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Mishna

An unpaid custodian may stipulate that he should be exempt without taking an oath. A borrower may stipulate that he should be exempt from liability. A Paid custodian and a renter may stipulate to be exempt from taking an oath, or from paying.

Anyone who makes a condition against what is written in the Torah, his condition is void. And any condition which commences with the action (*before he mentions the stipulation*), his condition is void. And any condition which can be eventually fulfilled and the condition was made in the beginning, his condition is valid. (94a)

Conditions

The *Gemora* asks: Why are the conditions mentioned in the *Mishna* valid? Aren't they conditions that are against what is written in the Torah, and all such conditions are void!?

The *Gemora* answers that the *Mishna* can be in accordance with the opinion of Rabbi Yehudah, who says that by monetary matters, those conditions are valid.

For we learned in a *braisa*: A man tells a woman he is going to betroth her, "on condition that you do not claim food support, clothes, and marital relations." [*These things are mentioned in the Torah as things that must be provided by a husband to his wife.*] She is betrothed, and the condition is null and void. These are the words of Rabbi Meir. Rabbi Yehudah says: Monetary conditions are upheld.

The *Gemora* asks: And can the *Mishna* be following the opinion of Rabbi Yehudah? Let us consider the latter part of the *Mishna*, which states: Anyone who makes a condition against what is written in the Torah, his condition is void. This (*which does not make a distinction between monetary and non-monetary matters*) is in accordance with Rabbi Meir's opinion!?

The *Gemora* answers that the *Mishna* can be in accordance with the opinion of Rabbi Yehudah, and the latter part of the *Mishna* is dealing with cases that do not involve monetary matters.

The *Gemora* asks: But let consider the next part of the *Mishna*, which states: And any condition which commences with the action (*before he mentions the stipulation*), his condition is void. Which is the *Tanna* that subscribes to this view? It is Rabbi Meir, for we learned in a *braisa*: Abba Chalafta, a man from the village of Chananya, said in the name of Rabbi Meir: If the condition is mentioned before the action, it is valid; if the action precedes the condition, it is void!

The *Gemora* answers: The entire *Mishna* is in accordance with Rabbi Meir; yet here it is different, because at the very outset, the custodian did not accept liability. [*He is not stipulating against something which is written in the Torah. He is asserting that he does not wish to be a custodian, and as long as he never acquired the deposit in*

the status of a custodian, he has the choice to watch it as he pleases. This is different than the case of kiddushin, where he first declared that he intends to marry her, and afterwards stipulates that it should be without a claim for food support, clothes, and marital relations. This is contrary to the Torah and the condition is deemed to be invalid.] (94a)

The *Gemora* cites a *braisa*: A paid custodian may stipulate that he should be liable just like a borrower.

The *Gemora* asks: He cannot obligate himself with mere words!?

Shmuel answers that this is referring to a case where the custodian made a *kinyan* with the witnesses (*obligating himself to pay like a borrower*).

Rabbi Yochanan explains that it may be referring even to a case where no *kinyan* was made. He is obligating himself differently. Since the custodian receives a benefit that people hear that he is very trustworthy, he decides to obligate himself. (94a)

The *Mishna* had stated: And any condition which can be eventually fulfilled and the condition was made in the beginning, his condition is valid.

Rav Tavla said in the name of Rav: These are the words of Rabbi Yehudah ben Teima, but the *Chachamim* say: Even if it is impossible to eventually fulfill it, and one stipulates it at the beginning, the stipulation is valid. For it has been taught in a *braisa*: If a husband says (*this is your get*), "On condition that you go up into the sky," "that you go to the depths of the earth," "that you swallow a reed of four cubits," "that you bring me a reed one hundred cubits long," "that you walk over the Great Ocean with your feet," if the condition is fulfilled, the *get* is valid; if not, the *get* is invalid. Rabbi Yehudah ben Teima says: Something such as this is a *get*. He said the following rule: Any condition that cannot eventually be fulfilled and the husband stipulates at the outset, he is just doing that to pain his wife, and the *get* is therefore valid.

Rav Nachman says in the name of Rav that the *halachah* is in accordance with Rabbi Yehudah ben Teima. Rav Nachman bar Yitzchak said: It can be proven like that from our *Mishna*, which states: And any condition which can be eventually fulfilled and the condition was made in the beginning, his condition is valid. We can infer from there that if the condition cannot eventually be fulfilled, the condition is void. This indeed is a proof. (94a)

WE WILL RETURN TO YOU, HASOCHEIR ES HAPOALIM

Mishna

If one borrowed a cow and borrowed its owner (*to work for him*) with it, or hired its owner with it, or, he borrowed the owner or hired him and afterwards borrowed the cow, and the cow died (*in any of the above cases*), he is exempt, as it is written [Shmos 22:14]: *If its owner is with him, he shall not pay*. But if he borrowed the cow and later borrowed the owner or hired him, and the cow died, he is liable, as it is written: *If its owner is not with him, he shall surely pay*.

[*A borrower is liable even for damages caused by circumstances beyond his control. The Torah, however, states concerning the borrower that if the owner was with him, he is not required to pay. Chazal understood that the intent of the Torah is that if the owner was with him at the time of the borrowing, the custodian is exempt from paying for the damages. This halachah is referred to as b'alav imo.*] (94a – 94b)

Explaining the Mishna

The *Gemora* notes: By the fact that the latter part of the *Mishna* stated, "and afterwards borrowed the cow," we

can deduce that when the former part of the *Mishna* states, "with it," it means that the owner and the cow were literally borrowed at the same exact time! Is such a thing actually possible? The cow will only be acquired when the borrower pulls it towards him (*the act of meshichah*), and the owner is acquired as soon as he says, "I will work for you"!? [*It is therefore essentially the same case as where he borrowed the owner or hired him and afterwards borrowed the cow!?*]

The *Gemora* suggests two answers: Either the cow was standing in the borrower's courtyard (*at the time that the owner committed to work for the borrower*), so that *meshichah* is not missing (*for the borrower acquires it on account that it is in the confines of his chatzer*), or alternatively, we can be dealing with a case where the borrower said to the owner, "You are not lent to me until I make a *meshichah* on your cow." (94b)

Scriptural Sources

The *Gemora* cites a *Mishna*: There are four types of guardians: A guardian who watches for free, a borrower, a paid guardian and a renter. A guardian who watches for free swears about everything (*and is exempt from liability*); a borrower pays for everything; and a paid guardian and renter swear regarding an animal that broke a limb, or was captured or died (*naturally*), but they would pay for an animal that was lost or stolen.

The *Gemora* asks: How do we know these *halachos*?

The *Gemora* cites a *braisa*: The first passage refers to an unpaid custodian, the second to a paid one, and the third to a borrower.

[*Here are the relevant verses from Parshas Mishpatim* [11: 6 – 14]:

1. [6 – 7]: *If a man gives his fellow money or articles for safekeeping, and it is stolen from the man's house … the custodian shall approach the judges to swear that he has not laid his hand upon his fellow's property*.
2. [9 – 11]: *If a man gives his fellow a donkey, a bull, a lamb, or any animal for safekeeping, and it dies, breaks a limb, or is captured … the oath of Hashem shall be between the two of them … and he shall not pay … but if it is stolen from him, he shall pay its owner*.
3. [13 – 14]: *And if a person borrows from his fellow and it breaks a limb or dies, if its owner is not with him, he shall surely pay. If its owner is with him, he shall not pay*.]

The *Gemora* asks: Now, as for the third passage referring to a borrower, it is understandable, for it states so explicitly: *And if a person borrows from his fellow and it breaks a limb or dies, if its owner is not with him, he shall surely pay.* But as for the first passage referring to an unpaid custodian, and the second passage referring to a paid one, perhaps it is the reverse?

The *Gemora* replies: It is reasonable to assume that the second passage refers to a paid custodian, since he is liable for theft and loss (*and logically, the custodian who is receiving payment should be more responsible than one who is guarding for free*).

The *Gemora* asks: On the contrary! Is it not more logical that the first passage refers to a paid custodian, since he is liable to pay twice the principal in a false claim of theft (*and later witnesses testify that he himself stole it; should we not assume that due to the strictness, the Torah is referring to the paid custodian*)?

The *Gemora* answers: Even so, the obligation to pay the principal even without taking a false oath (*a paid*

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custodian is required to pay immediately upon claiming that it was stolen) is a heavier liability than the obligation for paying double only conditioned upon taking a false oath. Proof to this can be brought from a borrower, though all the benefit is his (*for he can use the object without even paying for it; this should demand a higher degree of liability*), yet, he pays only the principal.

The *Gemora* asks: Does the borrower receive all the benefit? But does the borrowed animal not require food (*which it would be his responsibility to provide*)?

The *Gemora* answers: It is all his when the animal is standing in a meadow (*near his house*). [*And even in this case, the borrower will pay the principle.*]

The *Gemora* asks: But it needs to be guarded (*and the borrower must bear that expense*)!?

The *Gemora* answers: Where there is a town watchman.

Alternatively, we can answer that we do not have to say that all the benefit is his, but rather, most of the benefit is his.

Alternatively, we can be referring to a case where he borrowed utensils.

The *Mishna* cited above had stated: a paid guardian and renter swear regarding an animal that broke a limb, or was captured or died (*naturally*), but they would pay for an animal that was lost or stolen.

The *Gemora* asks: Now, as for theft, it is understandable, for it is written: *but if it is stolen from him, he shall pay its owner*, but how do we know that he will is liable for loss as well?

The *Gemora* answers: For it has been taught in a *braisa*: *If it is stolen from him*. From this I know only theft; how do I know that he is liable for loss as well? It is from the expression: *if it is stolen, it shall be stolen* (*the double expression of geneivah*), implying that he is liable no matter how it disappears.

The *Gemora* asks: Now, that answer is understandable according to the view that we do not say that the Torah employs human phraseology (*and we can derive the halachah from the double expression*). However, according to the opinion who holds that the Torah employs human phraseology, what can you say (*from where will he derive that the paid custodian is liable for loss*)?

In the West (*Eretz Yisroel*), they answered: It may be derived through the following *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*): If he must pay for theft, which is closer to an unavoidable accident, then surely he should be liable for loss, which is closer to a negligence.

The *Gemora* asks: And the other (*why does he need the double expression when there is a kal vachomer*)?

The *Gemora* answers: Something which may be derived through a *kal vachomer*, the Torah may anyway take the trouble to write it explicitly.

The *Mishna* cited above had stated: A borrower pays for everything.

The *Gemora* asks: Now, as for paying if the animal broke a limb or died, it is understandable, for it is written: *And if a person borrows from his fellow and it breaks a limb or dies*; but where do we know that a borrower is responsible if the animal was captured?

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And should you say that we should derive it from the liability I the cases where it broke or died (*and therefore it stands to reason that there shall be liability for any unavoidable accident*), it may be retorted that as for these, he is liable because they are accidents which may be anticipated, but can you say the same regarding "capture," which is not anticipated?

The *Gemora* answers: Let us derive it as follows: Injury and death are stated with respect to a borrower, and they are likewise mentioned in the case of a paid custodian. Just as there, capture is included within the same category (*as the Torah explicitly states*), so here too, capture is included (*although it is not stated*).

The *Gemora* asks: But this may be refuted: Perhaps capture is included by a paid custodian, for there it is included as a cause of exemption (*for he is exempt in cases of unavoidable accidents*); but can you say the same of a borrower, for it would be included as a cause of liability (*and perhaps, since it is an unanticipated accident, he would not be liable*)?

The *Gemora* answers: It may be derived in accordance with Rabbi Nassan's teaching. For it was taught in a *braisa*: Rabbi Nassan said: *And if a person borrows from his fellow and it breaks a limb **or** dies*: The word "or" extends the law to capture as well.

The *Gemora* asks: But isn't the word "or" needed to separate (*the two cases of injury and death*)? For I might have thought that he is only responsible if it broke a limb and also died; therefore the Torah had to state otherwise.

The *Gemora* notes that according to Rabbi Yonasan's view, it is well (*that we can derive "capture" from the word "or"*), but according to Rabbi Yoshiya, what can you say? For it has been taught in a *braisa*: It is written: *For any man that curses his father and his mother shall be put to death*. From this I would only know that he is punished for cursing his father **and** his mother; from where would I know that he is punished if he cursed his father without his mother or his mother without his father? It is from the end of the verse, which states: *his father and his mother he has cursed*. The extra words teach us that he is punished if he cursed his father or if he cursed his mother; these are the words of Rabbi Yoshiya. Rabbi Yonasan said: The verse (*when it stated "his father **and** his mother"*) implies either the two together or each one separately unless the Torah would have specified that he will not be punished until he curses them together. [*Accordingly, Rabbi Yonasan would agree with Rabbi Nassan that the word "or" is superfluous, and it comes to teach us the law of "capture".*]

The *Gemora* answers: Even Rabbi Yoshiya would agree that the word "or" is not necessary to separate (*the two cases of injury and death*), for what would be the difference if the entire animal was killed or only part of the animal was killed (*he should be liable just the same*)! [*Therefore, the word "or" is superfluous, and it comes to teach us the law of "capture".*] (94b – 95a)

INSIGHTS TO THE DAF

Fly like a Bird

The *Gemora* cites a *braisa*: If a husband says (*this is your get*), "On condition that you go up into the sky," "that you go to the depths of the earth," "that you swallow a reed of four cubits," "that you bring me a reed one hundred cubits long," "that you walk over the Great Ocean with your feet," if the condition is fulfilled, the *get* is valid; if not, the *get* is invalid. Rabbi Yehudah ben Teima says: Something such as this is a *get*. He said the following rule: Any condition that cannot eventually be fulfilled and the husband stipulates at the outset, he is just doing that to pain his wife, and the *get* is therefore valid.

There is another case brought down in the Tosefta: If the husband said, "On condition that you fly in the air."

Reb Yosef Engel in Gilyonei HaShas asks: Isn't this something that is possible? Don't we find such an occurrence by Alexander the Great? And in today's age (*of Reb Yosef Engel*), people fly in the air using air balloons!?

He answers that the language "fly" connotes "by himself," similar to a bird, and floating in the air using exterior devices is not what he had in mind. A condition must be fulfilled according to the language of the stipulator!

Stipulation regarding Marital Relations

The *Gemora* cited a *braisa*: If someone says to a woman that she is betrothed to him on condition that he does not owe her support, clothes, or marital relations, the *kiddushin* is valid, but the conditions are invalid; these are the words of Rabbi Meir. Rabbi Yehudah says: In monetary matters, the condition is upheld.

The *Gemora* explains that Rabbi Yehudah holds that one can make a condition modifying the obligations stipulated by the Torah regarding monetary law.

This would explain why Rabbi Yehudah holds that the condition is valid when he stipulated that he does not owe her support or clothing; however, why is it valid when he stipulates that he will not have marital relations with her? This is not a monetary law!?

Rashi, because of this, writes that the husband remains obligated to have marital relations with her, for this is not a financial right. Depriving a wife from relations would cause her physical distress and therefore the condition is void.

The Mishnah Lamelech challenges this from a *Gemora* which states that one can say to his fellow, "Hit me and you will be exempt." Evidently, one can waive physical anguish! Furthermore, we find that a woman can release the husband from his marital relations!?

Some answer that Rashi himself, cited in the Shitah Mikubetzes in Kesuvos (56a), states that the condition is void, for we assume that a woman will not waive her rights regarding anything which causes physical anguish; however, if she explicitly forfeits those rights, they are forfeited.

Rabbeinu Chananel holds that a man may stipulate on marital relations, and a wife can waive her rights to it as well. This is because the pleasure of relations belongs to her and it would be regarded as a financial right.

Kal Vachomer

The *Gemora* states that something which may be derived through 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*), the Torah may anyway take the trouble to write it explicitly.

The Bnei Yissoschar explains the reasoning for this: A *kal vachomer* is based upon logic. One might say that the reason this *halachah* (*derived through a kal vachomer*) is correct is because it is understandable to me; it makes sense. The Torah therefore goes out of its way to write it explicitly in order to teach us that the *halacha* is correct because the Torah said so; regardless of whether it is understood or not.

The Ra"n in *Nedarim* (3a) notes that this concept is applicable by a *hekesh* (*when the halachos from one topic are derived from another one*) as well. The *Gemora* in Bava Metzia (61a) states that it also applies to a *gezeirah*

shavah (*one of the thirteen principles of Biblical hermeneutics; it links two similar words from dissimilar verses in the Torah*).

According to the explanation of the Bnei Yissoschar, we could say that the concept should only apply to a *kal vachomer*, for that is based upon logic. The Torah would not find it necessary to state explicitly a *halachah* which is derived through a *hekesh* or *gezeirah shavah*, for they are not based upon logic at all, and it would be superfluous to write it.

The Yad Malachei writes that if the Torah does explicitly write a *halachah* which was derived through one of the thirteen principles of Biblical hermeneutics, we must treat it more stringently than an ordinary *halachah*. This is comparable to a Rabbinical prohibition, which has a slight support from something written in the Torah. Tosfos in Eruvin (31b) rules that such a prohibition is stricter than an ordinary one, which does not have any Scriptural support.

DAILY MASHAL

The Sochatchover Rebbe Honors His Father

The popular saying is that when the Torah declares "Any person (ish ish) who curses his father…", it refers even to one who regards himself as an important personality (the double ish). Such a person must be all the more heedful to honor his parents. An appropriate story involves the Sochatchover Rebbe, the Avnei Nezer, zt"l:

As a child, the Rebbe learnt with his father, Rav Ze'ez Nachum of Biala zt"l, author of Agudas Ezov. Rav Ze'ev Nachum asked him a question which he thought to be very difficult but his son immediately solved it, as if there was no question in the first place. The father rejected his answer, though, correcting him and giving him a light slap on his cheek. "Don't get used to thinking so fast", he advised, "without deeper examination."

His son became one of his generation's leading scholars and once, while visiting his aged father, Rav Ze'ev Nachum reminded his son of the above incident. The Bialer Rav told him that he had later reviewed the sugya with all the commentaries and realized that his son's original answer was right but didn't want to inform him, thinking it was better to keep him from excessive pride. "Still", he said, "you didn't deserve the slap. Please forgive me."

"I knew all along", replied the Sochatchover, "but didn't talk back so as not to dishonor you."

QUESTIONS AND ANSWERS FROM YESTERDAY'S DAF

to refresh your memory

Q: Can one stipulate regarding the right for his adult sons to eat the produce while they are working?

A: Yes.

Q: Can one stipulate regarding the right for his minor sons to eat the produce while they are working?

A: No.

Q: What type of custodian would be required to guard that which he is watching more than an ordinary paid custodian.

A: A town watcher.

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