

# Elements of Negotiability in Jewish Law in Medieval Christian Spain

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*Changes in the foundations of the negotiability of deeds took place in Jewish law in Christian Spain towards the end of the thirteenth century and in the fourteenth century. During the twelfth and thirteenth centuries, sages there adopted the legal tradition that had been shaped in Muslim Spain and North Africa in the eleventh and twelfth centuries. This was a direct continuation of the tradition of the Geonim in Babylon of the ninth to the eleventh centuries, and was based on Talmudic law. According to this tradition, a creditor could sell a loan deed, which is a necessary condition for the possibility of developing a negotiable bill, but two other decrees significantly impeded the emergence of the negotiable bill: one was the rule enabling a lender who sold the deed to forgive the debt, and the other was the requirement of a bill of sale in order to transfer ownership of the loan deed.*

*In the kingdom of Catalonia, the famous scholar Rashba stood at the forefront of the changes, blocking the forgiveness of a debt by a lender who sold a deed of the types: "to the lender and to whom he has empowered," and "to lender or bearer." Both deeds resemble the "pay to order" promissory note in English law. However, there is no evidence of modern negotiable instruments, where the transferee as a holder in due course obtains a bill without defects and with almost no direct links to the transferor. Rashba's and his followers' position appears consistent with the economic reality in the region of Catalonia and its capital city of Barcelona as a result of the transformation of the kingdom into a Mediterranean empire.*

*Changes in the kingdom of Castile were hesitant and focused on*

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*easing the transferability of deeds by adding special clauses. Harosh ruled in the case of a deed "to lender and whom he has empowered" or a deed "to lender or bearer" that the lender/seller can forgive the debt to the borrower after the sale of the deed, rejecting the innovation of Rashba, his contemporary in Catalonia. Thus, the legal tradition in Castile, a powerful landlocked country, failed to make significant progress toward negotiability at that time, perhaps, unlike Catalonia, because of a lack of economic pressure to do so.*

## INTRODUCTION

My objective in the framework of this Article is to determine the extent to which the modern legal concept of negotiability was developed in Jewish law in the thirteenth and fourteenth centuries in Jewish centers in the Iberian Peninsula.

In modern English law, the concept of negotiability has two main components: substantial negotiability and formal negotiability.<sup>1</sup> Substantial negotiability refers to the ability to transfer an instrument free of charge. Formal negotiability refers to the ability to assign a document and establish a direct legal relationship between the transferee and the debtor to the exclusion of the transferor (creditor). These two components shaped the modern negotiable instrument as a unique legal tool that became an important means of payment. In pre-modern Jewish law, as in other non-modern legal systems, transfers free of charge are unlikely to be found. In antiquity and during the first Muslim period, only a few and restricted elements of formal negotiability in relation to regular loan deeds are directly present in Jewish law in Babylon, marking the beginning of its development.

In the eleventh century the Jews brought the beginnings of negotiability to the great Jewish center in Muslim Spain, where the practices remained common until the destruction of these communities at the end of the twelfth century. Meanwhile, this concept began to spread to the north and greatly influenced the Jewish legal tradition which had been developing in Christian

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<sup>1</sup> English concepts in this article will serve only as a looking-glass through which to view the developments in northern Spanish Jewish law in the thirteenth to fourteenth centuries, rather than as tools for conducting comparative research. For comparative research on certain basic concepts of the laws of deeds in Jewish and English law, see Berachyahu Lifshitz, *Deed and Surety — Contract and Undertaking*, in *STUDIES IN CIVIL LAW, GAD TEDESCHI MEMORIAL VOLUME 401* (Izhak Englard et al. eds., 1995).

Spain. The location of the new center of Jewish life in the Crown of Aragon, abutting Provence, enabled direct contact with the Jewish center in Provence, and through it with the Ashkenazi centers in northern France and Germany. Jewish lawyers and practitioners in Christian Spain became familiar with Jewish legal ideas common in Provence, which provided them with new legal sources for dealing with the need to increase the negotiability of loan deeds.

That need may have been aggravated by economic challenges arising from the Crown of Aragon, especially the kingdom of Catalonia's emergence as a Mediterranean marine empire. However, the legal intellectual activity was confined mainly to the textual arena, that is, it consisted of the interpretation of the Talmudic text, which was considered the most important Jewish legal source, and of the examination of later central Jewish sources. As is common in Jewish law, even in pre-modern times the real economic space within which the law was applied was not discussed explicitly by the scholars. Nor is there any mention of the religious aspects, that is, matters of interest that might have influenced the legal positions.

I will begin by introducing the authoritative sources in Christian Spain. Afterwards I will discuss the legal, theoretical and practical innovations in Catalonia and Castile, and conclude by taking into account the presence of the economic element.

## I. LEGAL SOURCES AND BACKGROUND

### A. The Talmudic and Gaonic Eras<sup>2</sup>

A basic necessary condition for developing formal negotiability within a legal frame is a rule that recognizes assignments of debts. Indeed, from its beginnings in the Mishnaic and Talmudic eras (in the Land of Israel and Babylon during the first half of the first millennium C.E.), Jewish law has recognized the assignment of debts. In principle, the Talmud permits the assignment of debts,<sup>3</sup> as opposed to, for example, the English law until the

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2 This Section is based on Elimelech Westreich, *Elements of Negotiability in Talmudic and Gaonic Times*, in 19 JEWISH LAW ASSOCIATION STUDIES: JEWISH COMMERCIAL LAW 247 (Jonathan Cohen ed., 2009).

3 *Id.* at 253; see also BERACHYAHU LIFSHITZ, PROMISE: OBLIGATION AND ACQUISITION IN JEWISH LAW 347 (1988) (dealing extensively with various issues relating to the matter of the sale of deeds and the nexus of that subject with the general principles of contract law and acquisition in Jewish law).

seventeenth century, which opposed assignment. From the outset, then, Jewish law permitted the assignment of obligations, but without resorting to the development of a special branch of law such as the English law of negotiable instruments. A formidable obstacle, however, was posed by Shmuel, one of the important sages in the Talmud, who ruled that if "a person sells a deed of loan to another and then retracts and forgives the debt, the debt is forgiven."<sup>4</sup> This meant that the first creditor always remains in the picture, leaving the assignee bereft of security, in fear that the creditor who assigned the deed to him might forgive the debtor his debt at some stage.

Another obstacle was the degree of ease with which assignment could be carried out, which was a matter of dispute in the Mishnaic and Talmudic periods. R. Judah the Prince, the redactor of the Mishnah, and other sages in the Mishnah and 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.<sup>5</sup>

The latter position posed obstacles to the assignment of a document and made it inconvenient in a dynamic commercial environment. Toward the end of the Talmudic period, Amemar, one of the last sages, was supposed to resolve the dispute and received the endorsement of Rav Ashi, the editor of the Talmud. However, the correct version of Amemar's approach was subject to dispute during the Middle Ages on the ground of differences among manuscripts. In some manuscripts was written "Said Amemar: the rule [*halacha*] is that deeds [*otiot*] are not bought by transfer,"<sup>6</sup> which means that there is a demand for a deed of sale of deed in addition to physical transfer. In some manuscripts was written "Said Amemar: the rule [*halacha*] is that deeds [*otiot*] are bought by transfer,"<sup>7</sup> which means that there is a demand for physical transfer only without any need for an additional deed of sale of deed. Moreover, the very adoption of this position as a binding rule was disputed in the Gaonic era (Babylon/Iraq, circa 650-1050) which followed the Talmudic.

It can be said that modern significant principles of negotiability did not exist in the Talmudic age. Undoubtedly, the above legal arrangement — the first creditor's ability to forgive and, in some opinions, the need to draw up a deed, which severely limited the assignment of rights — was suited to an

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4 Westreich, *supra* note 2, at 256-57.

5 *Id.* at 253-56.

6 *Id.* at 366.

7 *Id.*

agricultural society in which market forces were barely operative. In such an environment, only few merchants traveled between far-flung commercial centers and there was no pressing need for an effective negotiable instrument to serve as their faithful companion.

In Babylon/Iraq in the time of the Gaonim (650-1050), several changes took place in the economic structure of the Jewish people's lives over a period of hundreds of years. Foremost amongst these was the transition from the village and agrarian society to the city and the economic activity characteristic of urban life. Although we find no change in the rule of Shmuel that the lender/assignor can forgive the debt, matters became more complex as changes led to even less negotiability. Early in this period, when Jewish society was still primarily agricultural, the leading Gaonim supported the ruling of R. Judah the Prince whereby a deed could be assigned by means of physical transfer alone. But toward the end of the period, the leading Gaonim adopted the approach of the sages, who said that it was necessary to draw up an additional document in order to assign the deed.<sup>8</sup>

Legal adaptation to the new socioeconomic situation seems to have been accomplished by adopting an institution from the outside. In the Gaonic era, the *suftaja*, which is a type of Islamic bill of exchange, began to gain currency among Jewish merchants in the Muslim Mediterranean basin, and scholars accepted it as a foreign law without applying the restrictions of the Talmudic law.<sup>9</sup> The specific, detailed source which has reached us is a *responsum* by the most important figure in the Gaonic era, R. Hay Gaon (Babylonia, 939-1038). Close scrutiny of the *responsum* reveals that the *suftaja* was not absorbed into the world of Jewish jurisprudence, but remained an alien object that gained recognition by virtue of merchant custom.<sup>10</sup>

## B. Continuity in Southern Spain

At the close of the Gaonic era, a new Jewish center began to flourish in the western parts of the Muslim world, the Maghreb, that is, North Africa and Muslim Spain (henceforth: the southern tradition). The new center was strongly influenced by the Gaonic center and its legal tradition was conveyed to there, including the aforementioned elements of assignment. An important link in the transfer was R. Itzhak Alfasi (Rif), who was active

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<sup>8</sup> *Id.* at 259-64.

<sup>9</sup> *Id.* at 266-68.

<sup>10</sup> *Id.* at 268-72.

in the second half of the eleventh century, mostly in the city of Fez in North Africa, then toward the end of his life in Luciana, in the south of Spain.<sup>11</sup> In his important codifying work, *Sefer Halachot*, he addressed at length the issue of assignment of deeds and the permanence of their transfer. Based decisively on the writings of the later Gaonim, he ruled according to Shmuel that the transferor can forgive the debt to the borrower.<sup>12</sup> He also accepted the version in the Talmud, "Said Amemar: the halacha (rule) is that deeds (*otiot*) are not bought by transfer,"<sup>13</sup> which means that there is a demand for a deed of sale of deed in addition to physical transfer. It bears note that we find no mention of the *suftaja* by Rif or other scholars in Muslim Spain. For instance, in a collection of samples of deeds from the beginning of the eleventh century from the town of Alisana in southern Spain,<sup>14</sup> there are several deeds dealing with the sale of loan deeds, but the *suftaja* is not mentioned, though it might have been expected to be. The legal situation had not changed by the twelfth century, and Maimonides in his famous code *Mishneh Torah*, which is the last great Jewish work produced in the Muslim world, followed in the footsteps of Rif.<sup>15</sup> Maimonides argued for the right of the creditor/seller to forgive the debt to the debtor because the sale of deeds is based on a rabbinic enactment and not on the law of the Torah, and therefore is not final. He also demanded a deed for the sale of deeds in addition to the physical transfer of the deed.

### C. Innovations of Provençal Scholars

A different course was taken by Maimonides' great rival, R. Avraham Ben David (Rabad), who was active in Posquières in the twelfth century and considered one of the greatest halachic scholars in all Provence.<sup>16</sup> In his critique of the code of Maimonides, he argued that this decree — the right of the creditor/seller to forgive the debt — is explained by the fact that the legal connection between the debtor and the creditor cannot be transferred, and therefore no legal connection has been established between the debtor and

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11 MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* (Bernard Auerbach & Melvin J. Sykes trans., 1994).

12 YITZHAK ALFASI (RIF), *HALACHOTH RAV ALFAS*, BAVA BATRA 396 (Zaksh ed. 1969).

13 *Id.* at 366.

14 YOSEF RIVLIN, *SHITREI KEHILAT ALISANA [THE DEEDS FROM ALISANA]* (1994) (Hebrew).

15 Moses Maimonides, *Mishneh Torah, The Book of Sale* 6: 10-12.

16 ISADORE TWERSKY, *RABAD OF POSQUIERES: A TWELFTH-CENTURY TALMUDIST* (Jewish Publication Society of America rev. ed. 1980).

the purchaser of the deed. 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 you empower," a direct legal connection is established between the debtor and the buyers, and the first creditor's forgiving the debt cannot sever this connection.<sup>17</sup>

The approach of Rabad was accepted by his contemporary R. Izhak Ben Abba Mari of Marseille, author of the book *ha-Itur*.<sup>18</sup> R. Izhak went even farther toward negotiability by ruling in reliance upon R. Yehuda the Prince that the assignment of a deed is fulfilled by transfer only and there is no need for an additional written deed.<sup>19</sup> Both Rabad and R. Izhak published their ideas in commentaries and codes, but not in any text that looks like real case law, although there is no reason to suspect that these opinions were not also the practical law.

## II. CATALONIA: THE RISE OF FORMAL NEGOTIABILITY

### A. In the Footsteps of the Southern Spanish Tradition (1100-1260)

The elements of negotiability found in the doctrine of Provençal sages of the twelfth century cannot be traced in the halachic writings of the sages of northern Spain in the same period. The first famous sage in this region whose work has reached us is R. Yehuda Barceloni, who was active at the turn of the twelfth century in Barcelona. Only a small portion of his voluminous work has survived, and part of it, a collection of samples of deeds, was published in the nineteenth century. One of these deeds is the "Deed of Sale for Deeds."<sup>20</sup> In the introduction to the deed, R. Yehuda Barceloni explains the main points of the rules of the Gaonim regarding deeds, starting with the decree that the sale of a deed requires the creation of another deed and the transfer of both. The author finds the sources for this decree in known Talmudic selections that were used by Rif and other sages who supported this approach, first and foremost Amemar's rule, which he had in Rif's version of

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17 Maimonides, *supra* note 15; R. AVRAHAM BEN-DAVID (RABAD), TESHUVOT U-PESAKIM [ANSWERS AND RULINGS] ch. 141 (Kapach ed. 1964) (Heberw).

18 YITZHAK BEN ABBA MARI OF MARSEILLES, SEFER HA-ITUR, pt. 2 (Mechila), at 55a (Vilnius, Meir Yonah ed. 1874).

19 *Id.* pt. 1 (Shemot Be'alim), at 25b.

20 R. YEHUDA BARCELONI, SEFER HA-SHETAROT [BOOK OF DEEDS], 47-49 (Shlomo Zalman Haim Halberstam ed., Berlin, Itzkowski Press 1898).

it.<sup>21</sup> R. Yehuda Barceloni's ruling is not surprising because he usually ruled in conformance with Rif, as he did in this case.<sup>22</sup>

After presenting the halachic foundations, R. Yehuda introduced the deed of sale for deeds. It is a long and comprehensive text, attesting to an already well-rooted legal and social phenomenon, whereby loan deeds were sold by means of a deed of sale. After introducing the deed and its common format, the author discussed the various clauses and instructions found in it, including debates about their validity and meaning, as well as the approaches of various sages in the matter. The author devoted his theoretical discussion primarily to the clause intended to compensate the buyer in case the deed is forgiven by the seller. What his writing makes clear is that in his time and milieu there was no known way of blocking the actual forgiving of the debt, for example by including in the original deed a clause such as the one found in Provence, "I obligate myself to you and to whom you empower." All that was left to protect the buyer, then, was to ensure proper compensation after the fact, in the hope that this would be sufficient to deter the seller from forgiving the debt.

The existence of such a deed deemed worthy of inclusion in a collection of useful deeds attests to the fact that this type of economic activity was common in the Jewish community. In fact, it had been common already for about 100 years in the south of Spain, as the collection of samples of deeds of the Alisana community shows. The passage from the south to the north of Spain did not produce, at this point, any real change in the sale of deeds, and we find no legal, theoretical, or practical infrastructures that would allow the development of a proto-negotiable deed in the future.

About a century after R. Yehuda Barceloni, there is evidence in Barcelona of wide-ranging legal activity in the field of commercial law as a result of R. Shmuel Hasardani and his work, *Sefer ha-Terumot*.<sup>23</sup> This work holds a special place in the universe of Jewish law because it contains comprehensive discussions on a broad range of legal topics having to do with the economic activities of merchants and with their debates in court. It can be regarded as

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21 RIF, *supra* note 12, at 366.

22 Israel Moses Ta-Shma, *Judah Ben Barzillai ("ha-Nasi"), Al-Bargeloni*, in 11 ENCYCLOPEDIA JUDAICA 483 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007).

23 R. SHMUEL BEN ITZHAK HASARDANI, SEFER HA-TRUMOT (Arie Goldsmith ed. 1988) (Hebrew) [hereinafter SEFER HA-TRUMOT]. About the author, see Arie Goldsmith, *Introduction to SEFER HA-TRUMOT*, *supra*, at 13-15. About the author and his book, see also ELON, *supra* note 11, at 1029-31. The author finished writing the book in 1225.



a digest of Jewish commercial law in the Middle Ages. Also, uniquely, the book's author not only had broad knowledge of Jewish law, at least in areas required of merchants, but was an active merchant himself. The work was thus written not only from the viewpoint of a scholar attempting to understand and interpret the Talmud and other authoritative sources, but also from that of a consumer of the law, in other words, of a merchant. The matter of the sale of deeds is discussed comprehensively in an extensive and excellent chapter (number 51), which contains many topics and details related to the sale of deeds; our interest, though, is mainly in the legal aspects of the negotiability of deeds.

The vital issue for the negotiability of deeds is the finality of the sale. Like all the sages discussed above, R. Shmuel Hasardani also ruled following Shmuel in the Talmud that the lender/seller can forgive the debtor the debt of the deed, whereby the borrower is released from the obligation to redeem the deed to the buyer. The author discussed the issue at length<sup>24</sup> and in detail, examining its various aspects, including the responsibility of the seller for the payment. The discussion reflects the practical matters involved and the fact that the sale of deeds was common, by reason of which there was great concern for the consequences of forgiving the debt. Another important ruling stated that it is not possible to block the forgiving of the debt by an explicit clause to that effect. Adoption of this rule prevented the expansion of negotiability by means of explicit clauses or by the use of implied terms.<sup>25</sup>

Following his comprehensive presentation of the subject of forgiving a deed that has been sold, R. Shmuel Hasardani discussed the rule of Rabad that made it possible to circumvent this ruling by means of a deed in which the borrower obligates himself to pay to the lender and to all whom he has empowered.<sup>26</sup> The author began by presenting Rabad's position that in this case a direct legal connection is established between the borrower and the buyer of the deed, and thus the seller/lender can no longer forgive the debt to the debtor. R. Shmuel Hasardani noted that R. Itzhak, author of *ha-Itur*, had ruled in conformance with Rabad, but that among the sages of his generation some had opposed this ruling, most prominently Nahmanides. The latter, considered to be the greatest halachic sage in the north of Spain, maintained close relations with R. Shmuel Hasardani and corresponded with him on many halachic topics. In an answer by Nahmanides, which R. Shmuel Hasardani quoted at length, he disagreed with Rabad's approach

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24 SEFER HA-TRUMOT, *supra* note 23, pt. 6. This is a particularly long passage.

25 *Id.* pt. 6, para. 4 (named *Sefer ha-Itur*).

26 *Id.* pt. 7.

and claimed that even in such a case the lender/seller can forgive the debtor his debt. He found support for his position in several Talmudic sources, and he based it on that of Rif and Maimonides, where the sale of deeds draws its validity from rabbinic enactment only and therefore can forever be forgiven. Clearly, the approach of R. Shmuel Hasardani and Nahmanides did not permit the development of a negotiable deed. It is a reasonable assumption that this was the dominant approach in Catalonia and throughout the entire Crown of Aragon as long as Nahmanides lived there and remained active as the greatest halachic sage in northern Spain.

The other topic pertinent to the negotiability of deeds was the manner in which deeds could be sold. This is how the author introduced the topic before embarking on a long discussion:

[A]nd where Reuben introduced a loan deed that Levi [the lender] has on Shimon [the borrower] and he [Reuben] introduced also a deed that Levi sold him [the loan deed]. In what way could we compel the borrower to repay the loan deed to Reuben?<sup>27</sup>

At the end of the discussion, his ruling was that in order to sell a deed it is necessary to write another deed and hand it over, following the positions of Rif, Maimonides, and R. Yehuda Barceloni.

### **B. Toward Formal Negotiability (1270-1391)**

After Nahmanides was exiled from Barcelona in 1263, following his religious disputation with Paulus Christiani, he was replaced by his outstanding student, R. Samuel Ben Adereth (Rashba). The latter, a prominent scholar and great lawyer, lived in Barcelona and was the leader and official chief judge of the Spanish Jews in the realm of Aragon in the last third of the thirteenth century and the first decade of the fourteenth century, until his death in 1310.<sup>28</sup> Rashba was also active as a successful moneylender together with other members of his family.<sup>29</sup> He addressed the topics relating to the transferability of deeds in his many writings, both in his commentary on the Talmud and in his *responsa*, thousands of which have been published.

Regarding the basic question regarding how deeds could be sold, Rashba followed in the footsteps of the scholars in southern and northern Spain,

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<sup>27</sup> *Id.* ch. 51, pt. 3, para. 1.

<sup>28</sup> YITZHAK BAER, *A HISTORY OF THE JEWS IN CHRISTIAN SPAIN* 281-305 (Jewish Publ'n Soc'y of America ed., 1961-66).

<sup>29</sup> ELKA KLEIN, *JEWS, CHRISTIAN SOCIETY, AND ROYAL POWER IN MEDIEVAL BARCELONA* 169-70 (2006).

including Rif, Maimonides, Nahmanides, and others. In his commentary on the Babylonian Talmud tractate Bava Batra, he adopted Rif's version of Amemar's rule that "the halacha is that otiot [deeds] are not acquired by physical transfer," but the deed must be handed over and another one written as well.<sup>30</sup> Regarding the validity of a debt's being forgiven by a lender who sold the loan deed, Rashba also followed in the footsteps of scholars in Spain and ruled according to Shmuel that forgiving is valid.<sup>31</sup> But Rashba accepted Rabad's rule in the case of a deed payable to the lender or to whomever he has empowered, writing:

Rabad, of blessed memory, relied on this and ruled that the seller of a loan deed wherein it is written "I obligate myself and my assets to you and to those you empower," if he then forgives the debt, the debt is not forgiven. As from the time it was sold [by the lender to the buyer], the obligation of the borrower [to the buyer] still exists. And therefore it seems to me that this is just and fair although there are sages who dispute this interpretation.<sup>32</sup>

In contrast to his great teacher, Nahmanides, Rashba adopted Rabad's stance and permitted the creation of a deed which eliminates the possibility of forgiving the debt. A deed of this sort is similar to the modern "pay to order" promissory note<sup>33</sup> (or bill of exchange<sup>34</sup>) in which the maker/drawer obligates himself to the first creditor of the deed, the payee with whom he has a direct legal contract, as well as to those he orders. This stance significantly strengthens the potential transferability of the deed and offers a strong guarantee to the transferee. No mention is found in the writings of Rashba about the possibility of transferring this type of deed — "pay to order" — without an additional deed of sale, but by transfer only.

Rashba appears to have discussed the possibility of transferring a deed without an additional deed of sale in relation to another type of deed which

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30 R. SHLOMO BEN AVRAHAM ADERETH (RASHBA), *HIDUSHEI HA-RASHBA, BAVA BATRA* [COMMENTARIES OF RASHBA, BAVA BATRA] 173a (Mosad ha-Rav Kuk 1999) (Hebrew); *see also* *RESPONSA OF RASHBA*, pt. 1, § 1156, at 507 (Jerusalem Institute 1997).

31 *RESPONSA OF RASHBA*, *supra* note 30, pt. 2 § 311.

32 *RESPONSA OF RASHBA*, pt. 5 § 107 (Jerusalem Institute 1998); SHLOMO BEN AVRAHAM ADERETH (RASHBA), *HIDUSHEI HA-RASHBA, GITTIN* [COMMENTARIES OF RASHBA, GITTIN] 13b (Mosad ha-Rav Kuk 1999) (Hebrew).

33 Bills of Exchange Act, 1882, 45 & 46 Vict., c. 61, § 83 (Eng.).

34 *Id.* § 3.

was of the type "payable to the lender or bearer" in response to the following question:

In a loan deed it is written: I, Reuven, owe a certain amount of money to Shimon or to the bearer of this deed. Now comes Judah and the loan deed is in his possession and he sues Reuven without having authorization from Shimon. Must Reuven pay this amount of money to Judah, who holds the deed without authorization, or not?<sup>35</sup>

The question specifies that the bearer of the deed did not have authorization from the creditor to demand payment. It is also clear that the bearer, Judah, did not have a deed of sale for the loan deed, otherwise it is difficult to understand why he would not have been able to demand payment from the borrower, or at the very least why this fact was not mentioned in the question.<sup>36</sup> In Rashba's opinion, an obligation of this sort by the borrower creates a direct link between him and anyone who may present himself in the future as the primary creditor. Therefore, there is no need for authorization, or apparently for any other legal vehicle to establish the standing of the bearer vis-?-vis the debtor. According to Rashba, then, it seems possible to transfer such a loan deed merely by handing it over, with no requirement to write a deed of sale.

Rashba based his decision, that there is no need for an authorization in a deed "to the lender or bearer," on the Talmudic passage about *Ma'amad Shloshtam* (literally "a meeting of the three"), in which the three parties, borrower, lender and transferee, are present. According to the explanation of the Talmud, the debtor is bound as he is considered to have said "I obliged myself to you and to whom you have empowered".<sup>37</sup> On the same wording, according to Rashba in another *responsum*,<sup>38</sup> Rabad based his rule to block forgiving in the case of a deed to "the lender and those he has empowered." Following this double use of the wording of the Talmud in both types of deeds, we may conclude that a deed of sale for selling a loan deed is not needed for a deed of the type "to lender and those he has empowered." Vice versa, we may also apply Rabad's rule that blocks forgiving the debt in case of the type "lender and those he has empowered," to the type "to lender or bearer".

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<sup>35</sup> RESPONSA OF RASHBA, *supra* note 30, pt. 1, § 921.

<sup>36</sup> A similar conclusion can be reached based on RESPONSA OF RASHBA, *supra* note 30, pt. 2, § 135. See my discussion *infra* note 43 and accompanying text.

<sup>37</sup> Babylonian Talmud, *Gittin* 13b. For an analysis see Shalom Albeck, *Assignment (of Debt)*, in 2 ENCYCLOPAEDIA JUDAICA 603 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007).

<sup>38</sup> RESPONSA OF RASHBA, *supra* note 30, pt 2, § 311.

To what extent are the remote holders of both types of deeds (empowered and bearer) independent of the lender from whom they received the loan deed? Consider the legal position in modern English law as a frame of reference. According to the Bills of Exchange Act, both might be considered holders,<sup>39</sup> and if they gave value they can sue in their own names.<sup>40</sup> But if the debtor has a good defense against the payee, that defense is also effective against the remote holder.<sup>41</sup> This means that the remote holder is independent of the seller/lender, but not absolutely independent. Only if the holder is considered a holder in due course is he protected against most defense claims by the debtor against the payee, mainly those defined as mere personal defenses, but not "real" or "absolute" defenses which arise from the invalidity or nullification of the instrument.<sup>42</sup>

The same issue was of concern to Rashba as well in relation to deeds of the type "to lender or bearer," although the context of Rashba's case is not common in modern law. The facts addressed by Rashba in his *responsum* were as follows.<sup>43</sup> A loan deed has been made out for the benefit of the lender or bearer with a clause concerning the lender's prerogative to claim that the loan was not paid off, without any need for him to bring proof or take an oath. The borrower died while the lender was still alive, and later the lender died as well. The first question concerns the prerogative specified in the deed in favor of the lender: is it binding only on the borrower or on his heirs as well? This question deviates from the topic at hand and therefore I bring only Rashba's decision, which is necessary in order to understand the rest of the discussion. Rashba ruled that the prerogative specified that the deed was binding only on the borrower himself and not on his heirs, and therefore in order to collect the debt the lender must take an oath before the heirs of the borrower.

The second question was whether the heirs of the lender could demand payment of the loan from the borrower's heirs, given that the lender had died. The rule in the Talmud is that a man does not bequeath an oath to his sons, which means that if the creditor was obligated to take an oath as a condition for collecting the payment, and then died, his heirs cannot demand payment of the debt because they cannot take an oath in his place. According to this rule, the heirs of the lender cannot demand payment of the loan because they cannot take an oath before the borrower's heirs. The

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39 Bills of Exchange Act, 1882, 45 & 46 Vict., c. 61, § 8 (Eng.).

40 *Id.* § 38(1).

41 Unlike the protection that is given to a holder in due course. *See id.* § 29.

42 MACKENZIE D. CHALMERS & ANTHONY G. GUEST, *ON BILLS OF EXCHANGE, CHEQUES AND PROMISSORY NOTES* paras. 5-069 to-074 (16th ed. 2005).

43 *RESPONSA OF RASHBA*, *supra* note 30, pt. 2, § 135, pt. 1, § 971.

possibility exists, however, that the heirs of the lender can exact payment of the debt not by representing the lender as his heirs, but on their own merit as bearers of the deed.

Rashba decreed that the bearer is not considered to be absolutely independent of the lender and his position in this respect is similar to that of a holder of a deed "to lender and those he has empowered."<sup>44</sup> To grant full independence to a bearer means that even if the bearer stole or found the deed, he has the right to demand payment of it. But such a position does not make sense because people are not so foolish as to produce a deed that could be taken away from them with no way of stopping it. From a modern point of view, granting the holder the right to collect the money in such circumstances would make a deed to bearer almost equivalent to money.<sup>45</sup>

After Rashba reaches the conclusion that the bearer is still dependent on the lender, he clearly cannot ignore the obligation of the lender to take an oath as a condition for collecting the money, an obligation that he is unable to meet. It is difficult to say whether in a similar case modern English law would rule in favor of a bearer who meets the conditions of holder in due course (HDC), or whether only money fits the bill, so to speak. Rashba did not address the issue mainly because the doctrine of HDC was not known to Jewish law at the time, and therefore could not have been applied to the heirs of a payee. Therefore, Rashba's position imposes on the bearer a status similar to that of a regular holder for value.

Rashba's argument creates the impression that the status of the bearer is not essential, but depends on the interpretation of the parties' intentions. Were we to conclude that the parties truly intended to broaden the bearer's independence, no legal limitations would apply. It is in this spirit that R. Yerucham of Marseille, who immigrated to Spain in 1306, comments on Rashba's approach that a holder of a deed of the type "to lender and bearer" is dependent on the lender in the same way as the holder of a deed of the type "to lender and empowered." He wrote:

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,"

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<sup>44</sup> *Id.*

<sup>45</sup> In modern English law a holder in due course of a bill to bearer who bought it from a thief obtains a good and complete title to the bill. See CHALMERS & GUEST, *supra* note 42, para. 5-074.

there is no need to come in the name of the lender, but whoever presents the deed will be paid.<sup>46</sup>

In other words, if it has been written in the deed that the bearer does not have to prove a legal connection, the deed is valid and the bearer can demand payment independently of the lender. Had such a stipulation existed in a similar case brought before Rashba, he might have ruled that the heirs of the lender have the power to sue directly, without taking an oath. According to this interpretation, Rashba realized the full potential for formal negotiability latent in the Jewish deed, although no indications of substantive negotiability can be found in his writings.

Rashba's approach was not accepted by all the halachic authorities of his time and place. R. Aharon HaLevi (Ra'ah) from Barcelona, a friend and contemporary of Rashba and also a student of Nahmanides, was uncertain whether to adopt Rabad's approach to blocking the possibility of forgiving the deed "to the lender or those he empowers." We find evidence for this in R. Yom Tov Alashvili (Ritva), one of the halachic leaders in the Kingdom of Aragon in the generation following Rashba, who was a student of both Ra'ah and Rashba. According to his testimony, "Our teacher, Ra'ah, of blessed memory, had his doubts about this [the rule of Rabad]"<sup>47</sup> and refused to accept the approach of Rashba, who had adopted the rule of Rabad. Nevertheless, Ritva himself adopted the same position as did Rashba, and setting aside the doubts of his second teacher, Ra'ah, he wrote:

In the case of a common debt [i.e., one without a specific mortgage], if it is written that I oblige myself to you and to all those whom you empower, I tend to agree with the words of our teacher, Rashba, of blessed memory, that the seller cannot forgive the sale of the deed anymore as he would be able to do if the borrower had written the deed directly to the buyer, on his name.<sup>48</sup>

Rashba's system persisted in the Kingdom of Aragon. In the generation after Ritva, Rabbi Nissim of Girona (Ran) (d. 1376), who was active in Barcelona and considered to be the greatest halachic sage in the third quarter of the fourteenth century in the Crown of Aragon, adopted this approach and ruled in accordance with it:

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

47 *RESPONSA OF RITVA* § 148 (Kapach ed., 1959).

48 *Id.* §§ 147, 148.

You my brother asked me: a person who has a loan deed from his friend can he sell it to another so that he [the seller] would not be able to forgive it [to the borrower] ... especially [given that] in our deeds *we are accustomed* to writing an obligation by the borrower to the lender and to those he empowers. [Answer] I follow the rule of Rabad ... that if it was explicitly written by the borrower, the debt cannot be forgiven. And although Nahmanides criticized him ... it is not a difficult question in my opinion ... and because we rejected the criticism of Nahmanides and the issue is clear and our reasoning is decisive, we rely on the words of Rabad, of blessed memory, which were already agreed upon by the greatest of the later sages, of blessed memory, in *this matter*.<sup>49</sup>

Following Rabad, then, Rabbi Nissim of Girona ruled decisively that it is possible to block the right of the lender to forgive a debt that has been sold. He unhesitatingly rejected Nahmanides' point of view, which was based on commentary on Talmudic sources, maintaining that the explanation was sufficiently decisive to rule as had Rabad. According to him, the great sages in subsequent generations had ruled the same way, and he appears to have been referring to sages in northern Spain, including Rashba and Ritva, whose decisions we have already discussed. R. Nissim of Girona's statement that "in our deeds we are accustomed,"<sup>50</sup> regarding the norms that were in effect in the community concerning the use of deeds of the type in which the obligation was to the lender and to all those empowered by him, shows that the legal norms matched common practice.

A few years after the death of R. Nissim of Girona in 1376, the riots of 1391 broke out, destroying the Jewish communities in the Crown of Aragon and their legal intellectual activity. We now turn our attention to the other important Christian kingdom, Castile, which was located in the heart of the Iberian Peninsula.

### III. HESITANT CHANGES IN CASTILE (1200-1350)

The first legal source from Castile on our subject dates from the first half of the thirteenth century at the end of the second Reconquista, when Castile became a powerful landlocked country, spanning the center and most of

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<sup>49</sup> RESPONSA OF RAN § 64 (Feldman ed., 1964) (first emphasis added).

<sup>50</sup> *Id.*



the south of the Iberian Peninsula. R. Meir Abulafia (1170-1244),<sup>51</sup> who was active in Toledo, the capital of the kingdom of Castile, in the first part of the thirteenth century, addressed matters having to do with the transfer of deeds. Overall, he ruled in the same way as the sages of Muslim Spain, Rif and Maimonides. R. Meir Abulafia adopted Shmuel's ruling that the seller of a loan deed to a third party can subsequently forgive the debt. Moreover, he rejected Rabad's rule blocking the ability of the lender to forgive a deed that was written to the lender and to whom he has empowered,<sup>52</sup> which makes the deed similar to a "pay to order" type bill in English law.<sup>53</sup> His version of Amemar's rule was similar to Rif's, and he also followed Rif in ruling that *otiot* [deeds] are bought both by written document and by transfer. On R. Meir Abulafia's approach, the loan deed was very limited in its transferability, as had been the case in Jewish law in Muslim Spain since time immemorial.

No additional sources from Castile have reached us until the coming of R. Asher Bar Yehiel (Harosh), who emigrated from Ashkenaz (Germany) and settled in the capital Toledo in 1305, serving there for more than two decades as the central rabbinical personality.<sup>54</sup> The legal work of Harosh is greatly varied and includes the main types of legal works: (a) *Tosafot*, a Talmudic commentary that was developed in the Ashkenazi milieu and is characterized by its highbrow academic character and sophisticated intellectual reasoning; (b) a code that organizes the Talmudic material on a theoretical level and adds the Ashkenazi legal tradition, offering the Jews in Spain an alternative to Rif's purely Sephardic code; and (c) a large body of *responsa*, most of which were written during his residence in Spain, that reflect the practical legal activity and its process.

At the theoretical level, Harosh followed in the footsteps of R. Abulafia and the tradition of southern Spain. In his code he, like Rif and the Ashkenazi sages, accepted the rule of Shmuel that a lender who sold a bill can forgive the debt to the borrower. He also ruled similarly that *otiot* (deeds) are bought both by a written document and by transfer. In this case there was no tension between the Ashkenazi tradition on which he was raised and the Sephardic tradition in which he was active, because most of the important Ashkenazi authors had ruled in keeping with Rif and Maimonides.<sup>55</sup> However, he

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51 Israel Moses Ta-Shma, *Abulafia, Meir (1170?-1244)*, in 1 ENCYCLOPEDIA JUDAICA 341-42 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007).

52 Tur, *Chosen Mishpat* § 66.

53 Bills of Exchange Act, 1882, 45 & 46 Vict., c. 61, § 8(2) (Eng.).

54 AVRAHAM HAIM FREIMAN, HAROSH — R. ASHER BAR IHIEL 27-33 (Menahem Eldar trans., 1986).

55 Rosh, *Bava Batra* ch. 10, § 23; only one famous Ashkenazi sage, R. Shmuel Ben

did not reject Rif's point of view that the validity of the sale is based on an enactment of the sages, rather than the law of the Torah, and therefore never final, explaining that the motivation for the enactment was to make debts more liquid.

Harosh also followed in the same footsteps on the question whether to limit the power of the lender/seller to forgive the loan in case of a deed to order. In his code, Harosh addressed Rabad's rule and discussed it at length.<sup>56</sup> His opinion was unequivocal: Rabad's rule was mistaken, none of his proofs were properly substantiated, and it must be rejected, especially on the basis of the argument by Rif and the Gaonim that the legal validity of the sale of deeds derives merely from rabbinical enactments. But it should be rejected also according to the great Ashkenazi scholar Rabbenu Tam, who argued that the validity of the sale of deeds derives from the Torah. According to Rabbenu Tam's opinion, in each loan two components of obligation are created, one of property, which can be transferred, and a personal obligation, which cannot be transferred. Therefore, even after the sale the creditor still has the power to forgive the personal obligation and cancel the debt. Moreover, Harosh distinguished between the sale of a loan deed in the presence of all three parties (*Ma'amad Shloshtam*),<sup>57</sup> in which case some sages hold that the lender cannot forgive to the borrower a loan he had sold, and the regular sale of a loan deed, in which case all scholars agree that the lender/seller can forgive the debt to the debtor.

Matters of negotiability — easing transferability and forgiving of the debt — were also discussed extensively by Harosh in his *responsa*, usually on a practical level. One of the questions was sent by his student Yosef, who asked regarding a deed "to you and to all whom you empowered" whether the lender/seller can forgive the debt to the borrower and which remedies are available to the buyer following a valid forgiving. Harosh introduced the question as follows:

You asked: he who sells a loan deed to his friend and in the deed it was written "I am hereby obligated to you and to all whom you empowered," can the seller forgive the debt to the borrower? Do we say that at the time the lender sold the deed to him the borrower is

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Meir (Rashbam), disagreed and ruled that there was no need to write an additional deed. Rashbam, *Bava Batra* 77a.

<sup>56</sup> Rosh, *Ktuvat* ch. 9 § 10.

<sup>57</sup> See *supra* text accompanying note 37.

considered to obligate himself to the buyer immediately as if he [the borrower] wrote to him [the buyer] a direct loan deed on his name?<sup>58</sup>

Harosh immediately identified Rabad's rule in the background to the question and discussed it at length, citing arguments very similar to those he put forward in his code. As in his code, here also his clear and unequivocal position is that Rabad's rule must be rejected, and even if a deed to the lender and those he has empowered has been written, the lender/seller retains the right to forgive the loan to the borrower even after the sale of the deed.

The possibility of transferring the deed by delivery only was not discussed because Yosef assumed that the deed was sold by an additional deed. It is not clear whether this was a real case and these were the facts, or whether it was a theoretical question intended to cover a future possibility.<sup>59</sup> In any case, it may serve as a hint that the use of an additional sale deed to transfer a loan deed was still the common practice in commerce.

A similar case in which the transfer of the loan deed was performed by an additional sale deed, in which the question relates to Rabad's rule, was published recently from manuscripts.<sup>60</sup> This was a real case, and the deed under discussion was of the type "to the lender and bearer." The case occurred in the late 1310s and the facts, which are described in detail, were as follows: Reuben lent money to Shimon and obtained from him a loan deed. Then Reuben sold the loan deed to Yehuda by a sale deed, and in the end Reuben forgave the debt to Shimon. Yehuda demanded the payment of the deed from Shimon, adducing various arguments to justify his position that forgiving the loan deed was invalid. One of his arguments was that the deed "to the lender and bearer" was similar to the deed "to whom you empowered," which according to Rabad's rule blocks forgiveness.

Harosh disagreed, claiming that Rabad's rule should be denied for any type of deed based on arguments in his code. Even if Rabad's rule is accepted, though, it should be restricted to a deed "to you and to all whom you empowered," and not be applied to a deed to the lender and the bearer, because only in the first case is there a real transfer of the loan and the buyer has full ownership of it, whereas in the case of a deed to lender and bearer

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58 RESPONSA OF HAROSH, Rule 69, § 1 (Jerusalem Institute 1994).

59 It seems more like a theoretical discussion as it focuses on a Talmudic paragraph, trying to define its scope and interpret its meaning.

60 Ephraim Elimelech Urbach, *The Responsa of R. Asher B. Yehiel in Manuscript and Printed Editions*, 2 SHNATON HA-MISHPAT HA-IVRI [JEWISH LAW ANNUAL] 68 (1975) (Hebrew).

the main intention is to empower the buyer as an agent to collect the money and eliminate the need for a deed of authorization.

Here again the question of transferability by delivery only, without an additional deed, did not arise, as in fact the loan deed was transferred by a deed of sale. But in other *responsa*, the question of transferability was discussed extensively, as was Rabad's rule. In a complicated case (the case of the heir), a man obligated himself for a certain amount of money "to his wife or to any bearer of this deed."<sup>61</sup> Subsequently, the man and his wife died, and another person, who claimed that he was entitled to payment because the deed was written "to any bearer," requested payment of the deed from the heir. Against him, the heir claimed that he was filling the position of his mother, who was named as the lender of the deed, and therefore he could forgive the deed to himself, as heir to the borrowing father.

Harosh addressed the possibility of easing the requirements for transferring a deed "to the lender or to the bearer," writing that,

Here in Toletola [Toledo], despite the fact that they wrote in the deeds 'to the lender or to the bearer of this deed, Jew or Gentile', the custom was that the bearer of the deed does not collect without permission, or writing, or transfer given to him by the lender.

That is, a type of deed "to the lender or bearer" was circulating in Toledo, the capital of Castile, but it had not yet prompted a legal change. By custom it appears to have been rejected (according to Harosh because of legal problems with the clause "Jews or gentiles") and people continued to demand a sale deed in transferring a loan deed of the type "to the lender or bearer." According to Harosh, the Toledo custom blocks the bearer from suing the debtor directly, even without the forgiveness of debt by the lender/seller.

The custom in Toledo not to give effect to the clause "to lender or to bearer" and to demand a deed for transferability is also mentioned in a *responsum* to another question, probably sent from somewhere else. Harosh agreed with the description of the custom in Toledo, adding that an explicit authorization is needed for the buyer to sue the borrower. There is no direct evidence of a different custom elsewhere in Castile, but from these *responsa* it may be assumed that in other places outside Toledo it was permissible to transfer by delivery only, without need for an additional deed of sale or deed of authorization.

In the case of the heir, Harosh could have stopped at this point and ruled

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61 RESPONSA OF HAROSH, *supra* note 58, Rule 68, § 7.

regarding the right of the heir, but he preferred to reinforce his conclusion, arguing that the heir had a right to the deed even if it is accepted that a deed "to lender and bearer" can be transferred by delivery only. Regarding Rabad's rule, he writes:

And I also say, even if this clause entitles anyone who bears the deed to collect the payment in any case, this clause comes only instead of an authorization or instead of writing and transfer. As it is known, the main portion of the money belongs to the lender, and this clause did nothing except remove the need for authorization, if he wishes to send an agent to collect the debt or if he wishes to sell it to another, so that he does not need writing and transfer but can transfer the deed and have it collected. And because the bearer of the deed is the agent of the lender, the mother of the heir, the heir replaced his mother and forgave the deed to himself, as he inherits his father and replaces his father. This is according to the rule that [the lender] who sold a loan deed and forgives it [to the borrower] the debt is forgiven, and even an heir [of the lender] can forgive.

According to Harosh, the bearer is not considered a real, direct and independent party with regard to the borrower, but someone who is the lender's follower, and dependent upon him. That is because the addition of "any bearer of the deed" is interpreted as being intended by the parties themselves to enable the transfer of the deed to a third party, without requiring explicit written authorization or a deed of sale. Therefore, the lender remains a critical link in any suit, and is empowered to forgive the debt to the borrower.<sup>62</sup>

Despite its conservative attitude, the Toledo community could not resist the demands to ease transferability, and we find yet another case that was brought before Harosh: "[A] deed in which it is written 'A borrowed from B a hundred and obligated himself to the lender or to any bearer of this deed so that there would be no need for an authorization to any one.'"<sup>63</sup>

The issue here is a deed "to lender and bearer" that explicitly enables the transferee to collect the debt for the creditor without producing a deed of authorization, and without transferring ownership of the debt. This clause seems to have been introduced into the deed in order to bypass the custom in Toledo to demand a deed of sale for deeds "to lender or bearer" as well.

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<sup>62</sup> Harosh adopts this position in another answer. *Id.* § 8.

<sup>63</sup> *Id.* (emphasis added).

This time Harosh did not doubt the validity of the transfer and discussed only the question of forgiving:

It is clear that forgiving the debt is effective because we know that the money belongs to the lender and it was written so only that he would not need to make an authorization deed, hence we follow his intention. This case is not different from a case in which the lender [explicitly] sold the loan deed or made an authorization to collect the debt that we assume he [the lender] wants to continue to control the money so that he will be able to forgive the debt. And all of this is to prevent any finder in case the deed is lost from collecting the debt by forgiving it to the borrower.

Based on the explicit statement "that he would not need to give authorization to anyone," Harosh argued that the lender is interested in continuing to control the debt so that he would be able to forgive it in case the deed were lost. He again rejected Rabad's rule and adhered to Shmuel's position on the two types of deeds, "to whom you empower" and "to lender or bearer." Thus, the legal tradition in Castile failed to make any significant progress toward negotiability at that time. The only headway made was the use of the explicit statement "that he would not need to give authorization to anyone," which made it possible to collect a debt without a deed of authorization. So far, these deeds, according to Harosh, resembled a modern bill in which endorsement is restricted by the formula "Pay to Payee or order for collection,"<sup>64</sup> as in both cases the transferee can sue in his own name without an additional authorization, but he is not the owner of the deed, only a collector for the benefit of the transferor.

Here Harosh emphasized the basic idea of freedom of contracts as an essential element in his decision, alongside the real intention of the parties. This idea was used by Harosh also in some of the above *responsa*, and with it he might have introduced a significant potential improvement in the area of negotiability. In a question addressed to Harosh from Burgos, in northern Castile,<sup>65</sup> he was asked about a "deed in which the name of the lender was not mentioned but in which the borrower obligated himself that any bearer of the deed can collect from him the amount mentioned in the deed, whether or not it is a valid deed."<sup>66</sup> Harosh's answer was unambiguous: "It appears that this

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64 Bills of Exchange Act, 1882, 45 & 46 Vict., c. 61, § 35 (Eng.).

65 For identification of the location, see MENACHEM ELON, *HERUT HA-PRAT BE-DARCHEI GVIYAT HOV BA-MISHPAT HA-IVRI* [FREEDOM OF THE INDIVIDUAL IN DEBT COLLECTION IN JEWISH LAW] 128 (2d ed. 2000) (Hebrew).

66 *RESPONSA OF HAROSH*, *supra* note 58, Rule 68, § 9.

is a valid deed and that any bearer can collect on it," this despite the fact that it was known that the bearer was not part of the loan transaction, but a third party. Harosh argued as follows:

[B]ecause the lender did not want to lend to the borrower until he obligated himself to any bearer of the bill, so that the lender will not have to sell it by writing a deed of sale and by transferring it, or if he should want to authorize another to collect the debt as his agent he should not have to write him an authorization deed or any clause. The reason is that in civil matters every clause is valid.

The freedom to shape the loan deed in this respect is complete, and it is up to the parties to create a deed that is fully a bearer deed, without specifying the party directly connected to the original loan transaction with the borrower. The motivation to draft this deed, according to Harosh, was the same which prompted him in the case of the deed payable "to the lender and bearer," that is, obviating the need for authorization in collecting the loan deed or the need for a deed of sale for its sale to another. Pure deeds to bearer, without mention of a specific lender and without the addition of "Jews or gentiles," were very innovative, and their like are not found even in Catalonia, where Jewish law made important progress toward negotiability.

Harosh was fully aware of the novelty of this approach, and therefore deployed a wide range of arguments whose cumulative weight he believed to support his position. Based on the explanation of the Talmud regarding *Ma'amad Shloshtam* that the debtor is bound, as he is considered to have said "I obliged myself to you and to whom you empowered," he explained that it was possible in principle to create an obligation to repay the loan on behalf of a third party. In the Talmudic source, however, there is a direct second party that is the lender, whereas in the Burgos deed "there is no known lender" and therefore the borrower's obligation may not be valid and "he is not obligated at all." To that end, Harosh brings evidence from another case mentioned in the Talmud, in which a deed was drafted in the court of Rav Huna that said, "I, such and such, borrow from you an amount," but the name of the lender was omitted.<sup>67</sup> According to the Talmud, any bearer of the bill would be able to collect "despite the fact that the lender is not mentioned in the deed," and even people who are not used to borrowing money would be able to sue based on this deed. In Harosh's writing, the same holds true for the Burgos deed, which is also valid, and any bearer could collect based on it.

But even this evidence can be refuted. In the case of R. Huna in the

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<sup>67</sup> Babylonian Talmud, *Bava Batra* 172b.

Talmud, the borrower obligated himself to a certain person he knew, face to face, and the name of the lender was omitted only by mistake. By contrast, in the Burgos deed the borrower obligated himself to anyone bearing the deed, even if it should be entirely clear that he was not the lender and not a direct party to the loan transaction. Indeed, Harosh believed that a combination of the two types of evidence is required (the Talmudic argument of the *Ma'amad Shloshtam* transaction and the case of the deed in the court of Rav Huna) in order to establish the theoretical foundation for the validity of the Burgos deed.

Harosh found complementary support in the Biblical story of King Saul, David, and Goliath, in which Saul obligated himself to grant a fortune to whoever would strike down Goliath the Philistine, but without being a direct party with whom a legal connection had been established. According to the Talmud, the agreement was valid, and with the amount promised to whoever struck down Goliath, David betrothed (*kiddushin*) Michal, the daughter of King Saul. Indeed, there was a dispute among Talmudic sages whether it is possible to betroth a wife by a choice in right (loan, in the language of the Talmud), or the money should be the real property of the groom. For the same reason, the sages disagreed about the validity of David's marriage to Michal, but in the opinion of all sages Saul's obligation was valid and, by virtue of it, David could demand its content from Saul.

A similar case occurred in Toledo in the time of Harosh. "R. David Ben Yaish issued a loan deed in which it is written that Abu-alhassin obligated himself ... for such and such amount of money to whoever bears this loan deed and did not mention in it any person." Abu-alhassin, the borrower, claimed that the bill was not valid, and in any case David Ben Yaish, having become the bearer without mention of the name of the lender, had no right to demand payment on his own because he was not the lender in this transaction. Harosh ruled that the bill unquestionably was valid and adduced arguments similar to those in his answer to the Burgos sages. His final conclusion was that the right of David Ben Yaish could not be challenged and that he was entitled to demand that the bill be redeemed by the borrower. Harosh had another reason for ruling that Abu-alhassin had to redeem the deed "even if by law he would not collect on this deed,"<sup>68</sup> namely that under the circumstances the borrower had taken an oath "to redeem to any bearer of the deed," and therefore had to be coerced to keep his oath.

It is clear that, according to Harosh, deeds of this type are sold by transfer alone and there is no need for a deed of sale, for in his opinion that is the

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68 RESPONSA OF HAROSH, *supra* note 58, Rule 68, § 11.



motivation for creating such a deed. It appears that even members of the Toledo community, though, did not challenge the fact that transfer alone was sufficient for transferring ownership of the deed, and the only claim was that the deed itself was not valid from a contractual point of view, because of the absence of an explicit second party. Thus, it appears from the presentation of the facts of the case that no mention was made of the existence of a deed of sale to David Ben Yaish, but nevertheless Abu-alhassin, the borrower, did not claim that the sale was not valid.

Note that the validity of the lender forgiving the loan was not raised in either this case or that of the Burgos deed, and therefore Harosh did not address it. From a theoretical point of view, the argument could be made that in the absence of an explicit lender specified in the loan deed, there is no one competent to forgive the debtor his debt. Acceptance of this argument would have enabled the development of a pure deed to bearer in the Castilian milieu that would have been transferred by delivery, without exposing the transferee to the threat of forgiving the debt. Such a deed would have been even closer to the modern negotiable instrument than the ones that were in use in Catalonia in that period.

It may be possible to reach a conclusion about this topic based on the views that Harosh's son, R. Yaakov, introduced in his code, *ha-Turim*, published in the 1340s. In it R. Yaakov followed in the footsteps of his father and included many of his father's responsa in general, as well as on this topic. However, only *responsa* dealing with deeds "to whom you empower" and "to the lender and bearer" are mentioned. The two *responsa* about the deed "to bearer" without specification of a lender are omitted, although R. Yaakov followed R. Huna's rule validating a deed in which the borrower had written "I borrowed from you" without specifying who the "you" was,<sup>69</sup> the rule on which Harosh had based his decision to validate a pure deed to bearer. There may have been technical reasons for not including these specific *responsa*. I am not in possession of any direct sources that might attest to R. Yaakov's position on this important matter.

It is impossible to trace further developments, as unfortunately no important treatise on Jewish law written in Castile after the code *ha-Turim* has survived. Nor have any collections of deeds or other documents been preserved that might reveal something about the commercial habits of the Jewish community that continued to reside there until the expulsion in 1492.

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<sup>69</sup> Tur, *Choshen Mishpat* § 50.

#### IV. SUMMARY OF THE LEGAL CHANGES AND THE HISTORICAL BACKGROUND

In this Article, I have focused on the changes in the foundations of the negotiability of deeds that took place in Jewish law in Christian Spain, namely the Kingdom of Castile and the countries of the Crown of Aragon, over a period of some two-three hundred years. Initially, sages in the two kingdoms (foremost among them Nahmanides in the Kingdom of Aragon and R. Abulafia in Castile) adopted the legal tradition that had been shaped in Muslim Spain and North Africa in the eleventh and twelfth centuries. This was a direct continuation of the tradition of the Geonim in Babylon of the ninth to the eleventh centuries, and was based on Talmudic law, which legally legitimized the sale of loan deeds. That was a necessary condition for the possibility of developing a negotiable bill, but two other decrees significantly impeded the emergence of the negotiable bill: one was the rule enabling a lender who sold the note to forgive the debt, and the other was the requirement of a bill of sale in order to transfer ownership of the loan deed.

Toward the turn of the fourteenth century, the trend in the two main Christian kingdoms of Spain clearly appeared to be towards increasing the transferability of loan deeds, although no special negotiable deed emerged like the Arabic *suftage* in Babylonian Jewish law.

In the Crown of Aragon, especially in the kingdom of Catalonia, Rashba stood at the forefront of the changes, strengthening the finality of the transfer by adopting Rabad's innovation. Two types of loan deeds were affected: "to the lender and to whom he has empowered," and "to lender or bearer." Both deeds resemble the "pay to order" promissory note in English law, in which a transferee who meets the demand of a holder for value is considered the owner of the deed and may sue in his own name based on the promissory note. In these special Jewish-Catalonian deeds, the transferor remained linked to the deed, and the transferee, even a bearer, was bound by the transferor's obligations (for example, to take an oath imposed on the transferor). In the modern English legal system, the transferee (assignee) is still bound by defenses that the maker/debtor raises against the transferor/lender. I have assumed that Rashba eased the demands for a valid sale of these special deeds as well, demanding only physical transfer, without an additional deed of sale. However, there is no evidence of modern negotiable instruments, where the transferee as a holder in due course obtains a bill without defects and with almost no direct links to the transferor.

Rashba's position appears consistent with the economic reality of the Crown of Aragon, especially in the region of Catalonia and its capital city

of Barcelona, although this is not mentioned in the writings of the scholars. The end of the Reconquista and James I's control over Valencia and other extended territories transformed the kingdom into a Mediterranean empire. Beginning in the mid-thirteenth century, an accelerated process of economic and commercial development took place in the Crown of Aragon. As Assis has shown in his research, the Jews took an active part in it as property owners and lenders, despite the fact that they were not directly involved in Mediterranean trade.<sup>70</sup> Assis has described the economic changes in the field of commerce as having taken place between the middle of the thirteenth century and the beginning of the fourteenth, but he did not specify the exact points in time when the changes and sharp reversals occurred.

This appears, therefore, to have been an evolutionary process. It is difficult to pin down the exact moment of its occurrence, neither is it possible to state that at a given point in time a revolution occurred and commerce began to flourish. Thus, we cannot identify a direct and close dependence between the economic changes and the rise of Rashba's approach concerning the negotiability of deeds. The kind of economic and legal processes discussed here are slow and lengthy, and their development is not always parallel. That is usually the case with a legal framework such as the Jewish law, which is quintessentially bound to tradition and to the authority of the Talmud and of earlier sources. It is not surprising, therefore, that this change did not take place earlier, in the time of Nahmanides, who was active in Catalonia until 1263, and that it was his exceptional student Rashba who brought about the change with his rulings, which depend, to a great extent, on the decisions of Rabad, from twelfth-century Provence. I am not surprised that Nahmanides adhered to the stance of his Spanish predecessors. It is well known that Nahmanides was a great admirer of Rif and avoided deviating from his approach even when he felt it was warranted.<sup>71</sup> Rashba, who was Nahmanides's student but did not share his teacher's great respect for Rif, felt

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70 Yom Tov Assis, *The Jews of Barcelona in Maritime Trade with the East, in EXILE AND DIASPORA — STUDIES IN THE HISTORY OF THE JEWISH PEOPLE PRESENTED TO PROFESSOR HAIM BEINART ON THE OCCASION OF HIS SEVENTIETH BIRTHDAY 258* (Aharon Mirsky, Avraham Grossman & Yosef Kaplan eds., 1988) (Hebrew). Assis devoted a monograph to this topic. See YOM TOV ASSIS, *JEWISH ECONOMY IN THE MEDIEVAL CROWN OF ARAGON, 1213-1327: MONEY AND POWER* 78-84 (1997); see also BAER, *supra* note 28, at 206-12.

71 See, for example, Nahmanides's approach to forcing a man to divorce his rebellious wife. Elimelech Westreich, *The Rise and Decline of the Law of the Rebellious Wife in Medieval Jewish Law*, in *12 JEWISH LAW ASSOCIATION STUDIES, THE ZUTPHEN CONFERENCE VOLUME* 213-14 (H. Gamoran ed., 2002).

less constrained and was able to develop an approach that made possible the negotiability of deeds, consistent with the dynamic commercial activity that was taking place in Barcelona and the rest of Catalonia.

Rashba's approach was not accepted immediately by all the halachic authorities of his time and place, his contemporary Ra'ah among them, for example. A generation later, however, his student Ritva, the most important halachic authority, adopted Rashba's position, as did R. Nisim of Gerona two generations later, on the eve of the destruction of the Jewish communities in the Crown of Aragon, bearing witness that this position had become common both in practice and among the scholars.

Changes in Castile were hesitant and focused on easing the transferability of deeds by adding special clauses. Different variants of deeds to bearer can be found: (a) a deed "to the lender or to the bearer of this deed, Jew or Gentile," (b) a deed "to the lender or to the bearer of this deed," (c) a deed "to lender or bearer without need of authorization," and (d) a deed "to bearer" without mention of the lender. In the capital city of Toledo, the first and second variants did not offer any advantages, and a deed of sale was needed to transfer the loan deed to a third party. Only an explicit clause, similar to the third variant, might enable a lender in Toledo to transfer a loan deed by delivery only. In some places, however, the second variant was accepted, and in the city of Burgos, in North Castile, the fourth was also accepted.

In all the cases, robust interactions are evident between the commercial usage and the legal instance, which was represented by Harosh, the central halachic figure of the period in Castile. In his arguments, Harosh emphasized the importance of common usage and the intentions of the parties toward the deed, together with purely legal aspects having to do with the law of obligations. Thus, Harosh validated the fourth variant even though such a deed lacks a second party, ruling that it could be transferred by delivery only.

However, Harosh limited the changes towards transferability that were the result of custom, requiring delivery only in some variants of deeds, without the need for a deed of sale. Concerning the rule of Shmuel, which limited the development of negotiability by allowing forgiveness of the debt, Harosh consistently rejected Rabad's innovation in the case of a deed "to lender and whom he has empowered," ruling that the lender/seller can forgive the debt to the borrower after the sale of the deed. He applied the same rule to a deed "to lender or bearer," arguing a *minori ad majus* that in this case the lender can forgive the debt because the essential purpose of the deed is to ease the collection of the debt. Only in the case of a deed of the "to bearer" variant, in which no specific lender is named, has it been assumed that the

debt could not be forgiven as there was no lender who could do so. This conclusion cannot be verified, however, and the code *ha-Turim*, written by Harosh's son, does not support it either. Thus, the legal tradition in Castile failed to make any significant progress toward negotiability at that time, perhaps, unlike Catalonia, because of a lack of economic pressure to do so.