

# **Deriving History from Law :**

## **Are Cheques Traceable to the Talmud ?**

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### *1. Introduction*

Eminent historians single out the Talmud<sup>2</sup> as being a unique legal text in Antiquity providing for a framework facilitating at least a

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<sup>2</sup> The Talmud 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 (being present-day Iraq). 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. There are two versions for the Gemara, between which the one whose compilation was completed in Babylonia in the fifth century CE ('Talmud Bavli') is the more authoritative one. The compilation of the other version, known as the Jerusalem Talmud ('Talmud Yerushalmi') was completed in Eretz-Yisrael in the fourth century CE. For an introduction, see e.g. A.STEINSALTZ, *The Talmud-The Steinsaltz Edition - A Reference Guide*, New York 1989. According to A.STEINSALTZ, *The Essential Talmud*, New York 1976, p.3: « If the Bible is the cornerstone of Judaism, then the Talmud is its central pillar ». Other than 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 chapter are in Hebrew.

limited cheque system<sup>3</sup>. However, the Talmud does not provide for adequate legal infrastructure for banking to develop; it prohibits the taking of interest on loans<sup>4</sup>, and further inhibits on the lending out of deposits<sup>5</sup>. Banking is premised on lending for profit out of bank deposits, and it is against the background of a thriving banking system that one expects the development of a cheque, or in fact any non-cash payment system<sup>6</sup>. Hence, the existence of a Talmudic cheque system is counter-intuitive.

Certainly, a plain reading of a relevant Talmudic text may point out to the possible existence of a cheque system. Nevertheless, a rigorous analysis of this text, supported by traditional scholarly

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<sup>3</sup> See e.g. R. BOGAERT, *Banques et banquiers dans les cités grecques*, Leyde 1968, p.340-341, fn.206, p.413, fn.7, and BOGAERT'S speech in a conference session reproduced in (1977), 123 *Revue belge de numismatique et de sigillographie* 265, where he speaks of the cheque under the Talmud as an instrument of payment to workers who according to Mosaic laws are to receive daily their wages. To a similar effect see also J. ANDREAU, *La vie financière dans le monde romain: les métiers de manieurs d'argent*, Rome 1987, p.562, J. ANDREAU, *Banking and Business in the Roman World*, Cambridge 1999, [translated to English by J. LLOYD] p.42: « the use of cheques is attested ... in Canaan, following rulings made by Mosaic laws on the payment of wages ». See also E. ASHTOR, "Banking Instruments Between the Muslim East and the Christian West" (1972), in *East-West Trade in the Medieval Mediterranean*, BZ. KEDAR (ed.) London: Variorum Reprints, 1986, 553, at p.555.

<sup>4</sup> Prohibition is based on three biblical cites and exists for any transaction where a party is obligated to deliver or pay in genre. These biblical verses are Exodus 22:24, Leviticus 25:36-7, and Deuteronomy 23:20. R. BOGAERT, *Les Origines antiques de la banque de dépôt*, Leyde 1966, p.157 acknowledges this factor as one that militated against the development of banking among the Jews in Judea during the period under discussion.

<sup>5</sup> The principal text is Talmud, *Bava Metzia*, p.43A et seq. It gives the moneychanger a limited right to use money deposited for safekeeping in an open bag but not to mix the entire deposit with others. See B. GEVA, *Bank Collections and Payment Transactions: Comparative Study of Legal Aspects*, Oxford 2001, p.67-71. Certainly, if so agreed, and for a fee, the moneychanger could invest money deposited with him, either for a depositor, or even under a joint venture with him, though in the latter case, only under a mutual profit and loss sharing agreement. See Talmud, *Bava Metzia*, pp.68a and 104b.

<sup>6</sup> For the link among these three activities, namely, deposit-taking, lending and the provision of payment services as underlying the origin of banking in Ancient Greece, see: BOGAERT, *Les Origines antiques de la banque de dépôt*, supra n.4, p.137 -144: To these days, « To be recognized as a bank ... an institution is expected to receive deposits of money from its customers; to maintain current accounts for them; to provide advances in the form of loans or overdrafts; and to manage payments on behalf of its customers ... » □ E. GREEN, *Banking — An Illustrated History*, New York 1989, p.11.

commentaries, leads to a contrary conclusion. Based on a study of the text and commentary, the present study makes the following arguments:

1. While written legal documents are recognized by the Talmud,<sup>7</sup> there is no indication supporting the existence of written cheques; at the most, the alleged cheque system was oral. True, a cheque need not necessarily be circulating which would have required writing, and yet, lack of embodiment in paper is inconsistent with standardization required for a 'system' to exist<sup>8</sup>.
2. While a cheque may be drawn against a line of credit, a cheque system is typically associated with funds kept with depositaries, which are withdrawn by cheque<sup>9</sup>. However, the Talmudic discussion on the closest scenario to a cheque system is taken to relate to a situation in which the paymaster extends credit to the debtor;
3. Presence of all three may be required for the renunciation of recourse by a creditor against the debtor to whom a paymaster extends credit. Presence of all three is however ill-fit to accommodate the cheque mechanism, under which a cheque is issued by the debtor to the creditor, and subsequently presented by the creditor to the paymaster, without all three present at the same time in the same place; and

<sup>7</sup> See e.g. Talmud, *Kiddushin*, p.47B-48A (documentary debt) and Talmud, *Bava Kamma* p.70A (the *urcheta*, being a written and properly witnessed authorization given by a creditor to an emissary, turning him into an agent with the power to collect from the creditor's debtor money or chattel owed by that debtor to his creditor)

<sup>8</sup> Contrast with the system for non-circulating and yet written cheques in Greco-Roman Egypt set out in R.S.BAGNALL and R.BOGAERT, *Orders for Payment from a Banker's Archive: Papyri in the Collection of Florida State University* (1975), in R.BOGAERT, *Trapezitica Aegyptiaca. Recueil de recherches sur la banque en Égypte Gréco-Romaine*, Firenze 1994, 219 at p.239, R.BOGAERT, *Note sur l'emploi du chèque dans l'Égypte ptolémaïque*" (1983), in *Trapezitica ibid.* at p.245, R.BOGAERT, *Recherches sur la banque en Égypte Gréco-Romaine* (1987-89), in *Trapezitica ibid.* 1 at p.23, R.BOGAERT, *Les opérations des banques de l'Égypte Ptolémaïque* (1998), 29 *Ancient Society* 45, p.141.

<sup>9</sup> In modern law the point is acknowledged in e.g. Article 3 of the Uniform Law on Cheques (adopted on March 11, 1931 by the Second Geneva Convention on Bills of Exchange) effectively providing that a cheque is usually: « drawn on a banker holding funds at the disposal of the drawer... »

4. The law that evolved in the Talmud to govern the situation under discussion is inadequate to provide for a comprehensive satisfactory scheme covering cheques, which would be atypical in light of the thorough and meticulous analysis of the relevant scenario.

The main part of the article is an in-depth analysis of the Talmudic passage and related Commentaries from which the existence of the cheque is said to derive. The article develops the above-mentioned arguments and concludes against the existence of cheques and a cheque system under the Talmud.

## 2. *Directing a Creditor to a Paymaster: the Bava Metzia Text*

### a. The Talmudic Text in Bava Metzia: Credit Extended by Paymaster

Biblical law requires an employer to pay wages that are due to a worker for labour on the day services were rendered<sup>10</sup>. In *Bava Metzia*, the Mishna presents some qualifications to the prohibition against delaying payment, one of which is the case where the employer directed the worker to receive payment from a storekeeper or moneychanger<sup>11</sup>. On this passage the Gemara asks whether the worker has recourse against the employer or not. One sage, Rav Shesheth would not allow the recourse, while another sage, Rabbah, would permit it<sup>12</sup>.

For lack of discussion on the points, it is safe to assume that neither a pre-existing master agreement nor writing is required. Rashi says that the scenario dealt with by the Mishna is that of an employer directing to the storekeeper a worker who needs to purchase provisions, and in which the employer instructs the storekeeper to sell

<sup>10</sup> Leviticus 19:13. The Mishna, in Talmud, *Bava Metzia*, p.111A, applies this same-day payment requirement also to the rental payment due from a hirer to an owner of a rented animal or utensils, so that the discussion below equally applies to the recourse from the hirer by an owner of a rented animal or utensils who is to be paid by a storekeeper or moneychanger.

<sup>11</sup> Talmud, *Bava Metzia*, p.111A.

<sup>12</sup> Talmud, *Bava Metzia*, p.112A. Both sages endeavour to rationalize their positions on the Mishanic 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.

the provisions to the worker, against the employer's payment (or reimbursement) obligation. In this setting, the storekeeper does not pay to the worker any amount previously deposited with him or otherwise owed by him to the employer; rather he extends credit to the employer.

On the setting involving the moneychanger, Rashi is more equivocal; he states that the employer instructs the moneychanger to give the employer small-value coins for one large-value coin. This sounds like a change transaction; presumably the employer is to pay a large-value coin against the payment of wages to few workers, each receiving his own wages in small-value coins. This could be consistent with a simultaneous exchange in a money-change transaction, as well as with an advance payment by the employer to the moneychanger, or even with a deposit held by the moneychanger for the employer, out of which payment to the worker is to be made. It could however be equally consistent with the situation in which the employer is to pay the large-value coin to the moneychanger at a later date, which is not different from the employer's obligation to pay the storekeeper for the provisions sold to the worker. It is the symmetry between the position of the storekeeper and moneychanger which supports the conclusion that the moneychanger ought to be treated as positioned in the same situation of the storekeeper, so as to be regarded as extending credit.

Under the picture depicted by Rashi, credit is extended by either the storekeeper or moneychanger in the form of actual payment, whether in kind or in money, and not in a form of a guaranty supporting the employer's undertaking to make such payment in the future. It is in this sense that the storekeeper or moneychanger acts in the *Bava Metzia* text as a paymaster and not surety.

Commentators made no distinction between scenarios involving a storekeeper or a moneychanger, and are taken to refer to both even when they mention one only; in the present discussion, "paymaster" is thus used to refer to either a storekeeper or moneychanger. Furthermore, the credit extension interpretation has not been challenged by commentators<sup>13</sup>. Indeed, the position of the storekeeper

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<sup>13</sup> By "commentators", I mean 'authoritative commentators' according to whom authorized ruling is promulgated in Jewish law. For a dissenting modern scholarly view on the point, drawn from historical parallels, see S.ALBECK, *The Assignment of*

as extending credit<sup>14</sup>, particularly in selling provisions against deferred payment obligations<sup>15</sup>, is mentioned elsewhere in the Talmud. In turn, the position of the moneychanger who regularly deals in money matters<sup>16</sup>, as also acting as a moneylender, is more obvious; elsewhere the Gemara refers to the employer who borrows from a moneychanger to pay the wages of his workers in the marketplace<sup>17</sup>. Presumably, in our scenario, by having the disbursement of the loan directly made to the worker, rather than to the employer who will then pay the worker, the employer may have saved on administration, at least by bypassing the need to deal with small-value coins to be paid to numerous workers<sup>18</sup>.

The conclusion that the paymaster extends credit to the employer may be supported by viewing the *Bava Metzia* narrative as limited to a situation where all three are required to be present together<sup>19</sup>. This is so since in *Gitin*, the Gemara discusses the legal implications of an instruction directed to a person who owes money to the instruction giver, to make payment to a third person; in such a case, presence-of-all-three in one place is specifically required<sup>20</sup>. This would cover the case of the employer who directs a storekeeper or moneychanger who owes money to him to make payment to the employer's worker. Hence, where presence of all three is required, a separate discussion may be needed only for the case of the employer who directs his

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*Debt in the Talmud* (1957), 26 Tarbiz 262, p.274-277 [in Hebrew], where he specifically rejects the view of the early commentators (p.277, fn.39) and argues that the scenario in the *Bava Metzia* narrative is in which the paymaster is instructed to pay out of the employer's deposit kept with him. Among the more recent commentators, cf. TUR, *Choshen Mishpat*, Section 339, where the scenario is described as one that *even* covers the case where paymaster owes nothing to the employer. ALBECK'S position is further dealt with in *infra* n.21, n.23 and n.39.

<sup>14</sup> See e.g. a general reference in Talmud, *Kiddushin*, p.40A.

<sup>15</sup> See e.g. discussion on the storekeeper concerning his ledger, Talmud, *Shevuot*, p.45A and the Jerusalem Talmud, *Shevuot*, p.36B (further dealt with in §2.e below), where nevertheless the storekeeper's books are not accorded great credibility. Particularly see PNEI MOSHE on the Gemara in the Jerusalem Talmud above-captioned page.

<sup>16</sup> See in general, A.GULAK, *The Moneychanger's Business According to Talmudic Law* (1931), 2 Tarbitz, p.154 [in Hebrew].

<sup>17</sup> Talmud, *Bava Metzia*, p.46A.

<sup>18</sup> See second paragraph above the one containing n.13 above.

<sup>19</sup> On this point, see RIF on Talmud, *Bava Metzia*, p.68A (of Rif's page numbering).

<sup>20</sup> Talmud, *Gitin*, p.13B.

worker to receive payment from a storekeeper or moneychanger who does not owe money to him.

Obviously however, this does not prove the reverse, namely, that presence-of-all-three is required in the *Bava Metzia* setting. It could well be, indeed, that the consensus on viewing the paymaster as extending of credit to the employer<sup>21</sup> is not premised on a requirement as to the presence of all three; rather it derives from an understanding of the economic background. As indicated in the paragraph that follows, support to the conclusion that as depositaries of money, who owed money to their depositors, neither the moneychanger nor the storekeeper acted as paymasters, may come from elsewhere in the Talmud.

Certainly, the moneychanger was in the business of taking deposits of money, and perhaps the storekeeper followed suit<sup>22</sup>. Yet, there is no indication as to the economic function of the depositary as a paymaster<sup>23</sup>. Indeed, an important observation can be made with

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<sup>21</sup> A modern departure from this consensus is by ALBECK, *The Assignment of Debt in the Talmud*, *supra* n.13. He assumes that the presence of all three is not required in the *Bava Metzia* narrative, but nevertheless argues that this text is concerned with the case where the paymaster owes the money to the employer. ALBECK distinguishes between the *Bava Metzia* scenario and the one in *Gitin* (see particularly *ibid.* p.276, fn.38), by saying that the former is concerned with a payment order, rather than the transfer of a debt owed by the paymaster, which is the concern in *Gitin*. In ALBECK'S view, in the *Bava Metzia* setting, upon assuming the employer's obligation to pay the worker his wages, the paymaster became subject to the requirement not to delay payment to the worker, and could not discharge himself by merely transferring to the worker the debt he (the paymaster) owes to the employer. But as will be seen *infra* n.39, there is a difficulty in theorizing the paymaster's liability to the worker, where the paymaster owed money to the employer. Nor does ALBECK explain lack of immediate payment by the paymaster (who allegedly owes funds to the employer) or why the worker's consent to the alleged debt transfer does not excuse the prompt payment obligation, all of which is addressed in §2.e below (which further supports the presence-of-all-three requirement).

<sup>22</sup> See Talmud, *Bava Metzia*, p.43A, discussed in §2.a above, where it is disputed as to whether in terms of his permission to deal with deposited money and his responsibility for its loss the storekeeper's position is that of the moneychanger or of a regular depositary. According to GULAK, *The Moneychanger's Business According to Talmudic Law*, *supra* n.16, p.159, it may well be that moneychangers operated only in large cities so that it was common for storekeepers to act as moneychangers in the villages. This view can be drawn, for example, from Rava in Talmud, *Bava Metzia*, p.52B.

<sup>23</sup> With respect, I do not think sources put forward by GULAK, *The Moneychanger's Business According to Talmudic Law*, *supra* n.16, p.158-159 and ALBECK, *The Assignment of Debt in the Talmud*, *supra* n.13, p.276-277, support their conclusions

regard to the abovementioned discussion in *Gitin*<sup>24</sup>, on the impact of an instruction given to a person who owes money to the instruction giver, to pay to a third party. The discussion is in general terms. It refers to the three individuals anonymously, as “Reuven, Shimon, and Levi”; it does not characterize them as employer, moneychanger or storekeeper, and worker, as in the scenario under discussion in *Bava Metiza*. Stated otherwise, in *Gitin*, the Gemara declines to refer to the depositary-paymaster as a moneychanger or storekeeper; rather it treats the depositary-paymaster as an anonymous “Shimon.” Thereby, it possibly tells us that as a paymaster, the moneychanger or storekeeper must have been taken to act as a credit extender and not a debtor to the instruction giver.

In the final analysis, no firm conclusions can be drawn from the plain *Bava Metiza* text which is quite equivocal as to whether it is envisaged that all three must be present. True, in his commentary, Rashi speaks of the employer as ‘cutting off the worker from him and making him stand with the storekeeper<sup>25</sup>’; there is no indication in Rashi’s description of the employer physically joining the worker and the paymaster, so that all three are present together. Yet, this interpretation is inconclusive; Rashi may use his words metaphorically and simply refer to the employer’s intention to sever the legal tie between him and the worker, and have it replaced by a new direct legal relationship between the paymaster and the worker.

A cheque may be drawn on a line of credit, though typically it is drawn on funds on deposit<sup>26</sup>. Even if tracing the early cheque to a mechanism premised on the extension of credit is not fatal to characterizing the mechanism as a cheque, it does not lend support to this characterization. At the same time, presence of all three is certainly inconsistent with the cheque transaction flow, under which a cheque is issued by the debtor to the creditor and subsequently presented to payment by the creditor to the paymaster not in the presence of the debtor. Indeed, inasmuch as it specifically requires

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to the contrary. Commentators cited throughout this Section have been of the view that relevant sources deal with moneychanger or storekeeper extending credit and not owing money to the employer.

<sup>24</sup> *Supra* n.20.

<sup>25</sup> Or in Hebrew, in English transliteration, ‘*Nitko me-ezlo ve-he-emidahu ezel chenvany*’.

<sup>26</sup> See *supra* n.9.



presence of all three, the *Gitin* passage has not been viewed as dealing with a cheque. Discussion on whether all three are required to be present in the *Bava Metzia* passage is thus central to the thesis of this article; discussion on the point will however be deferred to §2.e below, when the legal underpinning of the disputation between Rav Shesheth and Rabbah as well as other aspects of the factual scenario are clarified.

b. Tosafot's Commentary – Renunciation of Recourse

Commentators' analysis evolves around the effectiveness of the renunciation of the worker (creditor) against the employer (debtor) so as to discharge the employer and not allow recourse by the worker against him. Two principal issues are addressed. The first is whether recourse is available also prior to, and irrespective of, the paymaster's default in payment. The second is the scope of the renunciation; here the discussion focuses on whether effective renunciation is conditional or absolute, whether it is express or implied, and whether its effectiveness depends on the paymaster's own obligation to pay. As well, discussion evolves around various variations of the basic 'incomplete' scenario in our text.

Tosafot's commentary to the Gemara in *Bava Metiza*<sup>27</sup> contains a most comprehensive discussion on the recourse issue. It is clear to Tosafot that any impact on the worker's recourse against the employer stems from the worker's consent to abide by the direction, or more specifically, from the renunciation embodied in this consent. The starting point of Tosafot is that the employer is liable to the worker to pay the latter's wages. The issue then is not recourse, which is obviously available to the worker against the party liable to him; rather, the issue is that of discharge, or loss of recourse, on the basis of the worker's renunciation. Hence, it is the scope of the renunciation, and its effect to generate either an absolute or conditional discharge, which preoccupies Tosafot's discussion.

It is clear to Tosafot that no disputation could arise 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

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<sup>27</sup> Talmud, *Bava Metzia*, p.112A.

has been manifested by an act of *kinyan*<sup>28</sup>. Moreover, in Tosafot's view, there is no disputation as to the effectiveness of a renunciation unaccompanied by an act of *kinyan*<sup>29</sup>, except that in such a case its scope and requirements have to be more carefully scrutinized. That is, on its own, and without any express words accompanying it, an act of *kinyan* would affect an absolute discharge<sup>30</sup>; at the same time, a 'bare' renunciation, unaccompanied by an act of *kinyan*, requires support, in language, circumstances, or both, to ascertain its validity and scope<sup>31</sup>.

Against this background, Tosafot first endeavours to determine the exact fact situation with respect to which the Gemara discussion takes place. He starts by ruling out two settings, in which the answer, according to him, ought to be obvious, and hence not to give rise to any disputation. These are to be referred to below as Tosafot's two 'obvious' settings<sup>32</sup>. The first setting is where the worker, in agreeing to be paid by the paymaster, explicitly releases the employer, even in the case the paymaster will not pay. This is a case of an unqualified renunciation, unequivocally stated. The second setting is that of a limited renunciation, namely, when the worker, in agreeing to be paid by the paymaster, explicitly makes the release or discharge of the employer contingent or conditional on, actual payment by the paymaster. In Tosafot's view, it is obvious that recourse is not available to the worker in the first setting, that of an express absolute release of the employer by the worker; it is however equally obvious according to him that recourse is available, upon the default of the paymaster, in the second setting, that of an express conditional release

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<sup>28</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.1, p.254. For a proprietary act for the transfer of ownership see: Talmud, *Kiddushin*, pp.22B, 25B-26A and *Bava Batra*, p.84B.

<sup>29</sup> Which is in line with Talmud, *Kiddushin*, p.16A, cited by TOSAFOT in Talmud, *Bava Metzia*, p.112A. Hereafter, "TOSAFOT" is to mean Tosafot's editor.

<sup>30</sup> *Ibid.*

<sup>31</sup> To that end, an act of *kinyan* serves as an indication to the 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 1976, 1983, p.114-115 [in Hebrew]. The binding effect of a promise is the theme of B.LIFSHITZ, *Promise: Obligation and Acquisition in Jewish Law*, Jerusalem 1988 [in Hebrew].

<sup>32</sup> TOSAFOT, D'H Chozar, commenting on Talmud, *Bava Metzia* p.112A.

of the employer by the worker. In connection with both 'obvious' settings, the existence or absence of recourse is made dependent on the express terms of the worker's agreement to be paid by the paymaster.

Accepting the premise of a scenario involving the extension of credit by the paymaster to the employer, and adhering to his implicit assumption as to the centrality of the worker's consent to the direction by the employer, Tosafot then proceeds to lay down two alternative sub-scenarios in which the recourse controversy could arise<sup>33</sup>. The first sub-scenario is that of a worker, who agrees to be paid by the paymaster, so as to indicate his reliance on the paymaster's undertaking to pay<sup>34</sup>, without expressly specifying to the employer whether the employer is thereby released, and if so, under what conditions, namely whether the release, if any, is absolute or conditional. The second alternative sub scenario laid down by Tosafot is that of an express renunciation by the worker of his recourse against the employer, on the condition of payment made by the paymaster.

The first sub-scenario is that of renunciation implied from the reliance on the paymaster. In discussing it, Tosafot is cognizant of the general rule that applies in the absence of a deposit or loan owed to the instruction giver by the one who is instructed to pay to a designated payee. Then, the one who is instructed to pay may revoke his promise to pay the payee designated in the instruction; this is so even when such promise was given in the presence of all three<sup>35</sup>. True, Tosafot concedes, this revocability rule appears to apply to the promise of the paymaster (the one who is instructed to pay) who, having agreed to pay the creditor-payee/worker, is to extend credit to the debtor-employer/instruction giver; nevertheless, in the context of the first sub-scenario, and without necessarily limiting our scenario

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<sup>33</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 here.

<sup>34</sup> In fact, it is not all that clear as to whether in this sub-scenario the worker is to expressly advise the employer of his exclusive reliance on the paymaster. In my view, TOSAFOT'S analysis of this scenario also applies to the case in which the worker agreed to go to the paymaster without specifically stating that he relies on to the paymaster.

<sup>35</sup> Talmud, *Gitin*, p.13B.

only to circumstances wherein all three are present in one location<sup>36</sup>, Tosafot rejects the application of this revocability rule. Rather, in Tosafot's view, an absolute release of the employer by the worker is possible in the context of the first sub-scenario when the paymaster assumes, towards the worker, a binding and irrevocable obligation, guarantying that of the employer; at that point, the paymaster is taken to advise the worker to rely entirely on him and release the employer. It is on the basis of this guarantee that the worker's statement, expressly made to the employer as to the worker's own reliance on the paymaster, is taken to implicitly renounce the worker's recourse right against the employer.

Tosafot is however unclear as to the language required to generate an implied paymaster's guarantee. Rather, he uses a word<sup>37</sup> that could mean either that the paymaster caused the worker to be next or close to him, or that the paymaster caused the worker to rely upon him. Having so caused the worker, the paymaster became "as if saying" to the worker "rely on me and release the employer".

Both the binding effect of an oral guarantee, unsupported by an act of *kinyan*, and the absolute discharge it may confer to the employer, are derived from discussions elsewhere in the Talmud<sup>38</sup>. First, the Talmud considers the satisfaction derived by the guarantor from seeing he is deemed by the creditor trustworthy as adequate to produce the guarantor's binding commitment<sup>39</sup>.

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<sup>36</sup> This is so since TOSAFOT specifically speaks of the revocability or the paymaster's promise *even* (and not only) when given in the presence of all three.

<sup>37</sup> In Hebrew, in English transliteration, 'his-mi-cho'.

<sup>38</sup> Talmud, *Bava Batra*, p.173A-174A.

<sup>39</sup> See statement by Rav Ashi in Talmud, *Bava Batra*, p.173B. This however falls short of rationalizing the effectiveness of an implied (as opposed to express) guarantee, as undertaken by the paymaster in our case. In any event, no similar satisfaction can be derived where the debtor already owes the guaranteed sum to the creditor, such as when, notwithstanding ALBECK, *The Assignment of Debt in the Talmud*, *supra* n.13, as discussed in n.13, n.21 and n.23, the paymaster owed the sum to the employer. The satisfaction derived by the paymaster in our scenario is discussed in the paragraph that follows the next one. For the impact of satisfaction as a mode of either acquisition or binding obligation see Y.FRIEDMAN, *Satisfaction and Property in the Talmud* (1972-5732), 3 *Deinney Yisrael* 115 [in Hebrew]. For the binding effect of a guarantee on the basis of satisfaction, in light of the apparent no binding effect for a bare promise, see comprehensive discussion by LIFSHITZ, *Promise: Obligation and Acquisition in Jewish Law*, *supra* n.31, p.1-117 (Chapter 1 dealing with promise) and p.187-279 (Chapter 3 dealing with the guarantee).

Second, 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>40</sup> The one exception in which the debtor is completely discharged<sup>41</sup> is where 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 principal debtor, and the borrower receives an absolute discharge; in fact, he has never been even liable to the lender, but rather only to the guarantor<sup>42</sup>. Presumably<sup>43</sup>, what Tosafot is to be taken to mean, is that in our case, the paymaster 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<sup>44</sup>. The paymaster's obligation is then

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<sup>40</sup> Talmud, *Bava Batra*, p.173A-174A.

<sup>41</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.

<sup>42</sup> The five categories into which a guarantee may fall are explained by TOSAFOT in Talmud, *Bava Batra*, p.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 1991, p.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, *Kiddushin*, p.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 paymaster-guarantor) by resorting to the security of the debt owed by A (the employer-principal debtor) to B (the paymaster-guarantor); by itself this is not a matter of A (the employer-principal debtor) being directly liable to C (the creditor-worker).

<sup>43</sup> That point, namely, the basis for the primary nature of the paymaster's guarantee undertaking, has not been discussed by commentators.

<sup>44</sup> The position of a guarantor who, for all intents and purposes, replaces the debtor who was originally liable, is in fact addressed by the sources, but only in the case of a guarantee by a Jew for a loan taken from a non-Jew on which interest (which is forbidden for a debt owed by one Jew to another) is payable by the Jewish borrower. Such a guarantor is called '*shlof-dotz*'. See KAHANA, *Guarantee*, supra n.42, p.92-93. For the origins of the expression see RASHI in Talmud, *Yevamot* 109B D" H *Shalzion*.

primary, and not secondary or dependent on a co-extensive principal obligation of the employer<sup>45</sup>.

In effect, the dispensation with an act of *kinyan* to support the irrevocability of the guarantee obligation appears to be consistent with the absolute discharge of the employer in the particular case of a guarantee given by the paymaster. Thus, in the usual case of a guarantee given for a loan, the binding effect of the guarantee is on the basis of the guarantor's satisfaction derived from the reliance on him, so as to dispense with the *kinyan* requirement<sup>46</sup>. On its own terms this rationale is limited to circumstances where the guarantee was given prior to the disbursement of funds to the borrower by the lender;<sup>47</sup> in such a case, the disbursement of funds is the act done in reliance on the guarantee, which thus gives the guarantor the required satisfaction. In contrast, when the guarantee is given after the loan was disbursed, it cannot be said that the giving of the loan was on the basis of the guarantee, so as to give the guarantor the required satisfaction.

The broad principle is then that for a guarantee to bind without an act of *kinyan*, the guarantor is to derive satisfaction from 'something' done, or omitted to be done, by the creditor, in reliance on the guarantee. In our scenario, the debtor-employer is to be seen as already owing the debt to the creditor-worker; he also risks violation against the prohibition against delaying wages to the worker; hence, there is no satisfaction derived by the guarantor-paymaster, other than from seeing that on the basis of his guarantee, the worker-creditor is releasing the debtor-employer who is consequently positioned not to violate the prohibition against delaying payment.<sup>48</sup> To that end, the

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<sup>45</sup> Which is the case for an ordinary guarantee. See Talmud, *Bava Batra* at 173B and TOSAFOT, *supra* n.42. However, primary obligation is not necessary autonomous, namely free of defences available to the employer against the worker; it does not follow from the primary nature of the paymaster's obligation that the paymaster is liable even if the worker has not performed under his contract of employment. Stated otherwise, it may nevertheless be an obligation to pay against the worker's performance to the employer.

<sup>46</sup> *Supra* n.39, per Rav Ashi.

<sup>47</sup> Talmud, *Bava Batra*, p.176B.

<sup>48</sup> Even where the guarantee is given prior to the tasks to be performed by the worker under his contract of employment with the employer, as speculated below in §2.e in text around n.81, it may be far fetched to suppose that as a general rule the worker (creditor) agreed to work for the employer (debtor) only in reliance of the paymaster's guarantee, so as to give the paymaster the required satisfaction.

absolute discharge of, or loss of recourse against, the employer by the worker, is the ‘something’ happening on the basis of the paymaster’s guarantee, so as to give him the satisfaction which dispenses the act of *kinyan*<sup>49</sup>.

As recalled, the disputation between Rav Shesheth and Rabbah is on the continued liability of the employer. According to Rav Shesheth, no recourse is available so that the employer is released. Conversely, in Rabbah’s view, recourse is available so that the employer remains liable. The first alternative sub-scenario involves an implied absolute renunciation on the basis of the assumption of a guarantor’s liability by the paymaster. In this context, the disputation is as to whether, upon the default in payment of the paymaster, recourse against the employer is available to the worker, who did not specifically attach any condition to his agreement to be paid by the paymaster. Rav Shesheth appears to endorse both the guarantee’s undertaking of the paymaster 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 from Tosafot whether Rabbah’s view is premised on a rejection of the guarantee’s theory, 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.

As further indicated<sup>50</sup>, the second alternative sub-scenario laid down by Tosafot is that of an express renunciation by the worker of his recourse against the employer, on the condition of payment made

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<sup>49</sup> Granted, any impact on the worker’s recourse from the employer on the basis of the paymaster’s guarantee, even short of total loss of recourse, would have given the guarantor-paymaster the required satisfaction. For example, conditional discharge, effectively reversing the sequence of liability, so as to allow or require the creditor-worker to first attempt to recover from the guarantor-paymaster, and to pursue recovery from the debtor-employer only upon the default by the paymaster, would have allowed the guarantor-paymaster to derive satisfaction. Hence, dispensation of *kinyan* on the basis of derived satisfaction explains why in our scenario the paymaster’s undertaking is not an ordinary guarantee, in which the guarantor is secondary liable; yet it does not explain why in our scenario this is necessarily a guarantee of the type in which the debtor is absolutely discharged and the guarantor becomes the sole debtor. The point is not discussed by commentators and will not be further addressed here.

<sup>50</sup> Above, text that follows n.34.

by the paymaster. Contrary to the renunciation under the first alternative sub-scenario, which is absolute but implied, renunciation under the second alternative sub-scenario is conditional yet express. Thereunder, the worker reserves the recourse right against the employer in the case of default or non-payment by the paymaster. Also, unlike in the case of the first sub-scenario, which involves the guarantee undertaking of the paymaster, nothing is stated in the context of the second sub-scenario, on the existence or absence of an undertaking by the paymaster.

As pointed out, other than expressly adding the reservation of the right to go after the employer upon the default by the paymaster, the second sub-scenario is very much like the second 'obvious' setting of Tosafot, that of an express renunciation, conditional upon payment by the paymaster. In that latter setting Tosafot pointed out that it is obvious that on its own stated terms recourse is available to the worker against the employer upon the default in payment by the paymaster<sup>51</sup>. This observation appears to be fully applicable to the second alternative sub-scenario, so that in its context there is no disputation on this point; rather, in Tosafot's view, in the context of the second alternative sub-scenario, the disputation between Rav Shesheth and Rabbah is whether recourse from the employer is available to the worker even in the absence of default by the paymaster.

In effect, the disputation is then as to whether conditional release or discharge works; according to Rav Shesheth, conditional discharge is effective so that no recourse is available to the worker against the employer, as long as the paymaster has not defaulted. Conversely, Rabbah's view appears to be that recourse is available notwithstanding the conditional release. Stated otherwise, Rabbah's position is that conditional release does not work, so that the employer remains liable notwithstanding the worker's agreement to be directed to the paymaster, in which case recourse against the employer is available to the worker throughout, namely also before, and not only after, the paymaster's default.

No explanation is immediately discernible from the discussion by Tosafot to highlight the different conclusions of the sages as applied to the second sub-scenario. Both are stated to agree that an oral

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<sup>51</sup> *Ibid.*



explicit renunciation is effective on its own terms; certainly, Rav Shesheth's view is premised on this position. What is unclear then is on what grounds Rabbah does not apply this principle in the context of the second sub-scenario.

c. Other Commentators - Elaborating Tosafot's Discussion

Having accepted the premise of a scenario dealing with the extension of credit by the paymaster to the employer, commentators focus on the availability of recourse by the worker from the employer in the context of the two sub-scenarios of Tosafot. Overall, their discussion is on three levels. First, it endeavours to fill in blanks in Tosafot's analysis. Second, the discussion purports to determine which is actually the sub-scenario discussed in the Gemara, namely whether it is of an implied absolute discharge or express conditional discharge. Third and last, commentators aim to rule as to which of the two sages' positions regarding the availability to the worker of recourse from the employer, is to prevail. As recalled, recourse is to be precluded according to Rav Shesheth and available according to Rabbah.

In connection with the first sub-scenario (an implied absolute discharge based on reliance on the paymaster's undertaking), Nimukei Yoseph<sup>52</sup> explains the binding effect or irrevocability of the implied guarantee liability of the storekeeper or moneychanger as premised on the nature of his calling. Stated otherwise, the storekeeper, as a trader, or the moneychanger, who deals with money, are to be taken to be unable to revoke their undertaking, and be bound by it, even in the absence of a loan or deposit owed by either of them to the employer. In the view of Nimukei Yoseph, both Rav Shesheth and Rabbah are to be taken to be in agreement on that premise, that of the binding effect, or irrevocability, of the payment obligation of the paymaster to the worker.

Nimukei Yoseph does not discuss the possibility of a disagreement between Rav Shesheth and Rabbah as to the nature of the guarantee undertaken by the paymaster, that is whether the guarantee is an ordinary one, under which the employer is not discharged<sup>53</sup>, or of the

<sup>52</sup> N.YOSEPH, D"R *Chozar*, commenting on Talmud, *Bava Metzia*, p.68A (of Rif's page numbering).

<sup>53</sup> Yet to allow recovery first from the guarantor-paymaster and only then from the employer-debtor, the guarantee ought to be of the type '*arev-kablan*'. See TOSAFOT in Talmud *Bava Batra*, p.73B, discussed *supra* in n.42. Cf. RASHI in *Bava Metzia*, p.62A

category under which the guarantor is fully discharged. The former classification would have supported Rabbah's view that recourse is available, while the latter classification would have supported Rav Shesheth's opinion that recourse is not available. Rather, according to Nimukei Yoseph, the disputation evolves around the effectiveness of an oral implied renunciation in reliance of the paymaster's irrevocable guaranty obligation. Thus, Rav Shesheth is of the view that a renunciation implied from the worker's explicit reliance on the paymaster is fully effective so as to discharge the employer. Conversely, Rabbah is of the opinion that to be effective to release the employer, even in such circumstances, an express renunciation ought to have been made by the worker.

It is however unclear whether according to Nimukei Yoseph the two sages disagree on the adequacy of an implied renunciation in general, or on to the facts of the case. To the latter end, Rav Shesheth may be of the view that once there is a guarantee of the category under which the borrower is not liable, no recourse against him is available, and hence, no express renunciation of such recourse may be needed; renunciation may simply be implied from the nature of the guarantee relied upon. Conversely, Rabbah may be taken to draw a distinction between two situations in which a guarantor becomes the primary debtor. On one hand, there is the usual case of a borrower who received the lender's money through the guarantor, and who has never been liable, so that no recourse has ever been available against him. On the other hand, there is the case of the employer who was liable to the worker in the first place, and who allegedly becomes discharged due to the creditor's reliance on the guarantee making the guarantor the primary debtor. According to Rabbah then, while an express renunciation is not needed in the former case, it is certainly required in the latter.

Other commentators focus on the second sub-scenario (an explicit conditional discharge of the employer by the worker, attached to the worker's agreement to be paid by the paymaster). In this context, an express condition is attached to the worker's agreement to be paid by the paymaster; that condition, suspends the employer's obligation

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D" H *Detanan*, speaking of a guarantor who is an intermediary between the lender and the borrower, namely a guarantor who is liable directly and unconditionally to the lender and is entitled to recover from the borrower.

until default of the paymaster. Right to recourse upon default is however explicitly reserved. Commentators' remarks mostly endeavour to rationalize Rabbah's position, effectively invalidating this condition, by stating that notwithstanding such an express condition, recourse from the employer is available to the worker throughout, that is, even in the absence of, or prior to, default by the paymaster. In other words, the employer had not been discharged, even temporarily, and remained liable to the worker, irrespective of the qualified or conditional renunciation expressed by the worker.

A common explanation given to Rabbah's position, denying efficacy to the release of the employer by the worker until default by the paymaster, is premised on the revocability of the payment obligation of the paymaster. According to the Rosh, 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 paymaster is revocable<sup>54</sup>. The Mordechai strengthens the mistaken release theory, by adding that the worker is aware of the employer's power to countermand payment, that is, to revoke the authority given to the paymaster to pay, and thus cannot be taken to release the employer, lest no one will remain liable to pay to him his wages<sup>55</sup>. In connection with the second sub-scenario, Rav Shesheth, denying recourse, is taken to accept, at face value, the validity of the employer's release by the worker until default by the paymaster.

It is possible to view the analysis of first sub-scenario (an implied renunciation on the basis of a guarantee) as premised on the irrevocability of the paymaster's obligation, with Rav Shesheth and Rabbah disagreeing on the effect of an implied renunciation derived from the reliance on that obligation. Conversely, in the context of the second sub-scenario (an express discharge of the employer's obligation until default by the paymaster), Rabbah's position, invalidating the conditional discharge given by the worker to the employer, is premised on the revocability of the paymaster's obligation. At the same time, in connection with the second sub-scenario, Rav Shesheth's position, validating the express conditional discharge, is consistent with both premises, that of revocability and irrevocability of the paymaster's obligation, or in fact, where there is

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<sup>54</sup> ROSH, D"R *Ibaei lehu*, commenting on Talmud, *Bava Metzia*, p.112A.

<sup>55</sup> MORDECHAI, D"R *Himchahu*, commenting on Talmud, *Bava Metzia*, p.112A.

no obligation altogether on the part of the paymaster. In other words, if release of the employer is effective even when the substituting promise of paymaster is revocable, release ought also to work in the comparable case of absence of a commitment; furthermore, it is obvious that release ought to be effective in the easier case in which the substituting promise is irrevocable.

Not all aspects of the discrepancy between the two Tosafot's sub-scenarios, as subsequently analyzed by commentators, are entirely obvious. Indeed, per Tosafot, in the first sub-scenario, renunciation is absolute though implied; in the second sub-scenario it is conditional yet express. This indeed is an obvious factual discrepancy. However, per Tosafot, in the first sub-scenario, the paymaster's undertaking is in the form of an implied guarantee; at the same time, neither the existence of a paymaster's undertaking, nor its absence, is stated in the second sub-scenario<sup>56</sup>. On their part, commentators<sup>57</sup> strictly followed Tosafot as to the renunciation point; yet, in preferring Rabbah's position to that of Rav Shesheth as to the availability of recourse in the second sub-scenario, commentators discussed the irrevocability of the paymaster's undertaking; thereby, they filled in a blank in Tosafot's second sub-scenario, by adding an undertaking given by the paymaster.

In the context of the second sub-scenario, that of an express conditional discharge, commentators thus agree with Rabbah that in the absence of a paymaster's binding undertaking, recourse is available to the worker against the employer. Unfortunately, it is not obvious if they are to be taken to reject the possibility of an implied irrevocable guarantee by the paymaster, on which Rav Shesheth and Rabbah appear to agree in the context of the first sub-scenario<sup>58</sup>; in such a case, there is a discrepancy in the legal analysis of the two sub-scenarios. Alternatively, having accepted in principle the possibility of an implied irrevocable guarantee given by the paymaster in the second sub-scenario, such commentators may be taken to assert that in the facts of the second sub-scenario, required language, or perhaps any other condition, for the guarantee, have not been met. If the latter, discrepancy on the point is merely factual; an implied irrevocable

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<sup>56</sup> Above, text that follows n.34.

<sup>57</sup> See e.g. ROSH, *supra* n.54 and N.YOSEPH, *supra* n.52.

<sup>58</sup> See text above around n.37.

guarantee is then said to exist in the first sub-scenario but not in the second one; in such a case, however, Tosafot's absence of discussion on the language or circumstances required for the implied guarantee is mostly unfortunate, as there is no indication whatsoever as to the circumstances under which an implied guarantee will arise under the first sub-scenario, as opposed to an irrevocable undertaking under the second sub-scenario.

Final ruling in Jewish law appears to treat the *Bava Metzia* narrative as relating to the second sub-scenario (an express conditional discharge pending default by the paymaster). As well, final ruling in Jewish law appears to side with Rabbah's position as to the lack of validity of the conditional discharge, which allows the worker to have his recourse against the employer throughout, namely, even prior to and irrespective of default by the paymaster. The rationale given is that of the revocability of the paymaster's obligation, such revocability being premised on the absence of any deposit or loan owed by the paymaster to the employer<sup>59</sup>. This may be taken to reject as a matter of law the binding effect of the implied guarantee also per the first sub-scenario, and thereby to harmonize the treatment of the two sub-scenarios, with both taken to be premised, as a matter of law, on the revocability of the paymaster's obligation.

d. Which Scenario? – Aspects of Tosafot's Analysis Revisited

The acceptance of Rabbah's premise (recourse is available irrespective and prior to default) and reasoning (mistaken renunciation) in the context of the second sub-scenario (an express discharge conditional on payment by the paymaster) may appear to reopen Tosafot's ruling on the two initial settings, in which the answer was supposed to be 'obvious'<sup>60</sup>. The first setting was where the worker, in agreeing to be paid by the paymaster, explicitly released the employer, even in the case the paymaster would not pay. The second setting was that when the worker, in agreeing to be paid by the paymaster, explicitly made the release or discharge of the employer contingent or conditional on actual payment by the paymaster. In Tosafot's view, it was 'obvious' that recourse was not available to the worker in the first setting, that of an express absolute

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<sup>59</sup> See TUR, *Choshen Mishpat*, Section 339 and SHULCHAN ARUCH, *Choshen Mishpat*, Section 339.

<sup>60</sup> Above §2.b, particularly text around n.32.

release of the employer by the worker; it was equally 'obvious' that recourse was available, upon non-payment or default by the paymaster, in the second setting, that of an express conditional release of the employer by the worker. In both such cases, the existence or absence of recourse was made dependent on the express renunciation included in the worker's agreement to be paid by the paymaster.

Yet, at first blush, if the paymaster's obligation is revocable so that the worker's attempted expressly stated conditional release fails as a mistaken release, per Rabbah's view in the context of the second sub-scenario, it is hard to see why the express absolute discharge of the employer, per the first setting dismissed by Tosafot as 'obvious', will work better. Stated otherwise, arguably, discharge ought to be taken to be mistaken, and hence ineffective, not only when it is conditional (Rabbah's view for the second sub-scenario) but also, and in fact more so, when it is absolute (Tosafot's first 'obvious' setting); that is, if the obligation of the paymaster is revocable, an absolute discharge will leave the worker with no remedy whatsoever upon the revocation by the paymaster, as the worker may then be unable to go back and recover from the employer. The absolute discharge must then be seen as mistaken and invalid. Hence, the acceptance of Rabbah's premise and reasoning in the context of the second sub-scenario may result in the reversal of the 'obvious' conclusion reached by Tosafot for the first initial setting presented by him.

True, as suggested by Nimukei Yoseph<sup>61</sup>, Rabbah may still be seen as agreeing to the validity of an absolute discharge based on the irrevocable guarantee of the employer, but not to an absolute discharge purportedly given in the absence of such a binding undertaking. It is nevertheless possible to come up with an alternative explanation to Tosafot's position under which it is only the renunciation in the second sub-scenario, but not in the first 'obvious' setting, which is mistaken and hence invalid. The key is Tosafot's view as to the meaning of a mistaken renunciation, which emerges from another part of his same discussion on the *Bava Metzia* text, dealing with a related matter. Thus, in Tosafot's view, to be effective, renunciation given as part of a compromise or settlement of a monetary dispute cannot be oral and requires an act of *kinyan*<sup>62</sup>; this is

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<sup>61</sup> *Supra*, n.52.

<sup>62</sup> See above text at n.28-31.

so, since the party who would have won in court would not have settled had he known he would have won. Stated otherwise, in Tosafot's view, mistaken renunciation is not only one based on mistaken belief in the existence of a state of facts that actually does not exist, but also one based on risk taken as to contingent facts.

On these grounds, it is only an oral conditional renunciation, as in the second sub-scenario, but not an absolute one, as in the first 'obvious' setting, that can be viewed as mistaken; furthermore, per this reasoning, a conditional renunciation is inherently, by its nature, mistaken, since the existence of 'conditions' that may or may not be met gives rise to uncertainty, on which an oral renunciation cannot be based free of error. Arguably then, commentators who explain Rabbah's position under the second sub-scenario as premised on the mistaken basis of the employer's release by the worker adhere to Tosafot's expanded understanding of 'mistake' as covering uncertainties due to contingencies<sup>63</sup>.

There may also be an apparent contradiction between Rabbah's position as to the second sub-scenario and Tosafot's view as to the second 'obvious' setting. Thus, Rabbah's position for the second sub-scenario invalidates the worker's explicit undertaking to discharge the employer until default in payment by the paymaster. Consequently, the worker's recourse from the employer is not to commence upon the default in payment by the paymaster, as may be under Tosafot's second initial 'obvious' setting. In that setting, the employer's discharge is explicitly made by the worker contingent or conditional on actual payment by the paymaster. Rather, in Rabbah's view with regard to the second sub-scenario, recourse from the employer is to be available to the worker throughout, irrespective of his agreement to be paid by the paymaster. Hence, the acceptance of Rabbah's premise and reasoning for the second sub-scenario results in either the reversal, or the bypassing of the significance, of Tosafot's 'obvious' conclusion as to the second initial setting; if the employer is not discharged prior to the default by the paymaster, there is no

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<sup>63</sup> For such commentators see above, text and n.54-55. Compare and contrast with *Bava Metzia*, p.66B-67A, discussing the avoidance of an obligation incurred on the basis of either mistaken renunciation, or in the belief that a stated condition thereto will not be fulfilled, in which context 'mistake' is more conventionally understood to refer to the mistaken belief in the existence of a state of facts (or law) that actually does not exist.

employer's liability to be incurred upon the default by the paymaster. Stated otherwise, if the express discharge of the employer until default by the paymaster is ineffective so that the employer remains liable throughout, per Rabbah's position for the second sub-scenario, liability of the employer cannot be seen as triggered by the default by the paymaster, as may Tosafot's 'obvious' conclusion for the second initial setting be understood to state.

In the final analysis however, Tosafot's conclusions for both the second 'obvious' setting and the second sub-scenario are reconcilable; both involve the same stipulation by the worker, namely that of conditional renunciation upon payment; what is added in the second sub-scenario, namely, an express reservation of recourse upon non-payment, is in fact a double stipulation,<sup>64</sup> which ought to be taken as implied also in the second 'obvious' setting. For the second obvious setting, Tosafot is to be taken to say only that is clear that per the language expressing the renunciation, recourse is available upon non-payment; Tosafot is not to be taken as implying anything then on the availability of recourse prior to that, a point which he subsequently discussed in the context of the second sub-scenario, on which the views of Rabbah and Rav Shesheth vary.

e. Talmudic Text in Shevuot - Tosafot's Position Supported

Support to Tosafot's position as to the centrality of the renunciation issue and insight on whether the *Bava Metzia* narrative requires the presence of all three<sup>65</sup> may be derived by comparison to another Talmudic text, in *Shevuot*<sup>66</sup>. The situation dealt with there is that of a charge in the books or ledger of a storekeeper arising from a payment or sale made in alleged compliance by the storekeeper with an instruction given by a person; such an instruction was to provide wheat to the instruction giver's son or small-value coins to his worker. The Mishna discusses a case in which the worker and the storekeeper disagree as to whether the storekeeper complied. It rules that whenever the worker denies receipt of payment claimed to be made

<sup>64</sup> A double stipulation states both the positive and negative side of an obligation; it is a condition stating both what will happen upon its compliance and upon its breach. See Talmud, *Kidduhsin*, p.61A.

<sup>65</sup> A question left open in text around n.20 above. For the renunciation of recourse as central to Tosafot's position see §2.b above.

<sup>66</sup> Talmud, *Shevuot*, p.45A, and Jerusalem Talmud, *Shevuot*, p.36B, discussed immediately below.



by the storekeeper, the employer is to pay to both, that is, to the storekeeper and the worker<sup>67</sup>. This continued liability of the employer means the availability of recourse to the worker against him.

Two points ought to be highlighted. First, the text in *Shevuot* does not raise the issue of recourse by the worker against the employer; it appears to take its existence for granted. Second, the *Bava Metzia* narrative does not even refer to the *Shevuot* text; yet, it could have been expected that Rabbah would rely on the *Shevuot* discussion as supporting the availability of recourse and that Rav Shesheth would endeavour to distinguish it so as to justify lack of recourse according to his own analysis. It seems then that it was obvious to all concerned that the two Talmudic texts do not deal with the same scenario; indeed, in the *Bava Metzia* text the direction given by the employer is addressed to the worker, namely to the creditor, to go and recover from the paymaster. Conversely, in *Shevuot*, the direction is given by the employer to the paymaster, to pay to the worker. And while either way a double direction from the employer is required, the one to the worker to go and get paid, and the other to the paymaster to pay, the emphasis in each scenario on one direction is not without implications.

Thus, the issue of renunciation, with which Tosafot's analysis to the *Bava Metzia* narrative is concerned, is a matter coming up between the employer and the worker; it arises in a scenario involving them both, as when the employer directs the worker to go to the paymaster. At the same time, no renunciation comes up in that part of the scenario in which the worker is not involved, that of the direction given by the employer to the paymaster, as in *Shevuot*. By itself, the direction dealt with in *Shevuot* neither entitles nor binds the worker,

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<sup>67</sup> For this interpretation see PNEI MOSHE commentary to the Jerusalem Talmud, *Shevout* (Talmud p.36B) and to a similar end, in the Talmud, *Kiddushin*, p.43B. There is a disputation in the Mishna in *Shevuot* (p.45A in the Bavli Talmud; p.36B in the Jerusalem Talmud), irrelevant for our purposes, as to whether to be successful in their claims against the employer, both the worker and the storekeeper need take an oath. As well, note that the Talmudic discussion in *Shevuot* equally covers the father and son scenario, and not only that of the employer and worker, to which attention is restricted in the present discussion. Yet, it will be noted that the initial entitlement of the son from the father, unlike that of the worker from the employer, is not all that obvious. Arguably, the father and son case is relevant only to the oath taking aspect of the text, and is not to be taken as implying father's liability to his son. See TOSAFOT YOM TOV, D"R Ten livni, commenting on Mishna, *Shevuot*, Section 7, Rule 5.

who thus remains entitled to recover from the employer at any time. It is in fact the absence of any modification in the worker's rights on which the *Shevuot* text focuses. Conversely, in the *Bava Metzia* text, it is the worker's consent, to abide to the employer's direction, which is determinative; hence, it is only then that the issue of the modification of his rights, in the form of renunciation or loss of recourse, arises.

Indeed, in the Jerusalem Talmud, the Gemara in *Shevuot* limits the case dealt with by the Mishna, that of the direction addressed to the storekeeper, to a situation where the instruction is not given in the presence of all three. It is only then, that is, when the worker is not even present at the time the instruction is given by the employer to the storekeeper, that the employer remains liable to the worker. Conversely, where all three are present at the time the instruction is given, that is, when the worker has been present, the Gemara in the Jerusalem Talmud categorically states, the employer has been discharged and recourse is available to the worker only against the storekeeper<sup>68</sup>.

Obviously then, in holding that the storekeeper is liable and cannot renege<sup>69</sup>, the Gemara in the Jerusalem Talmud envisages a case in which the storekeeper undertook to pay. The Ridvaz takes the position that in such a case it is "as if" the storekeeper owed money to the employer who had paid him in advance; yet in fact, no advance had actually been made and even without a debt owed by the storekeeper to the employer, the employer is discharged, and the storekeeper may not renege. Mareh Hapanim is of the same opinion; in his view the case, dealt with by the Jerusalem Talmud is one in which the storekeeper extends credit to the employer, which is the same as in the *Bava Metzia* text. In the view of Mareh Hapanim, the Gemara in the Jerusalem Talmud thus appears to follow Rav Shesheth, who in his

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<sup>68</sup> Talmud, *Shevuot*, p.36B-37A. The Gemara text distinguishes between a situation in which the employer "did not make the worker stand [before the storekeeper] with him", namely with the employer, in which case there is recourse, and the situation in which the employer "made the worker stand [before the storekeeper] with him", namely the employer, in which case there is no recourse. PNEI MOSHE and RIDVAZ on the Gemara page are more explicit in characterizing the latter situation, in which recourse is lost, as involving the presence of all three.

<sup>69</sup> As PNEI MOSHE explains the Gemara text in the Jerusalem Talmud, in such a case, the risk falls on the storekeeper, who cannot get away by directing the workers to the employer who had been released, regardless of whether payment by the storekeeper is disputed or not made.

controversy with Rabbah in *Bava Metiza* precludes recourse against the employer; yet, per Mareh Hapanim, ultimately, “the law is not according to him”, but rather, according to Rabbah, who permits recourse against the employer.

It thus emerges that in the footsteps of the *Bava Metzia* scenario, the *Shevout* Gemara in the Jerusalem Talmud deals with a case in which credit is extended by the paymaster/storekeeper to the employer. Indeed, in fastening liability on the storekeeper and discharging the employer, the *Shevout* Gemara in the Jerusalem Talmud may well be at variance with “the law” as subsequently prevailed; what matters to us however is that in distinguishing itself from the *Shevout* Mishna the *Shevout* Gemara in the Jerusalem Talmud contrasts that Mishna with the *Bava Metzia* scenario, by envisaging the latter to apply where all three are present together.

Among the early commentators, both Rif<sup>70</sup> and the Rosh<sup>71</sup> are quite explicit in relying on the *Shevuot* Gemara in the Jerusalem Talmud as the basis for their own respective treatment of Rav Shesheth’s position on the loss of recourse in the *Bava Metzia*’s narrative, and viewing that position as confined to a situation where all three are present<sup>72</sup>. In the Rosh’s view, this position is further limited specifically to the first of Tosafot’s sub-scenarios, that of the implicit renunciation by the worker based on the paymaster’s the guarantee. Tosafot’s commentary to the *Bava Metiza* text is more ambiguous<sup>73</sup>; in dealing with that first sub-scenario, he mentions the revocation power of the paymaster who does not owe anything to the employer and states it to exist “even in the presence of all three”; he later on mentions the Jerusalem Talmud Gemara in *Shevuot* to refute the possibility that the *Bava Metzia* text, instead of dealing with a recourse against the employer, is actually concerned with a third sub-scenario, that of the reinstatement of the worker’s remedy for the violation of the prohibition against delaying payment<sup>74</sup>.

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<sup>70</sup> RIF on Talmud, *Bava Metzia*, p.68B (of RIF’S page numbering).

<sup>71</sup> ROSH, *supra* n.54.

<sup>72</sup> For Rav Shesheth’s position and a preliminary discussion on whether the *Bava Metzia* narrative is confined to a case where all three are present together see above §2.a.

<sup>73</sup> TOSAFOT, D’H *Chozar*, commenting on Talmud, *Bava Metzia*, p.112A.

<sup>74</sup> For the third sub-scenario, see *supra* n.33.

Among the later commentators, Kessef Mishna treats the disputation in the *Bava Metzia* text as relating to whether, in order to be effective, the worker's renunciation in the presence of all three must be express<sup>75</sup>. This excludes the second sub-scenario of Tosafot, that of an express conditional discharge; rather, this treatment must be taken as limiting the disputation in the *Bava Metzia* text to the case of the first Tosafot sub-scenario, that of the implicit renunciation on the basis of the paymaster's guarantee. It also points out at the *Bava Metzia* text as further restricted to the situation that all three are present.

Certainly, speaking of the direction given to the paymaster to pay the worker, the text of the Mishna in *Shevuot* ought to be taken as not purporting to affect the worker's own rights; he is to obtain payment of money and not a payment obligation from the paymaster, and is to remain to be entitled to obtain payment in money solely from the employer. Neither the accrual of a right against the paymaster nor the loss of a right against the employer is to take place, and hence there is no need for the presence of all three, or in fact, of any mechanism, to create rights and duties.

At the same time, speaking of the direction given to the worker by the employer to be paid by the paymaster, the *Bava Metzia* text ought to be taken as positioning the worker as dealing with both the employer and the paymaster. It is on the basis of what the paymaster tells the worker that the worker is purporting to renounce the recourse against the employer. This is particularly obvious in the first sub-scenario (an implied absolute discharge based on reliance on the paymaster's undertaking), in which renunciation is on the basis of the paymaster's guarantee to the worker. Strictly speaking, in the second sub-scenario of Tosafot (express conditional discharge), communication is a matter exclusively between the employer and the worker<sup>76</sup>; hence, there is no pressing need to see it as confined to the presence of all three scenario. Yet, as discussed, commentators treat also the second sub-scenario as involving an undertaking by the paymaster, albeit revocable<sup>77</sup>. Under this understanding, also the

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<sup>75</sup> RAMBAM, *Kinyan: Hilchot Mechira*, Section 6, Rule 8. On the renunciation in the various settings and sub-scenarios of the *Bava Metzia* text see above §2.a.

<sup>76</sup> See text above in §2.b that follows n.34 and n.50.

<sup>77</sup> See above §2.c, particularly around n.57.

second sub-scenario is to better be envisaged as involving the presence of all three together.

Hence it is more plausible to see all three standing together; the alternative is awkward: the worker, having received the direction from the employer, is to go to the paymaster, and having received from him an undertaking to pay, is now to return to the employer and make the renunciation.

Indeed, the view under which the loss of recourse in the *Bava Metzia* text is limited to circumstances where renunciation was made in the presence of all three, may explain the paucity in the discussion by commentators as to the mechanism under which instructions are to direct the paymaster to pay the worker; certainly, if all three are present, no issue arises as to formal writing requirements, flow of communication, authentication of instructions or identification of the worker.

On the other hand, if all three are present, it is not all that obvious why the paymaster is not to pay promptly to the worker, but is rather to undertake a deferred payment obligation, to be carried out at some point in the future<sup>78</sup>. Indeed, a delay may be understood to occur in the case of a paymaster-storekeeper, who is to extend credit by selling provisions to the worker over time; it is less understandable in the case of the paymaster-moneychanger who is to pay money to the worker. This is particularly so if the paymaster is held bound by the prohibition against delaying payment, from which the employer has been released by virtue of the direction issued to the worker to obtain payment from the paymaster<sup>79</sup>.

True, the *Bava Metzia* text may be taken to be limited to unusual circumstances, such as where the moneychanger does not have

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<sup>78</sup> Which was clearly the case in the scenario described in the Gemara in *Shevuot* in the Jerusalem Talmud, p.36B, *supra* n.66, in order to demonstrate a case in which the workers have no recourse against the employer.

<sup>79</sup> For the view that unless payment through the paymaster is agreed in advance, the requirement to comply with the rule prohibiting delaying payment passes from the employer to the paymaster see TOSEFTA on Talmud, *Bava Metzia*, Section 10, Rule 1. On the compliance by the paymaster see ALBEK, *Assignment of Debt*, *supra* n.13, p.276-277. His reasoning is valid even without accepting his position of the paymaster's pre-existing indebtedness to the employer, discussed in *supra* n.21 and n.23 above. As recalled, the prohibition against delaying payment to the worker was the main concern of the Mishna in the *Bava Metzia* narrative. See above, beginning of §2.a.

enough cash at hand, at least of the desired small coins, or else, the entire meeting of all three occurs either late in the day, after of what we may call today normal business hours, or not in the paymaster's place of business. This however may significantly reduce the relevance of the discussion to ordinary circumstances; unless of course moneychangers used to set a shop in the market but kept their money, at least in part, particularly other than small change, elsewhere, in which case customers with whom they transacted in the market had often to come later to that other location to obtain their money.

Another option, still adhering to the presence of all three setting, is to treat the scenario as one in which the paymaster promptly pays the worker, though not in cash, but rather in the form of agreeing to hold with him an amount available to the worker, for full or partial withdrawals, on demand. Under this view, the paymaster's agreement to hold the amount for the worker will serve as 'payment' in compliance with the rule prohibiting delaying payment. In such a case, the disputation between Rabbah and Rav Shesheth is on the recourse available to the worker against the employer, as long as actual payment in money has not been carried out. This may be a way to see the *Bava Metzia* scenario as not limited to unusual circumstances<sup>80</sup>.

Perhaps a simpler explanation to the delay in anticipated payment by the paymaster, while still requiring all three to be present, is to treat the setting as one wherein the direction given to the worker by the employer to get paid by the paymaster is given prior the end of the working day, that is, prior the completion of the work, namely, before the entitlement to payment accrues. Actual payment is then to be made at the end of the day, upon the completion of work. Indeed, this may explain the delay in payment by the paymaster; yet, this would have made any undertaking of the paymaster conditional upon completion of the work by the worker, for which we have no indication in any of the texts or discussions<sup>81</sup>.

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<sup>80</sup> Nevertheless, under this view of the matter, attention ought to have been given to the position of the employer who in reliance on the paymaster's agreement may have already paid him in whole or in part money to be kept for the worker; lack of a discussion on the point strongly weakens this explanation to the delay.

<sup>81</sup> The conditional order issue may further arise in connection with the view of the TOSEFTA, *supra* n.79, under which the prohibition against delaying payment is

Another possibility in the context of a rule requiring all three to be present, is to treat the scenario as referring to the case of a worker who completed his tasks in the course of the day, prior to its end, so that there is still time between then and the point of time, at the end of the day, in which the prohibition against delaying payment, will be violated. In such a case, the paymaster's obligation may be given ahead of actual payment; in turn, actual payment is to take place however prior to the end of the day, before the prohibition against delaying payment is violated. While this fits the text, it is questionable whether this is such a typical case to draw so much attention.

Nevertheless, the existence of a paymaster's payment obligation prior to actual payment is also not easily explained if the presence of all three is dispensed with. Even if the worker is to go on his own to the paymaster to demand payment, so that presence of all three is not required, it is not clear why payment is not to be made on the spot, and why instead the paymaster's undertaking to pay in the future arises. It could however be argued, though admittedly, quite tenuously, that such could be the case in one of a few situations. First, the case may fall into the second sub-scenario, as described by Tosafot and not as 'revised' by commentators, in which no undertaking is given by the paymaster. Second, in connection with the first sub-scenario, the situation may be that in which there is a standing obligation of the paymaster to pay to the employer's workers sent to him, in which case it is *as if* the paymaster actually spoke to the worker advising him to rely on him, but in fact did not speak to him directly at all. Third, a similar standing obligation can be contemplated also by the commentators who read Tosafot's second sub-scenario as involving an undertaking, albeit revocable, of the paymaster<sup>82</sup>. In each such a case the worker makes the renunciation, whose effectiveness and scope is the subject of the discussion, prior to coming to the paymaster.

In the final analysis, the simplest explanation to the paymaster's deferred payment obligation may however be that the worker is

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violated by neither the employer nor the paymaster where payment through a paymaster is agreed in advance. In such a case, however, at the initial stage of the agreement, payment is instructed to be made conditional upon the completion of the work, unless both the worker and paymaster are to be re-directed at its completion. Texts do not discuss this 'two-stage' agreement followed by direction.

<sup>82</sup> See above §§2.b and 2.c.

content with the obligation of the paymaster to pay to him in the future and does not demand immediate payment to which he is entitled by virtue of the law prohibiting delay in the payment of wages. This explanation holds true whether or not the worker's renunciation ought to be made in the presence of both the employer and the paymaster. Indeed, the Gemara is quite explicit in stating that the prohibition against delaying payment of wages is violated when delay occurs notwithstanding the worker's demand<sup>83</sup>; that is, the clock is ticking as of the demand only, and delay in payment is not precluded if consented by the worker who foregoes the demand. The presence-of-all-three setting may then prevail only as it appears to better fit the transactional flow, and not because it gives a superior explanation to the paymaster's deferred payment obligation.

At the same time, for this explanation to be consistent with the role of the storekeeper or moneychanger as a paymaster and not surety, in line with the picture depicted by Rashi and adhered to throughout the entire analysis above<sup>84</sup>, an actual payment, albeit delayed, in either kind (by the storekeeper) or money (by the moneychanger), is to be envisioned. Reasons and the extent for this delay, as well as the time for the employer's repayment to the paymaster, and any possible cost incurred by him in connection with the operation of the mechanism<sup>85</sup> are neither specified nor amenable to deduction from available materials.

It seems that the Talmudic text primarily focused on the legal implications of the renunciation in the various situations; no adequate attention was given to the operation of the payment mechanism in connection with which the renunciation is given. Unfortunately, commentators have not addressed the time lag between the payment obligation and payment itself, which could have shed more light and provided greater understanding of the mechanism. Certainly however, both the delay in actual payment, and as already indicated in §2.a, the probable existence of a presence-of-all three requirement, reinforce the view of the scenario as dealing with the credit extension by a paymaster who does not owe money to the employer.

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<sup>83</sup> Talmud, *Bava Metzia*, p.112A.

<sup>84</sup> See §2.a, text in paragraph preceding the one containing n.13, above.

<sup>85</sup> Certainly, any such cost may not violate the prohibition to take interest mentioned in *supra* n.4.



### 3. *Final Modern Lawyer's Observations*

Under modern law, a conditional discharge is implicitly given by the payee-creditor (the worker) to the drawer-debtor (the employer), in effect, of the type rejected by Rabbah in the context of the second sub-scenario. Thus, under modern law, upon the taking the cheque, in temporarily renouncing, or in effect suspending his right of recourse against the drawer-creditor, the payee-creditor does not rely at all on any undertaking or even representation emanating from the drawee bank- paymaster<sup>86</sup>; rather, he exclusively counts on the contingent liability of the drawer-debtor. Upon the dishonour of the cheque by the drawee-paymaster, the drawer-debtor becomes liable on the cheque<sup>87</sup>, and alternatively, on the basic transaction<sup>88</sup>.

With respect to the second sub-scenario, that of an express conditional discharge, modern law thus appears to be quite consistent with Rav Shesheth's position; per Tosafot's text, such is the case where no undertaking is given by the drawee-paymaster to the payee-creditor-worker. With respect to the first sub-scenario, that of an implied absolute discharge, the irrevocable undertaking given by the paymaster is not treated in modern law as a guarantee. It is either in the form of a bank's engagement on a certified or its own cheque, or in the form of a letter of credit. The better view under modern law is to see the former situation, that of the certification or the bank cheque, as typically giving rise to an absolute renunciation by the payee-creditor (worker) of his recourse against his debtor (the employer), the drawer of the certified cheque or the remitter of the bank cheque<sup>89</sup>. This is in line with the position of Rav Shesheth under the first sub-scenario<sup>90</sup>.

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<sup>86</sup> See for example in Canada, under the *Bills of Exchange Act*, RSC 1985 c.B-4, Section 126 (drawee is not liable on a bill unless he accepted it), as well as Section 130 (no liability on a bill without a signature). A 'cheque' is a specie of a bill. See Section 165.

<sup>87</sup> *Ibid.* Section 129(a). For dishonour by non-payment see Section 94. Alternatively he also becomes liable on the debt or basic transaction for which the cheque was given.

<sup>88</sup> This is so since payment by cheque is presumed to be conditional. See *Re Charge Card Services Ltd.* [1988], 3 All ER 702, p.707 (CA).

<sup>89</sup> This is reflected e.g. in the US in UCC 3-414(c).

<sup>90</sup> Conversely, the issue of the letter of credit is typically treated as conditional payment, releasing the debtor only on the condition of payment by the paymaster, the

Modern law departs from Rav Shesheth's position in several respects. First, it is obvious that no presence of all three is required; the debtor-employer directs the creditor- worker to be paid by the paymaster by either issuing his own cheque to the payee-worker, or delivering to him a bank cheque issued by the paymaster. In turn, the presentment of this instrument by the creditor-worker to the paymaster constitutes the debtor-employer's direction to the paymaster to pay. Second, the scope of the renunciation is implied by law, rather than in fact. In any given case, the presumption of either conditional or absolute discharge can be rebutted; yet, the relevant presumption arises without pursuing actual language and conduct of parties. Third, payment by cheque is taken to occur at the time it was accepted even in conditional payment, and not at the time it is actually honoured<sup>91</sup>; the lag preceding actual payment does not pose any problem. Fourth, while credit extension by the paymaster to the creditor is quite conceivable, the typical situation, at least in which a cheque is issued, is where the debtor's funds are held with the paymaster<sup>92</sup>. Fifth, a payment order must be written. It also must be unconditional<sup>93</sup>; the modern lawyer cannot easily live with the proposition that the paymaster's payment obligation may depend on the performance of the underlying contract by the payee-creditor, which is one of the possible scenarios to explain the time lag between the payment obligation and actual payment.

In conclusion, the mechanism discussed in the *Bava Metzia* Talmudic text involves neither writing nor funds on deposit. It involves a demand possibly made by the creditor on the paymaster only in the presence of the debtor, and leaves recourse to be continuously available to the debtor against the creditor.

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issuer of the letter of credit. See *WJ Alan & Co. Ltd. v. El Nasr Export and Import Co* [1972] 2 All ER 127, p.136; [1972] 2 QB 189, 209.

<sup>91</sup> As pointed out by MEGAW LJ in *The Brimnes Tenax Steamship Co v. The Brimnes (Owners)* [1974] 3 All ER 88, 111-112 (CA).

<sup>92</sup> The drawee bank's contractual duty to pay is subject to the availability of either funds in the drawer-customer's account, or of an overdraft facility to him or her. See *Barclays Bank v. W.J. Simms* 1 Lloyd's Rep. 225 at p.238, [1980] QB 677 (Goff J.).

<sup>93</sup> This is true for the cheque (see e.g. in Canada BEA *supra* n.86, Section 165(1) in conjunction with Section 16(1)) and transfer order (see e.g. in the US UCC Section 4A-103(a)(1)(i)). *Cf.* the letter of credit, with regard to which documentary (and no other) conditions are to be specified. ICC UCP 600 for Documentary Credits (2007 Revision) Articles 2 (definitions of 'credit' and 'presentation') and 4-5.

Notwithstanding the temptation to the contrary<sup>94</sup>, neither cheques nor a cheque system are proven to have been envisioned by the Talmud in connection with this mechanism. While the *Bava Metzia* Talmudic text and related commentaries may have foreseen interesting forthcoming issues, it is premature to treat these materials as discussing cheques or containing a nascent cheque law.

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<sup>94</sup> As set out in *supra* n.3.