A NOTE ON THE PENETRATION OF ROMAN LAW IN PROVENCE

by

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It is well known that Provençal law provided for no benefit of discussion. This right was given to the surety by Roman law, and its appearance in the Provençal customaries is one of the hallmarks of Roman penetration1). Possibly the earliest appearance of the benefit of discussion is found in the statute of Arles (1162—1202), where we read:

Item statuimus quod accessorius conveniri non valeat antequam conventus fuerit debitor principalis. Si vero fuerit alienus debitor principalis detur tempus unius mensis accessorio ad representandum debitorem principalem: tunc demum accessorius valeat conveniri2).

Some doubt exists whether this procedure was actually followed3). In his commentary on the Talmudic tractate Baba Mezila 71b, the Rabbi Abraham ben David (Rabad) of Posquières, the greatest Provençal Talmudist of the twelfth century (d. 1198)4), in concluding his discussion of the permissibility of a Jew serving as a surety in Jewish-gentile loans where usury is involved, makes the following remark:

And nowadays that we see that gentiles rule thus: that if one can collect from the debtor one does not collect from the surety5).

1) P. Tisset, Placentin et l'enseignement du droit à Montpellier, droit romain et coutume dans l'ancien pays de Septimanie, Recueil de Mémoires et Travaux de la Société d'Histoire du Droit et des Institutions des anciens pays de droit écrit, 2 (1951), p. 82.
2) Ch. Giraud, Essai sur l'histoire du droit français au Moyen Age, II, 189.
5) Sefer ha-Terumot (Saloniki 1596) 82c. The same text is cited by the Rosh
The term *dayni haki* (rule thus) has unmistakable connotations in Rabbinic Hebrew of actual practice. And indeed, since the issue at hand is a religious injunction (usury), Jewish law would take no cognizance of any outside theoretical ruling, but would take notice, would have to take notice, of any change in the day-to-day affairs that it seeks to regulate. One may say with confidence that in Posquières the doctrine of benefit of discussion was a fact of life.

Rabad's language suggests that the acceptance was not total. The standard term for benefit of discussion in Jewish law is either 'going (azio after the debtor first' or 'summoning (tobe'en) the debtor first.' Rabad employs neither of these stock phrases, but rather his own circumlocution, 'that if one can collect from the debtor one does not collect from the surety.' This suggests that the situation in Posquières towards the close of the twelfth century was very much like that found in Toulouse at the close of the thirteenth, namely: that suit could be brought against the surety simultaneously with that against the debtor; execution upon the surety, however, could only take place if the debtor was unable to pay.

We possess two earlier writings of Rabad on this topic, a responsum found in the Provençal collection known as the *Temim De'im* and his commentary to the *Sifra*. In both he discusses the problem of the permissibility of serving as a surety in Jewish-gentile loans where usury was involved, and in both he assumes that contemporary practice was the old Provençal one, of holding

(Pesakim B. M. 5: 53), the Rashba, (Hiddushe Ha-Rashba 'al Baba Mezi'a (Jerusalem 1956), p. 142, Shittah Mekubbezot (Amsterdam 1722), p. 157c. In the latter edition the word *dayni* is missing. But a) I would not take this reading as opposed to the independent corroborative testimony of the Rosh, Sefer ha-Terumot and Hiddushe ha-Rashba. b) as pointed out in the text, if this were an abstract ruling, it would be irrelevant to the issue at hand. Indeed, according to the text of the Shittah, the Rabad says that now gentile law is like the Jewish one, and the benefit of discussion in Jewish law is not just theory, but actual practice.
