



Produced by Rabbi Avrohom Adler, Kollel Boker Beachwood

Daf Notes is currently being dedicated to the neshamot of

Moshe Raphael ben Yehoshua (Morris Stadtmauer) o”h

Tzvi Gershon ben Yoel (Harvey Felsen) o”h

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

Loss for the Deceiver

The *Gemora* asks: Should we say that the *Mishnah* is not in accordance with the view of Rabbi Yosi? For Rabbi Yosi says (*regarding the following case: If two people deposited with one person, one a maneh and the other two hundred, one says, “Two hundred are mine,” and the other one says, “Two hundred are mine,” he should give a maneh to one and a maneh to the other, and the rest will remain until Eliyahu comes*): If so, what loss does the deceiver incur? Therefore let the whole amount be retained until Eliyahu comes? [*Would Rabbi Yosi not rule in our Mishnah that the cloak should not be divided at all?*]

But, the *Gemora* counters: Would not the same difficulty arise in regard to the view of the Rabbis? For these Rabbis maintain that the balance should remain until Eliyahu comes. Would they not accordingly rule similarly concerning the disputed garment in our case, which is like the disputed balance (*the third maneh*) in the other case (*for the ownership of the cloak is uncertain*)?

The *Gemora* disagrees: Is that a comparison! In the other case, where it is certain that the disputed *maneh* belongs to only one of the claimants, those Rabbis rightly decided that the amount in question should remain until Eliyahu comes; whereas here, in our *Mishnah*, where it is possible that the garment belongs

to both, the Rabbis would see that it should be divided among the two claimants under oath.

But in regard to Rabbi Yosi, the argument is the other way. If Rabbi Yosi ruled in his case, where each claimant is undoubtedly entitled to one *maneh*, that the money should remain until the coming of Eliyahu, how much more readily would he decide so in our case (*where it can be assumed that only one of the disputants is entitled to have the cloak*)?

The *Gemora* answers: The *Mishnah* can still be in agreement with Rabbi Yosi, for in his case, one of the disputants is definitely a deceiver, while in our case, we do not know for sure that one of the disputants is a deceiver, as it is possible that both of them picked up the cloak simultaneously.

Alternatively, you can answer that in his case, Rabbi Yosi penalized the deceiver (*in making him forfeit his hundred*) in order that he should admit the truth, but in our case (*where the dispute is regarding a found article*), what real loss would the deceiver incur (*if he would be forced to forfeit the cloak*) that could induce him to admit the truth?

But, the *Gemora* asks: This answer could be correct with regard to a found article, but how can it apply to the case of the buying and selling?

The *Gemora* concludes that the first answer is clearly the correct one. (3a1 – 3a2)

The *Gemora* asks: According to the views of either the Rabbis (who hold that the third hundred should remain until Eliyahu comes) or Rabbi Yosi (who holds that all the money should remain until Eliyahu comes), how is it that in the case of the shopkeeper and his ledger (a man said to the shopkeeper: “Give my worker money and place it on my account.” He says, “I gave,” but the worker said, “I did not receive it,”), the *halachah* is that the worker swears and receives and the shopkeeper swears and receives. Why don’t we say that the money should be taken from the shopkeeper and until the coming of Eliyahu, since it is certain that one of them is a deceiver?

The *Gemora* answers: In that case there is a special reason for the ruling given. The shopkeeper can say to the homeowner: I followed your instructions; what have I to do with your worker? Even if the worker swears, I would not believe his oath. You trusted him, in that you did not instruct me to give him the money in the presence of witnesses. The worker can say to the homeowner: I worked for you; what have I to do with the shopkeeper? Even if he swears, I would not believe him. Therefore they both swear and receive payment from the homeowner. (3a2 – 3a3)

Witnesses on Half

Rabbi Chiya taught the following *halachah*: If one says to his fellow: You have in your possession a *maneh* belonging to me, and the other replies: I have nothing of yours, but witnesses testify that the defendant has fifty *zuz* belonging to the plaintiff; the defendant pays the plaintiff fifty *zuz*, and takes an oath regarding the remainder, for the admission of his own mouth ought

not to be greater than the testimony of witnesses, which can be proven by a *kal vachomer* (literally translated as light and heavy, or lenient and stringent; an *a fortiori* argument; it is one of the thirteen principles of biblical hermeneutics; it employs the following reasoning: if a specific stringency applies in a usually lenient case, it must certainly apply in a more serious case).

And our *Tanna* (of our *Mishnah*) supports this: Two people are holding on to a cloak. This one says that he found it, and the other says that he found it. Now this is similar to Rabbi Chiya’s case (where there are witnesses), for since they are each holding the cloak, and when we see this person holding something, it is as if there are witnesses testifying that half the cloak is his, and when we see this person holding something, it is as if there are witnesses testifying that half the cloak is his, and yet the *Mishnah* rules that each claimant must swear. [The *Mishnah*’s case is similar to Rabbi Chiya’s case, for here we regard it as if each one is claiming that the entire cloak is his, and the other one denies it completely, but then witnesses (the fact that he is holding it) testify that half belongs to the claimant.]

The *Gemora* asks: What did Rabbi Chiya mean when he said: For the admission of his own mouth ought not to be greater than the testimony of witnesses, which can be proven by a *kal vachomer*? [Why is the *kal vachomer* necessary?]

The *Gemora* answers: The *kal vachomer* is necessary, for otherwise, we might have said that it is only in the case of his own admission that the Torah imposes an oath on him. This would be based on what Rabbah said, for Rabbah stated: Why did the Torah say that one who admits part of a claim must swear? It is because we assume that no man would be so insolent to deny his

obligation in the face of his creditor. He would wish to deny the whole debt, but he does not do so because no one is so insolent. (*This is why he is required to swear on the remainder.*) Indeed, he would like to admit to the entire claim, only he does not do so in order to evade the creditor for the moment, and he thinks, “As soon as I will have money, I will repay the debt.” This is why the Torah said: Impose an oath on him, so that he should admit to the entire claim. This logic applies by his own admission, but not in a case where witnesses testified (*and perhaps he should not be allowed to swear, for he has proven to be a thief and he will swear falsely*). The *kal vachomer* teaches us that we impose an oath on him, even in this case. (3a3 – 3b1)

Rabbi Chiya’s Kal Vachomer

The *Gemora* asks: What is Rabbi Chiya’s *kal vachomer*?

The *Gemora* answers: If the admission of his own mouth, which does not obligate him to pay money, nevertheless, it can obligate him to take an oath; how much more so by the testimony of witnesses, which can obligate him to pay money, certainly it can obligate him to take an oath!

The *Gemora* asks: But is it right to say that his own admission does not obligate him to pay money? Has not the principle been established that the admission of a defendant is equal to the testimony of a hundred witnesses?

The *Gemora* answers: What he meant by the payment of money is the payment of a fine (*which he would not be obligated to pay through his own admission*). And the *kal vachomer* is as follows: If the admission of his own mouth, which does not obligate him to pay a fine, nevertheless, it can obligate him to take an oath; how

much more so by the testimony of witnesses, which can obligate him to pay a fine, certainly it can obligate him to take an oath!

The *Gemora* asks: Doesn’t a person’s own mouth have more strength than the testimony of witnesses, for it can obligate him to bring a *korban chatas* (*if he says that he inadvertently violated a prohibition which would incur a kares penalty if willfully violated*), while the testimony of witnesses does not obligate him to bring a *chatas*?

The *Gemora* answers: This objection is not valid: Rabbi Chiya is of the same opinion as Rabbi Meir, who says that witnesses do obligate the offender to bring a *chatas* and he infers it by means of a *kal vachomer*. For we learned in a *Mishnah*: If two people say to a third person: You have inadvertently eaten *cheilev* (*forbidden fat*), but he says: I have not (*and therefore I am not liable to bring a chatas*), Rabbi Meir maintains that he is obligated to bring a *chatas*, but the *Chachamim* exempted him. Rabbi Meir explains: If two witnesses have the strength to bring upon an offender such a severe penalty as death, should they not be able to bring upon him the light penalty of a *korban*? To this the *Chachamim* replied: Had he desired to lie, he could have said, “I ate it deliberately (*and therefore I am not obligated to bring a chatas*).”

But, the *Gemora* asks: Does not a person’s own mouth have more strength than witnesses (*in a case of confession after a denial on oath*) in that it can obligate him to pay a fifth?

The *Gemora* answers: This objection is not valid: Rabbi Chiya is of the same opinion as Rabbi Meir, who says that just as witnesses obligate the offender to bring a



korban because of the *kal vachomer* inference; they also obligate him to bring a fifth.

But, the *Gemora* asks: Does not a person's own mouth have more strength than the witnesses in that it cannot be refuted by a contradiction or by *hazamah*. (*When witnesses offer testimony and other witnesses refute them claiming that the first set of witnesses could not possibly testify regarding the alleged crime since they were together with them at a different location at the precise time that they claimed to witness the crime somewhere else; The Torah teaches us that we believe the second pair in this instance; the first witnesses are called "eidim zomemim" "scheming witnesses," and they receive the exact punishment that they endeavored to have meted out to the one they accused. If, however, they would testify that the person who admitted was somewhere else, nothing would be accomplished and he would still be liable.*) Witnesses, on the other hand, can be refuted by a contradiction or by *hazamah*?

The *Gemora* answers: The *kal vachomer* must therefore be derived from one witness: If one witness, whose testimony does not obligate a defendant to pay money, nevertheless, it obligates him to take an oath, how much more so should two witnesses, whose testimony does obligate a defendant to pay money, they should certainly obligate him to take an oath!

But, the *Gemora* asks: The oath that is imposed by the testimony of one witness refers only to the part of the debt to which the witness testifies (*to deny that which the one witness testified about*), while the oath that you would impose by the testimony of two witnesses refers to the part which is denied by the defendant? (3b1 – 4a1)

INSIGHTS TO THE DAF

Two are holding a tallis

Our Mishnah explains that if two persons are holding the edges of a tallis and each claims that he found it first, each should swear that he does not own less than half of it and the tallis should then be divided equally between them. Still, the decision to divide disputed property is not uniform and the Gemara and Poskim mention six categories of such claims:

- i) If someone claims ownership of an article held by another, his claim is ignored as "one who claims something in the custody of his fellow must produce evidence". As long as the claimant fails to produce clear proof of his argument, the article stays in the possession of the person holding it (Bava Kamma 46b).
- ii) If two people dispute the ownership of an article deposited for safekeeping by a third party and neither can prove his claim, the article remains where it is till Eliyahu comes, as mentioned in our sugya.
- iii) When an article is not in either of the claimants' custody nor in the custody of anyone else, we apply the principle of "the stronger wins". That is, he who succeeds in seizing possession of the article has the upper hand (Tosfos, s.v. Veyachaloku; see Tosfos, Bava Basra 34b, s.v. Hahu).
- iv) If a beis din is sure that one of the claimants is lying, and the article is not held by either of them and if it is clear that neither claimant can ever produce more evidence, the judges may give the article to the claimant who seems honest (Kesubos 94a; Rambam, Hilchos Zechiah 5:6).
- v) When the discussion over ownership is not because of their claims, rather the episode itself raises a doubt in the mind of any objective onlooker, this is called *drara demamona*. For example, if someone sold a cow that gave birth and we cannot know if the calf



was born before or after the sale, Sumchus and the chachomim have different opinions in our sugya.

vi) In cases such as our Mishnah, where two are holding an article and each claims full ownership, they swear the above oath and divide the property.

Not all decisions to divide property are alike: Tosfos explain that the division of the tallis is not a compromise but a judicial decision. The case presented before the dayanim allows no other solution as one of the rules of possession is that property belongs to the one holding it till proven otherwise. Consequently, if two hold an article, the simple halachah is that it belongs to both and should be divided.

On the other hand, division of property is sometimes decided as a compromise, such as if a beis din is presented with a case disputed by the Poskim. The beis din lacks the authority to rule in either side's favor and crafts a compromise to divide the property (Remo, C.M. 139:1).

An implication of the difference between the division of property as a compromise or as a clear-cut decision may be seen if one of the claimants grabs the article from the other before the verdict. If the verdict to divide the property stems from the halachah that an article held by two belongs to both of them, the claimant's sudden act is regarded as thievery (below, 6a). If, however, the verdict is meant as a compromise, we cannot take the article from the one who grabs it without clear proof as there is no halachic decision regarding its ownership (Shach, *ibid*, S.K. 6).

DAILY MASHAL

Save us from Brazenness

We conclude the daily morning blessings with the following: Blessed are You, Hashem, who bestows beneficent kindness upon His people Israel (*Hagomel chasadim tovim l'amo Yisroel*). This is immediately followed by the *tefillah*, May it be Your will, Hashem, my God, and the God of my forefathers, that You rescue me today and every day from brazen men and from brazenness etc. What is the connection between the two *tefilos*?

Reb Shmuel Leider in *Nitei Eishel* explains as follows: Our *Gemora* states: Rabbah said: Why did the Torah say that one who admits part of a claim must swear? It is because we assume that no man would be so insolent to deny his obligation in the face of his creditor. And since the Holy One, Blessed be He has showered us with beneficent kindness without any limits whatsoever, so much so that we cannot even thank Him sufficiently. As we say in *nishmas*: Even if our mouths would be as full of song as the sea, and our tongue as full of joyous song as its multitude of waves, and our lips as full of praise as the breadth of the heavens etc., we still could not thank You sufficiently for even one of the thousand thousand, thousands of thousands and myriad of favors that You performed for our ancestors and for us. Accordingly, we are debtors to Hashem, so immediately after we thank Hashem for all the kindness He does for us, we pray that He should save us from brazenness, i.e. we should not Heaven forbid act insolently towards Hashem after all the kindness that He bestows upon us.