a Summary of

HILCHOS SHUTFIM

Written by

R' YITZHAK GROSSMAN

For more information contact:
Business Halacha Institute: 877.845.8455
ask@businesshalacha.com

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Partnerships in Halacha

Rabbi Yitzhak Grossman
Business Halacha Institute

For more information contact:
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ask@businesshalacha.com

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Table of Contents

Partnerships in Halacha 2
Introduction....................7
Note On Citations....................8
Creating Partnerships....................9
Kinyan....................9
Custom....................12
Secular Law....................14
Corporations and Separate Legal Entities....................14
Secular Law....................16
Automatic Partnerships....................18
Legal Rationalizations....................19
Examples and Applications....................20
Profits and Losses....................23
Profits....................23
Windfalls....................23
Losses....................24

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Profits and Losses Generated Via Criminal Or Prohibited Activity . 26

Debts Contracted On Behalf Of the Partnership 27

Torts Committed By Partners 27

Operations 29

Authority and Agency 29

Unstipulated Contributions 30

Capital Equipment and Real Property 30

Services 31

The Presumption Of Dedication 32

Decision Making and Voting 33

Fiduciary Duties 35

Duty Of Care and the Business Judgment Rule 35

Moonlighting 36

Profits From Prohibited Moonlighting 37

Paying For Divine Protection 38

Avoiding Oaths 39

Conflicts of Interest 40

Selling To Oneself 40

Self-Dealing 41

Mutual Liability 43

Bailee Liability 43

Losses Subsequent To A Partner's Deviation From Appropriate Conduct 44

Losses Not Consequent To the Deviation 44

Shemirah Be'Be'alim 45

Mazik Be'Yadayim 45

Na'aseh Alav Malveh 47

Bitul Kis and Grama 48

Bitul Kis 49

Grama 51

Hezek She'Eino Nikar and Harei Shelcha Le'Fanecha 53

The Partners' Oath 53

Dissolution 57

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Partnership Duration........57
Death Of A Partner........57
Early Withdrawal........58
Kinyan........59
Division of Assets........60
Divisible Assets........60
The Casting Of Lots........60
Midas Sedom........62
Indivisible Assets........63

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Introduction

To a large extent, the *halachah* of *shutfus* is built upon three other more basic areas of *halachah*: the laws of employees (*po'alim*), bailees (*shomrim*) and agents (*sheluhin*). *Sheluhin*, in particular, is deeply intertwined with *shutafin* (one section of Rambam's *Yad Ha'Hazakah*, titled *Hilchos Sheluchin Ve'Shutafin*, comprises the laws governing both arrangements[1]), and the difference between them is often blurry; for example, a commercial agent who receives a percentage of the profits of his endeavors can be considered either an agent or partner.

But in spite of the voluminous literature on the topic, the problematic nature of the organization of its foundations renders the entire edifice difficult to properly comprehend. Accordingly, the purpose of this study is not to develop novel theory, but merely to attempt to recast the sprawling layers and strands of this literature into a somewhat more digestible form.

A related goal is to compare and contrast the traditional *halachah* of partnerships with its secular counterpart. This may be useful in and of itself, to provide guidance to those familiar with secular law on significant divergences between it and *halachah*, but more importantly, such comparisons and contrasts can be useful as a framework for elucidating this unusually turbid area of halachah. Such references to secular law will be generally limited to American law, which in the area of partnerships is rooted in the Anglo-American common law tradition and supplemented by state laws[2], many of which are codifications of the Uniform Partnership Acts (UPA) of 1914 and 1997.[3] [By default, all references in this work to "secular" or "modern" law are to the aforementioned, unless otherwise specified.]

The goal of this work is not to provide a complete, comprehensive study of the laws of *shutafus*; entire full length volumes can, and have been,[4] written on the topic; our rather more modest objective is merely to provide an overview of most of its basic themes and main principles. Among the criteria for deciding what to include are:

- Practical significance (although the primary focus is on the classic rules, and consideration of modern situations and conventions is secondary – with the chapter on the corporate form being one notable exception).

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[1] *Mahaneh Efraim* has one section titled "*Sheluhin Ve'Shutafin*" and one titled "*Shutafus*".

[2] "Federal law plays a minimal role in partnership law", with certain limited exceptions – see here.

[3] See here and here, and see here for the text of the final (1997) Act itself, as well as related resources.

[4] The *Shutafin U'Mazranus* volume of R. Yaakov Yeshayah Blau's magisterial *Pis'hei Hoshen* - indubitably the greatest twentieth century systematization of *hoshen mishpat* – runs to three hundred seventy four pages.

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- Conceptual significance.
- Interconnectedness with the broader realm of *choshen mishpat*.

Again, it must be emphasized that this is not a practical manual on partnerships; much, perhaps most, of the discussion concerns the default rules governing partnerships, and as we shall frequently note, real-world partnership agreements can – and often do – stipulate alternative arrangements.[5] Furthermore, arriving at the actual *halachah* regarding any partnership situation requires knowledge of prevailing customs; as R. Shmuel di Medina (Maharashdam) asserts, "the matter of partners is extremely dependent on the custom of the merchants", to the extent that "were we to know the custom, there is no doubt that we would not need to establish the precise *halachah* ("*lei'reid le'omek ha'din*"), for in these matters, the custom is the main concern …"[6]. But while we will frequently refer to specific customs as well as note rules that involve the power of custom, our primary goal is the elucidation of the native, default *halachah*. As the Maharashdam continues: "everything is dependent on the customary practice of the merchants, but if the custom is not known, we need to know what the law provides").[7]

As noted above, the *halachah* of partnership builds upon many other more fundamental areas of *halachah*. Full introductions to and discussions of these topics are beyond the scope of this work, but a proper understanding of our material ineluctably requires at least some familiarity with them. Where technical halachic language and terms of art appear, they will be accompanied by brief English explanations of their basic meaning, with fuller background detail relegated to the notes, although even there, formal citations of and references to the halachic literature will be omitted entirely or kept to a minimum.

Note On Citations

References to the *Tur*, *Shulchan Aruch* and their commentaries and supercommentaries, as well as to other works divided according to the quadripartite organization of these works, are to *choshen mishpat*, and in the former group to *siman* 176 (the primary *siman* of *hilchos shutafin*), unless otherwise specified. References to Rambam, Ra'avad, *Hagahos Maimoniyos* and their commentaries are to *Hilchos Sheluhin Ve'Shutafin*, unless otherwise specified.

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[5] See Emanuel Quint, *A Restatement Of Rabbinic Civil Law*, Volume VI pp. 7-8. I am indebted to my father for bringing this work to my attention and for providing me with a copy thereof.

[6] Shut. Maharashdam siman 168 s.v. Teshuvah.

[7] *Maharashdam ibid*.

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Creating Partnerships

Kinyan

In *halachah*, a contract must generally be ratified by a formal act effectuating its terms (*kinyan*) to be binding;[8] there is a major dispute among the *poskim* over the extension of this rule to partnership agreements.[9] The Rambam rules that partnership agreements are no different in this regard from any other contractual agreement, and require an appropriate *kinyan*: "The general rule [is]: by all the ways that a purchaser acquires [his purchase], by those ways themselves do the partners acquire from each other the money that is pooled between them to partner therein."[10] The *Nesivos Ha'Mishpat* maintains that even according to this view, property purchased within the framework of a partnership agreement is nevertheless considered partnership property even in the absence of a *kinyan*, and any profit or loss therefore shared among the partners, as despite the absence of a binding agreement, the fact remains that the partners were intending to act as each other's agents in their partnership transactions;[11] R. Haim Halberstam (the Sanzer Rav) disagrees.[12]

A consequence of the requirement of *kinyan* is that partnership is only possible where tangible assets are being pooled, but professionals (such as tailors or weavers) who agree to split their incomes cannot be considered partners, as their anticipated revenues are not yet present

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[8] In *halachah*, *kinyan* is the essential ingredient and sin qua non of most types of binding obligations and transfers of property via sale or gift, irrespective of any consideration received. For example, A may agree to purchase a car from B, and even sign a contract with him to this effect and pay him the full agreed upon price in cash, but he will still not acquire title to the car until taking delivery of it and transferring it to his personal domain, which actually qualifies as several forms of *kinyan* with regard to personal property, as neither payment of the purchase price nor the signing of a contract qualifies as a *kinyan* with regard to personal property, although they do with regard to real property. Similarly, an employer and employee can enter into an employment agreement, but this will not be enforceable without a *kinyan* (although the commencement of the job may constitute a *kinyan*). The rules of *kinyanim* are complex and multifarious, with *halachah* defining a number of different classes of property, including personal property, real property, money and debts owed and requiring different, albeit partially overlapping, sets of *kinyanim* for them.

One of the most common and versatile *kinyanim*, applicable to both personal and real property and frequently executed in formal contexts, is *halipin* or *kinyan sudar*: the purchaser (or an agent or witness acting on his behalf) gives an item of his to the seller, in exchange of which the seller's item is transferred to the purchaser.

The *halachos* of *kinyan* are comprehensively discussed in the *Shulhan Aruch simanim* 189-204 (which should give an impression of just how complex this body of *halachah* is). Cf. Quint p. 4 n. 1.

[9] Cf. Quint pp. 3-7.

[10] 4:1. See there for the details of what constitutes an appropriate *kinyan* in this context.

[11] *Nesivos Ha'Mishpat biurim s.k.* 1 and *hidushim s.k.* 1.

[12] Shut. Divrei Haim helek 1 siman 26. Cf. Erech Shai beginning of siman 176; Avnei Ha'Hoshen beginning of siman 176.

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and are therefore considered "something that has not yet arrived in the world" (*davar she'lo ba le'olam*),[13] and not subject to *kinyan*.[14] According to this view, even income that has already been generated by such partnerships is not subject to the agreement (as it was *davar she'lo ba le'olam* at the time of the initial agreement) and may be kept by the partner that generated it.[15]

The Ra'avad, Rashba and other *rishonim* disagree, and allow partnerships even with regard to future revenues, explaining that the *kinyan* is not directly on the not yet present revenues, but, by analogy to slaves and employees, on the persons of the partners themselves.[16] While one cannot directly buy the crops that a field will yield in the future, by buying the field, the purchaser thereby gains the right to its future crops; similarly, while one cannot directly buy an individual's future income, by making a *kinyan* in the individual, the "buyer" is now considered to "own" him for the limited purpose of entitlement to his future income (for the duration, and according to the terms, specified in their agreement). R. Yosef Karo actually seems to find this analogy so persuasive that he suggests that even Rambam accepts the theoretical possibility of such an arrangement, if explicitly stipulated, and his position is merely that we do not normally so interpret a revenue sharing arrangement.[17]

Additionally, some *poskim* approach the matter from a slightly different perspective and point out that even though one cannot sell or give away (*makneh*) a *davar she'lo ba le'olam*, one can obligate himself (*me'hayev azmo*) concerning it. E.g., while one cannot now effectuate a binding transfer of the fruit that his tree will yield in the future, he can create a binding obligation upon himself to execute such a transfer in the future when the fruit has been produced, so that while the buyer has not yet obtained actual title to the fruit, he does have an enforceable commitment by the seller to eventually transfer such title to him. The Rambam therefore may agree that a partnership can be established with regard to *davar she'lo ba le'olam* provided it is structured as a

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[13] *Halachah* does not generally allow the transfer of property that does not yet exist (e.g., next year's crop yield – see *Shulhan Aruch siman* 209) or that is not yet in the possession of the person attempting to transfer it (e.g., an estate to which the transferer is heir – see *siman* 211). The former category is termed *davar she'lo ba le'olam* and the latter *davar she'eino be're'shuso*, although they are sometime both loosely subsumed under the rubric of *lo ba le'olam*.

[14] 4:2. Rambam concedes that *shutafus* is possible if the artisans invest capital, such as tailors or weavers who purchase textiles or other raw material out of their own capital, improve them and sell them for profit, even though the revenue they realize is surely due at least in part to the value added by their work and skill.

[15] *Shach s.k.* 5; *Nesivos Ha'Mishpat hidushim s.k.* 8.

[16] *Hasagos Ha'Ra'avad ibid.*; *Shut. Ha'Rashba* 2:87; *Hagahos Maimoniyos ibid. os* 1; Cf. Sefer *Ha'Itur helek 1 os shin shituf*; *Shut. Ha'Rashba* 2:72.

[17] *Kesef Mishneh* 4:1. Whether this is actually Maran's definitive view is not entirely clear; *Kezos Ha'Hoshen siman* 333 s.k. 5 assumes it is, but see *Lehem Mishneh ibid*. Other *poskim* who discuss the question of whether Rambam accepts the theoretical idea of Ra'avad include *Shut*. *Penei Moshe helek* 3 p. 18a column 1 (R. Shmuel Tilmisin (sp?)) and pp. 18b-19a (the author, R. Moshe Benveniste), and see also the sources cited in the following note.

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his'hayevus,[18] which as a practical matter yields the desired result, of a binding commitment by the partners to share their future revenue.

R. Meir Arik suggests, however, that the Ra'avad's conceptualization of partnership as mutual *kinyanim* of each partner on each other's person is only applicable to professionals who wish to pool their incomes, but not to businessmen who plan to jointly purchase merchandise, as this is ineluctably *davar she'lo ba le'olam*.[19]

A corollary of this rationale for allowing such a partnership, which is indeed articulated by some *poskim*, is that any partner can withdraw from it at any time, due to the Torah's fundamental anti-slavery principle (*ki li benei Yisrael avadim* - "for unto me the children of Israel are servants" - and not servants unto servants)[20] that allows an employee to renege on a commitment of service. [This withdrawal only affects subsequently earned income, but not income that has already been earned, for any income earned by a partner while his "employment" was in force has already become the property of his "employer".[21] This idea of treating partners as mutual employees and thus allowing them to invoke the anti-slavery rights of employees is discussed further below, in the section "Early Withdrawal".]

A third view maintains that a partnership can be established by mere verbal agreement, and no *kinyan* is required: since the commitments of the partners are mutual, each partner arrives at an unequivocal conviction to commit himself (*gomer da'as*)[22] in exchange for the corresponding commitment of the other.[23] This seems to support an idea that emerges from numerous laws in *choshen mishpat*, that the external, physical ritual of *kinyan* is not of primary importance in and of itself, but merely as an indicator of an internal, mental state of *gemirus da'as*, and where that state exists and can be established without a classic *kinyan*, the absence of *kinyan* is unimportant. As R. Shimon Shkop puts it:

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[18] *Shut. Mahari ibn Lev* 2:37 (pg. 18a column 2) and 2:38 (p. 19a column 1), but see also 2:23 (p. 13b column 1) in which he seems uncertain about this; Shut. Maharash Ha'Levi siman 7 s.v. Ve'la'hakirah she'amarnu and siman 8 s.v. Ve'heneh be'din zeh; Cf. Keneses Ha'Gedolah hagahos Tur os 16.

[19] Minhas Pitim 176:3 s.v. Ve'yesh omrim.

[20] *Bava Mezia* 10a and elsewhere.

[21] *Rashba* 2:87.

[22] *"Gomer da'as"*, *"gemirus da'as"*, *gomer be'libo*: these are *halachic* terms of art quite difficult to translate; roughly, they denote a firm, unequivocal frame of mind or decision, the *sin qua non* for *kinyan* and other types of action recognized by *halachah* as formally binding.

[23] *Mordechai Bava Kama perek Ha'Gozel Basra remez* 176; *Hagahos Maimoniyos gezeilah perek* 12 *os* 10 (based on *Shut. Maharam* (*defus* Prague) end of *siman* 941 and *siman* 968, and cf. *siman* 325) and cf. *mechirah perek* 14 *os* 6). Cf. *Beis Yosef os* 4.

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> The idea of *kinyan* is the *gemirus da'as* of the buyer and the seller, just that [Hazal] established that the evidence of this be via an action …[24]

And the *Hazon Ish*, even more emphatically and articulately:

> You should [understand] a great principle of *kinyanim*, that the essence of the *kinyan* is that he should be gomer *be'libo* to transfer the item to his fellow, and his fellow should rely on him, and there are some things that *Hazal* were sure that with mere words he is gomer *be'libo* to transfer to his fellow, and some that he is only gomer be'libo via the kinyanim that are explicit from the Torah or from *Hazal*, and consider this well and analyze it thoroughly, for everything is in it (*ve'hafoch bah de'kulah bah*)….[25]

Some *poskim* indicate that this opinion allows even a partnership based on the pooling of personal property to be established via mere verbal declaration.[26]

This idea of mutual obligation, in addition to dispensing with the need for *kinyan*, also obviates the problem of *davar she'lo ba le'olam*. Indeed, R. Yosef (Mahari) ibn Lev points out that this solution to the problem of *lo ba le'olam* is actually much more powerful than the argument from the analogy to slaves and employees, for that argument only applies to profit the partners generate through their own endeavors, but not to gifts they receive independent of any effort of their own, while the argument from mutual obligation allows them to pool even such gifts (where they so stipulate).[27]

Custom

Several *aharonim* assert that even where the normal requirement of *kinyan* has not been met, where there is a prevailing custom (*minhag ha'medinah* [the custom of the land] or *minhag ha'soharim* [the custom of the merchants]) to establish partnerships via mere verbal agreement, such an agreement will be binding, "for custom is of great significance in *dinei mamonos*"[28] and

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[24]*Ma'areches Ha'Kinyanim siman* 11 s.v. U'le'fi devareinu.

[25] *Hazon Ish end of hoshen mishpat s.v. Kelal gadol.*

[26]*Shach s.k.* 6. *Nesivos Ha'Mishpat biurim s.k.* 3 finds this problematic, but may nevertheless accept the holding as normative *halachah*.

[27]Shut. Mahari ibn Lev 2:38 (p. 19a column 1).

[28]*Shut. Radvaz* 1:380 at the end of the responsum.

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“we do not deviate from the custom of the merchants, even if it is against Torah law, and their custom is Torah”.[29]

R. Meir Arik, however, is unconvinced, arguing that the power of custom is merely that the customary arrangement is considered to have been expressly stipulated, but where even an express stipulation does not work (as in our situation, where simple stipulation would not normally suffice to establish a partnership, as mere words do not constitute a *kinyan*), custom cannot be any more effective.[30]

[R. Meir Arik assumes that custom cannot create a *kinyan* out of a mere verbal declaration; several years later, this was the subject of a great dispute between R. Shimon Greenfield (Maharshag) and R. Yissachar Shlomo Teichtal.[31] The Maharshag holds like R. Meir Arik, while R. Teichtal argues vigorously for the view that the principle that convention can assign the status of *kinyan* to any arbitrary ritual (*situmta*) can elevate even a mere verbal declaration into a binding *kinyan*, insofar as the prevailing custom considers it as such.[32]

Even more fundamentally, R. Meir Arik's basic contention that custom cannot be more effective than an explicit verbal stipulation is also the subject of considerable controversy, with *poskim* disagreeing over the effectiveness of custom in various contexts where an ordinary

[29] *Shut. Hasam Sofer siman* 96 s.v. *Amnam kol zeh* (cited in *Pis'hei Teshuvah s.k.* 3. *Aruch Ha'Shulhan* 176:8, too, endorses a similar “established custom” (“*minhag kavua*”) between merchants, although a careful reading of his ruling indicates that he is not invoking the power of custom to create a binding partnership out of whole cloth, but merely in support of his argument that the partnership agreements in question are actually binding under the classic *halachic* rules discussed above. Cf. *Shimru Mishpat* (Zafrani) 25:5:6-5:7, pp. 91-92.

[30] *Minhas Pitim* 176:3 s.v. *Sham ve'eino nikneh*.

[31] The debate between R. Teichtal and the Maharshag (which occurred some years earlier) can be found in *Shut. Maharshag helek* 1 *yoreh de'ah simanim* 87-88, also printed in *helek orah haim helek* 3 *simanim* 113-114.

[32] Cf. *Shut. Ha'Rosh* 12:3; *Shut. Radvaz* 1:278; *Kesef Ha'Kadashim siman* 201. R. Meir Arik himself later acknowledged debate about the application of *situmta* to verbal declarations in *Shiarei Minhah* 201:1.

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stipulation would be ineffective, such as *davar she'lo ba le'olam*,[33] conditional / penalty obligations (asmachta)[34][35] and transactions at unfair prices (ona'ah).[36][37]]

Secular Law

Some contemporary authors have argued that the necessity for *kinyan* is obviated by the secular law framework that does not require it, under the principle that in civil law contexts, *halachah* incorporates relevant secular law.[38]

Corporations and Separate Legal Entities

Modern law allows for the more or less free registration of corporations: separate legal entities with rights and liabilities distinct from their shareholders and members. The history of *halachic* literature dealing with this type of entity parallels its rise in popularity from the mid nineteenth century onward, but this literature is unfortunately fragmented and inconclusive. Strenuous efforts to find Talmudic and other classic precedents and models for the corporate form[39] are ultimately not dispositive, and *poskim* have arrived at dramatically divergent *halachic* perspectives toward such entities. Moreover, the discussion is distributed across a variety of

[33] See *Shut. Ha'Rosh ibid.* and 13:20 toward the end of the responsum *"u'mah she'ta'anu ha'murshin le'vatel ha'hakirus mishum de'havei davar she'lo ba le'olam ..."*; *Hagahos Mordechai Shabbas perek R. Eliezer De'Milah remazim* 472-73; *Radvaz ibid.*; *Yam Shel Shlomo Bava Kama perek 8 end of siman* 60; *Kezos Ha'Hoshen siman* 201; *Nesivos Ha'Mishpat siman* 201; *Shut. Hasam Sofer siman 66 end of os 2 s.v. Um"sh ma'alaso; Pis'hei Teshuvah siman 201 s.k. 2; Erech Shai beginning of siman 201; Mishpat Shalom 201:2 end of s.v. Sham o al yedei (and Shut. Maharsham 5:37 s.v. Ve'hen emes); Shut. Sho'eil U'Meishiv kama helek 2 siman 39; Shut. Maharam Shik siman 41; Shut. Tiferes Yosef (Meisels) hoshen mishpat siman 20; Divrei Geonim 24:15-16; Sedei Hemed helek 4 kelalim ma'areches ha'Mem kelal 38 p. 98 s.v. U've'sefer Masa Haim.*

[34] *Halachah* considers many types of penalty clauses and even conditional obligations in general as non-binding, due to a presumption of insufficient *gemirus da'as*. [Secular law, too, will often consider arbitrary penalty clauses invalid as being against public policy, although since the underlying rationales for the unenforceability are quite different, so, too, are the specific rules and details.]

[35] *Shut. Hasam Sofer ibid.*; *Tiferes Yosef ibid.*

[36] A seller who sells an item above the prevailing market price, or a buyer who buys it below it, may violate the Biblical prohibition of *ona'ah*, and the transaction may be subject to reversal or the injured party may have the right to demand its adjustment.

[37] *Shut. Teshuras Shai* 1:456 *from s.v. Ve'efshar afilu* and *Shut. Beis Shlomo siman* 87 argue that *minhag* should not overcome the problem of *ona'ah; Hochmas Shlomo* 209:2 and *Pis'hei Teshuvah siman* 232 *s.k.* 6 maintain that it does. Cf. *Shut. Shem Aryeh orah haim siman* 13, whose position seems in line with the former view.

[38] Quint, pp. 6-7 and nn. 7-8.

[39] These include: *tefisas ha'bayis* (an inherited estate prior to division between the heirs), which the Talmud (*Bechoros* 56b) distinguishes from ordinary partnership, considering it more of a unity (*Pis'kei Din shel Batei Ha'Din Ha'Rabbaniim Be'Yisrael*, Volume 10 p. 287) and the notion of *zibbur* (distinguished at length from ordinary *shutafus* in *Darchei Moshe*

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different areas of halachah, such as Sabbath observance,[40] the prohibition against usury,[41] ownership of *hamez* on Passover[42] and, of course, numerous *choshen mishpat* contexts (e.g., personal liability for debt), and we have little programmatic, comprehensive treatment of the topic.[43] Furthermore, much of the *halachic* analysis avoids the fundamental question of the *halachic* recognition of separate legal entities and resolves the various relevant practical questions on narrower and more technical grounds. For example, the Maharshag suggests that when a bank with Jewish shareholders borrows money from Jews with interest, this may not violate the Biblical - and perhaps not even the Rabbinic - prohibition against usury, not necessarily because the bank corporation is recognized as a legal entity separate from its shareholders, but simply because of its limited liability structure, i.e., since the liability of the shareholders is limited to the invested funds (which can be arranged via a simple contractual mechanism, without recourse to the idea of a separate legal entity), and they have no personal liability.[44]

– *Derech Ha'Kodesh (Amiel) helek 1 shma'atsa* 5 chapters 10-11, pp. 139-41; *Piskei Din ibid*.; *Shut. Helkas Ya'akov yoreh de'ah* 66 [3:191 in the earlier edition].

[40] *Shut. Igros Moshe orah haim* 1:90 at the end of the responsum s.v. *Ve'shutafus ha'nikra corporation*; *even ha'ezer* 1:7 at the end of the responsum s.v. *U'vedevar liknos shares mi'companies she'osin melachah u'mis'har be'shabbas*; *hoshen mishpat* 2 end of *siman* 15.

[41] *Shut. Minhas Shlomo kama siman* 28. See *Bris Yehudah* 7:25 and 30:16; Halachah and Contemporary Society (*Alfred S. Cohen, ed.) pp*. 183-85 for surveys of the literature on the topic of ribis and banks.

[42] *Mo'adim U'Zemanim Ha'Shaleim* 3:269:1 and n. 1, pp. 160-63.

[43] References to some of the sprawling literature (in addition to the citations in the previous and following notes) include: *Shut. Maharya Ha'Levi* 2:124; *Shut. Zafnas Pa'ane'ah siman* 184 p. 104; *Shut. Melamed Le'Hoil* 1:91; *Shut. Maharam Shik yoreh de'ah siman* 158 *s.v. Ve'samti el libi; Shut. Maharshag yoreh de'ah siman* 3; *Yad Shaul* (Weingort) pp. 35-49; *Resp. Minhas Yitzhak* 3:1; *Mishmeres Haim (Regensberg) siman* 36; *Shut. Pe'as Sadecha siman* 91; Dr. David Han, *Be'Din Shemitas Kesafim U'Pruzbul (Parshas Re'eh*, [5]766, issue #261). Cf. R. Tzvi Shpitz, *Mishpetei Ha'Torah helek* 2, *Hovos Esek Be'Eravon Mugbal*, *pp.* 205-06 (an English translation of this or a very similar piece of R. Shpitz is available as Corporate Debt In *Halacha*).

[44] *Maharshag ibid*. end of the responsum *s.v. U'lechorah; siman* 5 *s.v. Amnam ha'heter le'inyan shelo tihiyeh ribis de'oraisa* and *Noam (sefer sheni* 5719) pp. 33-37; and see R. Yitzhak Wasserman, *Ribis Be'Halva'ah Banka'is, Noam (sefer shlishi 5720) pp.* 195-203; *Minhas Yitzhak ibid. os* 2. *Shut. Igros Moshe yoreh de'ah* 2 end of *siman* 62 s.v. *Ve'henei im ha'loveh hu* corporation, too, takes for granted that the prohibition against usury does not apply to a corporate borrower whose shareholders have no personal liability. It is possible that he merely means the limited argument of the Maharshag, although his language does imply that he actually considers the corporation a separate legal entity: "with a corporation, where [the shareholders] have no liability, it follows that there is no borrower at all; the borrower is but the business, to whom obligations [i.e., halachic commandments] do not apply". Igros Moshe goes on to qualify that this dispensation is limited to corporate debtors, but the usury prohibition does indeed apply in the context of an individual debtor and a corporate creditor. It is unclear whether this is consistent with the conception of a corporation as a separate legal entity. Elsewhere, in Igros Moshe orah haim end of 1:90 he apparently considers corporations to be equivalent to ordinary partnerships with regard to the laws of shabbas, and in Igros Moshe hoshen mishpat 2 end of siman 15 he categorically insists, again with regard to the laws of shabbas, that "it is impossible to say that a company with limited liability (corporation) is an independent entity ("hativa bifnei azmah") … for this rationale is nothing ("eino klum").

Some *aharonim* unequivocally reject the notion of a corporation as a separate legal entity. R. Shmuel Ha'Levi Wosner insists that such a conception "is not the view of the Torah", which considers those who stand to profit and lose from the assets they have invested, and who have the right to dispose of the corporate assets as they see fit, as the owners according to the Torah;[45] R. Yitzhak Wasserman similarly declares that "It is certain that there is no possibility to innovate types of ownership that we do not find in *shas*";[46] and R. Moshe Shternbuch also insists that "We, the nation of Yisrael, have no such concept whatsoever in civil law (*dinei mamonos*), and it is also impossible for us to create it, for the statutes of civil law for us limit the right of ownership of property exclusively to a living person, and a dead [person], even via statutory creation has no ownership of property whatsoever, and we only have the possibility of partnerships with particular conditions but not companies with limited liability ...".[47]

Some *aharonim* distinguish between the holders of voting and non-voting shares,[48] or between shareholders who can (and intend to) significantly influence company policy and those who cannot,[49] or between "national" corporations, where no individuals have ownership rights over the corporate assets, and private corporations, whose assets are presumed to ultimately belong to the underlying individual owners.[50]

Secular Law

A commonly suggested *halachic* basis for the corporate form of ownership is the principle that "the law of the government [lit. kingdom] is the law" (*dina de'malchusa dina*), that *halachah* recognizes the temporal law as valid. Since modern secular law recognizes separate legal entities, perhaps *halachah* should, too, even if it has no such native notion.

Several objections have been raised to this argument:

- R. Menashe Klein makes the startling suggestion that the principle of *dina de'malchusa dina* may not apply to modern democratic governments, due to the prevalence of judicial law-making, and particularly due to the vagaries of the jury system - "they take some drunks from the marketplace, men who have never studied law, and they are corrupt in their na-

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[45] *Shut. Shevet Ha'Levi* 5:172 s.v. *Ve'gam pashut be'einai. Cf. Shut. Mishneh Halachos* 6:277 s.v. *Va'asher nireh bechol zeh.*

[46] *Noam sefer shlishi* p. 195. Cf. *Piskei Din ibid.* p. 288.

[47] *Mo'adim U'Zemanim ibid.* s.v. *Ve'achshav nisbonein na ve'nireh.*

[48] *Pe'as Sadecha ibid.*

[49] *Igros Moshe even ha'ezer* 1:7.

[50] *Shut. Har Zvi yoreh de'ah siman* 126.

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tures, and they determine the law by majority rule, and it is dependent on their opinion" - and judicial review - "and even the government many times rules a certain law, and the Supreme Court overturns it".[51] But while there is indeed strong theoretical basis for R. Klein's basic point, which is developed at length in the relatively modern context of nineteenth century European-Russia by R. Yekusiel Asher Zalman (Mahariaz) Enzil, who insists that the clear consensus of the *poskim* is that: "*dina de'malchusa dina* is only applicable with regard to laws and legislation decreed by the king, explicit and clear, without any doubt or [room for] opinion … but in matters that depend on the opinions of the judges that are appointed to the courts, who follow the laws that have been arranged for them by their earlier scholars in their books, as they have some from the Greeks and some from the Romans, and some that they have innovated for themselves according to the situation of the states, and they judge according to them by their own opinions, **no Jew who has [even] some brains in his skull ever entertained the idea** to say about them *dina de'malchusa dina*"[52], it is unclear why this should have any relevance to the basic issue of *halachic* recognition of the corporate form, as its basic existence is a matter of statute, not common law r judicial lawmaking.[53] In any event, the overwhelming consensus of contemporary *poskim* does in general apply the principle of *dina de'malchusa dina* to modern democracies.[54]

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[51] *Mishneh Halachos ibid.* s.v. *Ve'gam dina de'malchusa*.

[52] *Shut. Mahariaz Enzil siman 4 s.v. Amnam al zos yishtomeim kol ish ve'yispalei.*

[53] Furthermore, a major component of R. Enzil's argument is that judicial verdicts have no precedential value: "And as proof of this, all their judicial verdicts that are called *sentences*, even to them they are not considered *dina de'malchusa dina*, and one cannot bring proof from one of their judicial verdicts to a similar [situation], and even if they have sent it from the highest place of justice, as is known from the rules of their laws. And further, every day we see instances of judicial verdicts of their judges voided by those above them, and sometimes the verdicts vary in two places of justice regarding two cases, identical in all their general and specific characteristics, and no one recalls them, and many times we have seen one case come before a judge and he finds him liable, and all his fellow advisers agree with him, and when another case, entirely similar to this one in all aspects, comes before a different judge in the same place of justice, he finds him not liable, and no one flaps his wings ["*ve'ein noded kenaf*"], and both are settled. How, then, shall we say that any verdict decreed by any magistrate or any municipal or village justice shall be considered *dina de'malchusa dina*? If so, all the laws of our Holy Torah are void and "our enemies are judges" ("*ve'oyveinu pelilim*")! This should be forgotten and not said ("*yishtaka ha'davar ve'lo yei'amar*") …". It is possible, therefore, that R. Enzil might concede *dina de'malchusa dina* status to authoritative precedents, such as those of the Supreme Court of the United States.

[54] R. Yosef Eliyahu Henkin, *Teshuvos Ivra*, in *Kisvei HaGRYE"H helek* 2 *pp*. 175-76; R. Elazar Meir Preil, *Sefer Ha'Maor siman* 25 *p*. 99; R. Ovadia Yosef, *Shut. Yehave Da'as* 5:64; R. Ezra Bazri, *Dinei Mamonos helek* 4 *sha'ar* 1 *perek* 9 n. 10 pp. 56-62; R. Yehudah Silman, Darkei Hoshen [Second edition: 5762] helek 1 p. 362; R. Yehoshua Pinhas Bombach, *Shut. Ohel Yehoshua* [Brooklyn 5738] *helek* 2 *siman* 11; R. Eliezer Yehudah Waldenberg, *Shut. Ziz Eliezer helek* 5 end of siman 30 and helek 10 siman 52 os 3; R. Yisrael Grossman, Shut. Nezah Yisrael siman 33 os 10. Beyond these sources who explicitly extend the principle to modern democracies, the overwhelming consensus of poskim in the modern era takes for granted that the principle is still in force, in spite of the democratic nature of modern governments. As R. Silman notes: "It is obvious that since for five generations, virtually everywhere has democracy and the aharonim

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- R. Moshe Shternbuch takes for granted that *dina de'malchusa dina* cannot legitimize the creation of a type of ownership structure that *halachah* does not recognize (as per his aforementioned analysis), as the principle does not apply in contradiction to Torah law.[55] But while this rule barring *dina de'malchusa dina* from contradicting Torah law is indeed insisted upon by a number of major *aharonim*,[56] with the *Hazon Ish* even insisting that this is the "opinion of all the *poskim*", it is equally true that other *aharonim* conclude that the *halachah* does **not** follow this view, and does indeed recognize secular law even where it directly contradicts Torah law.[57]

More generally, the basic question of the scope of the principle of *dina de'malchusa dina* and the extent to which it results in the supersession of native *halachah* by secular law, and the establishment of the latter as the controlling legal authority over financial relations between Jews, is the subject of tremendous dispute, from the medieval period down to the present. A proper consideration of this topic is unfortunately beyond the scope of this work.[58]

Automatic Partnerships

An important facet of the *halachah* of partnerships is the idea of the automatic partnership: there are situations where no contractual arrangement, explicit or even implicit, exists between the various parties, but where the *halachic* idea of partnership nevertheless applies, given the objective fact of some shared need or objective, which would be impossible or inefficient for each party to satisfy independently. As the *Nesivos Ha'Mishpat* explains: "Even with two who are not partners, as long as there is something which is necessary for both of them, and one does not wish to do it, the second can compel him".[59]

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have considered le'ma'aseh [the application of] dina de'malchusa dina, it is clear from their words that they do not so distinguish [between traditional monarchies and modern democracies]".

[55] *Mo'adim U'Zemanim ibid.*

[56] Shach *siman* 73 *s.k.* 39; *Hazon Ish likutim siman* 16 *os* 1; and cf. *Shut. Hasam Sofer siman* 44 *s.v. Od pligi and ne'ayel le'ha didan; Shut. Imrei Yosher* 2:152:2.

[57] *Shut. Maharam Brisk* 1:85 *p.* 84b and 1:108:2 and cf. *Shut. Mishnas R. Aharon helek 2 (even ha'ezer – hoshen mishpat) siman* 71:1:3 *s.v. U'mikol makom mistaver.*

[58] A selection of some of the most important modern (from the last two centuries) sources on this topic: *Shut. Hasam Sofer hoshen mishpat siman* 44 *s.v. ne'ayel; Erech Shai hoshen mishpat* 73:14; *Shut. Teshuras Shai kama siman* 456 *s.v. U'mah she'nistapek* and *tinyana end of siman* 54; *Shut. Maharsham* 1:125; *Shut. Hisorerus Teshuvah* 1:232; *Shut. Maharam Brisk* 1:85 *p.* 84b and 1:108:2; *Shut. Imrei Yosher* 2:152:2 (but see also 2:147 *s.v. Henei be'davar*); *Shut. Doveiv Meisharim* 1:76 *s.v. Gam; Teshuvos Ivra ibid.; Hazon Ish hoshen mishpat likutim* 16:1. For excellent surveys of the topic see *Dinei Mamonos* (Bazri) *helek* 4 *sha'ar* 1 chapter 9 and *Dina De'Malchusa Dina* (Shilo).

[59] *Nesivos Ha'Mishpat biurim* end of *siman* 178.

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Legal Rationalizations

One explanation of this form of involuntary partnership is based on the idea of an "objective" *gemiras da'as*; even if these particular individuals are not actually gomer *da'as*, insofar as they are found in a situation where most people would be gomer *da'as*, a partnership is automatically formed, even against their will.[60]

This rationale is problematic, however: throughout *choshen mishpat*, while we do often allow a presumptive, theoretical *da'as* to take the place of actual, conscious *da'as* via mechanisms such as *zachin le'adam she'lo be'fanav*[61] and *umdena de'muchah*[62] this is almost always simply in lieu of actual *da'as*, but not in the face of contrary *da'as*![63]

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[60] Prof. Shalom Albeck (*Dinei Ha'Mamonos Be'Talmud*, chapter 14 beginning of section 5 pp. 506-07) explains this form of involuntary, objective partnership thus:

"Sometimes the partnership is formed and remains against the will of the partners, just as sometimes conditions and agreements are formed and and remain in force between people against their wills, as though there were *gemiras da'as* for this, and they obligated themselves to this willingly, as has been explained earlier with regard to one who does a favor for his fellow without his knowledge.

In general, a partnership is made with the consent of those partnering and with their *gemiras da'as*, whether they partnered via sale or via gift. And even if they became partners via inheritance, the partnership remains by their will, for every one of the heirs can divide the mutually held assets any time he wills, and if they did not do so, it is a willing partnership. But this *gemiras da'as* for partnership, like every *gemiras da'as*, is objective, and we evaluate it according to what most people are accustomed to be gomer be'da'atam in such a partnership, and not what these partners were *gamru be'da'atam*. And even if these people were not *gamru be'da'atam* at all for partnership, but are found in a situation where most people would be *gomrim da'atam* for partnership, we evaluate their *da'as*, that they, too, were *gamru da'atam* and agreed to this, even if they knew nothing at all of each other, and they did not know that there would be partnership, just as we evaluate the *da'as* of the recipient of a favor from his fellow without his knowledge, that he agrees to give him compensation of the benefit, even though he did not know of the favor and did not recognize the doer of the favor and there was never any agreement or discussion between them.

And this objective partnership is sometimes against the will of the partners, for they are partners without their knowledge, if most people are *gomrim da'atam* to partner in such a situation."

I am indebted to my friend R. Melech Press for bringing this work to my attention and for lending me his copy of it.

[61] *Zachin le'adam she'lo be'fanav* is the rule that anyone may act on behalf of someone else, even without having consulted him and obtained his consent, to acquire some item of property or legal right for him, insofar as his action is deemed beneficial to the recipient.

[62] *Halachah* often allows a contract, commitment or gift to be clarified, supplemented, modified or even voided entirely through the principle of *umdena de'muchah*: we make assumptions about what the parties would desire, even though they have not explicitly expressed this. For example, if a man, believing himself childless, bequeaths his entire estate to a stranger, and then his son, believed dead, turns up, the legacy is void – *Shulhan Aruch siman* 246.

[63] The idea of *batlah da'ato eizel kol adam* is rarely found in *hoshen mishpat* contexts, and it is certainly uncommon in contexts of *gemiras da'as*. The *Nimukei Yosef's* (*Bava Mezia* beginning of p. 12b in *Rif* pagination) explanation that in a case of *zuto shel yam*, the property owner's insistence that he does not give up hope is *batlah da'ato* is in the context of *ye'ush*, which is a question of expectations rather than *gemiras da'as*. One of the few examples of the invocation of *batlah da'ato* in a context of *gemiras da'as* is the ruling of the *Sema siman* 227 *s.k.* 14 that since most people forgive *ona'ah* of less

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An alternate justification for automatic, involuntary partnership is a basic notion of fairness: insofar as multiple individuals need the same thing, it is only fair that they should all contribute toward its accomplishment, and it would be unfair for some to freeload and take advantage of others by refusing such contribution.

Examples and Applications

One such situation is a courtyard or city that requires expenditures on improvements such as walls or gates; the residents may compel each other to contribute toward these projects.[64] Another is a spring or sewer that requires maintenance to rehabilitate or maintain its viability for irrigation or sewage; in the former case, all gardens *downstream* of the blockage must contribute toward the maintenance, as they are the ones who require and benefit from said maintenance, while in the latter case, all courtyards *upstream* of the blockage must contribute, as here it is they who benefit.[65]

A remarkable extension of this principle is advanced by R. Malkiel Tannenbaum. The context is a dispute between two producers of "sweet, fragrant water", where the former had obtained an appropriate permit from the Warsaw health department - "which of course requires no small amount of effort and expenditure" - and the latter then proceeded to produce the same product and sell it using the same permit details. R. Tannenbaum argues (inter alia) that the principle of automatic partnership requires the latter to compensate the former for his efforts

than one sixth, we say *batlah da'ato* regarding a buyer who claims that he does not do so. *Mishpat Shalom* 227:3 *s.v. Sham she'kol pahus mi'shtus* argues that even though we do find instances of *batlah da'ato* in *hoshen mishpat* contexts (he cites the *Taz* at the beginning of *siman* 194 s.v. *a"sh be'haga"hah mihu sechirus* and his discussion thereof in *Mishpat Shalom* 194:1 *s.v. Sham ve'chein im hisneh*, and cf. his brief note in his *Ein Ha'Roim entry of batlah da'ato eizel kol adam, os* 2), this is only to a universally held position, but not to one merely held by most people (cf. *Beis Aharon (Magid) helek 11 ma'areches ha'beis entry of batlah da'ato eizel kol adam, siman* 5), and therefore concludes that the *Sema* must really mean that "the whole world" - not just most of it - forgives *ona'ah* of less than one sixth. Even this, however, is *ex post facto*, and the *Sema* and *Mishpat Shalom* are not necessarily claiming that such an assertion made *ab initio* would not work. Cf. *Beis Aharon ibid. simanim* 37-38.

Prof. Albeck's reiterated analogy to "one who does a favor for his fellow without his knowledge" actually cuts both ways, as many *poskim* rule that the right to compensation actually does not apply where the recipient protests and refuses the favor at the time of its performance: *Shut. Toras Emes siman* 224 at the end of the responsum *s.v. Ve'su de'afilu nidon* (cited in *Keneses Ha'Gedolah siman* 375 *hagahos Tur os* 2); *Aruch Ha'Shulhan* end of 375:12.

Albeck is *li'shitaso*, as he declares unequivocally, albeit without proof or source, that the objection of the recipient of the favor is completely immaterial (*ibid.* beginning of chapter 4 p. 179), and there are indeed some *poskim* who rule this way: see *Shut. Pri Tevuah* 1:58 (cited in *Pis'hei Teshuvah siman* 264 *os* 3); *Shut. Maharya Ha'Levi* 2:151; *Shut. Maharash Engel* 3:15; *Shut. Ziz Eliezer* 15:67:1 *s.v. Sheinis; Shut. Yad Eliyahu (Lublin) siman* 74 *s.v. U'gedolah mizu n"l, s.v. Ve'ein le'hakshos.*

[64] *Bava Basra* 7b, *Shulhan Aruch* 163:1.

[65] *Bava Mezia* 108a, *Shulhan Aruch* 170:1.

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and expenditures in obtaining the permit, since his production and sale of the product clearly demonstrates his joint need for the permit. R. Tannenbaum adds that even though at the time of the first producer's expenditures his competitor had not yet had any intention whatsoever of entering this line of business, this is no objection, i.e., the idea of automatic partnership applies even *retroactively*![66]

Another interesting application of the concept of automatic partnership arises in the context of the problem of providing a satisfactory theory legitimizing government. While traditional *halachic* literature offers various theoretical justifications of government (the principle of *dina de'malchusa dina*, the concept of king [*melech*]), these all have various restrictions and limitations. R. Shaul Yisraeli therefore proposed that in a modern democracy, where the holding of office is of limited duration and not hereditary, we view the office holders as mere agents of the partnership that is the body politic:

> The election today to institutions of leadership and government, does not come to grant to the electee a status of dominion (*serarah*), and it is only a type of **agency**. What is this like? A business partnership, where the partners elect from among themselves the one suitable to lead the business. So, too, sometimes the order is established, that the partners rotate among themselves leadership of the business. The agent in this situation is only the proxy of others; he has no right and dominion over them, and even though he has the authority to give directions and they are obligated to execute them, he draws but **from their authority**, and on behalf of their good and the good of the joint venture does he do this. And **every moment**, only by the power of their agreement does he act ...[67]

R. Ezra Bazri vehemently rejects this idea, arguing that it has bizarre implications and is entirely *ahalachic*:

"For example, the foundation of partnership is consent, and it is impossible for one to compel his fellow to be his partner. And if we shall so judge according to *halachah*, every citizen in the state who will say that he does not wish to be a partner in this affair will cease to be a partner, ... and how can we draft him into the army? This would be contrary to the *halachah*, and how can we compel him to pay taxes? All this would be contrary to *halachah*, ... someone who will say "I am not interested in your partnership" will not be obligated by law, and how will we punish the thieves and murderers etc.? Does a partner have the power to do so to his partner? If we travel this route and we say that this is how the *halachah* views the *Knesset* and the municipality,

[66] *Resp. Divrei Malkiel* 3:157.

[67] *Torah She'Be'al Peh* (16) 5734 p. 78. Cf. *Amud Ha'Yemini sha'ar Aleph end of siman* 12 *p*. 96.

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as a business partnership, there will be no existence according to the *halachah* to anything that the municipality or the *Knesset* does, and this is simply absurd."[68]

R. Yisraeli, however, seems to have had in mind the sort of automatic partnership that we are discussing here, where the halachah considers individuals who share joint needs as partners regardless of their desire to enter into partnership.

[68] *Dinei Mamonos* Volume 4 *pp*. 58-59.

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Profits and Losses

Profits

Halachah, as well as secular law, set forth the perhaps not entirely intuitive rule that by default, profits are shared equally between all partners, regardless of the relative magnitude of their respective equity contributions to the partnership. But while this is indeed the rule set forth by the *amora* Shmuel,[69] the Talmud then proceeds with some rather unclear qualifications of this rule, concerning which R. Yehoshua Falk Cohen assembles no fewer than five schools of interpretation![70] Unfortunately, a proper discussion of this is beyond the scope of this work;[71] in any event, while this is certainly important and interesting from a theoretical standpoint, it is of limited practical significance, as *halachah* (like the law) explicitly allows the partnership agreement to stipulate any alternative profit sharing arrangement, and this is generally done.[72]

Windfalls

There is considerable dispute among the *poskim* over whether an item serendipitously found (*meziah*) by a particular partner may be kept by him,[73] or becomes the property of the partnership.[74]

The *Urim Ve'Tumim* understands that there is no rule (even in the default case) that automatically assigns ownership of a *meziah* to the partnership, but merely an application of the Presumption of Dedication (see below): a partner who finds a *meziah* is presumed to have taken possession of it on behalf of the partners jointly, but if he explicitly intends to acquire it for himself exclusively, then it indeed becomes his alone.[75] The *Kezos Ha'Choshen*, however, rejects the plausibility of this distinction, arguing that insofar as the default assumption behind the partnership is that the *mezios* will become partnership property, this then becomes the irrevocable arrangement, at least according to the opinions cited above that recognize the ability of part-

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[69] *Kesubos* 93a-b.

[70] *Drishah os* 8; *Prishah os* 8; *Sema s.k.* 15.

[71] For thorough discussion of the various approaches to this *sugya*, see, in addition to the sources in the previous note: *Beis Yosef os* 8; *Shach s.k.* 10-11; *Nesivos Ha'Mishpat biurim s.k.* 8-10; *Pis'hei Teshuvah s.k.* 5-7; *Aruch Ha-Shulhan se-ifim* 10-15;

[72] *Shulhan Aruch* 176:5. Cf. *R. Meir Ha-Levi Abulafia* (Remah – cited in *Tur os* 10); *Beis Yosef ibid.* (cited in *Be'er Ha'Golah os nun*); *Biur Ha'Gra os* 31.

[73] *Shach s.k.* 27 and *siman* 62 *s.k.* 12 (and *Nesivos Ha'Mishpat ibid. hidushim s.k.* 10); *Kezos Ha'Hoshen siman* 62 *s.k.* 3.

[74] See the sources cited by *Shach ibid.*, and cf. *Pa-amonei Zahav* 176:12.

[75] *Urim Ve-Tumim siman* 62 *Tumim s.k.* 10.

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ners to irrevocably transfer to the partnership even future revenue.[76] The *Hasam Sofer* defends the *Urim Ve'Tumim* by arguing that the original (implicit) partnership agreement to split equally all profit generated by any partner activity cannot apply to such activity that constitutes deviation from appropriate conduct, and the taking for oneself of found property constitutes such a deviation, due to the danger of punitive sanctions by the government if caught.[77] [The *Hasam Sofer's* logic would not seem to apply to a windfall where such danger does not exist, such as property that has been abandoned, where the common law Law of Finds, embodying the "ancient and honorable principle of 'finders, keepers'",[78] may apply.]

This discussion concerns a default partnership, but partners would often specify that their arrangement is all-inclusive, encompassing even *mezios*.[79] The *halachic* validity of such an arrangement, however, is subject to dispute, as per our earlier discussion of *kinyan* and *davar she'lo ba le'olam*; while some *poskim* assume that this arrangement is valid, due to the slave / employee model,[80] those who reject this model may reject the validity of the arrangement.[81]

Losses

Cleavage between *halachah* and modern law arises in the context of losses. While the latter simply treats losses the same as profits, the former establishes a more complicated set of rules:

- Losses, like profits, are indeed generally divided evenly between the partners.

There is an opinion that this is limited to the loss of invested capital (e.g., if A invested $50 and B, $100, and the value of the remaining assets at disbursement is $100, A receives $25 and

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[76] *Kezos Ha'Hoshen ibid. s.k.* 3.

[77] *Shut. Hasam Sofer siman* 47. The *Hasam Sofer* bases his apparent contention that the taking for oneself of lost property constitutes 'deviation' on the Talmudic assertion (*Berachos* 60a) that taking such property can be described as "*tovah me'ein ha'ra'ah*" [fortune currently good but which may turn ill] for "if the government hears of it, they will take it from him", i.e., "afflict him and demand of him more than he found" (Rambam) or "beat him with blows and tortures and take it from him" (*R. Ovadia of Bartenura*).

[78] See, e.g., Mark A. Wilder, Application of Salvage Law and the Law of Finds to Sunken Shipwreck Discoveries, p. 93 and Justin S. DuClos, A Conceptual Wreck: Salvaging the Law of Finds, in Journal of Maritime Law & Commerce, Vol. 38, No. 1, January 2007. The Law of Finds, of course, closely parallels the *halachic* doctrine of *ye'ush* as applied to *avedah*.

[79] E.g., *Or Zarua Bava Mezia perek* 6 *os* 266 (cited in *Hagahos Ashri ibid.* end of *siman* 15); *Mordechai Bava Mezia perek Ha'Shoel remez* 380; *Shut. Maharashdam siman* 168.

[80] *Hagahos Maimoniyos perek* 4 *os* 1.

[81] Rambam as understood by *Kesef Mishneh* 4:1. Cf. *Sefer Ha'Itur helek* 1 *os shin shituf*; and see our earlier discussion of *kinyan* and *davar she'lo ba le'olam*.

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B, $75, with each absorbing a loss of $25, half of the total loss of $50), but a partner is never required to make any further contribution in order to equalize the losses (e.g., in the above example, if the entire investment has been lost and no assets remain, A is not required to transfer an additional $25 to B so that they each end up having lost $75),[82] although this is the subject of dispute.[83] Furthermore, several *aharonim* explain that even the opinion that does not require a partner to contribute out of pocket toward a loss is limited to the case where both partners have invested some capital, but where all the capital has been supplied by one partner, we view that partner as having loaned half the invested capital to the other partner and therefore both partners bear the loss, meaning that the 'borrowing' partner must repay his share of any lost capital to the 'lending' partner.[84] Some later *aharonim* conclude that "everything depends on the view of the judges": if the managing, non-investing partner is impecunious, and therefore certainly intended no undertaking of responsibility for loss,[85] or if the value he brings to the enterprise due to his business acumen is commensurate with the actual capital invested by the other partner,[86] he may have no liability to make up the lost capital. Additionally, some *aharonim* take for granted that where the initial stipulation (or default arrangement) required both partners to contribute an equal amount, and one partner did so but the other contributed only a portion of the required sum and avoided completing his contribution, and there was subsequently a great loss, the delinquent partner is certainly required to compensate the other out of pocket;[87] R. Shlomo Yehuda Tabak[88] agrees in the case of losses in the course of business (i.e., depreciation), but not in the case of accidents (*ones*, e.g., losses due to theft).[89] The *Avnei*

[82] *Shulhan Aruch* 176:6.

[83] See *Shut. Mabit* 1:202; *Bah os* 8; *Prishah os* 8; *Taz se'if* 6; *Shach s.k.* 13; *Biur Ha'Gra os* 32; Kezos Ha'Hoshen s.k. 3; Pis'hei Teshuvah s.k. 8; Shut. Divrei Malkiel 1:36:13; Pa'amonei Zahav 176:6; Shimru Mishpat p. 82 s.v. Ayein msh"k ha'aharonim be'plugta zu. See also the sources cited in the following note.

[84] *Shut. Penei Yehoshua siman* 3, cited in *Gilyon R. Akiva Eger* to 176:1; *Shut. Shevus Ya'akov* 3:167. Cf. *Shimru Mishpat ibid.* s.v. *Kasav hagra"e.*

[85] *Mishpat Shalom* 176:6.

[86] *Shimru Mishpat ibid.* p. 83.

[87] *Mishpat Shalom ibid.* at the end of s.v. *Le'shaleim mi'beiso*; *Avnei Ha'Hoshen os* 12.

[88] R. Shraga Feivish Shneebalg (*Shut. Shraga Ha'Meir* 2:76 at the very end of the responsum) cites his master, the Tshebiner Rav, as having heard from R. Meir Arik that: "In the generation of the *Noda Be'Yehudah*, the *Noda Be'Yehudah* was the *posek* of the generation, and afterward, the *gaon* author of the *Hasam Sofer* was the *posek* of the generation, and afterward the author of the *Beis Shlomo* was the *posek* of the generation, and in contemporary times, [R. Arik] said that [R. Tabak] is the *posek* of the generation." [I am indebted to Prof. Marc Shapiro, "Review of Shaul Stampfer, Families, Rabbis & Education", the Seforim Blog, Dec. 9, 2010, for this reference.] Cf. *Shut. Maharam Brisk* 1:108:2 who asserts, regarding a certain point of *halachic* dispute, that we follow the view of R. Tabak, for "upon that *gaon*, who was the final *posek* of our era, we rely even when not in a *sha'as ha'dehak* ...".

[89] *Erech Shai* 176:6 *s.v. U'Mishpat Shalom kasav*.

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Ha'Choshen maintains that outstanding loans taken out on behalf of the partnership must certainly be covered by all partners equally, even where this requires out of pocket expenditures.[90] The *Aruch Ha'Shulchan* goes even further and maintains that the basic rule that partners are not liable to each other for losses that extend beyond the capital that each has invested is limited to where the partnership's business plan anticipated using only the invested capital, without any utilization of credit. Where the business was conducted on margin, and the liability far exceeded the invested capital, it is clear that the intent was that in case of losses exceeding the invested capital both partners would need to cover these losses out of their own resources, and so even where the total losses do not exceed the invested capital, they must still be borne jointly by the partners, even where that means that one partner must make an additional payment to the other.[91]

- Only capital losses, i.e., where the partnership assets are sold for less than their purchase price, are borne equally, but where property has been lost, due to theft or other circumstances, the losses are borne by the partners in proportion to their invested capital.[92]

Profits and Losses Generated Via Criminal Or Prohibited Activity

Some *poskim* rule that even profits generated via criminal or prohibited activity (such as dealing in non-kosher animals) are governed by the standard partnership terms of division;[93] others rule that the partner who engaged in the illegitimate activity keeps all the profits from such activity.[94] All agree that losses are borne exclusively by that partner, as prohibited conduct constitutes deviation from standard business activity.[95]

R. Haim Yosef David Azulai (*Hida*) distinguishes between the above case of dealing in non-kosher animals and a partner who desecrated the Sabbath by traveling on partnership business and subsequently had the partnership property stolen by bandits, as the former is inherently

[90] Avnei Ha'Hoshen ibid.

[91] *Aruch Ha'Shulhan* 176:16.

[92] *Shulhan Aruch* 176:7; *Shach s.k.* 15. *Cf. Biur Ha'Gra os* 35; *Nesivos Ha'Mishpat biurim s.k.* 12; *Divrei Mishpat* beginning of *siman* 176. For a contemporary application of these principles, see *Mishpetei Ha'Torah (Shpitz)* 1:63, *Shutafus Be'Keniyos Meniyos, pp.* 227-29.

[93] *Shulhan Aruch* and Rema 176:12.

[94] *Shach s.k.* 27 (and see *siman* 62 *s.k.* 12).

[95] *Sema s.k.* 39.

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prohibited and therefore considered deviation from appropriate conduct, whereas the prohibition in the latter case "is not relevant to the partnership, for if he sinned, he will bear his iniquity".[96] He rejects the argument that the Sabbath desecrater is a tortfeasor, as it was his sin that caused the subsequent loss, since this constitutes mere *grama* (indirect causation of loss),[97] "as it is not certain that they will rob him for the sin of Sabbath desecration, and it is an everyday occurrence that they desecrate the Sabbath and they do not rob them, and there are some who do not desecrate and are robbed …".[98] The Hida apparently takes for granted that a partner is not liable for *grama*, but as we discuss below, many poskim rule that a partner, as opposed to an ordinary tortfeasor, is liable even for *grama*.

Debts Contracted On Behalf Of the Partnership

Halachah considers all partners ultimately liable for the full value of all debts. This is similar to the legal attitude that considers partners jointly and severally liable for the debts of the partnership, meaning that creditors may collect the full value of their debts from any of the partners that they wish,[99] but *halachah* adds a crucial qualification: partners are primarily only proportionately liable, and are secondarily liable for the entire debt only as guarantors of their fellow partners. Consequently, creditors must first sue each partner for his portion of the debt, and may only sue one partner for the other partners' shares once those partners have been determined to have insufficient assets to satisfy the claim.

Of course, as is generally the case in the law and halachah of partnerships, and indeed in *choshen mishpat* generally, these are only defaults, but alternate arrangements of liability may be stipulated.[100]

Torts Committed By Partners

Halachah will not generally hold a partnership liable for actionable conduct of a particular partner, even when acting in the ordinary course of business of the partnership or with author-

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[96] *Shut. Haim Sha'al* 1:45.

[97] *Halachah* distinguishes in general, and in the context of torts in particular, between direct causation (*ma'aseh be'yadayim*) and indirect causation (*grama*). This dichotomy, and its ramifications for the *halachah* of torts and partnerships, is discussed further below.

[98] *Ibid.* at the end of the responsum. This conclusion of Hida is cited in *Zechor Le'Avraham helek* 3 *os shin os* 55 and *Pa'amonei Zahav* 176:10 *s.v. Ve'ayein be'sefer Zechor Le'Avraham*.

[99] UPA 306:a.

[100] *Shulhan Aruch* 77:1-2.

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ity of the partnership; this is an example of a general profound dichotomy between secular law and *halachah*: the former contains such doctrines as vicarious liability and respondeat superior that hold third parties responsible for the actions of those they have the "right, ability or duty to control", while halachah has no such native doctrines. Nevertheless, some *aharonim* have suggested that *halachah* can incorporate such doctrines via the mechanism of *minhag* (prevailing custom) in circumstances in which there exist such customs.[101]

[101] See *Erech Shai* 291:26 *s.v. haga"hah; Shut. Hesed Le'Avraham (Teomim)* 1:21; and particularly a couple of responsa of R. Moshe Perlmutter that note these precedents: *Shut. Hemdas Moshe siman* 132 (and the addendum thereto published in his *Shut. Tarshish Shoham, miluim le'sefer Hemdas Moshe, os* 31) and *Shut. Even Shoham siman* 106; these sources are all cited and discussed in "Tuvia Sinned and Zigud Is Punished?! Secondary Liability via Respondeat Superior", *Bein Din Le'Din*, Dec. 10, 2013.

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Operations

Authority and Agency

The *halachah* generally assumes that a managing partner is considered an agent of all the other partners; it follows, therefore, that the rules governing a partner's ability to contractually bind his other partners by his actions reduce to those that govern agency in general, and indeed, the primary texts of the *halachah* of partnership contain little discussion of this topic, relying, apparently, on the general discussion of the rules of agency.

These rules, however, diverge significantly from their secular law counterparts.[102] While the secular law of agency will generally allow an agent to bind his principal even in the absence of *actual authority*, as long as mere *apparent (ostensible) authority* is present, halachah flatly insists that a principal cannot be bound by the actions of even an actual agent who deviates from his instructions.[103] There are, however, opinions that a partner is different, and is able to bind his partner even where he is acting incorrectly, based on practical considerations: "for if not, no one would do business with a partner until the other partner agrees",[104] although others disagree, maintaining (in the context of the unauthorized forgiveness of a debt by one partner) that "not on this was the covenant of partnership made, that he should be able to forgive [a debt] without his [partner's] knowledge".[105]

One specific case where we find a major debate among the *poskim* over whether an improper action of one partner can nevertheless bind the other partners is where the partner sells partnership merchandise which subsequently increases in value. The *Shulchan Aruch* rules that the partner is not liable to the other partners for the lost revenue, but the Rema qualifies that if the partner's sale was prior to the appropriate time for the sale of the merchandise, then he is liable for the lost revenue. The *Shulchan Aruch* and Rema only discuss the partner's liability to his fellow partners (a topic we discuss further below), but do not explicitly consider the possibility of reversing the sale; the *Beis Hillel*, however, infers from the Rema's ruling that the sale cannot be reversed (for if it could, the question of the partner's liability to his fellow partners would be moot), at least insofar as it is customary for one partner to sell the merchandise on his own.[106]

[102] This author considers this to be one of the most significant and interesting such divergences between modern Anglo-American law and *halachah*.

[103] *Shulhan Aruch* 182:2-4, *Gilyon R. Akiva Eger* to *se'if* 2 s.v. *Ve'kanah ha'mekah*.

[104] *Shach siman* 77 *s.k.* 19.

[105] *Urim Ve'Tumim ibid. tumim s.k.* 9 and *urim s.k.* 20; *Nesivos Ha'Mishpat ibid. biurim s.k.* 8 and *hidushim s.k.* 15.

[106] *Beis Hillel even ha'ezer* 86:2, cited by *Beis Shmuel* there *s.k.* 19; R. Akiva Eger and *Hochmas Shlomo* to *Shulhan Aruch hoshen mishpat* 176:14.

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Some *aharonim* suggest that the Rema may simply be discussing a situation where it is impossible to retrieve the improperly sold merchandise,[107] but as a matter of normative *halachah*, the consensus seems to follow the latter opinion of the previous paragraph, that in order to facilitate the effective operation of partnerships, there is implicit prior acceptance by all partners to be bound by the actions of individual partners. R. Tabak, however, concludes that although where the buyer is in possession (*muhzak*) of the merchandise we will allow him to retain it, where he has merely executed a *kinyan* but not yet taken possession of it, we will not compel the protesting partner to deliver it, since the aforementioned presumption of implicit prior acceptance is but a "weak *umdena* [presumption of intent]".[108]

The *Maharsham*, however, asserts a couple of major limitations of the ability of a partner to bind his partners even when acting incorrectly:

- It is limited to where the violation is of unspoken, default norms, but where a partner violates explicit partnership rules, the other partners have the right to overturn his action.

- It only exists in the case of a general partnership, where the partners have joined together "in all their affairs, for a fixed term or indefinitely, but where two have purchased some merchandise but have not established between themselves a term for their partnership, and they have the right to dissolve their arrangement at any time whatsoever, certainly neither one has the ability to sell his fellow's portion in an incorrect manner without his knowledge"[109]

Unstipulated Contributions

Capital Equipment and Real Property

A partner who makes an unstipulated provision of the use of capital equipment or real property to the partnership is entitled to compensation (i.e., he receives the value of his contribution in return before profits or losses are calculated).[110] R. Ya'akov Yeshayah Blau assumes that this only applies with regard to assets for which rent is normally charged.[111]

[107] *Beis Meir even ha'ezer ibid.; Mishpat Shalom ibid.*

[108] *Erech Shai* 176:14.

[109] Shut. Maharsham 5:28 s.v. *U'mah she'sha'al.*

[110] *Shulhan Aruch* 176:44.

[111] *Pis'hei Hoshen* chapter 2 n. 39.

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Services

A partner who provides an unstipulated service to the partnership is entitled to compensation under the category of one who improves another's property absent a contractual framework, but who is considered "authorized" (*yored be'reshus*), who receives the standard compensation received by "local sharecroppers" (i.e., the standard compensation received by professionals for their services). The Rema rules that this is only insofar as his efforts result in the improvement of partnership property (movable or real); in other words, his compensation is capped by the value of any resultant improvement,[112] although there is a dissenting view that grants him the entire value of his efforts, regardless of any resultant improvement.[113]

On the other hand, the *Nesivos Ha'Mishpat* rules that a partner who voluntarily takes on more than his share of partnership work is not entitled to extra compensation for this, insofar as he failed to provide advance notice of his intention to his partner, since the latter can argue "had you notified me, I, too, would have worked myself", unless the second partner is actually incapable of performing the work himself (e.g., due to illness).[114] The *Nesivos* acknowledges that this is different from the aforementioned rule governing the provision of the use of real and personal property, but fails to explain the rationale for the distinction. Furthermore, he does not even acknowledge the rule of the previous paragraph entitling a partner to compensation for the provision of unstipulated services! Perhaps he understands that rule to apply only where notification of the other partner was impossible, or where the other partner could not have done the work himself.[115] An additional difficulty with the position of the *Nesivos* is that an actual *yored* is still entitled to compensation even where the beneficiary of his efforts was capable of doing the work himself; while he does not receive the full compensation, the beneficiary must still pay the amount we estimate he would pay to avoid having to do the work himself.[116]

The *Havos Ya'ir*, too, takes for granted that a partner who voluntarily works on behalf of the partnership is not entitled to compensation, although he offers little explanation for this, and surprisingly, he, too, completely ignores the aforementioned *halachah* entitling a partner to com-

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[112] *Shulhan Aruch* 178:3.

[113] See *Beis Shmuel siman* 88 *s.k.* 20; *Beis Meir ibid*.;

[114] *Nesivos Ha'Mishpat siman* 177 *biurim s.k.* 4 and *hidushim s.k.* 4.

[115] R. Yehiel Dzimitrovsky (*Milu'ei Mishpat ibid.*) considers this interpretation "*doheik gadol*".

[116] *Shulhan Aruch* 375:4. This argument, too, tends to support R. Dzimitrovsky's contention that the *Nesivos's* extension of the *halachic* rule that the failure to notify the beneficiary deprives the *yored* of the right to compensation from the case of brothers (*Shulhan Aruch* 287:1) to the general case of partners is unwarranted.

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pensation for the provision of unstipulated services![117] This objection (among others) is raised by R. Ya'akov Emden in a lengthy critique of the *Havos Ya'ir's* analysis; he seems to conclude that the halachah is uncertain.[118]

The Presumption Of Dedication

The *halachah* presumes that in the absence of an explicit declaration to the contrary, any action of a partner that can benefit the partnership has been undertaken on behalf of the partnership: "since he is a partner with him, it is his way to toil on behalf of the entire enterprise"; hence, if the partnership assets are in danger, and one partner acts to save them, any rescued assets are the property of the partnership, and cannot be kept for himself by the rescuing partner, unless he declares "I save on my own behalf".[119] Such a declaration is viewed as a dissolution of the partnership and division of its assets, and the acting partner may keep whatever he saves, up to his share of the assets.[120]

R. Aharon Sason apparently rules that a partner who manages to extract compensation for a theft of partnership assets may keep this compensation entirely for himself (up to his share of the partnership assets), since although the original assets belonged to the partnership, the compensation received for their theft did not, and the rule that assets rescued by a partner become partnership property only applies to assets that are / were actually partnership property, "but if he rescues something else, and that was not the thing itself that they snatched from them, it is entirely obvious ("*peshita u'peshita*") that the rescuer is entitled to it".[121]

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[117] *Shut. Havos Ya'ir siman* 224.

[118] *She'elas Ya'avez* 1:6 *s.v. Amnam*. Cf. *Pis'hei Hoshen ibid.* n. 37 and *Hilchos Sechirus* chapter 8 n. 73.

[119] *Bava Kama* 116b, as explained by Rashi there. *Nesivos Ha'Mishpat siman* 181 *biurim s.k.* 2 rules that this declaration need not even be made in the presence of the other partners, if they are not currently present, as a partner generally has the right to effect a dissolution of the partnership and division of its assets even without the presence of the other partners in a situation of impending loss. If the other partners are present, however, he must notify them, in order to give them the chance to save their share of the assets.

[120] *Shulhan Aruch* 181:2.

[121] *Shut. Toras Emes siman* 140 *s.v. Ve'od yesh lomar*, as understood by *Mahaneh Efraim hilchos shutfus siman* 3 *s.v. Ve'ra'isi*. *Mahaneh Efraim* raises an objection to this position, but ultimately asserts that it is solvable, although he does not provide the solution.

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Decision Making and Voting

Perhaps surprisingly, there is no clear and comprehensive discussion in the *poskim* of the question of how to resolve differences of opinion among the partners.[122] While we do find throughout the laws of partnership various rights that any individual partner may exercise against even the majority of the others (e.g., the right to block dissolution for the stipulated duration of the partnership), we do not have much discussion of the general case, where there is a choice to be made concerning which there exists neither a clear *halachic* rule, nor any standard convention that determines the appropriate course of action, and the partners cannot reach consensus. Do we require unanimity, is a majority sufficient, or is there some other rule?

The only significant direct discussion of this question of which I am aware is by R. Mendel Shafran, a leading contemporary Israeli authority, who provides the following guidelines:

- Any explicit agreement vesting decision-making authority in a particular individual is certainly dispositive.
- In many partnership contexts, the agreement typically establishes that disputes shall generally be resolved by majority rule, with particularly weighty resolutions requiring a super-majority of sixty or seventy five percent to pass. [It is also common to distinguish between voting and non-voting shares, which is construed as a stipulation that certain investors shall have no right to express their views on any partnership matter.]
- In such contexts, the principle of majority rule applies even in the absence of an explicit stipulation, as that is the prevailing custom.
- In contexts where no such custom exists, no departure from the initial agreement is allowed without unanimous consent, and even a lone holdout may block such a step.
- Where no agreement and no custom exists, we defer to "professional advice"; where this does not decide the question, and both options are "absolutely equal", we cast lots.[123]

R. Yosef di Trani (Maharit) does not directly address our basic question, but rather a case where the partnership agreement expressly stipulated that all decisions were to be made by majority rule, and a majority of the partners reached some decision without consulting one of their number; he rules that such a decision fails to meet the fundamental *halachic* standard that

[122] Quint, pp. 20-21, takes for granted that disputes between partners over their business operations are settled via arbitration of "merchants who are in the same business" as the partners.

[123] *Kovez Ha'Yashar Ve'Ha'Tov* #10, pp. 22-25.

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the majority reach their conclusion in conversation with the totality (*rov mi'toch kol*).[124] This standard is generally applied in judicial or quasi-judicial (i.e., arbitrative) contexts,[125] but the Maharit is extending it to the commercial context of partnership.

[Perhaps the most famous historical invocation of this rule was by R. Levi ibn Habib (Maharalbah) during the great sixteenth century controversy over the reinstatement of formal rabbinic ordination (*semichah*). In response to the declaration by R. Ya'akov (Mahari) bei Rav that he and his Safedian colleagues had the right to unilaterally make the decision to reinstate semichah, even without consultation with the Maharalbah and his Jerusalemite colleagues, as the former group constituted the majority of the sages of Israel, the Maharalbah retorted that "When the agreement of the majority is [reached] without discussion among the totality, it is not an agreement at all, for perhaps were the majority to have heard the arguments of the minority they would have conceded to them, and retreated from their position".[126]]

As usual, however, the requirement of *rov mi'toch kol* is only by default, but does not apply where the custom is that it is not required, and certainly not in the face of a stipulation to the contrary.[127]

R. Tabak makes the argument that when even one member of a decision making body votes under the influence of corrupt self-interest (a bribe, in his case), the entire decision, even if unanimous, is void, even where the custom and even express stipulation is not to require *rov mi'toch kol*, for two reasons:

- We presume that any such custom or stipulation was intended merely to facilitate timely and effective decision making - "for it is common that [an individual] will not be present, for he will travel for his needs or die, and if the remaining ones will not be able to make agreements, the community will frequently suffer loss, for if they wait for him to come home, perhaps then someone else will need to travel from home, because they typically are involved in their livelihoods" - but we should certainly not extend this dispensation to situations of corruption, the possibility of which "never occurred to the

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[124] *Shut. Maharit* 1:95, cited by *Erech Shai* 176:10. Cf. *Shut. Maharit* 2:79.

[125] See *mishneh Sanhedrin* 29a "*afilu shnayim mezakin o shnayim mehayvin ve'ehad omer eini yode'a yosifu ha'dayanin*"; Rashi s.v. *Afilu shnayim*; *Hagahos Ashri ibid.* 1:6; *Shut. Maharik end of shoresh* 180 (citing R. Yehudah (Mahari) Mintz); *Shulhan Aruch* 18:1,4; *Shut. Ha'Rashba* 2:104; *Shulhan Aruch* 13:7; *Keneses Ha'Gedolah siman* 13 *hagahos Beis Yosef from os* 22; *Be'er Heiteiv* and *Pis'hei Teshuvah* at end of *siman* 231.

[126] *Shut. Maharalbah (Kuntres Ha'Smichah)* beginning of p. 2b.

[127] *Shut. Maharashdam yoreh de'ah siman* 78 (p. 28a column 2, citing the Rashba); *Keneses Ha'Gedolah ibid. os* 28.

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community, for they typically appoint as communal representatives (*tu'vei ha'ir*) those presumed by them to be trustworthy".

- Based on the rationale given by the *poskim* for the requirement of *rov mi'toch kol*, that "had that individual been present, perhaps he would have presented a reason to overturn everything that the majority had agreed to, and the majority would have so conceded",[128] we can similarly argue in reverse that perhaps the corruption of one actually spreads and taints the entire process, via the corrupt individual persuading the others to agree with him, and once again, we presume that the stipulation or custom does not extend to the ratification of such an inappropriately realized majority.[129]

It should be noted that R. Tabak is not discussing commercial partners, but political representatives, where the standards are certainly higher,[130] but given the Maharit's extension of the requirement of *rov mi'toch kol* to the commercial context of partnership, R. Tabak's logic ought to dictate that a decision tainted by the illegitimate self-interest of even a minority of the partners is void.

Fiduciary Duties

Halachah takes for granted that a partner has fiduciary duties to the partnership, but the *halachic* standards are somewhat different from their secular counterparts.

Duty Of Care and the Business Judgment Rule

The operative legal principle for determining whether a partner has failed in his duty of care is the business judgment rule: "Under this standard, a court will not second guess the decisions of a director as long as they are made (1) in good faith, (2) with the care that a reasonably prudent person would use, and (3) with the reasonable belief that they are acting in the best interests of the corporation."[131] *Halachah* approaches the question somewhat differently, declaring a laundry list of types of unacceptable conduct, ranging from the specific and concrete to the general and abstract:

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[128] *Rashba* 2:104.

[129] *Shut. Teshuras Shai* 2:56.

[130] *Shut. Terumas Ha'Deshen* 2:214 (codified by Rema at the very end of *siman* 37) rules that municipal representatives have the status of judges, and the concomitant requisite qualifications, to the exclusion of someone who is considered a *halachic rasha* (evildoer); surely this cannot be extended to partnerships.

[131] Wex Legal Dictionary, "Business Judgment Rule".

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- A partner may not deviate from the prevailing custom with regard to the particular merchandise in question.

- He may not change his geographical location.

- He may not join with other partners.

- He may not deal in other merchandise. (see below, under "Moonlighting", for discussion of the meaning of this rule)

- He may not sell on credit, except for the type of merchandise which is always[132] sold on credit.

- He may not give property into the custody of another.

All these are prohibited unless there has been an initial stipulation allowing them, or the partner has (subsequently) obtained the other partners' permission.[133]

The foregoing are the general rules laying out the responsibilities of partners; there is, however, extensive discussion among the *aharonim* over whether halachah does indeed acknowledges some version of the business judgment rule, i.e., can someone with a fiduciary responsibility who has deviated from generally mandated conduct or even his specific instructions defend himself by claiming that he meant well ("*le'tovah niskavanti*"), that he had acted in good faith and according to his best judgment, in light of the specific circumstances before him?

The consensus of the *poskim* seems to rejects the idea of a business judgment rule as a defense for a partner against deviation from his explicit mandate or generally acceptable conduct.[134]

Moonlighting

We have previously noted the (Maimonidean) rule that "[A partner] may not deal in other merchandise". Some interpret this as barring moonlighting, "for when one partners with his fellow

[132] Where the merchandise is sometimes sold on credit, see *Sema s.k.* 33; *Nesivos Ha'Mishpat biurim s.k.* 21 and *hidushim s.k.* 23.

[133] *Rambam* 5:1; *Shulhan Aruch* 176:10.

[134] See *Shut. Mabit* 1:179; *Shut. Maharit Zahalon siman* 129; *Shut. Maharshach* 3:64 *s.v. Ve'atah avo*; *Shut. Maharit* 2:110,112; *Mahaneh Efraim* beginning of *sheluhin ve'shutafin; Sha'ar Mishpat siman* 176 *s.k.* 4; *Shut. Nehpah Ba'Kesef* 1:18-20 and *Mateh Yosef* cited immediately below (end of *s.v. Ve'al te'shiveini*), and see this author's paper, *Hisnazlus Shutaf, Sheliah, ve'Shomer Shelo Nahagu Ka'Raui Be'Ta'anah Shekivnu Le'Tovah*, in *Nehorai*. 5769 (2) pp. 396-416 for a comprehensive discussion of the topic in which most of these sources, as well as numerous others, are cited and discussed.

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it is in order that he focus his heart and soul on the business of the partnership, and if he deals in other merchandise, he will not pay enough attention (*lo yiten einav kol kach*) in the business of the partnership",[135] while others understand it as referring to a partner's activity on behalf of the partnership, denying him the right to substitute a type of merchandise different from the agreed upon, or standard, type.[136]

Some *poskim* do allow moonlighting;[137] and even within the former, stringent view, there is an opinion that distinguishes between involvement in a different area of business, which is forbidden, as this detracts from the partner's focus on the partnership business, and involvement in a similar area of business, which will not interfere with his conduct of partnership business.[138]

Secular law is somewhat more relaxed about moonlighting, with there being no general prohibition against the practice as long as assets, including intellectual property, are not misappropriated,[139] and generally, that the duty of loyalty is not violated,[140] although in the context of partners, the corporate opportunity doctrine, "a common law doctrine that limits a corporate fiduciary's ability to pursue new business prospects individually without first offering them to the corporation", "a subspecies of the fiduciary duty of loyalty",[141] might apply.[142]

Profits From Prohibited Moonlighting

Some *poskim* rule that profits from prohibited moonlighting are split between the partners, since we presume that the moonlighting partner has enriched himself at his partners' expense, due to his own business having distracted him from the requisite focus on the partnership

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[135] *Beis Yosef siman* 176 *os* 17. This is also the understanding of *Sema ibid. s.k.* 32; *Shach ibid. s.k.* 22; [*Shut.*] *Mateh Yosef (Nazir) helek* 1 *siman* 9, and apparently also that of Shut. *Maharashdam siman* 168 (as noted by *Mateh Yosef*).

[136] *Derishah ibid.*; *Shut. Maharit Zahalon siman* 132.

[137] *Tur ibid.* as understood by *Beis Yosef ibid.*; *Maharit Zahalon ibid.*

[138] *Mateh Yosef ibid. s.v. Ve'al te'shiveini*. Of course, one might argue the opposite, that dealing in the same merchandise as the partnership is more problematic, as this involves a direct conflict of interest as his private dealing competes with the partnership's business.

[139] See, e.g., *Matt Villano*, How to Moonlight as an Entrepreneur, The New York Times, Oct. 29, 2006; Alexandra Levit, How to Moonlight Without Losing Your Job.

[140] See, e.g., Jim Barber, HR & Employer Considerations for Moonlighting Employees. I am indebted to my wife Chana Sara for bringing this article to my attention.

[141] Erit Talley and Mira Hashmall, The Corporate Opportunity Doctrine, p. 1. I am indebted to my brother Menahem for bringing this doctrine, and this paper, to my attention.

[142] "In a partnership, the analogous principle is termed the firm-opportunity doctrine." - USLegal.com.

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business;[143] others rule that the moonlighter keeps all profit from his extra-partnership activities.[144] A compromise view distinguishes between a partnership limited to a specific enterprise, and one that encompasses all the affairs of the partners; in the former case, the moonlighter is entitled to keep all his profits, while in the latter, they are split among the partners.[145]

Paying For Divine Protection

An interesting question was posed to the Maharsham: a partnership faced the possibility of great loss, and one of the partners, without the other's knowledge, disbursed a large sum of money to charity and commissioned (apparently at substantial cost) prayers from "righteous men of the era" (the subsequent reference to "*misnagdim*" suggests that the allusion is to Hassidic personalities) in an attempt to avert the catastrophe. Can these expenses be charged to the partnership? The Maharsham completely sidesteps all thorny theological questions about the efficacy and reliability of these measures by simply considering the extent to which they constitute standard and generally customary efforts; he rules that "since this is not universal, and many do not do so, he ought not to have done this thing without his partner's knowledge, and particularly if the second partner is among the opponents ("*misnagdim*") of the aforementioned rabbis, then certainly there is no doubt that he may not charge this to the partnership against the will of [the other partner]".[146]

The Maharsham is discussing a partner who expended his own money and wishes to be compensated from the partnership assets; regarding a partner who unilaterally donates partnership assets to charity, R. Yehiel Michel Hibner apparently holds that at least ex post facto, the donation is valid, as this is the superlative act "in the interest of the partnership", as per the Biblical injunction "Sow [to yourselves] in righteousness".[147] [148]

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[143] *Maharashdam* and *Mateh Yosef ibid.*

[144] *Shach ibid.*

[145] *Nesivos Ha'Mishpat biurim s.k.* 20 and *hidushim s.k.* 22.

[146] *Mishpat Shalom* 176:10 s.v. *Sham hayah kezas b"a mochrim be'hakafah*. *Shut. Ziz Eliezer helek* 9 *siman* 17 *perek* 3 *os* 4 raises the general question of whether one who, in compliance with the Talmudic advice of *Bava Basra* 116a, expends money to travel to a sage to request him to beseech mercy for an ill household member can charge these costs to the ill one. He inclines to the view that he cannot, insofar as he has done so without the ill one's consent, because it is implausible to construe the Gemara's instruction as an actual obligation, and furthermore, "who is he that can establish that so-and-so is the Seer before whom the gates of Heaven are opened ...".

[147] *Hosea* 10:12.

[148] *Mishkenos Ha'Ro'im* (Hibner) Kuntres Eis Dodim p. 13a s.v. Ve'hinei gam. His logic is puzzling, as he bases his position on the aforementioned ruling of the *Shach* that the action of a partner is binding on the partnership even where it is *not* in the best interests of the *partnership*, but then immediately proclaims that donating to charity is actually the *best*

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Avoiding Oaths

Another interesting question at the intersection of religion and partnership law, this one discussed by a number of *poskim*, concerns a partner representing the partnership in *beis din* or before the secular authorities who is required to take an oath to affirm a claim on behalf of the partnership and refuses to do so, due to religious or ethical scruples. Can he be compelled to do so, or alternatively, if by refusing to do so he causes the partnership a loss, is he liable for this loss to the other partners?

R. Shlomo Drimer rules that the partner who refuses to swear is not liable for any consequent loss, based on two arguments:

- "Perhaps the reason he does not wish to swear is that he knows that the truth is that he is lying, and the law is with his opponent." This rationale might be plausible if the partner actually makes this claim, but I do not understand how we can continue to entertain such a possibility where the partner continues to maintain that he was indeed telling the truth but nevertheless would not swear.

- "Even if his claim is true and he does not wish to swear, it is mere indirect causation of damage (*grama*), like the law of one who suppresses his testimony [and thereby causes a loss to a litigant], for which he is not liable under human law (*be'dinei adam* - i.e., there is no claim enforceable by *beis din*, although there may still be a moral obligation under Heavenly law [*be'dinei shamayim*])". This argument is perfectly plausible – but as we discuss below, many *poskim* rule that a partner, as opposed to an ordinary tortfeasor, is liable even for *grama*.[149]

R. Dov Berish Weidenfeld (the Tshebiner Rav) endorses ("*le'dina*") the second argument of R. Drimer,[150] but in his context this is actually quite difficult to understand, as his question appears to have arisen *ab initio*, i.e., whether the reluctant partner was obligated to take the oath in the first place, in which case *grama* appears to be an irrelevant consideration, as the Talmud flatly declares that although *grama* does not engender liability *ex post facto*, it is still prohibited *ab initio* (*grama be'nizakin asur*).[151]

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thing one can do for the partnership. Furthermore, the rationale of the *Shach* is that if the partner's unilateral action would not be binding, "no one would do business with a partner until the other partner agrees", and it is unclear whether this should apply to charitable giving.

[149] *Shut. Beis Shlomo* at the very end of siman 57. Cf. *Shut. Heishiv Moshe siman* 88; *Shut. Maharya Ha'Levi* 2:10.

[150] *Shut. Doveiv Meisharim* 1:53 at the end of the responsum s.v. *U'le'dina*.

[151] *Bava Basra* 22b.

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R. Yosef Shaul Nathanson also rules that the reluctant partner is not liable for the loss, but he does not focus on whether the refusal to swear is an actionable tort. Instead, he simply declares that partners are generally responsible to indemnify each other from any damage that befalls them [as a consequence of the partnership affairs], and since "every man who fears and trembles at the word of G-d does not wish to swear even truthfully, on this assumption did they enter into the partnership, that if one can settle in lieu of the oath, his fellow, too, shall enter into the injury, for if not, they will not wish to borrow unless they both sign".[152] His perspective (also endorsed by R. Yosef Haim of Baghdad[153]) is very similar to that of the Maharsham with regard to expenditures on behalf of spiritual protection for the business, that the key consideration is standard practice and general expectations.

The Mahariaz Enzil, on the other hand, takes for granted that a refusal to swear constitutes *actionable* indirect causation of injury (*garmi*, as opposed to *grama* – see our discussion below), and therefore engenders liability for the loss: "that which he does not wish to swear, it is as though he is conceding to the [opposing litigant that his claim is valid], and causing injury to his partner and he is liable *mi'dina de'garmi*, for he himself concedes to [his partner that the opposing claim is not valid] ...".[154]

Conflicts of Interest

Perhaps surprisingly, outside the context of *beis din* procedure, where there are well developed rules governing self-interest ("interested in the matter" (*noge'a be'davar*) - a judge or witness who has an interest in the outcome of the case), bribery (*shohad*) and personal relationships ("friend" (*oheiv*) and "enemy" (*sonei*) – a judge who is a friend or enemy of one of the litigants), in the general commercial context, *halachah* has no general, systematic treatment of conflicts of interest. In this section, therefore, we shall merely present sundry, miscellaneous relevant *halachic* rules and discussions (and see our earlier discussion of moonlighting).

Selling To Oneself

An agent (or, presumably, a partner) cannot buy for himself the property that he is an agent to sell.[155] The primary reason for this is a technical limitation of *kinyanim*;[156] but there is an addi-

[152] Shut. Sho'el U'Meishiv mahadurah 4 helek 2 siman 88 s.v. Ve'hineih nishalti.

[153] Shut. Rav Pe'alim 2:6 s.v. Nimza le'fi zeh.

[154] *Shut. Mahariaz Enzil siman* 21.

[155] *Shulhan Aruch* 185:2.

[156] *Sema ibid. s.k.* 4.

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tional concern for even the appearance of conflict of interest: “and [ye shall] be guiltless before *Hashem*, and before Israel” (*ve'he'yisem ne'ki'im me'Hashem u'mi'Yisrael*).[157]

Self-Dealing

Perhaps surprisingly, *halachah* seems to have no black letter law on self-dealing, and *poskim* who discuss cases of such do not clearly articulate the precise nature of the wrong perpetrated by the self-dealer; following are a couple of analyses from the responsa literature of cases of self-dealing by fiduciaries.

The Officer Of A Charitable Fund Who Solicits Personal Consideration In Exchange For the Disbursement Of Funds

R. Malkiel Tannenbaum considers the case of an officer of a charity fund who planned to disburse funds under his control in exchange for certain personal consideration (for a family member). R. Tannenbaum initially declares that this seems to be “absolute theft” (*gezel gamur*), but subsequently, after admitting the possibility that the officer may judge the intended recipient to actually be a worthy recipient of the projected disbursement, all he can muster against the arrangement is the argument that since the officer is an interested party in this disbursement, he is prohibited from making the decision “alone”, since we know that “the officers of charity funds are like judges that the community has accepted upon themselves” - hardly conduct as egregious as “absolute theft”.[158] It is also unclear whether this final argument would extend beyond officers of charity funds (and perhaps other communal officers) to ordinary private fiduciaries such as partners and agents.

A Guardian Who Rents An Apartment For Less Than Its Fair Value in Exchange For A Kickback

The Sanzer Rav discusses the case of a court appointed guardian who rented a house under his guardianship for less than its fair value in exchange for a kickback “for his trouble and fear”. The Sanzer Rav insists that this is plain theft (*geneivah mamash*), and that the owner of the house has the option of either voiding the rental, or demanding the disgorgement of the kickback from the corrupt guardian, “for it [the kickback] is [his], for the house was worth more than

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[157] *Pesahim* 13a based on Numbers 32:22; *Sema siman* 175 *s.k.* 26.

[158] *Shut. Divrei Malkiel* 5:212 *s.v. Ve'od yesh ladun.*

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the sum that [the guardian] rented it to [the tenants], due to this bribe, and so he certainly must return it to the owner of the house".[159]

[159] *Shut. Divrei Haim helek* 2 *siman* 46. The Sanzer Rav's correspondent apparently viewed the kickback as the equivalent of an agent's commission, rather than a mere diversion of a portion of the rental fee, and therefore argued that in the situation under discussion there, where the house was destroyed in a fire during the rental term, the "commission" need not be refunded, while the Sanzer Rav himself viewed it as simple theft of a portion of the rental fee, as explained, and therefore ruled that it must be refunded. It is not entirely clear whether the Sanzer Rav's correspondent would concede the owner of the house the right to compel the corrupt guardian to disgorge the money he took in the case where the house and rental arrangement are still intact.

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Mutual Liability

Bailee Liability

Any partner with partnership assets in his custody stands in relation to the others as a paid bailee (*shomer sachar*).[160] This *halachic* category provides for liability that extends beyond loss due to gross negligence (*peshiah*) to theft and loss (*geneivah va'aveidah*), which implies both a heightened level of responsibility for accidents, including liability for an accident akin to theft and loss (*ones ke'ein geneivah va'aveidah*) [a standard of responsibility intermediate between responsibility only for *peshiah* and responsibility even for absolute accidents (*ones gamur*), i.e., strict liability[161]] and possibly also strict liability for actual theft and loss, even where these occurrences were beyond the control of the custodial partner.[162]

One major exception to the bailee responsibilities of the custodial partner, however, occurs where the several partners were all actively involved in the partnership affairs at its inception. In this situation, the rather mysterious exemption of "bailment with the owner" (*shemirah be'be'alim* - a term of art signifying that the property owner was in the service of the bailee at the

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[160] *Shulhan Aruch* 176:8. Cf. *Mahaneh Efraim hilchos shomrim siman* 36; Quint pp. 12-14 and n. 19.

[161] See *Tosafos Bava Kama* 27b s.v. *U'Shmuel Amar*. An actual *shomer sachar* has the additional responsibility of *netirusa yeseirta* - "excessive care", but the *aharonim* debate whether other individuals that *halachah* considers equivalent to a *shomer sachar*, such as an artisan (*uman*), renter (*socheir*) and the holder of a security (*mashkon*), are also held to this standard of excessive care. *Shut. Maharshach* end of 2:169, followed by *Shut. Shai La'Mora siman* 15 *s.v. Va'afilu it"l de'yesh lo eizeh hana'ah; Shut. Sha'ar Efraim siman* 122 *s.v. Ve'yesh le'yashev; Shut. Ginas Veradim* 1:1 (responsum of R. Moshe (Maharam) *ibn Habib*) p. 180 end of second column "*ve'od yireh li de'afilu le'da'as Ri ve'ha'Rosh...*"; *Shut. Kerem Shlomo siman* 85 pp. 217b-18a (responsum of the author's son, R. Moshe Amarillo (author of *Shut. Devar Moshe*)); Shut. *Hasam Sofer siman* 16 and *Shut. Maharam Shik end of siman* 48 *s.v. Ela she'akatei* limit the extra liability to an actual *shomer sachar*, *while Shut*. Ginas Veradim 1:2 (responsum of the author, R. Avraham Ha'Levi); *Mishneh Le'Melech hilchos sechirus* beginning of 10:1 and *Gilyon R. Akiva Eger* 72:12 reject Maharshach's distinction. Cf. *Keneses Ha'Gedolah siman 72 hagahos Beis Yosef os* 20; *Shut. Perah Shoshan* end of 1:2 s.v. *Od kasav Maharam; Kezos Ha'Hoshen siman* 72 *s.k.* 5; *Shut. Mizvas Cehunah siman* 20; *Pis'hei Teshuvah siman* 72 *s.k.* 4 (and *siman* 303 *s.k.* 4) and *Shut. Igros Moshe* at the very end of 2:69.
Some of these later *aharonim* (*Shai La'Mora*; R. Moshe Amarillo; *Perah Shoshan*) understand the Maharshach as excluding only the holder of a security from the obligation of *netirusa yeseirta*, due to the *de minimus* nature of the benefit (*prutah de'Rav Yosef*) that renders him equivalent to a *shomer sachar*, but others understand him as excluding all those who are not compensated directly and explicitly as bailees. In particular, *Hasam Sofer* explicitly excludes partners from the *netirusa yeseirta* obligation due to their not being directly compensated as bailees.

[162] See *She'iltos De'Rav Ahai Gaon* beginning of *parshas Va'Yeizei* and *Hamek She'alah* os 3; *Tosafos Bava Kama* 57a s.v. *Kegon she'ta'anu* and *Bava Mezia* 42a *s.v. Amar Shmuel*; *Hidushim* of Ramban, Rashba and Ran to *Bava Mezia* 42a; *Piskei Ha'Rosh Bava Kama* 6:5 and *Bava Mezia* 3:21; *Shulhan Aruch* 303:2; *Shach s.k.* 4; *Kezos Ha'Hoshen* beginning of *siman* 303.

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inception of the bailment)[163] is invoked, and there is no liability between the partners.[164] The details of this exemption are complex and subject to considerable dispute, and beyond the scope of this work.[165]

Losses Subsequent To A Partner's Deviation From Appropriate Conduct

When a partner commits any of the previously enumerated deviations from appropriate conduct, the basic rule is that profits still accrue to the partners according to the original (default or stipulated) arrangement, but losses that are due to the deviation are borne exclusively by the partner who has deviated.[166]

Losses Not Consequent To the Deviation

The key phrase "due to the deviation" appears in the formulation of this rule that appears in the laws of partnership, but not in the formulation of the identical rule that appears in the laws of agency,[167] and indeed, there is considerable dispute over whether the deviating partner is solely responsible for losses that are not related to the deviation. Many *aharonim* rule, some quite emphatically, that he is not,[168] while others rule, some equally emphatically, that he is.[169]

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[163] For example, if one borrows another's car, and at the time of the borrowing the owner is doing the borrower the favor of bringing him a glass of water, the borrower is not liable as a bailee for any subsequent damage to the car. This rule, derived from the Biblical text of Exodus 22:14, is one of the very few laws in all of *hoshen mishpat* that more or less qualify as a *hok*, a Biblically mandated *halachah* whose rationale is entirely unclear. [R. Yosef Bechor Shor acknowledges that the rationale behind the rule as understood by Hazal (as opposed to what he considers the *peshat* of the text) is difficult; see, e.g., the commentaries of *Ibn Ezra*, *Rashbam* and *Sforno* for various rationales of the rule, both according to *peshat* and according to Hazal.] The vast majority of *halachic* civil law is based on *sevara* ("logic"), Rabbinic enactments, which are invariably instituted for some definite and knowable reason, or Biblical laws whose basic rationales appear self-evident (*mishpatim*).

[164] *Shulhan Aruch* 176:8.

[165] See, e.g., *Shach ibid. s.k.* 16; Mahaneh Efraim *hilchos shomrim siman* 36; *Shut. Parah Mateh Aharon* 1:85.

[166] *Rambam* 5:1-2; *Shulhan Aruch* 176:10-11.

[167] *Rambam* 1:5; *Shulhan Aruch* 183:5.

[168] *Shut. Mabit* 1:179 (this is also the clear implication of 1:349); R. Shlomo Gavison, cited in *Shut. Maharshach* 3:65 and *Shut. Maharit Zahalon siman* 129 *p.* 106b *s.v. U'le'inyan im ha'sheliah*; R. Elisha Gallico, cited by *Keneses Ha'Gedolah hagahos Beis Yosef os* 113; *Shach siman* 183 *s.k.* 9 (he characterizes the Mabit's holding as "*pashut*"); *Shut. Harei Besamim mahadura hamisha'ah siman* 44 *os* 5.

[169] *Shut. Avkas Rochel siman* 163 (written in reaction to the aforementioned responsum of *Mabit*); *Shut. Maharshach* 3:65 *s.v. Amnam*; *Shut. Lehem Rav siman* 104 *s.v. U'bar min dein, siman* 180; *Kezos Ha'Hoshen siman* 183. *s.k.* 5 (asserting that "what is *peshita* to the *Shach* is *tamu'ah* ..."). For further discussion of this dispute, see *Shut. Ha'Ran siman* 73; *Maharit Zahalon ibid.*;

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It is somewhat unclear whether there is actually a distinction in this context between agency and partnership; the Talmudic and Maimonidean formulations of the law of one who deviates refer to an agent (*shaliah*), but one whose arrangement with his principal (*me'shale'ah*) stipulates (under normal circumstances, absent any deviation by the agent) equal sharing of profit and loss, which would seem to render them effectively partners. Nevertheless, R. Shlomo Ha'Cohen (Maharshach) does make a distinction between an agent and a partner, arguing, *inter alia*, that partners "in all matters, not just in a single solitary affair" are different from an agent.[170]

The Tshebiner Rav maintains that even the opinion that holds a deviating agent liable even for losses not consequent to the deviation is limited to where he made an incorrect purchase (e.g., where he purchased the wrong commodity), as there it can be argued that since the purchase was unauthorized, ownership in it does not inhere to the principal but remains with the agent, who therefore incurs the entire loss, but where the property belongs indubitably to the principal, all agree that the mere fact of the agent's deviation from appropriate conduct ("*sidur ha'shelihus*") does not suffice to hold him liable for losses not consequent to the deviation.[171]

Shemirah Be'Be'alim

Mazik Be'Yadayim

We have previously seen that partners' bailee liabilities (e.g., their responsibilities for losses due to negligence or theft) do not hold in circumstances of *shemirah be'be'alim*. There is, however, a major dispute among the *poskim* over whether this dispensation extends to their liabilities for losses subsequent to deviation from appropriate conduct. Some argue that one who deviates and thereby causes a loss is considered a "direct tortfeasor" (*mazik be'yadayim*), a category to which the dispensation of *shemirah be'be'alim* does not apply (as it is limited to bailee liability);[172]

Shut. Oholei Ya'akov (Castro) *siman* 45; *Mishneh Le'Melech* 1:2; *Keneses Ha'Gedolah siman* 183 *hagahos Tur osios* 33-35; *Mahaneh Efraim sheluhin ve'shutafin siman* 1 *s.v. Va'ani ha'koseiv; Shut. Darchei Noam siman* 34 p. 248b *s.v. Ve'amnam im ke'she'shinah ha'sheliah; Shut. Devar Moshe* (Amarillo) 3:16; *Shut. Zera Avraham siman* 24; *Shut. Nehpah Ba'Kesef* 1:18 from the bottom of p. 104b; *Divrei Mishpat* 183:5 os 4; *Or Same'ah* 5:2 *s.v. Sham Kol pehas she'yavo.Lehem Rav siman* 108 from *s.v. Aval be'mah she'shalah* and more explicitly in *siman* 117 limits a deviating partner's liability to damage caused by his deviation, contradicting his aforementioned responsa; one resolution to the apparent inconsistency would be the distinction of the Tshebiner Rav, below.

[170] *Maharshach ibid. p.* 70b column 2.

[171] *Shut. Doveiv Meisharim* 3:26.

[172] *Shach s.k.* 16 is uncertain whether a partner who improperly extends credit to a buyer is liable in the event of default even in a situation of *shemirah be'be'alim*; he entertains the possibility that he is, as the extender of credit is considered a *mazik be'yadayim*; *Shut. Shav Ya'akov siman* 11 s.v. *Ah"k mazasi* endorses the position that he is considered a *mazik be'yadayim* and therefore liable even *be'be'alim*, and this is also the position of *Shut. Radvaz* 1:129 (the responsum refers to a partner

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"the rubric of "negligence" only applies to one who fails to guard the bailment well, but when he performs a direct action and causes a loss he is called a tortfeasor and he is liable even *be'be'alim*".[173] There is a dissenting view that does apply the exemption of *shemirah be'be'alim* even to a partner who extends credit improperly,[174] although R. Meir Simha of Dvinsk understands that the dispute is merely over whether to categorize the improper extension of credit as mere negligence or actual direct tortfeasance, and he therefore suggests that even this view concedes that certain cases of egregious extension of credit are indeed considered direct tortfeasance.[175]

One argument against the categorization of a partner's misconduct as direct tortfeasance, raised by R. Tabak,[176] is based on the position of a number of *poskim* that someone whose involvement with a certain piece of property is incumbent upon him as a duty, for the benefit of the property owner, cannot be classified as a direct tortfeasor.[177]

Even insofar as the dispensation of *shemirah be'be'alim* does not apply to a direct tortfeaser, the *Mishneh Le'Melech* still entertains the possibility, based on a ruling of the Ra'avad that it does apply to a wife who (accidentally) breaks her husband's utensils in the course of her housework,[178] that one who causes damage non-deliberately, even though he is still generally liable as a tortfeasor due to the principle that "a man is always warned" (*adam mu'ad le'olam* - i.e., on notice

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who has been explicitly prohibited to extend credit, but as noted by *Mishpat Shalom* 176:8 s.v. *Sham be'Shach s.k.* 16, responsum 2:840 extends the classification of *mazik be'ya'dayim* to the general case of a partner who deviates from the prevailing custom and his partner's expectation; *Shut. Hasam Sofer siman* 156 s.v. *U'me'meila* takes for granted that one who commits a deviation that causes loss does not have the dispensation of *shemirah be'be'alim*, as he is considered a *mazik be'yadayim*, and not merely negligent. These sources are cited in *Pis'hei Teshuvah s.k.* 13. *Shut. Maharshach* 1:75 *s.v. Ve'yesh le'havi kezas siyu'a* rules that the improper extension of credit, along with "all that is mentioned in the words of the *poskim* regarding negligence [in the context] of partnership", "all those that the *Tur siman* 176 cites in the name of the Rambam" are considered *mazik be'yadayim* and do not have the exemption of *shemirah be'be'alim*. Cf. *Perishah os* 44; *Shut. Toras Emes siman* 44 p. 68a at the bottom of column 1 "*o she'te'hiyeh ha'peshiah hahi nikreis hezek ...* "; *Shut. Rav Pe'alim* 4:3 *s.v. Ve'da*.

[173] *Mishneh Le'Melech* 5:2.

[174] *Shut. Ha'Rif siman* 191; *Shitah Mekubezes Bava Mezia* 105a s.v. *Be'Teshuvas Rabbeinu Zk"l*; these sources are noted by *Sha'ar Mishpat* beginning of *siman* 176 and *Or Same'ah* 5:2.

[175] *Or Same'ah ibid*.

[176] *Erech Shai* 176:8 *s.v. De'shemirah be'be'alim hu*.

[177] R. Yitzhak b. Asher Ha'Levi (Riva), cited in *Tosafos Rabbeinu Perez Bava Kama* 27a s.v. *Ve'amar Rabah* (at the end of the discussion) (and in *Shitah Mekubezes* there); *Hidushei Ha'Ramban* to *Bava Mezia* 82b s.v. *Ve'asah R. Yehudah*. *Shut. Avnei Neizer siman* 19 s.v. *Ve'Chein mashma le'da'as Riva* understands this to be the rationale for the aforementioned position of the Ra'avad that applies the dispensation of *shemirah be'be'alim* to the wife who breaks utensils in the course of her housework, in spite of the inapplicability of the dispensation to a *mazik be'yadayim*.

[178] *Hasagas Ha'Ra'avad ishus* 21:9.

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that he is responsible for any damage he causes),[179] will nevertheless have the dispensation of *shemirah be'be'alim*.[180] [This only applies to accidents, not to deliberate deviation even where well-intentioned.] The *Beis Meir* finds this distinction very implausible ("*dahuk me'od*"), but as a matter of practical *halachah* nevertheless concedes the possibility that the possessor of the property (*muhzak*) may plead that he "holds" this position (*kim li* - a *halachic* procedural rule allowing a muhzak to retain possession of the disputed property as long as his position is supported by even a minority opinion)[181] based on the inescapable holding of the Ra'avad.[182]

Finally, as noted below, R. Meir Arik argues that even if the improper extension of credit is considered direct tortfeasance, moonlighting is not, and the moonlighting partner should therefore be exempt from damage he causes to the partnership business due to the distraction of his own affairs even in the absence of shemirah be'be'alim.[183]

Na'aseh Alav Malveh

Some *aharonim* offer another rationale for the inapplicability of the dispensation of *shemirah be'be'alim* to a partner who deviates from appropriate conduct, arguing that the partner's liability does not fall under the rubric of torts at all. As we have seen above, many *aharonim* maintain that a partner who deviates from his instructions or from default appropriate conduct becomes automatically liable for any subsequent loss, even loss that is completely independent of his deviation. This clearly indicates that his liability does not derive from a theory of torts, but rather

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[179] *Bava Kama* 26a-b, and see *Tosafos ibid.* 27b s.v. *U'Shmuel*. This principle indicates that the standard for liability as an ordinary tortfeasor is not gross negligence, but a lower threshold that includes even (at least certain levels of) accidents (*onsin*).

[180] *Mishneh Le'Melech shutafin ibid.*; *ishus ibid.*; *sechirus* 2:3. Cf. his comments to *nahalos* 11:5, where he seems to take Ra'avad at face value, that the dispensation of *shemirah be'be'alim* applies equally to a tortfeasor as to a bailee; *Beis Meir* (cited below) understands that his remarks in *shutafin* and *ishus* constitute a retraction of his position in *nahalos*. R. Akiva Eger (gloss to *ishus ibid.*, printed in the Frankel edition of the Rambam) asserts that *Shut. Penei Moshe* 1:6 [p. 14b, second column] also appears to maintain this distinction.

[181] This is a fundamental doctrine applicable throughout *hoshen misphat*, that in a case of unresolved dispute among the *poskim*, the defendant (technically, the possessor of the property in dispute), is entitled to have the matter decided in his favor, even where the position supporting his claim is a minority view. This doctrine is a corollary of the basic principle that "we do not follow the majority" in the context of civil disputes (*ein holchin be'mamon ahar ha'rov).* The literature on the scope and parameters of this doctrine is vast, complex and highly technical.

[182] *Beis Meir* 80:17. *Shut. Rav Pe'alim* 4:3 *s.v. Ve'da* also rules that the *muhzak* can plead *kim li* like the Ra'avad, and he further proposes that even the Rambam may agree to the Ra'avad on this point, rendering it undisputed and obviating the need for *kim li*. Cf. *Mahaneh Efraim shomrim siman* 39; *Hafla'ah kuntres aharon siman* 80 *os* 19; *Hochmas Shlomo* 421:3.

[183] *Minhas Pitim* 176:10 *s.v. Sham o nasa ve'nasan be'sehorah ahares.* As noted above, however, *Maharshach ibid.* asserts that "all" the examples of negligence enumerated by the Rambam are considered *mazik be'yadayim*, and he does not except moonlighting (although it is possible that he did not understand the Rambam as referring to moonlighting, as above).

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from a new principle, that a partner who deviates acquires the status of a "debtor", and he incurs an obligation to return the property he has "taken" to its owners. As R. Avraham di Boton explains, a deviating partner has no dispensation of *shemirah be'be'alim*, "for we are not obligating him by reason of negligence, where we could say "it is *peshiah be'be'alim*, and he is exempt", but because he has deviated from his commission, and he becomes a borrower of [the property]".[184] R. Aharon Perahyah endorses this position and elaborates: "Whenever his obligation derives from the rule of deviation, the partnership property become an indebtedness of his, and he is obligated [to return it], and so what is the difference whether its owner was with him or not, since his obligation does not derive from the law of the bailee but from the law of the debtor."[185]

The *Beis Shmuel Aharon*, however, insists that the consensus of authoritative *Ashkenazic poskim* rejects this position of the aforementioned Sephardic poskim, and maintains that the dispensation of *shemirah be'be'alim* always applies, even in the event of negligence and deviation.[186]

Bitul Kis and Grama

The *halachah* normally places several crucial limitations on the definition of an actionable tort; two of the most important are the exclusions of indirect harm (*grama*) and opportunity cost (*bitul kis*). One of the most important (and controversial) topics in the *halachah* of partnerships is whether a partner who injures partnership assets or prospects for profit is judged simply as an ordinary tortfeasor, with these concomitant dispensations for *grama* and *bitul kis*, or whether he is held to a higher standard due to his fiduciary responsibilities to the other partners; numerous *poskim* come down on opposite sides of one or both of these two highly intertwined questions.

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[184] *Shut. Lehem Rav*, end of *siman* 104 *s.v. Ve'ein liftor*. A similar idea is propounded by the *Kezos Ha'Hoshen* (*siman* 187) in the context of agency: an agent is liable for post-deviation loss in spite of the rule of *shemirah be'be'alim*, as his liability is "not under the doctrine of negligence, but because anyone who deviates, the moneys are considered by him as a debt".

[185] *Shut. Parah Mateh Aharon siman* 85 s.v. *Od mi'ta'am aheir, s.v. ve'od yesh le'havi ra'ayah*.

[186] *Shut. Beis Shmuel Aharon siman* 76 *s.v. Aval be'emes*. His assumption that the *poskim* he cites do not accept the doctrine of *na'aseh alav milveh* is debatable, as it seems to be largely predicated on a conflation of basic negligence (the context of most of the *poskim* he cites) with deviation (the context of *Lehem Rav* and *Parah Mateh Aharon*).
The sources cited in this note and the previous one are cited and discussed in *Mishpat Shalom* 176:8 *s.v. Sham be'Shach s.k.* 16 and *Mishmeres Shalom* there os 16, who adds that the position of the Rif cited earlier that applies the exemption of *shemirah be'be'alim* to the improper extension of credit is also incompatible with the stance of *Lehem Rav* and Parah *Mateh Aharon*.

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Bitul Kis

"One who forces his fellow's wallet to be idle is exempt" (*Ha'mevatel kiso shel haveiro patur*);[187] *halachah* does not generally consider opportunity cost damages actionable, i.e., only loss of value to property already possessed by the victim engenders an actionable claim, but not a missed opportunity to generate gain.[188]

The *halachah* is that a partner who sells the partnership merchandise "too early" and the price of the merchandise subsequently rises is liable to the partnership for the lost potential profit.[189] This seems to contradict both the preceding general rule that a tortfeasor is exempt from opportunity-cost damages as well as the standard *halachic* principle that "all thieves pay [the value of the stolen property] at the time of the theft" (*kol hagazlanin meshalmin ke'sha'as ha'gezeilah*), and are not liable for any subsequent price appreciation that would otherwise have accrued to the victim (i.e., in the event that the property is destroyed while still in possession of the thief, the thief is merely liable for the property's value at the time of the theft, and not for its subsequent appreciated value).[190] Even if the partner's improper sale is construed as outright theft, why should he be liable for the opportunity cost to the partnership? The *aharonim* offer various resolutions to this problem, with important ramifications for the general question of a partner's liability for opportunity cost damages:

- The Maharshach suggests that perhaps the *halachah* distinguishes between a partner who deviates from appropriate conduct and a thief. His proposed rationale for this distinction is that since a tortfeasor is at least liable for the value of the property that he has damaged or stolen, we need not hold him additionally liable for the opportunity cost to his victim, as this constitutes a reasonable compromise between the thief and his victim, whereas in the case of the partner who sells too early, if we do not hold him liable for the opportunity cost, there will be no (punitive) consequence of negligence.[191]

The *Kezos Ha'Choshen* suggests that this *halachah* is actually dependent on a dispute between the *rishonim* over whether one who damages property that will predictably increase in value (such as a product that is worth more on market days than other days) is liable for the value at the time of damage, or for the greater value that it is expected to achieve. [He apparently under-

[187] A paraphrase of *Yerushalmi Bava Mezia* 32b. Cf. *Tosafos Bava Kama* 20a *s.v. Zeh ein nehneh*; *Pis'kei Ha'Rosh ibid.* 2:6.

[188] See, e.g., *Yam Shel Shlomo Bava Kama perek* 9 *siman* 30; *Shach siman* 292 *s.k.* 15; *Shut. Hasam Sofer siman* 178; *Pis'hei Teshuvah ibid. os* 5; *Nahalas Zvi ibid.*

[189] Rema 176:14.

[190] *Bava Mezia* 43a. The principle also appears elsewhere in the Talmud (e.g., *Bava Kama* 93b), in related contexts.

[191] *Shut. Maharshach* 1:32 *s.v. Ve'gam amnam*. Cf. *Keneses Ha'Gedolah hagahos Tur osios* 96-97.

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stands that the case of predictable increase is an exception to the rule of *kol ha'gazlanin meshalmin ke'sha'as ha'gezeilah*.] As he himself notes, however, this approach is quite problematic, as normative *halachah* follows the view of the *rishonim* that holds the tortfeasor liable only for the actual value at the time of damage, and not for the expected increase in value.[192] Furthermore, R. David Menahem Manis Babad notes that according to this understanding of our *halachah*, the partner will only be liable in a situation of "certain injury" (*bari hezeika*), i.e., where there was a certain expectation that the merchandise would have appreciated in value with time, but not where the future price increase was uncertain.[193]

The *Nesivos Ha'Mishpat* invokes a celebrated doctrine that one who has a fiduciary obligation (explicit or implicit) to another, such as an employee, agent or partner vis-à-vis his employer, principal or other partner(s) is liable even for opportunity cost damages caused by his misconduct or negligence.[194] This doctrine, however, is quite controversial.[195] A further, apparently cogent, objection to the *Nesivos's* explanation of the *halachah* is raised by his *mehutan*, R. Yehoshua Heshel Babad: the theoretical underpinning of the doctrine invoked by the *Nesivos* is an implicit contractual obligation undertaken by the fiduciary to the property owner, so the *Nesivos's* explanation clearly implies that beyond the *bailee* obligations between partners explicitly acknowledged by the *halachah*, there exist additional *contractual* obligations. Now, we have seen that the *halachah* takes for granted that the standard exemption from bailee obligations of *shemirah be'be'alim* applies to partners, but according to the *Nesivos*, why should the partner not

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[192] *Kezos Ha'Hoshen s.k.* 7. Cf. *Shut. Imrei Eish siman* 23.

[193] *Shut. Havazeles Ha'Sharon helek* 2 *siman* 9 *s.v. Henei be'hoshen mishpat*.

[194] *Nesivos Ha'Mishpat biurim s.k.* 31, and see also his discussions of this doctrine in *siman* 183 *biurim s.k.* 1; *siman* 306 *biurim s.k.* 6. This doctrine is based on a passage in the commentary of Ritva to *Bava Mezia* 73b. *Shut. Hasam Sofer siman* 178, too, endorses this doctrine, and goes so far as to suggest that "all *poskim*" agree with it, although he immediately retreats as a matter of *halachah le'ma'aseh*, and concludes that "Nevertheless, since I have not found this to be explicitly the case, and similarly, the *Mordechai* to *Bava Kama siman* 115 is somewhat implicative to the contrary, therefore, when [such a case] shall come before me, I shall see to it to at least settle and compromise".

[195] *Mishpat Shalom 176:14 s.v. Sham ve'hayav le'shaleim* notes that other *rishonim* explain the relevant Talmudic passage in *Bava Mezia* differently from the Ritva, implying that they reject his doctrine; *Shut. Maharya Ha'Levi* 2:148 agrees with his correspondent that the *Nesivos's* approach is "baffling" ("*divrei ha'Nesivos .. temuhin*"), against the consensus of the *poskim* and even contraindicated by the language of the Rema himself. Cf. *Erech Shai* 185:1 *s.v. Meshaleim*, and *Shut. Teshuras Shai tinyana siman* 55 *s.v. Shuv ra'isi be'Maharitaz*, noting a ruling of *Shut. Maharit Zahalon siman* 135 that a partner who causes a loss to the partnership due to his failure to collect a debt is not liable, "because he has not performed any action". R. Tabak argues that this ruling, too, contradicts the doctrine of the *Nesivos*, and he concludes that since the *Maharit Zahalon* has claimed the existence of "many proofs" to his ruling, "it is impossible to rule like the *Nesivos* to extract [money]" from a partner who causes a loss by his inaction. [In other contexts, however, R. Tabak does endorse the Ritva doctrine as normative: *Erech Shai* 303:8 *s.v. Ve'hayev*; 312:14; *Shut. Teshuras Shai* 1:613. Cf. *Imrei Binah halva'ah siman* 39 *s.v. U've'Nesivos sham*; *Imrei Eish ibid*. at the end of the responsum.

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be held liable under his implicit contractual responsibilities (to which the special bailee exemptions surely do not apply)?[196]

- R. Y. H. Babad therefore proposes a different explanation of our halachah, suggesting that the rule of *kol ha'gazlanin meshalmin ke'sha'as ha'gezeilah* only applies to property for which a market exists at the time of the commission of the tort, in which case the obligation of the tortfeasor is limited to its value at that time, in spite of its subsequent appreciation, but where no market exists at that time, such as in our case where the partner sold the merchandise at a time when no one typically sells such merchandise, the liability of the tortfeasor is determined based on the time at which the property will be salable.[197]

Perhaps the most theoretically interesting and far-reaching answer to our dilemma is the one proposed by a number of other *aharonim*, that the mutual liability of partners extends far beyond that of ordinary tortfeasors : "partners [have the status of] paid bailees etc. and are liable even for *grama*, for this law of *garmi* is not said in [the context of] partners, but only between a man and his [unrelated by business ties] fellow, who has no obligation of bailment, but partners and paid bailees are liable even for *grama* … and the reason is, that [a partner] must take care that he not cause [harm] to the partnership even via mere *grama*".[198]

Grama

The final of the aforementioned approaches to holding a partner liable for revenue lost due to an improper early sale has major ramifications for partner liability beyond the specific case of opportunity cost; adherents of this doctrine argue that in general, a partner's liability extends well beyond the relatively narrowly defined limits of classic tortfeasance:

A fundamental pair of concepts in the *halachic* system of torts are *grama* and *garmi*; these are both categories of indirect damage, but instances of the former only engender liability "in the laws of Heaven" (*be'dinei shamayim*), not "in the laws of man" (*be'dinei adam* - i.e., the tortfeasor has a moral obligation to compensate his victim, but the latter has no actionable claim in court), while those of the latter engender liability even *be'dinei adam*. [The distinction between the two categories of *grama* and *garmi* is extremely complex as well as the subject of much dispute, and well beyond the scope of this work. We will content ourselves here with briefly noting that

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[196] *Sefer Yehoshua, pesakim u'kesavim siman* 64.

[197] *Sefer Yehoshua ibid.*, and see there for yet another possible explanation of our *halachah*.

[198] *Shut. Cehunas Olam siman* 10 *s.v. vnla"d de'ha'Rosh s"l ke'ha'Rashba*, cited in *Imrei Binah ibid. s.v. Ve'ayen be'Bah*. [The responsum is by R. Yehudah Shmuel Primo, the father-in-law of the author, R. Moshe Cohen.]
Cf. *Shut. Maharash* 7:78 *s.v. al kol panim*.

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the most popular definition of the distinction understands that the category of *garmi* comprises injuries that are more direct and immediate than those that fall under the rubric of *grama*.[199]]

Many *poskim* rule that a partner who causes damage to partnership assets is not subject to the same exemption (*be'dinei adam*) as an ordinary tortfeasor with regard to *grama*, as his fiduciary responsibilities to the other partners engender a higher standard of liability;[200] others, however, either explicitly or implicitly reject this distinction between a partner and and an ordinary tortfeasor.[201]

R. Meir Arik argues that even if we consider a partner who sells at the improper time a direct tortfeasor and consequently liable even in a situation of *shemirah be'be'alim*, this will not be the case for one who moonlights, as even though this activity constitutes a conflict of interest due

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[199] See, e.g., *Tosafos Bava Basra* 22b *s.v. Zos omeres*; *Piskei Ha'Rosh ibid.* 2:17 and *Bava Kama* 9:13; *Mordechai Bava Kama Ha'Gozeil Kama remez* 119; *Sema siman* 386 *s. k.* 1; *Shach ibid. s. k.* 1; *Sha'ar Mishpat ibid s.k.* 1.

[200] *Sha'ar Mishpat s.k.* 4. *Shut. Hasam Sofer siman* 140 *s.v. Kol zeh he'erachti* (cited in *Pis'hei Teshuvah siman* 55 *s.k.* 1 and *Divrei Geonim* 98:27, and cf. *Shut. Doveiv Meisharim* 1:96 and 3:26) espouses this doctrine with regard to bailees and agents, and would presumably do so with regard to partners, too, as partners are actually both bailees and agents. *Shut. Maharash* 7:61 cites the *Hasam Sofer* and debates his analysis, but concludes that "*le'dina*, most *poskim* have agreed that an agent and a bailee are liable even for *grama*, as the *Nesivos* has written in *siman* 176". In another responsum, 7:78, however, he writes: "In truth, the opinion of many *poskim* is that a bailee is liable even for *grama* … some *poskim* have written that a partner is considered like a bailee and is liable even for *grama*. But in truth, in this, too, there is dispute among the poskim, and it is difficult to extract money." He writes virtually the same thing in a third responsum, 6:62:4. In a fourth responsum, 7:71 *s.v. Ve'hinei Kt"h*, he cites his correspondent as asserting that one can plead "*kim li* that a bailee is liable even for *grama*, in accordance with the opinion of the Radvaz, cited in *Sha'ar Mishpat*". There is apparently some sort of corruption here, as it is the *Sha'ar Mishpat* himself, *against* the Radvaz, who maintains that a bailee is liable for grama (see the following note). *Erech Shai* 55:1 *s.v. Shlish*, too, raises objections to the *Hasam Sofer's* analysis and concludes: "Therefore, we should not take action in accordance with the view of the *Hasam Sofer*." *She'eilas Ya'avez* 1:85 (cited in *Divrei Geonim* 15:8) also espouses the doctrine that a bailee is liable even for *grama*. *Shut. Maharit* 2:110 also explicitly asserts that bailees and agents are liable for *grama*, although in his case, of an agent who violated his instructions and failed to sell the merchandise, which subsequently declined in value, he does not hold the agent liable, as the loss was not forseeably certain, and the agent can argue that he acted in good faith, according to his judgment of the best interest of his principal (see our earlier discussion of the business judgment rule. Divrei Geonim ibid. understands that the Maharit is of the same view as the She'eilas Ya'avez, and in 15:12 he infers from rulings of the Maharashdam and R. Avraham di Boton that they, too, hold bailees liable even for grama.

[201] The *Sha'ar Mishpat* himself introduces the doctrine as a basis for rejecting a ruling of *Shut. Radvaz* 1:399 that applies the *grama-garmi* dichotomy to the case of a partner who prevented his partner from selling partnership merchandise which subsequently declined in value (see below in the main text for further discussion of this case), and *Mishpat Shalom* 176:14 *s.v. Ve'nireh od rayah de'gam shutaf patur mi'grama u'bitul kis* indeed infers from this that the Radvaz exempts even a partner from *grama*. *Minhas Pitim* 385:1 *s.v. Sham de'da'in dina de'garmi*, on the other hand, strongly *endorses* the basic approach of the *Sha'ar Mishpat*, and explains that even the *Radvaz's* ruling is actually consistent with this perspective. *Shut. Sho'el U'Meishiv kama 3:56 at the end of the responsum* discusses an agent who seized merchandise of his principal and prevented him from selling it, and it subsequently declined in value, and rules that the agent is not liable, as his conduct constitutes mere *grama*; he apparently takes for granted that an agent is not treated specially with regard to *grama*; *Divrei Geonim* 15:17 notes that this contradicts the doctrine of the *Sha'ar Mishpat, She'eilas Ya'avez* and *Hasam Sofer* that agents are liable even for *grama*.

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to the distraction from his partnership duties that it causes, it is still no more than mere *grama*, not direct tortfeasance, and the partner should not be liable even in the absence of *shemirah be'be'alim*.[202] He apparently takes for granted that partners have the same exemption for grama as ordinary tortfeasors.[203]

Hezek She'Eino Nikar **and** Harei Shelcha Le'Fanecha

Ordinarily, one who is able to return property he has stolen still intact, or even damaged, if the damage is considered "indiscernible" (*hezek she'eino nikar*), may plead "here is your [property] before you" (*harei shelcha le'fanecha*) and has no further liability for the theft or damage.[204] Some *aharonim* extend this rule to partners, and therefore rule that a partner who prevented another partner from selling the merchandise at the appropriate time, and it subsequently declined in value, is nevertheless exempt, insofar as he acted in good faith, due to the defense of *harei shelcha le'fanecha*.[205] [One who acts maliciously, however, is liable, due to a rabbinic penalty imposed upon one who deliberately perpetrates a *hezek she'eino nikar*.] A dissenting view maintains that partners (like agents and bailees, according to some authorities[206]) have no defense of *harei shelcha le'fanecha*.[207]

The Partners' Oath

There is a fundamental rule that "we do not administer an oath in response to any uncertain claim [*ta'anas safek*]",[208] i.e., the claimant must assert his certainty of his claim in order for the court to impose an obligation upon his opponent to swear to his denial of the claim; one of the classic exceptions to this rule is the case of partnership, where we have a rabbinic institution obligating a partner to swear in response to a mere suspicion of his fellow partner that he has

[202] *Minhas Pitim* 176:10 *s.v. Sham o nasa ve'nasan be'sehorah ahares.*

[203] Similarly, as noted earlier (in the course of our discussions of a partner who refuses to take an oath and one who experiences a loss of partnership assets subsequent to Sabbath desecration), the *Hida*, R. Shlomo Drimer and the Tshebiner Rav also apparently take for granted that even a partner is not liable for *grama*.

[204] *Shulhan Aruch* 363:1 and 385:1.

[205] *Sha'ar Mishpat* s.k. 4; *Erech Shai* 185:1 *s.v. Meshaleim mah she'hifsid* and *Shut. Teshuras Shai* 1:593.

[206] The question of whether a bailee can plead *harei shelcha le'fanecha* is the subject of extensive debate among the *aharonim*; see, e.g., *Yam Shel Shlomo Bava Kama perek Ha'Gozeil Kama siman* 20; *Shach siman* 363 *s.k.* 7; *Nesivos Ha'Mishpat ibid. biurim s.k.* 3; *Sha'ar Ha'Melech hilchos hoveil u'mazik (hashmatah)* 7:3; *Magen Avraham siman* 443 *s.k.* 5; *Nesiv Haim ibid.*; *Hok Ya'akov ibid. s.k.* 8; *Hagahos R. Akiva Eger ibid.*; *Shut. Hasam Sofer orah ha'im siman* 105 (and see his glosses to the *Magen Avraham*); *Shut. Ahiezer* 3:82.

[207] *Divrei Geonim* 15:17 *s.v. Ve'zeh mi'karov nidfas sefer Erech Shai.*

[208] *Shulhan Aruch* 75:17.

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stolen from him or been careless in his accounts.[209] The right to demand such an oath exists for the duration of the partnership's existence; a partner may demand an oath from another partner even while the partnership is still a going concern, and need not wait until its dissolution,[210] or immediately upon its dissolution.[211] Subsequently, the rules revert to the normal ones: a partner with a claim of which he is certain may demand an oath, but one with only uncertain claims is not entitled to an oath, and may only exercise the standard right of even one with uncertain claims to have the court pronounce a general anathema (*herem stam*) against anyone who has stolen from him while in partnership with him.[212]

There is a major dispute among the *rishonim* and *aharonim* over whether the right to an oath is limited to where the defendant partner concedes some of the claim (*modeh be'mikzas*)[213] of the plaintiff partner.[214]

A key question is whether the plaintiff partner's suspicion of the defendant partner must be genuine, or may be a mere formal declaration of mistrust of his partner's reckoning. This question is directly raised by R. Ya'akov Reischer, who concludes that insofar as the plaintiff partner is convinced of the integrity of the defendant's character, he may not demand an oath: "Since he is believed by him, why shall he teach his tongue to speak falsehood[215] to say 'I do not believe you'?"[216] The *Taz* and *Nesivos Ha'Mishpat* go even further, inferring from the language of the *Tur* that the plaintiff must have a specific basis for suspecting the defendant, but if he concedes that he has no such basis, he may not demand an oath.[217] While the *Aruch Ha'Shulchan*

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[209] *Ibid*. 93:1.

[210] Rema *ibid*.

[211] See *Shut. Divrei Malkiel* 5:217 for a discussion of whether a partner who discovers a previously unknown basis for suspicion of his partner subsequent to the dissolution of the partnership has the right to demand the Partner's Oath.

[212] *Shulhan Aruch ibid*. 93:6. Once the partner has at least one claim of which he is certain, and so may demand an oath from the other partner on his denial of that claim, he may then further demand that the oath include denials of other claims of which he is uncertain, via the principle of *gilgul shevuah*.

[213] One of the examples of a Biblically mandated oath is where the plaintiff demands a certain sum and the defendant concedes a portion of it while denying the remainder. As explained, the Partner's Oath is merely a rabbinic institution, as the plaintiff partner's claim is uncertain, and Biblical oaths always require a certain claim by the plaintiff, but some *poskim* still require the criterion of partial concession even for this rabbinic oath.

[214] See *Sema ibid. s.k.* 7; *Shach ibid. s.k.* 3; *Pis'hei Teshuvah ibid. s.k.* 5; *Shut. Divrei Malkiel* 5:214.

[215] Jeremiah 9:4.

[216] *Shut. Shevus Ya'akov* 1:163. The responsum subsequently considers whether the plaintiff may at least use the threat of demanding an oath as an inducement to the defendant to settle; he concludes that this, too, is prohibited. Cf. 2:169.

[217] *Taz* beginning of *siman* 93; *Nesivos Ha'Mishpat ibid. hidushim s.k.* 4. *Pis'hei Teshuvah s.k.* 3 cites the *Taz* followed by the final portion of the *Shevus Ya'akov's* analysis cited in the earlier note, and comments that it is "*pashut*". In light of the fact

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staunchly rejects this condition,[218] R. Malkiel Tannenbaum reports that "our custom is like the opinion of the *Taz*" as the situation would otherwise be intolerable, with oaths being constantly required, as most business arrangements involve partnerships, employment and guardianship.[219]

Some *poskim* rule that the partner demanding the oath must accept upon himself the standard *herem stam* pronounced against "anyone who claims of him something in which he is not obligated, in order to demand an oath in vain",[220] which certainly implies that he may not demand the oath without genuine suspicion of his partner, but R. Chaim Yosef Dovid Weiss suggests this is limited to where the plaintiff partner is well acquainted with the business's affairs and thereby has direct knowledge that his partner owes him nothing, and so may not legitimately demand an oath, as this would constitute a "vain oath" (*shevuas shav*), but where the plaintiff partner has no such actual knowledge he may indeed demand an oath, even if he has complete faith ("*ma'amin be'emunah she'leimah*") in his partner's integrity and that he has not cheated him.[221]

Some *poskim* grant the defendant partner the option of *hipuch* (the right of a defendant to redirect the oath incumbent upon him to the plaintiff; i.e., to declare that instead of taking the oath incumbent upon him and thereby having the matter decided in *his* favor, the plaintiff shall instead take an oath (or subject himself to a *herem stam*) in support of his claim and thereby have the matter decided in *his* favor).[222] R. Weiss explains that although the *herem stam* discussed in the previous paragraph is only against a partner who has actual knowledge of the business's affairs and therefore direct knowledge of his partner's integrity in the matter under dispute, the *hipuch* discussed here is directed against a partner who may have no such actual knowledge,

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that the *Shevus Ya'akov* does not seem to have considered even the actual demand for an oath to be self-evidently illegitimate, it is not clear why the mere threat of doing so should be considered so; perhaps the *Pis'hei Teshuvah*, contra *Shevus Ya'akov*, does indeed consider the demand for an oath as self-evidently illegitimate, or perhaps he merely means that once we accept the basic premise of its illegitimacy, the illegitimacy of threatening to demand an oath becomes self-evident.

[218] *Aruch Ha'Shulhan* 93:1.

[219] *Shut. Divrei Malkiel* 5:214.

[220] *Taz* 87:22 (conclusion of the passage) and *Nesivos Ha'Mishpat ibid. hidushim s.k.* 20. This general anathema is typically imposed in the general case of a plaintiff whose right to an oath derives from his *ta'anas vadai*; the *Taz* and *Nesivos* are extending it to the exceptional cases (including the Partner's Oath) where an oath is required even in response to a *ta'anas safek*. *Sha'ar Mishpat ibid. s.k.* 17 disagrees, and as noted by R. Weiss (see below), *Shut. Maharil Ha'Hadashos* at the end of *siman* 174 also seems to take for granted that a *herem stam* is not invoked against an oath taken in response to a *ta'anas safek*.

[221] *Shut. Va'Ya'an David helek* 2 *siman* 222:1.

[222] *Tur siman* 87 *os* 17 citing R. Meir Ha'Levi Abulafia (Remah); *Bedek Ha'Bayis ibid.*; *Shulhan Aruch* 87:11 (as "*yesh mi she'omer*"); *Bah ibid.*; *Shach ibid. s.k.* 32.

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but who nevertheless trusts his partner and is demanding an oath in spite of the lack of any real suspicion of him.

A related question is debated by the *Tshebiner* Rav and R. Yehoshua Menachem Ehrenberg: a plaintiff knows that the defendant owes him money, but the defendant claims that he is unsure of this. In such situations, the plaintiff is normally entitled to demand an oath from the defendant that he is indeed unsure, but in our case, the plaintiff believes that the defendant is an honest man and genuinely unsure. If the plaintiff would concede this, there would certainly be no further room for an oath, so the plaintiff, who knows for certain that he is owed the money, would like to demand an oath despite his personal conviction of the defendant's integrity, in the hope that the defendant will avoid the taking of even a perfectly honest oath and thereby pay him the money to which he knows he is entitled. The *Tshebiner Rav* allows this,[223] whereas R. Ehrenberg (as well as the *Tshebiner Rav's* correspondent) consider the possibility that such a demand is forbidden by the imperative to "Keep thee far from a false matter",[224] as interpreted and extended by *Hazal* to include the utilization of falsehood even in the service of a legitimate claim.[225] In the course of his analysis, R. Ehrenberg suggests a distinction between one who is convinced of his opponent's integrity due to his personal acquaintance with his character, who he suggests may violate the above imperative by demanding an oath, and one who is merely inclined to trust his (affluent) opponent's rectitude due to the Proverbial assertion that "The righteousness of the upright shall deliver them",[226] as interpreted by *Hazal*[227] to imply that "if he were not a trustworthy and upright man, he would not have been made rich by Heaven".[228] This rule certainly does not engender "complete faith", as Providence certainly sometimes favors the undeserving, but merely a tendency toward trust as opposed to distrust, and therefore demanding an oath in this case may be legitimate.

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[223] *Shut. Doveiv Meisharim* 3:139:2.

[224] Exodus 23:7.

[225] *Shevuos* 30b-31a. *Shut. Devar Yehoshua* 5:50.

[226] Proverbs 11:6.

[227] It is unclear whether *Hazal* are stating their own view here, or merely describing the conventional wisdom.

[228] *Bava Mezia* 35a, as explained by Rashi s.v. *Loveh me'kayeim be'malveh*. For further discussion of these and related questions, see: *Shut. Beis Yitzhak* 53:12; *Nahal Yitzhak siman* 75 (se'if 9) *os* 5.

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Dissolution

Partnership Duration

As with the terms of partnerships generally, the partnership agreement may specify a duration for the partnership. In the absence of any such specification, any partner may force a dissolution at any point, unless there is a clear, fixed time for the sale of the partnership merchandise, in which case the rule is the same as where there exists a stipulated duration.[229] The *Aruch Ha'Shulchan* elaborates that each situation is considered in context: e.g., a partnership to open a shop to buy and sell merchandise has a minimum duration of a year, "as it is not standard to open a shop for less than a year"; if the shop is established in the context of a fair (*yerid*), the default assumption is that it is to operate until after the fair; "and the matter depends on the court's impression".[230]

Death Of A Partner

Secular law and *halachah* agree that a partnership terminates with the death of any partner, and both the heirs of the deceased partner, as well as the surviving partners, have the right to terminate their arrangement even during the explicitly specified duration of the partnership, even though in general, a contractual arrangement such as the loan of personal property does survive the death of either party.[231] As the *Sema* explains, the surviving partner can say: "I partnered with your father, for I knew that he was expert in the nature of business, or some other reason, and I am not so with you", and the heirs of the deceased partner can say: "Our father partnered with you, but we are not comfortable with you"'.[232]

Where there are multiple partners and one dies,some *aharonim* rule that the partnership relationship between the surviving partners and the heirs terminates, as above, but not the relationship between the surviving partners themselves.[233]

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[229] *Shulhan Aruch* 176:16-17.

[230] *Aruch Ha'Shulhan* 176:43.

[231] *Shulhan Aruch* 176:19. This is the consensus of Maran and the Mapah there, although the latter acknowledges a dissenting opinion.

[232] *Sema s.k.* 50.

[233] *Shut. Maharashdam siman* 153 p. 53b column 1); *Shut. Maharshach* 2:66. Cf. *Shut. Mishpat Zedek* 2:22 pp. 48b-49a, from *s.v. U'le'hakirah ha'aheres.*

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Early Withdrawal

The question of the right of a partner to withdraw from the partnership before the agreed upon time of termination is a classic example of the intersection of the *halachah* of partnership with other basic areas of *halachah*: general contract law, and employment law. Parties to a contract are generally obligated to fulfill their contractual obligations, but an employee is a special case: due to the Torah's fundamental anti-slavery principle mentioned above, he has special dispensation to renege on a commitment of service.[234] How is a partnership characterized? There may be mutual obligations upon the partners to perform services for the partnership (i.e., the other partners), but the partnership agreement typically goes beyond a simple employment contract. Indeed, the *rishonim* disagree over how to characterize a partnership: the *Nimukei Yosef* suggests[235] that it may indeed be equivalent to a simple case of employment, and therefore allows a partner to withdraw early, and not just his services but even his invested assets, for "if he is not bound, his assets are no longer bound, as they are bound based on him (*mi'koho*)",[236] whereas the Rambam[237] (and *Shulchan Aruch*[238]) flatly deny a partner the right to do so. The *poskim* have proposed several explanations of this position of the Rambam that does not seem to grant partners the rights of ordinary employees:

- The servitude in ordinary employment is unidirectional - the employee works for the employer, but not vice versa, and so were the employee not entitled to withdraw, he would be considered a slave to his master. But since the obligations of partners are mutual, and no one of them stands in relation to the others in the absolute character of an employee, they do not have the employee's special anti-slavery right.[239] It follows, therefore, that in a partnership comprising both managing partners as well as silent partners, who merely contribute capital but have no managerial duties, the managing partners

[234] *Bava Mezia* 10a and 77a-b.

[235] But see the *Toras Emes*, cited below, who argues that the *Nimukei Yosef* is not making a definitive assertion, but merely a tentative suggestion.

[236] *Nimukei Yosef Bava Mezia 63a in Rif pagination*. This is also the view of R. Yeshayah [di Trani the Elder], according to the *Tur os* 33.

[237] 4:4. This is also the view of the Ra'avad, according to the *Tur ibid.*

[238] *Shulhan Aruch* 176:15, and *cf. Beis Yosef ibid. os* 23. For further discussion of the normative *halachah* in this dispute, see the interesting analysis of *Shut. Lehem Rav siman* 100; Shut. *Maharshach* 1:70 *s.v. Ivra de'le'inyan; Zechor Le'Avraham helek* 2 *os shin p.* 363a *s.v. Shutafin she'nishtatfu; Erech Shai beginning of* 176:15.

[239] *Shut. Maharik shoresh* 181; *Lehem Rav ibid.; Shut. Toras Emes siman* 113; Cf. *Sema s.k.* 44; *Shut. Benei Aharon siman* 39 *s.v. Ve'li nireh DS"L le'Tur*.

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would have the right to renege vis-à-vis the silent partners,[240] but the silent partners cannot end the arrangement without the agreement of the managing partners.[241] R. Shalom Mordechai Ha'Cohen Schwadron of Berezhany (Maharsham) goes even further and rules that even where both partners are working on behalf of the partnership, to the extent that the duties of one exceed those of the other, he is considered a "slave" and has the right to withdraw (from those duties).[242]

- Only the person of an employee is committed to the service of his master, while partners commit their assets, too, and since they cannot remove the lien on their assets, they cannot remove the lien on their persons either.[243]

- The *Mahaneh Efraim* understands that there is actually no dispute between the Rambam and the *Nimukei Yosef*; the Rambam agrees that a partner, like any employee, may decline at any point to work for the partnership, and all he means is that he may not demand the early return of his investment (which the *Nimukei Yosef*, too, concedes).[244]

Kinyan

R. Yosef Colon (*Maharik*) suggests (in explanation of the position of the Ra'avad) that even insofar as a partner may withdraw from the partnership, where the partners have executed a *kinyan*, he may not do so.[245] The *aharonim* point out that this presupposes that an employee's right to renege does not exist where a *kinyan* has been made,[246] a position which is itself the subject of considerable dispute.[247]

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[240] Although not vis-à-vis each other, i.e., unless all the managing partners wish to terminate their arrangement, any dissenting managing partner may compel all the others to continue their arrangement.

[241] See *Shulhan Aruch* 176:23.

[242] *Shut. Maharsham* 4:95 at the end of the responsum *s.v. U'mah she'sha'al be'din RV"SH; s.v.* Ve'amnam.

[243] *Toras emes ibid.; Shut. Maharshach 1:70 s.v. Ve'omer de'ivra.*

[244] *Mahaneh Efraim shutafus siman* 2. *Maharshach ibid*. had already proposed such a dichotomous position, that a partner may withdraw his services but not his invested capital.

[245] *Maharik ibid. Aruch Ha'Shulhan* 176:4 also asserts that where a *kinyan* has been made, the partners cannot withdraw for the stipulated duration, but he makes this argument only in conjunction with the argument that partners are "more like" contractors (*kablanim*) than *po'alim* (employees). The sense of this hybrid argument is not entirely clear.

[246] *Keneses Ha'Gedolah hagahos Tur end of os 24 s.v. U'Maharshach; Mahaneh Efraim ibid s.v. U'me'atah; Kezos Ha'Hoshen siman* 333 *s.k.* 6.

[247] *Shut. Ritva* (Mosad Ha'Rav Kook) *siman* 117, in the name of his teacher R. Aharon Ha'Levi (Ra'ah), in the name of his teachers, cited in *Beis Yosef siman* 333 end of os 1; *Shut. Rivash* beginning of *siman* 476; *Shut. Mabit* 2:132; *Erech Lehem* 333:3; *Taz* 333:3; *Shach siman* 333 *s.k.* 14; *Shut. Shevus Ya'akov* 2:184; *Nesivos Ha'Mishpat siman* 181 end of *biurim s.k.* 4; *Pis'hei Teshuvah*

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Division of Assets

Upon dissolution, any partner can compel the others to divide the assets between the partners, with each receiving the amount of his initial investments, and any profits or losses allocated as per the rules set forth above. This applies to divisible assets, i.e., assets that can be divided into multiple portions such that "the name of the whole" will apply to each portion. For example, the minimum size of a "field" is (classically) an area suitable for planting nine *kabin*,[248] so if there are two partners, and one is to receive three quarters of the assets and the other one quarter, a partner can only compel division if the field is suitable for the planting of thirty six *kabin*. Otherwise, the asset is considered indivisible, and no partner can force a division thereof against the wishes of another partner,[249] although they may still divide the assets by unanimous consent.[250]

Divisible Assets

The Casting Of Lots

Where an asset is divisible into equal but distinguishable portions, e.g., a field whose subregions are equal in value but nevertheless geographically distinct, lots are drawn to determine which partner gets which portion.[251] This is actually a unique method of dispute resolution: as several *aharonim* point out, nowhere else in *halachah* do we resolve conflicts or disputes over assets or rights via lottery, "for the court cannot impose a lottery against the will of the litigants to deprive one of them [of his rights], since it is possible for them to offer compensation for the difference between them". It is only once a balanced, equitable settlement has been reached, as in our situation, where the asset has been divided into equivalent albeit distinct portions, and the question is only who is to receive which side of an equitable but asymmetric settlement arrangement, that we impose a lottery.[252]

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siman 333 end of *s.k.* 4; *Shut. Karnei Re'eim siman* 212; *Aruch Ha'Shulhan* 333:8 (in addition to the sources cited in the previous note).

[248] One *kav* is between 1.2 and 2.39 liters.

[249] *Shulhan Aruch* 171:1-2.

[250] *Ibid*. 173:1. The exception is Biblical scrolls, where physical dissection would be considered disgraceful to the holy scroll. Some extend this to synagogues: see *Mishkenos Ha'Ro'im ma'areches os beis os* 19; *Pa'amonei Zahav* 173:1.

[251] *Shulhan Aruch* 173:2 and 174:1.

[252] *Erech Shai* 154:3 *s.v. Haga"hah*, and see also *Hadrei De'ah yoreh de'ah siman* 157 *s.v. Ve'ayen Tiferes Le'Moshe*.

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Furthermore, there is a fundamental dispute among the *poskim* as to the theological significance of such a lottery. Some understand that the lottery is a way of discerning the Divine Will; this position finds its most extreme expression in a Geonic ruling declaring that no one may flout the results of the lottery, as it constitutes a Divine utterance, "and one who flouts the lottery is as one who flouts the Ten Commandments [*aseres ha'dibros*]".[253]

Another ramification of this understanding of lotteries is asserted by R. Yair Haim Bacharach, who rules that any deviation from "proper" lottery protocol, even one that does not affect the distribution of winning probabilities, invalidates the lottery (which must therefore be redone), "for it is likely that if the lottery is [implemented] proper[ly], Higher Providence will cleave to it, as it is written "*havah tamim*" ("Give a perfect [lot, or verdict]"),[254] whereas if the lottery is improper[ly implemented], there is no way to say of the winner that "This is Hashem's doing",[255] whether the impropriety was via human scheme or [mere] error, in any event the lottery is improper[ly implemented], and any one may say, "Had the lottery been done properly, I would have been successful, via my luck (*mazli*) or via my prayer that He give me success in all my affairs".[256] R. Bacharach attempts to prove this supernatural character of lotteries from the various Biblical accounts of the use of lotteries or similar proceedings in the contexts of the division of the territory of Israel among the tribes, the singling out of Achan as the violator of Joshua's anathema of the spoils of Jericho, the singling out of Jonathan as the violator of his father King Saul's adjuration to fast until nightfall, and the singling out of Jonah as the cause of the storm endangering his ship, but others counter that all these lotteries were special cases, expressly authorized and mandated by G-d, involving *Ru'ah Ha'Kodesh* and the *Urim Ve'Tumim*, and / or accompanied by miraculous corroboration.[257]

R. Avraham b. Ha'Rambam is ambivalent on the prognosticatory character of lotteries, believing that a lottery somehow does convey genuine information about hidden things, but uncer-

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[253] *Responsa of the Geonim (Prague) siman* 60, cited in *Keneses Ha'Gedolah siman* 173 *hagahos Beis Yosef* end of *os* 2; *Divrei Geonim kelal* 20 *os* 1; *Sedei Hemed helek* 2 *kelalim ma'areches ha'Gimmel pe'as ha'sadeh siman* 14; *Shut. Avnei Heifez siman* 8 *os* 6; *Shut. Yabia Omer helek* 6 *siman* 4 *os* 3. The *Divrei Geonim, Sedei Hemed* and *Avnei Heifez* all declare the responsum, with its comparison of lotteries to the Decalogue, a "wonder" (pele). Cf. *Ru'ah Haim helek* 2 beginning of *siman* 174; *Nevei Ha'Heichal, Aharei-Kedoshim* 9 *Iyar* [5]773, issue 193 s.v. *Mekor divrei ha'Gaon u'perushan*.

[254] Samuel I:14:41.

[255] Psalms 118:23.

[256] *Resp. Havos Ya'ir siman* 61, cited in *Divrei Geonim ibid. os* 2 and *Pis'hei Teshuvah* beginning of *siman* 175. He subsequently declares that "A lottery … has an affinity for Providence if done properly". Cf. *Mishpetei Ha'Torah* 2:27:3.

[257] *Shut. Yabia Omer os* 3; R. Haim David Ha'Levi, *Shanah Be'Shanah* ([5]750) pp. 177-84. Cf. *Taharas Ha'Mayim ma'areches ha'Gimmel os* 28 and *Sedei Hemed ibid.* end of *siman* 14.

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tain of the mechanism behind this,[258] and R. Haim David Ha'Levi has a lengthy and vigorous rebuttal of the idea that lotteries in contemporary times (as opposed to the Biblically enjoined instances) – and even those utilized by the priests to assign the privileges of Temple service - are anything more than mere convention (*haskamah*), "and no Divine Providence whatsoever inheres in this lottery". He is skeptical of the authenticity of the putative Geonic ruling, and feels that R. Bacharach has failed to put forth any convincing or compelling argument in favor of his view.[259]

Midas Sedom

Where one partner has a particular need for, or ability to benefit from, a particular portion, and the other partners have no objective preference, there is a dispute among the *rishonim* over whether the disinterested partners must defer to the one who stands to benefit, and waive their normal right to a decision by lottery. The argument for requiring deference derives from the fundamental *halachic* abhorrence of "Sodomite conduct" (*midas Sedom* - the Talmudic idiom for the insistence upon one's admittedly legitimate rights to the detriment of someone else's interests, even where he has nothing whatsoever to lose by concession). The Rambam rules that the rule that we compel people not to engage in *midas Sedom* (*kofin al midas Sedom*) does indeed require the essentially disinterested partner to defer to the interested one,[260] while others maintain that the rule only applies where the defendant is not attempting to trespass on the actual property rights of the plaintiff (but where the plaintiff would nevertheless have some right to enjoin the desired conduct of the defendant, were it not for the issue of *midas Sedom*), but it can never compel a property owner to relinquish his actual property rights. Just as the consideration of *midas Sedom* would not compel the owner of a parcel of land outright to exchange it for an equivalent parcel elsewhere for another's benefit, even though the other would gain thereby and he would lose nothing, so, too, now that each partner has the right to participate in a lottery to acquire each specific parcel of the currently jointly held land, *midas Sedom* cannot require him to relinquish this right even though he loses nothing thereby and the other gains.[261]

Even here where the default procedure is the casting of lots, there is a dispute among the poskim over whether a partner still retains the right to make a *gud o agud ultimatum*: some maintain that a partner may demand, with respect to a particular portion, that the other partners either

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[258] Resp. of R. Avraham b. Ha'Rambam (Jerusalem 5698) *siman* 12.

[259] *Shanah Be'Shanah ibid.*

[260] *Hilchos Shcheinim* 12:1, codified by *Shulhan Aruch* 174:1.

[261] Rosh *Bava Basra perek Ha'Shutafin siman* 46, codified by Rema *ibid.* (as *Yesh omrim*). See *Nimukei Yosef Bava Kama* 8b-9a in Rif pagination and *Sha'ar Mishpat beginning of siman* 153.

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allow him to purchase it for a stated sum, or purchase it from him for that sum, while others disagree.[262]

Indivisible Assets

For indivisible assets, *halachah* introduces the unique rule of *gud o agud*: one partner may issue another the ultimatum that he either buy out the former's interest, or sell him his interest. This ultimatum may set an arbitrarily high price for the asset, even one much higher than its true value, and the other partner must then choose between the options of buying or selling at that price.[263] The ultimatum may not, however, establish an unfairly low price for the asset, as this would allow a rich partner to take advantage of a poor partner, by forcing him to sell out to him without receiving fair compensation, as he will be unable to take advantage of the option to buy at the stated low price due to his lack of resources. A partner may not, however, demand that the other partner buy him out (without giving him the option of selling out), even if he is willing to accept a low valuation for the asset, as the other partner may insist that he wishes to sell rather than buy.[264]

The *poskim* debate whether a partner who lacks the resources to buy the other partner's share for himself, but is acting as a straw buyer for someone else, may issue a gud o agud ultimatum. The Rosh rules that he may not, for "we will not deprive the other from abiding in his inheritance[265] because of this one's excess profit (*tosefes damim*)".[266] The Rambam apparently disagrees, as he allows an impecunious partner to issue an ultimatum of gud o agud in the form of "Buy from me, or sell to me, and I will borrow and buy or sell to others".[267] But while some *aharonim* do indeed assume that the *Rosh* and *Rambam* disagree,[268] others attempt to reconcile their positions:

- R. Yosef Caro suggests that the *Rambam* is discussing a case where the other partner is unwilling to buy at any price, while in the *Rosh's* case, the other partner was willing to buy at

[262] *Shulhan Aruch* 174:5.

[263] This is the normative *halachah*, although the question of whether an arbitrary price can be named or whether the true price, established by the court, must be utilized, is actually a dispute among the *rishonim*; see, e.g., *Tur and Beis Yosef siman* 171 *os* 5.

[264] *Shulhan Aruch* and Rema 171:6.

[265] A reference to Samuel I:26:19.

[266] *Shut. Ha'Rosh* 98:3, cited in *Tur siman* 171 *osios* 27-28, and codified (as *yesh omrim*) by Rema 171:6.

[267] *Hilchos Shcheinim* 1:2, codified in *Shulhan Aruch* 171:6.

[268] *Drishah osios* 12,28. See *Sema s.k.* 14-15 and *Shach s.k.* 7 (cited below in the notes).

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the property's true price, and the *Rosh* therefore maintains that we do not force him to sell simply because the *gud o agud* ultimatum set a more expensive price.[269]

- The *Bah* suggests that the *Rosh's* ruling is limited to where the partner issuing the ultimatum is able to sell his portion on its own for its fair price, "or for a little less" than its fair price, and so we do not allow the ultimatum for the purpose of mere profit-seeking, whereas the *Rambam* is referring to a situation where the partner will be unable to sell his share, and therefore suffer loss, without the option of issuing the ultimatum.[270]

The *Sema* (who is of the opinion that the Rosh and Rambam disagree) explains that even according to the Rosh that a partner who is merely acting as a straw buyer cannot issue a *gud o agud* ultimatum, he may practically achieve the same goal by selling his share to someone else, who will then have the right to issue the ultimatum on his own account.[271] Likewise, even according to the Rosh a partner may borrow money for the purpose of issuing the ultimatum insofar as his intent is to keep the property for himself, and not to act as a straw buyer.[272]

The *Nesivos Ha'Mishpat* explains that even according to the Rosh, the *recipient* of a *gud o agud* ultimatum is entitled to purchase the property on behalf of another, for insofar as he is receiving more than the price offered by the issuer of the ultimatum, it follows that that price, even if essentially fair, is deemed unfair![273]

Where both partners are willing to buy but neither is willing to sell, or where neither wishes to buy or sell, the asset remains under joint ownership, and continues to be jointly used by the partners; if the asset is a rental property, it is rented and the proceeds are divided, and if it is not, the partners may both use it, either at will, or according to a scheduled division of time,

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[269] *Beis Yosef ibid.* (but see his comments earlier (*os* 12) where he entertains the possibility that the Rosh (along with his son, the *Tur*) and Rambam do indeed disagree).

[270] *Bah ibid*. He rejects the *Beis Yosef's* limitation of Rosh's responsum to where the other partner is offering to buy at the fair price, noting that the language of the query to Rosh indicates that the other partner was actually unable or unwilling to buy at any price, just as in the case of Rambam. Cf. *Shach ibid. s.k.* 7, who cites the position of *Bah* and comments that "the words of the *Sema* are more plausible".

[271] *Sema ibid. s.k.* 14; *Nesivos Ha'Mishpat ibid. hidushim s.k.* 12.

[272] *Sema ibid. s.k.* 15. Cf. *Shach ibid. s.k.* 7.

[273] *Nesivos Ha'Mishpat ibid. biurim s.k.* 8 and *hidushim ibid. s.k.* 12.

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depending on the nature of the asset.[274] Where both are willing to sell but neither is willing to buy, the asset is sold to a third party and the proceeds are divided.[275]

[274] *Shulhan Aruch ibid.* and 171:8.

[275] *Shulhan Aruch* 171:7. *Nesivos Ha'Mishpat ibid. biurim s.k.* 9 elaborates that even where one partner wishes to sell his portion by itself to a particular buyer (e.g., a relative, to whom he wishes to do a favor) for less than half of what a different buyer is prepared to pay for the whole parcel, the other partner may compel him to sell to the latter buyer.

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