

# IANUS

Diritto e Finanza



Quaderni

<https://www.rivistaianus.it>



ISSN: 1974-9805

Quaderni - 2015

MODULO JEAN MONNET

LIABILITY ON A CHEQUE: A LEGAL HISTORY

Benjamin Geva

## **LIABILITY ON A CHEQUE: A LEGAL HISTORY**

**Benjamin Geva**

*Professor of Law Osgoode Hall Law School York University*

*During the final stages of the preparation of this paper financial support was provided by the Social Sciences and Humanities Research Council of Canada (SSHRC) Small Grant Program and research assistance was given the by Leonidas Mylonopoulos of the 2016 graduating class at Osgoode Hall Law School.*

### **Table of Contents:**

1. Introduction: cheques and cheque law
2. The origins of cheques in Ptolemaic Egypt
3. Some cheque law without cheques under Roman law
4. More cheque law without cheques under Jewish law
5. Cheque-equivalents under Islamic hawale doctrine in the early Middle Ages
6. Cheques under Roman law in the late Middle Ages in Continental Europe
7. Cheques and cheque law come of age in post-Medieval England
8. Final Observations

## 1. Introduction: cheques and cheque law

Cheques are old payment instruments widely used in various parts of the world. In the United Kingdom, they are governed by the Bills of Exchange Act (hereafter, the BEA or 'Act'),<sup>1</sup> as supplemented by the Cheques Act<sup>2</sup>. As a rule, statutes in common law countries, and hence, their laws of cheques, are modelled on the BEA, though local variations may exist. A statute modelled on the BEA is in force for example in Israel<sup>3</sup> and South Africa<sup>4</sup>. Both are not pure common law jurisdictions<sup>5</sup>. In Canada, cheques are governed by the federal Bills of Exchange Act<sup>6</sup>, modelled on its English predecessor, which is in force also in the civil law province of Quebec. In - Australia, cheques were excluded from the coverage of the Bills of Exchange Act,<sup>7</sup> and are currently governed by a specific Cheques Act<sup>8</sup>.

However, the provisions of the latter statute are not substantially different from the former. For the purpose of the present discussion, all such legal systems having a statute modelled on the BEA can be characterized as common law jurisdictions. In a common law jurisdiction, the applicable statute<sup>9</sup> effectively defines a cheque<sup>10</sup> to be an unconditional<sup>11</sup> order in writing<sup>12</sup>, given by one person (the drawer), addressed to (or drawn on) a

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<sup>1</sup> 1882, 45 & 46 Vict., c. 61.

<sup>2</sup> 1957, 5 & 6 Eliz. 2, c. 36.

<sup>3</sup> The Bills of Exchange Ordinance [New Version] 1957, Laws of the State of Israel, New Version 19572, p. 12 (hereafter: BEO).

<sup>4</sup> No. 364 of 1964. Changes were made by the Bills of Exchange Amendment Act, 2000 (Act No. 56 of 2000) Govt Gazette 21846, 6 December 2000, proclaimed in force on 1 March 2001.

<sup>5</sup> In fact, Scotland, which is also a constituent of the United Kingdom, falls into this category.

<sup>6</sup> 18 R.S.C. 1985, c. B-4.

<sup>7</sup> Bills of Exchange Act 1909.

<sup>8</sup> No. 145 of 1986.

<sup>9</sup> Unless otherwise indicated, all ensuing statutory references are to the BEA in the UK, South Africa, and Canada, to the BEO in Israel, and to the Cheques Act in Australia. With regard to cheques in Australia, BEA provisions are superseded by the Cheques Act and thus are not to be taken into account or referred to.

<sup>10</sup> BEA ss. 3(1) and 73 in the UK, ss. 16(1) and 165(1) and (2) in Canada, ss. 1 and 2(1) in South Africa, ss. 3(a), and 73(a) in Israel, and s. 10(1) in Australia.

<sup>11</sup> For some elaboration see ss. 3(2) and (3) and 11 in the UK, to which correspond ss. 16(3) and 17(1) in Canada, ss. 2(3) and 9 in South Africa, and ss. 3(c) and 10(b) in Israel. In - Australia see s. 12.

<sup>12</sup> In the UK, the BEA clarifies in s. 2 that 'written' includes printed.

banker (or bank)<sup>13</sup> (the latter being the drawee), payable on demand<sup>14</sup>, to pay a sum certain<sup>15</sup> in money<sup>16</sup>, to or to the order of a specified person, or to the bearer<sup>17</sup>. A cheque is a species of a bill of exchange<sup>18</sup>, so as to be governed in the BEA by the provisions applicable both to cheques specifically and to bills of exchange in general. This, however, is not so in Australia, where the BEA does not apply to cheques anymore. The Geneva Uniform Law for Cheques (hereafter: the ULC)<sup>19</sup> is the basis of cheque legislation in civil law

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<sup>13</sup> In the UK (s. 2) and Israel (both in s. 1), a banker is effectively defined as someone carrying on the business of banking. Australia (s. 3(1)) and Canada (s. 2) opted for an institutional definition, initially effectively referring to regulatory legislation governing banks. The SA Bill, above, n.4 departs from the original position that was (in s.1) like that of the UK and Israel and combines the two definitions. In Canada, for the purpose of the provisions dealing with cheques, 'bank' was effectively broadened (in s. 164) to cover all members of the Canadian Payments Association which include non-bank regulated financial institutions. In Australia, where the drawee is a non-bank financial institution, the instrument was originally called 'payment order' rather than 'cheque'. The distinction, together with the 'payment order' category, was eliminated in 1998, and currently, under s. 10, a cheque must be drawn on a 'financial institution', broadly defined in s. 3(1) to cover domestic as well as foreign banks, the Reserve Bank of Australia, building societies, credit unions, and special services providers to credit unions and building societies.

<sup>14</sup> Normally, a cheque does not express time for payment, which makes it payable on demand in the UK (s. 10(1)(b)), Canada (s. 22(1)(b)), Israel (s. 9(a)(2)), South Africa (s. 8(1)(b)) and Australia (s. 14(1)(b)). Post-dated cheques are not payable prior to the date they bear in Israel (s. 73(b)) and Australia (ss. 16(1) and 61(2)). Cheque post-dating is not prohibited in the UK, South Africa, and Canada. Cf. s. 13(2), 11(2), and 26(d) respectively. That provision validates the post-dated cheque but is silent as to whether it is payable on demand prior to the date it bears. The current judicial position is that it is not.

<sup>15</sup> As elaborated in s. 9(1) in the UK, s. 27 in Canada, s. 8(a) in Israel, s. 7(1) in South Africa, and in s. 15 in Australia. In practice, a cheque states a fixed amount, without interest or any other charge.

<sup>16</sup> A foreign currency cheque may express or indicate a rate of exchange. See s. 9(1)(d) in the UK, s. 27(1)(d) in Canada, s. 8(a)(4) in Israel, s. 7(1)(d) in South Africa, and s. 15(3) in Australia.

<sup>17</sup> See ss. 7 and 8 in the UK, ss. 6 and 7 in Israel, ss. 18, 20, and 21 in Canada, ss. 4 and 5 in South Africa, and ss. 19-24 in Australia.

<sup>18</sup> For a pre-BEA authority to that effect see judgment of Byles J. in *Keene v. Beard* (1860), 8 CB (NS) 372 at 381; 141 ER 1210 at 1213 (C.P.), conceiving of a cheque to be "in the nature of an inland bill of exchange ..." and discussion in Part 7 below.

<sup>19</sup> *Convention Providing a Uniform Law for Cheques*, 19 March 1931, 143 L.N.T.S. 355, Annex I ("ULC") adopted by the Second Geneva Convention as part of an international effort which also generated the Geneva Uniform Law for Bills of Exchange and Promissory Notes, *Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes*, 7 June 1930, 143 L.N.T.S. 257, Annex I, (agreed upon in 1930) ("ULB"). For the latter, in the context of the overall international effort in which it was concluded, see M. O. Hudson and A.

countries, including France<sup>20</sup>, Germany<sup>21</sup>, Italy<sup>22</sup>, Japan<sup>23</sup> and Switzerland<sup>24</sup>.

Under art. 1, to be a ‘cheque’, an instrument must comply with six formal requirements. First, it must contain “in the body of the instrument and expressed in the language employed in drawing up the instrument” the term ‘cheque’. Second, the instrument must contain “an unconditional order to pay a determinate sum of money”<sup>25</sup>. Third, the instrument must name the drawee, that is, the person who is to pay. Fourth, a statement of the place where payment is to be made ought to be included<sup>26</sup>. Fifth, the instrument must state the date and place where it is drawn<sup>27</sup>. Sixth, the cheque must contain the drawer’s signature. Under art. 3, a cheque must be drawn on a banker<sup>28</sup> holding funds at the drawer’s disposal and in conformity with their agreement, “express or implied,” as to the drawer’s entitlement to dispose of those funds by cheque<sup>29</sup>. The maturity of a cheque is stated in art. 28 to be ‘at sight’, so that “[a]ny contrary stipulation shall be disregarded”. Finally, under art. 5, a cheque may either designate a specified payee<sup>30</sup>, or be made payable to bearer.

In the various jurisdictions of the USA, cheques are governed by the provisions of Article 3 of the Uniform Commercial Code (hereafter: the

H. Feller, ‘The International Unification of Laws Concerning Bills of Exchange’ (1931), 44 Harv. L. Rev. 333. For the Geneva Conventions legal systems, see P. Ellinger, “Negotiable Instruments”, Chapter 4 in JS Ziegel, chief ed., Commercial Transactions and Institutions, vol. IX of U. Drobnig & K. Zweigert, (responsible eds.), *International Encyclopedia of Comparative Law* (Tübingen: JCB Mohr, 2000) at 56-80 (Ellinger, “Negotiable Instruments”).

<sup>20</sup> Cheque Law, Decret-lois of 30 Oct. 1935.

<sup>21</sup> The Cheque Act, 14 Aug. 1933 (RGBl. I 597).

<sup>22</sup> R. D. 21 December 1933, n. 1736, as supplemented by L. 15 December 1990, n. 386.

<sup>23</sup> Law on Cheques, Law No. 57, 29 July 1933.

<sup>24</sup> Arts. 1100-44 of the Code of Obligations.

<sup>25</sup> Under art. 7, any stipulation in a cheque to pay interest shall be disregarded. Foreign currency cheques are governed by art. 36.

<sup>26</sup> This requirement is further elaborated on in art. 2. In general, even in the absence of an indication, the place of payment is deemed to be that of the drawee.

<sup>27</sup> Under art. 2, a cheque which does not specify the place at which it was drawn is ‘deemed to have been drawn in the place specified beside the name of the drawer’ and is nevertheless a cheque.

<sup>28</sup> Broadly defined in art. 54 to include ‘the persons or institutions assimilated by the law to bankers’.

<sup>29</sup> UCC Art. 3 goes on to conclude, that ‘[n]evertheless, if [its] provisions are not complied with, the instrument is still valid as a cheque’.

<sup>30</sup> In which case, it may be with or without the express clause ‘to order’, or with the words ‘not to order’.

UCC), as supplemented by UCC Article 4<sup>31</sup>. A cheque ('check' in the American spelling) is defined in UCC §3-104(f) to be essentially<sup>32</sup> an unconditional<sup>33</sup> order<sup>34</sup> in writing<sup>35</sup>, other than a documentary draft<sup>36</sup>, to pay a fixed amount of money<sup>37</sup>, payable on demand<sup>38</sup> and drawn on a bank<sup>39</sup>. It may, but is not required to, be payable to bearer or to order.<sup>40</sup>

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<sup>31</sup> UCC Article 3, Negotiable Instruments, and Article 4, Bank Deposits and Collections. The current text of Article 3 is from 1990. In case of conflict, Article 4 governs Article 3. See UCC §3-102(b). In addition to the UCC, federal law is relevant in the US as to the collection of cheques, a subject which is outside the scope of the present study.

<sup>32</sup> The provision further specifies that a draft drawn by a bank, whether on itself (in which case it is a 'cashier's check' under §3-104(g) or on another bank (in which case it is a 'teller's check' under §3-104(h), is also a 'check'.

<sup>33</sup> See UCC §3-106. For the possibility that a separate agreement may nevertheless affect the instrument see §3-117.

<sup>34</sup> An instrument which constitutes an order is a 'draft'. See §3-104(e). A 'draft' under the UCC is thus a 'bill of exchange' elsewhere. A cheque is a species of a draft.

<sup>35</sup> See UCC §3-103(8) defining 'order'.

<sup>36</sup> Under UCC §4-104(a)(6) 'Documentary draft' is stated to mean 'a draft to be presented for acceptance or payment if specified documents ... are to be received by the drawee or other payor before acceptance or payment of the draft'.

<sup>37</sup> Broadly defined in §1-201(24) to mean 'a medium of exchange authorized or adopted by a domestic or foreign government and includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more nations'. UCC §3-107 specifically deals with instruments (including cheques) payable in foreign money. The amount of money payable on an instrument may be 'with or without interest or other charges', see UCC §3-104(a). In practice, cheques do not contain provisions for interest or other charges.

<sup>38</sup> According to UCC §3-108(a), an order (including a cheque) is 'payable on demand' if 'it (i) states that it is payable on demand or at sight, or otherwise indicates that it is payable at the will of the holder, or (ii) does not state any time of payment'.

<sup>39</sup> Broadly defined in UCC §4-105(1) as 'a person engaged in the business of banking, including a saving bank, saving and loan association, credit union, or trust company'. This effectively covers any type of a depository financial institution.

<sup>40</sup> This is a specific exception, applicable exclusively to cheques. See UCC §3-104(c). All other types of negotiable instruments must be 'payable to bearer or order', as set out in §3-109, at the time of issue or delivery to the first holder. See §3-104(a)(1). In any event, the words 'to the order of' are almost always preprinted on the cheque form. According to §3-109(b), a cheque is payable to order if it is payable '(i) to the order of an identified person or (ii) to an identified person or order' (emphasis is added). The drafters rationalized the §3-104(c) cheque exception by explaining that holders of cheques may overlook the omission of the usual 'order' language, and ought nevertheless to be protected. The omission of the required words from the cheque may either be in the original form of the cheque, as was some credit unions' practice, or caused by the drawer striking out the 'payable to order' language from the preprinted form. See Official Comment 2 to UCC §3-104. A cheque payable to an identified person, while technically not 'payable to order', is thus nevertheless a 'check' and 'negotiable instrument' governed by UCC Article 3.

As a rule, in all jurisdictions, a cheque must be embodied in a tangible form<sup>41</sup> and is transferable by ‘negotiation’, namely, by delivery in the case of a cheque payable to the bearer, and delivery and endorsement in the case of a cheque payable to order.<sup>42</sup> However, in connection with a discussion on the legal doctrine underlying liability on a cheque these features are incidental. Hence, stripped to its bare bones, broadly defined, the cheque is in essence an unconditional order to pay a specific sum of money on demand, addressed to a bank or another type of depository of funds (“drawee”),<sup>43</sup> issued by a debtor- payer (“drawer”) to his creditor<sup>44</sup> (“payee”) <sup>45</sup>, authorizing the latter to collect payment from the drawee to his (payee’s) own use. As such the cheque is not only an order issued by the drawer addressed to the drawee to pay but also a mandate or authorization issued by the drawer to the to the payee to collect payment from the drawee. Finally, the cheque confers on the payee rights towards the drawee-banker and/or the drawer. The evolution of the payee’s remedies upon the dishonour of the cheque is the subject matter of this article.

In executing the drawer’s order a drawee of a cheque acts upon the presentation of demand by the payee. Accordingly, an order to pay communicated directly by the payer to the drawee, is not a cheque; in such a case the drawee acts on the order and not on a demand made by the payee to

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<sup>41</sup> This emerges from the writing requirements under both the BEA and UCC and is implied from the signature requirements under the ULC See three preceding paragraphs. It also emerges from the ‘negotiation’ requirements as in the next note and e.g. from ULC art. 16 as to the writing requirements for an endorsement.

<sup>42</sup> BEA s. 31; ULB art. 11; ULC art. 17; UCC §3-201. See also United Nations Convention on International Bills of Exchange and International Promissory Notes (UN Doc. A/RES/43/165) in *Yearbook of the United Nations 1988*, vol. 42 (New York: UN, 1988) at 834 (“UNCITRAL Bills Convention) art. 13. The term ‘negotiation’ appears only in the BEA and in UCC. Article 3. An endorsement which does not designate the transferee is an endorsement in blank, which effectively ‘converts’ the bill into one payable to the bearer. This is true even where instruments originally issued payable to the bearer are not recognized (see note 123, above). For the ‘conversion’ by blank endorsement of the bill payable to order see e.g. BEA s. 34(1); ULB arts. 12-13; UCC §3-205; UNCITRAL Bills Convention arts. 13-16.

<sup>43</sup> Cf. the Canadian definition which as indicated in note 13 above covers more types of regulated financial intermediaries.

<sup>44</sup> This study focuses on the issue of a cheque in payment of an obligation such as a debt. Certainly, a cheque may be issued to the payee also by way of gift. Whether in the latter case the cheque is enforceable may vary from one legal system to another.

<sup>45</sup> “Payee” is used here in the broad sense to include the first bearer to whom a cheque payable to bearer is issued. Where transfer is permitted “payee” includes the transferee.

execute the order. An order to pay given in the presence of all three (drawer, payee, and drawee) thus generates ambiguity. In such a case the drawee may be seen as acting either on the drawer's order itself or on the payee's demand for its execution. A cheque is involved only in the latter case.

This study focuses on the payee's rights as of the issue of the cheque until full payment. Of particular interest is the payee's right against the drawee as well as the payee's recourse right against the drawer. These two rights are interrelated. Thus, a payee will not renounce his rights against the drawer unconditionally unless the payee has an enforceable remedy against the drawee. The reverse is however untrue: a payee may keep his rights against the drawer even as he has rights against the drawee. The payee's rights against the drawer may be on the drawer's original obligation to him.

Where the payee's rights against the drawer are in addition to the payee's rights against the drawee, the drawer's obligation may be converted into a guarantee. Finally, where the payee remains entitled to recover from the drawer, a question arises as to the availability of this remedy prior to the dishonour of the cheque by the drawee's failure to pay it.

Indeed, the legal underpinning of the cheque operation does not require the drawee to become liable to the payee. At the same time, such liability need not necessarily be precluded. Historically, a payee-creditor may have been considered as an assignee of the debt owed by the drawee to the drawer-debtor. More broadly, where the drawee has been held to be liable to the payee, the drawee may have been held liable to the payee on the drawer's obligation to the payee, on the drawee's own debt to the drawer, or on an independent new obligation.<sup>46.1</sup> And of course, he may not have been held liable to the payee at all. As discussed in this study, historically, at different periods, legal systems varied in their approach to all such possibilities.

According to Holdsworth, "[t]here is no doubt that, from the first, the order [on a cheque] given by a customer to the banker to pay was regarded as a bill of exchange..."<sup>46</sup> Holden is in full agreement on this point.<sup>47</sup> He

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<sup>46.1</sup> Whether and what defences are available to the drawee (and where applicable, whether and what securities are available to the creditor in pursuing his remedies against the drawee), may well depend on the type of the drawee's obligation to the creditor as in the accompanying text. Due to space limitations this aspect is not specifically covered by this study.

<sup>46</sup> W. Holdsworth, *A History of English Law* vol. VIII, 2<sup>nd</sup> ed. (London: Methuen, Sweet & Maxwell, 1937, rep. 1966) at 190.

<sup>47</sup> JM Holden, *The History of Negotiable Instruments in English Law* (London: University of London: The Athlone Press, 1955, rep. 1993, WM. W. Gaunt & Sons) at 219.



emphasizes that “a cheque is merely a special type of bill of exchange”<sup>48</sup> and adds that “cheques ... were simply bills of exchange drawn upon a person carrying on a particular profession and payable on demand.”<sup>49</sup> Richards’ argument is not far off; while he endeavours to trace the cheque to an earlier demand note drawn on the Exchequer,<sup>50</sup> a point on which he is rebutted by Holden,<sup>51</sup> he is of the opinion that “[u]nder the Law Merchant, cheques also, it would appear, were regarded from the outset as bills of exchange.”<sup>52</sup>

Indeed, to a large extent, cheques and bills of exchange and the laws relating to them converge. Unlike a cheque a bill of exchange may be drawn on any person (and not only on a bank) and may be payable on a stated date (and not only on demand). Hence, it is only natural to expect a substantial overlap between the laws applicable between these two types of instruments. Nonetheless, this does not necessarily point out to a common origin or to the one being a type of the other. Notwithstanding view to the contrary cited in the previous paragraph, this study is designed to trace the origins and evolution of the cheque, as well as the law that govern it, in independent circumstances unrelated to those of the bill of exchange.

The ensuing discussion draws on my early work on comparative aspects<sup>53</sup> and legal history<sup>54</sup> of payment orders. The information is mostly there, particularly scattered in the latter study.<sup>55</sup> What is new here is the topical focus, namely, on the cheque, and the resulting selection and reorganization of materials shedding light on it. This allows me to have new ideas and insights so as to benefit the reader interested in the evolution of cheques and legal doctrine governing liability thereon.

In the context of an account on cheques and their origins, the study endeavours to trace the law that governs liability on the cheque to principles derived from pre-modern legal systems. Roman, Jewish and Islamic laws, of which ample sources remain available, are discussed. The study proceeds as follows. Part 2 sets out the origins of cheques in Ptolemaic Egypt. In the

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<sup>48</sup> *Ibid* at 204.

<sup>49</sup> *Ibid* at 208.

<sup>50</sup> R. D. Richards, *The Early History of Banking in England* (New York: A.M. Kelley, 1965, reprint of 1929 edition) at 52-64.

<sup>51</sup> Holden, *supra* n. 47 at 207-208.

<sup>52</sup> Richards, *supra* n. 50 at 49.

<sup>53</sup> Benjamin Geva, *Bank Collections and Payment Transactions: Comparative Study of Legal Aspects* (Oxford: OUP, 2001), particularly Part 3(B).

<sup>54</sup> Benjamin Geva, *The Payment Order of Antiquity and the Middle Ages* (Oxford and Portland Oregon: Hart, 2011).

<sup>55</sup> *Ibid* at Chapters 3-8 and 10-11.

absence of specific information on the law that governed such cheques, Part 3 addresses cheques law under Roman law, even as no cheque system has been documented to exist in Ancient Rome itself. Part 4 critically examines cheque law under the Jewish Talmud. While there is no evidence to a cheque system among the Jews, the Talmud is the first legal source containing a comprehensive legal discussion on what may look like a cheque and hence on principal issues in cheque law. Part 5 addresses cheque-equivalents under Islamic *hawale* doctrine in the early Middle Ages. In fact this is the first time we encounter both cheques and cheque law. Part 6 discusses cheques under Roman law in the late Middle Ages in Continental Europe particularly Italy and the Netherlands. Part 7 sets out the birth of the modern cheque system and cheque law in post-Medieval England.

## 2. The origins of cheques in Ptolemaic Egypt

Becoming deposit takers who lend deposited funds and provide non-cash payment services, moneychangers in Ancient Greece (*trapezitai*) became, mostly during the 5<sup>th</sup> century BCE, the “creators of the bank of deposit”.<sup>56</sup> Their activity gave rise to a nascent payment system in which written payment orders were nevertheless rare. This remained generally true even subsequently, in the Latin-speaking Roman world.<sup>57</sup> As part of a standard banking practice, the earliest written payment orders are said to be found in Greco-Roman Egypt.<sup>58</sup> An extensive bank payment activity documented

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<sup>56</sup> Raymond Bogaert, *Banques et banquiers dans les cités grecques* (Leyde: A.W. Sijthoff, 1968) at 413 [hereafter: Bogaert, *Banques et banquiers*]

<sup>57</sup> For this fact see e.g. M. Vasseur et X. Marin, *Le Chèque*, Tome II (Paris: Hamel, 1969) at 8. This is so notwithstanding E. Guillard, *Les Banquiers Athéniens et Romains suivis du Pacte de Constitut en Droit Romain* (Paris, Lyon: Guillaumin, H. Georg, 1875) at 40, to the contrary, whose view on the point may be based on the mistranslation of Greek and Latin terms. See J. Andreau, *La vie financière dans le monde romain: les métiers de manieurs d'argent* (Rome: École française de Rome Palais Farnèse, 1987) at 572-573.

<sup>58</sup> For detailed analysis see Roger. S. Bagnall and Raymond Bogaert, “Orders for Payment from A Banker’s Archive: Papyri in the Collection of Florida State University” (1975), in Raymond Bogaert, *Trapezitica Aegyptiaca*, Recueil de recherches sur la banque en Égypte Gréco-Romaine (Firenze: Edizioni Gonelli, 1994) [*“Trapezitica”*] at 219, 240 and Raymond Bogaert, “Note sur l’emploi du chèque dans l’Égypte ptolémaïque” (1983), in *Trapezitica ibid.* at 245. See also Raymond Bogaert, “Recherches sur la banque en Égypte Gréco-Romaine” (1987-89), in *Trapezitica, ibid.* at 1; and Raymond Bogaert, “Les opérations des banques de l’Égypte Ptolémaïque”, (1998), 29 *Ancient Society* 49 at 141.

particularly for the Ptolemaic period (323 BCE to 30 BCE).<sup>59</sup> The first documented cheque system is thus said to emerge in Ptolemaic Egypt during the first half of the 1<sup>st</sup> century BCE. No indication seems to be available in the literature as to the law that governed these instruments so as to confer on them the legal features of cheques. At the same time, they contained the ‘double mandate’ to pay and collect and are thus ‘cheques’ both in form and as a payment method.

Unlike the confirmation issued by a banker executing a payment order issued to it, the issue of a cheque by the payer does not carry with it the assurance of payment to the payee by the banker.<sup>60</sup> Perhaps this, together with the enhanced falsification risk, discussed further below, may explain the paucity of cheques from the Ancient era; and yet, there is evidence of the operation of a cheque system in Ptolemaic Egypt.

A collection of twenty six fragments of papyrus with Greek text, found in a mummy cartonnage in Abusir el-Melek may be the first evidence of a cheque system. Papyri contain written orders to bankers to pay a sum of money to third persons. They are from the close of the Ptolemaic era, or more specifically, from the first half of the 1<sup>st</sup> century BCE, most likely between 87 and 84 BCE. They range from complete documents to very small fragments. All are written on fairly small pieces; the maximum size is 14.5 x 10.2 cm; and most are smaller than 10 x 10 cm. Each document contains the text of the order, usually in seven lines, and bears wide margins on all or most sides. Some papyri have writings on their back, but in no case is this writing earlier than that of the payment order, and in no case can enough be read to yield meaning. The collection as a whole is known as the Florida collection, following its acquisition by the Robert Manning Strozier Library of Florida State University (Tallahassee) in 1973. Professor Bagnall presented the collection in 1974; he subsequently provided a translation on which Professor Bogaert commented in a joint paper.<sup>61</sup>

Altogether, twenty four payment orders, addressed to two respective bankers, were constructed out of the collection. The orders are addressed by various customers to their bankers. They bear similarities to instruments

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<sup>59</sup> See K. Geens, “Financial Archives of Graeco-Roman Egypt”, in K. Verboven, K. Vandorpe & V. Chankowski, eds., *Pistoi Dia Tèn Technèn-Bankers, Loans and Archives in the Ancient World: Studies in Honour of Raymond Bogaert* (Leuven: Peeters, 2008) at 133, 140-150 [hereafter: Verboven et al., *Ancient World*].

<sup>60</sup> For a cheque from Roman Egypt from 125 CE, giving rise to a dispute involving the unavailability of funds to cover payment, see R. Bogaert, “Recherches sur la banque en Égypte Gréco-Romaine” (1987), *Trapezitica*, above note 58 at 6, 23.

<sup>61</sup> Bagnall & Bogaert, *supra* n. 58.

used in connection with payments out of grain deposits.<sup>62</sup> Most of the texts either specify copper or are for amounts which are in copper. As well, they are for relatively small amounts. Most of them are dated, address and identify the banker, as well as identify both the payer and the payee. Their most striking features are the brevity of the text and ample use of abbreviations; they omit all mention of the reason or object for payment, do not indicate the deposit from which payment is to be carried out, do not bear signature, and do not indicate performance, namely, receipt of payment by the payee.

Having elsewhere pointed out to possible earlier origins for a sparse use of cheques,<sup>63</sup> Bogaert asserts that the Florida collection is nevertheless the first evidence of a cheque system, albeit, involving non-transferable cheques. Such cheques did not circulate; nor could they be collected through a deposit at payee's accounts with other bankers. Rather, the procedure for payee, to whom the cheque was issued, was to present the cheque to the payer's bank, either in person or through an agent, and collect payment, usually in cash. However, in principle, the payment in cash of the non-transferable cheque of Antiquity could be bypassed by means of a credit posted to the payee's account in one of two cases. First, such could be the case where the payee held his account with the same banker that also maintained the payer's account. Second, as discussed further below, under limited circumstances, a mechanism existed for facilitating the payment into the payee's account with a banker other than that of the payer.

The issue of a payment order by a customer, directly to his banker, typically involved a direct contact between the two. A customer could give the order either orally and in person, or in writing; a written order was likely to be sent physically closed and sealed, and to bear the banker's name on its verso. Under each such a procedure, fraud risk was reduced. In contrast, irrespective of how the payee was paid, the presentment of a cheque by the payee to the payer's banker did not involve a direct contact between the banker and his customer, the payer. Obviously, lack of direct contact between the payer and his banker increased the risk of falsification. This

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<sup>62</sup> The grain deposit system is concisely described by C. Préaux, *L'Économie royale des Lagides* (Bruxelles: Édition de la Fondation Égyptologique, 1939) at 142, as well as by MI Rostovtzeff, *The Social & Economic History of the Hellenistic World*, Volume II (Oxford: Clarendon Press, 1941) at 1287. An authoritative text relied on is in German: F. Preisigke, *Girowesen im griechischen Ägypten* (Strassburg: Verlag von Schlesier & Schweikhardt, 1910) [Reprinted: Hildesheim, New York: Georg Olms Verlag, 1971].

<sup>63</sup> Bogaert, *supra* n. 56 at 340-341.

remains true today; it was more so in Antiquity, where the instrument may have been written by a scribe, and not in the handwriting of the payer, and could have been unsigned.

Bogaert speculates that to reduce the possibility of payment to the wrong payee, payment by cheque was usually made to a payee either known to the payer's banker, or adequately identified, with great precision, in the cheque. In effect, this must be true also for a payment order issued directly to the banker, except that payment under it to the payee could be made in the presence of the payer, a procedure which would have defeated the purpose of a cheque. For its part, the absence of the payer from the bank at the time of the payment of the cheque further exposed the banker to the risk of falsification.

To that end, Bogaert asserts that, to reduce cheque falsification risks, the operation of the cheque system in the Antiquity was premised on the issue of two documents by the payer. One was the 'authentic' cheque itself, issued by the payer to the payee, and the other was an advice, or 'control note', issued by the payer to his banker, alerting him to the forthcoming presentment of the cheque by the payee. Under this scheme, the operative payment order was the cheque itself, issued by the payer to the payee, who was to present it to the payer's bank. The document issued by the payer to his banker was a mere advice or alert; by itself it did not require any action on the part of the banker.<sup>64</sup> In Bogaert's view, the Florida collection is an assortment of such advice documents, and not of the cheques themselves. In his mind, this explains the brevity of the documents, their use of abbreviations (including in the names of the payees), as well as the incomplete information contained therein. All this is contrary to texts of payment orders issued directly to a banker available from the same era. In short, the Florida collection testifies to the existence of a cheque system; yet, it does not contain the cheques themselves.

Bogaert's theory appears to have been confirmed in 1980 with the publication of the Berlin collection. The latter consists of sixteen orders of

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<sup>64</sup> It is interesting to compare that ancient practice to the positive-pay procedure of the late 20<sup>th</sup> century CE, under which, prior to payment of cheques purporting to be drawn by them and presented for payment, corporate customers confirm to banks electronically the authenticity of the cheque. For this practice in the USA see Subcommittee on Payments of the Uniform Commercial Code Committee, *Model Positive Pay Services Agreement and Commentary* (Chicago, Business Law Section of the American Bar Association, 1999). Certainly this electronic advice, professing to be on the 'cutting edge' of technological innovation, is a variation on the 'control note' of Ptolemaic Egypt of 2,000 years earlier.

payment. They all originated from the same mummy cartonnage in Abusir el-Melek from which documents of the Florida collection originated. These orders are addressed to directors of royal banks<sup>64.1</sup> and are dated from 82 BCE, namely very shortly after the last Florida document, so as also to belong to the Ptolemaic era. By comparison to those in Florida, the Berlin documents are of smaller amounts and yet are substantially more detailed; most names, and all those of the payees, are given in full; documents may give further details as to payee identification, such as family proximity or profession. As well, reason or object of payment is specifically indicated. Some documents are cancelled by crossed lines. In Bogaert's view, the Berlin documents are certainly authentic cheques, issued to payees; unlike the Florida counterparts, they are not mere 'control notes' or advice notes sent to banks.

It may well be that during both the Ptolemaic and Roman periods, a payee of a payment order, whether or not a cheque, rather than receiving payment in cash at the payer's banker, could instruct the payer's banker to make the payment into the payee's account with the payee's own banker. This could work only where the payer's banker kept funds in an account maintained by the payee's banker, namely, where the two bankers were correspondents. Under that mechanism, the payee of a cheque would instruct the payer's banker to draw on the payee's banker a cheque payable to the payee. The payee would then present that cheque to his own banker, on whom the cheque was drawn. That banker would then carry out payment by debiting the account of the payer's bank and crediting that of the payee. The process of payment of the cheque drawn by the payee's banker was like that of any other cheque; in fact, a 'control note' issued by the payer's bank to that of the payee was published together with the Berlin collection.

Being drawn by one banker on another, the cheque issued by the payer's banker was the forerunner of a bank draft or money order.<sup>65</sup> Its underlying mechanism was premised on the existence of bilateral inter-bank correspondent relationship. No interbank multilateral arrangements surfaced in Greco-Roman Egypt.

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<sup>64.1</sup> Royal Banks were called *basilikai trapezai*. They were located in the large cities and primarily served the state. Their principal task was to make and receive payments for the king; and yet they also kept accounts for individuals. For an overview of the banking system in Greco-Roman Egypt, see Geva, *The Payment Order of Antiquity and the Middle Ages supra* n. 54 at Chapter 3 §5.

<sup>65</sup> For legal aspects of these instruments under modern law see e.g. Benjamin Geva, "Irrevocability of Bank Drafts, Certified Cheques and Money Orders" (1987), 65 Can. Bar Rev. 107.

Cheque use appears to have been eclipsed in the course of the Roman period.<sup>66</sup> Arguably, in terms of the broad economic picture, and taking into account the lack of continuity in the documentary record, the historic importance of the Greco-Roman non-transferable cheque in Egypt should not be overstated.<sup>67</sup> However, in the search for the origins of facilities for payment through banks by means of the execution of payment orders, the cheque may well be singled out as a principal contribution of Greco-Roman Egyptian banking.<sup>68</sup>

### 3. Some cheque law without cheques under Roman law

Under Roman law a monetary debt is not an item of property; it is not an asset capable of being voluntarily conveyed or transferred from one person to another under the usual means for the transfer of property.<sup>69</sup> Hence, a payer-debtor could not transfer to a payee-creditor a debt owed to the payer-debtor by a drawee.

Rather, the order to pay has been analyzed as *delegatio*, or in English, delegation. In its narrow sense, the term has been defined as an order given by one person (“delegant”) to another (“person to be delegated”) to pay to,

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<sup>66</sup> For a reference to a cheque from the Roman period (year 125 CE) see *supra* n. 60. The Roman period roughly extended from the Roman occupation around 30 BCE and the partition of the Roman Empire in the course of the 4<sup>th</sup> century CE.

<sup>67</sup> A point made by J. Andreau, *Banking and Business in the Roman World*, trans. by J. Lloyd (Cambridge: Cambridge University Press, 1999) at 43.

<sup>68</sup> See e.g. V. Gabrielsen, “Banking and Credit Operations in Hellenistic Times”, in ZH Archibald, JK Davies, and V. Gabrielsen, eds., *Making, Moving and Managing: The New World of Ancient Economies* (Oxford: Oxbow Books, 2005) at 136, 140, referring to the use of non-transmissible cheques in “late Hellenistic and Roman Egypt” as “a further refinement of the practice of ‘order of payment through a bank’”, or more specifically, “a procedure that eased credit extension within the business community”.

<sup>69</sup> One reason, stated by HJ Roby, *Roman Private Law in the Times of Cicero and the Antonines*, vol. 2 (Cambridge: University Press, 1902) (also reprinted by Scientia Verlag Alen, 1975) at 45, is that “[a]n obligation is not susceptible, as a thing is, of bodily transference for the possession of one to the possession of another.” For another reason see e.g. R. Zimmermann, *The Law of Obligations-Roman Foundations of the Civilian Tradition* (Cape Town: Juta, 1990) at 58-59, who highlights the “highly personal” nature of an obligation and who further explains that “the action arising from [a debtor’s] obligation hinges on the bones and entrails of the creditor and can no more be separated from his person than the soul from the body.” For a comprehensive discussion, see E. Gaudemet, *Étude sur le transport de dettes* (Paris: Arthur Rousseau, 1898) at 154-95.

or assume an obligation towards, a third person (“delegatee”). In its broader sense, the term has come also to include the execution of the order.<sup>70</sup> As an order to pay money owed by one person to another, *delegatio* is an order by the delegant, a payer-debtor, issued to the person delegated (the drawee), who may owe him (the delegant) money, to pay to the delegatee, a payee-creditor, a debt owed by payer-debtor to payee-creditor.<sup>71</sup> The drawee may bind himself towards the payee-creditor by making a stipulation (or *stipulatio*).

The *stipulatio* is an oral solemn contract concluded in the form of a face-to-face exchange of a question and an answer between two persons who, on the basis of the successful completion of the exchange, become parties to a contract. Its formation requires a question to be asked by the stipulant, a would-be promisee-creditor, immediately followed by an affirmative answer given by the person to whom the question was directed, who thereby becomes the promisor-debtor. The two parties must be in each other’s presence and the question and answer must be spoken; furthermore, “there should be precise correspondence between question and answer.”<sup>72</sup> A stipulation could encompass any type of obligation; where it is to pay a sum

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<sup>70</sup> For the definition of *delegatio* see e.g. A. Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia: American Philosophical Society, 1953) at 429. For an analysis of delegation, see e.g. HJ Roby, *Roman Private Law in the Times of Cicero and the Antonines*, vol. 2 (Cambridge: University Press, 1902) (also reprinted by Scientia Verlag Aalen, 1975) at 42-45. See also WA Hunter, *A Systematic and Historical Exposition of Roman Law in the Order of a Code*, 3<sup>rd</sup> ed. (London: Sweet & Maxwell, 1897) at 631-32; R. Dannenbring (translator), *Roman Private Law*, 3<sup>rd</sup> ed. (Pretoria: University of South Africa, 1980, translation of M. Kaser, “Römische Privatrecht” 10<sup>th</sup> rev. ed.) at 269-70; and P. Gide, *Études sur la Novation et le Transport des Créances en Droit Romain*, (Paris: L. LaRose, 1879) at 379-480. For a comprehensive discussion see S. Maxwell, *De la délégation en droit romain*, (Bordeaux: Imprimerie V<sup>e</sup> Cadoret, 1895) and P. Rutsaert, *Étude sur la Délégation en droit privé Romain* (Bruxelles: Émile Bruylant; Paris: Recueil Sirey, 1929). See also R. Lanata, *Thèse pour le doctorat: Droit Romain: de la délégation; droit français: de la compétence des tribunaux français à l’égard des étrangers* (Paris: Imprimerie de Charles Noblet, 1882).

<sup>71</sup> Indeed, it is the benefit to the order giver from the execution of the order which turns an order into a delegation order. See e.g. A. Badareu ‘Tomsa’, *De la Délégation Imparfait*, (Paris: M. Giard & Brière, 1914) at 6.

<sup>72</sup> RW Lee, *The Elements of Roman Law with a Translation of the Institutes of Justinian*, 4<sup>th</sup> ed. (London: Sweet & Maxwell, 1956) at 298. See also B. Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1962) at 193. Berger *supra* n. 70 states at 716, v. ‘Stipulatio’, that “[t]he answer had to agree perfectly with the question; any difference or restriction (addition of a condition) made the stipulatio void.” But see Lee *Ibid.* at 416, Roby, *supra* n. 70 at 39, and Maxwell, *supra* n. at 57 as to the effect of a condition added to the stipulatory answer.



certain in money is a *stipulatio certa*.<sup>73</sup> Effectively, a delegation order is executed when at the ‘bidding’ of payer-debtor, payee-creditor stipulates from drawee for the money owed.

Even as the order on a cheque is a delegation, a cheque transaction cannot easily be characterized as the execution of a delegation. This is so if only because the order to pay on a cheque is not communicated directly by the payer-debtor to the drawee, but rather by the payee-creditor to the drawee.<sup>74</sup> The novatory<sup>75</sup> stipulation<sup>76</sup> is ill fit to accommodate the cheque transaction also due to the need to procure the consent of the drawee and the extinction of securities<sup>77</sup>.

Under such circumstances and against the impossibility of transferring anything other than “corporeal things” from one person to another,<sup>78</sup> to give impact to the delegation order, the cession (*cessio*), as an outright transfer of a debt owed, has developed gradually. Originally, as “a praetorian adaptation

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<sup>73</sup> Defined by Berger, *ibid* at 717 as a “stipulation in which the thing promised ... its quality ... and quantity were precisely fixed.” It is thus to be contrasted with *stipulatio incerta*. *Ibid*.

<sup>74</sup> See Part 1, around n. 45 *supra*, and paragraph that follows.

<sup>75</sup> The underpinning legal theory of the stipulation is that of *novatio* or novation, namely the process of transformation and transfer of a former obligation into a new one, under which an existing obligation is extinguished and substituted by a new one. For this ‘chain reaction’ of required stipulation leading to novation, see Gaius’ Institutes §38, See e.g. translation by WM Gordon & OF Robinson, *The Institutes of Gaius* (Ithaca: Cornell, 1988) at 139-41. *Novatio* is defined in Berger, *supra* n. 70 at 600 and discussed in the context of delegation and stipulation e.g. in Roby, *supra* n. 70 at 38-41; Dannenbring, *supra* n. 70 at 267-69; and Hunter, *supra* n. 70 at 629-32. In our setting, it is the payer-debtor’s obligation to the payee-creditor which is transformed to the drawee’s obligation to the payee-creditor.

<sup>76</sup> For bypassing the inalienability of debts, not being ‘corporeal things’, either by a novatory stipulation between the debtor and would be ‘transferee’, or an action by the ‘transferee’ in the creditor’s name, see Gaius’ Institutes Book II §§38-39, Gordon & Robinson *ibid* at 139-41.

<sup>77</sup> In the process of creating drawee’s novated obligation to payee-creditor, both defences and securities available under and for the original obligations, that of drawee-debtor to payer-creditor and that of payer-debtor to payee-creditor, have been forfeited. Drawee-debtor may invoke against payee-creditor only defences based either on the nullity of the novated obligation or on public policy grounds. For a detailed discussion, see Maxwell, *supra* n. 70 at 95-105.

<sup>78</sup> The transmission by death of the inheritor’s debts as part of the transmission of his entire estate to his heirs and other instances of transmission as an incident to the transmission of an entire estate are distinguishable. This is so notwithstanding Gide’s view to the contrary, *supra* n. 70 at 238. See A. Demangeat, *Droit romain: De la cession de créances. Droit des gens: De la juridiction en matière de prises maritimes* (Paris: A. Giard, Libraire-Éditeur, 1890) at 4-12.

of a civil law action,”<sup>79</sup> under “a variant of procedural representation”,<sup>80</sup> payer-debtor/assignor appointed payee-creditor/assignee to act as his representative. Alternatively, he gave payee-creditor a mandate in payee-creditor’s own interest (*mandatum in rem suam* or *procuratio in rem suam*) to sue and recover from drawee (debtor’s debtor). Acting on the authorization, payee-creditor could sue drawee in payer-debtor’s name, seeking a remedy under which drawee was to be ‘condemned’ to pay to payee-creditor.<sup>81</sup> Authorization however further permitted payee-creditor to keep, and not account to payer-debtor, whatever proceeds payee-creditor collected from drawee. The authorization was called “*mandatum ad agentum*”. Strictly speaking, however, it was not a mandate. The mandate is broadly defined as “a contract whereby one person (mandator) gives another (mandatary) a commission to do something for him ...,”<sup>82</sup> namely, the mandator; a mandate cannot be concluded wholly in the interest of the mandatary<sup>83</sup>.

By the time of Justinian, payee-creditor had not been required to sue drawee (debtor’s debtor) as a *cognitor* or *procurator* for payer-debtor; rather, payee-creditor was allowed to maintain an *actio utilis*<sup>84</sup> in his own name, and even when the ‘mandate’ had been determined by payer-debtor’s death

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<sup>79</sup> Lee, *supra* n. 72 at 411, and see also his discussion on transferred actions at 433-34. For the particular function of the Praetor and his role in expanding and adapting civil liability in Roman Law, see in general Nicholas, *supra* n. 72 at 23-28; Lee, *supra* n. 72 at 433-35; and Berger, *supra* n. 70 at 347 (v. ‘Actiones praetoriae’).

<sup>80</sup> Nicholas, *supra* n.72 at 200. Dannenbring, *supra* n. 70 at 271-72 and Zimmermann *supra* n. 69 at 61.

<sup>81</sup> See Gaius’ Institutes Book IV, *supra* n. 76, at §§83-84 (the appointment by a litigant of either a *cognitor* (namely representative), or a *procurator* (namely a mandatary) to substitute him in court) and §86 (debtor is ‘condemned’ to pay debt he owes to creditor to creditor’s representative or mandatary). See Gordon & Robinson, above note 76 at 469-73. Unlike a *procurator*, a *cognitor* was appointed in court in the presence of the other litigant. *Ibid.*

<sup>82</sup> See e.g. Lee, *supra* n. 72 at 334. A detailed monograph is A. Watson, *Contract of Mandate in Roman Law* (Oxford: Clarendon Press, 1961).

<sup>83</sup> See e.g. Zimmermann, *supra* n. 69 at 422, as well as Gide, *supra* n. 70 at 467.

<sup>84</sup> As “an adaptation or extension of an existing action” an *actio utilis* is a praetorian action which usually denotes “a modification of a civil law formula ... or to the application of a civil law formula to a new state of facts or to persons not entitled to make use of it.” Lee, *supra*, n. 72 at 435. For the formula, as “[a] written document by which in a civil trial authorization was given to a judge ... to condemn the defendant if certain factual or legal circumstances appeared proved, or to absolve him if this was not the case”, see Berger, *supra* n. 70 at 474. See also Lee *ibid* at 442-56.

or revocation.<sup>85</sup> By either giving drawee a formal notice, called *denuntiatio*,<sup>86</sup> or receiving from him part payment, payee-creditor assumed full control of payer-debtor's claim against drawee, which precluded payer-debtor from accepting a settlement from drawee or otherwise giving him a discharge.<sup>87</sup> It is only at this point that Roman law is said, at least in hindsight,<sup>88</sup> to "eventually ... have arrived at an effective system of assignment [of debts]";<sup>89</sup> under which the transfer to payee-creditor of payer-debtor's claim against drawee is fully recognized and protected.

Nevertheless, strong doubts arose in the post-Justinian era; they were based on confusion caused by the juxtaposition by Justinian as "existing laws" of "the various stages through which the development of assignment had passed." In civilian legal systems drawn on the Romanist tradition, doubts persisted until the middle of the 19<sup>th</sup> century. It is only as of then that "the tide was turning" so as to accord full recognition and protection to payee-creditor as a transferee in full control of payer-debtor's right against drawee<sup>90</sup>. As a matter of history, what was doctrinally achievable in the 6<sup>th</sup> century CE, came to be fully recognized only 13 centuries later.

An outright assignment for value is tantamount to the sale to the assignee (payee-creditor) of the assignor (payer-debtor)'s right against the obligor (drawee). Under an outright assignment, the assignee (payee-creditor) becomes entitled to recover from the obligor (drawee). Whether, and to what extent, following the assignment, the assignee (payee-creditor) is to have recourse against the assignor (payer-debtor) is a matter to be mutually agreed between the assignor (payer-debtor) and the assignee (payee-creditor). *Prima facie*, the treatment of the outright assignment as a 'sale' to the assignee

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<sup>85</sup> For payee-creditor's *actio utilis* as contrasted with, and being more advantageous than, payee-creditor's 'direct' action as *procurator* for payer-debtor, see J. Duponchel, *De la cession d'actions en droit romain. Du titre à ordre et des conséquences qui s'y rattachent en droit français*, (Versailles: Imprimerie de Beau Jeune, 1870) at 29-32.

<sup>86</sup> According to Berger, *supra* n. 70 at 431, *Denuntiare* means to give notice, to intimate, or announce. Duponchel, *ibid*, discusses at 5-7 issues relevant to the notice.

<sup>87</sup> Having received such notice, drawee could "possibly" raise a defence against payer-debtor's action based on payer-debtor's fraud (*exceptio doli*). See Zimmermann, *supra* n. 69 at 62.

<sup>88</sup> This qualification is based on the immediately following paragraph and is not of Nicholas.

<sup>89</sup> Nicholas, *supra* n. 72 at 201. Yet the transferability of a debt has remained subject to public policy restrictions, e.g. "in the case where the transfer was made in order to vex a debtor with a more powerful creditor," or otherwise against "persons that made a trade of harassing debtors." See Hunter, *supra* n. 70 at 628.

<sup>90</sup> For quoted language and discussion see Zimmermann, *supra* n. 69 at 63-64.

(payee-creditor), of the obligor (drawee)'s debt to the assignor (payer-debtor), appears to suggest the assumption by the assignee (payee-creditor) of the entire risk of default by the obligor (drawee) and hence the exoneration or release of the assignor (payer-debtor)<sup>91</sup>.

In the absence of an express agreement or clear guidance from the sources, Demangeat treats the assignment for value<sup>92</sup> as tantamount to an outright sale without recourse.<sup>93</sup> For his part, Duponchel<sup>94</sup> distinguishes between *cessio* and *assignatio*; the former is effectively an assignment without recourse, and the latter, which can be translated as 'assignation',<sup>95</sup> is an assignment with recourse.

Duponchel describes the assignation as creating a mandate for collection.<sup>96</sup> More specifically, it is a double mandate, under which the payer-debtor directs (i) his own debtor, the drawee, to *pay* the payee creditor and (ii) the payee-creditor to *collect* from the drawee. However, in my view, as the double mandate benefits the mandatary, this explanation is fraught with some difficulty.<sup>97</sup> True, in an assignation, payee-creditor, as the mandatary under the second mandate, that for collection, does not assume the risk of drawee's default, which remains on the payer-debtor as a mandator. Collection is thus for the benefit of the mandator- namely the payer-debtor – who obtains thereby the benefit of discharge. This fits very

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<sup>91</sup> For the analogous passage of risk with the transfer of property to a buyer of goods under a contract of sale under modern law see e.g. Ontario *Sale of Goods Act*, R.S.O. 1990, c. S.1, s. 21.

<sup>92</sup> An assignment for value is broad enough to cover both an assignment in payment of an existing debt (or an antecedent obligation), and not only an assignment for fresh value.

<sup>93</sup> Demangeat, *supra* n. 75 *Droit romain* at 49-60.

<sup>94</sup> *Supra* n. 85 at 10.

<sup>95</sup> Terminology on the point is however quite confusing. For example, in Scotland 'assignation' is used to denote 'assignment.' See e.g. *Glossary of Scottish and European Union Legal Terms and Latin Phrases*, 2<sup>nd</sup> ed. (Edinburgh: The Law Society of Scotland & Lexis-Nexis UK, 2003), defining at 17 "assignation" as "the act of transferring rights in incorporeal moveable property from one party to another" or "the document transferring such rights." See also *British Linen Co. v. Hay & Robertson and Brown* (1885), 22 S.L.R. 542 (First Division); and J. Bouvier, *A Law Dictionary: adapted to the constitution and laws of the United States of America, and of the several states of the American Union*, rev. 6<sup>th</sup> ed. (1856), online: Constitution Society <<http://www.constitution.org/bouv/bouvier.htm>>, defining **ASSIGNATION** in "Scotch law" to be "[t]he ceding or yielding a thing to another of which intimation must be made." At the same time, the Swiss Code of Obligations distinguishes (in French) between '*assignation*' and '*cession*' (arts. 466 and 164 respectively), the former being an order or authorization to pay and the latter being an assignment of a right.

<sup>96</sup> Duponchel, *supra* n. 85 at 10.

<sup>97</sup> See text and notes 82-83.

well the mandate theory. At the same time, collection is also for the benefit of the mandatary – namely the payee-creditor, who keeps the proceeds. To a similar effect, payment under the first mandate, that for payment, is not only for the benefit of the debtor-payer, which fits the mandate theory; rather, payment is also for the benefit of the drawee mandatary. Each obtains discharge for his respective debt. Accordingly, in my view, there are difficulties in viewing the assignation as a true mandate. Unfortunately, Duponchel neither discusses the origins of *assignatio* as a distinct legal relation nor sheds further light on its doctrinal foundation.

For his part, pointing out the infrequent use of *assignatio* in Ancient Rome,<sup>98</sup> Sorbier disfavours the double mandate explanation. Rather, he advances a theory under which the assignor (payer-debtor) in an assignation acts as a surety under a non-novatory delegation.<sup>99</sup> Presumably, in issuing to the payee-creditor the instruction (delegation order) directed to the drawee to pay the payee-creditor, the payer-debtor guarantees<sup>100</sup> to the payee-creditor payment by the drawee – of the debt owed by the drawee to the payer-debtor. No novated obligation is generated; the drawee is to pay the payee-creditor the debt owed by the drawee to the payer-debtor, thereby discharging both payer-debtor's debt to payee-creditor and drawee-debt to payer-debtor, together with the payer-debtor's guarantee to the payee-creditor attached to it<sup>101</sup>.

However, ultimately, this theory is not all that attractive; in Sorbier's view the assignor (payer-debtor) under an assignation remains 'the master of the debt' (owed to him by the drawee) and in most circumstances may recover payment from the drawee even after the assignation (to the payee-creditor).<sup>102</sup> I do not read a similar qualification by Duponchel who goes on to clarify the practical implication of the distinction between a cession and assignation. First he explains, in a cession, the payer-debtor does not

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<sup>98</sup> P. Sorbier, *L'ancien contrat d'assignation de créance; ou Délégation commerciale à titre de nantissement: son emploi dans les banques pour garantir un compte courant* (Paris: Imprimerie de France, 1937) at 22.

<sup>99</sup> It is the execution of the delegation which is non-novatory in the sense that it does not discharge the original obligation owed by the payer-debtor to the payee-creditor but rather 'supplements' it.

<sup>100</sup> In Roman law, *Cautio* denotes an obligation assumed as a guaranty for the execution of an already existing obligation or of a duty not protected by law. See in general, Berger, *supra* n. 70 at 384-85. At the same time, the *fidejussio* is a formal guaranty, given by way of a stipulation. See in general Berger, *ibid*, at 350 (v. "Adpromissio").

<sup>101</sup> Sorbier, *supra* n. 98 at 20-28.

<sup>102</sup> *Ibid*.

guarantee the solvency or payment by the drawee. Nonetheless, the payer-debtor effectively warrants the existence of a debt owed to him by the drawee<sup>103</sup>. *Quare* whether this means a defence-free debt<sup>104</sup>. Second, Duponchel points out, payer-debtor's debt to payee-creditor is discharged by drawee's debt to payer-debtor in a cession, and by actual payment by drawee (or payer-debtor) to payee-creditor in an assignation<sup>105</sup>. In each case discharge is absolute; no intermediary option of conditional discharge so as to revive payee-creditor's obligation upon drawee's default is considered.

In the final analysis, both *cessio* and *assignatio* are premised on the effect of the delegation order to make the drawee liable to the payee-creditor. In allowing the payee-creditor/assignee recourse against the payer-debtor/assignor for the existence of debt owed by the drawee to the payer-debtor/assignor, even the non-recourse assignment went a long way to serve as a doctrinal underpinning for a cheque transaction. To that end, in allowing the payee-creditor recourse against the payer-debtor upon any default by the drawee, the *assignatio* appears to be even more attractive.

#### 4. More cheque law without cheques under Jewish law

Under the Talmud<sup>106</sup>, an intangible such as a monetary debt may neither be possessed nor physically transferred and hence, can neither be owned nor

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<sup>103</sup> Duponchel, *supra* n. 85 at 10. On this point see also Demangeat, *supra* n. 75 *Droit romain* at 52.

<sup>104</sup> In the absence of novation, an assignee steps to the assignor's shoes and takes the debt subject to defences available to the debtor against the assignor had there been no assignment.

<sup>105</sup> Duponchel *supra* n. 85 at 10.

<sup>106</sup> The foundation Jewish legal text is the Talmud which is the summary of the oral law that evolved after centuries of post-biblical scholarly effort by the Jewish sages who lived in Eretz-Yisrael (Palestine, being biblical Canaan, or Judea as it was until shortly after the turn of the Common Era (CE)) and Babylonia. It has two complementary components; the Mishna, a book of law, and the extensive commentary, in the form of an edited record of the discussions in the academies, known as Gemara. In principle, each Mishnaic law is followed by the corresponding Gemara commentary, so that both form the Talmudic text on a given point. The compilation of the Mishna was completed in Eretz-Yisrael around 200 CE. A contemporary source not included in the Mishna but nevertheless reproduced and discussed in the Gemara is called a Beraitha. There are two versions of the Gemara; the one whose compilation was completed in Babylonia in the 5<sup>th</sup> century CE ('Talmud Bavli') is the more authoritative version. The compilation of the other version, known as the Jerusalem Talmud ('Talmud Yerushalmi') was completed in Eretz-Yisrael in the 4<sup>th</sup> century CE. For an introduction, see e.g. A. Steinsaltz, *The Talmud-The Steinsaltz Edition - A Reference Guide* (New York: Random House, 1989) [hereafter: Steinsaltz, *The Talmud: A Reference Guide*].

disposed of<sup>107</sup>. This is true unless the borrower's duly executed obligation is contained in a documentary note of indebtedness which is transferable by delivery<sup>108</sup>.

This state of law necessitated a search for alternatives under which a payer-debtor could pay a payee-creditor by means of a debt owed to payer-debtor by a third party drawee. I will first discuss an attempt to effectively provide for a cheque accomplishing such a method of payment by means of a document, called *urchera*, authorizing a creditor to collect a third party's debt owed to the debtor. The *urcheta* is a written and properly witnessed authorization given by a creditor to an emissary, turning him into an agent<sup>109</sup> with the power to collect from the creditor's debtor money or chattel owed by that debtor to the creditor<sup>110</sup>. It is drafted to confer on the emissary both the power to give an effective discharge to the debtor and the power to enforce payment against him. To give the emissary the power to enforce payment, namely, to bring a court action against the drawee, the *urcheta* must be drafted so as to convey a proprietary right to the emissary in the subject matter to be collected; otherwise, the emissary-creditor's action against the drawee for the money or chattel owed to the debtor (the *urcheta*

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According to A. Steinsaltz, *The Essential Talmud* (New York: Basic Books, 1976) at 3: "If the Bible is the cornerstone of Judaism, then the Talmud is its central pillar." Other than where indicated otherwise, the ensuing discussion is on the basis of the Hebrew-Aramaic original text of the Talmud Bavli. English translation and comprehensive commentary is published by Mesorah Publications Limited, the Artscroll Series/Schottenstein Edition. Unless specifically indicated otherwise, all Jewish law sources cited and discussed in this study are in Hebrew (or Hebrew-Aramaic). A non-exhaustive glossary of post-Talmudic Jewish law sources can be found in Geva, *The Payment Order of Antiquity and the Middle Ages supra* n. 54 at 186-190.

<sup>107</sup> For this conclusion see e.g. S. Albeck, "The Assignment of Debt in the Talmud" (1957), 26 *Tarbiz* 262 [in Hebrew] [hereafter: Albeck, "Assignment of Debt"].

<sup>108</sup> See e.g. Talmud, *Bava Batra* at 76A, commentary by both Rashi D"H "Ve-otiyot bimsira", and Tosafot, D"H "Iy". It is however disputed whether an accompanying properly executed bill of sale is also required from the transferor-lender. See Talmud, *Kiddushin* at 47B-48A where it is further disputed as to whether, to effect a transfer, the bill of sale (if needed) is required to contain prescribed language. See also Talmud, *Bava Batra* at 75B-77B (with Tosafot at 77A D"H "Amar Ameimar"), Talmud, *Sanhedrin* at 31A, and Talmud, *Yevamot* at 115B. Hereafter, "Tosafot" is to mean Tosafot's editor.

<sup>109</sup> For a modern perspective on agency in Jewish law, see monograph by S. Ettinger, *Agency in Jewish Law in Comparison with Agency Law, 1965* (Jerusalem: Institute of Research in Jewish Law, 1999).

<sup>110</sup> For a more detailed explanation, see *Talmudic Encyclopedia*, vol. 11 (Jerusalem: Yad Harav Herzog, 1965) [in Hebrew] at 15 s.v. "Harsha-a" (authorization).

issuer) will be dismissed for lack of standing to sue.<sup>111</sup> This proprietary effect also renders the authorization irrevocable so as to secure the effective power of the agent to give a discharge.

The Gemara records two disputations, one on the scope and the other on the effect of the *urcheta*<sup>112</sup>. The first disputation is whether the *urcheta* may be given by the issuer-debtor to the emissary-creditor with respect to the collection of money lent by the issuer-debtor to the drawee. Assuming a positive reply on that point, it is further disputed whether, with respect to money lent by the issuer-debtor to the drawee, the emissary-creditor may enforce payment against the drawee or only has the power to give him an effective discharge upon a voluntary payment. The second disputation is as to the effect of the *urcheta* to pass to the emissary (payee-creditor) ownership in the money he collected from the drawee, so as to apply it in the discharge of the debt owed to him (the emissary/payee-creditor) by the payer-debtor (the *urcheta* issuer).

As for the first disputation, most post Talmudic commenters maintain that the effect of the *urcheta* is to empower the emissary-creditor to collect from the drawee money lent to him by the payer-debtor. Furthermore, its effect is not only to authorize the emissary to give the drawee an effective discharge, but also to take the drawee to court and enforce payment against him. The explanation given is the primary nature of the *urcheta* as an authorization to collect, coupled with a conveyance of a proprietary right, even if solely for the limited purpose of allowing the emissary the standing to sue the drawee<sup>113</sup>.

The second disputation is as to the effect of the *urcheta* to pass to the emissary ownership in the proceeds he collected from the debtor. On this point, one sage, Ameimar, argues that, on the basis of the proprietary right conveyed to him by the *urcheta* issuer, the emissary may keep to himself the proceeds he collected from the drawee. Conversely, another sage, Rav Ashi, points out that the *urcheta* issuer states in the *urcheta* that he accepts upon

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<sup>111</sup> But note the view of the Maor Ha-Gadol, commenting on the Rif on Talmud, *Bava Kamma* at 27B (of Rif's page numbering), who understands Rav Ashi to argue not with Ameimar but rather with the view that a proprietary right must be conveyed.

<sup>112</sup> Talmud, *Bava Kamma* at 70A. The discussion which follows here does not set out the Talmudic account in the original sequence, but rather, as required for the understanding of the questions under discussion. A modern discussion on the Gemara text is by B. Lifshitz, "Authorization and Agency" (1999-5759), 58 Tarbitz 1.

<sup>113</sup> Particularly see Nimukei Yoseph and Milcahmot on the Rif commenting on Talmud, *Bava Kamma* at 27A-27B (of Rif's page numbering).



himself all expenses incurred on account of the litigation<sup>114</sup>. On this basis, Rav Ashi maintains, it is obvious that the *urcheta* issuer appointed the emissary as a mere agent for collection and is therefore empowered to claim from him the proceeds so collected. Under another version, Rav Ashi concedes passage of ownership to the emissary on the basis of the conveyance of a proprietary interest, but argues, again on the basis of the *urcheta* issuer's undertaking to cover all expenses, that this is only transfer of co-ownership, so that the *urcheta* issuer is not taken to divest himself of the entire proprietary right.

The final ruling of the Gemara on this second disputation sides with Rav Ashi's first view. Thereunder, the *urcheta* issuer appoints the emissary as a mere agent who, notwithstanding the language in the document conveying to him a proprietary right in the money collected from the drawee, cannot retain it to his own use<sup>115</sup>. While between collection from the drawee and remittance to the payer-debtor he is accorded a temporary proprietary right in the proceeds, the emissary/payee-creditor cannot apply the proceeds in satisfaction of the debt owed to him by payer-debtor (the *urcheta* issuer).

Agency for collection has thus failed to 'upgrade' the payee-creditor's rights in the proceeds of collection so as to confer to him the property right in the proceeds he collected from the drawee. Hence, the *urcheta* does not qualify as a cheque or in fact any other payment method.

A more promising avenue in the search for a legal doctrine underlying liability on a cheque is reported by the Gemara in *Gitin*<sup>116</sup>. The text quotes Rav Huna to say in Rav's name that if one person instructs his debtor to give the money owed to a third party, that third party thereby acquires the right to that money. This is however true only as long as all three of them are present together at the time the instruction is given. As participants in a mechanism for the discharge of a debt owed by the person who gives the instruction to the third party, these two are, respectively, payer-debtor and payee-creditor; the intermediary, that is, the one who owes the money to the person who gives the instruction, is the drawee. The payer-debtor thus pays his debt to the payee-creditor by conferring on him the right to the money owed by the

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<sup>114</sup> The original is however not unequivocal; the translation here follows the Rambam, *Kinyan: Hilchot Sheluchin*, Section 3, Rule 1 and Shulcahn Aruch, *Choshen Mishpat*, Section 122, Rule 6. However, in the view of Meiri, D"H "Kol shékatavnu" commenting on Talmud, *Bava Kamma* at 70A, what the creditor accepts is the outcome of the litigation, not its expenses. In any event, either interpretation supports Rav Ashi.

<sup>115</sup> According to the Bach (in Talmud, *Bava Kamma* at 70A) this is a later addition to Talmudic account - that nevertheless became part of the text.

<sup>116</sup> Talmud, *Gitin* at 13A.

drawee. This mode of acquisition by the creditor of the right to the money owed by the drawee is known in Talmudic law as ‘*ma-amad shloshtam*’ – in the presence of all three, or presence-of-all-three declaration. Thereunder, the oral instruction, uttered by one party in the presence of the two others, is adequate to confer the right to the money on the third party, without any formal act of acquisition<sup>117</sup>.

This principle is originally introduced in the Gemara in the context of piled up coins, that is, with regard to money owed by a depositary or custodian. However, Rav, in whose name the principle has been stated in the first place, firmly asserts<sup>118</sup> that the principle further extends to money lent. The point is then confirmed in the Gemara. To that end it cites a Mishnaic text, in the form of a Beraitha, to the effect that the drawee could be a borrower from the instruction giver (the payer-debtor).

Post -Talmudic sources raised various issues concerning many aspects of the presence-of-all-three declaration. One disputation is concerned with the discharge accorded to the payer-debtor towards the payee-creditor by the all-three-presence declaration instructing the drawee to pay the payee-creditor. One view supports an absolute discharge so that upon the default of the drawee no recourse is available to the payee-creditor against the payer-debtor. The other supports a conditional discharge, so that upon the default of the drawee recourse from the payer-debtor is available to the payee-creditor<sup>119</sup>.

The starting point in the discussion on this particular issue is an extract from the Jerusalem Talmud<sup>120</sup> dealing with the case of a debtor whose creditor agreed to rely on a drawee for the payment of the debt. It is explained in the Gemara that the debtor instructed the drawee to pay the creditor whatever the drawee owed the debtor. The drawee became impoverished and defaulted, at which point the creditor attempted to obtain recourse from the debtor. Recovery was, however, denied. It was noted though that this is the law as long as the debtor has not ‘cunningly’ misrepresented the drawee to be rich while he was not. The Rif (a post Talmudic commenter) cites this text in support of the proposition that in connection with a presence-of-all-three declaration, upon default by the drawee, and other than in the case where the misrepresentation exception

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<sup>117</sup> See in general, Albeck, “Assignment of Debt”, *supra* n. 107 at 267-77.

<sup>118</sup> He is recorded as invoking God’s name to support his assertion.

<sup>119</sup> See Shulchan Aruch, *Choshen Mishpat*, Section 126, Rule 9.

<sup>120</sup> Jerusalem Talmud, *Kiddushin*, Section 3, Rule 4.

applies, the debtor is absolutely discharged, and no recourse is available to the creditor against him<sup>121</sup>.

A view to the contrary is expressed by Baal Ha-Itur (a post Talmudic commenter), who is of the opinion that the presence-of-all-three declaration does not discharge the payer-debtor<sup>122</sup>. He explains that the creditor's consent to be paid by the drawee and to discharge the debtor is revocable so that recourse is available to the payee-creditor against the payer-debtor. He reasons that the debtor retains the power to release the drawee, which is the minority view on the point<sup>123</sup>. Indeed, it is hard to see how the debtor retains his power to release the drawee and still gets an absolute discharge against his creditor, thereby leaving the latter in the cold, with no recourse against either the drawee or the debtor. Stated otherwise, with respect to the debtor, an absolute discharge ought to suppose he has lost the power to release the drawee.

The Tur (a post Talmudic commenter) further elaborates on and expands on the position of Baal Ha-Itur<sup>124</sup>. He explains the ruling in the Jerusalem Talmud as based on the express release given by the creditor (the beneficiary of the payment order). In his view, in pursuing his recourse from the debtor, who gave the instruction, the creditor, to whom the drawee was instructed to pay, may argue that he agreed to be paid by the drawee only in order to accommodate the debtor. The creditor may thus assert that has not agreed to discharge the debtor, until he, the creditor, receives actual payment in full. Hence, contrary to the plain language of the text in the Jerusalem Talmud and the position state by the Rif, it is only the express release of the debtor

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<sup>121</sup> Nimukei Yoseph, D"H "Yerushalmi" commenting on the Rif on Talmud, *Bava Metzia* at 68B (of Rif's page numbering).

<sup>122</sup> Baal Ha-Itur, Section 5, "Hamcha-a".

<sup>123</sup> For this minority view see Ramban, D"H "Bemalvé" commenting on Talmud, *Kiddushin* at 48A. See also the Raavad (mentioned in the text of the Rashba, D"H "Amar Rava" commenting on Talmud, *Gitin* at 13B.) according to whom renunciation power is retained by the debtor where the drawee has not consented explicitly to the instruction by saying "I hereby bind myself to you and whoever you will nominate". For the majority view to the contrary see e.g. Rosh, D"H "Amar Rav Huna" commenting on Talmud, *Gitin* at 13B and Ran, D"H "Veika" commenting on Talmud, *Gitin* at 13B.

<sup>124</sup> The Tur attributes this opposing view to the Rosh and Baal Ha-Itur. This reliance is however problematic; as indicated by Beit Yoseph in the Tur *Chosen Mishpat*, Section 126, the Rosh (D"H "Ibaie lehu" commenting on Talmud, *Bava Metzia* at 112A) dealt with a drawee who does not owe money to the instruction giver which, per discussion below, is a distinguishable situation. At the same time, as indicated in the preceding paragraph, Baal Ha-Itur (also cited by Beit Yoseph) does not go as far as the Tur in his reasoning and hence in the reach of his conclusion.

by the creditor, and not only the creditor's mere agreement to be paid by the drawee, that confers on the debtor an absolute discharge<sup>125</sup>. In the absence of an express release, the debtor remains liable to the creditor, though effectively as a mere guarantor of the drawee, the new principal debtor.<sup>126</sup> In effect, the Tur goes beyond Baal Ha-Itur, as the Tur does not link the conditional release theory to the retention of the power to release. Indeed, the Tur does not deny Baal Ha-Itur's premises according to which those who maintain that where the debtor, as the instruction giver, retains the power to release the creditor, the latter ought to be taken as permitting recourse against him (the debtor). At the same time, under the explanation of the Tur, the reverse is not true so that the conditional release and hence the availability of recourse stand on their own reasoning, and are independent of, so as to be also but not exclusively compatible with, loss of the power to release.

In the final analysis, this controversy is on the impact of the silence of the creditor, namely, the beneficiary of the instruction to pay. In the absence of explicit terms, the creditor's acceptance may be construed to generate either the absolute or conditional discharge of the debtor. An absolute discharge completely releases the debtor from any liability to the creditor. Upon the default of the drawee, recourse is available to the creditor only against the drawee. Conversely, conditional discharge releases the debtor towards the creditor only as long the drawee has not defaulted. Upon the default of the drawee, recourse is available to the creditor against the debtor<sup>127</sup>. In effect, conditional discharge suspends the debtor's obligation until either default or actual payment made by the drawee.

This sticks out as a detailed discussion on the nature of discharge of a debtor who pays by debt owed to him from drawee. However, involving a situation in which all three are present, it remains unclear whether the drawee is required to act on the basis of the payer-debtor's instruction communicated to him by the payer-debtor (albeit in the presence of the payee-creditor) or whether the drawee is required to act on the basis of that

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<sup>125</sup> The Tur, *Chosen Mishpat*, Section 126.

<sup>126</sup> *Ibid.* Note however that unlike Sorbier (see Part 3, text around note 100, *supra.*), he does not argue that (notwithstanding the right against the drawee conferred on the payee-creditor) the payer-debtor remains 'the master of the debt' owed to him by the drawee so as to continue to be able in most circumstances to recover payment from the drawee.

<sup>127</sup> Though it may well be that recourse is available to the beneficiary against the instruction giver only after exhausting his remedies against the drawee. Shulchan Aruch, *Chosen Mishpat*, Section 126, Rule 9.

instruction as it is communicated to him by the payee-creditor (albeit in the presence of the payer-debtor). Only in the latter case do we have a cheque<sup>128</sup>.

A case closer to a cheque transaction is in a *Bava Metzia* Mishna. The text discusses a scenario in which an employer ('debtor'), having owed his worker ('creditor') wages, directs his worker to receive payment from a storekeeper or moneychanger ('drawee').<sup>129</sup> On this passage the Gemara asks whether the worker has recourse against the employer or not. One sage, Rav Shesheth, does not allow the recourse while another sage, Rabbah, permits it<sup>130</sup>.

Post Talmudic commenters' analysis of this passage revolves around the effectiveness of the renunciation by the worker (payee-creditor) of his claim against the employer (payer-debtor) so as to discharge the employer (payer-debtor) and disallow recourse by the worker (payee-creditor) against him.<sup>131</sup> It is clear to Tosafot that no disputation could arise in two cases. The first is where renunciation is accompanied by an act of *kinyan* (meaning a proprietary act). In such case, according to Tosafot, even Rabbah would agree that renunciation is effective to generate a discharge so that recourse has been lost. This is so under the general rule providing for the enforceability of agreements for which the serious intention has been manifested by an act of *kinyan*<sup>132</sup>.

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<sup>128</sup> For the ambiguity generated by an order to pay given in the presence of all three (drawer, payee, and drawee) see Part 1 *supra*, paragraph that follows the one containing note 45.

<sup>129</sup> Talmud, *Bava Metzia* at 111A.

<sup>130</sup> Talmud, *Bava Metzia* at 112A. Both sages endeavour to rationalize their positions on the Mishnaic text itself. Thus, Rabbah asserts that in merely stating that the employer is released from the transgression of the prohibition against withholding payment, the Mishna is telling us that the employer is not released from the responsibility to pay the worker. Conversely, Rav Shesheth asserts that in stating that the employer is released from the transgression of the prohibition against withholding payment, the Mishna is telling us that the employer no longer has any financial obligation whatsoever.

<sup>131</sup> I suppose that any renunciation by the worker must be made in conjunction with his consent to abide by the employer's instructions. But contrast Kessef Mishna to Rambam, *Mishpatim: Hilchot Schiruth*, Section 11, Rule 4, which requires worker's consent, and Beit Yoseph to the Tur, *Choshen Mishpat*, Section 339 which raises the possibility that worker's consent is not required.

<sup>132</sup> "*Kinyan*" literally means property or acquisition. In Jewish law, as a *Halakhic* concept, an act of *kinyan* is a formal procedure to render an agreement legally binding. Acts of *kinyan* include pulling, transferring, controlling, lifting, or exchanging an article. See in general: Steinsaltz, *The Talmud: A Reference Guide*, *supra* n. 108 at 254. For a proprietary act for the transfer of ownership, see e.g. Talmud, *Kiddushin* at 22B, 25B-26A and *Kiddushin* at 25B and *Bava Batra* at 84B.

As well, according to Tosafot, the second case in which there cannot be any disputation. Such is where an express release of the employer by the worker is stated to be conditional on the drawee's default. In such a case, even Rav Shesheth agrees that recourse against the employer becomes available to the worker at least as of the default of the drawee.

In Tosafot's view, there is even no disputation as to the effectiveness of a renunciation unaccompanied by an act of *kinyan*<sup>133</sup>, except that in such a case the renunciation scope and requirements have to be more carefully scrutinized. That is, an express absolute renunciation is effective so as to eliminate any recourse; it has the same effect as an act of *kinyan*, which on its own, and without any express words accompanying it, affects an absolute discharge<sup>134</sup>. In contrast, a 'bare' renunciation, unaccompanied by an act of *kinyan*, requires support, in language, circumstances, or both, to ascertain its validity and scope<sup>135</sup>.

Tosafot then proceeds to lay down two alternative scenarios in which, in the absence of either *kinyan* or an express absolute renunciation, the recourse controversy could arise<sup>136</sup>. The first scenario is that of an *absolute* renunciation by the worker -where it is only implied from his reliance on the drawee. The alternative scenario is that of an express renunciation by the worker of his recourse against the employer, which is *conditional* on payment made by the drawee.<sup>137</sup> As explained below, while the disputation as to the first scenario is concerned with the nature of the drawee's undertaking so as to lead to reliance by the worker, in connection with the second scenario, the disputation focuses on the impact of the condition on the enforceability of the renunciation.

Renunciation of recourse against the employer (payer-debtor) by the worker (payee-creditor) is assumed to occur on the basis of the drawee's

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<sup>133</sup> Which is in line with Talmud, *Kiddushin* 16A, cited by Tosafot in Talmud, *Bava Metzia* 112A.

<sup>134</sup> *Ibid.*

<sup>135</sup> To that end, an act of *kinyan* serves as an indication of firm resolution, without which an undertaking is not binding and is revocable; in the absence of such an act, the firm resolution is to be evidenced by other extrinsic circumstances. Cf. S. Albeck, *The Law of Property and Contract in the Talmud* (Jerusalem: Dvir, 1976, 1983) at 114-15 [in Hebrew]. The binding effect of a promise is the theme of B. Lifshitz, *Promise: Obligation and Acquisition in Jewish Law* (Jerusalem: Ministry of Justice, 1988) [in Hebrew].

<sup>136</sup> A third sub-scenario, under which the recourse does not relate to the underlying debt owed to the worker, but rather to the remedy for the violation of the prohibition against delaying payment, is not relevant to the present discussion and is thus not elaborated on here.

<sup>137</sup> For sure, an express absolute renunciation will work – see preceding paragraph. Implied-conditional is certainly weaker than express-conditional.

promise to pay the renouncing worker. In the first scenario, that of an *absolute* renunciation implied from the reliance on the drawee, the question is whether the renunciation is effective at all, so as to release the employer throughout. In the second scenario, that of an express renunciation *conditional* on payment made by the drawee, the question is whether the renunciation is effective to release the employer even prior to default by the drawee.

In discussing the first scenario, that of an *absolute* renunciation even where it is only implied from the reliance on the drawee, Tosafot is cognizant of the general rule under which in the absence of a deposit or loan owed to the instruction-giver by the instruction-receiver, the latter's promise to pay a designated payee is revocable, even when such promise was given in the presence of all three<sup>138</sup>. Nonetheless, in Tosafot's view, an absolute release of the employer-debtor by the worker-creditor is possible in the context of the first scenario when the drawee assumes, towards the worker, an implied albeit binding and irrevocable obligation, guaranteeing that of the employer. At least where this obligation is incurred in the presence of all three this must be true according to Tosafot even where no money was owed by the drawee to the debtor (instruction giver). Nimukei Yoseph<sup>139</sup> explains the binding effect or irrevocability of the drawee's implied guarantee as premised on the nature of the storekeeper's or moneychanger's calling.

However, under the Talmud, an ordinary guarantor is secondarily liable; he is answerable to the creditor only where the creditor is unable to collect from the principal debtor. To that end, the giving of the guarantee does not usually release the principal debtor from his primary liability; yet, there are exceptions to this rule<sup>140</sup>. Among those listed, the one exception in which the debtor is completely discharged<sup>141</sup> is where the guarantor is '*no-sé ve-noten ba-yad*', in which case the guarantor physically took the money from the lender and passed it on to the debtor. In such a case, the guarantor is regarded as the debtor to the lender, and the borrower receives an absolute discharge; in fact, he has never even been liable to the lender, but rather only

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<sup>138</sup> Talmud, *Gitin* at 13B discussed above in this Part.

<sup>139</sup> Nimukei Yoseph, D"H "Hozer" commenting on Talmud, *Bava Metzia* at 68A (of Rif's page numbering).

<sup>140</sup> Talmud, *Bava Batra* at 173A-174A.

<sup>141</sup> Other exceptions affect the sequence of recovery, namely, cover circumstances in which the creditor may or is to recover first from the guarantor, rather than from the debtor, who nevertheless remains liable.

to the guarantor<sup>142</sup>. Arguably then, Tosafot ought to be taken to say that in our case, the drawee is to be regarded *as if* he took money from the worker in order to pass it on to the employer, who had never been liable directly to the worker.

Alternatively, under a ‘*shlof-dotz*’ (‘detach and attach’) guaranty, the guarantor replaces the debtor as the one liable to the creditor. In such a case, the creditor (worker) *detaches* himself from the original debtor (the employer) and *attaches* himself to the guarantor-drawee instead<sup>143</sup>. The replacing guarantee absolves the debtor (employer) from liability towards the creditor (worker); instead, having been ‘detached’ from the creditor, the

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<sup>142</sup> The five categories into which a guarantee may fall are explained by Tosafot in Talmud, *Bava Batra* at 173B. The category under which the guarantor becomes a primary debtor and the principal (original) debtor is fully discharged is that of a ‘*no-sé ve-noten ba-yad*’, literally translated as “carries [the money from the lender] and gives [it] by hand [to the borrower]”. For a more detailed definition of ‘*no-sé ve-noten ba-yad*’ see B. Kahana, *Guarantee* (Jerusalem: Moresheet Hamishpat Be-Yisrael, 1991) at 95-101 [in Hebrew]. Tosafot points out that even in such a case, the borrower-principal debtor, who remains liable to the guarantor (who is liable to the lender-creditor), may find himself liable directly to the lender-creditor, though only in circumstances under which the guarantor cannot pay the lender-creditor; this could happen under what is known as “Rabbi Nathan’s lien” (see e.g. Talmud, *Pesachim* at 31A, *Ketouvoth* at 19A, *Gitin* at 37A, and *Kiddushin* at 15A). That lien applies where A owes to B who owes to C, in which case C may recover directly from A, but only where he (C) cannot collect from B. Yet, this is a matter of enforcement by C (creditor-worker) of the debt owed to him by B (the drawee-guarantor) by resorting to the security of the debt owed by A (the employer-principal debtor) to B (the drawee-guarantor); by itself this is not a matter of A (the employer-principal debtor) being directly liable to C (the creditor-worker). For this nature of “Rabbi Nathan’s lien” see Rambam, *Mishpatim: Hilchhot Malvé ve-Lovè*, Section 2, Rule 6; and Shulchan Aruch, *Chosen Mishpat*, Section 86, Rule 2.

<sup>143</sup> Admittedly, the position of such a guarantor is mentioned elsewhere, and almost in passing. The context is that of a guarantee given by a Jew for the repayment of an interest-bearing loan taken by a Jewish borrower from a non-Jew. See Kahana, *ibid*, at 92-93. For the origins of the expression, see Rashi in Talmud, *Yevamot* 109B D”H “Shalzion”. In so far as it transforms a lawful obligation (on an interest-bearing debt owed to a non-Jew) into an unlawful one (on an interest-bearing debt owed to a Jew), the ‘*shlof-dotz*’ guarantee is prohibited. See Talmud, *Bava Metzia* at 71B. Prohibitions against charging, taking and paying interest in transactions between Jews are based on three biblical cites: Exodus 22:24, Leviticus 25:36-7, and Deuteronomy 23:20. Under an ordinary (and contrary to a ‘*shlof-dotz*’) guarantee, a Jewish guarantor who was forced to repay a non-Jewish creditor an interest-bearing loan the latter had given a Jewish debtor, claims reimbursement from the Jewish debtor; he is not enforcing an interest-bearing loan and is thus not in violation of the interest prohibition. In my view, there is nothing to prevent a valid ‘*shlof-dotz*’ guarantee from applying to a non-interest bearing loan and, as such, from applying also to a transaction in which all participants are Jews.



debtor (employer) becomes ‘attached’ to the guarantor (drawee), so as to be liable to him.

Arguing against the availability of recourse, Rav Shesheth appears to endorse both the guarantee undertaking of the drawee and its falling into the category under which the primary debtor (the employer) receives an absolute discharge. He further seems to be of the view that the worker’s implied renunciation is fully effective. Conversely, it is not all that obvious whether Rabbah’s view, under which recourse is available, is premised on a rejection of the guarantee theory, on a disapproval of the treatment of the guarantee as falling into the category under which the principal debtor is discharged, or else on deeming an implied renunciation as inadequate to generate a discharge.

Thus, by way of an interim summary, in the first scenario under which there is disagreement between Rav Shesheth and Rabbah, as it relates to the first case in which there is no disputation between them, it is agreed that where an absolute renunciation is expressly stated no recourse is available. In Rav Shesheth’s view this is also the case even where the absolute renunciation is implied. Conversely, Rabbah holds that an implied absolute renunciation does not work so that recourse is available to the worker (payee-debtor) against the (payer-creditor). It is however unclear whether according to Rabbah recourse is available only as of default by the drawee or even any time prior to it.

As indicated, Tosafot’s alternative scenario for the disputation between Rav Shesheth and Rabbah, is that of a renunciation by the worker (creditor) of his recourse against the employer (debtor), even where it is expressly stated to be *conditional* on payment made by the drawee. In invalidating the renunciation and allowing recourse Rabbah is taken to hold that renunciation is mistaken since it is based on contingent and hence unknown facts as to whether the drawee will honour his undertaking to pay.

On this point, the Rosh (a post-Talmudic commenter) explains that the conditional release given to the employer by the worker must be taken to be mistaken, and thus not binding, since the payment obligation of the drawee is revocable<sup>144</sup>. Its revocability is premised on the absence of any deposit or loan owed by the drawee to the employer<sup>145</sup>. The Mordechai (a post-Talmudic commenter) strengthens the mistaken release theory by adding that the worker is aware of the employer’s power to countermand payment,

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<sup>144</sup> Rosh, D”H “Ibaei lehu” commenting on Talmud, *Bava Metzia* at 112A.

<sup>145</sup> See Tur, *Choshen Mishpat*, Section 339 and Shulchan Aruch, *Choshen Mishpat*, Section 339.

that is, to revoke the authority given to the drawee to pay, and thus cannot be taken to release the employer, lest no one will remain liable to pay him his wages<sup>146</sup>.

Presumably, in allowing recourse only after default, Rav Shesheth is not concerned with the revocability or even the existence of the drawee's obligation. This strikes me as logical; after all, on its own terms, the worker's renunciation does not release the employer after the drawee's refusal to pay. Indeed, in treating payment by cheque as conditional,<sup>147</sup> albeit premising it even on an implied renunciation, modern law echoes Rav Shesheth's position as to the second scenario, even as the latter addresses only an express renunciation.

Thus, by way of an interim summary, in the second scenario under which there is disagreement between Rav Shesheth and Rabbah, as it relates to the second case in which there is no disputation between them, it is agreed that in the case of a conditional renunciation expressly stated recourse is available at least as of the drawee's default. What is contested is the availability of the recourse at any time prior to the default. Rabbah submits that recourse is available during such period. Presumably, he holds the same for conditional renunciation, implied from the circumstances. On the other hand, Rav Shesheth submits that no recourse is available during that period, at least as long as the conditional renunciation was expressly stated. *Quare* as to Rav Shesheth's position as regarding conditional renunciation implied from the circumstances.

The final ruling in Jewish law appears to treat the *Bava Metzia* text as relating to the *second scenario* – that of an express conditional discharge pending default by the drawee. Furthermore, Rav Shehsheth's position represents the minority view<sup>148</sup>, so that “the law is not according to him”, but rather, according to Rabbah, who considers the worker-creditor's renunciation to be ineffective, and permits recourse against the employer even prior to the drawee's default<sup>149</sup>. To the disappointment of the modern lawyer, the disputation is resolved according to Rabbah's position as to the lack of validity of the *conditional* discharge even when it is expressly stated. This allows the worker (payee-creditor) to have his recourse against the employer (payer-debtor) throughout, namely, even prior to default by the drawee. The rationale given is that of the revocability of the drawee's

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<sup>146</sup> The Mordechai, D”H “Himchahu” commenting on Talmud, *Bava Metzia* at 112A.

<sup>147</sup> See Part 7 below.

<sup>148</sup> Albeit the one adopted by the Jerusalem Talmud, *Shevuot* 36B-37A.

<sup>149</sup> Mareh Hapanim to the Jerusalem Talmud, *Shevuot* 36B-37A

obligation. Such revocability is premised on the absence of any deposit or loan owed by the drawee to the employer,<sup>150</sup> so as to lead to the invalidation of the worker-creditor's renunciation in the first place. This may be taken to reject as a matter of law the binding effect of the implied guarantee also per the first scenario, and thereby to harmonize the treatment of the two scenarios, with both taken to be premised, as a matter of law, on the revocability of the drawee's obligation.

It has been further resolved in Jewish law that in the case dealt with in the the *Bava Metzia* text all three (employer/payer-debtor, worker/payee-creditor, and moneychanger-storekeeper/drawee) are present together<sup>151</sup>.

The scenario dealt with is nevertheless close to that of the issuance of a cheque since the text speaks of the employer directing the worker to the drawee,<sup>152</sup> so that the drawee may be seen as acting on the basis of the payee-creditor's demand advising of the payer-debtor's payment order.

Indeed, where the worker (payee-creditor) is not present at the time the employer instructed the drawee to pay, there is no renunciation and hence no question that the employer remains liable throughout<sup>153</sup>.

Even if it appears that the drawee is to act on the basis of the demand made by the worker/payee-creditor, we nevertheless do not have here a cheque system. First, the employer/payer-debtor's instruction is said to be oral. Second, the prevailing view<sup>154</sup> is that the text deals with a situation under which the drawee is extending credit to the payer-debtor, rather than charging an asset account in which the payer-debtor deposited funds<sup>155</sup>.

Both points do not exclude the possibility of a cheque equivalent drawing on credit extended by the drawee to the payer-debtor but militate

<sup>150</sup> See Tur, *Choshen Mishpat*, Section 339 and Shulchan Aruch, *Choshen Mishpat*, Section 339.

<sup>151</sup> Kessef Mishna, Rambam, *Kinyan: Hilchot Mechira*, Section 6, Rule 8.

<sup>152</sup> See above, Part I paragraph that follows the one containing note 45.

<sup>153</sup> As in Talmud, *Shevuot* at 45A, and Jerusalem Talmud, *Shevuot* at 36B.

<sup>154</sup> A modern view to the contrary is by Albeck, "The Assignment of Debt", *supra* n. 107. He assumes that the presence of all three is not required in the *Bava Metzia* narrative and yet argues that this text is concerned with the case where the drawee owes the money to the employer.

<sup>155</sup> Rashi to Talmud, *Bava Metzia* at 111A; Rosh, D"H "Ibaei lehu" commenting on Talmud, *Bava Metzia* at 112A; Rif on Talmud, *Bava Metzia* at 68B (of Rif's page numbering). For a comprehensive discussion on the Rif's position, drawing also on additional sources, see Y. Francus, "The Rif's Methodology in the Law Concerning Presence of All Three", (5748-1988) 102 Sinai 196 [in Hebrew]. See also Mareh Hapanim and the Ridvaz to the Jerusalem Talmud, *Shevuot* 36B-37A.

against a cheque system. However, in the final analysis, and notwithstanding the unsatisfactory resolution of the Rav Shesheth-Rabba's disputation, the *Bava Metzia* text and ensuing commentary reflects a most sophisticated and advanced discussion on issues that in hindsight underlie liability on a cheque.

## 5. Cheque-equivalents under Islamic *hawale* doctrine in the early Middle Ages

Documentation of Islamic payment instruments is quite rich;<sup>156</sup> this is particularly true for the period of the Fatimid Caliphate, which was in power between the 10<sup>th</sup> and 12<sup>th</sup> centuries<sup>157</sup>. Approximately from that period, or more specifically, between the 11<sup>th</sup> and 13<sup>th</sup> centuries, plenty of documents<sup>158</sup> originate from the Jewish *Geniza* of Cairo<sup>159</sup>.

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<sup>156</sup> See e.g. SK Bakhsh & DS Margoliouth, *The Renaissance of Islam* (translated from the German of Adam Mez) (Patna: Jubilee, 1937) at 476-77; and E. Ashtor, "Banking Instruments Between the Muslim East and the Christian West", 1 *Journal of European Economic History* 553; rep. (with same pagination) in E. Ashtor, *East-West Trade in the Medieval Mediterranean* (ed. by BZ Kedar) (London: Variorum Reprints, 1986). For summary and sources see e.g. ND Ray, "The Medieval Islamic System of Credit and Banking: Legal and Historical Considerations" (1997), 12 *Arab L.Q.* 43, at 66-79.

<sup>157</sup> For the Fatimid Caliphate visit <<http://en.wikipedia.org/wiki/Fatimid>>.

<sup>158</sup> A most recent comprehensive definite study analyzing the various Geniza payment instruments is by A. Shvitiel, "Orders of Payment, Order of Supply, Instructions for Payment, and Statement of Credit in the Genizah and other Collections at Cambridge University", in B. Outhwaite and S. Bhayro, "*From a Sacred Source*" -- Genizah Studies in Honour of Professor Stefan C. Rief. (Lieden & Boston: Brill, 2011) at 331 who builds on earlier work, particularly (*ibid* at 331) on the "monumental book" of SD Goitein, *A Mediterranean Society*, vol. I: Economic Foundations (Berkeley and LA: University of California Press, 1967) at 240-50. According to Shvitiel (*ibid* at 332), so far 134 documents have been discovered. He classifies them to mercantile payment order, orders for the delivery of goods, administrative payment instructions, and acknowledgements of debts.

<sup>159</sup> For the Cairo *Geniza* in general, see SC Reif, *A Jewish Archive from Old Cairo*, The History of Cambridge University's Genizah Collection (Surrey, Richmond:Curzon, 2000). *Geniza* (or *Genizah*) is a Hebrew word denoting the store-room or depository in a synagogue usually specifically for worn-out Hebrew-language books and papers on religious topics that were stored there before they could receive a proper cemetery burial, it being forbidden to throw away writings containing the name of God (even personal letters and legal contracts could open with an invocation of God). In practice, a *geniza* may have contained writings of a secular nature, with or without the customary opening invocation, and also contained writings in other languages that use the Hebrew alphabet. (see e.g. <<http://en.wikipedia.org/wiki/Geniza>>). Secular documents in the Cairo *Geniza*, such as

Islamic payment instruments have not always acquired distinct names.

Thus, the withdrawal out of an account with a *sarraḥ* (private moneychanger) in the execution of a non-cash payment made by a small retailer to his wholesaler may be treated simply as a *hawale*<sup>160</sup>. In turn, more specialized terminology, though not necessarily uniform or precise, has also developed. Thus, the *ruq'a* has a few meanings. First, it means an order for the delivery of goods. Second, it is a payment order, issued to the payee, instructing the drawee to make payment against its presentment by the person entitled to obtain payment. Third, it denotes the drawee's own obligation to pay, or in fact, any promisor's debt or acknowledgement of debt instrument<sup>161</sup>. The first sense is outside the scope of the present study; in both the second and third senses, which are of interest in the context of the present study, the *ruq'a* overlaps with the *sakk*<sup>162</sup>, from which, linguistically, the modern word 'cheque' may be derived.<sup>163</sup> In fact the second and third meanings may converge; this is so, since the drawee's obligation to pay on a *ruq'a* or *sakk* is typically in pursuance to the payment order directed to the drawee which is at least implicit on the instrument. The express terms of the document may however reflect the debtor's order, the drawee's promise, or both.

Typically, a *ruq'a* or *sakk* does not designate a named payee and is payable to the bearer. As an order to pay addressed to a person acting as a banker, the *ruq'a* and *sakk* correspond to the modern cheque. As a promise to pay, they correspond to the modern promissory note. Being payable to the bearer, and inasmuch as the promisor usually acts as a banker (or more

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payment instruments, were mostly written in Judeo-Arabic (an Arabic dialect using Hebrew alphabet) and may have contained the invocation of God.

<sup>160</sup> See M. Talbi, "Opérations bancaires en Ifrīqiya à l'époque d'al-Māzarī (453-536/1061-1141) – crédit et paiement par chèque", in *Études d'Histoire Ifriqiyenne et de Civilisation Musulmane Médiévale* (Tunis: Publications de l'Université de Tunis: 1982) at 420. See also M. Gill, *In the Kingdom of Ishmael* (Tel Aviv: Tel Aviv University, 1997) vol. I: Studies in Jewish History in Islamic Lands in the Early Middle Ages, at 497 [in Hebrew] who speaks of the use of the deposit document to make payments to the suppliers.

<sup>161</sup> For a *sakk*, from Western Sudan, in effect, in the latter sense, that of an 'IOU' (acknowledgement of debt) document, see e.g. N. Levtzion, "Ibn-Hawqal, the Cheque, and Awdaghost" (1968), 9 *Journal of African History* 223 who nevertheless (not having in mind precise legal terminology) speaks of the document as a 'cheque'.

<sup>162</sup> For the *sakk* (and *sufṭaj* not covered by this study) see e.g. CE Bosworth, "Abū 'Abdallāh Al-Khwārazmī on the Technical Terms of the Secretary's Art: A Contribution to the Administrative History of Mediaeval Islam" (1969), 12 *Journal of the Economic and Social History of the Orient* 8, respectively at 125 and 140.

<sup>163</sup> See e.g. Goitein, *supra* n. 158 at 245.

specifically, a moneychanger), in the third above-mentioned sense, they in fact correspond more to the post-Medieval English banknote<sup>164</sup>.

What is the legal underpinning for these instruments? In the footsteps of earlier legal systems<sup>165</sup>, Islamic law did not treat a debt or the claim to the money owed thereon as an item of property belonging to the creditor and hence disposable by him by transfer or otherwise<sup>166</sup>. However, over the years, bypassing strict orthodoxy, a few mechanisms have developed to confer on a debt the quality of a transferable item of property<sup>167</sup>.

The mandate for collection has played a principal role in that transformation. In this context, a person nominates a designated assignee,<sup>168</sup> typically his own creditor, as his 'mandatary', conferring on him the authority to collect a debt owed to the nominating person by another. In effect, this is a case of a debtor nominating his creditor to collect from the drawee the debt owed by the latter to the debtor. To achieve best results, the mandate to collect is to be reinforced by giving the mandatary-assignee/creditor the additional authority to sue a defaulting drawee on the debt the latter owes the mandator-debtor. The mandate is to be further strengthened by the inclusion therein of an express term under which the mandator (debtor) waives the right of revocation. Vis-à-vis the mandatary-assignee, the mandator/debtor may also waive the benefit of the debt to be collected by renouncing his claim to proceeds to be collected<sup>169</sup>. Such a claim to the proceeds may anyway be lost to the mandator-assignor/debtor and accrue for the benefit of the mandatary-assignee/creditor, to whom the former owes, by means of the operation of the right of setoff<sup>170</sup>.

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<sup>164</sup> For the post-Medieval goldsmith system in England, generating banknotes and cheques, see in general below, Part 7.

<sup>165</sup> See the opening paragraphs to Parts 3 and 4 above.

<sup>166</sup> J. Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964, rep. 1998) at 134 [hereafter: Schacht, *Introduction*]; and C. Chehata, *Essai d'une théorie générale de l'obligation en droit musulman hanéfite* (Paris: Éditions sirey, 1936\1969) at 97.

<sup>167</sup> E. Tyan, "Cession de dette et cession de créance dans la théorie et la pratique du droit musulman (d'après le madhab hanafite)" (1946), 2 *Annales de l'école française de droit de Beyrouth* no 3-4, 23 at 25-27 [hereafter: Tyan, *Cession*].

<sup>168</sup> The mandatary, beneficiary of the transaction, is referred here as an 'assignee' (and the transaction as an 'assignment') by reference to the practical implication of the arrangement, and not its formal legal characterization.

<sup>169</sup> See e.g. *Constantine Emilianides v. Aristodemo Sophocli* (1910), 9 *Cypr. L.R.* 115, at 116, dealing with a creditor appointing an assignee as an agent for collection with authority to keep the proceeds.

<sup>170</sup> For the operation of setoff in general, see Chehata, *supra* n. 166 at 90-92.

Alternatively, a creditor may effectively waive his claim to a debt and confer it on a designated beneficiary, typically his own creditor, by ‘acknowledging’ that the debtor’s debt is actually owed to that assignee<sup>171</sup>.

Beside such methods, Islamic law developed the *hawale* as a mechanism under which a debtor was able to transfer or shift his own obligation to pay his debt to another person. Thus, under Islamic law, the obligation to pay money owed, namely the indebtedness, has been considered as conferring a quality attached to, or bestowed on, the person of the debtor. Under specified conditions, it is however within the debtor’s power to pass on this quality to another person, who is to replace him and become a new debtor to the creditor<sup>172</sup>. The one who becomes a new debtor under the *hawale*, *i.e.* the drawee, may have already been a debtor to the debtor. By means of the mechanism the drawee receives a new creditor. Having owed the debtor, the drawee becomes the transferee of the debtor; he replaces the transferor/debtor as the new debtor to the debtor’s creditor. To that end, as explained below, stretching but staying within limits prescribed by Islamic doctrine, the *hawale* has developed to affect not only a change of a debtor to a creditor; rather it also developed to effect a change of a creditor to a debtor.

*Hawale* literally means ‘removal’<sup>173</sup> or ‘turn’. It denotes the transference of an obligation from one person to another, constituted by “an agreement by which a debtor is freed from a debt by another becoming responsible for it”<sup>174</sup>. What is transferred from the debtor to another person is an obligation

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<sup>171</sup> This is quite analogous to the Talmudic *Oditta* – except that the latter cannot be used as a mechanism for the transfer of a right to a sum of money. See *Talmudic Encyclopedia*, vol. 1 (Jerusalem: Yad Harav Herzog, 1955) [in Hebrew] at 116.

<sup>172</sup> A point highlighted by Tyan, *Cession*, *supra* n. 167 at 24.

<sup>173</sup> This is the preferred word used by *The Hedya* or Guide: Commentary on the Mussulman Laws, trans. by order of the Governor-General and Council of Bengal. By C. Hamilton, 2<sup>nd</sup> ed. with preface and index, by SG Grady (Lahore: New Book House, 1957) at 330. “The Hedya or ‘guide’ ... consists of extracts from the most approved works of the early writers of Mohammadan Law, and was composed in the later half of the 12<sup>th</sup> century.” See *Louka v. Nichola* (1901), 5 Cypr. L.R. 82 at 86, quoted by CA Hooper, *The Civil Law of Palestine and Trans-Jordan*, vol. II (Jerusalem, Azriel Press, 1936) at 24.

<sup>174</sup> For this definition see HAR Gibb & JH Kramers, *Shorter Encyclopaedia of Islam* (Leiden: EJ Brill; London: Luzac, 1953) at 137 where it is further stated that the transference of the obligation “is the angle around which this legal mechanism ‘turns’.” The word further denotes the document by which the transference of the obligation is completed. *Ibid.* Particularly for other meanings, see also B. Lewis, VL Ménage, Ch. Pellat & J. Schacht, *The Encyclopaedia of Islam* New Edition vol. III (Leiden: EJ Brill; London: Luzac, 1971) at 283-85.

to pay the debt; the *hawale* is thus distinguishable from the cession, which is the transfer from the creditor to another person of the right to the money owed or payment due on a debt<sup>175</sup>. Strictly speaking, to avoid a terminological confusion, it may thus be better to speak of the *hawale* as covering the transference of an obligation rather than of a debt; the latter is ambiguous and may be taken to mean as relating to either the obligation to pay the debt or the entitlement to the money owed on the debt.

In a *hawale* facilitating a payment mechanism, it is the drawee ('transferee') who substitutes the debtor ('transferor'), and takes over the debt owed by the latter to the creditor. In a practical setting, a drawee-transferee who owes money to the original debtor-transferor expects not only that his payment to the creditor will confer a discharge on the original debtor-transferor towards the creditor; rather, he also expects that in the process he (the drawee-transferee) will obtain his own discharge towards the original debtor-transferor. A drawee-transferee who does not owe money to the original debtor-transferor intends either to extend credit to him or to give him a discharge from the creditor by way of gift.

Legal theory underlying the *hawale* is contested among the four principal Islamic legal traditions which are the Hanafi, Maliki, Shafi'i, and Hanbali schools of law<sup>176</sup>. Among them, the Hanafi school has been prominent in the east, particularly in Iraq and Syria, while the Maliki school has been prominent in the west, particularly in Egypt and North Africa<sup>177</sup>. The controversy is ample with practical implications.<sup>178</sup>

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<sup>175</sup> For *cessio* in Roman law, see above Part 3.

<sup>176</sup> These schools are discussed by Schacht, Introduction, *supra* n. 166 at 57-68. For a succinct account see Hooper, *supra* n. 173 vol. II at 14-16. All such schools originated mostly in the course of the 2nd century of Islam.

<sup>177</sup> See Schacht, *ibid*, at 65.

<sup>178</sup> For the controversy underlying the *hawale* rules and its implications see Ray, *supra* n. 156 at 60-65. For a comprehensive discussion see A. Chéron & MS Fahmy Bey, "Le transport de dette dans les législations européennes et en droit musulman" II<sup>e</sup> partie, "Le transport de dette (*hewala*) en droit musulman" (1931), 22 L'Égypte contemporaine 137. See also Chehata, *supra* n. 166 at 99-102; LWC van den Berg, *Principes du droit musulman selon les rites d' Abou Hanîfah et de Châfi'i*, trans. by R. de France de Tersant (Alger: Typographie Adolphe Jourdan 1896) at 100-01. Translated primary sources relied on are the Hedya, *supra* n. 173 at 332-34; Khalîl ben Ish'âq, *Abrégé de la loi musulmane selon le rite de l' Imâm Mâlek*, vol. III: Le patrimoine, trans. by GH Bousquet (Alger: La maison des livres, 1961) at 69; Imam Malik ibn Anas, *Al-Muwatta' of Imam Malik ibn Anas: The First Formulation of Islamic Law*, trans. by A. Abdurrahman Bewley (London and New York: Kegan Paul International, 1989) at 309 (§36.31); GH Bousquet, traduction française annotée, *Kitâb et-Tanbîh ou Le livre de l'admonition touchant la loi musulmane selon le rite de l'Imâm Ech-Châfi'i* vol. II opérations sur patrimoine (Alger: la maison des livres, 1951) at 34-35



All Islamic schools require the creditor to become a party to the agreement establishing the *hawale*. These schools vary as to the identity of the other party to the agreement. Under the Hanafi Islamic school of law, the *hawale* is established by the agreement of the creditor and transferee (drawee). A specific agreement by the drawee is thus required. Conversely, under the three non-Hanafi Islamic schools, the *hawale* is established by the agreement of the creditor with the original debtor-transferor; neither the agreement nor the consent of the transferee-drawee is required. The latter is dispensed with inasmuch as the transferee-drawee is anyway a debtor to the transferor-debtor. Since under these three schools the *hawale* is conceptualized as the exchange in the creditor's hands of one existing debt (owed by the debtor to the creditor) by another debt (owed by the drawee to the debtor), its operation does not adversely affect the drawee who remains charged with his original liability, though to a different person.

Under all schools the *hawale* may be initiated by the payer-debtor's instruction to the payee-creditor to collect from the drawee. To entitle the payee-creditor upon presentment of the instruction to the drawee, the latter's consent is required under Hanafi rules but is dispensed with under the other schools. However, either way the *hawale* can be conceptualized on the creditor's power's to demand payment from the transferee-drawee so that the *hawale* can be treated as a precursor for a legal doctrine underlying the cheque.

The general rule in Islamic law is that a suretyship does not discharge the liability of the principal debtor to the guaranteed debt<sup>179</sup>. Being conceptualized by Hanafi law as the drawee-transferee's guarantee, the *hawale* ought to have accommodated a continuous original debtor-transferor's liability to the creditor<sup>180</sup>. Ultimately, however, the notion that prevailed in Hanafi law is that, on the basis of the *hawale*'s effect to 'remove' or transfer the debt from the original debtor-transferor to the drawee-transferee, the original debtor-transferor is to be discharged

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[hereafter: Bousquet, *Kitâb*]; and H. Laoust, *Le Précis de droit d'Ibn Qudâma* (jurisconsulte musulman d'école hanbalite né à Jérusalem en 541/1146, mort à Damas en 620/1223) (Beyrouth: Institut Français de Damas, 1950) at 104.

<sup>179</sup> See e.g. Schacht, *Introduction*, *supra* n. 166 at 158-59. This is so at least as long as the guarantee was given at the request of the principal debtor.

<sup>180</sup> According to this logic, it is the drawee-transferee's liability which should have been secondary, or contingent upon the original debtor-transferor's (primary debtor's) default. But see e.g. van den Berg, *supra* n. 178 at 101 who speaks of the effect of the *hawala* under Hanafi law to confer a conditional discharge upon the original debtor, pending a default by the drawee-transferee (which is obviously the reverse of an ordinary suretyship or guarantee).

altogether, other than when collection from the drawee-transferee becomes impossible<sup>181</sup>. Thus, the original debtor-transferor is taken to remain liable, though only contingently and in a quite limited way, in circumstances described as involving “the destruction of the debt” owed by the drawee-transferee to the creditor. Thus, in Hanafi law, once a *hawale* has been made, the original debtor-transferor becomes liable to the creditor upon the drawee-transferee’s death in poverty, as well as when the drawee-transferee denies the *hawale* which nevertheless cannot be proven by the creditor. This contingent liability is rationalized as analogous to the implied warranty of a seller of goods as to their quality<sup>182</sup>.

Consistent with their treatment of the *hawale* as a transfer or sale of a debt, all other schools deny to the creditor recourse against the original debtor-transferor who thus does not re-incur liability to the creditor upon the drawee-transferee’s default. Yet, other than under the Shafi’i school, this principle is subject to exceptions. Thus, in Maliki law, recourse against the original debtor-transferor is available to the creditor under prescribed narrow circumstances. First, recourse is available against the original debtor-transferor when he is guilty of misrepresentation. Second, recourse is available against the original debtor-transferor where the drawee-transferee is shown to have been insolvent already at the time of the *hawale*<sup>183</sup>. In fact, these are apparent and not real exceptions; continuous debtor-transferor’s liability under Maliki law is more for misrepresentation and breach of warranty relating to the drawee-transferee’s obligation and solvency than under a pure recourse for non-payment by the drawee-transferee<sup>184</sup>. Hanbali

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<sup>181</sup> For this conceptualization of the creditor’s recourse against the original debtor-transferor see E. Tyan, “Le transport de dettes en droit Ottoman” (1925), 1 *Gazette des Tribunaux Libano-Syriens*, no. 2, 25 at 29 [hereafter: Tyan, Transport].

<sup>182</sup> For this summary and the quotation see the Hedyā, *supra* n. 173 at 332-33. See also Chéron & Fahmy Bey, *supra* n. 178 at 140 and 162-67 (further elaborating on the controversies and their resolution over the centuries), and Tyan, Transport, *ibid.*, at 28-29. According to the Hedyā, drawee-transferee’s insolvency (or poverty) prior to death may be temporary and thus does not destroy the drawee-transferee’s debt owed to the creditor so as to revive the original debtor-transferor’s liability. But *cf.* Tyan nevertheless enumerates also the adjudication of the drawee-transferee’s bankruptcy as an event that revives the original debtor-transferor’s liability. Certainly, bankruptcy adjudication and the ensuing bankruptcy discharge did not exist in Medieval Islam (or elsewhere during that time).

<sup>183</sup> According to Khalil ben Ish’âq, *supra* n. 178 at 69, this is so only where the original debtor-transferor was aware of the drawee-transferee’s insolvency.

<sup>184</sup> Another apparent exception under Maliki law is where a person voluntarily assumes a debt of another, in which case, upon his death or insolvency, recourse is available to the creditor against the original debtor. Malik ibn Anas, *supra* n. 178 at 309 (§36.31). Per Maliki

law further restricts the creditor's recourse against the original debtor-transferor to a case of drawee's insolvency, but only in circumstances of an obvious error, as well as where the debtor either expressly warranted the drawee's solvency or deceived the creditor in that respect.

In general, all four schools allow creditor's recourse against the debtor when the requirements for effectuating a valid *hawale* have not been satisfied. For example, where a presenting payee-creditor fails to procure the drawee's consent, there is no *hawale* under Hanafi rules, in which case the payee-creditor has not lost his remedy against the payer-debtor. An unresolved question in the Hanafi, Maliki and Shafi'i schools is the effect of an express term by the creditor as to either availability of recourse against, or continued liability of, the original debtor, whether in general, or under specified circumstances<sup>185</sup>.

According to the Hanafi school, there is no requirement for a preexisting debt owed by the drawee-transferee to the original debtor-transferor; being a voluntary undertaking by him, the drawee-transferee may incur liability on a *hawale* as he wishes, whether or not he is indebted to the transferor-original debtor. Conversely, under all non-Hanafi schools, the drawee-transferee must have been liable for the money owed, albeit to the original debtor-transferor. An attempted *hawale* by a drawee-transferee who does not owe to the transferor is treated in Maliki law as an undertaking to pay the debt of another (namely, that of the original debtor). Such drawee's undertaking constitutes an "indemnity" contract<sup>186</sup>. An indemnity contract is created by express words of the indemnifier and is treated as an undertaking by him to substitute the original debtor who is thereby released. No recourse against

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doctrine this is however not a case of *hawale*, which is established by the agreement of the original debtor and creditor, and does not involve the voluntary undertaking of the drawee.

<sup>185</sup> Chéron & Fahmy Bey, *supra* n. 178 discuss this issue at 170-72 for all three schools but do not mention it in connection with Hanabali law. On the basis of the restrictive view of the Hanabali school on the availability of recourse (as in fact pointed out by these authors, *ibid.* at 171-72), one may speculate that this school does not treat such term as effective. According to van den Berg, *supra* n. 178 at 101, in Shafi'i law, recourse cannot be made available even by contract; Chéron & Fahmy Bey, *supra* n. 178 at 172 acknowledge this to be the dominant view of the Shafi'i school but cite a Shafi'ite opinion according to which this is an effective stipulation as long as it is stated to be an essential condition to the creditor's consent.

<sup>186</sup> Talbi, *supra* n. 160 at 433 does not use the term 'indemnity' (or any equivalent in French) and refers to such a contract as *hamāla*. However, according to Foster, the *hamala*, which is a synonym of *kafla*, is an ordinary guarantee, so that the indemnity contract which "should not be confused with the *hamala*" is the *haml*. See NHD Foster, "The Islamic Law of Guarantees" (2001), 16 Arab L.Q. 133 at 152.

the original debtor is thus available to the creditor who accepted the indemnity. This is however only as long as the indemnity contract was pronounced between the indemnifier (that is, the drawee-transferee) and the creditor in clear and unambiguous language; otherwise, as where the creditor is not aware of the fact that he is paid out of an overdrawn account of the debtor<sup>187</sup>, the latter remains bound on his original debt to the creditor<sup>188</sup>.

In the final analysis, by itself, in the broad sense, the *hawale* is not a distinct type of an Islamic payment instrument; rather, the *hawale* is the legal concept under which such instruments, and even oral agreements, operate as payment mechanisms<sup>189</sup>. To that end, the term is also used to denote any document or arrangement which triggers the application of the *hawale*. It is a bilateral contract<sup>190</sup> between the creditor and either the drawee-transferee under Hanafi law, or the debtor-transferor according to the other schools. Either way, insofar as it embodies both an order to pay and a mandate to collect, the *hawale* suits to provide an underlying legal framework for the operation of a cheque transaction.

## 6. Cheques under Roman law in the late Middle Ages in Continental Europe

Cheques emerged in Continental Europe as enhancements to book transfers practiced by deposit bankers. In the Medieval era, deposit banking is said to be the outgrowth of manual money change<sup>191</sup>. As originally in

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<sup>187</sup> *Ibid.*

<sup>188</sup> Talbi, *ibid.*, at 433; and Foster, *supra* n. 186 at 152-53.

<sup>189</sup> The term is not mentioned in the *Geniza* (see Goitein, *supra* n. 158 at 460, n. 63 (for text at 241); arguably, this is so since, unlike the *ruq'a*, *sakk* and *suf taj*, the *hawale* is not a distinct category of a payment instrument. And yet it is quite common to refer to the *hawale* as a financial technique, side by side with the other instruments. See e.g. AL Udovitch, "Reflections on the Institutions of Credits and Banking in the Medieval Islamic Near East" (1975), 41 *Studia Islamica* 5 at 10 and AL Udovitch, "Bankers without Banks: Commerce, Banking, and Society in the Islamic World of the Middle Ages", in Centre for Medieval and Renaissance Studies University of California, Los Angeles, ed., *The Dawn of Modern Banking* (New Haven and London: Yale University Press, 1979) at 263.

<sup>190</sup> Notwithstanding Rayner who asserts the *hawale* is a unilateral contract. See SE Rayner, *The*

*Theory of Contracts in Islamic Law* (London; Graham & Trotman, 1991) at 307.

<sup>191</sup> The view that attributes an important role in the early era of banking to the lending function, expressed by AE Sayous, "Les opérations des banquiers Italiens en Italie et aux Foires de Champagne pendant le XIII<sup>e</sup> siècle" (1932) 170 *Revue Historique* 1 at 2 and 6, is

Ancient Greece<sup>192</sup>, it was the moneychanger who commenced to take deposits. By 1350, in becoming bankers<sup>193</sup>, moneychangers developed a system of local payments by book transfers, with the view of eliminating “[t]he great inconvenience of making all payments in specie, especially the waste of time involved in counting coin”<sup>194</sup>. As in 12<sup>th</sup> century Genoa, the system that developed was strictly local; no facility for inter-city book transfers is known to have existed throughout the Middle Ages<sup>195</sup>.

This pattern is evidenced by Venetian banking experience. Between late 13<sup>th</sup> and early 14<sup>th</sup> century the moneychangers of Venice, the *campsores*, became bankers<sup>196</sup>. They accepted deposits, lent out of them, and provided payment services from and to current accounts kept with them<sup>197</sup>. Bankers kept with them only a fractional reserve, namely, a limited amount of coined money, ready to satisfy an anticipated demand for cash withdrawal; they lent or invested most money received on deposit. Availability of payment by

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now disfavoured. See e.g. MW Hall, “Early Bankers in the Genoese Notarial Records” (1935), 6 *Economic History Review* 73. At 76 and of R. De Roover, “New Interpretations of the History of Banking”, in J. Kirshner, ed., *Business, Banking, and Economic Thought in Late Medieval and Early Modern Europe: Selected Studies of Raymond de Roover* (Chicago and London: University of Chicago Press, 1974, Phoenix Edition 1976) at 200, 202 [hereafter: De Roover, “New Interpretations”].

<sup>192</sup> See above beginning of Part 2.

<sup>193</sup> De Roover, “New Interpretations” *supra* n. 191 at 213.

<sup>194</sup> See R. De Roover, “What is Dry Exchange?” in J. Kirshner, ed., *Business, Banking, and Economic Thought in Late Medieval and Early Modern Europe: Selected Studies of Raymond de Roover* (Chicago and London: University of Chicago Press, 1974, Phoenix Edition 1976) 183 at 184.

<sup>195</sup> A Medieval banker could be (i) a pawnbroker, (ii) a moneychanger who accepted deposits, or (iii) a merchant banker dealing in exchange. These were three distinct categories and only exchange bankers were involved in international (namely, inter-city) payments (that did not involve cheques). See R. De Roover, “Banking and Credit in the Formation of Capitalism”, Fifth International Conference of Economic History Leningrad 1970 (Paris, 1979) at 9 [hereafter: De Roover, “Banking and Credit”]. See in detail, R. De Roover, *Money, Banking and Credit in Mediaeval Bruges: Italian Merchant Bankers, Lombards and Money Changers: A Study in the Origins of Banking* (Cambridge, Mass.: The Mediaeval Academy of America, 1948; republished, London: Routledge/Thoemmes Pres, 1999 as vol. II of *The Emergence of International Business, 1200-1800*).

<sup>196</sup> W. Holdsworth, *A History of English Law*, vol. VIII (London: Methuen & Co., Sweet and Maxwell, 2<sup>nd</sup> ed.: 1937, rep. 1966) at 178 (though unfortunately at 128 he mistakenly attributes the invention, use and development of the bill of exchange to moneychangers, or in his language, to “the exchangers, whose business it was to give coins of one state in exchange for the equivalent value of coins of another state...”).

<sup>197</sup> See in detail: RC Mueller, “The Role of Bank Money in Venice, 1300-1500”, in *Fondazione Giorgio Cini et al.*, eds., *Studi veneziani* (NS), vol. III (Giardini, 1979) at 47.

book transfers, recognized by early 14<sup>th</sup> century legislation in Venice, allowed banks to reduce cash holdings even further and increase their investments and credit extensions. This type of local banking system had spread in Continental Europe throughout the 14<sup>th</sup> and 15<sup>th</sup> centuries. It was premised on deposits made by customers for convenience or safekeeping.

Customers held with bankers current accounts, in which deposits were made, to be used for book transfers. Parties to a book transfer had to appear in person before the bankers; that is, only oral payment orders were accepted. Written orders, as distinguished from letters authorizing agents to act on behalf of parties, did not exist. The inscription by a banker of a debit and credit in a current account was authoritative as a notarial instrument, and hence reliable. The personal-presence requirement did not involve any inconvenience since bankers and merchants were all located close to each other.

Bankers held accounts with each other which may have allowed for interbank transfers, albeit under a procedure that I was unable to ascertain<sup>198</sup>. Accounts among major banks may have been settled only on irregular intervals. In fact, the existence of correspondent accounts by banks with each other was often abused. Such was the case when a customer wishing to withdraw cash was sent by his banker to a correspondent (holding an account for the customer's banker) – who may have sent the customer to another correspondent (holding an account for the correspondent of the customer's banker) – and so on.

De Roover explains payment by book transfer as an “assignment in bank” which “[a]ccording to the medieval jurists ... discharged the debtor from any other obligation.”<sup>199</sup> Relying particularly on a 14<sup>th</sup> century Italian jurist named Bartolo Da Sassiferrato, he refers to the book transfer as an ‘assignment’<sup>200</sup>, requiring the consent of the debtor, banker, and creditor. Upon the occurrence in a bank of that transaction, the debtor is irrevocably discharged, so that the transfer is equal to payment in current coins. This is so “on condition that the banker or moneychanger promises the creditor to hold the sum transferred at the creditor's disposition.” This rule effectively treats the book entry on the banker's books as an absolute discharge of the

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<sup>198</sup> Note that contrary to Mueller above note 34 at 74-76, M. Manning, E. Nier & J. Schanz, eds., *The Economics of Large-value Payments and Settlement: Theory and Policy Issues for Central Banks* (Oxford: Oxford University Press, 2009) at 24 find “no conclusive evidence” for interbank transfers in Medieval Venice.

<sup>199</sup> De Roover, “New Interpretations”, *supra* n. 191 at 215, 216.

<sup>200</sup> For this term see above towards the end of Part 3.

original debt, upon which the creditor forfeits his recourse against the original debtor. The rule is said, however, to apply only to a bank transfer. Otherwise, that is in an ‘assignment’ on a third-party other than a public moneychanger, the creditor keeps his recourse right against the debtor in case the non-bank third party declines to honour his undertaking<sup>201</sup>.

Underlying this distinction is the fact that the similarity between the bank and merchant book-transfers could not be overstated. In some respects, a debt owed by a merchant is not the same as a debt owed by a deposit banker. True, a deposit banker is not necessarily more solvent than an established merchant. Nonetheless, one’s random debtor’s debtor may be less reliable or creditworthy than one’s debtor, and certainly, unlike one’s banker, had not been pre-selected. Furthermore, already in the Middle Ages deposit bankers were subject to some degree of public scrutiny and regulation<sup>202</sup>. Moreover, the theory under which payment on the books of a deposit banker may be treated by the payee/creditor as the equivalent of payment in cash, is premised on the assumption that the payee in any event would have deposited the cash received from the payer/debtor with the deposit banker, thereby replacing the payer by the deposit banker as his debtor. Payment by bank book-transfer eliminates the cumbersome process of counting and assessing the quality of the coins received<sup>203</sup>, so that the book transfer on the deposit banker’s books is in effect a short-cut to a bank deposit, bypassing altogether the cash payment of which it consists. It is against this background that a debtor paying by means of a bank book-debt is absolutely discharged, as if he handed the cash which was then deposited by the payee-creditor with the banker.

This cannot be said on a debt owed by a merchant. Hence, a creditor paid by means of a debt owed by a merchant, as opposed to a debt owed by a deposit banker, is not to be deemed as relinquishing his claim against the original debtor. Stated otherwise, grounds making the effect of the bank book-transfer to release the debtor altogether, do not exist in the case of a non-banking book transfer. Had the law insisted on complete substitution,

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<sup>201</sup> R. De Roover, *L’Evolution de la Lettre de Change XIV<sup>e</sup> – XVIII<sup>e</sup> siècles* (Paris: Librairie Armand Colin, 1953) at 208. See also at 212-13. In these three pages he summarizes the views of Bartolo Da Sassofferato (1314-1357); Baldo Degli Ubaldi (1327-1400); and Giasone Del Maino (1435-1519). De Roover acknowledges (at 208) Bartolo’s text to be “obscure” but, at 85-87, claims to follow its usual interpretation including by the two other jurists.

<sup>202</sup> For Venice, see e.g. Mueller, *supra* n. 197, particularly at 73-74 (licensing and bonding requirements) as well as 49, 52-53, 62-64, and 84-90.

<sup>203</sup> For a 15<sup>th</sup> century quote to a similar end see Mueller, *ibid*, at 49.

the procedure would have been less prevalent, and its practice would have been limited to circumstances where the replacing debtor (drawee) had been pre-screened so as to be absolutely acceptable to the transferee/payee in lieu of the original debtor (transferor). With this in mind, Medieval legal doctrine treated the non-banking transfer as carried out with recourse against the transferor/payer, to become available to the payee upon the default of the drawee, the latter being the merchant on whose books the transfer was carried out.

Unfortunately, terminology used by De Roover is confusing. First, as indicated above at the end of Part 3, assignation denotes a transfer with recourse. The bank book transfer is without recourse and hence to characterize it as assignation seems to be problematic. Alternatively, while *cessio* gives absolute discharge, like *assignatio*, it does not require the drawee's consent. Conversely, the Medieval banking book transfer requires the presence and consent of all three parties, namely, debtor-payer, creditor-payee, and drawee-banker. Indeed, a drawee-banker is likely to agree to the transfer of a credit balance from the account of one customer to that of another, and may breach his contract with the transferor if he declines to act on the latter's transfer instructions; hence the banker's consent is likely to be routinely given. At the same time, his consent and affirmative response in the form of posting on his books the entries reflecting the book transfer is an essential component of the payment transaction; this precludes the book transfer from being not only *assignatio* but also *cessio* from the payer/debtor to the payee/creditor.

For its part, the presence-of-all-three requirement, and hence, the lack of reliance on a written instruction, was bound to eliminate fraud. As indicated, the requirement was not a source of inconvenience, because usually all three were situated in the same vicinity and the banker tended to keep his books available on his desk<sup>204</sup>. However, on occasion, the debtor was ill and thus inhibited from coming to the banker. It is on such rare occasions that written payment orders started to be used. Gradually however, already throughout the 14<sup>th</sup> and 15<sup>th</sup> centuries, written payment orders spread and became common, first in Italy, outside Venice, particularly in Tuscany, including

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<sup>204</sup> A point highlighted by AP Usher, *The Early History of Deposit Banking in Mediterranean Europe* vol. I (Cambridge, Mass: Harvard University Press, 1943) at 8 (covering 1240-1723 in Catalonia) at 90, where he speaks of "the custom of transacting all important business in person if possible" as facilitated by "[t]he compactness of medieval and early modern towns and the concentration of the commercial community...".



Florence, and then elsewhere outside Italy<sup>205</sup>. Initially, “[w]ritten instruments could be used ... only as supplementary memoranda or as instruments appointing an agent”<sup>206</sup>. When they became payment orders, whose presentment to the banker by one party dispensed with the presence of the other, their function was to generate either a cash payment or a book transfer.

Possibly some of such payment orders were in effect cheques, each issued by the payer/debtor to the payee/creditor, instructing the banker to pay to the payee/creditor, as well as authorizing the payee/creditor to collect from the banker. It is in this process that a Medieval cheque mechanism was born. Medieval cheques were not negotiable, usually even non-transferable<sup>207</sup>; possibly other than in specific times and places they were not widely used<sup>208</sup>. They initiated either a payment in cash or a book transfer; either way the cheque accomplished “the transfer of the [depositor-drawer’s] right against the banker to [the payee].”<sup>209</sup>

As stated above in Part 1<sup>210</sup>, to be a cheque, an instrument containing a double mandate, to the banker to pay and the payee to collect, must confer on the payee the right to apply the proceeds to his own use, particularly in payment of a debt owed to him by the instrument issuer, i.e. the drawer. This

<sup>205</sup> For Barcelona, see e.g. Usher, *ibid.*, at 283-88.

<sup>206</sup> *Ibid.*, at 283.

<sup>207</sup> However, notwithstanding sources in the ensuing note, see the in-depth discussion (in Italian) of F. Melis, *Note di Storia della Banca Pisana nel Trecento* (Pisa: Società Storica Pisana, 1955) on an extensive cheque collection from the second half of the 14<sup>th</sup> century in Tuscany. Melis identifies cheques transferable by the instruction of the payee placed on the back (*recto*) of the cheque (*ibid.* at 112). The example given is of a situation in which the transferee was identified in the original cheque, that is, the payee was authorized to transfer the cheque to a specified transferee, from which I gather that no further transfer could have been made. This is of course a far cry from free circulation. I relied on an informal partial translation of Melis.

<sup>208</sup> See in general, De Roover, “New Interpretations”, *supra* n. 191 at 216-17 as well as Usher, *supra* n. 204 at 90-94. For an extensive discussion, see M. Spallanzani, “A Note on Florentine Banking in the Renaissance: Orders of Payment and Cheques” (1978), 7:1 *Journal of European Economic History* 145. The author points out (e.g. at 146) the difficulty in identifying with certainty those payment orders which are cheques. Furthermore, his definition of “cheque” (at 148), as “an order of payment issued on a bank ... by someone who has funds available” is too broad and in effect does not distinguish between a cheque and a payment order issued directly to the bank on which it is drawn. At the same time, my overall impression from the article is that he speaks of a “cheque” in the correct sense.

<sup>209</sup> Usher, *ibid.*, at 91, referring in the quoted language to the depositor-drawer as ‘creditor’ (of the bank) and to his own (the ‘creditor’-depositor-drawer’s) creditor, namely to the payee, as the “third party”.

<sup>210</sup> Paragraph containing notes 41-44, above.

right may be towards drawee-banker and/or the drawer. Stated otherwise, either the issue or presentment of the instrument to the banker may transfer or confer rights on the payee towards the drawee. Alternatively or in addition, either its issue or presentation to the banker need affect the drawer's rights towards the payee. Unfortunately, in the process just described, it is not clear to me when the payee acquired such rights. Stated otherwise, I have not been able to find a discussion on the payee's rights between the issuance of the cheque to him and the payment of the cheque whether in cash or in the form of credit posted to his account.

Enhancements in both practice and legal doctrine subsequently took place in Amsterdam, presumably in the transition from the 16<sup>th</sup> to the 17<sup>th</sup> century<sup>211</sup>. Thus, moneychangers, 'transformed' into 'cashiers' (or *kassiers* in Dutch), facilitated payments initiated by "written ... *assignaties*." These instruments, embodying depositors' payment orders given to their 'cashiers', "acted as cheques" that "[l]ike bills of exchange... were endorsable and thus might pass, as means of payment, from hand to hand."<sup>212</sup>

The use of such instruments spread with the establishment in 1609 of the Bank of Amsterdam (the *Wisselbank*)<sup>213</sup>. To a large extent its operations superseded those of the moneychangers<sup>214</sup>, and further heralded the appearance of other Continental public banks. Compelling merchants to open accounts with them, Continental public banks were deposit and transfer

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<sup>211</sup> "By the 1690s Amsterdam was the world capital of financial innovation." See N. Ferguson, *The Ascent of Money: A Financial History of the World* (New York: Penguin Press, 2008) at 127.

<sup>212</sup> P. Dehing & M. 'T Hart, "Linking the Fortunes: Currency and Banking, 1550-1800" in M. 'T Hart, J. Jonker & J.L. Van Zanden, eds., *A Financial History of the Netherlands* (Cambridge: Cambridge University Press, 1997) at 37, 43. See also P. Spufford, "Access to Credit and Capital in the Commercial Centres of Europe", in K. Davids & J. Lucassen, eds., *A Miracle Mirrored: The Dutch Republic in European Perspective* (Cambridge: Cambridge University Press, 1995) at 303, 306.

<sup>213</sup> For example, for the Bank of Amsterdam (founded at the beginning of the 17<sup>th</sup> century) and discussed further below, see JG Van Dillen, "The Bank of Amsterdam", in JG Van Dillen, ed., *History of the Principal Public Banks* (London: Frank Cass, 1964, being 2<sup>nd</sup> impression of the 1934 1<sup>st</sup> edition, The Hague: Martinus Nijhoff, 1934) at 79, 84.

<sup>214</sup> P. Dehing & M. 'T Hart, *supra* n. 212 at 43-44, note that with the establishment of the Bank of Amsterdam in 1609 "the municipal authorities of Amsterdam temporarily prohibited all money changers and cashiers and their paper money...". The ban was lifted in 1621 "and the remaining money changers and cashiers became licensed officials." However, in this new capacity, cashiers were required to hold accounts with the Bank of Amsterdam and were prohibited from keeping money in specie for longer than 24 hours.

banks. Some allowed the use of cheques (or ‘assignments’)<sup>215</sup>; others insisted on oral orders in the presence of all parties. Dave De Ruysscher speaks of the use during the first decades of the 17<sup>th</sup> century of “[o]rder notes ... called *assignatiën*” containing “orders of payment directed at the commissioners of the Bank of Amsterdam” which “introduced the Italian ‘*assengo in banco*’ on the Amsterdam market”<sup>216</sup>. Presumably the issuance of such instruments to payees did not discharge the payers. In his view it is the Dutch *assignatio* which links between Roman law and statutory provisions in Germany (BGB §§783-92)<sup>217</sup> and Switzerland (CO arts. 466-71)<sup>218</sup> addressing payment orders.

Under both Swiss CO art. 466 and German BGB §783, an order constitutes a double authority from the order giver (the ‘drawer’ in Germany). First, it is directed to the recipient of the order (drawee) to pay<sup>219</sup> the payee for the account of the order giver/drawer. Second, the order is directed to the payee, authorizing him to collect in his own name from the drawee. In both Switzerland (CO art. 468(1)) and Germany (BGB §784(1)), acceptance of the order by the drawee binds him towards the payee. Nevertheless, in both Switzerland (CO art. 467(1)) and Germany (BGB §788), where the order is intended to discharge a debt of the order giver/drawer to the payee, the debt is discharged only upon payment by the drawee to the payee. Stated otherwise, the acceptance by the drawee does not serve as an absolute discharge to the order giver/drawer towards the payee. In Switzerland, under CO art. 467(2), “the payee who has agreed to the order can only renew his claim against the order giver if, having demanded payment from the recipient of the order, he was unable to obtain it at the expiration of the term stated in the order.” The issuance of the payment order thus suspends the obligation of the order giver/payer and

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<sup>215</sup> See e.g. for the Bank of Amsterdam, Van Dillen, *supra* n. 213 at 86 where it is further stated that “[t]he assignments should be handed in by the customer personally or by his proxy.”

<sup>216</sup> Dave De Ruysscher, “Innovating Financial Law in Early Modern Europe: Transfer of Commercial Paper and Recourse of Liability in Legislation and *Ius Commune* (Sixteenth to Eighteenth Centuries)” (2011) 5 *European Review of Private Law* 505 at 510.

<sup>217</sup> *The German Civil Code*, Revised Edition translated with an Introduction by SL Goren, (Littleton, Colo.: Fred B. Rothman & Co., 1994).

<sup>218</sup> *Swiss Code of Obligations*, English Translation of the Official Text, Volume I Contract Law (Zurich: Swiss-American Chamber of Commerce, 2008).

<sup>219</sup> Under the provisions, the order directed to the drawee may be to remit to the payee money, securities or other fungibles. We are concerned here only with the remittance (namely, payment) of money.

operates to conditionally discharge it. Under CO art. 467(3), to avoid liability for damages, the payee who receives the order directly from the order giver must, if he does not intend to follow up his claim on it, notify the order giver of his refusal promptly.

By way of summary, in post Medieval Europe, the cheque emerged as an instrument issued by a payer to a payee and containing a double mandate ordering a banker to pay and authorizing the payee to collect. When the instrument evolved to confer rights on the payee towards the drawee and/or the drawer it became a 'cheque'. This evolution requires further research.

## 7. Cheques and cheque law come of age in post-Medieval England

Except for the ongoing introduction over the years of technological improvements, the fundamentals of the modern cheque system can directly be traced to the 17<sup>th</sup> century interbank goldsmith cheque system<sup>220</sup>. For its part, the cheque system served also as a model for ensuing systems for the clearing and settlement of payment orders other than those on a cheque.

During the second half of the 17<sup>th</sup> century, through a tight network of correspondent banking facilitating a systematic debt clearing, goldsmith banking allowed interbank customer payments to take place on a regular basis<sup>221</sup>. It was this tight network which underlay the emergence of a national banking system facilitating both a national payment system premised on the cheque as well as the indispensable role of banks as financial intermediaries. Arguably, it is the efficiency attributed to that network which enabled the goldsmiths to supersede altogether the scribes, on whose services as depositaries the goldsmiths themselves counted in the early days of their monetary operations<sup>222</sup>.

Richards<sup>223</sup> identifies *Vyner v. Clipsham*,<sup>224</sup> as “[p]robably the first case involving the use of cheques.”<sup>225</sup> According to his account, the case

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<sup>220</sup> The goldsmith cheque system developed to lay the foundations of the national cheque system as we know it today. See e.g. Vasseur & Marin, *supra* n. 57 at 11 where they also acknowledge that France followed suit in the middle of the 19<sup>th</sup> century.

<sup>221</sup> See in detail, S. Quinn, “Balances and goldsmith-bankers: the co-ordination and control of inter-banker debt clearing in seventeenth-century London”, in D. Mitchell, ed., *Goldsmiths, Silversmiths and Bankers: Innovation and the Transfer of Skill, 1550 to 1750* (London: Alan Sutton Publishing and Centre for Metropolitan History, 1995) at 53.

<sup>222</sup> For the use of the scribes by the goldsmith in the early days of the latter monetary operations, see e.g. see A. Feavearyear, *The Pound Sterling -- A History of English Money*, 2<sup>nd</sup> ed. by EV Morgan (Oxford: Clarendon Press, 1963) at 102.

<sup>223</sup> Richards, *supra* n. 50 at 49-50.

demonstrates the existence, albeit not the operation, of an interbank goldsmith system. It was concerned with a transfer from an account of a customer with one goldsmith to an account of the same customer with another goldsmith. The transfer was carried out by means of a cheque drawn on one goldsmith and deposited into the account with the other. The latter paid the depositor twice and was seeking to recover the second payment.

The goldsmith network manifested itself primarily in the effective clearing of interbank payments embodied in banknotes and cheques. The goldsmith clearing system was strictly bilateral. “Moreover, the goldsmith-bankers avoided depositing large sums with each other by routinely creating overdrafts.”<sup>226</sup> Stated otherwise, a goldsmith did not demand from a fellow-goldsmith a positive balance as a precondition for paying an instrument presented to him by the fellow-goldsmith. Rather, a cheque delivered for collection to a ‘cashing’ goldsmith was immediately paid by him in reliance on credit he extended to the fellow-goldsmith on which the cheque was drawn<sup>227</sup>. This did not unnecessarily tie up funds, and thus facilitated expansion<sup>228</sup>.

The initial trust, without which the system could not have operated, may be explained by the goldsmith trade’s earlier specialization in precious metals and the lengthy intensive apprenticeship required for the purpose of becoming a goldsmith. This method of apprenticeship was fully adapted to train the goldsmith to become a banker. “In exchange of seven years of non-wage skilled labour and often an initial fee, the master taught the apprentice the necessary banking skills, introduced him to established bankers and developed the ground work for a long professional relationship.”<sup>229</sup> Thus, in laying down the foundations for the modern banking system on the basis of

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<sup>224</sup> Richards, *ibid*, cites it as PRO, Ch P., before 1714 (Reynardson), 35/66. I was unable to verify this source.

<sup>225</sup> Holden, *supra* n.47 at 209.

<sup>226</sup> Quinn, *supra* n. 221 at 54.

<sup>227</sup> This improved on the Amsterdam Exchange Bank system under which a bill presented for payment was paid on the following day and only against an offsetting bill in the opposite direction. See Quinn, *ibid*, at 55 and Richards *supra* n. 50 at 234-35.

<sup>228</sup> At the same time, in this mutual dependence lies the roots of the ‘systemic risk’, being presently defined as “the risk that the inability of one of the participants to meet its obligations ... could result in the inability of other system participants ... to meet their obligations as they become due.” Committee on Payment and Settlement Systems (CPSS), *Core Principles for Systemically Important Payment Systems* (Basle: Bank for International Settlements, January 2001) at 5.

<sup>229</sup> Quinn, *supra* n. 221 at 61.

concepts and institutions that had already evolved elsewhere, London bankers took advantage of their goldsmith background and put it into use.

As pointed out in Part 1 above, the cheque has been overwhelmingly regarded as a type of a negotiable bill of exchange. Historically, this is incorrect. It is however true that the cheque evolved in England side by side with the transformation of the medieval bill of exchange both into (i) an instrument for the inland remittance of funds entitling the payee to recover thereon from the drawer with whom he has not dealt<sup>230</sup> and (ii) an instrument transferable by negotiation, that is, endorsement (where it is payable to a named payee) and delivery<sup>231</sup>. This generated unavoidable convergence between the laws governing these two instruments so that pragmatically it became convenient to treat the cheque as a type of a bill of exchange.

Perhaps the awareness of the distinct nature of the cheque led to the fact that judicial pronouncement of it as a type of a negotiable bill of exchange came late, and not without hesitation<sup>232</sup>. To begin with, *Grant v. Vaughan* (1764)<sup>233</sup> held that a “cash-note” drawn upon a banker, namely a cheque, payable to a named payee or bearer, is “by law, negotiable”<sup>234</sup>. Subsequently, *Boehm v. Sterling* (1797)<sup>235</sup> was an action brought “upon a bill of exchange”<sup>236</sup> to enforce payment on a cheque payable to the bearer. It was, however, argued in that case that in contrast to the note, the cheque is not considered negotiable, so that “whoever receives it in payment takes it on the credit of the person giving it and not on the intrinsic credit of the instrument itself”<sup>237</sup>. In the final analysis in that case, to Lord Kenyon, this

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<sup>230</sup> *Chat and Edgar Case* (1663) 1 Keble 636, 83 E.R. 1156 (where having been indebted to the payee, the remitter instructed the drawer to issue a bill of exchange payable to the payee). For the earlier use of the bill of exchange as a machinery for the execution of an inter-city exchange transaction see *Burton v. Davy* (1437) 49 Selden Society 3, Select Cases Concerning the Law Merchant (H. Hall, ed., London: Bernard Quaritch, 1932) 117 as explained e.g. by JS Rogers, *The Early History of the Law of Bills and Notes: A Study of the Origins of Anglo-American Commercial Law* (Cambridge: Cambridge University Press, 1995) at 44-5.

<sup>231</sup> *Anon.* (1694) Holt, K.B. 115, 90 E.R. 962; *Williams v. Field* (1694) 3 Salk. 68, 91 E.R. 696. For an earlier obiter to that effect see *Hodges v. Steward* (1692), 1 Salk. 125, 91 E.R. 117 (second point). See also *Claxton v. Swift* (1685) 3 Mod. 86, 87 E.R. 55.

<sup>232</sup> For a review of the process, see Holden, *supra* n.47 at 215-19.

<sup>233</sup> 3 Burr. 1516, 97 E.R. 957.

<sup>234</sup> *Ibid.* at 1523 (Burr.), 961 (E.R.).

<sup>235</sup> 7 T.R. 423, 101 E.R. 1055.

<sup>236</sup> *Ibid.* at 423 (T.R.), 1056 (E.R.).

<sup>237</sup> *Ibid.* at 428 (T.R.), 1058 (E.R.).

proposition “appear[ed] most extraordinary”<sup>238</sup>, and he dismissed it outright. Similarly, albeit only as late as in the middle of the 19<sup>th</sup> century, *Serle v. Norton* (1841)<sup>239</sup> did not question the right of a non-payee holder of a cheque payable to the order to sue the drawer<sup>240</sup>.

The nature of a cheque as a negotiable bill of exchange was finally confirmed, albeit not without being first challenged, quite late, in *Keene v. Beard* (1860)<sup>241</sup>. In the course of his judgment, Byles J. was of the view that a cheque “has ... all the incidents of an ordinary bill of exchange”<sup>242</sup>; as such it “falls within the class of ordinary bills of exchange”<sup>243</sup>.

Interestingly, Byles J. pointed out two unique features of a cheque which distinguish it from an ordinary bill of exchange. In his view, a cheque “is not discharged by delay in the presentment, unless ... he has been prejudiced thereby”<sup>244</sup>. On this point his ruling was subsequently codified<sup>245</sup>. As well he stated, a cheque appropriates drawer’s funds held by the drawee<sup>246</sup>. On this point he was subsequently overruled in *Hopkinson v. Forster*, (1874). In that case, having been “sure that [Byles J.] never meant to lay down that a banker who dishonoured a cheque is liable in a suit in equity by the holder,” Jessel M.R. specifically stated that being “a bill of exchange payable at a banker”, “A cheque is clearly not an assignment of money in the hands of a banker”<sup>247</sup>.

This position was codified. To begin with, “[a] cheque is a bill of exchange drawn on a banker payable on demand,” so that in principle, “... the provisions of [the BEA] applicable to a bill of exchange payable on demand apply to a cheque”<sup>248</sup>. Accordingly, as any bill of exchange, a cheque, by itself, “does not operate as an assignment of funds in the hands of the drawee available for payment thereof, and the drawee... who does not

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<sup>238</sup> *Ibid.* at 430 (T.R.), 1059 (E.R.).

<sup>239</sup> 2 M. & Rob. 401, 174 E.R. 331.

<sup>240</sup> Unfortunately, the Report contains a “somewhat irrelevant and certainly inaccurate footnote” to the contrary. See Holden, *supra* n. 47 at 218.

<sup>241</sup> 8 C.B. (N.S.) 372, 141 E.R. 1210.

<sup>242</sup> *Ibid.* at 381 (C.B.), 1213 (E.R.).

<sup>243</sup> *Ibid.* at 381 (C.B.), 1214 (E.R.).

<sup>244</sup> *Supra* n. 241 at 381 (C.B.), 1213 (E.R.).

<sup>245</sup> See s. 74 in the UK and Israel, s. 166 in Canada, and s. 60(1) in Australia.

<sup>246</sup> *Supra* n. 241 at 381 (C.B.), 1213 (E.R.).

<sup>247</sup> L.R. 19 Eq. 74 at 76.

<sup>248</sup> BEA s. 73 in the UK; 165(2) in Canada; s. 73 in Israel; s. 71 (in conjunction with s. 1) in South Africa.

accept<sup>249</sup> ... is not liable on the instrument<sup>250</sup>. For its part acceptance *per se* is not practiced with respect to cheques and is even precluded altogether under ULC art. 4 which goes on to provide that “A statement of acceptance on a cheque shall be disregarded”. Hence, upon the dishonour<sup>251</sup> of a cheque, as in the case of any unaccepted bill of exchange, regardless of the availability of funds owed by the drawee to the drawer, the payee has no remedy against the drawee. The payee’s sole recourse is against the drawer, both on the underlying transaction<sup>252</sup> and the instrument<sup>253</sup>.

A prominent avenue fastening liability on a drawee who has not accepted nonetheless exists under French law. This route allows the holder to recover from the drawee on the basis of *la provision*, namely, what the drawee owes the drawer, even without an acceptance<sup>254</sup>. This exception originated in

<sup>249</sup> The acceptance of a bill of exchange (which other than in Australia includes a cheque is defined as ‘the signification by the drawee of his assent to the order of the drawer’. See s. 34(1) in Canada, s. 17(1) in the UK, s. 15(1) in South Africa, and s. 16(a) in Israel. No cheque acceptance is provided for in Australia under the Cheques Act. Cheque acceptance is precluded under ULC art. 4. Acceptance of a bill of exchange is governed by ULB arts. 21-29.

<sup>250</sup> S. 53(1) in the UK, to which correspond s. 126 in Canada, s. 53(a) in Israel, s. 51 in South Africa, and s. 88 in Australia. See also UCC §3-408 (almost verbatim). This is the rule also under the ULC even in the absence of a parallel provision.

<sup>251</sup> A cheque is dishonoured by non-payment when it is duly presented for payment and payment is refused or cannot be obtained, or when presentment is excused. See s. 47(1) in the UK, s. 45(1) in South Africa, s. 94(1) in Canada, and s. 46(a) in Israel, Cf. s. 69 in Australia providing that a cheque is dishonoured ‘if the cheque is duly presented for payment and payment is refused by the drawee [bank], being a refusal that is communicated by the drawee [bank] to the holder ...’ The ULC does not use the term ‘dishonour’ but rather speaks (in s. 40) of the refusal to pay upon presentment.

<sup>252</sup> See *Re Charge Card Services Ltd* [1988] 3 All E.R. 702 at 707 (C.A.) applying *Sayer v. Wagstaff* (1844) 5 Beav. 415, 423; 49 ER 639, 642 (dealing with payment by promissory note as a conditional payment).

<sup>253</sup> As a rule, the holder may recover from any preceding party who has signed the instrument. See s. 47(2) in the UK, s. 45(2) in South Africa, s. 94(2) in Canada, s. 46(b) in Israel, and s. 70 in Australia. For the drawer’s engagement to compensate the holder upon the dishonour of the cheque, see s. 55(1)(a) in the UK, s. 53(1)(a) in South Africa, s. 129(a) in Canada, s. 55(a)(1) in Israel, and s. 71 in Australia. Since under the Cheques Act ‘dishonour’ does not include circumstances where presentment is excused, the drawer’s undertaking to compensate the holder is stated to cover the case where the presentment of the cheque for payment is dispensed with. For recourse for non-payment against parties liable on a cheque see ULC art. 40.

<sup>254</sup> For *la provision* in French law, see e.g. C. Gavalda & J. Stoufflet, *Instruments de paiement et de crédit*, 7<sup>ème</sup> éd. rédigée par J. Stoufflet (Paris: Litec, impr., 2009) at 105-14; and for a summary, P. Ellinger, “Negotiable Instruments”, *supra* n. 19 at 110-13. See also G. Ripert & R. Roblot, *Traité de droit commercial*, 13<sup>ième</sup> éd. (Paris: Librairie Gènerale de droit



connection with bills of exchange and extended to apply to cheques<sup>255</sup>. As understood in French law in the late 17<sup>th</sup> century<sup>256</sup>, *la provision* is constituted by the sum of money held by the drawee for the drawer, or perhaps, more specifically, provided to the drawee by the drawer, with which the drawee is obligated to pay the bill. However, over the years, *la provision* acquired a more subtle and in fact broader meaning. It has become the drawer's right towards the drawee that may not necessarily be constituted only by a sum of money held by the latter to the former. *La provision* is thus distinguished from both 'cover' and 'value'; 'cover' requires an actual asset, possibly a sum of money, and 'value' refers to what is, or to be, provided by the payee in return for the bill. On the other hand, *la provision* may be formed by an overdraft agreed by the drawee to provide the drawer. However, in its original meaning under French law, *la provision* was understood to give rise to a debt originally owed by the drawee to the drawer. Entitlement passes to the payee when he takes the bill. Its passage to the payee (and subsequently, to each ensuing endorsee), is predominantly seen as a matter of *cessio*<sup>257</sup>. To that end, the drawee's acceptance is viewed not as a new obligation, but rather, in the footsteps of the Roman *constitutum*<sup>258</sup>, as an acknowledgement, or confirmation, of an existing one, based on the receipt of 'the provision'<sup>259</sup>.

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et de jurisprudence, 1992) at 181-86. For a more extensive analysis, see P. Lescot & R. Roblot, *Les effets de commerce*, vol. I (Paris: Rousseau, 1953) at 389-465.

<sup>255</sup> For which it is now codified e.g. in arts. 3, 17, and 34 in the Cheque Law, *supra* n. 20.

<sup>256</sup> For the statutory reference in 1673, see e.g. JV Tardon, *La provision de la lettre de change* (droit comparé – loi uniforme) (Paris, Laussane: Pichon, Roth, 1939) at 6.

<sup>257</sup> For the meanings of '*la provision*', 'value', and 'cover', see Lescot & Roblot, *ibid.* at 390, 411-412. For the transfer of *la provision* as a 'sale' which defeats the drawer's creditors see e.g. H. Levy-Bruhl, *Histoire de la lettre de change au France aux xvii<sup>e</sup> et xviii<sup>e</sup> siècles*, (Paris: Recueil Sirey, 1933) at 91-95. In any event, drawer's creditors are to be defeated also under the *cessio* theory.

<sup>258</sup> The *constitutum* is a promise to pay an existing debt on a stated date and at a stated place; the existing debt is either that of the promisor or of another party. The former is a case of *constitutum proprii* and the latter is that of *constitutum debiti alieni*. In either case, the sum so promised is called *pecunia constituta* and accordingly, the action to enforce the promise, is *actio de pecunia constituta*. See e.g. H. Coulon, *Droit romain: Du constitut debiti alieni* (Poitiers: Typographie Oudin, 1889); A. Philippin, *Le pacte de constitute - actio de pecunia constituta* (Paris: Duchemin, 1929); and J. Déjardin, *L'action pecuniae constitutae* (Paris, Rousseau, 1914).

<sup>259</sup> For explaining the acceptor's liability as a confirmation of liability, and the procedural advantage accorded to his plaintiff suing on the acceptance in the Low Countries, see WDH Asser, "Bills of Exchange and Agency in the 18<sup>th</sup> Century Law of Holland and Zeeland –

A similar exception fastening liability on a drawee not on the basis of acceptance applies in Scotland, albeit at present not anymore for cheques. Thus, under BEA s. 53(2), in Scotland, a bill of exchange other than a cheque is stated to operate as an assignment of funds “from the time when the bill is presented to the drawee”.<sup>260</sup>

Other than in connection with *la provision*, some jurisdictions adopted cheque certification as a means to fasten liability on the drawee bank against the holder. Certification of cheques is recognized in legislation governing cheques<sup>261</sup> in the United States<sup>262</sup>, France<sup>263</sup>, Italy<sup>264</sup>, Japan<sup>265</sup>, and South Africa<sup>266</sup>. Certification is also recognized in Canada, albeit by case law<sup>267</sup>. In Germany it is recognized but only for cheques drawn on the central bank<sup>268</sup>. In both Canada<sup>269</sup> and the United States<sup>270</sup>, cheque certification is analyzed as a form of acceptance of the cheque. In line with the provisions of the UCL, this mode of analysis is precluded in France, Italy, Japan, and Germany. Besides marking, certification in Canada and the United States involves the actual withdrawal of funds from the drawer’s account and their placement in a suspense account, pending presentment for payment. Elsewhere, certification may involve the holding or blocking of funds by the drawee bank in the drawer’s account for the short period within which a cheque must be presented. In fact, cheque certification is not practised in Japan and Italy.

Other than under *la provision* as well as under certification, a drawee bank is not liable on a cheque. Arguably except for upon certification<sup>271</sup> the

Decisions of the Supreme Court of Holland and Zeeland” in V. Piergiovanni, ed., *The Courts and the Developments of Commercial Law* (Berlin: Duncker & Humblot, 1987) at 103, 112.

<sup>260</sup> BEA s. 53(2).

<sup>261</sup> For cites of all national statutes see Part 1 above.

<sup>262</sup> UCC §3-409(d).

<sup>263</sup> Art 12(1).

<sup>264</sup> Art 4(2).

<sup>265</sup> Arts 53-58.

<sup>266</sup> S. 72A(1).

<sup>267</sup> See *Boyd v. Nasmith* (1889), 17 O.R. 40 (CPD).

<sup>268</sup> See s. 23 of the Deutsche Bundesbank Act of 26 July 1957, BGBl. I745.

<sup>269</sup> See e.g. *Re Maubach and Bank of Nova Scotia* (1987), 60 O.R. (2d) 189 (H.C.J.), aff’d. (1987) 62 O.R. (2d) 220; and *A.E. Le Page Real Estate Services Ltd. v. Rattray Publications* (1991), 5 O.R. (3d) 216 (Gen. Div.), aff’d. (1995), 21 O.R. (3d) 164 (C.A.). See in general, B. Geva, “Irrevocability of Bank Drafts, Certified Cheques and Money Orders” (1986), 65 Can. Bar Rev. 107 at 123 – 30.

<sup>270</sup> UCC §3-409(d).

<sup>271</sup> For the discharge of the drawer (whose account has usually been already debited) see e.g. UCC §3-414(c).

drawer is not discharged of his liability on a cheque other than conditionally until either payment or dishonour<sup>272</sup>. This is true even where drawee is liable to the payee on *la provision*. Presumably this is so since even where it applies, *la provision* does not exhaust the theory of liability on a cheque. Rather, it is in addition to drawer's liability, the latter remaining governed by ordinary rules<sup>273</sup>.

The drawer's liability on a cheque has been taken to be as that on a bills of exchange. As for the latter, consistently with earlier case law holding the drawer liable upon the acceptor's default<sup>274</sup>, Lord Holt explained in *Starke v. Cheeseman* (1700)<sup>275</sup> that in ordering payment on a bill, while not unconditionally promising to pay, the drawer nevertheless "warrants payment on it ..." and is liable to pay if the bill is dishonoured. Upon the issue of the instrument the obligation on the transaction for which it has been given is suspended; this means that payment by bill or cheque is conditional. Indeed, the relationship between a contract and an instrument given in payment of it is discussed in English law already in 1422 when it was determined that "if I am your debtor ... by a simple contract and I make an obligation to you for the same [amount] on the same contract ... I am discharged of the contract by obligation"<sup>276</sup>. Contrary to such absolute discharge, the delivery of money by A to B for payment of A's debt to C, in circumstances entitling C to claim from B, was held to constitute a conditional discharge of A's debt to C<sup>277</sup>. In *Ward v. Evans* (1702)<sup>278</sup>, Lord Holt applied the "conditional payment" presumption to a goldsmith note. Subsequently, in *Currie v. Misa* (1875), Lush J. applied it "to a cheque payable on demand, as to a running bill or a promissory note"<sup>279</sup>. It is thus "common ground that where a debt is 'paid' by cheque ... there is a presumption that such payment is conditional on the cheque ... being honoured. If it is not honoured, the condition is not satisfied and the liability

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<sup>272</sup> *Supra* n. 253.

<sup>273</sup> Such is the case in France art. under 40.

<sup>274</sup> *Anon* (1668) Hards 585, at 487, 145 ER 560, at 561. *Browne v. London* (1670) 1 Mod. 285, 86ER 889.

<sup>275</sup> 1 Ld. Raym. 538, 91 E.R. 1259.

<sup>276</sup> *Salman v. Barkyng* (1422), Y.B. 1 Hen. VI, reprinted in (1933), 50 Selden Soc. 114 at 115 *per* Babington J. Note the medieval terminology: "contract" is not "promise" but the benefit conferred on the defendant under a transaction, such as money lent or goods sold to him. "Obligation" is the speciality contract under seal. See CHS Fifoot, *History and Sources of the Common Law: Tort and Contract* (London: Stevens & Sons, 1949) at 225.

<sup>277</sup> *Harris v. De Bervoir* (1624), Cro. Jac. 687, 79 E.R. 596.

<sup>278</sup> 2 Ld. Raym. 928 at 930, 92 E.R. 120 at 121 (K.B.).

<sup>279</sup> L.R. 10 Ex. 153 (Ex. Ch) at 163.

[on the debt] remains”<sup>280</sup> albeit as an alternative to the drawer’s liability on the cheque itself.

## 8. Final Observations

Stripped to its bare bones and broadly defined, the cheque is in essence an unconditional order to pay a specific sum of money on demand, addressed to a bank or another type of depository of funds (“drawee”), issued by a debtor- payer (“drawer”) to his creditor (“payee”), authorizing the latter to collect payment from the drawee to his (payee’s) own use. It confers on the payee rights towards the drawee-banker and/or the drawer. The evolution of the payee’s remedies upon the dishonour of the cheque was the subject matter of this study.

Having emerged in Ptolemaic Egypt during the first half of the 1<sup>st</sup> century BCE, the cheque nevertheless appears to have been eclipsed already in Greco-Roman Egypt even before the Middle Ages. Subsequently, a nascent cheque system operated in the early Middle Ages in Islamic lands. The cheque resurfaced in Continental Europe only as late as in the late Middle Ages. Later, in the 17<sup>th</sup> century CE, the cheque spread its roots and grew to generate a ‘cheque system’ in England from where it expanded worldwide.

The present study purported to demonstrate the evolution of legal doctrine governing the cheque throughout different eras and various locations. However, interrelation and interaction are different matters, so that my study has some limitations. Particularly, how much and if at all Islamic and Jewish laws affected developments in Continental Europe and in England during the late Middle Ages and thereafter, remains a matter of speculation. As well, linguistic limitations have precluded me from going further into the late Medieval cheque system both in Italy and the Netherlands. Further research is needed on this aspect.

In a nutshell, under Roman law, both *cessio* and *assignatio* are premised on the effect of the delegation order to make the drawee liable to the payee-creditor. Even *cessio* as a non-recourse assignment allowed the payee-creditor/assignee recourse against the payer-debtor/assignor for the existence of debt owed by the drawee to the payer-debtor/assignor. As such it went a long way to serve as a doctrinal underpinning for the cheque transaction. In allowing the payee-creditor recourse against the payer-debtor upon any

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<sup>280</sup> See *Re Charge Card Services Ltd.*, above note 252.

default by the drawee the *assignatio* appears to be even more attractive as a legal basis for the cheque.

Unlike Roman law, Jewish and Islamic laws did not allow the assignment of debts to evolve out of the mandate for collection. To bypass that obstacle, they developed more refined legal doctrines governing issues pertaining to the liability on a cheque transaction. Talmudic law discussed such doctrines in the context of a presence-of-all-three declaration in situations where drawee either owed or did not owe money to a payer-debtor/drawer. Islamic law introduced the *hawale* as both a payment instrument and a legal doctrine that governs it.

It seems to me that the present study puts an end to any speculation on the emergence of the cheque as a sub-category of the bill of exchange.

Rather, the cheque has its own history, both as a payment method and a subject of legal rules. Cheques originated as payment orders as part of the evolution of deposit banking. The law that governed liability on them may be traced to pre-modern legal systems. At the same time, as of the late Middle Ages, the cheque evolved side by side with the transformation of the bill of exchange both into (i) an instrument for the inland remittance of funds entitling the payee to recover thereon from the drawer with whom he has not dealt and (ii) an instrument transferable by negotiation, that is, endorsement (where it is payable to a named payee) and delivery. This generated unavoidable convergence between the laws governing these two instruments so that pragmatically it became convenient to treat the cheque as a type of a bill of exchange.

This however ought not to obscure the original roots, functions and hence surviving distinct features of the cheque.

Practically, this means that the further evolution of distinct cheque features designed to accommodate adaptation to new commercial developments ought not to be precluded.