The Gemara posits an answer to this question and inquires further:

אִם תִּמְצָא לוֹמַר – **If** upon analyzing the problem **you conclude and say** that שְׂכִירָה בִּשְׁאֵלָה מֵישַׁךְ שַׁיְיכֵי – the **rental is** indeed **connected with** the **borrowing** that preceded it,[10] so that the special exemption applies during the rental period as well, שְׂכָרָהּ בִּבְעָלִים – then in the reverse case, where **one rented [a cow] with the owner** in his service when he assumed responsibility for the animal שְׁאָלָהּ שֶׁלֹּא בִּבְעָלִים – and then before returning the animal to its owner **he borrowed it** for another period **without the owner** being in his service at the time, מַהוּ – **what is [the law]** if the cow died naturally during the period of borrowing? Does the special exemption of *if its owner is with him* apply in such a case?

The Gemara explains the two sides of the question:

שְׁאֵלָה בִּשְׂכִירוּת וַדַּאי לֹא שַׁיְיכָא – Do we say that the **borrowing is certainly not connected with** the preceding **rental,** and so the *shomer* is liable,[11] אוֹ דִלְמָא כֵּיוָן דְּשַׁיְיכָא בְּמִקְצָת – **or perhaps, since [the borrowing] is partially connected** with the rental,[12] כְּמַאן דְּשַׁיְיכָא בְּכוּלָּהּ דָּמֵי – **it is considered as if it were fully connected** with the rental,[13] so that the exemption applies even in the event of an unavoidable mishap?

The Gemara posits an answer to this question as well and inquires further:

אִם תִּמְצָא לוֹמַר – **If** upon analyzing the problem **you conclude and say** that לֹא אַמְרִינַן – **we do not say**[14] that כֵּיוָן דְּשַׁיְיכָא בְּמִקְצָת – **since [the borrowing] is partially connected** with the rental כְּמַאן דְּשַׁיְיכָא בְּכוּלָּהּ דָּמֵי – **it is considered as if it were fully connected** with the rental, שְׁאָלָהּ בִּבְעָלִים – then where **one borrowed [a cow] with the owner** in his service at the time he assumed responsibility for the animal וּשְׂכָרָהּ שֶׁלֹּא בִּבְעָלִים – **and** then before returning the animal **he rented it** for another period **without the owner** being in his service at the time, וְחָזַר וּשְׁאָלָהּ – **and then,** still before returning it, **he borrowed [the cow]** for a third period (again without the owner being in his service at the time), מַהוּ – **what is [the law]** if the cow died naturally during the second borrowing (i.e. the third) period? Does the special exemption of *if its owner is with him* apply in such a case?

The Gemara explains the two sides of the question:

הָדַר אָתְיָא לָהּ שְׁאֵלָה לְדוּכְתָּהּ – **Does** the **borrowing come back to its** original **place,** so that the exemption applies,[15] אוֹ דִלְמָא אַפְסִיקָא לָהּ שְׂכִירוּת בֵּינֵי וּבֵינֵי – **or perhaps** the **rental interposes between** the two borrowings, in which case the *shomer* is liable?[16]

The Gemara poses another question based on the assumption that a partial connection between a rental and a subsequent borrowing is not tantamount to a full connection:

שְׂכָרָהּ בִּבְעָלִים – If **one rented [a cow] with the owner** in his service at the time he assumed responsibility for the animal וּשְׁאָלָהּ – **and** then before returning the animal **he borrowed it** for another period (without the owner being in his service at the time), וְחָזַר וּשְׂכָרָהּ – **and then,** still before returning it, he **rented [the cow]** for a third period (again without the owner being in his service at the time), מַהוּ – **what is [the law]** if the cow was lost or stolen during the second rental period? Does the special exemption of *if its owner is with him* apply in such a case?

The Gemara explains the two sides of the question:

מִי אַמְרִינַן אָתְיָא לָהּ שְׂכִירוּת לְדוּכְתָּהּ – **Do we say** that the rental **comes** back **to its** original **place,** so that the special exemption applies,[17] אוֹ דִלְמָא אַפְסִיקָא לָהּ שְׁאֵלָה בֵּינֵי וּבֵינֵי – or perhaps the **borrowing interposes between** the two rentals, in which case the *shomer* is liable?[18]

The Gemara responds to these questions:

תֵּיקוּ – **Let [these questions] stand!** The problems remain unresolved.[19]

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separate transaction. Cf. *Shitah Mekubetzes*. See *Tosafos*, *Ramban*, *Ran* et al., who discuss the relationship of our passage with that of above, 96b (וְאָתְיָא שְׁאֵלָה מַפְקְעָא שְׂכִירוּת).

10. The Gemara now assumes that the liability created by the initial *meshichah* does not terminate with the *shomer*'s change of status.

11. In this case the *shomer's* liability for natural death was certainly not created by the initial *meshichah*, since a renter is not liable for unavoidable mishaps. Rather, it was created by the ensuing *kinyan chatzeir*, which ushered in the period of borrowing, and at that time the owner had already left the *shomer's* service. Hence, it would appear that the exemption does not apply when the cow dies naturally during the borrowing period (*Rashi*).

Rashash notes that from *Rashi* we see that the Gemara's query concerns liability for unavoidable mishaps during the borrowing period. *Rashi* thus implies that even according to this side of the question the *shomer* is certainly not liable for theft and loss, for in this aspect the borrowing is considered connected to the rental. *Rashash* further notes that according to this inference *Tosafos'* difficulty with *Rashi's* comment below (see *Tosafos* ד״ה ה״ג) is resolved (see notes 14 and 17 below).

12. Since it is possible to attribute the *shomer*'s liability for theft and loss during the ensuing borrowing period to the initial *meshichah* [inasmuch as a renter also incurs such liability], the borrowing and the renting can be regarded as being a continuum, and the exemption would apply to the borrowing period as well (*Rashi*).

13. Which *was* transacted while the owner was serving the *shomer*.

14. Our elucidation of the Gemara follows *Rashi*. *Tosafos* contend, however, that if the Gemara posits that "we *do not* say" that the borrowing is regarded as fully connected with the rental, the Gemara's fourth question (below) will be difficult to understand, since it suggests that there is a connection. [In our explanation of the fourth question we shall indicate how *Rashi* overcomes this problem; see note 17 below.] *Tosafos* therefore interpret the Gemara's third and fourth questions differently, based on a text that reads: "If you conclude and say (that) we *do* say (that... borrowing) is considered as if it were fully connected..."

See there for a full explanation of their approach.

15. Perhaps the second borrowing is merely a continuation of the first borrowing, which was itself effected by a *meshichah* that occurred when the owner was in the *shomer's* service. If so, the special exemption extends to the second borrowing period as well (see *Rashi*).

16. If the rental is regarded as an interruption, it cannot be said that the *shomer's* liability for the natural death was created by the initial *meshichah*. Rather, it was created later by *kinyan chatzeir*, at the time of the second borrowing, when the owner was no longer in the *shomer's* service. Hence, the special exemption would not apply during the second borrowing period.

17. Although the borrowing is not connected to the first rental, perhaps this does not matter, since this question is stated regarding theft and loss, and the borrowing was always seen as a continuation of the rental with respect to theft and loss (see note 11 above).

18. According to *Rashash* (see previous note), the Gemara now is suggesting that we do not say twice that periods are connected [i.e. from rental to borrowing and then from borrowing to rental] (see *Tosafos* ד״ה ה״ג). Therefore, we must say that the second borrowing was created by *kinyan chatzeir*, at which time the owner was no longer in the *shomer's* service. Hence, the exemption would not apply during this second rental period. (See *Shitah Mekubetzes*, who offers another approach *Rashi* could take to interpret the Gemara's question.)

19. The Geonim have ruled that when, with the expression אִם תִּמְצָא לוֹמַר, the Gemara posits an answer to a legal query in order to pose a related query, the halachah follows the posited answer (see *Rosh*). Accordingly, *Rosh* (who had *Tosafos'* version of the second אִם תִּמְצָא לוֹמַר; see note 14 above) rules that the exemption does apply in the first two cases, and that the Gemara's profession of doubt (תֵּיקוּ) applies only to the last two cases. *Rambam* (*Hil. Sh'eilah U'fikadon* 2:10), however, rules that the exemption applies with certainty only in the first case, but that the halachah is doubtful regarding the other three. *Shulchan Aruch* (*Choshen Mishpat* 346:14) follows *Rambam's* opinion, but *Rama* there cites *Rosh's* ruling. [*Hagahos HaGra* (§2) notes that in *Rambam's* text

Mishnah הַשּׁוֹאֵל אֶת הַפָּרָה וְשִׁלְּחָהּ לוֹ – If one was borrowing a cow, and [the lender] sent it to him בְּיַד בְּנוֹ – with his son, בְּיַד עַבְדּוֹ – with his slave or with his agent, בְּיַד שְׁלוּחוֹ אוֹ בְּיַד בְּנוֹ בְּיַד עַבְדּוֹ בְּיַד שְׁלוּחוֹ – or with the son, with the slave or with the agent of the borrower, וּמֵתָה – and [the cow] died naturally in transit (i.e. before the borrower himself received it), פָּטוּר – [the borrower] is not liable.[20] אֲמַר לוֹ הַשּׁוֹאֵל – If, however, the borrower said to [the lender], שַׁלְּחָהּ לִי בְּיַד בְּנִי בְּיַד עַבְדִּי בְּיַד שְׁלוּחִי – "Send [the cow] to me with my son," "with my slave" or "with my agent," אוֹ בְּיַד בִּנְךָ בְּיַד עַבְדְּךָ בְּיַד שְׁלוּחֲךָ – or "with your son," "with your slave" or "with your agent"; אוֹ שֶׁאָמַר לוֹ הַמַּשְׁאִיל – or if the lender said to [the borrower], בְּיַד בְּנִי בְּיַד עַבְדִּי בְּיַד שְׁלוּחִי – "I am sending [the cow] to you with my son," "with my slave" or "with my agent," אוֹ בְּיַד בִּנְךָ בְּיַד עַבְדְּךָ בְּיַד שְׁלוּחֲךָ – or "with your son," "with your slave" or "with your agent," וְאָמַר לוֹ הַשּׁוֹאֵל שַׁלַּח – and the borrower said to him in reply, "Send it," וְשִׁלְּחָהּ – and [the lender] then sent [the cow] with any of these people וּמֵתָה – and it died naturally in transit, חַיָּיב – [the borrower] is liable even though he never received the cow.[21]

וְכֵן בְּשָׁעָה שֶׁמַּחֲזִירָהּ – And so is the law at the time [the borrower] returns [the cow].[22]

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the words אִם תִּמְצָא לוֹמַר, *if you conclude and say,* do not appear, which is not the case in the texts of *Rashi* and *Tosafos.*]

20. The borrower does not assume responsibility for the cow until he actually receives it.

The Mishnah mentions "the borrower's agent" as one of the various emissaries. The Gemara (*Bava Kamma* 104a) records an Amoraic dispute regarding what this description actually means. According to Rav Chisda, the Mishnah refers to the borrower's worker or to a retainer who lives in the borrower's house. Although this person often acts on the borrower's behalf, there are no witnesses that he was actually appointed the borrower's agent to bring him the cow. Had there been witnesses to such an appointment, we would assume that the borrower had taken the trouble to appoint an agent in the presence of witnesses in order to become responsible for the animal when the agent took possession of it. Rabbah maintains, however, that even if the borrower appointed an agent in the presence of witnesses to bring him the cow, he did not intend to assume responsibility upon the agent's receipt of the cow. The appointment was merely to signal to the lender that the "agent" could be trusted to transport the animal safely; it did not, however, empower the "agent" to act in the borrower's stead to acquire the cow (*Rashi* here and to *Bava Kamma* ibid.).

21. Once the cow reached the hands of the borrower's designated representative, the borrower became responsible for any mishap that befell it.

The Rishonim ask: Inasmuch as the borrower never appointed any of these people as his agent, why does his liability commence with *their* receipt of the animal? The Rishonim advance the innovative explanation that the borrower's liability does not arise through the law of agency, but through the law of the guarantor (דִּין עֲרֵב; see *Kiddushin* 7a). That law provides that in consideration for a lender transferring his money to another party (i.e. the borrower) on the guarantor's say-so, the guarantor obligates himself to repay the loan if the borrower defaults. Similarly, in the Mishnah's case, in consideration for the lender transferring his cow from his possession and sending it to the borrower with his slave or agent on the borrower's say-so, the borrower assumes responsibility for any mishap that befalls the animal on the way (*Ran, Raavad* [cited in *Shitah Mekubetzes*], and *Nimukei Yosef*, who presents a second explanation; see also *Nesivos HaMishpat* 340:11).

22. That is, if the borrower sent the cow back with his son, slave or agent, or with the lender's son, slave or agent, the animal remains in the borrower's possession until it reaches the lender's hands. Hence, if the cow dies in transit, the borrower is liable. If, however, the lender instructs the borrower to send the cow with any one of these persons, or he consents to the borrower's declared intent to do so, the borrower will not be liable if the animal dies in transit [for in this case the lender relinquishes his rights by consenting to have these people bring the cow to him] (*Rashi*).

Gemara The Mishnah stated that if the borrower instructs that the cow be sent to him with the lender's slave, the borrower becomes liable for any mishap that befalls the animal on the way. The Gemara challenges this ruling:

יָד עֶבֶד כְּיַד רַבּוֹ חַייָב – Is it possible that if the lender sends the cow **with his slave, [the borrower] is liable** for any mishap?! – But in a legal sense **a slave's hand is like the hand of his master.**[1] Hence, the borrower should not become subject to liability until the slave actually delivers the animal into his hand! – ? –

The Gemara clarifies the case:

אָמַר שְׁמוּאֵל בְּעֶבֶד עִבְרִי – **Shmuel said:** The Mishnah speaks **of a Hebrew servant,**[2] דְּלֹא קָנֵי לֵיהּ גּוּפֵיהּ – **whose person [the master] does not acquire.**[3] Hence, when the servant takes the cow from the lender, it effectively leaves the lender's possession.

The Gemara presents a different opinion:

רַב אָמַר אֲפִילּוּ תֵּימָא בְּעֶבֶד כְּנַעֲנִי – **Rav said: You can even say** that the Mishnah speaks **of a Canaanite slave,** who *is* the lender's property, נַעֲשֶׂה כְּאוֹמֵר לֵיהּ – and the Mishnah can mean that it **becomes as if [the borrower] says to [the lender]:** הַכִּישֵׁהוּ בְּמַקֵּל וְהִיא תָּבֹא – **"Hit [the cow] with a stick and it will come to me."**[4]

The Gemara challenges this interpretation:

מַתְנִי' – **They objected** to Rav's interpretation on the basis of the following Baraisa: הַשּׁוֹאֵל הַפָּרָה וְשָׁלְחָה לוֹ – If ONE wishes TO BORROW A COW AND [THE LENDER] SENT IT TO HIM בְּיַד בְּנוֹ – WITH [THE LENDER'S] SON OR WITH [THE LENDER'S] AGENT, and the cow died in transit, חַייָב – [THE BORROWER] IS LIABLE.[5] בְּיַד עַבְדּוֹ פָּטוּר – But if the lender sent the cow WITH HIS SLAVE, [THE BORROWER] IS NOT LIABLE.[6] According to the Baraisa, then, sending the cow with a slave does not obligate the borrower; the Mishnah, however, ruled that it does. בְּשְׁלָמָא לִשְׁמוּאֵל – Now, **all is well according to Shmuel:** מַתְנִיתִין בְּעֶבֶד עִבְרִי – **Our Mishnah** speaks **of a Hebrew servant,** as Shmuel explained above,[7] בְּרַייְתָא בְּעֶבֶד כְּנַעֲנִי – while the **Baraisa** speaks **of a Canaanite slave,** who is merely an extension of the lender.[8] אֶלָּא לְרַב קַשְׁיָא – **But according to Rav,** who said that the Mishnah as well speaks of a Canaanite slave, **it is difficult!** The Mishnah and Baraisa appear to conflict with one another. – ? –

The Gemara replies in defense of Rav:

אָמַר לָךְ רַב – **Rav would say to you:** לֹא תֵּימָא נַעֲשֶׂה כְּאוֹמֵר לֵיהּ – **Do not say** that the borrower's designation of the Canaanite slave as his agent to receive the cow **becomes as if he said to [the lender],** "Hit the cow with a stick and it will come to me," which is how Rav's ruling was originally interpreted. אֶלָּא אֵימָא בְּאוֹמֵר לֵיהּ – **Rather, say** that the Mishnah speaks of **where [the borrower]** actually **said to [the lender],** הַכִּישֵׁהוּ בְּמַקֵּל וְהִיא תָּבֹא – **"Hit [the cow] with a stick and it will come** to me."[9]

The Gemara offers proof of this interpretation of Rav's ruling:

דְּאִיתְּמַר – **For it is stated** in Rav's name: הַשְׁאִילַנִי פָּרָתְךָ – In the case of a person who requested of his friend, **"Lend your cow to me,"** וְאָמַר לוֹ בְּיַד מִי – **and [the friend] said to him, "With whom** shall I send it?" וְאָמַר לוֹ הַכִּישֵׁהוּ בְּמַקֵּל וְתָבֹא – **and [the borrower] said to [the friend]** in reply, **"Hit [the cow] with a**

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1. In general, a Canaanite slave cannot legally acquire or possess property, for whatever he obtains automatically belongs to his master (see Gemara above, 96a). A slave is therefore the legal property of his owner, and does not constitute a domain different than that of his owner. Hence, the cow remains in the lender's possession even after his slave has physically taken it away. Indeed, it is as if the lender himself brings the cow to the borrower (*Rashi*).

2. The Torah provides that a Jew may be sold into servitude in one of two ways: He sells himself to escape extreme poverty (*Leviticus* 25:39), or he is a thief whom the court sells to enable him to reimburse his victims (*Exodus* 22:2).

3. Unlike a Canaanite slave, a Hebrew servant does not actually become the property of his master; he merely incurs a monetary obligation to serve the master for six years (*Rashi* to *Kiddushin* 16a ד"ה למה לי שטר). Hence, the Hebrew servant retains an independent power of acquisition. [Although the Gemara (*Kiddushin* ibid.) does state that the master acquires the Hebrew servant's person, this is only true in the sense that the master cannot just verbally waive the remainder of his monetary claim upon the servant to set him free; rather, the master must give to the servant a document of emancipation (*Tosafos*; see *Kiddushin* 16a and Rishonim there).]

4. In this case we must impute to the borrower the following instruction to the lender: "Drive your cow in my direction, and in return I agree to assume full responsibility for the animal's welfare as of the moment it crosses the border of your property." Accordingly, the borrower is ruled liable in this case not because the slave received the cow as his agent, but because the borrower accepted such liability upon himself (*Rashi*; see *Ritva*, who explains that in *Rashi's* interpretation the borrower's liability is grounded in the law of the guarantor – see above, 98b note 21; cf. *Tosafos* ד"ה כיון, who understand that the liability is created by an act of *meshichah*).

[Although according to many Rishonim the first cases of the Mishnah ("his son," "his agent") operated according to the law of the guarantor, the Gemara nevertheless questioned the efficacy of using a slave, since he constitutes an extension of the lender's domain. The Gemara's question was based on the premise that the guarantee is triggered by the transfer of the cow from the lender's domain into that of another, which does not occur in the case of a slave. The Gemara subsequently answered that the guarantee is triggered by the lender's compliance with the borrower's telling him to dispatch the animal in such a way that it could possibly be lost (see *Ran*). *Ritva* himself explains these earlier cases of the Mishnah as operating through the law of agency and not through the law of the guarantor. Hence, according to him, the case of the slave is the first mention of the innovative law of the guarantor.]

Tosafos note that although the lender's slave does not function as the borrower's agent to receive the cow, he does in practice serve the borrower by bringing him the cow from the lender's house. Inasmuch as a slave is considered an extension of his master (עֶבֶד כְּיַד רַבּוֹ), seemingly this is a case of the owner serving the borrower when the latter assumes responsibility for the animal [i.e. when the cow exits the lender's property with the slave alongside] (see above, 96a). Why, then, does the Mishnah rule the borrower liable? *Tosafos* explain that the principle, "a slave's hand is like the hand of his master," applies only if the borrower in our case had engaged the services of the owner and the owner substituted the slave in his stead (this is the case above, 96a). However, since the borrower directly engaged the services of the slave (i.e. to assist him by transporting the cow), the slave is tantamount to a second borrowed animal, inasmuch as a slave is simply another of his master's properties. Hence, the lender here is not regarded as having served the borrower, and the special exemption found in that case does not apply. Cf. *Ran*.

5. The Baraisa speaks of where the borrower designated the son or agent to receive and transport the cow on his behalf (*Rashi*).

6. He is not liable even if he designated the lender's slave as his agent (*Rashi*).

7. Since the Hebrew servant is not the lender's property, he retains an independent power of acquisition, and thus the cow has left the lender's domain.

8. Hence, the cow remains in the lender's possession even after his Canaanite slave has physically taken it away.

9. [Rav would explain that while we would not impute this instruction to the borrower (see above, note 4), if he does expressly state that the lender should just send out the cow] he thereby subjects himself to liability for the cow as of the time it exits the lender's property. The fact that the slave was sent along with the cow is immaterial (*Rashi*). Such is the Mishnah's case. Since the Baraisa speaks of a case where no such express statement was made, the borrower is not liable.

stick and it will come to me,"[10] אָמַר רַב נַחְמָן אָמַר רַבָּה בַּר אֲבוּהָ אָמַר רַב – Rav Nachman said in the name of Rabbah bar Avuha, who said in the name of Rav: כֵּיוָן שֶׁיָּצָאת מֵרְשׁוּת מַשְׁאִיל וּמֵתָה – Once [the cow] exited the lender's domain and died, חַיָּיב – [the borrower] is liable. Rav thus maintains that by expressly instructing a lender to drive an animal to him, a borrower can subject himself to immediate liability.

The Gemara asks:

נֵימָא מְסַיַּיע לֵיהּ – Shall we say that [the following Baraisa] supports [Rav]: הַשְׁאִילֵנִי פָּרָתְךָ – In the case of a person who requested of his friend, "LEND YOUR COW TO ME," וְאָמַר לֵיהּ בְּיַד מִי – AND [THE FRIEND] SAID TO HIM, "WITH WHOM shall I send it?" וְאָמַר לֵיהּ הַכִּישָׁהּ בְּמַקֵּל וְהִיא תָּבֹא – AND [THE BORROWER] SAID TO [THE FRIEND] in reply, "HIT [THE COW] WITH A STICK AND IT WILL COME to me,"[10] כֵּיוָן שֶׁיָּצָאת מֵרְשׁוּת מַשְׁאִיל וּמֵתָה – ONCE [THE COW] EXITED THE LENDER'S DOMAIN AND DIED, חַיָּיב – [THE BORROWER] IS LIABLE?

The Gemara argues that the Baraisa's case is not similar to that of the Mishnah; hence, no proof can be brought from there to Rav's innovative law, which is based on his interpretation of the Mishnah:

אָמַר רַב אַשִׁי – Rav Ashi said: הָכָא בְּמַאי עַסְקִינַן – With what situation are we dealing here in the Baraisa? כְּגוֹן שֶׁהָיְתָה חֲצֵרוֹ שֶׁל שׁוֹאֵל לִפְנִים מֵחֲצֵרוֹ שֶׁל מַשְׁאִיל – With a situation where the borrower's courtyard was located on the inner side of the lender's courtyard,[11] דְּכִי מְשַׁלְּחָה לָהּ – so that when [the lender] sends away [the cow], וַדַּאי לְהָתָם אָזְלָא – it will certainly go there, to the borrower's courtyard.[12] Because the Baraisa is speaking of a unique situation, it cannot support Rav's interpretation of the Mishnah, which speaks of where the cow must travel along a public thoroughfare to reach the lender's residence.

The Gemara asks:

אִי הָכִי – If it is so that in the Baraisa's case the lender's courtyard opens into the borrower's and the public domain does not intervene, מַאי לְמֵימְרָא – what, then, does the Baraisa come to say? Since the cow will inevitably run into his courtyard, it is obvious that the borrower's assumption of liability is effective as of the moment the cow exits the lender's property! – ? –

The Gemara answers:

לֹא צְרִיכָא דְּאִיכָּא גַּוְויָתָא – There is no difficulty! [The Baraisa's ruling] is necessary in a case where there are nooks and crannies in the lender's courtyard to which the cow can run off and avoid detection.[13] מַהוּ דְּתֵימָא – What is it that you would have supposed? לֹא סָמְכָא דַּעְתֵּיהּ – That [the borrower's] mind would not rely on receiving the cow, and so there is no assumption of immediate liability, דִּלְמָא קַיְימָא הָתָם וְלֹא אָתְיָא אֶלָּא לְהֶדְיָא – for perhaps [the cow] will go and stand hidden there in one of the crannies and will not proceed directly to the borrower's courtyard. קָא מַשְׁמַע לָן דְּסָמְכָא דַּעְתֵּיהּ – [The Baraisa] thus comes to teach us that [the borrower's] mind does rely on it, and is committed to an assumption of immediate liability despite this possibility. Hence, the Baraisa's ruling is not superfluous.

The Mishnah established that a borrower becomes subject to liability when he (or his agent) takes possession of the borrowed object. The Gemara discusses this method of acquisition:

אָמַר רַב הוּנָא – Rav Huna said: הַשּׁוֹאֵל קַרְדּוֹם מֵחֲבֵירוֹ – Regarding one who borrows a hatchet from his fellow for a particular period of time – בָּקַע בּוֹ קְנָאוֹ – once he has chopped wood with it, he has acquired it, לֹא בָּקַע בּוֹ לֹא קְנָאוֹ – but so long as he has not chopped wood with it, he has not yet acquired it.

The Gemara clarifies Rav Huna's ruling:

לְמַאי – Regarding what legal consequence is the above distinction made? אִילֵימָא לְאוֹנְסִין – If we say that it was made regarding the borrower's assumption of responsibility for unavoidable mishaps,[14] מַאי שְׁנָא פָּרָה – how, then, is the Mishnah's case of a borrowed cow different, דְּמִשְׁעַת שְׁאִילָה – for there the borrower is subject to liability from the time of borrowing?[15] אֶלָּא לַחֲזָרָה – Rather, Rava Huna's distinction was made regarding the lender's right of retraction, as follows: בָּקַע בּוֹ – Once [the borrower] chops wood with [the hatchet], לֹא מָצֵי הָדַר בֵּיהּ מַשְׁאִיל – the lender cannot renege on [his agreement] to lend the tool for the stipulated period of time. לֹא בָּקַע בּוֹ – But so long as [the borrower] has not chopped wood with it, מָצֵי מַשְׁאִיל הָדַר בֵּיהּ – the lender can renege on [his agreement].[16]

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10. And the lender subsequently complied with this instruction and the cow died of natural causes on the way.

11. The Baraisa speaks of where the lender's courtyard abutted and opened into the public domain, while the borrower's courtyard was recessed therefrom. The situation was such that to enter or exit the borrower's courtyard it was necessary to traverse the lender's courtyard (*Rashi*).

12. That is, when the lender stands his animal facing the borrower's courtyard and strikes it with a stick, it will certainly run into the borrower's courtyard. In such a case the borrower subjects himself to liability for the cow as of the moment it exits the lender's property, for the borrower can rely that the animal will come to his possession. [The Gemara speaks of where the courtyards of the borrower and lender were not actually contiguous, for if they were, the borrower's liability would be created by *kinyan chatzeir* (acquisition by his courtyard) and not by dint of the law of the guarantor (see note 4 above).] If, however, a *public* domain interposed between the two courtyards, quite possibly the borrower did not rely on the lender to release the cow into the public domain without an accompanying *shomer*. Hence, the borrower never subjected himself to liability for the cow until he actually received it, even if he did instruct the lender to drive it away toward him (*Rashi*).

13. Our elucidation follows *Rashi*; cf. *Ritva*, who understands that the nooks and crannies were located *between* the two courtyards in another person's property.

14. I.e. if we say that according to Rav Huna the borrower becomes subject to liability for unavoidable mishaps only upon making use of the borrowed item. *Ritva* explains that the Gemara entertains the thought that Rav Huna holds that the borrower's extraordinary liability for unavoidable mishaps does not start until he actually begins to derive benefit from the object. However, even at this point Rav Huna would hold a borrower liable for theft and loss even before he used the borrowed object [since, indeed, he has taken control of the object].

15. The Mishnah states that the borrower assumes responsibility for the cow even when his designated person takes possession of it, even though at that point he has derived no benefit from the animal. Hence, Rav Huna could not have meant that the borrower does not acquire the hatchet for purposes of incurring liability until he actually puts the tool to use. Rather, he concedes that the borrower becomes subject to liability — even for unavoidable mishaps — when he takes possession of the hatchet (see *Ritva*, and see following note).

16. Rav Huna maintains that *shomrim* do not *acquire* entrusted objects with *meshichah* — hence the lender can still retract (*Rashi*). *Ritva* explains the reason: According to Rav Huna, *meshichah* is not of Biblical origin; rather, the Rabbis instituted its use (see above, 47b) only in cases of selling and giving, where the object itself is acquired. Since, however, a borrower acquires only a right of use, and not the object itself, the Rabbis did not prescribe *meshichah* as a form of acquisition for cases of borrowing. *Ritva* further explains that it was therefore not through *kinyan meshichah* that the borrower became subject to liability for unavoidable mishaps when he took possession of the hatchet. Rather, the borrower is accepting responsibility for the object in return for being compensated monetarily — for the lender's agreeing to lend the hatchet and his releasing it into the borrower's possession constitute a tangible benefit, and in consideration of

The Gemara cites an opposing view:

וּפְלִיגָא דְּרַבִּי אַמִּי – **And [Rav Huna's position] conflicts with** that of R' Ami,[17] **דְּאָמַר רַבִּי אַמִּי** – **for R' Ami said:** **הַמַּשְׁאִיל קַרְדּוֹם שֶׁל הֶקְדֵּשׁ** – **If one lends a hatchet belonging to the Temple treasury** (*hekdesh*) to another person, **מָעַל לְמִי טוֹבַת הֲנָאָה שֶׁבּוֹ** – **[the lender]** thereby **misappropriates**[18] that consecrated object **according to the benefit of gratitude** involved **in [the lending],**[19] **וַחֲבֵירוֹ מוּתָּר לְבַקֵּעַ בּוֹ לְכַתְּחִילָּה** – **and his fellow,** the borrower, **is permitted to chop** wood **with [the hatchet]** even **in the first place,** i.e. with the full approval of Jewish law.[20] **וְאִי לֹא קָנָאוּ** – Now, **if [the borrower]** in R' Ami's case **did not acquire [the use]** of the hatchet when he initially performed *meshichah* upon it, **אַמַּאי מָעַל** – **why** do we say that **[the lender] misappropriated** the hatchet's use[21] even before the borrower began chopping with it, as R' Ami understands, **וְאַמַּאי חֲבֵירוֹ מוּתָּר לְבַקֵּעַ בּוֹ לְכַתְּחִילָּה** – **and why is his fellow,** the borrower, then **permitted to chop** wood **with it** even **in the first place?** **נִיהַדְרֵיהּ** – If, in fact, the hatchet and the right to use it belong to *hekdesh* until the borrower chops wood with it, **let [the borrower] return [the hatchet]** to *hekdesh*[22] **וְלֹא לִיקְנֵיהּ וְלֹא לִימְעוֹל** – **and not acquire it and not misappropriate** it! Since R' Ami holds the lender guilty of misappropriation and allows the borrower to use the hatchet, it is obvious that he maintains that *shomrim* do acquire entrusted objects with the initial *meshichah*.

The Gemara cites another opposing view:

וּפְלִיגָא דְּרַבִּי אֶלְעָזָר – **And [Rav Huna's position] conflicts with** that **of R' Elazar** as well, **דְּאָמַר רַבִּי אֶלְעָזָר** – **for R' Elazar said:** **בְּדֶרֶךְ שֶׁתִּקְּנוּ מְשִׁיכָה בִּלְקוּחוֹת** – **In the manner that [the Sages] instituted "drawing near"** (*meshichah*) as a method of acquisition **in** cases of **purchasers,** **כָּךְ תִּקְּנוּ מְשִׁיכָה בְּשׁוֹמְרִים** – **so they instituted "drawing near"** as a method of acquisition **in** cases of **custodians.**[23] **תָּנְיָא נַמִּי הָכִי** – **It was also taught thus in a Baraisa:** **כְּשֵׁם שֶׁתִּקְּנוּ מְשִׁיכָה בִּלְקוּחוֹת** – **JUST AS [THE SAGES] INSTITUTED "DRAWING NEAR"** as a method of acquisition **IN** cases of **PURCHASERS,** **כָּךְ תִּקְּנוּ מְשִׁיכָה בְּשׁוֹמְרִים** – **SO THEY INSTITUTED "DRAWING NEAR"** as a method of acquisition **IN** cases of **CUSTODIANS;** **וּכְשֵׁם** – **AND JUST**

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receiving this benefit the borrower subjects himself to liability even for unavoidable mishaps.

The question arises, however, that if according to Rav Huna the borrower did not acquire the hatchet with *meshichah*, why is the lender prevented from demanding its return even once the borrower has commenced using it? Certainly chopping wood does not constitute an act of acquisition! *Ritva* explains that it was the Rabbis who so curtailed the lender's right of retraction, and they did so (by enactment) for the benefit of society – i.e. to ensure that once work is undertaken with a borrowed object, it will not be left unfinished. See also *Ritva* to *Kiddushin* 47b.

17. Unlike Rav Huna, R' Ami maintains that *shomrim* do acquire entrusted objects with *meshichah*.

18. The laws pertaining to one who inadvertently derives personal benefit from Temple property are found in *Leviticus* 5:14-16. Violators must offer an animal sacrifice and make monetary restitution equaling the value of the principal plus one quarter of that amount (see *Sifra*).

19. A lender derives benefit from an act of lending in that it causes the borrower to feel grateful toward him. This benefit is called טוֹבַת הֲנָאָה, the *benefit of gratitude*, and, like any benefit, it has value. The value of this particular benefit is determined by calculating how much the lender would otherwise be willing to pay to create a debt of gratitude equivalent to that which was caused by the lending. It is this amount that the lender must offer *hekdesh* as restitution for deriving a benefit of gratitude by lending *hekdesh's* hatchet (*Rashi*).

20. Once the lender inadvertently misappropriated the hatchet (i.e. by lending it) and became obligated to compensate *hekdesh* for the benefit of gratitude he thereby derived, the *use* of the hatchet [which is what the lender misappropriated, since lending conveys use and not the object itself] passes from sacred to ordinary status (see *Kiddushin* 53b-54b). The borrower is therefore permitted to use the hatchet as per the terms of the lending even if he knows that the hatchet belongs to *hekdesh*, for that *usage* has become deconsecrated (*Rashi;* see *Tosafos* and *Ritva*, who elaborate on this point and cite other interpretations of this law).

21. I.e. in the measure of the benefit of gratitude involved in the lending (*Ritva*).

22. Since the borrower did not acquire the hatchet with his act of *meshichah*, it never left *hekdesh's* domain at all, and so no *me'ilah* has been committed (*Ritva*).

The borrower need not actually return the hatchet to *hekdesh*, since consecrated property is regarded as being in *hekdesh's* possession wherever it is located. Rather, the Gemara mentions returning the hatchet as a precautionary measure, for since the borrower is forbidden to use the hatchet, it is certainly inappropriate for him to retain it (*Ritva*).

23. Rishonim dispute the scope of this Rabbinic decree. *Rambam (Hil. Sechirus* 2:8) implies that the decree establishes two laws: (1) The owner's right of retraction terminates when a borrower or renter performs *meshichah* on the animal; (2) no *shomer* becomes subject to liability until he performs *meshichah* (see *Lechem Mishneh* there and *Hagahos HaGra* here). *Tosafos* maintain, however, that the Rabbinic decree establishes only the first law enumerated above. [*Tosafos* imply that this is so only regarding a borrower and a renter. The Rishonim discuss whether it is so with respect to a paid custodian; see *Ran* and *Nimukei Yosef*. See there also for a discussion of the right of retraction for the borrower and the renter.] They argue that paid and unpaid custodians become subject to liability as soon as the animal enters their custody, even before a *meshichah* is performed, and that a borrower incurs liability through *meshichah* by Biblical law. [See *Rosh*, who generally concurs with *Tosafos'* interpretation but maintains that under Biblical law even a borrower incurs liability without *meshichah* – see above, note 4; see *Tur Choshen Mishpat* 340, *Biur HaGra* ibid. §16, *Machaneh Ephraim Hil. Shomrim* §7; cf. *Tos. HaRosh*; see also *Choshen Mishpat* 291:5.]

Rosh explains why in his opinion termination of the owner's right of retraction does require *meshichah* by a borrower, while the borrower's assumption of responsibility does not: With respect to retraction, the object remains under its owner's control until an act that could effect a purchase (i.e. *meshichah*) is performed, thereby removing it to the *shomer's* control. Hence, the owner can retract at any time before *meshichah*, since he still has control of the object. Regarding liability, however, it is logical to say that at the moment the owner ceases watching his object at the *shomer's* behest (i.e. even before *meshichah*), the *shomer* then assumes responsibility for the object.

To summarize the three opinions presented by the Gemara (according to *Tos. HaRosh* and *Tosafos* to *Bava Kamma* 79a ד"ה תיקנו): Regarding whether *shomrim acquire* entrusted objects with *meshichah*, R' Ami maintains that they do under Biblical law (and so according to him the lender of *hekdesh's* hatchet is guilty of misappropriating consecrated property); R' Elazar maintains that *shomrim* acquire with *meshichah* only by Rabbinic decree; and Rav Huna holds that they do not acquire with *meshichah* even by Rabbinic decree (see *Tos. HaRosh*). Therefore, according to Rav Huna, an owner's right of retraction is not terminated until the borrower or lender actually uses the object. According to R' Ami and R' Elazar, it is terminated when the *shomer* acquires the object with *meshichah*.

שֶׁקַּרְקַע נִקְנֵית בְּכֶסֶף וּבִשְׁטָר וּבַחֲזָקָה – AS LAND IS ACQUIRED BY means of MONEY, A DOCUMENT OR A PROPRIETARY ACT,[1] כָּךְ שְׂכִירוּת נִקְנָה בְּכֶסֶף וּבִשְׁטָר וּבַחֲזָקָה – SO A RENTAL IS ACQUIRED BY means of MONEY, A DOCUMENT OR A PROPRIETARY ACT.

Assuming that the Baraisa means a rental of movable property, such as an animal or a vessel, the Gemara asks:

שְׂכִירוּת מַאי עֲבִידְתֵּיהּ – **Why is a rental mentioned** here?[2]

The Gemara clarifies the Baraisa's last statement:

אָמַר רַב חִסְדָּא – **Rav Chisda said:** שְׂכִירוּת קַרְקַע – The Baraisa speaks of **a rental of land,** and teaches that it is effected through any one of the three enumerated methods of acquisition.[3]

Having mentioned the case of the misappropriation of *hekdesh's* hatchet, the Gemara discusses another case of misappropriating consecrated property:

אָמַר שְׁמוּאֵל – **Shmuel said:** הַאי מַאן דְּגָזֵיל חֲבִיצָא דְּתַמְרֵי מֵחַבְרֵיהּ – Regarding **one who stole a cake of** pressed **dates from his fellow,** וְאִית בָּהּ חַמְשִׁים תַּמְרֵי – **and there were fifty dates** stuck together **in [the cake],** אַגַּב הֲדָדֵי מִזְדַּבְּנָן בְּמ״ט נָכֵי חֲדָא – so that **together [the dates] are sold for forty-nine** *perutos*[4] חֲדָא חֲדָא מִזְדַּבְּנָן בְּנ׳ – **and one by one they are sold for** a total of **fifty** *perutos*[5] – לְהֶדְיוֹט מְשַׁלֵּם חַמְשִׁים נָכֵי חֲדָא – if in such a case the stolen cake belonged **to a private person, [the thief] must pay him forty-nine** *perutos*,[6] לְהֶקְדֵּשׁ מְשַׁלֵּם חַמְשִׁים וְחוּמְשַׁיְיהוּ – but if the cake belonged **to the Temple treasury, [the thief] must pay fifty** *perutos* **and their fifth,**[7] מַה שֶּׁאֵין כֵּן בְּמַזִּיק – **which is not the case with regard to one who damages** *hekdesh* property, דְּלָא מְשַׁלֵּם חוּמְשָׁא – **for he does not pay an extra fifth.**[8] דְּאָמַר מַר – **For the master stated:** ״אִישׁ כִּי־יֹאכַל קֹדֶשׁ״ – The Torah states:[9] ***If a man will eat** of the holy inadvertently, he shall add its fifth to it and shall repay the holy to the Kohen.* פְּרָט לְמַזִּיק – Scripture teaches that one who partakes of sacred property[10] must pay the principal and a fifth – **to the exclusion of one who damages** sacred property, who under Biblical law incurs no liability even for the principal.[11]

The Gemara challenges Shmuel:

מַתְקִיף לָהּ רַב בִּיבִי בַּר אַבַּיֵּי – **Rav Bivi bar Abaye objected** to **[Shmuel's ruling]:** לְהֶדְיוֹט אַמַּאי מְשַׁלֵּם חַמְשִׁים נָכֵי חֲדָא – Why **does [a thief] pay to a private [victim]** the lesser figure of **forty-nine** *perutos*? נֵימָא לֵיהּ – **Let [the victim] say to** [the **thief]:** אֲנָא חֲדָא חֲדָא הֲוָה מְזַבְּנִינָא לְהוּ – **"I would have sold** [the **dates] one by one,** for a *perutah* each, and so the stolen cake's value was actually fifty *perutos*!" – ? –

The Gemara defends Shmuel's ruling:

אָמַר רַב הוּנָא בְּרֵיהּ דְּרַב יְהוֹשֻׁעַ – **Rav Huna,** the son of Rav **Yehoshua, said:** שָׁמִין בֵּית סְאָה בְּאוֹתָהּ שָׂדֶה תְּנַן – There is precedent for a lenient reckoning of compensation for damages when the victim is a private individual, for **we learned** in a **Mishnah:**[12] WE APPRAISE how much A *SE'AH'S* SPACE[13] IN THAT FIELD was worth and how much it is (now) worth.[14] Similarly, in cases of theft – which is a form of damage – the thief is not treated with stringency when the victim is a private individual.

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1. Real property can be acquired through one of these three methods. A proprietary act (*chazakah*) involves the purchaser demonstrating his assumption of ownership by performing some action that improves the property. He may, for example, plow a small portion of the field, lock a gate, or create an opening in a fence (see *Bava Basra* 42a). The Gemara (*Kiddushin* 26a) identifies the Biblical source for each method of acquisition (*Rashi*).

2. Literally: what is its function? That is, why does the Baraisa state that movable property may be acquired by means of money, a document or a proprietary act – irrespective of whether *meshichah* was performed? [The Mishnah (*Kiddushin* ibid.) expressly teaches that movable property is acquired only through *meshichah*!] Further, how is it possible to perform a proprietary act on movable property without first drawing it near (the essential act of *meshichah*)? (*Rashi;* see *Nimukei Yosef;* cf. *Ran, Ritva*).

3. The Baraisa thus teaches that when, for example, a house is rented, the agreement is consummated and cannot be rescinded by either party once (1) the renter tenders money, or (2) the owner writes a document that states, "My house is rented to you," and then transfers the document to the renter, or (3) the renter performs a proprietary act to improve the house (*Rashi*).

4. [Literally: fifty (*perutos*) less one; a *perutah* is the smallest coin used in Talmudic times.] One who purchases an entire cake of pressed dates will pay only forty-nine *perutos* so that he can then sell each of the fifty dates for a *perutah,* thereby earning a one-*perutah* profit (*Rashi*).

5. The seller receiving a *perutah* for each of the fifty dates in the cake.

6. A private victim is compensated according to the value of the fifty dates when sold together. The Gemara will explain below why in such a case the thief is not treated stringently [and made to pay fifty *perutos*] (*Rashi*).

7. Regarding one who misappropriates sacred property, we are stringent and demand the highest possible payment. In addition, the Torah states (*Leviticus* 5:16): *For what he has deprived the Sanctuary he shall make restitution, and add a fifth to it, and give it to the Kohen. Sifra* teaches that the transgressor must add one-quarter to the value of the principal, so that he pays five-quarters to the Temple treasury. Thus, the penalty payment is "a fifth" of the five quarters that the transgressor is required to pay. In our case, the total payment would be $62\frac{1}{2}$ *perutos.*

8. As the Gemara will presently explain, the additional payment of a fifth was imposed on one who misappropriates *hekdesh* property, but not on one who damages it. Further, according to Biblical law one who damages *hekdesh* property is not liable even for the principal, as the Gemara (*Bava Kamma* 9b) indicates. The Gemara here means that while *the Rabbis* obligated a damager to pay the principal, they refrained from imposing the additional payment of a fifth (*Tosafos;* see, however, *Rashi* to *Bava Kamma* 6b ד״ה שור רעהו).

9. *Leviticus* 22:14.

10. This verse refers to one who eats *terumah* (the Kohen's portion) inadvertently. He must pay the principal and a fifth to a Kohen (see *Terumos* ch. 6). One who *damages terumah,* though, is exempt from even repaying the principal. It is through a *gezeirah shavah* teaching that we "transfer" the damager exemption from one passage (*terumah*) to the other (*hekdesh*) [*Tosafos*].

11. The Gemara's point is that when the Rabbis imposed liability on a damager of *hekdesh,* they did so with leniency – obligating him to pay the principal but not the penalty "fifth" (see *Ritva* and *Ran*).

[In this context, then, a thief who takes *hekdesh's* property is a misappropriator, and not a damager, and must pay both the principal *and* the fifth.]

12. *Bava Kamma* 55b.

13. A *beis se'ah* (or *se'ah's* space) is an area in which a *se'ah* (a measure of volume) of barley is planted. In a standard tract of land this measures fifty square *amos* [between 1378 and 2006 square yards, depending on which authority's opinion is followed regarding the size of an *amah*].

14. The Mishnah's case is that of an animal that strays into a neighboring field and eats from a garden bed. The quoted part of the Mishnah discusses how the damage payment is assessed. That is, we do not determine the value of the crops that were actually eaten; rather, we view the damaged garden bed in the larger context of a field the size of a *beis se'ah* that is being sold along with its standing produce. The loss of one garden bed will not greatly diminish the value of the field in the eyes of a prospective purchaser, and it is only this amount of depreciation – and not the higher value of the crops that were eaten – that the owner of the foraging animal must pay. Since this method of computing damages is exegetically derived (from *Exodus* 22:4, by the Gemara in *Bava Kamma* 58b), it is apparent that the Torah treats damagers with a degree of leniency (*Rashi;* cf. *Tosafos,* who understand a *se'ah's* space to mean the area where a *se'ah* of produce *grows* – obviously a much smaller area than that indicated by *Rashi*).

The Gemara again questions Shmuel's ruling:

לְמֵימְרָא דְּסָבַר שְׁמוּאֵל דִּין הֶדְיוֹט לָאו כְּדִין גָּבוֹהַּ דָּמֵי – Is this **to say that Shmuel held** that the **law of a private [victim] is not like the law of** the **Most High** (i.e. when *hekdesh* is the victim), so that a ruling governing compensation for *hekdesh* cannot be inferred to the case of a private victim?[15] **וְהָתְנַן** – **But we learned in a Mishnah:**[16] **נָטַל אֶבֶן אוֹ קוֹרָה מֵהֶקְדֵּשׁ** – If [THE TEMPLE TREASURER] TOOK A STONE OR A BEAM FROM THE TEMPLE TREASURY, **לֹא מָעַל** – HE DID NOT MISAPPROPRIATE the consecrated object when he lifted it.[17] **נְתָנָהּ לַחֲבֵירוֹ** – But if HE subsequently GAVE [THE OBJECT] TO HIS FELLOW, **הוּא מָעַל וַחֲבֵירוֹ לֹא מָעַל** – HE then MISAPPROPRIATED it AND HIS FELLOW DID NOT MISAPPROPRIATE it.[18] **בְּנָאָהּ בְּתוֹךְ בֵּיתוֹ** – If, on the other hand, [THE TREASURER] BUILT [THE STONE OR BEAM] INTO HIS HOUSE, **לֹא מָעַל** – HE IS NOT MISAPPROPRIATING it[19] **עַד שֶׁיָּדוּר תַּחְתֶּיהָ בְּשָׁוֶה פְּרוּטָה** – UNTIL HE DWELLS BENEATH IT[20] and derives benefit EQUALING THE VALUE OF A *PERUTAH*. **וְיָתִיב ר׳ אַבָּהוּ קַמֵּיהּ דְּרַבִּי יוֹחָנָן** – **And it** once happened that **R' Abahu was seated before R' Yochanan,** **וְיָתִיב וְקָאָמַר מִשְּׁמֵיהּ דִּשְׁמוּאֵל** – **and** while **seated** there **[R' Abahu] said in the name of Shmuel:** **וְזֹאת אוֹמֶרֶת** – **This** Mishnah **indicates** that **הַדָּר בַּחֲצַר חֲבֵירוֹ שֶׁלֹּא מִדַּעְתּוֹ** – **one who dwells in his fellow's courtyard without [that person's] knowledge** **צָרִיךְ לְהַעֲלוֹת לוֹ שָׂכָר** – **is required to give him a** rental **fee.**[21] From here we see that Shmuel does derive laws concerning private individuals from those governing the affairs of *hekdesh*, and that we are not simply more stringent regarding *hekdesh*. – ? –

The Gemara responds:

(אָמַר לֵיהּ רַבִּי יוֹחָנָן) הָדַר בֵּיהּ שְׁמוּאֵל מֵהַהִיא – (**R' Yochanan said to him:**)[22] Indeed, **Shmuel retreated from that** ruling derived from the Mishnah![23]

The Gemara asks:

וּמִמַּאי דְּמֵהַהִיא הָדַר בֵּיהּ – **But from what** proof do you assert that **[Shmuel] retreated from that** ruling derived from the Mishnah? **דִּלְמָא מֵהָא הָדַר** – **Perhaps he retreated from this** ruling he issued regarding the stolen cake of pressed dates, so that he indeed is as stringent with the law of private individuals as with that of *hekdesh*! – ? –

The Gemara replies:

לֹא מֵהַהִיא הָדַר בֵּיהּ – **No!** It is clear that **[Shmuel] retreated from that** ruling derived from the Mishnah, **כִּדְרָבָא** – and the proof is **according** to the dictum **of Rava,**[24] **דְּאָמַר רָבָא** – for Rava[24] **said:** **הֶקְדֵּשׁ שֶׁלֹּא מִדַּעַת כְּהֶדְיוֹט מִדַּעַת דָּמֵי** – Benefit derived from **the Temple treasury without** its **knowledge is like** benefit derived from **a private person with** his **knowledge.**[25] Since, then, the Mishnah speaks (in the legal sense) of benefit illegally derived *with hekdesh's* knowledge, it is impossible to extrapolate from there to the case of one who dwells in a private courtyard *without* the owner's knowledge.[26] Hence, it is the ruling derived from the Mishnah that Shmuel retracted.[27]

The Gemara discusses another case involving variable compensation rates:

אָמַר רָבָא – **Rava said:** **הָנֵי שְׁקוּלָאֵי דְּתָבְרוּ חָבִיתָא דְּחַמְרָא לְחֶנְוָואָה** – In the case of **these porters who** negligently **broke a shopkeeper's jug of wine,** **בְּיוֹמָא דְשׁוּקָא מִיזְדַּבְּנָא בְּהֵ׳** – which on the **market day is sold for five** *zuzim* **בִּשְׁאָר יוֹמֵי מִזְדַּבְּנָא בְּאַרְבַּע** – and **on** all **other days is sold for four** *zuzim* – **אַהְדְּרוּ לֵיהּ בְּיוֹמָא דְשׁוּקָא** – if **[the porters] return** the loss **to [the shopkeeper]** by the upcoming **market day,**[28] so that he can sell a replacement jug on that market day for five *zuzim*, **מַהַדְרוּ לֵיהּ חָבִיתָא דְּחַמְרָא** – it

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15. Shmuel has stated that although a damager is treated leniently when the victim is a private person, he is treated stringently when *hekdesh* is victimized.

16. *Me'ilah* 19b-20a. The Gemara first quotes the Mishnah and then cites an inference that Shmuel drew therefrom. The inference conflicts with Shmuel's rulings in the case of the stolen cake of pressed dates.

17. *Me'ilah* (misappropriating consecrated property) can be committed in one of two ways: (1) by removing the property from *hekdesh's* domain; (2) by deriving a benefit worth a *perutah* from the property. By merely lifting the stone or beam, the Temple treasurer does neither of the above. That is, his *hagbahah* (*lifting*, which is an act of acquisition) does not remove the object from *hekdesh's* domain, for the sacred object was entrusted to the treasurer's care and the treasurer's hand is thus considered an extension of *hekdesh's* domain (*Ritva*; see also *Rashi*).

18. Since the other party is acquiring the gift of the beam or stone, the treasurer has effectively removed it from *hekdesh's* domain, thereby misappropriating it. He must therefore pay restitution to *hekdesh* (*Rashi*).

19. According to the Gemara (*Chagigah* 10b), the Mishnah speaks of where the treasurer placed the beam or stone over an aperture in the roof of his house. Since he did not physically alter the object, which would have removed it from *hekdesh's* domain, or derive benefit from it yet, he did not commit an act of *me'ilah* (*Rashi, Ritva*). See *Tosafos* to *Bava Kamma* 20b ד״ה הוא, and *Gidulei Shmuel* here.

20. So that the stone or beam shelters him from the sun or the rain.

21. The Mishnah taught that once the Temple treasurer derives a benefit of shelter from the consecrated stone or beam, he has committed *me'ilah* and is obligated to compensate *hekdesh*. This is so even though *hekdesh* suffers no financial loss, since the treasurer did not physically alter the sacred object. Shmuel derives from this ruling that one is likewise obligated to pay compensation if he dwells in a private individual's courtyard without the owner's knowledge [similar to the case of misappropriation, which also occurred without *hekdesh's* knowledge]. This liability is incurred even if the courtyard was not normally rented, so that the unauthorized dwelling caused the owner no financial loss [similar to the Mishnah's case of misappropriation, in which *hekdesh* suffered no financial loss] (*Rashi*).

22. *Hagahos HaGra* eliminates this phrase from the text. *Mesoras HaShas* notes that it did not appear in *Rashi's* version; rather, the Gemara is responding anonymously. Cf. *Bach*.

23. That is, Shmuel will not infer from the Mishnah's case of *hekdesh* to the case of one who dwells in a private individual's courtyard, for his rulings vis-a-vis the stolen cake of pressed dates indicates that he does not equate the law of a private individual with that of *hekdesh* to create a stringency (*Rashi*).

24. *Maharshal* emends this to read "Rabbah."

25. That is, the Almighty, Who prohibits the misappropriating of *hekdesh* property, does so knowing of those who misappropriate (*Rashi*), and protests their actions with His prohibition (*Tos. HaRosh*). The equivalent case of a private person, then, would be if the owner of the courtyard protested, in which case there is no question, and we need no proof, that he then must be compensated.

26. In his inference, Shmuel addressed the case of unauthorized habitation *without* the owner's knowledge, where it is not clear if one who derives benefit with no detriment to the benefactor must pay. There is no equivalent case vis-a-vis *hekdesh*, since it was the omniscient Creator who issued the *me'ilah* prohibition and so "protested." Hence, no inference can be drawn.

27. *Ritva* notes that Shmuel's retraction is based on a mere technicality – i.e. the dissimilarity of the cases. Hence, the Gemara is actually implying that, theoretically, laws governing private individuals can be inferred from stringent ones governing *hekdesh*! This conclusion still conflicts with Shmuel's ruling vis-a-vis the stolen cake of pressed dates (and where there is no technical impediment to equating the two cases and yet Shmuel fails to do so). Hence, the Gemara has not actually resolved the issue of Shmuel's contradictory statements. *Ritva* explains the Gemara to mean as follows: Since Shmuel in any event retreated from the ruling derived from the Mishnah for the reason (albeit technical) provided by Rava, we can now say that we will allow the other remaining ruling to stand unchallenged.

28. I.e. prior to the first market day after the breakage occurred.

is sufficient that **they return to [the shopkeeper]** another **jug of wine;**[29] בְּשֶׁאָר יוֹמֵי – however, if the porters offer compensation **on other days,**[30] מְהַדְּרוּ לֵיהּ ה' – **they must return five** *zuzim* **to [the shopkeeper]** and not a barrel of wine, which is presently worth four.[31]

The Gemara limits the scope of Rava's ruling:

וְלֹא אֲמָרַן אֶלָּא דְּלֹא הֲוָה חַמְרָא לֵיהּ לְזַבּוּנֵי – And this ruling[32] **was not stated** except **where [the shopkeeper] had no wine to sell;**[33] אֲבָל הֲוָה לֵיהּ חַמְרָא לְזַבּוּנֵי – **but if he had wine to sell** and did not do so, הָא אֵיבָּעֵי לֵיהּ לְזַבּוּנֵי – **he should have sold it!**[34] וּמְנַכֵּי לֵיהּ אָגַר טִירְחַיְהוּ – **And,** further, when the porters do pay five *zuzim,* **they deduct the value of [the shopkeeper's] labor**[35] וּדְמֵי בֵּרְזָנֵיהּ – **and the cost of tapping**[36] from that sum, since the shopkeeper would have incurred these expenses and was now spared them.[37]

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29. Since he will shortly be able to sell the wine for five *zuzim,* the shopkeeper may not demand to be compensated with money (*Tosafos*).

30. I.e. anytime after the first market day (see *Tosafos*).

31. The porters must pay the shopkeeper five *zuzim,* and not a barrel worth four *zuzim,* since the shopkeeper should not be required to wait until the next market day to sell the replacement jug for five (see *Rashi, Tosafos;* see also *Tos. HaRosh*). (Since a replacement jug of wine could have been sold for five *zuzim* on the first market day following the breakage, the value of the damage is fixed at the worth of the wine on that day; see *Ketzos HaChoshen* 304:1 and *Nesivos HaMishpat* 304:2.)

32. That the porters must pay the shopkeeper five *zuzim* after the market day (*Rashi*).

33. The fact that the shopkeeper had no wine before the first market day means that he most likely would have sold a replacement jug on that day (*Rashi*). Hence, the value of the damage is indeed five *zuzim* (see note 31 above).

34. That is, if the shopkeeper had other wine to sell on the first market day and did not sell it, it is obvious that he would not have then sold a replacement jug either. Hence, [the damage is not fixed at five *zuzim,* and so] the porters need offer only a replacement jug as compensation (*Rashi*).

35. This cost is determined according to the "idle worker" measure. That is, we estimate how much profit the seller would be willing to forgo in order to remain idle and thereby avoid having to sell the contents of a jug of wine little by little (*Rashi;* see *Rashash*). The amount arrived at constitutes the value of the seller's labor.

36. The shopkeeper would have had to hire a craftsman to bore a hole in the earthen vessel containing the wine (*Rashi,* citing other commentators). In *Rashi's* text, however, the Gemara states: דְּמֵי בֵּרְזָנֵיהּ, *the cost of calling out* (*Mesoras HaShas*). According to this version, the shopkeeper would have had to pay the town crier to publicize the availability of wine for purchase.

37. Our elucidation of the Gemara's discussion of the broken wine jug follows the interpretation of *Rashi, Tosafos* and *Tos. HaRosh.* See, however, *Rambam* (*Hil. Sechirus* 3:3, with *Maggid Mishneh*) and *Rosh,* who take two entirely different approaches in explaining this passage (one takes into account the day on which the barrel was broken, and the other the specific day on which payment is made). See also *Chochmas Mishpat* 304:5 with commentaries.

Mishnah The Tanna has completed his discussion of the laws of borrowing, and now begins to present laws governing disputes between buyers and sellers. These laws are included here because they parallel the disputes between borrowers and lenders that appeared in the second Mishnah of this chapter.[1]

The following Mishnah discusses a dispute that arises from the sale of a pregnant cow or slavewoman. In these cases an offspring was born prior to the buyer's actually taking possession of the mother, but possibly after he acquired legal title thereto. The parties to the sale of the mother dispute the ownership of the offspring:

הַמַּחֲלִיף פָּרָה בַּחֲמוֹר וְיָלְדָה – If **one exchanges a cow for a donkey and [the cow] calves,**[2] **וְכֵן הַמּוֹכֵר שִׁפְחָתוֹ וְיָלְדָה** – **and, similarly,** if **one sells his** Canaanite **slavewoman and she gives birth,**[3] **זֶה אוֹמֵר עַד שֶׁלֹּא מְכַרְתִּי** – **and this one** (the seller) **says,** "She gave birth **before I sold** her, and the offspring is mine," **וְזֶה אוֹמֵר מִשֶּׁלָּקַחְתִּי** – **and that one** (the buyer) **says,** "She gave birth **after I purchased** her, and the offspring is mine," **יַחֲלוֹקוּ** – **[the claimants] divide** the value of the calf or slave child.[4]

הָיוּ לוֹ ב׳ עֲבָדִים – Another case: If **one had two slaves – אֶחָד גָּדוֹל וְאֶחָד קָטָן** – **one large and one small,**[5] **וְכֵן ב׳ שָׂדוֹת** – **and, similarly,** if one had **two fields – אַחַת גְּדוֹלָה וְאַחַת קְטַנָּה** – **one large and one small,**[5] **הַלּוֹקֵחַ אוֹמֵר גָּדוֹל לָקַחְתִּי** – and **the buyer says, "I purchased the large** slave (or field)," **וְהַלָּה אוֹמֵר אֵינִי יוֹדֵעַ** – **while the other one says, "I do not know** which one I sold,"[6] **זָכָה בַּגָּדוֹל** – **[the buyer] is entitled to the large one.**[7] **הַמּוֹכֵר אוֹמֵר קָטָן מָכַרְתִּי** – If, however, **the seller says, "I sold the small one," וְהַלָּה אוֹמֵר אֵינִי יוֹדֵעַ** – **while the other one says, "I do not know** which one I purchased," **אֵין לוֹ אֶלָּא קָטָן** – **[the buyer] obtains only the small** slave or field.[8]

זֶה אוֹמֵר גָּדוֹל – If, in the same case, **this one** (the buyer) **says,** "It was the **large** slave (or field) that you sold to me," **וְזֶה אוֹמֵר קָטָן** – **while that one** (the seller) **says,** "It was the **small one,**"[9] **יִשָּׁבַע הַמּוֹכֵר שֶׁהַקָּטָן מָכַר** – **the seller shall swear that he sold the small** item,[10] and the buyer obtains only that item.

זֶה אוֹמֵר אֵינִי יוֹדֵעַ – Finally, if in the same case **this one says, "I do not know** whether the large or the small item was sold," **וְזֶה אוֹמֵר אֵינִי יוֹדֵעַ** – **and that** other **one** also **says, "I do not know,"** **יַחֲלוֹקוּ** – **they divide** the disputed value.

Gemara The Gemara challenges the Mishnah's first ruling: **אַמַּאי יַחֲלוֹקוּ** – **Why do [the claimants] divide** the value of the calf or slave child when the time of its birth is unknown? **וְלֵיחֲזֵי בִּרְשׁוּת דְּמַאן קָיְימָא** – **Let us see in whose domain [the calf or child]** currently **is,** **וְלֶהֱוֵי אִידָךְ** – **and let the other [claimant] be** subject to the rule: **הַמּוֹצִיא מֵחֲבֵירוֹ עָלָיו הָרְאָיָה** – **The** burden of **proof is upon the one who seeks to exact** money or property **from his fellow.**[11] – ? –

NOTES

1. *Meiri*.

2. In this particular case, Reuven owns a cow and Shimon a donkey, and they agree to exchange their animals. This can be accomplished through a method of acquisition called חֲלִיפִין, *chalifin* (exchange); see above, 47a, for the Scriptural source for this *kinyan*. Specifically, the type of exchange performed here is termed שְׁוָה בְּשָׁוֶה, objects of equal value exchanged, i.e. barter (see *Tosafos* ibid. ד״ה גאולה and Rishonim there). When the barter method is employed, once it has been agreed that one object is to be exchanged for the other, the transfer of one object suffices to complete the transaction legally and the second object is then automatically acquired by its new owner. It follows that the second object need not be present when the *kinyan* is performed. This aspect of *kinyan chalifin* may give rise to various uncertainties concerning the second object. In our case, Reuven effects the exchange by drawing the donkey toward himself. This act of *meshichah* not only transfers ownership of the donkey to Reuven, but also causes Shimon to gain ownership of the cow, which was located elsewhere at the time. Later, it is discovered that the cow calved around the time of *chalifin*, but it is unclear whether the birth occurred before the exchange took place (in which case the calf would belong to Reuven, having been born while the cow was still his) or afterward (in which case it would belong to Shimon, having been born after he acquired the cow).

This situation of doubtful ownership is possible only in a case of barter. Had Shimon given money for the cow, the sale would not take place until he drew the cow into his possession [since movables cannot be acquired by monetary payment]. That being the case, it would be clear whether the cow calved before or after the sale (*Rashi*).

3. In this case the sale is effected not by *chalifin* but by money, since – unlike other movables – Canaanite slaves can be acquired with a monetary payment, since they have the legal status of real property (see *Kiddushin* 22b). Thus, it is possible to purchase a slave without the slave being present at the transaction. In the Mishnah's case, the slavewoman gave birth around the time of the sale, when she was in a different location. It is unclear whether the birth occurred prior to the payment of money [in which case the child would belong to the seller, who was still in possession of the mother] or afterward [in which case it would belong to the buyer, since the mother had become his property] (*Rashi*).

4. The Gemara will explain the reason for this ruling.

5. And he sold one of the slaves (or fields), and now they are disputing which of the two – the more valuable physically larger one or the smaller one – the seller agreed to sell. (The parties did not effect the purchase with a document, which would have specified the item being sold.)

6. The buyer claims with certainty that they had agreed on the sale of the large slave or field, while the seller rejoins that perhaps it was the small one.

7. This ruling is problematic: Inasmuch as the seller is still in possession of the sale item, why does the buyer triumph solely on the basis of an unsupported, albeit superior, claim? According to halachah, actual proof is needed in order to extract money or property from its rightful holder (see above, 97a-b, and note 11 below). The Rishonim (*Ritva, Meiri*) explain this ruling in the context of the Gemara's explanation of the later cases in the Mishnah. See note 38 below, and *Gidulei Shmuel* ד״ה ובזה and ד״ה והנה.

8. [In this case the seller is definite in his claim, while the buyer – the plaintiff – is unsure.] Consequently, the seller is exempt even from swearing that he sold the small item (*Tiferes Yisrael*). See *Tos. R' Akiva Eiger* §70.

9. In this scenario, each party issues his claim with certainty.

10. The Gemara below will object to this ruling and elaborate on the Mishnah's case.

11. A basic principle of Torah law regarding monetary litigations is: הַמּוֹצִיא מֵחֲבֵירוֹ עָלָיו הָרְאָיָה, *the [burden of] proof is upon the one who seeks to exact [money or property] from his fellow* (*Bava Kamma* 46b). That is, if one person is in possession of property and another claims it as his, the holder's possession creates a legal presumption of ownership (a *chazakah*) and the burden of proving otherwise rests upon the claimant. Hence, the Gemara questions why the Tanna ruled that the two litigants divide the value of the calf or slave child, when the one currently possessing it – be he buyer or seller – has the presumption of ownership.

Tosafos find the Gemara's question difficult to understand, for the Gemara elsewhere (*Bava Basra* 36a) rules that one who possesses mobile property such as animals and slaves does not have a *chazakah* as proof of his ownership [because they may have strayed into the possessor's property or he may have seized them while they wandered through the street; hence, without valid proof they would be returned

The Gemara deflects the challenge by clarifying the Mishnah's case:

אָמַר רַב חִיָּיא בַּר אָבִין אָמַר שְׁמוּאֵל – Rav Chiya bar Avin said in the name of Shmuel: בְּעוֹמֶדֶת בַּאֲגַם – The Mishnah speaks of where [the calf] is standing in a meadow owned by neither litigant, שִׁפְחָה נַמִּי דְּקַיְימָא בְּסִימְטָא – and in the case of a slavewoman as well it speaks of where [her child] is in an alley adjacent to a thoroughfare, where animals and slaves are commonly sold. In each of these cases the contested property is found in neither party's domain.[12]

The Gemara challenges this explanation:

וְנוּקְמָא אַחֶזְקַת דְּמָרָא קַמָּא – But if neither buyer nor seller is in possession of the contested property, place it on its status of belonging to the first owner (i.e. the seller), וְלֶיהֱוֵי אִידָּךְ – and let the other [claimant] (i.e. the buyer) be subject to the rule: הַמּוֹצִיא מֵחֲבֵירוֹ עָלָיו הָרְאָיָה – The burden of proof is upon the one who seeks to exact money or property from his fellow.[13] – ? –

The Gemara deflects this challenge as well:

הָא מַנִּי – Whose ruling is this, that the value of the calf or slave child is divided when neither litigant possesses it? סוּמְכוֹס הִיא דְּאָמַר – It is the ruling of the Tanna Sumchos, who said: מָמוֹן הַמּוּטָּל בְּסָפֵק חוֹלְקִין בְּלֹא שְׁבוּעָה – Property whose disposition lies in doubt is divided by the litigants without an oath.[14] Since the Mishnah follows Sumchos' opinion, it rules that the buyer and seller divide the value of the slave child or calf, and it does not resolve the dispute by awarding sole possession to the first owner.[15]

The Gemara objects to this explanation:

אֵימוּר דְּאָמַר סוּמְכוֹס בְּשֶׁמָּא וְשֶׁמָּא – One could say that Sumchos said that property of uncertain ownership is divided in a case where the litigants claim **"perhaps" and "perhaps"** – i.e. where neither litigant is certain about his claim.[16] בְּבָרִי וּבָרִי מִי אָמַר – However, **did he say** also that such property is divided **in** a case where the litigants claim **"certainly" and "certainly"**[17] – i.e. where each litigant is certain about his claim, which is the case of our Mishnah?[18]

The Gemara replies:

אָמַר רַבָּה בַּר רַב הוּנָא – **Rabbah bar Rav Huna said:** אִין אָמַר סוּמְכוֹס אֲפִילּוּ בְּבָרִי וּבָרִי – **Yes, Sumchos said** his ruling **even in a** case of **"certainly" and "certainly."** Hence, our Mishnah indeed reflects his opinion.

The Gemara presents an opposing interpretation:

רָבָא אָמַר – **Rava said:** לְעוֹלָם כִּי אָמַר סוּמְכוֹס שֶׁמָּא וְשֶׁמָּא – **In truth, when Sumchos said** his ruling, he did so only where the litigants claim **"perhaps" and "perhaps"**;[19] אֲבָל בָּרִי וּבָרִי לֹא אָמַר – **however, he did not say** his ruling in a case of **"certainly" and "certainly."** וְתָנֵי – **Nevertheless, read** our Mishnah as though it stated as follows: זֶה אוֹמֵר שֶׁמָּא עַד שֶׁלֹּא מְכַרְתִּי – **"This one** (the seller) **says, 'Perhaps** she gave birth **before I sold** her, and the offspring is mine,' וְזֶה אוֹמֵר שֶׁמָּא מִשֶּׁלְּקַחְתִּי – **and that one** (the buyer) **says, 'Perhaps** she gave birth **after I purchased** her, and the offspring is mine.' "[20]

The Gemara challenges the interpretation of Rabbah bar Rav Huna:

תְּנַן – **We learned in the** final case of our **Mishnah:** זֶה אוֹמֵר אֵינִי יוֹדֵעַ – **IF THIS ONE SAYS, "I DO NOT KNOW** whether the large or the small slave (or field) was sold," וְזֶה אוֹמֵר אֵינִי יוֹדֵעַ – **AND THAT** other **ONE** also **SAYS, "I DO NOT KNOW,"** יַחֲלוֹקוּ – **THEY DIVIDE** the disputed value. בִּשְׁלָמָא לְרָבָא – Now, **all is well according to Rava,** who holds that Sumchos' ruling applies only when the litigants' claims are uncertain, מִדְּסֵיפָא שֶׁמָּא וְשֶׁמָּא – because **from** the fact **that the final case** speaks of where the

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to the last definite owner (the מָרָא קַמָּא). Why, then, does the Gemara imply that if the calf or slave child is found in the buyer's possession, he is presumed to be its owner? (See *Rashash*).

Tosafos explain that in the Mishnah's case the calf's (or slave's) ownership is inherently a matter of doubt, a דְּרָרָא דְּמָמוֹנָא, and not an issue unilaterally raised by one of the litigants. Hence, the seller's position as owner of the newborn in its fetal stage (which would qualify him as the מָרָא קַמָּא, the last-known owner, who is awarded the disputed item in the absence of any other indication of ownership; see note 13) is considerably weakened. The Gemara therefore suggests that even though the buyer would have no presumption of ownership (because the contested property in his possession is mobile), still, since he claims ownership with certainty and since the seller's position is weakened, we should allow him to keep the property until such time as the seller offers proof. However, had the buyer's claim been uncertain, *Tosafos* explain, he would have been required to surrender the property to the seller. Cf. *Choshen Mishpat* 223:1; and see *Ketzos HaChoshen* ibid. no. 2; see also *Ritva* and *Ran*. See *Shev Shmaatsa* 4:10-13, who discusses *Tosafos'* commentary at length.

12. The Gemara could have answered that the calf or child was in a public domain, but for either to be found in such a place is unusual (*Tos. HaRosh*).

13. What is established is that in its fetal stage the calf (or slave child) belonged to the seller. Since neither litigant now possesses the contested property, the accepted procedure for resolving the dispute regarding its ownership is to award sole possession to the last-known owner (i.e. the seller) until the buyer produces evidence of a change in its status. [Hence, the dispute is resolved according to the *chazakah* of the "first" owner (חֲזָקַת מָרָא קַמָּא). See *Ketzos HaChoshen* (end of 280:2), *Shev Shmaatsa* 4:24 and *Kuntres HaSefeikos* (1:5) for a discussion of this type of *chazakah*.]

14. See above, 2b note 16.

15. *Tosafos* cite *Rabbeinu Shmuel*, who infers from that which the Gemara retorted "Whose (ruling) is this" and not "*Rather*, whose (ruling) is this" that the Gemara was not retreating from its original interpretation (i.e. that the Mishnah speaks of where neither litigant is in possession of the contested property). *Rabbeinu Shmuel* thus concludes that Sumchos' ruling applies only in our present case; where, however, one litigant physically possesses the property *and* claims ownership with certainty, Sumchos would concede that the other party bears the burden of proving otherwise. Citing a Mishnah in *Bava Kamma* (35b), though, *Tosafos* then challenge *Rabbeinu Shmuel's* opinion and contend that Sumchos' ruling applies in all cases of inherent doubt (דְּרָרָא דְּמָמוֹנָא). [Actually, whether or not it applies even when the one in possession of the contested item (חֲזָקַת מָמוֹן) or the last-known owner (מָרָא קַמָּא) claims with certainty is a matter of debate in the Gemara below.] See also *Tos. HaRosh* and *Ritva* regarding this issue; see also *Hagahos HaGra* §3.

16. Such is the case of the Mishnah in *Bava Kamma* (46a), whose ruling both the Gemara and a Baraisa cited there attribute to Sumchos (see above, 2b note 16).

17. As mentioned above in note 15 (see also *Tosafos* ד״ה הא), an uncertain claim weakens the position of one in possession of the contested property (חֲזָקַת מָמוֹן). The Gemara is suggesting that Sumchos agrees with that reasoning, and that it is indeed an essential component of his approach, even against only a prior owner (מָרָא קַמָּא). When the claim of the person in possession of the contested property or of the prior owner is certain, however, then his possession or status is unassailable, even in a case of inherent doubt (דְּרָרָא דְּמָמוֹנָא) [see *Kuntres HaSefeikos* 2:4].

18. In the Mishnah's case the seller claims with certainty that the calf or slave child was born before the sale, while the buyer counters with certainty that the birth occurred afterward (see *Rashi*).

19. As per the case of the Mishnah in *Bava Kamma* (46a), where his ruling is taught.

20. Rava also concurs with the Gemara's establishing the Mishnah as being reflective of Sumchos' opinion. Nevertheless, he disputes Rabbah bar Rav Huna, contending instead that Sumchos' ruling applies only where the litigants' claims are uncertain. Rava is therefore compelled to interpret our Mishnah as speaking of such a case.

litigants claimed **"perhaps" and "perhaps"**[21] רֵישָׁא נַמִּי שְׁמָא – we can assume that **the first case,** which the Gemara has been discussing, **also** speaks of where the litigants claimed **"perhaps" and "perhaps."** Since in each case the litigants' claims were uncertain, the Mishnah ruled that both contested properties be divided, as per Sumchos' opinion. אֶלָּא לְרַבָּה בַּר – **However, according to Rabbah bar Rav Huna,** רַ"ח דְּאָמַר אֵין אָמַר סוּמְכוֹס אֲפִילּוּ בָּרֵי וּבְרֵי – **who said, "Yes, Sumchos stated** his ruling **even in** a case of **'certainly' and 'certainly'** " (i.e. even where the litigants' claims are certain), הַשְׁתָּא בָּרֵי וּבְרֵי אָמַר יַחֲלוֹקוּ – **now** that **[Sumchos] has said** that **[the claimants] divide** in the case of **"certainly" and "certainly,"** the Mishnah's first case, שְׁמָא וְשָׁמָא מִיבָּעְיָא – **is it necessary** to state that they divide in the case of **"perhaps" and "perhaps,"** the Mishnah's last case?[22] Hence, if the Mishnah's first case speaks of where the litigants' claims are certain, as Rabbah bar Rav Huna avers, the Mishnah's final case is superfluous. – ? –

The Gemara defends Rabbah bar Rav Huna:

אִי מִשּׁוּם הָא – **If** your refutation of Rabbah bar Rav Huna's interpretation is only **because of this** final case of the Mishnah,[23] לָא אִיְּירָא – **it is not** really **a problem.** תָּנָא סֵיפָא לְגַלּוּיֵי רֵישָׁא – Rather, **[the Tanna] stated the last case in order to clarify the first case,** שֶׁלֹּא תֹּאמַר רֵישָׁא שְׁמָא וְשָׁמָא – **so that you should not say**[24] that **the first case,** which does apply Sumchos' ruling, speaks of where the litigants claimed **"perhaps" and "perhaps,"** אֲבָל בָּרֵי וּבְרֵי לָא – **but** where the litigants claim **"certainly" and "certainly,"** Sumchos' ruling is **not** applied.[25] תָּנָא סֵיפָא שְׁמָא וְשָׁמָא – Therefore, **[the Tanna] stated the final case,** which expressly speaks of where the litigants claim **"perhaps" and "perhaps,"** מִכְּלָל דְּרֵישָׁא בָּרֵי וּבְרֵי – so that it follows **by implication** that the first case speaks of where they claimed **"certainly" and "certainly,"**[26] וַאֲפִילּוּ הָכִי יַחֲלוֹקוּ – **and nevertheless** the Mishnah rules that **[the claimants] divide** the value of the offspring, as per Sumchos' opinion.

The Gemara again challenges the interpretation of Rabbah bar Rav Huna:

תְּנַן – **We learned in the** next to the last case of our **Mishnah:** זֶה אוֹמֵר גָּדוֹל – If one had two slaves or two fields, one large and one small, and **THIS ONE** (the buyer) **SAYS,** "It was the **LARGE** slave (or field) that you sold me," וְזֶה אוֹמֵר קָטָן – **WHILE THAT ONE** (the seller) **SAYS,** "It was the **SMALL ONE,**" יִשָּׁבַע הַמּוֹכֵר שֶׁקָּטָן מָכַר – **THE SELLER SHALL SWEAR THAT HE SOLD THE SMALL** item, and the buyer obtains only that item. בְּשִׁלְמָא לְרַבָּא דְּאָמַר – Now, **all is well according to Rava, who said:** כִּי אָמַר סוּמְכוֹס שְׁמָא וְשָׁמָא – **When Sumchos stated** his ruling – that property whose ownership is in doubt must be divided – he did so only where the litigants claim **"perhaps" and "perhaps";** אֲבָל בָּרֵי וּבְרֵי לָא אָמַר – **however, he did not state** his ruling in a case of **"certainly" and "certainly"** – מִשּׁוּם הָכִי יִשָּׁבַע – **because of this [the seller] must swear,** and Sumchos' ruling is not applied.[27] אֶלָּא לְרַבָּה בַּר רַב הוּנָא – **However, according to Rabbah bar Rav Huna,** רַ"ח אֵין אָמַר סוּמְכוֹס אֲפִילּוּ בָּרֵי וּבְרֵי – **who said, "Yes, Sumchos stated** his ruling **even in** a case of **'certainly' and 'certainly'** " (i.e. even where the litigants' claims are certain), אַמַּאי יִשָּׁבַע מוֹכֵר – **why** does the Mishnah state: **THE SELLER MUST SWEAR?** יַחֲלוֹקוּ מִיבָּעֵי לֵיהּ – If Sumchos' ruling applies even when the litigants' claims are certain, **[the Tanna] should have** ruled: **[The buyer and seller] divide** the disputed property.[28] – ? –

The Gemara replies in defense of Rabbah bar Rav Huna:

מוֹדֶה סוּמְכוֹס הֵיכָא דְּאִיבָּא שְׁבוּעָה דְּאוֹרַיְיתָא – **Sumchos concedes** that **where there is a Biblical oath** that one litigant must swear,[29] the contested property is not divided,[30] כְּדִבְעִינַן לְמֵימַר לְקַמָּן – **as we will be required to say below**[31] to reconcile Sumchos' ruling, as interpreted by Rabbah bar Rav Huna, with a Baraisa that similarly compels a seller to swear.

The Gemara now scrutinizes this ruling, which stated:

הָיוּ לוֹ ב' עֲבָדִים אֶחָד גָּדוֹל וְאֶחָד קָטָן [וכו'] – If **ONE HAD TWO SLAVES – ONE LARGE AND ONE SMALL [etc.].**[32]

The Gemara raises three objections to the seller's swearing:

אַמַּאי יִשָּׁבַע – **Why should [the seller]** be required to **swear?** מַה שֶׁטָּעָנוּ לֹא הוֹדָה לוֹ – **That which [the buyer] claimed from him, he did not** even partially **admit to,** וּמַה שֶׁהוֹדָה לוֹ לֹא טָעָנוּ – **and what he did admit to [the buyer], [the latter] did not claim from him!**[33] וְעוֹד – **And, furthermore,** even if the

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21. Since each litigant professes ignorance of the facts of the case, his claim is perforce uncertain.

22. Certainly not, since the teaching of the last case can be derived by means of a *kal vachomer* (a fortiori argument) from that of the first case.

23. I.e. if your refutation is based on the fact that the Tanna bothered to teach a case involving two uncertain claims.

24. Had the last case not been taught.

25. Had only one case been mentioned, we would presume that it taught the less innovative ruling.

26. For why would the Tanna teach two similar cases of "perhaps" and "perhaps"? (*Rashi*).

27. [The Gemara below will explain why there is an obligation to swear here.] Since in this case each party issued his claim with certainty, the Mishnah did not rule that the property be divided. See following note.

28. *Ritva* (old) explains the Gemara's question as follows: Although there is an obligation to swear here, after the oath is taken the litigants should still divide (see there at length). See also *Ritva* and *Raavad* (cited in *Shitah Mekubetzes*).

29. Since the seller here admits to having sold the small slave or field, he must take the Biblical oath of partial admission (מודה במקצת). The Gemara below will object to this ruling on three counts, and will then offer various explanations to resolve the difficulties. *Rashi* here mentions the approach of Rav Sheishess (below, 100b), which the Gemara ultimately dismisses. *Hagahos HaGra* and *Maharam* question why *Rashi* adopts a discredited interpretation. See *Maharam* and *Maharam Schik*.

30. Since the seller cannot avoid swearing the Biblical oath of partial admission, a division of the contested property would be inequitable, for the buyer will take half without an oath while the seller takes his half with an oath. Since Sumchos' ruling calls for an equitable division of the contested property, it cannot be invoked in this case (*Ritva*). See *Raavad*, cited in *Shitah Mekubetzes*, for another explanation of the Gemara's answer.

31. 100b.

32. The Mishnah proceeds to rule that when the buyer claims with certainty that the large slave was sold and the seller claims with certainty that the small slave was sold, the seller swears that he sold the small slave (an oath of partial admission) and the buyer takes that slave.

33. The Gemara first contends that the Mishnah's case is not one of partial admission, for in a typical case of partial admission (e.g. where the plaintiff claims a measure of 100 and the defendant admits to owing 50) the defendant admits to part of the claim itself. In the Mishnah's case, however, the defendant completely denies owing the slave that is claimed and admits to owing an altogether different slave (*Rashi*). Indeed, this case is like where the plaintiff claims a certain quantity of one type of property (e.g. 100 bushels of wheat, analogous to the more valuable "large slave") and the defendant admits to a lesser amount of a different type (e.g. 50 bushels of barley, analogous to the less valuable "small" slave), and in such a case there is no partial admission [see above, 5a notes 16,18; *Shevuos* 38b].

Tanna does consider this a case of partial admission,[34] הֵילָךְ הוּא – it is nonetheless a situation of **"here, it is yours"** (*heilach*)![35] וְעוֹד – **And furthermore,** even according to R' Chiya, who holds that a defendant *is* required to swear in a *heilach* situation,[36] אֵין נִשְׁבָּעִין עַל הָעֲבָדִים – **we do not swear with regard to slaves!**[37] Hence, the seller should certainly be excused from swearing, and Sumchos' ruling of "they divide" should be applied. – ? –

The Gemara resolves these difficulties by revising the Mishnah's case:

אָמַר רַב בְּטוֹעֲנוֹ דְּמֵי – **Rav said:** In truth, the Mishnah speaks of **where [one party] claims money** from **[another],** and not an actual slave or field.[38] דְּמֵי עֶבֶד גָּדוֹל – That is, the plaintiff claims, "I gave you a sum of **money** sufficient to purchase **a large** slave for me, and, having failed to do so, you must return that money," דְּמֵי עֶבֶד קָטָן – while the defendant counters, "You gave me a sum of **money** sufficient to purchase only **a small slave,** and that amount is all I owe you."[39] דְּמֵי שָׂדֶה גְּדוֹלָה – Alternatively, the plaintiff claims, "I gave you a sum of **money** sufficient to purchase **a large field** etc.," דְּמֵי שָׂדֶה קְטַנָּה – while the defendant counters, "You gave me a sum of **money** sufficient to purchase only **a small field** etc."

The Gemara presents a different revision of the Mishnah's case: וּשְׁמוּאֵל אָמַר בְּטוֹעֲנוֹ כְּסוּת עֶבֶד גָּדוֹל – **But Shmuel said:** The Mishnah speaks of **where [the buyer] claims** from **[the seller] a garment** for **a large slave,** כְּסוּת עֶבֶד קָטָן – while the seller claims that he sold to the buyer only **a garment** for **a small slave.**[40] עוֹמְרֵי שָׂדֶה גְּדוֹלָה – Alternatively, the buyer claims that he had purchased the number of **sheaves of** produce that would ordinarily be collected from **a large field,** עוֹמְרֵי שָׂדֶה קְטַנָּה – while the seller counters that he sold only the number of **sheaves of** produce that would ordinarily be collected from **a small field.**

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34. That is, even if the Tanna agrees with Rabban Gamliel, who holds that the partial-admission oath applies even in such a case.

35. In this case the small slave, which the seller admits to having sold, stands ready for the buyer to take, and according to Rav Sheishess (above, 4a) such an admitted portion is not considered part of the plaintiff's (buyer's) claim any longer (see ibid. notes 26-27, 31). Rather, the plaintiff's claim is perceived as being only the difference between the value of a large slave and of a small slave, and that entire claim is being denied. Hence, according to Rav Sheishess the seller should not be subject to an oath of partial admission, and so the Gemara questions if the Tanna is indeed ruling that he is (see *Rashi*).

36. See above, 4a.

37. The Mishnah (*Shevuos* 42b) rules that none of the three Biblical oaths (שְׁבוּעַת מִגְוָה בְּמַקָּצָה, *the oath of partial admission*; שְׁבוּעַת הַשּׁוֹמְרִים, *the custodians' oath*; שְׁבוּעַת עֵד אֶחָד, *the oath [to contradict] a single witness*) is ever imposed in litigation involving slaves, documents, land and consecrated property. This law is derived from *Exodus* 22:8, which indicates that oaths are taken only with regard to items that are movable and have intrinsic value. Excluded by the first condition is land, and since the Torah compares slaves to real property, they are also excluded.

38. Thus, since money is at issue, none of the three objections to swearing is relevant: (1) The defendant admits to part of the claim itself; (2) this is not necessarily a *heilach* situation; (3) money is qualified to be the subject of a Biblical oath.

The Rishonim explain that once the Mishnah's case is established to be one of partial admission, the first ruling of the Mishnah regarding the two slaves – "he acquires the large one" – is a case of one who must pay because he cannot swear (see above, 97b, 98a). See also *Hagahos HaGra* §1.

39. Our rendition of the two claims follows *Rashi's* interpretation, which portrays the litigants as a principal and his agent. *Tosafos* object to this approach on the grounds that the Mishnah should have referred to them as such, and not as "the buyer" and "the seller." *Tosafos* therefore explain that the Mishnah speaks of where the plaintiff has paid cash for a particular slave, and is now demanding the return of his money.

This interpretation raises the following question: Since a Canaanite slave and a field are acquired with a monetary payment, it is the slave or field that the plaintiff claims – not the money! *Tosafos* explain that in the Mishnah's case there was an express stipulation that the sale shall not take effect until a document of sale is written and delivered. In the interim the plaintiff decides to rescind the agreement, as is his right, and thus demands the return of his cash payment. Cf. *Ritva* (old).

[*Tosafos* explain that there is an inherent doubt (דְּרָרָא דְּמָמוֹנָא) in this case because the parties agreed to the sale of both slaves for different prices, and now they disagree as to which price was paid.]

40. Shmuel rejects Rav's interpretation because the Mishnah expressly mentions "a large slave" and "a small slave," and the slave's garment – by virtue of the fact that it is what he would wear – is closer to the plain meaning of those expressions than is money paid for him (*Ritva*).

The Gemara challenges Shmuel's interpretation:

כְּסוּת – But why should the seller be required to take an oath of partial admission when he claims that he sold **a garment** for a small slave? מַה שֶּׁטְּעָנוֹ לֹא הוֹדָה לוֹ – **What [the buyer] claimed** from **him, he did not** even partially **admit to,** וּמַה שֶּׁהוֹדָה לוֹ לֹא טְעָנוֹ – **and what he did admit to [the buyer] [the latter] did not claim** from **him!**[1] – ? –

The Gemara replies in defense of Shmuel:

כִּדְאָמַר רַב פָּפָּא בִּדְיַיְלְפֵי – It is **as Rav Pappa said** below: We are speaking of **where** several pieces of cloth were **attached**[2] to form one large garment. הָכָא נַמִּי בִּדְיַיְלְפֵי – **Here, too,** the Mishnah speaks of **where** several pieces of cloth were **attached**[2] to form one large garment.[3]

The Gemara refutes Shmuel's interpretation and offers another:

קַשְׁיָא לֵיהּ לְרַבִּי הוֹשַׁעְיָא – **R' Hoshaya had a difficulty** with Shmuel's interpretation of the Mishnah: מִידֵי כְּסוּת קָתָנֵי – **Does [the Tanna] teach** anything about the sale of **a garment?** No! עֶבֶד קָתָנֵי – **He teaches** about the sale of **a slave;** hence, to interpret "slave" to mean "a slave's garment" does not improve upon Rav's interpretation of the Mishnah. אֶלָּא אָמַר רַבִּי הוֹשַׁעְיָא – **Rather, R' Hoshaya said:** כְּגוֹן שֶׁטְּעָנוֹ עֶבֶד בִּכְסוּתוֹ – The Tanna teaches **an example where [the buyer] claims** from **[the seller] a** large **slave with his garment,** while the seller admits to selling a small slave with his garment, וְשָׂדֶה בְּעוֹמָרֶיהָ – **and** he also teaches a case where the buyer claims **a** large **field with its sheaves,** while the seller admits to a small field with its sheaves.[4]

R' Hoshaya's interpretation is itself challenged:

וְאַכַּתִּי כְּסוּת – **But still,** with regard to the seller's claim vis-a-vis the **garment,** מַה שֶּׁטְּעָנוֹ לֹא הוֹדָה לוֹ – **what [the buyer] claimed** from **him, [the seller] did not** even partially **admit to,** וּמַה שֶּׁהוֹדָה לוֹ לֹא טְעָנוֹ – **and what he did admit to [the buyer] [the latter] did not claim from him!**[5] Since the seller thus incurs no obligation to swear regarding the garment, we cannot devolve upon him an obligation to swear regarding the slave. This contradicts the Mishnah, which rules that the seller does swear with regard to the slave. – ? –

The Gemara answers in defense of R' Hoshaya:

אָמַר רַב פָּפָּא בִּדְיַיְלְפֵי – **Rav Pappa said:** The Mishnah speaks of **where** several pieces of cloth were **attached**[6] to form one large garment.[7] Hence, the seller does admit to part of the buyer's claim vis-a-vis the garment. Since, then, he must swear that he sold a small garment, we devolve upon him an obligation to swear also that he sold a small slave.

The Gemara again challenges R' Hoshaya's interpretation:

קַשְׁיָא לֵיהּ לְרַב שֵׁשֶׁת – **Rav Sheishess had a difficulty** with R' Hoshaya's interpretation of the Mishnah:

זוֹקְקִין אָתָא לְאַשְׁמוּעִינַן – **Does [the Tanna] come to teach us the** law of **"subjection"?**[8] תְּנֵינָא – But **we have learned** that law explicitly **in** another **Mishnah:**[9] נְכָסִים שֶׁאֵין לָהֶן אַחֲרָיוּת זוֹקְקִין אֶת הַנְּכָסִים שֶׁיֵּשׁ לָהֶן אַחֲרָיוּת לִישָּׁבַע עֲלֵיהֶן – [MOVABLE PROPERTY] **CAN SUBJECT REAL PROPERTY**[10] to the requirement [THAT ONE] **TAKE AN OATH REGARDING IT.**[11] Hence, although the Torah classifies slaves as real property, we would derive from this Mishnah that an obligation to swear regarding a slave's garment can be devolved to require an oath regarding the slave himself. (The same holds true for a field and its sheaves.) It is therefore unnecessary for our Mishnah to teach its cases. – ? –

The Gemara thus abandons R' Hoshaya's interpretation, and presents one that preserves the plain meaning of "slave" and "field":

אֶלָּא אָמַר רַב שֵׁשֶׁת – **Rather, Rav Sheishess said:** הָא מַנִּי – **Whose ruling is this,** that the seller take the Biblical oath of partial admission even with regard to slaves and land, the two cases of the Mishnah according to its plain meaning? רַבִּי מֵאִיר הִיא – **It is** the ruling of **R' Meir,** דְּאָמַר עַבְדָּא כְּמִטַּלְטְלִין דָּמֵי – **who said**[12] **that a slave is like movable property** with respect to the law of oaths. Thus, just as an oath may be imposed in litigation involving movable property, so it may be imposed in litigation involving slaves.[13] This answers one of the three challenges to the Mishnah's ruling.

NOTES

1. The buyer claimed one type of garment [a large cloak] and the seller admitted to selling an altogether different type [a small cloak] (*Rashi*), analogous to the case of one who claims wheat and received an admission of barley (*Ritva*). Thus, since the seller did not admit to part of the buyer's claim, he incurs no obligation to take an oath of partial admission.

The Gemara's challenge is directed only at Shmuel's interpretation of the case of the slave, since a large cloak and a small cloak are different garments. In his interpretation of the other case, however, the defendant indeed admits to part of the plaintiff's claim, for the buyer claims that forty sheaves (the yield of a large field) were sold, while the seller admits to twenty sheaves (the yield of a small field). Hence, an oath of partial admission is justified (*Tosafos*).

2. Our translation follows *Bach* and *Rashash,* who emend בִּדְיַיְלְפֵי to בִּדְלְיְפֵי, which means *attached* (see *Nimukei Yosef*).

3. In the Mishnah's case the buyer claims that he purchased a large garment composed of several pieces of cloth that were sewn together. The seller claims that the garment sold was equal in circumference to that claimed by the buyer, but had an opening in the middle. Because the overall size of the garment claimed by the seller equals the overall size of the garment claimed by the buyer, the two garments are regarded as being of one type. Because the litigants concede that the garment in question is composed of separate pieces and they dispute the number of pieces, the seller's claim is considered a partial admission of the buyer's claim. Hence, the Mishnah properly requires the seller to swear an oath of partial admission (*Rashi,* as interpreted by *Bach,* based on *Rashi* to *Shevuos* 43a ד״ה אזורה נמי ליתני). Cf. *Ritva*. [See *Maayanei HaChochmah,* who addresses the *heilach* ("here, it is yours") problem.]

4. Since the seller admits to part of the buyer's claim regarding the garment (or the sheaves), he must swear an oath of partial admission (i.e. that the garment sold was small or the sheaves few). Once he has incurred that obligation, we apply the rule of גִּלְגּוּל שְׁבוּעָה (*devolving an oath;* see above, 98b note 5) and require him also to swear that the slave (or field) itself was small (*Rashi, Ritva*). Hence, the seller does swear with regard to the slave or field, as the Mishnah states. [R' Hoshaya, at this point, is apparently addressing the problem of "we do not swear with regard to slaves." See the Gemara's response below to Rav Sheishess' answer.]

5. See above, note 1.

6. See above, note 2.

7. See above, note 3.

8. The law of devolving an oath is explained in the Mishnah presently cited.

9. *Kiddushin* 26a.

10. See above, 4b note 31, for an explanation of why the Gemara refers to real property as "properties that provide a guarantee" and movable property as "properties that do not provide a guarantee."

11. We have learned that Biblical oaths are not imposed in litigations involving real property (see above, 100a note 37). However, if a plaintiff's claim covered both real and movable property and the defendant was required to swear regarding the movable property, the obligation to swear extends to the real property as well. This is an example of the law of devolving an oath.

12. In a Baraisa quoted below (*Rashi*).

13. At this point, the Gemara seems to be assuming that oaths can be taken regarding slaves only because they are viewed as movable property – land, however, cannot be the subject of an oath. The Gemara below will note that in the Mishnah, there seems to be a case involvin

The Gemara now challenges Rav Sheishess' interpretation:[14] **וְאַבָּתְּי מַה שֶּׁטָּעָנוּ לֹא הוֹדָה לוֹ – But still, what [the buyer] claimed from him, [the seller] did not** even partially **admit to, וּמַה שֶׁהוֹדָה לוֹ לֹא טָעָנוּ – and what he did admit to [the buyer] [the latter] did not claim from him!**[15] – ? –

The Gemara answers this objection:

סָבַר לָהּ כְּרַבָּן גַּמְלִיאֵל – [The Tanna] of our Mishnah **holds like the view of Rabban Gamliel, דְּתָנֵן – as we learned in a Mishnah:**[16] **טָעָנוּ חִטִּים וְהוֹדָה שְׂעוֹרִים פָּטוּר** – If **[THE PLAINTIFF] CLAIMED WHEAT** from **[THE DEFENDANT] BUT [THE LATTER] ADMITTED** owing him **BARLEY, [THE DEFENDANT] IS NOT OBLIGATED** to swear the oath of partial admission.[17] **רַבָּן גַּמְלִיאֵל מְחַיֵּיב** – **RABBAN GAMLIEL,** however, **REQUIRES** him to swear it. Our Tanna concurs with Rabban Gamliel, who holds that a defendant incurs liability for a partial-admission oath even without admitting to the same type of property claimed by the plaintiff; it is sufficient that he admit to a debt of lesser value than that claimed. Such is the case of our Mishnah, where the buyer claims a large slave (or field) and the seller admits to a small one.

The Gemara raises the third objection mentioned above:

אַבָּתְּי הֵילָךְ הוּא – Still, it is a situation of **"here, it is yours"** (*heilach*), and so the seller should not be subjected to an oath of partial admission![18] Why, then, does the Tanna rule that he is?

The Gemara answers this objection as well:

אָמַר רָבָא – Rava said: עַבְדָּא דְּקָטַע לְיָדֵיהּ – With regard to the case of the **slave,** the Mishnah speaks of **where** after the sale was transacted **[the seller] cut off the hand of [the small slave]** – the one he admits selling. **וְשָׂדֶה שָׁחַפַּר בָּהּ בּוֹרוֹת שִׁיחִין וּמְעָרוֹת** – **And** with regard to the case of the **field,** the Mishnah speaks of **where** after the sale was transacted **[the seller] dug pits, ditches or caverns in [the small field]** – the one he admits selling. Since neither the mutilated slave nor the damaged field stands ready to be taken by the buyer, inasmuch as it no longer resembles that which the seller admits that he sold, neither case involves a *heilach* situation.[19] Hence, the Mishnah properly obligates the seller to take an oath of partial admission.

Rav Sheishess' interpretation is based in part on the premise that our Mishnah accords with R' Meir, who held that a slave is like movable property (with respect to the law of oaths). The Gemara now challenges that premise:

וְהָא רַבִּי מֵאִיר אִיפְּכָא שְׁמִעִינַן לֵיהּ – But R' Meir has espoused the reverse opinion, that a slave is like real property (and therefore one would not swear regarding slaves)! **דְּתָנַן – For we learned in a Mishnah:**[20] **גָּזַל בְּהֵמָה וְהִזְקִינָה** – **If ONE STOLE AN ANIMAL AND IT AGED** while in the robber's possession, thereby depreciating in value, **עֲבָדִים וְהִזְקִינוּ** – or he stole **SLAVES AND THEY AGED** while in his possession, **מְשַׁלֵּם כְּשָׁעַת הַגְּזֵילָה** – **[THE ROBBER] PAYS AS OF THE TIME OF THE ROBBERY.**[21] **רַבִּי מֵאִיר אוֹמֵר** – However, **R' MEIR SAYS: בַּעֲבָדִים אוֹמֵר לוֹ הֲרֵי שֶׁלְּךָ לְפָנֶיךָ** – In the case of **SLAVES [THE ROBBER] MAY SAY TO [THE VICTIM]: "HERE IS YOUR** property **BEFORE YOU."**[22] From here we see that R' Meir classifies slaves as real property.[23] – ? –

The Gemara deflects this challenge:

הָא לֹא קַשְׁיָא – This is not difficult; rather, **it is as Rabbah bar Avuha interchanges** the two opposing opinions in that Mishnah **and teaches** the text as follows: **רַבִּי מֵאִיר אוֹמֵר** – **R' MEIR SAYS: מְשַׁלֵּם כְּשָׁעַת הַגְּזֵילָה** – **[THE ROBBER] PAYS AS OF THE TIME OF THE ROBBERY** – i.e. even in the case of slaves.[24] **וַחֲכָמִים אוֹמְרִים** – **BUT THE SAGES SAY: אוֹמֵר לוֹ בַּעֲבָדִים הֲרֵי שֶׁלְּךָ לְפָנֶיךָ** – **[THE ROBBER] MAY SAY TO [THE VICTIM] IN** the case of **SLAVES: "HERE IS YOUR** property **BEFORE YOU."** According to this version, which our Mishnah follows, R' Meir does classify slaves as movable property. Hence, Rav Sheishess' interpretation is indeed based on a sound premise.

The Gemara now assumes that Rav Sheishess would also hold that R' Meir is of the opinion that oaths are taken with regard to land, since the Mishnah rules that the seller swears in the case of the contested field. The Gemara now challenges this presumption:

אֶלָּא מִמַּאי דְּסָבַר רַבִּי מֵאִיר מַקְשִׁינַן קַרְקַע לְעֶבֶד – **But from what** evidence do we presume **that R' Meir holds** that we compare **land to a slave** in the following respect: **מָה עֶבֶד נִשְׁבָּעִין אַף קַרְקַע נִשְׁבָּעִין – Just as we swear** in litigation involving **a slave,** so, too, **we swear** in litigation involving **land? דִּלְמָא עֶבֶד הוּא דִּנְשְׁבָּעִין – Perhaps it is regarding a slave that we swear,** since according to R' Meir slaves are classified as movable property (which certainly can be the subject of an oath); **אֲבָל אַקַּרְקַע לֹא – however, regarding land,** we do **not** swear.[25] – ? –

The Gemara rejects this argument:

לָא סָלְקָא דַּעְתָּךְ – It should not enter your mind that R' Meir

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an oath taken on land (see *Rashi*; cf. *Tosafos*).

[The Gemara below will also question this entire assumption, and suggest that R' Meir holds that oaths are taken even with regard to land.]

14. Although, by attributing the Mishnah's ruling to R' Meir, Rav Sheishess has answered the Gemara's third objection to it (viz. "we do not swear with regard to slaves"; see above, 100a), Rav Sheishess has ostensibly done nothing to eliminate the other two objections. The Gemara now proceeds to raise them.

15. The seller completely denies owing the slave (or field) that the buyer claims (i.e. the large one) and admits to owing an altogether different slave (i.e. the small one). Hence, he does not even partially admit to the buyer's own claim, and thus should be exempt from taking an oath of partial admission (see above, 100a note 33).

16. *Shevuos* 38b; see above, 5a.

17. The Tanna Kamma requires that the partial admission relate to the type of property actually claimed. If it does not, there is no obligation to swear (*Rashi;* see above, 5a note 16).

18. See above, 100a note 35; and see Gemara above, 4a, for a discussion of the laws of *heilach*.

19. The seller's admission is now, at least in part, an admission that he owes money – which is not a case of *heilach* (see *Meiri*).

20. *Bava Kamma* 96b.

21. Aging is an irreversible change for the worse. Hence, the robber cannot return the animal or slave to the victim, since it is not the same entity that was stolen (*Meiri* there). He must therefore compensate the victim by paying him the value of the property at the time of the robbery (see *Bava Kamma* 93b).

22. The Gemara (*Bava Kamma* 95a) rules that real property cannot be stolen, and thus always remains in its owner's legal possession. R' Meir regards slaves as real property, and so according to him the robber does not acquire the slaves and does not become liable to compensate the owner with money. Rather, the slaves age – and thus deteriorate – in the *owner's* legal possession, and the thief need only return the slaves themselves (*Rashi*).

23. And if R' Meir classifies slaves as real property, we would assume that they may not be the subject of an oath (see note 13 above). [See also *Tosafos* ד"ה רבי מאיר and *Maharam* for a different explanation of the Gemara's question.]

24. In this version R' Meir indeed regards slaves as movable property, and so the robber acquires them and becomes liable to compensate the owner with money.

25. See *Tosafos* ד"ה דלמא, who explain the basis for the Gemara's question.

distinguishes between slaves and land with regard to swearing!

דְּתַנְיָא – For it has been taught in a Baraisa:[26] **הַמַּחֲלִיף פָּרָה בַּחֲמוֹר וְיָלְדָה – If ONE EXCHANGES A COW FOR A DONKEY AND [THE COW] CALVES, וְכֵן הַמּוֹכֵר שִׁפְחָתוֹ וְיָלְדָה – AND, SIMILARLY, if ONE SELLS HIS Canaanite SLAVEWOMAN AND SHE GIVES BIRTH, זֶה אוֹמֵר בִּרְשׁוּתִי וְזֶה שׁוֹתֵק – and THIS ONE SAYS, "She gave birth IN MY DOMAIN, and so the offspring is mine," AND THAT other ONE IS SILENT because he does not know, זֶה וָזֶה – [THE CLAIMANT WHO IS CERTAIN] IS ENTITLED to the offspring.**[27]** זֶה אוֹמֵר אֵינִי יוֹדֵעַ – If in the same case THIS ONE SAYS, "I DO NOT KNOW whether she gave birth in my domain," וְזֶה אוֹמֵר אֵינִי יוֹדֵעַ – AND THAT other ONE also SAYS, "I DO NOT KNOW," יַחֲלוֹקוּ – THEY DIVIDE the value of the offspring.**[28]** זֶה אוֹמֵר בִּרְשׁוּתִי – Finally, if THIS ONE SAYS, "She gave birth IN MY DOMAIN," וְזֶה אוֹמֵר בִּרְשׁוּתִי – AND THAT other ONE also SAYS, "She gave birth IN MY DOMAIN," יִשָּׁבַע הַמּוֹכֵר שֶׁבִּרְשׁוּתוֹ יָלְדָה – THE SELLER SHALL SWEAR THAT [THE MOTHER] GAVE BIRTH while still IN HIS DOMAIN, and the offspring is his.**[29]** לְפִי שֶׁכָּל הַנִּשְׁבָּעִין שָׁבַתּוֹרָה – The reason the seller must swear is BECAUSE ALL THOSE REQUIRED BY THE TORAH TO SWEAR נִשְׁבָּעִין וְלֹא מְשַׁלְּמִין – SWEAR AND DO NOT PAY.**[30]** דִּבְרֵי רַבִּי מֵאִיר – These are THE WORDS OF R' MEIR.**[31]** וַחֲכָמִים אוֹמְרִים – BUT THE SAGES SAY: אֵין נִשְׁבָּעִין לֹא עַל הָעֲבָדִים וְלֹא עַל הַקַּרְקָעוֹת – WE DO NOT SWEAR WITH REGARD TO SLAVES OR WITH REGARD TO REAL PROPERTIES.**[32]**

The Gemara now articulates its proof from the Baraisa:

לְאוֹ מִכְּלָל דְּרַבִּי מֵאִיר סָבַר נִשְׁבָּעִין – From the fact that the Sages responded to R' Meir, "We do not swear... with regard to real properties," is it not implied that R' Meir holds that we do swear with regard to real property?**[33]**

The Gemara rejects this proof:

מַאי – From what evidence do you draw such a conclusion? **דִּלְמָא כְּשֵׁם שֶׁאָמְרוּ לֵיהּ – Perhaps [the Sages] made a "just as" response to [R' Meir],** as follows: **כְּיוָן דְּאוֹדִית לָן בְּקַרְקָעוֹת – Just as you concede to us regarding real properties** (i.e. that they cannot be the subject of an oath), **אוֹדֵי לָן נָמֵי בַּעֲבָדִים – concede to us also regarding slaves** – that they, too, cannot be the subject of an oath. According to this interpretation of the Sages' response, the Baraisa does not indicate that R' Meir holds that we swear with regard to real property; on the contrary, it suggests the reverse. Hence, the Baraisa offers no definitive proof of R' Meir's position.

The Gemara now proceeds to refute Rav Sheishess' interpretation of the Mishnah by demonstrating that, indeed, in R' Meir's view we do *not* swear regarding real property:

תֵּדַע – You should know that R' Meir holds that oaths are not taken in litigation involving real property, **דִּתְנַן – for we learned in a Mishnah:**[34] **רַבִּי מֵאִיר אוֹמֵר – R' MEIR SAYS: דְּבָרִים שֶׁהֵן כַּקַּרְקַע וְאֵינָן כְּקַרְקַע – SOME THINGS ARE LIKE LAND** (i.e. they are attached to the ground) **BUT ARE NOT** treated **AS LAND** with respect to the law of oaths.**[35]** **וְאֵין חֲכָמִים מוֹדִים לוֹ – BUT THE SAGES DO NOT AGREE WITH HIM. כֵּיצַד – HOW** is this so? **גְּפָנִים טְעוּנוֹת מְסַרְתִּי לָךְ – If** one party claims, **"I ENTRUSTED TEN** grape-**LADEN VINES TO YOU,"**[36] **וְהִלָּה אוֹמֵר אֵינָן אֶלָּא חָמֵשׁ – AND THE OTHER [PARTY] SAYS, "THERE WERE ONLY FIVE," רַבִּי מֵאִיר מְחַיֵּיב – R' MEIR OBLIGATES** the defendant to take an oath of partial admission to support his claim, **וַחֲכָמִים אוֹמְרִים – BUT THE SAGES SAY: כָּל הַמְחוּבָּר לַקַּרְקַע הֲרֵי הוּא כְּקַרְקַע – ANYTHING ATTACHED TO LAND IS** treated **AS LAND,** and so the defendant is exempt from swearing.

The Gemara clarifies the dispute:

וְאָמַר רַבִּי יוֹסֵי בַּר חֲנִינָא – And R' Yose bar Chanina said: עִנְבִים הָעוֹמְדוֹת לִיבָּצֵר אֵיפְכָּא בֵּינַיְיהוּ – At issue between [R' Meir and the Sages] is whether **grapes that are ready to be harvested**[37] are classified as land or as movable property. **דְּמַר סָבַר בְּכִצּוּרוֹת דְּמָיְין – For** one **master** (i.e. R' Meir) **holds** that **[such grapes] are** regarded **as** already **harvested** and are therefore classified as movable property; hence, R' Meir requires the defendant to swear vis-a-vis the grapes. **וּמַר סָבַר לָאו בְּכִצּוּרוֹת דְּמָיְין – And** the other **master** (i.e. the Sages) **holds** that **[such grapes]** are not regarded **as** already **harvested;** hence, since they classify even the grapes as land, the Sages excuse the defendant from swearing. R' Yose bar Chanina thus teaches that R' Meir sanctions an oath only because he classifies ready-for-harvest fruit as movable property; from this we can derive that with regard to unripe fruit, and certainly land itself, R' Meir admits that a defendant is exempt from swearing. Hence, Rav Sheishess' interpretation, which would have required stating that in R' Meir's view oaths are taken also regarding land, is conclusively refuted. – ? –

The Gemara revives R' Hoshaya's interpretation by resolving the difficulty previously posed against it:

אֶלָּא לְעוֹלָם כְּדַרְבִּי הוֹשַׁעְיָא – Rather, in truth the Mishnah is to be

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26. This Baraisa parallels our Mishnah, presenting all the various arguments between a plaintiff and a defendant but inserting them all in the case of one who exchanges a cow for a donkey (the very first case of our Mishnah).

27. As in our Mishnah, the case is that the other party is required to swear and cannot do so, and so he must pay. Alternatively, perhaps this Tanna maintains that the "certain" claim is superior (see *Ritva* et al.).

28. The Gemara will explain this ruling as it did the parallel ruling in the Mishnah – that it accords with Sumchos.

29. The Gemara below will describe the case here, too, as one of partial admission.

30. With regard to all three Biblical oaths (see above, 100a note 37) it is the defendant who is charged with swearing, so as to exempt himself from paying. The Torah does not require a plaintiff to swear as a prerequisite for collecting. This rule, stated in the Mishnah (*Shevuos* 44b), is derived by the Gemara (ibid. 45a) from Exodus 22:10, which states: *The oath of* HASHEM *shall be between the two of them, that he did not extend his hand into his fellow's property; and the owner shall accept [it], and he shall not pay.* Scripture indicates that it is the one sued for payment that must swear – in order to exempt himself (see *Rashi*).

Although the aforementioned verse specifically concerns the custodians' oath, the Gemara extends its teaching to the other two Biblical oaths.

31. R' Meir maintains that the seller must swear in order to exempt himself from paying (i.e. surrendering to the buyer) both the calf and the slave child.

32. According to the Sages, the seller swears to exempt himself only in the case of the calf, which is movable property. With regard to the slave child, however, they would rule that no oath is taken.

33. Since neither case of the Baraisa involved real property, the Sages' mention of it is comprehensible only if their intention was to dispute what they knew to be R' Meir's position on the matter.

34. *Shevuos* 42b.

35. See *Tosafos* and *Ritva*, who argue whether the refutation of Rav Sheishess' interpretation can be derived from this statement in the Mishnah (which seemingly implies that in R' Meir's view oaths are not taken in litigation involving land), or whether the refutation can be drawn only from R' Yose bar Chanina's clarification, cited below.

36. The plaintiff now demands payment for the grapes, claiming either that the custodian ruined them through negligence or that he actually picked the grapes himself (*Yad Ramah* to *Sanhedrin* 15a).

37. I.e. that are *nearly* ready to be harvested, for if they were no longer receiving nourishment from the ground the grapes would certainly be regarded as detached, and thus classified as movable property (*Ritva*). Cf. *Tosafos* ד"ה ואמר

understood **according to** the interpretation **of R' Hoshaya,**[38] וּדְקַשְׁיָא לָךְ זוּקְקִין – **and** as for that **which was difficult for you** to fathom – i.e. why does the Tanna come to teach us once again the law of "**subjection**"?[39] – אִיצְטְרִיךְ – **it was necessary** to state that law in our case as well, and so his teaching is not superfluous. סָלְקָא דַּעְתָּךְ אַמֵינָא – For **it would have occurred to you** that **I might say** כְּסוּת עֶבֶד כְּעֶבֶד דָּמֵי – that **a slave's garment is like the slave** himself, עוֹמְרֵי שָׂדֶה כְּשָׂדֶה דָּמֵי – and that **a field's sheaves are like the field** itself,[40] and so it would be impossible to devolve an oath regarding the slave or the field. קָא מַשְׁמַע לָן – **[The Tanna]** thus **teaches us** to regard a slave and his garment, or the field and its sheaves, as separate sale items, thereby allowing for the devolvement of an oath vis-a-vis the slave or field itself. With this resolution of the difficulty, the Gemara adopts R' Hoshaya's interpretation of the Mishnah, and concludes its discussion thereof.[41]

The Gemara revisits a Baraisa that it quoted in its discussion of Rav Sheishess' interpretation. The Baraisa had stated in part: זֶה אוֹמֵר אֵינִי יוֹדֵעַ – If one sells his Canaanite slavewoman and she gives birth. . . and THIS ONE SAYS, "I DO NOT KNOW whether she gave birth in my domain," וְזֶה אוֹמֵר אֵינִי יוֹדֵעַ – AND THAT other ONE also SAYS, "I DO NOT KNOW," יַחֲלוֹקוּ – THEY DIVIDE the value of the offspring.

The Gemara asks:

הָא מַנִּי – **Whose ruling is this,** that the value of the disputed offspring is divided? סוּמְכוֹס הִיא דְּאָמַר – **It is** the ruling of the Tanna **Sumchos, who said:** מָמוֹן הַמּוּטָל בְּסָפֵק חוֹלְקִין – **Property whose disposition lies in doubt is divided** by the litigants. אֵימָא סֵיפָא – If that is so, **say the last case** of the Baraisa, to wit: וְזֶה אוֹמֵר בִּרְשׁוּתִי – If in the same case THIS ONE SAYS with certainty, "The mother gave birth IN MY DOMAIN, and so the child is mine," וְזֶה אוֹמֵר בִּרְשׁוּתִי – AND THAT other ONE also SAYS with certainty, "She gave birth IN MY DOMAIN, and so the child is mine," יִשָּׁבַע הַמּוֹכֵר שֶׁבִּרְשׁוּתוֹ יָלְדָה – THE SELLER SHALL SWEAR THAT [THE MOTHER] GAVE BIRTH while still IN HIS DOMAIN, and the offspring is his. וּלְרַבָּה בַּר רַב הוּנָא דְּאָמַר – **But according to Rabbah bar Rav Huna, who said,** אִין אָמַר סוּמְכוֹס אֲפִילוּ בָּרִי וּבָרִי – "**Yes, Sumchos said** his ruling **even** in a case of "**certainly**" **and** "**certainly**" (i.e. where each litigant is certain about his claim, which is the case here in the Baraisa), אַמַּאי יִשָּׁבַע מוֹכֵר – **why should** the **seller** be required to **swear?** If the Baraisa reflects Sumchos' opinion, **it should have** ruled: יַחֲלוֹקוּ מִיבַּעְיָא – "**They divide** the value of the contested offspring."[42] – ? –

The Gemara responds:

מוֹדֶה סוּמְכוֹס הֵיכָא דְּאִיכָּא שְׁבוּעָה דְּאוֹרַיְיתָא – **Sumchos concedes** that **where there is a Biblical oath** that one litigant must swear,[43] the contested property is not divided.[44] וּדְקַטְעָהּ לְיָדָהּ כִּדְרָבָא – **And,** further, this is not a *heilach* situation, for the Baraisa speaks of **where** after the sale was transacted **[the seller] cut off [the slavewoman's] hand, in accordance** with the explanation **of Rava,** cited by the Gemara above.[45]

Mishnah הַמּוֹכֵר זֵיתָיו לְעֵצִים – If **one sells his olive trees for** their **wood**[46] but the purchaser did not chop them down immediately, וְעָשׂוּ פָּחוֹת מֵרְבִיעִית לִסְאָה – **and [the trees]** subsequently **produced less than a quarter-*log* per *se'ah*,**[47] הֲרֵי אֵלּוּ שֶׁל בַּעַל הַזֵּיתִים – **these** olives **belong to the owner of the olive trees.**[48] עָשׂוּ רְבִיעִית לִסְאָה – If, however, **[the trees] produced** olives that yielded **a quarter-*log*** or more **per *se'ah*,** זֶה אוֹמֵר זֵיתַי גִּדְּלוּ – and **this one** (i.e. the purchaser) **claims, "My olive trees produced** the crop, and so it is mine," וְזֶה אוֹמֵר אַרְצִי גִּדְּלָה – **while that one** (i.e. the seller) **claims, "My land produced** the crop, and so it is mine,"[49] יַחֲלוֹקוּ – **they divide** the olive crop, since, in fact, both the purchaser's trees and the seller's land were instrumental in producing it.[50]

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38. According to R' Hoshaya, the Mishnah teaches a case where the buyer claims from the seller a large slave with his garment, while the seller admits to selling a small slave with his garment, and also the case where the buyer claims a large field with its sheaves, while the seller admits to a small field with its sheaves (see note 4 above).

39. See note 11 above.

40. It is possible to conceive of a slave and his garment [which he must wear] or a field and its sheaves [which it inevitably produces] as one entity. Accordingly, there would be no oath regarding the movable property (the garment or the sheaves), since its identity would be subsumed into that of the dominant slave or field. Hence, the possibility of devolving an oath regarding the latter would be eliminated (see *Rashi*).

41. **In summary:** According to **R' Hoshaya,** the Mishnah discusses the sale of *a slave and his garment*, and the sale of *a field with its sheaves*. Since in the first case the garment was formed by several pieces of cloth sewn together, the seller does admit to part of the buyer's claim, and so an oath of partial admission is appropriate [and a *heilach* situation does not exist]. Further, since the seller must swear as to the garment, we can devolve upon him an oath regarding the slave. According to **Rav,** the dispute in the Mishnah concerns *money* paid for a slave or a field. According to **Shmuel,** it concerns only a slave's *garment* or a field's *sheaves*.

42. See above, 100a notes 27 and 28.

43. Such as here, where the buyer claims that he bought the slavewoman and her child as one entity, and the seller admits to owing only the slavewoman. Since the seller admits to part of the buyer's own claim, he must take an oath of partial admission (*Rashi,* as understood by *Rashash*).

44. Regarding why Sumchos' ruling is not invoked in such a case, see above, 100a note 30.

45. [Since the mutilated slavewoman does not stand ready to be taken by the buyer, inasmuch as she no longer resembles that which the seller admits to selling, the seller's admission is an admission that he owes money, which is not *heilach*.] Hence, since this is not a *heilach* situation, and – further – since the Tanna of the Baraisa adopts the position of R' Meir (who holds that Biblical oaths *are* imposed when the ownership of slaves is at issue), the Baraisa properly obligates the seller to take an oath of partial admission (*Rashi*).

46. [The trees produced little] and so the owner sold them for use as firewood (*Rashi*). Although the Torah prohibits one to cut down a fruit tree (*Deuteronomy* 20:19), that stricture does not apply when the tree's yield is so deficient that its wood is worth more than its fruit (*Bava Kamma* 92a).

47. That is, the trees produced olives that were so inferior that a *se'ah* of them yielded not even a quarter-*log* (*revi'is*) of oil (*Rashi*). Alternatively, the olives growing in a field suitable for planting a *se'ah* of barley (an area measuring 50 x 50 *amos*) produced not even a quarter-*kav* of oil (see *Rabbeinu Chananel, Rabbeinu Yehonasan, Meiri*). [The contemporary equivalencies of these measures is a matter of dispute. According to the various opinions, a quarter-*log* ranges from 3 to 5.3 ounces; a *kav* from about 1.5 to 2.65 quarts.]

48. The reason the olives could possibly belong to the landowner in such a case is because when he sold the trees for wood, he presumably did so with the intention that any fruit would accrue to him (see note 53 below). The Gemara will explain under what circumstances, and why, the olives in this case belong to the purchaser of the trees.

49. The seller argues that since the nourishment needed for the growth of the olives was provided by his land, he is entitled to the crop.

50. This ruling accords with all opinions. It bears no relationship with Sumchos' opinion, for there is no uncertainty in this case. Rather, each

שָׁטַף נָהָר וַיִּתְּיוֹ – If **a river carried off one's olive trees** **וּנְתָנָם לְתוֹךְ שְׂדֵה חֲבֵירוֹ** – **and deposited them in the midst of his neighbor's field** (and the neighbor allowed them to remain there),[51] **זֶה אוֹמֵר זֵיתַי גִּדְּלוּ** – and **this one claims, "My olive trees produced** the crop, and so it is mine," **וְזֶה אוֹמֵר אַרְצִי גִּדְּלָה** – **while that one** (i.e. the neighbor) **claims, "My land produced** the crop, and so it is mine," **יַחֲלוֹקוּ** – **they divide** the olive crop, since both the trees and the land were instrumental in producing it.[52]

Gemara The Gemara analyzes the first case of the Mishnah, wherein the Tanna distinguished between a crop that produces less than a quarter-*log* of oil per *se'ah* and one that produces a quarter-*log* or more: **הֵיכִי דָּמֵי** – **What,** exactly, **is the case?** **אִי דְּאָמַר לֵיהּ קוֹץ לְאַלְתַּר** – **If** the Mishnah speaks of **where [the seller]** of the trees **had** originally **said to [the purchaser], "Chop** them **down immediately,"** **אֲפִילּוּ פָּחוֹת מֵרְבִיעִית נָמֵי לְבַעַל הַקַּרְקַע** – then **even** if the trees subsequently produced olives that yielded **less than a quarter-*log*** of oil per *se'ah*, the olives should belong **to the owner of the land** (i.e. the seller).[53] Why, then, does the Tanna rule that they belong to the purchaser? **אִי דְּאָמַר לֵיהּ כָּל אֵימַת דְּבָעֵית קוֹץ** – And **if [the seller] had** originally **said to [the purchaser], "Chop** them **down whenever you like,"** **אֲפִילּוּ רְבִיעִית נָמֵי לְבַעַל זֵיתִים** – then **even** if the trees subsequently produced olives that yielded **a quarter-*log*** or more of oil per *se'ah*, the olives should belong **to the owner of the olive [trees]** (i.e. the purchaser).[54] Why, then, does the Tanna rule that in such a case the olives are divided?

The Gemara clarifies the circumstances of the Mishnah's first case:

לֹא צְרִיכָא – The Mishnah's ruling **is not needed** except in a case **דְּאָמַר לֵיהּ סְתָמָא** – **where [the seller] spoke to [the purchaser][55] without specifying** when he wished the trees removed, **פָּחוֹת מֵרְבִיעִית לָא קָפְדֵי אִינָשֵׁי** – and the Tanna is teaching us that **people are not particular** about receiving their share of olives that yield **less than a quarter-*log*** of oil per *se'ah*,[56] **רְבִיעִית קָפְדֵי אִינָשֵׁי** – but **people are particular** about receiving their share of olives that do yield **a quarter-*log*** of oil per *se'ah*. Hence, the Tanna awards the first type of olives to the new owner of the trees, and rules that the second type must be divided.

The Gemara appends a clarification to the above discussion: **אָמַר רַבִּי שִׁמְעוֹן בֶּן פָּזִי** – **R' Shimon ben Pazi**[57] **said:** **וּרְבִיעִית שֶׁאָמְרוּ** – **And the "quarter-*log*"** reckoning **that they mentioned** in the Mishnah

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party argues why the crop should belong to him, and the ruling (to divide) positively states that the crop belongs to both of them (*Ritva* [old]).

51. This is not a continuation of the previous case. Rather, the Mishnah speaks of where a person owned good quality olive trees, and a river overflowed its banks, inundating the man's field and carrying off his trees. The river eventually deposited the trees in a neighbor's field, where they produced olives. The Gemara will explain the circumstances of the case in greater detail.

52. In this case the landowner insists on his rights even when the trees produced less than a quarter-*log* per *se'ah*, since he did not sell anything to the trees' owner that could be construed as a relinquishment of his rights (*Ritva*).

53. [Since the seller is strict about the removal of the trees, he obviously wishes to utilize and profit from his land. Thus, inasmuch as the trees do derive nourishment from his land] the seller is entitled to all the olives (see *Rambam, Hil. Shecheinim* 4:11; cf. *Rashba*, cited by *Maggid Mishneh* ibid., who rules that even in such a case the seller and purchaser evenly divide the entire crop).

54. Since, in essence, the seller ceded to the purchaser the right to use his field.

55. I.e. he told the purchaser that he was selling him the trees for their wood.

56. Since such olives are so inferior, the seller waives his right to take his fair share of the crop.

57. The words "R' Shimon ben Lakish" appears in the texts of *Rif* and *Rosh* (*Mesoras HaShas*).

חוּץ מִן הַהוֹצָאָה – is exclusive of the expense of picking and pressing the olives.[1]

The Mishnah had stated: שָׁטַף נָהָר זֵיתָיו – IF A RIVER CARRIED OFF ONE'S OLIVE TREES and deposited them in the midst of his neighbor's field . . . they divide the olive crop.

The Gemara clarifies this ruling: אָמַר עוּלָּא אָמַר רֵישׁ לָקִישׁ – **Ulla said in the name of Reish Lakish:** לֹא שָׁנוּ אֶלָּא שֶׁנֶּעֶקְרוּ בְּגוּשֵׁיהֶן – **They did not teach** that the litigants must divide the olives **only when [the trees] were uprooted with their clods of earth,**[2] וּלְאַחַר שָׁלֹשׁ – **and** only **after three** years had lapsed from the time of their deposit in the neighbor's field.[3] אֲבָל בְּתוֹךְ שָׁלֹשׁ הַכֹּל שֶׁל בַּעַל הַזֵּיתִים – **However, within** the first **three** years of their deposit **all the** fruit **belongs to the owner of the olive trees,** דְּאָמַר לֵיהּ – **for he can say to [the neighbor],** אִי אַתְּ נָטַעַתְּ בְּתוֹךְ שָׁלֹשׁ מִי הֲוָה אָכְלַתְּ – **"If you had planted** new trees immediately after the flood, **would you have** been permitted to **eat** their fruit **within** the first **three years?"**[4]

The Gemara rejects this reasoning: וְלֵימָא לֵיהּ – **But let [the neighbor] say to [the owner]** in rebuttal: אִי אֲנָא נְטַעִי – **"If I had planted** new trees immediately after the flood, לְאַחַר שָׁלֹשׁ הֲוָה אָכֵילְנָא לֵיהּ כּוּלֵּיהּ – **after three years I would be eating the entire [crop],** since the *orlah* prohibition would have lapsed. הַשְׁתָּא קָאָכְלַתְּ פַּלְגָא בַּהֲדַאי – Now, however, **you will eat half** of all future crops **with me."**[5]

The Gemara offers a different interpretation of the Mishnah: אֶלָּא כִּי אֲתָא רָבִין אָמַר רֵישׁ לָקִישׁ – **Rather, when Ravin came to** Babylonia from Eretz Yisrael he reported **in the name of Reish Lakish:** לֹא שָׁנוּ אֶלָּא שֶׁנֶּעֶקְרוּ בְּגוּשֵׁיהֶן – **They did not teach** that the litigants must divide the olives **except when [the trees]** were **uprooted with their clods of earth,** וּבְתוֹךְ שָׁלֹשׁ – **and** only **within** the first **three** years of their deposit in the neighbor's field.[6] אֲבָל לְאַחַר שָׁלֹשׁ הַכֹּל לְבַעַל הַקַּרְקַע – **However, after** the initial **three**-year period **all** the fruit **belongs to the owner of the land,** דְּאָמַר לֵיהּ – **for he can say to [the owner of the trees]:** אִי אֲנָא נְטַעִי – **"If I had planted** new trees immediately after the flood,[7] לְאַחַר שָׁלֹשׁ מִי לֹא הֲוָה אָכֵילְנָא לֵיהּ כּוּלֵּיהּ – **would I not be eating the entire [crop] after three** years, since the *orlah* prohibition would have lapsed? Having allowed the olive trees to remain instead, I am therefore entitled to their entire crop."[8]

The Gemara rejects this reasoning: וְלֵימָא לֵיהּ – **But let [the owner]** of the trees **say to [the neighbor]** in rebuttal: אִי אַתְּ נָטַעַתְּ – **"If you had planted** new trees immediately after the flood, בְּתוֹךְ שָׁלֹשׁ לֹא הֲוָה אָכְלַתְּ – **within** the first **three** years **you would not have eaten** any fruit, since the *orlah* prohibition would be in effect. הַשְׁתָּא קָא אָכְלַתְּ פַּלְגָא בַּהֲדַאי – **Now,** however, during the initial three-year period following the deposit of the trees – **you have eaten half** of the crops **with me,** and therefore I should be entitled to share in the future crops as well! – ? –

The Gemara refutes the rebuttal: מִשּׁוּם דְּאָמַר לֵיהּ – The trees' owner's argument is not compelling, **because [the neighbor] can say to him** in reply, אִי אֲנָא נְטַעִי – **"If I had planted** my own trees, הֲוָה קְטִינֵי – **they would be slender** saplings, which cast no shadows, וְזָרַעְנָא תְּחוֹתַיְיהוּ סִילְקָא וְיַרְקָא – **and I would have sown beneath them** seeds for **beets and greens.**[9] For that reason I am entitled to half the produce during the first three years."

The Gemara presents a related ruling: תָּנָא – **[A Tanna] taught** in a Baraisa: אָמַר הֲלָה זֵיתַיי אֲנִי נוֹטֵל – If THAT ONE[10] SAID to the neighbor, "I AM TAKING back MY OLIVE TREES," אֵין שׁוֹמְעִין לוֹ – WE PAY NO ATTENTION TO HIM (i.e. we do not allow him to retrieve his trees).[11]

The Gemara asks: מַאי טַעְמָא – **What is the reason** for the Baraisa's ruling?

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1. I.e. the value of the crop [i.e. to ascertain whether or not a quarter-*log* of oil has been obtained] is reckoned after deducting the cost of picking and pressing (*Rashi*).

2. I.e. with the clods of earth in which they were rooted, and which are large enough to sustain the trees if need be. Under these circumstances the trees maintain their legal status of "old trees," and are exempt from the prohibition of *orlah* (*Leviticus* 19:23), which prohibits the fruit of new trees for the first three years of a tree's growth (*Rashi*, citing Mishnah *Orlah* 1:3).

According to *Tosafos*, the Gemara mentions clods only because of their relevance to the law of *orlah* and to the disposition of the olives during the first three years following the flood, as the Gemara presently discusses. According to *Rambam* (*Hil. Shecheinim* 4:10), however, the clods are mentioned primarily because it is only their presence that allows the trees' owner to retain any rights in the trees; without the clods he would totally forfeit the fruit of the trees to his neighbor (see *Hagahos HaGra;* see also *Maggid Mishneh* and *Kessef Mishneh* there).

3. Had the neighbor planted new trees immediately following the flood, their fruit would be permitted to him after three years. Hence, as of that time, the clods cease providing the owner of the trees with any legal advantage, and so he must begin dividing the olives with the neighbor (*Rashi*). See *Rashba*, who explains the neighbor's claim in such a case.

4. During the first three years after the flood it is only the owner's clods of earth that exempt the trees from the *orlah* prohibition (see note 2 above). Hence, all olives that grow during that period rightfully belong to him (*Rashi*). See *Ritva*, who explains why at this point the Gemara thought that the neighbor has *no* rights.

5. The neighbor can argue that immediately after the flood he could have purchased and planted inexpensive saplings, which in three years' time would grow and bear fruit comparable to that produced by the owner's olive trees. Since he chose instead to allow the olive trees to remain on his land, he was thereby ceding to the owner half of all future crops following the initial three-year period, and he obviously did so in order to secure for himself half of all that grew *during* the three-year period. Since this clearly was the neighbor's intent and since the owner nonetheless chose not to retrieve his trees, we can presume that the trees' owner indeed agreed to divide the produce of the first three years (*Tosafos*; see *Maharsha*). Hence, Ulla's interpretation of the Mishnah is refuted.

6. The presence of the clods wards off the *orlah* prohibition (see note 2 above) and allows both parties to partake of the olives.

7. I.e. after ordering the removal of the olive trees from his property.

8. Ravin maintains that after three years, when the crop would have been permitted regardless, it indeed belongs totally to the owner of the land. During the three years of prohibition, when both parties are contributing to the fruits' growth and attaining permissibility for consumption, it is logical to say that they split the produce (see *Nimukei Yosef*).

9. Since saplings do not block the sunlight, the neighbor could have planted new trees and still profited from his land during the three years of the *orlah* prohibition. Since instead he allowed the olive trees to remain on his property, he is *entitled* to half of their produce.

10. I.e. the owner of the olive trees that were carried away by the flood.

11. Rather, the trees must be left in the neighbor's field, even though the owner will lose his right to share their produce after three years. The neighbor must, of course, compensate the owner for the trees. Since they are fruit-bearing, it is insufficient to pay him their value as firewood; rather, compensation is reckoned at the value of the trees if sold for replanting (*Tosafos*).

The Gemara answers: אָמַר רַבִּי יוֹחָנָן – R' Yochanan said: מִשּׁוּם יִשּׁוּב אֶרֶץ יִשְׂרָאֵל – Because of the importance of settling the Land of Israel.[12]

The Gemara comments: אָמַר ר' יִרְמְיָה – R' Yirmiyah said: כְּגוֹן דָּא צְרִיכָא רַבָּה – In a case like this, there is a great need to explain the reason for the ruling.[13]

The Gemara discusses another (unrelated) ruling whose rationale it deems necessary to state:[14] תְּנַן הָתָם – We learned there[15] in a Mishnah: ר' יְהוּדָה אוֹמֵר – R' YEHUDAH SAYS: הַמְקַבֵּל שְׂדֵה אֲבוֹתָיו מִן הַנָּכְרִי – IF ONE LEASES[16] AN ANCESTRAL FIELD FROM A GENTILE, מְעַשֵּׂר וְנוֹתֵן לוֹ – HE MUST first TITHE all the field's produce AND then GIVE TO [THE GENTILE] his entire share.[17]

The Gemara proceeds to analyze R' Yehudah's ruling:

סְבָרוּהָ – When contemplating this ruling [the scholars] initially assumed: מַאי שְׂדֵה אֲבוֹתָיו – What is the meaning of AN ANCESTRAL FIELD? אֶרֶץ יִשְׂרָאֵל – A field located in the Land of Israel. וְאַמַּאי קָרוּ לָהּ שְׂדֵה אֲבוֹתָיו – And why did they call it "an ancestral field"? שְׂדֵה אַבְרָהָם יִצְחָק וְיַעֲקֹב – Because it is a field that was originally promised to Abraham, Isaac and Jacob, the forebears of the Jewish people. וְקָסָבַר – And the scholars also assumed that [R' Yehudah] held אֵין קִנְיָן לְנָכְרִי בְּאֶרֶץ יִשְׂרָאֵל – that a gentile does not have ownership in the Land of Israel לְהַפְקִיעַ מִיַּד מַעֲשֵׂר – to exempt its produce from the tithing obligations,[18] וּמְקַבֵּל כְּחוֹכֵר דָּמֵי – and that therefore a sharecropper is treated in this case like a tenant-farmer,[19] in the following respect: מָה חוֹכֵר – Just as a tenant-farmer, בֵּין עָבַד וּבֵין לֹא עָבַד – whether [the leased field] produces the fixed amount of fruit or whether it does not produce that amount, is obligated to pay the owner, בָּעֵי עַשּׂוּרֵי וּמֵיתַן לֵיהּ – and is therefore required to tithe the entire crop and then give to [the owner] his due, דְּכִי פּוֹרֵעַ חוֹבָתוֹ דָּמֵי – for he is like one who pays his debt,[20] אַף מְקַבֵּל נַמִי כִּי פּוֹרֵעַ חוֹבָתוֹ דָּמֵי – so, too, a sharecropper is to be considered like one who is paying his debt;[21] מְעַשֵּׂר וְנוֹתֵן לוֹ – therefore, he must tithe the entire crop and then give to [the owner] his portion.

The scholars' interpretation of R' Yehudah's ruling was based in part on the assumption that he held that non-Jewish ownership of land in Eretz Yisrael does not nullify its sanctity, so that its produce *is* Biblically subject to all the tithing requirements. The Gemara now challenges that assumption:

אָמַר לֵיהּ רַב כַּהֲנָא לְרַב פַּפִּי – Rav Kahana said to Rav Pappi, וְאָמְרֵי לָהּ לְרַב זְבִיד – and some say that [Rav Kahana's question] was posed to Rav Zevid: אֶלָּא הָא דְּתַנְיָא – But regarding that which was taught in a Baraisa – רַבִּי יְהוּדָה אוֹמֵר – R' YEHUDAH SAYS: הַמְקַבֵּל שְׂדֵה אֲבוֹתָיו מִמְּצִיק נָכְרִי – IF ONE LEASES[22] AN ANCESTRAL FIELD FROM A FOREIGN OPPRESSOR,[23] מְעַשֵּׂר וְנוֹתֵן לוֹ – HE MUST first TITHE all the field's produce AND then GIVE TO [THE OPPRESSOR] his entire share – מַאי אִירְיָא מֵצִיק – why does R' Yehudah mention specifically an oppressor? אֲפִילּוּ אֵין מֵצִיק נַמִי – Even if the gentile landlord is not an oppressor, but is a rightful purchaser of the field, the sharecropper should also be required to tithe the entire crop – if indeed R' Yehudah maintains that non-Jewish ownership does not nullify the sanctity of the land![24] – ? –

The Gemara thus reinterprets R' Yehudah's ruling in the Mishnah:

אֶלָּא לְעוֹלָם – Rather, in truth, R' Yehudah's ruling in the

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12. The Baraisa's ruling applies only if the transplanted trees had already taken root in the neighbor's land. The Sages feared that even if the owner would replant them in his own field, the neighbor's field, from which the trees were taken, would remain barren and uncultivated (*Nimukei Yosef*).

13. Had R' Yochanan not explained it, we would not have derived it logically (*Rashi*). Rather, we would have thought that the owner is prohibited from removing his trees because the neighbor would afterward have little use for his field, since its nurturing of the trees had weakened its condition (see *Rashi* below, 101b ד"ה משום כחשא דארעא). Consequently, we would have applied the prohibition even outside of Eretz Yisrael (*Nimukei Yosef*; *Ritva*).

14. See *Rashi* below ד"ה א"ר ירמיה וכו'.

15. *Demai* 6:2.

16. Literally: receives. This Mishnah and the discussion to follow concern the subject of tenant-farming, of which there are basically two categories: (1) קַבְּלָנוּת, *kablanus,* sharecropping – a type of lease under which the sharecropper (קַבְּלָן, *kablan,* or מְקַבֵּל, *mekabel*) must give the owner of the field a fixed percentage of the crop (e.g. a half, a third or a fourth); and (2) חֲכִירוּת, *chachirus,* tenant-farming – a type of lease under which the tenant-farmer (חוֹכֵר, *chocheir*) pays a fixed fee (usually in produce) to the owner [if he pays the fixed fee in money, he is called a שׂוֹכֵר, *socheir*; see Introduction to Chapter 9 for elaboration]. R' Yehudah speaks of the first type of farmer – a sharecropper (*mekabel*), who owns a percentage of the crop, with the rest owned by the owner of the field.

17. For example, if the entire field yielded 100 bushels and its various tithes amounted to 22 bushels, the Jew must give the gentile 50 bushels (in a case where the crop is evenly divided) and retains only 28 bushels for himself. Were he allowed to tithe only his own portion, the Jew would separate 11 bushels and be left with 39 – a difference of 11 bushels (see *Rashi*).

18. That is, from the fact that R' Yehudah required the sharecropper to tithe the entire crop, the scholars deduced that he held that a non-Jew's purchase of a field in Eretz Yisrael does not nullify its sanctity, for if it did, the field's produce would not be Biblically subject to tithing or similar obligations (e.g. *terumah* and *bikkurim*) [see *Rashi* to *Gittin* 47a ד"ה שאין קנין]. See also *Tosafos* ד"ה סברוה, and Rishonim.

19. I.e. he is treated not as one who owns only a fixed portion of the crop (a *mekabel,* sharecropper), but as one (a *chocheir,* tenant-farmer) who essentially owns the entire crop and has agreed to pay the owner a fixed amount of produce annually regardless of whether or not the land yields that amount (see *Rashi*).

20. Since the tenant-farmer essentially owns the entire crop (see previous note), he is obligated to tithe the entire crop. If he pays the owner before tithing, his payment will be Biblical *tevel* – produce from which *terumah* and *maaser* must be separated; and if he gives the owner, for example, 50 pre-tithed bushels, he is using *terumah* and *maaser* to pay his debt of 50 bushels (see *Tosafos, Ritva*).

21. By rights the sharecropper should not be required to tithe the owner's portion of the crop, since he is not paying a "debt," but is merely giving the owner what is *his.* However, in the Mishnah's case, since R' Yehudah maintains that the tithing obligation for the entire field is Biblical (inasmuch as he holds that the gentile's ownership of the field does not nullify its sanctity [see note 18 above]), he applies the Biblical ruling of a tenant-farmer (*chocheir*) to a sharecropper (who would not have to tithe, since he is giving the owner his portion) on a Rabbinic level. [Were even a tenant-farmer only Rabbinically obligated to tithe the owner's due, R' Yehudah would not require a sharecropper to do so (*Tosafos* ד"ה סברוה, *Ritva* et al.).]

22. I.e. he leases it as a sharecropper, to receive a fixed percentage of the crop.

23. In the Baraisa's case, the non-Jewish landlord came into possession of the field by illegally seizing it, not by purchasing it.

24. Rav Kahana's challenge is based on the principle that land cannot be stolen (*Sukkah* 30b, 31a; *Bava Kamma* 95a). Hence, an oppressor does not acquire legal title to real property. Rav Kahana therefore questioned why R' Yehudah specified that a non-Jewish oppressor, who does not own the field, cannot nullify its sanctity. According to the scholars' understanding of his position, R' Yehudah should have taught the more novel ruling that *every* gentile – i.e. even a rightful purchaser – cannot do so (*Ritva*).

Mishnah can be of the opinion that usually יֵשׁ קִנְיָן לְנָכְרִי בְּאֶרֶץ – **a gentile has ownership in the Land of Israel to exempt** its produce **from the tithing** obligations.[25] יִשְׂרָאֵל לְהַקְדִּישׁ מִיד מַעֲשֵׂר וּמְקַבֵּל לְאוֹ כְּחוֹכֵר דְּמֵי – **And** even if R' Yehudah were to hold that a gentile does not have ownership in Eretz Yisrael to exempt its produce from the tithing obligations, in which case a tenant-farmer is Biblically obligated to tithe the entire crop, still **an ordinary sharecropper is not** treated **like a tenant-farmer,** and therefore is not even Rabbinically required to tithe the entire crop.[26] וּמַאי שָׂדֶה אֲבוֹתָיו מַמָּשׁ – **And what,** then, **is** the meaning of ANCESTRAL FIELD? שָׂדֶה אֲבוֹתָיו מַמָּשׁ – It is **literally his ancestral field,** for the Mishnah speaks of where the non-Jew seized it unlawfully from the sharecropper's forefathers. וּלְדִידֵיהּ הוּא דְּקָנְסוּהּ רַבָּנַן – **And it is** only a sharecropper such as **he that the Rabbis penalized,** דְּאַיְידֵי דְּחָבִיבָא עֲלֵיהּ – **for** they were certain that **since [the field] was dear to him,** טָפֵי וְאָזֵיל מְקַבֵּל לָהּ – he would accept the **added** cost of tithing the owner's portion **and go lease it anyway.** אֲבָל אִינִישׁ דְּעַלְמָא לָא – **However,** the Rabbis did not penalize **an ordinary person,** for they realized that an added tithing cost would deter him from leasing the field.

The Gemara asks:

וּלְדִידֵיהּ מַאי טַעְמָא קְנָסוּהּ רַבָּנַן – **But for what reason did the Rabbis penalize [this one],** the sharecropper who leases his ancestral field? What sin did he commit that makes him deserving of a penalty?

The Gemara explains:

אָמַר רִ' יוֹחָנָן – **R' Yochanan said:** כְּדֵי שֶׁתְּהֵא בְּרָה בְּיָדוֹ – In truth, this sharecropper committed no sin, but the Rabbis imposed an extra tithing obligation upon him **so that [the field] will become firmly** possessed **in his hand.**[27]

The Gemara comments:

אָמַר רַבִּי יִרְמְיָה – **R' Yirmiyah said:** כְּגוֹן דָּא צְרִיכָא רַבָּה – In a case **like this,** there is **a great need** to explain the reason for the ruling.[28]

The Gemara discusses a different case of one person's trees in another's field:

אִיתְמַר – **It has been stated:** הַיּוֹרֵד לְתוֹךְ שְׂדֵה חֲבֵירוֹ וּנְטָעָהּ שֶׁלֹּא בִּרְשׁוּת – Regarding **one who went down into his fellow's field and planted** trees there **without** the landowner's **consent,** אָמַר רַב – **Rav said:** שָׁמִין לוֹ וְיָדוֹ עַל הַתַּחְתּוֹנָה – **They evaluate for him** his expenses and the value of his improvements, **and he has the lower hand.**[29] וּשְׁמוּאֵל אָמַר – **But Shmuel said:** אוֹמְדִין כַּמָּה אָדָם רוֹצֶה לִיתֵּן בְּשָׂדֶה זוּ לִנְטוֹעָהּ – **We estimate how much** money **a person would want to give for** someone **to plant** trees in **this field,**[30] and it is this amount that the planter is compensated. אָמַר רַב פָּפָּא – In reference to these two rulings **Rav Pappa said:** וְלֹא פְּלִיגִי – **And [Rav and Shmuel] are not arguing;** כָּאן בְּשָׂדֶה הָעֲשׂוּיָה לִיטַּע – rather, **here** Shmuel speaks **of a field that is ready for planting** trees,[31] כָּאן בְּשָׂדֶה שֶׁאֵינָהּ עֲשׂוּיָה לִיטַּע – and **here** Rav speaks **of a field that is not ready for planting** trees.[32]

The Gemara explains how Rav's opinion was ascertained:

וְהָא דְּרַב לָאו בְּפֵירוּשׁ אִיתְמַר – **And this** opinion **of Rav**[33] **was not stated explicitly;** אֶלָּא מִכְּלָלָא אִיתְמַר – **rather, it was stated implicitly** during a judicial proceeding Rav conducted. דַּהֲוָה דְּאָתָא לְקַמֵּיהּ דְּרַב – **For** it once happened that **a certain** landowner **came before Rav** for judgment,[34] אָמַר לֵיהּ זִיל שׁוּם לֵיהּ – and **[Rav] said to him** somewhat ambiguously, **"Go evaluate for [the plaintiff]** his expenses and the value of his

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25. Hence, since even a tenant-farmer is only Rabbinically obligated to tithe the entire crop, R' Yehudah would not ordinarily require a sharecropper to do so as well (see note 21 above). [The Gemara will presently explain that R' Yehudah's ruling in the Mishnah refers to a specific case of sharecropper. See, however, note 27 below.]

26. Since a sharecropper does not own the landowner's share of the crop [he does not "pay" it to the latter (as does a tenant-farmer) – he merely "gives" it to him]. Hence, he cannot be regarded as one who pays his debt with *tevel,* and so he is not required – even Rabbinically – to tithe the landowner's portion (*Rashi*). See following note.

Our elucidation of the Gemara has followed *Rashi,* who understands "and a sharecropper is not like a tenant-farmer" as a second possible opinion held by the Mishnah [*Gilyon HaShas* cites a similar case in *Nedarim* 82b; see *Rosh's* commentary there ד"ה מאי אין יכול להפר]. According to *Tosafos* (end of ד"ה סברוה), however, the phrase is the corollary of the previous statement, and the Gemara is stating: Because the non-Jew's ownership of the field exempts its produce from the tithing obligations, even a tenant-farmer is only Rabbinically obligated to tithe; hence, R' Yehudah would not similarly obligate an ordinary sharecropper (see also *Ritva*).

27. The Rabbis reckoned that eventually the added tithing would become too burdensome for the sharecropper, and he would trouble himself to raise sufficient funds to purchase the field himself, thus returning it to Jewish ownership (*Rashi,* who understands בְּרָה to mean בְּרִירָה, *firm,* as in בְּרִירָה וּמְחֻזָּקָת, *firm and possessed*; cf. interpretation of *Rabbeinu Chananel,* cited in *Tosafos*).

Ramban and *Ran* point out the following difficulty: What does it matter if a gentile has ownership in Eretz Yisrael to exempt its produce from the tithing obligations? If we interpret the Mishnah as the Baraisa does – that the landowner is a gentile oppressor (see *Rashi*) – then it is obvious that an oppressor does not have ownership! Hence, if a sharecropper is treated like a tenant-farmer, the former should be Rabbinically obligated to tithe. And if a gentile has no ownership but a sharecropper is not treated like a tenant-farmer, why does the ruling apply only in the case of an oppressor? *Ramban* and *Ran* therefore explain (in *Rashi's* opinion) that the Gemara is stating that *here* it is irrelevant whether or not a gentile has ownership – because the ruling here is a special Rabbinic decree in the case of an actual ancestral field, and a sharecropper is not treated like a tenant-farmer because here certainly the gentile has no ownership. The reason the case concerns an oppression, *Ran* adds, is because even if we held that a gentile has no ownership and that a sharecropper is not treated like a tenant-farmer, the decree would apply only to an oppressor, who presumably will offer a better price to the sharecropper when the latter offers to buy the field. See *Ramban, Ran, Ba'al HaMaor, Milchamos* and *Raavad* for other interpretations of our Gemara.

28. Had R' Yochanan not explained it, we would not have derived it on our own (see *Rashi* above ד"ה צריכה רבה).

29. That is, he is paid the lower amount. Thus, if his expenses exceed the value of his improvements to the land, he is compensated according to the latter figure. Conversely, if the value of the improvements exceeds his expenses, he is reimbursed only for his expenses (*Rashi*). Regarding whether a worker's wages are included in "expenses," see *Tos. Yom Tov* to *Bava Kamma* 9:4.

30. That is, we ascertain the wages that other local gardeners are customarily paid for this type of work, so that according to Shmuel the planter has "the upper hand" (see *Rashi* below, ד"ה גליח ארעתך, and *Ritva*; cf. *Baal HaMaor,* cited by all Rishonim).

31. I.e. it is more suitable for the planting of trees than for the planting of grain (*Rashi*). Hence, since when he learned of them, the owner of the field did not object to the planter's activities [which enabled the owner to derive the maximum benefit from his field], it is as if he consented to them, and for that reason the planter has the upper hand with respect to compensation (see *Ritva, Nimukei Yosef*).

32. That is, the field is less suitable for the planting of trees than for the planting of grain. Since the field could have been put to more effective use, the planter is accorded the lower level of compensation.

33. That the planter has the lower hand if the field was not primarily suited for what he planted, and the upper hand if it was (see *Ritva*).

34. He was being sued for compensation by one who entered his property and planted trees there without permission.

improvements."[35] אָמַר לֵיהּ לֹא בְּעִינָא – **[The landowner] said to [Rav]** in reply, **"I do not want** the trees he planted, since I usually use my field for planting grain." אָמַר לֵיהּ זִיל שׁוּם לֵיהּ – Having ascertained that the field was not ready for the planting of trees, **[Rav] said to [the landowner], "Go evaluate for [the planter]** his expenses and the value of his improvements, וְיָדוֹ עַל הַתַּחְתּוֹנָה – **and he has the lower hand."**[36] אָמַר לֵיהּ לֹא בְּעִינָא – Again **[the landowner] said to** [Rav] in reply, **"I do not want** the trees he planted at all, since I want to use my field for planting grain," and Rav issued no further directives, effectively dismissing the planter's suit.[37] לְסוֹף חֲזָייֵהּ דִּגְדַּר וְקָא מַנְטַר לָהּ – However, the planter never removed his trees, and **eventually [Rav] saw that [the landowner] fenced in [the field] and was guarding it.** אָמַר לֵיהּ גַּלֵּית אַדַּעְתַּיךְ דְּנַיְחָא לָךְ – **[Rav]** therefore **said to him,** "By enclosing the field **you have revealed your mind – that** having trees grow there **is agreeable to you** – and you have thereby rendered it a field that is ready for the planting of trees.[38] זִיל שׁוּם לֵיהּ – Therefore, **go evaluate for [the planter]** what local gardeners are customarily paid for this type of work, וְיָדוֹ עַל הָעֶלְיוֹנָה – **and he has the upper hand."**[39]

The Gemara discusses a related case:

הֵיוֹרֵד לְתוֹךְ חוּרְבָּתוֹ שֶׁל חֲבֵירוֹ וּבְנָאָהּ – **It has been stated:** אִיתְּמַר – Regarding **one who went down into his fellow's ruin and rebuilt it without [the owner's] consent** שֶׁלֹּא בִּרְשׁוּתוֹ וְאָמַר לוֹ – **and** afterward **said to [the owner], "I am taking back my wood and stones,"**[40] עֲצַיי וַאֲבָנַיי אֲנִי נוֹטֵל – **Rav Nachman said: We listen to him** (i.e. we allow him to do so), רַב נַחְמָן אָמַר שׁוֹמְעִין לוֹ – but **Rav Sheishess said: We do not listen to him** (i.e. we do not allow him to dismantle the building).[41] רַב שֵׁשֶׁת אָמַר אֵין שׁוֹמְעִין לוֹ

The Gemara challenges Rav Nachman:

מֵיתִיבִי – **They objected** to Rav Nachman's ruling from a Baraisa, which stated: רַבָּן שִׁמְעוֹן בֶּן גַּמְלִיאֵל אוֹמֵר – RABBAN SHIMON BEN GAMLIEL SAYS: בֵּית שַׁמַּאי אוֹמְרִים שׁוֹמְעִין לוֹ – BEIS SHAMMAI SAY that WE LISTEN TO [THE BUILDER] who wants to dismantle his building וּבֵית הִלֵּל אוֹמְרִים אֵין שׁוֹמְעִין לוֹ – AND BEIS HILLEL SAY that WE DO NOT LISTEN TO HIM. לֵימָא רַב נַחְמָן דְּאָמַר כְּבֵית שַׁמַּאי – **Shall we say,** then, **that Rav Nachman ruled in accord with Beis Shammai,** when, in fact, the halachah generally follows Beis Hillel over Beis Shammai?

The Gemara answers:

הוּא דְּאָמַר כִּי הַאי תַּנָּא – No! **[Rav Nachman] held like this** following **Tanna,** who maintains that Beis Hillel do not argue with Beis Shammai on this matter, דְּתַנְיָא – **for it was taught in a Baraisa:** שׁוֹמְעִין לוֹ דִּבְרֵי ר׳ שִׁמְעוֹן בֶּן אֶלְעָזָר – WE LISTEN TO [THE BUILDER] who wants to dismantle his building – these are THE WORDS OF R' SHIMON BEN ELAZAR. רַבָּן שִׁמְעוֹן בֶּן גַּמְלִיאֵל אוֹמֵר – However, RABBAN SHIMON BEN GAMLIEL SAYS: בֵּית שַׁמַּאי אוֹמְרִים שׁוֹמְעִין לוֹ – BEIS SHAMMAI SAY that WE LISTEN TO [THE BUILDER] וּבֵית הִלֵּל אוֹמְרִים אֵין שׁוֹמְעִין לוֹ – AND BEIS HILLEL SAY that WE DO NOT LISTEN TO HIM. According to R' Shimon ben Elazar, even Beis Hillel maintain that the builder may dismantle his building and retrieve his materials, and Rav Nachman follows the opinion of this Tanna.

The Gemara inquires:

מַאי הָוֵי עֲלָהּ – **What will be** the law **in [this matter]?** May one who has improved another's property without consent later remove the improvement?

The Gemara decides the law:

אָמַר רַבִּי יַעֲקֹב אָמַר ר׳ יוֹחָנָן – **R' Yaakov said in the name of R' Yochanan:**

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35. Rav was attempting to ascertain whether the field was ready for the planting of trees or for the planting of grain. Hence, he did not initially specify the defendant's level of payment, but waited instead for the latter's reaction to the general declaration of liability (*Ramban, Ritva*).

36. Although he did not expressly state his reason, Rav awarded the planter the lower payment presumably because the field was determined to be not ready for what he planted. Hence, it is at this stage of the proceedings that Rav's opinion regarding the planter having the lower hand, cited above, is implicitly stated.

37. *Ramban* understands that the landowner was now demanding that the planter actually remove his trees from the field. Since the field was not normally used for the planting of trees, the landowner is legally entitled to do so (see *Rosh* and *Tos. HaRosh,* who discuss whether the landowner can so demand if the field was normally used for planting trees). For that reason Rav remained silent, and did not insist that the landowner comply with his order to pay.

38. *Rashi. Ramban* explains that by enclosing and guarding the field the landowner effectively prevented the planter from entering and removing his trees. This action indicated to Rav that the landowner no longer intended to grow grain there.

39. I.e. he is not paid the lesser of his expenses and the value of his improvements, but is compensated like a professional gardener (see *Rashi*). See *Rosh* §22 for a different interpretation of this passage.

40. The effect of which is the dismantling of the new building. The Gemara will later discuss the same question as it pertains to the previous case – i.e. where the planter says, "I am taking back my trees."

41. For a discussion of how the builder is compensated if the new building is allowed to stand (or if the builder does not seek to dismantle it), see *Nimukei Yosef.*

בְּבַיִת – **In the case of one who rebuilds another person's building** without consent and then wishes to dismantle it and retrieve his materials, שׁוֹמְעִין לוֹ – **we listen to him** and allow him to do so. בְּשָׂדֶה – However, **in the case of one who plants trees in another person's field** without consent and then wishes to remove his trees, אֵין שׁוֹמְעִין לוֹ – **we do not listen to him.**

The Gemara asks:

בְּשָׂדֶה מַאי טַעְמָא – **In the case of the field, what is the reason** for R' Yochanan's stringent ruling?

The Gemara offers two explanations:[1]

מִשּׁוּם יִשּׁוּב אֶרֶץ יִשְׂרָאֵל – We prohibit the planter to retrieve his trees **because of** the importance of **cultivating the Land of Israel.**[2] אִיכָּא דְּאָמְרֵי מִשּׁוּם בַּחֲשָׁא דְּאַרְעָא – However, **there are some who say** that he may not remove his trees **because of the weakening of the land** that has already occurred.[3]

The Gemara asks:

מַאי בֵּינַיְיהוּ – **What is** the practical difference **between [these two explanations]?**

The Gemara answers:

אִיכָּא בֵּינַיְיהוּ חוּצָה לָאָרֶץ – **There is** a practical difference **between them** with respect to the planter having the right to uproot his trees **outside the Land** of Israel. In that case we would accede to the planter's request according to the first explanation,[4] but according to the second explanation we would not.[5]

Mishnah From here until the end of the chapter the Tanna discusses the subject of renting houses and stores. This Mishnah establishes a requirement of giving notice of eviction for various situations:[6]

הַמַּשְׂכִּיר בַּיִת לַחֲבֵירוֹ – **If one rents a house to his fellow,** בִּימוֹת הַגְּשָׁמִים אֵינוֹ יָכוֹל לְהוֹצִיאוֹ – **he cannot evict [the tenant] in the winter**[7] – מִן הַחַג וְעַד הַפֶּסַח – i.e. **from the** Succos **festival until Pesach** – בִּימוֹת הַחַמָּה שְׁלֹשִׁים יוֹם – unless he gives the tenant notice **in the summer,**[8] at least **thirty days** before the beginning of Succos.[9] וּבִכְרַכִּים – **And in large cities,** where there is a perennial housing shortage,[10] אֶחָד יְמוֹת הַחַמָּה וְאֶחָד יְמוֹת הַגְּשָׁמִים – **both in summer and in winter** שְׁנֵים עָשָׂר חֹדֶשׁ – a landlord must give **twelve months'** notice before evicting a tenant. וּבַחֲנֻיּוֹת – **And with regard to stores,** אֶחָד עֲיָירוֹת וְאֶחָד כְּרַכִּים – **both** in the **towns and** in the **large cities** שְׁנֵים עָשָׂר חֹדֶשׁ – a landlord must give **twelve months'** notice.[11] רַבָּן שִׁמְעוֹן בֶּן גַּמְלִיאֵל אוֹמֵר – **Rabban Shimon ben Gamliel says:** חֲנוּת שֶׁל נַחְתּוֹמִים וְשֶׁל צַבָּעִים שְׁלֹשׁ שָׁנִים – In the case of **bakeries and dye shops,** however, a landlord must give **three years'** notice.[12]

Gemara The Gemara questions the Mishnah's first ruling:[13]

מַאי שְׁנָא יְמוֹת הַגְּשָׁמִים – **Why is a winter** rental **unique,** that the Tanna prohibits eviction during the rental period?[14] דִּכְיוָן אָגַר אִינִישׁ בֵּיתָא בִּימוֹת הַגְּשָׁמִים – Is it **because when a person rents a house for the winter,** אָגַר לְכוּלְּהוּ יְמוֹת הַגְּשָׁמִים – **he rents it for the entire winter?** יְמוֹת הַחַמָּה נַמִּי – If so, with regard to a **summer** rental **as well,** it stands to reason דְּכִי אָגַר אִינִישׁ בֵּיתָא – **that when a person rents a house,** לְכוּלְּהוּ יְמוֹת הַחַמָּה אָגַר – **he rents it for the entire summer!** If the landlord contracted to rent the house for the summer months, why is he allowed to evict the tenant after giving a thirty-day notice?[15]

The Gemara offers an explanation for the discrepancy in the two rulings:

אֶלָּא בִּימוֹת הַגְּשָׁמִים הֵיינוּ טַעְמָא – **Rather, the reason** a landlord is not allowed to evict a tenant **in the winter is** דְּלָא שְׁכִיחַ בֵּיתָא לְמֵיגַר – **because** during that season **one cannot find a house to rent.**[16]

NOTES

1. See *Maharsha* and *Maharam* to *Tosafos* ד"ה בשדה, who discuss who exactly offered the explanation which follows.

2. See *Rambam* and *Raavad* (*Hil. Gezeilah* 10:5), who dispute whether the importance of cultivating Eretz Yisrael prevents *the owner of the field* from demanding the removal of the other person's trees.

3. Since the time of planting, the roots of the trees have been drawing nourishment from the ground, thereby depleting and weakening it. Nevertheless, so long as the trees remain in place the landowner will profit from them. Should the planter uproot them, however, the land will have been made unsuitable for other use (see *Rashi*).

4. For there is no mandate to cultivate lands other than Eretz Yisrael.

5. Since trees weaken land in any locale, the prohibition is applied universally so as to protect landowners from financial loss (*Rashi*).

6. Rishonim dispute whether the Mishnah speaks only of rentals of indeterminate length, or even of rentals that have a fixed length. *Ritva* maintains that it speaks only of the former; hence, in his view notice of eviction is not required when a house or store is rented for a fixed term. See also *Meiri*. Cf. *Rashi* ד"ה להודיע קתני, and see below, notes 18 and 20.

7. Literally: in the days of rain. The rainy season in Eretz Yisrael coincides with the winter months.

8. Literally: in the days of heat.

9. For the benefit of the reader we have elucidated the Mishnah according to the Gemara's eventual understanding of it (see Gemara below). However, the plain meaning of the text seems to be that while a landlord may evict a tenant during a summer rental after giving thirty days' notice, he cannot evict a tenant at all during a winter rental. The Gemara will question this apparently anomalous ruling.

10. Large cities attract a great many residents because the markets are located there; hence, housing is at a premium (*Rashi*).

11. Storekeepers sell to many people on credit, and these customers pay only over a long period of time. Should a storekeeper have to vacate his rented premises suddenly, he would lose some of the money owed to him, since not all of his customers would be able to locate him (*Rashi*).

12. These types of businesses extend unusually long-term credit to many customers. [Hence, they must be granted more time to collect their debts] (*Rashi*). *Meiri* questions *Rashi's* interpretation on the grounds that there is no apparent reason for bakers and dyers to extend credit for longer terms than do other merchants. *Meiri* therefore explains that bakers and dyers are granted more time because moving is difficult for them, inasmuch as they must find a building that can accommodate their huge implements, a sufficient supply of water and a constant fire.

13. See above, note 9.

14. At this point the Gemara interprets בִּימוֹת הַגְּשָׁמִים, *in the winter,* as לִימוֹת הַגְּשָׁמִים, *for the winter,* and so it understands the Mishnah to mean: הַמַּשְׂכִּיר בַּיִת לַחֲבֵירוֹ בִּימוֹת הַגְּשָׁמִים, *[If] one rents a house to his fellow for the winter* (i.e. he contracted to rent the house for the winter months), אֵינוֹ יָכוֹל לְהוֹצִיאוֹ מִן הַחַג וְעַד הַפֶּסַח, *he cannot evict [the tenant] from Succos until Pesach (Rashi).*

15. At this point the Gemara understands the second part of the Mishnah's ruling to mean: לִימוֹת הַחַמָּה, *[But if one rents a house to his fellow] for the summer* (i.e. he contracted to rent the house for the summer months), שְׁלֹשִׁים יוֹם, *[he may evict the tenant if he gives] thirty days' [notice].*

16. Literally: a house is not found to be rented.

The Gemara now interprets בִּימוֹת הַגְּשָׁמִים according to its plain meaning, *in the winter,* and understands that the Mishnah speaks of a rental of unspecified duration. The Mishnah is teaching us that under Torah law such a rental should expire after thirty days, and goes on to say that if those thirty days conclude in the summer, the landlord may indeed evict the tenant, since he will be able to obtain other housing. If the thirty days conclude in the winter, however, the landlord may not evict the tenant until Pesach, since alternate housing becomes

The Gemara rejects this explanation:

אֵימָא סֵיפָא – If you will explain that the first part of the Mishnah prohibits eviction during the winter months because housing is not then available, I will cite **the latter [clause],** which indicates otherwise: בִּכְרַכִּים – AND IN LARGE CITIES, אֶחָד יְמוֹת הַחַמָּה וְאֶחָד יְמוֹת הַגְּשָׁמִים – WHETHER it originates in THE SUMMER OR in THE WINTER, שְׁנֵים עָשָׂר חֹדֶשׁ – a rental of unspecified duration expires after TWELVE MONTHS.[17] וְאִילּוּ מָלוּ לֵיהּ יוֹמֵי שְׂכִירוּת בִּימוֹת הַגְּשָׁמִים – **And** implied by this ruling is that **were** such **a** twelve-month **rental period completed in the winter,** מַפִּיק לֵיהּ – **[the landlord]** would be entitled to **evict [his tenant].** וְאַמַּאי – **But why** should he be permitted to do so? הָא לָא שְׁכִיחַ בֵּיתָא לְמֵיגַר – **One cannot find a house to rent** in the winter! – ? –

The Gemara thus rejects its understanding of the Mishnah, and formulates a different one:

אָמַר רַב יְהוּדָה – **Rav Yehudah said:** לְהוֹדִיעַ קָתָנֵי – **[The Tanna] stated** "thirty days" and "twelve months" in reference to a requirement **to notify** a tenant before eviction, וְהָכִי קָאָמַר – **and he** actually **is saying thus:** הַמַּשְׂכִּיר בַּיִת לַחֲבֵירוֹ סְתָם – **If one rents a house to his fellow without specifying** the length of the rental,[18] אֵין יָכוֹל לְהוֹצִיאוֹ בִּימוֹת הַגְּשָׁמִים – **he cannot evict [the tenant]** at any time **in the winter**[19] – מֵחַג וְעַד הַפֶּסַח – i.e. **from** the Succos **festival until Pesach** – אֶלָּא אִם כֵּן הוֹדִיעוֹ שְׁלֹשִׁים יוֹם מֵעִיקָּרָא – **unless he notified [the tenant] thirty days from** before **the onset** of Succos.[20]

The Gemara corroborates this interpretation:

תַּנְיָא נַמִי הָכִי – **It was also taught thus in a Baraisa:** כְּשֶׁאָמְרוּ שְׁלֹשִׁים וּכְשֶׁאָמְרוּ שְׁנֵים עָשָׂר חֹדֶשׁ – WHEN THEY SAID "THIRTY days" AND WHEN THEY SAID "TWELVE MONTHS" in the Mishnah, לֹא אָמְרוּ אֶלָּא לְהוֹדִיעוֹ – THEY SAID IT ONLY to establish when a landlord is required TO NOTIFY [HIS TENANT] of a pending eviction. וּכְשֵׁם שֶׁמַּשְׂכִּיר צָרִיךְ לְהוֹדִיעַ – AND JUST AS A LANDLORD IS REQUIRED TO NOTIFY his tenant of his intent to evict the latter at the termination of the lease, כָּךְ שׂוֹכֵר צָרִיךְ לְהוֹדִיעַ – SO A TENANT IS REQUIRED TO NOTIFY his landlord of his intent to vacate the premises at the termination of the lease.[21]

The Gemara explains the Baraisa:

דְּאָמַר לֵיהּ – **For [the landlord] can say to [the tenant]** if notice is not properly given: אִי אוֹדַעְתַּן – **"If you had notified me** of your intent to leave, הֲוָה טָרַחְנָא וּמוֹתִיבְנָא בֵּיהּ אִינִישׁ מַעַלְיָא – **I would have made an effort** to find **and install a suitable person in [my house]."**

The Gemara further elucidates the notice requirement:

אָמַר רַב אַסִּי – **Rav Assi said:** אִם נִכְנַס יוֹם אֶחָד בִּימוֹת הַגְּשָׁמִים – **If [the tenancy] entered one day into winter** without notice being given, אֵינוֹ יָכוֹל לְהוֹצִיאוֹ מִן הֶחָג עַד הַפֶּסַח – **[the landlord] cannot evict [the tenant] from the** Succos **festival until the Pesach** festival.

The Gemara challenges this ruling:

וְהָא אֲנַן שְׁלֹשִׁים יוֹם קָאָמַר – **But we learned in the Mishnah**[22] that notice must be given **thirty days** before the advent of Succos![23] – ? –

The Gemara clarifies Rav Assi's statement:

הָכִי קָאָמַר – **[Rav Assi] actually said thus:** אִם נִכְנַס יוֹם אֶחָד בִּימוֹת הַגְּשָׁמִים מֵהֲנֵי שְׁלֹשִׁים יוֹם – **If** even **one day of these thirty days** of prior notice **enters into the winter,**[24] אֵינוֹ יָכוֹל לְהוֹצִיאוֹ מִן הֶחָג וְעַד הַפֶּסַח – **[the landlord] cannot evict [the tenant] from the** Succos **festival until the Pesach** festival.[25]

The Gemara discusses a related ruling:

אָמַר רַב הוּנָא – **Rav Huna said:** וְאִם בָּא לְרַבּוֹת בִּדְמֵיהּ – **And if [the landlord] comes to increase the** rental fee at the termination of the lease, מְרַבֶּה – **he may increase** it even if he did not previously notify the tenant of his intent to do so.

The Gemara objects to this ruling:

אָמַר לֵיהּ רַב נַחְמָן – **Rav Nachman said to [Rav Huna]:** הַאי לְנַקְטֵיהּ בְּכוּבְסֵיהּ דְּלִשְׁבְקֵיהּ לִגְלִימָא – If a landlord raises the fee for a renewed rental without advance notice, he is like this one who **holds [the tenant] by his "cluster"**[26] **so that he will surrender his cloak** – i.e. there is no act of eviction greater than

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available only then. Of course, the tenant must continue paying the landlord the previously stipulated monthly rent (*Rashi*).

17. According to the present understanding of the first clause, the latter clause would be stating that in large cities (where housing is more scarce; see note 10 above) a rental of unspecified duration is for twelve months.

18. *Rashi* (ד״ה להודיעו קתני) writes in elucidation of the text: "[If] one rents a house to his fellow [and] the period of rental concludes in the winter...," which indicates that in his view the rental was for a *fixed* term. Apparently, then, in *Rashi's* version of the Gemara the words "without specifying [the length of the rental]" did not appear (*Maharam;* see also *Ritva;* cf. *Rif* and *Ran*).

19. Because at that time alternate housing is impossible to find.

20. In this case of a residential town rental that terminates in the winter (see note 18 above), the landlord must notify the tenant on the 15th of Elul (30 days before the onset of "winter") if he plans to evict the tenant when the lease expires. Such notice allows the tenant to search for another dwelling during the summer, when housing can be found. This rationale applies also when a lease expires in the summer, and so we may derive from the Mishnah's ruling that a thirty-day notice is required when eviction is planned in that case as well. If, however, a thirty-day notice has not been given in the summer, the tenant may stay for the entire winter. In the case of a residential rental in a large city, however, the prevailing housing shortage necessitates an advance notice of twelve months. This requirement applies regardless of the season in which the lease terminates. In all cases, if notice is given improperly or not at all, a tenant may ignore an eviction order but must continue paying rent according to the terms of the original agreement (*Rashi*).

The other Rishonim (cited in note 18 above) interpret the Gemara essentially as does *Rashi*, but with one difference. According to them, the Gemara speaks of where the rental term was not fixed; had it been fixed, the landlord could evict the tenant immediately.

With regard to the basic understanding of the Gemara, cf. *Raavad,* cited by *Rashba* and *Shitah Mekubetzes.*

21. If the tenant does not give notice on the 15th of Elul, he must remain in the premises until Pesach and pay the stipulated rental fee. If the value of rentals decreases during the winter, the tenant may offer to pay the lower fee, and, if the landlord rejects his offer, may then vacate the premises (*Nimukei Yosef;* see note 28 below).

22. *Yaavetz* emends קָאָמַר (*he said*) to תְּנַן (*we learned in the Mishnah*). Our translation follows this emendation.

23. The questioner understood Rav Assi to mean that notice is invalid if given anytime after Succos begins, but that if given before the 15th of Tishrei – even by one day – it is valid (*Ritva*).

24. I.e. if the landlord gave notice on the 16th of Elul, 29 days before the advent of Succos, so that the final day of the thirty-day period entered into the winter.

25. Rav Assi thus teaches that the notice period must be *a full thirty days* in the summer, and that the Mishnah, which stated "thirty days," did not mean "a majority" of thirty days (*Ritva, Nimukei Yosef*).

26. The word כּוּבְסָא connotes something that hangs, as in כְּמַאן תָּלִינַן כּוּבְסֵי בְּדִיקְלָא, *according to whom may we suspend a cluster* (*of dates*) *on a* (sterile) *palm tree* (see *Shabbos* 67a) [*Rashi*]. Hence, the Gemara here uses the word as a euphemism for the male private parts.

that![27] – ? –

The Gemara clarifies Rav Huna's ruling:

לֹא צְרִיכָא – This is **not** difficult; rather, the ruling is **necessary** in a case דְּאַיְיקוּר בָּתֵּי – **where** the rental of **houses became more expensive.** Under these circumstances increasing the rent without advance notice is acceptable.[28]

The Gemara establishes guidelines for when a tenant may be evicted without prior notice:

פְּשִׁיטָא נָפַל לֵיהּ בֵּיתָא – It is **obvious** that if **[a person's] house collapsed** אָמַר לֵיהּ לֹא עֲדִיפַתְּ מִינַּאי – **he may say to [his tenant]**[29] without giving advance notice: **"You are no better than I;** therefore, vacate the premises now that the lease has expired."[30] זַבְּנֵיהּ אוֹ אוֹרְתֵיהּ אוֹ יְהָבֵיהּ בְּמַתָּנָה – It is further obvious[31] that if **[a landlord] sells [rental property], bequeaths it, or gives it as a present** to a third party before the expiration of his tenant's lease, אָמַר לֵיהּ – **[the tenant] may say to [the one who acquired the rental property]:** לֹא עֲדִיפַתְּ מִגַּבְרָא דְּאָתֵית מִינֵּיהּ – **"You are no better than the man from whom your** ownership of the building **comes.** Just as he could not evict me (even upon termination of the lease) without first giving the requisite prior notice,[32] so you cannot, for your legal power is no greater than his."

Having presented cases of where eviction without timely notice is obviously permitted and obviously forbidden, the Gemara addresses a situation where the ruling is not clear-cut:

כַּלְלֵיהּ לִבְרֵיהּ – **If one married off his son** and needed to provide the young couple with housing,[33] חָזֵינַן אִי הֲוָה אֶפְשָׁר לְאוֹדוֹעֵיהּ – **we see:**[34] **If it was possible for [the father] to notify [his tenant]** in timely fashion,[35] אִיבָּעֵי לֵיהּ לְאוֹדוֹעֵי – **he should have** indeed **notified [the tenant]** in timely fashion;[36] וְאִי לֹא – **and if** it was **not** possible to notify the tenant in timely fashion,[37] אָמַר לֵיהּ – **[the groom's father] may say to [his tenant]:** לֹא עֲדִיפַתְּ מִינַּאי – **"You are no better than I."** That is, the father is entitled to evict him upon the termination of the lease, since here the father's rights vis-a-vis the house supersede those of the tenant, inasmuch as prior notice could *not* have been given.

The Gemara relates an incident in which a tenant was justifiably evicted without notice:

הַהוּא גַּבְרָא דִּזְבַן אַרְבָּא דְּחַמְרָא – There was once **a certain man who purchased a boat**load **of wine,** לֹא אַשְׁכַּח דּוּכְתָּא לְאוֹתוּבֵיהּ – but **he did not find a place to store it.** אָמַר לָהּ לְהַהִיא אִיתְּתָא – **He said to a certain woman,** אִית לָךְ דּוּכְתָּא לְאוֹגְרִי – **"Do you have a place to rent to me** for the storage of my wine?" אָמְרָה לֵיהּ לֹא – **She said to him, "No."** אָזַל קַדְשָׁהּ – [The man] then **went** and **betrothed her,**[38] יְהָבָה לֵיהּ דּוּכְתָּא לְעַיְילֵיהּ – and as a result **she gave** (i.e. rented) **to him a place to bring in [the wine].** אָזַל לְבֵיתֵיהּ – Whereupon **[the man] went** back **to his** own **house,** כְּתַב לָהּ גִּיטָּא שְׁדַר לָהּ – **wrote for her a** bill of **divorce,** and **sent it to her.** אָזְלָא אִיהִי אַגְרָא שְׁקוּלָאֵי – Whereupon **she went** and **hired porters,** מִינֵּיהּ וּבֵיהּ – paying them **from** the wine **itself,**[39] אַפִּיקְתֵּיהּ וְאוֹתְבֵיהּ בִּשְׁבִילָא – and **she** had them **remove [the wine] and place it on the path** outside. אָמַר רַב הוּנָא בְּרֵיהּ דְּרַב יְהוֹשֻׁעַ – The man subsequently brought suit in *beis din,* claiming that the eviction was illegal, but the judge, **Rav Huna the son of Rav Yehoshua, said:** כַּאֲשֶׁר עָשָׂה כֵּן יֵעָשֶׂה לוֹ – **As [the man] has done, so shall be done to him;** גְּמוּלוֹ יָשׁוּב בְּרֹאשׁוֹ – **his** unscrupulous **deed will rebound upon his** own **head.**[40]

The Gemara expounds upon Rav Huna's ruling:

לֹא מִיבַּעְיָא חָצֵר דְּלֹא קַיְימָא לְאַגְרָא – **It is not necessary** to state that the woman may evict her deceitful tenant if this is a case of a **courtyard that does not stand** available **for renting,** for then she does not wish to accommodate even sincere tenants; אֶלָּא אֲפִילּוּ חָצֵר דְּקַיְימָא לְאַגְרָא – **but even** if this is a case of a **courtyard that stands** available **for renting,**[41] אָמְרָה לֵיהּ – **[the woman] may say to [this particular person]:** לְכוּלֵּי עָלְמָא נִיחָא לִי לְאוֹגוּרֵי – **It is agreeable to me to rent** my property to **everybody,** וְלָךְ לֹא נִיחָא לִי – **but it is not agreeable** to me to rent it **to you,** דְּדָמֵית עֲלַי כִּי אַרְיָא אַרְבָּא – **for you appear** to me

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27. [The analogy involves someone who is not directly "taking" a cloak; rather, it is being given "willingly."] Here, too, Rav Nachman argues that since a significant increase in the cost of renting can effectively force a tenant to vacate the premises, the increase should be preceded by a timely notice – just as an actual eviction must be preceded by a timely notice.

28. Since the landlord will suffer a financial loss if the old rental fee is paid throughout the winter, an increase to the market value of rentals is certainly called for. Hence, the prior notice is unnecessary (see *Rashi*, *Nimukei Yosef*; cf. *Ritva*). See *Choshen Mishpat* 312:9 for the parameters of this ruling.

Rambam (Hil. Sechirus 6:9) derives from the Gemara's ruling that in the reverse case of a decrease in rental costs, the tenant may demand a lowering of the fee for the months not covered explicitly by the lease, and that if the landlord refuses to comply, the tenant may then leave without giving prior notice (see *Maggid Mishneh* there).

29. I.e. to one who lives in another house owned by him.

30. The landlord may successfully argue to the tenant: "Your only valid defense against eviction upon termination of the lease is that I failed to give timely notice, and thus you are unable to find another dwelling to rent. In this case, since I could not have notified you in timely fashion (because I did not know that my own house would later collapse), and since I, too, cannot find another house to rent, I can demand that you leave, for it is not appropriate that you continue to dwell in the house and I – the owner – remain homeless" (*Rashi*).

Rashi stated in his commentary that if the landlord's house collapses he may evict the tenant upon the termination of the lease. *Rashi* thereby implies that before the rental expires the landlord must either move in with the tenant (if the latter permits) or indeed remain homeless. *Nimukei Yosef* explains that a tenant can never be evicted before his lease expires since a rental is considered a temporary sale of the property to him.

Most Rishonim contend that the law applicable to a rental of unspecified duration (after thirty days) is similar to the law which applies upon termination of a lease – see *Choshen Mishpat* 312:11.

31. Based on *Ritva*.

32. See *Rambam, Hil. Sechirus* 6:11.

33. The groom's father owned rental property, and wished to evict the tenant and give the house to his son. See *Bava Basra* 98b.

34. I.e. we make the following determination.

35. I.e. if the wedding did not take place suddenly (*Nimukei Yosef*).

36. Since the groom's father knew the wedding date beforehand and nevertheless failed to notify the tenant on the 15th of Elul (or twelve months before eviction), he cannot evict the tenant until Pesach (*Nimukei Yosef*).

37. Where, for instance, the wedding was performed suddenly, because the bride's father insisted that his daughter's marriage not be delayed (*Nimukei Yosef*, *Ritva*).

38. That is, he performed *kiddushin,* the first stage of marriage, where she is legally his wife but they do not yet live together.

39. Either giving them some of the wine, or selling part of it and paying them with the proceeds.

40. Rav Huna was paraphrasing *Obadiah* 1:15, which refers to the future punishment of Esau's descendants for their persecution of Israel. Rav Huna thus ruled that the eviction was justified and legal, as the Gemara proceeds to explain.

41. So that one could argue: What does it matter if the man secured the rental through devious means? The woman seeks to profit from her property, and his money should be just as good as anyone else's.

like a lion in ambush, since you betrothed me only to obtain the rental.[42]

The Mishnah stated:

רַבָּן שִׁמְעוֹן בֶּן גַּמְלִיאֵל אוֹמֵר – **RABBAN SHIMON BEN GAMLIEL SAYS:** שֶׁל נַחְתּוּמִים וְשֶׁל צַבָּעִין שָׁלֹשׁ שָׁנִים – In the case of **BAKERIES AND DYE SHOPS,** however, a landlord must give **THREE YEARS'** notice.

The Gemara explains Rabban Shimon's reasoning:

תָּנָא – **[A Tanna] taught** in a Baraisa: מִפְּנֵי שֶׁהַקִּיפָּן מְרוּבֶּה – Here the notice period is longer **BECAUSE THE CREDIT** that these businesses extend **IS EXTENSIVE** and of unusually long-term duration.[43]

Mishnah This Mishnah discusses various rights and obligations of a landlord and of his tenant:

הַמַּשְׁכִּיר חָיֵיב בַּדֶּלֶת בַּנָּגָר וּבַמַּנְעוּל – **If one rents a house to his fellow,** הַמַּשְׁכִּיר בַּיִת לַחֲבֵירוֹ – **the landlord is obligated** to provide **the door,**[44] **the bolt**[45] **and the lock,**[46] וּבְכָל דָּבָר שֶׁמַּעֲשֵׂה אוּמָּן – **and everything that is the work of a craftsman.**[47] אֲבָל דָּבָר שֶׁאֵינוֹ מַעֲשֵׂה אוּמָּן – **But** regarding **something that is not the work of a craftsman,** הַשּׂוֹכֵר עוֹשֶׂהוּ – **the tenant must make it** for himself.[48]

הַזֶּבֶל שֶׁל בַּעַל הַבַּיִת – **Manure** found in the courtyard of a rented house **belongs to the owner** of the house (i.e. the landlord) for use as fertilizer, וְאֵין לַשּׂוֹכֵר אֶלָּא הַיּוֹצֵא מִן הַתַּנּוּר וּמִן הַכִּירַיִם בִּלְבָד – **and the tenant has nothing but the refuse of the oven and the double stove.**[49]

Gemara The Gemara elaborates on the obligations of the landlord and of the tenant:

תָּנוּ רַבָּנָן – **The Rabbis taught in a Baraisa:** הַמַּשְׁכִּיר בַּיִת לַחֲבֵירוֹ – **If ONE RENTS A HOUSE TO HIS FELLOW,** מַשְׁכִּיר חָיֵיב לְהַעֲמִיד לוֹ דְּלָתוֹת – **the LANDLORD IS OBLIGATED TO ERECT DOORS FOR IT,** לְפָתְחַ לוֹ חַלּוֹנוֹת – **TO OPEN WINDOWS FOR IT,**[50] לְחַזֵּק לוֹ תִּקְרָה – **TO STRENGTHEN ITS CEILING** if the boards became wormy and rotten, לְסָמוֹךְ לוֹ קוֹרָה – and **TO SUPPORT ITS BEAM** if one becomes broken. וְשׂוֹכֵר חָיֵיב לַעֲשׂוֹת לוֹ סוּלָּם – **AND THE TENANT IS OBLIGATED TO CONSTRUCT A LADDER FOR IT** for the purpose of ascending occasionally to the roof,[51] לַעֲשׂוֹת לוֹ מַעֲקֶה – **TO CONSTRUCT A RAILING FOR IT,**[52] לַעֲשׂוֹת לוֹ מַרְזֵב – **TO AFFIX A GUTTER-BOARD FOR IT,**[53] וּלְהָטִיחַ אֶת גַּגּוֹ – **AND TO PLASTER ITS ROOF.**

The Gemara records an exchange that occurred in the academy:

בָּעוּ מִינֵּיהּ מֵרַב שֵׁשֶׁת – **[The scholars] inquired of Rav Sheishess:** מְזוּזָה עַל מִי – **Upon whom** is the obligation to affix a *mezuzah* to the doorpost[54] – the landlord or the tenant?

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42. It is self-evident that the woman had no desire to rent her property to this man, since she had previously rejected his request. [*Ritva* adds that she stated at the time of the rental that ordinarily she would not be renting out her property.] Hence, it is as if she had expressly stipulated that she was indeed renting it only because the man betrothed her. When it is later revealed that the betrothal was merely a ruse, her agreement to rent is retroactively nullified. Hence, the rental never came into being, and so the woman rightfully removed the man's wine from the premises and placed it in the street (see *Ritva*). Regarding whether she would be obligated to notify *beis din* (or the wine's owner) of her actions, so that other arrangements could be made for the wine's safekeeping, see *Choshen Mishpat* 319 with commentaries.

43. See above, note 12. [According to *Meiri* (cited there), the translation of שֶׁהַקִּיפָּן מְרוּבֶּה would be: *because the [labor involved in] moving them is great.*]

44. If the tenant did not stipulate with the landlord concerning the type of facilities the latter must provide, the contract is still assumed to require the landlord to provide certain items that are basic to the structure and maintenance of a house (see *Sma, Choshen Mishpat* 314:6).

Should everything be in order at the time the tenant takes over the house but deterioration occurs over time, *Meiri* rules that the landlord is responsible to repair or replace those items for which he was responsible initially. *Nimukei Yosef*, however, differentiates based on the terms of the original contract. If the rental agreement called for providing the tenant with a house, but no particular house was stipulated, the landlord is indeed responsible to remedy any deterioration of the items mentioned in the Mishnah. If the contract called for a specific house, however, the landlord is required only to make the appropriate repairs at the onset of the rental. After that he is no longer responsible for deterioration, since this house is no longer intact (*Rama, Choshen Mishpat* 314:1). That is, since the contract was for a specific house, the landlord did not undertake to provide the tenant with housing for the duration of the lease, but only to let him have the use of this particular house. If the house deteriorated, it is as though this house is no longer standing, in which case the landlord is not obligated to provide another house, as will be explained in the next Mishnah (*Sma*, ibid. 314:7). See also *Ketzos HaChosen* 314:1.

45. This device would be used to lock the door from the inside by thrusting it into a hole in the threshold (*Rashi, Meiri, Nimukei Yosef*).

46. *Nimukei Yosef* defines this as a padlock, with which the tenant can lock the door when he leaves the premises.

47. The landlord must construct (or repair) any item that is essential for living in a house and that only a craftsman can build or repair (*Tos. Yom Tov* from *Rambam, Hil. Sechirus* 6:3). The Gemara will give examples.

48. Any item that an ordinary person can be expected to make for himself must be made by the tenant at his own expense (*Rambam*, ibid.). The Gemara will give examples.

In all these matters, however, we ultimately follow the prevailing local custom when it differs from the Mishnah's ruling (*Choshen Mishpat* 314:2).

49. The tenant retains only the ashes from the stove and oven, which also can be used as fertilizer (*Rashi*). [For a description of the ovens and double ovens used in Mishnaic times, see ArtScroll Mishnah *Shabbos* 3:1.]

The Gemara will cite this last section of the Mishnah and discuss what law the Mishnah is teaching us.

50. That is, the landlord must construct new windows for the house if the existing windows do not admit sufficient sunlight. This obligation applies even if the tenant saw the house before leasing it and said nothing. That is, we do not interpret his silence as a waiver of his right to have adequate lighting, for since he stipulated that he intended to use the house as a residence, and since that function cannot be achieved without adequate sunlight, it is as if the tenant expressly stipulated that he required new windows (*Raavad*, cited by *Ritva;* see *Nimukei Yosef* regarding the opinion of *Rambam* in *Hil. Sechirus* 6:3).

51. [Since people normally made only occasional use of the roof, constructing a ladder to ascend there was not the landlord's obligation, and this is apparently so even though it takes a craftsman's skill to build the ladder.] If, however, a ladder was needed to ascend to the upper floor of a rented house, the landlord would be required to provide it, since otherwise the dwelling would not be completely habitable (*Ritva*).

52. The Torah requires a Jew to erect a protective railing or other type of barrier along the edge of his roof (*Deuteronomy* 22:8). This commandment requires erecting a railing in other such situations, such as a swimming pool or tall stairway, as well as providing protection in all dangerous situations (*Rambam, Hil. Rotzeach* 11:1-5).

53. In Mishnaic times roofs were built to slant in all four directions and were coated with plaster to repel the rain. Runoff was carried away from the sides of the houses by boards that were attached horizontally to the sides near the bottom of the roof. The Mishnah rules that if one of these boards should fall, it is the tenant's responsibility to reattach it, since no particular expertise was necessary for the job (*Rashi*).

54. See *Deuteronomy* 6:9, 11:20.

מְזוּזָה – The scholars inquired about a *mezuzah?!* הָאָמַר רַב מְשַׁרְשִׁיָא מְזוּזָה חוֹבַת הַדָּר הִיא – **But Rav Mesharshiya said:** Affixing **a *mezuzah* is the obligation of the resident,** and not of the absentee owner![55]

The Gemara presents the correct version of the scholars' question:

אֶלָּא מְקוֹם מְזוּזָה עַל מִי – **Rather,** the scholars actually inquired: **Upon whom** is the obligation to prepare **a place** for the *mezuzah* if need be?[56]

The Gemara records Rav Sheishess' reply:

אָמַר לְהוּ רַב שֵׁשֶׁת – **Rav Sheishess said to them: You have learned it** in our Mishnah, for the Tanna stated: תְּנִינְתְּהוּ דָּבָר שֶׁאֵין מַעֲשֵׂה אוּמָּן הַשּׁוֹכֵר עוֹשֶׂהוּ – Regarding SOMETHING THAT IS NOT THE WORK OF A CRAFTSMAN, THE TENANT MUST MAKE IT for himself, וְהַאי נַמִּי לָאו מַעֲשֵׂה אוּמָּן הוּא – **and this task** of affixing a *mezuzah* scroll to a stone doorpost **is also not** of necessity **the work of a craftsman,** אֶפְשָׁר הוּא – for it is **possible**

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55. This law is derived exegetically in *Yoma* 11b (*Rashi* here and to *Pesachim* 4a ד"ה חובת; cf. *Ritva*). See also *Tos. HaRosh* for a discussion of when a *mezuzah* is required under Biblical law.

56. That is, where the doorpost is made of stone, it would be necessary to bore a slit in the post in which to place the *mezuzah* scroll. The scholars inquired whether this procedure is considered the work of a craftsman, for which the landlord would be responsible (*Rashi*).

The Gemara challenges this ruling:

מֵיתִיבִי – **They objected** to R' Yose's ruling on the basis of a Baraisa, which stated: כָּל אִם אָמַר – IF [A PERSON] SAID, מְצִיאוֹת שֶׁיִּכָּנְסוּ לְחוּכְּרִי הַיּוֹם – "ALL FOUND (i.e. ownerless) OBJECTS THAT SHALL COME INTO [MY COURTYARD] TODAY without my knowledge תְּקָנָה לִי חֲצֵרִי – MY COURTYARD SHALL ACQUIRE FOR ME," לֹא אָמַר כְּלוּם – HE HAS SAID NOTHING (i.e. the courtyard will acquire nothing for him).[13] וְאִם אִיתָא לְהָא דְּאָמַר רַבִּי יוֹסֵי בְּרַבִּי חֲנִינָא – But if that which R' Yose the son of R' Chanina said were true – חֲצֵרוֹ שֶׁל אָדָם קוֹנָה לוֹ שֶׁלֹּא מִדַּעְתּוֹ – namely, a person's courtyard acquires objects for him even without his knowledge – אַמַּאי לֹא אָמַר כְּלוּם – why does the Baraisa rule that [the courtyard owner] has said nothing? According to R' Yose, a person's courtyard can acquire objects for him even in his absence and without his knowledge. – ? –

The Gemara clarifies the case of the Baraisa:

הָכָא בְּמַאי עָסְקִינַן? – With what case are we dealing here in the Baraisa? בְּחָצֵר שְׁאֵינָהּ מִשְׁתַּמֶּרֶת – With a courtyard that is not protected by its owner.[14] In such a case R' Yose concedes that the courtyard cannot effect acquisition.

The Gemara persists in its challenge of R' Yose's ruling:

אִי הָכִי – If it is so that the Baraisa speaks of an unprotected courtyard, אֵימָא סֵיפָא – consider the final [ruling] in the Baraisa, which states: יָצָא לוֹ שָׁם מְצִיאָה בָּעִיר – But if WORD OF A FINDING in one's field WENT OUT IN THE CITY,[15] דִּבְרֵיו קַיָּימִין – HIS STATEMENT IS VALID.[16] וְאִי בְּחָצֵר שְׁאֵינָהּ מִשְׁתַּמֶּרֶת – But if we are dealing here in the Baraisa with a "courtyard" that is not protected by its owner, כִּי יָצָא לוֹ שָׁם מְצִיאָה בָּעִיר מַאי הִיא – what does it matter if word of a finding in his property went out in the city?! Even if the owner has knowledge of the ownerless object's presence in his property, still the property cannot acquire the object for him, since it is unprotected. Why, then, does the Baraisa's second ruling indicate otherwise?[17]

The Gemara justifies the second ruling:

כֵּיוָן דְּיָצָא לוֹ שָׁם מְצִיאָה בָּעִיר – Once word of a finding in this individual's property went out in the city, מִיבַּדֵּל בְּדִילֵי אִינָשֵׁי וְהַוְיָא לָהּ כְּחָצֵר מִינָּה – people separate themselves from it,[18] הַמִּשְׁתַּמֶּרֶת – and [the property] is therefore like a protected courtyard vis-a-vis this object. Hence, it acquires the deer or fish for the owner even if he personally has no knowledge of the object's presence therein.[19] The Baraisa, then, poses no difficulty for R' Yose's dictum.

The Gemara issues another challenge:

מֵיתִיבִי – **They objected** to R' Yose's ruling on the basis of a different Baraisa, which stated: וְכָל הַיּוֹצֵא מִן הַתַּנּוּר וּמִן הַכִּירַיִם – THE REFUSE (i.e ashes) OF THE OVEN AND THE DOUBLE STOVE, וְהַקּוֹלֶט מִן הָאֲוִיר – AND THAT WHICH IS COLLECTED FROM THE AIRSPACE of the courtyard,[20] הֲרֵי הוּא שֶׁלּוֹ – ARE [THE TENANT'S]. וְשִׁבְרָתָן וְשֶׁבְּחָצֵר – AND all manure THAT IS found IN THE BARN AND IN THE COURTYARD שֶׁל בַּעַל הַבַּיִת – BELONGS TO THE OWNER (i.e. the landlord).[21] וְאִם אִיתָא לְהָא דְּרַבִּי יוֹסֵי בְּרַבִּי חֲנִינָא דְּאָמַר – But if that which R' Yose the son of R' Chanina said were true, that חֲצֵרוֹ שֶׁל אָדָם קוֹנָה לוֹ שֶׁלֹּא מִדַּעְתּוֹ – a person's courtyard acquires objects for him even without his knowledge, קוֹלֵט מַאֲוִיר אַמַּאי הֲרֵי הוּא שֶׁלּוֹ – why does the Baraisa state, in reference to dung collected from the airspace of the courtyard: IT IS [THE TENANT'S]? אֲוִיר חֲצֵרוֹ הוּא – It is the airspace of [the landlord's] courtyard, and so at the moment of excretion[22] the landlord's airspace should acquire the dung for him![23] – ? –

The Gemara clarifies the case of the Baraisa:

בְּמַרְבִּיק כְּלִי בְּשׁוּלֵי פָּרָה – The Baraisa speaks of where one actually attached a vessel to the cow's bottom. Under these circumstances acquisition by courtyard is precluded.[24]

אָמַר אַבָּיֵי – **Abaye said:**

The Gemara offers a different explanation:

אֲוִיר שֶׁאֵין סוֹפוֹ לָנוּחַ – An object that enters the airspace of a place in which [the object] is not destined to come to rest רָבָא אָמַר – However, **Rava said:** לָאו כְּמוּנָּח דָּמֵי – is not considered as if it is resting in that place.[25] Hence, there can be no acquisition by courtyard in this case, and so the Baraisa does not refute R' Yose's ruling.

The Gemara questions this explanation:

וּמִי פְּשִׁיטָא לֵיהּ לְרָבָא – But is it obvious to Rava that an object

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13. Since the courtyard owner has no knowledge of incoming objects, this is a case of acquisition by courtyard without the owner's knowledge.

14. See note 12 above.

15. That is, if it became public knowledge that, for instance, a lame deer entered a person's field (and was in no condition to move on), or that a river overflowed its banks and deposited fish in that individual's field (*Rashi*).

16. That is, if one has presumably become aware that an ownerless object entered his property (see *Tos. HaRosh* and *Ritva*), his earlier declaration ("All found objects that shall come into [my courtyard] today etc.") is effective, and he acquires that object. [See below, end of note 19.]

17. The challenger himself understood that both cases of the Baraisa involve a protected courtyard, and that in the first case, since the property owner had no knowledge of the object's presence in his courtyard, he cannot acquire it, while in the second case he certainly knew of the deer's (or fish's) presence in his field. According to the Gemara's defense of R' Yose, however, in both cases the property is unprotected. Why, then, would acquisition be effected in the second case [i.e. even where the owner has knowledge]? (*Ritva*).

18. [People assume that it is his, or that he will shortly come and take it.] *Rabbeinu Chananel* (cited in *Shitah Mekubetzes*) adds that people avoided taking a found object whose existence was public knowledge, for the authorities would then confiscate it (see also Mishnah *Berachos* 9:5).

19. The challenger had understood that the effect of the circulating report was to make [illegible] in his field. According to R' Yose, however, the report effectively renders the field a protected "courtyard."

Tos. HaRosh asks: Since in this case the field is considered protected [and since R' Yose does not require the owner to know of the object's presence therein], why is the owner's general declaration ("All found objects etc.") necessary? See there for two explanations.

20. The Baraisa ostensibly speaks of where the tenant set up a bucket in the airspace of the courtyard for purposes of collecting in it dung produced by animals coming from the outside (see *Rashi*).

21. The Gemara presumes that in the Baraisa's case the courtyard and barn were not rented to the tenant (*Rashi*).

See *Nimukei Yosef* (to Mishnah on 101b) who discusses why the tenant acquires the ashes from the oven and the double stove even when the courtyard is retained by its owner, the landlord. See also *Tur Choshen Mishpat*, end of §313, in the name of *Ramah*.

22. I.e. when the dung enters the courtyard's airspace during its passage from the animal's body to the vessel.

23. See *Chidushei HaRan*, who explains the differing rulings in the Baraisa according to those who do not subscribe to R' Yose's opinion. See also *Ritva* and *Tos. Rabbeinu Peretz*.

24. For the excrement passed directly into the vessel, and never entered the couryard's airspace.

25. According to Rava, it is unnecessary to say that the Baraisa speaks of where the tenant attached a vessel to the animal's bottom. Rather, even if the dung entered the courtyard's airspace en route to the vessel, it is not regarded as having entered the courtyard, inasmuch as it is destined to land in the vessel and not in the courtyard.

not destined to land in a place whose airspace it enters is not considered resting in that place? וְהָא מִיבָּעֵי בָּעֵי לָהּ – But [Rava], in fact, **inquired about [the law]** in such a case, דְּבָעֵי – for [Rava] once **inquired:** זָרַק אַרְנָקִי בְּפֶתַח זֶה וְיָצְאתָה בְּפֶתַח זֶה – **If one threw a purse in this doorway and it exited that other doorway,** מַהוּ – **what is [the law]?** Does the owner of the house acquire the purse?[26] אֲוִיר שֶׁאֵין סוֹפוֹ לָנוּחַ – Rava elaborates: **Is** an object that enters the **airspace** of a place in which [the object] **is not destined to come to rest** כְּמוּנָּח דָּמֵי – **considered as if it is resting** in that place, אוֹ לָאו כְּמוּנָּח דָּמֵי – **or is it not considered as if it is resting** in that place? Since Rava is unsure of the law in this matter, how can he rule decisively in the case of the dung?

The Gemara distinguishes between the two cases:

הָתָם לֹא מִיפְסַק וְלֹא מִידֵי – **There** in the case of the purse **nothing intervenes** between the airborne purse and the floor of the house. Hence, even though the purse is destined not to land, Rava entertains the possibility that the airspace is considered an extension of the floor, which would allow *kinyan chatzeir* to operate. הָכָא מִיפְסַק כְּלִי – But **here** in the case of the dung the **vessel intervenes** between the falling dung and the floor of the courtyard. Rava therefore understands that the airspace here cannot be considered an extension of the ground, and so he rules that *kinyan chatzeir* does not operate.

The Gemara now analyzes the second part of the aforementioned Baraisa, which stated:[27] וְשֶׁבָּרֶפֶת וְשֶׁבֶּחָצֵר – AND regarding all manure THAT IS found IN THE BARN AND IN THE COURTYARD, הֲרֵי אֵלּוּ שֶׁל בַּעַל הַבַּיִת – THESE BELONG TO THE OWNER of the courtyard (the landlord).

The Gemara asks:

תַּרְתֵּי – Is it necessary for the Tanna to teach this law in **both** cases (i.e. that of the barn and that of the courtyard)?! It would have been sufficient to mention only one![28] – ? –

The Gemara reinterprets the Baraisa's case because of this objection:

אָמַר אַבַּיֵי הָכִי קָאָמַר – **Abaye said: [The Tanna] is** actually **saying thus:** וְשֶׁבָּרֶפֶת שֶׁבֶּחָצֵר – **"And** regarding all manure **that is** found **in the barn, which is** located **in the courtyard** that the tenant also rented, הֲרֵי אֵלּוּ שֶׁל בַּעַל הַבַּיִת – **these belong to the owner."**

The Gemara explains the import of this ruling:

אָמַר רַב אַשִׁי וְאֹת אוֹמֶרֶת – **Rav Ashi said: This** ruling **indicates** that הַמַּשְׂכִּיר חֲצֵירוֹ סְתָם – if **one rents his courtyard** to another **without specifying** what is included in the rental, לֹא הִשְׂכִּיר רֶפֶת שֶׁבָּהּ – **he does not rent out** the **barn that is** located **in [the courtyard].** Hence, any manure found in the barn belongs to the landlord.

R' Yose is again challenged:

מֵיתִיבֵי – **They objected** to R' Yose's ruling on the basis of yet another Baraisa, which stated: יוֹנֵי שׁוֹבָךְ וְיוֹנֵי עֲלִיָּיה – DOVES OF THE DOVECOTE AND DOVES OF THE LOFT[29] חַיָּיבוֹת בְּשִׁילּוּחַ – ARE SUBJECT TO the law of SENDING the mother bird from the nest,[30] וַאֲסוּרוֹת בְּגָזֵל מִפְּנֵי דַּרְכֵי שָׁלוֹם – AND ARE PROHIBITED to other people AS ROBBERY FOR THE SAKE OF PEACE.[31] וְאִם אִיתָא לְהָא דְּאָמַר רַבִּי יוֹסֵי בְּרַבִּי חֲנִינָא – **But if that which R' Yose the son of R' Chanina said were true** – חֲצֵרוֹ שֶׁל אָדָם קוֹנָה לוֹ שֶׁלֹּא מִדַּעְתּוֹ – namely, **a person's courtyard acquires** objects **for him** even **without his knowledge** – קְרֵי כָּאן ,,כִּי יִקָּרֵא'' פְּרָט לִמְזוּמָּן – **read here** the verse, *If a bird's nest* ***happens*** *to be before you on the road... you shall surely send...*, and apply its implication: **to the exclusion of** a nest that is **at hand.**[32] – ? –

The Gemara answers in defense of R' Yose:

אָמַר רָבָא – **Rava said:** בֵּיצָה בִּיצִיאַת רוּבָּהּ הוּא דְּאִיחַיְּיבָה לָהּ בְּשִׁילּוּחַ – **An egg becomes subject to** the law of **"sending away"**

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26. Before throwing the purse the owner declared it ownerless vis-a-vis whoever took it first (*Rashi*; cf. *Tosafos* above, 12a ד״ה ריצא and *Nimukei Yosef* there). Rava's question is indeed whether the owner of the house acquires the purse by means of *kinyan chatzeir* even though the purse never lands (nor was ever destined to land) in his house.

27. The Gemara's quotation is inexact.

28. Since the Baraisa speaks of where the landlord rented out neither the courtyard nor the barn, the ruling in one case will necessarily apply to the other. Hence, the Tanna need not have taught that the landlord acquires the manure in both cases (*Rashi*).

Unlike *Rashi*, who understands that both cases teach the same ruling, *Tosafos* understand that the two cases imply contradictory teachings. That is, *Tosafos* maintain that it is obvious that one who rents a house in a courtyard has no rights to the manure produced in the landlord's barn; hence, we must assume that the case of the barn was not taught for itself, but for purposes of instructing implicatively, as follows: Whereas the manure in the barn belongs to the landlord, since the tenant has absolutely no rights vis-a-vis the barn, the manure in the courtyard indeed belongs to the tenant, inasmuch as he does have a right of passage in the courtyard. The actual mention of the case of the courtyard (wherein the manure is awarded to the landlord) thus contradicts this implication, and it is to this inherent conflict in the Tanna's words that the Gemara alludes. *Ritva* adds that the Tanna should have taught only the case of the courtyard, and from there it could be inferred that the landlord certainly acquires any manure found in the barn (see there for a different explanation of what the difference between a barn and a courtyard might be).

29. These birds seek their food in the field but return to nest in the dovecote and loft, respectively. They are not considered domesticated doves (*Rashi*).

30. The Torah states (*Deuteronomy* 22:6-7): *If a bird's nest happens to be before you on the road, on any tree or on the ground – young birds or eggs – and the mother is roosting on the young birds or the eggs, you shall not take the mother with the young. You shall surely send away the mother and take the young for yourself...* The Torah thus prohibits one to take an ownerless mother bird when it is sitting on its eggs or young. One must send away the mother bird – even many times, if it keeps returning to the nest – and then he is permitted to take the eggs or young birds (see *Ramban* on these verses and *Rambam* in *Moreh Nevuchim* 3:48 for a discussion of the reasons for this commandment).

Since the Torah specifies that birds from nests that *happen to be before you on the road* are subject to the law of "sending away," the Gemara (*Chullin* 139a) infers that birds always "at hand" (מְזוּמָּן; i.e. domesticated) are not subject to the commandment. Since doves of the dovecote and of the loft often leave their nests to search for food, they are not always at hand. Hence, they too are subject to the law of "sending away" (*Rashi*).

31. Literally: because of the ways of peace. The Gemara below will explain this statement.

32. If R' Yose's dictum is correct, the dovecote owner's property will acquire the eggs for him even without his knowledge. Thus, the nest with the mother bird should be considered "at hand" (מְזוּמָּן), for since it is the eggs that give a nest its identity as a nest, the eggs – or baby birds too – must also be undomesticated (*Rashi*). Hence, if R' Yose's ruling is true, doves of the dovecote and of the loft should *not* be subject to the law of "sending away" – whereas the Baraisa rules that they are. The Baraisa thus refutes R' Yose's ruling.

[The second ruling of the Baraisa indicates that one who takes the doves or their eggs transgresses only a Rabbinic injunction against robbing. According to R' Yose, however, the dovecote owner gains full possession of the eggs, and so one who takes them should be *Biblically* guilty of robbery. *Tosafos* explain that the Gemara could have raised this question, but preferred to base its challenge on the Baraisa's first ruling. Alternatively, R' Yose would interpret the second ruling as follows: One who takes the eggs is (Biblically) guilty of robbery, and one who takes the mother bird (in relation to which the courtyard is not considered protected – see below, note 35) transgresses only a Rabbinic injunction, i.e. "for the sake of peace."]

with the exiting of a majority of it from the mother's body,[33] וּמִיקְנָא לֹא קָנֵי – but [the dovecote owner] does not acquire the egg until it falls into his courtyard,[34] וְכִי קָתָנֵי חַיָּיבוֹת בְּשִׁלּוּחַ – and so when [the Tanna] teaches that [the doves] of the dovecote and the loft are subject to the law of "sending away," מִקַּמֵּי דְּתִיפּוֹל לַחֲצֵירוֹ – he speaks of where the owner wishes to grab the egg before it falls into his courtyard. Since he has not yet acquired the egg at that time, the nest is not considered "at hand," and so the obligation to send away the mother bird still applies. Hence, the Baraisa does not refute R' Yose.

The Gemara challenges this answer:

אִי הָכִי – If it is so that the dovecote owner did not acquire the egg because it did not fall into his courtyard, אַמַּאי אֲסוּרוֹת מִשּׁוּם גָּזֵל – why are [eggs] even Rabbinically prohibited on account of robbery (the second ruling of the Baraisa)?[35]

The Gemara responds:

אַאִמָּן – In truth, when the Tanna taught the Rabbinical prohibition against robbery, he did so even with respect to their mother.[36]

The Gemara suggests an alternative interpretation:

וְאִיבָּעִית אֵימָא לְעוֹלָם אַבֵּיצִים – And if you wish, say that in truth the Tanna established the Rabbinical prohibition against robbery only with respect to the eggs, וּמִדְּנָפֵיק רוּבָּה דַּעְתֵּיהּ עִילָּוֵיהּ – and so taught that once a majority of [the egg] comes out of the mother, [the dovecote owner's] mind is on it, to acquire it. Hence, although he does not actually acquire the egg at this time, he nonetheless does not despair of doing so,[37] and so the Rabbis forbade other people to take it.

The Gemara dismisses the challenge posed by the Baraisa on other grounds:

וְהַשְׁתָּא דְּאָמַר רַב יְהוּדָה אָמַר רַב – And now that Rav Yehudah has said in the name of Rav, אָסוּר לִזְכּוֹת בְּבֵיצִים כָּל זְמַן שֶׁהָאֵם רוֹבֶצֶת עֲלֵיהֶם – "It is forbidden to acquire the eggs as long as the mother bird is roosting on them, שֶׁנֶּאֱמַר ,,שַׁלֵּחַ תְּשַׁלַּח אֶת־הָאֵם" – for it is first stated, *You shall surely send away the mother,* וְהָדַר ,,אֶת־הַבָּנִים תִּקַּח־לָךְ" – and only then does it state, *you shall take the young for yourself,*"[38] אֲפִילּוּ תֵּימָא דִּנְפְלָה לָהּ לַחֲצֵרוֹ – even if you say that [the egg] fell into [the dovecote owner's] courtyard, still the doves should be subject to the law of "sending away," for so long as the mother bird roosts on the nest, the nest is not considered "at hand." כָּל הֵיכָא דְּאִיהוּ מָצֵי זָכֵי לֵיהּ – For whenever [the dovecote owner] is legally capable of acquiring [eggs or baby birds], חֲצֵרוֹ זָכְיָא לֵיהּ – his courtyard acquires it for him; וְכָל הֵיכָא דְּאִיהוּ לֹא מָצֵי זָכֵי לֵיהּ – and whenever he is not legally able to acquire [eggs or baby birds],[39] חֲצֵרוֹ נַמִּי לֹא זָכְיָא לֵיהּ – his courtyard also does not acquire it.[40] R' Yose thus interprets the Baraisa as speaking of where the mother bird was roosting on the nest, and so the dovecote owner's courtyard was powerless to acquire the eggs for him. Hence, the nest is not considered "at hand," and so the commandment of "sending away" remains in place.

The Gemara challenges this interpretation of the Baraisa:

אִי הָכִי – If it is so that it is the mother bird's roosting that prevents the courtyard from acquiring the nest, אֲסוּרוֹת בְּגָזֵל מִפְּנֵי דַּרְכֵי שָׁלוֹם – then are the eggs prohibited as robbery only for the sake of peace, a Rabbinic stricture, and not on more serious grounds?! אִי דְּשַׁלְּחָהּ – Indeed, if it happened that [an intruder] sent away [the mother bird] before taking the eggs, גָּזֵל מְעַלְּיָא הוּא – it is a case of outright, Biblical robbery, since the courtyard acquired the eggs for its owner as the mother was sent away. Why, then, does the Baraisa downgrade the taking to a Rabbinic offense? אִי דְּלֹא שַׁלְּחָהּ – And if it happened that [the intruder] did not send [the mother] away before taking the eggs, הָא בָּעֵי שִׁלּוּחָהּ – he should have sent her away! By not doing so he violated the Biblical obligation to send away the mother before taking the eggs, and so why does the Baraisa mention only the Rabbinic injunction against taking the eggs?

The Gemara clarifies the Baraisa:

בְּקָטָן דְּלָאו בַּר שִׁילּוּחַ הוּא – We are dealing here with the case of a minor, who is not obligated to perform the mitzvah of sending away the mother bird, since he is completely exempt from observing the commandments.[41]

The Gemara objects to this explanation:

קָטָן בַּר דַּרְכֵי שָׁלוֹם הוּא – But is a minor obligated to return the eggs even "for the sake of peace"?[42]

The Gemara explains the Baraisa's ruling:

הָכִי קָאָמַר – [The Baraisa] actually said thus: אָבִיו שֶׁל קָטָן חַיָּיב לְהַחֲזִיר לוֹ – The minor's father is obligated to return the eggs to [the dovecote owner] מִפְּנֵי דַּרְכֵי שָׁלוֹם – for the sake of peace. The Rabbis placed the responsibility for returning the eggs on the minor's father who *is* charged with mitzvah observance.

NOTES

33. At that point of its evolvement it qualifies as an egg under the terms of the verse, *young birds or eggs* (*Deuteronomy* 22:6) [*Rashi*].

34. *Raavad*, cited by *Shitah Mekubetzes*, notes that the egg need not actually land on the courtyard floor. Rather, the dovecote owner will acquire it as soon as it completely exits the mother, at which time it is entirely in the airspace of the courtyard.

35. The Gemara at this point understands that taking the mother bird herself is not prohibited even Rabbinically, for since she is semi-wild the dovecote owner despairs of possessing her. Hence, the Gemara assumes that the Baraisa's second ruling applies only to the eggs. The Gemara therefore questions why the Tanna distinguishes between the eggs and the mother. That is, if it is so that the dovecote owner despairs of possessing the mother, he should likewise despair of possessing the eggs (since there is no guarantee that they will be laid in his courtyard when they are eventually laid). Hence, taking the eggs should not be prohibited even Rabbinically (*Rashi*, as explained by *Ritva*).

36. The Gemara now understands that the dovecote owner will not despair of possessing the mother bird, for he trusts that she will return to her nest in the evening. Therefore, since he does not despair of possessing the mother, he will not despair of possessing the eggs still inside of her. The Rabbis therefore prohibited the taking of either (*Rashi*, as explained by *Ritva*). *Ritva* himself finds *Rashi's* interpretation difficult on several counts, and endorses the approach of *Rabbeinu Tam*; see there and see also *Tosafos*.

37. Indeed, he *expects* to acquire it eventually.

38. Rav Yehudah's point is that although it seems as if the Torah forbids taking only the mother, it also forbids taking – or even just legally acquiring – the young and the eggs as long as the mother is there. The latter prohibition is part and parcel of the mitzvah of "sending away" (שִׁלּוּחַ הַקַּן).

39. For it is forbidden to do so, pursuant to the ruling of Rav Yehudah in the name of Rav.

40. *Ritva* explains that the courtyard *cannot* acquire it, for the Torah did not sanction acquisition by courtyard in such a case [i.e. where the acquisition is prohibited]. See there for a different explanation. See also *Minchas Chinuch* 544, who states that although it is forbidden to acquire the nest in such a case with a method of acquisition other than "courtyard," if one does so, the acquisition is nonetheless valid.

41. Hence, when the minor took the eggs without first sending away the mother, no Biblical commandment was violated. The Baraisa thus mentions only a Rabbinic requirement to return the eggs (see *Rashi*).

[Since the minor did not send away the mother, the courtyard never acquired the eggs for its owner, and so there is only a Rabbinic obligation to return the eggs; see *Tosafos*.]

42. A minor would incur no obligation to return the eggs, not even one mandated by the Rabbis for the sake of peace (*Ritva*).

Mishnah **הַמַּשְׂכִּיר בַּיִת לַחֲבֵירוֹ לְשָׁנָה – If one rents a house to his fellow for a year נִתְעַבְּרָה הַשָּׁנָה – and the year was** then **intercalated** (i.e. a leap year was then proclaimed),[43] **נִתְעַבְּרָה לַשּׂוֹכֵר – it was intercalated for the tenant.**[44] **הִשְׂכִּיר לוֹ לְחֳדָשִׁים – If, however, he rented** the house **to [the tenant] by the month**[45] **נִתְעַבְּרָה הַשָּׁנָה –** and **the year was** then **intercalated, נִתְעַבְּרָה לַמַּשְׂכִּיר – it was intercalated for the landlord.**[46] **מַעֲשֶׂה בְּצִיפּוֹרִי –** There was once **an incident in** the town of **Tzippori בְּאֶחָד שֶׁשָּׂכַר מֶרְחָץ מֵחֲבֵירוֹ – involving one who rented a bathhouse from his fellow בִּשְׁנֵים עָשָׂר זָהֵב לְשָׁנָה מְדִינָר זָהָב לְחֹדֶשׁ – at the rate of "twelve gold *dinars* for a year, one gold *dinar* for a month."**[47]

NOTES

43. Every few years it is necessary to intercalate an extra month into the lunar-based Jewish calendar to align it with the solar calendar. This thirteenth month is called אֲדָר שֵׁנִי, the *Second Adar*. Until the year 4119 (359 C.E.) these leap years were not determined by fixed calendars, but by various factors considered by the Sanhedrin (see *Sanhedrin* 11b-13b). In the case discussed by our Mishnah, the Sanhedrin decided after the year started that it was necessary to add an extra month.

44. That is, the added month goes to the tenant – he need not pay additional rent because of it, as it is included in the yearly rental (*Rashi*).

According to *Ritva*, this ruling applies only if a *particular* rental year was stipulated. In such a case we presume that the landlord conveyed the premises for the duration of that year, regardless of whether it consisted of twelve or thirteen months. Should the agreement call for the rental of a house for "a year," however, the intent would be a conventional year, and the tenant would be entitled to dwell in the house for only twelve months (see also *Nimukei Yosef* and *Maggid Mishneh, Hil. Sechirus* 7:2). *Rambam* (ibid.) does not appear to make this distinction, however, and *Choshen Mishpat* (312:15) does not record *Ritva's* opinion. *Sma* (ibid.), however, accepts it.

45. I.e. the parties agreed to a fixed monthly rent (*Meiri*).

46. That is, the added month goes to the landlord, and the tenant must pay rent for that month.

This ruling appears obvious. Since the house was rented by the month, the tenant certainly must pay for the extra month. *Ritva* explains that although the ruling is indeed superfluous, the Tanna taught the various laws relevant to this matter for the sake of completeness. See *Sma* to *Choshen Mishpat* (312:24) for other explanations.

47. That is, the lease stipulated both the yearly and the monthly rates. The year was then proclaimed a leap year, so that a month was added to the year, and an argument ensued over whether rent was owed for the extra month.

וּבָא מַעֲשֶׂה לִפְנֵי רַבָּן שִׁמְעוֹן בֶּן גַּמְלִיאֵל וְלִפְנֵי רַבִּי יוֹסֵי – And the incident came before Rabban Shimon ben Gamliel and before R' Yose for judgment,[1] **וְאָמְרוּ – and they said: יַחֲלוֹקוּ אֶת חֹדֶשׁ הָעִיבּוּר – Let them divide the intercalated month.**[2]

Gemara The Gemara is perplexed by the inclusion of this incident in our Mishnah:

מַעֲשֶׂה לִסְתּוֹר – Is the incident quoted to contradict the first part of the Mishnah?![3]

The Gemara resolves the difficulty:

חִסּוּרֵי מִחְסֶרְא וְהָכִי קָתָנֵי – It is as if [the text] of the Mishnah **is missing** words, **and [the Tanna] is teaching thus: וְאִם אָמַר לוֹ בִּשְׁנַיִם עָשָׂר זְהוּבִים – But if [the landlord] said to [the tenant],** "I am renting the premises to you **at the rate of twelve gold** *dinars* **for a year, one gold** ***dinar*** **for a month,"**[4] **יַחֲלוֹקוּ – they divide** the intercalated month. **וּמַעֲשֶׂה נָמִי בְּצִיפּוֹרִי – And** there was **an incident also in** the town of **Tzippori בְּאֶחָד שֶׁשָּׂכַר מֶרְחָץ מֵחֲבֵירוֹ – involving one who rented a bathhouse from his fellow בִּשְׁנַיִם עָשָׂר זְהוּבִים לְשָׁנָה מְדִינָר זָהָב לְחֹדֶשׁ – at the rate of "twelve gold** *dinars* **for a year, one gold** ***dinar*** **for a month." וּבָא מַעֲשֶׂה לִפְנֵי רַבָּן שִׁמְעוֹן בֶּן גַּמְלִיאֵל וְלִפְנֵי רַבִּי יוֹסֵי – And the incident came before Rabban Shimon ben Gamliel and before R' Yose** for judgment, **וְאָמְרוּ – and they said: יַחֲלוֹקוּ אֶת חֹדֶשׁ הָעִיבּוּר – "Let them divide the intercalated month,** for we do not know which expression is operative."[5]

An Amora reacts to the decision of Rabban Shimon and R' Yose: **אָמַר רַב – Rav said: אִי הֲוָאי הָתָם – If I had been there** when that "leap year" case was adjudicated, **הֲוָה יָהֵיבְנָא לֵיהּ כּוּלָּהּ לַמַּשְׁכִּיר – I would have given the entire [extra month's rent] to the landlord.**

The Gemara asks:

מַאי קָא מַשְׁמַע לָן – What new law **is [Rav] teaching us?** תָּמוּהּ **לָשׁוֹן אַחֲרוֹן – Is he teaching that when contradictory expressions** are employed we should **take hold of** (i.e. legally recognize as operative) the **final expression**?![6] **וְהָא אָמַר רַב חָדָא זִימְנָא – But Rav stated** that law **once** before! **וְדְאָמַר רַב הוּנָא – For Rav Huna said: אָמְרֵי בֵּי רַב – They said** in the academy of **Rav:**[7] **אִסְתִּירָא מְאָה מָעֵי – If a seller quoted** the price of an item as **"an** ***istira*****, one hundred** ***ma'os,"***[8] and the buyer agreed to the price, **מְאָה מָעֵי – the buyer must pay one hundred** *ma'os*. **מְאָה מָעֵי אִסְתִּירָא – If, however, the seller quoted** the price as **"one hundred** ***ma'os*****, an** ***istira*****," אִסְתִּירָא – the buyer need** pay only an ***istira***. Thus, Rav has already taught (through his disciples) that the second of two contradictory expressions is considered the operative one. **– ? –**

The Gemara explains that this ruling could have been interpreted differently, and so both of Rav's statements of the law are necessary:

אִי מֵהָתָם – If the only indication of Rav's opinion in this matter came **from there** (the case of "an *istira*, 100 *ma'os*"), I would not have attributed Rav's ruling to the fact that he held that the second of two contradictory expressions is operative; **הָוֵה אָמִינָא – rather, I would have said** that in that case the two expressions were actually one, **פֵּרוּשֵׁי קָא מְפָרֵשׁ – for [the seller]** was merely **clarifying** his first expression with the second.[9] **קָמַשְׁמַע לָן – [Rav]** thus states the law in the case of the bathhouse and

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NOTES

1. The terms of the lease were contradictory. The first part of the stipulation ("twelve gold dinars for a year") establishes a yearly rate, while the second part ("one *dinar* a month") establishes a monthly rate. In most years this makes no difference, but in a leap year a yearly rate includes the extra month, while the monthly rate requires an additional payment for it.

2. I.e. the extra month inserted into the calendar. The two sages ruled that the tenant must pay half a month's rent (in this case, half a *dinar*) for the thirteenth month. The Gemara below explains the reason for this ruling.

3. [Typically, the Tanna cites an incident to *illustrate* a ruling taught in the Mishnah.] Here, however, the first part of the Mishnah teaches that the extra month in a leap year goes either entirely to the landlord or entirely to the tenant, while in the reported incident it is divided (*Rashi*). See *Ritva*.

4. I.e. the implied third case of the Mishnah concerns where the expressions of the first two cases are both stated (see *Rashi*).

5. The landlord had stipulated the rental rate with two contradictory expressions. If the first expression ("twelve gold *dinars* for a year") is considered operative [a general principle called תָּפוּס לָשׁוֹן רִאשׁוֹן, literally: take hold of the first expression], the tenant need not pay for the extra month. If, however, the second expression ("one gold *dinar* for a month") is considered operative [a general principle called תָּפוּס לָשׁוֹן אַחֲרוֹן, literally: take hold of the final expression], the tenant must pay the extra month's rent. Since Rabban Shimon and R' Yose were uncertain as to which expression was the operative one, they applied Sumchos' principle, מָמוֹן הַמּוּטָּל בְּסָפֵק חוֹלְקִין, *property whose [disposition] lies in doubt is divided* (see *Shitah Mekubetzes* ד"ה בבא, and *Maharam* to Gemara below ד"ה אמר רב).

[The question of whether to follow the first or the second contradictory expression – a question found throughout the Talmud (see below) – occurs only where the second is uttered immediately after the first (תּוֹךְ כְּדֵי דִיבּוּר). Although the second expression would seem to imply a retraction of the first, the fact that the speaker did not see fit to elaborate (despite having uttered two contradictory statements in one breath) indicates that he might have reconsidered his second statement and resolved to revert to his earlier statement. For this reason Rabban Shimon and R' Yose are uncertain as to which expression is operative (*Ritva* to *Bava Basra* 105a ד"ה וחכמים אומרים).]

Tosafos note that only in cases like this, where the two expressions yield contradictory results, is R' Yose uncertain as to which expression is operative. Where, however, there is no contradiction, he rules that both expressions are operative (see *Temurah* 25b). In yet other instances (see *Nazir* 9a, *Zevachim* 30a et al.), R' Yose interprets the second expression as a clarification of the first. The Rishonim, in various places throughout the Talmud, define the parameters of this principle.

6. The final expression ("one *dinar* for a month") established a monthly rate, and if this expression is recognized as operative, the tenant must pay the extra month's rent.

Although Rav is an Amora and an Amora may not dispute the ruling of a Tanna, Rav follows the ruling of a different Tanna, Ben Nanas, who held (see *Bava Basra* 104b-105a) that the second of two contradictory expressions is operative [since the first is assumed to have been retracted] (*Tos. HaRosh*, *Maharam*).

7. The Gemara (*Sanhedrin* 17b) states that a ruling quoted in this manner is from Rav Hamnuna, Rav's disciple. However, our Gemara obviously regards the ruling as reflecting the view of Rav himself.

8. The *ma'ah* referred to here is the standard copper *ma'ah*, which is equal to a *perutah*. It is not to be confused with the silver *ma'ah*, which is worth one-sixth of a *dinar*, or 32 *perutos*.

An *istira* is the equivalent of half a *dinar*, and is worth 96 *perutos*. Hence, the seller's first expression ("an *istira*") indicates that his price is 96 *perutos*, while his second expression ("one hundred *ma'os*") indicates that it is 100 *perutos*. Thus, the two expressions of price are contradictory (see *Rashi* below ד"ה אי מהתם).

9. That is, when the seller said, "one hundred *ma'os*, an *istira*," he actually meant: "The price is one hundred 'inferior' *perutos*, which equal an *istira* coin, which is worth 96 *perutos*." Rav thus rules that the buyer must pay an *istira*. Conversely, when the seller said, "an *istira*, one hundred *ma'os*," he actually meant: "The price is a 'valuable' *istira*, which is worth one hundred *ma'os* [i.e. 4 *ma'os* more than an ordinary *istira*]." Here Rav rules that the buyer must pay one hundred *ma'os* (*Rashi*; see *Tosafos*, who challenge *Rashi's* interpretation of the Gemara and advance an altogether different one).

thereby **teaches us** that such an interpretation of the *istira* case is incorrect. Rather, Rav's ruling there is consistent with his holding that the second of two contradictory expressions is the operative one.

An Amora offers a different interpretation of the ruling of Rabban Shimon and R' Yose:[10]

וּשְׁמוּאֵל אָמַר – And Shmuel said: **בְּבָא בְּאֶמְצַע חֹדֶשׁ עַסְקִינַן – We are dealing** in the Mishnah with a case **where [the landlord] came** before the court **in the middle of** the thirteenth **month** and demanded that the tenant either agree[11] to pay for the extra month or vacate the premises. Only in such a case did Rabban Shimon and R' Yose rule that the contested month's rent is evenly divided.[12] **אֲבָל בָּא בִּתְחִלַּת חֹדֶשׁ – However, if [the landlord] had come** to court **at the beginning of** the extra **month,**[13] **כּוּלָּהּ לַמַּשְׁכִּיר – the entire [month's rent]** would belong **to the landlord,** for the bathhouse is his possession; **בָּא בְּסוֹף חֹדֶשׁ –** and if **he had come at the end of** the extra **month** to collect that month's rent, **כּוּלָּהּ לַשּׁוֹכֵר – the entire [month's rent]** would belong **to the tenant,** since he is in possession of the contested money.

Shmuel's interpretation of the Mishnah posits the non-resolution of the question of which expression is operative. The Gemara therefore asks:

מִי אָמְרִינַן תְּפוֹס – Did Shmuel actually **say** that **לֹא אָמְרִינַן תְּפוֹס לָשׁוֹן אַחֲרוֹן – we do not say: Take hold of the final expression** and recognize it as the operative one?! **וְהָא רַב וּשְׁמוּאֵל דְּאָמְרִי כּוֹר בִּשְׁלֹשִׁים תַּרְוַיְיהוּ – But Rav and Shmuel both have said:** If a seller says to a purchaser, **"I am selling to you a *kor*** of grain **for thirty** *selaim,*"[14] **אֲנִי מוֹכֵר לָךְ – [either party] may renege on [the sale] even during** the transfer of **the final *se'ah*** of the *kor*, for the sale is not complete until the buyer takes possession of the entire *kor*.[15] **יָכוֹל לַחֲזוֹר בּוֹ אֲפִילּוּ בְּסָאָה אַחֲרוֹנָה – If,** however, the seller says, **"I am selling to you a *kor*** of grain **for thirty** *selaim,* **a *se'ah* for a *sela,"** **כּוֹר בִּשְׁלֹשִׁים סְאָה בְּסֶלַע אֲנִי מוֹכֵר לָךְ רִאשׁוֹן רִאשׁוֹן קָנָה – [the buyer] acquires** each *se'ah* **one by one** as he takes possession of it,[16] and the sale of those *se'ahs* can no longer be rescinded. Now, the terms of this sale ("a *kor* for thirty *selaim,* a *se'ah* for a *sela*") are contradictory, for the first expression indicates that the entire *kor* is being sold as one unit, while the second expression indicates that each *se'ah* is being sold individually. Since Shmuel rules that each *se'ah* is acquired when the buyer performs *meshichah* on it, it is evident that he considers the final expression operative. Why, then, does he advance an interpretation of the Mishnah that reflects a position of uncertainty with regard to the question of which expression is operative? Why does he not take issue with the Mishnah's ruling, as did Rav?

The Gemara defends Shmuel's interpretation of the Mishnah:

הָתָם טַעְמָא מַאי – There, in the second case of the grain sale, **what is the reason** that Shmuel rules that the buyer acquires each *se'ah* as he takes it? **מְשׁוּם דְּתָפְסִי – It is because [the buyer] has grabbed hold** of it and is now in possession.[17] **הָכָא נַמִּי תָּפְסִי – Here, too,** in the case of the rental, according to Shmuel's interpretation, **[each party] has grabbed hold,** so to speak, of half the extra month's tenancy.[18] For that reason Shmuel understands that this month's rent is divided when the litigants come to court in the middle of the month.

The Gemara cites a different Amoraic reaction to the decision of Rabban Shimon and R' Yose:

וְרַב נַחְמָן אָמַר – And Rav Nachman said: **קַרְקַע בְּחֶזְקַת בְּעָלֶיהָ קַיֶּימֶת – Real property remains in the possession of its owner,** and the entire extra month's rent always accrues to the landlord!

The Gemara assumes that Rav Nachman awards the entire extra month's rent to the landlord because he holds that the final expression is operative.[19] The Gemara therefore asks:

מַאי קָא מַשְׁמַע לָן – What new ruling **is [Rav Nachman] teaching us?** **תְּפוֹס לָשׁוֹן אַחֲרוֹן – Is** he teaching that the landlord is entitled to receive rent for the extra month because we **take hold of** and recognize as operative the **final expression,** which stipulated a monthly rate? That cannot be, **הֵיינוּ דְּרַב – for this is**

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10. The Gemara initially understood that because they were uncertain as to which of the contradictory expressions was operative, Rabban Shimon and R' Yose applied Sumchos' general principle for cases of doubt (see note 5 above). The Gemara now presents a different interpretation – one that limits their ruling to one specific case, inasmuch as it understands that the two Tannaim actually applied *the Rabbis'* principle for adjudicating cases of doubt – הַמּוֹצִיא מֵחֲבֵירוֹ עָלָיו הָרְאָיָה, *the [burden of] proof is on the one who seeks to exact [money or property] from his fellow* (see *Ritva*).

11. The landlord cannot actually demand the money at that time, since rent is not due until the end of the rental term (see above, 65a).

12. Since these Tannaim were uncertain as to which of the two contradictory expressions of rental rate was operative, they employed the legal principle of *chezkas mamon* (current possession of property) to adjudicate the dispute. The question of the tenant's owing rent arises since we are not certain which expression is operative. However, with respect to the days of the thirteenth month that have already elapsed we take into account the renter's possession of his money (since he has already lived in the house), and we do not extract that past rent money from him. Rather, we apply the principle, חֲזָקָה מָמוֹן עַל חֶזְקָתוֹ, *let the [disputed] money remain in its [current state of] possession* (i.e. until proof is adduced as to its ownership), since he has already lived in the house. On the other hand, with respect to the upcoming days of the thirteenth month, we view the rental property, which belongs to the landlord, as being in *his* possession, and automatically he is entitled to receive rent for the remainder of the month or to demand the tenant's immediate ouster (*Rashi*).

13. Demanding that the tenant either vacate the premises or agree to pay for the extra month.

14. A *kor* is equal to thirty *se'ah*. The sale was thus thirty *selaim* for thirty *se'ah* of grain, or a *sela* per *se'ah*. In this first case, however, this breakdown was not explicitly stated; the terms of the sale were simply "a *kor* for thirty *selaim*."

15. Movable goods are not acquired by monetary payment, but through the buyer's pulling them into his possession (*meshichah*). Since the grain was sold as a *kor* unit, the sale is not complete until the buyer performs *meshichah* on the entire *kor* (i.e. on all thirty *se'ah*). Hence, until the buyer takes the thirtieth *se'ah*, either party may retract (see *Rashi*).

16. Since the seller said, "A *se'ah* for a *sela*," each *se'ah* is treated as a separate unit whose sale is complete once the buyer performs *meshichah* on it (*Rashi*).

17. In truth, in the case of the grain, too, Shmuel is uncertain as to which of two contradictory expressions is operative. Hence, he rules as he does, not because he maintains that the final expression is operative, but because *beis din* has no power to confiscate any grain already in the buyer's possession, in accord with the principle, חֲזָקָה מָמוֹן עַל חֶזְקָתוֹ, *let the [disputed] property remain in its [current state of] possession* (*Rashi*).

18. Since the tenant has already "grabbed" half of the month's tenancy, we can consider only the rent money for the half-month already gone by, and the tenant is in possession of that money. The landlord has possession of the bathhouse for the half-month yet to come, and that gives him the *chazakah* for the remaining time. Since the rights to the extra month's tenancy are in doubt (owing to the contradictory statements made in the lease agreement), each litigant is allowed to keep the part of the tenancy that he "holds."

See *Ritva*, who discusses the general efficacy of a *chezkas mamon* occasioned by an act of "grabbing" (תְּפִיסָה). See also note 20 below.

19. *Ritva*.

the very ruling **of Rav!** Why, then, would Rav Nachman bother to repeat it?

The Gemara clarifies Rav Nachman's ruling:

אַף עַל גַּב דְּאַפֵּיךְ מֵיפַּךְ – Rav Nachman does not hold that the second of two contradictory expressions is the operative one. Indeed, he awards the entire extra month's rent to the landlord **even though [the latter] reversed** the expressions and mentioned the yearly rate last![20]

The Gemara discusses a different issue in landlord-tenant law:

בָּעוּ מִינֵיהּ מֵרַבִּי יַנַּאי – **[The scholars] inquired of R' Yannai:** In the case of an annual rental, **שׁוֹכֵר אָמַר נָתַתִּי** – if the **tenant said, "I already gave** to you the annual rent," **וּמַשְׁכִּיר אוֹמֵר לֹא נָטַלְתִּי** – **and the landlord says, "I never took** (i.e. received) it," **עַל מִי לְהָבִיא רְאָיָה** – **upon whom** is it incumbent **to bring proof** of his claim?

The Gemara analyzes the question:

אֵימַת – **When** does the tenant claim to have paid the entire annual rent? **אִי בְּתוֹךְ זְמַנּוֹ** – **If** he says that he paid it **within his** allotted **time**[21] – **תְּנִינָא** – **we have** already **learned** the law in such a case, and so the scholars would not have needed to question R' Yannai! **אִי לְאַחַר זְמַנּוֹ** – **If** he says that he paid it **after his** allotted **time** – **תְּנִינָא** – **we have learned** the law in such a case as well, **דְּתָנַן** – **for** regarding both cases **we have learned in a Mishnah:**[22] **מֵת הָאָב בְּתוֹךְ שְׁלֹשִׁים יוֹם** – **IF THE FATHER DIED WITHIN THIRTY DAYS** of his firstborn's birth,[23] **בְּחֶזְקַת שֶׁלֹּא נִפְדָּה** – the child is accorded **THE PRESUMPTIVE STATUS THAT HE WAS NOT REDEEMED** **עַד שֶׁיָּבִיא רְאָיָה שֶׁנִּפְדָּה** – **UNTIL HE BRINGS PROOF THAT HE WAS REDEEMED.**[24] **לְאַחַר שְׁלֹשִׁים יוֹם** – If the father died **AFTER** the passage of **THIRTY DAYS** from the firstborn's birth, **בְּחֶזְקַת שֶׁנִּפְדָּה** – the child is accorded **THE PRESUMPTIVE STATUS THAT HE WAS REDEEMED**[25] **עַד שֶׁיֹּאמְרוּ לוֹ שֶׁלֹּא נִפְדָּה** – **UNTIL [THE NEIGHBORS] TELL HIM THAT HE WAS NOT REDEEMED.**[26]

From here we may derive the law in our case: If a tenant claims that he paid the rent before it fell due, we presume that he has not done so until he proves otherwise. Conversely, if one claims that he paid the rent after it fell due, we presume that he has indeed done so until the landlord proves otherwise. What, then, was the point of the scholars' inquiry?[27]

The Gemara clarifies the scholars' question:

לֹא צְרִיכָא – There is **no** difficulty here; rather, it was **necessary** for the scholars to inquire about the law **בְּיוֹמָא דְּמִשְׁלַם זְמַנֵּיהּ** – where the tenant claims to have paid the entire annual rent on **the day that his** allotted **time expires.**[28] **מִי עָבִיד אִינִישׁ דְּפָרַע** **בְּיוֹמָא דְּמִשְׁלַם זְמַנֵּיהּ** – The scholars therefore queried: **Does it happen that a person pays** his rent **on the day that his** allotted

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20. Like Rabban Shimon and R' Yose, Rav Nachman is uncertain as to which of the two contradictory expressions of rental is operative. However, whereas [according to Rav Nachman's understanding] the two Tannaim applied Sumchos' principle ("property whose [disposition] lies in doubt is divided") to settle the dispute, Rav Nachman prefers the approach of the Rabbis ("the [burden of] proof is on the one who seeks to exact [money] from his fellow"). Hence, Rav Nachman rules that even if the landlord sues for the extra month's rent at the *end* of that month, still, "real property remains in the possession of its owner." That is, in disputes concerning the rental of real property, Rav Nachman *always* considers the landlord to be the one in possession. This is because, unlike Shmuel, he views the doubt from the perspective of the beginning of the month, at which time the landlord was actually in possession of the property. Since from the beginning it was doubtful whether the tenant had the right to use the bathhouse rent-free, he was not allowed to use it without first establishing his right. Thus, even if the case comes before the court at the end of the thirteenth month, Rav Nachman rules that the tenant's grabbing hold is meaningless, and that therefore he must pay the full month's rent (*Rashi, Maharam;* see *Ritva*).

To summarize the opinions of the three Amoraim – Rav, Shmuel and Rav Nachman – cited by the Gemara: (1) *Rav* follows the opinion of the Tanna, Ben Nanas, who holds that the second of two contradictory expressions is the operative one. In the Mishnah's implied third case, then, Rav rejects the ruling of Rabban Shimon and R' Yose (who are uncertain as to which expression is operative), and awards the entire extra month's rent to the landlord because the operative final expression established a monthly rate. (2) Like Rabban Shimon and R' Yose, *Shmuel* is uncertain as to which expression is operative. He views the Mishnah's case from the perspective of when the doubt is actually raised, and understands that the Tannaim applied the Rabbis' principle ["the [burden of] proof is on the one who seeks to exact [money] from his fellow"] in adjudicating the case. (3) *Rav Nachman* shares the uncertainty of Rabban Shimon and R' Yose vis-a-vis which expression is operative; however, according to his understanding, they apply Sumchos' rule ["property whose [disposition] lies in doubt is divided"] to adjudicate the case, while he applies the Rabbis' principle. In addition, unlike Shmuel, he always views the case from the perspective of the land being in the possession of the landlord.

21. I.e. within the year, before the last day of the rental term, for the general rule is that rent is payable only at the end of the term [שְׁכִירוּת אֵינָהּ מִשְׁתַּלֶּמֶת אֶלָּא בְּסוֹף – above, 65a] (*Rashi*).

22. *Bechoros* 49a. The Mishnah to be cited appears in the text of *Rashi* and *Tosafos*, and concerns the subject of redeeming the firstborn son. In the text of *Rif, Rosh* and *Rambam*, however, a Baraisa dealing with the subject of an unspecified (i.e. thirty-day) rental appears (see *Hagahos HaGra*).

23. The Torah states (*Numbers* 18:15-16): . . . *you shall surely redeem the firstborn of man . . . from one month you shall redeem.* The Torah thus teaches that every firstborn Jewish male (other than those from the tribe of Levi) must be redeemed with a payment of five silver *shekels* to a Kohen. This ceremony occurs after thirty days have passed from the child's birth. The Gemara (*Kiddushin* 29a) teaches that it is the father of the firstborn who must perform the redemption.

24. We presume that the father did not convey the redemption money until he was actually obligated to do so – would it were that people paid their debts on time! Hence, if the father died before the passage of thirty days from the son's birth, the son must later redeem himself if he cannot prove that his father, in fact, did so (*Rashi*).

25. We presume that the father redeemed his son in a timely fashion (*Rashi*).

26. If the neighbors tell him that they heard the father attest on his deathbed that the son was never redeemed, the son becomes obligated to redeem himself. The Mishnah was compelled to formulate the ruling in this manner because it could not have stated simply that where the father dies after thirty days, "the Kohen must bring proof that the child was never redeemed." This is because the son cannot be forced to litigate with any *particular* Kohen, since he can always say, "I shall give the redemption money to another Kohen" (*Rashi*).

27. Actually, Abaye and Rava have taught, "It happens that a person repays (a loan) within his (allotted) time" (*Bava Basra* 5a), which means that a person is believed to claim that he indeed repaid his debt before it fell due. *Tosafos* explain, however, that the cases of the redemption and rental payments are different. That is, a father would be especially reluctant to advance redemption money, for perhaps in the interim the infant will die, or perhaps the money will be spent by the Kohen before the end of thirty days and, according to Rava (in *Bechoros* 49a), it will then be unable to effect redemption. Similarly, a tenant will be reluctant to prepay his rent, for perhaps the rented house will collapse before the end of the term and his lease does not entitle him to a replacement. Hence, in each of these cases there is a presumption that the obligee did *not* prepay (*Tosafos*). See *Machaneh Ephraim, Hil. Sechirus* 21, who discusses the applicability of Rav Nachman's principle ("real property remains in the possession of its owner") in this case.

28. The [illegible] of the last

time expires,[29] **אוֹ לֹא – or** does it **not** happen that he pays it at that time?[30]

The Gemara answers the scholars' question:

אָמַר לְהוּ רַבִּי יוֹחָנָן – R' Yochanan said to [the scholars]: **תְּנִיתוּהָ – You have** already **learned [the answer]** to your question in a Mishnah, which states:[31]

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day of the rental term, and the landlord denies having received it (*Rashi*).

29. If so, the landlord bears the burden of proving that the rent was *not* paid that morning. [Even if a person does not pay his rent before it falls due (see above, note 27), here we are questioning if one may pay it at the first possible moment of the day it indeed falls due.]

30. If this is the case, the tenant bears the burden of proving that he indeed paid in the morning.

31. Below, 111a.

שָׂכִיר בִּזְמַנּוֹ – IF A HIRED WORKER claims his wage ON TIME[1] and the employer claims that he already paid it, נִשְׁבָּע וְנוֹטֵל – [THE WORKER] MAY SWEAR that he has received nothing AND MAY then TAKE his pay.

The Gemara analyzes the Mishnah's ruling:

שָׂכִיר הוּא דְּרָמוּ רַבָּנָן שְׁבוּעָה – It is in the case of a hired worker that the Rabbis imposed an oath on [the plaintiff],[2] מִשּׁוּם דְּבַעַל הַבַּיִת טָרוּד בְּפוֹעֲלָיו – because there the employer is preoccupied with his workers and will sometimes think that he has paid a particular worker when, in fact, he has paid a different one.[3] The Mishnah implies that had he been able to do so, the employer/defendant would have been allowed to swear that he paid his worker's wages on the day they fell due, and would thereby have avoided liability. The Gemara thus infers: אֲבָל הָכָא שׂוֹכֵר מְהֵימַן בְּשָׁבוּעָה – But here a tenant is believed to claim – even on the day the lease expires – that he already paid the annual rent, and he does so with an oath.[4] Since the tenant/defendant in our case *can* swear that he paid the rent on the day it fell due, and thereby avoid liability, we allow him to do so. The scholars' question is thus answered.

The Gemara discusses a related case:

אָמַר רָבָא אָמַר רַב נַחְמָן – Rava said in the name of Rav Nachman: הַאי מַאן דְּאוֹגַר לֵיהּ בֵּיתָא לְחַבְרֵיהּ לַעֲשַׂר שְׁנִין – Regarding one who rents a house to his fellow for a term of ten years, וְכָתַב לֵיהּ שְׁטָרָא – and at that time he wrote for [the tenant] an undated document attesting that the rental was for ten years, וְאָמַר לֵיהּ נְקִיטַתְּ חָמֵשׁ שְׁנִין – and after some time he came before the court and said to [the tenant], "You have held the property already for five years,"[5] – מְהֵימַן – he is believed.[6]

Rava's ruling is challenged:

אָמַר לֵיהּ רַב אַחָא מִדִּפְתִּי לְרָבִינָא – Rav Acha from the town of Difti said to Ravina: אֶלָּא מֵעַתָּה – But if what Rava says is so, it should follow that אוֹזְפֵיהּ מְאָה זוּזֵי בִּשְׁטָרָא – if one lent a hundred *zuz* to another with a document[7] וְאָמַר לֵיהּ פְּרַעְתִּיךְ פַּלְגָא – and [the borrower] later said to him, "I already repaid you half of the loan,"[8] הָכִי נָמֵי דִּמְהֵימַן – so, too, he is believed!?[9]

The challenge is deflected:

אָמַר לֵיהּ – [Ravina] said to [Rav Acha] in reply: הָכִי הַשְׁתָּא – Now, is it so that the two cases are analogous?! הָתָם שְׁטָר לְגוּבַיְינָא קָאֵי – There in the case of the loan the document exists[10] for the purpose of collection.[11] אִם אִיתָא דִּפְרָעֵיהּ – Hence, if it were true that [the borrower] repaid [the lender] half of the loan, אִיבָּעֵי לֵיהּ לְמִכְתְּבָא אַגַּבֵּיהּ – he should have recorded that fact on [the document];[12] אִי נָמֵי מִיכְתַּב עֲלֵיהּ תַּבְרָא – alternatively he should have had [the lender] write a receipt for [the partial payment]. Since the borrower did nothing to mitigate the probative power of the document, the lender can use it to collect the entire loan. אֲבָל הָכָא אָמַר לֵיהּ – But here in the case of the ten-year lease [the landlord] can say to [the tenant]: הַאי דִּכְתַבִי לָךְ שְׁטָרָא – "That which I wrote a document for you כִּי הֵיכִי דְּלָא תַּחֲזֵק עֲלֵיהּ – was so that you will not be able to establish a presumptive ownership[13] of [my property]."[14] Thus, since the lease document was not written to invest the tenant with the right to occupy the premises, it is tantamount to the tenant having no document at all, and it is therefore he who must prove the lease's validity for the contested years.

The Gemara discusses another ruling that concerns borrowing:

אָמַר רַב נַחְמָן: שׁוֹאֵל אָדָם בְּטוּבוֹ לְעוֹלָם – Rav Nachman said: A person may borrow his fellow's utensil forever if he requests to use it "in its good [state]."[15]

A crucial condition is attached to this ruling:

אָמַר רַב מָרִי בְּרָהּ דְּבַת שְׁמוּאֵל – Rav Mari, the son of Shmuel's daughter, said: וְהוּא דְּקָנֵי מִינֵּיהּ – The above is true provided

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1. I.e. on the day he completes his work, which is when he is entitled to be paid.

2. Oaths are ordinarily imposed on defendants, who swear that they are not liable and are thereby excused from paying. The case of the hired worker is one of the exceptions to the rule, as enumerated in the Mishnah in *Shevuos* (44b) [*Rashi*].

3. Hence, since the employer/defendant is unable to swear (and be free from liability), the Rabbis transferred the oath to the employee/plaintiff who wins his suit by swearing).

4. The tenant must take a שְׁבוּעַת הֶיסֵּת (*hesseis oath*), which is a special oath imposed by the post-Mishnaic Rabbis on a defendant who denies the entire claim made against him [and who is therefore Biblically exempt from swearing] (*Rashi*).

5. The landlord claims that the tenant has already occupied the rented house for five years, while the tenant contends that he has dwelt there only three years (*Rashi*). The dispute thus concerns the length of time remaining in the lease.

6. In all disputes adjudicated by *beis din*, real property is regarded as being in the possession of its owner. Hence, the opposing party always bears the burden of proving his claim. In our case, even though he holds a document that establishes his right to occupy the premises for ten years, the tenant must prove that the lease is valid for an additional years; if he does not, he must vacate after five [for the landlord claims that the lease has five years left to run] (*Rashi*; cf. *Tosafos* and *Rishonim*).

7. The lender holds the document as proof of the debt owed him.

8. The lender had sued the borrower for payment of the entire loan, presenting the document in court as proof of his claim, and the borrower claimed that he had already paid half of the loan.

9. Like the landlord in Rava's case, the borrower is in possession of the property [in this case, money – the contested half of the loan] claimed by the plaintiff. According to Rava's ruling, the burden of proof should fall upon the lender, even though he holds a document giving him rights in that property. We know, however, that this conclusion is not tenable.

10. Literally: stands [ready].

11. I.e. it establishes the lender's right to collect the amount recorded therein.

12. Such a notation is valid even if written by the borrower, since it is recorded on the document itself [which is held by the lender] (*Nimukei Yosef*). See *Ritva* above, 21a ד״ה יוצא.

13. The Gemara refers to the concept of the *chazakah* of three years (חֲזָקַת שָׁלֹשׁ שָׁנִים), which is the uncontested occupancy of real property (for the prescribed period of time) that creates the legal presumption that the occupant owns the occupied premises. This subject is treated at length in the third chapter of Tractate *Bava Basra*.

14. The landlord can argue that he wrote the lease document primarily for his own benefit, so that the tenant cannot point to the years of uncontested occupancy and claim that he purchased the property from the landlord. Thus, the purpose of the document is to proclaim that the current occupant dwells there as a tenant, not as an owner. Although the landlord allows the tenant to hold the document [for the latter's protection, so that the landlord will not contest the length of the lease], he does not fear that the tenant will suppress it, since it has become common knowledge that the tenant holds such a document as a security (*Rashi*, as elucidated by *Tosafos*, who also cite – and explain why they prefer – a different interpretation of the Gemara; see also *Ritva*).

15. If one wishes to borrow a particular utensil from another and specifically requests, "Please lend it to me in its good state," and the owner agrees, the utensil is lent to him 'forever.' That is, the borrower may use the utensil as long as it is fit for its intended use, because the expression "in its good state" is common language for "so long as it is in good condition" [and Rav Nachman is teaching that the common meaning should be followed in this matter; see *Ritva*]. Hence, even if the borrower returns the utensil to its owner, he may take it back later if he needs to use it (*Rashi*). See *Tosafos*, *Rosh*, *Ritva* et al. for other explanations of שׁוֹאֵל בְּטוּבוֹ.

that [the borrower] acquires a commitment from [the utensil's owner].[16]

Rav Nachman's ruling is further elucidated:

אָמַר רַב מָרִי בְּרֵיהּ דְּרַב אָשִׁי – Rav Mari, the son of Rav Ashi, said: **וּמְהַדַּר לֵיהּ קַתָּיָא – And [the borrower] must return [the utensil's] handle to [the owner]** when the utensil breaks.[17]

The Gemara discusses another case in which the borrower's choice of words determines the extent of the loan:

הַאי מַאן דְּאָמַר לֵיהּ לְחַבְרֵיהּ – Regarding one who said to his fellow, **אוֹשְׁלַן מָרָא לְמֵירְפַּק בֵּיהּ הַאי פַּרְדֵּיסָא – "Lend to me this well** for irrigating my fields," **וְנִפְלָה – and** after the loan was made **[the well] collapsed,** **לָא בָּנֵי לָהּ – the law is: [The borrower] may not rebuild [the well].**[22] **גַּרְגּוֹתָא – If** he said, "Lend to me **a well** for irrigating my fields," **וְנִפְלָה – and** after the loan was made **[the well] collapsed,** **בָּנֵי לָהּ – [the borrower] may rebuild it,**[23] and it remains lent to him until he irrigates all of his fields. **בֵּי גַּרְגּוֹתָא – And if** he said, "Lend to me a **place** on your land to dig **a well,"** and the landowner agrees, **כָּרֵי רְפִיק בֵּיהּ – he may go ahead and dig** even **many** test **wells** in **[the lender's]** land **עַד דְּמִתְרְמֵי לֵיהּ – until he chances upon** a suitable place (i.e. one that has an adequate water supply). **וְצָרִיךְ לְמִיקְנֵי מִינֵּיהּ – And** in this last case **[the borrower] must** first **acquire** the entire field **from [the landowner].**[24]

Mishnah **הַמַּשְׂכִּיר בַּיִת לַחֲבֵירוֹ וְנָפַל – If one rented a house to his fellow and it collapsed** during the time it was rented, **חַיָּיב לְהַעֲמִיד לוֹ בַּיִת – he is obligated to provide [the tenant] with** another **house** for the duration of the lease.[25] **הָיָה קָטָן – If [the original house] was small,** **לֹא יַעֲשֶׂנּוּ גָּדוֹל – [the landlord] may not make [the replacement] large** over the tenant's objections, **גָּדוֹל – and,** similarly, if the original house was large, **לֹא יַעֲשֶׂנּוּ קָטָן – he may not make [the replacement] small.** **אֶחָד – If** the original house consisted of **one** unit, **לֹא יַעֲשֶׂנּוּ שְׁנַיִם – he may not make it two** units, **שְׁנַיִם – and** if the original house consisted of **two** units, **לֹא יַעֲשֶׂנּוּ אֶחָד – he may not make it one unit.**[26] **לֹא יִפְחוֹת מִן הַחַלּוֹנוֹת – [The landlord] may not decrease the** number of **windows,** **וְלֹא יוֹסִיף עֲלֵיהֶם – and he may not add to them,**[27] **אֶלָּא מִדַּעַת שְׁנֵיהֶם – except by their mutual agreement.**[28]

NOTES

16. If a borrower acquires an object for its use solely by performing *reshichah* on it, his acquisition will terminate when he returns the object to its owner. In order to secure for himself perpetual access to the object, he must perform with the owner an act of acquisition known as *kinyan chalifin* (see glossary), by which the owner *obligates himself* to lend the object to the borrower whenever he is requested to do so (*Rashi*, as explained by *Nesivos HaMishpat* 341:12; see *Gidulei Shmuel; cf. Ritva, Nimukei Yosef, Chidushei HaRan*).

17. When the utensil breaks or deteriorates and is no longer fit for its intended use, the borrower must return the fragments to the owner, for the former initially received the utensil not as a gift but as a loan, and only for such time as the utensil is in good condition (*Rashi*). Hence, the borrower is not permitted to repair and continue using the utensil (*Rosh, Hagahos HaGra*). Cf. *Raavad*, cited by *Rashba*; see *Nimukei Yosef*. See also below, note 21.

18. The borrower did not specify which garden he intended to dig up with the borrowed hoe (*Rashi*).

19. [I.e. there is no limit to the size of the one garden that the borrower is allowed to dig up] (*Rashi*); moreover, that one garden need not be his own (*Rambam, Hil. She'ilah U'fikadon* 1:7, as interpreted by *Hagahos HaGra*).

20. [Here, the gardens must be his according to all opinions – that is, in fact, the only limitation.]

The Gemara (*Bava Basra* 61b) teaches that if one sells "lands" without specifying how many parcels are included in the sale, the buyer receives only two parcels unless he can prove that more were intended, since the minimum number of "lands" is two. The Rishonim question why here, where the hoe was lent for use in an unspecified number of "gardens," the borrower is allowed to use it for more than two gardens. Tosafos offer two explanations, and both distinguish between a sale and a loan. The first explanation: We presume that a seller does not divest himself of all his fields, but that he relinquishes only the minimum number that his language can imply; hence, the buyer there bears the burden of proving that more than two parcels were sold. With respect to a lender, however, we presume that he does not mind if the borrower uses the borrowed object for all [since the object will eventually be returned]

who must prove that less than all the borrower's gardens were intended. The second explanation: In the case of the sale the seller is in possession of the contested fields, and so has the upper hand; hence, the buyer bears the burden of proof. In the case of the loan, however, the borrower is in possession of the hoe [with the lender's consent, for use in at least two gardens – see *Ritva*]; hence, the lender must prove that only two gardens were intended.

21. The handle is not regarded as a separate entity, but is subsumed into the larger entity known as a "hoe." Since only a "hoe" was lent to the borrower and it now broke, he has no right to retain the handle (*Ritva*).

22. For the lender can argue that he intended to lend only the original well, and not a reconstructed version thereof (*Rashi*).

23. For the lender agreed to provide *a* well [as opposed to a *particular* well] for the irrigation of the borrower's fields. The borrower cannot, however, compel the lender to provide another well or to rebuild the original one (see *Nesivos HaMishpat* 341:15, who explains why). [The Gemara, of course, speaks of where the borrowing was effected with a proper act of acquisition (e.g. a document, a proprietary act), for if not the lender can rescind the loan at any time (*Nimukei Yosef*).]

24. The borrower must intend either with the digging of the first test well (which itself is a proprietary act of acquisition), or with a preliminary act of *chalifin* (see note 16 above), to acquire the right to dig test wells in all of the lender's land until he finds water. If he fails to do so, he will have acquired (i.e. borrowed, through his proprietary act of digging) only the site of the first test well (*Ritva*, who suggests that this is also *Rashi's* interpretation).

25. The Gemara will discuss under what circumstances this is so.

26. *Aruch HaShulchan* (312:35) states: If it was one room, he shall not make it two rooms; and if it was two rooms, he may not provide one large room as a replacement.

27. That is, the landlord may not provide a house with fewer windows than the original house had. By the same token, he may not provide a replacement with more windows than the original had.

28. None of the above restrictions apply if the tenant consents to the changes proposed by the landlord.

Gemara The Mishnah taught that when a rented house collapses, the landlord must provide a replacement that is similar in size and structure to the original. The Gemara wonders what terms of the lease would create such an obligation: אִי דְּאָמַר לֵיהּ בַּיִת זֶה – **What is the case** of the Mishnah? If the Mishnah speaks of **where [the landlord] said to [the tenant],** "I am renting to you **this** particular **house,"** נָפַל אָזַל לֵיהּ – then when **[the house]** subsequently **collapsed, it is gone forever!**[29] Why should the landlord be required to provide a replacement?[30] אִי דְּאָמַר לֵיהּ בַּיִת סְתָם – And **if** the Mishnah speaks of **where [the landlord] said to [the tenant],** "I am renting to you **an unspecified house,"** אֶחָד – then when the original house consisted of **one** unit, אַמַּאי לֹא יַעֲשֶׂנּוּ שְׁנַיִם – **why may he not make it two** units? קָטָן – Or if the original house was **small,** אַמַּאי לֹא יַעֲשֶׂנּוּ גָּדוֹל – **why may he not make it large?**[31]

The Gemara attempts to clarify the Mishnah's case: אָמַר רֵישׁ לָקִישׁ – **Reish Lakish said:** דְּאָמַר לֵיהּ – The Mishnah speaks of **where [the landlord] said to [the tenant],** בַּיִת שֶׁאֲנִי מַשְׂכִּיר לְךָ – "With regard to the **house that I am renting to you,** מִדַּת אָרְכּוֹ כָּךְ וְכָךְ – the **measure of its length is such-and-such,** and the measure of its width is such-and-such." The Mishnah thus teaches that since the landlord did not agree to the rental of a particular house, he is obligated to provide a replacement; nevertheless, he must adhere to the stipulated dimensions when doing so; and all the laws cited in the Mishnah reflect such stipulations.

The Gemara rejects this explanation: אִי הָכִי – **If it is so** that the landlord stipulated the dimensions of the house to be rented, מַאי לְמֵימְרָא – **what** does the Mishnah come **to say?!** That the landlord must adhere to those dimensions when providing a replacement is self-evident, since they should be fully treated as terms of the lease. – ? –

The Gemara again attempts to clarify the Mishnah's case: אֶלָּא כִּי אֲתָא רָבִין אָמַר רֵישׁ לָקִישׁ – **Rather, when Ravin came** from Eretz Yisrael to Babylonia he said **in the name of Reish Lakish:** דְּאָמַר לֵיהּ – The Mishnah speaks of **where [the landlord] said to [the tenant]** as he pointed out a particular house, בַּיִת כָּזֶה אֲנִי מַשְׂכִּיר לָךְ – **"A house like this [one] I am renting to you."** The Mishnah thus teaches that since the landlord did not designate a specific house for the rental, he is obligated to provide a replacement; nevertheless, the replacement must resemble in size and in structure the house he initially pointed out.

The Gemara questions this explanation as well: וְאַבָּתְּי מַאי לְמֵימְרָא – **But still, what** does the Mishnah come **to say?!** That the replacement must be similar both dimensionally and structurally to the model house is self-evident, since we construe the landlord's words as a stipulation to that effect. – ? –

The Gemara answers this objection, and thereby clarifies the Mishnah's case and ruling: לֹא צְרִיכָא – This is **not** difficult; rather, the Mishnah's ruling is **necessary** in a case דְּקַאֵי אַגּוּדָּא דְּנַהֲרָא – **where [the house]** to which the landlord pointed[32] **stood on the bank of a river.**[33] מַהוּ דְּתֵימָא – Inasmuch as the landlord did not expressly stipulate the dimensions of the house to be rented, **what is it that you would have supposed:** מַאי כָּזֶה – **What is** the significance of "a house **like this [one]"?**[34] דְּקַאֵי אַגּוּדָּא דְּנַהֲרָא – **That it stands on the bank of a river?**[35] קָא מַשְׁמַע לָן – **[The Tanna]** therefore **teaches us** that the landlord stipulates with regard to *all* the attributes of the house on the river's bank.[36]

הדרן עלך השואל

WE SHALL RETURN TO YOU, HASHOEL

NOTES

e. since the tenant rented this particular house, and it collapsed, ss is attributed to his misfortune (*Rashi*). See *Hagahos Ashri* 6:10.

such a case the tenant must pay rent only for the period he occupied the house. If he paid the entire rent in advance, he is to a refund for the unfulfilled part of the lease (*Ramban*, cited ; see there for other opinions; see *Chazon Ish, Bava Kamma* see *Choshen Mishpat* 312:17 at length).

Gemara above (79a) it was explained that if one rented a onkey and it died during the term of the lease, then if the worth enough to purchase another donkey with the proceeds the owner must sell the carcass, purchase another donkey, to the renter to complete his rental. Even if selling the ld permit only the hiring of another donkey, the owner e carcass, hire another donkey, and give it to the renter. the case of our Mishnah do we not require the landlord to and stones of his collapsed house and with the proceeds se or rent another house for the tenant? *Nimukei Yosef* in the case of a deceased animal it is customary and ll the carcass [i.e. to minimize the loss]. [Hence, when an t his donkey, he implicitly agrees to sell its carcass to commitment should the animal die during the rental customary, however, to sell the wood and stones of a [Hence, a landlord makes no implicit agreement to do

sufficient for the landlord to provide even a minimal dwelling (i.e. one measuring four *amos* in length by four *amos* in width) as a replacement. Certainly, then, he may make any other structural or dimensional alterations (*Ritva*).

Ritva notes that the above leniency applies only if the collapse occurred before the tenant actually took up residence in the house. If it occurred afterward, then even in the case of an unspecified rental the landlord must provide a similar house as a replacement. *Nimukei Yosef* understands that *Rambam* disputes this last point, holding that the landlord may provide even a minimal dwelling no matter when the collapse occurred (see *Hil. Sechirus* 5:7). See also *Nesivos HaMishpat* 312:12.

32. When he said, "A house like this [one] I am renting to you."

33. A house so situated is very desirable (*Rashi*).

34. I.e. what attribute of the house is the landlord referring to when he promises to provide the tenant with a similar house?

35. I.e. we would have supposed that by his statement, "A house like this [one] I am renting to you," the landlord stipulated to rent to the tenant a house with an equally desirable location, but not one of similar size or structure.

36. That is, the landlord agrees to provide a house of similar size and structure, as well as with a similar location (*Rashi*). *Ritva* and *Rambam* (*Hil. Sechirus* 5:7) understand, however, that "a house like this" commits the landlord to providing only a house of similar size and ... The rental property need not have the same location, ...rtenances that the other house had.