



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

**Admitting Theft of His Own Items**

The *Gemara* relates another case. One person says to another, “What are you doing on my land?” The other person responds that he bought it, he’s been there for three years, and he produces one witness who has seen him there for three years.

The Sages who studied before Abaye thought to compare this to the case of Rabbi Abba’s silver ingot (in which there was only one witness). A person grabbed a silver ingot from his friend. The latter brought the case before Rabbi Ami, before whom Rabbi Abba was sitting at the time. He brought one witness to prove that the man had snatched the article from him. “Yes,” said the other, “I did snatch, but it was my own property that I snatched.”

Rabbi Ami said: How should we judge this case? We cannot make him pay, as there were not two witnesses who saw him take it (*and he should be believed with a migu that he could have said that he did not steal it away from the other party, but rather, it was his the entire time*). We cannot say he is exempt (*from taking an oath*) either, as there was one witness who testified that he grabbed it away. [*Even if he claimed it was his and he did not steal it away, he would need to swear against the witness who said that he saw him grab it.*] We cannot make him swear either, for being that he said he stole it away from the other person, he has made himself into a thief, who is unable to swear.

Rabbi Abba said to him: He is obligated to take an oath, but cannot do so. Anyone who is obligated to take an oath, but cannot do so, must pay.

Abaye asks: Are these cases comparable? In the case of the silver bar (*that he stole away*), the one witness is coming to undermine his claim. If one other witness would join him, the thief would clearly lose the case. In this case, however, the witness is supporting his claim. If one other witness would also testify to this effect, he would win the case!?

Rather, Abaye continues, Rabbi Abba’s case is similar to a case where there is one witness about one who occupied another person’s land for two years, and it was regarding paying for the fruits of that land.

[*The Rashbam explains that the case is where Reuven claims land from Shimon, and says Shimon has been using his land and fruit for two years. A witness indeed testifies to this effect. However, Shimon claims he seized the land and fruit and had been using it because it was his.*] (33b2 – 34a2)

**When does Beis Din Intervene?**

Two people were fighting over a boat, each claiming it was theirs. One of them came to *Beis Din*, and asked the *Beis Din* to seize the boat until he could bring witnesses that it belonged to him. Should the *Beis Din* seize the boat or not?

Rav Huna says they should seize the boat, while Rav Yehudah says they should not.

After the *Beis Din* had seized the boat (*either because they held like Rav Huna, or because both litigants agreed it should be in Beis Din’s possession in the interim*), the person was unable to find witnesses. One of the litigants told *Beis Din* to let the boat go, and whoever is stronger will win. Should *Beis Din* let the boat go or not?

Rav Yehudah says they should not, while Rav Pappa says they should. The Gemara rules: The law is that they should not seize the boat in the first place. If they did, however, they cannot let it go (*in the second case*). (34b1)

## INSIGHTS TO THE DAF

### ***Paying when he cannot Swear***

In a situation where two witnesses would require someone to pay, one witness would require him to swear, but he is not completely denying the testimony of the witness and therefore cannot take the oath that is incumbent upon him, we apply the concept of משלם יכול לישבע – if he cannot swear, he must pay. Therefore, when a single witness testifies that Reuven grabbed something from Shimon, we assume that it belongs to Reuven since he was holding on to it. Had Shimon been willing to swear that he didn't grab it from Reuven, we would believe him against the single witness. However, since Shimon admits to grabbing it, but is claiming that it rightfully belongs to him, he is unable to make the oath demanded of him, and therefore must return the item.

Tosfos asks that if Shimon would deny that he grabbed it and make an oath, he would be believed. Why don't we believe Shimon to say that he grabbed it and swear that it belongs to him, with a *migu* that he could have said that he never grabbed it? If he would not make an oath that it belongs to him, it would not be a valid *migu* since he prefers to use the claim that would exempt him from a oath. But since he is now making an oath that it belongs to him, it should be a valid *migu* (assuming that he can use a *migu* even if the *migu* claim would require a Biblical oath)?

Tosfos explains that this is exactly the point of argument between Rav and Shmuel against Rabbi Abba. Rav and Shmuel (Shavuos 47a) hold that since he has a *migu*, we don't require him to return the item. But Rabbi Abba holds that even though he has a *migu*, we require him to either

swear to contradict the witness by saying that he didn't grab it, or pay - no other options. Tosfos doesn't clearly speak out the point of argument between Rav and Shmuel against Rabbi Abba.

It seems that the point of dispute is whether a single witness obligates Shimon to support his claim with an oath, or is he obligating him to pay with an option to exempt himself using an oath. According to Rav and Shmuel, a single witness obligates an oath - meaning, that he obligates Shimon to support his claim with an oath. By Shimon swearing that it is his, and using a *migu* that he could have sworn that he didn't grab it, he is, in essence, using an oath to support his claim. But, Rabbi Abba holds that a single witness does not obligate him to merely support his claim with an oath. The fact that Shimon can prove he is correct by swearing it is his in conjunction with a *migu* isn't sufficient. The single witness obligates Shimon to pay with the only option out of paying being an oath to contradict a single witness. Shimon's only option out of paying is by making a oath to contradict the testimony of the single witness by swearing that he didn't grab it. Since Shimon admits to grabbing it and cannot make this claim, we resort to the default that he must pay.

### ***The Disputed Boat***

The Gemara discusses two cases in which two litigants argue over the ownership of an object (*a boat*) which neither one of them is holding in his possession. In the first case, one of the litigants asks the court to appropriate the object and hold it until he brings testimony of witnesses to support his claim (*so that the other litigant should not seize the object in the meantime and sell it to a third party, from whom the litigant with witnesses will not be able to get it back in court*). In the second case, the Gemara asks who is entitled to keep the object when neither litigant asks the court to hold it. In that case, Rav Nachman rules: "Kol d'Alim Gevar" – "whoever is stronger prevails." The Gemara itself says that the same *halachah*, "Kol d'Alim Gevar" applies in the first case.

If the same *halachah* applies in both cases, why does the *Gemara* change the other details of the case? In the first case, the *Gemara* says that each of the litigants claims that the boat is his. In the second case, the *Gemara* says that each of the litigants claims that the boat was his father's. Why does the *Gemara* not present the second question as a case in which each litigant claims that the object is his, in which the *halachah* is still "Kol d'Alim Gevar"?

Perhaps the *Gemara* prefers to give a case in which it is clear that neither defendant expects to find proof to support his claim of ownership, and therefore neither will request from the court to hold the object. When each one says, "The object is my father's and I received it as an inheritance," it implies that he does not know how his father obtained it, but just that he left it as part of his estate. If the claimant does not know how his father acquired the object, he will not be able to prove his ownership. [Although he might be able to prove that the object was seen in the possession of his father, such proof will not suffice to resolve the case, because -- at the present moment -- the object is in the possession of neither litigant, as Tosfos writes on 33b, DH v'ly Ta'in.]

In addition, the *Gemara* asks why the *halachah* here should differ from that in the case of "Shte Shtaros" – "two documents," where the *halachah* is either "Yachloku" – "they divide it" (or "Shuda d'Dayanei"), and the *Gemara* answers that "Yachloku" (or "Shuda d'Dayanei") applies only when neither litigant can bring proof for his claim. In contrast, in the case here of the disputed boat, it is possible for one of the litigants to prove that the boat belongs to him. Had each litigant said that "the object is mine," this answer would have been obvious. The *Gemara* assumed, however, that when each one says that the object belongs to his father (implying that he has no knowledge about how his father obtained it), one might have thought that the *halachah* is "Yachloku" (or "Shuda d'Dayanei") since the case will remain unresolved. The *Gemara* answers that even though, at present, neither litigant expects to find proof to his claim, nevertheless he can search and perhaps find proof of his

father's ownership. Therefore, the *halachah* in such a case remains "Kol d'Alim Gevar."

## DAILY MASHAL

### Self-sacrifice Pays

Our sugya explains that if two people argue about the ownership of a boat and each has equal proof, "the stronger wins". According to the Rosh, this means that "he who is right is willing to endanger himself to get what is truly his" and HaGaon Rav Natan Gestetner uses our gemara to clarify the following topic:

The Torah praises Moshe at his demise, saying "No other prophet arose in Israel like Moshe...[known for] the strong hand... that Moshe made" (Devarim 34:10-12) and Rashi comments "for receiving the tablets with his hands". Why does the Torah specially praise Moshe for accepting the tablets with his hands? In his Gur Aryeh, Maharal of Prague explains, according to the Yerushalmi, that when the people worshipped the golden calf, Moshe held on to the tablets by two handbreadths, Hashem held on to two handbreadths and two handbreadths remained between them. (Each tablet was six handbreadths wide, six tall and three thick, as we recently learnt in Bava Basra 14a; their corners were thus square and not round, as depicted by certain gentile artists). When the people sinned, Hashem tried to seize the tablets from Moshe but Moshe was stronger and grabbed them back and the Torah therefore praises him for his strong hand.

Rav Gestetner adds another aspect: The Torah can't be divided piecemeal: "Hashem's Torah is whole, restoring the soul" (Tehilim 19:8). It restores our souls only when whole and could not be divided between Hashem and Moshe. The Torah therefore praises Moshe, that by his self-sacrifice in seizing the tablets with all his might (from Hashem and fearless of the consequences!), we have indeed received the whole Torah – known as Toras Moshe! (Lehoros Nasan on the Torah IV p.212).