The Kornitzer Edition

שו"ת
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תשובות נג–צח

Volume 2 — Teshuvos 53–98

Phrase-by-Phrase English Translation
Explanations and Summaries
Indexes of Sources & Subjects

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Dedication

This volume is dedicated to the enduring legacy of Rabbi Akiva Eiger (1761–1837), one of the foremost *gedolei ha'acharonim*, whose penetrating brilliance in Torah was matched by extraordinary humility, purity of character, and unwavering devotion to *Klal Yisrael*.

Born into a distinguished family of Torah and shaped in the great centers of learning of his time, Rabbi Akiva Eiger rose to become a preeminent authority in *halachah*, serving as *Rav* and *Rosh Yeshivah* in the illustrious community of Posen. His *Teshuvos* and *Chiddushim*, marked by precision, depth, and clarity, remain foundational to the study of Gemara and *psak*, guiding generations of *talmidei chachamim*.

Yet alongside his unparalleled greatness stood profound modesty and simplicity. As recorded by the Mitteler Rebbe, who met him in Posen, he was "a genuine person... humble and unpretentious with all people," embodying a life of complete dedication to Torah and to the needs of his community.

This Kornitzer Edition of *Shailos u'Teshuvos Rabbi Akiva Eiger*, presenting the original Hebrew text with faithful elucidation, is dedicated by the Kornitzer family, descendants of Rabbi Akiva Eiger, as an expression of gratitude to Hashem for the privilege of transmitting his Torah and ensuring that his voice continues to illuminate future generations.

May the merit of learning this *sefer* bring blessing to all who engage with it, and may we soon merit, with the coming of *Moshiach*, to hear new *chiddushim* in Torah from Rabbi Akiva Eiger himself. And may this effort serve toward fulfilling the longing so often expressed by the Lubavitcher Rebbe—that through the dissemination of Torah, illuminated for our generation, we hasten the true and complete *Geulah*. May *Moshiach* come speedily in our days, ממש.

תשובה נג

Interest Deduction from Orphans' Loan Without Heter Iska

Property Law > Laws of Interest in Loans and Commerce • *Property Law > Laws of Bailees*

Summary

Correspondent and Context: Rabbi Akiva Eiger wrote to Rabbi Meir Poizner, Av Beis Din of Schotland. An *apotropos* lent the orphans' money at interest without a *heter iska*, which structures a loan as a business investment.
The Question (Sha'ila): The guardian lent the money on a bond (*obligatsion*) at six percent interest. After the loan was completed, he asked for eight percent, and the borrower agreed. The payments supported the orphans. The borrower now wants to repay the principal after deducting the interest.
The Ruling (Teshuvah): Rabbi Akiva Eiger rules that the borrower may deduct all eight percent. He may deduct the original six percent from the unpaid principal under *kim li*. The extra two percent is *avak ribis* because it was agreed only after the loan. The Rema permits deducting this interest from an ordinary debt. A bond is not a *mashkanta*, so the special rule against deduction does not apply. This form of *avak ribis* is not permitted for orphans' money.
Shulchan Aruch Background: Shulchan Aruch, Yoreh Deah 160 discusses *ribis* involving orphans' money. Yoreh Deah 166 addresses deducting *avak ribis* from an unpaid debt and distinguishes a *mashkanta* from other debts. Choshen Mishpat 81, 93, and 290 provide the oath rules used in the second part of the teshuvah.
Key Disputes (Machlokes): The Mishneh LaMelech presents the Rashba and Rivash as disagreeing about why orphans need not return *ribis*. The Rashba relies on *gozeil u'ma'achil*, the rule for one who robs and feeds his children, even for adults. The Rivash relies on minors' exemption from mitzvos. Rabbi Akiva Eiger suggests they may agree in the guardian's standard case, but he does not reject the Mishneh LaMelech's analysis. He also discusses whether *shevuas hashutafin* requires *hoda'ah bemiktzas* and notes conflicting statements in the Sma.

To my colleague, the Gaon Rabbi Meir Poizner, may his light shine, Av Beis Din of the holy community of Schotland.

Regarding what you asked us about a guardian (apotropos), who lent orphans' money on a bond (obligatsion) at six percent per year, without a heter iska. A *heter iska* structures the transaction as an investment instead of an interest-bearing loan. Without it, the fixed six percent is *ribis ketzutzah*. **And after the document was delivered to the guardian and the money was given to the borrower, the guardian said to the borrower that it would be proper for him to give the orphans eight percent. And the borrower responded: "This too I shall do." And he gave the guardian the profits.** The borrower paid

לַעֲמִיתִי הַגָּאוֹן רַבִּי מֵאִיר פּוֹיזְנֶר נֵרוֹ יָאִיר
אַב בֵּית דִּין דִּקְהִלָּה קְדוֹשָׁה שָׁאטְלַאנְד

עַל דְּבַר שֶׁשְּׁאָלוּנוּ בְּאַפּוֹטְרוֹפּוֹס שֶׁהִלְוָה
זוּזֵי דִּיתְמֵי עַל אַבְּלִיגַאטְיָאן שִׁשָּׁה
פְּרַאצֶענְטִי לְשָׁנָה בְּלִי הֶתֵּר עִיסְקָא
וְאַחַר שֶׁנִּמְסַר הַשְּׁטָר לְהָאַפּוֹטְרוֹפּוֹס
וְנָתַן הַמָּעוֹת לַהֲלָוֶה אָמַר הָאַפּוֹטְרוֹפּוֹס
לַהֲלָוֶה שֶׁמֵּהָרָאוּי שֶׁיִּתֵּן לַיְתוֹמִים שְׁמוֹנָה
פְּרַאצֶענְטִי וְהֵשִׁיב הַהֲלָוֶה גַּם זֶה אֶעֱשֶׂה
וְנָתַן לְהָאַפּוֹטְרוֹפּוֹס הָרְוָחִים וְהָאַפּוֹטְרוֹפּוֹס

נְתָנָם לַיְתוֹמִים לְהַאֲכִילָם וְעַתָּה טוֹעֵן הַהַלְוֶה שֶׁרוֹצֶה לְסַלֵּק הַקֶּרֶן וּלְנַכּוֹת שְׁנֵי פְּרַאצֶענְטִי שֶׁנָּתַן עוֹדֵף בְּכָל שָׁנָה תְּחִלָּה נְדַבֵּר מִדִּין שִׁשָּׁה פְּרַאצֶענְטִי אִם יוּכַל לְנַכּוֹתָם כְּדִין כָּל רִבִּית קְצוּצָה לְכְאוֹרָה יֵשׁ לַהֲפֹךְ בִּזְכוּת הַיְתוֹמִים עַל פִּי מַה שֶּׁכָּתַב הָרא"ש בִּשְׁו"ת וְכֵן פָּסַק לַהֲלָכָה (בְּסִימָן ק"ס) אִם עָבַר הָאַפְּטְרוֹפְּס וְהִלְוָה מָעוֹת הַיְתוֹמִים בְּרִבִּית קְצוּצָה וְהֶאֱכִילָם לַיְתוֹמִים פְּטוּרִים מִלְּשַׁלֵּם אֲפִלּוּ כְּשֶׁיִּגְדְּלוּ וְלָמַד רַשְׁבָּ"א וְזֶה בְּמִכָּל שֶׁכֵּן מִדִּין גּוֹזֵל וּמַאֲכִיל בָּנָיו דִּפְטוּרִים מִלְּשַׁלֵּם אָמְנָם בְּמִשְׁנֶה לַמֶּלֶךְ (פֶּרֶק ד' הִלְכוֹת י"ד מִמַּלְוֶה) כָּתַב דְּהָרַשְׁבָּ"א וְהָרִיבָ"שׁ פְּלִיגִי דְּהָרִיבָ"שׁ (סִימָן תס"ה) לֹא פָּטַר לַיְתוֹמִים רַק מִטַּעַם יַתְמֵי לָאו בְּנֵי מֶעְבַּד מִצְוָה נִינְהוּ וּמִמֵּילָא הַדִּין רַק בְּקָטַנִּים אֲבָל לְהָרַשְׁבָּ"א גַּם בְּאַפְּטְרוֹפּוֹס לַיְתוֹמִים גְּדוֹלִים כְּהַאי גַּוְונָא פְּטוּרִים וְאַחֲרֵי אֲרִיכוּת הַמִּשְׁנֶה לַמֶּלֶךְ בְּמַחֲלֹקֶת הָרַשְׁבָּ"א וְהָרִיבָ"שׁ כָּתַב וְזֶה לְשׁוֹנוֹ וְיֵשׁ לְהִסְתַּפֵּק בְּנָתַן רִבִּית לַהֲיְתוֹמִים וְלֹא נָתַן הַקֶּרֶן אִם מְנַכִּין לְהוּ הָרִבִּית אוֹ דִּילְמָא כָּל סַלּוּקֵי בְּלָא זוּזֵי אַפּוֹקֵי הוּא וּלְהָרִי"ף זְכִרוֹנוֹ לִבְרָכָה אֲפִלּוּ בְּלֹא מַשְׁכַּנְתָּא דִּינָא הָכִי הוּא וְאִם כֵּן הָכִי נַמִּי כֵּיוָן דִּפְטִירֵי מֵחֲמַת דְּלָאו בְּנֵי מֶעְבַּד מִצְוָה נִינְהוּ אִם כֵּן אַף מִהַקֶּרֶן אֵין מְנַכִּין דְּכָל סַלּוּקֵי בְּלָא זוּזֵי אַפּוֹקֵי הוּא עַד כָּאן לְשׁוֹנוֹ

eight percent annually to the *apotropos*. **And the guardian gave them to the orphans to sustain them. And now the borrower claims he wishes to repay the principal and deduct the two percent he paid in excess each year. First, we shall discuss the law regarding the six percent — whether he can deduct them as is the law with all ribis ketzutzah (fixed usury).** The question is whether the usual duty to return *ribis ketzutzah* also applies when orphans received it. **At first glance, there is room to argue in favor of the orphans, based on what the Rosh wrote in his Teshuvos,**[1] **and so it was ruled as halacha (in siman 160).**[2] The Rosh's ruling was adopted as the authoritative halacha in Shulchan Aruch, Yoreh Deah 160. **If the guardian transgressed and lent the orphans' money at ribis ketzutzah, and fed it to the orphans, they are exempt from repaying, even when they grow up. And the Rashba derived this through a kal vachomer (a fortiori argument)**[3] **from the law of one who robs and feeds his children, who are exempt from repaying.** The children received and consumed the stolen property through another person. The Rashba applies that rule all the more to these orphans. **However, the Mishneh LaMelech (Chapter 4, Halacha 14 of Hilchos Malveh)**[4] **wrote that the Rashba and the Rivash disagree. For the Rivash (siman 465) only exempted the orphans solely for the reason that "orphans are not subject to performing mitzvos."** The Rivash reasons that minors are not obligated to perform mitzvos, including returning the interest. **And consequently, this law applies only to minors. But according to the Rashba, even with a guardian for adult orphans, in such a case they are exempt.** The Rashba's reason does not depend on the orphans' age. **And after the Mishneh LaMelech's lengthy [discussion] of the dispute between the Rashba and the Rivash, he wrote, and these are his words: "And there is room to doubt: in a case where he gave the interest to the orphans but did not [yet] return the principal — whether they deduct the interest from them.** That is, whether the borrower may offset the interest he paid against the outstanding principal balance. **Or perhaps, any deduction without [actual] money is [tantamount to] extraction.** Under *silluki belo zuzei apukei hu*, deducting past interest from a debt counts as recovering that interest. This may be barred because the orphans are exempt. **And according to the Rif, of blessed memory, even without a mashkanta (mortgage), the law is so. And if so, here too, since they are exempt**

[1] SA, Yoreh Deah 160. The Shulchan Aruch codifies the Rosh's ruling regarding an *apotropos* who lent orphans' money at *ribis ketzutzah* and used the interest for the orphans' sustenance.

[2] SA, Yoreh Deah 160. The Shulchan Aruch codifies the Rosh's ruling regarding an *apotropos* who lent orphans' money at *ribis ketzutzah* and used the interest for the orphans' sustenance.

[3] The Rashba's reasoning draws on the Talmudic principle (Bava Kamma 112a) that one who robs and feeds his children exempts them from liability, and applies this *a fortiori* to orphans who consumed *ribis* through a guardian.

[4] Mishneh LaMelech on Rambam, Hilchos Malveh VeLoveh, Chapter 4, Halacha 14.

because they are not subject to performing mitzvos, then even from the principal one may not deduct, for any deduction without money is extraction." End of quote.

Now, even though the Mishneh LaMelech phrased his language [as follows]: "since they are exempt... because they are not subject to [performing mitzvos]...," which appears to have been stated according to the Rivash['s reasoning], nevertheless, it appears that even according to the Rashba's reasoning, there is room for doubt. Even though [the Rashba] compares it to one who robs and feeds [his children], one can argue that this applies only when both the principal and the interest have already been paid. Then it is like robbery. But when the principal has not yet been paid, since it is possible to deduct it, it is not yet called robbery. The borrower has not finally lost the interest while it can still be deducted. **And so I saw written plainly by my master and ancestor, the leader of the exile, Rabbi Avraham Broda, of blessed memory,[5] in his sefer Eishel Avraham, in Chiddushei Poskim, chapter Eizehu Neshech, siman 18, os 5 — [6] that according to the Rashba, when the principal has not been paid, [the borrower] can deduct. In any event, we have not escaped the realm of doubt. And he can assert "kim li" (I hold) that he can deduct.** In a money dispute, the person holding the money may follow a favorable halachic opinion. **And moreover, one can say: even if we were to say that according to both the Rashba and the Rivash, he also cannot deduct — nevertheless, in our case, where the orphans are now adults, it appears that according to the Rivash's reasoning, [the borrower] can extract the interest from them, even what they received while they were still minors. For according to the reasoning that orphans are not subject to mitzvos, it is only possible to exempt them temporarily while they are minors. But nevertheless, when they grow up, they must pay, just as with repaying a creditor.** Like other debts of minors, the duty is delayed until adulthood. **Therefore, he can deduct and say "kim li" like the Rivash. And even regarding an actual mashkanta (mortgage), where all agree that deduction without money is [tantamount to] extraction, nevertheless, regarding a matter of legal doubt, he can say "kim li," as I have demonstrated in a teshuvah elsewhere.** He previously ruled that the person holding the money may use *kim li* when the law is uncertain. **And even though the Shulchan Aruch ruled that they are exempt even when they grow up, one can say that this [ruling] is only due to the doubt, [and] they can say "kim li" like the Rashba.** The Shulchan Aruch may rely only on the orphans' *kim li* defense, not on a final rejection of the Rivash. **But where**

וְהִנֵּה אַף דְּהַמִּשְׁנֶה לַמֶּלֶךְ נָקִיט בִּלְשָׁנֵיהּ כֵּיוָן דִּפְטִירֵי וְכוּלֵי דְּלָאו בְּנֵי וְכוּלֵי דְּנִרְאֶה דְּנָקַט לָהּ אַלִּיבָּא דְּהָרִיבָ"שׁ מִכָּל מָקוֹם נִרְאֶה דְּגַם לְטַעְמָא דְּהָרַשְׁבָּ"א אִיכָּא לְאַסְפּוֹקֵי אַף דְּמַדְמֵי לְגוֹזֵל וּמַאֲכִיל יֵ"שׁ לוֹמַר דַּוְקָא בְּנָתַן כְּבָר הַקֶּרֶן וְהָרִבִּית אָז הֲוֵי כְּגָזֵל מַה שֶּׁאֵין כֵּן כְּשֶׁעֲדַיִן לֹא נָתַן הַקֶּרֶן דְּאֶפְשָׁר לְנַכּוֹתוֹ עוֹד לֹא מִקְרֵי גָּזֵל וְכֵן רָאִיתִי כָּתַב בִּפְשִׁיטוּת מָארִי זְקֵנִי רַב הַגּוֹלָה רַבִּי אַבְרָהָם בְּרוֹדָא זֵכֶר צַדִּיק לִבְרָכָה בְּסִפְרוֹ אֵשֶׁל אַבְרָהָם בְּחִדּוּשֵׁי פּוֹסְקִים פֶּרֶק אֵיזֶהוּ נֶשֶׁךְ סִימָן ח"י אוֹת ה' דְּלְהָרַשְׁבָּ"א בְּלֹא נָתַן הַקֶּרֶן יָכוֹל לְנַכּוֹת עַל כָּל פָּנִים מִידֵי סְפֵיקָא לֹא נָפְקָא וְיָכוֹל לוֹמַר דְּקִים לֵיהּ דְּיָכוֹל לְנַכּוֹת וּבְיוֹתֵר יֵ"שׁ לוֹמַר אַף אִי נֵימָא דְּלְהָרַשְׁבָּ"א וְהָרִיבָ"שׁ גַּם לְנַכּוֹת אֵינוֹ יָכוֹל מִכָּל מָקוֹם בְּנִדּוֹן דִּידָן דְּעַתָּה הַיְתוֹמִים גְּדוֹלִים דְּנִרְאֶה דְּלְטַעְמָא דְּהָרִיבָ"שׁ יָכוֹל לְהוֹצִיא מֵהֶם הָרִבִּית גַּם מַה שֶּׁקִּבְּלוּ בְּעוֹדָם קְטַנִּים דְּלְטַעְמָא דְּיַתְמֵי לָאו בְּנֵי מִצְוָה אִי אֶפְשָׁר לְפוֹטְרָם רַק לְפִי שָׁעָה בְּעוֹדָם קְטַנִּים אֲבָל מִכָּל מָקוֹם כְּשֶׁיִּגְדְּלוּ צְרִיכִים לְשַׁלֵּם כְּמוֹ בְּפִרְיעוֹת בַּעַל חוֹב אִם כֵּן מִמֵּילָא יָכוֹל לְנַכּוֹת וְלוֹמַר קִים לִי כְּהָרִיבָ"שׁ וְאַף בְּמַשְׁכַּנְתָּא מַמָּשׁ דְּלְכוּלֵי עָלְמָא סַלּוּקֵי בְּלָא זוּזֵי אַפּוֹקֵי הוּא מִכָּל מָקוֹם לְעִנְיַן סְפֵיקָא דְּדִינָא יָכוֹל לוֹמַר קִים לִי כְּמוֹ שֶׁהוֹכַחְתִּי בִּתְשׁוּבָה בְּמָקוֹם אַחֵר וְאַף דְּבִשְׁלְחָן עָרוּךְ פָּסַק דְּפְטוּרִים אַף לִכְשֶׁיִּגְדְּלוּ יֵ"שׁ לוֹמַר דְּרַק מִסָּפֵיקָא יְכוֹלִים לוֹמַר קִים לִי כְּהָרַשְׁבָּ"א אֲבָל הֵיכִי דְּלֹא נָתַן הַקֶּרֶן יָכוֹל לְנַכּוֹת וְלוֹמַר קִים לִי כְּהָרִיבָ"שׁ וּלְפִי עֲנִיּוּת דַּעְתִּי אֵין הֶכְרֵחַ לְדִבְרֵי הַמִּשְׁנֶה לַמֶּלֶךְ לוֹמַר דְּהָרִיבָ"שׁ חוֹלֵק בָּזֶה עַל הָרַשְׁבָּ"א דְּיֵ"שׁ

[5] Rabbi Avraham Broda (c. 1640–1717) served as Rav of Frankfurt am Main and later Prague. Rabbi Akiva Eiger identifies him as an ancestor (*mari zekaini*).
[6] Eishel Avraham by Rabbi Avraham Broda, Chiddushei Poskim, Perek Eizehu Neshech, Siman 18, Os 5.

the principal has not been paid, [the borrower] can deduct and say "kim li" like the Rivash. And in my humble opinion, there is no compelling reason for the Mishneh LaMelech's assertion to say that the Rivash disagrees with the Rashba in this matter. For one can say that the Rivash too holds the comparison to gozeil u'ma'achil. And what the Rivash discusses regarding the reasoning that orphans are not subject to mitzvos — this refers even to cases where the exemption based on gozeil u'ma'achil does not apply. The Rivash's separate reason may cover cases outside the Rashba's rule. **For example, where the interest was given directly to the orphans themselves not through the guardian.** Direct receipt removes the guardian who "feeds" them, so the analogy does not apply. **Or where the guardian lent with their knowledge and as their agent.** If the orphans authorized the loan, they are not innocent recipients. **Or it refers to a case where the interest is still extant (in kind). As the Mishneh LaMelech explored there. For according to the Rashba, specifically where [the guardian] fed [the interest to the orphans], like in the case of one who robs and feeds, but when [the interest] is still extant, [the orphans] are obligated to pay.** The exemption covers consumed property, not identifiable property still in their possession. **And regarding this [scenario], the Rivash ruled that they are nevertheless exempt, because orphans are not subject to performing mitzvos. And know this: for the Rivash wrote there, "Even though I saw in the Rashba's teshuvah that even regarding orphans' money, ribis ketzutzah is extracted by the courts, etc." And at first glance, this is surprising. For to the contrary, the Rashba exempts them, even adult orphans, based on the principle of gozeil u'ma'achil! Rather, it must be that [the Rashba's ruling about extracting ribis] refers to one of those cases where the principle of gozeil u'ma'achil cannot be applied.** These cases include direct receipt, agency, or interest that remains intact. **For in such cases, the Rashba holds that [the ribis] is extracted from the orphans. And the Rivash disagrees with him in this — that they are nevertheless exempt because they are not subject to performing mitzvos. But where the exemption of gozeil u'ma'achil applies, even the Rivash agrees that even adult [orphans] are exempt. Nevertheless, it is not appropriate to dispute the Mishneh LaMelech. Especially since, in any event, the Mordechai's opinion is explicit**[7] **that even when a guardian lent orphans' money, the ribis ketzutzah is collected from them. Also, according to the Rashba's approach, one can say that when the principal has not been paid, they deduct from them. And this is self-evident to my great-grandfather, the Gaon mentioned above.** This

לוֹמַר דְּגַם הָרִיבָ"שׁ סְבִירָא לֵיהּ לְדַמּוֹתוֹ לְגוֹזֵל וּמַאֲכִיל וּמַה דְּדָן הָרִיבָ"שׁ מִטַּעַם יַתְמֵי לָאו בְּנֵי מִצְוָה הַיְינוּ אַף הֵיכִי דְּלָא שַׁיָּיךְ לְמִפְטְרֵיהּ מִדִּין גּוֹזֵל וּמַאֲכִיל כְּגוֹן דְּנָתַן הָרִיבִּית לַיְתוֹמִים עַצְמָם שֶׁלֹּא עַל יְדֵי הָאַפְּטְרוֹפּוֹס אוֹ דְּהָאַפְּטְרוֹפּוֹס הִלְוָה מִדַּעְתָּם וּבִשְׁלִיחוּתָם אוֹ דְּמַיְירֵי דְּהָרִיבִּית בְּעַיִן כְּמוֹ שֶׁצִּדֵּד הַמִּשְׁנֶה לַמֶּלֶךְ שָׁם דְּלָהַרַשְׁבָּ"א דַּוְקָא בְּהַאֲכִיל כְּמוֹ בְּגוֹזֵל וּמַאֲכִיל אֲבָל בְּעַיִן חַיָּיב לְשַׁלֵּם וּבָזֶה דָּן הָרִיבָ"שׁ דְּמִכָּל מָקוֹם פְּטוּרִים מִשּׁוּם דְּיַתְמֵי לָאו בְּנֵי מִיעְבַד מִצְוָה נִינְהוּ וְתֵדַע דְּהֵרִי הָרִיבָ"שׁ שָׁם כָּתַב וְאַף עַל פִּי דְּרָאִיתִי בִּתְשׁוּבָה לְהָרַשְׁבָּ"א דַּאֲפִילּוּ בְּמָעוֹת יְתוֹמִים רִיבִּית קְצוּצָה יוֹצְאָה בְּדַיָּינִין וְכוּלֵי וְלִכְאוֹרָה יִפָּלֵא הָא אַדְּרַבָּה הָרַשְׁבָּ"א פּוֹטֵר אוֹתָם וַאֲפִילּוּ בִּיתוֹמִים גְּדוֹלִים מִטַּעַם גּוֹזֵל וּמַאֲכִיל אֶלָּא עַל כָּרְחָךְ דְּמַיְירֵי בְּחַד מֵהָנָךְ גַּוְונֵי דְּלֵיכָּא לְמֵימַר עָלָה מִדִּין גּוֹזֵל וּמַאֲכִיל דְּבָזֶה סְבִירָא לֵיהּ לְהָרַשְׁבָּ"א דְּמוֹצִיאִים מִיתוֹמִים וְהָרִיבָ"שׁ חָלַק עָלָיו בָּזֶה דְּמִכָּל מָקוֹם פְּטִירֵי דְּלָאו בְּנֵי מַעְבַּד מִצְוָה נִינְהוּ אֲבָל הֵיכִי דְּשַׁיָּיךְ לְמִפְטְרֵיהּ מִדִּין גּוֹזֵל וּמַאֲכִיל גַּם הָרִיבָ"שׁ מוֹדֶה בָּזֶה דְּגַם בִּגְדוֹלִים פְּטוּרִים מִכָּל מָקוֹם אֵינוֹ כְּדַאי לַחֲלוֹק עַל הַמִּשְׁנֶה לַמֶּלֶךְ בִּפְרָט דְּבָלָאו הָכִי דַּעַת הַמְּרְדְּכִי לְהֶדְיָא דַּאֲפִילּוּ בְּאַפְּטְרוֹפּוֹס שֶׁהִלְוָה מָעוֹת יַתְמֵי גּוֹבֶה מֵהֶם הָרִיבִּית קְצוּצָה גַּם בְּשִׁיטַת הָרַשְׁבָּ"א יֵשׁ לוֹמַר דְּבָלָא נָתַן הַקֶּרֶן מְנַכִּין לְהוּ וְהָכִי פְּשִׁיטָא לַאדוֹנִי אָבִי וְקָנִי הַגָּאוֹן הַנִּזְכָּר לְעֵיל לָזֶה נִרְאֶה לִי בְּנִדּוֹן דִּידָן יָכוֹל לְנַכּוֹת לְהַיְתוֹמִים

[7] The Mordechai rules explicitly that *ribis ketzutzah* is collected even from orphans whose guardian lent their money at interest — a stricter position than the Rashba's.

refers again to Rabbi Avraham Broda. **Therefore, it appears to me that in our case, [the borrower] can deduct from the orphans.**

עוֹד יֵשׁ לָדוּן לִזְכוּת לְהַיְתוֹמִים עַל פִּי מַה דְּפָסְקִינַן בְּשֻׁלְחָן עָרוּךְ (סְעִיף י"ט) אַפְּטְרוֹפּוֹס שֶׁהִלְוָה מָעוֹת יְתוֹמִים בְּרִיבִּית קָצוּצָה אִם הַלְוֶה נָטַל שְׂכָרוֹ רֶוַח לְחֶלְקוֹ כְּמוֹ שֶׁהִתְנָה לָתֵת לָהֶם חַיָּיב לִתֵּן לָהֶם עַיֵּין שָׁם וְהוּא מִדִּבְרֵי מוהר"ם

However, in our case, the borrower states in the course of the proceedings that immediately upon borrowing the money, he re-lent it to others and they lost his money and he suffered a total loss. It would appear as a matter of law that regarding all iska recipients, they do not need to swear that they did not profit. Even though in the Shulchan Aruch, Choshen Mishpat (siman 81, se'if 30),[10] it is explained that one must swear that there was no profit, nevertheless, the Beis Yosef already wrote there[11] regarding the reasoning of the matter: even though it is a ta'anas shema (a doubtful claim), nevertheless, he must swear as in the law of the oath of partners (shevuas hashutafin). The lender does not know whether the *iska* recipient earned a profit. The special oath for partners can apply even when the claimant is unsure. **And since we find that the view of Rashi and the Ramah is that the oath of partners requires hoda'ah bemiktzas (partial admission). And the Sma (siman 93, s.k. 7) wrote[12] that the Mechaber's view is also so, as he ruled plainly (in siman 290).[13] But the Sma at [another] sub-section wrote:[14] "And the Mechaber follows his own reasoning, for he holds that these oaths on doubtful claims do not require hoda'ah bemiktzas." And this is puzzling, for to the contrary, the Mechaber's view is that hoda'ah bemiktzas is required, as the Sma himself wrote in sub-section 7! This requires further investigation.** The addendum at the end resolves this contradiction. **Therefore, one can say that [the borrower] can claim "kim lan" (we hold) that hoda'ah bemiktzas is required.**

אַךְ בְּנִדּוֹן דִּידָן דְּאָמַר הַלְוֶה בְּתוֹךְ כְּדֵי שֶׁמִּיָּד שֶׁלָּוָה הַמָּעוֹת חָזַר וְהִלְוָה אוֹתָם לַאֲחֵרִים וְאִיבְּדוּ מָעוֹתָיו וְהִפְסִידוּ הַכֹּל לְכְאוֹרָה נִרְאֶה לְדִינָא בְּכָל מְקַבְּלֵי עִיסְקָא שֶׁאֵין צָרִיךְ לִשְׁבוּעָה שֶׁלֹּא הִרְוִיחַ אַף דִּבְשֻׁלְחָן עָרוּךְ חוֹשֶׁן מִשְׁפָּט (סִימָן פ"א סְעִיף ל') מְבֹאָר דְּצָרִיךְ לִישָׁבַע דְּלָא הָיָה רֶוַח מִכָּל מָקוֹם הָא כְּבָר כָּתַב הַבֵּית יוֹסֵף שָׁם בְּטַעֲמָא דְּמִלְּתָא אַף דְּהוּא טַעֲנַת שֶׁמָּא מִכָּל מָקוֹם צָרִיךְ לִישָׁבַע כְּדִין שְׁבוּעַת הַשֻּׁתָּפִין וְכֵיוָן דְּמָצִינוּ דַּעַת רַשְׁ"י וְהָרַמְ"ה דִּבְשְׁבוּעַת הַשֻּׁתָּפִין בָּעֵי הוֹדָאָה בְּמִקְצָת וּבַסמ"ע (סִימָן צ"ג סְעִיף קָטָן ז') כָּתַב דְּגַם דַּעַת הַמְחַבֵּר כֵּן כְּמוֹ דְּסָתַם (בְּסִימָן ר"צ) וּבַסמ"ע סְעִיף קָטָן כָּתַב וְהַמְחַבֵּר אָזִיל לְטַעְמוֹ דְּסָבִירָא לֵיהּ דִּשְׁבוּעַת שֶׁמָּא הַלָּלוּ אֵין צָרִיךְ לְהֵיוֹת מוֹדֶה בְּמִקְצָת וְתָמוּהַּ דְּהָא אַדְּרַבָּה דַּעַת הַמְחַבֵּר דְּצָרִיךְ לְהֵיוֹת מוֹדֶה בְּמִקְצָת וּכְמוֹ שֶׁכָּתַב הַסמ"ע עַצְמוֹ סְעִיף קָטָן ז' וְצָרִיךְ עִיּוּן אִם כֵּן יֵשׁ לוֹמַר דְּיָכוֹל לוֹמַר קִים לָן דְּצָרִיךְ שֶׁיִּהְיֶה מוֹדֶה בְּמִקְצָת

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[8] SA, Yoreh Deah 160:19 — the ruling of the Mechaber regarding an *apotropos* who lent orphans' money at *ribis ketzutzah*, and the borrower's obligation to share his profits.

[9] Maharam (Rabbi Meir of Rothenburg) — the original source for the ruling that a borrower who profited from orphans' money lent at interest must share his profits with the orphans.

[10] SA, Choshen Mishpat 81:30. The siman is titled: אם הודה מעצמו מתי יכול לומר משטה אני בך, ובו ל"ב סעיפים — "If one admitted on his own, when can he claim 'I was joking with you.' And it contains 32 se'ifim."

[11] Beis Yosef on Choshen Mishpat 81, explaining that the oath regarding *iska* profits derives from *shevuas hashutafin* (the oath of partners).

[12] Sma, Choshen Mishpat 93, s.k. 7. The Sma states: עד שיחשוד כו' בב' מעין כסף כן הוא לשון הגמ' ופרשוהו רש"י והרמ"ה דבעינן נמי הודאה במקצת... וכ"כ ג"כ המחבר בסי' ר"ץ ס"ט באפוטרופוס — "Rashi and the Ramah interpreted this as requiring *hoda'ah bemiktzas*, and the Mechaber rules the same in siman 290, se'if 9 regarding the *apotropos*."

[13] SA, Choshen Mishpat 290:9. This is where the Mechaber "ruled plainly" (*satam*) that *hoda'ah bemiktzas* is required for the oath of an *apotropos*.

[14] This appears to refer to Sma, Choshen Mishpat 93, s.k. 2, where the Sma states: והמחבר אול לטעמיה דס"ל דבשבועות שמא הללו א"צ להיות בהן מודה מקצת. וכמ"ש בסמוך ע"ש ומ"ה השמיטוהו ג"כ כאן — "The Mechaber follows his reasoning that these oaths on doubtful claims do not require *hoda'ah bemiktzas*, and therefore he also omitted [the Ramah's ruling] here." The sub-section number appears to be missing from the printed text.

וְכֵן מָצָאתִי בִּכְנֶסֶת הַגְּדוֹלָה (סִימָן צ"ז בְּבֵית יוֹסֵף אוֹת ו') כָּתַב אֲבָל הָרַשְׁדָ"ם וּמַהֲרָ"א שָׁשׁוֹן וּמָהָאד"ב בִּתְשׁוּבָה כְּתַב יָד וּמִשְׁפָּט צֶדֶק חֵלֶק א' (סִימָן ע"ג) כָּתְבוּ דְּיָכוֹל הַמּוּחְזָק לוֹמַר קִים לָן כְּרַשְׁ"י וְאֵין מַשְׁבִּיעִין אוֹתוֹ אִם לֵיכָא הוֹדָאָה וְאַף דִּבְכְנֶסֶת הַגְּדוֹלָה כָּתַב שָׁם בְּשֵׁם הָרַדְבָ"ז (סִימָן ר"ב) דְּאַף לְרַשְׁ"י מִכָּל מָקוֹם בָּתַר דְּתִיקוּן הִיסֵּת בְּכוֹפֵר הַכֹּל גַּם בְּשׁוּתָּף אַף בְּכוֹפֵר הַכֹּל צָרִיךְ לִישָׁבַע הִיסֵּת אַף דְּטוֹעֲנוֹ שֶׁמָּא עַיֵּין שָׁם וְכֵן כָּתַב הַטּוּרִי זָהָב (סִימָן צ"ג) בְּפֵירוּשׁ דִּבְרֵי רַבֵּינוּ יְשַׁעְיָה בַּטּוּר וּמִדַּמֵּי לֵיהּ לְתֵיבָה פְּרוּצָה וְכֵן מוּכָח לִכְאוֹרָה מֵהַגָּהַת שֻׁלְחָן עָרוּךְ (סִימָן פ"ז סְעִיף י"א) מִיהוּ יָכוֹל הַתּוֹבֵעַ לוֹמַר אֵינִי חָפֵץ מִמְּךָ רַק שְׁבוּעַת הִיסֵּת וְלֹא שְׁבוּעַת הַשֻּׁתָּפִים וְכוּלֵי וְלִכְאוֹרָה תָּמוּהַ דְּהָא בְּלֹא שְׁבוּעַת הַשּׁוּתָּפִין אֵינוֹ יָכוֹל לְהַשְׁבִּיעוֹ כְּלָל הִיסֵּת דַּהֲוֵי טַעֲנַת שֶׁמָּא אֶלָּא עַל כָּרְחָךְ בְּכָלָּא דִּשְׁבוּעַת שׁוּתָּפִין הוּא גַּם כֵּן הִיסֵּת כְּמוֹ שְׁאָר כּוֹפֵר בַּכֹּל דְּבְשׁוּתָּפִין עָשׂוּ חֲכָמֵינוּ זִכְרוֹנָם לִבְרָכָה תְּבִיעָתוֹ בְּשֶׁמָּא כְּמוֹ תְּבִיעַת בָּרִי וְשַׁפִּיר יָכוֹל לוֹמַר אֵינִי רוֹצֶה מִמְּךָ שְׁבוּעַת הַמִּשְׁנָה מִדִּין מוֹדֶה בְּמִקְצָת רַק שְׁבוּעַת הִיסֵּת מִדִּין כּוֹפֵר הַכֹּל

And so I found in the Knesses HaGedolah[15] **(siman 97, in the Beis Yosef [glosses], os 6), who wrote: "But the Rashdam, and Maharei"a Sasson, and Mahar'ADB in a manuscript teshuvah, and Mishpat Tzedek, volume 1 (siman 73), wrote that the possessor can say 'kim lan' like Rashi, and he is not administered an oath if there is no [partial] admission." And even though the Knesses HaGedolah wrote there, in the name of the Radbaz (siman 202), that even according to Rashi, since the institution of [shevuas] heses — regarding kofer hakol (total denial), even for a partner, even one who denies everything must swear heses, even though the claim is doubtful — see there.** The Radbaz requires the lesser *shevuas heses* even when the partner faces only a doubtful claim. **And so wrote the Taz (siman 93),**[16] **in explaining the words of Rabbeinu Yeshayah in the Tur, and he compares it to a "breached chest."** A "breached chest" means unmonitored access to another person's property. **And so it appears to be proven from the Rema's gloss (siman 87, se'if 11):**[17] **"However, the claimant can say, 'I only want a shevuas heses from you and not the oath of partners,' etc." And at first glance, this is puzzling. For without the oath of partners, he cannot administer even heses to him at all, since it is a doubtful claim!** Ordinarily, *shevuas heses* requires a definite claim. A doubtful claim cannot create that oath by itself. **Rather, it must be that within the framework of the oath of partners, heses is also included, just as for any other case of kofer hakol (total denial).** The partners' rule treats a doubtful claim as definite, allowing *shevuas heses*. **For regarding partners, the Sages, of blessed memory, treated a doubtful claim as equivalent to a definite claim. And he can properly say: "I do not want from you the Mishnaic oath based on hoda'ah bemiktzas, but rather shevuas heses based on kofer hakol."**

אוּלָם עִם כָּל זֶה הָא מְפוֹרָשׁ בְּהֵיפּוּךְ בְּשֻׁלְחָן עָרוּךְ (סִימָן ר"צ סְעִיף י"ט) שֶׁכָּתַב שָׁם אֲבָל אִם לֹא הָיָה טַעֲנָה אוֹ כְּפִירָה וְהוֹדָאָה כְּשִׁיעוּר זֶה אִם טוֹעֲנִים אוֹתוֹ וַדַּאי נִשְׁבָּע הִיסֵּת וְכוּלֵי הֲרֵי דְּלְהַשְׁבִּיעַ הִיסֵּת בָּעֵי דַּוְקָא טוֹעֲנוֹ וַדַּאי אֲבָל בְּטַעֲנַת שֶׁמָּא אֵינוֹ יָכוֹל לְהַשְׁבִּיעוֹ כְּלָל אֶלָּא אִם כֵּן בְּשֶׁנֵּי כֶסֶף וְהוֹדָאָה אִם כֵּן לִכְאוֹרָה בְּכָל מְקַבְּלֵי עִסְקָא אֵין צָרִיךְ לִישָׁבַע כַּמָּה הִרְוִיחַ דְּיָכוֹל לוֹמַר קִים לָן וְסָגֵי בִּנְיָדָן דִּידָן בְּחֵרֶם סָתָם

However, despite all this, it is explicitly stated to the contrary in the Shulchan Aruch (siman 290, se'if 19),[18] **where it states: "But if there was no claim or denial and admission of the requisite amount, if they claim against him with certainty, he swears heses, etc." This shows that to administer heses, the claim must specifically be a definite one. But with a doubtful claim, he cannot administer any oath at all, unless there is [a claim of] two silver coins' worth with [partial] admission.** A doubtful claim can produce the full partners' oath only with the required amount and partial admission. **Therefore, it would appear that regarding all iska recipients, they do not need to swear how**

[15] Knesses HaGedolah, Choshen Mishpat 97, Beis Yosef glosses, os 6.

[16] Taz, Choshen Mishpat 93. The Taz discusses the application of *shevuas heses* to partners' doubtful claims. He writes regarding the Sma's question: דסתם שבועת אפוטרופס היא שבועת המשנה — "The standard oath of an *apotropos* is the Mishnaic oath."

[17] Rema, Choshen Mishpat 87:11.

[18] SA, Choshen Mishpat 290:19. The Mechaber rules that *shevuas heses* in the context of guardianship requires a definite claim (*ta'anas vadai*); a doubtful claim cannot generate even *heses* without the requisite amount and partial admission.

much they profited, for [the iska recipient] can say "kim lan." Because there is no partial admission, he can rely on the opinion that exempts him from an oath. **And in our case, a general cherem (communal ban) suffices.** A general *cherem* against dishonesty replaces a formal oath.

וּמֵהַאי טַעְמָא נִרְאֶה דְּכָתַב הַשַּׁפְתֵי כֹּהֵן (סִימָן קס"ו) דְּאִם הַמַּלְוֶה אֵינוֹ מַאֲמִין לַחֲלוֹק יִכְתֹּב בִּשְׁטַר עִיסְקָא דְּאֵין הַלּוֹה נֶאֱמָן בְּהֶפְסֵד רַק בְּעֵדִים וְעַל הָרֶוַח יִהְיֶה נֶאֱמָן בִּשְׁבוּעָה חֲמוּרָה כִּרְצוֹן בַּעַל הַשְּׁטָר עַיִן שָׁם מַשְׁמַע בְּלֹא כָּתַב בְּפֵירוּשׁ אֵינוֹ יָכוֹל לְהַשְׁבִּיעוֹ [וְיֵשׁ לִדְחוֹת דְּמְהַנֵּי לְהַשְׁבִּיעוֹ בְּחוֹמֶר רְצוֹן בַּעַל הַשְּׁטָר בְּכִבּוּי נֵרוֹת וְכַדּוֹמָה] וּבְפָרָט דְּבָלָאו הָכִי קִיהָה הַרְבֵּה מִתְּשׁוּבָה מָהָרִיבָ"ל חֵלֶק ג' (סִימָן קי"ט) בְּיסוֹד דִּבְרֵי מוֹהַר"ם וּמַסִּיק דְּאֵין לַעֲשׂוֹת מַעֲשֶׂה כִּדְבָרָיו לוֹמַר דִּבְהִתְנָה הָאֲפַטְרוֹפּוֹס בְּרִבִּית קְצוּצָה דְּיִצְטָרֵךְ לִיתֵּן אִם נָטַל לְחֶלְקוֹ רֶוַח כָּל כָּךְ עַיֵּן שָׁם גַּם הַמִּשְׁנָה לַמֶּלֶךְ כָּתַב בְּשֵׁם הָרַב פְּנֵי מֹשֶׁה חֵלֶק ב' (סִימָן כ"ג) דְּיָכוֹל הַמּוּחְזָק לוֹמַר קִים לָן כְּרַשִׁ"י דִּבְזוּזֵי דִּיתְמֵי דְּהֵיתֵר קָרוֹב לְשָׂכָר וְרָחוֹק לְהֶפְסֵד הַיְינוּ רַק בִּפְנֵי בֵּית דִּין וּמִדִּין הֶפְקֵר בֵּית דִּין וּמִמֵּילָא לֵיתָא לְדִינָא דְּמָהַר"ם עַיֵּן שָׁם אִם כֵּן עַל כָּל פָּנִים הֵיכִי דְּטוֹעֵן שֶׁלֹּא הִרְוִיחַ כְּלָל בְּוַדַּאי אֵין לְחַיְבוֹ שְׁבוּעָה וְדֵי בְּקַבָּלַת חֵרֶם סְתָם

And for this reason, it appears that the Shach wrote (siman 166):[19] **If the lender does not trust the borrower, he should write in the iska document that the borrower is not believed regarding losses except with witnesses, and regarding profit, he shall be believed with a solemn oath at the discretion of the document holder — see there.** The Shach's guidance implies that *without* such an explicit provision, the borrower cannot be compelled to swear about profits. **This implies that without writing it explicitly, he cannot administer an oath to him. [And one can counter that it is effective to administer to him an oath with the severity as desired by the document holder — with extinguishing of candles and the like.]** Perhaps the clause changes only the oath's severity and ceremony. A basic oath might still apply without it. He leaves this objection unresolved. **And especially since, in any event, [the Maharival] significantly weakened in the Teshuvos Maharival, volume 3 (siman 119), the foundation of Maharam's words. And he concludes that one should not act in accordance with his words — to say that when the guardian stipulated ribis ketzutzah, that [the borrower] would need to give [to the orphans] if he took profit as his share — to that extent — see there. Also, the Mishneh LaMelech wrote in the name of the Penei Moshe, volume 2 (siman 23), that the possessor can say "kim lan" like Rashi — that regarding orphans' money, the dispensation of "close to profit and far from loss" applies only before beis din and by virtue of the principle of hefker beis din (the court's power to expropriate).** This structure gives the orphans a share of profits while shielding them from most losses. **And consequently, the ruling of Maharam is not valid — see there.** If only a court can create this arrangement, Maharam cannot derive a general contract rule from it. **Therefore, in any event, where [the borrower] claims he did not profit at all, one certainly cannot obligate him to swear. And a general acceptance of cherem suffices.**

אוּלָם לְאִינָךְ שְׁנֵי פְּרָאצֶענְטִי יֵשׁ לָדוּן דְּלָא הֲוֵי רִבִּית קְצוּצָה כֵּיוָן דְּלָא הִתְנָה עִמּוֹ כֵּן בְּשָׁעַת הַלְוָאָה וְאַף לְהַסּוֹבְרִים (סִימָן קס"ו) דְּגַם בְּשָׁעַת הָרָוַחַת וְמַן הֲוֵי רִבִּית קְצוּצָה אִם כֵּן יֵשׁ לוֹמַר כֵּיוָן

However, regarding the other two percent, there is room to argue that it is not ribis ketzutzah (fixed usury), since this was not stipulated with him at the time of the loan. Normally, *ribis ketzutzah* requires the interest to be fixed when the loan begins. **And even according to those who hold (siman 166)**[20] **that even at the time of extending**

[19] Shach, Yoreh Deah 166. The Shach advises that a lender who does not trust the borrower should specify oath provisions in the *iska* document — implying that without such specification, no oath can be compelled.

[20] SA, Yoreh Deah 166, where the laws of interest incurred at the time of extending a loan's term are discussed. Some authorities classify such interest as *ribis ketzutzah*.

the term, it constitutes ribis ketzutzah — if so, one can argue: since it is in his power to demand the money at any time he wishes, provided he notifies him three months in advance, as per the law of the land (dina demalchusa). Therefore, one can say: since at any moment he can notify him to repay his money within three months, it is like an extension of time in that he remains silent and does not demand his money. Each day of silence could count as an implied extension in exchange for added interest. **Nevertheless, this is not yet conclusive. Since he did not explicitly say that he was extending the time for this [additional interest], and no change or fixing of a [new] term was made at the time he stipulated those two percent, one can say it is not ribis ketzutzah. As the Shach wrote (siman 166, se'if 5):**[21] **that in such a case, it is only when one explicitly says, "in exchange for your money," for this implies that he is extending the time for this purpose, but otherwise, no — see there.**

However, in any event, we have not escaped the category of avak ribis (rabbinically prohibited interest). And regarding this, the Rema ruled (siman 166, se'if 3):[22] **that [the borrower] can deduct it from his debt.** For *avak ribis*, unlike *ribis ketzutzah*, the borrower can offset the interest against the outstanding balance. **For only regarding a mashkanta (mortgage) do we say "deduction without money is [tantamount to] extraction," but not in general. And I have already established in a teshuvah that an obligatsion (bond) is not included in the category of mashkanta for this purpose. And even though avak ribis was permitted for orphans — nevertheless, the Rashba already wrote in his Teshuvos (cited in the Beis Yosef, siman 160):**[23] **The fact that orphans' money is permitted to be lent "close to profit and far from loss" is only on condition that they stipulate that all the money shall remain designated — and that the orphans shall receive from the profit that is found in their actual money — but not that the borrower shall spend it and repay from other [sources].** The dispensation requires the money to remain identifiable. The orphans' earnings must come from profits earned with that money. **And the Mishneh LaMelech wrote in the name of the Maharival, volume 1 (siman 126), that we do not find anyone who explicitly disagrees with this. And the Mishneh LaMelech explained the reasoning of the matter: Even though [the borrower] did not stipulate that he would spend [the money] for his own needs, and therefore he did not fix the in-**

דְּבִידוֹ לְתְבוֹעַ הַמָּעוֹת בְּכָל זְמַן שֶׁיִּרְצֶה רַק שֶׁיּוֹדִיעוֹ לוֹ מִקּוֹדֶם שְׁלֹשָׁה חֳדָשִׁים כְּפִי דִּינָא דְּמַלְכוּתָא אִם כֵּן יֵשׁ לוֹמַר כֵּיוָן דִּבְכָל רֶגַע יָכוֹל לְהוֹדִיעוֹ שֶׁיְּשַׁלֵּם לוֹ מָעוֹתָיו אַחֲרֵי שְׁלֹשָׁה חֳדָשִׁים הֲוֵי כְּמוֹ הַרְחָבַת זְמַן בְּמַה שֶּׁשּׁוֹתֵק וְאֵינוֹ תּוֹבֵעַ מָעוֹתָיו מִכָּל מָקוֹם עֲדַיִן אֵינוֹ מְכָרָח כֵּיוָן דְּלָא אָמַר בְּפֵירוּשׁ שֶׁמַּרְחִיב לוֹ הַזְּמַן בִּשְׁבִיל זֶה וְלֹא נַעֲשָׂה שׁוּם הִשְׁתַּנּוּת וּקְבִיעַת זְמַן בְּשָׁעָה שֶׁקָּצַץ לוֹ הָנָךְ שְׁנֵי פְּרָאצֶענְטִי יֵשׁ לוֹמַר דְּלָא הֲוֵי רְבִית קְצוּצָה כְּמוֹ שֶׁכָּתַב הַשַּׁפְתֵי כֹהֵן (סִימָן קס"ו סְעִיף ה') דְּבְכַהֲאי גַּוְונָא דַּוְקָא בְּאוֹמֵר בְּפֵירוּשׁ בִּשְׁכַר מָעוֹתֶיךָ דְּזֶהוּ בְּמַשְׁמַע שֶׁמַּרְחִיב לוֹ זְמַן בִּשְׁבִיל זֶה אֲבָל בְּלָאו הָכִי לֹא עַיֵּן שָׁם

אַךְ עַל כָּל פָּנִים מִדִּין אֲבַק רִבִּית לֹא נַפְקָא וּבָזֶה הִכְרִיעַ הָרַמ"א (סִימָן קס"ו סְעִיף ג') דְּיָכוֹל לְנַכּוֹת לוֹ מֵחוֹבוֹ דְּדַוְקָא בְּמַשְׁכַּנְתָּא אָמְרִינַן סַלּוּקֵי בְּלֹא זוּזֵי אַפּוֹקֵי אֲבָל לֹא בְּעָלְמָא וּכְבָר הֶעֱלֵיתִי בִּתְשׁוּבָה דַּאֲבַלִּיגָאטִיאָן אֵינוֹ בִּכְלַל מַשְׁכַּנְתָּא לְעִנְיַן זֶה וְאַף דַּאֲבַק רִבִּית הוּתַּר לִיתְמֵי מִכָּל מָקוֹם הָא כְּבָר כָּתַב הָרַשְׁבָּ"א בַּשּׁוּ"ת (הוּבָא בְּבֵית יוֹסֵף סִימָן ק"ס) הָא דְּמָעוֹת יְתֹמֵי מֻתָּר לְהַלְוֹתָן קָרוֹב לְשָׂכָר וְרָחוֹק לְהֶפְסֵד וּבִלְבַד שֶׁיִּתְּנוּ שֶׁיַּעַמְדוּ כָּל הַמָּעוֹת מְיֻחָדִים וְשֶׁיְּקַבְּלוּ הַיְתוֹמִים מֵהֶרְוַח שֶׁנִּמְצָא בְּמָעוֹתֵיהֶם מַמָּשׁ אֲבָל לֹא שֶׁיּוֹצִיאֵם הַלְוֹה וְשֶׁיִּפְרַע לְאַחַר מִכָּאן וְכָתַב הַמִּשְׁנֶה לַמֶּלֶךְ בְּשֵׁם מהריב"ל חֵלֶק א' (סִימָן קכ"ו) שֶׁלֹּא מָצִינוּ חוֹלֵק עַל זֶה בְּפֵירוּשׁ וּבֵאֵר הַמִּשְׁנֶה לַמֶּלֶךְ בְּטַעְמָא דְּמִלְּתָא אַף שֶׁהוּא לֹא הִתְנָה שֶׁיּוֹצִיאֵם לְצָרְכּוֹ וְאִם כֵּן לֹא קָצַץ הָרִבִּית וַהֲוֵי רַק אֲבַק רִבִּית דְּמוּתָּר בְּשֵׁל יְתוֹמִים דְּכָל אֲבַק רִבִּית שֶׁאִם הָיוּ נוֹתְנִים בַּתְּחִלָּה לְכָךְ הֲרֵי זֶה רִבִּית קְצוּצָה וְאֵינוֹ אֲבַק אֶלָּא מִשּׁוּם

[21] Shach, Yoreh Deah 166:5.

[22] Rema, Yoreh Deah 166:3. The Rema rules that *avak ribis* may be deducted from the outstanding debt, and the principle of *silluki belo zuzei apukei hu* (deduction equals extraction) applies only to *mashkanta*, not to ordinary debts.

[23] Rashba, Teshuvos, cited in the Beis Yosef on Yoreh Deah 160. The Rashba restricts the orphan dispensation to cases where the money remains designated and profits come from the actual invested funds.

שֶׁלֹּא הִתְנָה לֹא הִתִּירוּ בְּשֶׁל יְתוֹמִים עַיֵּן שָׁם וְהָכִי נָמֵי בְּנִדּוֹן דִּידָן כֵּיוָן דַּהֲוֵי אֲבַק רִבִּית מֵחֲמַת שֶׁלֹּא הִתְנָה בְּשָׁעַת הַלְוָאָה וְאִלּוּ הִתְנָה הָיָה רִבִּית קָצוּצָה וְגַם כְּבָר כָּתַבְנוּ שֶׁהַלְוֶה טוֹעֵן שֶׁלֹּא הִרְוִיחַ בְּמָעוֹתֵיהֶם כְּלָל שֶׁהוֹצִיאָם לְדָבָר אַחֵר וַהֲוֵי מַמָּשׁ כְּדִינָא דְּהָרַשְׁבָּ"א וְאִם כֵּן הַדִּין דְּיָכוֹל לְנַכּוֹת כָּל הַשִּׁטָּה פראצענטי כֵּן נִרְאֶה לַעֲנִיּוּת דַּעְתִּי

terest, and it is only avak ribis, which is permitted with orphans' money — [nevertheless,] any avak ribis that, had they stipulated it initially, would constitute ribis ketzutzah, and is only [classified as] avak [ribis] because it was not stipulated — they did not permit [it] with orphans' money — see there. The dispensation does not cover interest that is rabbinic only because it was not stipulated. It covers forms of interest that remain rabbinic even when stipulated. **And so too in our case: Since it is avak ribis because it was not stipulated at the time of the loan, and had it been stipulated, it would have been ribis ketzutzah. And furthermore, we have already written that the borrower claims that he did not profit from their money at all — that he spent it on something else.** Thus, the interest did not come from profits earned with the designated money. **And this is exactly the case described by the Rashba. Therefore, the law is that he can deduct all eight percent. So it appears to my humble opinion.**

יְדִידוֹ אוֹהֲבוֹ עֲקִיבָא גִינְז מֵאַיְזֶנְשְׁטַאט

His friend who loves him. Akiva Ginz from Eisenstadt. Rabbi Akiva Eiger signs with his family name Ginz (Güns) and his place of origin, Eisenstadt.

[הַשְׁמָטוֹת: סִימָן נ"ג דִּיבּוּר הַמַּתְחִיל אַךְ שִׁיטָה י"ג וְצָרִיךְ עִיּוּן: אֶלָּא דְּיֵשׁ לוֹמַר בְּהֵיפּוּךְ כֵּיוָן דְּבִמְינַהוּ בֵּית דִּין צָרִיךְ לוֹמַר מוֹדֶה בְּמִקְצָת עַל כָּרְחָךְ בְּמִינַהוּ יְתוֹמִים אַף בְּמוֹדֶה בְּמִקְצָת לֹא יִשָּׁבַע מִשּׁוּם הָכִי הִשְׁמִיט הַמְחַבֵּר דִּבְרֵי הרמ"ה:]

[Addenda: Siman 53, s.v. "Ach," line 13. This addendum returns to the earlier contradiction in the Sma. **[Where it says] "and requires further investigation": Rather, one can say the opposite. Since when beis din appointed [the apotropos], hoda'ah bemiktzas (partial admission) must be present [for the oath], it follows that when the [father of the] orphans appointed [him], even with hoda'ah bemiktzas he does not swear.** A guardian appointed by the orphans' father usually does not swear, so he will agree to serve. The Mechaber requires partial admission for a court-appointed guardian's oath. A guardian appointed by the father remains exempt even after a partial admission. **That is why the Mechaber omitted the words of the Ramah.]** The Mechaber omitted the Ramah because he rejects the Ramah's conclusion, not the need for partial admission. This resolves the Sma's two statements.

תשובה נד

Interest Collected for Orphans and Deduction from Principal

Property Law > Laws of Interest in Loans and Commerce • *Property Law > Laws of Documents and Guarantors*

Summary

Correspondent and Context: This teshuvah continues the previous correspondence about interest collected for orphans. Rabbi Akiva Eiger answers the correspondent's arguments and defends his earlier positions.

The Question (Sha'ila): The main question is whether a borrower may deduct interest collected by a guardian for orphans from the principal he still owes them. Rabbi Akiva Eiger considers whether *gozel u'ma'achil* exempts the orphans. He also asks whether minors who consumed the interest are exempt as *ketanim she'hiziku*, and whether *dichui b'mitzvos* preserves that exemption after they mature. At the end, he discusses whether a claimant may demand a *shevuas heses* instead of a *shevuas hashutfin* under the Rema in Choshen Mishpat siman 87.

The Ruling (Teshuvah): Rabbi Akiva Eiger rules that the borrower may deduct the interest from the unpaid principal. He reaches this result under several possible views of the Rosh and Maharam concerning *dichui*. He also cites the Beis Yosef to show that when the borrower made no profit, money may be extracted from the orphans. In Choshen Mishpat siman 87, he reads the Rema as allowing the claimant to waive the partnership oath and demand only a regular *shevuas heses*.

Shulchan Aruch Background: The main discussion concerns Yoreh Deah siman 160 and the laws of *ribis*. It distinguishes *ribis ketzutzah*, which is biblically prohibited, from *avak ribis*, which is rabbinically prohibited and generally need not be returned by orphans. Rabbi Akiva Eiger also discusses Yoreh Deah siman 396 on a minor's mourning, Orach Chaim simanim 267 and 475/476 on Kiddush and matzah, and Choshen Mishpat simanim 81, 87, and 93 on claims and oaths.

Key Disputes (Machlokes): Rabbi Akiva Eiger discusses three main disputes. First, he challenges the Mishneh LaMelech's claim that the Rivash and Rashba disagree about a guardian acting for adults. The Rivash may have needed a special reason only because *gozel u'ma'achil* did not apply in his case. Second, the Maharam requires a minor who matures after *shiva* to mourn, while the Rosh exempts him. Rabbi Akiva Eiger questions the Rosh's two distinctions and compares them with the Gemara's unresolved question about *dichui*. Third, the Ra'avad treats possession of partnership property as partial admission. Other authorities require an actual admission concerning the disputed claim.

לְהַגָּאוֹן הַמְפֻרְסָם הַנּוֹזָכָר לְעֵיל בְּעִנְיַן הַנּוֹזָכָר לְעֵיל

To the famous Gaon mentioned above, regarding the matter mentioned above. This teshuvah continues the previous discussion about interest collected for orphans.

מַה שֶּׁכָּתַב מַעֲלַת כְּבוֹד תּוֹרָתוֹ הַגָּאוֹן נֵרוֹ יָאִיר עַל תְּמִיהָתִי בְּדִבְרֵי הַמִּשְׁנֶה לַמֶּלֶךְ הַנּוֹזָכָר לְעֵיל דְּיֵשׁ לוֹמַר דְּהָרִיבָ"ש מַיְירֵי בְּעִנְיַן דְּלֵיכָּא לְמֵימַר עֲלָהּ מִדִּין

What his honor the Gaon wrote regarding my objection to the words of the Mishneh LaMelech mentioned above. That one can say the Rivash is dealing with a case where one cannot invoke the principle of "one who robs and feeds [others]." *Gozel u'ma'achil* exempts those who receive stolen goods from liability. **Such as where the minors**

גּוֹזֵל וּמַאֲכִיל כְּגוֹן דְּהִלְווּ הַקְּטַנִּים בְּעַצְמָם וְכַדּוֹמֶה וְתֵדַע דְּאִם לֹא כֵּן יִסְתְּרוּ דִּבְרֵי הָרַשְׁבָּ"א שֶׁהֵבִיא הָרִיבָ"ש לְדִבְרֵי הָרַשְׁבָּ"א שֶׁהֵבִיא הַבֵּית יוֹסֵף וְכָתַב רוֹם מַעֲלַת כְּבוֹד תּוֹרָתוֹ דְּכָל זֶה מְבֹאָר בְּדִבְרֵי הַמִּשְׁנֶה לַמֶּלֶךְ עַצְמוֹ

נִפְלֵאתִי עַל כְּבוֹדוֹ וְכִי בְּמִידֵי דְּעָסִיקְנָא בּוֹ אַעְלִים עֵינַי מִסִּדּוּר הַדְּבָרִים אֲבָל עִיקַּר כַּוָּנָתִי הָיָה לְהַקְשׁוֹת מִתּוֹךְ דִּבְרֵי הַמִּשְׁנֶה לַמֶּלֶךְ עַצְמוֹ כֵּיוָן דְּכָתַב שֶׁלֹּא יִסְתְּרוּ דִּבְרֵי הָרַשְׁבָּ"א אַהֲדָדֵי מוּכָח דְּמַיְירֵי בְּעִנְיָן דְּלֵיכָּא בּוֹ טַעְמָא דְּגוֹזֵל וּמַאֲכִיל וְאִם כֵּן מִנַּיִן לוֹ לְהַמִּשְׁנֶה לַמֶּלֶךְ לַעֲשׂוֹת מַחֲלוֹקוֹת בְּאַפּוֹטְרוֹפְּס דִּגְדוֹלִים הָא יֵשׁ לוֹמַר כֵּיוָן דְּמַיְירֵי בְּעִנְיָן דְּלֵיכָּא לְדַמּוּיֵי לְגוֹזֵל וּמַאֲכִיל מִשּׁוּם הָכִי הוּצְרַךְ הָרִיבָ"ש לְמֵיתֵי עֲלָהּ מִדִּין יַתְמֵי לָאו בְּנֵי מֵיעְבַּד מִצְוָה אֲבָל בְּעָלְמָא סְבִירָא לֵיהּ גַּם כֵּן אַף בִּגְדוֹלִים פְּטוּרִים מִדִּין גּוֹזֵל וּמַאֲכִיל וְהֵן הֵן הַדְּבָרִים שֶׁהִקְשֵׁיתִי וּלְגוֹדֶל נְחִיצַת מִכְתָּבִי הִשְׁמַטְתִּי לִכְתֹּב כִּדְכָתַב הַמִּשְׁנֶה לַמֶּלֶךְ בְּעַצְמוֹ

וּמַה שֶּׁכָּתַב מַעֲלַת כְּבוֹד תּוֹרָתוֹ דְּאַף לְדִבְרֵי הַמִּשְׁנֶה לַמֶּלֶךְ דְּהָרִיבָ"ש חוֹלֵק מִכָּל מָקוֹם בְּמַה שֶּׁכָּתַב הָרַשְׁבָּ"א דַּאֲפִילּוּ קְטַנִּים עַצְמָם שֶׁהִלְווּ פְּטוּרִים לְהַחֲזִיר הָרִיבִּית שֶׁאָכְלוּ מִדִּין קְטַנִּים שֶׁהִזִּיקוּ, בָּזֶה לֹא מָצִינוּ דְּפָלִיג הָרִיבָ"ש דְּהוּא מַיְירֵי דַּעֲדַיִין הָרִבִּית בְּעַיִן, יָפֶה כָּתַב אוּלָם עַל כָּל פָּנִים יֵשׁ לוֹמַר הֵיכִי דְּלֹא נָתַן הַקֶּרֶן יָכוֹל לְנַכּוֹת דְּלֹא מִקְרֵי הִזִּיקוּ, דְּיֵשׁ לוֹמַר מִדִּידְהוּ קָאָכְלִי

themselves lent the money, and similar cases. Since in such a case no third party (like a guardian) committed the wrongful act of lending at interest, the *gozel u'ma'achil* exemption would not apply. **And the proof is that otherwise, the Rashba's words cited by the Rivash would contradict the Rashba's words cited by the Beis Yosef.** The two passages of the Rashba can only be reconciled if we limit the Rivash's case to one where *gozel u'ma'achil* does not apply. **And his honor wrote that all of this is already explained in the Mishneh LaMelech's own words.**

I am astonished at his honor. Would I, in a matter I am engaged with, turn a blind eye to the arrangement of the discussion? But my main intention was to raise a difficulty from within the Mishneh LaMelech's own words. Since [the Mishneh LaMelech] wrote that the Rashba's words should not contradict each other, it is proven that [the Rivash] is dealing with a case where the reasoning of "one who robs and feeds" does not apply. And if so, from where does the Mishneh LaMelech derive that there is a dispute regarding a guardian of adults? The Mishneh LaMelech had concluded from the Rivash that even a guardian of adult beneficiaries is exempt from returning interest — but this inference is unwarranted. **For one could say that since [the Rivash] is dealing with a case that cannot be compared to "one who robs and feeds,"** The Rivash may still agree with the Rashba in the general case. **Therefore, the Rivash needed to derive [the exemption] from the principle that orphans are not obligated in performing mitzvos.** The Rivash only resorted to the orphan-specific exemption because *gozel u'ma'achil* was unavailable in his case. **But in the general case, [the Rivash] may also hold that even [beneficiaries who are] adults are exempt based on the principle of "one who robs and feeds." And these are precisely the points I raised as objections. And due to the urgency of my letter, I omitted writing what the Mishneh LaMelech himself wrote.**

And regarding what his honor wrote that even according to the Mishneh LaMelech's view that the Rivash disagrees, Nevertheless, regarding what the Rashba wrote that even minors themselves who lent are exempt from returning the interest they consumed Based on the principle of "minors who caused damage" — in this, we do not find that the Rivash disagrees. Since [the Rivash] is dealing with a case where the interest is still extant — [the correspondent] wrote well. However, in any case, one can say that where [the borrower] has not yet paid the principal, he may deduct [the interest]. Since it is not called "they caused damage," because one can say they are consuming from their own [funds]. When the principal remains with the borrower, the "interest" the orphans received may be viewed as advance payment of their own principal — not as damage inflicted on the borrower.

וְנִרְאֶה לִי רְאָיָה לָזֶה מִתְּשׁוּבַת מַהֲרִי"ל הוּבָא בְּבֵית יוֹסֵף (סִימָן ק"ס דִּיבּוּר הַמַּתְחִיל כָּתַב בַּמָּרְדְּכִי) עַיֵּין שָׁם דְּטָרַח לְמִצֹא זְכוּת הַיְתוֹמִים וְלֹא אָתֵי עֲלָהּ מִדִּין קְטַנִּים שֶׁהִזִּיקוּ אֶלָּא עַל כָּרְחָךְ מַיְירֵי בְּשֶׁהַקֶּרֶן עוֹד בְּיַד הַלּוֶֹה וְיוּכַל לְנַכּוֹת וּלְפִי זֶה יֵשׁ לוֹמַר בְּדָרְךְ מַה נַּפְשָׁךְ אִם בָּאנוּ לְהַשְׁווֹת דִּבְרֵי מַהֲרִי"ל לְהָרַשְׁבָּ"א, עַל כָּרְחָךְ מוּכָח דְּיָכוֹל לְנַכּוֹת וְאִם נֵימָא דִּפְלִיגִי, יָכוֹל לוֹמַר קַיְימָא לַן כְּמַהֲרִי"ל וְכָעֵת אֵין אִתִּי סֵפֶר מַהֲרִי"ל לְעַיֵּין בִּמְקוֹר הַדְּבָרִים

And it seems to me there is proof for this from the responsum of the Maharil cited in the Beis Yosef (siman 160, s.v. "kasav b'Mordechai") — see there. For [the Maharil] labored to find merit for the orphans And he did not derive [the exemption] from the principle of "minors who caused damage." Had the Maharil been able to rely on the *ketanim she'hiziku* exemption, he would not have needed to seek another basis. **This must mean he is dealing with a case where the principal is still in the borrower's hands and [the borrower] can deduct. And accordingly, one can argue by way of "whichever way you look at it": If we wish to reconcile the words of the Maharil with the Rashba, it is necessarily proven that [the borrower] can deduct.** If the Maharil agrees with the Rashba, then the Maharil's failure to invoke *ketanim she'hiziku* proves the case involves unpaid principal, and deduction is possible. **And if we say they disagree, [the borrower] can claim that we follow the Maharil. And at present, I do not have the sefer of the Maharil available to examine the original source.**

וּמַה שֶּׁכָּתַב מַעֲלַת כְּבוֹד תּוֹרָתוֹ דְּלִסְבָרַת הַמַּהֲרַ"ם יֵשׁ לוֹמַר אַף בְּלֹא הִרְויחַ מִכָּל מָקוֹם הַקְּצִיצָה כְּמַאן דְּלֵיתָא וּמַה דְּנָתַן הֲוֵי כְּנָתַן בְּלֹא קְצִיצָה דַּהֲוֵי רַק אֲבַק רִיבִּית דְּהֻתַּר לְיתְמֵי אֶלָּא דְּאֵין כּוֹפִין לוֹ לִיתֵּן כֵּיוָן דְּלֹא הִרְויחַ אֲבָל מַה שֶּׁנּוֹתֵן נוֹתֵן בְּהֶיתֵּר דַּהֲוֵי רַק אֲבַק רִיבִּית כֵּיוָן דְּמִקָּרֵי לֹא קָצַץ וְזֶהוּ נִסְתָּר מִדִּבְרֵי הַמַּהֲרִי"ל הַנִּזְכָּר לְעֵיל דְּנָחִית גַּם כֵּן בִּשִׁיטַת מַהֲרַ"ם הַנִּזְכָּר לְעֵיל וְאַף עַל פִּי כֵן לֹא זִיכָּה לְהַיָּתוֹם רַק דְּדָנִין כְּאִלּוּ הִתְנָה לָזוּן הַיָּתוֹם בְּצִמְצוּם מִמַּה שֶּׁיַּרְויחַ וּמַה שֶּׁהִרְבָּה לִיתֵּן הֲוֵי מַתָּנָה בְּעָלְמָא עַיֵּין שָׁם מִבֹּאָר דְּאִלּוּ קָצַץ הַסַּךְ לִיתֵּן, לֹא הָיִינוּ דָּנִין לַאֲבַק רִיבִּית דְּהֻתַּר לְיתוֹמִים זוּלַת דְּנֵימָא דְּהַקֶּרֶן שֶׁבְּיָדוֹ עֲדַיִין לֹא מִקְרֵי נָתַן לָהֶם הָרִבִּית דְּיֵשׁ נַפְקָא מִינָה דְּקֶרֶן דִּידְהוּ נָתַן לָהֶם

And regarding what his honor wrote that according to the Maharam's reasoning, one can say that even when [the borrower] did not profit Nevertheless, the stipulated rate is as if non-existent. And what [the borrower] paid is as if given without a stipulated rate, which is only avak ribis (rabbinically prohibited interest), which is permitted to orphans. Except that we do not compel him to pay since he did not profit. But what he gives, he gives permissibly, since it is only avak ribis because it is considered as if he did not stipulate. This is refuted by the words of the aforementioned Maharil. Who also follows the approach of the Maharam mentioned above. And nevertheless did not find merit for the orphan Rather, [the Maharil] ruled as if [the guardian] had stipulated to support the orphan precisely from what [the borrower] would profit. And whatever extra he gave was merely a gift — see there. It is thus clear that if the amount to give had been stipulated, we would not rule it as avak ribis that is permitted to orphans. If the Maharil truly believed all payments under a voided stipulation become *avak ribis*, he would not have needed his elaborate reasoning. **Unless we say that since the principal is still in [the borrower's] hands, it is not considered that he gave them the interest.** There is one possible resolution: when the principal is still owed, the "interest" payments are really just partial returns of the orphans' own capital. **For there is a practical distinction that he gave them their own principal.**

עַל כָּל פָּנִים דַּי לָנוּ דְּזָכִינוּ לַדִּין דְּבִנְדוֹן דִּידַן דְּהַקֶּרֶן בְּיָדוֹ יָכוֹל לְנַכּוֹת

In any case, it suffices for us that we have established the ruling that in our case, where the principal is in [the borrower's] hands, he can deduct. Even if the broader analysis is uncertain, this narrower conclusion stands firm.

וּבְיוֹתֵר נִרְאֶה לְדִינָא דְּבֶאֱמֶת מוֹצִיאִין מֵהַיְתוֹמִים דְּהֵרֵי הַבַּיִת יוֹסֵף שָׁם דִּיבּוּר הַמַּתְחִיל אַפּוֹטְרוֹפּוֹס וְכוּלִּי כָּתַב עַל עִנְיַן אִם גָּבָה הָאַפּוֹטְרוֹפּס וְנָתַן לָהֶם כּוּלִּי וּכְבָר גָּלוּי לְפָנִים שֶׁכָּל זֶה אֵינוֹ אֶלָּא כְּשֶׁלֹּא הֵרְוִיחַ הַלָּוֶה וְכוּלֵּי הֲרֵי דְּסָבִירָא לֵיהּ לְרַבֵּינוּ הַבַּיִת יוֹסֵף בְּמִפּוֹרָשׁ דְּאַף לְסָבָרַת הַמַּהֲר"ם מִכָּל מָקוֹם בְּלֹא הֵרְוִיחַ מוֹצִיאִין מֵהַיְתוֹמִים אֶלָּא וַדַּאי בָּרוּר דְּדַוְקָא לְעִנְיַן מַה שֶּׁהֵרְוִיחַ בָּזֶה אָנוּ דָנִין דְּדָמֵי כְּדַאֲתָנוּ הַבַּיִת דִּין כְּמוֹ דְּמִקַּבֵּל סְתָם הֲוֵי כְּאַתְנוּ בֵּית דִּין עִמּוֹ לְמַחֲצִית שָׂכָר מִשּׁוּם הָכִי אַף בְּקָצַץ הָאַפּוֹטְרוֹפּס מַה לָּנוּ בִּקְצִיצָתוֹ הָא עַל כָּל פָּנִים מִמַּה דַּהֲוֵי כְּאַתְנוּ בֵּית דִּין עִמּוֹ מְחוּיָב לִיתֵּן מִמַּה שֶּׁהֵרְוִיחַ מִכֹּחַ תְּנַאי בֵּית דִּין מַה שֶּׁאֵין כֵּן כְּשֶׁלֹּא הֵרְוִיחַ לֹא שַׁיָּיךְ לוֹמַר דַּהֲוֵי כְּלֹא קָצַץ דְּהָא מִכָּל מָקוֹם מַה שֶּׁנָּתַן רַק מִכֹּחַ הַקְּצִיצָה נָתַן וַהֲוֵי רִבִּית קְצוּצָה כַּנִּרְאֶה לַעֲנִיּוּת דַּעְתִּי

And moreover, it appears as a matter of practical law that one actually extracts from the orphans. For the Beis Yosef there, s.v. "Apotropos" etc., wrote regarding the matter of whether the guardian collected and gave [interest] to [the orphans] etc. "And it is already revealed above that all this is only when the borrower did not profit" etc. Thus, our master the Beis Yosef explicitly holds that even according to the Maharam's reasoning, when [the borrower] did not profit, one extracts from the orphans. Rather, it is certainly clear that specifically regarding what [the borrower] profited — this is what we are adjudicating. For it resembles as if the court stipulated — just as one who receives [a business venture] without specification is treated as if the court stipulated with him for half the profit. The Maharam's approach treats the profit component as if governed by a court-implied partnership arrangement. **Therefore, even if the guardian stipulated [a rate], what do we care about his stipulation? For in any case, since it is as if the court stipulated with him, he is obligated to give from what he profited by force of the court's stipulation. But when [the borrower] did not profit, it is not applicable to say it is as if he did not stipulate.** There is no court-implied condition regarding payments unrelated to profits. **For in any case, what he gave was given solely on the basis of the stipulation. And it is ribis ketzutzah (fixed interest), as it appears to my humble opinion.** The payment therefore constitutes *ribis ketzutzah*. Even orphans must return it.

וּמַה שֶּׁכָּתַב רוֹם מַעֲלַת כְּבוֹד תּוֹרָתוֹ נָרוֹ יָאִיר מִדְּסָתָם הריב"ש מַשְׁמַע אַף כְּשֶׁגְּדְלוּ הַיְתוֹמִים פְּטוּרִים וְהַטַּעַם כֵּיוָן דְּבָעִידָן דְּהָיוּ קְטַנִּים הָיוּ פְּטוּרִים יֵשׁ דְּחוּי אֵצֶל מִצְוֹת וְהָא דְּלָרַב פַּפָּא דְּסָבִירָא לֵיהּ פְּרִיעַת בַּעַל חוֹב מִצְוָה נִזְקָקִין לְנִכְסֵי יְתוֹמִים קְטַנִּים כְּשֶׁגְּדְלוּ הַיְינוּ לְשִׁיטָתֵיהּ דְּאָמַר זֹאת אוֹמֶרֶת אֵין דְּחוּי אֵצֶל מִצְוֹת עַד כָּאן דְּבָרָיו

And regarding what his honor wrote: that from the Rivash's unqualified ruling, it is implied that even when the orphans mature, they are exempt. And the reason is that since at the time they were minors they were exempt, there is dichui (deferral/rejection) with regard to mitzvos. *Dichui* means that an obligation once deferred may remain deferred. **And as for the fact that according to Rav Pappa, who holds that repaying a creditor is a mitzvah, we attend to the property of minor orphans when they mature** This means that their debts are collected when they mature. **This is because [Rav Pappa] follows his own view, as he said "this tells us there is no dichui with regard to mitzvos" — thus far [the correspondent's] words.**

נִפְלֵאתִי אַף אִם נִידּוֹן כֵּן בְּכַוָּנַת הריב"ש מִכָּל מָקוֹם הָא גַּם לְדִידַן הוּא אִיבַּעְיָא דְּלָא אִיפְּשָׁטָא אִם יֵשׁ דְּחוּי אֵצֶל מִצְוֹת וּמִמֵּילָא בְּנִדּוֹן דִּידַן יָכוֹל לְנַכּוֹת וְלוֹמַר קַיְימָא לַן דְּאֵין דְּחוּי אֵצֶל מִצְוֹת

I am astonished — even if we interpret the Rivash's intent this way, Nevertheless, for us too, it is an unresolved Talmudic question whether there is dichui with regard to mitzvos. And consequently, in our case, [the borrower] can deduct and claim: "We hold that there is no dichui with regard to mitzvos." Since it is a monetary dispute, the borrower can invoke the unresolved doubt and retain the deducted amount.

וּבְעִיקַּר הַיְסוֹד נִרְאֶה לִי הָא הָרֹא"ש סוֹף

And regarding the fundamental premise, it seems to me That the

מוֹעֵד קָטָן כָּתַב בְּשֵׁם הר"ם דְּקָטָן שֶׁמֵּת לוֹ מֵת וְהִגְדִּיל אַחַר שִׁבְעָה דְּצָרִיךְ לְהִתְאַבֵּל דְּאֵין דִּיחוּי וְהָרֹא"ש כָּתַב שָׁם דְּפָטוּר מִלְּהִתְאַבֵּל וְכָתַב לְחַלֵּק אַף דְּאֵין דִּיחוּי אֵצֶל מִצְוֹת מִכָּל מָקוֹם כֵּיוָן דְּהַדִּיחוּי בְּגוּף הָאָדָם יֵשׁ דִּיחוּי אוֹ דְּגַבֵּי הַכְסוּי הֲוֵי בְּיָדוֹ מַה שֶּׁאֵין כֵּן בְּאֵין בְּיָדוֹ לְסַלֵּק הַדִּיחוּי מֵעָלָיו עַיֵּין שָׁם [וְדִבְרֵי הָרֹא"ש אֵלּוּ תְּמוּהִים לִי דְּאִם כֵּן לְמַאי אִצְטְרִיךְ הש"ס בְּפֶרֶק ג' דְּסֻכָּה לוֹמַר דְּרַב פַּפָּא גּוּפָא מְסַפְּקָא לֵיהּ הָא יֵשׁ חִלּוּק דְּבְכִסּוּי הֲוֵי בְּיָדוֹ וְגַם בְּהֵיפּוּךְ לְמַאי הוֹצָרְךְ הָרֹא"ש לַחֲלוּקוֹ הָא בְּלָאו הָכִי כְּפִי דְּקָאָמַר הש"ס דְּרַב פַּפָּא גּוּפָא מְסַפְּקָא לֵיהּ אִם כֵּן חַיָּיב בְּכִסּוּי רַק מִסָּפֵיקָא וּמִמֵּילָא בַּאֲבִילוּת הֲוֵי סְפֵק דְּרַבָּנָן וּלְקוּלָּא דְּהָא בֶּאֱמֶת עֲדַיִן לַחֲלוּקוֹ דְּהָרֹא"ש הָא מִכָּל מָקוֹם גַּם בְּמִידֵי דְּלָאו בְּיָדוֹ הוּא אִיבַּעְיָא דְּלָא אִיפְּשִׁטָא בַּעֲלָתָה בּוֹ תְּמָרָה אִם יֵשׁ דִּיחוּי אֶלָּא עַל כָּרְחָךְ דְּמִסַּעַם סְפֵק אֲבִילוּת מְקִילִין אִם כֵּן בְּלָאו הָכִי הֲוָה מָצֵי לִיתֵּן טַעַם זֶה, וְצָרִיךְ עִיּוּן אִם כֵּן בְּמַמָּה נַפְשָׁךְ לְשִׁיטַת הר"מ אֵין קִיּוּם לְדִבְרֵי מַעֲלַת כְּבוֹד תּוֹרָתוֹ דְּהָא מְחַיֵּיב בְּקָטָן שֶׁהִגְדִּיל וְלִדְבָרֵי הָרֹא"ש הָא לְפִי שְׁנֵי טְעָמִים שֶׁלּוֹ לְחַלֵּק בֵּין דִּיחוּי קָטָן לְדִיחוּי דְּכִסּוּי אִם כֵּן יִקָּשֶׁה מִפְּרִיעַת בַּעַל חוֹב מִיְּתוֹמִים שֶׁגָּדְלוּ דְּלֵיכָא לְשַׁנּוֹיֵי כִּדְכָתַב מַעֲלַת כְּבוֹד תּוֹרָתוֹ נֵרוֹ יָאִיר דְּרַב פַּפָּא לְשִׁיטָתֵיהּ הָא לַחֲלוּקוֹ דְּהָרֹא"ש אַף דְּרַב פַּפָּא סְבִירָא לֵיהּ דְּבְכִסּוּי אֵין דִּיחוּי מִכָּל מָקוֹם הַדִּיחוּי דְּקָטָן שָׁאנִי

Rosh at the end of [Masechta] Moed Katan wrote in the name of the R"M (Maharam of Rothenburg)[1] **That a minor whose relative died and who matured after the seven [days of mourning] must observe mourning, because there is no dichui. And the Rosh wrote there that [the minor who matured] is exempt from mourning. And [the Rosh] wrote to distinguish: even though there is no dichui with regard to mitzvos [generally], Nevertheless, since the dichui is in the person himself, there is dichui.** The Rosh first distinguishes a deferral inherent in the person. Such a deferral may be permanent. **Or alternatively, regarding the covering [of blood after slaughter], it is in his hands [to create the obligation].** The Rosh's second distinction: in the paradigm case of *kisui hadam*, one could uncover the blood and thereby trigger the obligation — it was *b'yado* (in his power). **As opposed to when it is not in his power to remove the dichui from himself — see there. [And these words of the Rosh are perplexing to me. For if so, why did the Talmud in chapter 3 of Sukkah need to state that Rav Pappa himself is uncertain [about dichui]?**[2] If the Rosh's distinction between *dichui* of the person and *dichui* of the object resolves the matter, the Gemara should not need to invoke Rav Pappa's general uncertainty. **For there is a distinction that in the covering [of blood], it is in his hands! And conversely, why did the Rosh need his distinction? For regardless, since the Talmud states that Rav Pappa himself is uncertain, Then [one] is obligated in covering [the blood] only due to doubt. And consequently, regarding mourning, it is a doubt in a rabbinic matter, and [the rule is] to be lenient. For in truth, even according to the Rosh's distinction — for in any event, even regarding a matter not in one's hands,** the Rosh's second distinction (that *kisui* is "in his hands") does not resolve everything. **It is an unresolved question—when a palm-like shoot grew on it—whether there is dichui.** The Gemara asks about a myrtle whose tip was cut and later grew a palm-like shoot. This change was not in the person's control. **Rather, it must be that the reason [we are lenient in mourning] is because we are lenient in a doubt regarding mourning. If so, the Rosh could have given this reason regardless — and this requires further investigation.** The Rosh's distinctions seem unnecessary if the ordinary rule for a rabbinic doubt suffices. **Therefore, whichever way you look at it: according to the R"M (Maharam), [the corre-**

[1] The Rosh discusses this at the end of Masechta Moed Katan, recording the dispute with his teacher the Maharam of Rothenburg. The Taz, YD 396, summarizes: "דין זה הוא במחלוקת בין מהר"ם להרא"ש תלמידו בסוף מועד קטן דמהר"ם סבירא ליה חייב להתאבל אחר שיגדיל שבעה ושלשים מיום שנעשה גדול" — "This ruling is a dispute between the Maharam and his student the Rosh at the end of Moed Katan, for the Maharam holds he must observe mourning after reaching majority — seven and thirty [days] from the day he becomes an adult."

[2] Sukkah 33b — The Gemara in chapter 3 discusses the myrtle whose majority of leaves dried: "תנו רבנן: יבשו רוב עליו ונשארו בו שלשה בדי עלין לחין כשר. ואמר רב חסדא: ובראש כל אחד" — "The Sages taught: if the majority of its leaves dried and three moist branches of leaves remained, it is valid. And Rav Chisda said: at the top of each one." The ensuing discussion addresses whether a myrtle initially disqualified and later restored is subject to *dichui*, and connects to Rav Pappa's unresolved question about *dichui* in mitzvos.

spondent's] words have no support. For [the Maharam] obligates a minor who matured. And according to the Rosh, based on his two reasons for distinguishing between dichui of a minor and dichui of the covering [of blood], Then a difficulty arises from the repayment of a creditor by orphans who matured. If the Rosh holds that a minor's *dichui* is permanent, why does Rav Pappa collect debts from orphans who matured? **For one cannot answer, as his honor wrote, that Rav Pappa follows his own view [that there is no dichui]. For according to the Rosh's distinction, even though Rav Pappa holds that regarding the covering [of blood] there is no dichui,** Rav Pappa's position on *kisui* does not determine his position on minors. **Nevertheless, the dichui of a minor is different.** According to the Rosh's own distinctions, the minor's personal *dichui* is stronger than the *dichui* of *kisui hadam* — so even Rav Pappa should recognize *dichui* for minors.

אֶלָּא עַל כָּרְחָךְ דִּבְלָאו הָכִי בִּפְרִיעַת בַּעַל חוֹב לֵיכָּא עִנְיַן דִּיחוּי דְּדַוְקָא בַּאֲבֵילוּת דְּבָאנוּ לְחַיְּבוֹ מִכֹּחַ הַמַּעֲשֶׂה שֶׁנַּעֲשָׂה בְּשָׁעַת קַטְנוּתוֹ דְּהַיְינוּ מִיתַת הַמֵּת וְכֵיוָן דְּלֹא נִתְאַבֵּל אָז דְּיַשְׁלִים עַתָּה, בָּזֶה אָמְרִינַן יֵשׁ דִּיחוּי אֲבָל בִּפְרִיעַת בַּעַל חוֹב אֵין צָרִיךְ לָדוּן עַל הַמַּעֲשֶׂה שֶׁנַּעֲשָׂה בְּקַטְנוּתוֹ שֶׁיָּרַשׁ מִנְּכְסֵי אָבִיו דְּאֵין שָׁעַת הַיְרֻשָּׁה דַּוְקָא גּוֹרֶמֶת לְהַמְּצָוָה אֶלָּא דְּכָל שֶׁיֵּשׁ בִּרְשׁוּתוֹ נִכְסֵי אָבִיו הַמְשֻׁעְבָּדִים לְבַעַל חוֹב רָמְיָא עֲלֵיהּ הַמְּצָוָה לְשַׁלֵּם וּמַה לָּנוּ אֵימָתַי הִתְחִילוּ לָבוֹא בִּרְשׁוּתוֹ וְהָכִי נָמֵי בְּרִבִּית דְּהַמְּצָוָה כָּל זְמַן שֶׁמָּעוֹת הָרִבִּית בְּיָדוֹ צָרִיךְ לְהַחֲזִיר אֶלָּא מִדְּגֵימָא לְחַלֵּק בֵּין רִבִּית לְפֵרָעוֹן חוֹב כֵּיוָן דְּחָזִינַן דְּבְרִבִּית לְבְרֵיהּ לֹא אַזְהַר רַחֲמָנָא אִם כֵּן אֵין הַחִיּוּב חָל בִּכְלָלוּת עַל מִי שֶׁמָּעוֹת הָרִבִּית בְּיָדוֹ דְּהָא מָעוֹת הָרִבִּית בְּיַד הַיּוֹרֵשׁ וְאֵין צָרִיךְ לְהַחֲזִיר אֶלָּא דְּהַחִיּוּב עַל מִי שֶׁלָּקַח הָרִבִּית עָלָיו מוּטָל הַמְּצָוָה לְהַחֲזִיר אִם כֵּן יֵשׁ לוֹמַר דְּמַעֲשֶׂה הַלְקִיחָה גּוֹרֶמֶת וְכֵיוָן דְּבְעִידָן הַלְקִיחָה לֹא חָל עָלָיו הַמְּצָוָה גַּם כְּשֶׁהִגְדִּיל פָּטוּר דְּיֵשׁ דִּיחוּי מַה שֶּׁאֵין כֵּן בִּפְרִעוֹן חוֹב דְּכָל זְמַן שֶׁהַנְּכָסִים בִּרְשׁוּת בְּנוֹ וּבֶן בְּנוֹ עַד סוֹף כָּל הַדּוֹרוֹת הַמְּצָוָה לְשַׁלֵּם לְהַבַּעַל חוֹב אֵין שָׁעַת מַעֲשֶׂה הַיְרֻשָּׁה גּוֹרֶמֶת, רַק הַמְּצָוָה

בְּכָל רֵגַע שֶׁנִּכְסִים הַמְשֻׁעְבָּדִים בְּיָדוֹ וַעֲדַיִן אֵין הֶכְרֵחַ לָזֶה גַּם יֵשׁ לוֹמַר לְחַלּוֹק שֵׁנִי דְּהָרא"ש דְּדַוְקָא בַּאֲבֵילוּת לֹא מִקְרֵי בְּיָדוֹ דְּאִם נִידּוֹן כְּהָר"ם לְחַיְּבוֹ לְהִתְאַבֵּל מִשֶּׁהִגְדִּיל נִרְאֶה דְּאַף אִם הָיָה מִתְאַבֵּל בְּקַטְנוּתוֹ דְּלֹא יָצָא בָּזֶה וְלֹא מִפְּטַר בְּכָךְ כֵּיוָן דְּבְאוֹתָהּ שָׁעָה לֹא הָיָה מְחֻיָּב בַּדָּבָר אֵינוֹ פּוֹטֵר לְשָׁעָה שֶׁיִּהְיֶה מְחֻיָּב בַּדָּבָר וּכְדֶהְקֵשָׁה הַכֶּסֶף מִשְׁנֶה פֶּרֶק ה' הַלָּכָה ז' מֵהִלְכוֹת קָרְבַּן פֶּסַח וְעַיֵּין מָגֵן אַבְרָהָם רֹאשׁ סִימָן רס"ז בְּקִידּוּשׁ קֹדֶם לַיְלָה עַיֵּין שָׁם] מִשּׁוּם הָכִי מִקְרֵי לָאו בְּיָדוֹ אֲבָל בְּפַרְעוֹן חוֹב וּבְרִבִּית, דְּאִם הֶחֱזִיר בְּעוֹדוֹ קָטָן פְּשִׁיטָא דְּיָצָא יְדֵי חוֹבָתוֹ וּמִפְּטַר בְּכָךְ יֵשׁ לוֹמַר דְּמִקְרֵי בְּיָדוֹ כְּמוֹ כְּסוּי הַדָּם

sion of his son, and his son's son, to the end of all generations, The mitzvah to repay the creditor [applies]. The moment of inheriting does not generate [the obligation]; rather, the mitzvah exists at every moment that encumbered property is in his hands. Therefore *dichui* cannot apply — there is no single triggering moment from which the obligation was deferred. **But this [distinction] is not yet conclusive. Also, one can say according to the Rosh's second distinction** This distinction asks whether fulfillment was within the person's power. **That specifically regarding mourning, it is not considered "in his hands." For if we were to rule like the R"M (Maharam) to obligate him to mourn from when he matures, It appears that even if he had mourned during his minority, he would not have fulfilled [the obligation] thereby. And he would not be exempted thereby, since at that time he was not obligated in the matter. [An act performed when] he is not [yet obligated] does not exempt [him] for the time when he will be obligated.** This principle explains why mourning during minority is not "in his hands" — even if he tried, it would not work. **As the Kesef Mishneh raised this difficulty in Chapter 5, Halacha 7 of Hilchos Korban Pesach.**[3] The Kesef Mishneh addresses the analogous problem of a minor who had the *korban pesach* slaughtered for him — since the minor has no obligation, how can this exempt him? **And see the Magen Avraham at the beginning of siman 267 regarding one who recited Kiddush before nightfall — see there.]** The Magen Avraham discusses whether Kiddush before nightfall fulfills the later obligation. **Therefore, [mourning during minority] is considered "not in his hands." But regarding debt repayment and interest return, if he returned [the money] while still a minor, it is obvious that he fulfilled his obligation and is exempted thereby. One can say this is considered "in his hands," just like the covering of blood.** Since the minor *could* have returned the money and it would have counted, the situation is analogous to *kisui hadam* — and therefore there is no *dichui*.

וְאַף דְּיֵשׁ לְחַלֵּק דִּבְכִסּוּי בְּיָדוֹ לְגַלּוֹת וּלְהָבִיא עַצְמוֹ לִידֵי חִיּוּב מַה שֶּׁאֵין כֵּן בְּקָטָן דְּאֵין בְּיָדוֹ לְהָבִיא עַצְמוֹ לִידֵי חִיּוּב מִכָּל מָקוֹם גַּם לַאֲבֵילוּת לֹא דָּמֵי דְּהָתָם אֵין בְּיָדוֹ כְּלָל

And even though one could distinguish — that regarding the covering [of blood], it is in his hands to uncover [the blood] and bring himself to the point of obligation, As opposed to a minor, where it is not in his hands to bring himself to the point of obligation, Nevertheless, [the minor's case regarding debt/interest] is also not comparable to mourning. For there [in mourning], it is not in his hands at all. Mourning during minority is completely futile — nothing the minor could do would fulfill the obligation. But in debt repayment, paying during minority would actually work.

[3]Kesef Mishneh, Hilchos Korban Pesach 5:7 — The Kesef Mishneh raises the difficulty: "ומה שכתב ואם שחטו עליו בראשון פטור. איכא למידק אטו קטן בר חיובא. ופיטורא הוא" — "Regarding [the Rambam's] statement 'and if they slaughtered [the korban pesach] for him at the first [Pesach], he is exempt' — one can ask: is a minor subject to obligation and exemption?" The point is that performing a mitzvah while not yet obligated raises the question of whether it has any legal effect.