CHAPTER 5

The “Custom of the Merchants” in Gaonic Jurisprudence and in Maimonides’ *Mishneh Torah*

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The distinguished honoree of this volume, Norman Stillman, got his start in scholarship writing about a Jewish merchant in the eleventh century. His 1970 dissertation, “East-West Relations in the Islamic Mediterranean in the Early Eleventh Century: A Study in the Geniza Correspondence of the House of Ibn ‘Awkal,” written at the University of Pennsylvania under the supervision of the doyen of Geniza research, S.D. Goitein, constituted an important contribution to the economic history of the Jews of the Mediterranean world in the Middle Ages. In his honor, I offer this essay on commercial practice and Jewish law.

1 Long-distance Trade, Agency Relations, and the Custom of the Merchants

Goitein was the pioneer in unravelling the complex world of the Geniza merchants. In the first volume of his *Mediterranean Society*, subtitled *Economic Foundations* (1967), he described in minute detail the commodities they imported and exported, the geographic scope of their activities, stretching from Spain to India, as well as the different forms of business organization in which they engaged, including one that seemed quite unusual. It differed from partnership, which required a written, witnessed contract and the symbolic ceremony of acquisition known as *qinyan*, typically with the partners grasping the ends of a piece of cloth in a kind of handshake. He called this type of business arrangement “informal ‘cooperation’” or “formal friendship.” Merchants

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did favors for one another on the basis of trust, and the “friend” doing the actual work—acting as agent, not as partner—traded with money or goods on the investor’s behalf, without sharing in the profit and without receiving remuneration. The whole process was arranged verbally, face-to-face, or by letter. The traveling agent was not responsible for loss due to market fluctuations or other unforeseen hazards. Merchants reciprocated services in a back and forth arrangement that could last for years.

Goitein estimated that this form of business collaboration, based on what the Jews themselves called ṣuḥba, “companionship,” or ṣadāqa, “friendship,” represented the dominant form of commercial collaboration in the Geniza world. He hypothesized, further, that this practice reflected the custom of Muslim merchants and that the commercial documents of the Geniza could therefore be used to portray economic life in general in the Islamic Mediterranean and in the India trade.

Abraham L. Udovitch, working on early Islamic commercial law, put the notion of typicality on solid footing. He discovered that the practices of Jewish merchants depicted in the Geniza reified what had been thought to be purely theoretical in Islamic legal treatises. His first statement about this correlation came in his lecture in 1967 at the conference on “Logic in Classical Islamic Culture,” which was published in 1970 and which he famously called “The ‘Law Merchant’ in the Medieval Islamic World.” These findings were further fleshed out in his 1970 book, Partnership and Profit in Medieval Islam. Udovitch further elucidated the predominance of informal agency in his important article, “Formalism and Informalism in the Social and Economic Institutions of the Medieval Islamic World.”

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