

## *Rabbi Banet's Charming Snake*

**By: DAVID NIMMER**

Disagreements among our sages, even pointed ones, are anything but rare. Thus, it is no surprise to find Mordechai Banet (1753–1829), Chief Rabbi of Nikolsburg, in sharp disagreement with the man he had previously sponsored for his first rabbinic post in Dresnitz, Moses Sofer (1762–1839), later Chief Rabbi of Pressburg. What is unusual about the clash is neither the depth of both scholars' knowledge (the latter is universally recognized as a genius, and the former was legendary in his own right) nor the disagreement's tone (both endeavored to couch their positions in courteous terms, despite the depth of their disagreement). But few exchanges are so enigmatic on their surface, yet so full of meaning when the full depth of their roots is brought to light.

To introduce the matter, a copyright dispute was at issue. Several centuries earlier, the introduction of the printing press brought to the fore issues of author's and publisher's rights. Jewish law no less than other legal systems had to grapple with this innovation. As a result, R' Moses Isserles issued a famous responsum in 1550, prohibiting Jews from trafficking in Rambam's *Mishneh Torah* as published by the Giustiniani house in Venice, in competition with the one published earlier that same year by the rival Bragadini house, under the supervision of Rabbi Meir ben Isaac Katzenellenbogen, the Maharam of Padua.

The second major copyright dispute to percolate into the responsa literature is the one that pitted R' Banet against the Hatam Sofer. In 1800, Wolf Heidenheim and his partner, Barukh Bashwitz, published the legendary Roedelheim maḥzor, noted for its beautiful typography, Judeo-German commentary and the fruits of Heidenheim's prodigious scholarship. Eventually the work grew to nine volumes, covering all the festivals of the Jewish year. A number of prominent rabbis gave their imprimatur to the work. Notable among

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them were the *haskama* (approbation) and *herem* (ban) inscribed by Pinḥas Horowitz (1730–1805), chief of the rabbinical court of Frankfurt am Main and author of novellae on the Talmud called *Sefer Hafla'ah*.<sup>1</sup>

The world took note of Heidenheim's accomplishment, as his volumes gained wide-scale currency. Some of the attention, though, was unwelcome—witness the unauthorized copies that began to proliferate. Heidenheim acted against two purveyors of those bootleg volumes.

The first case unfolded in 1807. In a dispute that we can dub *Heidenheim v. Schmid*, the Jewish publisher vehemently complained that Anton von Schmid, a Christian who served the Viennese court as official publisher of Hebrew books, had produced a rival version of the Roedelheim maḥzor. The second case arose decades later. In 1822, a Jewish firm in Silesia began to produce its own version of the Roedelheim maḥzor. When Heidenheim objected, the firm offered to pay him, but failed to reach a settlement. This case can be labeled *Heidenheim v. Printers of Dyhernfurth*.

We know about the first case only indirectly (as will be teased out below).<sup>2</sup> But the second case is the subject of a full-blown responsum, which initiates the subject matter of our investigation. The Silesian rabbi had taken the side of his local publishers, inasmuch as they already had finished several volumes of their work and would suffer great loss if forbidden from selling their product. R' Banet wrote to that rabbi and expressed his agreement with that point of view.

In responsum 7 (dated August 22, 1822), R' Banet covered many different terrains. He noted that he was writing “for the honor of Torah,” and proceeded to analyze in exquisite detail the various points of view set forth in *Bava Batra* 21b, pitting Rav Huna's minority view, against unfair competition (the case involved rival mills in an alleyway), against the majority position espoused by Rav Huna son of R' Joshua, in favor of free competition.

After due consideration covering several pages, R' Banet concluded that free competition should be the order of the day. In so

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<sup>1</sup> That term, reflecting “wonder,” is an acronym of his initials: **Ha**Qatan **Pin**ḥas **Levi** **Ish** **Ho**rowitz.

<sup>2</sup> Indeed, when we arrive there, we will learn of a third case: *Schmid v. Banet*.

resolving this copyright dispute, R' Banet ruled to the contrary of R' Isserles' famous responsum regarding the Maharam of Padua;<sup>3</sup> he therefore had to understand the logic of that previous case very narrowly. He cited various differences to that effect, ranging from predatory pricing to the evolution over time of governmental regulation. He further concluded that a printing ban should not be given effect as to the Roedelheim mahzor, as such a ruling would only benefit Gentile publishers, to the prejudice of their Jewish competitors.<sup>4</sup>

It did not take long for the Hatam Sofer to disagree. In his own responsum 41 (dated March 7, 1823), R' Sofer retorted that, from the beginning of the era of publishing, rabbis have held it appropriate to ban unfair competition in order to protect from harm those engaged in the meritorious act of book-publishing. Therefore, those bans—which he noted have been routinely included in Hebrew book publication—should be upheld. He derived additional support for that view from the need for accurate attribution, which approbations and bans uphold, and from an established device called the *herem ha-yishuv*, which barred non-residents from entering a new community without the consent of the local inhabitants. Contrary to R' Banet's position, R' Sofer concluded that governmental control over publishing rights exerts no effect on the viability and effectiveness of rabbinic bans set forth in approbations.

R' Banet reiterated his own views after the passage of several years. In responsum 8 (dated April 11, 1827), R' Banet objected to the very notion of a ban against doing that which it is lawful to do—if printing a given book is not independently actionable, the rabbis cannot proscribe it through a binding ban. He further enunciated the startling proposition that written bans cannot be legally binding, inasmuch as bans are effective only if pronounced orally.

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<sup>3</sup> See Neil Weinstock Netanel, *Maharam of Padua v. Giustiniani: The Sixteenth-Century Origins of the Jewish Law of Copyright*, Hous. L. Rev. Vol. 44 p. 821 (2007).

<sup>4</sup> These paragraphs contain only the briefest synopsis. Together with my colleague on the UCLA School of Law faculty, I have set out to systematically analyze the pertinent responsa from 1550–2000, in a future book to be published: Neil Netanel & David Nimmer, *From Maimonides to Microsoft* (Oxford Univ. Press, forthcoming).

The last volley came from the Ḥatam Sofer. In responsum 79 (undated), R' Sofer composed an entire treatise on the Jewish law governing unfair competition. In it, he drew together more Talmudic considerations, augmented by his own view on the policies underlying approbations. He also used the occasion to heap lavish praise on publishers in general, and on Wolf Heidenheim in particular.

The present article closely examines R' Sofer's responsum 41, which actually begins by setting forth correspondence from R' Banet. It is the conclusion of R' Banet's two-paragraph letter that is so remarkable—and also sufficiently obscure as to require extended consideration:

After reconsidering, I changed my mind because of the honor [due to the Ḥatam Sofer] and I shall say that even though one should not issue a ban, “For there is no divination in Jacob,” I shall write, in an ethical manner and in accord with customary decency,<sup>5</sup> additional words and he will receive the abovementioned approbation here. This is the word of the one who eternally seeks His peace, the insignificant Mordekhai Banet.

What does that obscure passage mean? Of what relevance is his citation of Bilaam's involuntary praise of the Jewish people, “For there is no divination in Jacob, no sorcery in Israel” [*Num.* 23:23]? This article attempts to penetrate his intent. The journey leads to surprising revelations. It also takes us back to the nineteenth century, through some fascinating byways. Above all, it shines a light on a time when rabbis were buffeted by larger forces as they attempted to remain true to halakha.

## **R' Banet's Approbations**

R' Banet's reference, in his letter to R' Sofer, to his having changed his mind seems to betoken a new mindset. Thus, although he composed his first *tshuva* in 1822 ruling against copyright protection for the Roedelheim mahzor, it appears that he changed his mind when he wrote the words that R' Sofer quoted in 1823, and now agreed that copyright protection was essential. He even assented to lend his own name to an approbation that R' Sofer requested him to sign.

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<sup>5</sup> בדרך מוסר וחק ד"א [דרך ארץ].

But that interpretation runs into serious problems when we reflect that R' Banet continued to adhere to his same sentiments *against* copyright protection for the Roedelheim maḥzor through 1827, when he authored his second *tsbuva* on the subject. Clearly, then, the surface interpretation of his 1823 comments to R' Sofer wants greater investigation.

By cataloguing how R' Banet treated bans and approbations on the works that he personally was asked to recommend, we can gain greater insight into his character and views on the subject.<sup>6</sup> Though the authors of these various works are scarcely known today, R' Banet's words of approbation for their efforts reflect an indirect light regarding his stance on the Roedelheim maḥzor.

## I. The Works of Herz Homberg

We begin with the works of Herz Homberg, a minor functionary who wrote in German since his Hebrew skills were poor<sup>7</sup> and who broke with Orthodoxy later in life.<sup>8</sup>

In the early 1800s, Homberg wrote a catechism that, by governmental decree, “every bridegroom and bride from the Israelite nation who seek permission to marry shall be examined... regarding the contents of this book and shall only receive permission to marry upon passing the examination.”<sup>9</sup> The work, *Bne-Zion*, led to innumer-

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<sup>6</sup> It is not necessary to engage in the parallel inquiry of how R' Sofer couched his own endorsements, inasmuch as he never doubted the efficacy of book bans. Some of the books to which R' Sofer offered approbations are set forth in Nosson Dovid Rabinowich, “Setting the Record Straight: Was the Chasam Sofer Inconsistent?”, *Hakirah* Vol 4 pp. 239, 253 n. 34 (2007).

<sup>7</sup> Wilma Abeles Iggers, *The Jews of Bohemia and Moravia* p. 14 (Wayne State U. Press 1992).

<sup>8</sup> *Id.* pp. 65–68.

<sup>9</sup> *Urkunden und Akten zur Geschichte der Juden in Wien: Erste Abteilung, Allgemeiner Teil 1526–1847* (1849) (Pribram, A.F., ed.) [Documents and Records of the History of the Jews in Vienna: First Section, General Part 1526–1847 (1849)] (Vienna and Leipzig: Wilhelm Braumüller 1918), pp.170-71 (setting forth decree dated December 14, 1810).

able tales of embarrassment and misunderstanding.<sup>10</sup> Ultimately, the book was so hated by traditional and Enlightenment Jews alike that they finally induced the government to ban it.<sup>11</sup> See Fig. 1 for title page of that work as published in Vienna in 1812.

Two years before its publication, R' Banet composed a German-language approbation for the work, writing under his German name, "Markus Benedikt."<sup>12</sup> (See Fig. 2.) The official government decree for the work took note of that approbation, requiring that all printings bear the name of Rabbi Markus Benedikt along with the author's name.<sup>13</sup>

That approbation is notable for proclaiming how satisfied R' Banet was with the material—not only does it "bring our holy religion appropriately to perfection and is in agreement with the teachings of the holy script of the Talmud and all great teachers of our nation in old and newer times, but also through the book's explanation and illumination, these concepts are presented in the brightest and most beautiful light." What is notably absent, however, is a ban. No prohibition is made on copying the work, and neither is any malediction called upon the heads of those who infringe it.

We may thus tentatively posit an antinomy—perhaps R' Banet distinguished between the *haskama* and *herem*. In other words, his willingness to give an approbation, but the absence of a ban, may have been emblematic of a larger stance. More investigation will be required to test this hypothesis.

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<sup>10</sup> Wilma Abeles Iggers, *supra* n.7, pp. 67, 113. Legions of stories circulated about government officials asking bashful brides questions gleaned from *Bne-Zion*, and not prepared to deal with the resulting theological controversy. *Id.* p. 114. One such exchange:

"Where is God?"

"God is in the air!"

"No, God is everywhere!"

"The air, too, is everywhere!"

<sup>11</sup> Wilma Abeles Iggers, *supra* n. 7, p. 113 ("They agitated so long against this unimportant opus that the government itself finally prohibited it.")

<sup>12</sup> The sources set forth that form as an alternative to "Mordekhai Banet." See Ignaz Maybaum, Nicholas Robert, & Michael De Lange, *Ignaz Maybaum: A Reader* 12 (2001).

<sup>13</sup> *Geschichte der Juden in Wien*, *supra* n. 9, pp. 170-71.

Earlier in his career, R' Banet had written an approbation for another work by the same Herz Homberg,—*Imrei Shefer*, published in Vienna in 1808.<sup>14</sup> (See Fig. 3 and Fig. 4.) Again that work merely included R' Banet's approbation that “in the final analysis, it is entirely founded upon wisdom.” On this occasion as well, the approbation contains no hint of a ban or other prohibition.

When later rebuked by a colleague, R' Banet reread *Imrei Shefer* and withdrew<sup>15</sup> his approval from it.<sup>16</sup> Yet one commentator notes that Homberg “refrained from expressing in this work his personal heterodox views, as it is written in entire harmony with the spirit of Jewish tradition.”<sup>17</sup> After he reread the book, R' Banet evidently concluded, to the contrary, that it did indeed reflect heterodox views—or else, by that time, Homberg's heretical reputation made his *oeuvre* as a whole untouchable.

In any event, the experience of R' Banet with Homberg shows his willingness to issue an approbation, but not a ban. Indirect evidence is beginning to accumulate for the proposition that, when R' Banet told R' Sofer that he was willing to join in a *haskama*, he meant his words to apply to the *haskama* alone, and not to any additional *herem*.

## II. The Works of Aryeh Leib Gunzberg

Challenging that view, on initial inspection, is R' Banet's conduct towards another book. The author in question was a rabbi in Metz, Aryeh Leib ben Asher Gunzberg (1695–1785). That author was best known by the title of a volume that he named after himself, *Sha'agat*

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<sup>14</sup> Meir Hildesheimer, “The Attitude of the Hatam Sofer Toward Moses Mendelssohn,” in *Proceedings Of The American Academy For Jewish Research* Vol 60 pp. 141, 171 (1994).

<sup>15</sup> In parallel fashion, R' Sofer retracted his approbation from a controversial German translation of the Talmud. Aaron M. Schreiber, “The Hatam Sofer's Nuanced Attitude Towards Secular Learning, Maskilim, and Reformers,” *Torah u-Madda J.* Vol. 11 pp. 123, 128 (2003).

<sup>16</sup> Meir Hildesheimer, *supra* n. 14, p. 174 n. 82.

<sup>17</sup> Meyer Waxman, *A History of Jewish Literature* Vol. 3 p. 80 (Thomas Yoseloff, New York, London, 1936, 1960) (“It even received the approbation of Mordecai Benet, the leading orthodox rabbi of the time.”).

*Aryeh* (“Roar of the Lion”).<sup>18</sup> See Fig. 5 for the title page, as published in Vienna in 1809.<sup>19</sup>

The book opens with an endorsement from R’ Banet, “the great leader, famous in his generation, Av Beit Din of the holy community of Nikolsberg and its district, may he live long.” (See Fig. 6.) Given how directly his words treat the domain of printing, the paragraph is worth quoting at length:

Ever since the emergence of the printing trade, it has been customary for rabbis to support the efforts of those who engage in the holy work, the printers of holy books, and lock the door before those who come afterward so they will not produce the same during a limited amount of time. It is well-known that members of a trade are allowed to reach an agreement between themselves concerning a general regulation, especially in a matter wherein there is [communal] profit and no financial loss to this [particular person]; and we are able to bear witness that this regulation is convenient for the printers, because in this manner each and every one will reap benefit for himself.

[After comments about development of the printing press and citations of various verses—such as those referencing Qiryat Sefer<sup>20</sup>—R’ Banet concluded that unrestrained publication would wrong the publishers who originally possessed the rights, so that those who engage in mitzvot would suffer loss.]

Moreover, this obstacle will become more severe in the future, because [publishers] will refrain from bringing books to print and holy books will cease to exist. Consequently, in order to repair the world, the Sages erected a fence, and behold we have already merited that enormous grace has been granted to us by our master, the righteous, noble, extolled and mighty Kaiser, may his majesty ascend, who has opened a path and granted permission to print our books.

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<sup>18</sup> See [http://en.wikipedia.org/wiki/Aryeh\\_Leib\\_ben\\_Asher\\_Gunzberg](http://en.wikipedia.org/wiki/Aryeh_Leib_ben_Asher_Gunzberg) (visited September 16, 2008). After being driven out of Pinsk, he settled in Metz, where “an early argument with his congregation led to him refusing to enter the synagogue except to give four sermons a year.” *Id.*

<sup>19</sup> This approbation by R’ Banet is cited in Yisrael Belsky, *Halacha Berura* Vol. 9 No. 4, p. 3 (no date).

<sup>20</sup> A place named in scriptures [*Josh.* 15:14-17], the literal meaning of Qiryat Sefer being “Town of the Book.”



Therefore, based upon these foundations, I shall follow the former [Sages] and since I have been asked to approve the petitions of the publisher, Mr. Jozef Rasmunn of Bruenn, who desires to publish the book *Sha'agat Aryeh* and the book *Behinot Olam*, I hereby approve since I have taken a look at these books and I have not found anything which opposes the nations under which this people of God is sitting on the threshold of their shade.

And whosoever shall arise and stand up in order to republish the book *Sha'agat Aryeh* before the passage of ten years, and the book *Behinot Olam* before the passage of three years, from the date of their publication, I hereby call out upon him the verse, "Cursed be he who moves his neighbor's landmark" [*Deut. 27:17*], and he shall be cursed, as shall all who support or assist him.

Those last imprecations reveal a radically different sentiment at work. Far from eschewing bans, R' Banet does not hesitate to set forth exclusive 10-year rights for *Sha'agat Aryeh*, calling down a curse on all who would dare ignore the ban. From this evidence, it would seem that, as of 1809, R' Banet did not actually hold to his anti-ban stance.

But, digging deeper reveals that conclusion to be in error. Aryeh Leib Gunzberg, who died in 1785, had already gained fame in his lifetime as the author of *Sha'agat Aryeh*. Accordingly, 1809 certainly cannot mark the work's first publication. The instant volume obviously constitutes a *republication*.

When did the *first edition* of Jozef Rasmunn's production appear? At the end of R' Banet's paragraph, the last word (*rishonim*) features letters in bold. That device employs a custom that traces back to fifteenth century incunabula, of using *gematria* in the words from a biblical verse to signal the pertinent year.<sup>21</sup> When that computation is performed here, it appears that R' Banet composed those words on August 23, 1797.

Indeed, there is a previous edition of *Sha'agat Aryeh* from 1797,<sup>22</sup> which bears the exact same paragraph from R' Banet that was later reprinted in 1809. It therefore appears certain that the ban R' Banet affixed on this work represents his handiwork of the eighteenth cen-

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<sup>21</sup> Malachi Beit-Arié, "Colophon," *Encyclopedia Judaica* Vol. 5 pp. 747, 750 (1972).

<sup>22</sup> That volume is located in the non-circulating collection of the New York Public Library, and hence could not be reproduced here.

tury, albeit reprinted almost a decade into the nineteenth in the version shown in Fig. 5.

### III. The Works of Moshe Leib Zilz

Almost a century after R' Banet's death, a book was published in Berdejov, Slovakia. Entitled *Milei D'Avot* (*Words of Our Fathers*, or *Ancestral Pronouncements*), it collected responsa from a variety of authors, including several successors to R' Banet as chief rabbi of Moravia. What is relevant for current purposes is that one of the decisors, Moshe Leib Zilz, reproduced a private letter from R' Banet that bears heavily on our study.

The Rabbinical sages of Ashkenaz have granted an approbation and ban to all of the maḥzorim printed in Roedelsheim<sup>23</sup> and translated into the vernacular. And it is elucidated on the title page by the Wise Man,<sup>24</sup> R' W. Heidenheim, that no other person may use the same format for twenty-five years; and I have said, lest there be among the children of our nation who reside under the merciful wings of His Majesty, the Kaiser, a man or woman whose heart will not wish to buy the maḥzorim that are being printed in the city of Vienna by Mr. Anton Schmid, I hereby invalidate and declare that all of the words regarding bans and curses which have been issued, and which will be issued in the future by rabbis in other countries, upon the next printing, are to be deemed nonexistent ...<sup>25</sup>

The letter is dated Monday 25 Tevet, but its year is obscured. Prof. Rakover quotes this letter from R' Banet as reproduced in *Milei D'Avot*, but without attributing it to any year.<sup>26</sup> The problem is that the printer of this volume in 1924 neglected to put into bold font the appropriate letters to add up to the year in question.

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<sup>23</sup> The spelling here reflects R' Banet's inclusion of a *samekh* in the town's name.

<sup>24</sup> The wording matches R' Sofer's formula for referring to Heidenheim. See Nosson Dovid Rabinowich, *supra* n. 6, p. 260.

<sup>25</sup> *Milei D'Avot*, pt. 1, Hoshen Mishpat, ¶ 3 (Ezekiel Menashe Horowitz 1924).

<sup>26</sup> Naḥum Rakover, *Zekhut Ha-yozrim Bemeqorot Ha-yebudi'im* 173 & n. 36, 397 n. 284 (Sifri'at Ha-mishpat Ha-'ivry 1991).

The reason for that neglect may inhere in a switch over time in the methodology for noting the year. On the title page of *Milei D'Avot*, the year is indicated by a long Hebrew phrase, יקִימוּ ה"א מילי דאבות. When every single letter of that phrase is added, the total comes to (5)685, which corresponds to 1924. Perhaps the printer thought that R' Banet had used a similar convention in the previous century. However, when every single character is added in the phrase employed by R' Banet from *Exod.* 6:13—ויצו"ם א"ל בני ישראל—the total comes out to (5)776, corresponding to 2015! We can therefore be sure that R' Banet intended in the nineteenth century to emphasize only a subset of the characters, but unfortunately the printer in the twentieth century obscured that intent.

The last time during R' Banet's lifetime that 25 Tevet fell on a Monday was 1817,<sup>27</sup> so we can conclude that this letter was written no later than that year—in other words, by January 13, 1817. In any event, it unambiguously reveals R' Banet's stance: He gave no force whatsoever to R' Horowitz's ban on the Roedelheim mahzor.

Thus, in 1797, R' Banet was willing to issue a ban. By 1817, he stridently rejected an illustrious predecessor's ban—and went out of his way to align himself against Heidenheim. Moreover, he himself appeared to follow a practice of refraining to issue bans, even when he was willing to author an approbation. What happened to him to make him change his former view? And when? Why was he so strident in his opposition to copyright protection for the Roedelheim mahzor?

#### IV. Revelation of Responsum 8

R' Banet initiated the investigation into copyright by issuing responsum 7 in 1822, to which R' Sofer responded the following year with his own responsum 41. The latter concluded, “What difference does it make to the government whether one person or another publishes a particular title, so long as the affected publisher pays the applicable taxes to the government each year?” Here is what R' Banet had to say in reply at the end of responsum 8, which he wrote only in 1827:

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<sup>27</sup> As a calendrical matter, during the interval from publication of the Roedelheim mahzor until R' Banet's death, 25 Tevet fell on a Monday in 1804, 1807, 1808, 1810, 1811, 1812, 1814 and 1817.

And I tested this thing when the gentleman-publisher Schmid printed the Roedelheim maḥzorim. When I cast the bans of the sages on the buyers and the dealers to prevent [publication], the aforementioned publisher brought us up in court before the authorities in my country, in the city of Bruenn. I was positioned in a grave dispute from morning until evening and they spoke harshly to me and they saw my activities as wrongs and in this way said I was rebelling against the government, until the mercy of God came upon me and I was released in peace on condition that “the mouth that forbids will be the mouth that permits.” And so I did, inasmuch as the ban was not pronounced verbally but only in writing.

By his own statement, therefore, R’ Banet’s impetus for his oft-repeated resolution against Heidenheim came not from his own reasoned judgment, but instead from compulsion. In other words, there was another case, which we can label *Schmid v. Banet*, whereby the Gentile publisher of Hebrew books, aggrieved to have been labeled the miscreant by a Moravian rabbi, hauled the latter to a forum more hospitable to his status as official court purveyor, namely before the civil authorities.

It remains to specify the date when R’ Banet was summoned to Bruenn (Czech, “Brno”), the capital of Moravia. The excerpt from responsum 8 just quoted points to events that preceded the issuance of responsum 7 in favor of Schmid in 1822. Thus, as R’ Banet revealed, at some point before 1822, he had ruled in favor of Heidenheim. One commentator identifies the year in question as 1807.

Heidenheim violently objected to the publication of the Schmid edition, for he felt that his business would be harmed if his own “Roedelheim Mahzor” would be used by A. Schmid. Heidenheim therefore appealed to Rabbi Pinhas Horovitz of Frankfort-on-the-Main to issue a “protective ban” in favor of the “Roedelheim Mahzor.” Horovitz acceded to Heidenheim’s request, but on November 12, 1807 the Austrian authorities in Vienna issued instructions that the ban against the Schmid edition should be ignored.<sup>28</sup>

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<sup>28</sup> Moshe Carmilly-Weinberger, *Censorship and Freedom of Expression in Jewish History* p. 196 (Sepher-Hermon Press, Yeshiva Univ. 1977). Part of that account is problematic—Heidenheim did not resort to R’ Horowitz for an approbation in response to Schmid’s depredations. Instead, the latter’s *haskama* accompanied the first printing of the Roedelheim maḥzor around 1800.

Indeed, the German-language literature supports the notion that the key event took place on November 12, 1807. On that date, a decree issued from the Chancellor's Court to its regional offices in Bohemia, Moravia, Galicia, and elsewhere, as follows:

News has been received that after the domestic book publisher Schmid, with authorization from the state censor, reissued the Jewish prayer book and also printed a well-advised German translation in Hebrew letters prepared by a Roedelheim Jew by the name of Heidenheim, on behalf of the aforementioned Jew Heidenheim, who earlier had received an exclusive privilege to print this book from the Chief Rabbi of Frankfurt, an appeal to the Jewish people has been issued, and has been sent to some of the most respected rabbis in the Austrian monarchy by means of the postal service, that several rabbis, and most notably the Chief Rabbi of Frankfurt, Pincas Levy Horowitz, pronounced a great excommunication order against the later publisher of the Mahzor and his coworkers and assistants. ¶ The regional offices shall draw the rabbis' attention to this absurd measure so that if they encounter one of these writings, they will suppress and make no use of it, and in case any of their fellow believers have questions, they shall instruct them about the unlawfulness of such a measure, and they shall in no way dare to enforce any part of the excommunication order.<sup>29</sup>

On May 25, 1808, the same Chancellor's Court underlined the issue to its regional offices, ordering them to "prepare a specific circular to give notice, and in particular to direct the rabbis to clearly and emphatically explain the same in the synagogues of their fellow believers, that every excommunication order is not in force so long as the government does not recognize its legal force, and that whoever disseminates such an excommunication order by his hand, will pay a money penalty of 50 thalers, or based upon the circumstances will face corporal punishment."<sup>30</sup> Additional scholarship in German<sup>31</sup>

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<sup>29</sup> *Geschichte der Juden in Wien*, supra n. 9, pp. 172-73.

<sup>30</sup> *Id.* pp. 173-74.

<sup>31</sup> Samuel(?) Krauss, "Merkwürdige Siddurim," in *Studies in Jewish Bibliography and Related Subjects in Memory of Abraham Solomon Freidus* (1867-1923), p. 138 (New York: Alexander Kohut Memorial Foundation 1929). To translate the German title, Siddurim are prayer books, while Merkwürdige "can be taken in the pejorative sense of curiosities, peculiarities, oddness, or strangeness but can at the same time imply things that

likewise concurs that the Austrian government suppressed the ban by means of a Chancellor's Court decree of November 12, 1807.

We may therefore conclude that the earthquake in R' Banet's life occurred in 1807. Prior to that time, he followed R' Isserles in upholding copyright protection. It was on that basis that he did not hesitate to rule in favor of Heidenheim in the case of *Heidenheim v. Schmid*. He also personally subscribed to printing bans before 1807, and issued a very harsh one in favor of *Sha'agat Aryeh*.

But then R' Banet found himself personally targeted in the case of *Schmid v. Banet*. After his shabby treatment at the hands of the secular authorities in 1807, R' Banet radically altered his practice. By 1817, he publicly proclaimed R' Horowitz's ban on the Roedelheim maḥzor to be a nullity. In 1822, he affirmatively issued a ruling against Heidenheim in the case of *Heidenheim v. Printers of Dybernfurth*. He still reviewed the works of others to offer his endorsement as to the value of their content in the form of an approbation, but he declined in that context to add that others are banned from copying them.

## Two Interludes

### 1. *Sefer Hayashar*

Challenging the view that R' Banet willingly issued bans before 1807 but not thereafter is a volume produced in Vienna in 1810, bearing *haskamot* from both R' Banet and R' Sofer. The work in question is *Sefer Hayashar*, compiling insights from the great Tosaphist Jacob ben Meir Tam, more popularly known as Rabbenu Tam (1100–1171).

Prominence in both placement and amount of space for the approbations in that work belongs to the one by R' Banet, with a much shorter approbation written by R' Sofer. Focusing first on the former, his words are a far cry from the fire-and-brimstone approach that he adopted in 1797 regarding *Sha'agat Aryeh*. There, it will be recalled, R'

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are exceptional and worth noticing or pointing out.” Allison P. Coudert, “Five Seventeenth-Century Christian Hebraists” in *Hebraica Veritas?*, pp. 286, 289 (Allison P. Coudert & Jeffrey S. Shoulson, eds., U. Penn Press 2004).

Banet stated that any interloper “shall be cursed, as shall all who support or assist him.” Here, by contrast, he simply noted that the sages

have imposed a designated period of twenty years from the time of the book's publication in print, [wherein] the rights to the book shall be solely theirs and to no outsider among them. Indeed, any stranger who approaches [*cf. Num. 3:10*], his action will be foreign [*cf. Lev. 10:1*] and he shall be a stranger to his brethren [*cf. Ps. 69:9*]. And in such an event, it shall befall him as stated in the proverb of ancients [*cf. I Sam. 24:13*]: “The purchaser shall mourn and the seller will not rejoice” in his deceitful deed [*cf. Ezr. 7:12*]. And one who toils will sow the wind, and his hands will not carry out their plans [*cf. Job 5:12*]. Because a marketed book that has been prohibited is an outcast and has no reader. And a prohibition is thereby imposed on all the House of Israel.

To be sure, this excerpt inclines in the direction of prohibiting copying, but in terms that fall far short of a curse or ban.<sup>32</sup> Thus, R' Banet's words stand in marked contrast to R' Sofer's own approbation on the same page, which does not shy away from imposing a curse on whoever trespasses upon his neighbor's boundary.<sup>33</sup> Unlike R' Banet's limitation to the category of prohibition (*isur*), R' Sofer goes all the way to invoke the category of curse (*arur*) and violation (*aveira*).<sup>34</sup>

In sum, therefore, this episode from 1810 occupies an intermediate position, both in time and in R' Banet's evident progression. In *Sefer Hayashar*, he has already retreated from the harsh stance of cursing copyright infringers that he followed in the previous century, but he has not yet reached his ultimate position, which emerges from his 1823 correspondence with R' Sofer, of limiting himself solely to an approbation without any of the condemnation that typically attends a ban.

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<sup>32</sup> Nonetheless, elsewhere in the approbation, R' Banet invokes the category of *basagat g'vul* (unfair competition), the entire subject matter of R' Sofer's later responsum 79.

<sup>33</sup> The language here invokes the same term just confronted, *basagat g'vul*.

<sup>34</sup> The key sentence from R' Sofer reads as follows: **העובר על דברינו קם ליה בארור משיג גבול רעהו**.

## 2. Aaron Ḥorin

R' Banet took an early liking to a young rabbinical student named Aaron Ḥorin (1766–1844).<sup>35</sup> Ḥorin subsequently adopted the controversial stance of allowing his congregants to eat sturgeon,<sup>36</sup> and later became a full-scale advocate of Reform, causing a rupture with his erstwhile patron.<sup>37</sup>

For students of the Roedelheim copyright controversy, Ḥorin's stance takes on special meaning, as he opposed both R' Sofer and R' Banet.<sup>38</sup> Ḥorin objected to R' Banet's condemnation (which might be labeled an "anti-approbation"), and on that basis brought the matter to a rabbinical court. That body sided with R' Banet and condemned Ḥorin.<sup>39</sup> The latter responded by appealing to the imperial government for redress. Those authorities, on "June 24, 1806, annulled the judgment and condemned the leader of his adversaries... to pay the expenses of the lawsuit."<sup>40</sup>

We thus witness an early foreshadowing of Anton Schmid. The year before R' Banet lost the civil case brought by Schmid, he had already lost a civil case brought by Ḥorin. The experience cannot have left the Chief Rabbi of Moravia enamored with his entanglement by the secular authorities. One may therefore speculate that

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<sup>35</sup> Emanuel Schreiber, *Reformed Judaism and Its Pioneers: A Contribution to Its History* 78 (1892).

<sup>36</sup> To be kosher, fish must have fins and scales. See *Lev.* 11:9-11. For a modern-day write-up, see <<http://www.bluthread.com/kashrut/sturgeon.html>> (visited June 2, 2008) ("Sturgeon is a controversial fish. Some say it is Kosher, some say it is not.").

<sup>37</sup> For their antagonism on the matter of the Hamburg Temple, told from the Reform side, see Schreiber, *supra* n. 35, pp. 82-83.

<sup>38</sup> Jacob Katz, *A House Divided* p. 34 (Ziporah Brody, trans., Brandeis Univ. Press 1998) (calling R' Sofer's condemnation of Ḥorin "well known").

<sup>39</sup> Given the animosity between Ḥorin and the traditionalists, it is fascinating to note the existence of a work on world geography by Shimon Halevi Bloch, bearing approbations from both him and his arch-rival, R' Sofer! Aaron M. Schreiber, *supra* n. 15, p. 160 n. 87.

<sup>40</sup> S. Mannheimer, "Aaron Chorin (Choriner)," *The Jewish Encyclopedia* Vol. 4 p. 43 (1903). Reputedly, Ḥorin chose to forego the fine and then foreswore further writings.



these earlier events set the stage in R' Banet's mind for the epochal events of 1807, which altered his views and practices fundamentally as far as printing bans and copyright infringement are concerned.

## R' Banet's Letter to R' Sofer

### I. The Obscure Passage

Armed with this historical background, we can now bore into the enigmatic comments from R' Banet, quoted by R' Sofer at the beginning of responsum 41<sup>41</sup> (though no imputation should arise that R' Sofer thereby violated R' Banet's copyright!).<sup>42</sup> In the letter, R' Banet explained that he was responding to R' Sofer's own letter from Rosh Hodesh Adar.<sup>43</sup> R' Sofer dated responsum 41 as 24 Adar (March 7, 1823).<sup>44</sup> We can therefore date this letter to around February 1823.<sup>45</sup>

R' Banet began the letter with fabulous praise for R' Sofer: "The face of Moses is like the surface of the sun which brings light to the world and to its inhabitants, with wisdom, opening gates with his knowledge that fills rooms at Sinai and uproots mountains, shining light upon the righteous." With those preliminaries out of the way, R' Banet explained that he received a letter from the Hatam Sofer and

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<sup>41</sup> The opening line of R' Sofer's responsum begins with the notation: "A copy of a letter from The Rav and great *Gaon*, the *Av Bet Din* and *Rosh Metivta* of the holy community of Nikolsburg and the Region, may [his merit] protect us, amen, and glory to God." After two paragraphs, the quotation closes, "Signed, the insignificant Mordekhai Banet."

<sup>42</sup> The same conduct, if contemporaneously undertaken in the United States, could lead to liability for copyright infringement. *Woolsey v. Judd*, 15 Copyright Off. Bull. 3006 (N.Y. Super. Ct. 1855). See *Nimmer on Copyright* Vol. 1 § 5.04.

<sup>43</sup> The letter from R' Sofer is not reproduced in the responsum; we have only R' Banet's reply.

<sup>44</sup> Controversy about the date is ventilated *infra* n. 48.

<sup>45</sup> The chronology seems to be that R' Sofer wrote a letter to R' Banet around 1 Adar, to which R' Banet replied by the paragraphs incorporated into the responsum. All of this occurred within the space of little over three weeks—a testament not only to the efficiency of the Moravian postal service but also to how quickly R' Sofer was able to compose a complicated responsum.

reiterated the basis for his earlier view in responsum 7 (as well as pre-viewing some of the additional points that he would later set forth in responsum 8). He added that he had recently written “in the same vein to the rabbi of the holy community of Dyhernfurth.”<sup>46</sup>

One memorable turn of phrase appears in this letter: R’ Banet notes that, in light of the fact that currently there are also Gentile printers who are under no obligation to abide by rabbinic decrees, “this one loses and that one doesn’t benefit.” That statement represents a twist<sup>47</sup> on a familiar halkhic *dictum*, “this one gains and that one doesn’t lose,” meaning roughly that when a plaintiff loses nothing, he has no right to sue for damages, even if defendant has benefited from use of his property. In the instant switch, by contrast, R’ Banet makes the point that the plaintiff may indeed have been harmed, but nobody else has gained any benefit from that harm. He therefore concludes that enforcing the ban would mean that the remaining Jewish publishers would lose out to the original Jewish publisher, who himself nevertheless would not make any profit, inasmuch as Gentiles could publish the same work.

It is the conclusion of R’ Banet’s letter that is so remarkable (as previously quoted at the outset of this article). Although the letter runs only two paragraphs, its mysteries are far out of proportion to its brevity.

After reconsidering, I changed my mind because of the honor [due to the Hatam Sofer] and I shall say that even though one should not issue a ban, “For there is no divination in Jacob,” I shall write, in an ethical manner and in accord with customary decency, additional words and he will receive the abovementioned approbation here. This is the word of the one who eternally seeks His peace, the insignificant Mordekhai Banet.

To understand the intent, we must break R’ Banet’s words down into parts.

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<sup>46</sup> It is unclear whether the reference is to R’ Banet’s responsum 7 itself, which was a *tshuva* to a *she’aila* posed by the rabbi of Dyhernfurth, or to private correspondence not replicated in R’ Sofer’s responsum 41.

<sup>47</sup> Later, we will see more explicit humor from R’ Banet. See text accompanying *infra* n. 82.

## II. *Oryan T'litai*

After reproducing that letter from R' Banet, R' Sofer turned in responsum 41 to his own words. He begins by expressing delight that R' Banet has agreed to his request to write an approbation, and there for the first time identifies the work in question: *Oryan T'litai*. That reference begins to clear the mist from R' Banet's cryptic letter. But much more remains to be discovered.

Let us revert to the chronology. R' Banet wrote responsum 7 in Nikolsberg on August 22, 1822. R' Sofer issued his return broadside, in the form of his own responsum 41, in Pressburg on March 7, 1823.<sup>48</sup> But even during that half-year interval, private correspondence traveled between the two sages. As best we can reconstruct the events, during that interval R' Sofer wished to obtain R' Banet's approval for a book under production, entitled *Oryan T'litai*. In other words, not only did R' Sofer vehemently disagree with R' Banet's pro-defendant ruling, but he further imperiously requested that R' Banet effectively recant his earlier stance. Whereas R' Banet in responsum 7 had declined to give validity to the approbation issued by R' Horowitz for the Roedelheim mahzor, R' Sofer now requested that R' Banet himself sign onto a new approbation, together with R' Sofer, for *Oryan T'litai*.

R' Sofer's request was audacious. It is one thing to read a colleague's *tshuva* and then issue one's own *tshuva* in disagreement—it is quite another to tell the original decisor to act in fundamental opposition to his own stance.<sup>49</sup> Yet this is exactly what R' Sofer asked, and it

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<sup>48</sup> In the modern printing of R' Sofer's responsa, the date of number 41 is set forth as תקפג"ל. *Sefer H'atam Sofer, H'eleq H'osben Mishpat*, # 41 (Grossman, New York, 1957). Prof. Rakover dates that enigmatic formulation to 1820. Naḥum Rakover, *supra* n. 26, p. 200. Nonetheless, inspection of the original collection of R' Sofer's responsa shows the reprinting to be in error. See *Sefer H'atam Sofer, H'eleq H'osben Mishpat*, # 41 (Könyvereskedése, Budapest, 1861). The formulation at the end of number 41 is actually תקפ"ג לפ"ק, which corresponds to 1823.

<sup>49</sup> Of course, that posture is far from unknown. It brings to mind the famous incident of a dispute between Rabban Gamliel and Rabbi Joshua son of Hananiah over the day on which Yom Kippur fell, with the former ordering the latter to bring his staff and money on the day that

seems that R' Banet, amazingly, acceded. Or did he? To answer that question, the first order of business is to track down the work in question.

History records many works by the name *Oryan T'litai* ("Three-Fold Law").<sup>50</sup> Focusing on those that appeared in print closest to 1822, the first candidate is shown in Fig. 7.

This book contains responsa written by R' Moses Te'omim, published in Lemberg (Lvov) in 1880.<sup>51</sup> It contains an introduction by its author, but no approbation at all, and certainly no endorsement from either R' Sofer or R' Banet. It therefore does not appear to be the volume in question.

The next candidate is shown in Fig. 8. This volume was produced in Salonika (Thessaloniki) around 1759, "under the rule of our master, the king Sultan... may his kingdom rise."<sup>52</sup> It consists of an anthology setting forth the novellae of illustrious rabbis from the past: R' Yosef ibn Migash, Ramban, and Ritva. Its author is Yosef ben Shmuel Modeliano,<sup>53</sup> who also produced a book of responsa under the title *Rosh Mashbir*.<sup>54</sup> What is important for current purposes is that

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the latter had calculated (against the ruling of the former). *Mishnah Rosh Ha-shanah* 2:8-9.

<sup>50</sup> The phrase derives from *Shabbat* 88a. Rashi (*ad loc.*) describes the "Torah of thirds" as consisting of the three parts of *Tanakh*: Torah, Prophets, and Writings.

<sup>51</sup> Located in Ukraine, that city at the time was "one of the main centers for the production of Hebrew books, not only for Eastern Europe but for the Balkans as well." Editor, "Lvov," *Encyclopedia Judaica* Vol 11 pp. 608, 614 (1972).

<sup>52</sup> As the reference to the Sultan connotes, this domain lay even farther from Moravia than did Lemberg, where the other *Oryan T'litai* was produced. Salonika was the seat of Sephardic culture, also a prominent center of Hebrew printing. Note the illustrious history of paying tribute to the Sultan; an earlier figure, Elijah Capsali (1420–1495), had even cast him in the redemptive image of Cyrus the Great! Yosef Hayim Yerushalmi, *Zakhor* p. 65 (Univ. Wash. Press 1982, 1996).

<sup>53</sup> His surname is variously listed as Modiano, Modiyano, Modeliano, and Modigliano.

<sup>54</sup> Modeliano escaped the fate that befell two of his predecessors in Salonika: On each occasion, when a particular Jew lost a case before a rabbinic decisor, the disgruntled litigant hired an assassin to kill the rabbi's

this volume, like the later one, lacks any approbation, and bears no trace from R' Sofer or R' Banet.

Unfortunately, those two editions of *Oryan T'litai* are either too early or too late to be the work for which R' Sofer sought R' Banet's approval. *Faute de mieux*, we must therefore alight upon a work entitled *Beit Aryeh*, published in Zolkiew (Ukrainian "Zhovkva," Soviet "Nesterov")<sup>55</sup> on May 28, 1834.<sup>56</sup> That book contains responsa, divided into several sections, of which the second is called *Oryan T'litai*. The book contains numerous approbations, although obviously none by R' Banet, who had died four years previously. But it does contain one by R' Sofer, praising the author, R' Aryeh Lebusch Horowitz.<sup>57</sup> It seems logical to assume that the work under preparation in 1823 did not reach fruition until many years later. We therefore cannot be sure how R' Banet would have phrased his approval of the book, had it been published during his lifetime.

But R' Banet's later history after 1807 shows that he was willing to offer words of approbation without, however, placing a ban on those who failed to heed his admonitions. Thus, R' Banet's words to R' Sofer reflect a middle course. He stated, "I shall write, in an ethical manner and in accord with customary decency, additional words and he will receive the abovementioned approbation here." That phraseology appears to be deliberately chosen—pointedly, he will receive the *approbation*, but not the *ban*. In other words, R' Banet agreed only to write "in an ethical... manner" words of approval for *Oryan T'litai*, but not to go so far as to join in any *herem* that might accompany the work.<sup>58</sup>

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son. Dean Phillip Bell, *Jews in the Early Modern World* p. 120 (Rowen & Littlefield 2008).

<sup>55</sup> This town, home at one point to the famous "Dubner Magid" Jacob ben Wolf Kranz (1740–1804), is located just ten miles north of Lemberg, where the 1880 *Oryan T'litai* was published.

<sup>56</sup> Aryeh Lebusch Horowitz, *Sefer Beit Aryeh* (Saul Dov Meyerhoffer 1834).

<sup>57</sup> The name and timing are such that this individual may be the same as the Av Beit Din of Zalozhtsy, which is located in the vicinity of Zolkiew. An author of responsa, he lived 1758–1844. Yehoshua Horowitz, "Aryeh Leib Ben Eleazar Ha-Levi Horowitz," *Encyclopedia Judaica* Vol 8 p. 986 (1972).

<sup>58</sup> Naḥum Rakover, *supra* n. 26, pp. 173-74.

Still, the question remains: Why was he categorically opposed to bans? Plus, the verse cited for that purpose remains obscure and requires explication to understand how it could possibly support the proposition at hand.

### III. Must a Ban Be Pronounced Orally?

In responsum 7, R' Banet concluded at length that a ban appearing in writing is invalid; instead, oral pronouncement is required in order to give a ban effect. It is worth pausing to consider how radical such a proposition appears to modern sensibilities. Imagine a judge ruling today in a case brought by plaintiff as copyright owner for infringement against defendant, who defends herself that she acted under license: "Well, I find that the defendant has been fully licensed in a notarized contract, signed by both parties. Nonetheless, there is no evidence that plaintiff ever *orally* made a grant to defendant. Inasmuch as a copyright assignment is valid only if spoken aloud, the defense fails, and I therefore rule for plaintiff."<sup>59</sup>

As jarring as that ruling seems, there is some warrant for R' Banet's conclusion, in both logic and practice. As a matter of practice, traditionally, the severe ban was "pronounced in the synagogue either before the open Ark or while holding a Torah scroll."<sup>60</sup> In addition, to heighten the physical presence of the pronouncement, shofar blasts were sounded.<sup>61</sup> Indeed, that practice evidently animated the early rabbis who granted approbations: When a ban was inscribed in a work by R' Joseph Caro in 1606, the three rabbis who lent their name to the project instructed the sexton to read it aloud in all the

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<sup>59</sup> United States copyright law is exactly to the contrary: It disallows oral copyright grants, while validating those in writing. See *Library Publ'ns, Inc. v. Medical Econs. Co.*, 548 F. Supp. 1231 (E.D. Pa. 1982), *aff'd*, 714 F.2d 123 (3d Cir. 1983).

<sup>60</sup> Irena Janicka-Świdorska, Jerzy Jarniewicz & Adam Sumera, *Jewish Themes in English and Polish Culture* p. 109 (Uniwersytetu Łódzkiego 2000). See Haim Hermann Cohen, "Herem," *Encyclopedia Judaica*, Vol. 8 pp. 344, 350-51 (1972).

<sup>61</sup> One community made its ordinances appropriately solemn through shofar blasts, public readings twice per year, and personal assent by each member. Dean Phillip Bell, *supra* n. 54, p. 105.

synagogues of Venice.<sup>62</sup> Based on that history, R' Banet might have concluded that the failure of R' Horowitz to proclaim his ban on reproduction of the Roedelheim maḥzor in all the synagogues of Frankfurt am Main rendered that *herem* deficient.

Turning to logic, there is equally some basis for his conclusion. Under the Jewish system of law, certain activities require oral pronouncement to be effectuated properly—consider the marriage formula (*harei at mekudeshet li*), reciting Megillat Esther on the holiday of Purim and, most important for current purposes, taking a binding oath (*shevu'a*).<sup>63</sup> In Biblical times, an oath was required to be taken orally [Lev. 5:4], such as occurred at Mizpah. [Judges 21:5]. Even today under secular law, oral does indeed appear to be better with respect to oaths. Imagine a perjury prosecution in which a false statement is alleged in the middle of the defendant's lengthy testimony. To the extent that the alleged lie is contained on page 30 of a 50-page affidavit, a ready defense arises: "I was careful to only attest to the truth, but my careless lawyer must have substituted this page for the earlier draft that I meticulously reviewed, as I never would have subscribed to those erroneous propositions." On the other hand, if the subject statement was made on the witness stand, even three hours into five hours of testimony, there is no way that the defendant can disavow it. In short, oaths really are better if made orally than in writing.

Now, let us extend our focus from oaths to bans. What is the connection? Commenting on the oath at Mizpah, the *Tanḥuma* comments, "this is to teach you that an oath is a ban and a ban is an oath."<sup>64</sup> To the extent that that midrashic comment is to be taken as

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<sup>62</sup> Moshe Carmilly-Weinberger, "Haskamah," *Encyclopedia Judaica* Vol. 7 p. 1452 (1972). It seems not unreasonable to posit that, at the dawn of the print era, oral culture remained predominant. See generally Walter Ong, *Orality and Literacy: The Technologizing of the Word* (Routledge 2002). At that stage in history, oral bans in synagogues may indeed have reached vastly more people than written ones.

<sup>63</sup> All are subject to analysis in Lewis H. Glinert, "Language Choice and the Halakhic Speech Act," in *The Influence of Language on Culture and Thought* (Robert L. Cooper & Bernard Spolsky, eds. Mouton de Gruyter 1991).

<sup>64</sup> *Midrash Yelammedenu, Va-yeshev* chap. 2.

normative,<sup>65</sup> logic supports R' Banet's conclusion that, just as an oath must be taken orally, so must a ban be delivered orally to take effect.

Yet a halakhic problem immediately arises. No less a figure than the Ramban (1194–1270), specifically addressing bans, wrote that they have “a more severe aspect than oaths, inasmuch as one can be bound by an oath only by accepting it upon himself and answering ‘Amen,’ whereas one can be bound by a ban even though he did not accept it upon himself and was not even present at the time of the edict, given that a court is empowered to order a ban.”<sup>66</sup> From this perspective alone, one can appreciate that, although the force of a ban is derivative of an oath, a ban is not necessarily limited to the identical parameters or conditions of an oath.

R' Banet's imposition of stringencies as to bans appears suspect. A host of other legal impediments also arise, which R' Sofer was not reticent to note at length.<sup>67</sup>

In sum, the stance that R' Banet took, rejecting the efficacy of a written *herem*, places him in isolation from the preponderance of halakhic opinion. Something strange is going on here. But matters get even more outré when his biblical quotation is explicated.

#### IV. *Nahash*

We have already remarked twice that the verse R' Banet cites—“For there is no divination in Jacob” [*Num.* 23:23]—requires explanation. In terms of occult arts, the Torah opposes various sorts: necromancy, soothsaying, augury, enchantment, witchcraft, sorcery. By contrast, it expressly approves of others, such as prophecy, dream-auditing, and

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<sup>65</sup> That proposition itself poses vexing challenges. David Berger, “Jacob Katz on Jews and Christians in the Middle Ages,” in *The Pride of Jacob* pp. 41, 47-48 & n. 20 (Jay M. Harris, ed., Harvard Univ. Press 2002).

<sup>66</sup> Moshe ben Nahman, *Mishpetei ha-Hereim*. Note that, among Ramban's seven halakhic monographs, this one details “the way a ban is imposed and release obtained from it.” Elmer Gertz, “Nahmanides,” *Encyclopedia Judaica* Vol. 12 pp. 774, 780 (1972).

<sup>67</sup> In responsum 79, R' Sofer methodically goes through the requirements of bans, concluding to the contrary of R' Banet that they need not be expressed orally.



the Urim ve-Tumim.<sup>68</sup> On the “bad” list, one is called *naḥash*. The term itself is used in Biblical Hebrew to refer to a kind of magic translated above as “divination.”<sup>69</sup> It is also the same word<sup>70</sup> that describes the serpent in the Garden of Eden [*Gen.* 3:1].<sup>71</sup> One could therefore allusively translate it into English as “snake-charming” (although scientific support is lacking<sup>72</sup> for drawing together its two root meanings<sup>73</sup> in that fashion).<sup>74</sup>

Moving from magic to snakes, the wisdom of Solomon teaches that “Whoever digs a pit may fall into it, and whoever breaks through a wall may be bitten by a snake” [*Ecc.* 10:8].<sup>75</sup> The *Talmud Yerushalmi* takes the wall as being the fence that the sages erect around the Torah [*JT Berakhot* 1:1]. The meaning is that someone who violates rabbinic decrees faces heavenly vengeance in the form of a snake-bite. A later commentator expanded the point. According to Yosef al-Ashkar (who settled in Tlemcen, Algeria, following the Spanish expulsion in 1492), a person should be

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<sup>68</sup> See generally Haim Hermann Cohen, “Divination,” *Encyclopedia Judaica* Vol. 14 pp. 111, 116 (1972).

<sup>69</sup> It is also the proper name of an Ammonite King. [*1 Sam.* 11:1]. But that usage does not necessarily denote any additional meaning (just as a woman today may be named “Jasmine” or “Rose,” without the denomination containing independent semantic content).

<sup>70</sup> The words are homonyms, although one is pointed with a *ḥataf*, the other with a *qameṣ*.

<sup>71</sup> A biography of the *naḥash* was recently published. See David Fohrman, *The Beast that Crouches at the Door* (Devorah Pub. 2007).

<sup>72</sup> In Aramaic, the root refers solely to “divination” [*naḥashaya*, Onkelos, *Num.* 23:23], whereas the word for “snake” is wholly different [*ḥiviya*, Onkelos, *Gen.* 3:1]. It is unclear how the two terms converged in Hebrew.

<sup>73</sup> A famous nineteenth century commentator does draw the parallel, construing both words as connotative of slithering around through an indirect path. Samson Raphael Hirsch, *The Pentateuch* (Isaac Levy trans., Judaica Press 1982) (on *Gen.* 44:5).

<sup>74</sup> See next footnote.

<sup>75</sup> King Solomon himself drew a similar literary parallel with the other meaning of *naḥash*, just three verses later in *Megillat Qoblet*. See *Ecc.* 10:11. The *naḥash* returns there, this time connected to *laḥash*. Although that word could be taken as referring to “hissing,” most commentators translate it as a reference to a charmer (literally, “snake-whisperer”).

careful not to depart from the sages' words, either to the left or the right, the reason being that their bite is like the bite of a snake. For just as a snake kills with its bite, so the sages punish those who break down their fence. As Solomon wrote, "Whoever digs a pit may fall into it, and whoever breaks through a wall may be bitten by a snake," and the word *NaHaSH* is an acronym for *Niddui*, *Herem*, and *Shamta*.<sup>76</sup>

Those last three words refer to the three species of excommunication. Thus, "snake" actually refers to the *herem*<sup>77</sup> and its near cousins,<sup>78</sup> those being the three types of rabbinic bans that condemn those who dare violate its dictates.<sup>79</sup>

The abbreviation cited by al-Ashkar gained widespread currency. Consider one of the most celebrated bans of all time, the *herem* of Rabbenu Gershom against opening other people's mail. A responsum from the seventeenth century reflects that Jews customarily wrote on the outside of their letters the abbreviation ופנין דרג"מה, so that anyone who found the envelope (or, more likely, sealed missive) in

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<sup>76</sup> *Mirkevet ha-Mishnah* on *Pirkei Avot*, chap. 2. For a brief biography of this figure, see Editor, "Joseph ben Moses Alashkar," *Encyclopedia Judaica* Vol. 2 p. 511 (1972).

<sup>77</sup> The root meaning of *herem* (ban) is to keep something separate from common use. It is therefore cognate with the (English loan word from) Arabic "harem," where women are kept segregated. It refers to a rabbinic ordinance that excommunicated individuals be separated from the community—they had to live in confinement and not have social intercourse with members in good standing. The ban is a hoary device, consisting of progressive stages of depriving the affected person of various ritual and religious requirements. "The final and ultimate punishment was the denial of a Jewish funeral to the recalcitrant and his family." Jacob Katz, *Divine Law in Human Hands* 174 (Hebrew Univ. Press 1998).

<sup>78</sup> The meaning of *niddui* is ostracism. As to *shamta* (desolation, curse), it was later analogized to death, by the transformation *sham mitah*. Haim Hermann Cohen, *supra* n. 60, p. 351.

<sup>79</sup> Note that Jewish congregations formerly recited the *shamta* on Yom Kippur as an anti-Gentile prayer. See Yaakov Deutsch, "Polemical Ethnographies: Descriptions of Yom Kippur in the Writings of Christian Hebraists and Jewish Converts to Christianity in Early Modern Europe" in *Hebraica Veritas?* (Allison P. Coudert & Jeffrey S. Shoulson, eds., U. Penn Press 2004) pp. 202, 203.

the marketplace would be barred from reading its contents.<sup>80</sup> The first word is an abbreviation containing the first letter of each word from the portion of *Ecccl.* 10:8 referring to snake bites וּפְרִיזְךָ יִשְׁכְּנוּ וְיִשְׁכְּנוּ וְיִשְׁכְּנוּ, while the second is an abbreviation for Of Rabbenu Gershom, Light of the Exile. The meaning, for anyone who finds a letter thus marked: A snake will bite you if you dare to open someone's mail, thereby transgressing the famous *herem*!

We therefore see an established linkage between the word *nahash* and the rabbinic *herem*. The clever transposition that R' Banet made here was to state, "one should not issue a *herem*, 'For there should be no *nahash* [*i.e.*, *herem*, along with *niddui* and *shamta*] in Jacob' [*i.e.*, among Jews and their decisors]."

To unpack the punch, one can detect four transformations here:

- Instead of quoting the standard verse from *Ecclesiastes*, he adduced an outlier verse from *Numbers*. The result strikes the reader as ironic, as the lesson no longer comes from the wisest man ever to walk the earth, the virtuous Solomon, but instead from the wicked Gentile prophet, Bilaam (albeit here speaking against his will with divine support).
- Concomitantly, instead of quoting a verse referring to a *nahash* of the reptilian variety, his selection of a verse from *Numbers* left him with a usage containing a meaning from the sorcery lexicon. Again, the effect strikes the reader as ironic, as it is no longer possible to invoke the metaphorical *snake-bite* of the sages through their *herem* (one would, instead, have to accuse the sages of prohibited *sorcery* should they dare to invoke a *herem*).
- Instead of adopting the usual approval of the *nahash* as a heavenly agent, he adopts a denunciation of *nahash*.
- Instead of following the traditional formulation to vest in rabbinic bans supreme power, such that those who dare violate them receive death by snake bite, he attacks the institution of bans, emptying the *herem* of much of its force (a stance that, in turn, drew fire from R' Sofer).

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<sup>80</sup> *She-alot Utsivot Ya'akov Giz, Hilkhot Ketanot*, pt. 1, # 59.

We now understand the etiology of R' Banet's strange ruling that bans must be pronounced orally, and are invalid if only in writing. As he himself admitted at the end of responsum 8, his operative construction of halakha changed as a function of his life circumstances.<sup>81</sup> One imagines that R' Banet must have had a smile on his face when he turned matters on their head in this fashion.<sup>82</sup>

## Conclusion

It is little short of amazing to learn that R' Banet's considered opinion against legal protection for the Roedelheim maḥzor—first penned in the context of responsum 7 (written in 1822) and then forcefully underlined again in responsum 8 (written in 1827)—came not from his own reasoned judgment, but instead from compulsion. Nonetheless, this is not to say that his rationale—that a ban, to be efficacious, must be pronounced orally, rather than printed—was devoid of halakhic merit. Still, it was an opinion out of sync with the weight of authorities.<sup>83</sup> R' Banet himself, in responsum 8, pronounced that he was able to find refuge in the circumstance that the ban was not pronounced verbally. In other words, he acknowledged that his primary constraint in ruling as he did came from the command of the Gentile authorities. Fortunately for him, he could resort to a legal technicality—the invalidity of a ban that is in writing. Absent that halakhic foothold, R' Banet might not have been able to boost himself out of his dilemma with the Austro-Hungarian authorities, consistent with his obligation to uphold the dictates of Torah.

R' Banet had already lost a case before the civil authorities in 1806, when Aaron Ḥorin filed suit against him and others. Against that background, we can appreciate R' Banet's frame of mind when hauled before the tribunal the following year in Bruenn. His subjective experience is that “they spoke harshly to me” and that they even went so far as to say that “I was rebelling against the government,” a

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<sup>81</sup> That theme underlies my subsequent article, “In the Shadow of the Emperor,” *Torah u-Madda Journal* (forthcoming 2009). Whereas the current article focuses on R' Banet, the Ḥatam Sofer is the “star” of that next installment.

<sup>82</sup> For an additional ironical instance, see *infra* n. 84. See also *supra* n. 47.

<sup>83</sup> See text accompanying note 67.

charge bordering on treason. It is therefore not surprising that he capitulated and accepted the governmental edict, which he ironically rendered as “the mouth that forbids will be the mouth that permits.”<sup>84</sup> That particular phraseology, quoting a familiar halakhic evidentiary trope,<sup>85</sup> reflects both R' Banet's personal predicament and its resolution.<sup>86</sup> In other words, he resolved the dilemma by taking the ban on Hebrew books that forbids their dissemination, and formulating a legal resolution to reach the opposite conclusion, *i.e.*, to permit newcomers to reprint those books without permission from the initial publisher.

The psychological dimension remains—why did R' Banet, whose legal analysis initially favored Heidenheim when he resolved the case of *Heidenheim v. Schmid*, take it upon himself to carry on at such length in adjudicating *Heidenheim v. Printers of Dyhernfurth* in responsum 7 against Heidenheim? It hardly seems that his motivation was entirely a venal one of placating the civil authorities. For had his concern been only to save his own hide, he would not have stated at the outset of responsum 7 that he was driven to answer the question “because of the honor of Torah,” and would not have engaged in such tight Tal-

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<sup>84</sup> We can take as a given that the secular authorities did not formulate their ruling as a pun on Jewish law, so the formulation reflects R' Banet's sense of humor. See *supra* n. 82.

<sup>85</sup> Imagine that woman X and man Y are caught cohabiting—without more, there is no violation. Now, let us posit the existence of evidence that X was married to Z—on that basis, X and Y would be guilty of adultery (and subject to execution, under biblical law). Nonetheless, if the only evidence for her marriage is that she says, “I got married, and then I got divorced,” the law is that “she is believed, for the mouth that forbids is that mouth that permits.” *Mishnah Ketubot* 2:5. In other words, the only basis for condemning her as an adulterous married woman is her own statement (“I got married”); but that statement simultaneously exculpates her (“I got divorced”).

The case would be different to the extent that independent evidence existed of her marriage. Under those circumstances, her exculpation is not believed. *Id.* In this fashion, a kind of “equal dignity” rule applies to equivalent oral statements, but not to oral contradiction of a written record.

<sup>86</sup> Just as an authority figure might say, “You broke it, you fix it,” so the secular judge in this case evidently commanded, “your mouth forbade this conduct, now your mouth had better permit it.”

mudic reasoning. Instead, one would have expected R' Banet to have issued a perfunctory ruling and then to have washed his hands of further involvement.

To the contrary, though, we find that responsum 7 defends the anti-Heidenheim position at great length. It was issued in 1822, many years after the government authorities had placed R' Banet under compulsion,<sup>87</sup> and followed in short order by his reiteration of views in the letter that he sent to R' Sofer. Moreover, he issued responsum 8 another five years later (1827), covering the same terrain by promulgating another lengthy analysis to the same effect. R' Banet fervently adopted the point of view that initially had been imposed on him.

The answer to these mysteries lies in *Schmid v. Banet*, the case in which the Austrian authorities, bowing to the court printer's wiles, exerted heavy pressure on the Moravian Chief Rabbi to recant his earlier views. (It is in this sense that Schmid himself acted like a snake, albeit perhaps one that was charming on the outside.)<sup>88</sup>

Nonetheless, multiple ways remain to interpret the effect that *Schmid v. Banet* exerted on the losing defendant. One explanation of R' Banet's invocation of "the honor of Torah" is psychological. In this typology, R' Banet could not bear to issue a responsum against his own inner lights. Having been commanded by the governmental authorities to rule in favor of Schmid, he had to convince himself that the halakha was in accord, and therefore re-plowed the same field, exhaustively, three times<sup>89</sup> to justify his stance. His own integrity as a decisor did not allow him the latitude to issue a perfunctory ruling; instead, cognitive dissonance forced his mind to follow where his body had been ordered to go.

In that regard, the most pregnant statement in all the responsa is R' Banet's acknowledgement that, after being ordered to reverse his prior stance, "And so I did, inasmuch as the ban was not pronounced verbally but only in writing." In other words, R' Banet himself recognized the contingent nature of his ruling; he was forced to hold in

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<sup>87</sup> Note that the date is given as November 12, 1807, when the authorities clamped down on R' Banet. See text accompanying note 29.

<sup>88</sup> See David Fohrman, *supra* n. 71.

<sup>89</sup> Reference is to his responsa 7 and 8, as well as his personal letter to R' Sofer reproduced in the latter's responsum 41.

favor of Schmid, and found himself in the fortunate situation that he could find a technicality on which to hang the conclusion that circumstances had forced him to proclaim.

Without passing judgment from our historical vantage point, we must recognize that R' Banet lived in an era that seldom afforded Jews complete liberty of conscience. He would have risked not only his position as Chief Rabbi of Moravia, but perhaps his liberty (and even his life), by opposing the civil authorities and continuing to side with Heidenheim.

But there is an alternative explanation, which rejects the psychological rationale as untrue to R' Banet's own psyche. It may be that, when he ruled in favor of the plaintiff in *Heidenheim v. Schmid*, he regarded the matter as one *en famille*. In other words, like R' Isserles centuries earlier, R' Banet may have concluded that the secular authorities would care little about publication of Hebrew books, and regarded the matter as one whose resolution should turn entirely on the principles of Jewish law.<sup>90</sup> Under this typology, *Schmid v. Banet* represented a rude awakening to the losing defendant.<sup>91</sup> At that point, R' Banet realized that the civil government cares a great deal about which party is authorized to print the Roedelheim maḥzor. In resolving *Heidenheim v. Printers of Dyhernfurth* in responsum 7, he pointed out that, during his own times, unlike conditions that he inferred must have obtained during the sixteenth century when R' Isserles ruled, printing is undertaken only with permission of the king.

In addition, there is a fundamental difference between the earlier case of *Heidenheim v. Schmid* and the later case of *Heidenheim v. Printers of Dyhernfurth*. We know that, based on first principles, R' Banet resolved the first case in favor of copyright protection, and may have ruled likewise in the second. But by the time that 1822 dawned, first principles were no longer operative. Instead, *Heidenheim v. Printers of Dyhernfurth* arose against a background in which it had already become established precedent that Heidenheim did not enjoy exclusive rights to print copies of the Roedelheim maḥzor. Rather, on account

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<sup>90</sup> Neil Weinstock Netanel, *supra* n. 3.

<sup>91</sup> Indeed, it upset his expectations every bit as much the burning of the Talmud in 1553 upset the Rema's expectation that the Gentile authorities would care little about his prohibition for Jews to buy the *Mishneh Torah* from Giustiniani. *Id.*

of *Schmid v. Banet*, the law was clear that a Gentile could freely pirate the work. That intervening change in the legal environment caused R' Banet to reason (in his letter to R' Sofer)<sup>92</sup> that, because there are currently also Gentile printers under no obligation to abide by rabbinic decrees, “this one loses and that one doesn’t benefit.”<sup>93</sup>

It takes a great deal of historical excavation to put ourselves back in R' Banet’s shoes. But, when we do so, a decision that seemed inexplicable becomes eminently reasonable. Without for a moment doubting the reasonableness as well of R' Sofer’s contrary point of view, the light of history vindicates R' Banet as a serious halakhist wrestling with evolving issues and reaching a defensible interpretation as to their resolution. ❧

*The author gives profound thanks to rabbis from A to Z—Yitzchok Adlerstein to Joel Zeff—for guidance through the primary materials and to Aryeh Peter, Ariel Strauss, and David Schultz for assistance in deciphering the responsa. German translations are courtesy of Scott Dewey. My hearty thanks for their*

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<sup>92</sup> R' Banet made the same point in responsum 7, wherein he noted that if circumstances were such that non-Jews were willing to engage in competition with the Jewish store owner, then a Jew was also permitted to engage in such competition—for any other rule would simply leave the field open to gentiles. In those situations, R' Banet concluded, Rabbenu Gershom did not impose a ban. Therefore, in the case before him, if “the printer in Vienna” (a) has the right to engage in printing, (b) can print what he chooses, and (c) has received a copy of the Roedelheim mahzor from Heidenheim’s partners, and if only Heidenheim and no other Jewish printer has the right to print the Roedelheim mahzor in his land, then this printer in Vienna would print his competing work and distribute it throughout the world. Better, therefore, is a ruling that other Jews have the right to print a mahzor in competition with the Roedelheim mahzor, so that the printer from Vienna would not be able to walk into a wide open market. For, in either case, Heidenheim would lose business—either from the non-Jewish Viennese printer or from the other Jewish printers who would compete with him. The conclusion follows that the sages would not impose a ban on the publication of a mahzor that would compete with the Roedelheim mahzor, because such a ban would be counterproductive.

<sup>93</sup> See text accompanying note 47.



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Fig. 1

**S u t a t e n**  
v o s  
Local- und Land-Rabbiners  
**M a r c u s B e n e d i k t**  
1 4  
Nikolsburg in Mähren  
über das Werk  
Bne-Zion, ein religiös-moralisches Lehrbuch  
für die Jugend israelitischer Nation.

Sie haben mir den Wunsch zu erkennen gegeben, meine Gedanken über Ihr mir zur Prüfung übergebenes, in deutscher Sprache verfaßtes Manuscript: Bne-Zion, ein religiös-moralisches Lehrbuch für die Jugend israelitischer Nation, Ihnen schriftlich mitzutheilen. Diesen Wunsch erfülle ich mit dem aufrichtig besten Willen. Das Werk hat mir wahrlich sehr viel Vergnügen gemacht. Die Begriffe, welche in demselben von Gott, seinen Eigenschaften, von der Bestimmung des Menschen, von der Tugend, der allgemeinen Menschenliebe und allen übrigen menschlichen und bürgerlichen Pflichten, von Strafe und Belohnung, von der Unsterblichkeit der Seele u. s. w. vorkommen, sind nicht nur unserer heiligen Religion vollkommen gemäß, und in Übereinstimmung mit den Lehren der heiligen Schrift, des Talmuds und aller großen Lehrer unserer Nation in den alten und neueren Zeiten, sondern dieselben werden durch Ihre Erläuterung in das hellste und schönste Licht gestellt.

Da der Vortrag dieser Tugendlehren so sanft und eindringlich ist; so hoffe ich zu dem heiligen Gott, der alles mit Wahrheit besiegelt hat, daß diese von Ihnen so deutlich gemachte Wahrheiten viel Gutes auf das Gemüth der lieben Jugend und der Erwachsenen wirken werden. Ich muntere Sie daher auf, dieses Werk, sobald als möglich, zum Drucke zu befördern, damit das Gute bald ausgefäet werde, und segensreiche Früchte bringe.

**Marcus Benedikt**  
Local- und Land-Rabbiner.

Nikolsburg am 12. Jänner 1810.

Fig. 2



Fig. 3

## הפכה

צ"ה כה הראני החכם העלם המפורסר מו"ה הירץ הומבירג  
מגלת ספר, הנותן אמרי ספר, מוסד מוסד על העיקר וראש  
אונה, אבן הפנה והספר כולו מומחדיס וממתקיס, כולס דברי  
לדיקיס, כי לשונו תדבר ומשפט הכנר ומעסהו באמונה, ולבו  
נוהג לאחוז בחכמה ומוסר יחדיו ביראת אלקיס \* מלמד להועיל  
צמה יזכה כנר את ארחו לשמור את אשר יעשה האדם וחי בהם,  
ומדריך דרך יגייע בה אל האשר והללה \* סוף דבר הכל בחכמה  
עשה מלאה הארס קנינו בינה ענה וחוש \* ראו זו מתת אלקיס  
הוא, חלק לו צבינה \* יאית לתנוכו ולאשרו, להוציא כלי  
למעשהו \* — — — — — וליהטומעים יונעס  
ויחזו כנועס ה' \* ולמען לא תהי' האמת כעדרת התמתי פה ק"ק  
כ"ס יוס' ד' ג' מרחשון תקס"ח לפ"ק \*

נאום ה"ק מרדכי כנעט חונה פה ק"ק ביקלעבורג  
והמדינה יג"ט \*

Fig. 4



Fig. 5



Fig. 6



Fig. 7

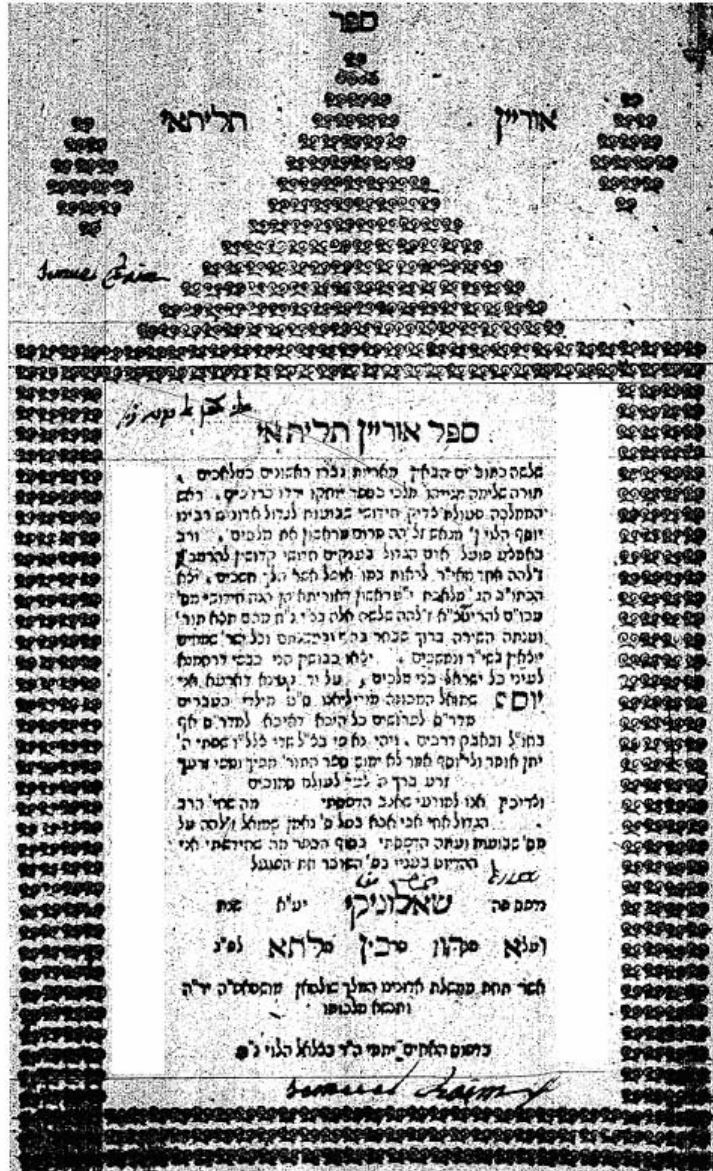


Fig 8