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שרשרת זהב

Take It or Leave It?

דינא לנפשיה

KOLLEL

לרפואה שלימה

שמואל יעקב בן רחל

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שרשרת זהב

These booklets are called **Sharsheres Zahav** *(Golden Chain)*, based on the verse describing the golden chains of the Choshen (Shemos 28:13–14). Just as those chains connected the Choshen to its proper place, so too these works are intended to be small links in the golden chain of Torah transmission, connecting the learner to the teachings of Chazal, the Rishonim, the Acharonim, and the great Torah scholars of every generation.

In particular, these booklets seek to connect the reader to the illuminating Torah of the **Ketzos HaChoshen**, whose teachings serve as a central foundation throughout. Everything written here is based on the sacred words of our sages and was prepared through sincere effort to clarify and understand the sugyos in the light of their teachings.

May Hashem grant that these words find favor among those who study Torah, and may these works become worthy additions to the eternal chain of Torah transmission from generation to generation.

Amen.

How to Read This Sheet?

Each source appears first in the original Hebrew or Aramaic, with a plain English version directly underneath. A Sugya Note helps explain the source in everyday words.

A Term Note defines an important word or idea. A Takeaway sums up the main point in a line or two.

You do not need any background to follow along. Read each source, then the English, then the note. The sheet is built to walk you through the discussion one step at a time.

Do not worry if you do not finish the sheet in one sitting. A good Torah session is not measured only by how much you finish, but by how deeply you learn to think through the discussion.

Take It or Leave It?
דינא לנפשיה

Opening Frame

Reuven lent Shimon a thousand dollars. The loan is overdue, Shimon keeps stalling, and Reuven is starting to worry: maybe Shimon will skip town, or maybe he will stand in court and say there never was a loan.

Then one day Reuven is visiting Shimon's house and notices Shimon's watch sitting on the table. He picks it up and holds onto it, planning to keep it until Shimon pays, or until the two of them sort it out in front of a court.

Was Reuven allowed to do that? In this sheet, "court" means Beis Din, a Jewish court that decides cases according to halachah. Our case turns on one question: when a person is sure he is owed money, may he reach out and take his fellow's property to protect himself?

Term Note

עביד דינא לנפשיה | ***avid dina l'nafshei***

taking the law into one's own hands. It describes a person who enforces what he believes is his right, on his own, instead of going to a court first.

I. May a Person Act for Himself?

First, the ground rule. May a person act on his own to get back what is his, or must he go to court first?

Talmud, Bava Kamma 27b | גמרא בבא קמא, דף כ"ז ע"ב

The Talmud (Gemara) is the record of the discussions of the Sages of the Mishnah and the generations after them, edited in Babylonia around the year 500.

אתמר, רב יהודה אמר: לא עביד איניש דינא לנפשיה, רב נחמן אמר: עביד איניש דינא לנפשיה. היכא דאיכא פסידא כולי עלמא לא פליגי דעביד איניש דינא לנפשיה, כי פליגי היכא דליכא פסידא, רב יהודה אמר לא עביד איניש דינא לנפשיה דכיון דליכא פסידא ליזיל קמיה דיינא, רב נחמן אמר עביד איניש דינא לנפשיה דכיון דבדין עביד לא טרח.

It was stated: Rav Yehuda said a person may not take the law into his own hands; Rav Nachman said a person may take the law into his own hands. Where waiting may cause a loss, all agree that a person may act on his own. They disagree only where nothing will be lost by waiting. Rav Yehuda said he may not act on his own, since nothing will be lost, let him go before a judge. Rav Nachman said he may act on his own, since he is only doing what is rightfully his, he need not trouble himself to go to court.

Takeaway

According to Rav Nachman: a person may act on his own, even when waiting would cost him nothing, since he is only claiming what is his. That gives us a strong starting point: if a person may act on his own, where are the limits?

II. The Torah's Limit on Taking Collateral

If a person may act on his own, does that cover every move?
How far may a lender go to take a pledge?

Rema, Choshen Mishpat, no. 4, note 1 | רמ"א, חושן משפט, סימן ד', סעיף א'

Rabbi Moshe Isserles (1530-1572, Krakow) wrote the rulings for Ashkenazic Jewry that run alongside the Shulchan Aruch, and his word is decisive for Ashkenazic practice.

Some say that it is called taking the law into one's own hands only when he harms his fellow, such as when he strikes him, and in that case he may not act unless he can prove the item is his. But simply taking hold of the fellow's item as collateral he may do in any case, and he then goes to court with him (Maharik, Chap. 161).

יש אומרים דלא מיקרי עביד דינא לנפשיה אלא כשמזיק לחבירו כגון שמכהו, ולכן לא יוכל לעשות אלא אם כן יוכל לברר שהוא שלו, אבל תפיסה בעלמא שתפסו למשכון יכול לעשות בכל ענין ויורד אח"כ עמו לדין (מהרי"ק, שורש סימן קס"א).

Maharik, Rabbi Yosef Colon (c. 1420-1480, Italy) was the leading authority on Jewish law of his time in Italy. His responsa shaped much of later practice.

Term Note

משכון | *mashkon*

collateral, or pledge. An item one person holds from another, so that if the debt is not paid, the item stands in its place.

Sugya Note.

The Rema, quoting the Maharik, draws a basic distinction in the law of acting for oneself. The real ban was said only where a person causes actual bodily harm to his fellow, such as when he strikes him. That is full-fledged taking the law into one's own hands, and it is allowed only if he can clearly prove the item is his. But simply taking the fellow's item as collateral, with no bodily harm at all,

הרמ"א כתב בשם המהרי"ק דמחלק חילוק יסודי בדין עביד דינא לנפשיה. עיקר האיסור לא נאמר אלא היכא שגורם היזק גוף ממש לחבירו, כגון שמכהו, דבכה"ג הוי עביד דינא לנפשיה

גמור, ולא שרי אלא אם כן יכול לברורי ברור היטב דהחפץ שלו הוא. אמנם תפיסה בעלמא, דהיינו שתפס חפצו של חבירו למשכון בלבד בלא שום היזק גוף, קיל טפי ושרי בכל ענין ואפילו בלא ברור, כיון דסו"ס יורד עמו לדין כדת וכהלכה, וממילא לא מיקרי עביד דינא לנפשיה.

is treated more leniently and is allowed in every case, even without proof, since in the end he goes to court with him in the proper way. That is not called taking the law into one's own hands.

So far, taking collateral seems easier to allow. The case of hitting does not mean random violence. It means using force while trying to get back what he claims is already his. Using force against the person is more serious and needs proof; taking an item as collateral and then heading to court is the less severe case, and the Rema presents it as allowed. But the Maharik was speaking about acting for oneself. The Torah has its own words about pledges.

Deuteronomy 24:10-13 | דברים, פרק כ"ד, פסוקים י'-י"ג

The Torah

כי תשה ברעך משאת מאומה לא תבא אל ביתו לעבט עבטו. בחוץ תעמד והאיש אשר אתה נשה בו יוציא אליך את העבוט החוצה. ואם איש עני הוא לא תשכב בעבטו. השב תשיב לו את העבוט כבא השמש ושכב בשלמתו וברכך ולך תהיה צדקה לפני ה' אלהיך.

When you make your fellow a loan of any kind, you shall not come into his house to take his pledge. Stand outside, and the man you are lending to will bring the collateral out to you. And if he is poor, do not lie down with his pledge. Return the collateral to him by sundown, so he can sleep in his garment and bless you, and to you it shall be righteousness before Hashem your God.

Mishnah, Bava Metzia 113a | משנה בבא מציעא, דף קי"ג ע"א

The Mishnah is the foundational collection of the Oral Law, arranged by Rabbi Yehuda the Prince around the year 200.

המלוה את חבירו לא ימשכננו אלא בבית דין, ולא יכנס לביתו ליטול משכונו, שנאמר בחוץ תעמד.

One who lends to his fellow may not take collateral from him except through a court, and he may not enter the house to take the pledge, as it says, "Stand outside."

Takeaway

Here is the tension. The Maharik treats taking collateral as the easier case and presents it as allowed. But the Torah, on a plain reading, says a lender may not just reach for collateral on his own. On the contrary, it must go through the court.

III. Grabbing for a Claim or Grabbing to Get to Court

Are those the same in the eyes of the law?

Ketzos HaChoshen, no. 4, note 1 | קצות החושן, סימן ד׳, ס״ק א׳

Rabbi Aryeh Leib Heller (1745-1812, Galicia) was a towering analytic mind, and his work on civil law became one of the standard works studied in batei midrash everywhere.

כתב הקצוה״ח (ס״ק א׳) וז״ל, וע׳ ביש״ש פ׳ המניח סי׳ ה׳ שהאריך לחלוק והעלה דאין אדם יכול לתפוס מחברו

> Term Note
>
> **מיגו | *migo***
>
> literally "since." A power of claim: since the holder could have made a stronger claim and been believed, he is believed in the weaker claim he actually made. Holding an item can give a person this kind of standing in court.

למשכון אפי׳ במידי דליכא איסור למשכנו כגון עבור גזילה וערב אם לא בחפץ המבורר לכל שהוא שלו, מ״מ נראה דהיינו דוקא שתופס משלו, אבל היכא שיש בידו משכון או פקדון יכול לעכב אפי׳ לכתחילה כדי להציל ממון שלו וזה לא נקרא עביד דינא לנפשיה שהרי לא תפס אלא שמעכב את שלו בשב ואל תעשה עכ״ל.

אבל הש״ך בספרו תקפו כהן סי׳ קט״ו וקט״ז שקיל וטרי והעלה דהיכא דברירא ליה יכול לתפוס בענין שיש לו מגו ע״ש, ונראה פשוט דהיינו דוקא היכא דליכא לאו דלא תבא אל ביתו לעבוט עבוטו כגון בשכירות וערבות וכיוצא, אבל בהלואה דאיכא איסור למשכנו, אסור לו לתפוס, דהא מנתח ניתוחי אסור וכמבואר בפרק המקבל (ב״מ, קי״ג ע״א) ואפי׳ בשוק אסור. הגם דמספר תקפו כהן סי׳ ק״י משמע דאפי׳ היכא דאית איסור למשכנו שרי ליה למיתפס בענין שיהיה לו מגו, אך המעיין שם יראה דלא ברירא ליה האי מלתא, ואדרבא בסי׳ קט״ו וקט״ז כתב לדחות ראית מוהרש״ל ומוקי לה בענין דאית איסור למשכנו ע״ש, וא״כ משמע דבהלואה אסור ליה לתפוס בכדי

See the Yam Shel Shlomo (chapter HaManiach, no. 5), who argued at length and concluded that a person may not seize his fellow's item as a pledge, even where there is no special ban on taking a pledge, such as for robbery or for a guarantor, unless the item is clearly known to everyone to be his. Still, it seems this is only when he seizes the fellow's own property; but where he already holds collateral or a deposit of the fellow's, he may keep it back even from the start in order to save his money, and this is not called acting for himself, since he did not seize anything, he is only holding back what is in his hand by doing nothing.

But the Shach, in his work Takfo Kohen (no. 115 and 116), discussed it back and forth and concluded that where the lender is sure he is owed, he may seize in a way that gives him a power of claim. And it seems plain that this applies only where there is no prohibition of "you shall not come into his house to take his pledge." But in a loan, where there is a prohibition against taking a pledge, he may not seize, for even pulling the item out is forbidden, as is explained in chapter HaMekabel (Bava Metzia 113a), and it is forbidden even in the marketplace.

It is true that Takfo Kohen (no. 110) suggests that even where taking collateral is forbidden, he may seize in a way that gives him a power of claim; but one who looks closely there will see the matter was not settled in his mind. On the contrary, he rejects the proof of the Maharshal and explains it as a case where taking collateral is forbidden. So it seems that in a loan he may not seize in order to gain a power of claim. And so it appears from the reasoning: even though we hold that a person may act for himself even where nothing will be lost by waiting, still the Torah was strict in a case of loan that he may not act for himself, even where waiting may cause a loss, such as where the borrower denies the debt, he may not seize in order to gain a power of claim. I have seen many people being clever about this, seizing from their fellow so as to have a power of claim before coming to court, and they are not acting properly, and it is close to a Torah prohibition if it is done by seizing.

שיהיה לו מגו, וכן נראה מתוך הסברא דכיון דקיימא לן עביד אינש דינא לנפשיה אפי' במקום דליכא פסידא, ואפ"ה בחוב הלואה הקפידה תורה דלא למיעבד ליה דינא לנפשיה, א"כ ה"ה אפי' במקום דאית פסידא כגון שהלוה כופר בחובו אסור לו לתפוס בכדי שיהיה לו מגו, וראיתי רבים מתחכמים בזה לתפוס מחבירו שיהיה לו מגו קודם בואו לדין ולאו שפיר עביד וקרוב לאיסור תורה אם הוא ע"י תפיסה.

Rabbi Shabsai HaKohen (1621-1662), known as the Shach, was a leading authority on Jewish law in Lithuania and Moravia while still a young man.

Sugya Note

The Ketzos draws a line between seizing and holding back. A person may not seize his fellow's item to save his money, unless the item is already in his hand as a deposit or a pledge, in which case he may keep it back, and that is not acting for himself. But the Ketzos adds that this is only where there is no ban on taking a pledge. In a loan, which carries the prohibition of "you shall not come," he may not seize even to gain a power of claim. And it seems, on careful reading, that the ban in a loan is specifically on seizing to gain a power of claim. A seizure that is not for a power of claim, but only so the two can go to court afterward, may be allowed.

מבואר מהקצות דמחלק בין תפיסה לבין עיכוב, דאין אדם רשאי לתפוס חפץ משל חבירו כדי להציל ממונו, אלא אם כן החפץ כבר בידו כפיקדון או משכון, שאז רשאי לעכבו ואין זה עביד דינא לנפשיה. אך כתב הקצות דדוקא במקום שאין בהם איסור למשכן כגון שכירות וערבות, אמנם בהלואה דיש בה איסור לא תבא, אסור לתפוס אפילו במיגו. ונראה למידק דדוקא במיגו אסור לתופס במקום הלואה, אבל תפיסה שאינה לשם מיגו, אלא כדי שיורד אח"כ לבי"ד, אפשר מותרת.

Takeaway

Now the picture is clearer. Holding back an item already in your hand is fine. Reaching out to seize is the problem, and in a plain loan the Torah's "you shall not come" forbids seizing to gain a power of claim. The Ketzos is warning about a seizure that gives him a stronger position in court, not necessarily every act meant only to bring the case to Beis Din. One question stays open: what about a seizure that is not aimed at a power of claim at all, only at getting both people in front of a court?

סמ"ע, חושן משפט, סימן ד', ס"ק ד' | Sma, Choshen Mishpat, no. 4, note 4

Rabbi Yehoshua Falk (c. 1555-1614, Lemberg) was a leading teacher of his generation in Poland whose running explanation of civil law sits on the page beside the Shulchan Aruch.

כשבא לתופסו במשכון שטוען עליו שחייב לו מענין אחר כך וכך, ויירא שמא ילך מכאן ולא יפרענו או יטעון אין לו, בזה יכול למשכנו אף בעדים וכו', ומשום הכי סיים וכתב ויורד עמו אח"כ לדין, ור"ל אם יודה הרי טוב ויהיה המשכון בידו עד שישלם לו, ואם יכפור יחזירנו לו וק"ל.

When he comes to take the item as a pledge, claiming the fellow owes him such-and-such from another matter, and he fears the fellow may leave and not pay, or may claim he has nothing, in this case he may take collateral even in front of witnesses. That is why the ruling concludes, "and he goes to court with him afterward." Meaning: if the fellow admits the debt, fine, and the collateral stays in his hand until he is paid; and if the fellow denies it, he returns the collateral to him, and this is readily understood, see there.

Sugya Note

דהיינו כאשר אדם תופס משכון מחבירו בטענה שחייב לו ממקום אחר, מחמת חשש שמא יברח או יכפור, מותר לו לתפוס אף בעדים, ובלבד שירד עמו אחר כך לבי"ד שאם יודה הנתבע, יהא המשכון בידו עד שיפרע, ואם יכפור, יחזיר לו את המשכון.

ויל"ע מה הנפק"מ אם התפיסה היא לשם מיגו, שתלוי בזה אם עובר על איסור לא תבא אל ביתו, אבל אם אינה אלא כדי שיורד אח"כ לבי"ד, ולא לשם מיגו אפשר שאין כאן איסור.

That is, when a person takes collateral from his fellow, claiming the fellow owes him from somewhere else, out of fear that he may flee or deny the debt, he is allowed to take it even in front of witnesses, as long as he goes to court with him afterward, so that if the one being sued admits the debt, the collateral stays in his hand until he pays, and if he denies it, he returns the pledge.

And we should look into what the practical difference is. If the seizure is for a power of claim, then it depends on whether he breaks the prohibition of "you shall not come into his house." But if it is only so that the two will go to court afterward, and not for a power of claim, it is possible there is no prohibition here. The words "even in front of witnesses" are important, because such a seizure may not create the same power of claim.

Takeaway

The Sma gives an allowed picture: take the collateral as security, go to court, return it if the claim falls apart. And it brings us back to the same question. If the seizure is to build a power of claim, the “you shall not come” concern remains. If the seizure is only to get to court, maybe there is no concern at all. To weigh that, we have to ask what collateral even is once it sits in a person’s hand. This makes the Sma sound less focused on winning through possession, and more focused on getting the case into Beis Din.

IV. What Does Collateral Become Once It Is Held?

To learn what collateral is once it is held, the Gemara turns to a surprising test: can a man betroth a woman with collateral instead of money?

Term Note

קידושין | *kiddushin*

the first stage of halachic marriage. It takes effect when a man gives a woman something of value for marriage and she accepts it for that purpose.

Term Note

מנה | *maneh*

a fixed amount of money weighing 425g of silver.

Talmud, Kiddushin 8a | גמרא קידושין, דף ח׳ ע״א
From the chapter that opens the laws of how a marriage is made.

אמר רבא אמר רב נחמן, א״ל התקדשי לי במנה והניח לה משכון עליה, אינה מקודשת, מנה אין כאן משכון אין כאן, איתיביה רבא לרב נחמן קידשה במשכון מקודשת, התם במשכון דאחרים, וכדרבי יצחק דאמר רבי יצחק מנין לבעל חוב שקונה משכון שנאמר ולך תהיה צדקה, אם אינו קונה צדקה מנין מכאן לבעל חוב שקונה משכון.

Rava said in the name of Rav Nachman: if a man said to a woman, "be betrothed to me with a maneh," and instead placed collateral in her hand, she is not betrothed; there is no maneh here, and there is no collateral here (A pledge only matters when it secures an actual debt. Here there was no money given, so the pledge does not create kiddushin.) Rava challenged Rav Nachman from a teaching: "If he betrothed her with a pledge, she is betrothed." The Gemara answers: that teaching speaks of collateral belonging to others. This follows the opinion of Rabbi Yitzchak, who said: how do we know that a creditor takes hold of collateral in some legal sense? As it says, "and to you it shall be righteousness." If the collateral does not become his, where does the righteousness come from? From here we learn that a creditor takes hold of a pledge.

Sugya Note

רבא אמר בשם רב נחמן דהיכא שאמר לה ״התקדשי לי במנה״ והניח לה משכון תמורת המנה, אינה מקודשת כלל, וטעמא דמילתא

Rava said in the name of Rav Nachman that if a man said to a woman, "be betrothed to me with a maneh," and instead placed collateral in her hand in place of the maneh, she is not betrothed at all. The reason is that neither one is here. There

דתרווייהו ליתנהו, מנה אין כאן שהרי לא נתן לה מנה ממש, ומשכון נמי אין כאן שהרי המשכון שלו הוא ולא יצא מרשותו לגמרי.

על זה פריך רבא לרב נחמן מברייתא דקתני "קידשה במשכון מקודשת", דמשמע דמשכון מהני לקידושין. דחי רב נחמן ואמר דהברייתא מיירי במשכון דאחרים, דהיינו שנתן לה משכון השייך לאדם אחר שחייב לו, וזה כדרבי יצחק דאמר מנין לבע"ח שקונה משכון, שנאמר "ולך תהיה צדקה", דמשמע שאם הצדקה נוהגת במשכון ע"כ שהמשכון קנוי לבע"ח, דאל"כ מאי צדקה שייך בדבר שאינו שלו. נמצא דמשכון דאחרים קנוי לו, ולכן כשנותנו לה לשם קידושין הוי כנותן דבר השייך לו וקידושין חלין, משא"כ משכון שלו עצמו דלא יצא מרשותו ולא מהני לקידושין.

is no maneh, since he never actually gave her a maneh, and there is no collateral either, since the collateral is his own and never fully left his hands.

Rava then challenged Rav Nachman from a teaching: "If he betrothed her with a pledge, she is betrothed," which sounds like collateral does work for betrothal. Rav Nachman answered that the teaching speaks of collateral belonging to others, meaning he gave her collateral that belongs to someone else who owed him. This follows Rabbi Yitzchak, who said: how do we know a creditor takes hold of a pledge? As it says, "and to you it shall be righteousness." If the act of charity applies to the pledge, the collateral must belong to the creditor in some legal sense, for otherwise how could charity apply to something that is not his? So collateral belonging to others becomes his, and when he gives it to her for betrothal it is like giving something that is his, and the betrothal takes effect.

His own pledge, which never left his hands, is different and does not work for betrothal.

Takeaway

Here is the main point. Rabbi Yitzchak teaches that a creditor takes hold of collateral in some legal way, learned from “and to you it shall be righteousness.” That much is clear. But what kind of holding is it? Full ownership, or something less? Before the Rishonim disagree about it, a quick word on the keepers, since the dispute is framed in their terms.

Background

The Four Keepers (Shomrim)

The Torah sets four levels of responsibility for someone holding another person's item. An unpaid guardian, who watches it as a favor, pays only if he was careless. A paid guardian, who was paid to watch it, pays for theft and loss, but not for true accidents beyond his control. A renter, who pays to use the item, carries about the same responsibility as a paid watcher. A borrower, who gets free use of the item, carries the most liability: he pays even for accidents that were nobody's fault. For what comes next, focus on two levels: a borrower, who pays even for accidents, and a paid keeper, who pays for theft and loss but not for true accidents. The question is which one the holder of collateral resembles.

Tosafos, Kiddushin 8a, "Minayin" | תוספות קידושין, דף ח׳ ע״א, ד״ה מנין

Tosafos are the school of French and German Talmud scholars of the 1100s and 1200s, many of them descendants and students of Rashi, whose give-and-take fills the outer column of the page.

פי׳ בקונטרס בשאר דוכתי להתחייב באונסין, וקשה דהא ר״מ ור״י פליגי במלוה על המשכון אי הוי ש״ש או ש״ח, אבל שואל לא הוי, ואוקי גמ׳ כר׳ יצחק, משמע דר׳ יצחק לא אמר להתחייב באונסין, לכך נראה לי שקנה את המשכון להתחייב גניבה ואבידה.

Rashi explained elsewhere that the creditor takes hold of the collateral to the point of being responsible even for unavoidable accidents. Tosafos disagrees: Rashi's explanation is difficult, since Rabbi Meir and Rabbi Yehuda disagree about one who lends on a pledge, whether he (the lender who is holding the collateral for security) is a paid keeper or an unpaid keeper, but neither says he is a borrower. And the Gemara explained our case like Rabbi Yitzchak, which suggests that Rabbi Yitzchak did not say the creditor is responsible for accidents, for if he were, he would be a full borrower. Therefore it seems to me that he takes hold of the collateral to the point of being responsible for theft and loss.

Sugya Note

תוס׳ מקשה על רש״י דהרי ידוע דפלוגתת ר״מ ור״י במלוה על המשכון היא אי הוי שומר שכר או שומר חנם, כלומר שניהם מסכימים שאינו שואל, ואם כן היאך יתכן לומר כרש״י דבע״ח חייב באונסין ודינו כשואל, והלא שואל חמור מכולם וחייב אפילו באונסין, ואילו ר״מ ור״י לא עלה על דעתם כלל לחייבו כשואל. ועוד, כיון דהגמ׳ אוקמה את

Tosafos challenges Rashi. It is well known that Rabbi Meir and Rabbi Yehuda's dispute about one who lends on collateral is whether he is a paid keeper or an unpaid keeper, which means both of them agree he is not a borrower. If so, how can Rashi say the creditor is responsible for accidents and is treated like a borrower? A borrower is the most responsible of all and pays even for accidents, yet it never entered the minds of Rabbi Meir and Rabbi Yehuda to treat the creditor as a borrower. Furthermore, since the Gemara explained our case like Rabbi Yitzchak, that a creditor takes hold of a pledge, it suggests that Rabbi Yitzchak did not mean he is responsible for accidents, for if he were, he would be a full borrower, and Rabbi Meir and Rabbi Yehuda clearly do not hold that way.

Tosafos concludes that taking hold of the collateral only makes him responsible for theft and loss, the level of a paid keeper. The reason is that not all the benefit is his, unlike a borrower, where all the benefit is his, so he cannot be treated like a borrower. Still, since he does take hold of the pledge, he has some connection and stake in it, so he is responsible at least for theft and loss, like a paid keeper.

It comes out that Rashi and Tosafos disagree about what it means to take hold of a pledge. For Rashi, the one who receives the collateral is responsible even for accidents, which suggests he is treated like a borrower. For Tosafos, he is responsible only for theft and loss, since not all the benefit is his, so he is not a borrower but a paid keeper.

הסוגיא כשיטת ר' יצחק דבע"ח קונה משכון, משמע דר' יצחק לא אמר שקנה להתחייב באונסין, שאם איתא דחייב באונסין היה שואל ממש, והלא ר"מ ור"י בהדיא לא סבירא להו הכי. לכן מסיק תוס' דקנין המשכון אינו אלא להתחייב בגניבה ואבידה, דהיינו דרגת שומר שכר, וטעמא דמילתא דכיון שאין כל ההנאה שלו כמו שואל שכל ההנאה שלו, לפיכך אי אפשר לחייבו כשואל, אבל מכל מקום כיון שקונה את המשכון יש לו בו קצת זיקה ועניין, ולכן חייב לפחות בגניבה ואבידה כשומר שכר.

מבואר שיש מחלוקת בין רש"י לתוס' בגדר קנין משכון, לדעת רש"י, המקבל משכון חייב אף באונסין, ומשמע שדינו כשואל, ואילו לדעת תוס' אינו חייב אלא בגניבה ואבידה בלבד, דכיון שאין כל ההנאה שלו, לפיכך אינו שואל אלא שומר שכר.

Takeaway

Two readings of one idea. For Rashi, taking hold of the collateral is strong: the lender carries it like a borrower and pays even for accidents. For Tosafos, it is partial: he is only a paid keeper. We now have two views on how much of the collateral the lender truly owns. Why should the lender carry that responsibility at all?

Birkas Shmuel, Kesubos, no. 54 | ברכת שמואל, כתובות, סימן נ"ד

Rabbi Baruch Ber Leibowitz (1864-1939, Kamenets) was among the foremost students of Rav Chaim of Brisk, and his lectures carry the Brisker way of analysis to a wide world of learners.

Term Note

לאו הניתן לתשלומין | *lav hanitan l'tashlumin*

a prohibition that is "given over to payment." When the very act that breaks a prohibition is also what creates a duty to pay, the wrongdoer pays rather than receiving lashes, since one is not both lashed and made to pay for the same act.

The Rambam (Maimonides, Laws of Lending & Borrowing 3:4) rules that a lender may not enter a borrower's home to take collateral, not the lender himself, nor even a court agent. Instead, the lender must stand outside while the borrower goes in and brings out the collateral himself, as the verse states: "You shall stand outside" (Deuteronomy 24:11).

If the lender violated this and entered by force or snatched the collateral, he does not receive lashes, because the prohibition is a lav she'nitak la'aseh, a negative commandment that is "converted" into a positive commandment (namely, "you shall return it"), which generally exempts one from lashes. However, if the collateral was lost or burned, the lender does receive lashes, since he can no longer fulfill the positive commandment of returning it.

The Ra'avad (Rabbi Avraham ben David) disagrees sharply, saying: "This is an error." He argues that even if the collateral is lost, the lender is exempt from lashes, because he has become financially liable for the object, and financial liability exempts one from lashes. This is the rule of lav she'nitak l'tashlumim, a prohibition whose violation results in monetary payment rather than lashes. The Talmud in Makkos (16a) establishes that when a prohibition generates a financial obligation, lashes are replaced by payment, as the two punishments do not coexist. Since the lender owes payment for the lost collateral, he cannot also receive lashes.

In order to resolve the Rambam's position, we must first explain his reasoning. Why is the prohibition of "you shall not come into his house" not counted as a prohibition that results in payment, given that the lender does in fact become financially responsible for the collateral?

To understand why the Rambam rejects the Ra'avad's reasoning, one must first grasp a precise legal principle: a prohibition is only considered "given over to monetary payment" when the very act prohibited is what directly generates the financial liability. Classic examples include robbery, where the act of stealing creates the obligation to repay, and bodily injury, where the act of wounding creates the obligation to pay damages. In each case, the action that violates the prohibition and the action that creates the debt are one and the same.

The question then becomes: what is the legal source of the lender's financial responsibility for the collateral? There are two possible answers, either because the act of taking the collateral itself creates financial liability, similar to robbery, or because taking possession creates a guardianship obligation, similar to that of

הרמב"ם בפ"ג הל"ד מהל' מלוה לוה כתב דאין המלוה רשאי לכנס לבית הלוה ולא שליח ב"ד למשכנו, אלא עומד בחוץ והלוה נכנס לביתו ומוציא לו המשכון שנאמר בחוץ תעמוד וכו', עבר ונכנס לבית הלוה או שחטף מידו המשכון בזרוע אינו לוקה מפני שנתק לעשה שנאמר השב תשיב וכו', ואם אבד המשכון או נשרף הרי זה לוקה.

וכתב הראב"ד, א"א שבוש הוא זה, אלא מפני שנתחייב באחריותו, ופי' דמקרי לאו הניתן לתשלומין, וכמבואר להדיא כדברי הק' בגמ' מכות דף ט"ז ע"א דפריך והרי גזל והרי משכון דאיתא קיימו ולא קיים בטלו ולא בטל ומשני מפני שנתק לתשלומין.

ולתרץ דברי הרמב"ם וקדים לבאר סברתו ולהבין מ"ט לא קאי חשיב לאו זה דלא תבוא אל ביתו לאו הניתן לתשלומין, הא באמת נתחייב בתשלומין, ולכאו' מ"ש לאו זה מלאו דגזילה, ונראה דע"כ לא מקרי ניתן לתשלומין אלא כשמעשה הלאו מחייבו ממון, כמו גזל וחובל בחברו, דכולהו מעשה הגזילה שעלי' הלאו הוא מחייבהו ממון, וכן חובל, ומשו"ה אין לחייבו אהך לאו מלקות דאין לוקה ומשלם, אבל היכא דהתשלומין לאו משם זה של לאו, ודאי לא ניתן לתשלומין הוא.

והנה באחריות של המשכון יש לחקור, הא אי נימא דמה שלוקח המשכון מחייבהו ממון, או שהאחריות מדין

a paid guardian. This question is precisely the point on which the Rambam and Ra'avad diverge, and notably, Rashi sides with the Ra'avad while Tosafot align with the Rambam.

The Ra'avad, following the view of Rashi, holds that the very act of taking the collateral is what creates the lender's financial liability, exactly as in the case of robbery. The verse "it shall be a merit for you" (Deuteronomy 24:13) teaches that the lender fully acquires the collateral and bears full responsibility for it. In other words, the lender is considered as though he fully owns the collateral. The object stands entirely in his domain and under his responsibility, and consequently, if it is lost, it is his loss, because it is, in a meaningful legal sense, his object.

Since the prohibition against unlawfully taking the collateral and the resulting financial obligation spring from the same source, this is a case of lav she'nitak l'tashlumim. The lender therefore bears full liability even for unforeseeable accidents, and is exempt from lashes whether or not the collateral survives.

The Rambam, whose view is shared by Tosafos, reads the verse differently. In his view, the Torah's statement that returning the collateral will be "a merit for you" teaches something narrower: it grants the lender a form of acquisition sufficient for certain legal purposes, such as using the collateral to betroth a woman or purchase land, but it does not make the lender fully responsible for the object as though it were his own. The lender's financial liability arises not from ownership, but from the law of guardianship. Since the lender derives some benefit from holding the collateral, he bears the responsibilities of a paid guardian (shomer sachar), liable for theft and loss, but not for unforeseeable accidents.

Crucially, this means the lender's payment obligation and the prohibition he violated have different legal sources. The prohibition concerns the manner in which he took the collateral; the financial liability concerns his duty as a guardian from the moment he holds it. Because the debt does not flow from the act of violation itself, this prohibition is not "given over to monetary payment" in the technical sense. Therefore, the principle that exempts violators from lashes when monetary liability exists does not apply here, and lashes remain a possibility, specifically when the collateral is gone and the lender can no longer return it.

What appears on the surface to be a narrow dispute about lashes and collateral is, at its core, a debate about the nature of acquisition and the relationship between prohibition and obligation. For the Ra'avad and Rashi, the lender's unlawful taking transforms him into

שמירה הוא.

והנראה דזה תלוי במח' הרמב"ם והראב"ד, דדעת הרמב"ם דבע"ח חייב רק באחריות גניבה ואבידה כש"ש, דהא אין כל הנאה שלו, והיא שי' התוס', אולם הראב"ד סובר דחייב אפי' באונסין כרש"י.

והנה טעמי' דהראב"ד ורש"י צריך להבין, דמדוע יתחייב באונסין הא לאו כל הנאה שלו, וכבר הק' בתוס' על שי' זו, ונראה דהנה שי' הראב"ד דעיקר גזה"כ דולך תהיה צדקה דאורי לן קנין משכון, גלוי לן לענין שקונהו שיהיה חייב באחריותו, דהתורה גילתא לנו דהמשכון עומד באחריות הבע"ח, שקונהו והוי כשלו, וממילא אם נאבד, שלו נאבד, ומשמע גם בתוס' שם שזוהי כונת רש"י וכו', כיון שקנהו ועומד באחריותו ומשו"ה מחייבו באונסין זוהי שי' הראב"ד ז"ל.

והרמב"ם סובר דעיקר גזה"כ בא לחדש לנו יפה כח הבע"ח שקונה לקדש בו אשה וקנין קרקעות, אבל לא לענין אחריות, ואך ממילא כיון שיש לו הנאה בו חייב בשמירה כש"ש ולא יותר, ולפי"ז להרמב"ם לא מקרי משו"ה ניתן לתשלומין, דהא מה שמשלם הוא משום דין שמירה, וכי בשביל שקבל שמירה בעת מעשה הלאו יקרא ניתן לתשלומין, אבל להראב"ד לשיטתיה דעיקר נטילת המשכון

a full owner, binding together his violation and his liability into a single legal act, and consequently shielding him from lashes. For the Rambam and Tosafot, the lender remains a guardian, not an owner; his liability and his violation are legally distinct, and lashes remain available as a sanction when restitution is impossible.

This explanation of the Ra'avad's reasoning regarding the lender's responsibility for accidents was received from my teacher, the Gaon Rabbi Chaim of blessed memory, lecturer of Volozhin.

מחייבהו ממון, הרי הוא ממש דמי כלאו דגזילה וחובל ועדים זוממין, דבפירוש ריבתה תורה לתשלומין עבור הנטילה ומשו"ה ליכא מלקות לדידי', ולבאר עי"ז סברת הראב"ד לענין אחריות אונסין של בע"ח קבלתי מפי מורי הגאון מוהר"ר חיים שליט"א [זצוקלל"ה] ר"מ דוולאזין.

Sugya Note

The root of the dispute between the Rambam and the Raavad depends on what counts as a "prohibition given over to payment." For the Rambam, it is called that only where the forbidden act itself is what obligates the payment, as in robbery and injury. But here, with the pledge, the duty of responsibility does not come from the prohibition of "you shall not come into his house" itself. It comes from a separate law of guarding, since he becomes a keeper over the pledge, so the payment is a side duty, and it does not count as a prohibition given over to payment.

As a result, it is treated as a prohibition fixed by the positive command of "you shall surely return," and if he cannot carry out the positive command, he is lashed.

The Raavad, on the other hand, holds that the very taking of the collateral creates ownership in the collateral itself, so he becomes responsible even for accidents, and it turns out the payment comes from the forbidden act itself. Since that is so, it is exactly like robbery, where the forbidden act itself obligates payment, and therefore it is a prohibition given over to payment, with no lashing at all, because one is not both lashed and made to pay.

We see that the Rishonim disagree about what Rabbi Yitzchak meant by taking hold of a pledge. For Tosafos and the Rambam it is not full ownership but only a law of guarding, and his status is like a paid keeper who is responsible only for theft and loss. For Rashi and the Raavad, the responsibility even for accidents shows that taking hold of collateral is real ownership, the collateral becomes his in some legal sense and is treated like his own, so if it is lost, his own is lost.

At first, the next move may sound backwards. If collateral is real

השורש פלוגתת הרמב"ם והראב"ד תלוי בגדר ד"לאו הניתן לתשלומין". דלדעת הרמב"ם, לא מקרי לאו הניתן לתשלומין אלא היכא דגופא דמעשה האיסור הוא דמחייב תשלומין, כה"ג בגזילה וחבלה. אבל הכא במשכון, האי חיוב אחריות לא נובע מעצם הלאו ד"לא תבוא אל ביתו", אלא מדין אחר דשמירה, דנעשה כשומר על המשכון, ומשו"ה התשלומין הוו חיוב צדדי, ולא שייך למיקרי ליה לאו הניתן לתשלומין. ממילא חשיב לאו הניתק לעשה ד"השב תשיב", ואם לא אפשר לקיומי לעשה, לוקה. אבל הראב"ד לשיטתו ס"ל, דעיקר נטילת המשכון גופא יוצר קנין בגוף המשכון, וממילא מתחייב באחריות אפילו באונסין, ונמצא דהתשלומין נובעים מעצם מעשה האיסור. וכיון שכן, הוי ליה ממש כגזילה, דמעשה הלאו גופא מחייב תשלומין, ומשו"ה הוי לאו הניתן לתשלומין, ואין בו מלקות כלל משום "אין לוקה ומשלם". נמצא דהראשונים נחלקו בגדר קנין משכון כדברי רבי יצחק, לדעת התוס' והרמב"ם

אין זה קנין גמור אלא דין שמירה בלבד, ודינו כשומר שכר שחייב בגניבה ואבידה בלבד, ואילו לדעת רש"י והראב"ד החיוב באחריות אף על אונסין מורה שקנין משכון הוא קנין ממש, והמשכון נקנה לו ונחשב כשלו, וממילא אם נאבד המשכון, שלו נאבד.

ownership, then maybe it needs an act meant to create that ownership. If he only seized the item to bring both sides to court, maybe he never made it into collateral at all. But if collateral mainly creates a guarding duty, then the moment he holds the item as security, that duty may begin even if he did not mean to own it.

Sugya Note

ולפי"ז אפשר לומר דלפי שיטת רש"י והראב"ד, דסוברים שקנין משכון הוא קנין ממש והמשכון נקנה לו כשלו, יש לחלק בין אופני התפיסה, אם אדם תופס משכון כדי לקנותו בתורת משכון ולהשתמש בו ככח טענה במיגו, הרי זו תפיסה גמורה ומשום כך עובר על איסור לא תבא אל ביתו, אולם אם תפס את החפץ רק כדי לירד עמו לבי"ד, בלא כוונה לקנותו בתורת משכון ובלא להעמיד לעצמו כח מיגו, אין כאן מעשה קנין משכון כלל, והחפץ אינו נחשב כשלו, וממילא אפשר שאינו עובר על איסור לא תבוא אף לשיטת רש"י והראב"ד. משא"כ לשיטת התוס' והרמב"ם, דקנין משכון אינו קנין ממש אלא דין שמירה כשומר שכר, סוף סוף עצם התפיסה נעשית חלות של משכון וחיוב שמירה, ולכן אף אם כוונתו רק לירד לבי"ד, נחשב דין משכון, ועובר על איסור לא תבוא.

On this we can say that for Rashi and the Raavad, who hold that taking hold of collateral is real ownership and the collateral becomes his in some legal sense, we should distinguish between two kinds of seizing. If a person seizes collateral in order to take hold of it as collateral and to use it as a power of claim, that is a full seizure, and so he breaks the prohibition of "you shall not come into his house." But if he seized the item only so that the two will go to court together, with no intent to take hold of it as collateral and with no intent to set up a power of claim for himself, then there is no act of taking hold of collateral at all, the item is not treated as his, and so it is possible that he does not break the prohibition of "you shall not come," even for Rashi and the Raavad. For Tosafos and the Rambam it is different. Since taking hold of collateral is not real ownership but a law of guarding like a paid keeper, the seizure itself still becomes collateral with a guarding duty. So even if he only meant to go to court, it counts as a pledge, and he breaks the prohibition of "you shall not come."

Sugya Note

ואמרתי יסוד זה לפני מו"ר הגאון הרב ישראל צבי ניומאן שליט"א, ראש ישיבה דבית מדרש גבוה דליקוואוד, ואמר לי שאפשר שאכן אינו עובר על איסור לא תבוא אל ביתו, אולם מכל מקום עובר על איסור גזילה. והוסיף שבאמת הדבר תלוי בחקירת הקצות בגדר גניבה למיקט. וביאור דברי רבינו ראש ישיבה שליט"א, דתנן בפרק איזהו נשך (ב"מ, ס"א ע"ב) לא

I said this idea before my teacher, Rabbi Yisrael Tzvi Neuman shlita (a Rosh Yeshiva of the Bais Medrash Govoha of Lakewood, one of the largest yeshivos in the world). He told me that it is possible that he indeed does not break the prohibition of "you shall not come into his house," but he still breaks the prohibition of theft. He added that the matter really depends on the Ketzos' inquiry into the nature of stealing in order to cause distress.

תגנובו דכתב רחמנא למה לי, לכדתניא לא תגנוב על מנת למיקט ע"כ. פרש"י שם וז"ל למיקט לצער.

Takeaway

The Rambam and Raavad dispute comes down to the same question as Rashi and Tosafos: is taking hold of collateral real ownership, or only a keeper's duty? On the ownership reading (Rashi, Raavad), taking the item to own it as collateral and build a power of claim is a real seizure and runs into "you shall not come," while taking it only to get to court may not be collateral at all. On the guarding reading (Tosafos, Rambam), even taking it only for court still makes the item a pledge, and the prohibition may apply. One question is still open, the one Rabbi Neuman raised: even if "you shall not come" does not apply, is it simply theft? Even if the act is not called taking collateral, it may still be taking someone else's property without permission.

V. If He Means to Return It, Is It Theft?

Set aside "you shall not come." A man takes his fellow's item, meaning to return it once they reach court. Is taking with intent to return even theft at all?

Ketzos HaChoshen, no. 348, note 1 | קצות החושן, סימן שמ"ח, ס"ק א'

Rabbi Aryeh Leib Heller (1745-1812, Galicia), whose probing questions on civil law set the terms of study for the generations after him.

Term Note

גונב על מנת למיקט | ***gonev al menas l'meikat***

one who steals in order to pressure or upset someone. He takes the item not to keep it, but to cause distress, while meaning to give it back.

I was in doubt about one who steals in order to cause distress: does he have the status of a real thief, responsible even for accidents, or do we say that since he means to

ונסתפקתי בגונב על מנת למיקט אם הוי ליה דין גנב ממש להתחייב באונסין, או נימא כיון דבדעתו להשיבו ואינו

return it and acts only to cause the fellow distress for a while, he did do something forbidden, but he does not have the status of a thief and is not responsible for accidents.

The Shitah Mekubetzes (a major collection of medieval Talmudic commentary) at the end of the chapter HaMafkid (Bava Metzia 41a), which discusses the law of shlichus yad, a guardian who "extends his hand" and misappropriates an object entrusted to him.

The Shitah Mekubetzes draws an important distinction between two categories of wrongful taking:

The robber and the unauthorized borrower can apply to anyone, whether a guardian or an ordinary person, because their defining characteristic is taking something with the intent to fully appropriate it, either permanently or partially, without intending to pay the owner back. Such a person becomes liable for accidents from the moment he lifts the object, even if no actual damage has yet occurred.

The misappropriating guardian applies only to a guardian who was already entrusted with an object. The very name implies it: the verse in the Torah uses the phrase "if he did not extend his hand" specifically in the context of guardians. The defining feature of misappropriation is that the guardian intends to use or diminish the object but plans to pay the owner back. He is not trying to steal it outright, he intends to compensate the owner for whatever he takes or damages.

The Shitah Mekubetzes implies that an ordinary person, someone who is not a guardian, who lifts an object with the intention of paying for it is not liable for unforeseeable accidents. His intent to compensate the owner means he lacks the full mental state of a robber or thief, and so the severe liability for accidents does not attach to him.

If an ordinary person who takes something with intent to pay is not liable for accidents, then all the more so, a person who steals with the intention of returning the very same object, should not carry full thief liability. His intent is even more benign than someone planning to pay since he only wants to cause momentary distress and then return the object entirely intact.

While he certainly commits a prohibition, and his act is legally and morally wrong, the question is whether his intent prevents the legal consequences of full thief status from attaching to him.

The case thus sits in a unique and uncharted space in halakhic thinking: the actor is clearly culpable in some sense, yet his intent may be sufficiently distinct from that of a true thief to deny the full weight of thief liability, particularly the severe consequence of bearing responsibility for accidents beyond his control. This needs further study.

עושה אלא ע"מ לצערו לשעה, נהי דאיסורא עביד אבל אין בו דין גנב להתחייב באונסין, והנה מדברי שט"מ סוף פרק המפקיד (שם, מא ע"א ד"ה תרגמה וכו') נראה דגוזל ע"מ לשלם אינו חייב באונסין ע"ש בסוגיא דשליחות יד ז"ל, וגזלן ושואל שלא מדעת שייכי בכל אדם בין שומר בין אינש דעלמא, אבל שולח יד ליתיה אלא בפקדון, ושמו מוכיח עליו וכדאמר קרא גבי שומרין אם לא שלח יד, והנוטל לגזול על דעת ליטלה כולה או ליטול מקצתה או שיחסרנה ולא ישלם לבעליה והוא חייב באונסין מכיון שמשך לדעת כן אע"פ שלא חסר, והשולח יד בפקדון דעתו ליטול ולחסר הכל או מקצת על דעת לשלם לבעליו עכ"ל, ומשמע דבאינש דעלמא אינו חייב באונסין אם הגביה על מנת לשלם, ומכ"ש גונב ע"מ למיקט ולהשיבו בעינא אח"כ צ"ע.

Sugya Note

The Ketzos HaChoshen questions someone who takes an object from his fellow not in order to keep it or profit from it, but solely to cause the owner distress, with the full intention of returning the object exactly as it was. The question is whether such a person carries the legal status of a true thief (ganav) under Jewish law, and consequently whether he bears liability for unforeseeable accidents (ones) that befall the object while it is in his possession.

The dilemma has two sides. On one hand, the person has unquestionably done something prohibited, he took an object belonging to someone else without permission. On the other hand, his intent was never to acquire the object or benefit from it in any lasting way. He planned all along to return it intact. Does his lack of acquisitive intent shield him from the severe legal consequences of full thief status, even while leaving him culpable for the prohibition itself?

To approach this question, the Ketzot draws on a fundamental distinction found in the Shitah Mekubetzes, which discusses a guardian who misappropriates an object entrusted to his care.

The Shitah Mekubetzes establishes a critical legal boundary. A true robber or thief, one who takes an object with the intent to fully appropriate it and not pay the owner back, becomes liable for accidents from the moment he takes the object. His act is one of complete appropriation, and the law treats him accordingly.

By contrast, a guardian's misappropriation applies only in the specific context of a guardian who already holds the object. The Torah uses this language explicitly in connection with guardians. The defining feature of this misappropriation is that the guardian takes or diminishes the object with the intent to pay the owner back. He is not stealing in the full sense; he intends to compensate. And crucially, the Shitah Mekubetzet implies that an ordinary person, not a guardian, who takes an object with intent to pay is not liable for unforeseeable accidents, precisely because his intent reveals that he does not wish to fully acquire the object.

From this distinction, the Ketzos constructs a compelling argument for exempting the thief-to-cause-distress from accident liability. The reasoning proceeds in two steps.

First, even a robber who takes an object with intent to pay monetary compensation is exempt from liability for accidents, because by expressing his willingness to pay rather than permanently keep the object, he reveals that he does not truly wish to acquire it. Since the legal severity of thief status is rooted in the complete appropriation of another's property, the

הקצות מסתפק בדין גונב על מנת לצער, דהיינו שגנב חפץ מחבירו לא כדי לזכות בו אלא כדי לצערו בלבד, ובדעתו להשיבו כמות שהוא. הספק הוא אי מקרי גנב ממש ומתחייב באונסין כדין גנב, או דילמא כיון שאין בדעתו לקנותו אלא להשיבו, נהי דאיסורא עביד מכל מקום אין עליו דין גנב להתחייב באונסין.

ומייתי הקצות ראיה לצד הפטור מדברי השיטה מקובצת בסוף פרק המפקיד, דמבואר שם דשליחות יד לא שייכא אלא בשומר דוקא ולא באינש דעלמא, וגזלן הנוטל על דעת ליטול לגמרי ולא לשלם הוא דחייב באונסין, אבל השולח יד בפקדון שדעתו ליטול על מנת לשלם, פטור מאונסין. ומדייק הקצות דכיון דאפילו הגוזל על מנת לשלם פטור מאונסין כיון שמגלה דעתו שאינו חפץ לקנותו, כל שכן גונב על מנת למיקט שדעתו להשיבו בעינא, דודאי לא גרע מגוזל על מנת

לשלם ויש סברא לפוטרו מאונסין, וצ"ע.

ממילא בנידון דידן, דאם אחד תופס משכון על מנת שיורד אחר כך לבי"ד, אפילו אליבא דרש"י והראב"ד דאין זה דין קנין משכון, מכל מקום יש לעיין אם עובר איסור גניבה, שהרי הקצות עצמו עמד בצ"ע אם גונב על מנת למיקט עובר איסור גניבה. אמנם אפשר לומר שבמקום שתופס על מנת שיורד אחר כך לבית דין, אין זה נחשב מעשה גניבה על מנת למיקט. דגניבה על מנת למיקט סוף כל סוף מאיסורי גניבה היא, שלקח את החפץ לרשותו כדי לצערו, וכיון שכוונתו להשיב אחר כך לבעלים ורק לקח את החפץ לרשותו כדי לצערו, יש להסתפק אם זה נחשב איסור גניבה גמור או אינו אלא איסור גרידא. אבל בנידון דידן, לא לקח את החפץ בכוונה שייכנס לרשותו ולצערו, אלא רק לקח את החפץ כדי שיורד עמו לבית דין, וממילא אין זה נחשב גניבה על מנת למיקט..

absence of such intent weakens or removes that status.

Second, and this is the Ketzos's central inference, if someone who takes an object intending to pay is exempt from accident liability, then all the more so should someone who takes an object intending to return the very same object intact be exempt. His intent is even further removed from true theft than the person planning to pay. He seeks no financial gain, no permanent acquisition, and no substitution of the object with money. He wants only to cause temporary distress and then restore things precisely as they were. It would be incongruous for the law to treat him more harshly than someone who at least intends to substitute the object with its monetary value.

The Ketzos's analysis thus hinges on a single underlying principle: liability for accidents follows from the intent to acquire, not merely from the act of taking. Where that intent is absent, and nowhere is it more absent than in a theft motivated purely by the desire to cause momentary distress, the full legal status of thief, with all its attendant consequences, may simply not apply.

In our case, if a person seizes collateral meaning to go to court afterward, then even according to Rashi and the Raavad, who would say this is not an act of taking hold of a pledge, we still need to consider whether he breaks the prohibition of theft, since the Ketzos himself was left in doubt whether one who steals to cause distress breaks the prohibition of theft. Still, we can say that where he seizes only so the two will go to court afterward, this does not count as an act of stealing to cause distress. Stealing to cause distress is, after all, one of the forms of theft, where he took the item into his own hands in order to cause the fellow distress. Since his plan is to return it to the owner afterward, and he took it into his hands only to cause him distress, we may be in doubt whether this is full theft or only a less serious wrong. But in our case, he did not take the item meaning to bring it into his own hands and cause the fellow distress. He took it only so that the two would go to court together. So this does not count as stealing to cause distress.

Takeaway

The Ketzos leaves the "steal to cause distress" case open in one specific way: maybe the person has the full status of a thief for accident liability, and maybe not. The Ketzos is not asking whether the act is clean or allowed. He is asking whether it gives the person the full status of a thief for accident liability. Our case may be milder still. The man who seizes only to get to court is not taking the item to cause distress or to keep it. Even so, the act may still be forbidden. The question is whether it creates full thief status.

Map of the Question

Case: Reuven is sure Shimon owes him money, and before any court has ruled, he takes hold of Shimon's item.

Question: When a person seizes his fellow's property to protect a debt, what is the seizure doing? Is he creating collateral and giving himself a power of claim, or is he only forcing both sides to come to court?

Side A: The seizure becomes real collateral. Once he takes the item, it may become collateral in his hand. If so, it can run into the prohibition of "you shall not come into his house," and there may also be a concern of theft. This fits the caution of the Shach and the Ketzos, who warn against seizing in a loan in order to gain a power of claim. It also fits Tosafos and the Rambam as explained here, because even a seizure meant only for court may still create the status of collateral.

Side B: The seizure does not become collateral if he only means to get to court. If he is not trying to own the item and not trying to build a power of claim, perhaps nothing has become his. If so, "you shall not come" may not apply. And since he plans to return the item once they get to court, perhaps he does not have the full status of a thief for accident liability either. This fits the room left by the Rema and the Sma, the Ketzos' own doubt about taking with intent to return, and it may fit Rashi and the Raavad on this reading.

The point left open: everything turns on what the act means at the moment he takes the item. Does his intent define the seizure, so that taking only to get to court is not really collateral? Or does the item become collateral once it is in his hand, even if he meant only to force a court case? And even if it is not collateral, taking someone else's property without permission may still be forbidden.

Conclusion

We began with a simple worry: a man is owed money, he is afraid he will be cheated, and he sees the chance to take matters into his own hands. The Gemara in Bava Kamma gives him real leeway. We follow Rav Nachman that a person may act for himself, even when waiting would cost him nothing, since he is only doing what is rightfully his. The Maharik, quoted by the Rema, goes further for our case: hitting your fellow is the more serious kind of self-help and needs proof, but quietly taking collateral and then heading to court is the less severe kind and may be allowed.

Then the later sources ask a deeper question. The Torah itself says, "you shall not come into his house to take his pledge." A lender does not just reach for collateral on his own. So what is this seizure? The Ketzos draws the line between reaching out to seize, which is the concern, and merely holding back what is already in your hand, which is different.

At that point, the Birkas Shmuel, built on Rav Chaim's explanation, gives us a sharper way to understand what collateral is. For Rashi and the Raavad, when an item is truly taken as collateral, the taking itself creates a strong responsibility, almost like the item now stands in the lender's own hands. For Tosafos and the Rambam, the lender does have a legal hold in the collateral, but his responsibility comes from a separate duty of guarding.

That split may help us understand our case. On one side, if the act of holding the item is enough to make it collateral, then even taking it only to get to court may still run into "you shall not come." This begins with the caution of the Shach and the Ketzos, who warn against seizing in a loan in order to gain a power of claim, and it may fit the application from Tosafos and the Rambam as explained here.

On the other side, if collateral depends on doing an act meant to create collateral, then his intent may matter. If he is not trying to own the item as collateral and not trying to build a power of claim, maybe he has not made it into collateral at all. That fits the room left by the Rema and the Sma, and it may fit Rashi and the Raavad on this reading.

But Rabbi Yisrael Tzvi Neuman adds one more caution. Even if the lender does not violate "you shall not come into his house," perhaps the act is still theft. The Ketzos' doubt about one who steals only to cause distress helps sharpen the question. Taking with intent to return may not create full thief status for accident liability, but that does not mean the act is clean or allowed.

We may not walk away with one final ruling, but we do walk away with a clearer question: what did the seizure mean at the moment it happened? "You shall not come into his house to take his pledge" sounds, at first, like a rule about a doorway. By the end it sounds like a rule about a hand, and about what is in the heart of the one who reached out.