

OVERVIEW of the Daf

1) Unclear terms used in the terms of the sale (cont.)

The Gemara declares that its initial thinking was that whether the seller used the term "divided" or whether he used the term "cut off" the buyer will be granted half the land.

This assumption is rejected in light of an explanation of the terms given by Abaye.

The Gemara states that it is obvious that the term חלוק means that the buyer should receive half but expresses uncertainty about the meaning of the term חלק.

Ravina bar Kisi cites a Baraisa that indicates that the buyer is granted at least a quarter of the property.

2) Withholding something from a sale

A Baraisa discusses a Levi who sells property to a Yisroel and stipulates that he should be given the ma'aser from that field.

The reason this stipulation works is that the Levi withheld the ma'aser from the sale of the property.

Reish Lakish applies this principle, namely that unnecessary stipulations are given meaning, to the case of one who sells a house and stipulates that the fenced rooftop is his.

R' Zevid and R' Pappa disagree what additional rights the seller retains by including that clause.

R' Pappa's interpretation is successfully challenged.

R' Dimi of Nehardea rules that if pits and cisterns are to be included in the sale of land the seller must add the phrase that he is selling the property to the depth of the earth and the height of the sky.

The rationale behind this ruling is explained.

Proof for this ruling is suggested but rejected.

The Gemara begins another proof to R' Dimi's ruling. ■

REVIEW and Remember

1. How is the term חלק interpreted?

2. When are clauses in a contract reinterpreted?

3. What is the point of dispute between R' Zevid and R' Pappa?

4. What is the essence of R' Dimi of Nehardea's principle?

Today's Daf Digest is dedicated
 l'illui nishmas Perla bas Naftali Nachman
 by Alan and Sheila Shapiro

Distinctive INSIGHT

Leaving the ma'aser rishon for himself

אמאי אין אדם מקנה דבר שלא בא לעולם

The Baraisa teaches that if a field belonging to a Levi is sold to a Yisroel, and the Levi who owned the field stipulates that the Yisroel who is buying the field will give the ma'aser rishon to him, this request is binding, and the ma'aser rishon must be given to that Levi. The Gemara asks why this condition is honored, as the general rule is that one may not buy or sell something that is not yet in this world (אין אדם מקנה דבר שלא בא לעולם), and the produce which generates the ma'aser rishon of subsequent years is not yet planted or grown at the point of the sale of the land. The Gemara answers that the mechanism here is that the Levi wishes that his request be honored, so we view the original sale as predicated upon the Levi's retaining for himself an area of the field upon which the ma'aser rishon will grow.

It is noteworthy that this sale was arranged with a condition and understanding that it would be valid only if the condition was fulfilled. Therefore, when the Levi said that he was selling it על מנת - on the condition - that he retains the rights to the ma'aser rishon, the condition should be binding. Why is this different than any condition that is agreed upon? For example, if someone sells a field on the condition that the buyer give him ten bushels of wheat each year, the ten bushels must be given each year, and we do not consider the issue of "something that is not yet in this world," even though the future wheat is not here at the time of the sale. Nevertheless, a condition is valid even if it is regarding something which is not yet in this world when it is stipulated as a provision which must be fulfilled. However, the Gemara felt that the seller's request was a שיוור - an element of restriction, and that the sale was limited to exclude the ma'aser which the Levi wished to keep for himself. The Gemara questioned why this should be valid, as it felt that just as one may not transfer rights to something which is not in this world, so too, one may not retain rights to something that is not extant.

R' Elchonon Wasserman notes (קובץ שיעורים סימן ר"פ) that we find a precedent where the produce would belong

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 By the Reifer family
 לע"נ מרת שושנה בת הרב דוב בער, ע"ה

HALACHAH Highlight

Transferring property that does not yet exist to one's son
 כיון דאמר ליה על מנת שמעשר ראשון שלי שיורי שייריה למקום מעשר

Since he said, "On condition that the ma'aser is mine" he excluded from the sale the area of the ma'aser

Mabit¹ rules that just as a person can transfer ownership of property to his sons that have not yet entered this world, so too a man can transfer ownership of items that do not yet exist to his living sons. In other words, the Gemara Bava Kama (42) teaches that a man can transfer ownership to a fetus yet in his mother's womb, since the closeness of the relationship allows his mind to complete the transfer. Following the same line of reasoning, a man can transfer property that does not yet exist to his sons since the same rationale applies, namely, a person feels close to his son and therefore has the *גמירת דעת* necessary to complete the transfer. He proves his assertion from our Gemara. The Gemara discusses the Levi who is selling his land to a Yisroel and stipulates that the Yisroel must give him the ma'aser. The Gemara goes on to discuss the case where the Levi stipulated that the ma'aser should be given to his son after he dies and rules that the stipulation is binding and the Yisroel must deliver the ma'aser to the Levi's son. Why is this transaction binding, asks the Gemara, when a person cannot make a kinyan on something that does not yet exist.

(Insight...continued from page 1)

to the Levi, but the Yisroel who buys the field has the right to designate that produce as ma'aser rishon for his crops. A person may sell possession of an object and retain certain rights regarding the item.

The conclusion of our Gemara is that the Levi is not making a condition in the sale, but he is rather retaining a portion of the land for himself. Rosh explains that the Gemara had to say this because if this was a condition, he would be receiving the ma'aser as fulfillment of his condition, and not "חלף עבודתו," as necessary. ■

The Gemara explains that by making this stipulation it is as if he is excluding that part of the land from the sale. We see from this, concludes Mabit, that just as a person will exclude some of the land for his own benefit so too a person would exclude from the sale some land for the benefit of his son and thus we see that a man can transfer property that does not yet exist to his son.

Mishpatei Uziel² challenges the proof that Mabit infers from our Gemara. The reason the Levi has the right to the ma'aser and can even transmit that right to his son has nothing to do with the principle that one could transfer something that does not yet exist to his son. The principle that is at work is that the Levi is not selling this part of the field and it remains his. Since it is his property he has the right to transfer it to his son. ■

1. שו"ת מבי"ט ח"ב סי' קל"ז.
2. שו"ת משפטי עוזיאל ח"ג סי' ל"ג. ■

STORIES Off the Daf

A fight over airspace

"עד רום הרקיע..."

A certain person purchased the top floor apartment in a large building and naturally figured that this included the rooftop that was over his apartment. After all, what do the other tenants of the building care if he makes use of the roof? As long as he is careful not to disturb the solar water heaters, he figured he could do what he wanted. After many years, he already had a big family and he decided to fence in the area above his house and build a staircase from his porch to the roof to provide easy access.

vide easy access.

This step infuriated one of his neighbors, who was hotheaded to begin with. After the neighbor warned this man to take down the fence and was rebuffed he resolved not to allow him to get away with what he saw as theft from all the neighbors. After all, theoretically it was possible for the entire building to receive permission to add two more stories to the building, which would be split between all sixteen apartment owners. But if they allowed the top floor neighbor to attain a chazakah, they would lose all possibility of profiting from the roof.

The next time that the family which lived on the top floor went out, their neighbor below climbed the ladder to the roof and cut down the entire fence which had enclosed the roof.

When the neighbor upstairs returned home he was shocked at this blatant vandalism, but the vandal paid the entire cost of the damage on condition that they go to Rav Yisrael Grossman, zt"l, for adjudication in their dispute.

Rav Grossman ruled, "I am sorry, but it is eminently clear that you had no right to build on the roof unless you purchased this explicitly from the contractor. We see clearly from Bava Basra Daf 63-64 that one who did not explicitly write that he acquires the roof may not build on it." ■

¹שו"ת משכנות ישראל, סי' ג' ■