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THE ROSH AND THE RAMBAM

The Halakhah of Ashkenaz Confronts the Tradition of Sefarad

by

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DIGEST

R. Asher b. Yehiel (ROSH, ca. 1250–1327) is one of the outstanding figures in the history of the halakhah. His fame and influence, which are felt in the Tur of his son Ya'akov and in the halakhic works of Yosef Karo, are based primarily upon his Hilkhot Ha-ROSH; in this compendium, Asher builds upon the foundation of Yizhak Alfasi's Talmudic epitome, analyzes Talmudic and post-Talmudic sources and arrives at his halakhic conclusions. Since Asher was the intellectual product of the Tosafist academies of Germany and since he compiled this work following his migration to Spain, many scholars contend that the Hilkhot Ha-ROSH is an attempt at synthesis and harmonization of the varying halakhic traditions of those centers of Talmudic learning. In addition, ROSH is usually portrayed as an admirer of the halakhic authority of Maimonides' Mishneh Torah, the dominant halakhic code in Asher's new homeland, Spain. A careful examination of a representative sample of the Hilkhot Ha-ROSH and a study of its relationship to Sefardic halakhah in general and Maimonides in particular, demonstrate the deficiencies of this scholarship. Drawing heavily upon the Tosafist tradition, Asher produces a halakhic commentary to and expansion of the Alfasi, which served as the primary halakhic textbook in the Spanish yeshivot of the period. By thus integrating Alfasi into the intellectual millieu of the Ashkenazic academies, Asher derives from him a "new" halakhah, one that differs substantially from that crystallized in the Maimonidean Code. Asher's work

thus constitutes not a synthesis but a challenge to the supremacy of Maimonides as self-sufficient code and as the authoritative halakhic "key" to the Talmud/Alfasi. This challenge, addressed by codifiers and commentators in subsequent centuries, is R. Asher's unique contribution to the history of the halakhah.

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PREFACE

Among all the giants of Jewish intellectual history—the philosophers, the mystics, the pietists and the poets—it is the sages of the halakhah, Jewish law, who occupy the central place. Until recent generations, halakhic thinking was the preoccupation of the bulk of Jewish scholars who, utilizing a vast array of textual and analytical skills, brought the power of their minds to bear upon the Talmud and its complexities. The literary results of their efforts are enshrined in a massive library of commentaries, codes and responsa that stretch in an unbroken chain from the academies of the Babylonian geonim to the Talmudic schools of our own day. This literature, in turn, has become the subject of modern scholarly investigation. Our knowledge of this mainstream of Jewish thought has been immeasurably increased due to the researches of I.H. Weiss, Haim Tchernowitz, J.N. Epstein, Simhah Asaf, Efraim Urbach, Isadore Twersky, Avigdor Aptowitzer and Israel Ta-Shema, to name but a few. These men, who meet Weiss' requirement that a scholar of the halakhic literature be a master of Talmud as well as of modern philology, have done much to make this aspect of Torah a true "possession of the congregation of Jacob."

This study of the methodology of R. Asher ben Yehiel as a halakhist and of his contribution to the history of Jewish law owes a great deal to the accomplishments of these scholars. If I differ with some of them, it is in my conviction that we must search for the method, tendenz and achievements of R. Asher—indeed, of any halakhist—not in biographical details, not in what he or other scholars have said about his work, but in the work itself. It is

when we examine the halakhist's actual literary product, his use of sources, his treatment of precedent, his contribution to the ongoing Talmudic dialectic that we can say, with some degree of confidence, that we know him. This is the approach that I have taken in this study. I hope that its findings shed new light on the role of this outstanding scholar in halakhic history.

I am deeply grateful to a number of people whose help has been essential to my completion of this dissertation. My teachers at the Hebrew Union College-Jewish Institute of Religion have been an unfailing source of inspiration; they taught me Wissenschaft in a way that did not leave it bereft of Judentums. My sincere thanks go to Dr. Jakob J. Petuchowski, a marvelous teacher who served on my examination committee; to Dr. Eugene Mihaly, for his insights and encouragement; and to Dr. Alexander Guttmann, whose tremendous erudition combined with warmth of personality served to awaken my love for halakhic literature. My appreciation is expressed as well for the Cincinnati staff and administration of HUC-JIR, especially to Ms. Donna Swillinger, who typed a difficult manuscript with remarkable ease and skill.

My wife, Connie Hinitz, has supplied a steady stream of patience, understanding and love during the writing of this dissertation and my graduate school career. That this thesis is complete today is largely due to her.

I cannot express, let alone repay, my debt of gratitude to my teacher, rabi ha-muvhak, Dr. Ben-Zion Wacholder. He has challenged me and has opened my mind to the richness of halakhic thought; he is the answer to the prayer: ve-ha-eir eineinu be-toratekha. It is a rare privelege to be his student, a role that I shall always cherish.

INTRODUCTION

R. Asher b. Yehiel (ca. 1250-1327), also known as Asheri or the ROSH, is among the most powerful and outstanding figures in the history of the post-Talmudic halakhah. His authority as a posek, halakhic decisor, reached massive proportions, so that by the sixteenth century, R. Bezalel Ashkenazi could describe him as the major halakhic authority of most of the Jewish world,[1] while Ashkenazi's contemporary, R. Yosef Karo, could regard R. Asher as one of the three great "pillars of the law" (along with Maimonides and R. Yizhak Alfasi) upon whom rests the entire structure of Jewish law.[2] This authority and prestige stem in large part from R. Asher's great legal compendium, the Sefer Ha-Halakhot, also called Piskei Ha-ROSH or Hilkhot Ha-ROSH. (It is this last title which will be utilized in the present study.) LIke all of the important preceding codes and compendia--the works of the Geonim, the Sefer Ha-Halakhot of Alfasi, the Mishneh Torah of Maimonides--the Hilkhot Ha-ROSH marks a milestone in the history of the halakhah itself. The work, therefore, is truly an appropriate subject for research. Various problems, however, face any researcher who approaches it. Unlike the great halakhic works of Maimonides and Karo, and unlike the TUR of his own son Ya'akov, R. Asher's book is not accompanied by an introduction which explains the occasion, the purpose and the methodology of the compendium. While an introduction is not necessarily an infallible guide to the content of the book,[3] its absence here means that the reader must draw his own basic conclusions concerning method and purpose from the raw materials at hand.

While scholars from both the traditional yeshivah and the modern university have recorded observations and drawn conclusions concerning the Hilkhot Ha-ROSH, their findings have not achieved the status of certainty. The exchange between Elyakim Elinson and David Zafrany in Sinai, 1983-1984,[4] demonstrates that despite the researches and the findings of even a dissertation-length monograph, the scholarly community still stands in disagreement concerning even the basic outlines of R. Asher's contribution to the history of the halakhah.

This study is an attempt to draw those outlines. Specifically, it will examine the halakhic method and content of the Hilkhot Ha-ROSH in comparison with that of Maimonides' Mishneh Torah. Maimonides, or the RAMBAM, composed the Mishneh Torah over a period of approximately ten years, beginning in 1177. Within several generations, the fame and prestige of this systematic halakhic compendium had made a lasting impression on the entire Jewish world. In Spain, during the period of R. Asher's residence and codificatory activity, the Mishneh Torah was regarded as the supreme halakhic authority.[5] This study contends that any adequate appreciation of the halakhic creativity of R. Asher and of his contribution to the history of Jewish law must consider carefully the relationship between his compendium and that of RAMBAM. What purpose does the Hilkhot Ha-ROSH serve that was not already met by the Mishneh Torah? What deficiencies existed within that respected and authoritative formulation of the halakhic corpus that necessitated the composition of another code? In essence, what does the work of R. Asher add to the halakhic tradition of his time and place that was not to be found within the work of Maimonides?

The Introduction will attempt to define the approaches adopted by the study towards the answering of these questions. It will first present a brief

biographical sketch of R. Asher b. Yehiel. Secondly, it will summarize and examine the views and findings of rabbinic and academic scholars concerning the purpose, tendenz and methodologies of the Hilkhot Ha-ROSH. Finally, it will discuss the requisites for a proper method and approach in studying the work and evaluating its contribution to the halakhic tradition.

Part I. Biographical Sketch.

This study will not attempt to repeat the work of others who have researched the life of R. Asher; special mention should be made of the monograph of Alfred Freimann,[6] which is still the most thorough biography in existence. R. Asher was born in Germany to a family that had been associated with the Hasidei Ashkenaz. Studying Torah under the tutelage of his father and his older brother, he eventually became the leading pupil of R. Meir of Rothenburg. Asher's learning was so respected that, following the imprisonment of R. Meir, the leadership of German Jewry passed to Asher. His active participation in Jewish communal life proved to be a mixed blessing; in 1303, he and his family fled Germany in response to threats against their freedom and safety. His journey took him to Provence, where he became acquainted with that independent center of Torah study and its halakhic traditions.[7] He moved on to Spain, where in 1304 he met the leading Spanish Talmudist of the day, R. Shelomo b. Adret (RASHBA) in Barcelona. In 1305, ROSH was invited by the community of Toledo, where R. Meir Ha-Levy Abulafia (RAMAH; d.1244) had once served, to become the rabbi of the city. R. Asher remained in Toledo until his death in 1327, exerting profound influence upon Jewish legal and communal life.

The fact that Asher possessed first-hand knowledge of the halakhic traditions of three great centers--Spain, Provence and northern France-Germany--accounts for the presence of citations from the sages of all three

traditions in his compendium.[8] Some scholars argue that this fact represents an attempt on his part to forge a synthesis or reconciliation of the viewpoints of the divergent schools, to create a single, unified halakhah out of the multiplicity of rulings emanating from the various centers. As we shall see, serious challenges can be posed to this view of Asher as the "synthesizer" of the halakhah. At any rate, Asher's work exerted profound influence upon his successors, due in no small measure to the TUR, the halakhic compendium of his son, Ya'akov. The TUR presents the viewpoint of ROSH on every halakhic issue, in addition to the rulings of other poskim. In its turn, the TUR serves as the basis for Yosef Karo's monumental Beit Yosef. In this manner, Asher serves as a "bridge" between the northern and southern European halakhic traditions, one of the primary means by which the halakhah of the Tosafot academies was brought into confrontation with that of the Sefardic authorities.

R. Asher compiled his Halakhot while in Spain, during the years 1310-1327. In addition to this work he authored more than one thousand extant responsa,[9] a commentary to Mishnah Zera'im and Toharot,[10] and a recension of Tosafot, designated as Tosafot Ha-ROSH.[11]

Part II. Scholarship on the Tendenz of Hilkhot Ha-ROSH.

The study of the Hilkhot Ha-ROSH as an independent work begins with Asher's son, Ya'akov, the author of the TUR and the Kizur Piskei Ha-ROSH. The Kizur can be seen as the preparation for the TUR, a methodology by which Ya'akov b. Asher rendered his father's decisions in a clear and concise form in order to include them in his own compendium. This methodology involved rules, kelalim, by which R. Ya'akov determined his father's decisions.[12] Such methodological observations on Asher and other authorities are found in various collections referred to as "sifrut ha-kelalim".[13] These collections

do not, however, constitute comprehensive and systematic treatments of the halakhic methodology of R. Asher, the purpose his work was intended to serve and its influence upon the subsequent development of the halakhah and its literature. On the other hand, modern scholars from the seminary and university communities have indeed made the ROSH a subject of critical study in an attempt to discover answers to the questions of methodology and tendenz. As indicated earlier, their findings are often in conflict; moreover, even when the research has attained the status of "scholarly consensus", that consensus can be seriously challenged. While the achievements of the modern scholars are certainly noteworthy in that they have laid important groundwork and have framed significant questions to address to the material, they have not necessarily provided satisfactory answers; in this respect, we may apply the rabbinic saying: מקום הניחו לנו חכמים להתגדר בו In order to survey the current state of research, we turn to a summary and analysis of the findings of the modern scholarship concerning the nature of the Hilkhot Ha-ROSH, its relationship to Sefardic halakhah in general and to the RAMBAM in particular, and its place in the history of the halakhah.

We consider first the findings of Heimann Joseph Michael, whose late-19th century bibliographical compendium Or Ha-Hayim follows closely upon the works of traditional rabbinic scholarship.[14] Michael characterizes the Hilkhot Ha-ROSH as a compendium of halakhic decisions following the pattern of the Hilkhot Ha-RIF; the ROSH generally recites the language of the Alfasi and constitutes his "Gemara".[15] To the Alfasi, R. Asher adds the words of the Tosafists and other scholars. The Hilkhot Ha-ROSH to tractate Baba Kama is clearly an exception to this rule; there, the ROSH is extremely brief, reciting the language of the Talmud only when he has a new idea or halakhah to contribute.[16] Michael discusses the problem of the relative dating of Asher's

pesakim and responsa; citing various opinions on the matter, including those of Ya'akov b. Asher (TUR HM 72), and Yehudah b. Asher (quoted in Beit Yosef, YD 341), he concludes that no absolute rule is possible. Some of the responsa are earlier than the Halakhot, while some of them are later.

I.H. Weiss includes his analysis of R. Asher's work in the fifth volume of his monumental history of rabbinic literature, Dor Dor ve-Dorshav.[17] Weiss describes the Hilkhot Ha-ROSH, which stems from the latter part of Asher's life,[18] as a powerful influence on all subsequent halakhic decision-making. ROSH's intent was to transform the Talmud into halakhah pesukah, definitive halakhic decisions; he bases his work upon the Alfasi on the one hand and upon the Tosafists on the other. ROSH also cites other Ashkenazic halakhic works, as well as the works of Sefardic authorities. This is especially true of R. Hananel and the RAMBAM, "whom he quotes throughout his pesakim, reconciling his (RAMBAM) decisions with Talmudic sources and defending him from his critics." (p. 63) Weiss discusses at some length the attitude of R. Asher towards the RAMBAM. He rejects the opinion of R. Shelomo Luria (Yam shel Shelomo, Baba Kama, Introduction), who contends that R. Asher regards RAMBAM as inferior in halakhic stature to the great sages of the Tosafist school. On the contrary: while ROSH certainly relies upon the Torah of his own (Ashkenazic) forbears, he will not reject the RAMBAM simply because R. Tam and R. Yizhak rule otherwise; see especially Resp. Ha-ROSH 43:6. In Resp. Ha-ROSH 46:1, Asher refuses to reject RAMBAM even though he determines that the halakhah is according to the Tosafists; "I dare not rule for leniency, inasmuch as the RAMBAM has ruled stringently," Rather than oppose the RAMBAM as halakhic authority, ROSH attempts "everywhere" to justify the decisions in the Mishneh Torah and desists from ruling against RAMBAM in actual case law. ROSH's true objection to the Mishneh Torah according to

Weiss is not to the book itself, but to those who render decisions based upon the Mishneh Torah without truly understanding RAMBAM's intent. This, in Weiss' view, is the import of Resp. Ha-ROSH 31:9, in which Asher criticizes a certain R. Mazliah for basing his decision upon the Code of Maimonides: the fault lay with the rabbi who misunderstood RAMBAM's actual ruling. Far from representing a negative attitude toward the Mishneh Torah, this responsum criticizes instead those scholars who misuse that great work due to their lack of learning. Indeed, how could R. Asher, whom Weiss characterizes as a peacemaker, a man of supreme humility and meekness, dare oppose the RAMBAM...

> ...for (Maimonides) was the glory of all of Spain, the man in whom (the Jews of Spain) gloried and rejoiced. How could (ROSH) speak with scorn and arrogance against the Code which was for them the Urim and Tumim? In reality, we see from his Halakhot, and even more so from his responsa, that the works of RIF and RAMBAM were the major foundations of Asher's halakhah. (p.67)

Weiss points out that Alfasi and Maimonides constituted the two major authorities of all halakhic study and decision-making in Spain; ROSH was aware of this fact and accepted it. In at least one case, ROSH follows the opinion of RIF and RAMBAM, even though other sages disagree with them, because Spanish communities follow the rulings of the former. (Resp. Ha-ROSH 32:11). While it is true that ROSH shows great independence in halakhic judgement, preferring the analysis of the sugya to automatic reliance upon the words of any gaon or posek (see Hil. Ha-ROSH, Sanh. 4:6 and Resp. Ha-ROSH 55:9), even here, "Asher resembles much more the earlier Spanish scholars, such as RAMBAM, than he does the Ashkenazim", who tend to follow the precedents and rulings of their predecessors rather than their own halakhic opinions (pp. 63-64). Weiss, therefore, rejects the notion of halakhic tension between ROSH and RAMBAM.

As mentioned earlier, Alfred Freimann produced, in 1918, a work which is still the most extensive biography on R. Asher.[19] His remarks concerning the Hilkhot Ha-ROSH are concentrated on pp. 301-305. According to Freimann, ROSH

bases his work upon RIF partly because of the admiration displayed toward Alfasi by R. Meir of Rothenburg. Asher's contribution is his understanding of the diverse halakhic traditions of Spain and Ashkenaz, his critical analysis of both and his attempt to forge a harmonization (Ausgleich) between them, to serve as a practical and authoritative halakhic guide. His Halakhot serve this purpose by providing a comprehensive commentary to the Talmud which would hopefully be free of objection. As for the Hilkhot Ha-ROSH to Baba Kama, Friemann suggests that their lack of resemblance to the rest of the work lies in the fact that they are actually part of his Tosafot (p. 302, n. 6). Freimann states that Asher displays a somewhat peculiar stance towards RAMBAM (p. 296). On the one hand, Asher admires RAMBAM and hesitates to permit that which Maimonides forbids (Resp. Ha-ROSH 46:1[20] and 43:6). On the other hand, ROSH objects to the Mishneh Torah on methodological grounds: since RAMBAM provides no source citations for his rulings, one should not attempt to issue halakhic decisions based upon that great Code alone. (Resp. Ha-ROSH 31:9 and 94:5). In this lies the difference between Freimann and Weiss; in Freimann's view, Asher has serious methodological objections to the Mishneh Torah.

Haim Tchernowtiz, in his Toldot Ha-Poskim,[21] sees R. Asher as part of an intellectual reaction among halakhic scholars against the Mishneh Torah. This reaction, represented primarily by RAMBAN and RASHBA, is directed not so much against Maimonides or his rulings; it simply constitutes a new way of learning the halakhah. This new method, occupying the middle ground between the concise halakhic presentation of RAMBAM and the pilpul of the Tosafists, is categorized as "expansion" and its spokesmen as "expanders" (marhivim). This new method requires a basic study and understanding of the Talmudic sugya before arriving at the authoritative pesak halakhah, although with RAMBAN especially, the goal of deciding the halakhah is never far from view (p. 109).

R. Asher is an "expander" who, like the others, objects primarily to the RAMBAM's methodology and organization of the halakhic corpus rather than to the actual decisions. In addition, ROSH stems from the school of the Tosafists, making his work one of the first to rely upon the Tosafot as a source of authoritative halakhah. Unlike the Alfasi, ROSH adds much material to the Talmudic passage, explaining and commenting upon it. Nevertheless, ROSH does not offer a commentary upon the Talmud as much as a book of halakhah; his work often appears to be a supplement to the Alfasi. Indeed, some would suggest that ROSH originally conceived of his work as a commentary to the RIF (resembling that of R. Nissim Gerondi), only subsequently turning his work into an independent unit. Deriving a number of rules of halakhic methodology from the Hilkhot Ha-ROSH,[22] Tchernowitz concludes that R. Asher is independent in his opinion, determining the halakhah by means of logical analysis of the sugya and holding fast to his own understanding even when great sages of the past ruled otherwise. This attitude toward his predecessors applies to the RAMBAM as well. To R. Asher, Maimonides has the same status as any other posek: at times he is right, at times he is wrong. This attitude of objectivity means that while ROSH will express disagreement with RAMBAM, "he does not strive to refute (RAMBAM'S) rulings. On the contrary: Asher quotes Maimonides with the proper expressions of respect (see Resp. Ha-ROSH 46:1), but no more than that." (p. 158). Although ROSH does not express, in general, opposition to RAMBAM's decisions, he strongly objects to the methodology and pattern of organization of the Mishneh Torah. Resp. Ha-ROSH 31:9, in contrast to Weiss' understanding, is indeed directed against the RAMBAM's approach to codification. Since RAMBAM provides no sources or argumentation in support of his views, ROSH opposes its use by those who have not first studied the Talmudic source of the particular halakhah. In this

view, R. Asher truly admires the halakhic work of RAMBAM; the Code, however, is meant to serve as an aid to true scholars who study the Talmud before rendering a decision rather than a self-sufficient guide to the halakhah which may be relied upon even by those unlearned in Talmud. Ironically, the Mishneh Torah suffers more from its "admirer", the ROSH, who rejects its claim to be the exclusive guide to halakhah, than it suffers from RAMBAM's great opponent, R. Avraham b. David of Posquieres (pp. 159-160).

Efraim Urbach discusses the Hilkhot Ha-ROSH only to the extent that this work touches upon the Tosafot Ha-ROSH, which forms part of Urbach's primary research.[23] The Tosafot, a collection made by ROSH from the Tosafot recensions of other scholars, served him as a preparation for his Halakhot, "a summary of the halakhic creation of Franco-German Jewry from the time of R. Gershom to his own day." ROSH sought to spread the halakhah of Ashkenaz throughout the diaspora. The dependence of the Halakhot upon the Tosafot is such that one might erroneously assume that R. Asher is expressing his own opinion when in fact he is quoting one of his sources. For this reason, many of Tchernowitz's conclusions concerning ROSH's halakhic methodology, says Urbach, are in error. ROSH's words are usually not his own, but those of Tosafot. (p. 599, n. 49).

In his comprehensive treatment of the process and literature of Jewish law,[24] Menahem Elon discusses the nature of the ROSH's codificatory endeavor as well as his attitude toward the Mishneh Torah of RAMBAM. R. Asher follows the Alfasi both in style and in language; he almost always cites the RIF verbatim. For this reason, ROSH may indeed have intended his book as a supplement to the RIF.[25] In addition to the RIF, Asher cites the opinions of the scholars of Ashkenaz and Sefarad and decides between them. In this respect, ROSH improves upon the work of various predecessors: he brings the

two great Torah traditions "under one roof, analyzes them and integrates them" (p. 1036, n. 65). This tendency to bring together the halakhic traditions and to unite them is continued by ROSH's son, Ya'akov, in the TUR.[26] R. Asher holds that the halakhah can be decided only upon the basis of the Talmudic sugya and not by the exclusive use of any post-Talmudic halakhic compendium. It is this fact, says Elon, which informs ROSH's stance toward the Mishneh Torah.[27] Citing Resp. Ha-ROSH 31:9, Elon concludes that R. Asher rejects the central aim of the RAMBAM that the Mishneh Torah be regarded as the sole authoritative guide to the halakhah; instead, he demands that the scholar first familiarize himself with the Talmudic source of the law in question before approaching the Code. "The very idea of the RAMBAM that his Mishneh Torah could serve as an authoritative halakhic code that would stand alone...stands in opposition to the essence of Jewish law, in which the multiplicity of opinions is a positive and vital feature." (p. 1016). Even assuming that such a compendium is error-free and that it is possible to rely upon it for a correct understanding of the law, its claim to halakhic exclusivity must be resisted; the Talmud, and the Talmud alone, is the exclusive source of halakhah. Without a proper understanding of the Talmudic source, one cannot properly understand the ruling in the Mishneh Torah; thus, ROSH contradicts the assertion of RAMBAM that his work is useful to both "great and small",[28] to those both learned and unlearned in the Talmud.

While Elon does not speak directly to the question of Asher's attitude toward the authority of RAMBAM as posek, his approach reminds one of that of Tchernowitz, as described above. R. Asher objects to RAMBAM primarily on methodological grounds: the Mishneh Torah cannot serve as an exclusive guide to the halakhah. From this, one may conclude that R. Asher in fact admired Maimonides' halakhah in terms of its content while disagreeing with its form

of presentation. Such a view is expressed by Yizhak Ze'ev Kahana,[29] who argues that ROSH objected to the Mishneh Torah solely on methodological grounds while admiring the RAMBAM as halakhic authority (Resp. Ha-ROSH 46:1).

Many of the questions concerning the halakhic methodology of the ROSH receive a systematic treatment in the 1980 doctoral dissertation of David Zafrany.[30] Especially helpful in its list of Asher's citations of other sages (ch. 7), the work constitutes a detailed look at his approach to halakhic decision-making. While no attempt will be made here to provide a comprehensive summary of his findings, what follows is an account of Zafrany's conclusions in those areas which have been addressed by other scholars and which are of particular interest to this study.

In general, according to Zafrany, R. Asher cites the Talmudic sugya (or the Alfasi) in fragments, inserting between them the rulings of the relevant poskim. This is the reason that ROSH will appear to provide his own comments when in fact he merely cites without attribution the words of others.[31] Zafrany determines that the Halakhot to Baba Kama precede all the others; this would explain the unique nature of those Halakhot. In this view, ROSH had not completely determined his methodology at this time, and he experimented with various approaches during the writing of these Halakhot. In the first two chapters of Baba Kama, R. Asher cites only that part of the sugya which he identifies as halakhically authoritative, adding to them the comments of Alfasi and other rishonim. In chapters three through seven, he begins to add words of commentary and explanation to the sugya itself. Through the rest of the tractate, he resembles the style of RIF: he cites the sugya while omitting most of the debate. He follows this with citations from Tosafot and rishonim, commentary, and finally the pesak halakhah. His style in this final stage, says Zafrany, dominates the remainder of the Hilkhot Ha-ROSH. (pp.

35-79)

Zafrany finds that the Tosafot Ha-Rosh precedes the Halakhot and the responsa; these Tosafot are the summary of his lectures in the yeshivah. As for the question of the priority of the responsa vis-a-vis the Halakhot, Zafrany notes that no firm rules can be set. It is impossible to take the words of Yehudah b. Asher (Resp. Zikhron Yehudah, 94) at face value and to assert categorically that the Halakhot are always later than (and therefore more authoritative than) the responsa. Not only do contradictions to this rule exist among other rishonim,[32] but it is also difficult to believe that R. Asher, a major halakhic authority in the Spanish Jewish community, wrote no responsa at all during the years (1310-1327) in which he labored over his Halakhot. Rather, in every case of contradiction between Asher's rulings in the Halakhot over against those in the responsa, we must carefully examine the facts to determine whether the one is later than the other or is considered more authoritative than the other. Thus, we follow the Halakhot, written in Spain, over any responsa that were composed while Asher was in Germany. In cases of contradiction between Spanish responsa and the Halakhot, we follow the decision recorded in the TUR, inasmuch as Ya'akov b. Asher is a reliable indicator of his father's rulings. In the event that the TUR does not provide a decision, we compare the date of the responsum against the order of the composition of the Halakhot (pp. 33-87). If the date is uncertain, we follow the source in which ROSH expresses his own view rather than merely reciting the opinion of Alfasi (as is common in the Halakhot). If both sources represent Asher's own view, we follow the one which is more completely argued (pp. 88-92).

One of Asher's major contributions in the field of halakhic methodology, according to Zafrany, is his use of the כללי הפסק, the rules of

decision-making. Many of these rules, whose roots stretch back to Talmudic or geonic times, receive a new interpretation from Asher. In some cases, especially in regard to disputes between Amoraim, ROSH was forced to develop such rules where none had previously existed (pp. 119-149).

Zafrany posits (chapter four, especially pp. 150-151) that ROSH has no "system" in determining the halakhah. He does not tend to follow any one authority. The halakhah is determined solely by means of clear proof from the Talmud, regardless of the opinions of any post-Talmudic authorities (Halakhot, Sanhedrin 4:6; Responsa, 46:2 and 68:23).

ROSH is heavily dependent upon the Alfasi, states Zafrany, especially in that the Hilkhot Ha-ROSH to almost every tractate is based upon the RIF.[33] Unlike the Alfasi, ROSH will occasionally comment upon the mishnah; in addition, he comments upon the RIF himself, developing certain " כללי הרי"ף ", rules by which to interpret the Alfasi, as do R. Zerahiah Ha-Levy and RAMBAN. It is certain that the ROSH admired the RIF greatly; otherwise, why would he have utilized the RIF as the basis for his own work? On the other hand, R. Asher shows no more favoritism toward Alfasi than he does toward any other authorities; the halakhah is to be decided upon the basis of the Talmud alone. This admiration for the RIF is displayed as well by Asher's teacher, R. Meir of Rothenburg (see Resp. Ha-ROSH 84:3). In fact, like Asher, two other students of R. Meir composed works of halakhah based upon Sefardic sources: R. Mordekhai b. Hillel on the RIF and R. Meir Ha-Kohen (Hagahot Maimoniot) on the RAMBAM. ROSH, however, differed in method from his fellow students. While they tend merely to cite the Ashkenazic halakhah alongside the Sefardic base text, ROSH "integrated and mixed together the Sefardic and Ashkenazic halakhah" (שילב ומיזג את הפסיקה הספרדית והאשקנזית ; pp. 185-204).

In his discussion concerning the motivations behind the Hilkhot Ha-ROSH, Zafrany suggests that Asher compiled the work in an attempt to provide a unified halakhah for all Israel, Sefardim and Ashkenazim alike. For this reason, ROSH bases his work on the Talmud, inasmuch as the Talmud is held an authoritative by all communities. Unlike his colleagues, the other students of R. Meir of Rothenburg, he cites Sefardic as well as Ashkenazic halakhah; "no previous Ashkenazic scholar cites as much of the Torah of Spain and Provence as does the ROSH" (p. 205). Indeed, the example of Yosef Karo, who makes ROSH one of his "pillars" of halakhic judgement, demonstrates that ROSH is held in high esteem by the Sefardim; this serves as proof of Asher's tendenz to combine the two Torah traditions into a format that would be equally acceptable to both communities.[34]

In his analysis of the attitude of ROSH toward the RAMBAM, Zafrany cites with approval the conclusions of Tchernowitz and Weiss.[35] While Asher criticizes the style and organizational pattern of the Mishneh Torah, he recognizes RAMBAM's greatness (Resp. Ha-ROSH 94:5, where ROSH cannot decide whether RAMBAM is greater or lesser an authority than RIF, R. Yizhak or RABAD.) He will explain the reasoning behind RAMBAM's rulings, even when he disagrees with him; this is a practice that he does not display toward other authorities. In spite of this admiration, however, ROSH treats RAMBAM as he treats the other poskim: he accepts or rejects RAMBAM's rulings based upon his own understanding of the sugya.

This brief survey of the scholarship on the ROSH yields the following summary concerning the motivations, the method and the tendenz of the Sefer Ha-Halakhot:

1) R. Asher builds his work upon the Halakhot of Alfasi, the Tosafot, and citations of other Ashkenazic and Sefardic halakhic works (all the

above-mentioned scholars hold to this; Zafrany stresses Asher's great admiration for the RIF).

2) Asher's work is an attempt to render the Talmud into halakhah pesukah. It is a "code" rather than a commentary.[35] His motivation in compiling this code is to reconcile the halakhic traditions of Spain and northern Europe, to bring them together and to create from them a single, uniform halakhah for the entire Jewish people (Freimann, Zimmels, Faur, Elon, Zafrany. Urbach differs in this respect; he sees the Hilkhot Ha-ROSH as a summary of Ashkenazic halakhic tradition).

3) ROSH does not show humble deference to the rulings of any authority. Rather, he insists that the halakhah must be decided according to careful study of the relevant Talmudic sugya and not through automatic reliance upon the rulings of any post-Talmudic authority or authorities (Weiss, Tchernowitz, Elon, Zafrany).

4) While ROSH treats RAMBAM as he does any other scholar, he admires RAMBAM as posek. He has no objection, in general, to the halakhah as codified in the Mishneh Torah; at times he agrees with RAMBAM, at times he disagrees. His principal objection is to the methodology of the Maimonidean Code, its lack of source citations and argumentation, and its total separation from the sugya. This view is common to almost all of the scholars whose work we have surveyed, although Weiss is the most extreme in his view of ROSH as the halakhic afficianado of RAMBAM.

We might refer to these four points as the "scholarly consensus" concerning the methodology, tendenz and approach of R. Asher in his Halakhot. By "scholarly consensus", we do not mean that every one of the scholars holds to each of the points and in every detail. This is rather a general picture

of the scholarship. Each of the four points is held by a preponderance of the scholars who have dealt with our subject. The "consensus", then, is the pattern that emerges from the scholarship when considered as a whole; it comprises the generally-held conclusions, assumations and presumptions concerning Asher's tendenz. It is this "consensus" which we must examine; when we do, we discover serious difficulties. Evidence exists that challenges the scholars' findings; moreover, much of the evidence cited in support of these conclusions does not, in fact, do so.

We turn first to Zafrany's statement that ROSH greatly admires Alfasi, inasmuch as he chooses the text of the Alfasi as the basis for his own work. Zafrany indeed provides evidence of a positive attitude within the yeshivah of R. Meir of Rothenburg toward the work of the eminent Sefardic poskim. He might well have consulted, on this point, Irving Agus' work on R. Meir.[36] Agus demonstrates R. Meir's attitude of respect and admiration toward RIF and RAMBAM as halakhic authorities. In fact, in separate cases we find that R. Meir refers to the rulings of both as "divrei kabalah". Yisrael Ta-Shema traces the changing Ashkenazic attitudes toward RIF in an important article written in the same year as Zafrany's dissertation.[38] R. Meir's interest in Alfasi is actually part of a process which began two generations prior to him; in Sefer RA'ABYAH, which dates from the early 13th-century, we see the beginnings of sustained interest on the part of Ashkenazic scholars in the Hilkhot Ha-RIF. While some Tosafists, particularly the RASHBAM, had shown some desire to study the RIF, they were exceptional cases until the time of RA'ABYAH.[39] From RA'ABYAH, interest in Alfasi passed to his students, R. Moshe of Coucy (Sefer Mizvot Gadol) and R. Yizhak of Vienna (Or Zaru'a). This interest spread throughout Germany and France until the time of R. Meir, who made the Alfasi a major source for the determination of the halakhah.[40]

Ta-Shema sees a progressive development in this field;[41] by the time of Asher's study with R. Meir, Alfasi was an integral part of the halakhic curriculum in Ashkenaz. Moreover, as Zafrany notes, R. Meir's students turn to the practice of appending halakhic treatises to the RIF and the RAMBAM. It is tempting, therefore, to look to this tradition as the sole cause of Asher's selection of RIF as the base text for his own compendium. Such a conclusion, however, ignores the obvious reasons of practicality that may also have led to this choice: RIF constitutes an effective and well-known foundation upon which to build a work such as Hilkhot Ha-ROSH. It is a common feature among many works of halakhah that their authors append them to other well-known works which serve as a base text, a point of departure for the halakhic analyses of the author of the new work. Yosef Karo, for example, decided to append his Beit Yosef to an existing work, choosing the TUR over the Mishneh Torah out of reasons of practicality. Although he greatly admired RAMBAM, Karo, desiring to bring together the full range of halakhic rulings, chooses the TUR as his base text because the TUR already cites many of these opinions, albeit in cursory form.[42] The ROSH may well have viewed the Alfasi in the same light: the Alfasi serves as a practical base text for his own work. If one would object that, after all, ROSH believes that halakhah must be derived from the study of the Talmud itself and that a post-Talmudic posek cannot serve as a proper foundation, according to his own view, for a work of halakhah, the answer lies in the special nature of the RIF in the world of Talmud study in Spain. To the Sefardim, Alfasi was not simply another post-Talmudic authority; he was, in fact, a "Talmud katan", an abbreviated version of the Talmud which, containing those sections of the Talmud deemed to be halakhically authoritative and omitting much of the Talmudic debate, served as the "official" substitute for the Talmud in many academies.[43] The

testimony of the fourteenth-century halakhist R. Menahem b. Aharon b. Zerah shows that RIF served as the basic textbook of Spanish yeshivot.[44] The RAMBAM himself recommends to a student that he use the Alfasi in place of the Talmud in his yeshivah study and to refer to the Mishneh Torah as the authoritative halakhic summary of this "Talmud", the RIF.[45] That RAMBAM nearly always accepts the halakhic judgements of Alfasi is a commonplace;[46] and ROSH himself is well aware of the dominance of Alfasi over the study of the Talmud in Spain.[47]

A revealing picture of Talmudic study emerges from these sources. First, we see that the Alfasi is studied, within the Sefardic yeshivah world, in place of the Talmud itself. Second, the RAMBAM views his own work, in one respect, as the halakhic key to the RIF, its "authorized halakhic commentary". ROSH operates within this community, where Alfasi is a substitute Talmud and where RAMBAM is seen as a halakhic summa of the RIF. If Asher chooses to append his own work to the Alfasi, this is due to factors other than his admiration for the RIF. It is just as reasonable to posit that, in addition to "admiration", ROSH was motivated to make use of Alfasi because of that work's nature as an halakhic abbreviation of the Talmud, the fact that it served in place of the Talmud in Spanish yeshivot, and because it had already become a practice to study the Alfasi along with an authoritative halakhic summary. This can help explain Asher's dual relation to Alfasi in the Hilkhot Ha-ROSH. There are instances in which Asher discusses Alfasi's opinions as though the RIF is one out of a number of post-Talmudic poskim. In most cases, however, ROSH quotes the Alfasi as a base text, as though he were the Talmud itself. The use of Alfasi as "Talmud", rather than or in addition to citation of him as a post-Talmudic authority, reflects the role of the Alfasi in the world of Talmud study in the Spain which the ROSH encountered. This situation contrasted

the ROSH encountered. This situation contrasted sharply with that of Ashkenaz, where the Talmud itself continued to serve as the "base text".

Similar difficulties emerge when we examine a second major feature of the scholarly consensus: that R. Asher's goal was to create a synthesis or integration of the halakhic traditions of Sefarad and Ashkenaz. If, in fact, ROSH sought to bring the divergent rulings "under one roof" (in Elon's phrase), why does the sheer weight of the Ashkenazic sources so vastly overpower the Sefardic material in the Hilkhot Ha-ROSH?[48] While the seventeenth-century scholar R. Yair Bachrach may have exaggerated when he declared that "R. Asher's words are merely those of the Tosafot in abbreviated form",[49] contemporary scholars such as Efraim Urbach,[50] Haym Soloveitchik,[51] and Elyakim Elinson[52] all stress the Ashkenazic bias of the Hilkhot Ha-ROSH and its heavy dependence upon the Tosafot literature. It is indeed true that R. Asher cites numerous Sefardic authorities throughout his work. It is also true, however, that the same R. Asher expresses himself unequivocally on the comparative value of the two Talmudic-halakhic systems: "I hold to the tradition (kabalah) of our ancestors, the rabbis of Germany, for the Torah is their inheritance from their forebears from the time of the destruction of the Temple. The tradition of the French sages is more reliable than that of the inhabitants of this land (Spain)."[53] These clearly are not the words of a peacemaker of the halakhah who seeks to harmonize the differences between the two schools and to produce a unified halakhah equally rooted in each and acceptable to the adherents of each. R. Asher was not impressed with the state of Talmud study in Spain,[54] and he compiled his Tosafot to fill the lacuna; in turn, his Tosafot became the exclusive method of Talmud study in those schools influenced by him.[55] That ROSH bases his own work on the Alfasi is no evidence of a "balance" or a desire to bring together the two traditions as crystallized in the Tosafot and the

RIF. As we have seen, the Alfasi served as a yeshivah textbook throughout Spain, virtually replacing the Talmud itself in many academies as the source for halakhic study. Asher thus had compelling reasons of practicality for appending his work, which was intended for study and use in Spain, to Alfasi's epitome of the Talmud. Alfasi serves ROSH as a convenient base, but this fact does not prove a tendenz on Asher's part to meld the two traditions. If, in fact, the halakhah which emerges from the Hilkhot Ha-ROSH differs significantly from that of the Alfasi; if it reflects a conscious effort to favor the decisions of the northern European school, then we cannot conclude that Asher's attempt is toward halakhic "balance". In short, if Asher merely uses Alfasi as a peg on which to hang the Ashkenazic halakhah, then the presence of the RIF does not demonstrate a desire to "reconcile" the divergent legal traditions.

We turn now to examine a third characteristic of the "scholarly consensus" concerning the ROSH: his attitude toward the halakhic authority of the Mishneh Torah of Maimonides.[56] While the scholars differ as to the level of admiration which Asher displays for the RAMBAM, they tend to agree that his primary objection to the Mishneh Torah was one of methodology rather than substance. According to this view, ROSH demonstrates great respect for the halakhah in the Mishneh Torah; he criticizes that work primarily for its author's failure to provide sources and argumentation for his rulings.[57] None of the scholars concludes that Asher displays a general criticism of the substance of RAMBAM's rulings themselves. Evidence exists, however, which points to such a criticism. R. Solomon Luria, a sixteenth-century halakhist, refers to a responsum (not in the extant collection of Teshuvot Ha-ROSH) in which Asher declares that R. Tam and R. Yizhak the Tosafist are superior to RAMBAM in halakhic authority.[58] A similar reference is found in the writings of R. Yair Bachrach in the seventeenth century.[59] Combined with Asher's more general

statement that the Torah of Ashkenaz is to be preferred to that of Sefarad (Resp. Ha-ROSH 20:20), these citations indicate a fundamental objection to the Mishneh Torah on the basis of its faulty halakhic content. Such an objection moves well beyond methodological critique. Not only is RAMBAM criticized for his lack of sources; his very authority and reliability as a posek is now called into question. The Sefardic halakhic tradition as codified in the Mishneh Torah is now seen as inferior in substance and intellectual power to that of the Tosafists.

When we discuss R. Asher's stance as a critic of the Mishneh Torah, we must distinguish among the various forms and approaches which such criticism has assumed in the rabbinic literature. These approaches of the authors of the "Maimonidean literature"--which includes both commentaries on the Mishneh Torah and references to RAMBAM's decisions in other halakhic works--differ widely. Twersky suggests that the various criticisms of the Mishneh Torah can be understood only against the background of "the total reception of the Mishneh Torah, where stricture and supplement, criticism and commentary, dissent and elaboration are inseparable." Accepted as an authoritative halakhic work, the Mishneh Torah was subjected to "exhaustive study". Rabbis examined it in accordance with their own understanding of the Talmud or their new insights; "the results--blanket endorsement, qualified approval, partial dissent, or relentless criticism--vary."[60]

Nevertheless, we may classify the major lines of Mishneh Torah criticism (i.e., negative criticism) under two broad headings: the critique of methodology and the critique of content. The methodological critique finds its "classic" formulation in the hasagah of RABAD to the Introduction to the Mishneh Torah: the effectiveness of RAMBAM's work is hampered by his failure to cite sources and dissenting opinions. R. Asher indeed expresses this

critique (Resp. Ha-ROSH 31:9, 100:2, 94:5), and ~~we~~ we have seen, contemporary scholarship tends to see this methodological critique as Asher's real objection to the Code of Maimonides. The second critique, that of content, is first and most clearly stated in the Introduction to R. Moshe of Coucy's thirteenth-century work, Sefer Mizvot Gadol. R. Moshe describes the dissemination of the Mishneh Torah throughout the Jewish world, and his own work is suffused with the language and spirit of the RAMBAM.[61] He still notes two difficulties with the Mishneh Torah as a guide to halakhah: RAMBAM's failure to cite his sources (the methodological critique) and the fact that "in some cases, the great pillars of the Torah--RASHI, R. Tam and R. Yizhak--disagree with (RAMBAM's) rulings." For all his admiration for the RAMBAM, so evident in his linguistic style and in his halakhic thought, R. Moshe rejects Maimonides' rulings when they conflict with those of the Tosafists.[62] This critique of halakhic content is also reflected by ROSH, in his attitude toward the Sefardic halakhah and in the responsum cited by Luria and Bachrach.

According to the "scholarly consensus", ROSH will disagree with RAMBAM, to be sure, when the sources call for such disagreement. According to this critique, as a general rule RAMBAM is to be rejected whenever the Tosafot deduces a conflicting conclusion. Such a critique procedes far beyond the "independence of halakhic judgement" posited by Tchernowitz and others. It involves the a priori adherence to a principle of halakhic decision. Such a critic, no longer "independent", is actually pre-committed to favor of the rulings of a particular school of halakhic thought. If this is true of R. Moshe of Coucy, who quotes the RAMBAM on every page, it is certainly true of the ROSH, who does not. In fact, one might posit a further aspect of Maimonidean critique which distinguishes ROSH from some others: while Sefer Mizvot Gadol declares that the halakhah follows RAMBAM except in cases where

the Tosafot disagree, ROSH makes no such declaration. R. Moshe grants to the Mishneh Torah authoritative status, whose rulings are to be followed unless otherwise noted. Asher, for his part, makes no such claim. If we are to conclude, along with the consensus, that Asher "admires" the halakhic authority of RAMBAM and shows deference to him, we must account for these indications of his anti-Maimonidean halakhic bias.

As we have noted, the "scholarly consensus" does not detect such a bias, such an a priori anti-Maimonidean halakhic tendency in the ROSH. On the contrary: even those who conclude that Asher maintains an attitude of scholarly objectivity toward the Mishneh Torah's rulings accept the view that ROSH shows great respect and deference for RAMBAM's halakhic authority and prestige. If R. Asher has any general criticism of the Mishneh Torah, in their view, it is the methodological critique; on the other hand, while disagreeing with RAMBAM on those occasions where he is judged to be wrong, Asher acknowledges Maimonides' greatness as a posek. As we have seen, the consensus scholars base this conclusion primarily upon evidence culled from the responsa of R. Asher. We find, however, that such evidence is far from conclusive. A careful examination of certain key responsa, frequently cited by scholars as proof of Asher's deference to RAMBAM, reveals that these responsa in fact point toward the opposite conclusion.

A) Resp. Ha-ROSH 32:11. This responsum is cited by Weiss to show that ROSH will follow the opinion of RIF and RAMBAM, even when other authorities disagree with them, because the Spanish communities accept the decisions of these two eminent poskim as authoritative. The case concerns a woman suspected of adultery with a certain man. After witnesses testify to adulterous conduct, the woman is divorced and marries her illicit lover. Should she be separated from her new husband? The operative Talmudic passage (Yebamot 24b) states:

אבל יש לה בנים . בד"א שאין לה בנים אכל יש לה בנים לא תצא) RASHI (s.v. explains that this refers to children she had by her first husband. RIF (fol. 6a) writes: אבל יש לה בנים מן הנטען לא תצא , i.e., the "children" are those she had by her second husband (the illicit lover). RAMBAM follows Alfasi's approach in Hil. Sotah 2:13. In his Halakhot 2:8, Asher deftly avoids the question of whether these are the children of the first or the second husband.[63] In the responsum, ROSH begins by arguing that RASHI's position is the correct one; the need to safeguard the status of the children of the first husband is at issue here, while evidence from other Talmudic sources shows that the status of the second husband's children is not at issue. "Nevertheless, since most of these regions decide according to RIF and RAMBAM", and since the woman has no children by the second husband, we require the divorce. It must be noted, however, that ROSH adds that in this case, even RASHI would agree that a compulsory divorce is warranted. Moreover, this position is followed by the Tosafists and R. Meir of Rothenburg, Asher's teacher (Hil. Ha-ROSH, loc. cit.). While the Ashkenazim would require the divorce on other grounds that do RIF/RAMBAM (and while RIF disagrees with the Ashkenazim on these very grounds),[64] ROSH concludes that לכולי עלמא מפקינן מבעל ומבועל .

Does this responsum demonstrate an attitude of halakhic deference by ROSH toward RIF and RAMBAM? At most, it shows his acceptance of a juridical fact: that for his correspondents, the Spanish Jewish community, Alfasi and Maimonides are the dominant halakhic authorities. Working within this juridical context, ROSH follows the Sefardic position on a sensitive matter of marital law, even though in principle he sharply disagrees with that position (כיוצא כזה לא מצינו בגמרא ; i.e., the Sefardic tradition rests upon no Talmudic base whatever). He further justifies his ruling on the grounds

that Ashkenazic authorities would also agree with the final decision, albeit for different reasons, reasons which the Sefardic tradition would actually reject. This responsum does not prove an admiration for the halakhic rulings and traditions of RIF and RAMBAM. It shows rather Asher's clear preference for the Ashkanazic halakhic tradition, which in this case is clearly at odds with that of the Sefaradim.

B) Resp. Ha-ROSH 94:5. Zafrany points to this responsum as evidence that ROSH recognized RAMBAM as a prestigious legal authority (הורה כגדולתן ; p. 254). R. Asher is unwilling or unable to decide a case against RAMBAM, even though R. Yizhak, RIF and RABAD rule against him: "I do not have the power to judge between their greatness (ולא שיש בי כוח להכריע בגדולתם)." Thus, RAMBAM is equal in authority to the three scholars ranged against him. Once again, a closer look at what Asher actually says undermines the conclusion drawn from this responsum. The case involves a scribe who, through negligence, loses legal documents which grant a plaintiff the right to collect damages from a defendant. Is the scribe liable for the damages caused by his negligence? The questioner, Asher's correspondent, cites RAMBAM, Hil. Sekhirut 2:3, which rules that the scribe, who acted as an unpaid bailiff (shomer hinam) is indeed responsible for these damages. In his answer, Asher remarks that the other three poskim disagree with this ruling of RAMBAM.[65] He adds that we should rule in their favor, rather than according to RAMBAM, who offers no argumentation in support of his decision. Moreover, we should also favor the other three sages because they are of greater halakhic authority than RAMBAM (שהיו מופלגים יותר בחכמה ובמנין). It is here that ROSH makes the statement upon which Zafrany relies: "It is not that I have the power to decide between their greatness", to distinguish between greater and lesser halakhic authorities, but rather he does so on the basis of "the tradition which I have

received (לפי השמועה ששמענו וקיבלנו)". Contrary to Zafrany, Asher does decide between the greatness of the the RAMBAM and the other poskim. He presents this criterion of evaluation, not as his own invention, but as the consensus of his teachers and is willing to rely upon that evaluation in rendering halakhic decisions.[66] This responsum, then, does not provide evidence of Asher's halakhic deference to RAMBAM. It shows instead his readiness to downgrade RAMBAM's halakhic prestige as compared with the other scholars. In contrast to his questioner, ROSH portrays himself as representing a Torah tradition in which RAMBAM is not held in particularly high regard.

C) Resp. Ha-ROSH 43:6. This brief responsum is cited by Freimann as evidence that ROSH regards Maimonides as equivalent in halakhic authority to the luminaries of the Tosafist school. For Weiss (p. 66), this responsum demonstrates R. Asher's "extraordinary respect" for Maimonides as well as his reluctance to disagree with his rulings. Once again, Asher's words do not justify such conclusions. ROSH is asked whether a husband may be coerced to divorce his wife when the wife claims that he is physically loathsome to her (" מאיס עלי "). He answers that while RAMBAM would allow coercion in such a case,[67] R. Tam and R. Yizhak disagree.[68] That ROSH clearly favors the Tosafists' position is evident from his Halakhot.[69] In this responsum as well, he argues against the use of coercion. He does so on the grounds that, inasmuch as the great poskim are divided on the issue, why should we allow the coercion with the attendant risk that such a process will produce an invalid get? "Whoever coerces a get based on this claim is guilty of multiplying mamzerim in Israel." A stronger denunciation of RAMBAM's position is hardly imaginable; Yosef Karo regards this responsum as evidence of Asher's fundamental dispute with Maimonides.[70] At this point, ROSH issues a qualifying statement: this position applies only to future cases. All rulings made until

now in accordance with RAMBAM's position are allowed to stand (מה שעשה עשוי). Since Asher argues forcefully, here and in his Halakhot, against the RAMBAM position, we cannot regard his decision, as do Weiss and Freimann, as proof of his reluctance to disagree openly with the Mishneh Torah. It is much more probable that Asher is motivated by the same principle which he mentions earlier: let us not multiply cases of mamzerut. If he declares invalid all those decisions made previously in accordance with RAMBAM, he will singlehandedly create a large number of mamzerim! He therefore lets those old rulings stand, but he states unequivocally that, from now on, the halakhah must follow the Tosafists rather than RAMBAM. A much better example of respect and admiration for RAMBAM is provided by RASHBA on the very same issue.[71] He rules that, if a community customarily follows the Mishneh Torah and decrees that coercion is warranted, "we have no power to dispute them and annul their ordinance." In addition, RASHBA argues in favor of RAMBAM's position on the basis of Geonic precedent. ROSH, as we have seen, demands that such a community change its practice.

D) Resp. Ha-ROSH 46:1. Weiss, Freimann, Tchernowitz and Kahana all refer to this responsum as an example of R. Asher's deference to RAMBAM's halakhic authority. The operative phrase: " אלא שלא מלאני לבי להקל כי ראיתי הרמב"ם ז"ל מחמיר "--"I dare not be lenient in this matter, since the RAMBAM has ruled stringently"--is said to prove that ROSH draws back from accepting a ruling of the Tosafists because this would contradict the Mishneh Torah. In this instance, as well as those analyzed above, the situation does not conform to the understanding of the "scholarly consensus." The case concerns a woman who was divorced by means of a conditional get. Subsequently, a challenge was raised against the validity of the get. ROSH states that, since his questioner did not provide the reasoning of those who challenge the

document, he must discuss the problem at some length. In Gitin 84b, Rava declares that the writing of a stipulation (tenai) in the get before the completion of the toref[72] renders the get invalid. ROSH adds that "the Geonim" follow Rava.[73] On the other hand, R. Yizhak the Tosafist interprets the passage in such a way that the get in question would be valid.[74] ROSH, however, does not wish to be lenient in this matter, inasmuch as RAMBAM, Hil. Gerushin 8:4, clearly rules that a tenai written into the document before the completion of the toref renders the get invalid. Nevertheless, later in the responsum, ROSH accepts this get as valid, largely by disqualifying the tenai itself. He does so by noting that the stipulation written into this get is not framed as a tenai kaful. The improper wording nullifies the stipulation so that there is no "tenai" that can disqualify the get. Indeed, a number of poskim do not require tenai kaful in the particular form of stipulation involved here; in fact, ROSH cites RAMBAM (Hil. Ishut 6:17) who rules to this effect. Nevertheless, ROSH follows "all of the sages of France and Germany" who do require tenai kaful. In other words, ROSH explicitly rejects the position of RAMBAM in order to accept the northern European tradition.[75] The contradiction between the latter part of the responsum and the earlier section does not escape Yosef Karo.[76] Why, he asks, does Asher not "dare" rule leniently in the face of RAMBAM's ruling concerning the placement of the tenai while explicitly contradicting him on the issue of technical vocabulary? He indicates that the difference lies in the intellectual tradition which each position represents. On the requirement of tenai kaful, ROSH is supported by "all the sages of France and Germany", whereas his idea that a tenai written before the toref is valid does not enjoy such wide approval among the Ashkenazic scholars. Does this responsum show Asher's respect for RAMBAM and a reluctance to rule against him? The beginning apparently does. Yet in the

very same responsum, Asher proves his preference for Ashkenazic tradition over Maimonidean halakhah and his willingness to reject the RAMBAM by name. Here, Asher shows "deference" to RAMBAM only where he is not contradicted by a clear unified Tosafist ruling.

How do the results of our analysis affect the "scholarly consensus" on the attitude of ROSH to RAMBAM? In all four of these responsa, R. Asher explicitly rejects the ruling of Maimonides on an important halakhic issue. In all four, ROSH prefers the Ashkenazic legal tradition to that represented by RAMBAM. In 43:6, he decries RAMBAM's position in especially strong language. In 94:5, reporting a tradition he has received from his teachers, he declares RAMBAM in several to be halakhically inferior to RIF, RABAD and R. Yizhak. The "scholarly consensus" relies on these sources to prove R. Asher's great esteem for Maimonides the halakhist; in fact, the very words of these responsa reflect the dominance of Ashkenazic halakhah in Asher's thought as against the halakhah of RAMBAM. The lack of open bellicosity on Asher's part should not be confused with an attitude of deference. It is true that, when referring to RAMBAM, Asher maintains a tone of respect and restraint. This language, however, more likely reflects his juridical context rather than a supposed attitude of esteem and admiration. R. Asher served as a rabbi in a community in which Maimonides was regarded as the supreme halakhic authority (32:11). In Toledo itself a takanah was adopted in 1305 (the year of Asher's arrival) declaring that virually all halakhic questions would be decided according to the decisions in the Mishneh Torah.[77] Whether he liked it or not, Asher had to operate within a community in which RAMBAM was greatly admired. Certainly, if he hoped that his rulings would win acceptance among the members of the community, he could not exhibit a pugnacious attitude to that community's most exalted posek.[78] It is to be expected, then, that Asher will refer to RAMBAM

with expressions of courtesy and respect; indeed, he does the same with other sages whose rulings he cites in his responsa and Halakhot. What is noteworthy is that, alongside these expressions, ROSH firmly rejects RAMBAM's decisions and explicitly describes him as inferior in halakhic status to other authorities. These responsa simply do not support the view of the "scholarly consensus" that Asher was an admirer of the halakhah in the Mishneh Torah. On the contrary: they demonstrate that Asher's objection to RAMBAM's Code rests not only its methodological shortcomings but upon its halakhic inferiority.

A word of caution: no attempt should be made, on the basis of these responsa alone, to prove R. Asher's anti-Maimonidean halakhic bias. Such a conclusion would suffer from the very methodological defects discussed in Part III of this Introduction. We can, however, utilize this evidence to challenge the accuracy of the "scholarly consensus" which bases its conclusions concerning Asher's attitude toward RAMBAM and the Sefardic halakhic tradition in large part upon these responsa. In short, the evidence cited by the "consensus" does not support those conclusions; the supposed certainties revert to uncertainty and unanswered questions. Is there a tendenz in the Hilkhot Ha-ROSH? Does ROSH seek to forge a synthesis between Sefardic and Ashkenazic halakhah, or does he attempt to enthrone the latter at the expense of the former? Does he show an anti-RAMBAM trend in his halakhic rulings? Answers to these questions are basic to a proper understanding of Asher's role in the history of the halakhah; the absence of such answers, the depth of uncertainty is clearly illustrated in the recent exchange between Elyakim Elinson and David Zafrany in the pages of Sinai.[79] Elinson writes that Asher shows a clear preference for Ashkenazic (and especially Tosafistic) halakhah over that of the Sefardim. ROSH indicates this preference at times by totally ignoring RAMBAM's rulings on controversial issues. Zafrany answers that ROSH does not show such

a pro-Ashkenazic bias; rather, his approach to halakhic decision is one of strict independence. He does cite numerous post-Talmudic authorities (one-third of whom are Sefardim or from Provence), but his decisions are based solely upon his own analysis of the Talmud itself. Similarly, Zafrany objects to the argument that ROSH overlooks the RAMBAM. True, Asher objects to the Mishneh Torah on methodological grounds (Resp. Ha-ROSH 31:9), but this fact proves that he did not ignore it. It is simply the practice of R. Asher to collect the writings of all the poskim on a particular issue, to examine them in the light of the sugya, and then to decide which to include and which to omit from his Halakhot. The RAMBAM receives this treatment from ROSH, just as do the other authorities. In his response to Zafrany, Elinson points to the halakhic disagreements between the TUR and the Beit Yosef as evidence of the disparity between the Ashkenazic tradition, represented by TUR and ROSH, and the Sefardic tradition, crystallized in Maimonides and Karo. "There is no room for debate among contemporary scholars" over the simple fact that ROSH prefers the halakhah of Ashkenaz to that of Sefarad. Of course, the Elinson-Zafrany exchange is just such a debate. Elinson claims that even a beginner in Talmudic studies (כל כך כי רב) is aware of the halakhic differences between ROSH and RAMBAM.[80] Zafrany, the author of a thorough research into the halakhic methodology of R. Asher, is no beginner, and he contends that the ROSH shows no bias against the Sefardic halakhic tradition. The debate continues over the most basic questions concerning ROSH and his role in halakhic history.

To summarize: the conclusions of the scholarship on R. Asher and his relationship to Maimonides and Sefardic halakhah cannot be accepted with any degree of certainty. The evidence cited by "consensus" scholars is often ambiguous; at times, it contradicts the very conclusions they draw from it. We are still debating the basic and fundamental questions concerning Asher's

halakhic tendency; firm and sure answers to those questions await a more precise study of the ROSH.

Part III. Toward a Methodology for the Study of Hilkhot Ha-ROSH.

The absence of solid, widely-accepted conclusions concerning R. Asher's halakhah results from the methodology pursued by the scholars. Weiss, Tchernowitz, Freimann, Elon and Zafrany base their findings upon statements made by ROSH in his responsa and his Halakhot. These sources, however, do not constitute systematic and exhaustive descriptions by ROSH of his halakhic tendenz. They are isolated remarks, scattered throughout his literary corpus, ad hoc observations that make no pretense of system or consistency. The problems of basing general conclusions concerning tendenz upon such evidence are obvious. We have already seen that the evidence itself is contradictory, that sources exist in which ROSH declares himself against the Sefardic halakhah and against the RAMBAM on grounds of halakhic content. We have also seen that evidence cited by the "consensus" scholars to prove Asher's desire for halakhic synthesis and his positive attitude toward RAMBAM's halakhic authority actually tends to prove the opposite conclusion. Whichever side is correct, if we wish to arrive at firm answers to the fundamental questions posed by this study, we must forge a new methodology for the analysis of the ROSH, one which concentrates not upon his isolated, chance statements about his work but upon the content of that work, upon the actual halakhic corpus of R. Asher.

Facing a similar problem in the research of the literary development of the Babylonian Talmud, Abraham Weiss offered a diagnosis very much akin to the methodological approach suggested in this study.[81]

> In my opinion, the sole reason for the failure of scholarship to answer this question (of development) is that it has sought to solve it from 'the outside in.' By this I mean on the basis of some chance and often ambiguous statement in the Talmud itself, or on the basis of some statement among the rishonim. At times these statements were expressed obiter dicta and in relation to

> some other subject; yet the scholars have built mountains of conjecture and entire theories concerning the literary development of the Talmud upon these statements. In my view, however, a solution to this problem can come only from 'the inside out', i.e., by means of a content and textual analysis of the Talmud itself...

Weiss' judgement of the current literary scholarship on the Talmud applies as well to the "scholarly consensus" we have seen on the ROSH. Scholars have based their theories upon scattered statements by Asher or by other authorities, even though the precise meaning of these statements is often equivocal. Even when the scholars have studied the actual Hilkhot Ha-ROSH, they have utilized the material as illustrative of the theoretical conclusions drawn from Asher's chance remarks about his work, his view of RAMBAM and so forth. Weiss' prescription for a proper methodology for the literary study of the Talmud fits just as well the study of the ROSH: such an approach should be "from the inside out", drawing its conclusions only after a careful analysis of the Hilkhot Ha-ROSH itself, of its use of source materials and of the actual halakhah it produces.

Haym Soloveitchik stresses methodological concerns as the essence of his "lover's quarrel" with halakhic historiography.[82] Much of the scholarship in the field has taken the biographical approach; Soloveitchik prefers the thematic approach, devoted to discerning the Talmudic interpretations of a particular sage with those of his predecessors and his impact upon his successors. "The subjective, the revolutionary, the historic in law reveals itself only to a thematic treatment." Soloveitchik proposes a thematic treatment of the halakhic works of R. Avraham b. David of Posquieres in order to measure the effect of RABAD on contemporary Provencal thought, his influence on the Gerona school (RAMBAN and others, who received the Torah of RABAD), and his impact on subsequent methods of codification. Only in this manner can we see RABAD "from the perspective of the immanent evolution of the discipline."

It is just such a "thematic approach" that shall be attempted here. The assessment of R. Asher's relationship to the various Torah traditions extant in his day, of his attitude toward the halakhah of the RAMBAM, of his general tendenz (if any) in composing his Sefer Halakhot is a crucial prerequisite to an adequate evaluation of his role in halakhic history. The findings of the "scholarly consensus" are inadequate, uncertain and easily challenged or refuted largely because the methodology employed by the scholars hardly suffices for such an assessment. A sufficient methodology must be based, not only on statements made by Asher and others about his work but on a careful study of that work itself. That study must address itself to three major questions: 1) How does R. Asher utilize the post-Talmudic sources available to him? 2) What is the relationship of the halakhah of ROSH to that of RIF and RAMBAM, the authoritative decisors of Spanish Jewry in his day? 3) To what extent does the halakhah of R. Asher influence the decisions of subsequent codifiers?

1) How does R. Asher utilize the post-Talmudic sources available to him? Zafrany points to the fact that ROSH possessed a wide range of post-Talmudic halakhic literature and that his method was to collect the halakhic material relevant to a particular topic, examine it, and determine which of it to include in his work, "as 'glue' holding together the parts of the sugya."[83] As a description of the mechanics of ROSH's work, this explanation may be adequate; it certainly conforms with the view held by Zafrany among others that R. Asher displays enormous independence of critical judgement, subjecting the sources to careful scrutiny before deciding, on the strength of his own opinion, the proper ruling.[84] Yet to understand ROSH's methodology we must ascertain whether there is a method in his choice of materials. It is not enough to say that "R. Asher bases his decisions on the Talmudic sources and

not on the precedents set by post-Talmudic authorities." If the ROSH consistently interprets those sources according to the understanding of a particular school or tradition, then the halakhot he deduces from these passages will inevitably reflect the legal approach of that school. No scholar approaches the task of codification by divorcing himself from his tradition of learning. The halakhist studies the Talmud, but he sees it through the filter of the tradition he has received. He may break with that tradition on a number of points, but as a posek his tendency is toward continuity rather than revolutionary change.[85] In a well-known passage,[86] ROSH declares that a posek should rule according to his own understanding of the Talmudic sources, even if that understanding conflicts with the rulings of the geonim or other post-Talmudic authorities. If, however, that posek consistently bases his "own" understanding upon interpretations stemming from a certain intellectual tradition, we must conclude that his independence of judgement is restricted to the classrooms and hallways of a particular yeshivah. This study seeks to determine whether ROSH's use of his sources is balanced, befitting an "independent" thinker, or whether he tends to favor one of those traditions by consistently interpreting the Talmud according to the teachings of that tradition.

2) What is the relationship of the halakhah of ROSH to that of RIF and RAMBAM? Asher wrote his compendium while serving as rabbi of Toledo; his halakhic teachings and rulings were addressed to an audience accustomed to looking upon Alfasi and especially Maimonides as their supreme legal authorities. For his part, Asher was a disciple of halakhic traditions that differed from that which dominated in Spain. A proper understanding of his lasting influence upon the halakhah must take into account his attitude and disposition toward that Sefardic halakhic school. The "scholarly consensus" holds that ROSH admired the Alfasi and the RAMBAM; his real objection to the

latter's Code was based on methodological grounds, its failure to cite sources and argumentation, rather than on a thoroughgoing disagreement with its halakhic content. Our analysis thus far has shown that this consensus view is seriously flawed. We cannot declare that Asher "admired" the RAMBAM's halakhic authority on the strength of the evidence cited by the "scholarly consensus". On the other hand, we cannot base a contrary view on that same evidence, which after all consists of isolated and ambiguous statements by ROSH and others. The task demands a careful determination of Asher's halakhic stance on each issue and the comparison of that stance with the ruling as codified in the Mishneh Torah (as we have seen, RIF and RAMBAM are nearly always in agreement concerning halakhic matters). If the "consensus" view is correct, we should discover that, in the main, Asher accepts the halakhah according to RIF and RAMBAM while adding to it the Talmudic sources on which the halakhah rests, along with the comments of various rishonim. If, however, the halakhah in the ROSH consistently differs from that found in the Sefardic code; if Asher continually rejects the Maimonidean ruling or "adjusts" it so that the law differs significantly from the corresponding ruling in the Mishneh Torah, then we will have to conclude that the halakhah of R. Asher diverges from that of RAMBAM and is based on different sources. We will have to conclude that, despite various honorific expressions he scatters throughout his responsa, ROSH does not "admire" the RAMBAM so much as pose a halakhic challenge to him. And we will have to conclude that R. Asher seeks not only to replace the code of Maimonides with a tool which is superior from a technical and methodological standpoint; rather his tendenz is to provide a new halakhah to the Spanish community. If this proves to be correct, we may then draw upon our findings concerning Asher's use of his sources to determine whether this "new" halakhah emerges from a synthesis of different traditions or reflects a bias toward a

particular halakhic school of thought.

3) To what extent does the halakhah of R. Asher influence subsequent codifiers? In one sense, this question has already been addressed in the research of Yizhak Ze'ev Kahana, who demonstrates the widespread influence exerted by the Hilkhot Ha-ROSH following the death of its author.[87] The aim of the present study is somewhat different, however. It is a well-known fact that ROSH was accepted among his successors as a halakhist of enormous prestige; Jacob b. Asher built his TUR on Asher's work and Yosef Karo, indeed, includes him as one of the three "pillars of the law". The goal here is to gauge the reaction of the subsequent codifiers to ROSH's halakhah, as it relates to the tradition of RIF and RAMBAM. If, for example, the halakhah in the ROSH constitutes a thoroughgoing rejection of or challenge to the authoritative Sefardic poskim, we would expect that this fact would be registered by the subsequent authorities. Their reaction to this fact might assume any one of a number of forms: they may accept the approach of R. Asher, they may reject him in favor of a defense of RIF/RAMBAM, or they may attempt to compromise between the two positions. We would certainly expect, however, that the conflict between these two great "pillars of the law" will be a significant preoccupation of the later halakhists. The reaction to the clash between ROSH and RAMBAM, in short, would become a principal feature of the subsequent intellectual history of the halakhah.

To carefully analyze the entire Hilkhot Ha-ROSH would excede the scope of a dissertation. A selection has been made to provide a good representative sample of Asher's halakhic corpus. The sections to be studied:

1) All of Gitin.

2) Kiddushin, chapter one.

3) Ketubot, chapter one.

4) Baba Mezia, chapter one.

5) Baba Batra, chapter one.

This sample provides a significant body of Talmudic/halakhic material from tractates that have become "classics" in the world of Jewish learning. An attempt has been made to avoid areas of the law which correspond to Shulhan Arukh Orah Hayim, since we can expect wide variations in local custom in the areas of liturgy, holiday observance and so on. However, material within our five tractates which does touch upon Orah Hayim will be considered along with the rest of the Halakhot.

The material in the Hilkhot Ha-ROSH will be divided, in the first instance, according to the simanim found in the text itself. These stem from the hand of Ya'akov b. Asher, author of the TUR.[82] Subdivisions will be made within each siman (identified by small Latin letters) for each distinct halakhic unit, i.e., a passage which stands on its own thematically. In every unit, the extent of Asher's linguistic dependence upon the Talmud or RIF will be noted; where Asher departs from the text of Talmud or RIF, the source of his words will be indicated. A narrative summary of ROSH's discussion will follow, concluding with the ultimate halakhic ruling. In cases where this ruling is ambiguous, the position of Ya'akov b. Asher, both in the TUR and in his Kizur Piskei Ha-ROSH, will be consulted and will serve as an authoritative guide to his father's ruling. The summaries provided here will not deal with the explication of the Talmudic sugya itself, except in cases where the understanding of the halakhic ruling requires it.

A comparison will be made between every halakhah in the ROSH and its corresponding number in the Mishneh Torah. These will be located by means of the standard apparatus: Ein Mishpat/Ner Mizvah[89] to the printed editions of the Talmud, the traditional commentaries to the Mishneh Torah, Karo's Beit

Yosef and Sirkes' Bayit Hadash (BaH) to the TUR, the commentary of R. Eliahu the "Gaon of Vilna" to the Shulhan Arukh. Other sources will be consulted as needed. As Asher himself points out (Resp., 31:9), the source of a ruling in the Mishneh Torah is not always clear. In the event of uncertainty, we shall follow the derivation given by a majority of the traditional commentators.

In the event of a divergence or dispute between ROSH and the Mishneh Torah, subsequent poskim will be consulted to determine to what extent they were conscious of the disagreement. Indeed, these codifiers are often a sure indication that a disagreement exists. These consist, first and foremost, of the TUR and the Beit Yosef. When other commentators and poskim provide analyses of the issues in dispute, their works shall be cited. This is especially true of the commentary of R. Nissim of Gerona (RaN) to the RIF. Although he does not cite Asher's work (and apparently did not see it), he frequently discusses the halakhic positions that are crystallized in the ROSH and contrasts them with the ruling of Maimonides.[90] In this he mirrors Karo and Vidal of Tolosa's Magid Mishneh. Additionally, the commentaries appended to the ROSH in the printed editions will be utilized when necessary and helpful.

The study does not make systematic use of manuscript variants. Only when differing texts and readings are possessed by subsequent poskim shall this issue be raised. The main concern is not to produce a "critical edition" of the ROSH, but rather to read him as he was read by his successors, in order to determine his role and influence in halakhic history.

The findings of this study will be presented in the Conclusion. Although the use of selection in the study of the ROSH necessarily renders these findings tentative, the bulk assures that definite trends will emerge from which we may draw reasonable conclusions. In truth, whatever its deficiences,

this study hopes that its methodology will pay much surer dividends in the study of the ROSH than have been reaped by the "scholarly consensus" heretofore. Ultimately, the best way in which to judge the achievements of a halakhic authority and his influence over those who followed is to read, carefully, critically and comprehensively, the words of his own halakhic works.

NOTES TO INTRODUCTION

[1]Resp. R. Bezalel Ashkenazi, n. 22.

[2]Introduction to Beit Yosef.

[3]An introduction may present the author's aims and intentions without assigning sufficient weight to them. The introduction to the Beit Yosef, for example, would lead us to believe that the work's primary function is to decide the halakhah in cases of disagreement among the major poskim. Only incidentally does Karo mention that he intends to elucidate those sections and rulings of the Mishneh Torah which require commentary. In fact, much of Karo's monumental work is a commentary on RAMBAM, frequently defending him from the contradictions raised against his halakhah from the opposing Tosafist legal tradition. The naturally leads to the suspicion that Karo, in the Beit Yosef, actually seeks to establish the supremacy of Maimonidean halakhah by crafting a systematic theoretical defense on its behalf.

[4]See the articles by Elinson (Sinai, v. 93, 1983, pp. 234-244), Zafrany (Sinai, v. 94, 1984, pp. 275-283), and Elinson (Sinai, v. 95, 1984, pp. 189-191).

[5]Y.Z. Kahana, Mehkarim be-Sifrut Ha-Teshuvot, Jerusalem, Mosad Ha-Rav Kuk, 1973, pp. 14ff; Alfred Freimann, "Die Ascheriden", Jahrbuch der Judische Literarischen Gesellschaft (JJLG), vol. 13, 1919, p. 174; I.H. Weiss, Dor Dor ve-Dorshav, Vienna, 1893, vol. 5, p. 141. R. Asher himself is well aware of Maimonides' standing as supreme halakhic authority in Spain; see Resp. Ha-ROSH 32:11. This tendency to establish one posek as the absolute authority within a particular jurisdiction is given the approval of RASHBA (Resp., I, n. 253), Asher's older contemporary in Spain.

[6]Alfred Freimann, "Ascher ben Jechiel. Sein Leben und Wirken", JJLG, vol. 12, 1918, pp. 237-317.

[7]On the tradition of Torah study in Provence, see B.Z. Benedict, "Le-Toldotav shel Merkaz Ha-Torah be-Provence", Tarbiz, vol. 22, 1951, pp. 85-109, and I. Twersky, RABAD of Posquieres, Philadelphia, JPS, 1980.

[8]David Zafrany provides a complete list in his Darkhei Ha-Hora'ah shel Ha-ROSH, Unpublished Doctoral Dissertation, University of Tel Aviv, 1980.

[9]Editio princeps: Constantinople, 1517.

[10]ROSH makes extensive use of RAMBAM's Mishnah commentary in his preparation of these works; see Freimann, "Ascher ben Jechiel", p. 296.

[11]For a study of the structure of Tosafot Ha-ROSH, see E.E. Urbach, Ba'alei Ha-Tosafot, Jerusalem, Bialik, 1981, pp. 586-599.

[12]Freimann, "Die Ascheriden", pp. 173-174; Zafrany, Darkhei, p. 11.

[13]See, for example, the "Kelalei Ha-ROSH" in Yad Malakhi, ed. Berlin, 1852; Sedei Hemed, Warsaw, 1898-1912, vol. 6, chapter 11; Introduction to

Korban Netanel, appended to the beginning of Hilkhot Ha-ROSH, Shabbat, in the Vilna editions of the Talmud.

[14]H.J. Michael, Or Ha-Hayim, Frankfurt, 1891, pp. 259-260.

[15]See Resp. MaHaRaM Padua, n. 39, and Resp. Havat Yair, n. 123.

[16]Derishah to TUR HM 406, n. 7, and Siftei Kohen, SA HM 350, n. 1.

[17]Vienna, 1893, vol. 5, pp. 61-67.

[18]Weiss derives this conclusion from remarks in various of Asher's Halakhot which indicate that he is in Spain. See p. 62, n. 5.

[19]See note 6, above.

[20]The citation "66:1" in Freimann's n. 2, p. 296, is a typographical error.

[21]Haim Tchernowitz, Toldot Ha-Poskim, New York, 1947, vol. 2, pp. 144-160.

[22]For a sharp critique of Tchernowitz's conclusions, see Urbach, Ba'alei Ha-Tosafot, p. 599, n. 49.

[23]Ibid., esp. pp. 598-599.

[24]Menahem Elon, Ha-Mishpat Ha-Ivri, Jerusalem, Magnes, 1973, pp. 1035-1037; pp. 1013-1017. The second (and more lengthy) section deals with Asher's methodological criticism of RAMBAM, making no reference to any substantive disagreement of ROSH with the halakhah of the Mishneh Torah.

[25]Ibid., p. 1035, n. 64. Compare to the discussion by Azulai in Shem Ha-Gedolim, Vilna, 1853, on the ROSH (n. 236). Zafrany, Darkhei, p. 207, argues that Hilkhot Ha-ROSH was originally an independent work and not conceived as a commentary to the RIF.

[26]Elon, p. 1060. The same conclusion is drawn by H.J. Zimmels in his Ashkenazim and Sefardim, London, Masla, 1976, p. 22: "Perhaps the greatest achievement of R. Asher was to harmonize the differences which existed between the Franco-German and Spanish schools."

[27]Elon, pp. 1013-1017.

[28]Introduction to Mishneh Torah.

[29]Y.Z. Kahana, "Ha-Pulmos seviv Kevi'at Ha-Hakhra'ah ke-RAMBAM", Mehkarim be-Sifrut Ha-Teshuvot, Jerusalem, Mosad Ha-Rav Kuk, 1973, p. 10.

[30]See note 8, above.

[31]Ibid., pp. 100ff. Zafrany bears out the statement of Urbach, Ba'alei Ha-Tosafot, p. 599, n. 49. This conclusion, however, is somewhat inexact. In the example analyzed by Zafrany, the "anonymous" material cited by ROSH is

drawn from the Tosafot. This would support a conjecture that Asher assumes a different attitude toward the Tosafot, which may be cited anonymously as though it is his own opinion, than he does toward the other rishonim, whose words are rightly attributed to their authors. This conjecture, of course, must be tested extensively against more of Asher's material. To simply state, however, that Asher cites without attribution the words of others does not tell the whole story.

[32]E.g., TUR HM 72, 103a.

[33]As Zafrany notes, Darkhei, p. 185, there is no Alfasi to Nedarim and Bekhorot. The Hilkhot Ha-ROSH to these tractates is appended to the work of RAMBAN.

[34]See also the takanah of the Moroccan Jews (ed. S. Bar-Asher, Jerusalem, 1977, p. 24), declaring ROSH to be the supreme posek. Zafrany refers to J. Faur, "Tosafot Ha-ROSH le-Masekhet Berakhot", Proceedings, American Academy for Jewish Research, vol. 33, 1965, p. 65; Faur contends that ROSH compiled his Tosafot in order to provide a reliable recension of Tosafot which would "mix" the intellectual product of the Sefardic and Ashkenazic academies. In Faur's view, this approach was designed to make the Tosafot more acceptable to Safardic students. Zafrany, p. 205, believes that similar motives lie behind the Halakhot. It should be noted that Faur's thesis concerning Tosafot Ha-ROSH is not accepted by Urbach, whose work on the Tosafot dominates the research in this field. Urbach rejects the notion that ROSH "edited" or "redacted" a version of Tosafot; rather, he merely copies from whichever Tosafot collections were available to him for each tractate. For this reason, in many tractates we find very little material from Spain and Provence included within Asher's Tosafot. If there is any "system" to Tosafot Ha-ROSH, Urbach concludes, it is a desire to provide a good recension of French (and not German) Tosafot to his students in Spain; we might add that, inasmuch as Asher was himself a German and a devoted pupil of R. Meir of Rothenburg, this French predominance in his Tosafot is further evidence of lack of system. ROSH would not have intentionally omitted the German material; rather, he copied from the recensions that happened to be in his possession. Significantly, Urbach makes absolutely no reference to Faur's article.

[35]Elon, p. 1036, n. 66, refutes Freimann's conception of the Hilkhot Ha-ROSH as a commentary to the Talmud.

[36]Irving Agus, Rabbi Meir of Rothenburg, 1947, Philadelphia, JPS, pp. 33-34.

[37]Resp. MaHaRaM, ed. Cremona, n. 81; ed. Lemberg, n. 426. See also ed. Berlin, n. 4.

[38]Yisrael Ta-Shema, "Kelitatam shel Sifrei Ha-RIF, Ha-RH ve-Halakhot Gedolot Be-Zarfat u-ve-Ashkenaz...", Kiryat Sefer, v. 55, 1980, pp. 191-201.

[39]Ta-Shema adjusts the assertion of Aptowitzer, Mavo Le-Sefer RA-ABYAH, Jerusalem, 1932, p. 372, that French scholars were more interested in RIF than were the German scholars prior to the time of RA'ABYAH. Ta-Shema shows that in neither center was RIF studied intensively, outside of several exceptional cases, before the first half of the thirteenth century. Aptowitzer cannot

cite RASHBAM's interest in RIF as evidence of a "pro-Alfasi" attitude among the French; RASHBAM's colleagues did not share his interest. RA'ABYAH apparently inherited his interest in Alfasi from his father; there also seems to have been interest in RIF in the yeshivah of R. Yehudah Sirleon, where RA'ABYAH studied. This is indicated in the fact that the two tractates of our Tosafot which mention RIF most frequently--Berakhot and Hulin--were redacted by students of R. Yehudah. See Urbach, Ba'alei Ha-Tosafot, pp. 600-601 and pp. 665-667. This, however, does not explain the absence of RIF from the Tosafot to the other tractates which emanated from the school of R. Yehudah.

[40]But see Urbach, Ba'alei Ha-Tosafot, p. 551, who warns against taking these words of R. Meir too literally. Often, words of admiration by one posek concerning a predecessor has more to do with the matter under discussion than with the setting of a consistent rule of halakhic decision-making. R. Meir, like others of his generation, saw himself as beholden to his forebears in the field of halakhah; this does not mean, however, that he did not regard himself as entitled to disagree with the rishonim when the occasion demanded disagreement.

[41]That is, the interest in RIF did not stem from R. Meir or from his "discovery" of this previously-unknown posek. The Tosafists had known of RIF for several generations but showed little interest in studying his work. This interest developed gradually, over several generations, to the time of R. Meir.

[42]Introduction to Beit Yosef.

[43]See especially Shraga Abramson's article, "R. Yizhak Alfasi", Encyclopaedia Ha-Ivrit, vol. 3, pp. 768-771. Abramson cites the major literature on the RIF.

[44]Introduction to Zeidah La-Derekh.

[45]Letter to R. Yosef b. Yehudah, Igerot Ha-RAMBAM, ed. D. Baneth, Jerusalem, Mekizei Nirdamim, 1946, pp. 68-69. This selection from the letter provides as well a revealing glimpse of Maimonides' negative attitude toward the student's concentrating upon the dialectics of the Talmud. For him, RIF was not only the authoritative halakhic compendium; it was pedagogically superior to the Talmud. Thus, he recommends that the Alfasi assume the place of the Talmud itself in the yeshivah curriculum.

[46]Introduction, Commentary to the Mishnah. For Maimonides' halakhic indebtedness to Alfasi, see I. Twersky, Introduction to the Code of Maimonides, New Haven, Yale, 1980, p. 160.

[47]Resp. Ha-ROSH 43:8.

[48]For a list of the sources cited in the ROSH, see Zafrany, Darkhei, pp. 239-271. We must consider, in addition, the vast number of anonymous citations in ROSH which are actually drawn from Tosafot.

[49]Resp. Havat Yair, n. 159. Bachrach, of course, was referring to the Tosafot in the printed editions of the Talmud. The Tosafot Ha-ROSH became available to East European scholars with their publication in the late

eighteenth century; see Urbach, Ba'alei Ha-Tosafot, pp. 587-588, n. 8.

[50]Urbach, Ba'alei Ha-Tosafot, p. 598.

[51]Haym Soloveitchik, "RABAD of Posquieres: A Programmatic Essay", Studies in the History of Jewish Society...Presented to Professor Jacob Katz, Jerusalem, Magnes, 1980, p. 20.

[52]Elyakim Elinson, "Le-Heker Kavei Pesikah shel Ha-ROSH", Sinai, vol. 93, 1983, pp. 234-235.

[53]Resp. Ha-ROSH 20:20.

[54]Resp. Ha-ROSH 20:27.

[55]See the letter of R. Ya'akov b. Asher, published by Alfred Freimann in Ha-Soker, vol. 2, p. 37.

[56]R. Asher's role in the controversy over the philosophical writings of Maimonides is outside the scope of this study. See J. Sarachek, Faith and Reason, New York, Hermon, 1970, pp. 226-228, and E.E. Urbach, "He'Ikam shel Hakhmei Ashkenaz...be-Fulmos al Ha-RAMBAM", Zion, vol. 12, 1947, pp. 149-159.

[57]See Freimann, "Ascher ben Jechiel", p. 296: "Nur da, wo Maimonides keine Quellenangabe aus dem Talmud hat--also im Jad he-chasakah--ist er nach Ascher fuer die halachische Praxis gaenzlich unzuverlassig." In other words, Asher does not object to Maimonides' rulings as such but only to his failure to list their sources.

[58]Introduction to Yam shel Shelomo, Baba Kama and Hulin. Compare this quotation to Resp. Ha-ROSH 94:5.

[59]Resp. Havat Yair, n. 192.

[60]Twersky, Introduction, pp. 521-523. Twersky deals at length with the subject in "The Beginning of Mishneh Torah Criticism", Biblical and Other Studies, ed. A. Altmann, Cambridge, Harvard, 1963, pp. 161-183.

[61]See Twersky, Introduction, p. 519: "...his Sefer Miswot Gadol, a major and influential work moving primarily in the orbit of Maimonidean concepts, definitions, and interpretations, may be seen as a high watermark in the spread of the Mishneh Torah in northern Europe."

[62]On Sefer Mizvot Gadol, see Elon, P. 1044-1046.

[63]See, however, TUR EHE 11, 2[illegible]a, and BaH and Perishah ad loc. These are apparently children of the first husband, in accordance with RASHI's interpretation.

[64] דבר מכוער וקלא דלא פסיק

[65]See Magid Mishneh, Hasagat Ha-RABAD, and Hagahot Maimoniot ad loc.

[66]In his conclusion, ROSH states that no decision need be rendered: the dispute among the poskim means that we do not force the scribe to pay. This "non-decision", of course, resulting out of safek as to the correct ruling, is identical to the position of RIF, RABAD and R. Yizhak. In Hil. Ha-ROSH, Baba Mezia 4:21, Asher rules that a shomer hinam is not liable for damages resulting from negligence. TUR HM 301, 221a, points out that this ruling contradicts that of RAMBAM.

[67]Hilkhot Ishut 14:8 and Magid Mishneh ad loc.

[68]Hil. Ha-ROSH, Ketubot 5:34.

[69]Ibid., and TUR EHE 76, 116a. See also Resp. Ha-ROSH 43:1.

[70]Beit Yosef to TUR, loc. cit.

[71]Toldot Adam, chapter 276.

[72]That part of the document which renders it legally efficacious; contains the names, dates, places, and the phrase

[73]See Ozar Ha-Geonim, Gitin, pp. 196-197.

[74]Tos. Ha-ROSH, 84b,

[75]See Magid Mishneh, Hil. Ishut 6:17.

[76]EHE 147, 69a.

[77]Kahana, pp. 18-19. The takanah reflects an attempt to accomodate Asher's opposition to the Spanish neglect of the laws of shemitat kesafim. It also, however, stresses the community's halakhic loyalty to the Mishneh Torah. For a statement on ROSH's negative attitude concerning the adoption of a "supreme posek" by a community, see R. Ya'akov b. Asher's Introduction to TUR Hoshen Mishpat, as well as R. Yehudah b. Asher's responsum, Zikhron Yehudah, n. 54. ROSH himself declares that any scholar has the right to dispute the ruling of even the greatest authorities if he feels that they have misconstrued the Talmud: Hil. Ha-ROSH, Sanhedrin 4:6.

[78]In 94:5, for example, the questioner is the one who refers to RAMBAM. The admiration of Spanish Jewry for Maimonides' halakhah is well-known; see the literature cited in n. 5, above.

[79]See n. 4, above.

[80]Elinson, Sinai, vol. 95, p. 189.

[81]Abraham Weiss, Le-Korot Hithavut Ha-Bavli, Warsaw, 1929, p. 4.

[82]Haym Soloveitchik, op. cit., pp. 30-31.

[83]Zafrany, Darkhei, pp. 112-113.

[84]This "independence of halakhic judgement" is the essence of Zafrany's

reply to Elinson, Sinai, vol. 94, pp. 275ff.

[85]Soloveitchik, loc. cit.

[86]Hil. Ha-ROSH Sanhedrin 4:6.

[87]Kahana, pp. 25-28.

[88]Freimann, p. 303.

[89]Yehoshua Boaz Barukh, Italy, sixteenth century.

[90]Soloveitchik, p. 16, n. 13, expresses some doubt as to whether R. Nissim made a "creative contribution" to the halakhah. While this question cannot be examined here, it should be noted that RaN serves to incorporate the writings of the Tosafists and the "RAMBAN school" into the study of the RIF (which served as the Talmud in many Spanish yeshivot). He also frequently provides the theoretical underpinning of Maimonidean rulings in light of the opposing views of other scholars. If, as I suspect, the history of much of the post-Asheri halakhic literature revolves around an attempt to "rehabilitate" the RAMBAM, to defend him against Ashkenazic (=Tos/ROSH) learning and legal tradition, R. Nissim stands in the middle and even in the forefront in this effort. This question calls for careful study; it is especially important to determine to what extent RaN parallels the work of his contemporary, the Magid Mishneh and how heavily Karo depends upon RaN in the Beit Yosef.

A SUMMARY OF THE HALAKHAH IN SEFER HILKHOT HA-ROSH

A. Tractate Gitin, Chapter One

1. המכיא - = RIF.

2.a. נהגו - = Tosafot Ha-ROSH 2a, המכיא . Cites the custom, requiring get to consist of 12 ruled lines, explanations by R. Tam, Hai Gaon, Saadyah Gaon.

This custom is not mentioned in RIF/RAMBAM. RASHBA (Hidushim, ad loc.) does have this tradition, but he stresses that there is no Talmudic precedent for it.

In Halakhot, ROSH stresses that the absence of twelve lines does not render the get unfit (pasul). In his Responsa (45:13), however, he does declare such a get to be pasul unless such a ruling would lead to a case of igun (making it impossible for the woman to remarry).

2.b. גמ' - Follows Gemara/RIF to דאתיוהו כי תרי ...; then = Tos.Ha-ROSH 2b, דאתיוהו . RASHI regards the two agents (shelihim) as עדי קיום , witnesses who can testify to the validity of the signatures on the get. This is his understanding of the Talmud's explanation of Rava's position on 2b. The Tosafot tradition, however, regards these agents as שליחים להולכה , agents of transport. If the two of them testify that the husband appointed them as agents, they need not be witnesses to the writing and signing of the get: the husband may not subsequently disqualify the get by claiming that he did not send them. However, he may indeed claim that the get itself is a forgery; thus the document would have to be validated on the strength of its signed witnesses.

The TUR (EHE 142, 59a-b) is aware of this distinction between shelihim and eidim. RAMBAM, on the other hand, sees these two agents as witnesses as

well (Hil. Gerushin 7:14), apparently basing his interpretation upon the Gemara in 5a (Magid Mishneh, ad loc.). Bet Yosef to the TUR is puzzled by the Tur's ruling, since R. Asher's statement in chapter 2, no. 2 indicates that on this point, ROSH=RAMBAM. BaH and Derishah (n. 6), however, point to the ROSH's ruling here, which distinguishes between a case in which the agents are also witnesses and a case in which the agents cannot testify to the validity of the signatures.

2.c. Based upon Tos.Ha-ROSH 3a אטו , ROSH rejects RASHI's decision that the agent might make any statement that testifies to his knowledge of the signatures. ROSH: only כפני נכתב וכפני נחתם indicates that the agent is certain on the signatures, and only that wording safeguards the get from the husband's counter-claim.

This point is not mentioned in RIF/RAMBAM.

3. רבה בר בר חנה - This paragraph serves as a true "commentary" to RIF, in which the Alfasi is elucidated phrase-by-phrase with explanations drawn from RASHI and Tosafot. ROSH also cites a beraita from 6a which helps establish that the halakhah follows Rav Ashi.

Tos. Ha-ROSH, 6a, אפילו , limits the scope of Rav Ashi's ruling that the agent need only have heard that the pen and the parchment of the get were prepared specifically for the purpose of writing this get (in order to testify: "It was written and signed in my presence.") A blind person cannot be such an agent, since he cannot say "...in my presence"; in 2.c., above, this specific formula is an absolute requirement for the agent. See 23a, in which a blind person is disqualified from serving as this type of agent.

Thus, Tos/ROSH resolve a potential contradiction between 6a and 23a. Neither RIF nor RAMBAM mention this contradiction. RAMBAM presents both rules: the agent need only hear the sound of the pen writing the get (Hil.

Gerushin 7:12), and a blind person cannot serve as such an agent (7:19).

4. כפני - =RIF.

5. המכיא - =RIF to ובפני נחתם ...

ROSH interprets the phrase כיצד יעשה as referring to the position of the sages. This indicates that a woman who remarried on the basis of this get is allowed to remain with her new husband only if the agent transmits the get to her a second time and makes sure to recite the formula כפני נכתב כיצד . This follows the analysis in Tos. Ha-ROSH 5b, .

TUR, EHE 142, 58a accepts this ruling: if the agent does not recite the formula, the woman must leave her new husband, although her offspring by that husband is not a mamzer.

RAMBAM, Hil. Gerushin 7:17, declares that the failure to recite this formula renders the get pasul; i.e., the woman is not allowed to remarry on the strength of that document, but should she remarry anyway she need not leave her new husband. (see Hil. Gerushin 10:2 for RAMBAM's definition of get pasul. ROSH accepts this definition as well--Gitin 9:6--but he regards this case as an exception. The Tosafot understanding of the sages' position is that the woman is allowed to remarry only on the basis of takanah, the procedure of repeating the transmission of the get while reciting the proper formula. Without that takanah, the woman must leave her new husband if she has remarried.

The ROSH quotes a version of RAMBAM from Hil. Gerushin 7:7. He seems to agree with the ruling in the Mishneh Torah; yet there is serious confusion over his reading of RAMBAM (which differs from ours) and the interpretation of that ruling. Se Beit Yosef, TUR EHE 142, 58a, as well as the commentators on this passage of ROSH. The Tiferet Shmuel, note 1, suggests that the status of

ספק מגורשת in the RAMBAM passage applies only in the case where the get has been lost and in the event of a challenge to that get by the husband. If the husband does not issue a challenge to its validity, the woman is unquestionably divorced. ROSH and TUR rule clearly that whenever the get is lost, even if the husband does not issue a challenge to its validity, the woman is ספק מגורשת.

6.a. ורקרק ר"י - = Tos. Ha-ROSH 5b, ויחזור. R. Yizhak of Dampierre deduces from the baraita on 5b that the agent must recite the בפני נכתב formula at the moment of the transfer of the get or immediately after the get has reached the woman's hand (based upon Rav Yosef's statement in 5a). In the case where the agent does not recite the formula immediately, or if he recites it before giving the document to the woman, the get is of doubtful validity.

RAMBAM, Hil. Gerushin 7:5, allows the agent to recite the formula and then to give the get to the woman. TUR EHE 142, 57a, rules that the statement may be made "at the moment that (the agent) gives (the get) to her or immediately adjacent (סמוך) to that moment." This may include permission to recite the formula immediately before the transmission; if so, RAMBAM's ruling is accepted and R. Yizhak's doubt is removed. However, this interpretation of סמוך is not at all certain; see SA EHE 142:6 and Beit Shmuel, note 9. At any rate, even if ROSH's ruling does not oppose RAMBAM here, it is at the least a halakhic deduction based on Tosafot and not found in the Mishneh Torah.

6.b. רבה בר אבוה - = Tos. Ha-ROSH, 6a, שאני. R. Tam rules that in our time, every locale is like Mehoza; therefore, in any case where an agent transports a get, he must be able to say בפני נכתב ובפני נחתם.

RAMBAM, Hil. Gerushin 7:5, requires this formula only when the agent

transports the get "from place to place". The Magid Mishneh, ad loc., recognizes that RAMBAM and R. Tam disagree, and Beit Yosef, EHE 142, 58b, cites him. See also Hagahot Maimoniot, ch. 7, n. 1-2.

7.a. ת"ר עכד שהכיא - =RIF until לא יהא בן חורין ... = Tos. Ha-ROSH 8b, שיור . The question concerns the interpretation of the position of Tana Kama (the unattributed view) in M. Pe'ah 3:8, discussed as well in Baba Batra 149b. When an owner transfers "all of his property" to his slave, the slave automatically gains his freedom on the strength of the deed of transfer; if, however, the owner excludes any property from the transfer, the slave does not go free. According to RASHBAM, this is because the excluded property is unspecified and might refer to the slave himself (BB 149; שיור). Tos/ROSH disagree, arguing on the basis of Tosefta Baba Batra 9:4 that, in the view of Tana Kama, the slave does not go free whenever any property is excluded from such a transfer, even when that property is specified. This is identified as RASHI's view as well.

RIF's interpretation of the mishnah is the same as that of RASHBAM (fol. 2b; see RaN ad loc.). RAMBAM refers to this rul in Hil. Avadim 7:1; his ruling will be discussed below.

7.b. ר"ש אומר -- = Tos. Ha-ROSH 9a, לעולם . Tos/ROSH reject RASHI's (9a, עד) interpretation of R. Shimeon's position in M. Pe'ah 3:8. Even if the owner of the property does not specify which property is excluded from the deed of transfer, the slave acquires title to himself and to all the property, provided that the owner can subsequently choose property equal in value to the amount excluded from the transfer.

ROSH adds that RIF agrees with RASHI on this point (fol. 2b).

7.c. אמר רב אשי . Rav Ashi explains that a deed of property transfer in which some property is excluded is not כרות גיטא , and therefore, the slave does not go free on the strength of that deed.

What is a כרות גיטא, required for a valid document of manumission? Alfasi (fol. 2b) and RAMBAM (Hil. Avadim 7:1) rule that a כרות גיטא is a document in which the owner does not reserve for himself any property rights whatsoever. Thus, any exclusion expressed in the document renders the manumission invalid; the slave does not go free. ROSH, on the other hand, argues that the owner may make distinctions between types of property, so that an exclusion with respect to one type need not affect the status of the other type. He cites an example: if the deed were to state עצמך ונכסי קנויים לך חוץ מ- : "You hereby acquire title to yourself and to my property, except for...". Granted that the exclusion "except for" means that the slave does not acquire title to any of the other property, he himself gains his freedom, since the document referred to him as distinct from the rest of the property. The deed is a כרות גיטא with respect to the slave.

The example cited by R. Asher as a valid כרות גיטא is not taken from RIF. It is found in RAMBAM (loc. cit.), who specifically rules that this is not a valid deed of manumission. See TUR, YD 267, 208b, who notes the disagreement between these poskim. Beit Yosef cites RaN (fol. 2b, שפתים), who attributes the ROSH position to "Tosafot". The wording of this particular example, however, is not found in extant Tosafot collections. RAMBAM has it, as does RABAD, in his Hasagot to RIF, fol. 2b. Perhaps Asher drew the example from one of these sources. Therefore, although the Alfasi ruling probably agrees with the RAMBAM's position (see, in addition to Beit Yosef, RaN, BaH and Korban Netanel note 9), the use of this example indicates that ROSH may be arguing directly against RAMBAM, without mentioning him. Since Asher could have made his point without citing as an example the wording found in the Mishneh Torah, he seems to be aiming his critique at the

RAMBAM specifically, as well as Alfasi.

8. והוא הדין -- ROSH follows the Gemara/RIF which state that the get, once its signatures have been validated, cannot be challenged by the husband. He adds the ruling of Tos. Ha-ROSH, 9a, אלא , that this applies as well to those who possess property formerly owned by the husband. If, on the strength of this validated get, the woman seeks to collect her ketubah by seizing this property, the purchasers cannot deter her by challenging the get's validity.

Tos. derives this ruling from the Yerushalmi, Gitin 1:3 (43c). Neither RIF nor RAMBAM mention "purchasers" in their treatment of the husband's challenge to the get.

9. מתנ' -- follows RIF.

10.a. כל -- follows RIF to חוץ מגיטי נשים . The Mishnah declares that all documents processed in Gentile courts, with the exception of bills of divorcement and manumission, are halakhically valid. The Gemara asks whether this permit applies to all commercial documents. There is no problem with a deed of sale, since the document merely serves as evidence that a transaction occurred through some recognized means. A deed of gift, however, is the actual instrument of transfer of ownership; may we accept such an instrument emanating from Gentile courts? The Gemara suggests two possible answers. The first is Shmuel's famous dictum: דינא דמלכותא דינא , "the law of the state is valid for us."[1] This would indicate that we accept such a deed of gift. The second answer is a suggested emendation of the Mishnah which would require that we disqualify all documents resembing divorces and deeds of manumission; in other words, any document processed in Gentile courts that is itself the instrument of legal transaction (such as deed of gift) is halakhically unacceptable.

On the surface, it appears that these two interpretations contradict each other, although RIF (fol. 4a) cites both of them without comment. RAMBAM (Hil. Malveh, 27:1) rules that a deed of gift processed in Gentile courts is invalid, following the second suggested interpretation of the Gemara.[2]

ROSH does not believe that the interpretations are contradictory. If the civil government has instituted proper legal procedure in its courts, then we apply the rule דינא דמלכותא and accept even deeds of gift. If such procedure has not been adopted, then the second interpretation is followed: all documents processed in Gentile courts which are actual instruments of legal transaction are unacceptable.

ROSH disagrees here with RAMBAM, while Alfasi does not render a clear ruling on the subject. That Asher has Hil. Malveh 27:1 in mind can be seen from part b of this siman.

10.b. רבינא סבר --Ravina seeks to declare acceptable document processed by public authorities which are not courts of law; Rafram rejects this attempt, since the mishnah deals with courts of law.

RIF adds that "courts of law that do not accept bribes" are the only legal authorities which may process documents acceptable to the halakhah. ROSH declares that Alfasi's language is vague: does he mean that all formal courts of law are acceptable because, in general, they do not accept bribes, as opposed to other public authorities, which do; or does he mean that only those courts of law which do not accept bribes (as opposed to courts of law which are indeed corrupt) are acceptable? ROSH cites RAMBAM, Hil. Malveh 27:1, who rules in favor of that second interpretation: a document processed by a Gentile court is acceptable only if we have Jewish testimony to the effect that the Gentile judges do not accept bribes. ROSH rejects RAMBAM's view. Such testimony is extremely unlikely. Rather, we posit that, as a general rule, Gentile courts adhere honestly to the ethics of legal procedure.

Since ROSH cites Hil. Malveh 27:1, it is clear that, although he does not mention RAMBAM in 10.a, he has RAMBAM in mind while arriving at a contradictory conclusion. ROSH need not mention RAMBAM in order to oppose the halakhah of the Mishneh Torah. See TUR, HM 68, 131b-132a.

10.c. אמר רבא האי שטרא -- = Tos.Ha-ROSH, 11a, האי .

The "Persian document" which Rava accepts if Jewish witnesses are present when it is transmitted to the recipient is valid, according to RASHI (11a, שטרא פרכאה), even when the document has been processed by הדיוטות , public authorities outside the official Gentile court system. R. Yizhak the Elder rejects this interpretation on the strength of a beraita on 11a. Documents processed by unofficial courts are never halakhically acceptable, even if transmitted in the presence of Jewish witnesses. Yet ROSH decides in favor of RASHI's view. Therefore, a "Persian document" which is valid if transmitted in the presence of Jewish witnesses may stem from an unofficial court, as long as it does not bear the signatures of Gentile witnesses. If such signatures appear on the document, it is invalid, even if Jewish witnesses are present at the transmission. ROSH cites R. Hananel in support of his view.

RAMBAM, Hil. Malveh 27:2, accepts as valid documents processed in unofficial Gentile courts, transmitted in the presence of Jewish witnesses and signed by Gentiles. TUR, HM 68, 132b-133a reports the discord between the two poskim. Alfasi does not mention the subject of Gentile signatures on the "Persian document."

11.a. והיה -- = Tos.Ha-ROSH, 11a, בראפציך . In order to accept documents processed in Gentile courts, the Gemara requires that the script by "forgery-proof". Specifically, the Gemara mentions documents treated with עפצא , a type of glaze that would clearly show any attempt to erase and alter the writing.[3] Rabbenu Tam rules that

"our" parchments are halakhically acceptable, for legal and ritual purposes, even though they are not subjected to this chemical treatment, inasmuch as they undergo another process which renders similar protection against alteration.

The position of RAMBAM on the issue of alternative chemical treatments is somewhat vague. In Hil. Megillah 2:9, he mentions עפצא specifically. In Hil. Tefilin 1:6, however, he requires that parchments be treated with עפצא or with "any similar substance" (וכיוצא בו) that produces a similar effect. Beit Yosef (YD 271, 218b), citing the authorities who agree with R. Tam's ruling (ROSH, RaN), adds that "the RAMBAM apparently agrees with this ruling." In short, it is not absolutely clear that the RAMBAM's ruling in Hil. Tefilin would permit the use of "our parchments as does R. Tam. The TUR itself does not mention RAMBAM on this subject. Neither does BaH, who mentions other poskim while omitting RAMBAM's ruling despite his favorable attitude to Maimonides the halakhist and his frequent attempts to defend the halakhah of the Mishneh Torah. In this instance, R. Asher states clearly a halakhah which is not treated in Alfasi (who cites only the word עפצין without discussing alternatives) and which the RAMBAM leaves vague.

11.b. והא בעינן -- follows RIF/Gemara to כדמהדר . ROSH refers us to his Halakhot in Baba Batra 10:2. One of the requirements for a valid document is that the last line of the document must repeat the essentials of the transaction. Does the failure to make such a repetition render the entire document invalid, or does it merely invalidate that line? See Tos. Ha-ROSH 11a, והא . ROSH disqualifies the entire document.

See TUR, HM 44, 78b. RAMBAN and others rule that only the last line of the document is thus invalidated. RAMBAM, Hil Malveh 27:3, writes only that

the last line must repeat the essentials of the transaction and the reason for this rule; he does not declare whether failure to do so invalidates the entire document or merely the last line. Magid Mishneh ad loc. suggests that RAMBAM agrees with RAMBAN on this issue. If so, then ROSH is in disagreement with RAMBAM on this point; if not, this is a case where Asher adds a halakhic detail to his work that is missing from RAMBAM.

11.c. אי הכי -- follows Gemara/RIF to לית ליה קלא. The Gemara rejects the use of a document signed by Gentiles as an instrument to collect a debt from secured property, on the grounds that collection from mortgaged property is allowed only if the debt is considered "public knowledge". Tos/ROSH (See Tos. Ha-ROSH, 11a, אי) deduce from this that, according to the opinion of R. Elazar, this is the only case where a document transmitted in the presence of Jewish witnesses (עדי מסירה) cannot be used by a creditor for the purpose of collecting his debt from secured property. In all other cases, the presence of these witnesses is sufficient to establish "public knowledge" even if there are no witnesses to the signatures on the document itself (עדי חתימה). RASHI, on the other hand, implies that only עדי חתימה can establish the "public knowledge" required to allow collection from secured property (11a, לית ליה קלא).

RAMBAM, Hil. Malveh 27:2, seems to follow the RASHI position: "public knowledge" follows the signatures not the transmission. Indeed, others accept this as the authoritative position; MaHaRSHaL pronounces RASHI's view as halakhically binding (Yam shel Shelomo, Gitin 1:24). ROSH, however, adds to the halakhic discussion a second possibility, one which is not mentioned in RAMBAM.

11.d. בעא מיניה ר"ל -- presents Gemara and interprets it

according to Tosafot view (see Tos. Ha-ROSH 11b, ערים). In the Gemara discussion, R. Yochanan states that a get signed with names that clearly belong to Gentiles is accepted if two Jews witness its transmission. RABAD writes that this ruling assumes the position of R. Shimeon in the mishnah on 10b: i.e., that even divorce documents processed by Gentile courts and signed by Gentile witnesses are halakhically acceptable. Therefore, says RABAD, the halakhah follows R. Shimeon and not the unattributed ("majority") view in the mishnah. R. Hananel rules that the halakhah follows R. Shimeon כדיעבד -- ex post facto; that is, in principle, we do not allow Gentiles to sign gitin, but should such a get come before a beit din we would accept it. RASHBAM, however, after noting the widely varying interpretations of this passage, argues that R. Hananel really agrees with him: i.e., neither Reish Lakish nor R. Yochanan seek to declare that the halakhah agrees with R. Shimeon. We never allow Gentiles to sign divorce documents. Rather, the question centers around Jews with "Gentile names" and whether the court may assume that these names denote Jews or whether it must invalidate the get out of concern that the names are those of Gentile witnesses. ROSH accepts this position: we do not decide according to the individual opinion against the majority view without decisive proof that the minority is correct.

See TUR, EHE 130, 31a, and BY ad loc. ROSH apparently relies on the traditions of the "Spanish" school as well as Tosafot here, inasmuch as the discussion of the views of RABAD and R. Hananel is found in Hidushei Ha-RaSHBA. RAMBAM, Hil. Gerushin 7:5, accepts a get "even if its witnesses are unknown to us, even if their names are Gentile names." Magid Mishneh ad loc. writes that RAMBAM apparently follows the majority view against R. Shimeon.

ROSH concludes this siman with a summary of his ruling on the issue of documents process by Gentile courts.

12. מתני' -- cites the mishnah on 11b.

13.a. גמ' -- follows RIF to לא קנה . See Tos. Ha-ROSH 11b, הכי . R. Yochanan declares that a third party may not legally seize the property of a debtor on behalf of his creditor. RASHI, in Baba Mezia 10a, לא קנה , states that this is true only if the third party has not been appointed as the creditor's agent. If he is an agent, however, he may seize the debtor's property, on the basis of the rule that "a person's agent acts for that person in all legal respects." Tos/ROSH reject RASHI's ruling, citing Ketubot 84b as evidence.

RAMBAM, Hil. Malveh 20:2, repeats the R. Yochanan statement as does Alfasi (fol. 4b). Neither mentions the subject of agency. Magid Mishneh ad loc. and Hagahot Maimoniot, n. 1, add this point to the general halakhic statement. The dispute of Tosafot with RASHI leads to a conclusion of halakhah not found in RIF or RAMBAM.

13.b. רחכ"א -- follows RIF to כעכו . Alfasi rules that, while an owner who hands a deed of manumission to an agent and says, "Give this to my slave" may not recant his instructions, the slave does not go free until the document is in his possession. ROSH rejects this view: the agent is the slave's legal representative, and the agent's possession of the deed frees the slave. Since Alfasi bases his ruling upon the wording of the mishnah on 13a, ROSH refers to the interpretations of RASHI and R. Tam, who explain the mishnah so that it does not refer to the appointment of an agent. See RASHI, 13a, האומר , and Tos. Ha-ROSH 13a, האומר .[4]

RAMBAM, in Hil. Avadim 6:1, follows Alfasi. The instruction: "Take title of this get on behalf of (זכה) my slave" means the slave goes free as soon as the agent receives the document. But "Give this get to my slave" does not automatically free the slave, who must take possession of the

document. See Kesef Mishneh ad loc. ROSH specifically rejects Alfasi's ruling; he does not mention RAMBAM, although the Mishneh Torah repeats the halakhah as stated in RIF.

13.c.-14. שאם ירצה -- follows RIF to ראיני זנך . The mishnah on 11b states that the owner of a Canaanite slave is not required to support the slave. The Gemara on 12b concludes that the owner is entitled to say to the slave: "Work for me and I will not feed you (rather, you must beg for your own food (RASHI, 12a, עשה)." Alfasi codifies this rule (fol. 5a), as does Maimonides (Hil. Avadim 9:7). These authorities differ on the reasoning injured behind this rule. Alfasi follows the Gemara's conclusion, based upon a beraita on 12b which states that slaves are fed with charity funds . Maimonides goes farther; while he also requires this slave to receive his food from public funds, he points out that such funds are readily available since Jews are commanded to provide sustenance for slaves in their midst.

ROSH follows Tos. Ha-ROSH, 12b, אלא , in making a distinction between normal years and drought years when assessing the owner's legal authority to make this statement. This distinction flows from another baraita, on 12a; according to the Gemara, this beraita assumes a situation in which the owner says to the slave: "Support yourself through the proceeds of your work" and the complicating factor of a drought year in which the slave cannot earn enough to support himself. Tos/ROSH integrate this beraita and its Talmudic discussion, part of a series of תא שמע arguments, into the final halakhah: although the owner indeed has the right to refuse to support his Canaanite slave, this right does not hold in years of drought, for in years of drought the slave cannot count on the generosity of donors to charity. Alfasi/Maimonides do not take this second beraita into account in

reaching their decision. They follow the conclusion on the sugya, based upon the final תא שמע agreement on 12b,[5] that the owner does have the right to refuse support. The sugya's conclusion makes no distinction between good years and bad years.

See TUR, YD 267, 205b, and Beit Yosef ad loc. In the baraita on 12a, which reports a dispute between R. Shimeon b. Gamliel and the sages, both sides apparently hold that the owner does not have the right to refuse to support his slave; rather, the slave may support himself from his earnings, a situation which in turn is affected by drought years. As Karo explains in both the Beit Yosef and the Kesef Mishneh, the conclusion of this baraita contradicts the conclusion of the sugya that forms the basis of the RIF/RAMBAM decision. The Tos/ROSH decision is an attempt to compromise between the baraita and the sugya: the owner has the right to refuse support, but only in those years when the slave can realistically expect to support himself through public funds.

The ruling in R. Asher does not conflict only with the halakhah in RIF/RAMBAM. Maimonides provides a ta'am, reasoning for the law that an owner may refuse to support his Canaanite slave: Jews are commanded to support slaves through public donation. Alfasi does not deal with this ta'am. Tosafot, however, bases its position, at least in part, on a concern for situations in which charity would not be forthcoming (years of drought). In this sense, ROSH's citation of this ruling could be a stricture however indirect, of the reasoning as presented in the Mishneh Torah.

15. מתנ' -- follows RIF to לא חיישינן . See Tos. Ha-ROSH 13a, אילימא . ROSH cites the ruling of R. Tam (though he does not mention his name in the Halakhot, the names does appear in the Tosafot) that the principle "it is a religious precept to fulfill the wishes

of the deceased" applies only when the intended gift had been previously deposited with an agent instructed to transmit it to the recipient.

RIF (fol. 6b) and RAMBAM (Hil. Zekhiah 4:5) both cite the principle "it is a religious precept, etc." Neither of these authorities, however, restricts the application of this principle to a case where the intended gift is already in the hands of an agent. See TUR, HM 250, 147a, and 252, 149a, and Beit Yosef to both passages. According to R. Yizhak bar Sheshet (Resp. RIVaSH, no. 207), "most of the 'later authorities' (אחרונים) agree with R. Tam on this point," although the RAMBAN dissents. At any rate, Asher's halakhah is different from the ruling in RIF/RAMBAM.

16. והא -- see TosHa-ROSH 13a, כל האומר הוא. ROSH cites R. Tam's explanation of why the second part of the mishnah is not explained according to the rule תן כזכי דמי : this rule applies only when the agent receives the intended gift directly from the giver.

RAMBAM, Hil. Zekhiah 4:4, holds to the rule תן כזכי דמי in all instances. He does not place limits upon the efficacy of this rule as do R. Tam and ROSH. See TUR, HM 125, 52a, and Beit Yosef n. 9.

17.a. אמר -- follows RIF to ככולהו קנה. This is a discussion of the rule במעמד שלשתן קנה according to which a creditor/depositor may transfer a loan or deposit to the ownership of a third party when the creditor/depositor, the debtor/bailiff and the third party are all present at the same transaction. See Tos. Ha-ROSH 13a, תנהו. Drawing on R. Yizhak b. Asher Ha-Levy[6] and R. Tam, ROSH rules that ownership may be transferred through this type of transaction even against the will of the debtor/bailiff.

RIF (5b) and RAMBAM (Hil. Mekhirah 6:8 and Zekhiah 3:3) do not rule on this aspect of the rule במעמד שלושתן קנה. See Magid Mishneh

to the passage in Mekhirah. See also TUR, HM 126, 53b, and Beit Yosef, n. 8.

17.b. ונראה -- Tos. Ha-ROSH 13a, כמעמד . Once the transfer has taken place, the former creditor cannot subsequently forgive the debt which the debtor originally owed to him. This apparently conflicts with the dictum of Shmuel in Kiddushin 48a that when a creditor sells a promissory note to a third party, he may indeed subsequently forgive the loan. This is resolved through an explanation of the differing nature of the two cases. When a creditor sells a note to a third party where the debtor is not present, not all of the debtor's obligation is transferred to the new creditor; some of that obligation remains with the original creditor who, in accordance with Shmuel's statement, may then forgive the debtor's obligation. Our Gemara, however, deals with a case of כמעמד שלושתן , when all three parties are present. This type of transaction was instituted as a result of a special rabbinic ordinance; its purpose was to facilitate the smooth operation of the marketplace (תקנת השוק). Its intent by necessity must be to transfer all obligation to the second creditor; otherwise, the second creditor, fearing that the obligation might be forgiven by the first creditor, would never accept the promissory note in lieu of payment for goods or services.

The position of RAMBAM on this issue is not clearly stated. In Hil. Mekhirah 6:12, he cites Shmuel's dictum without restriction: a previous creditor may forgive the obligation which he sold to a third party. There is no mention of a distinction between transactions carried out in the debtor's presence or absence. However, in Hil. Ishut 5:17, in which he codifies the law as determined from the sugya in Kiddushin, RAMBAM declares that a promissory note can serve as valid kiddushin-money if transferred to the woman in the presence of the debtor. See R. Nissim to Alfasi, Kiddushin, fol. 20a,

ויש מי שלמד , who argues that RAMBAM, on the basis of this ruling, believes that Shmuel would agree that in a case of מעמד שלושתן , the original creditor may not forgive the obligation. This view of RAMBAM is adopted by Karo in Kesef Mishneh, Mekhirah 6:8 and Beit Yosef, HM 126, n. 10, where Karo refers to the process of deduction (דקדקתי) through which he arrives at this interpretation of RAMBAM in the Kesef Mishneh. The Magid Mishneh, however, is not certain as to whether, in RAMBAM's view, an obligation transferred through this process may be forgiven by the original creditor: see especially to Hil. Mekhirah 6:8.

Tos/ROSH deduce a general principle: when a debt is transferred במעמד שלושתן , the original creditor can never forgive the debt subsequent to the transaction. This deduction is based upon two pillars, both of which appear in the Mishneh Torah: a) the dictum of Shmuel that a transferred debt can be forgiven by the original creditor, and b) the conclusion of the sugya that promissory note can serve as valid kiddushin-money when given to the woman in the presence of the debtor. What is missing from the Mishneh Torah is the deduction itself, the modification of Shmuel's general principle in cases where all three parties are present. For this reason, R. Nissim and Joseph Karo are constrained to make that deduction in the name of the RAMBAM, to attribute to him the same halakhic position as that held by Tos/ROSH. As we find in the Magid Mishneh, however, this conclusion is far from certain. In truth, we do not know whether RAMBAM agrees with Tos/ROSH; the ruling of the latter makes clear a point left vague in the Mishneh Torah.[7]

17.c. והיה ר"ת אומר -- Tos. Ha-ROSH 13a, במעמד . R. Tam declares that the rule of מעמד שלושתן does not apply when a non-Jew is involved in the transaction. R. Yizhak explains the legal

ramifications that occur when a non-Jew occupies any one of the three positions of מעמר שלושתן . ROSH himself adds that, should a Gentile creditor seize from the Jewish debtor the money that the debtor had previously been obligated to transfer to a Jewish third party in a מעמר שלושתן arrangement, the debtor is still responsible to fulfill that obligation. This does not apply if the arrangement concerned a deposit rather than a loan, if the "debtor" was actually a bailiff.

See TUR HM 126, 56a-b, and Beit Yosef, n. 29. Alfasi, in a responsum preserved in Sefer Ha-Terumah, writes that there is no distinction between Jew and non-Jew on the subject of מעמר שלושתן . RAMBAM does not mention the Jew/non-Jew issue in his passages on the subject. Given his general tendency to agree with the halakhah of Alfasi, we might assume that he follows RIF on this point, though he may not have seen the responsum quoted in the TUR. At any rate, ROSH presents a point of halakhah drawn from Tosafot that is not mentioned in Hilkhot Ha-RIF or in the Mishneh Torah.

17.d. אמר מר זוטרא -- follows RIF to ניהנו לחזרה ; adds the conclusion of the Gemara that even with a gift of little value, the giver may change his mind and retract the gift until it reaches the recipient, unless the transfer was made במעמר שלושתן .

This conclusion is missing from RIF/RAMBAM.

17.e. הנהו גינאי -- follows RIF to בטעות חוזר . =Tos. Ha-ROSH 14a, עכד . R. Hananel (cited in RIF as " רבואתא "), R. Tam and Alfasi all agree that a transaction can be cancelled on the basis of a mistake in calculation only when clear proof or the admission of the other party attests to the error.8 R. Yizhak deduces from this ruling that the claimant may not plead error in calculation without such proof or admission, even though we might believe him on the grounds of the migo

argument: "I already paid (carried out the transaction in full)".

The question of the migo argument is not treated in RIF. R. Nissim suggests that RIF even accept the migo in place of proof or admission (fol. 6a, הגי). See TUR, HM 126, 54b, and Beit Yosef, n. 14. RIF/RAMBAM do not deal with the question of migo here; RAMBAM does not even treat the question of mistake in calculation in his passages on מעמד שלושתן . He does rule that a mistake in calculation voids a sale (Hil. Mekhirah 15:1ff), but he says nothing about מעמד שלושתן or the standards of proof or admission required to establish that an error was made.

18. מעמד -- cites ruling of RAMBAN that the rule מעמד שלושתן does not apply if the donor appoints an agent to effect the transaction. Since the rule is הלכתא בלא טעמא , that is, an authoritative rule that has no convincing explanation for its existence (see 14a and RASHI, כהלכתא),[9] we should not seek to expand its operation to cover activities that do not come under its literal definition. ROSH accepts this, but he adds that the rule does apply when the recipient is represented by an agent.

RIF/RAMBAM do not mention this halakhic point. See TUR, HM 126, 56a, and Beit Yosef, n. 26.

19.a. איתמר -- follows RIF to אם בא לחדור חוזר . Asher adds the Gemara's suggestion: לימא כהא קמיפלגי , in order to introduce comments from Tos. Ha-ROSH, 14a, ומר . To the question: why can the agent not acquire ownership on behalf of the recipient (in this case, perhaps a creditor waiting for repayment from the debtor who appoints the agent) on the grounds of the rule הטופס לכעל חוב קנה , two explanations are offered:

1) R. Moshe of Evreux--the rule הטופס לכעל חוב applies only when the

debtor has no other property with which to repay his loan. Our case deals with a debtor who has other property.

2) R. Perets--the rule הטופס לבעל חוב applies only to loans whose due dates have passed. Our case involves a loan which is not yet due, and even the creditor himself may not seize the debtor's property before the loan is due.

The author of this Tosafot[10] does not believe that the rule offers a difficulty to the position of Shmuel in the memra on 14a. He does, however, accept the halakhic position of R. Moshe: a third party may seize property from a debtor on the creditor's behalf only when the debtor has no other property with which to pay his obligation. This applies even if the loan has not yet come due, which contradicts the position of R. Perets.

RAMBAM, Hil. Malveh 20:2, presents the rule הטופס לבעל חוב קנה with no such limitation. The Alfasi, in a responsum, does limit the right of seizure (see Magid Mishneh, ad loc., and TUR, HM 105, 15b-16a), but the RAMBAM, in the literal reading, would seem to allow seizure even if the debtor has other resources to repay the loan and there is no fear that the creditor will lose his money unless repayment is seized. The TUR presents the position of Asher/Tosafot on 16a, making no mention of RAMBAM. Karo, in SA HM 105:4, presents the wording of RAMBAM along with the qualifying rulings of RIF and ROSH (see Be'er Ha-Golah notes 8ff). This is a clear case of a limitation of a law which RAMBAM frames as a general rule.

19.b. תניא כוותיה דרב -- follows RIF to הכי נמי במתנה. Both RIF and ROSH posit that the instruction " הולך " given by a donor to his agent does not automatically transfer ownership to the intended recipient until the moment of receipt. R. Tam (Tos. Ha-ROSH 14a, הולך) adds that the instruction " תן " also does not transfer ownership until

the gift is in the recipient's possession. ROSH[11] adds further proof to this position. If " תן " did indeed transfer ownership of a gift, there would have been no need for this beraita to discuss " תן " at all. If " הולך " transfers ownership in regard to the repayment of a loan and the return of a deposit, even though it does not transfer ownership in regard to a gift, then certainly " תן " would transfer ownership of a gift. Yet the beraita discusses " הולך " and " תן " in equivalent terms, informing us that these two instructions carry the same legal force in all these transactions.

RAMBAM, Hil. Zekhiah 4:4, distinguishes between these two instructions: unlike " הולך ", " תן " effects immediate transfer of ownership to the recipient of a gift upon receipt by the donor's agent. Hagahot Maimoniot, ch. 4, n. 3, and RaN, fol. 6b, וכהב , point out that RAMBAM contradicts the Tosafot position here. See TUR, HM 125, 52a, and BY notes 7 and 9. Karo states that RAMBAM accepts the principle תן הוי כזכי במתנה since the Talmud specifically rejects " הולך " but not " תן ". He also notes that " תן " effects the transmission of a deed of manumission (Gitin 11b), a transaction which qualifies as "gift". ROSH, however, seems to anticipate this argument; he likens the act of manumission to the repayment of a debt, a transaction in which both " הולך " and " תן " effect transfer, according to the Tosafot position.

RIF does not comment on this subject. This halakhah directly refutes the position of the Mishneh Torah.

19.c. הולך מנה לפלוני -- follows RIF to כתובין וכמסורין . See Tos. Ha-ROSH, 14b, והא . ROSH and RIF agree that if a dying person transmits to an agent an object intended as a gift for recipient X, X acquires ownership of the object immediately upon the agent's receipt of it. Tosafot adds that this applies even if X does before the donor dies, it applies as

well even if the heirs of the recipient were not yet born when the donor died. The instructions of a dying person are held to be inviolate; the legal force of the transfer takes place at the moment of the transmission to the agent. As long as X is alive at the time the agent takes possession of the intended gift, X and his heirs acquire ownership of that gift. This ruling conflicts with the understanding of RaN, fol. 6b, רמשמע , who declares that the transfer of ownership takes place at the moment of the donor's death. Thus, if the recipient should die during the donor's lifetime, no acquisition is possible.

RAMBAM, Hil. Zekhiah 10:12, cites the portion of this halakhah which is accepted in common by all authorities:[12] if te recipient was alive at the time the agent received the intended gift from the donor, the recipient and his heirs acquire ownership of the gift. See TUR, HM 125, 52b, and BY ad loc., who recognizes that the details added by Tosafot/ROSH ("even if the recipient dies during the donor's lifetime") are not included in RIF/RAMBAM.

The ruling of R. Asher here does not necessarily conflict with the halakhah of RIF/RAMBAM. It is also true, however, that the Tosafot tradition adds important halakhic details in this matter that we do not find in the Alfasi or the Mishneh Torah.

NOTES TO GITIN, CHAPTER ONE

[1]For a positive-historical treatment of the subject, see S. Shilo, Dina de-Malhuta Dina, Jerusalem, Academic Press, 1978.

[2]RAMBAM here follows a Geonic tradition, according to which the halakhah follows the second of two suggested interpretations when the first is not conclusively proven. See Ozar Ha-Geonim, Gitin, Teshuvot no. 31. See also Magid Mishneh ad loc., who states that Maimonides rules in accordance with "most of the Geonim."

[3]So RASHI. See Kohut, Arukh Ha-Shalem, v. 1, p. 229, s.v. אפץ : "juice of gall nuts." The Arukh itself explains the term as מי טריא , a type of ink.

[4]Tos/ROSH accept the rule האומר תן כזכי דמי , which does not influence RIF/RAMBAM on this point.

[5]This follows the Geonic rule הלכתא כמסקנא ; see the discussion in S. Asaf, Tekufat Ha-Geonim ve-Sifrutah, Jerusalem, Mosad Ha-Rav Kuk, 1955, p. .

[6]Or R. Yizhak b. Mordekhai; see the comment by Raviz in Tosafot Ha-ROSH, Gitin, p. 58, n. 423.

[7]While R. Nissim interprets RAMBAM as agreeing with the pesak of Tos/ROSH, he attributes the opposite view to Alfasi: that Shmuel's dictum applies even when the debt is transferred במעמד שלושתן .

[8]The Tosafot Ha-ROSH passage does not mention Alfasi. In his Halakhot here, R. Asher reproduces the Tosafot passage, inserting the name "רב אלפס" because the format of his work is a "commentary" on the Alfasi. This corresponds to Urbach's view (Ba'alei Ha-Tosafot, p. 598) that Tos. Ha-ROSH is in part, a preparatory work toward the Halakhot.

[9]See the discussion on הלכתא בלא טעמא in Encyclopedia Talmudit, v. 9, p. 264. The institution of מעמד שלושתן is a rabbinic ordinance which is likened to halakhot received through authoritative tradition and do not owe their existence to reason or societal motivation. Yet this institution certainly does have such a motivation: it is intended to facilitate business and commercial activity. If, then, this rule is classified as הלכתא בלא טעמא , this must refer to the fact that this particular method of acquisition does not correspond to the usual procedures of transfer of ownership, or קנין . See Tos. Ha-ROSH, 14a, כהלכתא .

[10]Probably R. Yizhak of Dampierre; see Urbach, Ba'alei Ha-Tosafot, pp. 587ff.

[11]R. Nissim, fol. 6b, וכתב , attributes this analysis to R. Yizhak.

[12]See Magid Mishneh ad loc., who describes this ruling as מוסכם .

B. Tractate Gitin, Chapter Two

1. המביא -- = RIF.

2.a. אחר -- follows RIf to ובפניהן נחתם . =Tos. Ha-ROSH, 16a. אבל . The Tosafot ruling contradicts RASHI, 16a, מתחת , who requires that both agents physically hold the get. This clarifies the phrase גט יוצא מתחת ידי שניהם .

Alfasi does not explain this phrase; he does not tell us whether it must be taken literally, as RASHI reads it, or figuratively, in accordance with the Tosafot tradition. RAMBAM, Hil. Gerushin 7:15, follows Alfasi in reproducing the Talmud's language without further explanation. Magid Mishneh, 7:14, states that other commentators must carefully study the RIF/RAMBAM language in order to determine whether physical possession of the get is required. RASHBA, in his Hiddushim to Gitin 16a, must speculate as to the precise meaning of RIF/RAMBAM: the alternatives are those set out by RASHI and Tosafot. Clearly, the RIF/RAMBAM position was, in the eyes of contemporary scholars, in need of clarification; meanwhile, the agenda of future Talmudic-halakhic thought on this issue is set by the Franco-German school. See TUR, EHE 142, 59b and BY ad loc.

3. מתנ' -- =Mishnah/RIF.

4.a. גמ' -- follows RIF and adds several lines from Gemara (והא איפכא וכו'), along with R. Hananel's explanation.

4.b. Continues following RIF to ולא חרון באשת איש . See Tos. Ha-ROSH 17a, משום . R. Yohanan's view is that the date must be written in a get משום חיפוי . Tosafot suggests that, although this reason no longer applies, the date is still written in a get for other reasons. ROSH rejects these reasons as main motivations for this rabbinic ordinance; if R. Yohanan had been concerned about them, he would not have

cited חיפוי as the basis for the takanah. Nowadays, it is true, no longer applies, but since these other, "secondary" reasons do, we still require the date to be written on the get.

Alfasi does not discuss this point. RAMBAM (Hil. Gerushin, 1:24) cites the argument of חיפוי as the basis for the ordinance and does not consider whether this argument applies "nowadays". See Shiltei Giborim (to RIF, fol. 7b ff, n. 3) and Beit Yosef (EHE 127, 19a, וצריך), both of whom are aware of this additional dimension to the halakhic question: we must consider whether this takanah still holds legal force.

4.c. וכעל העיטור -- analyzes and rejects the contention of Sefer Ha-Itur that R. Yohanan actually follows the view ascribed to Resh Lakish and that at any rate the halakhah follows the Resh Lakish position on this matter. This is true whether one follows the opinion of RASHI or R. Tam.

Alfasi, fol. 8b, makes reference to an opinion (איכא מאן דאמר) that the halakhah follows Resh Lakish. ROSH, in this lengthy excursus, serves as a commentary upon that Alfasi statement.

4.d. ודלא כרש"י -- =Tos. Ha-ROSH, 17b, עד שעת נתינה . RASHI (17b, עד שעת נתינה) holds that in order to seize any of her property sold by her husband subsequent to her divorce, a woman must provide witnesses as to the time at which she received her get. Tos/ROSH reject this view on the basis of BM 19a: only in the case of a get which is lost must the woman provide such witnesses. In all other cases, it is assumed that the woman received the get on the day on which it was written (=the date inscribed on the get).

See Beit Yosef, EHE 127, 19a, צריך . RIF/RAMBAM do not deal with the question whether the date written on the get is assumed to be the date of the wife's receipt of it.

5.a. אי נמי -- =Tos. Ha-ROSH 17b, עד שעת נתינה ,

end. Because we may assume that a woman receives her get on the date inscribed in the document, a get may be written for the husband when his wife is not present. It is not a frequent occurrence that a husband will pre-date a divorce document; the husband will immediately give it to his wife or to an agent of receipt or an agent of transport. Therefore, should it happen that a get is not transmitted on the day it is written, the get is invalid. The only exception to this is the case where the get is handed to an agent of transport (shaliah le-holakhah) appointed by the husband to carry the document to the wife. The receipt of the get by the agent of transport causes the transaction to become public knowledge, which protects potential purchasers of the wife's property.

See TUR, EHE 127, 20a. Citing the above ruling in the name of R. Yizhak and his father, R. Asher, the TUR refers to RAMBAM, Hil. Gerushin 1:28, who seems to rule that in all cases where a get's delivery is delayed, the appearance of the date of the writing of the get would render the document invalid. Rather, a new get must be written which includes the date the get was given to the wife not the date on which the husband issued his original instruction. Karo, in Beit Yosef and Kesef Mishneh to the TUR and RAMBAM, argues that these two rulings do not conflict in that they deal with different rulings do not conflict in that they deal with different situations. The R. Yizhak/ROSH decision concerns a case where a get has already been written and whose delivery is delayed past the date inscribed upon it, RAMBAM, on the other hand, deals with a get which has not yet been written; the delay in question is the delay between the date on which the husband issues instructions to write the get and the date on which it is actually written. Moreover, says Karo, Asher rules according to the RAMBAM position in his

responsa, kelal 46, perat 14.

The BaH, and the Perishah (n. 12), however, point out that R. Yizhak and ROSH do differ from the RAMBAM on the subject of a get not delivered on the date of its writing. The former will accept the get if it was handed to a shaliah, whereas the latter will not accept the pre-dated get even in that case and [redacted] requires a new get be written. It should be noted that the responsum of R. Asher cited by Karo does not involve such an agent; it is therefore not surprising that ROSH requires that the date of transmission, rather than the date of the husband's instructions be inscribed upon the get. Had the husband given the document to an agent, the ROSH might very well have accepted that get as valid even though it included the original date of writing.

From the analysis of the TUR, the BaH and Perishah, it is clear that the position of R. Yizhak and ROSH does indeed differ essentially from that of the Mishneh Torah. The RAMBAM disqualifies any get delivered to the wife on a date subsequent to the date of the document; R. Yizhak and ROSH accept a "pre-dated get" if tranmitted through an agent.

5.b. ראי"ת לר"ל -- =Tos. Ha-ROSH 17a, ר"ש . This halakhah concerns a get me'uhar [redacted], a get delivered to the woman before the date inscribed upon it. Tosafot resolves a contradiction between our Gemara and Baba Batra 160a: a get me'uhar is not truly a get and the wife is not truly divorced until the date inscribed upon the get. For this reason, the husband may continue to collect proceeds of his wife's property until that date. This conflicts with the position of RABAD (see his hasagah to Mishneh Torah, Hil. Gerushin 1:25), who rules that the woman is indeed divorced on the basis of this get immediately upon her receipt of it; however, the husband continues to collect the proceeds of her property until the specified date. Apparently, says ROSH,

this would occur in a case where the woman agreed in advance to this peculiar arrangement. He concludes that it is best to be strict, following the viewpoint of Tosafot (which he now ascribes to R. Yizhak): the wife is not divorced until the date written upon the get.

RAMBAM, in Hil. Gerushin 1:25, states that a get me'uhar is invalid and cannot serve as an instrument of divorce. Hagahot Maimoniot, Gerushin 1, n. 10, points out that this ruling is at odds with the Tosafot position. TUR, EHE 127, 20a-b, cites the rulings of RABAD and R. Yizhak,[1] and he presents the RAMBAM as conflicting with those authorities and with ROSH. Karo, in Beit Yosef and Kesef Mishneh, defends RAMBAM on the basis of our Gemara, in which R. Yohanan and Resh Lakish both hold that a get me'uhar is invalid. He then buttresses this with a case from Yebamot 116a.[2] As for Baba Batra 160a, which holds that such a get is indeed valid, that case deals with a promissory note and not a document of divorce.

Alfasi is silent concerning get me'uhar; this entire matter is an issue addressed by later authorities. The position of RAMBAM opposes that of RABAD and that of Tosafot/ROSH.

6.a. אימר -- follows RIF and Talmud to עבדי משעת נתינה. RIF clearly follows Shmuel against Rav in this case, a decision which draws Asher's oppostion for several reasons.

1) It conflicts with a halakhic rule -- הלכהא כרב באיסורי the law follows Rav over Shmuel in cases of ritual law.[3]

2) Several "late" Amoraim agree with Rav's position, and the halakhah follows the opinion of the later sages.[4]

3) Some texts do read " הלכתא משעת כתיבה ", which would be an authoritative decision in favor of Shmuel's practice. RIF, however, does not have such a text, since he does not cite this statement.[5]

4) The accepted practice in France and Germany is to follow Rav's position.

RAMBAM, in Hil. Gerushin 11:19, follows RIF. See TUR, EHE 13, 24b; Beit Yosef cites the numerous authorities who agree with the Alfasi position. It is clear, nevertheless, that ROSH disputes Alfasi (whom he cites) and RAMBAM (whose name he does not mention).

6.b. איתמר -- follows RIF.

7. אמר שמואל -- follows RIF to עסוקין באותו ענין כשר. Shmuel states that a ketubah written during the day and signed after sundown is valid. Alfasi cites a case in which Rav, according to the Gemara's interpretation, adds a reservation to this ruling: the document is valid only if the legal proceedings surrounding it continued uninterrupted until its signing (עסוקין באותו ענין). It is possible, says ROSH, that Alfasi still follows the Shmuel position with regard to ketubah and the Rav position, supported by a beraita, in regard to other documents, although a responsum of Alfasi rules according to Rav.

At any rate, the beraita, ostensibly a comment upon the mishnah on 17a, implies that a get written during the day and signed after sundown is valid if the legal proceedings continued uninterrupted until the signing. ROSH cites the RAMBAM, Hil Gerushin 1:15, who rejects such a get; Asher pronounces RAMBAM's ruling as unreliable. See TUR, EHE 127, 20b. Beit Yosef ad loc. (= Kesef Mishneh to RAMBAM passage) explains that in RAMBAM's view, the beraita does not refer to gitin, but to other documents.[6] Hagahot Maimoniot, Gerushin 1, n. 30, presents the same reasoning and attributes the opposing view to R. Yizhak. See Tos. Ha-ROSH 17a, ריש , where it is clear that, according to the Tosafot tradition, the beraita on 18a is an explanation of the mishnah on 17a: i.e., it refers to gitin.

In this case, Asher suggests that Alfasi might be in agreement with him;

Maimonides, on the other hand, is specifically rejected.

8. אימר -- follows RIF to בקיום שטרות דעלמא .

= Tos. Ha-ROSH 18b, אמר . The Gemara cites an opinion that if ineligible witnesses sign at "the beginning" of a list of a number (such as ten) witnesses, the get is rendered pasul, lest the practice concerning get (following the opinion of R. Yohanan: "two of them serve as the actual witnesses, the rest as the fulfillment of the husband's stipulation", 18b) be extended to other documents. Yet in Baba Batra 162b, we read of a case where an ineligible witness signs immediately after the last line of the text, the document is valid as long as two eligible witnesses sign below him. Rather, says R. Tam, the prohibition against ineligible witnesses signing "at the beginning" is one of time, not place: such witnesses should not be the first to sign their names to the document, lest this give the impression that these ineligible witnesses constitute the "essential" testimony for the document. As long as eligible witnesses are the first to sign, others may add their names even on those lines in between the text and the signatures of the eligible witnesses.[7] See TUR, EHE 120, 6a-b.

RAMBAM interprets "at the beginning", at least in relation to get, as a matter of placement of the signatures; see Hil. Gerushin 9:27. His attitude is different concerning other documents; in Hil. Edut 5:6, he allows a document which, signed by many witnesses, carries the signature of an ineligible witness immediately following the text. Both Magid Mishneh (to Hil. Gerushin) and Kesef Mishneh (to Hil. Edut; at great length in Beit Yosef) explain that the seeming contradiction lies in the essential difference in function of witnesses to a get (where witnesses of transmission are the key to the document's validity) and other documents.

The "time-bound" interpretation of "at the beginning" is a feature of the

R. Tam/ROSH position; we do not find it in RAMBAM.

9.a. ההוא -- not in RIF. Asher rules that, inasmuch as R. Yehoshua b. Levy is in accord with Resh Lakish on this issue, the halakhah follows Resh Lakish and not R. Yohanan. R. Tam supports this rule with evidence from Tractate Megillah (see. Tos. Megillah, 27a, כוותיה).

ROSH states that Alfasi, who does not report the ruling of R. Yehoshua b. Levy, rules in accordance with R. Yohanan. RAMBAM (Hil. Gerushin 9:27) also follows R. Yohanan.

There may be a textual problem in this siman. TUR, EHE 120, 6a, does not record that his father preferred Resh Lakish. BaH (" אמר ") states that Asher rules according to R. Yohanan. Beit Yosef has our text, but he interprets Asher's explanation of RIF's position as an agreement with that position.

9.b. כתב רב האי -- Rav Hai Gaon[8] cites the dispute as to whether a predated get can be accepted as valid. The mishnah on 17a declares such a get invalid, but the opinion of R. Shimeon differs with this anonymous view. R. Yehoshua b. Levy (18b-19a) follows R. Shimeon's position in an emergency situation. ROSH, in 2:7, above, accepts a predated get as long as the legal proceedings surrounding that document continued without interruption until its signing. Here, he follows R. Shimeon, since the mishnah deals with "an emergency situation".

Alfasi, as noted in 9.a., above, does not cite the ruling of R. Yehoshua b. Levy. RAMBAM, Hil. Gerushin 1:25, holds that a predated get is invalid (see 2:7, above). See TUR, EHE 127, 19b, and Beit Yosef ad loc., who points out that in view of RIF and RAMBAM, the halakhah never follows R. Shimeon, even in the case of an emergency.

10. מתני' -- = RIF.

11. אימר -- essentially follows RIF, but adds to the Alfasi position of Shmuel, while Alfasi cites only the position of Rav. See TUR, EHE 130, 30a, and Beit Yosef, ראם , who cites a tradition that accepts both viewpoints. See also RITBA, Hidushim, 19a, אמר , and Meiri, pp. 68-69.

RAMBAM, Hil. Gerushin 1:23, cites the Shmuel position and does not refer to Rav. Karo follows him in Shulhan Arukh, EHE 130:16, with Isserles adding the Shmuel position. Meanwhile, R. Meir Ha-Levy Abulafia (RaMaH) favors the view of Rav over Shmuel.

ROSH perhaps cites the Shmuel view to indicate that both are acceptable. However, his son (Kizur Piskei Ha-ROSH, 2:11) sees Asher in agreement with Alfasi that Rav is the accepted viewpoint. Either way, ROSH disagrees with the halakhah as codified by RAMBAM.

12. רשאין -- follows RIF to ראינש אחרינא לא . The subject here is the beraita on the top of 19b (according to the Gemara's emended version). The anonymous view permits witnesses who cannot read to sign documents if those documents are first read aloud to them; R. Shimeon b. Gamliel restricts this permit to gitin and forbids it with all other documents. Alfasi cites a statement by Rava that the law follows R. Shimeon; ROSH points out that RIF omits the statement of Rav Gamda in the name of Rava that the law follows the anonymous view. There is evidence that Asher himself follows Rav Gamda's view. The Beit Yosef (TUR, HM 45, 80a, the BaH ad loc. and Derishah, n. 1, declare that ROSH states his agreement with Rav Gamda/ anonymous statement in the beraita. This would mean that all documents, not just divorces, may be signed by witnesses who cannot read if those documents are read aloud to them prior to their signature. Jacob b. Asher does rule in favor of this position, both in his own name (TUR, loc. cit.), and in the name

of his father, Asher (Kizur Piskei Ha-ROSH, 2:12). The difference between get and other documents, according to Asher, is that those other documents must be read by two people in the presence of the illiterate witness (or by a chief judge and his scribe). This, he contends, is Alfasi's interpretation of the beraita: whereas the anonymous view would allow one reader to read "other documents" to the illiterate witness, R. Shimeon requires two readers. As far as ROSH is concerned, he and Alfasi both agree on this point.

RAMBAM, in Hil. Malveh 24:5-6 and Hil. Gerushin 1:23, rejects this permit with respect to "other documents". Moreover, RAMBAM, unlike ROSH, requires two readers in the case of a get; he makes no distinction between the number of readers required in any case. Beit Yosef contends that this is the proper interpretation of Alfasi, as well; both the Magid Mishneh (Hil. Malveh) and RaN (to Alfasi, fol. 9b) seem to read RAMBAM and RIF in essential agreement. It is clear, however, that ROSH reads the Alfasi differently: in his view, he and the RIF disagree with the position of the RAMBAM. Here is a case where the Alfasi's methodology renders that work, in ROSH's opinion, superior to the Mishneh Torah. The RIF, inasmuch as he simply repeats the Gemara passage, can be interpreted in various ways just as the Gemara itself can be so interpreted. The Mishneh Torah, however, because it is divorced from the Talmudic material and presents only the pesak halakhah, cannot, in this case, be "correctly" or even differently interpreted.'

13. רב פפא -- a continuation of 2:12.

14. אמר -- = RIF.

15. ואמר -- not in RIF. See Tos.Ha-ROSH 19b, שמואל . Like the Alfasi, RAMBAM does not deal with this subject; see Beit Yosef, EHE 135, 38a, וכתב , for speculation as to why those authorities omit this material from their halakhic corpus.

16. אמר -- follows RIF to חלפיה קמ"ל .

= Tos. Ha-ROSH 19b, צריכי . The requirement that the get be read to the woman refers to the moment before the document is handed to her. However, this particular reading is not vital, since we do not suspect the husband of switching documents unless we have reason to believe he did so. The beraita on 19b involves such a case; there, the get was read before it was handed to the woman and before the husband took it back into his possession and lost it. Therefore, it is essential that the get be read by the witnesses of transmission after the woman has received it, as well as before. If the "after" reading was performed, the woman is legally divorced, even if the get was not read prior to her receipt of it. If the get was not read at all and is subsequently lost, another get is required. If the get is read before the woman receives it, and the husband thereupon takes the get back into his possession, she does not require another get.

RAMBAM, Hil. Gerushin 1:19, requires the get be read before the woman receives it; it is read following her receipt only if it was not read prior to the receipt. Hagahot Maimoniot, n. 5, points out the difference between the RAMBAM's position and that of Tosafot, quoted in the name of R. Yizhak. (See also our printed Tosafot, 19b, צריכי). In Hil. Gerushin 1:21, RAMBAM declares that if the get were not read and is subsequently lost, even if the husband contends that it was a valid get, the woman is safek megureshet: if she remarried on the strength of that get she must leave her new husband. This contradicts the position of TUR, EHE 135, 38a, which is apparently his interpretation of R. Asher, although Asher does not state whether this wife must leave her new husband; see Beit Yosef, 37b, and Korban Netanel, n. 300.

17. אמר -- follows Talmud. This section does not appear in our Alfasi. The halakhah does not differ from that in RAMBAM, Hil. Gerushin 3:4

and Hil. Tefilin 1:15.

18. ת"ר -- follows Talmud. This section does not appear in our Alfasi. The halakhah does not differ from that in RAMBAM, Hil. Gerushin 4:6 and 8:15.

19. ת"ר -- follows Talmud to דמעורי ; this section does not appear in RIF. = Tos. Ha-ROSH 20b, לא . ROSH cites the ruling of R. Yizhak b. Mordekhai that the letters on the get need not be surrounded by blank space, as is the case with tefilin and mezuzot. However, Tosafot/ROSH decide in favor of a more stringent standard. The letters of the get should not touch each other; if the ink from one letter runs into that of another, it can be removed, provided that it does not cover the inside portion of the other letter.

The position of RAMBAM, in Hil. Gerushin 4:10, is somewhat vague. Magid Mishneh, ad loc., citing RAMBAN on our Gemara, posits that Maimonides does not require that the letter of the text not touch each other. See also RaN, fol. 10a, who attributes this view to R. Yizhak and RAMBAM: if the letters of the get touch each other, the get is not rendered invalid. This is, of course, the same view as that of R. Yizhak b. Mordekhai. The Tosafot and ROSH, however, do mention the custom of stringency on this matter.[9] See TUR, EHE 125, 14a, and Beit Yosef ad loc.; the general view is that Maimonides does not demand this stringency even in theory.

20.a. בעי רמי בר חמא -- not in RIF; ROSH summarizes the sugya and adds explanatory notes taken from RASHI. The situation is this: a get is tatooed on the hand of a slave whom we know belongs to the husband. The wife now possesses the slave, and she testifies that the slave was given to her by her husband, in the presence of witnesses of transmission (עדי מסירה) as her document of divorce. These witnesses are not now present. Is the

woman indeed divorced? ROSH apparently accepts the answer of Resh Lakish: mere possession of a slave does not serve as evidence that the possessor legally acquired the slave from his owner. If so, the get is invalid, because the court must assume that the slave still legally belongs to the husband. This is the conclusion of R. Jacob b. Asher in Kizur Piskei Ha-ROSH 2:20 and TUR, EHE 124, 13a.

RAMBAM, Hil. Gerushin 4:4, rules that the wife is safek megureshet, as does RaMaH (cited in TUR, loc. cit.) Beit Yosef explains that the woman's possession of the slave creates a doubt as to legal ownership, even though the court must return the slave to the husband. The TUR, and quite probably the ROSH,[10] reason that since possession does not serve as evidence of ownership, there is no valid reason to cast doubt upon the ownership rights of the husband.

20.b. בעי רמי בר חמא -- not in RIF; ROSH summarizes sugya in the style of Alfasi (omitting all of the suggested answers to Rami's question except the final one) and adds an explanatory note from Tos. Ha-ROSH 20b, אשה . The halakhah is the same as that in Hil. Gerushin 4:5; see TUR, EHE 124, 13a.

20.c. א מר רבה -- not in RIF. Here, Asher merely recites the Gemara and its conclusion: if a slave holds a get, and the wife acquires ownership of the slave, she acquires the get only if the slave is fettered. Asher's actual ruling is found in Gitin 8:5, to 78a: the slave must be asleep as well as fettered. See Tos. Ha-ROSH 78a, והלכתא .[11]

RAMBAM, Hil. Gerushin 5:17, requires only that the slave be fettered for the get to be transferred to the wife's ownership. The TUR had a different text of RAMBAM in which the halakhah is the same as that of Tosafot/ROSH; see Beit Yosef, EHE 137, 44a and Kesef Mishneh to Hil. Gerushin 5:17.

20.d. ואמר רכה -- not in RIF. ROSH rules that the husband must own the courtyard that he transfers to the wife's ownership. If the courtyard belongs to another person and that person transfers it to the wife, the get within the courtyard is not a valid document of divorce. See RASHI, 21a, חצרה הבאה לאחר מכאן .

RAMBAM, Hil. Gerushin 5:18, does not include the provision that the courtyard must belong to the husband at the time he places the get within it. See TUR, EHE 139, 44a. While the RAMBAM passage may be read so as to agree with the halakhah of ROSH and TUR, this detail makes clear a rule that is left vague in the Mishneh Torah.

21.-22. על -- follows RIF to קציצה ונחינה . = Tos. Ha-ROSH 21b, יצא . The Talmud, which Alfasi simply repeats, concludes that a get must not be written on an object, such as the horn of an animal or the leaf of a tree which is then detached. The rule, derived midrashically from Deuteronomy 24:1, is that the object on which the get is written must be lacking in two and only two positive acts: writing (the get) and giving (the get to the wife). If a third act, such as detaching, must be performed, the object is invalid for the purpose of get. RAMBAM repeats this rule in Hil. Gerushin 1:6.

RASHBAM limits this rule to objects which must be detached from animals or from objects attached to the ground. This would permit a get to be written on the leaf of a potted plant which is subsequently detached from the plant. RASHI, according to this report, permitted a get to be written on a large parchment which was subsequently cut down to size. The Halakhot Gedolot (Hil. Gitin, 77c, Warsaw ed.) and R. Tam, however, hold that a get is invalid if written on any object which is subsequently cut, trimmed or detached. On the other hand, even in the view of R. Tam this would apply only if the cutting or

trimming were on a large scale.[12] If the get were written on a large parchment and then a small amount of the parchment is trimmed for cosmetic purposes, the get would be valid even according to R. Tam. See TUR, EHE 124, 12a.

It is vital to note that the various distinctions within this rubric drawn by RASHBAM, R. Tam and Tosafot/ROSH stem from certain Talmudic passages cited in Tosafot (Gitin 21b-22a, 72b, 17b, and Hulin 89a) as well as from precedents established in the Franco-German halakhic tradition. This material combines to create what we might call a new halakhic context, which demands that distinctions be drawn within the general rule to cover challenges that arise from comparison of our sugya with other passages. By contrast, the unadorned general rule that we find in RIF/RAMBAM cannot answer the questions and challenges that flow from the Tosafot analysis. In a real sense, the RIF/RAMBAM tradition becomes irrelevant to subsequent halakhic debate, since it does not and cannot deal with these new questions. For example, the Yam shel Shelomo, Gitin 2:28, does not mention them at all, and Beit Yosef (to TUR loc. cit.), while citing RAMBAM as accepting the general rule, must proceed to a lengthy analysis of the issues and ramifications in which he never mentions RAMBAM again.

23.a. מתני' -- adds explanation for the prohibition against writing the get on an object attached to the ground. Such an object is מחוסר קציצה : it must be detached before it can be given to the woman, whereas the halakhah allows only the two acts of writing and giving be done to the get. This prohibition applies, says ROSH, even if the attached object is not detached but is given to the woman as is after the get has been written upon it. See TUR, EHE 124, 12b.

Compare with RAMBAM, Hil. Gerushin 1:6-7. He forbids the use of an

attached object for the writing of a get because such a get would have to be detached after it has been written. One can read RAMBAM as permitting the use of an attached object if that object is given as is to the woman following the writing of the get. ROSH presents this halakhah in language that is free from this ambiguity. For this reason, perhaps, Beit Yosef does not mention RAMBAM in his commentary to the TUR passage; perhaps for this reason, as well, he uses the language of ROSH/TUR on this subject in SA EHE 124:4 (and see Bi'ur Ha-GRA, n. 14).

23.b. כתבו על המחובר -- follows Mishnah/RIF to וחכמים מכשירים . = Tos. Ha-ROSH 22a, לא . The prohibition by the mishnah against erasures in the get applies only if the signatures are written over an erasure while the text of the get is not. This would allow the husband subsequently to make alterations in the stipulations of the get without being detected. If both text and signatures are written over erasures, however, the get is valid, since it is easy to detect subsequent attempts to make erasures in the text. This is an adjustment to RASHI's understanding of the mishnah (21b, נ"ר מחוק).

This observation of Tosafot is taken from Baba Batra 164a and is cited as halakhah by RAMBAM in Hil. Malveh 27:9, as well as by TUR, HM 45, 83a, in relation to documents in general. ROSH applies that rule here, to stress that the law concerning erasures in other documents applies to get as well.

23.c. גמ' -- follows RIF to ונתנו לה כשר . Adds a section of Gemara omitted by RIF.

24.a. וחכמים -- follows RIf to עדי מסירה כרתי . = Tos. Ha-ROSH 22a, מאן . RASHI 22b, ר' אלעזר היא , states that, according to the position of R. Elazar, a woman who seeks to marry on the basis of a get must bring to the beit din the witnesses who saw

her receive the get; this rule, according to Tosafot, applies only if the get is written on a surface which allows for forgery. If the text is written on a "forgery-proof" surface, she need not supply these witnesses; in such a case, the signatures on the get are sufficient proof.

RAMBAM, Hil Gerushin 4:2, rules that a get may be written on material which allows for forgery, provided that the get is handed to the woman in the presence of witnesses of transmission. He does not say that if the get is written on material that guards against forgery, the woman may remarry without producing those witnesses; see TUR, EHE 124, 11b-12a. Here, R. Asher makes clear a point of halakhah which is ambiguous in the Mishneh Torah.

24.b. ואמר ר"א -- not in RIF/RAMBAM. See Magid Mishneh to Hil. Gerushin 4:2, and Beit Yosef EHE 124, 11b, who argue that both RIF and RAMBAM follow the view of R. Yohanan, as does ROSH.

24.c. ואמר רבי אלעזר -- presents the same halakhah as RIF in an expanded form; = Tos. Ha-ROSH 22b, אכל . ROSH's analysis here reflects the disagreement of R. Yizhak with RASHI's explanation of this law. ROSH points out that R. Hananel rules differently, but that ruling is rejected.

RAMBAM, Hil. Malveh ve-Loveh 27:1, presents the same position. TUR, HM 42, 72b, presents the law in the language of the ROSH. The difference between R. Asher on the one hand and RIF/RAMBAM on the other lies in the explanation offered by ROSH: without this explanation, one might think the rule does not apply in certain cases.

24.d. ועוד -- = Tos. Ha-ROSH 22b, ור' יוחנן . This note, concerning R. Yohanan's position with respect to other documents, is not a statement of halakhah, since in 24.c. we are told that the halakhah with respect to other documents follows R. Elazar.

25.a. גמ' – מתנ' -- expands on RIF on the basis of Tos. Ha-ROSH 22b, והא , and 23a, והתניא . Two positions are cited in Tosafot regarding the permit to write the get. The first position holds that the Gemara's refutation and defense on 22b-23a are in accord with the view of R. Elazar; since the only objection to these persons writing the get is that they may not know that the get is to be written for the specific woman to be divorced, we cannot introduce the further objection that the writer of the get be legally competent to serve as an agent. Thus, according to R. Elazar, "agency" is not a requirement for the writer, and a slave, who cannot legally serve as an agent, may nonetheless write a valid get. The second position, that of R. Yizhak, regards the Gemara's argument as stemming from the position of R. Meir. In this view, R. Elazar would indeed require that the writer of a get be legally competent to serve as an agent; this would disqualify a slave from writing a valid get. ROSH adds that the RAMBAM (Hil. Gerushin 3:15-16) also disqualifies a slave for the purpose of writing a get.

TUR, EHE 123, 10b-11a, reports the same ruling. It is important to note, however, that RAMBAM disqualifies the slave because he is not subject to the laws of marriage and divorce, while R. Yizhak disqualifies him on the basis that he cannot serve as an agent. However, see 23b: agency is denied to a slave with respect to get precisely because he is not subject to the laws of marriage.

25.b. אמר רב יהודה -- begins with an explanation of Alfasi's ruling. The statements of Rav Huna and Shmuel, in the view of Alfasi, are both halakhically authoritative: a get written by a deaf-mute, an insane person or a minor is valid only if the writing is supervised by a person who sees to it that the document is written for the woman in question

(=Rav Huna); in addition, this permit applies only to the writing of the tofes, the fixed, "standard" text of the get, but not to the toref, the part of the get which contains the names, date, place, etc. Thus, a non-Jew, who writes a get on his own opinion and not necessarily for the specific woman in question, is never allowed to write even the tofes of a get; moreover, in the case of the deaf-mute, the insane person and the minor, a tofes written by them without supervision is invalid. ROSH adds that RAMBAM agrees (Hil. Gerushin 3:18) that the three latter individuals may write the tofes only when under supervision.

The interpretation of the relationship between the statements of Rav Huna and Shmuel is a complex problem in the literature; see Beit Yosef, EHE 123, 10b. RAMBAM and ROSH apparently agree that both statements are authoritative. There may be disagreement, however, on the permit for the deaf-mute, etc. to write the tofes. ROSH's words indicate that should one of these individuals write a tofes without supervision, the get is invalid under all circumstances, whereas RAMBAM would allow this writing on an after-the-fact (bedi'avad) basis. In other words, RAMBAM follows Rav Huna lekhathilah and Shmuel bed'avad; as long as the toref is left blank, the unsupervised writing of these individuals is acceptable after the fact. See Lehem Mishneh, Hil. Gerushin 3:15 in his critique of Beit Yosef. The TUR recognizes that this is RAMBAM's position; Beit Yosef writes that it is unclear from the TUR's words whether ROSH would disqualify this get even after-the-fact.

25.c. מתנ' -גמ' -- follows RIF to כל...רות וסיפא שתחילתו .

The mishnah on 23a does not disqualify the slave from serving as an agent (for either the husband or the wife) in the transport of a get. The statement of R. Yohanan, cited by RIF, specifically disqualifies the slave from serving as the wife's agent. RASHI, 23a, לקבל , points out that this rule

applies as well to the case of the husband's agent. ROSH also includes R. Tam's explanation why the mishnah deals specifically with the idolator but not with the slave; see Tos. Ha-ROSH 23b, אין .

RAMBAM, Hil. Gerushin 6:6, rules as does RASHI: the slave is disqualified as an agent for either the husband or the wife. This reflects a disagreement stretching back at least to the days of R. Yosef ibn Migash (11th-12th c.), who argued that a distinction should be made in this case between agency on behalf of the husband and agency on behalf of the wife. See Magid Mishneh, ad loc., RaN, fol. 12a, and TUR, EHE 141, 50a.

26. גדלן -- ROSH continues the list of those qualified and not qualified to serve as agents in transporting the get. Those disqualified at rabbinic law may serve as agents, while those disqualified under the law of the Torah may not. If a person is disqualified as an agent under Toraitic law yet repents of his sin during the time between his receipt of the get and its transmission to the husband or wife, R. Meir Ha-Levy Abulafia rules that the get is valid. This is correct, says ROSH, because the only reason we would disqualify this agent is that we suspect him, as a sinner, of lying when he says: "This get was written and signed in my presence." As a repentant sinner, he removes this suspicion from himself. For this reason, as well, we accept as valid a get whose signatures have been validated, even if that get is transported by an unrepentant sinner, since the fear that the agent may lie is irrelevant in this case. This, says ROSH, contradicts the ruling of RAMBAM in Hil. Gerushin 6:7; there, we read that a get transported by an unrepentant sinner is pasul, even if it is validated by the beit din. Asher remarks that RABaD criticizes this ruling of the Mishneh Torah.

This is also the view of a number of other poskim; see Magid Mishneh, ad loc., and TUR, EHE 141, 50b, and Beit Yosef, ad loc. Moreover, RAMBAM does

not discuss any possible halakhic distinctions between the case of such an agent in Israel and a case outside of Israel; the possibility that such an agent will lie does not apply to Israel, where he need not make the statement "it was written and signed in my presence." This distinction, according to Tur, Beit Yosef and BaH, influences the opinions of RaMaH and ROSH.

27. כתב -- ROSH cites Halakhot Gedolot (ed. Hildesheimer, vol. II, p. 165)[13] on the issue of a non-Jew serving as an agent for transport of the get, an act forbidden by the mishnah on 23a. Rav Haninai Ga'on is asked the following question: suppose the get is wrapped in a package and handed to the non-Jew, who is then made an agent for the delivery of the package--but not the get itself. The gaon responds that this, too, is forbidden, inasmuch as the non-Jew may not serve as an agent with respect to get. Halakhot Gedolot adds that if a get is transported by a non-Jew to a Jew who then hands it to the wife in the presence of witnesses of transmission, the woman should not be allowed to remarry on the strength of that get (although, if after the fact she does remarry, we do not demand that she leave her new husband). ROSH dissents. True, a husband may not appoint a non-Jew as an agent who subsequently appoints a Jew in his stead. If, however, the husband gives the get to a non-Jew who then hands it to a Jew who has been appointed in writing as the husband's sole agent, there is no reason to disqualify the document. This, indeed, is the practice in Germany and France, based upon the ruling of R. Tam; see Sefer Ha-Yashar, Hiddushim, no. 756.[14]

See TUR, EHE 141, 50b, and Beit Yosef ad loc. The geonic ruling is found in a number of sources, including RASHBA, Hiddushim to Gitin 23a, and RaN, fol. 11b. These sources do not, however, present the Franco-German practice; neither is it found in the RIF or the RAMBAM.

28. אמר -- follows RIF.

29. מתנ' -גמ' -- follows RIF.

NOTES TO GITIN, CHAPTER TWO

[1]According to the emendation of Perishah, n. 14.

[2]The proof from Yebamot is cited only in Kesef Mishneh, not in Beit Yosef. This analysis of RAMBAM's position is taken almost entirely from RaN, fol. 8a, אמר . RaN rejects the proof from Yebamot; perhaps, for this reason, Karo omits reference to it in Beit Yosef. At any rate, this examples demonstrates the extent to which Karo the "arms-bearer" to the RAMBAM, relies on the pioneering work of R. Nissim and his school (including his teachers) in the critical study and analysis of the Mishneh Torah.

[3]See the sources included in Yad Malakhi, nos. 147-151.

[4]Concerning this rule, see M. Elon, Ha-Mishpat Ha-Ivri, Jerusalem, Magnes, 1973, pp. 233 ff., as well as the critique of I. Ta-Shema, "Hilkhata ke-vatraei", Shenaton Ha-Mishpat Ha-Ivri, Jerusalem, Institute for Research in Jewish Law, v. 6-7, 1979-1980, pp. 405-423. Asher's text differs from the standard printed editions of the Talmud, whose text records that Rav Ashi follows Shmuel's view. See M. Feldblum, Dikdukei Soferim, Ms. Gitin, New York, Horeb, 1966, to 18a: no other known readings agree with Asher's version, which reads Assi in place of Ashi.

[5]Our text, however, does read והלכתא משעת כתיבה, as does the printed text of Tosafot RYD. See Feldblum ad loc.: several MSS preserve, either in the text or in the margins, the reading הלכתא משעת נתינה, following Rav. These readings are apparently later accretions, inserted by copyists in accordance with one or the other halakhic tradition. Yerushalmi Yeb. 4:11 follows Shmuel, a fact which Hagahot Maimoniot (Hil. Gerushin 11, n. 6) and Beit Yosef (EHE 13, 24b) introduce into the debate.

[6]Tiferet Shmuel, n. 3, explains that. to RAMBAM, the beraita refers specifically to ketubah and not to other documents.

[7]Note that our printed Tosafot (18a, אמרי) records that R. Tam later retreated from this position. See RASHA, Hiddushim, 18b, and RaN, fol. 9a. ROSH and TUR follow R. Tam's original position; see Yam shel Shelomo, Gitin 2:10.

[8]Ozar Ha-Geonim, Gitin, p. 31, no. 71. See also Hagahot Maimoniot, Hil. Gerushin 1, n. 50.

[9]See Resp. Ha-ROSH 45:13, where the stringent view is defined as an Ashkenazic custom, a fact recorded as well in Sefer Mizvot Ha-Gadol, Pos. Comm. 173.

[10]See Korban Netanel, n. 5.

[11]Tos. Ha-ROSH, 21a, הלכתא , indicates that Asher compiled his Tosafot with a view towards his subsequent Pesakim. While our printed Tosafot discuss כפות וישן here, ROSH leaves the subject for his Tosafot to 78a and its corresponding pesak, 8:5.

[12]See RASHBA, Hiddushim, 21b, who suggests that Halakhot Gedolot would agree with this modification of the R. Tam ruling.

[13]ROSH apparently uses Or Zaru'a, I, no. 724 as his source of the quotation from Halakhot Gedolot; see Hildesheimer's notes ad loc.

[14]The text of Sefer Ha-Yashar is of poor quality here, as is generally the case; see Urbach, Ba'alei Ha-Tosafot, p. 93.

C. Tractate Gitin, Chapter Three

1.a. כל הגט -- follows RIF to אלא אחרון בלבד .

1.b. בעא מיניה רב אושעיא -- adds a section of Gemara omitted from RIF. From this section, ROSH concludes that the rule אין כריכה applies to a case of תולה כדעת אחרים as well as תולה כדעת עצמו . See TUR, EHE 131, 32b. RAMBAM, Hil. Gerushin 3:4, applies the rule only in the case of תולה כדעת עצמו . Beit Yosef, וכהא , as well as Lehem Mishneh to Hil. Gerushin 3:4, argues that RAMBAM agrees that the rule also applies to תולה כדעת אחרים . This conclusion is stated in RaN, fol. 12b-13a, and Tos. Ha-ROSH, 25a, לאיזו , which R. Asher uses as the source of his ruling.

ROSH makes clear a ruling which is not stated at all in the Alfasi or the RAMBAM, although the ruling is derived from those poskim by various commentators. The fact remains that it must be derived; see SA, EHE 131:4, and Be'er Ha-Golah notes 7 and 8. RIF/RAMBAM, left to themselves, do not present this halakhah with sufficient clarity; subsequent authorities, such as ROSH, must provide that clarification.

2.a. מתנ' -- see Tos. Ha-ROSH 26a, שטרות . RASHI (26a, לא לכתוב) believes that R. Elazar forbids the pre-writing of the toref of all documents, while allowing such preparation for the tofes (of any document except a get of divorce). The Tosafot position, however, holds that R. Elazar decreed with respect to bills of divorce only; pre-preparation is allowed with all other documents, even if the loan or sale has not yet been transacted.

All of this seems to presume that Tosafot/ROSH, like Alfasi, rule in accordance with the R. Elazar position on gitin.[1] RAMBAM, Hil. Gerushin 3:7 on the other hand, follows the ruling of the anonymous tanna in the mishnah on 26a, allowing the scribe to write the tofes of the get before receiving

specific instructions from a husband who seeks to divorce his wife. Explanations as to why RAMBAM departs from the Alfasi position are offered by RaN, fol. 13a, and Yam shel Shelomo, Gitin 3:3.

2.b. יש מפרשין -- ROSH continues to define the various shadings of the R. Elazar position. Some authorities would invalidate a pre-prepared get only on a lekhathilah basis: i.e., from the start. If, however, such a pre-prepared tofes is in fact (bedi'avad) used in a divorce, it is valid. RAMBAM rules that even bedi'avad such a pre-prepared tofes is invalid.

This version of RAMBAM conflicts with our text of the Mishneh Torah, Hil. Gerushin 3:7, which, as mentioned above, adopts the anonymous view in the mishnah and allows, even lekhathilah, the scribe to prepare tofesim for subsequent use, provided that he leaves space in order to write the toref for the specific divorce action in question. Karo (Kesef Mishneh ad loc. and Beit Yosef, EHE 131, ורע) alludes to the existence of varying texts of the Mishneh Torah. According to one text, quoted in Kesef Mishneh and attested to by the Meiri (Beit Ha-Behirah, Gitin, p. 102), the RAMBAM indeed rules that a pre-prepared tofes is pasul.[2] Our text, on the other hand, agrees with the version of RASHBA (Hiddushin, 23a), RaN (fol. 13a, הלכך) and TUR, EHE 131, 32a (although there are some problems with the TUR's reading as well; see the commentaries ad loc.). If our version of RAMBAM is correct, we might well follow the emendation of R. Asher suggested by Beit Yosef (loc. cit., צריך) and read RAMBAN instead of RAMBAM; such an emendation is supported by what we learn from TUR and R. Yeruham[3] concerning the position of Nahmanides on this subject.

Thus, we have three possibilities concerning the position of RAMBAM:

1) The rabbis permit the scribe to pre-prepare tofesim of gitin (our text of Mishneh Torah; =RaN, RASHBA, TUR, Beit Yosef).

2) A pre-written tofes is pasul (=R. Yeruham, variants preserved in Kesef Mishneh and Meiri).

3) A pre-written tofes is pasul even bedi'avad (our text of ROSH).

Clearly, 3) is impossible; the authorities (R. Yeruham and TUR) ascribe this view to RAMBAN. If as is probable, our printed text of RAMBAM (=1)) is correct, then we have a major disagreement between RAMBAM and ROSH, who invalidates the tofes on a lekhathilah basis but will accept it bedi'avad (although he prefers that another tofes be written, if possible). If 2) is correct, then the difference between the two authorities is not as great. Yet here, too, there are problems. According to this version, we do not know if RAMBAM would accept the tofes as valid bedi'avad. In this version, RAMBAM does not advance beyond the decree of R. Elazar, while ROSH discusses whether this decree applies in bedi'avad as well as in lekhathilah situations.

In summary, the relation of ROSH to RAMBAM here depends on the reading of the Mishneh Torah which we prefer. If we prefer reading 1), then ROSH clearly contradicts the RAMBAM. If we choose reading 2), ROSH ignores the Mishneh Torah in order to discuss a point of halakhah which the RAMBAM does not mention at all.

3. אמר אלפסי -- The crucial question relating to this halakhah: what is Alfasi's precise ruling? An examination of the Alfasi on this point, therefore, is a prerequisite to an understanding of R. Asher's ruling.

The mishnah on 27a states that a get lost by an agent of transmission is a valid instrument of divorce if it is found "immediately". The Talmud presents a mishnah from Baba Mezia 18a[4] which implies that, if the husband gave explicit instructions to the agent to "give" this get to his wife, should that get be lost and subsequently found, even after an extended period of time, it is a valid instrument of divorce. Rabah resolves the conflict: our mishnah, unlike that in Baba Mezia, deals with a case where we suspect that the "found" get in

fact belongs to another husband and is not the get addressed to the wife in question. According to Rabah, this suspicion exists if the following two factors are present:

1) if the get is discovered in a place where caravans frequently travel (X);
2) if we know that two men from the city of the get's origin bear the name of the husband (Y).[5]

The Talmud then presents the view of R. Zeira, of which there are two interpretations. The first holds that he agrees with Rabah: we do not return the get to the husband if both factors X and Y are present; the second states that we do not return the get to the husband even if only factor X exists, whether or not we know of another man in that city whose name is the same as that of the husband. According to this second interpretation (לישנא בתרא), R. Zeira is in disagreement with Rabah.

R. Yermiah rules that a "found" get is valid, even after an extended period of time, if the witnesses who signed it testify that they signed only one get for a man by this name. Rav Ashi states that a "found" get is valid if either the agent or the witnesses can identify it according to a specific characteristic of the document.

Alfasi rules here (fol. 13b) and in Baba Mezia (fol. 10b) according to the second interpretation of R. Zeira: a "found" get is invalid if it is discovered in a place where caravans frequently travel, even if no other person bearing the husband's name is known to live in the city of the get's origin. In other words, RIF validates the get whenever factor X is present, regardless of factor Y. We may, however, accept this get if the requirements set forth by either R. Yermiah or Rav Ashi are met. This ruling conflicts with that of Halakhot Gedolot (Warsaw ed., 78d), which favors the Rabah position: the get is invalid only if both factors are present. It also contradicts the more

extreme position later adopted by R. Shelomo Luria: Yam shel Shelomo, Gitin 3:5. R. Yermiah and Rav Ashi rule independently of Rabah and R. Zeira, and any "found" get must meet their requirements in order to be accepted, regardless of either factor X or factor Y.[6]

Poskim subsequent to the Alfasi begin to forge a separate halakhic tradition on this sugya. It is clear that R. Zeira, according to the authoritative second interpretation of his ruling, invalidates a get if factor X (caravans) is present, regardless of factor Y (similar names). These poskim extend this ruling to cover the opposite case: R. Zeira would also invalidate such a get if factor Y is present, regardless of factor X. Does Alfasi himself hold the get to be invalid if "Y but not X"? RABAD (Hasagot to Alfasi, fol. 13b) suggests that RIF ought to accept "Y if not X", since the existence of two men with the same name is a more persuasive reason to cast doubt upon the get than the mere fact that caravans frequently travel near the place where the get was found. This suggested interpretation, however, is contradicted by Alfasi's ruling in Yebamot (fol. 43a) which apparently follows the Rabah position in our sugya. RAMBAN (Sefer Ha-Zekhut, fol. 13b-14a) answers this apparent contradiction in the RIF and states that Alfasi rules strictly in both cases: the get is invalid when either factor X or Y is present. This reading of Alfasi is shared by RITbA (Hiddushim to Gitin, 27a) as well as RaN (fol. 14a), who writes that while Alfasi does not state this clearly, it is possible to interpret him this way based upon his treatment of the beraita on 27b.

In addition to the interpretations of these authorities, there is an opposing view, represented by Magid Mishneh to Hil. Gerushin 3:9. According to this view, RIF invalidates this get if factor X is present, but he accepts it if factor Y is present in the absence of factor X. The beraita on 27b, which discusses the definition of "immediately" in the mishnah, assumes a case where

caravans travel frequently. Thus, Rabah and R. Zeira dispute only concerning the length of time involved when we know that two persons bear the name of the husband; in either case, we assume that factor X exists as well. We need not extend this stringency to cover the case where factor Y exists in the absence of factor X. The Magid states that RAMBAM, Hil. Gerushin 3:9-11, rules this way. The RaN, fol. 14a, agrees with this interpretation of RAMBAM, although he argues that RIF might in fact extend the stringency to cover the case of "Y if not X". The RASHBA, on the other hand, in his Hiddushim to our sugya, explains both RIF and RAMBAM as invalidating the get in a case of either X or Y, an explanation at odds with that of Magid Mishneh and RaN.

R. Asher holds with the tradition that invalidates the get if either factor X or Y is present. He reasons that the existence of two men by the same name is a more serious challenge to the get than the fact that caravans frequently pass by the place where the get was found; in this respect ROSH's argument resembles that of RABAD. He resolves the contradiction between the two Alfasi rulings by declaring that the case in Yebamot 115a required special leniency (=Rabah's position here), inasmuch as it dealt with עדות אישה, testimony concerning the husband's death necessary to allow a wife to remarry.[7]

The above mentioned analysis cannot pretend to offer an adequate summary of the complexities of this sugya, but the outlines of the halakhic traditions concerning it are clear. RIF's position concerning the acceptability of a get found in a place where caravans do not frequently travel but where two men from the husband's city bear the name of the husband is vague. The RABaD suggests that Alfasi invalidates a get when either factor is present; RAMBAN and RASHBA clearly attribute this interpretation to Alfasi. The Magid Mishneh, however, rejects this view and holds that RIF would accept a get if factor Y is present in the absence of factor X. RAMBAM, like Alfasi, is unclear on this point;

while RASHBA and Beit Yosef (EHE 132, 34a) argue that he invalidates the get if either factor exists, Magid Mishneh and RaN conclude that, for RAMBAM, only factor X determines the validity of the get, regardless of factor Y. The Meiri (Beit Ha-Behirah, Gitin, p. 107) writes simply that RAMBAM did not clarify his stand sufficiently and refers us to the hasagah of RABAD to Hil. Gerushin 3:10. Asher stands in the long line of poskim who sense an ambiguity in the Alfasi (and in the RAMBAM) and who provide clarification of a point left vague in RIF.

4. מחנ -- follows RIF.

5.a. מחנ -- Alfasi quotes the mishnah on 28b and then the beraita on 29a; ROSH adds first a passage from Yerushalmi Gitin 1:4 (45a) which modifies the statement of R. Elazar b. Parta concerning a city under siege. If the city is besieged by an army of the same kingdom, the citizens within the walls are regarded as "perhaps alive, perhaps dead" for legal purposes. If, however, the city is besieged by an enemy nation, we presume that the enemy has come for booty; the citizens are presumed to be alive until we receive further evidence.

This seems to be the plain meaning of the Yerushalmi passage; see Korban Ha-Eidah ad loc. and Pnei Mosheh to the parallel in Yer, Ketubot 2:9.[8] The TUR, however, in EHE 141, 95b-96a, holds that the citizens are presumed "perhaps alive, perhaps dead" if besieged by an enemy force. The Yerushalmi passage, in fact, deals with two separate matters: in Gitin, it covers our present concern, while in Ketubot it is cited to provide an answer to the question whether the women of the city are presumed to have been raped. RAMBAM, Hil. Isurei Bi'ah 18:29, rules concerning the question of rape, basing his ruling, apparently, upon the Bavli parallel in Ketubot 27b. He does not cite this Yerushalmi (or Bavli) passage on the subject of the alive-or-dead status of residents of a besieged city. Beit Yosef ad loc. expresses surprise that RIF and RAMBAM do not

cite this Yerushalmi passage on this subject.

RASHBA, in his Hiddushim to Gitin 28b, cites this Yerushalmi passage, as well as the section of Talmud which Alfasi omits (see below, 5.b.). This allows us to speculate that ROSH used RASHBA as a source for this halakhah, or that the two of them used a common source.

5.b. גמ׳ -- ROSH quotes the section of Talmud missing from Alfasi. There are two versions of the statement of Rav Yosef. According to the first version, a person who has received a death sentence from a Jewish court is presumed "perhaps alive, perhaps dead" until we hear otherwise. If the death sentence is pronounced by a Gentile court, however, we presume the person dead. The second version of the statement reverses these presumptions. RIF does quote a beraita from 29a, but he does not clearly indicate whether he follows the first or second version of Rav Yosef's ruling. ROSH declares that Alfasi must accept the first version, since the beraita, which at first glance seems to support the second version, actually does not deal with the subject of judicial execution. Hence the stringency of "perhaps alive, perhaps dead", which the beraita requires when a Gentile court reports the death of an individual, is not extended to the case of execution; moreover, the beraita actually excludes the possibility of applying that stringency to a Gentile court in such a case.

RAMBAM, Hil. Gerushin 6:29, follows the second version of Rav Yosef's statement: the individual is presumed "perhaps alive, perhaps dead" if condemned to death by a Gentile court; see Magid Mishneh ad loc. Other poskim would extend the stringency to both cases; see RaMaH, cited by TUR, EHE 141, 96a, and RASHBA, Hiddushim, who explains that inasmuch as the halakhah has not been clearly decided, we must apply the stringent rule in both cases.

The uniqueness of ROSH's stand on this point can be seen from a look at two other authorities. Meiri, Beit Ha-Behirah, Gitin, pp. 114-115, records that

some poskim follow the second version (לישנא כתרא) of Rav Yosef's statement, while others extend the stringency to both cases; he does not mention any authorities who take up the position ultimate expounded by R. Asher. Shelomo Luria (Yam shel Shelomo, Gitin 3:9) argues that ROSH is incorrect in his assessment of Alfasi's position. Alfasi usually follows לישנא כתרא in any case where two versions of a statement are preserved by the Talmud. Furthermore, the RAMBAM, "the disciple" of Alfasi, himself prefers לישנא כתרא .

6. מתנ -- ROSH supplements the Alfasi with other material from Talmud. He also comments upon the Alfasi's ruling and explains it.

7. ואם אכר לו -- follows RIF to והלכתא כר' יוחנן . The mishnah on 29a reads as follows: "...and if (the husband) says (to the agent): 'Take for me from (my wife) a certain object', he should not send it in the hand of another." Various interpretations of this mishnah stem from the dispute between Reish Lakish and R. Yohanan on 29a-b. The halakhah follows R. Yohanan, who interprets the mishnah as having to do with the order of the legal transaction. The husband appoints an agent to deliver a get to his wife and to retrieve from her a certain object. If the husband instructs the agent to take the object and only then hand the get to the wife, should the agent thereupon change the order of the transaction and hand over the get first, the document is invalid: the agent has violated the terms of his agency. This applies even more so to a second agent subsequently appointed by the first agent. The function of the second agent ("the hand of another") serves as the focal point of a disagreement among the later commentators. RASHI (various diburim, especially 29b, ואזל) holds that the husband does not really care whether the get and the object are carried by the first agent or the second agent. He is concerned rather that the get not be handed to his wife until she

has surrendered the object to the agent; the object must not be in "the hand of another" (i.e., in his wife's possession; see RaN, fol. 14b). Thus, R. Yohanan would certainly invalidate the get in the case of the appointment of a second agent, for there is a greater possibility that a second agent will incorrectly fulfill the husband's instructions. Tos. Ha-ROSH (29a, כיי) disputes this interpretation. The mishnah makes clear that the husband's concern is that the object in question be carried by his agent and not by agents of that agent. The get is invalid if it reaches the wife before the first agent receives the object, even if a second agent receives the object and the woman subsequently takes the get from the first agent, who then receives the object from the second agent. The husband's instructions to his agent are clear: that agent (and not any agent whom he may subsequently appoint) must receive the object before the wife takes possession of the get.

RAMBAM, Hil. Gerushin 9:35, follows the RASHI interpretation. The husband is concerned only about the order of the transaction; therefore, the first agent should not send the get to the wife by means of another agent (presumably because the second agent will depart from the order of transaction). If a second agent does carry the get, and if he follows the order of transaction given to the first agent (take the object and then deliver the get), the get is valid. This directly contradicts the Tos/ROSH position, as is stressed by TUR, EHE 141, 92b. The husband is concerned that the object be in the possession of his agent before the wife receives the get.

8.a. מתני' -- follows RIF. The agent who transports a get may, if he becomes ill or is prevented by duress, from fulfilling his agency, appoint another agent. That agent may appoint a subsequent agent as well, should he himself become ill or fall victim to אונס , and this rule applies to all subsequent agent. RIF and ROSH require that the factor of אונס be present

in order for any of these agents to appoint a successor, as does RAMBAM (Hil. Gerushin 7:4) and RAMBAM (see Magid Mishneh ad loc.). This ruling contradicts the opinion of RaMaH, cited in TUR, EHE 141, 51a, that the factor of אונס applies only to the first agent and that all subsequent agents may appoint successors even if not under duress.

8.b. All opinions agree that the appointment of a successor agent, in Erez Yisrael, need not be made in the presence of a court. ROSH, however, requires that his procedure, as with all procedures dealing with marital and sexual issues, be done in the presence of two witnesses. This requirement appears to be a direct contradiction of RAMBAM, loc. cit., who reads: ואין צריך עדים לחזור ולעשות וכו׳. Inasmuch as Alfasi reads כיח דין and not עדים, Maimonides' ruling is his own, a departure from the RIF. ROSH here refutes only the position of the Mishneh Torah, the sole authority who extends the rule concerning a court to cover witnesses as well. Asher preserves the distinction which the RAMBAM eliminates.[9]

9. ההוא גברא -- follows RIF while adding an important halakhic distinction. RIF and RAMBAM (Hil. Gerushin 9:39) deal only with the case of the agent who, because he does not recognize the wife, is instructed to hand the get to a second agent, who thereupon becomes the agent of transmission. ROSH adds that a second procedure is possible: the husband may instruct the agent to deliver the get to the wife when two witnesses who testify that she is, in fact, his wife. The admissibility of this second procedure flows perhaps from a deduction by RASHBA (Hiddushim, 29b), that an agent need not recognize the wife in order to be able to hand her the get: he may do so on the word of witnesses who do recognize her. See also Mordekhai, no. 359, fol. 2c.

RIF and RAMBAM do not mention this distinction. See TUR, EHE 141, 50b.

10. ההוא גברא -- follows RIF, adding a commentary upon the readings possessed by both RIF and RASHI.

ROSH accepts Alfasi's ruling that a claim of duress is not accepted in order to invalidate a conditional get (אין אונס בגיטין). In Ketubot 1:2, however, R. Asher discusses this rule in detail and distinguishes certain cases where a claim of duress would be accepted; see the note of Korban Netanel here, n. 4, as well as the analysis of the first chapter of Ketubot in Hilkhot Ha-ROSH, below. The TUR, EHE 144, 64b-65a, presents both the general rule אין אונס בגיטין as well as the qualifications; hence, the ruling of ROSH in Ketubot takes precedence over the apparent ruling here. More probably, we would say that this ruling, which establishes the general principle, is intended to be read in conjunction with that in Ketubot.

11. מתני' -- follows RIF, with addition of R. Yohanan statement on 31b.

12. רבי יהודה -- follows RIF to ואיתימא רב פפא לשותפין . See Tos. Ha-ROSH, 31b, לשותפין . ROSH cites the opinion of R. Hananel and R. Tam on the sugya in Baba Mezia 105a that the conclusion לשותפין means that when two individuals share ownership of certain property, either one of them may prevent the other from selling the property until such time as such goods are customarily sold. He also cites the view of RASHI that לשותפין means that neither partner may sell the property without the consent of the other until such time; if, moreover, the one partner does sell the property at the "customary time", the other partner may not claim violation of the partnership agreement, even if the price of that property subsequently increased.

RAMBAM, Hil. Shutafin 4:4, cites only the R. Hananel interpretation; in this, he adheres to Alfasi in Baba Mezia, fol. 62b-63a.

NOTES TO GITIN, CHAPTER THREE

[1]In the view of Beit Yosef, EHE 131, 32a, צריך , the ROSH and Alfasi are in accord.

[2]Karo in Beit Yosef also cites R. Yeruham as a source for this reading; see the Venice edition of R. Yeruham, Part II, 204b. There, the RAMBAM is quoted as ruling פסול , while RAMBAM rules פסול כריעבד . R. Yeruham thus serves Karo as a source of the varient text of the Mishneh Torah as well as corroboration for his suggest emendation of the ROSH.

[3]See n. 2, above. Both the TUR (our printed editions) and R. Yeruham declare that RAMBAM and RaMaH agree that the get is פסול כריעבד . ROSH agrees that this is RaMaH's position and states that "RAMBAM' rules likewise. Our text of ROSH is the only witness to such a ruling by RAMBAM; it is more likely that the authority cited by R. Asher who agrees with RaMaH is in fact RAMBAM.

[4]The sugya there is a parallel to ours in Gitin.

[5]This second point is actually a conclusion drawn by the Talmud concerning Rabah's position; see RASHI, 27a,

[6]RaN, fol. 14a, also alludes to such an interpretation.

[7]See Resp. Ha-ROSH, 51:1-2. Asher follows Rabah in a case of . When confronted with the contradiction with the R. Zeira position in Gitin, he resolves the contradiction as he does here. It is interesting to speculate whether this responsum served as a source for the ruling in the Halakhot. Inasmuch as the first stage of the responsum does not mention to Gitin sugya, and as ROSH resolves the contradiction only when raised for him by his correspondent, it is logical that this intellectual construct originated as a response in an actual case and was repeated in the Halakhot. This conclusion, however, cannot be demonstrated with certainty. This discussion is not identical with that of Zafrany, pp. 88-92, of whether the Halakhot were written earlier or later than the responsa, a question first raised by Asher's sons Yehudah and Ya'akov. That discussion concerns the halakhic priority of either work over the other when the two are in conflict, which is not the case here.

[8]According to these commentators, the enemy army is in a great hurry and has no time for rape, but only for plunder. The inference drawn here is that the army of robbers spoken of in Yer. Gitin similarly has no time to kill the citizens and is concerned only with plunder.

[9]See Kizur Piskei Ha-ROSH ad loc. Jacob ben Asher accepts this ruling of his father, and according to Beit Yosef and Perishah (n. 77), he included it in the TUR. Although our text of the TUR is garbled here, we should accept their reading.

D. Tractate Gitin, Chapter Four

1. השולח -- follows Mishnah, RIF.

2.a. ירושלמי -- ROSH cites Yer. Gitin 4:1 (45c), which rules that an agent of transport (שליחי להולכה) appointed by the husband must give the get to the wife in the presence of two witnesses. The husband, moreover, must hand the get to the agent in the presence of two witnesses.[1] The ROSH seems to disqualify the agent from serving as one of those witnesses, or so the TUR understands him (EHE 141, 47b).[2]

RAMBAM, Hil. Ishut 3:16, allows an agent for the purpose of marriage to serve as a witness, and TUR cites this ruling as support of his own view that the agent of transport may serve as a witness. However, as Beit Yosef points out, these two cases are quite dissimilar; see also BaH, ad loc. RAMBAM also does not require witnesses for the appointment of the agent of transport; see Hil. Ishut 3:15 and Hil. Gerushin 6:4. Clearly, the RAMBAM does not regard this Yerushalmi passage as halakhically authoritative. Other authorities, including Sefer Mizvot Gadol (Venice ed., Pos. Comm., p. 133a), RASHBA (Hiddushim 32a), and Itur (Warsaw ed., Part II. p. 46a) cite this Yerushalmi and discuss its halakhic implications. ROSH, who certainly relies upon earlier sources such as these in this instance, also quotes the Yerushalmi on our mishnah; he quotes as well R. Tam's explanation that the requirement of two witnesses to the agent's transmission of the get to the wife applies to the viewpoint of R. Meir as well as to that of R. Elazar (see our Tosafot to 4a, ד"ה ר' אלעזר).

In summary, R. Asher differs from the RAMBAM on two major points: the agent must receive his appointment in the presence of two witnesses (RAMBAM does not require witnesses); and the agent may not serve as one of the witnesses (RAMBAM, at least according to TUR's interpretation of him, allows

this agent to serve as a witness).

2.b. גמ' -- follows RIF to הרי הוא הפקר .

While the Talmud answers a question by comparing חרם to הקדש , Tos. Ha-ROSH 32b, מאי , points out some serious flaws in this analogy. This is used by ROSH as a preventive measure against attempts to compare these two categories in all respects, an erroneous impression one might receive from the Talmud and RIF.

3. אמר -- follows RIf to רבריו קיימין .

The statement of Rav Sheshet, which declares that when a recipient of a gift says אי אפשי בה the gift is annulled, is a reverse of the reading of the parallel sugya in Keritot 24a.[3] See Tos. Ha-ROSH 32a, מבוטלת : the readings in both places must be as they are, in order for the Talmud to deduce its desired conclusions. But while Tosafot seeks to uphold the reading in both places, RASHI (Keritot 24a, ה"ג תכטל) emends the Keritot sugya to read according to ours. This leads to an apparent contradiction between Reish Lakish (Keritot 24a), who says that the statement אי אפשי בה by the recipient renders the gift ownerless, and Rav Sheshet, who takes the view that אי אפשי בה is not efficacious at all. RASHI and ROSH resolve this by referring the Reish Lakish statement to movable property, which has reached the possession of the recipient; in such a situation, אי אפשי בה is a formula which declares the property to be ownerless. Rav Sheshet, on the other hand, deals with real property, which has not been taken over by the recipient and which has not yet left the possession of the giver; in that case, אי אפשי בה , which refers to an action to take place in the future, has no legal consequences whatsoever.

Alfasi, fol. 16a, preserves the Gitin reading of the sugya and does not

comment on a reverse reading in Keritot; therefore, he does not draw, as do RASHI and ROSH, a distinction between types of gift. RAMBAM, Hil. Zekhiah 4:1, also does not make this distinction: one who receives a gift and says אינני רוצה בה (= אי אפשי בה) renders that gift ownerless. According to Magid Mishneh, RAMBAM does not enter the conflict over the reverse readings; he simply cites the Reish Lakish statement as the authoritative pesak. Karo (Kesef Mishneh and Beit Yosef, HM 245, 132b) argues that Maimonides reads both sugyot according to our version in Gitin; this requires that we emend the remainder of the sugya in Keritot so that, for RAMBAM, the conclusion לא אמר כלום ("his statement has no legal effect") must mean that the gift, while it does not return to the giver, also does not remain in the recipient's possession and becomes hefker. BaH makes a similar emendation in Keritot and concludes as well that, for RAMBAM, הפקר = לא אמר כלום . Actually, a good argument can be made that RAMBAM reads the Keritot passage as we have it: אי אפשי בה , while a legally efficacious statement, does not restore the gift to its original owner but renders it hefker. Thus RAMBAM, as is his wont, follows the conclusion of the sugya and cites it as halakhah.[4]

Whatever the "true" reading of our passage may be, the halakhic difference between ROSH and RAMBAM is clear. Since ROSH accepts RASHI's version of the sugya, he must make the distinction between real property (Rav Sheshet) and movable property (Reish Lakish). " לא אמר כלום " means that ownership does not change; the recipient retains possession of the gift. Even if RAMBAM follows the RASHI (=Gitin) version of our sugya (as Karo and BaH contend), his halakhah is fundamentally different. For him, " לא אמר כלום " means that possession does change: the gift departs from the ownership of the recipient and becomes hefker. Therefore, both Reish

Lakish and Rav Sheshet say the same thing: אי אפשי בה always renders the gift ownerless. No distinction need be drawn between types of gift. See TUR, HM 245 132a-b.

4.a. איבעיא להו -- = Tos. Ha-ROSH 32b, התם .

Tosafot notes the parallel sugya in Kiddushin 59b as well as the differing reading in that parallel. Our sugya suggests that, inasmuch as the get is an actual document and the husband's annulment of it is but a statement of words, that statement serves only to annul the agency of the shaliah but not the get itself: the document may be used subsequently to divorce the wife. The reading in Kiddushin, however, which lacks a crucial phrase in the Gitin version, implies that if the husband specifically annuuls the get as well as the agency, the document is disqualified from further use. Tos/ROSH seek to resolve the two versions: the writing of a get is a concrete deed, a ma'aseh. The husband's statement cannot annul that deed. However, we do not rely on this permit to use the get a second time.

RAMBAM, Hil. Gerushin 6:21, allows the husband the power to annul the get if he does so specifically. According to the Sefer Mizvot Ha-Gadol (Venice ed., 131a-b), RAMBAM accepts the reading in Kiddushin and rejects that in Gitin; see also Hagahot Maimoniot, Hil. Gerushin 6, n. 7. Magid Mishneh ad loc. cites other readings but reaches the same conclusion: RAMBAM concludes that the husband is empowered to annul the get so that it may not be used subsequently. See also RASHBA, Hiddushim, Gitin 32b, who distinguishes between the position of RAMBAM and "our French teachers", who conclude that the husband does not annul the get itself, although they frown on the use of the get a second time in practice.

While in practice, both ROSH and RAMBAM would disqualify a get such as this from subsequent use, in theory the two sages differ widely: RAMBAM holds

that the husband may annul the get as well as the agency, while ROSH accepts the view that the husband's statement cannot disqualify a written get.

4.b. מתני' -גמ -- follows RIF.

5. תנו רבנן -- ROSH accepts the view of RASHI (see 33a, יכול לבטל) that according to Rabbi, the husband's power to annul the agency of the get in the presence of some--but not all--of the agents hold on a lekhathilah basis. See Tos. Ha-ROSH, 33a, יכול , for an explanation of RASHI's view.

RAMBAM, in Hil. Gerushin 6:18, rules simply that the husband may annul the agency while not in the presence of all the agents he previously appointed. Beit Yosef, EHE 141, 94b, writes that this permit is meant only bediavad; in the Bedek Ha-Bayit ad loc., however, he retreats from this position and agrees that the RAMBAM allows the annulment to be made lekhathilah. Clearly, the lekhathilah/bedi'avad distinction is missing from the Mishneh Torah, since Karo has to argue for one, and then the other.

6.a. גרסינן -- follows RIF to למודעא קמא . Normally, a husband who authorizes a get for his wife can annul that document by means of a moda'ah; in some cases, he protects against enforced annulment of the moda'ah by means of a מודעה דמודעה proviso such as: "Even should I annul this moda'ah it remains valid". R. Asher rules that this possibility can be averted if the husband is induced to make a statement annulling any and all previous moda'ot. This, he says, is the prevailing custom, and it renders invalid any stipulations and reservations the husband may have attached to the document of divorce as a means of annulling it. ROSH points out that RAMBAM rules differently. In Hil. Gerushin 6:19, we read that if the husband should state in advance that "any statment I may make to annul this moda'ah is itself valid", the moda'ah remains in force even should he

formally annul his moda'ah before writing the get. RAMBAM suggests a solution for the problems that this might cause: the witnesses specifically interrogate the husband concerning the annulment of all previous moda'ot and statements that would render the get invalid. ROSH expresses some astonishment at this. Perhaps, says ROSH, RAMBAM is concerned that a statement invalidating moda'ot would not affect the status of the moda'ah de-moda'ah, a statement which invalidates in advance any attempt to invalidate a moda'ah. Thus, when the witnesses demand that the husband annul "any statement you have made that would cause this get to be invalid", this would apply to mod'ah de-moda'ah. For ROSH, the procedure is unnecessary as long as the husband's original statement invalidates all previous moda'ot, including moda'ah de-moda'ah.

Some later commentators do not perceive a difference between RAMBAM and ROSH. BaH, EHE 134, 35b, like Magid Mishneh ad loc., sees as crucial the fact that RAMBAM seems to follow the last words the husband makes in his statment; if those last words include a renunciation of any moda'ah de-moda'ah, the get is valid. Isserles, in Darkei Moshe n. 2, understands the ROSH and the RAMBAM to be in agreement on this point: Asher interprets RAMBAM precisely in this way. Both poskim hold that as long as the husband's final statement before the get is written includes moda'ah de-moa'ah, the get is valid. See Derishah, n. 1, who concludes that the real difference is that the RAMBAM insists that there must be a formal interrogation by witnesses before the moda'ah de-moda'ah is annulled.

As Darkei Mosheh and Derishah point out, the TUR understands the ROSH's words as an expression of disagreement with RAMBAM, although the fact that ROSH seeks to explain the RAMBAM's ruling may indicate that Asher himself saw that ruling as in basic agreement with his own. At the very least, however,

Asher's words display an attitude of puzzlement toward the halakhah in the Mishneh Torah: "perhaps this is what he means". If ROSH does not perceive a basic contradiction between his pesak and that of RAMBAM, he finds the wording of Maimonides confusing, vague and in need of explication. ROSH's "commentary" and explication of RAMBAM here need not be seen as a sign of his "admiration" for the halakhah of the latter; it is more evidently an attempt to clarify a problematic and vague ruling.

6.b. והמגרש -- when a husband divorces his wife willingly, while under no compulsion, should he fail to annul all previous moda'ot we accept the get nonetheless. Inasmuch as this is a voluntary act, we do not suspect him of creating difficulties for his wife.

This ruling corresponds with that of RAMBAM, Hil. Gerushin 6:27. See Magid Mishneh ad loc., who, like TUR, EHE 134, 35b-36a. cautions that even in the case of a voluntary divorce it is best to require the husband to annul any and all moda'ot that might serve to invalidate the get.

6.c. גירול כר רעילאי -- follows RIF.

7.a. מתנ -- Tos. Ha-ROSH 34b, בראשונה .

ROSH explains the term שינוי שם .

7.b. פירוש -- Tos. Ha-ROSH 34b, איש .

The particular name which the husband must state on the get is the name by which he is known in the place where the wife resides; this is the "primary" name.

RAMBAM, Hil. Gerushin 3:13, requires that the husband state the name by which he is generally known. He does not distinguish geographically: there is no difference between the name by which he and his wife are known in the place of her residence or in the place where he resides. See TUR, EHE 129, 24b. RAMBAM, like RIF, seems to base his ruling on the case cited in the Gemara

concerning the woman known by most people as Miryam (34b); Tos/ROSH are supported by the beraita which follows the opinion of Rav Ashi (34b).

7.c. וכן יש לפרש -- the get must include the name of the husband's city and the wife's city. This follows the language of the get included in the Mishneh Torah, Hil. Gerushin 4:12.

7.d. כתוב כטופסי גיטין -- Tos. Ha-ROSH 34b. וכל . Halakhot Gedolot requires that the husband include in the get, in addition to his name, the general statement כל שום וחניכה דאית לי , which would include any epithet or surname by which the husband might also be known. R. Tam rejected this practice, since it would imply that the husband does go by such epithets even when he does not; this would cause confusion over the identity of the husband. R. Tam therefore ordained that the husband should mention in the get the specific epithets, if any, by which he is known. The common practice, however, is to follow the Halakhot Gedolot version. In the Tosafot, this is explained by pointing out that the general statement clearly means "if I have any other name"; in the Halakhot, ROSH states that common surnames and epithets in Germany are given to Jews by their Gentile neighbors, and "it is not proper to write that (the Jew) is called by that name."

This agrees with the language of the get in Hil. Gerushin 4:12.

7.e. גמ' -- Tos. Ha-ROSH 34b, והוא . The get must include the general statement כל שום וחניכה דאית לי only if the husband is known to go by more than one name. This knowledge may be present in either the place where the get is written or in the place where the woman is to receive it.

See TUR, EHE 129, 24b-25a and the commentators ad loc. BaH suggests that this position of Tos/ROSH is a stringency compared to that of RASHI 34b

והוא דאיתחזק ; this, however, conflict with ROSH's understanding of RASHI (fol. 17b). RAMBAM, for his part, does not make any distinction between the husband's residence and the wife's residence on this point; see Hil. Gerushin 3:13. The Magid Mishneh ad loc. stresses that RAMBAM does nothing besides repeating the language of the Gemara and RIF in his own style. The details of the halakhah are supplied by him as a digest of the words of subsequent commentators.

7.f. שאלו את ר"ת -- Tos. Ha-ROSH 34b, וכל .

On the basis of a case involving an apostate who, writing a get for his wife, mentions his Gentile name but not his Jewish name,[5] Tos/ROSH conclude that if an individual is known by two names in one locale, it is sufficient that he mention one of these names in his get. This name may even be an epithet or a surname; it need not be the primary name of that individual. The case cited in the Gemara concerning a woman who is known by the primary name Miryam and by a secondary name Sarah, a case which would imply that the primary name must be the one mentioned in the get, deals, according to Tos/ROSH, only with a lekhathilah situation. The get should indeed mention the primary name, but if in fact only a secondary name was mentioned (along with the statement וכל שום וחביכה דאית לי), the get is valid. This ruling is supported by Yer. Gitin 4:2 (45c).

TUR, EHE 129, 23a-24a, refers to this ruling and to RAMBAM, Hil. Gerushin 3:14; according to the TUR, these two authorities disagree. RAMBAM seems to nullify any get in which the secondary name is utilized in place of the primary name; no distinction is made between lekhathilah and bedi'avad. Beit Yosef, 23b-24a, seeks to minimize the distance between the ROSH and the RAMBAM: the RAMBAM rejects the use of the secondary name along with the general formula וכל שם דאית לי , since this would lead us to confuse the primary

with the secondary name. The mention of the secondary name without that formula, however, would not render the get invalid. This interpretation is forcefully refuted by BaH ad loc. Indeed, the plain meaning of TUR and ROSH is that the use of the secondary name in the get, whether or not this name is combined with the וכל שם formula, is valid bedi'avad.

8.a. מתנ' -- follows RIF to רתעכיר כיה מעשה . Explains the Rav Yehudah statement according to R. Hananel's understanding.

8.b. ור"י כתב -- see Tos. Ha-ROSH 35a, מורה . Shmuel modifies the mishnah: we do not cause the widow who seeks payment of her ketubah from the husband's orphans to swear an oath in court, but she does swear the oath outside of court. R. Yizhak the Tosafist rules that nowadays the widow does swear an oath in court, according to the usual manner in which the person is threatened with excommunication should he swear falsely.

RAMBAM, Hil. Ishut 16:11, follows the Talmud's conclusion. The widow swears an oath only outside of court, since the punishment for swearing falsely on a Toraitic oath is so great that the courts simply refused to administer such oaths. Like the RIF, RAMBAM does not go beyond the "classical" sources here; the Tosafot tradition provides an option which the earlier authorities do not.

8.c. ולעניין -- Tos. Ha-ROSH 35a, מורה . The Talmud, in Shevuot 46b, discusses and rejects additions to the list of those who are חשוד על השבועה presented in the mishnah on 45a. R. Tam rules that one who has violated a public ban of excommunication is deemed to be חשוד על השבועה ; in such a case, a litigant who makes a claim against that person swears an oath and takes property from him.

RIF, Shevuot fol. 25b, and RAMBAM, Hil. To'en ve-Nit'an 2:2, do not advance beyond the Talmud's list of those חשודים על השבועה . TUR,

HM 92, 197a, sees the issue of the one who violates the public ban as a major division between RASHI, RaMaH, Alfasi and RAMBAM on the one hand and R. Tam and ROSH on the other.

8.d. התקין ר"ג -- =Tos. Ha-ROSH 35b, אכל . The Talmud quotes the statement of Rav Huna that we cannot impose a vow on the widow after she has re-married, since her husband is empowered to annul her vows. Tosafot suggests that the former widow be made to vow "with the agreement of the community" (על דעת רבים), a vow which cannot be annulled. This idea is rejected on the grounds that a woman always makes vows subject to the agreement of her husband; she cannot vow subject to the agreement of anyone else in place of her husband.

See TUR, YD 234, 153b-154a, and Beit Yosef ad loc. This is a point of halakhah that is absent from RIF/RAMBAM. The Mishneh Torah codifies the rule concerning the power of the husband to annul the wife's vows (Hil. Nedarim 11:8). It also states that a vow made "with the agreement of the community" cannot be annulled, except of a דבר מצוה . We do not learn from RAMBAM whether the husband has the power to annul a vow made by his wife על דעת רביב . On this issue, the Mishneh Torah is an inadequate guide to the halakhah.

9. וליחוש -- =Tos. Ha-ROSH 35b, וליחוש . The Talmud seems to suggest that even if the widow's new husband does not have the power to annul the vows she made to the orphans of her deceased husband, she herself may win a hatarah, a release from her vow by a competent legal authority. This suggestion violates the general rule that one who vows not to benefit from another's property can not win release from that vow except in the presence of that other person (see Nedarim 65a). Tos/ROSH make two restrictions to that rule: 1) it applies lekhathilah, but not bedi'avad (a

limitation which removes the contradiction raised by Tosafot here); and 2) R. Tam states that the presence of the other party is required only if the one who takes the vow actually benefits from that other party as a result of his vow. The Yerushalmi (Nedarim 5:4; 39b) implies that the presence of the other party may not be required even lekhathilah in certain cases; ROSH, however, prefers the pesak of "our" Gemara.

RAMBAM, Hil. Shevuot 6:7, reports only the general rule as found in Nedarim. He makes no exceptions such as the ones deduced by Tosafot, a fact noted by TUR, YD 228, 143b.

10. קסבר -- =Tos. Ha-ROSH 35b, רב פפא . ROSH draws upon Tosafot in order to supplement Alfasi, who does not include this section of the Talmud in his halakhot.

See RAMBAM, Hil. Sevuot 6:5: it is possible that the wording of this halakhah includes the position of Rav Papa that צריך לפרט . RAMBAM does not use that vocabulary, however, and Beit Yosef to TUR, YD 228, 142a-b, does not number RAMBAM among the poskim who accept Rav Papa's view. The RAMBAM simply is not mentioned in this regard.

11.a. אמר -- follows RIF to אין לו הפרה . =Tos Ha-ROSH 36a, אמר . Tosafot notes the variant between Amemar's statement in Gitin and its parallel in Makot 16a. The conclusion is that according to the either reading, Amemar rules that a vow made in public may be annulled.

11.b. ועוד היה אומר = Tos. Ha-ROSH 36a, אכל . According to R. Tam, a vow is "in agreement with the community" (על דעת רבים) only if the one who makes the vow specifies the names of the "community". If he says " על דעת רבים " without mentioning their names, the vow is of no legal force.[6]

This definition is not found in RIF or RAMBAM. As to whether they would require a vow על דעת רבים to mention specific names, RaN, 18b, writes that Maimonides would accept as a valid vow על דעת רבים one which does not specify the names of the three or more individuals who constitute the רבים . Beit Yosef quotes the RaN without comment, YD 228, 145a-b.

12. הערים -- inserts Tos. Ha-ROSH 36a, לא , into RIF. ROSH refers the reader to his Halakhot in 9:7, where he will disagree with the RIF's view that witnesses of transmission are unnecessary as long as two valid witnesses sign the get.

13.a. התקין -- follows RIF; adds commentary on Rav Nahman's statement.

13.b. ורבינו תם -- =Tos. Ha-ROSH 36b, דאלימי . R. Tam retracts the position he took in Sefer Ha-Yashar (Schlessinger ed., p. 123): he holds that the prozbul is written nowadays, provided that it is written in the leading court of the day. ROSH disagrees: the case reported in the Talmud shows that the Amoraim disagreed with Shmuel, who required that the prozbul be written in the leading court of the generation. Moreover, says ROSH, Alfasi also rules this way. Actually, this interpretation of Alfasi originates with RAMBAM; see BaH, TUR HM 67, 128b.

RAMBAM, Hil. Shemitah 9:17, holds with the R. Tam position: the prozbul may be written only by "the greatest sages" available. Kesef Mishneh ad loc. cites numerous supports for this view, including Resp. Ha-ROSH 77:6, in which Asher adheres to R. Tam's ruling. Clearly, however, R. Asher rejects the R. Tam position in his Halakhot--and with it, the RAMBAM as well.[7] He does so, moreover, while never mentioning RAMBAM.

14. אמר רב יהודה -- a section of Gemara not found in RIF;

supplement to Alfasi.

15.a. תנן -- follows RIF, along with commentary and supplementary passages from Gemara, to וכתב עליו פרוזבול . This is a good example of a case where ROSH provides a "running commentary" to RIF.

According to Asher, the minimum amount of land required as "security" for the prozbul may be granted to the possession of the debtor by a third party. This may be done even when the debtor is not present: i.e., without his permission; although the prozbul is to the debtor's monetary disadvantage and we normally do not strip an individual of legal advantages without his consent, a special leniency was instituted in regard to prozbul.

RAMBAM, Hil. Shemitah 9:19, states that the creditor may sell land to the debtor in order to be able to write the prozbul. There is no mention of the third party discussed by ROSH; see TUR, HM 67, 129b. In addition, the use of the verb מוכר in RAMBAM implies that in this transaction, as with all acts of sale, the consent of the purchaser is required.

15.b. אין לערב קרקע -- follows RIF.

15.c. תנן -- citing M. Shevit'it 10:6 and its Yerushalmi discussion ( ), ROSH establishes that a prozbul may be written for a debtor on the basis of property owned by his or her spouse. See TUR, HM 67, 129b.

While Alfasi does not mention this subject, RAMBAM, Hil. Shemitah 9:20, cites the mishnah in Shevi'it: a prozbul is written for a male debtor on the basis of his wife's property. He makes no mention of a prozbul for the wife based on her husband's property: i.e., he ignores the Yerushalmi parallel, which extends the mishnah's ruling concerning the husband to include the wife. Does ROSH have the Mishneh Torah in mind when he adds the detail concerning

the wife from the Yerushalmi? Is he acting here as a kind of RABaD, a commentator to the Mishneh Torah? At any rate, he adds a detail not found in the halakhah of Maimonides?

16. תנן -- ROSH adds passage from Gemara not found in RIF. Agrees with halakhah of RAMBAM, Hil. Shemitah 9:6 and Hil. Malveh 7:4.

17.a. תנן --ROSH adds passage from Gemara not found in RIF. M. Shevi'it 10:2 states that shemitah does not release debts secured by pledge. In Yer. Shevi'it 10:2, Shmuel includes even loans secured by a needle.

RAMBAM, Hil. Shemitah 9:14, rules that the pledge secures only that part of the loan equal in value to the pledge. If the loan is worth more than the pledge, the remainder of the loan's value is subject to shemitah. See Kesef Mishneh ad loc. and BaH, HM 67, 127b: RAMBAM apparently follows the conclusion of the sugya in Shevuot 44b which affirms that a pledge protects only its equivalent value of the loan form shemitah.[8] ROSH and TUR reject the Shevuot passage as theoretical and hold with Shmuel in the Yerushalmi.

17.b. והקפת חנות -- ROSH cites M. Shevi'it 10:1 as halakhah. The RAMBAM also cites this mishnah, in Hil. Shemitah 9:11. The ROSH disagrees with RAMBAM, however, on the question of the moment in the legal process where a shop-debt or wages owed to workers become a loan and thereby subject to shemitah. According to ROSH, these transactions become "loan" when the consumer/employer promises to pay them at a certain time. RAMBAM (Hil. Shemitah 9:12) regards these business obligations as loans from the moment that they are established as such in court. See Beit Yosef, HM 67, 128a, who delineates this difference between ROSH and RAMBAM and discusses the variant interpretations lent by those authorities to a crucial beraita in Gitin 18a.

17.c. ושביעית -- = RAMBAM, Hil. Shemitah 9:4-5.

17.d. ופרוזבול המאוחר -- = RAMBAM, Hil. Shemitah 9:22-23.

18.a. תנן -- cites M. Shevi'it 10:5; = RAMBAM, Hil. Shemitah 9:21.

18.b. חמישה -- which five debtors borrow from one creditor, a prozbul is written for each one of them if any one of them owns property. This follows the position of R. Shimeon b. Gamliel in Tosefta Shevi'it 8:8, according to the explanation in Yerushalmi Shevi'it 5:1 (36a).

See TUR, HM 67, 130a and BaH ad loc. The ROSH decides in favor of R. Shimeon here in spite of a halakhic rule of decision-making to the contrary. This legal point is not found in RIF/RAMBAM.

18.c. תניא בתוספתא -- ROSH cites Tosefta Shevi'it 8:11. Although the sabbatical year releases debts only at its conclusion, the prozbul must be written before the sabbatical year begins.

See TUR, HM 67, 130a, and Beit Yosef ad loc. Karo cites the ROSH's own explanation of this point on the basis of the literal interpretation of the Biblical verses on the subject (Deut. 15:1-7) -- see below 4:20.cd. This would forbid any legal action concerning debts, whether undertaken by the creditor or by the court, during the entire Sabbatical year. The RAMBAM, says Karo, allows creditor to press for repayment up to the end of the sabbatical year (Hil. Shemitah 9:4) and would ostensibly allow a prozbul to be written during that year. He also refers to Resp. RAMBAM, n. 98, which quotes the Itur's statement that the practice of forbidding the writing of a prozbul during the sabbatical year is based on a faulty reading of the Tosefta. BaH, on the other hand, seeks to resolve the contradiction between ROSH and RAMBAM. The plain sense of the rulings of both of those authorities, however, makes it clear that a difference does exist.

18.d. תניא בתוספתא -- cities Tosefta Shevi'it 8:6; = RAMBAM, Hil. Shemitah 9:6.

18.e. כפ"ק דמכות -- cites his own Halakhot to Makkot 1:3; = RAMBAM, Hil. Shemitah 9:9-10.

19. תנן התם -- not in RIF. ROSH cites the Talmud's discussion of M. Shevi'it 10:8, adding to it some commentary of his own. He explicitly rejects RASHI's understanding of Rabah's comment (ותלי ליה) on 37b. The RAMBAM also does not understand the verb תלה according to its literal meaning; see Hil Shemitah 9:28-29 and Kesef Mishneh ad loc. See also Arukh Ha-Shalem, ת ו לה , and Kohut ad loc., n. 12.

20.a. אמר רב יהודה -- follows Gemara to ואכיל איסורא . = Tos. Ha-ROSH 37b, לא . R. Tam rules that a creditor may claim that he lost his prozbul even without swearing an oath to that effect.

RAMBAM, Hil. Shemitah 9:24, accepts the claim of the creditor but does not mention the subject of oath.

20.b. כי אתו לקמיה -- follows Gemara to אינו צריך . Alfasi cites the mishnah in its proper place (Ketubot 89a) without the commentary of the Talmud here. This indicates to ROSH that Alfasi does not accept the creditor's claim that he lost his prozbul. Asher, as we have seen, does accept that claim.

20.c. וכיאור -- refers to the discussion of the calculation of the sabbatical year in Hilkhot Ha-ROSH, Avodah Zarah 1:7.

20.d. והא דאין כותבין -- an "appendix" containing an explanation of ROSH's pesak in 4:18.c.

The material in simanim 13-20 of chapter four is a fairly systematic treatment of Hilkhot Shemitah. The impetus for presenting a "code" of this sort here in Gitin begins with the Talmud itself. As there is no Babylonian

Talmud to Mishnah Shevi'it, the editors of Bavli Gitin place the Talmudic discussion on those mishnayot here, under the rubric of the final piskah of M. Gitin 4:3. This discussion, composed of sugyot constructed from Amoraic and setam material, covers the following mishnayot from Shevi'it: 10:3 (36a); 10:4 (36a); 10:6 (37a); 10:1 (37a); 10:2 (37a); 10:8 (37b). In addition, the discussion deals with M. Ketubot 9:9 (37b) and includes a number of statements by early Amoraim, especially Shmuel, Rav and Rav Yehudah, indicating an early stratum of Gemara on Shevi'it originating in the Babylonia academies.

It is instructive to compare the approach of R. Asher to that of Alfasi on this material. Alfasi omits the discussion of the following mishnayot: Shevi'it 10:3, 10:4, 10:1, 10:2, 10:8, and Ketubot 9:9. ROSH also omits M. Shev. 10:3 and 10:4; he includes, however, 10:1, 10:2, 10:8, and M. Ket. 9:9, all of which are missing from the Alfasi. In addition, ROSH brings material from Tosefta Shevi'it 8:8, 8:11, and 8:6, as well as parallel discussions from the Yerushalmi. Along with his own commentary and the material culled from Tosafot, ROSH creates a "Hilkhot Shevi'it" which expands upon its Talmudic basis and is much more thorough than Alfasi's abbreviation of it.

21.a. מתני׳ -- follows RIF to הלכה כרבים . ROSH cites the hasagah of RABaD on RIF (fol. 20a-b), summarizing it and adding that R. Yizhak also agrees that the halakhah follows R. Shimeon b. Gamliel.

RABaD and ROSH believe that Alfasi follows the view of R. Shimeon, although RAMBAN (Sefer Ha-Zekhut, fol. 20b) and RASHBA (Hiddushim, 38a) say that RIF accepts the anonymous viewpoint in the mishnah. RAMBAM, Hil. Avadim 8:15, follows the anonymous position; see Kesef Mishneh ad loc.

21.b. אמר רב שמן -- follows RIF.

22.a. תניא -- follows RIF to זכה בהם . See Tos. Ha-ROSH 39a, קטנים . ROSH explains the reasoning behind the statement

of Abba Shaul. RAMBAM, Hil. Zekhiah 2:17, presents the same ruling but a slightly different explanation.

22.b. אמר ר' יעקוב -- adds an explanation for the Talmud's pesak that is not found in RIF; quotes R. Tam. See our Tosafot, 39a,

23. אמר -- follows RIF to שהוא כתראה . Supplements Alfasi with material from 38b. = RAMBAM, Hil. Avadim 9:6.

24. אמר -- follows RIF.

25.a. אמר -- brings material from Talmud not found in RIF. = RAMBAM, Hil. Avadim 8:13.

25.b. אמר ר' זירא -- follows RIF to השיאו איטה . Adds explanation that the deed of manumission is required only to forestall a possible claim by the owner that he never freed the slave. If a master marries his own maidservant, no deed of manumission is required, since the master will not make such a claim. The assumption is that he freed her before marrying her; otherwise, he has committed a sin. ROSH points out that RaMaH disagrees with this view. See TUR, YD 267, 210b: according to RaMaH, the maidservant is regarded as possibly married (safek mekudeshet) and requires a deed of manumission, followed by a second wedding ceremony or by a divorce (whichever her former master prefers).

See Alfasi, Yebamot, fol. 5a. He cites there the Geonic tradition concerning the yihus of the offspring of a Jewish man and his own maidservant. Some of the geonim rule that we may presume that the offspring are of legitimate descent, on the grounds that, if the father has the opportunity to marry the woman in a permitted fashion, he will do so rather than commit a transgression (אין אדם עושה בעילתו בעילת זנות). RAMBAM (Hil. Avadim 9:1 and Hil. Gerushin 10:19) rejects the application of this presumption to sexual relations with a maidservant: the rule is valid only

with regard to one's wife. ROSH, Yebamot 2:3, upholds the viewpoint that this rule indeed applies to a man's maidservant; he does so on the basis of our own Gemara in Gitin 39b. Moreover, he specifically rejects RAMBAM's ruling.

26. אמר ריב"ל --follows RIF to הניח לו תפילין . = Tos. Ha-ROSH 40a, כשרכו . The Talmud concludes that when a master puts tefillin upon his slave, this is taken as a sign of that slave's previous liberation. Tos/ROSH stress that this is not because a slave is not allowed to recite berakhot when he performs a positive, time-bound commandment; after all, women, whose status is the same as that of the slave with regard to these commandments, are allowed to recite berakhot when performing them.

RAMBAM rules that a woman does not recite a blessing over the positive, time-bound commandments: see Hil. Zizit 3:9, Sukkah 6:13. Both BABaD and Magid Mishneh to the Sukkah ruling conclude that RAMBAM would forbid women to recite such berakhot on the basis of the rule אין מברכין מספק . ROSH, in Kiddushin 1:49, cites a lengthy analysis by R. Tam which allows women to recite these blessings; in that analysis, the safek argument is refuted.

27. ההיא -- not in RIF. = Tos. Ha-ROSH 39b, משום . Tosafot deduces that a slave may purchase his own freedom through the process of חליפין .

See RAMBAM, Hil. Avadim 5:1 and 5:3 while a slave may be purchased through חליפין , he cannot purchase his own freedom that way. RABaD, in his hasagah to 5:3, parallels the R. Tam position. See TUR, YD 267, 206a. The conflict between RAMBAM and ROSH/Tos is underscored in SA YD 267:26, where Karo follows the RAMBAM view and Isserles adds R. Tam's ruling from the TUR. It is important to note that the specific elimination of חליפין as one of the methods by which a slave might purchase his freedom is the RAMBAM's own contribution; he does not repeat it from Alfasi.

28. כי אתא -- follows RIF to לא כייפינן ליה .

= Tos. Ha-ROSH 40a, אי . ROSH cites RASHI's explanation of the term קורת רוח . RAMBAM, Hil. Avadim 6:4, accepts Alfasi's definition, which differs from that of RASHI which ROSH prefers. See TUR, YD 267, 212a.

29.a. אמר -- follows RIF to והלכתא כרבינה .

= Tos. Ha-ROSH 40a, זילו . RIF follows Ravina: if a slave is sold to a Gentile, he must receive a deed of manumission from the heirs of his former owner before winning his freedom. ROSH follows R. Yizhak, who rules that such a deed is required only because 1) the fact that a new owner purchased him means that the ritual prohibition attaching to the slave does not disappear following the death of his original (Jewish) owner and 2) such a document is needed in order to protect the slave against subsequent false charges that he is in fact not a free man. At any rate, once the monetary relationship between owner and slave is lifted, the ritual prohibition does not pass to the ownership of the heirs of that owner. In Asher's view, RIF does believe that the heirs inherit the possession of that prohibition; therefore, the slave must receive from them a deed of manumission on the basis of Torah law before winning his freedom. See TUR, YD 267, 210a, and BaH, המפקיר .

See RAMBAM, Hil. Avadim 8:13. He requires that the hefker-slave must receive a deed of manumission from the heirs of the previous owner. This implies that even though the monetary ownership of the slave has disappeared, the ritual prohibition still exists and is not lifted upon the death of the former owner. Therefore, there is a Toraitic requirement that the slave receive a deed of manumission from the heirs before joining the community as a free man. ROSH, following R. Yizhak, denies that the heirs have even this

hold upon the slave; the deed of manumission is required merely derabanan, for the sake of appearances.

29.b. ההוא עכרא -- follows RIF to על שמיה . = Tos. Ha-ROSH 40b, וכתב . A slave is owned by two partners; one of them liberates his half of the slave. According to rabbinic enactment (M. Gitin 4:5), a slave who is half-free is liberated by coercion of the remaining owner. The owner thereupon transfers his share of the slave to his minor son, who is not subject to legal coercion. Rav Pappa's solution: the minor child is induced to sell the slave at a nominal price; a legal guardian is appointed for the minor who writes a deed of manumission "in his name". RASHI (see 40b, זוזי) would hold that the deed is written in the name of the minor himself, inasmuch as minors do have the power to buy and sell movable property (M. Gitin 5:7). RASHBAM, however, objects that this legal competence is granted to minors by rabbinic enactment in certain limited situations; it does not extend the right to minors to remove a ritual prohibition from a slave (as manumission allows the slave to marry a Jewish woman). Rather, the guardian liberates the slave on his own authority. Although a guardian does not normally possess such authority, the rabbis rely upon the rule הפקר כיח דיץ הפקר : the father of this minor acted improperly in transferring ownership to his son, and the rabbis respond by declaring the slave ownerless and thereupon granting ownership to the guardian for the purpose of liberation. R. Tam agrees that the guardian liberates the slave on his own authority, although he reasons that the guardian possesses this power by Toraitic law and not by rabbinic decree. (see Gitin 52a).

RIF, fol. 21 a-b, accepts this position of the Tosafot; see RaN, ad loc., and RASHBA, Hiddushim, 40b. RAMBAM rules likewise; see Hil. Avadim 7:8. In his hasagah ad loc., RABaD argues the other view: the deed of manumission is

written in the name of the minor. ROSH follows his usual method here. He establishes the authoritative ruling through citation of the Tosafot tradition, ignoring the fact that others, outside of that tradition, might also rule in this way.

30. ת"ר -- cites RASHI's explanation of R. Yohanan's statement (40b, א"ר יוחנן).

31.a. ת"ר -- follows RIF to על ידי אחר .
= Tos Ha-ROSH 40B, חיישינן . The word חיישינן is interpreted to mean "certainly": if the owner claims to have freed his slave and the slave denies this claim, we regard the owner's claim to be a certain one, whereas the slave cannot deny that claim with equal certainty. ROSH adds to the Tosafot comment that the slave is permitted to marry a Jewish woman.

See TUR, YD 267, 211a. The verb חיישינן indicates to some authorities (RaMaH and RaN; see Beit Yosef ad loc. and RaN, fol. 21b) that the slave's status as a free person is less than complete, and he requires a deed of manumission before being allowed to marry a Jewish woman. RABaD (Hasagot on Alfasi, fol. 21b) comes very close to the ROSH position on the permit of marriage. RAMBAM, Hil. Avadim 6:3, merely cites the beraita word for word, without explaining the word חיישינן .

31.b. כתבתי -- follows RIF.

32.a. האומר -- follows to כמאה עדים דמי .
= Tos. Ha-ROSH 40d, הודעת . The principle that "the admission of the litigant is like the testimony of one hundred witnesses" is applied to the statement of the recipient. We do not apply it to the statement of the giver, since the giver might mistakenly believe that his agent gave the property to the intended recipient.

See RAMBAM, Hil. Zekhiah 4:12. His halakhic ruling is the same as that of the ROSH, but he does not explain why we apply this principle to the recipient but not to the giver.

32.b. מי אוכל פירות -- follows RIF. Omits RIF's discussion of Kiddushin 69a.

33. עבד -- follows RIF.

34. ת"ר -- follows RIF, with interspersed sections of commentary. = Tos. Ha-ROSH 41a, כתובה .

35.a. מתנ'-גמ' -- follows RIF.

35.b. ועבד של שני -- follows RIF to לא שייר בקנינו . ROSH follows RASHI (42a, אכל שחרר חציו) concerning the order in which these procedures are performed. See RAMBAM, Hil. Avadim 7:4, who does not mention this point, and Kesef Mishneh ad loc.

36. הכותב -- not in RIF. Two slaves owned by the same master can be liberated only by two separate deeds of gift. These may take one of two forms: 1) each of the deeds may say: "All my property is given to X (or Y)"; 2) one deed may state: "Half of my property is given to X" and the other deed states: "The other half of my property is given to Y." This ruling is, in part, a defense of RASHI, 42a, הא דאמר כולו , against a difficulty raised by RASHBAM in Tos. Ha-ROSH 42a, הא דאמר .

RAMBAM, Hil. Avadim 7:3, does not regard the slaves as liberated if the two deeds carry the word "half". See Beit Yosef, YD 267, 209a, citing RaN (fol. 22b): whenever the word "half" appears on the deed, it implies that the donor is keeping some of his property for himself. Since the slave might be included in this property, he does not acquire ownership of himself. ROSH, by requiring that one deed read "the other half" and that these deeds be granted to the slaves at the same time, ensures that the documents do not imply that

the donor retains any property under his ownership.

37.a. נגחו שור -- not in RIF. One who is half-slave and half-free, who works for his master on an alternate-day basis, keeps for himself all damages resulting from injury, even should he be injured on the day he works for his master. This opposes the memra on 42a, but as Tos. Ha-ROSH 42a, יום , explains that statement refers to the law according to mishnah rishonah, i.e., before the school of Hillel adopted the viewpoint of the school of Shamai (see M. Gitin 4:5). The Amoraic statement refers to special cases where the owner of the slave cannot be coerced into liberating him.

RAMBAM, Hil. Hovel 4:12, cites the memra as halakhah without question. RABaD (Hasagot ad loc.) rejects this ruling on the basis of the argument used by Tosafot. See Magid Mishneh ad loc. and to Hil. Nizkei Mamon 11:2; he points out that the RAMBAM simply recites the wording of the Talmud, without emending it or qualifying it. The result is that the other poskim and commentators virtually ignore him as a legal authority on this question, in that he is silent on a major issue concerning this law.

37.b. רוקא -- ROSH cites the Talmud's distinction in this case between injuries that heal and those that do not. RAMBAM, loc. cit., does not mention this distinction.

37.c. אי בעיא להו -- not in RIF. The question concerns the מעורכב גט שחרור , the slave who has no monetary attachment to his master, or the half-slave; these slaves should go free, but as yet they have not received the required deed of manumission. Does the owner receive a fine if this slave should be injured? ROSH declares that since the Talmud does not resolve this question, there is no fine. Moreover, since the slave has no legal heirs, no kofer indemnity is exacted should he be killed.

RAMBAM, Hil. Nizkei Mamon 11:1, states clearly that such a slave has no fine. In 11:2, he rules that if a half-slave is killed, half of the kofer goes to the owner. See Magid Mishneh ad loc., who posits that RAMBAM follows mishnah rishonah.

37.d. איבעיא להו -- RAMBAM, Hil Mekhirah 23:3.

37.e. איבעיא -- incorporates Tos. Ha-ROSH 43a, ראי , as commentary on Talmud. = RAMBAM, Hil. Ishut 4:17.

37.f. דרש רבה בר רב הונא -- not in RIF. = Tos. Ha-ROSH 43a, אכל . ROSH fixes the halakhah according to the view that kiddushin do apply to a woman who is half-slave. The penalty for adultery with this woman, however, is a guilt offering rather than death.

RAMBAM, Hil. Ishut 4:16, does not discuss the issue of penalty.[9]

37.g. אמר רב חסדא -- not in RIF. Rav Hisda is in doubt concerning the following question: a woman who is half-slave is betrothed to A. She is subsequently liberated and betrothed to B. Does the liberation complete the kiddushin with A, or does it annul that betrothal?[10] ROSH rules that a get is required from both husbands, or one may divorce her while the second marries her.

RAMBAM, Hil. Ishut 4:16, agrees: the woman is safek mekudeshet to both. A deeper question must be addressed, however, on the issue of the validity of the betrothal of a half-slave woman. In 37f, ROSH rules that betrothal does apply to such a woman; see TUR, EHE 44, 79b-80a, who says that Asher regards such a betrothal as קידושין גמורין . RAMBAM, by contrast, declares that the relationship is not קידושין גמורין (Hil. Ishut 4:16), and TUR perceives this as a basic contradiction between the two authorities. Moreover, RAMBAM writes that liberation completes the act of betrothal to the husband. Why, then, do we require a get from both husbands

if a second man should betroth her following her liberation? We might ask the same question of ROSH: why, if the betrothal of a half-slave woman is already "complete", is a get required from both husbands in the afore-mentioned situation? The Magid Mishneh writes that while for RAMBAM, liberation does indeed "complete" the betrothal, even Rav Hisda, the author of the view that the betrothal of a half-slave woman is valid, is in doubt concerning the effect of liberation upon his marital status. Thus, RAMBAM requires a get from both husbands out of doubt. This explanation would also remove the contradiction from the ROSH; as a matter of fact, Tos. Ha-ROSH 43b, מה , already provides it. In short, both ROSH and RAMBAM agree on the issue of get. They clearly disagree, however, on the status of the marriage of a half-slave woman prior to liberation: RAMBAM regards this as incomplete kiddushin, while ROSH either sees it as complete kiddushin (in the view of TUR) or is in doubt as to its status (see BaH, who understands the difference between ROSH and RAMBAM in this way; 80a). "Doubt" exists for both: ROSH states it openly, while the Magid must use it to resolve the contradiction in the words of RAMBAM. Each, however, stands upon a separate theoretical basis.

37.h. א"ר חנא -- follows RIF.

38.a. מתנ' -- follows RIF to מרכו ראשון . ROSH, summarizing the Gemara on 43b, interprets the word ימוסר as referring to a period of time in two separate legal transactions: 1) A Jew borrows from a Gentile, using slave as credit, and sets a time at which the Gentile may take possession of the slave; 2) the slave is used as a pledge for a loan, and the loan falls due before the Gentile takes possession of the pledged slave.

RAMBAM, Hil. Avadim 8:2, omits the rule concerning the pledge; see Kesef Mishneh ad loc., and TUR and Beit Yosef YD 267, 212a.

38.b. ת"ר גבאי = Tos. Ha-Rosh 44a, המוכר . -- Not in RIF. Concerning the word פרהנג 11, RASHI (44a, פרהנג) states than an actual sale is involved: property is forced from an individual by unlawful forfeiture, but the owner does receive money in return. Tos./ROSH object to the use of the word מכירה in its literal sense, for often the government officials who confiscated the property would restore it after their task was completed and take the money back. This transaction more properly resembles a conditional sale.

RAMBAM, Hil. Avadim 8:3, uses the word מכר with no qualification. TUR, YD 267, 212b, does modify the term פרהנג according to the Tos./ROSH understanding; see Beit Yosef ad loc.

38.c. בעי ר' ירמיה -- not in RIF. The Talmud does not answer a number of problems concerning situations in which a slave is sold: does the slave go free automatically when sold under these conditions? ROSH rules that since these questions are not answered, the slave does not win his freedom.

RAMBAM, Hil. Avadim 8:4, declares that in these situations there is doubt as to whether the slave has won his freedom or not. See TUR, YD 267, 212b. The practical differences between these viewpoints is highlighted in Korban Netanel, n. 200, and Kesef Mishneh, Hil Avadim 8:4.

39. בעו מיניה -- follows RIF to כמציל מידם . ROSH extends the rule that covers fugitive slaves, applying it to the case of captured slaves as well: if the owner cannot retrieve the slave, he may take the sale price offered by the new Gentile "owner".

RIF and RAMBAM, Hil. Avadim 8:12, deal only with the case of the fugitive slave mentioned by the Talmud.

40. א"ר -- follows RIF, adds a commentary phrase (לפרותו מן העכו"ם).

41.a. אמר -- follows RIF to עד מאה כדמיו .

Both RIF and ROSH accept the second version of Reish Lakish's statement on 44a: the penalty for selling a large beast to a Gentile is a 100-fold fine. RAMBAM, Hil. Shabbat 20:3, follow the first version of that statement and calls for a ten-fold fine.

41.b. כיתב רב אלפס --Alfasi, citing Geonic precedent, restricts the fine to the Land of Israel, since the law concerning fines does not operate in the Diaspora. ROSH rejects this Geonic/Alfasi ruling. The demand for ordained judges to administer the law of fines operates with respect to fines decreed by the Torah. Rabbinic fines, however, may be administered by non-ordained, Diaspora judges.

RAMBAM, Hil. Avadim 8:1, accepts the Alfasi position.

41.c. בעא מיניה -- follows RIF.

41.d. או לחוצה לארץ -- follows RIF to מרכו שני .

See Tos. Ha-ROSH 44b, לחוצה . The prohibition against selling a slave outside of Erez Yisrael applies even when the new owner promises to leave him in Israel and not take him abroad; perhaps the new owner will in the end convince the slave to follow him away from Israel.

RIF and RAMBAM (Hil. Avadim 8:6) follow the language of the Talmud and do not add this detail.

42. אמר -- cites passage of Gemara not found in RIF.

=RAMBAM, Hil. Avadim 8:8.

43. ההוא עבדא -- follows RIF to הכתוב מדבר .

= Tos. Ha-ROSH 45a, ואי . The requirement by R. Ahai that a slave who escapes from Erez Yisrael not be returned to his owner applies only if his owner cannot find a buyer for that slave in Erez Yisrael. The overriding concern is that the slave not be returned to his owner outside of Israel.

Moreover, if the owner suggests that he keep the slave and use him in Erez Yisrael, we do not allow him to do so, out of fear that the owner will persuade the slave to follow him abroad.

RAMBAM, Hil. Avadim 8:10, simply cites the statement of R. Ahai without the qualification imposed to Tos/ROSH. Note that in Tos. Ha-ROSH, Alfasi is cited as agreeing with the Tosafot position: the slave is not returned to his owner, but he may be sold to another owner in Erez Yisrael. Alfasi, like the Talmud itself, can be interpreted to agree with the Tosafot position; indeed, if Alfasi simply recites the language of the Talmud, Tosafot can read him exactly as it reads the Talmud itself. This is definitely not the case with the Mishneh Torah, whose rulings are wrenched from the Talmudic context and recast in the RAMBAM's own linguistic formulations. See RaN, fol. 23a: there is no alternative to the conclusion that RAMBAM understands R. Ahai's ruling in its strictly literal sense. The Talmud and Alfasi may be interpreted differently.

44. מתני׳ --RIF cites only the mishnah. = Tos. Ha-ROSH 45a, ד"ה אלא. In our Gemara, the question concerning the reasoning behind the takanah is not settled: do we refrain from paying exorbitant ransoms because this is a drain on the community, or because such ransoms encourage future kidnapping? In Ketubot, fol. 19a, RIF decides according to R. Shimeon b. Gamliel, whose statement is identical with our mishnah: we do not overpay the ransom. See ROSH, Ketubot 4:22: RIF follows R. Shimeon, meaning that the ban on overpayment covers all captives, even if the ransom is paid by family members. That, in RIF's view, is the interpretation of our mishnah as well. RaMaH, on the other hand, follows the anonymous view in the baraita in Ketubot 52a, as opposed to R. Shimeon: one's wife may be redeemed even for an exorbitant amount. The mishnah in Gitin, which seems to forbid payment in all

cases, refers to captives other than one's wife. Based upon RaMaH and upon the fact that the reason for the takanah is not known (i.e., if we do not overpay out of fear that we burden the community treasury, overpayment from private funds would be permitted), ROSH allows individuals to pay as much ransom as required in order to free certain captives. The takanah does not apply to all cases.

RAMBAM, Hil. Matanot Ani'im 8:12, follows RIF. He decides in favor of the explanation that "we do not wish to encourage further kidnappings". In no case may even a private person pay more than the basic valuation (דמיהם) to ransom a captive. He specificially applies this rule to the case of one's wife; Hil. Ishut 14:19. See Beit Yosef, YD 252, 186b: RAMBAM, among others, makes no distinction between one's wife and other captives, a stance at odds with Tos/ROSH. ROSH does make distinctions, and he does not believe that the authoritative explanation of the takanah has been established.

45. אין -- follows RIF to שמא עובד כוכבים כתבו . Supplements Alfasi with material from Talmud, 45b. Includes the rule that a convert who, out of fear, returns to idolatry is permitted to write a Torah scroll.

RAMBAM, Hil. Tefilin 1:13, does not mention the halakhah concerning the reverted proselyte. See TUR, YD 281, 226a.

46.a. מהך -- = Tos. Ha-ROSH 45b . Tos/ROSH limit R. Tam's interpretation of the baraita " כתיבה / שירה " on 45b. While the baraita forbids women from writing a Torah scroll or tefilin parchment, they are not thereby forbidden from making other ritual objects, such as ritual fringes, the lulav or the sukkah.

RAMBAM, Hil. Zizit 1:12, does not mention the issue of women making ritual fringes. Hagahot Maimoniot, n. 9, presents the background of this

dispute and of R. Tam's ruling. Apparently, some Ashkenazic authorities did rule that RAMBAM permits women to make zizit. Yet this point is never firmly stated in the Mishneh Torah as it is in ROSH and Tosafot. See, for example, Tosafot, Menahot 42a, מנין , and ROSH, Hil. Zizit, 13. The permit for women to make zizit is also found in Shulhan Arukh, OH 14:1; it is clearly taken from Tos/ROSH, as Be'er Ha-Golah notes.

46.b. תנא מעלין -- = Tos. Ha-ROSH 45b, מעלין . See Rashi, 45a, ת"ר : we are allowed to purchase Torah, tefilin and mezuzah scrolls from non-Jews for a small amount over and above their fair market value. Tosafot makes a distinction: The specific "small amount" spoken of by the baraita applies to tefilin and mezuzah parchments, while Torah scrolls are purchased from non-Jewish possessors according to their fair market value. However, a proportional "small amount" may be added to the redemption price of Torah scrolls as well.

RAMBAM, Hil. Tefilin 1:13, recites the literal mishnah: one cannot redeem scrolls at more than their market value. See Hagahot Maimoniot, n. 10, and TUR, YD 281, 226a.

47.a. מתנ' -- follows RIF to וכן הלכתא . If husband divorces wife because of unsavory rumors about her or because of a vow that she made, he is not allowed to remarry her, on the basis of a rabbinic takanah. Both RIF and ROSH accept the first version of Rav Nahman's explanation of this takanah: משום קלקולא . Therefore, if the husband does not explicitly state to her the reason for the divorce, he may later remarry her.

RAMBAM, Hil. Gerushin 10:12, does not require that the statement be made to the woman in order to prohibit the remarriage. Magid Mishneh, ad loc., explains that Maimonides follows both explanations of Rav Nahman:

משום קלקולא , which implies that if the husband does not make the statement he may remarry his wife, and משום פריצות , which is a stricter view, forbidding the husband from remarrying his wife even if he did not state to her the reason for the divorce. See TUR, EHE 10, and Beit Yosef ad loc., 20b, and SA EHE 10:3 and Be'er Ha-Golah, n. 7.

47.b. והא דאמר רבנן -- follows RIF to בקלא דליתיה .

47.c. נדר -- not in RIF. = Tos. Ha-ROSH 46a, רכ . Tos/ROSH reject RASHI's view that the "community" involved in a vow על דעת רבים consists of a minimum of two persons (Shevuot 39a). They set the minimum at two persons.

RAMBAM, Hil. Shevuot 6:8, does not mention a minimum number for " ברבים " or for " על דעת רבים "; see Hagahot Maimoniot, n. 3.

48. מעשה -- follows RIF.

49. מתני -- follows RIF to end of mishnah. Cites Rava's interpretation of the hakhamim position: the husband may remarry his wife provided that he did not formulate his statement upon her divorce as a tenai kaful.

RAMBAM, Hil. Gerushin 10:13, makes no mention of this. The husband may not remarry the wife, regardless of the formulation of his statement or even if he made no statement at all to her; compare with 47.a., above.

50. המוכר -- follows RIF.

NOTES TO GITIN, CHAPTER FOUR

[1]This section of the Yerushalmi passage is missing from our printed versions. A number of rishonim, however, do read the passage; see below in the text.

[2]As does BaH, 47b, ומ"ש .

[3]See Tosafot, Menahot 58b, as well as Tos. Ha-ROSH, Gitin 32a, מכדטלת .

[4]The problem with this conclusion is that in the first part of the halakhah, RAMBAM writes: א מר אינו רוצה כה...לא אמר כלום . This would support the version in Gitin.

[5]Tos/ROSH also cite Arukh (entry חנך , n. 1) and Tosefta Gitin 6:6.

[6]See Resp. Ha-ROSH 10:1.

[7]Since TUR also rejects R. Tam's ruling, we conclude that the decision of the Halakhot overrides that found in the responsum; see D. Zafrany, Darkhei Ha-Hora'ah shel Ha-ROSH, pp. 88-94, for a discussion of means by which to decide between contradictory conclusions in the Halakhot and the responsa.

[8]RaN, fol. 19b, who rules that a pledge secures only the equivalent value of the loan from Shemitah, explains his own ruling as based on the Gemara in Shevuout 44b.

[9]See Magid Mishneh, ad loc.: The RAMBAM implies that there is no death penalty.

[10]That Rav Hisda is in doubt is deduced by Tos. Ha-ROSH, 43b, מה .

[11]See Kohut, Arukh Ha-Shalem I, P. 237, אפרהנג : a Persian word: "judge". Compare with RASHI's " עלילה ".

E. Tractate Gitin, Chapter Five

1. מחלי -- follows RIF.

2.a. אמר מר דוטרא -- follows RIF to אלא מן הזכדרית .

See Tos. Ha-ROSH 50a, כירון . ROSH accepts RIF's decision: heirs pay the debt of their father's estate from the lowest grade of land, even if their father had stipulated that the debt be paid from the highest grade of his land. ROSH limits the scope of the rule: "Every monetary stipulation is legally valid", in that the rabbis ordained that heirs should never pay the debt of an estate from anything other than the lowest grade of land. RAMBAN writes that this rabbinic enactment is overriden when the father specifically stipulates that the debt shall be paid with the highest grade of land, "either by me or by my heirs". He bases this ruling on Ketubot 87a, where we read that heirs can be exempted from taking the normally-required oath upon payment of the debt of the estate if the father specifically exempted the heirs from the oath in his promissory note. RIF rules likewise (Ketubot, fol. 47a). R. Hananel and R. Yizhak dissent from this decision, but ROSH accepts it.

RAMBAM, Hil. Malveh 15:7, is vague. He clearly follows the RAMBAN/ROSH position on the question of oath: if the father specifically exempts his heirs from swearing the oath upon repayment of the loan, that stipulation is honored. He states that the father may stipulate that the debt is to be repaid from the highest grade of land and that even the heirs must honor this stipulation, since "every monetary stipulation is legally valid". Must this stipulation by the father specifically mention the heirs, as does his stipulation concerning oath? Or is this stipulation valid even if it does not mention that the heirs as well must repay the debt from the highest grade of land? RASHBA, in his Hiddushim, Gitin 50a, cites the RAMBAN ruling and quotes him as saying that he derived that ruling from Maimonides: i.e., the heirs

must honor the stipulation only if the father specifically included them in its terms. See also Magid Mishneh, ad loc.

ROSH apparently regards the RAMBAM as vague on this issue--or he regards his as ruling in an opposite manner. ROSH does not cite that part of RAMBAN's statement, quoted by RASHBA, which attributes his ruling to Maimonides. Neither RaN (fol. 24b) nor TUR, HM 108, 24a, attribute this pesak to RAMBAM. At best, RAMBAM must be interpreted to say what ROSH and the others clearly state.

2.b. והלכתא follows RIF to לזיבורית -- Rabbinic takanah allows heirs to pay the debt of the estate with the lowest grade land; this rule applies to all heirs, whether they are adults or minors. R. Yonah makes a distinction in the case of the payment of damages: adult heirs must pay those damages with the highest grade land, as required by the Torah (Ex. 22:4), while minor heirs are protected by the takanah in the payment of damage claims against the estate. ROSH accepts this distinction.[1]

RAMBAM, Hil. Malveh 19:1, exempts all heirs from payment of claims from anything other than the lowest grade land. In Hil. Nizkei Mamon 8:11, he specifically states that damages are paid in lowest grade land if the claim is made against the heirs of the estate. See Magid Mishneh, ad loc., who cites the R. Yonah distinction in contrast to RAMBAM's ruling.

2.c. מתנ' -- follows RIF, with a short note of explanation.

3. אין -- follows RIF.

4.a. המוצא -- ROSH decides here that the halakhah follows R. Elazar b. Ya'akov: while one who returns a lost object is exempt from swearing that he has returned the entire amount found, this does not apply if the finder returns the object to the heir of its owner. In such a case, we assume that the finder might "hold back" some of what he found; therefore, an

oath is required of him as of every other מודה במקצת הטענה .
ROSH accepts the analysis of R. Hananel and of R.Yizhak (see Tos. Ha-ROSH 51b, אלא), and points out that Alfasi also rules that the halakhah follows R. Elazar (Shevuot, fol. 22b-23a).

RAMBAM, Hil. To'en 4:5, takes a different approach. If the heir claims that the defendant has possession of an object belonging to the father, and if the defendant responds by admitting part of the claim, no oath is required of the defendant, inasmuch as he is the finder of a lost object. The only exception occurs when the heir makes a claim of certainty (bari) that the defendant possesses the object. RAMBAM follows the mishnah in Shevuot 6:1 and the Talmud, Shevuot 42a-b, where the bari/shema distinction appears (see Hagahot Maimoniot, n.3). Magid Mishneh, ad loc., writes that the bari/shema distinction applies "even to those authorities who follow R. Elazar." RASHBA, meanwhile, writes that R. Elazar does not distinguish between bari and shema when it comes to a claim by the heir. Those who follow the anonymous opinion in the beraita of R. Elazar might indeed make that distinction, but R. Hananel and RIF do not. See, however, TUR, HM 75, 159a, and Beit Yosef ad loc.: it would appear that RAMBAM follows R. Elazar. Yet there are some commentators who argue that, for Elazar, even if the claim is bari no oath is required in a case of the return of a lost object. The difference here is that a claim by the heir of the owner might be the occasion for the finder to lie; see Korban Netanel, n. 9. Magid Mishneh, end, refers to the opinion of those who rule that R. Elazar requires an oath even if the heir does not claim bari; if we follow that view, then RAMBAM does not rule according to R. Elazar.

4.b. מתנ' -- Mishnah/RIF.

5.a. גמ' -- follows RIF to רבי רבי . = Tos. Ha-ROSH 52a, וצריך . No halkhic difference with RIF/RAMBAM; dispute

between RASHI, Tosafot.

5.b. ההוא -- follows RIF.

6.a. הנהו -- follows RIF to וליכא מאן דיהיב להו .

Concerning the case of an "unappointed guardian", that is, a guardian who supports orphans without an official appointment by the father or by the court, RAMBAN[2] follows the ruling of RABAD: we do not require this person to take an oath. Since we do not require this oath of an officially appointed guardian, lest out of reluctance to swear he abstain from accepting the appointment, certainly the unofficial guardian, who derives no profit or benefit from the arrangement, would abstain from supporting the orphans if we require an oath from him. ROSH disagrees. The fear that the potential guardian might abstain applies only to the official guardian; it does not apply to the one who voluntarily supports minor orphans. On the contrary: unless we require an oath in this case, an unscrupulous individual might entice the orphans to accept his guardianship and thereby strip them of their wealth.

RAMBAM, Hil. Nahalot, does not deal at all with the subject of a guardian who supports minor orphans without an official appointment. See Magid Mishneh to 11:10, who expresses astonishment that RAMBAM does not mention the legal distinctions between the "official" and "unofficial" guardian. Ses also TUR, HM 290, 204b, and Beit Yosef ad loc., who cites the Magid Mishneh.

6.b. כתב הרמ"ה ז"ל -- RAMAH limits the power of the "unofficial" guardian to sell only property which minors themselves can sell. He also forbids him from serving as guardian in an unofficial capacity if the minor is below the age of nine. ROSH rejects these distinctions: the "unofficial" guardian is the legal guardian of the minor. He may buy and sell on behalf of the minor just as the official guardian may do so.

7.a. אמר -- follows RIF to הלכה באבא שאול . See Tos. Ha-ROSH 52b, הלכה . RAMBAM, Hil. Nahalot 10:7, rules that a court-appointed guardian is removed from his office on suspicion of misuse of the orphans' property. If, however, he is appointed by the father, he is removed only on the basis of proof that he misued the property.

ROSH makes no such distinction; see TUR, HM 290, 202a, Magid Mishneh to Hil. Nahalot 10:7.

7.b. ROSH cites his own Halakhot in Baba Kama 4:5, in which he rules that the guardian is liable for losses due to his negligence, whether he is appointed by the father or by the court. He mentions that RAMBAN exempts the guardian appointed by the father from liability due to negligence, while Rav Hai Gaon agrees with Asher's ruling.

TUR, HM 290, 204b, attributes this opposing view to RAMBAM; Beit Yosef, however, declares that this is a scribal error and should read RAMBAN. See also Magid Mishneh to Hil. Nahalot 11:5, end: RAMBAM does not deal with this question, while the ruling in dispute belongs to RAMBAN.

7.c. If the guardian is appointed by the father, he need not swear an oath against a claim of misuse of the orphans' property--unless that claim is bari.

This follows RAMBAM, Hil. Nahalot 11:5.

8. ת"ר -- Tos. Ha-ROSH 54b, אמר . Abaye and Rava dispute concerning the basis of the law of נאמנות באיסורין , the believability of one person to establish a state of ritual impurity on a particular object which is currently viewed to be true. The case deals with an individual who handled objects belonging to another owner; he is believed when he says: "The objects which I handled are impure". He is not believed, however, when he says: "The objects which I handled on such-and-such a day

are impure." According to Abaye, the individual is believed in the first case because the objects are still in the individual's possession; he has the power to defile them now if he has not previously done so. This is not the case with the second instance, when the individual no longer has those objects in his possession. Rava explains differently: the objects do not have to be in the individual's possession for him to declare that they have become unclean. He is not believed in the second case because that is a situation in which he had a chance to tell the owner that the objects were unclean on a previous meeting but did not do so. Thus, he is not believed on the subsequent meeting when he makes the claim. R. Tam notices a contradiction between our sugya and that in Kiddushin 66a. There, both Abaye and Rava seem to hold that the one individual can establish a presumption of ritual defilement, even if he does not have the power to defile that object now, as long as the owner or the person against whom the claim is made does not deny the claim. This is a difficulty against Abaye. Moreover, a difficulty is raised against Rava as well: our passage implies that in order for the individual witness's claim of defilement to be accepted, he must have had at one time the power to render that object unclean, even though he no longer possesses it. The Kiddushin passage, however, concerns a case in which the individual never possessed the object at all. R. Tam resolves the contradiction as follows. In our passage, the owner or person against whom the claim is made either denies the claim of the one witness or states: "I do not know if your claim is true". This denial renders the fact of possession relevant. In Kiddushin, however, the situation is one in which the "defendant" makes no denial at all; therefore, the witness need not have had the power to defile the object at any time for his claim to be accepted.

R. Tam draws an analogy from this sugya to the case of an individual who

handles wine belonging to another owner. That individual is believed when he claims: "Your wine has become nesekh"--according to the Rava position--if he informs the owner of this on their first meeting, even should the owner deny the claim. If the individual does not make that statement on their first meeting, he is not believed if the owner denies the claim; if, however, the owner makes no denial, his silence is tantamount to admission of the claim. R. Yizhak b. Avraham, on the other hand, holds that the "defendant's" silence does not necessarily constitute admission, as long as he can give a plausible reason for why he did not immediately deny the claim of defilement.

RAMBAM rules concerning this matter in two passages. In Hil. Pesulei Mukdashin 19:15, he takes no notice of either the Abaye or Rava position in Gitin or Kiddushin, a fact that stirs the astonishment of Kesef Mishneh. In fact, RAMBAM's source here is neither Gemara, but rather Tosefta Terumot 2:2, a fact noted by Mishneh La-Melekh. In Hil. Metamei Mishkav 13:8, RAMBAM deals with the subject in more detail. There we read that one witness is believed if the owner makes no denial; that one witness is not believed if the owner denies the claim; and that the claim of the one witness can be accepted only if it is made at the first meeting between him and the owner. RAMBAM does not answer all the questions raised and answered by Tosafot: what if the witness makes the claim at the first meeting and the owner denies it (do we believe the testimony or the denial?); what if the witness makes the claim at a subsequent meeting and the owner does not deny it? RAMBAM is unclear on both of these questions; R. Tam accepts the witness' testimony in both cases. While RAMBAM discusses both the question of the owner's silence and the distinction between the first meeting and subsequent meetings, he does not treat these points in combination, as do Tos/ROSH. See TUR, YD 127, 210a-211a; it is interesting that Beit Yosef ad loc. does not mention RAMBAM

at all in his analysis of the halakhah on this subject. The Tos/ROSH tradition is much more complete, whereas RAMBAM lacks the scope to serve as the basis of the authoritative pesak.

ROSH now presents a list of fourteen rules on the reliability of witnesses who testify concerning ritual impurities and prohibitions. ROSH draws upon other sources for this list, which was apparently an independent, edited arrangment of the halakhot of נאמנות באיסורין ;[3] its inclusion here constitutes an addition to the RIF/RAMBAM halakhic corpus. While both Alfasi and Maimonides discuss the laws in this field, neither has them arranged in a separate list or rubric.

1/ One witness may establish a presumption of heter or issur where no previously-established presumption exists.

2/ If a heter has been established, one witness alone cannot declare it to be an issur.[4]

3/ If an issur has been established, one witness alone cannot declare it to be a heter.

4/ One witness is believed concerning the ritual status of objects that he owns or controls.

5/ Those who are ignorant or suspect in this regard are not believed

9.

concerning objects in their ownership or control.

6/ The reliability of one witness is limited to cases where he has direct knowledge of the ritual status, and not where he sent an agent to remove a ritual prohibition.

10.

7/ "Ha-peh she-asar" (M. Ketubot 2:5).

8/ Wife is believed when she testifies that her husband has died.

11.

9/ When a "trustworthy" individual dies, we presume that all his produce has been properly tithed.

12.

10/ A kohen cannot receive terumah solely on the basis of his own testimony. Moreover, the testimony of a single witness other than the priest himself is not accepted if there is reason to suspect collusion between the priest and the witness.

13.

11/ One witness is believed when he declares an object which was in his possession to be ritually impure or unfit. This applies whether the owner of that object denies the claim or whether the object was previously presumed to be pure or fit.

12/ If the single witness never had the object in his possession or if it is no longer in his possession, he is not believed to declare the object to be impure--provided that the owner denies the claim or says "I do not know if it is true."

13/ Silence in the face of this claim is tantamount to admission, but not in all cases.

14/ Even if the witness no longer possesses the object, he is believed if he claims "impure" on the first meeting with the owner.

ROSH appears to modify the halakhic content of certain of these rules--especially rules 12 and 13--in comparison to the parallel sources. His ruling in rules 12 and 13 correspond closely to the pesak of R. Tam and R. Yizhak b. Abraham in 5:8, above. We note a number of differences between the halakhah in this collection and that found in the Mishneh Torah. RAMBAM does not state whether one witness may establish an issur (1/; see Isserles, YD 127:3). He

does not apply the rule in 6/ to the case of tithes, as do ROSH, Mordekhai, R. Meir and RASHBA. RAMBAM does have rule 9/ (Hil. Ma'aser 10:2); however, he does not cite the limitation drawn from the Yerushalmi in the ROSH and parallels. RAMBAM has rule 10/ (Hil. Is. Bi'ah 20:13; however, he does not deal with the subject of collusion and limit the power of the one witness to establish the priestly status of another. RAMBAM's position in regard to rules 11/-14/ has already been treated in 5:8, above.

13.a. הרוא דאתא -- follows RIF to אינו שוה כלום .

See Tos. Ha-ROSH 54b, א"ל . The case in the Gemara on 54b implies, at first glance, that the halakhah follows Abaye: i.e., the determining factor is whether the sofer still possesses the Torah scroll or not. We know that the halakhah actually follows Rava: i.e., the determining factor is whether the sofer told the owner that the Torah scroll was pasul on their first meeting. ROSH sets the story in a context that supports the Rava position.

RAMBAM, Hil. Tefilin 1:18, does not mention the consideration of first meeting/subsequent meetings. He decides the case according to its separate dynamic, whereas ROSH places the case within its larger halakhic (Abaye vs. Rava) context. See Yam shel Shelomo, Gitin 5:15.

13.b. ההוא דאתא -- follows RIF to קושטא קאמר .

An explanatory note that further establishes the rule that the halakhah follows Rava.

14. מתני'-גמ' -- follows RIF.

15. מתני'-גמ' -- follows RIF.

16.a. ר"ש -- follows RIF to דכתבי ליה אחריות .

See Tos. Ha-ROSH 58b, אכל . A suggestion is made that the dispute between Rav and Shmuel here is based upon their dispute in Baba Mezia 14a:

Rav holds that every valid deed of sale contains the element of אחריות --guarantee of repayment should the sale be invalidated. If this guarantee is not found in the deed, we regard its absence as a scribal error. Shmuel holds the opposite. In fact, the halakhah follows Rav with respect to deeds of sale and promissory notes; see RAMBAM, Hil. Mekhirah 19:3. Yet in this case, RIF decides according to Shmuel (in adherence to the rule הלכתא כשמואל כדיני) despite the fact that Shmuel does not regard the deed in and of itself as sufficient guarantee of repayment. This contradiction is apparently solved by Alfasi's resolution of another contradiction against Shmuel's decision: this time from Baba Batra 47b. There, the sale of property by an owner under duress is considered valid even if the seller did not write a guarantee into the deed of sale. RIF explains that in the Baba Batra case, money actually changes hands and thus serves as the seller's guarantee of repayment to the buyer, whereas in our case, no money has yet changed hands. Therefore, in our case, Shmuel would still require a written guarantee, and the halakhah follows him. ROSH extends this resolution to the topic of scribal error. We follow Rav (Baba Mezia 14a) and say that the absence of a guarantee in the deed is a scribal error only when money actually changes hands and we may assume that the buyer protected his investment by stipulating a guarantee. If money does not change hands, we cannot assume that stipulation and we do not read the guarantee into the deed.

Here is an example of ROSH making use of the "Tosafot method" in deciding the halakhah. Tosafot compares our sugya to the one in Baba Mezia; it is ROSH, however, who derives from that comparison and from the comparison made by RIF to Baba Batra that the rule concerning scribal error takes effect only when money changes hands. This limitation on the application of the rule of scribal error does not appear in RIF or RAMBAM; indeed, Asher himself does not

mention it in his Halakhot to Baba Mezia 1:39, nor does TUR in HM 225. Shelomo Luria does cite this comment in Yam shel Shelomo, Gitin 5:18.

16.b. ת"ר -- baraita not found in RIF nor codified by RAMBAM.

17.a. ת"ר -- not in RIF. The law of sikarikon does not apply to the case of אנפרות , a halakhically-invalid procedure in which a Gentile buys land from a Jew and sells it to another Jew. ROSH alludes here to his halakhah in Baba Kamma 6:7. RASHI declares that the original owner may recover the property without paying the one who purchased it from the Gentile (Gitin 58b, אין כן), whereas R. Gershom, in a responsum, rules that the owners must pay the buyer before taking back the property. ROSH and R. Yizhak (and see Tos. Ha-ROSH 58b, מחמת) rule according to R. Gershom. See TUR, HM 236, 120b-121a.

RAMBAM, Hil. Gezeilah 10:1-2, rules that the original owners cannot recover the property if there is proof that the Gentile was justified in taking it[5] or if the owners could have sought redress in the Gentile courts but did not do so. See Magid Mishneh ad loc.: RAMBAM apparently holds that if the law of sikarikon does not apply, then the one who purchases the property from the Gentile owes nothing to the owners--provided that they fulfill the conditions stated above. RABAD, on the other hand, seems to follow RASHI: the law of sikarikon does not apply and the property does not change ownership. The buyer, therefore, would receive nothing from the original owner. At any rate, RAMBAM does not state the rule that applies if the Gentile's claim to the land was invalid: does the buyer owe anything to the first owner upon return of the land?

17.b. אמר רב יוסף -- follows RIF.

18. מתנ'-גמ' -- follows RIF to אף כמטלטלין .

From Alfasi's presentation of the statement of Rav Nahman, ROSH deduces that

he follows the second version of that statement and that the halakhah follows Ben Beteirah. ROSH rejects this, preferring the first version of Rav Nahman, which would produce a stricter halakhic outcome.

RAMBAM, Hil. Mekhirah 29:2, presents the same halakhah as does ROSH. See TUR, HM 235, 119a and Beit Yosef ad loc.

19.a. מתנ' -- follows RIF to ואין ממכרן ממכר .

The statement of R. Yohanan, which asserts that the reason the sale by a young child[6] is a valid legal transaction is that he needs to buy and sell in order to live, implies that a transaction in a greater amount than required for that purpose would be invalid. Rav Hai Gaon accepts this view, with the exception that we allow the child to acquire more money in order to pay for schooling. RAMBAM, however, making an analogy to gifts made by a minor, which are valid in any amount, argues that the child may buy and sell movables in any amount. ROSH agrees.

RAMBAM, Hil. Mekhirah 29:6, rules that the child may indeed buy and sell in great or small amounts. TUR, HM 235, 116a, has a different reading of RAMBAM, and Beit Yosef, BaH, and Yam shel Shelomo (Gitin 5:20) all state that our reading is to be preferred. The Magid Mishneh has our reading as well. Perhaps the ROSH had the same version of Maimonides as that reported in TUR. This might explain why Asher does not cite RAMBAM in support of his ruling. RAMBAN, whose ruling the ROSH supports, provides an explanation for it which closely resembles the one in our reading of the Mishneh Torah. RAMBAM would have been a most appropriate citation here. It might also be that ROSH is depending here upon the source that includes Rav Hai and RAMBAN. See RASHBA (Hiddushim, 59b) and RAN (fol. 27b): both report the ruling of Rav Hai followed by that of RAMBAN. They may be citing from the actual hiddushim of RAMBAN. ROSH is using the same source, which itself does not cite RAMBAM,

since neither RASHBA nor RAN comment upon the Mishneh Torah in their discussions of this subject. ROSH adds nothing to his source.

19.b. וטעותן -- follows RIF to מתנה מועטת .

= Tos. Ha-ROSH 59a, אחת . R. Hananel rules that a gift made by a minor is valid even when a guardian is empowered over his affairs. ROSH refers us to his Halakhot in Ketubot 6:23, where he reports this ruling in the name of Hai Gaon as quoted by R. Hananel.

RAMBAM, Hil. Mekhirah 29:7, rules that a guardian has total power over the transactions of this child, implying that the gift is invalid. See Hagahot Maimoniot ad loc.

19.c. אחה מתנה -- = Tos. Ha-ROSH 59a, אחר .

Tos/ROSH resolve a contradiction between our sugya, which would forbid a minor to make a gift of land, and Baba Batra 155b, which implies the opposite conclusion. The resolution: the Baba Batra passage deals with a thirteen-year-old.

RAMBAM, Hil. Mekhirah 29:6, limits the power of the minor to make gifts of land " עד שיגדיל ". While RAMBAM arrives at the same halakhic conclusion, ROSH limits the analysis of this subject to the intellectual tradition of the Tosafot. Once again, ROSH does not cite RAMBAM even where he agrees with him; he prefers to reach the halakhic conclusion by means of the Tosafist tradition.

20.a. מתנ' -- repeats mishnah with a phrase of commentary drawn from Gemara.

20.b. גמ' -- follows RIF to וליטול מנה יפה ראשון .

= Tos. Ha-ROSH 59b, וליטול . The right of the kohen to take the "choicest portion" for himself is limited to charitable gifts, food served at a meal, etc. It does not apply to the proceeds of a partnership agreement.

See Pesahim 50b.

RAMBAM, Hil. Kelei Ha-Mikdash 4:2, codifies the baraita concerning the "choicest portion" and makes no limitation. Kesef Mishneh ad loc. refers us to RASHI and Tosafot.

20.c. ראף אם בא כהן -- ROSH cites baraita and Gemara's discussion, 59b. Our text of the ROSH indicates that he makes a distinction between weekday services, when a priest is entitled to forego the honor of reading first from the Torah and give that honor to his teacher or some other great scholar, and Shabbat and festivals, when he is not so entitled. This distinction is indicated by the Gemara passage; it is also attributed to ROSH by the TUR, OH 135, 119a. Thus, we must reject the emendation suggested in Hiddushei MAHARSHAL to erase the word " אין ". It is likely that this emendation was inspired by the case of Rav Huna, who read the "kohen portion" even though two rabbis who were kohanim were present. This would imply that the kohen may forego his honor even on Shabbat and festivals in certain cases; MAHARSHAL resolves the contradiction between the first and second parts of this halakhah by erasing " אין ": ROSH therefore holds that the kohen is always entitled to forego his honor, while the case of Rav Huna is a precedent in favor of this ruling. TUR maintains the word " אין ": normally, the priest is not allowed to forego his honor on Shabbat and festivals, inasmuch as this may lead to disputes in the synagogue. Rav Huna is now an exception to this general rule; as a truly great sage in his generation, the honor due to him overrides the law that applies to other individuals. TUR deduces that R. Asher indeed allows the kohen to forego his honor when a great sage or authority is present; this is in contrast to the Geonic ruling he reports which forbids the kohen from foregoing his honor in any case on Shabbat and festivals.

RAMBAM, Hil. Tefillah 12:18, cites the widespread custom that forbids the priest from ever foregoing his honor: the kohen always reads first. Indeed, in his commentary to M. Gitin 5:8, RAMBAM expresses astonishment at this custom, especially since an ignorant kohen would take precedence over a great scholar in the order of reading from the Torah. Beit Yosef (TUR, loc. cit. 120a) explains that in his commentary, RAMBAM follows the theoretical law of the Torah, which does not bestow ritual honors upon a kohen in the presence of great scholars. In the Mishneh Torah, however, RAMBAM cites the operative law, that is, the prevailing custom of always calling the priest to read first from the Torah even in the presence of a great scholar. It is this ruling which stands at odds with the ROSH/TUR tradition and in unison with the Geonic ruling mentioned by TUR.

20.d. אמר אביי -- = Tos. Ha-ROSH 59b, נתפרדה . RASHI reports two interpretations of the term נתפרדה חכילה (59b, נתפרדה). The first, ascribed to his teachers R. Ya'akov b. Yakar and R. Yizhak b. Yehudah and the Seder Rav Amram, states that a Levi does not read at all from the Torah when a kohen is not present. The second, that of R. Yizhak Ha-Levy, is that the Levi need not precced a Yisrael but may be called to the Torah when a kohen is not present. R. Yizhak b. Avraham, the Tosafist, supports this second interpretation: a Yisrael may precede a Levi unless the Levi is equal or superior to him in knowledge. In any event, the Levi is not forbidden to come to the Torah.

RAMBAM, Hil. Tefillah 12:19, follows the first interpretation: in the absence of a kohen, a Levi may not be called to the Torah. See Kesef Mishneh and Hagahot Maimoniot ad loc.

20.e. אמר אביי -- follows Gemara.

20.f. שלחו ליה -- follows RIF.

20.g. בעא מיניה -- RIF states simply that it is permitted to write less than an entire Torah scroll for a child to study. ROSH cites the Gemara on this subject and expresses astonishment at this ruling; both Rabah and the anonymous view in the baraita on 60a tend in the opposite direction, with the baraita allowing such writing only if the scribe intends to complete an entire Torah scroll. R. Asher does explain why RIF permits the writing of small sections of the Torah.

Does this mean that ROSH agrees with RIF? R. Ya'akov b. Asher suggests that his father was unsure on this point (Kizur Piskei Ha-ROSH 5:20). In the TUR, YD 283, 228 a-b, he writes that Asher actually agrees with RAHBAM, Hil. Sefer Torah 7:14, who follows the anonymous view in the baraita. He adds, however, that Asher concludes that RIF had good reasons for ruling as he did. Beit Yosef ad loc. rejects ROSH's explanations and seeks to find others.

By offering explanations for RIF's decision, ROSH allows room for the practice even though he tends against it. RAMBAM's ruling is absolute: we do not allow the writing of portions of the Torah unless the scribe intends to complete an entire scroll.

21.a. בדר -- ROSH cites R. Hananel in order to explain why Alfasi does not follow the accepted halakhic rule הלכתא בשמואל בדידני .

= Tos. Ha-ROSH 60b, והשתא .

21.b. מצורות -- follows RIF.

22. עני -- follows RIF.

23. אין -- adds to RIF a passage from Tosefta Gitin 3:18, which allows Jews to eulogize pagans out of a desire for peaceful social relations. The baraita on 61a does not mention eulogy;[7] neither RIF nor RAMBAM (Hil. Avel 14:12 and Hil. Melakhim 10:12) mention this point.

24. ומחזיקין -- follows RIF.

NOTES TO GITIN, CHAPTER FIVE

[1]RASHBA, Hiddushim 50a, also cites R. Yonah and, like ROSH, appends a brief note of approbation. ROSH apparently makes use of RASHBA here, or the two of them draw from a common source other than R. Yonah himself.

[2]The same RAMBAN text is cited in Hiddushei Ha-RASHBA 52a.

[3]This list is found in Responsa R. Meir of Rothenburg, ed. Rabinowitz, Lvov, 1860, no. 325; Resp. RASHBA I. no. 837; and Mordekhai, Yebamot, no. 77-78.

[4]Korban Netanel no. 400 sees a clash between this rule and rule 12; see below in text.

[5]This would be RAMBAM's interpretation of אנפרות : a Gentile creditor who seizes land from a Jew in payment for a debt or for damages without waiting for a Jewish court to adjudicate the matter.

[6]A פעוט, who is at least six years old.

[7]See Lieberman, Tosefta Kifshuta, Gitin, p. 850; none of the versions of this baraita in either Talmud mentions the subject of eulogy.

F. Tractate Gitin, Chapter Six[1]

1. מי שאחזו -- follows RIF, adding the line כמאי קמפלגי which does not appear in our Alfasi text, to והלכ' כר' יוחנן. = Tos. Ha-ROSH 70b, ור'. Both Reish Lakish and R. Yohanan would agree that we must take care that a dying man is in his right mind while his get is being written.[2]

RAMBAM, Hil. Gerushin 2:14-15, does not mention the case of the dying man's mental state. See Hagahot Maimoniot, n. 90, RaN, fol. 34a, and Beit Yosef, EHE 121, 8a, who attribute this ruling to R. Yizhak, as does ROSH.

2. מתנ'-גמ' -- follows RIF, but adds the note ואם היה חתום וכו'. This halakhic detail is not found in RAMBAM; see TUR, HM 46, 89a and SA HM 46:36.

3.a. רתבו -- follows RIF.

3.b. מהנ' -- = Tos. Ha-ROSH 72a, מהיום. According to R. Tam, should a dying man wish to divorce his wife and thus release her from the obligation of yibum/halizah, and should he wish to make this divorce conditional, lest he recover, the document should be written: "This is your divorce from this time (מעכשיו) should I die from this sickness". It should not read: "This is your divorce from today (מהיום) etc." Although the mishnah permits the use of מהיום, if the dying man should expire on this very day, a court might conclude that he intended his get to become valid only after his death, an intent which violates the rule אין גט לאחר מיתה.

Our printed Tosafot, 72a, מהיום, carry the opinion of R. Elhanan, who argues against R. Tam that the words מהיום and מעכשיו carry the same legal meaning; they both indicate the get is to take effect from the moment it is handed to the wife. He advises, however, that it is

wise to be strict in this matter. RAMAH argues as does R. Elhanan: the two words carry the same sense (TUR, EHR 145, 66b). RAMBAM, Hil. Gerushin 9:13, makes no distinction between the words (see Hagahot Maimoniot, n. 2), while RAMBAM specifically rejects the distinction made by R. Tam.

3.c. במ' -- follows RIF.

3.d. מחנ' -במ' -- = Tos. Ha-ROSH 72b, אמר . A dying man who makes a gift, even if he does not attach stipulations to the gift, is presumed to make the gift in contemplation of death. Thus, should he recover from his illness, the gift is automatically annulled. He need not issue a statement nullifying it.

RAMBAM, Hil. Zekhiah 8:14, writes that should the dying man recover, the gift is nullified. He does not mention the question of whether a statement must be issued to that effect. Beit Yosef (HM 250, 140b-141a) cites a responsum of RIVASH (no. 207) which attributes this view to RAMBAM: the recovered individual need not make a statement nullifying the gift. Clearly, however, a ruling which must be deduced from RAMBAM (" ושכן נראה מלשונו ") is stated clearly in Tosafot, ROSH and TUR.

4.a. ת"ר -- not in RIF. See Tos. Ha-ROSH 73a, שמע . The baraita on 73a reads as follows: "One who says: 'This is your get from today if I die from this sickness' and who subsequently dies by accident--the get is invalid. One who says: 'This is your get from today if I do not recover from this sickness' and who subsequently dies by accident--the get is valid." According to the discussion in the Bavli, the baraita centers upon the question of אונסא דלא שכיחא : does the husband forsee the possibility of an "infrequent accident" and include it within the stipulations of this conditional get? The first half of the baraita indicates that he does not forsee this possibility, while the second half implies that he does. The

Talmud suggests that we follow the rule that an individual does not foresee "infrequent accident"; the message from Palestine appears to state this clearly, while the case of Rava and Ravina demonstrates that, for the Babylonian Amoraim, the text of the baraita is faulty and self-contradictory. We must follow logic, rather than the inaccurate text of the baraita, in deciding this halakhah; and, as ROSH states, the conclusion of the sugya is that in neither case is the get valid. The version of this baraita in Tosefta Gitin 5:2 and in Yerushalmi Gitin 6:4 (48d), however, reads differently. Unlike the Bavli version, this parallel provides an explanation of the ruling in each case. The wording in those sources declares that the issue is not one of "infrequent accident". The first part of the baraita, the get is invalid because the husband stipulates that he must die from the illness; the get in the second part of the baraita is valid because the husband stipulates merely that he die during the illness. R. Hananel seems to follow the Tosefta/Yerushalmi version when he rules that the issue is whether or not the husband's conditions have been fulfilled by his manner of death. ROSH expresses surprise that R. Hananel follows Tosefta/Yerushalmi and ignores our Gemara, according to which neither get is valid because we do not presume that an individual forsees infrequent accident and includes it within a stipulation of this kind.

ROSH also cites RAMBAM, Hil. Gerushin 9:17, who rules that in the first case the get is invalid, while in the second case the get is of doubtful validity. This contradicts the understanding of most of the other rishonim, who hold that in both cases the get is invalid. Magid Mishneh ad loc., Ran, fol. 35a, and Meiri, p. 269, explain that, to RAMBAM, the wording of the statement sent from Palestine indicates that the rabbis were unsure as to the validity of the get in the second instance. Other commentators and poskim

interpret that statement as rejecting the validity of the get in both cases. See TUR, EHE 145, 67b: ROSH rejects RAMBAM. The get is clearly invalid in both cases.

4.b. ההוא גברא -- follows RIF.

4.c. מתנ'-גמ' -- follows RIF to מעת שאני בעולם .

See Tos. Ha-ROSH 73b, באומר . ROSH accepts the reading to R. Hananel and R. Tam of Rava's statement: כאומר , not באומר . Thus, the dispute between R. Yehudah and R. Yose in the mishnah involves the status of a woman whose conditional get reads מהיום . The importance of the difference in readings lies in the determination of the stance of R. Yose as to the moment at which this get becomes valid. The halakhah will ultimately follow R. Yose, in the view of the ROSH--but not in the view of RIF and RAMBAM; see 4.d., below.

4.d. תנו רבנן -- ROSH has a different reading of the Talmud than that possessed by RIF and RAMBAM. In the latter reading, during the days in between the delivery of the conditional get and the husband's death, the wife is considered divorced in all respects.[3] In the version cited in ROSH, which agrees with that of RASHI and of our printed text,[4] this position of the sages holds that the wife is in a status of doubtful divorce. This follows the view of R. Yose, rather than that of R. Meir (which is the case in the RIF/RAMBAM version of our text). This provides the link between this halakhah and the point in question in 4.c.: R. Yose is in doubt concerning whether a get which reads מהיום takes effect from the day of delivery or one hour before the death of the husband. For that reason, he rules ספק מגורשת . For RIF and RAMBAM, the position of R. Yose in 4.c. is unimportant, since according to their reading the halakhah follows R. Meir. See Tos. Ha-ROSH 73b, באומר , end.

5.a. מתנ׳-גמ׳ -- follows RIF to עד שתתן . This is a passage of true commentary upon the RIF, in which ROSH cites RIF to Kiddushin, fol. 4a, in support of RIF's decision here.

5.b. בעא מיניה -- follows RIF, Gemara (supplements RIF with passage from 74b).

6. ההוא -- accepts RIF's pesak. = Tos. Ha-ROSH 74b, הא , which poses the same challenge as does RIF from Baba Mezia 76a and basically the same resolution (the אריס possesses a different legal status than a פועל). The question must therefore be asked: what is the difference between the two explanations? We see a difference when we examine the hasagah of RABAD on Alfasi, fol. 35b-36a. Alfasi argues that the אריס is considered a partner of the owner, whereas RABAD argues that both the אריס and the day-laborer are kablanim: once they begin the work, they receive all profit and bear all loss resulting from unforseen circumstances. The difference between the two passages does not lie in a partnership arrangement for the אריס , but rather in the fact that, in the Baba Mezia case, the rain came before the workers had done any work at all. In both cases, however, once the work has begun, the אריס and the פועל are paid according to their contract. The wording of Tos/ROSH forestalls this argument, since it does not mention "partnership" at all. Rather, the workers in Baba Mezia are not paid because "they did not do the work", while the אריס in Gitin has begun the work and is paid according to contract. Unlike Alfasi and RAMBAM (Hil. Sekhirut 9:6), as well as RAMBAN (see RaN, fol. 36a), Tos/ROSH do not distinguish between the nature of אריסות and the nature of the contractural obligation of the day-laborer.

7.a. תנן התם -- not in RIF; follows Gemara 74b-75a to הויא נתינה . Rava deduces from M. Arakhin 9:4 that if the wife tries to

give the husband the money stipulated in the conditional get but he does not want to receive it, the get is invalid. Normally, a gift against the will of the recipient is not a valid gift; the takanah of Hillel applied only to the case of the redemption of a house in a walled city. Rav Papa counters that this may be true if the gift is transferred while the recipient is not present; if, however, the recipient is present the gift made against his will may indeed be a valid gift. = Tos. Ha-ROSH 75a, מכלל . Tos/ROSH point out that not all gifts are in question here. A simple gift cannot be acquired against the will of the recipient; on the other hand, a debtor or a bailiff may make repayment or return a deposited object even against the will of the creditor/owner. Rather, the issue here is a gift to which the intended recipient is legally entitled and in return for which the giver receives title to another object: e.g., a get. The Itur, quoting Rav Hai Gaon,[5] follows the second version of Rava's statement, in which he and Rav Papa reverse positions. Now Rava accepts the giving of the money against the husband's will as a valid gift; the get is valid as well. ROSH then cites RAMBAM, Hil. Gerushin 8:21: in such a case, the wife is ספק מגורשת . ROSH adds that it is wise to be strict in this case.

This would indicate that ROSH agrees with RAMBAM. There is, however, a problem with the text of the Mishneh Torah here. Our text reads: הגט פסול, a reading attested to by Magid Mishneh ad loc., RASHBA to Gitin 75b, RaN, fol. 36a, Beit Yosef, EHE 143, 61a, and Yam shel Shelomo Gitin 7:9. The Yam shel Shelomo cites the ROSH, but he suggests that a scribal error entered his words and that we should read "RAMBAN" instead of "RAMBAM". This is a reasonable suggestion, inasmuch as both RASHBA and RITBA rule ספק מגורשת in this case. If RAMBAM in fact rules that the get is pasul, then he actually agrees with Hai Gaon and rules against the stringency of the ספק מגורשת

situation; see RaN and Magid. ROSH, on the other hand, rules with the other poskim (RASHBA, RITBA) that we must be stringent in this case. Logic would indicate that the "RAMBAM" found in ROSH is in fact an error, but the testimony of TUR argues that R. Asher possessed a reading of the Mishneh Torah that differed from that of all other commentators and authorities.

7.b. אמר -- follows RIF to לא הוי גט .

Unlike RIF, ROSH declares that a conditional get is valid if the wife provides the monetary value of the specified object in lieu of the object itself.

RAMBAM, Hil. Gerushin 8:23, agrees with RIF. See Beit Yosef, EHE 143, 61b, who rejects the attempt of R. Yeruham to reconcile the positions of ROSH and RAMBAM.

8. ת"ר -- not in RIF. = Tos. Ha-ROSH 75a, לאפוקי . The Talmud does not usually examine the stipulations mentioned in the mishnah to determine their halakhic validity. It does so here, implying that these are the standards which all stipulations must meet. For example: the stipulation described in Kiddushin 6b, while not presented as a tenai kaful, is in fact a tenai kaful, despite Tos. Kiddushin 6b, לא .

See RAMBAM, Hil. Ishut 6:2, where he presents his list of the rules to which all stipulations must adhere. That list differs from the one presented here by ROSH; it does not contain the prohibition of תנאי ומעשה כרכר אחר. Magid Mishneh ad loc. explains that RAMBAM does not include this rule because it was stated by Rav Ada bar Ahavah while the authoritative voice in the sugya is that of Rav Ashi. ROSH understands the sugya differently; he sees the details suggested by the various Amoraim as complementary rather than contradictory. Beit Yosef, EHE 38, 68a, sees the controversy between ROSH and RAMBAM over this point; TUR follows the ROSH.

9. אתקין שמואל -- follows RIF to הן קורם ללאו .

= Tos. Ha-ROSH 75b, אלא . Tos/ROSH deduce that the halakhah follows R. Meir: stipulations in a get must take the form of תנאי כפול . Halakhot Gedolot (Warsaw ed., 76a) supports this ruling. This applies as well to stipulations of the על מנת form; all stipulations must adhere to the rules enumerated in section 8, above. True, there are legal situations that do not require formal tenaim. But where formal stipulations are required, they all must adhere to these rules.

ROSH now examines the opinions of other poskim on this subject.[6] Alfasi writes in a responsum (and on fol. 37b) that stipulations of the על מנת type do not require כפילות . Rav Hai Gaon agrees with this view. So does RAMBAM, Hil. Ishut 6:16-18. RABAD (quoted as well in Hiddushei Ha-RAMBAN, Gitin 75b) explains the reasoning behind this position: a tenai that states "if..." comes to nullify a legal transaction (such as a get); therefore, it must be formulated in "double" form ("if...if not..."). This is not the case with an על מנת or מעכשיו tenai, in which the legal transaction takes effect from this moment, the moment of the stipulation. RAMBAN presents this difficulty against RABAD: R. Meir certainly holds that " על מנת " is equivalent to " מעכשיו ", yet even so, he requires tenai kaful in such a stipulation. ROSH cites RAMBAM once again (Hil. Gerushin 9:1-2): a get which stipulates that a wife is to be divorced after a fixed time does not have to be written in the form of tenai kaful. R. Hananel, meanwhile, requires all the various rules be observed for all stipulations.

ROSH concludes with the observation that the Ashkenazic sages rule that these rules apply to all stipulations and that that is the normative practice. See TUR, EHE 38, fol. 68b, and Beit Yosef ad loc.

This siman is one of the few encountered so far in which ROSH plays the

part of the " מאכסן ", bringing together the diverse halakhic traditions of Ashkenaz, Sefarad and Provence. It takes the form of a comprehensive halakhic research, in which the sugya is analyzed according to the Tosafist tradition and the opinions and rulings of other authorities are considered before ROSH renders the final pesak. Inasmuch as the responsum 46:1 contains an even more lengthy analysis of this question and parallels our halakhah, one is tempted to suggest that this analysis has its roots in that responsum. In an actual case, in which R. Asher must rule on a question of practical significance within the Sefardic community, he would be perhaps more likely to discuss the full range of opinion, Sefardic as well as Ashkenazic, in order that his ruling might be more favorably accepted.

10.a. כתנ -- = Tos. Ha-ROSH 75b, מת . In the conditional get described in the mishnah, the wife must either nurse the child for a specified period or serve her father-in-law for the rest of his life. Should either the child or the father die, the get is valid. RASHI (מת הבן) regards this as referring to the death of the child before the specified time has elapsed. The problems here is that the mishnah's phrase מת האב tells us nothing; it is obvious that when the father dies, the wife's obligation has been fulfilled. Tos. Ha-ROSH suggests that this phrase refers to a situation where the father dies before the wife has begun to serve him; the get is valid. ROSH here resolves the problem by attributing the mishnah's wording to considerations of linguistic style.

10.b. גמ -- follows RIF to כרשכ"ג . A baraita conflicts with our mishnah: according to the baraita, one day of nursing or service is sufficient for the wife to receive her get. Several solutions are proposed. Rav Hisda suggests that the baraita follows the view of R. Shimeon b. Gamliel, who states in our mishnah that if the wife cannot perform the

stipulation for reasons beyond her control, the get is valid. RIF follows the anonymous view in the mishnah; R. Tam and R. Yizhak always follow R. Shimeon b. Gamiliel in the mishnah. That this is ROSH's view as well is demonstrated by Korban Netanel, n. 40. RAMBAM, Hil. Gerushin 8:20, follows RIF.

Rava interprets the mishnah, which requires two years of service to fulfill the tenai, as dealing with a case in which the husband did not specify a time limit to the service, while the baraita concerns a case with a time limit. Rav Ashi declares that there is no difference between these two cases. In either case, the wife fulfills the stipulation even if she serves for one day.

RIF decides according to Rav Ashi; ROSH follows Rava and states that RAMBAM agrees with him. The halakhah in Hil Gerushin 8:19, however, clearly follows Rav Ashi, as noted by Magid Mishneh ad loc. Beit Yosef, EHE 143, 61b, suggests a scribal error: "RAMBAM" should read "RAMBAN". Korban Netanel, n. 70, points out that there is no evidence of such a ruling on the part of RAMBAN. Since it is unlikely that RAMBAM would reject Alfasi in 8:19 while following him in the closely-related 8:20, however, it is reasonable to suppose a scribal error here. See TUR, loc. cit., 62a, who implies that ROSH follows Rava while RAMBAM decides according to Rav Ashi.

10.c. ת"ר -- follows RIF, but adds a short footnote referring us to 6:9, above, where ROSH clearly disagrees with RIF/RAMBAM.

11. ת"ר -- follows RIF.

12. מתני' -- follows RIF to והא לא אתא ולימחוש שמא פיים. The difficulty raised by the Talmud is applied at first to the baraita on 76b (=Tosefta Gitin 5:10) and then to the mishnah which follows (=M. Gitin 7:8). To apply it to the mishnah would indicate a stricter ruling, which is provided by R. Hananel and, in ROSH's

view, the Alfasi as well (since RIF generally follows the second of two suggested interpretations). RAMBAM, however, rules leniently. In Hil. Gerushin 9:11, he states that if the tenai provides that the woman is divorced if her husband does not return home within twelve months, we do not take note of the concern that he might have returned and reconciled with her if we have not seen the two of them together. ROSH strongly rejects this leniency in the case of a Toraitic ritual prohibition.[7]

TUR, EHE 144, 61a, explains that the husband must declare that his wife has the power to contradict him should he claim that he returned within the specified period; otherwise, we do fear that he returned and the get is invalid. Beit Yosef, ad loc., states that RAMBAM does not require this declaration on the part of the husband. See also RABAD's hasagah to Hil. Gerushin 9:11. The Magid Mishneh, like the Beit Yosef, feels that, for RAMBAM, the fear that the husband may have returned is based upon rabbinic law and is therefore not categorized as a Toraitic prohibition.[8]

13.a. מתני׳-גמ׳ -- ROSH follows the pesak of RIF and RAMBAM, Hil. Gerushin 9:11. He explains this ruling by citing Talmudic material missing from RIF, as well as the rule that if a בעיא is not resolved we should rule strictly, especially since violations of ritual prohibitions could follow a lenient ruling.

13.b. אמר אביי -- follows RIF; cites his own comment in Gitin 9:14, below.

13.c. מתני׳ -- follows RIF.

14.a. גמ׳ -- RASHI interprets the baraita on 77a as referring to a get which stipulates: "This is your get if I do not return (in the period of) after this Sabbatical cycle"--i.e., one full year following the seven. (77a, לאחר שבוע שנה) R. Hananel, on the other hand, believes

the baraita refers to a delayed get which takes effect after the eighth year regardless of the husband's return. ROSH prefers RASHI's view, since it is better supported by the language לאחר שכדע . A delayed get would be written in different language. RAMBAM, Hil. Gerushin 9:23, also interprets this baraita as dealing with a delayed get. ROSH rejects RAMBAM, in that if the husband instructed a scribe to write and deliver a get לאחר שכוע , the get would certainly be written and delivered immediately after the seventh year. Yet, according to ROSH, RAMBAM requires a further delay until the end of the eighth year.

Magid Mishneh ad loc. does not agree with ROSH's interpretation of RAMBAM: the get is to be written within the eighth year. RaN, fol. 39a, has the same explanation. Even the TUR, EHE 144, 65b, disagrees with his father's interpretation of the Mishneh Torah passage. See Beit Yosef, ad loc., who suggests that ROSH had a faulty reading of the RAMBAM text.

All of this does not deal with the truly central issue in this halakhah. ROSH, like RASHI, believes that the baraita on 77a is connected with the mishnah on 76b: both concern the issue of the husband's return within the time stipulated in the tenai. R. Hananel and RAMBAM both interpret the baraita as dealing with a delayed get, not to be written immediately, whether or not the husband leaves his wife's presence. ROSH disagrees with RAMBAM on the fundamental interpretation of the context of the baraita. We must therefore take ROSH's rejection of RAMBAM quite literally. In fact, there is ample reason to assert that ROSH does correctly interpret RAMBAM. According to the ROSH's version of the Mishneh Torah, RAMBAM states: אין כותבין אלא עד שנה אחר שכוע , which indeed supports the view that RAMBAM requires the get be written at the end of the eighth year. Our own text reads: אין כותבין אלא עד שנה אחר השכוע ,

which also supports Asher's interpretation. TUR's version reads: עד שנה של אחר השבוע , which indeed conflicts with Asher's understanding; see also the version cited in Yam shel Shelomo, Gitin 7:15, who carries the same version. Whatever the correct reading, it is also quite possible that RAMBAM is influenced by R. Hananel's understanding of this baraita.[9]

14.b. תניא -- follows RIF to כוותיה דרבי .

R. Hananel rules that the instruction to write the get if he should not return[10] "after the festival" means that the get should be written after fifteen days have elapsed since the festival.

RAMBAM does not mention this rule; see Magid Mishneh to Hil. Gerushin 9:23, who states that RAMBAM omits this point because the Gemara does not answer it clearly. RIF cites only the Gemara's report that Rabbi's suggestion of a thirty-day period was not accepted.

NOTES TO GITIN, CHAPTER SIX

[1]In R. Asher's Talmud, " מי שאחזו " is the sixth chapter, preceding " האומר ". Our printed texts have the reverse order. ROSH's order coincides with that of RASHI (see 71b, טעמא and האומר). See Tos. Ha-ROSH 62b, האומר : R. Tam follows the order of the Yerushalmi, in which " האומר " precedes " מי שאחזו " and supports that ordering by means of logical arguments concerning context. Raviz, Tosafot Ha-ROSH al Masekhet Gitin, p. 225, n. 1, cites manuscript evidence from Tos. Ha-ROSH indicating that he indeed follows RASHI's arrangement. We follow that arrangement here in order to correspond with the Halakhot.

[2]The printed Tosafot (70b, התם) quotes R. Yizhak as ruling that the dying man must not become insane כיון כחיכה לנתינה . Most rishonim accept the reading of Asher and Tosafot Ha-ROSH; see Korban Netanel, n. 1.

[3]This reading is found in Geonic sources; see Ozar Ha-Geonim, Gitin, pp. 245-246. RAZAH, in Sefer Ha-Maor, fol. 35a, attributes Alfasi's readings to Spanish texts and mentions that RASHI's version differs. Feldblum, Dikdukei Soferim, cites a Genizah fragment which agrees with RIF's version.

[4]See also Hiddushei Ha-RASHBA, who cites both readings and prefers that of RASHI (=ROSH).

[5]See also Ozar Ha-Geonim, Gitin, pp. 167-168.

[6]See Resp. Ha-ROSH 46:1 for the parallel of this discussion.

[7]See the kelalim of Korban Netanel, beginning of Masekhet Shabbat, n. 1. When two possible interpretations or versions are suggested in the איכא דאמרי or איכא דמתני form, ROSH rules for stringency if the case involves a Toraitic ritual prohibition. RIF, on the other hand, follows the second interpretation (לישנא בתרא), which in our case is the stricter ruling.

[8]See Resp. Ha-ROSH 45:12. Asher analyzes at length a case similar to the one here and reaches the same conclusion. At the very end of the responsum, he cites RAMBAM, without including the note of rejection so firmly stated in the Halakhot.

[9]The influence of R. Hananel upon the Mishneh Torah has been noted; see A.J. Dromberg, "Hashpa'at R. Hananel al Ha-RAMBAM," Sinai, v. 33, 1953, pp. 43-55.

[10]This is RASHI's understanding; see 77a, לאחר הרגל . R. Hananel, as noted in 6:14a, would regard this as merely a case of delayed get, having nothing to do with the husband's presence or absence.

G. Tractate Gitin, Chapter Seven

1. האומר -- follows RIF.

2. גמ' -- follows RIF.

3. איתמר -- follows RIF to לא עקר שליחותיה .

An agent appointed by the wife as an agent of transport is not allowed to tell the husband that he was appointed by an agent of receipt. In the reverse case, one appointed as agent of receipt may tell the husband that he was appointed an agent of transport. In the first case, the get is invalid even once it reaches the wife; in the second case, the get is valid once it reaches the wife. ROSH explains that we rely in the second case on the agent's statement, regarding him as an agent of transport, because this is the stricter ruling.

RIF and RAMBAM (Hil. Gerushin 6:11-12) provide a different explanation of the Gemara's phrase לא עקר שליחותיה . In the second case, the agent actually lessens the authority conferred upon him by the wife; we therefore rely upon his statement. See Tos. Ha-ROSH 62a, ש"מ . The fact that a similar case in Baba Mezia 76a was not resolved by the Talmud leads ROSH to rule for strictness here (and see Korban Netanel, n. 2). For this reason, ROSH abandons the RIF formulation here: he wishes to compare the two cases, which are not compared by RIF and RAMBAM.

4. ת"ר -- follows RIF.

5. אמר -- follows RIF.

6.a. ההיא דקרו -- follows RIF to וכן הלכתא .

Tos. Ha-ROSH 63b, כותכין . The agents must write another get in order to fulfill the husband's instructions; this applies certainly if they lost the first get. They must not re-write the get, however, on the basis of their own uncertainty of the validity of this get according to

customary stringencies which are not firmly rooted in the law. Thus, the husband ought to instruct them to write a get which is unquestionably valid in their view.

RAMBAM, Hil. Gerushin 2:8, writes that these agents must re-write the get as many times as necessary until it is valid. There are two questions at issue here: 1) are the agents empowered to re-write the get when they know it to be invalid? 2) are the agents empowered to re-write the get when they suspect that it may violate those customary stringencies? In regard to the first question, RAMBAM clearly answers yes. See Hagahot Maimoniot, n. 5: the Tosafot position, attributed to R. Yizhak, seems to prohibit any re-write of the get, without express instructions from the husband, on the basis of the agents' suspicions of the invalidity of the first get. ROSH, who mentions "customary stringencies", perhaps agrees with RAMBAM: if the agents believe or find that the get is in fact invalid, they are empowered to write another one.[1] Nevertheless, he also states that "if the get is lost" the agents re-write it, thus apparently limiting this power to the case where the get is lost. TUR, EHE 122, 9b, includes both "error" and "loss" as warrants for re-writing the get. As for question 2), there is no mention in RAMBAM of the power of the agents to re-write the get if they suspect that it may violate certain customary stringencies.

6.b. בעא מיניה -- follows RIF to חיקו . RIF interprets the בעיא as concerning whether the agents can serve as agents of transport a second time without an express appointment from the husband. ROSH, following RASHI (63b, כתבו וחתמו לשלוחה), sees this as a case in which the agent for transport has lost the get: the first two agents may not write another get without an express appointment.

RAMBAM, Hil. Gerushin 2:9, differs from both. For him, the problem is

that the get, having been delivered to the agent of transport, is subsequently found invalid. The agents have performed their agency; they may not re-write the get without the husband's appointment. Beit Yosef (EHE 122, 10a) writes that RASHI (=ROSH) holds this get to be valid, but lost. If the get were found to be invalid, they would certainly be empowered to re-write it. Beit Yosef is surprised that the TUR does not mention RAMBAM's view. See Meiri, p. 295, who suggests that the text of the Mishneh Torah may be in error.

6.c. רשב"ג -- follows RIF.

7. מתנ' -- follows Mishnah, RIF.

8.a. גמ' -- ROSH inserts comments from Tos. Ha-ROSH 64a, כעל אומר and הרי בעל נאמן, into RIF's words. He also bases himself upon RASHI, 64a, כעל. RIF rules that the halakhah follows Rav Hisda (we believe the agent), despite the fact that a Geonic tradition rules in favor of Rav Huna (we believe the husband).[2] ROSH disagrees: the sugya, upon which RIF bases his ruling, does not deal with the precise dispute between Huna and Hisda. R. Efraim had developed this attack two centuries before. RAMBAM testifies that he saw a version of Alfasi which rules according to Rav Huna (see Hiddushei Ha-RASHBA, Gitin 64a). ROSH concludes that, since we cannot be sure of the authoritative ruling, we must follow Rav Huna, the stricter of the two, as does R. Tam (see Tos. Ha-ROSH 64b, ד"ה מ).

RAMBAM, Hil. Gerushin 12:11, follows Rav Hisda. He does not make the distinction, found in Tos/ROSH, between a case in which the husband, wife and agent all live in the same city (in which case we believe the husband) and a case where they live in different cities (we would believe the agent). See TUR, EHE 141, 53a-b, and BaH ad loc.

8.b. ומודה רב הונא -- = Tos. Ha-ROSH 64a, מיגו. The Gemara states that Rav Huna agrees that a woman can testify that the agent was

appointed for the purpose of delivering the get to her. This is on the basis of the migo argument: if she wished, she could also contend that the get was given her directly by her husband. Tos/ROSH conclude that this must mean that the woman possesses the get. Yet the Huna/Hisda dispute deals with a case in which the agent has possession; why then the statement " ומודה רב הונא "? The rule therefore must also apply when the agent still holds the get; we do not suspect the wife of lying merely because the agent is there to back her story. Moreover, the migo still applies: the wife is believed when she says "My husband appointed him an agent of transport", because she could have claimed "My husband gave me the get and I deposited it with this agent."[3] Tos/ROSH argue that this second migo does not apply to the case where the agent himself claims "I was appointed for purpose of divorce" and is contradicted by the husband.

RAMBAM, Hil. Gerushin 12:11, requires that the get be in the wife's possession before her claim is accepted. TUR, EHE 141, 53b, identifies RAMBAM with the first opinion mentioned in Tosafot, whereas the ROSH finds that the wife is believed in this claim even if the agent holds the get. Note that, while Alfasi resembles the Gemara and can be interpreted both ways, the RAMBAM is more precise and definite on this question.

8.c. תנן אומרת -- = Tos. Ha-ROSH 64a, הא . The mishnah's requirement that witnesses must testify that the agent of receipt did receive the get applies only if no witnesses have signed the get. If such signatures appear, the agent merely testifies that the get was given to him in the presence of witnesses.

RAMBAM, Hil. Gerushin 6:1-2, does not require that witnesses be produced as long as the agent possesses the get. Does this mean that he would also require signatures on the get? BaH, EHE 141, 47a, thinks he does, inasmuch as

the get to which he refers must be complete in all respects. RASHBA, however, mentions the requirement for signatures as a separate issue from those addressed in RAMBAM (Hiddushim, 64a). In fact, the subject of signatures is not mentioned by RAMBAM; his position must be deduced, whereas ROSH deals specifically with this point.

8.d. בעל אמר -- follows RIF.

9.a. מתנ' -- = Tos. Ha-ROSH 64b, נערה . The anonymous view in the mishnah holds that a maiden (נערה) is empowered along with her father to receive her get. What of a minor girl, a קטנה ? RASHI presents two opinions. The first, implied in Gitin 64b, היא ואביה , and stated clearly in Kiddushin 43b, היא ואביה , holds that a minor is not so empowered. In Kid. 43b, נערה מאורסה , however, RASHI states that a minor may legally receive her own get. RIF supports the first interpretation, while Tosafot (R. Yizhak b. Meir) supports the second. ROSH concludes that, because of this dispute, we should follow the stricter opinion.

RAMBAM, Hil. Gerushin 2:18, clearly disqualifies a minor from receiving her own get. While this might appear as in accord with ROSH's advice that we should follow the strict opinion, this is not correct. See TUR, EHE 141, 46b. Both Beit Yosef and Darkei Moshe, n. 1, state that " ראוי להחמיר " means that we may rely on the lenient view during an emergency situation. Thus, unlike RIF and RAMBAM, ROSH's position would not hold a get for a minor to be invalid should she receive it herself, in place of her father.

9.b. גמ' -- follows RIF.

9חכ וכל שאיננה -- follows RIF to לרבר אחר . = Tos. Ha-ROSH 64b, וכל . While the Gemara would imply that a minor who is incapable of guarding her get cannot be divorced even if her father receives

the get on her behalf (see RASHI, 64b, אינה מתגרשת). R. Tam, however, rules differently: such a minor is divorced when her father receives her get. ROSH refers us to his Halakhot, Yeb. 14:3.

RAMBAM, Hil. Gerushin 2:18-19, agrees with R. Tam. The only time that the minor's mental capacity is at issue is when she receives her own get.

10. אמר -- see 11:a.

11.a. הפעוטות -- ROSH favors the reading of RASHI (65a, וכנגדן): the age of פעוטות is old enough to regard the minor's marriage as Toraitic and require get. Alfasi has an opposite reading: פעוטות -marriage is rabbinic in nature.

RAMBAM, Hil. Ishut 4:7 and Hil. Gerushin 2:18, follows RIF's reading. See TUR, EHE 43, 78b, and Beit Yosef ad loc.

11.b. הגיעו לעונת נדרים -- follow RIF to עד שיביאו כ' שערות . Unlike RIF, ROSH declares the Rabah statement to be in conflict with the halakhah. He suggests that RIF might actually agree with the understanding of RASHBAM; see Tos. Ha-ROSH 65a, וכנגדן .

RAMBAM, Hil. Yibum 1:17, agrees with RASHBAM that halizah is not allowed until the minor girl reaches the age of twelve. While ROSH integrates RIF into the Tosafot understanding of sugya, he does not mention RAMBAM--who already agrees with Tosafot. Certainly RAMBAM would be a valuable indicator of Alfasi's position, yet ROSH does not cite him even to support his own view of RIF.

12. מת' -- follows Mishnah, RIF.

13. האומר -- follows RIF.

14. מת' -- follows RIF, with minor additions from Gemara.

15.a. מה' -- follows RIF/Gemara to וכן הלכתא . ROSH refers us to his Halakhot in Baba Batra 9:18), where he rules that we

interpret the instruction "write" made by one setting out on a journey to mean "write and deliver" only for the purpose of a bill of divorce. We do not expand that interpretation to include gift. This negates Alfasi's understanding.

RAMBAM, Hil. Zekhiah 8:24, follows RIF's view. See Magid Mishneh ad loc., who refers to the "opposing" view that =ROSH here. In Baba Batra, ROSH attributes this view to R. Yonah, as does RaN, fol. 32a.

15.b. ירושלמי -- ROSH cites Yer. 6:5 (48 a-b) which includes under the rubric "condemned man" those imprisoned for monetary crimes as well. The baraita in the Yerushalmi also distinguishes between one who is ill and one who is dangerously ill.

RAMBAM apparently refers to this Yerushalmi in order to define "dangerously ill"; see Magid Mishneh loc. cit. RAMBAM does not, however, specify that those condemned for monetary crimes are also included under this rule.

16. קשיא -- follows RIF to כדי ליפות את כוחו . = Tos. Ha-ROSH 66a, מחמרא . RASHI (66a, כדי) interprets the word " מחמרא " in the instructions of the condemned man to mean that all the wine he owns is surety for his debt to a creditor. In this way, should some of that wine become sour, the heirs cannot claim that the sour wine came from the portion mortgaged to the creditor. Tos/ROSH point out that even if he said " המרא " in fact the creditor would really lose only that part of the sour wine proportional to his share in the entire stock. RIZBA supports RASHI's view: the entire loss would be taken from the creditor's portion. Tosafot concludes that if the man transfers an unspecified part of his stock to another, that other person becomes a partner in the entire stock. He would lose only a portion of the wine that sours.

All of this comes to explain the phrase כדי ליפות את כוחו . But how does the word " מחמרא " improve the creditor's legal position? RAMBAM, Hil. Zekhiah 8:22 does not say. Magid Mishneh writes that RAMBAM follows RASHI's view: if the condemned man says " יין " and not " מיין", the heirs can claim that all the sour wine belonged to the creditor's portion. RASHBA, however, cites this opinion in the name of RAMBAN. (Hiddushim, 66a). RAMBAM simply repeats the Talmud's language; unlike the other poskim, he does not explain it.

17. מתנ' -- follows mishnah, RIF.

18. הכריא -- follows RIF to בכריא וכו' . ROSH cites Tosafta Gitin 6:4, the parallel to this mishnah.[4] Both the version of this Tosefta cited by ROSH, as well as the Yerushalmi passage he cites afterward, raise the question of the legal ruling in the event we are uncertain as to whether the husband's death was a suicide or an accident. The Yerushalmi holds that, in the event of this doubt, a get previously written on the husband's instructions is considered valid and delivered to the wife; the husband is regarded as שכיב מרע . ROSH then cites RAMBAM, Hil. Gerushin 2:13, to the effect that a get in such a case is a safek get. ROSH mentions that RABAD already disagreed with this ruling and that, according to the Yerushalmi, the doubt in this case leads to a lenient ruling. This reading of the RAMBAM is at odds with our own and with that of RASHBA (Hiddushim, 65b) and Beit Yosef, EHE 141, 48b: both of them read הרי זה גט, which agrees with ROSH's decision. RABAD thereupon becomes a textual footnote which cites the source of this leniency, rather than a criticism of the ruling. See RASHBA: RABAD's note is a qualifier to the broad pesak of ("our") RAMBAM. The get is valid only if "he fell off the roof immediately": i.e., there is reason to believe that this death was a suicide, although we

are not certain. TUR, however, states that ROSH interprets RABAD in the opposite way: if we are uncertain whether the death was a suicide or an accident, we rule the get to be valid apparently regardless of whether "he fell off the roof immediately".

The dispute over the meaning of RABAD stems, of course, from the varying texts of the Mishneh Torah. If RAMBAM states גט ספק , then RABAD's note objects that the get is valid. If RAMBAM actually declares the get to be valid, then RABAD's hasagah (=TUR) becomes a hagahah (=BaH, 48a), giving the source of the ruling and inserting the distinction between immediate and delayed death.[5] Opinions clash as to whether our text of RAMBAM is correct (Beit Yosef, RASHBA, Meiri) or whether that possessed by ROSH/TUR is to be preferred (Tiferet Shmuel, BaH). This much is clear: the ROSH disagrees with the ruling in his version of the Mishneh Torah. And ironically, those who read הרי זה גט in the Mishneh Torah, a wording that ostensibly agrees with the ruling of ROSH, explain that the RAMBAM actually meant to include a distinction in the law not found in ROSH and TUR. The distinction is present in neither version of the RAMBAM nor in ROSH/TUR.

19.a. ההוא גברא -- follows RIF.

19.b. מתנ' -- follows RIF to ליח הלכתא כווותיה .

See Tos. Ha-ROSH 71b, קולו . The halakhah follows the position of R. Yose that מילי לא ממסרן לשליח .

The agents appointed by the husband to write the get cannot appoint another agent in their place to write the get. Even if the husband tells them to instruct the sofer to write the get, the document is invalid unless the scribe and the witnesses heard the husband's oral instructions. From the baraita on 72a, the Gemara deduces that a deaf person cannot issue written instructions for the writing of his get. Tos/ROSH reason that this ought not apply to a

hearing person who issued written instructions; after all, a mute may issue instructions for a get by means of gestures. R. Tam, however, states that the Tosefta parallel to this baraita (Tosefta Gitin 2:10) rules out the use of written instructions in all cases. If gestering is permitted for the mute, it is because a) body movements are legally superior to written instructions, or b) a special leniency was adopted in order to save the wife of a mute from igun.

RAMBAM, Hil. Gerushin 2:16, rules that a husband who has lost the power of speech may issue written instructions to write a get for his wife. Hagahot Maimoniot, n. 200, informs us that this is a dispute among the Tosafists as well, with R. Yizhak permitting a hearing person to write instructions and R. Tam (among others) forbidding this on the strength of Tosefta Gitin 2:10 and Yer. Gitin 7:8 (48b). TUR, EHE 120, 5a-6a, presents this as a dispute between RAMBAM and ROSH. BaH explains RAMBAM's ruling on the basis of the statement of Rav, 71a. Rav permits the חרש, the person who cannot hear, to issue written instructions for divorce. The Talmud on 72a declares that Rav's position is not in accord with the halakhah: RAMBAM, apparently, interprets this to mean that only the חרש is eliminated from the permit for written instructions. See Hil. Ishut 2:26 and Hil. Mekhirah 29:3: RAMBAM regards the person who hears but cannot speak is legally competent in all respects. R. Tam, as we have seen, follows the Tosefta, which seems to forbid the use of written instructions for all persons. RAMBAM does not apply that Tosefta to the question of persons who are deaf or mute.

20.a. ורואה -- see Tos. Ha-ROSH 71b, קולו. Tos/ROSH provide that this restriction against the use of written instructions does not apply to the wife: she may appoint an agent without directly speaking to him. We allow this on the basis of the principle that, in many cases, we know that

she would want the get. ROSH adds that an agent may be appointed by the husband as well, without hearing the instructions directly from the husband, as long as the agency does not involve the writing or signing of the get.

This distinction between husband and wife is not found in RAMBAM, who, as we have seen, permits the use of written instructions by most husbands even for the writing of the get.

20.b. גרס' -- follows RIF.

21. אמר -- follows RIF; adds explanatory note הלכך ככל עניין מכר ככולכם .

NOTES TO GITIN, CHAPTER SEVEN

[1]And see 7:6b, below, where ROSH holds with RASHI, who would apparently allow re-writing should the get be found invalid.

[2]See Ozar Ha-Geonim, Gitin, p. 142.

[3]RASHBA, Hiddushim, 64b, presents a similar argument.

[4]As Korban Netanel, n. 50, remarks, there are serious textual problems with this Tosefta. The section from ואם הרוח רחפתו to שאני אומר מעצמו נפל does not appear in either the MSS or the printed Tosefta; see Lieberman, Tosefta Kifshutah, Gitin, p. 860. Both RASHBA (Hiddushim, 65b) and RAN (fol. 32b) cite this section as part of the text of the Tosefta. Lieberman therefore asserts that it was part of the original Tosefta but has since been omitted from the several versions. Epstein, on the other hand, points out that the Yerushalmi (48b) cited by ROSH does not read this section as part of the Tosefta. Rather, the section was later inserted into the body of the Tosefta on the strength of the Yerushalmi. Moreover, in place of the statement of R. Shimeon b. Gamliel included in our version, the original Tosefta had the statement attributed to him by the Yerushalmi. See Mavo le-Nusah Ha-Mishnah, p. 600.

[5]See Meiri, p. 310. He too reads הרי זה גט in RAMBAM and, like RASHBA, believes that RABAD's comment seeks to apply this general rule to the specific case in which the death was immediate.

H. Tractate Gitin, Chapter Eight

1. הזורק -- follows RIF.

2. הדוא שכ"מ -- follows RIF to וכן הלכתא .

= Tos. Ha-ROSH 77b, תקף . RASHI, 77b, תקף , explains that the dying man in this case could not divorce his wife on Shabbat because it is forbidden to touch or move a get on Shabbat. RASHBAM disagrees: it is permitted to move a get on Shabbat, but in this case the get would have had to be transported through the public domain in order to reach the wife. Tos/ROSH prefer RASHI's argument; if RASHBAM were correct, the dying man could simply have appointed an agent to see to it that the wife received the get. This would not be prohibited, even though ordinarily both acquisition and divorce are prohibited on Shabbat; in both cases, we are allowed to undertake these transactions for the dying person.

RAMBAM, Hil. Zekhiah 8:3, places a limitation on the right to acquire from a dying person on Shabbat: the permit extends only to those transactions in which a formal act of acquisition (kinyan) is not required. If, however, a formal kinyan is legally required, it is not permitted even for the dying person on Shabbat. See TUR, HM 254, 157a, and ROSH, Baba Batra 9:36: a kinyan of this type is permitted on Shabbat, even if it is legally required in order to make the transaction valid.

As to the question of the permit to divorce on Shabbat if the husband is dying, we find this rule codified in TUR, EHE 136, 39a. RIF and RAMBAM do not mention this issue. Karo accepts the Tos/ROSH position, SA EHE 136:7.

3.a. מכאן -- = Tos. Ha-ROSH 77b, נעל . M. Baba Batra 3:3 states that "locking" a door is sufficient to establish hazakah, the legal presumption of ownership. RASHBAM interprets this to mean the actual fixing of a lock or to the door, since the mere act of engaging a lock already on the

door falls under the category of saving the property of one's neighbor and restoring his lost property; it is not proof of ownership, for Jews are commanded to do this on behalf of their neighbors.[1] Tos/ROSH disagree, arguing that our sugya proves that "locking" means the mere locking of the door. The Talmud cites this mishnah as proof that the dying man can give a get to his wife on Shabbat; if the wife must affix a lock to the door of the room in which the get is found, this labor would be prohibited on Shabbat. The mishnah, therefore, must be concerned with actions permitted on the Shabbath.

RAMBAM, Hilkhot Mekhirah 1:8, repeats the language of the mishnah and does not define the precise meaning of נעל . See TUR, HM 192, 25b, and Beit Yosef ad loc., who cites the discussion of RAMBAN on this issue as well. RIF and RAMBAM leave this question vague; the Tosafot tradition--RASHBAM and his critics--forms the basis for subsequent analysis of this subject.

3.b. ראיתי -- = Tos. Ha-ROSH 77b, נעל . Some say that the opening of a door is the same as locking it: both establish hazakah. Tos/ROSH reject this interpretation: opening a door does not keep others from entering the room, while locking the door is the sure sign of control and ownership. True, Rava's statement implies that the woman should "close and open" the door; this does not mean, however, that either action, including "opening" is sufficient. Perhaps, says ROSH, Rava includes "opening" in order to differentiate this sign of possession from the normal behavior of a wife who locks the door of a room which clearly belongs to her husband. In this case, when the woman locks the door and opens it again, it is obvious that she does so to demonstrate ownership and not in order to safeguard the property within.

RAMBAM, Hilkhot Mekhirah 1:10, seems to require that the presumed owner

lock the door and then re-open it in order to demonstrate ownership. In this way he shows that he can make use of the property he controls. Magid Mishneh, TUR, HM 192, 26a, and RAMBAN[2] view RAMBAM as requiring both actions in order for hazakah to be established. TUR states that he does not understand RAMBAM's ruling. Beit Yosef seeks to resolve the difficulty by positing that RAMBAM agrees with ROSH: locking of the door in itself is sufficient. RAMBAM's ruling comes to add that even if the door is subsequently opened, hazakah is nevertheless established. This is true for ROSH as well, says Karo, since he, too, remarks that in some cases, the mere locking of a door is insufficient sign of ownership of property.

The problem with this is that it does not square with the plain sense of RAMBAM's words. BaH, ad loc., stresses that when RAMBAM says "the buyer locks the door and then re-opens it", we should read these words in their obvious sense, as do the rishonim: both acts are required. ROSH requires but one. See Kizur Piskei Ha-ROSH 8:3.

3.c. בתוך ביתה -- follows RIF.

3.d. הרוא גברא -- not in RIF. The Gemara's case concerns a husband who throws a get to his wife, who stands within the husband's courtyard which has been lent to her for the purpose of allowing her to acquire the get. The get lands upon a pile of refuse within the courtyard: under certain circumstances, the refuse constitutes a separate reshut which was not lent by the husband for this purpose. In these circumstances (the pile is four square cubits, or ten tefahim in height, or carries a designation testifying to its separate status), the woman is not divorced, since she does not have possession of the spot where the get has landed. The husband has not fulfilled the requirement that he place the get into the woman's hand (=her property or an area under her legal control).

RAMBAM, Hilkhot Gerushin 5:9, clearly adds a proviso to this rule; if the pile lies within four cubits of the wife, she does take legal possession of the get. Her "four cubits" grant her possession of the document even if it should fall upon a spot in the courtyard which has not been lent to her by her husband. Magid Mishneh ad loc. and RaN, fol. 40a, both take exception to this ruling, on the grounds that the Talmud does not mention the issue of the wife's "four cubits". When the get falls upon an object over which the wife has no control, it remains the property of the husband no matter how close the wife stands to that object.

3.e. אפי' -- follows RIF.

3.f. לתוך חיקה -- follows RIF.

4. מתני' -- see Tos. Ha-ROSH 78a, נתן. The husband gives the get to his wife while she is asleep. The get is invalid until he states to her, when she awakens, that "this is your get." The reason, say Tos/ROSH, is that a person who is asleep possesses no דעת, which is normally required of a woman in order to be competent to receive a get. ROSH also agrees with RaMaH on the issue of the get which falls from the hand of the woman while she is asleep. If this happens, the husband must hand the get to her when she awakens. The wife did not have actual possession of the document while she was asleep.

RAMBAM, Hil. Gerushin 1:9, explains this mishnah according to the rule that a woman must know that the document she is given for the purpose of divorce. Thus, he would interpret the requirement of דעת as meaning that the woman possesses "awareness" of the nature of the legal proceeding. The RaMaH ruling adds another factor to this concept: the woman's ability to hold onto her get. The lack of דעת means the inability to control the document physically. This is the interpretation of Korban Netanel, n. 7.[3]

RAMBAN, Hiddushim 78a, states that the sleeping woman does not have the ability to take possession of the document; both RASHBA, in his Hiddushim, and RaN, fol. 40a, explain that the controlling factor is that the sleeping woman cannot physically take possession of her get. In other words, two separate issues are involved here: the wife must know that the document is given her for the purpose of divorce, and she must be able to take possession of it. RAMBAM does not mention the second issue, while ROSH and the other do. Clearly, ROSH and the other commentators interpret this mishnah in such a way that it speaks to both, not only one of these issues.

5.a. גמ' -- follows RIF to רטקלידה . = Tos. Ha-ROSH 78a, דעדיק . The case in the Talmud concerns a get which is inserted in the husband's belt. According to the first interpretation cited in Tos/ROSH, the husband fulfills the requirement that he physically "give" the document to his wife by twisting his body so that the get moves in her direction. If she takes hold of the get following his act, the get is valid. R. Hananel, however, suggests a different interpretation. In his reading, the husband must take some action to loosen his belt's hold upon the get as well as bring the document to his wife's direction. In order for the get to be valid, according to R. Hananel, the husband must both bring the get towards his wife and aid her in taking hold of it.

TUR, EHE 138, 40 a-b, states that ROSH follows this second interpretation,[4] and he points out that RAMBAM, Hil. Gerushin 1:12, requires only that the husband bring the get in his wife's direction. Beit Yosef suggests that ROSH does not necessarily accept R. Hananel's view; in fact, ROSH cites both interpretations and does not decide between them. Moreover, if ROSH does agree with Hananel, it could be that both of these authorities require two actions on the husband's part only when both are necessary in

order for the wife to take possession of the get. When the only action needed is for the husband to advance the get towards his wife, even R. Hananel would accept that one action as sufficient. BaH rejects both of these arguments; in his view, ROSH/R. Hananel clearly require both actions and therefore contradict RAMBAM. This is also the view of Yam shel Shelomo, Gitin 8:6. The evidence points to a clear halakhic disagreement between ROSH and RAMBAM.

5.b. אמר רבא -- not in RIF. = Tos. Ha-ROSH 78a, והלכתא .
A slave is analagous to a courtyard: his physical possession of an object acquires ownership of that object on behalf of his owner. A husband hands a get to the wife's servant, who is asleep while the wife watches over him. Does the slave's physical possession of the get acquire ownership on behalf of his mistress? If the slave is awake, the wife does not acquire the get, because the slave is considered "property not under the wife's supervision". To Rava's ruling that the sleeping slave does acquire ownership, the Talmud objects: the slave is a "moving courtyard", which does not have the power to acquire ownership of objects falling within its confines. The Talmud explains that, in this case, the slave is tied down. Tos/ROSH deduce that this sugya requires that the slave be both tied down and asleep, so that he not be considered either a "moving courtyard" or "property not under the wife's supervision". Parallel sugyot, including Gitin 21a, Baba Kama 12a, and Baba Mezia 9b, give the impression that we require only that the slave be bound in order for his possession to acquire ownership for his master. Since the "asleep/awake" issue is not mentioned in any of those sources, it seems sufficient that the slave not be a "moving courtyard". RASHI (Gitin 78a, ככפות) and Halakhot Gedolot (Warsaw ed., 77c), however, require both that the slave be bound and that he be asleep. Tos/ROSH add further proofs for this ruling from the Talmud. Even if the slave's hands and feet are tied and

the woman holds him by a rope or chain, inasmuch as the slave has his own mind he is considered "property not under the wife's supervision" unless he is asleep. The two factors required here are independent of each other. That we reject a "moving courtyard" is deduced from the Scriptural requirement of "hand" (Deut. 24:1), while the requirement that the courtyard be under the control of its owner in order to bestow ownership is based on logical considerations. Both factors must be present if the courtyard (or the slave) is to have the power to acquire ownership on behalf of its owner.

RAMBAM, Hil. Gerushin 5:17, rules that as long as the slave is bound, the get is acquired by the wife. The slave may be either asleep or awake. This reading conflicts with that preserved in the TUR, EHE 139, 44a, who quotes RAMBAM as requiring both "bound" and "asleep". All other authorities (RAMBAN and RASHBA in their Hiddushim to 78a; RaN, fol. 40b; Magid Mishneh to Hil. Gerushin 5:17 and Kesef Mishneh/Beit Yosef ad loc.) preserve our reading of the Mishneh Torah: as long as the slave is bound, the wife acquires the get. Moreover, RAMBAM rules that if the get is given to an unbound slave who is asleep and watched over by the wife, the get is pasul, invalid at rabbinic law, whereas ROSH and the other authorities regard the get as Toraitically invalid.

6.a. מתני׳ גמ׳ -- ROSH provides a detailed analysis of the Gemara, while RIF deals with this subject in abbreviated form. According to the mishnah, a get thrown to the wife by the husband is valid if "close to her" but not if "close to him"; if it lands halfway, the wife is מגורשת ראיבה מגורשת . Rav states that "close" in this instance refers to the four-cubit area that surrounds either the wife or the husband. The get is acquired according to the principle that an individual acquires objects that lie within "his" four cubit radius. See Tos. Ha-ROSH, 78a, ד"ה אמות :

this rule applies even when the other party should subsequently enter the four-cubit radius of the first party; the first party still owns the get. R. Yohanan, on the other hand, defines "close" as any place where either the husband or the wife is able to control and watch over the get. If the wife has control of the document, even if it lands one hundred cubits away, the get is hers. ROSH states that R. Yohanan does not disagree with Rav. We know from Baba Mezia 10b that R. Yohanan also holds that the four-cubit radius has the power to acquire a get. Rather, in this instance, the word "close" seems to include greater distances than four cubits, and the "halfway" rule also does not square well with a case of four cubits. Thus, we deal with the wife's right to acquire the get even at a much greater distance, and although a person does not normally possess the power to acquire at such distances, the rabbis instituted a special leniency in the divorce procedure. This analysis is apparently based upon that of RAMBAN and RASHBA in their Hiddushim to this sugya. Shmuel, for his part, seems to interpret "close" as any distance in which an individual might bend over and grasp the object; nevertheless, he rules that we not accept the get as valid until the woman actually takes it into her hand. ROSH does not regard Shmuel as offering a separate interpretation of the mishnah that conflicts with Rav and R. Yohanan. Certainly Shmuel accepts the four-cubit rule, and he also does not dispute the idea that ability to control the get confers possession. His ruling is rather aimed at the situation where both husband and wife stand within four cubits of the get and where the ability to control it may belong to either of them. In such an instance, it is advisable to be strict and not award the get to the wife until she takes it into her physical possession. ROSH rules that the halakhah indeed follows Shmuel if both husband and wife stand within four cubits of the get. If, however, the get is within the wife's four cubits

while the husband stands outside of that radius, Shmuel agrees that the get is valid.

Alfasi merely reports the statement of Shmuel, leaving the impression that Shmuel offers an interpretation of the mishnah. ROSH suggests that RIF's intent is merely to state that the halakhah follows Shmuel's strict position and that he omits the statements of those Amoraim who explain the mishnah. Note that this is really the same explanation given by RASHBA to the apparently contradictory statements in RAMBAM, Hil. Gerushin 5:12-14. In those halakhot, RAMBAM mentions the positions of all the Amoraim--Rav, R. Yohanan and Shmuel. According to RASHBA, RAMBAM does not regard Shmuel's statement as an interpretation of the mishnah. The halakhah follows Rav and R. Yohanan, but if both husband and wife stand within four cubits of the get, the woman is not divorced until she takes possession of the get.

According to RASHBA, Alfasi regards Shmuel's statement as an interpretation of the mishnah, along the lines of RASHI's comment, 78b, כדי. RASHBA does not attempt to resolve this problem as he resolves the contradiction within the RAMBAM. ROSH, on the other hand, uses the same explanation developed in RASHBA for the RAMBAM as a resolution of the difficulty he raises against RIF. That resolution--Shmuel does not interpret the mishnah, the halakhah follows Rav/R. Yohanan in most cases, Shmuel's stringency applies only when husband and wife stand within four cubits of each other--was intended originally as a defense of the RAMBAM. If ROSH, as seems likely, derived this explanation from RASHBA,[5] he studiously ignores all mention of RAMBAM and directs it towards the RIF.[6]

6.b. ורכינהו חננאל ז"ל -- = Tos. Ha-ROSH 78b, ראת . A tradition reported by the Arukh (ערך "גט") in the name of R. Hananel states that even if the get is tossed into the woman's courtyard we

should not regard it as valid until she takes it into her hand. Tos/ROSH reject this tradition and the proof offered from the Yerushalmi (Gitin 8:2, 49b).

RAMBAN and RASHBA mention this point in their Hiddushim to this sugya. While both agree that R. Hananel's position runs counter to the Talmud, they caution that we ought to recognize it as a valid halakhic ruling. RAMBAM does not mention this tradition; it is appended to his text by Hagahot Maimoniot, Hil. Gerushin 5, n. 1, which reads RAMBAM as disagreeing with R. Hananel.

6.c. וכן לענין בטיז -- follows RIF.

7a. אמר - follows RIF to מגורשת . = Tos. Ha-ROSH 78b, גט כירה . If the get handed to the woman is attached to a cord held by the husband, is this a fulfillment of the requirement that the husband place the get (ונתן) in the woman's hand (Deut. 24:1)? Rav Hisda rules that if the husband is unable to pull the get towards him by means of the cord, the get is in the wife's possession. According to R. Tam, this means that the get is in the wife's possession when the cord would break if pulled. RASHBAM agrees. The issue revolves around the thickness of the cord: if the husband can pull it without breaking it, the get is still in his possession. If the cord should break because the wife closed her fist and pulled the get, however, she is not divorced; the Scriptural requirement " ונתן " excludes any action on the wife's part. R. Yizhak, on the other hand, allows the woman to pull the get towards herself, so that if the cord should thereby sever, the get is in her possession. The husband began the act of נתינה ; even if she completes that act, the Scriptural requirement has been fulfilled. Tos/ROSH reject this view and the Talmudic examples upon which it is based. Those examples involve a true act of נתינה even though time elapsed between the beginning and

end of the action. In our case, as long as the woman's hand is open, the husband can pull the get towards himself. Thus, no נתינה has occurred; by closing her hand, the woman performs the entire action. RASHBA, in his Hiddushim, remarks that even R. Yizhak would opt for stringency in this case. See TUR, EHE 138, 40b, who writes that R. Asher accepts the ruling of R. Tam.

RAMBAM, Hil. Gerushin 5:16, does not advance beyond a restatement of Rav Hisda in the Talmud. Magid Mishneh ad loc. cites the Tosafist commentary from RASHBA. Beit Yosef suggests that RAMBAM may be in agreement with ROSH (וקצת נראה כן מדברי הרמב"ם), but this deduction is not at all present in the text of the RAMBAM.

7.b. מחנ'-גמ' -- not in RIF. ROSH presents the Gemara and does not comment upon it; he ignores the various interpretative problems raised by the Tosafists and by RAMBAN against the decision in RAMBAM, Hil. Gerushin 5:3. See Magid Mishneh ad loc. and RaN, fol. 41a. TUR, EHE 139, 42a, rejects the RAMBAM's contention that if a get thrown onto a roof from a courtyard is burned or erased before landing the get is invalid. This conclusion of TUR is the same as that raised by RAMBAN: the issue of "burning" and "erasure" refers only to the opposite case, where the get is tossed from the roof to the courtyard. TUR cites this as his own opinion, but in Kizur Piskei Ha-ROSH 8:7 he attributes this ruling to his father.

8. מחנ'-גמ' -- follows RIF to והלכתא כלשנא כתרא. ROSH cites RaMaH, who draws a distinction with respect to גט ישן that does not appear in RIF/RAMBAM. If the husband gives such a get to his wife after they have been together, the get is valid Toraitically. If, however, the husband and wife were alone together between the time that the get was written and the time the agent gives it to her, the get is invalid at rabbinic law.

TUR, EHE 141, 94b, includes this halakhic distinction. RAMBAM, Hil. Gerushin 3:5, follows RIF there is no objection if a woman remarries on the strength of a get yashan (and see Kesef Mishneh ad loc.) While it is true that that particular sugya concludes that a woman may remarry lekhathilah on the strength of such a get RaMaH/ROSH introduce other passages which give the impression that there are indeed legal consequences to a get yashan. This "comparative" analysis, reminiscent of Tosafot, creates an interpretative tension which is resolved by resorting to the husband/agent distinction.

9.a. מתנ -גמ -- follows RIF to והולך ממזר . The mishnah's phrase " היה במזרח וכתב במערב " is applied by the Gemara to the scribe: the scribe must list within the get his own location on the day the get is written. ROSH asks why this phrase could not be applied to the husband's location, with the mishnah's other phrase " שינה שם עירו " referring to the husband's place of residence? Since, however, the Talmud renders its interpretation, we find that only the domicile of the husband and wife (i.e., " שם עירו ושם עירה ") must be included in the get. We need not list their places of birth or their location on the day the get is written. Moreover, the mishnah seems to prohibit only the changing of the name of the domicile; if, however, the place of residence is not included at all, the get is still valid. The Franco-German custom is to list all three places--residence, birth, present location--in the get. R. Tam once accepted a get in which the place of birth was incorrect, because, as we have seen, the mishnah disqualifies only a get where the place of residence is incorrect. See printed Tosafot 80a, ושם , which attributes this precedent to R. Yizhak.

RAMBAM, Hil. Gerushin 3:14, simply repeats the mishnah's phrase " שינה שם עירו ושם עירה ". We do not know which city is referred

to: residence, birth, or present location. Kesef Mishneh, Hil. Gerushin 1:24, says that in RAMBAM's view this mishnah refers to the place where the get is written (=present location). As to the question of the omission of the place of residence, Magid Mishneh to 3:14 remarks that the various commentators--RABaD, Itur, and RASHBA--are in disagreement as to the get's validity. As we have seen, Tos/ROSH accept the get as valid as long as the name of the domicile is not listed incorrectly. RAMBAM's formulation is so general on this point that both TUR and Beit Yosef, EHE 128, 22a, omit him from the discussion.

9.b. אלא אסופר -- not in RIF. While the Gemara seems to require that the scribe write the name of his own city in the get, ROSH declares that this conclusion is inexact. The actual requirement is that the locus of the witnesses be included should it differ from that of the scribe. See TUR, EHE 128, 21a.

RAMBAM, Hil. Gerushin 1:25, seems to equate "the place where the get is written" with "the place where it is signed": i.e., the witnesses' city. This is the interpretation of Beit Yosef to the TUR passage and of Magid Mishneh on this halakhah. On the other hand, Lehem Mishneh ad loc. does not equate the two locations in his explanation of RAMBAM and takes exception to the Beit Yosef comment. See also Yam shel Shelomo, Gitin 8:13: RAMBAM's words "tend" in the direction of the position of the ROSH (רבן גוטה דברי הרמב"ם). In summary, the conclusion drawn clearly by ROSH must be deduced from the RAMBAM's ambiguous pesak, and even that deduction is not certain.

9.c. אמר רב יהודה -- follows Gemara/RIF to שמע מינה . See Tosafot, 80b, זר . Both RASHI (80b, הולך כשר) and RIF regard the statement of Rav as referring to the mishnah's requirement that the get be

dated according to the calendar of the general community. This would mean that, for Rav, a get should not be written lekhathilah without being dated in this way, but if a woman remarries on the basis of such a get her offspring is kasher. If this is the case, however, why are we permitted nowadays to date a get from the creation of the world? Rather, says R. Tam, Rav's statement refers to the question of היה במזרח וכתב במערב; both Rav and Shmuel agree that a get which is dated according to the creation is, in principle, valid. With respect to this issue, there is no real practical significance, since now the general practice is to date gitin according to the creation. There is indeed a halakhic implication, however, concerning the get in which the wrong city is listed. R. Hananel says that the halakhah follows R. Meir on this issue, meaning that the offspring of a woman who remarries on the basis of that get is a mamzer. R. Tam argues that such a get is rabbinically invalid but that the offspring is not a mamzer. Other authorities rule that the get is valid lekhathilah.[7]

TUR, EHE 128, 21a, summarizes the viewpoints on this issue. If the scribe writes the name of the wrong city--i.e., a city other than that in which the witnesses are found--R. Hananel regards the get as Toraitically invalid. R. Tam says the get is rabbinically invalid, while RASHI and RIF would accept the get as valid without question. ROSH does not agree with R. Hananel that mamzerut is at issue here, but it is unclear whether he sides with R. Tam or with RIF/RASHI (see Perishah, n. 3). Beit Yosef ad loc. points to RAMBAM, Hil. Gerushin 1:25, which states that a get which bears the name of the wrong city is pasul.[8] This would mean that RAMBAM agrees with R. Tam's ruling. As we have seen in 9.b., however, it is not entirely clear that RAMBAM refers in this halakhah to the witnesses' city. In any event, both ROSH and TUR omit any reference to RAMBAM on an issue where the rulings differ

so widely. If TUR, who regularly cites RAMBAM, does not do so here, we must conclude that RAMBAM's formulation is too vague and general to apply directly to the subject under discussion.

10. מחנ -- follows RIF, with note on ROSH, Yebamot 10:3.

11. כתכ-גמ -- follows RIF, with commentary supporting RIF's position.

12. גמ- מחנ -- follows RIF.

13.a. גמ- מחנ -- follows RIF to ראין לבו גס בה . ROSH, following Beit Hillel, accepts the rule אין אדם עושה כעילתו כ"ז , but limits its application to a man's intercourse with his divorcee. We do not apply it to other cases. ROSH points out that RAMBAM agrees with this view; see Hil. Gerushin 10:19. Compare also Hiddushei Ha-RASHBA, 81b: ROSH here resembles an abbreviated version of RASHBA's analysis.

See, however, Hilkhot Ha-ROSH, Yebamot 2:3, where ROSH accepts the Geonic application of this rule to intercourse between a man and his maidservant. There, ROSH specifically rejects RAMBAM's position. In Hil. Gerushin 10:17, as well as 10:19, RAMBAM restricts this rule to cases where some marital attachment either exists or once existed. He moreover specifically rejects the notion that intercourse with a maidservant can be assumed to take place for the purpose of marriage. Rather, we must know for certain that the maidservant (or Gentile) was liberated (or converted) before the intercourse took place. RABAD, on 10:19, makes a distinction between the Gentile and the maidservant. Since the man does not have the power to forcibly convert the Gentile woman before intercourse, we cannot assume that his intercourse was for marital purposes. In the case of a maidservant, however, the man does have the power to liberate her; we assume, therefore, that the man wished his intercourse to be a permitted act and that he liberated his maidservant prior

to the intercourse. See Yam shel Shelomo, Yeb. 2:10 and Gitin 8:16. A question remains: does ROSH permit intercourse with one's maidservant on the basis of the rule אין אדם עושה וכו׳, or does he permit it because of the second rule, namely that one is presumed to perform an act in a permitted fashion rather than in a prohibited fashion whenever possible?[9] To what extent does ROSH accept RAMBAM's limitation of the rule אין אדם עושה וכו׳ ? It seems clear that the halakhot, in Gitin and Yebamot, must be considered together. ROSH clearly follows RAMBAM here: he does not apply the rule to acts of non-marital intercourse; see TUR, EHE 149, 70a-b. Yet it is equally true that ROSH accepts the Geonic ruling[10] rejected by RAMBAM in the case of intercourse with one's maidservant, even though RAMBAM regards such intercourse as כעילת זנות.[11]

13.b. כי אתו -- not in RIF. See Tosafot 82a, צא . The precedent of R. Ami (=R. Yanai in ROSH) indicates that additional witnesses may sign a get mekushar (a get composed of several parchments sewn together) without being in the presence of the original two witnesses. R. Tam extends this rule to the get pashut, the get composed of one single parchment. If, in the case of a get mekushar, where additional witnesses are required for the additional parchments, those witnesses may sign while not in the presence of the original witnesses, then certainly the additional witnesses of a get pashut, who are not legally required in order that the get be valid, may sign separately as well. R. Meshulam supports this ruling: the requirement that the witnesses of a get sign in each other's presence has to do with the two witnesses legally required in order to render the get valid. Any subsequent witnesses, since they are not required for purposes of the get's validity, may sign separately.

RAMBAM, Hil. Gerushin 1:24, requires that the witnesses sign in each

ther's presence; if this requirement is not met, the get is pasul. In Hil. erushin 9:29, he explains that the husband might have issued instructions that hore than two witnesses sign the get. In order to meet this eventuality and o forestall the possibility that the wife might take that get after only two itnesses have signed it although it is not yet valid, the rabbis required hat all the witnesses sign the document in each other's presence. According o Tos/ROSH, R. Meshulam does not enforce this rule in cases where we know hat the get is valid with the minimum two signatures. See Beit Yosef EHE 130, 29b, who points out the varying halakhic views on this question. Shulhan Arukh EHE 130:13 repeats the RAMBAM ruling, while Isserles adds the Tos/ROSH position in his hagah.

NOTES TO GITIN, CHAPTER EIGHT

[1]See Rashbam, Baba Batra 53a, האי מכריח .

[2]As cited in Beit Yosef, 26a.

[3]It is not certain that Tos/ROSH interpret " דעת " as "ability to possess the get". It seems more likely that ROSH regards דעת and "ability to possess" as two separate requirements that stem from the mishnah. See Kizur Piskei Ha-ROSH, 8:4: the mishnah revolves around the question of "awareness" (דעת), while it is RaMaH who introduces the aspect of physical possession. If the woman does hold onto the get while asleep, the husband need not give it to her again. He need only state "This is your get" when she awakens. We annul the act of נתינה only if the wife loses possession of the get before awakening. Thus, the דעת required is the wife's awareness of the nature of the legal transaction; physical possession is a separate, but no less necessary requirement. RASHBA, on the other hand, apparently does identify " דעת " with "ability to possess", since this is the very difference he discerns between the case of the sleeping woman and that of the deaf woman. In any event, both ROSH and RASHBA base two halakhic requirements--awareness and possession--on our mishnah, while RAMBAM touches only upon the issue of awareness.

[4]This represents a change in the thinking of Ya'akov b. Asher. In the Kizur Piskei Ha-ROSH, 8:5, he writes that his father requires only that the husband bring the get towards his wife.

[5]A comparison of ROSH here with the parallel passages in RAMBAN and especially RASHBA reveals a remarkable correspondence.

[6]RASHBA's resolution is certainly not the only way to address the difficulties in RAMBAM; see Magid Mishneh and RaN, fol. 40b. Kesef Mishneh (=Beit Yosef EHE 139, 43b) actually prefers RaN's analysis over the others. ROSH ignores other approaches, adoting that found in RASHBA. Interesting here is the fact that RASHBA developed this analysis specifically as a resolution of a difficulty in the Mishneh Torah; since RAMBAM mentions the opinions of all three Amoraim, this resolution is particularly well-suited to him. ROSH takes the synthesizing approach of RASHBA and applies it to Alfasi, ignoring the RAMBAM altogether.

[7]See Korban Netanel, n. 2, and TUR, EHE 128, 21a. Both RASHI and RIF agree that the sages with R. Meir on היה כמזרח וכו' and rule the get completely valid.

[8]See also BaH, ad loc., who similarly explains RAMBAM's position.

[9]As suggested in Korban Netanel, n. 5.

[10]For the sources and background of this Geonic tradition, see Ozar Ha-Geonim, Yebamot, pp. 38-43.

[11]In Yebamot 2:3, ROSH adheres to the Geonic tradition as it applies to maidservant. RAMBAM, he points out, rejects that very tradition. For this

reason, Korban Netanel's attempt to resolve this dispute falls short. We cannot posit the existence of two separate rules when the entire discussion concerns the applicability of a single legal tradition. Quite simply, ROSH applies that tradition to the case of the maidservant, RAMBAM does not.

I. Tractate Gitin, Chapter Nine

1.a. המגרש -- follows RIF to אכל בעל מנת מורה ליה .

The mishnah reports a dispute between R. Eliezer and the sages over a get which permits a wife to any man except (אלא) a certain one. The sages apparently regard such an exclusion as שיור , an attachment of the wife to her former husband, whereas a valid get must constitute a complete separation between them. The Talmud asks whether this " אלא " is to be understood as a simple exclusion (" חוץ ") or whether the sages would also prohibit a get which reads "on condition (על מנת) that you do not marry (and/or have sexual contact with)...". Ravina concludes that the אלא referred to in the mishnah is to be understood as חוץ . ROSH (=Tos. Ha-ROSH 82a, איבעיא) deduces from the language of the Talmud's question that the sages would accept any על מנת formulation in the get, whether the stipulation prohibits marriage with a certain individual or whether it prohibits all sexual contact with him. The correct understanding is that no stipulation of this type constitutes an attachment between husband and wife; like any other stipulation, the get becomes valid as long as the woman fulfills the terms of that stipulation.

RIF does not speak of the distinction between marriage and sexual contact. RAMBAM, Hil. Gerushin 8:12, states that a stipulation forbidding marriage does not constitute שיור . Would this indicate that a stipulation forbidding all sexual contact is indeed a שיור ? RASHI, 82a, אכל , refers only to the prohibition of marriage, and R. Yeruham (Venice ed., 202b) apparently deduces from this that, in RASHI's view, a get which stipulates against sexual contact is invalid.[1] RaN, fol. 43b, however, suggests that RASHI merely repeats the wording of the baraita at the bottom of 82a, which mentions marriage; RASHI, in this view, would certainly agree with

Tosafot that no stipulation, even that which prohibits sexual contact, constitutes a שיור . Beit Yosef, EHE 137, 39b, makes the same suggestion on behalf of the RAMBAM.

Once again, we have a case where Tos/ROSH states clearly a point of halakhah which must be deduced from the RAMBAM's more ambiguous formulation. It is interesting that in Shulhan Arukh EHE 137:1, Karo adopts the language of TUR on this point, rather than that of RAMBAM. The wording of the Mishneh Torah is inadequate to express the law in this case. Tosafot, as codified in ROSH, becomes the authoritative expression of the halakhah on this point, displacing the RAMBAM in subsequent formulations. It remains for the RAMBAM's defenders to bring the Mishneh Torah into line with the authoritative view.[2]

1.b. כעי רבי אבא -- not in RIF. If one should say to his wife "you are permitted to all men except to Reuben and Shimeon" and then changes his mind and says "to Reuben and Shimeon"--what is the ruling? Does the second stipulation nullify the first, allowing the wife to marry Reuben and Shimeon as well as any other man, or does it reserve the first stipulation, so that the wife may marry only Reuben or Shimeon and no one else? Should we conclude that the first stipulation is nullified, what is the law should the second stipulation state: "to Reuben"? Does this include Shimeon as well, since he was included in the first stipulation? Or do we say that the second stipulation refers to Reuben alone? Should the second stipulation state: "also to Shimeon", does this include Reuben? The Talmud ends these questions with a תיקו .

R. Hananel declares that, since the Gemara reaches no conclusion, we should rule strictly in all of these cases. RAMBAM, Hil. Gerushin 8:7-8, rules that in the first case ("to Reuben and Shimeon") the wife is divorced, since the husband has nullified the original stipulation. According to ROSH,

RAMBAM then declares that, should the second stipulation permit the wife to either Reuben or Shimeon alone, she is not divorced. Our text of RAMBAM differs from this. In our text, RAMBAM sees the wife who is subsequently permitted to Reuben alone as not divorced, since the original stipulation concerning Shimeon is not nullified. Meanwhile, if the wife is permitted to Shimeon alone, we rule safek megureshet, since the question is not answered in the Talmud. Beit Yosef, EHE 137, 39b, cites RaN, fol. 43b, who explains RAMBAM's procedure for determining that the first question (which is followed by אם תמצא לומר) is in fact answered. See Tiferet Shmuel, n. 3.

TUR, EHE 137, 39b, sees all these questions as ending in תיקו , that is, they are all left unanswered. He therefore adopts the R. Hananel position (strictness in all cases) and recites the RAMBAM position (according to our text) in opposition. In Kizur Piskei Ha-ROSH 9:1, Jacob b. Asher attributes his position in the TUR to ROSH as well.

What is the ROSH's true ruling? If we follow TUR, we must conclude that in none of these cases does he regard the wife as divorced. If, however, we turn to Resp. Ha-ROSH 35:9, we see that he does believe, at least in the first case, that the husband may nullify the stipulation in this manner so that the wife is clearly divorced on the strength of this get.

2.a. אמר -- follows final form of Rava memra, 83b. See Tos. Ha-ROSH 82b, שרי . ROSH expounds his position: in a valid conditional get, we allow the woman to remarry even though the stipulation has not yet been fulfilled. We do not forbid her remarriage due to fear that she may not fulfill the stipulation, which would render the get retroactively invalid. This conclusion, however, is apparently contradicted by various examples of conditional gitin elsewhere in our tractate. We deduce, for example, from 84a, for example,[4] that if a husband should stipulate: "this is your get on

condition that you do not have sexual intercourse with so-and-so", the get is invalid, since we fear that at some point the woman might have intercourse with that person. ROSH also cites Tosefta as following this line.[5] Halakhot Gedolot (Warsaw ed., 77b) presents the following rule: if the woman has the power to fulfill the stipulation, we allow her to remarry immediately and are not concerned lest she not fulfill it. We can accomodate the afore-mentioned stipulation within this rule: if the husband stipulates that the wife must not have intercourse with so-and-so, we do not allow her to remarry since she might someday be raped by that person. The fulfillment of the stipulation does not lie completely within her power. This is also the case with the stipulation discussed on 74a ("...on condition that you pay me 200 zuz."): perhaps the woman, for reasons beyond her control, will not be able to raise the money.

RAMBAN, Hiddushim 83a, describes the various interpretations of this sugya.[6] The most liberal position holds that in all tenaim, we allow the wife to remarry and do not fear that she might not fulfill the stipulation. A second view holds that if the stipulation is a negative ("do not do this"), we allow the woman to remarry, since we assume that she will not take that action; if, however, the stipulation requires a positive act on her part, we do not allow her to remarry until she has fulfilled that stipulation. A corollary to this is that, should the stipulation be in the power of the wife to fulfill, we allow her to remarry, whether the stipulation is a positive or a negative act.[7] Finally, a strict position requires that the woman fulfill any stipulation before she may remarry. RAMBAM, Hil. Gerushin 8:1, end, codifies the first, most liberal position. Magid Mishneh ad loc. explains that RAMBAM rejects the baraita on 74a in favor of the sugya on 83a (a rejection which produces astonishment on the part of R. Shimeon b. Zemah; see

Kesef Mishneh ad loc.) and states, without supporting evidence, that RAMBAM restricts his permit for remarriage to those cases where the wife has the power to fulfill the stipulation (=RAMBAN, ROSH). TUR, EHE 143, 60a, understands RAMBAM literally: the woman may remarry without fulfilling the stipulation. He rejects RAMBAM on the basis of the baraita on 74a; in Kizur Piskei Ha-ROSH 9:2, he declares that the woman may remarry immediately only if the stipulation lies within her power to fulfill. ROSH clearly disputes the halakhah in RAMBAM. RIF, fol. 35b, does cite the baraita from 74a while omitting the sugya from 83b. One might conclude that he concurs with the "strict" position outlined in RAMBAN: all stipulations must be fulfilled before the wife may remarry. The commentators, however, do not include RIF in the discussion; his position is not clear on this particular issue.

2.b. בעא מיניה -- not in RIF. ROSH presents the question/answer of Rava to Rav Nahman in summary form, without comment. Apparently, he regards Rava's answer as halakhic: i.e., a stipulation which reads "today you are not my wife, tomorrow you are my wife" is not a valid stipulation and the woman is unquestionably divorced. See TUR, EHE 137, 39b.

RAMBAM, Hil. Gerushin 8:9, rules that the wife is not divorced by this get. Both Magid Mishneh ad loc. and RaN, fol. 44a, explain that RAMBAM regards the takanah of Rav (85b-86a: the get must include the word in order to resolve the problem raised here by Rava) as authoritative. If this stipulation should appear in the get in place of the word ולעולם , the wife is not divorced. Both Magid and RaN support the view that the wife is safek megureshet. ROSH/TUR apparently follow RASHI's view that Rav's takanah was ordained merely to prevent the get from being challenged or doubted. It follows from this that, should the word ולעולם not appear and the afore-mentioned stipulation be found in its place, the get is still legally

valid. See also RASHBA on our sugya. See, as well, Hilkhot Ha-ROSH 9:4, end: the requirement for the word ולעולם is for the purpose of insuring שופרא דשטרא . It is not an עיכוב ; the get is valid without it.

2.c. ת"ר -- follows RIF.

2.d. הרי זה גיטיך -- follows RIF.

2.e. ע"מ שתאכלי בשר חזיר -- not in RIF. ROSH presents a section of the sugya and adds some commentary of his own.

3.a. אם -- follows RIF. This implies that ROSH accepts RAMBAM's view, in Hil. Gerushin 8:4, that any stipulation made before the toref of the get is written renders the get invalid. See however, Resp. Ha-ROSH 46:1, TUR, EHE 147 68a-b, and Tos. Ha-ROSH 84b, כל . ROSH accepts the distinction drawn by R. Yizhak in this issue between stipulations that have been fulfilled and those which have not been fulfilled. This places ROSH at odds with RAMBAM, even though in the case before him, ROSH did not wish to accept the get as valid merely on the strength of R. Yizhak's opinion, inasmuch as RAMBAM makes no such distinctions and hold that any stipulation made before the toref is written renders the get invalid. It is interesting that ROSH subsequently does accept the validity of that get on other grounds which also involve a dispute with RAMBAM: see infra, pp. .

3.b. מתני'-גמ' -- RIF omits the Talmud's questions, most of which end in תיקו .[8] ROSH concludes that we must take the strict approach in all of them. TUR, EHE 137, 39b, rules that the wife in each case is safek megureshet, which corresponds to the decision of RAMBAM, Hil. Gerushin 8:5-6.

4.a. מתני'-גמ' -- follows RIF, Gemara.

4.b. אמר אביי -- ROSH devotes a section of commentary to various

customs concerning the written text of the get. Some of his explanations are in accord with RAMBAM; others, such as the get of R. Yosef Tov Elem, involve explanations that are not found in the Mishneh Torah. See Tos. Ha-ROSH 85b, דתהיוייין .

4.c. כתב הרמכ"ם ז"ל -- RAMBAM, Hil. Gerushin 8:14, declares that if the get does not include the various scribal features discussed in 4.b. (Hil. Gerushin 4:13), the document is pasul. The Itur, on the other hand, (Venice ed., 15a) quotes Geonic sources to the effect that these scribal rules apply in only two situation: a) the husband writes the get himself; b) the scribe writes the get but the husband subsequently challenges its validity, claiming that he purposely distorted the get and made sure that it did not conform to these scribal rules. If the husband does not contest the get, it is valid even if the scribe erred in one of these rules. Rav Hai Gaon rules likewise.[9] See Ozar Ha-Geonim, Gitin, pp. 197-199.[10]

TUR, EHE 126, pp. 17b-18a, writes that ROSH agrees with the Itur/Rav Hai position against RAMBAM.

4.d. אימעיא להו -- follows RIF. The subject matter here refers back to 9:2b, where ROSH disagrees with the RAMBAM position concerning Rav's takanah.

5. גופו -- follows Gemara, RIF.

6.a. מתנ'-גמ' -- follows RIF.

6.b. כתב בכתב ידו -- follows RIF to דכן הלכתא . The Talmud in 66b concludes that one who rules that agents may carry the husband's instructions to the scribe would also rule that a get signed by that scribe and one other witness is pasul. One who would not allow agents to transmit those instructions, on the other hand, would accept a get signed by the scribe and one other witness. ROSH, in his Halakhot to 7:19, rules that

agents do not have this power; therefore, he should also hold that a scribe may sign a get along with one other witness. In our halakhah, however, ROSH presents the analysis of R. Yizhak (=Tos. Ha-ROSH 86b, ורב), who rules that such a get is pasul, and he seemingly agrees with that analysis against the opposing view of R. Hananel. This is the interpretation of Asher's view found in Kizur Piskei Ha-ROSH 9:6, and it corresponds to Resp. Ha-ROSH 45:8 and 45:29, where R. Yizhak's view is presented as halakhically authoritative. RAMBAM, Hil. Gerushin 9:27, rules that a get signed by the scribe and one other witness is valid.

TUR, EHE 130, 30b-31a, presents ROSH as following R. Yizhak's view: the get is acceptible only on a bedi'avad basis. RAMBAM, in contrast, is presented as ruling that the get is perfectly valid. Beit Yosef, ad loc., resolves the contradiction between the two halakhot in ROSH by saying that in 7:19, ROSH's acceptance of the get's validity actually means "bedi'avad". If this is the case, we can interpret RAMBAM's ruling in the same way, so that he agrees with ROSH.[11] TUR, as we have seen, sees the rulings of his father and that of RAMBAM as contradictory.

6.c. שלושה בידיך אלו -- follows RIF to לכתחילה .

Rav Hai Gaon supports the position of R. Yohanan: if a get is invalid on the basis of rabbinic law, a woman who remarried on the strength of that get need not leave her second husband, even should she have no children by him. Various examples of gitin pesulim which do require that the woman leave her second husband are explained as referring to a point in time before the Talmud decided that M. Gitin 9:4 reflects the opinion of R. Meir. Since we now know, however, that this is the case, we follow the majority view: in the case of all gitin which are rabbinically invalid, the woman need not leave her second husband. RAMBAM, Hil. Gerushin 10:2, is cited in support: a get pasul does

not require that the woman leave her second husband should she remarry before the get is declared invalid. RIF, in a responsum, follows a contrary view. Our mishnah contains the only examples of invalid gitin where the woman is allowed to remain with her second husband. In all other cases, the woman must leave her husband and any offspring of that second marriage are safek mamzerim. RIF's view is rejected.

ROSH seems to draw this material from RAMBAN, Hiddushim, 86b. RASHBA, ad loc., follows the same pattern as does ROSH: 1) the discussion of Rav Hai; 2) the citation of RAMBAM in support of Rav Hai's ruling; 3) the discussion of RIF's responsum; 4) the rejection of Alfasi's conclusion in favor of that of Rav Hai.

7.a. ר' אלעזר אומר -- follows RIF to דרבי אלעזר בגיטין . ROSH deduces from Alfasi's wording that the halakhah follows R. Elazar (witnesses of transmission are decisive) only in respect to documents of divorce. With all other documents, the decisive witnesses are those who actually sign the document. R. Yizhak, however, proves from various examples in the Talmud that the halakhah follows R. Elazar in the case of all documents. ROSH accepts the ruling of R. Yizhak.

RAMBAM, Hil. Malveh 11:2, also follows the R. Yizhak position; see Magid Mishneh ad loc., who identifies RAMBAM's decision with that of "the French rabbis". ROSH does not cite RAMBAM in support of his own ruling; apparently, the Tosafot tradition, in Asher's view, is a sufficient foundation on which to base a rejection of Alfasi's decision. Compare to RaN, fol. 47a, who does cite RAMBAM.

7.b. כתב רב אלפס ז"ל -- follows RIF to דמלאכת שמים היא . RIF deduces from the statements of Rav (86a-b) that R. Elazar's requirement of witnesses of transmission holds only in the absence of

witnesses who sign the get. Rav appears to disqualify a get when signed by one witness, while at the same time accepting a get with no signatures when transmitted in the presence of witnesses. Alfasi concludes that the disqualification results from the absence of witnesses of transmission and that Rav would not require those witnesses if the get contained two valid signatures. Moreover, in M. Gitin 9:4, R. Elazar states that witnesses sign the get for purposes of tikun olam; if therefore, we required witnesses of transmission even when witnesses sign the get, what kind of tikun would this be? Rather, the get is valid either by means of the signature of winesses or by means of witnesses of transmission. In principle, we require witnesses of transmission; after the fact, (bedi'avad) we accept the get on the basis of its signatures even without witnesses of transmission. ROSH (=Tos. Ha-ROSH 86b, ורכ) rejects the proof from Rav's statements. Rav is explaining the mishnah, which is in accord with the view of R. Meir. The halakhah, of course, follows R. Elazar, who does not interpret the word " וכתב " in Deut. 24:1 as meaning "signature" (as does R. Meir).[12] The "tikun" resulting from the requirement that witnesses sign the get, even though witnesses of transmission are still required, lies in the area of convenience. Should the get be subsequently challenged, its validity may be proven by recourse to the signatures without having to search for the witnesses of transmission. This does not mean that a get signed by two witnesses need not be transmitted in the presence of witnesses; it means rather that, if a get is properly signed, we assume that it was properly transmitted as well. If Alfasi is correct, and the get is valid with either type of witness, how can he deduce that one type -- עידי מסירה --is required lekhathilah? Why are those witnesses more essential to R. Elazar than the witnesses who sign the get? Rather, we conclude that witnesses of transmission are always required in order that the

get be valid, whether or not the get is signed by two witnesses.

RAMBAM, Hil. Gerushin 1:15-16, accepts the Alfasi position; see Magid Mishneh and Lehem Mishneh ad loc. TUR, EHE 133, 34b-35a, reports that ROSH contradicts both RIF and RAMBAM. In a sense, ROSH acts here as a commentator or a mesig to the Alfasi, debating and refuting his conclusions. Although RAMBAM supports those very conclusions, ROSH does not mention him. ROSH operates within the Tosafot analysis here, ignoring the separate strain of critique against Alfasi, as represented by R. Efraim; see Sefer Ha-Zekhut and RaN, fol. 47b.

8.a. מחנ׳-גמ׳ -- follows RIF. Alfasi decides in accord with R. Yohanan, which leads RASHBA (Hiddushim, 86b) to conclude that, to RIF, R. Yohanan disputes the definition offered by Resh Lakish for the mishnah's term "kelal". RAMBAM, Hil. Gerushin 4:19, would accept a get written according to the definition of Resh Lakish; therefore, in RASHBA's view, the halakhah in RIF contradicts the conclusion in RAMBAM. Magid Mishneh ad loc. rejects RASHBA's analysis; R. Yohanan, who takes the lenient point of view in relation to Resh Lakish, would certainly not reject a get written according to the more stringent requirements proposed by Resh Lakish. RaN, fol. 48b, presents the same explanation: even though the halakhah follows R. Yohanan, this does not disqualify Resh Lakish's get. Since TUR, EHE 130, 28a-b, accepts RAMBAM (who allows both definitions of kelal), it is probable that ROSH agrees that R. Yohanan does not reject a get written according to the requirements set forth by Resh Lakish.

8.b. מחנ׳-גמ׳ -- follows RIF.

8.c. מחנ׳-גמ׳ -- follows RIF, with added commentary.

9.a. מחנ׳-גמ׳ -- follows RIF.

9.b. מחנ׳ -- = Tos. Ha-ROSH 88a, חניכתו .

ROSH presents the view of RASHI, R. Hananel, and R. Tam concerning the definition of " חניכה ". Is it the family name, or is it the name by which an individual is know other than his proper name itself?

RAMBAM does not deal with this distinction. See Beit Yosef, TUR, EHE 129, 24b.

9.c. גמ' -- follows RIF.

10.a. מתנ' -- = Tos. Ha-ROSH 88b, וכגוונים . ROSH reports the history of R. Tam's interpretation of this mishnah: eventually, R. Tam concludes that Gentiles are allowed to exert physical pressure on a husband to coerce him to issue a get, provided that this procedure is done under the direction of the beit din. Other sources, including Halakhot Gedolot,[13] are cited to support R. Tam's ultimate ruling.

RAMBAM, Hil. Gerushin 2:20, also follows this interpretation. See Hagahot Maimoniot, n. 5, which points out the correspondence of the Maimonidean and Tosafistic traditions on this point. Yet neither ROSH nor TUR, EHE 134, 36a-b, mentions RAMBAM's view. ROSH is satisfied with the Tosafistic tradition and does not see the need to link it with the interpretative systems of other schools, including the Sefardic trend represented by RAMBAM.

10.b. גמ' -- follows RIF.

11.a. מתנ'-גמ' -- supplements and adds explanatory notes to RIF. = Tos. Ha-ROSH 89a, פלונית . Rav's definition of kol does not come to dispute the others; rather, this definition concerns a kol based on rumor alone, without accompanying circumstantial evidence. Moreover, Rav's definition applies to a case of divorce as well as to marriage, unlike the other definition. Since the Talmud uses the word ערות to describe this definition, we conclude that Rav requires this rumor to conform to a basic

rubric of testimony: it is established only by two individuals who heard it from two other individuals. If, however, one hears it from one, or two heard it from one, we do not have a valid rumor.

RAMBAM, Hil. Ishut 9:22, accepts the rumor as valid if two witnesses report that they heard it from one individual who himself heard it from one individual. RaN, fol. 50a, finds this ruling difficult to square with the wording of the Talmud. RASHBA, Hiddushim 89a, interprets the Gemara as allowing a rumor if each of the two witnesses heard it from a separate individual; in this case, we still have "two heard it from two." See also Magid Mishneh on the RAMBAM passage. These various interpretations reject the notion that two witnesses may report the rumor in the name of one individual. ROSH, however, is the only authority who specifically rejects " תרי מחד "; perhaps this phrase is specifically directed at RAMBAM.[14]

11.b. א"ל אביי לרב יוסף -- not in RIF. If a kol has been established, does the beit din take steps to annul it? The Talmud states that this question is the occasion for local differences: the court in Sura does annul rumors, while the court in Nehardea does not. MaHaRaM of Rothenburg rules that, inasmuch as we follow Rav over Shmuel in ritual matters, we must accept the practice of Sura, Rav's academy, over the academy of Shmuel, Nehardea. Moreover, the rule that we should pay heed to kol in matters of marital law is of rabbinic origin, and we therefore follow the principle that, on a question of doubt concerning rabbinic law, we follow the lenient view. In addition, the Yerushalmi (9:11; 50d) quotes R. Yohanan as ruling in accordance with Sura's practice. R. Hananel, on the other hand, sees the dispute in the Talmud as evidence that this question is to be decided according to the rules and the conditions of each locality. In a locality where rumors spread easily, the court is certainly entitled to nullify them.

In a place where rumors do not spread as easily, the existence of a rumor may be taken as indication that the rumor is true, and the court does not nullify it. ROSH adds that the "rumor" in dispute here is a rumor which was officially accepted by the beit din because it was not accompanied by amatla or shover (evidence to the contrary). Afterwards, it becomes clear to the court that the original rumor was untrue.

RIF and RAMBAM do not mention this issue. RaN, fol. 50a, explains that the general practice nowadays is that we do not annul rumors once they have been established; for this reason, RIF does not include this issue in his Halakhot. Beit Yosef, EHE 46, 84a, offers this explanation for the RAMBAM's silence as well: he, too, does not accept the power of the court to annul rumors. ROSH clearly accepts the ruling of his teacher, MaHaRaM; see Resp. Ha-ROSH 35:11.

11.c. ההיא דנפק -- ROSH supplements RIF with material (cases) from 89a-b, along with commentary. RAMBAM also omits these cases; see Kesef Mishneh, Hil. Ishut 9:23. The TUR, EHE 46, 83a-b, distinguishes between two types of אמתלא : a clear אמתלא which automatically nullifies the rumor, and a case where the court has reason to believe that an אמתלא exists (אם יש לחוש לאמתלא). The first type apparently stems from M. Gitin 9:9, while the second type is illustrated by means of the cases included here in ROSH and omitted in RIF/RAMBAM. Karo, in Kesef Mishneh, suggests that RAMBAM includes the latter type under the rubric of "או קידושי ספק" in Hil. Ishut 9:23; in Beit Yosef, he adds that both RIF and RAMBAM interpret M. Gitin 9:9 as including both types of אמתלא. The BaH takes this view as well. A similar interpretation is provided by RAMBAN (cited in RaN, fol. 49b and paralleled in RASHBA, Hiddushim 88b: the mishnah calls upon the court to reject any rumor unless it is not

accompanied by evidence to the contrary. This includes a case of clear אמתלא and a case of "assumed" אמתלא . At any rate, ROSH/TUR state clearly the rule concerning the second type of אמתלא , while the commentators must strive to insert that meaning into RIF and RAMBAM. Note that Karo, in SA EHE 46:3, adds this material from ROSH/TUR to RAMBAM's ruling.

11.d. וכלבר -- follows RIF, but only apparently so. Rabah bar Rav Huna and Rav Zevid both offer interpretations of the mishnah's phrase: וכלבר שלא תהא שם אמתלא . Both RIF and ROSH reject the interpretation of Rabah, who accepts the אמתלא within a ten-day period from the time the rumor is established, in favor of that of Rav Zevid, who explains that the phrase means that we assume an אמתלא in any instance in which it might reasonably exist. RAMBAN, Hiddushim 89b, sees Rav Zevid as directly contradicting Rabah: we wait ten days only if there are grounds to accept the existence of an אמתלא . If such an אמתלא appears after ten days, we allow the woman to marry; if not, she is not allowed to marry lekhathilah. RAMBAM, Hil. Ishut 9:24, also sees Rav Zevid as opposing Rabah: while an אמתלא must normally accompany a rumor in order to be accepted as evidence to the contrary, we will accept a delayed אמתלא if it is a reasonable one. This would appear to follow Rav Zevid as against Rabah; see Magid Mishneh ad loc. and RaN, fol. 50a.

The TUR apparently follows the view enunciated by RASHI, 89b, במקום אמתלא : Rav Zevid's position must be considered separately from that of Rabah.[15] Rav Zevid does not deal with the issue of "time limit" or "grace period" at all. Thus, TUR decides (EHE 46, 83b, and see Kizur Piskei Ha-ROSH 9:11) that the אמתלא or the "presumed" אמתלא must accompany

the rumor. Once the rumor has been established, the אמתלא has no force against it. Beit Yosef holds that the TUR does not dispute the RAMBAM here, a view criticized by Derishah, n. 3. BaH agrees that the TUR disagrees with RAMBAM, but he adds that RAMBAM's understanding is supported by RIF and ROSH. This leaves us with a situation in which TUR rejects his father's ruling; yet in neither the TUR nor the Kizur do we find evidence of such a rejection. Rather, it is more probable that both TUR and ROSH accept Rav Zevid as having nothing to do with the issue of time periods. We reject Rabah, which means that there is no grace period whatsoever in dealing with אמתלא ; it must accompany the rumor. TUR's position is not only a reasonable interpretation of his father's halakhah; we are in addition constrained to accept the son's explanation of his father's words in cases of ambiguity such as this.[16] If TUR and BaH disagree on the interpretation of the ROSH, it is more probable that TUR preserves the true sense of R. Asher's position.

11.e. אמר רב אשי -- follows RIF.

12. אמר -- = Tos. Ha-ROSH 89b, ואידך . ROSH utilizes Tosafot as commentary on RIF/Gemara. Agrees with RAMBAM position against RABaD; see Hil. Ishut 4:13.

13.a. ומעשה -- = Tos Ha-ROSH 89b, ואידך , end. ROSH cites the ruling of R. Tam; see Sefer Ha-Yashar, ed. Schlesinger, ch. 148. See also Resp. Ha-ROSH 44:3.

13.b. לא מצאו -- follows RIF; adds explanatory note.

14. מעשה -- Tos. Ha-ROSH 90a, והלכתא . ROSH cites dispute between R. Tam and R. Yizhak over the requirement that a second get be written when the first is rumored to be pasul. See TUR, EHE 13, 24b, and Beit Yosef ad loc.

RAMBAM, Hil. Ishut 9:27, does not refer to the subject of this dispute. See Magid Mishneh ad loc., who cites the Tosafot report from RASHBA, Hiddushim 90a.

15.a. מתנ'–גמ' -- follows RIF, with explanatory comment.

15.b. ויצא מכיתו -- follows RIF.

NOTES TO GITIN, CHAPTER NINE

[1]See also Beit Yosef, EHE 137, 39b.

[2]ROSH does not mention the stringency of RAMBAN (Hiddushim 82a; see Isserles, EHE 137:1) which is applied to even a case of על מנת .

[3]Yet RaN preserves a reading of the Mishneh Torah which differs from that of ROSH and from our own text.

[4]See RASHI, 84a, אין חוששין .

[5]Ed. Zuckermandel, Gitin 6:7. This reading is directly contradicted by the text in the printed Tosefta, 4:8 (which is 4:10 in the Lieberman ed.) Lieberman, Tosefta Kifshuta ad loc., suggests that RASHI's deduction (see n. 4, supra) may have influenced the Tosefta textpossessed by R. Asher. See also Resp. Ha-ROSH 45:11.

[6]See also RASHBA, ad loc.

[7]This is the position assumed by RAMBAN and RASHBA, as well as ROSH. See Magid Mishneh, Hil. Gerushin 8:1, end. See also RaN, fol. 35b.

[8]RaN, fol. 45a, explains that RIF omits these cases because they occur infrequently.

[9]See also Hasagat Ha-RABaD, 4:14.

[10]ROSH here is a virtual repetition of RASHBA, Hiddushim 85b.

[11]Hagahot Maimoniot to 9:27 offers the same interpretation of RAMBAM's ruling.

[12]If " וכתב " refers to a requirement that witnesses sign the get, then we must conclude with R. Meir that עידי חתימה כרתי . R. Elazar understands the word " וכתב " as requiring that the get be written specifically for this particular woman (וכתב לה"- לשמה").

[13]Hildesheimer ed., p. 180. Warsaw ed., 80b, does not preserve this version. See Hildesheimer, loc. cit., n. 62, who points to the various rishonim who do read this interpretation in their text of Halakhot Gedolot.

[14]BaH, EHE 46, 82a, suggests that RAMBAM follows the first version of R. Abba's statement of 89a: i.e., we require . The Talmud mentions " " only as a description of what R. Abba does not require. This view, of course, places RAMBAM directly at odds with Tos/ROSH.

[15]See Korban Netanel, n. 1.

[16]Sedei Hemed, Kelalei Ha-Poskim, siman 11, n. 8, considers the instances of conflict between ROSH's ruling in the Halakhot with one of his responsa. He concludes that in such a case we follow the decision of the TUR. If TUR rules according to the responsum and against the Halakhot, we presume that he

was aware of his father's ultimate decision on that matter. This approach is accepted by Zafrany, pp. 90-91. It seems reasonable to extend this method to cases where the TUR renders an explicit decision on matters in which ROSH is ambiguous. In the case before us, TUR's ruling is based on an interpretation of the sugya, and there is no reason to assume that his father interpreted the sugya differently. This is especially true inasmuch as the TUR attributes his ruling to R. Asher in Kizur Piskei Ha-ROSH.

J. Tractate Ketubot, Chapter One

1. כתולה -- RIF; omits section on terumah.

2. אמר רבא -- summarizes Gemara; = Tos. Ha-ROSH 3a, איכא . R. Hananel rules according to the first version of Rava's statement: אין אונס בגיטין . RIF follows this position as well; see Gitin, fol 15a. Tosafot, on the other hand, points out that Rava does accept a claim of ones in certain cases; see Gitin 73a. A three-fold classification is required on this point: infrequent ones, frequent ones, and ones that falls between these two other categories. It is this third type of ones ("frequent and non-frequent") that lies at the root of the disagreement between the two versions of Rava's statement in our sugya, which we decide by ruling that אין אונס בגיטין .

RAMBAM, Hil. Gerushin 9:8, follows the position of R. Hananel and RIF: the rule is that אין אונס בגיטין , with no distinctions made between types of ones.[1] Magid Mishneh, ad loc., cites the Tosafot's distinctions in the name of מקצת המפרשים ; see also RAMBAN, Hiddushim, Gitin 30a and RaN, fol. 15b.

3a. אמר -- follows RIF to והוא דטריח ליה . = Tos. Ha-ROSH 3a, אשה . The Talmud accepts the dictum of Rav Shmuel b. Rav Yizhak that, in communities where the beit din meets every day, weddings may take place every day. RIF codifies this rule, as does RAMBAM, Hil. Ishut 10:15. The question is raised:[2] if the court is in session every day, why not require a virgin to be married on Friday (Thursday evening), since God blessed man on the sixth day of creation? Tosafot responds that the argument משום ברכה is an insufficient reason to specify a particular day for weddings. Rather, the consideration of " שקדו " (the rabbinic concern that the husband must take ample time to prepare the wedding feast and

rejoice with his bride) is a more important reason for the fixing of the date.

3.b. נישאת ככל יום -- = Tos. Ha-ROSH 3a, נשאת . We do not read literally the permit for weddings "every day", since weddings are not permitted on Shabbat. See Yerushalmi Ketubot 1:1 (24d): the huppah is a form of kinyan in that it bestows upon the husband the rights to the wife's income, and kinyan is forbidden on Shabbat. Likewise, it is forbidden to marry on Friday, since the beit din does not meet on Shabbat. Yet the contemporary custom, says Tos/ROSH, is to permit weddings on Friday. The reason is that, ordinarily, rabbinical courts do not convene daily; therefore, if a husband has a claim to lodge against his wife, he will assemble his own informal beit din for this purpose, an act which is permitted on Shabbat. Further evidence is brought from the Talmud to prove that there is no prohibition against the first intercourse on the night of Shabbat.

RAMBAM, Hil. Ishut 10:14, prohibits weddings on Friday, on the grounds that the preparations involved in the festive meal may lead to a violation of the laws of Shabbat. For this reason, weddings are also prohibited by RAMBAM on Sunday. RAMBAM follows the conclusion of the Gemara in 4b-5a. This conclusion is apparently rejected by RIF; see RaN, fol. 2a. For his part, ROSH rejects the concern that a wedding on Friday might lead to Shabbat violation (1:10). In defense of RAMBAM, RaN suggests that the permit for weddings on Friday is actually drawn from the permit to perform the first intercourse on Shabbat; RAMBAM would agree to this permit, provided that the actual wedding took place sufficiently early to preclude any possible meal preparations on Shabbat itself. Both RaN and Magid Mishneh to 10:14 mention that RAMBAN and ibn Migash oppose in principle the custom of holding weddings on Friday. See TUR, EHE 64, 97a-b.

3.c. והא דנישאת -- = Tos. Ha-ROSH 3a, נשאת . Cites the ruling by R. Efraim,[3] the student of Alfasi, that should the husband refuse to provide a wedding feast, the bride's family may force him to provide a feast according to local custom. RIF, says Efraim, rules thusly in a number of cases. See Hiddushei Ha-RASHBA 3a, where this ruling is attributed to R. Yosef ibn Migash.

RAMBAM does not mention this point; see Magid Mishneh, Hil. Ishut 10:14.

4. ולרוש --= Tos. Ha-ROSH 3b, ולרוש . See also Tos. Pesahim 25b, אף and Tos. Sanh 74b, והא . The Talmud suggests that it is permissible for virgin brides to subject to jus primae noctis[4] on the grounds that one is not culpable for acts performed under duress (ones). Tosafot asks how the Talmud could make this suggestion, inasmuch as one is obliged to submit to death rather than engage in an act of forbidden sexual intercourse (Sanhedrin 74a). R. Tam resolves this contradiction by deducing that intercourse with an idolator is not considered "intercourse" in the eyes of the halakhah. Citing the Gemara's treatment of Queen Esther (Sanhedrin 74b), whose sexual union with the king is questioned on the grounds that it is a public act and not a case of gilu'i arayot, R. Tam rules that a Jewish woman need not submit to death rather than have intercourse with a Gentile. In a case where a Jewish woman had intercourse with a Gentile, R. Tam permitted her to marry him following her repentance and his conversion; had the illicit lover been Jewish at the time of the affair, the marriage would be prohibited. Thus, R. Tam concludes that intercourse with a Gentile does not fit the halakhic definition of "intercourse" and that a woman need not choose death rather than submit to rape by a Gentile. R. Yizhak b. Meir, in contrast, points out that intercourse with a Gentile does indeed disqualify a wife from returning to her husband. Intercourse with a Gentile is not, as R. Tam claims, equivalent to bestiality. If such

intercourse is not recognized by the halakhah, that non-recognition extends to matters of genealogy only. In all other respects, a Gentile's intercourse is "intercourse". Therefore, if the Talmud suggests that the woman is not obliged to submit to death rather than forced intercourse with the Gentile official, it is because her act is totally passive in nature. The law which obligates the Jew to choose death rather than perform an act of forbidden intercourse applies on to positive acts, just as the law forbidding the Jew to commit murden even on the pain of death applies only to positive action on his part. The Talmud does not regard Esther's conduct as an act of illicit intercourse, not because the act is not legally considered intercourse, but because her role was entirely passive; she was therefore not required to choose death over submission to the king.

ROSH supports R. Tam's ruling, but for a different reason. It follows, then, that he supports R. Yizhak b. Meir's argument: the demand that one die rather than perform an illicit sexual act refers to the male and not to the female who performs no act but remains passive. See Beit Yosef, YD 157, 253a. Rape is not considered gilu'i arayot, not because the Gentile's intercourse is not "intercourse" (R. Tam) and not because the Gentile's intent is for his own pleasure (Rava, Sanhedrin 74b), but because the woman's role is entirely passive (Abaye, Sanhedrin 74b).

RAMBAM, Hil. Yesodei Torah 5:2, follows Rava. The woman is not culpable if she permits to rape by the Gentile rather than choosing death, because the Gentile's intent is for pleasure rather than to force her to violate her religion. Kesef Mishneh, ad loc., suggests that Maimonides agrees with RAMBAN that rape by a Gentile is not considered gilu'i arayot; thus the woman need not choose death over submission to the rape. In Beit Yosef, loc. cit., Karo infers that this is the opinion of R. Tam as well.

In summary, some Tosafot tradition holds that the woman is not culpable because she plays a passive role. R. Tam, RAMBAN and RAMBAM on the other hand, acquit her on the grounds that such rape does not qualify legally as an act of "illicit intercourse".

5.a. תניא -- follows RIF to ונוהג שכעת ימי המשתה וכו'. = Tos. Ha-ROSH 4a, ונוהג. Halakhot Gedolot (Warsaw ed., 42 c-d) holds that mourning overrides the second day of a festival, since the first day of mourning is a Toraitic institution while the second day of a festival is a rabbinic enactment for the Diaspora. Thus, if a death should occur on that day, the mourning period begins on that day. Tosafot presents a difficulty to this position based on our sugya: should a death occur during the seven prescribed days of feasting after a wedding, the mourning period is delayed until the feasting-week is over. The wedding feast is a rabbinic enactment; if the first day of mourning is Toraitic, it should then take precedence over the wedding feast. RaMaH resolves the difficulty by concluding that the first day of the wedding feast is also a Toraitic institution.

ROSH refers us to his Halakhot in Berakhot 2:15, see also Mo'ed Katan 3:3. ROSH recognizes the Alfasi (Berakhot, fol. 9b-10a) follows the position of Halakhot Gedolot, while Tosafot holds that all mourning is rabbinic. In neither locus does ROSH states his preference clearly; see Kizur Piskei Ha-ROSH to both. RAMBAM, on the other hand, follows RIF in declaring that the first day of mourning is Toraitic; Hil. Avel 1:1 and Kesef Mishneh ad loc. While ROSH does not provide a clear ruling on this theoretical issue, he presents the opposing viewpoint to that of RIF/RAMBAM.

5.b. הוא ישן כין האנשים -- cites RaBaD's ruling that both husband and wife must be "guarded" during this mourning period: men must sleep with

him and women with her.[5] On the other hand, RaBaD does not require separation or guarding of bride and groom during the daytime; see ROSH, Mo'ed Katan 3:36. There, R. Asher argues that the opposite should be the case: we should be more strict regarding separation in the daytime, while at night it is sufficient if either the bride or the groom sleeps under the supervision of others. See TUR, YD 342, 294 a-b. RAMBAN, in Torat Ha-Adam, supports RaBaD's view.

RAMBAM, Hil. Avel 11:8, follows Alfasi in rendering the baraita in its literal sense: both husband and wife must be "guarded" at night.

While ROSH does nothing but mention RaBaD's ruling here, he subsequently declares his opposition to it--and to the formulation in RIF/RAMBAM--in his Halakhot to Mo'ed Katan.[6]

6.a. ראין -- = Tos. Ha-ROSH 4a, ראין . RASHI interprets our baraita to state that a bride may adorn herself with jewelry even though she is a mourner during sheloshim. Yet the halakhah in Evel Rabati[7] exempts all wives from ritual requirements during that thirty-day mourning period which might make them appear less beautiful to their husbands. This baraita, therefore, must inform us concerning a different rule than that already stated in Evel Rabati. In the view of Tosafot, the "thirty days" mentioned by the baraita refers to the thirty-day period of rejoicing which follows the wedding, not to the thirty-day period of mourning. For thirty days following her wedding, a bride may adorn herself as a bride, even during the seven-day intensive period of mourning (shiva), should she become a mourner during those thirty days. By deduction, the wife who is not a new bride must therefore observe shiva but may adorn herself during the final twenty-three days of sheloshim.

RAMBAM, Hil. Avel 11:8 recites the baraita verbatim; as with the baraita

itself, one might argue (as do RASHI and Tosafot) whether the "thirty days" mentioned by RAMBAM refers to the mourning or the wedding period. Moreover, since RAMBAM does not draw the same difficulty in the contrast between our passage and that in Evel Rabati, he does not make the distinction between bride and wife, as do Tosafot and ROSH. See TUR, YD 381, 215b, and Beit Yosef ad loc.

6.b. ואחר שנהג -- should mourning occur during the days of the wedding feast, those days do not count towards the thirty-day mourning period. This ruling is taken from RAMBAN, Torat Ha-Adam; see the Warsaw, 1876 edition, 56b, and TUR, YD 342, 294b and Beit Yosef ad loc. RAMBAM rules likewise in Hil. Avel 11:7.

6.c. ורוקא -- ROSH refers to his Halakhot in Yebamot 4:27. Both the laws discussed there (remarriage of widower with children; marriage of orphan following sheloshim) involve disputes against the position of RAMBAM, Hil. Avel 6:5. Although ROSH does not mention RAMBAM in Yebamot, the existence of this dispute is acknowledged in Resp. Ha-ROSH 27:5, authored by one of Asher's sons.

6.d. אמר רפרם -- follows RIF to שבעת ימי המשתה כרישא. The baraita on 4a deals with a situation where a death occurs just as a wedding is to be held. ROSH deduces from RIF that, if a potential financial loss is involved to the groom, the seven days of feasting for the wedding precede the seven days of mourning, while in the event that loss can be avoided, the mourning period precedes the wedding feast. In both cases, the wedding itself precedes the funeral. ROSH cites the same view "in the name" of Halakhot Gedolot (see Warsaw ed., 43b) and "in the name" of Yizhak ibn Giat.[8] ROSH disagrees. The wedding is permitted to precede the funeral only in the event of the death of the groom's father or

the bride's mother, and only then if a financial loss is involved. These cases are spelled out in the baraita. In all other cases, where the mourning period precedes the wedding feast, the wedding is also delayed.

RAMBAM, Hil. Avel 11:8, end, arrives at the same ruling. See TUR, YD 342, 294b, and BaH ad loc. ROSH cites the poskim with whom he disagrees, but he does not mention that RAMBAM agrees with his conclusion. ROSH draws, perhaps, upon RAMBAN's Torat Ha-Adam as the source for the statement of ibn Giat; see the Warsaw, 1876 ed., 18a-b.

7.a. אמר מר -- = Tos. Ha-ROSH 4a, מסייע . The similarity between mourning observance during the festival to observance during the wedding feast, noted here in the Talmud, is made in other places as well: see Mo'ed Katan 7b.

RAMBAM does not draw this comparison between mo'ed and the wedding week, and this fact becomes important in the determination of the following halakhah.

7.b. וכירך -- = Tos. Ha-ROSH 4a, אכל . R. Yohanan states that, on festivals, the mourner/onen "practices" (נוהג) those mourning prohibitions which are observed in private. Since his statement is buttressed by the Talmud's citation of the baraita on 4a, we draw the full analogy: just as a mourner is forbidden to violate the private prohibitions during his wedding week, he is forbidden likewise to violate them should a death occur during a festival. Halakhot Gedolot, ed. Warsaw 42c, also rules that the mourner must observe prohibitions in private, such as the prohibition against sexual intercourse, if the death occurs during the festival.

RAMBAM, Hil. Avel 10:3 and 10:8, rules that no mourning customs are observed during a festival. Hagahot Maimoniot, n. 8, is constrained to add that "private prohibitions" are indeed observed. See Kesef Mishneh to 10:3,

who quotes from RAMBAN.[9] Apparently, a version existed of R. Yohanan's statement which read that on Shabbat (not on mo'ed) the mourner must observe the private prohibitions. Some authorities do in fact read "Shabbat" in place of "mo'ed".[10] Thus, RAMBAM has a firm textual basis for the ruling that "private prohibitions" are observed on Shabbat but not on a festival. See TUR, YD 399, 324b.

8.-9.a. דרש -- During certain periods of mourning a newly-married husband and wife are prohibited from sleeping together. Conversely, in the case of a groom whose bride has begun menstruation (following the consummation of the marriage), the couple are not separated. This does not mean that mourning is considered a "lighter" prohibition than niddah (and therefore, one that the husband would be more likely to violate were it not for the enforced separation). Indeed, the general feeling is that a husband is unlikely to initiate sexual intercourse during his period of mourning; therefore, certain acts of affection which the niddah is not permitted to perform for her husband are permitted to the wife whose husband is a mourner. Rather, the difference lies in this particular case of mourning, which the husband takes less seriously because it was delayed until the conclusion of the wedding feast. In this case, the couple are not to cohabit. Some authorities wish to draw the analogy between the case of mourning delayed by the wedding feast to mourning delayed by a festival: i.e., if the mourning period is delayed by the festival, the husband and wife should not be allowed to sleep together. See Tos. Ha-ROSH 4b, ד"ה גרסינן.

Tosafot and ROSH disagree. The leniency in respect to the wedding feast is a greater one than that allowed with the festival. In the former case, the mourning is delayed even though death occurs before the wedding; in the latter, the death occurs after the festival has begun, at a point when the

mourner is under a previously-existing obligation to observe the festival.

TUR, YD 383, 316a, attributes the rejected opinion of "some authorities" to RABaD; this attribution is rejected by Beit Yosef ad loc. and RAMBAN, Torat Ha-Adam, ed. Warsaw 45a. See also Tosafot, Yoma 18b, יחורי . RAMBAM, on the other hand, does not deal with this point, although one could deduce it from his position that mourning is not observed at all during a festival. ROSH and the other authorities make clear a point left vague in RAMBAM.

9.b. הא דאמרינן -- Tos. Ha-ROSH 4b והצעת . Rav Huna's statement prohibits a niddah from the act of הצעת המיטה . Two types of הצעה exist. The first, spoken of in M. Ketubot 5:5, appears to be troublesome work,[11] which a woman ought to avoid if she has servants. The הצעה spoken of here and in Ketubot 61a, however, is an act of affection between a woman and her husband, an act that is prohibited to a niddah lest it lead to forbidden sexual contact. RASHI, 61a, אכל draws this distinction. It would appear that only the "affectionate" form of הצעה would be prohibited to the niddah, while the "troublesome" form would still be permitted to her. Moreover, the "affectionate" הצעה is prohibited to the niddah only while her husband is present.

RAMBAM, Hil. Isurei Bi'ah 11:19, does not draw the distinction between the two types of הצעה . See Hagahot Maimoniot, n. 50, end, which cites this distinction in the name of R. Tam and RASHI.

9.c. וה"ר מאיר הלוי ז"ל -- RaMaH, quoting R. Tosef ibn Migash, rules that although a husband may complete the first intercourse if his wife becomes a niddah during that intercourse, he must subsequently separate from her for the remainder of her menstruation. Just as the rabbis fear that their leniency with respect to mourning may encourage a husband to denigrate the seriousness of that area of the halakhah, so too is there concern that

leniency may lead to his denigration of the niddah prohibitions. ROSH rejects this distinction. The husband is allowed to live with his wife even if she becomes a niddah during the first intercourse, just as he is allowed to live with her during all other menstrual periods.

TUR, YD 192, 71b, rejects this distinction. Beit Yosef ad loc. reports that "all other poskim" also reject it, inasmuch as they write this halakhah without referring to such a distinction. RAMBAM, Hil. Isurei Bi'ah 22:1, also omits any reference to this distinction.

9.d. וירא -- since mourning is taken more seriously by a husband than the niddah prohibition, it would seem to be permissible for him to sleep with his wife if they are both fully clothed. However, it is better to be strict about this, especially since our sugya, which apparently considers the possibility that sleeping together is permitted, actually does not prove that such "sleeping together" occurs in the same bed.

TUR, YD 383, 316a, attributes the permit for husband and wife to sleep together when clothed to R. Yizhak ibn Giat.[12] RAMBAN, Torat Ha-Adam, ed. Warsaw 44b-45a, attributes it to the Tosafists. RAMBAM, Hil. Avel 5:5, does not mention this point.

10.a. תני -- follows RIF to רע"ש ושכת . = Tos. Ha-ROSH 5a, רא"ב . Since the beit din meets every day in our time, a woman may be married on any day. The explanation of berakhah is not a sufficient reason to set a particular day for the wedding of a virgin or a widow. The chief reason for fixing a wedding date is the rabbinic enactment that the husband rejoice with his bride the prescribed number of days.

RAMBAM, Hil. Ishut 10:12 and 10:15 refers to this enactment.

10.b. איבעיא להו -- follows RIF, inserting explanation for why wedding feasts are allowed on Shabbat and Saturday evening; see Tos. Ha-ROSH

7a, והלכתא . Since RIF does not mention the fear that, should we allow wedding feasts on these days, animals might be slaughtered on Shabbat, it is concluded that he does not pay attention to that fear; see RaN, fol. 2a. RIF, therefore, would agree with ROSH that wedding feasts are permitted on these days.

RANBAM, Hil. Ishut 10:14, prohibits such feasts on the very grounds which RIF and ROSH reject: namely, preparations for the feast might involve activities prohibited on Shabbat. See Magid Mishneh ad loc., who states that "some authorities reject" the concern of Shabbat violations on this point. TUR, EHE 64, 97 a-b, specifically rejects RAMBAM's ruling (and the concern upon which it is based) in the name of ROSH.

11. אמר -- follows RIF, and adds halakhic detail from Tos. Ha-ROSH 7a, אי .

RAMBAM, Hil. Ishut 10:12 and Hil. Berakhot 2:9 rules likewise.

12.a. אמר רב נחמן -- follows RIF to בכית אירוסין . = Tos. Ha-ROSH 7b, כתב . The She'iltot[13] requires that ten men must be present for the recitation of birkat erusin, which takes place at the time of kiddushin, as well as for birkat hatanim, which is recited at the wedding. Shmuel Ha-Nagid, on the other hand, requires a minyan for birkat hatanim only. ROSH favors the She'iltot position; both Ruth 4:2 and Psalms 68:27, which are used as exegetical bases for the requirement for a minyan at a wedding, can just as easily refer to kiddushin as well.

RAMBAM, Hil. Ishut 10:5, requires a minyan for birkat hatanim but does not mention it as a requirement for birkat erusin.

12.b. ויש שכתבו -- = Tos. Ha-ROSH 7b, ויש שכתב . Some authorities rule that birkat erusin must precede the kiddushin, because of the requirement that, generally, blessings are recited immediately before the

corresponding act is performed.[14] Others rule that the berakhah must follow the kiddushin, lest the woman recant in the interval between blessing and kiddushin and create a situation of berakhah le-vatalah.[15] Since, in this berakhah, the actual commandment is not mentioned, there is no requirement that it be recited immediately prior to the corresponding act.

ROSH renders no clear decision here. TUR, EHE 34, 61a, also does not decide; see also Kizur Piskei Ha-ROSH 1:12. Beit Yosef ad loc. cites the responsum of ROSH, 26:1, in which R. Asher favors the first view, which is the same ruling as that rendered by RAMBAM, Hil. Ishut 3:23, and he concludes that ROSH agrees with RAMBAM. BaH, on the other hand, holds that ROSH indeed follows the second position, which disagrees with RAMBAM, so that his ruling in the Halakhot conflicts with his responsum. BaH then procedes to resolve the contradiction: ideally, the blessing should be recited before the kiddushin, but it may be recited afterwards bedi'avad. This would place Asher in conflict with RAMBAM, who states that the blessing may not be recited after the kiddushin has taken place.[16] The custom of reciting the blessing following kiddushin was prevalent in Ashkenazic communities; see Hagahot Maimoniot, n. 60, and the Tosafot in the name of R. Tam. At the very least, ROSH provides here an alternative halakhic tradition to the one advocated by RAMBAM and by Asher himself in the responsum.

12.c. מאי מכרכין -- ROSH cites the Franco-German custom of concluding the birkat erusin with the words: מקדש ישראל ע"י חופה וקדושין. This minhag is at variance with the practice described in RIF and in RAMBAM, Hil. Ishut 3:24. See Hagahot Maimoniot, 3, n. 70.

12.d. ויש מקשין -- = Tos. Ha-ROSH 7b, אקב"ו. Tosafot raises various difficulties against the wording of the birkat erusin: 1) Why do we not say "...who has sanctified us...and commanded us to betroth a

wife"? 2) Why do we recite a blessing over a prohibition, an act we do not perform? 3) Why is the huppah mentioned, inasmuch as the blessing is recited at kiddushin, where there is no huppah? Tos/ROSH answer these questions, providing explanatory material to a subject raised in the Talmud. The answer to the question why the word huppah is mentioned provides a theoretical basis for the practice described in 1:12c, which, as we have seen, differs with that of RIF/RAMBAM.

13.a. ת"ר -- = Tos. Ha-ROSH 7b, והוא . ROSH follows the definition provided by Tosafot[17] of פנים חדשות : "special, honored guests" whose visit is the occasion of joy. The blessing is recited when they attend the meal, even if they heard the blessing at the wedding itself. In addition, Shabbat is considered " פנים חדשות ".

While RIF does not define " פנים חדשות ", RAMBAM, Hil. Berakhot 2:10, sees them as any guests who did not hear the blessings at the wedding. See Hagahot Maimoniot 2, n. 5; TUR, EHE 62, 95a, and Beit Yosef ad loc.

13.b. ויש מקומות -- ROSH cites the reaction of Rav Hai Gaon to the custom of some congregations to accompany the groom to his home on Shabbat following services to recite the seven benedictions there. RIF and RAMBAM do not mention this custom.

13.c. ור"א -- although some say that the seven benedictions are to be recited following the meal, Tractate Soferim 19:11 records a different practice. RIF and RAMBAM do not mention this custom.

13.d. מאי מכרך -- follows RIF, with some omissions, to ואשר ברא . = Tos. Ha-ROSH 8a, ירמא . The "first day" of the wedding feast, on which the seven benedictions must be recited in full, is interpreted to mean the first meal of the week, even if eaten at night. On

Shabbat, the benedictions are recited at the morning meal, even though they have been recited the previous night. See TUR, EHE 62, and 95b. These points are not discussed in RIF/RAMBAM.

14. אמר -- follows RIF to ברכת רחבה . Cites Rav Paltoi Gaon's ruling that the customs of rehavah and shurah are no longer observed. RAMBAN, Torat Ha-Adam Warsaw ed., 52a, attributes this ruling to an anonymous gaon.

RAMBAM, Hil. Avel 13:1, holds that shurah is still observed. See TUR, YD 379, 313a.

15. ברכת -- ROSH cites a version of birkat betulim found in Halakhot Gedolot, Warsaw ed., 66d.[18] TUR, EHE 63, 96b, reproduces the benediction. RIF and RAMBAM do not mention it.

16. והורה -- Rav Nissim Gaon writes that birkat erusin, unlike birkat hatanim, need not be recited over a cup of wine or liquor; if such beverages are unavailable, the blessing may still be recited without them. See TUR, EHE 62, 94b: the wedding benedictions (birkat hatanim) must be recited over wine or liquor.

RAMBAM, Hil. Ishut 10:4, does not regard wine as an absolute requirement, even for the wedding benedictions. See Magid Mishneh ad loc.

17. כתב -- cites Rav Sherira Gaon, who prohibits the recitation of birkat erusin at the time of the wedding: i.e., the blessing must precede the betrothal. Rav Nissim Gaon and R. Yonah disagree, and so does ROSH. The birkat erusin may be recited at the wedding, inasmuch as the wedding ceremony "completes the permit" that began at betrothal. As long as the wedding has not taken place, birkat erusin may be recited. See TUR, EHE 34, 61a.

See 1:12b, above. There, ROSH is vague concerning whether the birkat erusin may be recited following the act of kiddushin. Apparently, 1:12b

concerns the liturgical situation at the kiddushin ceremony; there, ROSH seems to hold that the berakhah should be recited before the act of kiddushin.[21/9] In this halakhah, ROSH refers to the situation bedi'avad: may the benediction be recited later if it was not recited before the act of kiddushin?

RAMBAM, Hil. Ishut 3:23, forbids the recitation of the benediction following kiddushin; at that point, it is a berakhah le-vatalah. In other words, the situation lekhathilah is the same as the situation bedi'avad. RIVASH, Resp. 82, attempts to combine the two viewpoints. He agrees that birkat erusin may be recited at any time during the period of betrothal, until the wedding; it is good, however, to perform a second kiddushin ritual along with the benediction, in order that it not appear to be berakhah le-vatalah. See also Sefer Ha-Manhig, Rafael ed., v. II, p. 537. RAMBAM, in taking the strict view, leaves no room for the recitation of birkat erusin once the act of kiddushin has taken place. RIF, on the other hand, is unclear. It is true that he rules that the benediction should precede the act of kiddushin; see 12b, above. It is not known whether he would prohibit the recitation of the benediction bedi'avad at a later time.

18.a. א"ר -- follows RIF/Gemara (with some ommissions) to דאורייתא לקולא . ROSH cites an opinion, attributed to R. Yonah, that if a bat Yisrael, in response to her husband's claim that she was not a virgin upon their marital intercourse, states that his claim is true and that she was raped, her claim is accepted. She claims "bari", definite knowledge, while the husband does not know definitely whether her previous intercourse was a case of rape or not. Thus, even in a case where only one doubt exists (ארנס /רצון), the wife is permitted to return to her husband if she admits that the intercourse took place while she was married to him. ROSH rejects this reasoning, since the distinction ברי / שמא does not apply in

this case. He does accept this ruling, however, based on the mishnayot Ketubot 1:6 and 1:9. In such cases, a woman's claim of bari can override the fact that only one doubt exists concerning this Toraitic prohibition. See TUR, EHE 68, 102b-103a.

RAMBAM, Hil. Isurei Bi'ah 18:10-11, follows the Gemara and RIF literally. In any case where the only doubt is one of רצון/אונס , the woman is forbidden to her husband. Her counter-claim or admission is not taken into account. Magid Mishneh ad loc. describes the two viewpoints on this issue. The first, which coincides with that of ROSH and R. Yonah, holds that a bari claim may override the one-doubt situation and allow a woman to live with her husband. The second view states that this leniency applies only to monetary matters but not to permission for the wife to live with her husband. Magid identifies this second view with RASHBA (Hiddushim, 9b) and RAMBAM.

18.b. א"ר יהודה -- follows RIF to ומפסידה .
The above halakhah states that the husband's claim that the bride was not a virgin is accepted, for the purpose of forbidding their relationship, only if the wife denies the claim outright or does not respond to it. It is not accepted if she admits the fact that she is not a virgin but claims that she was raped. ROSH extends this conclusion to the issue of ketubah: the bride forfeits her right to the ketubah only if she denies the husband's claim or does not respond to it. If she admits the claim but says that she was raped, she retains her right to the ketubah. See TUR, EHE 68, 103a.

RAMBAM rules likewise in Hil. Ishut 11:11. ROSH does not merely repeat the halakhah as found in RIF. He extends his analysis in order to reject two alternative claims by the wife--"I was a virgin" and "I am a mukat eiz"--on the grounds that these claims are based upon faulty migo premises.

18.c. וחזינן לבעון -- follows RIF to הלכך לא מהימן .

RIF accepts the Geonic ruling[20] that the husband's claim disqualifies the bride from ikar ketubah but not tosefet ketubah; the tosefet, not a rabbinic enactment, is an obligation made by the groom of his own free will which he must fulfill, regardless of the wife's lack of virginity. ROSH disagrees. The groom undertook the tosefet out of love for his wife; he would never had made that promise had he known that his bride was not a virgin.

RAMBAM, Hil. Ishut 11:16, follows Alfasi. Kesef Mishneh ad loc. defends this ruling against ROSH: the Talmud makes it clear that the wife loses only that which the rabbis themselves enacted (ikar ketubah). TUR, EHE 68, 103a, does not cite ROSH's ruling, leading Beit Yosef to suggest that, in fact, ROSH does not dispute RIF and the Geonim here.[21] Yam shel Shelomo, Ketubot 1:26, draws the same conclusion. In Kizur Piskei Ha-ROSH, however, R. Jacob b. Asher does regard Asher's comments here as a dispute against the Geonic view. We must also note that Karo, in Kesef Mishneh and Beit Yosef, finds it necessary to refute the attach launched by ROSH against the theoretical basis of the Geonic decision.

18.d. והאי דנאמן -- = Tos. Ha-ROSH, Yebamot 111b, רבי יוסי . The husband's claim that the bride was not a virgin is accepted only if he makes it immediately. Otherwise, we must suspect him of having grown to hate his wife and of using this false claim as a means of punishing her.

RAMBAM, Hil. Ishut 11:15, rules likewise. ROSH, however, adds certain details missing from RAMBAM's language: if the husband does not make his claim immediately, that claim is not accepted whether he states "The intercourse took place immediately after the wedding" or "the intercourse did not take place until now". The greater detail provided by ROSH/Tos leads TUR, EHE 68, 103b, to use that source as his basis rather than to choose the

language of the RAMBAM as the expression of the halakhah.

19. מדקאמר -- = Tos. Ha-ROSH 10a, אמר רב נחמן .

While Rav Nahman's statement on 10a, as well as other references, imply that the ketubah is a rabbinic enactment, the custom in France and Germany is to include in the ketubah the words " דחזי ליכי מדאורייתא ". According to R. Tam, we may base this custom upon R. Shimeon b. Gamliel, whose position in M. Ketubot 13:11 is interpreted by the Talmud (Ket. 110b) as stating "the ketubah is a Toraitic institution". The problem is the conflict of rules between: a) הלכה כרב נחמן בדיניו ; and b) כל מקום ששנה רשב"ג במשנתנו הלכה כמותו .[22] R. Hananel opts for rule a) over rule b), basing himself on the Gemara's language in Ket. 110a: לאפוקי מדרשב"ג . Tos/ROSH, however, do not accept this proof, since that expression does not mean that the halakhah of necessity does not follow R. Shimeon b. Gamliel. Rather, we follow the view of "all the Geonim" that the ketubah is a rabbinic enactment. If Ashkenazic ketubot read " דחזי ליכי מדאורייתא ", this refers to the sum of fifty shekels of silver ordained by the rabbis as ikar ketubah; this sum is to be measured according to Toraitic valuation rather than the lower, current valuation (כסף מדינה). The higher valuation, says ROSH, was instituted in order to make it more financially difficult for the husband to divorce his wife.

TUR, EHE 66, 99a-b, presents the summary of viewpoints on this issue. Some authorities, such as R. Tam, hold that the ketubah is a Toraitic institution, while others, such as R. Meir of Rothenburg, rule that the ketubah is rabbinic in origin. This latter position is shared by "all the Geonim" and by RAMBAM, Hil. Ishut 10:7. It would follow that those authorities who follow the first view would calculate the ketubah according to

Toraitic valuation, while the second group calculates the husband's obligation in the lower-valued כסף מדינה . ROSH is the one authority who takes a middle ground. He agrees that the ketubah is indeed a rabbinic enactment, but it is measured in Toraitic currency. In order to uphold the Ashkenazic custom, ROSH forges a compromise between two seemingly contradictory halakhic positions.[23]

20.a. ההוא -- follows RIF to מהימן . = Tos. Ha-ROSH 10a, אסכרה . ROSH accepts the view of RIF and RASHI (10a, בחור) that corporal punishment is ordered only if the one who claims "she was not a virgin" is a bahur and is therefore not regarded as knowledgeable in this area. A groom who is regarded as trustworthy and knowledgeable is never punished for making this claim.

TUR, EHE 68, 103b, presents Asher's position. Beit Yosef ad loc. points out that RAMBAM is vague on this distinction between bahur (one who does not know enough to make this claim) and nasu'i (one regarded as knowledgeable).

20.b. ההוא דאתא -- follows RIF to נעול . Both versions of R. Gamliel's statement are intended for the use of the judge in examining the claimant who charges that his bride was not a virgin. The judge allows the claimant an opportunity to withdraw the claim and to return to his wife.

RAMBAM rules likewise, Hil. Ishut 11:12. The difference is that ROSH provides a reason and an explanation for this judicial procedure.

21.a. ההוא -- follows RIF.

21.b. גרסינן -- follows RIF to וכן הלכה . According to Alfasi's reading of the text on 36a, a bogeret (a girl who has just reached the age of maturity) does not always shed blood at her first intercourse. Therefore, a husband may not be able to claim ta'anat betulim.

He may, however, claim that his bride is not a virgin if her vagina opened too easily upon the first intercourse.[26] RASHI, Ket. 36b, ד"ה , has an opposite reading: the bogeret does shed blood at her first intercourse, but her vaginal opening begins to loosen at that age. ROSH cites RAMBAN (see Shitah Mekubezet to Ket. 36a) in support of RASHI's text. See also Tos. Ha-ROSH 36a, כוגרת .

RAMBAM, Hil. Ishut 11:13, states that he has examined a number of texts and that he favors the reading which RASHI preserves. RAMBAN, in the Shitah Mekubezet passage, explicitly refers to RAMBAM's rejection of the RIF/Geonic reading. ROSH, as we have seen, mentions RAMBAN; he apparently inserts RAMBAN's analysis into his own discussion of this text. Yet he makes no mention of RAMBAM, despite the fact that Nahmanides does mention him. RAMBAM states that he arrived at his reading through careful textual analysis; reference to him would bolster ROSH's position. ROSH, however, ignores RAMBAM, at the same time that he is willing to base himself upon another predecessor.

22. מתנ' -- follows RIF, Mishnah.

23. גמ' -- ROSH summarizes the Talmud passage, which is cited by RIF in Yebamot, fol. 16b. RIF does not include the statement by Rav Yosef that a minor may renounce the conversion upon reaching majority. According to ROSH, Rav Yosef's view is upheld by the sugya; moreover, R. Yosef ibn Migash also rules in favor of Rav Yosef.

RAMBAM treats this subject in two places in the Mishneh Torah. In Hil. Isurei Bi'ah 13:7, he rules that a minor may be converted upon the sponsorship of the beit din. In Hil. Melakhim 10:3, he declares that the minor may renounce the conversion, in accordance with Rav Yosef's position. There is still some uncertainty as to the length of time allowed to the minor to

renounce his conversion upon reaching majority. RAMBAM, in Hil. Melakhim, requires the minor to renounce the conversion "at the time" he becomes an adult. ROSH follows the view of R. Yizhak (see Tos. Ha-ROSH 11a, לכך): the renunciation may take place from the time the minor becomes an adult until such time as we see him or her fulfilling the obligations of Judaism. Once the person begins to keep the mizvot, he is no longer entitled to renounce the conversion. ROSH makes clear a point of halakhah left vague in RAMBAM; see SA YD 268:8, which adopts the language of Tos/ROSH, rather than that of RAMBAM, on this issue.

24. מחנ׳ -גמ׳ -- follows RIF.

25. מחנ׳ -גמ׳ -- not in RIF. = Tos. Ha-ROSH 12a, חבר .

According to Rav Ashi, a Judean groom who does not follow the Judean custom of supervision on the wedding night[25] may not claim before a beit din that his wife was not a virgin before the marital intercourse. R. Yizhak b. Meir suggests that Rav Ashi does not believe in the presumption that a groom would not spend his money on a wedding feast if he did not intend to keep his bride. R. Tam replies that Rav Ashi does hold to this presumption, but inasmuch as this groom, by refusing to follow the Judean custom, is suspected of cheating, we do not rely on the presumption in this particular case. Thus, Rav Ashi would allow the groom outside Judea to claim ta'anat betulim, even though he did not undergo "supervision". The controlling factor is the local custom. We hold to the presumption that the groom is serious about wanting to marry this bride, but if he departs from local practice, we doubt his sincerity. See TUR, EHE 68, 101b. In general, a husband may claim "she was not a virgin" as long as he did not spend time alone with her before marriage. We do not require evidence of his honesty, because we rely on the presumption that any husband who pays the wedding expenses must be sincere. The discussion in

Tos/ROSH places a limit on this rule, however: when the husband departs from local custom, we may suspect dishonesty.

RAMBAM, Hil. Ishut 11:8, simply states the rule that if husband and wife spend time alone before marriage, the husband may not claim ta'anat betulim. He does not mention the presumption of sincerity in this context. Tos/ROSH notice the contradiction between the prohibition of yihud before marriage and the presumption of the groom's sincerity, and they provide a theoretical framework in which this contradiction is resolved. Without this resolution, one might be led to think that the husband might still claim ta'anat betulim even though he spent time with the bride alone before marriage.

26. מתנ' -- follows Mishnah/RIF to כידוע חכמים . This passage, dealing with ancient priestly custom, does not appear at all in RAMBAM. See TUR, EHE 66, 99b, where the halakhic conclusion is drawn: if a woman's family has traditionally adhered to a certain sum in the ketubah, the court should follow family tradition in adjudicating the ketubah if the wife has lost the document.

27. מתנ' -- paraphrases RIF.

28. מתנ'-גמ' -- follows RIF.

29. ההוא -- follows RIF/Gemara, but adds qualifying remarks. The statement on 14a that הלכה כר"ג comes to decide the case where the arusah claims that the fetus is the offspring of her husband and when the husband is not present to either affirm or deny her claim. In such a case, Raban Gamliel's decision would lead us to accept the claim of the arusah.

ROSH's ruling is quite similar to that of RAMBAN, Shitah Mekubezet, Ketubot, v. 1, 66d. See TUR, EHE 14, 9a-b.

RAMBAM, Hil. Isurei Bi'ah 15:17, clearly states that the husband's denial

of the claim of the arusah renders the fetus a mamzer. He does not, however, decide the situation in which the husband is not present to respond to the claim.

30. מחנ -גמ -- follows RIF to ורוב סיעה .

= Tos. Ha-ROSH 14b, כמאן . The requirement that two "majorities" be present does not apply if the woman's claim is "bari": i.e., even without two majorities, she may marry a kohen.

RAMBAM, Hil. Isurea Bi'ah 18:13-14, requires two majorities even if the woman claims she was raped by a man who is kasher. See Magid Mishneh ad loc., RaN, fol. 5a, TUR, EHE 6, 15b-16a, and Beit Yosef and BaH ad loc.

NOTES TO KETUBOT, CHAPTER ONE

[1]See Beit Yosef, EHE 144, 64b. Karo implies that those who rule אין אונסא would accept a claim of ones in a case of אונס כגיטין דלא שכיחא. Thus, RAMBAM would agree with ROSH. It must be stressed that this distinction is a product of Karo's analysis and does not appear in the words of RAMBAM.

[2]Attributed in the printed Tosafot in R. Shimshon of Sens.

[3]R. Efraim ibn Avi Alragan, "R. Efraim of Kaleah", outstanding student and critic/commentator of the Alfasi, North Africa, d. early 12th century.

[4]See Jewish Encyclopedia, v. 7, p. 395.

[5]RABaD is also cited in Nahmanides' Torat Ha-Adam, Warsaw ed., 45a.

[6]Zafrani, pp. 79-87, concludes that the Halakhot to Mo'ed Katan antedate those to Ketubot.

[7]See Tractate Semahot, fol. 46c. and Nahalat Ya'akov, לתספורת. RIF, Mo'ed Katan fol. 14b, and ROSH, Mo'ed Katan 3:53 preserve the reading cited by Nahalat Ya'akov.

[8]ROSH's language indicates that he found the ruling of Hai Gaon and ibn Giat quoted in another source. Ibn Giat is cited in RAMBAN, Torat Ha-Adam, 18a-b.

[9]Torat Ha-Adam, 58a.

[10]Sefer Ha-Ma'or, Mo'ed Katan, fol. 14b; RITbA, cited in Shitah Mekubezet to our sugya; Hiddushei Ha-RaN, Mo'ed Katan 24a; Tosafot, Mo'ed Katan 24a, להכי.

[11]Defined in Tosafot/ROSH as "the arranging of mattress and pillows". The "affectionate" form of הצעה, forbidden to the niddah, refers to the spreading of the bedsheets.

[12]The permit should actually be attributed to R. Yizhak the Tosafist. See ROSH to Mo'ed Katan, 3:37, and Beit Yosef YD 383, 316a.

[13]Hayei Sarah, ch. 16: Mirsky ed., pp. 107-108.

[14]See RIF, quoted in Resp. Ha-ROSH 26:1.

[15]Tosafot, Pesahim 7a, כלבער, in the name of R. Tam.

[16]See 1:17, below. ROSH also allows the recitation of ברכת אירוסין at the wedding ceremony, if it was not recited at the betrothal. This would appear to support BaH's explanation.

[17]In the printed Tosafot, this view is attributed to R. Yizhak. RaN, fol. 2b, ascribes it to R. Tam.

[18]Hildesheimer ed., p. 226, n. 26, provides parallels.

[19]See BaH, EHE 34, 61a, and Resp. Ha-ROSH 26:1.

[20]Attributed by Mordekhai, fol. 1b, no. 135, to Hai Gaon.

[21]See ROSH's wording: אינני כחולק על דברי גאון .

[22]For discussion of these rules, see Yad Malakhi, no. 161 and nos. 306-308.

[23]RaN, Ketubot, fol. 65b, follows the majority position to its logical conclusion. The ketubah is derabbanan; therefore, those who write in their ketubot are in error.

[24]RIF's version is attributed to R. Hananel; see Tos. Ha-ROSH, Ket. 36a, הכוגרת , and RASHBA, Hiddushim 36a. The reading has Geonic roots, as indicated in Sha'arei Ziyon, p. 61. See Tractate Ketubot, v. I, ed. Hershler, Makhon Ha-Talmud Ha-Yisraeli Ha-Shalem, p. 262, n. 3.

[25]Attendants would see to it that neither bride nor groom tampered with the evidence concerning the bride's virginity or lack thereof; see RASHI, 12a, למשמש .

K. Tractate Kiddushin, Chapter One

1.a. האשה -- follows RIF, but rearranges the derashot on kesef, shetar and bi'ah to conform to the order in the Talmud.

1.b. אמר רב הונא -- not in RIF. ROSH summarizes the sugya and cites Tosafot (Ha-ROSH, 5a, ורב הונא) rules against Rav Huna's position for two reasons. First, the Gemara refutes Rav Huna on 3a. Second, Rava, who attacks Rav Huna on 5b, also disagrees with him. RIF, who does not cite Rav Huna's statement (האשה נקנית בחופה), therefore rules that this is not halakhically binding. RAMBAN agrees as well: we follow Rava on this point, even though Abaye defends Rav Huna against Rava's refutation. "All the poskim" agree with this position,[1] but R. Hananel dissents. Inasmuch as Rav Huna is defended against all the arguments and refutations, he rules that קידושי חופה is a case of safek kiddushin.

How does ROSH himself rule on this issue? Ya'akov b. Asher writes that his father follows the majority view: see Kizur Piskei Ha-ROSH 1:1 and TUR, EHE 26, 48a, where the safek position is attributed to R. Hananel only. This ruling is in accord with the emended reading of the ROSH. MaHaRSHaL, however, provides a reading which would lead us to believe that ROSH follows R. Hananel (Yam shel Shelomo, Kid. 1:2). This version is unlikely: it would mean that "all the poskim" must exclude Tosafot, RIF and RAMBAM,[2] and it contradicts the TUR's understanding of his father's pesak.

RAMBAM does not mention huppah as one of the methods of kiddushin in Hil. Ishut 3. ROSH accepts this position. In the face of R. Hananel's challenge, however, he turns to Tosafot and RAMBAN for the analysis of this topic. Moreover, he does not mention RAMBAM even in a cursory manner, as he does with RIF.

1.c. ת"ר כיצד בכסף -- follows RIF to אינה מקודשת .

= Tos. Ha-ROSH 5b, הא . ROSH adds the Tosafot conclusion that a kiddushin may be valid when the woman gives the kesef to "an important man".

RAMBAM, Hil. Ishut 3:2, apparently rules that whenever the woman gives the money the kiddushin is invalid. This is the TUR's understanding of RAMBAM; see EHE 27, 49b-50a. Beit Yosef ad loc. refers to the Hil. Ishut 5:22, where the ruling apparently allows the woman to give the kesef kiddushin to adam hashuv. Karo therefore holds that RAMBAM agrees with R. Asher's view; see also RaN, fol. 1b. Magid Mishneh to 3:2, however stresses that the situations in 3:2 and 5:22 are different cases which require different laws. For this reason, he says, RAMBAM separates them into 3:2 (the "normal" betrothal) and 5:22 (the "special" case).[3] Tosafot and ROSH do not make this distinction. BaH, EHE 27, 49b, criticizes Karo's statement. See also Isserles in EHE 27:9 and Bi'ur Ha-GRA ad loc.: a clear distinction is made between the positions of RAMBAM and ROSH.

1.d." חיישינן מדרכנן " = Tos. Ha-ROSH 5b, והא . ROSH adds that this is a case of safek kiddushin only if the couple were not previously discussing the details of their marriage. Since such a discussion would make the kiddushin valid even if the groom makes no statement of kiddushin, the marriage would be valid as well if the woman were to make the statement. See TUR, EHE 27, 49b.

This point is not found in RIF/RAMBAM.

2.a. אמר שמואל -- follows RIF to שישלח את עצמו . The rejected forms of the kiddushin statement, says ROSH, are also invalid even if the couple had previously discussed the arrangements of their marriage (see 1.d. above).

This point is not found in RIF/RAMBAM. See TUR, EHE 27, 49b, and Beit Yosef ad loc.[4]

2.b. ומסיק הכא -- = Tos. Ha-ROSH 5b, הכ"ע . The Talmud concludes that the husband may say " הרי את מקודשת לי ". Without the word " לי ", the statement is insufficiently precise (ידים שאין מוכיחות). Yet in Nazir 5b, an example used by our sugya to proves its point, we actually find the opposite. There, in the view of Shmuel, an imprecise vow of nazirut is binding, provided that a nazir is passing by; this is a case of ידים שאין מוכיחות , yet the vow is a valid one. The opposite situation, the case when a nazir is not passing by, is not a case of "imprecision", as the Gemara says here, but rather a case of "absolutely no precision/indication" (אפילו יד לא הוי). This means that we could use the example in Nazir 5b to arrive at the opposite conclusion from our sugya: following Shmuel, we could say that an imprecise statement of kiddushin is nevertheless valid (ידים שאין מוכיחות הויין ידים). Tos/ROSH resolve this conflict: if the husband does not say " לי ", the case is one of no precision/indication at all, the lowest level of precision regarding a formal statement or declaration. This explains why Abaye, who in our sugya holds that ידים שאין מוכיחות הויין ידים , does not interpret Shmuel as holding the same opinion.

Thus, according to all opinions (including Abaye), if the husband does not say " לי ", the kiddushin is invalid and no get is required. If, however, the couple were previously discussing the arrangements of their marriage and the man hands kesef to the woman without saying " לי ", the kiddushin is valid; this is a higher level of precision than that in the case of "a nazir passing by."

RAMBAN and RASHBA5 interpret the sugya differently, which leads them to a different halakhic conclusion. For them, the absence of the word " לי " is a case of ידים שאין מוכיחות , rather than אפילו יד לא הוי ,

as it is for the Tos/ROSH. Therefore, while the kiddushin is invalid, a get is still required. See Resp. Ha-ROSH 35:5, where R. Asher simply brushes aside the claims of the " חולקים " who take the RAMBAN/RASHBA position. In the same responsum, ROSH declares that RIF agrees with him. Since RIF carries the statement " הרי את מקודשת לי ", ROSH reasons that without " לי " there is not even a trace of validity to the kiddushin. RAMBAM, Hil. Ishut 3:1, has the same wording as the Gemara and RIF; although ROSH does not mention him, he presumably would regard the RAMBAM as agreeing with his own position. This is also the view of R. Yeruham, cited by Beit Yosef EHE 27, 36a.[6]

It is important to note that the vast majority of the commentators do not cite RAMBAM on this issue. He and Alfasi add nothing to the discussion, inasmuch as their general formulation of the halakhah does not address the question of precision and the requirement of a get. ROSH concludes that a get is not required, not on the basis of an ambiguous formulation, but as a result of an extensive analysis by Tosafot. Even in the responsum, where ROSH does cite Alfasi, the citation follows the extensive Tosafot analysis and serves only as "extra weight" to convince the correspondent that ROSH's ruling is correct. In the Halakhot, ROSH is concerned with the theoretical basis of this law and not with the views of other poskim.

2.c. ת"ר -- not in RIF. ROSH discusses the various expressions whose validity for the purpose of establishing kiddushin is doubtful. In cases of such safek, the court follows the strict interpretation: a get would be required. Such an expression may not be clarified in the Talmud, but if local custom accepts it, its use renders the kiddushin valid.

RAMBAM, Hil. Ishut 3:6-7, accepts the universal validity of the

expression הרי את חרופתי , while ROSH limits its validity to Judea, where the expression was clearly understood to mean הרי את מקודשת לי . See Tosafot, 6a, שכן . RaN, fol. 2a, suggests that RAMBAM interprets the word חרופה as referring to ishut; therefore, it is valid everywhere.[7] Kesef Mishneh to Ishut 3:2 suggests that RAMBAM had a reading of the Talmud which led him to this position, similar to the version preserved by R. Hananel.

3. תנן -- follows RIF.

4. אלא -- not in RIF. ROSH reproduces the passage forbidding one who is not familiar with the laws of kiddushin and divorce from involvement with those matters. TUR and SA also accept this statement as halakhic (EHE 49:3). RAMBAM does not cite this rule, possibly because he and Alfasi regard it as essentially aggadic; indeed, the rule is presented in aggadic style.

5.a. אמר -- = Tos. Ha-ROSH 6b, המקדש . Tos/ROSH broaden the concept of הנאת מלוה to include forgiving the loan as well as extending the collection date. See TUR, EHE 28, 51 a-b.

RAMBAM, Hil. Ishut 5:15, does not mention the concept of מחילת מלוה . Both RASHBA, Hiddushim 6b, and RaN, fol. 2b, state that Alfasi (and presumably RAMBAM, as well) would also accept this concept under their definition of הנאת מלוה . This is ambiguous, at best; RIF and RAMBAM do not say it.

5.b. אמר -- = Tos. Ha-ROSH 6b, המקדש . ROSH, along with other poskim, says that the "loan" referred to in this passage may be a loan that has just been made; see Beit Yosef EHE 28, 51a-b. RAMBAM, Hil. Ishut 5:15, regards it as a loan that has been made some time ago.

6.a. אמר רבא -- see Tos. Ha-ROSH 6b, לבר . ROSH

and RIF accept the statement that a gift given on condition that it be returned is a valid gift. ROSH explains that such a gift is invalid for the purpose of kiddushin because it would appear to be a halipin transaction, which does not effect valid kiddushin. Therefore, while a conditional gift is a valid act of kiddushin, the rabbis declare the marriage to be null and void.[8]

RAMBAM, Hil. Ishut 5:24, regards this situation as one in which the woman has not received any benefit from the money. In other words, the kiddushin is halipin and is Toraitically invalid. See BaH, EHE 29, 54b-55a, as well as RaN, fol. 2b, who delineate the dispute between RAMBAM and Tos/ROSH.[9]

6.b. אמר רבא תן מנה לפלוני -- follows RIF to והתקדשי לפלוני . ROSH explains that the person who gives the maneh to the woman is either an agent of the מקדש , or the mekadesh has stated that the woman is betrothed to himself by the money given to her by the other person. The idea that the "other person" is the agent of the mekadesh is found in RASHI, 7a, הילך . The second possibility, that the mekadesh himself makes the statement of kiddushin to the woman, who receives the money from the second person, is found in RAMBAM, Hil. Ishut 5:22. Magid Mishneh ad loc. and to 5:21, writes that RAMBAM does not feel that agency is required in this type of transaction. ROSH accepts RAMBAM's approach while adding to it that of RASHI.

6.c. בעי רבא -- ROSH adds a brief explanation to RIF.

7.a. אמר רבא -- not in RIF. ROSH adds the explanation of שיירי בקנינו , which differs from the explanation RAMBAM provides for this rule in Hil. Ishut 3:9.

7.b. בעי רבא -- not in RIF. R. Hananel[10] rules that these unresolved questions are teyku, and we must follow the strict view in each

case: i.e., the woman is safek mekudeshet. RAMBAM, on the other hand, states that in the first two cases (חצייך כחצי פרוטה וכו' and חצייך בפרוטה וחצייך בפרוטה), the kiddushin is valid because the questions are resolved (Hil. Ishut 3:10). ROSH explains that RAMBAM follows here the Geonic principle that whenever the Talmud follows a problem with the phrase אם תמצא לומר , the previously-stated problem is considered to be resolved.[11] ROSH rejects the use of this principle here. The third problem in the Gemara's chain, which certainly ends in teyku, makes a stronger claim than do the others to the solution "valid kiddushin". This problem, nevertheless, is not solved; therefore, the first two cases must also end in teyku, regardless of the phrase אם תמצא לומר . In all cases of "half-kiddushin", the result is safek.

RABAD, Hasagah to Hil. Ishut 3:10, writes that if a woman cannot be " מקודשת לחצאיין ", then the answer in all these cases must be safek. RASHBA, Hiddushim 7b, explains RAMBAM's adherence to the Geonic principle as does ROSH. RaN, fol. 3b, rebuts RABAD's kushya. See TUR EHE 31, 59b-60a, and Beit Yosef and BaH ad loc.

This is an example of R. Asher pausing to explain the theoretical basis of a ruling in the Mishneh Torah. Since RASHBA has the same explanation for RAMBAM, it is probable that ROSH drew upon an existent source for this material. The theoretical explanation seems necessary in order to place into context the ruling of R. Hananel, which ROSH ultimately adopts.

8. ההוא גברא -- follows RIF to לא צריכי שומא . = Tos. Ha-ROSH 9a, והלכתא . The Talmud states the halakhah: if the act of kiddushin is performed with silk, the silk need not be appraised for its value. Inasmuch as this is also the position of Rabah, R. Tam asks why the Talmud must state this rule. Does not the halakhah follow Rabah in

almost all cases? And why does the Talmud not phrase its decision: הלכתא כרבא ? R. Tam answers that while silk does not require appraisal, since its value is generally known, other objects must be appraised before the kiddushin ceremony. If a woman does not know the value of the object she receives, she may not agree to the marriage with a complete intent (לא סמכה דעתה). R. Tam further states that this is the reason for the custom of performing kiddushin with a ring that contains no stones: stones require appraisal. Tos/ROSH do not accept this explanation for that custom; according to all opinions, if a husband were to state " הרי את מקודשת לי בכל דהו ", the kiddushin is valid.[12] R. Yizhak, meanwhile, provides other reasons for why the Talmud does not state " הלכתא כרבא " and why it must make an explicit ruling in the first place.

RAMBAM, Hil. Ishut 7:18, also rules that silk is the only item that does not require appraisal, but for a different reason. He states that a woman desires fine silk and therefore will agree to the kiddushin with perfect intent, regardless of the value. That his interpretation differs from that of Tosafot is noted in Magid Mishneh ad loc. and RaN, fol. 3b. Both RaN and Beit Yosef, EHE 31, 58a, note the halakhic differences that result from the divergent interpretations. For this reason, no doubt, TUR explains the law of appraisal according to the Tos/ROSH conception and does not mention RAMBAM's view.

9. אמר -- follows RIF to מעכשיו דמי . ROSH adds comment that all stipulations of the על מנת variety must be phrased in the form of tenai kaful. See Hilkhot Ha-ROSH, Gitin, 7:9-11, and Korban Netanel, here, nos. 1 and 2.

RAMBAM, Hil. Ishut 6:17, rules that על מנת stipulations do not

require כפילות . See TUR, EHE 38, 67b, and Resp. Ha-ROSH 46:1, especially fol. 45a.

10.a. אמר רבא -- follows RIF to משכון איך כאן . Rava states that kiddushin performed through a pledge (mortgaged property serving as security for kesef kiddushin) is invalid. = Tos. Ha-ROSH 8b מנה . Some argue[13] that while marriage and the purchase of slaves or land cannot be effected in this way, one can secure a promise to give a gift to a recipient by means of mashkon. As soon as the intended recipient takes possession of the pledge, the donor becomes obliged to give him the gift. Support is cited from Baba Mezia 78a (in which the owner, by taking possession of the mashkon, obliges his employees to fulfill their contract). This opinion is rejected; no distinction can be made between marriage and gift on this point. A pledge cannot be mortgaged for security if its owner is not obligated to fulfill his statement. "I will give you this gift" is not an obligation; the "donor" may change his mind, and the pledge does not strip him of this option. The "recipient" has no lien on the pledge. In the case of Baba Mezia, on the other hand, the workers have a real obligation to repay the employer, and the employer therefore has a valid lien on the pledge. For this reason, when the engagement between man and woman (shidukhin) is drawn up, should the parties wish to set financial penalties in the event that either side withdraws, this penalty cannot be effected merely by means of mashkon. A formal kinyan sudar is conducted, establishing a debt between the parties. Once this obligation has been formally established, then and only then can the parties legally secure the debt by means of mashkon, and should one of the parties withdraw, that party's mashkon becomes the property of the other. See TUR EHE 50, 87b.

RAMBAM does not contain the rule concerning the pledge for shidukhin. SA

EHE 50:7 cites this rule from the TUR/ROSH; see Be'er Ha-Golah ad loc.

10.b. איתיביה -- follows RIF to שקונה משכון .

= Tos. Ha-ROSH 8b, התם . The idea that the creditor has ownership of the pledge apparently holds only for a pledge taken after the loan was made, serving as a means of enforcing payment. A pledge taken at the time of the loan, on the other hand, is merely a pledge of future repayment, so that the creditor does not have property rights over it.[14] Tosafot, however, concludes that a pledge taken at the time of the loan can serve as valid kesef kiddushin, the same as with a pledge taken after the loan was made. The creditor does not obtain full property rights over a pledge taken at the time of the loan, but he obtains enough possession in order to use the mashkon for the purpose of kiddushin (just as he has enough possession of it to protect his loan from shemittah; see Gitin 37a; see also Pesahim 31a). However, according to Tos/ROSH, the creditor who takes a pledge after the loan was made becomes a shomer sakhar with respect to it, a position that contradicts that of RASHI, 82b, שקונה משכון . R. Hananel agrees with the Tos/ROSH view. In that case, what is the sakhar ("fee") which the creditor receives for holding this pledge? R. Tam concludes that it must be the ownership which allows the creditor to use this pledge for the purpose of kiddushin.[15] For this reason, we must conclude that this power belongs to the creditor only with respect to a pledge taken after the loan was made; only then is he considered a shomer sakhar. A creditor who takes a pledge at the time of the loan does not receive "sakhar" which, according to R. Tam, can be interpreted only as the ability to perform kiddushin.

RAMBAM, Hil. Sekhirut 10:1, rules that one who receives a pledge--whether taken at the time of the loan or afterwards--becomes a shomer sakhar. See also Hil. Ishut 5:23, and Magid Mishneh ad loc.: kiddushin may be performed

with this pledge, regardless of the time at which the creditor took it from the debtor. See TUR EHE 28, 52a-b, along with the efforts of Beit Yosef and BaH to resolve the gap between ROSH and RAMBAM. Yam shel Shelomo, Kiddushin 1:12, on the other hand, recognizes the disagreement.

10.c. כני רב הונא -- follows RIF.

11.a. התקדשי לי כמנה -- follows RIF.

11.b. ת"ר -- follows RIF.

12. ת"ר -- follows RIF to מאי תיקו . = Tos. Ha-ROSH 8b, הלע . Tosafot asks why we cannot deduce from an analogous case in Baba Batra 84b that, if the kesef kiddushin is placed within property belonging to both the woman and the man, the woman is not betrothed. Tosafot answers that our case deals with more than the concept of kinyan hazer. The question here is whether the woman, by telling the man to place the money on a rock or on/within some piece of property, is actually telling him "I do not wish to accept your kiddushin". This interpretation is in conflict with that of RASHI, 8b, ואם היה , who regards the question as exclusively one of kinyan hazer, with no reference to the woman's expressed opinion. Tos/ROSH declare: even if the kiddushin is placed within the woman's property, she is not betrothed if she has stated that she does not wish to be betrothed. Even if she says nothing after the man has placed the kiddushin on her person, if she has previously expressed her opposition to the betrothal, the kiddushin are invalid. TUR EHE 30, 57a-b, cites this view in the name of Tosafot.

RAMBAM, Hil. Ishut 4:4, repeats the wording of the Gemara. The resulting ambiguity would allow one to conclude from his words that, if a man places kiddushin within her property the woman is betrothed, regardless of her expression of opposition. Tos/ROSH, unlike RASHI, RIF and RAMBAM, unite the

concepts of kinyan hazer and consent in order to present a more complete halakhic picture.

13.a. התקדשי -- the question is raised: suppose the woman says תנהו לכלב ואקדש אני לך . Do we consider that this is valid kiddushin in that the woman is similar to a guarantor (who, although he does not receive financial benefit, nevertheless obligates himself)? Or do we say that, in the case of the guarantor, financial benefit must reach someone, which is not the case here? ROSH cites "some great authorities" who rule that the kiddushin is valid. ROSH himself believes that the law of guarantor does not apply here and that the kiddushin is not valid. Nevertheless, he requires strictness (=get).

The "great authorities" who compare the cases on 8b to the law of the guarantor may be RAMBAN; see his Hiddushim ad loc. For his part, RAMBAN attributes the opposite view (=ROSH) to "French sages". See also RASHBA and RaN, fol. 4b.

RAMBAM, Hil. Ishut 4:3-4, does not mention the case where the woman says תנהו לכלב ואקדש אני לך . Magid Mishneh ad loc. supplements the discussion by citing RAMBAN; see also Beit Yosef EHE 30, 58a. RAMBAM does not speak to the issue; the Mishneh Torah becomes irrelevant on this point.

13.b. דהוא גברא -- follows RIF.

14. ההוא -- follows RIF to לאו כלום הוא .

ROSH suggests that the Talmud's examples of invalid kiddushin by means of food items do not apply if the man gives the food to the woman and states " הרי את מקודשת לי " while she remains silent. He cites RABaD as holding the same view. RASHBA, Hiddushim 9a, holds the opposite view. The woman is not betrothed because the subject of kiddushin was introduced by the man in the form of a question. Thus, she must respond with an affirmative statement to

his own statement of " הרי את מקודשת לי ". Silence does not imply consent.

RAMBAM, Hil. Ishut 4:5, also requires that the woman make a positive statement. See Magid Mishneh ad loc., and TUR and Beit Yosef EHE 29, 56a. See also RaN, fol. 5a.

15. אמר רבא -- follows RIF to והוא שבגרה . A minor girl who is given in betrothal by her father may physically receive her kiddushin at his direction; see Kid. 19a, also in the name of Rav Nahman. RABaD states that the girl does not act as her father's agent in this transaction, since the law of agency does not apply to minors. Rather, the father states his willingness to grant his daughter to her husband upon her receipt of the kiddushin. ROSH disagrees. The kiddushin, in order to be valid, must reach the father's possession. Inasmuch as the minor cannot take possession of an object on behalf of another, she must fall under the category of "agency". The rule which prohibits minors from acting as agents applies only when the agency confers benefit upon someone else. When the agency effects benefit upon the minor himself, he may serve as an agent. See RAMBAN, Hiddushim 9a, who agrees with RABaD.

RAMBAM, Hil. Ishut 3:14, rules that a minor girl may accept her own kiddushin, but does not declare the legal basis for this ruling. See Beit Yosef, EHE 37, 64b, who cites the discussion in R. Yeruham, v. 2, 189c. RAMBAM does not figure in these discussions.

16.a. שטר -- follows RIF.

16.b. איתמר -- follows RIF to והלכתא כוותייהו . RIF declares, on the basis of the sugya, that the halakhah follows Rav Papa and Rav Sharbia. ROSH mentions that R. Hananel also supports this ruling on the basis of Rav Nahman's statement on 9a. Hananel, however, that others rule

in favor of Rava, a fact which makes him hesitant to decide. ROSH attacks the theoretical basis of RIF's pesak (that a deed of kiddushin is invalid if written without the woman's consent)[16] as well as the support brought for it by R. Hananel. In the meantime, other poskim (Seder Tanaim ve'Amoraim, Halakhot Gedolot (Warsaw ed., 83d), and R. Yizhak) are divided on the question. ROSH therefore opts for strictness: a woman betrothed with such a deed is safek mekudeshet.

RAMBAM, Hil. Ishut 3:4, follows RIF's ruling. It is very possible that ROSH draws here from RAMBAN and RASHBA on our sugya. They, too, present the Geonic material and opt for the strict position. See TUR EHE 32, 60a-b: RaMaH also adopts this approach. In fact, the predominant tradition on this "old debate" (see RAMBAN, Milhamot Ha-Shem, Kiddushin, fol. 5b, as well as in his Hiddushim) is to accept the position of Rava and Ravina.[17] RIF/RAMBAM constitute the minority tradition. R. Hananel is probably a source for their view, but as we have seen, he was doubtful as to the proper ruling. ROSH follows the lead of RAMBAN: we rule safek mekudeshet.

16.c. איכעיא להו -- see RIF to Yebamot, fol. 18b. = Tos. Ha-ROSH 10a, כל . In the matter of גמר ביאה , we apply the rule כל הכועל דעתו על גמר ביאה only if he actually completes the intercourse. If he does not complete the intercourse, we say דעתו על תחילת ביאה and the kiddushin is valid by means of the incomplete intercourse. This is true as well if the man states that he intends to betroth the woman by means of the incomplete intercourse: we do not require complete penetration.

RIF, in Yebamot, fol. 18b, rules that our sugya requires complete intercourse for the purpose of kiddushin (though not for nisu'in). RIF takes the rule כל הכועל דעתו על גמר ביאה in its literal sense, while

Tos/ROSH follow that rule only when the man actually performs a complete intercourse.

RAMBAM, Hil. Ishut 3:5, apparently accepts RIF's understanding. Magid Mishneh, however, based on a text which includes the word מסתמא [18] argues that RAMBAM would accept incomplete intercourse if the man specifically states his intent to betroth the woman in this manner. See also Beit Yosef EHE 33, 60b and RaN, fol. 5b. This may be true, even though one might also argue that RAMBAM would follow RIF on this point, inasmuch as Alfasi serves as Maimonides' halakhic mentor in almost all cases. Even if we accept Magid Mishneh's approach, RAMBAM still would not accept the Tos/ROSH position that whenever the man does not complete the intercourse we say that such incomplete intercourse was his intention from the beginning. RAMBAM would accept this only if the man stated this intention in advance; Tos/ROSH do not require such a statement.

17.a. איכעיא להו -- not in RIF. ROSH summariezes the sugya, along with the answers and refutations of Abaye and Rava. RAMBAN,[19] analyzing the material, decides that the halakhah follows Abaye and Rava and our mishnah: intercourse effects erusin but not nisu'in. TUR EHE 33, 60b, follows this view.

RAMBAM, in Hil. Ishut 10:1, seems to follow Abaye and Rava: intercourse does not create the nisu'in relationship. See Magid Mishneh ad loc. However, Yosef Karo argues in a different vein in Kesef Mishneh. In Beit Yosef, he does not cite the RAMBAM at all in this context.[20] While we might say that RAMBAM adheres to M. Kiddushin 1:1 in limiting the legal efficacy of intercourse to kiddushin (see Hil. Ishut 1:2), he never specifically addresses this question in the Mishneh Torah. This halakhic question, left unresolved in the Talmud, finds its answers in the words of RAMBAN and ROSH; RAMBAM does

not contribute to the discussion.

17.b. כ"ה אומרים -- follows RIF, omitting Alfasi's calculations according to Arabic coinage.

17.c. אמר שמואל -- = Tos. Ha-ROSH 12a, חיישינן .

The sugya indicates that if kiddushin is performed with an object that is worth less than a perutah in that locality, the woman is safek mekudeshet, because we are concerned that the object may be worth a perutah elsewhere. Tos/ROSH stress that this safek has no Toraitic basis, since Torah law would not regard the woman as betrothed. This is, rather, a rabbinic stringency:[21] while the marriage is valid at rabbinic law, the rabbis regard it as a case of safek so that the "husband" would have to perform the act of kiddushin a second time. ROSH cites RAMBAM, Hil. Ishut 4:19, who makes a distinction regarding an item of kesef kiddushin that is perishable. If that item is not worth a perutah in this locality, the woman is not betrothed, inasmuch as the item would spoil before it could reach another locality where it might be worth at least a perutah. ROSH deduces from this that, for RAMBAM, if we know that in another locality the item is indeed worth a perutah, the kiddushin is valid. RAMBAM uses the term safek to refer to a case where we do not know whether this item may be worth a perutah elsewhere. R. Yizhak, on the other hand, holds that even if we know that the item is worth more elsewhere, the betrothal should be invalid. The only reason for kiddushei safek, as we have seen, is the rabbinic stringency. There is, therefore, no distinction to be made between perishable and non-perishable items. ROSH accepts R. Yizhak's conclusion: a woman would not agree to betrothal if the kesef was not worth a perutah in her own locality. In this instance, the betrothal is safek, even if we know that the item is worth more somewhere else. See TUR EHE 31, 58b-59a and Beit Yosef ad loc. ROSH's deduction from the RAMBAM is not the

only way to understand him; RAMBAN, Hiddushim 12a, interprets RAMBAM as saying that the betrothal is invalid even if the perishable item is surely worth more somewhere else, since it is not worth that much here. ROSH, however, interprets RAMBAM so that he conflicts with R. Yizhak and thereupon accepts the ruling of the latter over the former.

18. ההוא גברא -- follows RIF to משום פריצותא . See Tos. Ha-ROSH 12b, בכלהו . ROSH mentions that today, we follow the Nehardean version of Rav's practice in order to permit a hatan to live with his wife's family. See TUR EHE 26, 48a, who remarks that this conflicts with RAMBAM's ruling in Hil. Isurei Bi'ah 21:15. While Beit Yosef suggests that ROSH may have noted the common practice without expressing his approval of it, we follow the conclusion of TUR concerning the halakhic ruling of his father.

19.a. ההוא גברא -- follows RIF to בהנהו קירושי . RIF rules for stringency, based on Ravina's precedent. He does not deal with another possible basis for stringency: perhaps the myrtle branches, which are not worth a perutah in this locality, are worth more elsewhere (see 17c, above).[22] ROSH answers that, in this case, both husband and wife clearly regard the kesef kiddushin as the money contained within the bundle of branches, not the branches themselves. See RAMBAN, Hiddushim 13a, for a similar explanation.

RAMBAM, Hil. Ishut 5:25 does mention the stringency of 17c in connection with this halakhah. RIF rules for kiddushei safek on the basis of the Ravina precedent (and the statement of Rav Huna b. Rav Yehoshua); RAMBAM rejects the legal validity of Rav Huna's argument. The woman's silence does not imply consent in this case; we rule safek only because the branches might be worth more elsewhere.

19.b. ההיא איתתא -- follows RIF.

20. על כי ראיתי -- ROSH inserts a lengthy excursus on the Ashkenazic custom of performing kiddushin with a borrowed ring. If a woman accepts this ring assuming that it shall belong to her, logic dictates that the kiddushin would be invalid. ROSH cites the varying opinions of other authorities before beginning his own analysis.[23] If the owner of the ring lends the ring to the husband for a fixed period and allows him to use it for the purpose of kiddushin, the betrothal is valid, provided the woman knows that the ring is borrowed. We conclude this because the woman receives benefit (hana'ah) from the use of the ring for that fixed period. If these conditions are not met, the kiddushin is invalid. See Resp. Ha-ROSH 35:2.

See TUR EHE 28, 54a. RAMBAM does not mention this custom.

21. מתנ' -- follows RIF.

22.-23. אמר רבא -- follows RIF לבני לוט נתתיה ירושה . ROSH deduces that an apostate may inherit from his father, although it is prefereable that his portion of the inheritance be placed in escrow by the beit din, which will bestow it upon him should he repent.

RAMBAM, Hil. Nahalot 6:12, declares that the court bestows the mumar's inheritance upon his sons. TUR HM 283, 194b, presents the approaches of ROSH and RAMBAM as separate and distinct. BaH, ad loc. sees ROSH as disagreeing with RAMBAM: in the event that the mumar has no heirs, RAMBAM allows the court to liquidate the inheritance, whereas ROSH prescribes the escrow formula. Although BaH cites the attempt of Terumat Ha-Deshen to resolve the positions, the Shulhan Arukh and R. Moshe Isserles (HM 283:2), like TUR, view RAMBAM and ROSH as advocating two different legal dispositions of this case.

24. דתניא -- follows RIF to ולירתו בקדושה . = Tos. Ha-ROSH 18a, וכאן . According to RASHI (18a, ולירתו),

when a convert's son is born as a Jew it is praiseworthy for a borrower to repay a loan owed to the convert to the son (in the event the lender has died). If the son were not Jewish at the time of the father's conversion, the sages do not look favorably upon repayment to the son. Tosafot raises a difficulty against this from Baba Batra 149a, where Rava did not want to return an object he held as a pikadon to the son of the convert who had deposited that object with him. R. Tam answers that a loan is different from a pikadon: since the lender did a favor for the borrower, the borrower should not be ungrateful by insisting on a too-strict observance of the rules of the inheritance. In the case of the pikadon, it is the trustee, the holder of the object, who is doing the favor. Tosafot presents another resolution (attributed to R. Yizhak by the printed Tosafot, Beit Yosef and BaH): in the case of the pikadon, the wife of the convert (the mother of the son) was a born Jew, so that the son is not considered a convert at all. See TUR HM 127, 57a: we follow the second position, making no distinction between loan and pikadon.

This halakhah is not mentioned in the Mishneh Torah.

25. אמר רבא -- not in RIF. = Tos. Ha-ROSH 19a, אומר and מדר. A father may authorize his minor daughter to receive her kiddushin, though this law is not based on the law of guarantor. She is considered an agent of her father (see 1:15, above) as long as he authorizes her to give herself in betrothal (דעת אחרת מקנה אותה). For this reason, a minor orphan girl cannot give herself in betrothal; she has not been so authorized by her legal guardian.

RAMBAM, Hil. Ishut 3:14, agrees; see TUR and Beit Yosef EHE 27, 64b. What is noteworthy is that ROSH, confronting a lacuna in the Alfasi, turns to the Tosafot tradition for guidance. As Magid Mishneh points out, RAMBAM, like

Tos/ROSH, derives this law from Kiddushin 19a. Unlike Tosafot, however, RAMBAM does not mention the potential difficulties against this ruling; see Lehem Mishneh to 3:14. It is not enough merely to cite the Talmudic passage that serves as the basis for this ruling, for that passage is beset with problems that are removed only after the Tosafot analysis. That analysis forms, in turn, the basis of the treatment afforded this law by RaN (fol. 7b) and Beit Yosef. In this instance, Tosafot supplants RAMBAM as the effective expression of the halakhah; RAMBAM, who does not mention any of the difficulties associated with the law, is irrelevant to its subsequent discussion.

26. המקדש כמלוה -- not in RIF. = Tos. Ha-ROSH 19a, המקדש . The creditor who utilizes a loan secured by a pledge as kesef kiddushin need not return the pledge to the woman. See TUR EHE 28, 52a.

RAMBAM, Hil. Ishut 5:14, requires that the creditor return the pledge to the woman. RASHBA, Hiddushim 19a, argues in favor of the requirement that the pledge be returned; see also Magid Mishneh to 5:14.

27. כל הקונה -- not in RIF. = Tos. Ha-ROSH 22a, כל . The rules concerning the Hebrew slave do not apply to the hired laborer, who does not receive the lavish gifts prescribed for the eved ivri. ROSH adds that the owner may stipulate with the Hebrew slave to remove these terms, based on the Tosafot principle that an employer may stipulate with his workers that they labor for different compensation than that provided for by local custom.[24]

RAMBAM, Hil. Avadim 1:9 and Hil. Sekhirut 9:1, does not apply the Tosafists' rule of stipulation to either the slave or the hired worker.

28.a. מחנ׳ -- follows RIF, with commentary inserted into the text of RIF.

28.b. תנו רבנן -- follows RIF to מכל מקום .

ROSH limits the definition of hazakah in this instance--the means by which a Canaanite servant is acquired--to labors performed by the slave which actually affect the master's physical person. Other labors, such as sewing the master's clothes, do not constitute hazakah. Compare this to RAMBAN, Hiddushim 22b, who defines hazakah as including those labors normally done by a slave for a master (as opposed to sewing, which is a case of "enjoying the interest from an investment", taking benefit from the work of an employee. See also RASHBA ad loc.

RAMBAM, Hil. Mekhirah 2:2, defines this hazakah as does RAMBAN: a labor normally performed by a slave for his master. He does not, however, address the second question: do other labors, such as sewing, which grant economic benefit to the master but as not "slave-like", qualify as hazakah? Magid Mishneh ad loc. concludes that such labors do constitute hazakah, inasmuch as land is acquired when its rightful possessor "enjoys the fruits" of its produce; the Canaanite slave, occupies the same legal status as does land for purposes of acquisition (Hil. Mekhirah 2:1). Kesef Mishneh argues the opposite: RAMBAM restricts hazakah to precisely those labors normally performed by a slave for his master. In Beit Yosef, however, (YD 267, 205b) Karo determines that RAMBAM takes a view opposite that of ROSH and RAMBAN: "enjoying the fruits" is a valid means of hazakah with regard to land (and therefore with Canaanite slaves as well). See hasgat Ha-RABaD to Hil. Mekhirah 1:15. Actually, Karo's explanation of RAMBAM in Beit Yosef repeats the words of RaN, fol. 8a. It is difficult to establish Karo's ultimate view of RAMBAM. Does Kesef Mishneh represent Karo's opinion, or does he accept the approach of RaN?[25] At any event, a preponderance of opinion seems to divide the RAMBAM from ROSH/RAMBAN on this point.

28.c. וקונה עצמו -- ROSH explains the three positions on the subject of the manumission of the Canaanite slave: the positions of R. Meir, the sages and R. Shimeon b. Elazar. See Tos. Ha-ROSH 23a, רשב"א . The sages allow the slave to receive his own manumission money; therefore, he is certainly freed if others give his money to his master on condition that he be released. If others supply the money, he goes free even against his will, based on the explanations of Abaye and Rava on 23a. The full import of this conclusion can be seen by comparing Asher's words to the comments of RAMBAN and RASHBA in their Hiddushim to 23a and to RaN, fol. 8b-9a. Alfasi agrees that others may buy the slave's freedom without his knowledge, since one may bestow benefits upon a person without his express consent. The commentators state, however, that RIF does not allow the purchase of the slave's freedom against his will, if he expressly objects to the transaction. RaN extends this understanding to the ruling in RAMBAM, Hil. Avadim 5:2. Beit Yosef YD 267, 206a, repeats RaN's analysis without objection.

29. וכלבד -- = Tos. Ha-ROSH 23b, אין and ורבי . See also Hilkhot Ha-ROSH Nedarim 11:4. RASHI (23b, קנין דאישה) explains that the Talmud equates the slave to the wife in terms of gifts: neither may acquire ownership without the approval of the master or husband, who effectively acquire ownership of any gift to the slave or wife. Tosafot/ROSH point out a number of distinctions in which the wife's power to acquire ownership without her husband's consent or co-ownership renders her legal position superior to that of the slave. The wife is mentioned here as part of the general debate: if the sages are correct, and a slave may acquire ownership independently of the master, than surely the wife would be in the same position.

R. Tam decides the halakhah in accordance with R. Meir: both slave and

wife must have the consent of master or husband in order to acquire ownership of gifts. He decides this on the basis of Nedarim 88a, where Rav's position is deduced to be the same as that of R. Meir on our sugya; since the issue in question was one of ritual prohibition (vows), we follow Rav over Shmuel. According to Rav, a wife may receive a gift under the stipulation that she do "thus and such with it"; Shmuel holds that a more general stipulation, "that you do as you wish with it", suffices to remove the husband from ownership of the gift.

See RAMBAM, Hil. Zekhihah 3:13. RASHBA, Hiddushim 23b, and Magid Mishneh conclude that RAMBAM follows Shmuel. See also Nimukei Yosef, Nedarim 26b, and Beit Yosef and BaH EHE 85, 125a. RAMBAM's view is shared by other Sefardic authorities, including RAMBAN. ROSH'S view is that of the Tosafist tradition; see Mordekhai Kiddushin, no. 493. Note, however, that while Mordekhai, a contemporary of R. Asher, describes the opposing view and mentions the names of the authorities who follow Shmuel, ROSH does not. The thrust of ROSH here is to present the theoretical basis of R. Tam's ruling; he does not bring together the varying conflicting interpretations for the purpose of comparison and contrast.

30.a. תנא -- follows RIF to ראינו חוזר . According to ROSH, the rule concerning חלש כדקנו is included because it is a visible injury which does not heal. RIF does not include this injury as one which requires the slave's liberation.

RAMBAM, Hil. Avadim 5:10, derives this injury from the Biblical directive concerning injury to the slave's tooth (Ex. 21:27). Kesef Mishneh ad loc. seeks to resolve the possible contradiction emerging from this interpretive difference. ROSH would allow freedom as a result of any visible, permanent injury. RIF, who does not mention this injury at all, might very well

restrict liberation to those injuries specifically mentioned in M. Nega'im 6:7 (Kid. 25a).[26] If RAMBAM derives תלש בזקנו from "teeth", he might exclude any injury which, although visible and permanent, cannot be linked to those limbs mentioned specifically.

30.b. תנן -- ROSH, like RIF, cites the mishnah from Nega'im 6:7. He adds a note concerning castration, certain forms of which qualify as "visible, permanent injuries" which require liberation of the slave.

RAMBAM, Hil. Avadim 5:4, makes no distinction: a slave does not go free at any time if he is castrated. See Kesef Mishneh ad loc.: since "castration" is mentioned in the baraita on 25a as the opinion of an individual, we follow the anonymous (majority) view which does not include it.

30.c. ה"ג -- follows RIF to בפירוש שמיע לי . ROSH adds another feature to the definition of הכרעה .

30.d. תנו רבנן -- follows RIF.

31. ר"ח -- follows RIF.

32. ר"ח -- follows RIF; adds the halakhah based on the R. Eliezer baraita on 24b.

33.a. מתני'-גמ' -- ROSH refers us to his Halakhot in Baba Batra 5:2 and 5:4. See also Tos. Ha-ROSH 25b, בהמה and בדמה . There, we find that mesirah is not necessarily performed from hand to hand. The buyer may also take hold of the object at the instruction of the seller. Moreover, if an object is legally transferred by means of mesirah, its ownership may also be transferred by means of meshikhah. If, on the other hand, we learn that the ownership is transferred by meshikhah, it may not be transferred by means of mesirah, since meshikhah is of greater legal force (עדיפא טפי).

According to TUR HM 197, 33b-34a, mesirah is a valid means of transferring ownership of an animal, despite the baraita to the contrary on 25b. Beit Yosef ad loc. disputes TUR's interpretation of ROSH, asserting that R. Asher regards mesirah as valid only with regard to a boat and not with an animal. BaH and Darkei Moshe, n. 1 disagree: one can indeed interpret the ROSH as ruling in favor of mesirah as a valid means of transferring ownership of an animal.[27] See especially ROSH to Baba Batra 5:3, where he concludes that mesirah is a valid means of transferring ownership of an animal. Beit Yosef holds that this is said only according to the (rejected) opinion of those who rule in favor of this method. ROSH, in his view, rejects this opinion as does RAMBAM, Hil. Mekhirah 2:5. (and see Magid Mishneh ad loc.)

Inasmuch as TUR and others see ROSH as accepting mesirah as valid, we accept the view that, according to him, mesirah does serve as a valid means of transferring ownership of animals. Not only do we regard TUR as a good indicator of his father's views, but his interpretation of ROSH is at least as plausible as that offered by Karo.

33.b. מתנ' -- follows RIF.

34. נכסים -- follows RIF.

35. ה"ג -- not in RIF. = Tos. Ha-ROSH 26b, ה"ג .

Most extant readings of the text on 26b, according to the interpretation of R. Shemaya and R. Yehudah b. Natan, would forbid kinyan sudar (halipin) in the absence of the buyer. The reading favored by RASHI and Tosafot does allow for this transaction when the buyer is not present. See TUR HM 195, 30a.

RAMBAM, Hil. Mekhirah 5:7, rules that a third party may transfer ownership of a sudar or other implement so that the buyer may receive the merchandise in question. Since he does not distinguish between cases where the buyer is present or absent, Beit Yosef deduces that RAMBAM agrees with

ROSH. On the other hand, none of the other authorities who deal with this question mention RAMBAM as ruling on it. To say that RAMBAM agrees with ROSH requires a deduction of the kind provided by Beit Yosef. See SA HM 195:3, where Karo blends the wording of RAMBAM with that of TUR to present a unified expression of the halakhah on this issue. Be'er Ha-Golah, however, separates between the particular expression of the RAMBAM and that of TUR (=ROSH); see nos. 10 and 20. In short, RAMBAM does not address in clear fashion the question of the buyer's presence at this transaction. ROSH states clearly that the buyer need not be present.

36. איבעיא להו -- follows RIF to מעותיו .
= Tos. Ha-ROSH 27b, בר"א . Tosafot deduces that, when one field is at issue, hazakah is a valid means of acquisition of land, even in a locale where land is customarily transferred by means of deed. Money need not be handed over in order for the hazakah to be valid.

RAMBAM, Hil. Mekhirah 1:20, makes no mention of hazakah in the absence of money or deed. Magid Mishneh ad loc. summarizes the discussion among the other authorities on the issue. His wording indicates that, in his view, RAMBAM does not address this question. Beit Yosef HM 192, 27a-b, deduces that RAMBAM agrees with ROSH; see Hil. Mekhirah 1:4 and 1:8. Money does not suffice to buy land when a deed is required, and since RAMBAM makes no such distinction with regard to hazakah, Karo concludes that hazakah alone is a valid means of acquisition, even in a locale where deeds are required. Again, this kind of argument from silence is the result of a deduction on Karo's part; RAMBAM simply does not deal with the question in the Mishneh Torah.

37. דזוקקין -- follows RIF to עשה בה ספק כוראי .
= Tos. Ha-ROSH 27b, כפק . Tosafot argues the necessity of the kal va-homer argument on 27b. Furthermore, the permit of gilgul shevu'ah does not

extend to every case of doubt. There must exist some reason to suspect the defendant of having committed a particular act before the plaintiff is allowed to require him to swear that oath. See TUR HM 94, 202b-203a.

RAMBAM, Hil. To'en 1:12, seems to allow the plaintiff to require whatever oath he wishes from the defendant under the rubric of gilgul. Indeed, none of the other rishonim deal with this aspect of the limitation placed on gilgul shevu'ah. Even those authorities who agree that a claim of shema may require a gilgul shevu'ah do not deal with this issue.

38. ער -- follows RIF.

39. מח׳ -- both ROSH and RIF refer the reader to Baba Mezia 4:2-5 (fol. 27a in RIF, Baba Mezia.)

40. מח׳ -- follows RIF to המול לכם כל בשר . ROSH adds that when the beit din has a child circumcised, the blessing להכניסו כבריתו וכו׳ is not recited. He cites Sefer Ha-Itim as support for his ruling.

RAMBAM, Hil. Milah 3:1, rules likewise. RABaD, ad loc., mentions that it was customary for the sandek (or the beit din itself) to recite the blessing when the father was not present. TUR YD 265, 197a, follows RABaD and does not even mention his father's ruling. Hagahot Maimoniot, n. 3, explains that in the opinion of those who do not require the blessing when the father is not present, this benediction was created specifically for the father and for no one else. See also Sefer Yere'im, Liorno ed., 31b. On the other hand, most authorities follow TUR and RABaD and require the benediction even when the child is circumcised by the beit din. See Ozar Ha-Geonim, Shabbat, p. 137; Mahzor Vitry, p. 623; Sefer Ha-Itim (quoted by ROSH); Roke'ah, ch. 113; Ra'abyah, I, p. 352; Shibolei Ha-Leket Ha-Shalem, p. 187b; Ha-Manhig, p. 581; Ha-Eshkol (Albeck ed., p. 10; Itur, II. 22b; Hiddushei Ha-RITbA, Kiddushin

29a.

It is noteworthy that ROSH cites the Itim as support for his ruling, but he does not mention RAMBAM.

41.a. שרותר -- follows RIF.

41.b. ת"ר -- follows RIF to קא משמע לן דלא .

ROSH presents the outline of a ceremony for redemption of the first-born, which he attributes to Geonic sources. See Resp. Sha'arei Zion, no. 47, and Orhot Hayim, Schlesinger ed., II, pp. 19-20.[28] ROSH cites the same ceremony at the end of his Halakhot to tractate Bekhorot. He opposes the Spanish custom of reciting the benediction אשר קירש עובר וכו for several reasons: 1) the benediction is not recited in France and Germany; 2) it is not mentioned in the Talmud;[29] 3) the sanctity of the first-born has to do with his birth and does not attach to the fetus in the womb. See TUR YD 305, 250b-251a.

RAMBAM, Hil. Bikkurim 11:5, does not mention this custom, based on the Geonic practice. From this, we might deduce that RAMBAM opposes this custom along with ROSH. But see Resp. Ha-RIVASH, no. 131: ROSH is mentioned as opposing this benediction (RIVASH quotes TUR), but there is no reference to RAMBAM's view. RAMBAM simply does not mention the custom for good or bad; his halakhah on the redemption ceremony does not speak to this point.

42.a. ללמוד -- follows RIF.

42.b. ת"ר הוא -- follows RIF.

42.c. ת"ר ללמוד -- follows RIF to הא לן והא להו .

ROSH adds to the baraita the case of one who would be unable to study if he were to marry: marriage may be delayed, although not permanently. See TUR YD 246, 179b.

RAMBAM, Hil. Talmud Torah 1:5, repeats the baraita on 29b and does not

mention this case.

42.d. אמר רב הונא -- follows RIF.

43.a. עד -- follows RIF.

43.b. אמר ריב"ל -- follows RIF to קאמר לימי .

= Tos. Ha-ROSH 30a, לא . Some interpret R. Yehoshua b. Levi's dictum as follows: one must divide each day into thirds, studying Bible, mishanah and "talmud". This explains the custom of Seder Rav Amram to study section of each category of "Torah" in the morning prior to the Pesukei de-Zimra.[30] RASHI, (30a, לימי) explains that one should divide the days of the week into three periods, each one devoted to a particular category. R. Tam rules that the study of the Babylonia Talmud fulfills one's obligation to study all three categories; see Sanh, 24a. R. Tam's ruling is decisive; see TUR YD 246, 179b-180a.

RAMBAM, Hil. Talmud Torah 1:12-13, agrees with the anonymous opinion cited in ROSH: each day should be divided into three separate periods of study. He also states that, once a person becomes proficient in the study of Torah, he may turn to the exclusive study of the Babylonian Talmud. This does not correspond exactly to R. Tam, who does not release the individual from the obligation of studying Bible and mishnah. These obligations continue in force; they are merely fulfilled through the study of the Talmud. RAMBAM restricts the obligation to study Bible and mishnah to the early years of education. R. Yeruham, I, 16d, presents the R. Tam and RAMBAM views as conflicting.

43.c. להשיאו -- follows RIF.

44. כל -- follows RIF.

45. גרסינן -- follows RIF.

46. אמר -- follows RIF.

47. שאל -- follows RIF.

48. אמר -- not in RIF; serves as introduction to siman 49.

49. רבינו תם -- Tos. Ha-ROSH 31a, לא.[31] R. Tam rules that women may recite benedictions over the performance of positive, time-bound commandments which they are not bound to observe even according to rabbinic law. This does not constitute a violation against the prohibition of taking God's Name in vain (as a benediction which is unnecessary). That prohibition does not apply in all cases; see Berakhot 21a. Moreover, blind persons, exempt from observing certain commandments, are allowed to recite benedictions when they do perform those commandments. Proof is also cited from the case of Michal, the daughter of Saul, according to the opinion of R. Yose (Eruvin 96a), and from Pesahim 116b, where it is concluded that there is no obligation to a blind person reciting the hagadah as long as he does so for himself and not to fulfill the obligations of others. Tosafot objects to the R. Tam position: how can a person recite the words "...who has commanded us..." over the performance of an act which he or she is not commanded to observe? In addition, the blind may be obligated at rabbinic law to observe the commandments from which they are Toraitically exempt; therefore, one cannot compare their case to that of women.

ROSH does not state here whether he prefers the position of R. Tam or that of "Tosafot" which opposes him. In his Halakhot to Rosh Hashanah 4:7, however, ROSH cites his discussion here and does decide in favor of R. Tam's view. See TUR OH 589, 305b-306a. See also Meiri, Kiddushin, p. 182, who attributes R. Tam's position to "all the rabbis of France".

RAMBAM, Hil. Zizit 3:9, declares that women who wish to observe commandments from which they are exempt may do so without reciting a benediction. See RABaD ad loc. as well as Hagahot Maimoniot, n. 40, which

summarizes the Tosafot discussion on this issue. See also Magid Mishneh to Hil. Shofar 2:2.

50.a. בי -- follows RIF; adds supporting decision of the She'iltot (Parashat Yitro, n. 56).

50.b. והיכא דרויחא -- follows RIF to וכן שדרו ממתיבתא . = Tos. Ha-ROSH 31b, ואורו . In support of the halakhah that the son may be compelled, if necessary, to provide financial support for his parents, R. Hananel cites Yerushalmi Kiddushin 1:7 (61b), which teaches that a son must support his parents even if he is reduced to begging. Tosafot provides a definition of this requirement: the son, if he has no money of his own, must render honor to his parents even if this prevents him from working and thus reduces him to begging. See TUR YD 240, 169a.

RAMBAM, Hil. Mamrim 6:3, has the law concerning coercion of support. Inasmuch as he draws his ruling from the Bavli, he does not include the rules concerning begging which Tosafot learns from R. Hananel's ruling. See Hagahot Maimoniot, n. 4.

51. אלעזר -- follows RIF.

52. גרסינן -- follows RIF.

53.a. אמר -- follows RIF.

53.b. תנו רבנן -- = Tos. Ha-ROSH 32a, זקן ; Tos. Ha-ROSH 32b, איכא . Commentary to RIF.

53.c. אמר מר -- follows RIF to שעסוקין במלאכתן . = Tos. Ha-ROSH 33a, אין . Tosafot provides two explanations for the word רשאין , depending upon whether the craftsman is doing work for others or for himself. If he does work for others, he is forbidden to interrupt it in order to show honor to Torah sages. If he is doing his own work, he may interrupt it if he wishes. See TUR YD 244, 176b.

RAMBAM, Hil. Talmud Torah 6:2, holds with the second definition: the craftsman is not required to interrupt his work. Since RAMBAM does not make the distinction between one's own work and work done for others, he does not bring the first definition of רשאין . See Beit Yosef to TUR loc. cit.

53.d. אמר מר -- follows RIF to כל שיכה במשמע . The halakhah follows Issi b. Yehudah, who agrees with R. Yose Ha-Galili. This leaves us with two categories before whom to render honor: seivah and hakham (who need not be old). See TUR YD 244, 176a.

RAMBAM, Hil. Talmud Torah 6:1, requires that we render honor before any scholar. Does this include the young scholar, following R. Issi? Yosef Karo (Kesef Mishneh ad loc. and Beit Yosef to TUR loc. cit.) believes that it does and that RAMBAM does follow R. Issi, even though RIF, fol. 14a, apparently holds against Issi's view.[32] Note, however, Karo's words in Beit Yosef: וכן נראה מדברי הרמב"ם . This ruling must be interpreted into the words of the Mishneh Torah; it is stated explicitly in ROSH.

54. גרסינן -- follows RIF to והוא דמופלג בזקנה . Rav Ashi's statement in Baba Batra 120a makes the honor bestowed upon a sage or an elder conditional upon whether he is מופלג in this quality. ROSH cites the RASHBAM commentary on this passage in Baba Batra, where the various combinations of sage vs. elder are discussed (e.g., a zaken muflag vs. a hakham who is not muflag and so forth: which takes precedence in a yeshivah or at a banquet?). See TUR YD 244, 177b.

RAMBAM does not deal with this halakhic detail of precedence between sage and elder. See Beit Yosef: "RAMBAM" should read "RASHBAM".

55.a. עוד -- follows RIF. Refers to reader to Hilkhot Ha-ROSH Ketubot 11:2.

55.b. תניא -- follows RIF.

56. רכ אלפס -- Alfasi, on fol. 14a, does not cite the statement of R. Yanai (33a-b) which allows a scholar to rise before his teacher only at the time of the morning and evening prayers. RIF interprets the R. Elazar statement on 33b as contradicting that of R. Yanai, and he rules that the halakhah follows R. Elazar.

RAMBAM, Hil. Talmud Torah 6:8, follows R. Yanai. See TUR YD 242, 173b-174a.

57. איבעיא להו -- not in RIF. If the son is his father's Torah teacher, who rises before whom? Since neither of these questions is settled in the Talmud, ROSH rules that both rise. He cites the case of R. Meir of Rothenburg, who reportedly avoided his father as a means of preventing this situation from occurring.

RAMBAM, Hil. Mamrim 6:4, does settle the question: the son rises before the father, and the father does not rise before the son. RaN, fol. 14b, ascribes this ruling to R. Hananel as well as to RAMBAM, and he suggests that this ruling is based on Yerushalmi Kiddushin 1:8 (61ל). RaN prefers the clarity in the Yerushalmi (the question is settled there) to the doubt expressed in the Bavli (here and on 31b, the parallel to the Yerushalmi story of R. Tarfon showing deference to his mother. The Bavli obviously does not regard this story as halakhically authoritative; see Kesef Mishneh ad loc.). See also BaH YD 240, 169b, who offers a different defense of RAMBAM's position.

58. איבעיא להו -- follows RIF.

59. אמר -- follows RIF to ובחיי אביהן .

The procedure for rendering honor to scholars in Horayot 13b differs from the one here on 33b. Tosafot Ha-ROSH 33b, חכם , explains that the Horayot

procedure referred to the ancient beit midrash where the students sat in rows, while the procedure in 33b is that of rendering honor to a scholar on a public thoroughfare.

RAMBAM, Hil. Talmud Torah 6:6, makes the distinction between how to render honor when one sees a scholar (=33b) and when "a scholar enters" (=Horayot), but he did not make Tosafot's historical point concerning beit ha-midrash. Kesef Mishneh ad loc. must clarify this point based on the Tosafot comment.

60.a. כל -- follows RIF.

60.b. חוץ מכל תקיף -- adds explanation to RIF.

61. ת"ר -- follows RIF.

62. מתנ'-גמ' -- follows RIF to כלאי זרעים מותר .

= Tos. Has-ROSH 37a, חוץ . R. Tam derives from the Yerushalmi (Orlah 3:3, 63b) that orlah, kilayim and kerem revi'i apply to Gentile property as well as our own: i.e., we can derive no benefit from the orlah, etc. of Gentiles. He makes the same deduction from Yebamot 122a. See also Tosefta Demai 5:2, M. Orlah 1:2, Tosefta Orlah 1:5. R. Peter[33] cites proof for this position from Tosefta Terumah 2:13.

With this in mind, Tosafot must find a means to permit the practice of drinking wine made from grapes grown by Gentiles in the Franco-German communities. These vineyards are planted and grafted in such a way that their produce is orlah. The passage from Sifra (to Leviticus 19:23) seems to permit the planting of grafted vines, but Sotah 43b implies that this is the position of R. Eliezer b. Ya'akov, and the halakhah does not follow his view. Moreover, even R. Eliezer would agree that the current method of planting grafted vines does come under the prohibition of orlah. Tosafot resolves the conflict: see M. Orlah 1:5 and R. Shimshon of Sens ad loc. The prohibition

against the planting of grafted vines refers to vines that have been severed from the original plant. If "new" vines are planted while remaining connected to the old stem, the law of orlah does not apply to them. The Sifra passage deals with the case of "new" vines that remain connected to the old stem. Moreover, Tosafot rules that grafted vines outside the land of Israel are permitted because they are but safek orlah; see Kiddushin 39a.

This ruling must be compared with that of ROSH in Hilkhot Orlah, n. 5. There, the Tosafot ruling concerning safek orlah is ascribed to R. Yizhak. However, Jews also customarily drink wine grown from Jewish-owned vinyards, and these cannot be permitted under the rubric of safek orlah. ROSH concludes that we follow the opinion of R. Eliezer b. Ya'akov in Sotah 43b. While it is true that the halakhah does not follow him, this refers to neta revi'i; with respect to orlah, we do follow him. Thus, all grafted vines outside of the land of Israel are permitted and exempt from the law of orlah. The safek orlah argument is unnecessary.

This agrument is also made by RAMBAN; see RaN, fol. 16a. Like ROSH, RAMBAN links this permit with the practice of drinking wine made from grafted grape vines. Beit Yosef YD 294, 240a, declares that ROSH would surely have mentioned RAMBAN's name had he seen his argument; as it is, ROSH must have arrived at the same intellectual process by means of divine inspiration. See Mordekhai to Rosh Ha-shanah 9b, no. 704. It is true that various poskim turned to the same passage in order to permit the use of grafted vines. Yet it is highly improbable that ROSH's comments in Hil. Orlah are original with him, despite the fact that he writes as though these are his words alone.

RAMBAM, Hil. Ma'akhalot Asurot 10:11-12, codifies the rule of safek orlah. He also rules in accord with M. Orlah 1:5 that a vine that is not severed from the old stem is not subject to orlah; see Hil. Ma'aser Sheni

10:14ff. He does not, however, express the ROSH/RAMBAN position that all grafted vines outside the land of Israel are exempt from orlah (=R. Eliezer b. Ya'akov). See RASHBA, cited in Beit Yosef loc. cit.: this total exemption is indeed the logical implication of the ROSH/RAMBAN ruling.

63. מחנ -- follows RIF; adds Talmud's explanation.

64. וכל -- follows RIF.

65. ת"ר -- follows RIF to כיש אומרים . =

Tos. Ha-ROSH 40b, ר"י א . R. Hananel, citing Yerushalmi Ma-aserot 3:2 (16a), defines the condemnation of the one who eats in the marketplace as referring to the hotef, he who seizes food from shopkeepers. Tosafot objects: such a person is a thief, even if he eats the stolen food at home. The baraita must come to tell us something else. Various attempts are made to define "the one who eats in the marketplace" as something other than a thief (while still contemptible). R. Tam defines him as one who eats his meals in the marketplace, not necessarily by stealing food from shopkeepers. See TUR HM 34, 54b-55a: both R. Hananel and R. Tam are cited.

RAMBAM, Hil. Edut 11:5, disqualifies "one who eats in the marketplace" from testimony. He makes no distinctions between hotef and others; there is no mention of one who eats meals in the marketplace as opposed to one who snacks there. See Beit Yosef to TUR, loc. cit.: it is impossible to determine from the wording in the Mishneh Torah whether RAMBAM follows the R. Tam position or another view. See also Kesef Mishneh to Hil. Edut 11:5.

NOTES TO KIDDUSHIN, CHAPTER ONE

[1]According to the reading preserved in Beit Yosef EHE 26, 48a, and Hagahot Ha-BaH, n. 7.

[2]On the other hand, RASHBA, Hiddushim 5b, favors the R. Hananel position.

[3]Magid Mishneh draws his position from RASHBA, Hiddushim 5b. RASHBA attributes to Tosafot and RABaD the view that the kiddushin is valid in any situation in which a woman gives kesef kiddushin to adam hashuv. RIF and RAMBAM, he says, adopt this position only within the special circumstances described on 7a. See also Resp. RASHBA, I. n. 613.

[4]See also R. Yeruham, Venice ed., 181c.

[5]Resp. RASHBA, I, n. 774, and Resp. Ha-Meyuhasot Le-RAMBAN, n. 130. RIVASH (Resp., n. 266) attributes the opposite view to RAMBAN. See also Magid Mishneh, Hil. Ishut 3:1.

[6]The R. Yeruham position is apparently that which appears in Venice ed., 181c. The reference to RIF and RAMBAM does not appear in our text.

[7]RaN himself does not accept this position. RASHBA and RITbA, Hiddushim 6a, do accept it as an explanation of RAMBAM's ruling.

[8]RASHBA, Hiddushim 6b, provides a variant reading: גזירה שמא יאמרו אשה נקנית בחליפין . This would support the statement in Tosafot/ROSH that this transaction is not truly halipin. RaN, fol. 2b, attributes this reading to Hai Gaon.

[9]RASHBA, loc. cit., does interpret RAMBAM as agreeing with the Tosafot/ROSH position. This, however, is a minority view among the poskim.

[10]See also Ozar Ha-Geonim, Kiddushin, "Perush R. Hananel", p. 10.

[11]See Hil. Ha-ROSH, Baba Mezia 8:11, and Pilpula Harifta, n. 8, as well as S. Asaf, Tekufat Ha-Geonim ve-Sifrutah (Jerusalem, Mosad Ha-Rav Kuk, 19), p. 233.

[12]TUR EHE 31, 58b, presents another reading of Hil. Ha-ROSH on this point.

[13]Hagahot Maimoniot, Hil. Ishut 5, n. 10, cites this view in the name of Rabeinu Yehudah and its refutation in the name of R. Yizhak.

[14]Baba Mezia 81b-82a.

[15]R. Tam rejects alternative definitions for this "sakhar"; it can mean only "the power to use it for the purpose of kiddushin".

[16]Korban Netanel, n. 6, citing Ketubot 102b, holds that ROSH believes that Rav Ashi is in accord with Rava and Ravina. Actually, ROSH states merely that Ketubot 102b contradicts the position attributed to Rav Ashi in our sugya. Thus, no proof whatever may be cited from Rav Ashi's statement.

[17]See Ozar Ha-Geonim, Kiddushin, Teshuvot, p. 15.

[18]See Halakhot Gedolot (Warsaw ed., 84a; Hildesheimer ed., p. 215), where the word סתם figures prominently in this halakhah. The word מסתמא in RAMBAM is perhaps an allusion to the discussion in Halakhot Gedolot.

[19]The word "RAMBAM" in our text of ROSH is clearly in error; the Mishneh Torah does not engage in the kind of discussion/analysis attributed here to RAMBAM. See Beit Yosef EHE 33, 60b.

[20]RaN, fol. 6a, also does not cite him.

[21]See the note of R. Eliahu of Vilna to ROSH, n. 1.

[22]Since RIF himself accepts this stringency (see 1:17c, above), we might well ask why he does not resort to it here. See Korban Netanel, n. 1.

[23]R. Barukh, a student of R. Elazar of Metz, 13th-century; R. Moshe Ha-Kohen, 12th-century Lunel; Itur; R. Shimshon of Sens.

[24]See Baba Mezia 83a, and Tosafot, השוכר .

[25]The answer to this question would depend upon whether Karo wrote Kesef Mishneh before he wrote Beit Yosef. Unfortunately, this question defies a simple answer. See Yad Malakhi, Kelalei Ha-Rav Ha-Magid etc., n. 7; Azulai, Shem Ha-Gedolim, Sefarim, "Beit Yosef"; and L. Greenwald, Ha-Rav R. Yosef Karo u-Zemano (New York, Feldheim, 1954), p. 182.

[26]See Korban Netanel, n. 200.

[27]See also Yam shel Shelomo, Kiddushin 1:42.

[28]RASHBA (Resp., I, n. 200 and n. 758) attributes this ceremony to R. Hananel.

[29]But see Korban Netanel, n. 300. ROSH does not apply this rule consistently. See also TUR, who adds that thee is no place for the kohen to recite a benediction here. The father is the one who performs the commandment.

[30]Siddur Rav Amram (Goldschmidt ed.), p. 7.

[31]See also Tosafot, Rosh Hashanah 33a, ורא .

[32]RAMBAN, Hiddushim 33a, feels that RIF in fact rules according to R. Issi.

[33]R. Peter, a student of RASHBAM and R. Tam, of Austria; see Urbach, Ba'alei Ha-Tosafot, pp. 223-225.

L. Tractate Baba Mezia, Chapter One

1.a. שניים אוחזים -- follows RIF, along with a short passage of his own commentary, to ויחלוקו . = Tos. Ha-ROSH 2a, אוחזין בטלית . Since both claimants have physical possession of the garment, the court must order its division. We do not rule "let it belong to the strongest" (כל דאלים גבר), as we do in Baba Batra 34b. According to Tosafot (R. Tam), in the Baba Batra case neither claimant has physical possession of the disputed boat; thus, there is no legal basis for a decision to divide the boat. A court cannot prevent an individual from taking possession of property whose ownership is unknown. The one who is strongest will probably be the one who can supply proof as to his rightful ownership of the boat. In our case, where each claimant has physical possession of the garment, a decision of כל דאלים גבר would be tantamount to allowing one to rob the other. ROSH adds that the rule of division applies even in cases where only one of the claims can be valid and where the other must be fraudulent. The majority position is: whenever we can say that both claimants may have taken hold of the object simultaneously--even though one of them must be making a fraudulent claim--the property is divided and an oath is required of the claimants. The general rule is this: if both claimants possess the object, it is divided by oath; if neither has possession, the strongest takes possession; if one has possession, the court is not authorized to take it from him (with the exception of the case in M. Baba Mezia 3:4 (37a). TUR HM 138, 70a, presents the ROSH's view as based on that of R. Yizhak, whereas RAMBAN disagrees: whenever one of the claimants is certainly lying, the disputed object is held in escrow by the court until proof of ownership can be supplied.[1]

RAMBAM, Hil. To'en 9:7, codifies the rule from our sugya. He makes no

distinctions between the case where one of the claimants is certainly lying and the case where both claimants might have taken possession simultaneously. Magid Mishneh concludes from this that RAMBAM rejects the RAMBAN view and rules that in all such cases, we divide the object by oath. It should be noted that RAMBAM does not explicitly deal with this dispute. It is therefore possible to interpret him as disagreeing with the Tosafot/ROSH view: see Hagahot Maimoniot, n. 7.

1.b. זה אומר כולה שלי -- follows RIF to וזה נוטל רביע . = Tos. Ha-ROSH 2a, זה אומר . Tosafot asks why the first claimant does not simply take the half of the garment conceded to him by the second claimant and thus limit the scope of his oath to the other half, whose ownership is disputed. The answer is that the beit din is allowed to expand the scope of the oath (he must swear to ownership of no less than three-fourths of the garment, rather than to merely one-fourth) in order to increase its deterrent power. The judge may insist that a claimant swear specifically concerning every possible issue on which he may be lying; the claimant cannot protest. Such specificity in the oath is a greater deterrent to falsehood than a general formulation which does not explicitly mention the claimant's fraud.

RAMBAN, Shitah Mekubezet, fol. 2a, presents a different explanation for the mishnah's ruling. Technically, we should restrict the oath to only that half of the item under dispute. In this case, the monetary value of the garment has yet to be determined. Moreover, if the claimant swears concerning one-fourth of the garment, he may mean that portion which the other claimant concedes to him.[2] At any rate, RAMBAN does not regard this oath as a measure designed to prevent fraud.

RAMBAM, Hil. To'en 9:8, has his own explanation for the nature of this

oath. The claimant swears an oath only over that part of the garment which he will receive as a result of the litigation. The RAMBAM does not explain this rule on the basis of the judge's authority to include every possible aspect of fraud in the oath sworn by the claimant.

1.c. גמ' -- follows RIF.

2. תנו רבנן -- follows RIF to כשאר עדות דעלמא .

= Tos. Ha-ROSH 2b, ונחזי דודי . ROSH states that both RIF and RASHI (2B, ולימחי) agree that the seller is relied upon to identify the litigant to whom he sold the object in dispute--even if he took money against his intention from the other litigant--provided that the object is still in the seller's possession. But if the item is no longer in his possession, he cannot claim "I sold it to so-and-so" if he took money from both of them. He deduces from their position that, if the object is still in the seller's possession and if he received money from only one of the litigants, he may claim that he intended to sell it to the other and that the one litigant forced the money on him. Moreover, if the item is not in his possession but he received money from only one of the litigants, he may make the same claim. This is based on the deduction that, if the item is not in his possession, the seller may not claim he intended to sell it to one of them if he has received money from both. ROSH/Tosafot find a difficulty in this. If the item is no longer in his possession, why is the seller any more reliable than any other witness to identify the buyer, even if he has received money from only one of the litigants? The Tosefta passage (Baba Mezia 1:6) cited by RIF also supports the Tosafot/ROSH attack. Moreover, RIF's reading of the Gemara on 2b is difficult. His reading of ולא ירע [3] leads him to conclude that the seller is believed if he knows to whom he sold the object, even if he no longer possesses it. He also is forced to interpret the mishnah in a

difficult fashion, i.e., that it refers to a found object and not a purchased one. It is better, says ROSH, to interpret the mishnah in its plain sense, that it refers to sale as well as the finding of a lost object. Therefore, the seller is not relied upon when the object is no longer in his possession, even if he knows to whom he sold it. We should follow R. Hananel's interpretation in Kiddushin 74a. As long as the object is in the seller's possession, he may say "I sold it to so-and-so", because if he wished, he could still give it to that person. This migo argument does not apply if the seller no longer possesses the object; that he "knows" to whom he sold it is legally irrelevant. Of course, the Gemara's suggestion: "Let us see from whom he received the money" might lead to an opposite conclusion, but the Tosafists resolve this possibility. R. Yizhak says that this statement refers to the believability of the litigants, not that of the seller. We ask them which one gave the money to the seller; we assume that they will not lie, since their dispute really concerns whether the seller intended to sell the litigant A or B, regardless of which gave him the money. R. Tam says that we ask the seller. True, he is not automatically believed if the object is no longer in his possession. But his testimony is sufficient to allow one litigant to take half of the object without an oath and to require the other to swear a Toraitic oath.

ROSH concludes: the seller cannot say: "I intended to sell it to so-and-so", even if he possesses the object, because a migo is not acceptable when witnesses (the court) are available. If the seller is the only source of information that he received money from both litigants, he is believed to say: "I intended to sell it to so-and-so", on the basis of R. Hananel's migo. If he received money from only one litigant, the seller may not say that he intended to sell it to the other. If he no longer possesses the item, if he

received money from one litigant (according to the testimony of witnesses or of the litigants), that litigant receives it. And if he received the money from both, he cannot say: "I intended to sell it to so-and-so."

RAMBAM, Hil. Mekhirah 20:4, states simply that the seller may identify the rightful buyer as long as he (the seller) still possesses the object. He does not explicitly refer to the case where the seller received money from one litigant: does he have the right, as long as the object is in his possession, to say: "I wanted to sell it to the other"? According to ROSH's interpretation of RIF, the seller does have this right. Kesef Mishneh ad loc. posits that RAMBAM follows the R. Hananel/ROSH view: even if the object is in his possession, the seller who has received money from one litigant may not claim that he intended to sell it to the other (on the grounds that the court is a witness to the transaction and the migo does not apply. BaH, HM 222, 94b, also concludes that RAMBAM follows R. Hananel. Bedek Ha-Bayit, 94b, objects to the deduction made by ROSH concerning RIF: even Alfasi, according to Karo, follows R. Hananel on this issue. Thus, it makes no difference whether Karo says that RAMBAM follows RIF (=Beit Yosef, 94b) or R. Hananel (=Kesef Mishneh). TUR, however, does not mention RAMBAM at all. Clearly, RAMBAM must be deduced into saying what R. Hananel and ROSH say. He mentions nothing at all about the migo argument, which is the basis for the ruling that the seller may claim that he wanted to sell the object to the other litigant. Indeed, Hagahot Maimoniot, n. 1, must add the reference to migo to RAMBAM's ruling. It is instructive that Magid Mishneh does not mention this subject at all. For him, RAMBAM means exactly what he says: we rely upon the seller only when the object is in his possession.[4] Tosafot and R. Hananel introduce the element of migo into the debate. This creates legal elements to which RAMBAM simply does not respond. Other poskim discuss the issue of the seller

who has received money from one litigant on the basis of R. Hananel's migo principle. Subsequent commentators must read this principle into the words of the Mishneh Torah.

3. ומרכרי -- from the position of R. Tam in 1:2, ROSH deduces that the testimony of one witness can exempt a litigant from an oath which he is otherwise required to take. R. Meir of Rothenburg supplies support for this view from the midrash on Deut. 19:15; see Shevuot 40a and Sifre Deuteronomy, ch. 188. If one witness may require a claimant--who is presumed innocent--to swear an oath, then certainly one witness may exempt him from an oath. Proof is also cited from the R. Hiya statement on 4a.[5] A difficulty is raised against this position from M. Baba Mezia 3:2 (35b): if one who leases a cow subsequently lends that cow to another, should the cow die of natural causes, the lessee swears an oath to that effect and collects the value of the cow from the borrower. Why the need for an oath? Cannot the borrower testify that the cow died of natural causes and thus exempt the lessee from the oath? ROSH answers that the mishnah deals with dina, the Torah law. The lessee is required, in general, to swear that the cow died naturally, and there are times when he cannot find proof to this effect in order to exempt himself from that oath. Likewise, there are times when the borrower also cannot testify to this effect. Another difficulty is brought from Baba Mezia 36a, but ROSH rejects this on the grounds that one witness, although he may be able to exempt a litigant from an oath, cannot exempt him from financial liability. R. Yonah raises a difficulty from Shevuot 45b, where we learn that a bailiff whose receipt of a trust is attested by a deed may exempt himself from an oath to the trustor[6] if he returns the trust in the presence of witnesses. If R. Meir is correct, why do we require "witnesses", when one would suffice? ROSH replies that the word " עדים " in that passage is a customary

linguistic usage and should be interpreted as "testimony", i.e., whatever type of testimony that may exempt him from the oath. On similar grounds, ROSH rejects another difficulty raised by R. Yonah, from Shevuot 45a (M. Shevuot 7:7). See TUR HM 87, 179a; HM 75, 156a; and 84, 174b. Nimukei Yosef, fol. 1a, writes that RAMBAN (see Milhamot, fol. 1a) distinguishes between a rabbinic oath, from which one is exempt on the testimony of one witness, and a Toraitic oath, from which one witness cannot provide exemption. RaN, says Nimukei Yosef, supports the view of R. Meir.

RAMBAM, Hil. To'en 1:1, rules that one witness may require an oath; he says nothing concerning the power of one witness to exempt a litigant from an oath. Indeed, Sefer Terumah, sha'ar 21, ch. 5, implies that RAMBAM does not accept the R. Meir position. Beit Yosef, in Bedek Ha-Bayit HM 75, 156a, also seems to place RAMBAM against R. Meir.[7] At the very least, this halakhic ruling is not mentioned at all by RIF and by RAMBAM. It originates in the Tosafist school.

4.a. אמר -- not in RIF. =printed Tosafot, 4a, עד אחד . Explanation of why the Talmud does not attack the binyan av of R. Hiya. RAMBAM, Hil. To'en 4:10, presents the same halakhic ruling.

4.b. אתיא מגלגול שבועה -- = Tos. Ha-ROSH 3b, אתיא . The beit din may require the defendant to swear an oath on extraneous matters even though the plaintiff does not demand this. Support is brought from Shevuot 49a. See RASHI, Shevuot 49a, לפתוח לו : Tos/ROSH follow Rav Huna as against Rav Hisda. According to RaN, Shevuot, fol. 33a, RIF interprets the Huna/Hisda "controversy" as not a controversy at all. TUR HM 94, 202b, follows the Rav Huna position as understood by Tos/ROSH; see Beit Yosef and BaH ad loc.

RAMBAM, Hil. Sekhirut 11:9, rules on this subject, but the interpretation

is far from clear. Magid Mishneh understands him to say that in no case does the beit din require a gilgul shevuah if the plaintiff does not demand one. Kesef Mishneh objects that RAMBAM would not follow the view of the pupil (Hisda) against that of his teacher (Huna). Rather, RAMBAM must interpret the sugya as does RIF (according to RaN): The words לפתוח לו mean that the court suggests to the defendant that he may retain possession of the disputed items by means of an oath. It is not, therefore, a permit for the court to require the defendant to swear to claims which are not part of the plaintiff's demand. In Hil. To'en 1:12, RAMBAM states that the plaintiff is the one who requires a gilgul shevuah; from this we might deduce that the court may not make this requirement if the plaintiff does not. At any rate, none of the poskim and commentators read the Tosafot/ROSH view into the words of RAMBAM; see Nimukei Yosef, Baba Mezia, fol. 2a, and RaN, Hiddushim, 3b.

4.c. ומי התחזק כתרן -- not in RIF. = Tos. Ha-ROSH 4a, ומה להצר. R. Hiya's view implies that the testimony of witnesses is always equivalent to the confession of the defendant: an oath of always required concerning that part of the claim which he does not admit. Yet Rav Hisda states that a defendant who denies a witness-supported claim concerning an item held in trust is not an acceptable witness in other cases, ostensibly because he is regarded as a liar. This does not apply to the defendant who denies a claim concerning a loan, inasmuch as we know that he is merely buying time until he can collect the money for repayment. Since the trustee has no such extenuating circumstance on his behalf, why should he be made to swear an oath? Why should we believe the oath of an established liar? Tosafot answers that an oath is required in the case of the trustee as well. The difference is that the plaintiff swears the oath. See TUR HM 75, 155b-156a.

RAMBAM, Hil. To'en 4:10, deals with the question of the creditor vs. debtor. He does not mention the case of the trustee who denies the witness-supported claim. In Hil. To'en 2:2, he follows Rav Hisda that the trustee may not serve as a witness, but he does not rule as to whether no oath at all is involved in his case or whether the plaintiff swears the oath.

5.a. ואמר -- = Tos. Ha-ROSH 4a, ורב ששת . ROSH summarizes the Talmudic sugya (Alfasi's treatment is on fol. 4a). The halakhah follows Rav Sheshet, based on Baba Mezia 98a and 100a. ROSH utilizes Tosafot to buttress the halakhic decision. RAMBAM, Hil. To'en 1:3, rules likewise.

5.b. ולרב ששת -- follows RIF; adds citation of Shevuot 40a.

6. ת"ר -- follows RIF; adds another reason to support the view that all sides are in accord if the borrower says "two".

7.a. ההוא -- follows RIF to ומשתכע אשארא . = Tos. Ha-ROSH 5a, אי איתי . Although R. Zeira expresses some doubt as to whether the halakhah follows the position of R. Hiya (on 3a: witnesses who support part of plaintiff's claim produce the same legal result as defendant's partial admission of that claim), proof may be cited for his view: Baba Mezia 35b, Shevuot 39b and 40b. Moreover, R. Hananel also rules in favor of R. Hiya, stating that the words אי איתא do not indicate that the halakhah does not follow a certain view.

RIF does not clearly state the decision here. RAMBAM, Hil. To'en 4:10, rules according to R. Hiya on the grounds that "all the geonim rule" that way. This approach troubles Lehem Mishneh ad loc. Perhaps RAMBAM is uncertain about the words אי איתא ; this may be the reason that Hagahot Maimoniot, n. 10, reproduces the Tosafot/R. Hananel tradition here.

7.b. אמר אביי -- ROSH refers to the discussion in Shevuot

40b-41a, concerning whether a shevuat heset may be demanded if no monetary loss is involved. He rejects the notion that our sugya provides support for the "first" view in Shevuot: namely, that no monetary loss is required (see Tosafot, Shevuot 41a, ומאן). Nevertheless, since the setam Talmud supports the "first" view in Shevuot, we follow that approach. Rav Hai Gaon rules in favor of the second view (that a monetary loss must be involved); Alfasi follows the first view; R. Tam "did not protest" against judges who proceded according to the first view, although in principle he requires monetary loss for such an oath.

RAMBAM, Hil. To'en 1:3, makes no distinctions: the defendant swears shevuat heset whenever he denies the entire claim. Beit Yosef HM 75, 156b, reads RAMBAM as following the first view of R. Naham cited above.[8] Clearly, however, RAMBAM does not address the issue of monetary loss. Poskim prior to and subsequent to his time see the issue of monetary loss as central to this halakhic question. RAMBAM must be made to address this point, since his own formulation does not. Although his halakhic conclusion may be fully in agreement with that of ROSH, his words contribute nothing to the analysis and debate of this issue.[9] Perhaps for this reason, ROSH cites R. Tam, Alfasi and Hai Gaon--but not RAMBAM--on this disputed question of halakhah.

8. ורב -- commentary to RIF, based on RASHI, 5b, ותקנתא .

9.a. ותיפוק ליה -- follows RIF.

9.b. זה ישבע -- paraphrases Gemara to אפשר בחזרה .

Comments on RIF, who does not cite the Talmud's conclusion that we do not regard one who is suspect of theft to be automatically suspect of lying under oath. Nevertheless, this does not conflict with the Abaye position, which RIF does not cite, since Abaye does not hold one to be suspect of theft unless there are witnesses to establish that suspicion. In short, Abaye (and the

Talmud) do not reject R. Yohanan's explanation for the oath demanded by the mishnah.

RAMBAM, Hil. To'en 9:7, cites R. Yohanan's explanation for the mishneh. This, according to Hagahot Maimoniot, n. 8, means that RAMBAM rejects Abaye's explanation, which ROSH includes. The legal implications of this explanation are found in TUR HM 92, 197b.

10. אמר -- follows RIF.

11.a. בעי -- follows RIF to ניהליה בלא סהדי . = Tos. Ha-ROSH 6a, השתא . The Talmud interprets R. Zeira's problem as a situation in which two litigants had previously shared physical possession of a garment. Told to divide it between themselves, they return with the garment in the possession of one of them. The other litigant is not believed if he claims "I rented this garment to him" (i.e., "I still claim ownership"), inasmuch as he is unlikely to rent a garment to a man he regards as a thief unless the rental agreement takes place in the presence of witnesses. Tosafot concludes that the second litigant is believed if he claims that the first litigant seized the garment by force while the two of them were in the process of dividing it. See TUR HM 138, 71a.

RAMBAM, Hil. To'en 9:13, explicitly rejects the claim of the second litigant that the first seized the object from him. See Hagahot Maimoniot, n. 40. See Magid Mishneh ad loc.; RAMBAN, Hiddushim, 6a; Nimukei Yosef, fol. 3a. RIF does not mention the claim "he seized it from me" in this instance.

11.b. הלכך -- follows RIF to לא אפשיטא ליה . R. Zeira's question is not answered by the Talmud. Therefore, says ROSH, the court does not confiscate the object from the possession of the one who seized it.

RAMBAM, Hil. To'en 9:12, presents the same ruling, but for a different

reason. He regards the original silence of the second litigant as equivalent to admission that the first litigant actually owns the object which he seized. TUR HM 138, 70b, present RAMBAM's reasoning behind this law, although in Kizur Piskei Ha-ROSH he explains the ruling on the basis that the Talmud does not resolve the problem. BaH, ad loc., is aware of the difficulty of RAMBAM's argument: the original silence of the second litigant is not really an admission of the first litigant's claim, inasmuch as he subsequently does challenge that claim. In BaH's view, the explanations of RAMBAM and ROSH are not identical and, indeed, incompatible.

12. ההוא -- follows RIF, with interspersed commentary.

13.a. לעולם -- not in RIF. If a kohen seizes an animal on the strength of his claim that it might be a first-born, the court confiscates it from him. Seizure is valid only if the claim is certain (bari); in that case, the kohen becomes the legal possessor (muhzak) until such time as proof to the contrary is supplied. If his claim is doubtful (shema), the original possessor of the animal is still the presumed owner. See TUR YD 315, 258b.

RAMBAM, Hil. Bekhorot 2:6 and 5:3, rules that the kohen may keep the animal which he seized on the strength of his shema claim. Kesef Mishneh to 2:6 explains the theoretical basis of RAMBAM's ruling: we follow Rav Hamnuna on 7b and disregard Rabah's rejection of Hamnuna's conclusion. See also Beit Yosef and BaH to TUR, loc. cit.[10]

13.b. תני רב תחליפא -- follows RIF to ובשבועה. = Tos. Ha-ROSH 7a, מחוי. The oath in this case applies as well to that part of the object which each of the litigants possesses. The oath cannot refer only to that part which lies in dispute, since our mishnah already states that the oath deals with "the remainder" of the garment. Tosafot does not read " והשאר " in the text here.

RAMBAM, Hil. To'en 9:9; rules that the oath refers to that part of the object which neither litigant holds. The litigants may require a gilgul shevu'ah of each other concerning the part of the object which each possesses. See Magid Mishneh ad loc. RAMBAN, Hiddushim 7a, attributes the Tosafot view to RABAD as well, while RAMBAM is in agreement with Halakhot Gedolot (Warsaw ed., 91c).

13.c. אלא -- explanation of the word כרכשתא .

14. אמר -- follows RIF, with interspersed commentary.[11]

15. ת"ר -- follows RIF to ה"נ לרמי . The rule that creditor and debtor divide equally the amount shown on the promissory note which both of them hold applies only when both of them grasp the toref or when both of them grasp the tofes. If one of them is holding the toref, however, he gets a larger share of the amount specified in the note, since a note with the date written on it is worth more than a note which has no date. See TUR HM 65, 114b.

RAMBAM, Hil. Malveh 14:14, does not draw this distinction. Magid Mishneh ad loc. attributes the ROSH position to RASHBA. Apparently, ROSH follows the position of R. Elazar on 7b, while RAMBAM and RIF accept the R. Yohanan view; RASHI, however, holds that this might not be a dispute at all (7b, דקאי תורף). Whatever the reason, ROSH presents a different halakhah than do RIF/RAMBAM.

16.a. אמר -- not in RIF. The halakhah follows Rami bar Hama: two individuals who simultaneously pick up an ownerless object both acquire ownership, since each one takes hold of it with the intent that the other acquire half of the object. This proves that this law cannot apply if one of the individuals is a deaf-mute, since a deaf-mute cannot acquire ownership in this way. RAMBAM rules likewise, Hil. Gezeilah 17:3-4.

16.b. מתני' -- ROSH declares that M. Baba Mezia 1:2 is superfluous, inasmuch as we can derive the same law from the previous mishnah. The Talmud states (8b) that the mishnah comes to teach that the act of riding upon an animal acquires ownership of it. Shmuel, however, states that riding does not acquire ownership, and that the "riding" of which the mishnah speaks is the act of riding while holding the reins and guiding the animal (רכוב ומנהיג בהגליו). The mishnah is superfluous for this, as well; thus, it really teaches that when two individuals ride and guide and animal, both of them acquire ownership. We do not say that the first one takes precedence over the second. See TUR HM 138, 71a, and Beit Yosef ad loc. See also TUR HM 197, 33a-b.

RAMBAM, Hil. To'en 9:7, does not make this distinction between "riding" and "riding and guiding". In Hil. Gezeilah 17:7, Magid Mishneh declares that RAMBAM regards riding by itself as sufficient to acquire ownership of the animal, as against those who rule, as does ROSH, that the requirement is for "riding and guiding".[12]

17. ראין -- not in RIF. ROSH continues his analysis of the halakhic implications of M. Baba Mezia 1:2. An animal is acquired when the new owner asserts his control in the manner in which these animals are customarily guided. For example, a camel is acquired when the owner draws it towards himself; a donkey is acquired when it is driven. As to the question of reverse methods (is a camel acquired by driving or a donkey by drawing?), the Talmud on 9a records that one of these methods is effective but does not decide between the two possibilities. ROSH concludes that this doubt invalidates such acquisition with respect to sale or gift; the animal remains in the possession of its original owner. In the case of an ownerless object, however, the possessor becomes the presumptive owner, even though he takes

possession of the animal by a non-customary act of asserting control.

RAMBAM, Hil. Gezeilah 17:5, rules that in the case of an ownerless animal, either method acquires the donkey but only drawing suffices for a camel. Beit Yosef HM 197, 33a, explains that RAMBAM resolves the doubt expressed in the Talmud on 9a: i.e., of the two possibilities suggested as the ineffective means for acquiring an animal, RAMBAM chooses the second: הנהגה כגמל . Thus, either method suffices with a donkey, but a camel is acquired only by means of the customary act of control: drawing. See also Magid Mishneh to Hil. Gezeilah 17:5. Moreover, Beit Yosef concludes that for RAMBAM, either method suffices to acquire ownership of an animal; it is only in the limited situation described in the Talmud (one person draws the camel while the other drives it) that we favor drawing over driving. Ultimately, therefore, RAMBAM and RIF follow the basic rule as described in M. Baba Mezia 1:2: no distinction is made between משיכה and הנהגה , although RAMBAM takes the debate on 8b-9a to be of some halakhic import. ROSH, as we have seen, does distinguish in a basic sense between these two methods of acquiring ownership.

18. וכן -- ROSH continues his treatise on the acquistion of animals. Normally, one does not acquire an animal by riding it along a public thoroughfare; this is considered a contemptible act, and thus it is not the "customary" way in which people control the animals that they own. Certain persons (the upper class, the lowly and women) do customarily ride their animals through the streets, so that this method does acquire ownership for them. All persons acquire ownership by riding through alleyways or fields, since there is no shame in this and it is a customary practice. All of this refers to sale; any method acquires ownership of an ownerless animal. RASHI (see 9a, רכוב בשדה) holds that driving an animal suffices in all

cases to acquire ownership.

RAMBAM, Hil. Mekhirah 2:10, allows riding as a means of acquisition in a public thoroughfare, making no distinctions in this instance between social classes. Various observers (Beit Yosef and BaH HM 197, 35a; Hagahat Ha-GRA, Baba Mezia, 9b, n. 1) suggest that the difference between RAMBAM and ROSH here is that RAMBAM's text of the Talmud must read as does ours (ואי רשות הרכיבים הוא קני), while ROSH must have had a version which read ואי רשות הרכיבים הוא לא קני . See Dikukei Sofrim, Baba Mezia 9b, n. 5: the Hamburg MS does read according to the version which these commentators attribute to ROSH.

19. ואחר -- summarizes Rav Ashi's conclusion on 9a. Follows the ruling in RAMBAM, Hil. Gezeilah 17:7.

20.-21. וטלית -- = Tos. Ha-ROSH 9a, הואיל ויכול . The act of ניתוק is deemed to be a form of "lifting" and an efficacious means of acquistion. Potential contradictions against this conclusion are rejected by Tosafot. See TUR HM 269, 177a-b.

RIF and RAMBAM do not codify this halakhah.

22. אלא -- = Tos. Ha-ROSH 9a, אלא . The Talmud compares the lifting of a coin-purse on Shabbat to the act of riding an animal through town: both are acts which people customarily avoid. From this, Tos/ROSH conclude that it is forbidden to lift a coin-purse on Shabbat, even if it is a lost object. Inasmuch as riding a lost animal is not a customary act (it can be transported by driving), the Talmud's comparison of riding to lifting a coin-purse is conceivable only if it is "not customary" to lift a lost coin-purse on Shabbat. Thus, while Shabbat 153a, might imply that the prohibition extends only to carrying to purse and handing it to a non-Jew on Shabbat, it is actually forbidden to lift the purse as well.

RAMBAM, Hil. Shabbat 6:22 and 20:7, permits one to transport a found object on Shabbat in the same way that one would transport his own coin-purse. Hagahot Maimoniot 20, n. 6, as well as Bi'ur Ha-GRA OH 266: and 266:13, point out that this ruling contradicts that of Tosafot. Kesef Mishneh to 6:22 registers doubt as to RAMBAM's position, a doubt expressed in his decision in OH 266:13, where he decides in favor of ROSH. Magid Mishneh to 20:7, remarks that "all the commentators" disagree with RAMBAM on this point. See also Kovez Teshuvot Ha-RAMBAM, I, 43.

23. בעי ר' אלעזר -- = Tos. Ha-ROSH 9b, מי מהני . Tosafot distinguishes between the acquistion of an animal and the acquisition of a box: the acquistion of a box may lead to the automatic acquisition of its contents, since the act of meshikhah is the same for both. The load carried by the animal, however, is not acquired by means of leading the animal; a separate act of acquisition is required for the load.

RAMBAM, Hil. Mekhirah 3:13-14, does not make the same distinction between an animal and a container. Hagahot Maimoniot, n. 30, adds the Tosafot distinction in the name of R.Yizhak.

24. לקנות -- = Tos. Ha-ROSH 9b, מי קאמר . The expression " משוך לקנות " does not indicate the seller's desire to sell; see RASHI 9b, לקנות . Tosafot distinguishes between the sale of an animal, where this expression does not indicate desire to sell, and the sale of an item of movable property, where the expression does indicate such desire.[13] Meanwhile, R. Elazar's question concerning the simultaneous sale of an animal and the load it carries is not resolved by the Talmud. Thus, the expression: " משוך בהמה זו וקני כלים שעליה " does not serve to transfer ownership of the animal or of its load even if the animal is tied down. If, however, the animal is lost or ownerless, the finder acquires

ownership of the load by taking possession of the animal.[14] In both cases, the guiding principle is safek: the doubt as to the efficacy of this statement requires that the animal and its load remain in the hands of the muhzak (i.e., the previous owner in the case of sale and the finder in the case of a lost or ownerless animal). If the seller tells the buyer: " קנה בהמה וקנה כלים ", the buyer does not acquire ownership of the load by taking possession of the animal unless the animal is tied down. See TUR HM 202, 44a.

RAMBAM, in Hil. Mekhirah 3:13-14, does not make the distinction between sale and retrieving ownerless property. SA HM 202:14 cites the ruling of ROSH as " יש מי שאומר ".

25. ודגים -- not in RIF. Follows the halakhah in RAMBAM, Hil. Zekhiah 1:5 and Hil. Gerushin 5:8.

26. מתני' -- follows Mishnah, RIF.

27.a. גמ' -- see RIF to Gitin, fol. 4b-5a. = Tos. Ha-ROSH 10a, במקום . The rule that forbids an individual from seizing the debtor's property on behalf of a creditor when that seizure puts the other creditors at a disadvantage applies even if the individual is the legal agent of the creditor. The creditor himself may make the seizure, but the agent may not; see Ketubot 84b. Moreover, our own mishnah shows that even when agency exists, an individual may not seize lost property on behalf of a "finder" when that seizure disadvantages others. R. Hananel argues that an agent is forbidden this type of seizure, but a legal guardian may do so; he is considered equivalent to the creditor himself. We conclude that an individual may indeed seize property from a debtor, even if he has not been appointed an agent, as long as that seizure does not place other creditors at a financial disadvantage. It may be objected, however, that the individual here has no

legal standing in the case; unless he is a legal agent, the debtor may argue that he may not intervene in the legal conflict between debtor and creditor. Alfasi, in a responsum, addresses this objection: the debtor may indeed object to this seizure if he is able to pay the creditor. If, however, the seizure is necessary in order to save the creditor from imminent financial loss (e.g., in the event of the debtor's death), the individual may make the seizure. This, he adds, is a rabbinic takanah. ROSH disagrees with this definition. If the rule is that seizure is not permitted when it leads to the financial disadvantage of other creditors, it follows that seizure is permitted it the other creditors are not disadvantaged and that this is the actual law, not a rabbinic enactment or adjustment to the law. The individual may seize the debtor's property on the basis of the rule זכין לאדם שלא בפניו ; his legal standing is equivalent to that of the creditor, and the debtor cannot protest against his action.

RAMBAM cites this rule in Hil. Malveh 20:2. He does not address the issue of whether the individual who seizes the debtor's property is the agent of the creditor (see Hagahot Maimoniot, n. 1, and Magid Mishneh). He also does not discuss the nature of this rule as a takanah or as the Torah law, as does Alfasi in his responsum (Magid Mishneh cites the responsum as quoted by RASHBA, implying that in fact the rule is a takanah). See Beit Yosef and BaH HM 105, 15b: these questions form the basis of much subsequent analysis among the poskim. RAMBAM is not mentioned in the discussion on these issues; his ambiguity removes him from the debate over them.

27.b. א"ר חייא -- follows RIF to קנה חבירו . = Tos. Ha-ROSH 10a, אר"י . R. Yohanan rules that a person may lift a found object for the purpose of bestowing ownership upon another person. He is also the author of the rule in 27.a. that an individual may not seize property from

a debtor on behalf of a creditor if that seizure brings economic disadvantage to others. Although the Talmud implies that these two rules are based upon the same line of reasoning (which would mean that R. Yohanan's statements are contradictory), R. Tam explains that the rule concerning the found object actually stems from a migo argument: the finder may bestow ownership upon another because he could have retained ownership himself. From this migo, we also conclude that if an individual is himself a creditor or a debtor, he may seize property of the debtor on behalf of another creditor.

RAMBAM does not mention this distinction. We might conclude from Hil. Malveh 20:2 that in no case is an individual allowed to seize debtor's property on behalf of a creditor when that seizure disadvantages other creditors. See TUR HM 105, 15b, and Beit Yosef ad loc. This halakhic distinction is a contribution of Tosafot to the legal tradition.

28.a. מתנ'-גמ' -- follows RIF to בשרה חבירו לא .
= Tos. Ha-ROSH 10a, ארבע . According to Tosafot, the four-cubit radius serves to acquire in almost all transactions except theft. The four cubits to acquire for a woman the ownership of her get; see Gitin 78a-b, Hil. Ha-ROSH Gitin 8:6, and TUR EHE 139, 43a.

RAMBAM accepts this rule with relation to lost objects (Hil. Gezeilah 17:8) and to gifts (Hil. Zekhiah 4:9). He does not apply the rule to the acquisition of a get; see Hil. Gerushin 5:13-14. The acquisition of a get in the public domain is a matter of the ability of the woman to preserve it and guard it. RAMBAM does not mention the four-cubit radius, which is mentioned by Hagahot Maimoniot, n. 2. Kesef Mishneh suggests that RAMBAM does accept the four-cubit rule with respect to get; RAMBAM's ruling here deals with a case where the get falls outside her four cubits but she is still able to guard it. It should be noted that RAMBAM does not explicitly state this.

Moreover, in those cases where RAMBAM does accept the four-cubit rule, he declares that this method of acquisition does not apply in the public domain; see Hil. Zekhiah 4:9. ROSH, (Gitin, 8:6) extends this rule to public domain since the rabbis ordained a special leniency in order to avoid igun.[15]

28.b. נפל לו עליה -- = Tos. Ha-ROSH 10a, מעבירין . See also Tos. Ha-ROSH Kiddushin 59a, עני . The person who illegally seizes pe'ah (M. Pe'ah 4:3) does not retain possession of it, but he is not called "wicked" as is the one who seizes a stack of sheaves from a poor person attempting to gain possession of it. R. Tam adds that even in the latter case, the label "wicked" applies only when the poor person wishes to purchase the sheaves by means of his labor; since the other person could buy sheaves somewhere else, his forcible seizure of these is a wicked act. When a poor person is attempting to possess sheaves within a transaction of gift or recovery of ownerless property, however, it is permissible for another to attempt to seize the object as long as the poor person does not have possession.[16] See TUR HM 237, 121b.

RAMBAM, Hil. Mekhirah 7:10 and Hil. Ishut 9:17, interprets this law in relation to the law of agency. He does not address the question of the application to the law of hefker or matanah. R. Tam forms the basis of subsequent debate on the issue. See RaN, Kiddushin, fol. 24a, who cites RASHI, Tosafot, R. Tam and RAMBAN. Neither RaN nor Beit Yosef HM 237 mentions RAMBAM.

29. אמר -- commentary on RIF.

30. אמר -- not in RIF. RaMaH rules that the halakhah follows Rav Sama: if the "agent" who commits a transgression had no choice in the matter (e.g., if the courtyard serves as an "agent"), the "agent" is not liable for punishment or damages. In all other cases: אין שליח לדבר עבירה .

RAMBAM, Hil. Me'ilah 7:2, limits the concept יש שלית לדבר עבירה to me'ilah exclusively. He does not enter into the Ravina-Rav Sama dispute.

31.a. מתני -- = Tos. Ha-ROSH 11a, ואמר . According to the mishnah, one's field serves to acquire possession for the owner of the objects resting within it if he states: " זכתה לי שדי ". Tosafot posits that this statement is not a legal requirement, just as the four-cubit rule confers ownership in the absence of a clear statement (Baba Mezia 10a, above). See also Baba Kama 49b. The statement mentioned in the mishnah serves to prevent onlookers from trying to seize the animal.[17] See TUR HM 268, 176b-177a.

RAMBAM, Hil. Gezeilah 17:8, requires a statement from the owner in this case. See Hagahot Maimoniot, n. 8, who cites the Tosafot view in the name of R. Yizhak, as does Shiltei Giborim, fol. 5b, n. 1.

31.b. גמ -- follows RIF to אי לא לא . ROSH summarizes the remainder of the sugya and concludes that, for Alfasi, the proper understanding of the Rabban Gamliel case lies in the explanation that this was a transaction of אגב מקרקעי . ROSH himself prefers the approach of Rav Papa and Rav Ashi. A courtyard has the power of acquisition because it is, in effect, the "hand" (agent) of the owner. This allows us to draw a distinction between the courtyard's power to acquire a gift and to acquire a lost object. In the case of a gift, the giver acually grants possession to the receiver (דעת אחרת מקנה אותה); thus, even if the courtyard is unguarded its owner acquires the gift, since we may bestow benefits upon a person without his consent. In the case of a lost object, no one bestows possession upon the finder. Unlike the case of a gift, we cannot regard the courtyard as its owner's agent; the courtyard must be guarded,

protected, before we can say that the owner has acquired through it the possession of the lost object. See TUR HM 243, 130a.

RAMBAM, Hil. Gezeilah 17:11 and Hil. Zekhiah 4:8-9, equates the courtyard's power of acquisition of a gift and a lost object: in both cases, the courtyard must be guarded. If it is not protected, the owner must stand at the side of the courtyard and make a statement to the effect that "my courtyard acquires ownership on my behalf". Magid Mishneh to Hil. Zekhiah cites RAMBAN as agreeing with both RIF and Maimonides that the cases of gift and lost object are legally equivalent in this respect.[18]

31.c. עישור -- not in RIF. = Tos. Ha-ROSH 11b, ומקומו . Tosafot concludes that the lending of land cannot be effected by means of halipin. ROSH disagrees; the transaction was conducted as a rental agreement merely because it was easier to do so than to conduct a kinyan sudar. See TUR HM 195, 31b, and Beit Yosef ad loc.

RAMBAM does not mention this halakhic point.

31.d. אחר צכי לכור -- follows RIF.

32. היעי רבא -- not in RIF. = Tos. Ha-ROSH 12a, אויר ; see also RASHI 12a, כמונח דמי . RASHI, Tosafot and ROSH declare that Rava's question does not concern an object which will come to rest within the recipient's property; in such a case, the property owner acquires ownership of a gift or of an ownerless object as soon as the object enters the "air-space" of his property. The question concerns an object which exits the boundaries of the property before it comes to rest. An attempt to resolve this question on the basis of the mishnah on 11a is rejected. Thus, in both cases--gift and ownerless object--the object belongs to the muhzah: in the case of gift, the donor retains possession should he change his mind; in the case of the ownerless object, the property owner is the legal possessor since

the original owner removed himself from that object. See TUR HM 243, 130b.

Nimukei Yosef, fol. 5b, and RAMBAN, Shitah Mekubezet fol. 44a, deduce from Alfasi's silence on this point that he regards this instance as one of תיקו דממונא . The ownerless object would belong to this person who managed to take physical possession of it. This conflicts with ROSH, who rules that the "air-space" does acquire ownership of hefker in this case. RAMBAM is also silent on this point.

33.a. מתנ'-גמ' -- follows RIF to זהו גדול . = Tos. Ha-ROSH 12b, ומזכה . The definition of "a minor child" as one who, regardless of age, is supported by the father, applies to eruvin as well as to mezi'ah; see M. Eruvin 7:6 and Tosafot Eruvin 79b, ומזכה . Tosafot explains that in all cases we follow this position of R. Yohanan over that of Shmuel (קטן קטן ממש). See also Hil. Ha-ROSH Eruvin 7:8, where this opinion is attributed to R. Tam.[19]

RAMBAM, Hil. Gezeilah 17:13, follows R. Yohanan: a "minor" is any child supported by his father. In Hil. Eruvin 1:20, however, he does not cite this definition; there, he reproduces the mishnah, where the words קטן and גדול seem to follow their literal meaning. Magid Mishneh ad loc., Hagahot Maimoniot, n. 10, and TUR OH 366, 135b-136a all note the dispute over the definition of "minor child". Beit Yosef does not agree that RAMBAM follows Shmuel over R. Yohanan; rather, since the two authorities do not explicitly dispute the meaning of "minor" in M. Eruvin 7:6, we follow the literal sense of that mishnah.

33.b. מציאת -- explanation of Alfasi's omission of the Talmudic debate on מציאת עבדו .

34. רב אלפס -- ROSH cites RIF's discussion of the Yerushalmi, Baba Mezia 1:4 (8a). The Bavli, 12b, interprets the mishnah as

dealing with מגורשת ואינה מגורשת.

Since the Yerushalmi regards the woman in the mishnah as a divorcee whose ketubah has not been fully paid, the two Talmudim are in apparent conflict. The Itur (Warsaw ed., 36d-37a) holds otherwise: the Bavli agrees with the Yerushalmi on the case of the divorcee. It adds to the Yerushalmi's rule, however, that even if we have a case of doubtful divorce, the woman may keep whatever objects she finds. ROSH rejects RIF's other argument in favor of the Bavli view from Ketubot 107b. Concluding that the Bavli does not contradict the Yerushalmi, ROSH rules that we follow the latter.

RAMBAM, Hil. Gezeilah 17:13, follow RIF's interpretation of the mishnah. There is no halakhic difference on this point; if the מגורשת ואינה מגורשת may keep objects she finds, then certainly the divorcee may do so. See TUR HM 270, 178a. There is, however, a difference between ROSH and Alfasi over the issue of the payment of the ketubah. From Ket. 107b, RIF deduces that the divorcee receives mezonot up to but not exceeding the value of her (unpaid) ketubah. The Yerushalmi, on the other hand, implies that the divorcee receives mezonot until such time as she receives the full value of her ketubah and that these two sums are separate. ROSH disagrees concerning the disagreement: the Yerushalmi deals with a rabbinic enactment designed to induce the husband to pay the ketubah at once. The Bavli and the Yerushalmi, in his view, do not dispute the law on this issue. See TUR EHE 93, 136b. Beit Yosef writes that a number of other authorities follow RIF on this issue and do not accept the Yerushalmi's approach to the halakhah. RAMBAM, Hil. Ishut 18:21, accepts the Alfasi view; see Magid Mishneh ad loc.

35. מח׳ -- follows RIF.

36. והא -- follows RIF, with some added words of commentary, to כאביי או לא. ROSH objects to Alfasi's mention of

"collusion" in this halakhah, since collusion is a concern only when the note has been lost and subsequently returned. If we feared collusion even when the note has not been lost, then we would also have to fear it when the note is written for the borrower in the presence of the lender. In addition ROSH refutes Alfasi's definition of שטרי הקנאה as notes in which the property lien is created by an act of kinyan. The lien is created by the loan itself. We also cannot say that this kinyan creates the public knowledge of this transaction (so that others might beware of purchasing mortgaged property), since this is the function of the witnesses who sign the note. Rather, a שטר הקנאה is one which creates a lien on the borrower's property even if he does not actually receive the loan. This accords with RASHI's interpretation (13a, בשטרי הקנאה).

RAMBAM, Hil. Malveh 23:5, follows RIF: the note which may be written while the lender is not present is one in which "a kinyan is present". See TUR HM 39, 68b.

37. ורא -- not in RIF. Halakhah follows Rava against Shmuel: אחריות is assumed in deeds of sale, as well as promissory notes, whether written or not. RAMBAM follows this rule in Hil. Mekhirah 19:3.

38.a. אמר אביי -- follows RIF, adding halakhic implications (נפקא מינה) not found in Alfasi or Tosafot. These are: 1) if the seller had made the field an apotiki (a specific pledge to secure the loan), he may pay off the creditor with cash. The buyer of the field cannot do that. 2) should the creditor seize the field from the buyer, he may take the improvements as well. When he seizes it from the seller, he takes the field only. See TUR HM 226, 98a.

RAMBAM, Hil. Mekhirah 19:9, does not mention these implications. Magid Mishneh ad loc. cites them in the name of " קצת המפרשים ";[20]

Nimukei Yosef, fol. 6b, ולא מצי , records them without attribution; Meiri, Beit Ha-Behirah to Baba Kama, p. 25, cites the apotiki deduction in the name of RABAD.

Tos. Ha-ROSH 14a, דיני הא , also derives halakhic implications from this rule. In the Halakhot, however, R. Asher presents implications not addressed in Tosafot.

38.b. אמר אביי -- follows RIF, adding passages of commentary drawn primarily from Tos. Ha-ROSH 14a, עד . This commentary establishes that the case in the Gemara is one in which the buyer has already completed the purchase transaction but has not yet paid the seller. Until the money changes hands, the buyer may cancel the sale should it be legally contested. Abaye's statement on 14b continues that, should the buyer take possession of the field (in Tos/ROSH view, before the money has changed hands), he may not cancel the sale. See TUR HM 226, 98b.

RAMBAM, Hil. Mekhirah 19:2, defines this case as one in which money has already changed hands. He also presents a different definition of the act of hazakah called " דיש אמצרי " than that found in Tosafot/ROSH; see Hagahot Maimoniot, n. 2. RAMBAM draws his definition from RIF, fol. 6b; ROSH, who does not include this situation, clearly differs with RIF on this point.

38.c. איתמר -- follows RIF to דיש לא שכח . = Tos. Ha-ROSH 14b, אמר רב . The " שכח " spoken of in this context includes only improvements which are made by the buyer and not those which come about by natural course.

RAMBAM rules likewise in Hil. Gezeilah 9:6.

38.d. אמר שמואל -- while the buyer of stolen land cannot recover from the illegal seller the expenses he incurred in making

improvements, a creditor may seize land from the buyer along with all its improvements. ROSH explains that a creditor is given superior power in order to create more favorable conditions for the lending of money.

38.e. אמר רבה -- ROSH continues his commentary/ explanation in 38.d.

The exchange between Rav Hiya and Rava on 15a ends with the conclusion that a creditor may not seize שבח if the land were transferred from the debtor as a gift. RIF, fol. 7b, makes a distinction between improvements made by the recipient (which the creditor may not seize) and those which occur through the course of nature, which the creditor may seize. On the other hand, RaZaH (fol. 7a-b) argues that no distinctions are made between types of improvement. Thus, in respect to a sale, the creditor may seize all improvements; if the land is a gift, he seizes none. ROSH agrees with this approach, adding that the Talmud would have made this distinction if it were halakhically obligatory.[21]

RAMBAM, Hil. Malveh 21:3, follows Alfasi in making the distinction between types of improvement. Magid Mishneh ad loc. lists the various authorities who support RIF and RaZaH on the opposite sides of the question. Note the treatment given to this subject in TUR HM 115, 36a. He mentions that RAMBAM agrees with RIF as against RaZaH; R. Asher, in contrast, mentions the latter two poskim but not RAMBAM.

39.a. תניא -- follows Gemara/RIF to ואמאי נוטל הוראה מבע"ח. The Talmud concludes that the creditor seizes land and improvements from the one who bought that land from the debtor if the claim against the debtor equals the value of the land and the improvements. The creditor need not reimburse the buyer for the expenses incurred in making the improvements, since, as ROSH states, all the improvements are mortgaged as security for the

loan. When we say that the creditor collects the improvements, however, we do not mean the entire value of the improvements. Rather, the creditor divides the value of the improvements with the buyer; see Baba Batra 157b. Both the creditor and the buyer have a lien against the value of the improvements. Shmuel's statement: " בעל חוב גובה את השבח " means only that the creditor does have a lien against the improvements; he does not have a claim against their entire value. Only when the debtor guarantees that all the property he purchases (which implicitly includes improvements) is to serve as security for the loan while not making a similar guarantee to the buyer does the creditor seize the entire value of the improvements. This "half-shevah" rule is widely accepted as halakhah: see RASHBAM, Baba Batra 157b, ומשנה ; RIF, Baba Batra, fol. 74a; RaZaH, Baba Mezia, fol. 8a; RAMBAM, Hil. Malveh 21:1.

RAMBAM, loc. cit., distinguishes between improvements made at the expense of the buyer and improvements in the land which occur due to the course of nature; in the latter case, the creditor seizes the entire value of the improvements. ROSH does not make this distinction, a fact noted in TUR HM 115, 34b-35a. RAMBAN, Hiddushim 15a, explicitly rejects the distinction made by RAMBAM.

39.b. והא דקתני -- ROSH explains that the buyer receives reimbursement for his expenses from the creditor only when the creditor does not claim the value of the land plus the value of the improvements in payment of the debt.[22]

RAMBAM, Hil. Malveh 21:1, apparently rules that the buyer receives reimbursement for his expenses even if the loan equals the value of the land plus the improvements. See TUR HM 115, 35a, and RIF, fol. 8b, who rejects the reasoning of the "geonim" cited in RAMBAM. Beit Yosef originally did not

include this reading in his text of the RAMBAM; therefore, he declares that RAMBAM and RIF must be in agreement, since "we should reconcile RAMBAM's reasoning with that of RIF wherever possible." Thus, TUR's reading, which coincides with that of Magid Mishneh and our printed text, must be in error. Subsequently, however, Karo did discover a text of RAMBAM that agrees with TUR and Magid--and he ruled in accordance with this view that conflicts with that of RIF! See SA HM 115:1 and Isserles ad loc., as well as BaH HM 115, 35a.[23]

39.c. הכ"ע -- commentary/explanation for אפותיקי .

39.d. כללא דמילתא -- ROSH comments extensively on the Gemara, 14a-15b. ROSH summarizes the rules concerning the buyer/seller/creditor of seller transaction. In the event that the seller designated this particular field as a pledge (apotiki) for his loan, the buyer retrieves the cost of the improvements he added from the creditor; should the value of the improvements exceed the expenses, the buyer is reimbursed for that excess value by the seller.

RAMBAM, Hil. Malveh 21:6, calculates only one-half the value of the improvements in this equation; i.e., the creditor reimburses the buyer's expenses only up to one-half the value of the improvements. RABaD ad loc. criticizes this ruling, to the agreement of Magid Mishneh.

39.e. ופרי -- the creditor seizes the produce along with the land if the claim is equivalent to the value of the land and its produce. This applies to produce that is almost ready for harvest, although not to harvested produce. If the field was declared an apotiki, the creditor collects the produce even if his claim equals the value of the land alone. In short, the rule for the produce is the same as that which covers improvements; see TUR HM 115, 35b. See Tos. Ha-ROSH 15a, כשכח , for the definition of "produce almost ready for harvest." See also RASHI 15b, המגיע לכתפים :

this is produce which has almost ripened but which still needs to be rooted in the ground.

RAMBAM, Hil. Malveh 21:2, rules that the creditor may seize only that produce which has fully ripened. In this he follows Alfasi, fol. 8b. RAMBAN, Milhamot, fol. 7a, suggests that even RIF would agree that ripened produce is the same as harvested produce: i.e., the creditor does not collect it, but rather collects the produce which has almost ripened. This would apply, presumably, to RAMBAM as well, although Hagahot Maimoniot, n. 2, cites the RASHI/Tosafot tradition against RAMBAM's ruling. Magid Mishneh provides a detailed outline of the various positions on this definition.

39.f. הדין דינא -- ROSH again follows RIF's organization pattern (fol. 8b), but again he reformulates the section in his own words. The law concerning one who buys mortgaged property is much the same as that concerning one who unwittingly buys stolen land. The owner recovers the land and the improvements made by the buyer, but he reimburses the buyer for the expenses incurred in making those improvements. This reimbursement, is based upon the principle of היורד שלא ברשות ; see Tos. Ha-ROSH 15b, הא דמסיק and Baba Mezia 101a. One who works the field without permission must cease working it, but he recovers expenses incurred in improving that land from the owner. The law granting reimbursement to the one who buys land that is seized by a creditor is based upon the same principle.

Alfasi, for his part, explains the reimbursement in that the owner of the property derives benefit from the improvements made.[24] RAMBAM, Hil. Gezeilah 9:6, cites the legal ruling with no explanation. The explanation is added by Hagahot Maimoniot, n. 2; it is the Tosafist position, cited in the name of R. Yizhak.

39.g. והשתא -- = Tos. Ha-ROSH 15b, הא דמסיק . A

creditor seizes the שבח from a buyer: i.e., not from the recipient of a gift. It thus stands to reason that a creditor should not seize the improvements made by the debtor's heirs, since they, like gift recipients, have no one from whom to seek reimbursement. Nevertheless, other passages imply that the creditor does in fact collect the improvements from the heirs. For example, from Bekhorot 52a we deduce that a widow does not collect her ketubah (payable by the heirs) from the שבח because of a special leniency involved in the laws of ketubah. In a case where such leniencies do not apply, the creditor would indeed collect the improvements as payment for the debt. The heirs are unlike the recipient of a gift, since they are obligated to pay the debts against the estate. A possible contradiction to this conclusion from Baba Mezia 110a is resolved by interpreting that case as dealing with land which was made apotiki, a specific pledge for the debt. In such a case, the creditor collects the improvements, since the apotiki was considered to be in his possession from the time of the loan.

ROSH rejects this explanation of Tosafot. The sugya in Baba Mezia 110a really concludes that the creditor does not collect improvements made by the heirs. The apotiki interpretation, in his view, is forced. The Tosafists' reading of the sugya in Bekhorot can also be challenged. Rather, we rule that the heirs are equivalent to gift recipients in that the creditor does not collect improvements they have made to the land. R. Yonah agrees with this position.

Pilpula Harifta, n. 40, points out that in several other passages--Hilkhot Ha-ROSH Baba Mezia 9:42; Kebubot 5:1; and Kiddushin 3:14--R. Asher seems to follow the view of Tosafot that the creditor does collect improvements made by heirs. He mentions as well that TUR HM 115, 36a, follows the ruling here. BaH, ad loc., concludes from this that TUR regards this

passage as halakhically authoritative while the others are for purposes of commentary and explanation. On the other hand, Siftei Kohen HM 115, n. 32, declares that it is more probable that ROSH retracts the view expressed here in favor of the view mentioned in three other places. See also Hershler and Grodetzky's comment in their edition of Tosafot Ha-ROSH to our tractate, p. 51, n. 446. We should stress that in Hilkhot Ha-ROSH Baba Mezia 9:42, ROSH refers the reader to his discussion here; in other words, he indicates that this is his authoritative ruling on the subject, implying possibly that other passages are to be read as commentary and not as halakhah. In any event, a theory of "retraction" must account for the ruling of TUR which follows Asher's conclusion in our sugya. It seems that, in view of the tentative nature of the "retraction" theory,[25] we should accept TUR's version of Asher's ultimate position.

RAMBAM, Hil. Malveh 21:4, agrees that the creditor does not collect the improvements made by the heirs. He does, however, allow the creditor to collect those improvements which occurred as a result of nature. ROSH, as we have already seen (1:38e), does not make this distinction with respect to שיכח .

39.h. הכיר בה -- = Tos. Ha-ROSH 15b, עמ"ר . According to Rav on 15b, the one who knowingly buys stolen land intends his purchase price to be a deposit in the hands of the "seller" (thief). For this reason, the money is returned to the buyer once the rightful owner recovers his land. In the meantime, the thief, as the bailiff, is responsible for the money, inasmuch as he enjoys usufrucht while he holds it. The rules governing this case are the same as those governing the use of depositors' money by a banker or moneylender. Moreover, the buyer cannot demand his money from the "seller" before the land is recovered; the thief agrees to let him have the land in

return for the use of the money until the land is recovered. The buyer does not recover from the thief the value of improvements he made to the land, since such a transaction would resemble interest on the "loan" of the buyer's money. ROSH adds that this is the case even if the thief specifically promised to reimburse for improvements. RaZaH disagrees; see fol. 7a. This transaction is not regarded as a loan but as a sale; therefore, we do not fear the semblance of "interest".[26] In ROSH's view, the word "sale" is misplaced; the buyer knows that the land does not belong to the thief. He merely seeks it for the income it can produce for him until the rightful owner recovers it. See TUR HM 373, 62a, who cites the RaZaH view in the name of RaMaH.

RAMBAM, Hil. Gezeilah 9:7, agrees that the buyer does not recover the improvements. He does not treat the definition of the buyer as mafkid; therefore, we do not find in the Mishneh Torah the details of the depositor/bailiff relationship as brought out by ROSH.

39.i. כתב רב אלפס -- RIF, fol. 7a, rules that the buyer does not recover the improvements that occurred through the course of nature; he does, however, receive reimbursement for the expenses he incurred in making improvements to the stolen land. He cites Baba Kama 96a in support. Tosafot (Ha-ROSH, 15b, הכיר בה) disagrees: the passage in Bama Kama refers to chattel and not to real property. RaZaH accepts this view: the buyer gets none of the improvements. See TUR HM 373, 62a: the Tosafot view is attributed to R. Yizhak.

RAMBAM, Hil. Gezeilah 9:7, follows RIF. Once again, ROSH omits mention of RAMBAM in a discussion of the views of various poskim.

39.j. אמר רבא -- commentary to Gemara, 15b. = Tos. Ha-ROSH 15b, מעות . While Rava follows Rav's position here, we do not conclude that he follows the apparently identical position in Gitin 45a.

RAMBAM, Hil. Zekhiah 6:20, follows Shmuel; Hagahot Maimoniot, n. 50, attributes the same ruling to R. Yizhak.

Sections 38 and 39 constitute a separate unit of the Halakhot. ROSH presents here a halakhic essay on the legal relationship of buyer/seller/creditor (or rightful owner) of real property. He follows the order of the Talmud much more than the order of topics in the Alfasi. For example, RIF, fol. 6b, begins the discussion with Abaye's statement on 14a. He then presents the Rav/Shmuel dispute on 14b, followed immediately by Rava's summation on 15b. Following commentary and explanation, RIF discusses Shmuel's position on the creditor's right to improvements, which we find in the Talmud on 15a. The preponderance of Alfasi fol. 8a-b is a summation of the halakhah from the Talmud's 14a-15b; the words כללא נקטינן indicate that Alfasi departs from close adherence to the order of the Talmud in order to discuss the legal rubric in a more logical sequence. ROSH, for his part, remains more faithful to the order of the Talmud; he, too, however, engages in a lengthy halakhic summary/commentary, beginning with the words כללא דמילתא in 1:39.d. ROSH apparently takes his cue from Alfasi: he, too, departs from the Talmud in order to compose a thematic essay on the halakhah. Especially noteworthy is Asher's citation of "Tosafot" (1:39.g. and 1:39.i.). Normally, ROSH cites the Tosafot as though he is the voice of that school; here, he quotes Tosafot in third person, as a separate literary source upon which he may comment and with which he may disagree. In both cases where he cites "Tosafot", he adduces support from other rishonim. In this section, R. Asher approaches the status of halakhic commentator to the Talmud, a role assumed more often by authors such as RAMBAN, who interpret and summarize the sugya while discussing the views of other scholars. That he does so, however, is largely the result of RIF's similar approach; rather than

adhere to Alfasi's independent summary of the sugya, ROSH follows Alfasi's example and composes his own.

40.a. בעא -- follows RIF to והלכתא כוותיה דרב אשי .

RIF states that the halakhah follows Rav Ashi because the sugya continues to discuss his position rather than that of Mar Zutra. ROSH offers other reasons in place of this one.

40.b. פשיטא -- follows RIF to זוזי הוא דבעי .

ROSH declares that he has seen one commentator (apparently RASHBA; see Nimukei Yosef, fol. 9a) who rules that whenever the thief has any kind of financial claim against the land which he purchased from the owner after having stolen it, we do not presume that the thief bought the land in order to allow it to remain in the buyer's hands and protect his reputation. Only when the thief clearly intends to have the land remain in the buyer's possession do we presume that he purchased the land toward this end. ROSH disagrees; the Gemara already lists several exceptions to the general presumption. If any other cases were to be included, the Gemara would have mentioned them. See TUR HM 374, 62b.

RAMBAM, Hil. Gezeilah 9:9-12, mentions only the specific exceptions to the rule that we find in the Gemara. This need not imply, however, that RAMBAM disagrees with RASHBA and disallows other cases of lien, as does ROSH. Indeed, Beit Yosef to TUR, loc. cit., takes the position that the Talmud does not mean to exclude those conceivable cases which it does not mention. Thus, ROSH cites RASHBA on an issue which RIF and RAMBAM leave ambiguous. None of the authorities who take the opposite view--RASHBA, RaN, Beit Yosef--attribute a halakhic position to RAMBAM on this point. Apparently, his ruling may be interpreted in either direction, much as we may interpret the Talmud and the RIF on this point.

40.c. יהכיה ניהלילה -- ROSH summarizes the Gemara and does not follow RIF's formulation. ROSH decides according to Ravina as opposed to Rav Aha; see Pilpula Harifta, n. 400, and Baba Kama 95a. TUR, HM 374, 62b, explains that this is a question of hazakah: as opposed to RaMaH, who rules that the buyer is the muhzak, ROSH regards the (former) thief as the muhzak so that he keeps the property unless the buyer can prove that the thief intended to maintain the field in the buyer's possession.

RAMBAM, Hil. Gezeilah 9:13, follows Rav Aha. Karo (Kesef Mishneh and Beit Yosef) suggests that RAMBAM follows the reasoning of RaMaH; Magid Mishneh posits that RAMBAM simply prefers the reasoning of those (Rav Aha) who view this transaction as more like a sale than an inheritance. He also mentions that R. Hananel and RASHBA rule as does ROSH.

40.d. ועור אימת -- summarizes RIF's lengthy treatment of Rav Hai Gaon (fol. 9a-b). Adds commentary to it.

41.a. תניא -- follows RIF.

41.b. ירושלמי -- adds commentary of Rav Hai to RIF.

41.c. אמר ר' אבהו -- summarizes Gemara, 16b.

42.a. אמר רב יוסף -- ROSH summarizes RIF's commentary on the Talmud and supplies his own reason for following Rav Zevid.

42.b. אלא אי איכא -- RASHI, 17a, והעדים, explains that the debtor is judged a liar because he did not immediately pay the debt in the presence of witnesses at the instruction of the beit din. ROSH argues that this should not qualify him as a habitual liar; he may have an acceptable alibi for not having paid immediately, so that we do not judge him harshly for claiming that he has in fact paid. Whenever we can find any mitigating circumstances in this situation, we do not declare this debtor to be a habitual liar. Rather, the proper interpretation is this: the witnesses

testify that they know for a fact that the debtor did not pay the debt at the hour he claims to have paid it. In this case, he is established as a liar; if however, the witnesses can testify only that the debtor did not pay the debt immediately upon receiving the judgement of the beit din, we accept his claim that he subsequently paid.

RAMBAM, Hil. To'en 7:6, repeats the language the of memra on 17a (and RIF, fol. 10a). He does not explain the type of testimony required of these witnesses before the defendant is judged a liar, Magid Mishneh ad loc. reports the "most commentators" agree with the position taken by ROSH: the witnesses must testify that they know for a fact that the debtor did not subsequently pay the claim. Nimukei Yosef, fol. 10a, cites this view in the name of RASHBA and RaN, who reject the conflicting interpretation of RASHI. The possibility exists, therefore, that R. Asher received this interpretation from RASHBA along with its literary framework (in which RASHI's position is cited and rejected). At any rate, all of these poskim deal with an issue that RAMBAM does not address clearly.

42.c. הוחזק כפרן -- once the debtor has been established as a liar, RASHI does not seem to require that the creditor swear an oath before extracting payment. This is unlike the case of one who is suspected of lying under oath; in such a case, the plaintiff swears an oath before receiving payment because the suspicion against the defendant comes from some other claim/incident. Here, the presumption that the debtor is a liar stems from this case alone.

Nimukei Yosef, fol. 10a, attributes this view to RASHBA and RaN: both the halakhah and its explanation are in accord with that found in ROSH. Beit Yosef, HM 79, 165a, posits that both RIF and RAMBAM agree that no oath is necessary here; however, neither of those two authorities states this point

clearly and specifically.

42.d. חייב אתה -- follows RIF to ואין חייב כשבועה .

Rav Hai Gaon adds a distinction to the general rule found in RIF: if the defendant, who has claimed that he already swore the oath required of him, was required to swear a Toraitic oath, the plaintiff's claim forces him to swear a shevu'at heset. If the original requirement was that the defendant swear a rabbinic oath, this other oath is not required of him should he claim that he has indeed submitted to the court's decision.[27]

RAMBAM, Hil. To'en 7:5, does not cite the ruling attributed to Hai. SA HM 87:27 also makes no mention of it (see Bi'ur Ha-GRA ad loc.); we may thus conclude that Karo reads both RIF and RAMBAM in disagreement with the Gaon.

43. א"ר אסי -- follows RIF.

44. א"ר חייא כר אבא -- follows RIF to מרגניתא תותיה .

The statement of R. Yohanan and the conclusion of Abaye (17b) indicate that a husband may not claim that he has paid the ketubah contrary to his wife's assertion that he has not; this applies even in localities where the custom is to write a ketubah. The obligation to pay the ketubah is a ma'asei beit din; the husband may not claim that he paid it unless witnesses can testify to that fact. RIF, fol. 10a-b, cites R. Yohanan's statement as halakhah. In Ketubot, fol. 48b, however, RIF follows the opinion of Shmuel, who interprets the mishnah (Ketubot 9:9, 89a; this mishnah forms part of the discussion here between R. Yohanan and R. Hiya) as referring to a commentary where the ketubah is not customarily written. In such a case, we rely on ma'asei beit din; in communities where the ketubah is written, however, the wife does not collect unless she can produce the actual document. ROSH cites RAMBAM, Hil. Ishut 16:28, who agrees with Alfasi's ruling. There are, however, reasons to reject this decision. First, we follow R. Yohanan in cases where he disagrees with

Shmuel.[28] In addition, Abaye is the latest authority involved in this discussion; moreover, in our sugya, RIF himself seems to follow the R. Yohanan/Abaye position.

ROSH cites RAMBAN (see his Hiddushim to 17b), who resolves this contradiction. R. Yohanan actually agrees with Shmuel that in a community where the ketubah is customarily written, the wife cannot collect unless she presents the document. Abaye, in this view, also reads R. Yohanan's statement as dealing with a community where the ketubah is not customarily written. See Resp. Ha-ROSH 36:7 and TUR EHE 100, 151b-152a; ROSH accepts RAMBAN's treatment as the authoritative halakhah on this issue.

45.a. גמ'-מתני' -- ROSH summarizes the sugya here (18a-b) in a more abbreviated form than he does in the parallel (Gitin 27a, Hilkhot Ha-ROSH Gitin 3:3). ROSH rules that a lost get is not returned by the finder if either of the two extenuating circumstances (frequent caravan traffic and knowledge that another man by the same name lives in the city) exists.

Both RIF (fol. 10b) and RAMBAM (Hil. Gerushin 3:9-10) forbid the return of the get if the first factor (caravan traffic) is present. They do not provide the rule concerning a case where the second factor is present in the absence of the first. ROSH departs from the RIF text here, commenting upon the sugya itself in order to provide a detail of the law missing from RIF and RAMBAM.

45.b. ת"ר -- follows RIF.

46. ת"ר -- follows RIF to גט שחרור לידך .

See Tos. Ha-ROSh 19a, דאמרי . The reason that the former slave must prove the date of his receipt of the deed of manumission stems from the fact that it was lost and found. The implication is that, had the validity of the get not been thus called into question, we might not require the slave to

bring such proof. Indeed, Beit Yosef HM 65, 113b-114a, is surprised that ROSH requires this proof; in 1:36 and 1:49, R. Asher follows Abaye's position that such a document is valid from the date specified upon it, so that the date of receipt is irrelevant. BaH resolves this apparent contradiction; among other comments, he states that the fact that the document was lost indicates that it may have been discarded by the master before he gave it to the slave. Clearly, the Tosafist view is that the validity of this document is adversely affected by the נפילה .

RAMBAM, Hil. Gezeilah 18:8, does not mention the rule concerning the need to prove date of receipt. RIF, who does not mention that the "loss and finding" of this deed is the factor that weakens the slave's claim, may in fact rule that in any case where the slave seeks to repossess property sold by his former owner he must bring proof of the date of receipt. Tos/ROSH would limit this need to cases where the deed was lost and then found. See Nimukei Yosef, fol. 10b-11a.

47.a. ת"ר -- see Tos. Ha-ROSH 19a, אידו . RASHI (19a, מהיום)[29] interprets this gift as one in which the recipient possesses the principal now and receives the interest/income upon the death of the donor. Tosafot argues that this gift must be similar to the דייתיקי , in which the donor has the right to recant until his death. See Hagahot Maimoniot, Hil. Zekhiah 12, n. 8, who attribute this ruling to R. Tam.

RAMBAM, Hil. Zekhiah 12:14, derives from the same baraita on 19a the opposite ruling: a gift by a healthy donor, effected by a document which reads: מהיום ולאחר מיתה cannot be recanted. Tos/ROSH read the baraita as equating this gift by a healthy donor (who may not recant his gift) with that of the dying person, who has the power to retract his gift. Thus, the baraita must deal with a deed which reads: מהיום אם לא אחזור בי ,

in which the healthy donor retains the power to change his mind. It is possible that RAMBAM's ruling deals only with a case in which the power to recant is not specified in the deed; this seems to be the implication in TUR HM 257, 160b-161a and BaH ad loc., as well as Magid Mishneh to RAMBAM loc. cit. In other words, if the deed reads according to the Tosafot formula (מהיום אם לא אחזור בי), even RAMBAM would agree that this healthy donor has the power to recant his gift, in the same way that the dying person may recant his gift. Nevertheless, Tosafot argues that the RASHI/RAMBAM position is not the proper interpretation of the baraita. At the very least, RAMBAM's ruling does not contain the detail concerning the equalization of legal power between healthy and dying donor; his interpretation of the passage does not tell us whether a healthy donor may, in certain cases, retain the power to recant his gift.

47.b. שאני אומר -- follows RIF.

47.c. מצא שובר -- commentary to RIF, Talmud.

48.a. אמר רבא -- See Tos. Ha-ROSH 20a, שמע מינה , and RASHI, 20a, לשתי כתובות . The wife is not suspected of conniving with her husband to swindle the buyer of her ketubah; we invoke the principle of migo, inasmuch as she could simply have forgiven the husband's debt to her without going through the process of writing a fraudulent shover. However, the difficulty here is that the wife may be in a more advantegeous position should the husband produce the shover. If she were to forgive the husband's debt (in the ketubah), she would have to repay the buyers the full value of her ketubah inasmuch as he is a divorcee or widow, so that the husband's debt has fallen due. Should the husband produce the pre-dated shover, the wife would owe the buyer only the small amount they paid for the right to collect her ketubah once it should fall due. In short, the migo principle is

threatened. ROSH ultimately concludes that the woman in our sugya is of the same marital status when she forgives the ketubah as should would be if she wrote a shover: i.e., she is married in both cases. In this way, even if she forgives the ketubah, she does so before it falls due and thus owes the buyers only the expenses they incurred in purchasing it from her. If she forgives the ketubah after her divorce or her husband's death, the debt has fallen due and she is obliged to pay the buyers the full amount of the ketubah. ROSH cites R. Sherira Gaon in support of this ruling, along with "Tosafot".[30] See TUR EHE 105, 158a.

RAMBAM, Hil. Ishut 17:17-19, discusses the power of the wife to sell or forgive her ketubah. He does not, however, deal with whether the woman who forgives her ketubah after having sold it owes the buyer the full value of the ketubah or only the price he paid for it.

48.b. ר"א ת -- = Tos. Ha-ROSH 20a, שמע מינה . The wife's right to forgive the ketubah once she has sold it to a third party is challenged: suppose the sale was transacted במעמד שלושתן , in the presence of the wife, husband and buyer, the three interested parties. In this instance, the wife may not forgive the ketubah; see Kiddushin 48a. Tosafot answers that the prohibition against forgiving a debt transferred in מעמד שלושתן applies only to debts which may be collected immediately.[31] Since the ketubah may in fact never be collected, this means of transfer may not be used by the wife to sell her ketubah. The halakhic conclusions from this are: 1) if one forgives a debt after having sold the note to a third party, he (the original creditor) owes the third party only the amount he received for selling the note; 2) one who sells or gives a note to a third party in the presence of the debtor may not subsequently forgive the debt; 3) a ketubah may not be sold in a transaction.

RAMBAM, Hil. Hovel 7:10, follows RIF, Baba Kama, fol. 35a, on 1): one who forgives a note after selling it to a third party owes the third party the entire value of the loan specified in the note. See Hagahot Maimoniot, n. 6. RAMBAM's position with respect to the second of ROSH conclusions is not as clear. See Hilkhot Mekhirah 6:8: RAMBAM treats the מעמד שלושתן transaction, but he does not refer to the power (or lack of it) of the original creditor to forgive the loan. Magid Mishneh ad loc. sees this as a dispute among the poskim and does not attempt to derive RAMBAM's view on the matter. Kesef Mishneh, on the other hand, concludes that RAMBAM forbids the forgiving of the debt on the strength of Hilkhot Ishut 5:17.[32] Magid Mishneh to Ishut 5:17 does reach this conclusion, as does RaN (in RAMBAM's name) in Kiddushin, fol. 20a. At any rate, RAMBAM does not state this ruling plainly; ROSH, on the other hand, makes this deduction a clear principle of halakhah. See Hilkhot Ha-ROSH to Gitin, 1:17b., above. As for conclusion 3), RAMBAM does not mention this restriction in either Hilkhot Mekhirah or Hilkhot Ishut.

48.c. אביי -- according to Abaye, we can eliminate the fear of collusion on the part of husband and wife even if the right of mehilah is not granted: as long as the wife retains actual possession of the ketubah, we conclude that she did not sell it to a third party. ROSH raises a difficulty: suppose she sold the document by means of an אגב קרקע transaction. In such a case, she would retain physical possession of the document, but a third party would own it. The answer: a ketubah cannot be transferred in this manner, since the average buyer would not feel assured of his ownership.

This argument is attributed to RABaD in Shitah Mekubezet, fol. 65a. It extends back to Geonic times as well, as shown in 49a.

49.a. ורב האי גאון ז"ל -- on the basis of this argument, Rav Hai

Gaon rules that the only document that may be purchased אגב קרקע is the deed of sale for that plot of land; no other document may be transferred in this fashion. R. Hananel rules likewise. See Baba Batra 77b and Hilkhot Ha-ROSH, Baba Batra 5:6.

RAMBAM, Hil. Mekhirah 6:14, follows the view of Alfasi (Baba Batra, fol. 39a) that a document of any kind may be transferred אגב קרקע . See TUR HM 66, 119b, and Beit Yosef ad loc.

49.b. ורבא אמר -- ROSH summarizes Alfasi, fol. 6a-b. According to ROSH, Alfasi interprets Abaye in the following manner. The holder of a document acquires ownership or lien by means of the signatures upon that document. Although the Talmud (13a) reads Abaye as requiring that this document be in the possession of the individual it names, this requirement applies only to documents which that individual must utilize in order to acquire the physical possession of the property to be transferred (e.g. a promissory note: by means of the note itself the creditor acquires lien upon the debtor's property). If the individual named in the note already has physical possession of the property, he acquires ownership/lien by means of the signatures alone, even if the note is not in his physical possession. RIF also deduces from Abaye that the rule עו"ד בחתומיו זכין לו applies to a deed of sale or gift only in order to prevent a situation in which a note may be pre-dated. The owner of the property, however, may sell or give away that property to another person, even if the note has already been signed, provided that the note has not yet been transferred to the original intended buyer/donee. RASHI, on the other hand, disagrees; see 20a, ועוד . In RASHI's view, the signature of the note nullifies any subsequent sales or gift of the property, even if the note is not transferred to the original buyer/donee until after the property has been transferred to a

second person.

49.c. ושמעינן -- follows RIF to עדיו בחתומיו זכין לו . RIF (fol. 6b) follows Rava and Rabah (Baba Mezia 35b) against Abaye. ROSH disagrees. In this case, the disputants are Abaye and Rabah, Abaye's teacher, and we hold to the rule that from the time of Abaye and Rava, the halakhah follows the later authorities even in cases where they disagree with their teachers.[33] ROSH also appears to favor the reading of Tosafot (Ha-ROSH 20a, ועוד), in which the reading is clearly רבה instead of רבא . See also RIF, fol. 11a: here, he reads רבה , although on fol. 6b he points without doubt to רבא .[34] See also ROSH to Baba Mezia 4:19: the Talmud never states Rava's view before that of the older Abaye. Since on 20a, we read "Rava" before Abaye, ROSH would clearly prefer to read רבה . ROSH adduces other arguments against RIF's ruling. Baba Mezia 35b does not necessarily prove that Rava disagrees with Abaye. In addition, Tosafot follows Abaye on this point.

RAMBAM, Hil. Malveh 23:5, holds that the way to prevent collusion in this instance is to write a שטר הקנאה . Hagahot Maimoniot, n. 6, stresses that this ruling follows the opinion of Rav Assi, Baba Mezia 13a, rather than that of Abaye here (עדיו בחתומיו זכין לו). R. Tam, on the other hand, follows Abaye. See TUR HM 39, 68b: R. Yizhak, as opposed to RIF and RAMBAM, follows Abaye.

49.d. והאי דאמר -- = Tos. Ha-ROSH 20a, ועוד . Abaye's rule " עדיו בחתומיו זכין לו " applies only when the writing of the document clearly precedes the act. If, however, the chronological precedence of the document is not obvious, Abaye follows the rule " עדי מסירה כרתי "; see Sanhedrin 28b. In that case, the property is transferred upon the transmission of the document to the recipient.

See 49.c., above: RIF and RAMBAM do not follow Abaye's halakhah.

50. מהנ/ -- = Tos. Ha-ROSH 20a, מצא . If a lost document is stored in a container, we return it to its rightful owner if he can provide an identifying mark of the container. We do not require an identifying mark for the document as well. Nor do we worry that the owner of the container lent it to someone else and thus might come into wrongful possession of the document.

RAMBAM, Hil. Gezeilah 18:3, does not state whether the identifying mark pertains to the document or the vessel. Note that Shulhan Arukh HM 65:9 includes the words " שנותן סימן בכלי " on the strength of the Tosafot position; see Be'er Ha-Golah, n. 9.

51. תכריך -- ROSH interprets this section of the mishnah on the basis of Tosafot Ha-ROSH 20a, אר . While the validity of a lost-and-found document is usually suspect, in this case the identifying mark informs us as to whether the documents were lost by the creditor or by the debtor.

52.a. מצא -- a continuation of the mishnah on 20a, which has formed the basis of 1:50 and 1:51, above. ROSH cites RASHI on the mishnah (20a, מצא שטר). He also refers to a certain " מפרש " who rules that even if the two parties to the document agree as to its nature, the finder must not return it: we suspect collusion. ROSH disagrees: we do not suspect collusion except in cases where the actual loss of the document gives rise to doubts concerning its validity (i.e., the document was discarded because it had been paid, etc.). In this case, the doubt exists due to the finder's lack of knowledge concerning its origin; the document was certainly not discarded. Thus, if both the creditor and the debtor agree on its disposal, we return the document to the appropriate party. The "commentator" spoken of here may well be RASHBA; see Magid Mishneh, Hil. Malveh 16:11 and Nimukei Yosef, fol. 11b.

RAMBAM, Hil. Malveh 16:11, does not discuss the case where both creditor and debtor agree as to the disposal of the document. He states merely that if the finder does not know the nature of the note, it should be held in escrow. See Resp. Ha-ROSH 105:8.

52.b. גמ -- ROSH adds a detail (see RASHI, 20a זה כורר) concerning the point at which the litigant may change his mind and appoint another judge.

RAMBAM, Hil. Gezeilah 18:13, explains שטרי כרורין , but he does not include in his discussion the power of the litigant to change his mind.

52.c. מאי חזיסה -- follows RIF to שטרי . = Tos. Ha-ROSH, 20b, ש"מ . In order to retrieve a lost bundle or packet of documents, the owner must identify it according to the number of documents included. It is not enough to describe the packet.

RAMBAM, Hil. Gezeilah 18:3, requires that the owner provide a "siman", an identifying mark; he does not specify that this must be the number of documents. Beit Yosef HM 65, 112b, describes RAMBAM's ruling here as "סתום". In Shulhan Arukh HM 65:10, he adopts the Tosafot position.

52.d. ואחר שלוה -- follows RIF.

53. א"ר ירמיה -- commentary on RIF.

54.a. ובסימפרן -- = Tos. Ha-ROSH 21a, דהא . The word " עדים " in the baraita on 21a is altered to " אשרתא "; "if there are no witnesses" must be understood to mean "if there is no judicial attestation".

RAMBAM, Hil. Malveh 16:9, rules likewise.

54.b. ולא מבעיא -- = Tos. Ha-ROSH 21a, דהא . The receipt is valid when held by a third party. This is certainly true when a

migo operates (had he wished, the third party could have given the receipt to the borrower); it is also true if this migo does not operate (as in a case where we have seen the receipt in the third party's possession, so that he could not have returned it to the borrower).

RIF and RAMBAM do not deal with this issue. See TUR HM 65, 117a, and SA OH 65:19: the migo issue becomes a subject for future halakhic discussion.

NOTES TO BABA MEZIA, CHAPTER ONE

[1]See also Nimukei Yosef, fol. 1a.

[2]The explanations of RAMBAN and Tosafot are combined in Nimukei Yosef, fol. 1a.

[3]Rather than לא ידעינן ; see Dikdukei Soferim, Baba Mezia 2b, n. 60.

[4]Indeed, Kesef Mishneh is surprised that Magid does not address the points which Karo himself raises.

[5]Mordekhai, n. 219, fol. 73c, also attributes these arguments to R. Meir of Rothenburg.

[6]Should he return it without witnesses, the bailiff is believed if he subsequently swears that he returned it.

[7]See Shulhan Arukh HM 75:2 and Be'er Ha-Golah, n. 6.

[8]As does the Hagahot Maimoniot, n. 8.

[9]Magid Mishneh does not ever refer to it.

[10]Beit Yosef cites Resp. RASHBA, I, n. 311, which serves as a source of some of Karo's arguments on behalf of RAMBAM. Although RASHBA admits that, in this case, the halakhah is not in agreement with the ruling in the Mishneh Torah, we are nevertheless obliged to defend RAMBAM from halakhic critique whenever we are able to do so. As we shall see, ROSH never voices a similar concern that we serve as "arms-bearers" for the RAMBAM whenever difficulties are raised against him.

[11]See Dikdukei Soferim, Baba Mezia 7a, n. 60, for the history of the reading " רב אשי " in this statement.

[12]BaH, HM 197, 33a, identifies the second view as that of the majority of decisors. See also Kesef Mishneh, Hil. Gezeilah 17:5.

[13]In explaining this distinction, ROSH advances beyond the relatively brief comment in his Tosafot.

[14]While making a statement such as: " אני מושך בהמה זו לקנות ראה הכלים שעליה "; see TUR HM 202, 44a.

[15]See also RASHBA, Hiddushim, Gitin 78b, and Beit Yosef, EHE 139, 43a.

[16]As opposed to RASHI, KIddushin 59a, עני .

[17]The printed Tosafot, 11a, זכתה , concludes that the statement teaches another point: if the animal is running or flying normally through the property, the property owner does not acquire the animal even if he makes a statement of ownership. RASHBA, cited by RaN in Shitah Mekubezet, fol. 40b,

interprets the statement as the normal reaction of the property owner in this situation.

[18]RaN, Shitah Mekubezetm fol. 43c, attributes the distinction between מצידה and מתנה to R. Yehudah al-Barceloni in Sefer Ha-Itim. In fact, ROSH utilizes here an argument advanced by Itim: the halakhah follows Rav Papa because he is the later authority.

[19]As in Tos. Eruvin, loc. cit. and in the printed Tosafot, Baba Mezia 12b, רבי.

[20]He cites RAMBAN as a source for these deductions, although RAMBAN eventually rejects them.

[21]This is a somewhat surprising statement; after all, the Tosafists regularly draw legal distinctions (חילוקים) which are not stated explicitly in the Talmud.

[22]ROSH follows the view of RASHI, 15b, הא רקתני.

[23]Thus, Karo follows RAMBAM even against both RIF and ROSH.

[24]In fact, RIF (fol. 8b) explicitly rejects the Tosafot comparison of the buyer to היורד שלא כרשות.

[25]That is, it is as logical to assume that R. Asher expresses his true position here, where he deals with the subject at length, rather than in those places where his treatment of it is more superficial. Pilpula Harifta apparently follow a "majority principle": ROSH seems to rule the other way in three places while our sugya is the only source for this contradictory position. TUR, by accepting the ruling here as authoritative, seems more concerned with "quality" (the nature of the arguments) than quantity.

[26]This view is shared by RASHBA; see Nimukei Yosef, fol. 8b.

[27]R. Asher's source for Rav Hai's ruling may be Hiddushei Ha-RAMBAN, 17a. Hagahot Maimoniot, Hil. To'en 7, n. 6, however, attributes the ruling not to Rav Hai but to RASHBAM, quoting verbatim from his commentary to the Alfasi. Concerning RASHBAM's commentary/hasagot on the Alfasi, see Urbach, Ba'alei Ha-Tosafot, pp. 56-57.

[28]See Yad Malakhi, n. 616. ROSH mentions this rule in his Halakhot to Baba Kama 9:22.

[29]RASHI's position is the same as that of RASHBAM, Baba Batra 135b, ראיזר היא. Tosafot, Baba Batra 135b, כל, parallels the Tosafot position here.

[30]In arriving at this conclusion, ROSH uses R. Sherirah Gaon's ruling as a means of refuting the objections raised by Tosafot against this very conclusion. See Beit Yosef, HM 66, 123b.

[31]The rule מעמד שלושתן was a rabbinic ordinance for the purpose of תקנת התגרין; the ketubah was not instituted for

the same purpose.

[32]Betrothal by means of a promissory note transferred to the woman in the presence of the debtor is valid. Obviously, the husband is not entitled to forgive the loan; otherwise, the woman would not be sure of her possession of the kiddushin money and would not have given her consent to the betrothal.

[33]See Yad Melakhi, n. 17, for a discussion of the rule אין הלכה כתלמיד במקום רבו and its limitation to the generations preceding Abaye and Rava. See also Encyclopedia Talmudit, v. I, p. 619. In Hilkhot Ha-ROSH, Eruvin 2:4, R. Asher expresses some doubt as to whether we follow the rule hilkhata ke-vatra'ei in a dispute between Abaye or Rava and one of their teachers. See Korban Netanel ad loc., n. 9.

[34]RIF, fol. 6b, indicates that " רבא " might in fact be " רבה ": ואי אמרת (האי) דאפליג כהדיה הוא רבה.

M. Tractate Baba Batra, Chapter One

1.a. השותפין -- ROSH explains that the minhag referred to in the mishnah is that of courtyard partitions, not building walls. RASHBA, Shitah Mekubezet 2a-b, presents a similar explanation in the name of "my teacher", probably R. Yonah.[1]

RAMBAM does not precisely explain " הכל כמנהג המדינה " in Hil. Shekhenim 2:15; Magid Mishneh must add the RASHBA/ROSH commentary to supplement the Mishneh Torah.

1.b. כגויל -- follows mishnah to של שניהם .

= Tos., 2a, כגויל . The rule " הכל כמנהג המדינה " does not apply to the thickness of the partitions; this depends upon rabbinic decision as specified in the mishnah. If local practice differs from the mishnaic dimensions, that practice may be ignored.[2]

RAMBAM, Hil. Shekhenim 2:18, seems to read the mishnah in a similar way: the measurements of thickness are absolute requirements and not subject to local custom. See Magid Mishneh ad loc. Compare, however, Maimonides' commentary to M. Baba Batra 1:1: "ושיעור זה עם הסיד שטחים על הכותל הכל כפי המנהג ". This implies that the thickness measurements are in fact subject to local practice.

1.c. גמ' -- explains why Alfasi rules according to lishna batra.

2. ושותפין -- not in RIF. Neighbors divide a courtyard but do not build a wall. After some years, A sues to require that a wall be erected. B replies that A has renounced his right to protection against "overlooking" (היזק ראיה) and that he, B, has a hazakah on his side in that he held the property for at least three years without being demanded to build a wall. B's claim is rejected. Hazakah in this instance would apply only if the mahzik were also the sole tortfeasor (e.g., if his window overlooked the

property of his neighbor and the neighbor did not protest for three years). In this case, both A and B are tortfeasors and both are injured parties. Perhaps A was waiting for B to demand that a wall be built in the courtyard. In addition, the damage resulting from a shared courtyard is unavoidable; with a window, it is possible not to gaze at the activities of one's neighbor. B must therefore aid A in building the wall. If, however, A and B formally renounced the protection from היזק ראיה , and if there are witnesses to this renunciation, they cannot subsequently change their minds. The case is similar to one in which a creditor forgives a loan: each neighbor forgives the other's financial obligation to build the wall. This renunciation need not be validated by a kinyan, inasmuch as loans may be forgiven without a kinyan.

See Shitah Mekubezet 3b-c. A number of authorities deal with this question along the same lines as does ROSH; among them are RABaD, Yosef ibn Migash, RAMBAN and RASHBA. The general conclusion is that B may reject A's demand for a joint wall only on the following grounds: 1) if we say that "overlooking" is not a "damage"; 2) if the concept of hazakah applies to damages. ROSH apparently relies on Tosafot as well; see R. Yeruham, Venice ed., 78a. See TUR HM 157, 120a.

RAMBAM, Hil. Shekhenim 11:4, agrees that hazakah does not apply in this situation. He does, however, require a kinyan should the parties desire to renounce their protection against היזק ראיה . See Magid Mishneh ad loc., who refers to the disagreement over the necessity for a kinyan even among those authorities who agree that the neighbors may renounce their protection.[3]

3.a. וכי -- = Tos., 3a, כי רצו . Explanation of the Gemara.

3.b. כשקנו מידן -- follows RIF to והחזיק בחלקו .

Rav Ashi upholds the legal force of the kinyan if each neighbor takes physical possession of his share of the courtyard. See Tos., 3a, רב אשי . When one neighbor takes possession of his share, the other half of the courtyard becomes the particular share of the second neighbor; that neighbor need not take formal possession in order to gain ownership for purposes of the kinyan. Nimukei Yosef, fol. 2a, attributes this view to " אחרים ".

RAMBAM, Hil. Shekhenim 2:10, repeats Rav Ashi's statement verbatim. Both partners must take physical possession of their shares of the courtyard. Magid Mishneh ad loc. attributes R. Asher's interpretation to " יש מי שפירש ", while SA HM 157:2 speaks of " ר"א ". Both of these authorities imply that RAMBAM is to be understood as requiring both neighbors to take physical possession of their shares.

3.c. תימה -- = Tos., 3a, רב אשי . Rav Ashi's statement teaches as well that one may acquire land by hazakah--in this instance--when the previous owner is not present and if he does not specifically authorize the buyer to acquire the land in this manner. If neighbors A and B agree to divide the courtyard, either one may take physical possession of his share of the courtyard, without the presence of the other and without an authorization from the other. The difference between this case and the general rule (where authorization is required; see Baba Batra 53a) is that here, both partners own the courtyard.

RAMBAM cites the general rule requiring specific authorization when the owner is not present: see Hil. Mekhirah 1:8. In Hil. Shekhenim 2:10, he merely recites Rav Ashi's statement without further elaboration. Karo, SA HM 157:2, refers to this position of R. Asher as ר"א ; he sees it as standing in opposition to the "preferred" (=RAMBAM) interpretation of Rav Ashi's statement.[4]

3.d. מקום -- follows RIF.

4.a. אמר רב חסדא -- RIF cites Rav Hisda's statement in Megillah, fol. 7b-8a. The prohibition against demolishing an existing synagogue before a new one is built is משום פשיעותא and not משום צלויי . This follows the Talmud's conclusion in Megillah 26b, as well as that of RIF. See also RAMBAM, Hil. Tefillah 11:13.

4.b. רה"מ -- ROSH continues citing the Gemara on 3b. The prohibition against demolishing a synagogue do not apply if the building is in danger of collapse or when it is impossible to build a second synagogue without tearing down the first (e.g., if the purpose is to enlarge the building on the same site). This second exception is not mentioned in the Talmud.

RAMBAM, Hil. Tefillah 11:13, mentions the first exception to the prohibition, but he does not mention the second. ROSH apparently deduces from the first exception (building in danger of collapse) that in any case where building cannot take place without demolishing the existing structure, the present synagogue may be torn down.

4.c. כי הא דרב אשי -- = Tos., 3b, עיילי ליה . Tosafot objects to the implication that Rav Ashi slept within the synagogue during the repair work. Eating and sleeping within the synagogue are prohibited in Megillah 28a.[5] The response is that Rav Ashi slept in the outer chamber where visitors normally lodge but not within the synagogue itself. This interpretation contradicts that of RASHI, Megillah 28b, על תנאי , who states that stipulations may be drawn up to allow "non-religious" activities of this sort in a synagogue even when the building actively serves as a synagogue. Tosafot restricts these stipulations to the use of a synagogue which is in ruins or which no longer serves as a synagogue. See TUR OH 151,

128b: a stipulation made concerning such use of a synagogue building is invalid as long as the building actually serves as a synagogue.

RAMBAM, Hil. Tefillah 11:11, prohibits any "non-religious" use of the synagogue building, even when it lies in ruins; he makes no mention of any stipulations. RIF, Megillah, fol. 9a, rules that stipulations do not allow "improper" use of a synagogue even when it is in ruins; he mentions no exceptions with regard to eating, drinking or sleeping. See RaN, ad loc., who cites RAMBAN as holding the Tosafot position.

5.a. הכל כמנהג המדינה -- follows RIF to כהוצא ורפנא . The mention of these two "inferior" materials, according to R. Tam, comes for a precise purpose: if the local custom allows courtyard walls to be built out of lesser materials than these, that custom is to be rejected. See Tos., 2a, בגוילל . The opposite interpretation is presented by RAMBAN, quoted in TUR HM 157, 121a: the phrase " הכל כמנהג המדינה " implies that any materials may be used for the building of these walls so long as they are permitted under local custom.

RAMBAM, Hil. Shekhenim 2:15, cites the Talmud's formulation as halakhah: the word " הכל " in the mishnah comes to include הוצא and רפנא in the list of permitted materials, even though these two materials are not specified in the mishnah itself. We do not know from his ruling whether he would follow R. Tam, prohibiting materials of lesser quality, or RAMBAN, accepting any materials that are in accord with local practice. See Hagahot Maimoniot, n. 20. Isserles cites the R. Tam position in HM 157:4. Without this statement, we would be able to attribute either interpretation--that of R. Tam or that of RAMBAN--to the vague formulation " הכל כמנהג המדינה ". RAMBAM and RIF do not address this ambiguity.

5.b. מ"י -- according to one view, the legal requirements concerning

the materials, thickness and stability of the courtyard wall apply only when the wall is to occupy property shared by both neighbors. If, however, one neighbor wishes to erect a wall entirely on his own property, the thus remove the potential "damage by overlooking", he may build that wall even from inferior materials not approved by local custom, much as he may build a parapet on his roof out of any materials he wishes. Another view holds that even if the wall stands entirely within the property of one of the neighbors, it must be built out of sturdy materials in order to forestall damage and contention. ROSH favors the first view; should the wall be flimsy and collapse, the second neighbor has legal recourse to protect himself from היזק ראיה . See TUR HM 157, 121b. R. Yeruham (Venice ed., 78a) attributes the rule in this case to "Tosafot". Hagahot Maimoniot, Hil. Shekhenim 3, n. 1, refers this halakhah to the Geonim, as does Mordekhai, n. 473 (to Rav Zemah Gaon). This appears, then, to be a Geonic tradition known to the Tosafists of the school of R. Meir of Rothenburg.

RIF AND RAMBAM do not discuss this halakhic point.

6.a. ל פיכך -- commentary on RIF/Gemara.

6.b. וכן בגינה -- ROSH presents a phrase from the mishnah and a digest of the Gemara. See Tos., 4a, הכי . In the case of a garden, the requirement of a partition depends entirely upon local custom. Some argue that the same rule applies even to a courtyard: if the local custom is not to erect partitions, we do not require them. In this view, the mishnah, which seems to require the building of a partition, refers only to a new city where there is no established local practice. Others argue that partitions are required in all cases in courtyards, even the local custom is not to erect partitions. It is for this reason that the mishnah refers to "minhag" only with respect to gardens, not courtyards. ROSH favors this second view. See

TUR HM 157, 119a-120b. RASHBA makes the same distinction between חצר and גינה, in much the same language; see Nimukei Yosef, fol. 1a.

RAMBAM, Hil. Shekhenim 2:16, refers to a garden as a place where the neighbors are required to erect a partition. He does not cite the distinction drawn by Tos/ROSH that, where the custom is not to build partitions in gardens, the neighbors may follow that custom. See TUR HM 158, 123 a-b, and especially BaH, ad loc.

6.c. מאי חזית -- according to R. Yosef ibn Migash, the requirement for a hazit applies only in a location where neighbor A cannot compel neighbor B to share in the building of the partition. In a couryard, however, the hazit does not serve as proof of A's sole ownership of the wall, since the presumption is that A compelled B to build the wall according to law and custom. ROSH disagrees: a hazit should serve as sole ownership of a wall built in a courtyard just as it does elsewhere. Inasmuch as ibn Migash does allow windows as a siman that A has sole ownership of the wall, we accept hazit as well. See TUR HM 157, 120b-121a, who attributes this ruling to Sefer Ha-Itim.

RAMBAM, Hil. Shekhenim 2:16, mentions hazit only with respect to a כקעה, not a courtyard. In 2:18, he rules that should the wall of a courtyard collapse the materials belong to both neighbors, unless one of them can supply "proof" to the contrary. Ibn Migash is quoted by ROSH as limiting this proof to a written document. As ibn Migash was the teacher of RAMBAM's father, we may assume that RAMBAM, as well, restricts the evidentiary function of the hazit to כקעה.

7. מתני׳ - גמ׳ -- follows RIF to וכן הלכה. See the haga'hah in the RASHI on 4b. The mishnah concerns a כקעה; yet we have already learned that it is not customary to fence a כקעה.

ROSH responds that the latter conclusion refers only to the necessity of preventing against the "damage of overlooking". If, however, a fence is erected so that the inner field is protected against monetary damage, the owner of that field is obligated to share in the cost of the fence. The owner may exempt himself from sharing in the expense if he states explicitly that he does not want a fence erected around his property.

RAMBAM, Hil. Shekhenim 3:3, applies this rule to ruins rather than to fields; see Magid Mishneh ad loc., who describes the interpretation of ROSH as opposing that of RAMBAM. See also Lehem Mishneh; the central issue is the question of minhag. Apparently, RAMBAM takes quite literally the conclusion that it is not customary to fence a field; therefore, this mishnah must refer to some other locale. If the sages exempt a field from the requirement of fencing, why would they then allow an owner to require his neighbor to build a fence in this manner? The answer in ROSH is that the surrounded neighbor can protest that he wants no fence and thus escape any financial responsibility toward the construction. RAMBAM's answer is that the mishnah applies to a "ruin" and not to a field. This, however, leaves the difficulty that a "ruin" is also a place where it is not customary to erect a fence. See Sefer Me'irat Einayim, HM 158, n. 11, and Bi'ur Ha-GRA, HM 158:6.

8. מתני' -- the mishnah's phrase " אין מחייבין אותו " does not mean that, while B need not share A's expenses in building a higher wall A may yet build the higher wall without B's consent. B has the right to half the space on top of the existing wall, a space he would lose should A raise the wall. Rather, the interpretation is thus: B's silence while A builds a higher wall is not to be construed as consent. B is not required to share in the expenses until he actually makes use of the higher wall. See TUR HM 157, 122a-b: ROSH and R. Yonah agree that B has the right to prevent A

from raising the wall. The opposing view is attributed to " יש אומרים ".[6]

RAMBAM, Hil. Shekhenim 3:1, does not specify whether B has the power to prevent A from raising the wall. SA HM 157:9 cites both opinions; although the view opposing that of ROSH is cited as " יש אומרים " BaH declares that Karo fails to decide the matter.[7]

9.a. גמ' -- follows RIF to בזמנו . When the creditor does not specify a due date for the loan, the date is automatically set at thirty days; the debtor, moreover, may claim to have paid the loan within this period. The rule of Reish Lakish that a creditor is not likely to pay before the due date refers to a loan where a due date was specified in the presence of witnesses. See Tos., 5a, הקובע , where this view is attributed to R. Yizhak. TUR HM 78, 164a, recites this law, which Beit Yosef says is the opinion of all authorities. See also Resp. ROSH 77:3.

RAMBAM, Hil. Malveh 11:6, states that an individual is not likely to pay a loan before its specified due date. He does not, however, clearly differentiate the rules concerning this loan and the loan without a specified due date; this differentiation is supplied by Hagahot Maimoniot, n. 9. Mishneh La-Melekh, n. 6, cites the responsum of ROSH, indicating that RAMBAM does not clearly distinguish between the two types of loan.

9.b. והלכתא כר"ל -- follows RIF to בגו זימניה . See Tos., 5b, ואפילו . The rule of Reish Lakish applies to orphans and even to minor orphans; just as we do not presume that a debtor paid the loan before the (specified) due date, we also do not presume that he deposited a pledge with the creditor before his death.[8] ROSH thus rejects the view of R. Yonah, who argues that it is not unusual for security to be offered before the loan falls due. In this, he also rejects the conclusion of Tosafot, which

rules that collection must not be taken from minor orphans. See TUR HM 78, 163 a-b, and Nimukei Yosef, fol. 3a, citing " מפרשים ".

RAMBAM, Hil. Malveh 14:1, seems to apply this rule to all orphans, whether adults or minors. See Magid Mishneh ad loc. and Beit Yosef to TUR loc. cit. (This view is not unanimous; see Lehem Mishneh, n. 1). It is interesting that, in the course of this long halakhah, ROSH mentions a number of authorities: R. Yonah, RIZBA, R. Yizhak, Hai Gaon, RAMBAN. He does not, however, cite the ruling of RAMBAM, who apparently agrees with him.

9.c. איכעיא להו -- follows RIF, with some variations, to ומיפטר . ROSH cites RASHI's comment to the mishnah, 5a, עד שיכיא התובע , which declares that if witnesses testify that the defendant did not pay immediately upon demand, we no longer presume that he paid. This is problematic: suppose he paid later? Suppose he was trying to buy time until he could (and did) pay later? This is the same difficulty which ROSH raises against RASHI in Hilkhot Ha-ROSH, Baba Mezia 1:42.b., above. In the case here, we presume the defendant paid his share of the wall unless witnesses testify that they know he did not pay; it is not enough that they testify that he did not pay on demand.[9] See TUR HM 157, 122a.

10. סמק -- follows RIF.

11.-12.a. א"ר נחמן -- ROSH explains the terms הוררי and כשורי . Whether we accept or reject the reading of the "Spanish texts",[10] we still follow the ruling of Rav Yosef; it is most unusual for a person to contract for use of a wall for light construction but not heavy construction. If the hazakah is legally established for one, it is valid for the other. This hazakah, according to ROSH, is established when the construction has endured for three years and is accompanied by the builder's claim that he purchased or received the construction permit from the owner of

the wall. See TUR HM 153, 98b, who attributes the demand for a formal claim to R. Asher and to R. Tam. See also the "Tosafot" cited within RASHI on 6a, which brings a view quite similar to that cited by TUR in the name of RASHBAM, loc. cit.

RAMBAM, Hil. Shekhenim 8:7, does not require a claim: the owner's silence is enough to validate the hazakah. Magid Mishneh ad loc. explains that RAMBAM follows the Geonic view that in this type of hazakah no claim is required; this view is opposed to that of " רבותינו הצרפתים ", who require a claim.

11.-12.b. וכתב ה"ר יונה ז"ל -- ROSH rejects R. Yonah's opposing view, namely that the construction must not be made heavier than the original hazakah. The example in Baba Mezia 117b which R. Yonah cites involves a case where the hazakah (i.e., the "light" construction) existed when the partners purchased the house and the attic. If no previous hazakah existed, however, the owner of the attic does not forego his right to heavier construction merely because he begins with lighter materials. See Nimukei Yosef, fol. 3b: RABAD also responds to the difficulty raised by Baba Mezia 117b, though his resolution of the difficulty differs from that of ROSH.

11.-12.c. ונראה -- the owner of the construction is presumed to be half-owner of the wall as well. Thus, should the wall collapse, half its stones belong to him. He does not, however, own part of the ground on which the wall stands. This agrees with the view of R. Yonah, as cited in TUR HM 153, 98b-99a, as against that of Sefer Ha-Itim. TUR also cites RAMBAM as disagreeing with ROSH, ruling that the owner of the construction also owns a share of the ground beneath the wall. This should apparently read "RAMBAN", as Beit Yosef cites it. There seems to be no mention in the Mishneh Torah of the ownership of the stones and the ground in case the wall collapses.

13. ואמר -- ROSH adds that this hazakah, like those described in 11-12.a., is established after three years and must be accompanied by a formal claim.

14. אמר רב נחמן -- follows RIF to הרי חזקה . = Tos., 6b, האי . Ravina speaks of a hazakah in regard to a sukah attached by one neighbor to a wall belonging to another. Tos/ROSH declare that this hazakah is not a presumption of ownership but rather a presumption like the one in the mishnah on 5a: the builder of the sukah cannot claim that he aided his neighbor in building the wall until thirty days have passed since the building of the sukah. This is not a presumption of ownership (that the owner of the wall allowed the sukah to be built); such a presumption must be established after three years and the filing of a formal claim.

RAMBAM, Hil. Shekhenim 8:7, sees this presumption as one of ownership, in that the owner of the wall who does not protest within thirty days is assumed to have given his permission for the sukah. Both Magid Mishneh ad loc. and Nimukei Yosef, fol. 3b-4a, discuss the dispute among the poskim concerning hazakot of this type. Maimonides belongs to the camp of those who rule that certain presumptions may be established "immediately" upon the failure of the other party to protest the new construction. R. Asher follows the line of R. Tam which views all presumptions of ownership as requiring a three-year waiting period. RASHI, 6a, לא הויא חזקה , belongs to the first camp of authorities. Alfasi, fol. 3b-4a, recites the language of the Talmud and thus, like the Talmud itself, may be given a Tosafot reading. RAMBAM's more precise and definite formulation, on the other hand, clearly conflicts with the Tos/ROSH understanding of this halakhah.

15.a. אמר אכיי -- = RIF, with ROSH's commentary.

15.b. אמר מר -- = RIF, Gemara, with ROSH's commentary.

16. אמר רב נחמן -- ROSH summarizes the halakhah but does not enter the dispute over which type of roof is exempt from a four-cubit parapet; see Shitah Mekubezet to 6b. RAMBAM, Hil. Shekhenim 3:6, rules that these roofs are exempt because they are not suitable for residential use. Others write that the exemption depends upon the distance of the roofs from each other: i.e., the likelihood that the owner of one roof will perceive that his neighbor is watching him.[11] ROSH does rule that the owner of the roof must build a four-cubit parapet over the adjoining courtyard and that the owner of the courtyard is not required to share in the expense. RAMBAM does not mention this detail. Magid Mishneh cites RASHBA's ruling that the owner of the courtyard must share in the building of the parapet up to a height of ten tefahim; the Magid does not suggest that RAMBAM's ruling requires this interpretation.[12]

17.a. אידמר -- follows RIF to מלמטה וכונה . See Tos., 6b, שתי . ROSH explains the reasoning behind the ruling of Rav Hisda (supported by the baraita on 6b) that the owner of the higher courtyard must aid the owner of the lower courtyard in the building of the wall. Tosafot explains the opposite side of the rule: the owner of the lower courtyard must aid the neighbor, since when the neighbor stands in his higher courtyard he is visible to those in the lower. The owner of the lower courtyard must share the expense of building the wall to a height of four cubits above the ground level of the upper courtyard.

RAMBAM, Hil. Shekhenim 3:7, rules that the owner of the lower courtyard shares the expense of the wall only to the level of the ground of the higher courtyard; from there, the owner of the higher courtyard is responsible for building the remaining four cubits. Magid Mishneh ad loc. explains that Rav Hisda's requirement for the owner of the lower courtyard to share in the wall

extends only to the point at which he can no longer see into the higher courtyard. From that point, the owner of the higher courtyard has sole responsibility for raising the wall, so that he cannot see into the lower courtyard. See also Nimukei Yosef, fol. 4a. RIF, who reproduces the language of the Gemara without comment, can be interpreted according to the Tosafot understanding of Rav Hisda's ruling ("the opposite side of the rule", above). RAMBAM, on the other hand, formulates his own conflicting view into his halakhah; the Mishneh Torah here cannot be interpreted according to the Tosafot understanding of our passage.

17.b. וכן אם הצרו -- if A's courtyard is higher than B's roof, A need not build a partition of four cubits, since there is no damage of overlooking from a courtyard to a roof. A must, however, build a partition of ten tefahim in order to prevent against trespass onto B's property; see Rav Nahman's statement on 6b.

RAMBAM, Hil. Shekhenim 3:7, states that if A's courtyard is higher than B's roof, A owes nothing to B. Apparently, RAMBAM follows the language of the baraita on 6b and ignores the difficulty raised against the position of Rav Nahman along with the resolution of that difficulty. See Magid Mishneh ad loc., who expresses astonishment that RAMBAM, who follows Rav Nahman in 3:6, would ignore the Gemara's conclusion concerning his position in 3:7. Beit Yosef, HM 160, 126a, defends the RAMBAM (as well as Alfasi, who also recites the baraita without comment): perhaps Rav Nahman limits his requirement of a lower partition only to adjoining roofs but does not apply it to the case here. We might also ask whether this is an example of the well-noted tendency of RAMBAM to rule according to clear statements as opposed to the conclusions of Talmudic argumentation.[13]

17.c. תניא -- follows RIF.

18. הנהו -- follows RIF to ולא משתעבד לך .

ROSH adds that both the owner of the upper dwelling and the owner of the lower dwelling share in the cost of demolition and rebuilding. RAMBAN arrives at this conclusion as well in his Hiddushim to 7a.

RAMBAM, Hil. Shekhenim 4:6, requires demolition and rebuilding in the case described in the Talmud, but he does not specify that the two owners must share the costs. Indeed, Magid Mishneh ad loc. refers to a dispute among the authorities on this point.

19. ההוא -- follows RIF.

20.a. הנהו -- follows RIF, with some omissions and interpolations, to אמת המים זה על זה . = Tos., 7a, א"ל . According to R. Tam, the charge that a wall is "blocking light" from the house cannot be taken literally. If there were no light in the house, there is no doubt that the original agreement dividing the property would have covered this, inasmuch as a house with a light is useless. Rather, the house-owner here complains that the garden-owner's wall prevents him from seeing his fields beyond the garden. With this interpretation, we can understand the Gemara's conclusion that the two did not contract concerning "light" when they divided the property originally. R. Yizhak rejects this interpretation, on the grounds that Ravina attack Rav Hama's view by citing the baraita concerning the vineyard and surrounding field (7a). That baraita assumes that the disputed property right is necessary to the use of the vineyard, whereas the ability to see one's fields (according to R. Tam's understanding) is not of similar importance in the use of the house. We msut interpret "light" literally--but not too literally. This is a case where the wall blocks some but not all of the light that reaches the house. We can assume that the brothers may not have contracted concerning the loss of

partial light to the house; we cannot make that assumption concerning the loss of all the light. If the wall blocks all of the light, we hold that the wall-owner has treaded upon the hazakah of the house-owner. ROSH concludes that, as long as the wall does not block all the light from the house, the house-owner does not have a valid claim against the wall-owner, unless he can prove that the two had previously contracted concerning partial light.

RAMBAM, Hil. Shekhenim 7:10, merely recites the Gemara's conclusion that the wall owner may "darken" the house with his wall. He does not distinguish, as do R. Tam and R. Yizhak, concerning degrees of darkness.

20.b. כתב הראב"ד ז"ל -- RABAD rules that, while the courtyard-owner may build a wall that blocks the windows of the house-owner, he may not demand that the house-owner block up his own windows, even on grounds of "damage of overlooking". ROSH disagrees; if the house-owner has no hazakah over the light from the windows, he has no right to cause damage to his neighbor by looking through them. In addition, ROSH cites other arguments and concludes that RAMBAM agrees that the house-owner must block up his windows. See Hil. Shekhenim 2:12 and Magid Mishneh ad loc. TUR, HM 154, 107a, attributes the "RABAD" position to RAMBAN (see his Hiddushim, 7a) and adds that ROSH rejects this view; he does not, however, mention RAMBAM. Joseph Karo, in his Bedek Ha-Bayit ad loc., argues that this is not the proper interpretation of RAMBAM: the phrase " וסותם או החלון " in Hil. Shekhenim 2:12 refers to the right of the courtyard-owner to build a wall that blocks the light from the house. It does not mean that the courtyard-owner may force the house-owner to block up his own walls. Karo asserts that "all the poskim" with the exception of ROSH and RIVASH (Resp. 289) accept this interpretation of RAMBAM. BaH disagrees, favoring the ROSH/RIVASH view of the pesak in Mishneh Torah. Nimukei Yosef, 4b, interprets

RAMBAM according to the ROSH/RIVASH view, as does RAMBAN, who disagrees with him.

The RABAD/RAMBAN view coincides with RASHI's interpretation of the phrase " ולא חלונות ", 7b. This empowers the courtyard-owner to build a wall, but not to force the house-owner to block up his windows. ROSH, on the other hand, grants this second power to the courtyard-owner. While RAMBAM's formulation is vague and its interpretation in dispute, ROSH clearly cites it in support of his own view. His interpretation of RAMBAM is likewise supported by RIVASH and BaH. Note that ROSH cites RAMBAM only after he has rejected RABAD's position with arguments of his own.

21. ההוא -- follows RIF to דיתבי דייתיה .

ROSH cites the ruling of R. Yosef ibn Migash that Rav Hama's position concerning the receipt (shover) is not limited to a note which falls due during the lifetime of the father of the orphans in question. Even should the due date fall after the father's death, we assume that if the receipt were valid, the debtor would have produced it during the father's lifetime and demanded cancellation of the note.

RAMBAM, Hil. Malveh 17:8, makes no mention of this point. See Magid Mishneh ad loc., who describes the dispute among the poskim over the effect of the due date on the applicability of this law. See also TUR HM 108, 24a.

22.a. מתנ׳ גמ׳ -- follows Gemara to מזמרות .[14]

See Tosafot, 7b, לפי שכח . ROSH cites the Tosafists' ruling that all communal obligations are calculated according to wealth and income except in cases where lives are in danger. He adds that all demands for taxes and ransom by Gentiles must be paid according to the wealth of the members of the community (i.e., the rich give more), since even if these demands are accompanied by torture and physical oppression the Gentile rulers' primary

concern is monetary. See TUR HM 163, 129b.

RAMBAM, Hil. Shekhenim 6:4, mentions none of this. In Hil. Aveidah 12:11 he does cite the Tosafists' example from Baba Kama 116b, where calculation of ransom payment is made according to individual wealth. He does not, however, draw the general rule that whenever the issue is monetary the calculations are made according to wealth.

22.b. ואיכא דאמרי -- follows RIF to מסמרות .

ROSH cites R. Yosef ibn Migash, who concludes that the two versions of R. Yohanan's statement do not conflict. Calculations of this sort are made according to individual wealth. The second version, which declares that calculations are made according to the nearness of the houses to the city walls, serves to add to the law expressed in the first version: once assessments are set according to wealth, further adjustments are made according to location.

RAMBAM, Hil. Shekhenim 6:4, follows the second version: calculations are made according to distance. This follows RIF's conclusion, fol. 5a. Apparently, RIF and RAMBAM see these versions as conflicting, whereupon they rule according to the second version. Ibn Migash, on the other hand, does not regard these as conflicting sources, so that he can term wealth as the dominant of the two factors ("ikar"); see Magid Mishneh ad loc., Nimukei Yosef, fol. 5a, Beit Yosef, HM 163, 129b.

In this halakhah, sections a and b, R. Asher integrates the Tosafot with a similar ruling of a Spanish halakhic authority. He first cites the Tosafists' conclusion that, as a general principle, wealth is the determining factor in assessments of this type as long as lives are not in danger. He thereupon cites ibn Migash, who decides that the wealth factor applies to this case even though the "lishna batra", the second version of R. Yohanan's

statement, implies that the assessments are made according to the location of the houses. "Lishna batra" is often the authoritative version of the halakhic statement;[15] the ibn Migash comment addresses this point directly. In this way, ROSH refutes the possible claim that our halakhah constitutes an exception to Tosafot's general rule. In his role as "editor" here, R. Asher does more than simply quote the view of the authority whom he favors; he provides the student with a carefully-crafted halakhic essay whose integrity depends upon both Tosafot and ibn Migash.

22.c. ודכרים אלו -- ROSH further cites ibn Migash,[16] who rules that the distance of the houses from the walls is not a factor in calculating taxation during wartime. Location of the houses makes a difference only with respect to occasional violence and robbery. At a time of general breakdown of social order, however, all residents of a city are in equal danger. Thus, calculations are made on the basis of wealth or, if lives are at stake, the number of family members per household. See TUR HM 163, 129b.

Neither RIF nor RAMBAM make this distinction in the rules of tax assessment; see Hil. Shekhenim 6:4 and Magid Mishneh ad loc. The approach of Tosafot, ibn Migash and ROSH differs markedly from that of Alfasi and Maimonides on this entire subject. Whether on the basis of a Talmudic parallel ignored by RIF and RAMBAM (Baba Kama 117b, cited by Tos/ROSH) or on the basis of the internal logic of the legal situation (ibn Migash/ROSH), the former group of authorities creates a graded system of priorities in tax assessment for security purposes. RIF and RAMBAM merely follow the second lishna of the present sugya. The Tosafot-ibn Migash-ROSH position results from a broader intellectual focus, which considers textual and logical factors not found in the RIF/RAMBAM approach.[17] Alfasi and Maimonides, on the other

hand, determine the halakhah on the basis of the present text alone, read through the filter of a rule concerning the halakhic authority of lishna batra. Other texts and legal reasoning do not affect this halakhic thinking on this issue.

23. תוספתא -- follows RIF.

24. כופין -- follows RIF.

25. רב נחמן -- follows RIF, with short explanation of ארנונא.

26.a. רב פפא -- follows RIF.

26.b. ההוא דמי -- R. Yosef ibn Migash deduces from the cases on 8a that Torah scholars are exempt from sharing in the community's burden of taxation. ROSH adds that this exemption applies to those rabbis whose study is their primary occupation and to those who earn just enough in order to survive. Other scholars, who earn significant incomes, are required to pay taxes. See also Resp. Ha-ROSH 15:7,[18] and TUR YD 243, 175b.

RAMBAM, Hil. Talmud Torah 6:10, makes no distinctions between rabbis who earn incomes and those who do not: all are exempt from taxation. See also his commentary to M. Avot 4:7.[19]

27. כמה -- follows RIF.

28. תניא -- follows RIF.

29.a. אמר רב אסי -- follows RIF to רמינן עליה. The Talmud concludes that orphans are not exempt from taxes that support community defense.[20] R. Yosef ibn Migash deduces from this that orphans are exempt from other forms of taxation. ROSH objects: all forms of community taxation are actually for purposes of defense. Orphans must, therefore, pay all tax assessments. See TUR HM 163, 131a: orphans are taxed "לכל צרכי העיר ושמירתה".[21]

RAMBAM, Hil. Shekhenim 6:6, requires that orphans pay all taxes for purposes of community defense. This follows the wording of the Talmud, but it does not tell us whether all community taxes are regarded as defense revenues or whether there are other forms of non-defense taxation from which orphans are exempt.

29.b. רבא -- follows RIF.

29.c. ת"ר -- follows RIF to ולהסיע על קיצתן . = Tos., 8b, ולשנותה . R. Tam rules that zedakah funds may be diverted to meet other community needs; a gift to the community is given with the implied stipulation that the community may spend these funds as it sees fit. R. Yosef ibn Migash, on the other hand, limits this community discretion to other charitable purposes: i.e., a donation for a particular charitable purpose may be diverted, as long as it is spent on the poor in some way. Ibn Migash rejects the proof offered for R. Tam's view from Arakhin 6b and supplies as evidence for his own position M. Shekalim 2:5. ROSH, however, argues that M. Shekalim refers to ad hoc donations to charity and not to established funds and institutions; in the case of the latter, the trustees are empowered to divert the funds to meet other community needs. See also Yer. Shekalim 2:5, 7a. TUR YD 256, 189 a-b provides a summary: ROSH agrees with R. Tam that the community may divert charitable funds to any perceived need. This power is limited, however, to funds raised by established zedakah institutions. If the funds have been raised for a specific, one-time purpose, they may not be diverted elsewhere.

RAMBAM mentions this rule in Hil. Matanot Ani'im 8:6 and 9:7. He assumes that R. Tam position: the community may divert charity funds as it sees fit. He does not mention R. Asher's distinction between fixed and "emergency" appeals. See RADBAZ to 9:7: his assertion that "all the aharonim" reject the

opinion ascribed to ibn Migash[22] in favor of that of RAMBAM ignores the position taken by ROSH and TUR. See Siftei Kohen, YD 256, n. 7.

30. אמר מר -- follows RIF, Gemara.

31. מצא -- follows RIF, with brief comment.

32. אמר אביי -- follows RIF.

33. הנהו -- commentary on RIF/Gemara.

34. ת"ר -- follows RIF.

35. תנן -- follows RIF.

36. אמר רב אסי -- follows RIF.

37. מתני'-גמ' -- follows RIF while omitting a proof which RIF adduces, on the grounds that the point is obvious.

38.a. אמר -- follows RIF to חולקין בשוה .

RASHI (11a, חצר מתחלקת) interprets this rule as a case where the father gives his property to his two sons before his death; the brothers divide the courtyard according to the number of doorways in each house. R. Yizhak b. Asher agrees with this view, citing "Geonim" in support of it. He continues, however, that this rule applies only when the brothers receive the courtyard as a gift. In other cases--inheritance, purchase, through partnership--the courtyard is divided equally between them, regardless of the number of doorways in the houses. ROSH states that RASHI's distinction between gift and other transactions applies only to the opinion of Rav Huna (entire courtyard divided according to the number of doorways). According to the view of Rav Hisda (each doorway receives four cubits from courtyard, the remainder of the courtyard is divided in half), there is no need for this distinction. Heirs normally divide the inheritance according to appraisal of monetary value; the appropriation of four cubits per doorway is a similar case of appraisal/evaluation, so that the householder with more doorways

compensates his neighbor. ROSH applies this rule concerning the implied appraisal to a case where the two houses are unequal in value. If, however, the houses are equal in value and no appraisal need be made, the distinction between gift and other transactions remains. See TUR HM 172, 141 a-b, and Beit Yosef ad loc.

RAMBAM, Hil. Shekhenim 2:1, does not make this distinction; see Magid Mishneh ad loc. Hagahot Maimoniot, n. 2, as well as Magid, cites RASHI's interpretation that this rule involves a gift transaction; it is this interpretation which allows subsequent authorities to distinguish between gift and other transactions.

38.b. תניא כוותיה דרב חסדא -- follows RIF to ד"ה אמות בחצר . ROSH rules that even if the doorway is less than four cubits wide, the householder receives a space of four square cubits for that doorway from the area of the courtyard. This is considered the minimum space needed in order to make use of the doorway (e.g., to load and unload). See TUR HM 172, 140b-141a.

RAMBAM, Hil. Shekhenim 2:1, seems to limit the width of the allocation to the width of the doorway, even if the doorway is less than four cubits wide; see Magid Mishneh ad loc. Karo, in Bedek Ha-Bayit HM 172, 140b,[23] admits that RAMBAM can be interpreted in this way but argues that, inasmuch as ROSH cites a powerful proof (need for minimum useful space), RAMBAM speaks here only of the average doorway, which is four cubits wide. Although he does not discuss a case not mentioned specifically in the Gemara, RAMBAM would, claims Karo, agree with ROSH that the space allocated to each doorway must be a minimum of four square cubits. BaH, on the other hand, prefers to read RAMBAM according to his literal sense, which coincides as well with RASHI, 11a, נותן לכל פתח . RAMBAM can be interpreted in either direction, although logic

would favor the literalist approach of Magid and BaH over Karo's attempt to reconcile RAMBAM with R. Asher.

39.a. ואע"ג -- according to R. Yonah, the rule that courtyard space is allocated according to the number of doorways does not apply if the owner gives the two houses to one son and the courtyard to the other. In that case, we assume that each son received full rights to the use of his property. This is an extension of the rule מוכר בעין יפה מוכר .

RIF and RAMBAM do not make this halakhic distinction.

39.b. ולפי הגאונים -- ROSH cites a Geonic ruling that declares that, in a courtyard of eight square cubits, the owner of the house with two doorways cannot demand four square cubits for each doorway. Rather, one doorway receives four square cubits and the remainder of the courtyard is divided equally.

RIF and RAMBAM do not provide this detail.

39.c. וכתב הר"ר -- this issue here is the פירא דסופלי . ROSH interprets it as separate from the house, so that the " פתח " spoken of is the doorway of the house rather than the doorway/opening of the פירא . See TUR HM 172, 142a, as well as Nimukei Yosef, fol. 7a.

RAMBAM, Hil. Shekhenim 2:2, views the פירא as similar to a house. The "doorway" of which Amemar speaks is the opening to the פירא . See Magid Mishneh ad loc., quoting ibn Migash, as well as Hasagat Ha-RABAD ad loc.

40.a. אמר רב הונא -- follows RIF, with explanation of אכסדרא . See Tos., 11b, הכא . The aksadra is an open area in front of the doorway. If it consists of four square cubits, the houseowner is

not entitled to four additional cubits from the courtyard. If the aksadra consists of less than four square cubits, the houseowner is given a supplementary space from the courtyard so that he has access to a usable space of four square cubits in front of his door. See TUR HM 172, 142a, where R. Asher's position is cited in the name of R. Yizhak.

RAMBAM, Hil. Shekhenim 2:3, does not explain the nature of this aksadra; see Hagahot Maimoniot, n. 3. The distinction between definitions (whether the aksadra is closed off or open toward the courtyard) has concrete halakhic implications; see BaH, HM 172, 143a.

40.b. ת"ר -- follows RIF.

40.c. בעא מינידה -- ROSH cites R. Meir of Rothenburg. While RASHI interprets the alley spoken of in this question as the alley on the opposite side of the house (11b, כנגי מבוי מעכבין), R. Meir suggests that this interpretation is superfluous. The alley spoken of is the alley in which the houseowner presently has his doorway. See TUR HM 162, 127b-128a, and Nimukei Yosef, fol. 7b.

RAMBAM, Hil. Shekhenim 5:14, appears to accept the interpretation offered by RASHI; see Beit Yosef to TUR, loc. cit. Karo offers an alternative interpretation of RAMBAM (143a), but this is clearly forced.

41. תניא -- follows RIF.

42.a. אמר רב הונא -- ROSH cites the interpretation of R. Hananel, who is supported by R. Yizhak (Tos., 11b, אחר). The case refers to the owner of the innermost courtyard, which borders the dead end of the alley. RASHI (11b, שביקש לסתום), on the other hand, sees it as referring to any of the courtyards along the length of the alley.

RAMBAM, Hil. Shekhenim 5:16, interprets the case as does RASHI. See Hagahot Maimoniot, n. 20, as well as Beit Yosef and BaH, HM 162, 128a-b.

42.b. מיתיבי -- follows RIF to הלכה כרבי מחבירו . ROSH defends RIF's ruling, on the grounds that had Rav Huna known of the dispute between Rabbi and R. Shimeon b. Elazar, he would have agreed with Rabbi. Nimukei Yosef, fol. 7b, attributes this reasoning to "geonim".

43.a. אמר אביי -- commentary on RIF.

43.b. בית סתום -- commentary on RIF.

43.c. אמר רבה בר רב הונא -- follows RIF.

44. אמר רב ענן -- follows RIF/Gemara to ועיילי להתם . The rule that passersby on a public thoroughfare can prevent the houseowners from blocking their doorways opening onto an alley conflicts with Rabbi's decision in 42.b.: the houseowners may block off their "four cubits" if those neighbors closer to the end of the alley agree to this. ROSH does not accept the suggested resolution that Rabbi deals with an alley which opens onto karmelit rather than reshut ha-rabim. Rather, Rabbi's law concerns the residents of a side alley which opens onto a main alley that itself opens onto a public thoroughfare. The residents of the small alley need not worry that passersby will need to use their alleyspace in the event of heavy traffic. See TUR HM 162, 127b.

RAMBAM, Hil. Shekhenim 5:13, simply recites the rule that the passersby on the public thoroughfare may restrain the alley-dwellers from blocking their doorways. Like Alfasi, he does not deal with the potential contradiction to Rabbi's ruling, nor does he address the possible distinction between karmelit and reshut ha-rabim. It is possible to read the Mishneh Torah rule as limiting the restraining power to passersby in the public thoroughfare; ROSH, on the other hand, grants that power to passersby in karmelit as well.

45. ולא -- commentary on RIF.

46.a. פשיטא -- see Tos., 12b, חלק . The first-born son takes

his portion of the field as one unified section. This is valid, however, only if the portions of the inheritance are of equal value (e.g., if the father bequeathes three fields of equivalent value, the first-born takes two of the fields together; the other son does not receive the middle field). If the fields should differ in value, the first-born takes his double portion in each of the fields as a separate unit. He does not take his portion entirely from the most valuable field, even should he do so by means of appraisal. See TUR HM 174, 146b.

RAMBAM, Hil. Shekhenim 12:2 and Hil. Nahalot 3:8, makes no exceptions to the general rule that the first-born receives his double portion as one unified section. Magid Mishneh, in Hil. Shekhenim, holds that both RAMBAM and "his teacher"[24] agree that the first-born always receives an undivided portion, even if the fields or sections of the same field should differ in value; "other authorities", meanwhile, agree with the position outlined by R. Asher. Beit Yosef to TUR loc. cit. expresses some difficulty to RAMBAM's position, but he explains that, to RAMBAM and ibn Migash, the rule that the first-born receives a double, unified portion is simply a Scriptural commandment (גזירת הכתוב , Deut. 21:17) and admits no exceptions based upon logical inference.[25]

46.b. יכם מאי -- commentary on RIF.

46.c. ההוא -- follows RIF to דבי בר מריון .

= Tos., 12b, מעלינן . Rav Yosef rejects Rabah's contention that the family's refusal to allow the one brother to take his inheritance in an adjacent field is "midat Sodom". He also rejects that contention in the following case, on the grounds that the two fields receive unequal irrigation. From this, RASHI deduces that the first case must refer to non-irrigated fields which nevertheless receive varying amounts of rainfall. In his view,

"midat Sodom" does not apply when the portions of the inheritance are of unequal quality or economic value. Thus, the other heirs may prevent the one from demanding a portion adjacent to his existing property. Arguing that RASHI's distinction between irrigated and rain-watered fields does not apply, R. Tam explains that the refusal of the other heirs to part with the adjacent field (without exacting a high price for it) is not based upon differences in quality. The other heirs simply have a high stake in that field and are willing to make their brother pay dearly for it. Rav Yosef, in this view, believes that the other heirs have this right, inasmuch as they would be entitled to keep the adjacent field should that portion be allocated to them in the lottery which determines the division of the inheritance. Rabah, on the other hand, says they do not have this right; the increased price of the field is due solely to the fact that it is adjacent to the brother's property. The halakhah follows Rav Yosef. Both R. Yonah and RABAD rule that, if the portions of the inheritance have already been appraised, one of the heirs may demand the right to buy a particular portion by offering a price for it that is higher than the appraisal. Should the other heirs wish to withhold that portion from him, they must buy it at the price he has specified. The offering of a higher price nullifies the usual procedure of dividing the inheritance by means of lottery. See TUR HM 174, 144b-145b.

RAMBAM, Hil. Shekhenim 12:1, follows Rabah:[26] if the fields are of equal quality or value, the other heirs have no right to withhold the adjacent field from their brother. TUR expresses R. Asher's disagreement, based upon R. Tam's understanding of the position of Rav Yosef. In Resp. Ha-ROSH 97:2, however, R. Asher follows RASHI against R. Tam: the heirs may withhold the adjacent field from their brother only if it has a higher economic value than the other fields; they may not withhold it on the sole grounds that the brother would

pay more to get it. Indeed, in the responsum, ROSH answers the various difficulties raised by Tosafot against RASHI's position.

TUR ignores this responsum, in accordance with the rule that the halakhot, which are "later", take precedence over the responsa; see BaH, 144b. This general rule, which holds that the halakhot of the ROSH were written at a later date than his responsa and should therefore take halakhic precedence in the event of conflicts between the two sources, is highly controversial. Zafrany[27] rightly points out that we cannot accept this rule in its literal sense and that each conflict must be examined on its own merits. In this instance, the determination is difficult in the extreme. On the one hand, the TUR decides according to ROSH's position in the Halakhot, which indicates that the ruling there is more authoritative (or, in traditional purchance, "later") than the one in the responsum. On the other hand, the responsum, considered from a logical point of view, appears to be "later" than the ruling in the Halakhot. In the responsum, R. Asher does not merely cite RASHI and the Tosafists' objections to him; he refutes those objections, defending RASHI against the difficulties raised by R. Tam. Indeed, ROSH cites his "teacher", perhaps R. Meir of Rothenburg, as agreeing with the RASHI position. It is more logical to assume that the responsum, which constitutes the "next step" in the debate and which contains a more complete analysis than does the halakhah, is the "later" of the two sources, rather than to assume that ROSH first agreed with RASHI and then changed his mind. If the latter were the case, ROSH would be in the position of accepting arguments which he has already conclusively rejected.[28] Regardless of the dating of these sources, however, the position of the Halakhot is clear, and it is the view accepted by TUR.

47.a. חרא -- follows RIF to והאי לא מירוייל .

See Tos., 12b, מעלינן . ROSH cites R. Tam's view that this case is not linked, in terms of legal principle, to the previous case. See 46.c., above. Neither brother would pay more for a particular field, since neither owns a field adjacent to it; thus, the principle of " מעלינן " does not apply here.

RAMBAM, Hil. Shekhenim 12:1, applies the same principle to both cases; both refer to a situation in which one brother owns an adjacent field. See Beit Yosef, HM 174, 146a: RAMBAM follows RASHI against R. Tam. For this reason, RAMBAM, unlike ROSH and TUR, does not mention the "two fields" case as distinct from the case in 46.c.

47.b. תרוייהו אחד נגרא -- R. Yonah deduces that the primary law concerning the division of the inheritance is for each heir to receive a share of each separate field. If the law were that each heir should receive an entire field, why does Abaye suggest that, in this case, that the fields be divided in order to provide an economic advantage for one heir? It is not that we reject the pimary law of inheritance; rather, we reject the rabbinic practice of " כופין על מידת סדום ", inasmuch as the primary law is that each heir receives a share of each field. Abaye wishes to uphold the primary law and argues that "midat Sodom" does not apply to this case, in that one heir may realize an economic advantage should the fields be divided according to that primary law.

The implications of R. Yonah's deduction are treated in 1:48, below.

48. והא -- the verse Deut. 21:17 is interpreted to mean that each heir receives his portion as one continuous unit; see 1:46.a., above. According to R. Yonah, this Scriptural warrant applies only to the division of one field. If the heirs receive two fields, however, Toraitic law would require that each field be equally divided. It is the rule " כופין

על מדת סדום " which makes it possible to grant each field to an heir as an undivided unit. Thus, each heir is entitled to insist that each field be divided among the heirs, should that division be to his economic advantage. For example, one heir owns an adjacent field. He may, if his brothers do not allow him to take his share next to the adjacent field, insist that the fields be equally divided so that part of his inheritance will be closer to his current property. This demand is not a case of "midat Sodom", and we therefore follow the primary law of division. This applies as well to a case where one of the two fields is twice as large as the other. The larger field does not go automatically to the first-born son; his brother may demand that the fields be divided if he would realize an economic advantage in so doing.

See TUR HM 174, 146a-b, and BaH ad loc. R. Yonah's deductions follow R. Tam's view in 1:46.c., above. If one heir owns an adjacent field, the other heirs may demand that he pay dearly for the privilege of receiving the adjoining portion of his father's field. For this reason, the heir has the options described here. RASHI and RAMBAM, as we have seen in 1:46.c., regard the brothers' refusal to give this heir the adjoining field a case of "midat Sodom" if the fields are of equal economic value. In addition, we have seen that RAMBAM sees Deut. 21:17 as requiring that the first-born receive his portion in an undivided fashion. This is not the view of R. Yonah and ROSH here. Ultimately, the difference lies in the fact that, for R. Tam and his followers, that one of the heirs is a ben mezra constitutes a legitimate economic advantage for the other heirs; their demand for a high price from him in return for the adjoining section is not a case of "midat Sodom". RASHI and RAMBAM do not regard this as a legitimate economic advantage justifying the brothers' refusal to hand over the adjoining section to the ben mezra. R. Yonah's rulings here are weapons which the ben mezra uses to defend his

position in view of his brother's refusal; these weapons are clearly superfluous if the halakhah follows RASHI and RAMBAM.

49.a. ורבקטינן -- should two partners buy a field, where one owns a two-thirds share, the field is divided at the end of the partnership according to units. Like the first-born, the major partner receives his two-thirds is an undivided fashion. If, however, three partners each buy one-third of the field and one of them subsequently buys the share of another, that partner may not force the third to let him take his two shares as one unit at the dissolution of the partnership. These portions were not originally bought as one unit, much like the case of the yabam, who does not necessarily inherit his and his brother's portion as one unit. See TUR HM 174, 147a.

RAMBAM does not mention this rule; see Hil. Shekhenim 12:1-2. Magid Mishneh to 12:2 attributes the rule to ibn Migash. Perhaps RAMBAM's mention of the yabam in 12:2 implies the rule concerning partners, which ibn Migash likens to that of the yabam. This, however, is speculative at best.

49.b. חד גיסא -- follows RIF.

50.a. ולא -- if the law of גזר או איגזר applies, how is the price to be determined? RASHI (13a, אית דינא) declares that either partner may fix the price at which the other may buy his share. Others require that the court appraise the value of the property, so that either partner may purchase the share owned by the other. ROSH rejects the proof brought for this second option from M. Ketubot 10:2, since that mishnah deals with the protection of orphans' inheritance. Here there is no monetary loss involved, since A gives B the option of either buying or selling. Some geonim rule in this way, as does RAMBAM, Hil. Shekhenim 1:2.

Although ROSH cites RAMBAM for support, there is a difference between the

ROSH/RASHI view and that of RAMBAM, as pointed out by Karo in both Kesef Mishneh to 1:2 and Beit Yosef to HM 171, 136a. ROSH and RASHI explain that either partner may set the price at which the other may buy his share. RAMBAM, on the other hand, rules that one partner, who initiates the action, sets a single price at which he will either buy the other's share or sell his own. Karo attributes RAMBAM's approach to the Arukh (Ha-Shalem, v. 2, p. 235).[29] TUR, however, interprets his father's view as identical to that of RAMBAM (and see Kizur Piskei Ha-ROSH to our halakhah), a point noted by Derishah, n. 5.

It is clear that R. Asher cites RAMBAM, along with the geonim, as support for the ruling which he has derived by means of textual analysis. Perhaps for this reason, TUR ascribes to his father the same definition of this rule that RAMBAM provides. It is equally clear, however, that ROSH does not define the law in this way; Karo correctly points out that RASHI, on whose behalf ROSH marshals his arguments, conflicts with RAMBAM's interpretation.

50.b. דרינא דגרר -- the rule of גרר או איגרר does not apply to a jointly-owned courtyard. Neither neighbor can force the other to buy or sell, since the courtyard is indispensable for both houses. Thus, if the courtyard is too small to be divided, the neighbors must use it in partnership.

RAMBAM, Hil. Shekhenim 1:2, rules that the neighbors must divide the courtyard according to a year-by-year schedule of use: each neighbor gets its exclusive use in each alternating year. The concept of a schedule is attributed to ibn Migash (by Magid Mishneh ad loc.) and to the geonim (by TUR HM 171, 136b). TUR rejects this ruling on the basis of his father's reasoning; see BaH's resolution of the difference between RAMBAM and ROSH. See also RABAD's hasagah to 1:2.

50.c. ורב נחמן -- follows RIF[30] to דמסתברא טעמיה . RIF follows the view of R. Shimeon ben Gamliel: if the property is too small for division, we do not allow one of the partners to divide it by taking for himself an amount that is less than the minimum definition. R. Hananel, however, follows the majority view and allows this practice. In addition to the general rule that we follow the majority position, the Gemara indicates that R. Shimeon's ruling is not as persuasive as RIF believes. See TUR HM 171, 137b, Hagahot Maimoniot to Hil. Shekhenim 1, n. 9, and Mordekhai, n. 509, fol. 86c. ROSH seems to draw upon his teacher, R. Meir of Rothenburg, for this ruling.

RAMBAM, Hil. Shekhenim 1:5, follows RIF.

50.d. ר"י א -- a summary and explanation of RIF's view (fol. 8b).

50.e. רבינו חננאל -- summarizes sugya to ולמר מיבעי ליה האי והאי . The rule גזר או איגזר does not apply to the maidservants because each has unique skills which both partners require. The rule applies only to property whose function is exactly the same for each partner and which cannot be divided in such a way that each possesses a minimum sufficient amount. The same limitation applies to a case where partners own jointly a field and a vineyard; the ownership cannot be transferred on a גזר או איגזר basis, since each is different and serves a particular purpose, even though their monetary value may be identical. However, while neither partner may demand "you take one and I will take the other", he may demand גזר או איגזר for each possession separately. If the partners own two of the same kind of property (e.g., fields), and neither one is sufficient to divide in half, A can demand from B " גזר או איגזר " and include both properties in the transaction, inasmuch as their function is identical for both partners. See TUR HM 171,

138a-139a.

RIF and RAMBAM do not include these details. SA HM 171:13 cites these rules from the TUR and ROSH; see Be'er Ha-Golah ad loc.

51.a. כתב -- R. Yosef ibn Migash states that the rule גורד או איגורד applies only when the partnership originated as an inheritance or as a gift. If, however, the partners buy a house which cannot be adequately divided between them, neither partner may demand " גורד או איגורד ", since they bought the house on the understanding that they would share it in partnership. ROSH accepts this as long as both of them require the house as their residence, or if neither of them lives in the house but they purchased it for rental income. If one of these partners should lose his residence for any reason, however, he may apply the law of גורד או איגורד to this house. This partner now needs a place to live, and he is not required to share a house with the other partner. See TUR HM 171, 139b-140a. Nimukei Yosef, fol. 8a, attributes to R. Aharon Ha-Levy (RA'AH) the same distinction between heirs/gift recipients and purchasers that ibn Migash cites here. On fol. 8b, near bottom, he reports that R. Yonah makes the same distinction. See also Shitah Mekubezet to 13b.

RAMBAM, Hil. Shekhenim 1, does not make a distinction between different types of partnership here; see Nimukei Yosef loc. cit. and Beit Yosef HM 171, 140a, as well as Resp. RASHBA, n. 913, cited by Beit Yosef.

51.b. וכן -- ibn Migash states that the rule does not apply to a jointly-owned field, inasmuch as the two partners can make use of the field together. ROSH does not accept this distinction. See TUR HM 171, 140a. No other poskim appear to accept ibn Migash's distinction.

52.a. ת"ר -- see Tos., 13b, ועושה . ROSH cites the baraita according to R. Yizhak's emendation. This conflicts with the reading in the

Alfasi; see DDS ad loc., n. 60, especially the citation from RITbA.

RAMBAM does not mention this halakhic detail.

52.b. תניא -- again, ROSH emends the baraita ("מתחילתן" becomes "לתחילתן") in order to conform to the Tosafot understanding. See Shitah Mekubezet and Hiddushei Ha-RAMBAN to 13b: this problem of girsa, which RAMBAM does not address, is an old one.

52.c. ה"ר -- follows RIF to אינו יודע. The circumference of a Torah scroll is six tefahim, including the cylinder around which it is rolled. See also ROSH, Hil. Sefer Torah, fol. 3a, and TUR YD 272, 219a-b.

RAMBAM, Hil. Sefer Torah 9:1, does not include the cylinders in this measure of circumference; see Hagahot Maimoniot ad loc. and Beit Yosef to TUR, loc. cit. (219b).

53. ת"ר -- follows baraita on 14b.

[1]RASHBA's phrase " מודי הרב " refers to his teacher R. Yonah Gerondi; see Michael, Or-Ha-Hayim, n. 1189, pp. 575-576.

[2]R. Tam, in the Tosafot, derives from this conclusion that some customs may be disregarded even when the mishnah states: " הכל כמנהג המדינה ". On the subject of rabbinic supervision of minhagim and the power to reject them, see Elon, Ha-Mishpat Ha-Ivri, pp. 760-767, and the literature cited by him.

[3]R. Yizhak the Tosafist apparently agrees with RAMBAM on the issue of kinyan; see Magid Mishneh and Nimukei Yosef (fol. 12a).

[4]See Sefer Me'irat Einayim, n. 6.

[5]The prohibition against sleeping is not mentioned by the Talmud in Megilah 28a. See, however, Tosafta Megilah 3:7 and Yer. Megilah 3:3 (74a). Perhaps Tosafot possessed a reading of Meg. 28a which included the word " וישנים "; see Bi'ur Ha-GRA to OH 151:3. It seems more likely, however, that Tosafot derives the prohibition against sleeping from Pesahim 101a: " דאכלו ושתו וגנו ". See Tos., Meg. 28a, אין, Hagahot Ha-BaH, n. 4. See also DDS, Pes. 101a, n. 200. RAMBAM, Hil. Tefilah 11:6, does not prohibit sleeping in a synagogue although he does prohibit it in a house of study, presumably on the strength of R. Zeira's statement in Meg. 28a. See Hil. Talmud Torah 4:9.

[6]Some attribute this view to "geonim"; see Be'er Ha-Golah to HM 157, n. 9.

[7]For the various views concerning Karo's intent when he cites a view as " יש אומרים ", see Yad Malakhi, kelalei Ha-Shulhan Arukh, n. 6.

[8]See Baba Batra 174: minor orphans are exempt from paying the debts of the estate, on the grounds that the creditor may have accepted a pledge from their father. ROSH holds that this does not apply if the father died before the loan fell due.

[9]ROSH attributes this view to ה"ר ז"ל . Who is this authority? See ROSH, Baba Mezia 1:42.b., where some influence of the "Spanish school" is detected. See also RITbA to our sugya; he displays some similarities to R. Asher's language. We may with reason suggest, therefore, that the "rav" in question is either RAMBAN or some other major Spanish scholar.

[10]Our printed text preserves this reading. See DDS, Baba Batra 6a, n. 4.

[11]Magid Mishneh, Hil. Sanhedrin 3:5; Hagahot Maimoniot ad loc., n. 7, in the name of R. Yizhak.

[12]He does suggest that RAMBAM agrees with the note of RABAD to 3:6. Clearly, Magid sees RASHBA's comment as a detail of halakhah neither mentioned nor implied by RAMBAM. TUR HM 160, 125b-126a, accepts RASHBA's position; Beit

Yosef ad loc. agrees that this position is implied in the words of ROSH.

[13]For a discussion of RAMBAM's attitude towards Talmudic debate vs. clear memrot and baraitot as sources of halakhah, see B.Z. Benedict, "Le-Darko shel Ha-RAMBAM bet-sak Halakhah", Torah she-be-al Peh, v. 4, pp. 99-108; J. Levinger, Darkei Ha-Mahshevah Ha-Hilkhatit shel Ha-RAMBAM, Tel Aviv, 1965; and I. Ta-Shema, in Kiryat Sefer, v. 41, 1966, pp. 138-144.

[14]ROSH cites the first איכא דאמרי on 7b, which RIF omits, in order to include the Tosafot deduction concerning the calculation of financial obligation.

[15]See Sedei Hemed, v. 1, n. 219, for a detailed discussion of the halakhic implications of איבא דאמרי . Many Tosafists do not automatically follow the second version of the statement but prefer to base their conclusions on the legal categories involved. Others might follow the first version. The rule הלכתא כלישנא בתרא seems to be of Geonic derivation; see Tos., Avodah Zarah 7a, and Hilkhot Ha-ROSH Avodah Zarah 1:3. In R. Asher's view, RIF and RAMBAM customarily follow the second version of the statement; see Hilkhot Ha-ROSH Gitin, 6:12.

[16]Magid Mishneh, Hil. Shekhenim 6:4, attributes the following halakhah to R. Yosef ibn Migash.

[17]See Karo, Bedek Ha-Bayit to HM 163, 129b: the Tosafot/ibn Migash ROSH position is considered " טעמא דמסתברא ", advancing beyond the strict limitations of the text under consideration.

[18]ROSH cites RAMaH as holding the same opinion on the subject of rabbis who earn incomes.

[19]ROSH does, however, follow RAMBAM in extending the rabbinic tax exemption (where legitimate) to cover all types of taxation. See I. Ta-Shema in Iyunim...Mukdashim le-Prof. E.Z. Melamed, Bar-Ilan, 1982, esp. 314-315.

[20]The word " הנאה " in the printed text is read " נטירותא " by various MSS and rishonim; see DDS, 8a, n. 80.

[21]Compare to SA HM 163:4, which simply repeats RAMBAM's formulation and preserves the ambiguity of the Mishneh Torah: are there taxes which do not subsidize community defense? Nimukei Yosef, fol. 5b, suggests that RAMBAM rejects the distinction made by ibn Migash (a suggestion carried as well in Beit Yosef HM 163, 131a), but this is far from clear. It is much more probable that RAMBAM, like Alfasi, merely cites the "plain sense" of the Talmud and does not address the possible distinction between taxes for defense and non-defense purposes.

[22]And to R. Yonah; see Shitah Mekubezet to 8b.

[23]And in Kesef Mishneh, Hil. Sanhedrin 2:1.

[24]Ibn Migash; see Hiddushei Ha-RAMBAN, 12b.

[25]See also Shitah Mekubezet to 12b, citing RAMBAN. ROSH utilizes logical inference (the analogy to the two brothers, neither of whom is first-born, dividing an inheritance) to arrive at his ruling. Karo eventually accepts RAMBAM as the authoritative halakhic voice; see SA HM 174:2 and Isserles ad loc.

[26]And not Rav Yosef, as stated in Magid Mishneh; see Hagahot Maimoniot, n. 2, and Kesef Mishneh ad loc., who suggests that RAMBAM's text of this sugya did not include the first occurrence of the phrase והלכתא כרב יוסף. DDS presents no evidence of such a textual variant; RIF, moreover, does include that phrase in the position indicated. Actually, no such emendation is necessary in order to account for RAMBAM's ruling. If his reasoning agrees with that of RASHI (i.e., as Tosafot understands RASHI), then even Rav Yosef would agree that the other heirs can prevent the transaction only when the fields are of unequal value. See Resp. Ha-ROSH 97:2, where R. Asher follows RASHI's view and decides that the halakhah is in accordance with Rav Yosef: his position in the responsum agrees with that of RAMBAM. Thus, RAMBAM does follow Rav Yosef, rather than Rabah.

[27]Zafrany, pp. 88-92.

[28]I.e., ROSH could not re-adopt the R. Tam position without first accounting for the arguments which he himself raised on behalf of RASHI.

[29]See Be'er Ha-Golah, HM 171, n. 90.

[30]See Hagahot Me'erez Yisrael to RIF, fol. 8a, n. 1.

AN ANALYSIS OF THE HALAKHAH IN SEFER HILKHOT HA-ROSH

We have examined thirteen chapters of the Sefer Hilkhot Ha-ROSH, summarizing in detail the process by which he builds upon the Alfasi, cites other sources, and arrives at a final pesak. Each individual halakhic unit has been treated separately, in the conviction that only by the study of the details, the actual work which Asher performs in the composition of his book, can we arrive at a satisfactory understanding of his influence upon the halakhah. We now turn to an analysis of our findings, in order to establish the outlines of R. Asher's contribution to halakhic history.

Table 1.

TOTAL HALKHIC UNITS. 682.

Tractate Gitin. 341 Units.

Chapter One--33

Chapter Two--39

Chapter Three--16

Chapter Four--96

Chapter Five--37

Chapter Six--25

Chapter Seven--30

Chapter Eight--25

Chapter Nine--40

Tractate Ketubot, chapter one. 50 Units.

Tractate Kiddushin, chapter one. 98 Units.

Tractate Baba Mezia, chapter one. 100 Units.

Tractate Baba Batra, chapter one. 88 units.

The 682 halakhic units contain a wealth of halakhic material from which to build our analysis. This examination will not be statistical in nature, although it will make use of numbers and percentages. The aim of this study is descriptive, to bring into focus whatever halakhic tendencies ROSH exhibits. One such tendency is his citation of sources. The study detected no attitude of unusual animosity directed by Asher toward any particular authority. Likewise, he shows no blind admiration toward any of his predecessors. In this sense, the "scholarly consensus" is correct: ROSH demonstrates a certain "independence" in his relationship to his forebears. The consensus fails, however, to discern R. Asher's clear pattern in the choices he makes, the choices of which commentaries and rulings to cite in his Halakhot. This pattern has emerged clearly from our study; it begins to unfold as we catalogue the extent of Asher's citation of this Tosafot literature.[1]

Table 2.

Tractate Gitin. 1:2a; 1:2b; 1:3; 1:5; 1:6a; 1:6b; 1:7a; 1:7b; 1:7c; 1:8; 1:10c; 1:11a; 1:11b; 1:11c; 1:11d; 1:13a; 1:13b; 1:13c-14; 1:15; 1:16; 1:17a; 1:17b; 1:17c; 1:17e; 1:19a; 1:19b; 1:19c; 2:4b; 2:4d; 2:5a; 2:5b; 2:7; 2:8; 2:9a; 2:16; 2:19; 2:20b; 2:20c; 2:21-22; 2:23b; 2:24a; 2:24c; 2:24d; 2:25a; 2:25c; 3:1b; 3:2a; 3:3; 3:7; 4:2a; 4:2b; 4:3; 4:4a; 4:5; 4:7a; 4:7b; 4:7e; 4:8b; 4:8c; 4:8d; 4:9; 4:10; 4:11a; 4:11b; 4:12; 4:13b; 4:19; 4:20; 4:22a; 4:22b; 4:26; 4:27; 4:28; 4:29a; 4:29b; 4:31a; 4:32a; 4:34; 4:36; 3:37a; 4:37e; 4:37f; 4:37g; 4:38b; 4:41d; 4:43; 4:44; 4:45a; 4:45b; 4:47c; 5:2a; 5:4a; 5:5a; 5:7; 5:8; 5:13a; 5:16a; 5:17a; 5:19b; 5:19c; 5:20b; 5:20d; 5:21a; 6:1; 6:3b; 6:3d; 6:4a; 6:6; 6:7a; 6:8; 6:9; 7:3; 7:6a; 7:8a; 7:8b; 7:9a; 7:9c; 7:11a; 7:11b; 7:16; 7:19b; 7:20a; 8:2; 8:3a; 8:3b; 8:4; 8:5a; 8:6a; 8:6b; 8:7a; 8:9a; 8:9c; 9:13b; 9:1a; 9:2a;

9:4b; 9:6b; 9:7a; 9:7b; 9:9b; 9:10a; 9:11a; 9:12; 9:13a; 9:14.

TOSAFOT CITATIONS IN GITIN: 145.

Tractate Ketubot, Chapter One. 1:2; 1:3a; 1:3b; 1:3c; 1:4; 1:5a; 1:5b; 1:7a; 1:7b; 1:8-9a; 1:9b; 1:9d; 1:10a; 1:11; 1:12a; 1:12b; 1:12d; 1:13a; 1:13d; 1:18d; 1:19; 1:20a; 1:21b; 1:23; 1:25; 1:30.

TOSAFOT CITATIONS IN KETUBOT, CHAPTER ONE: 26.

Tractate Kiddushin, Chapter One. 1:1b; 1:1c; 1:1d; 1:2b; 1:2c; 1:5a; 1:5b; 1:6a; 1:8; 1:10a; 1:10b; 1:12; 1:13a; 1:16c; 1:17c; 1:18; 1:24; 1:25; 1:26; 1:27; 1:28c; 1:29; 1:33a; 1:35; 1:36; 1:37; 1:43b; 1:48-49; 1:50b; 1:53b; 1:53c; 1:59; 1:62; 1:65.

TOSAFOT CITATIONS IN KIDDUSHIN, CHAPTER ONE: 34.

Tractate Baba Mezia, Chapter One. 1:1a; 1:1b; 1:2; 1:4a; 1:4b; 1:4c; 1:5a; 1:7a; 1:7b; 1:11a; 1:13b; 1:20-21; 1:22; 1:23; 1:24; 1:27a; 1:27b; 1:28a; 1:28b; 1:31a; 1:31c; 1:32; 1:33a; 1:38b; 1:38c; 1:39e; 1:39f; 1:39g; 1:39h; 1:39i; 1:39j; 1:46; 1:47a; 1:48a; 1:49c; 1:49d; 1:50; 1:52c; 1:54a; 1:54b.

TOSAFOT CITATIONS IN BABA MEZIA, CHAPTER ONE: 40.

Tractate Baba Batra, Chapter One. 1:1b; 1:2; 1:3a; 1:3b; 1:3c; 1:4c; 1:5a; 1:5b; 1:6b; 1:9a; 1:9b; 1:11-12a; 1:13; 1:14; 1:17a; 1:20a; 1:22a; 1:29c; 1:40a; 1:42a; 1:46a; 1:46c; 1:47a; 1:52a-b; 1:38a.[2]

TOSAFOT CITATIONS IN BABA BATRA, CHAPTER ONE: 25.

TOTAL HALAKHIC UNITS BASED UPON TOSAFOT: 270

In all, approximately 39.6% of the halakhic material in the Hilkhot Ha-ROSH is based upon the Tosafot. Asher's dependence upon Tosafot is well

known; the common approach is to say that the ROSH is based upon the twin foundations of the RIF and the Tosafot.[3] To say this, however, is to misconstrue entirely the function played by Alfasi in the Hilkhot Ha-ROSH. It has been shown[4] that Alfasi served as a substitute for the Talmud in many Spanish yeshivot. Maimonides himself recommended that the RIF be studied in place of the Gemara. Thus, Alfasi cannot be considered, in the Spanish yeshivah world, a "post-Talmudic authority"; he is the Talmud itself, the basic study text of the yeshivah curriculum. In studying the ROSH, we cannot compare the RIF to the Tosafot, any more than we can compare the Talmud to the Tosafot; we must analyze the Tosafot along with the other post-Talmudic poskim in order to discern what ROSH adds to the body of the Talmud (i.e., RIF) itself. In some places, of course, Asher mentions RIF by name, commenting upon him and criticizing him. In these places, we will regard RIF as a "post-Talmudic" authority whose standing equals that of all the other sources which Asher brings to bear upon the Talmud. When, however, Asher recites the text of the Alfasi as though it were the Talmud; when it serves him as the Talmud itself serves the Tosafists and other commentators, we shall regard the Alfasi as "Asher's Talmud" and not as a post-Talmudic scholar. To summarize: the citations of Tosafot should be considered along side all the other rishonim excluding, in general, the RIF, who represents the consensus of the "halakhic" Talmud as it developed from the Geonic period. It is these authorities whom Asher utilizes in his attempt to derive the authoritative pesak, for which the Talmud/RIF is but the beginning of the process of deliberation.

With this in mind, let us consider Asher's own additions and contributions to the "halakhic consensus", the RIF.

Table 3.

ASHKENAZIC AUTHORITIES CITED IN ROSH.

R. BARUKH. Kiddushin 1:20. 1 citation.

R. EFRAIM B. YIZHAK. Gitin 7:8a; Ketubot 1:3c. 2 citations.

R. ELIAHU. Kiddushin 1:65. 1 citation.

R. GERSHOM ME'OR HA-GOLAH. Gitin 5:17a. 1 citation.

R. MEIR OF ROTHENBURG. Gitin 9:11b. Baba Mezia 1:3. Baba Batra 1:40c.
3 citations.

R. MESHULLAM. Gitin 1:2c; 8:13b. 2 citations.

R. PEREZ. Gitin 1:19a. 1 citation.

R. PETER. Kiddushin 1:62. 1 citation.

R. MOSHE OF EVREUX. Gitin 1:19a. 1 citation.

R. SHIMSHON OF SENS. Kiddushin 1:20; 1:62. 2 citations.

R. SHEMAYAH. Kiddushin 1:35. 1 citation.

RASHI. Gitin 1:2b; 1:3; 1:7a; 1:7b; 1:10c; 1:11c; 1:13b; 2:4c; 2:4d; 2:21-22;
2:24a; 2:25c; 3:2a; 3:3; 3:7; 3:10; 3:12; 4:3; 4:5; 4:19; 4:28; 4:29b;
4:30; 4:35b; 4:36; 4:37f; 4:38b; 4:47c; 5:5a; 5:17a; 5:20d; 7:6b; 7:9a;
7:9c; 7:16; 8:2; 8:9c; 9:9b.
Ketubot. 1:6a; 1:9b; 1:20a; 1:21b.
Kiddushin. 1:24; 1:29; 1:35; 1:43b.
Baba Mezia. 1:2; 1:18; 1:24; 1:36; 1:42b; 1:42c; 1:49b; 1:52a.
Baba Batra. 1:9c; 1:20a; 1:38a; 1:46c; 1:50a.
59 citations.

RASHBAM. Gitin 1:7a; 1:11d; 2:21-22; 4:29b; 7:11b; 8:2; 8:3a; 8:7a.
Kiddushin 1:54.
9 citations.

R. YEHUDAH B. NATAN. Kiddushin 1:35. 1 citation.

R. YIZHAK. Gitin 1:6a; 1:17c; 1:17e; 2:5b; 2:12; 2:25a; 4:8b; 4:8c; 4:21; 4:29a; 5:2a; 6:1; 6:10b; 8:7a; 9:6b; 9:7a; 9:14.
Kiddushin. 1:8; 1:16b; 1:17c.
Baba Mezia 1:2.
Baba Batra. 1:9b; 1:20a.
23 citations.

R. YIZHAK B. ASHER. Gitin 1:2b; 1:17a; 3:7; 5:8; 5:20d; 7:16.
Baba Batra 1:9b; 1:38a.
8 citations.

R. YIZHAK B. MEIR. Gitin 2:19; 2:21-22; 7:9a.
Ketubot 1:4; 1:25.
5 citations.

R. YIZHAK B. YEHUDAH. Kiddushin 1:48-49. 1 citation.

R. YOSEF TOV ELEM. Gitin 9:4b. 1 citation.

R. TAM. Gitin 1:2a; 1:6b; 1:11a; 1:13b; 1:15; 1:16; 1:17a; 1:17c; 1:17e; 1:19b; 2:4c; 2:4d; 2:8; 2:9a; 2:21-22; 2:25c; 2:27; 3:12; 4:2a; 4:7d; 4:7f; 4:8c; 4:9; 4:11b; 4:13b; 4:20; 4:22b; 4:26; 4:27; 4:29b; 4:45a; 5:8; 6:3b; 6:10b; 7:8a; 7:9c; 7:19b; 8:7a; 8:9a; 8:9c; 8:13b; 9:7b; 9:9b; 9:10a; 9:13a; 9:14.
Ketubot. 1:4; 1:19; 1:25.
Kiddushin. 1:8; 1:10b; 1:24; 1:29; 1:43b; 1:48-49; 1:62; 1:65.
Baba Mezia. 1:2; 1:3; 1:7b; 1:27b; 1:28b.
Baba Batra. 1:5a; 1:20a; 1:29c; 1:46c; 1:47a.
67 citations.
TOTAL CITATIONS OF ASHKENAZIC AUTHORITIES: 190.

Table 4.

SEFARDIC AND PROVENCAL AUTHORITIES CITED IN ROSH.

RABAD. Gitin 11:1d; 2:5b; 2:26; 4:21; 5:6a; 6:9; 7:18.

Ketubot 1:5b.

Kiddushin 1:14; 1:15.

Baba Batra. 1:20b; 1:46c.

12 citations.

R. YIZHAK IBN GIAT. Ketubot 1:6d. 1 citation.

RIF. Gitin 1:7b; 1:13b; 1:17e; 2:6a; 2:8; 2:9a; 2:12: 3:3; 3:5b; 3:6; 3:10; 4:21; 4:29a; 4:41b; 5:2a; 5:4a; 5:18; 5:20g; 6:4 c-d; 6:5a; 6:9; 6:10b; 6:12; 7:6b; 7:8a; 7:11a; 7:11b; 7:15a; 8:6a; 8:9c; 9:4b; 9:6c; 9:7a; 9:7b.

Ketubot. 1:2; 1:6d; 1:20a; 1:23.

Kiddushin. 1:1b; 1:56.

Baba Mezia. 1:2; 1:7b; 1:9b; 1:27a; 1:31b; 1:33b; 1:34; 1:36; 1:39i; 1:44; 1:49b; 1:49c.

Baba Batra. 1:1c; 1:50c; 1:50d.

55 citations.

SEFER HA-ITIM. Kiddushin 1:40. 1 citation.

SEFER HA-ITUR. Gitin 2:4c; 2:12; 6:7a; 9:4c.

Kiddushin 1:20.

5 citations.

RAMAH (Abulafia, d. 1244). Gitin 2:25b; 2:26; 3:2b; 4:25b; 4:37f; 4:44; 5:6b; 8:4; 8:8.

Ketubot 1:5a; 1:9c.

Baba Mezia. 1:30.

12 citations.

RAMBAM.[5] Gitin 1:5 (?); 2:7; 2:25a; 2:25b; 2:26; 3:2b (?); 4:6a; 4:25b; 6:4a; 6:7a (?); 6:9; 6:10b; 6:12; 6:14a; 7:18; 8:13; 9:1b; 9:4c; 9:6c.

Kiddushin. 1:7b; 1:17c.

Baba Mezia. 1:44.

Baba Batra 1:20b; 1:50a.

24 citations.

R. MOSHE HA-KOHEN. Kiddushin 1:20. 1 citation.

RAMBAN. Gitin 1:18; 5:2a; 5:6a; 5:7b; 5:19a; 6:9; 7:8a.

Ketubot 1:21b.

Kiddushin 1:1b; 1:17a; 1:44.

Baba Batra. 1:9b.

12 citations.[6]

R. YOSEF IBN MIGASH. Ketubot 1:9c; 1:23.

Baba Batra 1:6c; 1:21; 1:22b; 1:22c; 1:29c; 1:39c; 1:51a; 1:51b.

10 citations.

SHMUEL HA-NAGID. Ketubot 1:12a. 1 citation.

R. YONAH GERONDI. Gitin 5:2b; 7:15a.

Ketubot 1:17; 1:18a.

Baba Mezia 1:3; 1:39g.

Baba Batra. 1:9b; 1:11-12b; 1:38a; 1:39a; 1:46c; 1:47b-48; 1:50c.

13 citations.

R. ZERAHIAH HA-LEVY (RAZAH). Baba Mezia 1:39h; 1:39i. 2 citations.

TOTAL CITATIONS OF SEFARDIC AND PROVENCAL AUTHORITIES: 148.

This list excludes citations by ROSH of Geonic sources and of R. Hananel. These sources were in widespread use in the Tosafist academies at his time,[7]

and as such, we must consider them as much a part of his "Ashkenazic" heritage as of the Sefardic tradition represented by RIF and RAMBAM. The purpose of our study here is to analyze the extent to which ROSH added the Spanish and Provencal halakhic traditions to the learning he inherited from Ashkenaz.

The preponderance of the Ashkenazic citations (190) over the Sefardic/Provencal authorities (148) does not appear very large. It becomes more significant, however, when we consider that R. Asher bases his analysis upon Tosafot in 269 of the halakhic units included in this study. When we account for those units in which more than one sage is mentioned, Asher cites the Sefardic and Provencal poskim in 124 halakhic units; when we add the number of units in which Ashkenazic authorities are cited and for which there is no parallel in Tosafot, we arrive at 33. Thus, ROSH cites Ashkenazic authorities, including unattributed Tosafot, in 299 separate halakhic units. As a proportion of the 682 total halakhic units in this study, this number produces a total of 42.3 per cent: i.e., R. Asher cites Ashkenazic materials in 42.3 per cent of the halakhic units studied. In contrast, he cites the Spanish and Provencal authorities in a total of 18.2 per cent (124 citations out of 682 units) of the separate halakhic units.

Indeed, if we consider that 142 of the halakhic units in R. Asher are identical to the corresponding sections of the Talmud or RIF,[8] the percentages are even more revealing. Out of the 540 halakhic units in which ROSH adds to his basic text, 55.4 per cent include citations from Ashkenazic sages, while Sefardic and Provencal teachers are found in 22.9 per cent.

The 55.4 per cent on the Ashkenazic side does not include those halakhic units in which Asher refers to his other Halakhot, using himself as an authority, nor does it include passages where we may legitimately say that Asher's words are his own and not derived from other authorities. Based upon

his citation of other authorities, we conclude that Asher utilizes the Ashkenazic Talmudic tradition more than twice as frequently than he does the learning of Spain and Provence. If Asher's method was to study each sugya along with the rishonim, deciding at that point which of the rishonim deserved mention in his Halakhot,[9] our analysis shows that his predominant tendency is to explain the sugya and the halakhah in accordance with the Tosafot and other Ashkenazic authorities. This evidence casts serious doubt upon the view held by the "scholarly consensus" that ROSH sought, by means of his Halakhot, to forge a synthesis, reconciliation or Ausgleich of the varying Torah traditions. It also demands a re-evaluation of the notion that Asher displays extreme independence in halakhic judgement. This independence must be seen in light of what we know concerning his dependence upon the Ashkenazic learning for the explanation of the sugya. It is Tosafot, to an overwhelming extent which determines Asher's reading of the Talmud. We cannot, therefore, simply declare that "ROSH decides the halakhah based upon his own, independent understanding of the Talmud"; he does not arrive at that understanding in an intellectual vacuum. He receives it, in great measure, from his teachers, the Tosafists of northern Europe.

The predominantly Ashkenazic flavor of the Hilkhot Ha-ROSH, however, does not by itself invalidate the "scholarly consensus". The "consensus" views the major contribution of Asher as his "mixture" of the various traditions; unlike the Hagahot Maimoniot and Sefer Ha-Mordekhai, two other halakhic works emanating from the school of R. Meir of Rothenburg, ROSH is not content merely to cite the Ashkenazic tradition alongside the Sefardic text. Instead, he mixes ~~the~~ and integrates the fruits of Ashkenazic, Sefardic and Provencal halakhic creativity to a much greater measure than had any of his predecessors.[10] While the Ashkenazic source material in ROSH dwarfs that drawn from other

schools and while Asher's understanding of the Talmud is, by and large, that of the Tosafot, we nevertheless cannot overlook the fact that much Sefardic and Provencal halakhic writing does find its way into his work. We are left, then, somewhere in between the "consensus" view, which holds that Asher's aim was to reconcile the traditions, and the "minority" view of Urbach, Soloveitchik and Elinson, that the Hilkhot Ha-ROSH is an epitome of Ashkenazic halakhic creativity to the early fourteenth century. Asher hardly "reconciles" the Sefardic/Provencal traditions with those of Ashkenaz; the latter far outweigh the former. Yet he also does not ignore those other traditions. There is, in summary, a definite Ashkenazic tendenz in ROSH; its halakhic significance, however, in relation to the Sefardic and Provencal materials, has not been clearly determined.

Does ROSH attempt ~~to~~ a reconcilation between the varying halakhic systems? Or does he seek to enthrone the Ashkenazic halakhah over that of Sefarad? We cannot answer these questions solely through a tally of the authorities cited in the Hilkhot Ha-ROSH. We must instead turn to a thematic analysis of Asher's halakhah. "The Summary of the Halakhah in Sefer Hilkhot Ha-ROSH" determined the halakhic product of the ROSH in each of the 682 halakhic units under consideration. This product shall now be analyzed according to its relationship to the halakhic product of the predominant, authoritative poskim in early fourteen-century Spain, the RIF and the RAMBAM. To what extent does ROSH depart from the existing halakhic system in Spain? Does he primarily refine and adapt halakhic heritage, acting as commentator/critic while operating within the framework of the Maimonidean halakhic universe of discourse? Or does he tend to present a new halakhah, a compendium which substantially alters the legal status quo of the Mishneh Torah and seeks to replace it?

Table 5. ROSH IS IDENTICAL TO RIF/TALMUD.

In the following halakhic units, Asher makes no real change from the wording and content of the corresponding passages in Alfasi or the Talmud.[11]

Gitin. 1:1; 1:4; 1:12; 2:1; 2:6b; 2:10; 2:28; 2:29; 3:1a; 3:4; 3:8a; 4:1; 4:4b; 4:15b; 4:21b; 4:24; 4:31b; 4:32b; 4:33; 4:35a; 4:37h; 4:41c; 4:47b; 4:48; 5:1; 5:3; 5:4b; 5:5b; 5:14; 5:15; 5:17b; 5:20e; 5:20f; 5:21b; 5:22; 5:24; 6:3a; 6:3c; 6:4b; 6:11; 6:13c; 7:1; 7:2; 7:4; 7:5; 7:6c; 7:7; 7:8d; 7:9b; 7:12; 7:13; 7:14; 7:17; 7:19a; 7:20b; 8:1; 8:3c; 8:3e; 8:3f; 8:6c; 8:12; 9:2c; 9:2d; 9:4a; 9:5; 9:6a; 9:8a; 9:8b; 9:9a; 9:9c; 9:10b; 9:11e; 9:15b.

TOTAL, TRACTATE GITIN: 73 units.

Ketubot, Chapter One. 1:1; 1:21a; 1:22; 1:24; 1:27; 1:28.

TOTAL, TRACTATE KETUBOT, CHAPTER ONE: 6 units.

Kiddushin, Chapter One. 1:1a; 1:3; 1:10c; 1:11a; 1:11b; 1:13b; 1:16a; 1:17b; 1:19b; 1:21; 1:30d; 1:31; 1:32; 1:33b; 1:34; 1:38; 1:39; 1:41a; 1:42a; 1:42b; 1:43c; 1:44; 1:45; 1:46; 1:47; 1:51; 1:52; 1:53a; 1:55b; 1:58; 1:60a; 1:61; 1:64.

TOTAL, TRACTATE KIDDUSHIN, CHAPTER ONE: 33 units.

Baba Mezia, Chapter One. 1:1c; 1:9a; 1:10; 1:26; 1:31d; 1:35; 1:41a; 1:43, 1:47b; 1:52d.

TOTAL, BABA MEZIA, CHAPTER ONE: 10 units.

Baba Batra, Chapter One. 1:3d; 1:10; 1:17c; 1:19; 1:23; 1:24; 1:26a; 1:27; 1:28; 1:29b; 1:30; 1:32; 1:34; 1:35; 1:36; 1:40b; 1:41; 1:43c; 1:49b; 1:53.

TOTAL, TRACTATE BABA BATRA, CHAPTER ONE: 20 units.

TOTAL UNITS: 142.

Our analysis shows that in 20.8 per cent (142 out of 682) of the halakhic units, Asher does not depart from the language of his "talmud", whether the actual Talmud of the Alfasi. This does not mean that Asher agrees with at least one-fifth of Alfasi's "Sefardic" halakhah. The Talmud is neither Sefardic nor Ashkenazic; even though the two centers may have differed on numerous issues, they certainly did not dispute the halakhic import of every single passage of the Gemara. On the contrary, they will be in accord concerning numerous interpretations and rulings. Inasmuch as the same work served as the basis for the legal traditions of both schools, it is to be expected that Ashkenazim and Sefardim would have arrived at similar if not identical positions on most halakhic questions. Our concern here is not with those passages where ROSH adds nothing to the Alfasi; such passages cannot truly be considered his own work. We are interested in ROSH's particular contribution to the halakhah, with that learning and those interpretations which he brings to Spain, with that halakhic product which he adds to the corpus of the Sefardic "Talmud", the Alfasi. We therefore frame the question in this way: what is the halakhic import of those 540 units in which R. Asher adds new material to the RIF/Talmud? Does ROSH's contribution serve to buttress and elucidate--but not change--the Sefardic halakhah, or does it present an essentially different halakhic system?

Table 6. ROSH CONTRADICTS THE HALAKHAH OF RAMBAM.

In the following units, Asher's halakhah stands clearly at odds with that of RIF and RAMBAM. Those units marked with an asterisk (*) designate decisions in which ROSH disagrees with RAMBAM but not necessarily with Alfasi. Underlining indicates units based on material from Tosafot.

Gitin. 1:2b; 1:5; 1:6a; 1:6b; 1:7a; 1:7b; 1:7c*; 1:10a*; 1:10c*; 1:11b*; 1:13b; 1:13c-14; 1:19b*; 2:5a*; 2:5b*; 2:6a; 2:7*; 2:8; 2:9a; 2:9b;

2:11*; 2:12*; 2:16; 2:19; 2:20a*; 2:20c; 2:26*; 3:2a*; 3:2b*; 3:5b*; 3:7*; 3:8b*; 4:2a; 4:3; 4:4a*; 4:6a; 4:7b; 4:7f*; 4:8c; 4:11b; 4:12; 4:13b; 4:15a; 4:17a; 4:17b; 4:18c; 4:21*; 4:25b*; 4:26*; 4:27*; 4:28; 4:29a; 4:36; 4:37a; 4:37c; 4:37g*; 4:38b*; 4:38c*; 4:41a*; 4:41b; 4:43*; 4:44; 4:46b; 4:47a*; 4:49; 5:2b; 5:4a*; 5:7a; 5:13a-b; 5:19b; 5:20c; 5:20d; 5:20g*; 6:3b; 6:4a*; 6:4c-d; 6:7b; 6:8*; 6:9; 6:10b; 6:10c; 6:12; 6:14a; 7:6b; 7:8a; 7:8b*; 7:9a; 7:11a; 7:15a; 7:18*; 7:19b; 8:2*; 8:3b*; 8:3d*; 8:5a*; 8:5b*; 8:7b; 9:2a*; 9:2b; 9:3a; 9:4c; 9:4d; 9:6b; 9:7b; 9:11a; 9:11d.

TOTAL, TRACTATE GITIN: 106 units.

Ketubot, Chapter One. 1:2; 1:3b*; 1:4; 1:5b; 1:6c; 1:7b; 1:10b*; 1:12c; 1:13a*; 1:14*; 1:17*; 1:18a; 1:18c; 1:30.

TOTAL, TRACTATE KETUBOT, CHAPTER ONE: 14 units.

Kiddushin, Chapter One. 1:1c; 1:2c*; 1:4; 1:5b; 1:6a*; 1:7b*; 1:8*; 1:9; 1:10b; 1:14*; 1:16b; 1:16c; 1:17c*; 1:18; 1:22-23*; 1:26*; 1:27; 1:28b*; 1:28c; 1:29; 1:30a; 1:30b; 1:33a; 1:43b*; 1:48-49*; 1:56*; 1:57*; 1:62.

TOTAL, TRACTATE KIDDUSHIN, CHAPTER ONE: 28 units.

Baba Mezia, Chapter One. 1:1b*; 1:3; 1:4b; 1:11a*; 1:13b*; 1:15; 1:16b; 1:17; 1:18; 1:22*; 1:28; 1:30; 1:31a; 1:31b; 1:33a; 1:34; 1:36; 1:38b; 1:39a*; 1:39b*; 1:39d*; 1:39e; 1:39g; 1:39i; 1:40c; 1:42d; 1:48b; 1:48c-49a; 1:49b-c; 1:49d.

TRACTATE BABA MEZIA, CHAPTER ONE: 30 units.

Baba Batra, Chapter One. 1:2; 1:3b; 1:3c; 1:6c; 1:7; 1:11-12a*; 1:13; 1:14*; 1:17a*; 1:17b; 1:22b; 1:38b; 1:39c; 1:40c; 1:42a; 1:46a; 1:46c*; 1:47a; 1:47b-48; 1:50b; 1:50c; 1:52c.

TOTAL, TRACTATE BABA BATRA, CHAPTER ONE: 22 units

TOTAL UNITS: 200.

In 200 of the 540 units in which he adds to the text of Alfasi/Talmud, ROSH arrives at a halakhic conclusion directly at odds with the corresponding halakhah in the Mishneh Torah. This "rate of disagreement", which totals 37 per cent, includes 68 units in which Asher disagrees with or disregards RAMBAM but does not necessarily disagree with the RIF. At first glance, this divergence seems odd. Does not RAMBAM himself, in his Introduction to the Commentary on the Mishnah, tell us that he rejects Alfasi's decisions only ten times throughout the entire corpus of the halakhah? We would therefore expect halakhic unanimity between the two great Sefardic poskim, so that if Asher disagrees with the ruling of the one, this disagreement would apply equally to the decisions of the other. How then do we explain that of Asher's 200 halakhic disagreements, 68--a full 34 per cent--constitute rejections of RAMBAM but not of RIF? The answer lies in the nature of the Hilkhot Ha-RIF as a work of halakhic literature. The RIF, as we have seen, was regarded as a substitute for the Talmud itself in many Spanish yeshivot; often called "Talmud katan", it is in large part of halakhic epitome of the Talmud, preserving the latter's language, style and literary form. Alfasi registers his decisions by repeating, often without comment, those sugyot and sections of sugyot which are halakhically relevant. He shares, with the Gemara, certain weaknesses from a legal standpoint. For example, both the Talmud and the RIF are often unclear and vague as to their precise halakhic application; it becomes the commentator's task to explain carefully the passage's exact meaning. RAMBAM himself does this; by writing with precision, he fixes and refines the accepted halakhic interpretation of the Talmud and the Alfasi. The ambiguity of those sources, however, allows for different approaches to "precision". Consider, for example, Gitin 1:10a. Alfasi recites both of the Talmud's suggested answers to the question concerning deeds of gift emanating

from Gentile courts. There is an apparent contradiction between these two answers; what then is the proper ruling? RAMBAM, following a Geonic tradition, prefers the second answer. ROSH, on the other hand, finds a way to resolve the apparent contradiction in order to accept both answers. Alfasi does not improve upon the Talmud here. RAMBAM attempts to fix with precision the actual ruling; ROSH through harmonization, arrives at a contradictory "precision". In Ketubot 1:17, RIF does not tell us whether the birkat erusin may be recited following the act of kiddushin. Both RAMBAM and Asher address this issue; they arrive at divergent positions. In Baba Mezia 1:11a, Tosafot raises an issue concerning a particular claim made by a litigant. RAMBAM takes a position different from that of Tos/ROSH; RIF, on the other hand, does not mention the claim at all.

The difference between Alfasi and RAMBAM lies in this: where Alfasi is vague or does not deal with a specific issue, his commentators can interpret him so that he does answer these questions. Just as Tosafot and the rishonim draw halakhic conclusions from the Talmud which do not appear on its pages, so R. Asher, often applying those very Tosafot, can draw the same conclusions from the Alfasi. RAMBAM, for his part, does much the same thing; as a "commentator/posek", he clarifies the vagueness and ambiguity he finds in his sources. Once he does this, however, he no longer "matches" the halakhah of the RIF. His rulings are in large measure interpretations and explanations of the Alfasi which differ with the interpretations and explanations provided by subsequent authorities such as Tosafot and ROSH. Drawing upon his Tosafist tradition in 108 of the 200 cases of disagreement, Asher can often reach a decision which, while it undoubtedly refutes that of RAMBAM, may be interpreted so that it agrees with RIF.

In summary, these 200 units are more than a significant indication of

halakhic divergence between ROSH and the Sefardic school. They are evidence that ROSH saw his work, in part, as a replacement for the Mishneh Torah, not only as a codex of halakhic rulings, but as a study text in the yeshivot as well. The RAMBAM viewed his Mishneh Torah as an authoritative halakhic commentary to the Alfasi, an index of the proper halakhic rulings to be derived from the Hilkhot Ha-RIF.[12] Asher has the same idea for his own work. As a halakhic digest of the Tosafot literature, the Hilkhot Ha-ROSH becomes a new and better "key" to the "Talmud" (Alfasi). The Mishneh Torah is supplanted, both as an authoritative code and as an authoritative commentary. Asher's contribution is both a new halakhah and a new "Talmud", one which relies heavily on the intellectual heritage of the yeshivot of Germany and northern France.

Table 7. ROSH MAKES CLEAR HALAKHAH LEFT VAGUE IN RIF/RAMBAM.

In the following units, Asher addresses and clarifies halakhic questions which are not answered in RIF or RAMBAM. Underlining indicates Tosafot as source.

Gitin 1:11a; 1:17b; 1:17d; 1:17e; 2:2a; 2:20d; 2:23a; 2:24a; 3:1b; 3:3; 4:5; 4:6a; 4:7e; 4:8d; 4:10; 4:31a; 4:35b; 4:45a; 5:2a; 5:8; 5:17a; 6:3d; 7:8c; 7:15b; 7:16; 8:3a; 8:6a; 8:7a; 8:9a; 8:9b; 8:9c; 9:1a; 9:11c.

TOTAL, TRACTATE GITIN: 33 units.

Ketubot, Chapter One. 1:6a; 1:8-9a; 1:20a; 1:23; 1:29.

TOTAL, TRACTATE KETUBOT, CHAPTER ONE: 5 units.

Kiddushin, Chapter One. 1:2b; 1:5; 1:15; 1:17a; 1:35; 1:53d; 1:59.

TOTAL, TRACTATE KIDDUSHIN, CHAPTER ONE: 7 units.

Baba Mezia, Chapter One. 1:1a; 1:2; 1:7b; 1:27a; 1:40b; 1:42b; 1:45a; 1:48b; 1:50; 1:52a; 1:52b; 1:52c.

TOTAL, TRACTATE BABA MEZIA, CHAPTER ONE: 12 units.

Baba Batra, Chapter One. 1:1a; 1:5a; 1:8; 1:9a; 1:9c; 1:18; 1:29a; 1:40a; 1:44.

TOTAL, TRACTATE BABA BATRA, CHAPTER ONE: 9 units.

TOTAL UNITS: 63.

In these 63 units, which comprise 11.7 per cent of the halakhic units in which ROSH adds material to RIF/Talmud, answers are provided to the halakhic questions and issues which are not addressed in RIF and RAMBAM. The table indicates that the majority of this material stems from Tosafot. The "dialectical-critical" method of the Tosafists[13] gave rise not only to profound interpretations and hiddushim; it also produced much material with direct bearing on the halakhah. In Table 6, we saw that the Tosafist school produced halakhic traditions that were often at odds with the rulings of Alfasi and RAMBAM. Here, we find that the scholars of northern Europe raised new questions, explored new halakhic possibilities and in general widened the circumference of halakhic discourse beyond the limits of the great Sefardic poskim. An example of the halakhic fruits of the Tosafist method is Gitin 1:17b. Tosafot raises a potential contradiction to the rule in Gitin 13a from Kiddushin 48a. Tosafot procedes to resolve that contradiction by means of an exception to the general rule in Kiddushin. RIF and RAMBAM do not draw a similar distinction. RaN and Yosef Karo are therefore constrained to make the same distinction in the name of RAMBAM: i.e., facing a challenge by Tos/ROSH to the halakhah of RAMBAM, they interpret him so as to agree with the Ashkenazim. This necessity to "reinterpret" RAMBAM in light of the new

Tosafot halakhah is displayed clearly in Ketubot 1:35. Tosafot draws a distinction which simply does not appear in RAMBAM. On the other hand, he is sufficiently vague so as not to rule out the Tosafists' deduction; therefore, Beit Yosef determines that RAMBAM agrees with ROSH and goes so far as to blend RAMBAM with the language of the TUR in SA HM 195:3, giving the impression of a unified halakhah. The role of Karo and other commentator/halakhists in "reconciling" the RAMBAM and the ROSH (or in defending the former against the positions of the latter) is a separate subject worthy of intensive study. What is apparent from this study, however, is that ROSH utilizes the Tosafot and other sources to broaden the halakhic perspective. Talmudic discourse did not cease with the publication of the Mishneh Torah in 1187. In Torah centers around the world, and certainly in northern Europe, new questions and hiddushim multiplied at a rapid pace. The result, to oversimplify, was a "new halakhah" consisting of ideas, concepts and rulings which the limits of the Maimonidean halakhic tradition do not contain. Subsequent poskim must address the new ideas set forth by the Tosafists; thus, ROSH, as a representative of that school, largely sets the Talmudic/halakhic agenda of the following centuries. While Table 6 shows the halakhot in which Asher directly disagrees with RIF/RAMBAM, Table 7 demonstrates how he advances beyond the older tradition, giving halakhic expression to a larger, broader and more profound Talmudic universe of discourse.[14]

Table 8. ROSH ADDS HALAKHIC DETAILS NOT FOUND IN RIF/RAMBAM.

In the following citations, Asher agrees with the broad halakhic position of RIF and RAMBAM but adds specifics and details to that position which are not found in their compendia. Underlining indicates Tosafot as source.

Gitin 1:9c; 2:4b; 2:4d; 2:21-22; 3:2a; 4:15c; 4:18b; 4:20; 4:37f; 4:38a; 4:41d; 4:47c; 5:7b; 5:16b; 5:23; 6:1; 6:2; 7:6a; 8:9a; 9:9b; 9:13a; 9:14.

TOTAL, TRACTATE GITIN: 22 units.

Ketubot, Chapter One. 1:3c; 1:9d; 1:13d; 1:18d.

TOTAL, TRACTATE KETUBOT, CHAPTER ONE: 4 units.

Kiddushin, Chapter One. 1:1d; 1:2a; 1:36; 1:42c; 1:50b; 1:54.

TOTAL, TRACTATE KIDDUSHIN, CHAPTER ONE: 6 units.

Baba Mezia, Chapter One. 1:4c; 1:31c; 1:38a; 1:39h; 1:42c; 1:46; 1:47a; 1:48a; 1:54b.

TOTAL, TRACTATE BABA MEZIA, CHAPTER ONE: 9 units.

Baba Batra, Chapter One. 1:5b; 1:11-12c; 1:16; 1:21; 1:39b; 1:49a; 1:50e.

TOTAL, TRACTATE BABA BATRA, CHAPTER ONE: 7 units.

TOTAL UNITS: 48.

In 8.9 per cent (48 of 540) of tne units in which ROSH adds to RIF/Talmud, he presents a discussion which includes halakhic details which are not stated in RIF or RAMBAM, although those poskim might agree with the general rule on which these details are based. In a sense, these units resemble those cited in Table 7. There, however, the emphasis is upon answers to questions which RIF and RAMBAM never raise, halakhic results of the resolution of difficulties which the Sefardim do not notice or address. Table 7 includes "new" halakhah, produced largely through the Tosafot method of study, that Alfasi and Maimonides simply do not derive. Table 8, in contrast, includes halakhot which are addressed by both Asher and RIF/RAMBAM but which the former presents in greater precision. The effect produced by these differences may be the same as that noted under Table 7. In Ketubot 1:18d, Asher follows RAMBAM's position that a claim concerning a new bride's lack of virginity must be made by the husband immediately after the wedding night. ROSH adds, on the basis of Tosafot, that if the husband fails to make this claim immediately, he is not

believed later in the event that he claims that the intercourse did not take place until now or that it did take place immediately after the wedding. The greater detail found here leads the TUR to choose Tos/ROSH in language as well as content: i.e., he utilizes the very language of the ROSH, rather than that of RAMBAM, to express the halakhah. Moreover, just as in Table 7, the units here contain material which to a great extent determines the subject matter of future Talmudic debate. Once ROSH adds details to the halakhic corpus of RIF/RAMBAM, these new details must be discussed and integrated into the Jewish legal system. ROSH goes far in introducing Tosafot into the halakhic process; from now on, it will be impossible for a halakhist to content himself with citing RAMBAM without consulting the additional material stemming from the Tosafists and codified in ROSH.

Table 9. ROSH PLACES A LIMITATION ON A GENERAL RULE FOUND IN RIF/RAMBAM.

In a number of the units under study, ROSH engages in the familiar halakhic practice of חילוק, of drawing a distinction in order to limit the range of efficacy of a general law or principle.

Gitin. 1:15; 1:16; 1:17a; 1:17c; 4:9; 4:37b; 5:16a; 5:20b; 8:8; 8:13a; 8:13b.

TOTAL, TRACTATE GITIN: 11 units.

Ketubot, Chapter One. 1:9b.

TOTAL, KETUBOT, CHAPTER ONE: 1 unit.

Kiddushin, Chapter One. 1:12; 1:13a; 1:37; 1:65.

TOTAL, TRACTATE KIDDUSHIN, CHAPTER ONE: 4 units.

Baba Mezia, Chapter One. 1:23; 1:24; 1:27b; 1:28b; 1:48b.

TOTAL, TRACTATE BABA MEZIA, CHAPTER ONE: 5 units.

Baba Batra, Chapter One. 1:4c; 1:6b; 1:20a; 1:22c; 1:26b; 1:29c; 1:38a; 1:39a; 1:51a.

TOTAL, TRACTATE BABA BATRA, CHAPTER ONE: 9 units.

TOTAL UNITS: 30.

In these 30 units, 5.6 per cent of the 540 units in which ROSH adds to the halakhic corpus of RIF and RAMBAM, we find limitations placed upon the applicability of various halakhic rules and concepts. Once again, we note his heavy dependence upon Tosafot. Indeed, the Tosafot approach to the study of the Talmud seems to lend itself to the drawing of distinctions and nuances of interpretation which tend to limit or focus general principles. See, for example, Gitin 1:15. In order to explain the Talmud's interpretation of the mishnah, R. Tam must limit the applicability of the principle that "it is a mizvah to fulfill the wishes of the deceased." No such limitation is found in RIF and RAMBAM, who apparently did not see the same difficulty in the sugya as did R. Tam and Tosafot. In Kiddushin 1:12, Tosafot draws a distinction between the case in Kiddushin 8b and Baba Batra 84b, which deals with the concept of kinyan hazer. They conclude that even when the kiddushin money is placed within the woman's property, she is not validly betrothed if she expresses opposition to the transaction. RAMBAM, who merely recites the Talmud passage on 8b, might lead to the conclusion that kinyan hazer is valid in kiddushin even when the woman objects. Baba Batra 1:38a concerns the procedure for the division of a courtyard between two brothers. Basing himself upon Ashkenazic authorities, ROSH draw a halakhic distinction between a case in which the brothers receive the courtyard as a gift and a case in which they receive it through inheritance or purchase. This distinction, absent in RAMBAM, becomes the focal point for discussion in subsequent poskim. Once again, we see an expansion of the halakhic universe of discourse. The addition of new distinctions and shadings

of opinion serves to broaden the field of halakhic inquiry, including rules, cases and laws which are not and cannot be included within the world of Maimonidean halakhic concepts.

Table 10. ROSH CITES LAWS AND CUSTOMS NOT FOUND IN RIF/RAMBAM.

The following are units in which Asher cites rules, concepts and minhagim not contained in RIF or RAMBAM.

Gitin. 1:2a; 1:2c; 1:6a; 1:8; 1:13a; 1:18; 2:15; 2:24b; 2:27; 3:5a; 4:39; 4:45; 5:6a; 5:6b; 6:14a; 7:20a; 8:6b; 8:9a; 9:4b; 9:11b.

TOTAL, TRACTATE GITIN: 20 units.

Ketubot, Chapter One. 1:6a; 1:13b; 1:13c; 1:15; 1:19; 1:26.

TOTAL, TRACTATE KEBUTOT, CHAPTER ONE: 6 units.

Kiddushin, Chapter One. 1:10a; 1:20; 1:24; 1:41b.

TOTAL, TRACTATE KIDDUSHIN, CHAPTER ONE: 4 units.

Baba Mezia, Chapter One. 1:20-21; 1:32.

TOTAL, BABA MEZIA, CHAPTER ONE: 2 units.

Baba Batra, Chapter One. 1:22a; 1:52a-b.

TOTAL, BABA BATRA, CHAPTER ONE: 2 units.

TOTAL UNITS: 34.

Of these 34 units, only nine deal specifically with minhagim as opposed to rules of halakhah. In four of those cases (Ket. 1:13b; 1:13c; 1:15; and Kid. 1:41b), ROSH discusses customs emanating from Geonic, Palestinian or Sefardic practice. The relative dearth of Ashkenazic minang in Alfasi tends to support the conclusion of Elinson[15] that Asher emphasizes the Talmud in his Halakhot to the point that minhagim do not play as significant a role as they do in his

responsa. The reason for this difference is that, in the Halakhot, ROSH attempts to fix the halakhic decision for a general audience, while in his responsa he speaks to a Sefardic community whose local customs carry a great deal of practical significance. We would add simply that the lack of Ashkenazic minhag is not matched by the lack of Ashkenazic halakhah and Talmudic interpretation; we have already discerned the latter in a great number.

Table 11. ROSH PROVIDES ALTERNATE HALAKHIC POSSIBILITIES NOT FOUND IN RIF/RAMBAM.

In the following, ROSH does not disagree with the RIF/RAMBAM halakhic position as offer alternatives to it.

Gitin. 1:11c; 3:9; 3:12; 4:8b; 6:6; 7:3; 8:4.

TOTAL, TRACTATE GITIN: 7 units.

Ketubot, Chapter One. 1:5a; 1:12b.

TOTAL, TRACTATE KETUBOT, CHAPTER ONE: 2 units.

Kiddushin, Chapter One. 1:6b; 1:53c.

TOTAL, TRACTATE KIDDUSHIN, CHAPTER ONE: 2 units.

Baba Mezia, Chapter One. 1:4b.

TOTAL UNITS: 12.

"Alternate halakhic possibilities" often arise from alternate interpretations of the same material. In Gitin 8:4, all authorities agree that a get transmitted to a wife who is asleep is not valid until the husband informs her, when she awakens, that "this is your get". The issue is the lack of legal competence (da'at) on the part of a sleeping person. While RAMBAM would interpret da'at as "conscious awareness", ROSH and others broaden the

definition to include the ability to take physical possession of the document. Thus, while there is no dispute between ROSH and RAMBAM on the essential halakhah, the second view widens the definition of a legal concept and thereby increases the number of halakhic possibilities which may issue from it. In Ketubot 1:5a, ROSH points out the difference between Halakhot Gedolot on the one side and Tosafot on the other concerning the question whether the first day of mourning is Toraitic or rabbinic in origin. While Asher does not state a clear preference between the two opinions, his bringing together the varying interpretations provides the reader with a broader, more substantial basis on which to draw halakhic conclusions. Once again, ROSH expands the halakhah beyond the literary boundaries of RIF and RAMBAM.

Table 12. ROSH PROVIDES COMMENTARY TO RIF/TALMUD.

In the following, Asher adds material to his literary base which, while not refuting the halakhic conclusions in RIF/RAMBAM, serves to elucidate and expand the theoretical foundations of the halakhah. As in previous tables, underlining indicates that ROSH utilized Tosafot as his source.

Gitin. 1:3; 1:11d; 2:4a; 2:4c; 2:6a; 2:9a; 2:12; 2:17; 2:23b; 2:23c; 2:24c; 2:24d; 2:25a; 2:25b; 2:25c; 3:6; 4:2b; 4:6b; 4:7a; 4:7c; 4:7d; 4:8a; 4:11a; 4:13a; 4:14; 4:16; 4:17c; 4:17d; 4:18a; 4:18d; 4:18e; 4:19; 4:20b; 4:22a; 4:22b; 4:23; 4:25a; 4:29b; 4:30; 4:32a; 4:34; 4:37d; 4:37e; 4:40; 4:42; 5:2c; 5:4a; 5:5a; 5:7c; 5:18; 5:19a; 5:19c; 5:20a; 5:21a; 6:5a; 6:5b; 6:7a; 6:10a; 6:13a; 6:13b; 7:9c; 7:11b; 7:21; 8:10; 8:11; 9:1b; 9:2e; 9:3b; 9:4b; 9:6c; 9:7a; 9:8c; 9:10a; 9:12; 9:13b; 9:15a.

TOTAL, TRACTATE GITIN: 76.

Ketubot, Chapter One. 1:3a; 1:6b; 1:6d; 1:7a; 1:10a; 1:11; 1:12d; 1:18b; 1:20b; 1:21b; 1:24.

TOTAL, TRACTATE KETUBOT, CHAPTER ONE: 11 units.

Kiddushin, Chapter One. 1:1b; 1:6c; 1:7a; 1:19a; 1:25; 1:28a; 1:30c; 1:40; 1:50a; 1:53b; 1:55a; 1:60b; 1:63.

TOTAL, TRACTATE KIDDUSHIN, CHAPTER ONE: 13 units.

Baba Mezia, Chapter One. 1:4a; 1:5a; 1:5b; 1:6; 1:8; 1:9b; 1:11b; 1:13c; 1:14; 1:16a; 1:19; 1:25; 1:29; 1:33b; 1:37; 1:38c; 1:38f; 1:39f; 1:39j; 1:40a; 1:40d; 1:41b; 1:41c; 1:42a; 1:44; 1:47c; 1:51; 1:53; 1:54a.

TOTAL, TRACTATE BABA MEZIA, CHAPTER ONE: 29 units.

Baba Batra, Chapter One. 1:1b; 1:1c; 1:3a; 1:4a; 1:6a; 1:9b; 1:11-12b; 1:15a; 1:15b; 1:20b; 1:22a; 1:29c; 1:31; 1:33; 1:37; 1:42b; 1:43a; 1:43b; 1:45; 1:46b; 1:50a; 1:50d; 1:51b.

TOTAL, TRACTATE BABA BATRA, CHAPTER ONE: 23 units.

TOTAL UNITS: 153.

In 28.4 per cent (153 out of 540) of the units in which he adds material to his base text, Asher acts the role of commentator. "Commentator" is defined here as one who explains, clarifies, analyzes and expands upon the halakhic text under study without disputing the halakhic ruling of that text. In these 152 units, therefore, Asher does not depart from the halakhah of the school of Alfasi and Maimonides. His commentatorial activity assumes various forms. In some passages (e.g., Gitin 2:23c, 3:6, 4:23), ROSH supplements RIF with material from the Talmud that RIF himself omits. In others (e.g., Gitin 6:10a; Baba Mezia 1:16a), he cites entire passages which RIF does not include. At times, Asher will explain the reasoning behind Alfasi's decision; see Baba Batra 1:1c and Baba Mezia 1:49b. In some cases (e.g., Kiddushin 1:7a and 1:19a), Asher will rule as does RIF or RAMBAM while offering a different or additional reason in support of that ruling. Especially noteworthy, however, is Asher's use of Tosafot in constructing his "commentary" passages. In

approximately one-third of the passages (49 out of 153), ROSH draws upon the Tosafot literature not in order to arrive at a different halakhic conclusion from that found in RIF/RAMBAM, but to comment upon or explain the sugya. This produces various results. In Gitin 1:3, as well as Ketubot 1:3, ROSH utilizes Tosafot to answer a potential contradiction to the decision in RIF (and RAMBAM); neither of the Sefardic poskim deals with that contradiction. In Gitin 4:7a, ROSH explains a halakhic term with material he takes from Tosafot. In Gitin 5:4a, ROSH uses Tosafot to conclude that RIF supports a particular halakhic position, while the commentators disagree as to whether RAMBAM follows that opinion as well. In Ketubot 1:7a, Tosafot and ROSH draw a comparison between mourning during a festival and during the wedding feast week, while RAMBAM does not draw that comparison; although no immediate halakhic difference is to be noted, this analogy does have halakhic significance elsewhere. In Baba Mezia 1:38c, ROSH adds details to RIF from Tosafot. Although RAMBAM contains the same details, ROSH cites them from the northern European tradition and does not quote the Mishneh Torah. In Baba Batra 1:1b, Asher clarifies a question of definition on the basis of Tosafot; it is not clear whether RAMBAM accepts this clarification. The dependence on Tosafot carries with it some important intellectual consequences. In Kiddushin 1:25, ROSH fills a textual lacuna in RIF with citations from the Tosafot. The halakhah drawn from these citations agrees with that of RAMBAM. The superiority of the Tosafot analysis lies in the way in which this law is derived and defended against supposed contradictions and difficulties from other passages. RAMBAM, of course, mentions only the law itself, without the accompanying theoretical background. The Tosafot approach becomes the focus of subsequent halakhic discussion on this point, taking the place of RAMBAM as the authoritative expression of this halakhah.

The suggestion that R. Asher intended his work to be a commentary on the Talmud has been a subject of debate among the scholars.[16] The evidence adduced here tends in some respects to support both sides. The nature of the Hilkhot Ha-ROSH as a code, a book of halakhah rather than a Talmudic commentary, is plain: Asher certainly makes pesak halakhah his central concern. Table 12, on the other hand, displays the 153 units under study in which Asher serves as a commentator on the Talmud and/or the RIF. This is too large a body of material to ignore. The precise significance of this commentatorial activity has a great deal to do with our conclusions concerning the tendenz of the ROSH; these conclusions will be discussed in the final chapter.

We turn now to a consideration of the overall nature of Asher's halakhah in comparison with that of RIF/RAMBAM.

Table 13. OVERALL HALAKHIC ANALYSIS.

TOTAL UNITS IN WHICH ASHER ADDS HALAKHIC MATERIAL TO RIF/TALMUD: 540.

TOTAL UNITS IN WHICH ASHER DEPARTS FROM SEFARDIC HALAKHAH: 387.

A. Contradicts RIF/RAMBAM (Table 6): 200.

B. Clarifies Vague Halakhot in RIF/RAMBAM (Table 7): 63.

C. Provides Halakhic Details Not in RIF/RAMBAM (Table 8): 48.

D. Limits General Rule in RIF/RAMBAM (Table 9): 30.

E. Cites Laws and Customs Not Found in RIF/RAMBAM (Table 10): 34.

F. Provides Alternate Halakhic Possibilities (Table 11): 12.

TOTAL UNITS OF COMMENTARY TO RIF/TALMUD (Table 12): 153.

Our analysis shows that in 71.6 per cent (387 of 540) of the halakhic units in which Asher adds material to the corpus of his literary base (Alfasi, Talmud) he diverges from the halakhah as codified in RIF and RAMBAM. Thus, the cumulative effect of Asher's activity is to change or at least differ from the authoritative Sefardic halakhic codes of his day. The remainder of the

creative material in Asher's compendium--28.4 per cent--can be subsumed under the category of "commentary", in which Asher adds material to his literary base while not dissenting from its halakhic conclusions.

NOTES

[1]Wherever possible, the Hilkhot Ha-ROSH was examined against the corresponding volumes of Tosafot Ha-ROSH. The following editions were consulted in this study: Tosafot Ha-ROSH al Masekhet Gitin, ed. Ravitz, Bnei Berak, 1970; Tosafot Ha-ROSH al Masekhet Ketubot, Livorno, 1776; Tosafot Ha-ROSH al Masekhet Kiddushin, Warsaw, 1927; Tosafot Ha-ROSH al Masekhet Baba Mezia, ed. Herschler and Grodzitsky, Jerusalem, 1969. Asher's Tosafot to Baba Batra are not extant; his Halakhot to Baba Batra, chapter one, were compared against the printed Tosafot to that tractate. The editions to Gitin and Baba Mezia, based upon comparison of manuscripts and containing a critical apparatus of scholarly notes of both the academic and Talmudic variety, are quite helpful. It is hoped that, among the many critical editions of the rishonim currently approaching publication--the Hiddushim of RASHBA and RITBA are prime examples--scholars will continue to produce such editions of the remaining Tosafot Ha-ROSH. For a discussion of desired features of such editions, see the review by J. Florsheim of S.Z. Reichmann's Hiddushei Ha-RITBA al Masekhet Shabbat in Kiryat Sefer, v. 43, 1968, pp. 363-371.

[2]This passage, containing positions of RASHI and R. Yizhak b. Asher Ha-Levy, clearly originates in a Tosafot passage not included in our printed text.

[3]See pp. 5 ff.

[4]See pp. 18-19.

[5]The (?) indicates that there are serious textual problems with the particular citation. In each instance, the ruling attributed to RAMBAM differs with our version of the Mishneh Torah; in each case, major commentators suggest that the attribution is in error.

[6]There is good reason to believe that ROSH drew upon the RAMBAN, or at least upon a source common to both ROSH and RAMBAN, in the following: Kiddushin 1:13a; 1:16b; and 1:19a.

[7]Tosafot shows a great propensity to quote Halakhot Gedolot (175 times in our printed Tosafot) and R. Hananel (literally hundreds of times); see P. Tarshish, Ishim u-Sefarim Ba-Tosafot, New York, 1942, pp. 91-93 and 14-27. For the relationship of Tosafot to R. Hananel, see Urbach, Ba'alei Ha-Tosafot, p. 692. Y. Ta-Shema discusses the special relationship of the Tosafists to R. Hananel and Halakhot Gedolot in his article: "Kelitatam shel Sifrei Ha-RIF, Ha-RH, ve-Halakhot Gedolot be-Zarfat u-ve-Ashkenaz...", Kiryat Sefer, v. 55, 1980, pp. 191-201. While the Halakhot Gedolot and R. Hananel were in widespread use among the Tosafists from the very beginning of their literary enterprise (and RASH himself may have utilized R. Hananel), the Alfasi was not accepted by a broad cross-section of Tosafists until the appearance of Sefer RA'Abyah in the first half of the thirteenth century. Ta-Shema speculates that the acceptability of Halakhot Gedolot and R. Hananel lies in the fact that these works reached the Tosafists through Italian channels; the strong connection between the Ashkenazic and Italian halakhic centers aided in the reception of those two works in northern Europe. RIF, on the other hand, enjoyed no "Italian connection" and did not enter the Tosafists' curriculum

until much later. The RASHBAM, the brother of R. Tam, studied the RIF intensively in the twelfth century and produced a book of hasagot on him. RASHBAM, however, was very much alone in his generation in this literary interest. The special interest in Halakhot Gedolot shown by the Hasidei Ashkenaz and the central role it played in their program of Torah study are discussed by Ta-Shema in his "Mizvat Talmud Torah ke-Va'ayah Datit ve-Hevratit be-Sefer Hasidim", Sefer Bar-Ilan, v. 14-15, 1977. While these questions are outside the scope of the present study, they demonstrate that R. Asher was hardly the first Ashkenazic scholar to utilize Geonic sources in halakhic discussion. See also A. Grossman, "Zikatah shel Yahadut Ashkenaz Ha-Kedumah el Erez Yisrael", Shalem, v. 3, especially pp. 67-69.

[8]Zafrany, Darkhei, pp. 112-113.

[9]See Table 5, p. 392.

[10]Zafrany, Darkhei, pp. 185-204.

[11]The concern here is with halakhic content, the substance of the rulings, and not with minor variations in language.

[12]See p. 19 above.

[13]The best study of the method of Tosafot is Urbach, Ba'alei Ha-Tosafot, pp. 676-752. A good, brief description of the Tosafot method in the historical perspective of Talmudic study is found in Y. Ta-Shema, "Seder Hadpasatan shel Hiddushei Ha-Rishonim la-Talmud", Kiryat Sefer, v. 50, 1975, pp. 334-336. Jacob Katz expresses reservations concerning Urbach's approach to the subject in Kiryat Sefer, v. 31, 1955, pp. 9-16.

[14]See H. Soloveitchik, op. cit., pp. 19-20.

[15]Elinson, Sinai, v. 93, pp. 234-244.

[16]See p. 16 and n. 35, above.

CONCLUSION

Our "Analysis of the Halakhah in Sefer Hilkhot Ha-ROSH" demonstrates the tremendous divergence between Asher's halakhah and the halakhic tradition as codified in RIF and RAMBAM. This "divergence" displays itself in the form of contradiction, clarification, expansion, limitation, alternative halakhic possibilities and variant customs, and commentary and elucidation. The "divergence", however, must be viewed within the proper theoretical context. R. Asher b. Yehiel represents a vastly different intellectual tradition and approach to Talmud study than that of the "classical" Sefardic poskim. Asher bases his halakhah upon a different "Talmud" than that which was available to RAMBAM. While Maimonides and Alfasi represent the Geonic halakhic tradition, which emphasized the abbreviation of the Talmud to its halakhic essence, Asher's "Talmud" is that which emerged from the dialectical-critical study of the Tosafist academies, a method which stressed expansion rather than abbreviation, utilizing the entire Talmud, including its dialectics, for halakhic purposes. Any comparison between ROSH and RAMBAM must take this fundamental difference into account. The true "divergence" between these two authorities is not only their different opinions on points of halakhah, although the analysis of those opinions has been a central preoccupation for halakhic scholars. Asher "diverges" from RAMBAM because, unlike Maimonides, he is the student of the Tosafists and reads the Talmud according to the intellectual tradition of the northern European academies. It is not so much that Asher disagrees with RAMBAM's Talmudic interpretations; rather, he and the Tosafists ask different questions of the Talmud and derive answers from it which simply do not occur in the Sefardic tradition of which RAMBAM is the pre-eminent codifier. And, as we shall see, the role of Tosafot in Asher's approach to halakhah largely determines the answers to the three broad

questions posed in the Introduction.[1]

1) How does Asher utilize his post-Talmudic sources? Our analysis shows the predominantly Ashkenazic flavor of ROSH. Over half of those halakhic units in which he adds materials to his base text consist of citations from Tosafot or other Ashkenazic authorities. Only 22.9 per cent contain Sefardic material. Asher, the student of R. Meir of Rothenburg, is firmly rooted in the learning of the Tosafists, applying the determinations and deductions of that learning in a variety of ways. He uses the Tosafist tradition to disagree with the halakhah of the Sefardim, to clarify it where he finds it ambiguous, to supply detail and specifics in cases where RIF and RAMBAM deal in generalities. Significantly, he also relies on Tosafot in places where he agrees with the basic halakhic approach of the Sefardic authorities; almost one-fifth of all his citations from Tosafot (49 out of 270) fall into the category of "commentary" to the RIF and/or the Talmud.

The importance of the Tosafot heritage to R. Asher cannot be measured by statistics alone; we should look as well to the way in which he uses it, to the role played by Tosafot in the structure of Hilkhot Ha-ROSH. Zafrany has summarized ROSH's use of post-Talmudic authorities as follows: Asher collects the writings of the various poskim, deciding which of them to cite and which of them to omit. "At times, he copies them word-for-word; at times, he summarizes them. In general, he cites poskim when he has some comment to make upon their ruling or when he utilizes their rulings to arrive at his own decision."[2] This analysis does not touch the essence of Asher's special relationship to Tosafot. Of the 270 citations of Tosafot under study, in only one--Baba Mezia 1:39g--does ROSH use the word "Tosafot". In that one case alone, Tosafot is deemed to be a posek among the various poskim, whole rulings are to be discussed and considered along with all the others. In all the rest

of his citations, ROSH does not refer to "Tosafot"; he recites the words of Tosafot without such attribution, as though these are his own words.[3] In these places ROSH is Tosafot. Frequently, the sections of Tosafot cited in ROSH will contain the conflicting views of individual Tosafists; ROSH cites them by name and decides the halakhah in accordance with one or the other. What he does not cite by name is the Tosafot itself, as a body of literature, as a book or collection of books. For R. Asher, "Tosafot" does not stand for a particular posek or halakhic code (as, for example, "RABAD" or "Sefer Ha-Itur"); it is an intellectual process, the tradition of learning and interpretation which characterizes and colors his own approach to the Talmud and the halakhah. It is more than a collection of opinions; it is the way in which Asher understands the Talmud. Just as the RIF, when cited without attribution, represents the "Talmud" of the Spanish yeshivah world,[4] so the Tosafot, when cited without attribution, represents the manner in which, according to ROSH, this "Talmud" is to be understood. Neither Alfasi nor Tosafot serve Asher as "post-Talmudic authorities"; the one serves as a base text, the other the preferred means by which that text is to be read and understood.

This conclusion refutes Zafrany's assertion that ROSH has no "system" in determining the halakhah, that he does not tend to follow a particular authority, that he decides the halakhah on the basis of his own, independent reading of the Talmud regardless of the views of post-Talmudic halakhists.[5] It requires, as well, that we move beyond Tchernowitz's determination that Asher was one of the first poskim to "rely upon Tosafot as a source of halakhah."[6] Asher does have a system: his approach to the Talmud is that of the Tosafot, and his understanding of the sugyot and dialectic of the Gemara is profoundly shaped by "the traditions of our ancestors, the rabbis of

Germany", for whom the Torah was an inheritance from the time of the Temple's destruction, and whose teachings were more reliable than those of the sages of Spain.[7] He does not utilize Tosafot merely as a "source of halakhah"; it constitutes his intellectual alphabet, the very method by which he studied the Talmud. More than a collection of rulings, Tosafot, for Asher, is that process by which the Talmud is opened up, elucidated and made to yield halakhic decisions.[8]

In the view of the "scholarly consensus", Asher's intent in compiling his Halakhot was, in part, to bring together and reconcile the varying halakhic traditions of Sefarad and Ashkenaz. These scholars--Freimann, Faur, Elon, Zafrany and the others who follow in their wake--utilize terms such as "Ausgleich" and שילוב to describe ROSH's activity as he carefully weighed the rulings of the various schools before bringing the best of them together "under one roof". We have also seen a countervailing viewpoint, represented by Urbach, Soloveitchik and Elinson, which regards the ROSH as "a summary of Ashkenazic halakhic creativity"[9] and "the Alfasi of the Tosafist Talmud."[10] Both of these scholarly approaches are inadequate and inaccurate. The "consensus" view fails to recognize that Asher is thoroughly and predominantly a student of the yeshivot of Ashkenaz. The idea that he plays the role of halakhic conciliator rests on the notion of his intellectual independence, which assumes that he approaches halakhic decision-making as a rather impartial arbitrator, showing deference to no particular posek, basing himself solely on his own, objective reading of the Talmud. This, however, is not the case; Asher's "objective" reading of the Talmud is really that of Tosafot. It is the Tosafist tradition which forms the intellectual framework within which the decisions of the various poskim are inserted and considered. This Ashkenazic material far outweighs the number of citations of Sefardic and

Provencal scholars. We cannot, therefore, accept the view of Asher as the one who forges a balance or an integration of the conflicting halakhic schools of thought. On the other hand, the statements of Urbach, Soloveitchik and Elinson do not account for the considerable presence (in 22.9 per cent of the halakhic units in which Asher adds material to his textual base) of Sefardic and Provencal authorities. This heir of the Ashkenazic Talmud-halakhic tradition is certainly open to the writings of scholars from other geographical centers. His particular halakhic achievement, his contribution to the history of Jewish law and legal codification, becomes clearer when we consider his relationship to the legal traditions which prevailed in the Spain of his day. That he relies predominantly upon the Ashkenazic study of the Talmud is evident; how does this reliance influence the corpus of his halakhah, compare to the legacy of the outstanding Sefardic poskim?

2) What is the relationship of the halakhah of ROSH to that of RIF and RAMBAM? The Analysis of halakhah in those sections of ROSH involved in this study reveals that, in 71.6 per cent (387 out of 540) of the halakhic units in which he adds to his textual base, Asher diverges from the halakhah as codified in RIF and RAMBAM. These "divergences" fall into various categories: contradictions, clarification of ambiguities, the providing of detail, limitations placed upon general rules, the citation of laws and customs not found in RIF/RAMBAM, alternative halakhic possibilities. The common feature shared by all these categories is that ROSH provides new and different halakhic material than that contained within the Sefardic poskim; on every point within these units, Asher's Halakhot lead to different halakhic conclusions than those derived from those two authoritative codes. These divergences signify more than just a collection of different readings and interpretations of the same Talmudic material. They involve the expanded

intellectual horizons of the Tosafist method of Talmud study. This accounts for the difference between ROSH and R. Meir Ha-Levy Abulafia, (RAMAH, d. 1244) his predecessor in the rabbinate of Toledo. The RAMAH will disagree with the conclusions of RAMBAM, but the range of disagreement is limited by the fact that RAMAH stands firmly within the Sefardic halakhic tradition; his intellectual and conceptual approach to the Talmud is the same as that of Maimonides.[11] R. Shelomo Luria describes the effect of the Tosafist method as the rendering of the Talmud into a consistent whole, free of contradictions among sugyot.[12] Urbach adds that, through this process, new principles and interpretations were discovered that affected both the theoretical study of the Talmud and halakhic decision-making.[13] Asher, who approaches the Talmud as a Tosafist, represents this "new Talmudic world" in his halakhah.[14]

These findings demand a major reassessment of the "scholarly consensus" concerning Asher's attitude toward the Mishneh Torah. The "consensus" view holds that R. Asher admires RAMBAM and respects his authority as posek while criticizing the Mishneh Torah's failure to cite sources and argumentation for its rulings. In other words, Asher's primary objections to RAMBAM are technical and methodological and do not deal with issues of halakhic content and substance. Our analysis shows this view to be fundamentally unsound. The decisions emanating from Hilkhot Ha-ROSH are overwhelmingly and substantially different from those in the Mishneh Torah. ROSH, in short, gives us a new and divergent halakhah that procedes quite naturally from the intellectual tradition of northern Europe.

The "consensus" scholars have founded their conclusion upon various responsa in which ROSH explicitly criticizes the Mishneh Torah for its methodological shortcomings, along with citations in which ROSH seemingly expresses his admiration for RAMBAM as halakhist. We have already seen,

however, other references in which Asher ranks Maimonides as inferior to Ashkenazic sages in halakhic prestige; moreover, much of the evidence which supposedly demonstrates Asher's deference toward RAMBAM in fact proves (may suggest) otherwise.[15] On the basis of this analysis, it has been suggested that whatever deference and respect paid by Asher to Maimonides is as much a result of the juridical context in which he worked as it was a result of an attitude of admiration. The true test of this attitude, I have argued, lies in an examination of the actual halakhic product of the Hilkhot Ha-ROSH, in its tendency either to accept or reject the halakhic legacy of RAMBAM. The results of that test indicate clearly that R. Asher stands on the side of rejection. We have arrived at this conclusion by means of a side-by-side comparison of the two poskim. Despite their significant differences in form and style, both the Mishneh Torah and the Hilkhot Ha-ROSH present the reader with the halakhic results which stem from the Talmudic sources. One who studies the basic sugya and then compares the halakhic treatment given in ROSH to the corresponding ruling in the Mishneh Torah will see that, time and again, Asher derives "something else" from the sugya than does RAMBAM. That "something else" is substantially shaped and colored by Asher's Tosafist tradition, an intellectual world that advances far beyond the Maimonidean school of Talmudic study.

In addition, our study has revealed an important distinction between Asher's relationship to Alfasi and his attitude concerning the Mishneh Torah. As we have seen,[16] Alfasi acts as the basic study text for ROSH, just as he does in Spanish yeshivot at the time. Alfasi is interchangeable with the Talmud itself; in the Hilkhot Ha-ROSH, it is the "Talmud", serving as the basis on which Asher builds his structure of commentary and halakhic decision. It is only when he mentions Alfasi by name that ROSH regards him as one

post-Talmudic authority among the others. When he cites the Alfasi as though it were the Talmud, his relation to it is that of a Tosafist or other commentator/posek to the Talmud itself. Like the other rishonim, Asher interprets the "Talmud" in such a way that it yields a particular set of halakhic conclusions. The Tosafists, through their tradition of interpretation, create a "new" Talmud; ROSH applying the same methods of study and commentary, creates a "new" Alfasi, one who is absorbed into the intellectual world of the northern European yeshivah.

It is for this reason that, of his 200 disagreements/contradictions of the RIF/RAMBAM halakhah, 68 are cases in which ROSH definitely rejects the position of RAMBAM but does not necessarily disagree with RIF. The Alfasi, like the Talmud itself, can be interpreted in one way or the other; as the "Talmud katan", it may yield a number of varying and conflicting halakhic rulings from a particular sugya, depending upon the interpretation. RAMBAH, who insists that he follows the halakhah of Alfasi in virtually all cases, is but one possible interpretation of any given passage. Filtered through the intellectual medium of Tosafot and ROSH, the Alfasi, like the Talmud itself, renders halakhic decisions at odds with the formulations in the Mishneh Torah.

With is in mind, the 153 halakhic units in which ROSH acts as "commentator" on the Talmud/Alfasi become pivotal to our understanding of his tendenz. These 153 units comprise 28.4 per cent of the total halakhic units in which Asher adds material to his base text. He does not depart here from the "Sefardic" halakhah; he rather elucidates the sugya, explaining its terms and its concepts. Significantly, he draws upon the Tosafot in 49 of these units, almost one-third of a total. If RIF serves as Asher's base text, his "Talmud", then he in turn serves at times as RIF's commentator, performing the

classical function of the commentator to expound and expand upon the text in order to make it more intelligible to the student. The notion that Hilkhot Ha-ROSH is in part a "Talmudic commentary" has surfaced from time to time in the scholarship, only to be pushed aside by the understanding of the book as a "code".[17] It appears that a re-appraisal of this notion is in order: the Hilkhot Ha-ROSH is a halakhic commentary to the Alfasi, which serves as its "Talmud". This accounts for the number of Sefardic and Provencal authorities cited in the ROSH; Asher, though predominantly a Tosafist, is willing to utilize the halakhic traditions of the various schools in order to explain his "Talmud" and arrive at its authoritative halakhic product.

How can we consider the ROSH a "commentator" to the Alfasi when his discussion ranges far and wide over the halakhic corpus and is not restricted to the words of the RIF himself? This difficulty disappears when we reconsider the meaning of the term "commentary". Haim Tchernowitz has noted[18] that the major "commentators" to the Alfasi, whose works are printed alongside the RIF in all editions, are not "commentaries" in the "true" sense of the word. They do not elucidate the wording of the RIF or his halakhic conclusions as much as they explain the sugya of the Talmud and make it the foundation for their own hiddushim. In the course of these explanations, the "commentators" include the words of other poskim and commentators in their discussion. R. Nissim b. Reuven of Gerona, in particular "uses the Alfasi for his own pilpul...RaN's purpose was not to explain the RIF, to clarify his opinions and rulings." RaN, says Tchernowitz, is more concerned to explain the Talmud and the other authorities, using RIF as a base for his own work but not giving him the attention which one would expect that a "commentator" would pay to his base text. Without presuming to judge the accuracy of his claims, we might argue that Tchernowitz fixes upon a much-too-narrow definition of the

term "commentary". Certainly the RaN is a "commentator" on the Alfasi rather than on the Talmud. He ranges far beyond the linguistic confines of the base text because he desires to supplement that text with halakhic material necessary to a full understanding of the issues under study. If the Alfasi is to serve as the "Talmud", the basic text-book of Spanish yeshivot and the foundation of halakhic study, it must be adapted so that it reflects current halakhic reality. It must be made to include those sections of the Talmud which, though RIF omits them, are now deemed to be of halakhic import. It must reflect the views of the great authorities who succeeded RIF--RAMBAM, the Tosafists, the RAMBAN and the RASHBA, to name just a few. It must also be accompanied by a running explanation which allows it to be studied independently of the Talmud itself; RaN accomplishes this by repeating word-for-word much of RASHI's commentary to the corresponding sections of the Talmud. RaN's work may not be a "commentary" in the narrow sense of the word. We may call it a "supplement" or an "adaptation", but the point remains: RaN creates an apparatus which, amplifying the RIF, brings him up-to-date and enables him to serve as the text-book for the more intense and sophisticated study of the halakhah in the fourteenth century. RaN brings the RIF into the middle of this "new world" of Talmudic learning.

The same point should be made concerning R. Asher. He is a "commentator" in the sense that he supplements and adapts his base text to make it reflect the intellectual priorities of his own yeshivah. The manifold traditions which emerged from halakhic study subsequent to Alfasi's time are now included in the study of the RIF himself. Without such a "commentary", the RIF would have become irrelevant in those academies influenced by Tosafot learning. Rather than pass into halakhic oblivion, the Alfasi--like the Talmud itself--becomes part of the Tosafist dynamic, the foundation for new interpretations

and halakhic rulings. RIF, to a very great extend, is the "Talmud" in Hilkhot Ha-ROSH; Asher, in turn, provides this "Talmud" with a halakhic commentary that brings it into the middle of a universe of discourse that RIF himself never imagined.

The Hilkhot Ha-ROSH is therefore more than a code of halakhah; it is a halakhic commentary on the Alfasi, the lens through which Alfasi is to be read and understood. The ROSH functions as the authoritative halakhic key to the RIF, much the same function that Maimonides claimed for his Mishneh Torah.[19] In this light we see the true relationship of ROSH to RAMBAM. The Code of Maimonides has been rendered halakhically irrelevant. Just as the ROSH excels the Mishneh Torah in its method of codification (and this was, in the "consensus" view among scholars, Asher's real objection to the RAMBAM), it also supercedes it as an accurate and proper summary of the halakhah. Asher's work differs from that of RAMBAM in both form and content. If it was the intent of ROSH to produce a book of halakhah that was an improvement over the Mishneh Torah, this improvement, from Asher's standpoint, lies in the substance of the halakhah as well as in the mechanics of its codification. There is no longer any need to consult the Mishneh Torah, either as the "key" to the Alfasi or as a book of halakhah; it has been supplanted by a work that is superior on both counts.

From this vantage point we discover the explanation for Asher's considerable use of Sefardic and Provencal authorities. The Hilkhot Ha-ROSH is more than a theoretical text-book of Talmudic study; the Tosafot Ha-ROSH constitutes Asher's contribution to that discipline as well as the curriculum of his yeshivah.[20] The Hilkhot Ha-ROSH is aimed at the halakhic study of the Talmud/Alfasi; it is seen as the means by which the Talmud/Alfasi yields its halakhic product. Asher certainly intended for this work to be seen as

authoritative and relevant within the Spanish halakhic context; no halakhic treatise designed for that community would be complete without consideration of the legal traditions of Sefarad and Provence. Asher creates a halakhic commentary to the Talmud/Alfasi, based predominantly upon the northern European intellectual tradition, for the benefit of students and judges in Spain. It is not a "reconciliation" of the varying traditions, for its roots are planted deeply in Tosafist soil. It is not "an epitome of Ashkenazic halakhic creativity", for it contains a significant amount of halakhah from the other centers. It is, in the end, a new halakhah, founded upon the literary base of the old, which seeks to supplant the RAMBAM as the "authorized version", the accepted halakhic guide to the Talmud.[21]

3) To what extent does the halakhah of R. Asher influence subsequent codifiers? If Hilkhot Ha-ROSH represents a "new halakhah" in Spain, a virtual translation of the Alfasi into the halakhic vernacular of northern Europe, then his work would constitute a direct challenge to the RAMBAM as supreme posek. My contention is that ROSH objected to the Mishneh Torah on grounds of content as well as methodology; his compendium, intended to serve a purpose similar to that of the RAMBAM within the walls of the academy, differs substantially with the Maimonidean Code on both the substance and the organizational mechanics of the law. Did important sages of subsequent halakhic history take note of this challenge to RAMBAM's halakhic prestige? The very juridical context itself began to change, as communities in Spain and elsewhere resolved to follow the rulings of R. Asher in all cases where he differs from RAMBAM.[22] The TUR, the great halakhic compendium of Ya'akov b. Asher, follows Asher on all legal points while citing the rulings of other poskim. In its turn, the TUR served as the starting point for Yosef Karo's Beit Yosef, the massive commentary which ultimately produced the Shulhan

Arukh. R. Asher is cited by major poskim beginning with the middle of the fourteenth century; he occupies the "first rank" of legal authorities alongside RIF and RAMBAM. His tremendous influence upon subsequent generations is unquestioned.[23]

In addition, our analysis has revealed that virtually all of the divergences of Asher from the Mishneh Torah halakhic tradition are noted by later codifiers. The response by the codifiers to these divergences constitutes a major turning point in the history of the halakhic literature. The Tosafot tradition, introduced to Spain by RAMBAN in the thirteenth century, creates a massive expansion in the breadth and depth of Talmudic learning and a corresponding expansion of halakhah that overwhelms the conceptual confines of the Alfasi-Maimonidean framework. As we have seen, the Tosafist halakhah determines the intellectual agenda of the subsequent poskim.[24] These poskim, however, do not abandon the earlier Sefardic authorities in the face of the Tosafot tradition. Rather, Alfasi and Maimonides are brought into the new world of Talmudics dominated by the Tosafists' approach. In order to retain his eminence as a halakhic authority, RAMBAM must be made to answer arguments and consider concepts which in fact had never occurred to him; he must become a participant in the Tosafist dialectic. In the fourteenth century, both Magid Misheh and R. Nissim Gerondi undertake to explain Maimonides' rulings within the bounds of interpretation established by Tosafot: if Tosafist halakhah is perceived as a challenge to RAMBAM's decision, that decision is provided with a theoretical foundation to harmonize it with Tosafot.[25] This is true as well of Yosef Karo, who, unlike the latter authorities, did have access to the Hilkhot Ha-ROSH and the TUR. Setting the explanation of "difficult" passages in RAMBAM as one his major goals,[26] Karo defends him from the challenge posed by Asher's Tosafist

tradition. Actually, the term "defense" is inexact. The Tosafot does not attack RAMBAM as much as render him irrelevant to halakhic discussion. The intellectual approach of Tosafot creates a complexity and profundity of analysis that comes to dominate the study of the Talmud and the determination of the halakhah. The Mishneh Torah lay entirely outside the Tosafist tradition and thus could not respond to the challenges raised by its dialectic. The appearance of Hilkhot Ha-ROSH and the other literary embodiments of Tosafist tradition forces the admirers of the Mishneh Torah to provide that work with an adequate theoretical framework, including arguments on behalf of RAMBAM in light of the Tosafist analysis. This thorough-going intellectual "rehabilitation" of the RAMBAM brings him into an intellectual world dominated by Tosafot; to a great extent, Karo and the others do for Maimonides what ROSH does for Alfasi. This effort by RAMBAM's commentators lasts for two centuries and more; it was motivated by the Tosafot and, in large part, by the legacy of Asher b. Yehiel.

Summary. The Hilkhot Ha-ROSH is a halakhic commentary to and expansion of the Alfasi. Steeped in the intellectual traditions of northern European Talmudics, the compendium adapts to the Alfasi, the "Talmud" of the halakhic study in the Spanish yeshivot, so that it becomes an integral part of Tosafist learning. Along with the basic approach to the Talmud, an approach grounded in the Tosafist academies, Asher includes halakhic material stemming from Spanish and Provencal authorities; this inclusion makes the Hilkhot Ha-ROSH fit for halakhic decision-making within the juridical context of Spain. Serving, therefore, as a halakhic textbook for yeshivah learning and as a source of halakhic rulings--as both "commentary" and "code"--the Hilkhot Ha-ROSH supplants the Mishneh Torah in both respects. Asher takes the RIF to a level of learning on which the RAMBAM, the representative of a fundamentally

different approach to halakhic study, is simply irrelevant. Objecting to the Mishneh Torah in content as well as style, Asher poses a major challenge to Maimonides' halakhic prestige, a challenge addressed by major codifiers and halakhists in the subsequent centuries. The ROSH is not a "reconciliation" of varying traditions; he is not an "epitome" of Ashkenazic halakhah; and above all, he is not a great "admirer" of the halakhic authority of the RAMBAM. He is, quite simply, the codification of a new halakhah in Spain, one that differs substantially from that found in the Yad Ha-Hazakah. This difference lies at the heart of Asher's contribution to the history of the halakhah.

NOTES

[1]Pp. 35ff.

[2]Zafrany, Sinai, p. 279.

[3]See p. 10.

[4]See pp. 18-20 and 395.

[5]P. 14.

[6]P. 90.

[7]Resp. Ha-ROSH 20:20.

[8]See Urbach, Ba'alei Ha-Tosafot, p. 676: "Two tendencies are apparent in the works of the Franco-German scholars: theoretical and practical. It would seems that Tosafot serves the first purpose and books of halakhah the other, but this is not so. The discussion in Tosafot leads to halakhic decision, and the decision in a responsum or halakhic work usually brings with it a theoretical discussion of the sugyot in question." One cannot arbitrarily separate "Tosafot" from "halakhic code"; both of these literary categories involve the same intellectual approach.

[9]Urbach, op. cit., p. 598.

[10]Soloveitchik, op. cit., p. 20.

[11]For a description of the halakhic method of RaMaH and his place in halakhic history, see Y. Ta-Shema, "R. Meir Ha-Levy Abulafia ve-Yezirato Ha-Sifrutit", Kiryat Sefer, v. 45, 1970.

[12]Second introduction to Yam shel Shelomo, Hulin.

[13]Urbach, op. cit., p. 696. See also Soloveitchik, n. 20, for a description of the "new world" of Tosafist halakhah.

[14]Of the 270 citations of Tosafot in our study, 221 lead to divergences from the halakhah of RAMBAM.

[15]See pp. 24ff.

[16]See pp. 18-20 and 2

[17]Freimann, op. cit., p. 302, and Elon, op. cit., p. 1036, n. 66.

[18]Tchernowitz, op. cit., I, 163-164.

[19]See p. 17 and n. 39.

[20]Tosafot Ha-ROSH is the curriculum of Asher's yeshivah; see the responsum printed by Freimann in Ha-Soker, v. 2, p. 37.

[21]This, it seems, is the meaning of the words of Ya'akov b. Asher in his Introduction to TUR Hoshen Mishpat. He writes that his father's book "is founded upon the great Rabbi Alfasi, who sifted through the Talmud and filtered it...and brought to light all its profundities." Alfasi is the halakhic essence of the Talmud; he is not simply a posek among poskim. RAMBAM, in contrast, belongs to that second category: "in those places where (my father's) opinion differs from that of the other codifiers (my emphasis--MW), such as RAMBAM and those like him, I will write their opinion along with that of my father." Alfasi is the "Talmud" of halakhic study, the basis from which halakhic deliberations procede. RAMBAM is not the authoritative halakhic key to the RIF, but simply one posek among all the rest. The TUR, of course, sees ROSH as the authoritative "key" to the halakhah contained within RIF.

[22]Y.Z. Kahana, op. cit., pp. 25-28. R. Yehudah b. Asher condemned the concept of "supreme posek", even when communities sought to bestow that designation upon his father; see Resp. Zikhron Yehudah, n. 54.

[23]See p. 1.

[24]See pp. 398-399.

[25]It seems to me that R. Nissim's role as an expounder/commentator to RAMBAM has been overlooked by modern scholars, although Karo describes him as such in his Introduction to Beit Yosef.

[26]Introduction to Beit Yosef.

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