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OVERVIEW of the Daf

1) Seizing the item in front of Beis Din (cont.)

Abaye concludes his proof that in cases of doubt there is no obligation to tithe animals.

The Gemara identifies the exact case of tithing animals that are questionable that has been the topic of discussion until this point.

R' Huna is cited as ruling that one who cannot take an item in Beis Din is not empowered to make that item sacred.

The implication is challenged that one who owns an object can sanctify it, even if it is not in his possession.

The Gemara clarifies why this challenge is not relevant to the case in question.

2) Taking what is in one's hands

R' Tachlifa of Eretz Yisroel asserts that each claimant is granted the part of the talis that is in his hands and the rest is divided following an oath.

R' Pappa explains, in light of this ruling, the exact circumstances of our Mishnah.

R' Mesharshiya applies this principle to the halachos of חליפין.

R' Mesharshiya's ruling is unsuccessfully challenged.

Rava rules that a gold talis under dispute is divided between the two litigants.

The necessity and circumstances of this ruling are explained.

3) A disputed שטר

A Baraisa presents a dispute regarding the halacha of a borrower and lender who are both in possession of the loan document. Rebbi's ruling is successfully challenged.

Rava, in the name of R' Nachman, responds by clarifying the exact point of dispute between Rebbi and R' Shimon ben Gamliel.

The rationale behind their respective positions is explained.

(Continued on page 2)

REVIEW and Remember

1. Is one able to consecrate any item that he owns?

2. What is the dispute between Rebbi and R' Shimon ben Gamliel?

3. According to R' Yosi, when is a woman's kesubah returned to her?

4. Explain טופס and תורף.

Distinctive INSIGHT

An item cannot be consecrated if it is not in one's possession

שניהן אינם יכולין להקדישו זה לפי שאינו שלו וזה לפי שאינה ברשותו

In its attempt to resolve the case of the bathhouse which was consecrated by one of the people who was claiming its ownership, the Gemara cites the rule of R' Nachman, who says that if a person cannot acquire an item legally, he cannot consecrate it. In order to clarify this statement, the Gemara notes the rule of R' Yohanan. He states that if an item is stolen from its owner, and the owner has not yet been מייאש, neither the owner nor the thief may consecrate the item. The reason for this is that in order to be able to consecrate an item, the item must match the criteria found in the verse (Vayikra 27:14) regarding consecrating a house. Just as a house is owned by a person, and it is in his possession, so too anything one wishes to consecrate must be owned by him (as opposed to the thief, who does not own the item), and it must be in his possession (as opposed to the owner, whose object was taken from him).

R' Yochanan's statement suggests that even if had a strong legal position such that he could succeed in acquiring an item (יכול להוציאה בדיינים), in the meantime the item is not in his possession, and he cannot consecrate it. This contradicts the statement of R' Nachman. The Gemara answers that R' Nachman's statement was only made in reference to a building which housed a bathhouse (מקרקעי). A bathhouse building is automatically considered in the possession of the owner, which satisfies the criteria of R' Yochanan, and if he has a strong legal claim to recover it, the owner may consecrate it even before actually obtaining possession.

R' Elchonon Wasserman (קובץ שיעורים קידושין צ"ג) presents an inquiry to understand the concept of R' Yochanan which indicates that an item which is not in one's possession cannot be sold. Is it because the seller cannot legally transfer rights to an item he does not possess, or is the problem that the receiver (a buyer) does not accept legal ownership over an item he is not receiving? R' Elchonon proves from our Gemara that the issue is regarding the seller. Here, R' Yochanan states that an item can only be consecrated if the owner has it in his possession. In this case, הקדש has no problem receiving the item even if it is in the possession of a thief, but yet the transfer is not allowed. We therefore see that the issue is that the seller or provider does not fully offer the object when it is not present. The K'tzos HaChoshen (משובב סו א') concurs with this view, but Nesivos (סו א') understands that the deficiency is both from the seller as well as the buyer (receiver). ■

HALACHAH Highlight

The utensil used for chalipin

האי סודרא כיון דתפיס בית ג' על ג' וכו'

Concerning the kerchief [used for חליפין], once the seller grasps a portion that measures three by three fingerbreadths etc.

A valid חליפין transaction requires a buyer to hand a utensil to the buyer and that transfer effects the transaction. For example, when one does חליפין with his rabbi for the sale of chometz, the congregant is the seller and the rabbi is the buyer. At the time the rabbi hands the utensil to the congregant, the rabbi is given the authority to sell the congregant's chometz. Shulchan Aruch[1] writes that even if the seller does not take the entire utensil into his hands the חליפין is valid as long as he grasps the minimum size of a utensil which is the size of three fingers. S"ma[2] explains that Shulchan Aruch refers to a three finger by three fingers square of cloth which is the minimum size garment that is susceptible to tumah. From this example we see that regarding other utensils the seller must grasp enough of the utensil so that if the part that is in his grasp was to become detached from the rest of the utensil it would be a sufficient size that it could be susceptible to tumah.

Rema[3] notes that after חליפין is performed and the seller is in possession of the buyer's utensil the buyer does not have the option to keep the object for himself. The explanation he gives is that the transaction is made on condition that the utensil is returned. Ketzos Hachoshen[4] explains the mechanics of this transaction based on a Gemara in Nedarim. The Gemara Nedarim (48b) discusses a case of someone who acquires property for the purpose of passing it on to someone else. Ran asserts that this type of acquisition (על מנת להקנות) is not similar to one who acquires property on condition that he will return it (מתנה על מנת להחזיר) because although in the מתנה על מנת להחזיר case he is required to return the item, nevertheless, it is his for the time that it is in his possession. In the case where one is given an object for the purpose of making a transaction (על מנת להקנות) it never belongs to the recipient. Similarly, when the buyer gives a utensil to a seller for the purpose of performing a chalipin transaction the utensil is not given to the seller to become his property, its function is to effect חליפין, and thus the seller does not have the option to keep the item for himself. ■

1. שו"ע חו"מ סי' קצ"ה סע' ד'
2. סמ"ע שם ס"ק י"ב
3. רמ"א שם
4. קצות החושן שם סק"ד ■

(Overview. Continued from page 1)

Rava explains the last ruling of the previously-cited Baraisa.

The rationale behind R' Yosi's disagreement to the Baraisa's last ruling is explained.

Another Baraisa is cited that questions whether R' Yosi is concerned with the possibility of payment.

It is suggested that the names in the second Baraisa should be switched.

This explanation is unsuccessfully challenged.

R' Pappa asserts that the names in the second Baraisa do not need to be switched and suggests that R' Yosi was merely responding to Rabanan rather than expressing his own position.

Ravina asserts that the names in the first Baraisa should be switched.

R' Elazar and R' Yochanan disagree about the exact circumstance where the dispute between Rebbi and R' Shimon ben Gamliel applies.

R' Yochanan's position that they disagree in all cases is unsuccessfully challenged.

Ravina, in response to R' Acha, clarifies R' Elazar's position.

The Gemara applies this concept to another law.

Proof to this application is suggested but rejected. ■

STORIES Off the Daf

A Disputed Loan

מודה בשטר שכתבו אין צריך לקיימו

A certain person presented a validated loan contract to beis din. The borrower did not deny the loan or the document but claimed to have paid the lender back. Of course, in general, if the loan was really repaid, the borrower would not have left the document in the hands of the lender.

This particular case was a bit more complex, since the loan document was validated in a beis din very far away, and the present court had no way to ascertain if it was genuine or not. Similarly, the witnesses on the document were not known to the beis din.

Although today it is usually fairly easy to find out if dayanim are genuine, in the days of the Rishonim this was usually expensive and often impractical. The court was uncertain of the halachah. On the one hand, the borrower admitted to the loan, so perhaps he was required to pay the loan. On the other hand, maybe he could be assumed to be telling the truth, since he could have easily claimed the document and the validation were forged.

When this question reached the Ramban, zt"l, he ruled that the lender was required to provide proof that the document was genuine. "On Bava Metzia 7 we find that Rebbi and Rabban Shimon ben Gamliel argue whether a loan document must be validated when the borrower admits to the loan but claims to have repaid it. Rebbi holds that the lender must validate the document, while Rabban Shimon ben Gamliel disagrees.

He continued, "This dispute is a machlokes Amoraim and later authorities. I agree with those who rule like Rebbi, since Rav Nachman rules like him in Kesuvos. In my opinion, the burden of proof is on the lender!"[1] ■

1. שו"ת הרשב"א המיוחסות לרמב"ן סימן נ"ג

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