri Megadim and other Acharonim agree with the *Magen Avraham*. It is obvious . . ." Furthermore, this point is emphasized in *Sha'ar Ha-Tziyun* 19 where he states: "And even though Elya Rabba exerted efforts to reconcile the words of the Shulchan Aruch, his words are not at all acceptable. So too did the Peri Megadim argue against him, as did all the 'latter rabbinical authorities'."

Alternately, in these last three sub-paragraphs the Chafetz Chaim has discussed at length the stringent views concerned with the transfer of ownership of Jewish property to a Gentile, at times accepting these as law. I suggest that Rabbi Kagan is implicitly conveying his negative attitude toward such a Jew and Gentile relationship. Although this ruling is based on a halachic discourse his adoption of the stringent view, in contrast to the accommodative pattern implies my suggestion. This is also in agreement with my argument in previous sub-paragraphs and will be further explored in the summary of the study.

(17) By which he will be saved, etc. I.e., it is preferable, however, not to rely on this (to rent with the intention of rendering it ownerless upon the arrival of the Shabbos, or transferring ownership of it to the non-Jew at that time) since rendering an article ownerless or transferring ownership does not become widespread knowledge, so that there is a problem of *mar'is ha-ayin* (arousing suspicion), as mentioned above. See the end of the Section.

Analysis

In sub-paragraph 17, the Mishnah Berurah clarifies Karo's statement "by which he will be saved from /violating/ a Torah prohibition." The opening formulary "i.e." (*ratzah lomar*) initiates and emphasizes that the sub-paragraph 17 clarification is Rabbi Kagan's view, who he further expresses this point in his conclusion "see the end of this section", where he develops his own ruling. I have also discussed this argument in sub-paragraph 14.

The majority of the wording in sub-paragraph 17 is quoted from the Geraz. Rabbi Kagan here offers no reference to this 'latter rabbinical authority'.

(18) Since certainly his intention is only. I.e., it was certainly not his intention that it remain ownerless property forever, but only for the day of Shabbos--in order to free himself from the Shabbos prohibition--and to have it return to his possession after Shabbos.

On the day of Shabbos itself, however, it is certainly ownerless property in the full sense of the word. [For even it has the status of ownerless property, since the Talmud states that an article rendered ownerless for even one day is considered ownerless.] One need not fear, moreover, that someone else might take possession of it on Shabbos itself, for certainly the non-Jew will not permit this so long as it remains in his hands for his work.

Analysis

In sub-paragraph 18, Kagan clarifies the Rema's law "despite this, no other person will have the right to take possession of it, since certainly his intention is only to free himself of the Shabbos violation." The formulary "i.e." (*ratzah lomar*), which is also found in sub-paragraph 17, emphasizes that the Mishnah Berurah is explaining the statement of the Rema, and not Kagan's own adjudication.

The Mishnah Berurah in sub-paragraph 18 is confronted with a halachic dispute between the Magen Avraham and other 'latter rabbinical authorities'. The Magen Avraham interprets Isserles's law, that the Jew's animal is not entirely rendered ownerless. The other 'latter rabbinical authorities' claim the animal is indeed ownerless. The Mishnah Berurah deviates from his halachic pattern and does not side

with the Magen Avraham's view, but rather rules in accordance with the other 'latter rabbinical authorities'. Rabbi Kagan is prepared to diverge from his customarily legal pattern as he is confronted with the possibility of a law that entails a Torah prohibition. This is emphasized in sub-paragraph 18 in his statement: "In order to free himself from a Shabbos prohibition", thus implying this is a Torah prohibition. Furthermore, the fact that this ruling has no practical implications contributes to Rabbi Kagan's decision to suggest the Magen Avraham's opinion. As the Mishnah Berurah states: "One need not fear, moreover, that someone else might take possession of it on Shabbos itself"

Rabbi Kagan's dissatisfaction with his resolution to rule against the Magen Avraham is emphasized in the Sha'ar Ha-Tziyun 20 where he discusses his decision in detail and includes a series of 'latter rabbinical authorities' to substantiate this ruling. He writes: "So it is implied from the Bet Yosef and this is how the Olat Shabbat has written, that on Shabbos itself it is entirely renounced from ownership for if not it would not help to cancel the rest of the animal since it is still his animal, see there. And so agrees the Taz, see there, that wrote in detail and deferred ~~who~~ wanted to explain differently and even the Magen Avraham agrees to explain the words of the Rav in accordance with the opinion of the Levush. P did not

conclude so since a number of 'latter rabbinical authorities' questioned him on this matter, and they are the Maamar Mordechai, Chemed Mosheh, Bet Meir and in addition the Elya Rabbi and Peri Megadim that in conclusion adjudicated as the Taz and Olat Shabbat, claiming that it is required to be renounced entirely of its ownership, otherwise the prohibition of Shabbos is not removed. So it appears in the Gra's commentary, that on Shabbos day it is ownerless property and as such it appears in the Ba'eyr Heytev and the Geraz who did not refer at all to the Magen Avraham."

Sub-paragraph 18 is formed from the phraseology of the 'latter rabbinical authorities' such as the Taz, Geraz, and Olat Shabbat with Rabbi Kagan's interpretive comments. The terminology of this sub-paragraph is not unique to any specific 'latter rabbinical authority', but is based on the different 'latter rabbinical authorities' that deal with the theme of sub-paragraph 18.

(19) A person is not obligated, etc. For we deduce the commandment that one's animal rest on Shabbos from what is written: "...so that your ox and your donkey may rest like you,"--a passage written in connection with Shabbos. Nonetheless, one should not rent them out except as part of a more inclusive rental, so that it not constitute profits earned from Yom Tov.

But the *Maharshal* disputes this view, his opinion being that Yom Tov and Shabbos are equal in this, as in respect to all labors.

See *M.A.* who discusses the matter at length, citing that the *Beis Yosef* in Sec. 495 quotes /various/ opinions of Rishonim on this subject and inclines towards the view that it is prohibited, and that, accordingly, it is proper to follow the stringent view.

The *Beyur Ha-Gra* also discusses the matter at length, arriving at the conclusion that the correct view is that of the above-mentioned *Maharshal*. Likewise, below, in Sec. 495, Par. 3, the *Gra* explains that the reason for /the law/ appearing there in the *Shulchan Aruch* (that one must not carry out a load on an animal on Yom Tov) is because of /the commandment that one/ rest one's animals.

Analysis

In sub-paragraph 19, the *Mishnah Berurah* glosses and disputes the *Rema*. Rabbi Kagan initiates his adjudication with a halachic deduction based on a Torah passage, thus attributing and raising his ruling to a Torah prohibition. In order to substantiate his decision, the *Mishnah Berurah* quotes and analysis in the *Mishnah Berurah* text and *Sha'ar Ha-Tziyun* 22 and 23 an array of 'former' and 'latter rabbinical authorities'. Furthermore, the literary form of sub-paragraph 19 is presented as a rabbinical discourse commencing with a Torah passage and citing additional rabbinical sources. Rabbi Kagan, in the *Mishnah Berurah* text of sub-paragraph 19, emphasizes the two 'latter rabbinical authorities' upon whom he as a rule is most dependent for his halachic decisions, the *Magen Avraham* and the *Gra*. He writes "See the *Magen Avraham* who discusses this matter at length . . . and that accordingly, it is proper to follow the stringent view. The *Beyur Ha-Gra* also discusses the matter at length, arriving at the conclusion that the correct view is that of the above mentioned *Maharshal*." In the *Sha'ar Ha-Tziyun* 23 Rabbi Kagan states: "See there that with his comments he removes the question of

the Tosafot Yom Tov and also rejects what the Magen Avraham wished to say that carrying on Yom Tov does not apply to one's animal." One may infer from the conclusions of sub-paragraph 19 that in the case of a dispute between the Magen Avraham and the Gra, the Mishnah Berurah prefers to side with the Gra.

As stated above, the Mishnah Berurah in sub-paragraph 19 disputes the adjudication of the Rema. Although Rabbi Kagan states that the Mishnah Berurah is a commentary upon the Shulchan Aruch, when the 'latter rabbinical authorities' are in disagreement with this code of law he elects to identify with them. Thus the Chafetz Chaim offers further evidence to his halachic pattern, as well as his dependency upon the 'latter rabbinical authorities'.

The phraseology of sub-paragraph 19 is adapted from the 'latter rabbinical authorities'. For example the opening statement: "For we deduce the commandment that one's animal rest on Shabbos from what is written . . . so that your ox and your donkey may rest like you", is found verbatim in the Peri Megadim. The later segments of the sub-paragraph are analogous to the 'latter rabbinical authorities' quoted in the sub-paragraph 19.

Shulchan Aruch

4. If a Jew rents oxen to a non-Jew for plowing, whereupon /the non-Jew/ plows with them, some /authorities/ permit this (20) where the non-Jew assumes the entire liability /for the animal/ for death, robbery, theft, and rise and fall in value. There are others who say that since

the non-Jew cannot sell it if he wishes, it is deemed the Jew's animal. (21) (See below, this Section.)

Mishnah Berurah

(20) Where the non-Jew assumes, etc. For thereby the animal is considered as if it is the non-Jew's, and it is therefore permissible to plow with it on Shabbos. Even though he must return it as it is if nothing befalls it, nevertheless it is now completely in the possession of the non-Jew, considering that even any rise or fall in value is his /loss or gain/.

Analysis

In sub-paragraph 20, the Mishnah Berurah interprets Karo's accommodative law that is concerned with conditions of renting to a Gentile 'the animal of a Jew that will work on Shabbos'. The phraseology of sub-paragraph 20 is quoted from the Levush with interpretive remarks of Kagan. To illustrate this point I will reproduce sub-paragraph 20 underlining the quote from the Levush.

"For thereby the animal is considered as if it is the non-Jews, and it is therefore permissible to plow with it on Shabbos. Even though he must return it as it is if nothing befalls it, nevertheless it is now completely in the possession of the non-Jew, considering that even any rise or fall in value is his." No reference to the Levush is cited by the Mishnah Berurah.

While in sub-paragraph 20, the Mishnah Berurah proffers his interpretation of the Shulchan Aruch's law, Rabbi Kagan states that the decisive factor in the adjudication to render the animal the Gentiles property is the

condition of "any rise or fall in the value is his /loss or gain/." This innovation on the part of the Mishnah Berurah is further clarified in the Sha'ar Ha-Tziyun 24 where Kagan states: "But without loss or gain he is no better than a borrower who too is responsible for accidental damages and one is nevertheless forbidden to lend it to him, for borrowing is not acquisition and so it appears to me in section 3." In addition, the formulary "nevertheless" (*mikol makom*) initiates Rabbi Kagan's initiative, as discussed above.

(21) See below, etc. /I.e., the two /opinions beginning with/ "some permit," cited there, and also the gloss at the end of the Section, appear clearly to agree with those who permit it. (See what we write there.)

Analysis

In sub-paragraph 21, the Mishnah Berurah interprets and clarifies the Rema's statement: "See below, this section." This interpretation is initiated by the formulary "i.e." (*dhinu*). Kagan, in sub-paragraph 21, emphasizes the lenient adjudication through his suggestion to the reader to examine the ruling of the Rema at the conclusion of section 246. There, the Rema clarifies his accommodative view.

The Mishnah Berurah's concluding phrase: "See what we write there", is in keeping with my analysis of sub-paragraphs 14 and 17.

* * * * *

Although I have shown the pattern, style and structure of the last ten sub-paragraphs to be in keeping with my previous analysis of the Mishnah Berurah commentary, it is possible to question this conclusion. The change in the use of quotations, from the wording of the 'latter rabbinical authorities', as well as the decision to adhere to the stringent view is to be noted.⁵⁴ Furthermore the lesser frequency with which formularies are applied in the sub-paragraphs are absent. In addition from sub-paragraph 13 to sub-paragraph 34, Rabbi Kagan's commentary, the Beyur Halachah, does not appear. This raises the question as to the authorship of the Mishnah Berurah, which I discussed in sub-paragraph 14.

Shulchan Aruch

5. If a Jew and a non-Jew are partners in an animal, it is permitted to have the non-Jew do work with it on Shabbos by stipulating a condition with the non-Jew (22) initially, at the time that they purchase it, that the non-Jew has /sole/ possession of the animal for Shabbos, and the Jew) for a weekday.

(23) If they did not so stipulate initially, it is forbidden--(24) even though they do so stipulate subsequently.

If he gives the animal to the non-Jew as a full fledged loan (*halva'ah*) entitling him, should he so desire, to give it away or sell it without the Jew's consent, (25) and sets its value as a debt upon the non-Jew, while any liability for the oxen will be borne by the non-Jew, this is permitted.

Some /authorities/ permit it even though the non-Jew is not entitled (26) to sell it, such as where the value /of the cattle/ is assumed by the non-Jew upon himself as a loan and the non-Jew then assigns /the cattle/ as a security /for this loan/ (*apothiki*) (meaning, "Upon this shall /the loan/ rest," implying: "You may collect from this alone") to the

Jew or (27) gives them to him to hold as collateral (yeharhaneym), ("pawn" in Arabic is "rahan")--(28) provided he does not stipulate, "from now on."

Some permit it (29) by having him warn the non-Jew not to do work with it on Shabbos, and /stipulating/ that should he violate this warning and do work, all liability for it will fall upon him, even with respect to unavoidable accidents (oneys)--(30) this being recorded with the /non-Jewish/ courts." If subsequently he does work with the animal on Shabbos, it will no longer be considered the Jew's animal /with regard to working with it/, since it is now the non-Jew's as far as responsibility /for anything that happens to it is concerned/ including unavoidable accidents.

Gloss: All these various permissible devices (31) are halachically proper, and one may use (32) whichever one chooses. Even if the animal belongs to the Jew completely, (33) the law for this is the same as where the non-Jew is his partner--(34) provided that he publicizes the fact that he has done it in a permissible fashion.

Mishnah Berurah

(22) Initially, at the time that they purchase it, etc. So that the animal is not the Jew's acquisition at all for the day of Shabbos. Subsequently, they may then even divide /any profits/ equally without involving any problem of *sechar Shabbos* (Shabbos profits), as stated in Sec. 245, Par. 2. This is also permitted even if they then carry equal responsibility for all the days of the week (both for weekdays and for Shabbos).

(23) If they did not so stipulate initially. But, rather, after they had entered into partnership, he told him: "You take it for Shabbos, and I, against this, for the weekdays." Then even if we should hold that there is no prohibition requiring resting one's animal here, since the non-Jew has a share in it and he does the work without the Jew's consent, it is nevertheless forbidden. For he still takes one day /of earnings/ corresponding to the Shabbos day, and this constitutes *sechar Shabbos* (Shabbos profits) not taken as part of an overall payment.

Analysis

In sub-paragraphs 22 and 23 the Mishnah Berurah explains the conditions of Karo's law, "if a Jew and non-Jew are partners in an animal . . ." The phraseology of both

these sub-paragraphs is quoted from the Magen Avraham sub-paragraph 13 with Rabbi Kagan's interpretive remarks. Although the Magen Avraham presents his commentary in one sub-paragraph, Rabbi Kagan divides his remarks into two, sub-paragraphs 22 and 23. To illustrate this formation I will reproduce these sub-paragraphs and underline the Magen Avraham's commentary.

"(22) So that the animal is not the Jew's acquisition at all for the day of Shabbos. Subsequently, they may then divide equally without involving any problem of Shabbos profits, as stated in section 245 Paragraph 2. This is also permitted even if they then carry equal responsibilities for all the days of the week (both for weekdays and for Shabbos).

(23) If they did not stipulate initially. But, rather, after they had entered into partnership, he told them: 'You take it for Shabbos, and I, against this, for the weekdays. Then even if we should hold that there is no prohibition requiring resting one's animal here, since the non-Jew has a share in it and he does the work without the Jew's consent, it is nevertheless forbidden. For he still takes one day corresponding to the Shabbos day, and this constitutes Shabbos profits not taken as part of an overall payment.' Reference in Sha'ar Ha-Tziyun 26, 27 and 28 is made to the quotations of the Magen Avraham.

In sub-paragraph 22, Rabbi Kagan continues his literary pattern and emphasizes the accommodative view of the Shulchan Aruch. The Mishnah Berurah prefers not to combine the lenient and stringent discussion of two themes and therefore separates the sub-paragraph of the Magen Avraham into two, placing the stringent theme in sub-paragraph 23.

The Mishnah Berurah preserves the halachic structure and in the sub-paragraph 23 implies that Kagan accepts the stringent view of the Magen Avraham. Only in Sha'ar Ha-Tziyun 27 does he inform the reader that the Magen Avraham is not in agreement with the Shulchan Aruch. The Sha'ar Ha-Tziyun explains that Karo's rules in the case of "if they did not so stipulate", that the Torah prohibition of "requiring the resting of one's animal" applies, while the Magen Avraham writes "that there is no prohibition requiring resting one's animal here, since the non-Jew has no share in it." Thus, Rabbi Kagan accomplishes two purposes. First, he suggests his halachic pattern in which he prefers to adhere to the 'latter rabbinical authorities' even against the Shulchan Aruch. Second, he emphasizes the accommodative possibilities.

(24) Even though they do so stipulate subsequently. From this phrase it is implied that this would certainly be forbidden where he does not at all /subsequently/ make such a condition.

The Beis Yosef, however, inclines towards the view that if he does not make the /above/ condition, "You take, etc.," even after they form the partnership, and without

going into details they divide the income of the whole week evenly, this is permitted. For /the prohibitions of both Shabbos profits and resting one's animal do not apply, since/ /the Jew/ is thereby receiving Shabbos profits as part of an overall payment. As far as the injunction requiring one's animal to rest is concerned, /the Beis Yosef/ holds that this does not apply /where the above condition was not made/, since the non-Jew works on Shabbos without his consent, by virtue of the share he has in it.

[However, /the Jew/ committed a transgression in this case at the outset when he entered into partnership with him, for he should have suspected that he might do work with the animal on Shabbos and should therefore have stipulated from the beginning: "You take, etc." See *Beis Yosef* there.l.

But implied from the wording of the *Shulchan Aruch* /as above/, it appears that /the author of the *Shulchan Aruch*/ did not want to rely on this /view/ in actual halachic practice.

Bear in mind that even according to the above-mentioned opinion of the *Beis Yosef* that there is no problem of /the requirement of/ resting one's animal in this case, it cannot be permitted to divide /the profits/ subsequently without specifying the terms /of the division/ unless it is a case of great loss, following the opinion of the *Rema* in the gloss to Sec. 245, Par. 1. From the *M.A.* it appears that one may rely on this /opinion/.

Analysis

In sub-paragraph 24, the *Mishnah Berurah* clarifies Rabbi Karo's position pertaining to the problem of when a Jew did not subsequently stipulate his condition. Rabbi Kagan structures this paragraph as a rabbinical discussion which offers two contradictory views of Rabbi Karo. The *Mishnah Berurah* is concerned with this discord as it relates directly to the comprehension of the *Shulchan Aruch*, the most important of the stated purposes of his commentary. Furthermore, since discussion of this conflict is not prevalent in the 'latter rabbinical authorities' Rabbi Kagan feels the obligation to present it. To attribute greater

authority to the discussion, the Mishnah Berurah forms sub-paragraph 24 as a rabbinical discussion using the terminology and style of the 'latter rabbinical authorities'. In this way Rabbi Kagan, who usually prefers to avoid direct conflicts within the Mishnah Berurah text, presents this problem to his reader. The phraseology of sub-paragraph 24 is adapted from the 'latter rabbinical authorities' as the Magen Avraham and the Machatzit Ha-Shekel, both of whom are referred to in the Sha'ar Ha-Tziyun 28 and 29. The segments that are attributed to the Bet Yosef are cited from this rabbinic authority, although not necessarily in the same order as he writes them. The additional statements are the interpretive remarks of the Mishnah Berurah.

To illustrate this literary style, I will reproduce sub-paragraph 24, with the Bet Yosef underlined, the Machatzit Ha-Shekel in bold and the Magen Avraham in superscript. The difference here between prior quotations and sub-paragraph 24 is that sub-paragraph 24 is not quoted verbatim but includes changes that have no direct bearing upon the meaning or purpose of the 'latter rabbinical authorities' commentary.

"From this phrase it is implied that this would certainly be forbidden where he does not at all make such a condition.

The *Beis Yosef*, however inclines towards the view that if he does not make the condition, 'You take, etc . . .' even after they form the partnership, and without going into details they divide the income of the whole week evenly, this is permitted. For the prohibitions of both Shabbos profits and resting one's animal do not apply, since he is receiving Shabbos profits as part as an overall payment. As far as the injunction requiring one animal to rest is concerned, he holds that this does not apply, since the non-Jew works on Shabbos without his consent, by virtue of the share he has in it.

[However, he committed a transgression in this case at the outset when he entered into partnership with him, for he should have suspected that he might do work with the animal on Shabbos and therefore have stipulated from the beginning: 'You take etc.' See *Beis Yosef* there.]

But implied from the wording of the *Shulchan Aruch*, it appears he did not want to rely on this in actual halachic practice.

Bear in mind that even according to the above-mentioned opinion of the *Beis Yosef* that there is no problem of resting one's animal in this case, it cannot be permitted to divide subsequently without specifying the terms unless it is a case of great loss, following the opinion of the *Rema* in the gloss to Section 245, Paragraph 1. From the *Magen Avraham* it appears that one may rely on this."

The formulary "bear in mind" (*da*), as noted in my prior analysis of the Mishnah Berurah commentary, initiates Rabbi Kagan's own discussion in contrast to that of the 'latter rabbinical authorities'.

The Mishnah Berurah at first suggests one not accept the more lenient of Karo's two opinions, but concludes "from the Magen Avraham it appears that one may rely on this /opinion/." Rabbi Kagan is thus referring and ruling according to the accommodative view of the Magen Avraham. This decision offers further evidence of Kagan's halachic structure, which favours the Magen Avraham over the Shulchan Aruch. This preference is especially noticeable when the Magen Avraham suggests an accommodation.

(25) And sets its value as a debt. That is, he assesses its monetary worth according to what it is at that moment, and any rise or fall in value will be /the non-Jew's loss or gain/. Nevertheless, /the Shulchan Aruch/ requires that /the non-Jew/ have the authority to give it away or sell it--for he agrees with the above-mentioned opinion, /beginning with/ "there are others who say" in Par. 4, that it is required /, as well, / that the non-Jew be able to sell it.

Analysis

In sub-paragraph 25, the Mishnah Berurah interprets Karo's statement "and sets its value as a debt." This interpretation is initiated by the formulary "that is" (*dhinu*). Although the Mishnah Berurah does not quote the 'latter rabbinical authorities' in sub-paragraph 25 in the

Sha'ar Ha-Tziyun 30 the Gra is cited as the source for the latter segment of this interpretation.

Furthermore, through the clarification presented in sub-paragraph 25, Rabbi Kagan continues his argument concerning "any rise or fall in value" discussed in sub-paragraph 20.

(26) To sell it, such as where...as a loan. This, too, refers to where he lends it to the non-Jew and assesses its monetary value, as above, with the value assumed as a debt. However, the point of this passage is to add that even though where the non-Jew fixes it as the security /for his debt/ to the Jew, /the non-Jew/ forfeits the right to sell it, it is nevertheless permitted.

Analysis

In sub-paragraph 26, the Mishnah Berurah continues his interpretation of Rabbi Karo's phraseology. Initiated by the formulary "refers" (*myrei*), Rabbi Kagan explains the Shulchan Aruch's phrase "to sell it where the value /of the cattle/ is assumed by the non-Jew upon himself as a loan." As in sub-paragraph 25, the Gra is offered as the source for this sub-paragraph. The reference to the Gra is cited in the Sha'ar Ha-Tziyun 32.

Furthermore, following his literary structure, Rabbi Kagan emphasizes the lenient possibilities of the law. This emphasis is developed in Sha'ar Ha-Tziyun '32 where he concludes "even those who prohibit will admit that it is permitted . . . therefore it is permitted by all."

As in sub-paragraph 25, the terminology of sub-paragraph 26 is not quoted from a 'latter rabbinical authority'.

(27) Gives them to him to hold as collateral. That is, even though he leaves them as collateral in the Jew's possession to enable him to seize them as payment of his debt if he will not pay the money for them, and the non-Jew then takes them and does work with them, it is nevertheless permitted, since the animal itself belongs to the non-Jew.

Analysis

In sub-paragraph 27, the Mishnah Berurah clarifies Karo's statement "the non-Jew assigns /the cattle/ as security /for this loan/ to the Jew or gives them to him to hold as collateral." This clarification is adopted from the Magen Avraham with Rabbi Kagan's interpretive remarks. To illustrate this I will reproduce sub-paragraph 27 and underline the Magen Avraham.

"That is, even though he leaves them as collateral in the Jew's possession to enable him to seize them as payment of his debt if he will not pay the money for them, and the non-Jew then takes them and does work with them, it is nevertheless permitted, since the animal itself belongs to the non-Jew."

The Mishnah Berurah incorporates the Magen Avraham's formulary "that is" (*perush*) into his text to initiate this clarification.

In addition to the clarification, sub-paragraph 27 comes to emphasize Karo's accommodation. Furthermore, Rabbi

Kagan's concluding statement, "since the animal itself belongs to the non-Jew", suggests a response to a problem posed by the Tosafot Shabbat and the Gra. This problem is concerned with the ownership of the animal. No reference to this issue is offered in sub-paragraph 27.⁵⁵

(28) Provided... "from now on." That is, even if he says to him: "If I do not give you the money by such a date they will be yours." Since he did not say to him: "It will be yours from now on," the Jew will not have acquired it retroactively in the event that the non-Jew does not pay him. Thus /the Jew/, as of now, has nothing more than an ordinary lien on it.

Analysis

In sub-paragraph 28, the Mishnah Berurah interprets the stipulation in Karo's accommodative adjudication "provided he does not stipulate from now on." This interpretation is initiated by the formulary "that is" (*d'hinu*). Rabbi Kagan's interpretation in this sub-paragraph, as in sub-paragraph 27, is adapted from the Magen Avraham sub-paragraph 14, with the Mishnah Berurah's explanatory comments. In sub-paragraph 27, though, Rabbi Kagan did not supply the complete sub-paragraph 14 of the Magen Avraham. Thus in the Mishnah Berurah sub-paragraph 28 he quotes the rest of the Magen Avraham's statement.

To illustrate this I will reproduce sub-paragraph 28 with the Magen Avraham underlined.

"That is, even if he says to him: 'If I do not give you the money by such a date they will be yours.' Since he

did not say to him: 'It will be yours from now on,' the Jew will not have acquired it retroactively in the event that the non-Jew does not pay him. Thus /the Jew/, as of now, has nothing more than an ordinary lien on it."

To form the text of sub-paragraph 28, Rabbi Kagan does not quote the Magen Avraham in the same order that it appears in this 'latter rabbinical authority''s commentary. For example, the phrase, "the Jew will not have required it retroactively", appears before "even if he says to him: 'If I do not give you the money by such a date they will be yours.'" No reference to the Magen Avraham is cited for this quote.

The Mishnah Berurah, in sub-paragraph 28, preserves his literary halachic structure and emphasizes the accommodative view.

(29) By having him warn, etc. Even though the non-Jew does not have the right to sell it, nevertheless this is permitted.

The opinion of those who permit this above, in Par. 4, is being implicitly followed here, for here, too, we refer to where he has accepted it as being his possession regarding rise and fall of value.

Analysis

In sub-paragraph 29, the Mishnah Berurah clarifies Karo's accommodation "some permit by having him warn the non-Jew not to do work with it on Shabbos." Rabbi Kagan's emphasis upon this accommodation is initiated by the formula "even though" (*af al pi*). The Mishnah Berurah bases

sub-paragraph 29 on the statements of the Gra and Elya Rabba. The phrase, "the opinion of those who permitted above" is found in the Gra's commentary. The conclusion to sub-paragraph 29, "regarding rise and fall of value", is based upon the Elya Rabba's remarks. References to these 'latter rabbinical authorities' are cited in the Sha'ar Ha-Tziyun 33 and 34.

In the Sha'ar Ha-Tziyun 34, reference is also made to Rabbi Akivah Eiger. Rabbi Kagan, basing himself upon this 'latter rabbinical authority's' comments, further develops the accommodative possibilities of Karo's adjudication related to this sub-paragraph.

(30) This being recorded. To publicize the matter, so as not to give cause for suspicion.

Analysis

In sub-paragraph 30, the Mishnah Berurah explains the reason for Karo's statement "this being recorded with the /non-Jewish/ courts." Rabbi Kagan quotes the two (Hebrew) word paragraphs of the Magen Avraham "you publicize the matter", and adds his interpretive remarks "so as not to give cause for suspicion." No reference to the Magen Avraham is cited.

(31) Are halachically proper. The best of all ways by which it is permissible, is: /for the Jew/ to transfer possession of it to him during the weekday period through a full-fledged sale; to /have the non-Jew/ give him a down-payment on it and declare the balance of the money a loan incumbent upon himself; and to then render /the

animals/ a pledge /for the rest of the money/ to the Jew (so that he may be assured of getting his money).

The most proper way would be to execute the sale before the /Jewish/ judges of the city, so that it be done in accordance with Torah law and, moreover, so that the matter be made public so that there be no *mar'is ha-ayin* (suspicion of a violation).

Analysis

In sub-paragraph 31, the Mishnah Berurah is concerned with his social reality. Rabbi Kagan uses the Rema's phrase "are halachically proper" to initiate his discussion. Although in the previous sub-paragraphs Rabbi Kagan discussed a variety of accommodations which could be applied to his social reality, he suggested that they not be used. This view he emphasizes in his terminology: "The best of all ways which it is permissible, is; /for the Jew/ . . .", the phrase "the most proper way would be . . ." and "so that he does it in accordance with Torah law . . .".

Furthermore, the Chafetz Chaim, in his social reality, emphasizes the need for and dependency upon rabbinical authority. He writes: "The most proper way would be to execute the sale before the /Jewish/ judges of the city so that it be done in accordance with Torah Law . . ." This suggestion is not stated in the 'latter rabbinical authorities' customarily cited in the Mishnah Berurah commentary.

The phraseology of sub-paragraph 31 is that of Rabbi Kagan and not cited from other 'latter rabbinical authorities'.

(32) Whichever one chooses. Even, etc. That is, even the assumption of such responsibility alone (mentioned by the author /of the Shulchan Aruch/ at the end of his /last/ statement) is sufficient here, too--even though the non-Jew has no authority to sell it--since it is in his possession with respect to rise and fall in value.

Here the view of those who permit this in Par. 4 is being implicitly followed. It would be better, however, to execute a complete sale (as above in /sub-/ Par. 31), so as to satisfy the stricter view there, since according to their view there is a question of /a violation of/ Torah law involved.

If, however, all these forms of permissible ways are difficult for one to make and it is a pressing situation (*sha'as ha-dechak*) (as, for example, in a case where someone has fields which he cannot rent out to a non-Jew under a profit-sharing arrangement unless he gives him, at the same time, oxen with which to plow, whereupon he will not be able to prevent him from plowing with them on Shabbos /as well/), then one may rely on the above-mentioned view of the *Bach* who permits it by the device of declaring them ownerless in front of three persons before Shabbos, by which the matter will become generally known and no suspicion will arise.

The act of rendering it ownerless must be done wholeheartedly. But except for a pressing situation, one should not rely on rendering it ownerless, as stated above in *Mishnah Berurah*, sub-Par. 14. The *D.M.* agrees with this explicitly.

Analysis

In sub-paragraph 32, Rabbi Kagan discusses two issues. The first theme, initiated by the formulary "that is" (*dhinu*) interprets the *Rema's* statement, "are halachically proper and one may use whichever one chooses." The second topic is a continuation of sub-paragraph 31. This segment is initiated with the opening phrase, "the most proper way." Rabbi Kagan prefers to incorporate this segment into sub-paragraph 32 rather than sub-paragraph 31 to emphasize the accommodative possibilities not presented in sub-paragraph 31.

The Chafetz Chaim does not want to give his twentieth-century readers, especially his contemporary rabbinical authorities, the impression that he is an accommodative adjudicator. He therefore, commences this section of subparagraph 32 with a reminder of his stringent suggestion in subparagraph 31. This point is emphasized with the phrase "so as to satisfy the stricter view there, since according to their view there is a question of /violation of/ Torah law involved . . ." In the subsequent suggestions, Rabbi Kagan offers the reader accommodative possibilities. These accommodations are restricted to specific conditions. As the Mishnah Berurah states: "If, however, all these forms of permissible ways are difficult for one to make and it is a pressing situation . . ." To further substantiate his lenient opinion, Rabbi Kagan in the Sha'ar Ha-Tziyun 37 quotes an array of 'former' and 'latter rabbinical authorities'.

(33) The law for this is the same as, etc. Now, all this obtains in a case where he rents or lends it out to him for doing /the non-Jew's/ own work. But in a case where it is for the purpose of doing the Jew's work on Shabbos, this is in no way permitted (even if he sells him the animal through a fully valid sale), since, in any event, the non-Jew is doing the Jew's work for him on Shabbos.

Accordingly, if the Jew owns horses and, too, the non-Jew is his hireling for /performing/ any work the Jew may require, then it does not become permissible /to have the non-Jew work with them/ by selling him the horses. For it is forbidden for /the Jew/ to let him do his work for him unless /the non-Jew/ is in his employ for this particular job alone (/e.g.,/ travelling with the horses for the purpose of delivering him merchandise any time he may require it during that year), in which case it is permis-

sible according to the Rambam, as stated in Sec. 244, Par. 5.

Even in this manner, it is forbidden to tell him to travel on Shabbos; only that if he travels of his own initiative, it is not necessary to stop him from it. [Acharonim]

Analysis

In sub-paragraph 33, the Mishnah Berurah clarifies the statement of the Rema, "the law for this is the same as where the non-Jew is his partner." Rabbi Kagan forms this sub-paragraph from the commentaries of the Geraz and the Magen Avraham, with his own interpretory remarks. The majority of the first segment presented in sub-paragraph 33 is quoted from the Geraz. The latter segment of this sub-paragraph is found in the Magen Avraham. To illustrate this I will reproduce sub-paragraph 33 with the Geraz in bold and the Magen Avraham underlined.

"Now, all this obtains in a case where he rents or lends it out to him for doing /the non-Jew's/ own work. But in a case where it is for the purpose of doing the Jew's work on Shabbos, this is in no way permitted (even if he sells him the animal through a fully valid sale), since, in any event, the non-Jew is doing the Jew's work for him on Shabbos.

Accordingly, if the Jew owns horses and, too, the non-Jew is his hireling for /performing/ any work the Jew may require, then it does not become permissible /to have the non-Jew work with them/ by selling him the horses. For

it is forbidden for /the Jew/ to let him do his work for him unless /the non-Jew/ is in his employ for this particular job alone (/e.g.,/ travelling with the horses for the purpose of delivering him merchandise any time he may require it during that year), in which case it is permissible according to the Rambam, as stated in section 244, paragraph 5.

Even in this manner, it is forbidden to tell him to travel on Shabbos; only that if he travels of his own initiative, it is not necessary to stop him from it. [Acharonim]"

No reference to the Geraz or the Magen Avraham is explicitly cited. Reference to 'latter rabbinical authorities' is offered at the conclusion of the sub-paragraph.

(34) Provided that he publicizes, etc. See Beyur Halachah, where we cite that all these ways of rendering it permissible are not to be recommended for use other than in a time of pressing need (*sha'as ha-dechak*)--as opposed to those persons who deliberately sell their oxen to a non-Jew for the purpose of doing work with them on Shabbos, the work being widely known as the Jew's.

Even though one need not protest against those who follow the lenient view in this, since they have an opinion upon which to rely, nevertheless every person who seeks to keep mitzvos carefully should take heed not to act in such a way, except in a case of pressing need and following a decision by a learned scholar.

If a Jew owns a horse and is asked by the governor, with whom he is acquainted, to lend or rent it to him--a request he cannot refuse for fear of arousing his enmity--he should sell it to him for a pittance, whereafter the governor may do with it as he pleases. If, afterwards, he returns him the horse and gives him, in addition, a rental fee, then he is merely giving him a gift. [Responsa *Shewus Ya'akov*. See *Sha.T.* who agrees with him as against the *Yad Aharon*.]

Analysis

In sub-paragraph 34, the Mishnah Berurah's concluding statement for section 246, Rabbi Kagan continues his discussion from sub-paragraph 31 concerning the practical application of the *halachah*. Furthermore, in addition to the adjudication, the Chafetz Chaim states here his ethical suggestion. Preserving his literary style the Mishnah Berurah separates ethical issues and the practical application of the law from his halachic analysis of the Shulchan Aruch. At first, the accommodative possibilities are emphasized. Rabbi Kagan states: "Even though one need not protest against those who follow the lenient view in this, since they have an opinion upon which to rely." This statement is immediately followed by the Chafetz Chaim's ethical declaration: "Nevertheless every person who seeks to keep mitzvot (*b'ale nefesh*) carefully should take heed not to act in such a way." In addition, Rabbi Kagan stresses the need for adherence to rabbinical authority, as he concludes: "And following a decision by a learned scholar."

In sub-paragraph 34 a final segment not relevant to the prior discussion appears. The Mishnah Berurah, as if suddenly recalling after completing his commentary of section 246 that he had not previously included this segment, now interjects it. Although this addition gives the impression of a contemporary issue, this adjudication is

quoted verbatim from the Ba'eyr Heytev sub-paragraph 8. It can be argued that this addition is evidence to separate author and editor, a point that will be discussed later.

The Chafetz Chaim also continues his literary style in the Beyur Halachah commentary and concludes with an ethical suggestion. "He who trusts in the Lord and fulfills the will of the Torah as stated in the verse: 'So that your ox and ass will rest', etc. . . and acts according to its simple meaning and does not attempt to circumvent the matter of Shabbos, good for him and certainly, the Holy One blessed be He, will give him because of this, success with his possessions in the six work days."

CHAPTER 6

247: THE LAW CONCERNING NON-JEWS WHO CARRY

LETTERS /FOR JEWS/ ON SHABBOS

(Contains Six Paragraphs)

Shulchan Aruch

1. One may send (1) a letter with a non-Jew even on Erev Shabbos, (2) close to dusk, provided /the Jew/ specifies his wages /for carrying the letter/, (3) but only if he does not instruct him (4) to travel on Shabbos. If he does not specify /the wages/, then if (5) there is no permanently established postal official (*meaning, an appointed person to whom all letters are sent, who delivers them to their addresses*) in the town, (6) it is forbidden to send it /with the non-Jew/ (7) even as early as Sunday. But, (8) if there is a permanently established postal official in the town, he may send it even on Erev Shabbos, provided there is sufficient time left during the day to reach the house (9) adjacent to the /city/ wall.

Gloss: (10) Some /authorities/ permit it even if he does not specify /the wages/ and (11) even if there is no permanently established postal official in the town, as long as he sends it out on Thursday or earlier. In case of necessity, one may rely on them.

Mishnah Berurah

(1) A letter. The same law applies to all work: when one engages /a non-Jew/, if there is not sufficient time remaining to complete the work before Shabbos, it is required that one specify /to the non-Jew/ the wages that will be due for his work. For then /the non-Jew/ will be doing the work in his own interest and not for the Jew (as below in Sec. 252, Par. 2). /The reason why/ this law is stated /specifically/ for a letter, is /to inform us of a special prohibition applying to letter-carrying; namely,/ that it /alone/ is forbidden, /i.e., even where there is sufficient time remaining before Shabbos for the letter to be delivered/ where payment is not fixed and where there is no permanently established postal official in the city--as is concluded (the reason being as we shall write below /sub-Par. 5/).

But the law for all other vessels, objects or money /sent from one person to another/ on Erev Shabbos through a non-Jew is the same as for all work /which one engages a non-Jew to do/. /These/ are permitted, therefore, even where wages are not specified--as long as there is sufficient time left during the day to reach the premises of the recipient. For /in the case of all other articles/ we need not be concerned that /the non-Jew/ will not find /the addressee/ in his house and will have to search after him on the Shabbos.

Analysis

In sub-paragraph 1, the Mishnah Berurah interprets and glosses the law of Karo concerned with the delivery of a letter by a Gentile on Shabbat. Rabbi Kagan preserves his literary preferences, forms this sub-paragraph by quoting the statements of the Magen Avraham and the Taz. The additional comments in sub-paragraph 1 are the Mishnah Berurah's interpretive remarks. These remarks are analogous in their wording to those of the 'latter rabbinical authorities' concerned with this theme. To illustrate this, I will reproduce sub-paragraph 1 with the Magen Avraham underlined and the Taz in bold print.

"The same law applies to all work: when one engages /a non-Jew/, if there is not sufficient time remaining to complete the work before Shabbos, it is required, that one specify /to the non-Jew/ the wages that will be due for his work. For then /the non-Jew/ will be doing the work in his own interest and not for the Jew (as below in Section 252, Paragraph 2). /The reason why/ this law is stated /specifically/ for a letter, is /to inform us of a special

prohibition applying to letter-carrying; namely, / that it /alone/ is forbidden, /i.e., even where there is sufficient time remaining before Shabbos for the letter to be delivered/ where payment is not fixed and where there is no permanently established postal official in the city--as is concluded (the reason being as we shall write below /sub-Par. 5/).

But the law for all other vessels, objects or money /sent from one person to another/ on Erev Shabbos through a non-Jew is the same as for all work /which one engages a non-Jew to do/. /These/ are permitted, therefore, even where wages are not specified--as long as there is sufficient time left during the day to reach the premises of the recipient. For /in the case of all other articles/ we need not be concerned that /the non-Jew/ will not find /the addressee/ in his house and will have to search after him on the Shabbos." In Sha'ar Ha-Tziyun 1 the Magen Avraham is cited as the source for sub-paragraph 1. The Taz is not referred to in this sub-paragraph.

Although the adjudication on 'letter carrying' is stringent, Rabbi Kagan emphasizes the lenient possibilities related to this theme. These possibilities are concerned with letter deliveries as well as "to all work". For example, while preserving his literary style, the Mishnah Berurah concludes sub-paragraph 1 with a lenient possibility when he states: "/These/ are permitted, therefore, even

where wages are not specified--as long as there is sufficient time left during the day to reach the premises of the recipient. For /in the case of all other articles/ we need not be concerned that /the non-Jew/ will not find /the addressee/ in his house and will have to search after him on the Shabbos." Furthermore, the Sha'ar Ha-Tziyun 2 continues to develop a lenient opinion concerned with the theme of letter carrying. He writes: "Peri Megadim with the interpretation of the Magen Avraham and Elya Rabba wanted to present a new interpretation, that even without waiting it is permitted for them. The Peri Megadim questioned the Elya Rabba from where he derives this. Thus wrote the Tosafot Shabbos and Geraz like the Magen Avraham, if he made the agreement even at dusk it is permitted if he did not specify to him that he should go on Shabbos, as I have written here in section 252."

(2) Close to dusk. I.e., while the sun still shines. It is required, too, that the non-Jew leave the Jew's premises before Shabbos. [Rambam]

Analysis

In sub-paragraph 2, the Mishnah Berurah interprets Karo's terminology "close to dusk". The interpretation in this sub-paragraph is initiated by the formulary "i.e." (*hinu*). " This type of interpretive purpose in the Mishnah Berurah commentary is similar to that in Rabbi Kagan's remarks in section 246, sub-paragraph 8. In section 246 he

interprets Karo's terminology "before dusk", the latter also initiated by the formulary "i.e." In both sub-paragraphs the Mishnah Berurah concludes with reference to a rabbinical source. Section 246, sub-paragraph 8 concludes by citing the Maggid Mishneh, and in conclusion to sub-paragraph 2 Maimonides is referred to.

The phraseology of sub-paragraph 2 is quoted from the Elya Rabba, although not in the same order in which it appears in the commentary of 'latter rabbinical authority's commentary. For example, the phrase "while the sun still shines" appears at the conclusion of the Elya Rabba but at the beginning of the Mishnah Berurah. Reference to the Elya Rabba is cited in the Sha'ar Ha-Tziyun 3.

(3) But only if, etc. But if the non-Jew of his own account proposes to go on Shabbos, it does not concern us /if he goes/, since the Jew did not tell him to do so, and the non-Jew, for his wages, /travels/ on his own behalf.

Analysis

In sub-paragraph 3, the Mishnah Berurah glosses Karo's law in the Shulchan Aruch, "but only if he does not instruct him" with an accommodation. Rabbi Kagan adapts this gloss from Karo's commentary, the Bet Yosef. The first statement in sub-paragraph 3, "but if the non-Jew of his own account proposes to go on Shabbos", is quoted verbatim from the Bet Yosef. The subsequent remarks in sub-paragraph 3, although not quoted from this rabbinical source, are adapted from it

in content and terminology. Reference to the Bet Yosef is cited in the Sha'ar Ha-Tziyun 4.

(4) To travel on Shabbos. Similarly, he must not tell him: "See to it to be there on Sunday or on Monday," or the like, where it is clear that he cannot get there without travelling on Shabbos--since this is tantamount to telling him, "Travel on Shabbos." [Acharonim]

Analysis

In sub-paragraph 4, the Mishnah Berurah continues to gloss Karo's statement, "but only if he does not instruct him to travel on Shabbos." This gloss is initiated by the formulary "similarly" (*hu hadin*). Except for the opening formulary and concluding vocable, sub-paragraph 4 is a direct quote from the Magen Avraham. No direct reference to the Magen Avraham is cited, but rather it is included in the encompassing category of 'latter rabbinical authorities' referred to at the conclusion of sub-paragraph 4.

(5) There is no permanently established postal official, etc. That is, the postal official is not always found in the city to which it was sent, but sometimes goes to some other locality. /In such a case/ it is forbidden, for perhaps the non-Jew will not find him and will have to go after him /to find him/ on Shabbos.

The reason why /the Sages/ were so stringent and were concerned over this /in the case of a letter/ is that since /the non-Jew/ bears a /letter with a/ Jewish handwriting, and it is evident that an act of a Jew is involved, it may be said that /a Jew/ gave it to him for carrying on Shabbos.

Accordingly, if the letter is written in non-Jewish handwriting, it is permitted to send it even on Erev Shabbos, and even without first specifying the wages, as long as it can reach the first house within the wall /of the city to which it is being sent/ while it is yet day. This is just as it is permitted, above, to send /all/ other vessels and objects with a non-Jew.

Analysis

In sub-paragraph 5, the Mishnah Berurah interprets Karo's statement "where there is no permanently established postal official in the town." In addition sub-paragraph 5 is what Rabbi Kagan referred to in his statement in sub-paragraph 1, "as we shall see below." Reference to sub-paragraph 1 is cited at the conclusion of sub-paragraph 5, where the Mishnah Berurah states "this is just as permitted above."

The majority of the wording in sub-paragraph 5 is quoted from the Magen Avraham sub-paragraphs 2 and 3. The Mishnah Berurah had previously incorporated the terminology of the Magen Avraham to form prior sub-paragraphs. Thus the application of the Magen Avraham's terminology in the sub-paragraph is not necessarily presented in the same context as this 'latter rabbinical authority' intended. Although the Mishnah Berurah uses the wording of the Magen Avraham for his own purposes, he does not negate the Magen Avraham's interpretation of the Shulchan Aruch.

To illustrate Rabbi Kagan's adaptation of the Magen Avraham to his commentary, I will reproduce sub-paragraph 5 with the Magen Avraham's commentary underlined.

"That is, the postal official is not always found in the city to which it was sent, but sometimes goes to some other locality. /In such a case/ it is forbidden, for perhaps the non-Jew will not find him and will have to go

after him /to find him/ on Shabbos.

The reason why /the Sages/ were so stringent and were concerned over this /in the case of a letter/ is that since /the non-Jew/ bears a /letter with a/ Jewish handwriting, and it is evident that an act of a Jew is involved, it may be said that /a Jew/ gave it to him for carrying on Shabbos.

Accordingly, if the letter is written in non-Jewish handwriting, it is permitted to send it even on Erev Shabbos, and even without first specifying the wages, as long as it can reach the first house within the wall /of the city to which it is being sent/ while it is yet day. This is just as it is permitted, above, to send /all/ other vessels and objects with a non-Jew."

Although the latter segment of sub-paragraph 5 is not quoted verbatim from a 'latter rabbinical authority', it is analogous to the Geraz, sub-paragraph 2. Rabbi Kagan only makes reference to the Magen Avraham, which he cites in the Sha'ar Ha-Tziyun 6.

The Mishnah Berurah preserves his halachic pattern and rules in accordance with the 'latter rabbinical authorities', although it is a stringent adjudication. Alternately, not to deviate from his preference for the lenient opinion, he concludes with an accommodative possibility. Thus Rabbi Kagan does not present his concluding remarks in sub-paragraph 5 as a quote but rather as an addition incorporated into the quote from the Magen Avraham.

(6) It is forbidden to send it. The *O.Sh.* writes: It would appear that all this obtains only where he sends it with a non-Jew to the postal official. But if one sends a letter with /the non-Jew/ to one's friend, we need not fear that he might not find him at home and go seek after him on Shabbos. This, /therefore,/ is permitted even on Erev Shabbos, and even without specifying wages--as long as /the non-Jew/ can reach /the city/ while still day. The view of R. Avraham of Prague, cited in *Bach*, is likewise inclined to this opinion. (See there, where he goes into /the question at/ length and concludes with a lenient ruling.)

But the *Taz* and *M.A.* hold that in the case of sending a letter to a friend, as well, there is also the same concern /and it is forbidden/. The commentary of Rabbeinu Chananel, just published, indicates agreement with /the view of/ the *O.Sh.* (see there).

However, if one tells the non-Jew to travel /to deliver the letter to the addressee/ and, in case he will not find him, to give it over to his household members, this is permitted according to all views--even on Erev Shabbos and even without specifying wages--as long as he can reach the first house within the wall of the city where /the addressee/ is found.

Analysis

The *Mishnah Berurah* in sub-paragraph 6 glosses Karo's stringent ruling "if there is no permanently established postal official" with an accommodation. This lenient opinion is presented subsequent to the stringent laws discussed in the previous sub-paragraphs of section 246.

In sub-paragraph 6 Rabbi Kagan presents halachic views that dispute the *Magen Avraham*. Evidently, uneasy with this decision, Rabbi Kagan states his rabbinical sources in the text of the *Mishnah Berurah*, and embodies a 'former rabbinical authority', Rabbi Chananel. To further support his lenient ruling Rabbi Kagan informs the reader that this 'former rabbinical authority's' commentary was recently

published and made available, thus implying that it was not available to the Magen Avraham.

Furthermore, the Mishnah Berurah's uneasiness with his decision to dispute the Magen Avraham is expressed in the final segment of sub-paragraph 6, where he discusses an additional adjudication. Rabbi Kagan writes: "This is permitted according to all views", which encompasses the Magen Avraham's ruling.

The phraseology of the first segment is quoted from the Olat Shabbat, as Rabbi Kagan states in his opening to sub-paragraph 6. The second segment as stated in the Sha'ar Ha-Tziyun 7 is quoted from the Peri Megadim. To illustrate this I will reproduce sub-paragraph 6 with the Olat Shabbat underlined and the Peri Megadim in bold.

The Olat Shabbat writes: It would appear that all this obtains only where he sends it with a non-Jew to the postal official. But if one sends a letter with /the non-Jew/ to one's friend, we need not fear that he might not find him at home and go seek after him on Shabbos. This, /therefore,/ is permitted even on Erev-Shabbos, and even without specifying wages--as long as /the non-Jew/ can reach /the city/ while still day. The view of Rabbi Avraham of Prague, cited in Bach, is likewise inclined to this opinion. (See there, where he goes into /the question at/ length and concludes with a lenient ruling.)

But the *Taz* and *Magen Avraham* hold that in the case of sending a letter to a friend, as well, there is also the same concern /and it is forbidden/. The commentary of Rabbeinu Chananel, just published, indicates agreement with /the view of/ the *Olat Shabbat* (see there).

However, if one tells the non-Jew to travel /to deliver the letter to the addressee/ and, in case he will not find him, to give it over to his household members, this is permitted according to all views--even on Erev Shabbos, and even without specifying wages--as long as he can reach the first house within the wall of the city where /the addressee/ is found."

(7) Even as early as Sunday. But if it is a short distance (such as one day's travelling distance), it would appear that it is permitted even if he sends him on Monday or Tuesday, since even if he will not find him at home, he will still have plenty of time left for travelling. [M.A.]

Analysis

In sub-paragraph 7, the *Mishnah Berurah* interprets and glosses Karo's adjudication that where "there is no permanently established postal official in town, it is forbidden to send it /the letter/ even as early as Sunday." Rabbi Kagan's clarification, in addition to four interpretive words, is quoted from the *Magen Avraham*. Through the interpretation presented in sub-paragraph 7, the *Mishnah Berurah* emphasizes the accommodative possibilities of the law.

(8) If there is a permanently established postal official. I.e., the man appointed to be in charge of this is there at all times. This includes that individual, now known as the "post-master," generally found in larger localities who is on duty at fixed hours for receiving letters and delivering /them/ to whomever they belong.

◦ Analysis

In sub-paragraph 8 the Mishnah Berurah interprets Karo's statement "if there is a permanently established postal official." This interpretation is initiated by the formulary "i.e." (*hinu*). Other than the phrases "i.e. the man appointed to be", and "this includes that individual", sub-paragraph 8 is quoted from the Taz: Reference to the Taz is cited in the Sha'ar Ha-Tziyun 9.

Sub-paragraph 8, in its language and content, would appear to be concerned with the Chafetz Chaim's social reality. As I have shown in my analysis, this sub-paragraph quotes the Taz, thus it continues to discuss Karo's laws and not to deal directly with the nineteenth century social reality.

(9) Adjacent to the wall of the city to which it is sent. I.e., the first house within.

Analysis

In sub-paragraph 9, the Mishnah Berurah interprets Karo's phrase, "adjacent to the wall." The entire sub-paragraph is a quote from the Ba'eyr Heytev sub-paragraph 4. No reference to the Ba'eyr Heytev is cited. Rabbi Kagan

prefers in his literary structure not to incorporate the stringent opinion. Alternately, his dependency upon the Magen Avraham requires the Mishnah Berurah not to ignore the Magen Avraham's stringent opinion. In sub-paragraph 9, where Rabbi Kagan is confronted with this dilemma he solves the problem by citing the stringent view in the Sha'ar Ha-Tziyun 10. He states: "Magen Avraham, and if he brought mail and it is known to him [the post office, or postal official that the addressee] it is on the other side of the city, even if the city is surrounded by a wall it is required that he arrive there while it is still day. Peri Megadim." To further justify his reference to the Magen Avraham's stringent view, the Peri Megadim is also cited in this Sha'ar Ha-Tziyun.

(10) Some permit it, etc. Their reason is that since the Jew did not explicitly tell him to go on Shabbos, it should not be forbidden except close to Shabbos when he appears to be the Jew's messenger for this purpose (since asking a non-Jew to perform work /on Shabbos/ is forbidden by rabbinical prohibition even if one tells him on Erev Shabbos to perform work on Shabbos). But it does not appear as if he is telling him to perform work on Shabbos where there is some period of time separating /between the time the order is given and/ Shabbos. Therefore there is no reason to forbid it other than on Erev Shabbos. [Rosh]

Analysis

In sub-paragraph 10, the Mishnah Berurah explains the Rema's accommodation, "some /authorities/ permit it even if he does not specify /the wages/." This explanation is initiated by the formulary "their reason is" (*taamayhu*).

Although Rabbi Kagan attributes this sub-paragraph to the 'former rabbinical authority' the Rosh, only the last statement is quoted from this source. The actual quote states: "But it does not appear as if he is telling him to perform work on Shabbos where there is some period of time separating /between the time the order is given and/ Shabbos." Therefore there is no reason to forbid it . . .". This quote, as well as the first segment of sub-paragraph 10, beginning with "it should not", is found in the Olat Shabbat. Thus Rabbi Kagan, although citing the Rosh as his reference, is true to his literary style, and quotes a 'latter rabbinical authority', the Olat Shabbat. The Mishnah Berurah prefers to cite a 'former rabbinical authority' as his source to reinforce his accommodation.

No reference to the Olat Shabbat is offered by Rabbi Kagan in his commentaries. Furthermore, sub-paragraph 10 is further evidence of his emphasis of the accommodative adjudications.

(11) Even if there is no permanently established. It is also permitted, according to this view, even if it is known that he cannot reach there before Shabbos; for, since it is much before Shabbos, he does not appear to be his messenger (as mentioned above).

Analysis

In sub-paragraph 11, Rabbi Kagan continues his explanation to develop the Rema's accommodation. The first segment of sub-paragraph 11, "it is also permitted according

to this view, even if it is known that he cannot reach there before Shabbos", is quoted from the Magen Avraham sub-paragraph 4. Reference to the Magen Avraham is cited in the Sha'ar Ha-Tziyun 11.

The latter segment of this lenient view is the terminology of the Rosh's commentary referred to in sub-paragraph 10. This reference is what the Mishnah Berurah refers to in his statement, "as mentioned above."

Shulchan Aruch

2. If /the Jew/ makes a stipulation that he will pay him wages, then even though he does not specify how much he will give him, the law is the same as where he specifies the wages/, for the non-Jew relies on this /promise/ and, /as a result, then/ acts in his own interest.

But where, (12) even though he intends to pay him wages, no stipulation is made, it is forbidden, since /the non-Jew/ has nothing to rely upon and will therefore be working in the Jew's interest.

Mishnah Berurah

(12) Even though he intends. I.e., not only is it forbidden if the non-Jew is altogether in doubt as to whether he will be given wages, but even if the Jew understands that the non-Jew expects to be paid wages by him or by the addressee, it is still forbidden--since the Jew has as yet not actually promised him /the wages/.

Analysis

In sub-paragraph 12, the Mishnah Berurah interprets Karo's statement, "even though he intends to pay him his wages." This interpretation is initiated by the formulary "i.e." (*ratzah lomar*). Rabbi Kagan, through this formulary, emphasizes that sub-paragraph 12 is not his ruling but

rather the intention of the Shulchan Aruch. Thus the Mishnah Berurah implicitly states two purposes: first, that he does not state whether he rules according to the stringent law presented in paragraph 2 of the Shulchan Aruch.

Second, he avoids a contradiction between paragraph 2 and 4 of the Shulchan Aruch discussed by the 'latter rabbinical authorities'. Sub-paragraph 12 presents an interpretation that does not conflict with paragraph 4. Only in the Sha'ar Ha-Tziyun 12, where the Peri Megadim and Elya Rabba are cited, is this contradiction referred to. These 'latter rabbinical authorities' also offer a solution to the conflict in Karo's text, which is incorporated into the Mishnah Berurah's text. The emphasis upon this solution also permits the accommodation discussed in paragraph 4, which would have been compromised if not for the reason offered. Thus the Mishnah Berurah preserves his halachic pattern, which offers an impression of preference for the lenient view.

The phraseology of sub-paragraph 12 is adapted from the Magen Avraham, but only the last statement, "it is still forbidden--since the Jew has as yet not actually promised him /the wages/" is quoted verbatim. No reference to the Magen Avraham is cited.

Shulchan Aruch

3. (13) If he hires him by the day (i.e., a set amount for each day that he travels and returns), although he is not particular as to when he goes, then if it is (14)

on Erev Shabbos, it is forbidden. For when he sets out on Shabbos it will appear as if he stipulated with him that he do so.

Mishnah Berurah

(13) If he hires Kim by the day. I.e. even though we permitted this above even on Erev Shabbos where wages are specified, that was where /the Jew/ specifies a fixed amount /as payment/ for his work. For then he is doing it on his own behalf, and it does not at all appear that the work being done on Shabbos is done by the order of the Jew.

However, where he hires him by the day (i.e., he fixes wages for him for each day), if he hires him on Erev Shabbos it is forbidden even though he is not particular as to when he goes, and even though in this case, too, he works on his own behalf. [Because of this /i.e., that he works on his own/, this case /where he is paid by the day/ is better than where no wages are specified at all and is therefore permitted on Wednesday and Thursday, even according to the author /of the Shulchan Aruch/.] /The reason for this is that/ despite all this, since he sets out immediately afterwards on Shabbos, it appears as if he stipulated with him /to do/ so and that he is travelling as his agent--since he pays him wages by the day.

Analysis

In sub-paragraph 13, the Mishnah Berurah interprets Karo's adjudication, "if he hires him by the day . . . it is forbidden." This interpretation is initiated by the formulary "i.e." (*ratzah lomar*). As in sub-paragraph 12, here Rabbi Kagan is concerned with clarifying Karo's statement and not proclaiming his ruling, thus the formulary *ratzah lomar*. This concern is emphasized in the Sha'ar Ha-Tziyun 13, where Rabbi Kagan explains that Karo's statement and his interpretation of this law is attributed to a 'former rabbinical authority', Rabbi Nissim. The Sha'ar Ha-Tziyun states: "Elya Rabba and further 'latter rabbinical

authorities' reply, that the author of the Shulchan Aruch is concerned with the stringent opinion of the Ran which is strict with regard to the eve of Shabbos. See there the Elya Rabba." Although the formulary, "the reason for this" (*mikol makom*) is employed here, in contrast to previous sub-paragraphs Rabbi Kagan does not present his accommodative view but rather the stringent view of Rabbi Nissim.

The wording of sub-paragraph 13 is constructed from the terminology of the 'latter rabbinical authorities' concerned with this theme as well as that of Rabbi Nissim. For example the phrase, "it appears as if he stipulated with him /to do/ so", is quoted from Rabbi Nissim's commentary.

(14) On Erev Shabbos. But it is permitted on Thursday. According to the opinion of the Rema, above in the gloss, it is permitted on Thursday even if he did not at all specify /the wages/.

Analysis

In sub-paragraph 14, the Mishnah Berurah glosses Karo's stringent law, "if he hires him by the day . . . then if it is on Erev Shabbos it is forbidden", with an accommodation. Except for the phrase "above in the gloss", sub-paragraph 14 is quoted from the Magen Avraham. No reference to the Magen Avraham is cited.

Shulchan Aruch

4. If the non-Jew carries the letter free of charge, then even if he gives it to him on Erev Shabbos, it is permitted. (15) For /then/ the non-Jew does this on his own initiative; it is /apparently/ in appreciation of something

/i.e., some favor/ he benefitted from him /in the past/. This is the same as if he would specify /his wages/.

Gloss: Some/authorities/ dispute this and hold that whenever he does it free of charge it is forbidden--(16) and it is preferable to be stringent /and follow their view/. However, where the non-Jew takes the initiative in offering the Jew to travel for him free of charge, /the non-Jew/ certainly has in mind some benefit he received from /the Jew/, and it is permitted. (...)

Mishnah Berurah

(15) For the non-Jew does this on his own initiative. Meaning, the Jew does not compel him to do so, but, rather, he agrees on his own to deliver the letter. We therefore assume that the fact that the non-Jew has agreed /to take the letter there/ is due to some favor he previously received from him, and he is therefore working on his own behalf.

Analysis

In sub-paragraph 15, the Mishnah Berurah clarifies Karo's *halachah* concerned with a Gentile who delivers the Jew's mail for free. Rabbi Kagan does not cite the Magen Avraham, but rather resorts to the Elya Rabba. Thereby the Mishnah Berurah is able to avoid a problem stated by the Magen Avraham, and to emphasize the accommodation. In the Sha'ar Ha-Tziyun 15 the problem and solution are identified through the interpretation of the Tosafot Shabbat. The Sha'ar Ha-Tziyun states: "Examine the Gra's commentary in section 252 where he disputes in the matter of non-payment if it is permitted and if he did not specify his wages on Wednesday or Thursday. Thus since they are lenient previously in the matter of Wednesday or Thursday there is no source for permission with regard to no payment. From the

Palestinian Talmud." The phraseology of sub-paragraph 15 is quoted from the Elya Rabba, except for the words "to take the letter there is due to."

(16) And it is preferable to be stringent. Now from this phrasing it would appear that it is merely "preferable" to take this view into consideration. From the Taz, too, it appears that he agrees with the first opinion /and that it is permitted/.

However, in Darkei Mosheh, Sec. 252, it appears that he agrees with the disputing opinion /and forbids it/. Also from the Levush and the E.R. in this Section it appears that it is forbidden /where it is done/ free of charge.

It is therefore proper to fix at least some small amount as a remuneration, which can then be considered to be specified wages--since he agreed that this be his compensation. The Ch.A. writes the same.

Analysis

In sub-paragraph 16, Rabbi Kagan clarifies and glosses the stringent adjudication of the Rema in the case of letter carrying. This clarification is initiated by the formulary "now" (*hine*). Although sub-paragraph 16 appears to be a ruling for the Chafetz Chaim's social reality, he is preserving his literary style and only presents an analysis of the Rema's law.

The Mishnah Berurah in sub-paragraph 16, must contend with the contradictory rulings by the 'latter rabbinical authorities' in this sub-paragraph. Rabbi Kagan presents both views, and cites their rabbinical sources. The Mishnah Berurah then concludes with a compromise quoted from the Chayei Adam: "It is therefore proper to fix at least some small amount as a remuneration, which can then be considered

to be specified wages--since he agreed that this be his compensation." This view substantiates the stringent opinion discussed in sub-paragraph 16. To further support this ruling, the Sha'ar Ha-Tziyun 15 cites the Gra and the Magen Avraham, the two 'latter rabbinical authorities' upon whom Mishnah Berurah's adjudications are most dependent.

Although Rabbi Kagan feels obligated to be stringent because of the halachic direction taken by the 'latter rabbinical authorities', he implicitly conveys to the reader that he is not in full agreement with this decision. This message is conveyed through the formularies "that is merely preferable" (*d'rak tov*), and, "it is therefore proper" (*hanachon*). This literary suggestion is analogous with my analysis of sub-paragraph 12 in section 246.

Shulchan Aruch

5. If the non-Jew (17) is travelling of his own account to some other place and the Jew gives him a letter /to deliver/, this is permitted (18) in all cases.

Mishnah Berurah

(17) Is travelling of his own account. But if he knows that he travels a longer distance on account of him, it is forbidden. [B.Y.]

Analysis

In sub-paragraph 17, the Mishnah Berurah interprets and glosses Karo's *halachah* concerned with a Gentile who "is travelling on his own account to some other place and the Jew gives him a letter /to deliver/." Rabbi Kagan deviates

in this sub-paragraph from his halachic pattern, and emphasizes a stringent possibility. I suggest that the Mishnah Berurah incorporated this stringent view for two reasons: first, Karo in his Bet Yosef commentary makes the same argument, Rabbi Kagan included into his commentary. The Mishnah Berurah informs the reader of this point by citing the Bet Yosef at the end of sub-paragraph 17. Second, the Magen Avraham sub-paragraph 8 cites this gloss. The terminology of sub-paragraph 17 is found in the texts of both the Magen Avraham and the Bet Yosef.⁵⁶

(18) In all cases. I.e., even if he does not specify the wages to be given him but leaves this unspecified (in which case we hold in Par. 1 that it is forbidden to send it with him when there is no permanently established postal official, for we are concerned that he might not find him at home and will proceed after him on Shabbos), nevertheless we permit it here. For, since the non-Jew is not travelling as his messenger but is going there on his own, then certainly if he fails to find him he will not search after him.

But this applies only if sufficient time remains to get there while still day. If, however, no sufficient time is left to get there while still day, it is forbidden in this case, too. For even though the journey he undertakes is for himself, nevertheless his carrying of the letter is for the Jew.

It should be borne in mind, that to give him /a letter/ on Shabbos is forbidden according to everyone, even if he goes of his own account, and even if he fixes his wages for this while it is still day.

Consequently, it is forbidden to post a letter on Shabbos. [On Erev Shabbos, however, this is permitted--since /sending a letter through/ a postal service is always the equivalent of having the payment specified, for even if he does not pay /when he mails it/, the addressee will be compelled to pay.] This is forbidden even where there is an eyruv, and even through a non-Jew. [For on Shabbos itself, specification of wages is no remedy.]

However, in a case involving great loss, it may be permitted in this manner, since it is a rabbinical prohibition pertaining to a matter itself /only/ rabbinically forbidden, which is permitted in a situation involving loss.

In a case not involving loss, one must be stringent even on Erev Shabbos and not give a non-Jew a letter to post on Shabbos--even where wages are specified--since one thereby specifically designates the Shabbos day as the time for performing this work. [Ch.A., Sec. 3--see there.]

Analysis

The Mishnah Berurah divides sub-paragraph 18 into three segments. The first segment interprets Karo's accommodation concerned with a Gentile who "is travelling of his own account to some other place and the Jew gives him a letter /to deliver/, this is permitted in all cases." This segment is initiated by the formulary "i.e." (*hinu*).

The second segment, initiated by the formulary "but this applies" (*davka*), specifies the stringent conditions related to Karo's accommodation. These first two segments are adopted from the phraseology of the 'latter rabbinical authorities', especially in the Magen Avraham. The Magen Avraham and other 'latter rabbinical authorities' are cited in the Sha'ar Ha-Tziyun 17 and 18.

The final segment, although it appears in its language and halachic suggestions to be concerned with the Chafetz Chaim's social reality, is quoted from the Chayei Adam. This section is initiated by the formulary, "it should be borne in mind" (*da*). The formulary *da* also would suggest Rabbi Kagan's initiative or practical suggestion for his reader. This implication that here Rabbi Kagan refers to the social reality is further emphasized in the employment of the Yiddish vocable "post", which implies a function in

nineteenth-twentieth century Europe. But as I discussed and as explicitly stated at the conclusion of sub-paragraph 18, this segment is quoted from the Chayei Adam, who lived a century before the Chafetz Chaim.

To illustrate this I will reproduce the final segment of sub-paragraph 18 and underline the quotation from the Chayei Adam.

"It should be borne in mind, that to give him /a letter/ on Shabbos is forbidden according to everyone, even if he goes of his own account, and even if he fixes his wages for this while it is still day.

Consequently, it is forbidden to post a letter on Shabbos. [On Erev Shabbos, however, this is permitted--since /sending a letter through/ a postal service is always the equivalent of having the payment specified, for even if he does not pay /when he mails it/, the addressee will be compelled to pay.] This is forbidden even where there is an eyruv, and even through a non-Jew. [For on Shabbos itself, specification of wages is no remedy.]

However, in a case involving great loss, it may be permitted in this manner, since it is a rabbinical prohibition pertaining to a matter itself /only/ rabbinically forbidden, which is permitted in a situation involving loss.

In a case not involving loss, one must be stringent even on Erev Shabbos and not give a non-Jew a letter to post on Shabbos--even where wages are specified--since one

thereby specifically designates the Shabbos day as the time for performing this work. [Ch.A., Sec. 3--see there.]"

The Mishnah Berurah, in sub-paragraph 18, as in prior sub-paragraphs of section 247, deviates from his halachic pattern and emphasizes the stringent opinion. Rabbi Kagan, aware of this, clarifies his action in the Sha'ar Ha-Tziyun 17. He states: ". . . In any event it is difficult to be lenient for I have seen the achronim, and I have cited from the responsa of the Maharam 242 where it is explained in accordance with the Magen Avraham and therefore according to the law one must understand it thus even though the language of the Shulchan Aruch is difficult according to this explanation"; thus the stringent ruling.⁵⁷

Shulchan Aruch

6. If someone has hired a non-Jewish worker /to work for him/ for a period of a year or more, (19) it is forbidden to send him with a letter on Erev Shabbos.

Gloss: However, if he hired him for letter-carrying exclusively, some /authorities/ permit this, (20) as explained above, Sec. 244.

Mishnah Berurah

(19) It is forbidden to send him. For the mere fact that he is hired for the year does not make it the equivalent of having specified wages. The law for this is in all details the same as above in Par. 1, for the case where wages are not specified. Nevertheless, in this case we are more lenient, forbidding it only on Erev Shabbos, the reason being as we have explained in the Beyur Halachah.

Analysis

In sub-paragraph 19, the Mishnah Berurah explains and glosses the Shulchan Aruch's prohibition presented in paragraph 6. Rabbi Kagan first briefly explains the reason for Karo's prohibition. This is followed by a brief gloss that states: "Nevertheless, in this case we are more lenient, forbidding it only on Erev Shabbos." Rabbi Kagan does not develop this accommodation in the Mishnah Berurah text, but rather refers the reader to the Beyur Halachah. The Chafetz Chaim, after developing the need for a stringent ruling, does not want to conclude section 247 with a detailed analysis of the lenient opinion in the Mishnah Berurah text. Instead, he prefers to direct the reader to his Beyur Halachah commentary for this analysis and thus allows the Mishnah Berurah text to retain its developed halachic pattern.

(20) As explained above. I.e., the first opinion cited there, which holds that this is considered the equivalent of specifying wages. (See the reason there.) Nevertheless, it is forbidden to tell him to go on Shabbos, as mentioned above, Par. 1.

Analysis

In sub-paragraph 20, the Mishnah Berurah interprets and glosses the Rema's accommodation, "some /authorities/ permit this as explained above." This interpretation is initiated by the formulary "i.e." (*hinu*). In the first segment of sub-paragraph 19, Rabbi Kagan, wishing to

preserve the stringent halachic pattern suggested in sub-paragraph 19, only alluded to the lenient view. This is emphasized in the statement, "see the reason there", referring the reader to prior sub-paragraphs for the accommodative view. This segment "the first opinion cited there, which holds that this is considered the equivalent of specifying wages. (See the reason there.)", is quoted from the Magen Avraham.

In the final segment of sub-paragraph 20 the Mishnah Berurah prefers to conclude with a stringent reminder: "Nevertheless, it is forbidden to tell him to go on Shabbos", thus preserving the stringent halachic pattern developed in the latter sub-paragraphs of section 247.

CHAPTER 7

252: THE LAW FOR PERMITTED OR FORBIDDEN LABORS BEGUN ON EREV SHABBOS FOR COMPLETION ON SHABBOS

(Contains Seven Paragraphs)

Shulchan Aruch

1. One may begin work on Erev Shabbos near dusk, even /such work/ which will be impossible to complete while still day, but which will of itself become completed on Shabbos.

For example: /it is permitted/ (1) to steep ink and dyestuffs in water so that they will continue to dissolve throughout Shabbos.

/It is permitted/ to place 'unin (meaning, bundles) (2) of flax in an oven, so that they will become bleached.

/It is permitted/ to place (3) wool in a kettle which is not on a fire and which, besides, is sealed with clay. But if it is on a fire, (4) it is forbidden, lest one rake the coals (i.e., expose them /by removing the ashes covering them/ and stir up the coals with a shovel). Also, even if it is not on a fire, if it is not sealed with clay, it is forbidden (5) lest one stir it with a ladle, for someone who stirs a pot /on Shabbos/, even if it is not on a fire, (6) is held guilty for *Mevasheyl* (the Shabbos labor of cooking).

It is permitted to set (7) traps for wild animals, birds or fish, /even/ though they will be trapped on Shabbos.

It is permitted to sell /an object/ to a non-Jew and load /it for/ him /even when it is/ close to dusk, (8) provided that he leaves /the Jew's/ premises completely (9) while still day.

Gloss: Some /authorities/ permit the non-Jew to remove it /from the Jew's premises even/ on Shabbos (10) if the non-Jew has set himself aside a place in the Jew's premises /for the purchased article/ while still day. (11) It is proper to follow the stricter view here /and forbid this/. (...) See below, Sec. 325.

Mishnah Berurah

(8) Provided that he leaves, etc. This means that if there is not sufficient time left for this, or if the non-

Jew stipulates that he will take it from him on Shabbos, then even the sale is forbidden.

Analysis⁵⁰

In sub-paragraph 8 the Mishnah Berurah interprets Karo's adjudication "it is permitted to sell /an object/ to a non-Jew and load /it for/ him /even when it is/ close to dusk, provided that he leaves /the Jew's/ premises completely while it is still day." This interpretation is initiated by the formulary "this means" (*ratzah lomar*). Furthermore, as demonstrated previously, when he uses this formulary, Rabbi Kagan emphasizes that this interpretation argues Karo's intention and not his own. The Mishnah Berurah manifests his halachic preference in sub-paragraph 11 in the context of the Rema's adjudication. The discourse in sub-paragraph 11 presents the accommodative possibilities related to the law of the Gentile's departure from the Jew's premises prior to the Shabbat. In addition, in his Beyur Halachah commentary Rabbi Kagan brings other lenient opinions. The Beyur Halachah states "if the Gentile left the object by him, and came at night and took it. It appears that one should be lenient under pressing circumstances to give it to him even if he is not dumb since this prohibition is only because of outward appearances one should not be stringent in this as it is only a doubtful prohibition of the rabbis."

The Beyur Halachah, besides this augmentation, appraises the reader of a principle in his halachic decision making. He states "one should not be stringent in this as it is only a doubtful prohibition of the rabbis." This principle, as explicitly expressed, offers grounds for lenient ruling.

The Mishnah Berurah concludes sub-paragraph 8 with the stringent ruling "then even the sale is forbidden" with Sha'ar Ha-Tziyuh 7 referring to the Talmud. By adding this footnote, Rabbi Kagan emphasizes that this stringent view complies with the Talmud, the primary rabbinical source, and thus the need for the stringent adjudication.

(9) While still day. So that it will not appear as if the Jew ordered him to carry it out.

There is another reason for this: so that the Jew not be suspected of having sold it to him on Shabbos, or of having given it to him as collateral for a loan. According to this reason, it is forbidden even in a walled city or in an area where there is an eyruv. So, indeed /, that this reason be taken into account/, is the consensus of the Acharonim. /Therefore,/ for our case one must certainly be strict with respect to sale or rental of any object even if it is in a walled city where /, too,/ the non-Jew lives, and have him remove it from the /Jew's/ premises while it is still day.

Analysis

In sub-paragraph 9, the Mishnah Berurah explains the conclusion of Karo's ruling discussed in sub-paragraph 8. He relates to the phrase "while still day". This explanation is initiated by the formulary phrase "there is another reason for this" (*yeṣh od taam lazeh*). The phraseo-

logy of sub-paragraph 9, including the opening vocable "so that" (*kide*), is quoted from the Tosafot Shabbat, sub-paragraph 7. Reference to this 'latter rabbinical authority' is cited in the Sha'ar Ha-Tziyun 10 amongst an array of other 'latter rabbinical authorities'. To illustrate the Mishnah Berurah's utilization of the Tosafot Shabbat, I will reproduce sub-paragraph 9 and underline this 'latter rabbinical authority's' commentary.

"So that it will not appear as if the Jew ordered him to carry it out.

There is another reason for this: so that the Jew not be suspected of having sold it to him on Shabbos, or of having given it to him as collateral for a loan. According to this reason, it is forbidden even in a walled city or in an area where there is an eyuv. So, indeed /, that this reason be taken into account/, is the consensus of the Acharonim. /Therefore,/ for our case one must certainly be strict with respect to sale or rental of any object even if it is in a walled city where /, too,/ the non-Jew lives, and have him remove it from the /Jew's/ premises while it is still day."

To justify his decision to rule stringently, Rabbi Kagan adheres to his halachic pattern. This pattern asserts that when the majority of 'latter rabbinical authorities' adjudicate stringently, he is obligated to embrace their view. Therefore the Mishnah Berurah states in sub-paragraph

9, "so indeed is the consensus of the Acharonim. /Therefore/ for our use one must certainly be strict . . ." This statement is referenced to the Sha'ar Ha-Tziyun 10, which enumerates numerous 'latter rabbinical authorities'.

An examination of the Tosafot Shabbat sub-paragraph 7, reveals that Rabbi Kagan eliminated an accommodative ruling from his quote. Instead, he incorporates this lenient view in sub-paragraph 11, where he prefers to discuss the accommodative adjudications of paragraph 2. It would appear that Rabbi Kagan prefers mentioning the lenient rulings within the context of his own discussion of the Rema's halachah, rather than Karo's, as the Rema is the adjudicator for Ashkenazic Jewry. Furthermore, this preference is often evidenced when the Rema adopts a stringent ruling as illustrated in sub-paragraph 11, where the heading of this sub-paragraph cites the Rema's statement, "it is proper to follow the stricter view here."

Notwithstanding this, in sub-paragraph 9 Rabbi Kagan also suggests accommodative considerations. In the conclusion of the Sha'ar Ha-Tziyun 10 he states, "it seems that in a place of great need it is permissible to give it to him where there is an eyruv, and one can be dependent upon the first reason."

Thus the reader is advised that there is a lenient view as well, in regard to the law discussed in sub-paragraph 9.

(10) If the non-Jew has set himself aside, etc. Their reason is that this is considered as if it has already been /taken out and/ put in the non-Jew's premises.

Analysis

In sub-paragraph 10, the Mishnah Berurah explains the reason for the first opinion stated in the Rema, "some /authorities/ permit the non-Jew to remove it /from the Jew's premises/ even/ on Shabbos if the non-Jew has set himself aside a place in the Jew's premises /for the purchased article/ while still day." This explanation is initiated by the formulary "their reason" (*sevaratam*). The phraseology in sub-paragraph 10, except for the formulary, is quoted from the Tosafot Shabbat. No reference to this 'latter rabbinical authority' is cited.

(11) It is proper to follow the stricter view. So as not to accustom the non-Jew to /do/ this.

See the Acharonim whose consensus is that from the halachic standpoint /, not merely as a matter of strictness,/ one ought not to be lenient in this. For in Sec. 440, the ruling for *chameytz* (leavened bread) /owned by a non-Jew but in a Jew's house/ is the same: /even/ setting aside a place for /the non-Jew/ is of no avail. Aside from this, an observer will /still/ assume that the Jew has ordered him to remove it /from the premises/. One should, therefore, not be lenient here except where loss of money or great need is involved.

If the non-Jew is a man of power it may be permitted even without having reserved him a place, for under such circumstances the Sages did not mean to have their prohibition apply.

The *O.T.* writes: "It would appear that if one rents the room /in which the objects are found/ to the non-Jew for the duration of Shabbos for a *perutah* (a small coin), there is no need at all to be strict." (See there.) But the *M.A.* and other Acharonim hold that even where the room has been rented, this is not enough to rely on for being lenient /and permitting it/.

Analysis

In sub-paragraph 11, the Mishnah Berurah explains and glosses the second opinion presented in the Rema, "it is proper to follow the stricter view here /and forbid this/." This sub-paragraph, as sub-paragraph 9, commences with the formulary "so as" (*kede*).

The phraseology of sub-paragraph 11 is formed from the wording of the Magen Avraham, Taz, Tosafot Shabbat and the Olat Shabbat. The Magen Avraham and Olat Shabbat are cited in the Mishnah Berurah text. Other 'latter rabbinical authorities' are cited in the Sha'ar Ha-Tziyun 11. To illustrate the Mishnah Berurah's adoption of these 'latter rabbinical authorities', I will reproduce sub-paragraph 11 underlining the Tosafot Shabbat, printing the Magen Avraham in bold, the Olat Shabbat in superscript, and identifying the Taz and the Elya Rabba.

"So as not to accustom the non-Jew to /do/ this.

See the Acharonim whose consensus is that from the halachic standpoint /, not merely as a matter of strictness, / one ought not to be lenient in this. For in Sec. 440, the ruling for chameytz (leavened bread) /owned by a non-Jew but in a Jew's house/ is the same: /even/ setting aside a place for /the non-Jew/ is of no avail. Aside from this, an observer will /still/ assume that the Jew has ordered him to remove it /from the premises/. One should,

therefore, not be lenient here except where loss of money or great need is involved.

[If the non-Jew is a man of power it may be permitted even without having reserved him a place, for^d under such circumstances the Sages did not mean to have their prohibition apply.] (Taz)

The *O.T.* writes: "It would appear that if one rents the room /in which the objects are found/ to the non-Jew for the duration of Shabbos for a *perutah* (a small coin), there is no need at all to be strict." (See there.) But the *M.A.* and other Acharonim [hold that even where the room has been rented, this is not enough to rely on for being lenient /and permitting it/."] (Elya Rabba)

Sub-paragraph 11 commences with the explanation of the Rema's stringent view. To emphasize the necessity to rule strictly, Rabbi Kagan employs the terminology "from the halachic standpoint" (*d'midina ein lehakel*). Furthermore, the term "acharonim" is elected to suggest his lack of choice. This stringent segment of sub-paragraph 11 concludes with the accommodative suggestion permitting a non-Jew to remove the item from the Jew's premises "where the loss of money or great need is involved." The subsequent segment continues with a lenient ruling and concludes, ". . . for under such circumstances the Sages did not mean to have their prohibition apply." These lenient rulings are in accordance with my discussion in sub-paragraph 9.

The concluding segment of sub-paragraph 11 discusses a *halachah* where the Mishnah Berurah adduces both lenient and strict opinions. The literary pattern of this segment in accordance with Rabbi Kagan's halachic structure, namely, to cite in his text the name of the 'latter rabbinical authorities' when he is compelled to accept the stringent ruling. To further strengthen Kagan's decision, the term "acharonim" is cited immediately after the reference to the Magen Avraham who rules strictly.

Alternately, the Mishnah Berurah both here and in sub-paragraph 9 does not discuss the accommodation of "borrowing" referred to by the 'latter rabbinical authorities'. (See the Ba'eyr Heytev sub-paragraph 2.)

Shulchan Aruch

2. One may (12) give his clothes to a non-Jewish launderer or /his/ hides to a tanner (i.e., the type of artisan who prepares leathers) (13) close to dusk (14) if the amount to be paid /for the entire job/ is agreed upon beforehand, or if he does it /without payment/ (15) to repay a favor, provided that /the Jew/ does not tell him (16) to work on Shabbos, and that the non-Jew does the work (17) in his own premises.

Gloss: (18) However, if he does not fix the payment it is forbidden (19) on Erev Shabbos. See above, Sec. 247, (20) that there are some /authorities/ who disagree /and forbid it/ if he does it for him (21) free of charge, i.e., to repay a favor.

(22) If the /Jew/ sees him working /on his articles on Shabbos/ in order to repay a favor, he must tell him not to work on it on Shabbos.

Gloss: This is even if he gave /the clothes or the furs/ to him (23) several days before Shabbos.

Mishnah Berurah

(12) Give his clothes, etc. The same is true for other jobs. The reason for this /law/ is that since /the Jew/ fixes /the non-Jew's/ wages for the /completed/ job and is also not particular as to whether he does it immediately, if he then does the work on Shabbos he does it for his own interest--to complete his work more quickly.

Analysis

In sub-paragraph 12, the Mishnah Berurah explains Karo's accommodation, "one may give his clothes to a non-Jewish launderer or /his/ hides to a tanner close to dusk." This explanation is initiated by the formulary "the same is true" (*hu hadin*) and the term "the reason" (*hataam*). The phraseology of sub-paragraph 12 cannot be identified with any specific 'latter rabbinical authority', but is rather the wording employed throughout the theme.

(13) Close to dusk. These, too, must be completely removed from /the Jew's/ premises while still day. [Rambam]

Analysis

In sub-paragraph 13, Rabbi Kagan explains Karo's stipulation that the article must be given to the Gentile "close to dusk". As identified at the conclusion of sub-paragraph 13, the phraseology is quoted from Maimonides. The Mishnah Berurah identifies this source in his commentary in section 247 sub-paragraph 2, and does the same here, even though this does not follow his customary pattern in the employment of 'former rabbinical authorities'.

(14) If the amount to be paid. That is, a specific amount /for the entire job/; this excludes where he is hired by the day.

See Sec. 247, Par. 2, that if he stipulates with him that he will pay him after settling with him on a mutually agreeable sum, then even though he does not specify exactly how much he will pay him, this is the same as fixing the payment.

Nowadays, clothes /given in/ to a launderer without any specification of conditions have the same law as if the amount of payment is fixed, since the prices are generally known. General practice is, therefore, to give these /in to a laundry/ on Erev Shabbos close to dusk.

Analysis

In sub-paragraph 14, the Mishnah Berurah interprets and glosses Karo's condition to his accommodation "if the amount to be paid /for the entire job/ is agreed beforehand." This interpretation is initiated by the formulary "that is" (*hinu*). The context and phraseology of sub-paragraph 14 is quoted from the Magen Avraham and Tosafot Shabbat, with Rabbi Kagan's explanatory comments. To illustrate this, I will reproduce sub-paragraph 14 underlining the Magen Avraham and printing the Tosafot Shabbat in bold.

"That is, a specific amount /for the entire job/; this excludes where he is hired by the day.

See Sec. 247, Par. 2, that if he stipulates with him that he will pay him after settling with him on a mutually agreeable sum, then even though he does not specify exactly how much he will pay him, this is the same as fixing the payment.

Nowadays, clothes /given in/ to a launderer without any specification of conditions have the same law as if the amount of payment is fixed, since the prices are generally known. General practice is, therefore, to give these /in to a laundry/ on Erev Shabbos close to dusk."

In Sh'ar Ha-Tziyun 15, the reader is referred to the Beyur Halachah. This commentary develops the lenient views of the Magen Avraham concerned with the giving of clothes to a Gentile launderer. Preserving his literary style, Rabbi Kagan avoids the problems presented against the Magen Avraham's adjudication in the Mishnah Berurah text, but rather discussed it in the Beyur Halachah. Except for two segments, this Beyur Halachah stresses the lenient view. These two segments are concerned with the stringent aspects of the law. Rabbi Kagan emphasizes that he prefers the lenient view and concludes the first strict segment with the phrase "in practice, this needs further study." (*tzarich iyun lemaaseh*). The second stringent statement, after clearly identifying the lenient view, attributes the strict law to a long list of 'latter rabbinical authorities'. Thus the Mishnah Berurah rules in accordance with his principle that if this is the adjudication of the 'latter rabbinical authorities', he is compelled to accept it.

This second segment also suggests an additional principle in Rabbi Kagan's stringent halachic decision making. He states: "It is very difficult in reality to be

dependent upon this, since all the 'former rabbinical authorities' . . . ;"

The final segment in sub-paragraph 14 commences with the vocable "nowadays". The Mishnah Berurah text does not cite the source for this statement. Only in the Beyur Halachah is the Magen Avraham identified as the source. This follows Rabbi Kagan's literary style, which suggests to the reader that he is concerned with his "nowadays", nineteenth-twentieth century Eastern Europe when in reality it is a quote from a previous century.

(15) To repay a favor. That is, the non-Jew agrees to do it free of charge. We assume that most probably /his doing it without pay/ is in return for some favor the Jew previously did for him. He is, therefore, working on his own behalf.

Analysis

In sub-paragraph 15, the Mishnah Berurah continues to interpret Karo's condition for his accommodation, "or if he does it /without payment/ to repay a favor." This interpretation is initiated by the formulary "that is" (*hinu*). The Mishnah Berurah, in sub-paragraph 15, does not quote the terminology of the 'latter rabbinical authorities' concerned with this law, but rather employs the wording of section 247, sub-paragraph 15, that deals with a related theme. In this prior sub-paragraph Rabbi Kagan quoted the Magen Avraham. No reference is cited to section 247 sub-paragraph 15.

(16) To work on Shabbos. Similarly, if he tells the launderer: "Note that I need these clothes for the night immediately following the conclusion of Shabbos!" (as, for example, where he desires to set out on a trip immediately on the night after Shabbos), this, too, is forbidden, even if he fixes the payment /for the job/. For, since it is impossible to finish it /by the time mentioned/ without working on Shabbos, it is the same as if he would be telling him explicitly to launder /them/ on Shabbos; /in other words, /the non-Jew/ is his agent /to do the work/. [Acharonim]

Analysis.

In sub-paragraph 16, the Mishnah Berurah glosses Karo's statement with a stringent ruling: "Provided that /the Jew/ does not tell him to work on Shabbos." This gloss is initiated by the formulary "similarly" (v'chen). The phraseology of sub-paragraph 16 is quoted from the Ba'eyr Heytev, sub-paragraph 3, who states that his statement is adapted from the commentary of the Taz, section 407 sub-paragraph 3, and "as all the 'latter rabbinical authorities' have written." No specific 'latter rabbinical authority' is identified. This reference to 'latter rabbinical authorities' preserves the Mishnah Berurah's literary pattern, that a stringent law is embraced when it is the consensus of the 'latter rabbinical authorities'.

(17) In his own premises. That is, not in the Jew's premises--for then it appears as if he is doing it as the Jew's agent.

The Ch.A. writes that it is forbidden in the Jew's premises even if it is something which is customary for all the townspeople to give over under a job-contracting agreement (so that it will not be suspected that he is hired by the day). This, too, is forbidden for the above reason: people will say /the Jew/ ordered him to work on Shabbos.

Analysis

In sub-paragraph 17, Kagan interprets and glosses Karo's statement "and that the non-Jew does the work in his own premises." The interpretation is initiated by the formulary "that is" (*ratzah lomar*). This formulary emphasizes that the stringent conditions referred to by Rabbi Kagan are an explanation of Karo's ruling, but other possibilities are conceivable.

The first segment of sub-paragraph 17, "not in the Jew's premises--for then it appears as if he is doing it as the Jew's agent" is adapted from the phraseology of the Geraz. No reference to the Geraz is cited. The latter segment of this sub-paragraph, as stated in the Mishnah Berurah text, is adapted from the wording of the Chayei Adam. Rabbi Kagan preserves his literary pattern and cites the name of the 'latter rabbinical authority' in the Mishnah Berurah text when he presents a stringent opinion that might be disputed. Furthermore, evidence of this pattern is seen when problems of his social reality are excluded from the Mishnah Berurah analysis but are instead included in the Sha'ar Ha-Tziyun 17. In this Sha'ar Ha-Tziyun he states: "I have seen in certain places that the flax is leased to a Gentile to air it in his yard and they are aired on Shabbos day. What they are doing is not right. Even if it is the custom of the whole city, to work under contract, if it is in the possession of the Jew it is forever forbidden.

Therefore one should sell them the flax on Shabbos eve so that it will belong completely to the Gentile."

I suggest that the incorporation of the Chayei Adam's stringent opinion at the conclusion of sub-paragraph 17, which deviates from the Mishnah Berurah's literary style, serves as an introduction to Rabbi Kagan's contemporary case, thus preserving his pattern.

(18) However, if he does not fix the payment. That is, he did not make any stipulation with the Jew as to his remuneration; but nevertheless, the non-Jew still expects to be paid. This is forbidden: we do not say he is working on his own behalf since the Jew has not expressly promised him anything.

Analysis

In sub-paragraph 18, Rabbi Kagan interprets the Mishnah Berurah's stringent ruling, "however, if he does not fix the payment it is forbidden . . ." This interpretation is initiated by the formulary, "that is" (*hinu*). Following his literary pattern the Mishnah Berurah prefers to avoid disputing with the Magen Avraham and Shulchan Aruch in the Mishnah Berurah text. Only in the Beyur Halachah, does Rabbi Kagan present the dispute between the Rema and other 'latter rabbinical authorities'. This preference is especially prevalent when the Magen Avraham and the Gra, who stress accommodative view in this case, are involved.

(19) On Erev Shabbos. For if he gives it to him on Erev Shabbos it appears as if he is giving it to him on the condition that he work on Shabbos. But if he fixed the payment /for the job/ (in which case he is deemed to be

working on his own behalf), it does not appear as if he is so instructing him.

The halachic authorities write that if there is ample time left to complete the job while still day, then according to all opinions it is permitted--even on Erev Shabbos, despite the fact that he has not fixed payment. The reason the *Rema* cites "Erev Shabbos" in particular is because it would be permitted to give /the work/ to him on Wednesdays and Thursdays, (which are further removed from Shabbos), even if it is not possible to complete it before Shabbos, since /the Jew/ does not tell him to do it on Shabbos.

Analysis

In sub-paragraph 19, the *Mishnah Berurah* explains and glosses the *Rema*'s stringent statement, ". . . if he does not fix the payment it is forbidden on Erev Shabbos" with an accommodative view. Rabbi Kagan incorporates this accommodation under the heading of the Ashkenazic adjudicator, the *Rema*.

The *Beyur Halachah*, commencing "forbidden Erev Shabbos", analyzes the different opinions concerned with the theme of sub-paragraph 19. Rabbi Kagan preserves his literary style and prefers not to include the dispute within the *Mishnah Berurah* text. This *Beyur Halachah*, as well as sub-paragraph 19, emphasizes the lenient opinions. To further strengthen his lenient ruling, the phrase, "the halachic authorities", is selected, thus suggesting greater authority in his adjudication.

The phraseology of sub-paragraph 19 is adapted from the 'latter rabbinical authorities' concerned with this topic. This terminology is especially prevalent in the

commentaries of the Magen Avraham and Tosafot Shabbat. Reference to the Magen Avraham is cited in the Beyur Halachah.

(20) That there are some who disagree, etc. These /authorities/ hold that this is the same as where he does not fix payment, and that /on the contrary/ he is considered working on behalf of the Jew--which is forbidden on Erev Shabbos.

See D.M. who agrees with those "some who disagree." See also what I have written above in Sec. 247, Mishnah Berurah, sub-Par. 16.

Analysis

In sub-paragraph 20, the Mishnah Berurah explains the Rema's stringent statement "... that there are some /authorities/ who disagree /and forbid it/ if he does it for him free of charge." This explanation, as in sub-paragraph 10 is initiated by the formulary "these /authorities/ hold" (v'severah le). In this sub-paragraph, Rabbi Kagan prefers not to discuss the strict possibilities at length, and refers the reader to section 247 sub-paragraph 17. Segments from this previous sub-paragraph are quoted here in sub-paragraph 20.

Sub-paragraphs 18, 19 and 20 preserve the Mishnah Berurah's grouping style and do not quote the 'latter rabbinical authority' commentaries of the Shulchan Aruch, do not offer footnote commentaries, and do not quote verbatim from the 'latter rabbinical authorities'.

(21) Free of charge. This is not so where the non-Jew himself takes the initiative in telling the Jew that he will

do it for him free of charge. In such a case he certainly has in mind a favor previously received from him, and the ruling would be the same as /for a case/ where he fixes payment. [From above, Sec. 247, Par. 4 in the gloss.]

Analysis

In sub-paragraph 21, the Mishnah Berurah clarifies the Rema's stringent adjudication "if /the Jew/ sees him working /on his articles on Shabbos/ in order to repay a favor, he must tell him not to work on it on Shabbos", with a lenient gloss. As Rabbi Kagan specifies at the conclusion of sub-paragraph 21, this gloss is quoted from the Rema's ruling in section 247 paragraph 4.

(22) If /the Jew/ sees him working, etc. Even though the Shulchan Aruch ruled leniently above and permitted giving /the work/ even free of any obligation to pay while still day, without any concern as to whether or not he will work on Shabbos (even where he is sure that he will work /on Shabbos/, the reason being that he did not order him to do so--as explained above in, Sec. 247, Mishnah Berurah, sub-Par. 3), nevertheless if /the Jew/ enters /the non-Jew's/ premises and finds him working, /if he does not protest/ it will appear as if /the non-Jew/ is working on /the Jew's/ behalf, since he is not getting paid for this. /The Jew/ must therefore tell him not to work. Where, however, he initially stipulates /with the non-Jew/ that he will pay him, even though no specific amount is specified, he need not protest, for then /the non-Jew/ is working on his own.

Analysis

In sub-paragraph 22, the Mishnah Berurah clarifies and glosses Karo's intention in ruling, "if /the Jew/ sees him working /on his articles on Shabbos/ in order to repay a favor, he must tell him not to work on it on Shabbos." This clarification is initiated by the opening phrase, "even

though the Shulchan Aruch." The phraseology of sub-paragraph 22 is adapted from the Tosafot Shabbat, although only very little is quoted verbatim.

The second segment of sub-paragraph 22, the gloss, states, "where, however, he initially stipulates /with the non-Jew/ that he will pay him, even though no specific amount is specified, he need not protest, for then /the non-Jew/ is working on his own." This accommodation, although not presented as a dispute, responds to the 'latter rabbinical authorities' questions on the Magen Avraham. Rabbi Kagan thereby emulates his literary style by presenting the dispute between the Magen Avraham and 'latter rabbinical authorities' in the Sha'ar Ha-Tziyun 18, rather than in the Mishnah Berurah text. This Sha'ar Ha-Tziyun states: "Beis Yosef and Bach as they are explained according to the Elyah Rabba and other 'latter rabbinical authorities', to remove from them the question of the Magen Avraham. The Magen Avraham also agrees that this is the law of specifying fees."

Further lenient views are expressed in the Beyur Halachah commencing "in order to repay a favor." At the conclusion of this Beyur Halachah the Mishnah Berurah states: "So it seems from the adjudicators who rule this way without indicating any dispute on the matter. Later I found in the Chidushei Rabbi Akiva Eiger that he explicitly accepted a stringent view here." This is in keeping with

his statement in the introduction of the Mishnah Berurah, where he indicates the significance of and his dependency on the 'latter rabbinical authority' Rabbi Akiva Eiger.

(23) Several days. That is, in such a case all views agree that it was permitted to give /the work/ to him (as above); nevertheless, he must protest /and tell him to stop/ when he sees him /working/.

Now, moreover, that if the non-Jew was his day-worker during the weekday period, and now, /on Shabbos/ as well, he decides to work /for the Jew/, /even if this is/ in private, in his own premises, /the Jew/ must go and protest /against his working/ as soon as he hears of this, even though the work is not being done before his very eyes.

The M.A. writes that if someone places an order with a non-Jew for manufacture of shoes and /later/ finds him working on them on Shabbos, he need not protest, even if the payment /for the job/ was not fixed. For /the shoes/ are not as yet considered the Jew's. The non-Jew, should he so desire, could /still/ sell them to someone else and make him different shoes. If so, then, /the non-Jew/ is not working on /the Jew's/ behalf.

Analysis

In sub-paragraph 23, the Mishnah Berurah interprets and glosses the Rema's ruling "this is even if he gave /the clothes or the furs/ to him several days before Shabbos." Rabbi Kagan divides this sub-paragraph into three segments. The first segment, which interprets the Rema's adjudication is initiated by the formulary "that is" (*ratzah lomar*). The use of this formulary suggests that the Mishnah Berurah disagrees with this interpretation of the law.

The second segment is initiated by the formulary, "know" (*da*). Although this formulary previously is elected to argue Rabbi Kagan's analysis of the law in sub-paragraph 23, here it presents the stringent view of the Olat Shabbat.

The phraseology of sub-paragraph 23 parallels that of the Olat Shabbat but no reference to this 'latter rabbinical authority' is cited.

The third segment of sub-paragraph 23, commencing with the phrase "the Magen Avraham writes" continues the Mishnah Berurah's gloss. Rabbi Kagan quotes only one section of the terminology and adjudication of the Magen Avraham, sub-paragraph 9; the accommodation. The disputes and the stringent rulings of the Magen Avraham are deleted. Thus Rabbi Kagan preserves his literary style and concludes with a lenient opinion.

Shulchan Aruch

3. (24) If the work is /on an article/ (25) widely known as belonging to a Jew, and he works on it in a public place, it is proper to act strictly and to forbid it.

Mishnah Berurah

(24) If ... is, etc. For, usually, hides given to a tanner and clothes to a launderer are not widely known as belonging to a Jew. Therefore, even if the tanning or laundering is done in a public place, one need not protest against the non-Jew's working, where payment was fixed.

However, where the work is known to belong to a Jew, and, moreover, /the non-Jew/ does it in a place visible to the public, /the Jew/ must demand that he does not work on Shabbos. For an observer will not know that payment has been fixed, and will suspect him to have been hired by the day.

(This is as stated above in Sec. 244, Par. 1. See there, in Par. 4, that it is the opinion of the Shulchan Aruch that this is forbidden even from the halachic standpoint. See the Beyur Halachah there on this, s.v. "Dino.")

Analysis

In sub-paragraph 24, the Mishnah Berurah clarifies and glosses Karo's law concerned with the work done by the Gentile on an article which is "widely known as belonging to a Jew". The first segment of this sub-paragraph does not include any formulary, but is structured as a continuation of Karo's statement. This clarification emphasizes the accommodative possibilities of Karo's adjudication.

The second segment of sub-paragraph 24, that commences with the phrase, "this is as stated", glosses the Mishnah Berurah's discussion of Karo's ruling in section 244 sub-paragraph 23. I have analyzed this discussion in section 244 sub-paragraph 23.

* * * * *

At this point I would like to suggest that Rabbi Kagan perceived the adjudications of section 252 sub-paragraph 8 through sub-paragraph 24 concerning Jews and Gentiles as a gloss to the prior laws, especially section 247. This prior section, consistently referred to in the Mishnah Berurah commentary in section 252, is further evidence to my argument. The Mishnah Berurah's utilization of this section as a gloss is further exemplified in the literary structure of his commentary. First, he prefers to utilize fewer quotes from the 'latter rabbinical authorities'. Second, the stringent views and disputes are incorporated here rather than in the previous sections. For example in sub-

paragraph 24 Rabbi Kagan presents Karo's stringent opinion, where he states "that it is forbidden from the halachic stand point" while the accommodative view appears in section 244, Beyur Halachah, commencing "dino".

(25) Widely known, etc. According to this, a protest should be made where garments recognizable as belonging to a Jew are seen, on Shabbos, being washed by a non-Jew on the river shore (which is an open and public place). {M.A.} But the *To.Sh.* writes that /this/ suspicion does not apply here since it is not known whose they are.

The *Ch.A.* takes an even more lenient position in this for another reason: since it is known that the custom of all townspeople is to give clothes to a launderer under a job-contracting agreement, it is therefore permitted even if the non-Jew launders them in a public place; for there will be no suspicion here of /his being/ a day worker. (This is similar to what has been stated in Sec. 243, Par. 2.)

The same is true for all articles customarily given out under a job-contracting arrangement: there is no prohibition for these unless the work is done at the Jew's premises (in which place it can be permitted under no circumstances, as stated above in sub-Par. 17).

Analysis

In sub-paragraph 25, the Mishnah Berurah glosses Karo's law cited above in my analysis of sub-paragraph 24. This gloss is initiated by the formulary, "according to this" (*u'lefi zeh*). In this sub-paragraph Rabbi Kagan is concerned with a dispute between the Magen Avraham and other 'latter rabbinical authorities'. In this instance the Mishnah Berurah favours the 'latter rabbinical authorities' accommodative view over the stringent argument of the Magen Avraham. Kagan therefore identifies the 'latter rabbinical authorities' who state the lenient opinion) thus preserving his literary pattern.

The phraseology of sub-paragraph 25 is primarily taken from the 'latter rabbinical authorities', which are identified in the sub-paragraph as the Magen Avraham, Tosafot Shabbat and the Chayei Adam.

The Mishnah Berurah concludes sub-paragraph 25 with a reminder to his reader that "there is no prohibition for these unless the work is done at the Jew's premises (in which place it can be permitted under no circumstances . . .)" Although this segment is introduced with the formulary "the same is true" (*hu hadin*), it is a continuation from the Chayei Adam quoted immediately prior to this statement. Thus the Mishnah Berurah does not conclude sub-paragraph 25 with his own stringent ruling, and thereby preserves his literary pattern.

Shulchan Aruch

4. (26) Wherever the payment /for the job/ was fixed, (27) even though the non-Jew does the work on Shabbos, the Jew may wear the garment /upon which the non-Jew worked/ even on Shabbos itself. For, wherever payment is fixed, /the non-Jew/ is then working on his own behalf.

Gloss: (28) Some /authorities/, however, prohibit wearing it, if it is known that the non-Jew completed it on Shabbos (...), and therefore at Motza'ey Shabbos (the night after the conclusion of Shabbos), one must wait (29) a time period of sufficient duration for the work /that was done on Shabbos/ to be done. (...) This is the accepted and preferred practice--unless /the garment/ is needed for Shabbos, in which case one may follow the lenient view.

(30) If it is possible to assume that it was completed on Erev Shabbos, it is permitted in any case. (...)

But this is only where the non-Jew sends /the garment/ to /the Jew's/ house. It is forbidden, however, (31) to 'remove' /i.e., take back/ clothes (32) from the artisan's premises on Shabbos or Yom Tov. (...)

All this, however, concerns only clothes made /specifically/ for a Jew. (...) (33) However, where a non-

Jew manufactures shoes for sale, a Jew (such as one with whom /the non-Jew/ is familiar) may go and take them from him and /even/ don them on Shabbos--provided (34) that he does not fix the sales-price with him. (...)

Mishnah Berurah

(26) Wherever the payment, etc. This is only where there was no forbidden aspect at the time of giving it over; i.e., all, the other requirements necessary at the /time of the/ fixing of payment, as mentioned above, Par. 2, were also present.

Analysis

In sub-paragraph 26, the Mishnah Berurah clarifies the conditions for Karo's statement, "wherever the payment /for the job/ was fixed, even though the non-Jew does the work on Shabbat, the Jew may wear the garment /upon which the non-Jew worked/ even on Shabbos itself . . ." The phraseology of this sub-paragraph is not quoted from any specific 'latter rabbinical authority'.

(27) Even though, etc. This is not similar to what seems apparent from Sec. 276, Par. 1 in the gloss, that if a non-Jew kindles a light for a Jew, even after having fixed wages /for the non-Jew's work/, it is forbidden to benefit from its illumination. For in our case, even though the Jew benefits from work done on Shabbos when he wears it, nevertheless the non-Jew did not work on Shabbos in order to give the Jew benefit; this was done /primarily/ on his own behalf, to complete his job more quickly. In that case, however, the kindling /of the light/ on Shabbos was in order that the Jew make immediate use of it. It is therefore forbidden.

Accordingly, even in this case if the Jew tells the non-Jew shortly before dusk, "Why have you not completed the job for me?"--to which the other responds, "I will do this for you on Shabbos," it will, indeed, be forbidden, even according to the author /of the Shulchan Aruch/, to wear it on Shabbos, just as in the case of a light. [P.Mg.]

Analysis

In sub-paragraph 27, the Mishnah Berurah continues to clarify and gloss Karo's law stated in sub-paragraph 26. This clarification and gloss is initiated by the phrase, "this is not similar" (*lo dami*). Sub-paragraph 27 is divided into two segments. The first segment cites the Magen Avraham's comparison between the law of "candle lighting" and that of "garment", stressing the lenient possibilities. The Magen Avraham is identified in the Sha'ar Ha-Tziyun 20.

Although no reference to the Tosafot Shabbat is cited, Rabbi Kagan utilizes this 'latter rabbinical authority's' wording and explanation of the Magen Avraham.

The latter segment of sub-paragraph 27, as stated in its conclusion, is quoted from the Peri Megadim. Rabbi Kagan integrates into the quote from the Peri Megadim the phrases "even according to the authorities /of the Shulchan Aruch/" and "on Shabbos". Through these additions, Rabbi Kagan informs the reader that this is the opinion of Karo, but there are other opinions, and it is only forbidden to wear the garment on Shabbat.

The Chafetz Chaim's decision to conclude sub-paragraph 27 with the Peri Megadim's stringent view suggests his concern for the practical implication of this case in his milieu. Alternately, to preserve his literary pattern, he does not explicitly combine his analysis of the Shulchan

Aruch with contemporary issues of his era. (This concern will be discussed in further detail in the summary of this study.)

(28) Some, however, prohibit, etc. Their reason is that it is forbidden for a Jew under all circumstances to derive benefit from Shabbos work, since the work was, after all, done for him.

Analysis

In sub-paragraph 28, the Mishnah Berurah explains the Rema's statement: "some /authorities/, however, prohibit wearing it, if it is known that the non-Jew completed it on Shabbos." The formulary, "their reason" (*taamam*), as in sub-paragraph 10, initiates the reason for the opinion, usually the stringent view.

(29) A time period of sufficient duration for the work to be done. So as not to benefit from work done on Shabbos. Accordingly, if a non-Jew does work on the first day of the two-day Diaspora Yom Tov, one may derive benefit from it as of the beginning of the second day--as soon as enough time needed for doing that work has elapsed. For whichever way one looks at it, this is permitted: if the first day is the holy day, then the second is an ordinary weekday; while if the first is a weekday, then there is no question that it is permitted.

In all these instances, there is no difference between someone for whom /the work/ was done or anyone else. But the *E.R.* takes a lenient view /and permits benefit/ for someone else where payment was fixed.

Analysis

In sub-paragraph 29, the Mishnah Berurah explains and glosses the Rema's ruling, ". . . therefore at *Motza'ey Shabbos* (the night after the conclusion of Shabbos), one

must wait a time period of sufficient duration for the work /that was done on Shabbos/ to be done." The explanation in the first segment of sub-paragraph 29, "so as not to benefit from work done on Shabbos", as in sub-paragraphs 9 and 11, is initiated by the formulary "so as" (*kede*).

The second segment of sub-paragraph 29, the gloss, is initiated, as in sub-paragraph 25, with the formulary "accordingly" (*Iefi*). This gloss is quoted from the Magen Avraham, who is cited in the Shajar Ha-Tziyun 24. Rabbi Kagan concludes with the lenient view of the Elya Rabba, and thus preserves his exegetical literary pattern. Furthermore, as he presents a dispute between the Magen Avraham and the Elya Rabba, the Elya Rabba is cited in the Mishnah Berurah text. No reference to the Magen Avraham is found in the Mishnah Berurah commentary.

(30) If it is possible to assume, etc. Since some permit it in all circumstances.

If a shoe was already completed as of Erev Shabbos, but it was improved, by being smoothed, on Shabbos, it is permitted /to wear it/. For it could have been, as well, worn without this /improvement/. (This is as stated in Sec. 253, Par. 1 in the fourth gloss.) The same is true for linen clothes pressed by a non-Jew on Shabbos: they are also permitted for the same reason.

Analysis

In sub-paragraph 30, the Mishnah Berurah continues to gloss the Rema's adjudication that I discussed in sub-paragraph 29. This accommodative sub-paragraph is divided into two segments. The first segment, which concludes with

the phrase, "in the fourth gloss", is quoted from the Magen Avraham. The latter segment is quoted from the 'latter rabbinical authority' the Netiv Chaim. Both 'latter rabbinical authorities' are cited in the Sha'ar Ha-Tziyun 24 and 25 respectively. Rabbi Kagan preserves his halachic pattern and indicates the different lenient views within his glosses to the rulings of the Rema.

(31) To remove clothes. This is even if one knows for certain that they were completed before Shabbos or Yom Tov, and notwithstanding the fact that they are needed for Shabbos. The reason is that of *mar'is ha-ayin* (suspicious appearances): it will be said he did it on Shabbos with the Jew's consent.

The *Levush* holds that even if one does not carry them home on his arm but dons them there in the non-Jew's premises, it is still forbidden for this reason. The *M.A.* holds that perhaps it is forbidden to have it taken home /from the non-Jew's premises/ even by a non-Jew, since this is considered an *uvda dechol* /i.e., a typical weekday activity, which is forbidden on Shabbos/.

Analysis

In sub-paragraph 31, the Mishnah Berurah explains and glosses the stringent adjudication of the Rema "it is forbidden, however, to remove /i.e., take back/ clothes from the artisan's premises on Shabbos and Yom Tov." Rabbi Kagan adopts and emphasizes the strict ruling of the Magen Avraham. To stress this dependency on the Magen Avraham and stringent ruling the Mishnah Berurah utilizes the vocable of the Magen Avraham "even though" (*afilu*) as an opening formulary. The term is repeated in sub-paragraph 31 when the Mishnah Berurah quotes the Magen Avraham verbatim.

Rabbi Kagan taking into account that he has deviated from his suggested halachic pattern for leniency, justifies this ruling in the Sha'ar Ha-Tziyun 28. He states: "The Peri Megadim and Tpsafot Shabbat. Even though I saw in the Elya Rabba and Chemed Moshe a lenient view when a Gentile brings it, there are many other 'latter rabbinical authorities' that are stringent and they are the Maamar Mordechai, Geraz and Shulchan Shlomo. The Hagahot Maimoni and Geraz claim outward appearances to be applicable here, (see there), therefore I left the doubt of the Magen Avraham as is." This Sha'ar Ha-Tziyun, in addition to explaining the Mishnah Berurah's argument, presents further evidence to the principles of the Chafetz Chaim's halachic decision-making. First, it expresses his dependency on the Magen Avraham. Second, Rabbi Kagan emphasizes that when the majority of 'latter rabbinical authorities' rule in a specific direction he is obligated to accept their decision. This point is clearly stated in the statement, "I therefore left the doubt of the Magen Avraham as is." I suggest that a further reason for this stringent adjudication is as I argued in the conclusion of sub-paragraph 24.

The phraseology of sub-paragraph 31 is formed from the wording of the 'latter rabbinical authorities' concerned with this theme. Most dominant among the 'latter rabbinical authorities' is the terminology of the Magen Avraham and the Elya Rabba. In addition, the Mishnah Berurah actuates the

formulary, "the reason" (*taam*), twice in this sub-paragraph, followed by an explanation to apologize for his need to rule stringently. Furthermore, following his literary style, when there is a dispute or a delicate adjudication involved, the Mishnah Berurah identifies the 'latter rabbinical authorities' in the Mishnah Berurah text. In sub-paragraph 31, the Magen Avraham and the Levush are cited.

(32) From the artisan's premises. It makes no difference whether he is a Jew or a non-Jew.

Analysis

In sub-paragraph 32, the Mishnah Berurah continues to explore his ruling discussed in sub-paragraph 31. As in sub-paragraph 31, Rabbi Kagan also continues to explain the reason for this adjudication, but places it into the Sha'ar Ha-Tziyun 29 and not in the Mishnah Berurah text.

The phraseology of sub-paragraph 32 is not quoted from any specific 'latter rabbinical authority', but rather from the general terminology of this theme.

(33) However, where a non-Jew manufactures, etc. For he does it on his own behalf on Shabbos.

As for the prohibition of bringing things from the artisan's premises, the *Rema* holds that this does not apply here, even though /the Jew/ goes to him. For since everyone knows that the non-Jew ordinarily makes /these items/ for himself in order to sell them, there is no longer any problem of *mar'is ha-ayin* (suspicious appearances), that /people/ might think he ordered him to produce these items.

But the *M.A.* and many other Acharonim dispute his view, holding that even in such a case it is forbidden to go and take /the articles/ from him--just as from any other artisan. But once he has already brought it to the Jew's premises, he may wear it, for it is assumed, if the town is

one whose majority are non-Jews, that it was not made for a Jew (as written in Sec. 515).

However, if the non-Jew is a dealer, not an artisan, one may possibly follow the more lenient view. But the *To.Sh.* and the *P.Mg.* express hesitation even in such a case since, in any event, it constitutes an *uvda dechol* /i.e., a typical weekday activity, which is forbidden on Shabbos/.

Analysis

In sub-paragraph 33, the Mishnah Berurah explains and glosses the Rema's law, "however, where a non-Jew manufactures shoes for sale, a Jew (such as one with whom /the non-Jew/ is familiar) may go and take them from him and /even/ don them on Shabbos." Rabbi Kagan divides this sub-paragraph into three segments. The first segment that concludes with the phrase, "to produce these items", explains the Rema's accommodation.

The second segment, that commences with the statement, "but the *Magen Avraham* and many other Acharonim", presents the opinions of the 'latter rabbinical authorities' who dispute the Rema. The Mishnah Berurah in this segment preserves his halachic structure in the following manner: first, by identifying the 'latter rabbinical authorities' and especially the Magen Avraham in the instance of disagreement. Second, through the use of the phrase "many other Acharonim" he both justifies the emphasis on the stringent opinion and indicates that the majority of adjudicators rule accordingly. Third, Rabbi Kagan proclaims his preference to adhere to the rulings of the majority of the 'latter rabbinical authorities', even over the adjudi-

cation of the Rema. Fourth, he demonstrates his dependency especially upon the Magen Avraham.

The final segment commences with the formulary, "however" (*ach*), and presents an accommodation. The Mishnah Berurah preferring not to conclude with a prohibition, actuates the terminology "expresses hesitation" and not a term such as, "forbidden". Alternately, since there is a disagreement in the ruling, the 'latter rabbinical authorities' concerned are identified, and the lenient view clearly stated. In addition, Rabbi Kagan continues to develop and emphasize the lenient possibilities in the Beyur Halachah, commencing from "the artisan's house. Even, in this commentary, when the strict view is cited and the 'latter rabbinical authorities' identified, the Mishnah Berurah concludes "this requires further study" (*tzarich iyun*). A subsequent Ba'eyr Heytev, commencing "on Shabbos and Yom Tov" that concludes the topic of the Jews and Gentiles relationships in sub-paragraph 252, continues to stress the accommodative position of the *halachah*.

The phraseology of sub-paragraph 33 is adapted from the 'latter rabbinical authorities' concerned with this theme. Especially relevant is the terminology of the Magen Avraham and the Tosafot Shabbat, both of whom are referred to in the Mishnah Berurah text.

(34) That he does not fix ... with him. That is, that he should not mention to him any amount of money, for otherwise this would be forbidden under *mikach u-mimkar* (the

Shabbos prohibition of engaging in commerce)--even if he does not pay him now.

Analysis

In sub-paragraph 34, the Mishnah Berurah interprets the Rema's ruling "that he does not fix the sales price with him." This interpretation is initiated by the formulary, "that is" (*d'hinu*). The phraseology of sub-paragraph 34 is not adapted from any specific 'latter rabbinical authority', but rather utilizes the general wording on this theme.

CHAPTER 8

SUMMARY AND CONCLUSIONS

This study has explored the structure, content, form and patterns of Rabbi Israel Mayer Kagan's Mishnah Berurah. In our search for a paradigm of the perceptual world implied in this commentary, we have applied, to a modern rabbinic corpus the method of rhetorical and structural analysis employed in the study of early rabbinic texts. This analysis augments our knowledge of the socio-historical traits of nineteenth century Jewish society in which Kagan authored his commentary, as well as his personality as it is conveyed through the hagiography and his other writings. The emerging Gestalt manifests the perceptual world we seek to apprehend. These additional data only supplement our exploration of the text. First and foremost, we seek the implied meaning of a specific text.

Through Kagan's adherence to the literary structure and genre of previous commentaries of the Shulchan Aruch, he expresses loyalty to the "ongoing tradition of Jewish legal hermeneutics."⁵⁹ The Mishnah Berurah testifies to its author's desire to be identified with the Weltanschauung of the seventeenth and eighteenth century authoritative commentators on Shulchan Aruch as well with elements of

rabbinic continuity the genre of this literature represents. Kagan's employment of the structure and genre of 'latter rabbinical commentators' includes the Mishnah Berurah as part of a mature authoritative legal system that in the mind of its adherents stretches back over more than a thousand years. In particular the analysis of the Mishnah Berurah's rhetoric allows the student a clear understanding of Kagan's exegetical enterprise, which takes place in the context of a continuous tradition of Jewish legal hermeneutics.

Table 2 (see next page) summarizes the occurrence of those literary traits of all the sections studied which, in our introduction, we argue were characteristic of the Mishnah Berurah's literary genre.

Following this, for convenience, is the table originally seen on page 42 of the introduction which documents the occurrences of these same traits among those 'latter rabbinical authorities' repeatedly cited in the Mishnah Berurah.⁴

On the basis of these traits we draw conclusions pertaining to the following main areas:

1. the extra-halachic material employed in the Mishnah Berurah;
2. Kagan's concern with contemporary issues;
3. the accommodative approach in Kagan's rulings;
4. the principles of adjudication employed in the Mishnah Berurah;

5. Kagan's relationship to previous rabbinic authorities;

TABLE 2
CHARACTERISTICS OF THE GENRE OF
MISHNAH BERURAH

Rule	Sec. 243 16 sub- pars.	Sec. 244 37 sub- pars.	Sec. 245 24 sub- pars.	Sec. 246 36 sub- pars.	Sec. 247 20 sub- pars.	Sec. 252 27 sub- pars.
1.	16	37	24	34	20	20
2.	8	23	19	25	17	16
3.	15	26	20	24	18	18
4.	14	36	21	32	17	23
5.	15	33	24	34	20	27
6.	9	16	13	19	17	14
7.	16	27	14	22	9	17
8.	6	12	6	7	8	3
9.	16	36	24	34	20	27
10.	9	24	15	24	13	14
11.	6	21	13	25	10	11
12.	10	21	15	24	14	12
13.	3	0	1	3	0	0
14.	4	6	4	1	0	1
15.	16	35	23	24	20	27
16.	9	9	9	22	4	10
17.	1	1	1	1	0	0
18.	16	36	24	34	19	22
19.	16	34	24	34	20	27
20.	12	35	22	30	17	19

(Sec. = Section; sub-pars. = sub-paragraphs)

TABLE 1

CHARACTERISTICS OF THE GENRE OF 'LATTER RABBINICAL
AUTHORITIES' / SHULCHAN ARUCH COMMENTATORS

Rule	Mishnah Berurah	Magen Avraham	Ba'eyr. Heytév	Tosafot Shabbat
1	Y	Y	Y	Y
2	Y	Y	Y	Y
3	Y	N	N	Y
4	Y	Y	Y	Y
5	Y	Y	Y	Y
6	Y	N	N	Y
7	Y	Y	Y	Y
8	Y	Y	Y	Y
9	Y	Y	Y	Y
11	Y	Y	N	Y
13	Y	Y	N	Y
15	Y	Y	Y	Y
16	Y	Y	Y	Y
18	Y	Y	N	Y
19	Y	Y	Y	Y
20	Y	Y	Y	Y

(Y = the rules used; N = the rules not used)

6. the relationship between Jews and Gentiles on Shabbat;

7. Kagan's perceptual world.

Rabbi Kagan was popularly referred to as the Chafetz Chaim, a reference to his first published book of ethics, entitled The Chafetz Chaim (Seeker of Life) (published in 1873). His fame, under his sobriquet the Chafetz Chaim, was not based upon his halachic commentary, the Mishnah Berurah, but rather upon his halachic *musar*. Furthermore, his books of *musar* were redacted concurrently with the compiling of

the Mishnah Berurah. One is therefore led to believe that his popularity stemmed from being an author and representative of the *musar* movement as well as from his role as being a prevailing rabbinic authority in his milieu. This would suggest that *musar* or extra-legal materials⁶⁰ would be employed extensively in the writing of his legal commentary the Mishnah Berurah. Our analysis of the Mishnah Berurah contradicts this suggestion. The extra-legal materials have been sparingly employed in the writing of this commentary. Moreover, they are discerned only in independent sub-paragraphs which are not concerned with the exegetical analysis of the Shulchan Aruch, such as queries that we have identified as contemporary issues. In the six sections explored in this study which encompass one hundred and sixty sub-paragraphs, three sub-paragraphs can be classified as extra-legal materials.

In section 243 sub-paragraph 2, Rabbi Kagan refers to a Jewish heretic (*Yisrael mumar*). This reference is part of a comment on Karo's statement that a Jew is prohibited from renting a bath house to a Gentile. It concludes that the interdiction may be extrapolated to all *halachah*. Electing to comment upon Karo's phrase "to a non-Jew" Kagan states:

All the more so, it is forbidden to rent it to an Israelite *mumar* since then one also violates the law, "Do not place a stumbling block before the blind". This reason applies to a field as well as to anything else.

Rabbi Kagan's comment appears to gloss the Shulchan Aruch. However, it is noteworthy that the theme of *mumar* is

not discussed in this context (Jew and Gentile relationships on Shabbat) in other authoritative rabbinical sources. The Mishnah Berurah has thereby deviated from his normative literary pattern in which he cites and collates in his commentary the 'latter rabbinical authorities'. Thus Kagan, at the onset of the section concerned with Jew and Gentile relationships on Shabbat, advises his reader (implicitly) of the 'dangers' of crossing the halachic boundary, especially with regard to the laws of Shabbat which are to follow. When the Chafetz Chaim refers to a *mumar* he means a Jew who publicly transgresses the Shabbat laws. He equates the transgressor of the Shabbat law with an idol worshipper, a degrading and despicable status.⁶¹

In contrast to other halachic discussions proffered in the Mishnah Berurah Kagan cites no source for his treatment of the *mumar*, quite unlike his ordinary halachic exegesis. Moreover, the rabbinical commentaries on this section are not concerned with the Israelite heretic. One finds the law of *mumar* who publicly transgresses the Shabbat referred to in the B.T. Erubin 68a, b. The Talmud there states explicitly that the *Yisrael mumar* who desecrated the Sabbath in public is equated with Israelite idol worshipper. Maimonides also refers to this comparison in the Mishneh Torah at the conclusion of the laws of Shabbat. As a derivative of the above Talmudic source Karo and the Shulchan Aruch commentators (including Kagan) advance their

rulings and discussions of this topic in the laws of *Erubin* (*Orach Chaim*, section 385 paragraph 2). *Mumar* is also found in the *Tur* and the *Shulchan Aruch* in the laws of ritual slaughter (*shilchitah*). Moreover, when the issue arises in the writings of the 'latter rabbinical authorities' (in addition to sources mentioned) e.g. the *Magen Avraham*, section 304, and in the *Chayei Adam*, in section 64, the theme is the obligation of a Jewish master to his slave on Shabbat.⁶² The subject of *mumar*, therefore, is not dealt with in the writings of most rabbinical authorities who adjudicate of the laws of Jews and Gentiles on Shabbat (section 243). Thus, Kagan's decision to introduce the topic of *mumar* among the Sabbath laws concerning the relationship between Jew and Gentile and to state it without sources or explanation is evidence of a stringent attitude towards the *mumar*, the Sabbath violator.⁶³ Thus the characteristic of this genre of presenting rabbinic law may be called extra or supra-halachah. Its purpose is to propagate an ethic already accepted by the group or to cause the observance of a norm. Such supra-legal statements do not necessarily require citing earlier rabbinical sources and Kagan, indeed, does not discuss or analyze halachic texts in these rulings. Moreover, supra-legal opinions, such as that concerning *mumar*, may appear quite out of context, without substantive links to surrounding sections. Overall, the impression is com-

municated that the supra-legal teachings enjoy unquestioned halachic validity in the minds of the 'group'. That is to say, Kagan does not state that this law is supra-legal in character. Rather he presents it as an accepted halachic opinion and implies that a Jew who publicly transgresses the Sabbath is an idol worshipper and that the rules concerning relationships with non-Jews ~~apply to him.~~

From the writings of Rabbi Kagan and in the stories concerning him, the topic of a 'public transgressor of Sabbath' seemed to be of great concern to him and his 'group'. This concern may have motivated him to include the theme of *mumar* in the midst of an exegesis of the Shulchan Aruch which is based upon 'latter rabbinical authorities'. In contrast to his normal mode of analysis, which often treats as 'contemporary' situations discussed by others a minimum of one hundred years prior to his era, the issue of *mumar* is decidedly relevant to his situation. Finally, the editor of the Mishnah Berurah when he discusses contemporary issues that are of social and/or religious significance for him, such as the case of a Sabbath transgressor, offers supra-legal comments in a separate sub-paragraph.

The second supra-halachic opinion is found in section 244 sub-paragraph 10. Rabbi Kagan is here concerned with Karo's ruling prohibiting a Jew from contracting with a Gentile to build his wall or courtyard, or to harvest his

field on Shabbat. The remarks are adjacent to the term *l'hanichah* ("permit him") and discuss the issue of a Gentile constructing a house on Shabbat. He writes:

Permit him. It is stated in *Sefer Chasidim*, Section 348: It once happened that a certain person hired a non-Jew to build his house under a job contracting agreement, and the non-Jew built it on Shabbos. People were angry with him, but he paid no heed. Before long, none of the land remained in his or in his children's possession.

Although the *Sefer Chasidim's* narrative relates tangentially to the prohibition of the *Shulchan Aruch*, Kagan prefers to reprimand via an anecdote which relates the dire consequences for the Jew who allows the Gentile to build for him on Shabbat, even though this is permitted. This anecdotal style is not consistent with the *Mishnah Berurah's* normal mode of halachic analysis. To have a Gentile erect a house on Shabbat was for Rabbi Kagan a contemporary issue.⁶⁴ Kagan in treating contemporary questions, employs his "supra-halachic" style. His decision to put forward this supererogatory halachic statement in the form of narrative communicates to the reader his anxieties regarding a recognized religious 'more'. Evidence of the Chafetz Chaim's concern is offered in a subsequent statement (Section 244 sub-paragraph 21), where he adopts the stringent view that to live in this house built by a Gentile on Shabbat, is prohibited "forever--even for others".⁶⁵

An additional illustration of supra-legal material employed in the *Mishnah Berurah* is found in section 244 sub-

paragraph 35. The theme of this sub-paragraph commences in sub-paragraph 30. In this latter sub-paragraph, Rabbi Kagan comments on Isserles's ruling that if the Gentile is hired "for all sorts of work which might be needed within the hiring period, it is forbidden." The Mishnah Berurah commences with a supra-legal statement of stringency concerning the domestic domain: the working of maidservants on Shabbat in the house of a Jew. In this segment of the sub-paragraph once again no sources or halachic analysis are offered. Although the theme of 'maidservants' can be considered contemporary for Rabbi Kagan, he expresses less concern and anxiety about it than about the other social and religious problems discussed above. Furthermore, in the latter segment of this sub-paragraph, he reverts to his halachic exegesis, which includes listing sources and presenting lenient views, thus dealing in halachic analysis rather than ethical reproach.

Rabbi Kagan concludes sub-paragraph 30 with the instruction to examine sub-paragraph 35 of section 244. In sub-paragraph 35, the Chafetz Chaim discusses a contemporary problem of engaging Gentile liquor salesmen on Shabbat for stores owned by Jews. The two opening formulae "know" (*da*) and "from this one may know" (*mizeh teda*) initiate Rabbi Kagan's introduction of his opinion. The one source to which we refer to in this sub-paragraph is an external reference not directly related to the topic

discussed. Rabbi Kagan applies the stringent view and propounds the observed 'more', which curtails the much discussed principle of 'permitting in the case of loss' to specific instances. Furthermore, since he is concerned in this sub-paragraph with a contemporary issue, he emphasises the stringent views to contrast with earlier lenient considerations proffered. He states:

According to what we write below (quoting the Taz), in such a case the Jew may sit at a distance to guard against the non-Jew stealing from the business. However, he must be careful not to intervene in the business dealings nor to talk to him about anything pertaining to these matters. This, though, is something difficult to adhere to--not to say anything while sitting there.

The Chafetz Chaim, conscious of the fact that this last statement was not, and would not, become an observed 'more' (as he implied in the phrase "is something difficult to adhere to"), cites the rabbinic maxim "leave them alone, it is better that they sin unwittingly than they sin wantonly."⁶⁶ As a conclusion to his discourse of a contemporary issue, he declares in a supra-legal supererogatory statement: "But fortunate is he who trusts in God and does not seek out various leniencies for Shabbos." He thus emphasizes the difference between a discussion of a contemporary issue which demands supra-legal material, and his normative, halachic exegesis, which tends to avoid extra-halachic writings.

The exploration of sub-paragraph 35 clarifies Kagan's intent in sub-paragraph 30, which is conveyed in his

concluding statement, "see also what we state in sub-paragraph 35". The Chafetz Chaim is aware that he is imposing a ruling upon the observant Jew even though he is also conscious that operationally the law will not be strictly adhered to. Therefore in examining sub-paragraph 35, he informs his reader that not only "it is better that they sin unwittingly than they sin wantonly", but "fortunate is he who trusts in God and does not seek out various leniencies for Shabbos". Thus Kagan has also clarified his decision to present sub-paragraph 30 as an halachic analysis rather than simply a supra-legal pericope.

A further example of the supererogatory mode is discernable in the Beyur Halachah at the close of section 247. In a proclamation of *musar*, Kagan states: "He who trusts in God and fulfills the wishes of the Torah's ruling 'that your ox and ass will rest on Shabbos etc.' as the Torah intended, and does not attempt manipulations in regard to Shabbos, shall be contented. Then certainly the Holy One Blessed Be He, will grant him success in his possessions during the six days of work."⁶⁷ Kagan's decision not to place this expression in the Mishnah Berurah text is consistent with his literary pattern, this pattern being to dichotomize *musar* and halachic exegesis. Since the discourse in the Mishnah Berurah's concluding

sub-paragraphs of sections 247 are concerned only with legal commentary, the supererogatory could not be included.

In addition to the presence of supra-legal materials which we have identified in our analysis of the Mishnah Berurah text, two other forms of *musar* can be identified. In the first case, we find phraseology such as, "one must be stringent" [*yesh lehachmir*] (eg. section 247 sub-paragraph 18); "one must protest" [*yesh limchot biyadol*] (e.g. section 243 sub-paragraph 5); "it /the law/ truthfully /is/ . . ." [*b'emet*] (e.g. section 243 sub-paragraph 8). While this terminology might imply the supererogatory, an analysis of the Mishnah Berurah text clearly demonstrates it as a purely halachic statement. Rabbi Kagan employs this terminology when he expresses a principle of adjudication often embedded within a quotation from another rabbinical source. This phraseology functions in analogous fashion to terms such as "one must be lenient" [*yesh lehakel*] (eg. section 243 sub-paragraph 15); and "one must not protest" [*ein limchot byadam*] (eg. section 247 sub-paragraph 37).

In our second case, we have statements or concepts that are employed which imply Kagan's expression of *musar*, but these are actually citations from earlier rabbinical authorities. For example, section 247 sub-paragraph 34 states: "Every person who seeks to keep mitzvot carefully should take heed not to act in such a way". In section 244 sub-paragraph 13 the concept of 'desecrating God's name'

(*chālul Hashem*) is discussed. Although both these forms suggest Kagan's *musar*, they are citations from earlier rabbinical sources. Their legalistic role in the text is emphasized since they are presented in the normative halachic exegesis of the Mishnah Berurah, rather than the supra-legal context.

The reader is exhorted to keep in mind Rabbi Kagan's goal: to strengthen and regulate the inner and outer boundaries of rabbinic Judaism. The conclusion that derives from the above discourse is that although Kagan deviates from his usual style in cases of the supra-legal, he remains consistent with his overall purpose. This intent is achieved on the one hand, by offering lenient rulings, but within the utopian adjudications of the 'latter rabbinical authorities'. On the other hand, in contemporary issues not discussed by other sources he employs the supra-legal and stringent view.

A further examination of implicitly contemporary issues in the Mishnah Berurah will substantiate the Chafetz Chaim's world view.

Throughout, the Mishnah Berurah, topics of relevance to the period of the 'latter rabbinic authorities' were also relevant for the milieu of the Chafetz Chaim. In contrast with the issues which supra-legal materials were utilized with respect to contemporary cases, the Mishnah Berurah proceeds in its normative, analytical,

halachic style. Examples of such cases are: section 246, where the Chafetz Chaim discusses the law concerning partnership in the ownership of an animal with a Gentile; section 247, where the Shulchan Aruch deals with a Gentile delivering mail for a Jew on Shabbat; and section 252, where Kagan explores the issue of a Gentile purchasing from a Jew close to the start of Shabbat. To inform his readers that the topics being discussed are relevant to their epoch, Kagan will often quote terms from the 'latter rabbinical authorities' such as "in our times" (*b'zemanenu*) [section 244 sub-paragraph 13], "in this time" (*b'zeman hazeh*) [section 252 sub-paragraph 14] and "what we refer to today" (*ma shekorim achshav*) [section 246 sub-paragraph 8].

In our analysis of these segments, I have argued that the Mishnah Berurah deviates from its normal literary style. Kagan emphasizes the stringent, rather than the accommodative, view. The accommodation is not completely excluded, but is subordinate to the stringent rulings. The lenient adjudication is proffered only when it is presented as the unanimous ruling of the 'latter rabbinical authorities'. This phenomenon is infrequently found. In such cases, Kagan may cite one source, usually the Magen Avraham, (for example in 247 sub-paragraph 7) which is considered amongst European Jewry to be the most accepted authority among the Shulchan Aruch commentators.⁶⁸ Kagan may even refer to a 'former rabbinical authority'; for example, the Rosh is cited in

section 246 sub-paragraph 10 which deals with mail delivery by a Gentile on Shabbat. If the issue seems more complex, as in section 252 sub-paragraph 11 and Sha'ar Ha-Tziyun 10, additional rabbinical sources might be added to the Magen Avraham introduced by the term "and the rest of the 'latter rabbinical authorities' (*shaar acharonim*).

An examination of this discourse, where the Mishnah Berurah appears to deviate from his normative pattern, demonstrates that Kagan expresses his preference for the accommodation. Furthermore, this preference is found in such instances as contemporary issues, where he is compelled by force of tradition, predecessors to rule stringently. This alternative is illustrated in Sha'ar Ha-Tziyun 17 (section 247) when he discusses the contemporary case of sending mail via a Gentile on Friday. He states:

In any case it is difficult to be accommodative since I have seen in the 'latter rabbinical authorities' that were cited in the responsa of the Maharam section 202 that it is explained as the Magen Avraham. . . .

Thereby Kagan, in his statement "it is difficult to be accommodative", informs his readers that even with respect to a contemporary topic, his preference is to rule leniently. This predilection is, however overridden by Kagan's unwillingness to take upon himself the adjudicative authority to rule leniently on a contemporary issue when there are disputing opinions. Thus he remains consistent with his world view, as expounded in his introduction to this study. This *Weltanschauung* required a stringent

approach in contemporary issues in order to maintain and regulate the boundaries between his milieu and secular Jewish society.

Typical segments concerned with issues which may be identified as contemporary for Kagan and with respect to which he will rule stringently, are the three topics referred to above, found in sections 246, 247, 252. The themes of these sections 'animals', 'mail' and 'selling to a Gentile on Friday', were relevant issues to the nineteenth century East European society and therefore of practical halachic concern for Kagan. Our structural analysis of these sections offers evidence that for the Chafetz Chaim not only were they of halachic concern but they also represent Kagan's social-religious anxieties.

Section 246 sub-paragraph 31 of the Mishnah Berurah discusses the Rema's ruling concerning the laws of partnership in an animal on Shabbat. The Rema writes:

All these various permissible devices (31) are halachically proper, and one may use (32) whichever one chooses. Even if the animal belongs to the Jew completely, (33) the law for this is the same as where the non-Jew is his partner--(34) provided that he publicizes the fact that he has done it in a permissible fashion.

Rabbi Kagan does not appropriate the accommodative ruling of the Rema. The phraseology and formularies employed in the sub-paragraphs that comment on the Rema's law emphasize the stringent view. In sub-paragraph 31, referring to Isserles' phrase "are halachically proper", he emphasizes a strict opinion:

The best of all ways by which it is permissible, is:
/for the Jew/ . . .

He then concludes this commentary with an additional stringent statement:

The most proper way would be to execute the sale . . .

In the following sub-paragraph, Kagan continues this stringent accentuation and writes:

Here the view of those who permit this in paragraph 4 is being implicitly followed. It would be better, however, to execute a complete sale, so as to satisfy the stricter view. . . .

The Sha'ar Ha-Tziyun 27, commenting on this sub-paragraph appends the stringent opinion and states:

And one should be concerned (*lachush*) with the view of the stringent arbiters (*machmirim*) . . . but the Rema decided in favour of leniency. Therefore, to also adhere to the /stringent/ opinion of the Beis Yosef it is better to do as we have written.

Although Isserles is accepted as the adjudicator for Ashkenazic Jewry, Kagan favours Karo and the stricter view.

Sub-paragraph 34 continues this literary pattern. At the conclusion of the segment, after offering a lenient view Kagan quotes the Elya Rabba and writes:

Even though one need not protest against those who follow the lenient view in this, since they have an opinion on which to rely, nevertheless every person who seeks to keep mitzvot carefully should take heed not to act in such a way, except in a case of pressing need and following a decision of a learned scholar.

In the subsequent section the Mishnah Berurah continues its stringent exegesis of the laws concerning Gentiles who carry letters for Jews on Shabbat. Already in

sub-paragraph 1, Rabbi Kagan informs his reader of his concern for this theme of contemporary relevance. He differentiates between 'mail' and other similar problems that might arise on Shabbat, preferring the stricter view in the former.

/The reason why/ this law is stated /specifically/ for a letter, is /to inform us of a special prohibition applying to letter-carrying;/ that it /alone/ is forbidden. . . .

But the law for all other vessels, objects or money sent on Erev Shabbos through a non-Jew is the same as for all work. . . .

In sub-paragraphs 5 and 8 terms that imply contemporary relevance are employed. In 5 he writes: "The reason why they /adjudicators/ are stringent here and are concerned in our issue (*b'inyanenu*).". Sub-paragraph 8 which cites the Taz, uses a term from the local vernacular "*post miester*" (post master), thereby suggesting a current concern.

In sub-paragraph 16 Kagan comments on the Rema's gloss:

Some /authorities/ dispute this and hold that whenever he does it free of charge it is forbidden--(16) and it is preferable to be stringent . . .)

The Mishnah Berurah, not satisfied with Isserles's stringent statement, elects to annotate the phrase, "and it is preferable to be stringent":

Now from this phrasing it would appear that it is "preferable" to take this view into consideration. . . . in the Darkei Mosheh, section 252, it appears that he agrees with the disputing opinion /and forbids it/. Also from the Levush and the Elyah Rabba in this section it appears it is forbidden. . . . It is therefore proper . . .

Sub-paragraphs 17 and 18 deal with Karo's law (paragraph 5), which permits a Jew to give a letter to a Gentile if the latter is "travelling of his own account to some other place." In sub-paragraph 17, Kagan elects to gloss the Shulchan Aruch, ruling stringently.

But if he knows that he travels a longer distance on account of him, it is forbidden.

Subsequently in sub-paragraph 18 Kagan comments on Karo's accommodative phrase, "in all cases" with an interpretive, stringent statement. This interpretation is initiated by the opening formulary "i.e." (*hinu*). Kagan states:

I.e., even if he does not specify the wages to be given him but leaves this unspecified in which case we hold in paragraph 1 that it is forbidden to send it with him when there is no permanently established postal official . . .

Although the following segment of the sub-paragraph is more moderate in its rulings Kagan immediately returns to his stringent view. He writes:

It should be borne in mind, that to give him /a letter/ on Shabbos is forbidden according to everyone, even if he goes of his own account, and even if he fixes his wages for this while it is still day.

Consequently, it is forbidden to post a letter on Shabbos . . . This is forbidden even where there is an eruv and even through a non-Jew.

Kagan's phraseology "it should be borne in mind", and "according to everyone" emphasizes his need for stringency. Further evidence of this halachic pattern is expressed in the local vernacular "post", also employed in the sub-paragraph.

Finally, the Mishnah Berurah in sub-paragraph 20 concludes his commentary to section 247 with stringent remarks on Isserles's lenient gloss, which reads:

However, if he hired him for letter carrying exclusively, some /authorities/ permit this (20) as explained above, section 244.

In sub-paragraph 20 Kagan employs the formulary "nevertheless" (*mikol makom*), which initiates his own opinion, which in this case is stringent.

Within the exegesis of the above sub-paragraphs, lenient views are also interpolated into the stringent rulings. But, as I have argued previously, there is a pattern to the presentation of these adjudications. Accordingly, here the Mishnah Berurah may cite a 'former rabbinical authority' rather than a 'latter' one. Moreover, Kagan will present his comments as an uncontested decision. In such a case either one source will be referred to, usually the Magen Avraham, or a term such as "all the adjudicators" (*kol haposkim*) or "everyone" (*kule alma*) is employed. This pattern is clearly identified in the theme of 'mail delivery'. For example, in 'sub-paragraph' 2, Maimonides, a 'former rabbinical authority', is cited as the source for the lenient ruling. Sub-paragraph 5 offers Rashi, another 'former rabbinical authority', as its accommodative source. In sub-paragraph 6 Kagan writes "this is permitted according to all views."

Our final example of the 'stringent' pattern' is from section 252, paragraph 1, sub-paragraph 11; the Mishnah Berurah here comments on Isserles's gloss, concerned with selling an object to a Gentile on Friday close to the commencement of Shabbat. The Rema states:

Some /authorities/ permit the non - Jew to remove it /from the Jew's premises/ on Shabbos if the non - Jew has set himself aside a place in the Jew's premises /for the purchased article/ while still day. (11) It is proper to follow the stricter view here /and forbid this/.

Rabbi Kagan in sub-paragraph 11 comments on the phrase "it is proper to follow the stricter view." In the first segment of this sub-paragraph he chooses to emphasize the Rema's strict ruling and writes:

See the Acharonim whose consensus is that from the halachic standpoint /not merely as a matter of strictness/ ~~one not to be lenient in this.~~

Kagan concludes this segment with the statement, "one should not be lenient here except . . ." The sub-paragraph ends with a rejection of a lenient view:

But, the Magen Avraham and other Acharonim hold that even where the room has been rented, this is not enough to rely on for being lenient /and permitting it/.

In sub-paragraph 9, where the Mishnah Berurah discusses Karo's ruling concerned with the selling to a Gentile on Friday, the reader is informed of the contemporary intent. Karo employs the term "in our case" (*b'inyanenu*) which implies "our times". This is immediately followed by a stringent statement: "One must certainly be strict . . ."

These three representative cases ("animal", "mail" and "selling on Friday") provide clear evidence for our hypothesis that Kagan's halachic anxieties caused him to treat contemporary issues strictly.

Beyond the contemporary issues, Kagan also rules stringently when the decisions of the 'latter rabbinical authorities', or the majority of them, are strict. The Mishnah Berurah commentary manifests this pattern of adjudication, through formularies such as:

1. "and the 'latter rabbinical authorities' agreed" (*v'haacharonim hiscimu*) [section 243, Sha'ar Ha-Tziyun 12];
2. "so write numerous 'latter rabbinical authorities'" (*v'chen katvu harbe acharonim*) footnoted with an extensive list of such "authorities" ; see section 243 sub-paragraph 15 and Sha'ar Ha-Tziyun 17);
3. "the Magen Avraham and the rest of the 'latter rabbinical authorities' (*shaar acharonim*) are cited at the conclusion of a sub-paragraph; [section 244 sub-paragraph 6];
4. "it requires examination since it goes against the opinion of some arbiters" (*Tzarich iyun im yesh lehakel neged daat kama poskim baze*) [section 244 sub-paragraph 7];
5. after listing the names of 'latter rabbinical authorities' and using the expression "the rest of the 'latter rabbinical authorities'" he concludes "it is prohibited because there is no dispute amongst the 'latter

rabbinical authorities' / (*d'aur mishum d'lo pleug*) [section 244 *Sha'ar Ha-Tziyun* 20];

6. agreement of the arbiters (*haskamat haposkim*) [section 246 *Sha'ar Ha-Tziyun* 11]; 6. "the *acharonim* whose consensus is that from the halachic standpoint one ought not to be lenient in this" (*hacharonim haskimu d'medina ein l'hakel bazeih*) [section 252 sub-paragraph 11];

7. "But the Magen Avraham and other *acharonim* hold that even where . . . this is not enough to rely on for being lenient." (*aval haMagen Avraham v'shaar hacharonim kativu . . . ein l'smoch lehakel*) [section 252 sub-paragraph 11].

Kagan will also rule strictly when 'former rabbinical authorities' are explicit or are referred to by the 'latter rabbinical authorities'. For example in section 246 sub-paragraph 19 it states: "See the Magen Avraham who discusses the matter at length, stating that the Beis Yosef in section 495 quotes opinions of 'former rabbinical authorities' on this subject and inclines towards the view that it is proper that it be prohibited, and that, accordingly, it is proper to follow the stringent view."

Moreover, in the case of a Torah law or a question of 'apprehension' (*chashash*) with respect to a Torah ruling Kagan sees himself as compelled to decide stringently. For example:

1. in section 246 sub-paragraph 32 he writes: "So as to satisfy the stricter view there, since according to their view, there a question of /a violation of/ Torah law is involved." (*k'de latzet daat hamachmirim sham ki ledivreham yesh bazei chashash deorayita*);

2. in section 246 sub-paragraph 15 he states: "This is sufficient for avoiding /the violation of/ a Torah prohibition. (*dai bazei kidei l'hinatzei meisura d'oraita*). The decision to be stringent when based on Torah law, is not for Kagan as halachically binding as when 'latter rabbinical authority' is the basis for the ruling. Kagan evinces this principle of adjudication in section 246 sub-paragraph 12. There he comments upon the Shulchan Aruch's statement, "that a person is commanded with respect to the resting of his animal." Kagan writes: "It is proper to follow the more stringent view since there is a Torah prohibition involved." In his footnote to this sub-paragraph he inform the reader: "It is proper to be stringent since it seems from the Magen Avraham's gloss that it is a case of total doubt (*safek gamur*) . . . But some 'latter rabbinical authorities' have questioned this, and have therefore written that it is good for one to be careful /and not a total prohibition/ since it has come from the mouth of /the Magen Avraham/ a great rabbinical authority /gaon/." Thus as shown throughout the analysis of this study, the Chafetz Chaim in his exegesis of the

Shulchan Aruch prefers to rule leniently, but will only do so if it is not dissonant with his social concerns as well as the likelihood of the acceptance of his works.

While the evidence allows us to say much about Kagan's principles of adjudication, our data permits us to say relatively little on the topic of the relationship of the Jew and Gentile on the Shabbat in the Mishnah Berurah text. Some few comments may be proffered. Rabbi Kagan has not dealt distinctively with this theme than with the totality of his halachic exegesis. His normative principles of legal decision making have been employed in the analysis of the six sections of the Shulchan Aruch concerned with relationship between Jew and Gentile on Shabbat. Kagan in his Mishnah Berurah text as a whole does not convey an ideology specifically pertaining to the relationship between Jew and Gentile on Shabbat. His overall concern was the threat of the secular Jewish society (as I discussed in my introduction to this study), and less with the Gentile milieu. The Chafetz Chaim through his commentary strives to combat the threat of the secular Jews. Contemporary issues of concern to Kagan therefore must be decided stringently. Simultaneously, in rulings concerned with other issues the lenient pattern is dominant. This lenient style gives the reader the impression that halachic Judaism may also be flexible and liberal.

This mode of adjudication remains consistent with what

is said to be the personality of the Chafetz-Chaim, the 'man of *musar*', as well as his world view. In his desire to combat secularism he sought to strengthen and regulate the spiritual boundaries of the orthodox Jew. Therefore in contemporary issues he felt compelled to inculcate stringent behaviour. Alternatively he could imply to his halachically observant reader that Jewish law allows an accommodative attitude and that there is no need to turn to liberal or secular Judaism.

Rabbi Kagan, however, only allowed himself to use this lenient mode of adjudication as long as the ruling remained within the halachic boundaries set by the 'latter rabbinical authorities'. Therefore, the accommodation offered by the Mishnah Berurah commentary is not an independent pattern of lenient decision making initiated by a rabbinical authority (in this case himself). Rather, the decisions are dependent upon and adopted from laws formulated previously by the majority of the 'latter rabbinical authorities'. Kagan would not even allow himself to incorporate the opinions and rulings of his contemporaries.⁵⁹

In this rigorous appropriation of halachic tradition, shown in our analysis of other literary and substantive traits of the Mishnah Berurah, are found the essential results of our study. The Chafetz Chaim's consistent dependency upon the 'latter rabbinical authorities', and not upon his contemporaries, affirms his world view. Kagan

perceived the world construed by the *acharonim* as the idyllic Jewish society.⁷⁰ They had lived in a period before contemporary modernity, when traditional society had not yet been breached by emancipation and enlightenment. The halachah functioned, he felt, at a time when the Jew was totally isolated from the secular world. Even if the Jewish ghetto of such 'latter rabbinical authorities' as that of the *Magen Avraham* could not be physically isolated it was insulated from the outside world by social norms. Thus, in sum, via stylistic traits the *Mishnah Berurah* reinforces what it tries to do in its content, namely to enhance and regulate the boundaries between the halachically-observant Jew and the secular Jewish society.

NOTES

1. See note 22 for biographical references for Kagan.
2. For additional historical data on Karo and Isserles see Elon (1973a), 1087-1117; Twersky (1982), 130-147.
3. Examples of the works of these scholars are: Bosker (1984); Green (1983); Lightstone (1988); Neusner (1981); Eilberg-Schwartz (1986).
4. For a definition and historical background of rabbinism or rabbinic Judaism see Neusner (1974), 5-26.
5. By cosmology I refer to the definition offered by Neil Smelser (1969), 5; He defines it as the 'social system's norms and values'.
6. See Neusner (1986). Although he spells out this concept, he does not abide by it, (as I show below).
7. To date no scientific study of the biography of Rabbi Kagan has been pursued. I cannot consider Eckman (1973), as a scholarly study as it is based largely upon written and oral hagiography.
8. See Eckman (1973), for a detailed list of these publications.
9. For a descriptive report of this culture, see Zaborowski and Herzog (1952).
10. For an ethnographic report of this culture see Zaborowski and Herzog (1952). Goldscheider and Zukerman (1984) and Luz 1985 present an ethnographic report and analysis of the social-historical events of the period.
11. For an encompassing in-depth report and detailed list of sources of both Jewish and general social history of this place and period, I refer the reader to Goldscheider and Zuckerman (1984).

12. Although there are additional sections of the Mishnah Berurah that deal with the topic of the relationships between Jews and Gentiles on Shabbat (as section 325) these six sections will suffice to validate the hypothesis of this study.

13. See Lightstone (1981).

14. For an explanation and illustration of these texts see Polzin (1977), 16-17.

15. See note 2; appendix 1, for sources and a brief historical description of the works of the 'latter rabbinical authorities' referred to in seven sections of the Mishnah Berurah text being studied.

16. See Elon (1973a), 1188 for a description of this work.

17. *Ibid.*, 1198.

18. *Ibid.*, 1200.

19. See my discussion of Kagan's intent in publishing the Mishnah Berurah.

20. For the reasons Kagan proffers for redacting three separate commentaries in one work, see the introduction to volume one of the Mishnah Berurah.

21. See appendix 2 for definitions of Hebrew terms and concepts used in this study.

22. See Eckman (1973); Greiniman (1954); Kagan (1953); Schweid (1977), 12-14; Yosher (1984).

23. See note 22 for a list of hagiographical works on Kagan.

24. For the lack of a better translation I have employed the term 'stringent' to interpret *chumrah*. The Hebrew word denotes the requirement for a more demanding behaviour. Stringent only implies harshness.

25. In his subsequent publications concerned with early rabbinic literature, Professor Lightstone has classified literary forms and traits separately. (See Lightstone 1983.) His earlier definition, is characteristic of the literary style of modern rabbinic literature.

26. Further analysis of the commentaries of the Shulchan Aruch may reveal additional traits of the genre. What I have identified some of the most prominent in the Mishnah Berurah text.

27. For a definition of this principle see Elon (1973b), 139-140.

28. These 'rules' of genre are not consistent in their appearance. Their employment is dependent upon the type of commentary discussed.

29. See glossary for translation.

30. For a biographical description of Schwadran see Bloch (1948).

31. I have examined all the sections of the Palestinian Talmud relevant to our theme and have not found this source. Furthermore, I have explored the rabbinical literature that gives sources for the laws of the 'latter rabbinical authorities' and have not found the Talmudical citation referred to. For example, Landau (1928), states explicitly that he has not found the source for this law as stated in the Grà.

32. This theme is discussed at length in Eckman (1973), 27-30; Greiniman (1954), 5-12; Kagan (1953), 41-45; Yosher (1952), 266-283.

33. See my analysis of section 245 sub-paragraph 17.

34. See Elon (1973a), 980-988; Twersky (1980), 20-47.

35. See Elon (1973a), 1058-1067.

36. See Encyclopedia Judaica (1972), 12.534-537; Katz (1958); Schweid (1977), 12-14; Ury (1970); Eckman (1975).

37. I will demonstrate this suggestion in the summary of the study.

38. Also see Eckman (1973), 30; Kagan (1951), 85.

39. See note 30.

40. Kagan's travel to sell his books is referred to by the authors of his biography. See note 22.

41. For further sources see the summary of this study.

42. See my discussion of this theme in the introduction.

43. I have further developed this theme in the conclusion of this study.

44. For a discussion of this halachic principle see Elon (1973b).139, 140.

45. See Katz (1982), 111.

46. This formulary also initiates Kagan's lack of identification with the ruling being discussed.

47. This is then further developed in the summary of the study.

48. See Epstein, volume 5, page 88, for a detailed list of rabbinical sources.

49. This topic is discussed in greater detail in the summary of this study.

50. See Sofer (1965), (volume 2, section 244, sub-paragraph 19; Katz 2, 153-156.

51. This suggestion is in addition to my discussion of contemporary issues in the summary of the study.

52. See glossary for interpretation of this concept.

53. I have suggested in the second and third segments of sub-paragraph 4 a more exact translation than that found in the Hebrew-English edition of the Mishnah Berurah.

54. See my summary for a further discussion of stringent rulings in the Mishnah Berurah.

55. See also Sofer (1984), volume 4 page 11, sub-paragraph 67.

56. An additional analysis of Kagan's stringent view on the topic of mail delivery is discussed in the summary to this study.

57. This declaration by the Mishnah Berurah sheds further light on the pattern and structure of Rabbi Kagan's process of halachic decision-making.

58. The theme of Jew and Gentile relationships on the Sabbath commences in this section with sub-paragraph 8. I have added this section for the purpose of comparison as it

is concerned with the same topic as found in a number of previous sections.

59. I have borrowed this phrase from Ellinson (1985), 94.

60. This term is employed by Spero (1983), 166-200, in his discussion of halachah and ethics. Solomon (1986) uses the term 'Pan-halakhism'. It is interesting to note that in his general study of Eastern European rabbinic literature he arrives at similar conclusions pertaining to the relationship between *musar* and halachah.

61. See Kagan's footnote to his introduction to the Mishnah Berurah Volume 3 and my analysis of section 243 subparagraph 2.

62. See also the Mishnah Berurah section 304 subparagraph 15 and section 343 subparagraph 7, where the topic of 'heretic' is briefly referred to.

63. This is similar to Solomon Klugar's stringent ruling which is discussed in Ellinson (1985), 103.

64. Building by Gentiles for Jews is discussed as a live issue throughout halachic literature. Furthermore, I have substantiated this fact as well as the other contemporary issues from oral testimony of numerous Jews who lived in Eastern Europe in the early twentieth century.

65. In his halachic analysis of the problem, the Mishnah Berurah does not deviate from his literary pattern and proffers the accommodative opinions.

66. This concept employed by rabbinical authorities throughout the history of rabbinic law is cited throughout the Babylonian Talmud. For example it is found in B.T. Shabbat 148b.

67. The inclusion of *musar* at this point may have been influenced by his reference to the Elya Rabba's statement cited in the Beyur Halachah (same subparagraph). This citation reads: "Every person who seeks to keep *mitzvot* carefully should take heed of himself."

68. This claim may be substantiated by examination of the rabbinic literature that appeared subsequent to the Magen Avraham commentary. The adjudications of the authors of these post Magen Avraham works as a rule take into consideration the rulings of the Magen Avraham and in a majority of instances accept his opinion as decisive.

69. In the six sections studied, no contemporary of Kagan is referred to. My examination of the remaining sections of the Mishnah Berurah has found that references to his contemporaries are sparse.

70. This is comparable to the relationship between the redactors of the Mishnah and the Temple society. See Eilberg-Schwartz (1986), 195-200.

GLOSSARY

The following translations have been adapted from the English translation of the Mishnah Berurah.

Acharon: 'latter rabbinical authority'; A generic term for any commentator contemporary with or following the Shulchan Aruch.

Eruv: A rabbinically enacted device whereby certain acts forbidden on Shabbat become permitted.

Halachah (pl. *halachot*): Jewish law.

Kehilla (pl. *kehillot*): Community.

Maarit ha. - ayin: An act which can give rise to suspicion by an observer that a transgression of a law has taken place.

Posek (pl. *-im*): Authorities whose views are decisive in Jewish law; usually, the early commentaries to the Shulchan Aruch.

Rishon (pl. *-im*): 'Former rabbinic authority'; a generic term referring to the early commentators from approximately 9th century CE until the Shulchan Aruch.

Shabbat (*Shabbas* or *Shabbos*): A time period that commences at Friday before sunset and ends at nightfall the following day. During this period Jewish law requires the observance of a long list of rules. The day is popularly referred to as a day of rest.

Sechar Shabbat: Profit earned from work done on Shabbat; the prohibition forbidding enjoying such profit.

Shevut deshevut: Something that is only prohibited on Shabbat because of two independent decrees of the Sages, and which would be permitted had any one of these two decrees not been made.

Yom Tov: Any holiday on which work is forbidden.

APPENDIX 1

WORKS AND AUTHORS CITED IN THE ANALYSIS OF THIS STUDY

The majority of the following data is cited from the bibliography of the English translation of the Mishnah Berurah. I will employ the style of the author of this translation who explains the organization of his sources as:

For works published during or close after, the lifetime of their authors, the date of first printing is given. Where this is unknown, or where their works were published much after this, the dates of birth and death of authors are given. Jewish dates are given, followed by the common era equivalents in parentheses.

b. = born; d = died; p. = published; c. = circa (approximately); B: - Ben (son of); pl. = plural; sing. = singular.

Artzot Ha - Chayim: A commentary on the Shulchan Aruch Orach Chaim; p. Warsaw 5620 (1860).

Avodah Zarah: A tractate in the Babylonian Talmud.

Bach = Bayit Chadash: Classic commentary to the Tur; by Rabbi Yoel Sirkes; c. 5330 - 5400 (1570 - 1640).

Babylonian Talmud: A commentary on the Mishnah redacted in approximately 6th century CE.

B.H. = Beur Hetev: Digest of commentaries to Shulchan Aruch; by Rabbi Yehudah Ashkenazi of Tyktyń; p. Amsterdam, 5512 (1752).

Bet Meir: A commentary to the Shulchan Aruch; by Rabbi Meir. Pozner; 5489 - 5567 (1729 - 1807), P. Frankfort - on - the - Main; 5547 (1787).

Birkey Yosef: Commentary to the Shulchan Aruch Orach Chaim; by Rabbi Chaim Yosef David Azulai; 5484 - 5566 (1724 - 1806); p. Livorno, 5534 (1774).

B.Y. = Bet Yosef: Commentary to the Tur of which the Shulchan Aruch is a digest; by Rabbi Yosef Karo; 5248 - 5335 (1488 - 1575).

Ch.A. = Chayei Adam: A digest of laws of daily life; by Rabbi Avraham Danzig; p. Vilna, 5570 (1810).

Chemed Mosheh: Commentary to Shulchan Aruch Orach Chaim; by Rabbi Gadaliah Mosheh B. Tzvi Ha-Levi of Lonschitz; p. Fiorda, 5529 (1769).

Chiddushey Rabbi Akivah Eiger or Rabbi Akivah Eiger: Commentaries to the Talmud; p. Berlin, 5618 (1858).

Chosen Mishpat: One of the four volumes of the Shulchan Aruch.

Derishah: Commentary to the Tur (companion to the Perishah); by Rabbi Yehoshuah Ha-Koheyn Falk; 5315 - 5374 (1555 - 1614); p. Berlin and Lublin, 53955 - 5527 (1635 - 1767).

Dg.Mr. = Dagul Meyrevavah: Glosses and comments to the Shulchan Aruch; by Rabbi Yechezkel Landau; p. Prague, 5554 (1794).

Derech Ha-Chayim: Glosses to the prayer book; by Rabbi Ya'akov Lorbeerbaum; 5520 - 5592 (1760 - 1832); p. Berlin, 5600 (1840)

D.M. = Darchei Moshe: Glosses to the Bet Yosef; by Rabbi Moshe Isserles; c. 5290 - 5333 (1530 - 1573).

E.R. = Elya Rabba = Eliyahu Rabba: Commentary to the Levush; by Eliyahu B. Wolf Shapira; p. Salzabach, 5517 (1757).

Gaon (pl. im) = Teshuvat Hagonim: Responsas of the rabbinical authorities in approximately the sixthe to ninth centuries CE.

Geraz: The Shulchan Aruch of Rabbi Shneyur Zalman B. Baruch of Lyady; 5505 - 5573 (1745 - 1813). It incorporates the rulings of later authorities; p. Kopy, 5574 (1814).

Gra: = Beyur Ha-Gra = Gaon Rabbi Eliyahu: The Gaon of Vilna; 5480 - 5558 (1720 - 1797).

Haqahot Maimoni: Glosses to Maimonides' Mishneh Torah.

Jerusalem or Palestinian Talmud: The discussions and interpretations of the Mishnah attributed to the Rabbis of the land of Israel in the six century.

Kn.Hag = Knesset Ha - Gedolah and Shaari Knesset Ha - Gedolah: Collection of halachic rulings; by Rabbi Chaim Benbenishti; p. Livorno, 4418 (1658).

Kol Bo: A "code" of Jewish law; by an unknown student of the Rosh; c. 5100 (1340).

Levush: Classic "code" of Jewish law following the outline of the Shulchan Aruch; by Rabbi Mordechai Yaffe; p. 5348 (1588).

Levushey Serad: Glosses to the Shulchan Aruch; Rabbi David B. Shelomoh Eibeshitz; p. Mahlov, 5578 (1818).

M.A. = Magen Avraham: Commentary to Shulchan Aruch; by Rabbi Avraham Abeli Gombhiner; 5397 - 5443 (1637 - 1683).

Mach.Hash. = Machatzit Hashekel: Standard commentary to Magen Avraham; by Rabbi Shemuel Ha - Levin of Cologne; p. Wien, 5567 (1807).

Magen Giborim: A commentary on the Shulchan Aruch; by Rabbi Mordechai Zev Eiteinga and Rabbi Yosef Shaul Nathelzon; p. Levuv , 5594 (1834).

Maggid Mishneh: Classic commentary by an unknown former rabbinical authority'; published in all standard editions of the Mishneh Torah.

Maharil = Rabbi Yaakov Mulin Ha - Levi: A halachic authority; d. c. 5200 (1400).

Mahariya = Mahariy Abohav: Spanish scholar at the time of the exile; 5193 - 5253 (1433 - 1493).

Maharshal = Rabbi Shlomoh Luria: Contemporary of the Rema and author of responsa; c. 5270 - 5334 (1510 - 1574).

Ma'amar Mordechai: Commentary to the Shulchan Aruch; by Rabbi Mordechai Karmi; 5509 - 5585 (1749 - 1825); p. Livorno, 5544 (1784)

Match Yehudah: A Commentary to the Shulchan Aruch; by Rabbi Yehudah Ayash; p. Livorno, 5543 (1783).

Mechilta: A halachic Midrash to the Book of Exodus.

Mordechai: Halachic digest of Talmud and early authorities; by Rabbi Ben Hillel Ashkenazi, born c. 5000 (1340).

Na'har Shalom: A commentary on the Shulchan Aruch Orach Chaim by Rabbi Shabbtai b. Avraham Vetura; - p. Amsterdam, 5539 (1774).

Netiv Chaim: Glosses and correction to the Shulchan Aruch; by Rabbi Netanael Weil; 5547 - 5529 (1687 - 1769), p. 5539 (1779).

O.Sh. = Olat Shabbat or O.T. = Olat Tamid: Commentary to Laws of Shabbat; by Rabbi Shmuel B. Yosef; p. (together) Amsterdam, 5441 (1681).

Or Zaru'a: Commentary to the Talmud; by Rabbi Yitzchak of Wien; c. 4940 - c. 5010 (1180 - 1250).

Orchat Chaim: A commentary and gloss to the Shulchan Aruch Orach Chaim; by Rabbi Gedalya Lifshitz; Vilna, 5617 (1857).

Perishah: Commentary to the Tur (companion to the Derushah) by Rabbi Yehoshuah Ha - Koheyn Falk; 5315 - 5374 (1555 - 1614); p. Berlin and Lublin, 5395 - 5527. (1635 - 1767).

Prei Chadash: A commentary to the Shulchan Aruch; by Rabbi Chizkiyahu Desilva; p. Amsterdam, 5490 (1730).

P.Mq. = Peri Megadim: Commentary to the Magen Avraham and Taz, consisting of Eyshel Avraham and Mishbetzot Zahav; by Rabbi Yosef B. Meyer Tumim; p. Frankfurt, 5545 (1785).

Rabbeinu Chananel: A commentary on the Babylonian Talmud; c. 4750 - 4815 (990 - 1055).

Rabbeinu Simcha: German rishon, author of responsa literature; c. 5000 (1240).

Rabbeinu Yona: Spanish Rishon, author of numerous commentaries; d. 5024 (1263).

Radvaz = Rabbi David B. Zimra: A contemporary to Karo and author of responsas; 5240 - 5334 (1480 - 1574).

Ravad = Rabbi Avraham B. David: Author of glosses to Maimonides' Mishneh Torah; 4880 - 4959 (1120 - 1198).

Rema = Rabbi Mosheh Isserles: Author of the glosses to Karo's Shulchan Aruch; 5290 - 5332 (1530 - 1572).

Rambam = Maimonides = Mishneh Torah = Rabbi Mosheh B. Maimon: Author of code of Jewish law, responsa and philosophy; 4895 - 4965 (1135 - 1204).

Ramban = Rabbi Mosheh B. Nachman: A commentator on the Hebrew Bible and Babylonian Talmud; 4954 - 5030 (1194 - 1270).

Ran = Rabbi Nissim B. Reuven of Girondi: A commentary on the Rif; born c. 5100 (1340).

Rif = Rabbi Yitzchak Al - Fasi: A Spanish rishon and halachic authority; 4773 - 4863 (1013 - 1103).

Rosh = Rabbeinu Asher B. Yechiel: Author of commentary on the Babylonian Talmud and responsas; 5010 - 5088 (1250 - 1327).

S.Ch. = Sefer Chasidim: Mystical, ethical, halachic work; by Rabbi Yehudah Ha - Chasid; c. 4950 (1190).

Sefer Ha -Terumah: A code of laws; by Rabbi Baruch of Germaiza; c. 4960 (1200).

Semag: = Sefer Mitzvot Gadol: The *mitzvot* of the Torah and their Talmudic sources; by Rabbi Moshe B. Yaakov of Goucy, thirteenth century.

Sha.T. = Shaarei Teshuvah: A collection of responsa and opinions relating to the Shulchan Aruch; by Rabbi Chaim Mordechai Margolis; p. Dubnow, 5580 (1820).

Shach = Siftey Koheyn: A commentary on Yoreh Deah; by Rabbi Sabtay B. Meir Ha - Koheyn, 5381 - 5422 (1621 - 1662); p. Krakow 5406 (1646).

Shevut Yaakor: Responsa, by Rabbi Yaacov B. Yosev Reischer; P. Offenbach, 5479 (1719).

Shulchan Shelomoh: Digest of Shulchan Aruch Orach Chaim; by Rabbi Shelomoh Zalman Mirkis; p. Frankfurt, 5531 (1771).

Sifrei: A halachic midrash to the books of Numbers and Deuteronomy.

Taz = Turei Zahav: Commentary to the Shulchan Aruch; by Rabbi David Ha - Levi of Lwow; 5346 - 5427 (1586 - 1667).

Tosafot: A collection of commentaries on the Babylonian Talmud written by various French rishonim in the eleventh and twelfth centuries; published in the standard editions of the Talmud.

To.Sh. = Tosafot Shabbat: Commentary to the laws of Shabbat; by Rabbi Rafael Meizlish; p. Frankfurt 5527 (1767).

Tosafot Yom Tov: Classic rabbinical commentary to the Mishnah printed in most standard editions of the Mishnah; by Rabbi Yom Tov Lipman Heller; 5339 - 5415 (1579 - 1654).

Yad Aharon: Commentaries to the Tur (and later, to the Shulchan Aruch); by Rabbi Aharon B. Mosheh Alfanderi, p. Ismir, 5495 (1735).

Yad Efraim: Commentary to Shulchan Aruch Orech Chaim; by Rabbi Efraim Zalman Margolis; p. Dubnow, 5580 (1820).

Yeshuot Ya'acov: A commentary to the Shulchan Aruch; by Rabbi Yaakov Ornstein; p. Zholkva, 5588 (1828).

Yoreh De'ah: The second of the four volumes of the Shulchan Aruch.

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