

Elements of Negotiability in Jewish Law in Provence

by

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1. Introduction

In the present study I discuss the presence of elements of negotiability in Jewish law in Provence during the Middle Ages. We do not expect to find at this historical stage a special negotiable instrument, similar to the modern bill of exchange or promissory note; rather, we are looking for some elements of negotiability that may be found in regular contracts, especially in loan deeds.¹

In modern law (at least in Anglo-American modern law) negotiability comprises two main components: assignability, which is also termed formal negotiability, and freedom from equities, which is sometimes referred to as material negotiability. Formal negotiability refers to the ability to assign a document by virtue of physical transfer accompanied by a signature of endorsement, and thereby establish a direct legal relationship between the transferee and the debtor to the exclusion of the transferor (creditor). These two actions are simple and quick and do not involve the complicated procedures that make the transfer of other property difficult. An additional element of assignability is that the assignee can sue in his own name and does not have to appear as the representative or agent of the original debtor. Freedom from equities at times grants the recipient the benefit of a document that is free from any defect it may have borne when in the hands of the assignor. Let us mention already that in pre-modern Jewish law, as in other non-modern legal systems, we are unlikely to find transfers that are free of charge. Therefore, our paper focuses only on the extent to which the element of formal negotiability existed in Jewish law in Provence.

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¹ In English law as well, negotiable instruments were not set apart from regular contracts and other deeds all at once; rather, it was the outcome of a long, drawn-out process. See M. Holden, *The History of Negotiable Instruments in English Law*, London, Athlone Press, 1955, p. 13-14.

The component of formal negotiability is closely bound up with the concept of reification of the obligation to which the deed relates. This concept views the obligation in the negotiable instrument as one that blends into the deed and in itself becomes a tangible object.² As such, it can be assigned to another simply by physical transfer because the obligation is not merely represented in the deed, or more accurately, is not evidenced by the deed: rather, the obligation has been absorbed by it and has become a tangible object. The concept of reification assumed an important role already in the early stages of English law, in that it made possible the actual transfer of an obligation from the creditor to a third person.³ Jewish law, however, moved in a different direction and attributed elements of negotiability to deeds without using the idea of reification.

The development of negotiability occurred in a mercantile environment and began at the practical-business level, then moved on to become a system of merchant law, and in the end found expression in the law.⁴ It is generally assumed that merchants wished to view the bill of exchange as a substitute for cash, which they were afraid to carry with them on their long trade journeys. At the same time, bills of exchange and especially promissory notes were apt to serve as means for obtaining credit. For this reason, negotiable instruments needed to bear an ever-increasing resemblance to cash with respect to their most prominent characteristics. The first important trait is the possibility of assigning the creditor's right under the deed. The next significant trait concerns the mode of effecting the assignment, which was by physical transfer only. Note that the fact that we do not encounter the characteristic of freedom from equities does not in itself detract from the mercantile nature of bills and notes because even with respect to English law it is stated that "it is a mistake to treat the concept of material negotiability as the centrepiece of the history of the law of bills and notes. Surprising as this may seem to modern

² G. Gilmore, "Formalism and the Law of Negotiable Instrument," *Creighton Law Review*, vol.13, 1979, p. 449-450.

³ Traditional English law did not recognize the possibility of assignment of a debt because it held that it is the right of the debtor to remain connected to a particular creditor and not to have the creditor replaced by another. Holden, *supra* note 1, at p.13-14. Negotiable instruments bypassed this constraint by being perceived as embodying the obligation itself, not merely representing it, and by being equated with chattels, which may be assigned from hand to hand.

⁴ This is the accepted view of English and American scholars. On the beginning of the process of absorption of the Common law in the 17th century, see Holden, *ibid.*, at p. 30-65.

lawyers, the holder in due course rules played only a modest role in the law of bills and notes in the era when this body of law developed.”⁵

Our discussion, therefore, focuses primarily on the characteristic of assignability and the extent of its finality, which is a pre-condition for the characteristic of formal and material negotiability. The central question concerns the extent to which the assignability of loan deeds was efficient, quick, and final, so that they could be useful for merchants in an era of developing commerce, and spur the development of suitable legal concepts. We find two schools of thought in Provence concerning negotiable instruments: one is conservative, the other innovative. The conservative stream continued an approach that had consolidated earlier in the main legal sources of Jewish law, and which provided only a limited degree of negotiability for such instruments as loan deeds. By contrast, the innovative stream created and used important new rules that strengthened significantly the negotiability of loan deeds and brought them close to modern negotiable instruments. This innovation gained practical legal expression in neighboring Catalonia, where the rules of the innovative stream were increasingly adopted and even expanded starting with the end of the 13th century.

I present first the position gleaned from the sources that preceded the sages of Provence: the Talmud, the Geonim, the great codifications carried out in Muslim Spain, and the writings of halakhic sages from the north of France. Next, I discuss the two streams in Provence, the conservative and the innovative, and I conclude by showing the degree of influence that the innovative stream has achieved in Provence and in neighboring Catalonia.

2. Formal demands for the sale of loan deeds

Legal Sources

The Mishnah and the Talmud are the Jewish legal foundations that laid down the rules for future generations. In principle, the Talmud permits the assignment of debt, as opposed to, for example, English law until the 18th century, which opposed such assignment. From the outset, therefore, Jewish law permitted the assignment of obligations, without resorting to

⁵J.S. Rogers, *The Early History of the Law of Bills and Notes – A Study of the Origin of Anglo-American Commercial Law*, Cambridge, Cambridge University Press, 1995, p. 5.

the development of a special branch of law such as the English law of negotiable instruments. But the ease with which assignment could be effected was a matter of dispute in the Mishnaic and Talmudic periods. Rabban Shimon b. Gamliel and R. Judah, the redactor of the Mishnah, as well as Amoraim in the time of the Talmud held that it was sufficient to physically hand over the document in order to assign the right it represented. By contrast, other sages of the Mishnah and the Talmud held that in addition to physical transfer it was necessary to draw up a deed referring to the transfer itself in order to validate the assignment of the right. It is clear that this position posed obstacles to the assignment of the document, which made it highly inconvenient for use in a dynamic commercial environment. Toward the end of the Talmudic period, Amemar, one of the last Amoraim, resolved the dispute and received the endorsement of Rav Ashi, the editor of the Talmud. But the very adoption of this ruling was disputed in the time of the Geonim, and later, in the Middle Ages, it was subject to dispute among sages.⁶

The innovative stream

R. Itzhak ben Rabbi Abba Mari of Marseille, author of *Sefer Haitur*, was active in the last third of the 12th century.⁷ In his opinion, the legal rule follows the opinion that deeds are acquired by transfer alone, a position expressed in Amemar's statement. The author based his argument on *Sefer Metivot*, a work from the period of the Geonim, and on the work of R. Shmuel ben Meir (Rashbam), who was active in the previous generation in northern France. According to this position, the transfer of a loan deed is an easy and simple legal act, carried out by merely handing it over, even easier than what is required in a modern bill of exchange, unless it is a bearer bill.

Sefer Haitur discusses the sale of deeds also from the practical legal point of view. Under the heading "The Sale of Deeds," the author brings as an example the version of a deed for the sale of deeds, apparently contrary to his theoretical position.⁸ It is possible that even in

⁶ See at length Elimelech Westreich, "Elements of Negotiability in Talmudic and Geonic Times," *Jewish Commercial Law – Essays in Memory of George Webber*, ed. J. Cohen, *Jewish Law Association Studies*, vol. XIX, 2008, p. 253-256.

⁷ *Sefer Haitur* (Rabbi Meir Yonah's edition), vol. 1, article 6, "Names of Husbands" entry, p. 25b.

⁸ *Ibid.*, vol. 1, "Apotiki (=Mortgage)" entry, p. 64b.

places in which according to law it was sufficient to hand over a deed in order to transfer ownership of it, people used a written deed for reasons of security and certainty.

The conservative stream

As noted, some Babylonian sages during the period of the Geonim maintained that the sale of a deed is carried out by transfer alone and it does not require the writing of a new and separate deed. But the great codifiers of Muslim Spain, Itzhak Alfasi (Rif) and Maimonides, as well as the various important European halakhic sages in the Middle Ages maintained that it is necessary to produce an additional deed in order to transfer a loan deed. R. Itzhak of Marseille was alone in of the opposite opinion, which only Rashbam accepted (and even used as a reference). To the best of my knowledge, all the sages in Provence, before and after him, maintained that for the sale of a loan deed to be valid it was necessary to write a deed of sale at the time the loan deed was transferred. This was also the prevailing position in all rabbinical rulings in the various Jewish centers, and I was not able to find an exception to it so far.

3. Non-finality of assignment of loan deeds: Shmuel's rule

Under Talmudic law there was a substantive difficulty that greatly prejudiced recourse to the sale of deeds as a means of creating a negotiable instrument. One factor that determined the nature of the deed as a negotiable instrument was the extent to which the assignee was dependent on the creditor who assigned the right. This dependence could assume different forms: the ability of the assignor to exempt the debtor from his obligation; the ability of the assignee to sue the original creditor in his name independently (as opposed to depending on the assignor in this matter);⁹ the defenses available to the debtor *vis-à-vis* the assignee, and particularly whether or not every defense available to him *vis-à-vis* the original creditor would hold in relation to the assignee. An examination of even the first component alone, the power of the assignor to exempt the debtor, reveals that the creditor who affects the transfer remains a real presence in relation to the loan deed.

In the second half of the 3rd century, in the Babylonian Talmud, the *amora* Shmuel formulated the rule that “one who sells a deed to another, and forgives the debt, the debt is forgiven.”¹⁰ The presence of the original creditor and his control of the debt are substantial and persistent, so that the creditor can forgive the debt of the original debtor at any time, releasing him from his

⁹ Holden, *supra* note 1, p. 25.

¹⁰ Shmuel's ruling is cited in several places in the Babylonian Talmud: *Ketubot* 85b; *Kiddushin* 48a; *Baba Kamma* 89a; *Baba Mezia* 20a; *Baba Batra* 147b.

obligation. This power of the creditor also passes to his heirs, and they too can exempt the debtor and undermine the assignee. Shmuel's ruling is independent of the dispute between R. Judah and the sages as to whether *deeds* are acquired by physical transfer only or by physical transfer accompanied by a written document. Thus, according to all, the lender, after selling the deed to a third party, has the power to forgive the debt to the borrower. This ruling negates the basic negotiability of the deed in Talmudic law. It is absolutely clear that the Talmudic deed is very far from being a type of private currency, as the negotiable instrument is sometimes characterized in modern jurisprudence.

Shmuel did not justify the legal rule he decreed, and therefore it is difficult to glean the boundaries of the rule and the manner in which it may be possible to limit it. From the end of the period of the Geonim, halakhic sages suggested various ideas that shed light on the limits of the rule and the possibility of restricting it. We discuss this matter in detail in subsequent sections.

4. Restricting Shmuel's rule: The pay to order deed

Legal sources

Shmuel's rule was accepted in the Talmud on various occasions, and post-Talmudic halakhic sages followed it. The Geonim in Babylon adopted the rule, and no exceptions to it are known to us. Nevertheless, we must note that among Jewish traders in the Mediterranean basin the Arabic deed, known as the *suftaja*, gained currency and served as an alternative deed of sorts.¹¹ The first justification of Shmuel's rule was formulated by Rabbenu Hananel, who was active at the end of the period of the Geonim in North Africa. In his opinion, the creditor can claim that after checking his accounts he found that the debtor no longer owes him money. Thus, if it were possible to prevent the creditor by various procedural means from making such a claim, there would be no need for Shmuel's rule. I am not aware, however, of any such attempts in rabbinical rulings in circles associated with Rabbenu Hananel.

¹¹ Elimelech Westreich, "Elements of Negotiability in Talmudic and Geonic Times," *Jewish Commercial Law – Essays in Memory of George Webber*, ed. J. Cohen, *Jewish Law Association Studies*, vol. XIX, p. 266-272.

The codifiers in Muslim Spain also adopted Shmuel's rule but disagreed on Rabbenu Hananel's argument. Rif explained the reason for the law by arguing that the sale of deeds is not valid by virtue of Torah law, and it is only the enactment of the sages that makes the sale possible, probably for commercial reasons. Therefore the validity of the sale is weak and not full, and the creditor still retains the original right, so that he has the power to forgive the debt. Maimonides adopted Rif's argument and wrote:

“The assignment of deeds [by writing and transferring] in this manner follows the enactment of the rabbis. But according to the Torah, evidence cannot be bought, only the body of a thing is bought. Therefore, the seller of a loan deed can still forgive it, and even his heir can.”

Rabbenu Tam, from the north of France, who in general had great influence on the sages of Provence, followed a different approach. He argued that two systems of obligation are created in each loan: one of property, which can be transferred, and one personal, which cannot. In his opinion, given that the personal obligation of the borrower cannot be transferred, the creditor can forgive it to the debtor, and after the personal obligation is forgiven, the financial obligation also ends.

The sages of Provence were alert to these approaches. Let us now begin the discussion of the theories adopted by the sages of Provence by presenting the innovative stream, which opens a real possibility of circumventing Shmuel's rule.

The innovative stream

The typical representative of the innovative stream is R. Avraham ben David from Posquières (Rabad), who was active mostly in the last third of the 12th century.¹² He objected to Maimonides's writing, cited above, and wrote:

“This is not the rationale of the rule [of Shmuel] but because the borrower tells the buyer I did not obligate myself to you. Therefore, if he [the borrower] wrote to him [the lender] in the deed ‘I am obligated to you and to all whom you empower’ he [the lender/seller] cannot forgive the loan after the loan deed is sold.”¹³

¹² I. Twersky, *Rabad of Posquières - A Twelfth-Century Talmudist*, (Revised Edition), Philadelphia, Pennsylvania, 1980, p 39-49. On the great influence of Rabbenu Tam on Rabad, see Y. M. Ta Shma, *Talmudic Interpretive Literature*, Part 1: 1000-1200, Jerusalem, 2000, p. 203.

¹³ Rabad Critiques, Maimonides, *Halachot Mechira*, Section 6, 12.

Maimonides argued for the right of the creditor/seller to forgive the debt to the debtor because the sale of deeds is based on an enactment of the rabbis and therefore it is not final. By contrast, Rabad argued that this decree is explained by the fact that the legal connection between the debtor and the creditor cannot be transferred, and therefore no privity exist between the borrower and the buyer, and no legal connection has been established between them. In his opinion, it follows that if the debtor obligates himself directly to the buyer of the deed, for example, by using a formulation such as "I hereby obligate myself to you and to all whom you empower," a direct legal connection is established between the debtor and the buyers, and forgiving the debt by the first creditor cannot sever this connection. Note that this version of the deed is strongly reminiscent of the regular modern bill, in which the maker of a promissory note (or a drawer of a bill of exchange) promises (or orders the payer) to pay to the payee or to his order (henceforth, this deed is referred to as an order bill).

According to Rabad, therefore, the absence of privity between the debtor and the buyer of the deed results in "the borrower being able to reject the buyer and tell him that he is not a legitimate claimant."¹⁴ In other words, not only is it within the power of the seller/creditor to forgive the debt, but the buyer has no power to sue the debtor directly. It is possible to overcome the absence of privity if the creditor/seller names the buyer his agent in collecting the debt. But this solution does not promote negotiability (which is characterized by the fact that the buyer of the bill can sue in his name and not in the name of the seller) and therefore the seller is still able to forgive the debt. Nevertheless, a fundamental solution to this problem can be found in a "pay to order" deed, as he explains:

"He [the borrower] is like one who writes a deed on his [the buyer] name" and "[the creditor/seller] need not write to him [the buyer] in the deed of sale 'go debate and challenge him' and against his [the borrower] will he [the buyer] deals with him [the borrower] and collects the funds from him because he is obligated from the time of the loan and he was his legal claimant."¹⁵

This decree is of supreme importance in laying the foundation for a negotiable deed in Jewish law. Until then, the ruling was that of Shmuel, established at the beginning of the

¹⁴ As he wrote in a responsum published in the collection *Tamim Deim*, Section 64.

¹⁵ *Ibid.*, Section 65.

Talmudic period, whereby it is in the power of the lender to sever the legal connection between the buyer of the deed and the debtor, except in two special cases.¹⁶ From this point onward, it is possible to prevent easily the forgiving of a debt if during the drafting of the original deed an obligation is included to the lender and to his agents. Negotiability is further advanced by the fact that the buyer of the bill can sue in his name and not in the name of the seller.

It seems that Rabad's innovation in limiting the ability of the seller of the deed to forgive the debt was quoted anonymously by his contemporary countryman, R. Itzhak from Marseille. Initially, R. Itzhak rejected the approach of R. Hananel and preferred Rif's position, which justifies Shmuel's rule by the fact that the sale of deeds is valid by an enactment of the sages. Subsequently he noted that "according to some" the buyer of the deed cannot sue the debtor because of an absence of privity. Therefore, if the creditor/seller writes to the buyer "go litigate and benefit for yourself," he thereby names the buyer his agent and he can sue the debtor. R. Itzhak of Marseille added:

If the lender wrote "I obligate myself to you, and to all whom you empower" he cannot forgive. Because at the same time that the lender sold the deed to the buyer the borrower became obligated to him and he [the borrower] cannot tell him [the buyer] there is no privity between us. And therefore, the buyer goes to the borrower [to claim payment of the deed] and if the borrower rejects him [because he already paid the debt], the buyer returns and puts in a claim with the lender [who sold him the deed].

This paragraph is very similar to the words cited above on behalf of Rabad about the various components we discussed earlier. In this rule, R. Itzhak issued yet another important decree likely to contribute to the negotiability of loan deeds, in which the expression "those whom you empower" appears. The lender/seller of the bill is responsible for repudiation of the bill if it is not honored by the debtor. This rule is reminiscent of a rule in the English law of bills of exchange, whereby the payee who assigned a bill is responsible in a secondary manner for the redemption of the bill if, for example, the debtor does not redeem the bill.

¹⁶ If the lender/seller was on his death bed and if she was a married woman, in which case she cannot cause injury to her husband's rights.

If we combine this ruling with the previous one of R. Itzhak, which makes possible the sale of the deed by transfer alone, we obtain a deed with high assignability that is quite similar to a modern negotiable instrument and that can be created easily because it requires only the addition of a few words to the identity of the creditor: "those whom you empower."

From the manner in which R. Itzhak presented the topic in *Sefer Haitur* it is not clear what his personal opinion was about Rabad's position: did he prefer it over Rif's position, did he believe that it was compatible with Rif's position, or did he mention it but did not agree with it? In the *Sefer Haturim* codex, written in Spain in the 14th century, the author maintained that R. Itzhak, author of *Haitur*, supported Rabad's position in this matter.¹⁷ If so, R. Itzhak accepted Rabad's position, and thus two most important sages of Provence in the second half of the 12th century, Rabad and R. Itzhak, adopted a position that allows the creation of a Jewish proto-negotiable instrument.

I believe that evidence exists for the fact that another sage of Provence, in addition to Rabad, rejected Shmuel's rule in the case of order bills. In the comprehensive summary written by R. Menahem Hameiri at the end of the 13th century on the topic of the sale of bills,¹⁸ he mentioned an approach according to which in the case of order bills the seller cannot forgive the debt, and he attributed this approach to "one of the ancient commentators." Hameiri listed criticisms of this approach, and noted at the end of the paragraph: "And in any case, this is what the greatest commentators wrote in their glosses." It is clear that the sage identified as "one of the ancient commentators" is not the same as "the greatest commentators." We know for a fact that Hameiri always referred to Rabad as "the greatest commentators."¹⁹ It follows that "one of the ancient commentators" must be another sage, not Rabad. It is difficult to know whom Hameiri had in mind, and whether or not he referred to R. Itzhak of Marseille, because I found nothing that matches the description "one of the ancient commentators" in Hameiri's great work.²⁰ It is possible, therefore, that three sages of Provence, in the second half of the 12th century, supported the

¹⁷ *Haturim, Choshen Mishpat*, chap. 66:26

¹⁸ *Beit Habehira, Baba Mezia*, ed. Kalman Schlesinger, Jerusalem, 5737 (1977), p. 67.

¹⁹ *Ibid.*, in the introduction, p. 14, the editor lists about a hundred citations.

²⁰ He uses the term ancient in relation to Rabi, see *ibid.*, p. 13; *Beit Habehira, Kethuboth*, ed. Avraham Sofer Jerusalem, 5707 (1947), introduction, p. 15. Sometimes he uses this term in relation to R. Zerachia, *ibid.*

new approach that rejects Shmuel's rule in the case of an order bill, and in this way made possible the appearance of a Jewish negotiable instrument.

The conservative approach

In the first half of the 13th century, R. Meshulam bar Moshe of Béziers addressed the issue at length in his addendum to Rabad's innovation.²¹ He disagreed with Rabad's innovation, whereby an order bill can cancel Shmuel's rule, rejected the evidence brought by Rabad from Talmudic sources, and simultaneously brought evidence against Rabad's position. R. Meshulam entirely adopted Rif's position, which justifies Shmuel's rule by the limitations imposed by Jewish contract law requiring a real asset as the object of a sale and not an obligation such as a loan. This is not surprising, as the work is concerned with Rif's code and it is intended to complete that which is missing in Rif's book. Note that the work has a purely practical orientation, contrary to the theoretical writing that characterizes the sages of northern France in their *tosafot* works.

In the following generation, another sage from Provence, R. Itzhak bar Avraham, a student and friend of Nahmanides from Barcelona, adopted a similar position. Nachmanides was asked²² about his position with regard to Rabad's innovation and answered that the preferred position is Rif's, who disagreed with Rabad and regarded Shmuel's rule as following from the limitations inherent in Jewish contract law. To strengthen his position, he added that "Itzhak bar Avraham ruled the same way and this was how he acted every day."

A most comprehensive discussion of the sale of bills in general and of Shmuel's rule in particular can be found in *Beit Habehira*,²³ a large commentary by R. Menahem Hameiri of Perpignan, completed in the year 1300.²⁴ This sage produced the clearest analysis of Rif's approach in explaining Shmuel's rule: "The sale of something that is not real is not a finished sale and thus there is only the sale of a right, but the sale was validated by an enactment of the rabbis for the sake of repairing the world."²⁵ In other words, Jewish law recognizes the validity of

²¹ *Sefer Hahashlama, Baba Mezia*, Lubetzki edition, Paris, 5645 (1885), chap. A, paragraph 18.

²² S. Asaf, *Sifran shel rishonim: Tshuvot Ha-Ramban*, Section 55.

²³ *Ibid.*, note 18, p. 67-71.

²⁴ Y.M. Ta Shma, *Talmudic Interpretive Literature, Part 2: 1200-1400*, Jerusalem, 2000, p. 158-169. The following details about Hameiri have been taken from here.

²⁵ *Beit Habehira, Kethuboth, ibid.*, note 20, p. 381.

sale transactions only with regard to tangible assets and not of legal rights. A loan is not a tangible asset but only a right, and therefore it is not possible to transact in it based on the Torah laws. Nevertheless, the sages decreed that it is possible to sell loans because of the people's need to do so, but this is a weak sale, and forgiving the debt by the creditor cancels it.

The interesting question is whether Hameiri adopted Rif's position entirely and rejected Rabad's innovation, similarly to his predecessor, R. Meshulam of Béziers. Already in the opening of his comprehensive discussion, Hameiri addressed Rabad's innovation, mentioned above, and cited also its criticism by R. Meshulam of Béziers, but rejected the criticism. Nevertheless, Hameiri avoided taking an unequivocal position with regard to Rabad's innovation, both in the comprehensive discussion and in his many references in his commentary on other tractates. It is impossible to determine, based on this direct reference, whether Hameiri rejected Rabad's innovation, similarly to R. Meshulam and R. Itzhak bar Avraham, or whether he adopted the innovation, as did his contemporary and colleague in Barcelona, R. Shlomo b. Adereth (Rashba). But in the continuation of his work he treated at length the argument about the absence of privity between the buyer and the debtor, and examined in detail the evidence based on Talmudic sources for and against this position.²⁶ It is clear that he did not accept the approach that regards the absence of privity as the basis for Shmuel's rule, unlike Rabad, whom he mentioned as someone who adhered to this position. Given that the absence of privity is central to Rabad's position, and that his innovation relies on circumventing this factor, we must draw the conclusion that Hameiri continued the approach prevalent in Provence in the 13th century, which rejected Rabad's innovation.

5. A loan with a mortgage as a barrier to Shmuel's rule

There was an additional method that the sages of Provence had of thwarting Shmuel's rule: having the buyer hold a mortgage on the bill. Haym Soloveitchik attributed this rule to Rabad and argued that it joins the previous rule whereby an order bill can defeat Shmuel's rule.²⁷ In his

²⁶ Supra note 18, p. 68-69.

²⁷ Haym Soloveitchik, "Rabad of *Posquieres*: A Programmatic Essay," *Studies in the History of Jewish Society in the Middle Ages and in the Modern Period - Presented to Jacob Katz*, Jerusalem, 1980, p. 34-37.

opinion, both rulings reflect Rabad's tendency to expand the means of payment in the commercial market by using the assignment of loan deeds, for which it is essential to eliminate Shmuel's rule. I disagree with the argument that Rabad is the originator of the rule according to which mortgaging the asset held by the buyer neutralizes Shmuel's rule, and I cast doubt about the contribution this rule makes to the expansion of means of payment in the commercial market.

In many transactions it was customary to provide a mortgage in order to ensure that the debt is repaid. Some of the Provence sages argued that if the buyer holds a mortgage on the bill he also achieves a legal advantage by being exempt from the obligation to take an oath before the debtor or his heir. The first sage known to us to have addressed the topic was R. Avraham ben Itzhak Head of Rabbinical Court (Rabi), one of the prominent sages in Provence in the second third of the 12th century. In one of his responsa, which was published by Asaf²⁸ and by Kapah²⁹ based on two different manuscripts, he mentioned the elders who preceded him and noted that they were still following this practice in his town. Questioning this rule with regard to the exemption from the oath, Rabi's teacher, R. Itzhak ben Maron Halevi (died in 1134) decreed that in the case of a loan deed that was sold with a mortgage provided to the buyer, Shmuel's rule does not apply in any form, and the creditor/seller cannot forgive the debt to the debtor. The reason for this is that in both rulings holding a mortgage is considered as if the debt had already been paid and therefore there is no reason for an oath; by the same token, it is no longer possible to forgive the debt. Rabi emphasized that "this is the law in our town and in Madrash [an additional town the identity of which is not clear] and this is done every day." The two rulings are also cited in *Sefer Haitur* and are attributed to an anonymous sage "may his memory be blessed." Another source from Provence is the book by R. Menahem Hameiri, *Beit Habehira*. In his innovations on the Ketubot tractate he attributed these two rulings to "our great predecessor in Narbonne,"³⁰ who is probably Rabi,³¹ and in his innovations to Bava Metzia he attributed them to the "first sages of Narbonne,"³² who is possibly R. Itzhak ben Maron Halevi. The relation between these two sages is clear, as Rabi in his responsum cited R. Itzhak ben Maron as the source for the second rule. It

²⁸ Asaf, *Toratan shel rishonim*, Rabi Responsa, Section 5.

²⁹ Rabi Responsa, Kapah edition, Jerusalem, Section 115.

³⁰ *Ibid.* note 20, p. 218.

³¹ *Beit Habehira*, *Bava Metzia*, p. 70. See also *ibid.* note 512.

³² *Ibid.*

is clear that Hameiri did not attribute the source of the rule to Rabad, whom he generally called “the great commentator” and sometimes “the great glossist.”³³

Thus, the source of the rule whereby the holding of a mortgage neutralizes Shmuel’s rule goes back to the period of R. Itzhak ben Maron, approximately two generations before Rabad, and it became known to the sages from Rabi’s responsum. This conclusion contradicts Haym Soloveitchik’s statement that the source of this rule is Rabad. Haym Soloveitchik based his conclusion on Rabad’s responsum, which appears in *Sefer Hatrumot*, written by R. Shmuel Hasardi in Catalonia in the first half of the 13th century. But this source appears to be flawed, and it is difficult to regard it as proper proof. Haym Soloveitchik himself stated that he was not able to understand the reasoning put forward in that book to justify the rule, and he had to determine that it represented associative evidence – *asmachta*, in Talmudic language – and not proper evidence. Examining the text itself reveals that not only is the argumentation faulty but so are large sections of it. The author discussed the rule with reference to neutralizing Shmuel’s rule if the buyer holds a mortgage, and decreed that Shmuel’s rule is indeed rejected in these cases. He found a source for his statement in “Rabad’s responsa on behalf of R. Itzhak ben Maron Halevi.” There is no doubt that R. Shmuel Hasardi referred to the above-quoted responsum by Rabi, who in the Middle Ages was commonly referred to as “Rabad,” meaning “R. Avraham Av Beit Din” [R. Avraham Head of Rabbinical Court]. The same nickname was given also to his son-in-law, R. Avraham ben David of Posquières, which caused great confusion in the halakhic literature. In any case, it is clear here that the reference is to Rabi, and this is what Asaf and Kapah, the editors of Rabi’s responsa indicated, as did the editor of *Sefer Hatrumot*.

Up to this point, *Sefer Hatrumot* does not deviate from other texts from Provence mentioned above. But then we come across the following statement: “And Rabad was asked, he who sells a loan deed to another and there is [a mortgage]...” This is in reference to the responsum by Rabad cited as a source by Haym Soloveitchik, which he attributed to Rabad of Posquières. But this section is not original. In the first printings of *Sefer Hatrumot* that I examined, the Salonika and (1605) Prague (1628) editions, this paragraph does not appear. The paragraph was included in the text only in the Venice edition, which also contains the interpretation “*gidulei truma*.”

³³ *Ibid.*, note 18, Introduction, p. 11.

³⁴Examination of the commentator's statements indicates that because of the difficulties of the text, some of which were pointed out also by Haym Soloveitchik, he edited the text according to his own discretion and not on the basis of the manuscript.

This leads to the conclusion that the source of this rule is earlier, and that already at the beginning of the 12th century it was espoused by R. Itzhak ben Meron of Narbonne. His student, Rabi, who was also active in Narbonne, followed in his footsteps, as did R. Itzhak of Marseille a few years later. Toward the end of the 13th century, the tradition of Provence continued to adopt this rule, and we learn from Hameiri that there were no opponents to it in this region.³⁵ A wide spectrum of sages from Provence supported this rule with respect to the mortgage that neutralizes Shmuel's rule, and we have no knowledge of anyone opposing it. Among its supporters we find also sages of the 13th century who opposed Rabad's rule regarding the order bill that thwarts Shmuel's rule.

To what degree did this rule contribute to strengthening the negotiability of loan deeds and to turning them into real means of payment? As noted, Haym Soloveitchik assigned great weight to it, apparently no less than that he assigned to Rabad's rule. But I believe that we should question this conclusion. In my opinion, the contribution of this rule to negotiability is greatly limited. At most, the rule enhanced negotiability at the level of the local community, because the buyer of the bill was protected by the mortgage against the debt being forgiven. But in the case of commerce across large distances, between different cities and countries, handing a mortgage to the buyer represented a real encumbrance to economic activity. Merchants sought simple and convenient financial instruments that would not interfere with their traffic and would save them the hazards of carrying cash on their travels. The use of mortgaging, therefore, was a problematic remedy for their difficulties, and contrary to the position of Haym Soloveitchik, it could not protect a buyer in a remote location in cases in which the loan did not include an obligation of the debtor to the creditor and to agents on behalf of the creditor.

³⁴ This is the edition that Soloveitchik referred to. See *supra*, 27, p. 34, note 27.

³⁵ *Ibid.*, *supra* notes 30 and 31.

6. Compensation for the buyer

Although Shmuel's rule allows the creditor to forgive the debt after the deed was sold, it does not leave the buyer of the deed without legal remedies. Already in the Talmud we find various approaches to deal with this problem, some of them related to Jewish tort law.³⁶ One approach argues that the buyer is entitled to compensation only in the amount of the value of the paper, a small amount but not insignificant in those days. According to another approach the buyer is entitled to compensation for breach of contract, beyond the cost of drafting the agreement. This latter approach was accepted by halakhic literature, but the sages in the post-Talmudic period disagreed about the scope of the compensation paid to the buyer. One opinion held that he should receive the amount of money he had paid to purchase the bill, whereas according to the other opinion he had to be compensated by the amount on the bill, which is full compensation for the interest he expected to earn, and its amount is naturally higher than what the buyer had originally paid. Clearly, the second approach serves to deter much more the creditor/seller from forgiving the debt, because he would have to bear the cost of the compensation above the amount that he received for the bill. By contrast, the deterrent in the first approach is lower because the creditor/seller must return only the amount of money he received, not more.

Both approaches were adopted by post-Talmudic jurisprudence. Several Babylonian sages, as well as Rabbenu Hananel,³⁷ Maimonides,³⁸ Nachmanides, and others argued that the seller must pay the value of the loan deed. Other Babylonian sages, as well as R. Asher (Rosh), Haturim, and others argued that the creditor must pay only the amount he received for the deed.³⁹ According to an intermediate position proposed by R. Karo in *Shulchan Aruch*, the compensation is in the amount of the bill but the estimated cost of collection is deducted.⁴⁰

The Provence sages mentioned above were familiar with the various approaches. Rabad himself addressed the issue, and at some point he apparently changed his opinion. In the writings of Nachmanides, the great Catalonian sage of the middle of the 13th century, Rabad

³⁶ *B. Talmud, Ketubot* 86A.

³⁷ *Otzar Hageonim, Ketubot*, Hateshuvot 266.

³⁸ *Hilkhot Hovel Umazik* 7:10

³⁹ *Tur, Hoshen Mishpat* 66:32.

⁴⁰ *Sulchan Aruch, Hoshen Mishpat* 66:32.

appears as arguing that the compensation should be in the value of the bill, but only in exceptional cases in which the person forgiving the debt is also the heir of the debtor. This is also how Rabad's position is presented in the work of Hameiri. Rabad wrote to the same effect in his criticism on Rif's code,⁴¹ but in the Vilnius edition of Rabad's critique on Rif the following has been added: "After all, truth and reason form the main evidence, and it is not reasonable even for those who impose compensation for indirect damages, that he [the lender] paid but the money that he [the buyer] gave him." In other words, in addition to proofs from Talmudic texts, it is rational discernment that counts, and according to it the seller who forgave the debt should compensate the buyer only by the amount the buyer paid. It is difficult to know whether Nachmanides and Hameiri reflected Rabad's later approach, or perhaps his later approach is reflected in his criticism of Rif's code.

In *Sefer Hahashlama*, R. Meshulam ruled in a similar way following a discussion of the Talmudic topic, based on which he proved that the obligation is to pay the amount the buyer paid and not the value of the bill. He found proof for this argument in Rif's position,⁴² and ruled in accordance with it. In his writing,⁴³ Hameiri also described the various approaches of the decisors and cited Rabad's opinion, as reported by Nachmanides. But he ruled eventually contrary to the opinion he attributed to Rabad, and decreed, in accordance with *Sefer Hahashlama*, that the amount of the compensation is the same as what the buyer paid for the bill.

7. Elements of negotiability: Between innovation and conservatism

The innovation in Jewish law in Provence in the 12th century regarding the negotiability of instruments is of great interest because we found no precedent to it in ancient sources of Jewish law or in other centers where Jewish law was practiced. Two factors may be able to explain this innovation: the economic-social factor and the personal one. Haym Soloveitchik addressed the issue toward the end of his programmatic article about Rabad. He believed that the central factor had to do with changes in the economy taking place in Provence during that period, especially the transition to market economy, which required increased

⁴¹ Rif, *Hasagot Ha-Rabad*, Ketubot 45A.

⁴² *Ibid.* Despite the fact that Rif appears to say here that the entire amount of the bill must be paid.

⁴³ *Supra* note 18.

means of payment and credit. This was in contrast to the economy of the Talmudic period, in which Shmuel's rule was formulated, allowing the lender to forgive his loan to the debtor. Shmuel's was a primarily agricultural society that did not require guaranteed and varied means of payment. It was the difference between the two realities that brought about Rabad's rule concerning the order bill that thwarts Shmuel's rule and the rule of the loan backed by a mortgage that cannot be forgiven once it is transferred to the buyer of the bill. Note that Haym Soloveitchik did not differentiate between the modern negotiable instrument and Rabad's legal instrument in Provence.

This explanation is highly tempting but it raises difficult questions because Haym Soloveitchik did not describe the economic changes that took place in sufficient detail to be able to identify the intensity of the changes and the extent to which they occurred at various times and in various places. Did the critical economic change take place during Rabad's period or earlier, in the time of Rabad's teachers? Was the change lesser in the first half of the 12th century or was the economy still based preponderantly on agriculture? Moreover, did not these economic changes occur also in neighboring areas such as the north of France, England, Germany, and Catalonia? And if they did, why do we not find Rabad's innovation in these places as well? Note further that in England it took hundreds of years for economic factors to prompt the legal system to create the modern negotiable instrument, and economic developments in the Middle Ages did not produce a real change.

Furthermore, how can we explain, following Haym Soloveitchik, the regress that occurred in Provence after Rabad, in the 13th century? Was that the result of a reversal from a market economy to an agricultural one? We must also account for the fact that Hameiri, in Perpignan⁴⁴ of the end of the 13th century, which was part of Catalonia at the time, did not adopt Rabad's rule, although it is not clear whether he opposed it decisively. By contrast, his contemporary and friend, Rashba in Barcelona, adopted Rabad's rule enthusiastically and made it part of the Jewish legal tradition in Catalonia, until it became generally accepted.

⁴⁴ For an economic study on Jewish life here see Richard W. Emery, *The Jews of Perpignan in the Thirteenth Century*, New York, 1959.

It is possible that the model we proposed elsewhere⁴⁵ to explain the change that occurred following Rashba's position in Barcelona is likely to serve as a basis for the explanation we seek in the case of Provence. Until the 13th century, Jewish law in Catalonia in general and in Barcelona in particular rejected Rabad's rule. The opposition was led by the most prominent of sages there, Nachmanides. R. Shmuel Hasardi, in his practical legal work, *Sefer Hatrumot*, as well as other sages were in agreement with Nachmanides. The change was prompted by Rashba, Nachmanides's student. We attributed the change to a combination of the economic-social factor and the personal one. In the course of the 13th century Catalonia became an economically active Mediterranean empire. This had an indirect effect on Jewish economic activity, which focused primarily in the area of finance and not on commerce per se, and which prompted the legal system to create instruments of higher negotiability than what was available then, in the form of the order bill invented by Rabad and of the bearer bill. This legal innovation was not accepted during the time of Nachmanides, despite the fact that the political and economic changes occurred already in his time, because of his great admiration for Rif and because of his unswerving support for Rif's teachings. At the end of Nachmanides's period and with the rise of his student, Rashba, who did not share with his teacher a close adherence to Rif's teachings, the road was open to the adoption of Rabad's rule.

Returning to Provence in the 12th century, in my opinion, the most influential factor in the creation of the legal rule that makes possible negotiable instruments was the unique personality of Rabad. Various scholars, including Haym Soloveitchik, pointed out the uniqueness of Rabad in medieval rabbinical circles, which was manifest mostly in his innovativeness, originality, and daring. The thwarting of Shmuel's rule by means of the order bill is a typical example, but not the only one. It is reasonable to assume that indeed important economic changes were under way, which exerted pressure on the legal system to produce more sophisticated tools. But at the time, the amount and intensity of the changes was not such that meeting these demands was vital. Therefore, only a daring and original sage such as Rabad, and perhaps R. Itzhak of Marseille, who worked in his vicinity and was

⁴⁵ Elimelech Westreich, "Elements of Negotiability in Jewish Law in Medieval Christian Spain," *Theoretical Inquiries in Law*, vol. 11, 2010, p. 411-439.

influenced by him, would take up the challenge and put in place the order bill. Other, more conservative sages did not yet see the new economic reality as compelling enough to adopt such a revolutionary change. This was particularly true of sages in Provence in the 13th century, who adhered to the teachings of Rif and of Maimonides, the great codifiers of Muslim Spain, and whose position was diametrically opposed to that of Rabad. Rabad's position had to wait until the end of the 13th century, when the great Catalonian sage, Rashba, adopted it enthusiastically and caused it to become assimilated in a process that lasted throughout the 14th century.

We cannot know how Jewish law would have continued to develop in Provence in the 14th century and beyond, for during this period the Jews in most of the communities were forced to abandon their residences, and the special course of Jewish law there was arrested. But perhaps we will find more than a hint in the summary by R. Yeruham of Provence of Rashba's approach, which brought the negotiability of instruments to its peak in the Middle Ages. R. Yeruham was born in Provence, was expelled from there in 1306, and arrived in Spain where he studied with Rashba's student.

Rashba's approach was that the right of a holder of a deed of the type "to lender and bearer" (which was not common in Provence) derives from the right of the lender in the same way as the right of the holder of a deed of the type "to lender and those empowered." R. Yeruham commented:

It appears from what he [Rashba] said that if the borrower stipulated to pay to "any bearer of the deed, whether or not it is his own claim," there is no need to come in the name of the lender, but whoever presents the deed will be paid.⁴⁶

In other words, if it has been written in the deed that the bearer does not have to prove a legal connection to the lender, the deed is valid and the bearer can demand payment independently of the lender. In this interpretation R. Yeruham, the Provencal refugee in Spain in the 14th century, almost realized the full potential for formal negotiability latent in the Jewish deed.

⁴⁶ R. Yerucham Ben Meshulam, *Meisharim*, Netiv 6, pt 5, §6; see also Beit Yossef, *Choshen Mishpat* §50.