DAF Notes
Insights into the Daily Daf
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Daf Notes is currently being dedicated to the neshamot of

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May the studying of the Daf Notes be a zechus for their neshamot and may their souls find peace in Gan Eden and be bound up in the Bond of life

Rav Huna said in the name of Rav Assi: If the firstborn son protests (*against the proposed improvements by his brothers in the bequeathed estate; rather, he wants it to be divided as is, and he will improve the double portion himself*), his protest is valid (*and if they do not listen to him, he receives the double portion of their improvements as well*).

Rabbah said: Rav Assi"s ruling (*that the firstborn son receives a double portion when the brothers did not heed his protest*) stands to reason in the case where grapes were cut (*from the vines*) or where olives were harvested, but where they were pressed (*and made into wine or oil*), the firstborn does not receive a double portion (*because the brothers acquire the wine and oil through its transformation; they are regarded as thieves*). Rav Yosef, however, said: Even if they were pressed.

The *Gemora* (*assuming that Rav Yosef meant that even in that case, the firstborn son receives a double portion*) asks: But surely they were initially grapes and now they turned into wine (*which means that the brothers would acquire it with the transformation, so how can the firstborn receive a double portion in it*)?

The *Gemora* answers: This is as Rav Ukva bar Chama said elsewhere that the brothers are required to compensate him for the damaged grapes; so too here (*Rav Yosef meant that if the wine spilled or was ruined*), the brothers are required to compensate him for the damaged grapes (*and he may take from the wine an amount equal in price to the two portions he would have received in the grapes*).

The *Gemora* asks: In what connection was the statement of Rav Ukva bar Chama made?

The *Gemora* answers: It is in connection with what Rav Yehudah said in the name of Shmuel: If a father bequeathed grapes and olives to a firstborn and to an ordinary son (*and the firstborn protested that they should not cut it off*), and the brother cut the grapes or harvested the olives, the firstborn receives a double portion even if they pressed.

The *Gemora* asks: But surely they were initially grapes and now they turned into wine (*which means that the brother would acquire it with the transformation, so how can the firstborn receive a double portion in it*)?

The *Gemora* answers: He meant that the brother would be required to compensate him for the damaged grapes. (126a)

Renouncing his Claim

Rav Assi said: If a firstborn son accepted a share in a field equal to that of any other brother, he has renounced the claims for his double portion.

Rav Pappa said in the name of Rava: He has renounced his claim upon that field only (*but he may still claim the*

double portion in the remainder of the estate). Rav Pappi said in the name of Rava: He has renounced his claim

upon the entire estate. Rav Pappa said in the name of Rava that he has renounced his claim upon that field only, for he is of the opinion that the firstborn does not have any legal rights in his share before the division (*and therefore, he would not be able to sell his portion in any of the other fields - not until they began to divide it*). Rav Pappi said in the name of Rava that he has renounced his claim upon the entire estate, because he holds that the firstborn does have legal rights in his share before the division takes place, and we may assume that since he has renounced his claim upon that one field, he has also renounced his claim upon all the others.

The *Gemora* notes: The statements reported by Rav Pappi and Rav Pappa were not stated explicitly by them, but rather, they were inferred from the following case: There was a certain firstborn son who went (*before the division*) and sold his own property and that of his other brother (*without his consent, and then, the brother died*). The orphans (*the other brother's sons*) went to eat from the dates of the buyers, and the buyers hit them. The orphans" relatives said to them, "Is it not enough that you purchased their property illegally, but you must also hit them (*when they want to eat their dates*)?" They came before Rava, and he said to them: The firstborn son has accomplished nothing (*the sale is null and void*).

Rav Pappi (*upon hearing this ruling*) thought that Rava was referring only to the sale in the part of the estate belonging to the brother (*but the sale of his own double portion was ruled to be valid*). Rav Pappa, however, thought that Rave was referring to the entire estate (*for a firstborn does not have any legal rights in his share before the division*).

They sent the following message from *Eretz Yisroel*: If a firstborn son sells his share before the division of the estate took place, he has accomplished nothing. This indicates that the firstborn does not have any legal rights in his share before the division.

The *halachah* is that the firstborn does have legal rights in his share before the division.

Mar Zutra from Rishba divided a basket of pepper with his brothers in equal shares (*without taking his double portion*). Rav Ashi said to him: Since you have renounced your rights in a portion of the estate, you have renounced your rights in the entire estate. (126a - 126b)

Mishna

If a father says, "So-and-so, my firstborn son, shall not receive a double portion, or, if he says, "So-and-so, my son, shall not inherit with his brothers (*and then he died*), he has said nothing, for he has made a condition against what is written in the Torah.

One who orally divides his assets among his sons (*as a gift; not as an inheritance*), and gave more to one and less to another, or he made the firstborn's portion equal to them, his words are valid. However, if he said, "As an inheritance," he has said nothing. If he wrote either at the beginning, or in the middle, or at the end, "As a gift," his words are valid. (126b)

He is a Firstborn

The *Gemora* asks: Shall we say that our *Mishna* is not following the opinion of Rabbi Yehudah, for according to him, the father's stipulation should indeed be valid! For it was taught in a *braisa*: If someone says to a woman that she is betrothed to him on condition that he does not owe her support, clothes, or marital relations, the *kiddushin* is valid, but the conditions are invalid; these are the words of Rabbi Meir. Rabbi Yehudah says: In monetary matters, the condition is upheld.

The *Gemora* answers: Our *Mishna* can still be in agreement even with the viewpoint of Rabbi Yehudah, for there, she knew his conditions and waived her privileges, but here, the son did not waive his rights (*for he never knew about it*).

Rav Yosef said: If one said, "So-and-so is my firstborn son," he is entitled to receive a double portion. However, if he said, "So-and-so is a firstborn son," he is not entitled to receive a double portion, for he may have meant, "the firstborn son of his mother."

A man once came before Rabbah bar bar Chanah and said to him, "I know definitely that this man is a firstborn (*of his father*)." Rabbah asked him, "How do you know this? It is probably because you heard his father call him „a foolish firstborn." He might have been the firstborn only of his mother, because the firstborn of a mother can also be called „a foolish firstborn."" [*"Foolish" can mean "incomplete," and that is so because he does not have the full rights and privileges of a firstborn.*]

A man once came before Rabbi Chanina and said to him, "I know definitely that this man is a firstborn (*of his father*)." Rabbi Chanina asked him, "How do you know this?" The man replied, "I know this because when people would come to his father (for diseases in the eye), he used to say to them, „Go to my son Shikchas, who is firstborn and his saliva heals."

The *Gemora* asks: Perhaps he was only the firstborn son of his mother?

The *Gemora* answers: There is a tradition that the saliva of the firstborn son of a father is healing, but that of the firstborn of a mother is not healing. (126b)

INSIGHTS TO THE DAF

Is the Firstborn the First Conceived or the First Actually Born?

The following event occurred about 250 years ago. Someone married and divorced his wife within a short while, leaving her pregnant, and immediately remarried. His second wife bore a son seven months after their marriage and his first wife had a son soon thereafter.

Poskim were nonplussed to decide which was to be considered his firstborn, the one conceived first or the one actually born first, till the issue was referred to the Vilna Gaon, who declared that the Torah itself addresses the question: The Torah describes a situation where "if a man will have two wives, one beloved and one disliked, and they bear him sons, the beloved and the disliked, and the firstborn will belong to the disliked…" (Devarim 21:15). In describing their birth the Torah mentions the beloved's son first but later mentions the firstborn as belonging to the disliked wife. In other words, it could be that the beloved wife's son was born first whereas the disliked (alluding to the divorced) wife's son was conceived first. In such an instance "he cannot prefer the beloved wife's son to the son of the disliked wife, the firstborn. For he shall recognize the son of the disliked wife to give him a double inheritance for he is the first of his strength; the right of the firstborn belongs to him."

This wonderfully instructive interpretation, appearing in *Sa'aras Eliahu*, apparently determined that the first conceived is halachically regarded as the firstborn but the Gaon's simple explanation caused a great stir. Many halachic authorities expressed enormous doubt, citing much evidence, and remarked that firstborn rights belong strictly to the son actually born first (see Responsa *Shoel Umeishiv,* 3rd edition, III, 52; Responsa *Imrei Yosher,* II, 112; *Chochmas Shlomoh* on *Shulchan Aruch, C.M.* 278; *Pardes Yosef* on *Ki Teizei*). Some even added that they

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did not believe that the Vilna Gaon (or HaGaon Rav Chayim of Volozhin, to whom some works attributed the interpretation), ever expressed such an idea.

The Netziv of Volozhin also writes in his *Ha'amek Davar* (Devarim 21:15) that the interpretation is falsely quoted in the name of the Gr"a. The Netziv and *Cheishek Shlomoh* comment that the verses indicate an opposite case, where the beloved wife conceived first, as the beloved is mentioned first: "If a man will have two wives, **one** beloved and **one** disliked." The words **one** and, again, **one** are apparently superfluous but, on closer inspection, teach us that they did not become his wives simultaneously: First he wed the beloved wife and later the one he eventually disliked. The first wife usually conceives first but the Torah rules that the firstborn "will belong to the disliked" if he was actually born first (see *Peninim MiShulchan HaGera*).

Those who reject the interpretation attributed to the Vilna Gaon even support their contention with a *midrash* quoted by Rashi (Bereishis 25:26). The *midrash* attests that Yaakov was conceived first but Eisav was considered the firstborn as he was actually born first, up to the point where Yaakov bought his firstborn rights from him (see *Chochmas Shlomoh*, who reconciles this difficulty). *Ba"al HaTurim* already remarks that the fact that Yaakov was conceived first had no effect on Eisav's firstborn status as firstborn rights are strictly determined by a son"s actual birth (see *Moshav Zekeinim,* ibid; *Tosfos HaShalem* on Bereishis 25-33:3 and 25-31:11; Responsa *Chayei Olam Nata* by HaGaon Rav Y. Alevski of Moscow in his long correspondence from behind the Iron Curtain with HaGaon Rav Y.A. Krasileshtchikov, author of *Tevunah* on the Yerushalmi, [published by Mutzal MeEish], where the latter favors the opinion that firstborn rights belong to the son first conceived).

Making a Condition Against Something Written in the Torah

The *Gemora* cites a Machlokes between Rebbi Meir and Rebbi Yehudah regarding whether a person may make a Tenai modifying the obligations stipulated by the Torah regarding monetary law ("Masneh Al Mah she'Kasuv ba'Torah"). Rebbi Meir says that if a man is Mekadesh a woman on condition that he not be obligated to give her She'er, Kesus, and Onah, the Tenai is invalid and the Kidushin takes effect fully (and he is obligated to provide her with She'er, Kesus, and Onah). Rebbi Yehudah says the Tenai is valid, and the Kidushin takes effect and he is not obligated to provide her with She'er, Kesus, and Onah.

Rebbi Meir"s view is difficult to understand. If the Tenai is null and void, then why should the Kidushin take effect at all? The man was Mekadesh the woman on condition that if he is not obligated to give her She'er, Kesus, and Onah, then he wants the Kidushin to take effect, and conversely, if he will be obligated in She'er, Kesus, and Onah, then he does not want the Kidushin to take effect! (Rebbi Meir requires a "Tenai Kaful" -- both sides of the condition stated explicitly -- whenever a Tenai is used, as the Mishnah says in Kidushin 61a.) Since the man specified clearly that he does not want the Kidushin to be valid if he will be obligated to give She'er, Kesus, and Onah, then how can the Kidushin take effect and obligate him in She'er, Kesus, and Onah? He did not have in mind for the Kidushin to take effect under such circumstances! (**TOSFOS** DH Harei Zu)

ANSWERS:

(a) The **RI** explains that we learns all the laws of Tenai, including the very fact that one may make a Tenai, from a verse (in Kidushin, ibid.) If not for the fact that the Torah teaches that there is such a thing as making a Tenai, we would not have known that there is a concept of Tenai at all. Had the Torah not taught us the concept of Tenai, that one may make a stipulation when making a Kinyan, we would have thought that when a person

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makes a Tenai as a precondition to a certain Kinyan, we just ignore the Tenai and the Kinyan takes effect. By teaching that a Tenai does work, the Torah is teaching that if the condition is not fulfilled, the Kinyan is annulled retroactively. In the situations in which the Torah does not teach that a Tenai works (such as a situation in which the Tenai counters that which is written in the Torah), we revert back to the original way we would have ruled had the Torah not taught us the concept of Tenai, and the Kinyan works regardless of the fulfillment of the Tenai.

This answer of Tosfos is very difficult to understand. Even without the Torah teaching us the laws of Tenai, we should know, logically, that if a person sells an item to his friend and stipulates that the sale should not be valid unless his friend gives him something or does something, then if the friend fails to fulfill the Tenai the sale should not be valid, since the person did not fully commit himself to the sale!

To answer this question, we must first analyze a related Halachah -- the Halachah of Bereirah. In many places in the *Gemora* we find the view that holds "Ein Bereirah," which means that a Kinyan cannot be effected if -- at the moment that it takes effect -- it is not clear upon *what* it takes effect. For example, a person cannot pick up an item in order to be Koneh it and say, "If it rains tomorrow, I want this act of Kinyan to be for Reuven, and if it does not rain tomorrow, I want this act of Kinyan to be for Shimon." If a person does make such a stipulation, then even if it rains the next day, the object will not belong to Reuven. Similarly, a person cannot eat fruits today, "The portion that I will choose to separate tomorrow will be Terumah on these fruits starting from now." If he does so, then even if he separates a portion tomorrow, it will not serve as Terumah.

The logic for this, as the **RAN** explains in Nedarim (45b), is that "it is not appropriate for a Kinyan to take effect in a way that leaves a doubt as to how it took effect." This means that the Kinyan must take effect at the same moment at which the action which accomplishes the Kinyan is performed (such as the act of Hagba'ah (lifting up an item) in the case of a purchase, or Dibur (speech) in the case of making something Terumah). The Kinyan cannot take effect after the act, because the act which makes the Kinyan is no longer present. Thus, if at the moment that the act is performed, the Kinyan "does not know" where to take effect, the Kinyan does not take effect (or it takes effect on one of the two, regardless of what happens the next day; see Insights to Eruvin 37b). The Kinyan cannot see into the future, so to speak.

What is the difference between Bereirah and a Tenai? No Tenai should ever work if we say "Ein Bereirah," because the Kinyan cannot know what will happen in the future (whether the Tenai will be fulfilled or not) in order to be able to take effect now!

RASHI and **TOSFOS** (Gitin 25b, DH u"l"Chi Mayis) explain that when a person makes a Tenai, it is in his ability, and it is his intention, to fulfill the condition (for otherwise he would not have made the Kinyan in the first place). Hence, the Kinyan is not taking effect in a matter that leaves doubt. Rather, it takes effect *for certain* at the time the act of Kinyan is made, since he intends to fulfill the Tenai. What, then, is it that revokes the Kinyan retroactively when the condition is not fulfilled? The Kinyan has already been made and completed; it took effect, so how can it be revoked retroactively? The answer is that this is the reason why the Torah has to teach us the novel concept of Tenai -- even though the Kinyan was made, it can be revoked through not fulfilling the condition. This is what the Ri means to say -- since the Torah did not teach the concept of Tenai in a case where the Tenai contradicts the obligations of the Torah, then we revert to saying that the Kinyan is completed and nothing can uproot it retroactively, since it has already been done and has already taken effect. The person who

made the Kinyan *did* intend for the Kinyan to take effect for certain, since he was expecting the Tenai to be fulfilled.

For this reason, when a man makes a Kidushin on condition that he not be obligated to give She'er, Kesus, and Onah, he obviously thinks that he is able to create such a Kidushin and he has in mind that the Kidushin should be completed, except that it should be uprooted if it turns out that he is obligated to give She'er, Kesus, and Onah. But by that time, it is too late to revoke the Kidushin, since it already took effect.

(a) **RABEINU TAM** (cited by the Tosfos Yeshanim and the Tosfos ha'Rosh), the **RITVA**, and the **RASHBA** (cited by the Shitah Mekubetzes) explain that when a person makes a Tenai that contradicts the Torah, he does not really mean it, but he is just being "Mafligah b'Devarim" -- he is just frightening her with words. The Beraisa in Gitin (84a) teaches such a concept with regard to a person who says to his wife that he is giving her a Get on condition that she does something that is physically impossible to do (see Rashi there, DH Mafligah). Since he knows that the Halachah of the Torah requires that Kidushin be done in a certain way with certain obligations, it must be that he is not serious about his condition to alter those obligations, and therefore he probably has in mind to make a Kidushin, and he is just saying this condition in order to frighten her.

Rabeinu Tam might have rejected the explanation of the Ri because his explanation is logically sound only when the condition is something that will be fulfilled or not fulfilled at a point *after* the Kinyan is completed. In the case of Kidushin, though, the Kidushin takes effect *at the same time* that the obligations of She'er, Kesus, and Onah take effect (or do not take effect). Thus, since the Kidushin does not depend on a future event but on a present event, the Kidushin should not take effect (since he did not have in mind to make such a Kidushin that obligates him in She'er, Kesus, and Onah). (See also Rebbi Akiva Eiger.)

The R"i might have explained like the Rashba, who says that the condition that the husband was stipulating was not that Kidushin should take effect without the obligations of She'er, Kesus, and Onah. Rather, the husband was stipulating that Kidushin should take effect only if the woman *forgoes her entitlement* to She'er, Kesus, and Onah. This can take place after the Kidushin is effected. (This is not like the opinion of Rabeinu Elchanan as quoted later in Tosfos.)

The Ri, on the other hand, did not accept Rabeinu Tam‟s explanation, because "Mafligah b‟Devarim" can only be applied to a Tenai made against something written in the Torah, but not when any of the other details of Tenai were omitted. However, we find that if a person makes a Tenai in the wrong order ("Ma‟aseh Kodem le‟Tenai"), then the Kinyan takes effect and we ignore the Tenai even though the logic of "Mafligah b‟Devarim" does not apply (as the **RE'AH** points out)!

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DAILY MASHAL

Firstborn's Saliva

Our *Gemora* says that the saliva of a father's firstborn son can cure visual disorders (Rashbam, s.v. *Masei*). Meoros HaDaf Hayomi quotes the Gerer Rebbe, author of *Imrei Emes,* who supports this assertion with a passage from *Midrash Rabah* (Bereishis, 67). Rish Lakish commented on the verse: *And he said, Is that (hachi) why he called him Yaakov, that he caught me…* (Bereishis 27:36). *Hachi* has the sound of coughing or bringing up phlegm: Eisav started to cough and spit. Eisav wanted to verify if he was the real firstborn and tried to cure Yitzchak's eyesight with his saliva. When he failed, he realized he was no longer the firstborn and only then wept aloud (*Imrei Emes, Likutim*).