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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: He [the shomer] is made to swear that it is not in his possession. Why? We fear that he may have cast his eyes upon it.

An objection is raised: If one lends his fellow on a collateral and the collateral is lost, and he [the lender] says to him [the debtor], "I lent you a sela on it, and it was [only] worth a shekel (and therefore you owe me a shekel)"; while the other maintains, "Not so; you did lend me a sela upon it and it was worth a sela (and therefore I do not owe you anything)," he is free [from an oath] (because he is a kofer hakol – he is denying everything). "I lent you a sela on it and it was worth a shekel (and therefore you owe me a shekel)," while the other maintains, "Not so; you did lend me a sela on it, and it was worth three dinars (and therefore, I owe you one dinar)"; he is liable [to an oath]. [If the debtor pleads,] "You did lend me a sela on it, while it was worth two (and therefore you owe me a sela)"; and the other replies, "Not so; I lent you a sela on it and it was worth a sela (and therefore I do not owe you anything)," he is free [from an oath]. "You did lend me a sela on it and it was worth two (and therefore you owe me a sela)"; while the other replies, "Not so; I lent you a sela on it and it was worth five dinars (so I owe you one dinar)," he is liable [to an oath]. Now, who must swear? He who has possession of the deposit [i.e., the creditor], lest the other swear and then this one produce the deposit.

To which case does this refer? Shall we say, to the second clause; but there [the oath rests upon the creditor] follows from the fact that it is he who makes partial admission! — But, said Shmuel, it refers to the first clause. - How can it refer to the first clause (where there is no oath at all)? — He means the second subsection of the first clause, [viz.,] "I lent you a sela on it and it was worth a shekel (and therefore you owe me a shekel)," while the other maintains, "Not so; you did lend me a sela on it, and it was worth three dinars (and therefore, I owe you one dinar)"; he is liable [to an oath]. Now, the onus of the oath lies upon the debtor, yet the Rabbis ordered that the creditor should swear, lest this one [sc. the debtor] swear and then the other produce the collateral. But if Rav Huna's dictum be correct, since the creditor must swear that it is not in his possession, how can he produce it?

Rava suggests that the case is where the creditor has witnesses that the collateral was burned (and therefore need not swear that it is not in his possession). - If so, from where can he produce it? — Rather, said Rav Yosef, there are witnesses that it was stolen. - Yet after all, from where can he produce it? - He may exert himself and bring it. - If so, when the creditor swears, the debtor may take pains and bring it! — [No.] As for the creditor producing it, it is well, for he knows who enters and leaves his house, and so he can go, exert himself, and produce it, but does the debtor know who enters and leaves the creditor's house?

Abaye answers that we are concerned that after the creditor takes Rav Huna's oath, he will claim to have found the collateral later, and disprove the debtor.

Rav Ashi says that the *Mishnah* was not mandating that the creditor swear the worth of the collateral. Rather, the *Mishnah* was assuming that the creditor swears Rav Huna's oath, and the debtor swears the worth of the collateral. The *Mishnah* was simply stating that the creditor must swear

first, to avoid his disproving the debtor's oath with the collateral itself. (34b2 – 35a1)

Rav Huna bar Tachlifa quoted Rava, who said that the first case of the conclusion of the *Mishnah* seems to disprove Rav Huna. The *Mishnah* said that [if the debtor pleads,] "You did lend me a sela on it, while it was worth two (and therefore you owe me a sela)"; and the other replies, "Not so; I lent you a sela on it and it was worth a sela (and therefore I do not owe you anything)," he is free (from an oath, just as any other person who totally denies a claim of a debt). If Rav Huna is correct, when the creditor swears that the collateral is not in his possession, we should attach to that an oath to the collateral's value, using *gilgul* – attaching a new oath to an existing oath.

Rav Ashi said: I related this question to Rav Kahana and he said to me that the *Mishnah* is referring to a case where the debtor believes (that the creditor has not taken the collateral). but feels he is mistaken in his estimation of its value. – Then let the debtor believe the creditor in this too [viz.,] how much it was worth! — [The debtor reasons,] he [the creditor] did not fully ascertain it [sc. the value].[1] Then let the creditor believe the debtor, since he does fully know it? — [Nevertheless,] he does not believe him.[2] - Wherein lies the difference, that the debtor believes the creditor, but not vice versa? — The rationale to assume such a situation is the verse in Mishlei, which states that righteous people are oftentimes rewarded with riches, while dishonest people are punished with poverty. Therefore, the debtor assumes his creditor is honest, since he is richer, while the creditor assumes the poorer debtor is dishonest. (35a1 – 35a2)

Now, where did I Put it...?

A man entrusted a custodian with jewelry. When he requested them back, the custodian said he didn't know where he put them. Rav Nachman said that forgetting where he placed the item is negligence, and the custodian is therefore liable. The custodian did not pay, so Rav Nachman seized the custodian's mansion. Eventually, the custodian found the jewelry, and it had appreciated in value. Rav Nachman ruled that each party receives his property back – the custodian his house, and the depositor his jewelry.

Rava was present, and asked Rav Nachman why we don't consider the custodian to have acquired the jewelry once he paid for it, since the *Mishnah* says that if a custodian declines to swear and instead pays for an item, he receives it when it is recovered.

Rav Nachman ignored the question, and Rava later realized that the *Mishnah's* rule is only when the custodian did not trouble the depositor to go to court, and the depositor therefore gives it to him. However, in this case, the custodian troubled the depositor and the court to collect his obligation.

The *Gemara* suggests that this case proves that Rav Nachman holds that a court's seizure of assets is reversible, since he didn't consider the court's seizure of the mansion as concluding the case.

The *Gemara* deflects this by saying that this case was a mistaken seizure, since the earrings were in his possession from the outset. (35a2 – 35a3)

No Returns?

[The *Gemara* discusses at what point a court's seizure is irreversible.] The Nehardean scholars said that a court's appraisal is reversible for only twelve months. Ameimar said: I am from Nehardea and I maintain that it is always reversible. The halachah is that it is always reversible,

[1] Since the collateral is not the property of the creditor, he is not familiar with its worth.

[2] The creditor does not believe the debtor's estimation of the collateral, even though it's his property.

because it is stated: And you shall do that which is right and good.[3]

The *Gemara* then discusses the reversibility of various cases of court seizure:

1. This case is obvious: If a debtor's land was seized for a creditor, and he then used it to pay his creditor, the original debtor can retrieve the land, since the second creditor has no more rights than the first.

2. If the land left the creditor via a sale, a gift, or to his estate upon his death, the new owners specifically want land and not money, so it is not equitable for the land to be retrieved.

3. If it was appraised in favor of a woman [creditor], and she married, or if a valuation was made of a woman's [estate] and she married, and then died - the husband is regarded as a purchaser in respect to a wife's property; accordingly, he neither returns [the estate to the debtor], nor is it returned to him. For Rabbi Yosi ben Chanina said: In Usha it was enacted: If a woman sells of her 'property of plucking' (nichsei melog) in her husband's lifetime and then dies, her husband [as heir] can claim it from the purchasers.[4]

Where, however, he [the debtor] himself gave it to him [the creditor] for his debt, Rav Acha and Ravina disagree: One maintains that it is returnable; the other says that it is not. He who rules that it is not returnable holds that it is a true sale, since he voluntarily gave it in payment. But he who rules that it is returnable holds that it is not a true sale, and as for his giving it to him voluntarily and not going to court, — he gave it to him [merely] through shame. (35a3 – 35b1)

The *Gemara* cites three opinions as to when the creditor starts receiving the produce from land seized to pay his debt:

1. Rabbah: When he receives the collection document.
2. Abaye: When the collection document is signed.
3. Rava: When the public auction period is over.[5] (35b1)

Changing Hands

The *Mishnah* discusses a renter who lends his rented item to someone else. A renter is liable only for loss or theft, while a borrower is liable for anything except loss through normal usage. If the cow dies, the borrower is liable to pay the renter, but the renter simply swears that the cow died, and is not liable to pay the owner. Rabbi Yosi argues and says: How can the renter do business with his fellow's cow? Instead, we remove the renter from the transaction, and the borrower pays the owner. (35b1)

Rav Idi bar Avin said to Abaye: Let us see: how does the renter acquire the cow? By his oath! Then let the owner say to the renter, "Remove yourself and your oath, while I bring an action against the borrower!" — Do you think, he replied to him, that the renter acquires it through his oath! He acquires it from the time of its death, the oath being only to placate the owner.[6] (35b1)

[3] This is due to the creditor's obligation to be equitable, even when not necessitated by the letter of the law. Since the creditor only received land in payment for a monetary obligation, he should accept payment in return for the land.

[4] A husband is equivalent to a buyer. Therefore, if a woman creditor got married and then died, passing the seized land to her husband, he does not need to return it to the debtor. If a woman debtor whose land was seized got married and then died, her husband does not have the legal standing of an heir, and may not retrieve the seized land.

[5] The estate to be distrained was announced for public sale, to go to the highest bidder; after the period of announcing is passed without its being sold, the creditor has a right to the produce.

[6] Abaye explains that since the renter is not liable for the cow's death under normal usage, the renter acquires the cow at the time of death, and he therefore is paid by the borrower. The oath he takes is simply to assuage the owner.

How many Cows?

Rabbi Zeira explains that the owner and renter can enter into transactions that will result in the owner paying the renter multiple times the value of the cow. [The two principles are:

1. When one rents an item to someone, he must ensure the renter receives use of the item for the rental period. If the item is not available, the one providing the item must pay for the lost rental time.
2. When one borrows an item, if it is lost not through normal usage, the borrower must pay the value of the item.]

Below is a diagram of the transactions done with the cow:

Renter	Transaction	Duration	Owner	Obligation
	<<== Rents from	100 days ++++++++++		100 cow days
	==>> Lends to	90 days +++++++++		Cow (only 10 cow days of previous rental)
	<<== Rents from	80 days ++++++++		80 cow days
	==>> Lends to	70 days +++++++		Cow (only 10 cow days of previous rental)

Therefore, if the renter rented for 100 days, and then lent it back to the owner for 90 days, at that point in time, the borrower is liable to the renter for any loss on two counts. Since he is borrowing the cow, he must pay for loss of the cow, and during the remaining 10 days, he must ensure the renter has use of a cow. If he then rented the cow back to the renter for 80 days, and the renter then lent it back to the owner for 70 days, the owner has incurred two more payments – one for his second borrowing, and one for the 10 days of rental.

Rav Acha of Difti said to Ravina: Let us see, only one animal is involved, which was brought into [a certain state] and taken out: it was taken out of renting and brought into borrowing, taken out of borrowing and brought into renting! — Is the cow then still in existence, he replied, that we should say thus to him? Mar son of Rav Ashi said: He has a claim only in respect of two cows, one in respect of borrowing and one in respect of renting, [for] there is one designation of borrowing and one designation of renting. That in respect of borrowing belongs entirely to him [the renter], while as for that of renting, he must work with it for the period of renting and return it to its owner.[7] (35b1 – 35b2)

INSIGHTS TO THE DAF

It's Somewhere...

The *Gemara* stated that if a custodian states that he doesn't know where he placed the item given to him, this is negligence, and he is liable. The Meiri says the negligence is the possibility that the location of the item is not secure. The Ritva says that even if the custodian knows that it's in a secure place, if he doesn't know where, that is negligence, since he's preventing the owner from accessing it.

Seized Land

The *Gemara* says that if a creditor sells land that he seized, the buyer need not return it to the debtor.

Tosfos (35a Zabna) asks how the buyer can have more rights than the creditor? He is buying the land from the creditor, who can only transfer his ownership rights as part of the sale.

Tosfos explains that in principle the creditor is not legally obligated to return the land, but only must do so to be

[7] Rav Acha from Difti disagrees and says that fundamentally there are only two obligations the owner has to the renter – one for borrowing, and one for rental. Regardless of how many iterations of these obligations are incurred, the owner only pays the renter these payments.

equitable. Therefore, the buyer can buy the legal rights that the creditor has (t*o not return the land*), and the equitable requirement does not apply to him, since he explicitly wanted to buy land, not its value.

The *Gemara* says that a husband whose wife died is considered a buyer of his wife's property, and therefore a debtor cannot retrieve land seized by the wife, nor can the husband retrieve land seized from the wife. Tosfos (35a Loke'ach) explains that to prevent a debtor from retrieving land seized by the wife, it would suffice for the husband to be considered an heir, since heirs also have no obligation to return seized land. However, if the husband were considered an heir, he would be able to retrieve land seized from his wife. Therefore, the *Gemara* had to state that the husband is considered a buyer.

The Rishonim quote Rashi's opinion that when the wife is alive, the husband is neither an heir nor a buyer, and land can be retrieved by and from the wife. Tosfos seems to agree with Rashi's position.

According to the Ramban, the *Gemara*'s case is even when the wife has not died. In that case, the husband is not an heir. If the husband is not considered a buyer, neither statement would follow – the land could be retrieved from and by the husband.

The Middleman

The Sages hold that if a renter lends his rented cow to someone, and it dies naturally, he may collect the value of the cow from the borrower, and swear to the owner, and avoid liability. The *Gemara* explained that at the point of the cow's death, the renter acquired the cow, gaining its value from the borrower. Rabbi Yosi rejects the renter profiting from his rented cow, and states that the borrower pays its value directly to the owner.

Tosfos (35b Tachzor) says that Rabbi Yosi holds that the renter would acquire the cow by his swearing or otherwise proving that he was not negligent, and at that point, the owner can tell the renter that he prefer to bypass the renter's intervention. However, if the owner himself observed the cow dying naturally, the renter is already not liable, and the owner has no reason to bypass him.

Other Rishonim (Rosh, Rif, Rambam) say that Rabbi Yosi considers the renter to be an agent of the owner when he lent it out. Therefore, in all cases, Rabbi Yosi holds that the owner bypasses the renter, and receives payment from the borrower. According to Tosfos, the *Gemara*'s subsequent discussion of a renter and owner who exchange the cow multiple times is relevant even according to Rabbi Yosi, in the situation where the owner observed the cow dying. However, according to the other Rishonim, the discussion is only relevant according to the Chachamim.

Take it Back

The *Gemara* discusses the case of multiple exchanges of the cow between the owner and renter. The *Gemara* deducts 10 days from the time period of guarding at each step.

Tosfos (35b agra) suggests that if there were no change in the time period, we would assume each step was fully reversing the prior guarding, and there would be no accumulation of obligation.

Alternatively, Tosfos states that the borrowing has to be for a shorter time period, to ensure that the owner owes rental usage to the renter. Once the *Gemara* was reducing the time period for the borrowing, it also reduced the time period for the rental.

Profit from another's assets

Our mishnah cites Rabbi Yosi's famous rule: "How can one profit from another's cow?" The case presented here concerns someone who rented a cow and lent it to another. The cow died while in the borrower's care and the halachah pertaining to shomerim requires the borrower to pay its

worth to the renter. A borrower must compensate a lender – in this case, the renter – even in instances of force majeure (oness). The renter, though, does not have to pass the payment on to the owner as he is liable only for theft or loss. Rabbi Yosei insists that the renter must give the payment gotten from the borrower to the owner as he must not profit from another's assets. (This explanation is according to Rosh and other Rishonim quoted in Shittah Mekubbetzes, i.e., that the borrower acts as a shomer for the owner; Tosfos [s.v. "Tachazor"] interpret Rabbi Yosei's statement entirely otherwise; see Kehilos Ya'akov, 29).

Profit from a twice-rented vehicle: The meaning of the above rule becomes sharper if we consider this example: Someone rented a car for a day for NIS100 and immediately rented it to another for NIS150. May the owner demand the additional NIS50 from the first renter? Machaneh Efrayim (Hilchos Sechirus, 19) explains that he must not as the first renter was not paid for the car itself, which was returned to the owner, but for its use. The first renter paid the owner NIS100 to use the car and any profit he gets from its use is his. Rabbi Yosi's rule pertains if the renter profits from the property itself, as in our mishnah where the profit derives from the cow's death.

DAILY MASHAL

How would you rule?

A Torah scroll (sefer Torah) donated after a fire: The Jewish residents of a Brooklyn neighborhood moved on to greener pastures and the gabaim of the disused synagogue deposited their sefer Torah at a yeshiva. A fire broke out in the yeshiva which consumed the sefer Torah. The community, shaken by the tragedy, eagerly donated funds for a new sefer but the gabaim of the old synagogue demanded it, quoting Rabbi Yosei's rule. If their sefer Torah had not been destroyed, they claimed, the yeshiva could not have raised contributions for a new one.

How would you rule?

A tenant who insured a rented dwelling: Rabbi Meir Simchah HaKohen (*Or Sameach, Hilchos Sechirus 5:6*) discusses a tenant who insured the house he was renting. When the house caught fire, he collected the insurance and the landlord presented a claim, citing Rabbi Yosi's rule. The case obstensibly parallels that in our mishnah. The person who rented the cow gave part of the rental period to the borrower but we do not regard his act as an investment in hope of some force majeure that may happen to the cow; he must therefore pass on the payment to the owner. Reasoning likewise, we should disregard the tenant's investment in insurance and rule that the compensation for the fire damage belongs to the landlord.

How would you rule?