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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

Tumtum not like a Son

The *Gemora* discusses areas in *halachah* where a *tumtum* (one whose genital area was enclosed), who was found to be male, is still not considered a male.

1. He does not receive a double portion if he is the first born, since the verse says the first born son *v’haya - will be*, indicating that he must be identifiable the first born son from birth, when he begins to exist [Rabbi Ami].
2. He is not judged as a wayward son (*bein sorer umoreh*), since the verse says *ki yih’yeh l’ish bein soreir umoreh – when there will be to a man a wayward son*, indicating that he must be identifiable as a son from birth, when he begins to exist [Rav Nachman bar Yitzchak].
3. He is not included when calculating the extra portion given to the first born son, since the verse discussing the sons who split with the first born says *v’yaldu lo banim – and they bore him sons*, indicating that the sons must be identifiable as sons from birth [Ameimar].
4. He is not circumcised at eight days (*if it will violate Shabbos*), since the verse discussing a circumcision says *v’yalda zachar – and she gave birth to a male*, indicating that the son must be identifiable as male from the time of birth [Rav Shizvi].

5. His mother does not go through the process of impurity and purity that usually follows the birth of a son (7 days of impurity, followed by 33 days of purity), since it follows the verse about circumcision [Rav Shrivya].

The *Gemora* cites a *braisa* which states that if a woman miscarries a *tumtum* or *androgenus* (who has both male and female genitals), she must follow the impurity and purity processes of both a male and female (i.e., impure until 14 days, and beginning the general *nidah* cycle 26 days later). This disproves Rav Shrivya, who says that any baby not identifiable as a male at birth does not incur the impurity and purity process at all.

The *Gemora* suggests that this also disproves Rav Shizvi, since the same verse is used for circumcision.

The *Gemora* deflects this by saying that the *braisa* may feel that it is a doubt whether to read the verse this way. Therefore, we will not allow one to violate Shabbos to perform the circumcision, but we will also not allow the mother to have a period of purity that she would have when miscarrying a male.

The *Gemora* suggests that if that were the case, the *braisa* should have also said that the woman must follow the stringencies of *nidah*, since she may not be subject to the impurity and purity of regular birth. (126b - 127a)



Doubtful Bechor

Rava cited a *braisa* that supports Rabbi Ami's exclusion of a *tumtum* from receiving a double portion as a *bechor*, although not from the source that Rabbi Ami suggested. The verse states *v'haya habein habechor lasenia – and the firstborn son was to the hated [wife]*. The *braisa* says that the word *bein – son* excludes a *tumtum*, while the word *bechor – first born* excludes one who is only possibly a firstborn son.

The *Gemora* explains that the second exclusion teaches that the firstborn must be identified as the first born at some point in order to receive the extra portion.

Rava initially said that if two wives of a man gave birth to sons in the same dark house, and it was unclear which was born first, the two sons can give each other power of representation and together claim one extra portion for whomever is the true first born.

Rav Pappa told Rava that Rabbi Yannai said (*due to the braisa cited above*) that if the firstborn was never identified, neither gets an extra portion. Only if the firstborn was first identified, but subsequently mixed up, may they use the power of representation to claim the extra portion.

Rava accepted Rav Pappa's statement, and publicly announced his mistake, and its correction. (127a)

Father Knows Best?

The people of a town on a lake sent the following question to Shmuel: if we had known one son to be the *bechor*, and then the father stated that another son was the *bechor*, who gets the extra portion?

Shmuel answered that the two sons should grant each other right to representation, and between the two collect one extra portion, which they split.

The *Gemora* explains that Rabbi Yehudah says that a father is believed to identify a son as the *bechor*, even when we had known a different son to be the *bechor*, while the Sages say that a father is believed only when we had no prior knowledge who is the *bechor*. Shmuel did not know who to follow, and therefore ruled that the two should split it.

The *Gemora* explains that we know that a father can identify the *bechor*, since the verse says the father will *yakir – recognize the bechor*, indicating that he has the power to make the *bechor* recognizable to others. Rabbi Yehudah says this is true even when we had known a different son to be the *bechor*.

Rabbi Yehudah says that the father is likewise believed to state that his son is the product of a forbidden marriage, and therefore unfit to marry into families of *Kohanim*. The Sages say that this is only true when we need the father to identify a *bechor*, since we didn't know who it was.

Rav Nachman bar Yitzchak told Rava that he understands why the verse empowering the father to identify the *bechor* is necessary according to Rabbi Yehudah, since it is allowing the father to contradict what we had known until now. However, according to the Sages, why is the verse necessary? The verse is not necessary for property that the father already owns, since he has the power to give that outright, and is therefore believed to assign the extra portion to a *bechor*. According to Rabbi Meir, who says one can give an item that he does not yet own, we do not even need the verse for property that he will acquire later, since he can also give that to anyone outright.

The *Gemora* answers that even Rabbi Meir agrees that he cannot now give property that he will own at the end of life, when he would be too weak to give it. Therefore, the verse teaches us that he may assign even this property to the *bechor* who he identifies.



The *Gemora* cites a *braisa*, with two statements. If we had known one son to the *bechor*, and the father identifies another son as the *bechor*, the father is believed. If we hadn't known a son to be a *bechor*, and the father identifies him as the *bechor*, the father is not believed.

The *Gemora* says that the first statement is only according to Rabbi Yehudah, while the second statement is according to the Sages.

Rabbi Yochanan says that if one says, "This is my son," and then says, "This is my slave," we do not believe his second statement. However, if he first says, "This is my slave," and then says, "This is my son," we believe his second statement, since he can claim that his first statement simply meant that his son serves him like a slave. However, if he made these statements to the tax collector, the reverse is true, since one pays tax for a slave, but not for a son. Therefore, he can claim that he only called his slave his son to avoid taxes, but not that he called his son his slave for any reason, since it would cost him more.

The *Gemora* cites a *braisa* to disprove Rabbi Yochanan. The *braisa* says that if someone said, "This is my son," and then said, "This is my slave," we don't believe his second statement, even if he was serving him like a son. If he said, "This is my slave," and then said, "This is my son," we don't believe his second statement, even if he was serving him like a slave. The second statement of the *braisa* seems to disprove Rabbi Yochanan's position that he can switch from claiming someone as a slave to claiming him as a son.

Rav Nachman bar Yitzchak answers that the *braisa* is a case where the initial statement was, "This is my slave, who is worth 100 *me'ah*." No one refers to their son as a slave worth a specific amount, and he therefore is not believed in his second statement. (127a - 127b)

Do you Promise?

Rabbi Abba sent to Rav Yosef the following *halachah*: If one claims that someone stole his slave, and the defendant says that he acquired it from him, and then offers to let the claimant swear and retrieve his slave, if the claimant swore, he may collect the slave. Although the claimant has no legal standing, the defendant's offer gives him the right to swear and collect.

The *Gemora* cites a *braisa* that discusses one who offers to allow his fellow litigant to adjudicate their case in front of amateur judges, or judges that are relatives – who are ordinarily not valid judges. Rabbi Meir says that the litigant may revoke his offer, while the Sages say he may not.

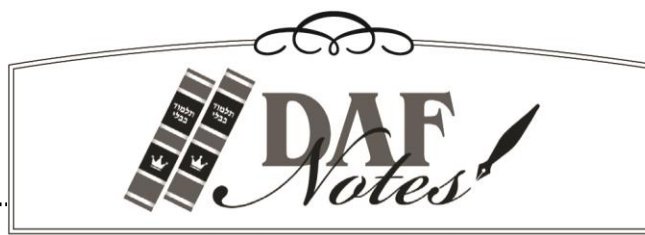
The *Gemora* explains that Rabbi Abba is teaching that the case of the dispute is even when the litigant agrees to pay based on their judgment, not just refrain from collecting, and we rule like the Sages. (127b - 128a)

INSIGHTS TO THE DAF

Compensation for a Cornea Stolen from the Deceased

A doctor performing an autopsy stole a cornea for a transplant and the heirs wanted to sue him for the cost of the eye, assuming that it could be likened to any stolen article. Our next paragraphs do not address autopsies, which constitute a topic on their own, but merely relate to the financial aspect of paying for the theft.

Apparently, the doctor cannot evade compensation to the heirs for the purloined cornea. The organ was worth something and if he stole it, he should pay for it. On closer examination, though, we shall discover that the matter is far from simple.



In our *sugya* the Amoraim try to find a situation where a person can acquire property without the ability to transfer its ownership to others and the *Gemora* concludes that such a situation characterizes a person in his final moments (*goses*) who has lost the power of speech. His inability to speak robs him of the possibility to grant ownership but he can still acquire assets such as by inheritance. It is evident that after his demise he can no longer acquire property or inherit.

The inheritance of posthumous rights

Returning to the cornea, we should first review the halachic treatment of theft. A thief must repay the value of any stolen item to the heirs of the person from whom he stole (*Tur, Shulchan Aruch, C.M. 367:4*) as heirs take their father's place and payment to a son, or another heir, is regarded as payment to the father (*Beis Yosef, ibid*). However, who exactly owns the cornea? If the heirs claim compensation with the assertion that they are the injured party, we must first determine if they inherited the cadaver. As, however, it is obvious that no one inherits his father's body, that possibility becomes invalid. What, though, about inheriting the right to collect compensation from the thief as in any instance of theft? Still, only the living can gain the right to collect compensation and when the cornea was removed, the deceased, of course, could no longer acquire any rights. No ordinary *halachah* of inheritance, then, enables the heirs to collect from the doctor (see the topic discussed in HaGaon Rav Y.Y. Fisher's Responsa *Even Yisrael*, VII, 46).

DAILY MASHAL

Admitting the Truth

Rava initially said that if two wives of a man gave birth to sons in the same dark house, and it was unclear which was born first, the two sons can give each other power of representation and together claim one extra portion for whomever is the true first born.

Rav Pappa told Rava that Rabbi Yannai said (*due to the braisa cited above*) that if the firstborn was never identified, neither gets an extra portion. Only if the firstborn was first identified, but subsequently mixed up, may they use the power of representation to claim the extra portion.

Rava accepted Rav Pappa's statement, and publicly announced his mistake, and its correction.

HaGaon Rav Chayim Kanievski relates that he was once a student at the Lomzha yeshiva in Petach Tikvah, where HaGaon Rav E.M. Shach zt"l was then a *rosh yeshivah*. After delivering a shiur Rav Shach would sometimes recheck a *chidush* and retract his words. He would then quickly pass among his students and call their attention to his error.

Rabbi Y.Z. Winograd zt"l, *rosh yeshivah* at Etz Chayim in Yerushalayim, told a similar story about his sojourn in Brisk to collect funds for charity. Attending a lesson by HaGaon Rav Chayim of Brisk, it seemed to him that the Gaon's statements contradicted a passage in tractate Chulin that he had learnt that morning and he whispered, "It seems that in Chulin..." "Yes? What did you want to say?" asked Rav Chayim. "It seems", replied Rav Winograd, "that the *Gemora* in Chulin says otherwise." "Not only "seems"! cried Rav Chayim, "It certainly says just the opposite!" Rav Winograd related that Rav Chayim ended the lesson then and there. At any rate, he became famous throughout Brisk and his charitable mission was crowned with success. Before leaving town, he asked Rav Chayim what he should know to succeed as a *rosh yeshivah*. "A *rosh yeshivah* must know", the *gaon* advised, "that even if he toils a whole night to prepare a *shi'ur* and it seems to be excellent and then the weakest student asks a good question that undermines its whole foundation, he should admit his error, even if he is sharp enough to reconcile it because he truly knows that the student is right" (*Peninei HaGeriz*, p. 173).