

## OVERVIEW of the Daf

### 1) An armed shepherd (cont.)

Abaye concludes his inquiry whether a shepherd is liable for inciting a thief to steal.

Rava confirms that the shepherd is liable.

2) **MISHNAH:** The Mishnah states that any of the watchmen can stipulate to relieve themselves of their mandated responsibilities. The Mishnah concludes by presenting the guidelines for which types of stipulations are valid and which are invalid.

### 3) Stipulations that go against what is written in the Torah

The Gemara wonders why guardians may stipulate to relieve themselves of their Torah-mandated responsibilities.

The Gemara answers that the Mishnah follows R' Yehudah who maintains that stipulations related to monetary matters are binding.

This explanation is challenged and the Gemara concludes that the Mishnah follows R' Meir and the reason the stipulation is binding is that he refused to accept upon himself a greater degree of responsibility.

A Baraisa teaches that a paid custodian may stipulate and accept upon himself the responsibilities of a borrower.

Shmuel and R' Yochanan disagree whether this must be done with a kinyan or not.

### 4) Stipulations

R' Tavla in the name of Rav asserts that the Mishnah's ruling that only a stipulation that can eventually be fulfilled is valid represents the position of R' Yehudah ben Teima but Chachamim disagree and maintain the stipulation is still valid.

A Baraisa is cited that presents the disagreement between R' Yehudah ben Teima and Chachamim.

R' Nachman in the name of Rav rules in accordance with R' Yehudah ben Teima and cites the Mishnah as support for this assertion.

### הדרן עלך השוכר את הפועלים

5) **MISHNAH:** The Mishnah presents the parameters for the Biblical ruling of בעליו עמו – "If its owner is with him."

### 6) If its owner is with him

The Gemara questions how it is possible for someone to borrow the owner and the animal at the same time since their methods of acquisition are different.

Two possible explanations are suggested.

### 7) Watchmen

The Gemara cites the earlier Mishnah that laid out the responsibilities of the four categories of watchmen.

A Baraisa is cited that identifies which parsha addresses which category of watchmen.

The Gemara begins to analyze the assertions of the Baraisa.

The Mishnah's statement that a paid watchman and renter are obligated if the deposit is lost is challenged.

A Baraisa is cited that supports the Mishnah's ruling.

This resolution is unsuccessfully challenged.

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## Distinctive INSIGHT

*The first paragraph (of the watchmans) is the unpaid watchman*

אפילו הכי קרנא בלא שבועה עדיפא מכפילא בלא שבועה

In Parashas Mishpatim, the Torah describes three categories of watchmen and their respective levels of liability. While the third episode explicitly speaks about a borrower, a שואל, the first two paragraphs do not identify which set of laws describes an unpaid watchman (שומר חנם), and which describes the laws of a paid watchman (שומר שכר). Nevertheless, our Gemara states that the first paragraph is that of the unpaid watchman. Here, the watchman can swear and be exempt if the item is stolen or lost. The second paragraph is that of the paid watchman, where the watchman must pay if the item is stolen or lost. The logic is that fewer expectations are placed upon an unpaid watchman, so the chapter which exempts him from paying if the item is stolen (the first paragraph) is that of the unpaid watchman.

The Gemara notes, however, that this leniency of being exempt does carry with it a certain strictness, and that is that this watchman is potentially eligible to pay double (כפל), if, after he claims that the item was stolen, it turns out that he stole it himself. From this perspective, the first paragraph of a watchman contains within it a more strict element, so perhaps this is the chapter of the paid watchman.

The Gemara answers that, nevertheless, paying upfront when claiming the item was stolen (קרנא בלא שבועה) is considered more strict than paying double after claiming it was stolen (כפילא בשבועה) and initially being exempt.

Rashi (to Bava Kamma 57b) explains. The watchman's paying in case of theft or loss is integral to his failing to fulfill his obligations. However, the payment of כפל in case he initially lies about its being stolen when he himself took it and is now caught is not a payment due to his not watching it properly, but it is rather a payment for his now having lied and having sworn

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## REVIEW and Remember

1. Explain R' Yehudah's position concerning stipulations that go against what is mandated by the Torah?

2. What is the case of בעליו עמו?

3. Which of the three parshas applies to which watchman?

4. What case is included by the word "או" from the phrase ונשבר או מת?

# HALACHAH Highlight

## The liability of a community that borrows a Sefer Torah

דהא שואל כל הנאה שלו

Because concerning a borrower all of the benefit of the arrangement is his

Ran<sup>1</sup> asserts that one who borrows a sefer is exempt from liability if an אונס occurs. The rationale behind this ruling is that the lender also benefits from this loan; therefore, the borrower is classified as a paid watchman which is the category assigned when both parties benefit from the agreement, i.e. the watchman has use of the deposit and the owner receives money or a service that is worth money. In our case, since the lender performs a mitzvah when he loans the sefer and more importantly, he is exempt from giving tzedaka at the moment he loans the sefer to his friend, it is considered as if he is receiving a benefit and thus the "borrower" is exempt from אונסים. Shach<sup>2</sup> cites this position as halacha but Sefer Miktzoa Batorah<sup>3</sup> rejects the position of Ran based on a ruling of Rosh. Rosh<sup>4</sup> rules that one who borrows an esrog is liable for אונסים even though the lender is performing a mitzvah when he loans out his esrog.

Poskim discuss the degree of liability when someone lends a Sefer Torah to a community to use and the Sefer Torah is destroyed by a fire. Are the community considered borrowers and responsible even if an אונס occurs or do we say that they are considered paid watchmen and are exempt from אונסים? Nesivos Hamishpat<sup>5</sup> asserts that the rationale behind Ran's ruling would

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falsely. Tosafos explains that the payment in case the object is stolen is an immediate and certain outcome. To pay double after initially being exempt is only a possible, yet unlikely, outcome. The threat of only having to possibly pay double therefore is not considered a strictness.

Ritva writes that the Gemara sensed that the second paragraph of the watchman is dealing with a paid watchman, because the paragraph of the borrower is last. It is most reasonable to say that the paragraphs are presented in order, most lenient to more strict. ■

not apply in our case. The matter of exemption from tzedaka when performing a mitzvah is limited to the moment when the loan occurs but once the borrower has possession of the deposit the lender's obligation to give tzedaka resumes. As such, it is illogical to assume that that momentary benefit should forever exempt the borrower from liability. Therefore, he asserts that Ran was referring to a case where the lender took a deposit from the borrower and since he had an ongoing responsibility to watch the borrower's item the "borrower" is classified as a paid watchman. Since in the case of a borrowed Sefer Torah these factors do not apply the community is responsible for the Sefer Torah. ■

1. שו"ת הר"ן סי' י"ט-כ"י.

2. ש"ך חו"מ סי' ע"ב ס"ק כ"ט.

3. ספר מקצוע בתורה חו"מ שם.

4. רא"ש מס' סוכה פ"ג סי' ל'.

5. נתיבות המשפט סי' ע"ב בבאורים ס"ק י"ז. ■

# STORIES Off the Daf

## The conditional divorce

"הרי זה גיטך ע"מ..."

Today's daf discusses a husband who made various conditions to divorce his wife.

A certain Russian man refused to give his wife a divorce. Even after she immigrated to Israel, he still refused to divorce. Rav Yitzchak Zilber, zt"l, contacted the husband to try to convince him to give a גט, and the husband eventually agreed to divorce his wife. But he had just one condition. "She must accept upon herself all the sins I have ever done."

The woman of course, absolutely refused this condition and seemed destined to remain tied to her heartless husband.

Rav Zilber was at a loss how to proceed, until a certain Torah scholar recommended that the woman that should accept the husband's condition and Rav Zilber would accept all sins that she received from the hus-

band on his own head. The woman gladly accepted this arrangement and was finally freed.<sup>1</sup>

But how could he accept this terrible burden upon himself? Is there really a mechanism for transferring one person's guilt to another?

When the Machaneh Chaim, zt"l, was approached regarding a person who paid money to another to accept his sins, he ruled that this was impossible. "How can you sell a sin or a lifetime of sins to someone who is innocent?"<sup>2</sup>

But when the Maharsham, zt"l, was approached about this question he ruled that it is not quite so simple. "In the Mishnah in Negaim we find that Rabbi Yishmael said, 'Yisrael, I am your atonement.' If one really cannot take away sins from another under any circumstance, why did he say this and why did Rabbeinu Hakadosh put this in the Mishnah? We see from here that he who takes on or purchases another's sins is likened to a cosigner who assumes full responsibility for the loan. Just as the lender

may either collect from the borrower or the cosigner, so too, Hashem will take out the sins on whichever one He wants.

"At the very least, a person wishing to rid himself of the sins shows that he regrets having done them..."<sup>3</sup> ■

1. ספר להשאיר יהודי, ע' שצ"ב

2. שו"ת מחנה חיים, חו"מ, סי' כ'

3. שו"ת מהרש"ם, ח"ג, סי' קנ"א ■

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The Gemara challenges the Mishnah's assertion that a borrower pays even if the animal is captured.

After two unsuccessful attempts to identify the source for this halacha, the Gemara suggests that the Mishnah's ruling follows R' Nosson who makes an exposition that a borrower must pay if the animal is taken into captivity.

It is noted that R' Yoshaya who disagrees with R' Nosson on this point must have a different source for this principle.

The Baraisa that presents the dispute between R' Nosson and R' Yoshaya is cited. ■