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1. Introduction: cheques and cheque law

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

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

[1] 1882, 45 & 46 Vict., c. 61.

[2] 1957, 5 & 6 Eliz. 2, c. 36.

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

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

[5] In fact, Scotland, which is also a constituent of the United Kingdom, falls into this category.

[6] 18 R.S.C. 1985, c. B-4.

[7] Bills of Exchange Act 1909.

[8] No. 145 of 1986.

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 With regard to cheques in Australia, BEA provisions are superseded by the Cheques Act and thus are not to be taken into account or referred to.

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

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

[12] In the UK, the BEA clarifies in s. 2 that 'written' includes printed.

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

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

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

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

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

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

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

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

countries, including France[20], Germany[21], Italy[22], Japan[23] and Switzerland[24].

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

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

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

[20] Cheque Law, Decret-lois of 30 Oct. 1935.

[21] The Cheque Act, 14 Aug. 1933 (RGBI. I 597).

[22] R. D. 21 December 1933, n. 1736, as supplemented by L. 15 December 1990, n. 386.

[23] Law on Cheques, Law No. 57, 29 July 1933.

[24] Arts. 1100-44 of the Code of Obligations.

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

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

[27] Under art. 2, a cheque which does not specify the place at which it was drawn is 'deemed to have been drawn in the place specified beside the name of the drawer' and is nevertheless a cheque.

[28] Broadly defined in art. 54 to include 'the persons or institutions assimilated by the law to bankers'.

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

[30] In which case, it may be with or without the express clause 'to order', or with the words 'not to order'.

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

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

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

[33] See UCC §3-106. For the possibility that a separate agreement may nevertheless affect the instrument see §3-117.

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

[35] See UCC §3-103(8) defining 'order'.

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

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

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

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

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

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

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

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

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

[43] Cf. the Canadian definition which as indicated in note 13 above covers more types of regulated financial intermediaries.

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

[45] "Payee" is used here in the broad sense to include the first bearer to whom a cheque payable to bearer is issued. Where transfer is permitted "payee" includes the transferee.

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

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

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

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

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[48] *Ibid* at 204.

[49] *Ibid* at 208.

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

[51] Holden, *supra* n. 47 at 207-208.

[52] Richards, *supra* n. 50 at 49.

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

[54] Benjamin Geva, *The Payment Order of Antiquity and the Middle Ages* (Oxford and Portland Oregon: Hart, 2011).

[55] *Ibid* at Chapters 3-8 and 10-11.

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

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

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

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

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

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

[61] Bagnall & Bogaert, *supra* n. 58.

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

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

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

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

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

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

3. Some cheque law without cheques under Roman law

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

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

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

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

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

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

certain in money is a *stipulatio certa*.[73] Effectively, a delegation order is executed when at the 'bidding' of payer-debtor, payee-creditor stipulates from drawee for the money owed.

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

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

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[73] Defined by Berger, *ibid* at 717 as a "stipulation in which the thing promised … its quality … and quantity were precisely fixed." It is thus to be contrasted with *stipulatio incerta*. *Ibid.*

[74] See Part 1, around n. 45 *supra*, and paragraph that follows.

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

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

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

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

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

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

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

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

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

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

[88] This qualification is based on the immediately following paragraph and is not of Nicholas.

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

[90] For quoted language and discussion see Zimmermann, *supra* n. 69 at 63-64.

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

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

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

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

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

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

[101] Sorbier, *supra* n. 98 at 20-28.

[102] *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

[116] Talmud, *Gitin* at 13A.

applies, the debtor is absolutely discharged, and no recourse is available to the creditor against him[121].

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

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

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

[122] Baal Ha-Itur, Section 5, "Hamcha-a".

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

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

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

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

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

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

[129] Talmud, *Bava Metzia* at 111A.

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

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

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

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

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

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

[138] Talmud, *Gitin* at 13B discussed above in this Part.

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

[140] Talmud, *Bava Batra* at 173A-174A.

[141] 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.

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

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

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

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

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

[144] Rosh, D"H "Ibaei lehu" commenting on Talmud, *Bava Metzia* at 112A.

[145] See Tur, *Choshen Mishpat*, Section 339 and Shulchan Aruch, *Choshen Mishpat*, Section 339.

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

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

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

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

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

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

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[150] See Tur, *Choshen Mishpat*, Section 339 and Shulchan Aruch, *Choshen Mishpat*, Section 339.

[151] Kessef Mishna, Rambam, *Kinyan: Hilchot Mechira*, Section 6, Rule 8.

[152] See above, Part I paragraph that follows the one containing note 45.

[153] As in Talmud, *Shevuot* at 45A, and Jerusalem Talmud, *Shevuot* at 36B.

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

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

Islamic payment instruments have not always acquired distinct names.

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

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

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

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

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

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

[163] See e.g. Goitein, *supra* n. 158 at 245.

Alternatively, a creditor may effectively waive his claim to a debt and confer it on a designated beneficiary, typically his own creditor, by 'acknowledging' that the debtor's debt is actually owed to that assignee[171].

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

Hawale literally means 'removal'[173] or 'turn'. It denotes the transference of an obligation from one person to another, constituted by "an agreement by which a debtor is freed from a debt by another becoming responsible for it"[174]. What is transferred from the debtor to another person is an obligation

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

[172] A point highlighted by Tyan, Cession, *supra* n. 167 at 24.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[192] See above beginning of Part 2.

[193] De Roover, "New Interpretations" *supra* n. 191 at 213.

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

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

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

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

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

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

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

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

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

[203] For a 15th century quote to a similar end see Mueller, *ibid*, at 49.

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

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

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

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[205] For Barcelona, see e.g. Usher, *ibid*, at 283-88.

[206] *Ibid*, at 283.

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

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

[209] Usher, *ibid*, at 91, referring in the quoted language to the depositor-drawer as 'creditor' (of the bank) and to his own (the 'creditor'-depositor-drawer's) creditor, namely to the payee, as the "third party".

[210] Paragraph containing notes 41-44, above.

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

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

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

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

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

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

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

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

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

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

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

[225] Holden, *supra* n.47 at 209.

[226] Quinn, s*upra* n. 221 at 54.

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

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

[229] Quinn, *supra* n. 221 at 61.

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

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

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

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

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[238] *Ibid.* at 430 (T.R.), 1059 (E.R.).

[239] 2 M. & Rob. 401, 174 E.R. 331.

[240] Unfortunately, the Report contains a "somewhat irrelevant and certainly inaccurate footnote" to the contrary. See Holden, *supra* n. 47 at 218.

[241] 8 C.B. (N.S.) 372, 141 E.R. 1210.

[242] *Ibid.* at 381 (C.B.), 1213 (E.R.).

[243] *Ibid.* at 381 (C.B.), 1214 (E.R.).

[244] *Supra* n. 241 at 381 (C.B.), 1213 (E.R.).

[245] See s. 74 in the UK and Israel, s. 166 in Canada, and s. 60(1) in Australia.

[246] *Supra* n. 241 at 381 (C.B.), 1213 (E.R.).

[247] L.R. 19 Eq. 74 at 76.

[248] BEA s. 73 in the UK; 165(2) in Canada; s. 73 in Israel; s. 71 (in conjunction with s. 1) in South Africa.

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

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

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

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

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

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

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

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

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

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

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

[260] BEA s. 53(2).

[261] For cites of all national statutes see Part 1 above.

[262] UCC §3-409(d).

[263] Art 12(1).

[264] Art 4(2).

[265] Arts 53-58.

[266] S. 72A(1).

[267] See *Boyd v. Nasmith* (1889), 17 O.R. 40 (CPD).

[268] See s. 23 of the Deutsche Bundesbank Act of 26 July 1957, BGBI. I745.

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

[270] UCC §3-409(d).

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

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

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

[272] *Supra* n. 253.

[273] Such is the case in France art. under 40.

[274] *Anon* (1668) Hardes 585, at 487, 145 ER 560, at 561. *Browne v. London* (1670) 1 Mod. 285, 86ER 889.

[275] 1 Ld. Raym. 538, 91 E.R. 1259.

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

[277] *Harris v. De Bervoir* (1624), Cro. Jac. 687, 79 E.R. 596.

[278] 2 Ld. Raym. 928 at 930, 92 E.R. 120 at 121 (K.B.).

[279] L.R. 10 Ex. 153 (Ex. Ch) at 163.

[on the debt] remains"[280] albeit as an alternative to the drawer's liability on the cheque itself.

8. Final Observations

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

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

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

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

[280] See *Re Charge Card Services Ltd.*, above note 252.

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

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

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

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

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

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