



**Medieval Jewish and Islamic payment
instruments:
Their Interaction and Lasting Heritage**

***** *** *****

Professor

Benjamin Geva

SJD, Harvard

**Osgoode Hall Law School York University
Toronto, Canada**

===

**The first annual conference of Islamic Economics, Islamic Finance
& Religious studies --- Toronto, August 30th & 31st, 2013**

Organized by: [ECO-ENA: Economics & ECO-Engineering Associate, Inc.](#),
Ottawa, Ontario, Canada

Day 2: August 31, 2013 at 1.00 PM

Chestnut Conference Centre:

Armoury Suite - 2nd Floor

University of Toronto

Toronto, Ontario, Canada

(Rev.)



Based on chapters

4. Deriving History from Law: Are Cheques Traceable to the Talmud?

6. The Medieval *Hawale*: The Legal Nature of the *Suftaj* and Other Islamic Payment Instruments

7. Funds Transfers Under Talmudic Law: Orthodoxy and Adaptation

of

B.Geva

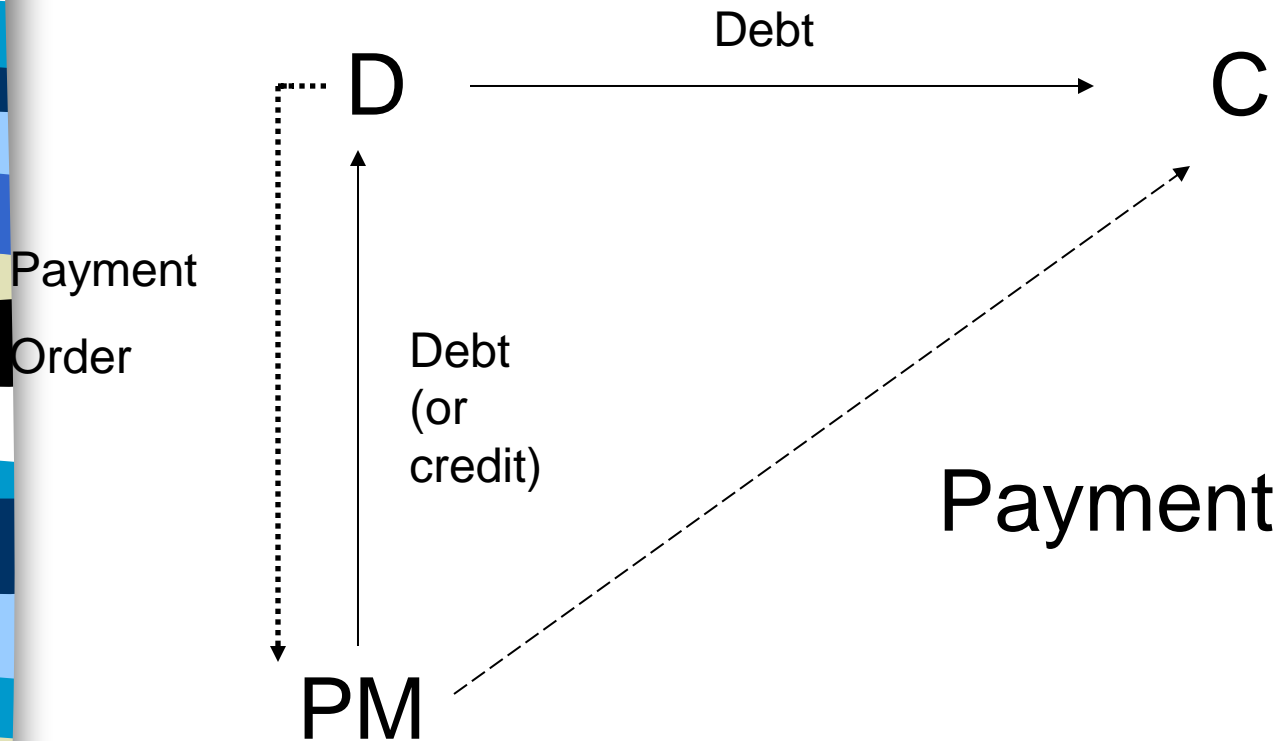
The Payment Order of Antiquity and the Middle Ages: A Legal History

(Oxford and Portland Oregon, Hart Publishing, 2011)

I

- A payment mechanism is any machinery facilitating the transmission of money [or monetary value] in the payment of a debt, which enables the debtor to avoid the transportation of money and its physical delivery to the creditor in the discharge of the debt.

Operation of Payment Mechanism



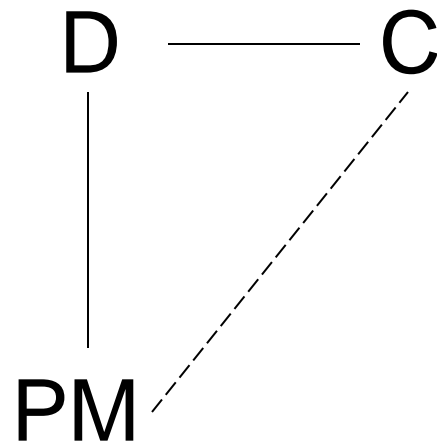
The Fundamental Issue

- Operation of payment mechanism is premised on C getting either a substituted debtor [PM to replace D] or a substituted debt [of PM to D- to replace D's original debt to C]
- *The primary hurdles in antiquity:*
 - = Formal contract requirements;
 - = Strict privity – even in informal contracts; and
 - = Debt is not an asset but a personal relationship so as to preclude debtor substitution as well as debt transfer

When and where nevertheless works:

Payment Mechanism:

Major Legal Issues



1. C – D: – discharge/recourse

2. Defences available to PM against C's claim

3. *Is C's claim transferable— and if so —by delivery of the order document? free of D's defences?*

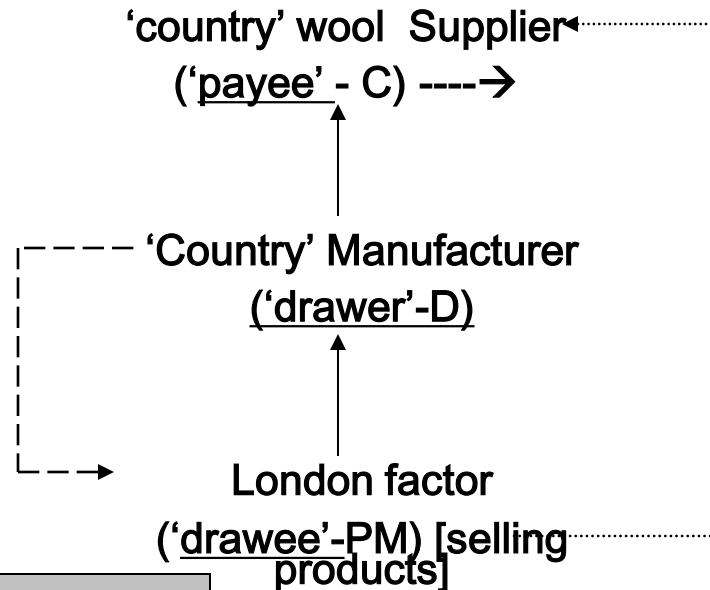


Modern Bill of Exchange – Basic Form

Drawer is Debtor
Payee is Creditor
Drawee is PM

To: Drawee
Pay Payee
(-) Drawer

A 17th -Century Inland Bill of Exchange in England [Transferable by Delivery- possibly with endorsement - since 18th century]



Index

- ▶ Debt(s)
- ▶ Order
-▶ Payment to be made

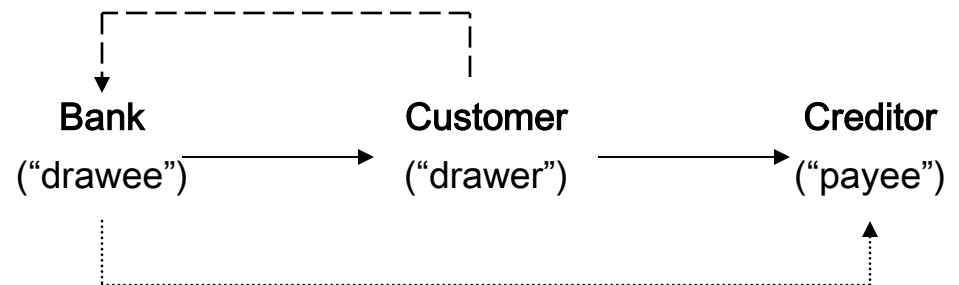
Modern Cheque is a setting

- Order of a customer to his or her bank to pay to the customer's creditor (a type of a bill of exchange)

To: Bank
Pay to Payee (or "bearer")
(-) Drawer

Index

—————> Debt(s)
-----> Order
.....> Payment to be made

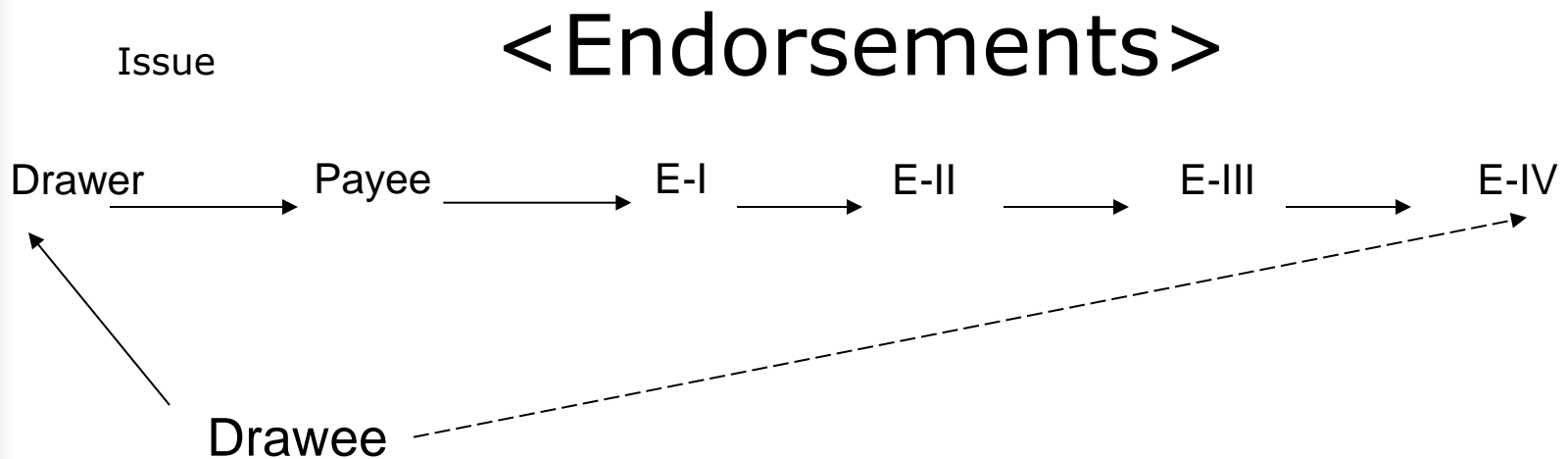




In modern law
A Bill, Cheque [or Note] is
'Negotiable'

- Document of title to a specific sum of money
- Transferable by delivery (possibly with an endorsement)
== Free of an obligor's defences and third-party claims (if transferee took it in good faith and for value)

Bill Discounting under Modern Law and Practice - Circulation free of defences



Holdsworth Vol 8 at 133

Being skeptical as to whether the modern bill of exchange is a true derivation from the business practices of the Arabs, he nevertheless speaks of the Arabs using "***something very much like the modern bill of exchange***" that as early as the eighth century CE: "***could pass from hand to hand by something very much like an indorsement; and, to use modern terms, the payee [thereof] had a right of recourse against the drawer in the event of non-payment by the acceptor.***"

Early Medieval Islamic Payment Instruments

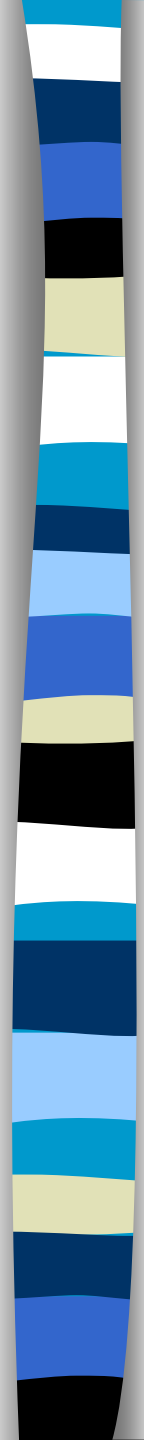
[*Cairo Geniza Documents*]

- ***Ruq'a***
- ***Sakk***
- ***Hawale*** – as a withdrawal out of an account with a *sarraḥ* (private money changer)
- ***Suftaj***



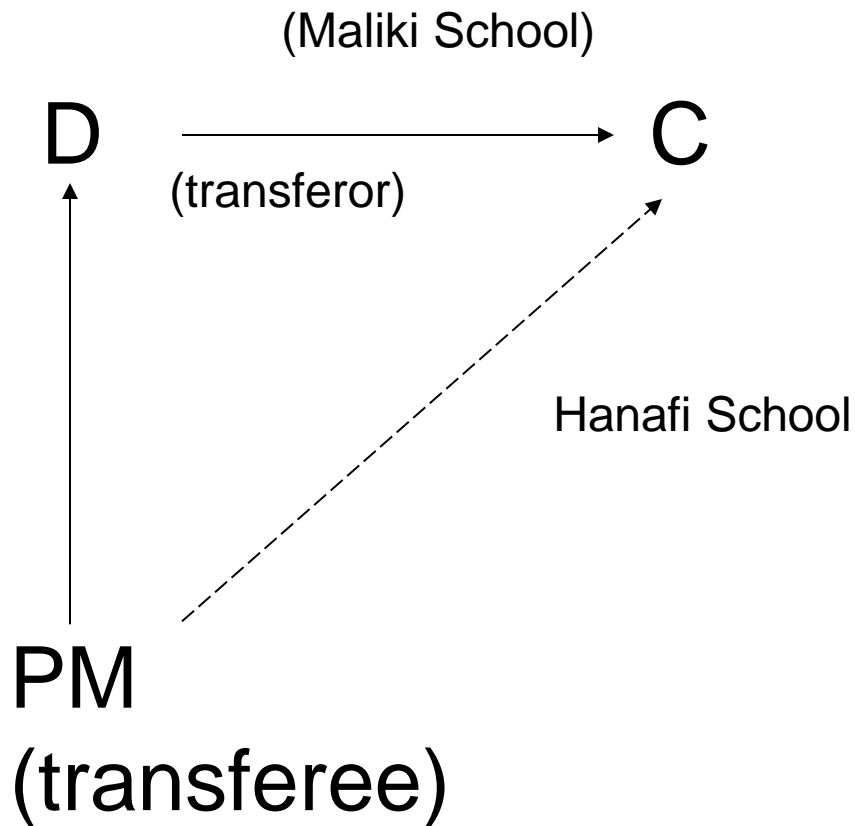
Islamic *Hawale*

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.

- 
- “Whenever the a person transfers his debt upon a rich man and the creditor assents to the same, then let the claim be made upon the rich man”

Translation by the *Hedya* or Guide: Commentary on the Mussulman Laws ... composed in the 12th century, at 32.

Parties to a *Hawale*



Hanafi v. Maliki Hawale

Hanafi Hawale [Mejelle]

- **PM must consent**
- **PM need not have owed D.**
- Usually D gets absolute discharge: no recourse to C
- C's claim against PM is subject to D's defences.

Maliki Hawale

- **PM need not consent**
- **PM is to have owed D.**
- Usually D gets absolute discharge: no recourse to C
- C's claim against PM is subject to PM's defences.

Suftaj

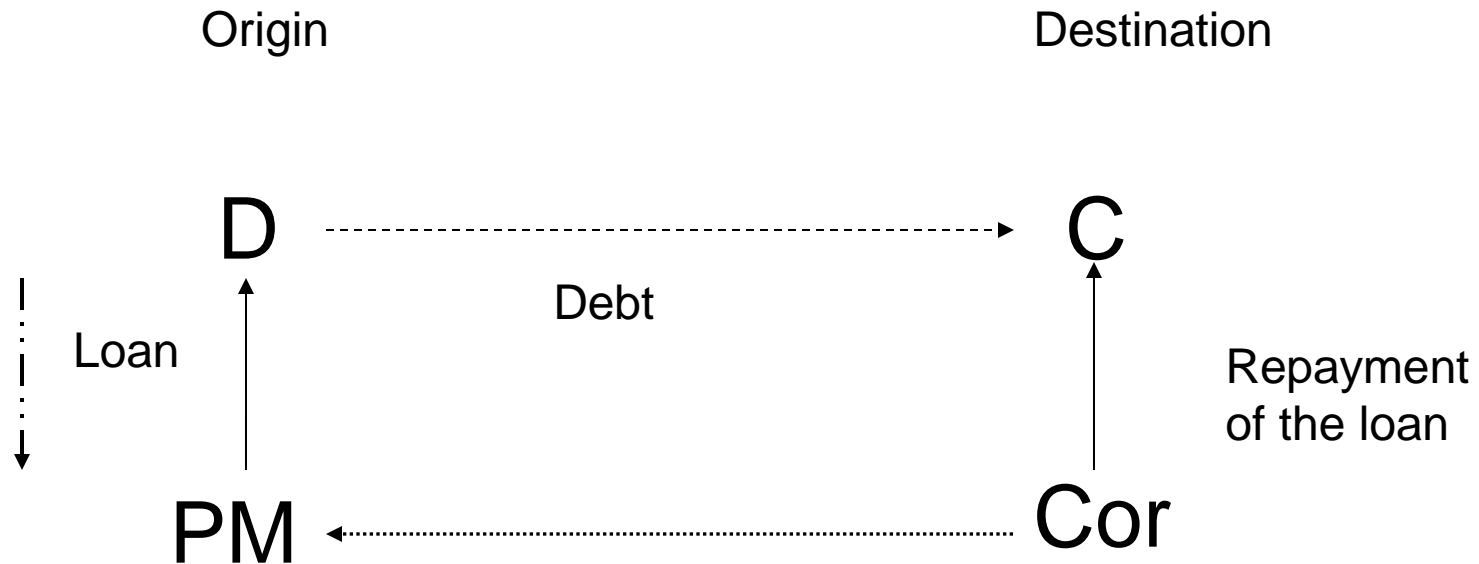
- Loan given (by D) to PM at point of origin payable (by Cor to C) at point of destination. Document may include PM's engagement to pay C as well as authorization to Cor to carry it out.
- D ('borrower') avoids transportation risk.

'Loan of money in order to avoid the risk of transport'

Islamic *Suftaj*: C v Cor

by means of 2 *hawales*

[in 2nd hawale – PM is debtor and Cor is paymaster]



■ Hanafi: PM/C; Cor/C;

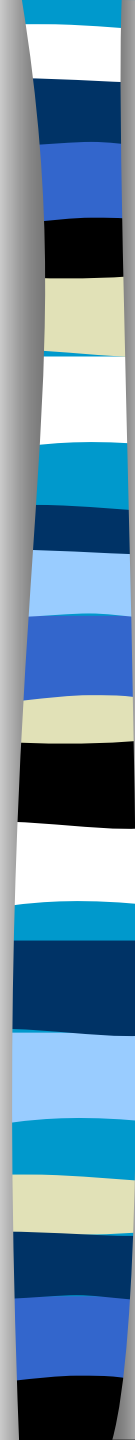
By means of *Suftaj* document sent by D to C – *and C's presentment to Cor.*

■ Maliki: D/C; PM/C;

By means of *Suftaj* document sent by D to C — *alone.*

The Talmud

- Monetary legal theory ('metalism')
- Cheques?
- No debt transfer (presence of all three)– *except for*:
- **Transfer of debt instruments by delivery**



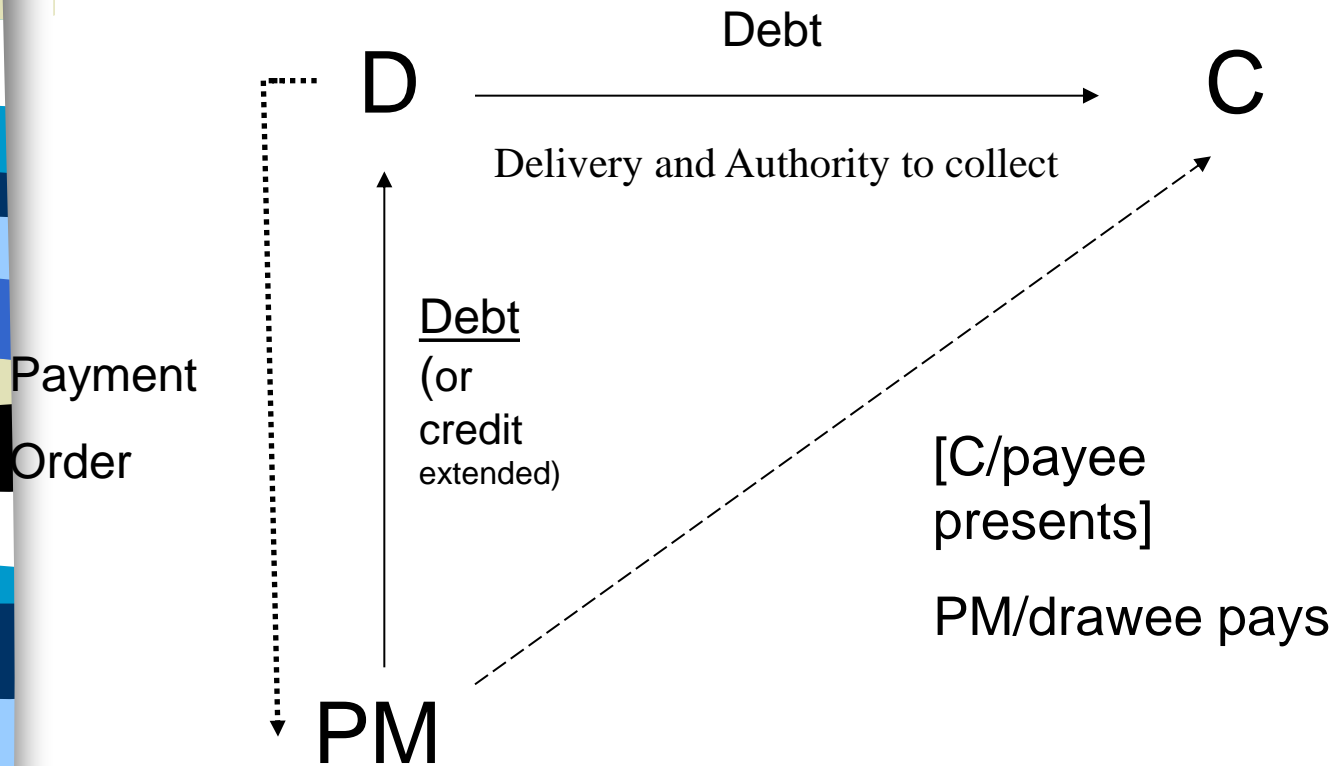
Payment of Debt (owed to C by D) by Transfer (to C by D) of a Debt Document (relating to debt owed by PM to D)

- Under the Talmud, to be transferable, a documentary note of indebtedness must be a *shetar*; it thus has to comply with formality requirements, even if only as to adequate witnessing. Furthermore, there may be formalities to be observed as for the transfer itself.

Disputations

- Does transfer occur by mere delivery (by D to C) of debt document (relating to debt owed by PM to D) or does transfer require also the execution of an accompanying formal bill of sale?
- Does the transfer forfeit altogether the power of the lender (D) to release the borrower (PM)?.

The Modern Cheque



- D: Drawer
- C: Payee
- PM: Drawee- 'banker'

Drawer instructs **Drawee** to pay and by issuing cheque to **Payee** authorizes **Payee** to collect from **Drawee** by presenting the cheque to **Drawee**



Are cheques traceable to the Talmud?

Employer (D) is sending employee (C) to be paid by moneychanger or retailer (PM)- is recourse available to C against D?

- No written cheque
- Drawn against credit extended by PM to D
- **Presence of all three may be required for C's renunciation of recourse against D**
- Inadequate law.

===Answer in the negative.

D Directs C to PM: Prevailing Talmudic View As
to D's Discharge
[or C's Recourse against D]

By virtue of C's renunciation against D:

- [Consensus: No recourse if **express absolute**; recourse if **express conditional** upon PM's default {but until default?}*]

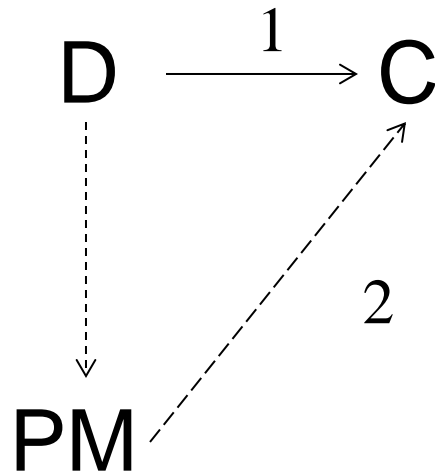
Otherwise dependent on C's claim from PM

-----Controversy-----

- Can it be implied [from C's reliance on PM] as absolute ?- **NO** (w/o PM's guarantee)
- ***Express conditional renunciation upon PM's payment—ineffective since PM's undertaking is revocable.**

-
- Modern law: **implied conditional** –
(No PM's undertaking)

Talmudic 'Unilateral' deposit-transfers

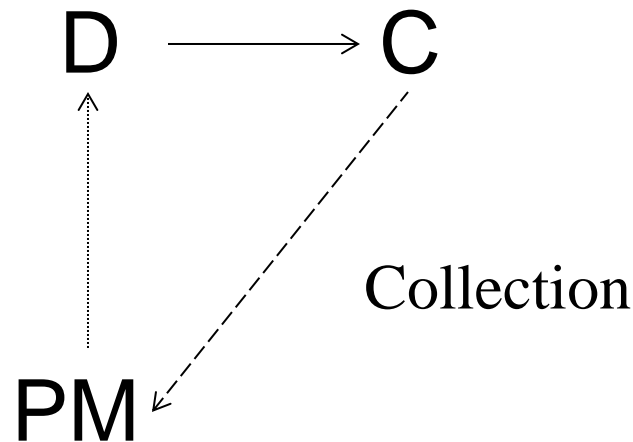


Transfer of claim to Deposit held by PM (custodian) from depositor D to his creditor C by:

1. **Oditta** – D's own formal acknowledgement; or
2. **Zechi** – proprietary act of PM: [at D's instruction].

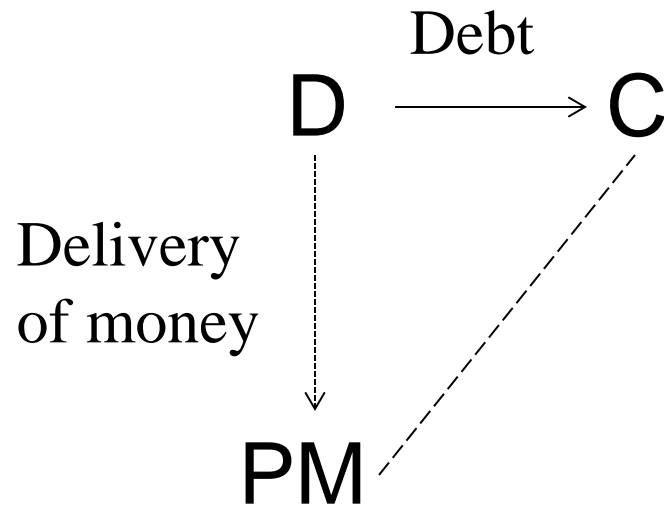
The Talmudic *Urcheta* *C as D's agent*

Urcheta



1. D: [C's debtor and PM's creditor] — ***Urcheta*** issuer
2. C: Emissary with authority to collect from PM [PM's debt to D with the view of applying the proceeds to D's debt to him]
3. PM: D's debtor

The Talmudic *Dyokani* *PM as C's agent*



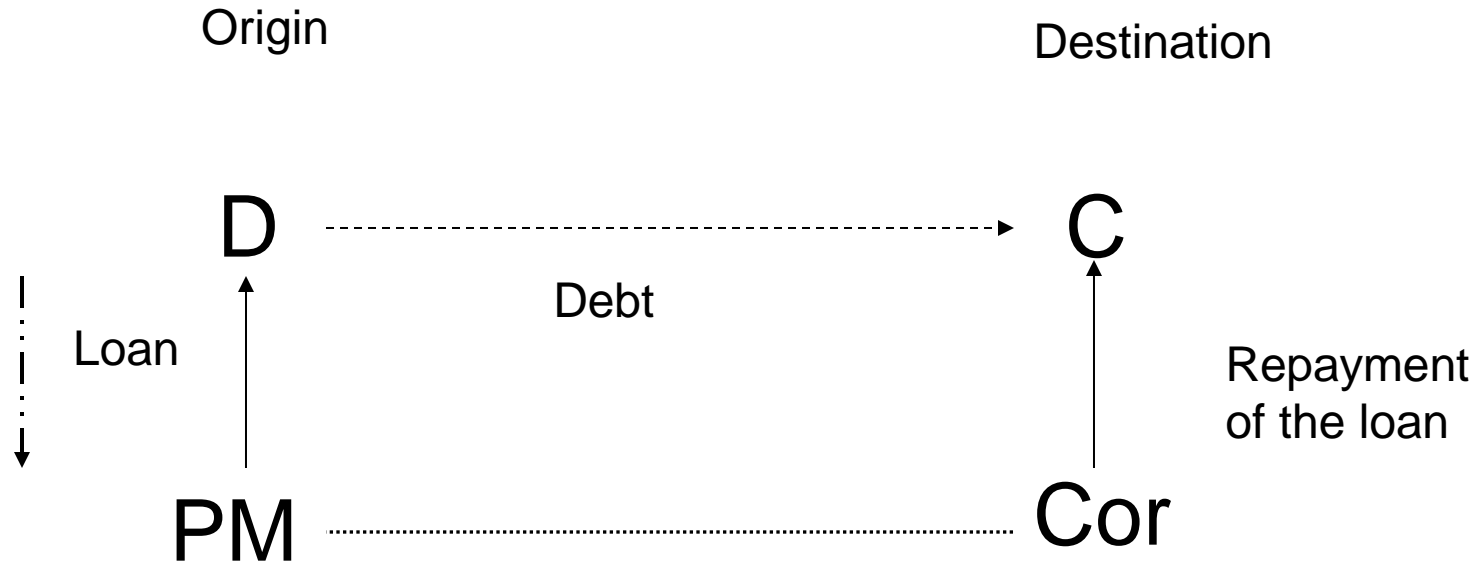
PM – C's emissary to whom D entrusted the money in discharge of D's debt to C – ***Is PM C's agent?***



Gaonic Response No 423 -I

Reuven wrote to Shimon a *suftaj* from one place to another and Shimon delivered it to Levy who received from him and after that denied. And the one who delivered and he [the second receiver] admits that he did not give. May Shimon go back to Reuven and claim the *suftaj* money since he got nothing from Levy?

Talmudic *Dyokani* Turns *Suftaj*
D delivered money to *PM* who
became bound to *C* -- but defaulted
**[May Shimon (C) go after Reuven
(D)?]**



D: either Reuven {or unknown debtor [of Shimon]}

C: Shimon [in both scenarios]

PM: either Levy [or Reuven]

Cor: Levy [in both scenarios]

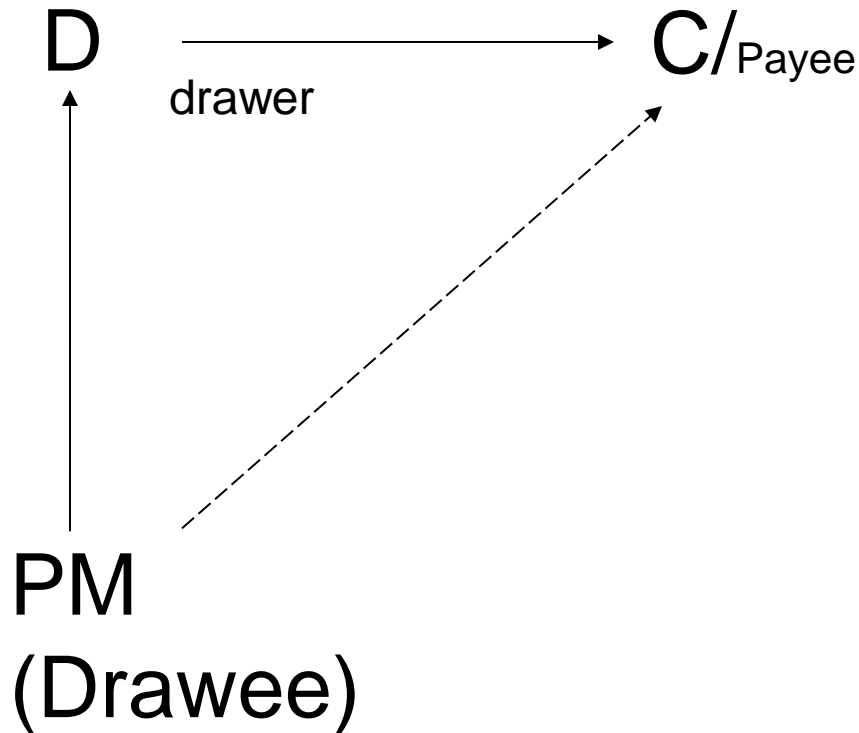
Gaonic Response No 423–II

—**NO!**

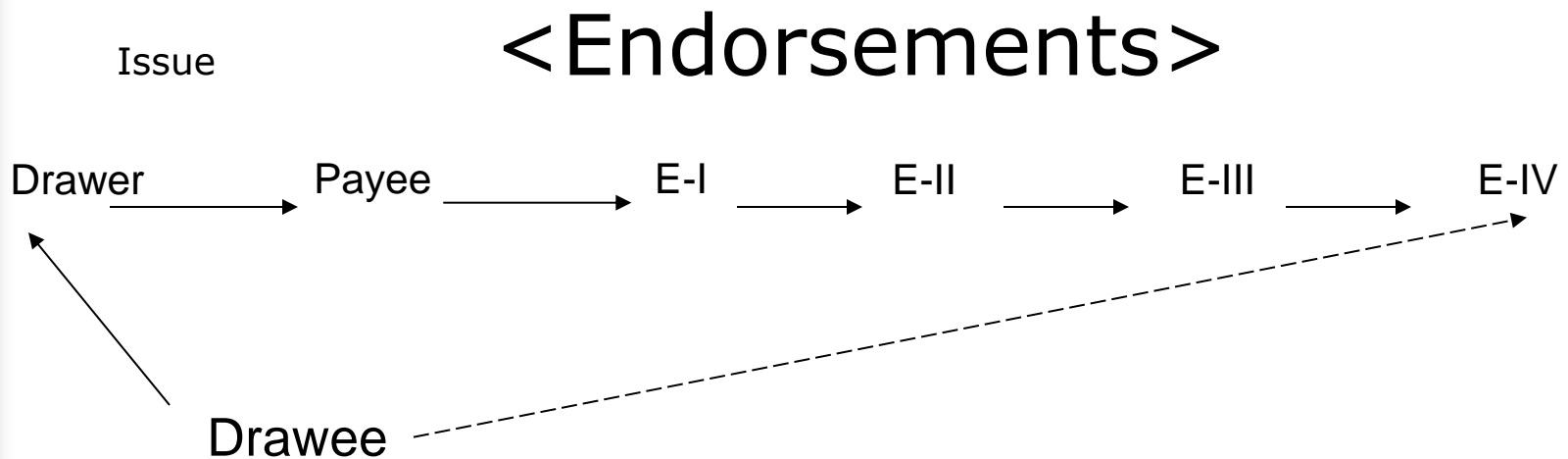
- *We have seen that there is nothing in the roots of our laws to permit [to send] the **suftaj**. This is so since our Rabbis said that you may not remit coins by means of a **dyokani** even when signed by witnesses. Nevertheless, having seen that people actually use the *suftaj* we recognized it so as not to hinder commerce. And we accepted upon ourselves to admit the *suftaj* under the law of the merchants and neither add nor subtract. And so is the law and it ought not to be changed*

Addendum I: The Modern Bill of Exchange

conditional payment; recourse;
transferable by delivery free of defences

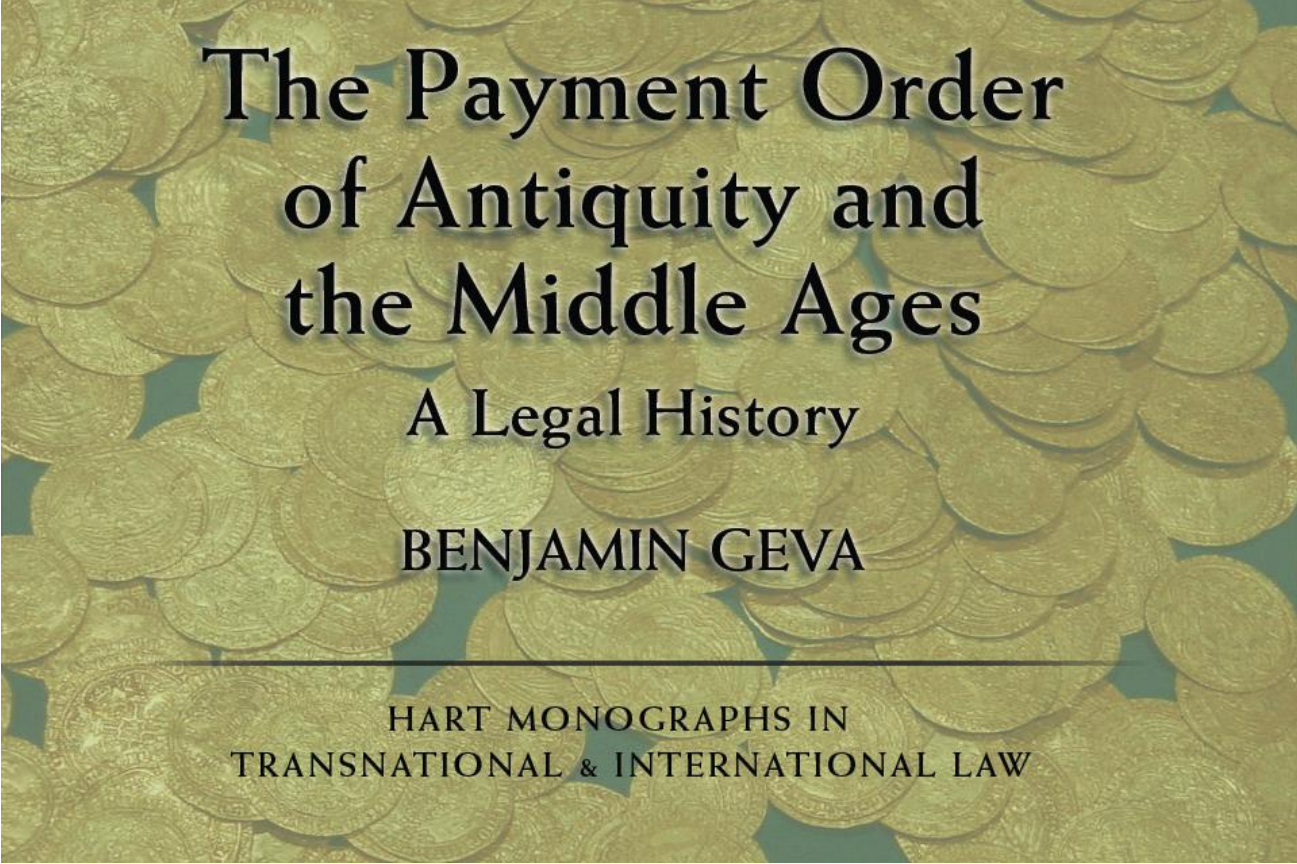
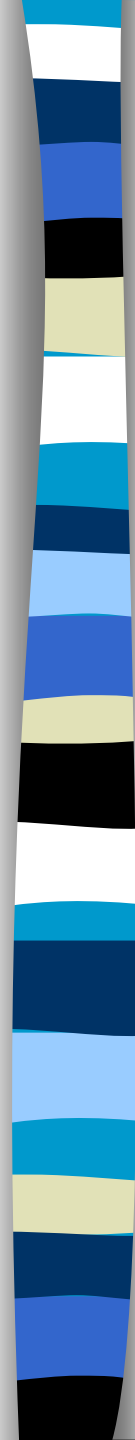


Addendum II: Bill Discounting under Modern Law



Holdsworth Vol 8 at 133

Being skeptical as to whether the modern bill of exchange is a true derivation from the business practices of the Arabs, he nevertheless speaks of the Arabs using "***something very much like the modern bill of exchange***" that as early as the eighth century CE: "***could pass from hand to hand by something very much like an indorsement; and, to use modern terms, the payee [thereof] had a right of recourse against the drawer in the event of non-payment by the acceptor.***"



The Payment Order of Antiquity and the Middle Ages

A Legal History

BENJAMIN GEVA

HART MONOGRAPHS IN
TRANSNATIONAL & INTERNATIONAL LAW

