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חירות ואחריות

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"Taking Responsibility for Torah"

WEEK FOUR SUMMARY OF SBM 2016

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Bava Batra 98a relates two statements of Rava, the second of which reads as follows:

One who accepts wine to travel with it to a faraway market, and before he gets there the price of wine falls - [the one who gave him the wine] accepts the loss.

The case is one where a wine seller gives a barrel of wine to a reseller who will travel to sell the wine for a profit, which will be split between them.

This ruling is mentioned in Rambam Hilchot Mekhirah 17:5) and Shulchan Arukh Choshen Mishpat 230. *Netivot HaMishpat* finds this ruling extremely problematic - how could it be that the profits would be split, yet the responsibility for any losses rests with the original wine-seller? This is not the way people actually engage in business! Furthermore, Rav Moshe Isserles (RMI) makes no comment here, indicating that he agrees, but in Choshen Mishpat 176 he states the following:

One who accepts merchandise to sell it elsewhere and split the profits, and within (alternatively: before) the time of travel, the merchandise loses value here - we evaluate the value of the merchandise [for the purpose of recouping the cost by the original seller] at the time at which the reseller begins travelling, not at the time he received the merchandise.

Netivot argues that we can infer from here that **after travel has begun**, the merchandise is under the responsibility of the reseller - and therefore price fluctuations do not impact the original seller, who is still entitled to the value of the merchandise as of the time the travel was begun (as long as there is a profit, even if diminished, that is split equally).¹ Yet this contradicts the ruling in 230 that so long as the price dropped **before the reseller reached the final destination**, the original seller is responsible for any price fluctuations, presumably because the wine is still "his."

To resolve this contradiction, *Netivot* explains that RMI

in 176 is based on Rabbeinu Yerucham's interpretation of Rava, which he understands to be saying that the time at which transport begins is the determinant. Before that time, the merchandise is under the jurisdiction of the original owner, who bears the cost of price fluctuation (whether the price goes up or down), while afterwards the two of them share equal responsibility for both gains and losses.

Choshen Mishpat 230, however, is based on Rashbam's interpretation of Rava. Rashbam says that Rava is discussing a case of a universal price drop rather than a local one. In the case of a local price drop, however, the cost of the price fluctuation would be split between the parties.

Netivot builds this up based on the explanation of Tosfot Ktuvat 47b *אלא לכונסה ב* as discussed in Mishneh L'Melekh (Hilchot Zekhhiah 6:1). Tosfot explains that one can get out of transactions by claiming an implicit condition only in cases where the transaction was dependent on only one party, such as when dedicating a sacrifice to the Temple. Mishneh L'Melekh adapts this explanation of Tosfot and says that one can annul a contract on the basis of an implicit condition only if the other party will not thereby sustain a loss as a result of the transaction, but rather will merely be restored to the situation that he would have been in had the transaction never been made.

Netivot then notes an issue - if one can annul a transaction whenever the other party will not thereby be subject to a more severe loss than if the transaction had never occurred, then if one buys a cow that subsequently dies, he should be able to undo the transaction - for if the transaction had not occurred, the seller of the cow would now have a dead cow!² To resolve this problem, he makes a further distinction regarding whether or not the buyer has

had the potential to benefit from the transaction. If he has had the potential to benefit from the transaction (e.g. had the cow in his possession for some time), even if he has not actually received any benefit, he is not able to annul the transaction. In Choshen Mishpat 230, where the reseller can by agreement sell the wine only in his market destination, if the price drops before he arrives, he can undo his transaction - leaving the original seller to bear the cost of the price fluctuation. However, when one buys a cow that subsequently dies, once one had the opportunity to gainfully use the cow, one can no longer undo the transaction.

Returning to the original contradiction between the Choshen Mishpat 230 and 176, *Netivot* attempts to explain why the case of a universal price drop (Rava as understood by the Rashbam and brought in Choshen Mishpat 230) differs from the case of a local price drop (Rava as understood by Rabbeinu Yerucham and brought by RMI in 176). In the case of a universal price drop, undoing the transaction simply places the original seller back where he would have been had the transaction never taken place - with a barrel of wine that had lost value. If there is a local price drop, however, undoing the transaction would indeed place the original seller in a worse position - he could now sell the wine at a higher price in his original location if he had the wine (i.e. if the transaction had not been made). Once the buyer sold the wine for cheaper in the distant market, however, this is no longer a possibility.

Netivot then discusses a practical case that he had ruled on which touches upon this issue. There was a war in a particular country, and the king ordered linen for uniforms in anticipation of enlarging his army. To that end, the king made contracts with many of his subjects. One subject, Reuven, sub-contracts to Shimon for the linen, showing him the contract from the government. Before Shimon fulfills his contract, however, the king loses the war and cancels all of his contracts for linen, resulting in a massive devaluation of linen. Shimon, however, wants to hold Reuven to his contract for all the linen at the original price. *Netivot* ruled in this case that Reuven did not have to uphold his contract with Shimon, as it is similar to a case of a cow which dies before the buyer has any opportunity to derive benefit from it, in that the buyer had no

opportunity to gain from the transaction, and the seller is not placed in a worse position than he would have been had the transaction not been made (as the price drop was universal).

It is interesting to note some of the broader perspectives of the *Netivot*. For example, while he holds that a loss to one party prevents the other party from undoing a transaction by claiming an implied condition, *Netivot* does not consider opportunity costs to be losses for this purpose.. While in modern Western contract law, damages can be awarded for a lost opportunity (such as an alternative investment), or expectation damages (ie. requiring the breaching party to put the non-breaching party in the position they would have been had the contract successfully been fulfilled), the *Netivot* does not recognize such principles (and indeed, they have only been developed in Western law since his time).

The *Netivot* himself notes an odd outcome of his resolution of the contradiction between the RMI 176 and Shulchan Arukh 230 - the rulings turn out to be based on mutually exclusive explanations of Rava on Bava Batra 98a. The explanation of the *Netivot* solves the practical contradiction with regard to the law, but the rulings remain mutually exclusive from a textual point of view. This raises methodological issues - to what degree are we bound to provide a consistent understanding of our legal texts? Can we accept all the rulings of several authorities, despite the fact that each would deny the basis (though possibly not the ruling itself) of the other? On the other hand, perhaps we should incorporate the best policies so long as we find appropriate authorities as support, which seems to drive the *Netivot's* analysis of the sugya. All the *Netivot* notes is that both rulings are sound law, and both can therefore be incorporated into our legal system, leaving us to consider any broader implications of his methodological approach.

Notes:

1. If there is a loss, as the final resale price has dropped below the worth of the merchandise when the transport was begun (say from 100 to 80), then that loss is split equally - the original owner would get the full 80, as well as 10 from the reseller - thus each loses 10. This is the case referred to by the language of the *Netivot*, "חל ההיזק על שניהם". *Netivot* does not care whether the relevant price fluctuation occurs in the original city or at the point of final sale.