Summary

Preventing *Get* Refusal According to *Halakhah*

J. Jean Ajdler

This article is devoted to the study of the conditions necessary to ensure the free delivery of a *get*. We show that a responsum of Rashba, which was the basis of the ruling of Rema in *Even ha-Ezer* 134:4 created many problems. Rashba's responsum was incorrectly reproduced in the *Beit Yosef*. As a result, Rema and rabbis who followed him knew only the incomplete version. This was the source of their misunderstanding of Rashba's ruling. It was generally accepted by the *Rishonim* that if a man freely accepts a penalty for not delivering a *get* to his wife, the *get* he subsequently gives is valid, unless the man utters a protest before witnesses. Rema ascribed to Rashba the ruling that, in the case of a retraction (the husband no longer wishes to give a *get* but does so only in order to escape the penalty), a legal protest is not required to invalidate the *get*. Because of this fear of a retraction, Rema required that the husband be released from any self-accepted penalty before the delivery of the *get*. Later authorities were stricter yet and even rejected Rema's ruling to allow a posteriori a *get* given without the husband's release from the penalty. Similarly, it was ruled that the purpose of the *get* not be mentioned in any statement of condition, freely accepted by the husband, involving his coercion. All these stringencies—which, in fact, result from an incorrect understanding of Rashba's ruling—make the situation today inextricable. If the thesis of this article were to be acknowledged and accepted, we could then slightly adapt the rabbinic legislation by removing unjustified stringencies that were unknown to the greatest halakhic authorities, the *Rishonim*. This would make possible the use of more effective prenuptial agreements that are fully justified on the halakhic level. It would spare much distress, pain, and suffering.

Preventing *Get* Refusal According to *Halakhah*

1. Introduction.[1]

The position of Rabbenu Tam[2] is that a *get* must be given by the husband freely and without any coercion. The cases of coercion are strictly limited and restrictively enumerated in the *Mishnah*.[3] Thus, R. Tam considered the legal and theoretical possibility of a rebellious woman (*moredet*)[4] remaining "married and unmarried," in effect chained or *"agunah*".[5] On a practical level, however, R. Tam opposed the possibility of having chained women in the community. But he ruled out any form of active and physical coercion and advocated a form of passive social seclusion, which he called *harhakot*: ignoring the man completely as if he did not exist and thus not speaking or trading with him, even going as far as refusing to circumcise his children or bury him.

In short, R. Tam rejected any form of physical coercion but accepted all other passive means of pressure once the woman could present a good justification for her claim:[6]

R. Tam wrote the following in a responsum: *It is forbidden to speak with him, to trade and deal with him, to invite him, to give him to eat or to drink, to escort him and to visit him in his illness. They may add other severities against any man who does not give a get to his wife, and this does not constitute an illegal coercion since, if he wants, he gives the* get. *But it is forbidden to beat him physically in this removal from society…* (Responsum n° 24 of R. Tam to R. Samuel[7] and our Rabbis in Paris).[8]

In words ascribed to R. Tam:

Not to do him any service, to do business with him, to circumcise his children or to bury him until he divorces. The rabbis may also apply any other severity against him except excommunicating him…(Glosses of Rema on Shulhan Arukh Even ha-Ezer 154, 21)

It is forbidden to speak with him, to trade and deal with him, to allow him to earn money,[9] to give him to eat or to drink, to escort him and to visit him in his illness. They may add other

---

[1] I thank Ms. Sara Brzowsky who made editorial remarks, corrected linguistic mistakes and improved the English.
I thank Professor Daniel Sperber who read the paper and approved it.
I thank Professor Berachyahu Lifshitz (Jerusalem) who read the paper, was convinced by it and made important remarks.

[2] R. Jacob ben Meir, grandson of Rashi, (Ramerupt 1100 – Troyes 1171).

[3] *Mishnah Ketubot* 7:10. For the position of R. Tam see *Mishnah Yevamot* 14:1 (end).

[4] Each spouse who does not fulfill the obligations deriving from the marriage is defined by the Talmud and the *halakhah* as a rebellious spouse: in Hebrew *mored* or *moredet*.

[5] Apparently, as long as the wife did not receive a bill of divorce, or *get*, she was entitled to receive material and monetary support. However, the final decision of the Talmud—that the wife remains married without any material support during the 12 months before she may receive her *get*—raises doubts about her situation if her husband fails to give her a *get*.

[6] This implies an obligation to give a *get* in such a situation and seems similar to the *hi'uv* mentioned in Rema *Yoreh Deah* 228.

[7] Rabbi Samuel ben Meir, Rashbam (around 1080-1085 – 1174), elder brother of R. Tam.

[8] *Sefer ha-Yashar le Rabbeinu Tam*, Responsa, ed. Shraga Rosenthal, Berlin 1894.

[9] The transcription of Maharik is accurate except this word; because of a lapsus calami the reading is *le-harviho* instead of *le-ha'ariho*.

severities against any man who does not give a get to his wife, and this does not constitute an illegal coercion since, if he wants, he gives the get*. But it is forbidden to beat him physically in this removal from society…* (Maharik n° 135*).*

R. Tam wrote the following in a responsum: *the obligation that he has to deliver a* get *to his wife is only a rabbinic obligation, in order that she should not be abandoned. The rabbis may tell him to divorce, otherwise they can order his "harhakah" or removal from the society…*(Rivash n° 127)[10].

Of course, this method must have been very effective in medieval communities. In our modern society, however, it is without effect.

Excluding exceptional cases where the *Mishnah* anticipates physical coercion, Jewish "common law"[11] adopted the following principles in R. Tam's name:

- Any physical coercion is forbidden and would make the *get me'usseh,* i.e., forced, and therefore *pasul*. The followers of R. Tam included additional forms of forbidden coercion, such as financial or even moral coercion.
- It is forbidden to "chain" a woman, and in such a case, a Jewish community has the obligation to put the recalcitrant man in seclusion (*harhakot* of R. Tam), as opposed to *niduy* and *herem,* which are stages of forbidden coercion. Seclusion is slightly milder than *niduy*, which is milder than *herem*.

2. The followers of R. Tam added additional restrictions to coercion.

When R. Tam forbade coercion to enable the granting of the *get*, what he fundamentally had in mind was physical pressure. He did not consider other, more subtle forms of coercion.

The followers of R. Tam extended the notion of physical coercion. They examined all the other forms of coercion, a discussion that is the subject of chapter 134 of the *Tur* and *Shulhan Arukh Even ha-Ezer*. According to this source, the *get* must be delivered completely freely and without any reservation or hidden resentment, lest it lead to a protest against the *get*'s validity based on the fact that it was extorted from the husband under pressure and against his will—in Hebrew: *messirat moda'ah*. Therefore, during the ceremony of the delivery of the *get*, an annulment is enacted in advance to forestall all future protests. The husband, who delivers the *get*, must affirm that he annuls in advance any future protest that he might utter and declares that he delivers the *get* freely and under no pressure.

Oath made freely by the husband to deliver the *get.*

An oath promising to deliver the *get* could be considered a form of moral coercion as it removes free choice and allows for only one possibility: giving the *get*—otherwise the oath

[10] Rivash, Rabbi Isaac bar Sheshet Perfet (Barcelona 1326 – Algiers 1408)

[11] Jewish law is based on the Talmud, codes, commentaries and responsa. Among these codes, the *Shulhan Arukh* of R. Joseph Caro plays a privileged role. There remains, however, an aspect of "common law." In certain matters the "common law" follows a particular opinion; in others, a different opinion. For example, in our present subject, in the case "*may'is alei*", we don't follow Maimonides and the ruling of the *Geonim* regarding coercion of the *get*, but we still follow Maimonides in respect to the general understanding of the Talmud and, contrary to R. Tam who forbade it, we allow the *get* and monetary support during the first 12 months of a woman's "rebellion."

will be transgressed. In such a case, we could consider that the husband no longer delivers the *get* freely but rather does so only in order to fulfill the moral commitment of his oath.

In a responsum reproduced in the *Beit Yosef* on *Tur Even ha-Ezer* 134, R. Maïmon Nadjar[12] notes that in the case of an oath to give a *get*, "our French rabbis" required that the husband be released from his oath before the delivery of the *get* because this *looks* like a form of coercion, since he made the *get* depend on the oath.

Ritva[13], in a responsum reproduced in the *Beit Yosef* on *Tur Even ha-Ezer* 154, ascribed this ruling to R. Perez[14] and considered it a stringency (for security). Indeed, he wrote: A *get* cannot become forced or *me'usseh* by any coercion freely accepted by the husband.[15] However, I found two different responsa[16] from Rashba[17] and Rashbaz[18] on the same subject, with different conclusions from the above, quoted in responsum 35 of R. Abraham ibn Tawa.[19] These two responsa apparently were ignored by R. Joseph Caro[20] in his *Beit Yosef.*[21]

The responsa of Rashba[22] and Rashbaz are in complete agreement. Both rabbis rule that if a husband made an oath to deliver a *get* and later refused to deliver it, he must fulfill his oath

---

[12] R. Maïmon Nadjar was a colleague of R. Simeon ben Tsemah Duran (Rashbaz). He was born in Majorca and studied under R. Ephraïm Vidal, who was also the teacher of Rashbaz. He arrived in Algiers in 1395 and became Dayan in Constantine He was in halakhic correspondence with Rashbaz.

[13] R. Yom Tov ben Abraham Ishbili (~1250 – 1330), pupil of R. Aharon ha-Levi and Rashba in Barcelona.

[14] R. Perez of Corbeil (about 40 km south of Paris), important French tosafist of the 13th century, pupil of R. Yehiel of Paris, friend to R. Meir ben Barukh of Rothenburg.

[15] *Tshuvot ha-Ritva*, R. Joseph Kafih, Mossad ha-Rav Kook 1962, n° 96.

[16] The first, from Rashba, corresponds to responsum 854, Venice 1545. In the modern editions of Rashba's responsa, it is part I, n° 854. The second, from Rashbaz, corresponds to responsum 68 of *Tashbets* II. This seems to confirm the tradition that R. Joseph Caro was unaware of parts II and III of the responsa of R. Simeon ben Tsemah Duran.

[17] Rabbi Solomon ben Abraham Aderet of Barcelona (1235 – 1310).

[18] Rabbi Simeon ben Zemah Duran (Majorca 1361 – Algiers 1444).

[19] North African rabbi who lived at the end of the 16th century, descendant of Rashbaz (6th generation). His responsa are collected in *Hut ha-Meshulash, Helek revi'i, ha-Tur ha-Shelishi*.

[20] R. Joseph ben Ephraim (Toledo 1488 – Safed 1575).

[21] Venice 1550-51.

[22] This responsum can be found under n° 854 in the Venice 1545 edition; it begins in the middle of the responsum with the word "**ve-she'amartem**". I thank R. Samuel Pinson who found this reference in *Sefer Knesset ha-Gedolah*. This responsum is very similar to a longer responsum, not well known, by R. Meir ben Barukh of Rothenburg, mentioned in the *Mordekhai* on Shevuot III, n°758. Rashba's responsum is probably a summary of this longer responsum. Indeed, responsum n° 854 of Rashba includes three different questions and ends with the words: "**ve-shalom, Barukh ben Meir, she-yih'ye**". I assume that Rashba agreed with the responsum of R. Meir ben Barukh (Maharam), which was certainly sent to him and included among his responsa. This must also have been the case with about twenty other responsa of R. Meir ben Barukh scattered mainly in the first part of Rashba's responsa. Apparently Rashba consulted in his youth Maharam and, perhaps consequently, because of the esteem of Maharam, his pupils Rosh still in Germany (I, n° 366) and R. Hayim Or Zarua in Vienna (I. n° 571) later consulted Rashba. We find an important piece of evidence in the *New Responsa of Rashba* (from MS) n° 345 and 346. They constitute the query of Rashba and the answer of Maharam about a difficult case that the king of Aragon, Pedro III (1276 – 1285) had submitted to him (and his older fellow, R. Jona Gerondi, the rabbi of Gerona and cousin of R. Jona Gerondi *ha-hassid*) for adjudication. Against his will, the case of an informer belonging to an aristocratic family was assigned to him for trial by order of the king: he sentenced the man to death and the condemned was put to death in about 1280. Three years later, in about 1283, Rashba was then 48, the relatives of the condemned man appealed the verdict and Rashba had to protect himself. He referred the case to Maharam, the foremost authority, who sustained the verdict, see details in JQR VIII, 1896 pp. 217 – 238. It appears thus clearly that Rashba referred to Maharam as his *halakhic* authority. The different responsa of Maharam were certainly addressed to Rashba, who accepted and followed his opinions and included them among his responsa. We can now conclude that Rashba indeed followed the opinion of Maharam, who disagreed with R. Perez, in the case of a *get* warranted by an oath. This would be an additional proof that

and deliver the *get*. Otherwise, we force him to fulfill his oath; if necessary, we beat him until he agrees. This force is legal, and the *get* is not considered a coerced *get*.

The quotation of Rashbaz by R. Abraham ibn Tawa is found in a passage at the end of a responsum included in his published responsa.[23] Rashbaz writes more specifically about the matter just before the quoted passage:

... it seems to me that it is a mere stringency, but he is allowed to divorce without the release of his oath, and it does not look like a coercion because this man, who took an oath to divorce, certainly had the intention to divorce with a kosher get…and [we can demonstrate it] more simply: Since he had the possibility to ask to be released of his oath and he didn't, we can consider that he divorces voluntarily…

Rabbi Perez of Corbeil[24] required the release of the oath before the delivery of the *get* because he said the situation *looks* like an illegal coercion. However, this is not a real coercion since the husband freely made his oath. In contrast, the two Spanish rabbis did not see the necessity of such a release. On the contrary, they ruled that the man must execute his oath; if he no longer wishes to deliver the *get* and wishes to retract, he should, if necessary, be beaten, and the *get* would not be made invalid by this pressure.

It is likely that the *Beit Yosef* was not aware of these two responsa and so did not take them into account.[25] However, the *Beit Yosef* was aware of responsum 96 of Ritva,[26] who wrote:

Rashba never contemplated the possibility of a *get me'useh* in the case of a *get* given under a commitment warranted by a freely accepted penalty, unless the man made an official protestation. Indeed Rashba follows Maharam and doesn't follow R. Perez (see further on).

Another responsum, nearly unknown, is also worth mentioning: responsum 103 of the responsa of R. Moses Provençal, Jerusalem 1989, p. 196. It was precipitated by a letter written by R. Joseph Treves at the end of 1570 to R. Moses Provençal of Mantova (1503 – 1575), one the most important Italian rabbis of his time, renowned for his talmudic scholarship). R. Treves wrote to R. Provençal that he had not been successful in persuading the husband of the unfortunate Ruth, the daughter of the great scholar, the late R. Joshua Boaz Barukh (author of *Shiltei ha-Giborim* on *Rif* and *Mordekhai*) to agree to pay a substantial penalty if he would not deliver a *get*. He was thus obliged to be satisfied by the husband's oath, which he, ultimately, did not respect. Ruth's complaints were threefold: Her husband was impotent, he beat her, and he had taken an oath to deliver her a get, which he did not respect. R. Provençal concluded that it was not possible to force the *get* based on the first two complaints. By contrast, the third complaint allowed the *get* to be forced, even to the point of beating him by gentiles or putting him in *niduy, shamta, or herem* in order to oblige him to fulfill his oath. R. Provençal wrote that normally we release the husband from his oath before the delivery of the *get*, but, that is only for "reasons of security" "*leravha demilta"* i.e., to proceed in the best way, but it is not mandatory.

[23] *Tashbets* II: 68, toward the end.

[24] In the text of the *Beit Yosef Even ha-Ezer* 134, the ר"פ is mentioned; that is, R. Perez of Corbeil, a tosafist of the 13th century and a friend of R. Meir ben Barukh. In the responsum *Tashbets* II: 68 of Rashbaz, there is a reference to *Sefer Even ha-Ezer* of Ravan and to *Seder Netinat ha-Get* of Rif, but the latter is certainly a misprint for Raf. In *Tashbets* I:1, it is written explicitly and without any abbreviation: *and this seems to be the opinion of Rabbenu Perez of blessed memory, who wrote that if he pawned a guarantee and divorced, this is not a coerced get*. Similarly, responsum 96 of Ritva refers to the writings of R. Perez. The responsum of R. Nadjar speaks about "our French rabbis." R. Perez is again mentioned in responsum *Binyamin Ze'ev* n° 88, which brings the text of a *takanah* established by R. Perez against men who beat their wives. The *herem* he instituted against men beating their wives required that a court grant the wife material assistance in such cases as if he were going abroad. It is thus likely that R. Perez wrote about *hilkhot Gittin* and that these writings were known by Ritva and Rashbaz but are now unavailable.

[25] Apparently, R. Nadjar was also unaware of the responsum of Rashba. What seems stranger is the absence of any reference to Rashbaz in the responsum of R. Nadjar. Indeed, it appears that responsum *Tashbets* II: 68 was addressed to R. Nadjar in Constantine to answer his query. The responsum in the *Beit Yosef* ascribed to R. Nadjar was thus certainly written after he received the answer of Rashbaz. We note that R. Nadjar even maintained some arguments rejected by Rashbaz.

And what Rabbi Perez wrote, was, in my opinion, because he requires a priori an indisputable divorce. It does not mean that the get *would be considered invalid a posteriori, but as he wrote about these laws, [he requires] the stringent and the optimal way. Similarly, it can be seen from his text, when he writes that it should not look like coercion, he did not write that it* is *coercion, and this is clear. It seems to me that this is the way he rules, and he certainly agreed [to our understanding].*[27]

A penalty freely accepted by the husband if he does not deliver the *get.*

The case of a freely accepted penalty by the husband constitutes a great halakhic controversy among the *poskim*. The origin of the problem lies in the incomplete and misleading transcription of a responsum of Rashba in the *Beit Yosef* and how it was understood in relation to a responsum of R. Maimon Nadjar.[28]

The responsum of R. Maïmon Nadjar deals with the case of a man who had accepted a penalty of 100 gold pieces to be paid to the town's mayor if the man would stay married to his wife. Subsequently, the delivery of the *get* took place normally, including an annulment of all possible future protests. The town's scholars questioned whether the delivery of this *get* was free and voluntary or rather the result of fear of the penalty and thus an invalid *get*. R. Nadjar argued in a responsum that the *get* was completely legal: "*He let his* get *depend on something else,*" i.e., he had freely made his *get* contingent on something independent and thus had freely decided to give the *get*. The husband was free to forfeit the penalty and to withdraw the *get*. In the words of R. Nadjar: "*He could have held on his wife by losing the 100 gold pieces, but this was his free will*." The situation would have been different if he had been forced[29] to accept a penalty of 100 gold pieces to guarantee the delivery of the divorce.

R. Caro seems to have been unaware of responsum 68 of *Tashbets* II. That responsum was addressed to R. Nadjar in Constantine and dealt with exactly the same subject. R. Nadjar apparently had consulted with Rashbaz before addressing the problem but did not refer to the answer he received from Rashbaz in his own responsum. We note, however, their complete agreement. Nevertheless, R. Nadjar did not accept all the arguments of Rashbaz. Rashbaz reached a similar conclusion in *Tashbets* I,1, where he wrote in much more general terms. It is quoted in the *Beit Yosef Even ha-Ezer 134:*

And there is another form of pressure where, although he [a parent of the wife] doesn't force him [the husband] physically to divorce, he forces him to do something else, and he [the husband], in order to escape this threat, divorces freely by himself. This is not an illegal coercion because they did not really force him to divorce her…

Regardless, we have here proof: that when we force him to pay the ketubah*, and if it happens that he cannot pay the* ketubah *and therefore he is compelled to give a* get *[in exchange for an annulment of his debt], still we did not clearly force him to divorce. On the contrary, in order to escape the threat of the payment of the* ketubah*, he agreed to give a* get*;*[30] *this is not a*

---

[26] See *Beit Yosef Even ha-Ezer* 154, toward the end there is a quotation of this responsum.
[27] Responsa of Ritva, Mossad ha-Rav Kook, 1959, responsum 96.
[28] The responsum already mentioned above.
[29] Unlawfully.
[30] This provides evidence from the 14th century that women were ready to renounce their *ketubah* in order to receive a *get.* This situation is paradoxical: the *ketubah* must guarantee the stability of the marriage and the

coerced get *because the pressure was not exerted on the* get *but on something else. He divorced voluntarily because we didn't force him to divorce…*

Thus, a freely accepted penalty whose purpose is to guarantee the delivery of the *get* is acceptable and does not invalidate the *get*. Moreover, legal pressure relating to another object—as, in the example above, the payment of the *ketubah*—which leads to the delivery of the *get* does not invalidate the *get*.

Examination of the disputed responsum of Rashba[31].

40. Perpignan, to Rabbi Menahem,[32]

You asked me the following question: Reuben, Leah's husband and Leah's relatives agreed that Reuben would divorce his wife, Leah, and they came to an agreement of a penalty of 1000 dinars if the get *would not be delivered by a fixed date. Thereafter, Reuben retracted and contested the agreement. Then Leah's relatives threatened Reuben with the penalty, so that Reuben went to the gizbar (a city official) and tried to make an arrangement with him. The latter, however, because of the tricks and the stratagems of Leah's relatives, did not accept any concession. On the contrary, they threatened him with imprisonment if he would delay even by only one hour, until he fulfilled his obligations.*[33] *Because of this fear, Reuben delivered the* get*. But he did not make an official protest because he did not know the procedure. Is that* get *forced [and therefore invalid] or not?*

Answer.

It seems to me that this get *is forced and invalid. [Such a situation exists] as soon as we are aware of his state of coercion, even if the person involved did not make any protest. Indeed we require a protest only if he received money, because we can reasonably assume that when a person accepts money, he accepts the transaction and renounces the option to invoke any coercion.*

[In such a situation,] we say: indeed "they tortured him and he agreed to sell, the transaction is valid," because when he accepts the money [representing the value of the object], he

---

future of the woman after widowhood or divorce; here, by contrast, we see how it is used as a bargaining chip to receive the *get*! The woman pays for her *get* but loses any material security.

[31] R. Solomon ben Aderet, Part IV, responsum 40, in the collection of responsa of Rashba published in Salonika in 1803, in Pietrokow in 1883, and reproduced in Israel in 1960. The incomplete transcription in the *Beit Yosef* does not allow for clear comprehension of either the situation or the answer. At first glance, it is impossible to know from the *Beit Yosef* how R. Caro understood the query. It depends on whether he had a correct version at his disposal or if his version was already corrupted.

[32] This responsum was addressed to R. Menahem ben Solomon Meiri of Perpignan (1249-1316), one of the most brilliant Talmudists of the time. Meiri considered himself to be the pupil of Rashba, as we can deduce from the following quotation at the end of his introduction to *Avot*, where he tells us that he wrote *Beit ha-Behira* from age 38 to 51. He writes there: "*R. Solomon ben Abraham Aderet …who wrote books, answered all the riddles. Thanks to him we succeeded in explaining difficult and opaque laws in different Tractates of the Talmud, by the generosity and the goodness that he showed us…."*

[33] The underlined text is completely absent from the shortened version of the responsum as it appears in the *Beit Yosef Even ha-Ezer* 134. The rest of the text appears in a free and slightly adapted version. The *gizbar* is the bailiff, responsible for executing the sentences of the Jewish court (See Yitzhak Baer: A History of the Jews in Christian Spain, Philadelphia, 1971 – 5731, vol II, p.82 bottom).

accepted the sale. But if he made a protest, he annuls the forced transaction.[34] *However, in the case of "they tortured him and he gave up his property," the transaction is worthless, and he does not need to make a protest. Our knowledge of his state of coercion is sufficient [to invalidate the transaction]. Therefore, if they tortured him and he gave a bill of divorce, his divorce is not valid, because he did not receive money (which would have made him accept the transaction). But you could argue that the* get *releases him from the expenses of her living and clothing. It is, however, explicitly proved in the Gemara that the release of these expenses is not considered to be a substitute for money, and therefore the situation must be compared to "they tortured him and he gave up his property," because a wife belongs to her husband and she is called "his money's acquisition." And the compulsion resulting from the threat of a penalty constitutes a true coercion. Therefore, when we say: "they tortured him," it does not mean only a corporal coercion, but it can also be a financial coercion, as we see in the story of the orchard.*[35]

And Rabad, of blessed memory, wrote about this last case: "From the story of the orchard we learn that a financial coercion constitutes a coercion." Rabbenu Hananel wrote similarly in the following terms: "From the story of the orchard we learn that if someone frightens his friend by threats that he could cause for example a loss of money or a beating, and a fortiori, a moral beating when he tells him, for example, if you don't sell me this object, I will do this to you, in the case of such threats, we (the witnesses) write a protest and write explicitly: "We are aware that the person involved is in a state of coercion"

Even if he did not carry out his threat and renounces it, nevertheless, as soon as he said: "I will do it, I can do it," this is coercion exerted on the seller."[36]

Now one might argue that we are, in fact, in the situation of "they tortured him and he agreed to sell" because he freely accepted a penalty of 1000 dinars, and when he gives the get *he gains this amount that he had freely accepted without any coercion, and thus it is a situation similar to receiving money. No, this is not the case: He does not receive money, but he is released from losing money, and this is worse than being released from the expenses of living and clothing, which we don't consider a substitute for money.*

Such a coerced get*, if it was coerced by Jews, is invalid, and a fortiori if it was coerced by gentiles. Because if it were [coerced] by gentiles, even if the force was legal, the* get *is invalid—unless they told him: "Do what the Jewish court tells you to do.*

This responsum by Rashba is exceptional because it was addressed to the renowned R. Menahem ben Solomon Meiri of Perpignan. It is thus an exchange between two of the most illustrious rabbis of Catalonia around 1300 C.E. We find in Meiri's commentary on *Gittin* 88b a confirmation that he received the responsum. Indeed the first part of the responsum and the quotation of R. Hananel are reproduced in that commentary. This proves beyond any doubt the authenticity of this responsum.

---

[34] After reading this responsum, we come to the conclusion that from the beginning onward, Rashba is speaking about a case of compulsion imposed by the second party and thus, in fact, a true coercion which invalidates the get because coercion is not legal in such a situation. But in such a case, when the husband receives money, he tacitly agrees to deliver a *get* unless he utters an official and legal protest.

[35] *B. Bava Batra* 40b. If he didn't agree to sell the orchard, the tenant threatened the owner with dispossession through the destruction of the mortgage contract and application of the rule of ownership and vested interests: חזקה.

[36] Here ends the quotation of R. Hananel. R. Hananel, Tunisia (990 – 1053).

The complete text of the query and its answer make possible a better analysis, but this does not simplify the problem and resolve all the difficulties.

The complexity of the case now results from the conjunction of different elements, which Rashba did not clearly separate in his answer. Therefore, we encounter great confusion and perplexity among the commentators of *Shulhan Arukh* and the *poskim*. The elements of the query are as follows:

- Reuben accepts a penalty if he does not free Leah.
- The penalty is connected to his failure to deliver the *get* by a fixed date. The amount of the penalty is rather important. However, we have no idea why Reuben accepted such a penalty. R. Nadjar and Ritva say that in their responsa that it was to "encourage himself".[37]
- Reuben changes his mind and retracts.
- Reuben is aware of the difficulty of the situation and tries to negotiate a deal with the treasurer (probably an official of the town). The text of the query gives the impression that the treasurer would have arranged a deal with him. Thus Reuben is prepared to pay an acceptable penalty in order to avoid the delivery of the *get*.
- Leah's family, which was probably rich and influential, now manages through tricks and stratagems to join forces with the treasurer and to conspire with him against Reuben. They persuade the treasurer to maintain his original demand and to threaten Reuben with imprisonment until he fulfills his obligation.
- Finally, Reuben has no choice but to deliver the *get*, reluctantly.

Rashba's answer departs from the principle that the *get* was forced, but he does not elaborate about where the force was located: whether the major element of coercion was the threat of imprisonment, the interference of Leah's family, or the insistence of the penalty sum by the treasurer. Rashba explains that, in some cases, a monetary coercion can be considered a coercion in the same manner as a physical coercion. By contrast, without the intervention of his wife's family, Reuben would have faced the same situation if the treasurer had not agreed to a deal. But it is not at all certain that Rashba would have considered the situation to be a coercion since Reuben had freely accepted it; in fact, is very likely or *even certain* that he would have reached the opposite conclusion.[38] Regardless, R. Nadjar, Rashbaz, and Maharik[39]

[37] We know the responsum of R. Nadjar and this explanation only through secondary sources, the original is no more extant. We must assume that these few responsa deal with wives who belong to rich and influential families. After a hard-headed discussion about the division of the couple's possessions and recovery of the family properties, the families of the wives probably granted some monetary advantage to the husband, while requiring in exchange a penalty or a pawn placed in the hands of an official in order to secure the delivery of the *get*. It is also possible that the wives' family's influence and power to cause harm were sufficient to persuade the men to "*freely"* accept the penalty or the pawning. However, the free nature of the husband's acceptance of the penalty was never disputed. It also is likely that the retraction of these men was not motivated by any desire to remain married, but rather by a desire to renegotiate the deal. In such cases, they tried to take back the pawn or renegotiate the amount of the penalty. As soon as a town's officials refused to return the pawn, the men had no choice but to give the *get*. However, the behavior of men who were attempting to get their pawn back gave the real impression that they had retracted and were not freely delivering the *get*. Hence the question often asked was, did the man in question freely give the *get* or did he deliver it because of his fear of losing the pawn or paying the penalty? If we exclude this contrary responsum of Rashba, all the other responsa accepted the principle that the *get* is valid unless a formal protest is made before two witnesses testifying to the husband's state of coercion.

[38] See above, responsum I, n° 854 of Rashba, according to which a man who took an oath to deliver a *get* to his wife could be forced even by beating to execute his oath, and this would not invalidate the *get*. A fortiori a freely accepted penalty, which appears to be less than an oath or a coercion, would not invalidate the *get*.

[39] R. Joseph Colon (Chambery Savoy1420 – Pavia 1480).

would have accepted as valid a *get* given to escape a penalty, as long as no official protest was uttered. Rashbaz even ruled that a *get* given in exchange for the release of the payment of a *ketubah* that a husband is unable to pay is valid.[40]

Similarly, Maharik wrote:[41]

Also in the matter of a financial pressure, it is clear that it is indeed an [unacceptable] coercion, as you wrote. However, I have doubts about what you wrote further on, about the pawning of an amount of money as security in order to guarantee the delivery of a get. It was agreed from the beginning that this pawn would be returned only after the delivery of the get*, and this was freely accepted. It is evident that the refusal of the arbiter to return the pawn without the delivery of the* get *does not constitute an [unacceptable] coercion. Indeed a pressure is considered a coercion when it is exerted by another, but if it is the result of his own action, it is not a coercion.*

Now, returning to the case of our responsum, we see that Rashba considered the situation to be a case of illegal coercion and compared it with one of two cases: (1) "*they tortured him and he agreed to sell, and the transaction is valid*" (where a forced transaction is ruled valid when the victim received money—unless he uttered a legal protest, a *moda'ah*); and (2) "*they tortured him and he gave up the property [reluctantly]"* (where a forced transaction without the payment of any money[42] is ruled invalid as soon as we know or can reasonably assume that the person was forced). In this second case, we don't require a legal protest: simply taking note of the unfairness toward the victim is sufficient. Rashba first compared the case in question to "*they tortured him and he gave up the property [reluctantly],*" and therefore he considered it to be pure extortion without any legal validity. On continued analysis, Rashba even considered whether it could be a case of "*they tortured him and he agreed to sell, the transaction is valid,*" because of the annulment of the penalty.

Rashba formally presents the arguments and concludes that in the present case the man did not effectively receive money and so the *get* was invalid. Because of the absence of an effective payment, we are in the situation of «*they tortured him and he gave up the property [reluctantly]* ». Therefore, we do not need a formal protest; simply taking note of the unfairness toward the victim is sufficient to invalidate the *get*: "*It is not necessary to utter a formal protest; as soon as we know his state of coercion, his divorce is not a legal divorce.*" Thus, if Reuben had effectively received money, Rashba would have considered the *get* to be valid, unless there had been a formal protest. This would have been the case if, instead of accepting a penalty, Reuben had pawned that amount of money. Regardless, we note that Rashba compares the case with the Talmudic cases of "*they tortured him*," which, implies an external intervention and certainly not a freely accepted penalty.[43]

In fact, Rashba did not refer in his responsum to the different details mentioned in the query. Rashba stated that we are indeed in a case of coercion making the *get* invalid without the

[40] See *Tashbets* I, 1. See the quotation above, just before the examination of the contrary responsum of Rashba. See also a similar conclusion in *Tashbets* II, 69. R. Isaac bar Sheshet Perfet reached a similar conclusion in *Tshuvot Bar Sheshet*, n° 127.

[41] *Responsa Maharik* 63:2. The responsum is mentioned in the *Beit Yosef* 134. The passage there is slightly different, but the meaning is not changed.

[42] It would be the same if he were forced to accept an amount clearly inferior to the value.

[43] This is not, however, an irrefutable argument per se. Only if a freely accepted penalty was indeed considered to be coercion, would a comparison to other cases of coercion in the Talmud of "*they tortured him, and he agreed to sell, and the transaction is valid*" and "*they tortured him, and he gave up the property,"* be justifiable.

necessity of a protestation. The whole responsum is devoted to the discussion whether the release from the penalty should be assimilated to an encashment of money which would make the *get* valid or whether it is only a release of an obligation of payment and the *get* would be invalid.

Therefore we cannot find in the responsum a convincing hint, establishing the decisive element of pressure taken into consideration by Rashba. At the first glance, the comparison with the case of the orchard seems to indicate that it is the pressure exerted by Lea's family, thus the pressure exerted by others which represents the deciding factor and not the pressure exerted by himself. But this cannot be considered as a formal proof. Therefore let us examine again the text of the responsum. According to the traditional understanding of the responsum, the cause of the ruling of Rashba is the self-coercion, exerted by Reuben himself. This coercion constitutes an illegal coercion i.e. a coercion exerted in a case where coercion is illegal. Therefore the *get* is invalid without the necessity of a protestation. According to this understanding, all the details and circumstances enumerated in Meiri's query, about the tricks, stratagems, attempts to frighten and the threats with imprisonment, are only details of the facts as they happened but they have no consequence and no halakhic importance and it would have been possible to reduce the query to one sentence: "Reuben accepted a penalty for not delivering the *get* before a fixed date, he retracted but he nevertheless gave the *get* in order to be released from the penalty and he did not make any protestation. What is the status of this *get*?"

The fact that an important part of the query addressed by Meiri and transcribed in Rashba's reponsum, is without any merit is surprising. But mainly this understanding raises important difficulties. We cannot find in this responsum a beginning of evidence and even a hint sustaining this understanding. Now if we examine the last sentence: *"and a coerced get as this, even if it was coerced by Jews, it is invalid and with greater reason if the coercion was caused by gentiles. Because in this case, even if the coercion was legal, the* get *is invalid, unless the gentiles had told him to make what the Jewish court requires, as we learn in the* Tosefta *and the Jerusalem Talmud*".

It is difficult to understand this last sentence according to the traditional understanding. What is the link between this sentence and the context of the beginning of the responsum? It is absolutely incomprehensible what it is about in this last sentence, why must Rashba mention here the coercion exerted by others, Jews or gentiles? What are gentiles doing here? There is no logical link between the responsum dealing with a case of self-coercion and the last sentence dealing with coercion exerted by others, Jews or gentiles. There is further no interest to mention the fact that a *get* coerced, when coercion is illegal, is invalid when the coercion was exerted by Jews and null and void when the coercion was exerted by gentiles.

In the same way, in the middle of the responsum of Rashba there is a surprising sentence which is a long quotation of R. Hananel. This quotation deals exclusively with different cases of coercion exerted by others and notably coercion by attempts to frighten and by threats. Again, according to the traditional understanding of Rashba's responsum, there is no link between the responsum dealing with a case of self-coercion and the quotation dealing exclusively with coercion exerted by others.

Because of these difficulties, I propose another explanation to this responsum. We must change the basic assumptions in the case of the self-coercion. In a case of self-coercion, the coercion exerted by oneself is not a true coercion. Therefore the *get* is not given under duress and the *get* is valid unless a formal protestation. In the case of Rashba's responsum however, the attempts to frighten and the threats of imprisonment constitute a coercion exerted by others, it is an illegal coercion because coercion is generally forbidden according to *halakhah*; therefore the *get* is invalid, even without the necessity of a protestation. Now we can understand the responsum without any difficulty. All the data that Meiri had enumerated in

the query and that Rashba had transcribed in his responsum are important and helpful. The rabbinical maxims "they tortured him and he sold his property" and "they tortured him and he gave up his property" refer to the case of a coercion exerted by others. This is more logic and acceptable than referring to a self-coercion on the basis of an assumption that the rule in the case of self-coercion is the same as the case of a coercion exerted by others. Therefore it is now justified to mention that if the responsible of the coercion is a Jew, the *get* is invalid, by rabbinical law, but if the responsible is a gentile, then the *get* is null and void.
Our proposition presents several advantages:

- There is no more a contradiction between Rashba and the other Rishonim in the case of a self-compulsion exerted by oneself, it is not a coercion.
- *Beit Yossef* quoted in one batch the responsum of Rashba and four other responsa which were until now assumed to contradict the first quote of Rashba. Now this contradiction disappears.
- It was also difficult to understand why R. Joseph Karo quoted this responsum of Rashba while in *Shulhan Arukh Even ha-Ezer* he did not rule according to this responsum. Indeed in chapter 134 we can deduce from the text that even in the case of a pressure exerted by oneself we need a protestation in order to invalidate the *get*.

All these difficulties disappear with our proposition. It solves all the contradictions and it shows that R. Joseph Karo shared this theory.

Now it is far from certain that Rashbaz did agree with the conclusion of Rashba making a difference between a penalty and a pawning. Indeed at the end of responsum II: 68 he writes:

Nevertheless, from the word of the Rav [Perez] who wrote that a pawning does not constitute coercion, we can deduce that if someone accepts a penalty of 100 gold coins in favor of the king if he does not divorce his wife, there is no suspicion of coercion. Indeed he freely accepted the penalty and therefore if he divorces, it is freely without any coercion…

Rashbaz wrote similarly in responsum I: 1:

And this also is the opinion of R. Perez, who wrote that if he gave a pawn and divorced, this is not coercion…

Thus, Rashbaz made no distinction between pawning an amount as a guarantee for delivery of the *get* and agreeing to pay the same amount as a penalty if he does not give the *get*.

Rashba does make a distinction between these two situations for a formal[44] reason in the case determined to be an illegal coercion, based on the principle of, "*they tortured him and he was*

[44] Another similar situation is encountered in the case of a woman who stole the effects of her husband and would only give them back if he granted her a *get*. This case, which was examined by Rashbaz in *Tashbets* I:1 is similar to the case treated by Rashba, because there too it is a situation of illegal monetary pressure. After much hesitation, Rashbaz ruled according to the principle: "*but the truth is that they tortured him, and he gave up the property [reluctantly]."* His great hesitation makes the conclusion unclear. If I understand him correctly, Rashbaz concluded that we are dealing with a case of *"they tortured him, and he gave up the property,"* and therefore no formal protest is necessary to invalidate the *get*. According to the reasoning of Rashba, we could have considered that this was a case of "*they tortured him, and he was forced to sell, the sale is valid,"* because the husband will receive his goods back. Because of the lack of proof, he could not get them back through judicial means, as he had renounced them and was in desperate straits, and therefore receiving back his goods could be considered as real enrichment. See also *Pithei Tshuva* on *Even ha-Ezer* 134:4 n° 11, who remained doubtful about the conclusion of Rashbaz. This could explain the lenient ruling of R. Jeroham in the same case: *Sefer Toldot Adam ve-Havah, netiv* 24, end of first part, Venice 1553, p. 203 c 1. See the appendix at the end of this paper.

forced to sell, his sale is valid." In such a situation, Rashba ruled that receiving an amount of money is required, but he did not accept the release of a debt[45] as an acceptable payment.

In order to arrive at a deeper comprehension of Rashba's ruling and prove the correctness of our understanding, let us examine what troubled R. Menahem Meiri about it.[46] It is evident that if the family of Leah had not interfered in the matter, then two scenarios were possible: the official could have reduced the penalty or not. In the second scenario, Reuben would have had to deliver the *get*, because it was impossible for him to pay the penalty. Meiri would certainly have considered such a *get* legal; otherwise, he would not have asked this more intricate query. Similarly, if Rashba had considered the *get* illegitimate in the latter case, he would not have developed such lengthy arguments. He would simply have answered that *even* without the interference of Leah's family, a *get* given in order to avoid a penalty the husband doesn't want to pay or to avoid an excessive penalty that he cannot pay, is forced and illegal. Furthermore, the use of the phrase "*they tortured him*" to describe the situation of a freely accepted penalty would be surprising.[47] It thus seems certain that Rashba and Meiri agree that a *get* given in order to release oneself from a penalty or from a huge penalty freely accepted is a legal *get*.[48]

In fact, what bothered Meiri was the following: Reuben had freely accepted a penalty of 1000 silver coins if he did not give a *get* by a fixed date. Ultimately, the interference of Leah's family did not fundamentally change the situation that Reuben had freely accepted. At the end of the day, he still faced the same choice: deliver the *get* or pay a penalty of 1000 silver coins. Therefore, should we say that the interference of Leah's family did not change the situation at all, or should we consider that the interference of Leah's family—persuading the treasurer not to make any concession, which it is assumed he was ready to make—must be considered a new element, which was illegally introduced without Reuben's agreement, thus creating the conditions of a coercion and placing our case in a new category: the category of "*they tortured him"*?
Rashba's answer was unequivocal: We have here a new situation; we are no longer looking at a freely accepted penalty but instead at a penalty that is unfairly imposed by others.

An additional proof that the interference of Leah's family was determinant can be found in the following quotations from a paragraph of *Beit ha-Behira Gittin* 88b,[49] which reflects Rashba's answer:
"*This coercion mentioned in the* Mishna *is not limited to the case of striking, but it concerns all types of pressure, including monetary pressure, for example confiscation of his money*

[45] Rashbaz ruled in *Tashbets* I,1 that when the rabbinic court coerces a recalcitrant man to pay the *ketubah*, the *get* given by the man in exchange for the annulment of the payment of the *ketubah* is a valid *get*.
[46] As noted, this exchange of query and answer was made between two of the most brilliant rabbis of the time. Meiri considered Rashba his superior and consulted him in the elucidation of a number of Talmudic passages. He called him "the greatest of our time."
[47] Therefore, it seems strange that a *get* given with the guarantee of a pawn is valid (*Shulhan Arukh* 134:4) while a *get* given with the guarantee of a penalty would be more problematic a priori (Rema 134:4 gloss). On the contrary, in the case of a freely accepted guarantee, we can deduce from the words of *Shulhan Arukh* that the *get* is valid when there was no *moda'ah*. Thus in the case of a freely accepted guarantee, there is no difference between a pawn and a penalty, apparently even for Rashba. From the words of Rema in the same paragraph, we can deduce that the freely accepted oath looks like a constraint but the freely accepted penalty doesn't. A difference between the guarantee of a pawn with regard to that of a penalty exists only for Rashba if the guarantee was constrained and not freely accepted.
[48] More than a century later, R. Nadjar and Rashbaz would rule similarly. And another sixty years later, Maharik would rule the same.
[49] In the paragraph beginning with *ve-issuy*.

until the delivery of the get *or the imposition of a penalty through gentiles. And even if he accepted freely a penalty, as soon as he retracted and one compelled him to fulfill his commitment because of the penalty, this is a pure coercion*"

"*…and because it is the same with a get and we don't need a protestation to invalid it, if it appears that they frightened him (in a case where coercion is not legal) or harassed him with threats that could really materialize or that he believes that they could materialize, this is a true coercion. If it was exerted by gentiles the* get *is null and void, if it was exerted by Jews the* get *is invalid but the woman is disqualified and couldn't anymore marry a Cohen*"

We must first observe that there is a misleading ambiguity in the word "*ones*" i.e. pressure. It can represent the pressure in the general meaning but it can also have a juridical signification and represent an illegal coercion, illegal because the Jewish law does not accept generally that the man should be coerced, and therefore this coercion invalidates the *get*, without the necessity of a protestation. In order to avoid this ambiguity, Meiri uses the word "*ones*" in the general meaning of pressure but when he uses the juridical concept, he uses the words "*ones gamur*" a true coercion with the meaning of an illegal coercion, when the *halakhah* does not accept coercion. This true coercion invalidates the *get* without the necessity of a protestation.
In the later rabbinical literature the pressure, thus the action is called "*ones*" or pressure. There exists a legal pressure and an illegal pressure. The legal pressure is exerted through means acceptable according to *halakhah* while the illegal pressure is exerted by means which are unacceptable according to *halakhah*, for example theft, unjustified imprisonment or arbitrary confiscation of property. The judicial or halakhic concept is "*kefiah*" the coercion. There is a legal coercion and an illegal coercion, legal coercion when the application of coercion is according to the *halakhah* and illegal coercion when the principle of application of coercion is contrary to *halakhah*.
In the first quote (it is the beginning of the paragraph): if Meiri considered indeed that if a man accepted freely a penalty and later retracted, the self-pressure constitutes a true coercion invalidating the *get* without the necessity of a protestation, the text of the end of the quote should have been:
"…. *And even if he accepted freely a penalty, as soon as he retracted this is a pure coercion*"
Indeed Meiri enumerated different elements of coercion which are true coercion, striking, financial pressure, seizing money, imposition of tax through gentiles and even if he accepts a penalty and retracts such an external pressure is a true coercion. Now according to the traditional understanding of Rashba's responsum, in the case of the free acceptance of a penalty followed by a retraction, the *get* delivered in order to escape the penalty is invalid without the necessity of a protestation. Therefore in the quotation of Meiri, the words "*and one compelled him to fulfill his commitment because of the penalty"* are useless, unjustified and misleading. But the truth is that these superfluous words change completely the signification and contradict this understanding and the principle according which in the case of a free acceptation of a penalty for not delivering the *get* followed by a retraction, the *get* delivered in order to escape the penalty is invalid without the necessity of a protestation. It appears now that the signification of the last pressure of the enumeration of Meiri is as follows: and even if he accepted a penalty [for not delivering the *get*] and then retracted we have still a case of true coercion "as soon as one compelled him to fulfill his commitment because of the penalty" Meiri wrote thus clearly that we have a case of true coercion if and only if we have an external coercion. Therefore as long as there is not a coercion by others we have not a true coercion and the *get* is valid and kosher unless he makes a protestation.

Now although the former deduction is correct and unquestionable, it does not represent the main point of Meiri's argument. In fact it was evident for Meiri that a self-coercion resulting from the acceptation of a penalty if the husband does not deliver the *get* followed by a retraction (he does not want anymore to give the *get*) does not constitute a coercion at all and therefore a *get* delivered in order to escape the penalty is valid unless a protestation. But less evident was the status of an unfair pressure exerted by others, with the aim to compel him, by threats and attempts to frighten, delivering the *get*, on the basis of the penalty that he had accepted before. Maybe such a pressure is not a true coercion because it is intended to force him only to fulfill his own commitment and this was in fact the object of the query that Meiri asked Rashba. The point of Meiri's statement is that even such coercion is still a true coercion. Of course the fact that Meiri, after hesitation and consultation of Rashba, decides that this unfair coercion exerted by others is still a true coercion proves again that without it, the self-coercion resulting from the acceptance of the penalty followed by a retraction is not a true coercion and the *get* delivered in order to escape the penalty is valid unless an official protestation.

In the second quotation (it is the end of the paragraph), Meiri writes that in the case of the *get*, we do not need a protestation as soon as it appears clearly that one harassed or frightened him in a case where coercion is forbidden". Thus only in the case of an illegal coercion exerted by others, i.e. in a situation where the *halakhah* does not allow coercion, we have a true coercion. But if there is no intervention of others and the husband gives the *get* in order to escape a freely accepted penalty, this is not a coercion invalidating the *get*. The *get* is kosher unless he uttered a protestation.

The apparently unresolvable contradiction[50] between Rashba and the other *poskim*—R. Perez, Ritva, Rashbaz, and especially Maharik—now seems to be definitively solved:

- Rashba dealt with a coercion exerted by others, even without the husband receiving money. This *get* was ruled to be forced and invalid despite the absence of a legal protest, *moda'ah*. Had the husband received money, the *get* would have been considered legal, unless a legal protest was made.
- Rashba was not expressing his opinion about a case of a freely accepted penalty, in which there was no interference or illegal coercion by others. In contrast, that is exactly the type of case all the other *Rishonim* were addressing. Therefore, there is in fact no contradiction between Rashba and the others.
- Rashbaz[51] dealt with an illegal coercion (the theft of the husband's property) but he questioned whether getting one's effects back could be considered enrichment.[52]

[50] The correct text of Rashba's responsum was published in Salonika in 1803. All the rabbinical authorities before this date could not have known this correct text. The rabbinical authorities of the 19th century also most probably were unaware of the correct text. But even today, Rashba's responsum is still quoted according to the version in the *Beit Yosef*. All the later authorities (*Aharonim*) presumed that Rashba was dealing with a case of a freely accepted penalty. Therefore, they thought that, according to Rashba, in the case of retraction, it is not necessary for the husband to utter a legal protest (*moda'ah*) to invalidate the *get*. This position of Rashba seemingly contradicts that of the other authorities. They thought Rashba ruled that the simple fact that the husband retracted is sufficient to invalidate the *get*. However, from the text of *Shulhan Arukh Even ha-Ezer* 134: 5, we cannot ascertain whether R. Caro correctly understood that the responsum of Rashba dealt with a case of illegal pressure or whether he thought it dealt with a case of self-pressure; either way, R. Caro did not rule according to Rashba. However the sequential quotations of the responsa of Rashba and R. Nadjar in the *Beit Yosef* support the idea that he believed they are in agreement. Therefore, it is likely that R. Caro correctly understood that the responsum of Rashba dealt with a case of illegal pressure.

[51] *Tashbets* I:1, the case of the woman stealing her husband's effects in order to receive the *get.*

- Maharik dealt with a case of a freely agreed-upon pawn. Despite an attempt to renegotiate the deal and get the pawn back, the *get* was delivered without a formal protest and therefore was valid.
- Ritva wrote that any case of an agreed-upon penalty cannot be considered coercion (as long as no protest is uttered before two witnesses).
- In the case of a freely taken oath to give a *get*, Ritva wrote that giving the *get* because of the oath is certainly not illegal coercion, since illegal coercion cannot result from a freely accepted commitment. The obligation to release the husband from his oath is a stringency required by R. Perez. In fact, Rashba and Rashbaz would even permit beating a recalcitrant husband who is refusing to fulfill his oath, and it would not be considered an illegal *get*. Regardless, even R. Perez agrees that an oath is not coercion, but it merely looks like coercion.
- From the ruling of R. Perez, which permits the replacement of an oath with a freely agreed-upon pawn (and according to Rashbaz, it makes no difference if it is a pawn or a freely accepted penalty), we can conclude that a freely accepted pawn or penalty does not even look like coercion and is acceptable a priori. Such a *get* could only become invalid if a legal protest were to be uttered.
- As long as we understand the responsum of Rashba according to the traditional understanding there is no difference between a self-coercion and coercion by others. Therefore the maxim "they tortured him and he sold the property, his selling is valid" can be valid in both cases. Thus the forced *get* is valid if the husband received money. Therefore a pawning of money is convenient because the husband brought that amount out of his possession and he will now receive new money. By contrast a penalty is not convenient because the husband will not receive new money; he will only avoid a paying out. But if we finally accept that even according to Rashba and Meiri, the self-coercion is not similar to the coercion by others, and only a coercion by others is a true coercion which invalidates the *get* without the necessity of a protestation, then a self-coercion is not at all coercion. Therefore when the husband accepts freely a penalty or a pawning, there is no difference anymore between penalty and pawning. There is only a difference in the case of a coercion exerted by others as in the case of Rashba. Indeed the pawning represents an encashment of fresh money which will validate the *get* unless he utters a protestation. By contrast the penalty is not valid in that case. This difference is in fact only valid according to Rashba who accepted the maxim "they tortured him and sold the property, his selling is valid" in matters of *get*. By contrast Rivash, Radvaz, and Rema did not accept this principle in matters of *get* and the *halakhah* follows their opinion.

In conclusion, we see that Rashba's responsum dealt with a case of unfair interference, and considered it a coercion that invalidates the *get*. His responsum was based on the presumption that a freely accepted penalty is not coercion. Rashba added that in the case of unfair pressure exerted on the husband, the forced *get* becomes valid when the husband accepts money. Just as a forced sale becomes valid when the seller accepts the money, a forced *get* becomes valid when the husband accepts money.[53]

---

[52] Rashbaz's conclusion seems to be that it is not enrichment. My own understanding of his answer At first glance, I personally think that that the answer depends on whether the husband was desperate and feared that he would never get his goods back (יאוש) or not.

[53] Rivash n° 127 contradicted this ruling on the basis that no monetary value can be given to a woman. R. Caro and Rema followed this opinion and also did not rule like Rashba.

A reviewer asked me the following query: what would be the law in the responsum of Rashba if the family of Leah, without any tricks and stratagems, without attempts to frighten and threats, was simply asserting before the treasurer against the reduction of the penalty because it would break the convention? The reviewer's intention is

3. *Shulhan Arukh*[54] and Rema[55] on *Even ha-Ezer* 134. Elements affecting the free delivery of the *get.*

Shulhan Arukh

If he takes an oath to give the get*, it is necessary to release him from this oath in order for it not to look like coercion [to give the get], but he can pawn a guarantee if he wishes, because this does not look like a coercion.* (*Even ha-Ezer* 134. 4)

The *Shulhan Arukh* followed the opinion of R. Perez: In the case of a man who has taken an oath to give the *get,* it is necessary[56] to release him from his oath because this situation *looks* like coercion.[57] In other words, it could appear as if the man no longer freely delivers the *get* but rather does so only in order to fulfill his moral commitment. Consequently, if such an oath has been made, the court must release the husband from it lest he give the impression that he lost his freedom of choice.[58].

The husband is allowed, however, to freely pawn a guarantee before his release, in order to prevent him from changing of mind. This would not be considered to have the appearance of coercion.

---

evident; he wants to prove that any intervention, even small, is a form of pressure. He considers that even without external intervention, the self-commitment represents a moral pressure which is a coercion invalidating the *get*. The answer is however simple. The arguments of the reviewer are groundless. Indeed Meiri considered the case of the commitment by an accepted penalty and he required two conditions to invalidate the *get* without the necessity of a protestation, a retraction and a coercion exerted by others. Thus as long as there is no coercion exerted by Leah's family, the *get* is kosher and a protestation is necessary to invalidate the *get*. The truth is that as long as the intervention of Leah's family is quiet honest, fair, and respectful of the *halakhah*, it is entitled to argue against any diminution of the penalty by the treasurer and any modification of the agreement. It is also entitled to contest any reduction of the penalty and sue Reuben at Beit Din. We remain in the framework of the freely accepted penalty and the *get* is kosher as far as he did not utter a protestation. Only a violent, unfair intervention which aims at taking the law into its own hands, outside the framework of the *halakhah* takes us out of the framework of the freely accepted penalty and brings us in the framework of the coercion exerted by others. It could perhaps be difficult to determine the boundary between the fair intervention and the unfair intervention. In the case of doubt, it belongs to the appreciation of the rabbinical court. This gives us a complete understanding of Rashba's responsum and of the text of Meiri. Remark: we will see later that according to one opinion, an external and objective discloser of the retraction is sufficient to invalidate a donation and similarly a *get* (see appendix). This opinion is nevertheless a minority opinion; Maimonides, *Shulhan Arukh* and Rema did not follow it. From the text of Rashba (the last sentence) and much clearer from the words of Meiri it appears that only an external coercion can invalidate the *get* without the necessity of a protestation. An external discloser of the retraction is not sufficient to invalidate the *get* without the necessity of a protestation.

[54] Major work of R. Joseph Caro, published for the first time in Venice by Justinian in 1565.

[55] R. Moses ben Israel Isserles (~ 1525 – 1572)

[56] From the responsa of Rashba and Rashbaz quoted by R. ibn Tawa, it appears that they did not impose this disposition.

[57] Rashbaz, in *Tashbets* II: 68 wrote that this statement makes no sense because the husband can always ask for a release from his oath. Therefore, this requirement is not necessary. The *Beit Yosef* was not aware of this responsum and followed R. Perez, whether because he knew the wording of R. Perez or because he followed the wording of Ritva: *"it looks like coercion."*

[58] Rashbaz in *Tashbets* II:68 opposed this reasoning: because the husband always has the possibility of requesting that he be released from the oath [because he did not realize its consequences], therefore he always has freedom of choice, and it does not look like coercion.

Indeed the husband has always had the option of forfeiting the money by not delivering the *get*.

It is likely that R. Caro did not make any distinction between a pawning and a penalty.[59] Thus, before releasing the husband from his oath, the wife's family or the court could require a pawning, but whether to do so or not ultimately remained the husband's decision. The *Shulhan Arukh* does not explain what happens if he refuses to give a pawn. According to the opinions of Rashbaz and Ritva, it is likely that they would not release him from his oath, and the delivery of the *get* would still be valid.

In fact, upon initial examination, it is hard to pin down R. Caro's position: We have the impression that he remained evasive in the evaluation of the different types of coercion. However, when we review the different paragraphs of chapter 134, we can reach the following conclusions:

Chapter 134:4:

- A freely taken oath is not coercion, but it looks like a coercion and therefore a priori, this coercion should be removed.
- It is permitted to replace an oath with a freely accepted pawn in order to secure the timely delivery of the *get*.[60]

From these rulings, we may infer that a freely accepted financial commitment does not constitute coercion from a legal standpoint even when an *imposed* financial obligation is coercion from a legal standpoint. A freely accepted financial commitment is allowed a priori without any restriction.

Chapter 134:5 to 8:

- In any case, if the husband retracts and utters a legal protest before two witnesses, there is no *get*.[61]
- In the case of legal coercion by a Jewish court, a legal protest by the husband renders the *get* invalid,[62] but the court may impose physical coercion until the husband "agrees" to deliver the *get.*
- In the absence of a protest, in the case of illegal coercion by a Jewish court, the *get* is invalid: *pasul*[63].

---

[59] Rashbaz, *Tashbets* II: 68 clearly wrote that there is no difference between the two. R. Nadjar dealt in his responsum with a case of a penalty and ruled that it did not constitute illegal coercion.

[60] According to the *Shulhan Arukh,* there is no difference between penalty and pawn. But a penalty is not as "secure" as a pawn and will certainly not interest the woman. Indeed a pawn gives her a guarantee while the acceptance of a penalty remains a moral commitment. Therefore it was not mentioned.

[61] Such a *get* is invalid by Torah law; it is as if it never existed, and the woman (if widowed) may marry a *kohen*.

[62] It is not a *get* by Torah law.
It could be argued that the *Shulhan Arukh*, Even ha-Ezer 134 did absolutely not deal with the case a self-coercion. This would nevertheless be surprising because *Beit Yossef* quoted and summarized in chap. 134 the responsa of Rashba, Ritva and R. Maimon Nadjar and in chap. 154 the responsum of Maharik, dealing all of them with self-coercion. It is clear that in *Shulhan Arukh* "*ansuhu*" refers to a coercion exerted by others but "*anus*" is a general term referring to the coercion exerted by others and by oneself. Therefore, from its very precise language we can deduce that in the case of self-coercion, if he made a protestation the *get* is null and void but otherwise it is kosher and valid.

[63] Made invalid by the rabbis (Maimonides), by the *Torah* (Tur). Therefore, this woman (if widowed) may not marry a *kohen*.

- If the coercion was exerted by gentiles, the *get* is invalid, *pasul* if the coercion was justified (in Jewish law) but if it was unjustified (in Jewish law), there is no *get* at all, *get batel*[64]

From these rulings, we may infer that:

- If the husband retracts under a freely accepted oath, he must make a legal protest for the *get* to cease to exist.
- A posteriori a *get* that is freely given by a husband, under a freely accepted oath, is kosher.
- In the case of a freely accepted pawn or penalty, the *get* can be invalidated only by a protest, a *moda'ah.*
- R. Caro does not mention whether a forced *get* can be validated by the acceptance of money.[65]

From these elements it seems likely that R. Caro correctly understood that Rashba's responsum dealt with a coercion by Leah's family. This is why he successively noted the responsa of R. Nadjar, Ritva, and Rashba in the *Beit Yosef* without any comment. Indeed these responsa do not contradict each other at all. R. Nadjar dealt with a freely accepted penalty that took place peacefully without any protest, and Rashba dealt with an illegal coercion that does not require an official protest. Ritva determined that a freely accepted *commitment* (financial or through an oath) is not coercion.

R. Caro therefore ruled that, in the case of a retraction following a freely accepted penalty or pawn, we require a legal protest before two witnesses. It is only in the case of illegal coercion that we do not require such a protest[66].

Rema

Gloss: It is also the case if he entered into a "formal engagement"[67] *to divorce. But if he accepted a penalty should he not divorce, this is not called coercion because he bound the* get *to something else, and he can pay the penalty and not divorce. There are, however, in this case, more stringent people [responsum of Rashba] and it is good, a priori, to fear their opinion and to release him from the penalty. However, if he already gave the* get *under this penalty or even under the oath that he had freely accepted, the* get *is kosher because in the beginning he was not forced [to accept the penalty or to take the oath]* (responsum of Ritva)
.

[64] By Torah law.
[65] R. Caro was influenced by the ruling of Rivash in *Tshuvot Bar Sheshet* n° 127. Rivash ruled that we cannot assign a monetary value to a woman as we do for an object. Therefore, he ruled that the acceptance of money by the husband in the case of a forced *get,* does not validate the *get*. Note, however, Maimonides, *Hilkhot Ishut* 14:19, where he rules that a husband is not obligated to redeem his wife at more than her value.
[66] One could also argue that on the one hand, R. Joseph Caro understood, as did Rema, that Rashba's responsum dealt with a freely accepted penalty and that in the case of a retraction, we do not require an official and legal protest, but on the other hand R. Caro did not rule according to Rashba. Thus R. Caro would understand Rashba's responsum exactly in the same way as Rema. We nevertheless note that R. Caro did not rule according to this understanding and we must then conclude that he did not rule according to Rashba but according to the other Rishonim. This assumption is not likely, however, because it would not explain the successive quotations of the responsa of R. Nadjar, Ritva, and Rashba in *the Beit Yosef* without any comment, allowing the assumption that these different quotations don't contradict each other. In contrast, according to Rema, these three quotations certainly do contradict each other. The *Aharonim* tried unsuccessfully to resolve this contradiction.
[67] An engagement without the possibility of retraction: a *kinyan*

This passage by Rema raised very serious difficulties and discussions among the commentators and *poskim*, which continue until today. These issues include:

- *Kinyan*[68]. The plain understanding is that we should release the husband from this *kinyan* (*Be'er Heitev*). On the face of it, this release seems strange and unusual; furthermore, the reference[69] given completely contradicts this text of Rema. For that reason, many commentators did not agree with Rema and remained without a satisfactory solution. In fact, the correct meaning is certainly this: that just as the pawn mentioned above does even not look coercion and certainly is not coercion, the *kinyan* too is not coercion and need not be released, this *kinyan* has no legal validity,[70] and its effect is at best psychological.

- *Knasot*.[71] A penalty *is not coercion* because free choice is assured. However, some are stringent, and that opinion should be taken into account a priori. This certainly refers to the responsum of Rashba as published in the *Beit Yosef Even ha-Ezer* 134. The reference to Rashba's responsum[72], included in Rema's gloss, makes sense because the understanding of the corrupt transcription of Rashba's responsum completely altered its meaning and significance. Indeed we saw in the original responsum that the unfair interference of Leah's family and its influence on the official was the deciding factor in the outcome of the matter and was the reason the *get* was invalidated. In the version of Rashba's responsum recorded in the *Beit Yosef*, the interference of Leah's family and its determining influence on the official's decision (to refuse Reuben's request to reduce the terms of his freely accepted penalty) is completely omitted. The case now appears to be one about a freely accepted penalty *without* an external interference. And it now also appears that Reuben's retraction—even absent a formal protest—is sufficient to give notice of the unfairness toward him and invalidate the *get*.[73]Rema's ruling thus rests on a corrupt transcription of Rashba's responsum and an incorrect understanding of it. Rema ruled a priori based on his misunderstanding of the case of the Rashba that in the case of a freely accepted penalty, any retraction by the husband, even without legal protest, invalidates the *get*. A posteriori he rested on the responsum of R. Nadjar and Maharik and accepted the *get*.
-

  In order to verify these assumptions, let us examine the text of the *Darkhei Moshe* on *Even ha-Ezer* 134.

  *And this is in agreement with the rulings of Rabbi Israel Isserlein n° 173: "If he entered into a formal engagement to divorce his wife, this is [**not**] coercion [because this engagement has no juridical value]. But if he accepted a penalty if he doesn't*

[68] Formal act of acquisition of an object or a commitment.
[69] *Terumat ha-Deshen Pesakim* n° 173.
[70] This is indeed the position of *Terumat ha-Deshen,* and was well known by Rema.
[71] Penalty.
[72] I tried to discover the origin of the references appearing in the text of *Shulhan Arukh* and Rema. We find marginal references in *Be'er ha-Gola* by R. Moses Rivkes (17th century, died in Vilna in 1671) published from 1661 onward. But the references within the main text are much older and are already extant in the Cracow edition of 1614 though absent from the Cracow edition of 1600 and from the Venice edition of 1594. Regardless, these references do not originate with Rema.
[73] According to the understanding of Rema, leaving aside the text of the responsum in *the Beit Yosef,* the difference between Rashba on the one hand and R. Nadjar and Ritva on the other, was that in the case of a freely accepted penalty, Rashba rules that a retraction invalidates the *get* while Ritva and R. Nadjar consider that *get* to be kosher unless there is an official protest. The responsum of Rashba thus contradicts the other responsa quoted in the *Shulhan Arukh*.

divorce, then he will be obliged to pay the penalty if he doesn't divorce her. Now if he made both things together [formal engagement to divorce his wife and accepting a penalty guaranteeing the delivery of the get*], then the engagement is invalid because the engagement to divorce is invalid. Therefore, the engagement is also invalid for the penalty." In a similar way Maharaik wrote (n° 63), following the wording of R. Maimon: When someone accepts a penalty, this is not called coercion because he accepts it voluntarily. Ritva wrote in a similar way in a responsum that I will quote below. However, the Beit Yosef wrote in the name of Rashba that if someone accepted a penalty if he doesn't divorce, and we know that he doesn't divorce voluntarily but only because he fears the penalty, this* get *is coerced and invalid, even if he did not utter a formal protest.*[74]

The first thing we note is that Rema referred to the *pesakim* of R. Isserlein and was well aware of the argument that would later be made in opposition to his position. We also must correct the text of *the Darkhei Moshe* and add a negation "not" (meaning that a financial commitment is not coercion) in order to reconcile an internal contradiction. Furthermore, we see that our understanding of the beginning of Rema's gloss is correct.

Regarding the case of the freely accepted penalty by the husband, Rema knew Rashba's responsum only through the *Beit Yosef* and thus was unaware of the complexity of the situation. We see that the *Darkhei Moshe* has further shortened and simplified Rashba's responsum: We are now dealing with the classic case of a husband freely accepting a penalty. However, because of the omission of important details, Rema did not understand that the case being considered was that of an illegal coercion resulting from the interference of Leah's family with the official. Instead, he understood it to be a case of a freely accepted penalty. It was thus difficult for Rema to understand why Rashba considered this to be a case of external coercion that he compared to the Hebrew phrase for a case of "*they tortured him.*" And it's unclear why Rema accepted it without objection.

According to Rashba, in this case of "*they tortured him,*" if the husband receives money, it is a case of, "*they tortured him and he accepted to sell [the orchard] to them, the sale is valid." Just as when a person accepts money or its value under coercion, we assume that he sold and permitted the orchard to be acquired,"* so too is the *get* valid—unless the husband makes a legal protest, or *moda'ah*. If the husband does not receive money—and according to Rashba, this is the case if he was granted an annulment of the penalty—then it is a case of, "*they tortured him and he gave up the property,*" and simply taking note of the unfairness toward the husband is sufficient to invalidate the *get*: *It is not necessary to utter a protest; as soon as we know of his state of coercion and that they tortured him and he divorced, his divorce is not a divorce because he did not receive money.*

---

[74] The text of Rashba's responsum at the disposal of Rema was the *Beit Yosef* version.
It is important to note that many extant responsa of Rashba were abridged whether because of their length or because the abridged responsa were used as a compendium of rulings before the redaction of the codes of *Turim* and *Adam ve-Hava* in the beginning of the 14th century. See
1. *Sefer ha-Zikaron shel R. Betsalel Zolti,* Jerusalem 1987, article of R. Solomon Havlin, p. 219, note 4.
2. Responsa of Rashba: facsimile of the first edition of Roma, ~ 1470, ed. Solomon Havlin, 1978, pp. 12-16.

It was Rema's[75] understanding that Rashba addressed the case of a freely accepted penalty. It was Rema's understanding that Rashba contradicted the following principle of Ritva and Maharik:

Ritva n° 96:
There is coercion only if it is exerted by others.

Maharik 63; 2:
There is coercion when it is exerted by others, excluding the case when this coercion is exerted by himself.

However, Rashba's comparison of the situation of a husband freely accepting a penalty if he does not deliver the *get*, to the case of *"they tortured him and he sold,"* or "*they tortured him and he gave"* is, according to Rema's understanding, very difficult to accept and even questionable.

According to Rema's understanding, a posteriori, the *get* is normally kosher (R. Nadjar and Maharik); however, a priori, if we know that the man delivers the *get* against his inner will, only in order to avoid the penalty, it is illegal (his understanding of Rashba),

As it is difficult to really know any person's intimate feelings and to ascertain whether the husband gives the *get* because of the penalty or because, by agreeing to deliver the *get and accept a penalty,* he proves he will deliver the *get* and thereby calms the fears of his wife's family, Rema's position seems to be that we must be cautious and suspicious of and fear any indication or sign of coercion. Furthermore in such a matter, rumor may embroider, exaggerate and ultimately transform an assumption or a suspicion into a certitude. Therefore, Rema decided, purely and simply, to avoid such a situation and ruled a priori to release the husband from the freely accepted penalty. Thus a priori Rema always fears a retraction and rules according to what he thought to be Rashba's ruling. But a posteriori, as long as we did not observe anything special about the case and there is no problem: the *get* is ruled valid, according to the responsa of R. Nadjar and Maharik.

In other words, because of the shortened version of Rashba's responsum as quoted in the *Beit Yosef*, Rema understood that Rashba was concerned with a case of a freely accepted penalty, without any external pressure exerted by others. Rashba wrote, however, that not only physical pressure but also financial pressure can be unacceptable pressure. Therefore, Rema understood that a penalty, even if freely accepted, is pressure that invalidates the *get*. Thus did Rema understand the thesis of Rashba: In any case of a freely accepted penalty, we must assume that the husband gave the *get* in order to escape the penalty.

The practical consequence of such a ruling is huge because once the man is released from his commitment to accept a penalty; the court loses any means of guaranteeing the timely delivery of the *get*. But the most important conclusion is that we realize that Rema's stringent ruling rests on a mistake in understanding Rashba's responsum.

According to our understanding, which is clearly supported by an analysis of the original text of Rashba's responsum, all these considerations by Rema are false problems, because the

[75] And all the subsequent *Aharonim* relying on him.

Rishonim never considered them. Rashba never contradicted later authorities[76] and was addressing an altogether different type of case: a coercion exerted by others. Ritva,[77] Rashbaz, and Maharik, on the other hand, were responding to cases of a freely accepted penalty. They wrote explicitly that there cannot be coercion with a freely accepted penalty.[78]

In the case of a freely accepted penalty and a retraction by the husband, there must be a legal protest before two witnesses. Otherwise, it is not considered a coerced *get*. Thus we have a clear situation, in which there is no problem of fear of a retraction. Furthermore, we note an internal contradiction in Rema. In134:4, R. Caro required the husband to be released from an oath before delivering the *get* but allowed the oath to be replaced by a freely agreed-upon pawn. Rema expressed no reservations on this point. This is surprising, as Rema should have objected to it and forbidden it because, a priori, he ruled like Rashba and moreover, he always feared a retraction. Therefore, Rema should not have allowed a freely accepted financial coercion, which could become an unacceptable coercion in the case of retraction that he so feared.[79]

A final word about Rema's ruling. It seems important to point out that in the *Shulhan Arukh* and Rema we find different expressions of it with almost imperceptible gradations. In the *Shulhan Arukh* , we find the following phrases : *it is good to fear, it is correct to fear, we should fear, it is fine and convenient to fear, we must fear*. Similarly in Rema we find: *it is good to fear, we must fear*.

From this language, we see that the requirement a priori to release the man from the freely accepted penalty is written in the most lenient terms. It seems that it is not a requirement but rather a recommendation, if it is possible, because this is the surest way to free the husband from his penalty. It is thus certainly not forbidden to allow him to agree to such a penalty; and if there were any danger that this requirement would threaten the delivery of the *get*, the court could probably proceed to the delivery of the get without removing the penalty. By way of proof, let us consider the following quotation from Rema on *Even ha-Ezer* 126:6, concerning a detail of redaction of the *get*, where situations could occur that required rewriting the *get* and which could, in some cases, create a danger of *iggun*:

And it is good to take this into consideration, except in the case where we can fear a risk of abandonment [of the wife by her husband without a formal get*]*

This would be in accordance with the opinion of R. Moses Provincial expressed in his responsum 103: *The custom to free the husband from an oath before the delivery of the* get *is for security (to ensure the most secure delivery of the* get) *but it is not mandatory*. And if this is the case for an oath, it is true a fortiori with a freely accepted penalty. Therefore our assumption is really indispensable because the oath looks like a constraint but the penalty is absolutely not a constraint and it doesn't even look like. More, without our assumption we would face an obvious contradiction between Rema's gloss here and in *Hoshen Mishpat* 242, 9 (see appendix).

---

[76] Ritva, R. Maïmon Nadjar, Rashbaz, and Maharik.

[77] It would have been strange had Ritva adopted an opinion completely opposed to Rashba's without noting it.

[78] Unless the husband utters a legal protest: *moda'ah* .

[79] One could argue in Rema's defense that in the case of a pawning we don't fear a retraction. Indeed, in the case of retraction, the husband's state of coercion does not invalidate the *get* because he will receive money back and this will validate the coerced *get*. This argument is not acceptable, however, because in the *Shulhan Arukh Even ha-Ezer* 134: 8, Rema wrote that the acceptance of money does not validate the coerced *get*. In other words, on this specific point, Rema did not follow Rashba but was influenced by Rivash n° 127.

Therefore, I think that Rema's position is a very lenient one, much milder than generally assumed. It certainly is not forbidden to accept such a penalty and, probably, according to Rema's text, if there were any danger in freeing the husband from his penalty, the court could organize the delivery of the *get* without removing the penalty.

It is generally accepted that Rema ruled a priori like Rashba and a posteriori like R. Nadjar. If our assumptions and analysis are correct, we should rather say that he ruled like R. Nadjar but he tried, where possible and without any drawbacks, to satisfy Rashba's ruling.[80]

4. Authorities contemporaneous with R. Caro regarding the responsum of Rashba.

All the following authorities quoted the responsum of Rashba according to the version of the *Beit Yosef* and, therefore, assumed incorrectly that this responsum dealt with a freely accepted penalty. The authorities included in this category are mainly the important Sephardic *poskim* of the sixteenth century. They ignored, or at the least, did not refer to the glosses of Rema.

R. Samuel de Medina,[81] Rashdam, in responsum 63.[82]

R. Elijah ben Barukh ibn Hayim,[83] Ranah, in responsum 63.
[84]

R. Hayim Benveniste [85] in his book *Knesset ha-Gedolah*[86] quoted the first book of the responsa[87] of R. Joseph ben David ibn Lev[88], Maharibal: According to him, Rashba contradicts the opinion of R. Nadjar and Maharik, and the practical conclusion follows the opinion of Maharik.

Rabbi Bezalel Ashkenazi[89] , is the only one who knew the responsum of Rashba in its original and complete version, and he quoted it.[90]

After transcribing Rashba's responsum, R. Bezalel Ashkenazi or Rabza[91] addressed the apparent contradiction between Rashba's assertion in that responsum that "*a penalty is a coercion; not only a physical pressure but also a financial pressure constitutes a coercion [in the juridical meaning of the word]*" with the statement by R. Perez of Corbeil, *that "a pawn is not coercion."*

---

[80] The ruling that Rema ascribed to Rashba.
[81] 1506 – 1589.
[82] 1st edition: Salonika 1585-1587 in 2 volumes, and a 2nd improved edition in 3 volumes: Salonika 1594-1598.
[83] ~1530- 1610. In this paper, we have quoted responsum 63 of Maharik, Rashdam, and Ranah! It is not a misprint, but rather sheer coincidence.
[84] Constantinople 1610. Ranah developed a very original theory for explaining the responsum of Rashba. See the end of the appendix.
[85] 1603 – 1673. This author certainly knew the glosses of Rema, but he did not refer to him.
[86] Smyrna 1731 and Lemberg 1861. See notes on *Tur Even ha-Ezer* 134 n° 30 and 56.
[87] Constantinople 1573.
[88] 1505 – 1580.
[89] ~ 1520 - ~1594.
[90] See R. Bezalel Ashkenazi's Responsa Venice 1595. See also a new edition of his responsa edited by Buhbut, Jerusalem 1994, p. 124, col 2 (end) and p. 125, col 1.
[91] **Ra**bbi **Bez**alel **A**shkenazi

He proposed two answers.[92]

First answer*: in the case of Rashba, the treasurer and the gentile interfered and therefore he delivered the* get*. But if Reuben had not changed his mind and had not retracted and he had given the* get*, we should not have suspected that he gave the* get *because of the fear of the penalty. By contrast, Rabbi Perez refers to a case where the man freely gave a pawn and the* get*. Rabbi Perez thinks that we do not suspect that he gave the* get *in order to recover his pawn.*

Second answer*: There is a difference between a penalty and a pawn. The pawn is no longer in his hands, and when he recovers it, he receives money, and this is different from avoiding paying a penalty.*

Regardless, from this responsum we can deduce that in our present problem,[93] we are dealing with a case of coercion exerted by a gentile.[94]"

We thus see that Rabza understood that Rashba's responsum dealt with a case of illegal coercion exerted by a gentile. Therefore, no protest is required to nullify the *get*.

In the first answer, the discussion between Rashba and R. Perez concerns the case of a freely accepted penalty if the husband does not deliver a *get*. According to Rashba, if we know with *certitude*[95] that the man retracted and gave the *get* in order to escape the penalty, then we are dealing with a case of coercion and the *get* is invalid.

It is possible, however, to present serious arguments against this first answer, which, in fact, is only an assumption.

- Rabza creates a contradiction between Rashba and R. Perez on the basis of a mere assumption.

- If Rashba really thought that in the case of a freely accepted penalty, the *get* is invalid, even without any protest, as soon as we know with certitude that the husband retracted, then Rashba would have formulated his responsum differently. He would have written: Why do you ask me about such an intricate case? Even in a much simpler case—without Leah's family conspiring with the treasurer— this *get* was already invalid because of the negotiation started by Reuben with the treasurer in order to diminish the penalty. This negotiation already provided the proof of his retraction and was sufficient to invalidate the *get*. It was only at this stage that Rashba had to refer to the coerced selling of the orchard in order to gain acceptance for his opinion that there is a difference between receiving money and avoiding the loss of money.[96]

---

[92] As Rashba did not explicitly address the case of a *get* delivered peacefully and without complication by a man who freely accepted a penalty, Rabza cannot give a definitive answer.

[93] Thus, in the case submitted to Rabza in Responsum 15 we are dealing, as it were, with the case in the responsum of Rashba— a case of coercion exerted by a gentile.

[94] In Jewish law, there is a slight difference between the coercion exerted by a Jew or by a gentile. In the case of coercion by a Jew, the *get* is *pasul*, but the wife (even when not divorced) would become forbidden to a *kohen* in her widowhood. In the case of coercion by gentiles, there was absolutely no *get* and she could marry a *kohen* in her widowhood.

[95] This certitude must be supported by an objective element. In the case of Rashba, the negotiation started by the husband with the treasurer in order to diminish the amount of the penalty is certainly proof of his retraction.

[96] This difference is very difficult to understand and seems to have a formal character.

- If Rashba really thought that in the case of a freely accepted penalty, the *get* is invalid, even without any protest, as soon as we know with certitude that the husband retracted, then in the *sugiah* of Bava Batra 40b. Ran and Nimukei Yossef would certainly have mentioned and quoted the opinion of Rashba in support of their thesis. Now as R. Caro and Rabza knew the correct and complete version of Rashba's responsum, it is difficult to accept that the other *Rishonim* (Rivash, Rashbaz and Maharik) didn't know it. More, we have seen above, through the analysis of Rashba's responsum and Meiri's commentary, that Rashba does not share this opinion. The truth is certainly that these *Rishonim* knew Rashba's responsum but they did not mention it because it does not deal with a similar case.

In the **second answer**, there is no contradiction between Rashba and R. Perez with respect to the case of a freely accepted penalty: Neither a penalty nor a pawn constitutes unacceptable coercion. In this second answer, the distinction between penalty and pawn noted by Rashba applies only to the case of a forced penalty or pawn. In such a case, both agree, they constitute unacceptable coercion. However, Rashba considers the pawn preferable to the penalty because the husband receives money. As a result, a *get* given under coercion is ultimately made valid because the husband received the money. In this second answer, it would not be possible to argue that the difference between penalty and pawn also applies to the case of the freely accepted pawn, because R. Perez wrote explicitly that the pawn is not coercion!

This second solution proposed by R. Ashkenazi seems the most likely.

Regardless, whether he based it on the reasoning of the first or the second answer, we see that R. Askenazi accepted a *get* given under a freely accepted penalty, if there was no evident and indisputable retraction. He required a formal protest in order to invalidate the *get*. Only in the case of an evident retraction, such as the negotiation of Reuben with the treasurer in order to diminish the penalty, would he invalidate the *get* without such a formal protest.

Rabbi Moses ben Joseph Trani[97] (Mabit).

R. Trani accepted a *get* given under a freely accepted penalty and referred to the responsa of Rabbi Nadjar and Rabbi Shimon ben Zemah Duran.[98] Although it does not constitute formal

[97] Rabbi Moses ben Joseph Trani (Salonika 1500 – Safed 1580)

[98] See Responsa of Mabit, Vol 2, responsum 138 (devoted to the famous Venturozzo-Tamari divorce in Venice 1560); Responsa of Mabit, Venice 1629-1630; and facsimile reproduction, *Yad ha-Rav Nissim*, Jerusalem 1990. The Dayan R. Abraham Scheinfeld wrote in a paper "*Heskem mammon kedam Nissuin*" Tekhumin 22, pp. 148 – 156, on p. 151, about the position of Mabit, that in the case of a freely accepted penalty, the get delivered by the husband in order to be freed from that penalty is kosher. However he added that if it is known that the husband had not the means to pay this penalty at the time when he accepted it, the *get* delivered in order to escape the penalty is a *get meu'ssah*. In fact Mabit did not write that in the referred responsum II, 138. Mabit referred to another case, of the payment of the *ketubah* and, in this context, he quoted the words of Rashbaz: "Anyhow we have here the proof that when we compel him to pay the *ketubah* and it can happen sometimes that he is obliged to give the *get* because of the payment of the *ketubah* that he cannot assume, the *get* is kosher. Indeed we did not really coerce him on the *get* and the divorce. In fact he accepted to deliver the *get* in order to escape the constraint of the payment of the *ketubah*. We don't call such a *get* a *get meu'ssah* because the coercion was exerted on something else and the *get* was freely delivered because we never coerced him to divorce," It is about this statement that the Mabit wrote "and if we know, that at the time when we compelled him to pay the *ketubah*, he had not the necessary means to pay it or even if he did not want to pay it, (this second limitation is incomprehensible and problematic because it empties completely the rule "כופין על הכתובה ומבקשין על הגט, i.e We coerce the *ketubah* but we require the *get*" enunciated by Rashbaz (and Rivash) from its content and even R.

proof, it seems likely that he knew the responsum of Rashba in its complete version, as did his close colleagues R. Caro and R. Ashkenazi, and he did not refer to it because it discusses a different case of coercion.

5. Later authorities, influenced by Rema, regarding the responsum of Rashba.

All the later authorities quoted the responsum of Rashba according to the version of the *Beit Yosef* and therefore incorrectly understood this responsum to be dealing with a freely accepted penalty. They were further influenced by the stringency of Rema, feared a retraction a priori.

Levush.[99]

Scheinfeld didn't invoke it) it seems to be a true coercion of the *get*." We find the same reasoning in his responsa II. 206 and III, 212 and therefore he strove, in those responsa towards a solution which would satisfy all the opinions, including his rigorous opinion, when this was possible. However, this reasoning contradicts completely the rulings of Rivash n°127 and Rashbaz I, 1, which did not consider such a limitation. It seems to be a rigorous and excessive position and at the very most a lonely isolated position. Indeed Mabit ruled himself that "we qualify a *get* as *meu'ssah* only when we coerce the *get*. But if we coerce him about something else, and he divorced in order to escape this other coercion, this is not considered as a *get me'useh*, provided that this coercion was legal." See responsa I, 22 and I, 76. In these two responsa, Mabit ruled practically according to this general principle, accepted by all the Rishonim and in contradiction with the former rigorous position. In order to solve the contradiction between these different responsa we must accept that the first reasoning was a rigorous and personal position that he considered only when it was possible to circumvent it. However, practically, when this was not possible, he did not rule according to this rigorous and lonely position but he followed the general principle accepted by the Rishonim, that a legal coercion of something else, for example the payment of the *ketubah*, thus not affect the *kashrut* of the *get*. See also "*Rabbinic Authority: The vision and the reality*", A. Yehuda Warburg, Urim Publications, Jerusalem New York, 2013, p. 147, note 147. The author, well aware of this contradiction, ruled against the rigorous position.
Anyhow Dayan Scheinfeld ascribed to Mabit a generalization by analogy, to a situation, which Mabit had not considered. In fact this generalization, from the case of the *ketubah* to the case of the freely accepted penalty, is problematic, even if we rule like Mabit. Indeed in the case of the penalty, we can argue like R. Maimon Nadjar "that it was his will from the beginning to divorce. He voluntary delivered the *get* and he had freely accepted the penalty in order to feel stronger and make up his mind to deliver the *get*." This argumentation is valid even he had not the means to pay the penalty. And this is really the opinion of Ritva, Rashbaz, R. Maimon Nadjar and Maharik. They never made any reserve and Mabit surely agreed with them. Similarly R. Uriel Lavi wants to ascribe the same thesis to Rema. In a paper "סידור גט לאחר חיוב הבעל בפיצוי כספי לאשתו " *Tehumin* 26, pp. 160 – 172, he wrote indeed that the position of Rema corresponds to that of Maharik quoted in *Darkei Moshe*, to which Rema added an additional limitation. Therefore a freely accepted penalty is not a coercion invalidating the get as long as the husband has the means to pay it. But this would not be the case if he cannot pay it. Apparently he made this deduction from the words of Rema: "… But if he accepted a penalty should he not divorce, this is not called coercion because he bound the *get* to something else, and he can pay the penalty and not divorce…" But this deduction doesn't seem genuine. First if he has not the means to pay the penalty, he can borrow this amount. If he cannot borrow the amount he could choose imprisonment and behold his wife. Therefore he doesn't loose his free choice and he is not coerced to divorce. We can also argue with R. Maimon Nadjar "that it was his will from the beginning to divorce. He voluntary delivered the *get* and he had freely accepted the penalty in order to feel stronger and make up his mind to deliver the *get*." This argumentation is valid even he hasn't the means to pay the penalty. And this is really the opinion of Ritva, Rashbaz, R. Maimon Nadjar and Maharik. Further R. Lavi wrote that Rema did not innovate original theses without a reference between Rishonim. Now we don't find any Rishon championing this thesis. Finally if this were really the position of Rema, then he would contradict Ritva, R. Maimon Nadjar, Rashbaz and Maharik, whose opinion (except that of Rashbaz exposed in *Beit Yossef*) he exposed in *Darkei Moshe*. All of them adopted, without any reservation, the principle "that an obligation is a coercion only if it was imposed by some one else and the get delivered in order to escape a penalty is not *me'useh* but valid".
[99]Rabbi Mordekhai Jaffe, 1535 – 1612. The different volumes of *Levush (ten Levushim)* were printed in Lublin, Prague, and Cracow between 1590 -1604.

R. Mordekhai Jaffe[100] (Levush) differed from Rema and tried to reconcile the responsum of Rashba with the responsa of R. Nadjar, Ritva, Rashba, and Maharik. He explicitly mentioned the different cases of R. Nadjar, Ritva, Rashba, and Maharik but presented them anonymously. The only difference he noted between the cases of Rashba and R. Nadjar was the introduction into Rashba's responsum of a fixed date that could not be passed. For this reason, Levush compared the situation involving a delay with that of an oath and ruled that it too looks like coercion and therefore— but here is the weak point— the *get* is illegal, even if there was no official protest! Levush must have been aware of the difficulty[101] in his explanation and so added that if the *get* was delivered normally, with the husband stating during the delivery that he gives this *get* freely, we rule that he annulled his coercion and the *get* is then considered legal and valid.

R. Jaffe also noted that even in this case—meaning where there is a freely accepted penalty and a fixed deadline— some rule that that it is not coercion, and he brought evidence from the ruling of R. Joseph Colon. Thus, at the least, he conceded that there was a contradiction between Rashba and Maharik.

R. Elijah Alfandari.[102]

In his responsa *Mikhtav me-Eliyahu*,[103] chapters 20 and 21 of Part VII: "Bitul ha-Get," R. Alfandari discussed the position of Rema.

R. Alfandari took exception with Rema. He argued that R. Nadjar and Rashba, quoted successively by the *Beit Yosef* without any comment, could not be contradicting each other. Therefore, he proposed the following distinction: In the case of R. Nadjar, there was no protest at any stage of the process, from the compromise reached until the delivery of the *get*. In contrast, in the case of Rashba, the husband retracted, hence the ruling of Rashba. According to R. Alfandari, Rashba agrees with R. Nadjar where there is no retraction.

This explanation seems farfetched and is unacceptable. Indeed, from the text of R. Nadjar's responsum we know that the *get* is valid as long as the husband did not utter a legal protest, even if he retracted. The husband always had free choice, whether to divorce his wife or to pay the penalty. In contrast, Rashba wrote that no legal protest is required. It thus seems difficult to conclude that they agree, since we see that R. Nadjar accepts a freely accepted penalty and will invalidate the *get* only if there is a legal protest.

Further on, R. Alfandari discussed the responsum of Ritva based on the ruling of R. Perez and deduced the following:

And as he wrote: "and if he retracted after he had taken an oath, he should have asked to be released from his oath in order to be free from this oath," we can deduce that only in the case of an oath, where it is possible to be released by finding an "opening" and a "regret," we don't fear a retraction. But in a case where he accepts a penalty or a pawning, from which there is no possibility of escape, we must fear a retraction [and assume that the get *was given*

[100] 1535 – 1612.
[101] Remember that R. Caro, quoting R. Perez, allowed the oath to be replaced by a freely accepted pawn, because it doesn't even look like coercion.
[102] Constantinople, 1670-1717.
[103] Constantinople, 1723.

only to escape the financial consequences of the penalty or the pawning, and the coerced get *is invalid]…*

R. Alfandari reached the conclusion that in the case of an oath, the husband can retract and ask for an "opening" of his oath. But if this oath was freely replaced by a pawning, the husband no longer has the option to retract, and therefore, he argues, we must fear a retraction. Thus, according to R. Alfandari, all the authorities—R.Perez, R.Nadjar, Rashba, and Ritva—agree that we fear a retraction. The only authority who does not is Maharik, who explicitly accepts the validity of the *get* even if the husband retracted and attempted to get his pawn back.

R. Alfandari's reasoning here seems incorrect, however. Ritva and R. Nadjar maintain that there is never a case of coercion when the oath is freely accepted by the man himself. Therefore, if the husband retracts, he must make an official protest. Further, let us recall that R. Perez wrote that an oath looks like coercion but it is not. He required only that the husband be released from his oath and tried to replace it with a pawn because the latter doesn't even look like coercion. This is the proof that we don't fear a retraction. Therefore, the reasoning of R. Alfandari, who seeks to prove that we must fear a retraction, would contradict the ruling of R. Perez adopted by R. Caro.[104] The position of R. Alfandari seems very difficult and untenable.

We have dwelled on the conclusions of *Mikhtav me-Eliyahu* because its author had a great influence on the responsa *Mishkenot Ya'akov*[105]*,* as well as on the ruling of the Great Rabbinical Court of Israel.[106]

Pithei Tshuva

Pithei Tshuva[107] on *Even ha-Ezer* 134:4, n° 10.

Pithei Tshuva quotes responsum 38 of *Mishkenot Ya'akov*,[108] a very long responsum about a *get* delivered in Pinsk after the signing of a compromise. The young husband expressed reservations during the procedure of the *get* because some conditions had not yet been fulfilled. After the delivery of the *get*, he made an official protest. R. Jacob of Karlin,[109] in his treatment of this very specific case, referenced Rashba's responsum, as quoted in the *Beit Yosef*. In order to justify his position, R. Jacob of Karlin quoted the arguments of R. Alfandari, examined above. We have demonstrated that those arguments are the result of an incorrect understanding of Rashba's responsum and of specious and untenable reasoning contradicted by an examination of many responsa. The main argument of *Mishkenot Ya'akov* is that Rashba in responsum n° 40 did not contradict R. Nadjar because the *Beit Yosef* quoted them together without any comment. Therefore, there is no reason for Rema to rule in *Even ha-Ezer* 134:4 a priori like Rashba and a posteriori against Rashba. He should have ruled like Rashba even a posteriori and he should have remained stringent and feared a retraction even a

[104] *Shulhan Arukh Even ha-Ezer* 134: 4.
[105] Vilnius 1837, n° 38 by R. Jacob of Karlin.
[106] *Piskei Din Rabbani'im* II, pp. 9-17.
[107] First edition, 1836; second edition, 1861. The note considered above deals with a book printed in 1837. It was added in the edition of 1861.
[108] Vilna 1837 – 1838.
[109] R. Jacob ben Aaron of Karlin (? – Karlin 1855). He was the grandson of R. Barukh Schick, also called Barukh Shklover, Talmudist, mathematician and scientist, belonging to the group associated with the Gaon of Vilna. He was the pupil of R. Hayyim of Volozhin and belonged to first graduates of the *yeshiva* of Volozhin.

posteriori. Of course, this approach rests on the incorrect understanding of Rashba's responsum. But, in fact, the *Beit Yosef* presented various responsa, notably those of R. Nadjar, Ritva, and Rashba. The responsum of Rashba (according to the incorrect understanding) cannot agree with the other responsa, which are all based on the principle that a freely accepted penalty cannot be considered coercion. Consequently, the reasoning of R. Jacob of Karlin is untenable. The fact is that Rashba's responsum dealt with a coerced penalty. The responsum is based on the presumption that a freely accepted penalty is not coercion. Therefore, in the case of retraction, a legal protest is necessary to invalidate the *get*.

Pithei Tshuva on *Even ha-Ezer* 134: 4, n° 11.

Pithei Tshuva quoted and commented on the book *Torat Gittin*[110]. In this book, we note imprecise quotations that have not been checked against the original, leading to questionable deductions and unjustifiable legal distinctions and stringencies.

Torat Gittin introduced a new distinction and a new principle: He required that the *get* not be mentioned in the formulation of the element of coercion. He proposed that the *get* given to a woman who stole goods from her husband is valid if she did not bind the restitution of the goods to the delivery of the *get*. Similarly, he explained that a threat to kill the son of a husband does not invalidate the *get* given by the husband because the two elements were not formally linked. If there had been a direct link—for example, if the husband was told, we will kill your son if you don't deliver the *get* to your wife—the *get* would be invalid. This rule of independence entered the *halakhah* because it seemed to make sense; it was already taken for granted in *Arukh ha-Shulhan* 134:25. Unfortunately, this new rule was artificially created by the author of *Torat Gittin*, in order to solve a contradiction between the responsum of Rashbaz[111] and the custom acknowledged by the author of *Torat Gittin*, without checking the original text of the responsa of Rashbaz, Maharik, and R. Nadjar. Therefore, this new rule is formally contradicted. Indeed it is written in *Tashbets* I: 1:

And there is another form of coercion: although it is a coercion exerted by others, it is not a physical coercion. For example, if his wife stole money from him and she doesn't want to make restitution ***before he gives her a*** **get** *and divorces her*[112] *…*

There is still another form of coercion…and it is a coercion exerted by others, legally or illegally, physically or financially, and they [who exert the coercive blackmail and] tell him ***explicitly*** *that they will not remove the coercion until he* ***divorces*** *his wife. Even in a case where the man has no legal obligation to divorce his wife, I affirm that this is not illegal pressure [which would invalidate the* get*,] even if they had threatened to kill his son…*

The statements of *Torat Gittin* were made without checking the original responsa; he based himself on quotations found in the *Beit Yosef*. The details regarding the independence between coercion and the *get* that he seeks to attribute to Rashbaz completely contradict the text of the cited responsa. Furthermore, we see in the following three quotations that such a preoccupation never existed.

Tashbets II:68 (and similarly the beginning of the responsum of R. Nadjar in *the Beit Yosef)*:

[110] R. Jacob Lorbeerboom of Lissa (1760 – 1832), Frankfort on Oder, 1813.
[111] See Rashbaz I:1: the woman who stole effects and would give them back in exchange for a *get*.
[112] In fact, Rashbaz was dubious, because he could not decide whether the husband's getting back his stolen effects should be considered enrichment or not.

Reuben had accepted a penalty of 100 golden coins to be paid to of the mayor of the town if he keeps his wife and does not ***divorce her****…*

Maharik 63:
…that the money had been pawned from the beginning for that purpose, that the guarantee would not be restituted ***before he divorces****…*

Rivash 127:
They were exacting a debt from someone, and he was jailed because of this debt. The parents of the wife told him: ***If you divorce your wife****, we will pay your debt and you will be released from jail. He accepted and divorced voluntarily. Would someone venture to say that this* get *was coerced and invalid because he gave the* get *in order to leave prison? But he was in jail because of his debt and not in order to force him to divorce. This* get *is not coerced but accepted…*

We have here in the *Torat Gittin* a pure stringency invented ex nihilo, which does not rest on a legitimate foundation. It seems artificial and purely formal to decide that a *get* is valid or invalid depending on the formulation of a convention when the link with the *get* is already understood. Today, things have reached the point that the following formulation is considered acceptable: "the financial assistance will be paid during their life together" in contrast with "the financial assistance will no longer be due after the delivery of the *get.*" In fact, *Pithei Tshuva* on *Even ha-Ezer* 134: 4, n° 11 already noted the contradiction with the text of Rashbaz and opposed the innovation and disagreed with this stringency. However, the stringency seems to have entered modern *halakhah* and become required by all rabbinical authorities of the day.[113] Furthermore, the brainstorm of *Torat Gittin* rested on two cases suggesting illegitimate coercion, but today these have been generalized for all cases— even that of a freely accepted penalty. I cannot explain this tendency.

It is not precluded that this last stringency is also connected to the misunderstanding of Rashba's ruling. According to this misunderstanding, a *get* delivered by a husband alongside a freely accepted penalty can easily be made invalid once we have the knowledge or even a suspicion that the *get* was not freely delivered but only delivered in order to avoid the penalty. The consequence of this preoccupation is inextricable; it certainly provides an additional reason to not mention the delivery of the *get* in the articulation of the penalty, i.e., the element of pressure.

Arukh ha-Shulhan*, Even ha-Ezer* 134: 23 - 27.[114]

23. *But if he retracted and wanted to be released from the penalty, and they forced him on the basis of the penalty, and because of the penalty [that he did not want or was not able to pay] he was obliged to divorce, this is complete coercion, although he did not utter a formal protest. Indeed he did not want to divorce…*

This statement is questionable; it rests on the corrupt text of Rashba. In fact, even according to the correct understanding of Rashba, a *moda'ah* would be necessary in this situation. This

[113] I observe in two recent papers the same tendency: the responsum of Rashba is still incorrectly reproduced and understood, and it is still the basis of all rulings. The requirement that the *get* not be mentioned in the articulation of the element of pressure or penalty is the rule. See two articles published in *Tehumin* 21 (5761), also available online, by R. Elyashiv Kenuel and R. Solomon Dichovski, regarding the *ketuba*h and prenuptial agreements.
[114] Beginning of the 20th century by R. Yehiel Michael Epstein 1829 - 1908. .

is exactly the case ruled on by R. Nadjar and Rashbaz:[115] the *get* is legal. Similarly, Rashbaz[116] explicitly ruled that a *get* delivered in order to be released from the obligation of a *ketubah* that the husband is unable to pay is valid. Similarly, Rivash ruled[117] that a *get* delivered by a man in jail because he could not pay a debt in exchange for the payment of the debt by his wife's family and his subsequent freedom, is valid. That is because the man always has free choice: *bererah*.

25. The principle that the *get* should not be mentioned in the formulation of the element of pressure, such as the penalty or the pawn, is completely new and likely originates from R. Lorbeerboom, the author of *Torat Gittin*.[118] The *Rishonim* discussed above never worried about this point.

26-27:
Arukh ha-Shulhan struggled to reconcile the rulings of Rashba and Maharik. The truth is that the cases are completely different. In the case of Rashba, the wife's family interfered and persuaded the official to maintain the penalty. Therefore, no *moda'ah* was required to invalidate the *get*. In the case of Maharik, although the husband retracted and tried to get the money back, the official did not change the initial conditions. In the absence of any illegal interference, the case remains one of a penalty freely accepted. The *get* is legal unless there is a formal *moda'ah*.

6. Prenuptial agreement as a method for preventing *iggun* (a situation in which the wife, separated from her husband, is still under the bonds and restrictions of the marriage).

Different forms of prenuptial agreements have been drafted in order to bring about a solution to the painful problem of *iggun*. The different provisions of the articles of chapter 134 of *Even ha-Ezer* and the additional glosses of Rema have a very restrictive nature and considerably limit the possibility of drafting an effective prenuptial agreement that could prevent cases of *iggun*. It is interesting to note that, to the best of my knowledge, the basis for such an agreement first appeared as a suggestion by *Torat Gittin*, which was quoted in Pithei *Tshuva* on *Even ha-Ezer* 134:4, n° 9.[119] Other prenuptial agreements,[120] although constructed on the same principle, claimed to derive from the *tena'im aharonim* proposed by the *Nahalat Shiva.*[121]

---

[115] *Tashbets* II: 67.
[116] *Tashbets* I:1.
[117] Responsa bar Sheshet n° 127. See the beginning of the paragraph beginning with ולנידון .
[118] See the paragraph: *Pithei Tshuva*.
[119] It is based on the principle that the husband waives his rights to his wife but maintains his obligations to her. In fact, this was not a prenuptial agreement but rather a pre-divorce agreement.
[120] For example, the model proposed by R. Riskin in *Women and Jewish Divorce*, Ktav 1989, pp. 139-142. See also "Modern-Day Agunot," by R. J. David Bleich, *The Jewish Law Annual*, Vol IV, 167-188.
[121] R. Samuel ben David ha-Levi (~ 1625 – 1681). The book *Nahalat Shiva* was issued in Amsterdam in 1667. It deals with formula for legal deeds of all kinds. It became very popular among rabbis. The versions of his *tena'im rishonim* and *tena'im aharonim* are still used in many *haredi* communities. It must be noted that the first editions underwent corrections because of comments and objections. However, it probably is not widely known that, despite these corrections, R. Ezekiel Landau harshly criticized this book and completely contested its halakhic value, writing: *and note that in the book* Nahalat Shiva*, it said meaningless things and by the breath of his mouth he had the effrontery to contradict important poskim, whose nails are broader than his hip. Now as most of his statements in these matters, are meaningless, I did not want to quote him at all. (Noda b'Yehuda, mahadurah kamma, Yoreh Deah, n° 68.* Therefore, it is not certain that this association of the *Nahalat Shiva* and the prenuptial agreement is a very happy one.

The problem manifests itself differently in Israel, in the United States and areas governed by common law, and finally in Europe and nations with a formal separation between state and religion.

In Israel, the best-known prenuptial agreement was drafted by R. Elyashiv Kenuel. Recently the rabbis of Tsohar proposed a new prenuptial agreement.

The principle is a symmetrical commitment to pay increased alimony following a couple's separation as long as the couple remains married. In his halakhic justification of this convention, R. Kenuel rests on *Arukh ha-Shulhan* on *Even ha-Ezer*134: 23-25. However, this solution does not satisfy the requirement of releasing the husband from the voluntary penalty (*knas*) before the delivery of the *get*. In addition, the phrase "increased alimony" is misleading: If the sum strictly covers the costs of living, then it is an obligation inherent to the marriage. The problem is that the agreement aims to provide payment of this obligation *after* the separation. Yet according to the *halakhah*, it is precisely at this moment that the husband's obligation becomes problematic. According to Rema *Even ha-Ezer* 70: 12:

A man is obliged to pay the food [the cost of living] of his wife only when she lives with him

Furthermore, if the wife committed adultery, the rabbinic court does not force the husband to provide financial assistance to his wife.

Now if the phrase "increased alimony" means that we have indeed increased the contractual alimony, then part of the sum certainly is an accepted penalty (*knas*) and this raises the problems mentioned above.

Another difficulty is that according to this prenuptial agreement, the husband must waive his right to the income of his wife. But according to the *halakhah*, this waiver must be granted by the husband between *erusin*[122] and *nissuin*.[123]

In the United States, the best-known prenuptial agreement is that of the Rabbinical Council of America (RCA). But it presents the same problems. The indexed amount of $150 for contractual alimony must be considered as alimony plus a voluntary penalty (*knas*). The base and the *knas* both raise problems. It has been proposed to view this amount as alimony penalty or damages because of the wife's status of "being prevented from remarriage." This new concept certainly is not unanimously accepted. Moreover, here too the requirement not to mention the *get* makes any satisfactory formulation difficult, if not impossible. For these reasons, prenuptial agreements still raise many problems, although their promoters avail themselves of various endorsements of halakhic authorities. Nevertheless, in two papers published in *Tehumin*, Dayanim Dichovski[124] and Sheinfeld[125] adopt cautious and even reticent positions.

7. Conclusions.

[122] *Erusin* is the first part of the marriage ceremony: *Erusin* consists of the first two benedictions, while *nissuin* consists of the next 5 benedictions. Between these two parts of the ceremony, the *ketubah* is read and delivered to the bride.
[123] See Rambam, *Hilchot Ishut,* Chapter 23, and *Shulhan Arukh Even ha-Ezer* 92. The waiver, signed by the witnesses, must confirm that the document was signed between *erusin* and *nissuin*. See *Noda b'Yehuda* II, *Even ha-Ezer*: n° 90.
[124] *Tehumin* 21, p. 279.
[125] *Tehumin* 22, pp. 151-152.

We posited the existence of a halakhic trend based on an incorrect version and understanding of Rashba.[126]This was the source of Rema's ruling that a freely agreed penalty should be released before the delivery of the *get*. This ruling contradicts the rulings of R Perez, Ritva, Rivash, R. Nadjar, Rashbaz, and R. Caro.[127] It is the result of an understanding erroneously ascribed to Rashba. Furthermore, some authorities even followed this ruling a posteriori, contradicting the a posteriori ruling of Rema. Indeed the book *Mishkenot Ya'akov*, published in 1837,[128] introduced a new stringency: It contradicted Rema's ruling, which validated a posteriori a *get* given when the husband had accepted a penalty should he not deliver the *get*, because of the principle ascribed to Rashba, "*a self-coercion is a coercion.*" R. Jacob of Karlin, following R. Elijah Alfandari, ruled that, even a posteriori, if the husband retracts, he need not make a legal protest and therefore a coerced *get* must always be feared in the case of a freely accepted penalty. The current rabbinical courts follow this ruling.

At the same time, we discussed another ruling that is strictly followed today. This ruling requires the *get* not be mentioned in the formulation of the element of pressure or penalty in any agreement preceding the delivery of the *get* or in a prenuptial agreement. *Torat Gittin*, published in 1813, introduced this new concept: One must avoid mentioning the *get* in the formulation of the element of pressure to be exerted by the court on the husband or accepted by the husband. Today, this ruling is an obstacle to any drafting of a prenuptial agreement.

This new ruling contradicts the practice of the great *Rishonim*. Furthermore, it is likely that the practice resulted from a mistaken opinion ascribed to Rashba. These are unjustified stringencies that people cannot tolerate. To state matters bluntly, if we had to validate each *get* examined by Rivash, Rashbaz, R. Nadjar and Maharik in the different responsa mentioned above by today's Israeli *Batei Din,* alas, they would all be invalidated on the grounds of a coerced *get*.[129] All this because a correct version of Rashba's responsum was not available to the Rabbis![130]

How can we justify it that by an accumulation of stringencies—which according to this paper, if I am correct, are completely unwarranted and certainly erroneous—we arrive at the current situation where we invalidate *gittin* that our greatest *poskim* accepted both theoretically and practically![131] In the past, the courts were cautious and the authorities stringent on the grounds that they feared an unlawful relationship; today, however, invalidating a *get* often means creating a new case of *iggun* and the risk of *mamzerut*, and by so doing, a ruling based on an incorrect understanding of Rashba's responsum out of custom and tradition becomes a

---

[126] Part 4, n° 40.
[127] *Shulhan Arukh Even ha-Ezer* 134: 5.
[128] These two rabbis, R Lorbeerboom and R. Jacob of Karlin probably were not yet aware of the original version of Rashba's responsum.
[129]Or rather: doubt of a constrained *get*.
[130] Rashba's disputed responsum was known in its correct version by R. Caro and R. Bezalel Ashkenazi. But it became known in its correct version in Western Europe only with the 1803 publication in Salonica of a collection of Rashba's responsa from a manuscript. The 1883 edition of Pietrokow is identical. It is thus possible and even likely that R. Jacob of Lissa and R. Jacob of Karlin did not know the correct version of Rashba's responsum. In an article by R. Dr. David Mescheloff, "Prenuptial Agreements," *Tehumin* 21, the question in Rashba's responsum was correctly transcribed. However, the author did not note the apparent contradiction between this text and its commonly accepted formulation. Regardless, today the responsum is still quoted in its corrupt version and consequently is still incorrectly understood. See recent papers: R. Solomon Dichovski, *Tehumin* 21, p. 279; and R. Abraham Tsvi Scheinfeld, *Tehumin* 22, p. 151.
[131] Let us not forget the principle: "*ma'ase rav*." Practical rulings have far more significance and value than theoretical teachings.

stringency leading to leniency! This unfounded stringency can only bring calamities. If Rashba could rise from the dead he would be astonished and horrified by this ruling incorrectly ascribed to him and by the subsequent stringencies built upon it.

What could ease the current situation? Allowing the possibility of retaining a penalty a priori during the process of delivering the *get* would be of great help. It would make it possible to draft an effective and halakhic prenuptial agreement. This could be achieved, without disavowing Rema, by acknowledging that the present situation has become catastrophic, not very different from that prevailing at the time of the *Geonim.* This would allow us to consider that a situation a priori could be treated as a situation a posteriori. In other words, we would again rule according to the Rema for the situation a posteriori rather than according to the stringency of *Mishkenot Ya'akov*. Better, we could rely on our proof that the requirement a priori of Rema, is in fact an advice in order to ensure the most secure delivery of the *get* but it is not mandatory. This is certainly the case when there is a danger of *iggun*. R. Moses Provençal wrote exactly the same argumentation about the requirement of *Shulhan Arukh* to release a man from the guarantee given by oath of delivery of the *get* (responsum 103). This argumentation applies even more so in the case of the freely accepted penalty. We could also rely on the opinion of R. Caro in the *Shulhan Arukh*, authorizing the free acceptance of a pawning or a penalty.[132]

The acceptance of these minor corrections to the instructions governing the rabbinic courts[133] would restore halakhic truth and bring serious relief to the situation. It would allow simplifying the text of the present agreements and avoiding some artificial formulations intended to circumvent halakhic difficulties. More generally it would allow the drafting of more effective and useful new prenuptial agreements, appropriate for the various jurisdictions and unimpeachable on halakhic grounds. It would help speed divorce proceedings in Israel and abroad. The present situation is not acceptable, either in Israel or abroad. Jewish marriage is endangered throughout the world. To maintain its present form, we must at least disencumber the divorce process of unjustified stringencies. Such action would spare much unnecessary and unjustified distress, pain and suffering.

"The time has come to act for the Lord because they have transgressed your law."

Appendix: The responsum n° 38 of *Mishkenot Ya'akov*.

The Great Rabbinical Court of Israel ruled in 1956 that a *get* delivered by a husband who had accepted a penalty if he would not deliver the *get*, is illegal if he retracted and gave the *get* only in order to avoid the penalty (*knas*).[134] Therefore, the Great Rabbinical Court ruled that it is forbidden to sign such a prenuptial agreement.

[132] The commentators did not discuss the position of *Mehaber* in depth. The case of the penalty is not explicitly mentioned but it is implicitly deduced.
[133] These instructions, established by the Great Rabbinical Court of Israel, added to the codes, form what I would call the "*Israeli rabbinic common law,*" applied by the Israeli Rabbinical Courts. The foreign courts and the Israeli *haredi* courts are more independent, but they are not more lenient.
[134] Piskei din rabbani'im II, pp. 9-17.

This ruling contradicts the position of Rema in *Even ha-Ezer 134:4* where he accepts such a *get* a posteriori, according to the rulings of R. Nadjar and Rashbaz, because the husband did not act under coercion. He had freely accepted the penalty and had the free choice to divorce or to pay the penalty.

This ruling of the Great Rabbinical Court is certainly based on the responsa *Mikhtav me-Eliyahu* and *Mishkenot Ya'akov*, the only authorities who adopted this position. It is thus important to analyze in depth the position of R. Ya'akov of Karlin.

Their main argument is that Rashba in responsum n° 40 did not contradict R. Nadjar. Therefore, there is no reason for Rema to rule in *Even ha-Ezer* 134:4 a priori like Rashba and a posteriori against Rashba, as R. Nadjar does. Rema should have ruled like Rashba even a posteriori, and he should have applied his own stringency and fear of a retraction even a posteriori. Of course, this approach rests on an incorrect understanding of Rashba's responsum; it would seem to concern a case of a freely accepted penalty that did not require a legal protest. It would also imply that the difference between Rashba and R. Nadjar is whether a retraction exists or not! The fact is that Rashba's responsum dealt with a penalty that was *not* freely accepted, thus constituting coercion. Contrary to how it was understood, the responsum is based on the presumption that a freely accepted penalty is *not* a coercion. Therefore, in a case of retraction, a protest is necessary to invalidate the *get*. The fear of retraction is meaningless.

But there is another great weakness in the reasoning of *Mishkenot Ya'akov*, which was already made by R. Alfandari in *Mikhtav me-Eliyahu* . When we check the *Beit Yosef* on *Even ha-Ezer* 134, we see that he does not only mention the responsa of R. Nadjar and Rashba but actually quotes or mentions five responsa and opinions.

1. He quotes the case of a protest that occurs during the divorce process, which was followed by delivery of the *get* with an annulment of any protest. He refers to *Tur* 138, where R. Meir ha-Levi Abulafia[135] accepted the *get*. See also *Shulhan Arukh Even ha-Ezer* 134; 10.

2. He quotes the responsum of R. Nadjar.

3. He refers to responsum 96 of Ritva that he quoted in the *Beit Yosef Even ha-Ezer* 154.

4. He refers to R. Jeroham, *Netiv* 24, Part 1.[136]

Rabbi Jeroham discusses the case of a woman who stole money from her husband. The latter gave her a get *in order to get his money back. Afterward, the* get *was contested, and it was argued that this was a coerced* get*. Rabbi Jeroham ruled that the* get *was valid.*[137]

---

[135] Toledo, ~ 1170 –1244

[136] Rabbeinu Jeroham, Provence, 1290 – 1350, disciple of Rosh and R. Abraham ben Ismael.

[137] At the first glance there is a contradiction between the rulings of R. Jeroham from one side and Rashba and Rashbaz from the other side. Acording to R. Jeroham a financial constraint, even illegal, is not a coercion invalidating the *get*. By contrast, according to Rashba and Rashbaz it is, even without a formal protestation. It is thus surprising that beit Yossef enumerated the rulings of R. Jeroham and Rashba together. There is two solutions to this difficulty: A, a financial constraint is a coercion invalidating the *get* but the problem is whether we consider the restitution of the husband's objects or bills as a collection of money and then we are in the case "they tortured him and he sold" or not and we are then in the case "they tortured him and he gave up". B, a financial constraint is a coercion invalidating the *get* only when the involved amount is important. These

The position of R. Jeroham is flexible and permissive in contrast to that of Rashbaz, was tentative and ultimately adopted a stringent position. R. Caro apparently preferred the position of R. Jeroham to that of Rashbaz.

5. He quotes the responsum of Rashba: Part 4, responsum 40.

R. Caro noted these five references without any comment; apparently he did not see any contradiction between them. This makes the argument of *Mikhtav me-Eliyahu* and *Mishkenot Ya'akov* definitively untenable. Indeed, the responsum of Ritva asserts that a freely accepted penalty can never constitute coercion from legal point of view. The responsum of Rashba, as it was understood, cannot be made to agree with the other responsa. In contrast, R. Nadjar agrees with Ritva that a *get* delivered in order to escape the penalty is valid as long as there was no protest. We thus see thus that R. Caro understood that Rashba's responsum did not contradict the other *Rishonim* because it dealt with an entirely different kind of case.

Another important argument made by *Mishkenot Ya'akov* was summarized in *Pithei Tshuva* with the following words:

Furthermore the argument of those who are permissive in the case of a man who freely accepted a penalty or who took an oath to divorce is that it is a self-coercion, which is not an illegal coercion. However, many authorities belonging to the greatest Rishonim contradict this opinion. They think that in matters of a gift, self-coercion is an illegal coercion as well, and that even without a formal protest, the gift is annulled. It is necessarily the same for the get, *and we must be especially stringent in the case of an "illicit relationship," according to their opinion [of these Rishonim]…*

R. Jacob of Karlin wrote more precisely:

However, many of the greatest Rishonim contradict this opinion and think that in the matter of a gift, self-coercion is a coercion, even without a formal protest. The gift is thus annulled according to the facts of the case of a man who wanted to marry a woman. The latter said to him that she would not accept unless he assigned all his property to her in writing. We conclude in the Gemara that the gift is annulled because it is proven that he assigned his property to her under coercion.

R. Jacob of Karlin refers to the opinions of R. Hananel, Ran, and *Nimukei Yosef*[138] regarding a passage in B. *Bava Batra* 40b. A man wished to betroth a woman, but she would only agree to marry him if he would assign to her all his property. The man took two witnesses and told them to hide themselves out of the town and to sign over his property to his eldest son. Afterward, he publicly assigned his property in writing to the woman and married her. Rava ruled that both transfers were invalid: the first, because it was hidden, and the second, because

---

explanations remain valid for the understanding of Rashbaz's hesitation in the case of the woman who stole her man's goods or bills in order to receive the *get*. The second solution corresponds to the reasoning proposed by *Pithei Tshuva , Even ha-Ezer* 134 n° 11, paragraph beginning by "*u le-aniyout da'ati*". It can also explain the words of *Torat Gittin* quoted in *Pithei Tshuva*: "It is common that a woman harasses her man in order to receive a *get*, by stealing money from him… and no one fears a coerced *get*.

[138] R. Joseph ibn Habib also called Habiba, a disciple of Ran, Barcelona, end of 14th and beginning of 15th century. *Nimukei Yosef* is a commentary on Rif and Talmud. It was published on those treatises, which R. Nissim (Ran) had omitted.

the first proved that the second was done under coercion.[139] The text of *Nimukei Yosef* (beginning on the last line of page 21b of the Rif on *Bava Batra*) is much clearer than the quotations in *Shita Mekubetset*.[140] It explains the position of the minority:

And it [the first hidden gift] is a protest against the other [second and official] gift. Explanation: Although this first gift is not considered a valid gift, it is sufficient to invalidate any later gift made after the first hidden gift, as we had first understood from the story of the man who wanted to marry a woman…But this is incorrect, the first secret gift does not invalidate a later gift, which is known by all and is official. And the fact about which Rava said that no one got the property, it is not because the first gift was secret and constituted a protest against the official gift. No, it is because through this first secret gift he revealed that he is coerced to make a gift of his property to his wife and that he does not transfer his property to her voluntarily. It is through this [first secret] gift that he made to his son that we are aware of this fact. Otherwise, as we did not see any coercion obligating him to sign over his property to his wife, and in fact, who forced him? And he did not even utter a protest; therefore, we must assume that he certainly agreed to give all his properties to her. It is then only because of the [first secret] gift that he gave to his son that we have evidence that the gift to his wife is coerced because she refused otherwise to marry him. And we can deduce from this fact that whenever we are aware of his state of being compelled, even if he did not utter a protest, his get *and his gift are invalid. It is not because the [first secret] gift is a formal protest that his gift to his wife was ruled invalid but because it [the first gift] made his state of coercion evident to all, as we explained. And this is also the opinion of Rabbenu Hananel and Rabbenu Nissim ben Reuben in his novellae [hidushim].*

According to the classic understanding as explained by Rashbam on *Bava Batra* 40b,[141] last lines, the first secret deed of assignment was considered a protest against the second official and public deed of assignment.[142] Without this first secret deed, the second deed would have been ruled valid, because we could prove that it was made under coercion. Indeed, the man could have refused to sign over the property and give up the woman; it was not a true coercion. And so, the transfer could only be made invalid by a protest. Thus, this opinion corresponds to the position of Ritva, R. Nadjar, and Maharik.

According to the minority opinion championed by *Nimukei Yosef*,[143] the first secret deed of assignment merely discloses the fact that the second official deed of assignment was made under coercion. Therefore, the author concluded that when we are certain that a deed of assignment is made under coercion, the transfer is invalid.

This would explain the ruling of Rashba in responsum n° 40 according to its incorrect version. In a case of a freely accepted penalty, the husband retracted and no longer wished to deliver a *get*. He ultimately was obliged to deliver the *get*[144] in order to avoid the penalty. In such a case no protest, *moda'ah,* was necessary; merely taking note of the coercion was sufficient to invalidate the *get*. In Rashba's words:

---

[139] The moral coercion exerted by the man on himself, resulting from his moral weakness; in Hebrew: *onsa de nafshei*.
[140] Commentary on the Talmud published by R. Bezalel Ashkenazi. It is a collection of glosses on the greater part of the Talmud, after the fashion of *Tosafot*, taken from the works of *Rishonim;* most of them, have not otherwise been preserved.
[141] And Rambam *Hilkhot Zekhiyah u-Matana* 5: 4. See also *Magid Mishneh* ad locum.
[142] This seems to be the majority opinion followed by Rambam, *Tur*, and *Shulhan Arukh Hoshen Mishpat* 242:9.
[143] This is also the opinion of R. Hananel and Ran. It remains a minority opinion.
[144] It would be the same for a gift.

In the case of, "they tortured him and he gave [the orchard]," this is nothing, and he is not obliged to utter a "formal protest" as soon as we know his state of coercion. And in the case "they tortured him and he gave a get*," his divorce is not a divorce because he did not receive money.*

R. Jacob of Karlin explains it in the following way:

a "self-coercion" exerted by himself is a coercion, even without a "formal protest." The gift is annulled, and it is the same with a get, *and according to their opinion in matters of divorce, we must certainly fear [a retraction] even in the case of a self-coercion, as soon as we know that he gave the* get *because of the coercion, even if he accepted this coercion.*

I am not sure R. Jacob of Karlin correctly understood the conclusion of *Nimukei Yosef.* When *Nimukei Yosef* states that if we have the certitude that the deed of assignment was made under coercion, the transfer is invalid, he does not speak of inner conviction or even a certitude that the man was being compelled. Rather, he speaks about our certitude that the man was under a true coercion,[145] which did not allow him any choice. This is easy to prove: In the case considered,[146] the man wrote a new deed of assignment that transferred his property to the woman he wanted to marry. We are thus certain that he made this gift under specious conditions, in order to marry her while disinheriting his children, that is, under a moral coercion we can call "self-coercion." According to R. Jacob of Karlin, that gift should be invalid because of our certitude of the coercion. But this is not the case; the gift is perfectly valid. It could only be made invalid by, at the least, the first secret deed in favor of the son. Only such a deed could disclose the coercion. Otherwise, the transfer document is valid and cannot be rescinded on the basis of a conviction that it is coercion. There is no true coercion.

Thus, contrary to the statement of R. Jacob of Karlin, all the examples of coercion imposed by the man himself, or "self-coercion," are not cases of true coercion. They always allow a choice; we call it "free choice".[147] Rivash introduced this concept in responsum n° 127 in regard to an even more questionable case, as we have quoted above.

In this case, the man can give his property to his future wife or he can choose not to marry her; he can pay the penalty and hold onto his wife or he can divorce her. Even if he cannot pay the penalty, he can borrow the amount. He can remain in jail and hold onto his wife or he can divorce her and recover his liberty. There is always a choice, and so we do not have true coercion. In such cases, we need something more to invalidate a gift or a *get*, whether it is a protest or, if it exists, some other disclosure that proves the concerned person was compelled.[148]

The final paragraph of *Nimukei Yosef* must thus be understood as follows: Only in cases of coercion imposed by others do we have true coercion; and in those cases, we do not require a protest, or *moda'ah* to invalidate the *get* or the transfer. But in the case of a freely accepted penalty, the husband always has a choice, and we do not have true coercion. A protest,

---

[145] The term "true coercion" is used by *Magid Mishneh* on Rambam, *Hilkhot Zekhiyah u-Matana* 5:4, *Tur* and Rema, *Shulhan Arukh Hoshen Mishpat* 242:9.
[146] *Bava Batra* 40b.
[147] Responsa bar Sheshet n° 127.
[148] Such as the existence of the first secret deed of assignment.

moda'ah, is then necessary or, at the least, evidence of an action or an objective element that can constitute a disclosure of the husband's state of coercion. Thus, in the case of a freely accepted penalty preventing the *get* from not being delivered, it is not possible to invalidate the *get* based on a conviction that the husband gave the *get* in order to avoid the penalty. We require something more to demonstrate coercion. This could be an attempt to renegotiate the terms of the penalty. In the absence of objective elements, the *get* is valid. Internal conviction or suspicion is meaningless.

R. Jacob of Karlin seems to have lost sight of this fact. He concludes:

"And according to their opinion, in the matter of divorce, we must certainly fear [a retraction] even in the case of self-coercion, as soon as know that he gave the get *because of coercion, even if he accepted this coercion*

This conclusion seems difficult and untenable. What exactly should we fear? The husband either acted in a way that disclosed his state of coercion and there is indeed no *get* or he did not do so, and the *get* is valid. Both the husband's internal retraction as well as our own inner conviction are meaningless and without effect: the *get* is valid. Invalidating the *get* out of a fear that if the husband had committed an act that disclosed his state of coercion, the *get* would be invalid seems to be an unacceptable stringency.

While I was in the last stages of reviewing this paper, I discovered a responsum of an important *posek*, R. Elijah ibn Hayim, Ranah or Maharanah.[149] In responsum n° 63, he examined Rashba's responsum Part 4 n° 40 and understood that it dealt with a freely accepted penalty. Earlier than R. Jacob of Karlin, he proposed establishing an analogy between the thesis of Rashba and the subject debated in *B. Bava Batra* 40b. Maharanah's understanding was that the retraction of Reuben was the objective element that revealed his state of coercion and invalidated the *get* without the necessity of a protest. Maharanah balanced the position of Rashba with that of R. Hananel and his fellow *poskim* (*Nimukei Yosef* and Ran). Without the retraction of Reuben, he reasoned, the *get* was valid as long as there was no protest.

The reasoning of Maharanah is much more subtle than that of R. Jacob of Karlin, who did not take into account the necessity for an element that revealed the state of coercion. Despite his lack of awareness of the true circumstances of the query answered by Rashba a result of the shortened version in the *Beit Yosef,* R. Elijah limited the contradiction between Rashba and the champions of the minority opinion on one side and the other *poskim* belonging to the majority opinion on the other side, to the point of whether an objective retraction existed in the case. As such, Rema's fear a priori of a retraction and even a posteriori of *Mishkenot Ya'akov*, does not make sense. It is only when we have definitive knowledge of a retraction that we can consider the existence of an element that reveals a state of coercion invalidating the *get*. Otherwise, the *get* is valid unless the husband makes an official protest.

If one were to argue that in the case of a freely accepted penalty Rashba considers that an objective discloser of the retraction, for example the negotiation with the treasurer in order to diminish the amount of the penalty, is sufficient to invalidate the *get* without the necessity of a protestation, then in the debate of Bava Batra, Ran and *Nimoukei Yossef* would certainly have referred to this important authority in their favor. Moreover, we have seen above through the commentary of Meiri on Gittin 88b, that this is not the opinion of Rashba, as he requires both,

[149] R. Elijah ben Barukh ibn Hayim (Andrinople~1530 - Constantinople 1610), Chief Rabbi of Constantinople from 1575 onward.

retraction and coercion by others. Finally the last sentence in Rashba's responsum puts the emphasis on the coercion by others.

At any rate, we are dealing with the minority opinion. The principle adopted by R. Jacob of Karlin to oppose the majority opinion, which had been followed until his time, and to adopt a more stringent ruling, following the minority opinion, is questionable.

It is easy to prove that all the *Rishonim* mentioned above did not accept this minority opinion. Indeed as we saw, according to the minority opinion, in the case of a freely accepted penalty for not delivering the *get*, we do not require a protest, *moda'ah*; to invalidate the *get*, we need only that the husband commit an act disclosing his state of coercion. Otherwise, the *get* is valid.

The minority view expressed by R. Jacob of Karlin certainly contradicts the opinion of the *Rishonim* we discussed above. All of them—R. Perez, Rivash, Rashbaz, R. Nadjar, Maharik, and R. Caro in *Shulhan Arukh*—ruled that a protest, a *moda'ah*, is necessary to invalidate the *get.* In particular, the great principle stated by Ritva and Maharik does not follow this minority opinion:

Ritva

There is coercion only if others exert it[150]

And Maharik

There is coercion when it was exerted by others, with the exclusion of the case of coercion when exerted by himself.

Finally, all this reasoning by R. Jacob of Karlin is based on the incorrect and misleading transcription of Rashba's responsum, Part 4, n° 40. The same is true for all the other arguments of *Mishkenot Ya'akov.*

But even according to Rashba's opinion, if we identify it with the minority opinion of Rah and Ran, we need an objective discloser, and in the case of the *get* we need a discloser of the retraction. An internal retraction or a simple rumor, without an external and objective discloser, has no judicial validity. Therefore there is no justification to fear a possible hidden and internal retraction; hence the position of Rema, *Mishkenot Ya'akov* and the Great Rabbinical Court is very difficult.

We must thus conclude that the present legislation adopted by the Great Rabbinical Court of Israel, probably based on R. Jacob of Karlin, relies on an incorrect version of Rashba's responsum and is in complete contradiction to the opinion and the rulings of all the *Rishonim* as well as all the great *poskim* who were not yet influenced by the misunderstanding of Rashba's responsum. The present situation is the result of a mistake that has not yet been acknowledged.

[150] Radvaz also accepted this principle, see his response: I, 161 and III, 982. Similarly Gra on *Shulhan Arukh Even ha-Ezer* 154, 23, n° 71 wrote: "and so wrote many rulers that something that a man makes on his own initiative cannot be considered as coercion".