J. David Bleich

SURVEY OF RECENT HALAKHIC PERIODICAL LITERATURE

CHECKS

During the course of 5747, a sabbatical year, many technical questions, both old and new, with regard to observance of the laws of *shemittah* became topical issues. Somewhat tangentially, the status of checks in Jewish law also received renewed attention in the context of those discussions.[1] "Every creditor shall release that which he has lent unto his neighbor; he shall not exact from his friend and his brother" (Deuteronomy 15:2) serves as an injunction not to demand repayment of loans that remain outstanding during the course of the sabbatical year. An examination of the nature and function of a check is prompted by the question of whether a person who has received a check, but who has not cashed it prior to the close of the sabbatical year, may present the check for payment after *Rosh ha-Shanah,* i.e., after expiration of the sabbatical year. Of course, as is the case with regard to all outstanding debts, the recipient of a check has the option of executing a *prosbol, viz.,* a device designed to permit the collection of debts after the expiration of the sabbatical year by means of a *pro forma* assignment of the debt to a rabbinic court. The identical question can thus be reformulated as a query as to whether it is necessary for the recipient of a check to execute a *prosbol* in order to be permitted to present the draft for payment after the sabbatical year has drawn to a close.

I. CHECKS PRESENTED AS GIFTS OR AS PAYMENT FOR MERCHANDISE

Although, as will be shown, some scholars disagree, ostensibly there is no occasion to raise this question with regard to a check accepted in repayment of funds advanced as a loan. The underlying loan is cancelled by operation of the laws of *shemittah* and hence it is not permitted to present the check for payment. Rather, the question arises with regard to checks which are presented in the form of a gift, including, but not limited to, gifts on the occasion of a wedding, *bar mitzvah,* or the like. The concern is that the issuance of a check may, in and of itself, constitute the generation of a debt; if so, cashing the check becomes tantamount to collecting a debt.

A similar question arises with regard to cashing a check that has been accepted as payment for merchandise. Ordinarily, the sabbatical year serves only as a release from repayment of loans or similar personal obligations. Obligations arising out of a commercial transaction are not cancelled unless the obligation has been converted to an ordinary personal debt. Issuance of a check, it may be contended, constitutes such a conversion, i.e., the commercial obligation is converted to an ordinary debt that is newly assumed by the obligee by virtue of issuance of the check. If this argument is accepted, a businessman would be constrained (in the absence of a *prosbol*) not to accept a check as payment for merchandise in the waning days of a sabbatical year unless he is confident that he will be able to present the check for collection prior to *Rosh ha-Shanah.* The same question in another guise arises with regard to wage earners or salaried employees who are paid by

check. Payment of wages and salaries is ordinarily not forgiven by operation of the laws of *shemittah.* However, when wages are converted to ordinary debts, such obligations are extinguished upon the expiration of the *shemittah* year. The issuance of a check, it is argued, is tantamount to conversion of the existing obligation to a personal loan. If so, the employee would not be permitted to cash the check after *Rosh ha-Shanah* unless, of course, he had the foresight to execute a *prosbol* before *Rosh ha-Shanah.*

Rabbi Moshe Nahum Spira, author of a comprehensive two-volume work, *Mishnat Kesef* (Jerusalem, 5726 and 5733), devoted to a detailed analysis of laws pertaining to the release of debts at the close of the sabbatical year, has recently published *Dinei Shemittat Kesafim u-Prosbol,* a brief compendium of the operative regulations governing this area of Halakhah. Appended to this publication, under the title *Kuntres Devar ha-Shemittah—Birurei Halakhah,* is a detailed discussion of the laws of *shemittah* as they bear upon the banking system. In the third chapter of his *Kuntres Devar ha-Shemittah,* Rabbi Spira asserts that all checks, including those given as gifts, must be cashed before *Rosh ha-Shanah* unless the payee has executed a *prosbol.* He bases this position upon the contention that every check, regardless of the purpose for which it is issued, constitutes a binding promissory note generating a personal debt.

As will be shown, Rabbi Spira's conclusions must be regarded as limited to checks issued and accepted with the presumption that the nature of the instrument is to be construed in accordance with Israeli law. Rabbi Spira's categorization of the nature and status of a check is incorrect insofar as the law in the United States as well as in most common law jurisdictions is concerned, and hence entirely different conclusions must be reached in applying the laws of *shemittah* with regard to gifts made in the United States in the form of a check.

It must be noted that, in American law, checks and promissory notes are not identical instruments. A note is an undertaking by the maker to pay a specified sum. A check is an order to a third party, *viz.,* the bank, to deliver a specified sum to the person named in the instrument. It is indeed true that the law construes a check as a contract by means of which the drawer covenants with the payee that, upon presentation, the bank will pay the stipulated amount to the latter.[2] Nevertheless, common law provides that, to be a binding obligation on the drawer, the check must be supported by consideration. Absent consideration, the check is "a mere naked promise unenforceable in law."[3] In American law this provision is codified in U.C.C. §3–408. Thus, a check presented as a gift generates no legal obligation.[4] Although Jewish law, in general, recognizes no requirement of consideration in order to establish a binding obligation, it does require language of obligation in order to generate a gratuitous liability. The language of a check is not the language of a promissory note and declares no obligation; it merely directs payment by a third party. Nor can it be argued that, although defective insofar as intrinsic provisions of Jewish law are concerned, the issuance of a check nevertheless generates a binding obligation by virtue of *dina demalkhuta* (the law of the land) or by virtue of custom and practice. Such an argument would be specious since, absent consideration, there exists no legal obligation.

Some confusion with regard to the halakhic status of a check arises by virtue of its similarity to two other instruments well-known in the annals of Jewish law. The earlier of these instruments probably originated in Spain during the Middle Ages. Known as a *mukaz,* an acronym of the words "*motsi ketav zeh*" ("whosoever presents this writing"), signifying that the face amount is payable to the bearer, that instrument was, to all intents and purposes, a fully negotiable

promissory note.[5] Unlike other forms of indebtedness, it could be assigned simply by delivery, whereas title to debts represented by other instruments could be assigned only by formal conveyance, e.g., written assignment.

During the medieval period another instrument having a strong resemblance to the modern bill of exchange came into use. The term by which that document is known is spelled variously as MMRI, MMRM or MMRN. MMRI is presumably a corruption of one of the other forms. Since vowels are omitted in written Hebrew, the vocalization may be either "*mamram,*" "*mamran,*" "*mamrem,*" "*mamren,*" or even "*memorem.*" The etymology of the word is obscure. It has been suggested that the term is derived from the word "*membrana,*" the name given to the parchment on which a bond was commonly written. The term might also have been derived from the Latin phrase "*in memoriam,*" and hence it may parallel the term *shetar zekhirah* mentioned in *Tur Shulhan Arukh, Hoshen Mishpat* 61:3. It has also been suggested that the term is really an abbreviation or an acronym. It is also possible that the term is derived from the Hebrew verb "*le-hamir*" meaning "to change."[6]

The *mamram* was in common use by the sixteenth century. The earliest reference to this document within the mainstream of rabbinic literature occurs in *Levush, Hoshen Mishpat* 48:1. A subsequent reference is found in *Sema, Hoshen Mishpat* 48:1.[7] Unlike other legal instruments, the *mamram* is a two-sided document. One side contains the signature of the debtor or the signatures of the witnesses; the amount of the debt and the date on which payment is due are recorded on the reverse side. There is no mention of consideration, the reason for execution of the note, the name of the creditor or the place of payment. As a result it may be transferred without written assignment or endorsement and hence, in its function, closely resembles a modern-day bill of exchange.

Later there developed an even more radical innovation, the blank or open *mamram.* This instrument contained only a signature. The amount of the debt and the due date were left blank when delivered by the debtor and were later filled in by the creditor himself. In usage such an instrument is readily comparable to a customer's delivery of a blank, signed check to a merchant or supplier and leaving it to the latter to total the purchases and fill in the proper amount. It is quite possible that the open *mamram* was utilized in a similar manner in order to facilitate trade at public fairs which often took place over an extended period of time. However, from the comments of R. Joel Sirkes, *Teshuvot ha-Bah,* no. 32, it appears that the open *mamram* was really used in a manner analogous to operation of the open letter of credit of modern bankers. The person issuing the *mamram* was not the customer but a third party who lent his name and credit to the bearer. Although the maker was fully bound, the obligation would, in actuality, be satisfied by the true obligor whose name did not appear on the instrument. The maker was thus, in effect, an accommodation party and the service rendered was much like that of a commercial banker. *Shakh, Hoshen Mishpat* 48:2, declares that, unlike a usual *shetar* or promissory note, use of a *mamram* was not limited to a single transaction. Upon satisfaction of the debt there was no need for it to be destroyed; rather, it might be reissued and circulated anew. Thus, the *mamram* could be treated as a bank note and indeed the effect of the circulation of such instruments was to create a rudimentary banking system.[8]

The difference between a *mamram* and a check is obvious: it is precisely the difference between a personal bill of exchange or letter of credit and a check. The former are instruments which generate obligations. Checks ostensibly direct a bailee to transfer funds to a third party as designated by the bailor. However, in actuality and as a matter of law, the bank

holds funds in checking accounts not as a bailee but as a borrower; the bank lends those funds to its own customers and generates profits thereby. Were the bank a bailee, such use would constitute unlawful conversion. Hence issuance of a check is simply an authorization of a third party to accept repayment of a loan on behalf of the creditor and an acknowledgment to the bank that it will be released thereby.

Israeli law governing contracts differs from American and common law, at least since amendment of the governing statute by the Israeli Knesset in 1973. Under present Israeli law, a contract need not be supported by consideration in order to be binding.[9] Moreover, Israeli law expressly categorizes a check as one of the various forms of a promissory note.[10] Thus, under Israeli law, a check is more than a directive to a third party to deliver funds. It serves concomitantly as an instrument generating an obligation. It then logically follows that, since consideration is unnecessary, even a check presented as a gift represents an actionable obligation in Israeli law. Since Halakhah similarly recognizes the validity of a unilateral obligation not supported by consideration, it may cogently be argued that a check drawn in Israel does indeed generate an obligation in Jewish law. Although the language of the instrument does not ostensibly employ terms of obligation, nevertheless, since usage and practice in Israeli commercial circles reflect Israeli law in treating a check as a promissory note, a check may be construed as a promissory note for purposes of Jewish law as well. Accordingly, it is reasonable to conclude that, in Israel, laws of *shemittah* apply to all uncashed checks, including checks presented by the drawer as a gift.[11]

The status of a check accepted as payment of wages or in return for merchandise is somewhat different insofar as the laws of *shemittah* are concerned. *Shemittah* does not ordinarily discharge obligations with regard to money owed as compensation for personal services or in exchange for merchandise. However, as noted earlier, such obligations are discharged if converted to an ordinary, personal debt. Rema, *Hoshen Mishpat* 67:14, records two opinions with regard to how such conversion is accomplished. The first opinion regards conversion as effected upon express stipulation of a date on which payment is to be due; the second opinion regards mere recording in a ledger of the total sum due and owing as conversion into an ordinary debt. Rabbi Spira, in his comprehensive work on the cancellation of debts by operation of the laws of *shemittah, Mishnat Kesef,* II, 67:14, *Panim Hadashot,* sec. 18, following R. Benjamin Silber, *Hilkhot Shevi'it,* II (Bnei Brak, 5726), 10:22, sec. 65, asserts that issuance of a check in payment of such obligations constitutes conversion according to all authorities.

II. CHECKS ACCEPTED IN REPAYMENT OF LOANS

In sharp contradiction to this position, a number of authorities maintain that, even with regard to a personal loan, once a check has been issued the debt is not extinguished at the close of the sabbatical year even if the check has as yet not been presented for payment. Such a conclusion may be reached upon either of two arguments. The first argument was originally advanced with regard to the status of a check in conjunction with the prohibition against usury (*ribbit*) and may be formulated as follows: Acceptance of a loan in return for a promissory note requiring payment of a larger sum is clearly *ribbit*. However, discounting a promissory note issued by a third party does not constitute a violation of this prohibition even though the funds are not immediately collectible and the discount demanded reflects this fact. The funds advanced in return for the note are not construed as a loan to be satisfied with interest upon collection of the face amount on the date due, but as the

purchase price of an object (*viz.*, an outstanding third-party debt) at its present value. The crucial distinction between such a transaction and a loan lies in the fact that a debt held by a creditor constitutes an object of value and may be transferred to another party by way of sale or assignment. Once the debt has been assigned, the successor has no recourse against the original creditor in the event that the debt is not satisfied unless, of course, pertinent facts have been withheld fraudulently from the assignee.[12] The very nature of a sale demands that attendant risks be borne by the purchaser. Were the assignee to have recourse against the assignor, the transaction, to all intents and purposes, would really be in the nature of a loan with the promissory note serving only as a form of collateral.

Quite obviously, discounting one's own promissory note does not avoid the prohibition against interest-taking. Execution of one's own note constitutes acceptance of a loan, not the initiation of a sale. Moreover, under such circumstances, the assignor, who is the maker, remains liable in case of default. Nevertheless, R. Raphael Joseph Hazan, *Hikrei Lev, Hoshen Mishpat,* II, no. 155, reports that he found it to be common practice for persons traveling on business to seek cash from business associates in the locale in which they found themselves. In return, the traveler issued a document directing his commercial agent to deliver a larger sum of money on a specified date. On first examination it would appear that such a practice should be regarded as a prohibited form of interest-taking. Ostensibly, the agent is a bailee and his principal is, in fact, using his own bailed funds for repayment of an interest-bearing loan. Nevertheless, *Hikrei Lev* points out that, until such time as return of the funds are demanded by the principal, the commercial agents involved in these arrangements are vested with full authority to convert the funds entrusted to them to their own use. Hence, argues *Hikrei Lev,* the agent's status and liability are those of a debtor, not of a bailee. Thus, concludes *Hikrei Lev,* the instrument directing payment to the principal's assignee constitutes, in effect, the sale of a debt to a third party. Accordingly, *Hikrei Lev* justifies this practice provided that the nature of the transaction as the sale or assignment of a debt is expressly acknowledged, that a valid form of conveyance or assignment is employed and that, in case of default, the assignee is denied recourse against the maker of the instrument.

In a treatise on usury in Jewish law that has become a modern-day classic, R. Jacob Blau, *Berit Yehudah* 15:17, notes 38–39, argues that contemporary checks are identical in their halakhic status with the instruments described by *Hikrei Lev.* The bank does not hold funds as a "deposit" or bailment; rather, since it is authorized to lend those funds to its own customers, the bank stands as a debtor vis-à-vis its depositors. Hence, argues *Berit Yehudah,* delivery of a check is actually the assignment of a debt. *Berit Yehudah* pertinently adds that a check can be construed as an assignment of a debt only if the bank does in fact actually owe the depositor money, i.e., if there is a cash balance in the depositor's account. If, however, the check is drawn against overdraft privileges it can hardly be construed as an assignment of a debt since, in such a situation, the bank owes the depositor nothing. According to *Berit Yehudah,* a person with funds in his account may accept cash in return for a check drawn for a larger amount provided that the check is not postdated and hence is immediately payable. In his opinion, such a transaction is the assignment of a debt rather than instruction to an agent to repay a debt with bailed funds.

The implications of this position for the discharge of debts during the sabbatical year is obvious. Repayment of a loan with a check issued by a third party, it may be argued, serves to discharge the debt. Endorsement of the check to the creditor is tantamount to satisfying the

obligation through the assignment of a third-party debt as full payment. Since the debt has been satisfied there is no longer an outstanding debt to be released by means of the sabbatical year. If the writing of the check is regarded as assignment of a debt due and owing the maker by the bank, the same result would obtain even when payment is in the form of a check issued by the debtor himself. Thus, since the debt has been satisfied by the very issuance of the check, it may be presented to the bank for payment even after the close of the sabbatical year. (This is, of course, true only if the bank in question is owned by non-Jews. Otherwise, absent a *prosbol* executed by the depositor-creditor or the successor in due course—i.e., the payee named in the check—the "debt" owed by the bank to its depositor is discharged at the close of the sabbatical year.)

However, the thesis developed by *Berit Yehudah* is predicated upon an erroneous premise. *Berit Yehudah* recognizes that, in order to be construed as a "sale" for purposes of Halakhah, the delivery of a check to the payee must be in the nature of an irrevocable assignment of the maker's claim against the bank for the amount of the check. Indeed, *Berit Yehudah* states that "the maker cannot void the check other than for limited cause." That statement is, however, simply incorrect. It is quite clear that the maker may issue a stop-payment order which must be honored by the bank without inquiry into the reason prompting its issuance.[13] Any further recourse by the payee will be against the drawer of the check, not against the bank. Accordingly, issuance of a check cannot be construed as a "sale" of a debt owed by the bank since a rescindable assignment certainly does not constitute a "sale."

It appears to this writer that *Berit Yehudah*'s position is incorrect even with regard to checks drawn in Israel although, in Israeli law, issuance of a stop-payment order is, in most circumstances, a penal offense.[14] Israeli law regards the stopping of payment, followed by failure to pay the face amount of the check within ten days of demand, as presumptive evidence that the check was issued with the knowledge that it would not be honored. The latter is a criminal offense punishable by a fine equal to four times the amount of the check or I£100,000, whichever is greater, or imprisonment for a period of one year.[15] The law, however, does not curb the maker's power to stop payment on a check and indeed expressly negates the bank's "obligation and authority" to render payment on a check subsequent to execution of a stop-payment order.[16] Hence it would appear that, even according to Israeli law, issuance of a check cannot be construed as the assignment of a debt.

Moreover, legally, a check or other draft does not of itself operate as an assignment of funds in the hands of the bank, as evidenced by the fact that the bank is not liable on the instrument until it accepts the check for payment.[17] The holder of a check cannot force the bank upon which it is drawn to honor the check and to issue the funds against which it is drawn. If, for any reason, the bank refuses to honor the check, the holder's only recourse is against the drawer or any prior endorsers. The bank may indeed be liable for wrongful dishonor if it fails to pay a proper order,[18] but the bank's liability for wrongful dishonor is to its own customer for breach of contract and not to the holder of the check which it declined to honor.[19]

Rabbi Spira, *Kuntres Devar ha-Shemittah,* chapter 3, also points out that should the drawer later issue a second check that is cashed before the first check is presented for collection, and thereby render the first check uncollectible for reason of insufficient funds, the payee of the first check has no claim whatsoever against the bank or against the payee of the second check. Were issuance of a check to be construed as assignment of a debt, it would preclude a second assignment of the same

debt with the result that the second payee would acquire no rights whatsoever. Since issuance of the check does not preclude issuance of a second check on the very same funds, argues Rabbi Spira, delivery of a check to the payee can hardly be construed as a conveyance.

A second argument in support of the position that once a check has been issued the underlying debt is not extinguished at the close of the sabbatical year, even if the check has as yet not been presented for payment, is advanced by R. Moshe Rosenthal, *Kerem Tsiyyon, Hilkhot Shevi'it* (Jerusalem, 5740) 20:1, *Giddulei Tsiyyon,* no. 1. The Gemara, *Gittin* 37a, declares that *shemittah* discharges uncollected debts, but debts which are "as if collected" (*ke-gavuy*) are not discharged. Hence a loan against a pledge of chattel is not discharged since, if the debtor were to default, the creditor would simply retain the pledge in satisfaction of the debt. Similarly, if a judgment of a court has been obtained commanding payment, the debt is regarded as if collected. The rationale underlying this provision is that, subsequent to the sabbatical year, the creditor is bound by the injunction, "he shall not exact from his friend" (Deuteronomy 15:2), but remains free to collect his debt provided that it is not necessary to "exact" or demand payment, e.g., if he has the option of retaining the pledge or if the court has already demanded payment. R. Joseph Saul Nathanson, *Teshuvot Sho'el u-Meshiv, Mahadura Hamisha'ah,* no. 71, advances this consideration as one of an amalgam of reasons in ruling that a promissory note payable to the bearer may be used by an assignee to collect the debt even after the lapse of the sabbatical year. *Sho'el u-Meshiv* argues that only debts requiring a "demand" by the *creditor* are discharged; the assignee, however, is not the creditor and hence his "demand" is not deterred. Applying a similar line of reasoning, Rabbi Rosenthal argues that by issuing a check the debtor has discharged his responsibility to the creditor and the creditor need no longer "demand" payment of the debtor but of the bank. Rabbi Rosenthal does, however, concede that checks postdated and thereby made payable only after the close of the sabbatical year cannot be regarded "as collected." This position is also adopted by Rabbi Spira in his *Mishnat Kesef,* II, 67:14, *Panim Hadashot* 18:2–3, as well as in an appendix to that volume, "*Dinei Shemittat Kesafim u-Prosbol,*" chap. 2, sec. 6, and by R. Gavriel Zinner, *Nitei Gavri'el* (New York, 5747) 17:12, note 20.

This position is, however, rejected by R. Benjamin Silber, *Hilkhot Shevi'it* 10:22, note 73, who adopts an opposing view on the grounds that "the bank is the servant of the debtor; it stands at the service of the debtor." Similarly, Rabbi Spira in his *Kuntres Devar he-Shemittah,* chapter 3, reverses his earlier position and concurs in Rabbi Silber's ruling. Rabbi Spira cogently notes that, as long as the check is not presented for collection, the drawer of the check may withdraw his money from the bank. He also notes that, until the funds are actually delivered to the payee, the bank continues to make use of the funds for its own purposes. However, Rabbi Spira fails to note the most telling objection, *viz.,* that the check may be voided by means of a stop-payment order.[20] For each of these reasons the debt can hardly be considered "as collected."

III. BANK DRAFTS AND CASHIERS' CHECKS

Rabbi Silber distinguishes "bank drafts" from personal checks, regarding the former "as collected." He hence rules that a debt satisfied by issuance of a bank check is not discharged by operation of the law of *shemittah,* even if the check is not presented for collection until after the close of the sabbatical year. Rabbi Silber regards debts satisfied by means of a bank draft "as collected" from the moment the draft is delivered, but does

not view this to be the case with regard to personal checks. Rabbi Spira agrees that insofar as the debtor is concerned the debt may be regarded "as collected" if paid by means of a bank draft. However, he points out that a bank draft represents indebtedness incurred by the bank and hence, in the case of a bank owned by Jews, absent a *prosbol* executed by the payee, the *bank's* debt is itself cancelled and hence the check cannot be presented for payment.

The reason that these authorities regard a debt to be "as collected" when satisfied by means of a bank draft is somewhat obscure. Considerations similar to those cited with regard to personal checks apply to bank drafts as well, i.e., the bank may continue to use its funds until the draft is presented for collection, and may conceivably issue a second check upon the same funds, relying upon future deposits for coverage. Indeed, it is presumably for those reasons that Rabbi Spira requires the depositor to execute a *prosbol* in order to withdraw or write checks upon the funds on deposit with the bank. The selfsame considerations operate to render the debt "uncollected" insofar as the original debtor is concerned. R. Ovadiah Yosef, *Hilkhot Shemittat Kesafim u-Prosbol, Yalkut Yosef* (Jerusalem, 5747), p. 8, adopts the view that even bank checks are uncollectible after *shemittah* since the debt "is lacking in collection."

Nevertheless, the distinction drawn between bank checks and personal checks appears entirely correct for a completely different reason. Insofar as the debtor is concerned, the debt is not "as collected" but, in accordance with Jewish law, would be regarded as having been *actually* satisfied by the creditor's acceptance of assignment of a third-party debt, i.e., the bank draft, as payment in full. Logically, a cashier's check, bank draft, or other direct bank obligation given in satisfaction of a debt discharges the debtor provided that the debtor is not a party to the bank obligation, i.e., the debtor has neither signed nor endorsed the instrument.[21] Failure of the creditor to execute a *prosbol* against the bank leaves him with no recourse against the debtor, both by reason of operation of the laws of *shemittah* and by virtue of the fact that failure to execute a *prosbol* against the maker of the instrument assigned to him constitutes negligence on his part. Hence, as recorded in *Shulhan Arukh, Hoshen Mishpat* 67:38, he has no recourse against the assigning party.

It may be noted that certification of a check does have the effect of rendering the sum "as collected." As stated by the Court in *Marks* v. *Anchor Savings Bank:*

> It is established in law that the certification of a check transfers the funds represented thereby from the credit of the maker to that of the payee, and that, to all intents and purposes, the latter becomes a depositor of the drawee bank to the amount of the check, with the rights and duties of one in such a relation.[22]

Thus, subsequent to certification, the funds are acknowledged as held by the bank for the payee. It should, however, be noted that the payee acquires no rights against the certifying bank unless and until the check has been delivered[23] and, indeed, certification may be cancelled at the request of the drawer, so long as the check remains in the possession of the drawer.[24] Hence, in order to avoid discharge of the debt by operation of the laws of *shemittah,* certification must be followed by delivery of the check to the creditor before the close of the sabbatical year.

It should also be noted that not only may certification be secured by the drawer but it is also an option available to any holder of a check. When the holder has the check certified, the drawer and all endorsers are discharged from liability, with the result that the holder may claim payment only from the bank.[25] The act of the holder in having the check certified is construed as release of the drawer not only from all liability on the check itself but also from the underlying debt for which the check had

been given.[26] Consequently, it is clear that certification of a check by the holder renders the debt owed by the drawer "as collected" and not subject to cancellation by operation of the laws of *shemittah.* Of course, if the check is drawn upon a bank owned by Jews, a *prosbol* will be necessary in order to enable collection from the bank.

NOTES

1. I am indebted to my son Moshe whose work in preparation of an article on *prosbol* spurred my interest in this topic.
2. See Henry J. Bailey, *Brady on Bank Checks* (Boston, 1979), p. 1–15.
3. See *Brady,* pp. 6–2 and 6–3. As early as 1865, in a decision rendered in *Jones* v. *Lock* (Eng. 1865) 14 W.R. 149, a British court found that the delivery of a check by the drawer to the payee is nothing more than a promise which cannot be enforced by the payee. In that case, a father, on returning from a journey, placed a check for £900 in the hands of his infant son and declared in the presence of the baby's mother and his nurse, "I give this to baby; it is for himself and I am going to put it away for him." He then placed the check in a locked safe and shortly thereafter died suddenly. The court ruled that there was neither a gift to, nor a valid declaration of trust in favor of, the infant. See *Brady,* p. 6–33.
4. Nevertheless, lack of consideration is not a defense against a holder in due course of a check. See U.C.C. §3–408.
5. In the absence of formal assignment of the debt by *kinyan,* the theory on which a course of action could be sustained by the bearer who is not in a relation of privity with the maker is discussed by *Ketsot ha-Hoshen* 61:3. The instruments in question were regarded as the equivalent of a promissory note couched in the formula "I obligate myself to you and to all who come through you," which, in turn, has its source in a statement of R. Huna, *Baba Batra* 172a. Early authorities advanced three theories for the actionability of such instruments:
   1) The efficacy is solely by virtue of rabbinic decree.
   2) The bearer is, in effect, the agent of the obligee.
   3) The indebtedness is deemed *ab initio* to have been to the bearer, i.e., the bearer is a third party beneficiary of the contract between the debtor and creditor. The contract does not fail for reason of indefiniteness (*bereirah*), argues *Ketsot ha-Hoshen,* because each and every human being might acquire the instrument in turn. Hence, since no one is necessarily excluded from being the beneficiary of the obligation, it is not regarded as lacking in determinacy or definitiveness. According to this theory, the actionability on the part of a bearer who was yet unborn at the time of the execution of the instrument would be problematic in light of the provision of Jewish law that stipulates that no obligation can be incurred in favor of an as yet nonexisting person. See also *Netivot ha-Mishpat* 61:3.
6. See sources cited in "Mamram," *Encyclopedia Judaica* (Jerusalem, 1974) VI, 838–39, and Marcus Cohen, "Mamren," *Universal Jewish Encyclopedia,* (New York, 1942), VII, 308; cf. Gottherd Deutsch, "Mamran," *The Jewish Encyclopedia,* VIII (New York, 1904), 278–79.
7. A much earlier reference to this instrument occurs in a work of R. Elhanan ben Isaac of Dampierre, *Tosefot Rabbenu Elhanan, Avodah Zarah* 2a, s.v. *ve-lifro'a me-hen.* The comments of R. Elhanan reveal that the *mamram* was well-known in his day. However, *Tosefot Rabbenu Elhanan* was not published until 1901 and hence is not cited in earlier rabbinic discussions.
8. See George Horowitz, *The Spirit of Jewish Law* (New York, 1973), pp. 516–517.
9. See *Hok ha-Hozim,* (5733–1973) *Helek Kelali.* Whether or not consideration was necessary prior to this amendment of the statute is a matter of some dispute. See Zev Zeltner, *Dinei Hozim shel Medinat Yisra'el* (Tel Aviv, 5734), I, 179; Daniel Friedman, "Torat ha-Temurah ba-Hakikah ha-Yisra'elit ha-Hadashah," *Iyyunei Mishpat,* III, 153ff; and Joel Sussman, *Dinei Shetarot* (Jerusalem, 5743), p. 117.
10. *Pekudat ha-Shetarot* (*Nusah Hadash*) §1.
11. An interesting ramification occurs in applying these principles in a case in which a check representing a gift is drawn on an American bank but presented in Israel. Israeli law appears

to provide that the nature of the check is to be construed in accordance with the law of the locale in which the check is delivered. See *Pekudat ha-Shetarot* (*Nusah Hadash*) §72(1).

12. See *Teshuvot Maharam Shik, Yoreh De'ah,* no. 161 and *Teshuvot Ketav Sofer, Yoreh De'ah,* no. 85.
13. See U.C.C. §4–403 and *Brady,* pp. 20–2 f.
14. *Hok ha-Onshim* (5737–1977) §432(c).
15. *Hok ha-Onshim* §432(a). Subsequent to conversion of the *lira* to *shekel,* payment of the fine is in *shekalim* equal to IL. 100,000.
16. *Pekudat ha-Shetarot* (*Nusah Hadash*) §75(1).
17. See *Brady,* p. 14–7 and pp. 18–21.
18. See U.C.C. §4–402.
19. See *Brady,* pp. 18–20 ff.
20. As noted earlier, even under Israeli law, which imposes criminal penalties for stopping payment of a check without justification, banks are required to honor stop-payment orders without inquiry into the reason of issuance. See *Pekudat ha-Shetarot* (*Nusah Hadash*) §75(1).
21. See U.C.C. §3–802(1)(a) and *Brady,* p. 4–19.
22. *Marks* v. *Anchor Savings Bank* (1916) 252 Pa. 304, 97 A. 399, 33 B.L.J. 448. See also *Brady,* p. 10–10.
23. See *Brady,* p. 10–13, and *ibid.,* note 23.
24. See *Brady,* p. 10–20.
25. See U.C.C. §3–411(1) and N.I.L. §188.
26. See *Brady,* p. 10–11.