

ELEMENTS OF NEGOTIABILITY
IN TALMUDIC AND GEONIC TIMES

by

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A. Introduction

This article seeks to identify elements of negotiability in Jewish law in the Mishnah and the Talmud and in Geonic times as part of a comprehensive enquiry which aims to determine the degree to which the treatment of deeds in Jewish law is compatible with modern-day life, as well as the ability of Jewish law to conduct a fruitful dialogue with Israeli law in this area.¹ Accordingly, I will not confine myself to internal-halakhic categories, which would have sufficed had we been undertaking a purely legal-historical investigation; rather, I will examine the principles of negotiability in Jewish law through categories drawn from the concepts of negotiability in Israeli law, which are none other than concepts of English law.² I should emphasise that the English concepts will serve only as a looking-glass through which to view Jewish law at various times and places over a period of around one thousand years, rather than as tools for conducting

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¹ Different scholars have dealt with this subject from a variety of perspectives. Some scholars disputed the question of the contribution of Jews to the creation of the bill of exchange in its various incarnations, which was widespread in Europe and in the Mediterranean basin from the time of the Middle Ages. For a survey of the various sources which have dealt with this topic see B. Arbel, "Jews, the Growth of Capitalism and "Cambio": Commercial Credit and Shipping Insurance in the Mediterranean at the Beginning of the New Era", *Zion* 69 (2004), 157-161 (Heb.). Other scholars discuss the place of Jews as intermediaries between the Moslem and Christian civilizations. On the influence of the Islamic East on the Christian West in the development of the bill of exchange and other means of payment, and on the presence of Jews in this arena, see E. Ashtor, "Banking Instruments Between the Muslim East and the Christian West", *Journal of European Economic History* 1 (1972), 553-573.

² The Israeli law is based on the Bills of Exchange Ordinance [New Version] 1957, which is an almost exact copy of the English Bills of Exchange Act 1882 (45 & 46 Vict., c.61), as well as on the massive absorption of the rules and directives of the Common law.

comparative research or for examining the mutual influences between two systems of law.³ The whole thrust of the article is, therefore, an examination of the presence and existence of the foundations of modern negotiability in Jewish law sources, especially the regular “Hebrew” deeds that were commonly used in various periods in the past, and the changes that they underwent.⁴

I will now present several concepts which will be discussed in the course of this article. Negotiability is a central characteristic of documents, by virtue of which they are considered and termed negotiable instruments. Prime examples of negotiable instruments today are the bill of exchange, especially the cheque, which is a special case of a bill of exchange in English law, and the promissory note. English law attributes two main components to negotiability: assignability, which is also termed formal negotiability, and freedom from equities, which is sometimes termed material negotiability.⁵ The outstanding characteristic of assignability is that ownership of the right indicated on the document passes over to the recipient by virtue of physical transfer, and if a person’s name appears on the document, the transfer must be accompanied by a signature of endorsement. These two actions are simple and quick and they do not involve the complicated procedures which make the transfer of other property difficult. An additional element included in assignability is that the assignee can sue in his own name, and does not need to appear as the representative and agent of the original debtor. Freedom from equities, at times, allows the recipient of the document to have the benefit of a document that is free from any contractual or proprietary defect that it bore when in the hands of the assignor.⁶ This point contradicts the general principle whereby a

³ For comparative research on certain basic concepts of the laws of deeds in Jewish and English law, see B. Lifshitz, “Deed and Surety – Contract and Undertaking”, in *Studies in Civil Law, Gad Tedeschi Memorial Volume* (Jerusalem: Institute for Legislative Studies, 1995), 401-39. I wish to leave comparative research until after completion of rigorous inductive study of the foundations of negotiable instruments in Jewish law sources over the ages until the present day. Abundant literature is available on the subject of the development of negotiable instruments in English law. See, e.g., M. Holden, *The History of Negotiable Instruments in English Law* (London: Athlone Press, 1955); J.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).

⁴ Neither will I embark on a discussion of the debt agent, which touches upon the subject of this work, at least at the early stages of the development of negotiable instruments: see Holden, *supra* n.3, at 4-9. I will refer to this subject of a debt agent only where it is connected directly with the subject of negotiability, such as the case of the *suftaja*: see below in the section on the Babylonian Geonim. For a comprehensive discussion of the general subject of claims agents in Jewish law, see N. Rakover, *The Jewish law of agency in legal proceedings* (Jerusalem: Mossad Harav Kook, 1972), chaps. 5 & 6 (Heb.). In the framework of these chapters, he discusses in detail the subject of the debt agent. See also B. Lifshitz, “Assignment and Agency”, *Tarbiz: Quarterly of Jewish Studies* 58 (1989), 1-19.

⁵ The Hebrew word for the English expression “freedom from equities” is “*tehirut*”, coined by Prof. Aharon Barak, President of the Israel Supreme Court, in a short but excellent essay/monograph, *The Nature of the Negotiable Instrument* (Jerusalem: Jerusalem Academic Press, undated), 23.

⁶ We are referring to a holder in due course, who is able to overcome defects of title and “mere personal defences” but not “real” or “absolute” defects. See Bills of Exchange Act, 1882, *supra* note 2,

person cannot assign or sell more than he has, and this applies also to an assignee, who cannot receive more than that which the assignor had (except in cases which comply with the strict requirements of the “normal course of business”).⁷ It could be said that the commercial instrument reaches the assignee in a better state than when it was in the hands of the assignor.

The attribute of formal negotiability is closely bound up with the concept of “realification” (conversion of a contractual [*in personam*] obligation into a real [*in rem*] right) of the obligation to which the deed relates. This concept views the obligation in the negotiable instrument as one which merges into the deed and in itself becomes a movable object. Therefore, it can be assigned to another, and physical transfer is sufficient, because the obligation is not merely represented in the deed: rather, the obligation has been absorbed by it and has become a movable object. The concept of realification 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. Traditional English law did not recognise 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.⁸ Negotiable instruments bypassed this constraint in their perception as embodying the obligation itself, and not just representing it, and in their equation to chattels which may be assigned from hand to hand.

The setting apart of negotiable instruments from regular contracts and other deeds did not come about all at once; rather, it was the outcome of a long, drawn-out process.⁹ The continuation of the development of negotiability, with its two components – assignability, and even more so, freedom from equities – is the pinnacle of a process hundreds of years old, which began in the Middle Ages at an unknown date and developed until it reached this state. The environment in which this took place was mercantile; it began on the practical-business level, then moved on to a system of merchant law, and in the end found expression in the general Common law system.¹⁰ 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

s.38(2); *Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes* (London, Sweet & Maxwell, 2005, 16th ed.), 342-344.

⁷ Thus, for example, if the debtor under the document had some defence *vis-à-vis* the assignor, it will not stand *vis-à-vis* the assignee. This is also the case if a person had a property right in a deed, such as a lien or a pledge: the assignee receives the deed when it is clear and unburdened by any rights of others.

⁸ Holden, *supra* n.3, at 13-14.

⁹ Holden, *ibid.*

¹⁰ This is the accepted view of English and American scholars. On the beginning of the process of absorption of the Common law in the seventeenth century, see Holden, *supra* n.3, at 30-65.

on their long trade journeys. At the same time, bills of exchange, as well as promissory notes, were apt to serve as means for obtaining credit. For this reason, negotiable instruments had to bear an ever-increasing resemblance to cash with respect to its most prominent characteristics. The first important trait is the possibility of assigning the creditor's right under the deed, and in its wake came the mode of effecting the assignment, which was by physical transfer only.

Nowhere in Jewish law during the period with which this paper deals, nor for hundreds of years thereafter, do we encounter the characteristic of freedom from equities, nor is it clear that that this characteristic was ever present. However, this fact does not in itself detract from the mercantile nature of the bills and notes, for even with respect to English law, Rogers states:

... it is a mistake to treat the concept of negotiability as the centrepiece of the history of the law of bills and notes. Surprising as this may seem to modern 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.¹¹

Moreover, in this period we have not found, within the bounds of Jewish law, any special documents characterised by special negotiability, and in fact only at a later stage did the *mamrani* bill, which could be characterised as a clearly negotiable deed, appear in an extensive way in eastern and central Europe.¹² It also seems that the concept of realification was not developed in Jewish law in this period, and already in talmudic times there was no particular need for this concept, since the Talmud recognised the possibility of assignment of debt. Our discussion will, therefore, focus primarily on the characteristic of assignability and the extent of its finality, which is a precondition for the existence of the characteristic of formal and material negotiability. The focal point will be the question of the extent to which the assignability of various legal documents was efficient, quick and final, such that they could be useful for merchants in an era of developing commerce, and spur the development of suitable legal concepts.

B. *Talmudic Times*

The Talmud recognises the possibility in principle of assigning obligations from the creditor to a third person,¹³ and of making a contract for the benefit of a third

¹¹ *Supra* n.3, at 5.

¹² See e.g. *Sifteï Cohen, Hoshen Mishpat* 48:2; see legislation on this matter in the corpus "Regulations of the Community of Moravia 5410-5508", Jerusalem 1952 (explained by Y. Heilprin), 74-76. For a discussion and summary of the research see: E. Fram, *Ideals Face Reality – Jewish Law and Life in Poland 1550-1655* (Cincinnati: Hebrew Union College Press, 1997), 132-143.

¹³ On the transfer of obligations in the Talmud, see A. Gulak, *The Foundations of Jewish Law* (Berlin: Dvir, 1922, second printing Tel Aviv: Dvir, 1967), II.96-104 (Heb.); S. Albeck, *Civil Law in*

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party, by virtue of the principle that a person may be benefited in his absence. Accordingly, a written or oral obligation may be the object of assignment according to the Talmud, as opposed to English law which, for example, dismissed the possibility of assigning obligations and of making a contract for the benefit of a third party. The questions which arose in talmudic law related, therefore, to the ways and means of assigning obligations, and the ramifications of so doing, particularly if the assignment was final.

The principal document discussed in the Talmud in the context of assignment of obligations is the loan bill. The regular, widespread form of this bill was a deed by witnesses who attested to the loan, whereas the debtor was a hidden element. There were also deeds in which the debtor was present in the first person, and it was he who was in fact the maker of the deed; however, these deeds were not common. The negotiable instruments that developed over the many years of English law were the bill of exchange or the promissory note in which the debtor was the maker of the deed and present in the first person. A deed of the type common in the Talmud – the deed by witness – was not a negotiable instrument, and the laws of negotiable instruments did not apply to it.¹⁴ Nevertheless, the fact that talmudic loan bills could be assigned served as a possible basis for the later development of proto-negotiable instruments, however limited.

The Talmud discusses extensively the possibility of assignment of debts by means of a deed, and leaves no doubt that, in principle, deeds relating to financial obligations may be assigned. The Talmud proposes three ways of assigning a debt, or, in fact, assigning a right: *ma'amad shloshtam*, sale of the deed, and *shi'abuda derabbi Natan*. The main method is sale of the deed and transfer of the ownership to another. I will discuss this at length below, but first, I will briefly describe the other two ways.

kinyan ma'amad sheloshtam

One way of assigning ownership of debts is in the form of a property transaction known as *kinyan ma'amad shloshtam* (“acquisition in the presence of three”).¹⁵ This method requires three parties: the debtor, the creditor and the assignee must all meet together and in that context the creditor transfers to the assignee his right *vis-à-vis* the debtor. The significance of such a transfer of ownership is that the

the Talmud (Tel Aviv: Dvir, 1976), 577-595 (Heb.).

¹⁴ We are referring to documents in the category of IOU's, which are in essence deeds by witness, attesting to the obligation but not creating it.

¹⁵ *Gittin* 13b; *Baba Batra* 149a etc. On *ma'amad shloshtam*, see A. Gulak, *supra* n.13, at 97-99.

debtor switches creditors, and henceforth he is directly indebted to the assignee. As a result, a direct relationship is created between the assignee and the original debtor, and the assignee can sue for repayment of the debt even without receiving permission from the original creditor. According to several *poskim*, the original creditor is no longer able to release the debtor from his obligation *vis-à-vis* the assignee, even if he forgives him the debt. This form of assignment of debt enables the transfer of obligations recorded in a deed or oral undertakings, but it was not the universal practice and in fact the talmudic Sages were divided on the matter. The general line taken by the Talmud was that which I presented earlier, i.e. that the form of *kinyan ma'amad shloshtam* is applicable to the assignment of obligations and other rights that are not *in rem*. Raba disagreed and held that by means of *kinyan ma'amad shloshtam* only real rights, such as chattels or money which are subject to bailment or deposit, could be acquired; however, a debt, which is of an obligatory nature, could not be assigned in this way. But even according to the general talmudic approach, which recognised the possibility of assignment by way of *kinyan ma'amad shloshtam*, this form entailed a significant disadvantage for the mercantile community which sought to assign rights. This was due to the requirement that the three parties involved be physically present and agree amongst themselves on the transaction. In the context of trade in the Middle Ages, clearly one of the principal reasons for the creation of a negotiable instrument was in order to deal with cases in which it was not possible for the three parties to meet, and the idea of using a negotiable instrument was mainly in order to circumvent this difficulty.

Shi'abuda derabbi Natan (“Rabbi Nathan’s pledge”)

A second method for transferring obligations is that which the Talmud calls *shi'abuda derabbi Natan* (“Rabbi Nathan’s pledge”). The following statement appears in the talmudic passage:

R. Nathan says: If a man lends another an amount, and the latter one lends to a third, how do we know that the Beth Din can take from the last [named] and give to the first [creditor]? Because it says, *And he shall give it unto him in respect of whom he has been guilty*.¹⁶

This form of assignment of a right is extremely effective. No legal action is required on the part of the original creditor, and certainly there is no need for a cumbersome procedure of drawing up an additional deed in order to realize the assignment, nor for a *kinyan ma'amad shloshtam* in order to ensure absolute

¹⁶ *Gittin* 37a. For a comprehensive discussion of the subject, see *Sefer Terumat* of R. S. Hasardi, 51:1.

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assignment. In effect, the law creates an assignment without any action having been taken by the parties to the agreement that engendered the obligations. It is sufficient that B is the creditor of A and also the debtor of C in order for A to become a debtor of C. However, this efficacy is limited in its application. The arena of its realization is the context of execution of debts, when the two obligations are due and two creditors seek relief in court in order to realize their rights by virtue of valid agreements. At this stage, after these rights have been recognised and execution is ordered, the Beth Din shortens the chain and creates a direct link between the debtor and the creditor of that debtor's direct creditor. This doctrine cannot, however, be applied at the contractual stage prior to the due date of repayment. For this reason, in relation to the classical bill of exchange, in which the date of payment is some time in the future and the assignments of the deed take place prior to that date, this doctrine cannot serve as the basis for a negotiable instrument. At the same time, in respect of a deed which is payable on demand, where the deed can be presented for payment at any time but need not necessarily be so presented, there is potential for invoking the principle of *shi'abuda derabbi Natan*.¹⁷

1. *Sale of a Deed: is an Additional Deed Needed?*

I will now discuss the main method of assigning rights, which is that of sale of the deed. The Talmud asks how this can be done, formulating the question thus: "Are *letters* [lit. "*otiot*", referring to a written deed] acquired by physical transfer or are they acquired by means of a written document and physical transfer?"¹⁸ In other words, is the physical transfer of the deed sufficient to confer upon the assignee the right represented by the deed, or is an additional document required in the form of a special deed in order to transfer the deed and the right it embodies? In various passages in the Talmud, this issue arises as a tannaitic dispute: R. Judah, the redactor of the Mishnah, held that *otiot* are acquired by way of physical transfer [alone], whereas the Sages disagreed and held that *otiot* are acquired by physical transfer together with a written document.¹⁹ Additional talmudic disputes hang on this dispute, e.g. the dispute between Rabban Shimon b. Gamliel and the Sages as to how the purchaser or the recipient of a gift should return the object of the

¹⁷ See *Sifteï Kohen, Commentary on the Shulḥan Arukh, Ḥoshen Mishpat 66*.

¹⁸ B. Lifshitz, *Asmakhta – Obligation and Acquisition in Jewish Law* (Jerusalem: Magnes Press, 1988), 347-70, deals extensively with various issues relating to the matter of the sale of deeds and the nexus of that subject to the general principles of contract law and acquisition in Jewish law. Here, I concentrate only on such rules as may have possible relevance in the context of negotiable instruments.

¹⁹ *Kiddushin 47a; Baba Batra 76a*.

transaction to the seller or the giver of the gift.²⁰ Is it sufficient that he return the deed of sale or the original gift, or must he perform a new act of acquisition, such as writing a new deed? Clearly, if the *halakhah* is decided according to R. Judah, then the deed which embodies an obligation is amenable to easy and quick assignment by means of physical transfer only, and no additional act of writing a deed is required. However, if the *halakhah* is in accordance with the Sages, then the deed which embodies the right can be assigned only by drawing up a new deed.²¹

It is important to note that this method of assigning deeds is not confined to deeds of only one particular type, as was the case in English law. Every written loan agreement, of whatever form and type, was included in the category of deeds which could be assigned, subject to the dispute between R. Judah and the Sages. Moreover, not only deeds relating to a monetary right were included, but also deeds whose subject was a full proprietary right, such as, for example, a deed of sale of movable property and even of immovable property. Indeed, modern law also recognises such a type of negotiable instrument, e.g. the bill of lading, the subject of which is certain chattels and not an obligation relating to a financial payment. However, bills of lading are characterised only by the quality of transferability but not that of freedom from equities, as opposed to negotiable instruments whose object is a monetary right, which are characterised by freedom from equities as well. This is clearly in accordance with Jewish law on this matter, for at no stage did any document in Jewish law achieve the quality of freedom from equities.

The talmudic dispute in *Baba Batra* between R. Judah and the Sages was apparently solved by the *Amora* R. Amemar, of the sixth generation of Babylonian *Amoraim*, whose view gained the support of Rav Ashi, the redactor of the Talmud. This means that, virtually up to the time of the redaction of the Talmud, this question remained open, and it is not inconceivable that the two approaches coexisted. However, even the decision made by Amemar regarding the dispute does not help us in determining the position of Jewish law on the subject, and we do not have an unequivocal answer as to the position of Jewish law at the end of the talmudic period and thereafter. First of all, a Geonic dispute exists as to whether the *halakhah* is decided according to Amemar, or in accordance with other rulings that imply – albeit indirectly – that the *halakhah* is not decided according to Amemar's view.²² This dispute exists despite the fact that the Geonim accepted the approach whereby Amemar's ruling supported that of the Sages and not of

²⁰ *Baba Batra* 169b.

²¹ For other disputes which depended on the dispute between Rabbi and the Sages, see e.g. *Baba Batra* 173a; *Sanhedrin* 31a and those which are discussed by Lifshitz, *supra* n.18.

²² See below, and in the section on the Geonim.

R. Judah. Secondly, beginning in the Middle Ages, we find in the writings of the Sages alternative versions of the ruling of Amemar. The version in the Talmud, First Printing, Venice 1520, and in the Vilna edition, is as follows: “Amemar said, the *halakhah* is that *otiot* are acquired by physical transfer as [held by] R. Judah.” This version is found in several important manuscripts of the Talmud. In the Munich manuscript, the version is similar, as is the Vatican manuscript.²³ Chief among the supporters of this version is R. Samuel b. Meir [Rashbam], an early Tosafist and one of the leading Ashkenazi Sages in the twelfth century, as well as other Sages who will be mentioned below.²⁴

As opposed to the version in the Munich manuscript, we find several manuscripts with a different, contradictory version. The Hamburg manuscript has the following text: “Amemar said, the *halakhah* is that *otiot* are *not* acquired by physical transfer” [my emphasis – E.W.].²⁵ According to this version, which contradicts the above-mentioned version, one does not rule like R. Judah, who holds that physical transfer alone suffices; rather, the *halakhah* is according to the Sages, who require both physical transfer as well as a deed. This version is also found in a passage from the Genizah published by Katz, and it is also the version found in the Paris manuscript.²⁶ It is supported by all the sources with which I am familiar from the Geonic period, even though not all of them agree with Amemar’s position as it emerges from this version. R. Yitshak Alfasi, too, accepted this version, and even ruled accordingly, and hence it penetrated massively into the Sephardic halakhic tradition.

According to the Munich MS. version, the Talmud itself decided that deeds are sold by way of physical transfer only, which is simple and uncomplicated, and does not require any additional deed in order to effect the transfer. According to the Hamburg MS. version, on the other hand, a deed may be sold only by way of physical transfer accompanied by an additional deed, in keeping with the approach of the Sages and contrary to the position taken by R. Judah. Undoubtedly, this procedure makes the transfer of an obligation most unwieldy, and it is difficult to imagine that merchants would choose this as the standard mode of doing business, particularly in the ancient world and the Middle Ages, when the drawing up of a deed was not a simple matter. Obviously, another transfer of the original bill of obligation would require another deed, such that the second assignee would need to hold three deeds in order to realise his claim. At this stage, merchants would surely

²³ In the Bibliotheca Apostolica Manuscript, Vatican, Ebr. 11, the version is, “the *halakhah* is that *otiot* are acquired by physical transfer.”

²⁴ Below, this version will be referred to as the Munich manuscript tradition.

²⁵ Below, this version will be referred to as the Hamburg manuscript tradition.

²⁶ In Paris Manuscript, Bibliothèque Nationale, Suppl. Heb. 1337, the version is: “Amemar said, *otiot* are *not* acquired by way of physical transfer.”

be unwilling to continue regarding the deed as a convenient, efficient means for their use, as opposed, for example, to a negotiable deed common today, which is transferred by the simple, efficient method of a signature of endorsement on the back, and whose use is only enhanced by multiple endorsements and assignees.

2. *Finality of Assignment of Rights*

However, under talmudic law there was another, more substantive drawback, which greatly prejudiced recourse to the sale of deeds as a means of creating a negotiable instrument. One factor determining the nature of the deed as a negotiable instrument was the extent to which the assignee was dependent upon the creditor who assigned the right. This dependence could assume different forms: the status of the assignor within the circle of creditors and debtors in general, and his ability to exempt the debtor from his obligation in particular; the ability of the assignee to sue in his name independently, as opposed to dependence on the assignor, the original creditor;²⁷ the defences available to the debtor *vis-à-vis* the assignee, and particularly whether or not every defence available to him *vis-à-vis* the original creditor would hold good in relation to the assignee.²⁸ An examination of even the first component alone – the power of the assignor to exempt the debtor – reveals that the creditor who effects the transfer continues to constitute a real presence in relation to the deed. The *Amora* Shmuel formulated the rule that “[o]ne who sells a bond of indebtedness to another, and forgives the debt, the debt is forgiven.”²⁹ The presence of the original creditor, and his control of the debt according to the deed, are very substantial, and persist throughout. Consequently, the creditor can forgive the original debtor his debt, thereby releasing him from his 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 *otiot* 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 borrower the debt.

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 characterised in modern jurisprudence. The ability of the creditor under this rule to exempt the debtor from

²⁷ Holden, *supra* n.3, at 25.

²⁸ Which is the characteristic of *tehirut*, discussed above near n.6.

²⁹ 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.

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his obligation, despite the sale of the deed to the assignee, renders superfluous, at this stage, a discussion of the other factors mentioned above, according to which the finality of the transfer is determined. Obviously, there is no room in such a legal system to examine the element of *material negotiability*, in view of the fact that the creditor remains in the picture, and a partial, truncated right reaches the assignee. It may be said that all that the deed has done is to create a legal relationship that is similar in its basis to the relationship that exists between a principal and agent, with certain improvements.

Up to this point we have dealt with a deed which is similar to a promissory note, since only two players – the debtor and the creditor – are involved, even though they are generally identified in the third, rather than the first, person. Do the talmudic sources contain any reference to a document which is similar – if only along general lines – to a bill of exchange in which three players are involved: the drawer, the payee and the principal debtor who is the drawee/acceptor? It would appear that traces of this can be found in the deed known in the Talmud as “*diukani*”,³⁰ particularly in the light of the fact that the *Geonim* drew a connection between this deed and the *suftaja* deed which was common at that time.³¹ The *diukani* is mentioned in *Baba Kamma* (104a-b), and it was the subject of an amoraic dispute: “R. Judah said that Shmuel stated that it is not right to forward money “by *diukani*” even if witnesses are signed on it [to identify the authentication]. R. Yoḥanan, however, said: If witnesses are signed on it [to identify the authentication] it may be forwarded.” The *diukani* is a document that is essentially an instruction from the maker of the deed to the deposittee, or the debtor, to pay a sum of money to the person who presents the deed. The stamp of the maker of the deed – the *diukani* – appears on the document. This document evokes a bill of exchange, for there is a drawer who makes the document, a drawee who is the holder of the money and a payee who will receive the money. *Prima facie*, the nature of the juridical link between the payee and the drawer is that of agency, and the payee does not have an independent right to receive the money unconnected to the relations between the payee and the drawer.³² In this aspect, this deed is different from a bill of exchange, in which the payee has independent

³⁰ A comprehensive discussion of this deed can be found in A. Gulak, *Deeds in the Talmud – in the Light of the Greek Papyri from Egypt and of Greek and Roman Law*, edited and with comments by Ranon Katzoff (Jerusalem, Magnes Press, 1994), 172 and chap.7 in its entirety (165-174). The Hebrew edition is a translation of the original essay by Gulak written in German, with the addition of comments and important updates by Prof. Katzoff. See also Y. Ostersetzer, “The “*Diukani*” in the Legal Documents in Talmudic Law], *Tarbiz* 11 (1940), 39-55.

³¹ See below near n.49.

³² See Gulak, *supra* n.27, who discusses the *diukani* deed in the framework of the chapter on agency, and presents the deed as a certain type of agency. This characterization of the *diukani* emerges clearly from the talmudic discussion, and is understood in this manner by the *Rishonim*.

status and claims in his own name.³³ Shmuel did not accept the validity of such a deed, but later in the talmudic passage he agreed that if, incidental to the acquisition of land (*kinyan agav karka*), the drawer/principal transferred to the payee ownership of the amount of money held by the drawee, then the payee would be able to use the deed and to receive his money from the drawee.³⁴ However, within this structure as well, the drawer remains in the picture, and the payee is dependent upon him and upon the original transaction, by virtue of which the drawee owes money to the drawer.

The talmudic sources and the Commentaries provide no indication of whether the *diukani* was in any way assignable by physical transfer, and, if so, what was the extent of its assignability. In the wake of the comparison which the Geonim drew between this deed and the *suftaja*, it would appear that the *diukani* was not transferable in its own right. At the same time, it is conceivable that it may have been sold in the usual manner of sale of deeds. This is because the directives and the rules that we described earlier in relation to the sale of loan deeds were also valid, in principle, with respect to deeds of sale and other deeds.

It may be said that in talmudic times the significant modern elements of negotiability did not exist. According to the Sages, the transfer of a bill by way of sale was characterized by difficulties, and all agreed that it was very limited because of the continued actual presence of the creditor/transferor. Assignment of the bill by way of *ma'amad shloshtam* was indeed final, but it required the physical presence of all three parties at once. The great disadvantage of the *shi'abuda derabbi Natan*, on the other hand, was that it was part of the execution, and became actual only at the stage at which the obligation fell due.

The Jewish communities in Babylon and in the Land of Israel in the talmudic period are generally considered to have been basically agrarian societies. There is no doubt that this position of talmudic law, severely limiting the assignability of rights, was suited to agrarian society, in which the level of commercial activity is low, and people have little recourse to wide-scale credit activity. The transactions which take place are in large measure barter or quasi-barter; loans are taken on the basis of need and distress, and are of a personal, rather than a commercial nature, which would require effective transfer of loan deeds. In such an environment, we

³³ Bills of Exchange Act 1882, s.38(1) "The Rights and power of the holder of a bill are as follows: (1) He may sue on the bill in his own name."

³⁴ Rashba, in his Commentary to the Talmud, holds that the transaction incidental to the acquisition of land (*kinyan agav karka*) is suitable only for tangible property, such as cash which has been deposited with the drawee. But if the drawer wishes to allow the payee to collect his debt from the drawee, then he must perform the act of acquisition appropriate for this right, which is acquisition by way of writing and physical transfer. Accordingly, the *diukani* does not hold any advantage as a method of transfer of monetary obligations in comparison with the regular sale of deeds, for Shmuel requires a document as well as physical transfer in every sale of a deed, including this.

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do not find evidence of large numbers of merchants who move between far-flung commercial centres, and a pressing need for an effective negotiable instrument, which is the constant companion of the long-distance merchant, does not arise.

C. The Geonic Period

Let us now consider whether there was a change in the Babylon of the Geonic period in the wake of the changes in the economic structure of the Jewish people – primarily the move from the village and agricultural work to the city and its characteristic economic activity.

1. Sale of a Deed by Means of Physical Transfer – the Position of the Early Geonim

The earliest discussion of the subject of sale of deeds is found in *Sefer Halakhot Pesukot* of R. Yehudai Gaon in the eighth century, the first known essay of a codificatory nature from the Geonic period. In the Sasson manuscript, which is the only surviving manuscript of the original Aramaic essay,³⁵ we find:

... the rule is that *otiot* are acquired by physical transfer as ruled by R. Judah the Prince, and where he gives it to his fellow ...³⁶

This also appears in an essay, *Hilkhot Re'u*, which is the Hebrew version of *Sefer Halakhot Pesukot*:

... the rule is that *otiot* are acquired by physical transfer as held by Rav [here, R. Judah the Prince],³⁷ that when a person gives a deed to another as a present, if he gives it in the presence of witnesses, ownership is acquired, and even if they did not buy from him, the rule is as R. Eliezer in [tractate] *Gittin*, who said that witnesses to the physical transfer confer validity.³⁸

This essay does not enlighten us with respect to the talmudic formulation of Amemar's ruling, but it is absolutely clear that R. Yehudai Gaon ruled according to R. Judah, i.e. that *otiot* are acquired by way of physical transfer alone, and it is

³⁵ This matter is discussed in far greater detail by N. Danzig, "Introduction to *Sefer Halakhot Pesukot*" (New York & Jerusalem: Jewish Theological Seminary, 5753/1973), e.g., at 34-39.

³⁶ *Halakhot Pesukot* (Sasson MS), 1971 facsimile, p. 71.

³⁷ In the above cited Sasson manuscript, it is written: "[as held by] Rabbi – [כר']", and of course this means "... by R. Judah the Prince [כרבי]". In my opinion, כר' also appeared in the Hebrew edition, but the copy editor and possibly the scribe of the manuscript mistakenly interpreted this as רב – Rav, instead of כרבי - Rabbi, i.e. R. Judah the Prince.

³⁸ *Halakhot Pesukot (Re'u)*, Schlossberg edition (Vienna 1886, Jerusalem facsimile, 1967), p. 56.

unnecessary to draw up an additional deed. Total identification with this position can be found in a later codificatory essay, *Sefer Halakhot Gedolot* of R. Shimon Kiara in the middle of the ninth century. According to this work:

The *halakhah* is not like Amemar, and *otiot* are acquired by physical transfer, in accordance with [the ruling of] R. Judah: where he gave his fellow a deed of gift and physically handed it over in the presence of witnesses, the acquisition is valid, even though he did not buy it, for we maintain (*Gittin* 86b) that the *halakhah* is like R. Eliezer in matters of *Gittin*, who said witnesses to the physical transfer confer validity.³⁹

The position taken by the author of *Sefer Halakhot Gedolot* is identical to that of *Sefer Halakhot Pesukot*, i.e. that the *halakhah* is according to R. Judah and not the Sages. This is not surprising, for the *Sefer Halakhot Gedolot* is very similar to *Sefer Halakhot Pesukot*, from which it derived a great deal of material. The innovation in *Sefer Halakhot Gedolot* is its explicit reference to the version of Amemar. It is absolutely clear from the text of *Sefer Halakhot Gedolot* that it was referring to the Hamburg MS version: “Amemar said, *otiot* are not acquired by physical transfer”, and not the Munich MS version. However, *Sefer Halakhot Gedolot* rejects Amemar’s ruling, and states that the *halakhah* must be according to R. Judah, whereby physical transfer of the deed is sufficient and there is no need to draw up an additional deed. This is so despite the fact that according to this version, *viz.* “*otiot* are not acquired by physical transfer”, the whole passage, including Rav Ashi, indicates agreement with Amemar’s ruling that both physical writing and physical transfer are required to transfer ownership of a deed.

The author of *Sefer Halakhot Gedolot* finds support for his decision in another ruling that was discussed in the Talmud, concerning bills of divorce. The *Tannaim* were divided on the question of whether, in relation to a bill of divorce, the witnesses who sign the document actually effect the dissolution of the marriage and bring about the divorce, or whether it is the witnesses who are present when the bill of divorce is handed over who are constitutive of the dissolution (*Gittin* 21b). Because the *halakhah* was decided in accordance with R. Eliezer, who said that it is the witnesses to the physical transfer who dissolve the marriage and not the witnesses to the signature, *Sefer Halakhot Gedolot* is of the opinion that this is the rule that applies in the sale of a deed. It is sufficient that witnesses be present at the time that the document in question is handed over, and there is no need to draw up an additional deed. This recourse to the ruling of R. Eliezer is not necessarily correct, for *prima facie* two different, independent subjects are involved. The fact is that in talmudic passages that deal with the sale of documents, no connection

³⁹ *Sefer Halakhot Gedolot* (Warsaw: Y. Goldman, 1874), 206a. The author once again ruled thus in *Laws of Loans*, and there he begins with the statement: “... and the law is that *otiot* are acquired by physical transfer”: 222, p.1. See N. Danzig, *supra* n.35, at 49-50 n.44.

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was made between the two, and this made it possible to rule like R. Eliezer on the one hand and like Amemar, who concurs with the Sages, on the other. It is true that in one passage,⁴⁰ a dispute between R. Judah and Rashbag (R. Shimon ben Gamliel) is decided by the question of whether the ruling is like R. Eliezer, i.e. that the witnesses to the physical transfer [of the *get*] dissolve the marriage, and at some stage the dispute is linked to the question of whether *otiot* are acquired by physical transfer. However, there is no *prima facie* connection between these two links in the passage. A comprehensive discussion of this question is beyond the scope of this paper.⁴¹ For our purposes, it is noteworthy that in the second half of the Geonic period, a cardinal, well-known halakhic work determined that ownership of a deed of loan could be assigned by means of physical transfer alone, and there was no need to draw up an additional deed.

It is hard to understand what led to the adoption of this position, in that it deviates from our expectations in the light of the explicit talmudic ruling issued by one of the last *Amoraim*, and in the light of the support of Rav Ashi, the redactor of the Talmud, for his position. Three explanations are possible. The first is the constraints of interpretation, in view of the existence of conflicting talmudic passages on this matter: the author preferred the passages which supported R. Judah's view whereby *otiot* are acquired by physical transfer alone. The second possibility is that the author knew of an ancient tradition from the academies of the Geonim whereby the *halakhah* is in accordance with R. Judah's view, even though this tradition was not explicitly stated in the talmudic text. The third possibility is that economic pressure led the author to adopt a position which would allow for the effective use of deeds of loan by providing a legal means for assigning them.

2. Later Geonim – Requirement of a Document

A contrary view can be found two generations after publication of *Sefer Halakhot Gedolot*, at the turn of the tenth century. R. Hilai Gaon, in a *responsum* published in the important work *Teshuvot HaGeonim Sha'arei Tsedek*, ruled as follows:

If A buys a deed from B, even though he took it from him and took it into his house, he has not acquired ownership, for we maintain [*Baba Batra* 76a,b] that *otiot* are not acquired by physical transfer and it is necessary to draw up a document, for Rav Papa said, one who sold a deed to another has to write to him [saying] 'buy it and any attachments it carries.'⁴²

⁴⁰ *Baba Batra* 169a.

⁴¹ See Lifshitz, *supra* n.18.

⁴² *Responsa of the Geonim Sha'arei Tsedek* 4:6:27.

Here we have a direct, explicit decision on the question under discussion: in order to sell deeds, a special deed of sale must be drawn up in addition to the physical transfer of the document. R. Hilai Gaon wrote something similar in another context:

We saw thus: that the *halakhah* is not in accordance with Rashbag on this matter, for although he returned the document and witnesses attested to that, his gift is still valid, until such time as he buys back [the present] from the person who returned it to him, for *otiot* are not acquired by way of physical transfer but by a document; if he returned a deed of sale or gift and did not buy from him, [the transaction has] no legal validity until such time as he buys it from him and they draw up a document relating to the deed which he returned to him. The *halakhah* is in accordance with the Sages who said that the gift is valid until it is bought from him and he draws up a document relating to the bill of sale or the deed of gift that he restored to him.⁴³

R. Hilai Gaon is discussing a case involving the dispute as to whether deeds are acquired by physical transfer, and the question is: how does the recipient of a deed of gift return the gift to the person who gave it to him? According to Rashbag the recipient returns the deed, and ownership is thereby restored to the person who made the gift. The Sages disagree, saying that this is not sufficient and an additional deed must be drawn up for the purpose of passing ownership of the original deed of gift back to the giver of the gift. According to the Talmud, these *Tannaim* were divided on the dispute of R. Judah and the Sages as to whether *otiot* are acquired by a document and physical transfer, or whether physical transfer is sufficient. Here the Sages hold a similar position to those who disagreed with R. Judah and required an additional document. R. Hilai Gaon rules on this matter in accordance with the Sages, i.e. the *halakhah* is that *otiot* are acquired by a written document as well as physical transfer.⁴⁴

It would appear that this position was supported by R. Shmuel b. Hofni Gaon, one of the most famous and prolific Geonim, who flourished towards the end of the tenth century in the Sura Academy. He too ruled like Amemar in accordance with the Hamburg MS version, whereby the sale of deeds requires both physical transfer and a new document, and the physical act is not sufficient in itself. We find explicit information about this position in the essay of R. Yeshayahu of Trani, who reviewed the positions of the Sages who adopted the view that *otiot* are acquired by physical transfer and a deed, and mentioned that “Rabbenu Shmuel b. Hofni wrote thus in his *Sefer Hamatanah*.”⁴⁵ A similar expression may be found in the work entitled “Laws of Gifts Written by R. Asher According to one of the *Geonim*

⁴³ *Responsa of the Geonim Sha'arai Tsedek* 4:3:15 s.v. *kakh ra'inu*.

⁴⁴ R. Hilai Gaon wrote in a similar vein in another *responsum* which appears in *Sha'arei Tsedek*.

⁴⁵ *Sefer Hamakhria* 21; *Tosafot Rid, Baba Batra* 77a.

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from the Geonic Period”, which was published by Assaf.⁴⁶ According to the anonymous *Gaon*, a deed may be acquired by means of drawing up an additional deed and the physical transfer of “two deeds into the hands of the receiver, by means of which there will be a *kinyan* of the deed”.⁴⁷ In the Introduction, Assaf assumed that the author of this work was R. Shmuel b. Hofni Gaon, on the basis of the above-mentioned essay by R. Yeshayahu of Trani.⁴⁸ Another source for the view that this was the position of R. Shmuel b. Hofni can be found in a *responsum* appearing in the volume of Geonic *responsa* published by Harkavi.⁴⁹ The question presented to R. Shmuel b. Hofni was: how does the recipient of a gift return the gift to the giver? We already mentioned that the *Tannaim* disagreed on this matter: Rashbag held that it was sufficient to return the original deed of gift to the giver in order for the gift itself to be restored to his ownership, whereas the Sages held that it was necessary to draw up an additional document specifying that the recipient gives the deed to the original giver. In the Talmud, this dispute was resolved in accordance with the resolution of the dispute as to whether *otiot* are acquired by a document as well as physical transfer. Rashbag ruled that *otiot* are acquired by simple physical transfer, and consequently the gift can be returned by means of handing the original deed of gift to the giver of the gift. The Sages held that *otiot* are acquired by a document as well as physical transfer; it is therefore necessary in every case to write an additional document, and ownership in the gift does not return with the actual restoration of the deed of gift to the giver. R. Shmuel Ben Hofni ruled on this matter like the Sages, that it is necessary to draw up an additional deed, hence he held that the sale of a deed requires an additional written deed, and that simple physical transfer is insufficient.

Continuing along this line was his son-in-law, R. Hai Gaon, who flourished in the earlier part of the eleventh century and was considered to be the last of the *Geonim* in time, but the foremost in stature. He dealt extensively with this subject in his work *Sefer hamekah vehamimkhar* (*The Book of Buying and Sale*)⁵⁰ in the framework of a general discussion of the deed as a means of creating an acquisition, which included the sale of deeds. According to R. Hai Gaon, “the deed alone does not acquire” another deed, and he illustrates this in the following situation:

For example, A held a deed of loan over B; A wanted to sell the deed to C or to give it to C as a gift; the ownership of the deed is not transferred until A writes a deed of sale and also

⁴⁶ S. Assaf, *From the Geonic Literature* (Jerusalem: Darom, 1933, Heb.).

⁴⁷ *Ibid.*, at 15.

⁴⁸ *Ibid.*, at 2.

⁴⁹ No. 313.

⁵⁰ Gate 13, p. 32b, Vienna 1800 (5560); Jerusalem 1949 (5709), (Lefkovitz ed). P. 169.

physically hands over the deed of loan.

According to R. Hai Gaon, there was a dispute in this matter between R. Meir⁵¹ and the Sages, and the *halakhah* was decided according to those Sages who say that "... ownership is not transferred until [he] writes and hands over." R. Hai Gaon is well aware of the other approaches, and it seems that he is referring to the approach of the *Sefer Halakhot Gedolot* that we mentioned. He calls upon the reader not to rely on this approach, since Amemar, who ruled in accordance with the Sages, as well as Rav Ashi, who agreed with him, are the last of the Amoraim, and a rule of decision-making exists whereby the *halakhah* is decided according to the latest of the Sages. He also rejects the proof adduced by *Sefer Halakhot Gedolot* from the fact that the passage makes the position of R. Judah, who holds that *otiot* are acquired by physical transfer alone, dependent upon the position of R. Eliezer, who holds that *edei mesirah kortim* [witnesses to the physical transfer are constitutive]. According to R. Hai Gaon, this proof can be dismissed, since R. Eliezer was talking only of a bill of divorce, and did not extend the rule to all types of deeds.⁵²

The radical change which took place at the end of the period of the Geonim is clear, and was already mentioned by R. Yeshayahu di Trani:

... the only thing which appears correct is as I wrote [that *otiot* are acquired by physical transfer alone – E.W.]. This is the approach of the *Halakhot Gedolot* and early Geonim⁵³ and later, this approach was revived by the *Aharonim*.... [emphasis supplied – E.W.]

3. *The Effect of the Economic Factor*

Apparently, the change that occurred in the time of the later Geonim is contrary to our expectations. The further away we move from the period of the Talmud, the further the Jews draw away from working the land, and they become a clearly urbanized population, whose main livelihood is from commerce and banking rather than agriculture. Adoption of the position that deeds may be sold only by way of drawing up an additional document would be most burdensome for commercial activity, and for banking activity in particular. I am not sure of the reason for this change that occurred on the halakhic plane. However, below we will see that in the

⁵¹ In some Geonic writings, R. Meir appears rather than R. Judah as the sage who holds that *otiot* are acquired by physical transfer alone.

⁵² The impression from his words is that even if this issue is proved in accordance with the *Halakhot Gedolot*, the passage in *Baba Batra* 77, in which Amemar rules explicitly like the Sages, takes precedence. This is because, as we have said, Amemar is one of the last Amoraim in the Talmud.

⁵³ He is referring to the author of *Sefer Halakhot Ketsovot* which is, according to Danzig, the *Sefer Halakhot Pesukot* mentioned earlier. See Danzig, *supra* n.35, at 49-50 (Introduction).

time of the later Geonim, other concomitant changes took place in Jewish law, and these enabled the banking and commercial sectors to function efficiently.

The fact that it is the later Geonim who apparently revert to the anti-commercial approach in relation to the sale of deeds invalidates the third explanation above, which posits that economic factors motivated the authors of *Sefer Halakhot Pesukot* and *Sefer Halakhot Gedolot* to rule that deeds are sold by physical transfer alone. Abandonment of the land and migration to the city increased with time, and there is no doubt that more Jews worked the land in the eighth century than in the tenth century. If the economic factor is the motive, how can we explain the radical change that took place, to the detriment of negotiability, at the end of the Geonic period?

The problematic nature of the economic explanation lies not only in the change to the detriment of negotiability towards the end of the Geonic period. For a number of reasons, the economic factor constitutes a weak explanation on a substantive level as well, and at most it can serve as a preliminary assumption for explaining the positions of the early Geonim. First, the picture of the changes in economic activity amongst the Jews of Babylon is fairly obscure. The best research that exists today is the long, comprehensive essay of M. Gil.⁵⁴ The essay demonstrates that there was, indeed, a significant change amongst the Jews of Babylon in the area of economic activity. At the same time, despite the movement to the city and to urban economics, the livelihood of many Jews still came from working the land, but we have no data on the extent of the change. Similarly, there is no way to follow the process of change over the long period of Moslem rule in Iraq. Iraq was conquered by the Moslems in the middle of the seventh century, and a significant portion of the sources on which Gil relies and which attest to abundant agricultural activity are from the tenth century. As mentioned, the author of *Sefer Halakhot Pesukot*, R. Yehudai Gaon, lived in Babylon in the middle of the eighth century, only about one hundred years after the conquest and towards the end of the rule of the Umayyad dynasty, the centre of which was Damascus and not Baghdad. Transfer of the centre of gravity of the empire to Iraq took place in the time of R. Yehudai Gaon with the ascent to power of the Abassid dynasty, and in this period the capital city of Baghdad was founded. Because the Arabs did not dispossess people of other religions from their land, it is reasonable that the migration from the village to the city stemmed mainly from economic factors, which operated slowly relative to political or military activity. It is not too far-fetched to suppose that in the middle of the eighth century, the Jews of Babylon still preserved their previous economic patterns of activity. Therefore, the economic factor cannot explain the stance adopted by the *Sefer Halakhot Pesukot*,

⁵⁴ *Bemalkhut Yishmael bitkufat HaGeonim*, pt. 1, *Mehkarim* (Jerusalem: Mossad Bialik, 1997), 593-721.

which had its foundations in the rulings of R. Yehudai Gaon in the middle of the eighth century. The reasonable assumption is that this stance stemmed from theoretical-halakhic considerations, and it is possible that its roots lay in the talmudic period, in the tradition received by R. Yehudai Gaon, but it did not find expression in the Talmud that we have.

4. *The suftaja - An Arabic Bill of Exchange?*

However, if the economic factor did not affect the development of the regular talmudic *halakhah* in such a way as to make it convenient for and suited to economic-commercial activity, this factor did have an effect on the adoption of legal institutions outside of the regular halakhic system. A *responsum* of R. Hai Gaon included in an important work containing *responsa* of the Geonim, published by Harkavi, deals with a question concerning a deed known as the *suftaja*. The questioner and the respondent did not clarify the nature and meaning of this deed, but it is very familiar to us from Arab societies and Goitein discussed it extensively in his monumental work, *A Mediterranean Society*.⁵⁵ According to Goitein, the *suftaja* is a bill of exchange, and primarily served the traders on the long-term trade routes who sought to avoid carrying cash.

Ashtor⁵⁶ deals extensively with the *suftaja* and examines various sources from the Geniza which were mentioned and discussed by Goitein, as well as a number of sources from the halakhic literature which I discuss below. Ashtor's primary goal was to prove that this Islamic deed, the *suftaja*, was not the source of the Western-Christian bill of exchange. Ashtor's main argument was that in the Western deed, the exchange of various currencies occupies a central place, whereas the *suftaja* does not involve an exchange of currency, and the components of the transaction take place within the framework of a single currency. This issue is irrelevant to the present article, as are the differences between the various deeds listed by Ashtor,⁵⁷ and therefore I will not deal comprehensively with Ashtor's arguments. For my purposes, it is sufficient that the *suftaja* has strong characteristics of negotiability, and that it is present in Jewish law in the Geonic period. As such it is of great interest, particularly for the extent to which it was incorporated into Jewish law.

On the substantive level, I believe that Goitein rightly invoked the term, "bill of exchange", even if Ashtor is correct in his contention that there are differences

⁵⁵ S.D. Goitein, *A Mediterranean Society – The Jewish Community of the Arab World as Portrayed in the Documents of the Cairo Geniza, V.I. Economic Foundations* (Berkeley and Los Angeles: University of California Press, 1967), 242-246. See also *The Encyclopaedia of Islam* I-XII, Online Edition "Suftaja" (by M.Y. Izzi Dien).

⁵⁶ *Supra* n.3.

⁵⁷ *Ibid.*, at 562-565.

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between the *suftaja* and a Western bill of exchange.⁵⁸ It is very important to distinguish between three different levels: the exchange transaction; the bill of exchange, which is issued in the framework of the exchange transaction; and the law governing bills of exchange. The basic level is that of the exchange transaction. Indeed, it would appear that there were a great number of exchange transactions for the purpose of financing and obtaining credit, and, as such, the matter of currency exchange lay at their heart. However, there were also transactions involving the transfer of capital, and here the parties were not always required to exchange currency. Thus, for example, in the case of *Burton v. Davy*, which is considered to be the first case of recognition of a bill of exchange in English law (outside of the special courts for merchants), both the currency of the debt and that of the repayment was specified in pounds sterling.⁵⁹ Certainly this is the case in relation to transactions which took place within the one political unit, e.g. England, in which one type of currency prevailed, and in this arena, too, we find extensive recourse to bills of exchange. It is important to note that on each of these levels, changes and developments took place throughout the course of history; moreover, any one particular level might not have always responded immediately and directly to changes taking place on another level. There is no doubt that the Western bill of exchange also underwent many changes throughout its history; at the same time, the use of this expression persisted, and this is also true of the law applying to bills of exchange. A clear example from English law is the characteristic of *material negotiability*, which adopts a central position in the modern era, as opposed to earlier times when it did not do so.⁶⁰ Suffice it to say that the *suftaja*, too, has the major characteristics of a bill of exchange, which I will discuss below, so that Goitein is correct in translating *suftaja* as a bill of exchange, though it was not his intention to argue that these two deeds are identical in their details or in their interdependency.

Islamic jurists defined the *suftaja* as a loan of money in order to avoid the risk of transport.⁶¹ Indeed, according to Islamic sources, as well as the Jewish sources from the Genizah, the *suftaja* was widely used between large commercial centres on fixed routes only, and was not normally in use in other areas.⁶² By virtue of these characteristics and the examples cited by Goitein, it would appear that there were three identifiable actors involved in the *suftaja*: the drawer, the payee and the

⁵⁸ I also do not agree with the criticism leveled by Arbel at Goitein on the basis of what Ashtor wrote, *supra* n.1, at 200.

⁵⁹ Holden, *supra* n.3, at 23-24, and the scientific literature mentioned there. But see also the contrary position of Rogers, *supra* n.3, at 44-51.

⁶⁰ See *supra* n.10.

⁶¹ Goitein, *supra* n.55, at 242.

⁶² *Ibid.*, at 244.

drawee; a fourth, hidden actor was the person financing the deed.⁶³ The financier was at place A, and sought to transfer money to the payee at place B, and the drawee, who was normally a banker, was at place B and agreed to pay the money. The drawer of the deed was in this case the agent or the partner of the drawee, and he was at place A. The financier paid the drawer the amount of money at place A – and in consideration the drawer gave him the deed in order that he [the financier] transfer it to the payee to whom the financier had to pay the money. It is to this that Goitein is referring when he characterizes the *suftaja* thus: “As a rule they were issued by and drawn upon well-known bankers or representatives of merchants.” In other words, the drawer of the deed as well as the drawee were bankers or representatives of bankers.⁶⁴ Sometimes, there were apparently only three actors, and then the drawer was also the financier of the deed. In such a case, the drawer had access to a certain amount of money in an account that he held with the drawee-banker, and by means of the *suftaja* he repaid his debt to the payee and financed his dealings.

It is not clear from Goitein whether there was an obligation on the drawee to sign as an acceptor upon the payee’s demand, and if such an obligation was widespread.⁶⁵ In a case in which four actors were involved, there was no real need for this, for the drawer was the representative or the partner of the drawee and obviously drew up the deed with his knowledge. More problematic was the case in which the drawer was the financier of the transaction and not the representative of the drawee. According to Goitein, Islamic law, in Egypt at least, imposed a heavy fine upon the drawee in respect of every day of arrears in repayment of the deed.⁶⁶ It is difficult to see how a person could be fined for not fulfilling a payment order that was referred to him without his agreement. It is possible that in such a case, no fine was actually imposed upon the drawee unless there had been a process of acceptance of the deed on his part.

A case of refusal to honour the *suftaja* deed was discussed in a *responsum* of R. Hai Gaon. The question was sent from an unknown source, and because of its importance I will quote it in full:

You asked about the *suftaja*. How will [the Beth Din] rule if A drew up a *suftaja* for

⁶³ A similar model can be found in the context of English law at the early stages of the development of the laws of negotiable interests: see e.g. Rogers, *supra* n.3, at 34.

⁶⁴ See Goitein, *supra* n.55, who cites the case in which a person complains that there is no one in his area who will issue a *suftaja*. Clearly, the reference here is to a system with four actors, and the hidden actor wished to acquire, at his place of residence, a *suftaja* from the representative of the merchant who had a branch in another place in which the transaction between the hidden party and the future payee of the deed was to have taken place.

⁶⁵ According to the English law the payee has a right to demand from the drawee to accept the bill. See Bills of Exchange Act, *supra* n.2, s.43.

⁶⁶ *Supra* n.55, at 243.

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B from one country to another, and B passed it on to C, who accepted it from him but afterwards contradicted it. And the one who passed it on [the second acceptee] admitted that he did not give it. Can B go back to A and demand payment of the *suftaja* since he received nothing from C? We have seen that in our laws there is nothing [permitting] the sending of a *suftaja*. As our Sages said, ‘One does not send money through a *diukani*,’ even if witnesses have signed it. But because we have seen that people do use this deed, we are prepared to discuss it in order that transactions between people will not be nullified. And we agreed to judge according to the law of the merchants not to add and not to detract. And this is the law, and nothing should be changed in it.⁶⁷

This *responsum* was originally written in Judaeo-Arabic and first published by Harkavi, who translated it into Hebrew. It should be noted that the words appearing in square brackets were added by Harkavi in an attempt to clarify unclear parts. In particular, the addition of the words “the second acceptor” stands out. This addition does not clarify the words of the questioner, nor does it contribute to an understanding of what is said. It is not clear from the translation of the first sentence who is the acceptor who was denied, and what exactly was the content of the denial. Was it C, the drawee, who denied actually receiving the deed? Harkavi, in the second sentence, added the words “the second acceptor”, and this is presumably evidence of a bill of exchange which is assignable, seemingly by being physically transferred. However, this would be in contradiction to what Goitein wrote, on the basis of research into many documents, that “nothing seems to indicate that these bills were assignable.”⁶⁸ This is also indicated by the definition, employed by Islamic jurists, of the *suftaja* as a means of payment which avoids the risks of transfer. This addition by Harkavi is therefore problematic, and nothing should be deduced from it in respect of the extent of assignability of the *suftaja*.

This *responsum* was also translated by Gil:

You asked how deeds may be lawfully acquired: if A wrote an assignment to B from one city to another and B brought it to C who accepted it from him but later denied doing so ... our view is thus: strictly according to our law it is not possible to send deeds, as our Sages said ... but since we have seen that they are used, we have begun to recognize the practice in order not to nullify the commerce of people.⁶⁹

Gil chose to translate the term *suftaja* as an assignment (*hamha 'a*). However, an assignment is not a bill of exchange: these are two different legal instruments. Indeed, the Arabic translation of the term assignment (*hamha 'a*) is “*haw'ala*”, as

⁶⁷ *Responsa of the Geonim*, Harkavi 423. The *responsum* in no. 548 also deals with the *suftaja*, and Harkavi attributes this also to R. Hai Gaon or to R. Sherira Gaon, his father.

⁶⁸ Goitein, *supra* n.55, at 245.

⁶⁹ Gil, *supra* n.54, at 240. Gil translates “*suftaja*” as an “assignment”.

Gil himself writes.⁷⁰ Another defect of the translation is the omission of the unclear, problematic line. At the same time, instead of the term “contradicted” which Harkavi used, Gil used the word “denied”, which is clearer and fits the context. According to this translation, the situation would appear to be thus: A drew up, for the benefit of B who is the payee, a *suftaja* drawn on C, but C did not sign and did not confirm the deed (and even if the institution of a signature of acceptance existed, C did not execute such a signature).

At my request, Prof. Mordekhai Akiva Friedman translated the second, problematic sentence from the Arabic source found in the photocopy of the Leningrad manuscript, from which Harkavi published the *responsum*. Friedman’s suggested reading is as follows: “The person to whom it was handed over claims now that it was not given to him ...” According to this suggestion, the picture is as follows: C, the drawee, is called here “the person to whom it was handed over” and he claims⁷¹ *vis-à-vis* B, the payee, that no sum of money was given to him by A, and he therefore does not have to pay out the *suftaja* to B.

The focus of the legal question that R. Hai Gaon was asked was whether the payee, B, had a right of recourse to A, the drawer, in view of the fact that C, the drawee, refused to honour the *suftaja*. The questioner does not specify the reasons for B’s claim against A, and it must be assumed that the questioner based himself on the legal usage in respect of the *suftaja*. But the common legal practice in a case in which there is a refusal to honour the deed does not emerge clearly from the questioner’s words.

R. Hai Gaon opens his *responsum* with the ruling that the *suftaja* is not valid from the perspective of talmudic law. He bases this on the talmudic statement that “currency is not sent with a *diukani* deed, even if there are witnesses signed on it.” If the *diukani*, which is a deed of license to collect a debt, is not valid, and it is not possible for the recipient of the deed to collect the debt through it, *a fortiori* a bill of exchange, the commercial nature of which resembles the *diukani* deed but from a legal point of view completely transfers the debt to the recipient of the deed, will not be valid.

This should be the position according to talmudic law, which does not recognize the transfer of a debt by means of the *diukani*. As R. Hai Gaon points out, however, the fact is that merchants often used the *suftaja*, and non-recognition of the document would have been liable to harm the regular course of trade. For this reason, says R. Hai Gaon, the *suftaja* gained the recognition of the halakhic system of the *Geonim* of Babylon; however, this recognition did not bring about the absolute internalization of the document, nor lead to its absorption into the halakhic system and its continued development. The “absorption” of the *suftaja* by

⁷⁰ Gil, *supra* n.54, at 641 n.357.

⁷¹ The Hebrew word מודה here means “claims”, and not “admits”, as in modern legal usage.

Jewish law extended only to that which was recognized by virtue of the general law, in the framework of which the merchants operated.

We do not know, in the light of this analysis, how R. Hai Gaon decided, and whether B, the payee, won his claim against A, the drawer. I would venture to say that the impression is that B's claim was dismissed, since the laws of *suftaja* did not recognize the cause of action of the payee *vis-à-vis* the drawer, and the attempt of the payee, B, to base a cause of action on the absorption of the *suftaja* and its merger into Jewish law was dismissed by R. Hai Gaon.

What is the nature of the economic transaction that formed the backdrop to the creation of the *suftaja* deed as discussed by R. Hai Gaon? Or, to put it another way, are we dealing with a four-sided or a three-sided transaction? According to one possibility, the drawer himself was a party to the transaction that was behind the *suftaja*, and a direct legal connection existed between the drawer and B, the payee. A therefore gave the *suftaja* to B in order to repay a loan involved in a particular transaction, and the repayment was meant to take place where C, the drawee, was located. A second possibility is that the transaction was between B and a hidden fourth party. It was this fourth party who financed the *suftaja*, and by its physical transfer to B, the payee, he sought to repay the loan involved in the original deal. A, the drawer, was not a party to the transaction but he was connected to C, the drawee, as his representative or partner, and he drew the *suftaja* at the behest of the fourth party, after the latter had financed the deed. It is reasonable to assume that in this case, four actors were involved, and A, the drawer, did not finance the *suftaja* but rather was the representative or partner of C, the drawee. For this reason, non-payment of the deed by C did not create a direct relationship between B, the payee, and A, the drawer, and *prima facie* it was not possible to obligate A to pay the deed. Things would have been different had A been a party to the transaction with B, and wished by means of the *suftaja* to repay his debt to B. In such a case, when it transpired that C did not pay the deed, B had a firm basis for approaching A and demanding payment of the debt in respect of the basic transaction.⁷² Even so, the unknown exceeds the known in this *responsum*, and we have not unraveled the knot. All that is clear is that according to R. Hai Gaon, the *suftaja* is an alien concept in Jewish law, and the question of its validity was dealt with by reducing it to the institution of the *diukani*, which exists in talmudic law. In the final analysis, the *suftaja* gained recognition in the framework of the halakhic principles that recognize the binding legal nature of extra-halakhic institutions by virtue of merchant custom.

To conclude, it might be posited, cautiously, that as opposed to the approach of R. Hai Gaon, another approach existed amongst the Geonim of Babylon at that time, according to which the *suftaja* was absorbed into Jewish law. We have

⁷² This is the case according to modern English law: see Bills of Exchange Act, s.47.

received a list of books authored by R. Shmuel b. Hofni Gaon, who headed the Sura Academy and was the father-in-law of R. Hai Gaon, head of the competing Academy at Pumpedita. One of his essays, written in Arabic, is entitled *Kitab al-Hawala wal Asftaij*.⁷³ Sklare translates the name of his book as *Treatise on Bills of Exchange*. In the original title, however, two terms appear: *Hawala* and *Asftaij*, and it therefore seems to me that an accurate translation would read: *Treatise on Assignment and Bills of Exchange*. It is a great pity that the contents of the book did not come into our possession, and that we know of it only from the list that was found in the Genizah. At the same time, we may venture to suggest that the fact that the Babylonian *Gaon* who headed the Sura Academy wrote a whole book on the subject indicates that the *suftaja* penetrated deep into Jewish law. Indeed, many questions to which we do not have the answers present themselves: what is the nature of the penetration?; was this subject an independent development of Jewish law – or, possibly, were rules and regulations from Moslem law incorporated here?; if there was incorporation from external sources, what is the extent of the foreign material, and what is the nature of the incorporation and integration of the foreign materials? Until the lost book is found, we are not able to provide answers to these and many other questions; our knowledge is confined to that stage in the history of Jewish law at which a Sage at the apex of the judicial pyramid dedicated an entire volume to the subject of bills of exchange.

D. Conclusion

In this article I have sought to identify, in Hebrew deeds beginning in mishnaic and talmudic times and up to the first quarter of the eleventh century in Babylonia, those basic elements found in modern negotiable instruments. Overall, we did not find, in this period, a clearly negotiable instrument similar to modern negotiable instruments or to the *maimrani* deed which was common in Poland and Germany towards the end of the Middle Ages. We therefore did not expect to discover at that time the quality of freedom from equities, which provides the recipient of the modern negotiable instrument with a better document than that held by the assignor, in that it is free from various defects. We only sought to ascertain the extent to which the phenomenon known as formal assignability existed in Hebrew deeds, on two levels: first, the ease with which a deed of loan could be assigned, and in particular whether an additional deed was required or whether the physical transfer sufficed; secondly, the degree of finality of the assignment, such that the lender/assignor could not forgive the debt, and the assignee had a direct

⁷³ D.E. Sklare, *Samuel ben Hofni Gaon and His Cultural World – Texts & Studies* (Leiden: E.J. Brill, 1996), 19-24. Concerning the term “Asftaij” the author writes: “This is how the name appears in the manuscript of the *fihris*t, and not *sufatij* as would be expected.”

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relationship with the debtor and could sue him without the intervention of the creditor.

Our discussion began with the Mishnah and the Talmud, in which the Jewish law foundations of this issue were laid down for future generations. In principle, the Talmud permits assignment of debts, as opposed, for example, to English law until the 18th century, which opposed assignment. From the outset, therefore, Jewish law permitted the assignment of obligations, without resorting to the development of a special branch of law such as the English law of negotiable instruments. However, the degree of ease with which assignment could be effected was a matter of dispute in the mishnaic and the talmudic periods. Rabban Shimon b. Gamliel and R. Judah, the redactor of the Mishnah, as well as *Amoraim* in the times of the Talmud, held that it was sufficient physically to hand over the document in order to assign the right it represented. As opposed to this, Sages in 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.

The position of the Sages posed serious obstacles to the assignment of the document, and made it very inconvenient in a dynamic commercial environment. It is true that towards the end of the talmudic period, we find that Amemar, one of the last *Amoraim*, resolved this dispute and received the endorsement of Rav Ashi, the editor of the Talmud. However, Amemar's approach was subject to dispute in the time of the *Rishonim*; moreover, the very adoption of this ruling as *halakhah* was disputed in the time of the *Geonim*. In addition, an obstacle was posed by Shmuel's ruling, whereby "a person sells a deed of loan to another and then retracts and forgives the debt, the debt is forgiven," and therefore the first creditor always remains in the picture, whereas the assignee has no security at all, fearing that the creditor who assigned the deed to him will forgive the debtor his debt at some stage.

It may be said that modern, significant principles of negotiability did not exist in the talmudic age. Undoubtedly, this legal arrangement, which severely limited the assignment of rights, was suited to an agricultural society in which market forces were barely operative. In such an environment, there was no large number of merchants who traveled between far-flung commercial centres, and there was no pressing need for an effective negotiable instrument as the faithful companion of the merchant operating from afar.

In Babylon in the time of the *Geonim*, changes took place in the economic structure of the Jewish people over a period of hundreds of years; prime amongst these was the movement away from the village and agrarian society to the city and the economic activity characteristic of urban life. Things were more complex, however, in the field of negotiability of instruments. At the beginning of this period, when Jewish society was still primarily agricultural, the leading *Geonim*

supported R. Judah's ruling whereby a deed could be assigned by means of physical transfer alone. It was towards the end of the period that the leading *Geonim* adopted the approach of the Sages, who said that it was necessary to draw up an additional document in order to assign the deed, and thus made the assignment of deeds a much more difficult process.

At the same time, the *suftaja*, which is a type of Islamic bill of exchange, began to gain currency amongst the Jewish merchants in general, as well as in Egypt. The specific, detailed source that reached us, the *responsum* of R. Hai Gaon, indicates that the deed was not absorbed into the world of jurisprudence of Jewish law; rather, it remained an alien object that gained recognition by virtue of merchant custom. At the same time, faint suggestions as to the deeper penetration of the *suftaja* into Jewish law can be discerned, even though the details of this penetration remain concealed.