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Bava Basra Daf 173

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Yosef ben Shimon

[The Mishna had stated: If there were two people in a city, one named Yosef ben Shimon and the other named Yosef ben Shimon - they cannot take out a loan document against one another (for the “debtor” can say, “This is a document for a loan which I lent you and it was returned to you after it was paid off”), nor can another take out a loan document against any of them (for they each can say that it is the other who owes the money). The Gemora inferred from here that any of them may produce a loan document against others. Yosef ben Shimon was holding a document that So-and-so owed Yosef ben Shimon money; the holder may collect with such a document and the defendant cannot claim that it is the other Yosef ben Shimon who he owes the money to.]

The Gemora cites a braisa (which is at odds with that which we inferred from the Mishna): Just as they cannot produce a loan document against one another, so too they cannot produce a loan document against others.

The Gemora explains the dispute: They differ on the issue whether letters (loan documents) may be acquired by means of mesirah (delivery; the handing over of the loan document to another). Our Tanna holds that letters are acquired by means of mesirah (and since we are not concerned that the document fell from one and was found by the other, the only concern left is that one Yosef ben Shimon gave the document to the other in order that he shall acquire the loan; if mesirah works, the holder may collect the debt); and the Tanna of the braisa holds that letters are not acquired by means of mesirah (and although we are not concerned that it fell, the holder cannot collect with it, for it is merely a deposit by him).

Alternatively, we can say that everyone holds that letters are acquired by means of mesirah, and the point of issue between them is regarding the question if it is necessary for the holder to produce proof (that he received the document to collect with and that he did not merely find it or receive it as a deposit). Our Tanna holds that it is not necessary to produce proof, while the Tanna of the braisa holds that it is necessary to produce proof, for it was stated: Letters are acquired by mesirah; Abaye said: He is required, however, to produce proof; and Rava said: He is not required to produce proof.

Abaye said: How do I know this? For it was taught in a braisa: If one of the brothers presents a loan document (of the father), he is required to produce proof (that the other brothers gave it to him, and that he did not grab it away from them). Does this not apply also to the case of others as well (and not only brothers)!? Rava, however, said: Brothers are different because they steal from each other (but other people would not be required to produce proof).

Others say that Rava said: Whence do I derive this? How do I know this? For it was taught in a braisa: If one of the brothers presents a loan document (of the father), he is required to produce proof (that the other brothers gave it to him, and that he did not grab it away from them). This applies only to brothers, since they steal from each other, but other people would not be required to produce proof. And Abaye explains that (it applies to others as well, but) it was necessary to mention the case of brothers, because I might have thought that since they steal from each other, they are extremely alert (regarding their property, and would be on guard to ensure that their documents were not taken by the other) and it would not be necessary to provide proof; therefore it was necessary



to teach us that it is not so.

The *Gemora* cites a *braisa* (which is at odds in a lenient manner with that which we inferred from the *Mishna*): Just as they may produce a loan document against one another, so too they can produce a loan document against others.

The *Gemora* explains the dispute: They differ on the issue whether one can write a loan document for a borrower even if the lender is not present (even before the loan). Our *Tanna* holds that one can write a loan document for a borrower even if the lender is not present. Consequently, it may sometimes happen that one (Yosef ben Shimon) would go to a scribe and witnesses and tell them, "Write for me a loan document, for I intend to borrow money from Yosef ben Shimon, my friend (and they granted his request); and after they had written and signed it for him, he would take hold of it and demand from his friend, "Give me the hundred which you borrowed from me." [It is for this reason that we do not allow them to produce a loan document against each other.] The *Tanna* of the *braisa* holds that no loan document may be written for a borrower unless the lender is present (and therefore, there is no concern for the scenario mentioned above; if one of them is holding the document, it must be that the other actually borrowed from him).

The *Mishna* had stated: If one found a receipt among his documents stating that the loan document of Yosef ben Shimon was paid (and there were two debtors in that city bearing that same name), the notes of both debtors are deemed to have been paid.

The *Gemora* notes: The reason (why the lender cannot collect) is because a receipt was found, but had there been none found, the loan document could be presented against one of them? The *Gemora* asks: But surely we have learnt in the *Mishna*: If there were two people in a city, one named Yosef ben Shimon and the other named Yosef ben Shimon - another person cannot take out a loan document against any of them (for they each can say that it is the other who owes the money)!?

Rabbi Yirmiyah answers: We are referring to a case where the loan document mentions three generations (and therefore they may use it to collect).

The *Gemora* asks: But if so, let us see what name is written in the receipt!?

Rav Hoshaya answers: The loan document mentions three generations, but not the receipt.

Abaye answers: This is the meaning of the *Mishna*: If the **borrower** found a receipt among his documents stating that the loan document of Yosef ben Shimon against me was paid (and he owed two people in that city bearing that same name), the notes of both **creditors** are deemed to have been paid (for although the *Mishna* taught us that if they pulled out a document against another person, he is liable to pay; here, the borrower can produce the receipt and be exempt from liability).

The *Mishna* had stated: What should they do (if they wish to borrow from each other or from someone else)? They should write three generations (their father's father). And if the three generations are also the same, they write an identifying feature; and if they have the same identifying feature, let them write *Kohen* (or *Levi* or *Yisroel*).

The *Gemora* cites a *braisa*: If they are both *Kohanim* (and have the same identifying features, and the third generation is also the same), they should write the next generation (until there is a distinction between the two). (172b – 173a)

Mishna

If a father said to his son, "A loan document among my documents is paid (and you should not collect it a second time), but I don't know which one it is, all of his documents are regarded as paid. If two documents (from the same borrower) are found, the larger one is regarded as paid and the smaller one is not paid. (173a)

"It has been Paid"

Rava said: If a lender declared to the borrower, "The loan document has been paid," the larger one is regarded as paid and the smaller one is not paid. If, however, he declared, "The debt you owe me is paid," all of his documents are regarded as paid (*for "debt" can be referring to more than one loan or document*).

Ravina asked Rava: Accordingly, if one would one say to another, "My field is sold to you" (*without specifying the particular field*), his larger field would be regarded as sold to him, but if he said, "The field that I have is sold to you," are all of his fields regarded as being sold?!

The *Gemora* answers: There, the holder of the document is at a disadvantage. [*He wants to deprive the owner of property in the possession of which he is confirmed. He therefore must produce convincing proof. In the case of a debt, however, the claimant is the lender, while the borrower is the confirmed possessor of the sum claimed. Therefore, the advantage is on the side of the borrower.*] (173a)

Mishna

One who lends to his fellow with a guarantor, should not collect from the guarantor. And if he said, "On condition that I collect from whomever I wish," he may collect from the guarantor. Rabban Shimon ben Gamliel says: If the borrower has real property, whether this way or that way, he may not collect from the guarantor. And so too, Rabban Shimon ben Gamliel said: One who is a guarantor for a woman's *kesuvah*, and her husband divorced her, he must vow not to let her derive any benefit from him, lest they make a conspiracy against this one's property (*for this way, she will collect from him, and afterwards, the husband will remarry her*), and he will take back his wife. (173a – 173b)

Guarantor

The *Gemora* asks: What is the reason that he cannot collect from the guarantor?

Both Rabbah and Rav Yosef say: It is because the guarantor can say, "You have entrusted me with a man (*the borrower*); and I have handed a man over to you (*I made him available to you; I was not guaranteeing the loan*)."

Rav Nachman asked: Is this not the law of the Persians?

The *Gemora* questions Rav Nachman: On the contrary! The Persians go after the guarantor even if the borrower has property!?

Rather, Rav Nachman asked: This ruling is similar to that of a Persian court of law, where they have no reason for their decisions (*and it is not logical that the lender cannot collect from the guarantor*)!?

Rather, said Rav Nachman, the *Mishna* means that he may not go to collect from the guarantor first. [*One can only collect from the guarantor if the lender does not come to Beis Din, or if he is not able to pay.*] It was also taught like this in a *braisa*: One who lends to his fellow with a guarantor, should not collect from the guarantor **first**. And if he said, "On condition that I collect from whomever I wish," he may collect from the guarantor.

Rav Huna said: How do we know that a guarantor is obligated to honor his commitment? It is because it is written (*when Yehudah told Yaakov to send Binyamin down to Mitzrayim with them*): *I will guarantee him; from my hand you shall demand him*.

Rav Chisda asked: This is an obligation of a *kablan* (*based on Yehudah's language; and a kablan accepts upon himself a higher level of responsibility, as we shall see below*)!? For it is written, *Deliver him into my hand, and I will bring him back to you!*



Rather, Rabbi Yitzchak says: it is from the following: *Take his garment because he became a guarantor for a stranger.* It also states: *My son, if you have become a guarantor for your friend; if you have stuck out your palms for a stranger; you are snared with the words of your mouth, caught with the words of your mouth; Do this now, my son, and deliver yourself: when you come into the hand of your neighbor, go, humble yourself and treat your neighbor as a ruler.* The Gemora explains the last verse: If he has money in your hand (*for you are a guarantor*), untie the palm of your hand to him (*by paying him*). If not (*you are not a guarantor, but you embarrassed him*), bring many of your friends around him (*and beg him for forgiveness*).

Ameimar said: The *halachah* that a guarantor becomes obligated is dependent upon the dispute between Rabbi Yehudah and Rabbi Yosi. According to Rabbi Yosi, who holds that an *asmachta* (some type of commitment that a person undertakes to convince the other party that he is serious regarding the deal) is binding; a guarantor will become obligated to pay. According to Rabbi Yehudah, however, who maintains that an *asmachta* is not legally binding (*he only made that stipulation in order to placate the creditor*), a guarantor is not obligated to honor his commitment.

Rav Ashi asked Ameimar: Surely, it is the daily practice (*of the judges*) that an *asmachta* is not binding, and yet, a guarantor is obligated to honor his commitment!?

Rather, said Rav Ashi, it is on account of the pleasure of being trusted by the creditor, he decides to accept this responsibility (*and since he is doing so wholeheartedly, it is not an asmachta, and is legally binding; the Rashbam explains that it is as if the lender is the agent of the guarantor to lend the borrower the money*). (173b)

DAILY MASHAL

Hidden Abilities

I guarantee his return; you will demand him from me (Mikeitz, 43:9). Yehudah assumed the responsibility to bring his brother

Binyamin back to his father Yaakov, and even if he could not do so because of force majeure (*ones*), he accepted the punishment of excommunication in this world and the next.

What did Yaakov have to gain from the severe responsibility assumed by Yehudah?

Rebbe Avraham of Sochatchov zt"l, author of *Anei Nezer*, explains that everyone's hidden abilities are unknown even to himself and that he can attain very great achievements by exerting all his efforts. By exposing himself to the ultimate punishment, Yehudah wanted to bring out and exercise his hidden abilities.

The Rich Guarantor

"Take his garment for he guaranteed a stranger" (Mishlei 20:16). The Gemora in Bava Metzia (115a) learns from the above verse that a lender may enter a guarantor's home to take some pledged property in payment for the guaranteed loan even though he must not enter the borrower's home.

Why is a guarantor treated worse than a borrower?

Rabeinu Bechayei explains that a guarantor is generally treated worse than a borrower since borrowers take loans because of their poverty. We may assume, though, that a guarantor is a person of means, as otherwise, he would not be acceptable to the lender. The Torah therefore pities borrowers whereas there is no need to pity guarantors (Rabeinu Bechayei on Devarim 24:10).