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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

Ownership Rights

In the previous discussion (67b), the *Gemora* had quoted Rabbi Yochanan’s statement that if someone stole an object, and the owner had not despaired of retrieving it, neither the thief nor the owner can consecrate the object. [This is because the Torah introduces the *Halachah* of consecration with the words *v’ish ki yakdish es beiso - when a man will consecrate his house*. This verse teaches us that to consecrate an object, it must be like his house, i.e., his, both *de jure* and *de facto*.] Neither of them can consecrate it – this one (the thief cannot) because it is not his, and this one (the owner cannot) because it is not in his possession.

[The *Gemora* now returns to discuss this statement in more detail. The *Gemora* raises a seeming contradiction between this statement and Rabbi Yochanan’s general rule that we always rule like an anonymous *Mishnah (stam Mishnah)*.]

Halachic Danger Signs

And did Rabbi Yochanan actually say this? But behold Rabbi Yochanan said that the halachah is like the anonymous *Mishnah*, and we learned in a *Mishnah* (in Maaser Sheini) as follows: lists various visual markers that were placed throughout *Eretz Yisroel* to alert people to religiously restricted areas. The *Gemora*, as it brings each part of the *Mishnah*, explains how each marker identified the type of restriction. In the case of a vineyard in its fourth year, the owners used to mark it with clods of earth, the sign implying an analogy to earth: just as in the case of earth a benefit may ensue from it, so also the fruit of this vineyard will after being redeemed be permitted to be enjoyed. That of *orlah* used to be marked with shards of clay tiles, the sign

indicating a similarity with shards: just as in the case of shards no benefit ensues from them, so also the fruit of *orlah* could not be enjoyed for any use whatsoever. A field of graves used to be marked with lime, the sign having the color of white, like corpses. The lime was dissolved in water and then poured out so as to make its color whiter.

Restriction	Prohibition	Marker	Similarity
<i>Kerem Revai</i> (fourth year vineyard)	May be eaten, but only if redeemed	Clumps of earth	One benefits from earth, but only if worked
<i>Orlah</i> (first three years of a tree)	All benefit prohibited	Shards of tile	Useless items
Graves	Makes walker impure	Plaster	White, like bones

The *Mishnah* goes on to quote Rabban Shimon Ben Gamliel, who limits these markers to the *Shemittah* year, when all produce is ownerless, and people therefore have permission to walk around on other’s land. However, on other years, we say – *Haliteyhu l’rasha v’yamos* – feed a wicked person (*harmful items*) and let him die. [If someone is trespassing, we are not concerned with his well-being, and don’t warn him of potential religious hazards.] Finally, the anonymous section of the *Mishnah* concludes that the *Tznuim* – the modest ones, who were extra careful in their behavior – would go extra far to avoid anyone coming to religious harm on their land. They would set aside money, and proclaim that “any fruits that were gathered from the fourth year vineyard is redeemed” on that money. [In this way, any fruits taken by trespassers would not be forbidden *kerem r’vai*

fruits. Even though the *Tznuim* were not the de facto owners of these fruits, they still had the right to redeem them. Since the *Tznuim* are part of an anonymous *Mishnah*, Rabbi Yochanan's limitation of consecration by de facto and de jure ownership contradicts Rabbi Yochanan's rule of following an anonymous *Mishnah*.] [See *Tosfos 68b Hu* for the parallel between redemption and consecration.]

The *Gemora* states that claiming that the *Tznuim* section of the *Mishnah* is not anonymous, but instead authored by Rabban Shimon Ben Gamliel, does not remove the contradiction, because Rabbah bar Bar Chanah said in the name of Rabbi Yochanan that we rule like Rabban Shimon Ben Gamliel in all *Mishnayos*, with the exception of three (*none of which is this one*): the guarantor (*Bava Basra 173b*), Tzidon (*see Gitin 74a*), and the final (*case regarding an* evidence (*in Sanhedrin 31a*).

Bereirah

They said: Do not say that the content of the *Tznuim's* proclamation was "any fruits that *were* gathered," but rather say: "any fruits that *will be* gathered." [Thus, the *Tznuim* would redeem their fruits while they were still in full possession, using *bereirah* – retroactive designation. *Bereirah* allowed them to do the redemption before the fruits were gathered (*when they were still the full owners*), but the designation of the actual fruits that were redeemed is only done when they are later gathered.] (69a1 – 69a2)

Caring for the poor

But did Rabbi yochanan say like so? Why, Rabbi Yochanan said: The *Tznuim* and Rabbi Dosa said the same thing, and Rabbi Dosa said: Any fruits that were gathered!? For it was taught in a Baraisa: [They are discussing a case of a field owner in whose field poor people collect *leket* – sheaves of grain that fall down when the owner is gathering them.

Leket is only applicable when one or two sheaves have fallen, but any more than that is still the property of the field owner. However, not all poor people are well versed in this distinction, so the owner of the field proclaims that any sheaves that poor people take – even if not technically *leket* – will be *hefker* (*ownerless*), making it legal for the poor people to take them. Rabbi Dosa and Rabbi Yehudah dispute the exact proclamation made.] Rabbi Yehudah says that the owner proclaims at the start of the day that any sheaves that *will be* gathered by the poor later today is now *hefker*, while Rabbi Dosa says that the owner proclaims at the end of the day that any sheaves that *were* collected by the poor are now *hefker*. [Since Rabbi Yochanan equated Rabbi Dosa with the *Tznuim*, the *Tznuim* must be in the form we have in our *Mishnah* – proclaiming, after the fact, that fruits *already* gathered should be redeemed.]

The *Gemora* answers that we can still alter the content of the *Tznuim's* declaration, by switching the opinions of Rabbi Dosa and Rabbi Yehudah. [By doing so, the *Tznuim* and Rabbi Dosa still line up.] - But why transpose this teaching, and not transpose instead the statement of Rabbi Yochanan, assigning to the *Tznuim* and to Rabbi Yehudah the same thing? — The *Gemora* states that we are switching these *Tannaim* - instead of modifying Rabbi Yochanan's statement to equate the *Tznuim* and Rabbi Yehudah - since this Baraisa states that Rabbi Yehudah accepts the principle of *bereirah*, and we have another source indicating that Rabbi Yehudah does not accept *bereirah*, for it was taught in a *Baraisa*: If someone buys wine from amongst the Cutheans¹ (*and he does not have a vessel to separate the tithes required to allow him to drink the wine in an orderly fashion*), he should say the following: "The two *lugin* (*a measurement*) that I will eventually separate (*from the one hundred lugin in total*) are *terumah* (*tithe for the kohen*), ten are *ma'aser rishon* (*tithe for the Levite*), nine are for *ma'aser sheini* (*to be eaten in Yerushalyim*)²," and he redeems the *ma'aser sheini* (*with coins*), and he can drink right away; these are the words of

¹ Converts to Judaism after an outbreak of wild animals in Eretz Yisroel and their conversion was debated as to its validity; they observed some commandments, but not others.

² Even though he is now separating the tithes, and thereby making the wine permitted, he is only designating what the actual tithes are at a later point, through the principle of *bereirah*.

Rabbi Meir. [Even though he is now separating the tithes, and thereby making the wine permitted, he is only designating what the actual tithes are at a later point, through *bereirah*.] Rabbi Yehudah, Rabbi Yosi, and Rabbi Shimon forbid this leniency. [*Rabbi Yehudah is not applying the principal of bereirah when it is dependent upon his own decision later on.* Therefore, Rabbi Yehudah's opinion must be altered anyway, resolving the contradiction.]

To this I may rejoin: When all is said and done, why have you transposed [the views mentioned in the Baraisa]? Because Rabbi Yehudah would otherwise contradict Rabbi Yehudah! But wouldn't now Rabbi Yochanan contradict Rabbi Yochanan? For you stated according to Rabbi Yochanan that we should not read 'whatever has been gathered,' but read 'whatever will be gathered,' thus proving that he upholds *bereirah*, whereas in fact Rabbi Yochanan does not uphold *bereirah*. For didn't Rav Assi say in the name of Rabbi Yochanan: [When brothers are partners to their father's estate, they own everything in partnership. When they split the estate, *bereirah* can tell us that whatever they received in the split was originally what they owned while partners.] The brothers are buyers (of each other's portion), so that they will have to restore the portions to one another on the advent of Yovel (indicating that Rabbi Yochanan does not accept *bereirah*)! (69a2 – 69b2)

Multiple Anonymous Mishnayos

We must therefore still read 'whatever has been gathered' [the *Gemora* is resolving the contradiction by saying that Rabbi Yochanan ruled against the anonymous *Mishnah* of the *Tznuim*] and Rabbi Yochanan found another anonymous *Mishnah* (that contradicted it). For we learned in our *Mishnah*: One who steals from a thief does not pay *kefel*. Why should this be? We grant you that he need not pay the first thief, [since Scripture says:] And if it is stolen out of the man's house, [implying] 'but not out of the house of the

thief'. But why not pay the owner? We must say that this shows that the one is not entitled to payment because the stolen article is not his, and the other one is not entitled to payment as the article is not in his possession. — But what induced him to follow that anonymous *Mishnah*? Why should he not act in accordance with the anonymous *Mishnah* dealing with the *Tznuim*? — Because he was supported by the verse: And when a man shall sanctify his house to be holy unto Hashem; just as his house is in his possession, so anything also which is in his possession can be sanctified.³ (69b2 – 69b3)

Other Potential Resolutions

TAbaye said: If Rabbi Yochanan had not equated the *Tznuim* and Rabbi Dosa, I might have said that while the *Tznuim* accepted the view of Rabbi Dosa, Rabbi Dosa did not uphold the practice of the *Tznuim*.

He explains: [The *Tznuim* and Rabbi Dosa are not expressing the rights of ownership, but rather stating special institutions set up by the Sages to protect people from transgression. The *Tznuim Mishnah* held that the Sages were concerned about the welfare of trespassers, and therefore gave special rights to the vineyard's owners, which protect the trespassers. Rabbi Dosa held that the Sages were concerned about the welfare of ignorant poor people, and gave special rights to the owner of the field for those poor people's welfare.] If the Rabbis were concerned about the welfare of a thief, is it necessary to say that they would be concerned about poor people (who unknowingly are taking too much grain)?! But Rabbi Dosa would not agree with the *Tznuim*. For it was only for the poor that the Rabbis made things easier, whereas for the thief they did not make things easier.⁴

Rava said: If Rabbi Yochanan had not equated the *Tznuim* and Rabbi Dosa, I might have said: who is the Tanna of the

³ Rabbi Yochanan reasoned that this is because the thief is not the de jure owner, and the theft victim is not the de facto owner. Rabbi Yochanan ruled like this anonymous *Mishnah*, and not the *Tznuim* one, because the verse of consecration indicates the importance of both de jure and de facto ownership

in determining rights of ownership, as the *Gemora* quoted in the beginning of the discussion.

⁴ Since these were special institutions, it wouldn't contradict Rabbi Yochanan's legal rule that ownership is limited to de jure and de facto ownership.



Tznuim? It is Rabbi Meir, for does Rabbi Meir not say that *ma'aser sheini* is Divine property? Even though it is not technically owned by the owner of the fruits, the Torah considers him to be the owner for purposes of redemption, insofar as he must redeem at a one-fifth premium. For it is written: And if a man will redeem some of his tithe, he shall add its fifth to it. The Merciful One thus designating it 'his tithe' and ordering him to add a fifth. The same applies to the vineyard in the fourth year, as can be derived from the occurrence of the term 'holy' there and in the case of the tithe. For it is written here 'shall be holy to praise', and it is written in the case of tithe, 'And all tithe of the land, whether of seed of the land, or of the fruit of the tree, belongs to Hashem, it is holy': just as the 'holy' mentioned in connection with tithe although it is Divine property, has nevertheless been placed by the Merciful One in the possession of the owner for the purpose of redemption, so also the 'holy' mentioned in connection with a vineyard of the fourth year, although the property is not his own, has been placed by the Merciful One in his possession for the purpose of redemption; now seeing that even when it is in his possession it is not his and yet he may redeem it; hence he may be able to redeem it [also when out of his possession]. But in the case of *leket*, which is his own property, it is only when it is [still] in his [own] possession that he is able to declare it ownerless, whereas when not in his possession he should not be entitled to declare it ownerless.⁵

Ravina said: If Rabbi Yochanan had not equated the *Tznuim* and Rabbi Dosa, I might have said: who is the Tanna of the *Tznuim*? It is Rabbi Dosa, so that this anonymous Mishnah would not refute the view of Rabbi Yochanan, for Rabbi Yochanan would have been right in not concurring with an anonymous statement of a single Tanna. (69b3 – 70a1)

⁵ The Torah uses the same phrase (*kodesh*) by *kerem revai* as well, indicating that it too is property of Hashem, but similarly in the "ownership" of the vineyard's own for purposed of redemption. Therefore, Rava would have

INSIGHTS TO THE DAF

Bereirah

In the course of discussing Rabbi Yochanan's statements, the *Gemora* introduces the concept of *bereirah*. *Bereirah* is a wide ranging concept, appearing throughout Shas, in a variety of forms, having ramifications in many halachic areas. Below are a number of facets of *bereirah*, which appear in the Rishonim and poskim.

Courtyard neighbors

The *Gemora* (Nedarim 55b-56b) discusses the status of two people who are partners in a courtyard. They both have use rights, but it may depend on *bereirah* to determine exactly when each one has ownership at a given time.

Partners

The *Gemora* (Beitza 37b-38a) discusses cases of partners who split their joined item, insofar as *techumim* ownership. *Bereirah* allows us to consider the ultimate allocation reflective of the original true ownership.

Inheritance

This case is discussed by Rabbi Yochanan in our *Gemora*, and appears in many other *Gemoros*.

Separating Tithes

This case is discussed by Rabbi Meir and Rabbi Yehudah in our *Gemora*, and appears in many other *Gemoros*.

Choosing a Techum

The *Gemora* (Eruvin 36b-38a) discusses various *Eruvei Techumim*, where the actual details of the *Eruv* are left for

thought that the *Tznuim* would agree that one cannot consecrate something outside of his de facto possession, but consider *kerem revai* an inherent exception to that rule.

later clarification, using *Bereirah*. The *Gemora* includes a lengthy discussion of Rabbi Yehudah's position on *Bereirah*, based on multiple conflicting sources.

Why does (or doesn't) it work?

Tosfos (Eruvin 37b Ela) states that those who do not accept *bereirah* feel that later designation is meaningless, and therefore the action is not effective at all. In our case, this means that the separation that will happen after *Shabbos* is meaningless, and therefore, the declaration at the onset of *Shabbos* has no wine to take effect on, and it not effective at all. Rashi (Chulin 14b osrin), on the other hand, states that those who do not accept *bereirah* simply hold that the later designation cannot resolve the initial unclarity. In the case of the wine, when the person declares that he is taking the tithes from wine that will be designated later, the tithes now exist in the wine, but the person cannot designate them later. Therefore, this wine has indeterminate tithes, and none of it can be used.

See Shaarei Yosher (3:22 v'af shera'isi) for a more detailed discussion of how *bereirah* does work, and what are its limitations. See Shiurei R. Dovid Lifshitz (Hulin, #29) for a further discussion of this dispute.

How much is unclear?

The Ran in Nedarim (55b v'ika) suggests that the case of partners' use in a courtyard can be considered full ownership, even according to those who generally do not accept *bereirah*, since the bulk of the "split" is already done, with only the exact time that it will be used left for later clarification.

Will it definitely be clarified?

Tosfos (Gittin 25b Rabbi Yehudah) states that some cases of *bereirah* are less acceptable, since there may never be any clarification. For example, as opposed to our case of the wine - where *some* wine will be taken, but it's not known

which - a case of one who consecrates the coin that he will take from his pocket, is a case where it's possible that no coin will be chosen at all.

Who decides?

The *Gemora* in Gittin (25a-b) raises the possibility that *bereirah* may be more acceptable in the case where the area left for later clarification depends on another party. If *bereirah* is unacceptable because the party doing the action must decide before acting, then if the only clarification is external, the active party has done his part, and left the rest up to something else. Examples of this are:

1. A person who betroths a woman, but stipulates that it will only take effect if the woman's father agrees.
2. A person who gives his wife a *Get*, which should be effective one moment before he dies. This is making it dependent on outside party, i.e., Hashem.

Explicit exceptions

There are cases where the Torah states an explicit detail, which overrides the general rules of *bereirah*.

The Torah explicitly states that a *Get* must be written "la" - for her (the wife), and from this the *Gemora* learns (Gittin 2b) that a *Get* must be written "lishma" - explicitly for the wife's sake. From this verse, Tosfos (24b l'aizo) suggests that even those who accept *bereirah* may invalidate a *Get* which was written for the sake of "the wife that I choose"

The *Gemora* on our daf mentions the case of brothers who split their father's estate as a case of *bereirah*. Tosfos (Gittin 48a Ee) suggests that, even without *bereirah*, inheriting brothers could be not subject to return on the Yovel year, due to the inherent nature of inheritance and Yovel.

Torah vs. Rabbinic

The Ri in Tosfos (Nedarim 56b) rules that we accept *bereirah* in all areas of *halachah*. The Rambam (Eruvin 8:7, Trumos

1:21, Yom Tov 5:20) rules that in Rabbinic areas of *halachah*, we accept *bereirah*, while in areas of Torah *halachah*, we do not accept *bereirah*.

Bittul

Tosfos (69a kol hanilkat) discusses how the part of the vineyard that grew after the Tznuim's declaration did not prohibit the rest of the vine. Tosfos assumes that the regular rules of bittul – nullification of a prohibition in a larger mixture – would not apply, since the fourth year vineyard is a *davar sheyesh lo matirin* – a prohibition which will become permitted. See the Rama YD 102:4 for a conflicting opinion.

Cuthean produce vs. D'mai

There is a dispute among the *Tannaim* whether Cutheans are Halachically Jewish, but just less trustworthy, or not Jewish at all. This depends on whether we classify them as Geirei Arayos - converts only due to fear of lions - or Geirei Emes - true converts. (See Tosfos Chulin on how to reconcile the second opinion with the verses in Melachim that state the history of the Cutheans). The Rishonim explain that the author of the *braisa* in our *Gemora* holds that the Cutheans are Jews, but just not trustworthy. Their produce is still different than D'mai, the produce of Amei Haaretz, on which there is a doubt as to some of the tithes. D'mai is most likely tithed, but the Sages instituted an assumption of some tithes not taken. Since it's a special stringency, there are areas where the Sages allowed leniency (e.g., poor people can eat it, it can be separated on twilight Friday night). However, the produce of the Cutheans are considered *definitely* not tithed, and these leniencies do not apply.

Ye'ush vs. Hefker

The Rishonim question why a person should have to declare the extra fallen sheaves to be *hefker* for the poor people. Presumably, the owners - who are ready to declare *hefker* on these sheaves - have given up on them, and such despair (*ye'ush*) is sufficient for someone to take ownership. Even

those opinions earlier in the perek who do not accept *ye'ush* to transfer ownership, will agree that changing possession together with *ye'ush* will. Tosfos (69a kol shelaktu) answers that *ye'ush* will effectuate ownership, but not remove the need for tithes. Tithes are not necessary for *hefker*, since the Torah states that tithes should be given to the Levi "ki ein lo chelek v'nachala imach" - because he does not have a portion and inheritance with you. This implies that *hefker*, where the Levi has equal rights with you and everyone else, will not require tithes. *Ye'ush*, however, will only *transfer* the grain to the poor, but not give the Levi (or anyone else) rights to the sheaves. In addition, Tosfos states that the *ye'ush* here is only vis a vis the poor people, and is no better than *hefker* only to the poor, which is not considered *hefker* at all.

How Kosher?

The poskim discuss different cases of people who transgress, and how we relate to them, in light of Rabban Shimon Ben Gamliel (Rashbag)'s opinion. One situation discussed in recent times is a hotel that wishes to be certified as kosher, but with limitations. The hotel owners agree that all the food prepared in the hotel will be kosher (including only kosher meat, and no cooking of meat and milk together). However, they explicitly do not want to restrict their guests from eating milk right after meat, or even mixing (not cooking) meat and milk together. These actions are Rabbinically forbidden, but not as severe as the other potential transgressions being avoided by the certification. Rav Ovadia Yosef (Yabia Omer Y"D 4:7 and 6:3:3) rules that the rabbinate may - and should - certify the hotel, and says that Rashbag's statement does not apply to this case. The Rambam rules like Rashbag, but says it's good to be like the tznuim, making it a positive trait to be concerned with people's religious welfare. Further, the Rambam may rule like Rashbag only in the case of robbery, which is more severe. Further yet, in the case of the trespassers, they may avoid the land altogether if they know that it may involve other prohibitions. In this case, without the certification, no one will avoid prohibitions, but, on the contrary, violate



other ones. Finally, there are many customers who will not eat milk and meat together, and therefore the certification will make the difference for them between forbidden and permitted food. These people (including unwitting tourists) know no better, and therefore are considered anusim (forced), and we are concerned with their welfare.

Rav Moshe Feinstein (Y"D 1:52) also discusses a similar case of an establishment that agrees to only prepare kosher food (with certification), but not restrict the uses of the food by its patrons. Rav Moshe rules that the restaurant should be certified, since a certification does not have to relate to and concern external matters, even in the use of the certified food. Rav Moshe adds that this is especially true, since some of the patrons may be totally ignorant, and have the status of tinok shenishba. This would remove the rule of haliteyhu entirely, even according to Rashbag.

The Tzitz Eliezer (11:55 and 12: page 224) strenuously disputes these rulings, and states that only bad results can come from such a certification. The public at large will take the rabbinate certification much more lightly, and even the certification will be hard to enforce. The Tzitz Eliezer states that Rashbag's statement definitely applies here, as we want to have no hand in enabling transgressions, and have no interest in ameliorating any of the transgressions involved. In his response to Rav Ovadia Yosef's letter to him, the Tzitz Eliezer says that it seems that he and Rav Ovadia Yosef approach this halachic area differently.

DAILY MASHAL

Haliteyhu l'rasha v'yamus

The Rambam (Maaser Shaini 9:7) rules according to Rabban Shimon Ben Gamliel, and states (Peirush *Mishnahyos*, Maaser Sheini 5:1) that we do not look out for the religious well-being of a wicked person, especially in the case of a trespasser, since robbery is such a grave offense. The Rambam also notes that it is good to be like the Tznuim, whom the Rambam assumes made their proclamation only

on Shmitta. Tosfos (69a v'hatznuim), however, holds that the Tznuim made their proclamation only in non Shmitta years.

The Gilyon Maharsha (YD 151 on Shach 6) states that this concept applies only to an action that is being done in violation of *Halachah*. Insofar as that action is concerned, we do not intervene, to avoid further violation. However, one who violates *Halachah* does not lose our religious concern for him, in regard to other actions.